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SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-0

FERNANDO ALMEIDA, JR.,

Plaintiff-Respondent,

v.

UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY, BRANDON MBUAKOTO, and LANCELOT COLTHIRST,

Defendants-Appellants.

March 23, 2015

Argued September 24, 2014 – Decided

Before Judges Alvarez, Waugh, and Carroll.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-5746-09.

Jennine DiSomma argued the cause for appellants (Saiber, LLC, attorneys; Melissa H. Raksa, Assistant Attorney General, of counsel; Jane A. Greenfogel and Robert P. Preuss, Deputy Attorneys General, on the briefs).

Gregory B. Noble argued the cause for respondent (O'Connor, Parsons, Lane & Noble, LLC, attorneys; Mr. Noble, of counsel and on the brief).

PER CURIAM

Defendant University of Medicine and Dentistry of New Jersey (UMDNJ), and two of its supervisory employees, defendants Brandon Mbuakoto and Lancelot Colthirst, appeal orders entered by the Law Division in connection with plaintiff Fernando Almeida's successful whistleblower claim, brought under the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -8. Because we conclude that Almeida did not

reasonably believe that his employer's conduct violated a law, rule, regulation, or a clear mandate of public policy, we reverse.

I.

We discern the following facts and procedural history from the record on appeal.

Almeida commenced working at UMDNJ in 2005 as a patient transporter. After he obtained his radiology technician certificate, he was hired as a radiology technician. He started his ninety-day probationary period on or about July 1, 2008. During that period, his performance was to be reviewed and his employment was subject to termination without cause. He was assigned to the midnight shift, working from midnight until 8:30 a.m.

Almeida's job duties included performing portable x-ray examinations ordered by a physician. In order to avoid transporting the patient, the portable x-ray machine was brought into the patient's room so that the scan could be performed while the patient was in bed.

Almeida was working the midnight shift on August 30, 2008. At approximately 6:30 a.m., he was completing a patient's x-ray when a doctor whom he did not know, later identified as Payam Benson, M.D., approached him. Benson asked Almeida to complete a chest x-ray on a different patient on the same floor. Prior to the encounter, Benson noted on the patient's chart that he was requesting the x-ray in conjunction with other tests to determine the patient's respiratory and pulmonary status.

During his radiology technician training, Almeida learned that there were laws governing x-rays. He testified at trial that he was taught that an x-ray could only be performed after receipt of a written requisition from a licensed physician.

According to Almeida, he asked Benson if he had completed a requisition for the x-ray. Benson responded, "[n]o, not at the time." Almeida testified that he informed Benson that protocol for ordering x-rays required the doctor to call the radiology desk and submit a request. He told Benson that once the request document was generated, he would be able to perform the x-ray. Benson said he would fill out the request with the department so that Almeida could do the x-ray. Almeida also told Benson that he did not have the type of film required, but would get the film and come back.

Almeida characterized the rest of his shift as "busy." However, he called the radiology desk and asked whether Benson had requisitioned the x-ray, and was told that no requests had been received. Later in his shift, Almeida went to the radiology desk and was again told that no requisition for the x-ray had been generated.

Because Almeida had not taken a meal break during his shift, Colthirst, his supervisor at the time, gave him permission to leave thirty minutes early. He left the hospital at 8:00 a.m., without having completed the x-ray. Almeida acknowledged at trial that he left knowing that he had not performed the x-ray Benson had verbally instructed him to perform.

The patient for whom the x-ray was ordered died a half-hour after Almeida left.[1] Annie C. Bails, R.N., a nurse on the patient's floor, testified that she saw the x-ray

requisition concerning the deceased patient at the nurse's desk around 8:30 a.m. However, the form was not produced during discovery or at trial.

Bails reported the event to Jaimon Mathew, the radiology supervisor. Both Bails and Mathew prepared written statements reflecting their understanding of the facts. According to Bails' statement, she was on the patient's floor when she overheard the float doctor assigned to the floor at that time, Benson, ask an x-ray technician, Almeida, for a portable x-ray on the patient. She heard the technician reply that he did not have another x-ray cassette, but that he would go downstairs to retrieve another cassette to perform the x-ray. Mathew's incident report contained essentially the same information as Bails' statement, and identified her as the source of the information.

Following the incident, Mbuakoto, the director of radiology, commenced an investigation to determine whether there had been a breakdown in procedure. Mbuakoto contacted Almeida at home on September 2, and asked him what had happened and why he did not complete the x-ray as ordered. Almeida told him that nothing unusual had happened, that it was a very busy overnight shift, and that he may have forgotten to do the x-ray.

Mbuakoto asked Almeida to prepare an "incident report." Almeida testified that he tried to put everything in the statement that he could remember. He wrote the following:

> As stated on the phone, I was doing portables on Friday into early Sat. morning and was completing a chest x-ray . . . . [W]hen I was leaving the unit I was approached by a [doctor] . . .

about 7am—cxr on a patient. The [doctor] was coming in for duty, and did not have a completed requisition to perform the x-ray; also it was never called downstairs to our office. So I asked the [doctor] when he was ready with a req. to call it in so I could come back and do it because at the time as was called on STAT calls that I needed to attend to prior to returning to the unit. As I became overwhelmed with more STATS that I can attend I called down and spoke to Mary who was at the desk and told her that I needed someone to cover the other STATS that were called in a timely manner. She said that Hugo was on his way to cover the other STATS—I mentioned that I was approached by the [doctor] in H-blue for a cxr—she said to disregard it because it might have been cancelled due to it not being called in so it could be done. As I completed the ports STATS and on my way to complete my paperwork I mentioned it to Mary about H-blue to see if they still needed [the x-ray.] [S]he said that no one from H-blue called about the cxr so we took it as it was cancelled. The only people I mentioned it to were Mary and Hugo about H-blue. Before leaving I signed off my duties and there was never any mention of H-blue - - I signed off all my ports and was called back to SICU for cxr on patients that were already completed the night prior. The nurse just wanted to know if they were done because the res. could not find them. I came down and mentioned it to Lance and he

> checked and said to disregard because they were already done . . . . He checked and he remedied the problem for the res. Nothing was done intentional, it was just miscommunication. I was trying to assist every patient in a timely manner and performing to the best of my ability.

Mbuakoto met with Almeida on September 5, to discuss factual inconsistencies between his report and Bails' statement, as well as discrepancies between what Almeida told him on the telephone and the contents of his written statement. Almeida told Mbuakoto that he wanted to retract his statement and amend it. He asserted that he felt rushed when preparing the statement and that there were things he had originally intended to include but had not. Almeida then stated that he would no longer participate in the investigation.

At the end of their meeting, Mbuakoto handed Almeida a staff disciplinary notice dated September 5, stating that he was terminated effective immediately for "[p]oor [w]ork [p]erformance" and "[f]ailure to follow [d]irectives." After his termination, Almeida sent an email to UMDNJ's office of ethics and compliance to dispute his termination. Although he asserted that it was against the radiology department policy to perform an x-ray without a requisition, Almeida's email made no reference to any statutes, regulations, or mandate of public policy.

On October 15, Susan Young, a UMDNJ compliance investigator, interviewed Almeida. Young's memorandum of the interview reflected that Almeida

> told [the doctor] that he ran out of x-ray cassettes but that after he retrieved another one, he would return. He also told [the doctor] that he had to fill out the necessary paperwork. He did not return to the floor because he got too busy. Throughout the night he asked the other Techs if any calls or paperwork came from [the patient's floor] for an x-ray. No one had any information regarding this issue.
>
> [Almeida] stated that his shift ended at 8:30 a.m. but the charge nurse . . . who was his supervisor for that shift, gave him permission to leave at 8:00 a.m. because he did not have a lunch break. He did not discuss the issue that occurred . . . with him.

On October 24, Young reported to UMDNJ's acting president that Almeida's allegations were unfounded. Her report concluded that Almeida "was terminated for poor job performance and failure to follow directives during his 90 day probationary period."

Young testified at trial that in reaching this conclusion she relied on Almeida's failure to return to the floor to perform the x-ray, which corresponded with the stated reason for his termination. She also testified that Almeida never reported that he believed UMDNJ's policies were not being followed or that he had been ordered to do the x-ray without a requisition form. He had simply explained he was busy during the shift and did not return to perform the x-ray prior to leaving for the day.

On July 15, 2009, Almeida filed his complaint alleging a CEPA violation.[2] He sought compensatory and punitive damages. Almeida alleged that UMDNJ violated CEPA by terminating him for his refusal to perform an x-ray on a patient without a requisition form, which he believed was illegal.

Defendants filed a motion for summary judgment in July 2012, arguing that undisputed material facts demonstrated that Almeida was not a whistleblower under CEPA. In Almeida's counterstatement of material facts in dispute, he identified N.J.A.C. 7:28-19.3(h) and (m) as the regulations that supported his claim that it was improper to perform the scan without written authorization. The motion judge denied defendants' motion in an October 18 order, which was accompanied by a written decision.

The judge found that there were genuine issues of material fact as to whether (1) "a timely and proper request, if any, was submitted authorizing the x-ray," (2) Almeida "had a reasonable belief that he was being asked to perform an illegal activity," and (3) Almeida's failure to administer the x-ray absent proper authorization warranted termination. The judge also noted that public policy considerations embodied in N.J.S.A. 26:2D-24 and N.J.A.C. 7:28-19.1 led her to question whether UMDNJ's x-ray administration policies were in accordance with state or federal regulations.

During the six-day trial in April 2013, the UMDNJ defendants moved for dismissal at the end of Almeida's case and at the close of evidence. The jury returned a verdict in favor of Almeida, awarding him $175,000 in lost wages, $250,000 in pain and suffering damages, and $265,000 in punitive damages, for a total of $690,000.

On May 20, UMDNJ moved for a judgment in its favor on the grounds that Almeida had failed to prove a prima facie CEPA case or, in the alternative, for a new trial. The trial judge denied UMDNJ's motion on June 7. The judge subsequently awarded Almeida's counsel $212,202.41 in counsel fees under the CEPA fee-shifting provision. This appeal followed.

II.

The UMDNJ defendants appeal the trial judge's orders denying their motions for (1) summary judgment, (2) a directed verdict, and (3) judgment notwithstanding the verdict. They base their arguments on what they contend was Almeida's failure to establish a prima facie case under CEPA.

A.

Before turning to the UMDNJ defendants' specific arguments, we outline the basic legal framework that governs our consideration of this appeal.

We afford deference to a jury's fact-finding role, taking care to "not overstep [our] bounds by usurping the jury's task of assessing the credibility of the witnesses." Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 415 (1997). "[T]he jury's factual determination will be disturbed only if we find that the jury could not have reasonably used the evidence to reach its verdict." Ibid. If the trial judge has correctly charged the jury on the governing law, our authority to interfere with the jury's application of those legal standards to the evidence is circumscribed. Feldman v. Lederle Labs., 132 N.J. 339, 345 (1993).

If the pivotal question on appeal is whether the verdict is sustainable as a matter of law, which is the situation in this case, we consider the issue de novo, because it is well established that our review of a judge's conclusions of law is plenary. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995) ("A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.").

In the context of a motion for summary judgment, we apply the same standard governing the trial judge. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 539-40 (1995); R. 4:46-2(c). We must determine whether there are any genuine issues of material fact when the evidence is viewed in the light most favorable to the non-moving party. Rowe v. Mazel Thirty, LLC, 209 N.J. 35, 38, 41 (2012); Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007).

Motions for involuntary dismissal in accordance with Rule 4:37-2(b), as well as motions for judgment occurring at the close of evidence, Rule 4:40-1, or after the verdict, Rule 4:40-2(b), are governed by essentially the same standard: "'[I]f, accepting as true all the evidence which supports the position of the party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied . . . .'" Verdicchio v. Ricca, 179 N.J. 1, 30 (2004) (alteration in original) (quoting Estate of Roach v. TRW, Inc., 164 N.J. 598, 612 (2000)). We use the same standard. Barber v. ShopRite of Englewood & Assocs., Inc., 406 N.J. Super. 32, 52 (App. Div.), certif. denied, 200 N.J. 210 (2009).

"[CEPA's] purpose is 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 Twp. Bd. of Educ., 138 N.J. 405, 431 (1994). In Dzwonar v. McDevitt, 177 N.J. 451, 463 (2003) (quoting Abbamont, supra, 138 N.J. at 431), the Supreme Court reiterated that it had "long . . . recognized that CEPA is remedial legislation and therefore 'should be construed liberally to effectuate its important social goal.'"

CEPA provides, in relevant part, that

> [a]n employer shall not take any retaliatory action against an employee because the employee does any of the following:
>
> . . . .
>
> 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 a rule or regulation promulgated pursuant to law . . .;

> (2) is fraudulent or criminal . . . ; 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.]

A valid CEPA claim has four requirements: (1) the employee "reasonably believed that his or her employer's conduct was violating either a law, rule, or regulation . . . , or a clear mandate of public policy"; (2) the employee "performed a 'whistle-blowing' activity" specified in N.J.S.A. 34:19-3(c); (3) the employer took "an adverse employment action" against the employee; and (4) "a causal connection exists between the whistle-blowing activity and the adverse employment action." Dzwonar, supra, 177 N.J. at 462.

B.

With that background, we turn to the merits of the UMDNJ defendants' appeal, concentrating our discussion on the issue of whether Almeida had an objectively reasonable belief that taking the scan without a written requisition violated a law, regulation, rule, or important mandate of public policy.

"CEPA does not require that the activity complained of . . . be an actual violation of a law or regulation, only that the employee 'reasonably believes' that to be the case."

Estate of Roach, supra, 164 N.J. at 613. In Dzwonar, supra, 177 N.J. at 464 (emphasis added), the Court concluded that

> a plaintiff must set forth facts that would support an objectively reasonable belief that a violation has occurred. In other words, when a defendant requests that the trial court determine as a matter of law that a plaintiff's belief was not objectively reasonable, the trial court must make a threshold determination that there is a substantial nexus between the complained-of conduct and a law or public policy identified by the court or the plaintiff. If the trial court so finds, the jury then must determine whether the plaintiff actually held such a belief and, if so, whether that belief was objectively reasonable.

In Dzwonar, the Court summarized its decision in Abbamont as an example of the analysis it was requiring:

> [A]n industrial arts teacher at a local middle school claimed that the school board's failure to rehire him was retaliation for his complaints about inadequate health and safety conditions in the school's metal shop. As a threshold matter, we noted that the plaintiff had "established the existence of health and safety administrative rules and regulations and a clear mandate of public policy applicable to conditions of the metal shop." Specifically, the plaintiff informed the trial court that he was aware of administrative

> regulations that required "'dependable ventilation'" that called for "'a minimum amount of outdoor air supply and exhaust on movement' for different types of industrial arts, including metal work." After reviewing the terms of those regulations, we concluded that the plaintiff could have "demonstrated 'a reasonable, objective belief that the conduct of the school officials was a specific violation' of those regulatory standards and 'incompatible' with their public policy mandate." The plaintiff's description of the "lack of ventilation and poor air quality in the shop," combined with his "work-related pulmonary problems," underscored "the reasonableness of [his] belief," as did the testimony of a ventilation expert who testified that "operating the machines in plaintiff's shop without individual ventilation hoods was unsafe." Because plaintiff's evidence was closely related to the violation of a specific regulation, we reinstated the jury's verdict in favor of the plaintiff in respect of his CEPA claim.
>
> [Id. at 465 (second alteration in original) (citations omitted).]

Significantly for the purposes of this case, the regulation cited by Abbamont "specifically require[d] 'dependable ventilation' that provides 'a minimum amount of outdoor air supply and exhaust on movement' for different types of industrial arts, including metal work." Abbamont, supra, 138 N.J. at 424.

Almeida and the motion judge relied on several statutory and regulatory provisions. N.J.S.A. 34:19-2(f) defines "'[i]mproper quality of patient care'" as "any practice, procedure, action or failure to act of an employer . . . which violates any law or any rule, regulation or declaratory ruling adopted pursuant to law, or any professional code of ethics." N.J.A.C. 7:28-19.3 provides, in relevant part:

> (h) No person shall use or permit the use of ionizing radiation-producing equipment in such a manner as to expose humans to unnecessary ionizing radiation.
>
> (m) No person licensed pursuant to this subchapter shall use ionizing radiation-producing equipment on humans for any purpose other than for medical diagnosis, dental diagnosis, therapy simulation, therapy or monitoring of dental treatment. All such use must be at the direction of a licensed practitioner who is practicing within the scope of his or her license.

N.J.A.C. 7:28-19.3(n) provides that "[n]o radiologic technologist licensed pursuant to this subchapter shall prescribe a radiological examination." Finally, N.J.S.A. 26:2D-24, which was mentioned by the motion judge, contains a legislative finding and declaration that

> the citizens of the State of New Jersey are entitled to the maximum protection practicable

> from the harmful effects of excessive and improper exposure to ionizing radiation; that the protection can be increased by requiring appropriate training and experience of persons operating medical equipment emitting ionizing radiation and requiring them to operate the equipment under the specific direction of a licensed practitioner; and that it is therefore necessary to establish standards of education, training and experience for these operators and to provide for the appropriate examination and certification thereof.

All of these provisions have one thing in common, they contain no requirement that a licensed practitioner order an x-ray in writing.

Almeida does not allege facts that, if true, would arguably be a violation of the above regulations. They require only that the use of ionizing radiation-producing equipment be authorized by "a licensed practitioner," shall not "expose humans to unnecessary ionizing radiation," and cannot be prescribed by a licensed technologist, such as Almeida. They contain no language that requires a written authorization by the licensed practitioner or that can reasonably be interpreted as doing so. That UMDNJ itself requires a written prescription does not change the fact that the applicable statute and regulations do not. Dzwonar, supra, 177 N.J. at 469.

We are cognizant of the fact that "[s]pecific knowledge of the precise source of public policy is not required," because "[t]he object of CEPA is not to make lawyers out of conscientious employees but rather to prevent retaliation against those employees who

object to employer conduct that they reasonably believe to be unlawful or indisputably dangerous to the public health, safety or welfare." Mehlman v. Mobil Oil Corp., 153 N.J. 163, 193-94 (1998) (emphasis added). Nevertheless, we do not understand CEPA, or the cases interpreting it, to provide a viable cause of action to a plaintiff who conflates the provisions of statutes and regulations, which are an appropriate basis for a CEPA claim, with an employer's rules or procedures, which are not, when the facts as alleged by that plaintiff would not be a violation of the statutory or regulatory provisions relied on by the plaintiff.

Consequently, we conclude that Almeida had no "objectively reasonable belief" that a violation had occurred because there was "no substantial nexus" between Almeida's belief that taking the x-ray without a written authorization was unlawful and the legal basis relied upon by Almeida, none of which actually or arguably require a writing. That being the case, the motion judge should have granted the UMDNJ defendants' motion for summary judgment and the trial judge should have dismissed the case at trial.[3]

For these reasons, we reverse the judgment and orders on appeal, and remand for entry of judgment in favor of defendants.

Reversed.

1 The issue of whether the failure to perform the x-ray was related to the patient's death was not before the trial court and is not relevant to this appeal.

[2] Almeida also filed a violation of public policy claim and a defamation claim, both of which were voluntarily dismissed.

3 Because we find that Almeida failed to demonstrate the first requirement set forth in Dzwonar, supra, 177 N.J. at 462, we need not reach the issues of whether there was whistleblowing conduct or a causal nexus between such conduct and Almeida's termination.
