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Ruling Expands CEPA Liability for Retaliatory Action

By Henry Gottlieb

Plaintiffs' employment lawyers are clamoring for publication of an unreported Appellate Division opinion that expands the definition of supervisor retaliation actionable under the whistleblower statute.

The April 4 ruling, in a case against Voorhees Township's police department, says that separate minor acts against workers who complain about wrongs may constitute a pattern of retaliatory conduct that is actionable, even if each act is not.

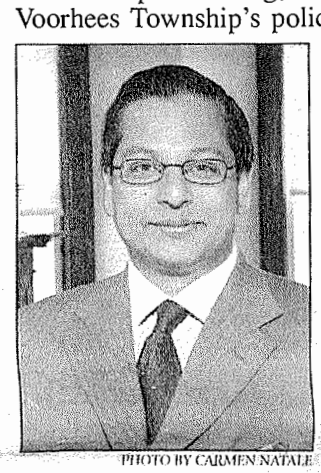

PHOTO BY CARMEN NATALE

NELA-NJ's Ty Hyderally wants the ruling published.

The state Supreme Court mentioned the concept in dicta in a 2003 decision, but the appeals court in the latest case, *Nardello v. Township of Voorhees*, A-1811-03T2, is the first to cite the justices' language as a foundation for a ruling, members of the plaintiffs' bar say.

Leaders of the National Association of Employment Lawyers-New Jersey, who organized a letter-writing campaign to get *Nardello* into the canon of precedent, say publication is particularly important because a reported decision by another appeals panel last Wednesday differs.

That opinion, *Klein v. University of Medicine and Dentistry*, A-3070-03T2, brushes aside the idea that a group of

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Newark Works To Land Jumbo Deal

Seeks millions from Port Authority as back rent for use of airport, seaport

By Tim O'Brien

Protracted litigation against the Port Authority of New York and New Jersey over many millions of dollars due Newark for decades of back rent for its airport and seaport may be moving closer to settling, possibly with help from former Gov. James McGreevey.

Newark's federal suit — now in year seven, with the city claiming it's owed more than $1 billion — is bogged down in a nasty accounting battle, with both the city and a court-appointed adviser hurling charges against Deloitte & Touche LLP, the Port Authority's longtime outside auditor. While the "Big 4" accounting firm vigorously denies any wrongdoing, it has acknowledged it lost docu-

