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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5570-09T2

CAROL VALENTINO,

Plaintiff-Appellant,

vs.

THE BOROUGH OF WOODCLIFF LAKE,

Defendant-Respondent.

Submitted: May 11, 2011 - Decided: June 30, 2011

Before Judges Cuff and Fisher.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-3182-08.

Ronald T. Nagle, attorney for appellant.

Pfund McDonnell, P.C. attorneys for respondent (David T. Pfund and Mary C. McDonnell, on the brief).

PER CURIAM

Plaintiff Carol Valentino, a former employee of defendant Borough of Woodcliff Lake (Borough), appeals from the order granting summary judgment to the Borough. Plaintiff alleged that the Borough Administrator terminated her after she called to his attention several incidents that she considered theft of time by other Borough employees, and she persisted in her

efforts to have the Borough Administrator address these claims. The motion judge found that plaintiff failed to establish that she had suffered an adverse employment impact and granted the Borough's motion. We affirm.

We apply the same standard as the motion judge. Spring Creek Holding Co. v. Shinnihon U.S.A. Co., 399 N.J. Super. 158, 80 (App. Div.), certif. denied, 196 N.J. 85 (2008); 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 identify the undisputed facts and view the remaining facts and the inferences drawn from these facts in the light most favorable to plaintiff. Brill v. Guardian Life Ins. Co., 142 N.J. 520, 536 (1995).

Plaintiff commenced her employment for the Borough in August 2003 as an administrative secretary. In this capacity, she served as an assistant and secretary to both the Mayor and the Borough Administrator. Among her other responsibilities, plaintiff was required to "[t]rack all vacation, sick and unused sick time, and comp time for all employees; prepare monthly and annual reports." Specifically, plaintiff was required "to input time into a computer program from time cards filled out by the Borough employees. This was done to determine the pay that

these employees received from the Borough and to ensure that they were working the proper hours."

Edward Sandve was hired as Borough Administrator in 2004 after Mayor LaPaglia was elected that same year.[1] Plaintiff was already employed by the Borough when Sandve became Administrator.

In November 2006, plaintiff believed some Borough employees were not accurately recording their work hours on their time cards. She brought this to the attention of Sandve. Plaintiff suggested a time clock should be implemented, and she expressed dissatisfaction with being put in a position that required her to confront other employees about the accuracy of their time cards.

A year later, on November 5, 2007, plaintiff again approached Sandve about the time card issue. Sandve had returned just the day before from several weeks on sick leave and November 5, 2007 was Election Day. She told Sandve "nothing had changed and . . . reminded him of [her suggestion to implement a time clock]." She also believed someone with authority should collect the cards because she was receiving "negativity from the employees throughout the process." On the same day, Sandve advised plaintiff that he would be working the

[1] LaPaglia became Mayor January 1, 2004.

polls on election day in her place. Although plaintiff had worked on general election days in the past, Sandve decided to replace her in 2007 because he was the deputy clerk. He explained that his service saved the Borough wages because he did not qualify for compensatory time as did plaintiff.

Soon after this meeting, plaintiff asserts that several employees at Borough Hall stopped speaking with her and assisting her at work. These employees included the Borough clerk, tax assessor, and another administrative employee. Plaintiff had accused each of these employees of stealing time by submitting time cards that overreported or mischaracterized the time they worked.

Plaintiff requested and received a meeting with the Mayor and Sandve about her concerns. The meeting took place on November 28, 2007. Plaintiff gave the Mayor a specific example of an employee falsifying time. Sandve responded that he had already corrected the issue. The Mayor was sufficiently concerned about plaintiff's allegations that he instructed Sandve to have the finance chairman of the Borough Council, John Glazer, investigate the allegations. Sandve became frustrated with plaintiff during this meeting, told her she was not the "time card police," told her she "was walking around like she ruled the roost" and "had changed."

Glazer investigated the allegations and the possibility of installing a time clock. Plaintiff met with Glazer on November 30, 2007. The Mayor supported the implementation of a time clock, but Sandve thought it unnecessary. Glazer reported that none of the employees "acted intentionally in seeking improper payment or was improperly paid. Nor was there a claim that the Administrator ever approved any such request for payment."

At the end of 2007, the Borough finished a process, begun two years earlier, of restructuring its staff and giving employees revised job descriptions. On December 19, 2007, each employee received a job description for their position with deletions and additions of job responsibilities visibly noted. Sandve requested each employee to review the job description carefully in anticipation of a further discussion with him. Plaintiff felt she could not realistically perform the new responsibilities. Instead of helping the employee responsible for issuance of dog and cat licenses, plaintiff would assume these duties. Plaintiff conceded that the Borough required residents to renew dog and cat licenses in January each year. Therefore, most of this activity occurred in January and certainly no later than March. In addition, she would assume responsibility for office supplies and equipment. She would

have no involvement, however, collecting time cards and entering information from the cards into the payroll system.

Plaintiff's meeting with Sandve to discuss her reorganized responsibilities occurred on January 9, 2008. Plaintiff's version of the meeting differs from Sandve's. According to plaintiff, she attempted to explain that she was inundated with new work and she recalls being nervous and intimidated by Sandve. She advised Sandve that she could not be responsible for several employees' jobs. Plaintiff recalls that Sandve became loud and assertive at this point, and reminded her that she had not wanted to be responsible for the time cards. Plaintiff reminded Sandve that her concern was not with processing the time cards but with inaccuracies in the self-reporting of time by co-employees. Plaintiff asserts Sandve continued to be loud, accusatory, and abusive, and in order to not "be exposed to any further abuse[,]" plaintiff told Sandve she wanted to leave his office. Plaintiff asserts that Sandve responded "'[i]f you leave this meeting you can go home.' . . . 'If you go home you can stay home.'" Plaintiff believes she was terminated during this exchange.

Sandve's recollection differs. Sandve maintains he did not raise his voice, and recalls plaintiff becoming loud, and indicating she was through working for the Borough. Sandve also

believes plaintiff simply never wanted the responsibility of processing the time cards. Sandve asserts that while he was discussing the restructuring with plaintiff, plaintiff stated she was through. Sandve asserts his last response was "Carol, please, if you leave now, don't come back." He also later felt it would be inappropriate to let her return after how she acted.

Several employees present at the time confirmed that plaintiff emerged from Sandve's office visibly upset. However, Deborah Dakin and Fauba Negahban testified they heard Sandve speak to plaintiff in a normal tone. Both heard him ask plaintiff to return to his office. He never raised his voice.

Councilwoman Josephine Higgins investigated the circumstances surrounding plaintiff's termination. Higgins, discussed the termination with plaintiff, the Mayor, and other employees. In 2007, however, Higgins was not part of the council or the day-to-day operations of the Borough. Higgins did not believe Sandve retaliated against plaintiff as an employee and her primary concern was that the Borough never conducted a closed-session meeting after the termination.

Plaintiff cited several instances of retaliation following her disclosure to the Borough Administrator and the Mayor of several instances of falsification of time cards. First, Sandve worked on Election Day rather than she. Second, her revised job

description added several responsibilities, including dog and cat licenses. Third, Sandve issued a memorandum to all Borough employees about personal telephone and internet usage. Plaintiff conceded she sometimes engaged in lengthy personal telephone calls, but believed Sandve directed this memorandum specifically to her. Fourth, she believed that Sandve informed the employees identified by her as stealing time, specifically the Borough clerk and Borough tax assessor, and permitted them to stop speaking to her or assisting her at work.

Plaintiff filed a three-count complaint in which she asserted that she was discharged from her employment in retaliation for her disclosure that certain employees falsified their time cards and her insistence that the Borough Administrator and Mayor address the problem. In Count One, she contends that her discharge violates the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -8. In Count Two, she alleges common law wrongful termination. In Count Three, plaintiff sought recovery for accrued but unpaid vacation time. Defendants contended plaintiff walked out on her position, her revised duties were the product of a prolonged process of re-organizing the work in Borough Hall that affected virtually the entire administrative staff, and plaintiff's problems with co-employees were the product of her behavior to them.

In an oral opinion, the motion judge explained his decision to grant the Borough's motion for summary judgment. He held that plaintiff failed to establish an adverse employment action. In reaching this conclusion, the judge found that the Borough Administrator did not terminate plaintiff's employment. He acknowledged that an employer could take action that an employee would consider a constructive termination. The judge found, however, that "the employer's actions were not the type that would compel a reasonable employee to resign." The judge elaborated as follows:

> The Borough re-structured the duties of all employees at Borough Hall, taking away certain jobs and adding others to the list of duties that each individual had to perform on a day-to-day basis. The removal of election duties from Plaintiff's list of duties, and the addition of new duties was part of this restructuring, and were clearly not any type of adverse employment action. The actions of other employees, such as the comments made by [the Borough clerk], are not alleged to have been directed by the Borough Administrator or Mayor, nor has proof been offered that they were, and these actions can therefore not be considered an "adverse employment action" taken by the Borough. There are no facts offered to support the allegation of intimidating memoranda, only an assertion that such memoranda existed. As to the alleged "termination," Plaintiff was told that if she left the meeting she should not return. Presented with this choice, she chose not to return, voluntarily terminating her employment with the Borough. Even with all inference being given to Plaintiff as the

> non-moving party in this matter, no dispute of material fact exists as to whether Defendant took "adverse employment action" against Plaintiff.

