

## NJ High Court Poised To Clarify Whistleblower Protections

By **Martin Bricketto**

*Law360, New York (April 11, 2013, 9:31 PM ET)* -- A case set for oral arguments before the New Jersey Supreme Court next week in which a UPS Inc. supervisor is accusing the shipping giant of illegal retaliation could be a launching pad for the justices to provide broad new guidance on protected activity under the state's powerful whistleblower law.

Claiming violations of the state's Conscientious Employee Protection Act and Law Against Discrimination, Michael Battaglia contends UPS demoted him for voicing various complaints detailing the purportedly poor performance of a division he once oversaw, the abuse of company credit cards and lunch breaks, and his manager's use of crude language to refer to female employees.

With arguments scheduled for Wednesday afternoon, attorneys seem particularly eager to see where justices draw the line between internal company issues and illegal or fraudulent conduct that could spawn CEPA-shielded whistleblowing.

"If the court wants to, it really can define, in the context of six or seven specific factual allegations, the type of conduct that is protected by these statutes, and the type of conduct that is not protected by either or both," said Thomas A. Linthorst of Morgan Lewis & Bockius LLP.

Preserving a jury determination that Battaglia's demotion was retaliatory conduct under the law, the state's Appellate Division said in 2011 that his CEPA claim was comparable to the case of *Estate of Roach v. TRW Inc.* In that dispute, a former employee of a defense contractor claimed he had been fired for pursuing claims that another worker had submitted false expense reports and time cards, hid conflicts of interest, and misused company property. Like UPS, TRW had a code of conduct that encouraged employees to report unethical behavior.

In a 2000 decision, the state Supreme Court declined to find that the defense worker only had a private dispute with his employer.

"Consistent with CEPA's broad remedial purpose, we are satisfied that the Legislature did not intend to hamstring conscientious employees by requiring that they prove in all cases that their complaints involve violations of a defined public policy," the high court said.

But Adam N. Saravay of McCarter & English LLP stressed the type of company at issue in the TRW case and the possibility there that the alleged misconduct could have some impact on government contracts. In the present case, the alleged misconduct only seemed to impact UPS, and the court could decide whether that makes a difference, he said.

“It would be helpful for employers to have some guidance from the court on the question of whether complaints about internal company issues that don't affect the public or the government can constitute protected activity under the whistleblower statute,” Saravay said. “It's an issue that has not been fully addressed yet by the court. The question is: How do these rules apply when the company has private customers?”

How the high court views UPS' code of conduct could prove important for businesses as they craft their policies, Saravay said.

“If the court were to hold that a complaint about a violation of a company's internal code of conduct constitutes whistleblowing, even if the violation wouldn't be illegal or fraudulent conduct, companies might reassess whether some provisions of their codes of conduct might increase the potential for whistleblower litigation rather than reduce potential legal liability,” he said.

One of UPS' main arguments on appeal was that Battaglia didn't have a “reasonable belief” of wrongdoing within his former division and had only relied on hearsay.

The Appellate Division refused to second-guess the jury on that issue, but it will be worth watching Wednesday to see if the justices probe the parties on the kind of information that an employee needs to establish a reasonable belief of unlawful or fraudulent activity — a key requirement under CEPA, according to Saravay.

The Supreme Court's eventual ruling could also tackle the so-called cat's paw theory of liability, according to Salvador P. Simao of Ford Harrison LLP. That theory — named for a fable in which a monkey convinces a cat to burn his paw pulling chestnuts from a hot fire and then eats all the chestnuts himself — holds that an employer can be liable for discrimination based on the actions of a biased employee.

UPS argued that Battaglia couldn't connect a conversation with his manager on the alleged wrongdoing to his demotion more than a year later, but the appeals court found that the time between those events didn't settle the issue. The panel also felt the Supreme Court would adopt the cat's paw theory in considering CEPA-related questions of causation.

Meanwhile, although the appeals court refused to hand UPS judgment or a new trial on the CEPA claim, it agreed with the company that the allegedly offensive conduct of Battaglia's superior didn't fall within the LAD and that Battaglia's actions didn't amount to protected activity under the law. There was no evidence that any female employee heard the supervisor's remarks or was treated differently, the court said.

The court's LAD findings could also provide employers and employees with significant guidance going forward, according to Linthorst.

“They're really taking on very broad subject matters here to try to define this line under both of the primary statutory protections for employees in New Jersey in the same case,” he said. “It gives the court a lot of material to work with, and it gives a lot of fodder for oral argument.”

Attorneys for the parties declined to comment Thursday.

UPS is represented by Michael T. Bissinger of Day Pitney LLP.

Battaglia is represented by Maureen S. Binetti of Wilentz, Goldman & Spitzer PA.

The case is Battaglia v. United Parcel Service Inc., case No. A-86/87-11, in the New Jersey Supreme Court.

--Additional reporting by Abigail Rubenstein. Editing by Elizabeth Bowen and Chris Yates.

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