THOMAS TRYON vs. MASSACHUSETTS BAY TRANSPORTATION AUTHORITY.

No. 19-P-111.

Suffolk. October 11, 2019. - October 26, 2020.

Present: Milkey, Sullivan, & Ditkoff, JJ.

Massachusetts Bay Transportation Authority. Public Employment, Termination. Employment, Retaliation, Termination. Limitations, Statute of. Practice, Civil, Statute of limitations, Directed verdict, Judgment notwithstanding verdict, Instructions to jury. Damages, Punitive.

Civil action commenced in the Superior Court Department on August 20, 2014.

The case was tried before Paul D. Wilson, J., and motions for judgment notwithstanding the verdict and for a new trial were considered by him.

Kevin P. Martin (Christina S. Bitter also present) for the defendant.

Robert S. Mantell (Kevin G. Powers also present) for the plaintiff.

SULLIVAN, J. The Massachusetts Bay Transportation Authority (MBTA) appeals from a judgment entered on a jury verdict awarding former MBTA employee Thomas Tryon $277,919 in

lost wages and pension benefits, trebled by the trial judge in a subsequent order, and $22,081 in emotional distress damages for Tryon's claims arising under the Massachusetts Whistleblower Act, G. L. c. 149, § 185. The MBTA contends that (1) it is entitled to judgment as a matter of law because Tryon's complaint was untimely filed; (2) an erroneous jury instruction regarding the discovery rule warrants a new trial; and (3) the evidence was insufficient to support the treble damage award. We affirm.

Background. For purposes of evaluating the MBTA's contentions regarding timeliness and punitive damages, we summarize the facts as the jury could have found them, viewed in the light most favorable to Tryon. Cf. Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 110 n.2 (2000). Thomas Tryon began working for the MBTA as a laborer in the maintenance of way division in 1984. He received a series of promotions through the positions of trackperson, foreperson, and general foreperson, before becoming a superintendent of maintenance of way in August 2001. In that role he was responsible for maintenance of the Red, Blue, Green, and Orange Lines.

On August 18, 2001, after a routine visit to the work site of a maintenance of way crew (crew) on the Green Line, Tryon alerted his supervisor that members of the crew were not present

at the times they were scheduled to work overtime. Following investigation, the crew members were docked between thirty minutes and three hours of pay. The crew included trackperson Patrick Kineavy.

The following month, in September 2001, Kineavy and the crew filed a complaint against Tryon with the MBTA's department of organizational diversity, alleging that Tryon spied on them and that he had engaged in "harassment and retaliation."[1] Kineavy and the crew followed up on their complaint several times by letter and telephoned the investigator weekly. When the MBTA found no merit in the complaint, Kineavy contacted MBTA General Manager Mike Mulhern in August 2002 to complain about Tryon and the manner in which the crew's complaint had been handled.

For the next several years, Tryon and Kineavy had little direct contact; there were several intervening levels of supervision between Tryon and Kineavy. In 2004, Tryon made a lateral move from superintendent of maintenance of way for the Red, Blue, Green, and Orange Lines to become superintendent of maintenance of way for training.

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[1] It is unclear why the complaint was filed with this office. Tryon represents that all involved were white men, and the complaint did not contain any allegations of discrimination on the basis of protected class.

In 2008, the MBTA promoted Kineavy directly from trackperson to superintendent of maintenance of way for the Green Line, despite his opposition in 2001 to Tryon's efforts to curb overtime abuse, and despite the fact that he had no supervisory experience in his years at the MBTA. Kineavy skipped over the intermediate positions of foreperson, general foreperson, section foreperson, and supervisor.

In September 2010, Stephen Trychon was promoted from deputy director of systemwide maintenance and improvements to director of engineering and maintenance, where he oversaw several departments, including the maintenance of way division in which Tryon and Kineavy were superintendents.

At that time, Trychon had worked for the MBTA for less than two years, and had no experience in the maintenance of way division. He relied on Kineavy in his roles as superintendent of maintenance of way and later as deputy director of maintenance of way to determine staffing in the maintenance of way division.

On September 20, 2010, at the suggestion of Kineavy (who was Tryon's peer, not Tryon's supervisor), Trychon notified Tryon that he would be reassigned from his day shift training position to a night position with the same title he then held, superintendent of maintenance of way. Tryon testified that Kineavy asked Trychon to reassign Tryon to an undesirable night

shift in order to compel Tryon to retire.[2] The night superintendent position was not posted, and Tryon was not interviewed for it.

At some point, it is unclear exactly when, Kineavy (unbeknownst to Tryon) also told Trychon that Tryon "sucked," that he was lazy, that he slept on the job, and that Kineavy did not want him in the maintenance of way division. Tryon was unaware of Kineavy's role, and attributed his transfer to Trychon. Tryon began looking for other jobs both within the MBTA and outside of it.

In November 2010, Kineavy was promoted to deputy director of maintenance of way. As deputy director of maintenance of way, Kineavy became Tryon's immediate supervisor. Tryon characterized their relationship at this point as "strained." Kineavy told Tryon to engage in covert observations of his crews to see if their time records were accurate. Tryon found the request ironic, in view of Kineavy's protests in 2001, and declined to do so, because he thought that deliberate surveillance of this sort would damage the working relationship with his employees.

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[2] Tryon's testimony was based on what Trychon told Tryon at a later date. The testimony was not admitted for the truth of the matter, but to show Kineavy's state of mind, and that he said it. The judge gave a limiting instruction. This ruling is not at issue on appeal.

In an e-mail dated December 10, 2010, Tryon quoted a former boss as saying, "[w]hen the horse is dead it's time to dismount." At trial he testified that he sent this e-mail both because he thought he had fallen out of favor with Trychon, and because he thought that having Kineavy as a supervisor would not be good for him.

On December 16, 2010, the MBTA posted Kineavy's former position of superintendent of maintenance of way for the Green Line internally, with a closing date of December 31, 2010. Although superintendent positions carrying the same pay had been filled in the past without posting (as was the case with Tryon's reassignment to the night shift), this position was posted.

Even though Kineavy made the recommendation to eliminate Tryon's position "fairly quickly upon his promotion" to deputy director of maintenance of way in November 2010, Tryon was not informed until after the posting for the superintendent position had closed. Trychon notified Tryon on January 6, 2011, that "a decision was made to eliminate the night superintendent position." Under normal MBTA practice, Kineavy, as Tryon's immediate supervisor, not Trychon, should have informed Tryon that his position would be eliminated. This deviation from usual practice occurred at Kineavy's request. Kineavy told Trychon that it would be difficult for Kineavy to terminate Tryon because he had known Tryon for years.

According to Tryon, when he asked whether he could apply for Kineavy's old job, Trychon responded that there were already two "young, aggressive" applicants who were being considered for the job and "that he would not interview or consider [Tryon] for the position." Trychon informed Tryon that the facilities division might have a position open, and both Trychon and Tryon contacted the facilities division in January 2011 to inquire whether it had a position for Tryon. Tryon sent his resume to the facilities division, which informed Tryon that there was no position available. Tryon also searched internal job postings within the MBTA to no avail.

On January 31, 2011, without an equivalent position, Tryon retired. On November 1, 2011, Tryon filed a complaint with the Massachusetts Commission Against Discrimination (MCAD), alleging age discrimination on the basis of Trychon's statement that he was considering "young, aggressive" applicants, and the subsequent hiring of a younger, less experienced applicant.

On June 11, 2013, Tryon and Trychon met with attorney Kevin Powers, who at the time represented both of them in separate actions against the MBTA.[3] Trychon told Tryon that he had not lost his position because of his age. Trychon told Tryon that Kineavy had told Trychon that Tryon was a bad worker, had asked

[3] See Trychon v. Massachusetts Bay Transp. Auth., 90 Mass. App. Ct. 250 (2016).

Trychon to move Tryon to nights, had asked Trychon to eliminate Tryon's job, and had asked Trychon to inform Tryon that his job would be eliminated.

On February 14, 2014, Tryon withdrew his MCAD complaint, and on August 20, 2014, he filed this whistleblower case in Superior Court. After a nine-day trial, the jury found for Tryon. Answering special questions, the jury answered "No" to the question whether Tryon knew or reasonably should have known prior to August 21, 2012, that he had been harmed by allegedly retaliatory action by the MBTA.

The jury also answered an advisory question regarding treble damages, finding that the MBTA acted with evil motive or reckless indifference to Tryon's rights. The judge then independently considered the question of treble damages. In a thoughtful and comprehensive twenty-one page decision, he found that Kineavy was not credible and was motivated by evil intent. He also found that the MBTA acted with reckless disregard for the rights of Tryon by promoting an unqualified and malicious Kineavy to supervisor and failing to take steps to supervise him. The judge awarded treble damages against the MBTA. This appeal followed.

Discussion. 1. Discovery rule. The Massachusetts Whistleblower Act provides, among other things, protection against retaliation for public employees who disclose to a

supervisor activity that the employee reasonably believes is a violation of the law. G. L. c. 149, § 185 (b). See Cristo v. Worcester County Sheriff's Office, 98 Mass. App. Ct. 372, 376 (2020). On appeal the MBTA does not directly contest the jury's verdict on liability.[4] The MBTA instead contends that its motions for directed verdict and for judgment notwithstanding the verdict should have been allowed because Tryon's action was untimely.

In reviewing a ruling on a directed verdict or a judgment notwithstanding the verdict, the question presented 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." Kiely v. Teradyne, Inc., 85 Mass. App. Ct. 431, 434 (2014),

[4] The jury found, and the MBTA does not dispute on appeal, that Tryon's August 18, 2001 report that Kineavy and others had misrepresented the amount of overtime worked was protected whistleblower activity. See generally Cristo, 98 Mass. App. Ct. at 376-378. The jury found that the MBTA retaliated against Tryon for whistleblower activity in 2011 when he was laid off by the MBTA. The case was tried without argument or objection on the basis that both Trychon and Kineavy were the MBTA's agents, for whose conduct (both individual and collective) the MBTA could be held liable. Where, as here, "the decision makers relied on the recommendations of supervisors whose motives have been impugned," the supervisors' motives are "treated as the motives for the decision" for purposes of liability (brackets omitted). Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., 474 Mass. 382, 403 (2016), quoting Bulwer v. Mount Auburn Hosp., 473 Mass. 672, 688 (2016). See Staub v. Proctor Hosp., 562 U.S. 411, 420 (2011).

quoting Haddad v. Wal-Mart Stores, Inc. (No. 1), 455 Mass. 91, 94 n.5 (2009).

The statute of limitations governing a claim of retaliation under the Whistleblower Act is two years. G. L. c. 149, § 185 (d). See Perez v. Greater New Bedford Vocational Tech. Sch. Dist., 988 F. Supp. 2d 105, 112 (D. Mass. 2013). Here, because he filed his complaint on August 20, 2014, more than two years after either his notice of his layoff on January 6, 2011, or his last day of work on January 31, 2011, the MBTA contends that Tryon's complaint is untimely unless the statute of limitations is tolled by the discovery rule.

The discovery rule provides that "a cause of action accrues when the plaintiff discovers or with reasonable diligence should have discovered that (1) he has suffered harm; (2) his harm was caused by the conduct of another; and (3) the defendant is the person who caused that harm." Harrington v. Costello, 467 Mass. 720, 727 (2014). Neither this court nor the Supreme Judicial Court has had occasion to address the application of the discovery rule to the Whistleblower Act, G. L. c. 149, § 185.

We look to analogous employment statutes for guidance. In employment discrimination and retaliation cases, see G. L. c. 151B, "the statute of limitations for a particular cause of action does not begin to run until the plaintiff knows, or should have known, that she has been harmed by the defendant's

conduct." Silvestris v. Tantasqua Regional Sch. Dist., 446 Mass. 756, 766 (2006). See Cuddyer v. Stop & Shop Supermkt. Co., 434 Mass. 521, 539, 540 n.22 (2001) (limitation period for hostile work environment claim where there was continuing violation began to run when "plaintiff knew or reasonably should have known that her work situation was pervasively hostile and unlikely to improve" and "plaintiff knew, or should have known, that the defendant's conduct has caused harm"); Wheatley v. American Tel. & Tel. Co., 418 Mass. 394, 398 (1994) (limitations period does not begin to run in age discrimination action until plaintiff knows or reasonably should know of replacement by younger employee). The same formulation applies to claims under the Wage Act. See G. L. c. 149, §§ 148, 150; Crocker v. Townsend Oil Co., 464 Mass. 1, 8 (2012) ("Under the discovery rule, limitations periods in Massachusetts run from the time a plaintiff discovers, or reasonably should have discovered, the underlying harm [here, the plaintiffs' misclassification as independent contractors] for which relief is sought"). We hold that the discovery rule, as articulated in these employment cases, likewise applies to whistleblower claims under G. L. c. 149, § 185 (d). A cause of action accrues when a whistleblower knows or reasonably should have known that he or she has been retaliated against for engaging in protected conduct.

This case implicates the second prong of the test. The MBTA submits that under the second prong, "[r]easonable notice that . . . a particular act of another person may have been a cause of harm to a plaintiff creates a duty of inquiry and starts the running of the statute of limitations." Passatempo v. McMenimen, 461 Mass. 279, 294 (2012), quoting Koe v. Mercer, 450 Mass. 97, 102 (2007). Pointing to the fact that Tryon started a job search after he had been moved to the night shift, and his statement that "[w]hen the horse is dead it's time to dismount," the MBTA argues that Tryon's whistleblower action is untimely because he was on actual notice of Kineavy's enmity toward him, that he should have suspected Kineavy may have been involved, and that he had a duty to inquire about Kineavy's role in the layoff.

