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CEPA: When Whistleblowing Is Just Part of Your Duties

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If an employee speaks out about something that falls within his job responsibilities to report, can he still be a whistleblower under the Conscientious Employee Protection Act (CEPA), N.J.S.A. § 34:19-1, et seq.? A trio of appellate decisions suggests the answer to this question is no.

The issue first appeared in *Massarano v. N.J. Transit*, 400 N.J. Super. 474 (App. Div. 2008), which has been construed by two unpublished appellate decisions to hold that an employee cannot be a whistleblower if it is part of her job to report activity she considers to be against public policy or illegal. However, those cases interpreted *Massarano* too broadly and risk leaving employers with the impression that by simply making it part of every employee's job description that they must report an activity that is illegal or against public policy, an employer may exempt its employees from CEPA's protections.

Massarano Decision

In *Massarano*, the plaintiff was an employee of Gateway Security, Inc., a

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company that contracted with New Jersey Transit (NJT) to provide security services. The plaintiff was a security operations manager for NJT, and her job responsibilities included supervising security personnel. In August 2002, it was brought to her attention that there were blueprints for various NJT operations laying discarded in recycling bins at an NJT building in Newark. The plaintiff testified that she believed the discarded blueprints were a violation of policy and a threat to public safety.

Because her supervisor was not at work that day, she reported the discovery to NJT's acting executive director. When she advised her own boss what had happened, he got upset with her for going over his head. He also testified that he did not consider the issue as serious as the plaintiff had because NJT's own police department was satisfied that the loading dock was locked and secure. After this incident, the plaintiff's relationship with her boss began to deteriorate, culminating in her telling him a few months later that she felt she could no longer be loyal to him. She soon resigned when asked to do so.

The plaintiff's CEPA claim was dismissed on NJT's motion for summary judgment and on appeal, the Appellate Division affirmed. In addition to affirming the trial court's determination that the disposal of the documents was not

a clear violation of law or public policy, the Appellate Division also agreed with the lower court's finding that the plaintiff had not engaged in a whistleblowing activity. The trial court had concluded that it was the plaintiff's job to find and fix security problems, and that her report was merely a "request for an authority to allow her to take possession of the papers and categorize them." The court concurred with the trial judge's analysis that the plaintiff was "merely doing her job" by reporting her findings. According to the court, it was "clear" that her supervisor was angry not because she reported her findings, but because she had "gone over his head."

Post-Massarano Decisions

Two recent unpublished appellate opinions dealt with a similar issue. In *Aviles v. Big M, Inc.*, A-4980-09 (N.J. App. Div. Mar. 8, 2011), the plaintiff was a store manager for Mandeel. She suspected a customer of stealing and ultimately was fired for the manner in which she dealt with the issue. The defendant claimed that the plaintiff was terminated for violating its company policy prohibiting searches of customers' bags, while the plaintiff argued that she was terminated for reporting illegal activity and, as such, was entitled to protection under CEPA. The Appellate Division affirmed the lower court's dismissal of the case and held that an employee reporting the alleged criminal activity of a third party, rather than a fellow employee, did not constitute whistleblowing under CEPA.

Although the Appellate Division could have stopped its analysis there, it found additional grounds for uphold-

ing the dismissal of the plaintiff's CEPA claims. The court held that "[a] plaintiff's job duties cannot be considered whistle-blowing conduct." In support for this determination, the court cited *Massarano*, describing that holding as barring a plaintiff that was "merely carrying out her employer's designated responsibilities" from protected whistleblower status.

Another appellate court agreed with *Aviles*'s synopsis of *Massarano*, and cited to *Massarano* in a similar manner. In *White v. Starbucks*, A-3153-09 (N.J. App. Div. Dec. 9, 2011), the plaintiff was a district manager for Starbucks, and her job responsibilities included ensuring that employees complied with legal and operational requirements. During the course of her employment, the plaintiff reported numerous violations of company policy and the law, including missing inventory from one store and afterhours sex parties at another. The plaintiff was ultimately asked to resign for being an alleged liability risk. In affirming the trial court's dismissal of the plaintiff's CEPA claim on summary judgment, the Appellate Division again cited *Massarano* for the proposition that "[a] plaintiff who reports conduct, as part of his or her job, is not a whistleblower whose activity is protected under CEPA."

