SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1472-15T3

CHRISTINE SHALLCROSS,

Plaintiff-Appellant,

v.

STATE OF NEW JERSEY; OFFICE OF THE ATTORNEY GENERAL; THE DIVISION OF STATE POLICE; INVESTIGATOR WILLIAM LUCAS; ANNE MILGRAM; PAULA DOW; INVESTIGATOR PATRICIA ENGLAND; LIEUTENANT J.J. PEACOCK; GWENDOLYN RACK; and COLONEL RICK FUENTES,

Defendants-Respondents,

and

ALEXIS HAYES,

Defendant.

Argued October 16, 2017 – Decided April 4, 2018

Before Judges Messano and Vernoia.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-3172-10.

George T. Daggett argued the cause for appellant (Law Offices of George T. Daggett, attorneys; George T. Daggett, on the brief).

Matthew J. Lynch, Deputy Attorney General, argued the cause for respondents (Christopher S. Porrino, Attorney General, attorney; Lisa A. Puglisi, Assistant Attorney General, of counsel; Matthew J. Lynch, on the brief).

PER CURIAM

Plaintiff Christine Shallcross, a sergeant with the New Jersey Division of State Police (NJSP), was charged with violations of the Division's rules and regulations. The matter was transferred to the Office of Administrative Law (OAL) as a contested case, and, in his initial decision, the Administrative Law Judge (ALJ) sustained three charges and recommended certain discipline. In his final agency decision, defendant Joseph R. Fuentes,[1] NJSP Superintendent, sustained the charges and increased the suspension to 120 days.

Plaintiff appealed, arguing "N.J.S.A. 53:1-33 bars the imposition of discipline [in 2011] for events that occurred in November 2005 and were subject to an equal employment opportunity (EEO) investigation within the Division of State Police in 2006." In the Matter of Detective Sergeant Christine Shallcross, No. A-2820-10 (App. Div. Feb. 16, 2012) (slip op. at 1). We affirmed

[1] Fuentes is named in the complaint as "Rick Fuentes."

the Superintendent's decision, finding the charges were timely filed, and the discipline and penalty imposed were "supported by sufficient credible evidence." Id. at 2.

While the appeal was pending, plaintiff filed a complaint in the Law Division against Fuentes, other NJSP employees and employees of the Office of the Attorney General (OAG, collectively, defendants). As best we can discern, plaintiff's fourth amended complaint, filed after we issued our decision, alleged: certain defendants conspired to violate plaintiff's "civil rights . . . protected by [the] . . . law against discrimination [(LAD)]" by suborning perjury or otherwise prosecuting the disciplinary charges; defendant Hayes maliciously prosecuted plaintiff in the OAL and in federal district court and other defendants refused to provide plaintiff with a defense in the federal action; plaintiff's suspension was without good cause and resulted in her physical and financial impairment; Fuentes and NJSP unlawfully discriminated against plaintiff because she was a "gay female[]."

Defendants moved for summary judgment, which the motion judge granted by order dated November 20, 2015.[2] Plaintiff now appeals. We affirm.

[2] In its earlier December 7, 2012 order, the court dismissed a prior iteration of the complaint against Attorneys General Milgram (continued)

"An appellate court reviews an order granting summary judgment in accordance with the same standard as the motion judge." Bhagat v. Bhagat, 217 N.J. 22, 38 (2014) (citing W.J.A. v. D.A., 210 N.J. 229, 237-38 (2012); Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010)). We "identify whether there are genuine issues of material fact and, if not, whether the moving party is entitled to summary judgment as a matter of law." Ibid. (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995); R. 4:46-2(c)). We accord no particular deference to the legal conclusions of the motion court. Cypress Point Condo. Ass'n v. Adria Towers, L.L.C., 226 N.J. 403, 415 (2016) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

Initially, plaintiff's failure to abide by our Rules of Court inhibits our review. Rule 2:6-1(a)(1) requires that appellant's appendix "include a statement of all items submitted to the court on the summary judgment motion and all such items" except the briefs filed with the motion court. Plaintiff failed to do that. Although her appendix included more than three-hundred pages of documents, we were unable to ascertain which documents were

(continued)
and Dow, as well as counts five and eight as to all defendants. On July 26, 2013, apparently after the filing of the fourth amended complaint, the court granted summary judgment to the remaining defendants on counts six, seven, and nine. Those orders are not before us.

furnished to the motion judge. See Ji v. Palmer, 333 N.J. Super. 451, 463-64 (App. Div. 2000) ("In reviewing a summary judgment, we can consider the case only as it had been unfolded to that point and the evidential material submitted on that motion.").

