

CEPA, *PIERCE*, and LAD

**Presentation for:
Legal Services of New Jersey
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January 21, 2008

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I. RETALIATION CLAIMS

The Conscientious Employee Protection Act, NJSA 34:19-1, et seq.

a. The Elements of a CEPA action

- ◆ The Conscientious Employee Protection Act, NJSA 34:19-1, *et seq.* (“CEPA”) is a powerful statute, enacted almost 20 years ago, in the State of New Jersey that protects employees who are subjected to adverse employment actions based on taking part in protected whistleblower activity.
- ◆ CEPA is a specific statute that contains highly scrutinized criteria that must exist for an employee to be successful in presenting a whistleblower claim. The statute includes the following elements:

a. Elements of CEPA Action (cont'd)

- ◆ An employer shall not take any retaliatory adverse action against an employee because the employee does any of the following:
 - ◆ 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*;

a. Elements of CEPA Action (cont'd)

- ◆ 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

a. Elements of CEPA Action (cont'd)

- ◆ 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?

- Prior to the very recent case of D'Annunzio v. Prudential Ins. Co. of Am., 192 N.J. 110 (N.J. 2007), in most cases, independent contractors, were not covered under CEPA similar to the LAD.
- The Appellate Division expanded CEPA's coverage to include not only common law employees, but also many independent contractors.

b. Who is covered by CEPA? (cont'd)

- The Court held that the definition of “employee” under CEPA is broader than the definition under the LAD, and rejected the analysis set forth in Pukowsky v. Caruso, 312 N.J.Super. 171, 711 A.2d 398 (App.Div.1998)
- The Court set forth a broad new test for determining whether a person is to be considered an “employee” for purposes of CEPA:

b. Who is covered by CEPA? (cont'd)

- As a result, we hold that independent contractors are not necessarily excluded and that only the following factors contained in Pukowsky, supra, 312 N.J.Super. at 182-83, 711 A.2d 398, have relevance:
 - first (“the employer's right to control the means and manner of the worker's performance”);
 - second (“the kind of occupation-supervised or unsupervised”);
 - fourth (“who furnishes the equipment and workplace”) and;
 - seventh (“the manner of termination of the work relationship”)
- And we conclude that those factors provide an appropriate guide for identifying those workers who fit CEPA's definition of “employee.”

Who is covered by CEPA? (cont'd)

- Our holding is particularly compelled by CEPA's primary purpose, which is to encourage workers to voice concerns about the unlawful activities of employers and co-workers.
- CEPA exhibits no particular interest in regulating the terms of the employer-worker relationship, except to preclude retaliation, when the worker acts in the interests of the health, safety and welfare of the public.

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.
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c. Defining an adverse action (cont'd)

- The definition of adverse action was narrowly construed by Judge Axelrad in the New Jersey Appellate Division in the case of Hancock v. Borough of Oaklyn, 347 N.J.Super. 350, 360, 790 A.2d 186, 193 (App.Div.2002).
- In Hancock, the Court found that an adverse action was an action that either impacted the employee's "compensation or rank" or an action that is "analysis was followed in Borawski v. Henderson, 265 F. Supp. virtually equivalent to discharge" in order to give rise to the level of a retaliatory action required for a CEPA claim.
- The court found that having to perform certain duties and go through disciplinary hearings, although "mildly unpleasant," did not rise to the level of an adverse action. This 2d 475 where the New Jersey District Court found that the denial of phone use and a possible lengthy suspension did not constitute an adverse action.

c. Defining an adverse action (cont'd)

- Subsequent cases expanded CEPA's scope to allow that an adverse action could occur by looking at more than one discrete action. However, this still allowed for ambiguity and inconsistent results as to what actions rise to the level of an adverse action.

c. Defining an adverse action (cont'd)

- In a 2003 New Jersey Supreme Court case, the court ruled that adverse action may include many separate, but relatively minor, instances of behavior directed against an employee that may not be actionable individually, but that combine to make up a pattern of retaliatory conduct. Green v. Jersey City Bd. of Educ. , 177 N.J. 434, 448 (2003).
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c. Defining an adverse action (cont'd)

- Similarly, in Guslavage v. City of Elizabeth, 2004 WL 3089743, the court defined adverse action broadly. In this case, a sergeant, in the Police Department, was transferred internally to a lesser unit, after engaging in CEPA protected activity. The court found that the transfer was an adverse action.

c. Defining an adverse action (cont'd)

- In Nardello v. Township of Voorhees, 277 N.J. Super. 428, the court found that a series of minor instances could constitute adverse action by considering the aggregate impact of each minor instance.
- See also Beasley v. Passaic County, 377 N.J. Super. 585 (App. Div. 2005) (“A pattern of conduct by an employer that adversely affects an employee's terms and conditions of employment can qualify as retaliation under CEPA.”). See, Isetts v. Borough of Roseland, 2005 WL 2334363 (Law Div. 2005), (comprehensive analysis of adverse action in LAD and CEPA cases).

c. Defining an adverse action

- Thus, just when it appeared that the Courts were providing a broad interpretation of what constitutes an adverse employment action, the Appellate Division handed down a ruling that provided a narrow interpretation to what constituted an adverse employment action. Klein v. University of Medicine and Dentistry of New Jersey, 377 N.J.Super. 28 (App. Div. 2005).

c. Defining an adverse action (contd.)

