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SUPREME COURT OF NEW JERSEY
No. 066968

STEVEN J. WINTERS,	:	On Appeal From the
	:	SUPERIOR COURT OF NEW JERSEY,
Plaintiff-Respondent	:	Appellate Division
	:	Docket No. A-1117-09T3
	:	
v.	:	
	:	Sat Below:
NORTH HUDSON REGIONAL FIRE	:	
AND RESCUE, et als.	:	Hon. Stephen Skillman
	:	Hon. William P. Gilroy
Defendants-Appellants	:	Hon. Marie P. Simonelli
	:	

AMICUS BRIEF OF NATIONAL EMPLOYMENT
LAWYERS ASSOCIATION/NEW JERSEY CHAPTER

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Richard E. Yaskin, Esquire

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INTRODUCTION

This appeal raises issues of public importance in determining the rights of New Jersey civil service protected employees who exercise appeal rights to the Civil Service Commission and also wish to litigate their Conscientious Employee Protection Act ("CEPA") and New Jersey Law Against Discrimination ("LAD") motivated retaliation and discrimination claims in New Jersey Superior Court.

To undo the Appellate Division's holding, as the defendants/appellants seek, would make it difficult or impossible for victims of retaliation and discrimination to also exercise their rights to obtain administrative review of public employer disciplinary actions by the Civil Service Commission and, thereby, thwart the well-settled principle that New Jersey's CEPA and LAD statutes are liberally construed so as to extirpate the cancer of workplace discrimination and retaliatory animus.

LEGAL ARGUMENT

I. THE EXPANSIVE PUBLIC POLICY UNDERLYING NEW JERSEY'S CEPA STATUTE PERMITTED MR. WINTERS TO WITHHOLD THE ISSUE OF HIS EMPLOYER'S RETALIATORY MOTIVATION FROM CIVIL SERVICE COMMISSION PROCEEDINGS

A. As Under The LAD, A CEPA Plaintiff May Elect to Pursue The Issue Of Retaliatory Discharge In New Jersey Superior Court

"[CEPA] is a civil rights statute. Its purpose 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. Consistent with that purpose, CEPA must be considered 'remedial' legislation and therefore should be construed liberally to effectuate its important social goal." Green v. Jersey City Bd. of Educ., 177 N.J. 434, 448 (2003) (quoting Abbamont v. Piscataway Township Bd. of Educ., 138 N.J. 405, 431 (1994)).

"The essential purpose of CEPA is to provide 'broad protections against employer retaliat[ion] for workers whose whistleblowing activities benefit the health, safety and welfare of the public.'" Racanelli v. County of Passaic, 417 Super. 52, 56 (App. Div. 2010) (quoting Feldman v. Hunterdon Radiological Assocs., 187 N.J. 228, 239 (2006)).

When called upon to interpret and analyze CEPA, courts have turned to case law under the LAD, N.J.S.A. 10:5-1 to -49, for guidance. Green, 177 N.J. at 448, (noting that "[t]he policy concerns underpinning the determination in Shepherd [v. Hunterdon Developmental Ctr.], 174 N.J. 1 (2002)] in respect of LAD claims require the application of the Morgan/Shepherd framework in CEPA actions"); Zubrycky v. ASA Apple, Inc., 381 N.J. Super. 162, 166 (App. Div. 2005).

The Court in Hennessey v. Winslow Twp., 183 N.J. 593 (2005) held that plaintiff was not precluded from pursuing a LAD civil action because the Merit System Board did not make a final decision on the merits of her discrimination claim. The Court

declared that the plaintiff's "decision to forego an administrative remedy at that stage and to seek instead a judicial forum for her LAD claim **was hers to make.**" Id. at 604. (emphasis added) There is no reason why a different result should obtain under the CEPA statute.

Recently, the Appellate Division applied Hennessey's analysis of collateral estoppel to a CEPA claim which presented the identical procedural posture of the Winters appeal. See Racanelli, 417 N.J. Super. at 58. The court first stated that it was appropriate to "look to decisions rendered in LAD matters when applying the provisions of CEPA." Id., citing Green, supra. 177 N.J. at 448.

In Racanelli, the trial court dismissed the plaintiff's CEPA claim challenging her termination as retaliatory because the Civil Service Commission had issued a final decision upholding the decision to terminate the plaintiff's employment. But the Appellate Division reversed.

The Racanelli court ruled persuasively as to the application of collateral estoppel in the instant appeal.

We are therefore convinced that here, as in Hennessey, plaintiff is not barred from pursuing a CEPA claim because he elected not to raise this claim in his administrative appeal. Like the plaintiff in Hennessey, plaintiff had the discretion to pursue his retaliation claim in a judicial forum rather than in the administrative process. The trial court erred by concluding otherwise.

Id. at 58. In other words, the Appellate Division ruled that plaintiff could proceed with his retaliation claim in Superior Court under CEPA because the Civil Service Commission did not make any determination on whether the employer's motivation for its actions was retaliatory.

The Appellate Division in Winters below, ruling before the Racanelli panel, made the same policy determination before it reached the same conclusion that issue preclusion cannot apply. Because Mr. Winters sought to address the issue of retaliatory motivation for his firing in Superior Court under CEPA, the Civil Service Commission never decided the issue of retaliation. The court soundly rejected defendants' argument for collateral estoppel on public policy grounds.

Defendants' contention that plaintiff cannot establish retaliatory motivation because the administrative decisions determined that plaintiff's actions required severe discipline does not give sufficient recognition to the purpose of CEPA. Recognized as remedial legislation and "construed liberally to effectuate its important social goal" (citations omitted), CEPA's purpose in protecting employees from being retaliated against. . . for reporting illegal or unethical workplace activities would be undermined if employers, motivated solely or partially by retaliation, could discipline an employee and rely on the Commission's decision that finds legitimate reasons exist for the discipline **but which does not examine the motivating reason in bringing the disciplinary action.**

Winters v. N. Hudson Reg's Fire & Rescue, 2010 N.J. Super.

Unpub. LEXIS 2152, at *22-23 (App. Div. Aug. 30, 2010) (emphasis supplied).

The public importance of eliminating retaliation from employment actions, and the difficulty of proving an unlawful employer motivation even with the full panoply of discovery tools and subpoena power available in the Superior Court, see e.g. Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994) (noting that its summary judgment standard "places a difficult burden on the plaintiff"), compels application of the Hennessey and Racanelli rationales to the instant appeal.¹ Mr. Winters was entitled to withhold the issue of retaliatory discharge from the civil service proceedings in which he challenged his employer's imposition of discipline.²

In Long v. Lewis, 318 N.J. Super. 449, 454 (App. Div. 1999), plaintiff claimed that at the time she appeared before the Merit System Board, she was unaware of her employer's alleged disability bias. After her discharge had been upheld administratively, the

¹ An entitlement to broad discovery tools over 450 days as allocated for Superior Court Track III CEPA and LAD cases stands in sharp contrast with the informal, limited discovery "Conference Hearing" proceeding that was made available to Mr. Winters at the OAL. See N.J.A.C. 1:1-10.6. (A party wishing to utilize Interrogatories, admissions or depositions must establish good cause by motion).

² Plaintiff Winters contends that certain procedural obstacles prevented his full presentation of retaliatory motivation in the administrative process. See Winters' December 28, 2009 Appellate Division ("App. Div.") Brief, pp. 56-60. Those arguments are consistent with the principle that "[e]ven when the requirements of the general rule of collateral estoppel are satisfied, the Court must consider whether there are special circumstances present which make it inequitable or inappropriate to foreclose relitigation of a previously determined issue.'" Gannon v. American Home Products, Inc., 414 N.J. Super. 507, 523 (App. Div. 2010) (quoting AMTRAK v. Pa. Pub. Util. Comm'n, 288 F.3d 519, 528 (3d Cir. 2002)). Irrespective of such obstacles, your Amicus contends that plaintiff had an option to withhold the issue of his employer's retaliatory motivation for a civil action under CEPA.

court addressed plaintiff's entitlement to pursue a LAD disability discrimination claim in court. Upon considering "this State's strong policy against employment discrimination," id. at 455 (citation omitted) and the decision in Ensslin v. Township of North Bergen, 275 N.J. Super. 352 (App. Div. 1994), *certif. denied* 142 N.J. 446 (1995), the court reasoned:

But there is a significant difference between the cases of Long and Ensslin that undercuts the defendant's reliance on collateral estoppel. Ensslin raised the LAD as a defense in the administrative hearing; Long did not. **Collateral estoppel only bars relitigation of issues that were actually litigated.** Ensslin, 275 N.J. Super. at 369 (citing Mazzilli v. Accident & Cas. Ins. Co. of Winterthur, 26 N.J. 307, 314-16 (1958)).

Id. at 456 (emphasis added).

