SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5755-14T3

SERGEANT ROGER MALONE, A member of the New Jersey State Police (Badge No. 5181),

Plaintiff-Appellant,

v.

STATE OF NEW JERSEY, DIVISION OF STATE POLICE OF THE STATE OF NEW JERSEY, DIVISION OF LAW AND PUBLIC SAFETY, SERGEANT FERRONI and ACTING MAJOR HEITMANN,

Defendants-Respondents,

and

MAJOR ROBERT CATULLO (ret.), MAJOR MICHAEL MATTIA (ret.), MAJOR FOWLER (ret.) and CAPTAIN BROOKLYN SMITH,

Defendants.

Argued November 30, 2016 – Decided April 21, 2017

Before Judges Alvarez and Accurso.[1]

On appeal from Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-2530-14.

George T. Daggett argued the cause for appellant (Daggett & Kraemer, attorneys; Mr. Daggett and Joseph M. Corazza, on the brief).

Joseph M. Micheletti, Deputy Attorney General, argued the cause for respondents (Christopher S. Porrino, Attorney General, attorney; Lisa A. Puglisi, Assistant Attorney General, of counsel; Alex J. Zowin, Deputy Attorney General, on the brief).

PER CURIAM

Plaintiff Roger Malone appeals from a final order dismissing his complaint alleging violations of the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14, by defendant State of New Jersey, Division of State Police and certain members thereof, and denying his motion for reconsideration. Because we agree with Judge Innes that a

[1] Hon. Carol E. Higbee was a member of the panel before whom this case was argued. The opinion was not approved for filing prior to Judge Higbee's death on January 3, 2017. Pursuant to R. 2:13-2(b), "Appeals shall be decided by panels of 2 judges designated by the presiding judge of the part except when the presiding judge determines that an appeal should be determined by a panel of 3 judges." The presiding judge has determined that this appeal remains one that shall be decided by two judges. Counsel has agreed to the substitution and participation of another judge from the part and to waive reargument.

liberal reading of the complaint does not suggest plaintiff pleaded a CEPA claim, we affirm. See Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183-85 (2005); Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989).

As this was a motion to dismiss, we take the facts from plaintiff's single-count complaint. Plaintiff alleged that in 2012, when he was a State Police sergeant assigned to Troop B's Somerville station, a young, newly appointed trooper conducted a search, later determined to be illegal. In the course of an internal inquiry into the search, plaintiff claimed another sergeant, defendant Ferroni, reported to the major, defendant Catullo, Ferroni's "close personal friend," that Ferroni had been in the station supervising the search, but that the young trooper had failed to follow his direction. Plaintiff claimed that statement was false and Ferroni was actually at his girlfriend's house and not in the station "when he should have been."

The young trooper told Major Catullo that Ferroni was not in the station and had not supervised the search. Plaintiff alleged that because Catullo believed his friend Ferroni, the major "threatened a candor investigation into the statements of the young trooper."

Plaintiff claimed when he learned of the dispute, he went to a captain at Troop headquarters and told him Ferroni "was not in the Somerville station at the time of the search." Plaintiff claims he also told Catullo that Ferroni's "statement was false." Plaintiff claims he told both officers "the young trooper could not have refused to listen" to Ferroni and that it was Ferroni "who exhibited a lack of candor and not the young trooper."

A week later, plaintiff left the station to go on vacation, locking his service weapon in his locker. When he returned from vacation, he found his locker open and his service weapon "stolen." State Police opened an internal investigation in connection with the disappearance of the weapon. The weapon was never recovered and disciplinary claims against plaintiff were not substantiated. Plaintiff alleged in the complaint that Ferroni and persons unknown "conspired to enter [p]laintiff's locker, remove his weapon and cause for the [p]laintiff, disciplinary problems."

Plaintiff alleged that within a month of the incident with the young trooper, plaintiff was transferred to another Troop. He also claimed he had been passed over for promotion forty-eight times since then, a number of those times "within the year preceding the filing of this [c]omplaint." Plaintiff claimed

the conduct alleged constituted "a clear violation of N.J.S.A. 34:19-3(a) and (c) . . . in that he objected to and refused to participate in any activity, policy or practice which he reasonably believed was a violation of law and was fraudulent or criminal."

Defendants filed a motion to dismiss in lieu of answer pursuant to Rule 4:6-2(e), contending plaintiff's complaint failed to allege facts sufficient to support a prima facie case of discriminatory retaliation under CEPA. Specifically, defendants maintained plaintiff's belief that someone made statements plaintiff did not agree with during an internal investigation would not support the first element of a CEPA claim, that is, a reasonable belief that the employer's conduct violated a law, rule, regulation or public policy. See Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003).

Plaintiff opposed the motion, arguing that he had a reasonable belief that Ferroni and Catullo had violated N.J.S.A. 2C:28-1, 2C:28-4 and 2C:29-3 in conspiring to "intentionally lie and mislead an internal investigation into an illegal search and seizure."

Plaintiff's counsel failed to appear on the return date of the motion. At 9:30 a.m., Judge Innes took the bench and advised the deputy attorney general that the judge had learned,

after a call to counsel's office, that counsel was in trial in another county and would not appear. As counsel failed to advise he would not appear on the scheduled return date, the judge gave the deputy the option of proceeding on his motion or rescheduling. The deputy opted to proceed, and the court engaged him in argument focused on whether plaintiff had alleged facts, which if proven, would support the first element of a claim under N.J.S.A. 34:19-3c.

After hearing argument, Judge Innes granted the State's motion. In a comprehensive opinion delivered from the bench, the judge found that none of the three statutes plaintiff identified in opposition to the motion, perjury, N.J.S.A. 2C:28-1; false reports to law enforcement authorities, N.J.S.A. 2C:28-4; and hindering, apprehension or prosecution, N.J.S.A. 2C:29-3, applied to the facts alleged in the complaint. The judge found "absolutely no showing . . . of any oath being taken or any affirmation being taken by the . . . sergeant who made the report," making perjury inapplicable. False reports he deemed could not apply because it requires implicating another in a crime or offense, or falsely reporting a crime or offense, neither of which occurred here. The judge deemed hindering inapplicable because it similarly requires hindering the detention, apprehension, investigation, prosecution, conviction

or punishment of another for a Code offense or a violation of Title 39 or Chapter 33A of Title 17, not hindering an internal investigation as occurred here.

The judge also considered an argument plaintiff had not raised, that is whether some clear mandate of public policy could be identified to permit the CEPA claim to go forward under N.J.S.A. 34:19-3c(3) even in the absence of a statutory violation. Stated differently, could plaintiff's "disagreement with the investigation being conducted by the State Police concerning the young trooper's activities and plaintiff's voicing of same[,] support a reasonable belief that the State Police were engaging in conduct" incompatible with a clear mandate of public policy. See Turner v. Associated Humane Societies, Inc., 396 N.J. Super. 582, 593-94 (App. Div. 2007) (explaining that although it is "easier" for an employee to prove under subsection c(3) that an employer's conduct is "incompatible" with a clear mandate of public policy than to show, as required by subsection c(1), that the conduct "violated" a law, rule or regulation, a plaintiff proceeding under subsection c(3) must also prove that the conduct has "public ramifications" and is more than simply a private disagreement). Relying on Maw v. Advanced Clinical Communications, Inc., 179 N.J. 439, 444 (2004), Judge Innes

found plaintiff's objections to the statements of other troopers made in the course of an internal investigation could not satisfy that "high degree of public certitude in respect of acceptable verses unacceptable conduct" necessary to establish a "clear mandate" of public policy. Ibid.

