New Jersey Law Journal

Justices Mull Pre-emption of Union Wage and CEPA Claims

By: Michael Booth, New Jersey Law Journal
January 6, 2016

Lawyers argued before the New Jersey Supreme Court on Jan. 6 over whether a union laborer's complaints of wage violations and alleged retaliation for his whistleblower activity are automatically pre-empted by federal labor law.

In *Puglia v. Elk Pipeline*, plaintiff Salvatore Puglia, a laborer who claims he was laid off after he complained that his employer was violating the state's Prevailing Wage Act (PWA) is asking the court to overturn two lower court rulings that because there was a collective bargaining agreement between his union and the employer, federal labor laws pre-empt any actions in state court.

Puglia worked for Elk Pipeline Inc. of Franklinville from Oct. 2, 2006, until Dec. 16, 2010, when he was laid off, according to court documents.

In January 2010, Puglia noticed that he was not receiving the proper overtime and hourly rates that were due to him under the PWA. He and another employee, Robert Barrette, began complaining to their superiors, eventually speaking to the company president, Thomas McCouch, court documents said.

It was not until after he filed a complaint with the state Department of Labor that Puglia's proper hourly wage was restored. However, he did not believe he had been correctly compensated for his overtime, according to court documents.

When Puglia was laid off, he was told it was because the sewer construction project he was working on was complete, court documents said.

Puglia then filed a suit in Superior Court alleging that his rights under the Conscientious Employee Protection Act (CEPA) and the PWA were violated. The PWA claim was settled for an undisclosed sum and Elk moved to have the CEPA claim dismissed on summary judgment.

Gloucester County Superior Court Judge Jean McMaster dismissed the CEPA claim. She ruled that it was actually a wage claim and that because there was a collective bargaining agreement between Elk and Puglia's union, the International Association of Machinists and Aerospace Workers, AFL-CIO, Local Lodge S-76, the claim was pre-empted by the federal Labor Management Relations Act of 1947 and the National Labor Relations Act of 1935.

Appellate Division Judge Marie Lihotz, joined by Judges Carmen Messano and Michael Guadagno, agreed with McMaster, and added that Puglia also had complained about being laid off even though he had seniority, and that claim was governed by the CBA.

The Supreme Court agreed to hear Puglia's appeal.

Puglia's attorney, Deborah Mains, said the Appellate Division's ruling was too broad.

"The ruling endangers the rights of any employee who is a member" of a collective bargaining organization, said Mains, of Costello & Mains in Mount Laurel. "Plaintiffs will have no rights under CEPA or the [Law Against Discrimination]."

Mains added that Puglia is not interested in pursuing a claim that his seniority rights were violated, and that it was mentioned in the complaint only as a relevant fact.

Mains said all Puglia has to demonstrate for his CEPA claim to prevail is that his complaining played a role in the decision to lay him off.

Justice Anne Patterson asked why Puglia's seniority was mentioned in the complaint.

"It's not a factor," Mains said. "It doesn't need to be raised at trial. It was one comment at a deposition. There was no grievance over it.

"The CBA is not relevant here," she said.

Justice Barry Albin asked Mains if it was her position that the CBA cannot be invoked to deny a plaintiff the opportunity to pursue a CEPA claim.

Mains agreed.

"The plaintiff is the master of the complaint," she said. "He is not invoking any rights under the CBA."

Mains said that other courts have ruled that federal labor laws do not automatically pre-empt state laws when there is a CBA involved, especially if there is a "deeply rooted local interest."

The New Jersey Association for Justice participated as amicus. Its attorney, Ravi Sattiraju, agreed with Mains.

If the Appellate Division decision is affirmed, it will allow employers with unionized workers to have state claims dismissed and force the workers to pursue claims with the National Labor Relations Board, said Sattiraju, who runs a firm in Princeton.

CEPA, he said, represents an important public policy and that pre-emption is not automatically triggered.

"It's clearly an area of local concern," he said.

Elk's attorney, Douglas Diaz, said McMaster and the Appellate Division reached the correct decision.

"The legal principles are well settled," said Diaz, of Haddonfield's Archer & Greiner.

"The plaintiff is arguing that union employees will no longer have any rights," he said. "That is not accurate."

The only real point of contention is what forum Puglia must use to have his complaint adjudicated, he said.

The NLRB, Diaz said, "would not hesitate one iota" to determine that it could and should handle the dispute.

Diaz added that Puglia originally complained about his pay rates with another employee, which meant that he was engaged in a "garden-variety concerted activity" that is a protected activity under the NLRA.

"The primary jurisdiction lies with the NLRB," Diaz said. "Plaintiff still has his rights."

Albin suggested that there had to be a "balancing test" between Puglia's rights and those of the employer.

"It's a close case," Albin said.

"No, it's not, Diaz said.

Albin said the state Legislature wanted employees in New Jersey to be able to have the protections of CEPA.

"So do the NLRB and the Congress," Diaz said. "That's the essence of pre-emption."

The Employers Association of New Jersey also participated as amicus. Its counsel, John Sarno, agreed with Diaz that the lower court rulings should be affirmed.

"There is a broad definition of 'concerted activity,'" Sarno said. "There is a clear jurisdictional issue" that favors federal pre-emption.

***