SUPREME COURT OF NEW JERSEY

Docket No. 73,324

JOEL S. LIPPMAN, M.D. Plaintiff-Respondent, v. ETHICON, INC. AND JOHNSON & JOHNSON, INC., Defendants-Petitioners.	:	On Petition for Certification from a Final Judgment of the SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-4318-10T2 Sat Below: Hon. Jose L. Fuentes, P.J.A.D. Hon. Jonathan N. Harris, J.A.D. Hon. Ellen L. Koblitz, J.A.D.

AMICUS CURIAE BRIEF AND APPENDIX OF EMPLOYERS ASSOCIATION OF NEW JERSEY

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PRELIMINARY STATEMENT

Forced to choose between "polarized" legal arguments framed by the parties, the Appellate Division here held that an employee can pursue a claim under the Conscientious Employee Protection Act ("CEPA") even though the employee merely performed the tasks and functions of the job for which he was hired. As a consequence, businesses that disagree with or refuse to implement the recommendations of such a "watchdog" employee have an unreasonably enhanced risk of committing unlawful "retaliation."

To avoid this untenable result, *Amicus Curiae* Employers Association of New Jersey ("EANJ")[1] urges this Court to reaffirm that any employee—"watchdog" or otherwise—must allege that she disclosed or objected to activities, policies, or practices falling *outside* the scope of her job responsibilities, which she reasonably believes were illegal or against public policy. To hold otherwise ignores the plain language and intent of CEPA and extensive, long-standing New Jersey precedent instructing that activities which are part and parcel of an employee's assigned responsibilities are not "whistleblowing."

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[1] As a non-profit organization comprised of more than 1,000 employers within New Jersey and dedicated to helping employers make responsible employment decisions through education, informed discussion, and training, EANJ is uniquely situated to submit this *amicus curiae* brief.

LEGAL ARGUMENT[2]

I. Acts Within The Scope Of An Employee's Job Duties Cannot Constitute Whistleblowing Activity Under CEPA.

A. The Legislative History And Plain Text Of CEPA Do Not Contemplate That An Employee Performing Normal Job Functions Is A Whistleblower.

When Governor Thomas Kean signed CEPA into law, he emphasized the purpose of the statute: to protect employees from "firing, demotion or suspension for calling attention to *illegal activity* on the part of his or her employer." News Release, Office of the Governor, at 1 (Sept. 8, 1986) (emphasis added). Our Legislature later clarified and confirmed that the "special emphasis [of CEPA is to] protect[] any employee who discloses to a supervisor or a public body, or refuses to participate in, *any deception or misrepresentation which may defraud* [various parties, including patients, customers, employees, or government entities]." Statement, Conscientious Emp. Act Amendments, P.L. 2005, Ch. 329 (2006) (emphasis added). The language and legislative history of CEPA manifestly demonstrate that activities that violate the law or a public policy, or that are designed to deceive or misrepresent, must—by their very

[2] EANJ relies upon the Procedural History and Statement of Facts set forth in Ethicon Inc.'s original brief in support of its motion for summary judgment.

nature—fall outside the scope of an employee's everyday job responsibilities.[3]

Subsequent opinions from this Court confirm the fundamental intent and plain wording of CEPA: to protect an employee who reports unlawful conduct outside of her typical job functions. See Roach v. TRW, Inc., 164 N.J. 598, 613-14 (2000) ("CEPA is intended to protect those employees whose disclosure falls sensibly within the statute; it is not intended to spawn litigation concerning the most trivial or benign employee complaints."); Mehlman v. Mobil Oil Corp., 153 N.J. 163, 179 (1998)("The purpose of CEPA is 'to protect and encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employees from engaging in such conduct.'"(quoting Abbamont v. Piscataway Bd. of Educ., 138 N.J. 405, 431 (1994)); accord Hernandez v. Montville Twp. Bd. of Educ., 179 N.J. 81, 82 (2004) (LaVecchia, J., dissenting) ("[CEPA's] purpose [is] to facilitate the exposure of 'illegal activities' of employers.").

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[3] See DeLisa v. Cnty. of Bergen, 165 N.J. 140, 147-48 (2000) ("[S]tatutes are to be read sensibly rather than literally and the controlling legislative intent is to be presumed as consonant to reason and good direction . . . [T]he spirit of the law should control where a literal interpretation would create a manifestly absurd result." (citations omitted) (internal quotation marks omitted)).

B. New Jersey's Well Developed Body Of Case Law Holds That An Employee Cannot Blow The Whistle When Carrying Out Her Normal Job Responsibilities.

Because of how the litigants framed their legal arguments, the Appellate Division was forced either to adopt or reject the argument that a category of so-called "watchdog" employees are immune and exempt from the protections of CEPA. The Panel correctly held that no "employee's job title or employment responsibilities should be considered *outcome determinative* in deciding whether the employee has presented a cognizable cause of action under CEPA." Lippman v. Ethicon, Inc., 432 N.J. Super. 378, 381-82 (App. Div. 2013) (emphasis added). After all, a "watchdog" employee is just another "employee" under the auspices of CEPA.

Where the Panel respectfully erred was in reading Massarano v. N.J. Transit, 400 N.J. Super. 474 (App. Div. 2008), as holding (or even suggesting) that a plaintiff's job title or position plays any role in conferring standing under CEPA. Indeed, Massarano—and the litany of cases preceding and following that decision—hold that the employee's *conduct* is outcome determinative, and that conduct performed within the scope of an employee's job duties does not constitute whistleblowing activity.

Massarano illustrates the vital difference between an employee's title (irrelevant) and her actions (dispositive). In

that case, Ms. Massarano, security operations manager for New Jersey Transit, discovered documents left in an unguarded public space that she believed might threaten public safety and security. 400 N.J. Super. at 477-80. Ms. Massarano's supervisors discussed the issue and determined that there was an absence of a public threat. Id. at 480-82. Ms. Massarano nonetheless claimed she was terminated shortly after reporting her concerns to her supervisor, in violation of CEPA. Id. at 485.

The Appellate Division disagreed, holding that "[e]ven if [the court] were to find that the disposal of the documents violated public policy, [Ms. Massarano's] reporting the disposal . . . did not make her a whistle-blower under the statute." Id. at 490-91. Rather, she "was merely doing her job as the security operations manager *by reporting her findings and her opinion*," and therefore, her actions did not trigger a violation of CEPA. Id. (emphasis added). Massarano makes the important point that the plaintiff's actions (*i.e.*, "reporting her findings and her opinion") did not warrant the protection of CEPA because they were part and parcel of her job functions.

Massarano did not break new ground with this determination. Indeed, appellate cases pre-dating Massarano rejected CEPA claims based upon the same reasoning. See, e.g., Watkins v. N.J. Office of Attorney Gen., No. A-5663-03T2, 2006 N.J. Super.

Unpub. LEXIS 853 (App. Div. Jan. 30, 2006) (where concerns raised by plaintiff were part of plaintiff's position as project manager, employer's disagreements with plaintiff's suggestions did not transform plaintiff's complaints into disclosures or whistleblowing activity triggering CEPA); Weisfeld v. Med. Soc. of N.J., No. A-0904-03T2 (App. Div. Feb. 1, 2005) (plaintiff did not engage in whistleblowing activity where he was performing a required and assigned duty that was a part of his employment); see, e.g. Goldstein & Goodman, N.J. Practice, Vol. 18, Employment Law §5.9, at 213-14 (2d ed. 2005) (discussing cases); compare Parker v. M&T Chems., Inc., 236 N.J. Super. 451, 460 (App. Div. 1989) (holding that in-house attorney was covered by CEPA because he was terminated not for refusing to perform his job duties but for refusing to violate a court order—which obviously falls outside the scope of his job).

Likewise, a litany of decisions rendered after Massarano adopted the identical approach. See, e.g., Gallo v. Atlantic City, No. A-3188-11T3, 2013 WL 2319425 (App. Div. May 29, 2013) (objections by plaintiff were regular part of supervisory job responsibilities as city tax collector, not whistleblowing activity); Tayoun v. Mooney, No. A-1154-10T3, 2012 N.J. Super. Unpub. LEXIS 2422 (App. Div. Oct. 26, 2012), cert. denied, 213 N.J. 538 (2013) (plaintiff reporting violations of law as part of his job not a whistleblower under CEPA); White v. Starbucks

Corp., No. A-3153-09T2, 2011 WL 6111882 (App. Div. Dec. 9, 2011), cert. denied, 210 N.J. 108 (2012) (manager did not engage in whistleblowing activities where part of her job included reporting violations of law to management); Aviles v. Big M, Inc., No. A-4980-09T4, 2011 N.J. Super. Unpub. LEXIS 564 (App. Div. Mar. 8, 2011), cert. denied, 208 N.J. 336 (2011) (plaintiff's confrontation of a suspected shoplifter not protected whistleblowing conduct because she was merely carrying out her designated responsibilities); Richardson v. Deborah Heart & Lung Ctr., No. A-4611-08T2, 2010 WL 4067179 (App. Div. July 28, 2010), cert. denied, 205 N.J. 100 (2011) (plaintiff's refusal to overlook staff billing errors were part of her quality assurance job duties and not protected whistleblowing conduct); Ortiz v. Union Cnty., No. A-0644-08T1, 2010 WL 1329052 (App. Div. Apr. 7, 2010) (plaintiff's act of disciplining subordinate for misrepresenting work hours was part of his supervisory job function, not protected whistleblowing activity). See also Gianfrancesco v. Laborers Int'l Union of N. Am., No. 10-6553, 2013 WL 244905 (D.N.J. May 24, 2013) (plaintiff was not a whistleblower under CEPA because activities at issue fell within his job duties); Patterson v. Glory Foods, Inc., No. 10-6831, 2012 WL 4504597, at *8 (D.N.J. Sept. 28, 2012) ("it is well established that CEPA does not protect disclosures that are a regular part of the employee's job

responsibilities"); Mehalis v. Frito-Lay, Inc., No. 08-1371, 2012 WL 2951758 (D.N.J. July 2, 2012) (inquiries and concerns raised by plaintiffs were part of their general duties, not whistleblowing activity). This is consistent with other jurisdictions outside of New Jersey, as well.[4]

Certainly, the in-house attorney (Parker), the security operations manager (Massarano), the quality assurance supervisor (Richardson), the area manager (White), and similar employees in the vast body of case law in this area are prototypical "watchdog" employees who investigate alleged misconduct and monitor corporate compliance with applicable laws, rules, and

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[4] See, e.g., Hagan v. Echostar Satellite, 529 F.3d 617 (5th Cir. 2008) (employee conduct must be outside of her job duties to be protected activity under FLSA); Skare v. Extendicare Health Servs., 515 F.3d 836 (8th Cir. 2007) (employee who reported compliance problems was not a statutory whistleblower where her job duties included reporting compliance problems and exposing unlawful behavior internally); Sasse v. U.S. Dep't of Labor, 409 F.3d 773, 779-80 (6th Cir. 2005) (former U.S. attorney could not maintain whistleblowing claims where he merely fulfilled his job responsibilities); Huffman v. Office of Pers. Mgmt., 263 F.3d 1341, 1352 (Fed. Cir. 2001) (Whistleblower Protection Act not enacted to protect performance of job duties, but to protect employees who go beyond job duties to report hidden violations of the law); McKenzie v. Renberg's, 94 F.3d 1478 (10th Cir. 1996), cert. denied, 117 S. Ct. 1468 (1997) (plaintiff did not engage in protected activity under FLSA where actions were consistent with her job duties); Stone v. Entergy Serv., Inc., 9 So.3d 193, 200 (La. Ct. App. 2009) (plaintiff was not protected by Louisiana Environmental Whistleblower Statue because reporting concerns and violations was part of his job responsibilities); Kidwell v. Sybaritic, Inc., 749 N.W. 2d 855, 855-65 (Minn. Ct. App. 2008) (in-house attorney not protected by Minnesota Whistleblower Act because his report was drafted and sent as part of his job duties).

regulations. It is perfectly normal for these "watchdog" employees, like other employees, to advocate strong opinions within the organization about legal affairs, business strategy, and the public welfare. To keep management informed, robust discussion and even contentious debate is expected. Such interaction may even descend into a power struggle over methodology, best business practices, and institutional influence. But at the end of the day, the "watchdog" is an employee like any other and should respect and, at times, accede to the demands of the employer—unless those demands are to engage in acts that are unlawful. It stands to reason that unlawful demands must fall outside the scope of regular employment.

If the Court were to adopt the appellate Panel's approach, however, employers will be inundated with CEPA lawsuits from so-called "watchdogs." Indeed, any "watchdog" raising an objection to a supervisor concerning a potential violation of law or public policy during the normal course of her daily work will be deemed to be engaging in "protected" activity. The unintended consequence of this is the creation of at-will employees who cannot be the subject of an adverse employment action without simultaneously triggering a potential CEPA violation—regardless of their performance. Such "untouchable" employees, who do not accept criticism or are fiscally irresponsible or ignore

feedback or cannot get along with co-workers or are underperforming are *not* engaging in protected activity; yet the Panel's reasoning allows for any "watchdog" to assert a CEPA claim so long as she is performing her "duties in good faith, and consistent with the job description." Lippman, 432 N.J. at 410. This cannot stand. Employees, even "watchdog" employees, must do more than their normal job functions to warrant the protection of CEPA in order to reconcile the statute with New Jersey employers' recognized right to manage their internal operations. See Zive v. Stanley Roberts, Inc., 182 N.J. 436, 446 (2005) (acknowledging "the authority of employers to manage their own businesses"); Viscik v. Fowler Equip. Co., 173 N.J. 1, 21 (2002) ("[T]he employer's subjective decision-making may be sustained[,] even if unfair."); Peper v. Princeton Univ. Bd. of Trs., 77 N.J. 55, 87 (1978) ("Anti-discrimination laws do not permit courts to make personnel decisions for employers").[5]

Additionally, the Court should not lose sight of the equally well-developed line of cases holding that employers have the right to disagree with their employees, even "watchdogs,"

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[5] See also Hood v. Pfizer, Inc., 322 Fed. App'x. 124, 129 (3d Cir. 2009) ("courts are not arbitral boards ruling on the strength of cause for discharge"); Billet v. CIGNA Corp., 940 F.2d 812, 825 (3d Cir. 1991) ("a company has the right to make business judgments on employee status."); Mitchell v. UBS Servs. USA LLC, No. 07-1651, 2009 WL 1856630, at *10 (D.N.J. June 26, 2009) ("it is not the purview of this Court to select which errors UBS may and may not consider termination events").

without triggering CEPA. See, e.g., Maw v. Advanced Clinical Commc'n, 179 N.J. 439, 448 (2004) (employee's refusal to follow employer's directive to sign a non-compete agreement not a CEPA violation); Dzwonar v. McDevitt, 177 N.J. 451, 464 (2003) (employee's belief that employer wrongfully concealed information from general union membership not a CEPA violation); Cosgrove v. Cranford Bd. of Educ., 356 N.J. Super. 518, 525 (App. Div. 2003) (disagreement concerning employer's method of distributing overtime not a CEPA violation); Smith-Bozarth v. Coal. Against Rape & Abuse, Inc., 329 N.J. Super. 238, 244 (App. Div. 2000) (employee's disagreement with supervisor over viewing confidential client files not a CEPA violation); Demas v. Nat'l Westminster Bank, 313 N.J. Super. 47, 51-52 (App. Div. 1998) (employee's report of co-worker conduct contrary to employer's private business interests not a CEPA violation); Young v. Schering Corp., 275 N.J. Super. 221, 233-34 (App. Div. 1994) (disagreement with company's allocation of research resources not a CEPA violation), aff'd, 141 N.J. 16 (1995); accord DeVries v. McNeil Consumer Prods. Co., 250 N.J. Super. 159, 171 (App. Div. 1991) ("mere voicing of opposition to corporate policy provides an insufficient foundation" for wrongful discharge claim); Mutch v. Curtiss-Wright Corp., No. A-5454-00T2, slip op. at 30 (App. Div. June 17, 2002), cert. denied, 175 N.J. 75

(2002) (CEPA requires more than mere "policy difference" between employee and employer).

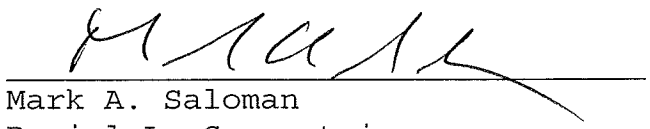
CONCLUSION

An employer has every right to agree or disagree with how a "watchdog" or any other employee performs her job and, unless that employee is disclosing or objecting to an activity, practice, or policy falling outside the scope of his job responsibilities (such as a violation of law or public policy), she has not engaged in protected activity sufficient to warrant the protection of CEPA. The very idea that a "watchdog" is "blowing the whistle" each and every time she expresses a concern, voices an opinion, or makes a recommendation—potentially every hour of every day of her employment—is an untenable impossibility.

For the foregoing reasons, EANJ respectfully urges this Court to reverse the Appellate Division's decision.

Respectfully submitted,

PROSKAUER ROSE LLP



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APPENDIX OF UNPUBLISHED DECISIONS AND OTHER SOURCES

OFFICE OF THE GOVERNOR

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NEWS RELEASE

CN-001
Contact: CARL GOLDEN
609-292-8956 OR 292-6000 EXT. 207

TRENTON, N.J. 08625
Release: MON., SEPT. 8, 1986

Governor Thomas H. Kean yesterday signed legislation to prohibit retaliatory action by an employer against an employee who discloses illegal activities on the part of the employer.

The so-called "whistle blower bill," S-1105, was sponsored by Senator John Dorsey, R-Morris.

The legislation, effective immediately, prohibits the firing, suspension or demotion of an employee who discloses wrongdoing or illegal activity; who testifies before a public body concerning illegal activity; or who refuses to participate in an action which he or she believes to be in violation of the law.

The legislation provides that the protection will not be afforded unless the employee gives written notice to a supervisor of the alleged illegal activity and has given the employer a reasonable amount of time to correct the situation.

An employee who is discharged, suspended or demoted may seek relief through the courts within one year of the violation.

"It is most unfortunate --- but, nonetheless, true --- that conscientious employees have been subjected to firing, demotion or suspension for calling attention to illegal activity on the part of his or her employer," Kean said.

- more -

"It is just as unfortunate that illegal activities have not been brought to light because of the deep-seated fear on the part of an employee that his or her livelihood will be taken away without recourse," the Governor said.

The legislation requires that employers display notices in the workplace of an employees' rights under the law, including the names of persons to whom written notices of violations should be directed.

# # # #

P.L. 2005, CHAPTER 329, *approved January 12, 2006*
Senate, No. 1886

AN ACT concerning the rights and remedies of employees who disclose or refuse to participate in certain fraudulent practices of employers, and amending P.L.1986, c.105 and P.L.1995, c.142.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Section 3 of P.L.1986, c.105, (C.34:19-3) is amended to read as follows:

3. An employer shall not take any retaliatory action against an employee because the employee does any of the following:

a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer, or another employer, with whom there is a business relationship, that the employee reasonably believes:

(1) is in violation of a law, or a rule or regulation promulgated pursuant to law, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, in the case of an employee who is a licensed or certified health care professional, reasonably believes constitutes improper quality of patient care; or

(2) is fraudulent or criminal, including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity;

b. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer, or another employer, with whom there is a business relationship, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, in the case of an employee who is a licensed or certified health care professional, provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into the quality of patient care; or

c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:

(1) is in violation of a law, or a rule or regulation promulgated

EXPLANATION - Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and intended to be omitted in the law.

Matter underlined thus is new matter.

pursuant to law, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, if the employee is a licensed or certified health care professional, constitutes improper quality of patient care;

(2) is fraudulent or criminal, including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity; or

(3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment. (cf. P.L.1997, c.98, s.2)

2. Section 5 of P.L.1986, c.105, (C.34:19-5) is amended to read as follows:

5. Upon a violation of any of the provisions of this act, an aggrieved employee or former employee may, within one year, institute a civil action in a court of competent jurisdiction. Upon the application of any party, a jury trial shall be directed to try the validity of any claim under this act specified in the suit. All remedies available in common law tort actions shall be available to prevailing plaintiffs. These remedies are in addition to any legal or equitable relief provided by this act or any other statute. The court **[**may**]** shall also order, where appropriate and to the fullest extent possible:

a. An injunction to restrain **[**continued**]** any violation of this act which is continuing at the time that the court issues its order;

b. The reinstatement of the employee to the same position held before the retaliatory action, or to an equivalent position;

c. The reinstatement of full fringe benefits and seniority rights;

d. The compensation for all lost wages, benefits and other remuneration; and

e. The payment by the employer of reasonable costs, and attorney's fees**[**;**]**.

[f. Punitive damages; or

g. An**]** In addition, the court or jury may order: the assessment of a civil fine of not more than **[**$1,000.00**]** $10,000 for the first violation of the act and not more than **[**$5,000.00**]** $20,000 for each subsequent violation, which shall be paid to the State Treasurer for deposit in the General Fund; punitive damages; or both a civil fine and punitive damages. In determining the amount of punitive damages, the court or jury shall consider not only the amount of compensatory damages awarded to the employee, but also the amount of all damages caused to shareholders, investors, clients, patients, customers, employees, former employees, retirees or pensioners of the employer,

or to the public or any governmental entity, by the activities, policies or practices of the employer which the employee disclosed, threatened to disclose, provided testimony regarding, objected to, or refused to participate in.
(cf: P.L.1990, c.12, s.4)

3. Section 6 of P.L.1995, c.142 (C.2A:15-5.14) is amended to read as follows:

6. a. Before entering judgment for an award of punitive damages, the trial judge shall ascertain that the award is reasonable in its amount and justified in the circumstances of the case, in light of the purpose to punish the defendant and to deter that defendant from repeating such conduct. If necessary to satisfy the requirements of this section, the judge may reduce the amount of or eliminate the award of punitive damages.

b. No defendant shall be liable for punitive damages in any action in an amount in excess of five times the liability of that defendant for compensatory damages or $350,000, whichever is greater.

c. The provisions of subsection b. of this section shall not apply to causes of action brought pursuant to P.L.1993, c.137 (C.2A:53A-21 et seq.), P.L.1945, c.169 (C.10:5-1 et seq.), P.L.1989, c.303 (C.26:5C-5 et seq.), [or] P.L.1992, c.109 (C.2A:61B-1) or P.L.1986, c.105, (C.34:19-1 et seq.), or in cases in which a defendant has been convicted pursuant to R.S.39:4-50 or section 2 of P.L.1981, c.512 (C.39:4-50.4a).
(cf: P.L.1995, c.142, s.6)

4. This act shall take effect immediately.

STATEMENT

This bill enhances the scope and strengthens the enforcement provisions of the "Conscientious Employee Protection Act" (CEPA) P.L.1986, c.105 (C.34:19-1 et seq.), with special emphasis on protecting any employee who discloses to a supervisor or a public body, or refuses to participate in, any deception or misrepresentation which may defraud shareholders, investors, clients, patients, customers, employees, former employees, retirees or pensioners of the employer, or governmental entities.

The bill expressly includes, among the fraudulent or criminal employer actions which an employee may disclose and refuse to participate in, any activity, policy, or practice of deception or misrepresentation which the employee reasonably believes may defraud any of the employer's shareholders, investors, clients, patients, customers, employees, former employees, retirees or pensioners, or

any governmental entity.

The bill requires, rather than permits, that the remedies ordered by a court in a civil action for a violation of the act include, to the fullest extent possible, all of the following:

1. An injunction against any continuing violation of the act;

2. Reinstatement of the employee to the same, or comparable, employment with full fringe benefits and seniority rights;

3. Compensation for all lost remuneration; and

4. Payment of reasonable costs and lawyers fees.

As is currently the case under CEPA, the court may also order civil fines and punitive damages. The bill amends that law to raise the maximum civil fine for a first violation from $1,000 to $10,000 and for subsequent violations from $5,000 to $20,000, and to direct the court, when determining the amount of any punitive damages to be ordered, to consider not only the amount of compensatory damages awarded to the employee, but also the amount of damage caused by employer actions to shareholders, investors, clients, patients, customers, employees, former employees, retirees or pensioners of the employer, or to governmental entities or the public. Finally, the bill exempts punitive damages awarded under CEPA from the maximum limit set by the "Punitive Damages Act," P.L.1995, c.142 (C.2A:15-5.9 et seq.), which is the greater of $350,000 or five times the awarded compensatory damages.

This bill is intended to enhance the scope and strengthens the enforcement provisions of the CEPA, and is not intended to diminish, reduce or curtail the rights or remedies available to employees under that act in any way.

Enhances rights and remedies of employees who disclose or refuse to participate in fraudulent employer practices.

Not Reported in A.3d, 2011 WL 780889 (N.J.Super.A.D.)
(Cite as: 2011 WL 780889 (N.J.Super.A.D.))

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.
Sandy AVILES, Plaintiff-Appellant,
v.
BIG M, INC., a corporation, Defendant-Respondent,
and
Marina Amaya, individually, Defendant.

Argued Jan. 24, 2011.
Decided March 8, 2011.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-1254-08.

Alan L. Krumholz argued the cause for appellant (Krumholz Dillon, PA, attorneys; Mr. Krumholz, on the brief).

Stanley L. Goodman argued the cause for respondent (Fox Rothschild, attorneys; Mr. Goodman, of counsel; Mr. Goodman and Keith A. Reinfeld, on the brief).

Before Judges RODRÍGUEZ and LeWINN.

PER CURIAM.

***1** Plaintiff Sandy Aviles appeals from the June 20, 2008 order terminating her claim pursuant to the Conscientious Employee Protection Act (CEPA), *N.J.S.A.* 34:19-1 to -14, against her employer Big M, Inc. (Mandee), the owner of Mandee, a women's apparel retail store. She also appeals from two February 8, 2010 orders dismissing the remaining claims against Mandee and denying restoration of the CEPA claim. We affirm.

We review the facts presented on the summary judgment motions in the light most favorable to Aviles, and give her the benefit of all favorable inferences. *Brill v. Guardian Life Ins. Co. of Am.*, 142 *N.J.* 520, 536 & 540 (1984).

Aviles was hired by Mandee in May 1996 as a sales associate in its West New York store. By March 2007, she was promoted to manager of that store.

On December 31, 2007, a dressing room attendant notified Aviles that a customer, later identified as Lissete Farfan, had been in the dressing room for an extended period of time, and was making noises in the dressing room that sounded like she was trying to remove security tags from the merchandise. Farfan had entered the dressing room with three garments and emerged with one. Aviles found some merchandise tags in the dressing room after Farfan left. She approached Farfan and asked what happened to the other garments she brought into the dressing room. According to Aviles, Farfan said that she did not steal anything and offered to let Aviles search her handbag. Aviles declined, saying that was not her job. Aviles claimed that she neither touched Farfan nor called the police because she was not sure that Farfan had stolen anything.

Aviles called her district manager, Victor Firavanti, about this situation. Firavanti told her not to call the police. When Farfan exited the store, the merchandise alarm was activated, indicating that a security tag was still attached to an item.

Two days later, Farfan called Mandee's customer service department to complain about her treatment by Aviles. The message was forwarded to Firavanti who then called Farfan to apologize for the incident.

A few days later, Mandee regional manager

Ronda Hisiger called Farfan to discuss the complaint. Farfan told Hisiger that Aviles accused her of stealing and told her that "it was company policy to search her." Hisiger prepared a report, indicating that Farfan claimed that Aviles rummaged through her handbag.

Mandee requires all employees to attend loss prevention training and view their loss prevention video at the start of their employment and at the company's annual meetings for those stores that have high levels of theft. Aviles acknowledged that she viewed the loss prevention video on at least two occasions. Mandee's loss prevention video provides four criteria that a store manager must follow before detaining or confronting a suspected shoplifter. The manager must:

(1) personally observe the shoplifter conceal company owned merchandise;

***2** (2) know the exact location of the concealed merchandise;

(3) maintain constant surveillance of the person after the concealment has occurred; and

(4) make sure that person makes no effort to pay for the merchandise before leaving the store.

There is no written rule that states whether a manager is allowed to look into a customer's handbag.

Firavanti and Hisiger met with Michael Bush, director of human resources, Jim Selwood, director of loss prevention, and Rona Korman, general counsel, to discuss the incident. The meeting participants decided to further investigate Farfan's allegations. According to Selwood, the group agreed that if the allegations contained in Hisiger's report were true, Aviles would be fired because she violated company policy.

Firavanti and Hisiger visited Aviles at the West New York store. Hisiger questioned Aviles about what occurred during the December 31, 2007 incident. Hisiger reported to Bush that Aviles admitted to confronting Farfan and asking to search her bag. Bush instructed Hisiger to terminate Aviles for violating company policy.

Aviles sued Mandee, alleging wrongful termination and violations of CEPA and the New Jersey Law Against Discrimination (LAD), *N.J.S .A.* 10:5-1 to -49. Mandee moved to dismiss the complaint for failure to state a claim. Subsequently, Aviles moved to amend her complaint to add fellow employee Marina Amaya as a defendant and to add three additional counts for breach of an implied contract of good faith and fair dealing; wrongful termination of her employment in violation of public policy; and libel.[FN1] Judge Mary K. Costello dismissed Aviles' CEPA claim and granted her motion to amend her complaint.

FN1. The libel claim against Amaya was tried to a jury, which returned a no cause of action verdict.

In a pre-trial deposition, Farfan testified that Aviles was waiting outside the dressing room when she exited. Aviles asked to look inside Farfan's bag but she refused. Farfan stated that Aviles tried to grab her bag but she snatched it away. Aviles followed her from the dressing room to the cash register. Farfan felt embarrassed and humiliated by Aviles' actions. She asked one of the employees to speak to Aviles' manager. One of the employees gave Farfan the customer service telephone number. At the cash register, Farfan showed the inside of her handbag to Aviles and the employees behind the register. Her handbag was never opened until she opened it at the cash register. Aviles looked into the handbag when Farfan opened it.

After the conclusion of discovery, Mandee moved for summary judgment to dismiss the remainder of Aviles' claims. Aviles opposed Mandee's motion and moved to reinstate her CEPA claim. Judge Costello issued a written opinion on February 8, 2010, dismissing the remaining claims against Mandee and denying Aviles' motion to

reinstate the CEPA claim.

Aviles appeals arguing that the judge erred in: (1) dismissing her CEPA claim because her action in confronting the suspected shoplifter was protected; (2) granting summary judgment on her common law claim for improper retaliatory discharge in violation of public policy; and (3) granting summary judgment on her claim that Mandee breached the covenant of good faith and fair dealing because of the contractual nature of her employment relationship with Mandee.

***3** We begin our analysis by noting that, "[i]n New Jersey, an employer may fire an employee for good reason, bad reason, or no reason at all under the employment-at-will doctrine." *Witkowski v. Thomas J. Lipton Inc.*, 136 *N.J.* 385, 397 (1994) (citing *English v. Coll. of Med. & Dentistry*, 73 *N.J.* 20, 23 (1977)). The only exceptions are when there is a claim that the employer has violated CEPA; the LAD; or there is an implied contract based on an employee manual pursuant to the holding in *Wade v. Kessler Inst.*, 172 *N.J.* 327, 339 (2002).

THE CEPA CLAIM

Aviles argues that her actions in confronting Farfan who she believed was shoplifting, were protected pursuant to CEPA and therefore, her claim should not have been dismissed by the trial court. Aviles argues that the protection afforded to employees by CEPA in reporting criminal actions of employers that has been interpreted as covering reporting of illegal actions of co-employees, should be extended to protect employees who report the wrongdoing of the employer's customer. We disagree.

The Supreme Court has noted that "CEPA codified the common-law cause of action, first recognized in *Pierce v. Ortho Pharm. Corp.*, 84 *N.J.* 58, 72 (1980), which protects at-will employees who have been discharged in violation of a clear mandate of public policy." *Higgins v. Pascack Valley Hosp.*, 158 *N.J.* 404, 417-418 (1999). "Thus, the CEPA establishes a statutory exception to the general rule that an employer may terminate an at-will employee with or without cause." *Ibid.* (citing *Pierce, supra,* 84 *N.J.* at 65). *N.J.S.A.* 34:19-3 provides in pertinent part:

> An employer shall not take any retaliatory action against an employee because the employee does any of the following:
>
> a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer, or another employer, with whom there is a business relationship, that the employee reasonably believes:
>
> (1) is in violation of a law, or a rule or regulation promulgated pursuant to law, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, in the case of an employee who is a licensed or certified health care professional, reasonably believes constitutes improper quality of patient care; or
>
> (2) is fraudulent or criminal, including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity;
>
> ....
>
> c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:
>
> (1) is in violation of a law, or a rule or regulation promulgated pursuant to law, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, if the employee is a

licensed or certified health care professional, constitutes improper quality of patient care;

***4** (2) is fraudulent or criminal, including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity; or

(3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.

"The purpose of CEPA ... is 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).

In order to establish a prima facie CEPA claim, a plaintiff must show that:

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

[*Dzwonar v. McDevitt,* 177 *N.J.* 451, 462 (2003) (citing *Kolb v. Burns,* 320 *N.J.Super.* 467, 476 (App.Div.1999)).]

A plaintiff "need not show that his or her employer or another employee actually violated the law or a clear mandate of public policy." *Ibid.* (citing *Gerard v. Camden Cnty. Health Servs. Ctr.*, 348 *N.J.Super.* 516, 522 (App.Div.), *certif. denied,* 174 *N.J.* 40 (2002)).

Here, Aviles confronted a customer of her employer who she believed was committing an act of shoplifting in violation of *N.J.S.A.* 2C:20-11. Aviles points to the holding of the Court in *Higgins* interpreting *N.J.S.A.* 34:19-3c, to extend protection to employees who disclose information related to illegal activities perpetrated by co-employees. 158 *N.J.* at 419. Aviles argues that the *Higgins* holding also extends protection to employees who engaged in whistle-blowing activity based on the actions of third parties such as customers. We disagree.

In support of her position, Aviles notes the expansive reading of the CEPA statute by the court in *Hernandez v. Montville Twp. Bd. of Educ.*, 354 *N.J. Super* 467 (App.Div.2002), *aff'd.* 179 *N.J.* 81 (2004). In *Hernandez,* the court reinstated a jury verdict in a case where the plaintiff, an elementary school janitor, reported the school's failure to timely remedy unsanitary and unsafe conditions. *Id.* at 477. In addition, Aviles points to *Potter v. Vill. Bank of N.J.*, 225 *N.J. Super* 547 (1988), a pre-CEPA case where the plaintiff, a bank manager, was fired for reporting suspected money laundering by his superiors. The court in *Potter* noted that "[i]t stands to reason that few people would cooperate with law enforcement officials if the price they must pay is retaliatory discharge from employment. Clearly, that would have a chilling effect on criminal investigations and law enforcement in general." *Id.* at 560. Aviles also points to decisions by courts in other jurisdictions upholding whistle-blower protections based upon public policy considerations of facilitating the reporting of criminal activity. *See Schlichtig v. Inacom Corp.*, 271 *F.Supp.*2d 597 (D.N.J.2003); *Nettis v. Levitt,* 241 *F.3d* 186 (2d Cir.2001); *Palmateer v. Int'l. Harvester Co.,* 421 *N.E.2d* 876 (Ill.1981). However, all of the cases cited by Aviles involve situations where an employee reported the wrongdoing of a fellow employee. Aviles cites no authority that extends whistle-blower protection to reporting wrongdoing of third parties.

***5** We reject her argument and agree with

Mandee's argument that Aviles' confrontation of a suspected shoplifter does not constitute a whistle-blowing activity pursuant to the CEPA. A plaintiff's job duties cannot be considered whistle-blowing conduct. *See Massarano v. N.J. Transit,* 400 *N.J.Super.* 474, 491 (App.Div.2008) (holding that a plaintiff that was merely carrying out her employer's designated responsibilities in reporting what she believed was improper disposal of documents, did not qualify for whistle-blower status). Aviles cannot establish a prima facie case based on the elements set forth in *Dzwonar* because she does not allege that she "reasonably believed that ... her employer's [or fellow employees'] conduct was violating either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy." 177 *N.J.* at 462. Aviles does not challenge Mandee's loss prevention guidelines, which require that an employee investigating shoplifting follow certain procedures, as violative of CEPA. In fact, Aviles asserts that she followed those guidelines.

THE PIERCE CLAIM

Aviles argues that the judge erred in granting summary judgment on her claim that her actions in prevention of shoplifting invoked a clear mandate of public policy and her conduct was protected under the common law principles of *Pierce, supra,* 84 *N.J.* 58. We disagree.

The Supreme Court "first recognized a common law cause of action for retaliatory discharge" in *Pierce. Tartaglia v. UBS PaineWebber, Inc.,* 197 *N.J.* 81, 102 (2008) (citing *Pierce, supra,* 84 *N.J.* at 72). "[A]n employee has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy." *Pierce, supra,* 84 *N.J.* at 72. The Court in *Pierce* reasoned that "[a]n employer's right to discharge an employee at will carries a correlative duty not to discharge an employee who declines to perform an act that would require a violation of a clear mandate of public policy." *Ibid.* The Court further noted that:

> In recognizing a cause of action to provide a remedy for employees who are wrongfully discharged, we must balance the interests of the employee, the employer, and the public. Employees have an interest in knowing they will not be discharged for exercising their legal rights. Employers have an interest in knowing they can run their businesses as they see fit as long as their conduct is consistent with public policy.
>
> [*Id.* at 71.]

Although "the Legislature enacted [CEPA], effectively creating a statutory cause of action for retaliatory discharge," it "did not entirely supplant *Pierce.*" *Tartaglia, supra,* 197 *N.J.* at 103. "Instead, the Legislature recognized the continuing viability of the common law cause of action as an alternate form of relief, but included a statutory provision that deems the filing of a CEPA complaint to be an election of remedies." *Ibid.* (citing *N.J.S.A.* 34:19-8).

***6** In an effort to establish the continuing viability of such causes of action, Aviles points to several cases where courts have upheld the common law protection against retaliatory termination pursuant to the Court's decision in *Pierce. See Velantzas v. Colgate-Palmolive Co.,* 109 *N.J.* 189, 192 (1988) (stating that "public policy of the State of New Jersey should protect those who are in good faith pursuing information relevant to a discriminatory discharge"); *Cerracchio v. Alden Leeds Inc.,* 223 *N.J.Super.* 435, 446 (App.Div.1988) (finding that "the reporting of unsafe conditions in the workplace by an employee is action in furtherance of [a] firmly held policy"); *Macdougall v. Weichert,* 144 *N.J.* 380, 399 (1996) (recognizing that "conduct that is directed against constitutionally-protected activity may violate a clear mandate of public policy, even though it may not offend any other statutory or legal standard" when a plaintiff was fired for voting against the interests of his employer at a council meeting); *Ballinger v. Del. River Port Auth.,* 172 *N.J.* 586, 602 (2002) (holding that the common law

cause of action was viable in a case where an employee was fired for reporting stealing by fellow employees to the police).

Aviles contends that the prevention of shoplifting is a clear mandate of public policy. However, she was not fired for preventing shoplifting, but for violating Mandee's internal loss prevention policy. As stated already, Aviles does not argue that the loss prevention policy violates a clear mandate of public policy.

COVENANT OF GOOD FAITH AND FAIR DEALING CLAIM

Aviles also contends that the judge erred in granting summary judgment on her claim that Mandee "breached the covenant of good faith and fair dealing because it terminated her employment when she acted in accordance with the terms of the employer's manuals and training." Aviles argues that, because she was acting within the parameters of company policy, her employer's termination of her employment constitutes a breach of the covenant of good faith and fair dealing. Aviles' claim is without merit.

As stated already, in this State an employer may terminate an employee at will for good reason, bad reason, or no reason at all. *Witkowski, supra,* 136 *N.J.* 3 at 397 (citing *English, supra,* 73 *N.J.* at 23). However, "[a]n employment manual may alter an employee's at-will status by creating an implied contract between an employer and employee." *Wade, supra,* 172 *N.J.* at 339 (citing *Woolley v. Hoffmann-La Roche, Inc.,* 99 *N.J.* 284, 297-98, *modified on other grounds,* 101 *N.J.* 10 (1985)). The Court in *Woolley* held that "absent a clear and prominent disclaimer, an implied promise contained in an employment manual that an employee will be fired only for cause may be enforceable against an employer even when the employment is for an indefinite term and would otherwise be terminable at will." 99 *N.J.* at 285-286. "Whether an employment manual creates an enforceable contract is a question of law or fact depending on the given case." *Wade, supra,* 172 *N.J.* at 339. Nevertheless, "[a]n effective disclaimer by the employer may overcome the implication that its employment manual constitutes an enforceable contract of employment." *Nicosia v. Wakefern Food Corp.,* 136 *N.J.* 401, 412 (1994) (citing *Woolley, supra,* 99 *N.J.* at 309). Aviles points to no provision in Mandee's employment manual that she claims creates a contractual relationship.

*7 Although it is "true that in New Jersey an employer can discharge an 'at will' employee at any time and for any reason, this principle is a consequence of the fact that the length of an 'at will' employee's engagement is not controlled by contract." *Nolan v. Control Data Corp.,* 243 *N.J.Super.* 420, 429 (App.Div.1990). "In the absence of a contract, there is no implied covenant of good faith and fair dealing." *Ibid.* (citing *Noye v. Hoffmann-La Roche Inc.,* 238 *N.J.Super.* 430, 433 (App.Div.1990)). Thus, "New Jersey courts have not invoked the implied covenant of good faith and fair dealing to restrict the authority of employers to fire at-will employees." *Citizens State Bank of N.J. v. Libertelli,* 215 *N.J.Super.* 190, 194 (App.Div.1987) (citing *Woolley, supra,* 99 *N.J.* at 290-292).

Here, Aviles argues that the covenant of good faith and fair dealing:

> (1) arises from the employment relationship; (2) is manifested or demonstrated in employee manuals and policy writings; (3) was allegedly violated by the conduct of the Mandee at bar; and (4) should give rise to a cause of action, allowing tort damages for violation of the covenant resulting in, or constituting, a wrongful termination of employment.

Without citing authority, Aviles contends that "the fact that an employment be at will, whether by writing or orally, does not negate the existence of the contractual relationship for as long as it lasts." We are not persuaded.

Aviles signed an acknowledgement form which

prominently stated that her "employment can be terminated by [her] or the Company, at any time with or without prejudice." Thus, she was an "at-will" employee at the time her employment was terminated and cannot invoke the covenant of good faith and fair dealing in asserting wrongful termination of her employment.

Affirmed.

N.J.Super.A.D.,2011.
Aviles v. Big M, Inc.
Not Reported in A.3d, 2011 WL 780889 (N.J.Super.A.D.)

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(The decision of the Court is referenced in the Atlantic Reporter in a table captioned "Supreme Court of New Jersey Table of Petitions for Certification".)

Supreme Court of New Jersey
Sandy Aviles
v.
Big M, Inc., a Corporation

NOS. C-5 SEPT.TERM 2011, 067875
September 09, 2011

Disposition: Denied.

N.J. 2011.
Aviles v. Big M., Inc.
208 N.J. 336, 27 A.3d 949 (Table)

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.
Patricia Capasso **GALLO**, Plaintiff–Appellant,
v.
CITY OF ATLANTIC CITY; Lorenzo Langford, Mayor; and **City** Council of **Atlantic City**,
Defendants–Respondents.

Submitted May 21, 2013.
Decided May 29, 2013.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L–5120–09.
Kochanski, Baron & Galfy, P.C., attorneys for appellant (Andrew M. Baron, on the brief).

Ruderman & Glickman, attorneys for respondents (Steven S. Glickman, of counsel; Vincent M. Avery, on the brief).

Before Judges HARRIS and HAYDEN.

PER CURIAM.

***1** Plaintiff Patricia Capasso Gallo appeals from the January 20 and February 15, 2012 orders of the Law Division that together dismissed her retaliation complaint against defendants City of Atlantic City, Lorenzo Langford, Mayor, and the City Council of Atlantic City. We affirm.

I.

Here, the motion court granted summary judgment against Gallo, the non-moving party. Accordingly, we " 'employ the same standard [of review] that governs the trial court," *Henry v. N.J. Dep't of Human Servs.*, 204 *N.J.* 320, 330 (2010) (quoting *Busciglio v. DellaFave*, 366 *N.J.Super.* 135, 139 (App.Div.2004)), and "view the evidence in the light most favorable" to Gallo. *Wilson v. City of Jersey City*, 209 *N.J.* 558, 564 (2012).

Gallo, a certified tax collector, was initially appointed in August 2004, to serve an unexpired term as the interim Atlantic City tax collector until December 31, 2004. On January 1, 2005, Gallo was appointed to a full four-year term as tax collector. The new stint was not without tribulations.

Shortly after her appointment in 2004, Gallo learned of, and complained to her supervisor about, "several boxes of unopened mail which contained several uncashed checks from taxpayers." Gallo contended that this was due to the neglect of the predecessor tax collector, Linda Steele.

In 2005, Gallo "learned that a member of [her] staff had accepted a twenty dollar ($20.00) tip from a taxpayer." When Gallo tried to reprimand the employee, "[Gallo] was told [she] could not do so by the Acting Director of Revenue and Finance." Then in 2006, Gallo was told by a supervisor "to make a change on a certified check for a lienholder that was making a purchase at a tax sale" and to "give special treatment to this lienholder who turned out to be the Atlantic City Business Administrator."

On September 21, 2006, Hope R. Gallagher, the assistant tax collector (and Steele's daughter), wrote a memo to Gallo expressing frustration with "a long standing problem, [Gallo's] lack of communication and consistency with staff and [Gallagher]." Gallagher was, among other things, displeased about learning of operational changes in the office "second hand" rather than from Gallo herself.

A year later, on September 10, 2007, Gallagher filed a grievance with the Atlantic City Supervisors' Union against Gallo, complaining that Gallagher's

vacation request was not promptly acted upon. In her grievance, Gallagher accused Gallo of "[c]ontinued favoritism and discrimination." In her September 12, 2007 response, Gallo explained her procedure for processing vacation requests, and denied the existence of favoritism and discrimination in her office.

As her four-year term drew to a close, notwithstanding the challenges of the office, Gallo, with "[twenty-two] years of government service, ... expected reappointment in January 2009, which would have given her tenure in the position." On December 23, 2008, Gallo learned that her "nomination for reappointment had been pulled without reason" by Mayor Langford. Gallo came to believe that her reappointment would be considered at the next council meeting; however, she received notice on January 23, 2009, that she would not be reappointed without participating in an interview process.

*2 On January 26, 2009, Gallo was interviewed for the tax collector position by a three-member committee of Steele, Redina Gilliam–Mosee, and Irv Jacobi. Theresa Elberson was appointed to the tax collector's four-year term. On March 4, 2009, the City officially terminated Gallo's employment.

Throughout her term of office, Gallo was a resident of Voorhees, located in Camden County. Gallo never moved to Atlantic City or Atlantic County.[FN1] Elberson, however, was a resident of Atlantic County, and had acquired the appropriate certificate to qualify as a tax collector.

> FN1. Since September 28, 2004, Atlantic City expressed a preference for appointing bona fide residents to its local government service. See Atlantic City Code § 56–2 ("All officers, employees, including but not limited to Directors of the City of Atlantic City, appointed to positions or hired for employment by the City of Atlantic City ... are required ... to be bona fide residents of the City of Atlantic City except as otherwise provided by law."). However, if qualified residents were not available, appointments were to be made in the following order: "(1) Other residents of Atlantic County[;] (2) Other residents of counties contiguous to Atlantic County[;] (3) Other residents of the state[; and] (4) All other applicants." Atlantic City Code § 56–5(B).

Gallo testified at her deposition that "Gallagher always went behind [her] back and tried to have [her] fired constantly." Gallo claimed that her co-worker was jealous because "[Gallagher] didn't get the job that [Gallo] got. [Gallagher] couldn't get the job that [Gallo] got, so, therefore, [Gallagher] retaliated against [Gallo]." Gallo testified that there were continuous complaints from Gallagher. Gallagher even sent a long letter to Mayor Langford regarding Gallo proclaiming that Gallo was "terrible for the people of Atlantic City. [Gallo] didn't have the taxpayers in mind. [Gallo] wouldn't take partial payments. [Gallo] was terrible at [her] job. [Gallo] was terrible being a boss. [Gallo] was terrible at everything [she] did."

Gallo stated that she had disciplined Gallagher because Gallagher had "scream [ed] in the office at [Gallo] in the middle of the office screaming in front of all the employees and the taxpayers.... She just got up and started screaming, so, yes, [Gallo] did discipline her." Gallo also stated that Gallagher "would make up stories about [her] and [Gallo] would have to answer them and [Gallo was] sure [her] attorney ... [has] that on file and finally they did have a meeting with her and told her to stop doing this, to go to work."

Gallo commenced the present action on December 22, 2009 by filing a thirteen-count complaint seeking remedies based upon breach of contract (counts one, two, and four), breach of the implied covenant of good faith and fair dealing (counts three and five), intentional infliction of emotional distress (count six), misrepresentation (count seven), wrongful discharge (count eight),

age discrimination (count nine), "individual liability" (count ten),[FN2] "false statements of others" (count eleven), "whistleblower violations" (count twelve), and "hostile workplace" (count thirteen).

> FN2. The only individual defendant is Mayor Langford. Neither Steele nor Gallagher is a named defendant.

After discovery was completed, defendants filed a motion for summary judgment to dismiss the entire complaint. Gallo responded with a certification in opposition to the motion and a cross-motion asking the court to conduct an in camera hearing so that she could reveal, for the first time, certain information that she had withheld during discovery. Gallo filed a certification stating that "[w]ithin three months of the City's decision not to reappoint [her], [she] was subpoena[ed] and summoned to a State Criminal proceeding related in part to the City and practices in [her] office" before her time as tax collector. Gallo stated that she did not disclose or discuss her involvement in the investigation because she "took an oath, and was directed not to do so by State officials."[FN3]

> FN3. The record is silent regarding the identity of these "State officials" and the nature of the "State Criminal proceeding" in which Gallo allegedly participated.

*3 After oral argument, the motion judge issued a fourteen-page written opinion focusing primarily upon Gallo's whistleblower claim (count twelve) under the Conscientious Employee Protection Act (CEPA), *N.J.S.A.* 34:19–1 to –8. The judge granted defendants' motion for summary judgment on that count, and denied Gallo's request for an in camera hearing. In his opinion, the judge determined that there were no material facts in dispute, and Gallo did "not cite any statute, regulation, or public policy that would be violated if the facts as alleged are true, either in her [c]omplaint or in opposition to [d]efendant[s'] motion." Ultimately, the judge found that Gallo "knew that she would be employed as a tax collector at least until December 31, 2008" and "that tenured positions, specifically the position of tax collector, were not positions that the Legislature had in mind when enacting CEPA."

The requested in camera hearing was denied because the motion judge ruled that the post-termination investigation "could not have been the basis for the City's decision not to reappoint, nor could the investigation have formed the basis for [p]laintiff's [c]omplaint in this matter." Furthermore, the discovery period had ended many months earlier, and a trial date, which had already been adjourned four times, was scheduled for one month hence.

The motion judge indicated that he "was prepared to dismiss all the non-CEPA counts of [p]laintiff's [c]omplaint. However, at oral argument ..., [p]laintiff's counsel indicated that he would forward a supplemental certification which would specifically address the counts of the [c]omplaint on which [d]efendant[s] had moved for summary judgment." After Gallo filed a supplemental certification and a second round of oral argument was conducted, the judge dismissed the remainder of Gallo's complaint. In his seven-page written decision, the judge noted that Gallo was not terminated; she just was not reappointed. He then determined that Gallo's "numerous breach of contract claims must fail because (1) her contract was not breached; and (2) the CEPA waiver provision bar[red] Plaintiff from making these claims. Plaintiff's wrongful discharge claims must fail as well for the same reasoning."

Regarding Gallo's intentional infliction of emotional distress claim, the court stated that "[t]here [was] no utterly intolerable or outrageous conduct here. Plaintiff has not made out a prima facie case of intentional infliction of emotional distress." Finally, the judge found that "to the extent that [p]laintiff's certification was intended to reach her hostile work environment claim, there is absolutely no evidence in the record that the

harassment that [p]laintiff alleges that she endured came as a result of her race, religion, sex, or other protected status."

A memorializing order was entered on February 15, 2012. This appeal followed.

II.

On appeal, Gallo presents the following arguments[FN4] for our consideration:

> FN4. Because Gallo did not brief the issue of the in camera hearing, we deem any claims related thereto to have been abandoned. *See Gormley v. Wood–El,* 422 *N.J.Super.* 426, 437 n. 3 (App.Div.2011).

*4 POINT I: THERE ARE SEVERAL ISSUES OF MATERIAL FACT IN DISPUTE WHICH NECESSITATE REVERSAL OF THE DECISION GRANTING SUMMARY JUDGMENT.

POINT II: APPELLANT HAS A VALID CEPA CLAIM AND DECISION ON THIS ISSUE SHOULD HAVE BEEN DELAYED.

We have surveyed the record presented on appeal and conclude that Gallo's arguments are meritless. *R.* 2:11–3(e)(1)(E). We add only the following brief comments.

Gallo was appointed for a four-year statutory term of employment. When that term ended, Atlantic City's elected officials decided not to reappoint her. Whether invoking the ordinance-based residency requirement or the paucity of evidence to link the non-appointment to an impermissible basis, the Law Division rightly concluded that Gallo had failed to create any dispute for which a jury's determination was necessary or appropriate. None of Gallo's grievances—either individually or collectively—constitute grounds for granting her the sought-for appointment and tenure, *N.J.S.A.* 54:1–35.31(1), much less compensatory and punitive damages. We are fully in accord with the analysis and conclusions of the motion judge. We also discern that *N.J.S.A.* 34:19–8, providing that institution of an action under CEPA shall be deemed a waiver of the rights and remedies available under ... State law, rule or regulation or under the common law fully disposes of the vast majority of Gallo's claims, all of which share the same factual matrix as her claim for CEPA remedies.

As for the CEPA claim itself, Gallo does not identify the specific provision of the statute that she relies upon. We assume, because of her scattered references to her complaints made to superiors, that she relies upon *N.J.S.A.* 34:19–3(a), and to some extent –3(c). Gallo appears to allege that she engaged in CEPA-protected conduct by revealing and objecting to activities of her subordinates that she reasonably believed violated some undisclosed ordinances and policies of the City or, in some cases, the laws of the State of New Jersey. However, such revelations and objections were a regular part of Gallo's supervisory job responsibilities as tax collector. Consequently, her actions cannot constitute whistleblowing under the CEPA. *See Massarano v. N.J. Transit,* 400 *N.J.Super.* 474, 491 (App.Div.2008).

Gallo's last argument, claiming that the trial court abused its discretion in not adjourning the summary judgment motion in favor of waiting for the New Jersey Supreme Court to decide a similar case, is moot. *White v. Starbucks Corp.,* 210 *N.J.* 108 (2012).

Affirmed.

N.J.Super.A.D.,2013.
Gallo v. City of Atlantic City
Not Reported in A.3d, 2013 WL 2319425 (N.J.Super.A.D.)

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Not Reported in F.Supp.2d, 2013 WL 2296759 (D.N.J.)
(Cite as: 2013 WL 2296759 (D.N.J.))

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Only the Westlaw citation is currently available.NOT FOR PUBLICATION

United States District Court,
D. New Jersey.
Anthony GIANFRANCESCO, Plaintiff,
v.
LABORERS INTERNATIONAL UNION OF NORTH AMERICALOCAL 594, et al., Defendants.

Civ. No. 10–6553.
May 24, 2013.

David H. Kaplan, Law Office of David H. Kaplan, LLC, Stanhope, NJ, for Plaintiff.

John Paul Joseph Mattiace, Albert G. Kroll, Kroll Heineman Carton LLC, Iselin, NJ, for Defendants.

OPINION

THOMPSON, District Judge.

I. *INTRODUCTION*

***1** This matter has come before the Court upon the Motion for Sanctions and Attorneys' Fees filed by Defendants John Adams, Patrick Byrne, Jose Colon, Eastern Regional Office of the Laborers International Union of North America ("Eastern Regional Office"), Laborers International Union of North America Local 594 ("Local 594"), New Jersey Building Construction Laborers District Council ("N.J. District Council"), and Raymond Pocino (collectively, "Defendants"). (Docket Entry No. 47). Plaintiff Anthony Gianfrancesco ("Plaintiff") opposes the motion. (Docket Entry No. 52). The Court has decided the matter upon consideration of the parties' written submissions and oral arguments made before the Court on May 23, 2013. For the reasons given below, Defendants' Motion for Sanctions and Attorneys' Fees is denied.

II. *BACKGROUND*

This case concerns Defendants' termination of Plaintiff, an employee at Local 594 who reported a number of alleged wrongdoings and illegalities at the union that he uncovered in the course of his employment. Plaintiff sought relief from Defendants for wrongful termination, claiming that he was terminated in retaliation for acting as a whistleblower in violation of the New Jersey Conscientious Employee Protection Act ("CEPA"). The Court assumes the parties' familiarity with the underlying facts of the case and briefly recites those facts relevant to the Court's analysis.

A. Factual History

From 2000 until November 2009, Plaintiff was an employee of the Laborers' International Union of North America ("LIUNA"). During that time, LIUNA employed an organizational hierarchy that included the Eastern Regional Office, the N.J. District Council,[FN1] and Local 594. Plaintiff held positions at both the local and district council level of the union. He served as President and District Council Delegate of Local 594, as well as President, Secretary Treasurer, and Field Representative of the N.J. District Council.

> FN1. Prior to the formation of the N.J. District Council in August 2009, Local 594 was a member of the Central New Jersey Building Laborers District Council. For the purposes of this motion, the two organizations are referred to as "the N.J. District Council."

While working in these capacities, Plaintiff became aware of "numerous wrongdoings and illegalities." In particular, Plaintiff's cooperation in financial audits in 2008 revealed a number of wrongdoings concerning the finances of the N.J. District Council and Local 594, each of which he reported. Specifically, he reported that his brother, another union em-

ployee, had used a credit card to make personal purchases, had failed to return the card upon his retirement, and had also been awarded pay for five weeks of unused vacation time upon his retirement. Additionally, Plaintiff reported the presence of non-union and undocumented workers at a job site.

In November 2009, Plaintiff was terminated. Defendants claimed he was terminated because he was an "underperforming" employee and the union needed to reduce the workforce as a result of a deepening economic slump. Plaintiff claimed, however, that he was terminated in retaliation for acting as a whistleblower.

B. Procedural History

***2** On October 28, 2010, Plaintiff initiated this lawsuit against Defendants, alleging that his termination constituted a violation of CEPA. [FN2] (*See* Compl., Docket Entry No. 1, Attach. 2). Plaintiff was deposed on May 11, 2012 and testified that all of his alleged whistle-blowing activities fell entirely within his job duties. (Docket Entry No. 47, Attach. 2, Ex. A). Defendants' counsel then sent a letter to Plaintiff's counsel on May 14, 2012, informing him that Defendants intended to file a motion for sanctions because Plaintiff's claim was frivolous. (*Id.* Ex. F). In the letter, Defendants' counsel explained that Plaintiff's admission that his whistleblowing acts were within his job duties as an employee rendered Plaintiff's claim "wholly without basis in law or fact" as a result of the "job duties exception" to CEPA. (*Id.*).

> FN2. The complaint was initially filed in the Superior Court of New Jersey and was subsequently removed to federal court on December 14, 2010. (*Id.*).

Defendants filed the motion for sanctions and attorneys' fees on July 9, 2012. (Docket Entry No. 26). On September 17, 2012, the Court conducted a telephonic hearing on the motion. (Docket Entry No. 36). During the hearing, the Court denied the motion and converted it to a motion for summary judgment, explaining that "it may well be that the defendant is entitled to attorneys' fees" but that such a determination should be deferred until after summary judgment. (Docket Entry No. 53 at 8:14–16, 9:1–12).

On January 22, 2013, after the parties submitted new briefs for the motion for summary judgment, the Court granted summary judgment. (Docket Entry Nos. 45, 46). In granting summary judgment, the Court rejected Plaintiff's argument that no "job duties exception" existed and concluded that "as [Plaintiff's] whistle-blowing activities fall within his job duties, he is not entitled to relief under CEPA." (Docket Entry No. 45 at 7–11). Defendants have now renewed their motion for sanctions and attorneys' fees. (Docket Entry No. 57).

III. *LEGAL STANDARD*

Defendants seek sanctions and attorneys' fees under Federal Rule of Civil Procedure 11(c)(2) and 28 U.S.C. § 1927. (*Id.*). They also seek attorneys' fees under N.J.S.A. 34:19–6. (*Id.*).

A. Federal Rule of Civil Procedure 11

Federal Rule of Civil Procedure 11 governs attorneys' ethical obligations associated with filing or pursuing a lawsuit. FED. R. CIV. P. 11. It provides that

> [b]y presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney ... certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances ... [t]he claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law....

FED.R.CIV.P. 11(b)(2). Rule 11 essentially imposes a "duty to look before leaping and may be seen as a litigation version of the familiar railroad admonition to 'stop, look, and listen.' " *Lieb v. Topstone, Indus., Inc.,* 788 F.2d 151, 157 (3d Cir.1986). Under Rule 11, an attorney's actions must be reasonable under the circumstances. *Business Guides, Inc. v. Chromatic Commc'ns Enters., Inc.,* 498 U.S. 533, 551, 111 S.Ct. 922, 112 L.Ed.2d 1140 (1991). "Reasonableness" is defined as "an objective knowledge or belief at the time of the filing that the claim was well-grounded in fact and law." *Ford v. Summit Motor Prods., Inc.,* 930 F.2d 277, 289 (3d Cir.1991). This duty continues after the initial filing, as "insisting on a position after it is no longer tenable" also violates the rule. FED. R. CIV. P. 11(B), (C) advisory committee note.

***3** Rule 11 imposes mandatory sanctions if a violation is found. *Lieb,* 788 F.2d at 157. "The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorneys' fees and other expenses directly resulting from the violation." FED. R. CIV. P. 11(c)(4).

B. Section 1927

Under 28 U.S.C. § 1927, a court may award attorneys' fees in certain circumstances. 28 U.S.C. § 1927. The statute provides that

> [a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiples the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Id. The Third Circuit has held that "a bad faith finding is required as a precondition to the imposition of attorneys' fees under section 1927." *Baker Indus., Inc. v. Cerberus, Ltd.,* 764 F.2d 204, 208 (3d Cir.1985). "Bad faith" may be shown through "the intentional advancement of a baseless contention that is made for an ulterior purpose, e.g. harassment or delay." Ford, 790 F.2d at 347. Therefore, "[w]hen a claim is advocated despite the fact that it is patently frivolous or where a litigant continues to pursue a claim in the face of an irrebutable defense, bad faith can be implied." *Loftus v. Se. Pa. Transp. Auth.,* 8 F.Supp.2d 458, 561 (E.D.Pa.1998), aff'd 187 F.3d 626 (3d Cir.1999).

C. N.J.S.A. 34:19–6

CEPA contains a fee-shifting provision as well. *See* N.J. S.A. 34:19–6. It provides that

> [a] court, upon notice of motion in accordance with the Rules Governing the Courts of the State of New Jersey, may also order that reasonable attorneys' fees and court costs be awarded to an employer if the court determines that an action brought by an employee under this act was without basis in law or in fact. However, an employee shall not be assessed attorneys' fees under this section if, after exercising reasonable and diligent efforts after filing a suit, the employee files a voluntary dismissal concerning the employer, within a reasonable time after determining that the employer would not be found to be liable for damages.

Id. Therefore, for an employer to recover reasonable attorneys' fees under the provision, "the employer must be vindicated and the employee must have proceeded without basis in fact...." *Best v. C & M Door Controls, Inc.,* 200 N.J. 348, 358, 981 A.2d 1267 (2009). This standard is similar to New Jersey's frivolous claim law which awards costs to a prevailing party when it is shown that the nonprevailing party "knew, or should have known that the complaint ... was without basis in law or equity...." *Buccina v. Micheletti,* 311 N.J.Super. 557, 562–63, 710 A.2d 1019 (App.Div.1998) (citing N.J. S.A. 2A:15–59.1).

IV. *ANALYSIS*

***4** As a preliminary matter, the Court considers Plaintiff's argument that the motion for sanctions and attorneys' fees should be analyzed under the standard for a motion for reconsideration. Plaintiff argues that this is the proper standard because Defendants' original motion for sanctions and attorneys' fees was denied by the Court. In denying the motion, however, the Court converted it to a motion for summary judgment with leave to renew the motion for sanctions if summary judgment was granted. As such, the Court finds that the standard for a motion for reconsideration is not proper here.

The Court now turns to the substance of Defendant's motion for sanctions and attorneys' fees. In arguing whether the imposition of sanctions and attorneys' fees is appropriate in this case under Rule 11, Section 1927, and CEPA's fee-shifting provision, Plaintiff and Defendant essentially disagree on one point—the extent to which the "job duty exception" to CEPA is established law.

To establish a prima facie case under CEPA, a plaintiff must demonstrate that

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

Dzwonar v. McDevitt, 177 N.J. 451, 462, 828 A.2d 893 (N.J.2003). A number of courts, however, have found a "job duty exception" to CEPA. *See, e.g., Kerrigan v. Otsuka Am. Pharm., Inc.,* No. 12–4346, 2012 WL 5380663 (E.D.Pa. Nov.1, 2012); *Tayoun v. Mooney,* No. A–1154–10T3, 2012 WL 5273855 (N.J.Super.A.D. Oct.26, 2012); *Aviles v. Big M, Inc.,* No. L–1254–08, 2011 WL 780889 (N.J.Super.A.D. Mar. 8, 2011), cert. denied,. 208 N.J. 336 (2011); White v. Starbucks Corp., No. L–2422–08, 2011 WL 6111882 (N.J.Super.A.D. Dec. 9, 2011); *Richardson v. Deborah Heart & Lung Ctr.,* No. A–4611–08T2 at 17–18 (N.J.Super.Ct.App.Div. July 28, 2010), cert. denied, 205 N.J. 100 (2011); *Massarano v. New Jersey Transit,* 400 N.J.Super. 474, 948 A.2d 653 (N.J.Super.Ct.App.Div. Jan.30, 2008). Under this exception, "a plaintiff cannot establish that he engaged in a CEPA-protected act when the plaintiff's actions fall within the plaintiff's job duties." Kerrigan, 2012 WL 5380663, at *2–3.

Although this Court recognized the "job duty exception" and, consequently, dismissed Plaintiff's CEPA claim on summary judgment, the Court cannot say that the "job duty exception" is so well-settled that sanctions are appropriate in this case. First, as the Court noted in its summary judgment opinion, recognition of the "job duty exception" is an "emerging trend" that first appeared in 2008 in *dicta* in *Massarano v. New Jersey Transit,* 400 N.J.Super. 474, 948 A.2d 653 (N.J.Super.Ct.App.Div. Jan.30, 2008). (Docket Entry No. 45 at 10). Additionally, in at least one case since then, a court has not applied the "job duty exception" where it would arguably otherwise apply. *See Hallanan v. Twp. of Fairfield Bd. of Educ.,* No. L–379–08, 2012 WL 1520822 (N.J.Super.Ct.App.Div.2012).

***5** The Court's conclusion is further supported by the fact that the only opinions applying the "job duty exception" are unpublished decisions of the New Jersey Appellate Division.[FN3] In New Jersey,

> FN3. As previously explained, *Massarano,* a New Jersey Supreme Court case, did not apply the "job duty exception" but discussed it in *dicta.*

> [n]o unpublished opinion shall constitute precedent or be binding upon any court. Except for appellate opinions not approved for publication that have been reported in an authorized administrative law reporter, and except to the extent required by res judicata, collateral estoppel, the single controversy doctrine or any other similar principle of law, no published opinion shall be cited by any court. No unpublished opinion shall be cited to any court by counsel unless the court and all other parties are served with a copy of the opinion and of all contrary unpublished opinions known to counsel.
>
> New Jersey Court Rule 1:36–3. As such, an unpublished opinion "cannot reliably be considered part of our common law." *Trinity Cemetery Ass'n, Inc. v. Twp. of Wall,* 170 N.J. 39, 784 A.2d 52, 58 (N.J.2001). The Court cannot say, therefore, that the "job duty exception" is such well-settled law as to necessitate sanctions in this case.

Furthermore, Plaintiff argues that there is no New Jersey Supreme Court decision applying the "job duty exception" and that he is permitted to advocate that such an exception would be overturned by the New Jersey Supreme Court. (*Id.* at 14, 784 A.2d 52). To support this argument, Plaintiff points to *Hernandez v. Montville Twp. Bd. of Educ.,* 354 N.J.Super. 467, 808 A.2d 128 (N.J.App.Div.2002), in which the court did not apply the "job duty exception" despite facts suggesting that the exception would apply. 808 A.2d at 128. Furthermore, the New Jersey Supreme Court granted certification in *Hernandez* and affirmed the decision of the New Jersey Appellate Division despite a dissenting opinion that included some language acknowledging that the plaintiff had been performing his job duties. 179 N.J. 81, 843 A.2d 1091 (N.J.2004).

In this case, Defendants clearly advised Plaintiff that he was proceeding with a claim unsupported by a number of unpublished opinions from the New Jersey Appellate Division. Plaintiff and his counsel, however, chose instead to push forward where prudence would have dictated otherwise. Plaintiff's counsel, in particular, should have been wary of proceeding with such a claim in light of the underlying family feud that is apparent from many of Plaintiff's allegations. In light of the foregoing discussion, however, the Court cannot say that the "job duty exception" was so well-settled as to render Plaintiff's claim frivolous or without basis in law or fact. As such, the Court finds that an award of sanctions or attorneys' fees under Rule 11, Section 1927, or N.J.S.A. 34:19–6 is not appropriate at this time.

V. *CONCLUSION*

For the foregoing reasons, Defendants' Motion for Sanctions and Attorneys' Fees is denied. An appropriate order will follow.

D.N.J.,2013.
Gianfrancesco v. Laborers Intern. Union of North America Local 594
Not Reported in F.Supp.2d, 2013 WL 2296759 (D.N.J.)

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Not Reported in F.Supp.2d, 2012 WL 2951758 (D.N.J.)
(Cite as: 2012 WL 2951758 (D.N.J.))

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Only the Westlaw citation is currently available.NOT FOR PUBLICATION

United States District Court,
D. New Jersey.
John MEHALIS, Plaintiff,
v.
FRITO–LAY, INC., Defendant.
Curtis Thibodeau, Plaintiff,
v.
Frito–Lay, Inc., Defendant.

Civil No. 08–1371 (AET).
July 2, 2012.

Ross Begelman, Begelman & Orlow, P.C., Cherry Hill, NJ, for Plaintiffs.

David Andrew Cohen, Marc E. Wolin, Jane Jhun, Saiber LLC, Florham Park, NJ, for Defendant.

MEMORANDUM OPINION & ORDER

THOMPSON, District Judge.

I. INTRODUCTION

***1** This matter comes before the Court on Defendant Frito–Lay, Inc.'s ("Frito–Lay") Motions for Summary Judgment against John Mehalis [docket # 50] and Curtis Thibodeau [51]. Plaintiffs Mehalis [53] and Thibodeau [54] oppose the respective motions. The Court has decided these motions after taking into consideration the parties' submissions and without oral argument pursuant to Federal Rule of Civil Procedure 78(b). For the reasons set forth below, Defendant's motions will be granted.

II. BACKGROUND

Plaintiffs Mehalis and Thibodeau both worked as fleet technicians (mechanics) in Frito–Lay's garage site in Franklin Park, New Jersey, starting in December 2004 and June 2005 respectively. As the only two fleet technicians at the facility, Plaintiffs were responsible for maintaining, servicing, and repairing the approximately 80 bulk trucks and route trucks in the facility's fleet. On February 7, 2007, Frito–Lay terminated Mehalis. On February 23, 2007, Frito–Lay terminated Thibodeau.

Plaintiffs allege that during the course of their employment they continuously raised concerns they had with respect to what they believed were safety issues involving the truck fleet and some of Defendant's practices. Beginning in mid to late 2006, Thibodeau allegedly began making these complaints in writing. On or about May 5, 2006, Thibodeau allegedly wrote the Department of Labor requesting information as to whether there was a minimum mechanic to truck ratio. *See* (Thibodeau Opp'n at 6). On or about October 4, 2006, Thibodeau also allegedly sent a letter to the Human Resource Department describing safety issues with the fleet vehicles and noting that Tyler Montgomery, the fleet manager, did not grant Thibodeau's request for certain shop equipment, two additional full time mechanics, newer spare trucks, and better working conditions. *See* (Thibodeau Ex. H).[FN1] Thibodeau and Mehalis additionally allege that during this period they began making verbal complaints concerning vehicle safety. Plaintiffs claim that they experienced acts of retaliation by Defendant, including both mechanics receiving the exact same Expectations Actions List on January 17, 2007, despite having never previously been disciplined. *See* (Thibodeau Opp'n at 28). Following the January 17, 2007 meeting, Thibodeau alleges that he sent a second letter to Defendant's Human Resources Department setting forth complaints about the safety of the fleet. *See* (Thibodeau Ex. I).[FN2] On January 21, 2007, Thibodeau called Frito–Lay's "Speak Up" hotline where employees can call to raise concerns about a

business situation that may be inconsistent with the company's Code of Conduct, values, policies or the law. Thibodeau complained that "the fleet is in really bad shape" and noted that he felt that Montgomery had intimidated him into signing the Expectations Action List. *See* (Thibodeau Ex. N). Thibodeau called the hotline again on January 31, 2007 and repeated his complaints.) (*Id.*) Plaintiffs allege that as a result of these complaints Defendant retaliated against both Plaintiffs by terminating Mehalis' employment on February 7, 2007, and Thibodeau's employment on February 23, 2007.

> FN1. Defendant maintains that it has no record of this letter. (Def.'s Statement of Undisputed Material Facts (Thibodeau) ¶ 58). Defendant has further suggested that this letter may have been fabricated by Thibodeau after his termination. (Def.'s Reply Br. (Thibodeau) at 5 n. 1). The Court rejects this argument for the purposes of its review of the pending motions.
>
> FN2. Defendant also maintains that it has no record of this letter. *See* (*id*).

***2** In contrast to the picture presented by Plaintiff, Defendant maintains that during the period of time Plaintiffs were employed at the Franklin Park facility, Montgomery received numerous complaints from several sales and operations managers that Mehalis and Thibodeau were failing to repair trucks in the fleet. (Def.'s Statement of Undisputed Material Facts (Mehalis) ¶ 29). Montgomery purportedly discussed these complaints with Plaintiffs on several occasions. (*Id.* ¶ 33). On January 17, 2007, Montgomery had separate formal meetings with Mehalis and Thibodeau and provided each with a detailed Expectations Action List purportedly designed to address problems observed at the facility. (*Id.* ¶ 34). The list included a series of bullet points about the duties and responsibilities that were expected of a Frito–Lay mechanic. (*Id.* ¶ 35). The list also flagged issues observed within the facility including:

- Prioritization of repairs—safety issues addressed first, prioritize out of service list and repairs made in timely matter.

- Multiple failures on several trucks—Research truck history and fix the re-occurring issues.

- When truck is brought in for PM, a thorough inspection should be done to identify ALL issues.

(Wolin Certification, Ex. AA). On February 1, 2007, Darren Patnode, one of the fleet leads, allegedly found Mehalis in the midst of filling out six PM forms (physical inspection forms) at the same time. (Def.'s Statement of Undisputed Material Facts (Mehalis) ¶ 44). Defendant contends that this was an "obvious problem" because under company policy a mechanic should complete the PM form as he is performing the actual physical inspection of each truck, and no trucks were present. (*Id.* ¶ 45). Moreover, the PM forms indicated that the safety inspections for these trucks had been completed on January 31, 2007, whereas the PM forms were not complete (even though it was February 1, 2007) and Mehalis admitted that the inspection work had not been completed. *See* (*id.* ¶¶ 46–55). Mehalis was suspended while an investigation of the trucks at issue was being performed. (*Id.* ¶ 58). In the course of the investigation, Defendant discovered numerous problems with the vehicles which had not been fixed or noted on the PM forms. (*Id.* ¶ 63). As a result, on February 7, 2007, Montgomery terminated Mehalis' employment for falsification of company records in violation of Frito–Lay's Code of Conduct. (*Id.* ¶ 71).

Shortly thereafter, several mechanics from other regions came to the Franklin Park facility to assist Thibodeau. (Def.'s Statement of Undisputed Material Facts (Thibodeau) ¶ 46). The mechanics discovered significant issues with the Franklin Park fleet which

they ascribed to the failure of Mehalis and Thibodeau to perform proper preventative maintenance. (*Id.* ¶ 47). On February 14, 2007, a visiting mechanic reviewed a complaint received by a sales representative concerning Truck R99038 and discovered that the left front brake assembly was totally worn out and reported the problem to Montgomery. (*Id.* ¶ 50). The visiting mechanic noted that Thibodeau allegedly performed a safety PM inspection of Truck R99038 on February 4, 2007 and further opined that preventative maintenance had not been properly performed because the brakes could not have deteriorated to that extent in ten days. *See* (*id.* ¶ 52). In view of this safety violation, as well as the additional complaints he had received from sales managers, sales representatives, and visiting mechanics, on February 23, 2007, Montgomery terminated Thibodeau's employment. (*Id.* ¶ 54).

***3** Based on these events Plaintiffs separately brought suit against Frito–Lay in the Superior Court of New Jersey, Law Division, Somerset County, seeking relief under New Jersey's Conscientious Employee Protection Act ("CEPA"), N.J.S.A. § 34:19–1, *et seq.* Upon removal to this Court, given the similarity of the complaints, the cases were consolidated. [2]. Defendant Frito–Lay now moves for summary judgment as to the claims asserted against it.

III. DISCUSSION

A. Legal Standard on Summary Judgment

Summary judgment is appropriate if the record shows "that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A fact is "material" if it will "affect the outcome of the suit under the governing law...." *Anderson v. Liberty Lobby,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In deciding a motion for summary judgment, a district court considers the facts drawn from "the pleadings, the discovery and disclosure materials, and any affidavits" and must "view the inferences to be drawn from the underlying facts in the light most favorable to the party opposing the motion." Fed.R.Civ.P. 56(c); *Curley v. Klem,* 298 F.3d 271, 276–77 (3d Cir.2002) (internal quotations omitted). The non-movant, however, "must point to concrete evidence in the record"; mere allegations, conclusions, conjecture, and speculation will not defeat summary judgment. *Orsatti v. N.J. State Police,* 71 F.3d 480, 484 (3d Cir.1995); *Acumed LLC v. Advanced Surgical Servs., Inc.,* 561 F.3d 199, 228(3d Cir.2009) ("[S]peculation and conjecture may not defeat a motion for summary judgment.").

In resolving a motion for summary judgment, the Court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson,* 477 U.S. at 251–52. More precisely, summary judgment should be granted if the evidence available would not support a jury verdict in favor of the nonmoving party. *Id.* at 248–49. The Court must grant summary judgment against any party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex,* 477 U.S. at 322. However, "[i]n considering a motion for summary judgment, a district court may not make credibility determinations or engage in any weighing of the evidence...." *Marino v. Indus. Crating Co.,* 358 F.3d 241, 247 (3d Cir.2004) (quoting *Anderson,* 477 U.S. at 255). But, a mere "scintilla of evidence," without more, will not give rise to a genuine dispute for trial. *Anderson,* 477 U.S. at 252. In the face of such evidence, summary judgment is still appropriate "[w]here the record ... could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). "Summary judgment motions thus require judges to 'assess how one-sided evidence is, or what a 'fair-minded' jury could 'reasonably' decide.' " *Williams v. Borough of W. Chester, Pa.,* 891 F.2d 458, 460 (3d Cir.1989)

(quoting *Anderson,* 477 U.S. at 265 (Brennan, J., dissenting)). Properly applied, Rule 56 will "isolate and dispose of factually unsupported claims or defenses" before those issues come to trial. *Celotex,* 477 U.S. at 323–24.

B. Conscientious Employee Protection Act

***4** CEPA was enacted to protect employees who report illegal or unethical actions in the workplace, and also to encourage such reporting. *See Fleming v. Correctional Healthcare Solutions, Inc.,* 164 N.J. 90, 751 A.2d 1035, 1038–39 (N.J.2000). Under CEPA, it is unlawful for an employer to retaliate against an employee because the employee discloses an activity of the employer that the employee reasonably believes is fraudulent, criminal, or in violation of the law. N.J. Stat. Ann. § 34:19–3(c). Because CEPA is remedial in nature, New Jersey courts have held it should be construed liberally so as to achieve its important social goals. *See, e.g., Barratt v. Cushman & Wakefield of N.J., Inc.,* 144 N.J. 120, 675 A.2d 1094, 1098 (N.J.1996); *Fleming,* 751 A.2d at 1038–39; *Kolb v. Burns,* 320 N.J.Super. 467, 727 A.2d 525, 531 (N.J.Super.Ct.App.Div.1999). New Jersey courts apply the familiar *McDonnell–Douglas* burden-shifting framework in evaluating claims under the statute. *See Blackburn v. UPS, Inc.,* 179 F.3d 81, 92 (3d Cir.1999). In order to establish a prima facie claim of retaliation under CEPA, a plaintiff must prove by a preponderance of the evidence that:

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

Massarano v. N.J. Transit, 400 N.J.Super. 474, 948 A.2d 653, 662 (N.J.Super.Ct.App.Div.2008) (quoting *Dzwonar v. McDevitt,* 177 N.J. 451, 828 A.2d 893, 900 (N.J.2003)). Once a plaintiff has established a prima facie case, the burden then shifts to the employer to produce a legitimate, nondiscriminatory reason for taking the employment action. *See Klein v. U.M.D.N.J.,* 377 N.J.Super. 28, 871 A.2d 681, 687 (N.J.Super.Ct.App.Div.2005). If an employer provides evidence of a nondiscriminatory reason for its action, it is then the employee's burden to demonstrate pretext by a preponderance of the evidence. See *id.*

Frito–Lay contends, among other things, that Plaintiffs have not established a prima facie case under the CEPA because: (1) Plaintiffs cannot establish that they engaged in any "whistle-blowing activity" as described in N.J.S.A. § 34:19–3c; and (2) Plaintiffs cannot causally connect the alleged whistle-blowing activity with their termination. Defendant further argues that, even assuming that Plaintiffs can present a prima facie case of retaliation, Plaintiffs have not presented any evidence rebutting Frito–Lay's legitimate, non-discriminatory reasons for its actions. In response, Plaintiffs contend that their various complaints about the safety conditions of the Frito–Lay fleet were protected "whistle-blowing activity" and that "[v]iewing the time line [sic] of events," a reasonable jury could conclude that Plaintiffs were terminated "for [their] complaints and the trouble and headaches this caused to Montgomery, Thompson, and Patnode, and to the company as a whole." (Thibodeau Opp'n at 28). The Court will consider these matters in turn.

***5** As an initial matter there is some question as to whether the alleged complaints made by Plaintiffs should be considered "whistle-blowing activity" as described in N.J.S.A. § 34:19–3c. Defendant correctly notes that New Jersey courts have held that where a plaintiff is simply performing his own job duties, that is not whistle-blowing under the CEPA. *See Massarano,* 948 A.2d at 663; *Aviles v. Big M, Inc.,* A–4980–09, 2011 WL 780889, at * 5

(N.J.Super.Ct.App.Div. Mar.8, 2011); *White v. Starbucks,* A–3153–09, 2011 WL 6111882, at * 9 (N.J.Super.Ct.App.Div. Dec.9, 2011) (agreeing that plaintiff did not engage in whistle-blowing activity because "the issues on which she bases her claim fall within the sphere of her job-related duties"). Arguably because Plaintiffs had to ensure the safety and reliability of the Frito–Lay fleet vehicles, any inquiries and concerns Plaintiffs raised about the unsafe condition of the fleet and/or need for additional equipment/manpower should be considered part of their general duties as mechanics.

Here, even if the Court were to find that Plaintiffs' complaints should properly be considered "whistle-blowing activity" under a broad reading of the CEPA, after reviewing all of the evidence, the Court finds that Plaintiffs' arguments with respect to causation are deficient at this stage of litigation. New Jersey courts require that a plaintiff demonstrate causation "by presenting either direct evidence of retaliation or circumstantial evidence that justifies an inference of retaliation." *Zaffuto v. Wal–Mart Stores, Inc.,* 130 F. App'x 566, 569 (3d Cir.2005); *Bocobo v. Radiology Consultants of S. Jersey, P.A.,* No. 02–1697, 2005 WL 3158053, at *3–4 (D.N.J. Nov.21, 2005). This is not a burden that can be met by mere speculation: a plaintiff must demonstrate a factual nexus between the protected activity and the retaliatory employment action. *See Wheeler v. Twp. of Edison,* No. 06–5207, 2008 WL 1767017, at *9 (D.N.J. Apr.15, 2008); *Hancock v. Borough of Oaklyn,* 347 N.J.Super. 350, 790 A.2d 186, 194 (N.J.Super.Ct.App.Div.2002). Temporal proximity alone is insufficient to establish causation under the CEPA. *See Hancock v. Borough of Oaklyn,* 347 N.J.Super. 350, 790 A.2d 186, 194 (N.J.Super.Ct.App.Div.2002) (citing *Bowles v. City of Camden,* 993 F.Supp. 255, 263–64 (D.N.J.1998)).

Plaintiffs concede that the decision to terminate them was made by Montgomery alone. Plaintiffs, however, have not offered any non-speculative evidence to suggest that Montgomery, knew about, let alone acted in consideration of, Plaintiffs' alleged whistle-blowing activities. Plaintiffs merely assert that:

> One must question why, if there were supposedly so many issues with both individuals' work performance, and so many (identical) criticisms, this was never an issue before, but only became problematic, at the identical time, after they complained about the multitude of safety issues involving the fleet? It is respectfully suggested that the most obvious reason, and the only reason that truly makes sense is that this was retaliation for Plaintiffs' protected whistleblowing activity.

***6** (Thibodeau Opp'n at 28). Plaintiffs' whimsical assertions, however, at this stage are insufficient to avoid summary judgment. The record before the Court is empty as to the October 4, 2006 letter being received by Defendant, let alone that Montgomery was aware of the letter or the contents thereof. Nor have Plaintiffs proffered any evidence which would suggest that Montgomery initiated the January 21, 2007 meeting and development of the Expected Actions List to retaliate against Plaintiffs' alleged whistle-blowing. Thibodeau concedes that he never sent copies of the letter to Montgomery or otherwise mentioned that he sent the letter. (Thibodeau's Resps. to Def's Statement of Facts ¶¶ 59–60). Moreover, when Thibodeau was asked at deposition whether he expressed any concerns with respect to safety issues, he responded:

> I don't know if I actually said they were safety issues, you know. I didn't run up to them and say you are violating the law.... I would go and talk to Tyler basically and tell him hey, the springs are broken ... I didn't say Tyler, it's a safety issue ... I don't think I said this is a safety violation and I'm running to OSHA to tell on ya. It wasn't like that.

(Wolin Cert., Ex. C 575:19–576:7). Additionally, Mehalis has alleged no specific whistle-blowing activity likely known by Montgomery. Mehalis' alleged

whistle-blowing activities largely consist of statements made prior to Montgomery being hired and/or interactions with other managers without disciplinary authority over him. A potential "retaliatory motive on the part of non-decisionmakers is not enough to satisfy the causation element of a CEPA claim." *Caver v. City of Trenton,* 420 F.3d 243, 258 (3d Cir.2005).

Although Plaintiffs suggest that they experienced "bullying" and "on-going antagonism" prompting Thibodeau to purchase a tape recorder, *see* (Thibodeau Opp'n at 25), Plaintiffs have described no specific incidents that a reasonable juror could rely on in determining that Plaintiffs' whistle-blowing caused the adverse employment actions in this case. Plaintiffs have provided no evidence to suggest that any of the managers were aware of, let alone acted in consideration of, Plaintiffs' outside complaints in engaging in the alleged "bullying." In the absence of any record evidence supporting causation, this Court finds that there is no material fact at issue with regard to causation.

Finally, even if the Court were to assume *arguendo* that Plaintiffs have presented sufficient evidence to support a prima facie case of causation, Defendant has presented ample evidence of legitimate, non-discriminatory reasons for their actions towards Plaintiffs. Defendant contends Plaintiffs were reprimanded and given the Expectation Actions List after numerous complaints by sales representatives concerning the condition of the fleet. Moreover, Defendant contends that even after receiving the Expectation Actions List Mehalis was found falsifying documents and Thibodeau failed to perform his duties as a mechanic leading to their respective terminations.

*7 Having found that Defendant has successfully articulated a legitimate, non discriminatory reason for its decision to terminate the Plaintiffs, which is supported by evidence in the record, the burden would shift back to Plaintiffs to show that there is a genuine issue for trial. *Blackburn,* 179 F.3d at 94 (citing Fed.R.Civ.P. 56). Here, Plaintiffs have presented no admissible evidence to indicate that the Frito–Lay's reasoning was "implausible, inconsistent, incoherent, or contradictory." *Bocobo,* 2012 U.S.App. LEXIS 7642, at *23; *see also Blackburn,* 179 F.3d at 103; *Fuentes v. Perskie,* 32 F.3d 759, 764 (3d Cir.1994). Thibodeau attempts to create a contradiction in FritoLay's reason for his termination by alleging, in his certification, that he never performed the safety inspection on February 4th as set forth in the termination memorandum. This certification, however, is not evidence. *See* Fed.R.Civ.P. 56(c)(4). Moreover, an unsworn certification such as this, which is not supported by any documentary or testimonial evidence, is plainly insufficient to defeat summary judgment. *See, e.g., Byrne v. Monmouth Cnty. Dep't of Health Care Facilities,* 372 F. App'x 232, 234 (3d Cir.2010). Therefore, the Court does not consider any allegation stated in this certification as sufficient to create a factual dispute precluding summary judgment. Because Plaintiffs have not established a prima facie case or met their burden in presenting evidence of pretext, the Court does not believe a reasonable jury could find in their favor. Accordingly, judgment will be entered on Plaintiffs' CEPA claims in favor of the Defendant.

IV. CONCLUSION

For the reasons stated above, it is on this 29th day of June, 2012,

ORDERED that Defendant Frito–Lay, Inc.'s Motions for Summary Judgment against John Mehalis [docket # 50] and Curtis Thibodeau [51] are hereby GRANTED; and it is

ORDERED that this case is hereby CLOSED.

D.N.J.,2012.
Mehalis v. Frito-Lay, Inc.
Not Reported in F.Supp.2d, 2012 WL 2951758 (D.N.J.)

END OF DOCUMENT

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Only the Westlaw citation is currently available.

United States District Court,
D. New Jersey.
R. Dale MITCHELL, Plaintiff,
v.
UBS SERVICES USA LLC, Defendant.

Civ. Action No. 07–1651 (KSH).
June 26, 2009.

West KeySummary**Civil Rights 78 ⇐1209**

78 Civil Rights
78II Employment Practices
78k1199 Age Discrimination
78k1209 k. Motive or Intent; Pretext.
Most Cited Cases

Former employee was not discriminated against due to his age under the New Jersey Law Against Discrimination (NJLAD) when he was terminated. The employer's reason for terminating employee, poor performance, was not pretextual. The job-related errors were well documented and undisputed, the importance of accuracy maintaining accurate data was undisputed, and many of the errors were repetitive. N.J.S.A. 10:5–1.

R. Dale Mitchell, c/o Vanguard Integrity, Las Vega, NE, pro se.

Dawn L. Jackson, The Law Office of Dawn L. Jackson, LLC, West Paterson, NJ, for Plaintiff. Francis X. Dee, McElroy, Deutsch, Mulvaney, & Carpenter, LLP, Newark, NJ, for Defendant.

OPINION

KATHARINE S. HAYDEN, District Judge.

***1** In early 2001, defendant UBS Services USA LLC ("UBS") hired plaintiff R. Dale Mitchell, who was almost 54 years old at the time, to work in its Corporate Information Security ("CIS") Department. Four years later, in 2005, UBS fired Mitchell, citing his persistent failure to satisfy the company's employment expectations. In response, Mitchell filed a two-count complaint against UBS, alleging violations of the New Jersey Law Against Discrimination ("NJLAD"), N.J.S.A. § 10:5–1, *et seq.* He claims in this diversity action that UBS discriminated against him because of his age and in retaliation for complaining about the discrimination. UBS has moved for summary judgment [D.E. # 22], which the Court now grants for the reasons that follow.

I. FACTS & PROCEDURAL HISTORY[FN1]

FN1. Facts have been drawn from the amended complaint [D.E. # 6], the parties' statements of material fact submitted pursuant to Local Civil Rule 56.1, and exhibits submitted in support thereof. Material facts discussed herein are undisputed unless specifically stated otherwise.

UBS provides information technology services to its affiliated companies. Def. R. 56.1 Statement of Material Facts ("Def.Facts") ¶ 1. Its CIS Department is responsible for ensuring the technological security and integrity of computer systems throughout the UBS family. *Id.* ¶ 2. The company hired Mitchell on February 2, 2001 to work as a Lead Associate in the CIS Department; Mitchell was 53 years and 11 months old at the time. *Id.* ¶¶ 3–4, 7.[FN2] Peter Sacher, a Systems Administration manager and Mitchell's direct supervisor throughout his employment at UBS, interviewed and participated in the decision to hire Mitchell. *Id.* ¶¶ 5–6; Certification of Peter Sacher ("Sacher Cert.") ¶ 5. Mitchell asserts that Sacher did not play a primary role in the interview and that the responsibility for the hiring decision came from Technology Officer Regina Toney. Pl. Resp. 56.1 Statement of Facts ("Pl.Resp.Facts") ¶ 5. Mitchell admitted at his deposition, however, that he did not know who made the ultimate hiring decision. Def. Rep. R. 56.1 Statement of Facts ("Def.Rep.Facts")

¶ 5.

FN2. Mitchell was actually hired by PaineWebber, UBS Services's predecessor in interest. *See* Plaintiff's Exhibit ("Pl.Ex.") 1, attached in opposition to defendant's motion for summary judgment.

As a Lead Associate, Mitchell's responsibilities included the following:

- Establishing computer access for authorized users;
- Creating user IDs to ensure that UBS employees had sufficient access to the UBS system, consistent with their security clearances;
- Resolving and closing "tickets"—troubleshooting requests for assistance by computer users experiencing technical difficulties;
- Issuing passwords to UBS computer users to permit them to access the mainframe;
- Creating reports for user access;
- Conducting forensic analysis of computer users' activity;
- Providing "on-call" support upon request;
- Registering the correct installation date for computer programs, which are necessary for programs to be put into production at the correct time.

Def. Facts ¶¶ 10–15 [FN3]; Certification of David B. Beal ("Beal Cert.") Ex. 5 (hereinafter referenced as "Mitchell Dep") at 26:8–14; 28:25–31:23; 34:17–35:25; 36:1–25.[FN4] When asked at his deposition whether he considered CIS's role within UBS important, Mitchell responded, "Oh yes, critical," and elaborated that without CIS, "things could be mismanaged, things could be misappropriated, things could be—information could be damaged. In a financial institution, it is built on trust and integrity of the data. We must keep that [data] *precisely accurate.*" Mitchell Dep. at 25:5–15 (emphasis added).

FN3. In his responsive statement of facts, Mitchell partially "disputes" UBS's characterization of some of the listed employment responsibilities. *See* Pl. Resp. Facts ¶¶ 13–15. These minor quibbles, however, are not material—the parties are in essential agreement as to what duties Mitchell was required to perform.

FN4. Mitchell also submits as Exhibit 17 portions of his deposition testimony in opposition to defendant's summary judgment motion. Where citations to his deposition do not appear in the Beal Certification, they appear at Exhibit 17.

***2** Mitchell's employment went without incident until August 2004, when his superiors began alerting him of a series of job-related errors. On August 11, 2004, Toney advised Mitchell via e-mail that he had processed a ticket (a troubleshooting request) incorrectly by assigning the user the wrong access code. Beal Cert. Ex. 6; Def. Facts ¶ 17. On August 19, 2004, Toney again e-mailed Mitchell, stating that he had failed to close a number of tickets that were supposed to be closed on August 4, 2004 (Mitchell had instead placed the tickets in a hold status). Beal Cert. Ex. 7. She requested that Mitchell close 12 remaining tickets and advised him that she "need[ed him] to start taking extra steps and double check the information that's given in the request forms and not just place the tickets in pending or on-hold status." *Id.;* Def. Facts ¶ 18. The next day, Toney alerted Mitchell that he had granted certain access to users who had not been approved, and emphasized that "I must stress to you to be careful when you are defining new dataset profiles[,] if you need help please see me." Beal Cert. Ex. 8; Def. Facts ¶ 19.

On August 23, 2004, Toney e-mailed Mitchell the following:

> We were told **two years ago** by auditing that we can **no longer** setup user ids and make their **non-expiring password the same as the *id.*** We spoke about this issue back on 7/26/04 when you processed GTS ticket 250034 to create the two non-expiring user ids RESPRD1 and RESPRD2. You forgot **again** to run the **encryption job** that you created for the group back in December of 2000 that answered our audit issue .... If you need more training on these procedures please see me. If one of these processes are [sic] not followed correctly we will never be able to pass the audit.

Beal Cert. Ex. 9 (bold in original); Def. Facts 20. A week later, on August 31, 2004, Noel Murphy (another UBS employee) e-mailed Mitchell (and cc'd Toney and Sacher) the following in response to Mitchell's modification of a ticket request that he had submitted:

> Here we go again. You cannot modify either a new job request or an update to [a] current job request. Once we process a request from you that's it. You then have to fill out another online request form.... We will then receive this new request and act on it. Once a request is marked complete or in rare cases rejected that's it. You either verify your request was done or you resubmit the request again correctly. In the latter case yes a new request number is generated.

Beal Cert. Exh 10; Def. Facts ¶ 21. Toney replied to Murphy's e-mail by e-mailing Sacher, stating that "[w]e went over this issue last week. Dale was told he needs to generate a new ticket for [h]is updates, but again he used an old ticket number ...." *Id.*

On September 7, 2004, Mitchell e-mailed Sacher, alerting Sacher to an error he had made regarding changing a portion of a computer program, and advised him that he had forgotten to make the necessary change, but that the error was in the process of being corrected. Beal Cert. Ex. 11; Def. Facts ¶ 23.

*3 On November 10, 2004, Sacher e-mailed Mitchell requesting an explanation as to why he had sent an e-mail to a certain group of employees (the "Technology Infrastructure" distribution list) that should not have received it. Beal Cert. Ex. 13; Def. Facts ¶ 25. Mitchell explained that he was trying to find the correct recipient of the e-mail because the normal contact was out of the office, and unfortunately the list "turned out bigger than [he] thought." Beal Cert. Ex. 13. Approximately two months later, on January 11, 2005, Mitchell was sent an e-mail by Ron Seggio, Director of Application Support and Communication Services, again admonishing him to stop using the Technology Infrastructure distribution list because the e-mail to that list was being "delivered to many many people that should not receive it." *Id.* Ex. 14 (repetition in original); Def. Facts ¶ 26. In response, Sacher (who had apparently been forwarded the e-mail) reminded Mitchell of the erroneous e-mail in November 2004 that he had sent to the Technology Infrastructure distribution list, which sends a message to the "entire division." Beal Cert. Ex. 14. Sacher then demanded to know why Mitchell had again used the Technology Distribution list after being warned not to only two months before. *Id.*

In mid-January, 2005, Mitchell rotated in as the on-call associate responsible for troubleshooting technical issues that arose during off-hours. Beal Cert. Ex. 16. At 5:00 a.m. on January 15, 2005, Toney e-mailed Mitchell (and cc'd Sacher) with a technical problem that had arisen during the night. Beal Cert. Ex. 15. She stated that she had tried calling him at two different phone numbers, explained the particular technical issue, and asked him to verify her understanding of the issue. *Id.* Later that morning, Sacher e-mailed Mitchell, asking him to confirm that the numbers at which Toney had called him were correct; Sacher explained that he too had experienced problems reaching him at the numbers. *Id.* Mitchell responded to Sacher at 10:18 a.m., stating that "[the numbers] are correct. I[mu]st have left my PC plugged in when I fell asleep—the cell phone was on the charger. I was going to check the job the next morning rather than at 3AM, for there

was no rush." *Id.* Four days later, on January 19, 2005, Sacher e-mailed Mitchell to confirm that Mitchell's new laptop was functional (unbeknownst to Sacher, Mitchell had spilled coffee on his old one). Beal Cert. Ex. 16. Sacher stated that "[i]t is critical that you are able to remotely assist with any issues that arise off hours since you are on-call this week." *Id.*

Mitchell does not dispute that he committed the errors described above; rather, he disputes the gravity and exceptional nature of the mistakes. For instance, Mitchell asserts that the incorrect ticket that he processed on August 11, 2004 was a type of error "not uncommon for his co-workers." Pl. Resp. Facts ¶ 17; Mitchell Dep. at 168:14–23. With respect to his repeated e-mails to the Technology Infrastructure distribution list, Mitchell minimizes the impact of the mistakes, asserting that "in most cases, the only problem with sending an e-mail to the wrong distribution list [i]s that it creates clutter." Pl. Resp. Facts ¶ 26; Mitchell Dep. at 58:5–9. Regarding the tickets which Toney specifically advised Mitchell that he had failed to process and which prompted her request for him to take extra steps to close them, he avers only that the "amount of time required to close a ticket varies depending upon the ticket." Pl. Resp. Facts ¶ 18; Mitchell Dep. at 153:5–16. With respect to Toney's inability to contact him during his January 15, 2005 on-call duty, Mitchell acknowledged that he should have been reachable at the time Toney was attempting to contact him. Mitchell Dep. at 65:13–22. He asserts, however, that it was not uncommon for people in his department to be unreachable while on call, and that that incident was the first time he had been unavailable to meet his duties as the on-call associate. *Id.* at 172:15–173:24; *see also* Pl. Resp. Facts ¶ 30. FN5 Mitchell emphasizes that the other errors were easy to make and caused insignificant harm to the company, or in some cases, none at all. Pl. Resp. Facts ¶¶ 21, 23, 24, 26.

FN5. Mitchell also asserts that one of the reasons he could not be reached at the time was because he was in the subway and his pager could not receive radio signals. Mitchell Dep. 173:13–18; Pl. Resp. Facts ¶ 30. It is unclear, however, how Mitchell could be asleep and in the subway simultaneously.

***4** Meanwhile, Mitchell asserts that between October 2004—shortly after the time in which UBS now asserts that he began underperforming—and January 2005, he and Sacher had a series of one-on-one meetings. Def. Facts ¶ 40; Mitchell Dep. at 101:8–9, 109:15–20, 156:4–10. He states that during these meetings, Sacher would begin "ranting and raving and shouting," but he cannot recall precisely what Sacher said other than that he called Mitchell "absentminded," "forgetful," and "slow." Def. Facts ¶¶ 41, 48; Pl. Resp. Facts ¶ 48; Mitchell Dep. at 101:19–103:23, 184:22–187:1. At his deposition, Mitchell described Sacher's demeanor at the first meeting, and his own reaction thereto, as follows:

> I was called into his office. The door was closed. And he started one of his rants. And he was complaining about, oh, mistakes, not crossing the Ts or dotting the Is or a typo or a date that was off or something like that. And it was not constructive.... To my opinion, it was irrational.... He was using a very loud voice.... I was appalled and bewildered.

Mitchell Dep. at 156:11–157:13; Def. Facts ¶ 42; Pl. Resp. Facts ¶ 42. When pressed as to what Sacher actually said, this exchange followed:

> Q: So he called you into his office. And tell me what you can recall was said in the conversation as closely as you can recall it as if I was listening to it.
>
> A: That's the problem. A lot of what he said didn't make a lot of sense.
>
> Q: Regardless of whether it made sense—
>
> A: No—

Q: —can you tell me what he said?

A: No.

Q: You can't recall what he said?

A: No.

Q: Can you recall generally what he said?

A: Basically ranting and raving and then shouting.

Q: Ranting and raving and shouting?

A: Yes.

Q: But you cannot recall anything specific that he said?

A: No. It was so—it didn't make any sense.

Q: I'm not following you. What do you mean it didn't make any sense?

A: It was irrational.

Q: What about it was irrational that he said?

A: The train of thought.

Q: But you can't tell me what it was—

A: Not specifically.

Q: —that led you to believe it was irrational?

A: No.

Q: Can you tell me why you claim that it amounted to discrimination on the basis of your age?

A: Again, going back to you forget things and you're absentminded, and basically going back to you forget things, you forget things, you forget things.

Q: Now, you're saying going all the way back to that. I'm not following that. Are you saying that that was something that was said in October 2004?

A: Yes. Yes.

Q: So you do recall something that was said in October of 2004?

A: Yes.

Q: Okay.

A: You forget things.

Q: Okay. Other than you forget things, is there anything else that you can recall—

A: No.

Q: —that he said in this conversation?

A: No.

Mitchell Dep. at 102:10–104:14.

Mitchell also could not recall specifically anything Sacher said at the second meeting between the two—weeks later—in part because he asserts that he "was very upset." Def. Facts ¶ 43; Pl. Resp. Facts ¶ 43; Mitchell Dep. at 107:5–16. He described Sacher's demeanor at the second meeting much the same as he did the first:

> ***5** He was again, very, very angry about something and just redressing me [to] no end about petty mistakes.... I sat back and tried to figure out what this was all about and tried to defend my work as more important than crossing Ts and dotting Is.

Mitchell Dep. at 165:23–166:8; Def. Facts ¶ 46; Pl. Resp. Facts ¶ 46. With respect to the other meetings, Mitchell could not recall anything specific that Sacher said, but did describe them as "pretty much cookie-cutter repeats of ranting and raving." Def. Facts ¶ 45; Mitchell Dep. at 156:3–10.

After his second meeting with Sacher, Mitchell spoke with Jennifer Ryan, a Human Resources

Generalist, regarding Sacher's behavior during the two prior meetings. Def. Facts ¶ 51; Pl. Resp. Facts ¶ 51. Mitchell testified that he told Ryan "how the discussion with Peter ... had progressed," that "she took notes," and that "she was conciliatory, she was comforting, and she was offering advice ..." Mitchell Dep. at 113:15–16, 114:22–24. He cannot remember, however, anything specific that either he or Ryan said at the meeting other than that he said "I don't understand why [Sacher] is behaving this way." Mitchell Dep. at 113:22–115:9; Def. Facts ¶ 51; Pl. Resp. Facts ¶ 51. When Ryan offered to speak to Sacher, Mitchell declined, telling her:

> Maybe he'll calm down and straighten out and this won't happen again. Maybe there's something bothering him that we don't know, family matter, I don't know what it is, but maybe he just woke up on the wrong side of the bed.... [L]et's see if he calms down and everything goes back to peace in the valley.

Mitchell Dep. at 115:20–25, 116:24–25; Def. Facts ¶ 51; Pl. Resp. Facts ¶ 51.

Mitchell again advised Ryan of Sacher's alleged intemperate conduct in October or November 2004, but cannot remember what was said, other than a general "recounting of what had transpired" between him and Sacher on that particular day. Def. Facts ¶ 52; Mitchell Dep. at 117:16–119:13. Mitchell testified that he had three more meetings between November 2004 and January 2005—two with Ryan and one with another Human Resources person (whose name he could not remember). Mitchell Dep. at 119:14–123:19. He could not recall specifically what was said at those meetings, other than that at each meeting he recounted to Ryan (and on the one occasion, the other unidentified employee) his recollection of what Sacher had said to him. Def. Facts ¶¶ 53–55; Pl Resp. Facts ¶ 53–55. On January 17, 2004, Mitchell agreed to allow Ryan to intervene on his behalf by meeting with Sacher. Def. Facts ¶ 57; Mitchell Dep. 230:3–7. Mitchell cannot recall exactly what was said at the meeting among the three, but he asserts that they resolved that Sacher and Mitchell would try to work together better. Mitchell Dep. at 125:11–126:12.

Although Mitchell received satisfactory employment reviews in 2001, 2002, and 2003, in his 2004 performance review issued on January 24, 2005, Sacher rated Mitchell's overall contribution a "4" (Objectives Partially Met) and his overall competency a "D" (Below Profile/Partially Effective).[FN6] Def. Facts ¶ 27; Pl. Exhs. 2, 3. Under the heading "Development Areas," Sacher stated that "Dale needs to focus on the details of both his daily responsibilities as well as the special reports he generates. He has repeatedly made errors that should have been recognized before he implemented his changes." Sacher Cert. Ex. 1; Def. Facts ¶ 27.

> FN6. UBS rates employees on a performance rating scale using contribution and competency criteria. Contribution is measured on the following 1–5 scale: 1–Objective(s) Significantly Exceeded; 2–Objective(s) Exceeded; 3–Objective(s) Met; 4–Objective(s) Partially Met; and 5–Objective(s) Not Met. Competency is measured on the following A–E scale: A–Greatly Exceeds Profile: Extremely Effective; B–Exceeds Profile: Very Effective; C–Meets Profile: effective; D–Below Profile: Partially Effective; and E–Much Below Profile: Inconsistently Effective. Def. Facts ¶ 28.

***6** Mitchell's mistakes continued. On January 27, 2005, Sacher e-mailed him asking why he had entered an incorrect installation date on a particular project. Beal Cert. Ex. 17. Mitchell admitted in his deposition that the installation date that he had entered was October 10, 2005 when, as Sacher noted in the e-mail, it should have been January 28, 2005. Mitchell Dep. at 67:1–24. He stated that he made the mistake because "[s]ometimes we reuse [forms] that still ha[ve] old dates on them[, and that] [i]f you're not very careful, you can leave the

old date there." *Id.* at 67:17–19. Mitchell further acknowledged that, had Sacher not caught the error, the package would not have been installed. *Id.* at 67:15–17. He asserts, however, that "it [wa]s not unusual for one or more of us to miss a typo," *id.* at 67:22–23, and that the "mistake was easily correctable and did not cause any losses to UBS." Pl. Resp. Facts ¶ 31. On February 28, 2005, Toney e-mailed Mitchell informing him that he had created two new user IDs, but had neglected to remove two access groups from the IDs, as Toney had previously explained must be done. Beal Cert. Ex. 18. Mitchell does not dispute that he made this error. Pl. Resp. Facts ¶ 32.

On March 2, 2005, Sacher met with Mitchell in order to place him on a Performance Improvement Plan ("PIP"). Def. Facts ¶ 33; Sacher Cert. ¶ 12. At the meeting, Sacher presented Mitchell with a three-page PIP, entitled "2005 Expectation Setting," which was dated February 7, 2005. Sacher Cert. Ex. 2. The PIP stated the following relevant objectives and expectations for Mitchell's performance going forward:

> **Competency Development/Developmental Needs**
>
> *Ownership and Accountability*
>
> You must take ownership and accountability in the job responsibilities that are part of your day to day duties. Specifically[,] you are responsible to support your share of the telephone calls that are made to the Data Security hotline. You are also responsible to be able to support and be responsive when you are contacted off hours to support security issues. As an example[,] on January 15, 2005 when Job TSSD80AP failed[,] Regina Toney[,] the Lead of our group repeatedly tried to contact you with no success.
>
> *Attention to Detail*
>
> You need to demonstrate a consistent[,] sustained focus on "attention to detail" in all aspects of your job and responsibilities. There is more work to be done here.... Going forward I fully expect you to dedicate yourself to focusing your efforts on incorporating an "attention to detail" mindset across all your areas of responsibility[.]
>
> **Conclusion**
>
> I will sit with you on a monthly basis to discuss your progress on the above stated objectives. It is my desire to see you succeed in your position as a Lead Associate. Expectations, objectives[,] and your ongoing progress will certainly be discussed during our regular monthly meetings also.

Sacher Cert. Ex. 2. Mitchell, Sacher, and Toney signed the PIP, although it is unclear whether Toney attended the meeting. *Id.*

*7 On March 4, 2005, Mitchell wrote to Ryan to tell her about a tragic 1991 accident that had fractured his skull and inner ear bones, left him without an ear drum, severed his olfactory nerves, and had affected his memory. Beal Cert. Ex. 19. He closed the letter by stating that "[w]hen I am told that I am forgetful and absentminded, I am the first to agree that I have been all my life. I am just now more so than before February of 1991." *Id.* Mitchell does not dispute making this statement or its truth, but characterized it at his deposition as "tongue in cheek." Mitchell Dep. at 136:16–137:10; Pl Resp. Facts ¶ 60.

On Tuesday, March 22, 2005, Sacher e-mailed Elaine Pellunat–Rodriguez, Director of Human Resources, confirming his discussion with her on March 8, 2005 regarding Mitchell's performance. Sacher Cert. Ex. 3. In the e-mail (on which Ryan and another individual, Kent Cinquegrana, were cc'd), Sacher indicated that at Pellunat–Rodriguez's suggestion, he had "compiled documentation of the incidents that [he] ... needed to address with Dale as it relate[d] to his performance in the group." *Id.* The e-mail further discussed Mitchell's 2004 per-

formance failures and the development of the PIP. *Id.* It then stated the following:

> To date for this year I have not seen any improvement in Dale[']s performance which I also have documented and spoke to Dale about. The main reason why both Kent and myself met with you was to show our concern that Dale[']s performance has not improved and to also stress that as a Senior security administrator in my group[,] Dale has administrative privileges at the highest level to perform his job. We are very concerned that we have been fortunate that these incidents with Dale have not resulted in a major impact to the firm. However[,] we feel the risk does exist. I would like to know how much documentation and discussions with Dale you will require from me before we explore more serious actions?

Id. UBS asserts that between the time the PIP was implemented on March 2, 2005 and Sacher's March 22, 2005 e-mail, Mitchell's performance did not improve. Sacher Cert. ¶ 4. It has not submitted, however, any documentation pointing to any specific deficient performance issues after Mitchell, Sacher, and Toney signed the PIP. *See* Pl. Resp. Facts ¶ 35.

At some point between Sacher's e-mail to Pellunat–Rodriguez and April 12, 2005, the ultimate decision was made to terminate Mitchell's employment, a decision in which Sacher participated. Def. Facts ¶ 36; Pl. Resp. Facts ¶ 36. At a termination meeting held on April 12, 2005 between Mitchell, Sacher, and Ryan, Sacher gave reasons for his termination:

> We have had some concerns/issues that we have discussed with you in detail with appropriate examples and development activities in order to help you improve in these areas. You have expressed a difference of opinion regarding your performance level versus the level that I perceive you at which has created a strain in our overall working relationship and has resulted in negative affect [sic] on the department. We feel that at this time it is in the best interest for you and the firm, if we end this relationship effective today.

***8** Def. Facts ¶ 37; Sacher Cert. ¶ 16, Ex. 4. FN7 At the time he was terminated, Mitchell was 58 years old, and Sacher was 43 years old. Mitchell Dep. at 24:7–8; Def. Facts ¶ 38.

> FN7. Sacher has appended to his certification a "Sample Script" memorializing his conversation with Mitchell. Sacher Cert. ¶ 16, Ex. 4. This document is substantially similar—although not identical—to what Sacher certifies he advised Mitchell orally at the termination meeting. Mitchell does not dispute the language in which UBS asserts Sacher orally advised him of his termination, Pl. Resp. Facts ¶ 37, and thus the Court will assume that the language appearing at paragraph 37 of the defendant's statement of facts (and paragraph 16 of Sacher's certification) is the language that Sacher actually used.

Mitchell filed a two-count complaint in this Court on April 9, 2007 [D.E. # 1], and thereafter filed an amended complaint on May 17, 2007 [D.E. # 6]. FN8 The amended complaint asserts that UBS violated the NJLAD by terminating his employment on account of his age and in retaliation for complaints he had made about earlier discriminatory acts taken against him. Am. Compl. ¶¶ 12–15. UBS answered on June 11, 2007 [D.E. # 8], and filed this motion on November 24, 2008 [D.E. # 22]. The case was transferred to the undersigned on February 24, 2009 [D.E. # 33]. On March 30, 2009, Mitchell—who by then was without benefit of counsel FN9—filed a letter [D.E. # 35] requesting leave to further amend the complaint to add a count of discrimination on the basis of disability. After holding a conference call on the issue, Magistrate Judge Patty Shwartz entered an order [D.E. # 37] denying the request to amend and deeming Mitchell *pro se* unless and until counsel enters an appearance on his behalf.

FN8. Diversity jurisdiction is proper pursuant to 28 U.S.C. § 1332(a). Mitchell has not pursued a federal cause of action under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623, *et seq* ("ADEA").

FN9. It appears that Mitchell's attorney has resigned from the practice of law. *See* D.E. # 29.

II. STANDARD OF REVIEW

Summary judgment is appropriate under Rule 56(c) of the Federal Rules of Civil Procedure "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court must view the facts in the light most favorable to Mitchell, and must accordingly draw all inferences in his favor. *See Gray v. York Newspapers,* 957 F.2d 1070, 1078 (3d Cir.1992). In opposing the motion, Mitchell "may not rest upon mere allegations or denials of the ... pleading"; instead, he must, "by affidavits or as otherwise provided in [Rule 56]," set forth "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 n. 11, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). In other words, there must be sufficient evidence for a jury to return a verdict for him; merely colorable evidence or evidence not significantly probative will not suffice. *Ambruster v. Unisys Corp.,* 32 F.3d 768, 777 (3d Cir.1994); *see also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). UBS's burden "may be discharged by 'showing' ... that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

III. DISCUSSION

A. Legal Standards

As is relevant here, the NJLAD proscribes the discharge of any employee based on his or her age, absent a lawful justification. N.J.S.A. § 10:5–12(a). The act further prohibits "reprisals against any person because that person has opposed any practices or acts forbidden" under the NJLAD (i.e., age discrimination). *Id.* § 10:5–12(d). The analysis governing Mitchell's NJLAD claims is informed by that under the federal ADEA. *See Retter v. Georgia Gulf Corp.,* 755 F.Supp. 637, 638 (D.N.J.1991), *aff'd,* 975 F.2d 1551 (3d Cir.1992); *see also Waldron v. SL Industries, Inc.,* 56 F.3d 491, 503–04 (3d Cir.1995); *Dixon v. Rutgers,* 110 N.J. 432, 442–43, 541 A.2d 1046 (1988); *Young v. Hobart West Group,* 385 N.J.Super. 448, 458, 897 A.2d 1063 (App.Div.2005); *Giammario v. Trenton Bd. of Educ.,* 203 N.J.Super. 356, 361, 497 A.2d 199 (App.Div.1985). Thus, the Court applies the familiar evidentiary burden-shifting paradigm established in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 801–04, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). FN10 Under that framework, Mitchell has the initial and relatively light burden of establishing a *prima facie* case of discrimination. *Tex. Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). If he does so, an inference of discrimination arises, and UBS must produce a legitimate non-discriminatory justification in response thereto. *Fuentes v. Perskie,* 32 F.3d 759, 763 (3d Cir.1994). Upon producing such a justification, the initial discriminatory inference evaporates, and Mitchell must then produce evidence creating a genuine issue of material fact as to whether UBS's proffered justification is pretextual. *Id.* at 765.

FN10. The *McDonnell Douglas* framework applies to Mitchell's retaliation claims under the NJLAD as well. *See Moran v. Davita, Inc.,* No. 06–5620, 2009 U.S. Dist. LEXIS 22951, at *49–53, 2009 WL 792074 (D.N.J. Mar. 23, 2009) (Pisano, J.) (analyzing retaliation claim under NJLAD using *McDonnell Douglas* framework). The Supreme Court of the United States

recently eradicated a burden-shifting approach (with respect to the burden of persuasion) in mixed-motives cases brought under the ADEA, holding that a plaintiff carries the burden of persuasion at all times of proving that the employer's illegitimate reason was the "but for" cause of the adverse employment action. *See Gross v. FBL Financial Servs., Inc.,* No. 08–441, slip op. at 1, 4–5, 12 (June 18, 2009), *available at* http://www.supremecourtus.gov/opinions/08pdf/08–441.pdf Mitchell does not argue that this is a mixed-motives case, and in any event *Gross* did not rule out a *McDonnell Douglas* evidentiary analysis in non-mixed-motives cases brought under the ADEA. *See id* . at 6–7 n. 2 (majority opinion) ("[T]he Court has not definitively decided whether the evidentiary framework of [*McDonnell Douglas*] utilized in Title VII cases is appropriate in the ADEA context."); *see also id.* at 5–6 (Stevens, J., dissenting opinion) (listing non-mixed-motives cases that have applied *McDonnell Douglas* evidentiary framework). Additionally, the New Jersey Supreme Court has yet to overrule the application of *McDonnell Douglas* to age discrimination claims brought under NJLAD. Thus, *Gross* does not affect this case, and the Court therefore applies *McDonnell Douglas.* Likewise, the Court continues to assume that under New Jersey anti-discrimination laws, an illegitimate "motivating" or "determinative"—rather than a "but for"—cause for termination constitutes an unlawful employment practice, at least for purposes of summary judgment analysis. *See Fuentes v. Perskie,* 32 F.3d 759, 764 (3d Cir.1994); *DeWees v. RCN Corp.,* 380 N.J.Super. 511, 527–28, 883 A.2d 387 (App.Div.2005) (adopting *Fuentes* summary judgment framework). To the extent the Court cites federal case law that no longer applies post-*Gross* in the ADEA non-mixed-motives context, it does so with the understanding that those cases accurately state the current legal standards under the anti-discrimination laws of New Jersey.

B. Analysis

***9** Mitchell's theory in this case is that his age was the reason behind Sacher's verbal abuse, beginning in October 2004 and continuing through April 2005, as well as his ultimate termination from UBS. *See* Am. Compl. ¶¶ 1, 6(a). Specifically, he alleges that Sacher's outbursts at the one-on-one meetings with Mitchell were inflicted only upon him, and not on younger employees similarly situated. *Id.* ¶ 6(a). He also complains of Sacher's micromanagement of his—but not his younger colleagues'—work. *Id.* ¶¶ 6(g), 6(1). As evidence of discriminatory conduct, Mitchell avers that "Sacher's criticisms of [his] being forgetful [and absentminded] were ... based, in part, upon a stereotypical assumption that employees over a certain age are forgetful [and absentminded]." *Id.* ¶ 6(e). The amended complaint further asserts that UBS fired him in retaliation for his meetings with Ryan, during which he complained about Sacher's alleged age discrimination. *Id.* ¶ 15.

1. *Discrimination*

To establish a *prima facie* case of age discrimination under the NJLAD, Mitchell must prove by a preponderance of the evidence the following: (1) that he is a member of a protected class; (2) that he performed his duties at a level that met UBS's legitimate expectations; (3) that he suffered an adverse employment action; and (4) that he was replaced by a "candidate sufficiently younger to permit an inference of discrimination." *Young,* 385 N.J.Super. at 458, 897 A.2d 1063 (citing *Bergen Commercial Bank v. Sisler,* 157 N.J. 188, 210–13, 723 A.2d 944 (1999)). The first, third, and fourth elements of a *prima facie* case are not in dispute here. UBS argues, however, that Mitchell has not established that he lived up to the legitimate expectations placed upon him by his employer. Def. Br. in Support of Motion for Summ. Judg. ("Def.Br.") at 16.

UBS further argues that even if Mitchell has established a *prima facie* case, he has not adduced evidence sufficient to cast doubt on UBS's proffered reason for terminating him.

Whether Mitchell has established a *prima facie* case of discrimination is a close question. Mitchell does not have a heavy burden at this stage. *Zive v. Stanley Roberts, Inc.,* 182 N.J. 436, 455, 867 A.2d 1133 (2005). The Court must make an objective assessment of Mitchell's performance considering only the evidence he has adduced; because performance markers like poor evaluations and documented job errors are "more properly debated in the second and third stages of the [*McDonnell Douglas*] burden-shifting test, they do not come into play as part of the second prong of the *prima facie* case." *Id.* Instead, Mitchell correctly argues that all he must show is that "[he] was actually performing the job prior to the termination ." *Id.* at 454, 867 A.2d 1133. Given his satisfactory employment from 2001 through most of 2004 and the garden-variety nature of his mistakes, the Court finds that Mitchell has met his relatively light burden of establishing a *prima facie* case of discrimination. *See Moran,* 2009 U.S. Dist. LEXIS 22951, at *45, 2001 WL881255 ("The Court will assume, but not decide, that [plaintiff] established a *prima facie* case of discrimination, and evaluate whether [defendant] has articulated a legitimate, non-discriminatory reason for terminating [plaintiff's] employment ....").

***10** Mitchell does not dispute that UBS's asserted justification—poor performance—is legitimate and non-discriminatory. Pl. Opp. Br. at 8. The Court therefore proceeds to the third stage of the *McDonnell Douglas* inquiry, and asks whether Mitchell can undercut UBS's cited justification as pretextual. To do so, he "must point to some evidence, direct or circumstantial, from which a factfinder could reasonably either: (1) disbelieve [UBS's] articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of [its] action." *Fuentes,* 32 F.3d at 764. In other words, Mitchell "must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [UBS's] proffered legitimate reason[ ] for its action that a reasonable factfinder could rationally find them 'unworthy of credence.' " *Id.* at 765 (quoting *Ezold v. Wolf Block, Schorr & Solis–Cohen,* 983 F.2d 509, 531 (3d Cir.1992).

The Court begins by noting that Mitchell's job-related errors are well documented and undisputed. Additionally, as described above, Mitchell has acknowledged the importance of precision and accuracy in his daily routine. In response to a question as to whether the role of CIS within the UBS family is important, he responded, "Oh yes, critical." Mitchell Dep. at 25:5–8. He then described what could happen without CIS's protection: "[T]hings could be mismanaged, things could be misappropriated, things could be—information could be damaged. In a financial institution, it is built on trust and integrity of the data. We must keep that [data] *precisely accurate." Id.* at 25:9–15 (emphasis added). Despite this admission that meticulous accuracy is an objective of the highest order at CIS, Mitchell does not dispute that beginning in August 2004, he made no less than eleven errors (documented above) that were called to his attention. *See* Def. Rep. Br. at 3–6. In likening the errors to mere failures to cross T's and dot I's that resulted in no significant harm to the company, he seriously minimizes his supervisors' expectations and warnings. Furthermore, many of the documented mistakes are repeated errors, qualitatively identical to those which Toney and Sacher had counseled Mitchell to avoid. While Mitchell might consider the errors miniscule in quality and impact, Toney and Sacher obviously considered them important.

That Mitchell's errors did not cause any significant harm does not mean UBS was unjustified in terminating him for cause. First, Sacher emphasized in his e-mail to Pellunat–Rodriguez that the company had "been fortunate that [Mitchell's errors

had] not resulted in a major impact to the firm. However [,] we feel the risk does exist." Sacher Ex. 3. Given Mitchell's admission that seemingly minor errors could have grievous results, Sacher's perception that Mitchell posed a serious risk was not inappropriate. Second, in assessing pretext, it is not the purview of this Court to select which errors UBS may and may not consider termination events. *See Peper v. Princeton Univ. Bd. of Trs.*, 77 N.J. 55, 87, 389 A.2d 465 (1978) ("Antidiscrimination laws do not permit courts to make personnel decisions for employers"); *Billet v. CIGNA Corp.*, 940 F.2d 812, 825 (3d Cir.1991), *overruled in part on other grounds by St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) ("Barring discrimination, a company has the right to make business judgments on employee status, particularly when the decision involves subjective factors deemed essential to certain positions."); *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1160 (6th Cir.1990) (affirming summary judgment for defendant because plaintiff did not raise a genuine issue of material fact that the employer's reason to discharge him was pretextual when he acknowledged that his supervisors were dissatisfied with his performance, but argued that the employer made "too big a deal" of his problems).

***11** Despite the mistakes that temporally preceded his termination, Mitchell makes three principal arguments to show that UBS's assertion of poor performance is nonetheless pretextual. First, he argues that Sacher berated and criticized him alone for his errors and did not admonish his younger colleagues for similar missteps. Pl. Opp. Br. at 9. Second, he argues that Sacher's use of the words "absentminded," "forgetful," and "slow," when referring to Mitchell, are euphemisms for older workers, and are thus evidence of Sacher's discriminatory animus. *Id.* at 10–12. Finally, he argues that his satisfactory performance reviews in 2001, 2002, and 2003 permit the inference that his 2004 performance review was based on his age. *Id.* at 9–10. These arguments are not persuasive.

First, Mitchell has adduced no evidence—save for his conclusory assertions—that Sacher treated him any differently than his younger compatriots. While he refers to a "mountain of evidence which refutes the claim that [he] was terminated for poor performance," Pl. Opp. Br. at 10, Mitchell has not identified any co-worker who committed the same or a similar amount of mistakes, nor has he provided Sacher's alleged reactions thereto. Furthermore, he admitted at his deposition that he knew nothing about Sacher's method of counseling his colleagues about their performance. Mitchell Dep. at 253:6–13. Sacher has submitted a reply certification in which he avers that "[w]hile Mitchell reported to me, he made significantly more job-related errors than his co-workers." According to Sacher, when Mitchell's "co-workers would make a job-related error, [Toney or he] would counsel the employee about the error, just as [they] would counsel Mr. Mitchell." Sacher Rep. Cert. ¶¶ 3–4. Mitchell has not submitted any evidence (other than his conclusory assumptions) that would permit a factfinder to discredit Sacher's assertion that he and Toney treated all CIS analysts—old and young—the same.

In *Greenberg v. Camden County Vocational and Technical Schools,* 310 N.J.Super. 189, 708 A.2d 460 (App.Div.1998), the plaintiff withstood summary judgment as to pretext in her age discrimination claim by proffering evidence that younger teachers had similar deficiencies and received as many "memos of concern" as she did, yet were retained by the school district. *Greenberg,* 310 N.J.Super. at 205–07, 708 A.2d 460. The plaintiff also submitted a statistical chart illustrating that of all the teachers up for tenure over the previous five years, all female teachers over the age of forty-five were terminated, while all the younger teachers were retained. *Id* . at 206–07, 708 A.2d 460; *see also Richards v. Johnson & Johnson, Inc.*, No. 05–3663, 2009 U.S. Dist. LEXIS 46117, at *23–27, 2009 WL 1562952 (D.N.J. June 2, 2009) (denying summary judgment where plaintiff had proffered statistical data demonstrating potential age bias in

hiring decisions). Here, in contrast, Mitchell makes bald assertions—without any corroborative evidence—that Sacher treated him differently from his colleagues. This is not sufficient to withstand summary judgment; Mitchell "may not rest upon mere allegations, general denials, or such vague statements" that Sacher subjected him (but not others) to ranting and raving. *Quiroga v. Hasbro, Inc.,* 934 F.2d 497, 500 (3d Cir.1991); *see also Ness v. Marshall,* 660 F.2d 517, 519 (3d Cir.1981) ("[A] party resisting a [summary judgment] motion cannot expect to rely merely upon bare assertions, conclusory allegations or suspicions."); *Warner v. Fed. Express Corp.,* 174 F.Supp.2d 215, 223 (D.N.J.2001) (conclusory assertions of discrimination and pretext without any such evidence to support those claims is insufficient to create genuine issue of material fact). Similarly, Mitchell cannot recall anything specific that Sacher said at any of the one-on-one meetings beginning in late 2004 (other than "forgetful," "absentminded," and "slow," *see infra*). Vague claims that Sacher "ranted and raved" at meetings or that his conduct was otherwise "irrational," even if assumed as true, do not amount to evidence that UBS's assertion that it terminated Mitchell for poor performance—and not because of his age—is pretextual.

***12** Second, Mitchell argues that as further evidence of Sacher's discriminatory purpose, his use of "the terms 'forgetful,' 'absentminded,' and 'slow' were veiled references to Mr. Mitchell's age, since it is a well-established stereotype that as people age, they become more forgetful, absentminded[,] and slow." Pl. Opp. Br. at 10–11. The Court rejects this argument. As Mitchell himself concedes, *see id.,* all three terms are age-neutral and do not by themselves suggest age bias. *See Perry v. Prudential–Bache Secur., Inc.,* 738 F.Supp. 843, 851 (D.N.J.1989) (supervisor's comment that plaintiff was "burned out and forgetful" spoke not to his age but to his adequacy as an executive); *see also Young v. General Foods Corp.,* 840 F.2d 825, 829 (11th Cir.1988) (manager's comment that employee "moved in slow motion" and was the same age as manager's father considered to be merely descriptive and not discriminatory); *Barnes v. Southwest Forest Indus., Inc.,* 814 F.2d 607, 610–611 (11th Cir.1987) (assertion that old employee could not pass a physical exam not considered to be direct evidence of age discrimination).

In response to UBS's argument that the terms do not in and of themselves indicate Sacher's animus against older workers, Mitchell asserts only that "although that ... may be true, it does not change the fact that as stereotypes, being forgetful, absentminded[,] and slow are characteristics of the elderly." Pl. Opp. Br. at 11. But again, the terms alone are not probative evidence that any discriminatory animus flowed from Sacher's statements; absentmindedness occurs in the young, middle-aged, and elderly alike. More important, Mitchell admitted to Ryan that he had been "forgetful and absentminded all [of his] life." Beal Cert. Ex. 19. Thus, not only was Sacher's use of the allegedly stereotypical terms age-neutral generally, Mitchell specifically describes himself in those terms.

Finally, Mitchell argues that a rational factfinder could discern a discriminatory intent from Sacher's satisfactory performance reviews in 2001, 2002, and 2003. Pl. Opp. Br. at 9–10. But previously adequate reviews do not warrant stellar assessments in perpetuity. *See Ezold,* 983 F.2d at 528 ("Pretext is not established by virtue of the fact that an employee has received some favorable comments in some categories or has, in the past, received some good evaluations."); *Heck v. Am. Multi–Cinema, Inc.,* No. 07–4915, 2009 U.S. Dist. LEXIS 17441, at *28–35, 2009 WL 540685 (D.N.J. Mar. 4, 2009) (citing *Ezold*). In any case, the e-mails documenting Mitchell's performance beginning in August 2004 fully support his lower 2004 review. Furthermore, several of the emails advising Mitchell that he had committed a mistake originated from an employee *other than* Sacher. *See* Beal Cert. Exhs. 6, 7, 8, 9, 10, 14, 15. Not only does this fact corroborate the 2004 performance review, it undercuts Mitchell's general theory in the

case—that Sacher was the source of the discrimination.[FN11] Because Mitchell does not argue that Toney, Ryan, or anyone else at UBS discriminated against him, it is difficult to see why his 2004 performance review, although given by Sacher, is the result of age discrimination when documentary evidence generated by others not accused of unlawful discrimination substantively supports the review. The Court agrees with UBS that Mitchell's emphasis on his earlier performance reviews is a non-sequitur: it would defy logic to conclude that Sacher hired Mitchell when the latter was 54, gave him adequate performance reviews for three consecutive years, and then "inexplicably and suddenly developed an aversion to 58–year olds ..." Def. Rep. Br. at 8; *see also Maidenbaum v. Bally's Park Place, Inc.,* 870 F.Supp. 1254, 1267 n. 24 (D.N.J.1994), *aff'd,* 67 F.3d 291 (3d Cir.1995) (granting summary judgment and stating that employers who hire an applicant knowing that he or she falls into a protected class will seldom be credible targets for pretextual termination).[FN12]

> FN11. Mitchell's pretext argument is further weakened by the fact that Sacher was 43 years old at the time Mitchell was terminated, and was thus a member of Mitchell's protected class. *See, e.g. Elwell v. Pa. Power & Light, Inc.,* 47 F. App'x 183, 189 (3d Cir.2002); *Heck,* 2009 U.S. Dist. LEXIS 17441, at *33–34, WL 540685 n. 7. *Dungee v. Northeast Foods, Inc.,* 940 F.Supp. 682, 688 n. 3 (D.N.J.1996) (citing cases that hold that a plaintiffs ability to raise an inference of discrimination is hampered when the decision maker is a member of the plaintiff's protected class).
>
> FN12. Mitchell also asserts that five other age discrimination lawsuits asserted against other UBS affiliates bolster his claim of pretext. Pl. Opp. Br. at 11–12. Given Mitchell's theory that the age discrimination came from Sacher alone, the Court agrees with UBS that the existence of other age discrimination suits within the UBS family is not probative of whether Sacher acted with discriminatory intent, and is thus not relevant to the matter before the Court. *See* Fed.R.Evid. 401.

***13** While Mitchell does not make the argument, the Court notes that the absence of any documented errors after Sacher placed Mitchell on the PIP is immaterial. Mitchell's failure to meet UBS's subjective expectations before being placed on the PIP permitted the company to terminate Mitchell's employment at that time, and the Court knows of no requirement for placing an employee on an improvement program before termination becomes lawful. *Cf. Viscik v. Fowler Equip. Co .,* 173 N.J. 1, 21, 800 A.2d 826 (2002) ("[T]he employer's subjective decision-making may be sustained[,] even if unfair."). Thus, even if the PIP was never intended actually to permit Mitchell to rehabilitate his position and reputation at CIS, the preexisting and nondiscriminatory basis for his termination defeats any possible inference that his termination after the implementation of the PIP was on the basis of age.

In sum, Mitchell has presented no evidence that could permit a rational factfinder to conclude that UBS terminated him for any reasons other than his poor performance, which, again, is well documented. While he argues that UBS "cannot cite any facts which would create an inference that Mr. Sacher's actions were not discriminatory," Pl. Opp. Br. at 12 (header), it is Mitchell's affirmative burden to establish facts indicating discrimination, not the other way around. *See Zive,* 182 N.J. at 450, 867 A.2d 1133 ("The burden of proof of discrimination does not shift; it remains with the employee at all times."). Given the evidence of Mitchell's errors beginning in late 2004 and continuing into 2005, he has not met his burden. The Court will therefore grant UBS's motion for summary judgment on Count One of Mitchell's amended complaint.

2. *Retaliation*

To establish a *prima facie* case of retaliation,

Mitchell must show that: (1) he engaged in an activity protected by the NJLAD; (2) UBS took adverse action against him; and (3) there is a causal connection between the two events. *Abramson v. William Paterson Coll. of N.J.,* 260 F.3d 265, 286 (3d Cir.2001); *see also Moron,* 2009 U.S. Dist. LEXIS 22951, at *50, 2001 WL 881255. With respect to the first prong, vague complaints or generalized grievances of unfair treatment without alleging the employer engaged in unlawful discriminatory conduct do not qualify as protected activity. *Moran,* 2009 U.S. Dist. LEXIS 22951, at *50–51; *see also Barber v. CSX Distrib. Servs,* 68 F.3d 694, 701–02 (3d Cir.1995) (affirming district court's award of judgment as a matter of law to employer on employee's retaliation claim because plaintiff's letter complaining of generally unfair treatment did not specifically complain of prohibited discrimination). "Although a plaintiff need not file a formal complaint of discrimination to meet the first prong of the *prima facie* case, to constitute protected activity, the opposition, complaint or protest, whether formal or informal, must clearly indicate a belief that an act forbidden by the NJLAD has occurred." *Hood v. Pfizer, Inc.,* No. 04–3836, 2007 U.S. Dist. LEXIS 72696, at *60, 2007 WL 2892687 (D.N.J. Sept. 28, 2007) (citing *DeJoy v. Comcast Cable Commc'ns Inc.,* 968 F.Supp. 963 (D.N.J.1997)).

***14** Mitchell has failed to establish a *prima facie* case of retaliation. He asserts that he engaged in activity protected by the NJLAD when he proceeded to Ryan's office to complain after each incident of Sacher's verbal abuse. But he cannot recall what he said to Ryan other than that Sacher's "ranting and raving and ... shouting" was "irrational," was "not constructive," and that he was "appalled and bewildered" in response to such conduct. Mitchell Dep. at 102:10–104:14, 156:11–157:13. He also asserts that each time he went to Ryan, he recounted what had just transpired in Sacher's office, but he cannot recall what it is that Sacher said. Despite this, he argues the cases cited above are distinguishable because he "complained on several occasions about ongoing abusive behavior, which could easily be identified as discriminatory." Pl. Opp. Br. at 16. Even if the Court could credit Mitchell's assertion that Sacher's conduct was discriminatory (it has found above that it cannot), noticeably absent from Mitchell's argument is any assertion that he actually complained about age discrimination. Viewing the facts in the light most favorable to Mitchell, the most that can be said on the evidence adduced is that he complained to Ryan of Sacher's general demeanor towards him. Again, generalized complaints of non-discriminatory mistreatment are not actionable under the NJLAD's retaliation provisions.

For the same reasons that apply to Mitchell's discrimination claim, the Court also finds that even if he had established a *prima facie* case of retaliation, he cannot rebut UBS's asserted justification—Mitchell's sub-par performance. Summary judgment is appropriate on Count Two of the amended complaint on this basis as well. *See Moran,* 2009 U.S. Dist. LEXIS 22951, at *53 (after finding *prima facie* case of retaliation lacking for plaintiff's failure to establish that she had engaged in protected activity, incorporating by reference pretext analysis for discrimination claim into pretext analysis for retaliation claim and concluding that plaintiff had not undermined defendant's proffered justification in any event).

IV. CONCLUSION

For the reasons stated above, defendant's motion for summary judgment is granted. An appropriate order accompanies this opinion.

D.N.J.,2009.
Mitchell v. UBS Services USA LLC
Not Reported in F.Supp.2d, 2009 WL 1856630 (D.N.J.)

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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-5454-00T2

ROBERT E. MUTCH,

Plaintiff-Appellant,

v.

CURTISS-WRIGHT CORPORATION,
CURTISS-WRIGHT FLIGHT SYSTEMS,
INC. and BRIAN D. O'NEILL,

Defendants-Respondents.

Argued: May 30, 2002 - Decided: JUN 17 2002

Before Judges Newman, Fall and Axelrad.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Docket No. MRS-L-3536-98.

Bruce P. McMoran argued the cause for appellant (McMoran & Associates, attorneys; Mr. McMoran and Michael F. O'Connor, on the brief).

Rosemary Alito argued the cause for respondents (McCarter & English, attorneys; Ms. Alito, of counsel, and Adam N. Saravay, on the brief).

PER CURIAM

Plaintiff Robert Mutch appeals from entry of an order on May 4, 2001, granting summary judgment in favor of defendants, Curtiss-Wright Corporation (Curtiss-Wright), Curtiss-Wright Flight Systems, Inc. (Flight Systems), and Brian D. O'Neill, dismissing his retaliatory discharge claim brought pursuant to the Conscientious

Employee Protection Act (CEPA), N.J.S.A. 19-1 to -8, and his claim for tortious interference with a prospective economic advantage. We conclude the trial court properly entered summary judgment and now affirm.

Plaintiff was hired by Curtiss-Wright in June 1978 as a manufacturing manager. His employment was at will and he had no written contract of employment. On May 31, 1978, in anticipation of his employment with Curtiss-Wright, plaintiff executed a confidentiality agreement, acknowledging that his employment was at will.

Throughout his years of employment plaintiff steadily advanced within the employment structure of Curtiss-Wright. In 1980, plaintiff was promoted to director of quality assurance; in 1985, he became director of operations; in 1987 he attained the position of vice-president and general manager; and in 1991 plaintiff became president of Flight Systems, a subsidiary of Curtiss-Wright. In 1992, plaintiff became an officer of Curtiss-Wright and assumed the additional role as its executive vice-president.

As president of Flight Systems, plaintiff was responsible for the entire operation of this subsidiary, including its growth, its strategic direction and its profits and losses.

Although Flight Systems showed a profit of $1,556,000 in 1995, there was a negative cash flow of over $11 million. In 1996, Flight Systems fell short of its budget by $2.3 million and in 1997, it fell short by $2.7 million.

In April 1997, David Lasky, president and chairman of the board of directors of Curtiss-Wright, wrote to plaintiff and directed his attention to the inventory and accounts receivable at Flight Systems' facilities in Miami, Florida; Shelby, North Carolina; and Fairfield, New Jersey. Lasky expressed concern that the inventories at these facilities were high and he asked plaintiff to review these items in preparation for an upcoming presentation to Curtiss-Wright. In response, plaintiff asked the general managers of each facility to review the matter and present it at the meeting.

Lasky met with plaintiff at the end of 1997 and stressed the importance of budgeting for 1998 in a manner that Fairfield would not incur any further losses. In response, plaintiff prepared a budget showing that Fairfield would show a profit of $1 million in 1998. According to plaintiff, the parent corporation scrutinized this projection and agreed it was reasonable.

However, by January 1998, the Fairfield facility was already showing losses of approximately $250,000. When Lasky asked plaintiff for an explanation, he received a memo from Walter Peters, vice president and general manager of the Fairfield facility. Lasky was not satisfied with the explanations, finding them "rather general . . . and not indicative of why the budget was erroneous." Fairfield showed another loss of approximately $250,000 in February 1998.

In April 1998, Lasky asked plaintiff to prepare a presentation

regarding the problems at the Fairfield facility. Plaintiff delegated the preparation of the presentation to the director of program management, the vice-president and general manager of Fairfield, and to the controller.

The presentation was made to Lasky; Robert Bosi, the manager for finance for Curtiss-Wright; and Ken Slezak, corporate controller of Curtiss-Wright. Lasky was not satisfied with the presentation, stating it was chaotic and a free-for-all. Lasky concluded Flight Systems was being mismanaged and that plaintiff was hearing things for the first time during the presentation and had no detailed knowledge of the problems at Fairfield. Lasky discovered at the meeting that some low-level employees had apparently bypassed the inventory control system and there was a major fault in the estimate-to-complete (ETC) process.

One of the reasons given for the excess inventory was the planning department's use of Excel spreadsheets. Flight Systems had decided against replacing the computer system because of its cost and because the employees were in the middle of a difficult development system. Plaintiff admitted that the employees were making errors in using the Excel spreadsheets due to both a bad system and human error in executing that system. Plaintiff admitted he was not aware of those problems prior to the presentation to Lasky, Bosi and Slezak.

Plaintiff claimed that excess inventory at Fairfield was not something that came as a total surprise in 1998. He noted that at

the end of 1997 Flight Systems had done an extensive write-off of inventory. Plaintiff stated although he thought the company got all of it, apparently it did not. However, plaintiff did admit in his deposition that the information given during the April 1998 presentation came as a surprise to him because he was unaware of the magnitude of the excess-inventory problem.

Plaintiff claimed the problems with Fairfield's ETCs were due to the use of an incorrect baseline the year before by the accounting department, which reported to plaintiff. The net effect of the excess-inventory problem was approximately $1 million and the net effect of the ETC problem was an additional $1 million.

At about this same time, it was discovered that Flight Systems' Shelby facility also had inventory problems. Those problems were discovered by Mike Siegal, the controller at the Miami facility, who reported them to Mike Held, the group controller. After Held reported the problems to plaintiff, plaintiff telephoned Lasky.

Plaintiff advised Lasky that a potential inventory problem had been discovered in Shelby due to discrepancies in the records, which were incomplete or not in accordance with accounting principles. Plaintiff suggested that Lasky send personnel from Curtiss-Wright to look at the books, and Lasky agreed.

At his deposition, plaintiff admitted that, at the time he telephoned Lasky, he had no reason to believe that Rich Stepanovich, who was responsible for accounting at the Shelby

facility, had done anything illegal or unethical. Similarly, plaintiff did not suspect that Held, Slezak or Price Waterhouse, the company's external auditor, had done anything unethical or immoral. Rather, plaintiff viewed the problems as sloppy bookkeeping, not intentional wrongdoing. In plaintiff's view, sloppy bookkeeping violated good standard accounting practices and Curtiss-Wright's own code of conduct. However, plaintiff stated that because he was not an accountant, he was unable to identify any specific accounting practices that were violated. Plaintiff asserted he believed the books were not "honest" and were not certified correctly, noting that the books had to be certified for the Securities and Exchange Commission since Curtiss-Wright was a publicly-traded corporation.

Plaintiff believed Lasky was surprised to hear the news about the Shelby inventory problem. Plaintiff did not believe Held had reported the problem to anyone but him, even though Held directly reported to Robert A. Bosi, vice-president of finance and Kenneth P. Slezak, controller, of Curtiss-Wright. Randy Kesterson, Shelby's general manager, and Carl Hill also knew about the inventory problems. However, plaintiff based his conclusion that Lasky was surprised on his telephone demeanor and the type of questions he was asking plaintiff.

Lasky, however, denied that plaintiff was the first to bring these accounting errors to his attention. Lasky claimed Bosi had discussed these matters with him in some detail on the same day,

but before, plaintiff telephoned Lasky. Notes taken by Bosi dated March 26, 1998, confirm that a visit on March 16, 1998 revealed a "further inventory issue" at Shelby due to "faulty detail records" and "sloppy accounting."

On April 8, 1998, Lasky sent a memo to plaintiff, which was not received by plaintiff until April 10, 1998. The memo expressed extreme disappointment regarding the recent "accounting surprises" at Flight Systems. In this memo, Lasky reminded plaintiff these problems had surfaced in 1997 and that plaintiff had assured Lasky they were being addressed. In his deposition, Lasky stated by that time he had concluded plaintiff was not capable of handling these problems and had to be terminated for not being able to effectively perform his job.

Although Lasky asked plaintiff for an explanation, he did not wait for one. On April 13, 1998, Lasky asked plaintiff for his resignation because of the "recent problems," advising plaintiff that if he did not resign, he would be terminated. Plaintiff stated in his deposition that he assumed the "recent problems" referred to the inventory and ETC problems at the Fairfield and Shelby facilities. Plaintiff later learned that Lasky had offered plaintiff's job to George Yohrling, the head of aerospace at Flight Systems, on April 9, 1998. Plaintiff refused to resign and he was terminated.

Plaintiff believed that corporate auditing, as well as Price Waterhouse, should have caught these accounting mistakes.

Plaintiff claimed he had relied on people in the organization who, as it turned out, were engaging in "pure negligence" and were failing to perform their jobs.

Although plaintiff admitted, as president of Flight Systems, he was ultimately responsible for these mistakes, plaintiff also believed Lasky was ultimately responsible, since plaintiff relied on the same information as did Lasky. Notwithstanding plaintiff's contention that Lasky was surprised at hearing plaintiff's news concerning the inventory problems at the Shelby facility, plaintiff admitted that Lasky was "not in the dark" about these problems. Plaintiff also contended Lasky "shot the messenger" and that plaintiff was made a scapegoat to cover up Lasky's own responsibility for the problem and to explain away the negative effect on shareholder earnings.

Plaintiff asserted he did not think failure to meet budget constituted good cause to terminate a chief executive officer. Plaintiff believed he was terminated because of the accounting problems, the ETC and inventory problems, and the lack of profitability of Flight Systems.

Lasky contended plaintiff was terminated not because of the accounting "surprises," but because of the substance of these surprises, namely, because plaintiff did not address the inventory problem and because he did not monitor the ETCs. Lasky maintained that as president and chief executive officer of Flight Systems, plaintiff had to be held responsible.

One month after plaintiff was terminated, Lasky wrote to various executives, reminding them of the importance of keeping accurate and complete books and records. Lasky admitted that Curtiss-Wright's corporate code of conduct required all employees to accurately maintain all records. However, Lasky stated he was unaware that there had been any violation of this code by virtue of the accounting errors brought to his attention by plaintiff.

According to Curtiss-Wright's corporate bylaws, any elected officer could be removed at any time with or without cause by a vote of the majority of the whole Board of Directors at a meeting called for that purpose. Here, there was no such vote. William Sihler, a board member, believed plaintiff had resigned.

Several weeks after plaintiff's termination, Curtiss-Wright's board of directors held its annual meeting on April 28, 1998. At that meeting, as at all annual meetings, a new slate of corporate officers was elected. Plaintiff was not elected to that slate, but Yohrling was. Meanwhile, on April 13, 1998, a resolution was passed by the board of Flight Systems, removing plaintiff from the office of president of that company.

William Mitchell, a board member of Curtiss-Wright at the time of plaintiff's termination, agreed with Lasky's decision to terminate plaintiff. According to Mitchell, Flight Systems was being mismanaged, it took on jobs that were beyond its capabilities, did not hire the right people, did not select the correct vendors, and had no strategic plans. Mitchell felt that as

head of Flight Systems, plaintiff was ultimately responsible for these shortcomings. Although Lasky, as corporate chairman, was also responsible, Mitchell believed that Lasky accepted his responsibility by terminating plaintiff.

Randy Kesterson was general manager of the Shelby facility at the time of plaintiff's termination. Although he was aware of the accounting problems at Shelby, Kesterson was unaware of their magnitude. Stepanovich, who reported directly to Kesterson, was the director of finance at the time. Kesterson stated he relied on Stepanovich's numbers, which turned out to be erroneous, and Stepanovich was also terminated. Kesterson believed Stepanovich had been able to convince the internal and external auditors that things were under control.

Kesterson testified at depositions he was surprised he did not lose his own job as a result of Stepanovich's mistakes, since they occurred on Kesterson's "watch." Neither Bosi nor Slezak were ever held responsible for Stepanovich's errors. However, in February 2000, Slezak was asked by the chief financial officer to resign because he was not happy with Slezak's performance.

On November 9, 1998, plaintiff filed his complaint in the Law Division, alleging wrongful termination in violation of company policy and CEPA.

In an effort to seek gainful employment following his termination, plaintiff worked as a consultant for MOOG, Inc., one of Curtiss-Wright's competitors, from August to November 1999. The

consultant contract called for plaintiff to be paid $1,000 per day for twenty days, plus expenses. Plaintiff completed his assignment and was fully compensated for his work.

Robert Brady was MOOG's chief executive officer. Plaintiff told Brady that he had left Curtiss-Wright because Lasky wanted to make a change, but did not go into any of the details surrounding his termination.

Plaintiff's original deposition in this matter occurred on August 18, 1999. Brian D. O'Neill, Curtiss-Wright's in-house counsel, was present at that deposition. During the course of the deposition, plaintiff stated he was about to commence work for MOOG on a consulting project. On or about August 20, 1999, O'Neill wrote to plaintiff, reminding plaintiff about the terms of his confidentiality agreement. O'Neill never spoke with anyone at MOOG concerning plaintiff.

Lasky, ostensibly concerned about preserving Curtiss-Wright's proprietary information, asked Yohrling to telephone Brady to determine whether plaintiff's work would violate his confidentiality obligation to Curtiss-Wright. At the time of plaintiff's deposition, Curtiss-Wright was in the process of entering into a teaming agreement with MOOG regarding a particular piece of equipment. Notwithstanding that joint effort, Curtiss-Wright regarded MOOG as one of its primary competitors. Lasky stated he was concerned that the divulging of proprietary information by plaintiff would damage the evolving strategic

relationship between the two companies.

Yohrling stated at depositions that he called Brady. When Brady asked Yohrling how he knew about plaintiff's consulting agreement, Yohrling replied it had come to the attention of Curtiss-Wright during the course of plaintiff's litigation. Yohrling stated Brady was apparently surprised to learn of plaintiff's lawsuit. Yohrling advised Brady that plaintiff was an outstanding operations manager but the company wanted to be sure plaintiff would not inadvertently compromise any proprietary data.

Brady did not recall having the telephone conversation with Yohrling. Instead, Brady claimed he received a telephone call from Lasky shortly before plaintiff's employment with MOOG began. Brady stated Lasky advised him that Curtiss-Wright had discovered plaintiff's consulting agreement as a result of depositions taken during plaintiff's lawsuit. Lasky admitted he spoke with Brady and told Brady to hire plaintiff because there was no ill will, but that MOOG should not seek to extract any confidential information from plaintiff.

Brady testified during his deposition that after speaking with Lasky, Brady spoke with Mike Rowan, plaintiff's supervisor at MOOG. Brady advised Rowan concerning the dispute between plaintiff and Curtiss-Wright. Brady agreed that a prospective employer might be reluctant to hire a new employee who had an ongoing lawsuit with his or her former employer. Brady admitted plaintiff's lawsuit would have to be taken into consideration before hiring plaintiff

for another assignment, since plaintiff would be engaged in an adversarial proceeding with one of MOOG's "partners."

Brady nevertheless maintained that plaintiff was not hired for another consulting assignment because MOOG did not generally use consultants, and the opportunity to further utilize plaintiff's capabilities did not develop.

Plaintiff claimed he was unable to secure employment in the aerospace industry and could only conclude that individuals at Curtiss-Wright went to great lengths to soil his reputation. However, plaintiff offered no support for that conclusion.

Defendants moved for summary judgment, seeking dismissal of the complaint. The motion was argued in the Law Division on January 7, 2000. The judge reserved decision. On January 13, 2000, the court issued a written statement of reasons and executed an order granting partial summary judgment in favor of defendants, dismissing plaintiff's claims under CEPA. However, the court denied defendants' motion as to the balance of the complaint. In so ruling, the judge stated:

> This Court grants defendants' motion for summary judgment . . . on plaintiff's CEPA claim because plaintiff has failed to identify any law, rule or regulation promulgated pursuant to law which was allegedly violated by defendants or a co-worker employed by defendants.
>
> The purpose of CEPA is to protect employees who report illegal or unethical work-place activities. Barratt v. Cushman & Wakefield, 144 N.J. 120, 127 (1996). In Barratt, the plaintiff reported to the Real

Estate Commission that an employer with whom his employer had a business relationship may have participated in commercial bribery, an illegal act, seven years earlier. In Higgins v. Pascack Valley Hosp., 158 N.J. 404 (1999), the plaintiff disclosed to a supervisor that she believed that co-employees had violated a specific state regulation and hospital policy promulgated pursuant to that regulation which required certain forms to be completed when treatment was administered to a patient. She also disclosed that she had observed another co-worker stealing a patient's medication. In Abbamont v. Piscataway Township Board of Education, 269 N.J. Super. 11 (App. Div. 1993), the plaintiff reported a violation of a specific regulation contained in the New Jersey Industrial Education Safety Guide to a supervisor.

Here, plaintiff has failed to establish that defendants did anything illegal or to identify what rule or regulation he claims the defendants violated. He has failed to state as the plaintiffs did in the cases cited above what S.E.C. regulation he believes the defendants may have violated. The identification of the regulation is not something he can learn from the defendants in discovery. He is the one who claims he was terminated because he disclosed this violation, yet he cannot identify the law or rule or regulation which he claims was violated even though the S.E.C. regulations are public documents and available to him. Clearly, on a motion for summary judgment, plaintiff cannot simply rely on vague allegations; he must come forward with sufficient proofs of his claim in order to withstand the motion. Brill v. Guardian Life, 142 N.J. 520 (1995). This he has failed to do.

With regard to defendants' motion for summary judgment on plaintiff's claims that defendants could only terminate him for cause and that defendants breached a covenant of good faith and fair dealing, the Court finds that this application [is] premature. Discovery is continuing. Plaintiff claims

> that other employees were aware of the company's policy of only terminating employees for cause. Plaintiff shall have the opportunity to establish that that was company policy and that the policy was breached when he was terminated.

On application of plaintiff, the court entered an order on May 19, 2000, granting plaintiff's motion for leave to file an amended complaint to add O'Neill as a party defendant. The amended complaint alleged that O'Neill and the other defendants intentionally interfered with plaintiff's prospective employment after his termination.

Thereafter, defendants again moved for summary judgment, seeking dismissal of the complaint. Plaintiff filed a cross-motion, seeking summary judgment declaring that his discharge was wrongful. In separate orders, the judge denied both motions, but requested additional briefs on the issue as to whether the court should reconsider the previous partial grant of summary judgment to defendants dismissing plaintiff's CEPA claim. Upon receipt of additional briefs, the judge issued a written decision dated October 18, 2000, declining to reconsider dismissal of the CEPA claim. In doing so, the judge stated:

> I have reviewed the decisions of the New Jersey Supreme Court in the Estate of Frank L. Roach v. TRW, Inc., 164 N.J. 598 (2000) and DeLisa v. County of Bergen, 165 N.J. 140 (2000), as well as the briefs submitted by both parties. I have determined that neither case requires this Court to modify its previous decision to dismiss plaintiff's CEPA claim.

The record reflects that the plaintiff failed to disclose to his supervisor any activity, policy or practice of Curtiss-Wright that the plaintiff reasonably believed was in violation of a law or a rule or regulation promulgated pursuant to law as required to state a cause of action under N.J.S.A. 34:19-3(a). The record also fails to show that plaintiff reasonably believed any activity engaged in by Curtiss-Wright employees was in violation of any law, rule or regulation promulgated pursuant to law as required to state a cause of action under N.J.S.A. 34:19-3(c)(1). Finally, the record fails to show that plaintiff objected to any policy or practice engaged in by Curtiss-Wright employees which plaintiff reasonably believed was fraudulent or criminal or was incompatible with a clear mandate of public policy concerning the public health, safety, welfare or protection of the environment. (N.J.S.A. 34:19-3(c)(2) and (3)).

In Roach, the jury found that the alleged misconduct of plaintiff's co-employees was not incompatible with a clear mandate of public policy concerning the public welfare. The New Jersey Supreme Court held that proof of an impact on the public interest is required only with respect to public policy claims under N.J.S.A. 34:19-3(c)(3) and that it is not necessary to prove that there are violations of a defined public policy where claims are brought under other sections of the law.

The other sections of the CEPA law require proof that the complaining employee reasonably believed that certain activities engaged in by co-employees were in violation of some specific statute or regulation or were fraudulent or criminal. Roach at 610. Here, the plaintiff has failed to cite a specific statute or regulation which he believes was violated. The Curtiss-Wright Code of Conduct does not rise to the level of a statute or regulation promulgated pursuant to law. Moreover, plaintiff has not claimed any employee committed a fraudulent or criminal act.

On January 24, 2001, the court entered an order permitting plaintiff to file a second amended complaint to add a sixth count charging defendants with violating plaintiff's rights as defined by Article V, Section 3, of the by-laws of Curtiss-Wright by failing to call a meeting of the board of directors for the purpose of removing plaintiff as an officer of the corporation. Defendants then moved for summary judgment, seeking dismissal of the remaining claims in plaintiff's complaint. The motion was argued in the Law Division on April 27, 2001. In granting summary judgment in favor of defendants, the judge stated, in pertinent part:

> [W]e have nothing indicating that at the level of [plaintiff] that there was any practice, even policy, practice, whatever . . . to provide for any good cause or any warnings, et cetera.
>
> Now, I will start out with [plaintiff] was an at-will employee. He could be discharged at will. The case law indicates if he has a contract for a period of time, that's an issue. But there is no . . . suggestion here that he had a contract for a period of time. . . .
>
> While I have given the plaintiff full opportunity to establish that there was a policy upon which [plaintiff] could reasonably rely, that there was some type of an oral policy that existed for somebody at his level, not a human resource person, not somebody at a lower level, I have no documents, I have nothing that supports [plaintiff's] opinion that there was an oral policy. . . . I have nothing to indicate that anybody here would support [plaintiff's] view that there was an oral policy, with regard to termination.
>
> Next is the . . . fact that even if we go

through that, it's my opinion, in this particular case, that he had warnings. He certainly had some warnings with regard to the budgets, he had warning with regard to the inventory. . . . The whole thing is the buck stops here. . . . [T]here's nothing to suggest that he had any basis for assuming that he needed to have certain specific warnings. I'm not even sure of what specific warnings that he believes he should have had. . . . Apparently, he was given an opportunity to resign. . . .

So on the basis of the . . . contract claims or whatever the policy is or the practice is, I guess if there's no contract, he's an at-will employee, the law still is, in the State of New Jersey, that you can terminate an at-will employee unless there is some other policy in place that somebody could reasonably anticipate that the policy would apply to them. I have no proofs that there's any policy that [plaintiff] could reasonably anticipate would apply to him, and I am going to grant summary judgment on that claim.

Next is the claim that . . . the defendant violated the covenant of good faith and fair dealing, as a matter of law. Again, the cases hold that with regard to fair dealing, that is only with a contract. If there is no contract, then there is no obligation. . . . In the absence of a contract, there is no implied covenant of good faith and fair dealing. This does not mean that an implied obligation of good faith is inapplicable to those aspects of the employer-employee relationship which are governed by some contractual terms, regardless of whether that relationship is characterized generally as being at will. As to such aspects, there can be no doubt that they are subject to [an] implied covenant of good faith and fair dealing in all contracts.

So if it's outside, if there's nothing dealing with the length of the contract, if there's nothing dealing with the length of time that he is to be employed there, as I understand that law, there is no implied

covenant of good faith and fair dealing. . . . And considering everything else that . . . I have here, I don't see this as any type of violation of any good faith and fair dealing in the relationship between or amongst these parties.

Now, with regard to the tortious interference claim, I find also that that fails, as a matter of law. With regard to the case law on that, it indicates that to prove a claim for interference with an advantageous economic relationship, the plaintiff[] must show the existence of a reasonable expectation of economic advantage. . . . There's no proof here that prior to anything that took place that [plaintiff] had a reasonable expectation of economic advantage. There's nothing here indicating that in the conversations with MOOG, . . . that they had any suggestions that they were going to have a job for him, that he needed to go through this period of being a consultant first, that there was going to be an opening. Nothing - - [not] even a scintilla of anything indicating that he had any expectation of this consulting position continuing, that he had had any discussions with anybody, that even anybody hinted at anything.

Also, he would have to prove intentional and malicious interference with that expectation, that interference caused him to lose the [prospective] economic advantage and the damages. . . .

. . . .

The next thing is with regard to the corporate bylaws, there was a resolution to remove him as President of Flight Systems. I find that that was in order. That . . . he was properly removed. With regard to the Executive Vice President of Curtiss-Wright, it was a one-year term. Within two weeks, the elections came, he was not reelected. There is no pay for this position, so I find that there is no claim based upon any breach of the . . . bylaws.

> And since I have determined that all of those claims fall, any claims with regard to emotional distress or any claims for punitive damages must fall because they have to be piggy-backed into some other . . . claim. I am also going to deny the claim for counsel fees on the cross motion.

An order was entered on May 4, 2001, memorializing the court's April 27, 2001 rulings.

On appeal, plaintiff presents the following arguments for our consideration:

> POINT I
> THIS COURT SHOULD REVERSE THE TRIAL COURT'S ORDER GRANTING SUMMARY JUDGMENT ON MUTCH'S CEPA AND TORTIOUS INTERFERENCE CLAIMS BECAUSE SUMMARY JUDGMENT WAS IMPROPERLY GRANTED.
>
> POINT II
> THIS COURT SHOULD REVERSE THE TRIAL COURT'S ORDER GRANTING SUMMARY JUDGMENT ON MUTCH'S CEPA CLAIM.
>
> A. Standards For Analyzing CEPA Claims.
>
> B. Mutch Established a Prima Facie Case.
>
> 1. Mutch reasonably believed that defendants' conduct was unlawful or incompatible with a clear mandate of public policy.
>
> a. Mutch reasonably believed that defendants' accounting practices either violated applicable SEC Rules on financial reporting or were incompatible with the public policy served by these Rules.
>
> b. Mutch reasonably believed that the defendants' accounting practices violated 15 U.S.C.A. §78m's accounting requirements.

c. Mutch reasonably believed that defendants had breached their common law duty of due care.

2. The trial court's order granting defendants summary judgment on Mutch's CEPA claim should be reversed.

3. Mutch engaged in whistleblowing activity.

4. Mutch demonstrated a casual connection between his whistleblowing activity and his termination.

C. Defendants' Proffered Reason for Terminating Mutch Is Unworthy of Credence.

POINT III

THIS COURT SHOULD REVERSE THE TRIAL COURT'S ORDER GRANTING SUMMARY JUDGMENT ON MUTCH'S TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE CLAIM.

I

Plaintiff claims the motion judge erred in dismissing his CEPA claim on summary judgment because the evidence demonstrated that he reasonably believed defendants' conduct was unlawful or incompatible with a clear mandate of public policy. Specifically, plaintiff contends he reasonably believed defendants' accounting practices violated SEC rules or the public policy served by those rules; that they violated provisions of the Securities Exchange Act of 1934; and that defendants had breached their common law duty of care. Plaintiff further contends the evidence presented in the record established a causal connection between his whistle blowing activity and his termination, and that defendants' proffered reason

for terminating him was unworthy of credence.

N.J.S.A. 34:19-3 provides, as follows:

> An employer shall not take any retaliatory action against an employee because the employee does any of the following:
>
> a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer or another employer, with whom there is a business relationship, that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law, or, in the case of an employee who is a licensed or certified health care professional, reasonably believes constitutes improper quality of patient care;
>
> b. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer or another employer, with whom there is a business relationship, or, in the case of an employee who is a licensed or certified health care professional, provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into the quality of patient care; or
>
> c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:
>
> (1) is in violation of a law, or a rule or regulation promulgated pursuant to law or, if the employee is a licensed or certified health care professional, constitutes improper quality of patient care;
>
> (2) is fraudulent or criminal; or
>
> (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.

The CEPA statute protects at will employees who are discharged in violation of a clear mandate of public policy. Higgins v. Pascack Valley Hosp., 158 N.J. 404, 417-18 (1999); Mehlman v. Mobile Oil Corp., 153 N.J. 163, 180 (1998). The purpose of CEPA is to protect employees who report illegal or unethical workplace activities. Estate of Roach v. TRW, Inc., 164 N.J. 598, 609-10 (2000). As remedial legislation, the CEPA statute should be construed broadly to effectuate its social goals. Roach, supra, 164 N.J. at 610; Kolb v. Burns, 320 N.J. Super. 467, 477 (App. Div. 1999).