B. As With The LAD and CEPA, A Section 1983 Plaintiff May Elect To Pursue The Issue Of Retaliatory Discharge In A Judicial Forum

The Third Circuit Court of Appeals addressed similar issues of collateral estoppel in a case arising under Pennsylvania and federal law. Edmundson v. Borough of Kennett Square, 4 F.3d 186, 189 (3d Cir. 1993). The court there held as follows:

In the case at hand, we must consider the effect of both reviewed and unreviewed state agency decisions, each involving different issues. With respect to both the Civil Service Commission's ruling on plaintiff's termination and that of the Unemployment Compensation Board which was reviewed by the Commonwealth Court, issue preclusion prevents reexamination of the fact that plaintiff was discharged because of prior infractions and because his failure to follow orders amounted to willful misconduct.

Thus, there are valid reasons under state law to justify plaintiff's discharge solely for these reasons. Assuming that plaintiff's criticism of the police chief was

protected by the First Amendment, the question is whether the Borough would have terminated plaintiff's employment even in the absence of the challenged remarks. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977). This matter requires examination of two possibilities in terms of issue or claim preclusion - whether plaintiff's comments are protected by the First Amendment and whether they were the *sine qua non* of his discharge.

If these alternatives had been adjudicated by the Commonwealth Court or the Court of Common Pleas, issue preclusion would apply under both federal and Pennsylvania law. It is clear, however, that no such review occurred in any state court proceeding.

The only administrative ruling in this case which was reviewed by a state court was the unemployment compensation proceeding. **Plaintiff did not raise his claim of retaliatory discharge or produce any evidence on that subject in the administrative proceeding, nor did he raise the point in his appeal to the Commonwealth Court.**

Because plaintiff never raised the First Amendment defense, issue preclusion cannot be based on the unemployment compensation case.

Id. at 189 (emphasis added).

As in the instant appeal, the Edmundson Court noted that "[t]he Civil Service Commission's ruling on plaintiff's discharge did not discuss whether the asserted protected conduct had a determinative effect on the Borough's decision." Id. at 191. The court's ruling not only supports plaintiff's issue preclusion argument under CEPA, but should be binding authority with respect to Mr. Winters' First Amendment/Section 1983 claim and his NJ Civil Rights Act claim.

II. ABSENT THE CIVIL SERVICE COMMISSION'S ADJUDICATION OF A PUBLIC EMPLOYER'S MOTIVE FOR ALLEGED RETALIATORY ACTIONS, COLLATERAL ESTOPPEL DOES NOT BAR SUCH EMPLOYEE'S CIVIL ACTION UNDER CEPA

A. CEPA's Waiver Clause, N.J.S.A. 34:19-8, Permits A Public Employee To Obtain Both A Civil Service Commission Review Of Employer Disciplinary Action And A Judicial Determination Of His Employer's Alleged Retaliatory Motives

The CEPA statute includes a "waiver" provision which states that "the institution of an action [under CEPA] 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. In Scouler v. City of Camden, 332 N.J. Super. 69, 72 (App. Div. 2000), the Merit System Board (now the Civil Service Commission) held that this provision precluded a civil service employee who had filed a CEPA lawsuit from appealing to the Board from a disciplinary action that was also one of the grounds of retaliation alleged. The Appellate Division reversed, holding that an employee who has filed a CEPA action is not precluded from appealing a disciplinary action to the Board simply because the employee alleges that his employer instituted disciplinary charges against him for the same retaliatory reasons. See Id. at 73-75.

The Scouler court relied upon Young v. Schering Corp., 141 N.J. 16 (1995), where this Court addressed the scope of the CEPA waiver provision. The issue in Young was whether this provision precludes an employee who has filed a CEPA action from pursuing not only

related common-law claims but also other claims that are substantially independent of the retaliation claim. The Court found that the purpose of the waiver provision is solely to "prevent an employee from pursuing both statutory and common-law retaliatory discharge causes of action" based on the same operative facts. Id. at 27. Young therefore rejected "the overly literal reading of the waiver provision urged by defendants," Id. at 25, and decided that this provision should be construed "narrowly." Id. at 27. The Court held that the waiver provision "applies only to those causes of action that require a finding of retaliatory conduct that is actionable under CEPA." Id. at 29.

The court in Scouler also recognized that "neither N.J.S.A. 34:19-8 nor any other section of CEPA precludes an employee who alleges a retaliatory motive for the institution of a civil service disciplinary charge from subsequently filing a CEPA action." Id. at 75. The court's rationale is well justified by the language and intent of CEPA's waiver provision. That provision does not state that litigating an administrative claim under State law bars a CEPA lawsuit - - literally it states just the opposite. N.J.S.A. 34:19-8 thus indicates a statutory preference for litigating CEPA claims separately from civil service proceedings.

III. THE CIVIL SERVICE COMMISSION'S FINDING THAT MR. WINTERS WAS GUILTY OF MISCONDUCT WHICH JUSTIFIED HIS TERMINATION DOES NOT PRECLUDE A FINDING OF RETALIATION UNDER CEPA AS A MOTIVATING FACTOR FOR THE DISCIPLINE

A. By Raising Disputed Factual Issues As To Disparate Comparative Discipline, Mr. Winters May Present His CEPA Retaliation Claim To A Jury

Defendants below argue that the Civil Service Commission's findings of justification for Mr. Winters' disciplinary suspension and termination necessarily preclude a finding of pretext that is necessary to sustain a claim of retaliatory discharge. See Appellants' December 4, 2009 Appellate Division Brief, p. 16. This is not the law. In Jason v. Showboat Hotel & Casino, 329 N.J. Super. 295, 302 (App. Div. 2000), plaintiff contended that summary judgment was erroneously granted because despite defendant's proffered legitimate, non-discriminatory reasons for his termination, "he was entitled to have a jury consider evidence that defendant treated white employees more leniently, and to draw an inference from such evidence that plaintiff's race was a substantial factor in his termination." The court held that plaintiff's theory was "'viable,' [explaining that] [t]reating white employees more leniently than black employees for similar infractions can be a violation of the New Jersey Law Against Discrimination." Id. at 302-03.

To present such a *prima facie* case of discriminatory discipline, an employee must show: (1) That plaintiff was a

member of a protected group; (2) That there was a company policy or practice concerning the activity for which he or she was discharged; (3) That the non-minority employees either were given the benefit of a lenient company practice or were not held to compliance with a strict company policy; and (4) That the minority employee was disciplined either without application of a lenient policy, or in conformity with the strict one. *Id.* at 304-05, citing Jackson v. Georgia-Pacific Corp., 296 N.J. Super. 1, 21 (App. Div. 1996) *certif. denied*, 149 N.J. 141 (1997) (citing EEOC v. Chas. Schaefer Sons, Inc., 703 F. Supp. 1138, 1147 (D.N.J. 1988)). "Especially relevant to such a showing would be evidence that white employees involved in acts . . . of comparable seriousness . . . were nevertheless retained . . ." *Id.* at 305, quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973).

The Jason court thus held that a disparate treatment claim with regard to discipline requires comparison between the defendant's conduct toward plaintiff and other members of the protected class on one hand, and similarly situated employees not within the protected class on the other." *Id.*

In the discriminatory promotion context, this Court has declared that "by 'similarly situated' we mean those persons possessing equivalent qualifications and working in the same job category as plaintiff." Peper v. Princeton Univ., 77 N.J. 55,

84-85 (1978). Yet, the Court cautioned: “[w]e do not mean to suggest that [the listed] aspects of ‘similarly situated’ status are exhaustive or of equal significance in different employment contexts. The trial judge will have to make sensitive appraisal in each case to determine the most relevant criteria.” Id. at 85. Accordingly, the Jason court concluded there is no bright-line rule for deciding who is a similarly situated employee. Jason, 329 N.J. Super. at 305.

Plaintiff Winters cited as comparators numerous firefighters and fire officers who worked second jobs while on sick leave, injury leaves and modified duty, as well as those who engaged in other misconduct far more serious than Winters, all of whom the defendants either failed to discipline at all or disciplined far less severely than Mr. Winters. See Winters App. Div. Brief, pp. 45-54. Plaintiff’s evidence showing the disparate treatment of numerous comparable co-employees, who did not engage in protected whistleblower activities, presents the very type of factual dispute which the Jason court found to be “viable” under the LAD.

B. By Raising Disputed Factual Issues As To His Employer’s “Mixed Motive” Retaliatory Actions, Mr. Winters May Present His CEPA Retaliation Claim To A Jury

Plaintiff Winters also raises a “mixed motive” retaliation claim. See Winters’ App. Div. Brief, pp. 28-29. Under this model, an employer may be liable for discrimination or

retaliation even if its reasons are not shown to be pretextual, where it harbored so-called "mixed motives." This concept applies where the employer's adverse action was motivated by both retaliatory reasons and by valid business reasons.

