SUPREME COURT OF NEW JERSEY
NO. 086861

VICTORIA USACHENOK,
Plaintiff-Petitioner,

v.

STATE OF NEW JERSEY DEPARTMENT OF THE TREASURY, *et al.*,
Defendants-Respondents.

Civil Action

On Appeal from the Superior Court of New Jersey, Appellate Division
App. Div. Docket No. A-4567-18

Sat Below:
Hon. Jose L. Fuentes, P.J.A.D.
Hon. Robert J. Gilson, J.A.D.
Hon. Katie A. Gummer, J.A.D.

BRIEF AND APPENDIX OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY AND AMERICAN CIVIL LIBERTIES UNION

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PRELIMINARY STATEMENT

Amici Curiae the American Civil Liberties Union Foundation and its state affiliate the American Civil Liberties Union of New Jersey (hereinafter, the "ACLU") respectfully submit this brief supporting Plaintiff-Petitioner Viktoriya Usachenok and urging reversal.

First, the Appellate Division was wrong to assume that the New Jersey Constitution's protections for free expression as applied to this case are co-extensive with those under the federal First Amendment. They are not. The New Jersey Constitution, on which Ms. Usachenok relies, provides some of the broadest protections for free expression in the country, and its unique text, structure, and history support interpreting its protections for public-employee speech more broadly than those afforded by federal constitutional law. In particular, unlike the U.S. Constitution's text, the New Jersey Constitution includes an affirmative right to "freely speak" on "any subject," N.J. Const. art. I, ¶ 6; a right of the People to "consult for the common good," *id.* ¶ 18; and express protection for public employees to organize collectively to address workplace issues, *id.* ¶ 19. Accordingly, should this Court reach Ms. Usachenok's constitutional claim, it should resolve that claim on independent state grounds. (Point I)

Second, the Appellate Division erred in concluding that N.J.A.C. 4A:7-3.1(j) (hereinafter, the "challenged regulation") poses no constitutional problem because it "requests," rather than requires, confidentiality. That position fundamentally ignores the robust nature of New Jersey's affirmative right to speak freely and the power imbalance inherent in the employer-employee relationship. A public employee faced with a "request" for confidentiality would reasonably fear that a failure to comply could bring adverse consequences. Accordingly, such a request will inevitably chill the employee's speech. Moreover, the State's subjective intent in amending the challenged regulation and its removal of some disciplinary language do not save the regulation from constitutional infirmity, particularly given that other portions of the administrative code continue to permit discipline based on an employee's "insubordination" or "failure to perform duties," and for any "other sufficient cause." N.J.A.C. 4A:2-2.3(a)(1), (2), (12). (Point II)

Third, the Court should adopt its own standard for assessing the state constitutionality of restrictions on public-employee speech. Although Ms. Usachenok should prevail even under the federal First Amendment standards she relies on, those standards, particularly as interpreted by the U.S. Supreme Court in subsequent cases, are not appropriate to apply to public employees' broader right to free expression under the New Jersey Constitution. (Point III.A)

In particular, the standard applied by this Court to public employers' confidentiality policies in internal investigations should require employers to justify confidentiality on a case-by-case basis. It should also recognize that employees have a constitutional interest in speaking about workplace terms and conditions, irrespective of whether those subjects can be characterized as a matter of public concern. And it should allow for consideration of multiple other factors, including the interests that complainants and witnesses may have in confidentiality where an employer can show that confidentiality is necessary to prevent further harassment or retaliation. (Point III.B)

Under the standard that the ACLU urges this Court to adopt, the challenged regulation plainly does not pass state constitutional muster. (Point III.C)

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The ACLU accepts the facts and procedural history set forth by the Appellate Division in its opinion below. *Usachenok v. Dep't of the Treasury*, No. A-4567-18, 2022 WL 588546 (App. Div. Feb. 28, 2022).

ARGUMENT

I. The New Jersey Constitution provides broader protection than the federal First Amendment for public employees' free expression.

Although Ms. Usachenok has consistently challenged the regulation on state constitutional free-speech grounds, *see* 4th Am. Compl. ¶¶ 252, 260; Pl.'s

Pet. 10, the Appellate Division resolved her claim without considering it in light of the New Jersey Constitution's unique text, structure, and history. Instead, the court referred to the claim as one involving "state employees' First Amendment right to freedom of speech," *Usachenok*, Slip Op. 8, thus suggesting that the court treated state and federal constitutional protections in this area as co-extensive. And the Appellate Division did not quote or even cite the relevant state constitutional provisions before concluding that the challenged regulation warrants no constitutional scrutiny because it "requests," rather than requires, confidentiality.

This Court should not make the same mistake. Although New Jersey's free speech provisions have in some cases been interpreted as co-extensive with the First Amendment, *E&J Equities, LLC v. Bd. of Adjustment of the Twp. of Franklin*, 226 N.J. 549, 568 (2016), in many circumstances the State Constitution affords more robust free speech protections than federal law. *Mazdabrook Commons Homeowners' Ass'n v. Khan*, 210 N.J. 482, 492 (2012); *see also Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n*, 192 N.J. 344, 356 (2007) (observing that New Jersey's expression protections are broader than "practically all others in the nation" (cleaned up)).

This case provides yet another example where state constitutional protections for expression sweep more broadly than federal constitutional law.

To begin with, the "language employed" in the New Jersey Constitution provides a "basis for finding [its] exceptional vitality . . . with respect to individual rights of speech." *State v. Schmid*, 84 N.J. 535, 557 (1980), *appeal dismissed sub nom. Princeton Univ. v. Schmid*, 455 U.S. 100 (1982; *see also State v. Muhammad*, 145 N.J. 23, 41 (1996) (identifying factors, including distinctive text, relevant to recognizing a state constitutional right that is broader than its federal analogue (citing *State v. Hunt*, 91 N.J. 338, 364–67 (1982) (Handler, J., concurring))). Article 1, paragraph 6, of the New Jersey Constitution provides an affirmative guarantee that "[e]very person may freely speak, write, and publish his sentiments," and may do so "on all subjects, being responsible for the abuse of that right." N.J. Const. art. I, ¶ 6. Article I, paragraph 18 grants to "the people" an affirmative right not just to assemble and petition, but "to consult for the common good" and to "make known their opinions to their representatives." N.J. Const. art I, ¶ 18.

These "affirmative[] guarantees" in the New Jersey Constitution have no textual counterparts in the federal First Amendment's limitations on state power. *Compare Schmid*, 84 N.J. at 560, *with* U.S. Const., Amend. I ("Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

Based in part on these textual differences, this Court has, for example, recognized certain state constitutional violations of the right to free expression even in the absence of state action. *See, e.g.*, *Dublirer v. 2000 Linwood Ave. Owners, Inc.*, 220 N.J. 71, 79 (2014). Similarly, the Supreme Court of Connecticut, interpreting language nearly identical to New Jersey's article I, paragraphs 6 and 18, concluded that a right to speak "on *all* subjects" supports finding "that the state constitution protects employee speech in the public workplace on the widest possible range of topics, as long as the speech does not undermine the employer's legitimate interest in maintaining discipline, harmony and efficiency in the workplace." *Trusz v. UBS Realty Invs., LLC*, 123 A.3d 1212, 1221 (Conn. 2015) (emphasis added). And while this Court has not yet addressed the meaning to be ascribed article I, paragraph 18's phrase "consult for the common good," the Illinois Supreme Court has interpreted a nearly identical provision and held that the phrase, set off by commas there as in New Jersey, creates a right that is independent from an assembly right and that is broader than the federal First Amendment. *City of Chicago v. Alexander*, 89 N.E.3d 707, 718–20 (Ill. 2017). *Cf. Harris v. Hutchinson*, 591 S.W.3d 778, 781 (Ark. 2020) (suggesting that an independent "right to remonstrance" in Arkansas' assembly-and-petition provision might provide grounds for a public-employer whistleblower retaliation claim).

New Jersey's tradition and history also evince an even "stronger concern" than under federal law "for speech on public matters." *Sisler v. Gannett Co.*, 104 N.J. 256, 274–75 (1986). For example, this Court's precedent imposes a higher standard for actionable defamation than would be required by the federal First Amendment with respect to speech about non-public figures who are engaged in matters of public concern. *Id.* at 270–71, 279; *see also, e.g.*, *W.J.A. v. D.A.*, 210 N.J. 229, 242 (2012).

Likewise, the State's legislative enactments "echo the Constitution" by "evincing a paramount concern for freedom of speech." *Sisler*, 104 N.J. at 271; *Muhammad*, 145 N.J. at 41 (identifying this factor as relevant to the scope of a state constitutional right). New Jersey's Conscientious Employee Protection Act, for example, protects the right of employee whistleblowers to be free from retaliation for disclosing to a supervisor or a public body any activity that they reasonably believe violates the law. N.J.S.A. 34:19-3.[1] And just last month, the New Jersey Legislature unanimously adopted the Uniform Public Expression Protection Act, which provides an expedited process for dismissal of strategic

[1] The New Jersey Legislature's commitment to protecting worker speech is consistent with the history of legislative enactments in numerous other states, which began protecting the "expressive freedom of workers . . . *more than a century* before the federal courts did" under the First Amendment. Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 Harv. L. Rev. 2299, 2333 (2021).

lawsuits against public participation, i.e., "SLAPP suits." *See* N.J. Legis., Bill Search, N.J. S2802, https://www.njleg.state.nj.us/bill-search/2022/S2802; *see also Sisler*, 104 N.J. at 271 (citing N.J.S.A. 2A:84A-21, New Jersey's Shield Law).

Notably, another provision of the New Jersey Constitution—article I, paragraph 19—confirms that article I, paragraphs 6 and 18, provide robust speech protections to public employees in particular. Since 1947, paragraph 19 has guaranteed that public employees "shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing." N.J. Const. art. I, ¶ 19; *see also In re Univ. of Med. & Dentistry*, 144 N.J. 511, 523 (1996). The "very general language" of article I, paragraph 19 is "oriented toward collectivity," aiming "to secure to employees . . . the right to get together." *Lullo v. Int'l Ass'n of Fire Fighters*, 55 N.J. 409, 420 (1970). This state right is "accorded the same stature as other fundamental rights." *George Harms Constr. Co v. N.J. Tpk. Auth.*, 137 N.J. 8, 28–29 (1994) (cleaned up).[2]

[2] When interpreting the scope of article I, paragraph 19, this Court has indicated that it "regard[s] the 'experience and adjudications' under the [National Labor Relations Act] as appropriate and helpful guides." *Comite Organizador de Trabajadores Agricolas v. Molinelli*, 114 N.J. 87, 98 (1989) (citing *Cooper v. Nutley Sun Printing Co*, 36 N.J 189, 199–200 (1961)); *see, e.g.*, *In re Univ. of Med. & Dentistry*, 144 N.J. at 525–28 (upholding state

To "effectuate" article I, paragraph 19, the New Jersey Legislature has enacted the Employer-Employee Relations Act ("EERA"), N.J.S.A. 34A:1 to -29, which creates "certain substantive rights on behalf of public employees." *In re Univ. of Med. & Dentistry*, 144 N.J. at 523. In particular, public employers are barred from "[i]nterfering with, restraining or coercing employees in the exercise of the rights guaranteed to them under" the EERA. N.J.S.A. 34:13A-5.4(a)(1); *see also id.* 34:13A-5.14(b) (providing that a "public employer shall not encourage or discourage an employee from joining, forming or assisting an employee organization"). And by statute, public employees "shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity." *Id.* 34:13A-5.3; *see also State of N.J., Dep't of Corrs.*, 42 NJPER ¶ 108, 2015 WL 10371869 (Nov. 25, 2015) (explaining that New Jersey's Public Employment Relations Commission has held, in reliance on the federal NLRA, that protected activity under the EERA may include individual activity undertaken for employees' mutual aid and protection).

The New Jersey Constitution's inclusion of article I, paragraph 19, which

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agency's determination that, pursuant to state law, employees are entitled to the equivalent of a federal *Weingarten* right to be accompanied by a representative of their choosing in meetings likely to lead to discipline (citing *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975))).

has no federal constitutional analogue, underscores that this State provides unusually strong constitutional protection for public employees' speech. *Muhammad*, 145 N.J. at 41 (identifying constitutional structure as a factor relevant to the scope of a state constitutional right). The State's legislative adoptions in this area likewise support that conclusion. *See id.* at 42–43. And these factors all suggest that New Jersey courts, when deciding claims of state constitutional law, should be wary of importing wholesale First Amendment standards for public-employee speech, particularly where claims involve speech about workplace terms and conditions. *See, e.g.*, *Trusz v. UBS Realty Invs.*, 123 A.3d at 1221–22 (rejecting under Connecticut constitutional law the U.S. Supreme Court's holding in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), as to public employees' First Amendment rights).

In light of these distinctions between state and federal constitutional law, this Court should resolve Ms. Usachenok's constitutional claim with direct reference to the New Jersey Constitution's unique text, structure, and history.

II. The Appellate Division erred in concluding that a confidentiality "request" insulates the challenged regulation from constitutional scrutiny.

The Appellate Division concluded that the challenged regulation "does not restrict speech" or "constitute an improper prior restraint of speech" because the regulation merely "requests" confidentiality, thus "reflect[ing] at most, an

attempt to convince," rather than coerce, employees. *Usachenok*, Slip Op. at 10–11 (internal quotation omitted); *see also id*. at 13. In so holding, the Appellate Division relied principally on the agency's "intent" behind the regulation, which had been amended to eliminate a mandatory confidentiality requirement that was backed by express threat of employee discipline. *Id* at 9–10. The Appellate Division's rationale in this respect is incorrect for at least four reasons.

First, the Appellate Division's holding ignores entirely the "economic dependence of . . . employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). In the federal labor context, for example, numerous courts have recognized the employer-employee power imbalance and rejected the contention that employer requests discouraging protected activities are insulated from review. *See, e.g.*, *Allegheny Ludlum Corp. v. NLRB*, 301 F.3d 167, 177 (3d Cir. 2002) (involving the question whether employer "polling" of employees as to their union sympathies violates employees' federal rights to organize); *see also Franklin Iron & Metal Corp*., 315 NLRB 819, 820 (1994) ("It makes no difference whether employees were 'asked' not to discuss their wage rates or ordered not to do so . . . . In the absence of any business justification for the rule, it was an unlawful restraint on rights

protected by [the National Labor Relations Act ("NLRA")]."), *enf'd*, 83 F.3d 156 (6th Cir. 1996).

Given this economic reality, it beggars belief to suggest that employees participating in an internal EEO investigation would reasonably interpret an employer's "request" for confidentiality as permitting the employees to simply disregard that request at their choosing. And psychological studies confirm that people often feel compelled to obey authority figures in their lives. *State v. Carty*, 170 N.J. 632, 644–45 (2002), *as modified*, 174 N.J. 351 (2002) (reviewing literature and observing that "many persons, perhaps most, would view the request of a police officer to make a search as having the force of law" (internal quotation marks omitted)); *see also, e.g.*, Alexandros Karakostas, *et al.*, *Compliance and the Power of Authority*, 124 J. Econ. Behavior & Org. 67, 69 (2016) (in study of participants' willingness to cut partner's income, where study administrator asked study participants to do so "in the form of a polite request with respect to the action being 'useful,' even if there is not explicit reason provided for the usefulness," participants complied at greater rate than where request was framed as an order).

Moreover, even if the Appellate Division were correct in concluding that excision of the express threat of discipline cured that portion of the regulation's coercive effects, other portions of New Jersey's administrative code still permit

discipline against public employees for, among other actions, "insubordination," a "failure to perform duties," and any other "sufficient cause." N.J.A.C. 4A:2-2.3(1), (2), (12). *Cf. Brown v. Bd. of Rev.*, No. A-3942-04T2, 2006 WL 2096081, at *2 (N.J. App. Div. July 31, 2006) (upholding denial of unemployment benefits based on employee's termination for insubordination after "[c]laimant refused to comply with the employer's *request*" that he report to a distant office one day per week (emphasis added)).[3]

Second, the Appellate Division ignored the well-established principle, even under federal constitutional law, "that governmental action may be subject to constitutional challenge even though it has only an indirect effect on the exercise of" free-speech rights. *Laird v. Tatum*, 408 U.S. 1, 12–13 (1972). That principle applies with special force where, as here, the overbreadth doctrine is at issue, since that doctrine expressly examines the extent of a law's "deterrent effect on legitimate expression." *State v. Hoffman*, 149 N.J. 564, 582 (1997) (internal quotation omitted); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels.*, 413 U.S. 376, 390 (1973) (noting that the "special vice of a prior restraint is that communication will be suppressed, either directly *or by inducing excessive caution in the speaker*" (emphasis added)). The U.S. Supreme Court

[3] Pursuant to *R.*1:36-3, this unpublished opinion is attached. Counsel knows of no opinions with contrary holdings.

has, for example, struck down a government policy burdening speech by banning honoraria for public employees who speak on their own time. *See United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454 (1995) ("*NTEU*"). The Court observed that while the honoraria restriction "neither prohibits any speech nor discriminates among speakers based on the content or viewpoint of their messages, its prohibition on compensation unquestionably imposes a significant burden on expressive activity." *Id.* at 468.

Similarly, the U.S. Supreme Court invalidated a federal requirement that an addressee, in order to receive U.S. mail on certain subjects, formally request that the mail be delivered. *Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965). While this restriction did not prohibit individuals from ultimately obtaining their mail, the Court emphasized that the requirement was "almost certain to have a deterrent effect," particularly for those whose "livelihood" might have been "dependent on a security clearance." *Id.* Moreover, the Court observed that "any addressee" was "likely to feel some inhibition in sending for literature which federal officials ha[d] condemned as 'communist political propaganda.'" *Id*.

The same is true here. The challenged regulation, albeit fashioned as a policy that investigators "request" confidentiality from employees, will necessarily deter those employees from speaking, even in instances where the State has little to no interest in requesting confidentiality. *See infra* Part III.

Third, the Appellate Division erred by distinguishing between a "request" and a requirement for confidentiality without first considering the unique nature of New Jersey's constitutional protection for speech.

The affirmative right granted by the New Jersey Constitution to "freely speak . . . on all subjects," art. I, ¶ 6, and "to consult" with colleagues "for the common good," *id.* ¶ 18, carries a concomitant obligation that the State not "unreasonably frustrate, infringe, or obstruct the expressional and associational rights of individuals exercised under Article I, paragraphs 6 and 18 thereof." *Schmid*, 84 N.J. at 560. This aspect of New Jersey constitutional law undergirds, for example, the Court's holding that state free-speech protections "serve[] to thwart inhibitory actions" even by certain private entities when those entities engage in "unreasonably restrictive or oppressive conduct" vis-a-vis speakers on their private property. *Id. Cf. State v. Shack*, 58 N.J. 297, 307–08 (1971) (reversing criminal trespass convictions for attorney and a social services worker visiting migrant workers on employer property and emphasizing that an "employer may not . . . interfere with [a worker's] opportunity . . . to enjoy associations customary among our citizens").

The challenged regulation in this case is likewise an "inhibitory" policy that makes "unreasonably . . . oppressive" requests of employees and thereby "frustrate[s]" and "obstruct[s]" public-employee speech. *Schmid*, 84 N.J. at 560.

Accordingly, for the purpose of state constitutional law, it is of no moment that the regulation may nominally require only that investigators "request" confidentiality from employees.

Fourth, the Appellate Division erred by focusing on the State's avowed intent in amending the challenged regulation to make it less, not more, restrictive. An employer's intent cannot overcome a speech regulation that employees would reasonably understand to prevent them from speaking. *See supra* p.14–15. This objective approach relying on the perspective of a reasonable employee is consistent with employees' right to engage in concerted activity under Section 7 of the NLRA, a right similar to one constitutionalized in New Jersey under article I, ¶ 19. In *Quicken Loans, Inc. v. NLRB*, for example, the D.C. Circuit enforced a Board order holding that a company policy forbidding employees from using or disclosing personnel information violated the NLRA by "unreasonably burden[ing] the employees' ability to discuss legitimate employment matters, to protest employer practices, and to organize." 830 F.3d 542, 545 (D.C. Cir. 2016). The court of appeals emphasized that the "concern about discouraging protected employee activities exist[ed] just the same whether or not that [was] the intent of the employer." *Id.* at 549 (internal quotation omitted). It concluded, consistent with the NLRB's position at that time, that the relevant inquiry asked whether an employee "would reasonably

construe" the confidentiality language as barring protected activity, not whether the employer intended to convey that message. *Id.* (citing *Cintas Corp. v. NLRB*, 482 F.3d 463, 467 (D.C. Cir. 2007)).[4]

* * *

For all of these reasons, the Appellate Division erred by concluding that the challenged regulation was immune from constitutional scrutiny solely on the ground that it involves a "request," rather than a requirement, for confidentiality.

III. The Court should adopt its own balancing standard for public-employee speech claims, and the challenged regulation cannot satisfy that standard.

A. The Court should not import a federal First Amendment standard to assess the state constitutionality of public employees' speech.

Because the Appellate Division erroneously concluded that a "request" for confidentiality triggers no constitutional scrutiny, it did not determine what degree of scrutiny should apply to assess Ms. Usachenok's free-speech claim. Ms. Usachenok argues, at minimum, that the court should have used a federal First Amendment standard developed under *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *United States v. National Treasury Employees Union*, 513 U.S. 545 (1995) ("*NTEU*").

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[4] In 2015, the NLRB reached the same conclusion in a case involving employer investigations specifically, including those concerning harassment and discrimination complaints. *Banner Health Sys.*, 362 NLRB 1108 (2015). We discuss *Banner* in greater detail in Part III.

The federal decisions on which Ms. Usachenok relies require courts to balance governmental and free speech interests to assess the constitutionality of public employers' restrictions on employee speech. "The *Pickering* test has two prongs: first, whether the speech addresses a matter of legitimate public concern; and second, whether the public employee's right to speak freely outweighs the public employer's interest in regulating the speech to promote the efficiency of the public services it performs." *In re Inquiry of Broadbelt*, 146 N.J. 501, 518 (1996) (citing *Pickering*, 391 U.S. at 567–70). Moreover, under *NTEU*, which applied *Pickering* to a facial challenge involving a general policy restricting speech, "the Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government," 513 U.S. at 468 (quoting *Pickering*, 391 U.S. at 571).

The ACLU agrees that Ms. Usachenok should prevail if the federal First Amendment standard under *Pickering* and *NTEU* applies, for the reasons given by Ms. Usachenok. *See generally* Pl.'s Pet.; *see also, e.g.*, *Taylor v. Metzger*, 152 N.J. 490, 515 n.3 (1998) (recognizing that a supervisor's conduct "allegedly in violation of the powerful anti-discrimination policies of this State . . . is indisputably a matter of public concern and one that can be shared with the

public").

However, the ACLU urges this Court to reject the reflexive adoption of federal First Amendment precedent for purposes of state law, *see supra* Part I, particularly given the contraction of *Pickering*'s protection for speech in subsequent U.S. Supreme Court decisions. *See Greenberg v. Kimmelman*, 99 N.J. 552, 568 (1985) (recognizing that "an interpretation of the New Jersey Constitution that is not irrevocably bound by federal analysis" helps avoid a need for this Court to adjust its "construction of the state constitution to accommodate every change in federal analysis of" the U.S. Constitution).

For example, in *Connick v. Myers*, 461 U.S. 138 (1983), the U.S. Supreme Court held that an employee must speak on a matter of public concern before *Pickering* balancing even applies. And in *Garcetti*, 547 U.S. 410, the Court held that public-employee speech, even on a matter of public concern, is not protected if made in the context of one's official job duties. These limitations on public-employee speech find no home in the text of the New Jersey Constitution. *See supra* Part I.[5]

[5] For a more detailed discussion of the ways in which federal First Amendment protections for public employees have narrowed over time and engendered confusion, see, e.g., Charles W. "Rocky" Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 Wm. & Mary Bill Rts. J. 1173, 1204 (2007); R. George Wright, *A Democratic View of Public Employee Speech Rights*, 70 Cath. U. L. Rev. 347, 366 (2021) (arguing that the

B. The Court should adopt a test that favors transparency and balances employees' speech interests—including an interest in addressing workplace terms and conditions—against countervailing interests.

Instead of using a federal First Amendment standard to determine the scope of state constitutional protections, this Court should adopt its own balancing test for assessing the constitutionality of restrictions on public-employee speech. That test should, as in *Pickering*, involve a balancing of employees' interests in speaking against employers' interest in maintaining workplace operations, including their interest in conducting internal investigations designed to identify discrimination and other wrongdoing. Moreover, as in *NTEU*, the Court should make clear that to justify a broad policy restricting employee speech, the government must demonstrate that the interests of "potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government."

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current federal "law of public employee speech rights amounts to a near-perfect storm of jurisprudential undesirability" and collecting cases). Some lower courts in New Jersey have adopted federal narrowing constructions used in the First Amendment context when resolving state constitutional claims. *See, e.g.*, *Dolinski v. Borough of Watchung*, No. A-1350-20, 2022 WL 2542356, at *5 (N.J. Super. Ct. App. Div. July 8, 2022); *Bessler v. Cnty. of Morris*, No. A-1038-18T1, 2020 WL 2769051, at *7 (N.J. Super. Ct. App. Div. May 28, 2020); *In re Winters*, No. A-6436-08T1, 2011 WL 5119100, at *6 (N.J. Super. Ct. App. Div. Oct. 31, 2011). Pursuant to *R.* 1:36-3, these unpublished opinions are attached. Counsel knows of no opinions with contrary holdings.

NTEU, 513 U.S. at 468 (quoting *Pickering*, 391 U.S. at 571).

However, unlike *Pickering* and its progeny, a New Jersey constitutional standard should recognize that public employees have an expressive interest that extends beyond speech addressing matters of public concern, *contra Connick*, 461 U.S. 138, and speech outside of one's official job duties, *contra Garcetti*, 547 U.S. 410. In particular, any standard adopted by this Court should recognize that public employees have a constitutionally cognizable interest in discussing terms and conditions of work, irrespective of whether they make an independent showing that their speech addresses a matter of public concern. *Cf. State v. Olenowski*, 253 N.J. 133, 154 (2023) (adopting a "*Daubert*-type" evidentiary standard in New Jersey but "declin[ing] to embrace the full body of *Daubert* case law as applied by state and federal courts"). A robust conception of cognizable employee interests for purposes of state constitutional law is necessary to give full effect to the New Jersey Constitution, which confers not only a right to speak on "*any* subject," N.J. Const. art. I, ¶ 6 (emphasis added), but also a "fundamental" right of public employees to organize, *George Harms Constr. Co*, 137 N.J. at 29.

