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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1058-12T1

MARIO GATTO,

Plaintiff-Appellant,

v.

TARGET CORPORATION, TARGET CORPORATION OF MINNESOTA, JASON BUCZEK, SCOTT RAPP, and TANIA DELGADO,

Defendants-Respondents.

Argued September 10, 2013 – Decided October 23, 2013

Before Judges Reisner, Alvarez and Carroll.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket No. L-2154-10.

Neal M. Unger argued the cause for appellant (Neal M. Unger, PC, attorneys; Mr. Unger, of counsel and on the briefs; Jeffrey Zajac, on the brief).

LeRoy J. Watkins, Jr., argued the cause for respondents (Jackson Lewis, LLP, attorneys; Mr. Watkins, of counsel and on the brief; Eric G. Guglielmotti, on the brief).

PER CURIAM

Plaintiff Mario Gatto appeals from the September 21, 2012 summary judgment dismissing his complaint, in which he alleged that defendants Target Corporation, Target Corporation of

Minnesota, Jason Buczek, Scott Rapp, and Tania Delgado violated the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -8.

During the time of Gatto's employment relevant to his claim, he worked at a Target store overseeing the unloading and sorting of merchandise from delivery trucks. His position required him to keep the unloading area clear of hazards, and to provide safe access for workers. He was also required to drive a truck to and from the store and the warehouse.

It is undisputed that in the beginning of September 2009, Gatto learned that another employee, Dwight Carrara, was pulled over while driving a truck leased from Penske that had air brakes. Gatto understood that Carrara was ticketed for driving without a commercial driver's license (CDL), and further understood that such licenses were required in order for a driver to lawfully operate a truck with air brakes.

Gatto brought the CDL issue to the attention of Buczek, his supervisor. He told Buczek that he no longer wished to drive the Penske truck because he did not have a CDL, and that he did not believe anyone without such a license should do so. Eventually, Buczek informed Gatto that Rapp, another Target supervisor, had investigated the question, and that contrary to Gatto's belief, it was lawful for a driver without a CDL to

operate a vehicle with air brakes, so long as it did not exceed 26,000 pounds. The Penske truck was less than 26,000 pounds. Dissatisfied with that response, Gatto brought in a pamphlet which he had underlined and highlighted, which he later claimed corroborated his position. Despite the fact his supervisors disagreed with him, Gatto was not required to drive trucks with air brakes. He was not reassigned, did not lose hours, and his pay was unaffected.

On November 13, 2009, about two months later, Gatto noticed a scissor lift had broken down in a back room opening onto the loading dock. A scissor lift is a one-ton motorized vehicle, the size of a car or van, which has a platform that can be moved up and down to allow access to high, otherwise inaccessible areas. Gatto told Buczek that he was going to move the scissor lift; Buczek responded that Gatto should not do so. In addition to not considering moving the equipment a priority at the time, because of the size and nature of the lift, Buczek believed for Gatto to do so would be dangerous.

Afterwards, Brandon Purcelly, another supervisor, entered the back room and saw Gatto attempting to move the scissor lift with a crown lift. A crown lift is small and manually operated, primarily used to move pallets. Purcelly told Gatto to stop trying to move the scissor lift with the crown lift because the

disproportion in size made doing so unsafe. When Purcelly left the area, Gatto persisted in moving the scissor lift with the crown lift until he finally succeeded. When Buczek noticed what Gatto had done, he told him he should not have moved it because it was too dangerous.

The following day, Gatto's repeated failure to comply with his supervisors' instructions was reported to Tania Delgado, a regional supervisor, who discussed the issue with Purcelly and with Wendy Catalan, the district manager responsible for human resources. Pursuant to Target's safety guidelines, they concluded that Gatto's disregard for his supervisors' directives, and his decision to persist in moving the scissor lift, was "gross misconduct" and "reckless conduct" which warranted immediate termination. On November 19, Delgado and Rapp informed Gatto that he was fired. This suit followed.

In his response to defendants' summary judgment motion, Gatto did not disagree with Target's version of the events regarding the Penske truck, except that he claims that he brought in a Motor Vehicle Commission (MVC) pamphlet which verified his interpretation of the law, while Target disputes that the law requires a CDL license. In support of the summary judgment motion, Target produced MVC material corroborating its interpretation of the law. When deposed, Buczek agreed that

Gatto had brought in a pamphlet to support his point, but remembered nothing further about it. Gatto was unable to produce a copy of the pamphlet during discovery.

Gatto does not dispute Target's version of events surrounding the scissor lift, except that he claims he did not perceive Buczek or Purcelly's instructions to be orders. In fact, he argued that his conduct in moving the scissor lift made the back room safer and enabled the workers to safely unload the trucks.

In reviewing a grant of summary judgment, we apply the same familiar standard under Rule 4:46-2(c) employed by the trial court. Murray v. Plainfield Rescue Squad, 210 N.J. 581, 584 (2012). We must "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." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Additionally, on appeal, we review the facts in the light most favorable to plaintiff.

Plaintiff contends that the trial court erred because (1) his termination was causally connected to his expressed concerns regarding the need for a CDL, and (2) his termination was pretextual. We do not agree that any error was committed on

either score, and therefore do not reach Gatto's other arguments.

As to plaintiff's first point, no rational factfinder could conclude that a causal connection existed between the termination and Gatto's statements regarding the necessity for a CDL license. That such a connection is necessary is well-established. See Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003). To succeed on a CEPA claim, or even to establish a prima facie case, an employee must prove, among other elements, that his alleged whistleblowing activity caused the adverse employment action, in this case, Gatto's termination. Ibid.

We are satisfied from our review of the record that Gatto's understanding of motor vehicle law and his subsequent notification to his supervisors resulted in no adverse employment action. He did not lose pay. His hours were not reduced. His position was not changed. He was not reprimanded. He was not even required to drive the Penske truck. Nothing in the record indicates the matter was even mentioned again after the beginning of September. Gatto presents no evidence tying together his termination and his concerns regarding CDL licensing. Under these circumstances, no rational factfinder would infer a connection between plaintiff's refusal to drive the Penske truck and his termination more than two months later.

As to plaintiff's second point, no rational factfinder could conclude the termination was pretextual. See Gerard v. Camden Cnty. Health Servs. Ctr., 348 N.J. Super. 516 (App. Div. 2002). Gatto moved a very large and heavy piece of machinery with a disproportionately small, manually operated piece of equipment after being ordered by two supervisors not to do so. The proofs in the record establish that the decision to terminate him, made within twenty-four hours of the incident, was the immediate result of his failure to follow his supervisors' directives and his insistence on moving the scissor lift.

To his employer, Gatto's failure to follow directions created a dangerous condition in the workplace which ran contrary to Target's own guidelines for safety. Buczek and Purcelly, Gatto's supervisors, brought the matter to the attention of the regional supervisor and the human resources district manager, but it was ultimately a group decision based solely on the incident with the scissor lift that resulted in the termination.

Gatto did not proffer any evidence that the earlier incident with the CDL license was even mentioned during that meeting. Thus the record is devoid of any proofs that the termination was pretextual. And as we have said, an employer is

entitled to exercise its business judgment in making personnel decisions so long as the decisions do not involve unlawful conduct. Maiorino v. Schering-Plough Corp., 302 N.J. Super. 323 (App. Div.), certif. denied, 152 N.J. 189 (1997).

Because Gatto has neither demonstrated a causal connection between his concerns regarding the necessity of a CDL license and the adverse employment action, nor established that his termination was pretextual, we do not reach his other arguments. The trial judge, viewing the evidence in the light most favorable to Gatto, concluded that no rational factfinder could resolve the disputed issue in his favor. We agree. Hence summary judgment was correctly granted to defendants.

Affirmed.