BLOWING THE WHISTLE ON CEPA: WHY NEW JERSEY'S CONSCIENTIOUS EMPLOYEE PROTECTION ACT HAS GONE TOO FAR

*Carolyn Dellatore**

TABLE OF CONTENTS

I. INTRODUCTION

Throughout New Jersey, employers have a reason to be wary of their workers. Historically, employers have held the power in the employer/employee relationship, absent a collective bargaining agreement or some other form of employment contract. Both the New Jersey Legislature and the courts have altered that relationship. Thanks to the Conscientious Employee Protection Act[1] (CEPA), New Jersey employers are finding themselves with few options when dealing with employees who are dissatisfied with company policies or disagree with the direction in which employers wish to lead their businesses. Instead of exercising their right to leave the job and find work with an employer more in tune with their ideals, these employees now

* J.D., 2008, Seton Hall University School of Law.

[1] Conscientious Employee Protection Act (CEPA), N.J. STAT. ANN. §§ 34:19-1 to -14 (West 2000).

have the right to sue. This is due to the New Jersey Supreme Court's broad interpretation of CEPA. If the employer takes retaliatory employment action[2] against that employee's whistleblowing, that employer may well violate CEPA.

In the United States, employment-at-will has long defined the relationship between employers and most employees in this country.[3] Under the common law, an employer had the right to terminate an employee for any reason or no reason at all,[4] regardless of whether that discharge was wholly unfair or against public policy.[5] Alternatively, employees had the right to quit their jobs without notice.[6] Over time, federal and state legislation has eroded the right of employers to discharge employees at any time for any reason.[7] Nevertheless, absent discrimination laws, a collective bargaining agreement or an employment contract, employers still largely retained the power to fire employees for any reason, good or bad, throughout most of the twentieth century.[8]

Historically, New Jersey has been at the forefront of providing legal protection not only for workers but also for those typically

---

[2] CEPA defines retaliatory action as the "discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms or conditions of employment." N.J. STAT. ANN. § 34:19-2(e). "Under this definition any reduction in an employee's compensation is considered to be an adverse . . . action . . . in terms and conditions of employment." Maimone v. City of Atlantic City, 903 A.2d 1055, 1063 (N.J. 2006) (internal citations omitted).

[3] Gabriel S. Rosenthal, Comment, *Crafting a New Means of Analysis for Wrongful Discharge Claims Based on Promises in Employee Handbooks*, 71 WASH L. REV. 1157, 1159 (1996).

[4] MARK ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW: CASES AND MATERIALS 30 (5th ed. 2003).

[5] Black's Law Dictionary defines public policy as "principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society. More narrowly, [public policy is] the principle that a person should not be allowed to do anything that would tend to injure the public at large." BLACK'S LAW DICTIONARY 1267 (8th ed. 2004).

[6] Rosenthal, *supra* note 3, at 1159.

[7] Examples of federal laws that reduce the sweeping effect of the employment-at-will doctrine include Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e (2000); the Americans with Disabilities Act, 42 U.S.C. § 12101-213 (2000); and the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 (2000). A New Jersey statutory example is the Law Against Discrimination (LAD), N.J. STAT. ANN. 10:5-1 et seq. (West 2002).

[8] Rosenthal, *supra* note 3, at 1160.

marginalized in society.[9] The employment-at-will doctrine has been significantly eroded in New Jersey in an attempt to protect workers. Beginning with the seminal case of *Pierce v. Ortho Pharmaceutical Corp.*,[10] New Jersey has applied a "public policy exception" to the employment-at-will rule. Under *Pierce*, an employee has a claim for wrongful discharge "when the discharge is contrary to a clear mandate of public policy."[11]

While whistleblower protection was a major change in the common law, New Jersey went further, codifying *Pierce* in 1986 with the Conscientious Employee Protection Act ("CEPA").[12] CEPA, which was the broadest whistleblower statute in the country when it was enacted[13] and is still one of the most expansive, protects employees from termination for refusal to violate a law or a clear mandate of public policy. The courts' interpretations of CEPA have been even broader than the plain language of the statute suggests, dramatically eroding the employment-at-will doctrine for employers.

Under CEPA, an employee is protected if he or she reports a violation of public policy, even if no violation actually exists. The employee must merely have a reasonable belief that there is such a violation.[14] This accords employees a great deal of protection when reporting possible breaches in public policy.

Additionally, the New Jersey Supreme Court has repeatedly expanded the definition of what constitutes a "clear mandate of

---

[9] "Both the New Jersey Conscientious Employee Protection Act, N.J. STAT. ANN. § 34:19-1 et seq., and the New Jersey Law Against Discrimination, N.J. STAT. ANN. § 10:5-1 et seq., provide remedies and substantive protections that go far beyond their federal analogs." Fasano v. Fed. Reserve Bank of N.Y., 457 F.3d 274, 290 (3d Cir. 2006). "Both CEPA and LAD effectuate important public policies. Each seeks to overcome the victimization of employees and to protect those who are especially vulnerable in the workplace from the improper or unlawful exercise of authority by employers." Abbamont v. Piscataway Twp. Bd. of Educ., 650 A.2d 958, 964 (N.J. 1994).

[10] Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505 (N.J. 1980).

[11] *Id.* at 512.

[12] N.J. STAT. ANN. §§ 34:19-1 to -14 (West 2000).

[13] John H. Dorsey, *Protecting Whistleblowers*, N.Y. TIMES, Nov. 2, 1986, at 34. In addition to being broad, CEPA was also unique. "The bill brings New Jersey into the forefront of this arena. Only California and Maryland and the City Counsel of Detroit have, like New Jersey, made the retaliation against conscientious employees illegal."

[14] Dzwonar v. McDevitt, 828 A.2d 893, 901 (N.J. 2003).

public policy." Employees can now seek the protection of CEPA against retaliation for merely disagreeing with an employer's policies or for assuming that an employer is directing the business in an irresponsible direction without any proof to substantiate that assumption.[15] Employees have been protected against retaliation for making false accusations about coworkers' behavior and for insubordination.[16] For example, the statute has protected an employee whose "clear mandate of public policy" was the need to clean a clogged toilet.[17]

This Note proposes that, while CEPA's public policy protection for employees serves an admirable purpose, it has been applied too broadly, at times turning the employer/employee relationship on its head.[18] Section II of this Note will examine the employment-at-will doctrine and the evolution of the wrongful discharge public policy exception. Section III will examine CEPA and its broad statutory construction, as well as the Legislature's intent when the statute was enacted. Section IV will discuss the Court's expansive interpretation of the already broad statute.

