

2.32 NEW JERSEY CONSCIENTIOUS EMPLOYEE PROTECTION ACT (“CEPA”) (N.J.S.A. 34:19-1 et seq.) (Revised 04/2014)

Plaintiff claims that defendant [*insert alleged retaliatory action, e.g., terminated his/her employment, demoted him/her, failed to promote him/her, subjected him/her to a hostile work environment*]¹ because plaintiff [*insert alleged protected activity, such as disclosed or threatened to disclose to a supervisor or public body, or provided information or testimony to a public body, or objected to or refused to participate in*] regarding [*insert description of alleged wrongful activity, policy, or practice about which plaintiff “blew the whistle”*].²

Defendant denies these allegations and instead maintains that it [*insert alleged retaliatory action*] because [*insert defendant’s explanation, such as “plaintiff’s job performance was inadequate”, “plaintiff’s job was eliminated”,*

¹ This charge uses the pronoun “it” in referring to the defendant in recognition of the fact that the defendant will usually be the employer and thus will usually be an institutional entity. It is important to note that, as of the date of this Charge, it remains unsettled whether New Jersey recognizes the existence of individual liability under CEPA and conflicting case law supports both positions. *Compare Cokus v. Bristol Myers-Squibb Co.*, 362 N.J. Super. 245 (App. Div. 2003) and *Ecker v. Dana Transport Systems, Inc.*, 2006 WL 740468 (L. Div. 2006) (failing to recognize individual liability under CEPA), *with Maw v. Advanced Clinical Communications, Inc.*, 359 N.J. Super. 420 (App. Div. 2003), *rev’d on other grounds*, 179 N.J. 439 (2004) and *Zelkina v. Orlioukova*, 2009 WL 417282 (App. Div. 2009) (recognizing individual liability under CEPA). The Supreme Court has not addressed this issue.

² The trial court “must be precise in [its] communications with the jury and must ensure that the factual evidence could support a basis for a CEPA claim.” *Battaglia v. United Parcel Serv.*, 214 N.J. 518, 559 (2013). Thus, “[i]n instructing the jury on a CEPA claim, it is incumbent upon the court to identify the protected activity precisely” and not through a “broad and open-ended description in the jury charge.” *Id.* at 561-62.

etc.]. If defendant did, in fact, [*insert alleged retaliatory action*] because plaintiff [*insert alleged protected activity*] regarding [*insert description of alleged wrongful activity, policy, or practice about which plaintiff “blew the whistle”*], that would be unlawful under the *New Jersey Conscientious Employee Protection Act*.

NOTE TO COURT

Generally, juries should not be charged regarding the *prima facie* case and the shifting burdens of proof in cases brought under the CEPA. *See, e.g., Zappasodi v. State*, 335 N.J. Super. 83, 88-91 (App. Div. 2000) (holding in a CEPA case that “the ... analytical framework of pretext and burden-shifting need not be a component part of the jury charge”). The New Jersey Supreme Court has so held with regard to cases brought under the *Law Against Discrimination* (LAD). *Mogull v. CB Commercial Real Estate Group, Inc.*, 162 N.J. 449 (2000). The reasoning of *Mogull* that the burden-shifting analysis was created for purposes of summary judgment motions and will unduly confuse juries applies with equal force to CEPA claims. Consequently, the following language regarding the plaintiff’s *prima facie* burden should only be charged when one or more of the elements of the *prima facie* case are in dispute.

[If one or more of the prima facie elements is in dispute, charge the relevant portion(s) of the following explanation of the plaintiff’s prima facie burden:]

Plaintiff must show that it is more likely than not that (1) he/she reasonably believed that [*insert description of alleged wrongful activity, policy, or practice about which plaintiff “blew the whistle”*] was either (a) in violation of a law or rule or regulation issued under the law (including laws, rules, and regulations prohibiting fraud and criminal conduct), or (b) incompatible with a clear mandate of public policy concerning public health, safety, or welfare or the protection of the

environment;³ (2) he/she [*insert alleged protected activity*] regarding [*insert description of alleged wrongful activity, policy, or practice about which plaintiff “blew the whistle”*]; (3) defendant [*insert alleged retaliatory action*]; and (4) the existence of a causal connection between his/her protected activity and the retaliation by the defendant.^{4,5}

To prove the first element of his/her claim, plaintiff must establish that he/she reasonably believed that [*insert description of alleged wrongful activity, policy, or practice about which plaintiff “blew the whistle”*] was either (a) in violation of a law or rule or regulation issued under the law (including laws, rules, and regulations prohibiting fraud, crime, and improper health care), or (b) incompatible with a clear mandate of public policy concerning public health, safety, or welfare or the protection of the environment, plaintiff need not prove that [*insert description of alleged wrongful activity, policy, or practice about which plaintiff “blew the whistle”*] actually violated the law or a clear mandate of public

³ The first element of jury instructions setting forth the elements of a CEPA claim in cases involving a licensed or certified health care professional should read as follows: “Plaintiff must show that it is more likely than not that (1) he/she reasonably believed that [*insert description of alleged wrongful activity, policy, or practice about which plaintiff “blew the whistle”*] constituted improper quality of patient care”. *N.J.S.A.* 34:19-3.

⁴ *Dzwonar v. McDevitt*, 177 *N.J.* 451, 462 (2003) (setting forth elements of *prima facie* case under CEPA).

⁵ This portion of the charge dealing with the *prima facie* elements does not address the fourth *prima facie* element of a causal connection between the protected activity and the retaliatory action because that is the ultimate issue that the jury will decide, and it is addressed below in the instruction to the jury regarding whether the whistle-blowing was a determinative factor in causing the retaliatory action.

policy. Rather, plaintiff need only prove that he/she reasonably believed that to be the case. Put another way, plaintiff need not prove that a law or clear mandate of public policy would have been violated if the facts he/she alleges regarding *[insert description of alleged wrongful activity, policy, or practice about which plaintiff “blew the whistle”]* are true. The only thing you must decide with respect to this issue is whether plaintiff actually held the belief that *[insert description of alleged wrongful activity, policy, or practice about which plaintiff “blew the whistle”]* was unlawful or in violation of public policy, and whether that belief was reasonable.⁶ I charge you that there is a [law] [rule] [regulation] [public policy] that closely relates to the conduct about which plaintiff blew the whistle. That [law] [rule] [regulation] [public policy] states that *[insert description of relevant law/rule/regulation/public policy]*.⁷ You need not decide whether *[insert description of alleged wrongful activity, policy, or practice about which plaintiff “blew the whistle”]* actually violated that [law] [rule] [regulation] [public policy]. The only thing you must decide is whether plaintiff *believed* that *[insert description of alleged wrongful activity, policy, or practice about which plaintiff*

⁶ *Id.* at 462-64 (holding that CEPA “does not require a plaintiff to show that a law, rule, regulation or clear mandate of public policy actually would be violated if all the facts he or she alleges are true [; i]nstead, a plaintiff must set forth facts that would support an objectively reasonable belief that a violation has occurred ... [and] the jury then must determine whether the plaintiff actually held such a belief and, if so, whether that belief was objectively reasonable”).

⁷ *Id.* at 463-64 (holding that “the trial court must identify a statute, regulation, rule, or public policy that closely relates to the complained-of conduct”).

“blew the whistle”] violated the [law] [rule] [regulation] [public policy] that I just described, and, if so, whether plaintiff’s belief was reasonable.⁸

To prove the second element of his/her claim, plaintiff must establish that he/she actually “blew the whistle”. Thus, you must determine whether plaintiff has proven that, it is more likely than not that, he/she [*insert alleged protected activity*] regarding [*insert description of alleged wrongful activity, policy, or practice about which plaintiff “blew the whistle”*].

To prove the third element of his/her claim, plaintiff must establish that defendant took retaliatory action against him/her. Retaliatory action can be a discharge, suspension, demotion, or any other adverse employment action taken against an employee in the terms and conditions of employment.⁹ Retaliatory action does not need to be a single incident. Rather, it can include many separate but relatively minor instances of adverse action against an employee.¹⁰

[End Of Optional Prima Facie Element Section]

⁸ “When instructing juries, trial courts must be vigilant in identifying the essential complaint made by the employee in order that the jury will be able to test it against the standards that the law imposes as a prerequisite to recovery.” *Battaglia v. United Parcel Serv.*, 214 N.J. 518, 559-60 (2013). To that end, the trial court’s description must “provide the jury with the appropriate focus as a matter of law” so as to allow the jury to test the CEPA claim “against what plaintiff knew and reasonably believed, not upon what actually was or was not happening.” *Id.* at 562.

⁹ N.J.S.A. 34:19-2(e).

¹⁰ *Green v. Jersey City Bd. of Ed.*, 177 N.J. 434, 448 (2003); *Nardello v. Twp. of Voorhees*, 337 N.J. Super. 428, 434-435 (App. Div. 2005); *Beasley v. Passaic County*, 377 N.J. Super. 585, 609 (App. Div. 2005).

NOTE TO COURT

The following addresses the fourth and final element of plaintiff's *prima facie* case. It is also the ultimate issue to be decided by the jury:

To prove the fourth and final element and to prevail in his/her case, the plaintiff must prove, by a preponderance of the evidence, the existence of a causal connection between his/her protected activity and the retaliation by his/her employer. In other words, it is plaintiff's burden to prove that it is more likely than not that defendant engaged in intentional retaliation against plaintiff because plaintiff [*insert alleged protected activity*] regarding [*insert description of alleged wrongful activity, policy, or practice about which plaintiff "blew the whistle"*]. That is the ultimate issue you must decide: did defendant [*insert alleged retaliatory action*] because plaintiff [*insert alleged protected activity*] regarding [*insert description of alleged wrongful activity, policy, or practice about which plaintiff "blew the whistle"*]. Plaintiff may prove this directly, by proving that a retaliatory reason more likely than not motivated defendant's action, or indirectly, by proving that defendant's stated reason for its action is not the real reason for its action.¹¹ You may find that defendant had more than one reason or motivation for its actions. For example, you may find that defendant was motivated both by a

¹¹ *Estate of Roach v. TRW, Inc.*, 164 N.J. 598, 612 (2000) (holding that in "[e]xamining whether a retaliatory motive existed, jurors may infer a causal connection based on the surrounding circumstances").

retaliatory reason and by other, non-retaliatory factors, such as plaintiff’s job performance. To prevail, plaintiff is not required to prove that retaliation was the only reason or motivation for defendant’s actions. Rather, plaintiff must only prove that retaliation played a role in the decision and that it made an actual difference in defendant’s decision. If you find that retaliation did make an actual difference in defendant’s decision, then you must enter judgment for the plaintiff. If, however, you find that defendant would have made the same decision regardless of whether plaintiff [*insert alleged protected activity*] regarding [*insert description of alleged wrongful activity, policy, or practice about which plaintiff “blew the whistle”*], then you must enter judgment for the defendant.¹²

Because direct proof of retaliation is often not available, plaintiff is allowed to prove retaliation by circumstantial evidence. In that regard, you are to evaluate all indirect evidence of retaliation that you find was presented during the trial. [*The court may refer to specific types of indirect evidence presented during the trial, such as comparative evidence, statistical evidence, prior conduct, and/or comments of the parties, etc.*]

¹² *Donofry v. Autotote Systems, Inc.* 350 N.J. Super. 276, 296 (App. Div. 2001) (holding that “[p]laintiff’s ultimate burden of proof is to prove by a preponderance of the evidence that his protected whistle-blowing activity was a determinative...motivating factor in defendant’s decision to [take adverse employment action against plaintiff] – that it made a difference [;plaintiff need not prove that his whistle-blowing activity was the only factor in the decision to take adverse employment action]”).

One kind of circumstantial evidence can involve the timing of events, *i.e.*, whether defendant's action followed shortly after defendant became aware of plaintiff's [*insert alleged protected activity*]. While such timing may be evidence of retaliation, it may also simply be coincidental – that is for you to decide. Another kind of circumstantial evidence might involve proof that defendant's behavior toward plaintiff changed for the worse after defendant became aware of plaintiff's [*insert alleged protected activity*]. Again, this may be evidence of retaliation, or it may simply be coincidental – that is for you to decide.

You should also consider whether the explanation given by defendant for its actions was the real reason for its actions. If you do not believe the reason given by defendant is the real reason that defendant [*insert alleged retaliatory action*] against plaintiff, you may, but are not required to find, that plaintiff has proven retaliation.¹³

You are permitted to do so because, if you find that defendant has not told the truth about why it acted, you may conclude that it is hiding retaliation. However, while you are permitted to find retaliation based upon your disbelief of defendant's stated reasons, you are not required to do so. This is because you may

¹³ *Fleming v. Correctional Healthcare Solutions, Inc.*, 164 N.J. 90 (2000) (holding in CEPA case that “the ‘factfinder’s disbelief of the reasons put forward by the defendant ... may ... suffice to show intentional [retaliation]” (quoting *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 511, 113 S.Ct. 2742, 2749, 125 L.Ed. 2d 407 (1993))).

conclude that defendant's stated reason is not the real reason, but that the real reason is something other than unlawful retaliation.

In short, the ultimate issue that you must decide is whether plaintiff has proven that it is more likely than not that defendant unlawfully retaliated against him/her for his/her [*insert alleged protected activity*].