As a result, the clerk's office requested plaintiff comply with our rules and identify which items in the appendix were submitted to the motion court. Plaintiff filed a list of exhibits contained in the appendix that she supplied in opposition to defendants' summary judgment motion. See Rule 4:46-2(b). Two problems remain.

First, there are exhibits in plaintiff's appendix that were not on the list supplied in response to our inquiry, thus, we assume these exhibits, "Plaintiff's Acts, Facts and Inferences" and "Plaintiff's Statement of Material Facts," were not before the motion judge, nor did plaintiff ever move before us to supplement the record. Second, and more importantly, Rule 2:6-1(a)(1) requires appellant supply us with all items submitted to the motion court, including any items respondents filed in support of their summary judgment motion. Plaintiff failed to do that.

Plaintiff's appellate brief is an amalgam of asserted errors with little citation to the actual motion record and even less legal argument. It contains no table of citations. R. 2:6-2(a)(3). We are reluctant to dismiss an appeal on procedural

grounds, even though we would be justified doing so in this case. In re Zakhari, 330 N.J. Super. 493, 495 (App. Div. 2000). We therefore attempt to address plaintiff's contentions.[3]

The factual support for plaintiff's complaint centered on allegations made by defendants Hayes and Rack, NJSP recruits in the NJSP academy 2005 class, regarding plaintiff's behavior. Plaintiff was an instructor at the academy during that time. In 2009, the NJSP conducted an internal investigation, spearheaded by defendants England and Lucas, which resulted in five specific disciplinary charges against plaintiff. The charges were sustained after a Loudermill[4] hearing that plaintiff alleged was

[3] We refuse, however, to consider a point made in plaintiff's brief, which argues the judge should not have dismissed the complaint against Hayes. The deputy attorney general who represented the other defendants did not represent Hayes, who apparently retained private counsel who did not seek summary judgment. A second order contained in plaintiff's notice of appeal, also entered on November 20, 2015, by its terms denied plaintiff's motion to reinstate the complaint as to Hayes. The complaint against Hayes was dismissed pursuant to Rule 1:13-7 because she never filed an answer.

In her appendix, plaintiff supplied only the order denying her motion to reinstate, not her motion or any supporting documents. Additionally, plaintiff's appellate appendix includes exhibits which she acknowledges were not before the motion judge and, indeed, which she became aware of only after filing this appeal. Needless to say, plaintiff never moved to supplement the record as to these exhibits, either. We refuse to consider the argument and affirm the second order that denied plaintiff's motion to reinstate the complaint against Hayes.

[4] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).

a sham. Thereafter, as we explained above, Fuentes sustained three charges, imposed discipline and we affirmed on appeal.

The legal theory of plaintiff's complaint, as explained by her counsel during oral argument on the summary judgment motion, was that defendants conspired against her because she was a homosexual woman. The conspiracy resulted in a biased investigation, leading to the disciplinary charges, which were in turn supported by false testimony before the ALJ, and ultimately Fuentes' final decision. As a result, plaintiff was denied the opportunity for promotion and transferred to another location requiring a two-hour commute each way in retaliation.

