NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-6140-12T4

IN THE MATTER OF DETECTIVE
ARIEL GONZALEZ.

Argued November 17, 2015 – Decided April 4, 2016

Before Judges Yannotti, St. John and Vernoia.

On appeal from the Waterfront Commission of New York Harbor.

Michael A. Bukosky argued the cause for appellant Ariel Gonzalez (Loccke, Correia & Bukosky, attorneys; Mr. Bukosky, on the briefs).

Siobhan B. Krier, Senior Counsel, argued the cause for respondent Waterfront Commission of New York Harbor (Phoebe S. Sorial, General Counsel, attorney; Ms. Sorial and Tracey A. Agnew, on the brief).

PER CURIAM

Ariel Gonzalez, a Detective employed by the Waterfront Commission of New York Harbor (Commission), an instrumentality of the states of New York and New Jersey, appeals from the Commission's final determination that he violated the Collective Bargaining Agreement between the Commission and the Detectives'

Endowment Association P.B.A. Local 195 (CBA), the Commission's Police Division's Standards of Professional Conduct, Law Enforcement Code of Ethics, Rules and Regulations, and Employee Handbook. As a result of the infractions, Gonzalez was terminated. Following our review of the arguments advanced on appeal, in light of the record and applicable law, we affirm.

I.

The record discloses the following facts and procedural history of the administrative appeal under review. Gonzalez began his employment as a Detective with the Commission in 1999.[1] On June 4, 2012, Gonzalez executed a sworn affidavit on behalf of Kimberly Zick, a former Commission assistant general counsel, in connection with her lawsuit against the Commission and Walter M. Arsenault, its Executive Director, which she had filed in the United States District Court for the Southern District of New

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[1] The Commission's statutory mission is to investigate, deter, combat, and remedy criminal activity and influence in the Port of New York and New Jersey. See N.J.S.A. 32:23-2. It also ensures fair hiring and employment practices. See N.J.S.A. 32:23-5. Pursuant to its enabling legislation, the Commission is a fully-recognized law enforcement agency and is vested with broad licensing, regulatory, and investigative powers, as well as subpoena powers. N.J.S.A. 32:23-10. Investigators, including Commission detectives, are vested with police powers that are the same as those of state police officers of New York and New Jersey. N.J.S.A. 32:23-86(4).

York. She alleged employment discrimination, intentional infliction of emotional distress, and constructive discharge.

Specifically, Zick alleged she was unlawfully fired from her position at the Commission in violation of the Americans with Disabilities Act (ADA), 42 U.S.C.A. §§ 12101-12213, and the Rehabilitation Act of 1973 (Rehabilitation Act), 29 U.S.C.A. §§ 701-796. Zick also claimed that she was subject to unfair treatment throughout her employment at the Commission, rising to the level of constructive discharge. On October 4, 2012, Zick's case was dismissed with prejudice for failure to state a claim upon which relief could be granted. Zick v. Waterfront Comm'n of N.Y. Harbor, No. 11 Civ. 5093 (S.D.N.Y. October 4, 2012).

On October 19, 2012, the Commission advised Gonzalez that he was the subject of an internal investigation related to his statements in his June 4 affidavit, which had been submitted as an exhibit to Zick's complaint. On December 3, Internal Affairs Officer Captain Margaret Baldinger questioned Gonzalez under oath, and he maintained the truth of the statements made in his affidavit.

On February 7, 2013, Gonzalez was served with a statement of disciplinary charges, at which time he was suspended pending a hearing. On February 19, Gonzalez filed an action in the United States District Court for the District of New Jersey

alleging that the Commission had violated the ADA, Title VII, and the First Amendment to the United Sates Constitution. On March 13, the judge issued an order denying Gonzalez's request for a preliminary injunction. Gonzalez appealed the order denying his request for a preliminary injunction, which was denied.

