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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1436-11T3

ANTHONY ONUOHA,

Plaintiff-Respondent,

v.

ROCHE MOLECULAR SYSTEMS, INC.,

Defendant-Appellant,

and

KRISTY FIGLAR and FRANCIS REGINA,

Defendants.

Submitted June 5, 2012 – Decided July 3, 2012

Before Judges Yannotti, Espinosa and Kennedy.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-7419-09.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., attorneys (Patrick M. Stanton, of counsel; David A. Copus and Jennifer Rygiel-Boyd, on the briefs).

Cahn & Parra, L.L.C., attorneys for respondent (Steven D. Cahn and Harold A. Parra, on the brief).

PER CURIAM

Defendant Roche Molecular Systems, Inc. (Roche) appeals from a judgment awarding plaintiff Anthony Onuoha damages on his claim for retaliatory discharge, in violation of the New Jersey Law Against Discrimination (NJLAD), N.J.S.A. 10:5-1 to -49, as well as attorneys' fees and costs. We affirm.

I.

The following are the relevant facts. Plaintiff is an African-American who emigrated to the United States in or about 1991, and became a citizen of this country in 2005. In 1996, plaintiff received a doctoral degree in chemistry from the University of Connecticut. He was thereafter employed by several companies in this field. In February 2004, plaintiff was hired by a staffing agency as a temporary employee for Roche.

Roche is the manufacturer of diagnostic test kits used to screen blood for infectious diseases. Roche employed scientists at its Branchburg, New Jersey location to confirm that its products were in proper working order through a process called "validation." Validation requires determining that Roche's kits met certain specifications established in the manufacturing process. Roche's scientists were required to author reports about their findings. As a temporary employee, plaintiff worked

as a scientist validating products in a department that Kristy Figlar (Figlar) supervised.

In June 2004, Roche announced an opening for a position as senior scientist, with a $75,000 starting salary. At Roche, the lowest pay grade is the pay for senior scientist, with higher pay for principal scientist, a group leader or senior manager, and a director, in that order. Plaintiff applied for the position of senior scientist. Roche offered plaintiff the position but as a principal rather than senior scientist because plaintiff had a doctoral degree. Roche nevertheless offered plaintiff the salary of a senior scientist. Plaintiff accepted the offer.

In December 2004, Roche reorganized the company's validation operations into three groups: equipment facility validation, test-method validation and process validation. Francis Regina (Regina) was promoted to head all groups, and Figlar was placed in charge of the process validation group.

Plaintiff was assigned to Figlar's group, which was divided into two sub-groups, one managed by Lon Goei (Goei) and the other managed by Jenny White (White). Plaintiff worked in the Goei sub-group, with principal scientists Vera Krasovsky (Krasovsky) and Gilbert Quinton (Quinton), and senior scientist Tim Dunkel (Dunkel).

In February 2005, plaintiff received his annual performance review for 2004. Figlar rated plaintiff "3" on a scale of one to five, which signified that he had "fully achieved" his employment objectives. Based on the "3" rating, plaintiff received a 4.75 percent raise in salary. Figlar testified that plaintiff's raise was above average, because a "3" rating would usually result in a 3.5 percent raise.

Sometime in 2005, plaintiff learned that other employees in the product validation group had higher salaries even though they were hired after him. Plaintiff also learned that Roche usually paid new hires at his level a salary of $88,500. Plaintiff complained to Figlar about his salary. She conferred with Regina and denied plaintiff's request for a raise.

In February 2006, plaintiff received his annual performance review for 2005. Figlar rated plaintiff a "2", which signified that plaintiff had only "partially achieved" his employment objectives. Plaintiff reacted negatively to his rating and asked Figlar to change the review to make it "more positive." She declined to do so. Plaintiff initially refused to sign the review, but later signed it with a written comment that it did not reflect his "true performance."

On February 20, 2006, plaintiff submitted a complaint to Joanne Spadaro (Spadaro), Roche's vice-president, about his

performance review for 2005 and his low salary. A week later, plaintiff submitted another complaint to Spadaro about his salary and his perception that Regina and Figlar had prevented him from attending training seminars to advance his career. He also complained that Regina was not friendly to him. Plaintiff attributed Figlar's performance review and the lack of training and advancement opportunities to prejudice and unfair treatment by Regina and Figlar.

Spadaro met with plaintiff, Figlar and Regina to discuss plaiantiff's complaints. According to Regina, plaintiff stated that he felt he was being discriminated against, but did not mention that it was racially based. Figlar showed Spadaro various data to support her review of plaintiff's performance. She also said that some of plaintiff's reports were untimely and of poor quality.

The meeting was not productive and Spadaro referred the matter to Roche's human resources department, which investigated the complaints and concluded that plaintiff's performance review was fair. The human resources department also concluded that plaintiff's pay was within the salary range, and plaintiff would not receive additional compensation because he had a Ph.D. degree. Plaintiff was told that if he wanted a higher salary, he would have to get a better performance rating. The human

resources department additionally noted that Regina and Figlar had encouraged plaintiff to attend training seminars, provided they did not conflict with "business matters."

Plaintiff was re-assigned to a new supervisor, Dorta Hoag (Hoag), who reported to Filgar. Hoag reviewed plaintiff's performance for 2006. She rated plaintiff a "2." In August 2007, plaintiff was again assigned to Goei's sub-group. In 2007, plaintiff had difficulty obtaining approval of his request for vacation leave. Goei refused to allow plaintiff to take a two-week vacation, after being out for up to six weeks on medical leave, because there was too much work.

In May 2009, Spadaro told Regina she would have to lay off nine permanent employees in the validation service groups. Roche employed about forty-five persons in these groups. Regina evaluated the three groups and determined that additional workers were needed in the equipment validation group. Spadaro re-assigned employees to that group, including Goei. To work in the equipment validation group, an employee had to have an engineering background. Plaintiff did not have such a background.

Regina then decided that the only test-method validation group would be in New Jersey and, consequently, he terminated six employees working in that group in California. Regina also

terminated his administrative assistant and a senior manager in the equipment validation group because of poor performance. Thus, Regina had terminated eight employees and needed to terminate one more.

Employees in the test-method validation group in New Jersey were not considered for termination because of the increased workload resulting from the termination of employees in that group in California. Therefore, the last employee to be terminated would have to come from the process validation group, which worked in New Jersey.

Regina refused to consider terminating employees in White's sub-group, because four persons in that group had recently resigned, and only one of those persons had been replaced. Regina focused on Goei's sub-group. He would have to terminate either Dunkel, Quinton, Krasovsky or plaintiff. Regina reviewed their performance reviews for 2008, but did not consider the performance reviews for 2005 to 2007.

Regina did not consider Dunkel for termination because he wrote the most documents and was more productive than the others. In addition, Krasovsky had the highest rating of the three principal scientists, followed by Quinton and then plaintiff. Since plaintiff was rated the lowest in the Goei sub-

group, Regina selected him for termination. Plaintiff was terminated in May 2009.

On September 4, 2009, plaintiff filed a complaint in the Law Division against Roche, Figlar and Regina, alleging discrimination on the basis of race and retaliatory discharge, in violation of the NJLAD. He also asserted a claim under the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14, and a common law cause of action for wrongful termination under Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58 (1980). The court thereafter granted Roche's motion to dismiss the CEPA and Pierce claims.

The NJLAD claims were then tried before a jury. At trial, plaintiff dismissed his claims against Figlar and Regina. The jury returned a verdict finding that Roche did not discriminate against plaintiff on the basis of his race, but found that Roche illegally terminated plaintiff in retaliation for his complaints about discrimination by Regina and Figlar. The jury awarded plaintiff $512,000 in past and future economic loss damages, and $250,000 in emotional distress damages.

Roche thereafter filed a motion for judgment notwithstanding the verdict pursuant to Rule 4:40-2, a new trial under Rule 4:49-1, and for remittitur of the damages verdict. Plaintiff filed a motion for attorneys' fees and costs pursuant

to N.J.S.A. 10:5-27.1. The trial court denied Roche's motions by order of October 11, 2011. On the same day, the court granted plaintiff's motion for counsel fees and costs.

The court entered a judgment for plaintiff in the amount of $762,000, plus interest of $24,771.18, and attorneys' fees and costs of $305,653.07, for a total judgment of $1,092,424.25. This appeal followed.

II.

Roche first argues that plaintiff's claim of unlawful retaliatory discharge under the NJLAD failed as a matter of law because plaintiff did not establish a causal connection between his complaint of discrimination and his termination. Roche therefore argues that the trial court erred by denying its motion at trial for judgment under Rule 4:40-1 and its post-trial motion for judgment notwithstanding the verdict under Rule 4:40-2. We disagree.

Motions for judgment under Rule 4:40-1 and Rule 4:40-2 are governed by the following standard:

> [I]f, accepting as true all the evidence which supports the position of the party defendant against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied.
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> [Dolson v. Anastasia, 55 N.J. 2, 5 (1969).]

In applying this standard, "[t]he trial court is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion." Id. at 5-6.

The NJLAD provides in pertinent part that it shall be unlawful

> [f]or any person to take reprisals against any person because that person has opposed any practices or acts forbidden under this act or because that person has filed a complaint, testified or assisted in any proceeding under this act or to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this act.
>
> [N.J.S.A. 10:5-12(d).]

To establish a prima facie case of retaliation under the NJLAD, a plaintiff must show that: (1) he was engaged in a protected activity known to the defendant; (2) he was subjected to an adverse employment action by the defendant; and (3) there was a causal link between the two. Romano v. Brown & Williamson Tobacco Corp., 284 N.J. Super. 543, 548-49 (App. Div. 1995). At this stage of the case, the plaintiff bears a "modest" evidentiary burden of showing that retaliation "could be a reason for the employer's action." Zive v. Stanley Roberts, Inc., 182 N.J. 436, 447 (2005).

After the plaintiff establishes a prima facie claim of retaliation, the burden shifts to the defendant to "'articulate a legitimate, non-retaliatory reason for the decision.'" Young v. Hobart W. Grp., 385 N.J. Super. 448, 465 (App. Div. 2005) (quoting Romano, supra, 284 N.J. Super. at 549). Thereafter, the plaintiff must prove that the defendant had a discriminatory motive, and that its proffered reason for the adverse employment action was merely a pretext for unlawful retaliation. Romano, supra, 284 N.J. Super. at 549.

In this case, plaintiff presented evidence that, beginning in February 2006 he filed complaints with Roche, alleging that he had been subject to unlawful discrimination in the terms or conditions of his employment, which is a protected activity under the NJLAD. N.J.S.A. 10:5-12(a) and (d). In addition, plaintiff established that he was subjected to an adverse employment action when he was terminated in May 2009.

Roche argues that there is insufficient evidence to show a causal relationship between plaintiff's discrimination complaint and his termination. Roche maintains that plaintiff only claimed that Regina's proffered reason for terminating him was false, which is insufficient to prove that he was subjected to unlawful retaliation under the NJLAD.

A plaintiff may establish a causal link between the protected activity and the adverse employment action by presenting circumstantial evidence from which an inference of retaliatory motive may be drawn. Romano, supra, 284 N.J. Super. at 550. Thus, the evidence of plaintiff's relationship with Regina, Figlar and other supervisors may be considered to establish a retaliatory motive, even if plaintiff was not subjected to any incident that is actionable under the NJLAD. Roa v. Roa, 200 N.J. 555, 576 (2010).

At trial, plaintiff presented proof that he did not work amicably with Figlar after he complained about her, and evidence that Regina treated him in an unfriendly manner. Plaintiff testified that Regina did not speak with him after he submitted his complaints alleging discrimination. Plaintiff also presented evidence showing that Regina would not consider terminating employees in White's sub-group, regardless of their performance ratings.

According to plaintiff, Regina chose to retain Luanne Duncan, who joined Roche in December 2008, for no reason other than the fact that she was in the White sub-group, instead of retaining plaintiff who was the most senior principal scientist. In addition, Regina chose to retain Dunkel from Goei's sub-

group, even though he was the least senior employee in that group and plaintiff was the most senior.

Plaintiff also presented evidence which indicated that in 2005-2007, he was either more productive than most of his peers, or at least as productive as they were. Plaintiff had some better individual ratings than Quinton, but Regina limited his evaluation to the overall ratings in 2008, when plaintiff's productivity and efficiency fell below the others in his sub-group. Plaintiff additionally claimed that he had been denied training opportunities that would have allowed him to take on more job responsibilities. He was the only African-American in the process validation group.

Based on these facts, a jury could reasonably infer that retaliation was more likely than not the motivating factor in Roche's decision to fire plaintiff, and that Regina's proferred reasons for recommending plaintiff's termination were only pretextual. See Estate of Roach v. TRW, Inc., 164 N.J. 598, 612 (2000) (noting that, in examining whether a retaliatory motive exists for purposes of the NJLAD, the jury may infer a "causal connection based on the surrounding circumstances").

Roche further agues that plaintiff's claim of a retaliatory discharge failed in part because the jury found that plaintiff was not subjected to unlawful racial discrimination. However, a

claim for retaliation under the NJLAD may be established if a person is subject to reprisal for complaining about unlawful discrimination, even if the underlying discrimination claim ultimately is not proven. See Kluczyk v. Tropicana Prods., Inc., 368 N.J. Super. 479, 493 (App. Div. 2004) (holding that a retaliatory discharge in violation of the NJLAD can occur if the employee is subjected to retaliation for complaining of unlawful harassment even if harassment is not established).

We therefore conclude that plaintiff presented sufficient evidence to allow the jury to find that there was a causal link between plaintiff's complaint of unlawful discrimination and his termination.

III.

Next, Roche argues that the trial court erred by failing to instruct the jury that the passage of time between plaintiff's complaint of discrimination and his discharge could "negate" a causal link between the two. Again, we disagree.

When we review the trial court's instruction to the jury, we must consider the charge in its entirety. Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 418 (1997). A jury charge must adequately inform the jurors of the law, and neither confuse nor mislead the jury. Ibid. An error in the charge will be deemed harmless where it does not have the capacity to lead

to an unjust result. Fisch v. Bellshot, 135 N.J. 374, 392 (1994).

As we stated previously, to establish a retaliatory discharge in violation of the NJLAD, a plaintiff must show a "causal link" between engaging in a protected activity and the defendant's adverse employment action. Romano, supra, 284 N.J. Super. at 548-49. The "causal link" may be established by circumstantial evidence from which an inference of a retaliatory motive may be drawn. Id. at 550.

Temporal proximity between the protected activity and the adverse employment action will usually be insufficient to establish the causal link. Young, supra, 385 N.J. Super. at 467. Therefore, in order to establish causation, the plaintiff must show more than a temporal proximity.

Here, the trial court instructed the jury as follows with respect to the proof required to establish the "causal link" between the protected activity and the alleged retaliatory action:

> Because direct proof of intentional retaliation is . . . often not available, [plaintiff] may rely upon circumstantial evidence to prove retaliation.
>
> One kind of circumstantial evidence relating to retaliation[] involves the timing of events, whether the defendant's action followed shortly after the defendant

> became aware of [plaintiff's] prior complaints.
>
> Such timing may be evidence of retaliation. However, it may also be simply . . . coincidental. That is for you to decide. But there is no bright line as to the period of time which is sufficient.

Roche argues that the court should have instructed the jury as follows:

> The passage of time may negate any inference of causal connection; but there is no "bright line" as to the period of time which is sufficient. The cases indicate that time periods of three years; two years; one year and even two to four months are sufficient to find no inference of a causal connection between two events.

We are convinced that the court's refusal to include this instruction in the charge was not reversible error. Roche's proposed charge merely makes more specific what was spelled out in the judge's charge. The court stated that the timing of events could be evidence of retaliation. Such timing could be evidence of retaliation or merely coincidental.

The jury charge employed here gave the jury the choice of determining whether the time between plaintiff's complaints of discrimination and his discharge was evidence of retaliation or not. The jury was free to conclude that the timing here negated any inference of retaliation. We are satisfied that the charge adequately conveyed the relevant legal principles to the jury,

and it was not confusing or misleading. Sons of Thunder, supra, 148 N.J. at 418.

IV.

Roche also argues that the jury verdict was against the weight of the evidence. We do not agree.

"A jury verdict, although not sacrosanct, is entitled to great deference." City of Long Branch v. Jui Yung Liu, 203 N.J. 464, 492 (2010). A motion for a new trial based on a claim that the jury's verdict was against the weight of the evidence should not be granted unless "it clearly and convincingly appears that there was a miscarriage of justice under the law." R. 4:49-1(a); City of Long Branch, supra, 203 N.J. at 492.

In deciding whether to grant the motion, the trial judge "'may not substitute his [or her] judgment for that of the jury merely because he [or she] would have reached the opposite conclusion.'" Ibid. (quoting Dolson, supra, 55 N.J. at 6). Our review of the trial court's ruling on the motion is similarly limited. R. 2:10-1 (stating that a trial court's ruling on a motion for a new trial "shall not be reversed unless it clearly appears that there was a miscarriage of justice under the law").

Applying this standard, we are satisfied that the trial court did not err by denying Roche's motion for a new trial based on its claim that the verdict was against the weight of

the evidence. We are convinced that plaintiff presented sufficient evidence for the jury to find that Roche fired plaintiff in retaliation for his complaints about discrimination, and that Roche's proffered reason for plaintiff's termination was only a pretext for the unlawful retaliation. We are therefore satisfied that it does not clearly appear that the verdict was a miscarriage of justice under the law. R. 4:49-1(a); R. 2:10-1.

V.

Roche additionally challenges the trial court's award of attorneys' fees and costs. Roche maintains that that the award was unreasonable and should have been reduced by half. Again, we disagree.

The NJLAD provides that a prevailing party in an action brought under the law may be awarded reasonable attorneys' fees and costs. N.J.S.A. 10:5-27.1. To determine the reasonable fee, the court must calculate the lodestar, which is the number of hours reasonably expended multiplied by a reasonable hourly rate. Rendine v. Pantzer, 141 N.J. 292, 316 (1995). The resulting fee may be reduced to reflect the level of success achieved in the litigation, when compared to the relief sought. Id. at 336. In addition, the fee may be enhanced in contingency cases to provide for the risk of nonpayment. Id. at 343-44. See

also Walker v. Guiffre, 209 N.J. 124, 137-41 (2012) (reaffirming the framework established in Rendine for awarding counsel fees under fee-shifting statutes, including contingency enhancements).

Here, the trial court noted the fees and costs requested by plaintiff were reasonable, and the hourly rates of the attorneys involved were appropriate. The court awarded a ten percent fee enhancement on the lodestar fees because plaintiff's attorneys took the case pursuant to a contingency arrangement. The court awarded plaintiff $305,653.07 in fees and costs, which included a $268,702.50 lodestar fee, $10,080.32 in costs, and a ten percent fee enhancement of $26,870.25.

Roche argues that the court erred by failing to consider the level of success that plaintiff achieved, as compared to the relief sought. Roche notes that plaintiff initially asserted claims against Roche, Regina and Figlar under the NJLAD for racial discrimination and retaliatory discharge, as well a CEPA claim and a Pierce wrongful-termination claim. As we stated previously, plaintiff dismissed his claims against Regina and Figlar, and the court dismissed his CEPA and Pierce claims. As we stated, plaintiff only prevailed at trial on his NJLAD retaliation claim. We are nevertheless satisfied that the trial

court did not err by refusing to reduce the counsel fee award because plaintiff only succeeded on his NJLAD retaliation claim.

In Kluczyk, the plaintiff asserted claims of sexual harrassment, hostile work environment and retaliatory discharge under the NJLAD, but only prevailed on the retaliation claim. Kluczyk, supra, 368 N.J. Super. at 484. The trial court awarded the plaintiff attorneys' fees and the defendant challenged the award on the ground that the plaintiff did not prevail on his principal NJLAD claims. Id. at 485. We affirmed the award. Id. at 499-500.

We stated that:

> [i]t was the termination which resulted in successful litigation and which caused plaintiff's counsel to change his attack to one which included a wrongful discharge claim premised on the work he did incident to the constructive termination and harassment suit. When the "unsuccessful claims are related to the successful claims, either by a 'common core of facts' or 'related legal theories,' the court must consider the significance of the overall relief obtained to determine whether those hours devoted to the unsuccessful claims should be compensated." Singer v. State, 95 N.J. 487, 500, cert. denied, 469 U.S. 832, 105 S. Ct. 121, 83 L. Ed. 2d 64 (1984) (quoting Hensley v. Eckerhart, 461 U.S. 424, 435, 103 S. Ct. 1933, 1940, 76 L. Ed. 2d 40, 51 (1982)); . . . . As the trial judge explained, the evidence overlapped and proof of the harassment claim was necessary to

> show why defendants retaliated. There was no abuse of discretion in setting the lodestar and enhancing the fee.
>
> [Ibid.]

Similarly, in this case, the retaliatory discharge claim was based on the alleged past racial discrimination, which led to plaintiff's formal complaint in 2006. Thus, the proof related to the discrimination claim was required to establish plaintiff's retaliation claim. Moreover, although plaintiff dismissed his claims against Regina and Figlar, there is no indication that the evidence regarding those claims was any different from the evidence presented to support the claims against Roche or that prosecution of these claims would have required a substantial amount of additional time. In addition, the CEPA and Pierce claims were essentially based on the same core of facts as those which supported the claim for retaliatory discharge.

We therefore conclude that a reduction in plaintiff's fee award was not required based on a comparison of the results obtained and the relief sought. We are satisfied that the award was not an abuse of discretion.

Affirmed.