

## BUSINESS LITIGATION ALERT

JANUARY 2009

### New Jersey High Court Clarifies Burden On “Common Law” Whistleblowers

**The New Jersey Supreme Court just expanded the scope of common law “Pierce” retaliation claims by holding that a former in-house attorney who claimed she was fired for complaining to supervisors about allegedly unethical conflicts of interest in the legal department did not have to complain first to an external authority in order to sustain a retaliatory discharge claim.** *Tartaglia v. PaineWebber*, A-107/108-06 (December 18, 2008). The common law claim is based upon *Pierce v. Ortho Pharmaceuticals Corp.*, 84 N.J. 58 (1980), in which the Court established a cause of action for a firing that violates a clear mandate of public policy.

Tartaglia, an in-house lawyer for a large financial institution, claimed she was fired because she complained to her supervisors about, among other things, certain alleged conflicts of interest in dealing with internal disputes involving its financial advisors. At trial, the court dismissed Tartaglia’s retaliation claim because she did not first complain, or at least threaten to complain, to an external authority about the alleged misconduct. The Appellate Division affirmed, holding that merely voicing complaints about corporate behavior within the corporation is not sufficient to uphold a retaliatory discharge claim.

The Supreme Court reversed. The Court held that neither *Pierce* nor several other precedential rulings relied upon by the Appellate Division (*House v. Carter-Wallace*,

*Inc.*, 232 N.J. Super. 42, 49-51 (App. Div. 1989); *Young v. Schering Corp.*, 141 N.J. 16 (1995)) held that an employee who merely voiced complaints within the corporation could not state a retaliatory discharge claim. According to a unanimous Court, “[n]othing in *Pierce* . . . mandates an actual or even threatened external complaint as an element of the cause of action.”

At the same time, mere complaints, without something more, are also not enough. According to the Court, an employer cannot be held liable simply because an employee is “grousing or complaining” about work conditions in general. Instead, “although she need not have voiced a complaint to an external authority, she must demonstrate that she took other actions reasonably calculated to prevent the objectionable conduct.” Thus, the employee’s objection must communicate a disagreement with a corporate policy or action, and must also be made to someone senior enough to do something about it. The Court stated:

Even though we do not require that an external complaint be made to support a *Pierce* claim, the remedy is not unbounded. \* \* \* [I]t requires in this context an expression by the employee of a disagreement with a corporate policy, directive, or decision based on a clear mandate of public policy . . . . It requires, as well, a sufficient expression

# BUSINESS LITIGATION ALERT

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of that disagreement to support the conclusion that the resulting discharge violates the mandate of public policy and is wrongful. That is to say, a complaint to an outside agency will ordinarily be a sufficient means of expression, but a passing remark to

co-workers will not. A direct complaint to senior corporate management would likely suffice, but a complaint to an immediate supervisor generally would not.

■ Jed L. Marcus

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## New Jersey Supreme Court Rules On Title Insurance Coverage

An issue which affects many business owners who have ownership interests in real estate was addressed by our state Supreme Court recently in the case of *Shotmeyer v. New Jersey Realty Title Insurance Company*. In that case, brothers had purchased a commercial property in the name of a general partnership, and at the time of purchase they obtained title insurance to protect against any loss caused by a defective title. Approximately 10 years after the purchase, they conveyed the title in the property to a limited partnership, made up of the same persons, to aid in their respective estate plans. Years after the conveyance a title defect was found and reported to the title company, but the company

refused to pay the claim because of the change in ownership to the limited partnership.

The Court held that even though the new entity was made up of the same people, they were not entitled to the protection of the title insurance policy, because the limited partnership was a completely different business entity not covered by the title policy. This holding requires that a new policy of title insurance be purchased when a change in ownership occurs where the new business entity acquiring ownership of the property is different and distinct, even if the individual owners of that acquiring business entity are the same. Even though title claims are somewhat rare, it may be worth the peace of mind to purchase the new title policy.

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