Moreover, New Jersey's constitutional standard should recognize that when a broad restriction governing both current and future public-employee speech is at issue, as was the case in *NTEU*, some types of restrictions may never

pass state constitutional muster because of their categorical nature and the type of interests involved. Broad policies requiring or requesting employee confidentiality in internal investigations of discrimination or other wrongdoing are one such example; in these instances, employers must use a case-by-case approach in which they justify seeking confidentiality with respect to the particular circumstances of each investigation.

The NLRB's decisions with respect to confidentiality policies for employer investigations provide a useful guide. In *Banner Health System*, for example, the NLRB held that an employer violated employees' right to engage in concerted activity under the NLRA by "maintaining and applying a policy of requesting employees not to discuss ongoing investigations of employee misconduct." 362 NLRB 1108, 1113 (2015). In so holding, the NLRB adopted a standard that required employers to assess the need for confidentiality on a "case-by-case basis," *id.* at 1110, and placed the burden on employers to "demonstrate that, in connection with a particular investigation, there was an objectively reasonable basis for seeking confidentiality, such as where witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, or there is a need to prevent a cover up," *id.* at 1109 (internal quotation omitted).

Numerous other NLRB decisions are also consistent with the *Banner* standard. *See*, *e.g.*, *Hyundai Am. Shipping Agency, Inc.*, 357 NLRB 860 (2011) (oral confidentiality directive regarding HR investigations violated NLRA); *Phoenix Transit Systems*, 337 NLRB 510 (2002) (finding NLRA violation for confidentiality rule during sexual harassment investigation), *enf'd mem.*, 63 Fed. App'x 524 (D.C. Cir. 2003); *Caesar's Palace*, 336 NLRB 271 (2001) (confidentiality rule during investigation of managers' and employees' alleged illegal drug operation, including alleged threats of violence, did not violate NLRA).

This Court should adopt several aspects of *Banner*'s rationale in resolving Ms. Usachenok's claim.[6] *Banner* appropriately establishes a presumption in favor of transparency, and it places the burden on employers to justify

[6] The D.C. Circuit ultimately declined to enforce *Banner* in part on alternative grounds and therefore did not consider the standard that the NLRB applied for assessing an employer's use of investigatory confidentiality policies. *Banner Health Sys. v. NLRB*, 851 F.3d 35, 39 (D.C. Cir. 2017). And although the NLRB overruled *Banner* in 2019, concluding that blanket confidentiality rules during *open* investigations do not unlawfully impinge workers' NLRA rights, the NLRB expressed skepticism about the need for continued confidentiality once an investigation is closed. *Apogee Retail LLC*, 368 NLRB No. 144, at *11–13 (Dec. 16, 2019). The NLRB is currently considering whether to return to the *Banner* case-by-case standard. *See Stericycle, Inc.*, 371 NLRB No. 48 (2021). Regardless of how the NLRB resolves that issue, *Banner*'s subsequent history does not prevent this Court from relying on it to the extent it finds *Banner*'s analysis persuasive.

confidentiality in light of the distinct, objective circumstances of each investigation. In addition, *Banner* correctly requires the consideration of multiple interests. It recognizes, for example, that discussions about discipline and disciplinary investigations "are vital to employees' ability to aid one another in addressing employment terms and conditions with their employer." *Id.* at 1109. On the other hand, *Banner* acknowledges an employer's interest in preserving the integrity of its internal investigations, including by preventing collusion and destruction of evidence. *Id.* at 1113; *see also id.* at 1110 (suggesting employer interest in confidentiality is reduced after the close of an investigation).

Importantly, *Banner* also recognizes that complainants and third-party witnesses may have a strong interest in confidentiality in some investigations. *Id.* at 1111; *see Green Party of N.J. v. Hartz Mountain Indus., Inc.*, 164 N.J. 127, 149 (2000) (recognizing the role that third-party interests in privacy may have on free-speech balancing). Research shows that employees are deeply reluctant to raise concerns about workplace harassment and discrimination, particularly because they fear negative repercussions. *See*, *e.g.*, U.S. Equal Emp. Opportunity Comm'n, *Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* 16 & n.60 (2015) (hereinafter, "EEOC Co-Chairs- Report") ("The least common

response of either men or women to harassment is to take some formal action—either to report the harassment internally or to file a formal legal complaint."). Research also demonstrates such fears are well-founded in many instances; for example, one study found that two-thirds of public employees who complained about sexual harassment experienced some form of retaliation—from their harasser, their employer, their co-workers, or all of the above. Lilia M. Cortina & Vicki J. Magley, *Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace*, 8 J. Occup. Health Psych. 247 (2003); *see also Crawford v. Metro. Gov't of Nashville*, 555 U.S. 271, 274 (2009) (worker complaint of harassment, corroborated by two colleagues, resulted in employer's discharging all three employees).[7]

[7] In recognition of these realities, the EEOC recommended in 2016 that employers foster "a supportive environment where employees feel safe to express their views and do not experience retribution," because doing so helps make harassment "reporting systems work well and will provide employees with faith in the system." EEOC Co-Chairs' Report 42 & n.184. It also recommended that the "privacy of both the accuser and the accused should be protected to the greatest extent possible, consistent with legal obligations and [the need to] conduct[] a thorough, effective investigation." *Id.* at 42 & n.186. The EEOC acknowledged, however, that these recommendations could conflict with NLRB rulings, including *Banner*—then the Board's controlling precedent—prompting it to recommend that the "EEOC and NLRB confer and consult in a good faith effort to determine what conflicts may exist, and as necessary, work together to harmonize the interplay of federal EEO laws and the NLRA." *Id.* at 42. To date, however, the agencies have not issued such harmonized standards.

C. The challenged regulation cannot satisfy the balancing standard that this Court should adopt.

The challenged regulation does not satisfy the standard that the ACLU urges this Court to adopt. Most importantly, the policy categorically seeks confidentiality in all current and future investigations, N.J.A.C. 4A:7-3.1(j), rather than establishing a case-by-case framework for when confidentiality may be requested in a particular investigation. *Compare Banner*, 362 NLRB at 1113. Moreover, the challenged regulation limits "all persons interviewed" from disclosing information to all "others," N.J.A.C. 4A:7-3.1(j). *Compare* N.J. Const. art. I, ¶ 19; *Banner,* 362 NLRB at 1113. And the challenged regulation applies to matters at issue in "any aspect of [an] investigation," N.J.A.C. 4A:7-3.1(j), presumably including, for example, information already disclosed to the public and the subject of ongoing debate, or information relevant to workers' terms and conditions of work. *Compare* N.J. Const. art. I, ¶ 6 (protecting speech on "any subject"); *id.* ¶ 18 (protecting a right to "consult for the common good"); *id.* ¶ 19 (protecting the right of public employees to organize, and thus affect the terms and conditions of their work). The regulation's imposition of confidentiality has no end date, N.J.A.C. 4A:7-3.1(j), imposing a code of silence even after an investigation is long closed. In all of these ways, the regulation cannot pass state constitutional muster.

The State's arguments to the contrary lack merit. Although the challenged

regulation includes a statement of the State's purported interests, *see id.*, it makes no attempt to show that in all covered investigations, the employee expression sought to be silenced would have a 'necessary impact on the actual operation' of the Government," much less that this impact would outweigh the broad range of interests supporting the speech. *NTEU*, 513 U.S. at 468 (quoting *Pickering*, 391 U.S. at 571).

Moreover, the State's inclusion of an undefined "legitimate business interest" exception, N.J.A.C. 4A:7-3.1(j), is insufficient to cure the challenged regulation's overreach. While this language suggests a clumsy attempt to conform the policy with the NLRB's prior decisions holding that an employer's confidentiality rules satisfy the NLRA if the employer has a "legitimate and substantial business justification," *Banner*, 362 NLRB at 1009, the actual language adopted here borders on the nonsensical. It is the *employer* that should be obligated to articulate a legitimate business reason for keeping investigation matters confidential; the employee-complainant or employee-witness should not be obligated to provide a reason for disclosing those matters. Far from incorporating a balancing standard designed to protect workers' right to free expression, the challenged regulation turns that standard on its head by demanding that workers justify their interest in exercising this right.

CONCLUSION

For the foregoing reasons and those set forth by Ms. Usachenok, this Court should reverse the decision below.

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July 24, 2023

Appendix of *Amici Curiae*

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

Troy BESSLER, Plaintiff-Appellant,
v.
COUNTY OF MORRIS, Morris County Sheriff's Department, Frank Corrente, and John Kowalski, Defendants-Respondents.

DOCKET NO. A-1038-18T1
|
Argued telephonically March 26, 2020
|
Decided May 28, 2020

On appeal from the Superior Court of New Jersey, Law Division, Sussex County, Docket No. L-0316-16.

Attorneys and Law Firms

Ashley V. Whitney argued the cause for appellant (Law Offices of Gina Mendola Longarzo, LLC, attorneys; Ashley V. Whitney, on the briefs).

Bryan P. Regan argued the cause for respondent County of Morris (Kaufman, Semeraro & Leibman, LLP, attorneys; Bryan P. Regan, on the brief).

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Robert J. Greenbaum argued the cause for respondent John Kowalski.

Before Judges Whipple, Gooden Brown, and Mawla.

Opinion

PER CURIAM

***1** Plaintiff Troy Bessler appeals from a September 19, 2018 order granting defendants County of Morris, Morris County Sheriff's Department, Frank Corrente, and John Kowalski summary judgment under the New Jersey Civil Rights Act (NJCRA), N.J.S.A. 10:6-1 to -2. We affirm.

In 1987, the Morris County Sheriff's Department hired plaintiff as a corrections officer for the Morris County Correctional Facility (jail). As a paramilitary organization, the jail has a very strict chain of command. The Morris County Sheriff's Office Bureau of Corrections Rules and Regulations [1] defines the chain of command as the "unbroken line of authority" that extends from the sheriff, through the undersheriff, through the warden, through a captain, through a lieutenant, through a sergeant, and then to a corrections officer, and vice versa.

Individuals holding the titles set forth in the chain of command are "duly appointed sworn" persons referred to as "members" under Regulation 1:3.19. During normal day-to-day agency operations and when communicating a "matter of office business" to any supervisor, members are to maintain strict adherence to the chain of command, and "[i]n no event shall a member ... evade his immediate supervising officer without the awareness and permission of said supervisor" under Regulations 2:5.13 and -14. Members may request permission to see the sheriff, undersheriff, or warden through their chain of command, but if the matter is "of a personal nature and does not involve the operations of the Morris County Sheriff's Office, the chain of command may be circumvented" under Regulation 2:5.14.

Plaintiff was promoted to sergeant in 2003, which, through the chain of command, reports directly to a lieutenant. According to the jail's organizational structure, a sergeant is to supervise officers, conduct tours of the facility, perform "supervisory and other assigned duties in accord with established policies, regulations, and procedures," and perform other related duties as required. Plaintiff was assigned as a control center sergeant, and then as a shift commander in the absence of a lieutenant, where his job was to supervise all actions occurring during that shift. One of his duties was to observe the jail from the monitors in the control center that received video feeds from the many cameras spread throughout the jail. His duties also included conducting tours of the jail to check for anything out of the ordinary and to make sure the facilities were secure, which took him through the jail's K-9 Unit kennel. When there were dogs in the kennel, he was not charged with caring for them, as that was the responsibility of the K-9 Unit.

In 2009, Frank Corrente became undersheriff, a position responsible for the day-to-day operations of the jail. At that time, Lieutenant John Kowalski was the administrative lieutenant, and was, according to plaintiff, under Corrente's "umbrella" and would feed Corrente information about those in Corrente's disfavor to target them for disciplinary action.

***2** In late summer or fall of 2010, when plaintiff was working in the control center filling out forms on the computer, he overheard an officer say to another officer "did you see him." Plaintiff asked what they were talking about, and they told him Corrente's dog was in the jail's kennel. Plaintiff looked at the monitor and saw an unfamiliar dog in the kennel run.

Plaintiff considered it an unlawful theft of services for Corrente to house his personal pet in the jail kennel. Because plaintiff "thought there was some illegal activity going on," he stated it was his "job to notify my superiors," and that "you're obligated, if you believe that there's something wrong, to report it." In fact, Regulation 2:1.28 states "[m]embers ... knowing of other members or employees violating laws, ordinances, rules, regulations, policies or procedures of the [o]ffice, or disobeying orders, shall report the violation to their supervisor. The supervisor shall notify the [undersheriff] through the chain of command ...." Additionally, the "failure to take appropriate action on the occasion of a crime, disorder, or other act or condition deserving police attention and failure to perform duties associated with a current assignment" is neglect of duty under Regulation 1:3.22.

The Regulations further provide that "[t]he administrative delegation of the enforcement of certain laws and ordinances to particular units of the [o]ffice does not relieve members of other units from the responsibility of taking prompt, effective police action within the scope of those laws and ordinances when the occasion so requires," under Regulation 2:1.6. Members are also not to "withhold any information concerning criminal activity, a law enforcement investigation or violation of rules, regulations, policies or procedures" under Regulation 2:1.27.