"All employment discrimination claims require the plaintiff to bear the burden of proving the elements of a prima facie case." Victor v. State, 203 N.J. 383, 408 (2010). "What makes an employer's personnel action unlawful is the employer's intent." Zive v. Stanley Roberts, Inc., 182 N.J. 436, 446 (2005). Plaintiff must "demonstrate not only a hostility toward members of the employee's class, but also a direct causal connection between that hostility and the challenged employment decision." Smith v. Millville Rescue Squad, 225 N.J. 373, 394 (2016); see also Battaglia v. United Parcel Service, Inc., 214 N.J. 518, 547 (2013) (holding that to establish a prima facie case of retaliation under the LAD, a plaintiff must show "there [was] a causal link between

the protected activity and the adverse employment action."); Jason v. Showboat Hotel & Casino, 329 N.J. Super. 295, 303-04 (App. Div. 2000) (a disparate treatment claim under the LAD requires the plaintiff to demonstrate any disparity was motivated by discriminatory animus).

In granting defendants' motion, the judge said:

> I spent hours scouring this record and going through the acts, facts, inferences, statement of material facts, opposition, responsive statement, trying to find the appropriate citations, reading the record, trying to understand what the allegations here by the Plaintiff -- and I had a difficult time trying to understand the allegations at all because they are, in substance, based on conjecture, speculation, and improper inferences.
>
> [(Emphasis added).]

We agree completely with the judge's assessment of the record.

Moreover, although the ALJ discredited much of the testimony by Hayes and Rack, he ultimately sustained three disciplinary charges against plaintiff. Fuentes's final decision sustained those findings, and we affirmed the agency's decision on appeal, concluding it was supported by sufficient credible evidence in the record. Despite that procedural history, plaintiff contends the entire disciplinary process was commenced, investigated and ultimately concluded with her suspension, not because she violated

NJSP rules and regulations, but because of discriminatory animus. The claim is untenable.

Moreover, there was ample evidence in the record that explained why plaintiff was not considered for a promotion after her suspension and why she was transferred. "[I]f the employer proffers a non-discriminatory reason, plaintiff does not qualify for a jury trial unless he or she can 'point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action.'" Zive, 182 N.J. at 455-56 (quoting Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994)). It suffices to say that plaintiff failed to demonstrate a prima facie case under the LAD, N.J.S.A. 10:5-1 to -49.

Plaintiff's other major argument is that the entire disciplinary process was akin to a malicious prosecution, and the motion judge mistakenly granted summary judgment on her claims for violation of the Civil Rights Act (CRA), N.J.S.A. 10:6-2, or common law malicious prosecution. We disagree.

The CRA is modeled after the analogous federal Civil Rights Act, 42 U.S.C.A. §1983, and given the similarity of the statutes, "[t]his state's qualified immunity doctrine tracks the federal

standard." Brown v. State, 230 N.J. 84, 98 (2017). Although there was much discussion before the motion court about whether qualified immunity applied to shield defendants from liability, it is clear to us that the motion judge never determined the issue. Nor do we, because resolution is unnecessary. We also need not decide whether the litigation privilege, see, e.g., Hawkins v. Harris, 141 N.J. 207, 216 (1995), another doctrine discussed at length during the summary judgment argument, applies, because plaintiff failed in the first instance to demonstrate a prima facie case of malicious use of process[5] against any defendant.

In order to establish a prima facie case, plaintiff needed to produce evidence establishing the five elements of the common law tort. Those elements are: the institution of a civil action, motivated by malice, with an absence of probable cause, a termination in plaintiff's favor and "a special grievance caused by the institution of the underlying civil claim." LoBiondo, 199 N.J. at 90. "[T]he absence of any one of these elements is fatal to the successful prosecution of the claim." Ibid.

[5] "Malicious prosecution provides a remedy for harm caused by the institution or continuation of a criminal action that is baseless. Malicious use of process . . . is essentially the analog used when the offending action is civil rather than criminal." LoBiondo v. Schwartz, 199 N.J. 62, 89-90 (2009) (citations omitted).

Here, the disciplinary investigation resulted in plaintiff's suspension, which she challenged unsuccessfully on appeal. That alone results in the inescapable legal conclusion that the underlying disciplinary action did not end favorably for plaintiff and was not brought without probable cause.

To the extent we have not specifically addressed them, the balance of plaintiff's arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.