- Klein v. University of Medicine and Dentistry of New Jersey, 377 N.J.Super. 28 (App. Div. 2005).
- In this case, Dr. Klein lost clinical privileges and had to be supervised by another physician after engaging in CEPA protected activity. The court found that UMDNJ's responses were not severe enough to constitute an adverse employment action. *See also* Yurick v. State of N.J. (inadequate funding did not constitute an adverse action).
- Thus, the issue of what constitutes an adverse action is still one that must be examined closely to survive summary judgment.

d. What constitutes a violation of public policy

- One method of asserting a CEPA claim, is to engage in whistleblowing activity of 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 instances to opine as to 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); *also, see, e.g., Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 404, 161 A.2d 69 (1960) ("Public policy at a given time finds expression in the Constitution, the statutory law and in judicial decisions.");
- ▶ Radwan v. Beecham Labs., 850 F.2d 147, 151-52 (3d Cir.1988) (finding a clear mandate of public policy in New Jersey's constitutional right to collective bargaining, N.J. Const. art. 1, ¶ 19);
- ▶ Zamboni v. Stamler, 847 F.2d 73, 83 (3d Cir.) (finding public policy in free-speech and--assembly clauses of United States and New Jersey Constitutions) *cert. denied*, 488 U.S. 899, 109 S.Ct. 245, 102 L.Ed.2d 233 (1988);

i. The Constitution can be the source of a violation (cont'd)

- ▶ Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 710 P.2d 1025, 1033 (1985) (general statement including constitution as source of public policy); Gantt v. Sentry Ins., 1 Cal.4th 1083, 4 Cal.Rptr.2d 874, 881, 824 P.2d 680, 687 (1992) (same);
- ▶ Parnar v. Americana Hotels, Inc., 65 Haw. 370, 652 P.2d 625, 631 (1982) (same); Palmateer v. International Harvester Co., 85 Ill.2d 124, 52 Ill.Dec. 13, 15, 421 N.E.2d 876, 878 (1988) (same) Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859, 871 (Mo.Ct.App.1985) (same); Burk v. K- Mart Corp., 770 P.2d 24, 28 (Okla.1989) (same).

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. In certain instances, a professional code of ethics may contain an expression of public policy.

ii. A Pierce violation (contd)

- However, not all such sources express a clear mandate of public policy. For example, a code of ethics designed to serve only the interests of a profession or an administrative regulation concerned with technical matters probably would not be sufficient.
- Absent legislation, the judiciary must define the cause of action in case-by-case determinations.

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).

iii. The Public interest is at issue (cont'd)

- 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 inform our determination 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.

The Public interest is at issue (cont'd)

- In the recent case of Maw v. Advanced Clinical Communications, Inc., 179 N.J. 439, 444-45 (2004), the court took a hard look at whether being discharged for refusing to sign a restrictive covenant agreement could constitute a violation of the law.
- The court first found that restrictive covenant agreements are valid in New Jersey although they may be overreaching. The court specifically addressed the phrase, "clear mandate of public policy" as a section 3c(3) CEPA violation.
- The court found that a public policy expressed in the form of a statute, rule or regulation promulgated pursuant to law, is not what was meant under Section 3c(3).

The Public interest is at issue (cont'd)

- The Court found that this type of restrictive interpretation would reduce *N.J.S.A. 34:19-3c(1)* (Section 3c(1)) to mere surplusage, since it employs those legal precepts as a frame of reference for evaluating an employer's conduct... A "clear mandate" of public policy suggests an analog to a constitutional provision, statute, and rule or regulation promulgated pursuant to law such that, under Section 3c(3), there should be a high degree of public certitude in respect to acceptable versus unacceptable conduct... The legislative approach vis-à-vis a "clear" mandate of public policy bespeaks a desire not to have CEPA actions devolve into arguments between employees and employers over what is, and is not, correct public policy.
- Such an approach also fits with the legislative requirement of a "mandate" as opposed to a less rigorous standard for the type of public policy that is implicated.

iv. A summary 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, ___ N.J. Super. ___ (App. Div. 2005); 2005 WL 275822. - (Restrictive covenants unenforceable against psychologists because of public policy protecting psychologist-patient relationship)
- ▶ American Medical Association Council on Ethical and Judicial Affairs may constitute public policy. Pierson v. Medical Health Centers, 2004 WL 1416265, *Certif. Granted* 181 N.J. 336. (Restrictive covenants still enforceable against doctors based upon Karlin v. Weisberg, 77 NJ 408 (1978) despite physician-patient relationship).

iv. A summary of what constitutes public policy (cont'd)

▶ 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 in 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). A dispute over an arbitration agreement implicates public policy and can violate LAD and give rise to a Pierce claim.

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).

2. Common Law Retaliation

- In New Jersey, the Supreme Court allows for common law retaliation for a termination that occurs because the employee complained of a violation of public policy that differs from CEPA in certain respects. Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 72 (1980).

2. Common Law Retaliation (cont'd)

- Some of the critical differences is that:
 - CEPA has a one year statute of limitations compared to the two year statute for Pierce claims.
 - CEPA does not require a written complaint whereas Pierce claims seem to so require.
 - The public policy requirements under Pierce claims are more strictly construed than under CEPA.
 - Some courts have construed Pierce to require an actual complaint to an outside agency whereas CEPA protects employees who threaten to make a complaint but do not actually make the complaint.

