SUPREME COURT OF NEW JERSEY
Docket No. 069,843

KARI WHITE,	:	Civil Action
Plaintiff-Petitioner,	:	ON PETITION FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY
v.	:	APPELLATE DIVISION DOCKET NO. A-3153-09T2
STARBUCKS CORPORATION and JEFFREY PETERS,	:	ENTERED DECEMBER 9, 2011
Defendants-Respondents.	:	Sat Below: Hon. Jose L. Fuentes, P.J.A.D. Hon. Victor Ashrafi, J.A.D. Hon. William E. Nugent, J.A.D.

BRIEF AND APPENDIX ON BEHALF OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION/NEW JERSEY AMICUS COMMITTEE IN SUPPORT OF THE PETITION FOR CERTIFICATION

BENNET D. ZUROFSKY, ESQ.
17 Academy Street - Suite 1010
Newark, New Jersey 07102
(973) 642-0885
bzurofsky@zurofskylaw.com

ANDREW DWYER, ESQ.
The Dwyer Law Firm, L.L.C.
17 Academy Street – Suite 1010
Newark, New Jersey 07102
(973) 242-3636
andy@thedwyerlawfirm.com

Attorneys for National Employment Lawyers Association/New Jersey Amicus Committee

On the Brief:

Bennet D. Zurofsky, Esq.
Andrew Dwyer, Esq.

TABLE OF CONTENTS

ARGUMENT

I. THE DECISION BELOW WAS BOTH "GAME CHANGING" AND WRONGLY DECIDED; CERTIFICATION SHOULD THEREFORE BE GRANTED.....1

II. THE LOWER COURT'S RE-WRITE OF CEPA MUST BE REVERSED.....5

III. THE WHISTLEBLOWER LAWS OF OTHER STATES ALMOST UNIFORMLY PROVIDE PROTECTION TO ACTIVITIES WITHIN THE SPHERE OF JOB-RELATED DUTIES.....15

CONCLUSION.....19

TABLE OF AUTHORITIES

CASES

Abbamont v. Piscataway Township Bd. of Educ.,
138 N.J. 405 (1994).....3, 12

AMN, Inc. v. S. Brunswick Twp. Rent Leveling Bd.,
93 N.J. 518 (1983).....10

Barratt v. Cushman & Wakefield,
144 N.J. 120 (1996).....12

Bd. of Educ. Of Neptune v. Neptune Tp. Educ. Ass'n,
144 N.J. 16 (1996).....5-6

Brown v. Mayor of Detroit,
734 N.W.2d 514 (Mich. 2007).....16

D'Annunzio v. Prudential Ins. Co. of Am.,
192 N.J. 110 (2007).....12

Donelson v. DuPont Chambers Works,
206 N.J. 243 (2011).....2, 5, 7, 12

Dzwonar v. McDevitt,
177 N.J. 451 (2003).....12

GE Solid State v. Director, Taxation Div.,
132 N.J. 298 (1993).....8, 9-10

Gerard v. Camden County Health Services Center,
348 N.J. Super. 516 (App. Div. 2002).....3

Hernandez v. Montville Twp. Bd. of Educ.,
179 N.J. 81 (2004).....3

Higgins v. Pascack Valley Hospital,
158 N.J. 404 (1999).....5, 11, 12, 13, 14

Kidwell v. Sybaritic, Inc.,
784 N.W.2d 220 (Minn. 2010).....17-18

Mackowiak v. Univ. Nuclear Sys.,
735 F.2d 1159 (9th Cir. 1984).....17

Massarano v. New Jersey Transit,
400 N.J. Super. 474 (App. Div. 2008).....3

Mazzacano v. Estate of Kinnerman,
197 N.J. 307 (2009).....7

Mehlman v. Mobil Oil Corp.,
153 N.J. 163 (1998).....3, 5, 11

Munoz v. New Jersey Automobile Full Ins. Underwriting,
145 N.J. 377 (1996).....7, 10

Parker v. M&T Chemicals, Inc.,
236 N.J. Super. 451 (App. Div. 1989).....3

Perez v. Pantasote, Inc.,
95 N.J. 105 (1984).....9

Pierce v. Ortho Pharm. Corp.,
84 N.J. 58 (1980).....11-12

Rogers v. City of Fort Worth,
89 S.W.3d 265 (Tex. Ct. App. 2002).....17

State v. Hoffman,
149 N.J. 564 (1997).....8

State v. Kittrell,
145 N.J. 112 (1996).....9

State v. Sutton,
132 N.J. 471 (1993).....9

Turner v. Associated Humane Societies, Inc.,
396 N.J. Super. 582 (App. Div. 2007).....3

