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New Jersey Supreme Court Adopts Fact-Based Inquiry for Determining Who is an "Employee" Entitled to Sue under State Whistle Blower Law

In its July 5, 2006 decision in *Feldman v. Hunterdon Radiological Associates, et al.*, A-71 September Term 2005 ("*Feldman*"), the New Jersey Supreme Court addressed the applicability of the Conscientious Employee Protection Act ("CEPA") to shareholder-directors of professional associations. The Court held that, under CEPA, "it is not a shareholder-director's title or ownership interest that determines employee status. Rather, the inquiry is fact-intensive, focusing on the professional association's direction and control over the shareholder-director and the true power and vulnerability of the shareholder-director within the association." The decision raises a high burden for would-be plaintiffs and their likely lawyers and precludes any sort of bright-line status-based limit on standing that defendants and their bar sought.

The Court's decision in *Feldman* will raise the hurdle that a shareholder-director of a professional association must vault to survive a motion for summary judgment upon his or her CEPA claim. Specifically, a plaintiff will need to adduce evidence that he or she "was a shareholder-director in name only, was less powerful than any other shareholder-director, or that the power-sharing arrangement set forth in the [governing a]greement was not the real state of affairs." Significantly, the Court noted that "[b]ased upon the power and influence of the particular shareholder or owner, every decision we have located has concluded, on summary judgment, that the party was not an employee" under the standard adopted by the Court in *Feldman.*

But that higher burden appears quite Pyrrhic to defendants. This fact-based test means summary judgment is less likely in such cases, thus making them more and more expensive. Indeed, in not precluding shareholder-directors as a matter of law, the Court created a group of highly desirable plaintiffs, as they are more likely to have been high income earners. Further, the decision in *Feldman* could have significant repercussions upon the health care industry, with ever more health care professionals structuring their practices through professional associations. As the very facts in *Feldman* demonstrate, where a shareholder-director of a health care industry professional association claims retaliation for airing

concerns that appropriate standards of care are not being met, that person may have standing to bring a CEPA claim against the group.

Lower Court in *Feldman*

In *Feldman*, plaintiff was a physician shareholder-director of defendant Hunterdon Radiological Associates ("HRA"). There were concerns within HRA regarding the competency and quality of care being provided by one of plaintiff's colleagues at HRA, a Dr. Yeh, and a dispute developed among the group's members as to the appropriate remedial action. Plaintiff felt that strong action was required to address the situation, but a majority of the other shareholder-directors disagreed. Plaintiff alleged that because of this disagreement, she was marginalized by the other members of the group, and eventually was forced to resign from HRA. Plaintiff filed suit under CEPA, alleging that her constructive discharge was in violation of the statute, as it was done in retaliation for her seeking to take action against what she "reasonably believe[d] constitute[d] improper quality of patient care."

The Court rejected plaintiff's reliance upon the language of the Employment and Stock Purchase Agreement ("Agreement"), which governed the terms of her working relationship with HRA. Plaintiff cited the Agreement's repeated references to her status as an "employee." The Court stressed that "the categorization of a working relationship depends not on the nominal label adopted by the parties, but rather on its salient features and the specific context in which the rights and duties that inhere in the relationship are ultimately determined." The Court noted that CEPA defines an "employee" as "any individual who performs services for and under the control and direction of an employer for wages or other remuneration." As plaintiff concededly performed services for remuneration, the Court framed the issue as "whether, in light of her status as a shareholder-director, plaintiff was sufficiently subject to HRA's 'control and direction' that she could reasonably be considered an employee rather than an employer."

Supreme Court in *Feldman*

In *Feldman*, the New Jersey Supreme Court expressly adopted the non-exhaustive six factor test articulated by the United States Supreme Court in *Clackamas Gastroenterology Associates PC v. Wells*, 538 U.S. 440 (2003), for determining the status of a shareholder-director as an "employee" for purposes of the Americans with Disabilities Act:

(1) Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;

(2) Whether and, if so, to what extent the organization supervises the individual's work;

(3) Whether the individual reports to someone higher in the organization;

(4) Whether and, if so, to what extent the individual is able to influence the organization;

(5) Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts;

(6) Whether the individual shares in the profits, losses, and liabilities of the organization.

This is not an exhaustive list but rather, according to the Court, provides "an appropriate point of departure in analyzing a shareholder-director's employee status under CEPA." The Court stressed that "it is not the shareholder-director's delineated status that is pivotal; rather, the focus should be on the party's true power and influence within the organization." Each individual case must be considered on its particular merits, and the determination "depends on 'all of the incidents of the relationship … with no one factor being decisive.'" Nevertheless, the Court stated that "[i]t goes without saying that the fourth *Clackamas* factor – the extent to which the individual is able to influence the organization – is critical. It is that factor that incorporates an in-depth inquiry into the dynamics of an organization and reveals which shareholder-directors are in a position to influence the operation and which are marginalized and have power in name only."

In *Feldman* itself, plaintiff had begun working at HRA on a part-time basis in 1978, and had become a shareholder-director in 1992. At the time of the dispute over Dr. Yeh, plaintiff had been one of six shareholder-directors. Applying the newly-adopted test to the specific facts before it, the Court noted that plaintiff "shared equally with the other shareholder-directors in HRA's profits and losses and had an equal vote in significant business decisions." The Court further noted that "HRA was a democracy in which plaintiff had power that was at least equal to that of the other shareholder-directors…." The Court thus reinstated the trial court's grant of summary judgment to defendants, concluding that the "power struggle among the equals on HRA's Board of Directors over the proper method of resolving Dr. Yeh's situation is simply not one that CEPA was intended to address."

Impact of *Feldman*

The test articulated by the New Jersey Supreme Court in *Feldman* effectively raises the bar for a shareholder-director of a professional association who brings suit under CEPA. Such a plaintiff will be required to adduce evidence that he or she was a shareholder director in name only, that he or she had less actual power within the association than any other shareholder director, or that the coequal power sharing arrangements set forth in the governing agreements was not in fact the real state of affairs. But this test also tends to ensure that such plaintiffs will have the opportunity to attempt to vault that bar at trial.

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Please feel free to contact **James P. Flynn**, a member of the firm resident in its **Newark office**, if you have any questions or comments. He can be reached at 973-639-8285 or **jflynn@ebglaw.com**.
Michael J. Slocum, an associate in that office, assisted with the preparation of this Alert.