SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

KARI WHITE,	:	Docket No. A-3153-09T2
Plaintiff/Appellant,	:	On Appeal from a Final Order From The Superior Court of New Jersey, Law Division, Essex County
v.	:	Sat Below:
STARBUCKS CORPORATION and JEFFREY PETERS,	:	The Hon. Michael J. Nelson, J.S.C. Docket No.: ESX-L-2422-08
Defendants/Respondents.	:	Civil Action

AMICUS CURIAE BRIEF OF EMPLOYERS ASSOCIATION OF NEW JERSEY

PROSKAUER ROSE LLP
One Newark Center - 18th Floor
Newark, New Jersey 07102
973.274.3200
Attorneys for Employers Association of New Jersey

Of Counsel and On the Brief:

Marvin M. Goldstein, Esq.
Mark A. Saloman, Esq.

and

John J. Sarno, Esq. (Employers Association of New Jersey)

Preliminary Statement

The trial court correctly held that an employee, performing the routine tasks and functions of the job for which she was hired, is not a whistle-blower. Kari White's observations, instructions, and interactions arising in the course of her daily work routine simply were not "disclosures of" or "objections to" an employer "activity, policy or practice" sufficient to trigger the protections of the New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-1, et seq. ("CEPA"). To hold otherwise ignores the plain language of CEPA and extensive New Jersey precedent, which instruct that activities which are part and parcel of an employee's assigned responsibilities are not "whistle-blowing."[1]

EANJ urges the Court to definitely resolve any confusion on this point by applying the same analytical framework to CEPA that was established by the U.S. Supreme Court in Garcetti v. Ceballos. Adopting a straightforward, common sense approach, the Supreme Court confirmed that the "controlling factor" for

---

[1] As a non-profit organization comprised of more than 1,000 employers within New Jersey and dedicated exclusively to helping employers make responsible employment decisions through education, informed discussion, and training, the Employers Association of New Jersey ("EANJ") is uniquely situated to submit this *amicus curiae* brief in opposition to any undue judicial expansion or enlargement of New Jersey's Conscientious Employee Protection Act, N.J.S.A. 34:19-1, *et seq*. ("CEPA").

proving a cause of action similar to CEPA is whether the allegations of unlawful conduct arise out of the plaintiff's job duties. If a plaintiff, like White, is obligated to perform a whistle-blowing activity as part of her professional responsibilities, then she has no claim for relief against her employer. This clear-cut approach is both readily applicable to CEPA and long overdue.

Legal Argument[2]

The Trial Court Correctly Held That An Employee's Mere Communication With Her Supervisor Concerning Items Within Her Normal Scope Of Responsibility Is Not Protected Whistle-Blowing Activity

A. The trial court's decision is consistent with the plain language of CEPA.

All three branches of our State's government have confirmed that CEPA's remedial purpose is to protect the public by permitting a cause of action by an employee alleging an employer activity, policy or practice which, at a minimum, arises out of a law, administrative rule, or regulation or a clear mandate of public policy. Indeed, when CEPA was signed into law in 1986, then-Governor Kean emphasized the statute's purpose: to protect employees from "firing, demotion or suspension for calling attention to illegal activity on the part of his or her

[2] EANJ relies upon the Procedural History and Statement of Facts set forth in Respondent Starbucks' original brief in support of its motion for summary judgment and its opposition to White's appeal, incorporated herein by reference.

employer." Office of the Governor, News Release at 1 (Sept. 8, 1986); see also Hernandez v. Montville Township Board of Education, 179 N.J. 81, 82 (2004) (LaVecchia, J., dissenting). Accord Roach v. TRW, Inc., 164 N.J. 598, 613-14 (2000) ("CEPA is only intended to protect those employees whose disclosure falls sensibly within the statute; it is not intended to spawn litigation concerning the most trivial or benign employee complaints.")

Thus, CEPA prohibits, in relevant part, an employer from taking retaliatory action against an employee because she makes "disclosures" or "objects to" "any activity, policy or practice" which the employee reasonably believes is:

(1) in violation of a law, or a rule or regulation promulgated pursuant to law;

(2) fraudulent or criminal, including any activity, policy or practice of deception or misrepresentation; or

(3) incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.

N.J.S.A. 34:19-3, et seq.

When the New Jersey Legislature amended CEPA in 2006, it again emphasized the Act's purpose of protecting the public from deceptions and misrepresentations and to protect employees "who disclose or refuse to participate in fraudulent employer practices." Bill Statement, P.L. 2005, Chapter 329, at 4 (2006). Accord Mehlman v. Mobil Oil Corp., 153 N.J. 163, 179 (1998)("the

purpose of CEPA is 'to protect and encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employees from engaging in such conduct.'"(quoting Abbamont v. Piscataway Bd. Of Educ., 138 N.J. 405, 431 (1994)).

In enacting, and later amending, CEPA, the Legislature carefully sought to balance the rights of both employers and employees on matters that concern the way in which a company carries out its business. Nothing in the language of CEPA suggests that a cause of action can be based upon disagreements or controversies arising out of the routine performance of job responsibilities. In context, the carefully chosen words for the phrase "activity, policy or practice" connote ongoing, ubiquitous conduct held together by a common directive or purpose——and *not* an employee's personal or idiosyncratic performance to everyday job directives.

Such a reading of the words "disclose" or "object to" is also consistent with Governor Kean's description of the need for CEPA: to remedy past instances in which "illegal activities have not been brought to light because of the deep-seated fear on the part of an employee." Office of the Governor, News Release at 2. In context, the deliberate use of the word "disclosure" means the reporting or uncovering of a previously unknown act that is illegal, dishonest, or unethical. The meaning of the

phrase "object to" obviously relates to an employee who is ordered to do something over her objection that she reasonably believes is illegal, dishonest, or unethical. See, generally, Gilhooley v. County of Union, 164 N.J. 533, 542 (noting that the meaning of words in a statute is informed by their context and relation to other words that accompany them). If, as here, the language of the statute is clear and unambiguous, the court need not seek further guidance. See Pizzullo v. N.J. Mfrs. Ins. Co., 196 N.J. 251, 264 (2008); Roberts v. State, Div. of State Police, 191 N.J. 516, 521 (2007).

This common sense reading of the terms "disclose" and "object to" comports with the judiciary's interpretation of CEPA. For example, in Maw v. Advanced Clinical Comm., the Supreme Court held that an employee who refused to sign a confidentiality and noncompetition agreement presented by her employer as a condition of continued employment did not blow the whistle because she was unable to show that such a request violated a clear mandate of public policy. According to the Court, a

> clear mandate of public policy conveys a legislative preference for a readily discernable course of action that is recognized to be in the public interest . . . [T]here should be a high degree of public certitude in respect of acceptable versus unacceptable conduct.

179 N.J. 405, 444 (2004). In other words, Karol Maw's refusal to sign the agreement was personally motivated and advanced no discernable public interest.

Likewise, when an employee disputes a performance outcome with her supervisor, or disagrees with how a job should be done, or refuses to carry out a lawful instruction, or has problems getting along with her boss or co-workers, the employee is *not* objecting to, or refusing to go along with, an activity, policy, or practice which violates a clear mandate of public policy. Instead, all of these activities are part and parcel of the job, thus making such objections and refusals personal, unique, and idiosyncratic.

In the case at bar, White was hired and employed to assist the establishments in her district to prevent the loss of merchandise, ensure proper refrigeration of perishable food items, and maintain the comfort and satisfaction of customers. White cannot legitimately argue that defendant, an internationally-franchised coffee house and food merchandiser, advanced an "activity" or maintained a "policy" or "practice" that promoted the theft of its merchandise, sale of spoiled food, or discomfort of its customers. Indeed, it was White's job to ensure that her employer's business and customer satisfaction activities, policies, and practices were properly carried out. White "disclosed" nothing that was an illegal,

dishonest, or unethical "activity, policy or practice" by her employer, nor did she "object to" any such "activity, policy or practice." While White may have experienced job performance problems and discussed them with her supervisor, they were all directly related to the normal course of activities to which she had been hired to perform and obliged to carry out. This does not give rise to a cause of action under CEPA.

B. The trial court's decision is consistent with the U.S. Supreme Court's analysis in Garcetti v. Ceballos.

The logic of the trial court's decision that whistle-blowing activity cannot arise from normal job performance is grounded in the precedent that "the complained of activity must have public ramifications, and that the dispute between employer and employee must be more than a private disagreement." Maw, 179 N.J. at 445. Yet, the need to discern between a private dispute and one which might have public ramifications——or what constitutes an objective, reasonable belief versus a subjective, unreasonable assumption——requires a needlessly complex analysis for employers and employees alike. Accordingly, EANJ urges this Court to adopt the analytical framework set forth by the U.S. Supreme Court in Garcetti v. Ceballos, 547 U.S. 410 (2006), which holds that public employees do not engage in constitutionally protected speech when they make statements pursuant to their official job duties.

In that case, Richard Ceballos was a deputy district attorney and calendar deputy with the Los Angeles County District Attorney's Office. One of his job responsibilities was to review the accuracy of search warrants. In 2000, a defense attorney told Ceballos that a deputy sheriff's search warrant affidavit might be inaccurate. Ceballos investigated the matter and concluded that the affiant had misrepresented facts in the affidavit. Id. at 414.

Ceballos then reported the misrepresentation to his supervisor, Frank Sundstedt, and wrote a memo recommending that the criminal case be dismissed. Id. After a meeting with Ceballos, Sundstedt, the warrant affiant, and other employees from the sherrif's department, Sundstedt decided to proceed with the prosecution. Ceballos' memo was introduced by the defense and Ceballos was subsequently called to testify about his findings concerning the validity of the affidavit. Id. at 414-15.

Thereafter, Ceballos alleged that his supervisors retaliated against him on several instances, including his reassignment to a trial deputy position, transfer to another courthouse, and denial of a promotion. Id. at 415. He filed suit alleging that he was unlawfully subjected to retaliation for statements made in the normal course of his job duties.

In rejecting Ceballos' claim, the U.S. Supreme Court balanced the right of an employee to speak about issues of public concern with the employer's right to operate its business in a uniform and efficient manner. The Court stressed that the "controlling factor" in denying Ceballos' claim was that his allegations (like White's) arose "pursuant to his duties as a calendar deputy." Id. at 421. Indeed, "[t]hat consideration—— the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case"——led the Court to conclude "that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." Id. In short, "Ceballos did not act as citizen when he went about conducting his daily professional activities." Id. at 422

Though a First Amendment case,[3] Ceballos is entirely analogous to the case at bar. Ceballos, like White, "wrote his

[3] The conceptual framework for analyzing First Amendment retaliatory discharge claims has long been applied to claims under federal anti-discrimination and labor laws. See, generally, Mount Healthy City School Dist. v. Doyle, 429 U.S. 274 (1977) (concerning dismissal of teacher who criticized school policy, the court noted close parallel between First Amendment analysis and analysis under Title VII of the Civil Rights Act of 1964 and National Labor Relations Act). Likewise, this court has held that the CEPA *prima facie* case is

disposition memo because that is part of what he, as a calendar deputy, was employed to do." Id. Ceballos, like White, was obligated by his job functions to make the report which became the foundation for his cause of action against his employer. Id. Ceballos' claim was rejected because his entire cause of action——like White's——"owes its existence to [his] professional responsibilities." Id. at 421-22.

EANJ, therefore, urges this Court to strike the same reasonable balance under CEPA and hold that, to state a cause of action for employer retaliation, an employee must allege that she objected to, or refused to abide by, activities, policies, or practices falling outside the scope of her job responsibilities which she reasonably believes were illegal, dishonest, or unethical. White was not acting as a whistle-blower when she observed and discussed issues that arose out of her normal job responsibilities. Her "disclosures" and "objections" owe their very existence to her job responsibilities. The conflict that emerged from performance outcomes that fell short of White's employer's expectations were

---

analytically indistinguishable from anti-discrimination law. See Kolb v. Burns, 320 N.J. Super. 467, 476-79 (App. Div. 1999) (CEPA's analysis is "consistent with New Jersey's general treatment of claims asserted under anti-discrimination statutes."). Thus, it makes logical sense to apply Garcetti v. Ceballos to CEPA because doing so would ensure a consistent and conceptually coherent body of law under related theories of recovery.

the result of the normal exercise of her employer’s control over its workplace.

The Ceballos common sense analysis amplifies, and simplifies, what is already the law of New Jersey: that CEPA does not apply to private disputes between an employer and employee. See, e.g., Maw, 179 N.J. at 448. This framework is consistent with New Jersey precedent, which rejects workplace disagreements as falling outside the (albeit broad) scope of CEPA. See, e.g., Maw (employee's refusal to sign a non-compete agreement); Dzwonar, 177 N.J. at 464 (union member's claim that information was impermissibly concealed from general union membership); Cosgrove, 356 N.J.Super. at 525 (complaint regarding method of distribution of overtime); Smith-Bozarth v. Coalition Against Rape and Abuse, Inc., 329 N.J. Super. 238, 2__ (App. Div. 2000) (employee's disagreement with supervisor over viewing confidential client files); Demas v. National Westminster Bank, 313 N.J. Super. 47, __ (App. Div. 1998)(employee's report of co-worker misconduct contrary to employer's private business interests); Young v. Schering Corp., 275 N.J. Super. 221, 2__ (App. Div. 1994) (disagreement with company's priorities regarding allocation of research resources to controversial drug); Fineman, 272 N.J. Super. at 629 (physician's refusal to treat patients to protest understaffing); Warthen v. Toms River Community Memorial Hosp.,

199 N.J. Super. 18, __ (App. Div.1985)(nurse's refusal to administer treatment to terminally ill patient based upon her own "moral, medical and philosophical objections"); Littman v. Firestone Tire & Rubber Co., 715 F. Supp. 90, 93 (S.D.N.Y. 1989) (interpreting CEPA) (objecting to conduct allegedly harmful to publicly-traded company's shareholders).[4] CEPA likewise does not shield the "constant complainer" or employee who simply disagrees with an employer's decision, if the decision is otherwise lawful. Klein, 377 N.J.Super. at 42, ___; accord Young, 275 N.J.Super. at 237.[5]

---

[4] See also Thornton v. New Jersey Manufactured Housing Ass'n, Inc., 2006 WL 2861804 (App. Div. 2006)(objection to authority of third-party administrative agency to levy fines); Weisfeld v. Med. Soc. of New Jersey, Docket No. A-0904-03T2, slip op. at 12 (App. Div. 2005) (employee's belief of corporate conflict of interest); Haffy v. Hackensack Univ. Med. Ctr., No. BER-L-6510-00 (Law. Div. 2003), aff'd Docket No. A-4555-02T1 (App. Div. 2005)(dispute concerning internal hospital policy permitting unrestricted use of laptop computers); accord Schechter v. New Jersey Dept. of Law & Public Safety, Div. of Gaming Enforcement, 327 N.J. Super. 428, 4__ (App. Div. 2000) (employee's "policy dispute" with agency decision not protected); DeVries v. McNeil Consumer Products Co., 250 N.J. Super. 159, ___ (App. Div. 1991) ("mere voicing of opposition to corporate policy provides an insufficient foundation" for wrongful discharge claim); Mutch v. Curtiss-Wright Corp., Docket No. A-5454-00T2, slip op. at 30 (App. Div.), cert. denied, 175 N.J. 75 (2002)(CEPA requires more than mere "policy difference" between employee and employer); Edwards v. Salem Mgmt. Co., No. A-1473-03T1, slip op. at 5 (App. Div. Nov. 17, 2004) (complaints of property manager to employer concerning habitability of apartment he was provided as partial compensation for his work).

[5] Nor is CEPA intended to "shelter every alarmist who disrupts his employer's operations by constantly declaring that illegal

The Ceballos holding is likewise consistent with New Jersey's grant of sufficient discretion to employers to manage their operations. A holding to the contrary "would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business." Id. at 423. Such "displacement of managerial discretion by judicial supervision" would be unprecedented, id., and has already been rejected by New Jersey courts at every level. See Zive v. Stanley Roberts, Inc., 182 N.J. 436, 446 (2005) (acknowledging "the authority of employers to manage their own businesses."); Viscik v. Fowler Equip. Co., 173 N.J. 1, 21 (2002) ("[T]he employer's subjective decision-making may be sustained[,] even if unfair."); Peper v. Princeton Univ. Bd. of Trs., 77 N.J. 55, 87 (1978) ("Anti-discrimination laws do not permit courts to make personnel decisions for employers"). See also Hood v. Pfizer, 322 Fed. Appx. 124, 129 (3d Cir. 2009) ("courts are not arbitral boards ruling on the

---

activity is afoot," Blackburn v. United Parcel Service, Inc., 179 F.3d 81, 93 (3d Cir. 1999), "or to spawn litigation concerning the most trivial or benign employee complaints." Mutch, No. A-5454-00T2, slip op. at 26-27. Accord Tartaglia v. UBS PaineWebber Inc., 197 N.J. 81, 109 (2008) ("An employer remains free to terminate an at-will employee who engages in grousing or complaining about matters falling short of a 'clear mandate of public policy.'").

strength of cause for discharge."); Billet v. CIGNA Corp., 940 F.2d 812, 825 (3d Cir. 1991) ("a company has the right to make business judgments on employee status."); Mitchell v. UBS, 2009 WL 1856630, *10 (D.N.J. June 26, 2009) ("it is not the purview of this Court to select which errors UBS may and may not consider termination events.").

Thus, Ceballos presents the ideal analytical framework to apply to future CEPA claims.

C. White's reliance upon Hernandez v. Montville Township Board of Education is misplaced.

Contrary to the argument advanced by *amicus curiae* National Employment Lawyers Association (NELA), Hernandez v. Montville Township Board of Education does not hold that an employee can, in effect, blow the whistle on their own job performance. In that *per curium* decision, the Supreme Court upheld an appellate panel that overruled the trial court's grant of judgment notwithstanding the verdict. The appellate panel focused on the issue of whether Hernandez, a custodian who had attended health and safety classes, proved at trial that he had a reasonable belief that exposing children to malfunctioning toilets and fire code violations in an elementary school setting were contrary to a clear mandate of public policy. 354 N.J. Super. 467, 473-474 (App. Div. 2002), affirmed, 84 N.J. 81 (2004). The panel specifically observed, however, that Hernandez' "complaints"

were not part of his job functions: concerning his alleged complaints about broken toilets, Hernandez testified that "he was advised it was maintenance's job to repair the toilets, *not* the custodian's." Id. at 475 (emphasis added). Likewise, his alleged complaint about unlit exit signs arose from his inability to obtain replacement bulbs——which also were in the control of *other* employees. See id. at 474-75. Hernandez, unlike White, voiced (albeit "trivial")[6] complaints concerning issues which were beyond the scope of *his* job functions and not part of *his* daily routine.

Hernandez, therefore, does not hold, and the Supreme Court has never suggested, that a cause of action under CEPA can be predicated upon disagreements which arise from the job duties that an employee is hired and paid to carry out. By contrast, in Massarano v. New Jersey Transit, the Appellate Division precisely and logically held that the reporting of problems arising out of "merely doing [a] job" does not constitute

---

[6] Id. at 472. In the words of the trial court, which are equally appropriate here, "Talk about trivial. This is a case [which] I should never have let . . . go to the jury." Accord 179 N.J. at 85 ("Put simply, plaintiff's criticism of the timeliness of 'maintenance's response' to occasional operational problems posed by toilets that clogged or light bulbs that burned out, or his dissatisfaction with the Superintendent's responsiveness to his request for a meeting, do not support a CEPA claim that rendered plaintiff immune from termination due to the Board's dissatisfaction with plaintiff's work performance.") (LaVecchia, J., dissenting).

whistle-blowing under CEPA. 40 N.J. Super. 474, 491 (App. Div. 2008)

CONCLUSION

For the forgoing reasons, EANJ respectfully urges this Court to adopt the analytical framework of Garcetti v. Ceballos and affirm the trial court's January 5, 2010 decision. White was not a whistle-blower as a matter of law. Should this court hold otherwise and reverse the trial court's grant of summary judgment, it would forever transform the minutia of the daily grind at work into a civil action. Such a holding would go well beyond expanding CEPA; it would constitute a wholesale re-write of the statute and undermine both the executive and legislative branches of our State government.

Respectfully submitted,

PROSKAUER ROSE LLP

____

Marvin M. Goldstein
Mark A. Saloman
One Newark Center
18th Floor
Newark, New Jersey 07102
Attorneys for Employers
Association of New Jersey
Amicus Curiae for the Respondent

and

John J. Sarno, Esq.
Employers Association of New Jersey
30 West Mount Pleasant Avenue
Suite 201

Livingston, New Jersey 07039