Young v. Schering Corp.,
141 N.J. 16 (1995).....10, 12

STATUTES

Ala. Code § 36-26A-3.....15

Alaska Stat. § 39.90.100.....15

Ariz. Rev. Stat. Ann. § 23-1501(3).....15

Ariz. Rev. Stat. Ann. § 38-532.....15

Ark. Code Ann. § 21-1-603.....15

Cal. Gov't Code § 8547.2(d).....15

Cal. Lab. Code § 1102.5.....15

Colo. Rev. Stat. Ann. § 24-50.5-102.....15

Conn. Gen. Stat. Ann. § 31-51m(b).....15

Del. Code Ann. tit. 29, § 1703.....15

Del. Code Ann. tit. 29, § 5115.....15

Fla. Stat. Ann. § 112.3187.....15

Fla. Stat. Ann. § 448.102.....15

Ga. Code Ann. § 45-1-4.....15

Haw. Rev. Stat. Ann. § 378-62.....15

Idaho Code § 6-2104.....15

Ill. Comp. Stat. Ann. § 174/15.....15

Ill. Comp. Stat. Ann. § 174/20.....15

Ind. Code Ann. § 36-1-8-8.....15

Iowa Code Ann. § 70A.28.....15

Kan. Stat. Ann. § 75-2973.....15

Ky. Rev. Stat. Ann. § 61.102.....15

La. Rev. Stat. Ann. § 42:1169.....15

Me. Rev. Stat. Ann. tit. 26, § 833.....15

Md. Code Ann. State Pers. & Pens. § 5-305.....15

Mass. Gen. Laws Ann. ch. 149, § 185.....15

Mich. Comp. Laws Ann. § 15.361 et seq.....16

Mich. Comp. Laws Ann. § 15.362.....15

Minn. Stat. Ann. § 181.931 et seq.....17

Miss. Code Ann. § 25-9-171.....15

Mo. Rev. Stat. § 105.055.....15

Mont. Code Ann. § 39-2-904(1)(a).....15

Neb. Rev. Stat. § 81-2705.....15

Nev. Rev. Stat. Ann. § 281.631.....15

N.H. Rev. Stat. Ann. § 275-E:2.....15

N.H. Rev. Stat. Ann. § 275-E:3.....15

N.J.S.A. 1:1-1.....7

New Jersey Conscientious Employee Protection Act,
N.J.S.A. 34:19-1 et seq.....1

N.J.S.A. 34:19-3.....1

N.J.S.A. 34:19-3(a).....2, 6, 8

N.J.S.A. 34:19-3(b).....2, 6, 8

N.J.S.A. 34:19-3(c).....passim

N.Y. Civ. Serv. Law § 75-b.....15

N.Y. Lab. Law § 740(2).....15

N.C. Gen. Stat. § 126-85.....15

N.D. Cent. Code § 34-01-20(1).....15

N.D. Cent. Code § 34-11.1-04.....15

Ohio Rev. Code Ann. § 4113.52(B).....15

Okla. Stat. Ann. tit. 74, § 840-2.5.....15

Or. Rev. Stat. § 659A.203.....15

43 Pa. Cons. Stat. Ann. § 1423.....15

R.I. Gen. Laws § 28-50-3.....15

S.C. Code Ann. § 8-27-20.....15

Tenn. Code Ann. § 8-50-116.....15

Tenn. Code Ann. § 50-1-304.....15

Tex. Gov't Code Ann. § 554.001 et seq.....17

Tex. Gov't Code Ann. § 554.002.....15-16

Utah Code Ann. § 67-21-3.....16

Vt. Stat. Ann. tit. 3, § 973.....16

Va. Code Ann. § 2.2-3010.....15, 16

Wash. Rev. Code Ann. § 42.40.020.....16

Wash. Rev. Code Ann. § 42.40.050.....16

W. Va. Code Ann. § 6C-1-3.....15, 16

Wis. Stat. Ann. § 230.80.....16

Wis. Stat. Ann. § 230.83.....16

Wyo. Stat. Ann. § 9-11-103.....16

COURT RULES

Rule 1:13-9(d)(3).....1

Rule 2:12-4.....4

LEGISLATIVE HISTORY

Assembly Labor Committee Statement, Senate,
No. 1105 – L. 1986, c. 105 (May 22, 1986).....10

Senate Committee Statement, Senate,
No. 1105 – L. 1986, c. 105 (Feb. 24, 1986).....10

MISCELLANEOUS

John H. Dorsey, Protecting Whistleblowers,
N.Y. Times, Nov. 2, 1986, § 11NJ, at 34.....10-11

