P.E.R.C. NO. 2006-11

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,
OFFICE OF THE PUBLIC DEFENDER,

Respondent,

-and-

Docket No. CO-2004-252

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO, LOCAL 1037,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies a motion for summary judgment filed by the State of New Jersey, Office of the Public Defender, and a cross-motion for summary judgment filed by the Communications Workers of America, Local 1037. CWA filed an unfair practice charge alleging that the State violated the New Jersey Employer-Employee Relations Act when the Public Defender terminated an attorney assistant in retaliation for engaging in protected activity - specifically, raising a health and safety issue in an October 1, 2003 e-mail to management. The State moved for summary judgment contending that the attorney assistant's actions were solely on her own behalf and did not constitute protected activity. Assuming the truth of the evidence presented by CWA and viewing the evidence in the light most favorable to it, the Commission concludes that CWA has presented sufficient evidence from which a reasonable factfinder could determine that the e-mail constituted protected activity and that the attorney assistant was terminated in retaliation for that activity. The matter will proceed to hearing.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Respondent, Peter C. Harvey, Attorney General (Gerri Benedetto, Deputy Attorney General, on the briefs)

For the Charging Party, Weissman & Mintz, attorneys (William G. Schimmel, of counsel).

DECISION

On February 19, 2004, the Communications Workers of America, Local 1037 (CWA), filed an unfair practice charge alleging that the State of New Jersey, Office of the Public Defender, violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. The charge alleges that the Public Defender terminated Attorney Assistant Rachel Towle, effective October 13, 2003, in retaliation for her engaging in protected activity - specifically, raising a health and safety issue in an October 1, 2003 e-mail to management. CWA seeks Towle's reinstatement with back pay. On August 9, the Director of Unfair Practices issued a

Complaint on the allegation that the Public Defender violated N.J.S.A. 34:13A-5.4a(3).

On August 20 and October 18, 2004, the Public Defender filed an Answer and Amended Answer. The Amended Answer admits that Towle was terminated effective October 13, 2003 and that, on October 1, she sent an e-mail to Deborah Collins and Linda Biancardi that "listed lots of workplace issues" that Towle felt needed attention. However, the Public Defender denies that the termination violated the Act or that it retaliated against Towle for engaging in protected activity. It asserts that it exercised a legitimate managerial prerogative when it terminated Towle, an unclassified at-will employee who served at the pleasure of the Public Defender.

On April 14, 2005, the Public Defender moved for summary judgment, primarily contending that Towle's October 1, 2003 e-mail was made solely on her own behalf and did not constitute protected concerted activity under the Act. It submitted the supporting certification of Patrick DiMattia, its Human Resources Manager.

On June 1, 2005, CWA opposed the Public Defender's motion and cross-moved for summary judgment in its favor. It submitted certifications from Towle, attorney assistants Stephen Martinez and Suzanne Martinez, and CWA shop steward Marcia Blum, an attorney in the Appellate Section. It also moved to strike

DiMattia's affidavit on the grounds that, in responding to CWA's interrogatories, DiMattia stated that neither he nor any other employee of the Public Defender had personal knowledge of all the matters raised in the interrogatories. DiMattia added that the information included in his answers had been assembled at his direction by department employees.

On July 18, 2005, the Public Defender filed a reply, maintaining that it had a contractual and statutory right to discharge Towle, an unclassified at-will employee with less than six months' experience. It urges that, even with all inferences drawn in CWA's favor, no reasonable factfinder could find that Towle engaged in protected activity, as opposed to lodging a personal complaint. Further, it suggests that we be guided by the procedural provisions in R. 4:46-2. Accordingly, the Public Defender urges us to deny CWA's cross-motion, and deem its own statement of facts to be admitted, on the grounds that CWA did not, pursuant to the court rule, admit or dispute each of the points in the Public Defender's statement of facts and did not separately identify any additional facts that it contends are material.

