

Breadth of whistleblower law before justices

By Rocco Cammarere

Should employees be protected for blowing the whistle on illegal conduct by their fellow workers?

New Jersey's whistleblower law, the Conscientious Employee Protection Act, already protects the informing worker if the accused boss retaliates. But it's not so clear whether CEPA, N.J.S.A. 34:19-1, applies when it's a fellow employee who has been accused of improper or illegal actions and the boss had no involvement in that conduct.

Further, how far down the management ladder should the safety net for whistleblowers be applied? Should middle-management be held personally responsible for any retaliation against the informer?

The New Jersey Supreme Court will consider these questions next Monday when it hears oral arguments in *Higgins v. Pasack Valley Hospital*, a case that could dramatically broaden the scope of New Jersey's whistleblower law.

Newark attorney Andrew W. Dwyer, representing Josephine Higgins who was fired for turning in two paramedics, noted there is no case law interpreting CEPA application to middle-level managers.

But, he pointed out, CEPA's definition of employer is similar to other labor statutes in Title 34 and federal legislation, which are considered broad enough to include middle management.

"It's no different from the federal Fair Labor Standards Act," he said of CEPA's definition.

He sees no problem applying the law when the situation involves co-workers.

John H. Schmidt Jr. of Westfield, who represents the Bergen County hospital, has a different interpretation of the law's breadth.

"It was not intended to protect employees from retaliation for reporting

illegal activity' of their co-employees unless it can be shown that the employer condoned or ratified such illegal activities," Schmidt said. "That statutory interpretation is clear from the legislative history of CEPA, which only refers to protecting employees from disclosure or threatened disclosure of information concerning their employers."



A full text of the briefs in *Higgins*, Order No. 8205, is available from the NJL Facts-on-Call Service, 800-340-4725.

The Appellate Division panel that decided the *Higgins* case said it could not give the law the broad reading Higgins wanted.

"In our view, then, plaintiff's CEPA cause of action depends upon her contention that not only had [the paramedic] violated hospital procedure ... but the hospital, through its supervisors ... condoned and ratified that conduct by whitewashing the investigation," Judge Erminie L. Conley wrote. "Were that so, we have no doubt that damages against the hospital would be warranted."

She added, "Our reading of the statute and its legislative history with our understanding of the sense of *Abbanont* [v. *Piscataway Board of Education*] leads us to the conclusion that in order for plaintiff to be entitled to compensatory damages on her CEPA claim, she must demonstrate that [the two supervisors] either condoned or ratified the alleged violative conduct of which she complained and for which she says she was retaliated against," Conley said.

As far as Dwyer is concerned, the law is clear.

"CEPA's protections are not limited to objections to misconduct 'of the



Andrew W. Dwyer

employer.' " Dwyer said. "CEPA's purpose to protect the public from illegal 'work-place activities' is served equally whether the illegal activities are committed by the employer or not."

Law's intent

If the law is interpreted as protecting workers only if the employer were involved or condoned the activity, Dwyer

said, the statute's clear intent of ferreting out illegal conduct would be subverted. If the law were read otherwise, it is doubtful employees would "take a chance of reporting illegal activity," he said, noting, "No employee with any common sense is going to do that."

Higgins was a part-time nurse for Pascack Valley Hospital's mobile intensive care unit, which responds to emergency calls and provides more-intensive medical care than ambulance personnel.

She reported two paramedics for improperly completing paperwork regarding a call. She claimed the hospital later forged some documents to cover the mistake.

She later accused one of the paramedics of stealing a patient's drugs. The hospital investigated both incidents and found no evidence the paramedics did anything wrong or illegal.

As word of her actions spread, other staffers in the mobile intensive care unit refused to work with her. She was transferred and her hours cut, she claims, for her actions.