3. Statutory Claims

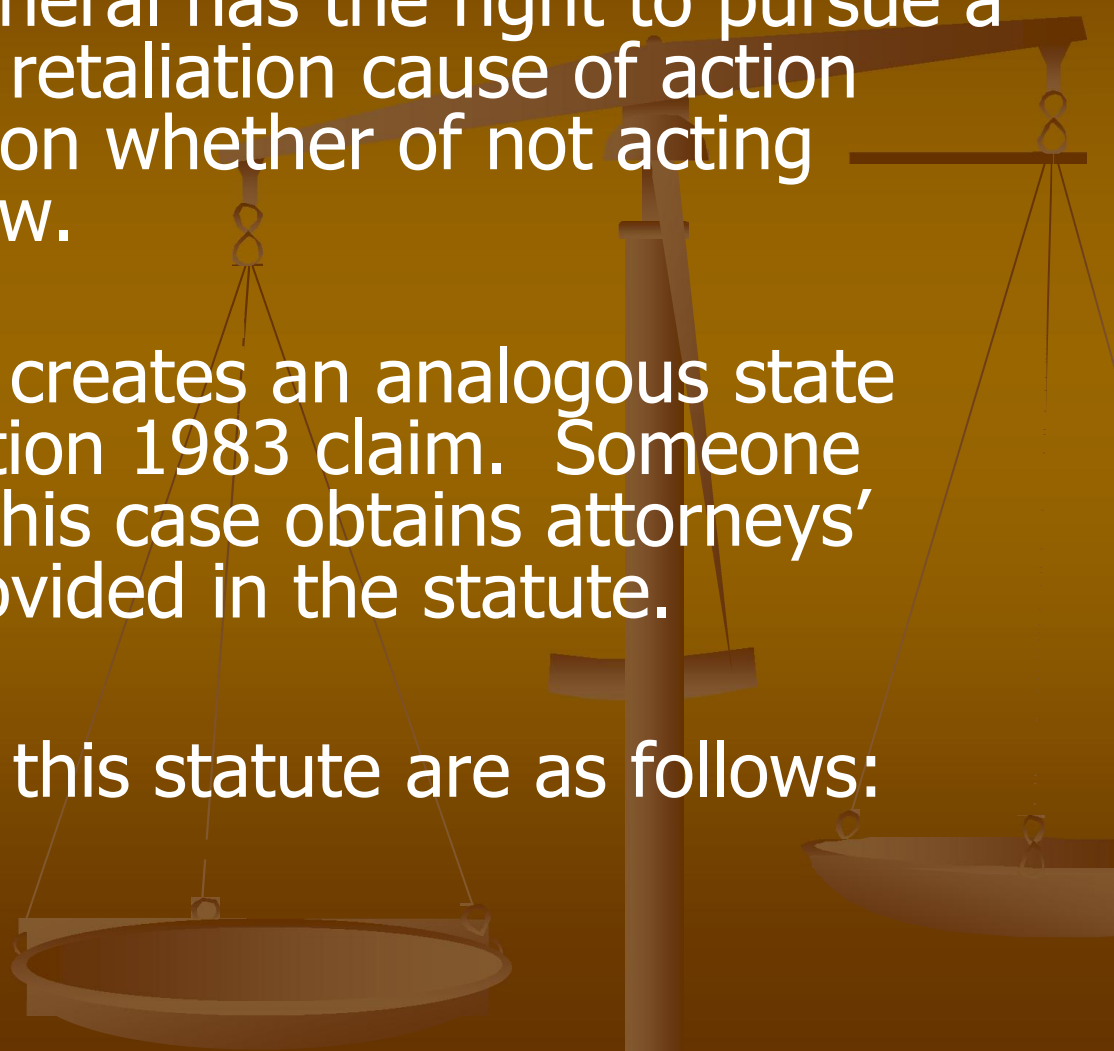
- Numerous employment statutes, such as the ones listed below have separate provisions that provide for a retaliation claim if the employee has a reasonable belief that he/she is subject to the protections of the statute, alleges a violation of the statute, and is then subjected to a retaliatory adverse action by the employer:
 - New Jersey Law Against Discrimination;
 - N.J.S.A. 10:5-1 *et seq.*;
 - Title VII of the 1964 Civil Rights Act,
 - 42 U.S.C. § 2000e-2(a);
 - the Age Discrimination in Employment Act;
 - the Americans with Disability Act;
 - the New Jersey Worker's Compensation Statute;
 - N.J.S.A. 34:15-1 *et seq.*, OSHA regulations, etc.

4. 42 U.S.C. §1983

- Section 1983 claims pertain to retaliation that a person might experience for exercising constitutional rights against persons acting under color of law. A major difference between §1983 and CEPA has been that CEPA traditionally has only protected employees while §1983 protects “all persons” including independent contractors. This has now changed with the opinion in D'Annunzio v. Prudential Ins. Co. of America, --- A.2d ----, 2005 WL 3789960 (App. Div. 2006). *See infra*.

5. New Jersey Civil Acts Act, N.J.S.A.10:6-1, et seq.

- The Attorney General has the right to pursue a constitutional or retaliation cause of action against any person whether or not acting under color of law.
- The statute also creates an analogous state version of a Section 1983 claim. Someone who prevails in this case obtains attorneys' fees which is provided in the statute.
- The elements of this statute are as follows:



New Jersey Civil Acts Act, N.J.S.A.10:6-1, et seq. (cont'd)

- a. If a person, whether or not acting under color of law, subjects or causes to be subjected any other person to the deprivation of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State, the Attorney General may bring a civil action for damages and for injunctive or other appropriate relief. The civil action shall be brought in the name of the State and may be brought on behalf of the injured party. If the Attorney General proceeds with and prevails in an action brought pursuant to this subsection, the court shall order the distribution of any award of damages to the injured party and shall award reasonable attorney's fees and costs to the Attorney General. The penalty provided in subsection e. of this section shall be applicable to a violation of this subsection.