A plaintiff must establish the following four elements to constitute a CEPA cause of action: (1) the plaintiff believed or reasonably believed the conduct in question violated a law or rule or regulation promulgated pursuant thereto; (2) the plaintiff performed a whistle blowing activity pursuant to subsection (a), (c)(1), or (c)(2) of N.J.S.A. 34:19-3; (3) an adverse employment action was taken; and (4) a causal connection exists between the whistle blowing activity and the adverse employment action. Kolb, supra, 320 N.J. Super. at 476.

Where a CEPA plaintiff proceeds on a pretext theory, a three-step analysis, similar to that used in pretext cases involving Law Against Discrimination (LAD)[1] discriminatory-discharge cases, must be used by the court. Id. at 477. Specifically, the plaintiff

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[1] N.J.S.A. 10:5-1 to -42.

must establish a prima facie case that he or she was discharged because he or she was engaged in a protected whistle blowing activity. Id. at 478-79. The burden then shifts to the employer to articulate a legitimate nondiscriminatory reason for the discharge. The employee must then establish that the reason given was pretextual. Id. at 478. To avoid summary judgment, the employee must demonstrate that retaliation for the protected activity was more likely than not a determinative factor in the decision to discharge. Id. at 479. That is, the employee must show that the proffered reason was a post hoc fabrication or did not otherwise actually motivate the employer's decision. Id. at 480.

We recently clarified the CEPA-claim statutory requirement that the plaintiff "reasonably believe" that the conduct disclosed, threatened to be disclosed, provided information concerning, testified to, objected to, or which he or she refused to participate in "is in violation of a law, or a rule or regulation promulgated pursuant to law[,]" "is fraudulent or criminal[,]" or "is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment[,]" as follows:

> Here, then, in the context of the motion for summary judgment, whether the conduct to which plaintiff objected was, in fact, violative of a law, regulation, public policy, fraudulent or criminal, is not dispositive. What must be determined is whether a factfinder could reasonably conclude that [the

> employer's] conduct, to which the plaintiff was objecting, could objectively reasonably have been believed by plaintiff to be so violative and that that was what [he or] she was objecting to. See Hancock v. Borough of Oaklyn, 347 N.J. Super. 350, 357 (App. Div. 2002) (although affirming summary judgment in favor of defendant on the basis of CEPA plaintiffs' failure to establish retaliatory conduct, we observed that in addition to the necessary element of causally related retaliatory conduct, a CEPA plaintiff's burden includes only that he or she "reasonably believed" the prohibited employer or coemployee conduct occurred, to which he or she objected.).
>
> [Gerard v. CCHSC, 348 N.J. Super. 516, 523 (App. Div. 2002).]

Accordingly, the CEPA plaintiff is not required to identify a statute, regulation, or policy which would be violated if the facts as alleged are true. Rather, the CEPA claimant must establish that he or she "objectively reasonably believed" that the activity complained of constituted such a violation. Id. at 522. However, the CEPA plaintiff must show that his or her belief had an objectively reasonable basis in fact, that is, that a reasonable lay person would conclude that the prohibited activity was taking place. Regan v. City of New Brunswick, 305 N.J. Super. 343, 356 (App. Div. 1997).

Sources of public policy, both under CEPA and at common law, include federal and state constitutions, federal and state laws, administrative rules, regulations and decisions, the common law and judicial decisions, and professional codes of ethics. Mehlman v. Mobil Oil Corp., 153 N.J. 163, 181 (1998); MacDougall v. Weichert,

144 N.J. 380, 391 (1996). A mandate of public policy must be "clearly identified and firmly grounded." Vague, controversial, unsettled, and otherwise problematic public policies do not constitute clear mandates. Mehlman, supra, 153 N.J. at 181, 188; MacDougall, supra, 144 N.J. at 391; Demas v. National Westminster Bank, 313 N.J. Super. 47, 53 (App. Div. 1998), certif. denied, 161 N.J. 151 (1999).

Moreover, the offensive activity must pose a threat of public harm, not merely private harm or harm to the aggrieved employee. Mehlman, supra, 153 N.J. at 188; Demas, supra, 313 N.J. Super. at 53. The employee must have an objectively reasonable belief that the activity is illegal, fraudulent, or harmful to the public health, safety, or welfare, and that there is a substantial likelihood that the activity is incompatible with a constitutional, statutory, or regulatory provision, a code of ethics, or other recognized source of public policy. Mehlman, supra, 153 N.J. at 193.

Although CEPA's overriding policy is to protect society at large by shielding employees who expose "illegal or deleterious activities" in the workplace, Roach, supra, 164 N.J. at 610, the statute is not intended to "protect chronic complainers or those who simply disagree with their employer's lawful actions." Blackburn v. United Parcel Serv., Inc., 179 F. 3d 81, 93, n. 3 (3d Cir. 1999). Nor is it intended to "shelter every alarmist who disrupts his employer's operations by constantly declaring that

illegal activity is afoot, ibid., or to spawn litigation concerning the "most trivial or benign" employee complaints. Roach, supra, 164 N.J. at 613-14. Rather, CEPA is intended to protect those disclosures which "sensibly" fall within the statute. Id. at 613.

Here, plaintiff admitted in his deposition that he had no reason to suspect that anyone had done anything intentionally wrong or unethical, or that any criminal law had been violated. Rather, plaintiff alleged only that the errors made by the accounting employees were sloppy and careless. Such an allegation, reported to his superior, did not constitute the disclosure of any activity that was in contravention of any law, statute, regulation or public policy. Plaintiff's contention that Lasky "shot the messenger" rings hollow since plaintiff was responsible for the content of the message.

On appeal, plaintiff for the first time alleges that the conduct which he reported to Lasky violated various SEC statutes and regulations. However, none of the SEC statutes or regulations now identified by plaintiff address the activities that plaintiff reported to Lasky.

15 U.S.C.A. § 78j(b), now cited by plaintiff, makes it unlawful for any person, "by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange," to

> use or employ, in connection with the purchase or sale of any security registered on a national securities exchange . . . , any

> manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

The regulation enforcing this statute, 17 C.F.R. § 240.10b-5, makes it clear that what is required is either: a device, scheme, or artifice to defraud; a false statement of material fact; or an act, practice, or course of business that operates as a fraud or deceit upon any person in connection with the purchase or sale of any security. Ibid. However, by plaintiff's own admission, he did not believe that anyone has engaged in any fraud, manipulation, or deception and, more importantly, he did not accuse anyone of such conduct when he informed Lasky of the accounting errors at the Shelby plant.

Plaintiff's reliance on 15 U.S.C.A. § 78r(a) is also misplaced. That statute merely imposes liability on someone who makes a statement in certain reports or documents or in registration statements which, at the time and in the light of the circumstances under which it was made [was] false or misleading with respect to any material fact." Plaintiff did not allege, nor did he establish, that anyone who made the accounting errors at Shelby did so with the requisite intent to mislead, that the errors related to any material fact, or that they were reported in the types of written documents by that statute.

Plaintiff also cites to 15 U.S.C.A. § 78m and the regulations promulgated thereunder, that require issuers of securities to file

certain documents and annual reports with the SEC. These reports must "accurately and fairly reflect the transactions and dispositions of the assets of the issuer." 15 U.S.C.A. § 78m(b)(2)(A). The issuer must also maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles. 15 U.S.C.A. § 78m(b)(2)(B)(ii)(I). "No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account" governed by this statute. 15 U.S.C.A. § 78m(b)(5).

Again, plaintiff's reliance on these sections is misplaced because of the absence of any allegation of an intentional misreporting. Moreover, to the extent plaintiff alleges that the errors he reported may have ultimately affected the company's report of annual earnings, or the price of the share of the company's stock, plaintiff cannot demonstrate that that is the conduct he was reporting to his employer. This was not a situation where plaintiff was alleging that the company was deliberately ignoring accounting errors made by lower-level employees in order to falsely inflate the stock price of the company or where plaintiff was complaining about any systemic accounting practice.

Our review of the record also discloses that plaintiff's report to his employer did not involve any violations of law that

might be considered to indirectly affect shareholders. Plaintiff has not demonstrated that he reasonably believed any violation of the law occurred or was occurring. Additionally, plaintiff has not shown that shareholders or the investing public were even indirectly affected by what he was reporting. This was a simple case of a boss reporting that his employees had been making errors that he had failed to catch or prevent.

Plaintiff also contends his report to Lasky implicated the company's own code of conduct, which required accurate record keeping. Private codes of conduct are not the equivalent of statutes or rules. Moreover, plaintiff did not allege that anyone had tried to cover-up the discovery of sloppy record keeping in an effort to mislead shareholders, the SEC, or the public in general.

Accordingly, we conclude that plaintiff did not engage in any of the protected whistle blower activity delineated in the CEPA statute. Plaintiff admitted that he was terminated because of the inventory and accounting problems at the Shelby plant, because of the ETC and inventory problems at Fairfield, and because of the lack of profitability of Flight Systems. Plaintiff believes his firing was unfair because others were also responsible for these problems. These constitute non-retaliatory reasons. Plaintiff was not terminated for reporting the problems to Lasky. He was fired because, as president and CEO of Flight Systems, he was responsible for the content of the information he was reporting. Plaintiff cannot shield himself from discharge by claiming protection under

CEPA simply because he was the one to report the bad news.

II

Plaintiff also argues the trial court erred in dismissing his claim for tortious interference with a prospective economic advantage.

To establish a cause of action for tortious interference, a plaintiff must show that he or she had a reasonable expectation of advantage from a prospective contractual or economic relationship, that the defendant interfered with this advantage intentionally and without justification or excuse, that the interference caused the loss of the expected advantage, and that the injury caused damages. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 751-52 (1989).

Here, plaintiff's claim is based on the telephone calls defendants made to MOOG's CEO following the revelation, during plaintiff's deposition in this litigation, that plaintiff was about to begin work on a consulting contract with MOOG.

The evidence in the record establishes that either Yohrling or Lasky, or both, called Brady, MOOG's CEO, just prior to plaintiff beginning his work with MOOG, to remind Brady that plaintiff was subject to a confidentiality agreement with Curtiss-Wright. During those conversations, it was revealed to Brady that Curtiss-Wright had become aware of plaintiff's upcoming employment with MOOG during the course of this litigation. Brady admitted that the information he received from defendants might have made him

reluctant to hire plaintiff for further work because MOOG was then-currently involved in a joint initiative with Curtiss-Wright and he would not have wanted to jeopardize that relationship.

Accordingly, we disagree with the trial court's analysis that plaintiff's tortious interference claim fails because he failed to establish he had any reasonable expectation of employment with MOOG in the future. However, we conclude the dismissal of plaintiff's tortious interference claim was proper because the record discloses that defendants provided only truthful information to MOOG. Defendants merely informed Brady that plaintiff was currently involved in a lawsuit with Curtiss-Wright. According to Restatement (Second) of Torts § 772 (1979):

> One who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relation, by giving the third person
>
> (a) truthful information, or
>
> (b) honest advice within the scope of a request for the advice.

It is generally recognized that a party may not be held liable for tortious interference for merely providing truthful information. East Penn Sanitation, Inc. v. Grinnell Haulers, Inc., 294 N.J. Super. 158, 180 (App. Div. 1996), certif. denied, 148 N.J. 458 (1997); see also Beck v. Tribert, 312 N.J. Super. 335, 340 (App. Div.), certif. denied, 156 N.J. 424 (1998) (plaintiff's

tortious interference claim dismissed where information provided by defendant to one of plaintiff's prospective employers that plaintiff had reported someone to OSHA, was true).

Here, there is no dispute that the information provided by defendants to MOOG was true. Accordingly, the motion judge properly dismissed plaintiff's tortious interference claim.

Affirmed.

Not Reported in A.2d, 2010 WL 1329052 (N.J.Super.A.D.)
(Cite as: 2010 WL 1329052 (N.J.Super.A.D.))

H

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.
Edgardo ORTIZ, Plaintiff-Appellant,
v.
UNION COUNTY and Union County Prosecutor's Office, Defendants-Respondents.

Submitted Oct. 6, 2009.
Decided April 7, 2010.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket No. L-4437-06.
Sarah Fern Meil, attorney for appellant.

Bauch Zucker Hatfield, LLC, attorneys for respondents (Kathryn V. Hatfield, of counsel and on the brief).

Before Judges SKILLMAN and GILROY.

PER CURIAM.

*1 Plaintiff Edgardo Ortiz appeals from the August 29, 2008 order that granted summary judgment to defendants Union County, and the Union County Prosecutor's Office (UCPO). We affirm.

On December 20, 2006, plaintiff filed a complaint against defendants alleging that they had violated the Law Against Discrimination (LAD), *N.J.S.A.* 10:5-1 to -49, by failing to promote him because of his race, ancestry, and/or national origin; subjecting him to a hostile work environment; and retaliating against him for having filed a discrimination charge against one of his superior officers. The complaint also alleged that defendants violated the Conscientious Employee Protection Act (CEPA), *N.J.S.A* . 34:19-1 to -8, by retaliating against him for his refusal to acquiesce in certain UCPO policies. On October 17, 2007, plaintiff filed an amended complaint adding an additional count alleging disability discrimination in violation of the LAD. On July 17, 2008, after completion of discovery, defendants filed a motion for summary judgment. On August 29, 2008, the trial court entered an order supported by a written opinion granting the motion.

Plaintiff is Hispanic. Plaintiff joined the UCPO in 1988; and retired from the organization in March 2007. During his employment, the UCPO never disciplined plaintiff. Indeed, plaintiff received letters of commendation and appreciation, and was nominated for the UCPO's Distinguished Service Award in 1998.

Initially, the UCPO assigned plaintiff to its Trial Unit as an investigator to assist in the preparation of cases for trial. Plaintiff next served as an undercover detective in the UCPO's Narcotics Strike Force Unit from January 1989 to an unspecified date in 1994. For two of those years, the UCPO assigned plaintiff to work with the Federal Drug Enforcement Agency in Newark.

In June 1995, plaintiff sustained a significant injury to his right knee. Because of the injury, the UCPO placed plaintiff on light duty for approximately two years evaluating cases. Plaintiff filed a workers' compensation claim petition against Union County and received a permanent partial total disability award for the injury.

The UCPO next assigned plaintiff as a detective to the Violent Crimes or Homicide Unit. Plaintiff served in that unit until December 2007, performing the duties of a crime scene technician. From Decem-

ber 1997 until June 2006, plaintiff served in the Administrative Services Unit (ASU), which consisted of four sections: Records and Evidence; Computer Services; Fleet Services; and Forensics. The ASU had seven or eight officers assigned to it at that time. Plaintiff began his assignment in the Records and Evidence section.

From 1997 through the end of January 2000, Sergeant Becky Weston served as plaintiff's immediate supervisor. In February 2000, plaintiff wrote two letters to the UCPO, which were followed by a formal internal complaint against Weston, alleging that she had treated him unfairly and in a demeaning manner because he was a Hispanic male. The UCPO ordered an independent investigation. On August 2, 2000, then Prosecutor Thomas Manahan reported that the investigator found no gender or national-origin animus by Weston.

*2 In January 2000, while serving in the ASU, Prosecutor Manahan promoted plaintiff to the position of sergeant, a position plaintiff held until retirement. In July 2002, Theodore J. Romankow became the Union County Prosecutor, and upon assuming his position, he appointed Robert Buccino to the position of Chief of Detectives.

From July 2002 to January 2003, plaintiff served as the ASU's Acting Commander. He again served as that unit's Acting Commander from January 2004 to January 2005. Although the individuals who commanded the ASU immediately before plaintiff and from January 2003 to January 2004 held the position of lieutenant, plaintiff was not promoted to that position while commanding the unit.

While serving in the ASU, plaintiff complained of difficulty in lifting heavy objects because of the injury to his right knee. In response, the UCPO provided plaintiff with a lifting platform to assist him in performing his duties. Plaintiff never requested any other accommodations because of his knee injury.

In late 2002, plaintiff confronted Joseph Koury, a detective in ASU's Forensic section concerning Koury's tardiness and misrepresentations of hours worked. After reporting the matter to Buccino, Buccino directed that plaintiff issue a reprimand to Koury. Although plaintiff complied, he never filed formal disciplinary charges against Koury. The UCPO later promoted Koury to the position of sergeant and transferred him from the ASU to the Forensic Services Unit, a former section of the ASU.

On August 26, 2002, soon after his appointment to Chief of Detectives, Buccino issued a letter stating the qualifications for promotion from the position of sergeant to that of lieutenant. The criteria required a minimum of three years in the position of sergeant, and included a point system for other qualifications, for example, commendations, education level, supervisory service and diversity of experience. On September 6, 2002, Buccino issued an amendment to the qualifications, eliminating the three years' minimum requirement in the position of sergeant. As such, all sergeants became eligible to interview for promotions. Because plaintiff never received Buccino's amendment eliminating the minimum in-level service requirement, plaintiff did not apply for promotion in 2002.

In late 2002 or early 2003, Romankow promoted Sergeants Robert Jones and Kevin Foley to lieutenants. Both officers had held the position of sergeant longer than plaintiff.

While commanding the ASU, plaintiff retained the responsibilities for records, evidence, computer services, petty cash, equipment and supplies. In a January 2003 letter, plaintiff complained of being overworked, stressed, and lacking support staff. The letter stated in part:

> I am practically a one-man unit responsible for a workload that requires two or three individuals. This is a task that is physically impossible for one person to do. At this point, this situation is affecting my physical and mental health.
>
> *3 For the past 2 years I have been reporting my situation to my superiors but nothing has been done to alleviate my situation.... This past year, I have been diagnosed with having an irritated esophagus caused by acid reflux. One of the causes of acid reflux is stress. The working conditions that I have been experiencing this past year and a half [have] been causing my stress. I am under the care of [doctors] who are treating me for this condition.

Sometime in 2003, while Lieutenant Jones commanded the ASU, Buccino eliminated the Fleet Services section from the unit. On October 8, 2003, prior to leaving the ASU, Jones recommended to Buccino and then Captain Gregory Clay that plaintiff be promoted to lieutenant.

In 2004, plaintiff again served as Acting ASU Commander. During mid-2004, Buccino eliminated the Forensics section from the ASU. Either shortly before or after this reorganization, plaintiff had written to Buccino requesting that he be considered for promotion to lieutenant and listed his qualifications. However, Buccino recommended Sergeants Lester Swick and Tracy Diaz [FN1] for promotion; and on December 18, 2004, Romankow promoted Swick and Diaz to lieutenants.

> FN1. Although Tracy Diaz has a Spanish-sounding surname, she is not Hispanic.

In January 2005, plaintiff no longer served as ASU's Acting Commander. On July 13, 2005, plaintiff sent a letter to Buccino, again requesting a promotion to lieutenant. Buccino responded that plaintiff's request would be considered in the near future within the ordinary course of the promotion process. Either immediately before or after this exchange, Buccino removed Computer Services from the ASU. At this time, plaintiff supervised the Records and Evidence section with one member of support staff. In November 2005, Prosecutor Romankow promoted Sergeants Carl Riley and Abdel Anderson to lieutenant, not plaintiff.

Plaintiff claims his qualifications were superior to those of the four officers promoted to lieutenant in 2004 and 2005, and that he was not promoted because he was Hispanic. Although none of the four officers was Hispanic, the UCPO did promote Roy Diaz, an Hispanic sergeant, to lieutenant on April 1, 2003. No other promotions to lieutenant were made by the UCPO before plaintiff's retirement in March 2007.

Romankow was the sole decision-maker regarding promotions. In making promotions, he used an informal process that included personal communications with staff and recommendations from Buccino and other superior offices, as well as from outside agencies. According to Romankow, all applicants who applied for promotion were considered. However, Romankow did not consider plaintiff qualified for promotion because plaintiff only supervised a single subordinate, and had not performed investigative work while in the ASU.

On an unspecified date, Buccino penned a note to himself enumerating several facts about plaintiff, such as his injury, his promotion date, his complaint against Weston, commendations, and some job assignments. Although undated, the note does not reference any events regarding plaintiff post-2002, when Buccino became Chief of Detectives. The back of the note lists a number of events that had occurred between 1994 and 2004, some of which pertained to persons other than plaintiff. According to Buccino, he probably composed the note in 2006 or 2007, in preparation for this litigation.

***4** Plaintiff disputes Romankow's motivation for not considering him for promotion after 2002, asserting that even though plaintiff's supervisory qualification was minimal and did not warrant him serving as lieutenant, he could have been laterally transferred to another unit, where a lieutenant position was needed. According to plaintiff, three of the four newly-appointed lieutenants were transferred to other units following their promotions.

Since 1997, when first transferred to the ASU, plaintiff never requested a lateral transfer out of the unit. However, on May 26, 2006, plaintiff requested a transfer to the Trial Unit. In making the request, plaintiff stated that he sought "an opportunity to once again do field work and enhance my investigative skills so that I may become a more suitable candidate for future promotions." The UCPO granted plaintiff's request. On transfer to the Trial Unit, plaintiff was assigned as a detective to work with two assistant prosecutors, and reported to a sergeant who, although had more tenure in the unit than plaintiff, had less tenure than plaintiff overall.

In December 2006, plaintiff filed his complaint in the Law Division. In March 2007, plaintiff accepted an early retirement incentive buyout.

On July 17, 2008, defendants filed a motion for summary judgment. On August 29, 2008, the court entered an order, supported by a written opinion, granting the motion. In dismissing plaintiff's LAD claims for failure to promote based on his race and disability, the court concluded that plaintiff had failed to present sufficient evidence to withstand summary judgment under either the mixed motives theory, *Price Waterhouse v. Hopkins,* 490 *U.S.* 228, 276, 109 *S.Ct.* 1775, 1804, 104 *L. Ed.*2d 268, 304-05 (1994) (O'Connor J., concurring), or the more common multi-step, pretext burden shifting framework of *McDonnell Douglas Corp. v. Green,* 411 *U.S.* 792, 802, 93 *S.Ct.* 1817, 1824, 36 *L. Ed.*2d 668, 677-78 (1973). In so ruling, the court stated: "Accordingly, defendants' proffered legitimate and non-discriminatory reasons have not been discredited, regardless of whether they are construed in terms of a plaintiff's race-based, disability-based, or retaliation claims."

As to plaintiff's hostile work environment claim, the court determined that, assuming plaintiff was given more tasks to perform than one person could possibly perform while in the ASU, plaintiff failed to show that the work environment "would not have occurred but for his protected characteristics, whether race based or on account of the complaint he filed against Mrs. Weston." Simply stated, the court concluded that "[p]laintiff fail[ed] to carry his burden of proving that the hostile work environment was caused by his membership in a protected class."

Lastly, as to plaintiff's CEPA claims, the court determined that the claims were time barred, having been filed more than one year after the last act complained of. *N.J.S.A.* 34:19-5.

***5** On appeal, plaintiff argues:

POINT I.

THE MOTION JUDGE ERRED BY FAILING TO CREDIT THE UCPO'S DISCRIMINATORY DIFFERENCES IN TREATMENT TOWARD LATINO AND NON-LATINO PROMOTIONAL CANDIDATES AS EVIDENCE OF PRETEXT.

POINT II.

THE MOTION JUDGE ERRED BY FAILING TO CREDIT THE LACK OF CONSISTENCY AND CREDIBILITY OF THE EMPLOYER'S PROFFERED "LEGITIMATE REASON" AS EVIDENCE OF PRETEXT.

A. A REASONABLE FACTFINDER COULD CONCLUDE THAT MR. BUCCINO'S PURPORTED REASON FOR DECIDING NOT TO RECOMMEND [PLAINTIFF] FOR PROMOTION IS UNWORTHY OF CREDENCE.

B. A REASONABLE FACTFINDER COULD CONCLUDE THAT MR. ROMANKOW'S PURPORTED REASON FOR DECIDING NOT TO RECOMMEND [PLAINTIFF] FOR PROMOTION IS UNWORTHY OF CREDENCE.

POINT III.

SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED BECAUSE THERE ARE NUMEROUS MATERIAL FACTS AND INFERENCES IN DISPUTE.

A. WHEN MR. BUCCINO LEARNED OF [PLAINTIFF'S] COMPLAINT OF DISCRIMINATION AGAINST MS. WESTON.

B. WHEN MR. BUCCINO LEARNED OF [PLAINTIFF'S] KNEE INJURY.

C. WHEN MR. BUCCINO CREATED THE ACTION SLIP AND, BY INFERENCE, WHETHER HE CONSIDERED [PLAINTIFF'S] COMPLAINT OF RACE DISCRIMINATION AND DISABILITY IN MAKING PROMOTIONAL RECOMMENDATIONS.

D. WHETHER MR. BUCCINO ASKED [PLAINTIFF] TO TRANSFER TO NARTCOTICS.

E. MR. BUCCINO'S MOTIVATION FOR ASSIGNING MR. JONES TO ASU AND FOR REMOVING FLEET SERVICES, COMPUTER SERVICES AND THE FORENSIC UNIT FROM ASU.

F. WHETHER THE QUALIFICATIONS OF THE OFFICERS PROMOTED TO LIEUTENANT WERE, IN FACT, SUPERIOR TO [PLAINTIFF'S] QUALIFICATIONS.

G. WHETHER OTHER LATINO OFFICERS SUFFERED SIMILAR DISCRIMINATION IN PROMOTIONAL DECISIONS MADE BY THE UCPO.

H. MR. ROMANKOW'S MOTIVATION FOR NOT PROMOTING [PLAINTIFF].

POINT IV.

THE MOTION JUDGE ERRED IN DISMISSING PLAINTIFF'S HOSTILE WORKING ENVIRONMENT CLAIM BECAUSE [PLAINTIFF] PUT FORTH FACTS THAT, IF PROVEN, CONSTITUTE A HOSTILE WORKING ENVIRONMENT UNDER THE LAD.

POINT V.

NONE OF PLAINTIFF'S LAD CLAIMS ARE TIME-BARRED.

POINT VI.

THE MOTION JUDGE ERRED BY GRANTING SUMMARY JUDGMENT ON PLAINTIFF'S CEPA CLAIM.

A. PLAINTIFF MADE OUT A PRIMA FACIE CASE OF RETALIATION IN VIOLATION OF CEPA.

B. PLAINTIFF'S CEPA CLAIM IS NOT TIME-BARRED.

A trial court will grant summary judgment to the moving party "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." *R.* 4:46-2(c); *see also Brill v. Guardian Life Ins. Co. of Am.,* 142 *N.J.* 520, 523, 666 A.2d 146 (1995). "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." *R.* 4:46-2(c).

***6** On appeal, "the propriety of the trial court's order is a legal, not a factual, question." Pressler, *Current N.J. Court Rules,* comment 3.2.1 on *R.* 2:10-2 (2009). "Appellate courts employ the same standard [that governs trial courts] when reviewing summary judgment orders." *Block 268, LLC v. City of Hoboken Rent Leveling & Stabilization Bd.,* 401 *N.J.Super.* 563, 567, 952 A.2d 473 (App.Div.2008).

We have considered plaintiff's arguments challenging the grant of summary judgment dismissing his LAD claims in light of the record and applicable law. We reject the arguments and affirm substantially for the reasons expressed by the trial court in its written decision of August 29, 2008.

We next address plaintiff's argument challenging the trial court's dismissal of his CEPA claim on the grounds that it was time barred. Plaintiff contends that he is entitled to pursue that claim under the continuing tort doctrine. Because we affirm the grant of summary judgment dismissing the CEPA claim for a different reason than expressed by the trial court, we need not address the correctness of the trial court's decision.

Appeals are taken from judgments, not from oral or written decisions. *Glaser v. Downes,* 126 *N.J.Super.* 10, 16, 312 A.2d 654 (App.Div.1973), *certif. denied,* 64 *N.J.* 513, 317 A.2d 726 (1974). An order of judgment will be affirmed on appeal if it is correct, even though the judge gave the wrong reasons for it. *Isko v. Planning Bd. of Twp. of Livingston,* 51 *N.J.* 162, 175, 238 A.2d 457 (1968); *see also El-Siloufi v. St. Peter's Univ. Hosp.,* 382 *N.J.Super.* 145, 169, 887 A.2d 1170 (App.Div.2005) (explaining that "a correct result, even if predicated on an erroneous basis in fact or in law, will not be overturned on appeal").

"CEPA is 'remedial legislation, designed to expand employee protection.' " *Notte v. Merchs. Mut. Ins. Co.,* 386 *N.J.Super.* 623, 627, 902 A.2d 352 (App.Div.2006) (quoting *Crusco v. Oakland Care Ctr., Inc.,* 305 *N.J.Super.* 605, 610, 702 A.2d 1363 (App.Div.1997). *N.J.S.A.* 34:19-3 provides, in pertinent part,

> An employer shall not take any retaliatory action against an employee because the employee does any of the following:
>
> a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer or another employer, with whom there is a business relationship, that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law ...;
>
> ....
>
> c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:
>
> (1) is in violation of a law, or a rule or regulation promulgated pursuant to law ...;
>
> (2) is fraudulent or criminal; or

(3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.

A CEPA "retaliatory action" is defined as "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). To establish a prima facie case of a CEPA retaliatory action by an employer, an employee must demonstrate: (1) the employee reasonably believes that the employer's conduct violated either a law or a rule or regulation promulgated pursuant to law; (2) the employee performed whistle-blowing activity described in CEPA; (3) the employer took adverse employment action against the employee; and (4) a causal connection exists between whistle-blowing activity and the adverse employment action. *Blackburn v. United Parcel Services, Inc.,* 179 *F.3d* 81, 92 (3d Cir.1999); *Kolb v. Burns,* 320 *N.J.Super.* 467, 476, 727 A.2d 525 (App.Div.1999).

*7 Here, plaintiff confronted Koury concerning Koury's misrepresenting the hours worked, and his tardiness. Plaintiff also reported Koury's actions to Buccino and issued Koury a reprimand. Plaintiff's actions in both reporting Koury and issuing him a reprimand occurred during plaintiff's tenure as Acting ASU Commander, that is, while plaintiff was in a managerial or supervisory position over Koury. Disciplining a subordinate under these circumstances does not qualify as whistle blowing under CEPA. Rendering discipline is a responsibility of a supervisor and a part of a supervisor's job function. Otherwise, all supervisors who reprimand or discipline subordinates would qualify as CEPA claimants. That was not the Legislature's intent.

Affirmed.

N.J.Super.A.D.,2010.

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United States District Court,
D. New Jersey.
Ellsworth D. PATTERSON, Jr. and Karen Patterson, Individually & as H/W, Plaintiffs,
v.
GLORY FOODS, INC. and McCall Farms, Inc., Defendants.

Civil Action No. 10–6831(FLW).
Sept. 28, 2012.

Matthew Benjamin Weisberg, Prochniak Weisberg, PC, Morton, PA, for Plaintiffs.

Francis V. Cook, Fox Rothschild, Lawrenceville, NJ, for Defendants.

OPINION

WOLFSON, District Judge.

***1** Plaintiff Ellsworth David Patterson, Jr. ("Plaintiff" or "Patterson"), a former employee of Glory Foods, Inc. ("Glory Foods"), filed this suit against Glory Foods and McCall Farms, Inc., which company merged with Glory Foods (collectively, "Defendants"), alleging that he was wrongfully terminated for being a "whistleblower" in violation of New Jersey's Conscientious Employee Protection Act ("CEPA").[FN1] In the present matter, Defendants move for summary judgment on Plaintiff's CEPA claim. Upon reviewing the motion, this Court finds that: (1) Plaintiff was objectively unreasonable in his belief that his employer's business interactions were unlawful or unethical; (2) Plaintiff's emails to the President of Glory Foods did not amount to "blowing the whistle" within the definition of the CEPA; and (3) Plaintiff has not established a causal connection between his alleged disclosure and his ultimate termination. For these reasons, Defendants' motion for summary judgment is **GRANTED.** Below is the Court's determination.

FN1. Ellsworth and Karen Patterson filed their initial Complaint on December 30, 2010, asserting the following counts: (I) wrongful termination, (II) violation of the New Jersey Conscientious Employee Act, and (III) loss of consortium. Thereafter, Defendants moved to dismiss Counts I and III, and both plaintiffs consented to the dismissal. Consequently, the Court dismissed Counts I and III with prejudice on May 10, 2011. Having dismissed Count III, Karen Patterson no longer remains a named plaintiff in this case and Count I is the only remaining cause of action.

I. BACKGROUND[FN2]

FN2. The Court will only recount relevant facts necessary for the resolution of this motion.

A. Plaintiff's Employment with Defendant Glory Foods, Inc.

Plaintiff was employed by Glory Foods, a consumer retail company that sells vegetable products to supermarkets, as an at-will Area Sales Manager from October 2008 through March 12, 2010. (Defendants' Fact Statement ("DFS") ¶ 1, 4, 5); (Plaintiff's Response to Defendants' Fact Statement ("PR") ¶ 1, 4, 5; Pl.'s Dep. 106:13–15.) His job responsibilities at Glory Foods included monitoring retail pricing, developing relationships with retailers, partnering with brokers to create selling strategies, and reporting sales activities and results. (DFS ¶ 6; PR 6.) Plaintiff's

immediate supervisor was Lisa Cliff ("Cliff"), the former Vice President of Sales at Glory Foods. (DFS ¶ 7; PR ¶ 7; Cliff Dep. 16:17–25.) Plaintiff's relationship with Cliff became tenuous over the course of his tenure at Glory Foods. (DFS ¶ 8; PR ¶ 8.)

B. Underpayment by Wakefern

In early 2010, Plaintiff exchanged a series of emails with President of Glory Foods, Jacqueline Neal ("Neal"), and Cliff regarding an accounting discrepancy of a payment made by Wakefern, a client that Plaintiff managed. By way of background, before Plaintiff's employment, Wakefern failed to pay Glory Foods for certain products it had received, resulting in a loss to Glory Foods in an amount between $100,000 and $200,000. (Pl.'s Dep. 27:1–29:20.) This discrepancy occurred during the tenure of Sharon Anderson ("Anderson"), who was the previous Wakefern account manager at Glory Foods. (*Id.* at 29:23–30:2, 31:2–15.) As a result of the discrepancy, Glory Foods entered into a "handshake agreement with Wakefern" whereby Wakefern would provide "free ads, waiv[e] new items and establis[h] an accrual program" in order to pay back the amount. (*Id.* at 30:11–16, 31:2–7.) This agreement was never memorialized in writing because the broker for the Wakefern client had "improperly filled out paperwork." (*Id.* at 30:15–16.) Nevertheless, the President of Glory Foods at the time, Barry Huff, implemented the Accrual Program, which, according to Cliff, ended sometime in 2007—prior to Plaintiff's employment. (Cliff.Dep.33:14, 34:2–3, 38:1–2.)

*2 Plaintiff has explained that at the beginning of his employment he was unaware of the existence of the Accrual Program. Indeed, in late 2008 or early 2009, Plaintiff drafted a new contract with Wakefern without any provision of the Accrual Program. (Pl's Dep. 51:7–52:11, 53:9–22.) According to Plaintiff, he first became aware of the Accrual Program's existence when Anderson informed him of Wakefern's underpayment and the subsequent agreement at a trade function. (*Id.* at 30:11–16, 31:2–7.) Plaintiff further explained that through meetings with Cliff and a broker for Wakefern, he was made aware of other information regarding the program, including that the underpayment was in the amount of approximately $100,000.[FN3] (*Id.* at 26:6–15.) Plaintiff "discovered" that in 2009, the sales figures relating to Wakefern were down from the previous year, and thus, he believed that this was due to the discontinuation of the Accrual Program. (*Id.* at 45:21–5, 46:1–7.) Thereafter, Plaintiff made an initial inquiry to Wakefern brokers "Mike and Cyndi" to determine whether the program could be renewed. (*See* Email dated November 12, 2009.) Plaintiff later asked Cliff about both the underpayment and the Accrual Program. (Cliff Dep. at 43:19–25, 44:1.) Cliff informed Plaintiff that the Program had ended prior to his employment. At that time, Plaintiff did not further inquire about the Accrual Program and more importantly, he did not characterize this apparent "discrepancy" as a result of unlawful conduct on the part of Glory Flood.[FN4]

FN3. During his deposition, Allen testified that neither he nor Cliff knew how Plaintiff reached "his 100 to $200,000 number." (Allen's Dep. at 30:25–31:3.)

FN4. Plaintiff also referenced a January 2010 meeting regarding the Wakefern client, during which Dan Charna, one of the owners of Glory Foods and its Vice President of Operations, told the room that Wakefern had "stolen $200,000." (Pl's Dep. 27:11–13, 61:16–19.) In attendance, among others, were Plaintiff, Allen, and new owners of Glory Foods from McCall Farms. (*Id.* at 61:5–14.) Plaintiff explains that this is another incident upon which he based his suspicion of wrongful activity on the part of Glory Foods. However, Plaintiff never pursued his suspicion with anyone at Glory Foods after this incident, nor does Plaintiff provide any explanation as to this comment.

C. Plaintiff's Initial Communication with Neal

On the morning of February 24, 2010, Neal sent an email to the management team, including Cliff, informing them about a "2010 Plans discussion" meeting. Around the same time, Neal sent an email to the Sales Team, which included Plaintiff, requesting that each salesperson review his or her clients and provide "comments, questions, or insight" that would be productive for the upcoming sales meeting.

Plaintiff responded to Neal on February 25, 2010, at 2:59 PM, writing, among other things, regarding the Wakefern client, that "[w]e were running different programs in FY 09 versus FY 10 that affected the current IRI number negatively. We have programs in place to address any of these declines." He explained that the figures in 2009 were approximately "70,000 cases," compared to "100,000 cases" in 2008 with the "program" in place, for a difference of "30,000 cases." [FN5] *Id.* at 47:4–17. He copied Cliff on this email. Thereafter, at 3:01 PM, Cliff immediately took issue with Plaintiff's communication with Neal, and to that end, Cliff directed Neal not to send emails to Neal without her approval.[FN6]

> FN5. Apparently, there is a dispute as to when the Accrual Program ended. According to Plaintiff's belief, the program ended sometimes in fiscal year 2009, whereas Cliff stated that it ended in 2007. For the purpose of this motion, this dispute is not material to the Court's determination.

> FN6. Defendants also point to a prior instance in August 2009, where Plaintiff had sent Neal a direct email regarding an unrelated issue and was reprimanded by Cliff, who wrote in an email to Plaintiff: "YOU NEED TO STOP SENDING things to Jacqui without talking to me first!" DFS ¶ 21.

Before Plaintiff had responded to Neal's email, Cliff had emailed Plaintiff and "Dino" a task at 2:00 PM with the subject line "Customers that need to be increased by 4[pm] today." Cliff had asked the two salespeople to "increase [the listed] numbers for the team." (*See* email dated February 25, 2010.) After Cliff saw Plaintiff's response to Neal, she sent another email to Plaintiff at 4:16 PM, stating that the task sent to him at 2:00 PM was "extremely important" and "takes place over whatever [Plaintiff was] working on ...." (*Id.*) Plaintiff admits that he missed the deadline; however, he reasons that he did not see this email because it was not marked as high priority, and because he was working on the task from Neal. (Pl.'s Dep. 165:5–166:9.)

D. Plaintiff's Final Email to Neal

***3** Subsequently, on February 26, 2010, at 11:02 AM, Neal responded to Plaintiff, asking him for "more information on Wakefern" regarding the "different vs Yago" programs and what "specific programs" he had in place to address the declines. In his response email to Neal, dated March 1, 2010, Plaintiff explained that

> "[t]here was an accrual program in place at Wakefern prior to my arrival to the company. This program was set up to recoup the $100–200,000 over payment [sic] to Wakefern. The affect [sic] of the accrual program resulted in a positive growth of 41% in sales in 2008. However, the accrual program was not run in 2009 which resulted in a decrease of IRI numbers. Additionally, the price increase affected volume in 2009."

Plaintiff also explained the programs he had implemented to address the declines. Importantly, however, Plaintiff did not raise any issues regarding the alleged "scheme" involving the Accrual Program with Neal or Cliff after receiving both of Neal's emails dated February 24, 2010 or February 26, 2010.

E. Plaintiff's Discharge

After Plaintiff addressed the accounting issue

concerning the Accrual Program to Neal, multiple events occurred, which led to Plaintiff's ultimate discharge. First, Cliff sent an email to Plaintiff and Mryon Allen, a subordinate of Cliff, asking Allen to discuss with Plaintiff his insubordinate conduct. According to Plaintiff, Allen called him to inquire as to why Plaintiff raised the Accrual Program with Neal without first informing Cliff and advised him to report to Cliff so that Plaintiff would be instructed on how to properly respond to superiors. (Pl.'s Dep. 59:20–60:1.) In his own words, Plaintiff claims that Allen had told him to "immediately cease any communications with the company concerning the accounting discrepancy with Wakefern." (*Id.* at 57:23–58:5.) However, according to Allen, he merely gave Plaintiff guidance regarding respect for the chain of command and for communicating "incorrect information." (Allen Dep. 29:7–11.)

Plaintiff claims that on March 12, 2010, Neal and Cliff held a telephone conference with him, wherein Cliff informed Plaintiff that "[d]ue to the recent merger with McCall Farms [Plaintiff's] job [was] being terminated...." (Plaintiff's Memorandum of Record dated May 5, 2010, p. 1.) According to Plaintiff, Neal then stated that Plaintiff's termination was not due to sales performance issues, but rather due to a personality conflict with Cliff, with whom "there had been several incidents and [Plaintiff] missed an important deadline to turn in sales numbers estimates." [FN7] (*Id.*) Moreover, Neal noted that Plaintiff had not taken responsibility for the missed deadline or apologized for the incident. In response, Plaintiff responded that he was unaware of such a personality conflict, as he had never discussed any issues with Cliff. (Pl.'s Dep. 69:20–21, 70:5–6.) However, Plaintiff revealed that he had been concerned about their relationship because "she did not listen to any ideas or suggestion that wasn't her own ..." (*Id.* at 70:13–15.) Ultimately, Plaintiff was terminated on March 12, 2010.

FN7. Plaintiff asserts that the missed deadline referenced in the conference was the task assigned by Cliff in the email, dated February 25, 2010, with the subject line "Customers that need to be increased by 4 today." (Pl.'s Dep. at 71:10–13.)

*4 Defendant now moves for summary judgment on Plaintiff's CEPA claim, the only remaining claim in the Complaint.

II. STANDARD OF REVIEW

A moving party is entitled to judgment as a matter of law where there is no genuine issue as to any material fact. *See* FED R. CIV. P. 56(c); *Brooks v. Kyler,* 204 F.3d 102, 105 n. 5 (3d Cir.2000) (*citing* FED R. CIV. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)); *Orson, Inc. v. Miramax Film Corp.,* 79 F.3d 1358, 1366 (3d Cir.1996). The burden of demonstrating the absence of a genuine issue of material fact falls on the moving party. *See Taylor v. Phoenixville Sch. Dist.,* 184 F.3d 296, 305 (3d Cir.1999) (citations omitted). Once the moving party has satisfied this initial burden, the opposing party must identify "specific facts which demonstrate that there exists a genuine issue for trial." *Orson,* 79 F.3d at 1366.

Not every issue of fact will be sufficient to defeat a motion for summary judgment; issues of fact are genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Further, the nonmoving party cannot rest upon mere allegations; he must present actual evidence that creates a genuine issue of material fact. *See* FED R. CIV. P. 56(e); *Anderson,* 477 U.S. at 249 (*citing First Nat'l Bank v. Cities Serv. Co.,* 391 U.S. 253, 290, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968)). In conducting a review of the facts, the non-moving party is entitled to all reasonable inferences and the record is construed in the light most favorable to that party. *See Pollock v. American Tel. & Tel. Long Lines,* 794 F.2d 860, 864 (3d Cir.1986). Accordingly, it is not the Court's role to

make findings of fact, but to analyze the facts presented and determine if a reasonable jury could return a verdict for the nonmoving party. *See Brooks,* 204 F.3d at 105 n. 5 (*citing Anderson,* 477 U.S. at 249); *Big Apple BMW v. BMW of N. Am., Inc.,* 974 F.2d 1358, 1363 (3d Cir.1992).

III. ANALYSIS

Plaintiff alleges that Glory Foods terminated him for reporting the accounting discrepancy relating to Wakefern, which was the result of an illegal kick-back scheme. (Pl.'s Compl. ¶ 52.) On this motion, Defendants argue that Plaintiff has not established a *prima facie* case under CEPA or met his burden of rebutting Defendants' proffered reason for his termination. The Court agrees.

CEPA was enacted "to protect and encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employees from engaging" in such activity. *Abbamont v. Piscataway Tp. Bd. Of Educ.,* 138 N.J. 405, 431, 650 A.2d 958 (1994); *see also Barratt v. Cushman & Wakefield,* 144 N.J. 120, 127, 675 A.2d 1094 (1996); *Higgins v. Pascack Valley Hospital,* 158 N.J. 404, 417, 730 A.2d 327 (1999).

Like New Jersey's Law Against Discrimination, CEPA reflects a "reaffirmation of [New Jersey's] repugnance to an employer's retaliation against an employee who has done nothing more than assert statutory rights and protections and a recognition by the Legislature of a preexisting common-law tort cause of action for such retaliatory discharge". *Lally v. Copygraphics,* 85 N.J. 668, 678, 428 A.2d 1317 (1981). Indeed, New Jersey has consistently advanced a strong public policy against work place discrimination and promotes liberal construction of statutes and policies to further the remedial goals of all anti-discrimination work place protective legislation. "In enacting the NJLAD, the New Jersey Legislature expressed a strong public policy in protecting the State's residents against the practice of discrimination, which as the Legislature declared, 'threatens not only the rights and proper privileges of the inhabitants of this state, but menaces the institutions and foundations of a free democratic state'." *See Finding and Declaration of Legislature* N.J. S.A. 10: 5–3.

***5** CEPA provides, in relevant part, that:

> [a]n employer shall not take any retaliatory action against an employee because the employee does any of the following: a. Discloses, or threatens to disclose 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 ... (2) is fraudulent or criminal ... or c. Objects to or refuses to participate in any activity, policy or practice which the employee reasonably believes: (1) is in violation of a law, or a rule or regulation promulgated pursuant to law [;] ... (2) is fraudulent or criminal; or (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.

N.J. S.A. 34:19–3.

To succeed on a CEPA claim, a plaintiff must prove four elements: (1) that the plaintiff reasonably believed that employer's conduct violated a law or regulation; (2) that the plaintiff performed "whistle-blowing activity" as defined in CEPA; (3) that an adverse employment action has been taken against him or her; and (4) that the whistleblowing activity caused such adverse employment action. *See Kolb,* 320 N.J.Super. at 476, 727 A.2d 525; *Dzwonar,* 177 N.J. at 462, 828 A.2d 893. At base, CEPA covers employee complaints about activities the employee reasonably believes are: (i) in violation of specific statute or regulation; (ii) fraudulent or criminal; or (iii) incompatible with policies concerning public health, safety or welfare or the protection of the environment.

See Estate of Roach, 164 N.J. at 610, 754 A.2d 544. Importantly, "CEPA does not require that the activity complained of ... be an actual violation of a law or regulation, only that the employee "reasonably believes" that to be the case." *Id.* at 613, 754 A.2d 544.

Once a plaintiff has established a prima facie case under CEPA, courts employ the well-established burden-shifting analysis that is used in federal discrimination cases involving "pretext" claims. *Blackburn v. United Parcel Services, Inc.,* 179 F.3d 81, 92 (3d Cir.1999). Under this test, "the burden of production shifts to the defendant to 'articulate some legitimate, nondiscriminatory reason' for its actions." *Woodson v. Scott Paper Co.,* 109 F.3d 913, 920 n. 2 (3d Cir.) (*quoting McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)). Once the defendant articulates a legitimate reason for the adverse employment action, the presumption of retaliatory discharge created by the prima facie case disappears and the burden shifts back to the plaintiff. *See id.* Then, "[t]o prevail at trial, the plaintiff must convince the factfinder 'both that the reason [given by the employer] was false, and that [retaliation] was the real reason.' " *Id.* (*quoting St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 515, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993)). For summary judgment purposes, the court must determine whether the plaintiff has offered sufficient evidence for a reasonable jury to find that the employer's proffered reason for the discharge was pretextual and that retaliation for the whistleblowing was the real reason for the discharge. *See Sempier v. Johnson & Higgins,* 45 F.3d 724, 728 (3d Cir.1995) ("[T]o defeat a summary judgment motion based on a defendant's proffer of a nondiscriminatory reason, a plaintiff who has made a prima facie showing of discrimination need only point to evidence establishing a reasonable inference that the employer's proffered explanation is unworthy of credence."). Typically, the types of evidence that the plaintiff must point to are "inconsistencies or anomalies that could support an inference that the employer did not act for its stated reasons." *Id.* at 731.

A. Reasonable Belief

***6** Regarding his reasonable belief, Plaintiff alleges that Defendants' failure to seek full repayment from Wakefern in an estimated amount of $200,000 was unlawful or unethical because "it is unheard of in his industry to not seek repayment of $200,000." (Plaintiff's Reply Brief ("PRB") ¶¶ 9–10.) To establish that belief, Plaintiff explains that he believed that the discrepancy was the result of an unlawful scheme based, in part, on the fact that Cliff "informed Plaintiff to let the issue of the overpayment go" and never explained why "[Defendants] were not seeking repayment." (PRB ¶¶ 9.) Plaintiff construes Cliff's alleged instructions as a "cover-up" of unlawful activities. In addition, Plaintiff questions why "nothing was done to remedy" the overpayment after the Accrual Program ended for reasons unknown to him. *Id.* at 9. Finally, subjectively speaking, Plaintiff explains that because he encountered a similar experience at a prior company, where a failure to investigate into missing supplies and equipment was audited to reveal employee kickbacks and fraud, he is thus reasonable in his belief that such conduct could have occurred at Glory Foods. *Id.* at 10.

Even when liberally construing the facts in Plaintiff's favor, his claim fails because no reasonable jury could find that Plaintiff's belief—that the discontinuation of the Accrual Program was motivated by an unlawful scheme—was reasonable. Plaintiff presents no evidence to show that at the time he allegedly objected to the overpayment, he believed an illegal scheme took place. To the contrary, Plaintiff merely presented the issue of overpayment to management purely as a business matter. Indeed, Plaintiff claims that he formed his suspicions of alleged illegal activity from Cliff's silence on this subject, coupled with Plaintiff's previous encounter of fraudulent activity at a different job; both after-the-fact rationales. These reasons are insufficient.

For scenarios involving this type of conclusion

jumping rationale, the decision in *Blackburn v. United Parcel Service, Inc.* is particularly persuasive. 3 F.Supp.2d 504 (D.N.J.1998). In *Blackburn,* the plaintiff expressed his concerns about the company's pricing policies over the course of several memos he wrote to fellow employees. *Id.* at 508. Specifically, he questioned management's practices as they related to anti-trust law and the potential for a current or future violation of such laws. *Id.* However, much like this case, his CEPA claim failed because "the memos and conversations show [ed] only that plaintiff, as he was obligated to do in his managerial capacity, brought several potentially problematic issues to his employer's attention." *Id.* at 514. The court concluded that the employee's belief "a law *might* someday be violated if ... certain changes are not made simply does not violate any law of which this court is aware." *Id. See also, Falco v. Community Med. Ctr.,* 296 N.J.Super. 298, 308, 686 A.2d 1212 (App.Div.1997) (holding that plaintiff's concerns regarding "management style" did not equate to complaints about unlawful actions, and thus was unreasonable under CEPA); *Young v. Schering Corp.,* 275 N.J.Super. at 237, 645 A.2d 1238 (holding that CEPA "was not intended to provide a remedy for wrongful discharge for employees who simply disagree with an employer's decision, where that decision is entirely lawful.").

*7 Here, Plaintiff's belief was unreasonable because the "discrepancy" and the termination of the Accrual Program resulted apparently from an entirely lawful business decision. While, under CEPA, Plaintiff does not have to prove that an unlawful activity had occurred, his lack of evidence to the contrary buttresses the Court's finding that the allegations of wrongdoing on the part of Glory Foods are insufficient to support Plaintiff's belief that Glory Foods was involved in a "kick-back" scheme. Indeed, to the contrary, Cliff testified that when Plaintiff asked her about the overpayment to Wakefern, she informed Plaintiff, and Plaintiff does not dispute, that this accounting discrepancy occurred before Plaintiff's employment, and the Accrual Program was put in place to address the issue.[FN8] Cliff Dep. at 44:4–6. Moreover, as Cliff explained, the program ended in 2007—nearly two years before Plaintiff began his employment—because Glory Foods and Wakefern mutually determined that the program should discontinued after a year. *Id.* at 43:6, 13–15, 44:4–17, 645 A.2d 1238. Although Plaintiff suggests that the program may have been terminated in 2009, there is no evidence supporting this assertion. Significantly, Plaintiff was specifically informed by Cliff that the issue of the overpayment had been resolved between the former President of Glory Foods and Wakefern. *Id.* at 44:14–19, 645 A.2d 1238. Therefore, it appears Plaintiff's insistence that some unlawful conduct took place is merely based upon his own subjective belief regarding how Glory Foods' finances should be managed.

> FN8. Although Plaintiff claims in his Opposition Brief that Cliff insisted that Plaintiff "ignore" the issue of the overpayment, Plaintiff fails to support his version of events with any competent evidence. Without any evidence, Plaintiff's accusation rings hollow.

Furthermore, the facts of this case even fall short of the circumstances in *Blackburn,* where the plaintiff there at least relayed his concerns regarding a potential conflict with the company's policy and the law. The Court notes that CEPA plaintiffs must "have an objectively reasonable belief, *at the time of the objection* ... that such activity is illegal [or] fraudulent." *Mehlman v. Mobil Oil Corp.,* 153 N.J. 163, 193, 707 A.2d 1000 (1998). Here, Plaintiff provides no evidence whatsoever that he communicated his belief to Glory Foods that any unlawful activity transpired. In his initial email to Neal following her request for general sales comments, Plaintiff explained that with regard to Wakefern, Glory Foods was "running different programs in FY 09 versus FY 10 that affected the current IRI number negatively," but that he "had programs in place to address any of these declines." Plaintiff did not even reference the Accrual Program

or any concerns regarding a possible illegal scheme. From its content, this email demonstrates that Plaintiff was merely commenting on or—at worst—criticizing the decisions of Glory Foods on the Wakefern account. More importantly, as noted above, Plaintiff offered this information ***in response*** to Neal's inquiry. What is more, only after Neal's further inquiry regarding the Wakefern account did Patterson mention the Accrual Program and its effect on sales numbers. For reassurance, Plaintiff informed Neal that he had put in place a specific program to counteract the alleged losses that resulted from the Accrual Program's discontinuation. At that time, it is apparent from Plaintiff's emails that he did not suspect any unlawful conduct; rather, it was business as usual.

***8** In sum, Plaintiff never conveyed in any conversation or email sent to Neal, Cliff, or any of his co-workers that he thought something illegal had occurred. In that regard, Plaintiff not once referenced any law he thought the overpayment might have violated, much less his 11th-hour insinuation of fraud or a kickback scheme. The Court finds that the evidence supports the conclusion that Plaintiff merely brought the issue to Neal's attention in the midst of carrying out the tasks of his job, not as a complaint or a red flag.[FN9] Therefore, there is no evidence that Plaintiff reasonably believed that a kickback scheme occurred; without such a showing, Plaintiff cannot sustain his *prima facie* burden. On this basis alone, his CEPA claim fails as a matter of law. *See Young v. Prudential Ins. Co. of America, Inc.*, 297 N.J.Super. 605, 627, 688 A.2d 1069 (App.Div.1997) (holding that "if [plaintiff's] belief, however sincere, was objectively unreasonable, his actions are not protected activity and his CEPA claim must fail.")

> FN9. Plaintiff stated in his submissions that he "raised this issue of kickbacks with the President of Glory Foods, Jackie Neal, in an email...." PRB at ¶¶ 3. However, this is contrary to Plaintiff's own testimony. Plaintiff testified that he "spoke to [Neal] about the $200,000 on email so she's aware of that issue of the $200,000." Pl.'s Dep. 37:2–4. Moreover, there is nothing on the record that supports Plaintiff's assertion.

B. Whistleblowing Activity

Even assuming that Plaintiff has met the first element of a CEPA claim, this Court finds that Plaintiff cannot meet the "whistleblowing activity" element. Under section 3a, a whistleblowing activity occurs when an employee "[d]iscloses, or threatens to disclose to a supervisor or to a public body an activity, policy, or practice of the employer or another employer with whom there is a business relationship, that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law." N.J.S.A. 34:19–3a. "The object of CEPA is not to make lawyers out of conscientious employees but rather to prevent retaliation against those employees who object to employer conduct that they reasonable believe to be unlawful." *Mehlman,* 153 N.J. at 193–194, 707 A.2d 1000. Thus, CEPA plaintiffs need not complain about the "exact violation" that occurred. *Hernandez v. Montville Tp. Bd. Of Educ.*, 354 N.J.Super. 467, 474, 808 A.2d 128 (App.Div.2002).

However, courts have declined to view a CEPA plaintiff's proffered complaint as a whistleblowing activity when it makes no references to violations of the law. *See Boyle v. Quest Diagnostics, Inc.*, No. 05–CV–4463, 2008 WL 2242443, at *7 (D.N.J. May 29, 2008) (holding that plaintiff's CEPA claim failed in part because his alleged whistleblowing activity made no indication that plaintiff believed his employer's activities were in contravention of any law, or a rule or regulation promulgated pursuant to law). Likewise, the disclosure of complaints or disagreements about otherwise lawful employer actions has not been considered whistleblower activity. *See Young v. Schering Corp.*, 275 N.J.Super. 221, 237, 645 A.2d 1238 (App.Div.1994).

In that connection, it is well established that

CEPA does not protect disclosures that are a regular part of the employee's job responsibilities. *See Massarano v. New Jersey Transit,* 400 N.J.Super. 474, 491, 948 A.2d 653 (App.Div.2008) (holding that plaintiff was merely doing her job as security operations manager and was not a whistleblower under CEPA when she reported her findings and opinion regarding defendant's allegedly reckless disposal of documents); *Capanna v. Tribeca Lending Corp.,* 2009 WL 900156, *8 (D.N.J.2009) (holding that plaintiff was merely performing her routine duties as a loan underwriter in reporting an error regarding an applicant's occupation and salary to her supervisor and did not disclose or object to any unlawful activity or conduct by the company).

***9** In the instant matter, Plaintiff alleges that he informed Neal of the accrual program, and in doing so, objected to conduct he reasonably believed was unlawful.[FN10] As previously stated, Plaintiff was not objectively reasonable in his belief that what he was reporting was unlawful. However, even assuming that he harbored this reasonable belief, neither the emails sent on February 25, 2010 or March 2, 2010, to Neal could be considered a whistleblowing activity for the purposes of CEPA. Plaintiff insists that these emails are the culmination of his efforts to object to Defendants' conduct. [FN11] The Court disagrees.

FN10. In his brief, Plaintiff makes multiple arguments that lack proper citations to the record and are otherwise belied by the record. To reiterate, Plaintiff asserts that he "raised the issue of repayment with Cliff and was instructed to ignore it." PRB, p. 11. This allegation is not supported by any evidence. Second, Plaintiff states that he "knew Lisa Cliff would probably fire him if he raised the issue of the missing $200,000, because she was deliberately hiding the facts of the missing money from the Plaintiff." *Id.* This is yet another conclusory assertion unsupported by the record.

FN11. Plaintiff refers to his February 25th email to Neal as the "crucial" email which informed Neal of "the fact that the repayment program was stopped without reason, and without knowledge as to what was repaid by Wakefern and without any accounting performed by Glory Foods." PRB, p. 11. However, that language is quoted from the March 1st email from Plaintiff to Neal.

Nothing in these emails can be reasonably construed as an objection in a CEPA context. Indeed, as noted earlier, the February 25, 2010 email merely stated that "[Glory Foods was] running different programs in FY 09 versus FY 10 that affected the current IRI numbers negatively." *See* Patterson's email dated February 25, 2010. Significantly, contrary to any indication of wrongdoing, Patterson noted that he has put in place "programs ... to address any of these declines." *Id.* Even more obvious, in the followup email that references the Accrual Program, Plaintiff simply explains the program to Neal as he understood it, and sets forth steps that he was taking "to counter any losses from the prior year." *Id.* Clearly, not only did Plaintiff fail to object to any unlawful conduct in substance—as the discontinuation of the Accrual Program in and of itself was not unlawful—but Plaintiff makes no mention or assertion whatsoever at the time he sent the emails to Neal that he believed the overpayment and the subsequent discontinuation of the Accrual Program referenced in those emails, were the result of an illegal scheme or unethical act. Moreover, fatal to Plaintiff's claims is his suggestions in those emails of ways to mitigate the company's losses from a business standpoint; this is compelling evidence which reveals Plaintiff's apparent disagreement over the discontinuation of the Accrual Program, rather than a seemingly *post hoc* belief of illegality. At best, Plaintiff was being critical of a management decision. However, this falls short of supporting a whistleblower activity. Accordingly, under no set of facts on this record can a reasonable jury find that

Plaintiff objected to Glory Foods' conduct or that Plaintiff engaged in a whistleblowing activity. *See, e.g., Boyle,* 2008 WL 2242443, at *7; *Young,* 275 N.J.Super. at 237, 645 A.2d 1238 ("[CEPA] nevertheless was not intended to provide a remedy for wrongful discharge for employees who simply disagree with an employer's decision, where that decision is entirely lawful.").

Finally, as a last-ditch effort, Plaintiff points to the CEPA provision providing a cause of action for employees who refuse to participate in violative conduct and he claims, in a conclusory manner, that he was asked by Cliff and Allen to participate in illegal acts. Plaintiff does not specify what conduct he was asked to participate, nor did he allege any in his Complaint. Additionally, there is nothing in the record that would support Plaintiff's assertion in this regard. Thus, this newly concocted theory of liability fails on this motion.

C. Causal Connection

***10** Thus far, the Court has found that Plaintiff has failed to demonstrate the first two elements of a CEPA claim. There is no dispute that Plaintiff presumably suffered an adverse employment action—termination of his employment. As to the last element of causation, Plaintiff has failed to prove that a casual nexus exists between his alleged protected activity and termination.

To satisfy the element of causation, plaintiff must demonstrate that "a causal connection exists between the whistle-blowing activity and the adverse employment action." *Dzwonar,* 177 N.J. at 462, 828 A.2d 893. Plaintiff must show that the "retaliatory discrimination was more likely than not a determinative factor in the decision." *Donofry v. Autotote Sys., Inc.,* 350 N.J.Super. 276, 293, 795 A.2d 260 (App.Div.2001) (citations omitted). In analyzing the causal link between a protected activity and adverse employment action, courts often look to the temporal proximity because it is circumstantial evidence which CEPA plaintiffs may proffer to raise an inference that their protected activity was the likely reason for the adverse action. *Campbell v. Abercrombie & Fitch, Co.,* No. Civ.A. 03–3159, 2005 WL 1387645, at *7 (D.N.J. June 9, 2005) (*citing Kachmar v. Sungard Data Sys.,* 109 F.3d 173, 177 (3d Cir.1997)); *Jalil v. Avdel Corp.,* 873 F.2d 701, 708 (3d Cir.1989).

> However, it is important to emphasize that it is causation, not temporal proximity itself, that is an element of plaintiff's prima facie case, and temporal proximity merely provides an evidentiary basis from which an inference can be drawn. The element of causation, which necessarily involves an inquiry into the motives of an employer, is highly context-specific.

Id. at *8 (citations and internal quotations omitted).

Here, as to causation, Plaintiff argues that the temporal proximity between the submissions of his emails and his eventual termination is highly suggestive that he was terminated for retaliatory purposes. Indeed, the record reflects that after sending the email dated March 1, 2010, Plaintiff was terminated from Glory Foods on March 12, 2010. However, notwithstanding the short time frame, Plaintiff cannot demonstrate causation because he was simply not a whistleblower. *See supra,* Section B. In *Blackburn,* the court found that plaintiff's actions did not constitute whistleblower activity, and therefore "plaintiff [could not] demonstrate the required nexus between a 'whistleblowing activity' and his termination." *Blackburn,* 3 F.Supp.2d at 517. Equally applicable in the instant matter, Plaintiff could not have been terminated for "blowing the whistle" if he did not actually "blow the whistle." *Id.* Accordingly, for the reasons set forth above, Plaintiff has failed to demonstrate causation.[FN12]

FN12. Assuming that Plaintiff has estab-

> lished his *prima facie* case—which he has failed to do—his CEPA claim would still fail as a matter of law. Indeed, Defendants have properly articulated legitimate, non-discriminatory reasons for the termination of his employment and Plaintiff cannot show that their reasons were pretextual. There is nothing in the record from which this Court can infer that Patterson's termination was the result of his whistleblowing activity—assuming Plaintiff was able to demonstrate on this motion of such activity. To the contrary, there is sufficient evidence to support Defendants' position that Plaintiff's termination was the result of missed deadlines, disrespect for the chain of command, and a merger with McCall Farms. Because the Court has found conclusively that Plaintiff cannot prove his *prima facie* case, the Court need not engage in an in-depth analysis of these reasons. Suffice it to say, Plaintiff cannot point to any inconsistencies or anomalies surrounding his termination that would be sufficient to defeat summary judgment.

IV. CONCLUSION

For the aforementioned reasons, Defendants' motion is **GRANTED.**

D.N.J.,2012.
Patterson v. Glory Foods, Inc.
Not Reported in F.Supp.2d, 2012 WL 4504597 (D.N.J.)

END OF DOCUMENT

Not Reported in A.2d, 2010 WL 4067179 (N.J.Super.A.D.)
(Cite as: 2010 WL 4067179 (N.J.Super.A.D.))

Superior Court of New Jersey,
Appellate Division.
Joyce **RICHARDSON**, Plaintiff-Appellant,
v.
DEBORAH HEART & LUNG CENTER,
Defendant-Respondent.

Submitted May 25, 2010.
Decided July 28, 2010.

West KeySummary**Labor and Employment 231H**
778

231H Labor and Employment
231HVIII Adverse Employment Action
231HVIII(A) In General
231Hk775 Reporting or Opposing Wrongdoing; Criticism and "Whistleblowing"
231Hk778 k. Protected Activities.
Most Cited Cases

Employee failed to show any law, rule, regulation, or public policy that she reasonably believed the employer was violating, and thus, the employee did not engage in Conscientious Employee Protection Act (CEPA) protected activity. The employee alleged that she engaged in CEPA-protected conduct by enforcing the employer's professional services billing compliance program policies and procedures, and that by refusing to overlook staff mistakes, she refused to participate in conduct that she reasonably believed to be in violation of the law. However, the employer had a policy and practice of correcting employee mistakes; it was not consenting to them. N.J.S.A. 34:19-1.

On appeal from Superior Court of New Jersey, Law Division, Camden County, Docket No. L-2101-07.

Van Syoc Chartered, attorneys for appellant (Sebastian B. Ionno, on the brief).

Thorp, Reed & Armstrong, LLP, attorneys for respondent (Barry R. Elson, Christopher J. Day, and Heather J. Holloway, on the brief).

Before Judges CARCHMAN and ASHRAFI.

PER CURIAM.

***1** Plaintiff Joyce Richardson appeals from dismissal of her complaint alleging violations of the Conscientious Employee Protection Act (CEPA), *N.J.S.A.* 34:19-1 to -8. We affirm.

Plaintiff was employed for more than thirty years by defendant Deborah Heart and Lung Center (Deborah) as a laboratory technician and later assistant manager. She resigned from that employment in September 2006. She then filed this lawsuit alleging violation of CEPA and constructive discharge in retaliation for "whistle-blowing" conduct. The court granted Deborah's motion for summary judgment, finding that plaintiff had not demonstrated a genuine issue of disputed fact as to essential elements of her cause of action. This appealed followed.

In reviewing a grant of summary judgment, we apply the same standard under *Rule* 4:46-2(c) that governs the trial court. *See Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A.*, 189 *N .J.* 436, 445-46, 916 A.2d 440 (2007); *Prudential Prop. & Cas. Ins. Co. v. Boyland*, 307 *N.J.Super.* 162, 167, 704 A.2d 597 (App.Div.), *certif. denied*, 154 *N.J.* 608, 713 A.2d 499 (1998). We must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." *Brill v. Guardian Life Ins. Co. of Am.*, 142 *N.J.* 520, 540, 666 A.2d 146 (1995). On this appeal, we review the

facts most favorably to plaintiff.

Plaintiff first became employed by Deborah in 1975 as an x-ray technician. Twenty years later, she was promoted to Assistant Technical Manager in Deborah's Adult Heart Catheterization Laboratory (Cath Lab). In this new role, plaintiff was responsible for managerial and administrative tasks in addition to regular laboratory work.

The promotion also brought plaintiff under the direct supervision of her sister, Judy DePstrokonski.[FN1] While Deborah had an anti-nepotism policy, it was flexibly enforced. Before Deborah invoked the anti-nepotism policy as one of the reasons to transfer plaintiff to another department, she worked under her sister's supervision for ten years, even sharing an office and telephone. Plaintiff alleges the anti-nepotism policy was a pretext for adverse job action in violation of CEPA.

> FN1. Plaintiff's brief and other papers refer to plaintiff's sister as Judy D. We will also use that reference with no disrespect intended.

Plaintiff's tasks as Assistant Manager of the Cath Lab included assisting with payroll, conducting quality assurance functions (QA), and setting the "call" schedule, that is, determining which staff members would be on-call in the lab at various times. QA tasks, which were the responsibility of plaintiff and two other managers, consisted of ensuring that information pertaining to medical procedures was accurately entered into the hospital's primary database. This data included patients' names, billing information, the procedures that were performed, and the names of staff members who performed them. Where information was inaccurate, plaintiff filled out an "edit slip" reflecting the corrections. Additionally, she was required to notify staff members of their errors. Plaintiff estimated approximately ten to fifteen percent of her work time was spent on QA tasks. On June 17, 2005, a staff meeting was held at which the Cath Lab's supervising physicians raised questions regarding the accuracy of some data entered into the computer system and sought modification of QA practices.

***2** During the fall of 2005, the Chief Operating Officer of Deborah, Joseph Chirichella, informed Judy D. and another supervisor, Andrew Haviland, that he had received anonymous complaints from former Cath Lab employees and other staff regarding plaintiff's scheduling practices, high levels of overtime, and alleged failure to contribute to regular lab duties. Judy D. and Haviland strongly disputed the veracity of the allegations stating that "at no time, past or present, has anyone brought these subjects" to their attention.

The complaints were brought to plaintiff's attention in November 2005. After an internal investigation, Chirichella found most of them were unfounded, but he did determine that plaintiff herself had earned more overtime and on-call pay in 2004 and 2005 than any other Cath Lab employee. Plaintiff countered that most other staffers were rejecting "on-call" work in an attempt to force Deborah to increase wage rates, and she suggested the complaints were prompted by her failure to support the other employees' cause.

In December, Judy D. and Haviland developed a plan to address the "[p]erception that preferential treatment is afforded" to plaintiff. Among the changes, plaintiff was removed from a reporting relationship with her sister, instead being supervised solely by Haviland. Other changes were adjustment of her work schedule and broadening of her non-administrative skills to assist staff where necessary.

In February 2006, plaintiff and three other Cath Lab managers did not receive a 3.5 percent pay increase granted to Cath Lab staff. Higher management noted the pay raise was provided solely to clinical staff, not to managers. Although plaintiff acknowledged being a manager, she challenged her exclusion from the pay raise on the

ground that she "had an hourly rate and ... was assigned the same amount of call and late shifts as the clinical staff." Additionally, she cited her exclusion from a February 13, 2006 staff meeting as evidence of a campaign against her.

On March 23, 2006, another anonymous complaint regarding plaintiff was made to Deborah's internal reporting hotline, this time alleging plaintiff was improperly using edit slips to include herself on procedures she did not work, while excluding staff who did the work. Chirichella again investigated the charges, interviewing ten employees, and he found disagreement about including or excluding staff from the billing data but no wrongdoing by plaintiff.

At the end of May 2006, management asked plaintiff to transfer to the electrophysiology study (EPS) lab at "the same benefit level" while retaining the ability to pick up additional shifts in the Cath Lab if her schedule allowed. Plaintiff made notes of a May 25 meeting with Chirichella, indicating there were no longer any outstanding QA issues and that she had taken "a black eye" for her work in this area, but that transfer to EPS would be the most appropriate action in light of how she was perceived by staff. She also wrote: "Staff morale is the reason for transfer."

*3 A May 31 letter from Deborah's counsel led plaintiff to believe she would be terminated if she did not accept the transfer. The pertinent paragraph of the letter states:

> [Deborah] has the legal right to involuntarily transfer employees to different positions or departments, and to unilaterally modify or terminate any term or condition of employment, or to terminate employment-at any time or for any reason. At this point though, [plaintiff] has been asked to consider a voluntary transfer, and has the option to accept or decline this option. Deborah's attempts to keep [plaintiff] whole through such a transfer and with a grandfathered wage rate is evidence that there is no illegal motive, but rather, a desire to demonstrate appreciation of [plaintiff's] service, and at the same time, stabilize the department morale in an effort to manage the institution, rather than just deal with the interests of a single employee.

On June 6, plaintiff spoke with Bret Bissey, Deborah's Chief Compliance and Privacy Officer, and expressed her belief that she was "being set up to be terminated." Bissey encouraged her to work through the usual Human Resources channels. Meanwhile, a June 16 email from Chirichella to a Human Resources manager stated Chirichella had to contact EPS supervisor Rose Tuck to "remove any uncertainty" she had regarding plaintiff's reputation, finally convincing Tuck to go along with the planned transfer to the EPS lab. Plaintiff ultimately accepted the transfer, effective July 24.

The transition was not smooth. Plaintiff initially alleged the position was a "do nothing job" consisting mostly of "EKG issues and paperwork," in contrast to the more clinical work she performed in the Cath Lab. In her deposition, however, plaintiff admitted the work in each lab was actually quite similar. Plaintiff also maintained she was being inadequately trained for the new position and that EPS supervisors refused to speak with her. Plaintiff wrote a letter to Tuck on August 21 in which she stated:

> As per my first day in the EPS department you expressed a desire to speak with me. So this is just a reminder that I anxiously wait for this opportunity.
>
> Further, I have not received a copy of the Job Specific Orientation Checklist, which would greatly enlighten me, concerning the do's and don't's of the EPS department.

On September 1, 2006, plaintiff resigned from her employment at Deborah after only five weeks of orientation in the EPS lab.

Plaintiff obtained new employment in a similar

role at another hospital shortly after her resignation. At her deposition, she testified she had interviewed for that position in July 2006, before her transfer to the EPS lab became effective.

On April 20, 2007, plaintiff filed a one-count complaint alleging her co-workers and Deborah management had "aided or abetted or participated in a retaliatory course of conduct which led to the constructive termination" of her employment, in violation of CEPA. She alleged she had been forced to resign through an "involuntary transfer," and she had been "defamed" by co-workers who had made "knowing falsehoods regarding [her] conduct in connection with her employment relationship."

*4 After completion of discovery, Deborah moved for summary judgment. Addressing the elements of a claim under CEPA, the trial court expressed difficulty identifying the "public policy which the employer has allegedly violated" as well as "what it was exactly that the plaintiff was alleging was the protected activity." The court also said plaintiff's evidence did not show any retaliation within the meaning of the statute. The court found that, despite loss of her "manager" title, plaintiff suffered "no loss of pay [and] that there was overtime available" in the EPS Lab.

The court explained its reasoning further:

> [T]he plaintiff's arguments seem to be that simply because [she] was in some way involved in activities that appear to be compliance issues, that that fact in and of itself establishes that she was engaged in protected activity. But ... I don't believe that the case law supports the position that having that type of job, in and of itself, entitles you to allege that you're engaged in protect[ed] activities.
>
> Now certainly if the plaintiff was being advised to do things that were illegal or violated public policy or advised to pursue procedures that did implicate laws, rules, regulations or public policy, that would be a different situation. But this is not the case here. It is simply a matter of co-employees complaining about her, whether validly or not, there being a certain perception that favoritism was being shown, and the resulting transfer.

We agree with the trial court's reasoning in concluding that plaintiff could not prove a CEPA violation.

We recently explained the general purpose of CEPA in *Donelson v. DuPont Chambers Works,* 412 *N.J.Super.* 17, 988 A.2d 604 (App.Div.2010):

> [CEPA's] purpose is to protect and encourage employees who report illegal or unethical workplace activities. CEPA prohibits an employer from taking retaliatory action against employees "who object to employer conduct that they reasonably believe to be unlawful or indisputably dangerous to the public health, safety or welfare."
>
> [*Id.* at 29, 988 A.2d 604 (quoting *Dzwonar v. McDevitt,* 177 *N.J.* 451, 464, 828 A.2d 893 (2003)) (citations omitted).]

Retaliatory action is defined 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.* 34:19-2e. Examples of adverse employment action include reductions in pay or the withdrawal of previously provided benefits. *Maimone v. City of Atlantic City,* 188 *N.J.* 221, 235-36, 903 A.2d 1055 (2006). But such retaliation is not "limited to a single discrete action, but may include 'many separate but relatively minor instances of behavior directed against an employee ... that combine to make up a pattern of retaliatory conduct.' " *Donelson, supra,* 412 *N.J.Super.* at 29, 988 A.2d 604 (quoting *Green v. Jersey City Bd. of Educ.,* 177 *N.J.* 434, 448, 828 A.2d 883 (2003)).

CEPA protects employees from retaliatory

action in response to three forms of whistle-blowing activity, two of which are relevant in this case. These protected activities are when an employee:

> *5 a. Discloses, or threatens to disclose 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 ...;
>
> ....
>
> c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:
>
> (1) is in violation of a law, or a rule or regulation promulgated pursuant to law ...;
>
> (2) is fraudulent or criminal ...; or
>
> (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.
>
> [*N.J.S.A.* 34:19-3.]

To maintain a cause of action under either subsection a or c of the statute, a plaintiff must establish:

> (1) he or she reasonably believed that his or her employer's conduct was violating either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy;
>
> (2) he or she performed a "whistle-blowing" activity described in [the statute];
>
> (3) an adverse employment action was taken against him or her; and
>
> (4) a causal connection exists between the whistle-blowing activity and the adverse employment action.
>
> [*Dzwonar, supra,* 177 *N.J.* at 462, 828 A.2d 893 .]

Upon showing all four elements of the claim, a plaintiff may be entitled to an injunction, reinstatement to a previous position, reinstatement of benefits and seniority rights, lost wages and benefits, and the payment of attorney's fees and costs of litigation. *N.J.S.A.* 34:19-5.

On this appeal, plaintiff devotes much of her argument to alleged disputed issues of fact as to the third element of a CEPA claim, an adverse employment action. On the other hand, Deborah argues that plaintiff failed to establish any of the four elements of a CEPA claim.

We conclude that plaintiff failed to show any law, rule, regulation, or public policy that she reasonably believed Deborah was violating, and that she also failed to show genuine issues of disputed fact as to any whistle-blowing activity by her as defined in the statute. We need not address whether issues of fact exist as to the last two elements of a CEPA claim, adverse employment action and a causal connection.

Plaintiff alleges she engaged in CEPA-protected conduct "by enforcing [Deborah's] professional services billing compliance program policies and procedures and [Deborah's] other compliance and quality assurance procedures." She claims she "insure[d] that all of the billing information and Cath Lab reports that she reviewed contained ... accurate information to avoid potentially harmful mistakes to patients and to prevent unlawful practices or insurance fraud."

Plaintiff's claim fails because everything plaintiff describes as her protected whistle-blowing activity was also an "activity, policy or practice" of her employer, Deborah. As Deborah argued in support of summary judgment:

> *6 [I]f you look at the internal procedures and policies that Deborah has, they basically say we

> want to make sure that we're doing everything correct when it comes to billing and patient information, and if you see a mistake it is absolutely your obligation to report it, and if you don't, even if you had nothing to do with it, you're going to be terminated.

Far from disclosing or threatening to disclose to a supervisor or public body, *N.J.S.A.* 34:19-3a, or objecting to or refusing to participate in, *N.J.S.A.* 34:19-3c, the employer's activity, policy, or practice that was contrary to law or public policy, plaintiff describes her protected conduct as enforcement of Deborah's policy or practice of correcting potential billing mistakes. Plaintiff lacks evidence of an activity, policy, or practice of Deborah that was in violation of law, rule, or regulation; was fraudulent or criminal; or was "incompatible with a clear mandate of public policy concerning the public health, safety or welfare." *See N.J.S.A.* 34:19-3a, -3c.

Plaintiff contends that by refusing to overlook staff mistakes, she "refused to participate in conduct that she reasonably believed to be in violation of the law." She argues that her QA tasks were in themselves protected conduct under CEPA. We disagree, as did the trial court, that plaintiff's express job duties could also be the protected whistle-blowing conduct under CEPA in the circumstances presented here.

To support her argument, plaintiff contends that CEPA treats fellow employees in the same way as an employer, and her co-employees' practices in providing mistaken billing information were an activity or practice of Deborah that plaintiff reasonably believed was in violation of law and public policy. Plaintiff's argument fails for two reasons.

First, CEPA has separate definitions for "employee" and "employer." *See N.J.S.A.* 34:19-2a, -2b. An employee is "any individual who performs services for and under the control and direction of an employer for wages or other remuneration." *Ibid.* Cath Lab staff who allegedly made the mistakes were employees.

Plaintiff cites *Maw v. Advanced Clinical Communications, Inc.*, 359 *N.J.Super.* 420, 440, 820 A.2d 105 (App.Div.2003), *rev'd on other grounds,* 179 *N.J.* 439, 846 A.2d 604 (2004), for its holding that an employee, as well as the employer, is subject to the prohibitions of CEPA. That holding, however, requires that the employee be acting " *on behalf of or in the interest of an employer with the employer's consent.* " *Ibid.* (quoting *N.J.S.A.* 34:19-2a). In this case, the employer, Deborah, had a policy and practice of correcting employee mistakes; it was not consenting to them.

We recognize that the Supreme Court held in *Higgins v. Pascack Valley Hospital,* 158 *N.J.* 404, 418-24, 730 A.2d 327 (1999), that a plaintiff's complaints regarding the improper activities of co-employees are protected by CEPA against retaliation. The Court stated:

> *7 Nothing indicates that the Legislature intended that the CEPA's expansive protection should depend on a strict parsing of employer and employee conduct.... A solitary employee may not be able to determine whether an illegal activity is the isolated act of a single co-employee or a systemic practice. When an employee complains of the wrongdoing, he or she may not know whether the employer will condone the act. Failure to protect complaining employees therefore will inhibit them from reporting practices for which they reasonably believe their employer is responsible.
>
> [*Id.* at 421, 730 A.2d 327.]

The holding of *Higgins,* however, was in the context of a plaintiff lodging complaints of co-employee conduct in isolated situations outside the plaintiff's job duties. When the employer has assigned plaintiff the express task of correcting and reporting the mistakes of co-employees, the

employer cannot reasonably be viewed as having condoned the alleged errors of co-employees. The errors or misconduct of co-employees that are alleged to be in violation of law or public policy cannot be fairly attributed to the employer.

The glaring deficiency in plaintiff's claim is that her employer did not ask her to overlook staff mistakes. In fact, she was charged with the task of finding and correcting staff mistakes. At all times during her employment in the Cath Lab, plaintiff had the authority to catch errors and the support of management in bringing those errors to the attention of supervisors and staff. Plaintiff disregards the systems and policies she admits Deborah had in place for the identification and correction of staff mistakes. There was no evidence in the summary judgment record that Deborah had a policy or practice of permitting mistakes of the Cath Lab staff in the information they provided for billing purposes.

Furthermore, nothing in the evidence plaintiff gathered before the close of discovery supported her contention that Deborah sought to end tight QA practices in the Cath Lab. Plaintiff's evidence did not support a finding that she reasonably believed Deborah was violating a law, rule, regulation, or clear mandate of public policy regarding its billing procedures.

Moreover, plaintiff failed to show what law, rule, regulation, or clear mandate of public policy was potentially violated by Deborah's QA policy and practices. Whether a CEPA plaintiff has shown the existence of such a law, rule, regulation, or clear mandate of public policy is an issue of law to be determined by the court and not an issue of fact for the jury. *Mehlman v. Mobile Oil Corp.*, 153 *N.J.* 163, 187, 707 A.2d 1000 (1998). While a CEPA plaintiff need not show an actual violation, she must identify "a statute, regulation, rule, or public policy that closely relates to the complained-of conduct." *Dzwonar, supra,* 177 *N.J.* at 463, 828 A.2d 893. "The trial court can and should enter judgment for a defendant when no such law or policy is forthcoming." *Ibid.*

***8** Here, plaintiff generally claimed that it was a violation of law and public policy to permit false information in billing information. She also claimed that such false information would constitute insurance fraud. Initially, we note that misspellings of names or the identification of individuals in the Cath Lab who worked on a procedure would not constitute false billing. It would appear that only information about incorrect listing of procedures could affect billing and insurance payments.

Plaintiff identified no law, rule, regulation, or clear mandate of public policy that indicated Deborah's QA policy and practices were inadequate in correcting such potential billing errors. Moreover, her activities were not protected whistle-blowing because she was, in fact, merely performing the job duties assigned to her by her employer for the very purpose of avoiding a policy or practice that may have been contrary to law or public policy. She was not disclosing, objecting to, or refusing to participate in an employer policy or practice that was in violation of law or contrary to a clear mandate of public policy.

Because of staff dissatisfaction with the manner that plaintiff was performing her managerial tasks, and a staff perception that she was benefiting from favoritism, higher management transferred her to improve staff morale.

Plaintiff failed to present evidence to satisfy the first two elements of a CEPA violation. Therefore, the trial court correctly granted summary judgment to defendant dismissing plaintiff's complaint.

Affirmed.

N.J.Super.A.D.,2010.
Richardson v. Deborah Heart & Lung Center
Not Reported in A.2d, 2010 WL 4067179 (N.J.Super.A.D.)

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(The decision of the Court is referenced in the Atlantic Reporter in a table captioned "Supreme Court of New Jersey Table of Petitions for Certification".)

Supreme Court of New Jersey
Joyce Richardson
v.
Deborah Heart & Lung Center

NOS. C-585 SEPT.TERM 2010, 066680
February 03, 2011

Disposition: Denied.

N.J. 2011.
Richardson v. Deborah Heart & Lung Center
205 N.J. 100, 13 A.3d 363 (Table)

END OF DOCUMENT

DAVID J. TAYOUN, Plaintiff-Appellant, v. TIMOTHY MOONEY, JOHN MOONEY, DOMINIC CAPELLA, ROBERT LEVY a/k/a BOB LEVY, KIMBERLY BALDWIN, ESQ., KAREN UPSHAW, ANTHONY COX, TIMOTHY MANCUSO, WILLIAM MARSH, DENNIS MASON, JOYCE MOLLINEAUX, EUGENE ROBINSON, JOHN SCHULTZ, GEORGE TIBBIT and G. BRUCE WARD, Defendants, and CITY OF ATLANTIC CITY, Defendant-Respondent.

DOCKET NO. A-1154-10T3

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2012 N.J. Super. Unpub. LEXIS 2422

May 8, 2012, Argued
October 26, 2012, Decided

NOTICE: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

SUBSEQUENT HISTORY: Certification denied by *Tayoun v. Mooney, 2013 N.J. LEXIS 458 (N.J., May 13, 2013)*

PRIOR HISTORY: [*1]
On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-1897-07.

COUNSEL: Clifford L. Van Syoc argued the cause for appellant (Van Syoc Chartered, attorneys; Sebastian B. Ionno, of counsel; Mr. Ionno and D. Rebecca Higbee, on the brief).

Tracy L. Riley argued the cause for respondent (Law Offices of Riley & Riley, attorneys; Ms. Riley, of counsel and on the brief).

JUDGES: Before Judges Yannotti, Espinosa and Kennedy.

OPINION

PER CURIAM

Plaintiff David Tayoun appeals from the Law Division's order granting summary judgment to defendant, City of Atlantic City (the City), dismissing plaintiff's complaint alleging violations of the Conscientious Employee Protection Act, *N.J.S.A. 34:19-1 to -14* (CEPA), and the New Jersey Civil Rights Act, *N.J.S.A. 10:6-1 to -2* (the CRA). We have considered the arguments raised in light of the motion record and applicable legal standards. We affirm.

I.

The motion record revealed that in January 2006 plaintiff was appointed by the City's newly elected Mayor, Robert Levy, as Director of the City's Neighborhood Services Department (NSD). The NSD oversees the "regulatory functions of the City," according to plaintiff, and comprises the Division of Code [*2] Enforcement, the Mercantile Division, the Construction Division and Landlord/Tenant Affairs. The heads of each Division report to and are supervised by the NSD Director, who is responsible for the overall functioning of the department.

On March 13, 2006, plaintiff prepared a

memorandum to the City's business administrator requesting the termination of a field inspector in the Code Enforcement Division, alleging that the inspector was incompetent and had been accused of soliciting bribes. Similarly, on March 23, 2006, plaintiff prepared memoranda to the business administrator recommending the termination of another field inspector for incompetence and unethical conduct, and the Division's chief inspector for "covering up" the alleged derelictions of those he supervised.

Domenic Cappella,[1] the City's business administrator, testified at his deposition that he received the memoranda and removed from duty the inspector accused of taking bribes, pending a police investigation, which later "failed to uncover any criminal activity" by the inspector. He added that the other two employees remained on the City payroll, but that they would have been removed had the allegations been "credible."

> 1 In [*3] the caption, he is referred to as "Dominic Capella." We have retained that spelling in the caption of this appeal, but we utilize the spelling of his name as referenced in his deposition transcript, in the body of this opinion.

Plaintiff also told the business administrator that he had received complaints from staff that the head of the Mercantile Division was "drinking on the job" and that a clerk in that division was also "either drinking or actually intoxicated on the job." The head of the Mercantile Division was a City police sergeant who was related to the Chief of Police. Cappella recalled plaintiff telling him that he "ought to check" on the head of the Mercantile Division and that, in response, he "might have" asked the Chief of Police to follow up on the complaint. He added that plaintiff, as the "direct boss" of the Mercantile Division head, could have taken "direct action" against the individual by "sen[ding] him home" and notifying Cappella if the individual was found to be intoxicated on the job.

Plaintiff further stated that the head of the Mercantile Division was quoted in a newspaper article "as being aware of integrity issues" within the Division in connection with the [*4] licensing of taxicabs. Plaintiff claimed that taxicab licensees were "illegal[ly] subleasing" their licenses to more drivers than the City's ordinance would permit. While the actual requirements of the ordinance at that time remained disputed,[2] plaintiff in October 2006 ordered a Mercantile Division clerk to deny licenses to an taxicab owner who had more than two registered drivers. Plaintiff contends that he thereafter received a call from the Office of the City Solicitor rescinding plaintiff's order.

> 2 The ordinance is not part of the record. Plaintiff and the head of the Mercantile Division offered differing recollections about the requirements of the ordinance.

Plaintiff further alleged that he voiced objections about the conduct and work performance of other subordinates in the NSD, but that neither the business manager nor the Mayor disciplined, investigated or terminated those individuals.

Plaintiff claimed that on October 18, 2006, he was "wrongfully terminated" by a letter "hand delivered" to him by the Mayor. The letter stated: "Please be advised that you are hereby terminated effective Wednesday, October 18, 2006, close of business" and that "your service has been appreciated."

The [*5] mayor conceded at his deposition that he had not provided the municipal council with notice of his intention to terminate plaintiff and that he never gave plaintiff an opportunity to be heard on his termination. Plaintiff also did not request such a hearing.

On June 5, 2007, plaintiff filed a complaint against the City, members of the municipal council, the Mayor, the business administrator and various city employees. In his complaint, plaintiff alleged that he was discharged in retaliation for engaging "in protected conduct by objecting to unlawful activity" in violation of CEPA. In count two of his complaint, plaintiff alleged that his discharge violated *N.J.S.A. 40:69A-43*, which required the mayor to notify the council of his intent to discharge and give plaintiff "an opportunity to be heard." Plaintiff alleged that the failure to comply with the statute violated plaintiff's rights under the CRA.

Following discovery, the City moved for summary judgment. The motion judge granted the motion and stated, in pertinent part:

> [Plaintiff] objected to conduct of . . . 8 or 9 different people and all of those people were his subordinates. None of those people were at his level. None of those

> [*6] people were above him. They were all people who were responsible and answerable to him, people over whom he had direct supervisory responsibilities. His memo to the City Administrator . . . didn't take away his ability to exercise any independent actions of his own. He didn't begin a disciplinary process as to anybody. He didn't go to the Prosecutor's Office as to anybody. He - - he didn't file criminal charges against anybody, but he complains about all this illegal conduct of people that are answerable to him [by] . . . writ[ing] one memo to . . . the City Administrator saying, you know, I got some bad people working for me. I'm not - - I'm not sure that, you know, that's whistleblowing. In fact, I'm confident that the objections that he raised concerning his subordinates doesn't . . . satisfy whistleblowing.

The judge also dismissed plaintiff's claims under the CRA, explaining that because plaintiff was concededly an at-will employee, defendant's actions affected no "substantive due process rights" of the plaintiff.

Plaintiff thereafter moved for reconsideration and recusal of the motion judge. The latter motion was based on a claim that the motion judge demonstrated a bias against [*7] employment lawsuits against the City when, in a 2010 written opinion, he stated, "[i]n Atlantic City, employment lawsuits are the continuation of politics by other means" and characterized such suits as a "plague on the body politic . . . ." The motions were denied and this appeal followed.[3]

> 3 Plaintiff's claims against all other defendants have been dismissed with prejudice and are not the subject of any appeal. Accordingly, the within appeal is from a final judgment pursuant to *R. 2:2-3(a)(1)*.

II.

Plaintiff argues on appeal that the motion judge erred in dismissing his CEPA claim because "his protected conduct was not a part of his day-to-day job duties" and "even if it was, it would still be protected under CEPA." Plaintiff also argues the judge erred in dismissing his claim under the CRA because "all public employees have a [substantive due process] property interest in their continued public employment," and because the mayor did not follow the requirements of *N.J.S.A. 40:69A-43* upon discharging plaintiff. Further, plaintiff asserts the judge erred by not recusing himself.

A.

We conduct our review of a grant of summary judgment de novo applying the same standards that governed the trial [*8] court. *Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330, 9 A.3d 882 (2010)*. We first determine whether the moving party has demonstrated there were no genuine disputes as to material facts. *Atl. Mut. Ins. Co. v. Hillside Bottling Co., 387 N.J. Super. 224, 230, 903 A.2d 513 (App. Div.), certif. denied, 189 N.J. 104, 912 A.2d 1264 (2006)*. To the extent factual disputes exist, we accord plaintiff the benefit of all favorable evidence and inferences in the motion record. *Henry, supra, 204 N.J. at 329*; *see also R. 4:46-2(c)*. We then decide "whether the motion judge's application of the law was correct." *Atl. Mut. Ins. Co., supra, 387 N.J. Super. at 231*. In doing so, we owe no deference to the motion judge's conclusions on issues of law. *Ibid.* (citing *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378, 658 A.2d 1230 (1995))*.

B.

We begin our analysis by noting that, "[i]n New Jersey, an employer may fire an employee for good reason, bad reason, or no reason at all under the employment-at-will doctrine." *Witkowski v. Thomas J. Lipton Inc., 136 N.J. 385, 397, 643 A.2d 546 (1994)* (citing *English v. Coll. of Med. & Dentistry, 73 N.J. 20, 23, 372 A.2d 295 (1977))*. The only exceptions under state laws are when there is a claim that the employer has violated [*9] CEPA; the CRA; the New Jersey Law Against Discrimination, *N.J.S.A. 10:5-1 to -49*; or a contractual right or an implied contract based on an employee manual pursuant to the holding in *Wade v. Kessler Inst., 172 N.J. 327, 339, 798 A.2d 1251 (2002)*.

The Supreme Court has noted that "CEPA codified the common-law cause of action, first recognized in *Pierce v. Ortho Pharm. Corp., 84 N.J. 58, 72, 417 A.2d 505 (1980)*, which protects at-will employees who have been discharged in violation of a clear mandate of public policy." *Higgins v. Pascack Valley Hosp., 158 N.J. 404, 417-18, 730 A.2d 327 (1999)*. "Thus, the CEPA establishes a statutory exception to the general rule that an employer may terminate an at-will employee with or

without cause." *Ibid.* (citing *Pierce, supra, 84 N.J. at 65*).

CEPA provides, in relevant part, that:

> [a]n employer shall not take any retaliatory action against an employee because the employee does any of the following: a. Discloses, or threatens to disclose 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 . . . (2) is fraudulent or criminal . . . or c. [*10] Objects to or refuses to participate in any activity, policy or practice which the employee reasonably believes: (1) is in violation of a law, or a rule or regulation promulgated pursuant to law [;] . . . (2) is fraudulent or criminal; or (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.
>
> [*N.J.S.A. 34:19-3.*]

"The purpose of CEPA . . . is 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, 650 A.2d 958 (1994).*

To succeed on a CEPA claim, a plaintiff must prove four elements: (1) that the plaintiff reasonably believed that employer's conduct violated a law, a regulation or a clear mandate of public policy; (2) that the plaintiff performed "whistle-blowing activity" as defined in CEPA; (3) that an adverse employment action has been taken against him or her; and (4) that the whistle-blowing activity caused such adverse employment action. *See Kolb v. Burns, 320 N.J. Super. 467, 476, 727 A.2d 525 (App. Div. 1999).* At base, CEPA covers employee complaints [*11] about activities the employee reasonably believes are: (i) in violation of specific statute or regulation; (ii) fraudulent or criminal; or (iii) incompatible with policies concerning public health, safety or welfare or the protection of the environment. *See Estate of Roach v. TRW, Inc., 164 N.J. 598, 610, 754 A.2d 544 (1999).* Importantly, "CEPA does not require that the activity complained of . . . be an actual violation of a law or regulation, only that the employee 'reasonably believes' that to be the case." *Id. at 613.*

Once a plaintiff has established a prima facie case under CEPA, courts employ the well-established burden-shifting analysis that is used in federal discrimination cases involving "pretext" claims. *See Zappasodi v. New Jersey, Dept. of Corrections, 335 N.J. Super. 83, 89, 761 A.2d 96 (App. Div. 2000)*; *Blackburn v. United Parcel Services, Inc., 179 F.3d 81, 92 (3d Cir. 1999).* Under this test, "the burden of production shifts to the defendant to 'articulate some legitimate, nondiscriminatory reason' for its actions." *Woodson v. Scott Paper Co., 109 F.3d 913, 920 n.2 (3d Cir.)* (quoting *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), cert. denied, 522 U.S. 914, 118 S. Ct. 299, 139 L. Ed. 2d 230 (1997)).* [*12] Once the defendant articulates a legitimate reason for the adverse employment action, the presumption of retaliatory discharge created by the prima facie case disappears and the burden shifts back to the plaintiff. *See ibid.*; *Klein v. Univ. of Medicine & Dentistry of N.J., 377 N.J. Super. 28, 39, 871 A.2d 681 (App. Div.), certif. denied, 185 N.J. 39, 878 A.2d 856 (2005).* Then, "[t]o prevail at trial, the plaintiff must convince the factfinder 'both that the reason [given by the employer] was false, and that [retaliation] was the real reason.'" *Woodson, supra, 109 F.3d at 920 n.2* (quoting *St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993)).*

For summary judgment purposes, the court must determine whether the plaintiff has offered sufficient evidence for a reasonable jury to find that the employer's proffered reason for the discharge was pretextual and that retaliation for the whistle-blowing was the real reason for the discharge. *Klein, supra, 377 N.J. Super. at 39*; *see Sempier v. Johnson & Higgins, 45 F.3d 724, 728 (3d Cir. 1995).* ("[T]o defeat a summary judgment motion based on a defendant's proffer of a nondiscriminatory reason, a plaintiff who has made a prima facie [*13] showing of discrimination need only point to evidence establishing a reasonable inference that the employer's proffered explanation is unworthy of credence."). Typically, the types of evidence that the plaintiff must point to are "inconsistencies or anomalies that could support an inference that the employer did not act for its stated reasons." *Id. at 731.*

Because we conclude that defendant's allegations do not constitute "whistle blowing" activity, we need not address whether issues of fact exist as to the other elements of a CEPA claim, or whether plaintiff has advanced sufficient evidence which would allow a reasonable jury to find that the reasons advanced by defendant for plaintiff's discharge are pretextual.

Plaintiff alleges he engaged in CEPA-protected conduct by disclosing and objecting to activities of his subordinates that he "reasonably believed" violated the ordinances and policies of the City or, in some cases, the laws of the State of New Jersey. However, such disclosures and objections are a regular part of plaintiff's supervisory job responsibilities as Director of the NSD. Consequently, plaintiff's disclosures and objections, in the context of these facts, cannot constitute [*14] "whistle blowing" under CEPA.

Far from disclosing or threatening to disclose to a supervisor or public body, *N.J.S.A. 34:19-3(a)*, or objecting to or refusing to participate in, *N.J.S.A. 34:19-3(c)*, the employer's activity, policy, or practice that was contrary to law or public policy, plaintiff describes his protected conduct as enforcement of the City's policies and ordinances. Plaintiff contends that by refusing to overlook the alleged derelictions of duty of his staff, he refused to participate in conduct that he "reasonably believed to be in violation of the law." We disagree, as did the trial court, that plaintiff's job duties could also be the protected whistle-blowing conduct under CEPA in the circumstances presented here.

To support his argument, plaintiff contends that CEPA treats fellow employees in the same way as an employer, and his subordinates' practices were an activity or practice of the City that plaintiff reasonably believed was in violation of law and public policy. Plaintiff's argument fails for two reasons.

First, CEPA has separate definitions for "employee" and "employer." *See N.J.S.A. 34:19-2(a), -2(b).* An employee is "any individual who performs services for and [*15] under the control and direction of an employer for wages or other remuneration." *Ibid.* The purportedly errant staff members within the NSD were thus employees.

Maw v. Advanced Clinical Communications, Inc., 359 N.J. Super. 420, 440, 820 A.2d 105 (App. Div. 2003), rev'd on other grounds, 179 N.J. 439, 846 A.2d 604 (2004), held that an employee, as well as the employer, is subject to the prohibitions of CEPA. That holding, however, requires that the employee be acting "on behalf of or in the interest of an employer with the employer's consent." *Ibid.* (quoting *N.J.S.A. 34:19-2(a)*). In this case, by contrast, there is no suggestion that plaintiff's alleged errant subordinates were acting on behalf of the City by undertaking the alleged proscribed conduct.

We recognize that the Supreme Court held in *Higgins, supra, 158 N.J. at 418-24*, that a plaintiff's complaints regarding the improper activities of co-employees are protected by CEPA against retaliation. The Court stated:

> Nothing indicates that the Legislature intended that the CEPA's expansive protection should depend on a strict parsing of employer and employee conduct . . . . A solitary employee may not be able to determine whether an illegal activity is the isolated [*16] act of a single co-employee or a systemic practice. When an employee complains of the wrongdoing, he or she may not know whether the employer will condone the act. Failure to protect complaining employees therefore will inhibit them from reporting practices for which they reasonably believe their employer is responsible.
>
> [*Id. at 421.*]

The holding of *Higgins*, however, was in the context of a plaintiff lodging complaints of co-employee conduct in isolated situations outside the plaintiff's job duties. When an employer has assigned plaintiff the express task of supervising its employees, the employer cannot reasonably be viewed as having condoned the alleged misconduct of those subordinate employees. Under the circumstances, the alleged misconduct of such employees cannot be fairly be attributed to the employer.

In support of his position, plaintiff notes our expansive reading of CEPA in *Hernandez v. Montville Twp. Bd. of Educ., 354 N.J. Super 467, 808 A.2d 128 (App. Div. 2002), aff'd, 179 N.J. 81, 843 A.2d 1091 (2004)*. In *Hernandez*, we reinstated a jury verdict in a case where the plaintiff, an elementary school janitor,

reported the school's failure to timely remedy unsanitary and unsafe conditions. *Id. at 477.* In [*17] addition, plaintiff points to *Mehlman v. Mobil Oil Corp., 153 N.J. 163, 707 A.2d 1000 (1998)* (plaintiff objected to overseas sale by defendant's subsidiary of gasoline with benzene in excess of five percent); *Abbamont, supra, 138 N.J. 405* (art teacher fired after complaining of unsafe facilities); *Turner v. Assoc. Humane Societies, 396 N.J. Super. 582, 935 A.2d 825 (App. Div. 2007)*(clerical employee fired after objecting to sale of vicious dog to unsuspecting person); *Gerard v. Camden Cnty. Health Services Cntr., 348 N.J. Super. 516, 792 A.2d 494 (App Div. 2002)* (assistant director of nursing discharged after refusing to comply with her supervisor's order to bring charges against a nurse). However, none of the cases cited by plaintiff concern situations where an employee was discharged for undertaking the very supervisory activities he or she was hired to undertake in the first instance. Plaintiff cites no authority that extends whistle-blower protection for undertaking the very duties of one's job.

The performance of one's job duties cannot be considered whistle-blowing conduct in these circumstances. *See Massarano v. N.J. Transit, 400 N.J. Super. 474, 491, 948 A.2d 653 (App. Div. 2008)* (holding that a plaintiff carrying out her designated [*18] job responsibilities in reporting what she believed was improper disposal of documents did not qualify for whistle-blower status). Plaintiff does not establish a prima facie case based on the elements set forth in *Dzwonar v. McDevitt, 177 N.J. 451, 828 A.2d 893 (2003)*, because he cannot show that he reasonably believed his "employer's conduct" was violating a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy. *177 N.J. at 462.* Rather, plaintiff here believed that those he was charged with supervising were not performing their job functions appropriately or, in some cases, lawfully. However, it was plaintiff's duty to supervise these employees, and plaintiff's complaints about their job performance cannot constitute "whistle-blowing" under CEPA.

In *Massarano*, the plaintiff worked for New Jersey Transit as a security operations manager, which included supervision of security personnel in New Jersey and New York City. *400 N.J. Super. at 478-88.* In that role, she "'discussed everything'" with her supervisor, Frank Fittipoldi, who also "participated in and approved [the] plaintiff's assignments and proposals." *Id. at 478.*

The plaintiff was advised by the Newark building [*19] supervisor "that he saw some schematics that were discarded in a bin on the loading dock of the Newark building." *Id. at 479.* The schematics contained detailed drawings of transit facilities in both New Jersey and New York. Because she was "concerned that anyone could enter the loading area and retrieve the discarded plans" which arguably could have resulted in a threat to public safety, plaintiff contacted the acting executive director. When Fittipoldi returned, the "plaintiff informed him of the discarded documents." *Id. at 480.* Fittipoldi became irate that plaintiff had directly contacted his superior. Relations between plaintiff and Fittipoldi declined rapidly thereafter, leading to plaintiff's alleged involuntary "resignation." *Ibid.*

The trial court dismissed the plaintiff's retaliation claims under CEPA. Among other contentions, the plaintiff in *Massarano* argued on appeal that "the trial court erred in determining that [she] was not a whistle-blower within the meaning of *N.J.S.A. 34:19-3(c)(1)* and *(2)*." *Id. at 488.* We rejected that argument, and agreed "with the trial court's analysis that [the] plaintiff was merely doing her job as the security operations manager by reporting [*20] her findings and her opinion to [the acting executive director]." *Id. at 491.* A plaintiff who reports conduct, as part of his or her job, is not a whistle-blower whose activity is protected under CEPA. *Ibid.*

Plaintiff's attempt at distinguishing our holding in *Massarano* by contending that he not only was doing his job, but also was objecting to numerous violations of the law, is unavailing. Plaintiff testified that it was his job to supervise and set policies for employees in the NSD. In that capacity, he communicated with the business administrator concerning alleged violations of law and policy. His job was to ensure that these alleged violations were addressed and corrected.

Thus, like the plaintiff in *Massarano, supra, 400 N.J. Super. 474*, the record here shows that, as part of his job, plaintiff reported violations of law to his supervisor as well as others in management to keep them abreast of the situation and to advise them of the action he proposed to take. Stated differently, plaintiff did not engage in the activities covered and protected by CEPA.

C.

With respect to his claim under the CRA, plaintiff

argues that he is entitled to a substantive due process property right in public [*21] employment. The law is otherwise.

The CRA provides, in pertinent part, that:

> [a]ny person who has been deprived of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State . . . may bring a civil action for damages and for injunctive or other appropriate relief.
>
> [*N.J.S.A. 10:6-2(c)*.]

The Legislature adopted the CRA "for the broad purpose of assuring a state law cause of action for violations of state and federal constitutional rights and to fill any gaps in state statutory anti-discrimination protection." *Owens v. Feigin, 194 N.J. 607, 611, 947 A.2d 653 (2008)* (citation omitted). The CRA was modeled after *42 U.S.C.A. § 1983. Rezem Family Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 114-15, 30 A.3d 1061 (App. Div.), certif. denied, 208 N.J. 366, 29 A.3d 739 (2011)*. The CRA has been interpreted analogously with *Section 1983. See Trafton v. City of Woodbury, 799 F. Supp. 2d 417, 443 (D.N.J. 2011)*.

In *Filgueiras v. Newark Public Schools, 426 N.J. Super. 449, 468-69, 45 A.3d 986 (App. Div. 2012)*, another case in which we considered a claim pleaded under [*22] the CRA, we recently held:

> To establish a *§ 1983* claim, "the first task . . . is to identify the state actor, 'the person acting under color of law,' that has caused the alleged deprivation." *Rivkin v. Dover Twp. Rent Leveling Bd., 143 N.J. 352, 363, 671 A.2d 567* (citing *Monell v. City Dep't of Social Servs., 436 U.S. 658, 691, 98 S. Ct. 2018, 2036, 56 L. Ed. 2d 611, 636 (1978)), cert. denied, 519 U.S. 911, 117 S. Ct. 275, 136 L. Ed. 2d 198 (1996)*. "The second task is to identify a 'right, privilege or immunity' secured to the claimant by the Constitution or other federal laws of the United States." *Ibid.* (quoting *42 U.S.C.A. § 1983*). Thus, *Section 1983* "'is not itself a source of substantive rights,' but merely provides 'a method [for] vindicating federal rights elsewhere conferred. . . .'" *Ibid.* (quoting *Baker v. McCollan, 443 U.S. 137, 144 n.3, 99 S. Ct. 2689, 2694 n.3, 61 L. Ed. 2d 433, 442 n.3 (1979))*.
>
> "The principle of substantive due process, founded in the federal Constitution, *U.S. Const. amend XIV, § 1*, and our State Constitution, *N.J. Const. art. I, § 1*, protects individuals from the 'arbitrary exercise of the powers of government' and 'governmental power [. . .] being used for [the] purposes [*23] of oppression.'" *Felicioni v. Admin. Office of the Courts, 404 N.J. Super. 382, 961 A.2d 1207 (App. Div. 2008)* (quoting *Daniels v. Williams, 474 U.S. 327, 331, 106 S. Ct. 662, 665, 88 L. Ed. 2d 662, 668 (1986)), certif. denied, 203 N.J. 440, 3 A.3d 1228 (2010)*. "However, the constitutional guarantee 'does not protect individuals from all governmental actions that infringe liberty or injure property in violation of some law.'" *Ibid.* (quoting *Rivkin, supra, 143 N.J. at 366*). "[S]ubstantive due process is reserved for the most egregious governmental abuses against liberty or property rights, abuses that 'shock the conscience or otherwise offend . . . judicial notions of fairness . . . [and that are] offensive to human dignity.'" *Ibid.* (second alteration in original) (quoting *Rivkin, supra, 143 N.J. at 366*). Accord *Chainey v. Street, 523 F.3d 200, 219 (3d Cir. 2008)* ("To establish a substantive due process claim, a plaintiff must prove the particular interest at issue is protected by the substantive *due process clause* and the government's deprivation of that protected interest shocks the conscience.").

"To establish a cause of action [under the CRA], a plaintiff must allege a specific constitutional violation." *Matthews v. N.J. Inst. of Tech., 717 F. Supp. 2d 447, 452 (D.N.J. 2010)* [*24] (citing *N.J.S.A. 10:6-2(c)*). Here, plaintiff claims that the right infringed is his right to

public employment under the *N.J. Const. art. I, P 6.*

However, in *Filguerias, supra*, we explicitly held that there is no constitutionally protected property interest for an at-will employee in continued public employment:

> "[A]n employee hired at will has no protected interest in his employment and may not prevail on a claim that his or her discharge constituted a violation of property rights." *Morgan v. Union County Bd. of Chosen Freeholders, 268 N.J. Super. 337, 355, 633 A.2d 985 (App. Div. 1993)* (citing *Bd. of Regents v. Roth, 408 U.S. 564, 578, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548, 561 (1972))*, *certif. denied, 135 N.J. 468, 640 A.2d 850 (1994)*. In *Nicholas v. Pa. State Univ., 227 F.3d 133, 142 (3d Cir. 2000)*, the court went further by concluding that "tenured public employment is [not] a fundamental property interest entitled to substantive due process protection."
>
> [*426 N.J. Super. at 469-70*].

Plaintiff argued in opposition to defendant's summary judgment motion, that the violation of *N.J.S.A. 40:69A-43*, somehow made his substantive due process claim cognizable under the CRA. However, we disagree. We note [*25] first that plaintiff's claim under the statute, read expansively, is a claim for procedural due process. The CRA, as noted, only protects substantive due process rights.

Also, plaintiff served at the mayor's discretion under *N.J.S.A. 40:69A-43(c)*, and the mayor was empowered to "'remove [him] at will subject only to veto by a two-thirds vote of the whole number of the council.'" *DeSoto v. Smith, 383 N.J. Super. 384, 393, 891 A.2d 1241 (App. Div.)* (quoting *Hutt v. Robbins, 98 N.J. Super. 99, 105, 236 A.2d 172 (App. Div. 1967)*, *certif. denied, 51 N.J. 185, 238 A.2d 471 (1968))*, *certif. denied, 187 N.J. 81, 899 A.2d 304 (2006)*. When plaintiff was terminated, the mayor did not question plaintiff's reputation. *See id. at 394* (stating that mayor's termination of plaintiff under such circumstances does not implicate a liberty or property interest). *Hurdleston v. New Century Fin. Servs., 629 F. Supp. 2d 434, 443 (D.N.J. 2009)*.

Secondly, we note that *N.J.S.A. 40:69A-43(c)* provides that the mayor may "in his discretion" remove any department head, and the removal becomes effective on the twentieth day after the mayor gives written notice of his intention to the council, unless the council before that date adopts a resolution by a two-thirds vote disapproving [*26] the removal. Here, plaintiff never requested an opportunity to be heard on his removal, and the council, by virtue of this suit, was on notice of the removal and could have disapproved it. It did not. The council thus effectively ratified the mayor's decision. *Stomel v. City of Camden, 192 N.J. 137, 152, 927 A.2d 129 (2007)* ("the Council effectively ratified the Mayor's action when it did not exercise its veto power.").

D.

Finally, we determine that plaintiff's argument that the motion judge erred when he did not recuse himself on plaintiff's motion brought after the grant of summary judgment, to be without sufficient merit to warrant discussion in a written opinion. *R. 2:11-3(e)(1)(E)*.

Affirmed.

ROBERT J. WATKINS, Plaintiff-Appellant, v. STATE OF NEW JERSEY, OFFICE OF THE ATTORNEY GENERAL; JOHN J. FARMER, JR., ATTORNEY GENERAL; STATE OF NEW JERSEY, DIVISION OF STATE POLICE; LT. COL. MICHAEL FEDORKO, ACTING SUPERINTENDENT; THE NEW JERSEY DIVISION OF PURCHASE AND PROPERTY; MARGARET DOYLE; CAPTAIN JOSEPH SARNECKY; CAPTAIN FREDERICK MADDEN; CAPTAIN RUDY CHESKO; CAPTAIN HOWARD BUTT; CAPTAIN FRANK McNULTY; CAPTAIN LAWRENCE LARSEN; LT. BRIAN REILLY; LT. GARRY HOLMBERG, SFC KEVIN MOORE, JOHN DOES 1-10, Defendants-Respondents.

DOCKET NO. A-5663-03T2

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2006 N.J. Super. Unpub. LEXIS 853

September 21, 2005, Argued
January 30, 2006, Decided

NOTICE: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY RULE 1:36-3 FOR CITATION OF UNPUBLISHED OPINIONS.

SUBSEQUENT HISTORY: Certification denied by *Watkins v. Office of the Atty. Gen., 187 N.J. 79, 899 A.2d 302, 2006 N.J. LEXIS 962 (2006)*

PRIOR HISTORY: [*1]
On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket No. 3387-99.

COUNSEL: Arthur J. Murray argued the cause for appellant (Jacobs & Barbone, attorneys; Louis M. Barbone, of counsel; Mr. Barbone and Mr. Murray, on the brief).

Vincent J. Risso, Jr., Deputy Attorney General, argued the cause for respondents (Peter C. Harvey, Attorney General, attorney; Patrick DeAlmeida, Assistant Attorney General, of counsel; Mr. Rizzo, on the brief).

JUDGES: Before Judges Stern, Grall and Levy.

OPINION

PER CURIAM

Plaintiff appeals from an order of May 12, 2004, granting defendants' motion for summary judgment and dismissing his complaint under the Conscientious Employee Protection Act (CEPA). *N.J.S.A. 34:19-1 et seq.* The order was based on Judge Andrew Smithson's letter opinion of the same day.

Plaintiff is a Sergeant First Class in the New Jersey Division of State Police, a defendant in this suit. During the 1990's, the Division of State Police began researching and testing a Computer Aided Dispatch and Records Management System (CAD/RAM) for future purchase. The plaintiff was heavily involved in the early stages of the project.

On June 6, 1996, Bull HN Information Systems, Inc. (Bull) was awarded [*2] the contract to install the system for the State Police. During the final stages of procuring a

CAD system, plaintiff was contacted by Major Tezsla, who asked him to become project manager. Plaintiff declined for two reasons. First, he had had several "confrontations" and "personal disagreements" with Captain Madden, the head of the Criminal Justice Records Bureau which controlled the CAD Unit. Second, he was concerned with the long hours and the long drive to Division Headquarters, which was an hour and forty-five minutes from his South Jersey home. At a later date, Major Tezsla again asked plaintiff to become project manager, and he, again, declined the position. However, after Major Tezsla informed plaintiff that he would become Project Director, which would alleviate any problems with Captain Madden, and that he would set up a work space for plaintiff at the Buena Vista Headquarters in South Jersey, plaintiff agreed to become project manager. [1] In 1997, the CAD Unit was officially established and plaintiff was named Unit Supervisor.

1 After his retirement, Major Tezsla told an internal investigator he had "told SFC Watkins that eventually he would have to come to [the] Division full [*3] time . . . once the vendor was selected and their representative was at [the] division."

From the beginning of the procurement process, plaintiff had concern about Bull's ability to perform the job. After the contract was awarded to Bull, plaintiff complained about its conduct, and recommended that penalties be imposed under the contract because of its delays, but the CAD Management Committee did not agree with the suggestion. In April 1998, Bull entered into a Memorandum of Understanding with the State Police concerning the settlement of disputes. Plaintiff complained that the procedure embodied in the Memorandum was not honored, and that the appropriate Bull project manager was bypassed concerning disputes.

Upon his retirement, Major Tezsla was replaced by Captain Frank McNulty who, on August 3, 1998, removed plaintiff as project manager and named Lieutenant Kevin Moore, plaintiff's assistant, to replace him. Captain McNulty asserted he did so because the project manager had to be located at Division Headquarters. Plaintiff was also removed as Unit Supervisor, and was named Assistant Supervisor, before seeking a transfer to Troop A at Buena Vista. [2] At the time of the transfer, the [*4] CAD Unit had no lieutenant position available. When a lieutenant position was subsequently created for the Unit, Moore was promoted. However, plaintiff maintained his rank of Sergeant First Class upon transfer to Troop A. Plaintiff insists his loss of positions constituted "demotions." He also asserts he was the victim of adverse unlawful "retaliatory action," based on his complaints about the Division's violations of the CAD-RAM Memorandum of Understanding and the Division's failure to remedy and correct the problems with the contractor that he pointed out.

2 According to McNulty's deposition:

> A. I talked to Sergeant Watkins on the 4th, 5th and 6th, actually the 7th, I talked to him every day of that week. Monday was the only day I saw him in person. The other days I talked to him on the phone.
>
> I asked Sergeant Watkins if there was anything I could offer him at division headquarters, and he advised that if it meant coming to division headquarters on a full-time basis, there was nothing I could offer him. I then asked him if he would consider a transfer to the field services unit, and the reason I asked him to consider that is because that unit, basically, works out of their home. They [*5] come in to division headquarters every once in a while. They, basically, work out of their homes, they go around to the police departments, the courts, the prosecutors. They monitor the automated criminal history system out in the field and also the automated/paperwork court disposition reporting system out in the field.
>
> So I felt that that would be a good trade-off for Sergeant Watkins because he could have a position in the field services unit which would allow him to work out of his house. There was a lieutenant's position in the field services unit. He would have been

> one of two SFCs in that unit, so, ultimately he could potentially vie for a lieutenant's position. I asked him to contact Lieutenant Toner, who was in charge of that unit, to ask any questions he may have of the unit's responsibilities and duties, and then to get back to me on his decision.
>
> Sergeant Watkins got back to me, I believe, the same day, and advised me that he was not interested in a transfer to the field services unit. Since I was out of options at that point in time as far as accommodating Sergeant Watkins within the records identification section, I asked Sergeant Watkins what his opinion would be as to [*6] what he wanted to do. He asked if I could transfer him back to troop A.

On this appeal, plaintiff specifically contends that "the trial court erred by not finding that the totality of the circumstances showed that genuine issues of material fact existed [regarding] whether defendants, by their actions, were in violation of [CEPA]," that summary judgment should have been denied under the "law of the case" doctrine because of a prior denial of summary judgment without prejudice, [3] and that summary judgment was improperly granted. [4]

> 3 The first motion judge noted that the motion could be renewed at the beginning of the trial when defendants could develop "how promotions are made."
>
> 4 According to the plaintiff's brief, "Watkins' complaints about violations of the contract and violations of the memorandum of understanding went to the issue of trooper safety and public safety. Moreover, his movement toward enforcing the contract by fining Bull and/or replacing Bull at Bull's expense with another contractor conformed to the . . . instructions that he wanted aggressive contract management by protecting the interests of the taxpaying public . . ."

We affirm the judgment substantially for the reasons [*7] expressed by Judge Smithson in his letter opinion of May 12, 2004. Judge Smithson concluded that "[p]laintiff did not blow the whistle by voicing concerns over the implementation of CAD because those activities do not constitute disclosure," as the Division's superiors were well "aware of the project's problems" and the delays in Bull's performance under the contract. The judge also determined that "reporting breaches of the Memo of Understanding were not acts of whistleblowing" because no public policy is violated by the breach of its terms, and the concerns for trooper safety were "too attenuated to have been implicated by the complained of behavior." *Ibid.* We agree, and add the following:

N.J.S.A. 34:19-3 provides in relevant part:

> An employer shall not take any retaliatory action against an employee because the employee does any of the following:
>
> a. Discloses or threatens to disclose to a supervisor or 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 . . . .
>
> . . . .
>
> c. Objects to, or refuses to participate in any activity, policy or practice which [*8] the employee reasonably believes:
>
> (1) is in violation of a law, or a rule or regulation promulgated pursuant to law . . .;
>
> (2) is fraudulent or criminal; or
>
> (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.

"'Retaliatory action' means 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).*

"[A] court examining a CEPA claim 'must first find and enunciate the specific terms of a statute or regulation, or the clear expression of public policy, which would be violated if the facts as alleged are true." *Falco v. Cmty. Med. Ctr., 296 N.J. Super. 298, 310, 686 A.2d 1212 (App. Div. 1997), certif. denied, 153 N.J. 405, 709 A.2d 798 (1998) (quoting Fineman v. New Jersey Dep't of Human Servs., 272 N.J. Super. 606, 620, 640 A.2d 1161 (App. Div.), certif. denied, 138 N.J. 267, 649 A.2d 1287 (1994)).* Stated differently:

> In order to maintain a cause of action under subsections a. or c. of CEPA, a plaintiff must satisfy the following elements: (1) that he or she reasonably believed that his or her employer's conduct was violating either a law or a rule [*9] or regulation promulgated pursuant to law; (2) that he or she performed whistle-blowing activity described in *N.J.S.A. 34:19-3(a), (c)(1)* or *(c)(2)*; (3) an adverse employment action was taken against him or her; and (4) a causal connection exists between the whistle-blowing activity and the adverse employment action. A claimant under subsection *(c)(3)* must establish the same prima facie elements, however, he or she must first articulate the existence of a clear mandate of public policy which the employer's conduct violates.
>
> [*Kolb v. Burns, 320 N.J. Super. 467, 476, 727 A.2d 525 (App. Div. 1999)* (citations omitted).]

"Sources of public policy include the United States and New Jersey Constitutions; federal and state laws and administrative rules, regulations, and decisions; the common law and specific judicial decisions; and in certain cases, professional codes of ethics." *MacDougall v. Weichert, 144 N.J. 380, 391, 677 A.2d 162 (1996)* (citations omitted).

However, "[a] vague, controversial, unsettled, and otherwise problematic public policy does not constitute a clear mandate. Its alleged violation will not sustain a wrongful discharge cause of action." *Id. at 392.* Moreover, the Supreme Court has stated that "a 'clear mandate' [*10] of public policy suggests an analog to a constitutional provision, statute, and rule or regulation *promulgated pursuant to law* such that, under *Section 3(c)(3)*, there should be a high degree of public certitude in respect of acceptable versus unacceptable conduct." *Maw v. Advanced Clinical Commc'ns, Inc., 179 N.J. 439, 444, 846 A.2d 604 (2004)* (emphasis in original). "The legislative approach vis-a-vis a 'clear' mandate of public policy bespeaks a desire not to have CEPA actions devolve into arguments between employees and employers over what is, and is not, correct public policy." *Ibid.* "Such an approach also fits with the legislative requirement of a 'mandate' as opposed to a less rigorous standard for the type of public policy that is implicated." *Id. at 444-445. See also Mehlman v. Mobil Oil Corp., 153 N.J. 163, 189-90, 707 A.2d 1000 (1998).*

We agree with Judge Smithson that the alleged breaches of a contract or the Memorandum of Understanding did not implicate any violation of a "clear mandate of public policy," *N.J.S.A. 34:19-3(c)(3)*, and that any connection with public policy was "too attenuated" in this case. A dispute with supervisors regarding how to proceed on perceived violations of an agreement the employer [*11] has entered cannot reasonably be turned into a basis for action under CEPA. In any event, plaintiff did not "disclose[], or threaten[] to disclose," any misconduct, as required by CEPA. *N.J.S.A. 34:19-3(a).* Plaintiff's concerns regarding Bull's delays and the complaints that he voiced were part and parcel of his position as project manager and a participant at CAD committee meetings, and he voiced them to others aware of the problems in the project. The fact that the defendants disagreed with plaintiff's suggestions as to how to remedy the problems does not transform the nature of the complaints into disclosures or constitute "whistleblowing" activity required to trigger the protections of CEPA.

As already noted, there was no lieutenant position in the CAD unit while plaintiff was there, and he had no desire to drive to West Trenton Division Headquarters. When Major McNulty replaced Major Tezsla upon his

retirement, a new management team was put in place, and plaintiff was not reduced in rank or pay. Nevertheless, in light of our disposition that plaintiff was not a "whistleblower" within the meaning of CEPA, we need not decide if plaintiff suffered unlawful "retaliatory action."

In [*12] summary, we hold that the plaintiff was not a "whistleblower" within the meaning of CEPA because he disclosed nothing to a supervisor or public body in the manner contemplated by the Act.

The judgment is affirmed.

A-904-03T2

DKT

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0904-03T2

NEIL E. WEISFELD,

Plaintiff-Appellant,

v.

MEDICAL SOCIETY OF NEW JERSEY; MIIX GROUP, INC.; ANGELO S. AGRO, M.D.; EILEEN M. MOYNIHAN, M.D.; BESSIE M. SULLIVAN, M.D.; S. MANZOOR ABIDI, M.D.; AND PAUL J. HIRSCH, M.D.,

Defendants-Respondents.

Argued October 25, 2004 – Decided FEB 01 2005

Before Judges Parker and Yannotti.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, L-3632-02.

Thaddeus P. Mikulski, Jr. argued the cause for appellant (Marshall Berman, admitted pro hac vice; Ronald A. Schmidt, admitted pro hac vice; Mikulski & Mitchell, attorneys; Mr. Mikulski, on the brief).

Linda Olsen argued the cause for respondents Medical Society of New Jersey and S. Manzoor Abidi, M.D. (Ronan, Tuzzio & Giannone, attorneys; James M. Ronan, Jr., of counsel; Mr. Ronan and Matthew Sapienza, on the brief).

David J. D'Aloia argued the cause for respondents MIIX Group, Inc., Angelo S. Agro, M.D., Eileen M. Moynihan, M.D., Bessie M. Sullivan, M.D., and Paul J. Hirsch, M.D. (Saiber, Schlesinger, Satz &

LC

Goldstein, attorneys; Mr. D'Aloia, of counsel; Joan M. Schwab and Paola Ciappina, on the brief).

PER CURIAM

Plaintiff, Neil E. Weisfeld, appeals from an order dismissing all counts of his amended complaint pursuant to R. 4:6-2(e). We affirm.

Plaintiff, an at-will employee of the Medical Society of New Jersey (MSNJ), was terminated after eleven years of employment. During the last seven years of his employment, he was Deputy Executive Director. He contends that his firing was retaliatory for his disclosure of an alleged conflict of interest of the individual defendants who sat on the boards of both MSNJ and MIIX Group, Inc. (MIIX). In this appeal, plaintiff contends that the trial court erred in dismissing his claims alleging violation of the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -8, and tortious interference with his employment.

MSNJ is a New Jersey non-profit corporation governed by a twenty-seven member Board of Trustees, a seven-member Executive Committee and a House of Delegates consisting of representatives of each county medical society. The officers of MSNJ are the members of the Executive Committee.

In the 1970's, MSNJ formed MIIX, a private insurance exchange, owned by its member physicians for the purpose of providing affordable medical malpractice insurance to qualified physicians. MSNJ also owned an underwriting entity which was responsible for managing the insurance exchange's underwriting policies and claims. MIIX is a Delaware for-profit corporation and owner of the MIIX Insurance Company, which provides medical malpractice insurance. When MIIX elected to go public in 1999, MSNJ received a substantial stock interest in the company in exchange for the sale of its underwriting entity.

Defendants, Doctors Agro, Moynihan and Sullivan, were officers and members of the MSNJ Executive Committee while serving on the MIIX Board. Dr. Agro was MSNJ's president, Dr. Moynihan served as treasurer, and Dr. Sullivan was secretary. These three defendants were also MIIX stockholders. Their dual service on the Executive Committee and the MIIX Board was fully disclosed. Dr. Abidi was second vice-president of MSNJ and a member of the Executive Committee. Dr. Hirsch was a past president of MSNJ, editor of MSNJ's journal and vice-chair of the MIIX Board. He is also a MIIX stockholder. Plaintiff alleges that Dr. Agro "took control of MSNJ's internet website, which is a major communications channel for MSNJ to its physician members and the public," and Dr. Hirsch, in his role as editor of the

MSNJ journal, "controlled the editorial content," giving "MIIX complete control of communications to MSNJ's physician-members."

In late 2001, MIIX reported substantial losses and increased the premiums for its malpractice insurance. When numerous MSNJ member-physicians complained, the MSNJ president created a Taskforce on Medical Liability. A majority of the Taskforce members were also members of the MIIX Board. At the time, plaintiff voiced his concerns that the MIIX board members would exert undue influence over the project and fail to protect the interests of the physicians and the public at large. He recommended that a non-MIIX member co-chair the Taskforce.

At about the same time the Taskforce was created, a Special Advisory Committee was established by Dr. Rigolosi, MSNJ's President-Elect, to study and recommend whether MSNJ should sell its stock in MIIX. Plaintiff was assigned to the Committee. He complained to his supervisor, Vincent Maressa, about the "pervasive" MIIX influence at MSNJ and his "reasonable belief" that actions taken by those with dual service on the boards conflicted with the interests of MSNJ and its "fiduciary obligation" to its physician-members.

In March 2002, plaintiff drafted a proposed Committee Report setting forth a range of measures to meet the alleged conflict of interest, including a future prohibition of dual

board membership. The Committee adopted that recommendation. Not satisfied with that, however, on April 1, 2002, plaintiff sent a memo to Committee members recommending immediate action to prohibit dual board members from participating in any discussions or recommendations regarding sale of MIIX stock. The memo stated in part:

> To refresh your memory . . . the Board has adopted[] the following policy statement:
>
> > That in the future, beginning in May 2002, individuals elected to an office or a voting position on the Board of Trustees of MSNJ should not also serve on the Board of Directors of The MIIX Group. This policy would not affect individuals currently holding MSNJ Board seats or offices, until reelected or elected to office.
>
> This policy statement offers the advantage of clearly limiting or preventing future conflicts of interest. However . . . MSNJ should try to avoid taking actions that will hurt MIIX.
>
> My suggestion is that the Committee consider taking an alternative approach . . . and the Board . . . adopt[] the following policy:
>
> > That, effective immediately, any officer or member of the Board of Trustees, who also serves on the Board of Directors of The MIIX Group, shall disclose his or her affiliation with MIIX in writing to the President and Speaker;
> >
> > . . . .

> That, any officer or member of the Board of Trustees, who also serves on the Board of Directors of The MIIX Group, shall recuse himself or herself from any deliberations or discussions within the House of Delegates, Board, or any Council, committee, or task force, or with staff, pertaining to the adoption, amendment, implementation, enforcement, or termination of any agreement with The MIIX Group;
>
> . . . .

Plaintiff alleges that the reaction of MSNJ's Executive Committee to the April 1, 2002 memo was "immediate and vicious." On April 3, 2002, Dr. Agro called a special meeting of the MSNJ Executive Committee, at which Doctors Agro, Moynihan, Sullivan and Abidi voted to fire plaintiff. After the Executive Committee meeting, Agro called plaintiff out of a meeting and had him escorted from the premises by two local police officers. Plaintiff contends that he was given no explanation and was not even provided an opportunity to retrieve his personal belongings. On April 10, 2002, the MSNJ Board of Trustees held a special meeting to reconsider plaintiff's firing and unanimously ratified the decision.

On November 20, 2002, plaintiff filed his initial complaint. Rather than file an answer, defendants moved to dismiss the complaint for failure to state a claim upon which relief could be granted pursuant to R. 4:6-2(e). Judge Andrew

Smithson rendered an oral opinion on August 19, 2003. In his opinion, the judge set forth the undisputed facts, including the fact that plaintiff was an at-will employee, not subject to any contract.

In granting defendants' motion to dismiss the CEPA claim, Judge Smithson noted that an employee must show

> (1), that he reasonably believed that his employer's conduct was violating either a law, a rule, or regulation promulgated pursuant to law, (2) that he performed the whistleblowing activity, described in the statute, (3) that an adverse employment action was taken against him, and (4) there's a causal connection between the two, meaning the whistleblowing activity and the adverse employment consequences.
>
> . . . .
>
> Plaintiff was performing a required and assigned duty at the time, and that was very much a part of his employment. He was actively engaged in advising his employer of certain concerns of significance that he perceived as potential conflicts of interest, as a result . . . [of] a dual membership of Medical Society and MIIX board members.
>
> This is not what whistleblowing activity is all about. Such activity is not pr[o]scribed by the operative statute. To find otherwise would be tantamount to this Court engaging in creation of additional legislation.

With respect to the tortious interference claim, the judge noted initially that such a claim requires third-party interference. MSNJ was plaintiff's employer and the individual defendants were officers and/or board members of the Medical

Society. Consequently, he found that there was no third-party to be charged with tortious interference, except for MIIX. Since plaintiff cannot sustain a claim of tortious interference between himself and his employer or another employee, the judge dismissed that claim against the individual defendants, and found no factual allegations to sustain a claim against MIIX.

In this appeal, plaintiff argues that Judge Smithson erred in (1) dismissing the tortious interference claim; and (2) dismissing the CEPA claim. We begin our analysis with our standard of review. A motion to dismiss pursuant to R. 4:6-2(e) for failure to state a claim upon which relief can be granted is based solely on the pleadings. Pressler, Current N.J. Court Rules, comment 4.1 on R. 4:6-2(e). Our scope of review is governed by the same standard as the trial court. Seidenberg v. Summit Bank, 348 N.J. Super. 243, 250 (App. Div. 2002). We must make a "painstaking" examination and search the pleadings "in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement . . . ." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989) (quoting DiCristofaro v. Laurel Grove Memorial Park, 43 N.J. Super. 244, 252 (App. Div. 1957)). When determining whether a cause of action is "suggested" by the

facts, the plaintiff is entitled to every reasonable inference. Ibid.

In his tortious interference claim, plaintiff alleged that MIIX and Doctors Agro, Moynihan, Sullivan, Abidi and Hirsch tortiously interfered with his employment at MSNJ by inducing MSNJ to terminate him. He contends that their actions were "intentional," "malicious and without legal justification or excuse." He further claims that Dr. Hirsch "orchestrated" the wrongful termination in concert with the others to promote MIIX's and/or his own personal interests. Plaintiff provides no factual evidence to support these allegations, however.

To establish a prima facie case of tortious interference with a business relationship or contract, four elements must be met: "(1) a reasonable expectation of economic advantage to plaintiff, (2) interference done intentionally and with "malice," (3) causal connection between the interference and the loss of prospective gain, and (4) actual damages." Varrallo v. Hammond, Inc., 94 F.3d 842, 848 (3d Cir. 1996) (citing Printing Mart, supra, 116 N.J. at 751-52). Malice has been interpreted to mean "wrongful and 'without justification or excuse.'" Id. at 848 n.10 (quoting Printing Mart, supra, 116 N.J. at 756).

It is "fundamental" that "the claim be directed against defendants who are not parties to the relationship." Printing

Mart, supra, 116 N.J. at 752. Significantly, "[s]ince Printing Mart, a clear cut consensus has emerged that if an employee or agent is acting on behalf of his or her employer or principal, then no action for tortious interference will lie." DiMaria Constr., Inc. v. Interarch, 351 N.J. Super. 558, 568, 573 (App. Div. 2001) (citing Fioriglio v. City of Atl. City, 996 F. Supp. 379, 392-93 (D.N.J. 1998), aff'd, 185 F.3d 861 (3d Cir. 1999), cert. denied, 528 U.S. 1075, 120 S. Ct. 789, 145 L. Ed. 2d 666 (2000)), aff'd, 172 N.J. 182 (2002); Obendorfer v. Gitano Group, Inc., 838 F. Supp. 950, 956 (D.N.J. 1993); Sammon v. Watchung Hills Bank, 259 N.J. Super. 124, 127 (Law Div. 1992). All of the individual defendants were officers and/or trustees of plaintiff's employer, MSNJ. As such, they were agents of MSNJ, Paramus Bathing Beach, Inc. v. Div. of Employment Sec., 31 N.J. Super. 128, 132 (App. Div. 1954), and fall within the employer/agent privilege.

The only circumstance which would permit a claim for tortious interference against an employee or agent of the employer is when the employee or agent acts outside the scope of employment or beyond his authority. DiMaria, supra, 351 N.J. Super. at 568. Plaintiff argues that in firing him, the defendants "were acting ultra vires, for themselves personally

and for the insurance company MIIX rather than for MSNJ's interests."

In DiMaria, we indicated that when an employee or agent acts from personal interest, he or she steps outside the scope of their employment or agency. Id. at 569-70. We will not, of course, make factual determinations regarding the motives of the individual defendants. It is undisputed, however, that both MSNJ and the individual defendants owned MIIX stock, creating a common interest rather than merely personal interest on the part of the individual defendants. Moreover, MSNJ's full Board of Trustees unanimously ratified the Executive Committee's decision to fire defendant. The ratification vitiates plaintiff's argument that defendants were acting contrary to MSNJ's interests.

With respect to MIIX, plaintiff failed to allege any facts by which MIIX, as a separate entity, tortiously interfered with his employment by MSNJ. The allegations focus on the individual defendants and MSNJ's Executive Committee in firing him. We have carefully searched the pleadings and can find no factual allegations upon which plaintiff may premise a tortious interference claim against MIIX.

Finally, plaintiff waived his right to plead a tortious interference claim when he alleged a CEPA violation. A CEPA

claim "shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, State law, rule or regulation or under the common law." N.J.S.A. 34:19-8. For all of the reasons stated above, plaintiff's tortious interference claim was properly dismissed.

With respect to the CEPA claim, plaintiff alleged that he "reasonably believed" defendants had a "severe" conflict of interest between their fiduciary duty to MSNJ and their fiduciary duty to MIIX. Plaintiff alleged that the personal interests of the individual defendants were contrary to the interests of MSNJ members and MIIX stockholders. The defect in plaintiff's CEPA claim is that his belief was personal and not a matter of law or public policy.

Under CEPA,

> An employer shall not take any retaliatory action against an employee because the employee does any of the following:
>
> a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer or another employer, with whom there is a business relationship, that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law . . . .
>
> b. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer . . . .

> c. Objects to or refuses to participate in any activity, policy or practice which the employee reasonably believes:
>
> (1) is in violation of a law, or a rule or regulation promulgated pursuant to law . . .;
>
> (2) is fraudulent or criminal; or
>
> (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.
>
> [N.J.S.A. 34:19-3].

To establish a CEPA claim under c(3), plaintiff "must first articulate the existence of a clear mandate of public policy which the employer's conduct violates." Kolb v. Burns, 320 N.J. Super. 467, 476 (App. Div. 1999). "Sources of public policy include the United States and New Jersey Constitutions; federal and state laws and administrative rules, regulations, the common law and specific judicial decisions; and in certain cases, professional codes of ethics." MacDougall v. Weichert, 144 N.J. 380, 391 (1996). The alleged violation "must pose a threat of public harm, not merely private harm or harm only to the aggrieved employee." Mehlman v. Mobil Oil Corp., 153 N.J. 163, 188 (1998).

Plaintiff presents no law, rule or code of conduct that precludes dual membership on the MSNJ and MIIX Boards. Indeed, N.J.S.A. 15A:6-8 expressly endorses dual board memberships and provides that contracts or transactions between corporations

with common directors/trustees are presumptively valid and shall not be voided merely because of a common trusteeship or interest, as long as the common trusteeship or interest is disclosed.[1] There is no dispute that defendants' dual board memberships were fully disclosed.

Although plaintiff argues that the alleged conflict of interest was harmful to MSNJ members, the ownership of MIIX stock by both MSNJ and the individual defendants provides a common interest rather than a conflicting one. Moreover, the ratification of plaintiff's firing by MSNJ's full Board of Trustees is further evidence of the common interest among MSNJ members and the individual members. Thus, accepting the allegations as true for the purpose of a R. 4:6-2(e) motion, plaintiff has failed to state a CEPA claim. Plaintiff's April 1 memo cannot be construed as "whistleblowing" because it simply did not point to any illegal conduct.

Affirmed.

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[1] N.J.S.A. 15A:6-8 governs boards of non-profit corporations. N.J.S.A. 14A:6-8 is the corresponding statute governing for-profit corporations.

Not Reported in A.3d, 2011 WL 6111882 (N.J.Super.A.D.)
(Cite as: 2011 WL 6111882 (N.J.Super.A.D.))

H

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.
Kari **WHITE**, Plaintiff–Appellant,
v.
STARBUCKS CORPORATION and Jeffrey Peters, Defendants–Respondents.

Argued Jan. 26, 2011.
Decided Dec. 9, 2011.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L–2422–08.
Jonathan I. Nirenberg argued the cause for appellant (Resnick & Nirenberg, P.C., attorneys; Mr. Nirenberg, on the brief).

David W. Garland argued the cause for respondents (Epstein Becker & Green, P.C., attorneys; Mr. Garland, of counsel; Mr. Garland and Jill Barbarino , on the brief).

Mark A. Saloman and John J. Sarno argued the cause for amicus curiae Employers Association of New Jersey (Proskauer Rose L.L.P., attorneys; Marvin M. Goldstein and Mr. Saloman, of counsel and on the brief; Mr. Sarno, on the brief).

Bennet D. Zurofsky, attorney for amicus curiae National Employment Lawyers Association/New Jersey.

Before Judges FUENTES, ASHRAFI and NUGENT.

PER CURIAM.

*1 Plaintiff Kari White, a former district manager for defendant Starbucks Corporation, appeals from the judgment of the Law Division granting defendant's motion for summary judgment and dismissing her complaint brought under the Conscientious Employee Protection Act (CEPA), *N.J.S.A.* 34:19–1 to –14. The trial court found plaintiff failed to establish she engaged in whistle-blowing activity. We affirm.

Because the court dismissed plaintiff's complaint as a matter of law, we will review the facts developed before the motion judge in the light most favorable to plaintiff, giving her the benefit of all reasonable inferences derived therefrom. *R.* 4:46–2. *See also Brill v. Guardian Life Ins. Co. of Am.*, 142 *N.J.* 520, 529–30 (1995); *Prudential Prop. & Cas. Ins. Co. v. Boylan*, 307 *N.J.Super.* 162, 167 (App.Div.1998).

I

A

Initial Training

On May 19, 2006, plaintiff formally accepted defendant's offer of employment as district manager in the Upper Mid–Atlantic Region. According to the job description for this position, plaintiff was

> required to regularly and customarily exercise discretion in managing the overall operation of the stores within [her] district[,] ... [including] overseeing the district's store management workforce, making management staffing decisions, ensuring district-wide customer satisfaction and product quality, ... and managing safety and security within the district.

She was also responsible for "ensur[ing] ... [that employees] adhere to legal and operational compliance requirements." Plaintiff reported to defendant Jeffrey Peters, who was at the time Starbucks' Regional Director of Operations for the central and northern sections of New Jersey.

On July 10, 2006, plaintiff began training with Michael Lawniczak, a district coach manager. The

training topics included customer care, communication, managing food and financial performance, store development, and delegation. Plaintiff was also trained in retail management and compliance with public health laws. She received and reviewed a manual titled "Starbucks Food Safety, Store Cleanliness and Store Condition Standards," which included a section on refrigeration and cold storage. That section instructed staff to replace "inaccurate or broken thermometers as needed."

Toward the end of her six-week training period, plaintiff noticed that, in the Hoboken store where she had been training, certain merchandise from "the four retail cabinets along the wall were missing merchandise," including coffee mugs and accessories, and that "the cabinets that were full were now about [eighty] percent empty." Although, as a trainee, she was not required to take any action, she informed the Hoboken store manager, Tim Ilch, who in turn suggested that plaintiff double-check to confirm that the items were in fact missing. Plaintiff "shared ... her ... experience" regarding the missing merchandise with Marilyn Gaudioso, the district sales manager, Peters, and Lawniczak. According to plaintiff, Gaudioso "appreciated" that she told her about the missing merchandise, and said "that she would work with Tim ... in resolving it."

*2 At the end of September 2006, plaintiff met with Peters, as she usually did every two months, to discuss what had transpired during the month or the quarter, including matters involving employees, the stores, and even her career aspirations. At this particular meeting, plaintiff "reviewed" with Peters the problem with the missing merchandise at the Hoboken store. According to plaintiff, Peters seemed satisfied to learn that she reported the problem to Gaudioso.

In the beginning of October 2006, plaintiff met with Peters, Lawniczak, and others in management to review and recap her training. Plaintiff discussed at this meeting the positive experiences she had during training. She also told those present that she had witnessed a theft of merchandise at the Hoboken store.

B

Activities as District Manager

On October 8, 2006, plaintiff went "live," meaning that she formally assumed her management role in the six stores in her district.[FN1] The managers of those stores reported directly to plaintiff. Toward the end of October or the beginning of November 2006, plaintiff became aware that the Woodbridge store did not have thermometers in the refrigerated food and beverage cases to ensure that their contents were kept at a safe temperature prior to sale. According to plaintiff, it was her responsibility to ensure that the stores had all the right tools and resources to operate effectively. She thus asked the Woodbridge store manager, Steve Szabo, and a shift supervisor, Curt, to order thermometers "as soon as possible." The thermometers were thereafter ordered and installed. She also informed Peters that the Woodbridge store was missing thermometers.

FN1. Plaintiff's district consisted of Linden, Newark, Union, Westfield, Woodbridge, and Route 1 North Iselin.

Also around the end of October or the beginning of November 2006, during her initial visit to the Newark store with Amy Vetter, the store manager, and Iona Flowers, the shift supervisor, plaintiff noticed that the refrigerated food and beverage cases were missing thermometers. According to plaintiff, instead of imposing some kind of disciplinary sanction, she decided to use the situation as an opportunity to train Vetter and Flowers by asking them to order replacement thermometers while using the daily routine book to ensure that the refrigerated food and beverage cases were kept at a proper temperature. Plaintiff also reviewed the situation with Vetter and Flowers afterwards to ascertain what they had learned from their conversation.

The thermometers were delivered and installed at the Newark store a few weeks later. Because they were not functioning properly, however, plaintiff "asked ... [Vetter and Flowers] to contact the operations team and have someone come out to fix the equipment as soon as possible." The repairs were not successfully made the first time, so she "asked ... [Vetter] to call the operations team and tell them that they may have to come out to fix it...." The repairs were successfully completed around the end of November. At that time, the cases were at the correct temperature level.

***3** During her visits to the Newark store, plaintiff had also observed unsanitary conditions such as: (1) "a water sink that had mold around it"; (2) a water filter with "cobwebs on it"; and (3) "filthy dirty" pastry knives. Plaintiff addressed these issues with the store's management team, and the problems were substantially corrected by the beginning of December 2006.

Plaintiff informed Peters that Vetter and Flowers were not using the daily routine book, and that Vetter specifically was resistant to Starbucks's procedures. Peters suggested that plaintiff should first discuss the issue with them in lieu of taking formal corrective action. Consequently, plaintiff met with Vetter to "ensure that she was following the company guidelines." According to plaintiff, Vetter told her "that she didn't appreciate the conversation, that she felt like ... [plaintiff] was nitpicking her store."

During November or December 2006 in a "peer District Manager meeting[ ]," in which managers discuss the things they had found on their visits to the stores within their district, plaintiff spoke generally about violations of Starbucks's policy and procedure she observed at the Woodbridge and Newark stores. According to plaintiff, Peters was present at the meeting as a "listening ear."

C

Complaints from Subordinates

After the December 2006 peer District Meeting, a number of the managers of stores within plaintiff's district lodged internal complaints about plaintiff through Starbucks' helpline. According to a complaint made by Vetter on December 11, 2006, plaintiff: (1) dominated meetings with sales numbers without allowing store managers to give any input; (2) sent important business e-mails to the managers' personal e-mail addresses instead of the store e-mail addresses; (3) made Vetter stay after her shift to "speak with her about the numbers" despite knowing that she needed to pick up her child from school; (4) antagonized employees and insisted on keeping the store open until 10 p.m. despite the fact that surrounding businesses closed at 8 p.m. for security reasons; (5) upset customers, noting that in November 2006, a customer complained to Vetter about plaintiff, saying that "the morale of the store plummete[d]" since plaintiff went "live;" and (6) promoted a Caucasian employee to the position of shift supervisor and ignored Vetter's suggestion to promote an African–American employee, despite Vetter's opinion that the Caucasian employee "needed some more training."

On December 18, 2006, Mike Miller, the Iselin store manager, complained that plaintiff conducted a mandatory meeting with all store managers in the district on Monday December 4, 2006. The managers objected to meeting on a Monday because that day was usually set aside for administrative work and employee development. According to Miller, plaintiff was not sympathetic to these concerns, and emphasized that the employees were their "subordinates." Miller alleged that he and other managers "found her comment to be offensive and not becoming of a district manager." Miller also claimed that plaintiff used profanity to express her displeasure when the managers did not bring to the meeting certain information she had requested.

***4** On the day after Miller's complaint, an anonymous caller reported that since October 2006, plaintiff "has continually been rude and disrespectful to" employees, "consistently

display[ing] a lack of trust[,] ... respect [,] ... and ... a general lack of care for anything besides her own business agenda."

Peters testified that he received "numerous complaints about the way [plaintiff] was conducting business from a variety of store managers in her employ." Specifically, according to Peters, the complaints concerned

> the way that she was speaking to [employees], providing direction that ... was counter to the customer experience, failing to take into account what they were currently working on and what was important to them for that day, and solely focused on her objectives with no disregard [sic] for the [employees] nor the customers.

After learning about the managers' complaints, Peters asked plaintiff if she would be amenable to "a roundtable [discussion] with her ... [team] ... [to] better gauge the progress that she was making...." According to plaintiff, Peters told her that the purpose of the roundtable was to see how she was performing and assess "her relationships with the store managers." At his deposition, Peters described this kind of roundtable discussion as a "skip level" meeting, which he defined as a forum in which regional directors meet directly with store managers or assistant managers, without district managers being present. Peters also indicated he conducted such "skip level" meetings on a quarterly basis.

On December 26, 2006, Peters held a roundtable discussion with the store managers in plaintiff's district. Plaintiff testified that Peters denied her request to participate in the discussion. According to Peters, "[t]he feedback from the managers at the meeting was around [plaintiff's] lack of patience, [her] lack of listening, [her] lack of providing clear direction, [and their] feeling undervalued...." At the end of the meeting, Peters asked the managers "to be open to building a relationship" with plaintiff.

After the roundtable discussion, Peters memorialized the managers' comments in a document he titled: "Things We Don't Like or Understand." The comments included statements such as "no trust," "degrading tone," "lack of consistent focus," "improper language," "disruptive," and "customer complaints." Peters met with plaintiff on January 3, 2007, to share with her the feedback from the roundtable discussion. Peters told plaintiff "what [the managers] liked and then how they wanted ... [her] to do better." According to plaintiff, Peters asked her to be "open for feedback," to which she responded that she would "always ... remain open for feedback."

Soon after the roundtable discussion ended, plaintiff told Peters that Rich Vasquez, the Union store manager, told her that the managers' complaints against her were in response to her reporting improper things that had taken place in their stores. Also around this time, plaintiff testified that Flowers, the shift supervisor at the Newark store, called her "confidentially" to report that some employees at her store were drinking alcohol at work, and that "Amy Vetter, the store manager, knew about it." Plaintiff also testified that she later learned that another shift supervisor "was involved in the alcoholism as well." Plaintiff testified that she met with Vetter in the back room of the store to discuss the matter. She also reported the incident to Peters at her regularly scheduled meeting with him.

D

Performance Problems

*5 Later in January 2007, plaintiff prepared a Partner Development Plan as required by Starbucks policy. The plan is intended as a means for the company to assess the performance and aspirations of employees in supervisory positions. As per Peters's suggestion, plaintiff selected "Building Peer Relationships" as a core competency to be developed, as well as "Creating the Environment," which included making the development of store and assistant managers "a priority" and "promoting functional diversity."

In a January 30, 2007, e-mail to Glenn Shuster,

partner resources manager for the Upper Mid–Atlantic Region, plaintiff inquired whether Shuster had received a surveillance videotape that had been requested by employees whom plaintiff had suspended for insubordination. Shuster responded via e-mail dated February 6, 2007, asking plaintiff for the status of the employees' suspensions; in response, plaintiff again indicated that she had requested, but had not yet received, the pertinent surveillance videotape. Shuster responded to her e-mail later that night, indicating his "increasing[ ] concern[ ]" that employees were "on suspension for over two weeks."

The following morning, Peters sent plaintiff an e-mail expressing his dismay that plaintiff had gone to Seattle "without resolving this issue." Peters concluded the e-mail as follows: "Suspensions should be for no more that 48–72 hours. I was under the assumption that this case would be addressed and closed by last Tuesday/Wednesday. Also, who is watching your district while you are away?" FN2

> FN2. Plaintiff acknowledged at her deposition that Starbucks had a forty-eight-hour maximum suspension policy. She claimed, however, that no one told her about the policy before this incident arose.

Sometime in February 2007, plaintiff requested a transfer to a regional director position in Texas, to which plaintiff claimed Peters responded: "Absolutely not." Peters then suggested that plaintiff start looking for another job, to which plaintiff responded: "Absolutely not ... I intend on staying with Starbucks for the next ten years or so ... I'm a performing individual. I am doing my job very well."

Sometime in mid-February 2007, plaintiff told Shuster and Peters about alleged after-hours sex parties occurring in the Iselin store. She had previously discussed the matter with the store's manager and shift supervisor. Plaintiff told Shuster that she was "going to be taking statements"; two days later, she sent an e-mail to Peters reporting that "there was some overnight activity in the stores. That they had been coming into the store and having overnight sex events, and that ... I'm gaining statements."

Also in February 2007, a female customer phoned plaintiff and told her that she had been physically attacked by an employee at the Newark store. Plaintiff advised the customer to call back and speak with her and Shuster. She also told Peters that she planned to have a "three-way call" with the customer and Shuster, and that she "would be following up ... immediately with ... Vetter [the store manager]." Plaintiff thereafter spoke to Vetter and advised her "to do a little bit more research on what [wa]s going on here."

*6 On February 26, 2007, Peters received an e-mail regarding plaintiff from Guy DeFazio, the Westfield store manager. DeFazio alleged that plaintiff: (1) "no-called, no-showed" for three meetings in February; (2) e-mailed him at 6:00 a.m., on his day off, to schedule a meeting, and complained to the barista when he did not appear at the meeting at 3:00 p.m.; (3) referred to an accident that occurred on October 28th involving DeFazio, to criticize his work performance; and (4) did not foster a trusting work environment. In response, plaintiff indicated she missed only one of the three meetings; she denied asking DeFazio about his health for improper reasons, and specifically certified that she did not "intrude[ ]" into DeFazio's "personal medical condition."

Plaintiff requested to meet with Chris Shaw, employee resources director, to discuss her concern that she was being punished for reporting violations of company policy. By e-mail dated February 28, 2007, plaintiff "formally requested help" from Peters, indicating that she had "a clear vision of what specific behaviors [were] needed to better support" him.

In her meeting with Shaw, plaintiff discussed Peters's performance, and gave Shaw a

memorandum dated February 22, 2007, titled "Timeline of Occurrences/Incidents." She described the document as containing everything that she had reported to Peters, from the beginning of her career at Starbucks. At the end of the meeting, she told Shaw that Peters told her to work on her relationships. Shaw told plaintiff to put everything together in an e-mail. Plaintiff complied, as reflected in her e-mail to Peters of February 28, 2007.

Peters responded to plaintiff's e-mail that same day. He told her that he "was excited to move forward" and requested that she let him know when they could meet to personally discuss "past discussions and expectations going forward." Peters emphasized that this was the third time he had requested to meet with plaintiff face to face.

Plaintiff and Peters met in his office approximately two weeks later. She said she was in the process of implementing the plan outlined in her February 28, 2007, e-mail. Peters responded that she would "not ... be moving forward with th[e] plan from ... Shaw." Specifically, plaintiff was "not [to] be phoning [her] district manager peers on a daily basis" and should "ask for help, [and] continue to develop on [her] relationships." Peters also told her not to discuss with the managers the substance of the roundtable conversations. Peters thereafter e-mailed an interoffice memorandum to plaintiff recapping their conversations "regarding performance and expectations going forward."

Sometime in early March 2007, Iselin store manager Miller called plaintiff late at night and told her that he had received a "pornography transmittal" via e-mail involving two Iselin store employees.[FN3] Plaintiff told Miller that she would "notify both ... Shuster and ... Peters right away." Plaintiff then sent a text message to Shuster and Peters informing them that "Mike Miller has just phoned me at 12 midnight.... That he has received a pornography transmittal at his home from [naming the employee] at the Route 1 North" store. Plaintiff testified that Shuster told her he received her text message.

> FN3. At her deposition, plaintiff named the two employees involved. We have not included their names here in the interest of confidentiality. When asked to describe what Miller told her, plaintiff testified that the e-mail transmitted a photograph of an employee's penis. According to plaintiff, Miller was able to determine that the photograph was taken inside the bathroom of the Starbucks store. Plaintiff eventually terminated the employee responsible for the e-mail. He was the same individual involved with the overnight sex parties.

*7 Sometime in February or March 2007, plaintiff testified that she noticed the tables and chairs in the Westfield store arranged in such a way "that a human body couldn't fit between [them], let alone a wheelchair." Plaintiff believed it was part of her job to "instruct[ ] ... DeFazio ... to move the tables and chairs in a way that didn't violate the law." She testified she knew this was her responsibility because she had received training on the Americans with Disabilities Act (ADA).

Plaintiff indicated that she told Peters that the tables and chairs needed reconfiguration as part of a conversation in which they discussed "maybe eight to ten different topics ... about things that had not been implemented ... related to the organizational setup of the location...." She testified that Peters did not say anything in response. Although she did not "recall specifically," plaintiff testified that she mentioned the furniture configuration to the zone vice president, Joe Hallihan, when they rode together in a car, wherein she "list[ed] off quite a few things within the stores that had not been completed."

E

Plaintiff's Separation From Starbucks

In a lengthy e-mail to Peters dated March 14, 2007, Miller memorialized his complaints about plaintiff's conduct, which he characterized as

"inappropriate" and undermining his role as a store manager. On or around March 17, 2007, Peters received a memorandum from Vetter summarizing some of the difficulties she had with plaintiff.

On or around March 20, 2007, plaintiff met with Peters and Shuster in Shuster's office. According to plaintiff, Shuster began the meeting by stating to her that "we're highly concerned about your career with Starbucks. We've received—I've received a phone call from ... DeFazio that has stated some information that we're concerned about and we want to ask you some questions around that." Shuster then asked plaintiff whether she had spoken to DeFazio about his health, to which she answered: "No." Peters then told her that he believed she was "a liability risk to Starbucks...." According to Peters, he "told her she potentially put the company at risk with some of her behaviors." He also explained that "[s]he continued to have conversations with ... [DeFazio] around his medical conditions that resulted from an accident, even after being asked on three separate occasions to not broach the subject with him." As the meeting came to an end, plaintiff reviewed with them the violations of law she believed she had observed during her employment, such as the furniture configuration and the missing inventory at the Hoboken store.

The next morning, plaintiff met with Peters and Shuster. According to plaintiff, Peters said

> he believed that [she] was a liability risk to the company, they had made the phone call on [her] behalf ... to someone in the district who they thought would support [her], that that individual did not support [her], and that at this point they would like to terminate [her] services with the company.

***8** Peters said she had "a choice" to either resign or be terminated. In either case, her services were no longer wanted. Plaintiff chose to resign; she handwrote a resignation letter and gave it to Shuster that day.

On or about April or May 2007, plaintiff filed a report with the Hoboken Police Department regarding that store's missing inventory that she allegedly discovered in August 2006. On May 10, 2007, plaintiff reported to the Woodbridge Police Department the sex parties and the pornography in the Iselin store. Plaintiff testified that during her employment, when she asked Peters whether she should report to the police the various violations of law she had reported to him, Peters allegedly said "no."

II

Plaintiff argues that the trial court erred by dismissing her CEPA claim as a matter of law. Amicus NELA/NJ joins in this argument. We disagree.

A trial court must grant a motion for summary judgment if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." *R.* 4:46–2. *See also Brill, supra,* 142 *N.J.* at 529–30. On appeal, we apply the same standard of review. *Prudential, supra,* 307 *N.J.Super.* at 167. Our review of the trial court's legal conclusions is de novo. *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan,* 140 *N.J.* 366, 378 (1995).

With these principles of review as our guide, we now turn to the specific statutory claims before us. CEPA is remedial legislation, designed by the Legislature to promote two complementary public purposes: " 'to protect and [thereby] encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employers from engaging in such conduct.' " *Yurick v. State,* 184 *N.J.* 70, 77 (2005) (quoting *Abbamont v. Piscataway Twp. Bd. of Educ.,* 138 *N.J.* 405, 431 (1994)). *N.J.S.A.* 34:19–3 prohibits an employer from taking "retaliatory action" against an employee because the employee engages in any one of the following activities:

a. Discloses, or threatens to disclose 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 ...; or

(2) is fraudulent or criminal ...;

....

c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:

(1) is in violation of a law, or a rule or regulation promulgated pursuant to law ...;

(2) is fraudulent or criminal ...; or

(3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.

N.J.S.A. 34:19–2(e) defines "retaliatory action" as a "discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment." To state a claim under *N.J.S.A.* 34:19–3(a) or (c), a plaintiff must show:

***9** (1) that he or she reasonably believed that his or her employer's conduct was violating either a law or a rule or regulation promulgated pursuant to law; (2) that he or she performed whistle-blowing activity described in *N.J.S.A.* 34:19–3a, c(1) or c(2); (3) an adverse employment action was taken against him or her; and (4) a causal connection exists between the whistle-blowing activity and the adverse employment action.

[*Kolb v. Burns,* 320 *N.J.Super.* 467, 476 (App.Div.1999).]

Relying on our holding in *Massarano v. New Jersey Transit,* 400 *N.J.Super.* 474 (App.Div.2008), the trial court concluded that plaintiff did not engage in whistle-blowing activity because "the issues on which she bases her claim fall within the sphere of her job-related duties." We agree.

In *Massarano,* the plaintiff worked for New Jersey Transit as a security operations manager, which included supervision of security personnel in Newark, Maplewood, Kearny, and New York City. *Id.* at 478–88. In that role, she "instituted training, raised standards, enhanced and updated guidelines and manuals, established a tiered pay scale to attract and retain better employees, terminated workers who did not improve their performance, upgraded equipment and prepared a business plan for the security office." *Id.* at 478. Moreover, she " 'discussed everything' " with her supervisor, Frank Fittipoldi, who also "participated in and approved [the] plaintiff's assignments and proposals." *Ibid.*

The plaintiff was advised by the Newark building supervisor "that he saw some schematics that were discarded in a bin on the loading dock of the Newark building." *Id.* at 479. The plaintiff "was concerned that anyone could enter the loading area and retrieve the discarded plans and schematics," which arguably could have resulted in a threat to public safety or security. *Id.* at 480. Neither Fittipoldi nor his supervisor, Frank Hopper, were at work the day the plaintiff discovered the documents. *Ibid.* Thus, she contacted the acting executive director. *Ibid* . When Fittipoldi returned, the "plaintiff informed him of the discarded documents." *Ibid.*

The trial court dismissed the plaintiff's retaliation claim, holding that she did not engage in whistle-blowing activity; she " 'simply [made] a plea for help ... Her job was to find security problems ... and ... fix them. And in an attempt to fix them going to somebody who allows her to take possession of the object that she believes is the source of the problem is hardly whistle-blowing.' " *Id.* at 487.

Among other contentions, the plaintiff in *Massarano* argued on appeal that "the trial court

erred in determining that [she] was not a whistle-blower within the meaning of *N.J.S.A.* 34:19–3 (c)(1) and (2)." *Id.* at 488. We rejected that argument, and agreed "with the trial court's analysis that [the] plaintiff was merely doing her job as the security operations manager by reporting her findings and her opinion to [the acting executive director]." *Id.* at 491. A plaintiff who reports conduct, as part of his or her job, is not a whistle-blower whose activity is protected under CEPA. *Ibid.*

***10** Plaintiff's attempt at distinguishing our holding in *Massarano* by contending that she "was not *merely* doing her job, but was also objecting to numerous violations of the law" is unavailing. Plaintiff testified that it was her job "to oversee the performance of the store managers" in her district. In that capacity, she communicated with the managers concerning alleged violations of law and company policy, including: (1) discussing the missing merchandise with the Hoboken store manager; (2) dealing with the lack of thermometers with the Woodbridge and Newark managers; (3) addressing the unsanitary conditions with the Newark manager; (4) dealing with alcohol consumption by employees while on the job, the alleged physical attack of a customer, after-hours sex parties, and the electronic transmittal of a pornographic photograph by an employee with the Iselin manager; and (5) correcting the improper configuration of tables and chairs at the Westfield store. Her job was to ensure that these alleged violations were addressed and corrected.

Plaintiff raised and discussed these alleged violations of law with her supervisors as part of her job responsibilities. With respect to the stores under her supervision, plaintiff informed Peters that the tables and chairs in the Westfield store needed reconfiguration to comply with handicap accessibility laws; during a routine meeting, she discussed with Peters that thermometers were missing in the Woodbridge store; she informed Peters of the lack of thermometers and unsanitary conditions in the Newark store, with the expectation that Peters would authorize her to take corrective action; she spoke generally about the violations of policy and procedure in Woodbridge and Newark during a peer District Manager meeting; she told Peters about the alleged drinking on the job by employees; she advised Shuster and Peters that she would be taking statements in regards to the alleged after-hours sex parties; she advised Peters how she planned to handle the customer attack; and she immediately informed Shuster and Peters about the pornographic transmittal.

Thus, like the plaintiff in *Massarano, supra,* 400 *N.J.Super.* 474, the record here shows that, as part of her job, plaintiff reported violations of law to her supervisor as well as others in management to keep them abreast of the situation and the action she was taking as district manager. Stated differently, plaintiff did not engage in the activities covered and protected by CEPA.

Affirmed.

N.J.Super.A.D.,2011.
White v. Starbucks Corp.
Not Reported in A.3d, 2011 WL 6111882 (N.J.Super.A.D.)

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