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By LAWRENCE SANDAK AND MARK A. SALOMAN

When a Whistle-Blower Is Not a Conscientious Employee

New Jersey narrows the contours of CEPA

New Jersey's Conscientious Employee Protection Act was enacted in 1986 to protect from retaliation employees who report illegal or unethical workplace activities. New Jersey courts have consistently stated that as remedial legislation, CEPA should be construed broadly to effectuate its societal goals.

By year-end 2002, corporate malfeasance was at the forefront of the American public's collective attention. During a year marked by perilous foreign entanglements, the effort to build an effective homeland defense, and a failing economy, three whistleblowers were named *Time*'s Persons of the Year.

Against this backdrop, the Appellate Division has applied the brakes to efforts at expanding CEPA's scope, underscoring that the statute does not protect employees who simply disagree with their employer's lawful actions, even when those actions are cast as "unethical."

Instead, the courts have insisted that CEPA plaintiffs identify a law or firmly grounded public policy they reasonably believe their employer violated and that they prove a causal connection between their whistle-blowing activities and the adverse employment actions alleged. Temporal proximity alone, accordingly to recent appellate decisions, remains insufficient to establish causation.

At a time when corporate whistleblowing activity has captured the public's attention, these decisions provide a measure of assurance to New Jersey employers that CEPA will not be misused either to shelter poorly-performing employees who mischaracterize themselves as whistle-blowers or to create a cottage industry of "ethics" litigation based upon corporate activities which are neither unlawful nor contrary to a clearly-defined mandate of public policy.

To prove a CEPA cause of action, a plaintiff must demonstrate: (1) a reasonable belief that his employer violated a law, rule or regulation, or committed a fraudulent or criminal act, or acted in a manner incompatible with a clear mandate of public policy; (2) that he engaged in a form of whistle-blowing activity described in CEPA; (3) that he suffered an adverse employment action; and (4) a causal connection between the whistle-blowing activity and the adverse employment action. N.J.S.A. 34:19-3.

Employee opposition to corporate actions that constitute outright violations of civil and criminal statutes generally leaves little doubt as to the reasonableness of the employee's belief. In the more amorphous area of "public policy" violations, cases often turn on the plaintiff's ability to establish that he reasonably believed that his employer's actions were incompatible with a well-grounded public policy.

The state Supreme Court has ruled that because the "object of CEPA is not to make lawyers out of conscientious employees," specific knowledge of the precise source of public policy is not required of the CEPA plaintiff. *Mehlman v. Mobil Oil Corp*., 153 N.J. 163, 193 (1998). The employer must, however, have an objectively reasonable belief that the activity is illegal, fraudulent or harmful to the public health, safety or welfare, and that there is a substantial likelihood that the activity is incompatible with a constitutional, statutory and regulatory provision, a code of ethics, or other recognized source of public policy. *Mehlman* also requires that a mandate of public policy be firmly grounded. Vague, controversial or unsettled public policies do not constitute clear mandates.

'Reasonable Belief' Refined

Despite *Mehlman*'s admonition that CEPA plaintiffs need not identify sources of public policy with lawyer-like precision, a recent Appellate Division ruling makes it clear that a plaintiff's inability to point to a law, rule or regulation that the employer's conduct allegedly violated will doom

Sandak is a partner and Saloman is an associate at Proskauer Rose in Newark, where they represent management in employment law matters.

his case. *Cosgrove v. Cranford Board of Education*, 813 A.2d 591, 356 N.J. Super. 518 (2003).

Patrick Cosgrove, a school custodian, complained to his supervisor that he was never given the opportunity for premium overtime and that most opportunities for overtime were distributed among other custodians. Cosgrove also claimed that a supervisor told him that "he would be history" if he filed a grievance on the issue. He and another custodian nevertheless filed a complaint with their union and a settlement was eventually reached requiring that overtime be distributed on a rotating basis.

Cosgrove claimed that after he filed the grievance, he was held to a higher standard than anyone else in the school district, received unmerited criticism from his supervisor, and was not re-employed for the following school year. In reviewing his CEPA claim, the court reasoned that it first must "find and enunciate the specific terms of a statute or regulation, or the clear expression of public policy, which would be violated if the facts alleged are true." This threshold identification is a question of law to be decided by the court.

While acknowledging that Cosgrove was "not required to show the specific overtime law that may have been violated," the court found fatal to his claim his inability to "assert any law or regulation that might have been violated by the school district's method of distributing overtime to its custodians."

As to Cosgrove's argument that he was protected under the strong public policy barring retaliation against persons who file union grievances, the court found that the act of filing a grievance falls outside the scope of CEPA's protection. In determining whether a plaintiff has identified a clear mandate of public policy, the focus is on the employer's underlying "activity, policy, or practice" that triggers an employee's objection or refusal to participate. The underlying act triggering Cosgrove's complaint was the company's failure to evenly distribute overtime, and not the grievance arising out of that act. Because the overtime distribution, even if unfair, did not violate an existing law, regulation or public policy, there was no identifiable act triggering CEPA's application.

Cosgrove's argument also failed because his objection to the distribution of overtime was personal to himself and was not made on behalf of the public as required under CEPA. Although the sources of an identifiable public policy under CEPA are to be considered broadly, the court reinforced that a significant "limiting factor" to CEPA's scope is that "the alleged activity must represent a public harm rather than a private harm or harm only to the aggrieved employee." Because the underlying complaint regarding the distribution of overtime was personal in nature, CEPA did not apply.

Cosgrove is consistent with two recent unpublished Appellate Division cases decided on the same day last summer. In *Mutch v. Curtiss-Wright Corporation*, No. A-5454-00T2, (App. Div. June 17, 2002), the plaintiff claimed that the defendant company "shot the messenger" when it made him a scapegoat to cover up senior management's own failure to accept responsibility for the company's accounting errors and to explain away the negative effect of these errors on shareholder earnings.

The appellate court affirmed the trial court's finding that Mutch was not a CEPA-protected whistle-blower because he could not identify the law, rule or regulation his employer had allegedly abrogated. This was critical, as he was "the one who claim[s] he was terminated because he disclosed this violation, yet he cannot identify the law or rule or regulation which he claims was violated."

On appeal, Mutch alleged that the conduct he reported violated various SEC statutes and regulations, but his admission at deposition that he had no reason to suspect that anyone at the company had done anything intentionally wrong or unethical, or that any criminal law had been violated, defeated this argument. Each of the statutes and regulations he cited at a minimum required intentional misreporting to be actionable. He alleged only that he had reported sloppy and careless accounting errors.

Mutch also argued that his "whistle-blowing" activity implicated the company's own code of conduct which required accurate record keeping. But the Appellate Division held "private codes of conduct are not the equivalent of statutes or rules."

The court in *Mutch* strongly cautioned against over-extension of CEPA's protections, stating that CEPA was not intended "to protect chronic complainers or those who simply disagree with their employer's lawful actions" nor "to shelter every alarmist who disrupts his employer's operations by constantly declaring that illegal activity is afoot . . . or to spawn litigation concerning the most trivial or benign employee complaints."

Schaefer v. Campbell, No. A-6786-00T5, decided the same day as *Mutch* but by a different Appellate Division panel, stemmed from the plaintiff's report that she had observed lewd, pornographic and sexually abusive images on a computer video clip in the defendant Catholic high school's business office. The next day, the responsible individual was reprimanded and forced to write a letter of apology. Apparently dissatisfied with the school's handling of the matter, plaintiff Schaefer raised the issue again at a committee meeting of the technology directors of the diocesan high schools, where she discussed the incident and management's response with other technology directors.

Roughly one month after that meeting, Schaeffer was fired for what she claimed was retaliation for reporting the lewd video incident to the outside technology committee. She testified that the school's principal allegedly stated that she would not allow the plaintiff to "ruin a good man's career" and that Schaefer did not "understand the Catholic way — we don't go outside." The trial court dismissed Schaefer's CEPA complaint.

Schaefer argued on appeal that her complaints regarding the dissemination of lewd material and her employer's allegedly inadequate response to it represented an objection to employer activity that was incompatible with a clear mandate of public policy. The sources of "public policy" identified were N.J.S.A. 2C:34-2, which proscribes the distribution of "obscene" material to

minors, and "her own personal code of ethics."

Since the record was devoid of evidence that "the video in question was either distributed to students or made available to students," the plaintiff's belief that a criminal statute was violated was found "unreasonable." Schaefer's "personal morals" were also rejected as a source of public policy sufficient to support a CEPA claim. Finally, the court observed that even if she were indeed fired for complaining about the lewd video incident and the school's failure to react appropriately to it, she would have no viable claim because CEPA requires more than simply "a policy difference" between employee and employer.

Temporal Proximity Not Enough

While *Cosgrove, Mutch* and *Schaeffer* focused on the first prong of CEPA's four-part standard of proof, two other recent cases raised the bar under the fourth prong, which requires a causal connection between the alleged whistle blowing and the adverse employment action. In *Simmler v. CVS Company, Inc*., No. A-179-01T3, (App. Div. Nov. 7, 2002), the plaintiff argued that the trial court should have "inferred the causation element" because his termination occurred just a few weeks following his refusal to refill certain drug prescriptions that he believed were improper. In short, Simmler argued that the brief time span between his alleged whistle-blowing and his discharge proved retaliation by CVS.

The appeals court agreed with the trial judge that "temporal proximity" between the allegedly protected action and the discharge "was not enough to establish causation." Rather, every CEPA plaintiff must produce tangible evidence that the action taken against him was retaliatory. Reliance upon conclusory statements or speculation is insufficient.

This reasoning was followed in *Grainger v. State of New Jersey*, No. A-1257-01T1, (App. Div. Nov. 14, 2002), in which the plaintiff, a temporary worker who handled employee benefits issues and questions for the State during a full-time worker's maternity leave, claimed that she was retaliated against when the State refused to hire her for full-time employment. As proof of retaliation, plaintiff Grainger claimed that she was involved in an investigation in which she determined that certain employees were improperly charged for benefits during approved leaves of absence. Grainger reported her findings to her supervisor, the matter was reviewed, her interpretation was sustained, and the benefits of the affected employees were recalculated. Grainger then sued the state based upon her belief that her failure to obtain any of the full-time positions for which she subsequently applied was retaliation for reporting the improper benefits calculations to her supervisor.

The appellate court, once again, sustained the trial court's dismissal because Grainger offered no proof of a connection between her report and her subsequent inability to obtain full-time employment—the close temporal proximity notwithstanding. Rather, her theory of retaliation by the State was "purely speculative and completely unsupported by any fact in the record."

Impact of Sarbanes-Oxley

In response to the sweeping corporate scandals of 2001 and 2002, Congress passed the Corporate Auditing and Accountability Act of 2002 (Sarbanes-Oxley), signed into law last July 30.

Sarbanes-Oxley mandated a series of corporate and legal changes including: securities litigation reform; prevention of discharge of debts under any claim relating to a violation of state or federal securities laws or any securities fraud or manipulation; and real time disclosure of information concerning material changes to corporate operations and/or financial conditions. The act requires the CEO and CFO of any publicly traded corporation to personally certify to the truth of quarterly or annual reports filed with the SEC.

In its promotion of "corporate responsibility for financial reports," the act mandates that corporations and their chief executives establish and maintain "internal controls" designed to ensure the accuracy of recording, processing and reporting corporate financial data. See 15 U.S.C. 7241(a)(4). It also requires that publicly traded corporations create a "code of ethics" for their senior financial officers designed "to promote honest and ethical conduct." See §7264.

One significant question is whether alleged violations of the act's reporting and disclosure duties, or of these statutorily prescribed "internal controls" and "codes of ethics," will generate a groundswell of new CEPA claims. One could argue that the federal requirements alone create new sources of public policy.

But absent a reasonable belief that a corporate employer has committed or is about to commit a fraud — matters which are already proscribed by statute — an employee who "blows the whistle" on a violation of an internal policy or practice may not enjoy CEPA's protections. Indeed, Sarbanes-Oxley's own whistle-blower provision, 18 U.S.C. §1514A, is limited to those who provide information, testimony or other assistance in an investigation or proceeding relating to corporate fraud.

Consistent with the recent developments under New Jersey law, moreover, it is doubtful that the new federal law will, in and of itself, usher in a new wave of viable CEPA claims. ■