18-P-1713 Appeals Court

JUDE CRISTO vs. WORCESTER COUNTY SHERIFF'S OFFICE.

No. 18-P-1713.

Worcester. January 3, 2020. - September 10, 2020.

Present: Kinder, Henry, & Ditkoff, JJ.

Sheriff. Public Employment, Misconduct, Termination. Employment, Retaliation, Termination. Damages, Punitive. Practice, Civil, Damages, Attorney's fees.

Civil action commenced in the Superior Court Department on September 6, 2011.

The case was tried before Diane C. Freniere, J., and postjudgment motions were considered by her.

Timothy M. Burke for the plaintiff.
Andrew J. Abdella, Special Assistant Attorney General, for the defendant.

DITKOFF, J. A Superior Court jury found for the plaintiff, Jude Cristo, on his complaint against the defendant, the Worcester County Sheriff's Office (sheriff's office), for violations of the Whistleblower Act, G. L. c. 149, § 185 (act). The parties filed cross appeals. We conclude that, under the

act, an employee need not make a written disclosure to a supervisor before objecting to a request to participate personally in misconduct. Further concluding that the plaintiff presented sufficient evidence that the sheriff's office retaliated against him for objecting to such participation in unlawful conduct and that the judge acted within her discretion in declining to award treble damages, we affirm the amended judgment.

1. Background. a. The plaintiff's termination. "We recite the evidence 'in the light most favorable to the nonmoving party,'" in this case, the plaintiff. Sheehan v. Weaver, 467 Mass. 734, 736 (2014), quoting Situation Mgt. Sys., Inc. v. Malouf, Inc., 430 Mass. 875, 876 (2000). The plaintiff began working at the sheriff's office in 1999. By 2007, the plaintiff had been promoted to serve as the human resource director, the payroll administrator, the equal employment opportunity officer, the affirmative action officer, the sexual harassment officer, the protected class harassment officer, and the Americans with Disabilities Act compliance officer. As a part of his responsibilities, the plaintiff supervised the entry of all of the employees' working hours so that they were promptly and correctly entered into the State compensation management system.

During the summer of 2009, the incumbent sheriff decided not to seek reelection. Consequently, Assistant Deputy Superintendent Scott Bove entered the race to become sheriff. The election was in 2010.

In early 2010, the plaintiff came to believe that Superintendent Bove and another sheriff's office employee, Captain Jason Dickhaut, were engaged in campaign activities while marking themselves present for work hours. Furthermore, Captain Dickhaut was not regularly sending the plaintiff the working hours of correctional officers, which the plaintiff needed to enter into the State compensation management system. When the plaintiff's staff attempted to follow up with Captain Dickhaut, no one could find him. The plaintiff observed Captain Dickhaut in the parking lot with nomination papers collecting signatures on one occasion and distributing campaign bumper stickers on another.

The plaintiff heard that Superintendent Bove came in the morning for roll call and then left immediately afterwards to campaign. The plaintiff complained multiple times to Special Sheriff Shawn Jenkins and to First Assistant Deputy Superintendent Paul Legender that Captain Dickhaut and Superintendent Bove were campaigning during working hours and marking themselves as present. He believed that he was reporting illegal conduct.

After the plaintiff made his complaints, Captain Dickhaut confronted the plaintiff in his office, "screaming and yelling" that the plaintiff had no right to question Captain Dickhaut's whereabouts, what he was doing with his time, or why he was unable to process payroll. After Captain Dickhaut left the plaintiff's office, the plaintiff asked Special Sheriff Jenkins if he had heard the confrontation from his office. Special Sheriff Jenkins laughed and said he thought it was hilarious. After this, some employees who worked under Captain Dickhaut or supported Superintendent Bove's candidacy shunned the plaintiff and called him names.

In June 2010, the plaintiff sent an e-mail to Special Sheriff Jenkins "[r]egarding some of these problems and actually putting it in writing because [he] felt . . . [his] complaints were falling on deaf ears." Special Sheriff Jenkins responded that he wanted to meet with the plaintiff in his office, and Special Sheriff Jenkins "essentially said to [him] that he was concerned that [the plaintiff had] put something in writing."

Superintendent Bove lost the primary election, and Lewis Evangelidis was elected sheriff. In January 2011, the plaintiff attended Sheriff Evangelidis's inauguration. When the plaintiff introduced himself and extended his hand, the sheriff "kind of looked at [him] and said 'Jude Cristo' and he turned around and he walked away from [the plaintiff]." A few days after the

inauguration, Special Sheriff Jenkins informed the plaintiff that he was being fired, stating that the plaintiff's position was being consolidated. The new hybrid position's job description, however, involved the same tasks that the plaintiff had been performing. The transition team never interviewed the plaintiff, even though the sheriff had stated that he was going to give current employees a chance to prove themselves. The person who was hired for the hybrid position had less experience than the plaintiff, but was friendly with the new sheriff.

The plaintiff's termination was announced in newspaper and magazine articles, which were then posted on the sheriff's office's website. The plaintiff appealed his firing to the sheriff, but he did not receive a hearing. The plaintiff tried to receive a copy of his personnel file and compensation for a portion of his unused sick leave. After his requests, the sheriff sent an e-mail instructing all employees not to have any contact with the plaintiff. The sheriff's office never investigated the plaintiff's complaints that two employees were marking themselves as present while campaigning during work hours.

b. Procedural history. On September 6, 2011, the plaintiff filed suit against the sheriff's office for violations of the act and against Sheriff Evangelidis, Special Sheriff

Jenkins, and Captain Dickhaut under 42 U.S.C. § 1983.[1] A Superior Court judge denied the motion for summary judgment submitted by the individual defendants. On the sheriff's appeal, we vacated the Superior Court's order and remanded the case for entry of an order allowing summary judgment for him on the ground of qualified immunity. See Cristo v. Evangelidis, 90 Mass. App. Ct. 585, 586, 593 (2016).[2]

The only remaining claim, the whistleblower claim against the sheriff's office, was first tried in January 2018, resulting in a defense verdict. Because of an error in the jury instructions, a Superior Court judge ordered a new trial, which was held in March 2018. On March 30, 2018, the jury returned a verdict in favor of the plaintiff. The jury found that the plaintiff "object[ed] to, or refuse[d] to participate in, any activity, policy or practice which he reasonably believed was in violation of the law, or a rule or regulation promulgated pursuant to a law." The jury further found that the sheriff's

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[1] The plaintiff's complaint originally pleaded the whistleblower violation against the individual defendants as well, but the plaintiff agreed to dismiss the whistleblower count against the individuals. The plaintiff also alleged a Massachusetts civil rights claim under G. L. c. 12, §§ 11H and 11I, and a civil conspiracy claim. These claims were dismissed.

[2] As a result of our decision and the dismissal of other counts (see note 1, supra), the judge later dismissed all three individuals from the suit.

office took retaliatory action because the plaintiff engaged in protected conduct, and awarded him $885,000 in damages.

The plaintiff moved for treble damages and attorney's fees; the sheriff's office moved for judgment notwithstanding the verdict or to alter and amend the judgment. The trial judge denied the plaintiff's motion for treble damages and the sheriff's office's motion for judgment notwithstanding the verdict. The judge, however, reduced the damages to $742,089.40 and awarded the plaintiff attorney's fees and costs of $66,732.10. Both parties appealed.

2. Whistleblower claim. a. Standard of review. Review of the denial of a motion for judgment notwithstanding the verdict "requires us to construe the evidence in the light most favorable to the nonmoving party and disregard that favorable to the moving party." McCarthy v. Waltham, 76 Mass. App. Ct. 554, 560 (2010). "[T]he question is whether 'anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the plaintiff.'" Beliveau v. Ware, 87 Mass. App. Ct. 615, 616 (2015), quoting Zaniboni v. Massachusetts Trial Court, 81 Mass. App. Ct. 216, 217 (2012), S.C., 465 Mass. 1013 (2013).

b. Requirements of the whistleblower statute.

i. Overview. "The Massachusetts whistleblower statute

prohibits a public employer . . . from taking any retaliatory action against an employee who engages in protected activities." Bennett v. Holyoke, 362 F.3d 1, 5 (1st Cir. 2004). To prevail on a whistleblower claim, "[t]he plaintiff-employee must prove that (1) the employee engaged in a protected activity; (2) participation in that activity played a substantial or motivating part in the retaliatory action; and (3) damages resulted." Trychon v. Massachusetts Bay Transp. Auth., 90 Mass. App. Ct. 250, 255 (2016).

The act prohibits retaliating against an employee for undertaking three categories of activities. First, the act protects an employee who "[d]iscloses, or threatens to disclose to a supervisor or to a public body[3] an activity, policy or practice of the employer . . . that the employee reasonably

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[3] A public body is defined in the act as

> "(A) the United States Congress, any state legislature, including the general court, or any popularly elected local government body, or any member or employee thereof; (B) any federal, state or local judiciary, or any member or employee thereof, or any grand or petit jury; (C) any federal, state or local regulatory, administrative or public agency or authority, or instrumentality thereof; (D) any federal, state or local law enforcement agency, prosecutorial office, or police or peace officer; or (E) any division, board, bureau, office, committee or commission of any of the public bodies described in the above paragraphs of this subsection."

G. L. c. 149, § 185 (a) (3).

believes is in violation of a law, or a rule or regulation promulgated pursuant to law, or which the employee reasonably believes poses a risk to public health, safety or the environment." G. L. c. 149, § 185 (b) (1). Second, the act protects an employee who "[p]rovides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law, or activity, policy or practice which the employee reasonably believes poses a risk to public health, safety or the environment by the employer." G. L. c. 149, § 185 (b) (2). Third, the act protects 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 which the employee reasonably believes poses a risk to public health, safety or the environment." G. L. c. 149, § 185 (b) (3).

In summary, the act protects employees who (1) disclose or threaten to disclose misconduct to a supervisor or public body; (2) assist in a public body's investigation; or (3) object to or refuse to participate in an illegal or unsafe activity. For the first category (disclosure), an employee who makes a disclosure to a public body is not protected by the act "unless the employee has brought the activity . . . to the attention of a

supervisor of the employee by written notice and has afforded the employer a reasonable opportunity to correct" the misconduct. G. L. c. 149, § 185 (c) (1).[4] For the second and third categories (assisting in an investigation and objecting to or refusing to participate in misconduct), there is no such written disclosure requirement. See Quazi v. Barnstable County, 70 Mass. App. Ct. 780, 784 (2007).

The main distinguishing point between the first category (disclosure, § 185 [b] [1],) and the third category (objecting to or refusing to participate in misconduct, § 185 [b] [3]), is the employee's level of involvement. The first category contemplates misconduct, in which the employee may be, but need not be, involved. See Bennett, 362 F.3d at 3, 6 (plaintiff filed complaint on behalf of fellow officer with Massachusetts Commission Against Discrimination). The third category contemplates misconduct in which the employee is personally involved, or in which the employee is asked to participate. See, e.g., Quazi, 70 Mass. App. Ct. at 782, 784 (plaintiff refused to falsely credit overdue account and reported illegal

[4] There are exceptions to the requirements of G. L. c. 149, § 185 (c) (1), for (1) emergencies where an employee is "reasonably certain" that a supervisor is already aware of the misconduct; (2) instances where an employee reasonably fears physical harm as a result of the disclosure; and (3) disclosures of crimes to law enforcement or a judicial officer. G. L. c. 149, § 185 (c) (2).

request to two people). See also Mailloux v. Littleton, 473 F. Supp. 2d 177, 181, 184-185 (D. Mass. 2007) (plaintiff refused to record false information). This is why the written disclosure requirement does not apply to the third category. An employee should not be required to engage in misconduct personally until such time as the employee makes a written disclosure and has allowed the employer a reasonable amount of time to correct the problem.

Finally, it should be evident that the three categories are not mutually exclusive, because an employee may refuse to participate in misconduct and then disclose it. Similarly, an employee may refuse to participate in misconduct and assist in a public body's investigation of that misconduct. And, of course, an employee assisting in a public body's investigation of misconduct would always be disclosing misconduct to a public body. See Trychon, 90 Mass. App. Ct. at 256 (allegations construed to rest on both § 185 [b] [1] and § 185 [b] [3] where plaintiff reported colleagues' nonfeasance and cover-up and provided report of safety issues to supervisor).

ii. Applicability of the third category. Here, the case was submitted to the jury only under the third category, and the jury found that the plaintiff "object[ed] to, or refuse[d] to participate in, any activity, policy or practice which he reasonably believed was in violation of the law, or a rule or

regulation promulgated pursuant to a law." The sheriff's office argues that the trial judge erred in denying its motion for judgment notwithstanding the verdict because the evidence did not support a claim under the third category. The sheriff's office argues that the plaintiff's only claim was under the first category, but that such a claim was unavailable because the plaintiff failed to provide written notice as required by the act. We disagree with both assertions.

The plaintiff oversaw payroll for the sheriff's office, and he was responsible for submitting all employees' working hours to the State compensation management system. The plaintiff testified that he refused to go along with (or at least objected to) his own submission of working hours for time spent by other employees on political campaigning. See G. L. c. 268A, § 23 (b) (2) (ii). He believed that he was terminated because he "refused to participate in the illegal activities that were going on and [he] objected strongly that people were getting paid for not working." He repeatedly disclosed these illegal activities to his supervisors. Accordingly, the plaintiff described activity that was protected under both the first and third categories. In the light most favorable to the plaintiff, the evidence supported a claim for relief under G. L. c. 149, § 185 (b) (3), based on the plaintiff's objection to or refusal to participate personally in an activity that violated the law.

See Bolduc v. Webster, 629 F. Supp. 2d 132, 140, 154 (D. Mass. 2009) (plaintiff corroborated coworker's objections to racist behavior).

iii. Applicability of the first category. Had the claim been submitted to the jury under the first category, the written disclosure requirement would not have been a bar on these facts. The disclosure requirement removes the protection against retaliation from "an employee who makes a disclosure to a public body unless the employee has brought the [misconduct] to the attention of a supervisor of the employee by written notice and has afforded the employer a reasonable opportunity to correct the activity, policy or practice." G. L. c. 149, § 185 (c) (1). The written disclosure requirement, therefore, applies only before an employee brings misconduct to the attention of a public body, not before an employee brings misconduct to the attention of a supervisor. The sheriff's office, however, argues that, because the sheriff's office is itself a public body, the employee was not protected by the act unless he made a written disclosure of the misconduct to a supervisor before disclosing the misconduct to any employee of the sheriff's office.

This contention is illogical. If the plaintiff were required to make a written disclosure to a supervisor before revealing the misconduct to an employee of the sheriff's office,

he could not make such a written disclosure without first making an earlier written disclosure, and so on. Read this way, it would be literally impossible for an employee of a public body to comply with the written disclosure requirement. The sheriff's office skirts this logical conundrum by arguing that, as applied to an employee of a public body, this subsection requires that at least the first disclosure to another employee be in writing. Putting aside the baffling question why the Legislature would want to discourage law enforcement officers from orally telling their supervisors about misconduct, this interpretation requires us to rewrite the act to state that the protection against retaliation "shall not apply to an employee who makes an oral disclosure to a public body." It is not, however, within our authority to rewrite a statute. See DiLiddo v. Oxford St. Realty, Inc., 450 Mass. 66, 77 (2007).

If, however, we interpret "disclosure to a public body" to refer to an outside public body, the entire statutory scheme makes sense. See Duff-Kareores v. Kareores, 474 Mass. 528, 533 (2016), quoting Chin v. Merriot, 470 Mass. 527, 532 (2015) ("Although we look first to the plain language of the provision at issue to ascertain the intent of the Legislature, we consider also other sections of the statute, and examine the pertinent language in the context of the entire statute"). This interpretation, moreover, comports with the ordinary sense of

the words in the statute. See Matter of E.C., 479 Mass. 113, 118 (2018) ("If the words used are not otherwise defined in the statute, we afford them their plain and ordinary meaning"). The plaintiff's oral complaint to his supervisors was not a disclosure to the sheriff's office of the misconduct, as the sheriff's office already had all the information the plaintiff possessed. After all, its human resource director, the plaintiff, had that information. The plaintiff disclosed the misconduct to his supervisors but did not add to the knowledge the sheriff's office possessed.

This is the conclusion reached by our colleagues on the United States Court of Appeals for the First Circuit in Dirrane v. Brookline Police Dep't, 315 F.3d 65 (1st Cir. 2002). There, the court rejected the reading of the act urged by the sheriff's office in the instant appeal, stating, "[I]t is apparent that an oral disclosure to a supervisor is protected outright against retaliation; the requirement of written notice and an opportunity to correct is imposed where the disclosure is to an outside public body." Id. at 73. As that court pointed out, "the purpose was to give the employer unequivocal notice (i.e., in writing) and an opportunity to clean up its own house before the matter was taken outside." Id.

Our resort to Dirrane, however, leads us to confront another aspect of that opinion. The court in Dirrane went on to

hold that, because the plaintiff there filed his lawsuit without prior written notice, his claim was barred. Id. Cf. Bennett, 362 F.3d at 7 ("[the Dirrane court's] interpretation is certainly not the only possible reading of the statutory language"). This interpretation is fundamentally flawed. An employer in Massachusetts is prohibited from retaliating against an employee for disclosing misconduct to his supervisor. G. L. c. 149, § 185 (b) (1). If an employer violates the act by retaliating against the employee for his disclosure, the employee has a cause of action. The fact that the employee then files a lawsuit does not magically cause the employer's illegal retaliation to retroactively become lawful. As we explained in Quazi, 70 Mass. App. Ct. at 784 n.3, the court filing is irrelevant where the plaintiff alleges "retaliation that preceded, and did not result from, his court filing."

More recently, the First Circuit has recognized that the reasoning in Quazi "directly conflicted with a key assumption of Dirrane[] and its progeny." Saunders v. Hull, 874 F.3d 324, 332 (1st Cir. 2017). We confirm (as was implicit in Quazi) that, in our view, Dirrane does not reflect Massachusetts law in this regard.[5]

[5] We acknowledge, of course, that the First Circuit is bound by the Supreme Judicial Court's expression of Massachusetts law, see, e.g., GGNSC Admin. Servs., LLC v. Schrader, 958 F.3d 93, 95 (1st Cir. 2020), but is not bound by our opinions. Nonetheless,

3. Treble damages. The plaintiff cross-appeals from the trial judge's decision not to award him treble damages. Under the act, "[t]he court may . . . compensate the employee for three times the lost wages, benefits and other remuneration, and interest thereon." G. L. c. 149, § 185 (d). The act, however, does not provide any indication when the court should award multiple damages. In that regard, it is similar to the pre-2008 version of G. L. c. 151, § 1B, involving failure to pay overtime wages, which stated that a plaintiff "may recover in a civil action three times the full amount of such overtime rate of compensation less any amount actually paid to him or her by the employer." G. L. c. 151, § 1B, as amended by St. 1993, c. 110, § 183.[6]

Faced with the old version of G. L. c. 151, § 1B, the Supreme Judicial Court was cognizant that "[m]ultiple damages such as the treble damages at issue here 'are "essentially punitive in nature."'" Goodrow v. Lane Bryant, Inc., 432 Mass. 165, 178 (2000), quoting Fontaine v. Ebtec Corp., 415 Mass. 309, 322 (1993). Applying the standard articulated in Dartt v.

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principles of comity compel us to speak clearly, for the benefit of our Federal colleagues. See Cullinane v. Uber Techs., Inc., 893 F.3d 53, 61 (1st Cir. 2018) (discretionarily applying precedent of Massachusetts Appeals Court in absence of Supreme Judicial Court precedent).

[6] In 2008, the Legislature amended G. L. c. 151, § 1B, to make treble damages mandatory. St. 2008, c. 80, § 6.

Browning-Ferris Indus., Inc. (Mass.), 427 Mass. 1, 17 (1998), that "[p]unitive damages may be awarded for conduct that is 'outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others,'" Goodrow, supra at 178, the Supreme Judicial Court upheld the denial of an application for treble damages where the court found no such outrageous conduct. Id. at 179. For the same reasons, we agree with the trial judge here that the Goodrow standard applies to the act, and that treble damages are available only for outrageous conduct.

Here, the trial judge declined to award treble damages because "the evidence presented at trial did not suggest that Sheriff Evangelidis' decision to terminate plaintiff was so outrageous as to suggest an underlying evil purpose." "Such a determination is in the discretion of the judge." Wiedmann v. Bradford Group, Inc., 444 Mass. 698, 710 (2005). We discern no abuse of discretion.

The jury found that the sheriff's office retaliated against the plaintiff by terminating him for objecting to paying employees who engaged in campaign activities during work hours. The sheriff's office posted articles about the termination on its website. No investigation into the plaintiff's complaint occurred. Although reckless indifference to the rights of others could be outrageous under certain circumstances, see

Haddad v. Wal-Mart Stores, Inc., 455 Mass. 91, 107-108 (2009), the trial judge could reasonably have seen this conduct as neither outrageous nor suggesting an "underlying evil purpose." Accordingly, we have no cause to disturb the judge's exercise of discretion. See Dixon v. Malden, 464 Mass. 446, 453 (2013).

4. Appellate attorney's fees. Under G. L. c. 149, § 185 (d), we "may . . . order payment by the employer of reasonable costs, and attorneys' fees." Our decision in this regard is within our broad discretion, and is not dependent on a finding of outrageous conduct. See Larch v. Mansfield Mun. Elec. Dep't, 272 F.3d 63, 75 (1st Cir. 2001) ("the statute confers broad power to award attorney's fees, without setting forth criteria for deciding when to award them, and its evident purpose is to protect employees who are found to have been subject to retaliation"). On this basis, it would be within the scope of our discretion to award fees. Here, however, it is evident that this appeal involved complex questions of statutory construction made all the more complex by inconsistent jurisprudence between this court and the Federal courts. Under these circumstances, we decline to exercise our discretion to award appellate attorney's fees to the plaintiff. See Broderick v. Evans, 570 F.3d 68, 75 (1st Cir. 2009).

Amended judgment affirmed.