Within a couple of days of his discovery, plaintiff reported Corrente's personal use of the jail kennel to Lieutenant O'Brien. O'Brien showed plaintiff a memorandum that only allowed certain staff to go into the kennel and told plaintiff there was nothing he could do; O'Brien asserted he already reported it to Captain Pascale, O'Brien's direct supervisor in the chain of command, and was told to mind his own business. O'Brien testified in his deposition he considered his obligation fulfilled by reporting the matter to Pascale and did not feel he was required to do anything further.

During another shift, where plaintiff was on duty to tour the facility and check the back door of the kennel, he again saw Corrente's dog and reported it to Lieutenant Torkos, who was the shift commander that night. Torkos laughed and stated if he put his personal pet in the kennel he would be in prison. Plaintiff again saw Corrente's dog in the jail kennel around Thanksgiving 2010. At one point, an officer asked plaintiff what he was going to do about Corrente's dog; plaintiff told him he already did his part in reporting it to his lieutenant.

Over a course of years, plaintiff continued to see Corrente's dog in the jail kennel "[p]retty much every holiday," and said he continued to report it to whichever lieutenant was present that shift. However, he did not report it to Lieutenant Guida, who was in charge of the K-9 unit and would take care of Corrente's dog when it was at the jail. Other officers, lieutenants, and sergeants were also aware that Corrente's dog was often in the kennel, and some of them helped care for it.

***3** While plaintiff did not know for certain that anyone reported his complaints about the dog to Corrente or to Kowalski, as no one ever told him they did or that Corrente or Kowalski knew of his complaints, plaintiff assumed the complaints went up the chain of command and asserted that November 2010, around the time of his first complaint about the dog, marked the beginning of a "campaign of harassment against" him.

Plaintiff asserts he was put under "undue scrutiny," and that Kowalski took it as a challenge to find a reason to discipline plaintiff, whom he had not yet written up since he had been there. Plaintiff contends his logbook entries were scrutinized, that Kowalski and Pascale watched him on the surveillance videos looking for reasons to discipline him, and that he was transferred to the midnight shift. Plaintiff further alleges he received three disciplinary charges against him in retaliation for his reports: the first in January 2011 regarding an inmate extraction; the second in April 2011 involving alleged gossiping; and the third in January 2012 for removing photos from a surveillance video plaintiff said he did to protect himself by documenting Kowalski's intimidation tactics toward him. The first charge was sustained, the second charge was dismissed, and the third charge resulted in a twenty-five day suspension, with a warning from the hearing officer that if plaintiff was subjected to further discipline, a

demotion or termination would be considered at that time. Plaintiff asserts that during this time he told O'Brien and Torkos he was being targeted, but he did not ask them to take any action.

In July 2012, plaintiff took a photo of Corrente's dog with his personal camera to document it. However, he never reported Corrente to anyone outside the chain of command, such as the prosecutor, internal affairs, or a newspaper, as it was "against policy" and "in the [Regulations]" that you could only report up the chain of command.

Plaintiff reported other incidents through the chain of command on other occasions as well. In February 2011, he reported an incident he saw on camera where a sergeant was assaulted by an inmate, as "all such major incidents have to be documented." In May 2011, an inmate told him he saw two officers fighting, after which plaintiff "accessed video," because if there "is an issue, you go back to the video. ... It's one of our tools. It's an extension to look into things we need to look into," and then reported the incident to Torkos as assaulting an officer was unlawful and would garner "mandatory jail time."

Corrente retired in December 2012, and Kowalski became undersheriff. Plaintiff was hoping to be promoted to lieutenant in January 2013, but was not, which he asserts was additional retaliation, although the record reflects he ranked tenth out of nine candidates and the positions were filled after the ninth candidate was promoted. Plaintiff then retired March 1, 2013; he asserts he was "progressively" set up for termination, and he felt he had to retire five months early or risk losing his pension. He was then denied a retirement breakfast, ostensibly due to budget issues, and he did not receive his retirement badge until much later.

On September 8, 2014, plaintiff filed a complaint against County of Morris, Morris County Sheriff's Department, Corrente, and Kowalski. The complaint alleged a single count of adverse employment actions and retaliation due to plaintiff's lawful exercise of his right to speak out and expose official misconduct and violations of law, which was in violation of plaintiff's right to freedom of speech as guaranteed by Article I, Paragraph 6 of the New Jersey Constitution and the NJCRA, N.J.S.A. 10:6-1 to -2. In May 2018, all four defendants moved for summary judgment. After a September 14 hearing, the court granted defendants' motion in a September 19, 2018 written decision on the grounds that plaintiff spoke as a public employee, not as a citizen, which precluded his claims under the NJCRA. This appeal followed.

***4** We review a grant of summary judgment de novo, applying the same standard as the trial court. Woytas v. Greenwood Tree Experts, Inc., 237 N.J. 501, 511, 206 A.3d 386 (2019) (citing Bhagat v. Bhagat, 217 N.J. 22, 38, 84 A.3d 583 (2014)).

Under Rule 4:46-2(c), a motion for summary judgment should be granted where "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." A genuine issue of material fact exists where, when viewed in the light most favorable to the nonmoving party, a rational factfinder could find in favor of the non-moving party. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523, 540, 666 A.2d 146 (1995).

Plaintiff asserts he was subjected to retaliation for engaging in activity protected under Article I, Paragraph 6 of the New Jersey Constitution, which guarantees a citizen's right to freedom of speech, in that after reporting Corrente was illegally using the jail's kennel to board his pet dog, defendants took adverse action against him.

The NJCRA, N.J.S.A. 10:6-1 to -2, permits an individual to bring a civil action when that individual's exercise of Constitutional rights has "been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under color of law." N.J.S.A. 10:6-2(c). It was enacted as a state analog to 42 U.S.C. § 1983, Perez v. Zagami, 218 N.J. 202, 212, 94 A.3d 869 (2014), and as such, "the interpretation given to parallel provisions of [§] 1983 may provide guidance in construing our Civil Rights Act," Tumpson v. Farina, 218 N.J. 450, 474, 95 A.3d 210 (2014).

"It is well-established that a public employee does not relinquish his or her First Amendment right to comment on matters of public interest, otherwise available to citizens, simply as the result of the fact of public employment." In re Gonzalez, 405 N.J. Super. 336, 346, 964 A.2d 811 (App. Div. 2009). "Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government," like writing a letter to a local newspaper, as in Pickering v. Board of Education, 391 U.S. 563, 566, 88

S.Ct. 1731, 20 L.Ed.2d 811 (1968), or discussing politics with a co-worker, as in Rankin v. McPherson, 483 U.S. 378, 384, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987). Garcetti v. Ceballos, 547 U.S. 410, 417, 423-24, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006).

A public employee's statement is protected under the First Amendment where "(1) in making it, the employee spoke as a citizen, (2) the statement involved a matter of public concern, and (3) the government employer did not have 'an adequate justification for treating the employee differently from any other member of the general public' as a result" of that statement. Gorum v. Sessoms, 561 F.3d 179, 185 (3d Cir. 2009) (emphasis added) (quoting Hill v. Borough of Kutztown, 455 F.3d 225, 241 (3d Cir. 2006) (quoting Garcetti, 547 U.S. at 418, 126 S.Ct. 1951)). The United States Supreme Court held that where "public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." Garcetti, 547 U.S. at 421, 126 S.Ct. 1951. "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." Id. at 421-22, 126 S.Ct. 1951.

***5** Therefore, even where a communication may be of public importance, the claim will fail where the employee is not speaking as a citizen, but rather is speaking pursuant to his or her duties. See Fraternal Order of Police, Lodge 1 v. City of Camden, 842 F.3d 231, 244-45 (3d Cir. 2016). Accordingly, "before analyzing whether an employee's speech is of public concern, a court must determine whether the employee was speaking 'as a citizen' or, by contrast, pursuant to his duties as a public employee." Foraker v. Chaffinch, 501 F.3d 231, 243 (3d Cir. 2007), abrogated on other grounds by Borough of Duryea, Pa. v. Guarnieri, 564 U.S. 379, 131 S.Ct. 2488, 180 L.Ed.2d 408 (2011) (quoting Sigsworth v. City of Aurora, 487 F.3d 506, 509-10 (7th Cir. 2007)).

Whether speech was performed pursuant to an individual's job duties is a mixed question of fact—the scope and content of a plaintiff's job responsibilities—and law—the ultimate constitutional significance of those facts. Flora v. Cty. of Luzerne, 776 F.3d 169, 175 (3d Cir. 2015) (citation omitted). The inquiry as to the scope of an employee's duties "is a practical one." Garcetti, 547 U.S. at 424, 126 S.Ct. 1951. The listing of a task in a written job description "is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes," as "job descriptions often bear little resemblance to the duties an employee actually is expected to perform." Id. at 424-25, 126 S.Ct. 1951. Generally, if the employee speech is part of what the employee is paid to do, it is largely unprotected. Janus v. Am. Fed'n of State, Cty., and Mun. Emps., Council 31, —— U.S. ——, 138 S. Ct. 2448, 2471, 201 L.Ed.2d 924 (2018); see also Garcetti, 547 U.S. at 422, 126 S.Ct. 1951. In Garcetti, the Court found an attorney was not speaking as a citizen in a disposition memorandum he wrote for his supervisor for a pending criminal case, as he was paid to do that task, and it was pursuant to his duties as a calendar deputy. 547 U.S. at 420-22, 126 S.Ct. 1951.

Other federal cases can also provide guidance as to what constitutes speaking as a citizen versus speaking pursuant to one's duties. In Foraker, state police officers assigned as instructors to a firing range sent e-mails regarding safety issues and poor conditions up their chain of command, and argued that speech was protected because it was outside the scope of their duty, which they asserted was only to teach students how to fire weapons, not to speak out about health and safety problems. 501 F.3d at 233, 238. However, the court found the plaintiffs' claims were "foreclosed" because they were "expected, pursuant to their job duties, to report problems concerning the operations at the range up the chain of command," they spoke internally and "were required to speak up the chain of command and were prevented from speaking to the press without prior approval." Id. at 241.

The Foraker court pointed out a distinction made by the Ninth Circuit in Freitag v. Ayers, 468 F.3d 528, 546 (9th Cir. 2006), which found internal reports the public employee made documenting sexual harassment by prisoners and inaction on the part of her superiors were made pursuant to her official duties, whereas a letter she wrote to the Director of the California Department of Corrections and Rehabilitation explaining the hostile work environment she encountered was as a citizen. Foraker, 501 F.3d at 240.

"[A]n employee does not speak as a citizen if the mode and manner of his speech were possible only as an ordinary corollary to his position as a government employee," such as where a public defender's speech to judges and other attorneys off the record and in the form of idle chatter was not speaking as a citizen, as he "had the opportunity to speak

in court to attorneys and judges only as an ordinary corollary to his position" as a public defender. De Ritis v. McGarrigle, 861 F.3d 444, 450-51, 453-54 (3d Cir. 2017). The De Ritis court found that the plaintiff's ordinary job duties included in-court obligations to build rapport with judges and other attorneys, and all statements in court, even if idle chatter and off the record, are official communications with official consequences. Id. at 450-51, 453.

***6** Similarly, where police officers filed a complaint against the city and the police department claiming an unlawful quota policy, which the court found to be a matter of public importance, their claims failed as they objected to the policy on police department counseling forms. Fraternal Order of Police, Lodge 1, 842 F.3d at 236, 243. The court found they were not speaking as citizens, as "[c]itizens do not complete internal police counseling forms. Rather, completing counseling forms as part of the police disciplinary process falls under officers' official duties. Therefore, the plaintiff-officers' speech here 'owe[d] its existence to [their] public employee[ ] professional responsibilities.' " Id. at 244 (second, third, and fourth alterations in original) (quoting Gorum, 561 F.3d at 185).

By contrast, in Matthews, a police officer believed a quota system was damaging to his department's core mission, and reported it not up the chain of command, but directly to precinct commanders with whom he did not have regular interactions and who had an open door to citizens in the community for comments and complaints. Matthews v. City of N.Y., 779 F.3d 167, 169, 175-76 (2d Cir. 2015). While the police officer was required under the patrol guide to report criminal activity or other misconduct directly up the chain of command, the quota was not criminal nor expressly prohibited, and there was nothing in the scope of his duties or practical reality of his everyday work that indicated he was employed to speak out on policy matters. Id. at 174. The court held that "when a public employee whose duties do not involve formulating, implementing, or providing feedback on a policy that implicates a matter of public concern engages in speech concerning that policy, and does so in a manner in which ordinary citizens would be expected to engage, he or she speaks as a citizen, not as a public employee." Ibid. (emphasis added).

Public employees were also found to be speaking as citizens in Lane v. Franks, 573 U.S. 228, 232-33, 238, 134 S.Ct. 2369, 189 L.Ed.2d 312 (2014) (holding "[t]ruthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen," even where the testimony related to fraud the public employee uncovered during his employment); Flora, 776 F.3d at 180 (finding fact issues remained as to whether it was part of a public defender's "ordinary job duties" to publicly report lingering effects from government corruption or to file a class action lawsuit to compel adequate funding for his office after reporting up the chain of command failed to produce results; those actions merely "related to" his job duties, whereas the correct standard and "controlling factor" is whether the statements were made "pursuant to" his duties); and in Dougherty v. School District of Philadelphia, 772 F.3d 979, 983-94, 988 (3d Cir. 2014) (finding a school employee's disclosure to a newspaper of alleged misconduct of a superintendent, while uncovered during the course of his duties, was as a citizen as "nothing about [the plaintiff]'s position compelled or called for him to provide or report this information," and the school district appeared to discourage such speech through its Code of Ethics' confidentiality provision).

Here, plaintiff's reports to his supervisors were pursuant to his ordinary job duties in that he was paid to monitor the facilities and report anything improper, unlawful, or against procedure. He discovered Corrente's dog was in the kennel using the video monitors, which he regularly used as one of his "tools" during the course of his daily activities to monitor activities in the jail. He was mandated to, and did, report unlawful acts and misconduct directly through the chain of command, not only as to Corrente but as to others, and the avenue of reporting was not one available to any citizen.

***7** While plaintiff argues he was not responsible for the K-9 Unit or for supervising superior officers, and therefore his reports regarding Corrente's dog were not within the scope of his duties, that argument is not convincing. Plaintiff himself stated it was his obligation to report anything wrong, and O'Brien, who also had nothing to do with the K-9 Unit, considered it his obligation to report Corrente's dog to his direct supervisor Pascale as well. Further, the Regulations specifically state members "knowing" of violations of laws or rules of "other members" are required to report them, without any mention of seniority or an assignment to monitor that person specifically. The Regulations further state that "administrative delegation of the enforcement of certain laws and ordinances to particular units of the [o]ffice does not relieve members of other units from the responsibility of taking prompt, effective police action within the scope of those laws and ordinances when the occasion so requires."

Because a review of the record in the light most favorable to plaintiff shows plaintiff's reports were in fact congruent with his duties as a corrections sergeant, in that they were within the scope of the regular duties he was paid to do, part of the practical realities of his every day work, and were made through channels not available to citizens generally, plaintiff's claims are precluded under the NJCRA, and summary judgment was appropriate.

Affirmed.

All Citations

Not Reported in Atl. Rptr., 2020 WL 2769051

Footnotes

1 The Regulations are "[o]ffice mandates consisting of specific actions binding members ... in terms of authority, responsibility, and conduct" under Regulation 1:3.35. Morris County Sheriff's Office, Bureau of Corrections, Rules and Regulations, (rev. March 2011).

2006 WL 2096081
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

Jay J. BROWN, Claimant-Appellant,
v.
BOARD OF REVIEW and Tri-State Design, Inc., Respondents-Respondents.

Submitted July 11, 2006.
|
Decided July 31, 2006.

On appeal from a Final Decision of the Board of Review, Department of Labor, 53,240.

Attorneys and Law Firms

Jay J. Brown, appellant pro se.

Zulima V. Farber, Attorney General of New Jersey, attorney for respondent, Board of Review (Michael J. Haas, Assistant Attorney General, of counsel; Ellen A. Reichart, Deputy Attorney General, on the brief).

Before Judges PARKER and SAPP-PETERSON.

Opinion

PER CURIAM.

***1** Claimant Jay J. Brown appeals from a decision dated February 16, 2005 by the Board of Review (Board) finding him ineligible for unemployment benefits. We affirm.

The facts relevant to this appeal are as follows. Claimant was employed by Tri-State Design, Inc. from March 16, 1998 through November 4, 2002 as a recruiter for temporary office staff. He initially worked in Tri-State's Kenilworth office, but when that office closed, he worked from home and reported to meetings at the company's Verona office when required to do so by his supervisors. After the Verona office closed, the company moved to Wayne, Pennsylvania.

On November 1, 2002, claimant's supervisor, Cheryl Mankins, requested that he report one day a week to the Pennsylvania office. Mankins sent claimant an e-mail advising him to report to the Pennsylvania office the following week. The e-mail stated:

> [The president of the company] and I need you to come to the office once a week to work with the team. It would be a team-building effort. It will keep you updated with open employment requirements. I hope it does keep you organized as well. Then we may not have you calling candidates that have already been hired. I would like you to know, to know which day of the week you will be coming.

Mankins testified that she and the president of the company thought it important for claimant "to be aware of all the changes[,] to ... meet with the team to see if there's anything new, [and] to work together. When you work remotely sometimes you get disconnected, plus there's also issues with our server. You know it was remote dial-in access." The Pennsylvania office was eighty miles from claimant's home but the employer did not believe it was burdensome for him to commute one day per week.

Claimant refused to comply with the employer's request. Mankins testified that claimant "said he wasn't coming in. He said he came in the week before and he didn't get a sandwich or anything offered to him, and he wasn't going to do it." Indeed, when Mankins called claimant on Friday, he "hung up the phone" and sent a responding e-mail, stating:

> What's the deal? Why do you keep blowing me off. Something needs to be addressed. You're stonewalling me. Don't underestimate you-I'm not a fool. I've been given excuses. I want to speak ... for you not to speak to me. I have sensed you mistrust me in the tone of your e-mails. I'm feeling the same way about you. I am not new; I know how you operate.

When asked if he was refusing to come to the Pennsylvania office, claimant responded, "Yes." Thereafter, he was terminated for insubordination.

Claimant testified that the reason he refused to attend meetings in Pennsylvania once a week "is because they wanted me to do the same exact thing I was doing at home; and I couldn't see driving a hundred, two-hundred-mile round trip, and that was not an option. The agreement was I worked from home. You know after I worked from home a year or two, then they decided I could come in once a week, which was not part of the agreement."

***2** After hearing the testimony, the Appeal Tribunal determined that claimant was disqualified for benefits under *N.J.S.A.* 43:21-5 because he was discharged for misconduct connected with his work.

> "Misconduct within the meaning of the Unemployment Compensation Act excluding from its benefits an employee discharged for misconduct must be an act of wonton or willful disregard of the employer's interest, a deliberate violation of the employer's rules, a disregard of standards of behavior which the employer has the right to expect of his employees or negligence in such degree or recurrence as to manifest culpability, wrongful intent, employer's interests, or of the employee's duties and obligations to the employer." 48 American Jurisprudence 541.

The Appeal Tribunal found that "claimant refused to report as required by the company. The claimant does not show good cause for refusing to report once a week on a day of his choice." The Appeal Tribunal concluded:

> The claimant's action in refusing a directive from the supervisor and from the president, which was the cause of the discharge, was a disregard of the standards of behavior which the employer has a right to expect of his employees and constitutes misconduct connected with the work. Therefore, the claimant is disqualified for benefits under *N.J.S.A.* 43:21-5(b), as of 11/3/2002 through 12/14/2002 as he was discharged for misconduct connected with the work.

Claimant appealed to the Board of Review and the Board affirmed the Appeal Tribunal's decision but modified claimant's termination date to November 5, 2002.

In this appeal, claimant argues that his "leaving was due to unreasonable request by employer to move work location, which would cause a hardship, and therefore, he should not have been disqualified for benefits." In essence, claimant argues that he "was unable to comply with the new employment conditions due to hardship." Claimant has presented no evidence, however, that he was "unable" to comply, nor did he present any evidence indicating that he had no obligation to comply with his employer's request. Rather, the evidence indicated that claimant simply chose not to comply with the employer's request that he report to the Pennsylvania office once a week on a day of his choice.

Our scope of review of administrative decisions is narrowly circumscribed. *In re Taylor,* 158 *N.J.* 644, 656 (1999). Our role is to determine " 'whether the findings made could reasonably have been reached on sufficient credible evidence present in the record' considering 'the proofs as a whole,' with due regard to the opportunity of the one who heard the witnesses to judge their credibility." *Ibid.* (quoting *Close v. Kordulak Bros.,* 44 *N.J.* 589, 599 (1965)). We may not engage in an independent assessment of the evidence, *In re Taylor, supra,* 158 *N.J.* at 656, and we will accord a strong presumption of reasonableness to the decision of an administrative agency. *Smith v. Ricci,* 89 *N.J.* 514, 525 (1982). We give great deference to administrative decisions, *State v. Johnson,* 42 *N.J.* 146, 159 (1964), but we do not act simply as a rubber stamp of the agency's decision. *Henry v. Rahway State Prison,* 81 *N.J.* 571, 579-80 (1980). An administrative decision will be reversed only when it is found to be "arbitrary, capricious or unreasonable or it is not supported by substantial credible evidence in the record as a whole." *Ibid* .

***3** Applying these principles to the record before us, we are satisfied that the Board's decision was neither arbitrary, capricious nor unreasonable. The decision is supported by substantial credible evidence in the record. *R.* 2:11-3(e)(1)(D). Claimant failed to carry his burden to demonstrate that he was not fired for misconduct.

Affirmed.

All Citations

Not Reported in A.2d, 2006 WL 2096081

2022 WL 2542356
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

Michael DOLINSKI, Plaintiff-Appellant,
v.
BOROUGH OF WATCHUNG and Chief Joseph Cina, Defendants-Respondents.

DOCKET NO. A-1350-20
|
Argued March 16, 2022
|
Decided July 8, 2022

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-1080-19.

Attorneys and Law Firms

Patrick P. Toscano, Jr., argued the cause for appellant (The Toscano Law Firm, LLC, attorneys; Patrick P. Toscano, Jr., on the brief).

Kathryn V. Hatfield argued the cause for respondents (Hatfield Schwartz Law Group, LLC, attorneys; Kathryn V. Hatfield, of counsel and on the brief; Andreya DiMarco, on the brief).

Before Judges Sumners and Vernoia.

Opinion

PER CURIAM

***1** Plaintiff Michael Dolinski, a police officer with defendant Borough of Watchung (the Borough), appeals from a Law Division order granting summary judgment dismissal on his claims under the New Jersey Civil Rights Act (NJCRA), N.J.S.A. 10:6-1 to -2, and the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14, against the Borough and its Police Chief, defendant Joseph Cina. Having considered the parties' arguments and applicable law, we affirm.

I.

On August 15, 2019, plaintiff filed his complaint against defendants seeking compensatory and punitive damages based on violations of NJCRA and CEPA and claims of intentional infliction of emotional distress and municipal liability based on the Monell [1] doctrine. After plaintiff filed a first amended complaint, defendants removed the complaint to federal court based on subject matter jurisdiction. The matter was subsequently remanded back to the Superior Court after plaintiff voluntarily dismissed his municipal liability claim.

In this appeal, plaintiff argues the motion judge erred in granting summary judgment because he should have recused himself after releasing a preliminary decision; he misapplied the law in dismissing the NJCRA and CEPA claims; and he made improper factual determinations in dismissing plaintiff's claim for punitive damages. Plaintiff's intentional infliction of emotional distress claim was dismissed on summary judgment, but he does not challenge that ruling.

II.

Dismissal of Plaintiff's Complaint

At the completion of discovery, defendants filed a motion for summary judgment to dismiss plaintiff's complaint. Oral argument was conducted by an initial motion judge (hereinafter referred to as "initial motion judge" or "initial judge"), but the matter was then transferred to a different judge. Two days before oral argument in front of the second motion judge (hereinafter referred to as "motion judge" or "judge"), the parties received the judge's preliminary written decision granting summary judgment dismissing the entire complaint. In a letter to the judge and at oral argument, plaintiff requested the judge recuse himself pursuant to Rules 1:12-1(d) and (g), or, in the alternative, that the initial judge decide the motion. The judge denied the request. [2] Two days after argument, the judge issued his order and written decision granting summary judgment in favor of the defendants.

A. Recusal Request

***2** We reject plaintiff's continued contention that summary judgment should be vacated because the motion judge's

refusal to recuse himself after his chambers prematurely released his draft opinion to the parties prior to oral argument on the motion violated Rules 1:12-1(d) and (g). Rule 1:12-1(d) requires a judge to be disqualified where she or he "has given an opinion upon a matter in question in the action." The motion judge's preliminary decision was based upon his assessment of the facts and law as argued in the parties' briefs, not his previous opinion on the issues raised in the contested motion.

In addition, Rule 1:12-1(g) requires a judge to be disqualified where "there is any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so." There is no reason to "reasonably question [the judge's] impartiality," as plaintiff asserts, due to "[t]he issuance of an order and complete decision prior to the motion hearing." The customary practice to draft an opinion before argument—as explained at argument—does not bring into question the judge's partiality and objectivity. As the judge noted, the parties were made aware of his thinking prior to argument, thereby enabling them to focus their arguments on issues stressed in the preliminary opinion. As discussed below, the judge's reasoning in his ultimate written opinion evinces no hint of impartiality. And the same can be said for the draft opinion. In short, plaintiff was afforded a fair and unbiased motion hearing.

III.

Summary Judgment

We review an order granting summary judgment de novo. Giannakopoulos v. Mid State Mall, 438 N.J. Super. 595, 599 (App. Div. 2014). Our recitation of the facts is derived from the evidence submitted by the parties in support of, and in opposition to, the summary judgment motion, viewed in the light most favorable to plaintiff, and giving plaintiff the benefit of all favorable inferences. Angland v. Mountain Creek Resort, Inc., 213 N.J. 573, 577 (2013). Summary judgment is granted when the record reveals "no genuine issue as to any material fact" and "the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c).

The factual record before the motion judge in the light most favorable to plaintiff was as follows.

A. Plaintiff's WPD Employment

Since July 2005, plaintiff has been employed with the Watchung Police Department (WPD). In 2008, he was assigned to serve on the Somerset County Special Weapons and Tactics (SWAT) team, in addition to his regular patrolman duties. He later was named as an assistant team leader of the SWAT containment team and promoted to a SWAT entry team unit. In 2015, plaintiff was selected to serve as an acting full-time watch commander within the WPD, making him responsible for ensuring service calls were properly handled and all WPD policies and procedures were followed, as well as approving his fellow police officers' reports.

B. Plaintiff's Concerns Regarding His Treatment By Cina And The WPD

In 2009, Cina, then a WPD Lieutenant, interviewed plaintiff's brother for a position with the WPD. Cina reportedly told plaintiff that he had to talk his younger brother "off the ledge" because his interview with the WPD "went horrible," which was contrary to the brother's perception and recollection of the interview. This caused plaintiff to be "uncomfortable with ... Cina any time he had any contact with him."

In 2011, plaintiff was unsatisfied with Cina's evaluation of his 2010 job performance finding him deficient in the areas of appearance, attitude, performance, productivity, and sick time usage. Plaintiff claimed that Cina stated he was unproductive because he was not writing enough summonses. Plaintiff did not grieve the evaluation nor the performance improvement plan (PIP) he was placed on. Within four months of being placed on a PIP, Cina removed plaintiff from the PIP based on his continued improved performance.

***3** In August 2015, plaintiff was first placed in the Guardian Tracker system by now-Chief Cina due to concerns regarding his use of sick time. He did not receive any discipline because of this entry and he received multiple commendations in the Guardian Tracker regarding his performance.

In December 2016, when concerns over his sick time reemerged, plaintiff informed Cina that he "use[d] sick time when [he was] sick or injured, and sometimes [when] doing jiu jitsu and boxing[,] [I] get injured," to which Cina responded, "maybe [you] should start changing [your] off-duty activities" because they add "nothing of value" to the WPD. Cina admitted in his deposition that during multiple discussions over several years he threatened to remove plaintiff from the SWAT team if the sick time abuse continued.

In 2017, Cina removed plaintiff from the SWAT team assignment. Cina stated it was due to plaintiff's abuse of sick time. Plaintiff claimed it was because he complained about Cina's unfair treatment of him.

In April 2018, a Guardian Tracker entry was made by Lieutenant Andrew Hart stating plaintiff caused a motor vehicle accident in a patrol vehicle. Plaintiff disputed a "motor vehicle accident" occurred, claiming "technically, it wasn't a motor vehicle accident, it was a parked car."

In July 2018, plaintiff was wrongfully reprimanded by one of his supervising lieutenants, contrary to the New Jersey State Attorney General Guidelines, when he was given a written reprimand for slamming a police cruiser door on July 19.[3] Plaintiff claimed he was off duty for four days before the alleged incident and was out of work due to an injury the day of the alleged incident and two days thereafter. Plaintiff claimed that his PBA president told him that he wasn't allowed to grieve minor discipline.

On August 23, 2018, plaintiff was placed into the Early Intervention Program (EIP) for ten months for causing damage to police vehicles some years prior, although the Document Management System[4] recommended only three months of EIP.

In September 2018, plaintiff received another Guardian Tracker entry for wearing "stretchy" patrol pants that were not approved by the WPD. Plaintiff contended other officers also wore the same pants and did not receive Guardian Tracker entries. This same month, Cina denied plaintiff's request to take a "road job" before noon for extra pay because the WPD was short-staffed.

In January 2019, plaintiff was interviewed by Somerset County Prosecutor's Office investigators following his complaints against Cina and the WPD regarding improprieties within the WPD. Over the years, plaintiff complained to his sergeants that Cina was pressuring him to write more tickets and make more arrests, in violation of N.J.S.A. 40A:14-181.2(b) and N.J.S.A. 2C:30-2, by threatening to remove him from the SWAT team if his "ticket numbers" did not increase.

***4** In April 2019, Cina denied plaintiff's requests to be reinstated to the SWAT team and to attend firearms instructor school and become a field training officer. Plaintiff contends he had the necessary qualifications and years of experience.

IV.

NJCRA Claims

In dismissing plaintiff's NJCRA claims, the motion judge reasoned that plaintiff's complaints regarding Cina and the WPD to the Somerset County Prosecutor's Office were not protected speech under NJCRA and he failed to identify any specific civil rights violation. The judge reasoned:

> The First Amendment protects a public employee from freely expressing his or her views on matters of public concern. But where the expression merely involves issues of private concern such as routine disputes involving an employee and an employer, the employer is not required to tolerate actions which it could reasonably believe are disruptive to the office[ ] or would undermine the employer's authority or would destroy working relationships.

Plaintiff argues his NJCRA claim should not have been dismissed because "his ... violated [rights] implicate matters of public concern and he has presented triable issues of material fact" for this claim. Quoting Borden v. School District of East Brunswick, 523 F.3d 153, 170 (3d Cir. 2008), he maintains his complaints to the Somerset County Prosecutor's Office were matters of public concern because they " 'implicat[e] the discharge of public responsibilities by an important government office, agency[,] or institution[,]' " and he "brought to light 'wrongdoing or breach of public trust' on the part of government officials." Stressing that Cina admitted he was aware of these complaints, plaintiff states Cina took retaliatory action against him.

Plaintiff argues the motion judge erred in granting defendant Cina qualified immunity. Citing Morillo v. Torres, 222 N.J. 104, 118 (2015), plaintiff argues the judge did not apply the proper standard of review, because he did not accept

the facts as plaintiff alleged and did not view every fact and inference alleged by plaintiff in the light most favorable to him. Plaintiff essentially argues that the motion judge "ignored that Cina's actions against [plaintiff] were taken in retaliation for [his] written and verbal objections to the Guardian Tracker entries ... and unwarranted reprimands ... as well as his complaints to the Somerset County Prosecutor's Office." Plaintiff also argues the judge erred in finding Cina acted within his rights as the Chief of Police because he "engaged in a continual pattern of inexplicable, shocking events that were intended to harass, abuse, and retaliate against [plaintiff]."

We conclude that viewing the facts in the light most favorable to plaintiff and as a matter of law, the motion judge properly dismissed plaintiff's NJCRA claim because plaintiff did not assert facts sufficient to establish a violation of the NJCRA.

The NJCRA in pertinent part states:

> Any person who has been deprived of ... any substantive rights, privileges or immunities secured by the Constitution or laws of this State, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under color of law, may bring a civil action for damages and for injunctive or other appropriate relief.
>
> ***5** [N.J.S.A. 10:6-2(c).]

Thus, the NJCRA provides a cause of action to any person who has been deprived of any rights under either the federal or state constitutions by a "person" acting under color of law. Ibid. It "is not a source of rights itself." Lapolla v. Cnty. of Union, 449 N.J. Super. 288, 306 (App. Div. 2017) (citing Gormley v. Wood-El, 218 N.J. 72, 97-98 (2014)). By its terms, "[t]wo types of private claims are recognized under this statute: (1) a claim when one is 'deprived of a right,' and (2) a claim when one's rights have been 'interfered with by threats, intimidation, coercion or force.' " Ibid. (quoting Felicioni v. Admin. Off. of Cts., 404 N.J. Super. 382, 400 (App. Div. 2008)).

The NJCRA, modeled after the Federal Civil Rights Act, 42 U.S.C. § 1983, affords "a remedy for the violation of substantive rights found in our State Constitution and laws." Brown v. State, 442 N.J. Super. 406, 425 (App. Div. 2015) (quoting Tumpson v. Farina, 218 N.J. 450, 474 (2014)), rev'd on other grounds, 230 N.J. 84 (2017). The NJCRA has been interpreted by our Supreme Court to be analogous to Section 1983; thus, New Jersey courts "look[ ] to federal jurisprudence construing [Section 1983] to formulate a workable standard for identifying a substantive right under the [NJCRA]." Harz v. Borough of Spring Lake, 234 N.J. 317, 330 (2018).

"[S]peech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." Connick v. Myers, 461 U.S. 138, 145 (1983) (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982)). "A public employee has a constitutional right to speak on matters of public concern without fear of retaliation." Baldassare v. State of N.J., 250 F.3d 188, 194 (3d Cir. 2001). Accord Garcetti v. Ceballos, 547 U.S. 410, 417 (2006). But the First Amendment only affords protection if the employee speaks "as a citizen on a matter of public concern." Id. at 418. In Garcetti, the United States Supreme Court held that if a public employee is not speaking as a citizen, "the employee has no First Amendment cause of action based on his or her employer's reaction to the speech." Ibid. "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." Id. at 421.

Plaintiff failed to assert facts—as required by NJCRA—demonstrating defendants disregarded and interfered with his exercise of his constitutional free speech rights. Although speaking as a citizen and not in his official capacity as a police officer—his speech solely concerned alleged actions taken by defendants that only negatively impacted his employment. Any alleged retaliation taken against plaintiff by Cina was not due to plaintiff's exercise of free speech rights. Plaintiff did not assert that Cina's conduct affected anyone else in the WPD or the public, nor were his complaints egregious enough to warrant public notice. We therefore join the motion judge in concluding that plaintiff's complaints to the Somerset County Prosecutor's office were not protected speech under NJCRA as they related solely to his employment conditions.

***6** Considering our conclusion that plaintiff's NJCRA's claims should be dismissed, we need not address his contention that Cina was not entitled to qualified immunity as the motion judge ruled. That said, for the sake of completeness, we agree with the judge that any claims against Cina in his official capacity should also be dismissed as duplicative of the claims against the Borough. See Kentucky

v. Graham, 473 U.S. 159, 165 (1985). And because we also agree that plaintiff failed to demonstrate Cina's alleged conduct violated his constitutional free speech rights, Cina has qualified immunity from suit. See Brown v. State, 230 N.J. 84, 98 (2017) (holding a governmental official is entitled to qualified immunity unless it is established that a clearly established constitutional right was violated).

V.

CEPA Claims

The motion judge dismissed plaintiff's CEPA claim, ruling that all alleged adverse conduct which occurred prior to August 15, 2018, was barred by CEPA's one-year statute of limitations as the suit was filed on August 15, 2019.

As for the merits of the claim, the judge ruled plaintiff did not engage in any whistle-blowing activity. He decided:

> [N]one of [Cina's] purported conduct suggests that at any time [p]laintiff believed he was required to participate in illegal activity. As such, there are no allegations made by [p]laintiff that [he] refused to participate in or objected to participation in any alleged illegal activity. Accordingly, the [c]ourt will evaluate whether any of the [p]laintiff's allegations amount to whistle[-]blowing activities by disclosing or threatening to disclose unlawful conduct.
>
> ....
>
> The [c]ourt finds that [p]laintiff's allegations amount to nothing more than routine workplace disputes about internal policy and management style. Accordingly, none of the [p]laintiff's allegations amount to whistle[-]blowing activity under CEPA. While [p]laintiff claims that he made a complaint about ... Cina to the Somerset County Prosecutor's Office in 2019, he has not presented any testimony or documentary evidence to show that this complaint was based on anything more than workplace grievances. Accordingly, this also does not constitute whistle[-]blowing activity under CEPA.

For completeness, the judge addressed and rejected defendants' argument that the NJCRA claim was subsumed under CEPA's waiver provision because the claim alleged the same set of operative facts of his CEPA claim and plaintiff did not differentiate between the facts supporting the respective claims. The judge explained:

> Plaintiff's NJCRA claim is based on his claims that he voiced objections or concerns regarding practices and treatment by his employer, and as a result of his speech, he was retaliated against. This is the identical argument [p]laintiff makes in support of his CEPA claim, and therefore it is subsumed.

Plaintiff contends the judge erred in finding his CEPA claim was untimely filed because he misclassified Cina's pattern of conduct over the years as "discrete acts," and incorrectly found that the only conduct that fell within CEPA's statute of limitation period was the 2019 denials of plaintiff's attempts to be reinstated onto the SWAT Team and promoted to Sergeant. By glossing over Cina's engaged continual pattern of unlawful conduct over the course of years that created a hostile work environment, plaintiff, citing Shepherd v. Hunterdon Development Center, 174 N.J. 1, 19 (2002), asserts the judge "ignore[d] that hostile work environments are created by repeated unlawful conduct over a period of time in direct contrast to discrete acts, which consist of single acts."

Plaintiff specifically points to Cina's engagement in an "unrelenting stream/barrage of unequivocal and wide-ranging lies included bogus disciplinary charges to cover up his true retaliatory motives." Plaintiff maintains that the "mischaracterization of his sick time usage," the "conflated reports of incidents involving damage to police vehicles," as well as Cina singling plaintiff out in a group and reprimanding him for wearing "stretchy" patrol pants was all pretext for his retaliation.

***7** Moreover, plaintiff claims the motion judge did not review and consider the certification of WPD officer Richard Lyons "impartially" or "in the light most favorable to [plaintiff]." Lyons, who had previously sued and settled a lawsuit against the WPD over Cina's treatment, certified that plaintiff complained numerous times over the course of years about Cina to co-workers, that Cina "had it out for" plaintiff, and he reiterated the examples of "abuse and retaliation" plaintiff asserted in his complaint and appeal. Plaintiff further challenges the motion judge's the characterization of the

certification as "an attempt to resurrect or bolster [plaintiff's] claims" with "merely self-serving assertions that are not based upon any personal knowledge." Instead, he insists Lyon's certification corroborates his CEPA claim by "providing precise and detailed examples of Cina's incessant adverse actions against [plaintiff]." Plaintiff, therefore, maintains that the continuing violation doctrine should have been applied to his CEPA claim.

To establish a prima facie case under CEPA, a plaintiff must prove:

> (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.
>
> [Lippman v. Ethicon, Inc., 222 N.J. 362, 380 (2015) (quoting Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003)).]

"The evidentiary burden at the prima facie stage is 'rather modest ....' " Zive v. Stanley Roberts, Inc., 182 N.J. 436, 447 (2005) (quoting Marzano v. Comput. Sci. Corp., 91 F.3d 497, 508 (3d Cir. 1996)). Once a plaintiff establishes the four CEPA elements, the burden shifts to the defendant to "advance a legitimate, nondiscriminatory reason for the adverse conduct against the employee." Klein v. Univ. of Med. & Dentistry of N.J., 377 N.J. Super. 28, 38 (App. Div. 2005). "If such reasons are proffered, plaintiff must then raise a genuine issue of material fact that the employer's proffered explanation is pretextual." Id. at 39.

CEPA prohibits employers from retaliating against an employee who:

> 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 ...;
>
> 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
>
> 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.]

CEPA was enacted to prevent retaliatory action when an employee blows the whistle on improper activities, "not to assuage egos or settle internal disputes at the workplace." Klein, 377 N.J. Super. at 45. CEPA defines "retaliatory action" as "the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment." N.J.S.A. 34:19-2(e).

Generally, a plaintiff has one year from the occurrence of the retaliation to file an action under CEPA. N.J.S.A. 34:19-5. Retaliatory actions can be a single discrete action, like the failure to promote, or a hostile work environment, which consists of "many separate but relatively minor instances of behavior directed against an employee that may not be actionable individually but that combine to make up a pattern of retaliatory conduct." Green v. Jersey City Bd. of Educ., 177 N.J. 434, 448 (2003).

***8** The limitations period, however, is subject to an equitable exception for continuing violations. Roa v. Roa, 200 N.J. 555, 566 (2010). The continuing violation doctrine is "a judicially created doctrine ... [that] has developed as an equitable exception to the statute of limitations." Bollinger v. Bell Atl., 330 N.J. Super. 300, 306 (App. Div. 2000). Under the continuing violation doctrine, which applies to CEPA claims, Green, 177 N.J. at 446-49, "a plaintiff may pursue a claim for discriminatory conduct if he or she can demonstrate that each asserted act by a defendant is part of a pattern and at least

one of those acts occurred within the statutory limitations period." Shepherd v. Hunterdon Dev. Ctr., 174 N.J. 1, 6-7 (2002) (citing West v. Phila. Elec. Co., 45 F.3d 744, 754-55 (3d Cir. 1995)).

In Shepherd, the Court highlighted the difference between a hostile work environment claim that falls within the continuing violation doctrine and a claim based on a discrete act that does not. 174 N.J. at 19-20.

> Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct. The "unlawful employment practice" therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own. Such claims are based on the cumulative [e]ffect of individual acts.
>
> ....
>
> ... A hostile work environment claim is comprised of a series of separate acts that collectively constitute one "unlawful employment practice." ... It does not matter, for purposes of the statute, that some of the component acts of the hostile work environment fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.
>
> That act need not, however, be the last act. As long as the employer has engaged in enough activity to make out an actionable hostile environment claim, an unlawful employment practice has "occurred," even if it is still occurring. Subsequent events, however, may still be part of the one hostile work environment claim and a charge may be filed at a later date and still encompass the whole.
>
> [Ibid. (quoting AMTRAK v. Morgan, 536 U.S. 101, 115-17 (2002)).]

The Court adopted the following two-prong test:

> First, have plaintiffs alleged one or more discrete acts of discriminatory conduct by defendants? If yes, then their cause of action would have accrued on the day on which those individual acts occurred. Second, have plaintiffs alleged a pattern or series of acts, any one of which may not be actionable as a discrete act, but when viewed cumulatively constitute a hostile work environment? If yes, then their cause of action would have accrued on the date on which the last act occurred, notwithstanding "that some of the component acts of the hostile work environment [have fallen] outside the statutory time period."
>
> [Id. at 21 (alteration in original) (quoting Morgan, 536 U.S. at 117).]

A. Timeliness of Some CEPA Claims

In the present matter, all of plaintiff's claims constitute discrete acts which cannot be aggregated; therefore, the motion judge properly limited his claims to those after August 25, 2018. The facts do not indicate a pattern of violations that were "continuous, cumulative, [or] synergistic." Wilson v. Wal-Mart Stores, 158 N.J. 263, 273 (1999). Most of plaintiff's claims occurred sporadically over the course of a decade, and, when viewed cumulatively, they do not suggest a hostile work environment.

***9** First, plaintiff only provided one negative performance review from 2010 and one PIP in 2011, which constitute discrete actions. As to the allegations that plaintiff was misusing sick time, this was first alleged in the 2010 review and plaintiff did not get another similar warning until 2015 when an entry was made in the Guardian Tracker. This occurred five years after the first allegation and two years after the implementation of Guardian Tracker. This was also plaintiff's first entry in the system. Five years without any issues does not speak to a pattern of continued violations.

Plaintiff contends he was improperly removed from the SWAT team in 2017, and plaintiff admits he did not suffer any other disciplinary action that year. In 2018, plaintiff was placed on EIP and received a written reprimand; however, that still did not establish a pattern of violations, as it was only two times for separate purposes. These all constitute discrete employment actions, which are not continuing violations to be aggregated to revive an untimely claim. Thus, summary judgment dismissal of plaintiff's CEPA claims occurring before August 25, 2018, was proper because they were not timely filed.

B. Merits of CEPA Claims

Turning to plaintiff's CEPA claims occurring after August 25, 2018—the denials of his request for reinstatement to the SWAT team, for promotion to sergeant and of his 2019 request to attend firearm training—that were dismissed on their merits, plaintiff argues the motion judge erred

because, like his NJCRA claim, he provided "ample factual proof supporting his cause of action or, at a minimum, raising genuine factual issues that ... precluded a grant of summary judgment" in favor of defendants. He contends that pursuant to N.J.S.A. 34:19-3(a)-(c) and Dzwonar, 177 N.J. at 462, he does not have to show that the employer actually violated the law, rule, regulation, or other authority that he relies upon. Instead, he need only "demonstrate that he ... reasonably believed that a violation occurred" about which he complained.

Plaintiff asserts his "whistle-blowing" activity under N.J.S.A. 34:19-3(a)(1) occurred when he reported his allegations of mistreatment and unlawful conduct by Cina to the Somerset County Prosecutor's Office. He contended at the motion hearing that Cina's threats to fire him if he didn't write more tickets constituted official misconduct, N.J.S.A. 2C:30-2, and a violation of N.J.S.A. 40A:14-181.2(b), which prohibits "us[ing] the number of ... citations ... as the sole criterion for promotion, demotion, dismissal, or the earning of any benefit provided by the department or force." Plaintiff maintains that Cina fabricated disciplinary charges "to place him on a PIP" in the effort to "derail [plaintiff's] promotional opportunities, ruin his career, and ultimately force him out of the WPD in retaliation for [p]laintiff's persistent objections to Cina's false accusations about his job performance and the complaints he made about Cina to superiors." He argues that his complaints encompassed more than mere routine workplace disputes or grievances, and, therefore, the summary judgment motion should have been denied.

Citing Estate of Roach v. TRW, Inc., 164 N.J. 598 (2000) and Higgins v. Pascack Valley Hospital, 158 N.J. 404 (1999), plaintiff further argues that even if his allegations merely concern internal workplace policies and procedures, CEPA's public policy prong still encompasses internal complaints on employer policies. Contending CEPA claims are liberally construed in view of the remedial nature of the statute, Dzwonar, 177 N.J. at 461, in addition to "the fact-sensitive nature of retaliation claims," plaintiff claims the summary judgement motion should have been denied based on the evidence presented which included contested issues of fact.

***10** Even though we liberally construe CEPA claims in view of the remedial nature of the statute, Dzwonar, 177 N.J. at 461, our close and careful review of the factual record and our summary judgment principles compels us to conclude that defendant's CEPA claims, before and after August 25, 2018, were correctly dismissed on summary judgment. As noted above, plaintiff's complaints addressed his personal job disputes with Cina and the WPD. There is no indication that his complaints to the Prosecutor's Office were anything other than an effort bring light to his belief that he was denied employment opportunities and unfairly disciplined. His allegation that defendants violated N.J.S.A. 40A:14-181.2(b) by disciplining him for not writing enough tickets speaks to his employment complaint that he was unfairly disciplined.

Because we conclude plaintiff did not engage in any whistle-blowing activity, we need not address whether he suffered any adverse employment action.

VI.

Punitive Damages Claim

Punitive damages are awarded to ensure "deterrence of egregious misconduct and the punishment of the offender." Longo v. Pleasure Prods., Inc., 215 N.J. 48, 57-58 (2013) (quoting Herman v. Sunshine Chem. Specialties, Inc., 133 N.J. 329, 337 (1993)). They are allowable only if

> the plaintiff proves, by clear and convincing evidence, that the harm suffered was the result of the defendant's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions. This burden of proof may not be satisfied by proof of any degree of negligence including gross negligence.
>
> [N.J.S.A. 2A:15-5.12.]

Plaintiff argues the motion judge erred in dismissing his CEPA claim for punitive damages given there are genuinely disputed issues of fact. We disagree. Because we conclude summary judgment dismissal of his CEPA claim was appropriate, plaintiff has no viable damages claim let alone one for punitive damges.

Any arguments made by defendant that we have not expressly addressed are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

All Citations

Not Reported in Atl. Rptr., 2022 WL 2542356

Footnotes

1 Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

2 The judge explained that the initial judge did not recall until after hearing argument that the case was assigned to the judge a few weeks earlier. In addition, his preliminary decision was accidentally uploaded on the e-courts as an order. The judge admitted that he had already decided the motion and detailed how, in the past, judges sent all their preliminary opinions to the parties before oral arguments so they could go into the argument knowing how the judge was thinking. They are "just too busy to do that now, so [they] have them all obviously prewritten one way or the other." Plaintiff's counsel accepted the judge's explanation, stating, "the way [y]our [h]onor, the fashion in which you addressed that, answered it, answered my questions, [j]udge, is absolutely fine and acceptable to us on our end."

3 The reprimand referenced a March 2016 Guardian Tracker entry by Lieutenants Hart and Kelly for "slamming a police cruiser door with too much momentum" on March 7 and 15; plaintiff refuted their account.

4 The Document Management System is a record management program used by the WPD to maintain and document department "policies, procedures, specific orders, and all the rules that dictate how [the department] operates."

2011 WL 5119100
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

In the Matter of Steven J. WINTERS, North Hudson Regional Fire and Rescue.

Argued telephonically Nov. 9, 2010.
|
Decided Oct. 31, 2011.

On appeal from the New Jersey Civil Service Commission, Docket No. 2006–2792–I.

Attorneys and Law Firms

Catherine M. Elston argued the cause for appellant/cross-respondent Steven J. Winters (C. Elston & Associates, LLC, attorneys; Ms. Elston, on the briefs).

David F. Corrigan argued the cause for respondent/cross-appellant North Hudson Regional Fire and Rescue (The Corrigan Law Firm, attorneys; Bradley D. Tishman, on the brief).

Paula T. Dow, Attorney General, attorney for respondent Civil Service Commission (Andrea R. Grundfest, Deputy Attorney General, on the statement in lieu of brief).

Before Judges FUENTES, GILROY and NUGENT.

Opinion

PER CURIAM.

***1** Petitioner Steven Winters appeals from the August 20, 2009 final decision of the Civil Service Commission (CSC) adopting the findings and recommendations of an Administrative Law Judge (ALJ) upholding Winters' sixty-day suspension and demotion from the rank of captain to firefighter for disclosing a confidential report. Respondent North Hudson Regional Fire and Rescue (NHRFR or the Department) cross-appeals, arguing that the ALJ's determination that Winters delivered the report to a clerical employee is not supported by the record, and seeking the imposition of a more severe penalty because Winters misrepresented that he delivered the report. We affirm.

I.

Winters was a fire captain with the NHRFR. On December 13, 2003, he prepared a "correspondence report" recounting an anonymous firefighter's allegations that an NHRFR battalion chief had sexually harassed the reporting firefighter and other firefighters. Winters claims that he addressed the report to the NHRFR Chief, placed the report in an envelope marked "confidential," and delivered the envelope containing the report to the Chief's secretary.

In late 2004, Teaneck firefighter William Brennan telephoned Winters and explained that he represented an NHRFR firefighter who allegedly had been the victim of retaliatory discipline for objecting to the battalion chief's sexual harassment. Brennan asked Winters about any reports concerning the battalion chief. Winters gave him a copy of the December 13, 2003 report, believing that it would be used only at a NHRFR confidential, closed hearing. Winters did not receive permission from his superiors to give the confidential report to Brennan.

Brennan subsequently gave the report to a television news reporter without Winters' knowledge. The reporter investigated the report's allegations, but never aired them. Nevertheless, the reporter's investigation resulted in a departmental investigation which failed to produce evidence supporting the allegations of sexual harassment by the battalion chief.

On September 28, 2005, the NHRFR served Winters with a Preliminary Notice of Disciplinary Action (PNDA), in which it proposed to suspend him for sixty days and demote him to the position of firefighter, based on violations of eight of NHRFR's Rules and Regulations. The PNDA specifications charged Winters with providing a copy of the December 13, 2003 report to Brennan without authorization; falsely testifying during an internal investigation that he had submitted the report to the Chief's secretary on December 13, 2003; submitting the report to the Chief's secretary without following the chain of command; and failing to follow up to ensure that the report was received by the Chief.

After Winters waived a hearing, the NHRFR served him with a Final Notice of Disciplinary Action (FNDA) on December

5, 2005, suspending him for sixty days and demoting him to the position of firefighter effective immediately. Winters appealed to the Merit System Board [1] which transferred the matter on March 29, 2006, to the Office of Administrative Law as a contested case.

***2** After eleven days of hearings, the ALJ assigned to the case found that Winters had delivered the December 13, 2003 report to the Chief's secretary, and thus did not testify falsely about delivering the report during the internal investigation. The ALJ also found that Winters bypassed the chain of command when he delivered the report to the Chief's secretary, and that he gave a copy of the report to Brennan without authorization from the NHRFR. Based on those factual determinations, the ALJ determined that Winters violated NHRFR *Rule* 16.130, which provides:

> Members shall treat all official business and communications of the Department as confidential. They shall impart no information that has been published for Department use to any party or parties. They shall allow no transcript or copy to be made of any Department record, report, or journal without the approval of the Chief.

The ALJ concluded that by violating the regulation, Winters engaged in conduct unbecoming a public employee.

The ALJ also determined that Winters' conduct was reckless and egregious, and needlessly placed in jeopardy the effective operation of the NHRFR. Finding that Winters' conduct revealed a lack of proper judgment and integrity, essential elements demanded from those in leadership positions, warranting his demotion and suspension, the ALJ affirmed the FNDA decision, and ordered that Winters be suspended from the NHRFR for sixty days and that he be demoted to the position of firefighter.

Winters and the NHRFR filed exceptions with the CSC. On August 20, 2009, the CSC issued its final decision adopting the ALJ's findings and recommendations upholding the demotion and suspension.

II.

Our review of administrative agency decisions is limited. *In re Stallworth,* 208 *N.J.* 182, 194 (2011). The standard of review "requires that courts defer to the specialized or technical expertise of the agency charged with administration of a regulatory system." *In re Virtua–West Jersey Hosp.,* 194 *N.J.* 413, 422 (2008). Consequently "an appellate court ordinarily should not disturb an administrative agency's determinations or findings unless there is a clear showing that (1) the agency did not follow the law; (2) the decision was arbitrary, capricious, or unreasonable; or (3) the decision was not supported by substantial evidence." *Ibid.* "The burden of demonstrating that the agency's action was arbitrary, capricious or unreasonable rests upon the [party] challenging the administrative action." *In re Arenas,* 385 *N.J.Super.* 440, 443–44 (App.Div.), *certif. denied,* 188 *N.J.* 219 (2006); *McGowan v. N.J. State Parole Bd.,* 347 *N.J.Super.* 544, 563 (App.Div.2002); *Barone v. Dep't of Human Servs.,* 210 *N.J.Super.* 276, 285 (App.Div.1986), *aff'd,* 107 *N.J.* 355 (1987). "Absent arbitrary, unreasonable or capricious action, the agency's determination must be affirmed." *In re Arenas, supra,* 385 *N.J.Super.* at 443.

***3** Our deference to agency decisions "applies to the review of disciplinary sanctions as well." *In re Herrmann,* 192 *N.J.* 19, 28 (2007). "In light of the deference owed to such determinations, when reviewing administrative sanctions, the test ... is whether such punishment is so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness." *Id.* at 28–29 (internal quotations and citations omitted). "The threshold of 'shocking' the court's sense of fairness is a difficult one, not met whenever the court would have reached a different result." *Id.* at 29.

With those principles in mind, we turn to Winters' contentions. He first challenges the CSC's decision on constitutional grounds, asserting that *Rule* 16.130 is facially unconstitutional because it constitutes an overly broad restriction on free speech, and that disciplining him for giving Brennan a copy of the report violated his right to free speech. He also argues that the undisputed evidence demonstrates he did not disseminate his report outside of the Department, because Brennan was an authorized representative of a Department employee. Finally, Winters contends that the discipline is arbitrary, unreasonable and capricious because it is disproportionate to the charges. [2]

The NHRFR argues that *Rule* 16.130 is constitutionally valid. It also contends that the ALJ's finding that Winters delivered the report to the Chief's secretary is not based on credible evidence. Based on that argument, the NHRFR seeks an increased suspension for Winters.

We first address Winters' claim that NHRFR's *Rule* 16.130 is facially overbroad because it prohibits constitutionally protected conduct. Freedom of speech is protected by the Free Speech Clause of the First Amendment and the free speech clause of the New Jersey Constitution. *U.S. Const.* amend I; *N.J. Const.* art. I., ¶ 6. "We rely on federal constitutional principles in interpreting the free speech clause of the New Jersey Constitution...." *Karins v. City of Atl. City,* 152 *N.J.* 532, 547 (1998).

The overbreadth doctrine "involves substantive due process considerations concerning excessive governmental intrusion into protected areas." *Id.* at 544 (quotations and citation omitted). Regulations that restrict a public employee's speech must be narrowly drawn so that they do not infringe upon the First Amendment rights of those employees. *See Pickering v. Bd. of Educ.,* 391 *U.S.* 563, 568, 88 *S.Ct.* at 1731, 1734–35, 20 *L. Ed.*2d 811, 817 (1968). "The standard is not whether the law's meaning is sufficiently clear, but whether the reach of the law extends too far in fulfilling the state's interest." *Karins, supra,* 152 *N.J.* at 544. However, "courts have allowed the government more leeway in regulating conduct-related speech rather than prohibiting speech itself." *Ibid.* Additionally, a regulation should be construed to render it constitutional if the regulation is reasonably susceptible to such a construction. *Id.* at 546.

***4** *Rule* 16.130 prohibits employees from "impart[ing] ... information that has been published for Department use to any party or parties." The rule further prohibits employees from "allow[ing] transcripts or copies to be made of any Department record, report or journal without the approval of the Chief." Significantly, the rule does not constitute a blanket prohibition against speaking to the media or other outside agencies or persons. Rather, the rule has been drawn to restrict only the imparting of information published for Department use to any party or parties.

Winters relies upon *Salerno v. O'Rourke,* 555 *F.Supp.* 750 (D.N.J.1983), *In re Disp. Action Against Gonzalez,* 405 *N.J.Super.* 336 (App.Div.2009), and *Ramirez v. Cnty. of Hudson,* 167 *N.J.Super.* 435 (Ch. Div.1979) in support of his argument that the rule is facially unconstitutional. Those cases are distinguishable.

In *Salerno,* the rules at issue prohibited jail employees from making disparaging remarks about the way the affairs of the jail were conducted, publicly discussing jail affairs when off duty, and giving information to newspaper representatives without the specific consent of the Sheriff. *Supra,* 555 *F.Supp.* at 757. The rule in this case does not prohibit the employees from engaging in such activities. Instead, it restricts the dissemination of information published for Department use and the copying of transcripts of Department records without prior approval of the Chief. In *Gonzalez,* the employer promulgated a policy that prohibited all staff members from initiating contact with the media without prior approval of the Executive Director. *Supra,* 405 *N.J.Super.* at 341. Here, no such prohibition exists. Employees are not prohibited from communicating with the media.

Finally, in *Ramirez,* plaintiff, a corrections officer, wrote a letter to a newspaper complaining about working conditions in the county jail. *Supra,* 167 *N.J.Super.* at 436–37. He was disciplined for violating a rule prohibiting the imparting of information to the newspaper "regarding the County Correctional Facilities[.]" *Id.* at 437 n. 2. The trial court held that the regulation was invalid because it banned all comments, favorable, unfavorable or neutral, and "indiscriminately casts its net so as to catch, along with that speech which the Department may properly regulate, much speech in which the Department's legitimate interest is minimal." *Id.* at 440 (quoting *Gasparinetti v. Kerr,* 568 *F.2d* 311, 317 (3d. Cir.1977), *cert. denied,* 436 *U.S.* 903, 98 *S.Ct.* 2232, 56 *L. Ed.*2d 401 (1978)). Here, the rule at issue does not ban NHRFR employees from speaking about the Department. Instead, it serves the legitimate interest of maintaining the confidentiality of official business communications published for Department use.

In view of *Rule* 16.130's limited restriction against imparting internal, published department communications to third parties, we do not find the rule constitutionally overbroad.

***5** We turn next to Winters' argument that he was disciplined for exercising his right to free speech. Winters is indisputably a public employee. "[T]he First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Garcetti v. Ceballos,* 547 *U.S.* 410, 417, 126 *S.Ct.* 1951, 1958, 164 *L. Ed.*2d 689, 698 (2006). In determining whether a public

employee's speech is entitled to First Amendment protection, the court must "arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering, supra,* 391 *U.S.* at 568, 88 *S.Ct.* at 1734–35, 20 *L. Ed.*2d at 817. In determining whether an employee's speech is entitled to constitutional protection, a court must make two inquiries:

> The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. This consideration reflects the importance of the relationship between the speaker's expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.
>
> [*Garcetti, supra,* 547 *U.S.* at 418, 126 *S.Ct.* at 1958, 164 *L. Ed.2d* at 699. (internal citations omitted).]

To determine when "conduct-related speech in public employment is not protected, the Court stated that if 'the fact of employment is only tangentially and insubstantially involved in the subject matter of the [employee's communication], it is necessary to regard the [employee] as the member of the general public he seeks to be.' " *Karins, supra,* 152 *N.J.* at 548–49 (quoting *Pickering, supra,* 391 *U.S.* at 573, 574, 88 *S.Ct.* at 1737, 1738, 20 *L. Ed.*2d at 820, 820–21).

Winters did not act as a citizen when he provided a copy of the report to Brennan. By his own admission, he provided the report solely for Brennan's use in a departmental hearing. Winters testified:

> Mr. Brennan and I spoke about what was the purpose of me turning this report over, and he said it was going to be used in the departmental hearing, and we did have discussions on that, and that was important to me, because any departmental hearings were confidential.

Accordingly, when Winters gave the report to Brennan, he was not acting with the intention of contributing to the public discourse.

***6** "[E]mployees retain the prospect of constitutional protection for their contributions to the civic discourse. The prospect of protection, however, does not invest them with a right to perform their jobs however they see fit." *Garcetti, supra,* 547 *U.S.* at 422, 126 *S.Ct.* at 1960, 164 *L. Ed.*2d at 702. Winters believed that his conduct was consistent with the departmental rules, and he also believed that his report would remain confidential, out of reach of the public domain. Indeed, Winters' position during the administrative hearings and in this appeal is that he did not violate *Rule* 16.130 because he maintained the confidentiality of his report and disclosed it only to a representative of a member of the department. Consequently, we reject his argument that his providing the report to Brennan was entitled to constitutional protection.

Winters also asserts that he did not violate the rule because Brennan was a representative of a NHRFR employee. The ALJ and CSC rejected this argument. We will not disturb that factual determination. Brennan was neither a member nor employee of the Department.

Winters next argues that his suspension and demotion were disproportionate to his offense. We disagree. "[W]hen reviewing administrative sanctions, appellate courts should consider whether the punishment is disproportionate to the offense, in the light of all of the circumstances, as to be shocking to one's sense of fairness." *Stallworth, supra,* 208 *N.J.* at 195 (internal quotations and citations omitted).

After carefully reviewing the record in light of Winters' arguments, we are satisfied that the discipline imposed upon Winters was not excessive. The ALJ concluded that Winters' conduct was reckless and egregious, and that he needlessly placed in jeopardy the operation of the NHRFR. The CSC, quoting *In re Tuch,* 159 *N.J.Super.* 219, 224 (App.Div.1978), added that his conduct had a tendency to destroy public respect for public employees, and that "providing a confidential report that contained unsubstantiated allegations regarding a fellow employee to a third party violates the 'the implicit standard of good behavior

which devolves upon one who stands in the public eye....' " In view of those considerations, we do not find the discipline shocking to one's sense of fairness. *Stallworth, supra,* 208 *N.J.* at 195.

Finally, we review NHRFR's cross-appeal alleging that the ALJ's finding of fact that Winters delivered the report to a clerical employee is not supported by the record; and that Winters should be subjected to additional penalties because he misrepresented that he so delivered the report. We find NHRFR's arguments to be without sufficient merit to warrant discussion in a written opinion. *R.* 2:11–3(e)(1)(E).

Affirmed.

All Citations

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Footnotes

1 The Merit System Board was replaced by the CSC effective June 30, 2008. *N.J.S.A.* 11A:2–1.

2 Winters also contends that he filed a summary judgment motion after the hearing before the ALJ. The NHRFR disputes that Winters filed a summary judgment motion. It does not appear that Winters included the motion as part of the record. *See R.* 2:5–4(a) (designating what constitutes "the record on appeal"); *R.* 2:6–1(a)(1)(C) (requiring the appendix prepared by the appellant to contain "the judgment, order or determination appealed from or sought to be reviewed"). In view of our disposition of Winters' other arguments, we need not address or resolve the parties' dispute about whether Winters filed a summary judgment motion.