For Whom, What, and Where the Whistle Blows: Exploring the Impact of *Gaughan v. Deptford* on the Scope of N.J.S.A. 34:19-3(c)

by Kathryn Kyle Forman

An interesting distinction appears among the three subsections of the New Jersey Conscientious Employee Protection Act (CEPA), set forth at N.J.S.A. 34:19-3. CEPA generally prohibits employers from taking an adverse employment action against employees who engage in protected activity as defined by the statute. Subsection (a) shields an employee who "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..." violates a law, rule or regulation or is fraudulent or criminal.[1] Subsection (c), however, offers the statutory protection to an employee who "objects to, or refuses to participate in *any activity, policy or practice* which the employee reasonably believes..." violates a law, rule or regulation or is fraudulent or criminal, or is incompatible with a clear mandate of public policy concerning the public health, safety, welfare, or protection of the environment.[2]

Seemingly, the language of subsection (c) can be read to protect an employee who objects to any illegal activity, regardless of the activity's relationship to the employer.[3] Although the Legislature certainly intended for CEPA's reach to be broad, New Jersey courts have cautioned that it is not boundless.[4] Recently, in *Gaughan v. Deptford Township Municipal Utilities Authority*,[5] the Appellate Division appears to have established a requirement for demonstrating a nexus between the employer and the complained-of conduct for the complaining employee to receive statutory protection.

Gaughan v. Deptford

The facts of *Gaughan* are somewhat convoluted. The matter involved a group of employees of the Deptford Municipal Utilities Authority (DMUA), and the key players in addition to the plaintiff, William Gaughan, were an employee named B.N.; an employee named S.F.; the executive director (R.H.); the superintendent (E.D.); and S.F.'s father, P.F., who was not an employee of the DMUA.[6] B.N. had a history of disciplinary issues dating back to 2008, and had been involved in a workplace altercation with S.F. in July 2014. During this incident, B.N. allegedly challenged S.F. to a fight, and R.H. separated B.N. and S.F.[7] Approximately two months later, B.N. reported to the police that P.F. had punched B.N. while B.N. was sitting in a DMUA vehicle.[8] When the police went to interview P.F., P.F. told the police that he had gone to B.N.'s house in July or August to attempt to resolve the ongoing dispute between B.N. and S.F., and B.N. had put a gun to his head and threatened his life.[9] P.F. did not report this alleged incident to the police at the time he claims it happened.[10] Law enforcement did not find probable cause to charge B.N. with criminal activity, but did charge P.F. with unlawfully entering B.N.'s home.[11]

Gaughan[12] was interviewed by the police in connection with this series of events and told the police that B.N. had anger issues, and that he wanted B.N. removed from the workplace because he feared for his own life.[13] In Sept. 2014, the union contacted R.H. and told him that Gaughan, S.F., and another employee (R.M.) had reported that they were fearful of B.N.'s conduct at work.[14]

When R.H. interviewed Gaughan, Gaughan refused to answer questions, threw a press clipping about workplace violence on the table, and accused R.H. of "sitting on [his] hands like a little faggot."[15] Two days later, Gaughan walked off the job, stating he was leaving due to B.N.-related safety concerns.[16]

DMUA's labor counsel later found that the complaints about B.N. were unfounded, and that Gaughan, S.F., and R.M. had filed complaints regarding B.N.'s conduct that "they knew or should have known to be exaggerated or false."[17] Gaughan was charged with conduct unbecom-

ing, insubordination, violation of the DMUA's collective negotiation agreement, and violation of DMUA standards.[18] A hearing officer sustained all the charges and found that Gaughan walked off the job for no reason and made derogatory and offensive comments to R.H. In light of two prior disciplinary issues, Gaughan was issued a 10-day suspension.[19]

Gaughan sued DMUA and alleged it suspended him in retaliation for complaining about B.N.'s illegal activity. The Appellate Division upheld the trial court's grant of summary judgment in favor of DMUA. The issues on appeal were whether Gaughan's claim met the first and fourth elements necessary to establish a *prima facie* CEPA claim; whether Gaughan "reasonably believed that his employer's conduct was in violation of a law, rule, or clear mandate of public policy;" and whether "his whistle-blowing activity was causally connected to" his suspension.[20]

A Nexus between the Conduct and the Employer

In reaching its decision, the court could have relied upon any one of several reasons to affirm summary judgment. First, to the extent that Gaughan alleged he blew the whistle on conduct that violated public policy, the court found that Gaughan failed to identify a clear mandate of public policy in his objection to his employer's response to B.N.'s alleged conduct, and relied instead on DMUA's internal policies and procedures, which cannot support the reasonable belief required to establish a CEPA case.[21] The court also noted that a jury would be unlikely to find that Gaughan reasonably believed that B.N. had engaged in criminal activity by threatening P.F. with a gun because Gaughan did not witness the incident, relied only upon what P.F. told him, and the police did not find probable cause to charge B.N. with a crime.[22] Perhaps most importantly, the court also found that Gaughan's report of B.N.'s conduct was exaggerated or false.[23] This lack of good faith certainly could and should have divested Gaughan of any protection to which he would otherwise have been entitled under CEPA. Furthermore, with respect to the element of causation, the court held that Gaughan's undisputed conduct of leaving work without being excused and calling R.H. a derogatory name established a legitimate, non-retaliatory basis for Gaughan's suspension, and Gaughan could not present evidence that such a basis was pretextual.[24]

The *Gaughan* court further articulated a holding that requires a whistleblowing employee to establish a nexus between the employer and the complained of conduct that goes beyond the mere fact that an employee of the employer engaged in the conduct. In deciding that Gaughan did not establish a reasonable belief to support a *prima facie* case, the court expressly referenced Gaughan's failure "to cite to any authority that holds he may assert a cognizable CEPA claim by reporting a co-employee's off-duty unlawful conduct that does not involve another co-employee, workplace activity or the employer's business."[25]

Gaughan's Application

Although the *Gaughan* court did not provide guidance on the practical application of its holding, it makes sense to read *Gaughan* in connection with the New Jersey Supreme Court's decision in *Blakey v. Continental Airlines*.[26] In *Blakey*, in the context of harassing conduct implicating the New Jersey Law Against Discrimination (NJLAD), the Court distinguished between private communications of employees and those that permeate the work environment, cautioning that although "employers do not have a duty to monitor private communications of their employees; employers do have a duty to take effective measures to stop co-employee harassment when the employer knows or has reason to know that such harassment is part of a pattern of harassment that is taking place in the workplace and in settings that are related to the workplace."[27]

In the context of the Supreme Court's holding in *Blakey*, the *Gaughan* decision can be understood to require that an employee is not shielded by CEPA when the employee objects to the conduct of a co-worker that, although unlawful, is generally private in nature, and neither takes place in the workplace nor in workplace-related settings, nor involves other employees, nor the employer's business. Examples of such private unlawful conduct could, in theory, include an employee's involvement in a domestic altercation or drug-related activity while off duty. However, neither *Gaughan* nor *Blakey* create a bright-line rule: Objecting to a domestic altercation that victimizes a co-worker or takes place at a work-related event, or to drug-related activity that involves co-workers or takes place in an environment connected with the workplace would still likely be fair game for CEPA protection under *Gaughan*'s holding.

A prudent application of *Gaughan* would be a fact-

sensitive test that evaluates the relationship between the alleged unlawful conduct and the employer based on the totality of the circumstances, taking into consideration the extent to which the complained of conduct: 1) occurred in the workplace; 2) occurred in a setting related to the workplace or in connection with an activity related to the workplace; 3) directly involved one or more of the employer's employees; and 4) utilized the resources of the employer's business. Such a test would arguably further the purpose and intent of CEPA without improperly expanding its scope.

Gaughan's Implications

The *Gaughan* holding does not reflect a zero sum game. While it may be a boost for employers, it is not likely to result in a big loss for workers. In the author's view, it simply reflects a common sense approach to CEPA, which was drafted specifically to target retaliation against whistleblowers who object to or report an employer's unlawful activity.

From a practical standpoint, the *Gaughan* decision may be most useful to support employers in situations similar to the one faced by the DMUA, where an adverse action against an employee is necessary, but the employee attempts to leverage his or her past objection to a co-worker's private unlawful conduct to allege that the action is retaliatory. In that vein, proper application of the *Gaughan* decision may also dissuade employees from relying on CEPA in furtherance of their own personal agendas, attempting to use the statute as a shield as they 'dig up dirt' regarding their colleagues and bring that dirt into the office under the guise of objecting to unlawful activity.

The author believes the *Gaughan* decision should not be viewed as a limitation of the rights bestowed upon employees by CEPA; instead it should be viewed as a reasonable measure by the Appellate Division to prevent an expansion of CEPA that would contravene the legislative intent and existing interpreting authority. ■

Kathryn Kyle Forman is an associate of Porzio, Bromberg & Newman, P.C. in Morristown.

Endnotes

1. N.J.S.A. 34:19-3(a).
2. N.J.S.A. 34:19-3(c).
3. *Id.*
4. *See, e.g.*, *Klein v. Univ. of Med. & Dentistry of N.J.*, 377 N.J. Super. 28, 45 (App. Div. 2005).
5. *Gaughan v. Deptford Twp. Mun. Utils. Auth.*, No. A-5044016T3, 2018 WL 6816090 (App. Div. Dec. 15, 2018).
6. *Gaughan*, 2018 WL 6816090, at *3.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at *4.
12. The court's decision does not set forth why the police elected to interview Gaughan in connection with this incident.
13. *Gaughan*, 2018 WL 6816090 at *4.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 4-5.
18. S.F. and R.M. were also disciplined for having made false or exaggerated complaints regarding workplace violence. *Gaughan*, 2018 WL 6816090, at *5, n.2.
19. *Id.*
20. *Id.* at 7-8.
21. *Id.* at 8-9 (*citing Young v. Schering Corp.*, 275 N.J. Super. 221, 234 (App. Div. 1994)).
22. *Id.* at 11.
23. *Id.* at 5.
24. *Id.* at 12.
25. *Id.* at 11.
26. *Blakey v. Cont'l Airlines*, 164 N.J. 38 (2000).
27. *Id.* at 62.