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How Global Reach Affects Employment Relations

Policy Forum

- **Employment and the Law**

Features

- **Employment Relations in Australia and New Zealand**
- **Book Review: U.S. Health Care in Crisis**

Whistleblower Claims: A New Jersey Perspective

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Here is an effective formulation for describing an employee whistleblower's claim of retaliation: *Retaliation is what happens when someone does something bad to an employee who reasonably complained or objected about something that was worth complaining about.* Employment relations practitioners dealing with such issues know this seemingly simplistic formulation raises all the right questions. Moreover, protecting a worker against retaliation is the core of state-level whistleblower laws.

The federal Sarbanes-Oxley Act of 2002, passed in response to corporate scandals of the dot-com boom and bust, couples worker protection with establishment of an internal channel for reporting organizational misconduct. Most states, however, do not enlist employees in rooting out corporate corruption; the laws simply allow whistleblowers to seek damages for pain, suffering, and economic losses caused by retaliation. In fact, many states have not made it easy to seek or prove redress.

New Jersey, which has had a whistleblower law since 1986, appears to be one of the few states where meaningful remedies are both accessible and awarded. Indeed, plaintiffs prevailed most often in

their claims, especially in this decade. The New Jersey law's applicability to public and private employers and the state's widely publicized history of political corruption help account for awareness of the state's whistleblower protections. As a result, such claims are common and among the most frequently litigated employment-related claims in the state.

Still, the formulation stated above raises specific questions that demand answers.

They include: Who is protected? What types of complaints or objections warrant protection? What employer actions toward a "whistle-blowing" employee are deemed bad enough to warrant a remedy? The New Jersey experience has developed a unique and unusually clear body of case law on these questions. Practitioners and academics alike would do well to examine the New Jersey perspective, and this article reviews some of the central issues.

Protected Individuals

New Jersey's Conscientious Employee Protection Act (CEPA) provides a comprehensive remedy to employees who are retaliated against for engaging in certain protected activities. CEPA protects employees who complain, object, or refuse to participate in any activity that they

In New Jersey, whistleblower remedies are meaningful and claims are common.

reasonably believe: (1) violates a law, rule, or regulation promulgated pursuant to law; (2) is fraudulent, criminal, or incompatible with a clear public-policy mandate concerning public health, safety, welfare, or protection of the environment; or (3) (in the case of employees who are licensed or certified health care professionals) constitutes improper care of a patient. In addition to demonstrating one of the above and that he or she performed a whistle-blowing activity, a plaintiff must show that an adverse employment action was taken against him or her and that a causal connection exists between the whistle-blowing activity and the adverse employment action.

Employees are protected by CEPA, but New Jersey has also determined that independent contractors and those designated as owners and partners in name only may also be covered in certain circumstances. A recent New Jersey Supreme Court opinion fleshed out this issue.

In *Feldman v. Hunterdon Radiological Associates*, the court was asked to decide whether an individual who has an ownership interest and controlling shares in an organization can be considered an "employee" under CEPA.¹ The plaintiff was one of six physicians and "shareholder-directors" of a medical group, and the case arose out of a dispute between the plaintiff and her fellow owners over the group's handling of (and response to) a number of doctors' complaints regarding the quality of x-ray readings by a fellow shareholder-director. The plaintiff alleged that fellow shareholder-directors did not agree with her on addressing her partner's deficiencies and that the working environment thereafter became hostile. The plaintiff later resigned, characterizing her resignation as a constructive discharge (when an employer's actions leave an employee no choice but to quit), and then sued, claiming that her "discharge" was retaliation for complaining about her fellow shareholder's work.

The New Jersey Supreme Court held that the plaintiff was not an "employee" under CEPA. An employee is "any individual who performs services for and under the control and direction of an employer for wages and remuneration." Adopting the analysis set forth by the United States Supreme Court in *Clackamas Gastroenterology Associates v. Wells*, which addressed employee status under the Americans with Disabilities Act, the New Jersey court held that employee status turns on the individual's true power and influence within an organization, and not the individual's title or ownership interest.² The *Clackamas* Court developed a "non-exhaustive" six-factor test to determine someone's status as an employee: 1) whether the organization can hire or fire the individual or set the rules and regulations of the individual's work; 2) whether, and to what extent, the organization supervises the individual's work; 3) whether the individual reports to someone higher in the organization; 4) whether and 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; and 6) whether the individual shares in the profits, losses, and liabilities of the organization.

Each case involving an individual who shares in the ownership and control of an organization must be considered individually on the merits, utilizing the *Clackamas* factors (and any other factors the court deems relevant to power and control). Under the circumstances of the New Jersey case, the plaintiff was one of only six directors who shared equally in the management and control of the firm. Ultimately, the plaintiff's claim arose only after she failed to convince her fellow partners of the correctness of her proposed method of resolving the situation regarding reading x-rays, and

after she took several other steps that demonstrated her power and authority. The court concluded that the "power struggle" among the shareholder-directors over how to handle the shareholder-physician situation was simply not one that CEPA was designed to address.