Procedural Issues

We address two preliminary procedural issues. First, we deny CWA's motion to strike DiMattia's affidavit. CWA does not assert that DiMattia lacks personal knowledge of the information

in the affidavit itself and does not link the interrogatory answers to the affidavit. Moreover, an individual answering interrogatories may specify what information included in the answers is not within his or her personal knowledge.

Second, we decline to apply the procedural requirements in R. 4:46-2 to the CWA's motion. Our rules rather than Court rules govern unfair practice cases. N.J.A.C. 19:14-4.8(e) provides that summary judgment motions will be decided based on the "pleadings, together with the briefs, affidavits and other documents filed. . . ." We decline to impose, through decision-making, the more specific procedures in R. 4:46-2. See Metromedia v. Dir., Div. of Taxation, 97 N.J. 313 (1984).

Facts for Purposes of Considering These Motions

We now turn to the substance of the motions. For the purposes of considering these motions, we summarize the evidence presented in the parties' submissions.

The Public Defender's Appellate Section represents criminal defendants appealing trial court verdicts, typically on constitutional grounds. The majority of clients are incarcerated during their appeal, but some are out on bail or probation.

When a case is transferred to the Appellate Section, it is assigned to an attorney assistant, each of whom handles 200 or more appeals. The attorney assistant communicates with clients and their family members and obtains all documents required to

prepare the brief in support of an appeal - a process that may take several months.

Towle was hired as an attorney assistant in the Newark office of the Public Defender, Appellate Section, effective April 23, 2003. Her appointment letter advised that she was an unclassified employee and therefore served at the pleasure of the Public Defender. The Attorney Assistant Performance Appraisal Review (PAR) form lists the following as one of seven job responsibilities:

> Serves as primary liaison between office and clients during period of compiling appellate record. Evaluates telephone and written inquiries about case status and legal problems from inmate, family members and others. Responds to routine inquiries independently in writing or by telephone. Refers non-routine and urgent matters to supervising attorney.

Assistant Public Defender Linda Biancardi, head of the Appellate Section, and Deputy Public Defender Deborah Collins, the administrative managing attorney for the Appellate Section, met with each of the attorney assistants to review the job responsibilities in the Attorney Assistant PAR form. Towle signed the form, as did Collins and Biancardi as her rater and reviewer, respectively.[1/]

1/ While DiMattia asserts that Towle's supervisor was Claire Drugach, a supervising attorney in the Intake Unit, Towle states that she was instructed that Collins was her supervisor. She adds that Drugach was not part of

(continued...)

Attorney assistants are covered by the collective negotiations agreement between the State of New Jersey and CWA, Professional Unit. That agreement allows unclassified employees with more than six months' service to ask for agency head review in the event they are dismissed for misconduct. It also specifies that this and other review procedures shall not be construed as "limiting the State from exercising its inherent discretion to dismiss employees covered by this section who serve at the pleasure of the department or agency head, without stating the reasons for the dismissal." In addition, the agreement includes an Article 32, entitled Health and Safety. Sections G 1 and 2 of that article state:

> 1. References to safety are intended to include a concept of reasonable personal security and protections, which shall be maintained to assure employees against physical harm.
>
> 2. It is understood that references to safety and health hazards and conditions of work referred to in this Article are not intended to include those hazards and risks which are an ordinary characteristic of the work or are reasonably associated with the performance of an employee's responsibilities and duties. However, this is not intended to eliminate the State's general obligations for the safety and health of such employees as set forth in other provisions of this Article.

1/ (...continued) management. We need not resolve this dispute to decide the parties' motions.

Some of the client calls received by some attorney assistants are perceived by them to be abusive, hostile, or harassing. According to Towle, she and other attorney assistants discussed and shared concerns about such phone calls. Stephen Martinez certifies that one female attorney assistant received sexually explicit calls from a client; she complained to Biancardi, who then listened to the recorded phone message.

On June 3, 2003, Biancardi met with Towle and other attorney assistants. Among the subjects addressed were whether, in order to avoid receiving harassing or abusive calls, attorney assistants could decline to take a call from a difficult client or request that the receptionist screen their calls. Towle was one of the assistants who addressed these issues and, according to Suzanne Martinez, Biancardi stated that she would speak to the receptionist about screening calls. However, Martinez maintains that there was no change with respect to this issue.

In addition, Towle, Suzanne Martinez and Stephen Martinez certify that they have, or had, safety-related concerns that clients or members of a client's family could visit them without an appointment. Suzanne Martinez certifies that she was concerned for her safety when a client's parents came to the office without an appointment; were directed to her desk; and became loud and abusive. Towle certifies that she witnessed this encounter and was frightened by it.

On September 30, 2003, Collins sent an e-mail to Towle and the other attorney assistants, reminding them to give clients the receptionist's telephone number, never the direct number of an attorney. Collins added that one of the attorneys had been assigned a "troublesome" client and wanted to protect himself.

On October 1, 2003, at 11:58 a.m., Towle sent the following e-mail to Biancardi and Collins. Drugach was copied on the communication, and the subject line consisted of a client's name and file number.

> This is a complete file that was opened at the beginning of the year, which for reasons I don't fully understand (Claire knows all the details), cannot be put on the SOA calendar.
>
> This woman calls once, often two and three times a week asking questions to which she has already been told the answers. She refuses to listen to any explanations that either Claire, or I give her, she raises her voice, talks over me, gets hysterical and won't get off the phone. My average client call lasts about five minutes. Hers are 15-20 and consist of her ranting and me repeating myself.
>
> Yesterday, reception put her through to me at 5:20 p.m. (This has happened several times and I was under the impression we weren't supposed to get client calls that late).[2/] I told her once again that she wasn't going to be put on the calendar and she started shrieking at me. This time (previously I had been very patient with her) I, too raised my voice and let my frustration come through. I

2/ A letter sent to clients apprises them that their calls would be accepted from 9:00 a.m. to 4:00 p.m. on weekdays.

> won't give you a complete run-down of the conversation in this email, but I would be happy to give you more details in person if necessary.
>
> I am not comfortable taking any more calls from this woman. First of all, I do not know what to say to her and second, she is abusive. Ms. _____ was convicted of harassment, stalking and physical assault. According to her PSI, she has some form of mental illness and does not take her medication. She is also paranoid and has a persecution complex. Additionally, she is not incarcerated and her M.O. indicates that she might very well show up here.
>
> As a paralegal, I am apparently not afforded the same luxury as an attorney of having my calls screened. Therefore, I respectfully ask that reception be instructed not to put _____'s call through to me, nor send her to my desk should she come to the office.
>
> I look forward to hearing your response to this matter.

At 4:49 p.m. on October 1, 2003, Biancardi sent an eight-paragraph e-mail to Collins and Drugach concerning Towle's communication. She stated that she was "extremely displeased with the tone and the assertions" it contained and added that no paralegal or staff attorney can simply refuse to talk with a client. Biancardi emphasized that the nature of Public Defender work was that clients may be mentally ill, out on bail, and charged with crimes far worse than harassment and assault. She indicated that the Public Defender's employees are supposed to learn how to handle clients and show compassion and support. Biancardi stated that the e-mail's tone indicated a "complete

disregard" for management and she commented that it was "completely inappropriate" for Towle to "raise her voice and let her frustration show through" with a client. With respect to paralegals taking attorney phone calls, she wrote:

> The PAR specifically states that paralegals will provide backup assistance to attorneys, including taking calls (Deborah, we identified that paragraph in response to Rachel's complaint about announcing the caller at the paralegal meeting). She signed the PAR indicating that she understood her job responsibilities in this regard.

Biancardi concluded that Collins and Drugach should meet with Towle; explain the points outlined in Biancardi's e-mail; and speak to her about her attitude and the need to learn how to handle clients.

That meeting did not occur. Biancardi spoke with DiMattia; he advised her that if it had already been determined that Towle was "not a match" for the Public Defender, terminating her employment before she attained six months of service would prevent Towle from seeking a departmental hearing on the grounds that the termination was disciplinary. In this vein, DiMattia asserts that Towle's e-mail prompted Biancardi to review Towle's entire work history and conclude that her skills and temperament were inconsistent with the Public Defender's mission. Therefore, management decided not to address with Towle the concerns in Biancardi's memo. As noted, an October 2, 2003 letter terminated Towle's services effective October 13.

Marcia Blum and Dan Gauteri are Public Defender attorneys and shop stewards for the negotiations unit that includes attorney assistants. On October 31, 2003, they wrote a memorandum to Biancardi stating that Towle's October 1 e-mail highlighted a health and safety concern arising under Article 32 A and G(1) of the agreement. The stewards referred to Towle's request for help "with a persistent and intractable client"; stated that Rachel was gone but the problem remained; and commented they had recently learned that paralegals, unlike attorneys, could not decline calls from difficult clients or choose not to meet with clients who did not have an appointment. They maintained that these policies raised an issue under the PAR, which states that attorney assistants are to refer urgent and non-routine matters to supervising attorneys. They asked for clarification concerning the ability of paralegals to decline calls or unscheduled visits from difficult clients. They also requested training for the whole staff on how to deal with abusive clients.

On November 6, 2003, Biancardi responded with a memo to all Appellate Section staff stating that client calls are not considered a health and safety hazard under Article 32 because they are an "ordinary characteristic of the work." The memorandum also stated that clients do not walk through the

building unattended and all visitors are required to register with security and walk through a metal detector.

On December 4, 2003, Local 1037 filed a group grievance alleging that the Public Defender had violated Article 32 by not allowing attorney assistants to screen calls and by not adequately screening visitors to the office. The grievance was resolved by the issuance of a February 11, 2004 memorandum from Biancardi concerning office visitors and attorney assistant communications with clients. The memorandum stated that it reiterated policies that had been in effect since Biancardi was appointed Assistant Public Defender for the Appellate Section.

The memorandum specifies that attorney assistants shall immediately inform their direct supervisor or the Intake Unit manager whenever they receive a call that they deem "beyond the range of ordinary communications for the Appellate OPD client population." The supervisor may then determine whether a supervisor's presence is required during any future communications between the attorney assistant and the client or whether "it is necessary to limit the attorney-assistant's communication with the client in some other way." The memorandum continues that, with respect to office visits, staff members will be asked whether they can meet with a client who comes to the office without an appointment. If not, the client will not be

allowed past the security desk and will be advised to call the office to schedule an appointment.[3/]

Analysis

Summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law. N.J.A.C. 19:14-4.8; Brill v. Guardian Ins. Co., 142 N.J. 520, 540 (1995). In re Bridgewater Tp., 95 N.J. 235, 244 (1984), sets forth the elements that a charging party must prove to establish a violation of 5.4a(3), and it thus provides the substantive framework for evaluating the parties' motions.

Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this

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3/ We reject the Public Defender's position that, consistent with Evid. R. 407, the February 2004 memorandum is inadmissible as a subsequent remedial measure. Even if the memorandum can be so characterized, Evid. R. 407 excludes such post-event evidence only for the purpose of proving that the "event" was caused by negligence or culpable conduct. Evidence of remedial measures may be admitted as to other issues. Here, the event that is the subject of litigation is Towle's termination, and the policy is not a measure undertaken to prevent future dismissals. Further, the memorandum is pertinent to the question of whether screening client calls was a group concern of attorney assistants, a factor that bears on whether Towle's e-mail involved protected activity.

activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

We turn first to the Public Defender's motion. Assuming the truth of the evidence presented by CWA and viewing the evidence in the light most favorable to it, Brill, 142 N.J. at 540, we conclude that there is sufficient evidence to permit a rational factfinder to conclude that Towle engaged in protected activity and that she was terminated in retaliation for that activity. Further, the contract provisions governing the employment and termination of attorney assistants do not entitle the Public Defender to summary judgment as a matter of law. We detail the reasons that lead to these conclusions, starting with the question of whether Towle engaged in activity protected by our Act.

Our Act gives public employees the right, without fear of penalty or reprisal, to form, join and assist any employee organization. N.J.S.A. 34:13A-5.3. The Act also covers concerted activity engaged in for employees' mutual aid and protection. See City of Margate, P.E.R.C. No. 87-145, 13 NJPER 498, 500 n.3 (¶18183 1987) (protection for "mutual aid" derives from the Act's broad definition of "representative" as encompassing a "group of public employees", N.J.S.A. 34:13A-3, and from the right of public employees, pursuant to Article I, par. 19 of the New Jersey Constitution, to present grievances

through representatives of their own choosing). Drawing on case law interpreting 29 U.S.C. §157 of the National Labor Relations Act (NLRA), we have held that protected activity may include individual conduct - such as complaints, arguments, objections, letters or similar activity - related to enforcing a collective negotiations agreement or preserving or protesting working conditions of employees in a recognized or certified unit. North Brunswick Tp. Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451, 454 n.16 (¶4205 1978), aff'd NJPER Supp.2d 63 (¶45 1979), citing Dreis v. Krump Mfg. Co., 345 F.2d 320 (7th Cir. 1976) and NLRB v. Interboro Contractors, Inc., 388 F.2d 455 (2d Cir. 1967). However, mere "personal griping" does not constitute protected concerted activity. Compare Capitol Ornamentental Concrete Specialities, Inc., 248 NLRB 851, 1518 (1980) (employee's complaint about condition of road leading to new parking area not protected activity where there was no evidence that he acted in concert with any other employee and no reason to infer that his complaint touched a matter of common concern) and Salisbury Hotel Inc., 283 NLRB 685 (1987) (non-unionized employees were engaged in concerted activity to change employer's lunch hour policy where employees had balked at the new policy and complained among themselves and to management; therefore, discharged employee's complaints to other employees, and her individual complaints to the employer, were part of that concerted effort).

In North Brunswick, we held that a secretary engaged in protected, concerted activity when she strenuously objected to her supervisor about a change in work hours - an existing working condition that pertained to a certified negotiations unit but that was not set out in the negotiated agreement. See North Brunswick Tp. Bd. of Ed., H.E. No. 79-1, 4 NJPER 269, 270-271 (¶4138 1978). Similarly, in Atlantic Cty. Judiciary, P.E.R.C. No. 93-52, 19 NJPER 55 (¶24025 1992), aff'd 21 NJPER 321 (¶26206 App. Div. 1994), we relied on North Brunswick in finding that an employee engaged in protected conduct when, during a group meeting called by management to discuss a new evaluation system, he questioned the proposed changes. We reasoned that he was commenting on a working condition affecting all employees.[4/] By contrast, in Essex Cty. College, P.E.R.C. No. 88-32, 13 NJPER 763 (¶18289 1987), we found that where the college had a policy of distributing paychecks at 4 p.m., a part-time employee did not engage in protected activity when she complained to the college president about not receiving her paycheck at the end of her workday at 1:15 p.m. She was not acting on behalf of an employee organization; she did not act in concert with anyone; and her complaint was on behalf of herself individually and did not

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4/ The charge in Atlantic Cty. was ultimately dismissed on the grounds that, while the employee's transfer was partly motivated by his protected conduct, he would have been transferred even absent that conduct. 19 NJPER at 57.

relate to enforcing a collective negotiations agreement or changing the working conditions of employees other than herself. See also State of New Jersey (Public Defender), P.E.R.C. No. 86-67, 12 NJPER 12 (¶17003 1985), recon. den. 12 NJPER 199 (¶17026 1986), aff'd NJPER Supp.2d 169 (¶148 App. Div. 1987) (personal opinions about how office should be organized and the practice of law conducted were not related to terms and conditions of employment and did not constitute protected activity; complaints about office Christmas party were protected but employer showed that attorney was terminated for poor performance).

Contrary to the Public Defender's assertion, we have not required that an individual take part in collective negotiations, grievance processing or contract interpretation as a precondition to a finding that he or she was engaged in protected activity. To the extent that language in the Director of Unfair Practice's decision in New Jersey Network, D.U.P. No. 98-32, 24 NJPER 245 (¶29117 1998), suggests otherwise, it cannot override Commission decisions. Moreover, regardless of how New Jersey Network framed the standard for evaluating individual conduct, its holding comports with Commission decisions - that is, an individual's complaint to an affirmative action officer was made solely on her own behalf where it alleged that she was treated less favorably than a male co-worker.

Within this analytical framework, we conclude that CWA has presented sufficient evidence from which a reasonable factfinder could determine that Towle's e-mail constituted protected activity concerning a matter of common concern to attorney assistants rather than simply a personal gripe. By stating that "as a paralegal" she did not have the luxury, as did attorneys, of having client calls screened, Towle's e-mail could be interpreted as addressing a working condition that pertained to all attorney assistants. In addition, a reasonable factfinder may choose to view the e-mail in conjunction with other evidence bearing on attorney assistants' concerns about client phone calls and visits. For example, Biancardi met with attorney assistants on June 3, 2003 to discuss various issues. At that meeting, Towle raised the issue of attorney assistants having their calls screened to avoid harassment - a fact that Biancardi noted in her October 2 e-mail to Collins. Compare Atlantic Cty. Judiciary (employee questioned employment condition in group setting). Further, Towle and two other attorney assistants, Stephen Martinez and Suzanne Martinez, certify that they have each received harassing or abusive calls; feel the need to have their calls screened to protect against such callers; and had discussed their concern about harassment amongst themselves and at the meeting with Biancardi. These two attorney assistants also assert that Towle had raised this issue with management and, like

Towle, they state that they have safety concerns about unscheduled client visits. In addition, Stephen Martinez certifies that he has personal knowledge of a fourth attorney assistant who has received harassing calls. The December 2003 group grievance contended that health and safety issues were triggered by the section's policy on client calls and visits and the February 2004 memorandum set forth procedures for dealing with unscheduled client visits and directed attorney assistants to inform their supervisors of unusual client calls.

The fact that Towle sought an accommodation with respect to one particular caller does not mandate a finding that Towle's e-mail was a "personal gripe" within the meaning of Essex Cty. and Capitol Ornament. Towle's request was prefaced by her concern that "as a paralegal" she could not decline calls on her own and, as noted, CWA has proffered evidence that other attorney assistants were also concerned about whether they could decline to take telephone calls from the occasional difficult client. Further, a finder of fact could conclude that an individualized request was one way in which a concern affecting all attorney assistants could be raised and ameliorated, given that they had sought to be relieved of the obligation to take a client's call only in unusual circumstances and that the February 2004 policy was not inconsistent with that position. Of course, it is ultimately for the Hearing Examiner to find all the facts,

including whether attorney assistants had such shared concerns and, if so, whether Towle's e-mail reflected them or instead addressed issues personal to her.

There is also sufficient evidence to warrant a hearing on whether Towle was terminated in retaliation for protected activity given Biancardi's stated displeasure with her e-mail and the fact that she terminated Towle the next day. See Warren Hills Reg. Bd. of Ed., P.E.R.C. No. 2005-26, 30 NJPER 439 (¶145 2005), appeal pending App. Div. Dkt. No. A-001747-04T5; Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985) (timing is an important factor in assessing motivation and understanding the context of events). As we discuss in deciding CWA's motion, whether protected activity was a substantial motivating factor in the termination, and whether Towle would have been terminated otherwise, are factual questions that are generally not appropriate for summary judgment.

In light of the foregoing, the fact that the Public Defender may have had a contractual right to terminate at-will employees with less than six months of service - a point the CWA does not dispute - does not entitle the Public Defender to summary judgment. An employer does not have a right to invoke a contractual provision for discriminatory reasons. Whether it has in fact done so will be tested under Bridgewater's standards.

See Hudson Cty. Police Dept. Layoffs, P.E.R.C. No. 2004-14, 29 NJPER 409 (¶136 2003).[5/]

We are also unpersuaded by the Public Defender's additional arguments in favor of summary judgment. For example, it stresses that, during her employment, Towle herself never maintained that she engaged in concerted activity and neither the shop stewards' October 31, 2003 memorandum nor the group grievance assert that Towle's actions constituted protected union activity. These circumstances are not determinative. Whether or not Towle's conduct amounted to protected activity is ultimately a legal issue for us to decide. In assessing that legal issue, we reject the Public Defender's arguments that North Brunswick is not pertinent because it addressed the individual conduct issue in a footnote and applied a pre-Bridgewater analysis in assessing when an unfair practice had been committed. Bridgewater did not supersede North Brunswick's analysis of what constitutes protected activity and we have reiterated its standard in the other cases cited in this opinion.

Finally, the contract language stating that tasks are not considered a health hazard when they are an "ordinary

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5/ The same analysis would pertain with respect to any statute stating that attorney assistants served at the pleasure of the Public Defender. However, while the employer cites N.J.S.A. 2A:158A-6, that provision applies only to deputy and assistant public defenders, not attorney assistants.

characteristic" of an individual's job responsibilities does not require an award of summary judgment in the Public Defender's favor. Regardless of whether some client calls present a health and safety hazard, raising a common concern about a working condition addressed in a collective negotiations agreement constitutes protected activity under our case law. In any event, the Attorney Assistant PAR Form indicates that an assistant may refer "non-routine and urgent" matters to an attorney and the February 2004 memorandum includes procedures for limiting an assistant's communications with an especially difficult client. This evidence, coupled with Collins' e-mail referring to an attorney's desire to "protect" himself by not taking a particular client's calls, could support a finding that some client calls could trigger health and safety issues.

We next address CWA's motion for summary judgment. It contends that it has met the Bridgewater standards because it has shown that Towle engaged in protected activity and the Public Defender effectively admits that she was terminated in retaliation therefore because it acknowledges that the e-mail prompted a review of her work history. For the following reasons, we also deny this motion.

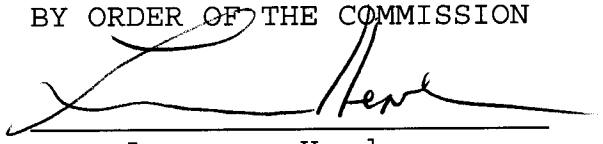
For the purpose of analysis we will assume that Towle engaged in protected activity when she wrote the e-mail and that the e-mail triggered her termination. Nevertheless, summary

judgment in CWA's favor is still not appropriate given that its 5.4a(3) claim requires an assessment of the employer's state of mind and motivation in terminating Towle. While Towle's e-mail may have raised concerns about working conditions that affected other attorney assistants, Towle also acknowledged that she had "let her frustration show through" with a client. Further, Biancardi believed that Towle should have shown more patience with, and compassion for, the client. Thus, in addition to addressing policies concerning office visitors and the screening of attorney assistant phone calls, the e-mail also produced performance-based concerns that were specific to Towle. Therefore, a hearing is required to determine whether the termination was substantially motivated by Towle's questioning of the office telephone and visitation policies, as opposed to performance issues that Biancardi believed were evidenced in the e-mail and Towle's work history. See generally, Pressler, Current N.J. Court Rules, comment following R. 4:46-2, p. 1662 (2003) (summary judgment should not ordinarily be granted where an action or defense requires determination of a state of mind or intent, such as claims of waiver, bad faith, fraud or duress). Of course, if a hearing examiner finds that hostility towards protected activity was a substantial factor in Towle's termination, he or she will then assess whether Towle would have been terminated even absent that conduct.

ORDER

The Public Defender's motion for summary judgment is denied, as is CWA's cross-motion for summary judgment. The case shall be set for hearing.

BY ORDER OF THE COMMISSION



Lawrence Henderson
Chairman

Chairman Henderson, Commissioners Buchanan, DiNardo, Fuller, Mastriani and Watkins voted in favor of this decision. None opposed. Commissioner Katz was not present.

DATED: September 29, 2005
Trenton, New Jersey
ISSUED: September 29, 2005