354 N.J.Super. 467
Superior Court of New Jersey,
Appellate Division.

Victor HERNANDEZ, Plaintiff–Appellant,
v.
MONTVILLE TOWNSHIP BOARD OF EDUCATION, Defendant–Respondent.

Argued Oct. 1, 2002. | Decided Oct. 24, 2002.

Custodian sued school district alleging he was terminated in violation of Conscientious Employee Protection Act (CEPA). After the jury returned a verdict in his favor, the Superior Court, Law Division, Morris County, granted school district's motion for a judgment notwithstanding the verdict, and custodian appealed. The Superior Court, Appellate Division, Axelrad, J.T.C., held that: (1) issue of whether custodian had a CEPA claim was for the jury, and (2) punitive damages claim should have been submitted to the jury.

Reversed and remanded.

West Headnotes (6)

[1] **Labor and Employment**
Purpose and construction in general

Conscientious Employee Protection Act (CEPA) was designed to provide broad protections against employer retaliation for employees acting within the public interest and, as remedial legislation, it should be construed liberally to effectuate its important social goal. N.J.S.A. 34:19-1 to 34:19-8.

12 Cases that cite this headnote

[2] **Labor and Employment**
Reporting or Opposing Wrongdoing; Criticism and "Whistleblowing"

In order to maintain a cause of action under the Conscientious Employee Protection Act (CEPA), a plaintiff must establish that: (1) he or she reasonably believed that his or her employer's conduct was violating either a law or rule or regulation promulgated pursuant to law; (2) he or she performed whistleblowing activity described in the statute; (3) an adverse employment action was taken against him or her; and (4) a causal connection exists between the whistleblowing activity and the adverse employment action. N.J.S.A. 34:19-1 to 34:19-8.

15 Cases that cite this headnote

[3] **Education**
Proceedings and review

Testimony by custodian that he informed principal of school and facilities manager of district that toilets at elementary schools overflowed and that light in exit sign was out, that he tried to schedule meetings with superintendent and business administrator when he became frustrated at the lack of response, and that based on his twenty years of experience with another employer and safety training he received he believed conditions violated health and safety rules and regulations, and testimony by custodian's wife who was also employed by district that she left notes for district officials, raised fact issue for jury as to whether custodian reasonably believed that district's conduct violated health and safety rules and regulations and that he performed whistleblowing activity, in custodian's Conscientious Employee Protection Act (CEPA) action against school district. N.J.S.A. 34:19-1 to 34:19-8.

2 Cases that cite this headnote

[4] **Education**
Grounds for removal or other adverse action
Education
Proceedings and review

Evidence that, until custodian began

complaining about overflowing toilets at elementary schools and light that was out in exit sign, custodian had a good work record, raised fact issue for jury as to whether a causal connection existed between his whistleblowing activity and his termination, in custodian's Conscientious Employee Protection Act (CEPA) action against school district. N.J.S.A. 34:19-1 to 34:19-8.

2 Cases that cite this headnote

[5] **Education**
Actions

Testimony of custodian that he complained to principal of school and facilities manager of district that toilets at elementary schools overflowed and that light in exit sign was out, that he tried to schedule meetings with superintendent and business administrator to discuss such concerns when he became frustrated at the lack of response, and that co-worker warned him to keep his mouth shut or he would get fired, testimony by wife of custodian who was also employed by district that she left notes for district officials, and testimony by district officials denying that the alleged conversations and attempted contacts with them occurred, raised fact issue for jury whether punitive damages should be awarded to custodian, in custodian's Conscientious Employee Protection Act (CEPA) action against school district. N.J.S.A. 34:19-1 to 34:19-8.

2 Cases that cite this headnote

[6] **Municipal Corporations**
Damages

Punitive damages, which are available under the Conscientious Employee Protection Act (CEPA) against public entities, should be determined by a jury as the trier of fact. N.J.S.A. 34:19-1 to 34:19-8.

1 Cases that cite this headnote

Attorneys and Law Firms

****130 *469** David A. Amadio argued the cause for appellant.

Raymond W. Fisher, Forham Park, argued the cause for respondent (Schwartz Simon Edelstein Celso & Kessler, attorneys; Stephen J. Edelstein, of counsel; Mr. Fisher and Christopher R. Welgos, on the brief).

Before Judges WALLACE, JR., CIANCIA and AXELRAD.

Opinion

The opinion of the court was delivered by

AXELRAD, J.T.C. (temporarily assigned).

Plaintiff, Victor Hernandez, a night custodian for defendant, Montville Township Board of Education, appeals from the grant of defendant's motion for a judgment notwithstanding the verdict (JNOV) on plaintiff's Conscientious Employee Protection Act (CEPA) claim. The jury had returned a verdict in plaintiff's favor for $44,000 for wage loss and $150,000 for emotional distress.

***470** On appeal, plaintiff contends: (1) the trial court erred in granting defendant's motion; (2) it was error to fail to submit the punitive damages issue to the jury; and (3) if we reverse, the trial court should consider his application for interest, attorney's fees and costs. We agree and reverse the JNOV, reinstate the jury award, and remand for a trial on punitive damages, interest, attorney's fees and costs.

For twenty years prior to his employment with defendant, plaintiff was employed by Consolidated Edison (Con Ed) as a custodian and later as a mechanic. At Con Ed he attended seminars addressing OSHA[1] laws, and was trained to identify and report safety hazards within the company. In April 1996, he was hired by defendant as a part-time maintenance employee while he also maintained his position at Con Ed. In January 1997, following plaintiff's successful completion of a thirty-day trial period, defendant approved plaintiff's appointment as a full-time night custodian for two of defendant's elementary schools, William Mason and Cedar Hill. The

employment contract covered the period from December 2, 1996, through June 30, 1997.

Defendant also required plaintiff to attend health and safety meetings. At one meeting, a safety representative indicated that the cleanliness of the bathrooms was regulated by OSHA, which mandated a sanitary environment. Plaintiff was also provided with a staff handbook which emphasized the importance of safety at the schools and directed a custodian to assume responsibility for the general safety of the building.

Plaintiff first noticed a safety issue at the school in December 1996, which he reported to the principal Dr. Stephanie Adams and the facilities manager Leon Vandeneulebroeke.[2] In February and ****131 *471** March 1997, plaintiff also observed and either reported or attempted to discuss with the superintendent Dr. Richard Bozza and business administrator Dominic Butler other safety and sanitary concerns. Specifically, plaintiff was concerned with broken toilets that were clogged and overflowing for prolonged periods of time, causing feces and urine to spill out on the floor, and an exit sign that was unlit for seven days due to a burned out bulb. Thereafter, plaintiff was criticized in a series of memos for the first time for poor work performance, engaging in lengthy personal phone calls while on duty, not arriving on time, theft of services, and not following the chain of command. On March 6, 1997, he was suspended from his position and on March l8, 1997, he was terminated.

On February 6, 1998, plaintiff filed suit against defendant alleging he was terminated in violation of CEPA, *N.J.S.A.* 34:19–1 to –8. Plaintiff and his wife Deborah, who was also employed by defendant as a custodian, testified at trial as to the nature of plaintiff's complaints and their attempts to bring them to the attention of defendant's representatives. Plaintiff also testified about medical and emotional problems he experienced for about three to four months following his termination, including being upset, crying often, having difficulty sleeping, having diarrhea and losing weight, and about the depression he experienced in March 1999. The court reserved decision on defendant's motion for dismissal under *Rule* 4:37–2(b).

Defendant presented the testimony of Vandeneulebroeke, Bozza, Adams, Butler, and another custodian Mike Foschini. The court thereafter denied defendant's motion for judgment at the close of all evidence. In addition, the court ruled that only the issues of the exit sign being unlit for seven days and the clogged and overflowing toilets would be submitted to the jury. After being charged under *N.J.S.A.* 34:19–3a, the jury returned a verdict favorable to plaintiff. The court denied plaintiff's request to send the issue of punitive damages to the jury, concluding the facts did not support the imposition of such damages.

***472** Thereafter, defendant moved for JNOV, for a new trial, or for remittitur. On September 14, 2001, the court granted defendant's motion for a JNOV, stating:

> Talk about trivial. This is a case—and I never should have let it go to the jury, I should have read now the McLelland case ... I should have made a determination right at that time, before the trial even started, but I didn't because I didn't know what the facts were. But certainly by the time the jury went out, I should have concluded that the plaintiff simply had not made out a case, under the CEPA law, because he never disclosed or threatened to disclose to his supervisor an activity, policy, practice of an employer that the employee reasonably believed was in violation of law or a rule or regulation promulgated pursuant to the law. There simply was none. There were trivial things that he didn't like. The toilets he said were for days clogged up, and one light-one light, for a—short period of time, an exit light, didn't have the light—the bulb working. And it turns out whose job is it to change the bulb, his. His job. And then he falls back and says well, I couldn't get a bulb.
>
> I have never seen anything like it. And that's supposed to support a CEPA claim? And he, himself, admitted that he never explained to anyone what it was exactly that he was complaining about. He—he says—he simply said he ****132** wanted a meeting about some issues, safety issues or whatever they were, without specifying what they were.
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> But in addition to that, there isn't any other evidence adduced by anyone in the case that these things that he's complaining about ever occurred, except for the most trivial thing about this light bulb that wasn't out.
>
> I didn't believe anything [plaintiff] said, but that isn't the test here. The test is whether a reasonable jury could have concluded, number one, that there was a—a—a violation of some law, regulation or even public policy. If there's a public policy involved here about clogged toilets, it is trivialization beyond belief.

The order which is the subject of this appeal was entered on September 20, 2001.

The key issue on appeal is whether plaintiff performed whistleblowing activity by reporting the unsanitary conditions of the bathroom and the broken light in the fire exit sign and was terminated as a result. Accepting as true

the evidence supporting plaintiff's position and according him the benefit of all legitimate inferences which can reasonably and legitimately be deduced therefrom, *Dolson v. Anastasia*, 55 *N.J.* 2, 5–6, 258 *A.*2d 706 (1969), we find the verdict is sustainable and it was error for the trial court to grant JNOV. *R.* 4:40–2.

The CEPA statute, *N.J.S.A.* 34:19–3a, provides:

> ***473** An employer shall not take any retaliatory action against an employee because the employee does any of the following:
>
> a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer ... that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law ...

[1] New Jersey's CEPA statute has been described as the most far reaching "whistleblowing statute" in the nation. *Mehlman v. Mobil Oil Corp.*, 153 *N.J.* 163, 179, 707 *A.*2d 1000 (1998). CEPA was designed to provide broad protections against employer retaliation for employees acting within the public interest and, as remedial legislation, it should be construed liberally to effectuate its important social goal. *Abbamont v. Piscataway Township Bd. Of Educ.*, 138 *N.J.* 405, 418, 650 *A.*2d 958 (1994); *Dzwonar v. McDevitt*, 348 *N.J.Super.* 164, 791 *A.*2d 1020 (App.Div.), *certif. granted in part*, 172 *N.J.* 180, 796 *A.*2d 897 (2002).

[2] In order to maintain a cause of action under this statute, a plaintiff must establish that: (1) he or she reasonably believed that his or her employer's conduct was violating either a law or rule or regulation promulgated pursuant to law; (2) he or she performed whistleblowing activity described in *N.J.S.A.* 34:19–3a, c(1) or c(2);[3] (3) an adverse employment action was taken against him or her; and (4) a causal connection exists between the whistleblowing activity and the adverse employment action. *Kolb v. Burns*, 320 *N.J.Super.* 467, 476, 727 *A.*2d 525 (App.Div.1999).

****133** Plaintiff established he reasonably believed the unsanitary bathroom conditions and unlit exit sign at the elementary school violated health and safety rules and regulations and were contrary ***474** to a clear mandate of public policy. *See, e.g.*, *Abbamont, supra*, 138 *N.J.* at 410, 650 *A.*2d 958 (permitting a CEPA claim by a teacher who expressed his concerns about poor health and safety conditions in the school's metal shop, including broken machines, lack of air ventilation, inadequate lighting, and slippery floors).

[3] Plaintiff, a custodian for over twenty years who received continual safety training and was informed about OSHA, knew there were regulations and policies against exposing schoolchildren to urine and feces and against unlit exit signs, particularly in an elementary school setting. Plaintiff was informed by defendant's safety representative that OSHA's general standards require washing facilities to be maintained in a sanitary condition. Vandenuelebroeke conceded that an unlit exit sign is a fire violation. Moreover, the staff handbook provided to plaintiff stressed the importance of safety, and that it was his job to maintain the general safety of the school buildings.

Contrary to the court's finding in granting JNOV, it is irrelevant to plaintiff's CEPA claim whether there was independent corroboration of the overflowing toilets. As previously stated, under the JNOV standard the court must accept as true plaintiff's testimony, which the jury clearly found credible. *Dolson, supra*, 55 *N.J.* at 5–6, 258 *A.*2d 706. Moreover, Vandeneulebroeke acknowledged that on more than one occasion if parts were not in stock it took a week to repair a toilet.

Giving plaintiff the benefit of all favorable inferences, there was ample credible evidence to support the jury's conclusion that plaintiff made his superiors aware of the problems even if he did not always articulate the exact violation. Plaintiff testified he told principal Adams the exit light was out, which she denied, and pursuant to her direction he took the bulb out the next day in Vandeneulebroeke's presence, handed it to him and was told "I'll see you tomorrow." According to plaintiff, during the seven days it took for the facilities manager to bring him a replacement bulb, plaintiff consistently asked for the bulb and gave the principal a note indicating an unlit exit sign is a fire code violation.

***475** Plaintiff further testified he told Vandeneulebroeke and the schools' principals about the malfunctioning toilets, often several times a day, and when he requested a plunger he was advised it was maintenance's job to repair the toilets, not the custodian's. Vandenuelebroeke acknowledged receiving the call.

Becoming frustrated with maintenance's lack of response, in late January or early February 1997, plaintiff approached superintendent Bozza and asked if they could discuss "health hazard conditions and maintenance lack of service in the building." Pursuant to Bozza's instructions, plaintiff called his office the next day to schedule a meeting and despite plaintiff's subsequent efforts to contact him, Bozza never returned plaintiff's phone calls. At trial, Bozza acknowledged that plaintiff had

approached him near the end of January but insisted that plaintiff did not mention any violations and only talked about having some ideas for the school system generally.

Thereafter, plaintiff scheduled a meeting with business administrator Butler for March 4, 1997 although he did not inform him of the purpose. Butler, however, canceled the meeting and never rescheduled it.

****134** According to Deborah Hernandez, she advised Bozza's secretary, Marie Cetrulo, that plaintiff had concerns over the toilets and thereafter told Bozza her husband's concerns about the "toilets [being] extremely dirty [and] they smell" and that "there were no lights on the exit sign light." Bozza denied this conversation. She further testified she left a note for Vandeneulebroeke and two notes on Butler's desk stating that her husband had informed her that there were safety and sanitary issues at the schools and requesting that a meeting be scheduled, but neither person responded. At trial Vandeneulebroeke and Butler denied having received notes.

[4] Until plaintiff began complaining, he had a good work record. Vandeneulebroeke admitted he had no problems with plaintiff's performance during plaintiff's probationary period or ***476** throughout January 1997, and acknowledged that plaintiff was the only custodian he ever recommended for termination after the conclusion of the probationary period. Bozza admitted he did not receive any complaints about plaintiff from April 1996 through January 1997, although Adams testified she began having problems with plaintiff thereafter. Plaintiff testified that following his encounter with Bozza in which he mentioned "health hazard conditions and maintenance lack of service in the building," his wife's talk with Bozza regarding plaintiff's concerns about the toilets and exit sign light, and his scheduling of a meeting with Butler, he began to receive memos about his poor performance and was terminated shortly thereafter in retaliation. There was ample evidence in the record for the jury to conclude defendant's proffered reason for termination was a pretext and that the whistleblowing itself was a substantial factor in the termination. *See Estate of Roach v. TRW, Inc.*, 164 *N.J.* 598, 612, 754 *A.*2d 544 (2000) and *Donofry v. Autotote Sys.*, 350 *N.J.Super.* 276, 293, 795 *A.*2d 260 (App.Div.2001). Thus, this was not a "runaway jury" as categorized by the court. Accordingly, it was error for the court to substitute its judgment for that of the jury and reverse the jury verdict.

[5] [6] Furthermore, the punitive damage claim should have been submitted to the jury. Plaintiff claims that Bozza, Butler, Adams and Vandeneulebroeke all lied in their testimony. He further testified that Foschini, the other janitor, warned him "to keep [his] mouth shut" because if he said anything about unsafe conditions and health hazards, he would get fired. Based upon the compensatory damage verdict, it appears that the jury agreed. Our Supreme Court in *Abbamont, supra*, 138 *N.J.* at 432, 650 *A.*2d 958, made it clear that "punitive damages, which are available under CEPA against public entities, should be determined by a jury as the trier of fact." The court stated:

> Because punitive damages are part of common-law tort claims ... the remedy of punitive damages herein should be decided by a jury, as it is in common law tort actions. There is no reason to remove this issue from the jury. The court's role in that setting is limited: [d]ue to the universal recognition of the broad discretion by ***477** a jury to determine whether to give or withhold punitive damages and, when awarded, to determine the amount to be awarded, only one area of judicial control of the exercise of jury discretion has been recognized. That area of control is over excessive punitive damage awards.
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> [*Id.* at 433, 650 A.2d 958.]

Because plaintiff presented sufficient evidence to sustain the jury verdict, we reverse the trial court's grant of a JNOV and reinstate the verdict on compensatory ****135** damages. We remand for a new trial on punitive damages and consideration of interest, attorney's fees and costs.

Parallel Citations

808 A.2d 128, 170 Ed. Law Rep. 733, 19 IER Cases 1176

Footnotes

1 Occupational Safety and Health Act of 1970, 29 *U.S.C.* § 651 *et seq.*

2 The trial court's ruling that the jury could not consider evidence of alleged problems other than the exit sign and bathrooms is not challenged on appeal. Accordingly, we will not discuss testimony other than that relating to the exit sign and bathrooms.

3 *N.J.S.A.* 34:19–3c provides as follows:
An employer shall not take any retaliatory action against an employee because the employees does any of the following:

c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:
(1) is in violation of a law, or a rule or regulation promulgated pursuant to law ...; or
(2) is fraudulent or criminal.

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179 N.J. 81
Supreme Court of New Jersey.

Victor HERNANDEZ, Plaintiff-Respondent,
v.
MONTVILLE TOWNSHIP BOARD OF EDUCATION, Defendant-Appellant.

Argued Oct. 7, 2003. | Decided March 23, 2004.

***81 **1091** On certification to the Superior Court, Appellate Division, whose opinion is reported at 354 N.J.Super. 467, 808 A.2d 128 (2002).

Attorneys and Law Firms

***82** Stephen J. Edelstein, Florham Park, argued the cause for appellant (Schwartz Simon Edelstein Celso & Kessler, attorneys; Raymond W. Fisher and Denis G. Murphy, on the briefs).

David A. Amadio, argued the cause for respondent.

Kathleen A. Dunnigan, submitted a brief on behalf of amicus curiae, National Employment Lawyers Association of New Jersey (Dwyer & Dunnigan, attorneys; Ms. Dunnigan and Ty Hyderally, on the brief).

Opinion

PER CURIAM.

The judgment is affirmed, substantially for the reasons expressed in Judge Axelrad's opinion for the Appellate Division, reported at 354 *N.J.Super.* 467, 808 *A.*2d 128 (2002).

Justice LaVECCHIA, dissenting.

When the Conscientious Employment Protection Act, *N.J.S.A.* 34:19-1 to -8 (CEPA), was signed into law, Governor Kean emphasized the statute's purpose to facilitate the exposure of "illegal activities" of employers. Office of Governor Kean, *News Release* at 1 (Sept. 8, 1986). In pertinent part, CEPA protects a whistle-blowing employee from "retaliatory action" by an employer when that employee "discloses, or threatens to disclose ... an activity, policy or practice of the employer ... that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law." *N.J.S.A.* 34:19-3a; *see also N.J.S.A.* 34:19-2e (defining "retaliatory action"). In Section 3a, the Legislature carefully sought to balance the rights of both employers and employees on matters that concern the way in which an entity carries out its business. The language of the provision does not suggest an intent to allow a CEPA cause of action for every employee who differs with an employer over the conduct of business on a day-to-day basis within the bounds set by law. The question then is whether plaintiff has alleged a claim that meets the threshold established by the Legislature in CEPA.

The facts adduced at trial may be summarized briefly. After a one-month probationary period, the Board hired plaintiff as a full-time ***83** night custodian in January 1997. Allowing plaintiff the full benefit of his proofs, it appears that during his probation he began noticing problems at the buildings he was assigned to clean. Specifically, ****1092** he observed that a clogged toilet and a missing light in an exit sign were not remedied for approximately one week. Plaintiff believed that those problems might be safety or health hazards.[1] He apprised his immediate supervisors of his concerns and attempted to speak directly to the Superintendent of Schools. At about the same time, plaintiff's supervisors were criticizing plaintiff's work performance in internal memoranda shared with plaintiff, including that he was "engaging in lengthy personal phone calls while on duty, not arriving on time, [sic] theft of services, and not following the chain of command." *Hernandez v. Montville Township Bd. of Educ.*, 354 *N.J.Super.* 467, 471, 808 *A.*2d 128, 131 (App.Div.2002). On March 18,

2003, the Board terminated plaintiff, citing the unsatisfactory performance citations he had accumulated.

Plaintiff filed this complaint alleging wrongful termination, contending initially that the Board's action violated *N.J.S.A.* 34:19-3a and -3c, respectively.[2] In pre-trial rulings, the trial court effectively dismissed the Section 3c claim from the action and the parties have not disputed that determination.[3] After the jury ***84** returned a verdict for plaintiff, the trial court granted the Board's motion for judgment notwithstanding verdict (JNOV), observing that it never should have let the case go to the jury in the first instance. See *R.* 4:40-2.

The Appellate Division reversed, reinstated the jury's verdict in favor of plaintiff, and remanded the matter for consideration of punitive damages, interest, and attorney's fees. *Hernandez, supra,* 354 *N.J.Super.* at 477, 808 *A.*2d at 134-35. A majority of this Court now affirms. I must respectfully disagree because I believe that the trial court correctly concluded that plaintiff's claim does not state the type of employee complaint that the Legislature ever intended to be cognizable under CEPA.

Section 3a prohibits retaliation against an employee who takes action in respect of "an *activity, policy or practice*" of the employer that the employee reasonably believes is contrary to law, rule, or regulation. *N.J.S.A.* 34:19-3a (emphasis added). Those words derive meaning from their textual association. See *Gilhooley v. County of Union,* 164 *N.J.* 533, 542, 753 *A.*2d 1137, 1142-43 (2000) (noting that meaning of words in statute informed by words that accompany them). In context, the words included in the phrase "activity, policy or practice" connote ongoing, ubiquitous conduct, stitched together by a common directive or purpose, and not idiosyncratic responses to discrete maintenance problems. Plaintiff has not "disclosed" any sort of Board activity, policy, or practice discouraging the unclogging of clogged of toilets or preventing the purchase and ****1093** distribution of working light bulbs for exit signs. He did not "blow the whistle" on an "activity, policy or practice." Moreover, a Section 3a whistle-blowing employee must disclose "*an* activity, policy or practice *of the employer*," not merely "*any* activity, policy or practice." *Compare N.J.S.A.* 34:19-3a (emphasis added), *with N.J.S.A.* 34:19-3c (emphasis ***85** added); *see generally Higgins v. Pascack Valley Hosp.,* 158 *N.J.* 404, 419, 730 *A.*2d 327, 335 (1999) (remarking on construction to be attributed to Legislature's choice of term "any" in Section 3c, but not 3a, and "omission of the phrase 'of the employer' " in Section 3c). Plaintiff may have observed incidents of lack of diligence on the part of certain maintenance employees when responding to operational problems concerning toilets. However, even if the person or persons did not repair or restore operation of the clogged toilet as quickly as plaintiff believed possible or preferable, that dereliction does not equate to an "activity, policy or practice" "of the employer."

Further, to trigger CEPA protection under Section 3a, an employee must disclose "an activity, policy or practice ... that the employee reasonably believes *is in violation of a law, or a rule or regulation promulgated pursuant to law.*" *N.J.S.A.* 34:19-3a (emphasis added). Much of plaintiff's concern focused on the speed (or alleged lack thereof) with which the Board's employees addressed the maintenance issues he raised, and the Board's purported failure to schedule a meeting with plaintiff in a timely fashion. See *Hernandez, supra,* 354 *N.J.Super.* at 471, 475, 808 *A.*2d at 131, 133 (describing plaintiff's "attempts to bring [his concerns] to the attention of [the Board's] representatives" and "frustrat[ion] with maintenance's lack of response"). However, plaintiff has pointed to no law, regulation, or rule making it illegal for the Board not to address plaintiff's concerns as quickly as he would have liked.

Put simply, plaintiff's criticism of the timeliness of "maintenance's response" to occasional operational problems posed by toilets that clogged or light bulbs that burned out, or his dissatisfaction with the Superintendent's responsiveness to his request for a meeting, do not support a CEPA claim that rendered plaintiff immune from termination due to the Board's dissatisfaction with plaintiff's work performance. In that last respect, I cannot help but note that it was plaintiff's responsibility to clean the restrooms. His complaints about clogged toilets soiling the nearby ***86** floor of the restroom (however distasteful it is to contemplate such a circumstance in a school) is a complaint about a matter that lay within his own area of responsibility.

In summary, although plaintiff's desire for a more prompt response to the specific maintenance problems he encountered may have been admirable, he has failed to plead a cause of action under CEPA. Idiosyncratic responses by other employees to occasional operational problems do not constitute the type of illegal "activity, policy or practice" rendered actionable under *N.J.S.A.* 34:19-3a. We expect our trial courts to be gatekeepers to prevent the expenditure of time and resources on claims that do not raise a cognizable cause of action. The trial court's instincts were correct here. This matter should not have gone to the jury. The grant of JNOV to defendants should not be reversed, and plaintiff should not be allowed to return to the trial court to seek punitive damages, interest, and attorney's fees.

I respectfully dissent.

Chief Justice PORITZ and Justice VERNIERO join in this opinion.

For affirming-Justices LONG, ZAZZALI, and ALBIN and Judge CONLEY, temporarily assigned-4.

***For reversing*-Chief Justice PORITZ and Justices VERNIERO, LaVECCHIA-3.**

Parallel Citations

843 A.2d 1091 (Mem), 186 Ed. Law Rep. 457

Footnotes

1 Plaintiff testified that he had had some OSHA training. "OSHA" refers to the Occupational Safety and Health Administration, a federal administrative agency operating under the authority of the Occupational Safety and Health Act of 1970, 29 *U.S.C.A.* § 651 *et seq.*, and regulations promulgated pursuant thereto by OSHA.

2 Section 3c prohibits an employer from taking retaliatory action against an employee who "[o]bjects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes ... is in violation of a law, or a rule or regulation promulgated pursuant to law, or ... is incompatible with a clear mandate of public policy concerning public health, safety or welfare or protection of the environment." *N.J.S.A.* 34:19-3c.

3 The trial court's jury charge and the verdict sheet instructed the jury to consider only plaintiff's Section 3a claim, although the verdict sheet appears to have erroneously allowed the jury to take into account transgressions of "public policies," an ambiguous reference to a standard that has relevance only to the alleged Section 3c claim that was no longer in the case.

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