

## Employment Exposure Alert: NJ Court Allows Employee to Prosecute COVID-19-Related Whistleblower/Discrimination Claim, by Iram Valentin, Esq., & Christopher Turano, Esq., 2-21-2023

On February 3, 2023, a Middlesex County New Jersey Superior Court judge denied an employer's motion to dismiss a case by an employee alleging violations of New Jersey's Conscientious Employee Protection Act ("CEPA"), N.J.S.A. 34:19-1 to 34:19-14 and New Jersey's Law Against Discrimination ("NJLAD"), N.J.S.A. 10:5-1 to -50. The ruling expands the exposure to lingering claims employers face in the sub-pandemic era.

In Hollibaugh v. Border Café of Woodbridge, Inc., New Jersey Superior Court, Middlesex County, Law Division, Civil Part, Docket No. MID-L-4680-22, plaintiff John Hollibaugh worked for defendants Jose Tejas, Inc., Elwin Murray and Keith Santangelo. Plaintiff claimed that he was potentially exposed to the COVID-19 virus and reasonably believed, based on CDC guidelines and his healthcare provider's recommendation, that he was required to quarantine until his symptoms subsided; that he had a legal and ethical obligation to quarantine; and that reporting to work would be in violation of law, rules, regulations, and would constitute improper customer service and/or be incompatible with a clear mandate of public policy. Plaintiff disclosed to his supervisors that he was symptomatic and conveyed his reasonable belief that he had or could have COVID-19, and was thus legally unable to report to work; however, Plaintiff alleges that upon his legal return to work, he was terminated for simply following the law, public policy, and common sense. Defendants, in fact, advised Plaintiff that he was terminated because he missed five (5) days of work. Plaintiff then filed suit and Defendants moved to dismiss Plaintiff's Complaint for failure to state a claim, teeing up the issue for the trial court.

The Court denied Defendants' motion. With respect to Plaintiff's CEPA whistleblower claim against the entity defendants, the Court held that Plaintiff adequately alleged facts to survive a motion to dismiss, that he had a reasonable belief that he would be violating the law or public policy if he returned to work while he was symptomatic after being exposed to COVID-19. With respect to Plaintiff's CEPA claim as to the individual defendants, the Court also found that Plaintiff adequately alleged facts to survive a motion to dismiss on that claim, reasoning that informing defendants Murray and Santangelo, who respectively were the company's CEO and Director of Operations was sufficient.

As to his Pierce v. Ortho Pharm. Corp., 84 N.J. 58, 72 (1980), public policy claim, based on the sources Plaintiff cited as underlying his reasonable belief, the Court found that Plaintiff sufficiently plead a causal nexus between his exercise of an established right grounded in public policy and his termination. Finally, with respect to his NJLAD retaliation claim, the Court held that Plaintiff alleged facts sufficient to survive dismissal, reasoning that a reasonable fact-finder could find that Plaintiff engaged in a protected activity by reporting to defendants that he was symptomatic and sick; that he sustained an adverse employment action since he was terminated, and that there was a causal connection between the protected activity and adverse action since Plaintiff was fired within days of informing his employer that he was experiencing COVID-19 symptoms.

In light of this ruling, it is clear that some New Jersey state courts are willing to expand the scope of protections under the states' anti-retaliation and/or anti-discrimination laws to employees with COVID-19-related grievances. Employers should carefully scrutinize, and discuss with counsel, the potential ramifications of any action taken within the post-pandemic context.

Iram P. Valentin  
New Jersey Partner  
(201) 708-8233  
ivalentin@kaufmandolowich.com

Christopher J. Turano  
New Jersey Partner  
(201) 708-8259  
cturano@kaufmandolowich.com