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# The Development of Global Labor Rights – Does New Jersey's Conscientious Employee Protection Act Export Substantive Employment Rights to Workers in the Third World?

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## I. Introduction

Labor rights in the U.S. developed over the course of many years in a matrix of legislative enactments, common law protections, and the collective action of employees.[1] The laborers "most likely to organize were autonomous workers who had substantial independence in the workplace."[2] In most third world countries, collective employee action is either prohibited or is not effective.[3] Workers are forced to labor in onerous and unsafe conditions for long hours and minimal wages.[4]

Companies headquartered in the United States export jobs to developing nations. The purpose is to obtain the benefits of an inexpensive labor force, while avoiding the obligations imposed by federal, state, and local statutes and regulations. In doing so, U.S. companies obtain the work product of their third world "employees" without being encumbered by legal responsibilities to those employees imposed by statutes aimed at protecting the American workforce.

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[1] *See generally* PATRICK HARDIN, JOHN E. HIGGINS, & CHRISTOPHER T. HEXTER, THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT (5th ed. 2006).

[2] Daniel Nelson, *Introduction* to 2 ST. JAMES ENCYCLOPEDIA OF LABOR HISTORY WORLDWIDE, at xix - xx (Neil Schlager ed., 2004).

[3] For example, in China, independent unions are banned. *See* Kathy Marks, *Stitched Up: The Human Cost of Cheap Clothing*, THE INDEPENDENT UK, July 27, 2004. Marks points out that even in third world countries where unions are allowed, factory plant owners discourage strikes and other union movement, by threatening to move production to China. *Id.* For example, in Indonesia, Dae Joo, a company that creates backpacks for Adidas and Jansport, "refused to negotiate with unions and threatened union members with dismissal." *Id.* Workers in the plant "say they were once warned: 'One more strike, and we will move all production to China.'" *Id.*

[4] *See, e.g.*, Elinor Spielberg, *The Myth of Nimble Fingers, in* NO SWEAT: FASHION, FREE TRADE, AND THE RIGHTS OF GARMENT WORKERS 113 (Andrew Ross ed., 1997).

In order to receive any form of protection against employers who exploit this labor force, foreign employees must find new ways to bring actions against their employers in U.S. courts. In New Jersey, a series of state court decisions suggest that foreign employees might have legal recourse in New Jersey state courts by bringing a cause of action under New Jersey's Conscientious Employee Protection Act ("CEPA").

## II. The Protections of CEPA

At the time of its enactment in 1986, CEPA was considered "the most far reaching 'whistleblower statute' in the nation."[5] CEPA is to be read broadly to effectuate a legislative intent to prevent companies from taking "retaliatory action" against employees who engage in conduct which is statutorily defined as "whistleblowing activity."[6] "[T]he essential purpose behind CEPA" is to protect 'whistleblowing"' activities that "benefit the health, safety and welfare of the public,"[7] by encouraging employees to report, or object to, illegal or unethical workplace conduct, practices and policies of the employer.[8] CEPA "applies to private sector, state, and local government employees."[9]

CEPA defines an employee as "any individual who performs services for and under the control and direction of an employer for wages or other remuneration."[10] The protections of CEPA extend beyond employees to independent contractors.[11] CEPA also broadly defines the "employers" which come within its purview as "any individual, partnership, association, corporation or any person or group of persons acting directly or indirectly on behalf of or in the interest of an employer with the employer's consent . . . ."[12]

CEPA protects employees who engage in a broad range of activity. An employee who discloses information regarding an activity, policy or practice of an employer which is unlawful has engaged in protected whistleblowing activity under CEPA.[13] In addition, an employee who provides information to, or testifies before, a public body regarding the employer's illegal activity, policy or practice is engaged in protected whistleblowing activity.[14] Lastly, an employee is engaged in CEPA protected whistleblowing activity if he:

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[5] Mehlman v. Mobil Oil Corp., 707 A.2d 1000, 1008 (N.J. 1998) (citing John H. Dorsey, *Protecting Whistleblowers*, N.Y. TIMES, Nov. 2, 1986, at 34).

[6] *See* Higgins v. Pascack Valley Hosp., 730 A.2d 327, 336 (N.J. 1999). As remedial legislation, the statute "should be construed liberally to effectuate its important social goal." *Id*. (citing Abbamont v. Piscataway Twp. Bd. of Ed., 650 A.2d 958, 971 (N.J. 1994)).

