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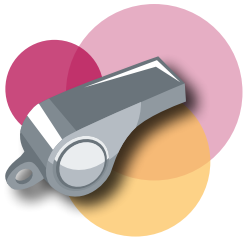

Workplace Whistleblower

New Jersey Court Affirms $192,000 Fee Award Against Whistleblower Plaintiff

By Ada W. Dolph and Robert T. Szyba

Earlier this week, employers in the Garden State saw another glimmer of hope for defending against frivolous claims brought under New Jersey's whistleblower statute, the Conscientious Employee Protection Act ("CEPA"), N.J.S.A. 34:19-1 et seq. As you may recall, much of our CEPA reporting lately has focused on recent court decisions affirming the expansive whistleblower protections under CEPA. (See one recent blog article here). However, on Monday, in *Fulton v. Sunhillo Corp.*, No. A-3950-13T2 (N.J. Super. Ct. App. Div., filed July 20, 2015), New Jersey's Appellate Division upheld an award of $191,652 in attorneys' fees against the plaintiff, holding that the award was justified given the "frivolous" and "harassing" nature of the plaintiff's CEPA (and other) claims and litigation.

The plaintiff, Ronald Fulton, had been employed as Director of Business Development for Sunhillo Corporation since December 2007, a position that he explained later in deposition entailed developing new business for the company, which designs and manufactures data-communications products for the aviation industry. Consistent with his role, his compensation was partly based on commissions for sales to new customers. As he conceded during his deposition, however, he generated no new business in 2008 or 2009, and was laid off in September 2009.

Within a month of his termination, in October 2009, Fulton filed his first case (of two), representing himself *pro se*, against the employer in New Jersey Superior Court in Camden County, alleging that his employment was terminated because he was a whistleblower, and seeking $5 million in damages. He accused the company and several executives of unlawful sales and business dealings with China and Thailand, and of an "unethical and illegal plan" to bribe foreign government officials. In the complaint filed with the court, he detailed the objections he made while employed to the conduct he identified as unlawful, including the company's response: hiring outside counsel, at Fulton's suggestion, to conduct an investigation and audit. During the litigation, the plaintiff filed amended pleadings and discovery entailed "substantial and highly-contested motion practice," which included motions regarding the plaintiff's use and disclosure of the employer's attorney-client communications and legal advice from the outside counsel who performed the investigation.

In the end, the trial court granted the company's motion for summary judgment, finding that the plaintiff could not establish a CEPA violation because he could not connect the termination of his employment to his purported whistleblowing activity. The court noted that the company had taken a variety of affirmative steps to address the plaintiff's concerns, and that other employees who raised similar concerns (including an employee that the plaintiff conceded was the known driving force behind the alleged whistleblowing) remained employed. The court also found that the plaintiff proffered no evidence that the company's reason for the termination—the plaintiff's failure to generate any new sales in 2008 and 2009—was a pretext for retaliating against him. The timing of the two events, by itself, was not enough.

Over the course of two appeals (the first in 2013) and the trial court's determination based on an evidentiary hearing, the Court found the plaintiff's claims were frivolous, and that the plaintiff's conduct during the litigation revealed "harassing, if not outright extortive[,] motivation" and awarded fees under the New Jersey Frivolous Litigation Statute, N.J.S.A. 2A:15-59.1, and Court Rule 1:4-8 (the state court rule addressing frivolous litigation). The Court noted that this was the third time the plaintiff sued a former employer with a similar theory and was unable to explain several non-CEPA claims even though he persisted in pursuing them. Further, the plaintiff admitted during his deposition that despite having no supporting facts, he nevertheless pursued a claim that the company breached a covenant of good faith and fair dealing, and initially misrepresented that his employment was not "at will," forcing litigation over the issue. The Court also found that his settlement demand of $5 million had no relation to any actual damages and indicated the plaintiff's intention to harass the company. Even when asked by the trial court to provide a factual basis for his allegations of judicial bias and misconduct—allegations which the plaintiff argued led to the dismissal of his case and the award of counsel fees—the plaintiff refused.

With the $191,652 award affirmed, the trial court is tasked with determining how much more the plaintiff will be ordered to pay for the two trips to the Appellate Division in this frivolous lawsuit. While perhaps an unusual ruling, *Fulton* makes clear that litigants seeking to exploit CEPA's expansive protections to harass and extort former employers can be ordered to reimburse the company for defending claims that are frivolous and brought in bad faith.

Ada W. Dolph is Co-Lead of Seyfarth's National Whistleblower Team and a partner in the firm's Chicago office. Robert T. Szyba is an associate in the firm's New York office and is a member of both the National Whistleblower Team and the New Jersey practice group. If you would like further information, please contact a member of the Whistleblower Team, your Seyfarth Shaw LLP attorney, Ada W. Dolph at adolph@seyfarth.com, or Robert T. Szyba at rszyba@seyfarth.com.

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