CEPA was enacted to "protect and encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employers from engaging in such conduct." Abbamont v. Piscataway Bd. of Educ., 138 N.J. 405, 431 (1994). Accordingly, the statute provides:

> An employer shall not take any retaliatory action against an employee because the employee does any of the following:
>
> a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer, or another employer, with whom there is a business relationship, that the employee reasonably believes:
>
> (1) is a violation of a law, or a rule or regulation promulgated pursuant to law, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, in the case of an employee who is a licensed or certified health care professional, reasonably believes constitutes improper quality of patient care; or
>
> (2) is fraudulent or criminal, including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity;

b. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer, or another employer, with whom there is a business relationship, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, in the case of an employee who is a licensed or certified health care professional, provides information to, or testifies before, any public body conducting an investigation, hearing, or inquiry into the quality of patient care; or

c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:

(1) is in violation of a law, or rule or regulation promulgated pursuant to law, including any violation involving deception or, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, if the employee is a licensed or certified health care professional, constitutes improper quality of patient care;

(2) is fraudulent or criminal, including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity; or

(3) is incompatible with a clear mandate of public policy concerning the

> public health, safety or welfare or protection of the environment.
>
> [N.J.S.A. 34:19-3.]

Plaintiff's claims implicate subsections 3a and 3c.

A plaintiff who brings a CEPA claim must satisfy a four-part test to establish a prima facie case. Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003). A plaintiff must demonstrate:

> (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. 34:19-3c; (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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> [Ibid. (citing Kolb v. Burns, 320 N.J. Super. 467, 476 (App. Div. 1999)).]

If a plaintiff meets this initial burden, "the defendants must come forward and advance a legitimate, nondiscriminatory reason for the adverse conduct against the employee." Klein v. Univ. of Med. & Dentistry of N.J., 377 N.J. Super. 28, 38 (App. Div.) (citing Zappasodi v. State Dep't of Corr., 335 N.J. Super. 83, 89 (App. Div. 2000)), certif. denied, 185 N.J. 39 (2005); Kolb, supra, 320 N.J. Super. at 479. However, the employer's burden is minimal. The employer need only "'produc[e] evidence (whether ultimately persuasive or not) of non-discriminatory

reasons.'" Mogull v. CB Commercial Real Estate Gp., Inc., 162 N.J. 449, 469 (2000) (quoting Saint Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509, 113 S. Ct. 2742, 2748, 125 L. Ed. 2d 407, 417 (1993)). This burden is "little more than a mechanical formality; a defendant, unless silent, will almost always prevail." Ibid. (citation omitted). If, or more likely when, the defendant-employer meets this burden, the burden returns to the plaintiff to "raise a genuine issue of material fact that the employer's proffered explanation is pretextual." Klein, supra, 337 N.J. Super. at 39.

A trial court will grant summary judgment to a moving party "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). In other words, to determine whether a genuine issue as to a material fact exists, the trial court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill, supra, 142 N.J. at 523.

Whether the trial court properly entered a summary judgment order is a legal, and not a factual, question. Bennett v. Lugo, 368 N.J. Super. 466, 479 (App. Div.), certif. denied, 180 N.J. 457 (2004). This court must first determine whether there exists a genuine issue of fact and then, if there are none, we must decide if the motion judge's legal determination was correct. Walker v. Atl. Chrysler Plymouth, Inc., 216 N.J. Super. 255, 258 (App. Div. 1987).

We, like the motion judge, conclude that plaintiff had a reasonable belief that some Borough employees violated the law by submitting time cards with inaccurate information. In addition, by telling the Business Administrator and the Mayor of her concerns, plaintiff performed a "whistle-blowing" activity. We, like the motion judge, also conclude that no adverse employment action was taken against her.

"The universe of possible retaliatory actions under CEPA" is broad. Donelson v. DuPont Chambers Works, ___ N.J. ___, ___ (2011) (slip op. at 18). Retaliatory action can mean simply, "discharge, suspension or demotion of an employee, . . ." N.J.S.A. 34:19-3e. Discharge comes in two forms, "actual termination from employment, [and also] constructive discharge." Donelson, supra, ___ N.J. at ___ (slip op. at 17). This latter form of discharge occurs "when an employer's conduct 'is so

intolerable that a reasonable person would be forced to resign rather than continue to endure it.'" Id. at 17-18 (quoting Shepherd v. Hunterdon Dev. Ctr., 174 N.J. 1, 28 (2002)). However, until an employee actually stops working, an actual or constructive discharge has not occurred; "'[t]he definition of retaliatory action speaks in terms of completed action. Discharge, suspension or demotion are final acts. Retaliatory action does not encompass action taken to effectuate the discharge, suspension or demotion.'" Hancock v. Borough of Oaklyn, 347 N.J. Super. 350, 359-60 (App. Div. 2002) (quoting Keelan v. Bell Commc'ns Research, 289 N.J. Super. 531, 539 (App. Div. 1996)), appeal dismissed, 177 N.J. 217 (2003).