II. THE HISTORY OF THE PUBLIC POLICY EXCEPTION TO EMPLOYMENT-AT-WILL

Professor H.G. Wood was the first to proffer the concept of employment-at-will in the United States in his groundbreaking 1877 treatise.[19] Wood stated that if a worker is hired without an employment contract, "it is an indefinite hiring and is determinable at the will of either party . . . ."[20] This means that "absent an express agreement to the contrary, employment for an indefinite duration is terminable at any time and for any reason by either the employer or the employee."[21] After Wood's treatise, employment at will quickly became the dominant

---

[15] *See generally* Maimone v. City of Atlantic City, 903 A.2d 1055 (N.J. 2006).

[16] Higgins v. Pascack, 730 A.2d 327 (N.J. 1999); Gerard v. Camden County Health Serv. Ctr., 792 A.2d 494 (N.J. Super. Ct. App. Div. 2002).

[17] Hernandez v. Montville Twp. Bd. of Educ., 843 A.2d 1091 (N.J. 2004)

[18] *Maimone*, 903 A.2d at 1066–67 (Rivera-Soto, J., dissenting).

[19] H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT (1877).

[20] *Id.* at 272.

[21] Rosenthal, *supra* note 3, at 1159.

employer/employee relationship during the late nineteenth century.[22]

As it developed in the United States, employment-at-will had two key aspects.[23] The first was that the employer was free to impose any conditions of employment on the employee.[24] Second, the employer had the freedom to discharge the employee at any time for any reason,[25] and was free to affect the discharge in any manner.[26] Employees were also free to terminate their employment without providing advance notice.

In the late nineteenth century, which was characterized by rapid industrial development, courts believed that the employment-at-will doctrine would further economic growth and benefit both employers and employees.[27] According to that rationale, the benefit to employees was the ability to move freely between jobs during a period when American industry was creating new jobs daily.[28] The benefit to employers was the ability to freely terminate employees and "replace them with more highly skilled or specialized workers."[29]

In fact, the absolute right of an employer to discharge an employee, and of an employee to resign, was so deeply

---

[22] *Id.*

[23] *See* ROTHSTEIN & LIEBMAN, *supra* note 4, at 30.

[24] *See* Payne v. W. & Atl. R.R., 81 Tenn. 507 (Tenn. 1884). The employer railroad forbade its employees from trading at a store owned by the petitioner. The Supreme Court of Tennessee upheld the railroad's right to terminate its employees for reasons completely outside the scope of their employment.

[25] Clarke v. Atl. Stevedoring Co., 163 F. 423 (C.C.E.D.N.Y.1908). A group of black longshoremen were hired under the auspice that they would have jobs as long as there was work to be done. However, as soon as white longshoremen became available, the black workers were terminated. The black longshoremen argued that they had been guaranteed employment, but the District Court disagreed, and stated that outside a definitive employment contract, they could be discharged at any time.

[26] ROTHSTEIN & LIEBMAN, *supra* note 4, at 30. *See* Henry v. Pittsburgh & L.E.R. Co., 21 A. 157 (Pa. 1891). The railroad terminated one of its employees after finding accounting irregularities in his department although there was no evidence that the employee was to blame. The railroad later informed a local newspaper that the employee was terminated for dishonesty. The court held that the employee had no cause of action against the railroad.

[27] Rosenthal, *supra* note 3, at 1159.

[28] *Id.*

[29] *Id.*

entrenched in American employment law that during the *Lochner*[30] Era, the Supreme Court held that any restriction on the employer's right to terminate employment was a violation of the employer's liberty and property rights.[31]

The employment-at-will doctrine was at its peak from the nineteenth through the early twentieth centuries, when business owners dealt directly with employees.[32] Prior to the twentieth century, businesses were typically small and medium size firms, not large corporations.[33] This resulted in a clear delineation of owners/employers and employees.[34] However, the owner/employer has been replaced by a "supervisor" in the corporate ladder who is himself an employee.[35] We are now a "nation of employees."[36]

As industry evolved, so did the workers' need for additional job security.[37] Businesses changed and large corporations with multi-tiered management replaced business owners directly

---

[30] Lochner v. New York, 198 U.S. 45 (1905). *Lochner* announced that the freedom to contract was a right protected by the due process clauses of the Fifth and Fourteenth Amendments. This theme was followed over the next three decades, with the Supreme Court declaring almost 200 state laws unconstitutional as violating the due process clause of the Fourteenth Amendment. This era in judicial history is commonly referred to as the "*Lochner* Era." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 592 (2d ed. 2002).

[31] *See* Adair v. United States, 208 U.S. 161, 174–75 (1908). In *Adair*, the Supreme Court held that a federal statute forbidding an employer engaged in interstate commerce from discharging an employee solely based on union membership was unconstitutional. The Court determined that such a restriction on the right to contract was a breach of personal liberty. *See also* Clarke v. Atl. Stevedoring Co., 163 F. 423 (C.C.E.D.N.Y. 1908). In *Clarke*, the court noted that the Adair holding also allowed employers to make hiring (and firing) decisions based on race, gender and other characteristics, which are now considered impermissible employment considerations.

[32] Pierce v. Ortho Pharm. Corp., 417 A.2d 505, 509 (N.J. 1980).

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] Rosenthal, *supra* note 3, at 1160. Rosenthal explains that the concept of employment-at-will assumes that the employer and employee hold equal bargaining positions. This assumption no longer holds true. Jobs characteristic of twentieth century industry require increased specialization, which in turn requires a higher level of training and education. This narrows alternative job opportunities and decreases employee bargaining power.

supervising employees.[38] As a result, the employment-at-will doctrine evolved.[39] Employers found ways to abuse the system, discharging long-term employees days before their pensions vested, as well as terminating employees for "reporting illegal activities, refusing sexual advances, or reporting for jury duty."[40] Finally, union pressure coupled with prodigious commentary surrounding the doctrine led to the enactment of legislative reform.[41]

One of the earliest pieces of legislation was the National Labor Relations Act, which, *inter alia*, prohibits discriminatory acts committed by employers in an effort to discourage membership in unions.[42] Other state and federal statues followed.[43] Most important were federal and subsequent state statutes developed to protect employees from racism, sexism, and age discrimination.[44] Thereafter, a public policy exception for wrongful termination emerged in several states to supplement these laws. These states recognize a wrongful termination claim in several forms, ranging from tort theories to contract principles.[45]

In New Jersey, this cause of action was recognized for the first time in *Pierce v. Ortho Pharmaceutical Corp.*[46] There, the plaintiff, Dr. Grace Pierce, worked for defendant Ortho Pharmaceutical, a large

---

[38] *Pierce*, 417 A.2d at 509.

[39] *Id.*

[40] Rosenthal, *supra* note 3, at 1161.

[41] *Id.*

[42] 29 U.S.C. § 152 (2000). *See* 2 NELSON LIECHTENSTEIN, SUSAN STRASSEN & ROY ROSENWEIG, WHO BUILT AMERICA? WORKING PEOPLE AND THE NATION'S ECONOMY, POLITICS, CULTURE, AND SOCIETY 430–32 (2000). (Union support of the NLRA was far spread. For example, the United Auto Workers of America distributed a leaflet that read, in part, "The Wagner Act Is Behind You!" and actively promoted the legislation. The NLRA was often referred to as the Wagner Act because it was sponsored by Senator Robert F. Wagner, a Democrat from New York.).

[43] Rosenthal, *supra* note 3, at 1161. "Title VII of the Civil Rights Act of 1964, one of the best known legislative exceptions to employment-at-will, makes it unlawful to discharge any individual because of that individual's race, color, religion, sex or national origin. The Federal Age Discrimination in Employment Act protects persons between the ages of forty and seventy from discharge because of age. State legislatures joined in the effort to scale back employment-at-will by extending protection against discrimination in employment to other classes of workers as well."

[44] *Id. See* 42 U.S.C. § 2000e-2 (2000).

[45] Pierce v. Ortho Pharm. Corp., 417 A.2d 505, 509–11 (N.J. 1980).

[46] *Id.* at 505.

drug manufacturer.[47] Dr. Pierce opposed the development of a drug containing saccharin and voiced her concern to her supervisor.[48] In her opinion, saccharin's safety was medically debatable and she would be in violation of her Hippocratic Oath if she conducted research with it.[49] Dr. Pierce's supervisor removed her from the drug project but told her that she could choose to work on other projects.[50] Dr. Pierce viewed this as a demotion and tendered her resignation.[51] She then sued for damages, arguing that her termination was forced.[52]

The New Jersey Supreme Court held that an employee has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy.[53] Sources of a clear mandate of public policy include "legislation; administrative rules, regulations or decisions; and judicial decisions."[54] The Court held, however, that Dr. Pierce never alleged that saccharin was dangerous, but merely stated that it was controversial and that she personally did not believe it should be used.[55] The Court further noted that Ortho's research did not violate medical ethics or any statute and discerned no clear mandate of public policy that prevented Dr. Pierce from working with the substance.[56] Therefore, Dr. Pierce could not prevail on her claim because she could not prove that experiments with saccharin violated public policy. The Court determined that this was merely a case of an employee disagreeing with her employer.[57]

While the New Jersey Supreme Court did provide protection for employees, the Court was careful to note, "[e]mployees will be

---

[47] *Id.* at 506.

[48] *Id.* at 507.

[49] *Id.*

[50] *Id.*

[51] *Pierce*, 417 A.2d at 507. The trial judge barred Ortho's motion for summary judgment on the theory that Dr. Pierce was prevented from bringing a wrongful termination suit because she resigned. That determination was not challenged on appeal.

[52] *Id.* at 508.

[53] *Id.* at 512.

[54] *Id.*

[55] *Id.* at 507.

[56] *Id.* at 513.

[57] "Viewing the matter most favorably to Dr. Pierce, the controversy at Ortho involved a difference in medical opinions." *Pierce*, 417 A.2d at 513.

secure in knowing that their jobs are safe if they exercise their right in accordance with a clear mandate of public policy."[58] The Court went on to state that "employers will know that unless they act contrary to public policy, they may discharge employees at will for any reason."[59] *Pierce* made it clear that the doctrine of employment-at-will was alive and well outside the restrictions imposed on it by statutes and the new common law tort, and employers still had the right to discharge employees so long as they avoided violating those "clear mandates of public policy."

III. CODIFYING PIERCE*: THE BIRTH OF CEPA*

In 1986, CEPA was signed into law, much to the satisfaction of proponents of workers' rights, such as the AFL-CIO and the A.C.L.U.[60] The purpose of CEPA is essentially the same as the public policy exception established in *Pierce*.[61] Its goal is to protect from retaliatory discharge employees who, "believing that the public interest overrides the interest of the organization they serve, publicly 'blow the whistle' because the organization is involved in corrupt, illegal, fraudulent or harmful activity."[62] Employers were not enthusiastic about the new law because it gave employees whistle blowing protection beyond what was being offered in any other state at the time. Specifically, employers expressed concern that they were losing the right to "clean their own house."[63]

---

[58] *Id.* at 512.

[59] *Id.*

[60] Dorsey, *supra* note 13, at 34 (citing Ed Martone of the A.C.L.U. who wrote that "no person should lose his or her job for exercising the constitutional right of free speech, especially when that exercise results in the reporting of unhealthy, unsafe or illegal practices.").

[61] The Legislature chose not to preempt *Pierce* through CEPA. Therefore, an employee can choose a cause of action under either CEPA or *Pierce*. N.J. STAT. ANN. § 34:19-8 (West 2000).

[62] Mehlman v. Mobil Oil Corp., 707 A.2d 1000, 1013 (N.J. 1998) (internal citations omitted).

[63] Dorsey, *supra* note 13 at 34. *See also,* Julie Jones, *Give a Little Whistle: The Need for a More Broad Interpretation of the Whistleblower Exception to the Employment-At-Will Doctrine,* 34 TEX. TECH L. REV. 1133, 1137 (2003) (stating that "[e]mployers justify retaliating against whistleblowers as a necessity 'to enforce employee loyalty, to avoid disruptions of employee morale, to preserve internal company security and procedures, or to avoid embarrassment of the employer.'").

A. *CEPA's Language*

The statute states in pertinent part that:

> An employer shall not take any retaliatory action against an employee because the employee does any of the following: Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes: (1) is in violation of a law, or a rule or regulation promulgated pursuant to law, [. . .]; (2) is fraudulent or criminal, [. . .] or (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.[64]

The legislature chose to incorporate the "clear mandate of public policy" language from *Pierce* into the statute, leaving employees recourse even if the behavior of their employer does not rise to the level of illegality.

B. *Who Is Protected?*

In order to fall within CEPA's protection, an employee must have an objectively reasonable belief that his employer is acting illegally, fraudulently or contrary to public policy.[65] That employee must then perform a "whistle blowing" activity described in N.J.S.A. 34:19-3(c). The statute defines whistle blowing as disclosing or threatening 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 criminal, fraudulent or contrary to public policy."[66] Once the employee has "blown the whistle," a

---

[64] N.J. STAT. ANN. § 34:19-3(c) (West 2000).

[65] *Id.*

[66] *Id.* Whistle blowing is also defined as providing information to, or testifying 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, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, in the case of an employee who is a licensed or certified health care professional, provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into the quality of patient care.

violation occurs if an adverse employment action is taken against him or her and if there is a causal connection between the protected activity and the adverse employment action.[67]

C. *The Burden of Proof for the Employee*

A plaintiff employee bringing a CEPA action under § 3(c) is not required to show that a law, rule, regulation or clear mandate of public policy actually would be violated, if all the facts he or she alleges are true.[68] Instead, a plaintiff must only show that he had an objectively reasonable belief that a violation occurred.[69] The New Jersey Supreme Court has stated that in order to show an objectively reasonable belief, the employee must show a "substantial nexus between the complained-of conduct and a law or public policy identified by the court or the plaintiff."[70] If that nexus exists, the plaintiff has to prove only that he actually held such a belief.[71] The Legislature adopted this "objectively reasonable" language so that an employee would be encouraged to report questionable behavior on the part of his employer, instead of refraining from reporting violations for fear of not being protected under the statute.[72] Thus, the relaxed nature of this requirement, while grounded in the idea that an employee should not need to be an expert in the law in order to have CEPA's protection, allows employees to bring claims for retaliation for reporting only a perceived infraction by an employer.[73]

An employee may attain protection by reporting certain workplace conduct to both a public body as well as to his

---

Id. § 24:19-3(c) also states that an employee objecting to, or refusing to participate in any activity, policy or practice that the employee reasonably believes is fraudulent, criminal or a violation of public policy constitutes whistle blowing.

[67] Dzwonar v. McDevitt, 828 A.2d 893, 900 (N.J. 2003).

[68] *Id.* at 901.

[69] *Id.*

[70] *Id.*

[71] *Id.* at 901-02.

[72] Mehlman v. Mobil Oil Corp., 707 A.2d 1000, 1015–16 (N.J. 1998).

[73] Justice Stein wrote that, "Specific knowledge of the precise source of public policy is not required. The object of CEPA is not to make lawyers out of conscientious employees but rather to prevent retaliation against those employees who object to employer conduct that they reasonably believe to be unlawful or indisputably dangerous to the public health, safety or welfare." *Id.*

employer.[74] Many states that offer whistle-blowing protection to employees limit protection to workers who report an employer's wrongful behavior to an outside entity. This is often a disadvantage to an employer who would prefer to keep any unethical or irresponsible behavior out of the public's knowledge. Under CEPA, protection is triggered when an employee complains to his supervisor, thus providing wider protection for reporting employees.[75] This gives employers some time to correct the problem before an outside agency needs to become involved.

Thus, CEPA can be an asset to employers who are willing to correct problems that are brought to their attention. However, the absence of a requirement to report problems to an outside agency, coupled with the fact that claims are not limited to what is actually illegal, makes CEPA very broad. Anything that could reasonably be considered a violation of a clear mandate of public policy gives an employee protection if it is reported to a supervisor.

IV. THE NEW JERSEY COURTS' DEFINITION OF A "CLEAR MANDATE OF PUBLIC POLICY."

The New Jersey Supreme Court has defined public policy as "that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public or against the public good. The term admits of no exact definition . . . [p]ublic policy is not concerned with minutiae, but with principles."[76] The Court has also stated that, "A vague, controversial, unsettled, and otherwise problematic public policy does not constitute a clear mandate."[77] CEPA's aim of empowering employees to prevent employers from violating public policy applies only to clearly defined public policy.[78] The New Jersey Supreme Court has stated that examples of clear mandates under CEPA include federal and state constitutions, statutes, administrative rules and decisions, judicial decisions, and

---

[74] Richard A. West, *No Plaintiff Left Behind*, 28 SETON HALL LEGIS. J. 127, 142 (2003).

[75] *Id.* at 144.

[76] Schaffer v. Fed. Trust Co., 28 A.2d 75 (N.J. 1942).

[77] MacDougall v. Weichert, 677 A.2d 162, 167 (N.J. 1996).

[78] N.J. STAT. ANN. § 34:19-1 (West 2000).

professional codes of ethics.[79] These sources are not exclusive; however, they offer a helpful guide to determine what qualifies as a "clear mandate."

Pierce had a major effect on the New Jersey Supreme Court's definition of public policy under CEPA.[80] In *Pierce* the Court determined that the Hippocratic Oath that Dr. Pierce took upon becoming a doctor did not provide a clear enough guideline to protect her under a public policy cause of action. The Court in *Pierce* was careful to convey that a public policy exception to employment-at-will should be limited to clear mandates of public policy. Justice Pollock, writing for the majority, conceded that "Commentators have . . . noted that disgruntled employees may be encouraged to bring vexatious suits."[81] However, he went on to state that, "the standard enunciated [in this opinion] provides a workable means to screen cases on motions to dismiss for failure to state a cause of action or for summary judgment."[82] If an employee fails to point to a clear mandate of public policy, the court should grant a motion to dismiss or for summary judgment.[83]

Despite Justice Pollack's language, the New Jersey Supreme Court interpreted the clear mandate requirement broadly when the issue was addressed under CEPA in 1997. In *Mehlman v. Mobil Oil Corp.*,[84] the plaintiff, Dr. Myron Mehlman, was a member of Mobil's toxicology department.[85] During a business trip to Japan, Dr. Mehlman addressed a group of managers for a Japanese subsidiary of Mobil about health and environmental issues.[86] Mehlman discovered that the Japanese subsidiary was producing gasoline with benzene levels at approximately 5.7 percent.[87] It was

---

[79] Mehlman v. Mobil Oil Corp. 707 A.2d 1000, 1013 (N.J. 1998).

[80] The New Jersey Supreme Court stated in *Mehlman* that "[T]he statutory cause of action authorized by CEPA elaborates on and derives from the common law cause of action for wrongful discharge this Court first recognized in *Pierce v. Ortho Pharmaceutical Corp.* Accordingly, the case law determining the sources and characteristics of clear mandates of public policy for the purpose of applying the *Pierce* doctrine is also useful in defining the parameters of a CEPA claim." *Id.* at 1008.

[81] Pierce v. Ortho Pharm. Corp., 417 A.2d 505, 513 (N.J. 1980).

[82] *Id.*

[83] *Id.*

[84] *Mehlman*, 707 A.2d at 1000.

[85] *Id.* at 1002.

[86] *Id.* at 1003.

[87] *Id.*

(and continues to be) illegal to sell gasoline with such high benzene levels in the United States, and Mehlman believed that it was socially irresponsible to sell gas with high concentrations of benzene anywhere in the world.[88] He informed the Japanese managers that they needed to reduce the benzene levels, regardless of cost, or they could not sell the gasoline.[89] When Mehlman returned to the United States, Mobil accused him of stealing company resources for use in his wife's business.[90] He was terminated and filed a CEPA suit, arguing that he was in fact discharged for the comments he made during his trip to Japan.[91]

The Court addressed whether Mehlman's complaint concerned a clear mandate of public policy that would satisfy his burden under CEPA.[92] At trial, Mehlman stressed that it is illegal to sell gasoline in the United States with benzene concentrations greater than one percent.[93] He offered evidence that high concentrations of benzene increase the risk of leukemia[94] and he provided a 1988 Consumer Product Safety Commission regulation that required products with greater than five percent benzene concentrations to be labeled poisonous.[95] Mehlman also presented evidence that the European Economic Community prohibits sale of gasoline with greater than five percent benzene levels.[96] Significantly, Mehlman submitted that the Japanese Petroleum Association, of which the Mobil subsidiary was a member, had guidelines that limited benzene levels in gasoline to less than five percent.[97] After "[c]onsidering the totality of these proofs"[98] the

---

[88] *Id.*

[89] *Id.*

[90] *Mehlman*, 707 A.2d at 1004.

[91] *Id.*

[92] *Id.* at 1005-1007. "The critical issue at trial was whether Mehlman satisfied his burden of proof on the question whether the sale in September 1989 by Mobil in Japan of gasoline with five percent or more benzene was 'incompatible with a clear mandate of public policy concerning health, safety or welfare.'" *Id.* at 1005 (citing N.J. STAT. ANN. § 34:19-3(c)(3)).

[93] *Id.* at 1014.

[94] *Id.* at 1005.

[95] *Id.* at 1014.

[96] *Mehlman*, 707 A.2d at 1005.

[97] *Id.* at 1015.

[98] *Id.*

Court determined that prohibiting the sale of gasoline with high benzene levels was a clear mandate of public policy.

Justice O'Hern dissented in *Mehlman*.[99] The majority focused heavily on the fact that Mobil was a member of the Japanese Petroleum Association, which issued guidelines against producing gasoline with high benzene levels.[100] Justice O'Hern argued, "That Mobil agreed to abide by the policies of the Japanese Petroleum Association maybe established company policy, but it surely does not establish the public policy of the United States, the State of New Jersey, or the government of Japan."[101] Justice O'Hern noted that when Mehlman vocalized his concern about benzene levels in the gasoline, a definitive public policy against high benzene levels in gasoline was just emerging.[102] At one time France was experimenting with gasoline with benzene levels at ten percent![103] "If a New Jersey court were to determine that selling a gasoline product overseas with a benzene content in excess of five percent is against domestic public policy, the New Jersey based company would not be able to compete in the French market."[104]

In sum, Justice O'Hern posited that Dr. Mehlman was merely arguing against a decision by his employer with which he disagreed. He was not crusading against some violation of a public policy, especially not at the time he voiced his disagreement. Justice O'Hern stated that Mehlman, "just like Dr. Pierce, [. . .] disagreed with the conduct of an employer that was not clearly proscribed by then existent public policy."[105]

The dissent in *Mehlman* expressed concern that employees would have unreasonable power over their employers when they disagree with company action that falls short of a violation of

---

[99] *Id.* at 1017 (O'Hern, J., dissenting).

[100] *Id.* at 1015. The majority opinion states "[t]his specific guideline, which confirmed a broad scientific consensus undisputed by the record that gasoline with more than five percent benzene was hazardous to human health, reflected a commitment by the Japanese oil industry not to market a gasoline product acknowledged to be unsafe." *Id.* The majority considered this guideline comparable to a governmental regulatory action.

[101] *Id.* at 1019 (O'Hern, J., dissenting).

[102] *Mehlman*, 707 A.2d at 1019 (O'Hern, J., dissenting).

[103] *Id.*

[104] *Id.*

[105] *Id.*

public policy and can at best be classified as controversial.[106] "Observers perceive [the holding in *Mehlman*] will establish the principle that a scientist should not suffer retaliation on account of expressing scientific views that depart from company policy."[107] The dissent argued that the majority in *Mehlman* did not apply a definition of public policy. Instead, Justice O'Hern stated that the majority's definition of the "clear mandate" was an amalgam of non-uniform regulations that varied in different countries and in different markets. Ultimately, *Mehlman* established that a clear mandate of public policy might be something as insubstantial as regulations from a foreign association, so long as that association's guidelines coincide with the United States' position. Such policy need not be universal, which can easily create liability for a multinational corporation such as Mobil.

Two years after the *Mehlman* decision, the Supreme Court strengthened CEPA yet again in *Higgins v. Pascack Valley Hospital.*[108] Ms. Higgins worked as a part time nurse for the hospital's Mobile Intensive Care Unit.[109] Higgins reported to her supervisor on separate occasions that two of her coworkers committed infractions while on the job.[110] She claimed that both workers filed incorrect forms for a patient, and she stated that one stole prescription medication from a patient.[111] The hospital investigated each complaint, but found no evidence of employee misconduct.[112] Shortly thereafter, Higgins' coworkers went to the Mobile Intensive Care Unit supervisor and asked not to be assigned with Higgins because they felt she could not be trusted.[113] As a result, the hospital transferred Higgins to the Emergency Room. It claimed that Higgins was promised approximately the same number of hours per week and that the transfer was only temporary until her co-workers were once again willing to be

---

[106] *Id.* at 1020.

[107] *Id.*; *See* Frank Hoke, *Whistle Blower's Legal Victory Seen as Supporting Industry Scientists Who Criticize Their Employers*, THE SCIENTIST, Aug. 22, 1994 at 1, 6.

[108] Higgins v. Pascack Valley Hosp., 730 A.2d 327 (N.J. 1999).

[109] *Id.* at 329.

[110] *Id.*

[111] *Id.* at 330.

[112] *Id.* at 330–31.

[113] *Id.* at 332.

assigned to a team with her.[114] Higgins denied being given this information from the defendant.[115] She viewed her transfer as a retaliatory demotion and filed a CEPA claim.[116]

The plaintiff sought CEPA's protection from co-employees' actions rather than the employer's actions.[117] The New Jersey Supreme Court held that CEPA covered such a claim because "misconduct of a co-employee, like that of an employer, can threaten the health and safety of patients."[118] The issue, the Court determined, was whether Higgins reasonably believed that her coworkers were violating some precept of public policy, and whether her employer retaliated against her for making that belief known.[119]

As a result of Higgins' reports to her supervisor, she created an unpleasant work environment for herself and her coworkers and then filed a CEPA claim against her employer when her supervisor reassigned her in an effort to ameliorate that situation. The employer was denied the right to make management decisions in a work environment where teamwork and trust are crucial to saving lives. While there is certainly a genuine public policy reason to protect employees who report unethical or illegal behavior of their co-employees,[120] the employer was left incapacitated and unable to improve the distrustful work environment Higgins had created. CEPA, in protecting an employee who incorrectly accused coworkers of misconduct,[121] gave Higgins the power to dictate whether she could be transferred to another department, regardless of the negative effects her presence in the Mobile Unit might have caused.

In a 2002 Appellate Division decision, CEPA was again interpreted broadly. In *Gerard v. Camden County Health Services*

---

[114] *Higgins*, 730 A.2d at 332.

[115] *Id.*

[116] *Id.* at 333.

[117] *Id.* at 329.

[118] *Id.* at 336.

[119] *Id.* at 338.

[120] *Higgins*, 730 A.2d at 336. The Court explained "a paramedic's theft of patient medication, whether or not condoned by the hospital, could undermine public health. Sometimes, moreover, only an employee can bring a co-employee's wrongdoing to the attention of the employer of a public agency." *Id.*

[121] West, *supra* note 74, at 147.

Center,[122] Gerard, an assistant director of nursing at a long-term care facility, claimed that after failing to follow a hospital administrator's request to serve disciplinary charges upon another nurse, the employer retaliated against Gerard.[123] The other nurse, Georgiana Young, was Gerard's friend. When she was told to serve the charges, she chose to investigate whether they were true before carrying out her supervisor's directive.[124] Gerard determined that the charges were erroneous, and were intended as a response to Young filing a complaint about yet another nurse, who was a friend of the hospital administrator.[125] Gerard further determined that administering the disciplinary charges would be unjust and refused. She was subsequently suspended several times and was eventually terminated.[126] The Appellate Division stated that main issue in Gerard's case was "whether a fact finder could reasonably conclude that [the employer's] conduct, to which the plaintiff was objecting, could objectively reasonably have been believed by plaintiff to be so volatile and that that was what she was objecting to."[127]

Admittedly, the employer's behavior against Young was unscrupulous, and Young would have had a strong CEPA claim against the Health Services Center if she chose to sue. However, there would have been no adverse impact on Gerard if she had followed her employer's directive. Instead, she chose to involve herself in the dispute between Young and the Health Center.

Gerard's objection to her employer's behavior was that having disciplinary action taken against her for what she believed were false charges was violating her co-worker's rights.[128] "[S]he {the plaintiff} 'just knew this was not right.' She thought it might be a violation of Young's 'Civil Service rights.'"[129] Gerard was very clear that she did not believe that she was being asked to do anything criminal. She believed that her employer was acting in an unjust

---

[118] Gerard v. Camden County Health Serv. Ctr., 792 A.2d 494 (N.J. Super. Ct. App. Div. 2002).

[123] *Id.* at 495–96.

[124] *Id.*

[125] *Id.* at 496.

[126] *Id.* at 496, n. 3.

[127] *Id.* at 498.

[128] *Gerard*, 792 A.2d at 498.

[129] *Id.*

and unfair manner, and she refused to take part. Gerard's CEPA claim rested on the fact that "[p]unishing Young for attempting to protect the patients cannot be consistent with good patient care."[130] The Appellate Court ruled that CEPA protects an employee challenging the treatment of a co-worker,[131] further increasing the potential liability of an employer.

In 2004, the New Jersey Supreme Court went even further in defining "a clear mandate of public policy" in *Hernandez v. Montville Township Board of Education.*[132] Hernandez was a custodian for two of the township's elementary schools when he noticed a clogged toilet in one of the school's bathrooms and also became aware of a burned-out light bulb in an exit sign.[133] He complained to several of his immediate supervisors and attempted to contact the Superintendent over the matter.[134] After making these complaints, Hernandez claimed that he began to get memoranda criticizing his work performance, specifically accusing him of having lengthy phone conversation while on duty, being late to work, and not following the chain of command.[135] When Hernandez was suspended and eventually terminated, he filed a CEPA claim, arguing that his whistleblowing about the clogged toilet and the broken exit sign led to a retaliatory discharge.[136]

At the trial level, the Judge entered a judgment notwithstanding the verdict order after the jury returned with a verdict favorable for Hernandez,[137] stating "[i]f there's a public policy involved here about clogged toilets, it is trivialization beyond belief."[138] The New Jersey Supreme Court disagreed,

---

[130] *Id.* at 499.

[131] West, *supra* note 74, at 148.

[132] Hernandez v. Montville Twp. Bd. of Educ., 843 A.2d 1091 (N.J. 2004).

[133] Hernandez v. Montville Twp. Bd. of Educ., 808 A.2d 128, 130 (N.J. Super. Ct. App. Div. 2002).

[134] *Id.* at 130–31.

[135] *Id.* at 131.

[136] *Id.*

[137] *Id.* at 132.

[138] *Id.* The trial judge was astounded by the jury verdict and regretted ever allowing the case to go to trial. The judge stated, "I should have made the determination right at the time, before the trial even started, but I didn't know what the facts were." The judge went on to expound, "I have never seen anything like it. And that's supposed to support a CEPA claim? And he, himself, admitted that he

holding that Hernandez's complaint about the toilet and the exit sign rose to a violation of a clear mandate of public policy. In a 4-3 decision, the majority held that Hernandez met CEPA's criteria because he reasonably believed that the unsanitary bathroom and the burned out exit sign were violations of health and safety rules. The Court found ample evidence to support the jury's finding that his discharge was retaliatory and causally connected to his health and safety complaints.

The dissent, written by Justice LaVecchia and joined by Chief Justice Poritz and Justice Verniero, argued that "Idiosyncratic responses by other employees to occasional operational problems do not constitute the type of 'activity, policy or practice' actionable under CEPA."[139] CEPA § 3(a) states that retaliation against an employee who takes action with respect to an employer's "activity, policy or practice"[140] that the employee reasonably believes is contrary to law, rule, or regulation, is prohibited.[141] Justice LaVecchia argued that the words "activity, policy or practice" connote ongoing conduct. Hernandez's complaint about the custodial staff's failure to fix the backed-up toilet and the exit sign was not a complaint about an ongoing policy or practice.[142] The dissent viewed Hernandez's dissatisfaction with the speed with which the toilet and exit sign were fixed as not rising to the level of a CEPA claim.[143] The Board of Education and Hernandez's supervisors simply did not address the problem that Hernandez had identified as quickly as he would have liked,[144] and as a result, Hernandez was protected from any demotion or discharge under CEPA that was considered retaliatory. Here, the New Jersey Supreme Court appeared to abandon its dictum in *Pierce* that "[i]f an employee does not point to a clear expression of public policy, the court can grant a motion

---

never explained to anyone what it was exactly that he was complaining about." *Id.* at 131.

[139] Hernandez v. Montville Twp. Bd. of Educ., 843 A.2d 1091, 1093 (N.J. 2004) (LaVecchia, J., dissenting).

[140] N.J. STAT. ANN. § 34:19-3(a) (West 2000).

[141] *Hernandez*, 843 A.2d at 1092.

[142] *Id.* at 1092–93.

[143] *Id.* at 1093.

[144] *Id.*

to dismiss or for summary judgment."[145] If Hernandez had complaints about a chronic sanitation problem at the school, there could have been a potential injury to the public. However, because he based his claim largely on the "idiosyncratic responses" of his supervisors to the problem, at most his complaint highlighted an unsightly and unpleasant temporary circumstance at his place of employment. Under CEPA, "the offensive activity must pose a threat to public harm, not merely private harm or harm only to the aggrieved employee."[146] Here, Hernandez merely found the unsightly toilet bothersome.

"A clear mandate of public policy suggests an analog to a constitutional provision, statute, and rule or regulation promulgated pursuant to law such that, under Section 3c(3),[147] there should be a high degree of public certitude in respect of acceptable versus unacceptable conduct."[148] Hernandez did not allow the issues he perceived to raise to the level of unacceptable conduct. This case extends the public policy definition under CEPA so far that employees appear to have endless options as to what they can assert as violations of a clear mandate of public policy. This potentially places a significant burden not only on employers, but also on the courts. In such a case where the claim in so debatable, the Court should strike it down.

Recently, the New Jersey Supreme Court addressed CEPA's public policy definition in its *Maimone v. City of Atlantic City* decision.[149] Maimone, an Atlantic City police detective, had been in charge of conducting prostitution investigations since 1991.[150] In

---

[145] Pierce v. Ortho Pharm. Corp., 417 A.2d 505, 513 (N.J. 1980).

[146] Maw v. Advanced Clinical Communications, Inc., 846 A.2d 604, 608 (N.J. 2004), *citing* Mehlman v. Mobil Oil Corp., 707 A.2d 1000, 1012–13 (N.J. 1998). Holding that an employer requiring employees to sign a non-competition agreement did not fall under CEPA because it concerned a private dispute between the employer and the employee.

[147] N.J. STAT. ANN. § 34:19-3(c)(3) (West 2000). An employer shall not take any retaliatory action against an employee because the employee does any of the following: "Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes: . . . (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment." *Id.*

[148] *Maw*, 846 A.2d at 607.

[149] Maimone v. City of Atlantic City, 903 A.2d 1055 (N.J. 2006).

[150] *Id.* at 1057.

May of 2000, Maimone's Captain instructed him to not begin any new investigations unless the case "directly impacted the citizens of Atlantic City."[151] Soon thereafter, Maimone's direct supervisor told him to abandon all pending prostitution investigations and to focus solely on narcotics investigations.[152] All of Maimone's files on past prostitution cases were moved from their usual filing area and were made unavailable to him.[153] Maimone sent a memorandum to his immediate supervisor, requesting that he once again be granted access to the files. The supervisor ignored his request.[154] Later, Maimone asked that the Police Office formally request that the City revoke the license of a sexually-orientated business operating within 1000 feet of a school.[155] After making this request, Maimone received a reassignment to patrol work, which resulted in a three percent salary reduction. Maimone filed a CEPA claim,[156] arguing that the transfer was retaliatory.

The New Jersey Supreme Court stated that for Maimone to prevail on a CEPA claim under N.J. Stat. Ann. § 34:19-3(c)(3), he must prove that he had an objectively reasonable belief that the City's decision to restrict policing prostitution violated public policy with respect to the public health, safety or welfare. Maimone carried this burden by demonstrating a substantial nexus between the public policy factors he identified and the lack of law enforcement against prostitution and the criminal code.[157]

---

[151] *Id.*

[152] *Id.* at 1057–58.

[153] *Id.* at 1058.

[154] *Id.*

[155] *Maimone*, 903 A.2d at 1058–59. License revocation was the primary means of curbing sexually orientated business, as opposed to enforcement through the criminal code. The sexually orientated business Maimone complained of violated N.J. STAT. ANN. § 2C:34-7, which renders it a fourth-degree offense to operate such a business within 1000 feet of a school or church.

[156] Specifically, Maimone filed suit under subsection (3) of N.J. STAT. ANN. § 34:19-3(c), which states that an employer shall not take any retaliatory action against an employee because the employee objects to a policy or practice which the employee reasonably believes is "incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment."

[157] *Maimone*, 903 A.2d at 1062. Maimone was required to pass the test created in *Dzwonar v. McDevitt*, which sets out the following factors:

> A plaintiff who brings a cause of action pursuant to N.J. Stat. Ann. § 34:19-3c must demonstrate that: (1) he or she reasonably believed that his or her employer's conduct was violating either a law, rule, or regulation

The Court stated that if Maimone could prove that he reasonably believed that the City's apparent abandonment of prosecuting prostitution claims breached a clear mandate of public policy, he would then be protected from retaliation.

The majority determined that Maimone met his burden.[158] Since Maimone was the only detective working prostitution cases, he could reasonably infer that the City was abandoning all prostitution investigations when he was relieved of his assignments.[159] The trier of fact could find that ceasing to prosecute prostitution offenders was "incompatible with a clear mandate of public policy concerning the public health, safety and welfare."[160] Maimone, therefore, having limited information, met his burden by telling his supervisors that he disagreed with being taken off his usual assignments, and then subsequently proving "by inferences" to the trier of fact that his transfer was related to this whistle blowing activity.[161]

Here, the Court once again made CEPA's definition of a clear mandate of public policy extremely broad and restricted the police department's ability to transfer an employee after a change in policy. Certainly, preventing prostitution and zoning sexually orientated businesses away from schools are deeply rooted in public policy. In fact, a recent *New York Times* article referred to the *Maimone* decision when it discussed the recent string of prostitute murders in Atlantic City.[162] The case is considered an

---

> promulgated pursuant to law, or a clear mandate of public policy; (2) he or she performed a "whistle-blowing" activity described in N.J. Stat. Ann. § 34:19-3c; (3) an adverse employment action was taken against him or her; and (4) a causal connection exists between the whistle-blowing activity and the adverse employment action.

822 A.2d 893, 900 (N.J. 2003), *quoting* Kolb v. Burns, 727 A.2d 525, 530 (N.J. Super. Ct. App. Div. 1999). The trial court determined that Maimone's complaint about the municipality's failure to enforce the anti-prostitution laws was "simply a disagreement with a discretionary decision of supervisory police officials regarding the allocation of police personnel and resources." *Maimone*, 903 A.2d at 1060. The Appellate Division reversed. *Id.*

[158] *Maimone*, 903 A.2d at 1062.

[159] *Id.* at 1062–63.

[160] *Id.* at 1063.

[161] *Id.* at 1064–65.

[162] David Kocieniewski & Serge F. Kovaleski, *In Glittery Atlantic City, 4 Walked Dark, Deadly Path*, N.Y. TIMES, Dec. 5, 2006, at A1. On November 20, 2006, four women were found in a drainage ditch in Egg Harbor, outside of Atlantic City. All four

example of Atlantic City's "laissez fair attitude toward prostitution."[163] The safety of the women who work the streets, as well as the general public, is greatly compromised when there is no anti-prostitution law enforcement. The majority stated that, because Maimone did not know the City's intention when he was removed from his prostitution cases, he was justified in expressing his concern about the City's dedication to enforcing anti-prostitution laws.[164]

Justice Rivera-Soto argued in his dissent that this interpretation of CEPA "turns the basis of the employer/employee relationship on its head."[165] The opinion states that, if an employer makes a policy decision that may appear to be contrary to public policy, and an employee, having very limited information, expresses concern to the employer about that decision, that employee is now protected under CEPA from resulting discharge or demotion.[166] The employee need only satisfy his burden by showing that there was a causal connection between his expressed concern and his demotion/discharge. Justice Rivera-Soto explained, "in order to avoid a potential CEPA lawsuit, an employer must explain every discretionary decision to the satisfaction of every line employee."[167] Citing the trial court's opinion, Justice Rivera-Soto posited that the majority's holding gives police officers the ability to question what cases the police department pursues, as well as how aggressively it pursues them and with what resources it elects to pursue them with.[168]

Maimone was protected from a transfer that could be construed as a demotion because he expressed concern that prostitution cases would not receive adequate attention. Perhaps the Atlantic City police department did allow its anti-prostitution enforcement to become dangerously relaxed. However, Maimone should not be protected from being transferred to another department simply because he questioned the wisdom of the

---

women were prostitutes who made their living in Atlantic City. Police are currently investigating the homicides.

163 *Id.*

164 *Maimone*, 903 A.2d at 1063.

165 *Id.* at 1068 (Rivera-Soto, J., dissenting).

166 *Id.* at 1067.

167 *Id.* at 1068.

168 *Id.* at 1067 (Rivera-Soto, J., citing the trial court).

decision to remove him from his prostitution detail. The purpose of CEPA was not to alter the hierarchy between management and employees, and the *Maimone* decision upsets that hierarchy. Employers may be forced to include employees in decisions that should traditionally fall squarely on management's shoulders in order to avoid liability under CEPA.

V. CONCLUSION

CEPA was enacted to protect employees who blow the whistle on illegal or unethical activity committed by their employers or coworkers. Whistle blower protection is certainly necessary not only to protect workers from unscrupulous employers but also to shield the public from harm. Transgressions committed by an employer may be all but impossible to detect from outside the business and may pose significant risks to the community. Because CEPA's purpose is to protect employees who report illegal or unethical work-place activities, CEPA has always been considered remedial legislation. The courts have used CEPA to encourage all types of employee complaints.

CEPA's benefits are clear. Employees who exercise their societal responsibility by refusing to engage in illegal or socially irresponsible behavior should be protected from adverse employment action. Likewise, protecting employees who report unethical behavior on the part of their employer protects the public at large.

As the *Mehlman*, *Hernandez*, and *Maimone* cases illustrate, however, the New Jersey Supreme Court has expanded CEPA to address employee complaints that arguably do not approach the level of public policy defined in *Pierce*. CEPA has grown from a statute that protects employees into an opportunity for employees to step into the employer's shoes. The New Jersey Supreme Court should stop interpreting CEPA's language so broadly so that the purpose of the statute is once again clear. If an employer is not acting illegally or against public policy, then an employee should not have CEPA protection. The New Jersey courts have interpreted CEPA's clear mandate of public policy language so broadly that many employees, with arguably trivial concerns, are protected. An employer has the right to manage his business the

way he sees fit, so long as he does not violate any laws. The *Mehlman* and *Maimone* decisions hinder that right.

Thanks to the employment-at-will doctrine, an employee not under contract has the power to leave his job. In *Pierce*, which was the precursor for CEPA, the Court was clear in noting that "employers will know that unless they act contrary to public policy, they may discharge employees at will for any reason."[169] The Court has since deviated from this assurance by defining public policy so broadly that employers' right to discharge is now difficult to define.

CEPA should be interpreted for what it is—protection for employees who are genuinely concerned about their employer's behavior. The statute should not be used as a means to hinder an employer's ability to manage employees or to lead the business in a direction that an employee might not agree with.

[169] Pierce v. Ortho Pharm. Corp., 417 A.2d 505 (N.J. 1980).