If Reporting It Is Your Job, You Can Still Be a Whistleblower

Supreme Court clarifies that all employees are entitled to the protection of CEPA

By Andrew M. Moskowitz

> The job is what you do when you are told what to do. The job is showing up at the factory, following instructions, meeting spec, and being managed. ... Your art is what you do when no one can tell you exactly how to do it.
>
> *Linchpin: Are You Indispensable?*
> —Seth Godin

In *Lippman v. Ethicon*, A-65/66-13 (July 15, 2015), the New Jersey Supreme Court held that individuals who simply do the job and those who have their own art for doing their job are both entitled to protection under the Conscientious Employee Protection Act (CEPA). In so holding, the court rejected the "if it's your job, it's not whistleblowing" argument on which two appellate panels had relied to dismiss CEPA claims. In addition, in holding that employees whose job involved ensuring that their employer complied with the law—so-called "watchdog employees"—were entitled to protection under CEPA, the *Lippman* court rejected the Appellate Division's attempt to articulate a specific, heightened standard for such employees.

Precursors: *Massarano* and *White*

In relevant part, CEPA protects employees who object to or refuse to participate "in any activity, policy or practice" which they reasonably believe is in violation of a law, rule or regulation promulgated pursuant to law (or, in the case of an employee who is a licensed or certified health-care professional, reasonably believes constitutes improper quality of patient care); is fraudulent or criminal; or is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment. N.J.S.A. 34:19-3(c)(1)-(3).

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Prior to the Supreme Court's decision in *Lippman*, two appellate panels had held that, where an employee's actions were within the scope of his or her job responsibilities, these actions did not constitute whistleblowing activity under CEPA. First, in *Massarano v. New Jersey Transit*, 400 N.J. Super. 474 (App. Div. 2008), the plaintiff was a security operations manager for New Jersey Transit who alleged that she had observed four recycling bins which contained "blueprints or schematics for bridges, tunnels, a new rail operations center, underground gas lines and building specifications." The plaintiff stated that, due to her concern "that anyone could enter the loading area and retrieve the discarded plans and schematics," and her belief that this situation posed a "threat to public safety and security," she reported the presence of the discarded documents to NJT's acting executive director. The plaintiff alleged that her employer retaliated against her for reporting the disposal of these documents. In affirming the trial court order granting summary judgment dismissing plaintiff's CEPA claim, the *Massarano* panel found no evidence that the plaintiff had been retaliated against for reporting the disposal of the documents. However, the panel also "agree[d] with the trial court's analysis that plaintiff was merely doing her job as the security operations manager," and that such actions did not constitute whistleblowing activity.

Similarly, in *White v. Starbucks*, A-3153-09T2 (App. Div. Dec. 9, 2011), which was an unpublished decision, the plaintiff was a district manager whose job responsibilities included "'oversee[ing] the performance of the store managers' in her district" and "'ensur[ing] ... [that employees] adhere[d] to legal and operational compliance requirements.'" In reliance on *Massarano*, the panel held that the actions the plaintiff described—reporting missing and stolen merchandise, addressing unsanitary and unsafe conditions at stores, investigating employees' on-the-job alcohol consumption and "after-hours sex parties," etc. —"'f[e]ll within the sphere of her job-related duties'" and therefore did not constitute whistleblowing activity under CEPA.

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Factual Background and Lower Court Holdings

The plaintiff, Joel S. Lippman, M.D., was worldwide vice president of medical affairs and chief medical officer of Ethicon, which is a manufacturer of medical devices. In these positions, Lippman "was 'responsible for safety [and] ensuring that safe medical practices occurred in clinical trials of [Ethicon's devices] ....'" He was also a member of a company quality board whose function was "'to assess the health risks posed by Ethicon's products.'" The plaintiff claimed that his termination resulted due to his advocacy of the recall of a product he believed to be dangerous. In reliance on *Massarano*, the trial court held that, "because plaintiff admitted 'it was his job to bring forth issues regarding the safety of drugs and products,' he 'failed to show that he performed a whistle-blowing activity' protected by CEPA.'"

In *Lippman v. Ethicon*, 432 N.J. Super. 378 (App. Div. 2013), the Appellate Division reversed. The panel determined that "watchdog employees"—defined 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) when an employer's proposed plan or course of action would violate or materially deviate from that standard of care"—were entitled to protection under CEPA. However, the panel imposed a heightened standard on watchdog employees which required them to demonstrate that they "either (a) pursued and exhausted all internal means of securing compliance; or (b) refused to participate in the objectionable conduct."

Supreme Court's Holding

In *Lippman*, the Supreme Court noted that CEPA was "considered remedial legislation entitled to liberal construction," and that, as set forth in *Abbamont v. Piscataway Twp. Bd. of Educ.*, 138 N.J. 405 (1994), the statute's purpose was to "'protect and encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employers from engaging in such conduct.'"

In examining whether certain types of employees qualified for protection under CEPA, the *Lippman* court began with the statute's definition of an employee. The court noted that CEPA defined an employee as "any individual who performs services for and under the control and direction of an employer for wages or other remuneration." N.J.S.A. 34:19-2(b). Thus, "by its very terms, CEPA does not define employees protected by the Act as inclusive of only those with certain job functions." The *Lippman* court therefore declined to "engraft language that the Legislature has not chosen to include in a statute."

In addition, the court noted that, as remedial legislation, CEPA should be liberally construed. Thus, rather than restricting the definition of employee, "our case law has taken an inclusive approach in determining who constitutes an employee for purposes of invoking the protection provided through this remedial legislation." The court noted, for example, that it had extended the statute's protection to independent contractors, *D'Annunzio v. Prudential Ins. Co. of Am.*, 192 N.J. 110 (2007), and to public defenders, *Stomel v. City of Camden*, 192 N.J. 137 (2007).

The court then addressed the "if it's your job, it's not whistleblowing" argument. The court noted that "[t]here is no language in subsection (c) that hints that an employee's job duties affect whether he or she may bring a CEPA claim." It noted that defendants had argued that the words "object" and "refuse to participate" were ambiguous and "implicitly indicate, in this context, that an employee must act outside of his or her prescribed duties to engage in protected whistleblowing activity." The court found that these words were not ambiguous and that there was no indication that they were "indicative of a requirement that employees go beyond or contradict their job duties." To the contrary, subsection (c)(1) specifically protected health-care professionals who objected to or refused to participate in "employer activity that 'constitutes improper quality of patient care' [which] provides further indication that CEPA-protected conduct may occur in the course of one's job duties." The court therefore concluded that, "[r]ead as a whole, it is inexplicable that the Legislature intended for subsection (c) to carry an implicit 'job duties' exception that excludes watchdog employees."

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The court noted that its own precedent had extended protection to so-called watchdog employees. They included a director of toxicology whose duties were to represent the company "on toxicology matters" and who alleged that he was terminated after he instructed a company subsidiary to reduce the benzene content of its gasoline, see *Mehlman v. Mobil Oil Corp.*, 153 N.J. 163 (1998); and a manager of a company's Business Ethics and Conduct Program "who was substantially involved in implementing the company's code of conduct" and who alleged that he was discharged after seeking to

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report possible code violations. See *Estate of Roach v. TRW*, 164 N.J. 598 (2000).

The *Lippman* court therefore rejected the appellate panel's requirement that watchdog employees demonstrate that they either: "'pursued and exhausted all internal means of securing compliance; or (b) refused to participate in the objectionable conduct'" (quoting *Lippman*, 432 N.J. Super. at 410). The court found that "the panel has added to the burden required for watchdog employees to secure CEPA protection under subsection (c) by including an obligation nowhere found in the statutory language."

Watchdog employees need not demonstrate that they took additional steps to qualify for the statute's protection.

Conclusion

Lippman is undoubtedly an important decision. Employers may no longer argue that, because a CEPA plaintiff's actions fell within his or her job-related duties, they did not constitute whistleblowing. In addition, *Lippman* clarifies that watchdog employees need not demonstrate that they took additional steps to qualify for the statute's protection. ■