New Jersey Civil Acts Act, N.J.S.A.10:6-1, et seq. (cont'd)

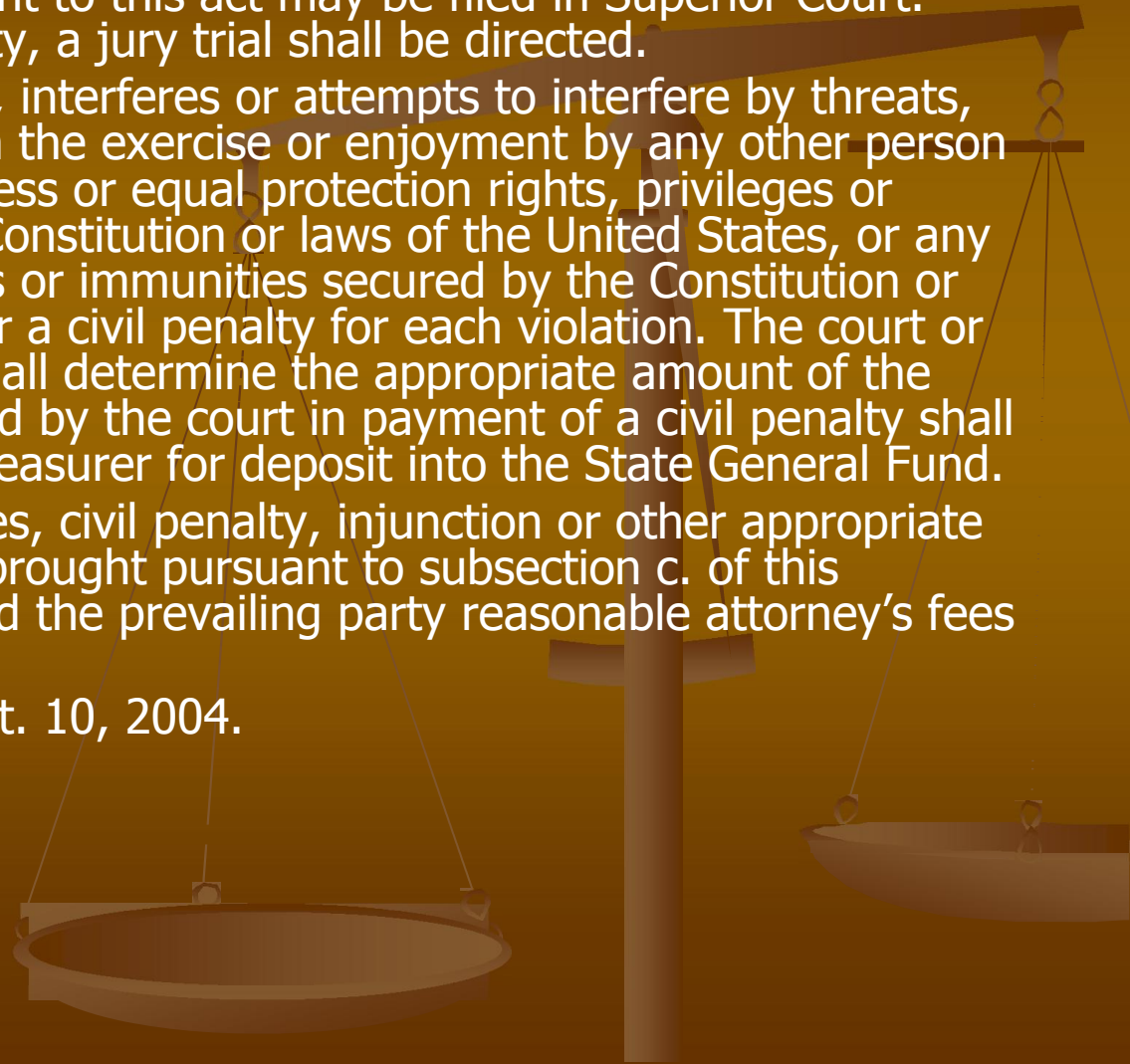
- b. If a person, whether or not acting under color of law, interferes or attempts to interfere by threats, intimidation or coercion with the exercise or enjoyment by any other person of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State, the Attorney General may bring a civil action for damages and for injunctive or other appropriate relief. The civil action shall be brought in the name of the State and may be brought on behalf of the injured party. If the Attorney General proceeds with and prevails in an action brought pursuant to this subsection, the court shall order the distribution of any award of damages to the injured party and shall award reasonable attorney's fees and costs to the Attorney General. The penalty provided in subsection e. of this section shall be applicable to a violation of this subsection.

New Jersey Civil Acts Act, N.J.S.A.10:6-1, et seq. (cont'd)

- c. Any person who has been deprived of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under color of law, may bring a civil action for damages and for injunctive or other appropriate relief. The penalty provided in subsection e. of this section shall be applicable to a violation of this subsection.

New Jersey Civil Acts Act, N.J.S.A.10:6-1, et seq. (cont'd)

- d. An action brought pursuant to this act may be filed in Superior Court. Upon application of any party, a jury trial shall be directed.
- e. Any person who deprives, interferes or attempts to interfere by threats, intimidation or coercion with the exercise or enjoyment by any other person of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State is liable for a civil penalty for each violation. The court or jury, as the case may be, shall determine the appropriate amount of the penalty. Any money collected by the court in payment of a civil penalty shall be conveyed to the State Treasurer for deposit into the State General Fund.
- f. In addition to any damages, civil penalty, injunction or other appropriate relief awarded in an action brought pursuant to subsection c. of this section, the court may award the prevailing party reasonable attorney's fees and costs.
- L.2004, c. 143, § 2, eff. Sept. 10, 2004.



