SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5425-13T3

KEVIN KOLBECK,

Plaintiff-Appellant/
Cross-Respondent,

v.

COUNTY OF UNION,

Defendant-Respondent,

and

GEORGE DEVANNEY, Individually
and as former County Manager,

Defendant-Respondent/
Cross-Appellant.

Submitted December 20, 2016 – Decided March 24, 2017

Before Judges Espinosa and Guadagno.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket No. L-4765-11.

Robert A. Ungvary, attorney for appellant/cross-respondent.

LaCorte, Bundy, Varady & Kinsella, attorneys for respondent County of Union (Christina M. DiPalo, on the brief).

Palumbo Renaud & DeAppolonio, LLC, attorneys for respondent/cross-appellant George Devanney (Catherine M. DeAppolonio and Robert F. Renaud, on the brief).

PER CURIAM

Plaintiff, an employee of Union County (the County) since 1986, filed a verified complaint in lieu of prerogative writ against the County and George Devanney, the former County Manager, alleging defendants violated the New Jersey Civil Rights Act (NJCRA), N.J.S.A. 10:6-1 to -2, "by acting under color of state law to retaliate against [him] by reason of [his] perceived political affiliations and associations," rights protected by Article I, Paragraphs 6 and 18 of the New Jersey Constitution.[1] He appeals from the dismissal of his complaint.[2] We affirm.

I.

Plaintiff, a Democrat, described two factions in the Union County Democratic party. One was led by Charlotte DeFilippo, the chairman of the Union County Democratic Committee and the other

[1] The second count of the complaint, alleging intentional infliction of emotional distress, was dismissed and is not a subject of this appeal.

[2] Devanney filed a cross-appeal in which he argued the trial judge erred in denying his motion for summary judgment because the NJCRA claim was time-barred under the applicable statute of limitations. In light of our disposition of the appeal, we need not address the merits of this argument.

was led by Michael Lapolla, who was the County Manager until 2002. Plaintiff testified the two had an openly critical and hostile relationship.

In 2002, Devanney succeeded Lapolla as County Manager. Plaintiff believed Devanney was closely associated with DeFilippo and took orders directly from her.

Plaintiff was friendly with Lapolla and, while LaPolla was County Manager, he was appointed to the Civil Service title of General Supervisor of Trades. Plaintiff stated when he worked "under the Lapollas[3] everything was good." He said he was treated very differently "as soon as the Lapollas left," explaining, "they have been mistreating me because I have a relationship with the Lapollas, political and friends."

When Devanney became County Manager, plaintiff supervised approximately sixty people and occupied an office he described as "spacious and well-appointed" in the Union County Courthouse. In November 2005, plaintiff was reassigned to a janitorial position in which he supervised approximately six people, and was relocated to an office in the Union County Police building that he described as "a windowless storage room" and a "dungeon." In or around

[3] Plaintiff testified that Richmond Lapolla (Michael Lapolla's brother) appointed him to the position of General Supervisor of Trades and Maintenance.

November 2008, plaintiff was relocated to the Public Works building in Scotch Plains, which he described as "intolerable" and "constantly filled with diesel fumes." Prior to this reassignment, plaintiff tape-recorded a meeting he had with Devanney and testified Devanney told him he was "being punished because [he] associated with the Lapollas" and refused to report to Devanney instances where others badmouthed him.

Plaintiff testified Devanney caused his reassignment because "nobody [did] anything without" Devanney's authorization. Plaintiff also claimed Devanney took away his county vehicle, had him followed by police, and withheld his salary raise. Despite his changes in assignments, plaintiff maintained his civil service title and his salary never decreased.

Devanney retired from his position as County Manager in August 2011. Plaintiff filed a complaint in lieu of prerogative writ approximately four months later, alleging that, while he was County Manager, Devanney engaged in a continuing course of harassment against him, beginning in November 2005. He sought civil damages and to be reinstated "to a position commensurate with his civil service title."

After defendants filed summary judgment motions, the relief granted by the motion judges included the dismissal of the NJCRA claim against the County because it could not be vicariously liable

for the alleged unconstitutional conduct of Devanney, and against Devanney because he was shielded by the defense of qualified immunity. In his appeal, plaintiff argues the motion judges erred in granting summary judgment.

II.

In Point I, plaintiff argues the motion judge erred in granting summary judgment to the County. He contends an issue regarding the application of the Tort Claims Act (TCA), N.J.S.A. 59:1-1 to -12.3, was raised for the first time at oral argument and the motion judge "entered an [o]rder dismissing the case against the County of Union on Title 59 grounds and failure to state a claim upon which relief may be granted." He contends the TCA does not apply to his action in lieu of prerogative writ. Plaintiff does not offer any argument as to why it was error to dismiss the NJCRA claim on substantive grounds, only stating the County should have remained a defendant in the case as to the issue of reinstatement of plaintiff to his former position. This argument lacks sufficient merit to warrant discussion in a written opinion beyond the following brief comments. R. 2:11-3(e)(1)(E).

First of all, although plaintiff conceded the notice provision of the TCA applied to his intentional infliction of emotional distress claim, the motion judge did not dismiss the NJCRA claim or plaintiff's action in lieu of prerogative writ for

any reason related to the TCA. Plaintiff also conceded he had no monetary damages claim against the County.

The action he argues should have survived is his effort to compel the County, a governmental body, to reinstate him "to a position commensurate with his civil service title" and "the physical location where he worked before the pattern of harassment began."

Although the relief sought resembles a writ of mandamus, see Selobyt v. Keough-Dwyer Corr. Facility of Sussex Cty., 375 N.J. Super. 91, 96 (App. Div. 2005) (quoting Alexander's Dep't Stores of N.J., Inc. v. Borough of Paramus, 125 N.J. 100, 107 (1991)), the relief plaintiff seeks is not available through this remedy. A writ of mandamus is an appropriate remedy "(1) to compel specific action when the duty is ministerial and wholly free from doubt, and (2) to compel the exercise of discretion, but not in a specific manner." Vas v. Roberts, 418 N.J. Super. 509, 522 (App. Div. 2011) (quoting Loigman v. Twp. Comm. of Middletown, 297 N.J. Super. 287, 299 (App. Div. 1997)). Courts have no authority under a writ of mandamus to compel action by a governmental body unless it is "required by law to act." Zimmer v. Castellano, 432 N.J. Super. 412, 418 (App. Div. 2013); see also Switz v. Middletown, 23 N.J. 580, 588 (1957) ("[T]he fair use of judgment and discretion is the province of the functioning authority.") Because the County is

not required by law to reinstate plaintiff "to a position commensurate with his civil service title" or to place him "in the physical location where he worked" prior to his relocation, a writ of mandamus will not provide the relief he seeks. See Zimmer, supra, 432 N.J. Super. at 418. Therefore, the fact that an action in lieu of prerogative writ was used as a vehicle for asserting plaintiff's claim does not preclude the entry of summary judgment.

Moreover, plaintiff's complaint, filed in December 2011, approximately four months after Devanney retired, was untimely. R. 4:69-6(a).

As we have noted, plaintiff presented no argument to challenge the dismissal of his NJCRA claim against the County on its merits.

III.

In Point II, plaintiff argues Devanney was not shielded from liability by qualified immunity. This argument also merits only limited discussion. R. 2:11-3(e)(1)(E).

The qualified immunity doctrine is an affirmative defense that "shields government officials from a suit for civil damages when 'their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Gormley v. Wood-El, 218 N.J. 72, 113 (2014) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396, 410 (1982)). This defense is available when a

plaintiff asserts a claim for money damages under the NJCRA. Ramos v. Flowers, 429 N.J. Super. 13, 24 (App. Div. 2012).

It is unclear what relief plaintiff seeks from Devanney since he has not appealed from the dismissal of his claim for intentional infliction of emotional distress and concedes he has no money damages as a result of the changes in his assignments.

The equitable relief sought by plaintiff, to reinstate him "to a position commensurate with his civil service title, with all offices, staff, and duties of his civil service position, and in the physical location where he worked before the [alleged] pattern of harassment began" is relief that could only be obtained from the County and not from Devanney, who is no longer County Manager.

The only argument plaintiff presents regarding the issue of qualified immunity is that Devanney had to know it was wrong to take retaliatory action against plaintiff based on "Devanney's animosity towards individuals that plaintiff socially associated with, and whom Devanney believed were critical of him." Plaintiff contends this resulted in the denial of "a firmly established right, the right to interact socially with political rivals of his supervisor."

For plaintiff's claim against Devanney to survive, he must show that this right to social interaction is both constitutionally protected and that it was clearly established at the time Devanney

engaged in it. He has done neither.

For a claim of political affiliation retaliation to be viable, plaintiff must have engaged in constitutionally protected conduct. Galli v. N.J. Meadowlands Comm'n., 490 F.3d 265, 271 (3d Cir. 2007); Commc'ns Workers of Am. v Whitman, 335 N.J. Super. 283, 289-90 (App. Div. 2000), certif. denied, 167 N.J. 636 (2001). Typically, such conduct occurs in situations where the plaintiff is required to join or support the political party in power or suffers retaliation for supporting a losing candidate or for failing to engage in the political process whatsoever. See Galli, supra, 490 F.3d at 272-73 (collecting cases). Plaintiff has not cited any case that recognizes the social relationships he has described as constitutionally protected conduct.

To defeat the assertion of qualified immunity, plaintiff must vault an additional hurdle. "Qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right." Ramos, supra, 429 N.J. Super. at 27 (emphasis added) (quoting Pearson v. Callahan, 555 U.S. 223, 232, 129 S. Ct. 808, 816, 172 L. Ed. 2d 565, 573 (2009)). "For a right to be clearly established, '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" Gormley, supra, 218 N.J. at 113 (alteration in original) (quoting Anderson v.

Creighton, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523, 531 (1987)). We look to the "case law existing at the time of the defendant's alleged improper conduct" and determine whether there was "sufficient precedent at the time of action, factually similar to the plaintiff's allegations, to put defendant on notice that his or her conduct is constitutionally prohibited." McLaughlin v. Watson, 271 F.3d 566, 572 (3d Cir. 2001), cert. denied, 535 U.S. 989, 122 S. Ct. 1543, 152 L. Ed. 2d 469 (2002). Again, plaintiff has cited no authority, let alone sufficient precedent at the time of Devanney's actions that could provide such notice.

Plaintiff's claim of political affiliation retaliation fails on its merits. And, it follows, since there is no basis to find the violation of a "clearly established right," Devanney would have qualified immunity in any case.

Affirmed.