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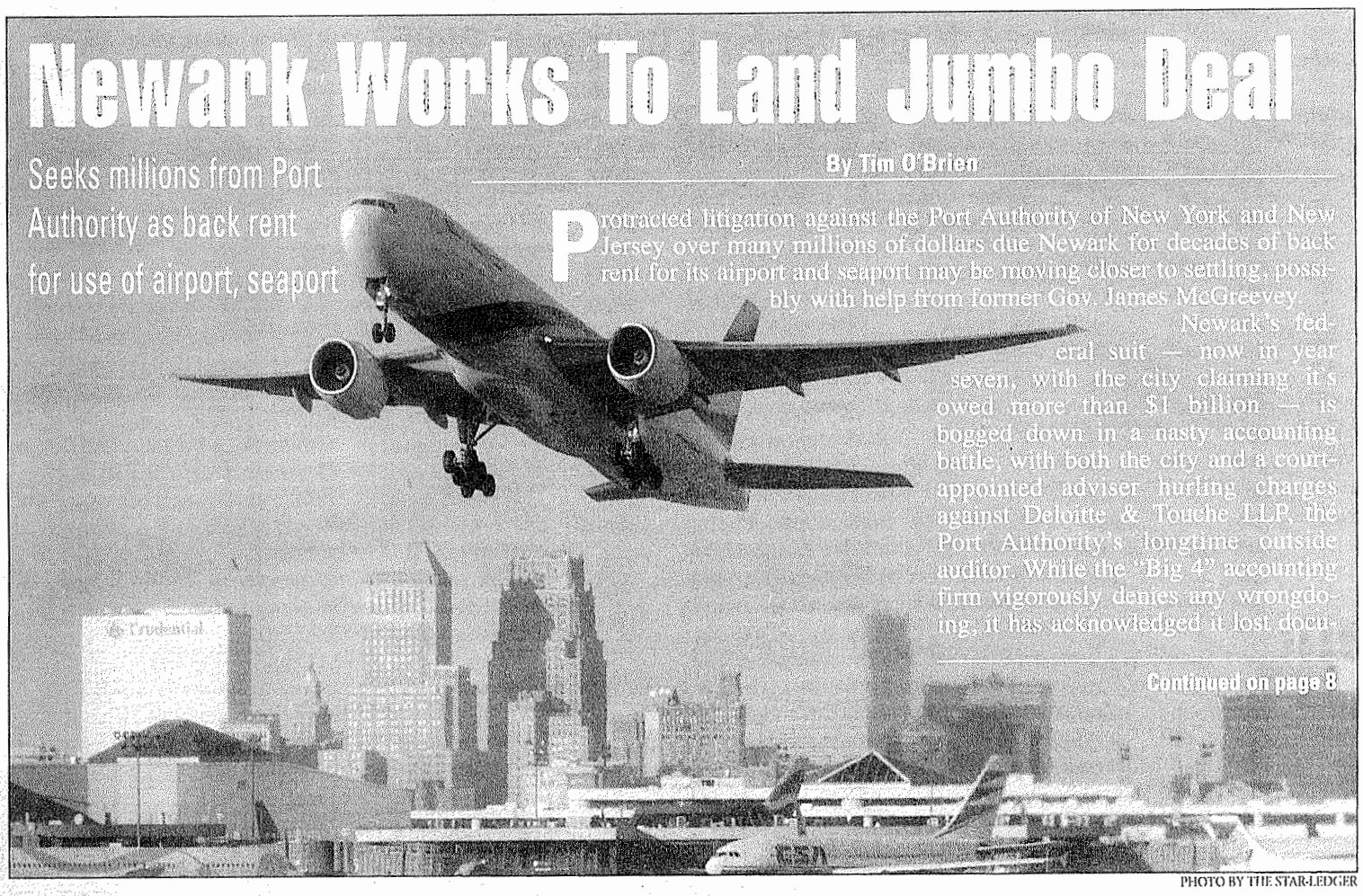

PHOTO BY THE STAR-LEDGER

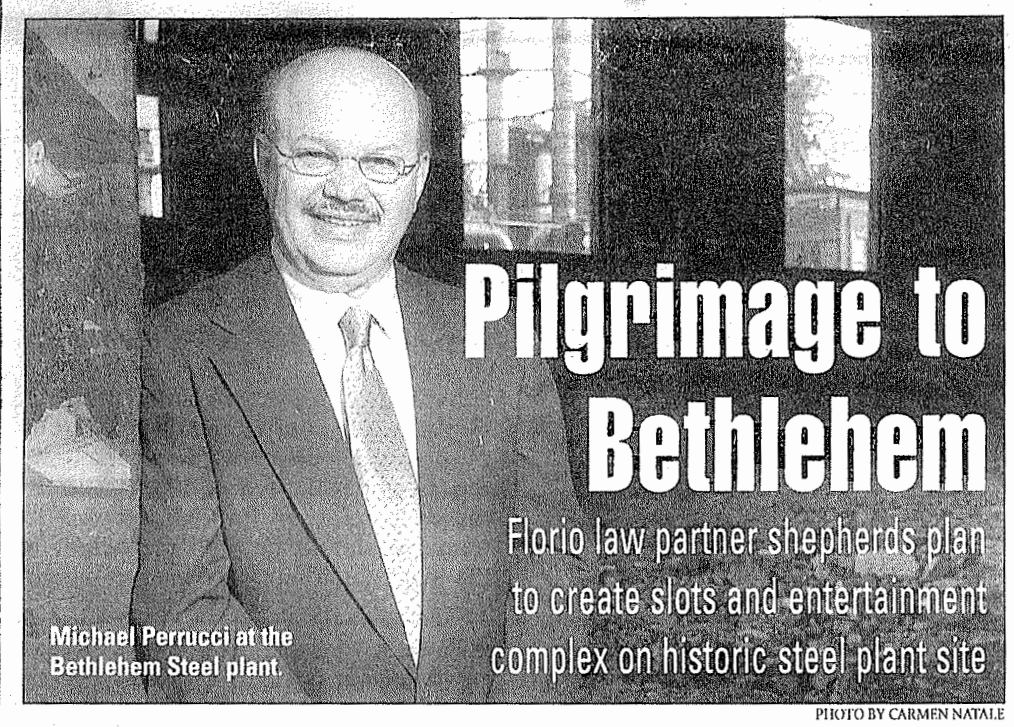

PHOTO BY CARMEN NATALE

Pilgrimage to Bethlehem

Florio law partner shepherds plan to create slots and entertainment complex on historic steel plant site

Michael Perrucci at the Bethlehem Steel plant.

By Lisa Brennan

Michael Perrucci has his eye on the ultimate brownfields site, and it is 15 miles over the New Jersey border in Bethlehem, Pa.

Perrucci, the law partner of former Gov. James Florio, has an $879 million plan to convert the former Bethlehem Steel plant into a Lehigh Valley Soho, to be called BethWorks Now and fueled by a stand-alone slots parlor — if slot gaming debuts in Pennsylvania next year.

Unlike other New Jersey lawyers eyeing Pennsylvania for the legal work to be extracted when gaming takes hold, Perrucci wants to be on the inside. He hopes to parlay his political connections into a license and he has lined up as partners heavy hitters in the industry.

They include Manhattan developer

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inchoate adverse actions are enough to sustain a claim. Impact on a worker's rank or compensation, or discipline equivalent to discharge, are required, the court said.

On a separate issue of equal importance, *Klein* is a victory for hospitals because the court said a doctor's suit didn't qualify under CEPA, despite amendments that liberalized the law to include medical personnel.

The two decisions demonstrate that CEPA law remains very much a work in progress after 18 years.

"There's a great deal of confusion among the bar and judiciary about the application of CEPA, and there's a lot of frustration," says Montclair solo Ty Hyderally, a member of NELA-NJ's executive board.

Lynne Huston, administrator of the Committee on Opinions, says she has received more than enough letters from NELA lawyers to put the issue before the committee. Board member Richard Schall wrote, for example, "*Nardello* is a very significant decision, and its publication will bring some consistency to an issue under CEPA that has been in dire need of clarification."

Huston says she is getting ready to submit the letters to the three members, retired Appellate Division Judges Melvin Antell, David Landau and Sylvia Pressler. She says the typical review takes about two weeks. Under Rule 1.36-1, anyone who objects to an appellate panel's decision against publishing an opinion can ask the Committee on Opinions to make it a reported ruling. The committee decides after consulting with the presiding judge of the particular panel, Huston says.

What Conduct Is Actionable?

In their per curiam decision in *Nardello*, Judges Dennis Braithwaite, Joseph Lisa and Michael Winkelstein reinstated a retired police lieutenant's claim that he had been subject to illegal retaliation because he complained about wrongdoing in the department.

The defense conceded that the wrongs plaintiff Jeffrey Nardello alleged, including violations of proper police procedure, were the kinds of whistleblowing defined by the statute.

But the trial judge granted summary judgment for the defense because the retaliation against Nardello didn't rise to the level of actionable conduct covered by CEPA. He wasn't discharged, suspended, demoted or subject to other adverse employment action, the trial judge ruled.

The appeals court reversed, agreeing with Nardello that CEPA also covered what happened to him. He allegedly was given demeaning jobs like fixing toilets, removed from the detective bureau and coerced to resign from the SWAT team.

For authority, the panel cited the Supreme Court's decision in *Green v. Jersey City Bd. of Educ.*, 177 N.J. 434 (2003). Though that decision hinged on a punitive damages question, the justices said something in dicta about retaliation:

"Many separate but relatively minor instances of behavior directed against an employee that may not be actionable individually but that combine to make up a pattern of retaliatory conduct" may constitute an adverse employment action.

The appeals court concluded that while many of the incidents Nardello alleged were relatively minor, they may have constituted a pattern of prohibited retaliatory conduct.

Nardello's lawyer, Clifford Van Syoc of Cherry Hill, says the decision varies with cases, like *Hancock v. Borough of Oaklyn*, 347 N.J. Super. 350 (App. Div. 2002). Those decisions require a showing of at least de facto termination or a substantial impact on working conditions.

"I can't tell you how many cases we've lost with judges saying under *Hancock* if he didn't get fired, he didn't get demoted or lose pay you have no claim," Van Syoc says.

"This case says that's not the law and you should be able to sue for retaliatory hostile work environment even if each individual act by itself wouldn't be actionable," he says.

Defense counsel Patricia Smith, of Voorhees' Ballard, Spahr, Andrews & Ingersoll, won't comment on the drive to get the opinion published, but she does say the decision seriously erodes the traditional threshold for a CEPA claim by, in effect, exalting the importance of minor events.

In the police context, she says, the opinion is worrisome because it puts police chiefs at risk of being sued for routine staffing decisions, like rotating police lieutenants' duties for training purposes.

"That would have tremendous societal costs," she says.

Smith might have done better if she had the panel in *Klein*, the published opinion that went the other way.

The three judges affirmed a grant of summary judgment against Sanford Klein, an anesthesiologist at the University of Medicine and Dentistry who claimed he was the target of retaliation because he complained that the hospital was compromising patient safety.

According to the opinion, supervisors reassigned Klein from clinical to administrative duties and barred him from administering anesthesia in an operating room without direct supervision.

But those actions weren't enough to qualify for the protections of CEPA, Judges Francine Axelrad, Richard Newman and John Holston ruled. They sided with the principles in the pro-employer *Hancock* case, which is not surprising because Axelrad and Newman were on the *Hancock* panel.

"An employer's actions are not retaliatory under CEPA merely because they result in a bruised ego or injured pride on the part of the employee," Axelrad wrote in *Klein*.

"Plaintiff was not discharged; he was not terminated, suspended or demoted," she wrote. "Nor were defendants' actions a change in the terms and conditions of plaintiff's employment so as to be the functional equivalent of a demotion."

The winning defense lawyer, Steven Ritardi of Roseland's Lum, Danzis, Drasco & Positan, says that on the issue of adverse actions "nothing has changed."

Klein's main focus is on a CEPA issue of first impression, according to the court: How liberalizing are 8-year-old amendments that include health-care professionals under the protections?

CEPA had always barred employers from retaliating against employees who disclosed or threatened to disclose violations of laws, rules or regulations or refused to take part in activities that violate a law rule or regulation.

Under the 1997 amendment, licensed or certified health care professionals are protected from retaliation for complaining about acts that constitute improper quality of patient care.

Klein alleged that he pointed out dangers caused by actions by the hospital's radiology department, including equipment breakdown, lack of back up, and little or no technical support. He also claimed that the hospital retaliated against him because he pointed out the need to address seven specific improvements to ensure patient safety, the opinion says.

But the judges said he couldn't sustain a CEPA claim because he couldn't identify a rule, law, regulation or professional code of ethics the hospital had violated.

There's no dispute that provision of good health care is a strong public policy and that the 1997 amendment was designed to further that policy, Axelrad wrote. "However, merely couching complaints in terms of a broad-brush allegation of a threat to patients' safety is insufficient to establish the first prong of a CEPA claim," she added.

Defense lawyer Ritardi agrees that the legislative history of the 1997 amendment shows that guaranteeing sound health care was a goal. But he adds, "Notwithstanding the public policy behind it — having good medical care — you're still going to have to meet the threshold for a CEPA action. The rules of the game are still the same.

"CEPA is such an amorphous statute; it's so hard to get your arms around it," he says. "Every time one of these cases comes up, you often find courts going out of their way for the plaintiff to make it fit. Here you have a decision in favor of the employer where the upshot is this: a private dispute is not going to carry the day for a trial even in the world of health care."

Klein's lawyer, Gerald Resnick of Deutsch & Resnick in Hackensack, says he thinks the court was overly restrictive in its interpretation by not making danger to patients, as perceived by a medical professional, the threshold for a claim. That fits with CEPA cases in which the clear mandates of public policy are good enough reasons for protecting a whistleblower, he says.

It also fits with the plain language of the statute, which doesn't require a specific violation of a rule or law, he says.

"They complain in the opinion there was no specific regulation cited but he, surely, as a doctor who has been in anesthesiology in a hospital for years, surely has the credential to indicate what he felt was a danger to the patients," he says.

He agrees with his fellow plaintiffs' lawyers that *Nardello* is in direct conflict with *Klein* on the issue of adverse job actions. Klein wasn't demoted, suspended or discharged, which the *Klein* court would require. By Resnick's reckoning, Klein did suffer a demotion in rank because, according to the allegation, he had to be observed by other doctors after a long career of independent practice. ■