

# CLIENT ALERT

## Employment & Labor

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### **New Jersey Court Rejects Whistleblower Claim of Healthcare Professional**

In a case of first impression, the Appellate Division of the New Jersey Superior Court recently rejected the whistleblower claim of a healthcare professional who asserted that he had been subjected to retaliation for raising concerns regarding the operation of his medical department. In *Klein v. University of Medicine and Dentistry of New Jersey and Robert Wood Johnson Medical School*, the court held that the New Jersey Conscientious Employee Protection Act (“CEPA”) does not protect a healthcare professional who merely disagrees with his employer’s internal practices and procedures which do not implicate any violation of a law, rule, regulation or professional code of ethics.

#### **Factual Background**

Plaintiff, Dr. Stanford L. Klein, a board-certified anesthesiologist, served as Chair of the Department of Anesthesiology, and Chief of Anesthesia Services, at the Robert Wood Johnson University Hospital from approximately 1983 until 1999. Throughout that period, Dr. Klein complained that cramped working space and lack of equipment in the hospital’s Radiology Department raised issues of patient safety regarding the administration of anesthesia.

In August 2002, similar complaints were raised by Dr. Klein in a letter to the hospital’s Chief of Anesthesiology, who acknowledged the concerns and indicated that he intended to meet with individuals in hospital administration to make appropriate changes regarding the physical layout of the Radiology Department and the staffing necessary for the administration of anesthesia. Dr. Klein was then made a member of a special committee of the

Anesthesiology Department which presented specific proposals to the hospital’s Chief of Staff regarding the physical structure of the Radiology Department and personnel assignments. The proposals were addressed to such matters as the desire to have special procedure rooms with equipment designated for anesthesia rather than portable machinery and supplies.

After presenting the committee’s proposals, Dr. Klein notified the Chief of Anesthesiology that he would not accept assignments to the Radiology Department until all of the proposed changes were implemented. When Dr. Klein refused an assignment he was temporarily relieved of his clinical duties. His clinical privileges were restored after only a few days, subject to supervision by another member of the University’s faculty. Because he found such supervision to be insulting and damaging to his reputation, Dr. Klein voluntarily withdrew from all clinical duties, and filed suit under CEPA claiming that the actions taken against him were in retaliation for his reasonable belief that the failure to implement the proposed changes in the Radiology Department threatened patient safety.

#### **The Health Care Amendments to CEPA**

Under CEPA, it is unlawful for an employer to retaliate against an employee who discloses to a supervisor, or objects about an employer practice which he reasonably believes is in violation of a law, rule or regulation promulgated pursuant to law. Retaliation is defined in the statute as “the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment.”

In 1997, the New Jersey Legislature amended CEPA to specifically provide

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protection to healthcare professionals who “blow the whistle” based on the reasonable belief that an employer’s policy or practice constitutes “improper quality of patient care,” which is defined as a policy or practice which “violates any law or any rule, regulation or declaratory ruling adopted pursuant to law, or any professional code of ethics.”

### The Trial Court

The trial court granted defendants’ motion for summary judgment. The court found that Dr. Klein’s concern about the application of anesthesia in the Radiology Department did not implicate CEPA, but was instead merely a private dispute about the need for more space and more efficient procedures in the Department. The Court also determined that Dr. Klein had not suffered an adverse employment action under CEPA because there was no loss of salary or rank in connection with the actions taken by the hospital, and because Dr. Klein voluntarily refused to accept clinical assignments rather than suffer the indignity of having another faculty member supervise his work.

On appeal, Dr. Klein argued that the trial court erred based on his contention that he reasonably believed that the Radiology Department procedures created a danger to patients, and that the imposition of supervision on his clinical duties was the functional equivalent of a suspension.

### The Appellate Division

The Appellate Division affirmed the order granting summary judgment and dismissing the complaint.

First, the Appellate Division observed that the 1997 amendments

require a healthcare professional to meet the same standard for a *prima facie* case as any other claimant under CEPA: proof that he had a reasonable basis to believe that the practices complained of violate some law, rule or regulation. The court properly observed that a plaintiff need not prove that a violation actually occurred, but must at a minimum identify a law, rule, regulation or other clear mandate of public policy that he reasonably believed would be violated by the practices in question, and show that there is a “substantial nexus” between the employer’s practice and the law or public policy identified.

Applying that standard, the Appellate Division agreed with the trial court that Dr. Klein could not establish a *prima facie* case merely by characterizing the practices in the Radiology Department as “improper health care,” or as a “danger” to the health of patients. The court observed that while there is a strong public policy in New Jersey to ensure quality health care, more is required under CEPA in order to establish that there is a reasonable basis to believe that the employer violated a law, rule or regulation. In this regard, the court noted that Dr. Klein did not assert a violation of any regulation governing the administration of anesthesia, or of the equipment or safety procedures utilized by the hospital in connection with the administration of anesthesia. Rather, the court found that Dr. Klein believed only that the hospital should provide additional staffing, more space, and more attention to the needs of the anesthesiologists, which reflects only a private disagreement over internal practices and priorities rather than potential violations of rules or regulations. The court specifically noted that the hospital,

which operates in a highly regulated environment, had never been found to be deficient in connection with the administration of anesthesia, and that Dr. Klein had not alleged that it had.

The Appellate Division also agreed with the trial court’s finding that Dr. Klein had not suffered an adverse employment action as defined in CEPA because there was no reduction in either his salary or rank. The court noted that Dr. Klein’s clinical privileges had been restored within a few days, and found that the imposition of supervision, while possibly demeaning and insulting, did not adversely affect a term or condition of employment and was therefore not an act of retaliation prohibited by CEPA.

### Conclusion

The *Klein* opinion reflects that the courts in New Jersey will apply the same CEPA *prima facie* case analysis to claims by healthcare professionals as are applied to claims by employees in other industries.

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