

Memorandum of Decision on Motion

**NOT FOR PUBLICATION WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS**

Eileen Connell

v.

William R. Edleston

Docket No. HNT-L-690-08

Motion to Dismiss

Opposed

Submitted & Decided: June 10, 2011

The Honorable Peter A. Buchsbaum, J.S.C.

This matter is an employment dispute alleging that the defendant terminated the plaintiff in retaliation for her objection to his alleged fraudulent billing procedures. The plaintiff filed a two-count Complaint, with Count I alleging violation of the New Jersey Conscientious Employee Protection Act ("CEPA"), and Count II alleging a public policy cause of action under *Pierce v. Ortho Pharmaceuticals*, 84 N.J. 58 (1980).

The defendant files the instant motion to dismiss the plaintiff's *Pierce* public policy claim on the grounds that same is barred by CEPA's election of remedies provision. CEPA is the codification of the common law cause of action, expressed in *Pierce*, which stated that

an employee has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy. The sources of public policy include legislation; administrative rules, regulations or decisions; and judicial decisions... Absent legislation, the judiciary must define the cause of action in case-by-case determinations. An employer's right to discharge an employee at will carries a correlative duty not to discharge an employee who declines to perform an act that would require a violation of a clear mandate of public policy.

Id. at 72. CEPA, N.J.S.A. 34:19-8 provides:

Nothing in this act shall be deemed to diminish the rights, privileges, or remedies of any employee under any other federal or State law or regulation or under any collective bargaining agreement or employment contract; except that the institution of an action in accordance with this act shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, State law, rule or regulation or under the common law.

(emphasis added). The New Jersey Supreme Court thus noted in *Tartaglia v. Painewebber, Inc.*, 197 N.J. 81, 103 (2008), that "the Legislature did not entirely supplant *Pierce*. Instead, the Legislature recognized the continuing viability of the common law cause of action as an alternate form of relief, but included a statutory provision that deems the filing of a CEPA complaint to be an election of remedies."

Nonetheless, plaintiff argues that the defendant is equitably estopped from making the election of remedies argument this close to trial. The New Jersey Supreme Court Stated in *Township of Middleton v. Simon*, 193 N.J. 228, 250 (2008):

"[t]he essential principle of the policy of [equitable] estoppel ... is that one may, by voluntary conduct, be precluded from taking a course of action that would work injustice and wrong to one who with good reason and in good faith has relied upon such conduct." ... Stated differently, "to establish **equitable estoppel**, plaintiffs must show that defendant engaged in conduct, either intentionally or under circumstances that induced reliance, and that plaintiffs acted or changed their position to their detriment."

(citations omitted).

The plaintiff has no valid claim of reliance here. The law is clear – without any need for interpretation or speculation –

that bringing suit under CEPA is an election of remedies. Any conscientious attorney agreeing to work on a CEPA case knows this information. Thus, there can be no argument that the defendant's late motion is to blame for the plaintiff filing a claim under *Pierce* despite being barred from doing so under CEPA's election of remedies provision.

The plaintiff next argues that "there has been no reported decision in New Jersey, which set forth definitively at what time that waiver provision becomes applicable. (Plf.'s Brief at 2.) The plaintiff asserts that "the appropriate time to make an election of her alleged causes of actions is at the close of evidence, but prior to the submission of the matter to the jury."

The plaintiff is correct in that it has not been precisely established when an action has been "instituted" for purposes of CEPA's election of remedies. Although it did not decide the issue in the opinion, the New Jersey Supreme Court stated in *Young v. Schering Corp.*, 141 N.J. 16, 31-32 (1995):

Although the waiver provision does not use language of estoppel, "institution of an action" may be susceptible of meaning something other than the filing of a complaint as contemplated by Rule 4:2-2. The meaning of "institution of an action" could conceivably contemplate an election of remedies with restrictions in which the election is not considered to have been made until discovery is complete or the time of a pretrial conference contemplated by Rule 4:25-1.

The plaintiff additionally relies on *Maw v. Advanced Clinical Communications, Inc.*, 359 N.J. Super. 420, *rev'd on other grounds*, 179 N.J. 439 (2003). The Appellate Division in *Maw* recited that portion of *Young* quoted above, and stated that, "[w]e take this language to mean that before electing remedies, a plaintiff should have an opportunity to complete discovery. Only after gaining access to all of the facts, will a plaintiff be in a position to make a knowing and meaningful election." *Id.* at 441. In that case, the Appellate Division reinstated the plaintiff's common law retaliation claim since she had not yet had the opportunity to complete discovery.

In this case, there is no issue of the plaintiff not being privy to all of the necessary facts. Discovery was complete in

this matter on November 9, 2010. The plaintiff submits that she should be permitted until the close of all evidence to select her remedy, as such

timing would allow plaintiff to be fully informed as to what facts and evidence have been made available, such that she can make a knowing and meaningful election. Anytime prior would place Plaintiff at a prejudice while creating absolutely no prejudice for Defendants. The Defendant in this matter cannot point to *any* prejudice, other than perhaps the filing of the instant motion, that would result from defending both the CEPA and *Pierce* counts.

(Plf.'s Brief at 2.)

This argument cannot succeed. Discovery ended nearly seven (7) months ago, and the Court Rules and Rules of Evidence require that the plaintiff be apprised of the evidence that the defendant intends to submit at trial ahead of time. The only thing that the plaintiff does not know are the precise strategies and style of the case that the defendant will use at trial. However, there is no law which supports prolonging the election of remedies so that the plaintiff can address the defendants' trial strategies. It is up to the plaintiff to properly prosecute her own case, which is in keeping with the policy behind the election of remedies to prevent "[p]arallel claims based on those rights, privileges and remedies ... because they represent multiple or duplicative claims based on retaliatory discharge." *Young*, 141 N.J. at 19. The plaintiff cannot now argue that she does not know what facts she will base her case on at trial. She makes no assertion that the two claims would not duplicate one another, and cannot proceed any further with both counts of her Complaint. She has not waived the CEPA claim, thus indicating that she intends to proceed forward on same at trial based on the facts discovered in this litigation. She is in effect advocating confusing the jury by presenting to it a claim that must be waived.

The law is clear that she cannot maintain the CEPA claim and a common-law *Pierce* claim at the same time. To have both presented to the jury in the form of the waiver flies in the face of the word "institution" of litigation -- even if the term is not wholly precise, institution of litigation does not occur at the end of a jury trial.

For the reasons discussed above, defendant's Motion to Dismiss is **GRANTED**. Count II of the plaintiff's Complaint is hereby dismissed.