Protected Activity

As indicated above, employees are not protected against retaliation for making complaints about any type of activity. *Klein v. University of Medicine and Dentistry of New Jersey* explores this distinction.³ The New Jersey Appellate Division held that CEPA is not intended to protect a chronic complainer who merely disagrees with hospital medical procedures that are otherwise in accordance with lawful and ethical mandates.

Dr. Stanford L. Klein regularly complained to his supervisors about various patient safety concerns such as cramped working spaces and lack of equipment. Klein's complaints continued even after he was appointed to a special committee to address work issues in one of his departments. When he refused to work in that department until the committee recommendations were enacted, Klein was required to perform his clinical duties under supervision. He then sued his employer alleging a CEPA violation and later appealed the lower court's grant of summary judgment in favor of the defendants.

The appellate court upheld the dismissal of Klein's complaint. Alleging "improper quality of patient care" requires a reasonable belief that there has been a violation of a law, rule, regulation, or declaratory ruling (adopted pursuant to law or professional code of ethics). Klein was not required to show that the hospital actually violated the law, but he still had to show that he reasonably believed that to be the case. The court

The court relied on a six-factor test to determine someone's status as an employee.

found, however, that Dr. Klein's complaints did not assert such a violation; rather, his objections were couched in terms of "broad brush allegations" of public policy and were thus insufficient to establish a CEPA claim. The court observed that CEPA is not intended to shield a constant complainer who simply disagrees with the manner in which the hospital is operating one of its departments, provided the operation is in accordance with lawful and ethical mandates.⁴



Two recent New Jersey Supreme Court cases involved claims that the employer violated clear mandates of public policy, albeit not specific laws or regulations. In *Maw v. Advanced Clinical Communications*, an employee brought a CEPA claim challenging her termination for refusing to execute an employment agreement containing "what she believed to be an overly expansive do-not-compete clause."⁵ The court concluded that imposition of what the employee believed to be an unreasonable contract term did not constitute "a clear mandate of public policy" because an employer's attempt to impose an unreasonable no-competition agreement impacts solely upon the individual employee and does not "implicate the public interest."⁶

The cases reviewed so far show the limits of the New Jersey whistleblower law. *Maimone v. City of Atlantic City*, meanwhile, represents the broadest interpretation of management activities that may endanger the public interest. In *Maimone*, a detective assigned to investigate prostitution and other sexually

related offenses objected to his department's decision to stop enforcing laws related to prostitution and other sex offenses (in order to focus on narcotics investigations). He sued under CEPA, claiming that he was demoted for complaining about conduct that he reasonably believed was "incompatible" with a clear mandate of public policy.

The New Jersey Supreme Court found he had a valid claim. In cases involving a mandate of public policy, the plaintiff did not have to show a violation, only that the conduct complained about "is irreconcilable" with the law. Laws prohibiting prostitution and restricting the location of sexually oriented businesses constitute "a clear mandate of public policy concerning the public health, safety or welfare."⁷

An unreasonable contract term did not constitute "a clear mandate of public policy."

The Adverse Employment Action

"Retaliatory action" under CEPA is defined as "the discharge, suspension, or demotion of any employee or other adverse employment action taken against an employee."⁸ To rise to the level of a retaliatory action required for a CEPA claim, an employer's action must affect the employee's "compensation or rank" or be "virtually equivalent to discharge." Moreover, retaliatory action does not encompass action taken to effect the discharge, suspension or demotion, but rather speaks in terms of completed action.

The imposition of a minor sanction is insufficient to constitute a retaliatory action under the statute. Nor does the imposition of a condition on continued performance of duties constitute, by it-

self, an adverse employment action as a matter of law, absent evidence of adverse consequences flowing from that condition. For example, in *Klein*, the plaintiff felt that performing his clinical duties under the observation of his colleagues was demeaning, but this did not meet the statutory definition of a retaliatory act.

While a short article can provide only a rough survey, the cases discussed above sketch some of the contours of how whistleblower legislation is applied in New Jersey. Since this is a rapidly growing area of employment law across the nation, the New Jersey experience is worthy of attention from policymakers, researchers, and practitioners from coast to coast.

NOTES

1. A-71-05, 2006 WL 1851111 (July 5, 2006).
2. 538 U.S. 440 (2003).
3. 377 N.J. Super 28 (App. Div. 2005).
4. *Id.* at 42.
5. 179 N.J. 439 (2004).
6. *Id.* at 445.
7. A-59-05 (July 20, 2006).
8. N.J.S.A. 34:19-2e.



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