

New Jersey Appeals Court Saves Wachovia from \$3.6 Million Whistleblower Award

by Ramon Rivera on May 3, 2012

A New Jersey appeals court has overturned a \$3.6 million whistleblower award against Wachovia after an employee alleged he was terminated for revealing fraud rather than for using his work email to share illicit images. The New Jersey whistleblower case was “unsustainable as a matter of law” and “should never have been submitted to the jury,” the appeals court held in *Powell v. Wachovia Corporation*, A-1727-10.

The plaintiff and eight other employees were fired after a random audit discovered they used their company e-mail accounts to share pornographic images. The plaintiff claimed he was fired in retaliation for objecting to a new compensation scheme that resulted in a reduction of sales commissions for Wachovia’s benefits producers.

The case was brought under the Conscientious Employee Protection Act (CEPA), a civil rights statute intended 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.” *Yurick v. State*, 184 N.J. 70, 77 (2005).

To establish a CEPA violation, a plaintiff must demonstrate that:

- He or she reasonably believed that his or her employer’s conduct was violating either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy;
- He or she performed a “whistle-blowing” activity described in the statute;
- An adverse employment action was taken against him or her; and
- A causal connection exists between the whistle-blowing activity and the adverse employment action.

In this case, the court found that the plaintiff failed to satisfy several of the required elements. Although the plaintiff characterized Wachovia’s conduct as fraudulent, its decision to change the compensation structure for its employees was simply a breach of contract dispute, the court concluded.

“Powell has not demonstrated that Wachovia Insurance’s matrix-related conduct, including the manner in which it was presented to affected employees, was reasonably believed to be fraudulent, deceptive, or unlawful,” they said. Changes in compensation plans are matters between an employee and the employer, the court added.

The court also found that the plaintiff was acting in his own self-interest by pursuing legal action related to the new compensation structure and not engaging in any “whistle-blowing” activity.

“Powell was acting not under the mantle of the CEPA, but rather in furtherance of contractual self-interest. We do not criticize Powell for that impulse. However, it cannot be elevated, as a matter of law, to a CEPA springboard for damages,” the court wrote.

The Message for New Jersey Employers

Although this plaintiff was unsuccessful, this case demonstrates how costly a whistleblower lawsuit can be for employers. Therefore, it is important to take all employee complaints seriously and have procedures in place to address them. In addition, to avoid allegations of retaliation, it is important to thoroughly document the basis for terminating all employees.

If your company would like to strengthen its protections against whistleblower lawsuits, please contact Ramon Rivera, Chair of Scarinci Hollenbeck’s Labor and Employment Law Group.