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parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2260-15T1

JOHN P. MCGOVERN,

Plaintiff-Respondent,

v.

CITY OF ORANGE TOWNSHIP  
and DWAYNE WARREN,

Defendants-Appellants,

and

WILLIS EDWARDS, III,

Defendant.

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Argued July 6, 2017 – Decided July 21, 2017

Before Judges Yannotti and Haas.

On appeal from Superior Court of New Jersey,  
Law Division, Essex County, Docket No. L-1596-  
14.

Christopher K. Harriott argued the cause for  
appellants (Florio Kenny Raval, L.L.P.,  
attorneys; Mr. Harriott, of counsel and on the  
briefs).

Ronald J. Ricci argued the cause for  
respondent (Ricci, Fava & Bagley, L.L.C.,  
attorneys; Mr. Ricci, of counsel and on the  
brief; Marisa Dominguez, on the brief).

PER CURIAM

Defendants City of Orange Township (City) and Dwayne Warren (Warren) appeal from an order entered by the Law Division on January 7, 2016, which determined that the City terminated plaintiff John P. McGovern in violation of the New Jersey Conscientious Protection Act (CEPA), N.J.S.A. 34:19-1 to -14; ordered plaintiff's reinstatement to his position; awarded plaintiff damages, back pay, attorney's fees and costs; and required the City to make pension contributions on plaintiff's behalf from the date of his termination to the date of his reinstatement. We affirm.

I.

In March 2014, plaintiff, a former attorney in the City's Law Department, filed a complaint in the trial court against defendants and Willis Edwards, III (Edwards).<sup>1</sup> According to the complaint, in the time relevant to the complaint, Warren was the City's Mayor, and Edwards was the City's Business Administrator. The City employed plaintiff as an Assistant City Attorney.

Plaintiff alleged that the City's Clerk had been on medical leave following an automobile accident, and the City paid all of

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<sup>1</sup> In July 2015, plaintiff dismissed his claims against Edwards. Therefore, in this opinion, we refer to the City and Warren as defendants.

the Clerk's medical bills and temporary disability benefits because it was "a workers' compensation matter." Plaintiff claimed Warren and Edwards wanted to "transition" the Clerk back to work on a full-time basis. The Clerk allegedly had obtained a settlement of his lawsuit against a third-party, and owed the City about \$100,000, which was secured by a workers' compensation lien.

Plaintiff claimed Edwards told him to waive the lien so that the Clerk could keep all the money he received in the settlement of his lawsuit. Plaintiff alleged that he told Edwards that the City Council and the Mayor would have to approve the waiver of the lien, but Edwards insisted the Clerk should be allowed to keep all of the settlement monies.

Plaintiff further alleged that he told his supervisors he was concerned Edwards had asked him to do "something illegal and contrary to [p]ublic [p]olicy." Plaintiff asserted that thereafter, he ignored Edwards' request that he waive the lien, but Edwards allegedly confronted him "in a menacing and hostile manner" and demanded that he write a letter waiving the lien.

Plaintiff claimed that on January 31, 2012, he "nervously" wrote the letter and waived the lien. The letter stated that he was waiving the lien at Edwards' direction. Plaintiff asserted that Edwards was "infuriated" because he stated that he waived the lien because Edwards directed him to do so. On February 1, 2013,

plaintiff was told he was going to be fired. Plaintiff asked Warren if he was going to be terminated, and Warren allegedly told him he was being "let go" because the City was making "budget cuts." On February 5, 2013, plaintiff received a letter stating he was terminated, effective February 1, 2013.

In his complaint, plaintiff asserted claims of wrongful discharge, violation of CEPA, and breach of contract. He sought reinstatement to his former position, compensatory and punitive damages, attorney's fees and costs, and other relief.

In August 2014, plaintiff served a discovery request upon the defendants. On January 9, 2015, the court granted plaintiff's motion and struck defendants' answer without prejudice pursuant to Rule 4:23-5(a)(1) because they had not responded to plaintiff's discovery requests within the time required.

In March 2015, plaintiff filed a motion to strike defendants' answer with prejudice pursuant to Rule 4:23-5(a)(2), and to schedule a proof hearing on his claims. Defendants then filed a motion to restore their answer. The judge later heard oral argument on the motions.

At the argument, plaintiff's attorney noted that, in this case, plaintiff was claiming he was fired after he complained to his superiors that Edwards had ordered him to waive a significant workers' compensation lien for a person who was his friend or

associate. Plaintiff's attorney stated that defendants had taken the position that plaintiff was an at-will employee, and they were not required to provide any reasons for terminating his employment. Plaintiff's attorney noted that there were other outstanding discovery requests.

Defendants' attorney responded by stating that plaintiff was fired because a new administration had taken office, and the new Mayor had the power and authority to hire and fire the City's attorneys. The judge stated that, if that was the City's reason for firing plaintiff, it should put it in writing. Plaintiff's attorney consented to restoring defendants' answer, but indicated that his consent was conditioned upon defendants providing a written statement of the reasons plaintiff was fired, as well as responses to plaintiff's other outstanding discovery requests.

On May 29, 2015, the judge entered an order, which denied plaintiff's motion to strike defendants' answer with prejudice. The judge also entered an order dated May 29, 2015, which vacated the order striking defendants' answer, restored the answer, extended the time for discovery, and required defendants to respond to plaintiff's outstanding discovery requests within ten days after the order.

It appears that on June 4, 2015, defendants provided answers to interrogatories. Nevertheless, plaintiff's attorney wrote to

the court on July 30, 2015, and asserted that defendants had not fully complied with the court's order of May 29, 2015. The judge conducted a case management conference on August 26, 2015, and entered an order dated September 8, 2015, extending the time for discovery until November 30, 2015. The order identified the discovery to be completed and the dates for completion.

On September 28, 2015, plaintiff again filed a motion to strike defendants' answer with prejudice. In a certification submitted in support of the motion, plaintiff's attorney stated that defendants had not complied with the court's September 8, 2015 order. Defendants did not oppose the motion. On October 23, 2015, the judge entered an order striking the defendants' answer with prejudice. The judge scheduled a proof hearing for December 1, 2015.

On November 25, 2015, defendants filed a motion to vacate the order striking their answer and extend the time for discovery. In a supporting certification, counsel for defendants stated that defendants had produced one witness for a deposition, but other depositions had not been scheduled because he had been involved in a federal court matter. Plaintiff opposed the motion.

On December 8, 2015, the judge conducted a proof hearing, and defendants were represented by counsel. The judge denied defendants' request to adjourn the proof hearing pending a decision

on defendants' motion to restore their answer. At the proof hearing, plaintiff testified and the court permitted defendants' attorney to conduct limited cross-examination. The judge then placed an oral decision on the record. The judge found that the City had terminated plaintiff in violation of CEPA for whistleblowing activity.

The judge noted that plaintiff had objected to "pressure" from Edwards to compromise a workers' compensation lien, which plaintiff believed was a violation of the City's ordinance. The judge pointed out that he had ordered defendants to provide a written statement of the reasons plaintiff was fired, and they had not done so. The judge found that plaintiff should be restored to his position and awarded back pay of \$136,048.96.

The judge also awarded plaintiff compensatory damages of \$50,000 for the embarrassment and anxiety plaintiff suffered as a result of his termination. In addition, the judge determined that plaintiff was entitled to lost benefits, specifically, the pension contributions the City should have made for plaintiff from the date he was terminated until his reinstatement. The judge also determined that plaintiff was entitled to an award of attorney's fees and costs.

Thereafter, defendants filed a supplemental certification with the court, stating that the court should have adjourned the

proof hearing. Counsel asserted that the court's prior order striking defendants' answer did not comply with Rule 4:23-2 or Rule 4:23-5. Counsel stated that any failure to provide discovery was not intentional. He also stated the City was not required to provide any reason for the termination of an at-will employee, but defendants had provided those reasons to plaintiff verbally and by letter.

On December 18, 2015, the judge heard oral argument on defendants' motion to vacate the order striking their answer and to restore their defense. The judge placed an oral decision on the record. The judge observed that the case had "a very long and extremely tortured procedural history." The judge found that defendants' attorney had "consistently ignored" plaintiff's discovery requests, forcing plaintiff to file numerous motions.

The judge pointed out that initially the court had suppressed defendants' answer without prejudice for failure to provide discovery, and plaintiff's attorney had consented to restoring the answer on the condition that defendants provide a written statement as to reasons the City fired plaintiff. The judge rejected defendants' assertion that plaintiff was not prejudiced by their failure to provide the reasons plaintiff was fired.

The judge added that defendants' attorney continued to fail to comply with the court's discovery orders, even though counsel



told the judge and plaintiff's attorney "that he would provide this information and he would get it to him quickly." The judge stated that although the court had given defendants many opportunities to comply, they did not do so. Finally, plaintiff filed a motion to strike defendants' answer with prejudice, which was unopposed. The motion was granted.

The judge found that defendants had engaged in a pattern of discovery violations, which included defendants' failure to comply with the court's orders. The judge stated that defendants' attorney "[h]as shown a complete lack of respect for [the] [court's] orders and the discovery rules."

The judge determined that the order entered on October 23, 2015, striking defendants' answer with prejudice was appropriate and there was no basis to vacate that order. The judge also stated that plaintiff was entitled to supplemental attorney's fees because plaintiff's attorney had been forced to respond to the motion.

The judge entered an order dated January 7, 2016, which awarded plaintiff back pay in the amount of \$136,048.96, with pre-judgment interest of \$6511.57, totaling \$142,560.53; awarded plaintiff compensatory damages of \$50,000; reinstated plaintiff to his position as Assistant City Attorney; required the City to pay pension contributions for plaintiff from February 1, 2013,

until the date of his reinstatement; and directed defendants to pay plaintiff attorney's fees and costs totaling \$37,354. The order stayed plaintiff's reinstatement pending any appeal defendants may take.

Thereafter, defendants filed a notice of appeal. On May 13, 2015, we granted defendants' motion to stay the monetary judgment entered against them pending disposition of the appeal.

## II.

On appeal, defendants argue that the trial court erred by striking their answer with prejudice, entering the default judgment against them, and refusing to vacate the same. Defendants contend their attorney's failure to comply with the court's orders was not deliberate, and less drastic sanctions were available to address the discovery violations.

Rule 4:23-2(b) authorizes the trial court to impose sanctions for failing to comply with a court order "to provide or permit discovery." Among other sanctions, the court may enter "[a]n order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof with or without prejudice, or rendering a judgment by default against the disobedient party." R. 4:23-2(b)(3).

The ultimate sanction of dismissal should be imposed "only sparingly." Abtrax Pharms., Inc. v. Elkins-Sinn, Inc., 139 N.J. 499, 514 (1995) (quoting Zaccardi v. Becker, 88 N.J. 245, 253 (1982)). "The dismissal of a party's cause of action, with prejudice, is drastic and is generally not to be invoked except in those cases in which the order for discovery goes to the very foundation of the cause of action, or where the refusal to comply is deliberate and contumacious." Ibid. (quoting Lanq v. Morgan's Home Equip. Corp., 6 N.J. 333, 339 (1951)). "Since dismissal with prejudice is the ultimate sanction, it will normally be ordered only when no lesser sanction will suffice to erase the prejudice suffered by the non-delinquent party, or when the litigant rather than the attorney was at fault." Ibid. (quoting Zaccardi, supra, 88 N.J. at 253).

A court may strike a pleading with prejudice in order to penalize those whose conduct warrants such relief, and to deter others from violating the discovery rules. Id. at 514-15 (citing Zaccardi v. Becker, 162 N.J. Super. 329, 332 (App. Div.), certif. denied, 79 N.J. 464 (1978)). We review an order striking a pleading for a discovery violation for abuse of discretion. Id. at 517.

Notwithstanding defendants' arguments to the contrary, we are convinced the motion judge did not mistakenly exercise its discretion by striking defendants' answer with prejudice. The

record supports the court's finding that defendants' counsel "consistently ignored" the court's discovery orders, despite providing assurances that defendants would comply with the discovery requests. Moreover, the discovery sought related directly to the foundation of plaintiff's cause of action under CEPA.

To establish a cause of action under CEPA, the plaintiff must demonstrate that:

- (1) he or she reasonably believed that his or her employer's conduct was violating either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy;
- (2) he or she performed a "whistle-blowing" activity described in N.J.S.A. 34:19-3[(c)];
- (3) an adverse employment action was taken against him or her; and (4) a causal connection exists between the whistle-blowing activity and the adverse employment action.

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

If the plaintiff presents a prima facie case under CEPA, "the defendant must then come forward to advance a legitimate reason for discharging [the] plaintiff." Massarano v. N.J. Transit, 400 N.J. Super. 474, 492 (App. Div. 2008) (quoting Zappasodi v. N.J. Dept. of Corrs., 335 N.J. Super. 83, 89 (App. Div. 2000)). Plaintiff is required to demonstrate that the reasons proffered by the employer are not worthy of belief. Kolb v. Burns, 320 N.J. Super. 467, 479 (App. Div. 1999).

As we noted previously, defendants claimed that because plaintiff was an at-will employee, they were not obligated to provide any reason for his discharge. However, where the plaintiff asserts a claim of wrongful termination under CEPA, and the plaintiff presents a prima facie case under CEPA, the defendant has the burden of coming forward with evidence showing that it discharged the plaintiff for a legitimate reason.

Here, plaintiff properly sought a statement of the reasons that the City would advance as justification for his termination. The record shows that defendants consistently refused to comply with the court's orders, which required the City to set forth in writing the reasons for plaintiff's discharge. Furthermore, defendants failed to provide other discovery, which also was addressed to the core of plaintiff's CEPA claim. Thus, plaintiff was prejudiced by defendants' failure to comply with the court's discovery orders.

We note that in December 2015, when defendants sought to restore their answer, their attorney asserted that in defendants' answers to interrogatories, defendants had asserted they had no duty to provide a reason for plaintiff's termination. Counsel also stated that Dan Smith, the City's attorney, had written a letter to plaintiff's attorney, stating that when a new Mayor takes office, it is expected that there may be a change of personnel.

Plaintiff's attorney said he did not receive the letter. In any event, neither the answer to the interrogatories or Smith's letter provided what plaintiff had been seeking, specifically, a statement of the reasons plaintiff was fired.

Defendants argue, however, that rather than strike their answer, the trial court should have imposed lesser sanctions. This argument fails because the trial court did, in fact, employ a series of lesser sanctions before ultimately deciding to strike defendants' answer with prejudice. As we have explained, the court first struck defendants' answer without prejudice, but defendants did not thereafter provide the discovery requested.

The court later denied plaintiff's motion to strike the answer with prejudice, and entered an order compelling defendants to provide discovery. Defendants did not comply with that order. The court conducted a case management conference, and entered an order specifying the discovery that remained, and the time in which discovery must be completed. Defendants did not comply with the order.

Defendants nevertheless contend that the trial court could have ordered depositions of persons with knowledge of the reasons for plaintiff's termination; however, the court had entered the order of September 8, 2015, which mandated that all depositions be noticed and completed within forty-five days of that order.

Defendants produced only one witness for a deposition within the time required. That witness was a secretary who did not have any relevant knowledge of the reasons for plaintiff's termination.

Defendants further argue that the court could have entered an order stating that defendants had not articulated a legitimate reason for plaintiff's termination, and prohibited defendants from presenting any evidence on that issue. However, such an order would have been tantamount to granting partial summary judgment to plaintiff on his CEPA claim, leaving only the issue of damages for trial. This is essentially what happened here.

Defendants also contend the court could have required their prior attorney to pay plaintiff's attorney's fees and other expenses caused by their failure to comply with the court's discovery orders. Even if such an order had been entered, plaintiff still would not have had the discovery he sought, which went to the heart of his CEPA claim. This was not a lesser sanction that would have addressed defendants' failure to comply with the court's discovery orders.

### III.

Next, defendants argue that the trial court erred by failing to vacate the order striking their answer with prejudice. They contend such relief should have been granted pursuant to Rule 4:50-1. We disagree.

A trial court's decision on a Rule 4:50-1 motion is entitled to "substantial deference, and should not be reversed unless it results in a clear abuse of discretion." US Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467 (2012). An abuse of discretion may be found when a decision lacks a "rational explanation," represents an inexplicable "[departure] from established policies," or rests "on an impermissible basis." Ibid. (quoting Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 123 (2007)).

Rule 4:50-1 provides that the court may relieve a party from a judgment for the following reasons:

(a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under [Rule] 4:49; (c) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (d) the judgment or order is void; (e) the judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application; or (f) any other reason justifying relief from the operation of the judgment or order.

Defendants argue that Rule 4:50-1(f) applies in this case. However, relief under this subsection of the rule is only available when "truly exceptional circumstances are present." Guillaume,



supra, 209 N.J. at 484 (quoting Hous. Auth. of Morristown v. Little, 135 N.J. 274, 286 (1994)). "The rule is limited to 'situations in which, were it not applied, a grave injustice would occur.'" Ibid. (quoting Hous. Auth. of Morristown, supra, 135 N.J. at 289).


Defendants argue that the conduct of their prior counsel in failing to comply with the court's orders presents exceptional circumstances that warrant relief under the rule. Defendants contend their former attorney failed to keep them reasonably informed of the status of the matter, and did not handle the matter in accordance with accepted standards of care. They assert that the failure to provide discovery was not due to any fault on their part.

Defendants have not, however, shown that the trial court's refusal to grant relief under Rule 4:50-1(f) was a mistaken exercise of discretion. Defendants have not presented an affidavit or certification which establishes that their attorney failed to keep them reasonably informed of the status of the matter, or that the failure to comply with the court's prior discovery orders was entirely the fault of their attorney. Defendants also have not refuted plaintiff's claim that all parties were well aware of what was required, but defendants nevertheless deliberately refused to comply with the court's discovery orders.

Simply put, defendants have not shown "truly exceptional circumstances," which are required for relief under Rule 4:50-1(f). Guillaume, supra, 209 N.J. at 484 (quoting Hous. Auth. of Morristown, supra, 135 N.J. at 286). They have not shown that the court's order represents a grave injustice. Ibid. (citing Hous. Auth. of Morristown, supra, 135 N.J. at 289).

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION