Employer As Employee: The Continuing Expansion Of Whistle-Blower Protection By New Jersey Courts

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In *Feldman v. Hunterdon Radiological Associates, et al*., Docket No. A-4732-03T3 (App. Div. August 15, 2005), the Appellate Division held that a shareholder/director of a medical practice was an "employee" under the Conscientious Employee Protection Act ("CEPA" or "the Act"), *N.J.S.A.* 34:19-1 to - 8, and entitled to protection under the Act. Although unpublished, this decision gives insight into the direction New Jersey courts are heading as they continue to expand the definition of "employee" under CEPA, and portends the likely expansion of CEPA's protection to include shareholders and directors in other professional service organizations such as law firms, accounting firms and engineering firms.

CEPA Background

CEPA protects employees who "'blow the whistle' on organizations engaged in illegal or harmful activity." *Young v. Schering Corp., et al.,* 141 N.J. 16, 23 (1995). It provides that an employer cannot take retaliatory action against an employee if the employee discloses illegal practices by the employer, or refuses to participate in any activity which is in violation of the law or which constitutes improper quality of patient care, is fraudulent or criminal, or is clearly against public policy concerning the public health, safety or welfare or protection of the environment." *N.J.S.A.* 34:19-3.

To maintain a cause of action under CEPA, a plaintiff must demonstrate: "(1) that he or she reasonably believed that his or her employer's conduct was violating either a law or rule or regulation promulgated pursuant to law; (2) that he or she performed whistle-blowing activity described in *N.J.S.A.* 34:19-3a, c(1) or c(2); (3) an adverse employment action was taken against him or her; and (4) a causal connection exists between the whistleblowing [sic] activity and the adverse employment action." *Kolb v. Burns*, 320 N.J. Super. 467, 476 (App. Div. 1999). Under CEPA, an "employee" is "any individual who performs services for and under the control and direction of employers for wages or other remuneration." *N.J.S.A.* 34:19-2(b).

CEPA specifically affords protection to an employee in the health care profession who reports conduct that he or she "reasonably believes constitutes improper quality of patient care." *N.J.S.A.* 34:19-3(a). The Act defines "improper quality of patient care" as "any practice, procedure, action, or failure to act of an employer that is a health care provider which violates any rule, regulation, or declaratory ruling adopted pursuant to law, or any professional code of ethics." *N.J.S.A.* 34 :19-2(f).

Factual Background

Plaintiff, Ruth F. Feldman, M.D. ("Feldman"), is a physician licensed to practice medicine in New Jersey as a board certified radiologist. *Feldman,* Docket No. A-4732-03T3 (App. Div. August 15, 2005) at 2. Defendant, Hunterdon Radiological Associates, P.A. ("HRA"), is a New Jersey Professional Association comprised of physicians who specialize and limit their medical practice to the field of radiology. *Id.* In 1990, Feldman entered into an "Employment Agreement" with HRA, and during most of the relevant period, she was an equal shareholder in HRA with five other physicians, including Dr. Sophia Yeh and the managing partner of HRA, Dr. Mark S. Malzberg. *Id.* at 2-3.

In March of 2000, Feldman became Chairperson of the Radiology Department at the Mid-Jersey Health Corporation, a subsidiary of Hunterdon Medical Center ("HMC"). *Id.* at 3. Shortly thereafter, Feldman began receiving complaints about Dr. Yeh, which led Feldman to question Dr. Yeh's competence. *Id.* at 3-4. Pursuant to Feldman's duty to report under HMC's Medical Staff Bylaws, she corresponded with the HMC Board of Trustees about her concerns and recommended in July of 2000 that Dr. Yeh be placed on probation. *Id.* at 4-5. Feldman also brought her concerns regarding Dr. Yeh's competency to the attention of her partners at HRA. Collectively, they imposed a structured educational program on Dr. Yeh, which was intended to enhance her training and skills. *Id.* at 6.

Although Dr. Yeh made an effort to comply with the plan developed by her partners, Feldman was not satisfied that her concerns regarding Dr. Yeh's competency were being adequately addressed. *Id.* at 7-8. In subsequent correspondence to the President of the Medical Staff of HMC in November of 2000, and to the President & CEO of HMC in December of 2000, Feldman reiterated her concerns regarding Dr. Yeh's competency and, once again, recommended that Dr. Yeh's privileges at HMC be curtailed pending resolution of Feldman's concerns regarding Dr. Yeh's competency." *Id.* at 8-9.

Feldman claimed that her views regarding Dr. Yeh's competency created friction among the partners of HRA who retaliated against her and caused her working conditions at HRA to become intolerable. *Id.* at 24-27. Allegedly, Dr. Malzberg subjected her to hostility, verbal abuse and intimidation and also undermined her position at HMC. *Id.* She also claimed that she was intentionally excluded from HRA board meetings and was subjected to insults and vulgarities within HRA. *Id.*

In November of 2001, Feldman resigned from HRA. *Id.* at 10. On December 7, 2001 Feldman filed an eleven-count complaint against HRA and Dr. Malzberg, which included a claim under CEPA. *Id.* After the other claims were resolved, defendants moved for summary judgment on the CEPA claim.

Summary Judgment Granted Below

The trial court granted defendant's motion for summary judgment finding that Feldman was a shareholder of HRA and did not qualify as an employee under CEPA. *Id.* at 10. The court based its analysis on the opinion of the U.S. Supreme Court in *Clackamas Gastroenterology Associates, P.C. v. Wells*, 528 U.S. 440, 442 (2003), which used six Equal Employment Opportunity Commission ("EEOC") factors in its analysis of whether physicians engaged in a medical practice as shareholders and directors of a professional corporation could be considered "employees" covered by the Americans with Disabilities Act. *Id* at 11.

The *Clackamas* factors focus on the level of autonomy and responsibility of the shareholder-director, including whether the organization can fire the employee or set rules regarding the employee's work; the extent to which the individual is supervised and the reporting relationship; the influence of the individual over the organization; whether the individual shares in the profits and losses of the organization; and whether the parties intended the individual to be an employee. *Id*. at 12. Here, the court found that the *Clackamas* factors weighed against finding Feldman to be an employee of HRA, as Feldman had the ability to hire and fire others, and she practiced independently without daily supervision. *Id*. at 13.

Summary Judgment Reversed On Appeal

The Appellate Division reversed, however, finding that the determination of Feldman's status should not be evaluated under the EEOC factors, but instead, according to the factors set forth in the Restatement (Second) of Agency § 220 (1958), per the dissent in *MacDougall v. Weichert*, 144 N.J. 380, 437 (1996) (Pollock, J., dissenting). *Id*. at 13-14. The Restatement provides 10 factors to consider, among others, in order to determine whether one working for another is a "servant" or "independent contractor." *Id*. at 15. Those factors include the extent of control the "master" exerts over the work performed, the type of occupation and the skill required, whether the employer provides the tools and place of work, the length of employment, the method of payment, whether the parties believe they are creating a master-servant relationship, and whether the principal is or is not a business. *Id*. The Appellate Division noted that it has "previously applied a similar test in determining whether a plaintiff is an "employee" within the meaning of the Law Against Discrimination, *N.J.S.A.* 10:5-1 to - 42[.]" *Id.* at 16. (citing *Pukowsky v. Caruso*, 312 *N.J. Super.* 171 (App. Div. 1998), and *Crisanthis v. County of Atlantic*, 361 *N.J. Super.* 448 (App. Div.), *certif. denied*, 178 *N.J.* 31 (2003)). The Appellate Division identified "the employer's right to control the means and manner of the worker's performance" as the most important factor in determining whether a plaintiff is an "employee" under CEPA. *Id.*

Based upon the test set forth in Restatement (Second) of Agency § 220 (1958), the Appellate Division concluded that Feldman was an "employee" under CEPA, notwithstanding her status as an equal shareholder in HRA. *Id.* at 17. The Appellate Division concluded that the competent evidentiary materials, including Feldman's Employment Agreement with HRA, "show that she received an annual salary from HRA, she was required to comply with the standards set forth by HRA, and she reported to Dr. Malzberg, the Managing Partner of HRA." *Id.* More specifically, the Appellate Division noted that Feldman's employment agreement with HRA provided that she "…shall not…practice medicine except as an *employee* of the Corporation." (emphasis added). *Id.* at 18. The Agreement also provided that Feldman's medical practice was completely under the regulation and control of HRA and that she could not engage in any business outside of HRA. *Id*. at 18-19. Further, Feldman did not have the ability to choose her own patients or set her own rates, and even income earned from speaking and lecturing belonged to the firm. *Id*. at 19. HRA also reserved the right to terminate Feldman for cause or no cause. *Id*. Finally, Feldman, as well as the other shareholders of HRA, received all of the other "employee fringe benefits" including health insurance, disability and group life insurance, reimbursement for business related expenses, contributions to the employee retirement plan, and paid time-off for vacations and medical conventions. *Id.* at 20.

Based upon its review of the evidence, the Appellate Division concluded that Feldman was an "employee" of HRA and, therefore, entitled to protection under CEPA. *Id.* Because the Appellate Division also concluded that a rational juror could find that Feldman engaged in whistle-blowing activity, and that there was a causal connection between her whistleblowing activity and the subsequent conduct of Dr. Malzberg and HRA, the Appellate Division reversed the order of summary judgment and remanded the matter for further proceedings. *Id.* at 22-28.

Conclusion

The *Feldman* decision shows that New Jersey courts will continue to broaden the reach of CEPA by pushing the limits of who is considered an "employee" and, thus, protected from retaliation under CEPA for whistle-blowing activity. The more expansive list of factors to consider under the Restatement (Second) of Agency § 220 (1958) and the Law Against Discrimination in determining whether an individual is an "employee" under CEPA appear to make it much easier to classify an individual as such, even if the individual is a shareholder/director with a seemingly high degree of responsibility for the daily functioning and success of a business.

Professional service organizations such as law firms, accounting firms, engineering firms and medical associations, which are traditionally structured as professional corporations or partnerships, are well-advised to take notice of this unpublished decision, and to modify their employment and shareholder agreements to lessen the likelihood that these documents trigger CEPA protection for partners, shareholders and directors.

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