II. CEPA vs. PIERCE – A COMPARISON

1. Waiver

- ▶ **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. However, both CEPA and Pierce actions may be pled in the Complaint as long as one cause of action is dropped before trial.**

CEPA vs. PIERCE – A COMPARISON

1. Waiver (cont'd)

- ▶ **The Appellate Division directly addressed this issue in *Maw v. Advanced Clinical Communications, Inc.*, 359 N.J. Super. 420, 440-41 (N.J. Super. 2003), *rev'd on other grounds*, 179 N.J. 43 (2004).**
- ▶ **In *Maw*, the defendant had also tried to dismiss the Plaintiff's Pierce claim, making the same arguments advanced by *Orkin*. The Appellate Division held that it is inappropriate to dismiss the Pierce claim until the Plaintiff has had an opportunity to take discovery, The Court explained:**

CEPA vs. PIERCE – A COMPARISON

1. Waiver (cont'd)

- ▶ Common-law claims of wrongful discharge in violation of public policy, which merely duplicate a CEPA claim, are routinely dismissed under CEPA's exclusivity provision, albeit, generally at later stages of the litigation. Falco v. Cmty. Med. Ctr., 296 N.J.Super. 298, 304, 318, (App.Div.1997), *certif. denied*, 153 N.J. 405, 709 A.2d 798 (1998); Catalane v. Gilian Instrument Corp., 271 N.J.Super. 476, 492-93 (App.Div.), *certif. denied*, 136 N.J. 298, 642 A.2d 1006 (1994); Flaherty v. The Enclave, 255 N.J.Super. 407, 413, 605 A.2d 301 (Law Div.1992).

CEPA vs. PIERCE – A COMPARISON

1. Waiver (cont'd)

- ▶ Indeed, the Supreme Court has held that this was precisely the Legislature's intent in enacting CEPA's exclusivity provision. Young, supra, 141 N.J. at 27, ("we are persuaded that the Legislature intended that the N.J.S.A. 34:19-8 waiver prevent an employee from pursuing both statutory and common-law retaliatory discharge causes of action" and "curtail ... cumulative remedial actions").

CEPA vs. PIERCE – A COMPARISON

1. Waiver (cont'd)

- ▶ Although none of the cases cited specifically address at what point the election must be made, Young is instructive. The Court found the election needed to be made "once a CEPA claim is 'instituted.'" Id. at 29.
- ▶ However, in discussing the meaning of "institution of an action," the Court noted that "[t]he meaning of 'institution of an action' could conceivably contemplate an election of remedies with restrictions in which the election is not considered to have been made until discovery is complete or the time of a pretrial conference contemplated by Rule 4:25-1.

CEPA vs. PIERCE – A COMPARISON

1. Waiver (cont'd)

- ▶ Another question is whether the statutory waiver is applicable if the CEPA claim is withdrawn or otherwise concluded prior to judgment on the merits." Id. at 32. ***We take this language to mean that before electing remedies, a plaintiff should have an opportunity to complete discovery. Only after gaining access to all of the facts, will a plaintiff be in a position to make a knowing and meaningful election.***
- ▶ Maw, 359 N.J. Super. at 441. (Emphasis added)

CEPA vs. PIERCE – A COMPARISON

1. Waiver (cont'd)

- ▶ Justices Zazzali and Long of the New Jersey Supreme Court also gave guidance on this issue in their thoughtfully reasoned dissent.
- ▶ Although a plaintiff who pursues a CEPA claim must forego a common-law claim, it would be unjust to force a party into making that decision at the pleading stage of the proceedings before a court has determined whether either action may lie. Maw, 139 N.J. at 450, dissent at FN1.

CEPA vs. PIERCE – A COMPARISON

1. Waiver (cont'd)

- ▶ The statute of limitations for CEPA is one year, N.J.S.A. 34:19-5. The statute of limitations for Pierce claims is two years for tort claims. Montells v. Haynes, 133 N.J. 282 (1993) (holding that common law tort claims are governed by two-year statute). The statute of limitations for Pierce claims is six years for contract claims. Pierce, 84 N.J. at 72.
- ▶ Pierce claims only pertain to terminations. CEPA more broadly protects “any retaliatory action.” N.J.S.A. 34:19-3.
- ▶ Because Pierce claims are more congruous with the common law retaliation claims of other states, Pierce claims will be recognized in some situations involving interstate claims, whereas CEPA claims may not. *See e.g.* Ballinger v. Delaware River Port Authority, 172 N.J. 586 (2002).
- ▶ Attorneys fees are available under CEPA (NJSA 34:19-5e), but are not available under Pierce unless the claim is brought for retaliatory termination taken under color of law (Civil Rights Act. NJSA 10:6-2).

2. Differences between Pierce and CEPA claims

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 or 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).

2. Differences between Pierce and CEPA claims

The necessity of prior complaints (cont'd).

- To pursue a Pierce claim, there is some confusion as to whether there is a requirement for a complaint to an outside agency. The confusion has arisen as a result of incorrect dictum contained in Young v. Schering Corp., 141 N.J. 16, 27 (1995).
- The Appellate Division in Young had held that an outside complaint is necessary, 275 N.J. Super. 221, 234-35 (App. Div. 1994), and relied upon a partial sentence from House v. Carter-Wallace, Inc., 232 N.J. Super. 42, 49, 556 A.2d 353 (App. Div.), certif. denied, 117 N.J. 154, 564 A.2d 874 (1989). The complete sentence from House states:

2. Differences between Pierce and CEPA claims

The necessity of prior complaints (cont'd)

- However, no New Jersey case has recognized a claim for wrongful discharge based solely upon an employee's internal complaints about a corporate decision, where the employee has failed to bring the alleged violation of public policy to any governmental or other outside authority ***or to take other effective action in opposition to the policy.*** (Emphasis added).

2. Differences between Pierce and CEPA claims

The necessity of prior complaints (cont'd).

- Cases holding that a Pierce claim exists in the absence of complaint to outside agencies include Carracchio v. Aldan Leeds, Inc., 223 N.J. Super. 435 (App. Div. 1988);- Hennessey v. Coastal Eagle Point Oil Co., 129 N.J. 81, 92, 93 (1992); Velantzas v. Colgate-Palmolive - Velantzas v. Colgate-Palmolive Co. Inc., 109 N.J. 189 (1988).

2. Differences between Pierce and CEPA claims

The necessity of prior complaints (cont'd).

- On February 6, 2006, Federal Judge Greenaway, in Badrinauth v. Metlife Corp., Slip Copy, 2006 WL 288098 (D.N.J. 2006), rejected the defendant's argument that NJ has, in effect, a per se rule requiring that an actual report to an external authority is a predicate to maintaining an action for wrongful termination under Pierce.

2. Differences between Pierce and CEPA claims

The necessity of prior complaints (con'd)

- Pierce claims have been recognized in situations where a termination is in violation of public policy, even where there is no complaint or refusal to participate in unlawful activities.
 - Carracchio v. Aldan Leeds, Inc., 223 N.J. Super. 435 (App. Div. 1988) - employee who is terminated for suffering a worker's compensation injury may bring Pierce claim, even when employer, and not employee, files claim with their insurance company.
 - Hennessey v. Coastal Eagle Point Oil Co., 129 N.J. 81, 92, 93 (1992) - employee may state a Pierce claim if terminated for refusing a random drug test, where the employer does not have a legitimate reason to require such a test.
 - Velantzas v. Colgate-Palmolive - Velantzas v. Colgate-Palmolive Co. Inc., 109 N.J. 189 (1988) - employee states a Pierce claim when terminated for requesting to see personnel file for purpose of establishing discrimination.
 - Epperson v. Walmart Stores, 373 N.J. Super. 522, 541 (App. Div. 2004) - employee may state Pierce claim where employee is wrongfully terminated and maliciously prosecuted.

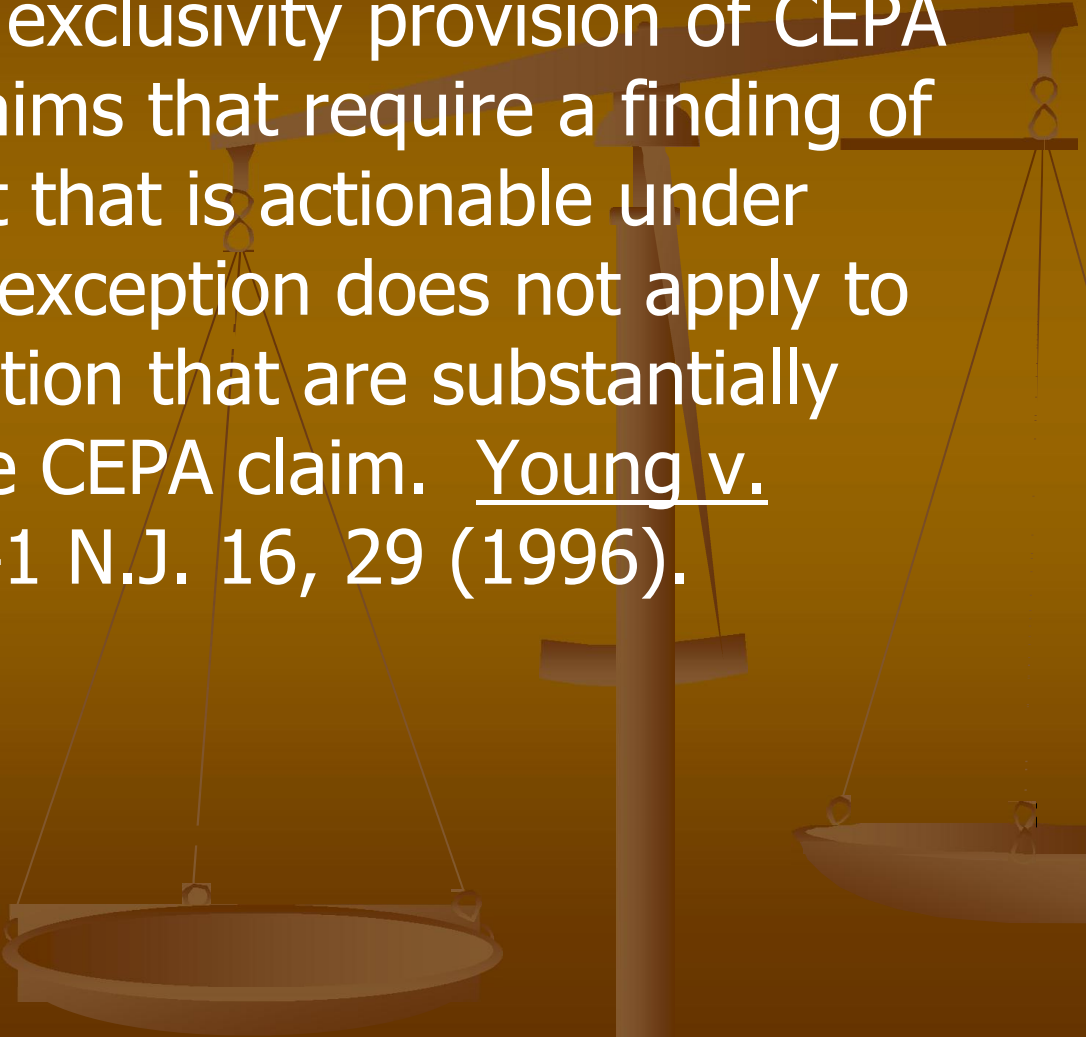
2. Differences between Pierce and CEPA claims

The necessity of prior complaints (cont'd).

- Under Pierce it is possible to claim that an employee who is discharged for no reason and then must defend a malicious criminal proceeding instituted by her employer may state a Pierce claim. *See Giudice v. Drew Chem. Corp.*, 210 N.J.Super. 32, 36, 509 A.2d 200 (App.Div.), *certif. denied*, 104 N.J. 465, 517 A.2d 448, 449 (1986),
- But not have a cause of action when "merely" victimized by similar conduct. (The Pierce claim was dismissed on "waiver" grounds, as there was also a CEPA and malicious prosecution claim which subsumed the Pierce claim.).

3. No Waiver of claims requiring different elements

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).



PART II: SEXUAL HARRASMENT

Purposes of this Training

- WE WANT YOU TO BE INFORMED.
- WE WANT YOU TO BE RESPONSIBLE.
- WE WANT YOU TO KNOW HOW TO HANDLE SITUATIONS APPROPRIATELY.



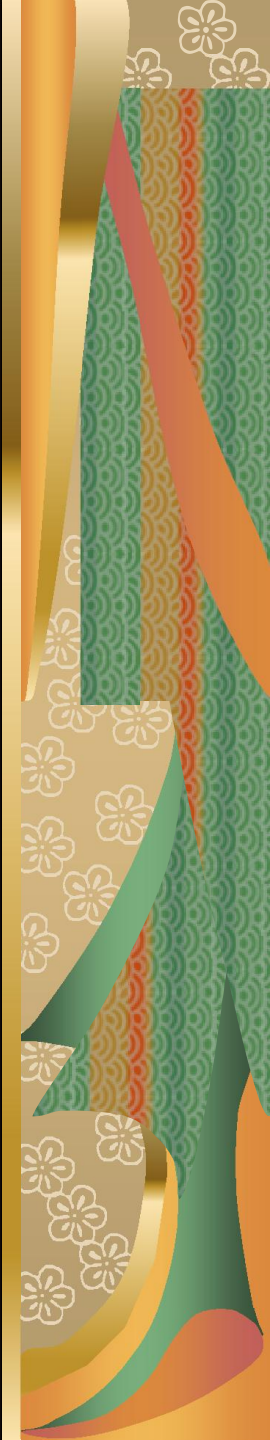
What is Sexual Harassment About?

- Sexual Harassment is about using supervisory power to extract sexual favors from a subordinate or causing a hostile work environment based on sexual advances.



What is Sexual Harassment About?

- Sexual Harassment is about stereotypes of how people behave in working relationships and not recognizing that the rules have changed.



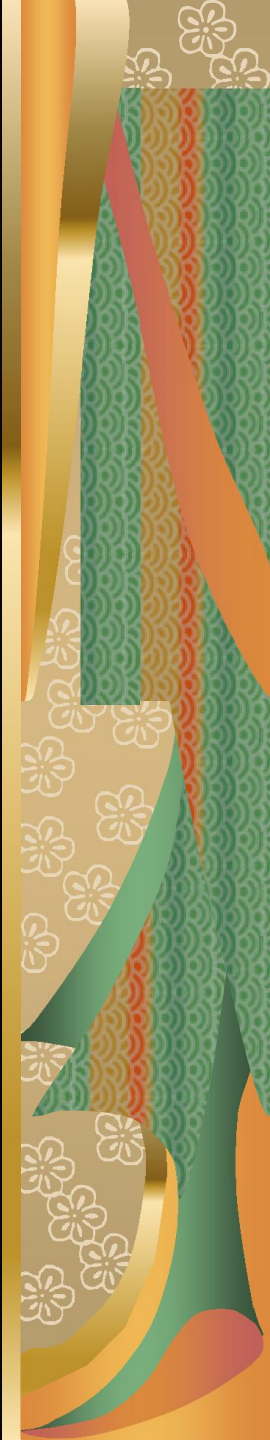
What is Sexual Harassment About?

- Sexual harassment does not happen just to women. Both men and women can be subject to sexual harassment.



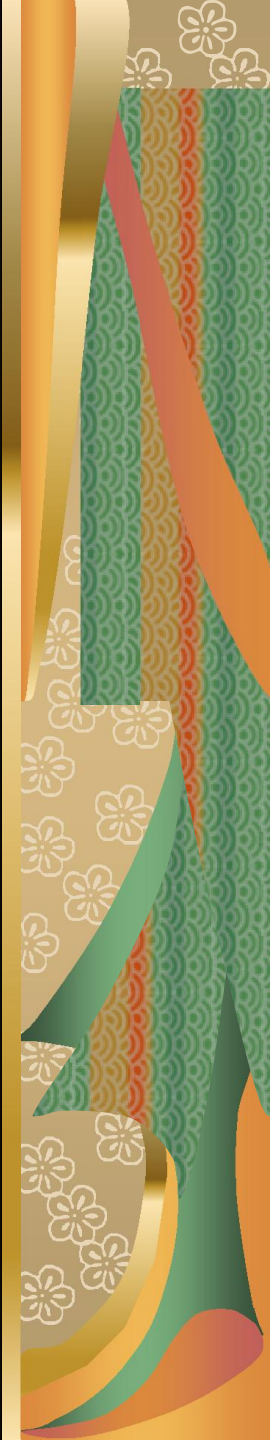
What is Sexual Harassment About?

- Sexual Harassment is not just about sex.
- It is about conduct designed to contribute to a sense of powerlessness in a subordinate or a colleague.



What is Sexual Harassment About?

- Sexual harassment does not always have to occur between two individuals of the opposite sex.



The Cost of Engaging in Sexual Harassment

- It is not just liability we are talking about.
- Individuals can be held liable for engaging in sexual harassment.



A plaintiff could potentially come after your personal assets, your home, or even garnish your wages.