There were facts in dispute with respect to what Tryon knew or should have known, and it was for the jury to resolve the factual dispute. See Commonwealth v. Tradition (N. Am.) Inc., 91 Mass. App. Ct. 63, 73 (2017) ("where the date triggering the statutes of limitation is disputed . . . the wiser course is to present the matter to the fact finder"). The layoff occurred nearly ten years after Tryon reported discrepancies regarding Kineavy's pay. During most of that time, the two men had little to do with one another. Since Kineavy's promotion, the relationship between them was strained, but not hostile. When

Tryon was put on nights, he thought his job was in jeopardy, but he attributed the action to Trychon's dissatisfaction, not Kineavy's intervention, as Kineavy was his peer. At that point, Tryon was not aware that Kineavy had badmouthed him to Trychon and urged Trychon to put him on nights to force him to retire. In addition, according to Tryon, when Trychon told him that his position was being eliminated, Trychon also told him that they were looking for new, younger employees, an explanation that pointed away from Kineavy. The facts before the jury permitted divergent inferences as to what Tryon should have known, and it was for the jury to find whether Tryon was on reasonable notice that Kineavy was or may have been involved.

Furthermore, Trychon told Tryon that the decision had been made to lay him off, leaving the impression that the decision came from Trychon -- or his managers. In fact, the MBTA defended on the basis that the decision was part of a reorganization plan approved by Trychon and "those above him" -- an explanation that the MBTA argued to the jury in both its opening statement and closing argument. The jury permissibly could have found that it was not unreasonable for Tryon to accept Trychon's explanation for the layoff, an explanation that the jury were also being urged to adopt.

Finally, Kineavy deliberately concealed his involvement by persuading Trychon to deliver the bad news regarding the layoff.

A reasonable jury could take these circumstances into account in determining whether Tryon had a duty to inquire, and indeed whether any inquiry would have been successful. This, after all, was a case in which the "wrongdoer concealed the existence of a cause of action through [an] affirmative act done with the intent to deceive." Albrecht v. Clifford, 436 Mass. 706, 714 (2002). See generally Passatempo, 461 Mass. at 294; G. L. c. 260, § 12.[5] Both common sense and the law tell us that the "obligation[] of reasonable inquiry" involves a determination "whether any misrepresentation should reasonably have been uncovered . . .[,] made in light of what reasonable inquiry would have disclosed." Bowen v. Eli Lilly & Co., 408 Mass. 204,

[5] General Laws c. 260, § 12, provides, "If a person liable to a personal action fraudulently conceals the cause of such action from the knowledge of the person entitled to bring it, the period prior to the discovery of his cause of action by the person so entitled shall be excluded in determining the time limited for the commencement of the action." Neither party relied explicitly on the statute at trial, and the judge was not asked to instruct in accordance with it. However, whether Kineavy engineered the layoff and concealed his involvement was a live issue at trial. Had Tryon specifically "alleged fraudulent concealment and alleged facts that, if true, would support such a finding, the . . . statutory discovery rule rather than the common-law discovery rule" would apply. Magliacane v. Gardner, 483 Mass. 842, 852 (2020). "In such circumstances, the limitations period is tolled unless the plaintiff has actual knowledge of the claim." Id. As this argument was not made to the trial judge, we reference the statute only to underscore that, given the manner in which this case was tried, the factual issues regarding concealment did not present a question of law that could have or should have been resolved on dispositive motions.

206 (1990), quoting Friedman v. Jablonski, 371 Mass. 482, 485-486 (1976). It was for the jury to decide the scope, if any, of Tryon's obligation, and what a reasonable inquiry would have revealed.[6]

Once Tryon learned of Kineavy's involvement (when he was informed of it by Trychon in their lawyer's office), he acted promptly.[7] The judge properly denied the motions for directed verdict and for judgment notwithstanding the verdict.

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[6] The cases involving the duty of inquiry often arise in a context where the information necessary to determine cause or injury is ascertainable in the hands of a third party, and inquiry of the third party would reveal the cause of action. In Bowen, 408 Mass. at 209-210, for example, the plaintiff learned that her tumors may have been caused by her mother's ingestion of the drug diethylstilbestrol during pregnancy. The court held that once she had notice of this possible cause of her illness, she had a duty to consult medical experts. Id. at 210-211. In Koe, 450 Mass. at 99-100, the harm at issue -- depression and posttraumatic stress disorder -- had multiple possible causes that, as was the case in Bowen, the plaintiff could have disentangled with professional guidance. Similarly, in a case involving deceit in the sale of real estate, see Friedman, 371 Mass. at 486, the court concluded that the plaintiffs could have learned of the true status of a disputed easement by a title search, and held that the statute of limitations began to run when the plaintiffs accepted the deed to the property without conducting a title search. This case differs because the information Tryon sought was in the hands of the MBTA, and the MBTA did not provide the information to Tryon. The MBTA has not cited, and we have not found, a case where the plaintiff's duty of inquiry extends to the entity that attempted to conceal the facts from the plaintiff in the first place. Compare G. L. c. 260, § 12; Magliacane, 483 Mass. at 852.

[7] The MBTA also argues that Tryon should have done more, but what he should have done is unclear. Unlike a personal physician, an employer is not under an affirmative obligation to respond to an employee's inquiry. Legal process, such as the

2. Jury instructions. The MBTA maintains that the judge erred by giving a jury instruction regarding the discovery rule that did not include the phrase "may have been caused." We conclude that the issue was unpreserved, and that in any event the instruction was not erroneous.

Initially, the MBTA requested a lengthy instruction on the duty of inquiry, but shortly before the case went to the jury, the MBTA asked the judge to instruct that "[r]easonable notice that . . . a particular act of another person may have been a cause of harm to a plaintiff creates a duty of inquiry and starts the running of the statute of limitations." At first, the judge expressed skepticism about giving such an instruction. The Superior Court model jury instructions did not contain this language[8] and Tryon argued that there was no evidence that he

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filing of the MCAD charge here, is an avenue to obtain information. Once a charge is filed, the employer is obligated to provide a written answer, see 804 Code Mass. Regs. § 1.10(8) (1999) (now appearing in 804 Code Mass. Regs. § 1.05[8] [2020]), and in some situations, the plaintiff is entitled to discovery, see 804 Code Mass. Regs. § 1.19 (1999) (now appearing in 804 Code Mass. Regs. § 1.10 [2020]). An employee may demand to see a copy of the employee's personnel file, see G. L. c. 149, § 52C, but it would be an unusual employer that would document allegedly unlawful activity in a personnel file.

[8] The model jury instruction states in pertinent part:

> "The general rule is that a claim accrues on the day of the plaintiff's injury. However, the rule does not apply where the plaintiff did not know, and could not reasonably have known, of his claim.

knew or should have known that Kineavy would try to get him fired. After some deliberation, however, the judge proposed the following "compromise" instruction, which included instruction on Tryon's duty to inquire, but did not explicitly use the phrase "may have":

> "And here's my new language which varies what [defense counsel] just suggested.
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> The law provides that if a plaintiff has, quote, reasonable notice, end quote, that his harm resulted from a retaliatory act by his employer, the employee then has a duty of inquiry and the two year period begins to run when the plaintiff has such, quote, reasonable notice."

The judge then instructed in conformity with his proposal.[9]

> ". . .
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> "The question comes down to when the plaintiff 'knew' or 'should have known' that [he/she] had been harmed by the defendant's conduct.
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> "'Knew' means had actual knowledge.
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> "With respect to the question of whether the plaintiff 'should have known,' you will determine this by referring to what in your judgment a reasonable person would have known under the circumstances."

Superior Court Civil Jury Instructions § 13.13 (Mass. Cont. Legal Educ. 2014).

> [9] The final instruction stated, in pertinent part:
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> "The whistleblower act requires the plaintiff to bring a lawsuit within two years of his employer's alleged retaliatory action. The general rule is that this two year period begins to run on the date of the defendant's allegedly retaliatory action; however, the rule does not apply where the plaintiff did not know or could not reasonably have known of the alleged retaliatory action.

The MBTA did not object to the omission of the language "may have" in the instruction. Nor did the MBTA object to that omission after the instruction had been given.[10] See Mass. R. Civ. P. 51 (b), 365 Mass. 816 (1974); Rotkiewicz v. Sadowsky, 431 Mass. 748, 751 (2000) ("In order to preserve the issue for appellate review, the better practice would have been for defense counsel to renew the objection, with specificity, at the end of the charge").

". . .

"This question comes down to whether the plaintiff knew or should have known that the defendant employer took retaliatory against -- action against him and when he should have known -- when he knew or should have known that.

"Knew means to have actual knowledge. With respect to the question of whether the plaintiff should have known, you will determine that -- that by referring to what, in your judgment, a reasonable person would have known under the circumstances. The law provides that if a person has reasonable notice that his harm resulted from a retaliatory act by his employer, then the employee has a duty of inquiry and the two year period begins to run when the plaintiff has such reasonable notice."

[10] The MBTA requested an instruction using the term "inherently unknowable" to describe harm under the discovery rule. The judge declined to give it. The MBTA did renew its objection on this basis after the instructions were given and requested an instruction that stated that "under the discovery rule, if the plaintiff had suffered an inherently unknowable injury or wrong, the statute of limitations will be tolled until he knows or with reasonable diligence should know that he has suffered an injury and the identity of the defendant who caused the injury." The MBTA did not request an instruction regarding what Tryon "may have" known.

Accordingly, the argument was unpreserved and therefore waived. See Matsuyama v. Birnbaum, 452 Mass. 1, 35 (2008). The failure to object is understandable, however, as the instruction was not erroneous. "We review objections to jury instructions to determine if there was any error, and, if so, whether the error affected the substantial rights of the objecting party." Dos Santos v. Coleta, 465 Mass. 148, 153–154 (2013), quoting Hopkins v. Medeiros, 48 Mass. App. Ct. 600, 611 (2000). See Mass. R. Civ. P. 61, 365 Mass. 829 (1974). Looking to "the 'adequacy of the instructions as a whole,' Selmark Assocs., Inc. v. Ehrlich, 467 Mass. 525, 547 (2014), and . . . the 'wide latitude' the judge has in framing the instructions (citation omitted), Kelly v. Foxboro Realty Assocs., LLC, 454 Mass. 306, 316 (2009)," we are satisfied that the instruction adequately conveyed Tryon's duty of inquiry. DaPrato v. Massachusetts Water Resources Auth., 482 Mass. 375, 386 (2019).

The MBTA claims that the instruction misled the jury because it did not explicitly state that Tryon had a duty of inquiry if he should have known that the MBTA retaliated or that the MBTA may have retaliated against him. We are not persuaded, as the instruction was adequate to convey both concepts to the jury. The instruction drew a distinction between actual knowledge and reasonable notice of harm. The use of the phrase "reasonable notice" adequately conveyed that Tryon had a duty of

inquiry if he was on notice that the MBTA's conduct may have caused harm.[11] Moreover, unlike the medical malpractice cases from which the "may have" caused language derives, see Koe, 450 Mass. at 101-102; Bowen, 408 Mass. at 210-211, causation was not at issue in this case. It was undisputed that the MBTA terminated Tryon. What was at issue was the reason for the termination.

3. Treble damages. Finally, the MBTA argues that the judge erred by awarding treble damages to Tryon because the evidence was insufficient to demonstrate either outrageous behavior or a reckless disregard for the rights of others.

General Laws c. 149, § 185 (d), provides that "[t]he court may: . . . (4) compensate the employee for three times the lost

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[11] The MBTA also argues that the jury's factual finding on the tolling of the statute of limitations is fundamentally inconsistent with the judge's findings on treble damages, because the judge found that "Mr. Tryon believed that, [once] Mr. Kineavy was his direct superior, it was only a matter of time before Mr. Kineavy would force him out of the MBTA," and this finding means that Tryon should have known that Kineavy caused him harm. The judge made this finding, not the jury, and for the reasons stated above, the jury were not obligated as a matter of law to make this finding. Moreover, even if the jury had made the same finding, it was still for the jury to weigh this fact along with other facts before them, including the MBTA's concealment of Kineavy's involvement, and the explanation given to Tryon, in determining whether Tryon should have known that Kineavy engineered his termination. Finally, this argument conflates notice with motive. Tolling looks to what Tryon knew or should have known. Treble damages looks to Kineavy's motive. Kineavy's willful concealment of his retaliatory conduct undergirds both findings.

wages, benefits and other remuneration, and interest thereon . . . ." An award of multiple damages under G. L. c. 149, § 185 (d) (4), is permissive, not mandatory, and is reviewed for abuse of discretion. See Bennett v. Holyoke, 362 F.3d 1, 10 (1st Cir. 2004) (G. L. c. 149, § 185 [d], "adds a list of additional remedies that the court may, in its discretion, award to prevailing plaintiffs[, including] injunctive relief, multiple damages, and attorneys' fees").

The parties agreed at trial that multiple damages under the Whistleblower Act were punitive damages. This was correct. See Cristo, 98 Mass. App. Ct. at 381 (treble damages under Whistleblower Act are awarded under same standard as punitive damages). The parties also agreed, at the MBTA's suggestion, to use the prevailing standard for assessing punitive damages.[12]

[12] The use of this standard means that the MBTA was held vicariously liable for punitive damages for the actions of Kineavy and Trychon, whose motives and conduct could be imputed to the MBTA. The Supreme Judicial Court has limited the reach of vicarious liability for punitive damages, holding that a corporation could not be held liable for punitive damages for acts of lower-level supervisors of which its senior managers were unaware, at least in the context of a sexual harassment case. See Gyulakian v. Lexus of Watertown, Inc., 475 Mass. 290, 298–299 (2016) ("Whether a plaintiff is entitled to punitive damages from his or her employer on the basis of being exposed to a sexually hostile or offensive work environment created by one of its employees is therefore a two-step inquiry. We consider first whether the employer was on notice of the harassment and failed to take steps to investigate and remedy the situation; and, second, whether that failure was outrageous

"Under the existing standard, '[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.' Dartt v. Browning-Ferris Indus., Inc. (Mass.), [427 Mass. 1,] 17 [(1998)], quoting Restatement (Second) of Torts § 908(2) (1979). An award of punitive damages requires a determination of the

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or egregious"). In Merrimack College v. KPMG LLP, 480 Mass. 614, 627–628 (2018), the court further explained:

> "Thus, where an employee has engaged in misconduct, and where a person harmed by that misconduct seeks punitive damages against the employer, that misconduct will not necessarily be imputed to the employer. See Gyulakian[, supra at 298-299]. Rather, in awarding punitive damages, 'it is the actions of the employer, not the actions of that employee, that are the appropriate focus, and . . . it is the employer's conduct that must be found to be outrageous or egregious.' Id. at 299 n.14. And, in determining whether the employer engaged in outrageous or egregious conduct, we look to whether 'members of senior management' participated in the misconduct, or acquiesced in it by knowing of the misconduct and failing to remedy it. See id. at 300-301. The misconduct of lower-level employees -- even those at the supervisory level -- is insufficient to warrant punitive damages. See id. at 298."

We do not apply Gyulakian and Merrimack College to this case, as the parties chose to litigate under a different standard. No argument under Gyulakian was made at trial, and the parties do not rely on Gyulakian and Merrimack College in this appeal. However, we note that both Trychon and Kineavy were highly placed in management. The judge found that there was only one manager between Trychon and the MBTA general manager. Kineavy was listed as third manager in the division, along with Trychon and his supervisor. Below Kineavy there were several superintendents, and below them, over twenty line supervisors and forepersons. In addition, the MBTA successfully moved in limine to bar certain evidence regarding Kineavy's background and family, evidence that may have been considered by the judge had a different punitive damages standard applied.

defendant's intent or state of mind, determinations properly left to the jury, whose verdict should be sustained if it could 'reasonably have [been] arrived at . . . from any . . . evidence . . . presented.' Dartt v. Browning-Ferris Indus., Inc. (Mass.), supra at 16, citing Labonte v. Hutchins & Wheeler, 424 Mass. 813, 821 (1997)." Haddad, 455 Mass. at 107. Treble damages are appropriate where conduct "is so egregious that it warrants public condemnation and punishment" to "deter such behavior." Id. at 111.[13]

The case law refers to "evil motive" or "reckless indifference" in the disjunctive, and thus permits multiple recovery where a defendant acts either with evil motive or reckless indifference. The MBTA maintains that the judge erred as a matter of law because the evidence failed to support either a finding of "evil motive" or "reckless indifference." The facts found by the judge provided adequate grounds to determine that this was a "particularly outrageous" case. Haddad, 455 Mass. at 110. The judge could reasonably have found that both evil motive and reckless indifference were present here.

The judge's findings regarding Kineavy's motives were well supported. The judge found that Kineavy led a "year-long

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[13] On appeal, Tryon now urges us to conclude that treble damages under the Whistleblower Act is a form of compensatory rather than punitive damages. This argument is foreclosed by Cristo, 98 Mass. App. Ct. at 381-382.

campaign of complaints against Mr. Tryon" in 2001 and 2002 after Tryon reported the overtime abuse, a campaign that the judge found was "revenge" for Tryon's report, and was an effort to "cow" Tryon from looking into overtime abuse in the future. Kineavy carried the grudge against Tryon for nearly a decade. As soon as he was in a position of authority, Kineavy disparaged Tryon to Trychon, and recommended moving Tryon to nights to force Tryon to retire. When that did not work, Kineavy ultimately recommended, successfully, the elimination of Tryon's position. He engineered the timing of the layoff to block Tryon from applying for the open Green Line position, accelerating the end of Tryon's career at the MBTA. He then enlisted Trychon to cover up his involvement, thus effectively concealing his role from Tryon. The damage done was willful, malicious, and substantial. "[D]eliberate violations of [the law] by 'those charged with the public duty to enforce the law equally,' present a heightened degree of reprehensibility." Clifton v. Massachusetts Bay Transp. Auth., 445 Mass. 611, 623-624 (2005), quoting Dalrymple v. Winthrop, 50 Mass. App. Ct. 611, 621 (2000). See Ciccarelli v. School Dep't of Lowell, 70 Mass. App. Ct. 787, 796 (2007).[14] On this basis, the award of punitive damages was warranted.