ARGUMENT

I. THE DECISION BELOW WAS BOTH "GAME-CHANGING" AND WRONGLY DECIDED; CERTIFICATION SHOULD THEREFORE BE GRANTED

According to the Employers Association of New Jersey (EANJ), *amici* herein supporting the defense, the Appellate Division decision in this case is "game-changing," "the biggest whistleblower case of the year." http://www.eanj.org/content/webinar-archive-understanding-white-v-starbucks-biggest-whistleblower-case-year (last viewed January 31, 2012, 1:09 p.m.) (print version attached as an appendix). As *amici* supporting the plaintiff, National Employment Lawyers Association/New Jersey (NELA/NJ) fully agrees.[1]

The court below held that employee conduct that would otherwise be protected from retaliation by the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 et seq. loses that protection if it is "within the sphere of [the employee's] job-related duties." *Slip Opinion* p. 22. This holding completely subverts CEPA by eliminating the core question of whether "[a]n employer [has] take[n] any retaliatory action against an employee because the employee" has engaged in protected conduct, N.J.S.A. 34:19-3, and replacing it with nothing more than inquiry into what the plaintiff's job description was and whether the allegedly protected conduct fell within that job description.

Although the Appellate Division found that Ms. White had "reported violations of law to her supervisor" that would have

[1] NELA/NJ was granted *amicus* status by the Appellate Division and is filing this brief pursuant to R. 1:13-9(d)(3).

entitled her to the protection of N.J.S.A. 34:19-3(a) and/or (c) if it had not been "part of her job," *Slip Opinion* p. 25, it never analyzed what has hitherto been the core question in all CEPA litigation - whether the employer retaliated against her *because* she engaged in that conduct. Thus, the entire question of causation was subsumed by a determination of her job description.

The holdings below thereby re-write the plain statutory language, to provide that CEPA only protects an employee who "[o]bjects to, or refuses to participate in any activity, policy or practice, ***unless it falls within the sphere of the employee's job duties.***"[2] Quite simply, the decision below has added language to the statute which is not there.

Moreover, the lower courts performed this re-write without any discussion of the statutory language, thereby acting in complete derogation of this Court's teaching that all CEPA "analysis [begins] by looking at the statute's plain language, which is generally the best indicator of the Legislature's intent." Donelson v. DuPont Chambers Works, 206 N.J. 243, 256 (2011).

Re-writing CEPA in this way eliminates the statute's core protection by allowing every employer to assert that reporting unlawful activity and refusing to participate in unlawful activity is an express or implied part of every employee's job

[2] The example in the text is derived from N.J.S.A. 34:19-3(c), but the holding below engrafts its limitations on to subsections (a) and (b) as well.

description. Certainly the cases are legion, including many long-standing precedents in this Court, that would have had to have been decided differently if the decision reached here below was the law. E.g., Hernandez v. Montville Twp. Bd. of Educ., 179 N.J. 81 (2004) affirming on the opinion below 354 N.J. Super. 467 (App. Div. 2002) (school janitor pressing for repairs in toilet and other areas he was charged with cleaning); Mehlman v. Mobil Oil Corp., 153 N.J. 163 (1998) (toxicologist raising concerns about toxicity of company product); Abbamont v. Piscataway Township Bd. of Educ., 138 N.J. 405 (1994) (school shop teacher pressing for repairs to ventilation systems in shop classrooms); Turner v. Associated Humane Societies, Inc., 396 N.J. Super. 582 (App. Div. 2007) (animal shelter employee questioning client adoption of doberman pinscher that had bitten previous owner and was scheduled for euthanasia); Gerard v. Camden County Health Services Center, 348 N.J. Super. 516 (App. Div. 2002) (middle manager refusing to impose unwarranted discipline upon a subordinate despite order to do so); Parker v. M & T Chemicals, Inc., 236 N.J. Super. 451 (App. Div. 1989) (in-house attorney raising professional ethics concerns).

Accordingly, as EANJ has stated, the decision below truly is "game-changing." Unlike Massarano v. New Jersey Transit, 400 N.J. Super. 474 (App. Div. 2008), and the unpublished Appellate Division decisions cited by the defendants in their opposition to certification, Ms. White's case presents no alternate grounds

for its decision.[3] Summary Judgment was granted against her solely because the lower courts concluded that everything that she claimed was protected activity was "within the sphere of her job-related duties." *Slip Opinion* p. 22.[4]

The question of whether the lower courts were correct to add this new limitation to CEPA's protection is cleanly presented. Both sides of the organized employment bar agree that the Appellate Division decision makes important changes to the rules of the game under CEPA, a frequently litigated statute. Decision of the issue presented is therefore "a question of general public importance . . . [that] should be settled by the Supreme Court." R. 2:12-4. Thus, this case is highly appropriate for certification, which should be granted.

[3] Please see the discussion and distinctions of Massarano at pages 5-7 of the Appellate Division *Brief On Behalf of National Employment Lawyers Association/New Jersey in Support of Motion to Appear Amicus Curiae* that has been filed herewith.

[4] NELA/NJ takes no position as to whether there might be other grounds upon which summary judgment for the defendants could be sustained herein. It may be, for example, that Ms. White has presented insufficient proof that her having engaged in protected conduct was the cause of the adverse employment actions taken against her. Indeed, the lower courts seem to have seized upon the job description issue as a way of avoiding analysis of the question of causation. Because neither of the lower courts addressed causation or other grounds the defendants may believe they have for summary judgment, this Court should not address any such grounds in the first instance. If, as NELA/NJ hopes, this Court reverses and remands this case, the defendants could, if they so choose, file a new motion for summary judgment arguing those other grounds.

II. THE LOWER COURT'S RE-WRITE OF CEPA MUST BE REVERSED

The decision below has improperly re-written CEPA in a manner that leaves unprotected any employees who raise or act upon legal concerns that they have about anything that arises "within the sphere of [their] job-related duties." *Slip Opinion* p. 22. This is obviously contrary to legislative intent and this Court's precedent.

CEPA was "described at the time of its enactment as the most far reaching 'whistleblower statute' in the nation." Mehlman v. Mobil Oil Corp., 153 N.J. at 179. "Since its creation, CEPA's overall structure has remained essentially unaltered, but the scope of its protections and the breadth of its remedies have expanded considerably." Donelson v. DuPont Chambers Works, 206 N.J. 243, 259 (2011). But if the holding below stands, New Jersey will have judicially amended CEPA, turning it into one of the few whistleblower statutes in the country that does not protect employees who complain about illegal activity that falls within the scope of their normal job duties.[5]

The starting point to determine whether CEPA protects only whistle-blowing activity that falls outside the scope of an employee's job duties is the statutory language itself. Donelson v. DuPont Chambers Works, 206 N.J. at 256; Higgins v. Pascack Valley Hospital, 158 N.J. 404, 418 (1999). "A statute should be interpreted in accordance with its plain meaning if it is 'clear

[5] See Point III, *infra*, for full discussion of other states' whistleblower statutes.

and unambiguous on its face and admits of only one interpretation.'" Bd. of Educ. of Neptune v. Neptune Tp. Educ. Ass'n, 144 N.J. 16, 25 (1996). N.J.S.A. 34:19-3(c)[6] states:

> 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, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, if the employee is a licensed or certified health care professional, constitutes improper quality of patient care;
>
> (2) is fraudulent or criminal, including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity; or
>
> (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.

As noted in Point I, *supra,* the Appellate Division re-wrote this plain statutory language, to provide that CEPA protects an employee who "[o]bjects to, or refuses to participate in any activity, policy or practice, ***unless it falls within the sphere of the employee's job duties***." Quite simply, the lower court

[6] Ms. White also alleges violation of N.J.S.A. 34:19-3(a). For reasons of clarity and brevity, the text of this brief only directly addresses N.J.S.A. 34:19-3(c). As noted in footnote 2, *supra*, the identical arguments could be made from the text of subsection (a) or (b) of N.J.S.A. 34:19-3.

legislated, creating an exception to CEPA's protections which was not there before.

The creation of such an exception was plain error. As this Court recently held: "The clear language of CEPA is our surest guide. We will not 'rewrite a plainly-written enactment' or engraft 'an additional qualification which the Legislature pointedly omitted.' See Mazzacano v. Estate of Kinnerman, 197 N.J. 307, 323 (2009) (internal quotation marks and citation omitted)." Donelson v. DuPont Chambers Works, 206 N.J. at 261. "It is ***not*** the role of a court to supply what the Legislature has omitted . . . ." Munoz v. New Jersey Automobile Full Ins. Underwriting, 145 N.J. 377, 389 (1996) (emphasis added).

"Moreover, any deviation from the plain meaning of a statute is permitted only where there is 'specific' legislative intent ***requiring*** an alternate reading." Id. at 388 (emphasis added). See Donelson v. DuPont Chambers Works, 206 N.J. at 260-61; see also N.J.S.A. 1:1-1 (statutes should be given their generally accepted meaning "unless inconsistent with the ***manifest*** intent of the legislature") (emphasis added). There is no evidence of any "specific" legislative intent that employees who object to illegal activities that fall within the sphere of their job duties will not be protected from employer retaliation.

In fact, the statutory language reveals the opposite - a legislative intent to protect employees who engage in whistle-blowing, even when it concerns issues that fall within the

sphere of their job duties. Thus, N.J.S.A. 34:19-3(c) protects not only the employee who "objects" to illegal activity, but also the employee who "refuses to participate" in any illegal activity. But an employee would never be expected to "participate" in an activity unless it fell within her job duties in the first place. If the legislature meant to deny employees any protection for whistle-blowing that concerned issues that fell within their job duties, it is difficult to see why the legislature would include the "participation" language in N.J.S.A. 34:19-3(c) at all.[7]

Likewise, N.J.S.A. 34:19-3(c) specifically protects any licensed "health care professional" who "refuses to participate" in "any activity" that "constitutes improper quality of patient care." It is quite impossible to see why the legislature included this language, if it meant to deny any protection for a nurse who refused to participate in a medical procedure that he reasonably believed jeopardized a patient's health.

