

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5626-10T3

JOE PERRY,

Plaintiff-Respondent,

v.

COUNTY OF HUDSON,

Defendant-Appellant,

and

ROBERT F. MURRAY, DONALD
DALY, JAMES DALY, GARY
GUSICK AND DIANA YOUST,

Defendants.

Argued February 12, 2014 – Decided March 13, 2014

Before Judges Fuentes, Simonelli and
Fasciale.

On appeal from the Superior Court of New
Jersey, Law Division, Hudson County, Docket
No. L-0713-08.

Cindy Nan Vogelman argued the cause for
appellant (Chasan Leyner & Lamparello, P.C.,
attorneys; Ms. Vogelman, of counsel and on
the briefs; Robert E. Finn, on the briefs).

Brian F. Curley argued the cause for
respondent.

PER CURIAM

Plaintiff Joe Perry filed a civil action against defendant County of Hudson and other supervisory level staff¹ alleging he was harassed and ultimately terminated from his position as a Community Youth Worker ("CYW") in violation of the New Jersey Conscientious Employee Protection Act ("CEPA"), N.J.S.A. 34:19-1 to -14. Plaintiff claimed defendant retaliated against him when he engaged in protected whistle-blowing activities by complaining to his supervisors and to the Juvenile Justice Commission about the manner defendant operated the juvenile In Home Detention (IHD) Program. Specifically, plaintiff claimed defendant intentionally modified or distorted the criteria for IHD eligibility to allow dangerous juveniles to participate in the Program, thereby reducing the population of the County's youth detention facility. According to plaintiff, this policy increased the risk of recidivism by these juveniles and placed CYW staff monitors like himself at a greater risk of being injured.

The jury returned a unanimous verdict in plaintiff's favor, awarding him \$406,792 in damages for lost wages and emotional distress. The trial court thereafter entered a final judgment in the amount of \$852,096 that included an award of counsel fees

¹ Plaintiff voluntarily dismissed his claims against Robert F. Murray, Donald Daly, James Daly, Gary Gusick, and Diana Youst.

and costs. Defendant now appeals arguing, inter alia, that the trial court erred by failing to dismiss plaintiff's cause of action as a matter of law because the Family Part Judge has the exclusive discretionary authority to admit a juvenile into the IHD Program under the menu of alternatives to pre-adjudication detention under N.J.S.A. 2A:4A-34(d)(6). We reject defendant's arguments and affirm.

We discern the following facts from the evidence adduced at that trial. Plaintiff began working as a CYW in July 2001. His principal responsibility was to monitor juveniles who had been accepted into the IHD Program. Judges sitting in the Family Part assigned to hear juvenile delinquency cases used the IHD Program as an alternative to detaining a juvenile in defendant's detention facility. Defendant and the court administered the Program together.

Until 2002, a screening committee, comprised of the Program Director Abdul Muhammad and representatives from several social and State programs, met and decided whom to recommend to the judge for placement into the Program. The recommendation was based on the nature of the charges pending against the juvenile, whether the juvenile had a problem with school or with illegal drugs, the likelihood that the juvenile would benefit from the Program, and whether the parents or guardians would cooperate

with the Program's requirements. According to plaintiff and Muhammad, the policy had always been that a juvenile was not eligible for the Program if he or she was charged with a serious offense, such as a weapons-related offense, armed robbery, arson, or homicide. In 2002, the committee stopped meeting, and Muhammad and plaintiff began deciding whether to recommend juveniles into the Program. This procedure continued until about the spring of 2005.

Beginning in April 2005, the Program administration changed the way the Program functioned. The administration prevented CYWs from entering the courthouse, and began recommending that juveniles charged with serious offenses be placed in the Program. These changes made it difficult for CYWs to do their jobs and alarmed plaintiff. At trial, plaintiff introduced evidence that, due to overcrowding in defendant's detention facility between 2005 and 2006, defendant was under pressure to place more juveniles into the Program.

