Whistleblowing Past The Graveyard: Making Sense of Two Recent, and Seemingly

October 31, 2023

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Employment Law Monthly

Most New Jersey employers are familiar with the Conscientious Employee Protection Act (CEPA), which protects employees who engage in "whistleblowing" from retaliatory action by their employers. As a brief refresher, there are four elements to a CEPA claim: (1) the employee believed that his or her employer violated the law or public policy; (2) the employee engaged in a "whistleblowing" activity, i.e., informed the employer or an outside entity of the conduct; (3) the employee suffered an adverse employment action, such as being fired; and (4) there was a causal connection between the whistleblowing activity and the adverse employment action. Once the employee establishes these four elements, it is up to the employer to show that there was a "legitimate, non-discriminatory" reason for the adverse employment action. Even if the employer shows such a reason, the employee can prevail if he or she is able to show that the proffered reason is a mere "pretext," and not the real reason for the adverse action.

Any of the four elements of a CEPA claim can offer vexing fact patterns. In two recent and very similar cases from the Appellate Division, it was the fourth element which sowed confusion, and produced two seemingly contradictory rulings.

Smith v. Konica Minolta Business Solutions U.S.A., Inc.

In *Smith*, the plaintiff employee believed that several other employees were engaging in business fraud. She informed her supervisors several times beginning in 2018, and later made two calls to her employer's anonymous whistleblower hotline. Two months after her second call, her supervisor discovered that she had received an unsolicited email with information regarding additional potential fraudulent activity by her co-employees. Her supervisor asked her to turn over her personal laptop pursuant to the employer's Bring Your Own Device (BYOD) policy. She refused and was terminated. After she filed suit under CEPA and several other causes of action, her employer moved for summary judgment to have the matter dismissed, arguing that she could not establish the fourth element of a CEPA claim because she had been terminated for violating the BYOD policy and for no other reason.

Adikibe-Ejioqu v. Partners Pharmacy

Similarly, in *Adikibe-Ejioqu*, the plaintiff employee informed a number of colleagues and superiors that he believed his employer was not complying with Board of Pharmacy cleaning and garbing guidelines. These complaints began in earnest in early 2019 and continued until July 2019. The plaintiff's employer terminated his employment after conducting an internal video audit and discovering that the plaintiff routinely failed to abide by internal and Board of Pharmacy patient safety guidelines. He was terminated soon after. Just as in *Smith*, the plaintiff filed a CEPA claim and his employer moved for summary judgment, arguing that he could not establish the fourth element of a CEPA claim because he was terminated for violating internal rules and Board of Pharmacy regulations.

The Appellate Division Decisions

In decisions dated days apart, the Appellate Division reached opposing conclusions in the two cases. In *Smith*, the appellate panel reversed the trial court's decision granting summary judgment to the employer. The panel concluded that there was sufficient evidence in the record to support a causal connection between the plaintiff's complaints and her termination. In

particular, the panel noted that a jury could find that her supervisor knew or suspected that she had called the anonymous hotline, and terminated her because of it. In *Adikibe-Ejioq*u, on the other hand, the Appellate Division affirmed summary judgment in the employer's favor, concluding that the plaintiff could not show a causal connection between his complaints and termination, nor establish that his employer's proffered reason for terminating him was pretextual.

On their face, the two cases seem to reach contradictory conclusions. But a few subtle, yet important, factual distinctions may explain the difference. In *Smith*, there were facts in the record establishing that the plaintiff had been frozen out by her supervisor after she made the initial complaint. For example, her supervisor began excluding her from important meetings. This conduct intensified after the plaintiff called the whistleblower hotline. Moreover, the incident which led to her termination was directly related to her whistleblowing activity; she refused to turn over a laptop containing potential evidence of fraud by other employees. Taken together, the Appellate Division believed there was enough evidence for a jury to conclude that the plaintiff's supervisor was hostile towards her, had pieced together that she had called the whistleblower hotline, and terminated her at the first opportunity after she failed to comply with the BYOD policy.

The facts underlying *Adikibe-Ejioqu* contain several important differences. The plaintiff's employer took no adverse action against him before viewing the video footage which led to his termination. Even after he made his first complaint in February 2019, he received a more favorable performance review than he had the year prior. He was terminated upon review of the video footage because his employer believed his conduct endangered patient safety. Finally, there was no evidence that the supervisor who terminated the plaintiff knew of the complaints the plaintiff made in July 2019, just prior to his termination. Rather, the supervisor knew only of the plaintiff's original February 2019 complaint. Given that the plaintiff later received a favorable performance review, and was terminated roughly five months later and only after the discovery of egregious misconduct, the Appellate Division concluded that the plaintiff could not establish a causal connection between his whistleblowing and termination.

Takeaways For Employers

Employers can take away several lessons from the divergent outcomes in these two cases. First, freezing out employees who complain of potential misconduct is a grave mistake, and can create factual issues regarding retaliation even where the employee is terminated for a legitimate reason. The employers' handling of their respective employees in the months leading up to the employees' termination is the most important distinction between the two cases. Second, an anonymous hotline is only as good as its ability actually to protect anonymity. If an anonymous caller's identity is discovered, or if management is able to deduce the person's identity, then a whistleblowing hotline might be more trouble than it is worth. Taking common sense steps to protect anonymity and to guard against retaliation in such circumstances is a key. Finally, employers **can** terminate whistleblowing employees who engage in misconduct, so long as they take the appropriate safeguards. In addition to the precautions above, employers who investigate misconduct by a whistleblowing employee should, where possible, ensure that no other employee related to the whistleblowing activity participates in the investigation, and should treat and discipline misconduct by whistleblowing employees in the same way they would misconduct by any other employee.

The Porzio Employment Team is available to help employers with policy development, training, and guidance to mitigate the risk of CEPA claims.

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