Non-Monetary Costs of Sexual Harassment

- Complaints of sexual harassment are investigated and can prove embarrassing for individuals who are accused of such acts.
- Co-employees can be liable to each other.



Forms of Sexual Harassment

- Quid Pro Quo Harassment.
- Hostile Work Environment.

Quid Pro Quo Harassment

- Literally means “this for that” in Latin.
- Easiest type of sexual harassment to recognize.

Quid Pro Quo Harassment

- In short, quid pro quo sexual harassment occurs where a sexual favor is exchanged for a job benefit or protection against a job detriment.

Quid Pro Quo Harassment

- NOTE: Even where a favor is not actually exchanged, but simply requested, and no job detriment occurs, the request can constitute an act of sexual harassment known as a hostile work environment.

ELEMENTS OF QUID PRO QUO HARASSMENT

- UNWELCOME
- SEXUAL ADVANCES
- OF A SUPERVISOR
- AFFECTING A TERM OR CONDITION OF EMPLOYMENT
- OF A SUBORDINATE
- PROMISING SOMETHING FOR SUBMISSION

Hostile Work Environment Harassment (Environmental Harassment)

- Definition: Conduct on the part of an employer, supervisor or co-employee that creates a hostile, intimidating or offensive work environment.



Hostile Work Environment

- NO BRIGHT LINE ON HOW MANY TIMES IT TAKES.
- ONE SEVERE COMMENT OR ACT CAN CONSTITUTE A HOSTILE WORK ENVIRONMENT.



Hostile Work Environment

- PHYSICAL

- VERBAL

- VISUAL



Physical Environmental Harassment

■ Unwelcome touching

- fondling
- pinching
- patting
- brushing up against someone
- kissing
- moving into their personal space continually

■ Unwelcome touching

- putting your arms around them, whether playful or unplayful
- placing your hand on or massaging their shoulder or back
- touching another person's clothing or jewelry

Verbal Environmental Harassment

- Making comments about a subordinate's anatomy, whether complimentary or derogatory
- Lewd or suggestive sexual jokes
- Banter
- Whistling
- Inquiries about one's sexual activities;
- Use of sexually derogatory terms.
- Using slang or street terms, whether English or another language, to refer to another employee, e.g., "chick," "bitch," "homo," "faggot."

Visual Environmental Harassment

- Calendars, pin-up centerfolds, pictures, drawings, etc., that are sexually oriented or offensive to other employees
- Sexually explicit or pornographic magazines.
- E-mails/Internet sites
 - Sent to employee
 - Displayed on screen
- Leering, ogling or staring at a person's anatomy, or winking suggestively.
- Directing your eyes at the individual whenever he or she walks by.

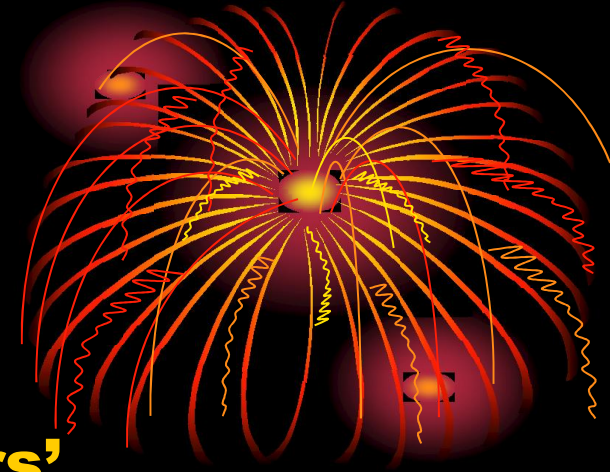
ELEMENTS OF HOSTILE WORK ENVIRONMENT

- UNWELCOME SEXUAL CONDUCT
- that is SEVERE OR PERVASIVE
- in the view of the REASONABLE VICTIM
- that ALTERS the reasonable victim's WORK ENVIRONMENT
- to RENDER it HOSTILE

Workplace Romances

- ◆ Subsequent discipline or other detriment may be claimed to be in retaliation for ending the relationship.
- ◆ Claim that the relationship was never consensual.
- ◆ Constructive discharge claim if the person in position of authority is not willing to believe that the relationship has ended.

Legal Theories



- **FEDERAL LAW**

- Title VII
- ADEA
- ADA

- **STATE LAW**

- LAD
- CEPA

- **Workers' Compensation Law**
- **Common Law Claims**

- Intentional Infliction of Emotional Distress
- Assault
- Battery
- Invasion of Privacy
- False Imprisonment

What to Do With Sexual Harassment Problems When They Occur?

- Don't try to go it alone.
- Use the existing system to address any concerns.
- Don't sweep the problem under the rug.
- Don't turn a deaf ear or blind eye to possible sexual harassment.
- You MUST report any suspected or known incidents of sexual harassment.



Reporting and Investigation Procedures

- Aside from not actually engaging in sexual harassment, you have only one responsibility when you become aware of potential sexually harassing conduct:

REPORT, REPORT, REPORT.



No Retaliation

- **We always want to encourage employees to report any sexual harassment problems to the company.**



Sexual Harassment Policy

- Cooperation.
 - An effective sexual harassment/ discrimination policy requires the support and example of all company personnel.
 - All employees are responsible for their own conduct, as well as the conduct of personnel they supervise or manage.
 - Employees can be held personally liable for any illegal conduct in which they engage, or in which they knew, or should have known, was occurring and failed to report.



Our Purpose Here

- To sensitize;
 - To recognize pressures of the workplace--the hectic pace;
 - To recognize that the rules have changed;
 - To protect yourself from claims of sexual harassment as well as harassment itself; and

CEPA/PIERCE/LAD **Presentation**



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