

## Client Alert **Employment & Labor**

### ***“Watchdog” Employees Are Entitled to Same Protections as Other Employees under New Jersey’s Whistleblower Statute***

New Jersey employers must proceed with great caution when disciplining “watchdog” employees, such as employees responsible for ensuring company compliance with laws and regulations. In *Lippman v. Ethicon, Inc.*, the New Jersey Supreme Court recently held that claims brought by watchdog employees pursuant to New Jersey’s Conscientious Employee Protection Act (“CEPA”) are evaluated under the same standards applicable to CEPA claims brought by any other employee. Accordingly, the court held that a watchdog employee’s normal job duties, such as reporting company conduct to upper management, can constitute whistleblowing activity that is protected by CEPA. Consequently, an employer that takes an adverse employment action against a watchdog employee must consider that employee a litigation risk.

#### **Background**

During his tenure as Ethicon’s vice president of medical affairs, Lippman’s normal job duties required that he, in part, provide Ethicon with his medical opinion about the safety of Ethicon’s products. After Ethicon terminated Lippman, Lippman sued the company, alleging that it terminated him for engaging in CEPA-protected whistleblowing activities he undertook as a part of his normal job requirements.

Specifically, Lippman claimed he was terminated for reporting to the company that a number of its products were dangerous and in violation of federal and state laws, and

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advising the company to recall or perform further research with respect to the products. Accordingly, Lippman argued that his termination violated provisions of CEPA, including “subsection (c),” which prohibits an employer from retaliating against an employee who “objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes,” in relevant part, violates a law or government regulation, “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.”

The trial court granted summary judgment in favor of the company. The trial court found that, because it was Lippman’s job “to bring forth issues regarding the safety” of Ethicon’s products, and Lippman’s performance of such duties formed the basis of his CEPA claim, he could not establish that he engaged in CEPA-protected activity.

The Appellate Division rejected the trial court’s rationale and reversed. However, the Appellate Division went a step further by articulating a modified *prima facie* test to be applied to CEPA claims brought by watchdog employees. The Appellate Division modified the standard *prima facie* test such that a watchdog employee would be required to show that “he or she either (a) pursued and exhausted all internal means of securing compliance; or (b) refused to participate in the objectionable conduct.”

### **Supreme Court’s Decision in *Lippman v. Ethicon, Inc.***

Consistent with the Appellate Division’s decision, the Supreme Court held that “watchdog employees are entitled to CEPA protection when performing their ordinary job duties.” However, the Court rejected the Appellate Division’s modification of the *prima facie* test, and held that watchdog employees are subject to the same *prima facie* test as every other employee.

To the extent the Supreme Court agreed with the Appellate Division, the Court stated that there “is simply no support in CEPA’s definition of ‘employee’ to restrict [CEPA’s] application and preclude its protection of watchdog employees.” Moreover, the Court noted that CEPA contains “no language . . . that hints that an employee’s job duties affect whether he or she may bring a CEPA claim.” The Court further explained that watchdog employees need not “contradict” or act “outside the scope of their job duties in order to engage in CEPA-protected conduct.” In other words, an employee that “objects to or refuses to participate” in certain employer conduct in accordance with his or her normal job duties engages in protected activity.

Additionally, in rejecting the Appellate Division’s modified *prima facie* test, the Court stated that the Appellate Division “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. . . . In subsection (c), there is no exhaustion requirement.” Accordingly, watchdog employees are not required to pursue or exhaust all internal means in order to establish a CEPA claim under subsection (c). In this regard, the watchdog employee need only show that he or she objected to or refused to participate in the objectionable conduct – even if the employee did so by performing his or her normal job duties.

### Employer Tips

In light of the Court’s decision, employers should consult with counsel before taking an adverse action against a watchdog employee. The attorneys in the Sills Cummis & Gross P.C. Employment and Labor Law Practice Group can assist employers in addressing these new developments.

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