[7] Feldman v. Hunterdon Radiological Assoc., 901 A.2d 322, 329 (N.J. Super. Ct. App. Div. 2006) (citing *Mehlman*, 707 A.2d at 1008).

[8] *See*, *e.g.,* Aguerre v. Schering-Plough Corp., 924 A.2d 571, 573-74 (N.J. Super. Ct. App. Div. 2007).

[9] ROSEMARY ALITO, NEW JERSEY EMPLOYMENT LAW, 69 (2nd ed. 1999).

[10] N.J. STAT. ANN. § 34:19-2(b) (West 2007).

[11] *See generally* D'Annunzio v. Prudential Ins. Co. of Am*.,* 927 A.2d 113 (N.J. 2007); *see also* Stomel v. City of Camden, 927 A.2d 129 (N.J. 2007). For purposes of determining whether a person is an employee or an independent contractor eligible for protection under CEPA, the New Jersey Supreme Court in *D'Annunzio* adopted a twelve-factor "totality of the circumstances" test. *D'Annunzio,* 927 A.2d at 120.

[12] § 34:19-2(a).

[13] § 34:19-3(a)(1) (2007).

[14] § 34:19-3(b).

> Object[s] or refuse[s] to participate in any activity, policy, or practice, which the employee reasonably believes: (1) is in violation of law, or a rule or regulation promulgated pursuant to law; (2) is fraudulent or criminal; or (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.[15]

If the employee or independent contractor engages in such protected whistleblowing activity, an employer may not take "retaliatory action" against the employee.[16] Whistleblowers, as defined by CEPA, cannot be fired, demoted, or have any loss of pay as a result of their whistleblowing activity.[17]

The remedies afforded by CEPA are expansive.[18] The New Jersey "[l]egislature has assured that '[a]ll remedies available in common law tort actions shall be available to prevailing [CEPA] plaintiffs,'"[19] including "a tort remedy of compensatory damages."[20] An aggrieved employee may also receive punitive damages, reasonable attorney fees, and injunctive relief.[21]

The rights and remedies granted by the New Jersey Legislature under CEPA may be available to workers in developing countries who are employed by New Jersey companies or their subsidiaries. This result is a product of the case law that has interpreted CEPA. If applicable to foreign workers, the CEPA statute provides an effective vehicle to protect such employees from adverse employer action and to expand their labor rights.

## III. New Jersey Courts Export CEPA's Protections in *D'Agostino*, *Mehlman*, and *Aguerre*

New Jersey courts have extended the broad remedial purposes of CEPA to employees of New Jersey companies who work exclusively in foreign nations. This expansive interpretation of CEPA's protections, as set forth in *D'Agostino v. Johnson & Johnson*,[22] *Mehlman v. Mobil Oil Corp.*,[23] and *Aguerre v. Schering Plough Corp.*,[24] confirms that foreign employees enjoy substantive employment rights under CEPA and access to New Jersey courts in order to enforce those rights.

In *D'Agostino v. Johnson & Johnson Inc.*, a U.S. resident, D'Agostino, resided in Switzerland and worked for a Swiss subsidiary of Johnson & Johnson ("J&J") corporation, Cilag.[25] D'Agostino was not a New Jersey resident at the time of the case.[26] D'Agostino alleged that he attended a

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[15] § 34:19-3(c)(1)-(3).

[16] § 34:19-3.

[17] *See* § 34:19-2(e). "Retaliatory action" is defined broadly as "discharge, suspension, or demotion of an employee or other adverse employment action taken against an employee in the terms and conditions of employment." *Id.*

[18] For example, the remedies afforded to an employee under CEPA include equitable relief, such as reinstatement of employment, recovery of fringe benefits and seniority, lost wages, payment of reasonable costs and attorney's fees, and punitive damages. § 34:19-5(a)-(e).

[19] Palladino ex rel. U.S. v. VNA of Southern N.J., Inc., 68 F. Supp. 2d 455, 474 (D.N.J. 1999) (quoting N.J. STAT. ANN. § 34:19-5).

[20] *Palladino*, 68 F. Supp. 2d at 474.

[21] *See* § 34:19-5.

[22] 628 A.2d 305, 315 (N.J. 1993).

[23] 707 A.2d at 1016-17.

[24] 924 A.2d at 599.

[25] 628 A.2d at 307.