This alternate method for proving discrimination at trial was established in Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989). The "mixed motive" test has been applied to New Jersey law in various contexts. See e.g., Fleming v. Corr. Healthcare Solutions, Inc., 164 N.J. 90, 100-01 (2000) (applying the Price Waterhouse "mixed motive" test to whistleblower claims under CEPA.); Bergen Commer. Bank v. Sisler, 157 N.J. 188, 208 (1999) (applying said test to a case brought under New Jersey's age discrimination laws). See also McDevitt v. Bill Good Builders, Inc., 175 N.J. 519, 527 (2003) (applying the Price Waterhouse test to a state court suit brought under the federal Age Discrimination in Employment Act.)

. . . . when a plaintiff produces evidence that an employer placed substantial reliance on a proscribed discriminatory factor in making its decision to take the adverse employment action, *the burden of persuasion shifts to the employer* to prove that even if it had not considered the proscribed factor, the same employment action would have occurred.

McDevitt, 175 N.J. at 527, citing Price Waterhouse, supra. 490 U.S. at 244-45.

Federal courts initially allowed the use of a "mixed motive" test only where a plaintiff introduced "direct evidence"

that an illegitimate factor played a substantial role in the employment decision. See Price Waterhouse, supra., 490 U.S. at 275 (O'Connor, J. concurring).

As Title VII was amended and federal "mixed motive" case law further developed, presenting direct evidence of discrimination was no longer required. See Desert Palace, Inc. v. Costa, 539 U.S. 90, 99-100 (2003) (allowing a "mixed motive" jury charge based on evidence that the plaintiff's supervisors had singled her out, treated her less favorably and with harsher discipline, "stacked" her disciplinary records, and had tolerated or used sex-based slurs). This change in the law was attributed to an amendment to Title VII of the federal statutes, which now reads:

an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was a *motivating factor* for any employment practice, *even though other factors also motivated the practice*.

42 U.S.C.A. § 2000e-2(m) (emphasis added).

In Desert Palace, the Supreme Court determined that if Congress, in amending Title VII, had the desire to include a standard of proof requiring direct evidence, "it would have been included in the amended statute that now focuses on whether discrimination was 'a motivating factor' in an employer's decision." Desert Palace, 539 U.S. at 99.

New Jersey courts have since applied the precepts of Desert Palace to "mixed motive" discrimination cases litigated in state court. See Myers v. AT&T, 380 N.J. Super. 443, 458-62 (App. Div. 2005), *certif. denied*, 186 N.J. 244 (2006), after remand as 2009 N.J. Super. Unpub. LEXIS 301 (App. Div. Jan. 29, 2009) ("Myers II"). The Appellate Division observed in Myers that "the logical conclusion is that the revised articulation of the 'mixed motive' analysis found in Desert Palace ought not be limited to Title VII cases alone." Id. at 461. This conclusion was based significantly on the Desert Palace Court's "more general language concerning the reliability of circumstantial proofs [of discrimination]." Myers, *supra.*, 380 N.J. Super. at 461.

As tried before a jury in Myers II, the trial judge issued a "mixed motives" jury instruction notwithstanding evidence described by the Myers II Appellate Division as "fall[ing] woefully short of the standard for direct evidence articulated in Bergen Commer. Bank v. Sisler, *supra.*, 157 N.J. at 208." See Id. at *23.

Plaintiff Winters amply supports a mixed motive analysis, marshaling nine bullet-points of evidence in his App. Div. Brief at 39-40. This includes a statement that the discipline was motivated by Winters' protected objections and speech, statements expressing anger and frustration about Winters'

protected conduct and other evidence directly reflecting defendants' retaliatory animus. See Id. As the Appellate Division originally concluded in Myers:

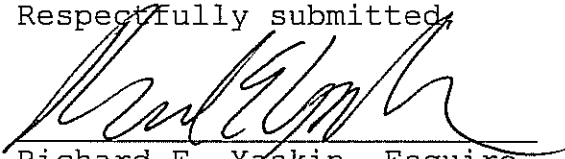
the evidence is sufficient to comply with the mixed motive analysis regardless of whether we apply the standard as articulated in Desert Palace or the stricter standard of proof required under the more traditional Price Waterhouse formulation.

Id. at 463.

CONCLUSION

For the foregoing reasons, the decision and reasoning of the Appellate Division construing CEPA's broad protections and liberal access to a judicial forum should be affirmed.

Respectfully submitted,



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