

CLIENT ALERT

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New Jersey Supreme Court Rules That CEPA Does Not Protect Partners/Shareholders Who Disagree With One Another

In a case of first impression, the New Jersey Supreme Court has determined that the protections of the Conscientious Employee Protection Act (“CEPA”) do not extend to disagreements between partners or shareholders of a business because such individuals are not “employees” blowing the whistle on activities that are unlawful or contrary to public policy, but are instead the persons who control the activities of the organization. In *Feldman v. Hunterdon Radiological Associates*, the Court adopted the test developed by the U.S. Supreme Court in a similar context to determine whether a shareholder-director of a business entity may be an “employee” protected under CEPA.

The Facts

Plaintiff Dr. Ruth Feldman (“Feldman”), a physician, was a shareholder and director of defendant Hunterdon Radiological Associates (“HRA”), a radiology practice that provided magnetic imaging services to the Hunterdon Medical Center. Including Feldman, there were a total of six HRA shareholder-director physicians. Each shareholder-director had an equal vote in significant business decisions and they shared equally in HRA’s profits and losses.

In 2000, Feldman became the chairperson of medical imaging at Hunterdon Medical Center. In that position, she began to receive complaints from other doctors about the ability of Dr. Sophia Yeh (“Yeh”), another shareholder-director of HRA, to read x-rays accurately. At Feldman’s urging, HRA asked Yeh to pursue additional training to address her performance limitations, but the shareholder-directors were divided over what further action to take.

Feldman favored strong action, but a majority of the shareholder-directors disagreed. According to Feldman, the working environment at HRA subsequently became hostile and she was marginalized by the other shareholder-directors. In addition, Feldman contended that, in retaliation for her actions regarding Yeh, HRA’s members, among other things, interfered with her efforts to become the medical director of Hunterdon Medical Center’s Breast Care Program.

Feldman resigned from and tendered her ownership interest in HRA. She could not find comparable employment and, as a result, accepted a position paying approximately half of what she had earned at HRA. She filed a lawsuit alleging, among other things, that HRA unlawfully retaliated against her in violation of CEPA because of her whistle-blowing conduct regarding Yeh.

CEPA

CEPA generally prohibits an employer from retaliating against an “employee” for disclosing or objecting to conduct by the employer that he or she reasonably believes to be unlawful. In the healthcare field, CEPA prohibits retaliation against an “employee” who is a licensed or certified health care professional for disclosing or objecting to a policy or practice that he or she “reasonably believes constitutes improper quality of patient care.”

The Trial Court and Appellate Division

Feldman argued that she was an “employee” under CEPA and was constructively discharged in retaliation for her whistle-blowing efforts regarding Yeh. The trial court dismissed Feldman’s CEPA claim on summary judgment. The Appellate Division reversed, holding that “the competent evidential materials are sufficient to permit a rational juror to find that plaintiff was an ‘employee’ who was retaliated against” in



violation of CEPA. The New Jersey Supreme Court granted HRA's petition for certification to address the issue of whether Feldman was an employee under CEPA.

The Supreme Court

Under CEPA, "employee" is defined as "any individual who performs services for and under the control and direction of an employer for wages or other remuneration." After concluding that Feldman was clearly an individual who performed services for wages, the Court turned to the issue of whether, given that she was a shareholder-director, Feldman was "sufficiently subject to HRA's 'control and direction' that she could reasonably be considered an employee rather than an employer."

According to the Court, no previous New Jersey cases directly addressed the issue of whether a shareholder-director can be an "employee" under CEPA. Nonetheless, the Court reviewed earlier decisions in similar contexts and identified "a general approach for determining employee status as contemplated by CEPA." According to the Court, "courts must look to the goals underlying CEPA and focus not on labels but on the reality of plaintiff's relationship with the party against whom the CEPA claim is advanced."

The Court then considered the test that the U.S. Supreme Court developed in *Clackamas Gastroenterology Associates v. Wells* for determining whether shareholder-directors of a medical practice should be considered "employees" under the Americans with Disabilities Act. Under *Clackamas*, the list of factors to consider are:

1. Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;
2. Whether and, if so, to what extent the organization supervises the individual's work;

3. Whether the individual reports to someone higher in the organization;
4. Whether and, if so, to what extent the individual is able to influence the organization;
5. Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts;
6. Whether the individual shares in the profits, losses, and liabilities of the organization.

The New Jersey Supreme Court adopted this test for determining whether a shareholder-director is an "employee" under CEPA. The Court emphasized that the *Clackamas* list of factors is not exhaustive and that "any relevant matter may be considered, with no particular weight to be accorded to any one factor." As the Court further explained, "the focus should be on the actual power and influence of the party within the organization because 'control' is the principal guidepost." According to the Court, a plaintiff's job title and the duties set forth in an employment contract are not determinative of whether he or she is an employee.

The Court indicated that the fourth factor of the *Clackamas* test – the extent to which the person is able to influence the organization – is "critical" because it "incorporates an in-depth inquiry of an organization and reveals which shareholder-directors are in a position to influence the operation and which are marginalized and have power in name only." In applying this factor, the Court explained that courts should consider whether the shareholder-director was unable to influence the organization and, therefore, was within the class of individuals whom the statute was intended to protect, or the shareholder-director had all of the tools within his or her control to eliminate the wrongdoing and did not need to "blow the whistle" at all.

Applying the *Clackamas* test to the facts here, the Court concluded that Feldman was not an employee under CEPA. The Court explained that Feldman "had all the tools within her control to address Dr. Yeh's deficiencies and in fact exercised them. The resulting power struggle among the equals on HRA's Board of Directors over the proper method of resolving Dr. Yeh's situation is simply not one that CEPA was intended to address." Thus, the Court reversed the Appellate Division's judgment and reinstated the trial court's grant of summary judgment.

Conclusion

CEPA cannot be wielded like a sword by partners or co-owners who simply disagree with one another. As the *Feldman* decision makes clear, however, merely providing employees with a title such as "director" and issuing them an interest in the business will not necessarily remove them from the protection of CEPA. The focus remains on an individual's actual ability to influence the organization. Of course, regardless of their source, complaints that can be construed as whistleblowing should be taken seriously and addressed pursuant to established and consistent policies and procedures.

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