Nevertheless, N.J.S.A. 34:19-3e also defines retaliatory action as "other adverse employment action taken against an employee in the terms and conditions of employment." This broader statement envisions as actionable, a range of conduct directed at an employee. Although "[w]hat constitutes adverse employment action must be viewed in light of the broad remedial purpose of CEPA," Donelson, supra, ___ N.J. at ___ (slip op. at 18), "allegations of retaliation [that] are minor and have no impact on either . . . compensation or rank[,]" are generally not sufficient to qualify, Hancock, supra, 347 N.J. Super. at 360.

As a general guide, adverse employment action can be found when "an employer targets [an employee] for reprisals -- making false accusations of misconduct, giving negative performance reviews, [or] issuing an unwarranted suspension, . . ." Donelson, supra, ___ N.J. at ___ (slip op. at 18). In Donelson, the plaintiff alleged that after initiating a complaint with OSHA,[2] his employer assigned him to a new shift supervisor who began imposing new sick- and vacation-day reporting requirements on the plaintiff. Id. at 5. Later, the new supervisor falsely accused the plaintiff of forging timecards, failing to take proper chemical readings, and making fictitious log entries. Id. at 5-6. Following this, the plaintiff received a negative performance review. Id. at 6. In addition, the plaintiff endured constant verbal abuse, investigations, was placed on short-term disability without pay, lost earned overtime, and was required to engage in mental health examinations as a condition of reinstatement. Id. at 6. When he returned, the plaintiff was placed on probation and subject to performance reviews and continued to be subjected to false accusations. Id. at 7. Finally, the plaintiff was required to work "twelve-hour shifts in isolation[,]" and left his employment after taking a six-month leave of absence. Ibid.

[2] The Federal Occupational Safety Administration.

The primary retaliatory action cited by plaintiff was the alteration of her job responsibilities. The record, however, roundly supports the finding that the additional responsibilities given to plaintiff and the elimination of her obligation to collect the time cards and enter the time and attendance data cannot be considered a retaliatory action or adverse employment action. Whether plaintiff asked to have no further part of receiving time and attendance cards from co-employees, as stated by the Borough Administrator, or whether plaintiff wanted nothing to do with this task as long as co-employees submitted inaccurate information, as plaintiff insists, the record clearly supports the finding that plaintiff was uncomfortable performing this task and stated on several occasions she would rather not do it.

In addition, the transfer of responsibility for dog and cat licenses and office supplies and equipment from other employees to her could not be considered unduly burdensome. The record clearly establishes that dog and cat licenses must be renewed annually in January and by March virtually all license work is complete. Indeed, the person who succeeded plaintiff testified that she accomplishes all of the tasks in plaintiff's job description and more with ease. Moreover, plaintiff lost the obligation to collect, review, and enter time-card data. More

importantly, the job description revisions had been underway for a considerable period of time before plaintiff confronted the Borough Administrator on November 5, 2007. It is also undisputed that one of the Borough Hall employees obtained the certification to allow her to be designated the Chief Financial Officer (CFO) for the municipality. Her designation as CFO triggered the long-planned reorganization of Borough Hall staff. Virtually every administrative employee experienced alteration of their job descriptions.

The other primary retaliatory actions cited by plaintiff, the memo to all employees concerning use of vacation and compensatory time and her failure to work the polls for the general election on November 6, 2007, also cannot be considered adverse employment actions. The Business Administrator, as Deputy Clerk, was expected to work the polls. Moreover, it is undisputed that the Business Administrator had been on sick leave for several weeks and articulated his intention to share the work others had been required to do in his absence. Finally, the memorandum from the Business Administrator to all employees concerning their obligations to accurately record their time and to refrain from lengthy personal calls cannot reasonably be considered as intended only for plaintiff, who admitted to engaging in lengthy personal telephone calls.

Moreover, the memorandum was issued within days of plaintiff's November 2007 discussion with the Business Administrator and Mayor. Any reasonable person would have viewed it as a response to a legitimate concern advanced by plaintiff.

In short, we have concluded that no rational jury could find that the actions cited by plaintiff were singly or in combination retaliatory actions leading to the ultimate adverse employment action of termination due to her complaints to the Business Administrator of actions by co-employees. Although we are obliged to view the facts and all legitimate inferences in the light most favorable to plaintiff, in viewing those facts, we must determine whether a rational factfinder could find for the plaintiff based on those facts and inferences. Brill, supra, 142 N.J. at 523. We conclude that a rational factfinder could not find that the actions cited by plaintiff can be considered retaliatory and adverse employment actions occasioned by her whistle-blowing activity. We, therefore, affirm the April 16, 2010 order granting summary judgment to the Borough and the June 11, 2010 order denying plaintiff's motion for reconsideration.

Affirmed.