For their proposed re-writing of CEPA's plain language, defendants rely on the purported legislative objectives of CEPA's drafters, arguing in their brief to the Appellate Division (p. 26) that it is "inconceivable" that CEPA was designed to protect an employee whose complaints were made in

[7] The "participation" language is only found in subsection (c), and is not included in subsections (a) or (b) of N.J.S.A. 34:19-3. The selective use of language in one subsection but not another demonstrates that its inclusion was not inadvertent. See GE Solid State v. Director, Taxation Div., 132 N.J. 298, 308 (1993); State v. Hoffman, 149 N.J. 564, 579 (1997).

the course of fulfilling her job responsibilities.[8] It is well-established, however, that "[i]f the statute is clear and unambiguous, we need not look beyond its terms to determine the legislative intent." State v. Sutton, 132 N.J. 471, 479 (1993). Although formal legislative history may be used to ascertain legislative intent, "it is the statute's express language that determines in what manner and to what extent the Legislature sought to attain those goals. In the final analysis, it is the statute as written that must govern." Perez v. Pantasote, Inc., 95 N.J. 105, 114 (1984). See also State v. Kittrell, 145 N.J. 112, 125 (1996) (legislative commentary "cannot overcome the plain language of the statute").

Defendants do not – and cannot – point to any ambiguity in CEPA's language to justify a resort to extrinsic aids. The mere fact that N.J.S.A. 34:19-3(c) does not include the limiting language – "unless it falls within the employee's job duties" – does not render the statute ambiguous. If that were the rule, every statute would be ambiguous "unless it explicitly sets forth every possible condition, qualification, or exception that it does ***not*** adopt." GE Solid State v. Director, Taxation Div.,

[8] The defendants plainly have a very limited imagination if they cannot conceive of why the Legislature would wish to protect employees whose complaints arise in the course of the performance of their regular assigned work. To name just one obvious example, wouldn't the legislature want those charged with preparing and filing a corporation's tax returns to raise an alarm if they came to believe that the returns they were being directed to prepare improperly reported the required information or amounted to fraud? Indeed, it is "inconceivable" that the Legislature would *not* want to protect such employees from retaliation.

132 N.J. 298, 307 (1993) (emphasis in original). Such reasoning "renders inoperable" the most basic canons of statutory construction." Id. at 307-08.[9]

In any event, the legislative history of CEPA does not help defendants. "There is a dearth of legislative history . . . explaining CEPA." Young v. Schering Corp., 141 N.J. 16, 24 (1995). What "scant" legislative history exists does not suggest that an employee will not be protected from employer retaliation for objecting to illegal activity that concerns the employee's job duties. The formal committee statements that accompanied passage of CEPA merely recite the statutory language. See Assembly Labor Committee Statement, Senate, No. 1105 – L. 1986, c. 105 (May 22, 1986); Senate Committee Statement, Senate, No. 1105 – L. 1986, c. 105 (Feb. 24, 1986). None of this legislative history reveals a "specific" legislative intent to exclude from protection an employee who objects to illegal activity that falls within the sphere of her ordinary job duties. Munoz v. New Jersey Automobile Full Ins. Underwriting, supra, 145 N.J. at 388-89. See also John H. Dorsey, Protecting Whistleblowers, N.Y. Times, Nov. 2, 1986, §

[9] In the Appellate Division, defendants relied on AMN, Inc. v. S. Brunswick Twp. Rent Leveling Bd., 93 N.J. 518 (1983) for their novel approach to statutory construction. But in AMN this Court found it was "undisputed" that the drafters did not consider or contemplate the application of the ordinance at issue. Id. at 525. There is no evidence in this case that CEPA's drafters did not contemplate the application of CEPA to an employee who refuses to participate in her ordinary job duties because she reasonably believed doing so would violate the law. On the contrary, as noted, the statute's language shows the legislature contemplated precisely this scenario.

11NJ, at 34 (analysis by Senate sponsor of CEPA, describing purpose of statute was to protect workers who "report illegal or irregular business practices," who "disclose illegal practices," who "mak[e] known wrongdoing," or who report "unhealthy, unsafe or illegal practices"), cited in Mehlman v. Mobile Oil Corp., 153 N.J. at 179.

As this Court has explained:

> The purpose of CEPA is to "protect employees who report illegal or unethical work-place activities." . . . Generally speaking, CEPA codified the common-law cause of action, first recognized in Pierce v. Ortho Pharm. Corp., 84 N.J. 58, 72, 417 A.2d 505 (1980), which protects at-will employees who have been discharged in violation of a clear mandate of public policy.

Higgins v. Pascack Valley Hospital, 158 N.J. at 417-18.

This Court's reference to CEPA as codifying the holding in Pierce is telling. After all, Dr. Pierce was the Director of Medical Research, responsible for overseeing the development of therapeutic drugs and for insuring their safety. Pierce, 84 N.J. at 62. Her specific complaint was that a drug being developed by her team might prove unsafe. Id. at 62-63. In recognizing a cause of action for an employee in Pierce's situation, this Court described the following dilemmas faced by employees whose job duties might involve clear mandates of public policy.

> One writer has described the predicament that may confront a professional employed by a large corporation:
>
> > Consider, for example, the plight of an engineer who is told that he will lose his job unless he falsifies his data or conclusions, or unless he approves a product which does not confirm to specifications or meet minimum standards. Consider also the dilemma of

> a corporate attorney who is told, say in the content of an impending tax audit or antitrust investigation, to draft backdated corporate records concerning events which never took place or to falsify other documents so that adverse legal consequences may be avoided by the corporation; and the predicament of an accountant who is told to falsify his employer's profit and loss statement in order to enable the employer to obtain credit.
>
> Employees who are professionals owe a special duty to abide not only by federal and state law, but also by the recognized codes of ethics of their professions. That duty may oblige them to decline to perform acts required by their employers.

Pierce, 84 N.J. at 71 (citation omitted). Ironically, if the holding below stands, neither the engineer nor the lawyer nor the accountant in this Court's hypothetical would receive any protection under CEPA, because in each case the "issues on which [they] base[] [their] claim[s] fall within the sphere of [their] job-related duties."

Most egregiously, defendants ignore this Court's repeated admonition that "[b]ecause CEPA is 'remedial legislation,' it 'should be construed liberally to effectuate its important social goal'—'to encourage, not thwart, legitimate employee complaints.' [Dzwonar v. McDevitt, 177 N.J. 451, 463 (2003)] (internal quotation marks and citations omitted); accord D'Annunzio v. Prudential Ins. Co. of Am., 192 N.J. 110, 120, (2007)." Donelson v. DuPont Chambers Works, 206 N.J. at 256. See also Abbamont v. Piscataway Tp. Bd. of Educ., 138 N.J. 405, 431 (1994); Barratt v. Cushman & Wakefield, 144 N.J. 120, 129 (1996); Young v. Schering Corp., 141 N.J. 16, 25 (1995).

For example, in Higgins v. Pascack Valley Hospital, 158 N.J. 404 (1999), this Court declined to add language to N.J.S.A.

34:19-3(c) to limit CEPA's protections to complaints about illegal activity "of the employer," after noting the statute's broad remedial purpose.

> Misconduct of employees, like that of employers, can threaten the public health, safety, and welfare. . . . Sometimes, moreover, only an employee can bring a co-employee's wrongdoing to the attention of the employer or a public agency. If left unprotected, employees who otherwise would complain about a co-employee might hesitate to come forward out of fear of retribution. A vindictive employer could resent disruption in the workplace or the disclosure of improper practices within the organization. In this context, "reporting a fellow employee's violation . . . is not so different from traditional notions of whistle-blowing."

Higgins v. Pascack Valley Hospital, supra, 158 N.J. at 421.[10] Of course, the same argument applies here. Misconduct can threaten the public safety, health and welfare, regardless of whether the issues fall within the normal job duties of the whistle-blower. As in Higgins, sometimes the employee whose duties include monitoring health and safety is the only person who can bring wrongful conduct to light. And, as in Higgins, if left unprotected, an employee who would otherwise complain will hesitate to come forward about safety issues involving his job duties, out of fear of retribution by a vindictive employer, who resents disruption in the workplace.

---

[10] Oddly, in their opposition defendants defend the holding below by contending that plaintiff did not engage in whistle-blowing because she "presented no evidence that the misdeeds of her subordinates were performed 'with the employer's consent.'" Db12. Higgins has already established, however, that CEPA protects whistle-blowing regarding another employee's wrongful conduct, regardless of whether the employer condoned the wrongful conduct or not. Higgins, supra, 158 N.J. at 424. Defendants thus appear to be arguing for the overruling of Higgins.

Restricting CEPA's protections for only ***some*** complaints about illegal activity thus defeats the statute's goals, as well as being contrary to its plain language. After all, as Higgins noted, N.J.S.A. 34:19-3(c) protects an employee who blows the whistle on "***any*** activity, policy or practice" which is unlawful or contrary to a clear mandate of public policy. "The term 'any' in subsection 'c' indicates that ***the statute applies regardless of the source of the activity, policy or practice***." Higgins, 158 N.J. at 419 (emphasis added).

In sum, there is no basis for the lower court's re-write of CEPA to deny protection to those employees whose otherwise protected activity arises "within the sphere of her job-related duties." *Slip Opinion* p. 22. The issue of the employee's duties is, in fact, irrelevant to CEPA's analysis, which the statute and precedent require to focus on the question of whether the alleged retaliation was caused by the plaintiff having engaged in protected activity.

Many employees, such as corporate compliance officers and police officers, may engage in protected activity all day long, every day, by virtue of the nature of their jobs. The employer need only fear a CEPA suit if it retaliates against them *because* they engaged in such activity. Deciding whether the employer's "adverse employment action" was caused by the employee having engaged in protected activity or by something else is for the jury. It is not an issue that can be resolved as a matter of law based solely upon the employee's job description.

Accordingly, the decision below must be reversed.

III. THE WHISTLEBLOWER LAWS OF OTHER STATES ALMOST UNIFORMLY PROVIDE PROTECTION TO ACTIVITIES WITHIN THE SPHERE OF JOB-RELATED DUTIES

Of the eighteen other state statutes that protect whistle blowing in private employment, none provide an exception when the employee's complaints are made in the performance of her ordinary job duties.[11]

Likewise, in the public employment setting, none of the forty-six other state statutes that protect whistle blowing limit their protections to reports made outside the employee's ordinary job duties.[12]

---

[11] See Ariz. Rev. Stat. Ann. § 23-1501(3)(c); Cal. Lab. Code § 1102.5; Conn. Gen. Stat. Ann. § 31-51m(b); Del. Code Ann. tit. 29, § 1703; Fla. Stat. Ann. § 448.102; Haw. Rev. Stat. Ann. § 378-62; Ill. Comp. Stat. Ann. §§ 174/15 and 174/20; Me. Rev. Stat. Ann. tit. 26, § 833; Mich. Comp. Laws Ann. § 15.362; Mont. Code Ann. § 39-2-904(1)(a); N.H. Rev. Stat. Ann. §§ 275-E:2 and 275-E:3; N.Y. Lab. Law § 740(2); N.D. Cent. Code § 34-01-20(1); Ohio Rev. Code Ann. § 4113.52(B); R.I. Gen. Laws § 28-50-3; Tenn. Code Ann. § 50-1-304; Va. Code Ann. § 2.2-3010; W. Va. Code Ann. § 6C-1-3.

[12] Ala. Code § 36-26A-3; Alaska Stat. § 39.90.100; Ariz. Rev. Stat. Ann. § 38-532; Ark. Code Ann. § 21-1-603; Cal. Gov't Code § 8547.2(d); Colo. Rev. Stat. Ann. § 24-50.5-102; Conn. Gen. Stat. Ann. § 31-51m(b); Del. Code Ann. tit. 29, § 5115; Fla. Stat. Ann. § 112.3187; Ga. Code Ann. § 45-1-4; Haw. Rev. Stat. Ann. § 378-62; Idaho Code § 6-2104; Ill. Comp. Stat. Ann. §§ 174/15 and 174/20; Ind. Code Ann. § 36-1-8-8; Iowa Code Ann. § 70A.28; Kan. Stat. Ann. § 75-2973; Ky. Rev. Stat. Ann. § 61.102; La. Rev. Stat. Ann. § 42:1169; Me. Rev. Stat. Ann. tit. 26, § 833; Md. Code Ann. State Pers. & Pens. § 5-305; Mass. Gen. Laws Ann. ch. 149, § 185; Mich. Comp. Laws Ann. § 15.362; Miss. Code Ann. § 25-9-171; Mo. Rev. Stat. § 105.055; Mont. Code Ann. § 39-2-904(1)(a); Neb. Rev. Stat. § 81-2705; Nev. Rev. Stat. Ann. § 281.631; N.H. Rev. Stat. Ann. §§ 275-E:2 and 275-E:3; N.Y. Civ. Serv. Law § 75-b; N.C. Gen. Stat. § 126-85; N.D. Cent. Code § 34-11.1-04; Ohio Rev. Code Ann. § 4113.52(B); Okla. Stat. Ann. tit. 74, § 840-2.5; Or. Rev. Stat. § 659A.203; 43 Pa. Cons. Stat. Ann. § 1423; R.I. Gen. Laws § 28-50-3; S.C. Code Ann. § 8-27-20; Tenn. Code Ann. § 8-50-116; Tex. Gov't Code Ann. §

For example, in Brown v. Mayor of Detroit, 734 N.W.2d 514 (Mich. 2007), the plaintiffs were a detective and a bureau chief in Detroit's police department. They had investigated and reported allegations of illegal conduct by officers in the Executive Protection Unit and by Mayor Kwame Kilpatrick. They alleged they were retaliated against for their actions, in violation of Michigan's Whistleblowers Protection Act, Mich. Comp. Laws Ann. § 15.361 et seq. The Mayor sought dismissal of the claims, arguing inter alia that the plaintiffs were not engaged in protected activity because they were merely engaged in their ordinary job duties as law enforcement officers. After noting the statute's plain language, the Michigan Supreme Court rejected this argument:

> [T]here is also no language in the statute that limits the protection of the WPA to employees who report violations or suspected violations only if this reporting is outside the employee's job duties. The statute provides that an employee is protected if he reports a "violation or a suspected violation of a law or regulation or rule . . . ." . . . There is no limiting language that requires that the employee must be acting outside the regular scope of his employment. The WPA protects an employee who reports or is about to report a violation or suspected violation of a law or regulation to a public body. The statutory language renders irrelevant whether the reporting is part of the employee's assigned or regular job duties.

Brown v. Mayor of Detroit, 734 N.W.2d at 518.[13]

554.002; Utah Code Ann. § 67-21-3; Vt. Stat. Ann. tit. 3, § 973; Va. Code Ann. § 2.2-3010; Wash. Rev. Code Ann. §§ 42.40.020 and 42.40.050; W. Va. Code Ann. § 6C-1-3; Wis. Stat. Ann. §§ 230.80 and 230.83; Wyo. Stat. Ann. § 9-11-103.

[13] Of course, Mayor Kilpatrick's argument for a crabbed interpretation of Michigan's WPA is especially ironic, in light of his subsequent conviction and imprisonment for criminal wrongdoing.

Likewise, in Rogers v. City of Fort Worth, 89 S.W.3d 265 (Tex. Ct. App. 2002), a deputy marshal was discharged in retaliation for a report he made of an alleged violation of law in the course of his duties. The Texas Court of Appeals rejected the argument that this was not protected activity under the Texas Whistleblower Act, Tex. Gov't Code Ann. § 554.001 et seq., because Rogers was "simply doing his job."

> Further, while it appears that Rogers made his report primarily in his role as an employee rather than as a citizen, we decline to hold, based on this fact, that Rogers did not report a violation of law. See City of Weatherford v. Catron, 83 S.W.3d 261, 270, 2002 Tex. App. LEXIS 5118 (Tex. App. – Fort Worth 2002, no pet.) (rejecting city's argument that city water plant manager was "simply doing his job" when he reported low chlorine levels in city's water supply to Texas Natural Resources Conservation Commission); City of San Antonio v. Heim, 932 S.W.2d 287, 290-91 (Tex. App. – Austin 1996, writ denied) (op. on reh'g) (holding that police officer who, in the course of his employment, arrested an off-duty officer for driving while intoxicated reported a violation of law within the meaning of the Act); Castaneda, 831 S.W.2d at 503 (holding that public employee who participated in investigation at the request of law enforcement authorities reported a violation of law protected by the Act).

Rogers v. City of Fort Worth, 89 S.W.3d at 276. See also Mackowiak v. Univ. Nuclear Sys., 735 F.2d 1159, 1162-63 (9th Cir. 1984) (internal safety reports made by quality control inspector at nuclear power plant constituted protected activity under whistleblower provisions of Energy Reorganization Act). Cf. Kidwell v. Sybaritic, Inc., 784 N.W.2d 220, 226-27 (Minn. 2010) (three Judge plurality, with three Judges dissenting, interpreting Minnesota's whistleblower statute, Minn. Stat. Ann. § 181.931 et seq., "reject[s] as too broad the court of appeals' conclusion that, as a matter of law, 'an employee does not

engage in protected conduct under the whistleblower act if the employee makes a report in fulfillment of the duties of his or her job,'" but nonetheless holds that the employee's job duties are relevant to determine if the employee's report was made in "good faith").

Nothing in CEPA's language even suggests that a different result should be reached here. As in all of the other states that have whistleblower protection statutes, conduct that is within the sphere of an employee's job-related duties is entitled CEPA's protection. To interpret CEPA any other way would not only require a re-write of the statute, but it would render CEPA one of the most retrograde whistleblower laws in the country. A "game changer" indeed.

CONCLUSION

For all of the foregoing reasons, NELA/NJ urges this Court to grant Ms. White's Petition for Certification and to then reverse the decision below and remand the case for further proceedings.

Dated February 3, 2012

Respectfully submitted,

_____
BENNET D. ZUROFSKY, ESQ.
17 Academy Street, Suite 1010
Newark, New Jersey 07102
(973) 642-0885
bzurofsky@zurofskylaw.com

_____
ANDREW DWYER, ESQ.
The Dwyer Law Firm, L.L.C.
17 Academy Street, Suite 1010
Newark, New Jersey 07102
(973) 242-3636
andy@thedwyerlawfirm.com

Attorneys for National Employment Lawyers Association/New Jersey