Plaintiff moved for reconsideration, contending the court should not have proceeded to hear the motion in his absence, notwithstanding counsel's conceded failure to advise he was at trial elsewhere, and erred in failing to recognize that plaintiff's objection to the other sergeant's false report to law enforcement satisfied the first element of his cause of action. In a cogent opinion from the bench, Judge Innes found no justification for counsel's failure to appear on the motion after notice. He noted the arguments put forward in plaintiff's brief had been thoroughly considered, and that plaintiff had only reiterated the same arguments on reconsideration. Accordingly, the judge denied the motion.

On appeal, plaintiff argues the trial court abused its discretion in allowing argument on the motion to dismiss to proceed in his absence and in granting the motion and denying his motion for reconsideration. He also argues the court erred by "failing to convert defendants' motion to a motion for summary judgment pursuant to R. 4:6-2 because defendants

presented facts outside of the face of the complaint and the trial court relied on those facts as support for its ruling." We reject those arguments as without merit.

We begin by noting we find no error in the procedure employed by the trial judge here. It is axiomatic that trial judges enjoy broad discretion over the conduct of the proceedings before them. See Smith v. Smith, 17 N.J. Super. 128, 132 (App. Div. 1951), certif. denied, 9 N.J. 178 (1952). Plaintiff's counsel concedes he was the one who failed to inform the court he could not appear for a scheduled return date of which he had ample notice. Having the benefit of the motion briefs and the oral argument transcript, we are confident the court considered all the arguments plaintiff raised and some he did not. Any disadvantage plaintiff perceived was cured by the opportunity the court afforded him to argue the reconsideration motion. See Medina v. Pitta, 442 N.J. Super. 1, 26-27 (App. Div.), certif. denied, 223 N.J. 555 (2015).

Turning to the substance, we apply a plenary standard of review to a trial court's decision to dismiss a complaint for failure to state a claim, owing no deference to the trial court's conclusions. Rezem Family Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 114 (App. Div.), certif. denied, 208 N.J. 366 (2011). We are required to "examin[e] the legal

sufficiency of the facts alleged on the face of the complaint[,]" Printing Mart, supra, 116 N.J. at 746, giving plaintiffs the benefit of "'every reasonable inference of fact' and read[ing] the complaint in the light most favorable to plaintiff," Jenkins v. Region Nine Hous. Corp., 306 N.J. Super. 258, 260 (App. Div. 1997) (quoting Printing Mart, supra, 116 N.J. at 746), certif. denied, 153 N.J. 405 (1998). "The examination of a complaint's allegations of fact required by the aforestated principles should be one that is at once painstaking and undertaken with a generous and hospitable approach." Printing Mart, supra, 116 N.J. at 746.

Applying that standard here, we agree with Judge Innes that plaintiff's complaint does not state a cause of action for retaliatory discrimination under CEPA.

CEPA is remedial legislation designed 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). "The statute thus shields an employee who objects to, or reports, employer conduct that the employee reasonably believes to contravene the legal and ethical standards that govern the employer's activities." Hitesman v. Bridgeway, Inc., 218 N.J. 8, 27 (2014).

The Supreme Court has recently reminded of "the importance of the plaintiff's reasonable belief that the defendant's conduct contravened an authority recognized in CEPA:"

> [I]f an employee were to complain about a co-employee who takes an extended lunch break or makes a personal telephone call to a spouse or friend, we would be hard pressed to conclude that the complaining employee could have "reasonably believed" that such minor infractions represented unlawful conduct as contemplated by CEPA. CEPA is intended to protect those employees whose disclosures fall sensibly within the statute; it is not intended to spawn litigation concerning the most trivial or benign employee complaints.
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> [Id. at 32 (quoting Estate of Roach v. TRW, Inc., 164 N.J. 598, 613-14 (2000)).]

Thus the Court characterized a CEPA plaintiff's obligation to identify a law, rule, regulation, or clear mandate of public policy "that bears a substantial nexus to his or her claim" as "a pivotal component of a CEPA claim." Ibid. It has directed that a "trial court can and should enter judgment for a defendant when no such law or policy is forthcoming." Dzwonar, supra, 177 N.J. at 463; see also Pierce v. Ortho Pharm. Corp., 84 N.J. 58, 73 (1980) ("If an employee does not point to a clear expression of public policy, the court can grant a motion to dismiss or for summary judgment.").

We agree with Judge Innes that none of the statutes plaintiff identified as having a substantial nexus to his claims under N.J.S.A. 34:19-3a and -3c, perjury, false reports to law enforcement authorities or hindering, suffice for the reasons the judge expressed. The statements by his colleagues that plaintiff took issue with were not made under oath and did not involve any crime. Cf. Delisa v. Cty. of Bergen, 165 N.J. 140, 142-43 (2000) (finding the plaintiff stated a CEPA claim when his negative characterization of his colleagues' conduct occurred in the course of "testimony" to representatives of the Prosecutor's and the Attorney General's offices considering criminal charges against the colleagues); Giudice v. Drew Chemical Corp., 210 N.J. Super. 32, 36 (App. Div.) (finding no CEPA claim based on private investigation of possible criminal activities of fellow employees), certif. granted and summarily remanded on other grounds, 104 N.J. 465 (1986).

On appeal, plaintiff suggests his colleagues' conduct was incompatible with the higher duty of candor imposed on members of the State Police.[2] Leaving aside that he failed to argue that

[2] On reconsideration to the trial court, plaintiff also claimed his colleagues' conduct violated "Rules and Regulations" of the State Police but failed to identify any such rule or regulation. He has likewise failed to identify any rule or regulation on appeal.

in opposition to the motion to dismiss, see Selective Ins. Co. of Am. v. Rothman, 208 N.J. 580, 586 (2012); Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973), it is easy to see the wisdom of the trial judge in focusing on whether the statements plaintiff complained of, made in the course of an internal inquiry and not connected with the investigation of a crime, were under oath. Relying, not on any law, rule or regulation but on the "image of personal integrity and dependability" we expect of public safety officers, see Twp. of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966), as the policy mandate in an officer's CEPA claim regarding the conduct of an internal, non-criminal inquiry, risks that minor infractions could support a reasonable belief of unlawful conduct, a result not intended by the Legislature, see Hitesman, supra, 218 N.J. at 32.[3]

[3] Plaintiff objected to the conduct of an internal inquiry into whether a junior trooper had followed the directions of his supervisor or whether the supervisor was not in the station overseeing the trooper's activities as claimed. The investigation was thus one involving personal harm to the trooper involved, not one implicating the public interest. See Maw, supra, 179 N.J. at 445. Had the internal investigation involved criminal activity or directly implicated public safety, the public policy analysis would likely have been different. See Maimone v. Atlantic City, 188 N.J. 221, 225-29, 232-33 (2006).

Returning to procedure to address plaintiff's remaining argument, we find no error in the court's failure to treat the motion to dismiss as one for summary judgment under Rule 4:6-2. Plaintiff complains the deputy was allowed to "testify" that the troopers who gave statements as part of the internal inquiry were not under oath. To the contrary, the court correctly observed that plaintiff, master of his own complaint, did not allege the statements were under oath.

Finally, we note that in accord with customary practice, plaintiff's complaint was not dismissed with prejudice. See Pressler & Verniero, Current N.J. Court Rules, comment 4.1.1 on R. 4:6-2 (2016); Hoffman v. Hampshire Labs, Inc., 405 N.J. Super. 105, 116 (App. Div. 2009). Although plaintiff never sought to amend his complaint to assert additional facts, such as that the statements were made under oath, or identify any other law, rule, regulation or public policy mandate implicated, he clearly could have done so if he believed additional information could have saved his cause of action. See ibid.

Affirmed.