When plaintiff learned juveniles charged with committing acts of violence and weapons-related offenses were being admitted into the Program, he complained verbally to Muhammad that admitting such individuals caused a safety threat to himself and the community. Plaintiff and Muhammad relayed these issues to Muhammad's superior, Donald Daly, the Director of the

Hudson County Juvenile Detention Center (the "JDC"), who requested plaintiff to write down his complaints. On April 13, 2005, the day after plaintiff had expressed his complaints, plaintiff, another CYW, and Muhammad wrote a memorandum to Donald Daly stating in part that

[m]any juveniles that have been convicted of serious crimes, such as homicide, aggravated assault (with deadly intent), possession of a firearm, and other similar acts, are referred to the [P]rogram, without much consideration as to the nature of their offenses.

. . . .

We believe that juvenile offenders that have already exhibited aggressive and/or threatening behavior may cause a danger to the community, as well as to the [CYW] assigned to monitor their case. If a juvenile poses a threat during a home visit, [CYWs] have no protection against firearms or weapons attacks.

We request that greater consideration be given as to the nature of the offenses before referring a juvenile for placement in the [Program]. This action should be taken to ensure the safety of our staff as well as the community.

Although neither Daly nor any other representative of the County responded to this memorandum, plaintiff continued to complain orally to Muhammad without any results. Plaintiff testified that after he expressed his objections regarding the changes to the Program, Daly; James Murray, Division Chief of the JDC; and

Diana Youst, Deputy Chief of the JDC, harassed him by criticizing his work, disciplining him for petty matters, imposing unachievable goals, and accusing him of things he did not do.² Despite these ostensible performance deficiencies, plaintiff received a favorable yearly evaluation in January 2006.

On March 31, 2006, after defendant failed to sufficiently address plaintiff's continued complaints, plaintiff issued a memorandum to the Executive Director of the New Jersey Juvenile Justice Commission (the "JJC"), complaining about the new IHD Program procedures,³ and reiterating his previous objections. He stated, in part, that

[d]ue to the serious nature of the offenses being committed by some of the juveniles, the [CYWs] forwarded a[n April 2005] memo expressing their concerns about their safety when visiting a juvenile that has been charged with possession of a deadly weapon

² The listed persons accused plaintiff of scheduling a vacation at an inconvenient time, failing to timely forward biweekly reports, and producing incomplete files.

³ Because CYWs were no longer allowed entry into the courthouse, they: (1) did not have immediate access to case files or an office; (2) could not meet with parents, guardians, or juveniles in private rooms; (3) were unavailable to the court; and (4) could not efficiently complete paperwork or schedule meetings with families who appeared at the courthouse. Also, CYWs were no longer allowed to give the parents and guardians their pager numbers, which meant that in the event of an emergency after business hours, the CYWs were unavailable to the families as a resource.

or aggravated assault. During one of their staff meetings, they requested that bullet-proof vests be provided to them, [which were never provided to them].

Plaintiff "strongly urged" that the JJC investigate the JDC's supervision of the Program. In January 2007, Personnel Officer Anthony Staltari recommended that plaintiff be terminated due to insubordination, neglect of duty, and conduct unbecoming a public employee. In February 2007, Murray terminated plaintiff, citing those same charges.

Plaintiff sought other employment after his termination, but was not successful. Plaintiff subsequently filed his complaint in February 2008. The jury returned a verdict for plaintiff, defendant unsuccessfully moved for a new trial, and defendant then appealed.

On appeal, defendant argues that (1) the trial judge erred by denying its motion for a directed verdict pursuant to Rule 4:37-2(b); (2) the jury charges and verdict sheet were flawed; (3) plaintiff failed to show defendant's proffered reason for terminating him was pretextual; and (4) the counsel fee award should be vacated if we reverse the judgment. Because we reject all of defendant's arguments attacking the legal viability of the jury verdict, the argument related to the award of counsel fees is now moot. We focus, instead, on defendant's remaining arguments.

I.

We begin by addressing defendant's contention that the court erred in denying its motion for a directed verdict. Defendant argued that plaintiff did not have an objectively reasonable belief that defendant violated a law, rule, regulation, or clear mandate of public policy because a judge, not defendant, decided to place juveniles into the Program. Defendant also maintained that plaintiff did not participate in whistle-blowing activity.

Pursuant to Rule 4:37-2(b), a court should deny a motion for a directed verdict "if the evidence, together with the legitimate inferences therefrom, could sustain a judgment in plaintiff's favor." The same standard applies to an appellate court's review. Polyard v. Terry, 160 N.J. Super. 497, 505-06 (App. Div. 1978), aff'd, 79 N.J. 547 (1979). We have instructed that

[n]either the trial judge nor the appellate court is concerned with the weight, worth, nature or extent of evidence, but must accept as true all the evidence supporting the party opposing the motion, and accord him [or her] the benefit of all favorable inferences. Then, if reasonable minds could differ, the motion must be denied.

[Ibid.]

Applying these standards, we see no error.

A.

Plaintiff's CEPA claims are predicated on N.J.S.A. 34:19-3a(1) and -3c(3), which state that

[a]n employer shall not take any retaliatory action against an employee because the employee does any of the following:

a. Discloses, . . . to a supervisor . . . an activity, policy or practice of the employer, . . . with whom there is a business relationship, that the employee reasonably believes:

(1) is in violation of a law, or a rule or regulation promulgated pursuant to law . . .

c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:

. . . .

(3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.

To establish a claim under N.J.S.A. 34:19-3c(3), a plaintiff must show 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. 34:19-3c; (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).]

When a plaintiff bases a CEPA claim on a violation of public policy, like here, the plaintiff "must identify a statute, regulation, rule, or public policy that closely relates to the complained-of conduct." Id. at 463. "The trial court can and should enter judgment for a defendant when no such law or policy is forthcoming." Ibid. However, the plaintiff "need not show that his or her employer or another employee actually violated the law or a clear mandate of public policy. Instead, the plaintiff simply must show that he or she reasonably believes that to be the case." Id. at 462 (citations and internal quotation marks omitted). To find otherwise would be inconsistent with the goal of CEPA, which is "not to make lawyers out of conscientious employees but rather to prevent retaliation against those employees who object to employer conduct that they reasonably believe to be unlawful or indisputably dangerous to the public health, safety or welfare." Id. at 464 (quoting Mehlman v. Mobil Oil Corp., 153 N.J. 163, 193-94 (1998)).

When a defendant moves for a directed verdict on the ground that the plaintiff did not have a reasonable belief that the defendant's conduct violated a law, rule, or clear mandate of

public policy, "the trial court must make a threshold determination that there is a substantial nexus between the complained-of conduct" and the law, rule, or public policy that the plaintiff believed the defendant violated. Ibid. Here, the judge found properly that a substantial nexus existed.

Plaintiff contended that Donald Daly's recommendations to judges sitting in the Family Part that potentially violent juveniles be admitted into the IHD Program violated N.J.S.A. 2A:4A-34, which enumerates the criteria for placing a juvenile in detention or, in certain instances, releasing the juvenile into a home detention program such as the IHD.

N.J.S.A. 2A:4A-34 provides that

a. Except as otherwise provided in this section, a juvenile charged with an act of delinquency shall be released pending the disposition of a case, if any, to any person or agency provided for in this section upon assurance being received that such person or persons accept responsibility for the juvenile and will bring him before the court as ordered.

. . . .

d. The judge or court intake officer prior to making a decision of detention shall consider and, where appropriate, employ any of the following alternatives:

. . . .

(6). Release with required participation in a home detention program[.]

. . . .

e. In determining whether detention is appropriate for the juvenile, the following factors shall be considered:

- (1) The nature and circumstances of the offense charged;
- (2) The age of the juvenile;
- (3) The juvenile's ties to the community;
- (4) The juvenile's record of prior adjudications, if any; and
- (5) The juvenile's record of appearance or nonappearance at previous court proceedings.