What Effect Will the Decisions Have?

Certification is pending in the New Jersey Supreme Court in *White*. The question, at least for these practitioners, is whether *White* unnecessarily extended *Massarano*. If affirmed, the concern is that it will create an undue precedent for potential whistleblowers.

First, a literal reading of *White* eviscerates the purposes of CEPA. CEPA was enacted to protect employees. This line of decisions has developed a judicially sanctioned category of employees excepted from the broad protections envisioned by the legislature.

Second, possible violations of law or public policy may be visible to an employee only through the course of carrying out job duties. This category of employees will now find themselves be-

tween a rock and a hard place, wondering: "Do I risk termination for reporting an illegal activity because I do not qualify for whistleblower protection, or do I avoid reporting it and risk termination for not performing my job responsibilities?"

Third, the holding will create a disparity in the workplace. For example, an employee whose responsibility it is to identify security problems is merely doing her job when she reports that money is missing, but an employee with different job responsibilities making the same report would be a protected whistleblower.

Fourth, the expansive reading of *Massarano* creates an incentive for employers to expand all job descriptions to include reporting violations of law or public policy, thus removing more and more employees from the protections of CEPA.

Further, it appears that the *White* court took *Massarano* further than the latter's panel intended. The decision in *Massarano* was based more on context than on a bright-line rule that any reporting that could be considered a job duty denied an employee the protection of CEPA. Indeed, *Massarano* was careful to point out that it was clear that the plaintiff was not terminated for speaking out against the manner in which blueprints and schematics were disposed, but was instead terminated for personal issues she had with her boss. In fact, it appears that the plaintiff herself did not consider it "whistle-blowing" to report the activity but instead, once terminated, attempted to construe that activity as one protected by CEPA. The court also noted that the plaintiff's boss did not care that she reported the activity but was only upset that she went "over his head," and that she did not have an objectively reasonable belief that the activity she was reporting was a violation of law or public policy. It does not appear that the *Massarano* court intended to establish a bright-line rule that any time an employee reports something that conceivably could be within her job duties, she is not a whistleblower under

CEPA.

Massarano's holding appears to have been first unnecessarily extended in *Aviles*. There, the court turned *Massarano*'s contextual finding into the bright-line rule that "[a] plaintiff's job duties cannot be considered whistle-blowing conduct." This extension was unnecessary since the *Aviles* court had already rested its holding that plaintiff was not protected by CEPA on the fact that she was reporting the alleged illegal activity of a third party. The further extension by *White*, in declaring that an employee reporting on the illegal activities of fellow employees was not whistleblowing as a matter of law, is therefore an overly broad application of *Massarano*.

Making sure that it is not too easy for employees to cry "Whistleblower!" may be a valid concern, and may have fueled the panels' analyses in *Aviles* and *White*. However, given the broad remedial purpose of CEPA, courts should be more concerned that under *White*'s holding, employees will be too easily robbed of CEPA's protections. Instead, a fair reading of *Massarano* suggests that in that case, the court struck the proper balance. As part of the overall analysis of whether the plaintiff was a whistleblower, the court noted that she was merely doing her job. In other words, in her mind, she was not a whistleblower or even doing anything out of the ordinary.

The court also noted that she was clearly fired because of her relationship with her boss, including negative comments made by the plaintiff herself. *Massarano* does not suggest that if a plaintiff discovered activity that was illegal or against public policy, reported it, and was subsequently fired for reporting it, there could be no CEPA violation if it conceivably was part of her job to report any kind of illegal behavior. Instead, *Massarano* holds that if, contextually, it is clear that the plaintiff did not have an objectively reasonable belief there was an activity that was illegal or against public policy occurring, and was clearly fired for other reasons, they will not be converted to whistleblower status. ■