[26] *Id.*

conference at J&J headquarters in New Jersey regarding the registration in Switzerland of a synthetic hormone.[27] Swiss authorities rejected the registration of this hormone twice.[28] After returning to Switzerland, D'Agostino was asked to sign a voucher for payment of "consulting fees" to the President of the College of Experts, the office that controls the registration of new drugs in Switzerland.[29] D'Agostino "believed the payments to be a bribe and refused to sign the voucher."[30] J&J subsequently fired D'Agostino.[31] D'Agostino reported his allegations about the illegal payments to J&J headquarters in New Jersey prior to his termination.[32]

There were various proceedings before the case reached the New Jersey Supreme Court.[33] The court ultimately held that New Jersey law, as opposed to Swiss law, governed the dispute.[34] The New Jersey Supreme Court used the "governmental-interest analysis," to determine which law should apply. Under the governmental-interest analysis, "the determinative law is that of the state with the greatest interest in governing the particular issue."[35] The court stated that "the qualitative, not the quantitative, nature of a state's contacts ultimately determines whether its law should apply."[36] The court added that "New Jersey has no interest in regulating Swiss employment relationships. But this case is not about regulating just Swiss employment relationships. It is . . . about regulating the conduct of parent companies in New Jersey that engage in corrupt practices through a subsidiary's employees."[37]

The New Jersey Supreme Court then cited CEPA and stated that in New Jersey, "an employee may be fired for any reason, be it good cause, no cause, or even morally-wrong cause, but *not when the discharge is contrary to a clear mandate of public policy*."[38] The "sources of public policy include legislation; administrative rules, regulations or decisions; and judicial decisions."[39]

The court then held that the Foreign Corrupt Practices Act ("FCPA") was a source of state public policy to determine whether the discharge of an employee violates a clear mandate of public policy.[40] Moreover, the court noted that public policy "can also apply extraterritorially when Congress intends that the policy have overseas applications."[41] Furthermore, the court stated that the FCPA was intended to have an extraterritorial effect.[42] Therefore, the court deemed the FCPA sufficient to govern J&J's actions in Switzerland.[43]

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[27] *Id.* at 308.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] The trial court held that New Jersey law governed. *Id*. at 309. The Appellate Division reversed and held that Swiss law governed the proceedings. *Id*.
[34] *Id*. at 321.
[35] *Id*. at 309.
[36] *Id*. (citing Veazey v. Doremus, 510 A.2d 1187, 1189-90 (N.J 1986)).
[37] *Id.* at 311.
[38] *Id*. (citing Woolley v. Hoffman LaRoche, Inc., 491 A.2d 1257, 1260 (N.J. 1985)) (discussing the common law, "*Pierce*" cause of action for whistleblowing employees prior to the enactment of CEPA) (emphasis added).
[39] *Id*. (citing Pierce v. Ortho Pharm. Corp., 417 A.2d 505, 512 (N.J. 1980)).
[40] *Id.* at 312.
[41] *Id*. at 315.
[42] *Id.*
[43] *Id.*

In *Mehlman v. Mobil Oil Corp.*, Mehlman, a scientist for Mobil Oil Corp., gave a presentation in Japan to the managers of Mobil's Japanese subsidiary regarding high benzene levels.[44] At the presentation, it was made known that Mobil's Japanese subsidiary was adding a dangerous level of benzene to gasoline.[45] Mehlman advised the Japanese managers to either discontinue making the product or to reduce the level of benzene.[46]

When Mehlman returned from Japan, he was fired.[47] Mobil alleged that Mehlman had "used Mobil's resources to assist . . . his wife's publishing company."[48] Mehlman asserted "that he did so with the consent" of Mobil's management because the "publishing activities directly benefited and enhanced Mobils's reputation in the relevant scientific community."[49] Mehlman then brought a CEPA claim against Mobil Oil.[50]

In *Mehlman*, the New Jersey Supreme Court specifically addressed two issues: what mandates of public policy trigger a CEPA cause of action and whether CEPA's "broad protections against employer retaliatory action . . . are available when the relevant mandate of public policy is intended to protect the health, safety or welfare of people who reside outside of New Jersey."[51]

