

# Handling Employee Complaints to Avoid a Retaliation Claim: Is it Whistle Blowing or Just an Unhappy Employee?

## I. INTRODUCTION

### A. Federal Sources of Employee Protections Against Retaliation

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e
2. Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*
3. Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*
4. Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, *et seq.*
5. Occupational Safety and Health Act, 29 U.S.C. § 650, *et seq.*
6. And More...

### B. State Sources of Employee Protections Against Retaliation

1. Law Against Discrimination, N.J.S.A. 10:5-1, *et seq.*
2. Conscientious Employee Protection Act, N.J.S.A. 34:19-1 *et seq.*
3. N.J. Family Leave Act, N.J.S.A. 34:11B-1 *et seq.*
4. And More...

## II. BOTH LAW AGAINST DISCRIMINATION ("LAD") & CONSCIENTIOUS EMPLOYEE PROTECTION ACT ("CEPA")

### A. Who can be liable?

1. Employers
  - a. Even if they are not complicit in the illegality
2. Individuals (including supervisors)<sup>1</sup>

### B. Who is an employee?

1. Can be regular employee or an independent contractor
2. Depends on 12 factors<sup>2</sup>:
  - a. the employer's right to control the means and manner of the worker's performance
  - b. the kind of occupation - supervised or unsupervised;
  - c. skill;
  - d. who furnishes the equipment and workplace;

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<sup>1</sup> Maw v. Advanced Clinical Communications, Inc., 359 N.J. Super. 420, 439-40 (App. Div.), rev'd on other grounds, 179 N.J. 439 (2004).

<sup>2</sup> Pukowsky v. Caruso, 312 N.J. Super. 171 (App. Div. 1998)

- e. the length of time in which the individual has worked;
- f. the method of payment;
- g. the manner of termination of the work relationship;
- h. whether there is annual leave;
- i. whether the work is an integral part of the business of the "employer;";
- j. whether the worker accrues retirement benefits;
- k. whether the "employer" pays social security taxes; and
- l. the intention of the parties.

C. What types of damages can be awarded?

- 1. Compensatory: back pay; front pay; benefits; pain & suffering, emotional distress
- 2. Punitive
- 3. Attorney fees

### III. THE LAW AGAINST DISCRIMINATION ("LAD")

A. "It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination... d. For any person to take reprisals against any person because that person has opposed any practices or acts forbidden under this act or because that person has filed a complaint, testified or assisted in any proceeding under this act or to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this act."<sup>3</sup>

B. What kind of complaints are protected?

- 1. The underlying complaint must be<sup>4</sup>:
  - a. reasonable
  - b. made in good faith

C. What makes it retaliation?

- 1. Employer's action was
  - a. "materially adverse"
  - b. to a reasonable employee

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<sup>3</sup> N.J.S.A. 10:5-12d.

<sup>4</sup> Carmona v. Resorts Int'l Hotel, Inc., 189 N.J. 354 (2007).

2. A "plaintiff must show that a reasonable employee would have found the challenged action materially adverse," i.e. "it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"<sup>5</sup>

#### IV. THE CONSCIENTIOUS EMPLOYEE PROTECTION ACT ("CEPA")

##### A. An employee is protected if he or she<sup>6</sup>:

1. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer or another employer, with whom there is a business relationship, that the employee reasonably believes is
  - a. in violation of a law, or a rule or regulation promulgated pursuant to law;
  - b. fraudulent or criminal
2. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer, or another employer, with whom there is a business relationship
3. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:
  - a. (1) is in violation of a law, or a rule or regulation promulgated pursuant to law;
  - b. (2) is fraudulent or criminal; or
  - c. (3) is incompatible with a clear mandate or public policy concerning the public health, safety or welfare...

##### B. An employee must prove that<sup>7</sup>:

1. He or she reasonably believed that his or her employer's conduct was violating either a law or a rule or regulation promulgated pursuant to law;
2. He or she performed whistle-blowing activity;
3. An adverse employment action was taken against him or her; and

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<sup>5</sup> Roa v. Roa, 200 N.J. 555 (2010) (discussing Burlington Northern & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006))

<sup>6</sup> N.J.S.A. § 34:19-3.

<sup>7</sup> Kolb v. Burns, 320 N.J. Super. 467, 476 (App. Div. 1999).

4. A causal connection exists between the whistle-blowing activity and the adverse employment action.
- C. What is a reasonable belief that a law, rule or regulation was violated?
1. Public ramifications
  2. Not private disagreements
  3. Decided by the judge, not jury
- D. What is a whistle blowing activity?
1. Can be written or verbal
  2. Discloses, or threatens to disclose an activity, policy, or practice of the employer, co-worker, or another business with which the employer does business
  3. Provides information to government entity or testifies in hearing
  4. Objects to, or refuses to participate in activity, policy, or practice
- E. What is an adverse employment action?
1. Materially adverse
  2. includes "discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment"<sup>8</sup>
- F. What proves causal connection?
1. Determined on a case-by-case basis depending on all the circumstances
  2. How long was it before the adverse employment action occurred?
  3. Who knew about the whistle blowing?
  4. Who was the decision-maker?
  5. Who was implicated as a wrongdoer?

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<sup>8</sup> N.J.S.A. 34:19-2(e)