Does "Blowing the Whistle" Include Reporting On Workplace Problems As Part of an Employee's Everyday Duties?

Kevin J. O'Connor*

A recent unpublished Appellate Division decision, White v. Starbucks Corp., 2011 WL 6111882 (Dec. 9, 2011), provides a textbook example of how New Jersey's whistleblower statute, the Conscientious Employee Protection Act, N.J.S.A. § 34:19-1 to -8 ("CEPA"), is being used by employees to sue under circumstances far broader than ever was contemplated by the Legislature in passing the act. The White case addresses a critical issue: if an employee/manager is tasked with ensuring workplace safety, and writes up complaints to upper managers about workplace safety issues and hazards as part of her job responsibilities rather than to object to illegal or dangerous employer practices, can the employee claim down the road (after she is fired), that she was previously "blowing the whistle" on illegal activities?

The Appellate Division ruled that she cannot, and affirmed the dismissal of the employee's complaint, although the employee is now seeking review by the New Jersey Supreme Court.

The employee in White wrote up emails and reports to management as part of her duties as a district manager of Starbucks, tasked with overseeing a number of stores in its Mid-Atlantic Region. She claims to have documented a wide variety of quality and safety issues, such as theft within the stores, alcohol use, "sex parties" after hours, and the failure to observe safe handling of food. She was terminated by Starbucks for poor performance less than a year before she started. After being fired, she went to the police

and made formal complaints of the alleged theft of items in the stores and of the alleged "sex parties" and pornography in one of the stores.

The Appellate Division's decision in White makes clear that at no time during her employment and prior to her firing did the employee engage in "whistleblowing activities" within the type described in the Act and governing case law. If this employee's actions could be construed as whistleblowing activity, it would have the net effect of creating an issue of fact for any case in which an employee merely documents unsafe or illegal activities in the workplace and is terminated in close proximity to such documentation. Time will tell if the New Jersey Supreme Court will hear the appeal and address the issue.

*O'Connor is a partner with Peckar & Abramson, PC, who focuses his practice on employment and construction law. The views expressed herein are those of the author and not necessarily those of the law firm Peckar & Abramson, PC.