Notes and Analysis

Ruling could chill potential whistleblowers

By Deborah Ellis and Andrew Dwyer

The Appellate Division last January ruled that New Jersey's whistleblower law, the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 *et seq.*, did not protect a nurse who reported to her supervisor falsified medical records and the theft of a patient's medication.

The *per diem* nurse, Josephine Higgins, had her hours reduced and was denied a promotion after making the reports. Yet the Appellate Division ruled in *Higgins v. Pascack Valley Hospital*, 307 N.J. Super. 277, that CEPA did not prohibit the hospital's retaliation because the wrongdoing Higgins reported was committed by a co-worker rather than the hospital.

Deborah Ellis is an adjunct professor at NYU School of Law. Andrew Dwyer is an associate at Reinhardt & Schachter in Newark and represents Josephine Higgins.

The ruling is a case of first impression in New Jersey, which has never before resolved who must commit wrongdoing before CEPA can operate. The New Jersey Supreme Court has granted certification and if it upholds the Appellate Division's ruling, it will chill a variety of whistleblowers who fear retaliation if they report wrongdoing in their workplace. Under the appellate holding, for example, an honest police officer who reports corruption of fellow officers would not be a whistleblower and would be subject to retaliation without CEPA's protection.

In its decision, the court acknowledged that the wrongdoing Higgins reported — theft of medication and falsification of records — was the type of misconduct contemplated by CEPA because it constituted a violation of criminal laws, administrative regulations, and clear mandates of public policy. Nonetheless, the court held that in order for CEPA to apply, a plaintiff must "demonstrate employer involvement in [the] workplace violation of a law, rule, or a clear mandate of public policy." This holding contravenes the statutory language, the purpose of CEPA, and judicial interpretation in New Jersey and elsewhere.

Statutory language

The most-striking feature of the court's ruling is its willful disregard of CEPA's plain language. The pertinent subsection of the statute, N.J.S.A. 34:19-3, provides:

"An employer shall not take any retaliatory action against an employee because the employee does any of the following ...
c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:
(1) is in violation of a law, or a rule or regulation promulgated pursuant to law;
(2) is fraudulent or criminal; or
(3) is incompatible with a clear mandate of public policy concerning the public health, safety, or welfare."

On its face, the statute does not require that the activity the whistleblower objects to be committed by the employer. Indeed, the Appellate Division acknowledged that "using standard principles of statutory construction," the Legislature's failure to require specifically that the illegal activity be of the "employer" would mean CEPA protected reports of any unlawful workplace activity "whether or not acquiesced in by the employer."

It is hornbook law that the plain language of the statute is dispositive. The point is even more compelling in light of subsections (a) and (b). Unlike subsection (c), subsections (a) and (b) explicitly include the statutory language the court is looking for — namely, a requirement that the illegal activity be "of the employer." Thus, subsection (a) protects an employee who "discloses" to a public body any illegal "activity, policy or practice of the employer." Likewise, subsection (b) protects the employee who provides information to "any public body conducting an investigation" regarding any violation of law "by the employer." These subsections confirm the Legislature knew how to restrict protected activity to that related to illegal conduct "of the employer" and demonstrates the failure to include that restrictive language in subsection (c) was intentional. *See GE Solid State v. Director, Taxation Div.*, 132 N.J. 298.

A full text of *Higgins*, Order No. 8186, is available from the NJL Facts-on-Call Service, 800-670-3370.

Nonetheless, the court decided to set aside CEPA's plain language and effectively added new language to the statute. In holding an employer must condone or ratify the alleged violative conduct, the court obviously was concerned about limiting employer liability, reasoning that to follow the statutory language would impose "strict liability" upon an employer for misconduct by a nonsupervisory employee.

The court's concern to protect employers, while commendable, is off the mark. Employers do not need protection from strict liability because CEPA is not a strict liability statute. No employer can be held liable when an employee reports wrongdoing *unless the employer takes "retaliatory action" against the employee* as prohibited by the first section of the statute. This is vastly different from strict liability in tort, for example, where a manufacturer can be held liable for an unsafe product

Continued on page 18

Notes and Analysis

Ruling could chill potential whistleblowers

Continued from page 5

even if it exercises all possible care in its preparation. In contrast, CEPA comes into play only when an employer retaliates against an employee for reporting misconduct.

Historical perspective

A review of what little legislative history there is supports the "plain language" reading of the statute. The legislative history for CEPA's initial enactment merely recites the statute's language. After initial passage, however, the Legislature amended subsections (a) and (b) to expand the protection to apply to illegal conduct of "another employer, with whom there is a business relationship." In making this change, the Legislature recited the section at issue, subsection (c), but left it unchanged. Under basic tenets of statutory construction, the Legislature's failure to change the language of that subsection supports the view that the initial choice of language was no accident.

In the 12 years since enactment of CEPA, New Jersey courts often reiterated it is "a civil rights statute" that "must be considered 'remedial' legislation and therefore should be construed liberally to effectuate its important social goal." *Abbamont v. Board of Educ.*, 138 N.J. 405. That goal "is to protect employees who report illegal or unethical workplace activities." *Barratt v. Cushman & Wakefield*, 144 N.J. 120.

The Supreme Court has noted the "Legislature obviously intended to provide a comprehensive and effective cause of action for retaliatory discharge." *Young v. Schering Corp.*, 141 N.J. 16. Thus, in construing another section of the law, N.J.S.A. 34:19-3(a), protecting an employee who reports an illegal act of another employer that has a business relationship with the employee's employer, the New Jersey Supreme Court in *Barratt* relied on the remedial purpose of CEPA to find that a passive investor with a minority interest in a partnership could constitute such "another employer."

Not surprisingly, the *Higgins* decision places New Jersey at odds with virtually every other state that protects employees who report unlawful conduct.

CEPA's purpose to protect the public from illegal "workplace activities" is served equally whether or not the illegal activities are committed by the employer. This explains why traditionally whistleblower is defined as "[a]n employee who refuses to engage in and/or reports illegal or wrongful activities of his employer *or fellow employees.*" *Young v. Schering Corp.*, 275 N.J. Super. 221 (emphasis added), (quoting *Black's Law Dictionary*).

Sister states

Not surprisingly, the *Higgins* decision places New Jersey at odds with virtually every other state that protects employees who report unlawful conduct. Of the 13 other state statutes that protect whistleblowing in private employment, all but Louisiana do not restrict their protections to reports of wrongdoing by the employer. In the 30 state statutes that apply to public employees, again all but Louisiana protect whistleblowers who report wrongdoing by co-employees. The same is true for 5 U.S.C. §2302(b)(8), the Whistleblower Protection Act for federal employees.

Furthermore, all the courts — in California, Illinois, Michigan, Minnesota, New York, and Ohio — interpreting these statutes have found whistleblowers like Higgins should be protected. The Michigan Supreme Court, for example, ruled in 1993 that its Whistleblower Protection Act (WPA) protects employees from retaliation against an employee who filed a criminal complaint against a co-employee for an assault in the workplace. *Dudewicz v. Norris-Schmid*, 503 N.W.2d 645. The Michigan court relied on WPA's plain language, its legislative history, and the rule of statutory construction that remedial statutes are to be liberally construed in favor of persons intended to benefit.

It emphasized the plain reading of the statutory language did not limit the protection to employee reports of violations by employers. The court also noted the assault occurred at work over a workplace dispute, even while acknowledging the more typical whistleblower case might involve "health code and safety violations."

The *Dudewicz* decision was followed by *Dolan v. Continental Airlines*, 454 Mich. 373, in which the Michigan Supreme Court extended the protection of WPA to instances where the reported wrongdoing was by a third party. The court noted the statute applied to all wrongdoing and the misconduct was connected to the employment setting. Most important for *Higgins*, the court reasoned the underlying purpose of WPA is to protect the public by removing barriers that may inhibit a whistleblowing employee from coming forward.

Josephine Higgins is exactly the sort of employee the Legislature had in mind when it enacted New Jersey's whistleblower law. She reported serious wrongdoing that could have grave consequences for public health, and her employer severely retaliated against her. The public health and welfare is threatened equally whether the misconduct is committed by a co-employee or the employer. Honest employees should not be orphans of the law. Otherwise, the next Josephine Higgins will not come forward when a threat to public safety occurs.