NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0226-09T2

MICHAEL BATTAGLIA,

Plaintiff-Respondent/
Cross-Appellant,

v.

UNITED PARCEL SERVICE, INC.,

Defendant-Appellant/
Cross-Respondent,

and

WAYNE DeCRAINE,

Defendant.

Argued April 5, 2011 – Decided August 12, 2011

Before Judges Wefing, Baxter and Hayden.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-10341-06.

Michael T. Bissinger argued the cause for appellant/cross-respondent (Day Pitney, L.L.P., attorneys; Mr. Bissinger and Justin B. Incardone, on the briefs).

Maureen S. Binetti argued the cause for respondent/cross-appellant (Wilentz, Goldman & Spitzer, P.A., attorneys; Ms. Binetti and Stephanie D. Gironda, of counsel and on the briefs).

PER CURIAM

Plaintiff sued his employer, United Parcel Service (UPS), following his demotion from a managerial position to a supervisory one.[1] He alleged his demotion was in retaliation for certain complaints he had voiced about practices he had observed at work, and he sought damages under the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -8; the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -42; and for breach of contract. Following the close of plaintiff's case the trial court granted defendant's motion to dismiss plaintiff's claim of breach of contract. R. 4:37-2(b). The jury awarded plaintiff economic damages of $500,000 and damages of $500,000 for his emotional distress; its verdict made no distinction between damages under CEPA and damages under LAD. The jury later found no cause with respect to plaintiff's claim for punitive damages. In post-trial motions, the trial court denied defendant's motion for judgment with respect to plaintiff's claims under CEPA and LAD, remitted plaintiff's damages for emotional distress to $205,000, denied plaintiff's motion for a new trial with respect

[1] Plaintiff named Wayne DeCraine, his immediate supervisor at the time of his demotion, as a defendant as well as UPS. At the conclusion of the case, the trial court dismissed DeCraine as a defendant individually. For purposes of this opinion, we shall refer to defendant in the singular and refer to DeCraine only when describing his actions that led to plaintiff's complaint.

to punitive damages, denied plaintiff's motion for pre-judgment interest on the emotional distress damages and awarded plaintiff's counsel fees and costs of $433,080, rather than the $1,261,807.25 that had been requested. The parties have appealed and cross-appealed from the judgment that was entered. Having reviewed the record in light of the contentions advanced on appeal, we affirm in part, reverse in part and remand for further proceedings.

I

Plaintiff began working for UPS in 1985. His initial position was as a driver. Over the course of his employment he received several promotions, eventually becoming a division manager with responsibility for the southern portion of New Jersey, referred to as the Bound Brook division.[2] In 2003, plaintiff was transferred to Baltimore, again as a division manager. Plaintiff remained in Baltimore only a brief period. He became ill with Lyme disease and was out of work for a period of time. UPS filled that position of division manager with someone else in his absence.

[2] The record indicates that the general division of employees at UPS was between hourly, unionized employees, such as drivers and loaders, and salaried, management employees. The management level was further subdivided, for positions pertinent to this appeal, from part-time supervisors, to supervisors, to managers, to division managers, and district managers.

Plaintiff then returned to New Jersey, but by that point his previous position as division manager of the Bound Brook division had been filled by another long-term UPS employee, Gary Sanderson. Plaintiff was thus assigned in June 2004 to another managerial position at the Skylands division, responsible for northern New Jersey. He was not, however, division manager. That position had been recently filled by Wayne DeCraine. Plaintiff and DeCraine had worked together previously. Plaintiff had been DeCraine's manager when DeCraine was a supervisor and his division manager when DeCraine was a manager. One of the results of plaintiff returning from Baltimore was that he reported to DeCraine, while in the past DeCraine had reported to him.

DeCraine reported, in turn, to Craig Wiltz, who was the manager of the Northeast district, of which New Jersey was one portion. Wiltz was also a long-time UPS employee and had served in several different areas of the country. He became the district manager at or around the time plaintiff returned from Baltimore and had had no prior dealings with either plaintiff or DeCraine. It is clear that Wiltz expected those individuals working under him to produce results for UPS and was not pleased when they did not.

In addition to appointing managers on a geographical basis, UPS also appointed managers on a subject-matter basis, such as human resources and security. Individuals serving in those positions would provide support in their particular areas for several different UPS facilities. At the relevant time periods, Regina Hartley served as the human resources manager and Craig Wheeler the security manager for the area.

UPS prepared and distributed to all of its employees a Code of Business Conduct, outlining the company's expectations of its employees. According to the Code, all employees are required to adhere to it, and "[a]ny employee . . . who violates our legal or ethical responsibilities will be subject to appropriate discipline, which may include dismissal." The Code states that "UPS is a company of honesty, quality, and integrity," which it described as "fundamental to our ability to attract and retain the best people." It notes that employees are obligated "to make sure our daily decisions support the values and principles of the company" by "conduct[ing] business fairly, honestly, and ethically." Every employee has the "responsibility" not only of "[c]ompliance with our legal and ethical obligations," but also "to report potential violations of those obligations."

The Code further declares that UPS's "commitment to integrity includes a responsibility to foster an environment

that allows people to report violations without the fear of retaliation or retribution," and to that end, it assures that "[n]o employee will be disciplined, lose a job, or be retaliated against in any way for asking questions or voicing concerns about our legal or ethical obligations, when acting in good faith." It specifies that "'[g]ood faith' does not mean an individual has to be right; but it does mean believing the information provided is truthful." The Code names several ways for employees to report such concerns, and it pledges respect for an employee's decision to remain anonymous.

The Code also enunciates workplace standards, and assures employees they will be free "from any form of discriminatory harassment," including "conduct that . . . has the effect of . . . creating an environment that is intimidating, hostile, or offensive to the individual." In addition, the Code prohibits the use of company resources "for personal benefit" without prior authorization "from the appropriate manager."

Battaglia testified that he heard DeCraine and several other high-level UPS managers use extremely crude and sometimes obscene language referring to female employees. Battaglia placed most of these incidents after his return from Baltimore. All of these remarks were made to other men; none of the remarks were made to or in the presence of any women. Battaglia did

testify that DeCraine had occasionally used this language during the times that plaintiff was his manager and that he had cautioned DeCraine about it. That did not deter plaintiff, however, from recommending DeCraine for advancement within UPS. Battaglia said he remonstrated with DeCraine about this practice initially, to no avail. DeCraine denied ever using such language in the workplace.

Battaglia also testified that he observed DeCraine engage in flirtatious behavior with another manager, Nola Wood. He said he approached DeCraine in December 2004 to tell him that he should be careful because there was a rumor circulating that DeCraine was involved in an affair with Ms. Wood. DeCraine denied any inappropriate behavior. DeCraine and Ms. Wood were peers, and DeCraine did not have supervisory authority over her.

Toward the end of 2004, plaintiff approached DeCraine on several occasions to tell him that he had heard that managers in the Bound Brook division, which plaintiff had previously headed, were inappropriately using the credit cards issued to them by UPS. These alleged improprieties included dividing charges among those attending business lunches to evade the limit placed on such charges and going to lunch and never returning. DeCraine responded by telling plaintiff that he should keep his

focus on his present division and not concern himself with what occurred in another division.

In addition, plaintiff would review the productivity reports for the Bound Brook division, which appeared to indicate that it was not performing at the same level it had achieved when plaintiff served as its division manager. DeCraine testified that plaintiff would regularly leave these reports on DeCraine's desk, with the results circled, with written comments on the unsatisfactory figures. DeCraine testified that he told plaintiff to focus his attention on his present division and not to concern himself with the performance results of another division.

On Saturday, December 18, 2004, there was a mandatory meeting for all UPS managers. During the course of the meeting, plaintiff made a disparaging remark to one of the managers, Sikorsky, who was making a presentation on developing new business. This disrupted the meeting, and plaintiff left not only the meeting but the building. DeCraine instructed one of the other managers to call plaintiff and instruct him to return. That individual returned, saying plaintiff was not answering his cell phone. DeCraine then gave the other manager his own cell phone, telling him to use that phone because plaintiff would recognize the number and answer the call. Plaintiff did answer

and was instructed to return. He returned to the building, but not the meeting. After the meeting concluded, plaintiff met with DeCraine and Ms. Wood, who was Sikorsky's manager, and he apologized for his behavior. In accordance with UPS practice, he wrote out a statement acknowledging that his behavior was inappropriate and giving assurances it would not be repeated. He also personally apologized to Sikorsky. DeCraine wrote a memo to plaintiff's file about the incident.

In January 2005, plaintiff wrote an anonymous letter to the human resources manager at UPS's corporate headquarters. Because of the importance of this document to this matter, we set it forth in full.

> I'm writing you this letter with deep regret. But I think it's time someone has informed you of the disappointment of the direction of the North Jersey District. I can not [sic] reveal my name because of the threat of retaliation. What I hope is not the same throughout the corporation is the treatment of its people that takes place here. If it is, then we as partners have more to worry about. I'm not sure if that word partner is even worth using anymore. I have read the policy book people section and the code of conduct book so many times and every time I read it, it doesn't change. The comments of fairness, our biggest assets, we will not tolerate threats of any kind. Do these same principles still remain in practice? Here in North Jersey I don't think so. It use[d] to be all for one, people use[d] to enjoy going to work. Now it's sad to say that has seen [sic] sucked out of not only me but many like me. It

seems that the demeanor has changed because of our results or lack there of [sic]. This District just two years ago was a top 10 district in the balance scorecard and we were proud of that. Now we are a bottom 10 District and getting worse. What has changed? Was it the people that have been here for years with a positive desire to be successful? I don't think so. All that being said I could probably live with poor direction, but I can't and should not live with threats of our jobs. Hopefully you would agree. When a District Manager stands in front of groups of people and threatens there [sic] livelihood in front of the District ERM [Employment Rotation Manager] we have problems. What kind of message are we sending when that type of behavior is practiced by the guy leading the place? This happened more than once and in the presence of many hard working, wanting to be successful UPSers. This is beyond unacceptable behavior. I ask the question of you, is it fair that people come to work with the fear that they will be unemployed if the [sic] have a bad day? I believe the word throughout the District now is "don't be the one he makes a [sic] example off [sic]." There are so many examples off [sic] poor and unacceptable, unethical behavior that something must be done or at the least addressed to hopefully restore what we once had. And that's good hard working honest people feeling no fear of making a mistake or getting a bad # on something.

Please look for yourself. How ethical is it when division managers sit in with there [sic] managers and supervisors when the[y] take the ERI [Employment Relations Index].[3]

[3] The ERI was a survey of UPS employees. Plaintiff alleged that management personnel were monitoring employees' responses, thus skewing the results.

> How ethical is it to have the leaders of the district use langue [sic] you wouldn't use with your worse [sic] nightmare.
>
> How ethical is it to be berated in front off [sic] your pears [sic] on daily calls.
>
> How ethical is it to be pressured enough to even consider integrity reporting.
>
> How ethical is it to threaten a man or women's [sic] livelihood.
>
> And much more.
>
> Please, I ask you to help us. This is not a good place to work. So many have invested so much of their lives to not to have to work under conditions like these. People don't come to UPS to do a bad job; the pressure to do a good job inhibits their abilities. I'll close with this. Look back at the track record of North jersey, and then look at us now. What has changed? You could answer that question. It begins and ends with respect; the organization owes it to its people to have the feeling of coming to work without the pressure of retaliation and reprisal if things are not perfect. Please get involved it must stop before good people suffer any longer.

The letter was signed "Threatened UPSer." Plaintiff testified he wrote this letter because his comments to DeCraine about his language and what he perceived as DeCraine's inappropriate conduct, and his concerns about improper actions at the Bound Brook facility had not produced any results. He testified that his reference to language you would not use in "your worse nightmare" was directed at DeCraine.

The anonymous complaint was forwarded to Moises Huntt, UPS's Northeast regional manager for human resources. He, in turn, assigned responsibility for pursuing the matter to Regina Hartley. During that process, she alerted Wiltz that his demeanor and conduct had been the subject of a complaint. At some point, she came to the conclusion that Battaglia was the author, an opinion she also shared with Wiltz.

Plaintiff maintained that his demotion, which took place in October 2005, was in retaliation for the several complaints he had voiced to DeCraine and for sending the anonymous letter. Defendant denied that retaliation played any role and contended that plaintiff's demotion was the result of his own behavior.

In support of this position, UPS pointed to a number of incidents, including the Sigorsky incident of December 2004 and plaintiff's apparent focus on the poor figures generated by the Bound Brook division, which UPS characterized as undermining, as opposed to supportive, behavior. It also noted that in March 2005 plaintiff had been assigned to investigate a report that a female UPS driver, Lynn Nagel, had been involved in an accident with a UPS truck and had not reported it. According to UPS, plaintiff, by his aggressive, threatening behavior, reduced her to tears. Plaintiff denied this, saying that the meeting had been attended by two union representatives who were rude and

aggressive to plaintiff and that she started to cry when a shouting match developed between the two sides.

On September 9, 2005, a Friday, UPS held what it referred to as a "scorecard meeting" at which various managers in the district would report to Wiltz on their divisions' progress in meeting goals and resolving problems. At this meeting, Wiltz called upon Steve Lagnese to report upon the Bridgewater facility in the Bound Brook division, whose productivity numbers were not satisfactory. Lagnese had taken over responsibility for this facility only three days before the meeting and had not anticipated being called upon to give such a report, and as a result, he was unprepared. Wiltz questioned him in depth in front of the other managers for approximately forty-five minutes. During the course of that interrogation, Lagnese, in attempting to describe how he intended to improve the figures for the Bridgewater facility, mentioned that he had already had a supervisor ride on the truck with Chris Debbie, a driver who evidently was not completing his route in a timely manner and that, as a result, Debbie had completed his route in less time. Lagnese testified that as he later stood outside during a break, plaintiff passed him and said, "Good report," a remark that Lagnese did not view as a compliment. Battaglia denied doing so.

That evening, someone called Chris Debbie to tell him that his name had come up at the scorecard meeting, and Debbie was disturbed at the news.

The following Monday was a scheduled UPS charity golf outing, an event which plaintiff had organized for several years, and he was at that rather than at work on Monday. DeCraine testified that when plaintiff came to work on Tuesday, plaintiff asked him whether he had heard that someone had told Debbie about the scorecard meeting. DeCraine responded he had not and again repeated that plaintiff should focus on his own division. Debbie had assisted plaintiff in organizing the golf outing, and plaintiff testified that Debbie called him late on Tuesday to tell plaintiff that his name had surfaced as a possible source of the leak. Plaintiff said he was upset at this and returned the next day to DeCraine to ask for a meeting with managers from the Bound Brook division. DeCraine told him he had heard nothing and that plaintiff should not pursue it.

The fact that someone had told Debbie of Lagnese's comments generated intense concern in UPS management, both because it was perceived as an egregious breach of confidentiality and because Debbie served as a union steward at the Bridgewater facility and had the ability to have a significant impact upon the morale of the other union employees. The division manager, Sanderson,

asked to have the matter investigated because he considered it wrong for a manager to have told a non-managerial employee something that had occurred in this meeting.

Regina Hartley and Chris Wheeler were assigned the responsibility of determining who was responsible for this leak. Debbie would not cooperate with them and refused to tell them who had notified him that he had been used as an example at the scorecard meeting. (By the time of trial, Debbie had a change of heart and testified that it was plaintiff who leaked the information to him.) Their attention turned to plaintiff as the source of the leak, and on September 22, 2005, Hartley and Wheeler met with plaintiff. He denied that he had leaked the information to Debbie. Based upon other information she had gathered, Hartley concluded plaintiff was not being truthful, and she suspended him with pay while the investigation continued. During the course of their investigation of this leak, they learned of the Sikorsky incident, the Nagel incident, and plaintiff's apparent concentration on problems in the Bound Brook division.

Plaintiff was directed to report to the office on October 4, 2005, where he met with Hartley, Wheeler, DeCraine and Rivieccio, the operations manager for northern New Jersey. They reviewed with him the Sikorsky incident, the Nagel incident

and the accusation that he had leaked information from the scorecard meeting. They told him that this constituted a pattern of conduct that constituted insubordination and was undermining the area's goals. At trial, they testified that plaintiff's attitude at the outset of the meeting was cavalier and seemingly dismissive of the charges.

In accordance with what we have noted was a UPS practice, plaintiff was instructed to write down an acknowledgement of what he had done, and he was left alone to do so. After some period of time, they returned and considered what plaintiff had written to be unsatisfactory because it spoke in generalities, rather than specifics. He was instructed to write another document and again was left alone to do so. After another period of time, they returned and again considered his writing insufficient. Plaintiff took the paper and said he would write anything they wanted, but he simply wanted to return to work. They again considered this insufficient since it would not represent his acknowledging responsibility for his conduct. He then jumped up, saying he was recanting everything, that he had not been insubordinate or done anything to undermine the company and its goals. The others were taken aback, and Hartley declared the meeting at an end. Plaintiff was told to go home and wait further instructions. He kept asking if he was being

terminated, to which she made no response. The entire meeting took approximately six hours.

The following day, Hartley consulted with Wiltz and with Moises Huntt and recommended to them that plaintiff be demoted for his conduct, and they concurred with her recommendation. On the next day, October 6, plaintiff returned to the office at DeCraine's direction. There, following an outline prepared by Hartley, DeCraine informed him that he was being demoted from manager to supervisor.

As a result of this demotion, plaintiff's salary decreased approximately $30,000 per year, and his eligibility to share in stock awards was lessened. In addition, he testified that he felt humiliated by the experience. He suffered depression, anxiety and sleeplessness and sought assistance from a psychiatrist who prescribed medication and provided therapy. He filed this action for damages.

II

We turn first to defendant's appeal. Defendant makes the following arguments: that the trial court erred in not granting its motion for judgment on plaintiff's CEPA claim, or, in the alternative, that it is entitled to a new trial on the CEPA claim; that it is entitled to judgment on plaintiff's LAD claim; that it is entitled to a new trial on plaintiff's LAD claim

because neither the anonymous letter nor the alleged flirtatious behavior constitutes protected activity under LAD; the trial court incorrectly limited its proofs with respect to plaintiff's unprofessional conduct; plaintiff's closing argument was unfairly prejudicial; the trial court should have granted a greater remittitur of plaintiff's emotional distress damages; the award of economic damages should be vacated because it is not supported by sufficient credible evidence.

A

We turn first to defendant's argument that the trial court should have granted its motions with respect to plaintiff's CEPA claim. Defendant made a motion for judgment at the close of the case and a motion for judgment notwithstanding the verdict. R. 4:40. The trial court denied both motions. The standard for deciding such motions is that which governs motions for dismissal at the end of the plaintiff's case under Rule 4:37-2(b). The court must accept as true all the evidence that supports the position of the party defending against the motion and must accord that party the benefit of all legitimate inferences that can be deduced from that evidence. Potente v. County of Hudson, 187 N.J. 103, 111 (2006); Alves v. Rosenberg, 400 N.J. Super. 553, 565 (App. Div. 2008). Guided by that

standard, we reject defendant's argument that the trial court erred in denying its motion for judgment.

CEPA was enacted to prohibit an employer from taking retaliatory action against an employee in certain instances. At the time of these events, the statute barred retaliation if an employee "[d]iscloses . . . to a supervisor . . . an activity, policy or practice . . . that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law," N.J.S.A. 34:19-3a; or "[p]rovides 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 . . .," N.J.S.A. 34:19-3b; or "[o]bjects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes . . . is in violation of a law or regulation promulgated pursuant to law . . ., is fraudulent or criminal [or] is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment." N.J.S.A. 34:19-3c. Plaintiff in his complaint pled an amalgam of subsections (a) and (c).

CEPA was enacted "to protect and encourage employees to report illegal and unethical workplace activities and to discourage public and private sector employers from engaging in

such conduct." Abbamont v. Piscataway Twp. Bd. of Educ., 138 N.J. 405, 431 (1994). It "is intended to encourage employees to speak up about unsafe working conditions that violate the law or public policy and to provide protection for those who do so." Donelson v. DuPont Chambers Works, 206 N.J. 243, 255-56 (2011). The overriding policy of the statute is "to protect society at large." Cedeno v. Montclair State University, 163 N.J. 473, 478 (2000).

"[T]he essential purpose behind CEPA was to provide 'broad protections against employer retaliation' for workers whose whistle-blowing actions benefit the health, safety and welfare of the public." Feldman v. Hunterdon Radiological Assocs., 187 N.J. 228, 239 (2006) (quoting Mehlman v. Mobil Oil Corp., 153 N.J. 163, 179 (1998)). Although it was not intended to "assuage egos or settle internal disputes at the workplace . . .," Klein v. Univ. of Med. and Dentistry of New Jersey, 377 N.J. Super. 28, 45 (App. Div. 2005), it should be liberally construed as it is broad, remedial legislation. Donelson, supra, 206 N.J. at 256; D'Annunzio v. Prudential Ins. Co., 192 N.J. 110, 120 (2007); Aquerre v. Schering-Plough Corp., 393 N.J. Super. 459, 471 (App. Div.), certif. denied, 193 N.J. 276 (2007).

An employee's claim of retaliatory conduct under CEPA is analyzed under the burden-shifting approach enunciated in

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Massarano v. N.J. Transit, 400 N.J. Super. 474, 492 (App. Div. 2008); Zappasodi v. State, Dep't of Corr., 335 N.J. Super. 83, 100 (App. Div. 2000).

Under that approach, the employee must first make a prima facie case of discrimination; that shifts the burden to the employer "to articulate some legitimate, nondiscriminatory reason for" its action. McDonnell Douglas, supra, 411 U.S. at 802, 93 S. Ct. at 1824, 36 L. Ed. 2d at 677-78. The employee then gets "a fair opportunity to show that [the] stated reason for" the action "was in fact pretext." Id. at 804, 93 S. Ct. at 1825, 36 L. Ed. 2d at 679.

The plaintiff's evidence of pretext may be indirect, such as a demonstration "that similarly situated employees were not treated equally." Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255-58, 101 S. Ct. 1089, 1094-96, 67 L. Ed. 2d 207, 216-18 (1981) ("Burdine"). It may be circumstantial. Mandel v. UBS/PaineWebber, Inc., 373 N.J. Super. 55, 75 (App. Div. 2004), certif. denied, 183 N.J. 213 (2005). It may even be just the incredibility of the employer's proffered reason, which, in conjunction with the prima facie case, may be legally sufficient to support the inference that the alleged discriminatory reason was an actual one. St. Mary's Honor Ctr. v. Hicks, 509 U.S.

502, 511, 514-20, 113 S. Ct. 2742, 2749, 2751-54, 125 L. Ed. 2d 407, 418, 421-24 (1993) (rejecting dicta in Burdine that the employee need only discredit the employer's reason). Accord Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 147-48, 120 S. Ct. 2097, 2108-09, 147 L. Ed. 2d 105, 119-20 (2000); Marzano v. Computer Science Corp., 91 F. 3d 497, 509 (3d Cir. 1996); Kelly v. Bally's Grand, Inc., 285 N.J. Super. 422, 433 (App. Div. 1995). The employee does not have to show that the prohibited reason was the employer's sole reason, but rather just that it may have been one of the employer's "but-for" reasons. Fuentes v. Perskie, 32 F. 3d 759, 764 (3d Cir. 1994). Accord Slohoda v. United Parcel Serv., 207 N.J. Super. 145, 155 (App. Div.), certif. denied, 104 N.J. 400 (1986).

In many respects, plaintiff's CEPA claim is closely analogous to the situation presented in Estate of Roach v. TRW, Inc., 164 N.J. 598 (2000). The defendant in that case was a defense contractor for the government and, as such, was required to "promulgate a company code of conduct." Id. at 602. The defendant's code stated in part, "'It should be understood that the spirit of this policy requires that [TRW] maintain a high degree of integrity in all of its interactions with shareholders, employees, customers, suppliers, local communities, governments at all levels and the general public.'"

Ibid. It provided, "'[a]ny employee who acquires information that gives such employee reason to believe that another employee is engaged in conduct prohibited by this policy' has a responsibility to report promptly such information to his or her supervisor or a TRW attorney." Id. at 603.

The plaintiff had served for a time as the manager of TRW's Business Ethics and Conduct Program, id. at 602, although he no longer held that position at the time of the underlying events. Another employee reported to him that a third employee was engaged in certain acts of misconduct, including submitting a false expense report and false time cards, failing to disclose conflicts of interest and leasing equipment through TRW for his personal use. Id. at 604. The plaintiff looked into the complaints and concluded they had validity, and he reported them in turn to his supervisor. Id. at 604-05. His supervisor did not pursue the matter and would not provide the plaintiff a statement in writing that the plaintiff had satisfied his reporting requirements. Id. at 605. The subject of the allegations became aware of the situation; he denied the allegations and was displeased at the plaintiff's pursuit of them. Ibid. One year later, in the course of a reorganization, the plaintiff was laid off. Id. at 606. He filed suit, alleging that he was laid off in retaliation for his

investigation of the alleged improprieties and thus in violation of CEPA. Id. at 607.

The Supreme Court rejected this court's determination that the plaintiff had a merely private dispute with his employer and thus did not have a cause of action under CEPA. Id. at 607-09. The Court stated that "CEPA is supposed to encourage, not thwart, legitimate employee complaints. 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." Id. at 610.

We note that defendant does not rest its argument with respect to plaintiff's CEPA claim upon the Court's further statement in Roach that

> if an employee were to complain about a co-employee who takes an extended lunch break or makes a personal telephone call to a spouse or friend, we would be hard pressed to conclude that the complaining employee could have "reasonably believed" that such minor infractions represented unlawful conduct as contemplated by CEPA. CEPA is intended to protect those employees whose disclosures fall sensibly within the statute; it is not intended to spawn litigation concerning the most trivial or benign employee complaints.
>
> [Id. at 613-14.]

Rather, the focus of defendant's argument is that plaintiff failed to establish both that he had a "reasonable belief" that there was wrongdoing in the southern division and the existence of a causal connection between his one conversation with DeCraine on this topic and his subsequent demotion. In support of these arguments, defendant stresses that plaintiff relied solely upon hearsay, presented no corroboration of the allegation and conceded on cross-examination that he did not consider such conduct "fraudulent." It also points to the more than a year that separated plaintiff's conversation with DeCraine about alleged improprieties in the southern division and plaintiff's demotion.

That, however, is hardly determinative. In Roach, for example, approximately the same length of time existed between the plaintiff's investigation of financial improprieties on the part of another employee and his ultimate termination. Roach, supra, 164 N.J. at 604-06; see also Ivan v. County of Middlesex, 595 F. Supp. 2d 425, 472 (D.N.J. 2009) (noting "Temporal proximity can be helpful in assessing causation under the petition clause, but it is not dispositive. When retaliatory action occurs well after protected activity the inference that protected activity was a substantial factor is more difficult to draw but is not foreclosed.") In our judgment, the answers to

defendant's arguments were within the purview of the jury. Defendant presented those arguments to the jury, and the jury by its verdict clearly rejected them. We decline to second guess its judgment.

We note also that with respect to defendant's argument on causation, the United States Supreme Court has recently held that an employer may be held responsible for "employment discrimination based on the discriminatory animus of an employee who influenced, but did not make, the ultimate employment decision." Staub v. Proctor Hospital, ___ U.S. ___, 131 S. Ct. 1186, 1189, 179 L. Ed. 2d 144, 149 (2011). Although this case arose under a different statute, we are persuaded that our Supreme Court would adopt its approach and analysis, referred to as the "cat's paw" theory, id. at ___, 131 S. Ct. at 1190, 179 L. Ed. 2d at 151, in considering questions of causation for purposes of CEPA. We thus reject defendant's contention that it was entitled to entry of judgment on plaintiff's CEPA claim.

B

Defendant also contends that it is entitled to a new trial with respect to plaintiff's CEPA claim. To the extent defendant's argument rests upon the same issues it asserts entitled it to judgment on the CEPA claim, we reject it for the reasons we have just set forth.

Defendant also notes as part of its argument that the trial court, in charging the jury with respect to the CEPA claim, instructed it that plaintiff's CEPA claim "dealt with credit cards, dealt with meal practices and other things. And he reasonably believed that what was going on in connection with those activities [was] fraudulent."

Such a charge did not clearly outline for the jury the parameters of plaintiff's CEPA claim and which of plaintiff's complaints could be entitled to protection under CEPA and which might not. We would, for instance, find it difficult to conclude that a complaint that some employees were drinking at lunch or taking extended lunch hours constitutes protected activity under CEPA. There is nothing illegal or against public policy about such an activity. That it might violate an unspecified internal UPS policy would be immaterial, however, for purposes of CEPA.

The trial court held an extensive charge conference with counsel and defendant did not object to this language. Nor did defendant note any exception to the charge after the trial court concluded its instructions.[4] Defendant has not established that the use of this phrase constitutes plain error under Rule 2:10-

[4] We note as well that defendant did not except to the court's charge on causation and does not challenge it on appeal.

2, and we reject defendant's argument that it is entitled to a new trial on the CEPA claim.

III

We turn now to defendant's arguments with respect to plaintiff's LAD claim, which rested upon his contention that UPS improperly retaliated against him for his complaints about DeCraine's offensive, sexually-based language and apparently improper conduct.

The LAD prohibits employment discrimination "because of" any of several personal characteristics including "sex." N.J.S.A. 10:5-4. A claim of sexual discrimination under the LAD may be based on an employer's creation or tolerance of a hostile work environment. Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 601-03 (1993). The employee must establish that the conduct "would not have occurred but for" the gender of the targeted employee, and that it was "severe or pervasive enough" to make a "reasonable" employee of that gender "believe that . . . the conditions of employment are altered and the working environment is hostile or abusive." Id. at 603-04. Retaliation against an employee for reporting sexual discrimination against other employees violates the LAD and gives the reporting employee, who may be of either sex, an LAD claim of his or her own. Roa v. Roa, 200 N.J. 555, 575-76 (2010).

A plaintiff's LAD claim must find root in the statute and we thus turn to the statutory language. N.J.S.A. 10:5-5 defines the terms "unlawful employment practice" and "unlawful discrimination" to "include only those unlawful practices and acts specified" in N.J.S.A. 10:5-12. We are thus not at liberty to expand the statute's scope beyond that created by the Legislature.

N.J.S.A. 10:5-12(a) provides that it is an unlawful employment practice or unlawful discrimination "for an employer, because of the race, creed, color, national origin, ancestry, age, marital status, . . . or sexual orientation . . . to discriminate against such individual in compensation or in terms, conditions or privileges of employment. . . ." N.J.S.A. 10:5-12(d) declares it to be an unlawful employment practice or unlawful discrimination "to take reprisals against any person because that person has opposed any practices or acts forbidden under this act . . . ."

Claims of unlawful discrimination or unlawful employment practices under the statute may rest upon either discrete acts or the creation of a hostile work environment. Ivan, supra, 595 F. Supp. 2d at 448. The latter involves conduct that is "sufficiently severe or pervasive to alter the conditions of

employment and to create an intimidating, hostile, or offensive working environment." Lehmann, supra, 132 N.J. at 603.

Plaintiff alleged in connection with his LAD claim that his demotion was in retaliation for the anonymous letter, with its complaints about language, and his remonstrances to DeCraine for his language and his flirtatious conduct. While in no way condoning the vile language attributed to DeCraine, we are satisfied that the conduct alleged does not fall within the LAD and that, as a result, Battaglia's actions do not constitute protected activity under LAD.

The record is barren of any evidence that any female employee heard the comments attributed to DeCraine.[5] It is similarly barren of any evidence that any female employee of defendant's was treated differently in any manner, whether by DeCraine or any other employee of defendant. The statute prohibits discrimination "in compensation or in terms, conditions or privileges of employment." There is no evidence of any gender-based discrimination or that UPS permitted a work environment hostile to its female employees.

[5] The only reference in the record to any other UPS employee complaining about inappropriate language in the workplace dealt with a complaint by two women about another employee, having no relationship to this litigation. Plaintiff testified that he informed DeCraine of the complaint, was assigned to investigate it, did so, and resolved the matter to the women's satisfaction.

We do not question that plaintiff may have been genuinely offended by the comments he attributed to DeCraine. That he may have taken offense, as would most individuals, is not, however, a basis for a claim of gender-based discrimination.

Plaintiff also asserted that he was demoted for cautioning DeCraine that other employees thought that DeCraine was engaged in an affair with Nola Wood in light of his behavior with her. In our judgment, that also fails to qualify as a protected activity under the LAD. There is no evidence in this record that, assuming that DeCraine was indeed engaged in such a relationship, that it was anything other than consensual. Erickson v. Marsh & McLennan Co., 117 N.J. 539, 559 (1990) (noting that plaintiff, who alleged he was discharged so that his superior could promote a female employee with whom he was romantically involved, did not allege actionable discrimination; the relationship was "consensual, voluntary and non-coercive.")

> To sustain a claim for third-party sexual harassment, a plaintiff must establish that: (1) employment opportunities or benefits were bestowed upon a third party due to that third party's "submission" to the employer's coercive sexual advances; and (2) the plaintiff was qualified for but was denied the same opportunities or benefits bestowed on the third party because of the coerced sexual harassment. An adverse employment action allegedly resulting from a consensual, non-coercive relationship between the employer and the third party, is

> insufficient to establish a claim of third-party sexual harassment.
>
> [Mandel v. UBS/PaineWebber, Inc., supra, 373 N.J. Super. at 77-78 (citations omitted).]

There was no testimony or evidence of any sort that the relationship, assuming it occurred, had any impact upon either the other party or any other employee. Because the relationship did not trigger LAD, plaintiff's statements about it do not qualify as protected activity for purposes of the statute.

Because plaintiff's proofs did not establish gender-based discrimination or a hostile working environment for purposes of LAD, the trial court should have granted defendant's motion for judgment on that claim.[6]

IV

A

We address certain of defendant's remaining contentions for the guidance of the trial court for any future proceedings that may occur. Defendant argues that the trial court improperly restricted its proofs with respect to plaintiff's employment history, specifically allegations of his own improper language and overbearing management style during the mid-1990's. The

[6] The parties agreed that plaintiff's damages were the same under CEPA and under LAD. Thus, our conclusion that plaintiff did not establish a cause of action under LAD, does not, ipso facto, mandate a new trial on damages.

court excluded testimony about specific incidents and notes from that time period as being too remote.

Relevant evidence is "evidence having a tendency in reason to prove or disprove" a material fact. N.J.R.E. 401. Relevant evidence is usually admissible unless some exception applies. N.J.R.E. 402. However, relevant evidence may be excluded if its probative value is "substantially outweighed" by risks that include undue prejudice, confusion of the issues, and waste of time. N.J.R.E. 403. The decision to admit or exclude relevant evidence is within the court's discretion, and it is reversible only if the court "palpably abused" its discretion by making a finding "so wide of the mark that a manifest denial of justice resulted." State v. Carter, 91 N.J. 86, 106 (1982). Accord Verdicchio v. Ricca, 179 N.J. 1, 34 (2004).

Our Supreme Court has specifically held that "[t]he question of remoteness is to be decided by the trial court as a matter of discretion, and the determination so made is not reviewable unless it appears there was a palpable abuse of discretion." State v. Rogers, 19 N.J. 218, 229 (1955). The Court has also recognized that "[t]he 'more attenuated and the less probative the evidence, the more appropriate it is for a judge to exclude it' . . . ." State v. Covell, 157 N.J. 554,

569 (1999) (quoting State v. Medina, 201 N.J. Super. 565, 580 (App. Div.), certif. denied, 102 N.J. 298 (1985)).

We are unable to conclude that the trial court abused its discretion in its rulings on this issue. Defendant at trial maintained that the decision to demote plaintiff was based upon the Sikorsky and Nagel incidents and the leak that occurred in September 2005. It did not attempt to prove that those involved in the decision to demote plaintiff reviewed his entire employment history before making their decision.

Nor do we see that such evidence was material to a qualitative analysis of plaintiff's employment or his credibility as a witness. Plaintiff, contrary to defendant's arguments, did not cast himself as a perfect employee. Indeed, he was one of the few witnesses who acknowledged the use of vulgar language on occasion.

B

Defendant also complains of remarks by plaintiff's counsel in summation. A summation "must be limited to the facts in evidence and inferences reasonably to be drawn therefrom." State v. Bey, 129 N.J. 557, 620 (1992), cert. denied, 513 U.S. 1164, 115 S. Ct. 1131, 130 L. Ed. 2d 1093 (1995). Nonetheless, "'counsel is allowed broad latitude in summation'" and "'may draw conclusions even if the inferences that the jury is asked

to make are improbable, perhaps illogical, erroneous or even absurd,'" as long as they are not completely groundless and do not stray into misstating the evidence. Bender v. Adelson, 187 N.J. 411, 431 (2006) (quoting Colucci v. Oppenheim, 326 N.J. Super. 166, 177 (App. Div. 1999), certif. denied, 163 N.J. 395 (2000)). Accordingly, comments in summation do not justify a new trial unless they "are so prejudicial that 'it clearly and convincingly appears that there was a miscarriage of justice under the law.'" Ibid. (quoting R. 4:49-1(a)). The comments are to be viewed in the context of the entire record, Bey, supra, 129 N.J. at 620, and prejudicial impact can be neutralized by a curative instruction. State v. Zola, 112 N.J. 384, 426 (1988), cert. denied, 489 U.S. 1022, 109 S. Ct. 1146, 103 L. Ed. 2d 205 (1989).

This trial was hotly contested, and the parties presented sharply disparate views of what had occurred. Plaintiff's counsel, for example, presented an argument with respect to the testimony presented at trial. The trial court, however, correctly instructed the jury to rely upon its own recollection of the testimony and not the statements of counsel.

Defendant also complains that plaintiff's counsel made several legal misstatements in her summation. The jury was

instructed, however, to rely on the trial court's charge, and defendant makes no complaint with respect to the court's charge.

We have reviewed the summation of plaintiff's counsel and are satisfied that none of the remarks of which defendant complains warrant a new trial.

C

Defendant also contends that the trial court erred in the scope of the economic damages it permitted the jury to consider. Specifically, it argues that so much of the award as constitutes "front pay," that is, compensation for plaintiff's future loss of income was based on speculation and thus lacked an appropriate evidential basis. Defendant points to what it considers the many uncertainties underlying plaintiff's claim for front pay, such as how much longer plaintiff would continue to work and whether plaintiff might be promoted in the future, thus reducing the extent of his loss. We disagree.

Defendant noted those factors in counsel's closing argument and the trial court also pointed out to the jury in its instructions factors to consider in determining an award for front pay. It is clear by its verdict that the jury was cognizant of these uncertainties. The trial court noted in its charge that plaintiff's economic expert had computed plaintiff's past lost wage claim, in round numbers, at $160,000.

Plaintiff's counsel noted in summation that his economic expert had estimated plaintiff's future economic loss at more than one million dollars. The jury, however, awarded $500,000 as plaintiff's total economic loss.

D

The jury also awarded plaintiff $500,000 for the emotional distress he experienced following his demotion, and, as we have noted, the trial court later remitted that to $205,000. Defendant argues that was still too large, plaintiff that the trial court erred in remitting the award at all. Having reviewed this record, we are satisfied the award cannot stand for another reason. In its charge, the trial court instructed the jury that in considering this issue, it could compensate plaintiff for the emotional distress he would continue to experience into the future and charged the jury with respect to plaintiff's anticipated life expectancy of 30.3 years. There was no testimony, however, that plaintiff suffered from a permanent condition as a result of his experience in being demoted. The charge on permanency was unwarranted.

In his opposition to this aspect of defendant's argument, plaintiff points to this court's opinion in Lockley v. Turner, 344 N.J. Super. 1 (App. Div. 2001), rev'd in part on other grounds sub nom. Lockley v. State, Dep't of Corr., 177 N.J. 413

(2003), in which we upheld an award of $750,000 for emotional distress in which plaintiff had not presented any expert testimony. In that case, however, we specifically noted that the plaintiff had "presented no expert testimony in support of his claim of emotional distress, and, in consequence, the jury was not allowed to include any future emotional suffering and distress as a component of its award." 344 N.J. Super. at 12. Here, in contrast, the jury was permitted to include plaintiff's potential future emotional distress without any supporting expert testimony that plaintiff was likely to experience such.

We do agree with plaintiff, however, that he is entitled to receive prejudgment interest on any award he may ultimately receive on his claim for damages for his emotional distress. In disallowing prejudgment interest, the trial court cited to Baker v. Nat'l State Bank, 353 N.J. Super. 145 (App. Div. 2002). In that case, in which the plaintiffs sought damages under LAD, we approved the inclusion of prejudgment interest. 353 N.J. Super. at 159.

We note that we have set aside so much of the judgment as rested on plaintiff's claims under LAD but have left in place his claim under CEPA. The Supreme Court has, on many occasions, looked to LAD to determine a proper construction of CEPA. D'Annunzio v. Prudential Ins. Co. of Am., 192 N.J. 110, 123

(2007); Green v. Jersey City Bd. of Educ., 177 N.J. 434, 445-48 (2003). In Abbamont, supra, 138 N.J. at 417, the Court observed that the same considerations of public policy that underlay its construction of LAD "inform[ed] our analysis of the scope of employer liability for retaliatory conduct under CEPA." Guided by those principles, we can discern no reason in logic or policy to reach a different result with respect to prejudgment interest under CEPA than we would under LAD.

E

We discuss briefly the remaining issues plaintiff has raised in his cross-appeal. He argues that the trial court erred in dismissing his breach of contract claim. While we consider the trial court's conclusion correct, we are also satisfied the argument is moot. Plaintiff does not contend that his contract claim encompassed damages beyond those he asserted in his CEPA claim, upon which he prevailed and which we have declined to set aside.

Plaintiff argues the trial court erred in denying his motion for a new trial on punitive damages. We disagree. We reject, as without merit, his contention that defendant was judicially estopped to contest the issue because defense counsel, in his summation in the punitive damages proceedings, told the jury that UPS "took responsibility" for what had

occurred and would satisfy the compensatory damages award. R. 2:11-3(e)(1)(E). Further, plaintiff points to no error with regard to the punitive damages proceedings but simply disagrees with the jury's verdict and the trial court's refusal to set aside. Plaintiff's disagreement is not a basis for relief.

Plaintiff also argues that the trial court erred when, prior to the trial, it granted summary judgment on his claim for damages for intentional infliction of emotional distress. We decline to address the merits of the argument because we are satisfied that by asserting a CEPA claim, plaintiff waived a claim for intentional infliction of emotional distress. N.J.S.A. 34:19-8.[7] Finally, because plaintiff's claim for emotional distress damages must be retried, we decline to address plaintiff's argument that the trial court erred in not awarding the full amount of counsel fees and costs requested.

On defendant's appeal, the judgment under review is affirmed in part and reversed in part and the matter is remanded for further proceedings. With respect to plaintiff's cross-appeal, the judgment is affirmed in part, and the matter is remanded for further proceedings.

[7] We note for the sake of completeness that defendant did not argue on appeal that plaintiff, by filing his CEPA claim, waived an LAD claim.