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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1758-11T2

MICHELE STARK and
BARBARA BALLISTRERI,

Plaintiffs-Appellants,

v.

SOUTH JERSEY TRANSPORTATION
AUTHORITY, and CHARLES
GIAMPAOLO,[1]

Defendants-Respondents.

Argued March 18, 2014 – Decided May 21, 2014

Before Judges Alvarez, Ostrer and Carroll.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-708-07.

Heidi Weintraub argued the cause for appellants (Van Syoc Chartered, and Ionno and Higbee, LLC, attorneys; Clifford L. Van Syoc, Sebastian B. Ionno, and D. Rebecca Higbee, on the briefs).

Kevin J. O'Connor argued the cause for respondents (Peckar & Abramson, P.C., attorneys; Mr. O'Connor, on the brief).

PER CURIAM

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[1] Defendant Charles Giampaolo is improperly referred to as Giampoalo in the pleadings and transcripts.

Plaintiffs Michele Stark and Barbara Ballistreri appeal from the grant of summary judgment to defendant South Jersey Transportation Authority (SJTA) dismissing their amended complaint alleging retaliatory action by SJTA, their employer. Earlier, they had filed complaints alleging violations of the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. The amended complaint alleged violation of the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -8. We affirm, limiting our discussion to only those issues necessary to a fair disposition of the matter.

Initially, we note that plaintiffs filed a civil case information statement stating that plaintiffs "are appealing any and all adverse ruling (sic)." Their notice of appeal, however, only identifies the November 2, 2011 order dismissing the amended complaint alleging retaliation pursuant to CEPA. Plaintiffs assert three points of error, with a total of eighteen subheadings in their eighty-page brief. The November 2, 2011 order effectively ended the litigation, as plaintiffs' claims under LAD had been previously dismissed.

Plaintiffs attached numerous other orders without explanation or comment to their notice of appeal: 1) a February 6, 2009 order denying plaintiffs' application to file an amended complaint, and to extend discovery, signed by now-retired Judge

Steven P. Perskie; 2) an August 5, 2009 order granting summary judgment dismissing plaintiffs' LAD claims against defendants SJTA and defendant Charles Giampaolo, denying defendants' application for summary judgment on plaintiffs' LAD retaliation claim, denying defendants' request to strike an expert report, and denying plaintiffs' cross-motion to bar defendants' evidence at trial; 3) a September 25, 2009 order issued by Judge William E. Nugent denying plaintiffs' motion under Rule 4:50 to file an amended complaint and to extend discovery for an additional ninety days; 4) an order signed by Judge Carol E. Higbee dated March 1, 2010, denying a host of requests for relief related to discovery, including defendants' requests for sanctions; 5) an April 15, 2010 order quashing a subpoena served on defendants' outside counsel; 6) an August 13, 2010 order denying without prejudice defendants' motion for summary judgment, granting plaintiffs' request to amend their complaint to include retaliation for their surreptitious recording of defendants' agents and for other relief; 7) an August 27, 2010 order sanctioning plaintiffs for filing an amended pleading which did not comply with the court's prior directive limiting causes of action, and requiring plaintiffs to refile an amended complaint in compliance with the prior order; and 8) a November 12, 2010

order allowing defendants to refile their application for summary judgment and for further discovery.

Rule 2:5-1(f)(3)(A) states that "[i]n civil actions, the notice of appeal shall . . . designate the judgment, decision, action or rule, or part thereof appealed from . . . ." Plaintiffs' notice of appeal does not comply with the Rule.

The Rule requires an appellant to identify the orders and issues he or she contends constitute error. The blanket statement that any "adverse ruling" is under consideration and attaching the orders does not suffice. This was protracted litigation, spanning several years, addressed by three judges, regarding plaintiffs' claims for violations of LAD and LAD retaliation, and CEPA retaliation. Clearly, more than what was provided here would have not only complied with the Rule, but would have allowed us to more expeditiously focus on the relevant information. In fact, many forms of relief were granted in the appended orders which were adverse to plaintiffs, but which were not addressed in their brief. Merely attaching the numerous extensive orders is simply inadequate. See 1266 Apt. Corp. v. New Horizon Deli, 368 N.J. Super. 456, 459 (App. Div. 2004); Fusco v. Newark Bd. of Ed., 349 N.J. Super. 455, 461-62 (App. Div.), certif. denied, 174 N.J. 544 (2002);

Campagna v. Amer. Cyanamid, 337 N.J. Super. 530, 550 (App. Div.), certif. denied, 168 N.J. 294 (2001).

This brings us to a point of greater concern. Rule 2:6-2(a)(4) requires a brief to include a concise statement of the facts "supported by references to the appendix and transcript." Plaintiffs' twenty-eight pages of facts include misleading references to the record, not to mention mischaracterizations of the record. Furthermore, their legal argument relies on facts not contained in the statement of facts at all, characterizations of the facts not warranted based on the statement of facts, and not supported by record references.

Despite seventeen appendix volumes, the relevant circumstances are straightforward. Ballistreri commenced working for SJTA in 1982, and Stark in 1983. By 1990, they were assigned to the toll audit division, overseen by a manager. Plaintiffs worked in an office in a trailer located near the Farley Service Plaza on the Atlantic City Expressway. Their employment was subject to the terms of their union's collective bargaining agreement (CBA).

Our review of the extensive record, including transcripts of court proceedings, multiple depositions, answers to interrogatories, and certifications, clearly documents that plaintiffs had a history of abuse of sick time, of family leave,

and of vacation time. By 2006, both plaintiffs were working "flex time," although it had never actually been authorized and was not permitted to union employees under the CBA. This "flex time" included their hours of arrival, departure, and the length of breaks.

Additionally, plaintiffs were chronically unable to complete their monthly audit reports on a timely basis. On March 27, 2006, Giampaolo became their manager. He was charged, among other things, with the responsibility of generating the audit reports of each month by the fifteenth of the following month. Giampaolo's efforts at obtaining plaintiffs' compliance with the report timelines, not to mention employee policies and procedures regarding vacation days, sick time, and family leave, proved fruitless.