[14] This case is thus distinguishable from Cristo, 98 Mass. App. Ct. at 381-382, in which we held that the judge did not

Whether the MBTA also acted with reckless indifference presents a closer question, but we conclude that the evidence was sufficient for the judge to conclude that the MBTA's acts and omissions were "so egregious that [they] warrant[] public condemnation and punishment" to "deter such behavior." Haddad, 455 Mass. at 111. "Reckless" means "marked by a lack of caution" and "careless . . . of consequences." Webster's Third New Int'l Dictionary 1896 (2002). "Indifferent" means "marked by a total or nearly total lack of interest . . . or concern . . . ." Id. at 1151. The evidence supports a finding that the MBTA was indifferent to Kineavy's qualifications and competence and the impact of Kineavy's actions on Tryon, adopted Kineavy's recommendations without caution, and was careless of the consequences.

The judge found that the MBTA systematically and rapidly promoted Kineavy, an unqualified person with no supervisory experience, into ever higher positions of responsibility and authority. The MBTA was on notice of Kineavy's 2001-2002 campaign against Tryon at the highest levels -- his letters had

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abuse his discretion in denying an award of punitive damages in a case under the Whistleblower Act where the only evidence was of the retaliation itself. In addition to the fact that the judge here awarded treble damages, we also have retaliation coupled with a long-term grudge, careful planning, deliberate falsehoods regarding Tryon's character and competence, and a sustained effort to both derail Tryon's career and to conceal deliberate wrongdoing.

been copied to the MBTA's then general manager and investigated. Kineavy's manager, Trychon, adopted Kineavy's recommendations regarding Tryon and assisted Kineavy in obscuring his role in these decisions, all without making any effort to verify the basis for Kineavy's recommendations. There is naught in the record to indicate that Trychon ever made an inquiry into the basis for Kineavy's escalating criticism of and attacks on Tryon. There is equally scant evidence to support Kineavy's allegations regarding Tryon's character and performance, and the judge found Kineavy to be wholly lacking in credibility on this subject. Indeed, the only evidence credited by the judge establishes that Tryon was a good employee; in addition to steady promotions up the ladder throughout his career, he received an award for "outstanding performance" from the Governor in 2008.

The judge did not abuse his discretion in concluding that the MBTA acted with reckless indifference to the rights of Tryon by creating and perpetuating a vacuum in which retaliation festered unchecked. While deliberate violations of the law are reprehensible, see Clifton, 445 Mass. at 623-624, tolerance or ratification of such conduct is also reprehensible, and the award of punitive damages to deter such an abdication of

responsibility is warranted.[15] Given the facts found by the judge, the finding of reckless indifference was also fully supported.

Conclusion. For the reasons stated above, the judgment entered on September 6, 2018, is affirmed.[16] As the prevailing party, Tryon may be awarded fees and costs on appeal. See G. L. c. 149, § 185 (d) (5). Under the facts and circumstances here, we exercise our discretion to award attorney's fees and costs. "Our decision in this regard is within our broad discretion, and

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[15] At trial, the MBTA defended in part on the basis that Tryon's layoff was the result of a legitimate management reorganization and that Kineavy was a good and unbiased employee.

[16] The MBTA points out that the Superior Court entered an "updated" judgment consolidating orders on a supplemental fee application, additional costs, and updated interest on February 1, 2019, after the Appeals Court had taken jurisdiction. Although the docketing of an appeal will deprive the trial court of jurisdiction (absent leave of the appellate court) to hear matters to rehear or vacate the judgment, see Hager v. Hager, 12 Mass. App. Ct. 887, 888 (1981), new matters or matters collateral to the judgment, such as attorney's fees, may be heard and acted upon. An appeal does not deprive the trial court of jurisdiction to adjudicate a fee application. See Farnum v. Mesiti Dev., 68 Mass. App. Ct. 419, 423 (2007), citing Commonwealth v. Cronk, 396 Mass. 194, 197 (1985); Ben v. Schultz, 47 Mass. App. Ct. 808, 814 (1999); Springfield Redev. Auth. v. Garcia, 44 Mass. App. Ct. 432, 434-435 (1998). See also Braun v. Braun, 68 Mass. App. Ct. 846, 852 (2007) (divorce modification is new proceeding); Hager, supra (same). There was no appeal from the fee award in the original judgment, and no issue has been argued on appeal regarding attorney's fees. Nonetheless, we may only affirm the original judgment. See Garland v. Beverly Hosp. Corp., 48 Mass. App. Ct. 913, 915 n.5 (1999). See Cronk, supra at 196-197 & n.2.

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')." Cristo, 98 Mass. App. Ct. at 382. Within fourteen days of issuance of the rescript in this matter, Tryon may apply for an award of reasonable appellate attorney's fees and costs. See Fabre v. Walton, 441 Mass. 9, 10-11 (2004). The petition should address the nature of the case and the issues presented, an itemization of the time and labor required, the amount of damages involved, the result obtained, the experience, reputation, and ability of the attorney, and the usual fee charged for similar services by other attorneys in the same area. The MBTA will then have fourteen days to file an opposition to the amounts requested. See id.

So ordered.