

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4669-06T1

ROBERT BAUER,

Plaintiff-Appellant,

v.

GALLOWAY TOWNSHIP, ALLAN KANE,
and NORMAN MEYERS,

Defendants-Respondents.

Argued November 3, 2008 - Decided January 5, 2009

Before Judges Carchman, R.B. Coleman and
Sabatino.

On appeal from the Superior Court of New
Jersey, Law Division, Atlantic County,
Docket No. L-3990-04.

Clifford L. Van Syoc argued the cause for
appellant (Van Syoc Chartered, attorneys;
James E. Burden, on the brief).

A. Michael Barker argued the cause for
respondent Galloway Township (Barker, Scott
& Gelfand, P.C., attorneys; Mr. Barker and
Vanessa E. James, on the brief).

Linda A. Galella argued the cause for
respondents Allan Kane and Norman Meyers
(Allan E. Richardson, LLC attorneys; Ms.
Galella, on the brief).

PER CURIAM

In this employment case, plaintiff, Robert A. Bauer, a police officer in Galloway Township, appeals the Law Division's order of March 30, 2007 granting summary judgment to defendants, Galloway Township Police Department ("the Department"), Police Lieutenant Allan Kane ("Lieutenant Kane") and Police Sergeant Norman Meyers ("Sergeant Meyers"). Plaintiff alleges that defendants had engaged in acts of reprisal against him in violation of both the Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1 to -49, and the Conscientious Employees Protection Act ("CEPA"), N.J.S.A. 34:19-1 to -8. We affirm.

I.

Plaintiff began his employment with the Department as a dispatcher in October 1997. He became a full-time police officer with the Department in March 1999. Plaintiff alleges that as a result of a series of incidents defendants took various disciplinary actions against him. The incidents and disciplinary actions, which we describe in roughly chronological order, consist of: (1) the Hackney overtime incident; (2) the pepper-spray incident; (3) the domestic violence incident; (4) the suicide call incident; (5) plaintiff's March 2004 performance evaluation; (6) Corporal Jucciarone's car accident; (7) the April 2004 squad transfer; and (8) the Garden State Fuel patron incident. Several of these incidents prompted an

Internal Affairs investigation within the Department, which we also will summarize.

The Hackney Overtime Incident. The first dispute that allegedly gave rise to plaintiff's claims occurred on November 25, 2003. That evening, several members of the Department attended a City Council meeting, at which a fellow officer received an award for actions taken during a shooting. One of the officers in attendance was Officer Hackney.¹ On his way home from the event, Officer Hackney received a phone call from a councilman. The councilman informed Officer Hackney that he had been in a car accident. Despite being off-duty, Officer Hackney responded to the councilman's call.²

Upon arriving at the scene of the accident, Officer Hackney requested an on-duty officer to respond. Shortly thereafter, in response to that call, plaintiff arrived. Perceiving that the investigation was almost completed, plaintiff asked Officer

¹ The first name of Officer Hackney, who is male, is not provided in the record.

² The Department has adopted an internal transportation policy, known as the "Lexington Plan," which is patterned after the police department in Lexington, Kentucky. The policy allows all officers who live in Galloway to take their police vehicles home. Although the officers are therefore never "off-duty" while in their assigned vehicle, if given permission by the police chief, the vehicle can be used for personal reasons and non-police personnel may be transported. Officers may not, however, create an overtime situation by their use of the assigned vehicle.

Hackney to fill out the police report, despite the fact that Hackney was then off-duty.

Officer Hackney subsequently complained to a fellow police officer, Sergeant Stephen Doyle, that plaintiff had resisted his attempt to turn the accident investigation over to him. Presumably, Hackney had been trying to adhere to the Lexington Plan and avoid creating an overtime situation. Sergeant Doyle discussed the incident with plaintiff. Doyle supposedly assured plaintiff that the incident would stay between the three officers unless Hackney had a problem obtaining overtime for his work. As it turned out, Hackney was denied overtime pay for his time responding to the councilman's accident, because he had failed to obtain permission from Lieutenant Kane before responding to the call.

In December 2003, Lieutenant Kane requested Sergeants Weir and Meyers to conduct a preliminary investigation into the facts surrounding Officer Hackney's overtime request. Based upon that investigation Kane concluded that plaintiff should have taken over the investigation and written the accident report because Hackney was off-duty. As a result of this finding, Hackney was issued a verbal reprimand. Additionally, Kane issued plaintiff

a performance notice for failing to complete the call himself and to write the report.³

The Pepper-Spray Incident. On February 7, 2004, plaintiff was dispatched to a call involving a dispute between two brothers. After arriving at the scene, plaintiff determined at some point that one of the brothers was attempting to chase the other brother into a house. Plaintiff used his pepper spray on the aggressor. He then wrote up an investigation report.

Sergeant Meyers subsequently discussed with plaintiff the contents of his report about this incident. According to Meyers, he admonished plaintiff for failing to include in his report that he had told the suspect that he was under arrest prior to pepper-spraying the individual. Plaintiff instead contends that Meyers told him to falsify his report and to include an inaccurate statement that plaintiff had used the pepper-spray because he had been in imminent danger of attack. Plaintiff also contended that Meyers improperly directed him to charge the individual with obstruction, instead of a disorderly persons charge.

The Domestic Violence Incident. On March 6, 2004, patrol units were dispatched to a call at 109 Sussex Place in Galloway

³ Pursuant to the Department's policies, if no further incidents had occurred during a six-month period, the reprimand for the Hackney incident would have been removed from plaintiff's file.

Township. Upon arriving, plaintiff observed a naked female running after a male. He observed her hitting the male in the head. Shortly thereafter, more officers arrived, including a female officer, Corporal Jody Jucciarone. While speaking to plaintiff and the corporal, the male participant told the officers that he did not like what the female was wearing out that evening so he had taken off her clothes.

Corporal Jucciarone then went to speak to the female involved in the incident. The female mentioned to the corporal that the couple had a child together. At that point, Corporal Jucciarone determined that the matter should be classified as a domestic violence incident. Plaintiff initially disagreed with Jucciarone, asserting that he thought the matter should be instead handled as an "unwanted person" incident, not a domestic violence matter. After requesting to speak to the corporal in private, plaintiff eventually relented from his position. However, he maintained that if the encounter was going to be classified as a domestic violence call, the female attacker also should be arrested for assault as well as the male. Corporal Jucciarone then arrested the female.

According to Lieutenant Kane's testimony, the Department had an internal policy in March 2004, to call a judge to determine if a domestic violence arrest should be issued through

a summons or, alternatively, through an arrest warrant. In light of that policy, plaintiff called Sergeant Meyers to discuss the arrest and to be guided on how he should proceed. Meyers then called Lieutenant Kane. The two supervisors decided to release the female attacker on only a summons, without contacting a judge.

Corporal Jucciarone reported plaintiff's conduct concerning this incident to Kane and Meyers. She claimed that plaintiff had improperly sought to handle the dispute as an unwanted persons call, even though he had witnessed the female assault the male. She also complained about plaintiff's insubordinate behavior towards her at the scene. The corporal memorialized these issues in a memorandum to her regular supervisor, Lieutenant Davies.

The Suicide Call Incident. On March 15, 2004, another incident transpired involving Sergeant Meyers and plaintiff. On that day, plaintiff received a suicidal person call. In responding to the call, plaintiff was assaulted and injured by the suicidal person. Following the incident, Sergeant Meyers told plaintiff that the suicidal person should have been charged for assaulting plaintiff. In addition, Meyers was dismayed by plaintiff's poor handling of the incident. Specifically, Meyers thought that it was improper for the suicidal person to ride to

the psychiatric hospital with his parents, as opposed to being driven there by the police or by an EMT.

On March 19, Sergeant Meyers began the officers' roll-call, at which plaintiff was present, by referring to plaintiff's improper handling of the suicidal call. Plaintiff was not, however, disciplined for his conduct.

Plaintiff's March 2004 Performance Evaluation. On March 29, 2004, Sergeant Meyers issued plaintiff his performance evaluation for the period of May 27, 2003 through December 31, 2003. Meyers drafted the evaluation and Lieutenant Kane reviewed it.

The categories within the evaluation had a maximum rating of seven, with a minimum rating of one.⁴ With respect to the category of "dealing with citizens," Sergeant Meyers felt that plaintiff should be given a rating of three. Lieutenant Kane felt that plaintiff should be given a higher rating of four. The rating was based on both civilian complaints that the Department had received about plaintiff and also, plaintiff's perceived difficulties with the police dispatchers. Among other things, the report presented a mixture of positive and negative observations:

⁴ A rating of seven would be a perfect score.

[Plaintiff] has a general flaw in the area of the Attitude and Relations category of the evaluation process which I view as critical and needs immediate improvement on his part. [His] attitude toward certain members of dispatch is a problem as he is constantly critical of what he believes to be their improper action or inaction relating to how they [the co-workers] perform their job . . . [.] He has been the subject of administrative inquiries as a result of complaints filed by the dispatchers as well as citizens.

. . . .

[Plaintiff] gets along with his fellow squad members.

. . . .

[Plaintiff] is one of the most pro-active and productive members of the squad, as he [is] active in his assigned patrol area. He is always willing to assist other members of the squad

. . . .

As a general rule his reports are flawless and on point.

Lieutenant Kane instructed Meyers to remove from the evaluation any mention of the Hackney incident.

On the whole, most of the 2004 performance evaluation was positive. In a majority of the categories upon which plaintiff was graded, he received a rating of six out of a high of seven.

Corporal Jucciarone's Car Accident. On April 2, 2004, Corporal Jucciarone was involved in a car accident with a

civilian motorist. She was the driver at fault. Sergeant Doyle was responsible for investigating the incident. His investigation revealed that the corporal had made a u-turn while attempting to chase a hit-and-run suspect. During the course of her u-turn, another vehicle hit the rear of the corporal's car. The other driver involved in the accident confirmed Corporal Jucciarone's account.

Plaintiff subsequently telephoned Doyle and informed him that he had witnessed the corporal's accident. Doyle told plaintiff that he would meet with him after taking all of the other eyewitness statements. After he spoke with plaintiff, it became clear to Doyle that plaintiff had not seen the accident, but rather, had only seen the corporal begin to make the u-turn.

Doyle advised plaintiff to look at the Sergeant's report about the accident when it was completed. Thereafter, plaintiff did examine the report. He discovered that the report did not include information that the civilian vehicle had allegedly been stopped at a light on Route 30 and Cologne Avenue. The report also did not indicate that Corporal Jucciarone's tires had gone up on the curb during the u-turn, a fact which plaintiff claimed to have witnessed. Upon reading the Sergeant's report, plaintiff returned to the scene of the accident and personally

measured the skid marks. He then wrote his own statement concerning the accident.

On April 8, 2004, plaintiff discovered that his statement about the accident had not been included with the investigation file in the records room. Plaintiff called Sergeant Doyle and complained about the absence of his statement. In response, Sergeant Doyle went to the Department's record room and spoke with the clerk, Lori Curtz. She told Doyle that plaintiff had supplied her with an extra copy of his statement to put with the file. Plaintiff further instructed the clerk to attach his statement and to mail the entire report to the other driver involved in the accident.

After reviewing plaintiff's actions, Lieutenant Kane charged him with a violation of the Department's rules and regulations. In particular, he was charged with improperly directing the clerk to mail a copy of the police report to the other driver.

The April 2004 Squad Transfer. On or about April 5, 2004, plaintiff was reassigned to a squad supervised by Sergeant Richard Komar. Plaintiff alleged in his pleadings that this transfer was a form of illegal retaliation because he had brought to light Sergeant Meyers's "repeated acts of misconduct." Plaintiff further alleged that Lieutenant Kane was

aware of the hostile work environment and that the lieutenant had acknowledged to plaintiff his awareness of that hostility at the time of the transfer.

The Garden State Fuel Patron Incident. On April 15, 2004, plaintiff responded to an altercation at Garden State Fuel. The altercation arose out of a dispute between a patron of the service station and an employee. Upon arriving at the scene, plaintiff learned that a dispute between the two individuals involved two dollars. Downplaying the significance of the altercation, plaintiff told the patron that "in the, I think the grand scheme of things, two dollars is very minimal."

As a result of his disparaging comments to the patron, plaintiff was charged with a violation of the Department's rules and regulations for "Using Rude or Insulting Language or Offensive Conduct to the Public." The Department recommended a three-day suspension as a sanction.

The Ensuing Internal Affairs Investigations. As a result of plaintiff's conduct relative to the domestic violence dispute, Corporal Jucciarone's accident, and the Garden State Fuel incident, three separate internal affairs investigations were conducted. Those investigations resulted in plaintiff being charged with three disciplinary infractions: (i) improper actions during the domestic violence dispute; (ii) improper

release of the report from Officer Jucciarone's accident; and (iii) abusive conduct during the gas station altercation.

After learning of these charges, plaintiff's counsel requested a hearing and formally entered a not guilty plea on his behalf. Following that request, but before any hearings took place on the disciplinary charges, plaintiff filed the present lawsuit in the Superior Court.

In his complaint, plaintiff alleged that the Department and the individual defendants violated both the LAD and CEPA. He particularly claimed, among other things, that he had been retaliated against for "objecting to gender[-]based discrimination in the provision of public services" in connection with the domestic dispute that he had responded to with Corporal Jucciarone. He also alleged other forms of reprisal.

While discovery was ongoing in plaintiff's case in the Law Division, his disciplinary hearing was conducted before a hearing officer.⁵ Plaintiff was represented by counsel at those proceedings, which took place over three intermittent days in November 2005, January 2006, and September 2006. Several witnesses testified at the hearing. Following those proofs,

⁵ The hearing officer was a retired judge.

counsel presented written post-hearing submissions, as well as oral summations.

Upon considering the proofs, the hearing officer concluded that plaintiff was guilty of some, but not all, of the disciplinary infractions that had been charged against him. With respect to the domestic violence incident, the hearing officer found that there were actually two separate acts of domestic violence: (1) the forced undressing of the girlfriend by the boyfriend, and (2) the girlfriend's physical striking of the boyfriend and her pulling of his hair. With respect to those two acts, the hearing officer concluded that plaintiff was guilty of failing to "carry out the [Department's] requirement of taking the necessary police action after witnessing the assault." However, the hearing officer separately concluded that there was "insufficient evidence to conclude that [plaintiff] exhibited such conduct that could be considered insolent, or that he [had] attempted to intimidate [Corporal Jucciarone]."

As to plaintiff's involvement in the reporting of Corporal Jucciarone's motor vehicle accident, the hearing officer found that plaintiff had improperly directed the Department's records room clerk to mail the accident report, along with his own attached statement, to the other driver involved in the

accident. On this issue, the hearing officer found the testimony of the Department's witnesses accusing plaintiff of such wrongdoing "absolutely credible." By contrast, the hearing officer found that plaintiff, who had denied such conduct, "either has a failure of recollection or is providing an inaccurate recitation of the facts."

Consequently, the hearing officer found plaintiff "guilty of violat[ing] the general order of the [Department] in attempting to release or disseminate a document, particularly his statement, without approval of a public information officer or a chief of police as is required." The hearing officer also found that plaintiff had caused the accident report to be mailed as a means of "retaliation against [Corporal] Jucciarone for filing the report and a complaint against him respecting the March 6, 2004 [domestic violence] incident."

Lastly, the hearing officer found plaintiff guilty of making offensive statements to the civilian at the Garden State Fuel station. The hearing officer specifically concluded that plaintiff had made "rude, discourteous, and demeaning verbal comments," because he had "apparently believed [the civilian's] request for police assistance was beneath his dignity and position as a police officer." He added that plaintiff acknowledged at the disciplinary hearing that "in hindsight, his

comments should not have been said and could have been considered offensive." Consequently, the hearing officer found that plaintiff's conduct in this third cited incident violated Section 8:1.17 of the Department's rules and regulations.

Guided by the hearing officer's specific findings adverse to plaintiff, the Department disciplined him. For the domestic violence incident, plaintiff received a written reprimand, which was to be placed in his personnel file. As to his behavior in connection with Corporal Jucciarone's accident, plaintiff received a five-day suspension. As to the Garden State Fuel incident, the Department recommended a one-day suspension, but that sanction was abated to a written reprimand. These three sanctions were ratified in writing by the Chief of Police. Plaintiff then filed an action in lieu of prerogative writs in the Superior Court contesting the discipline.

Meanwhile, after discovery was completed in plaintiff's LAD/CEPA lawsuit, defendants moved for summary judgment. Plaintiff opposed the motions, contending that genuine issues of material fact existed and that his claims under the LAD and CEPA had a proper legal and factual basis.

After hearing oral argument, the Law Division judge granted defendants summary judgment in the LAD/CEPA case. In his written decision, the judge found that plaintiff's claims of

wrongful retaliation under CEPA were unmeritorious. Among other things, the judge observed that the Department's internal affairs investigation and the disciplinary charges levied against plaintiff had been, for the most part, "ultimately substantiated" by the hearing officer. The judge also noted that Meyers's performance evaluation of plaintiff was insufficient to support a CEPA claim, as the evaluation had never led to a discharge, suspension, demotion or other adverse employment action. The judge further concluded that plaintiff's transfer to a different assignment within the Department following these incidents was not retaliatory. In fact, the judge noted plaintiff had acknowledged that his transfer was "a positive event." The judge likewise found plaintiff's claims under the LAD deficient as a matter of law.

Summarizing his assessment of the record facts, the motion judge observed at the end of his written opinion:

Plaintiff's recitation of the occasional clashes and skirmishes he has had with his superiors and fellow officers, and the difficulties he has encountered in performing his duties as he understands them, don't amount to unlawful conduct by the Galloway Township Police Department, nor by the individual defendants. In particular, they don't rise to the level of a violation of LAD or CEPA.

At best, plaintiff is a highly-principled individual who has taken his co [-]workers to task often enough to strain

his relationship with them. The best advice for such a person is to be sure not to break any rules himself because it is likely someone will look for an opportunity to find him in violation of a standard on which they can take him to task.

At worst, plaintiff is a person who responds to criticism and accusations of wrongdoing by making cross accusations. Either way, the result can be - and apparently is - discord in the workplace. Unfortunately, discord in the workplace is a common experience. But in order for him to have a cause of action under either the LAD or the CEPA there must be tangible adverse consequences to him.

Plaintiff's separate action in lieu of prerogative writs was also unsuccessful. After considering the hearing officer's findings and the competing arguments of counsel, the Assignment Judge⁶ dismissed plaintiff's complaint seeking to have those findings overturned. In her detailed twenty-nine-page written opinion, the Assignment Judge, on de novo review, affirmed the hearing officer's determinations "in all respects."

Specifically, the Assignment Judge found that plaintiff "failed to investigate the [March 6, 2004] matter as a domestic violence incident and initiate an arrest[.]" The judge ruled that "[t]he violation of [Departmental regulation] § 8:1.35 clearly sustains discipline for that violation and a written

⁶ The Assignment Judge presided over plaintiff's prerogative writs action, and a different judge from the Law Division presided over plaintiff's LAD/CEPA action.

reprimand is an appropriate sanction." The Assignment Judge agreed, however, with the hearing officer that the record did not establish that plaintiff had been verbally abusive to Corporal Jucciarone.

The Assignment Judge also upheld the hearing officer's determination that plaintiff had acted improperly with respect to Corporal Jucciarone's motor vehicle accident, and that the five-day suspension for his behavior was warranted. The court noted that plaintiff had not been the investigating officer assigned for the accident and that he wrongfully failed to obtain permission from his superiors before attaching his own statement to the official investigation report in the file. The court further noted that plaintiff had admitted to Sergeant Doyle that he had not even seen the collision of the vehicles involved. Additionally, plaintiff had returned to the accident location in violation of an express directive by Sergeant Doyle not to do so. Moreover, the court found "[e]ven more egregious . . . plaintiff's flagrant violation of the Department's protocol for the dissemination of information to the media and public."

Finally, the Assignment Judge sustained the hearing officer's finding that plaintiff had made "rude and insulting" comments to the civilian motorist at Garden State Fuel. The

judge likewise was satisfied that the sanction of a written reprimand imposed for that behavior was "adequate and not excessive under the circumstances."

Plaintiff did not appeal the Assignment Judge's dismissal of his action in lieu of prerogative writs. He appealed only the Law Division's issuance of summary judgment in this LAD/CEPA action. He argues that the Law Division erred as a matter of law in granting relief to defendants, and that genuine issues of material fact require a trial of his claims.

II.

In reviewing the trial court's summary judgment order, we are guided by well-established standards. A motion for summary judgment must be granted 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." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-29 (1995); R. 4:45-2(c). These same familiar standards apply on appeal. See N.J. Div. of Taxation v. Selective Ins. Co., 399 N.J. Super. 315, 322 (App. Div. 2008) (citing Prudential Prop. & Cas. Ins.

Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998)).⁷

A. The LAD Claims

The LAD protects employees from discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, disability, nationality, sex, gender identity, expression, or source of lawful income used for rental or mortgage payments. N.J.S.A. 10:5-4. To prove a cause of action for retaliation under the LAD, as alleged here, a plaintiff must show that: (1) he or she engaged in a protected activity known to defendant; (2) he or she was subjected to an adverse employment decision; and (3) there was a causal connection between the two. Pilkington v. Bally's Park Place, Inc. 370 N.J. Super. 140, 150 (App. Div. 2003), rev'd on other grounds, 180 N.J. 262 (2004); see also Craig v. Suburban Cablevision, 140 N.J. 623, 629-30 (1995) (same). Plaintiff contends that he engaged in a protected activity under the LAD by attempting to prevent

⁷ As a threshold matter, we reject plaintiff's procedural argument that defendants' submissions to the trial court in support of their motion violated Rule 1:6-6 and Rule 4:46-2(a). The documents relied upon by the Law Division judge essentially were sworn statements of witnesses, transcripts of deposition testimony, and documents variously referenced by both parties and the deponents. There is no showing that plaintiff objected to these submissions before the motion judge. We discern no basis to vacate the judge's order under the cited Rules.

Corporal Jucciarone from engaging in gender-based discrimination at the scene of what ultimately was classified as a domestic violence incident. He further alleges that defendants retaliated against him because he had voiced such resistance to Corporal Jucciarone.

We recognize that police officers must carry out their duties in a non-discriminatory fashion. See Ptaszynski v. Uwaneme, 371 N.J. Super. 333, 346 (App. Div.), certif. denied, 182 N.J. 147 (2004). Even so, plaintiff failed to substantiate a valid cause of action here under the LAD. His claims under that statute were properly dismissed for several reasons.

First, inasmuch as plaintiff brought separate legal claims against defendants under CEPA, arising out of the same allegations of reprisal, his LAD claims are foreclosed by CEPA's election-of-remedies provision. In particular, N.J.S.A. 34:19-8 plainly states that "the institution of action in accordance with [CEPA] shall be deemed a waiver of the rights and remedies available under any other . . . State law." See also Young v. Schering Corp., 275 N.J. Super. 221, 238 (App. Div. 1994) (applying Section 34:19-8).

Moreover, we are satisfied that the factual record does not reasonably support plaintiff's LAD claims as a matter of law. Apart from the single domestic violence episode of March 6,

2004, plaintiff has not presented evidence of any pattern and practice of gender-based discrimination by Corporal Jucciarone, or the Department, in investigating and charging individuals in a domestic disturbance. The record reflects that plaintiff and Corporal Jucciarone had a personal disagreement as to which of the combatants in the domestic incident of March 6, 2004 was the aggressor, or both. Plaintiff was found to have violated the Department's policies, which we note are gender-neutral, in his own handling of the incident. He was consequently disciplined for his own mistakes. Even viewed in a light most favorable to plaintiff, the record does not show that he was victimized by gender-based discrimination, or that he was retaliated against on gender-based grounds.

Accordingly, we affirm summary judgment dismissing plaintiff's LAD claims, both substantively and also procedurally under election-of-remedies principles.

B. The CEPA Claims

It is well settled that CEPA is designed to "prevent retaliation against those employees who object to employer conduct that they reasonably believe to be unlawful or indisputably dangerous to the public health, safety or welfare." Mehlamn v. Mobil Oil corp., 153 N.J. 163, 193-94 (1998), see also N.J.S.A. 34:19-3. "[T]he offensive activity must pose a

threat of public harm, not merely private harm or harm only to the aggrieved employee." Mehlman, supra, 153 N.J. at 188. To establish a cognizable CEPA claim, an employee 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. 34:19-3(c);
- (3) an adverse employment action was taken against him or her; and
- (4) a causal connection exists between the whistle-blowing activity and the adverse employment action.

Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003).

The Law Division judge correctly determined that plaintiff failed to demonstrate a reasonable basis in the record to meet all of these essential statutory requirements. Even assuming, for the sake of discussion, that plaintiff "reasonably believed" that the Department and certain of his superiors had violated the laws or a clear mandate of public policy, he only lodged timely complaints concerning the Hackney overtime incident and the pepper-spray incident.⁸

⁸ With respect to the domestic violence incident, plaintiff merely mentioned to Sergeant Meyers, while plaintiff and his superior officers were deciding how to handle the arrest, that
(continued)

As to the critical third and fourth elements of a CEPA claim requiring causal-based retaliation, we agree with the Law Division judge that plaintiff failed to establish "tangible adverse consequences to him" that were imposed as a reprisal for any alleged whistle-blowing. The disciplinary measures that the Department imposed for plaintiff's improper conduct in the three cited episodes (the domestic violence incident, Corporal Jucciarone's accident, and the Garden State Fuel encounter) were founded upon substantial credible evidence. The Department did not reach a final decision on those sanctions until after a full-blown multi-day hearing before a retired judge serving as a hearing officer. An "investigation of an employee is not normally considered retaliation." Beasley v. Passaic County, 377 N.J. Super. 585, 606-07 (App. Div. 2005). "When plaintiffs are afforded a hearing and represented by counsel, plaintiffs 'cannot claim that . . . substantiated disciplinary charges and resulting brief suspensions from work [are] retaliatory.'" Id. at 607 (citing Hancock v. Borough of Oaklyn, 347 N.J. Super. 350, 361 (App. Div. 2002)).

(continued)

Corporal Jucciarone's interpretation of the incident had been erroneous. Plaintiff did not formally complain about Corporal Jucciarone's conduct at the scene until after he already was approached and questioned as part of the internal affairs investigation that had been opened against him.

The sanctions imposed by the Department upon plaintiff were supported by substantial reasons. The subpar rating, with respect to "dealing with citizens," contained in plaintiff's 2004 performance evaluation, which is otherwise generally favorable,⁹ did not negatively impact his wages or benefits or result in any "direct economic harm." Victor v. State, 401 N.J. Super. 596, 616 (App. Div. 2008). In addition, plaintiff concedes that his transfer to a different assignment, which he alleges was improperly motivated, nevertheless has resulted in a more positive work environment for him. See Shepherd v. Hunterdon Dev. Ctr., 336 N.J. Super. 395, 419-20 (App. Div. 2001) aff'd in part rev'd in part, 174 N.J. 1 (2002) (similarly finding that plaintiff's transfer to another location had "worked out well for him" and that the stress of the transfer itself did not comprise adverse employment action).

We also sustain the Law Division judge's finding that the two individual defendants, Lieutenant Kane and Sergeant Meyers, were not personally liable to plaintiff under CEPA on the record facts presented, although we also recognize that individual liability of supervisors is cognizable under CEPA on a proper factual showing. See Higgins v. Pascack Valley Hosp., 158 N.J.

⁹ In fact, plaintiff received near-perfect scores in several categories in the same evaluation.

404, 425 (1999); Maw v. Advanced Clinical Communications, Inc., 359 N.J. Super. 420, 440 (App. Div. 2003), rev'd on other grounds, 179 N.J. 439 (2004).

As a final observation, although one not essential to our analysis, we note that the hearing officer's adverse factual findings, and the ensuing rejection of plaintiff's action in lieu of prerogative writs, are wholly consistent with a conclusion that plaintiff was not the victim here of illegal retaliation at the hands of defendants. Plaintiff has failed to provide an adequate reason to disturb those adverse findings or to relitigate them. See Ensslin v. Twp. of No. Bergen, 275 N.J. Super. 352, 362 (App. Div. 1994) (noting the potential applicability of collateral estoppel to civil claims of discrimination by a police officer who had unsuccessfully litigated the underlying factual issues in related administrative proceedings), certif. denied, 142 N.J. 446 (1995).¹⁰

¹⁰ We perceive nothing in Hennessey v. Windslow Twp., 183 N.J. 593 (2005), a case cited by plaintiff, that requires us to ignore the adverse final outcome of plaintiff's action in lieu of prerogative writs. In Hennessey, unlike the present case, plaintiff did not seek judicial review of an adverse departmental hearing, in which she could have challenged "the appropriateness of discipline and the severity of the discipline." Id. at 604.

On the whole, we concur with the Law Division judge's perceptive assessment that plaintiff has experienced "discord in the workplace," in part because of his manner of interacting with his co-workers, but that such discord is insufficient on this record to sustain his pleaded claims under CEPA or the LAD.

The Law Division's companion orders of March 30, 2007 granting summary judgment to all defendants are affirmed.

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



CLERK OF THE APPELLATE DIVISION