In June 2006, Giampaolo, who had noticed that plaintiffs were not auditing individual toll collectors, created a computer program to do so. While implementing the program, he discovered that between June and July, an individual toll collector had stolen approximately $14,000. That individual was terminated and eventually prosecuted for theft.

In response to Giampaolo's discovery, plaintiffs filed a grievance against him under the CBA claiming a violation because

he had performed union work even though not a member of the union. That grievance was withdrawn in September.

Plaintiffs also contacted SJTA's Affirmative Action Officer Doris McClinton in July 2006 to discuss their concerns regarding Giampaolo's allegedly harsh manner of dealing with them, his complaints about their productivity, and his responses to their leave requests. They objected to his requirement, for example, that they fill out a spreadsheet tracking their work, and document requests for sick leave. Plaintiffs did not accuse Giampaolo of gender discrimination or sexual harassment. Shortly after plaintiffs met with the affirmative action officer, Giampaolo and Ballistreri had an argument regarding her sick time. There is no question that while the dispute was ongoing, Ballistreri was being treated for a serious health problem — but one which she never documented to the SJTA authorities and about which Giampaolo was unaware.

At McClinton's request, on July 21, 2006, plaintiffs prepared a written complaint regarding their concerns about Giampaolo. The complaint did not include allegations of gender discrimination or sexual harassment. Plaintiffs also emailed McClinton in August and September 2006 regarding their concerns, but made no reference to gender discrimination or sexual harassment. The conflicts between plaintiffs and Giampaolo

escalated, until finally he instructed them in writing that they must come into work by 8:30 a.m., not leave prior to 4:30 p.m., and honor the lunch hour, which he designated to run from noon to 1:00 p.m.

Stark complained to Giampaolo that she had a family member whose disability required her to work flexible hours. But, Giampaolo refused her request because of plaintiffs' abuse of their privileges and failure to complete their work in a timely manner. Giampaolo reminded Stark that the work hours were set by union contract and that any change had to be approved by a human resource manager. Nonetheless, Stark neither consulted with human resources nor adhered to the work hours.

From August through September, both Stark and Ballistreri were significantly absent, using sick time, administrative leave, and vacation time, although no doctor's note was ever provided documenting the sick days. June 2006 was the last month for which plaintiffs completed an audit report.

During that timeframe, plaintiffs met with James Iannone, SJTA's then-acting executive director, after an altercation with Giampaolo. Iannone sent them home for the rest of the day on their own time. In September, plaintiffs met again with McClinton about Giampaolo, though at no time did they make any reference to sexual discrimination or harassment. Ballistreri

never disclosed to McClinton that she had been treated for a health condition.

SJTA retained a private attorney to complete McClinton's investigation and issue a report regarding plaintiffs' complaint because numerous disciplinary charges had been filed against them in September. Simultaneously, SJTA requested that SMART Consulting, LLC (SMART), the firm it had retained to conduct a state mandated five-year management audit, complete plaintiffs' work. SMART issued a final report dated December 13, 2006, stating that plaintiffs were "seriously behind" in their work. It strongly recommended that toll revenue audit functions be performed by non-union members in the finance department, because it was a conflict of interest to have plaintiffs auditing toll collectors when all belonged to the same union.

Plaintiffs returned to work January 2, 2007, and met with Joel Falk, SJTA's director of ITT. Falk advised plaintiffs their jobs were going to be eliminated, in line with SMART's recommendations regarding conflicts of interest, and offered them other options. SJTA hoped to create two new union positions for plaintiffs, one in each toll plaza, that would be in line with their experience. Falk noted that the plan would require the agreement of Union Local 196. Plaintiffs agreed to accept the transfers. Because of the implementation of SMART's

recommendations, Giampaolo was also moved to a different department.

Stark and Ballistreri were initially given jobs counting violators. Stark continued to work flex hours because of her family situation. Ballistreri was subsequently given a desk job in the toll repair department.

On February 28, 2007, plaintiffs filed suit against SJTA and Giampaolo alleging that, among other things, Giampaolo had improperly referred to another employee as a lesbian and told a woman in the office who had worked there part-time that she should engage in inappropriate sexual conduct at her "bachelorette party." Both of those employees, when deposed, denied these events occurred as plaintiffs described them. Both maintained that Giampaolo, who denied making the statements, had said nothing offensive. Other than those two allegations, there were no specific claims of sexual harassment or gender discrimination.

In April 2007, plaintiffs' positions were eliminated in accord with SMART's recommendation. Local 196 unsuccessfully grieved the action. Because SJTA and Local 196 could not agree upon new positions for plaintiffs, each plaintiff was allowed to "bump" a less senior union member to fill an existing position.

The SJTA's investigating attorney's report concluded that plaintiffs' allegations of harassment and retaliation could not be substantiated. Instead, she found Giampaolo's statements credible that, to the contrary, plaintiffs had been inappropriately and openly hostile towards him and failed to comply with his management directives. The attorney also found that plaintiffs had job performance issues and that Giampaolo's conduct constituted neither harassment nor retaliation.

Plaintiffs' disciplinary hearings were held on March 28, 2007, before Samuel Donelson, SJTA's Director of Engineering and Operations. Plaintiffs did not dispute the charges, other than to object that the CBA timelines had been violated.

At the conclusion of the hearing, Donelson upheld four of the five charges against Stark, finding that: (1) according to transponder data, she was tardy thirty-three times, left work early thirty times and returned late from lunch six times within fifty-three working days; (2) the time she logged into the computerized time entry system did not match the time she actually worked on numerous occasions; (3) records confirmed that she was not completing her work in a timely manner and that this inefficiency could be attributed to her dereliction of her duties; and (4) she had a history of insubordination but offered no defense to the current charges. Donelson deemed inconclusive

the evidence in support of the charge of abuse of sick time. He imposed the ten-day unpaid suspension sought by SJTA, but opined that the evidence against Stark warranted termination. Donelson further noted that Stark had been allowed to work flex time notwithstanding the absence of any CBA provision permitting it. He recommended that this privilege be revoked.

Donelson upheld all three of the charges against Ballistreri, finding that: (1) records confirmed that she did not complete her work in a timely manner, or meet established deadlines for the monthly toll audit, and that this inefficiency could be attributed to her dereliction of her duties; (2) she not only had a history of insubordination but offered no defense to the current charge; and (3) she had exceeded her allotted number of sick days per year without seeking approval and had provided no doctor's note regarding her absences. Donelson upheld SJTA's determination to suspend Ballistreri for ten days without pay, although he believed that termination was warranted based upon her conduct.[2]

In order to initiate the bumping process, on May 14, 2007, plaintiffs and union president Dominick Penn, met with Paul Heck, SJTA's then-Human Resources Manager, and Wade Lawson,

[2] Ballistreri successfully grieved this disciplinary action and, pursuant to a written settlement dated February 29, 2008, her suspension was reduced from ten days to five.

SJTA's Deputy Executive Director, in the boardroom at the Farley Administration Building. Plaintiffs were shown a seniority list and asked to select the jobs they wished to take. During the meeting, plaintiffs and Penn stepped out multiple times to "caucus." Plaintiffs asked Heck and Lawson whether they would be able to continue working their current hours of 8:30 a.m. to 4:30 p.m. if they took any one of the "clerk" positions, and also whether flex time was available. Heck and Lawson called the various departments and made inquiries about the work hours. Ultimately, neither plaintiff was willing to commit that day to a particular job. Each insisted that she had to know whether the work hours could be adjusted to accommodate her.

Stark chose to "bump" the existing clerk at the State Police barracks as of July 2007, and worked from 8:30 a.m. to 4:30 p.m. Her commute remained the same and she received the same salary. Ballistreri assumed the position of clerk in Toll Repair and likewise suffered no loss in salary.

According to Donelson, Stark's new supervisor, there was not a single union member among the 136 employed in his department who had ever been provided with flex hours. Stark had never formally requested the flexible schedule she had previously enjoyed. Stark did request, and was granted, FMLA

leave from Sept 1, 2007 through August 31, 2008, and again from September 2008 through August 2009.

In their July 30, 2008 interrogatory answers, plaintiffs claimed, for the first time, to be in possession of a CD containing certain recorded "admissions" made by Heck and Lawson during a May 14, 2007 meeting while plaintiffs were not in the room. However, plaintiffs did not produce the CD (which actually contained nine hours of multiple recorded conversations) until September 11, 2008, and it was not until October 20, 2008, that plaintiffs provided defense counsel with a one-page summary describing the contents of the CD. The summary described the recorded May 14, 2007, meeting as follows:

> @38:00 into recording, Heck and Lawson talking to Stark and Ballistreri regarding the bump. @56:00 into, Heck states that Stark will have an issue with the hours. @57:45 Lawson says, "the hours will screw her". (Stark) @58:25 Lawson says, accommodations can be taken away, and play hard ball, that'll screw her. Heck says, "good". Lawson repeats, "That'll screw her big time."

Plaintiffs did not provide certified transcripts of all of the recorded conversations, including the one from May 14, 2007, until January 7, 2010.

The following is the transcription of the recorded conversation between Heck and Lawson during one of the occasions plaintiffs and Penn were out of the room:

> UNIDENTIFIED MALE SPEAKER: This doesn't make sense to me. They've known this for months.
>
> UNIDENTIFIED MALE SPEAKER: I know.
>
> UNIDENTIFIED MALE SPEAKER: They know the jobs they want, the hours and what they are. What I would do if they want to screw around, I'll take that accommodation away. You want to play hardball? Joel could change that accommodation any chance he wants. (Indiscernible) --wait 'til the union, he can wait until August and put a new shift in, she's screwed.
>
> UNIDENTIFIED MALE SPEAKER: He could.
>
> UNIDENTIFIED MALE SPEAKER: I mean, she is screwed big time.
>
> UNIDENTIFIED MALE SPEAKER: Yeah. You can say none of them are later than eight o'clock.
>
> UNIDENTIFIED MALE SPEAKER: Right. All of them will be 8:00 to 4:00. We can do that at the bargaining table. She gets screwed.
>
> UNIDENTIFIED MALE SPEAKER: Could.

The SJTA forwarded the CD to its attorney, Russell Lichtenstein, who on October 30, 2008, advised that the recording of the May 14, 2007, conversation between Heck and Lawson was illegal.

By memos dated November 7, 2008, SJTA advised plaintiffs that: (1) they had been charged with willful violation of the Wiretapping Statute and conduct unbecoming a public service employee; (2) a termination hearing had been scheduled for November 17, 2008; and (3) they were immediately suspended

without pay pending the outcome of the hearing. The CBA specifically provided that "[i]n the event of an alleged serious offense, an employee may be suspended without pay pending the outcome of the charges."[3]

Plaintiffs' disciplinary hearings were conducted November 25, 2008, before Thomas Rafter. Neither plaintiff appeared at the hearings or presented any witnesses or certifications to dispute the charges against them. No argument was made on their behalf that Rafter was biased.

Rather, plaintiffs' counsel merely argued that the charges against plaintiffs had not been brought within the requisite ten-day period.[4] Lichtenstein responded that, regardless of when SJTA obtained the CD, it only learned that plaintiffs had illegally recorded Heck and Lawson between October 30, and November 7, 2008, and that therefore action was taken against plaintiffs within the proper time frame. Heck and Lawson denied giving plaintiffs permission to tape their private conversation

[3] Further, according to the SJTA's Personnel Policies Manual, the SJTA was not required to practice "progressive discipline," but retained the "authority and prerogative to impose discipline appropriate under the circumstances, up to and including termination."

[4] At the hearing, plaintiffs' counsel denied that the one-page summary of the contents of the CD had been furnished by his office, insisting that it had likely been prepared by SJTA's attorneys. He also indicated that he could not tell his clients apart.

or knowing any taping was taking place. Kathleen Aufschneider, Deputy Executive Director of SJTA, who was present for the hearing, instructed Rafter that it was not necessary to swear in either Heck or Lawson since that was not the SJTA's normal practice at an administrative proceeding.

In a December 9, 2008 written memorandum of decision, Rafter upheld the termination of Stark's employment with SJTA, and reduced Ballistreri's punishment to a four-week suspension. Rafter believed that Ballistreri's lesser involvement in the illegal recording and its use warranted the lesser discipline.

At a February 4, 2010 deposition, Ballistreri insisted that she and Stark had not intentionally recorded the private conversation between Heck and Lawson. Thereafter, at a second deposition on September 10, 2010, Ballistreri said she knew Stark was recording the May 14, 2007 proceedings, and also that she helped draft the summary for their attorney, which he had denied came from his office.

At her September 10, 2010, deposition, Stark asserted that the private conversation between Heck and Lawson was unintentionally recorded when she left her handbag in the conference room, with the active recording device inside, during a time that she and Ballistreri stepped outside to "caucus" with the union president. She admitted that she initially assumed

the recording was illegal but nonetheless shared it with her husband, an employee of SJTA, Ballistreri, and later with her attorney. Stark also eventually confirmed that either she or Ballistreri had prepared the summary and furnished it to her attorney.[5]

Both plaintiffs signed certifications filed on December 8, 2010, claiming that, at the May 14, 2007 meeting they: (1) only intended to record conversations to which they were a party; (2) never intended to record private conversations solely between Heck and Lawson; (3) had not realized that they might leave the room while the meeting was in progress; (4) completely forgot that their recording device remained behind and was running when they stepped outside to speak to Penn; and (5) did not realize that they had recorded a private conversation between Heck and Lawson until after the conclusion of the meeting.

On appeal, plaintiffs allege the following points of error:

> I. THE TRIAL COURT ERRED IN FINDING THAT THE MAY 14, 2007, RECORDING WAS ILLEGAL.
>
> II. THE TRIAL COURT ERRED IN FINDING THAT THE PLAINTIFFS DID NOT ENGAGE IN PROTECTED CONDUCT.
>
> A. PROTECTED CONDUCT.

[5] At an earlier deposition on November 3, 2009, Stark claimed that she did not recall participating in preparing the summary.

B. ALL ADVERSE EMPLOYMENT ACTIONS TAKEN AGAINST PLAINTIFFS, INCLUDING STARK'S TERMINATION AND BALLISTRERI'S UNPAID SUSPENSION, WERE CLEAR ACTS OF RETALIATION IN VIOLATION OF CEPA.

1. Plaintiffs Were Subjected to an Open, Obvious and Extensive Campaign of Retaliatory Harassment from Giampaolo Following Their Protected Conduct.

2. Stark's Termination, Ballistreri's Suspension, and the Disciplinary Charges That Led to Same Were Acts of Retaliation.

C. WHEN CONSIDERED TOGETHER, ALL ADVERSE EMPLOYMENT ACTIONS TAKEN AGAINST PLAINTIFFS[] PRIOR TO THE 2008 DISCIPLINE SUPPORT A FINDING THAT STARK'S TERMINATION AND BALLISTRERI'S SUSPENSION WERE MOTIVATED BY RETALIATION.

D. THERE IS A CAUSAL LINK BETWEEN THE PROTECTED ACTIVITY AND THE RETALIATION AND PLAINTIFFS' PROOFS DEMONSTRATE THAT THE DEFENDANTS' ASSERTED NON-RETALIATORY REASONS FOR THE ADVERSE EMPLOYMENT ACTIONS WERE PRETEXT FOR RETALIATION.

E. THE TRIAL COURT'S INVOLUNTARY DISMISSAL OF PLAINTIFF[S'] CLAIMS AGAINST GIAMP[AO]LO IS CONTRARY TO THE "LAW OF THE CASE" AND BINDING SUPREME COURT PRECEDENT.

IV. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

A. JUDGE HIGBEE ERRED IN OVERTURNING JUDGE PERSKIE'S RULING THAT THE PLAINTIFFS HAD ESTABLISHED AN ACTIONABLE LAD RETALIATION CLAIM.

B. DEFENDANTS' FINAL MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED UNDER THE DOCTRINES OF LAW OF THE CASE AND JUDICIAL ESTOPPEL.

C. JUDGE HIGBEE'S DECISION WAS IMPROPERLY COLORED BY A CLEAR ANIMUS TOWARD PLAINTIFFS' COUNSEL.

I

In Point I, plaintiffs reassert that all three judges erred in finding the May 14, 2007 recording, which Stark made and shared with her husband and Ballistreri, who are both employees of SJTA, was illegal. Stark herself assumed that the recording was illegal. She also acknowledged preparing the summary of the tape, which differed from the certified transcript. Ballistreri confirmed that she knew that Stark was recording the May 14, 2007 meeting, and that she helped her draft the summary.

That both Stark and Ballistreri proffer to have unintentionally recorded the conversation we consider of little moment to the exclusion of the recording. We reach that conclusion not only under the Wiretap Act, but also the principles outlined in Quinlan v. Curtiss-Wright Corp., 204 N.J. 239 (2010).

It is necessary to review the trial judges' decisions on exclusion in some detail. On defendants' initial application to bar the evidence, plaintiffs did not defend its use on the basis

that the recording was innocently made. Thus Judge Perskie's January 9, 2009 decision, based on the assumption the recording was deliberate, stated:

> There is no dispute that the conversation at issue is included in the Wiretapping Act's definition of "oral communication." Thus, the critical issue for the motion is whether Lawson had a reasonable expectation of privacy as to the conversation in the meeting room. At some point, Plaintiffs and Penn left the room to "caucus," leaving Heck and Lawson alone. This is when the conversation at issue took place. It is hard to imagine a more demonstrable circumstance for the application of the "reasonable expectation of privacy" standard.
>
> . . . In this instance . . . [t]he recording device was, apparently, surreptitiously placed in the [meeting room] before the employees left the room. While Lawson, as a public official, must certainly have had the expectation that he would have been responsible for anything that he said in an official capacity, this factual context presents no reason to doubt that his expectations were that any conversation under those circumstances would have been private, and that such expectations were objectively reasonable.
>
> Even ignoring SJTA's status as a public entity (which there is certainly no reason to do), the concept of secreting a recording device in a location and under circumstances designed to "capture" comments that would be made in the "reasonable expectation of privacy" is offensive to any rational observer. Arguably, there is[,] as a general rule [] nothing in the law that would prevent the surreptitious recordation of comments made in any conversation among

> participants to the conversation. But in this instance, when most of the participants to a meeting have left the room to "caucus," the remaining two participants are, as a matter of law under these circumstances, entitled to the finding that their conversation enjoyed a "reasonable expectation of privacy."

Judge Perskie signed the first order excluding the evidence on January 13, 2009.

Further muddying the procedural waters, plaintiffs filed a motion in January 2009 to amend their complaint to allege that the November 2008 discipline constituted unlawful retaliation under LAD. On February 6, 2009, Judge Perskie denied the application relying in part on the illegal recording, explaining that:

> [i]n this case, Defendant[s] alleged that Plaintiffs recorded a conversation in violation of the [Wiretapping Act]. Defendants found that Plaintiffs had violated the Wiretapping Act at [a] hearing . . . . Plaintiffs now seek to amend their complaint so that they may argue that Defendant's actions in holding the hearing [were] retaliatory under the [LAD]. . . . The court refers Plaintiffs to the motion returnable January 9, 2009, in which the court ordered that Plaintiffs had in fact violated the [Wiretapping Act]. . . . Accordingly, the court finds that it has already ruled on the claims raised in Plaintiffs' amended complaint and has determined, as a matter of law, that Plaintiffs' actions were improper. The court therefore denies Plaintiffs' motion to amend their complaint.

On the date the trial was to commence, September 8, 2009, plaintiffs sought to vacate the January 13, 2009, and February 6, 2009 orders. The application was denied as untimely and without merit. Plaintiffs' attorney then made certain offensive remarks regarding Judge Perskie's objectivity, who, as a result, recused himself. The matter was addressed the following day by his replacement, Judge Nugent.

Judge Nugent first observed it was "inexcusable" of plaintiffs' counsel to wait until immediately before trial to file the motion, opining that it could have been denied on that basis alone. He nonetheless considered it on the merits, ultimately agreeing with Judge Perskie that the recording should be barred and that plaintiffs could not amend their complaint to allege LAD retaliation. Judge Nugent found that plaintiffs intended to surreptitiously tape the meeting, and that Heck and Lawson had a reasonable expectation of privacy when plaintiffs and the union representative left the room to caucus. Judge Nugent, who had been presented with the first certifications that the recording was accidental, added:

> Now on the motion record there was an argument that there was an issue of fact, and some evidentiary hearing had to be held as to whether, in addition to the reasonable expectation of privacy, there was the appropriate mens rea on the part of the plaintiffs to trigger the exclusionary bar in the statute, actually to trigger the

statutory violation. The problem is there was nothing on that motion record submitted by the plaintiffs to [dispute] what the undisputed facts established, and that is that they went in there with the intention to tape record and that they left the recorder on when . . . the other two were alone. So Judge Perskie, when he decided that [motion], . . . even though the emphasis in the memorandum of decision is on the reasonable expectation of privacy, there was absolutely nothing to refute the undisputed evidence that the plaintiffs went in there fully intending to record that conversation and when they were excused left the recorder on and thereby surreptitiously recorded a conversation that they were not a party to in violation of the statute.

It was, in my view, a conclusion that was easily reached on that motion record[,] that it was done intentionally, or there's another part of the statute that doesn't even require purpose. It requires an endeavor to do that. And under either section there appeared to be a violation of the statute. I acknowledge that [in] the certifications that were submitted . . . in the last week, the plaintiffs did certify that this was an accident and essentially . . . [they] . . . did not anticipate that they would be excused from the meeting . . . [and] when they left they were no longer thinking about the tape recording and, therefore, they didn't have as a purpose the unlawful interception of the communications.

. . . . .

[However,] [t]his is not evidence that the plaintiffs could not have presented on the first motion before Judge Perskie. So the question in my view is whether he abused his exercise of discretion when he denied the motion for reconsideration, and in my view he did not.

Because of counsel's conduct towards Judge Nugent, he also recused himself and the matter was transferred to Judge Higbee.

Judge Higbee then decided plaintiffs' renewed motion, possibly the fourth, seeking to vacate the orders barring admission of the tape. She found no basis for reconsideration of either Judge Perskie or Judge Nugent's orders, concluding that the May 14, 2007 recording was illegal and inadmissible.

Judge Higbee, after listening to the recording, commented that nothing "suggest[ed] in the tape that Heck and Lawson were doing anything in retaliation against" plaintiffs. In other words, there was no "huge smoking gun"; rather, there was simply a small portion of the tape containing language that might or might not help plaintiffs in their suit, and there was other language that might help SJTA. Finally, the judge said:

> the bottom line was, that was a private conversation between two people who did not know they were being taped, who did not understand that they were being taped, and who . . . [plaintiffs] had no right to tape.
>
> It is against the law to tape people who are not aware they're being taped, who are not talking to you or including you in their conversation. . . .
>
> Now, whether they could or couldn't have been prosecuted for illegal wiretapping, the nuances of the statute which says that in order to be a violation of the law it has to be intentional I don't think are really at issue here. . . .

[T]his is not a criminal trial where we're trying to decide whether or not they violated the wiretap law in the sense that they should be punished for it by a court of law in a criminal fashion beyond a reasonable doubt . . . .

What we're talking about here is whether they violated the law, which they did. They illegally taped someone. They . . . went there for the purpose of taping those people . . . . to assist their litigation. They knew immediately when they discovered — and we'll assume for this purpose that they discovered that they left the tape machine running in their pocketbook and that, therefore, as . . . Stark claims, when she left it there she didn't even think about it, she just left it there inadvertently and when she came back she had them on tape in a time when she admits she knew that she shouldn't have had them on tape and she knew that it was probably illegal for her to tape them.

Ballistreri also thought that it was illegal for her to tape them . . . [And] . . . Ballistreri acknowledges that she knew that they were taping; although neither of them admit that they knew that the tape was running in the sense that they didn't realize that her pocketbook was in the room.

So we get into all these little nuances about is it intentional when you intentionally go take a tape recorder to tape people, but at the exact moment that you're taping them you didn't realize they were being taped; . . . but there's some things that aren't nuanced, and that is that you can't tape people, period. And you can't make a tape available — you know, you can't just say, okay, we put it there but I didn't intend to tape you, I intended to tape Y, and . . . [X] got picked up instead of [Y]. In this case she actually goes

> there anyway to tape the people who are being taped, and for the purpose of assisting her in the litigation. And when she gets home she knows it's illegal. And she then shares it with her husband and other people, including her co-worker. They . . . write up a summary of it and, eventually, they give it to their attorneys . . . .

Given the "untenable" outcome for employers to have employees "forgetting" that their recording devices were on, thereby accidentally recording private conversations, Judge Higbee also determined the recording was illegal and inadmissible.

Pursuant to N.J.S.A. 2A:156A-3, any person who:

> a. Purposely intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire, electronic or oral communication; or
>
> b. Purposely discloses or endeavors to disclose to any other person the contents of any wire, electronic or oral communication, . . . knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication; or
>
> c. Purposely uses or endeavors to use the contents of any wire, electronic or oral communication, . . . knowing or having reason to know, that the information was obtained through the interception of a wire, electronic or oral communication:
>
> shall be guilty of a crime of the third degree. Subsections b. and c. of this section shall not apply to the contents of any wire, electronic or oral communication, . . . that has become common knowledge or public information.

Any "aggrieved person" in any trial may move to suppress the contents of any intercepted wire, electronic or oral communication on the grounds that the communication was unlawfully intercepted. N.J.S.A. 2A:156A-21(a). It is not unlawful for a "person not acting under color of law to intercept a wire, electronic or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." N.J.S.A. 2A:156A-4(d).

Before a violation of the Wiretap Act is found, it must be established that the individual whose communications were intercepted had a reasonable expectation of privacy. Hornberger v. Am. Broad. Cos., 351 N.J. Super. 577, 621-22 (App. Div. 2002). Whether the privacy expectations of the person recorded were reasonable is a question of law. Id. at 622. Generally, conversations taking place in an enclosed indoor room are deemed private and protected. Ibid.; see also N.J.S.A. 2A:156A-2(b) (defining "oral communication" as one "uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation"). That Heck and Lawson's expectation of privacy was reasonable cannot be seriously disputed.

As to Judge Higbee's decision, plaintiffs now contend she erred in finding the recording was illegal, because she did so in the absence of due process. We review a trial judge's decision as to a matter of law de novo. Manalapan Realty L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). Although the substance of this argument is not entirely clear, we are certain that in the civil context, plaintiffs received all the due process they were entitled to with regard to defendants' motion to exclude the evidence and their opportunity to respond, not just as to Judge Higbee, but as to the other two judges as well.

Judge Higbee considered plaintiffs' admission that they intended to record the meeting to satisfy the mens rea required by the statute. The initial intent to record controlled, and plaintiffs' subsequent "forgetfulness" that the device was on did not make their recording inadvertent. They were purposefully recording.

Practically speaking, to hold otherwise would indeed undermine the Wiretap Act, encouraging disgruntled employees and others to have convenient moments of "forgetfulness." Additionally, plaintiffs intentionally disclosed the contents of their recording, not just to Stark's husband, also an employee of the SJTA, but to others, including their attorney. They did

this while "knowing . . . that the 'information was obtained through the interception of . . . oral communication.'" See N.J.S.A. 2A:156A-3(b).

Which brings us to plaintiffs' contention that, pursuant to Quinlan, the taping was a protected activity, and that all three trial judges erred by using the illegality of the recording to distinguish the case from Quinlan and to exclude the taped material. We do not agree that Quinlan in any way changes the outcome — that the tape must be excluded.

In Quinlan, the plaintiff alleged specific acts of gender discrimination by her employer which readily brought her claims within the purview of LAD. No such conduct has been alleged here. That alone warrants ending the analysis.

For the sake of completeness, however, we review the several factors the Quinlan Court enumerated in determining whether, given the totality of the circumstances, improperly obtained material can be moved into evidence. Quinlan, supra, 204 N.J. at 269-71. None favor the plaintiffs, who simply did not allege conduct, included in LAD or CEPA, directed towards them by their employer.

In fact, Judge Higbee, in considering Quinlan, found that almost every factor favored the exclusion of the recording: (1) the recording was obtained illegally, not innocently; (2) Stark

shared the recording not just with her attorney, but with her husband, a fellow SJTA employee at the time, and Ballistreri, also a fellow employee; (3) the recording was of a private conversation; (4) the violation here was of a law, not just a company policy; (5) the recording was disruptive and of minimal relevance; and (6) admitting the recording would set a poor precedent, creating an untenable situation for defendant-employers who would have to deal with "plaintiffs left and right forgetting that they . . . just happened to have left [a] recorder in a room somewhere."

Judge Higbee's assessment was entirely warranted. We add only the following brief comments. Plaintiffs' conduct was illegal; that they claimed it was "accidental" simply does not lessen the wrongfulness of recording a private conversation. Under Quinlan, the trial court was clearly entitled to take that illegality into account as a factor in the analysis. No benefit accrues to the broad remedial purposes of either LAD or CEPA by the admission of illegal secret recordings of private conversations.

II

Plaintiffs also contend that Judge Higbee erred in dismissing their claim of retaliation, based on the November

2008 discipline. Although plaintiffs amended their complaint to allege such retaliation, nowhere do they identify the protected activity for which the discipline would qualify as retaliation under CEPA. If asked directly, presumably they would point to their complaints about Giampaolo as the protected activity — but an individual conflict between managers and those they supervise does not fall under the CEPA umbrella.

As Judge Higbee noted:

> the allegation []here is that [Ballistreri's suspension and Stark's termination] [were] in retaliation for the lawsuit, I guess; although, it's substantially after the lawsuit's filed[,] . . . not close in time. [But] it is close in time to when they . . . illegally taped these two individuals.
>
> And the [c]ourt finds that there's no evidence to support the plaintiffs' claim that the termination and the suspension were not for the reasons asserted by the defendants that there was an illegal act by . . . Stark and that there was some participation in that act in the fact that she knew about it immediately afterwards, still summarized it, still shared it and still used it, or attempted to use it, and, therefore, there was a suspension of . . . Ballistreri.
>
> The fact that . . . Ballistreri's still working for the company even today is further proof of the lack of retaliation.

The well-established standard for appellate review of summary judgment requires affirmance in the absence of a genuine issue as to any material fact and where the moving party is entitled

to judgment as a matter of law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

Under CEPA, an employer may not take retaliatory action against an employee because that employee has "disclose[d]. . . to a supervisor" or "object[ed] to" "any activity, policy or practice" of the employer which the employee "reasonably believes" is in violation of a law. N.J.S.A. 34:19-3(a)(1), (c)(1). In order to maintain a cause of action under CEPA, a plaintiff must demonstrate:

> (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 as described in N.J.S.A. 34:19-3a or c; (3) an adverse employment action was taken against him or her; and (4) a causal connection existed between his [or her] whistle-blowing activity and the adverse employment action.
>
> [Klein v. Univ. of Med. & Dentistry, 377 N.J. Super. 28, 38 (App. Div.) (citing Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003)), certif. denied, 185 N.J. 39 (2005).]

CEPA defines actionable retaliation as "the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment." N.J.S.A. 34:19-2(e). Neither an investigation of an employee nor substantiated disciplinary charges are considered retaliatory. Beasley v. Passaic Cnty.,

377 N.J. Super. 585, 606 (App. Div. 2005); Hancock v. Borough of Oaklyn, 347 N.J. Super. 350, 361 (App. Div.), certif. granted, 174 N.J. 191 (2002), appeal dismissed, 177 N.J. 217 (2003). Further, "[w]here the affected party does not deny committing an infraction that resulted in discipline, the discipline cannot be considered 'proscribed reprisal.'" Beasley, supra, 377 N.J. Super. at 607 (internal citations omitted).

In "[e]xamining whether a retaliatory motive existed, jurors may infer a causal connection based on the surrounding circumstances." Estate of Roach v. TRW, Inc., 164 N.J. 598, 612 (2000). The temporal proximity of employee conduct protected by CEPA and an adverse employment action is one of many circumstances that may support an inference of a causal connection. Maimone v. City of Atlantic City, 188 N.J. 221, 237 (2006); Romano v. Brown & Williamson Tobacco Corp., 284 N.J. Super. 543, 550 (App. Div. 1995).

Given well-established and clear precedent, plaintiffs have not demonstrated any violation of LAD or CEPA which would establish the animus behind the disciplinary proceedings against them as wrongful. Indeed the November 2008 discipline followed, not the filing of plaintiffs' complaint nor any of the earlier in-house activities they initiated against Giampaolo, but SJTA learning that the illegal taping had occurred.

Plaintiffs also argue that the November 2008 disciplinary hearing was fatally flawed because: (1) it was tainted by bias on the part of Rafter; (2) sworn testimony was not taken from the various witnesses; and (3) it was premised upon charges that were not timely brought against plaintiffs. However, plaintiffs made no allegations at the hearing regarding any bias on the part of Rafter and filed no grievance or internal appeal on this basis. Additionally, plaintiffs have identified no rule or precedent contradicting Aufschneider's position, based upon her familiarity with SJTA's practices, that witnesses were not required to testify under oath at those types of proceedings. Plaintiffs also failed to file a grievance or internal appeal on this basis.

Finally, the testimony of both Aufschneider and Lichtenstein confirmed that the November 2008 charges were brought within ten days of SJTA learning that plaintiffs had violated the Wiretapping Act. Lawson and Heck's testimony did not prove otherwise, and, once again, plaintiffs did not file an objection on this basis. Substantiated disciplinary charges are not retaliatory. By making the surreptitious recordings, plaintiffs engaged in conduct both illegal and in violation of the company's internal policies. Therefore, we find these points to also lack merit.

We see no error in Judge Higbee's conclusion that Giampaolo's alleged mistreatment of plaintiffs did not equate to discrimination or disparate treatment in violation of LAD. At-will employees in New Jersey can be treated poorly by their supervisors without any cause of action necessarily resulting from the conduct. See Wade v. Kessler Inst., 172 N.J. 327, 338-39 (2002). Even this assumes, which we do not find, that Giampaolo's responses to plaintiffs' workplace practices were inappropriate.

Judge Higbee also found there to be no evidence that SJTA retaliated against plaintiffs for making a claim of sexual discrimination under LAD. Again, we agree. As she said:

> Up to the hearing on May 14, 2007, there was no action against the plaintiffs which would show retaliation. There was a change in the employment which was brought about by . . . an independent report, from an independent agency, auditing what the processes were there and there's no proof that the plaintiffs had been singled out or that there was some kind of plan or design to try to change their employment. There were a lot of reasons which were a lot bigger than these two women as to why . . . those positions were changed and there's no way that a jury could find otherwise.
>
> The things that they say that were done to them, like they no longer had . . . as much flex time, although they . . . admit in the dep[osition] that they never even really asked for the flex time again, that they didn't really ask for longer lunches, that

> they weren't denied these things, none of it really amounts to anything[.]

Under CEPA, an employer may not retaliate against an employee because the employee has disclosed "to a supervisor or to a public body an activity, policy or practice of the employer . . . that the employee reasonably believes: (1) is in violation of a law, or a rule or regulation promulgated pursuant to law." N.J.S.A. 34:19-3(a).

A CEPA plaintiff "must show that his belief that illegal conduct was occurring had an objectively reasonable basis in fact — in other words that, given the circumstantial evidence, a reasonable lay person would conclude that illegal activity was going on." Regan v. City of New Brunswick, 305 N.J. Super. 342, 356 (App. Div. 1997) (internal citations and quotations omitted). A plaintiff is not obligated to show that his employer actually violated the law. Dzwonar, supra, 177 N.J. at 462, 464; Klein, supra, 377 N.J. Super. at 39. Circumstantial evidence that supports an objectively reasonable belief in wrongdoing is sufficient. Regan, supra, 305 N.J. Super. at 356.

Retaliation under CEPA need not be a single discrete action; rather, it can include "many separate[,] but relatively minor[,] instances of behavior directed against an employee that may not be actionable individually[,] but that combine to make up a pattern of retaliatory conduct." Green v. Jersey City Bd.

of Educ., 177 N.J. 434, 448 (2003); accord Nardello v. Twp. of Voorhees, 377 N.J. Super. 428, 435 (App. Div. 2005). A "pattern of conduct by an employer that adversely affects an employee's terms and conditions of employment can qualify as retaliation under CEPA." Beasley, supra, 377 N.J. Super. at 609.

A transfer may be found to be a de facto demotion. Mancini v. Twp. of Teaneck, 349 N.J. Super. 527, 564-65 (App. Div. 2002), aff'd as modified on other grounds, 179 N.J. 425 (2004). Circumstances to consider are whether the transferee's new position is isolating, involves unpleasant work conditions or is without room for growth, and whether it is not commensurate with the transferee's experience or previous responsibility. Shepherd v. Hunterdon Dev. Ctr., 174 N.J. 1, 27 (2002); Hancock, supra, 347 N.J. Super. at 360.

However, adverse employment actions do not qualify as retaliation 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. Neither an investigation of an employee nor substantiated disciplinary charges are considered retaliatory. Beasley, supra, 377 N.J. Super. at 606; Hancock, supra, 347 N.J. Super. at 361. The imposition of a minor sanction is also insufficient to constitute a retaliatory action under CEPA. Id. at 360.

The requirement that an employee who brings a CEPA action must show a causal connection between his or her protected activity and the alleged adverse employment action "can be satisfied by inferences that the trier of fact may reasonably draw based on circumstances surrounding the employment action." Maimone, supra, 188 N.J. at 237. The temporal proximity between protected conduct and an adverse employment action "is one circumstance that may support an inference of a causal connection." Ibid. However, "mere temporal coincidence [will not] support[] a cause of action where an objective view of the facts simply does not." El-Sioufi v. St. Peter's Univ., 382 N.J. Super. 145, 177 (App. Div. 2005).

Plaintiffs now argue that in addition to engaging in protected conduct when they made the complaints to McClinton, and when they filed suit, that they engaged in protected conduct by objecting to unspecified instances of "Giamp[ao]lo's dishonest behavior" and were retaliated against as a result. We reiterate that facts in a brief require record references. These particular claims of dishonest behavior plaintiffs allegedly made regarding Giampaolo's conduct are nowhere to be found in the record. Even if plaintiffs are taking the position that the "dishonest" statements were the criticisms Giampaolo levied against them regarding their failures to abide by

standard work hours in accord with the CBA, or their job performance, that in no way constitutes the type of dishonest behavior that falls within the purview of CEPA. We are also mindful that plaintiffs did not even initially defend themselves as to the merits of the charges at the first disciplinary hearing initiated against them. In sum, plaintiffs did not engage in protected conduct for purposes of CEPA.

III

Plaintiffs also contend that Judge Higbee's decision should be vacated on the basis that she too was biased against plaintiffs' counsel. It is true that in discussing the procedural history of the case, she said:

> But at any rate, I do know that at that point . . . counsel for the plaintiff made several attacks, and I would say vicious attacks, on Judge Perskie and on his impartiality in the case, and at that point Judge Perskie recused himself.
>
> It went to Judge Nugent. Judge Nugent at some point became so concerned about the viciousness of plaintiffs' counsel that he also recused himself and I wound up, I don't want to say stuck with the case but I wound up handling the case.
>
> Judge Nugent, however, had, before he recused himself, as have several other judges in this vicinage, because of the actions of plaintiffs' counsel against judges, Judge Nugent had decided that Judge Perskie was correct and had upheld his decisions.

[(emphasis added).]

The judge also made the following comments about plaintiffs' decision to tape various conversations:

> [M]eanwhile, during the course of the litigation, the plaintiffs were apparently taping, on a regular basis, conversations that they had at work with different co-employees and other people.
>
> We don't know and it doesn't really matter whether that was at the request of their attorneys or not. It's a known fact that [plaintiffs' counsel's] firm's clients frequently tape, on a regular basis, conversations with their [co]-employees when they're involved in these type of lawsuits, and it's a fairly routine practice. But at any rate, . . . we know they were doing it for the litigation and they were, in fact, taping conversations between themselves and other people, which is not a violation of any law and which is legal. It's certainly somewhat disruptive of an office environment to have people taping each other, but it's legal.
>
> [(emphasis added).]

In discussing the November 25, 2008 disciplinary hearing, Judge Higbee stated as follows:

> At that hearing, both Stark and Ballistreri were allowed to appear. Neither of them did. Their attorney did appear but he seemed to be pretty ill-informed. In fact, he several times advised the hearing examiner that the summary was not prepared by his clients when it was. He advised the hearing examiner he didn't know which client was which and he would not admit as to which of the two was actually the one who taped or not because he didn't know who was who.

[(emphasis added).]

Plaintiffs now insist that these "irrelevant," "gratuitous," and "insulting remarks" indicate that the judge's evaluation of plaintiffs' claims was "improperly colored by a clear dislike for [p]laintiffs' counsel."

All of the statements made by the judge were either accurate restatements of known facts or fair comment on the record presented to her. Moreover, it must be noted that Judge Higbee upheld Judge Nugent's grant of plaintiffs' counsel's untimely request to proceed under CEPA rather than LAD, and also permitted plaintiffs to thereafter amend their complaint to add new claims of retaliation.

That Judge Higbee made these comments in no way negates the findings, with which we agree, of all three trial judges: plaintiffs simply had no facts supporting a claim of violation of LAD or CEPA. Despite years of litigation, many depositions, interrogatories, and certifications, in the final analysis, they had nothing to support their claims.

IV

Any points we have not specifically addressed, we choose not to address because we consider them so lacking in merit as

to not warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION