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NEW JERSEY'S APPELLATE DIVISION FINDS INTERNAL COMPLAINTS AND CIVIL LAWSUITS "WHISTLE-BLOWING ACTIVITY" UNDER CEPA

By Rob Bernstein and Phil Lipari
Princeton Office

Continuing New Jersey's trend of expanding worker rights, the Appellate Division recently held, in an unpublished opinion, that "the filing of an internal complaint" or a "civil complaint" may qualify as whistle-blowing activity under New Jersey's Conscientious Employee Protection Act ("CEPA"). The anti-retaliation provisions contained in both federal and state anti-discrimination laws are apparently insufficient for this New Jersey panel, whose decision affords disgruntled employees yet another arrow in their litigation quiver.

Briefly, in *Hester v. Parker, et. al.*, N.J. Super Ct. App. Div., No. A-1681-09T1 (April 14, 2011), plaintiff, a white male who worked as the Winslow Township School District's Director of Facilities and Operations, alleged that Patricia Parker, an African American female President of the Winslow Township Board of Education, discriminated against him on the basis of race. Specifically, plaintiff alleged that Parker preferred African American employees over "regulars" (supposedly her term for Caucasians), as Parker believed students could relate better to those who "look like her." Further, plaintiff claimed Parker discouraged him from wearing ties to work, prohibited his attendance at back-to-school nights and encouraged other administrators to give him negative performance evaluations.

Plaintiff, who began his employment with the School District in 2003, filed an internal complaint citing reverse discrimination based on Parker's alleged statements and conduct. In response, the school board wrote plaintiff a letter informing him that his complaint was not covered under its affirmative action policy and recommending he contact the New Jersey Division on Civil Rights. Though plaintiff contacted the New Jersey Division on Civil Rights based on this recommendation, he did not initially bring a claim against the Board.

Parker retained her role as school board president for the 2006-2007 school year. Over the course of the year, the school suffered significant inadequacies in connection with cleaning and waste management, critical components of plaintiff's job. At the end of the school year, or April 2007, Parker's term on the board ended. Around the same time, plaintiff entered another one-year contract with the Board for the 2007-2008 school year. Shortly thereafter, an administrator gave plaintiff a negative performance review and recommended his termination.

On May 18, 2007, plaintiff filed a lawsuit in the Superior Court alleging reverse race discrimination under New Jersey's Law Against Discrimination ("LAD"), retaliation and intentional infliction of emotional distress against the Board and Parker. About five weeks after service of the Complaint, the Board terminated plaintiff's employment. Plaintiff then added a claim under CEPA.

April 27, 2011

Plaintiff's claims were dismissed on summary judgment. In granting summary judgment on his CEPA claim, the trial court concluded in part that plaintiff's internal complaint and lawsuit were not CEPA protected activities. On plaintiff's appeal of the trial court's CEPA holding, the Appellate Division reversed, holding that filing internal and civil complaints of discrimination may qualify as whistle-blowing activities. The Appellate Division based its ruling on the discrete issue of "whether filing the internal complaint in December 2005 and the civil complaint in May 2007 qualify as whistle-blowing activities." The issue previously received "scant" attention from New Jersey courts.

The Appellate Division, following *Sandom v. Travelers Mortgage Services, Inc.*, 752 F. Supp. 1240 (D.N.J. 1990), *aff'd*, 998 F.2d 1005 (3d Cir. 1993), held: "[W]hen an employee complains of illegal activity in the workplace, the employer does not remedy the situation, and the employee thereafter files a complaint alleging [a] violation of clearly mandated standards, such as discrimination based on race, gender, religion, or sexual preference, the filing of the complaint may be a 'whistle-blowing activity' as it is an attempt to draw attention to and obtain a remedy for a perceived wrong or improper conduct."

The Court's analysis is fact-sensitive and its breadth uncertain. The Appellate Division observed: "We hesitate to hold that every employee who invokes an established dispute resolution procedure, such as a contractual grievance procedure, or who files a civil complaint, or pursues a claim before an administrative body against his employer, and is thereafter terminated has a CEPA cause of action. For example, the simple filing of a complaint seeking back wages or a workers' compensation claim cannot be considered a 'whistle-blowing activity.'"

EMPLOYERS BEWARE!

At bottom, this expansion of CEPA's coverage could salvage otherwise meritless discrimination claims because simply filing a complaint - even internally - with some "reasonable belief" that the employer violated "law, or a rule or regulation promulgated pursuant to law" may now constitute protected "whistle-blowing activity." Therefore, put simply, employers beware: Where an employee brings a "discrimination" (whatever that means and however amorphous) complaint internally or files it in Court during his tenure, his continued employment may now potentially be shielded by *Hester* even if his underlying allegations are ultimately found to be meritless.

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