We agree with the trial judge that the foregoing statute supported plaintiff's reasonable belief that defendant violated the law and public policy by recommending into the IHD Program juveniles who had committed violent crimes and weapons offenses, even though judges ultimately decided to admit juveniles into the Program. From N.J.S.A. 2A:4A-34 flows a general public policy that reflects a delicate balance favoring releasing juveniles who are charged with non-violent offenses, have little to no prior contacts with the juvenile justice system, and have responsible adult supervision willing and able to assume responsibility for the juvenile's conduct. The other side of the scale reflects the concern for protecting society by detaining high-risk youths who are facing serious charges involving violent offenses, have a long history of adjudications

of delinquencies, and lack adult supervision.

The statute makes clear that a juvenile charged with a violent crime or weapons offense should be detained and not released into the community. See Higgins v. Pascack Valley Hosp., 158 N.J. 404, 419 (1999) (defining whistle-blowing activity under N.J.S.A. 34:19-3c as objecting to "any" act that the employee reasonably believed violated a law, rule, regulation, or public policy). Additionally, Rule 5:21-2(a) precludes a judge from releasing a juvenile who pose a threat to public safety. The Rule provides in part that

[w]henever it will not adversely affect the health, safety or welfare of a juvenile, the juvenile shall be released pending disposition to an authorized person or agency upon written assurance that such person or agency shall assume responsibility for the juvenile subject to conditions which may be imposed by the court and shall bring the juvenile before the court at all scheduled hearings or as otherwise ordered.

As a result, the CEPA protections applied to plaintiff's complaints regarding defendant's recommendations and changes to the Program.

Muhammad testified that in the years that he supervised the IHD Program, judges always followed his recommendations, because they were based on the premise that juveniles charged with weapons offenses and violent crimes did not qualify for placement. Here, the trial judge found a substantial nexus

existed between plaintiff's complaints and the laws providing the criteria for detention and release into the community. Stated differently, although the Family Part judge made the ultimate decision to release or detain a juvenile, the judge's decision was heavily influenced by the criteria for eligibility into the IHD Program developed by Donald Daly as the Director of the Hudson County Juvenile Detention Center, as well as others high level supervisory staff employed by or acting on behalf of defendant. Thus, whether plaintiff had a reasonable belief that defendant violated a law or public policy was a question for the jury to determine.

B.

We disagree with defendant's contentions that plaintiff failed to introduce evidence of whistle-blowing activity and that the April 2005 and March 2006 memos were insufficient to constitute whistle-blowing activity under CEPA. Plaintiff made numerous verbal complaints regarding defendant's conduct, which the memos documented.

Protected whistle-blowing activities include "[d]isclos[ing] . . . to a supervisor . . . an activity, policy or practice of the employer . . . that the employee reasonably believes . . . is in violation of a law, or a rule or regulation," N.J.S.A. 34:19-3a(1), and "[o]bject[ing] to . . .

any activity, policy or practice which the employee reasonably believes . . . is incompatible with a clear mandate of public policy," N.J.S.A. 34:19-3c(3). Here, plaintiff's continued verbal complaints and two memoranda constituted whistle-blowing activity under CEPA.

Plaintiff wrote the April 2005 memorandum the day after he complained verbally during a staff meeting that the Program was admitting dangerous juveniles. Shortly after plaintiff's April 2005 complaints, defendant changed the Program procedures to increase oversight of the staff and decrease the CYWs' access to information and the courts. As plaintiff argued, this undercut the Program's effectiveness. By September 2005, plaintiff's superiors began disciplining him for what plaintiff claimed were petty or bogus offenses. Plaintiff was not disciplined prior to his complaints. And defendant did not take any action to investigate his complaints. In January 2006, plaintiff received a favorable performance evaluation, but he was disciplined again in March 2006. Thus, contrary to defendant's contention, there existed sufficient evidence in the record for the jury to find plaintiff's April 2005 complaint resulted in wrongful retaliation and discharge.

The March 2006 memorandum to the JJC constituted a whistle-blowing activity because plaintiff expressed his objections and

concerns regarding changes to the IHD Program he believed were "incompatible with a clear mandate of public policy concerning the public health, safety or welfare," N.J.S.A. 34:19-3c(3). In the March 2006 memo, plaintiff referenced his earlier complaints and emphasized that placing juveniles with serious offenses in the IHD Program subjected youth workers to safety risks. Further, the March 2006 memorandum discussed plaintiff's opinion and explained why he believed the new procedures were inefficient and detrimental to the IHD Program.

II.

Defendant contends that a defective verdict sheet and jury charge resulted in an impermissible verdict. It maintains that the judge merged the elements of a CEPA claim in the verdict sheet and failed to charge the jury that plaintiff's belief must be "objectively reasonable." Defendant also argues the judge misled the jury by instructing it to accept facts that were strongly disputed. The record does not support defendant's arguments.

"[A]ppropriate and proper jury charges are essential for a fair trial." Wade v. Kessler Inst., 343 N.J. Super. 338, 344 (App. Div. 2001), aff'd, 172 N.J. 327 (2002). The court must "'outline the function of the jury, set forth the issues [that the jury must decide], correctly state the applicable law in

understandable language, and plainly spell out how the jury should apply the legal principles to the facts as it may find them.'" Id. at 344-45 (quoting Velazquez v. Portadin, 163 N.J. 677, 688 (2000)).

Generally, "an appellate court will not disturb a jury's verdict based on a trial court's instructional error 'where the charge, considered as a whole, adequately conveys the law and is unlikely to confuse or mislead the jury, even though part of the charge, standing alone, might be incorrect.'" Wade, supra, 172 N.J. at 341 (quoting Fischer v. Canario, 143 N.J. 235, 254 (1996)). In fact, "[c]ourts uphold even erroneous jury instructions when those instructions are incapable of producing an unjust result or prejudicing substantial rights." Fisch v. Bellshot, 135 N.J. 374, 392 (1994). The adequacy of a jury's verdict sheet is reviewed under the same standard as instructional error; it will not be disturbed where the verdict sheet "is unlikely to confuse or mislead the jury, even though part of the [sheet] might be incorrect." Wade, supra, 172 N.J. at 341 (citation omitted). Applying these standards, we see no error.

A.

Defendant contends that the verdict sheet provided an incomplete and confusing recitation of the second, third, and

fourth elements of a CEPA claim. Those three elements require a plaintiff to show that (1) the plaintiff participated in whistle-blowing conduct, (2) the plaintiff suffered retaliation, and (3) a causal connection, or nexus, existed between the whistle-blowing activity and the retaliation. Dzwonar, supra, 177 N.J. at 462. Defendant challenges the following question on the verdict sheet:

Has Plaintiff, Joe Perry proven, by a preponderance of the credible evidence, that the County of Hudson/Youth Detention Center took retaliatory action by, among other things, suspending him and ultimately discharging him as a result of plaintiff's written and/or verbal objections regarding the actions and inactions of the County of Hudson/Youth Detention Center employees including supervisors regarding juveniles, charged with serious or violent crimes, being released to the In-Home Detention Program?

Defendant maintains that the judge erred by refusing to separate this language into three questions, each pertaining to one element of plaintiff's CEPA claim. We conclude that the contested language in the verdict sheet was unlikely to confuse or mislead the jury particularly because, considered as a whole, the final charge mirrored the model charge and adequately and accurately conveyed the law on CEPA to the jury.

B.

Defendant contends that the court should have instructed the jury that to find in plaintiff's favor, the jury had to conclude that plaintiff not only had a reasonable belief defendant's conduct violated a law, rule, regulation, or clear mandate of public policy, but also that plaintiff's belief was "objectively reasonable."

