SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0217-16T4

KATRINA OSBORNE,

Plaintiff-Respondent,

v.

NEW JERSEY TRANSIT
and KEVIN RUFF,

Defendants-Appellants.

Argued March 23, 2017 – Decided April 20, 2017

Before Judges Lihotz, O'Connor, and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-2151-15.

Christopher J. Kelly, Deputy Attorney General, argued the cause for appellants (Christopher S. Porrino, Attorney General, attorney; Stephanie J. Cohen, Assistant Attorney General, of counsel; Mr. Kelly, on the brief).

Matthew R. Grabell argued the cause for respondent (Grabell & Associates, P.A., attorneys; Mr. Grabell, on the brief).

PER CURIAM

By leave granted, defendant New Jersey Transit (NJT) appeals from a March 18, 2016 decision rendered by a Law Division judge, compelling it to provide various documents to plaintiff Katrina Osborne.[1] NJT also appeals from a July 22, 2016 order denying its motion for reconsideration of the March 18, 2016 decision. We reverse and remand for further proceedings.

I

Plaintiff filed a complaint against NJT and defendant Kevin Ruff under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -49, alleging hostile work environment sexual harassment and retaliation. In her complaint, plaintiff claims she had been the Assistant Supervisor for Bus Operations in NJT's Orange, New Jersey, facility. From June 2013 to November 2013, plaintiff engaged in a consensual relationship with another employee, Chris Williams, but then ended the relationship. While romantically involved with him, Williams

[1] Although "it is well-settled that appeals are taken from orders and judgments and not from opinions, oral decisions, informal written decisions, or reasons given for the ultimate conclusion[,]" see Do-Wop Corp. v. City of Rahway, 168 N.J. 191, 199 (2001), the judge who issued the March 18, 2016 decision retired before entering an order. However, except in one respect, which we address at the end of this opinion, the July 22, 2016 order sets forth what the judge ordered on March 18, 2016. Under these particular factual circumstances, we are permitting an appeal from the March 18, 2016 decision.

told plaintiff not to report their relationship to NJT or she would "suffer consequences," including the loss of her job. Plaintiff followed his advice.

Plaintiff's complaint further states that, in March 2014, NJT required her to work two days per week in its Newark facility, which necessitated she report directly to Williams. The first day she worked under his supervision, Williams told plaintiff he wanted to resume their relationship, but she declined the invitation. Plaintiff alleges Williams engaged in various acts of sexual harassment in an attempt to reestablish another sexual relationship. Plaintiff details those acts in her complaint, which we need not repeat here. She does allege when she continued to spurn Williams' advances, he threatened to take action that would preclude her from being promoted. He also gave her an "exceptional" workload.

On May 20, 2014, plaintiff filed an Equal Employment Opportunity/Affirmative Action (EEO/AA) complaint in NJT's EEO/AA Department. Plaintiff claims NJT ignored her complaint until June 16, 2014, when defendant Ruff, an NJT EEO/AA officer, arranged a meeting with her. During that meeting, plaintiff reported Williams' alleged harassing conduct. She claims NJT failed to contact her thereafter about her complaints, except to suspend her without pay for violating NJT's "Nepotism/Dating

Relationships Standard Operating Procedures." Then, on August 8, 2014, NJT terminated plaintiff. She claims she was terminated in retaliation for complaining about Williams' conduct.

During discovery, the notice to produce and interrogatories plaintiff served upon NJT demanded it produce various documents. The documents in issue, which are set forth in numbers fourteen and fifteen of plaintiff's notice to produce and number fifteen of her set of interrogatories, are as follows:

> [1] All documents which evidence, relate or refer to any charges of sexual harassment filed with any court or agency against Defendant NJT, or any of its employees, by employees of NJT, other than those filed by Plaintiff, from 2010 to the present.
>
> [2] All documents which evidence, relate or refer to any charges of retaliation filed with any court or agency against Defendant NJT, or any of its employees, by employees of NJT, other than those filed by Plaintiff, from 2010 to the present.
>
> [3] [The] name, job title/capacity, present (or last known) address and phone number, [of] all individuals who have made any allegation(s) of sexual harassment, or retaliation, whether or not charges were formally filed with any court or agency, against New Jersey Transit, or any of its employees from 2010 to the present.

Although plaintiff requested and NJT resisted producing other documents, they are not in issue in this appeal.

When defendant did not produce the subject documents, plaintiff filed a motion to compel their production. Following oral argument, the judge issued a decision from the bench, in which she ordered NJT to produce only those complaints filed by an employee regarding "sexual harassment or harassment" who worked in Newark from 2010 to the present. However, the judge also authorized NJT to redact from the complaints any information it deemed privileged or confidential. The judge did not order NJT to produce any other documents.

After the judge (first judge) retired, this matter was assigned to another judge (second judge). During a case management conference with the second judge, during which the parties discussed the failure of the first judge to enter an order, the second judge suggested NJT file a motion for reconsideration. NJT did so, arguing the first judge should have but did not look at the complaints in camera before ordering NJT to turn them over to plaintiff. The second judge denied the motion for reconsideration, finding NJT could have but failed to raise the latter argument before the first judge.

II

As it did before the second judge, on appeal, NJT contends the first judge should have reviewed each complaint NJT was ordered to produce and determine what, if anything, should have

been excised from these complaints before turning them over to plaintiff. While NJT was provided authority to redact from the complaints that which it concluded was privileged or confidential, we assume NJT deemed it the court's responsibility to make these determinations. NJT also contends the second judge erred when he denied NJT's motion for reconsideration, arguing the first judge's failure to examine the documents in camera was an error mandating reconsideration.

In our view, the first judge abused her discretion when, pursuant to decisional authority governing in-camera review of allegedly privileged documents, see Payton v. N.J. Tpk. Auth., 148 N.J. 524, 550 (1997), she abdicated to NJT her responsibility to examine and determine which complaints could be properly turned over to plaintiff. The second judge then failed to recognize the first judge's error and denied NJT's motion for reconsideration.

Rule 4:49-2 permits the reconsideration of a decision when a court has overlooked "controlling decisions." We cannot discern from the record whether, when before the first judge, NJT asserted she was required to review the complaints in camera. However, even if NJT had not done so, as a matter of law the first judge was obligated to engage in and complete this task, a point the second judge overlooked.

As for the first judge's obligation to review the subject complaints, we note complaints of sexual harassment made by co-employees in the workplace may be relevant to a claimant's allegation the employer failed to take remedial action to address sexually harassing conduct and, thus, tolerated a hostile work environment. See Payton, supra, 148 N.J. at 538-39; see also Connolly v. Burger King Corp., 306 N.J. Super. 344, 348-49 (App. Div. 1997). Such complaints may also lead to the discovery of evidence other employees were terminated in retaliation for complaining about harassment in the workplace.

However, while a complaint filed in court does not, an employee's informal complaint to or the filing of an EEO/AA complaint with an employer about a co-employee's or even the employer's sexually harassing conduct may implicate privacy concerns. Many who pursue their claims informally or through the filing of EEO/AA complaints do not wish to draw undue attention to themselves, especially if the allegations are of a sexual nature.

In fact, in recognition of the concerns of those involved when even an informal claim is made by an employee, State agencies, which must investigate all claims of harassment, see N.J.A.C. 4A:7-3.1(g), are required to advise all persons interviewed in connection with a claim that they may not discuss

any aspect of the investigation with others "in light of the important privacy interests of all concerned" and the failure to do so "may result in administrative and/or disciplinary action, up to and including termination of employment." See N.J.A.C. 4A:7-3.1(j).

In light of these competing concerns, specifically, a plaintiff's need to review not only those complaints filed in court, but also informal or EEO/AA complaints, versus the need for privacy of victims or those falsely accused of harassment, a judge must review such complaints in camera. First, a judge must establish the relevancy of each complaint by determining whether a complaint contains "evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401.

Second, if a complaint is relevant, a judge is required to "examine each document individually and make factual findings with regard to why [a plaintiff's] interest in disclosure is or is not outweighed by [the State's] interest in nondisclosure." Keddie v Rutgers, 148 N.J. 36, 54 (1997); see also Hammock by Hammock v. Hoffmann-LaRoche, 142 N.J. 356, 381-82 (1995) (noting, in a matter pertaining to the sealing of documents concerning health, safety, and consumer fraud, "[t]he need for secrecy must be demonstrated with specificity as to each

document. . . . [T]he trial court . . . must examine each document individually and make factual findings . . . .").

When providing its reasons for nondisclosure, a judge must "state with particularity the facts, without disclosing the secrets sought to be protected, that . . . persuade the court to seal the document or continue it under seal." Hammock, supra, 142 N.J. at 382. If a judge is unable to reveal factual findings without disclosing the confidential material sought, the disclosure of those factual findings can be sealed for appellate review, thus permitting a meaningful determination by us whether the judge correctly exercised his or her discretion. See Shuttleworth v. City of Camden, 258 N.J. Super. 573, 589 (1992).

We therefore remand this matter to the trial court with directions to review the complaints in camera in accordance with the applicable case law and render a decision, making specific reference to each complaint or groups of complaints, if there are groups of complaints similar enough to be discussed collectively. In addition, as we sanctioned in Connolly v. Burger King Corp., 306 N.J. Super. 344 (App. Div. 1997), if there is a substantial number of complaints, the court may in its discretion, "place limits on the chronological . . . scope

of the request" or employ any other measure "to manage the flow of material." Id. at 350.

Finally, the July 22, 2016 order does not include a provision stating NJT is permitted to redact from the complaints any material it deems privileged or confidential. Although NJT's reluctance to engage in this exercise and our opinion make such a provision superfluous, for the sake of completeness, we direct on remand the court amend the July 22, 2016 order to include this provision.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.