NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1727-10T4

JAMES POWELL,

Plaintiff-Respondent/
Cross-Appellant,

v.

WACHOVIA CORPORATION AND
WACHOVIA INSURANCE SERVICES,
INC.,

Defendants-Appellants/
Cross-Respondents.

Argued March 14, 2012 – Decided April 9, 2012

Before Judges Graves, J. N. Harris, and Haas.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-3323-07.

Rosemary S. Gousman argued the cause for appellants/cross-respondents (Fisher & Phillips, LLP, attorneys; Ms. Gousman and David E. Strand, of counsel; David J. Treibman, on the brief).

Charles Z. Schalk argued the cause for respondent/cross-appellant (Mauro, Savo, Camerino, Grant & Schalk, P.A., attorneys; Mr. Schalk, of counsel and on the brief).

PER CURIAM

Following an adverse jury verdict, Defendants Wachovia Insurance Services, Inc. (Wachovia Insurance) and Wachovia Corporation (Wachovia) appeal from a judgment and numerous orders[1] entered in the Law Division that collectively hold them liable to plaintiff James Powell for approximately $3,600,000 for violating the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14. Because Powell's CEPA claim was unsustainable as a matter of law, and the dispute should never have been submitted to the jury, we reverse.[2]

I.

We glean the following facts from the record, including the testimony and documentary evidence that was adduced at trial. We do not recite the facts and circumstances relating to Powell's damages, the jury charge, the verdict form, or the

[1] Specifically, the Wachovia defendants appeal from the August 31, 2010 judgment; the September 16, 2010 amended judgment; the October 26, 2010 order denying judgment notwithstanding the verdict; and the October 26, 2010 second amended judgment.

[2] Powell filed a cross-appeal seeking an upward adjustment of CEPA-reallocated attorneys' fees and disbursements that were awarded by the trial judge. In light of our disposition of the Wachovia defendants' appeal, the cross-appeal is moot. Powell does not appeal any aspect of the jury verdict that rejected his alternate claim that the Wachovia defendants had violated his rights under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -49.

applications for reallocated attorneys' fees and disbursements as they are not necessary to our disposition of the appeal.

A.

Starting in 1993, Powell was employed by several insurance brokerages that were purchased by entities ultimately culminating in the ownership by Wachovia Insurance. Powell, an at-will employee, was fired on February 22, 2007, after earning approximately $210,000 the previous year.

Powell's job —— a benefits producer —— was to "prospect, market and place business employee benefits, group health insurance, group life, group dental, long term disability, short term disability, those types of employer benefits with different insurance companies." His clientele included "[s]mall to medium size employers in New Jersey." He testified that his employee benefit group in Wayne, New Jersey generated "a large amount of revenue for Wachovia" and that of the thirty-five offices in the United States, his office was "in the top five." Stewart McDowell, President of Wachovia Insurance, confirmed this productivity. He also indicated that Wachovia Insurance employed approximately 1800 individuals throughout its nationwide offices.

Before 2006, Powell was compensated according to a 1993 contract that "followed all the way through" to Wachovia

Insurance. For every dollar of commissions that Powell generated, he would receive fifty percent and Wachovia Insurance would retain the other fifty percent. Powell claimed that his employer "had a big problem with the 50/50 commission split" and "they were always trying to push us off that 50/50" because "they wanted to keep a bigger piece of the pie."

According to Powell, in early 2006, Wachovia "tried to introduce a matrix" whereby benefits producers "would get paid based on [their] production and [their] retention, [and they] would land somewhere on a scale." Powell testified that under the proposed matrix, "if we had a good year," this would result in benefits producers receiving "around [thirty-five] percent on new [policies] and maybe [twenty-five] percent on renewal[s]." He continued, "if we had a bad year, we could be at [eighteen] percent on new [policies] and [ten] percent on renewal[s]."

McDowell testified that the new compensation plan was developed in 2004 or 2005 and was to be implemented in 2006. He sent an announcement to each of the approximately 200 employees who would be affected by the matrix to "make sure that every person heard directly and individually from [him] the main points and the spirit . . . of the new program so that there would be consistency and fairness . . . and equal communication throughout the organization."

Although he considered the new compensation plan fair, McDowell received "noise from virtually every location" when the plan was revealed because "no one likes their compensation to be changed and it can be threatening if not done properly." Other than Powell and four of his colleagues, no other affected employees retained an attorney to challenge the compensation plan. According to McDowell, Wachovia Insurance lost only one benefits producer as a result of the new program.

As noted, five benefits producers (representing approximately twenty percent of the production in the Wayne office), including Powell, retained attorney Joseph Rizzi, Esq., in an effort to "protect [their] higher commissions." On March 26, 2006, Rizzi sent a letter to Wachovia Insurance objecting to the implementation of the matrix.[3] In the letter, Rizzi stated that his clients "would have no alternative but to look to the [c]ourts to enforce their contractual commission arrangements, an action that would without question reverberate throughout the company." On cross-examination, Powell agreed that the letter also indicated that he and the others were "at-will employees of Wachovia Insurance." Powell also acknowledged that the letter

[3] The Rizzi letter was never admitted into evidence at trial, and it has not been reproduced by the parties in their appellate appendices. We rely upon the trial transcript, where excerpts were read, for its contents.

was "asking for better terms than the compensation plan that was going to apply to all of the other producers that worked at Wachovia Insurance Company." Accordingly, Rizzi indicated that his clients would "execute confidentiality agreements confirming that they have not discussed and will not discuss the terms of such a resolution with any other persons within or outside the company" if a satisfactory agreement were reached.

In response to Rizzi's letter, the parties engaged in negotiations. Concessions were made on both sides, and ultimately they agreed to a "60/40 split" for new business, which was "a twenty percent reduction in pay," and a "70/30 [split]" for renewals, which was a "[forty] percent . . . reduction in commission on renewal." On August 21, 2006, Powell and Wachovia Insurance entered into a formal Producer Compensation Agreement to memorialize their arrangement. Paragraph 13 provided that "the existence and terms of this Agreement are to be [sic] remain confidential. The Producer shall not disclose the terms of this [A]greement to any person except as is required by law or as is necessary for him to enforce his rights under this Agreement."

B.

The following facts relate to Powell's termination of employment six months later.

Ruth Annette Million, a manager of operational excellence, had among her job responsibilities the task to do "everything for the employee benefit line of business, which included data integrity, . . . e-mail audits to verify that [Wachovia Insurance was] within the standards of HIPPA[4] privacy, put[] together the standard operating procedures, [and] any sort of application or process or system that [a]ffected the employee benefit population." Starting in September 2006, it was part of Million's job to audit the e-mails of the approximately 200 employees who worked with employee benefits. As part of her protocol, she reviewed five e-mails per employee, per year. Each month, Million randomly selected "an even blend of male and females" to audit but she was neither directed who to audit nor in what particular order to conduct the audit. McDowell claimed that the January 2007 audit performed by Million of the Wayne office was conducted at that time because "[i]t would just have been their turn."

As part of her review, Million began with Mark Ferrara, a senior vice president and the manager of the employee benefits

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[4] HIPPA is a common acronym for the Health Insurance Portability and Accountability Act (HIPPA), 42 U.S.C.A. § 1320, which concerns the protection of personal medical information and regulates its use and disclosure. See N.J. Transit PBA Local 304 v. N.J. Transit Corp., 384 N.J. Super. 512, 516-17 (App. Div. 2006)

group in Wayne. Ferrara had been selected randomly. Million searched for sent e-mails that had a large attachment or other indicia that would lead her to believe that client information might be included in the e-mail. She selected an e-mail, opened the attachment, and instead of client information, found a "very graphic video of a woman performing oral sex on a man." She found it "extremely vulgar, vile" and was "completely repulsed and disgusted." Million knew that she needed to report what she found because it was contrary to Wachovia Insurance's "code of conduct and ethics that . . . clearly indicates that any type of pornographic material and activity like that is against company policy." Based upon what Million found and reported to her immediate manager, Sue Webster[5] was notified. Webster "launched an investigation for looking at the communication system of Mark Ferrara."

Throughout January and February 2007, a computer forensic team analyzed the e-mail accounts of several Wachovia Insurance employees. Ultimately, eight employees were identified as either sending or receiving inappropriate e-mail messages or

[5] Webster, a human resources manager, was involved in employee discipline for Wachovia Insurance. Webster testified that Powell had never been the subject of any ethical or disciplinary proceedings prior to his termination. Webster "knew nothing" about the Rizzi letter before becoming involved in this proceeding, and she was not involved in Powell's termination.

attachments. Powell was accused of having "stored [thirteen] e-mails, sent [ten] e-mails, but only six of those went outside [Wachovia Insurance]."

McDowell did not participate in the investigation or instruct anyone as to whose e-mails to review. After receiving the audit reports and consulting with other executives, McDowell "affirmed and enacted" the decision to terminate the individuals involved but he testified that the decision was "mandated by . . . company policy and the actions of the employees." Powell was fired on February 22, 2007.

McDowell testified that at the time of the decision to terminate eight individuals, he knew nothing about Powell, other than "being just generally familiar with his name as a producer." He had seen the Rizzi letter and would have seen the names of those involved but, at the time of the decision to terminate, "that was not taken into consideration." Four of the five individuals involved with the Rizzi letter were terminated.

Powell testified that he "[a]bsolutely" believed "Wachovia retaliated against [him] when they terminated [him]." He claimed the retaliation was because he and the other four men "objected to practices of —— from Wachovia that were unlawful, fraudulent, deceptive or —— misleading."

C.

During cross-examination, Powell was asked to describe his whistle blowing activity. After the trial court overruled Powell's counsel's objection, Powell explained that he participated in retaining Rizzi when "Wachovia tried to take another chunk of the pie by introducing what they called a matrix." Powell noted that Rizzi had written the Wachovia defendants that "we objected to their practices." Powell also asserted that Wachovia Insurance's effort to change his future commissions was unlawful.

When Powell was then asked what law Wachovia Insurance violated, Powell's counsel again objected. The trial court allowed the question but reminded the jury that Powell was not an attorney "and his answers are not to be judged as a legal answer in the strict sense of the word, but the question is asked to simply elicit his understanding of . . . these issues."

The following exchange took place:

> BY [Defense Counsel]:
>
> Q Can you tell me any law that that violated?
>
> A Yeah, the CEPA law, the Conscientious Employee Protection Act.
>
> Q No, my question is [what] law would changing your future commission violate?

> A I don't know of any law that it —— that it violates, just that it violated our contract.
>
> Q Okay. When you [sic] aware of any rule or regulation that it would violate to change your future commission?
>
> A Only what was written in our contract.
>
> Q Okay. So you're just saying that this violated your personal contract that you had with Wachovia?
>
> A Well not just me, all of us.

Powell also maintained that "Wachovia's action in putting in this matrix and compensation system was fraudulent" because

> the truth of the matter is that they were just looking to get a bigger piece of the pie. They didn't —— they were never comfortable with the 50/50 commission split and even when we went down to 60/40 they were very unhappy with that and they put this matrix in to get us down to like 18 and ten on the commissions and then fraudulent in effect that they misrepresented themselves in saying —— not in telling us that, you know, they wanted to get more of the pie, they were just telling us, you know, oh we're gonna put a matrix in and it's gonna be good and everybody's gonna be happy when it really wasn't. It was —— it was set up for us to fail.

Powell further asserted that the second paragraph of the Rizzi letter —— discussing Wachovia Insurance's putative breach of contractual commission agreements —— identified the fraud, although the words fraud and fraudulent were not used in the letter. Over objection, the following brief exchange occurred:

BY [Defense Counsel]:

Q Okay. So really the complaint was that the change would breach your contract?

A Yes.

II.

Powell contends that his termination violated the CEPA, a civil rights statute intended 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.'" Yurick v. State, 184 N.J. 70, 77 (2005) (quoting Abbamont v. Piscataway Twp. Bd. of Educ., 138 N.J. 405, 431 (1994)). Because it is remedial legislation, courts are to construe the statute liberally to achieve its remedial purpose. Barratt v. Cushman & Wakefield of N.J., Inc., 144 N.J. 120, 127 (1996). In pertinent part, the statute provides:

> An employer shall not take any retaliatory action against an employee because the employee does any of the following:
>
> . . . .
>
> c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:
>
> (1) is in violation of a law, or a rule or regulation promulgated pursuant to law, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient,

> customer, employee, former employee, retiree or pensioner of the employer or any governmental entity . . .;
>
> (2) is fraudulent or criminal, including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity;
>
> [N.J.S.A. 34:19-3(a), -3(c)(1), -3(c)(2).]

Prohibited retaliatory action includes an employee's suspension from or termination of his or her employment. N.J.S.A. 34:19-2(e); Donelson v. Dupont Chambers Works, 412 N.J. Super. 17, 30 (App. Div. 2010), rev'd on other grounds, 206 N.J. 243 (2011).

To establish a CEPA violation under section 3(c)(1), a plaintiff must demonstrate that:

> (1) he or she reasonably believed that his or her employer's conduct was violating either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy; (2) he or she performed a "whistle-blowing" activity described in N.J.S.A. 34:19-3c; (3) an adverse employment action was taken against him or her; and (4) a causal connection exists between the whistle-blowing activity and the adverse employment action.
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> [Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003).]

Similarly, a plaintiff who brings an action pursuant to section 3(c)(2) must demonstrate: (1) he or she reasonably believed his

or her employer's conduct was fraudulent or criminal; (2) he or she performed a "whistle-blowing" activity described in N.J.S.A. 34:19-3(c); (3) an adverse employment action was taken against him or her; and (4) a causal connection exists between the whistle-blowing activity and the adverse employment action. Maimone v. City of Atl. City, 188 N.J. 221, 230 (2006). Here, we are only concerned with the second and third elements, that is, did Powell establish a reasonable belief in the fraudulent conduct of Wachovia Insurance, and did he perform whistle-blowing activity?

A plaintiff who brings these types of claims is not required to show that his or her employer's conduct was actually fraudulent. Rather, "the plaintiff simply must show that he or she 'reasonably believes' that to be the case." Dzwonar, supra, 177 N.J. at 462.

Powell has not demonstrated that Wachovia Insurance's matrix-related conduct, including the manner in which it was presented to affected employees, was reasonably believed to be fraudulent, deceptive, or unlawful. Absent proof of these facts, Powell's claim is fatally flawed. It is not enough for Powell to show only what amounts to a subjective interpretation of misrepresentation. The clear statutory mandate requires proof of fraudulent activity beyond mere lip service.

Powell's best case is epitomized by Rizzi's words, when he challenged Wachovia Insurance for breaching his clients' commission contracts. There is not a hint of an allegation couched in terms of Wachovia Insurance's violation of law, deceit, or fraudulent activity. Powell's carefully rehearsed trial mantra parroting the statute —— "object[ing] to practices of . . . Wachovia that were unlawful, fraudulent, deceptive or . . . misleading" —— is belied by his concession, advanced by his attorney, that Wachovia Insurance's conduct affected only his (and his colleagues') contractual right to certain commission percentages. Moreover, there was no basis for anyone, least of all Powell, to complain that Wachovia Insurance's notification of the matrix's commission revisions rendered the calculation of the effect of the changes on future income expectations false. Whether the revenue effect upon a given employee was fair or unfair was a subjective matter between the employee and employer. See Winslow v. Corporate Express, Inc., 364 N.J. Super. 128, 139 (App. Div. 2003) (holding that the employer was free to prospectively "change the method by which [employee]'s commissions were calculated" and employee then had the "opportunity to decide whether he wished to continue working at a reduced rate of compensation").

More importantly, regardless of what words Powell and Rizzi may have used to describe Wachovia Insurance's implementation of the matrix, at its core all that was at stake was a contract dispute. The record contains nothing to suggest that Powell was interested in correcting the supposed sharp tactics of Wachovia Insurance's management. All that he and Rizzi's other four clients wanted was their —— and only their —— commissions to remain relatively untouched.[6] The best evidence of this intention was Rizzi's offer on behalf of his clients for a sealed-lips agreement, and Powell's ultimate promise of silence that was contained in the August 21, 2006 Producer Compensation Agreement.

On different facts, Powell's CEPA claim might merit further consideration. However, Rizzi's writings, as supplemented by Powell's testimony, established that Powell was acting not under the mantle of the CEPA, but rather in furtherance of contractual self-interest. We do not criticize Powell for that impulse. However, it cannot be elevated, as a matter of law, to a CEPA springboard for damages.

[6] Cf. James T. Hunt, The Masquerading Fraud Claim, 207 N.J.L.J. 666 (February 29, 2012) (noting, not in the CEPA context, that "many fraud allegations are really just 'breach-of-promise' claims").

Even if Powell harbored concern for his co-employees who were not pursuing remedies with Rizzi, and who might not choose to fully explore the matrix's effect upon their future earnings, we cannot conclude that Rizzi's letter —— or Powell's hiring of Rizzi to write to his employer —— was a protected activity under the CEPA, as the employer's putative conduct was not "violative of a law, regulation, public policy, fraudulent or criminal." Gerard v. Camden Cnty. Health Serv's. Ctr., 348 N.J. Super. 516, 521 (App. Div.), certif. denied, 174 N.J. 40 (2002).

Because Powell's claim did not surmount the threshold of a prima facie case under the CEPA, his complaint, at best, should have been dismissed on summary judgment. At worst, the claim should have been subject to dismissal at the close of Powell's case under Rule 4:37-2(b).

Reversed and remanded for the entry of an order dismissing the complaint with prejudice and vacating the October 26, 2010 second amended judgment.[7]

[7] Our disposition renders the balance of the Wachovia defendants' arguments and Powell's cross appeal moot.