To prove the first prong of plaintiff's CEPA claim, plaintiff had to demonstrate he "reasonably believed that his . . . employer's conduct was violating either a law, rule, or regulation . . . , or a clear mandate of public policy." Dzwonar, supra, 177 N.J. at 462 (emphasis added) (quoting N.J.S.A. 34:19-3c(3)). The model jury charge states in part that

[t]o prove the first element of his . . . claim, plaintiff must establish that he . . . 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 . . . , or (b) incompatible with a clear mandate of public policy concerning public health, safety, or welfare Plaintiff need only prove that he . . . reasonably believed that to be the case. . . . 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. . . . The only thing you must decide is whether plaintiff believed that [insert description of alleged wrongful activity, policy, or practice about which plaintiff "blew the whistle"] violated the [law] [rule] [regulation] [public policy] that I just described, and, if so, whether plaintiff's belief was reasonable.

[Model Jury Charge (Civil), 2.32 New Jersey Conscientious Employee Protection Act ("CEPA") (N.J.S.A. 34:19-1 et seq.) (2010) (emphasis added).]

The judge's jury charge mirrored this language. We conclude that the final jury charge was unlikely to confuse or mislead the jury and, considering the charge as a whole, the judge adequately conveyed the law to the jury.

Defendant relies on Dzwonar for the proposition that a jury must find plaintiff's belief was also "objectively reasonable." Defendant's reliance on Dzwonar is misplaced. In Dzwonar, the Court analyzed when a judge should enter judgment in favor of a defendant, thereby preventing a jury from hearing a plaintiff's CEPA claim. Id. at 460-63. The Court stated in part that

when a plaintiff brings an action pursuant to N.J.S.A. 34:19-3c, the trial court must identify a statute, regulation, rule, or public policy that closely relates to the complained-of conduct. The trial court can and should enter judgment for a defendant when no such law or policy is forthcoming.

[Id. at 463.]

Such a plaintiff is under no obligation to demonstrate that his or her employer actually violated the law or clear mandate of public policy. Id. at 462. "Instead, the plaintiff simply must show that he or she reasonably believes that to be the case." Ibid. (quoting Estate of Roach v. TRW, Inc., 164 N.J. 598, 613 (2000)) (internal quotation marks omitted). In the context of adjudicating a defendant's request to dismiss a N.J.S.A. 34:19-3c CEPA complaint, rather than considering what a plaintiff must demonstrate to a jury, the Court stated that

a plaintiff must set forth facts that would support an objectively reasonable belief that a violation has occurred. In other words, when a defendant requests that the trial court determine as a matter of law that a plaintiff's belief was not objectively reasonable, the trial court must make a threshold determination that there is a substantial nexus between the complained-of conduct and a law or public policy identified by the court or the plaintiff.

[Id. at 464.]

Assuming that the judge erred, which is not the case here, by omitting in the final jury charge the phrase "objectively reasonable belief," we will not disturb a jury's verdict "'where the charge, considered as a whole, adequately conveys the law and is unlikely to confuse or mislead the jury, even though part of the charge, standing alone, might be incorrect.'" Wade, supra, 172 N.J. at 341 (citation omitted). Defendant argues

plaintiff's belief was not objectively reasonable because a judge, and not defendant, decided whether to place juveniles into the Program. But, plaintiff's theory was that defendant violated law and public policy by recommending to the juvenile court that potentially dangerous juveniles be placed in the IHD Program and by enacting procedures that inhibited the effective functioning of the IHD Program, all of which posed a risk of harm to youth workers and the community. Looking at the charge as a whole, the court explained to the jury that a judge, not the IHD Program staff, made the ultimate decision to place a juvenile in the Program. Thus, as a whole, the charge adequately conveyed the law to the jury.

C.

Defendant contends that the judge misled the jury by treating certain facts as undisputed. Defendant focuses on two statements the judge made concerning the first and second prongs of plaintiff's CEPA claim. In both instances, we conclude that the judge did not err.

On the first element of plaintiff's CEPA claim, defendant asserts that the judge erred by stating that

[plaintiff] must establish that he reasonably believed that the process by which juveniles charged with serious or violent crimes were released [in]to the . . . [P]rogram as a result of [defendant's] recommendations or failure to make

recommendations to the [c]ourt on who gets into the [P]rogram[,] . . . was either, again, a violation of the law or rule or regulation issued under the law, or two, incompatible with a clear mandate of public policy concerning public health or safety.

Defendant maintains that the judge should have deleted reference to defendant's recommendations and replaced it with language regarding defendant's participation in the committee, which made the recommendations. The court refused to change the language, believing doing so would confuse the jury; however, the judge allowed defense counsel to argue the distinction to the jury in summation, which defense counsel did.

Plaintiff brought his CEPA claim against defendant for its actions regarding the IHD Program, including its recommendations to the court. Plaintiff testified the committee did not meet between 2002 and 2005. During that time, he and Muhammad decided whom to recommend for placement into the Program. The instruction that defendant urged would have ignored this testimony.

Defendant argues that the judge usurped the role of the jury on the second element of plaintiff's CEPA claim by stating that

[plaintiff] must establish that he actually blew the whistle. Assuming the jury finds in favor of [plaintiff] on the first element [of his CEPA claim], the [c]ourt finds that [plaintiff] has met the second prong/element

of the claim because it is undisputed that [plaintiff] did express his objections regarding the process by which juveniles charged with serious or violent crimes were released to the . . . [P]rogram to his supervisors, that was in the 2005 memo, and then to the public body, that's the 2006 memo when it went to the [JJC].

Defendant argues this shows the judge instructed the jury plaintiff engaged in whistle-blowing activity. Contrary to defendant's contention, the judge simply told the jury that if it found plaintiff had established the first element of his CEPA claim (a reasonable belief defendant's conduct violated a law or public policy), then the jury would have to conclude plaintiff participated in whistle-blowing activity because it was undisputed he had complained to his superiors about the conduct he believed violated law and public policy.

We have upheld "even erroneous jury instructions when those instructions are incapable of producing an unjust result or prejudicing substantial rights." Fisch, supra, 135 N.J. at 392. Although this part of the charge is not a misstatement of the law, assuming the court erred in the instruction, the error was harmless. Defendant conceded that plaintiff: (1) complained verbally to his superiors about the IHD Program; (2) followed up on those complaints by writing the April 2005 memorandum; (3) continued to verbally complain about defendant's recommendations and modification of the IHD Program; and (4) wrote and sent the

March 2006 memorandum to the JJC reiterating his prior complaints.

III.

Defendant contends that it properly disciplined and fired plaintiff because of his poor job performance, not because of any complaints that he made to his supervisors. Defendant argues that plaintiff failed to establish defendant's proffered explanation for termination was pretextual. It is unclear whether defendant raised this argument in its motion for a new trial. Motions for a new trial are governed by Rule 2:10-1, which provides that

the issue of whether a jury verdict was against the weight of the evidence shall not be cognizable on appeal unless a motion for a new trial on that ground was made in the trial court. The trial court's ruling on such a motion shall not be reversed unless it clearly appears that there was a miscarriage of justice under the law.

Assuming defendant raised this contention in its motion, the record shows the verdict does not "clearly appear[] that there was a miscarriage of justice under the law." Ibid.

Defendant asserts it disciplined plaintiff because, despite "repeated requests and reminders, he failed to submit properly completed paperwork and attendance sheets; violated a policy prohibiting non-employee passengers in a vehicle during work hours; and failed to make the requisite contacts with juveniles

assigned to him. These assertions, however, go to the weight of the evidence before the jury, which was free to accept or reject whether defendant's proffered explanation for termination was pretextual.

IV.

After a thorough review of the record and consideration of the controlling legal principles, we conclude that defendant's remaining arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION