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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1681-09T1

TERRY HESTER,

Plaintiff-Appellant,

vs.

PATRICIA PARKER,

Defendant,

and

THE WINSLOW TOWNSHIP BOARD
OF EDUCATION,

Defendant-Respondent.

Argued: September 22, 2010 - Decided: April 14, 2011

Before Judges Cuff, Sapp-Peterson, and Simonelli.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Docket No. L-2605-07.

Heidi Kopelson argued the cause for appellant (Folkman Law Offices, P.C., attorneys; Ms. Kopelson, on the brief).

Patrick F. Carrigg argued the cause for respondent (Lenox, Socey, Formidoni, Brown, Giordano, Cooley & Casey, attorneys; Mr. Carrigg, of counsel and on the brief).

PER CURIAM

Plaintiff Terry Hester, the former Director of Facilities/Operations for defendant Winslow Township Board of Education (Board), appeals from an order granting the Board's motion for summary judgment and dismissing his complaint in which he alleged his termination violated the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -8.[1] Plaintiff also appeals from the order denying his motion for reconsideration. Finding that the various complaints filed by plaintiff, including the civil complaint alleging various causes of action founded on plaintiff's claim that he was a victim of reverse discrimination, could be considered whistle-blowing events, we reverse.

A moving party is entitled to summary judgment if there is no genuine issue as to any material fact in the record. R. 4:46-2. In deciding a summary judgment motion, we must apply the standard articulated in Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995):

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the

[1] Plaintiff's complaint and amended complaints asserted breach of contract, race discrimination, Law Against Discrimination (LAD) retaliation, 42 U.S.C.A. § 1983, and intentional infliction of emotional distress claims, all of which were dismissed subject to a partial stipulation of dismissal, except for the LAD race discrimination claim. This claim was dismissed by the September 25, 2009 order also addressing the CEPA claim.

> motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.

Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). Therefore, we must assume plaintiff's version of the facts is true and give plaintiff the benefit of all favorable inferences. Brill, supra, 142 N.J. at 536. However, a court "may pick and choose inferences from the evidence to the extent that 'a miscarriage of justice under the law' is not created." Ibid.; R. 4:49-1(a). To prevail on a summary judgment motion, defendants must show that plaintiff's claim was so deficient as to warrant dismissal of his action. Butkera v. Hudson River Sloop "Clearwater," Inc., 300 N.J. Super. 550, 557 (App. Div. 1997). Applying this standard, the following facts inform the disposition of this appeal.

The Board hired plaintiff on August 4, 2003, as the Director of Facilities/Operations for the Winslow Township Public School District (District). His duties included overseeing the Building, Grounds, and Custodial Department, which is in charge of cleaning and maintaining all equipment and grounds within the District. Plaintiff had substantial

experience in this field, having worked for several school districts in the state. Plaintiff is Caucasian.

Plaintiff reported directly to the Business Administrator and also to the Superintendent. In December 2004, John C. Oberg, the first of several District Business Administrators, gave plaintiff a generally positive evaluation during his employment in the District.

Defendant Patricia Parker, an African-American, was elected to the Board in April 2004. Parker has a long history of working in the field of education. She is known in the community as a proponent of affirmative action. In April 2005, Parker was elected President of the Board. She ended her tenure as President in April 2006. She did not stand for re-election, and her term on the school board ended in April 2007. Plaintiff asserted his problems with Parker began as soon as she was elected to the Board.

During several Board meetings, Parker expressed views that some people felt were racist and/or discriminatory. Plaintiff described one such meeting where Parker stated she did not want to hire "regulars," and she wanted to hire people who look like her so the students could relate better to them. Nancy Hester, plaintiff's wife, believed the term "regular" referred to Caucasians. Dr. Daniel Swirsky, who worked in several

capacities for the District between 2000 and August 2008, felt Parker made inappropriate comments in public, but did not interpret the comments as racist or discriminatory. Plaintiff's wife also believed Parker demonstrated racist and discriminatory behavior when she "nitpick[ed]" or "zero[ed] in" on certain administrators' actions, particularly because personnel management was not one of her responsibilities as a Board member.

Plaintiff alleged that Parker exerted pressure on his superiors to issue him bad evaluations and cited as evidence Parker's discriminatory animus towards him. Oberg certified that during the 2004-2005 school year, Parker directed him to "negatively evaluate Terry Hester's performance . . . ." He, however, evaluated plaintiff's performance as generally positive, the second of such evaluations. Similarly, plaintiff asserts that in February or March 2005, Dr. Swirsky and Rita Hanna, the interim Business Administrator, advised him that Parker tried to pressure them to give him a bad evaluation, specifically with respect to School 3 in Sicklerville. In addition, Hanna told him that Parker complained to her about plaintiff's performance at that school. Plaintiff and his wife also cited Parker's attempt to prevent plaintiff from wearing a

tie at work and prohibiting his attendance at a back-to-school night.

Plaintiff filed a complaint with the District's Director of Human Resources on December 19, 2005. He alleged that Parker and another Board member discriminated against him in violation of his civil rights. Up until then, plaintiff had never been suspended from work, docked any pay, or demoted. Plaintiff contacted an attorney, and on January 6, 2006, he and Swirsky met with plaintiff's attorney. Although the substance of the meeting is disputed, Swirsky stated he was simply there to help plaintiff express his state of mind.

On January 24, 2006, Dr. Michael Schreiner, the Interim Superintendent, sent a letter acknowledging receipt of plaintiff's December 2005 complaint. Schreiner informed plaintiff that the District's Affirmative Action policy did not cover plaintiff's complaint. He recommended plaintiff contact either the New Jersey Division on Civil Rights or another investigatory authority to pursue this matter. Plaintiff contacted the Division on Civil Rights.

During the 2006-2007 school year, the District began having problems with waste management and sanitation. Specifically, the trash dumpsters were too small for the amount of trash that the schools generated. Although plaintiff attempted to remedy

the problem, the situation was complicated because the Township, not the District, held the contract with the waste removal company. Thus, despite plaintiff's efforts, the larger trash dumpsters required by the schools were not delivered until after plaintiff had been terminated.

In addition to the trash problem, mouse droppings appeared in the high school cafeteria in March 2007. The Camden County Board of Health issued numerous citations over a five-month period.

Prior to the expiration of his 2006-2007 contract, but before preparation and issuance of his 2006-2007 performance evaluation, plaintiff entered a contract for the 2007-2008 school year commencing on July 1, 2007. When issued, the tone of the evaluation was generally negative. Pasquale Yacovelli, Business Administrator, noted several performance areas which needed improvement, and on this basis recommended termination.

Plaintiff filed a notice of claim pursuant to the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 to 12-3, and filed a civil complaint against the Board and Parker on or about May 18, 2007. The complaint was served on June 18, 2007. Nine days later, on June 27, 2007, the Superintendent recommended plaintiff's termination to the Board. Plaintiff received notice that the Board would discuss his employment at that meeting, but

did not attend due to the Superintendent's earlier assurance that he had nothing about which to worry.

The Board lacked sufficient votes to adopt the recommendation at its meeting on June 27, 2007. On August 2, 2007, the Board terminated plaintiff by majority vote.

Parker's role or influence in plaintiff's termination is disputed. In her deposition, she testified she never spoke to anyone about plaintiff after her term expired in April 2007. Yacovelli stated he received no pressure from Board members and also believed that he would have lost credibility with Board members if no action had been taken in light of the health and maintenance issues encountered during the school year. Others not directly associated with the Board reported that Parker's influence lingered after her departure.

Following submission of a partial stipulation of dismissal, the only remaining claims for resolution by the court on the Board's motion for summary judgment were plaintiff's reverse racial discrimination claim and his claim that the Board terminated him in retaliation for submitting a reverse discrimination claim to the District's Director of Human Resources and filing a civil complaint alleging reverse discrimination. In her opinion, the motion judge held plaintiff could not establish two of the four prongs of his CEPA

retaliation claim. Specifically, the judge found no competent evidence that Parker had any role in plaintiff's termination. She also held that plaintiff failed to demonstrate a causal connection between the December 2005 complaint to the District Director of Human Resources and his August 2007 termination, and the May 2007 civil complaint and his August 2007 termination.

On appeal, plaintiff argues that the motion judge confined her review to the December 2005 internal complaint. Our review of the record reveals that the motion judge did not confine her attention solely to the December 2005 internal complaint. She addressed the May 2007 civil complaint and expressly held that the filing of the civil complaint in this matter cannot be considered a whistle-blowing event. She also opined that there was no causal connection between the December 2005 complaint and the August 2007 termination.

CEPA provides that an employer

> shall not take any retaliatory action against an employee because the employee . . . a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer . . . that the employee reasonably believes: (1) is in violation of a law, or a rule or regulation promulgated pursuant to law . . . .
>
> [N.J.S.A. 34:19-3.]

In order for a plaintiff to establish a prima facie case of discriminatory retaliation under CEPA, he must show:

> (1) he or she reasonably believed that his or her employer's conduct was violating either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy; (2) he or she performed a "whistle-blowing" activity described in N.J.S.A. 34:19-3[]; (3) an adverse employment action was taken against him or her; and (4) a causal connection exists between the whistle-blowing activity and the adverse employment action.
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> [Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003).]

Accord Klein v. Univ. Med. & Dentistry of N.J., 377 N.J. Super. 28, 38 (App. Div.), certif. denied, 185 N.J. 39 (2005). These four requirements are to be liberally construed in order to further CEPA's goal of "protect[ing] and encourag[ing] employees to report illegal or unethical workplace activities . . . ." Abbamont v. Piscataway Twp. Bd. of Educ., 138 N.J. 405, 431 (1994).

As to plaintiff's belief that his employer's conduct violated a law, rule, regulation, or clear mandate of public policy, plaintiff need not show an actual violation of law, but rather "set forth facts that would support an objectively reasonable belief that a violation has occurred." Dzwonar, supra, 177 N.J. at 464. Plaintiff must also establish that he performed a "whistle-blowing" activity, that he suffered an

adverse employment action, and a causal relationship exists between the whistle-blowing activity and the adverse employment action.

Once plaintiff establishes his prima facie case, defendants must put forward a "legitimate, nondiscriminatory reason for the adverse conduct against the employee." Klein, supra, 377 N.J. Super. at 38. In order to survive a motion for summary judgment, plaintiff must then "raise a genuine issue of material fact that the employer's proffered explanation is pretextual." Id. at 39.

Here, it is undisputed that racial discrimination by a public body is contrary to law and that plaintiff suffered an adverse employment action. The threshold issue in this case is whether the filing of the internal complaint in December 2005 and the civil complaint in May 2007 qualify as whistle-blowing activities. If they are, the summary judgment record certainly precludes judgment in favor of the Board on the issue of causal connection in light of the negative performance evaluation ten days following filing of plaintiff's multi-count civil complaint and termination nine days following service of the complaint. In addition, viewing the evidence and all reasonable inferences in favor of plaintiff, Parker's influence during and following her departure remains a highly disputed fact.

An employer may not take retaliatory actions against an employee who discloses or threatens to disclose to a public body "an activity, policy or practice of the employer . . . that the employee reasonably believes . . . is in violation of a law, or a rule or regulation promulgated pursuant to law . . . ." N.J.S.A. 34:19-3a(1). "Public body" includes the Superior Court of New Jersey, N.J.S.A. 34:19-2c(2), and "employer" includes a board of education, N.J.S.A. 34:19-2a.

Plaintiff founds his CEPA claim on two acts by which he publicly disclosed the reverse racial discrimination affecting him. The motion judge held that plaintiff could not establish that his termination was causally related to his December 19, 2005 complaint to the Director of Human Resources.[2] In a case in which an employee alleges a course of conduct that allows the institution and continuation of an illegal activity, policy, or practice, parsing several actions by the employee and seeking to identify direct causal connections between discrete events and an adverse employment action may skew the analysis and frustrate the remedy invoked by the employee. The very nature of plaintiff's claim suggests a broader view is required. He

[2] We note that this complaint satisfies the statutory requirements of prior written notice to a supervisor and affording the employer a reasonable opportunity to correct the illegal practice. N.J.S.A. 34:19-4.

asserts that a board member initiated a campaign to achieve racial diversity in the school district that was characterized by broad and pervasive attacks on the job performance of various Caucasian employees. The effects, if any, of the influence wielded by a local board member during and after their term in office is extremely fact-sensitive and may require evaluating the evidence more broadly. We, therefore, hold that dismissal of this aspect of plaintiff's CEPA claim was premature.

The May 2007 civil complaint filed by plaintiff disclosed that the Board allowed Caucasian employees to be subjected to unduly harsh criticism. He also claimed his termination was unwarranted, and such conduct constituted reverse racial discrimination in violation of federal and state law. Having initiated a lawsuit in state court, plaintiff disclosed actions to a public body, which if proved, constitute illegal activity of a public employer. Plaintiff argues that the remedial nature of CEPA and the liberal construction afforded to CEPA by the courts of this state militates holding that filing a civil complaint against an employer alleging racial discrimination satisfies the disclosure to a public body requirement of the statute. Under the facts of this case, we agree.

In considering this issue, we must invoke basic and well-established principles of statutory construction, which require

a court to interpret statutory terms in accordance with their plain meaning. DiProspero v. Penn, 183 N.J. 477, 492 (2005). Here, the Legislature defined two of the critical terms, public body and employer, and did so in terms that encompass filing a civil complaint in the Superior Court against a public employer.

Whether filing a complaint with an administrative agency or a court of law is a disclosure to a public body and a whistle-blower activity has received scant attention, and the existing authority is in conflict. In Smith v. Travelers Mortgage Services, 699 F. Supp. 1080, 1081 (D.N.J. 1988), the federal district court held that filing a complaint with the Equal Employment Opportunity Commission (EEOC) is not within the protection of CEPA. Judge Rodriguez held that CEPA was confined to "whistle-blowers" and "whistle-blowing activity," and "[f]iling an EEOC claim does not constitute a disclosure under [CEPA] nor does such a charge fall under the 'providing information' section of the statute." Id. at 1083. The judge reasoned that individual discrimination claims were never intended to fall within the scope of CEPA. Ibid. He expressed skepticism that the Legislature intended every person who filed an EEOC claim to be entitled to reinstatement under CEPA. Ibid.

On the other hand, in Sandom v. Travelers Mortgage Services, Inc., 752 F. Supp. 1240 (D.N.J. 1990), aff'd, 998 F.2d

1005 (3d Cir. 1993), another federal district court judge reached a different conclusion on virtually indistinguishable facts. In Sandom, the dismissed executive filed two complaints with the EEOC in which she alleged gender-based discrimination. Id. at 1242-43. Judge Cohen found "nothing restrictive about the term 'whistle-blower,'" id. at 1244, and "an employee who discloses unlawful sex discrimination is certainly a 'whistle-blower.'" Ibid. Judge Cohen also dismissed Judge Rodriguez's "proverbial floodgates" concern that every person discharged after filing an administrative claim will have a CEPA claim. Id. at 1245. He reasoned that "[o]nly those employees who have been discharged in retaliation for exercising their right to file an EEOC claim for alleged illegal employment practices will have a cause of action." Ibid.

Although not binding on this court, Terry v. Mercer County Board of Chosen Freeholders, 86 N.J. 141, 156 (1981), we consider the reasoning in Sandom as more consistent with the CEPA jurisprudence articulated by our Supreme Court and this court than the reasoning of Smith. Indeed, the Court has held that disclosure may include testimony of illegal activity by a public employer by a witness in a litigated matter. See Stomel v. City of Camden, 192 N.J. 137, 154 (2007) (finding that a municipal public defender's testimony implicating the mayor in a

political corruption trial "undoubtedly" qualifies as protected speech under CEPA). On the other hand, "the complained of activity must have public ramifications, and . . . the dispute between employer and employee must be more than a private disagreement." Maw v. Advanced Clinical Commc'ns, Inc., 179 N.J. 439, 445 (2004). An allegation of racial discrimination by a school board cannot be considered a private disagreement.

The Court has recognized that not every dispute between an employer and employee that leads to termination of an employee provides a cause of action under CEPA. Ibid. An employee who invokes the powerful remedial forces of CEPA must also engage in whistle-blowing activities. Thus, we hesitate to hold that every employee who invokes an established dispute resolution procedure, such as a contractual grievance procedure, or who files a civil complaint, or pursues a claim before an administrative body against his employer, and is thereafter terminated has a CEPA cause of action. For example, the simple filing of a complaint seeking back wages or a workers' compensation claim cannot be considered a "whistle-blowing activity." When, however, an employee complains of illegal activity in the workplace, the employer does not remedy the situation, and the employee thereafter files a complaint alleging violation of clearly mandated standards, such as

discrimination based on race, gender, religion, or sexual preference, the filing of the complaint may be a "whistle-blowing activity" as it is an attempt to draw attention to and obtain a remedy for a perceived wrong or improper conduct. See, e.g., Barratt v. Cushman & Wakefield of N.J., Inc., 144 N.J. 120, 127 (1996) (holding that CEPA protects an employee who reported illegal conduct to the Real Estate Commission). When termination of employment follows on the heels of such a complaint, CEPA may be triggered.

Here, plaintiff's May 2007 civil complaint reported that Board officials succumbed to pressure exerted on them over a three-year period to replace him with a person of another race. During three of the four years plaintiff served in his position, he received generally positive reviews, the Board renewed his contract, and he received raises. The Board renewed plaintiff's contract for a fourth year, then terminated him for conditions he asserts were beyond his power to control or remediate. Before service of the complaint, the Board renewed his contract. Nine days after serving the complaint, he received a negative performance review and but for lack of a quorum, he would have been terminated that night. Five weeks later, forty-five days after service of the complaint, he was terminated.

Under the facts of this case, we hold that the motion judge erred in granting summary judgment to defendant insofar as plaintiff asserted in his amended complaint that his termination was causally connected to his disclosure of racially discriminatory employment practices in his December 2005 complaint to district supervisors and the May 2007 civil complaint, and the facts before the motion judge did not permit entry of summary judgment in favor of defendant Board.

Reversed.

SAPP-PETERSON, J.A.D., concurring.

I concur in the result reached by my colleagues. I write separately to express my disagreement with the majority's conclusion that disclosure of the Board's racially discriminatory employment practices in the civil complaint plaintiff filed in Superior Court in May 2007, is a "disclosure" to a "public body" within the meaning of CEPA. N.J.S.A. 34:19-3.

Although CEPA is remedial legislation that should be liberally construed to effectuate its purposes, Abbamont v. Piscataway Twp. Bd. of Educ., 138 N.J. 405, 431 (1994), I do not believe the Legislature intended that "[d]isclos[ure] . . . to a public body" includes the filing of a civil complaint in court. N.J.S.A. 34:19-3(a). Indeed, N.J.S.A. 34:19-5 expressly provides that "[u]pon a violation of any of the provisions of [CEPA], an aggrieved employee or former employee may, within one year, institute a civil action in a court of competent jurisdiction." (emphasis added). What is suggested by this language is that first a violation must occur and then the aggrieved employee "may" commence a civil action in "a court of competent jurisdiction." Ibid. I do not suggest that a court can never be a "public body" for purposes of "disclosure" under

CEPA, but only that the disclosure must take some form other than the mere filing of a complaint in which a plaintiff alleges that an employer has engaged in activities, polices or practices that violate "a law, or a rule or regulation promulgated pursuant to law." N.J.S.A. 34:19-3(a)(1). Thus, for example, in Stomel, it was the plaintiff's testimony at trial implicating a public official that constituted a "[d]isclos[ure] . . . to a public body[,]" that being the court and jury. Stomel, supra, 192 N.J. at 154; N.J.S.A. 34:19-3(a).

I concur rather than dissent because the facts, when viewed most favorably towards plaintiff, establish a course of conduct by the Board that ultimately resulted in his termination. A jury could reasonably conclude that plaintiff's termination was causally related to his disclosure of what he reasonably believed to be the Board's illegal practices about which he complained in his internal complaint as well as to others.