On June 11, 2013, the United States Equal Employment Opportunity Commission (EEOC) dismissed Gonzalez's charge because he had filed a lawsuit in a federal district court. The District Court held that it must abstain from exercising federal jurisdiction because Gonzalez could raise his federal claims in the State administrative and related court proceedings. During the pendency of this appeal, the Court of Appeals for the Third Circuit affirmed the decision of the District Court, determining that his "window of opportunity to raise these claims is not yet closed, as he is permitted to—and indeed has—raised his federal claims in his appeal to the New Jersey Superior Court, Appellate Division." Gonzalez v. Waterfront Comm'n of N.Y. Harbor, 755 F.3d 176, 184 (3d Cir. 2014).

The Commission's administrative hearings with regard to Gonzalez's disciplinary charges were held over three days before a New York administrative law judge (ALJ). As an initial matter, the ALJ stated that he would not entertain the claims

made under the ADA or Title VII retaliation.

The affidavit Gonzalez completed on Zick's behalf at her attorney's office stated in pertinent part:

> 1. I submit this affidavit for the purpose of presenting my knowledge of certain circumstances underlying Kimberly Zick's lawsuit against the [Commission].
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> . . . .
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> 9. In or about the first week of May, 2010, I was summoned to a meeting in Mr. Arsenault's office at the New York Administrative offices of the Commission. Upon my arrival, Chief of Police Hennelly, Captain Brown, Mr. Arsenault, Lt. (then Sgt.) Alexander, and Ms. [Michelle] Demeri were already present.
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> . . . .
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> 16. After Ms. Zick's departure from the Commission, [Phoebe S. Sorial, General Counsel] sent a Commission wide email telling employees to save any correspondence whether via email or telephone, to or from Ms. Zick, even if it was personal, or that employee would face a termination.
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> 17. Also, after Ms. Zick's departure, Mr. Arsenault sent another Commission wide email telling about her EEOC case against the Commission, despite its private content. It became clear that Mr. Arsenault had spoken to many people regarding the facts of Ms. Zick's case because I overheard many personal details about her case. Other employees at the Commission were talking about her as though she had lied to the Commission and was a dishonest and untrustworthy person; characterizations I believe to be untrue.

In its introduction to the charges against Gonzalez, the Commission stated:

> [i]n each Count set forth herein, it is hereby alleged that while assigned as a Detective with the New Jersey Field Office of the [Commission], in connection with a federal law suit filed against the Commission in the United States District Court, Eastern District of New York, <u>Kimberly M. Zick v. Waterfront Commission of New York Harbor</u>, 11-Civ. 5093, on or about June 4, 2012, you did swear falsely, by making false statements, which were not true and for which you demonstrated reckless disregard as to the truth thereof, to wit: on or about June 4, 2012, you executed a duly sworn affidavit, in which paragraphs 9, 16 and 17 contain false and inaccurate statements therein; and on December 3, 2012, you affirmed these false statements while testifying under oath during an administrative investigation into the false statements contained in your [a]ffidavit.

At the hearing before the ALJ, the Commission presented the testimony of Ariel Ventura, its Director of Information Technology. He testified that he had used a tool to retrieve all emails Sorial had sent to the entire Commission. He also stated that he was asked to retrieve access card reader information. Ventura stated, "logs are only generated when [Gonzalez's] specific card touches that reader, so if he is not in the office it doesn't do anything. He is basically in another office." The log generated for the New York office did

not contain any log-in dates for Gonzalez's entry for the time period between April 26 and June 1, 2010.[2]

Michelle Demeri, the Commission's attorney allegedly present at the meeting referred to in Gonzalez's affidavit, said she could not recall ever attending such a meeting. She also stated that in her experience, it would not have been typical for detectives to participate in case meetings with attorneys or the Executive Director. She testified that she had received an email advising her to retain emails and correspondence between herself and Zick, but that it did not contain any language that suggested noncompliance would result in termination. She stated that she perceived the "sanctions" referred to in that email as being a variety of disciplinary actions, including getting "sent home for the day" or something similar. She testified that she undoubtedly had not attended the alleged meeting in 2010 with Arsenault and Sorial.

Captain Thomas Alexander testified he had never been a Lieutenant with the Commission. He did not recall attending a meeting in Arsenault's office in the first week of May 2010. However, he recalled receiving a document retention email from Sorial with instruction to save any correspondence with Zick,

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[2] The access logs are not included with the record.

but he did not recall that it contained any language suggesting "termination" as a consequence of not doing so.

