Commentary

CEPA Protects Employers as Well as Employees

By Alan Krumholz

I write to offer an opposing view to the op-ed article on March 29, "Blowing the Whistle on CEPA Expansion," which hailed what the authors saw as a needed curb on the statute's expansion.

The authors expressed satisfaction, on behalf of employers, in a court decision perceived as placing limitations on the "expansion" of the Conscientious Employee Protection Act. They also decried previous "expansions" of the statute's applicability in such cases as *Higgins v. Pascack Valley Hospital*, 158 N.J. 404 (1999), *Gerard v. Camden County Health Serv. Ctr.*, 348 N.J. Super. 516 (App. Div. 2002), and *Hernandez v. Montville Twp. Bd. of Educ.*, 179 N.J. 81 (2004).

It would seem that these three cases reflect correct applications of CEPA, regardless of whether they were "expansions."

I could not help but notice the irony that 2010 marks the 30th anniversary of the Court's landmark decision in *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58 (1980), which provided New Jersey employees a measure of redress for discriminatory conduct (aside from remedies in Title VII), followed by passage of CEPA in 1986.

I recognize the desire of employers to enjoy unfettered discretion in the management of their businesses, but it never ceases to amaze me that they fail to recognize that laws such as CEPA and the Law Against Discrimination actually protect employers.

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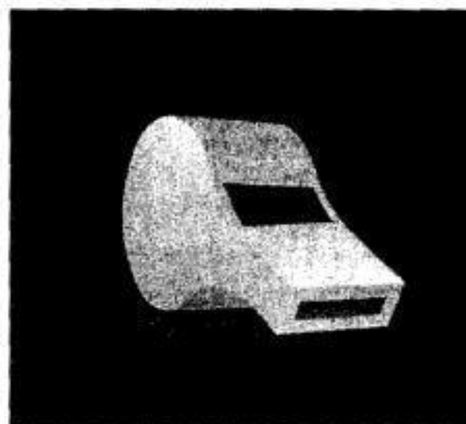
Employers, and their employees, who conduct activities that are or may be discriminatory, illegal or unsafe, can be subject to prosecution for criminal conduct or to a lawsuit by victims of such conduct.

By protecting employees who recognize and report such wrongdoing, employers benefit from having an environment that is, in a sense, self-regulating.

CEPA and LAD are intended to provide some degree of protection for employees — who are often loyal, conscientious and vigilant — from predatory or retaliatory practices of managers who may engage in wrongful conduct or strive to protect themselves or their company from those who would expose unlawful, unhealthy, discriminatory or fraudulent practices.

Conscientious employees are often people who stick their necks out. They often act at risk to their job security and popularity, too often subjecting themselves to retaliation by vengeful co-employees or managers. These are people who can be easily injured by employer representatives exercising arbitrary power. They need all the protection the law can provide.

The tone of the article reflects the management philosophy that such employees are troublemakers. If management could embrace the larger view, it might recognize that conscientious employees protect companies from discriminatory, fraudulent, unsafe and unlawful practices by supervisors.



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By shielding workers who report wrongdoing, employers benefit from having a self-regulating environment.

The abilities of managers who engage in discriminatory conduct to influence decision makers has been recognized in case law as the "subordinate bias" or "cat's-paw" theory, as noted in *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F. 3d 476 (10th Cir. 2006); *Abrams v. Lightolier Inc.*, 50 F. 3d 1204 (3d Cir. 1995); and *Kwiatkowski v. Merrill Lynch and Wonder*, A-2270-06 (2008) (unreported).

It is also profoundly disappointing to recognize that employers have failed to recognize the moral imperative, and the common sense, of exercising restraint and compassion in their human resource departments.

With few exceptions, every time an employee is discharged, the economic, social, emotional and psychological effects on that employee are deeply felt. Moreover, the idea that employment "at will" reflects or measures some degree of equality between employer and employee is a cruel myth.

In times of economic slowdown, especially, employees rarely leave their employment for a better job, so employee flexibility is used to justify all manner of employer "at will" actions, including reductions in force, layoffs and arbitrary terminations.

Although more than a few employees who are terminated must be turned away by plaintiff-oriented law firms, such as ours, where there is no evidence of discrimination, retaliation, whistleblowing, or Family and Medical Leave Act violation, they feel the consequences of being unemployed. The effects of loss of employment are especially cruel when employees cannot afford to assume the costs of COBRA coverage.

For those who are, or appear to be, genuine victims of discrimination or retaliation, at least the law provides a slow forum for proving the case, but the case should never have had to happen, and any redress is often too little and too late.

Moreover, employees who merely seek to exercise their rights, such as under the Workers Compensation Act, the state and federal family and medical leave statutes or LAD, who are temporarily or partially disabled due to illnesses or injury, are often also subject to a variety of disciplines.

Employers who terminate employees who are out of work while recovering from work-related or nonwork medical conditions do so too often with impunity. Even if such employees can find legal remedy, the numbers of such cases that are successful probably do not dissuade company numbers-crunchers from taking the calculated risk of termination.

Returning to the *Law Journal* article, I was offended and disappointed that lawyers representing employers could not or were unwilling to see the forest for the trees as they celebrated perceived success in beating back those offensive conscientious employees. ■