

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4214-09T2

MICHAEL J. MESSINA,

Plaintiff-Respondent,

v.

BOROUGH OF FAIR LAWN, a corporate
body politic of the State of New
Jersey, and ERIK W. ROSE,

Defendants-Appellants.

Argued March 1, 2011 – Decided July 11, 2011

Before Judges Wefing, Payne and Baxter.

On appeal from Superior Court of New
Jersey, Law Division, Bergen County, Docket
No. L-552-08.

Thomas B. Hanrahan argued the cause for
appellants (Thomas B. Hanrahan & Associates,
L.L.C., and Botta & Associates, L.L.C., attorneys;
Mr. Hanrahan and Christopher C. Botta, of
counsel; Mr. Hanrahan and David J. Pack, on
the brief).

Edward J. Nolan argued the cause for
respondent.

PER CURIAM

Defendants appeal from a judgment entered in plaintiff's
favor following a jury trial for a total award of \$815,324.67.

Of that amount, \$419,000 represents the jury's award for compensatory damages under the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -8, \$126,548 its award for punitive damages, and the balance includes counsel fees, prejudgment interest and a sum to cover the negative tax consequences plaintiff would experience in light of the lump sum award. After reviewing the record in light of the contentions advanced on appeal, we reverse and remand for further proceedings.

Plaintiff is a sergeant on the police force of the Fair Lawn Police Department. Defendant Erik Rose is the Chief of the department. Plaintiff joined the department in 1988 and in 1998 was promoted to sergeant. In 2001 plaintiff was given supervisory responsibility for the Detective Bureau, a position that had previously been held by a lieutenant. In April 2001, plaintiff took and passed the examination for promotion to the rank of lieutenant. He initially was ranked third on the list of candidates eligible for promotion but later dropped to fourth when another individual took and passed the exam. While that individual was promoted to lieutenant, plaintiff was not promoted during the life of the list, which expired on April 25, 2004. Plaintiff took the exam a second time and again ranked fourth. Two other candidates were promoted to lieutenant,

moving plaintiff up to second place by the time the list expired on February 11, 2007, without plaintiff being promoted.

Plaintiff did not take the exam a third time.

In October 2004, Chief Rose appointed Lieutenant Yirce as the detective lieutenant for the Detective Bureau, and plaintiff was assigned to train Yirce for the post. Plaintiff maintained that Yirce was unable to perform the duties satisfactorily, and eventually Yirce was assigned purely administrative duties, and plaintiff resumed handling the duties of the detective lieutenant.

In February and May 2006, plaintiff approached Chief Rose with respect to Yirce. Plaintiff testified that he told Rose that the assignment of Yirce to the Detective Bureau was not working out. He testified that he told Rose that either he should be promoted to lieutenant or another lieutenant should be assigned to the Bureau. According to plaintiff, Rose responded, "Things are working really smoothly right now with you doing the work, there's no reason for me to change [Yirce's] assignment. I'm going to leave it the way it is."

Plaintiff was not satisfied with this response, and in June 2006, he returned to Rose and told Rose that he was considering

requesting a desk audit.¹ Plaintiff testified that Rose did not appear to have a particular reaction to this statement.

In July 2006, plaintiff submitted his request for a desk audit to the Department of Personnel. In his submission, plaintiff observed that he "ha[d] been given all of the tasks performed by Lieutenants assigned to the Detective Bureau in the past and was called upon to train a newly assigned Lieutenant in the same tasks, only to obtain those duties again when the newly assigned Lieutenant was given an administrative title less than three months later." He stated that as a remedy he sought promotion to the rank of Lieutenant.

In August 2006, Chief Rose, at the request of the Department of Personnel, sent in his response to plaintiff's submission. He noted that plaintiff had more administrative responsibilities than did patrol sergeants because he supervised a smaller number of officers. He also noted that, contrary to plaintiff's statement, plaintiff did not supervise any sergeants. To help him prepare this response, Chief Rose had requested further detailed information from Captain Serrao with respect to plaintiff's duties. Chief Rose attached to his

¹ Under N.J.A.C. 4A:3-3.9, an employee who believes that his or her "duties . . . do not conform to the approved job specification for the title assigned to that position" may request a review of his or her job classification.

response Captain Serrao's memo to him and noted that it endorsed plaintiff's request.

Approximately two months later, in October 2006, the Department of Personnel notified plaintiff and the municipality that it had decided that plaintiff's position was properly classified and if either disagreed with this conclusion, an appeal could be filed with the Division of Merit System Practices and Labor Relations. Plaintiff did file such an appeal, and a hearing was held on June 20, 2007. In September, the Commissioner of Personnel rejected plaintiff's appeal, concluding that his position was properly classified as that of a sergeant. Plaintiff did not seek any further appellate review.

Plaintiff contended that Chief Rose was angered by his request for a desk audit and retaliated against him for doing so. He identified four specific acts of retaliation: three investigations by Internal Affairs he characterized as "frivolous" although he admitted the conduct at issue and a transfer from the Detective Bureau back to the Patrol Division. Plaintiff alleged that this transfer, which did not involve any change to his rank of sergeant, did affect his compensation because he would not have as many opportunities for overtime work in the Patrol Division as he had in the Detective Bureau

and because he would lose the \$500 clothing allowance afforded to members of the Detective Bureau. Maimone v. City of Atlantic City, 188 N.J. 221, 236-37 (2007) (holding reduction of overtime opportunities, loss of clothing allowance and other benefits sufficient to constitute an adverse employment action under CEPA). Plaintiff maintained that in the more than twenty years he had worked in the Fair Lawn Police Department, he had never seen an instance of an involuntary transfer from the Detective Bureau to the Patrol Division.

In January 2008, plaintiff filed a one-count complaint seeking damages under CEPA. Following nine days of trial the jury found in plaintiff's favor. After the trial court denied defendants' motion for judgment notwithstanding the verdict or a new trial, this appeal followed.

CEPA prohibits an employer from taking retaliatory action against an employee in any of three instances: if the employee "[d]iscloses, or threatens to disclose to a supervisor or to a public body 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 a rule or regulation promulgated pursuant to law . . . [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. In his complaint, plaintiff relied upon subsections (a) and (c) of the statute.

The Supreme Court has had several occasions to consider the underlying purpose of this statute and its scope. It was enacted "to protect and encourage employees to report illegal or 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, ___ N.J. ___, ___ (2011) (slip op. at 15). 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. D'Annunzio v. Prudential Ins. Co., 192 N.J. 110, 120 (2007); Aguerre v. Schering-Plough Corp., 393 N.J. Super. 459, 471 (App. Div. 2007).

Although, as we noted, plaintiff in his complaint cited both subsection (a) and subsection (c) of the statute, the trial court, without objection from plaintiff's counsel, only charged the jury with respect to subsection (a). Plaintiff on appeal does not contend that the trial court should have done otherwise. We thus confine our analysis to subsection (a).²

To maintain an action under CEPA, a plaintiff need not show that the conduct complained of would actually violate a statute or regulation but only that the plaintiff reasonably believed that it would. Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003).

² Within his brief, plaintiff does assert that his claim was supportable under subsection c(1) as well as subsection c(3) because regulations are a source of public policy. We do not address that contention in light of the restricted nature of the charge that was given to the jury.

A plaintiff "must set forth facts that would support an objectively reasonable belief that a violation has occurred." Id. at 464. In that case, the Court concluded that it was not reasonable for plaintiff, a union official, to believe that the local's practice of not reading minutes of Executive Board meetings to the general membership violated federal labor law and public policy.

Here, plaintiff argued that having him perform the duties of a lieutenant while paying him as a sergeant, and failing either to promote him to lieutenant or reassign to a lieutenant those of his duties that were properly allocable to a lieutenant was a violation of New Jersey's law and public policy. This position is supported by N.J.A.C. 4A:3-3.4, which states:

No person shall be appointed or employed under a title not appropriate to the duties to be performed nor assigned to perform duties other than those properly pertaining to the assigned title which the employee holds, unless otherwise provided by law or these rules.

Here, the jury unanimously found that plaintiff reasonably believed that his performing as a sergeant the job duties of a lieutenant in the Detective Bureau violated Civil Services regulations. That finding with respect to plaintiff's reasonable belief finds ample support in the record, and we have no basis to reject it.

That belief by itself, however, would be insufficient to support plaintiff's CEPA claim. Although this court has recognized that the statute is not intended to redress simple workplace grievances with respect to work assignments, Klein, supra, we must follow the rule stated in Estate of Roach v. TRW, Inc., 164 N.J. 598, 610-11 (2000), that an employee proceeding under subsection (a) of the statute, as did plaintiff, need not establish that the employer's activity violates the public interest or public policy. In that case, the Court stated 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. Because CEPA does afford protection to an employee who seeks to correct what he reasonably believes is a violation of civil service regulations, plaintiff was entitled, under Roach, to invoke CEPA.

Defendant's initial contention on appeal is that plaintiff is not entitled to the protection afforded by CEPA because he did not engage in an activity protected by CEPA when he requested the desk audit. We do not agree, for two reasons.

First, the act of requesting the desk audit fits squarely within the parameters of subsection (a), disclosing to a public body an activity, policy or practice plaintiff reasonably

believed to be in violation of a duly adopted civil service regulation. Secondly, defendant agreed at trial that asking for a desk audit constituted whistle-blowing activity for purposes of CEPA. Defendant should not be permitted to retreat from that position on appeal.

The next element to plaintiff's CEPA claim is that defendants retaliated against him for requesting this desk audit. During trial, plaintiff pointed to his allegation that Chief Rose misrepresented his job duties in opposing the desk audit, transferred him from the Detective Bureau to the Patrol Division, and initiated several internal affairs investigations of him. The jury answered, by a vote of six to one, that plaintiff had proven that Chief Rose took retaliatory action against him. Although defendants argue that no action rose to a level sufficient to constitute retaliation for purposes of CEPA, we disagree.

What constitutes an "adverse employment action" must be viewed in light of the broad remedial purpose of CEPA, and our charge to liberally construe the statute to deter workplace reprisals against an employee speaking out against a company's illicit or unethical activities. Cast in that light, an "adverse employment action" is taken against an employee engaged in protected activity when an employer targets him for reprisals--making false accusations of misconduct, giving negative performance reviews

[Donelson, supra (slip op. at 18).]

We earlier referred to the Court's decision in Maimone, in which the Court concluded that the economic consequences attendant to a transfer from the detective bureau were sufficient for purposes of CEPA. Maimone, supra, 188 N.J. at 236-37. That analysis is controlling upon us, and thus plaintiff satisfied the third element of his CEPA claim.

At trial, however, plaintiff put forth several different actions that he maintained were retaliatory for purposes of CEPA, including, as we have mentioned, the internal affairs investigations. The jury was not asked to identify which of the actions it considered to have been taken in retaliation but was simply asked the generic question whether retaliatory action had been taken. Although we recognize that the parties did not ask the trial court to include that identification as part of the jury's verdict, we consider it essential because of the effect on the damages calculus. If, for instance, the jury concluded that the transfer was not retaliatory but the initiation of the internal affairs investigation was, there would not be the same effect upon plaintiff's earnings.

Further, the trial court, in its charge, instructed the jury that if it concluded that plaintiff was entitled to damages, he was entitled to receive

the difference between the earnings he received, and will receive in the future as a police sergeant and the compensation he should have received, and should receive in the future, as a . . . police lieutenant, as well as his net retirement income [loss]. That is, [the] difference in the pension benefits that he will receive as a sergeant from that which he should have received in the future as a lieutenant.

We agree with defendant that this was incorrect.

If plaintiff was working out of title, and performing job responsibilities that should have been fulfilled by a lieutenant, the remedy was not solely, as this instruction would imply, that plaintiff be promoted to lieutenant. The department could have restructured the position in such a way that plaintiff no longer worked out of title. It could have decided to place someone already holding the rank of lieutenant in the post. The jury was never asked to determine whether plaintiff was denied advancement to the rank of lieutenant in retaliation for his request for a desk audit. That factual issue is a linchpin to plaintiff's entitlement to collect damages for lost wages.

Further, plaintiff claimed entitlement to past wages starting from his initial transfer to the Detective Bureau in 2001. Plaintiff's economic expert based his computation of plaintiff's lost wage claim from 2001, and plaintiff's counsel

in summation asked the jury to award damages from 2001. His CEPA claim, however, did not arise until after he requested the desk audit in July 2006. The jury should have been instructed with respect to the temporal limitation of plaintiff's damage claim, but it was not.

Defendants also argue that the trial court incorrectly permitted plaintiff to relitigate the question whether his position within the Detective Bureau was properly classified. This, defendants contend, was resolved by the administrative proceedings that concluded plaintiff was not working out of title. We do not agree.

Plaintiff argued that the results of the desk audit were incorrect because Chief Rose, in plaintiff's view, purposely did not supply an accurate description of the tasks plaintiff performed in the Detective Bureau. We are satisfied that plaintiff had to be afforded the opportunity to demonstrate to the jury why, in his view, the result of the desk audit was skewed by Chief Rose's response, with defendants having the concomitant opportunity to argue to the jury that Chief Rose's answers were proper in every way. The jury had to determine who was correct in this regard.

Defendants' remaining argument is that the trial court should have granted their motion for judgment notwithstanding

the verdict with respect to the jury's award of punitive damages. Although an award of punitive damages need not depend on a precise relationship to an award for compensatory damages, "the award must bear some reasonable relation to the injury inflicted and the cause of the injury." Smith v. Whitaker, 160 N.J. 221, 242-43 (1999) (citation omitted). As we have set forth, plaintiff's claim for compensatory damages must be retried to determine the precise injury for which the jury is compensating plaintiff. Therefore, his claim for punitive damages must also be retried to ensure the award is properly related to the injury and its cause.

The judgment entered by the trial court is reversed, and the matter is remanded for a new trial at which the jury shall identify which actions were taken in retaliation for plaintiff requesting a desk audit and what damages proximately flowed from the retaliatory act or acts.

Reversed and remanded for further proceedings in accordance with this opinion.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION