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Q&A

● ROUNDTABLE SERIES 2007

Edited By Susan Kostal

Whistleblower and retaliation claims are serious business for any employer. Recent cases have broadened the class of worker covered by these statutes. We asked six attorneys to share their views on the best defense and most viable HR practices. They are John K. Bennett, a partner with Connell Foley LLP; Kelly Ann Bird, a director with Gibbons P.C.; Steven B. Harz, a member of Herten Burstein Sheridan Cevasco Bottinelli Litt & Harz LLC; Thomas B. Lewis, a shareholder with Stark & Stark; Richard G. Rosenblatt, a partner with Morgan Lewis; and Lawrence R. Sandak, a partner with Proskauer Rose. Our panel, held at Morgan Lewis in Princeton, N.J., was moderated by legal affairs freelance writer Susan Kostal and recorded by Robert M. Levine for Rosenberg & Associates, Inc.

MODERATOR: Describe the current environment that employers face, and why we see increased emphasis on retaliation and whistleblower claims.

HARZ: In the early '80s, a number of state courts began to make the determination that they have the right to set standards as to what constitutes mandates of public policy. That led to certain whistleblower statutes, such as New Jersey's CEPA, among others. Sarbanes-Oxley brought a whole new framework for publicly traded companies, which heightened sensitivity to corporate wrongdoing. Now, companies have no recourse but to act to protect themselves with respect to whistleblowers.

ROSENBLATT: Juries tend to think that employers sit back and wait for an opportunity to take an adverse action against somebody because they complain. And if you think about it, intuitively that may make some sense. If someone has been accused of doing something illegal, it's understandable that some people might reach the conclusion that they're not going to take kindly to that. Having said that, those of us around this table recognize that when someone blows a whistle, most employers treat those people with kid gloves. But these days, the top plaintiff lawyers add some type of whistleblower claim to every complaint they file, believing that juries may favor a whistleblower.

SANDAK: And the courts have invited an increase in claims. In New Jersey, the courts for the most part have continuously expanded upon the statutory language. They've invited more claims by more people than the legislature envisioned when it first passed CEPA.

BIRD: Retaliation is such a tough standard on a summary judgment motion. Plaintiffs know that all they need to do is throw out a few one-sided but supported facts, and we've now got disputed facts. That means it's tough to get the case thrown out before trial.

BENNETT: The bulk of the retaliation cases are not true "whistleblower" claims made for the common general good or based on reasonable beliefs that some "law, rule, or public policy" was violated; rather, they are mainly individual grievances by employees who complain that some decision of their employer didn't go their way, such as not getting the job posting or assignment that they wanted, and they say it must be because of their statutorily-protected status. Then, if another adverse decision

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follows the initial complaint, it gives rise to a retaliation claim for engaging in "protected activity" under the anti-discrimination and anti-retaliation statutes. And that's why the New Jersey Supreme Court, in *Carmona v. Resorts International Hotel*, joined the bulk of the federal circuits in recognizing the requirement that had been in the anti-discrimination statutes, like Title VII, for a reasonable good-faith basis for the initial complaint. That is very significant.

LEWIS: Has anyone seen actions where it has been a clear Law Against Discrimination (LAD) case with a CEPA allegation in the complaint? I had a recent situation dealing with a Workers' Compensation issue where an individual claimed he was fired for exercising his Workers' Compensation rights. Plaintiff's lawyer contacted me and suggested that it might be a CEPA violation, because Workers' Compensation as a statute protects against retaliation. And as a result, retaliation is a violation of public policy. Where is it going to stop, with the way the courts are expanding CEPA?

BENNETT: Employers' counsel have been successful in exposing those kind of bootstrapping arguments. The Workers' Compensation statute itself, for example, provides a remedy for retaliation for filing a claim. Therefore, one could argue, CEPA should not.

LEWIS: It should. But when plaintiffs' counsels are bootstrapping the argument under CEPA, they get potential punitive damages and legal fees that otherwise do not fall under the Workers' Compensation statute. This heightened remedy available to the plaintiff can sometimes force a large company to succumb to the power of CEPA.

HARZ: I agree that the courts are moving away from the early mandate that public policy cases were based upon the health, safety, and welfare of the public. The courts are much more inclined now to consider individual grievances.

ROSENBLATT: The concept of protecting the public has, to some extent, gone by the wayside. Moreover, the reasonable belief standard has devolved. People do not really care whether something is illegal or unethical or a violation of some regulation; it militates in favor of employees burying their heads in the sand so they can say I thought this was illegal. I had no reason to believe it wasn't. And so it has become a perfectly legitimate basis for complaint. A plaintiff's lawyer will then try to leverage that into a settlement, because companies don't want to have the bad publicity of a whistleblower claim, even if ultimately that so-called reasonably held belief proves wrong. Companies can be extremely sensitive to that type of publicity, particularly those in the consumer products businesses. They just can't afford these issues surfacing, unfounded or not.

SANDAK: New Jersey's protections have evolved into the broadest whistleblower protections of any state in the country. Many states limit their whistleblower laws to particular categories of employees. In New Jersey, it applies to all employees. Many states limit the allegations to those which concern health and safety issues. In New Jersey, it applies to a complaint concerning any violation of law, rule, statute or public policy. There's the reasonable belief standard, which doesn't exist in many states. And on top of that, the courts have broadly interpreted the statute, which creates great difficulties for employers in predicting the types of activities to which the statute will be applied next, and even in identifying who a whistleblower is.

BIRD: The statutes have become more broadly viewed vis-à-vis what is retaliation. The courts are not only looking at other

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CEPA cases in the State of New Jersey, but at LAD cases. We're seeing a much broader scope of what is the actual employment action at issue. We're well beyond demotion, termination or significant reduction in compensation. We're dealing with nitty-gritty terms and conditions of employment.

LEWIS: In the Burlington-Northern case, which is a Title VII case, the employee needed only to show that a reasonable person would have been dissuaded from exercising rights as a result of the employer's retaliatory actions. That can be so broadly construed by both the state courts and the federal courts that it would be virtually impossible in today's climate to file an effective motion for summary judgment.

ROSENBLATT: As management-side lawyers, we need to focus on some of the good language in the Burlington-Northern case. I think there's room to push back.

BENNETT: There have been recent Third Circuit decisions, since the Burlington Northern

decision, which actually do show some hope in terms of the standard for the materiality of the challenged action. They have created an objective test: the perspective of the reasonable person in the plaintiff's position. And therefore, the Third Circuit has recognized that it is an issue appropriate for summary judgment and has affirmed the grant of summary judgment on the legal question of what is a materially adverse employment action that would have dissuaded a reasonable person from making or supporting a charge of discrimination? We as defense lawyers like to see objective standards, because judges are likely to take those on in summary judgment motions, rather than defer it to a jury. The early federal circuit decisions after *Burlington* show some hope that there's some judicial willingness to decide, in dispositive motions, what is a material adverse employment decision for retaliation purposes.

HARZ: I have found it very difficult, however, to obtain summary judgments with respect to the issues of reasonableness and good faith. Judges just don't seem to want to grant those summary judgments.

BIRD: I think that's particularly the case in the state court here.

LEWIS: I agree, especially in the south Jersey area. How about in federal court?

BENNETT: Some mid-Atlantic states and southern states have shown that they will affirm summary judgment under the federal standards set down by the Supreme Court and the circuits. I do share everyone's view, however, that to the extent that plaintiffs' lawyers can bring a state court action under the state anti-discrimination statutes and stay out of federal court by keeping their cases removal-proof, they do that. And it generally has been more difficult to obtain summary judgment in the state courts.

When plaintiffs' counsels **bootstrap** CEPA onto a Workers' Compensation claim, they get **potential** punitive damages and legal fees that otherwise do not fall under the Workers' Compensation statute. This heightened remedy can sometimes **force** a large company to **succumb** to the power of the statute. -Thomas B. Lewis

ROSENBLATT: One thing that employers should always be looking at when there is a state law whistleblower claim filed is whether the underlying law, rule or regulation in any way touches upon a federal law, rule or regulation such that you might have an opportunity to remove it to federal court. Because certainly, especially in Jersey, you're going to get a much more favorable audience, experience shows, with a federal court judge than most state court judges.

MODERATOR: How do you help your clients identify potential whistleblowers?

BIRD: Anybody can be a whistleblower, particularly employees at companies where they feel they don't have a voice. If you don't have either an open-door policy or a complaint procedure, employees are more likely to make a big fuss about something that they perceive is going to get some attention. I think you can't be too careful. It's not just employees who have a certain level of responsibility are likely to be whistleblowers.

HARZ: Any complaint involving any allegedly unlawful conduct should be investigated and documented. It should be considered as potentially very serious.

SANDAK: Employers would be well served to have a policy in place establishing a mechanism for employees to raise concerns, as well as a procedure to have those concerns fully investigated. Such employers are able to intervene early in the process. That has beneficial effects both in terms of learning and possibly preventing actual violations of law, and making employees feel as though they have a voice. Whistleblowers, even those who are misguided, are less likely to bring lawsuits if they are made to feel that they have been taken seriously.

BENNETT: In a lot of these whistleblower claims, you find in discovery that the employees brought the claims at least in part because they didn't understand the employer's decision they were challenging, for example, why a decision was made in someone else's favor. They didn't know all the circumstances that went into it. One way to manage potential claims is to sit the employee down and effectively communicate why this decision was made.

ROSENBLATT: We also need to help clients realize that the underlying employment issue is not necessarily the top priority; the underlying complaint is the top priority. Don't let the tail wag the dog if there is a significant issue. You've got to get compliance officers involved. If it's a Sarbanes-Oxley case, we as employment lawyers need to have a seat at the table, but the securities lawyers should be there also. Part of the defense of any whistleblower claim is we take these things incredibly seriously—look how deep we investigated it.

BIRD: An effective mechanism, like that which you describe, will also result in an employee being more likely to keep the complaint internal before going to somebody outside the company. That makes a huge difference in how you can internally control the issue. But it doesn't work unless the complaint procedure is published, and the employees know that they're going to get a response. I don't know how many times I've heard employee complaints to the effect that "if you go to so-and-so with a complaint, it just sits there." That's the kind of a policy that's not worth the paper it's written on.

HARZ: Employers need to be trained to treat potential whistle-blowing situations very seriously. Employee handbooks

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should include written policies on whistleblowing and nonretaliation, and should specifically outline the complaint procedure. Employees should be assured orally and by way of written policy that they will not be subject to retaliation for making complaints.

ROSENBLATT: What I see very often is people don't know that certain conduct is whistleblowing. Managers must be trained to identify what is whistleblowing.

BENNETT: Managers need to also be reminded to get HR involved right away, because HR is trained to get the in-house employment attorneys with whom we partner involved right away, and complaints get a better response and handling internally.

ROSENBLATT: Managers and supervisors need to understand that the biggest problem their lawyers face in advising them is that they haven't properly managed employee performance. So if someone comes to us for the first time and says this

person is an incredibly poor performer, it is a problem when the first time the employee is told about those performance issues is after having made a whistleblower complaint. With that, you face the risk of creating a paper trail that may itself be perceived as retaliatory.

SANDAK: The counterpoint to that is that employers shouldn't feel paralyzed to act simply because someone is or is trying to become a member of a protected class. If discipline is warranted, if there are significant performance issues, and if those issues have been properly documented, employers have to feel free to act on those issues. They cannot fail to address performance issues out of fear that an employee claims to be a whistleblower.

BIRD: The employee is going to have a lot harder time linking the protected activity, if there was any, to the employment action, if it has been documented well before the protected activity.

SANDAK: Speaking of the timing, it's important that employers take disciplinary action as soon as the decision to impose discipline is made. It's remarkable how many cases we have where a decision is made, a week or two passes, and during that week or two the employee gets wind of the discipline, and suddenly the employee makes himself into a whistleblower.

ROSENBLATT: At that point, exit interviews can prove important in the context of litigation. I suggest employers ask an open-ended question along the lines of "is there anything else that you think is important to share with us?" If that box is checked "no," you later have an avenue to attack their complaint.

MODERATOR: If need be, how can HR and in-house counsel figure out what's the best way to keep an employee on the job and manage an unfolding case at the same time?

To the extent that plaintiffs' lawyers **CAN** bring a state court action under the state Anti-Discrimination Statute and **stay OUT** of federal court and keep their cases removal-proof, they do that. It is more **difficult** to obtain summary judgment in the state courts. -John Bennett

BIRD: If they're inclined to do anything about managing performance or taking any action relative to the employee's position, all of that has to be tied to specific job-related issues. If you go to put an employee on a performance improvement plan, you need to establish objective measures, if they exist, by which to monitor ongoing performance.

ROSENBLATT: I think there's a more important issue, and that's how to manage the management. My mantra is patience is a virtue. People are going to want to execute on the action that they had originally intended to make, whether it's termination or suspension. But once you learn of a potential complaint, everyone has to recognize that the game has changed. Decisions have to be made much more cautiously. Sometimes you'll get a lot of push-back. A little trick in the trade is to advise them that most of these statutes that involve whistleblowing have individual liability. Then they tend to listen a little bit more closely.

SANDAK: There's been a very interesting dynamic around the table. Susan, you asked the

question how does the employer deal with the whistleblower. And everyone around the table, being management defense lawyers, started to address how do you deal with the whistleblower who's really got significant performance issues and you're anticipating a lawsuit. But there are people who blow the whistle because they legitimately believe that there is an issue in the company, that there's been a violation of law, or that there is a public policy implicated. And there's a real question about how you deal with them. Because someone who blows the whistle may well annoy or anger someone else within the company. And the whistleblowing employee may begin to feel isolated and apart from the management of the company. Considerable attention should be given to making them feel comfortable about what they've done. These employees aren't necessarily problem employees. They could be genuine whistleblowers. Whether they're ultimately correct, they should be treated with dignity and respect.

MODERATOR: Let's move to the two cases that are pending before the New Jersey Supreme Court. What are some key elements for employers?

HARZ: A lot will depend upon the way the New Jersey Supreme Court does, in fact, decide *D'Annunzio v. Prudential Insurance Co.* and *Stomel v. City of Camden*. But as the law exists now, the definition of whom or what constitutes an employee under CEPA has broadened and at present time applies to individuals who, from a common law perspective, might not have been considered employees but are independent contractors. The Appellate Divisions under *Stomel* and *D'Annunzio* accepted that breath and in fact stretched it even further.

LEWIS: The case of *Stomel* talks about the two different types of tests, one being the control and direction test. The second has to do with the relative nature of the work test. And that typically involves a professional who we would think would be an outside nonemployee, a subcontractor. So for certain situations, *Stomel* broadens the scope of who is an employee with CEPA protection.

HARZ: The court under that relative nature of work test cited certain elements that they felt tilted the scales in terms of someone being considered an employee. And a major one, it appears, was the fact that the plaintiff, *Stomel*, received a monthly check on the basis of an annual salary that was not based on any per client fee or rate.

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have a voice. -Kelly Ann Bird

BENNETT: This has broad ramifications that go beyond New Jersey. With our 21st century, contingent workforces, temporary-service providers go well beyond providing their customers with traditional office-type workers, and include, for example, highly skilled professionals performing clinical research in major pharmaceutical companies.

SANDAK: I argued *D'Annunzio* before the New Jersey Supreme Court, so I can't comment on the case specifically. But the existing Appellate Division decisions in those cases increased by tens of thousands of people the number of employees within the State of New Jersey who would come within the scope of CEPA. Interestingly, during the oral argument, Justice Rivera-Soto said, "I thought CEPA was the Conscientious-Employee-Protection Act, not the Conscientious-Everyone-Protection Act." He voiced what many of you feel, which is that the statute has broadened under existing Appellate Division decisions to an extent not contemplated by the legislature and not supported by statutory definitions.





KELLY ANN BIRD devotes her practice to employment litigation and counseling on behalf of management. Her experience includes defending discrimination, harassment and whistleblower claims, wrongful discharge, tort and contract claims, and litigating restrictive covenant matters. Ms. Bird regularly counsels clients on employment and labor law issues, such as ADA and other equal employment issues, wage and hour requirements, and hiring and termination decisions. She also works with clients to develop and draft employment policies and procedures, contracts and handbooks to fit their business needs. In addition, she conducts training on, among other topics, harassment and discrimination for employees of all levels.

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