Arsenault testified that he had served as Executive Director of the Commission since September 2008. He stated that he had not sent an email to the entire Commission regarding Zick's EEOC complaint. He asserted that employees who failed to save correspondence potentially pertinent to the Zick case as required by Sorial's email could potentially face sanctions from the court. Arsenault testified he did not have a meeting during the first week of May 2010 with Hennelly, Brown, Alexander, Demeri, and Gonzalez. He stated that at the time of the alleged meeting, Gonzalez had been placed on modified duty and relieved of his firearm, and a detective in those circumstances would not have attended a meeting of that nature.

When Arsenault received Gonzalez's affidavit, he believed that under a recent court decision, he was required to turn over any material that could impeach Gonzalez's credibility in future cases, including the false affidavit. Arsenault testified that he had not initiated an investigation into another affidavit that Gonzalez had submitted in a different employment discrimination case.

Gonzalez presented the testimony of Baldinger. Gonzalez had requested that the Commission provide him with a copy of

Baldinger's internal investigation report, which was denied by the Commission as it maintained, among other grounds, that it was privileged. Baldinger testified that she found Gonzalez to be an honest officer from her experience working with him.

Gonzalez also presented the testimony of Captain William Brown. Brown had supervised Gonzalez for five years and described his ability as a detective as exceptional. He characterized Gonzalez as honest and truthful. Brown remembered the case on which Gonzalez and Zick had been working, and stated that he had been contacted by Baldinger in December 2012 about a meeting he had attended with Arsenault and Gonzalez in the spring of 2010. He recalled a meeting in the Commission's New York office. Brown testified that meetings with Arsenault and Gonzalez present "happened on several occasions." During this particular meeting, Arsenault announced that a case Zick was handling would be reassigned to Demeri. In the hallway, Brown asked Arsenault about the reason for the reassignment, to which Arsenault responded something to the effect of, "[d]on't worry, I'll be taking care of that."

When Brown was shown the paragraphs of Gonzalez's affidavit at issue here, he testified that the description given in the Paragraph 9 of the affidavit was consistent with his memory of the meeting. He stated that detectives were often remiss in

their completion of their daily activity reports (DAR) and audio logs, and he did not expect that a detective would document a meeting in the New York office. Finally, he did not recall receiving an email from Arsenault about Zick's lawsuit.

Gonzalez testified that he would fairly regularly attend "meetings with the Executive Director, the Chief, . . . as well as assistant counsel." He stated that with regard to one case on which he had worked, he had been directed to keep facts confidential, thereby keeping "to a minimum the kind of notations that [he] would have otherwise used" for his DAR. He noted that the type of information he would record was "discretionary."

Gonzalez also stated that often detectives would travel in groups between the New York and New Jersey offices and that he would sometimes record the information regarding the car they had used. He testified that

> If you came up with a group of people [to the New York office], there is no need for everybody to swipe their card. You might be one of three people and the person who is at the head of the line is going to swipe their card and everybody is going to walk through that door.

Gonzalez explained he had not recorded the meeting at issue in his affidavit in his DAR because he did not consider it "of high importance."

On the day Gonzalez completed the affidavit, he stated that

> [Zick's attorney Jonathan Behrins] and I made a prior arrangement that I would be at his office June 4th, and that we would go over the affidavit; there was a draft of the affidavit that I had in my hands when I was in the office, and he was typing on the computer and asking me, is this accurate, and would read it off, and there were things that either the language wasn't correct, or the substance wasn't, and I would say, okay, I don't agree with this, and he would change it on the computer.

He stated that Behrins had not let him know that the statements were sworn and under oath. Gonzalez testified that he did not have any documents, such as notes, in front of him when he had completed the affidavit.

On cross-examination, Gonzalez was asked about the email from Sorial that he swore was a communication to the entire Commission about possible termination for failing to preserve documents related to Zick's employment at the Commission. Gonzalez stated that he "wasn't quoting the e-mail," and instead that the paragraph in the affidavit was his own words. Counsel for the Commission presented Gonzalez with a document that indicated that Behrins filed his affidavit through the electronic filing system of the Southern District of New York at 11:03 a.m. on June 4, 2012, which conflicted with Gonzalez's testimony that he had gone to Behrins' Staten Island office in the afternoon of that same day.

On June 16, 2013, the ALJ issued a report and recommendation to the Commission which concluded that the statements contained in Paragraphs 9, 16, and 17 of Gonzalez's affidavit were false, and that the false statements were grounds for termination.

First, regarding Paragraph 9, which detailed the alleged meeting that took place during the first week of May 2010, the ALJ found "by a preponderance of the evidence, that this paragraph is false." He based this conclusion on the fact that Gonzalez misstated the rank of Alexander; the testimonies of Arsenault, Alexander, and Demeri, who did not recall the meeting; and the fact that Brown and Gonzalez's recollections differed. The ALJ noted that Gonzalez's DAR and the open case report on the case allegedly discussed at the meeting did not reflect that the meeting had in fact taken place.

With respect to Paragraph 16, which described Sorial's alleged email, the ALJ found it to be "indisputably wrong." The ALJ rejected Gonzalez's assertion that the passage of time affected his memory and his acknowledgement that he had not reread the email before he dictated his affidavit.

Finally, the ALJ determined that Paragraph 17, in which Gonzalez stated that Arsenault had disseminated information about the case to the entire Commission, was false by a

preponderance of the evidence. Specifically, the ALJ rejected the confusion to which Gonzalez had testified regarding whether an email about Zick was sent to the entire Commission staff or a smaller group.

The ALJ found Gonzalez's testimony to be "not credible." The ALJ determined Gonzalez had read the affidavit and knew what he was swearing to when he signed the document due to his comfort level working with such documents. The ALJ concluded that the falsehoods in Gonzalez's affidavit demonstrated "reckless disregard for the truth." The ALJ decided that the Commission had proven Counts II, III, V, VI, IX, X, and XI of the charges by a preponderance of the evidence.

On July 15, 2013, the Commission issued a Memorandum of Decision, upholding the ALJ's findings and terminating Gonzalez. With respect to the findings of fact made by the ALJ, the Commission found "it difficult to fathom why Gonzalez made an affidavit that was so replete with inaccurate statements of fact, most of which could have been verified beforehand with only a modest degree of diligence." The decision concluded, "the Commission has satisfied its burden of proving that Gonzalez made false statements under oath, for which he demonstrated a reckless disregard of the truth thereof."

The Commission considered the mitigating and aggravating factors both in support of and against Gonzalez's termination. It noted Gonzalez's false statements in the affidavit were inconsistent with the Commission's high standards for its law enforcement employees. Moreover, in a footnote, the Commission noted

> [it] is further compounded by the fact that despite fourteen years of experience, and extensive training and repeated counseling during the past several years, Gonzalez has repeatedly failed to meet the expectations of this agency. His shortcomings are well documented in the employee evaluations entered into evidence at the hearing. Notably, in two out of three evaluations in evidence, Gonzalez needed development . . . in performing efficiently without jeopardizing quality, striving to increase productivity while maintaining a high level of quality, completing work that is thorough and accurate, producing written documents that are clear and concise, and consistently exercising good judgment in analyzing work and drawing sound conclusions. He was found not to possess the skills necessary to perform job expectations . . . . As was pointed out during the hearing, the extent of these failures is now fully known as a result of his execution of the affidavit in question.

Next, the Commission concluded that Gonzalez's termination was not a result of retaliation against him for providing his affidavit in support of another employee's ADA and Title VII claims, or his union activities, and it was not due to his prior

case against the Commission.[3] Specifically, the Commission determined:

> First, we reject the notion that any disciplinary action taken against Gonzalez in this matter is in retaliation for making the June 4, 2012 affidavit. As Executive Director Walter Arsenault testified in the hearing, Gonzalez and other detectives submitted affidavits in support of another detective's lawsuit. The Commission did not initiate an internal investigation or file charges against Gonzalez or any other detective because they merely stated their opinion regarding the treatment of the complainant.
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> Second, Gonzalez's argument that we are retaliating against him for his union activities is also without basis. He has not been the President of the PBA or a PBA representative for over four years, and we have not taken any adverse action against the union's current President and representatives for their representation of employees, filing of grievances, or involvement in any other union activities.
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> Third, the notion that we are now seeking to retaliate against Gonzalez for actions that occurred eight years ago is untenable, considering that every Commission executive . . . who was involved in his 2005 suspension and eventual reinstatement as a result of the 2007 New Jersey Appellate Division decision that he references has since been replaced . . . .

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[3] Gonzalez successfully appealed a decision by the Commission that he had violated its Media and Public Relations Policy. We reversed the decision of the Commission. In re Disciplinary Action Against Gonzalez, 405 N.J. Super. 336 (App. Div. 2009).

Finally, the Commission found that the discrepancies between the filing information regarding the affidavit and Gonzalez's testimony warranted his termination. In particular, the Commission set forth that the affidavit was filed at 11:03 a.m., which conflicted with Gonzalez's testimony that he had gone to Behrin's office in the afternoon. The Commission found "his apparent lack of candor with regard to the drafting and execution of the affidavit . . . even more disturbing." It determined Gonzalez had "no potential for rehabilitation" and the "nature and seriousness of the misconduct at issue" warranted his termination. This appeal ensued.

II.

On appeal, Gonzalez argues that even if false, his affidavit's statements were a protected activity, the Commission was not permitted to determine the truth of these statements, his conduct constituted protected activity for which he could not be disciplined, and the Commission's decision was arbitrary and capricious.

Established precedents guide our task on appeal. Our scope of review of an administrative agency's final determination is limited. In re Herrmann, 192 N.J. 19, 27 (2007). "[A] 'strong presumption of reasonableness attaches'" to the agency's decision. In re Carroll, 339 N.J. Super. 429, 437 (App. Div.)

(quoting In re Vey, 272 N.J. Super. 199, 205 (App. Div. 1993), aff'd, 135 N.J. 306 (1994)), certif. denied, 170 N.J. 85 (2001). The burden is upon the appellant to demonstrate grounds for reversal. McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 563 (App. Div. 2002); see also Bowden v. Bayside State Prison, 268 N.J. Super. 301, 304 (App. Div. 1993) (holding that "[t]he burden of showing the agency's action was arbitrary, unreasonable[,] or capricious rests upon the appellant"), certif. denied, 135 N.J. 469 (1994).

To that end, we will "not disturb an administrative agency's determinations or findings unless there is a clear showing that (1) the agency did not follow the law; (2) the decision was arbitrary, capricious, or unreasonable; or (3) the decision was not supported by substantial evidence." In re Application of Virtua-West Jersey Hosp. Voorhees for a Certificate of Need, 194 N.J. 413, 422 (2008); see also Circus Liquors, Inc. v. Governing Body of Middletown Twp., 199 N.J. 1, 9-10 (2009). We are not, however, in any way "bound by the agency's interpretation of a statute or its determination of a strictly legal issue." Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973).

Moreover, if our review of the record satisfies us that the agency's finding is clearly mistaken or erroneous, the decision

is not entitled to judicial deference and must be set aside. L.M. v. State of N.J., Div. of Med. Assistance & Health Servs., 140 N.J. 480, 490 (1995). We may not simply "rubber stamp" an agency's decision. In re Taylor, 158 N.J. 644, 657 (1999).

Gonzalez contends that his participation in Zick's ADA and Title VII complaint, by completing an affidavit on her behalf, was a protected activity subject to the retaliation clauses of both statutes, and therefore, the Commission could not have properly subjected him to discipline. His argument focuses on the anti-retaliation provision in Title VII, which prohibits an employer from discriminating against an employee "because he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C.A. § 2000e-3(a); see Crawford v. Metro. Gov't of Nashville & Davidson Cnty., 555 U.S. 271, 274, 129 S. Ct. 846, 850, 172 L. Ed. 2d 650, 655 (2009). The first part of the clause is known as the "opposition clause," and the other as the "participation clause." Ibid. The violation of either clause is sufficient to establish a prima facie case of retaliation. Ibid. We analyze ADA retaliation claims under the same legal framework that we

employ for retaliation claims arising under Title VII. See Krouse v. Am. Sterilizer Co., 126 F.3d 494, 500 (3d Cir. 1997).

Our analysis begins with the familiar McDonnell Douglas burden-shifting framework. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). To demonstrate a defendant-employer's liability for Title VII retaliation, a plaintiff-employee must first bring forth enough evidence to establish a prima facie case of illegal retaliation. In order to meet this burden, the plaintiff must have evidence that he (1) engaged in Title VII-protected activity; (2) the defendant-employer took adverse employment action against the plaintiff;[4] and (3) there was a causal nexus between the plaintiff's participation in the protected activity and the defendant's adverse action. Moore v. City of Phila., 461 F.3d 331, 340-41 (3d Cir. 2006) (citation omitted); See Craig v. Suburban Cablevision, Inc., 140 N.J. 623, 629-30 (1995). The United States Supreme Court clarified that the "causal nexus" in a retaliation case must be "but-for causation." Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. ___, ___, 133 S. Ct. 2517, 2534, 186 L. Ed. 2d 503, 524 (2013).

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[4] The Commission does not dispute the adverse employment action.

If the plaintiff proves a prima facie retaliation claim, the burden of production shifts to the defendant, who is obligated to advance evidence of a legitimate, non-retaliatory reason for its adverse employment action. See Delli Santi v. CNA Ins. Cos., 88 F.3d 192, 199 (3d Cir. 1996). If the employer successfully provides such evidence, the burden shifts back to the plaintiff to prove the defendant's legitimate, non-retaliatory reason was a pretext for retaliation. Moore, supra, 461 F.3d at 342.

The anti-retaliation provision statutory language is quite broad, but falls well short of providing an absolute privilege that immunizes a knowingly false affidavit and knowingly false statements made under oath. The question before us, therefore, is whether the false statements transgressed the bounds of the protection afforded by the statutes.

However, the fact that such false statements are not privileged does not necessarily lead to the conclusion that the employer targeted by such statements is entitled to respond with disciplinary action against the participating employee. Some circuits, see, e.g., Pettway v. American Cast Iron Pipe Company, 411 F.2d 998 (5th Cir. 1969), have concluded that employers have no authority to "unilaterally" police abuses of the EEOC process. Id. at 1005. Others take the view that, "Title VII

was designed to protect the rights of employees who in good faith protest the discrimination they believe they have suffered," and not to "arm employees with a tactical coercive weapon under which employees can make baseless claims simply to advance their own retaliatory motives and strategies." Mattson v. Caterpillar, Inc., 359 F.3d 885, 890 (7th Cir. 2004) (internal quotations omitted); see also Richey v. City of Independence, 540 F.3d 779, 784-86 (8th Cir. 2008) (where documentary evidence results in a conclusion that an employee has violated non-discriminatory company policy, even if the violations occurred in the context of a workplace harassment investigation, the resulting adverse employment actions are not retaliatory).

One district court has held that threats of discipline are per se illegal retaliation. See Proulx v. Citibank, N.A., 681 F. Supp. 199, 200-01 (S.D.N.Y. 1988), aff'd without opinion, 862 F.2d 304 (2d Cir. 1988).[5] However, another court has applied a "good faith" requirement for protected activity in retaliation cases like the present one. See Quinn v. Green Tree Credit Corp., 159 F.3d 759, 769 (2d Cir. 1998), abrogated in part on

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[5] We note that while Proulx was affirmed as to the quantum of damages, the liability finding was not appealed. See Proulx v. Citibank, N.A., 709 F. Supp. 396, 397 (S.D.N.Y. 1989).

other grounds by Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002) ("Quinn need not establish that she successfully described in that complaint conduct amounting to a violation of Title VII. She need only demonstrate that she had a good faith, reasonable belief that the underlying challenged actions of the employer violated the law." (internal citations omitted)).

Gonzalez argues that his statements, even if untrue, are protected, and he cannot be subject to discipline. We disagree. Employers are under an independent duty to investigate and curb violations of Title VII and the ADA by lower level employees of which they are aware. See Duch v. Jakubek, 588 F.3d 757, 762 (2d Cir. 2009). This is because the primary purpose of Title VII "is not to provide redress but to avoid harm." Faragher v. City of Boca Raton, 524 U.S. 775, 806, 118 S. Ct. 2275, 2292, 141 L. Ed. 2d 662, 688 (1998). It would therefore be anomalous to conclude that an employer is not allowed to investigate, with a view to discipline, false statements.

In Gilooly v. Missouri Department of Health & Senior Services, 421 F.3d 734 (8th Cir. 2005), the United States Court of Appeals for the Eighth Circuit explained:

> It cannot be the case that any employee who files a Title VII claim and is disbelieved by his or her employer can be legitimately fired. If such were the case, every

> employee could be deterred from filing their action and the purposes of Title VII in regards to sexual harassment would be defeated. However, it also cannot be true that a plaintiff can file false charges, lie to an investigator, and possibly defame co-employees, without suffering repercussions simply because the investigation was about sexual harassment. To do so would leave employers with no ability to fire employees for defaming other employees or the employer through their complaint when the allegations are without any basis in fact.
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> [Gilooly, supra, 421 F.3d at 740.]

Our decision that the affidavit and statement under oath by Gonzalez are not protected is supported by another consideration. Law enforcement officials are required to file reports accurately. The Commission, therefore, has a greater interest than most employers in disciplining officers who do not take that obligation seriously. Moreover, the Commission noted that a law enforcement officer who has filed a false statement under oath with a governmental agency and with a court may well be cross-examined about those false filings as a witness in an unrelated case where the officer's credibility is at issue.

In reviewing the facts of these various retaliation cases, we find no inconsistencies in their results when the ordinary McDonnell-Douglas burden-shifting regime, which governs retaliation cases, Terry v. Ashcroft, 336 F.3d 128, 141 (2d Cir. 2003), is applied. Once the plaintiff has proffered

sufficient evidence that the discipline was triggered by plaintiff's participation in the protected activity, a prima facie case of retaliation will usually have been established.

We therefore believe it fairly obvious that a prima facie case has been established in the present matter. As noted, the burden of producing evidence of a non-retaliatory reason for the discipline shifts to the Commission, with the burden of showing pretext falling on Gonzalez, who bears the ultimate burden of showing illegal retaliation. Here, the Commission has produced sufficient credible evidence demonstrating a non-retaliatory reason for disciplining an officer who twice lied under oath.

In contrast, Gonzalez has presented no evidence, other than his unsupported conjecture, that the disciplinary action was the result of anything other than his false statements. As noted, he has the ultimate burden of proof on that issue. Therefore, even though Gonzalez has established a prima facie case on his retaliation claim based on the charges that resulted in his termination, the Commission has presented evidence that defeats Gonzalez's retaliation claim as a matter of law.

Gonzalez argues the hearing was not fair because certain documents were excluded and there existed a conflict of interest. He asserts that because he did not receive Baldinger's internal investigation report and underlying witness

statements, the "hearing was defective." We disagree. This is not a matter in which unknown eyewitness statements were the central issue before the ALJ. Assuming Gonzalez attended the meeting in question, the attendees would be available to him to corroborate his sworn statements. Either the statements made by Gonzalez in his affidavit, as affirmed by him under oath, are true or not true. Gonzalez was apprised of the charges against him, had an opportunity to cross-examine all witnesses against him on issues relevant to the charges, to present his own witnesses, and to testify on his own behalf. He fails to demonstrate any relevant evidence excluded from the proceedings.

Gonzalez further reiterates that Arsenault and Sorial "clearly designed and intended the disciplinary investigation to punish [him] for his testimony in an ADA and Title VII proceeding even though Arsenault was a primary defendant in the case." Gonzalez offered no credible evidence supporting this contention.

The additional contentions of Gonzalez are without sufficient merit to warrant discussion in this opinion. R. 2-11-3(e)(1)(E).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION