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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4390-10T4

HOWARD E. FLECKER, III, on behalf of himself and all other similarly situated persons,

Plaintiffs-Appellants,

v.

STATUE CRUISES, LLC, and TERRY MACRAE,

Defendants-Respondents.

Argued April 18, 2012 – Decided November 14, 2012

Before Judges Axelrad, Sapp-Peterson and Ostrer.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-4522-09.

Ravi Sattiraju argued the cause for appellants (The Sattiraju Law Firm, P.C., attorneys; Mr. Sattiraju, of counsel and on the brief).

Raymond G. McGuire (Kauff, McGuire & Margolis) of the New York bar, admitted pro hac vice, argued the cause for respondents (Genova, Burns & Giantomasi, and Mr. McGuire, attorneys; Patrick W. McGovern and Mr. McGuire, of counsel; Aislinn S. McGuire (Kauff, McGuire & Margolis) of the New York bar, admitted pro hac vice, on the brief).

PER CURIAM

Plaintiff appeals from the April 1, 2011 trial court order denying his motion for summary judgment and granting defendants' cross-motion for summary judgment dismissing his complaint brought against his employers, Statue Cruises, L.L.C. (Statue) and Terry MacRae, pursuant to the New Jersey Wage and Hour Law, N.J.S.A. 34:11-56a4 to -56a30, and the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14. Plaintiff also appeals from the February 18, 2011 order compelling him to undergo an independent medical examination (IME) and the May 28, 2010 order "denying class certification on Count II (CEPA Claim) of the [a]mended [c]omplaint." We reverse the grant of summary judgment dismissing plaintiff's CEPA claim. We also reverse the dismissal of plaintiff's Wage and Hour claim and remand to the trial court for further proceedings in order to determine whether application of New Jersey's Wage and Hour Law is pre-empted by federal law. The Fair Labor Standards Act, 29 U.S.C.A. § 201 to -219 (FLSA).

Upon remand, the court must make specific factual findings that include a determination to what extent, if any, Statue's operations extend into federal waters, and if so, whether application of New Jersey's Wage and Hour Law would prove so disruptive that federal law should pre-empt New Jersey law, as well the nature and scope of Statue's operations in New Jersey

and New York. We affirm the orders denying plaintiff's motion for summary judgment, the denial of class certification, and the order compelling plaintiff to undergo an IME.

I.

Because plaintiff's complaint was dismissed at the summary judgment stage, we review the facts in the light most favorable to plaintiff, as the non-moving party. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Plaintiff was employed as a deckhand by Statue, which provides passenger ferry service from ports in New York and New Jersey to Liberty Island and Ellis Island. Plaintiff was a member of a collective bargaining unit whose employment contract with Statue called for the forty to forty-five employees subject to the collective bargaining agreement (CBA) to be paid for overtime at a rate of time and one-half of the employee's straight time for hours worked in excess of forty-eight hours per week.

On September 10, 2009, plaintiff filed a single-count class action complaint alleging that the CBA was contrary to the Wage and Hour Law. After filing the complaint, a Statue executive, Michael Burke, authored an October 1 memorandum informing employees about the lawsuit. The memo identified plaintiff as the named party in the lawsuit and advised employees that in an effort to mitigate damages, they would not schedule union

employees to work more than forty hours per week until the issues raised in the complaint were resolved. The memo stated further:

> We have been informed, and have reason to believe, that this lawsuit (which is brought by Howard Flecker III, the brother of an official in Local 333) may be supported by your collective bargaining representative, Local 333. If that is the case, we are puzzled and disappointed that the Union apparently did not consider the impact the lawsuit would likely have on you and our Company. For those of you who will lose a day's pay (or more) every week, I leave it to your good judgment whether Local 333's possible involvement in this lawsuit was in your best interests.

Plaintiff's co-workers immediately started confronting him. Some of the co-workers urged him to drop the suit, while others started to ignore him or expressed that they were upset with what he had done. Shop steward, Matthew Gill, asked plaintiff "to consider the whole, big picture" and the impact his suit would have on the more senior employees. Gill drafted a letter on behalf of himself and twenty other employees opposing the lawsuit and encouraging the union to address the issues in contract negotiations. Another co-worker, Al McGee, in a confrontational manner, told plaintiff that his lawsuit was "ruining everybody's career," affecting everyone financially, and told plaintiff he wanted to get plaintiff's complaint and "burn it on the boat with everybody."

Plaintiff did not report these confrontations to defendants because he felt management deliberately humiliated and embarrassed him with the memo and he did not trust management to be of help to him. However, in an October 4 letter, plaintiff's attorney demanded that defendants retract the memorandum on the basis that it violated CEPA. The next day, plaintiff's counsel filed a motion in the wage and hour litigation seeking sanctions and a curative notice. Defendants' attorney responded two days later, stating Statue was "well within its rights to engage in normal management practices (*i.e.*, scheduling so as to limit the cost of overtime), and to limit any potential damages resulting from the lawsuit . . . ."

Plaintiff claims his hours were reduced from forty to fifty hours per week to approximately thirty-five hours per week after Burke issued the October memo. In addition, the stress of his daily encounters with co-workers forced him to resign from his position. On October 15, he filed an amended complaint adding a CEPA claim.

Notwithstanding defendants' position regarding the October 1 memorandum, as articulated by defense counsel in the October 6 letter to plaintiff's counsel, the parties negotiated two curative notices that defendants issued to their employees on November 30. The first notice was directed to all Statue cruise

captains, and instructed that captains "should not discuss the case or the issues in the case with deckhands under any circumstances." The second memorandum, issued to all union-represented employees, provided in pertinent part:

> In sending you [the October 1st] memorandum, it was not our intention to influence your decision whether to join the lawsuit. The Company will not interfere in any way with your right to pursue these claims, if that is your choice. Please be assured that you may pursue these claims and join the suit without fear of retaliation. Supervisory employees (including Captains) are prohibited from engaging in retaliation against any employee for participating in this suit. Retaliation includes, but is not limited to, any actual or threatened adverse employment action, or other conduct which punishes employees for participating in the suit.
>
> . . . .
>
> In addition, we mentioned in the October 1st memorandum that the lawsuit in question had been brought in the name of one of our employees, Howard Flecker. Again, we did not intend to suggest that Mr. Flecker did not have a right to file the lawsuit, nor that he had breached any obligation he owed to the Company in doing so. Mr. Flecker was well within his rights in filing the suit; he continued to work for us after he filed the suit; and the Company will not retaliate against Mr. Flecker in the future because of his suit.

In April 2010, plaintiff filed a motion for class certification. On May 28, the court granted the motion with respect to plaintiff's wage and hour claim but denied class

certification for plaintiff's CEPA claim. Plaintiff then sought leave to appeal that part of the May 28 order denying class certification on the CEPA claim. We denied plaintiff's application.

In February 2011, defendants filed a motion seeking to extend discovery and to compel plaintiff to undergo an IME. In support of this application, defendants noted that as part of plaintiff's CEPA claim, plaintiff alleged: "As a result of Defendants' conduct, Plaintiffs [sic] have endured significant damages including, but not limited to, physical and bodily injuries, severe emotional distress, humiliation, embarrassment, personal hardship, career and social disruption, psychological and emotional harm, economic losses, and other such damages."

Defendants argued that an IME was needed because plaintiff failed to provide adequate discovery on the issue of his severe emotional distress, despite being requested to do so in interrogatories and document requests propounded upon him. On February 18, the court granted defendants' request to compel plaintiff to submit to an IME. The record does not reflect whether plaintiff was ever examined.

Thereafter, the parties filed summary judgment motions. The court denied plaintiff's motion but granted defendants' cross-motion. In granting defendants' cross-motion, the court

adopted defendants' position that the October 1 memorandum was not an adverse employment action because it was not a completed personnel action that impacted plaintiff's employment. The court similarly rejected plaintiff's contention that defendants' retaliatory conduct included reducing his hours of work. The court observed that plaintiff's hours had been on the decline even before he filed his lawsuit. Turning to the purported confrontations with his co-workers, the court found that these encounters, while creating a hostile work environment, were not sufficiently egregious, when compared to circumstances addressed in reported decisions where courts have found the working environment sufficiently hostile, to support a CEPA claim.

In denying class certification of plaintiff's CEPA claim, the court ruled that CEPA provided no cause of action to anyone other than the whistleblower and that even if such a cause of action existed, plaintiff failed to meet the standards for class certification.

Finally, the court concluded plaintiff's wage and hour claim was pre-empted by federal law. The court stated:

> Here, under New Jersey law, there is not an exemption from the Wage and Hour laws with respect to seamen. New York, like the [FLSA], has a specific provision in its law that would exempt them.
>
> Under the analysis employed in Strain [v. W. Travel, Inc., 70 P.3d 158 (Wash. Ct.

App. 2003), review denied, 82 P.3d 243 (2004)], Coil [v. Jack Tanner Towing Co., 242 F. Supp. 2d 555 (S.D. Ill. 2002)], and Fuller [v. Golden Age Fisheries, 14 F.3d 1405 (9th Cir.), cert. denied, 512 U.S. 1206, 114 S. Ct. 2677, 129 L. Ed. 2d 812 (1994)], the New Jersey Wage and Hour law should not apply.

The present appeal followed.

On appeal, plaintiff raises the following points for our consideration:

POINT I

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, AND IN DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, ON PLAINTIFF'S CEPA CLAIM.

A. The Purpose and Legal Framework of CEPA.

i. There is No Dispute That Plaintiff Meets the First, Second and Fourth Prongs of the Prima Facie Case for CEPA.

B. The Trial Court Erred in Finding that Plaintiff Was Not Subjected to an Adverse Employment Action.

i. The Trial Court Erred in its Definition of an Adverse Employment Action under CEPA Because [i]t Ignored Plaintiff's Reduction in Hours.

ii. Punishing Plaintiff's Co-Workers is Illegal Third-Party Retaliation and Also Constitutes an Adverse Employment Action.

i. Plaintiff Has Established Numerosity and That Joinder is Impracticable.

ii. There are Questions of Law and Fact Common to Plaintiff and the Class.

iii. Plaintiff [W]ill Fairly and Adequately Protect the Interests of the Class.

iv. The Class Satisfies the Predominance and Superiority Requirements of R[ule] 4:32-1(b)(3).

POINT III

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON COUNT ONE OF PLAINTIFF'S COMPLAINT UNDER THE NEW JERSEY WAGE [AND] HOUR LAW.

A. Applying The NJWL is Fully Consistent With Congressional Intent.

i. The FLSA Exemption and Savings Clause.

ii. Precedent That Includes a Full Analysis of the Congressional Intent Behind the FLSA Supports Plaintiff's Position.

iii. The Three Decisions Relied on by the Trial Court Do Not Contain Any Analysis as to the Congressional Intent Behind the FLSA.

B. Nothing in the FLSA Suggests That a Court Should Not Conduct a Choice of Law Analysis in This Situation.

C. A Straightforward Choice of Law Analysis in this Matter Reveals that Only New Jersey Law Should Apply.

IV. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION TO COMPEL AN INDEPENDENT MEDICAL EXAMINATION OF PLAINTIFF.

II.

When reviewing a grant of summary judgment, we employ the same legal standards used by the motion judge. Spring Creek Holding Co. v. Shinnihon U.S.A. Co., 399 N.J. Super. 158, 180 (App. Div.), certif. denied, 196 N.J. 85 (2008); Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). First, we determine whether the moving party has demonstrated that there were no genuine disputes as to material facts, and then we decide whether the motion judge's application of the law was correct. Atl. Mut. Ins. Co. v. Hillside Bottling Co., Inc., 387 N.J. Super. 224, 230-31 (App. Div.), certif. denied, 189 N.J. 104 (2006) (citations omitted). In so doing, we view the evidence in the light most favorable to the non-moving party and analyze whether the moving party was entitled to judgment as a matter of law. Brill, supra, 142 N.J. at 523, 529. We accord no deference to the motion judge's conclusions on issues of law, Manalapan Realty, L.P., v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995), which we review de novo. Spring Creek, supra,

399 N.J. Super. at 180 (citations omitted); Dep't of Envtl. Prot. v. Kafil, 395 N.J. Super. 597, 601 (App. Div. 2007).

A. The CEPA Claim

CEPA, commonly referred to as the whistleblower statute, is remedial legislation 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). CEPA's remedial purpose also includes an objective to encourage employers to correct illegal activity. To that end, the statute, in pertinent part, provides:

> An employer shall not take any retaliatory action against an employee because the employee . . . [d]iscloses . . . to a public body an activity, policy or practice of the employer . . . that the employee reasonably believes . . . is in violation of a law, or a rule or regulation promulgated pursuant to law . . . .
>
> [N.J.S.A. 34:19-3.]

To establish a CEPA violation, a plaintiff must show:

> (1) a reasonable belief that the employer's conduct was violating either a law, rule, regulation or public policy; (2) he or she performed a "whistle blowing" activity . . .; (3) an adverse employment action was taken against him or her; and (4) a causal connection existed between his whistle-blowing activity and the adverse employment action.

> [Klein v. Univ. of Med. & Dentistry of N.J., 377 N.J. Super. 28, 38 (App. Div.), certif. denied, 185 N.J. 39 (2005) (citations omitted).]

If the plaintiff makes this threshold showing, the burden shifts to the defendant to set forth a legitimate non-retaliatory reason for the adverse action. Ibid. "If such reasons are proffered, plaintiff must then raise a genuine issue of material fact that the employer's proffered explanation is pretextual." Id. at 39.

Here, the motion judge was satisfied plaintiff established the first two prongs but failed to establish a prima facie case for the remaining two elements. We disagree.

First, in concluding the October 1 memorandum was not an adverse employment action under CEPA, the court mistakenly relied upon Keelan v. Bell Communications Research, 289 N.J. Super. 531 (App. Div. 1996), to find, as a matter of law, that CEPA requires a "completed action." The primary issue in Keelan, however, was determining at which point the statute of limitations commenced on a CEPA claim involving an alleged retaliatory discharge. The trial court had determined that the time period commenced at the time the plaintiff received the termination notice. We reversed, holding that the limitations period did not begin to run until the plaintiff was actually discharged. Id. at 539. Thus, our focus in Keelan was the

timeliness of the plaintiff's claim, not its substantive merits. Id. at 534. As the Court recently held in Donelson v. Dupont Chambers Works, 206 N.J. 243, 257 (2011), "the universe of possible retaliatory actions under CEPA is greater than discharge, suspension, and demotion[.]" Consequently, that universe may include creating a hostile work environment through a memorandum that defendants knew or should have known would incite plaintiff's co-workers, who then commenced harassing plaintiff about his lawsuit to such an extent that the work environment became so intolerable to plaintiff that he was forced to resign. See Daniels v. Mutual Life Ins. Co., 340 N.J. Super. 11, 17-18 (App. Div.), certif. denied, 170 N.J. 86 (2001).

Likewise, the universe of retaliatory action may also include reducing plaintiff's hours of employment. It is well-settled that retaliatory acts which impact an employee's compensation are actionable under CEPA. Beaseley v. Passaic Cnty., 377 N.J. Super. 585, 609 (App. Div. 2005). The court expressly found that plaintiff's hours had been on the decline even before he filed his lawsuit September 2009. The court observed that the decrease in plaintiff's work schedule after Labor Day that year had been consistent with past practices for all employees and therefore defendants had

articulated a legitimate, non-retaliatory reason for decreasing plaintiff's hours. This ruling, however, presupposed that defendants did not act with a retaliatory intent.

Although the court analyzed whether defendants had a justification for reducing plaintiff's hours, it did not consider whether that justification was pretextual. The record reflects defendants provided shifting explanations for reducing plaintiff's hours. The October 1 memorandum suggested that the hours of all union employees would be reduced to minimize Statue's liability. Yet, the record shows that certain employees, like Gill and McGee, never experienced any change.

Defendants later argued that they had reduced plaintiff's hours because of seasonal changes and because plaintiff was less senior than other deckhands. However, the memorandum made no reference to these factors. If, as defendants urge and the trial court found, reduction in hours was seasonal, the need to alert employees with the October 1 memorandum is questionable. Further, in Burke's deposition, he testified the new schedule essentially "reverted" to a previously-used, less-popular schedule that distributed available hours without regard to seniority. This testimony contradicts defendants' claim that plaintiff's hours were reduced because he was less senior.

In short, disputed factual issues material to the resolution of the third and fourth prongs of plaintiff's CEPA claim exist. A jury could reasonably conclude the changing justifications proffered by defendants were after-the-fact explanations crafted to disguise retaliatory motives.

Summary judgment is improper when a plaintiff presents evidence, whether direct or circumstantial, that would lead a reasonable juror to find that the proffered explanation was either pretextual or contrived after-the-fact to justify the retaliation. Kolb v. Burns, 320 N.J. Super. 467, 480 (App. Div. 1999). See also Kelly v. Bally's Grand, Inc., 285 N.J. Super. 422, 432 (App. Div. 1995) (to survive summary judgment a plaintiff need only "cast such serious doubt on the veracity of [the employer's] articulated legitimate reasons as to allow a jury to reasonably conclude that" the employer actually acted in retaliation). Despite the inconsistencies in defendants' explanations, the court wholly accepted their explanation and never addressed plaintiff's contradictory claim that full-time employment was guaranteed by his superiors.

A similar flaw undermines the court's rejection of plaintiff's claim that his confrontations with his co-workers were adverse employment acts. Certainly, anti-discriminatory laws such as CEPA were not intended to be a civility code.

Cokus v. Bristol Myers Squibb Co., 362 N.J. Super. 366, 383 (Law. Div. 2002), aff'd, 362 N.J. Super. 245 (App. Div.), certif. denied, 178 N.J. 32 (2003). Indeed, an employer's actions will not be deemed "retaliatory under CEPA merely because they result in a bruised ego or injured pride on the part of the employee." Klein, supra, 377 N.J. Super. at 46. Here, when the facts are viewed in the light most favorable to plaintiff, a jury could reasonably find that defendants retaliated against plaintiff by turning his coworkers against him and that those repeated confrontations stemmed directly from the October 1 memorandum, ultimately causing his resignation.

A termination under CEPA may encompass both actual and constructive discharges. Donelson, supra, 206 N.J. at 257. An employee has a general "obligation to do what is necessary and reasonable in order to remain employed rather than simply quit." Woods-Pirozzi v. Nabisco Foods, 290 N.J. Super. 252, 276 (App. Div. 1996). Accord Shepherd v. Hunterdon Dev. Ctr., 174 N.J. 1, 29 (2002). Nonetheless, a constructive discharge will be found

> when the employer has imposed upon an employee working conditions "so intolerable that a reasonable person subject to them would resign." . . . In a constructive discharge situation, the retaliatory action is the creation of intolerable conditions which a reasonable employee cannot accept.
>
> [Daniels, supra, 340 N.J. Super. at 17-18 (internal citation omitted).]

Thus, an employer will be held liable if it knowingly permitted intolerable working conditions that would cause a reasonable person to resign. Woods-Pirozzi, supra, 290 N.J. Super. at 276.

The October 1 memorandum from Burke not only alerted plaintiff's co-workers to the lawsuit but also attributed the change in employees' work schedules going forward to plaintiff's lawsuit. Moreover, the court also overlooked Burke's deposition testimony that he became angry with the union and suspected that plaintiff filed suit at the union's behest. This testimony could lead a reasonable juror to conclude that Burke issued the October 1 memorandum to lash out at both the union and plaintiff. Burke claimed that the purpose of his memorandum was to keep Statue employees informed. However, it is just as feasible to view the comments in the memorandum as an attempt to foment resentment against plaintiff. Ultimately, Burke's intentions for issuing the memorandum raised questions of fact that should have been left to a jury. See Brill, supra, 142 N.J. at 540 (holding that under the summary judgment standard, "[c]redibility determinations will continue to be made by a jury and not the judge."). Viewed favorably towards plaintiff, the hostile working conditions to which plaintiff was subjected following the issuance of the October 1 memorandum were causally related to plaintiff's later resignation.

B. Class Certification

While recognizing the absence of precedents to bring a CEPA claim on a class action basis, plaintiff contends the present matter is analogous to LAD[1] cases where employers have been held liable for engaging in retaliatory acts against third parties and urges that certification of his claim is necessary to vindicate the remedial aims of CEPA. Because we conclude plaintiff fails to meet the prerequisites for class certification under Rule 4:32-1, we need not address the legal question of whether CEPA's remedial purposes include permitting class actions.

Focusing our discussion on class certification, a party seeking class certification must establish the following:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> [R. 4:32-1(a).]

[1] Law Against Discrimination, N.J.S.A. 10:5-1 to -49. "[T]he LAD 'unequivocally expresses legislative intent to prohibit discrimination in all aspects of the employment relationship . . . .'" Alexander v. Seton Hall Univ., 204 N.J. 219, 228 (2010) (citing Nini v. Mercer Cnty. Cmty Coll., 202 N.J. 93, 106-07 (2010)).

Notwithstanding that courts should liberally construe this rule to permit class certification whenever feasible, Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 103-04 (2007), a court's decision granting or denying certification will not be reversed unless the decision manifests an abuse of discretion. Beegal v. Park W. Gallery, 394 N.J. Super. 98, 111 (App. Div. 2007). However, the legal determinations a trial court makes in connection with a certification request are subject to de novo review. Ibid. We are satisfied the motion judge did not abuse his discretion in denying the application.

Plaintiff alleges there are between forty and forty-five putative class members. Defendants contend, however, that during the time period between October 1, 2009, when the memorandum was issued, and November 30, 2009, the date when defendants issued their curative notice, there were only eighteen employees actively working for Statue. Plaintiff proffered no evidence to dispute this figure. As such, this figure does not represent a putative class so numerous that joinder is impracticable.

Turning to whether there are questions of law and fact common to the class, although the claims may arise out of the events that unfolded after plaintiff filed his wage and hour complaint, plaintiff's allegations belie commonality. The very

class of individuals plaintiff relies upon for certification are the same individuals plaintiff claims confronted him about the lawsuit after the October 1 memorandum was issued, who started to ignore him, refused to speak to him, and created the hostile work environment that led to his forced resignation.

Likewise, regarding the typicality and representative factors, plaintiff cannot demonstrate that his CEPA claim would be typical of those he seeks to represent. Rather, the class primarily includes the very individuals who allegedly harassed him. As a result of these adverse interests, plaintiff can not adequately represent the interests of these individuals. See In re Cadillac V8-6-4 Class Action, 93 N.J. 412, 425 (1983) (holding the representing party must be able to fairly and adequately protect the interests of the class).

Because plaintiff fails to satisfy the threshold requirements for class certification, we need not address whether plaintiff can satisfy the additional requirement that the issues common to the class outweigh those issues which are not common to the proposed class, the predominance requirement. See R. 4:32-1(b)(3); see also Beegal, supra, 394 N.J. Super. at 111. Plaintiff's CEPA claim is based upon his whistleblowing activities and defendants' subsequent retaliatory actions. Plaintiff's proposed class members did not engage in any

whistleblowing activities, and because they did not do so, there would be no corresponding retaliatory actions directed towards them as a result of such activities.

III.

In finding that plaintiff's wage and hour claim was pre-empted by federal law, the court agreed that federal law controls in cases where the laws of multiple states are implicated. Beyond its general statement that New Jersey's Wage and Hour Law do not contain an exemption for "seamen" while New York law does and references to cases cited by defendants to support their contention that federal law applied, the court did not elaborate in its findings. The court's determination implicates a legal determination. Once again, we accord no deference to the motion judge's conclusions on issues of law, Manalapan Realty, supra, 140 N.J. at 378, which we review de novo. Spring Creek, supra, 399 N.J. Super. at 180; Kafil, supra, 395 N.J. Super. at 601.

A review of the record and the applicable law in this case establishes that the issue requires a closer examination. To begin, the United States Constitution confers exclusive power upon Congress to regulate interstate commerce, State v. Comfort Cab, Inc., 118 N.J. Super. 162, 168 (Law Div. 1972), including all maritime matters. Coil, supra, 242 F. Supp. 2d at 558. On

the other hand, employment compensation matters generally fall within a State's police powers. Comfort Cab, supra, 118 N.J. Super. at 169. Maritime and state wage and hour laws intersect in this appeal.

With limited exceptions, none of which have been raised here, employers are required to pay their employees overtime in an amount equivalent to "1 1/2 times such employee's regular hourly wage for each hour of working time in excess of 40 hours in any week[.]" N.J.S.A. 34:11-56a4. The FLSA has similar provisions to protect an employee "who in any workweek is engaged in commerce. . . ." 29 U.S.C.A. § 207(a)(1). However, the FLSA specifically exempts certain employees from its requirements. 29 U.S.C.A. § 213.

Particularly relevant to this appeal is the "seaman" exemption, which provides that the FLSA's overtime requirements "shall not apply with respect to . . . any employee employed as a seaman[.]" 29 U.S.C.A. § 213(b)(6). Federal regulations define the term "seaman" as one who provides "service which is rendered primarily as an aid in the operation of such vessel as a means of transportation, provided he performs no substantial amount of work of a different character." 29 C.F.R. § 783.31 (2012).

The FLSA also features a so-called "savings clause," which provides that "[n]o provision of [the FLSA] . . . shall excuse noncompliance with any . . . State law . . . establishing a minimum wage higher than the minimum wage established under [the FLSA] or a maximum workweek lower than the maximum workweek established under [the FLSA] . . . . 29 U.S.C.A. § 218(a).

Neighboring New York law follows the FLSA and similarly exempts seamen from overtime pay requirements. 12 New York Comp. Codes R. & Regs. tit. 128142-2.2 (2012). ("An employer shall pay an employee [overtime wages] subject to the exemptions . . . of the [FLSA]"). Notably, plaintiff does not appear to dispute defendants' statement of New York law. Plaintiff also does not appear to contest the court's determination that he is, in fact, a seaman under the FLSA. Instead, the controversy is limited to the court's preemption analysis and its implicit rejection of plaintiff's assertion that a choice-of-law analysis should have governed. Absent an appropriate factual record and findings, we are unable to ascertain whether New Jersey's Wage and Hour Law is preempted, and whether a choice-of-law analysis should have governed.

No reported New Jersey decisions address this precise issue. However, in one of the first New Jersey cases to consider the relationship between the FLSA and New Jersey wage

and hour laws, the court observed that both enactments were intended to be "humanitarian and remedial," and that, generally, where a conflict exists between state and federal law, the scheme "creating an overtime arrangement more favorable to the employee . . . should prevail." Comfort Cab, supra, 118 N.J. Super. at 168, 173-76. Accord Keeley v. Loomis Fargo & Co., 11 F. Supp. 2d 517, 520 (D.N.J. 1998) (noting that "every Circuit that has considered the issue has held that states may require employers to pay overtime wages to employees who are . . . exempt under . . . the FLSA."), rev'd on other grounds, 183 F.3d 257 (3d Cir. 1999), cert. denied, 528 U.S. 1138, 120 S. Ct. 983, 145 L. Ed. 2d 933 (2000).

A similar conclusion was reached in Pacific Merchant Shipping Association v. Aubry, 918 F.2d 1409 (9th Cir. 1990), cert. denied, 504 U.S. 979, 112 S. Ct. 2956, 119 L. Ed. 2d 578 (1992). There, the Ninth Circuit examined the enforceability of California's overtime laws against an employer, operating vessels off the California coast. Id. at 1411. The district court agreed with the employer, who argued that the FLSA preempted California law. Id. at 1411-12. In reversing the district court, the Ninth Circuit differentiated between maritime employees and seamen, describing a "maritime employee" [as] a "'seaman' in the general maritime sense; and a 'seaman'

[as] a maritime employee exempted from the FLSA's overtime pay provisions. . . ." Id. at 1412.

> Historically, those who work on ships have been called "seamen." As a matter of general maritime law, the term "seamen" includes a broad range of marine workers whose work on a vessel on navigable waters contributes to the functioning of the vessel, to accomplishment of its mission, or to its operation or welfare. "Seamen" is also used, in a much narrower sense, in the [FLSA] to define a category of maritime workers *exempted* from coverage under federal overtime pay provisions.
> [Ibid. (internal citations omitted).]

The court also differentiated between the "territorial sea" and the "high sea," the latter presumably being the point at which state jurisdiction ended and federal jurisdiction began. Ibid. Applying those terms to the FLSA and California wage and hour laws, the court ruled there was no per se rule barring the application of California law to those who otherwise would be exempt under the FLSA. Id. at 1419. The court next addressed maritime employees, in particular those who worked on the high seas. Id. at 1412, 1420. The court noted that those employees' interests raised questions of admiralty law, but that California's laws were not necessarily preempted by federal admiralty law because "application of the state's overtime law [could] not disrupt international or interstate commerce." Id. at 1424, 1425. Significantly, the court added:

> We have focused in this section on the question whether, under general admiralty principles, California is preempted from applying the state's overtime pay laws to non-exempt maritime employees . . . . But our analysis applies as well to FLSA-exempt seamen who work on such vessels. As we held above, allowing California to apply its overtime pay laws to seamen does not conflict with the FLSA; exemption from the FLSA's overtime provisions does not, per se, preempt state overtime laws. Also, the balance between state and federal interests is the same with respect to the seamen at issue in this case as it is with respect to nonexempt maritime workers.
>
> [Id. at 1426.]

The court's pre-emption analysis in Aubry, though not controlling, is instructive insofar as the court engaged in a fact-sensitive analysis in order to determine whether "the application of a state's overtime law will . . . disrupt international or interstate commerce." Id. at 1425.

Lacking here, however, is the court's fact-sensitive analysis. As a result, meaningful appellate review is impeded. Raspatini v. Arocho, 364 N.J. Super. 528, 532-33 (2010) (noting "R. 4:46-2(c) specifically directs the court to make fact findings and conclusions in accordance with R. 1:7-4," and "[g]iven the absence of any factual findings . . . meaningful review is impossible"). We are therefore constrained to reverse the grant of summary judgment dismissing plaintiff's wage and

hour claim on the basis of pre-emption and remand for further proceedings on this issue.

IV.

Finally, plaintiff contends the court erred in its ruling compelling him to undergo an IME because he did not place his mental status in controversy. We disagree.

CEPA claims are often analyzed utilizing the same framework we employ in LAD cases. See Abbamont, supra, 138 N.J. at 417 (citing Green v. Jersey City Bd. of Educ., 177 N.J. 434, 448 (2003); see also Racanelli v. Cnty. of Passaic, 417 N.J. Super. 52, 58 (2010). The Legislature has declared that among the harms caused to victims of discrimination is emotional distress. Because emotional distress resulting from discrimination is presumed, a plaintiff bringing an LAD action is not required to produce expert testimony on the issue of emotional distress. Such distress may be presented through plaintiff's testimony, from family, friends and co-workers. Tarr v. Ciasuilli, 181 N.J. 70, 78-79 (2004) (citing Rendine v. Pantzer, 276 N.J. Super. 398, 442 (App. Div. 1994), aff'd, 141 N.J. 292 (1995)) (holding that expert testimony or other independent corroborative evidence is not necessary to support a finding of emotional distress.). Likewise, CEPA is also remedial legislation designed 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, supra, 138 N.J. at 431. Its purpose additionally includes the objective to encourage employers to correct illegal activity. Therefore, emotional distress stemming from the consequences of reporting suspected illegal or unethical employer activity should also be presumed and generally not require expert testimony.

Here, however, contrary to plaintiff's assertion on appeal that his injuries were of "garden variety," in his complaint he alleged that he suffered "severe emotional distress" with accompanying physical sequelae as a result of defendants' conduct. In his interrogatory responses, plaintiff stated that he "has endured severe emotional distress as a result of [d]efendants' retaliatory conduct, which has impacted his physical and emotional well-being." Plaintiff amended his answers and stated that he suffered from "sleeplessness, anxiety, increased stress, humiliation, and loss of self-esteem." Finally, in his deposition testimony, in addition to the conditions he identified in his amended interrogatory answers, he also testified that he experienced "panic" that came "like an attack." Moreover, he testified that he lost weight, which he regained and that he was "embarrassed. It was

physically bothering me. That's why I couldn't sleep, the stress. I also deal with an autistic child, so this was just added stress." Because plaintiff's alleged emotional distress includes physical sequelae as well as admitted pre-existing emotional distress related to having an autistic child, defendants were entitled to conduct discovery regarding plaintiff's claim that defendants' conduct aggravated his pre-existing emotional distress. We therefore conclude the motion judge did not abuse his discretion in entering an order directing plaintiff to undergo an IME.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.