Trzaska v. L'Oréal USA, Inc. and the Further Expansion of CEPA Whistleblower Protections

by Richard J. Cino, Douglas J. Klein and Ashley D. Chilton

The U.S. Court of Appeals for the Third Circuit recently affirmed the expansive whistleblower protections the New Jersey Conscientious Employee Protection Act (CEPA) provides employees.[1] In *Trzaska v. L'Oréal USA, Inc.*,[2] the Third Circuit found a former in-house attorney adequately pled a cause of action for CEPA retaliation by claiming L'Oréal terminated his employment after he objected to a facially lawful company policy he alleged would cause him to violate his professional ethical obligations. In doing so, the Third Circuit reversed the district court's decision, which granted the employer's motion to dismiss the complaint.

Background

Steve Trzaska, an in-house attorney and former head of L'Oréal USA's regional patent team in Clark, New Jersey, alleged L'Oréal terminated his employment for refusing to apply for potentially dubious patents. L'Oréal's parent company adopted an internal initiative requiring each regional office to meet an annual patent quota. In 2014, under the quota requirement, Trzaska and his team were required to file 40 patent applications with the U.S. Patent and Trademark Office (USPTO).[3] Trzaska expressed concern that the quota could only be met by filing patent applications for inventions he did not, in good faith, believe were valid.[4] Trzaska alleged he believed the quota ran afoul of another L'Oréal policy requiring improvement in the quality of patent filings, as well as the Rules of Professional Conduct (RPCs) of both Pennsylvania, where he was admitted to practice law, and the USPTO.[5] Both RPCs generally prohibit attorneys from filing bad faith or frivolous patent applications or knowingly making false statements to a tribunal.[6] Significantly, violating the RPCs could result in sanctions or disbarment for the offending attorney.

Trzaska alleged he advised his superiors that neither he nor the patent group he supervised would file patent applications they believed were not in good faith, as to do so would violate the RPCs.[7] At the time, Trzaska did not identify any objectionable patent application L'Oréal instructed him to file. Subsequently, L'Oréal offered Trzaska two severance packages, both of which he declined.[8] Shortly thereafter, L'Oréal terminated Trzaska's employment, advising his position was no longer needed.[9]

District Court Decision

Trzaska filed suit in U.S. District Court for the District of New Jersey,[10] alleging unlawful retaliation under CEPA. He alleged L'Oréal terminated him because he refused to participate in applying for frivolous patent applications that would violate his obligations under the RPCs.

L'Oréal moved to dismiss Trzaska's CEPA claim pursuant to Rule 12(b)(6) arguing the RPCs were an inadequate basis to plead whistleblower retaliation under CEPA. The district court agreed and granted dismissal, finding that the RPCs were insufficient to maintain a CEPA claim because the RPCs "have no bearing on Defendant's business practices,"[11] nor had L'Oréal "ever asked him to submit defective or deficient patent applications."[12] The district court reasoned Trzaska simply disagreed with L'Oréal's position on the propriety of the application quota, and that such disagreement did not trigger CEPA. According to the district court, pressure placed on in-house lawyers to file questionable patent applications did not constitute actionable conduct under CEPA.[13]

Third Circuit Reversal

On July 25, 2017, the Third Circuit reversed, holding Trzaska adequately alleged a colorable CEPA whistleblower retaliation claim.[14] In a split decision, the Third Circuit found it need not expressly decide whether the RPCs could serve as a basis for a CEPA violation if they do not regulate L'Oréal's business practices, since "the basis of the CEPA claim here is not L'Oréal's violation of the RPCs; rather, it is the instruction to its employees that would result in the disregard of their RPC duties and hence violate[] a mandate of public policy."[15] The

Third Circuit found abuse of the patent system and violation of the RPCs harm the public interest, and "[a] n allegation that an employer promulgates such a policy serves as an adequate basis to bring a CEPA claim[]"[16] when an employee refuses to follow the policy and is terminated. In a dissenting opinion, Judge Michael Chagares agreed with the majority that the RPCs could form the basis of a CEPA claim, but disagreed that Trzaska had pled a cognizable claim under CEPA.

CEPA Claims of 'Watchdog Employees'

The *Trzaska* decision highlights two important issues for employers. First, under well-established case law, to qualify as a CEPA whistleblower, an individual must report conduct he or she reasonably believes constitutes an employer's violation of a public policy established in a law, rule or regulation. However, the *Trzaska* decision allows a CEPA case to proceed based on an employee's objection to a facially lawful company policy the employee believes will require the employee to engage in future conduct that violates a clear mandate of public policy. From the employer's positon, there was no issue with imposing an annual patent application quota on the regional offices. However, by terminating Trzaska after he complained about his team's ability to meet the quota in light of an insufficient number of viable patents, the employer ran afoul of CEPA even though the RPCs did not apply to the company directly and Trzaska had not identified any frivolous applications he had been forced to file.

Moreover, *Trzaska* is the latest decision involving the applicability of CEPA to so-called 'watchdog employees,' such as in-house counsel and internal compliance professionals, whose job duties involve vetting and ensuring legal compliance. The majority in *Trzaska* did not comprehensively address whether Trzaska, an attorney, should be held to a higher standard concerning his "reasonable belief" of a violation to plead a CEPA claim. The majority stated that the imposition of a heightened standard on such employees would be "inappropriate when considering a motion to dismiss."[17]

The dissent disagreed, citing the New Jersey Supreme Court in *Tartaglia v. UBS PaineWebber Inc.*[18] Specifically, in his dissent, Judge Chagares found Trzaska did not meet the heightened standard that applies to an attorney, namely the requirement of an actual violation of an RPC.[19] However, the majority distinguished *Trzaska* from *Tartagalia*, stating, "*Tartaglia* dealt with an attorney-employer's own RPC violations (ours does not); a *Pierce* whistle-blowing claim regarding that violation (ours does not); and a claim that has a statutory corollary in N.J. Stat. Ann. § 34:19-3(a) (which we have noted above Trzaska has not sufficiently pled as stated in his complaint, as opposed to his claims under § 34:19-3(c))."[20]

Moreover, in July 2015, the New Jersey Supreme Court held in *Lippman v. Ethicon, Inc.*,[21] that "CEPA imposes no additional requirements on watchdog employees bringing a CEPA claim unless and until the Legislature expresses its intent that such employees meet a special or heightened burden."[22] Nevertheless, the dissent in *Trzaska* denotes the inherent difficulty facing employers in attempting to determine when watchdog employees are engaging in statutorily protected activity under CEPA, or are simply doing their jobs.

In light of *Trzaska*, employers must exercise caution when taking adverse employment actions against 'watchdog' employees objecting to the future implications of employer conduct or a policy that may appear to be facially lawful.

Conclusion

CEPA has long been considered one of the most significant and expansive whistleblower protection statutes in the country. *Trzaska* does nothing to lessen this reputation. Employers must always consider potential whistleblower implications when taking any adverse employment action against an employee. Particular attention must be paid to in-house attorneys and other compliance professionals in light of *Trzaska*. These employees are in a unique position to establish potential whistleblower status by suggesting an employer's policies or practices may lead to unintended violations of public policy. Any subsequent adverse employment action taken against such employees may result in a CEPA claim and potential liability.

To complicate matters, since watchdog employees routinely raise issues or opine as to the legality of certain actions as part of their job duties, it is often difficult to distinguish when they are acting as an advisor to the company or advocating on their own behalf. As explained by the United States Supreme Court, the attorney-client privilege is the "oldest of the privileges for confidential communications known to the common law."[23] But, as indicated by the Third Circuit's opinion in *Trzaska*, even an employer's most trusted advisor can leave a company vulnerable to a CEPA claim. ■

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Endnotes

1. N.J.S.A. 34:19-1, *et seq.* CEPA prohibits employers from retaliating against an employee who "[d]iscloses or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer….that the employee reasonable believes….is in violation of a law, or a rule or regulation promulgated pursuant to law…. or is fraudulent or criminal[,]" N.J.S.A. 34:19-3(a) or who "[o]bjects to, or refuses to participate in" the same wrongful conduct that which the employee reasonably believes "is incompatible with a clear mandate of public policy concerning the public health, safety or welfare of the environment." N.J.S.A. 34:19-3(c).
2. 865 F.3d 155 (3d Cir. 2017).
3. *Trzaska*, 865 F.3d at 158.
4. *Id.*
5. *Id.* at 157. In a footnote, the *Trzaska* court provides, "In relevant part, the RPCs of the USPTO provide:

   A practitioner shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good-faith argument for an extension, modification or reversal of existing law [;]

   and

   A practitioner shall not knowingly….[m]ake a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the practitioner….

   37 C.F.R. §§ 11.301, 11.303(a)(1) (2013). Trzaska also alleged that 37 C.F.R. §§ 11.18, 11.113, 11.201, and 11.804 are relevant, as they relate to other pertinent forms of attorney misconduct. Parallel provisions appear in Rules 1.13, 3.1, 3.3, and 8.4 of the Pennsylvania RPCs. *See* 204 Pa. Code § 81.4. Parallel provisions appear in Rules 1.13, 3.1, 3.3, and 8.4 of the Pennsylvania RPCs. *See* 204 Pa. Code § 81.4." *Id.* at 158 n.1.

6. *Id.* at 157-58.
7. *Id.* at 158.
8. *Id.*
9. *Id.*
10. *Trzaska v. L'Oréal USA, Inc.*, 2015 U.S. Dist. LEXIS 147170 (D.N.J. Oct. 30, 2015).
11. *Id.* at *10.
12. *Id.* at *12.
13. *Id.* at *14.
14. *Trzaska*, 865 F.3d at 162.
15. *Id.* at 161.
16. *Id.*
17. *Id.* at 162 n.4.
18. 197 N.J. 81, (2000).
19. *Trzaska*, 865 F.3d at 168.
20. *Id.* at 162 n.4.
21. 222 N.J. 362 (2015).
22. Trzaska's A. 2015, Memorandum of Law of Plaintiff in Opposition to Defendant L'Oréal's Motion to Dismiss Plaintiff's First Amended Complaint, cited to *Lippman* to support his argument that 'watchdog' employees are also entitled to CEPA protection. (Plaintiff's Reply Brief, pp. 4, 21).
23. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (internal citation omitted).