The defendants argued, based on *D'Agostino*, that a valid CEPA claim could not be maintained "based on an employer's out-of-state conduct unless the clear public policy mandate violated is a New Jersey policy intended to have extraterritorial effect, and the out-of-state conduct adversely effects the health, welfare or safety of New Jersey citizens."[52] However, the court in *Mehlman* distinguished *D'Agostino* by noting that Mehlman, unlike D'Agostino, "was discharged in New Jersey by a New Jersey employer, thereby presenting no question of the extension of CEPA to a foreign employment relationship."[53] The court continued and held:

> the purposes of CEPA are no less served by recognizing a cause of action for a New Jersey employee whose employer retaliated against him or her for objecting to the violation of a clear mandate of public policy that threatened to harm citizens of other states or countries. Under CEPA, the wrongful conduct is the employer's retaliatory action, and *we decline to impose artificial geographical limits on the harm or illegality that the objecting employee sought to avoid*.[54]

Thus, even though those harmed by Mobil's use of high-level benzene gasoline were Japanese citizens, Mehlman's objection to the violation of public policy was valid under CEPA.[55] The court reasoned that CEPA applies "even if the employer's action retaliates against an employee's protest of a violation of an out-of-state public policy."[56]

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[44] *Mehlman*, 707 A.2d at 1003.
[45] *Id.*
[46] *Id.*
[47] *Id.* at 1004.
[48] *Id.* at 1004-05.
[49] *Id.* at 1005.
[50] *Id.* at 1001.
[51] *Id.* at 1008.
[52] *Id.* at 1016.
[53] *Id*. at 1013.
[54] *Id*. at 1016-17 (emphasis added).
[55] *See id.* at 1016-17.
[56] *Id*. at 1016.

In *Aguerre v. Schering-Plough Corp.*, the plaintiffs were employees of an Argentinian subsidiary of Schering-Plough Corp. ("Schering-Plough"), a New Jersey based corporation.[57] The plaintiffs alleged that they were fired "after disclosing 'widespread unethical and illegal marketing and sales practices.'"[58] The plaintiffs also alleged that Schering-Plough bribed doctors and public officials to sell more of its anti-infective and anti-cancer products.[59]

After complaining about these illegal practices, Aguerre provided documents demonstrating the bad acts to management in Buenos Aires.[60] The management promised not to fire Aguerre, who told the management that the plaintiffs, Archimbal and Caamano, also had documents to prove the illegal conduct was going on.[61] The plaintiffs were fired and executed settlement agreements with Schering-Plough.[62] Each of the settlements was reduced to judgment in Argentina.[63] However, the plaintiffs argued that the agreements were coerced because the defendants "threatened to blacklist them from other employment in the industry."[64]

The plaintiffs filed suit in a New Jersey state court alleging that their employment terminations violated CEPA.[65] Additionally, they filed a tort claim alleging defamation.[66] In response to the filed Complaint, the defendants moved for summary judgment.[67]

The trial court dismissed the defamation claims on the grounds of forum non conveniens.[68] However, the Appellate Division reversed the trial court's dismissal of the CEPA claims.[69] Although the plaintiffs were aliens who had been employed exclusively in Argentina, the Appellate Division determined that the plaintiffs were "entitled to pursue their . . . substantive CEPA claims" in the state court.[70] The Appellate Division found that the "CEPA claims . . . raise significant public policy issues in the context of corporate retaliation against whistleblowers employed by a foreign corporation with its roots in New Jersey."[71]

Thus, the court in *Aguerre* took the decisions in *D'Agostino* and *Mehlman* a step further by expressly confirming that employees working for a foreign subsidiary of a New Jersey corporation were entitled to litigate CEPA claims in New Jersey courts.

## IV. A Hypothetical Analysis: Extending CEPA to Third World Employees

The express provisions of CEPA, as interpreted by New Jersey courts can, and under appropriate circumstances will, provide expanded employment rights to foreign employees of New

[57] 924 A.2d at 573-74.
[58] *Id*. at 574.
[59] *Id*.
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id*.
[64] *Id*.
[65] *Id*. at 577.
[66] *Id*.
[67] *Id*.
[68] *Id.* at 580-81.
[69] *Id.* at 582.
[70] *Id.* at 580.
[71] *Id.* at 582.

Jersey based companies who work in third world countries.[72] Application of CEPA to the following hypothetical describes the manner in which the expanded employment rights would be effectuated.

### a. **The Hypothetical**[73]

The Yellow Banana Company is incorporated in the State of New Jersey and has its headquarters in Newark, New Jersey. The company has a wholly owned subsidiary, Plantain Pickers, Inc., which operates a banana farm in Dominica, a Caribbean country. Plantain Pickers, Inc. has 150 employees, all of whom are citizens of Dominica. The bananas picked at Plantain Pickers, Inc. are shipped to the Yellow Banana Company's facility in Newark, where they are then distributed.

The workers at Plantain Pickers, Inc. are directed by the management of the company to commence spraying the banana crop with the chemical dibromochloropropane ("DBCP"). The employees, concerned with the health hazards associated with the ingestion of DBCP, object and refuse to conduct the spraying as directed. Each of the employees is summarily terminated based upon their refusal.

The employees subsequently retain counsel in New Jersey and initiate litigation against Plantain Pickers, Inc. and its parent, the Yellow Banana Company. A single cause of action is asserted. The employees allege that the termination of their employment violates CEPA.

The employees have a cognizable cause of action against Plantain Pickers, Inc. and the Yellow Banana Company for a violation of CEPA. In order to sustain a cause of action under CEPA, a plaintiff must establish: (a) a reasonable belief that the employer's conduct violated a law, rule, regulation or public policy; (b) that he engaged in "whistleblowing activity" as that term is defined under CEPA; (c) that an adverse employment action was taken against him; and (d) that a causal connection exists between the whistleblowing activity and the adverse employment action.[74] The employees of Plantain Pickers, Inc. can sustain their burden.

### b. **The Employees Have a Reasonable Belief the Employer's Conduct Violated a Law, Rule, Regulation or Public Policy**

The employees of Plantain Pickers, Inc. have a "reasonable belief" their employer's actions violate a law, rule, regulation or public policy. A plaintiff must identify, and a court must find as a matter of law, "the specific terms of a statute or regulation, or the clear expression of a public policy, which would be violated if the facts as alleged are true."[75] CEPA does not require that an employer's activity complained of, or objected to, constitutes an actual violation of law or public policy; it is sufficient only that the employee "reasonably believe" it to be the case.[76] In addition, an

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[72] *See id.*

[73] This hypothetical is based upon the facts and circumstances in Dow Chem. Co. v. Alfaro, 786 S.W.2d 674 (Tex. 1990) (aliens were given access to a Texas state court for work-related injuries against a third party, which was not the plaintiffs' employer).

[74] *See* Klein v. U.M.D.N.J., 871 A.2d 681, 687 (N.J. Super. Ct. App. Div. 2005); Dzwonar v. McDevitt, 828 A.2d 893, 900 (N.J. 2003); and Bowles v. City of Camden, 993 F.Supp. 255, 262 (D. N.J. 1998).

[75] Fineman v. N.J. Dep't. of Human Serv., 640 A.2d 1161, 1168-69 (N.J. Super. Ct. App. Div. 1994), *cert. denied*, 649 A.2d 1287 (N.J. 1994); Falco v. Cmty. Med. Ctr, 686 A.2d 1212, 1221 (N.J. Super. Ct. App. Div. 1997).

[76] Estate of Roach v. TRW, Inc., 754 A.2d 544, 552 (N.J. 2000).

employee who objects to an employer's unlawful conduct need not be able to identify the specific law, regulation or public policy at the time the objection or refusal is made.[77]

The employees of Plantain Pickers, Inc. can identify two statutory provisions that they "reasonably believed" were being violated by their employer's directive to utilize DBCP.

In 1998, Dominica adopted the Transnational Causes of Action Act ("Act"). While the Act was intended primarily to address the issue of forum non conveniens as a defense against suits brought by citizens of Dominica for tort claims in the United States, the Act contains substantive provisions reflecting the public policy of Dominica.[78] More specifically, "[s]ection 8(2) [of the Act] imposes strict liability upon any person who manufactures, produces or otherwise places any product or substance into the stream of commerce which results in harm or loss."[79] "Harm or loss" can occur if it is "caused by the use or consumption of the product or substance."[80]

In addition, U.S. public policy prohibits all uses of DBCP involving food.[81] On November 3, 1977, the U.S. Department of Environmental Protection issued an order "suspending registrations of pesticides containing DBCP."[82] This action confirms a "public policy" within the United States that food treated with DBCP is deemed harmful to consumers of food products. Moreover, placing such foods in the "stream of commerce" would, therefore, cause "harm or loss" within the meaning of Dominica's Transnational Causes of Action Act.

In *D'Agostino, Mehlman,* and *Aguerre*, the New Jersey Supreme Court confirmed that these statutory and regulatory provisions satisfy the requirement that a plaintiff establish the existence of a public policy under CEPA. First, these cases make clear that the foregoing expressions of public policy can provide the basis for a CEPA claim.[83] As such, the Transnational Causes of Action Act provides a source of public policy upon which a CEPA claim could be properly based. This is further confirmed by the fact that the Act is intended to protect users of products who would, under the facts in the hypothetical, include citizens of the State of New Jersey who may purchase bananas from the Yellow Banana Company in Newark. In addition, the Department of Environmental Protection regulation also provides a valid expression of public policy upon which a CEPA claim could be founded. Federal statutes and regulations are proper sources of public policy under CEPA.[84]

The fact that the Plantain Pickers, Inc. employees are located in Dominica does not bar their reliance upon CEPA as a source of employment rights. The purpose of CEPA is to prevent an employer's "wrongful [retaliatory] conduct" without regard to any "artificial geographical limits on the harm or illegality that the objecting employee sought to avoid."[85] Furthermore, there are "significant public policy issues in the context of corporate retaliation against whistleblowers" even if the whistleblowers are aliens, as long as the offending employer has "its roots in New Jersey."[86]

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[77] *See Dzwonar*, 828 A.2d at 901.

[78] Winston Anderson, *Forum Non Conveniens Check Mated? The Emergence of Retaliatory Legislation*, 10 FLA. ST. J. TRANSNAT'L L. POL'Y 183, 186 (2001).

[79] *Id*. at 208.

[80] *Id.*

[81] *See Dow Chem. Co*., 786 S.W. 2d at 681.

[82] *Id.*

[83] *See generally D'Agostino*, 628 A.2d 305; *Mehlman*, 707 A.2d 1000; *Aguerre*, 924 A.2d 571.

[84] *D'Agostino*, 628 A.2d at 312.

[85] *Mehlman*, 707 A.2d at 1017.

[86] *Aguerre*, 924 A.2d at 582.

Based upon the foregoing, the employees of Plantain Pickers, Inc. meet the first element of a cause of action under CEPA because they can establish a statutory and regulatory expression of public policy which they "reasonably believed" was being violated by their employer.

**c. The Employees Engaged in Whistleblowing Activity**

The Plantain Pickers, Inc. employees engaged in whistleblowing activity within the meaning of New Jersey Statute section 34:19-3(c).[87] A refusal to participate in an employer's unlawful "activity, policy, or practice" constitutes whistleblowing activity. Therefore, the employee's refusal to use DBCP constitutes protected whistleblowing activity, affording the employees the protection of the statute and satisfying the second element of a CEPA cause of action. The fact that the whistleblowing activity occurred in a foreign country is of no consequence.[88] It is the retaliatory conduct of the New Jersey based employer that is the primary object of CEPA.[89]

**d. The Employees Suffered a "Retaliatory Action"**

CEPA protects employees who engaged in whistleblowing activity from "retaliatory action" as that term is defined in New Jersey Statute section 34:19-2(e). "Retaliatory action" includes "discharge, suspension or demotion of an employee, or other adverse action taken against an employee in the terms and conditions of employment."[90] The Plantain Pickers, Inc. employees suffered "retaliatory action." They were summarily fired because of their refusal to participate in the use of DBCP. They will be able to sustain this portion of a cause of action under CEPA.

**e. A Causal Nexus Exists Between The Whistleblowing Activity And The Retaliatory Action**

A person asserting a CEPA claim must establish a "causal connection" between the whistleblowing activity and the retaliatory action.[91] The Plantain Pickers, Inc. employees will have no difficulty satisfying this element of the cause of action. There is a direct causal connection between their whistleblowing activity and their termination. They were fired solely because of the whistleblowing activity. The foregoing establishes that the Plantain Pickers, Inc. employees will have a viable CEPA cause of action. The import of the existence of such a cause of action, however, goes beyond the simple availability of a cause of action for the aggrieved employees. Instead, it is the utilization of the expansive remedies available under CEPA, the achievement of CEPA's remedial purposes, and the access to New Jersey's courts, which transforms a CEPA claim into a potential source of labor rights (under certain circumstances) to third world employees of New Jersey based companies.

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[87] In general terms, whistleblowing activity includes: disclosing information, N.J. STAT. ANN. § 34:19-3(a) (West 2008), providing information to a public body, § 34:19-3(b), and objecting to an activity which violates the law or public policy, § 34:19-3(c). For purposes of the hypothetical, the applicable analysis occurs under section 34:19-3(c).

[88] *See Aguerre*, 924 A.2d at 573-74.

[89] *See supra* note 54 and accompanying text.

[90] § 34:19-2(e).

[91] *Dzwonar*, 828 A.2d. at 900.

## V. CEPA Remedies as a Vehicle for the Expansion of Labor Rights

While CEPA provides a remedy for those aggrieved by an employer's unlawful retaliatory action, its remedial purpose includes the discouragement of an employer from engaging in the underlying activity, practice or conduct about which the employee complained or objected.[92] This remedial purpose provides an expansive source of labor rights for workers in third world countries employed by New Jersey corporations.

For the Plantain Pickers, Inc. employees, an avoidance of exposure to DBCP or similar chemicals is a labor right they might not have the ability to obtain without the broad remedial purposes of a statutory provision like CEPA. The broad remedies permitted under CEPA provide a compelling financial incentive for the company to decide not to use the chemical in the first instance. Under CEPA, the company cannot legally retaliate against the employee for refusal to employ a dangerous chemical. In this way, CEPA should cause the company to avoid the use of DBCP, without the necessity of an employee refusal.

Employees aggrieved by an employer's unlawful retaliatory action are entitled to "[a]n injunction to restrain any violation of [CEPA] which is continuing at the time the court issues its order."[93] For the Plantain Pickers, Inc. employees, this could include an order that the company not take any "retaliatory action" against any future employee who refuses to use DBCP. Such an order would effectively preclude Plantain Pickers, Inc. from using DBCP at its location in Dominica, thereby insuring that the workers perform their labor in a safer environment.

CEPA also permits a court to order the reinstatement of the employees to their prior positions with compensation for all "lost wages, benefits and other remuneration."[94] As such, employees are entitled to collect all of their lost income and benefits from their employer for the period after their termination and before their reinstatement. This exposes the employer to the payment of sums to discharged employees who have not provided any services to the employer.

CEPA allows an award of attorney's fees to the successful employee plaintiffs.[95] Therefore, a company faces the prospect of having to pay not only its lawyers to defend the action, but the employees' attorneys for bringing the action. The possible assessment of such fees against the company provides a further financial incentive for an employer to act in accordance with the law and to not take retaliatory action against employees who report or object to an employer's unlawful conduct.

Employers violating CEPA also face the imposition of civil fines in the amount of not more than $10,000 for the first violation and not more than $20,000 for each subsequent violation.[96] In addition, "punitive damages" can be awarded against an employer for violating CEPA.[97]

## VI. Conclusion

The combination of the available remedies under CEPA provides significant financial exposure to an employer that decides to engage in an activity, practice, or policy which violates a

[92] *See, e.g.,* Higgins v. Pascack Valley Hosp*,* 704 A.2d 988, 996-99 (N.J. Super. Ct. App. Div. 1998); *see also Aguerre*, 924 A.2d at 573-74.
[93] § 34:19-5(a).
[94] § 34:19-5(b), (d).
[95] § 34:19-5(e).
[96] § 34:19-5.
[97] *Abbamont*, 650 A.2d. at 970 (citing Restatement (Second) of Torts § 908 (1979)).

law, rule, regulation or public policy in violation of CEPA. The New Jersey courts' expansive interpretation of CEPA, affording protection to foreign employees of New Jersey corporations based upon an employer's violation of a public policy found in either the foreign country or the U.S., establishes a source of broad and wide-ranging labor rights to workers who toil in third world countries.

Perhaps most importantly, access to the New Jersey courts to vindicate the protections of CEPA was permitted for employees working outside the U.S. in *D'Agostino* and confirmed for foreign citizens working exclusively in foreign countries in *Aguerre*. Such access provides a forum for the vindication of substantive employment rights, which was previously denied under the doctrine of forum non conveniens.

The exportation of jobs to third world countries, therefore, may not make New Jersey companies immune from state law requirements under CEPA. In contrast, CEPA's broad remedial purposes, and the court's effectuation of those purposes in its decisions affecting foreign employees, reveal an intent to couple the exportation of jobs with a concomitant exportation of labor rights.