A DIFFICULT DILEMMA:
WHISTLEBLOWING IN LAW ENFORCEMENT

By Matthew A. Peluso, Esquire

With the cases of Bradley Manning and Edward Snowden dominating the news, the debate over "whistleblowers" in our country is at a crucial stage. The line between being a justified whistleblower protected by law and a criminal facing imprisonment is blurry, dynamic and dependent on the specific nature of an employee's job.

Law enforcement officers often face this dilemma because of their access to confidential and privileged information in the performance of their duties. Further, because they are sworn to enforce the law and report all criminal activity known to them, law enforcement officers are placed in a uniquely precarious position not faced by most other American workers. Therefore, it is important that law enforcement officers understand their legal rights and obligations under controlling whistleblower law so that they can fulfill their obligation to "protect and serve" the public and, at the same time, protect themselves from potential criminal prosecution or, at the very least, civil liability.

Basically, a "whistleblower" is an employee who discloses illegal or improper activity by his or her employer. Federal employees are protected by the Whistleblower Protection Act of 1989 ("WPA"), 5 U.S.C. 1201, *et seq.* Through enactment of the WPA, Congress sought to "strengthen and improve protection for the rights of federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government by mandating that employees should not suffer adverse consequences" when reporting illegal activity by the federal government. In 2012, Congress passed the Whistleblower Protection Enhancement Act ("WPEA"), which clarified and expanded the protection afforded employees under the WPA.

In New Jersey, the controlling whistleblower statute is the Conscientious Employee Protection Act ("CEPA"), *N.J.S.A.* 39:19-1, *et seq.* CEPA was enacted in 1986. When signing CEPA into law, former Governor Kean stated: "It is most unfortunate—but nonetheless, true—that conscientious employees have been subjected to firing, demotion or suspension for calling attention to illegal activity on the part of his or her employer. It is just as unfortunate that illegal activities have not been brought to light because of deep-seated fear on the part of an employee that his or her livelihood will be taken away without recourse."

Under CEPA, an employer in this state is prohibited from taking any retaliatory action against an employee because the employee discloses, or threatens to disclose to a supervisor or to a public body, an activity, policy or practice of the employer that the employee "reasonably believes" is in violation of a law, or a rule or regulation promulgated pursuant to law, or is fraudulent or criminal. Such prohibited retaliation includes, but it not limited to, suspension, demotion, departmental transfer, elimination or reduction of duties, and termination of employment.

An employer is also prohibited from retaliating against an employee who objects to, or refuses to participate in, any activity, policy or practice, which the employee reasonably believes is in violation of law, or is fraudulent or criminal. CEPA protects an employee who provides information to, or testifies 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.

In order to maintain a cause of action under CEPA, a plaintiff must establish that: (1) he/she reasonably believed that his/her employer was engaged in the violation of a law or rule or duly promulgated regulation; (2) he/she engaged in whistleblowing as defined in the statute; (3) he/she was subjected to an adverse employment action; and (4) there is a causal relationship between the whistleblowing action and the adverse employment action.

Thus, for law enforcement officers, protected whistleblowing activity can arise in several different contexts. For example, if a law enforcement officer obtains knowledge that a fellow officer has actually committed a criminal offense or is enabling someone else to perpetrate a crime, that officer would be protected under CEPA for seeking formal charges against the offending officer through the chain of command, or, if that procedure is blocked or futile, through direct contact with the local county or federal prosecutor's office.

However, the underlying wrongful conduct triggering protection under CEPA does not have to rise to the level of an actual criminal offense. If a law enforcement officer obtains knowledge that a state, local or even departmental rule or regulation controlling or relating to law enforcement duties has been violated or ignored, that officer would be protected under CEPA for reporting the violation to the relevant internal or outside governmental authority. For example, if a law enforcement officer becomes aware that any of the State Attorney General Guidelines applicable to certain type of investigations (e.g. internal affairs and domestic violence) are being routinely violated by that officer's department, the officer will be protected under CEPA for reporting such activity to the Office of the Attorney General if no other recourse has been successful.

In the case of *Maimone v. City of Atlantic City*, 188 N.J. 221 (2006), an Atlantic City police officer brought a CEPA action because he was transferred from his detective position back to patrol after objecting to the chief of police's decision to stop enforcement of provisions of the Code of Criminal Justice prohibiting promotion of prostitution and restricting the location of sexually-oriented businesses. This retaliatory transfer occurred after the officer reported his objections to his captain in a written memo requesting that the state criminal law be enforced.

In finding that Officer Maimone had stated a viable cause of action under CEPA, the Supreme Court of New Jersey ruled that he only had to reasonably believe that the chief's decision not to enforce

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prostitution laws in Atlantic City was "incompatible" with a clear mandate of public policy. He was not required to prove that the chief's decision "actually violated" a statute, rule or other clear mandate of public policy.

CEPA also protects law enforcement officers who report or testify about the illegal treatment of fellow officers that violates New Jersey law. Unfortunately, as many law enforcement officers know, telling the truth in an internal affairs investigation, departmental disciplinary hearing or private lawsuit about sexual harassment, racial discrimination or anti-union conduct directed toward fellow officers can cause immediate and serious retaliation against the testifying officer. Thus, it is important for law enforcement officers to know that they can bring their own, separate CEPA claim for any retaliation directed against them for supporting another officer in a departmental disciplinary hearing, administrative case or private lawsuit for discrimination or harassment. See, *Gerard v. Camden County Health Services Center,* 384 N.J.Super. 518 (App. Div. 2002).

It is also important for law enforcement officers to understand that they do not have to be demoted, suspended or terminated to bring a CEPA claim against their department. In *Nardello v. Township of Voorhees*, 377 N.J.Super. 428 (App.Div. 005), the New Jersey Appellate Division ruled that a police officer established a *prima facie* case under CEPA even though he had not been terminated, suspended or demoted. "Employer actions that fall short of [discharge, suspension or demotion], may nonetheless be the equivalent of an adverse action." Rather, a CEPA case will be based upon the specific acts of retaliation taken against the officer in the context of that officer's job duties and career.

As an attorney who has represented law enforcement officers in CEPA cases, I am sensitive to the significant and particular emotional distress that officers struggle with when deciding whether to report improper conduct by any fellow officer, even a disliked or dirty one. Unlike private sector employees, loyalty is perhaps the most valued bond between law enforcement officers. Without it, no officer could effectively do his or her job. Even thinking about "breaking ranks" and reporting the conduct of another officer can cause feelings of guilt, betrayal of the unwritten code of dealing with problems cop-to-cop, and disloyalty to the badge. Long-time friends become patently hostile or distant. The work environment becomes toxic. Socializing after work stops, and the reporting officer's family also feels the resulting alienation and isolation.

The Hall of Fame basketball player, Oscar Robertson, once said that the hardest thing to do in his game was to know when to shoot or when to pass. Unlike athletes, and most other employees, the decision of a law enforcement officer to report illegal or unethical behavior is not a game, or even a discretionary choice in many circumstances. It can have serious negative, and even life-altering, consequences for members of the public, as well as the personal life and professional career of the individual officer involved.

Knowing when or when not, to "blow the whistle" is a difficult and fact-specific decision that no law enforcement officer should make alone, and without first consulting a qualified attorney. However, if law enforcement officers aren't willing to step up and do the right thing when confronted with illegal activity in their own departments, the entire concept of law enforcement is undermined and, ultimately, their own jobs will become even more difficult.

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