

Interview

On Safeguarding Rights of Whistle-Blowers

Kathleen M. Connelly is an attorney at the law firm of Lindabury, McCormick & Estabrook in Westfield. She specializes in labor and employment law and represents employers on matters relating to employee discharge, sexual harassment and employee whistle-blowing. She discusses the effect of state and federal laws that protect whistle-blowers from reprisals with Associate Editor João-Pierre S. Ruth.



NJBIZ: How well protected are whistle-blowers?

Connelly: In the state of New Jersey, we have one of the most comprehensive whistle-blowing statutes in the entire country. It's quite an extraordinary statute that affords almost unlimited protection to employees who whistle-blow. There is also the federal Sarbanes-Oxley Act of 2002 that was enacted in response to the Enron debacle. That's a federal statute that affords whistle-blower protection to employees who complain about fraud upon stockholders to their supervisors or outside entities such as Congress or an administrative agency. Our Conscientious Employee Protection Act (CEPA) statute is the one in New Jersey that an employer has to really be concerned about as well as the federal statute.

Another recent development on the CEPA statute that has caused a lot of

concern for employers is a case where the statute extends to [complaints about the] wrongful conduct of co-workers.

NJBIZ: What are the issues for employers?

Connelly: Under the CEPA statute, an employer should be aware that an employee is protected from any retaliation by the employer if they report any activity that they reasonably believe is a violation of law, is fraudulent, is a safety concern or is contrary to a clear mandate of public policy. If I report there is asbestos in my building at work and there is a regulation in town that says you cannot have asbestos exposed in the workplace, that is a violation of law. That would trigger protection under the statute. Another example might be if an employer directs an employee to make an accounting record to reflect a loss into

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a profit column so the financial reports look different. That's illegal conduct. If the employee refuses to do it or reports

the activity, they are entitled to protection and cannot be subject to any adverse employment action for having refused to do the conduct or reporting the conduct.

A violation of a clear mandate of public policy is a little bit more slippery. If a radiology technician in a hospital refuses to administer medication to a patient, there is no law against that person administering a pill to a patient. But the public policy in the state, through case law or codes of conduct for medical personnel, suggests that the only person who should administer medications has to be a registered nurse. That case would be a violation of the public policy of the state of New Jersey even though it is not technically a violation of the law.

NJBIZ: If it is later proven the employee was wrong, is that employee still entitled to protection?

Connelly: Absolutely, so long it was reasonable for them to conclude that the conduct was wrongful, they are entitled to protection. Some other state statutes require that the employee prove an actual violation.

Let's say I am in my office and see some friable material coming down from the ceiling. I move the ceiling tile and there is a material there that looks a lot like asbestos to me. I complain there is friable asbestos coming into my office and my employer is not very happy I complained about it and they terminate me. Even if ultimately the employer shows it wasn't asbestos, it was certainly reasonable for me to believe that was asbestos.

Now if it is an unreasonable belief, things change. An employee was complaining that the fluorescent lights in her office were creating airwaves that enabled UFOs to communicate with her. That's clearly not a reasonable belief. The belief has to be something to which the normal layperson would say, "Yes, that is reasonable." If you are talking about a complaint against something more technical, there has got to be some kind of literature that would [support] the theory. For example, the case of cancer being caused by power plants. We don't know if that is true or not. [But it] would be reasonable

for an employee in a plant to make that assumption in light of the literature.

NJBIZ: How should employers deal with a complaint that may be unreasonable?

Connelly: The employer has to be extremely cautious about any employee who complains about what they believe is wrongful conduct in the workplace. Not every complaint is going to be protected. But the biggest mistake an employer can make is not paying attention to the employee's complaint. Get a clear understanding of what it is the employee is complaining about. Investigate the nature of the employee's complaint to find out if there is any rational basis for the employee's belief. Communicate to the employee the results of the investigation. An employer should go through that exercise even if the employer believes the complaint is somewhat bizarre. If you show that you went through a process and came to a rational conclusion, then explain and demonstrate to the employee that, while they may have thought there was a violation or unsafe condition, in actuality there was not, that certainly would serve to undermine their reasonable belief.


NJBIZ: Has there been an increase in whistle-blower cases since these laws were enacted ?

Connelly: Absolutely. The CEPA statute is one of four or five statutes out there that has had increasing activity. I see complaints that have a CEPA claim as well as a law against discrimination claim co-joined together. It's become a hotbed of activity. An employer's biggest concern is the situation where they are contemplating adverse employment action against an employee who has made a complaint in the past. They have to be extremely careful with that employee to make sure there is no evidence to suggest there was a causal connection between the disciplinary action and the whistle-blowing activity. The way to protect yourself from that is to have documentation of poor performance, misconduct or whatever reason you are going to use as a basis for adverse employment action. The employer better be certain they could show

if a different employee engaged in similar misconduct or poor performance that they too would be subject to disciplinary action.

NJBIZ: Is the legal medicine too strong for the ills they are intended to cure?

Connelly: No, I don't think the medicine is too strong. The statutes were enacted with a noble intent. Every employee should feel free to complain about unsafe conditions and illegal conduct in the workplace without fear of reprisal. It's made the workplace on the whole a better place. Employers are getting the idea they can't shun employee complaints. ■


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