



et's talk
abor
QW

Photos by Carmen Natale/Design by Scott Rogers

● 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

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. —Steven B. Harz



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

New Jersey's protections have evolved into the broadest whistleblower protections of any state in the country. -Lawrence Sandak

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 nit-picky 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

