SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2228-16T1

JEFFREY SCOZZAFAVA,

Plaintiff-Appellant,

v.

SOMERSET COUNTY PROSECUTOR'S OFFICE,

Defendant-Respondent.

Argued April 23, 2018 – Decided May 14, 2018

Before Judges Sumners and Moynihan.

On appeal from Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-0536-16.

David Zatuchni argued the cause for appellant (Zatuchni & Associates, LLC, attorneys; David Zatuchni, on the brief).

Charles Z. Schalk argued the cause for respondent (Savo, Schalk, Gillespie, O'Grodnick & Fisher, PA, attorneys; Charles Z. Schalk, of counsel and on the brief).

PER CURIAM

Plaintiff, Detective Jeffrey Scozzafava, appeals from the trial court's order dismissing his complaint against his employer,

the Somerset County Prosecutor's Office (Office), alleging violations of the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14. Plaintiff alleged his transfer from the Office's forensic unit — to which he was assigned upon his hiring in 2007 after retiring from the New Jersey State Police (NJSP) as a forensic instructor and trainer in the Crime Scene Investigation Unit — to the Office's fugitive squad was "in retaliation for his whistle-blowing conduct in lodging complaints regarding deficient and improper evidence collection and casework by the [f]orensic [u]nit" and his supervisor. He argues the court erred in finding his transfer was not an adverse employment action under CEPA. We agree and reverse.

The court, relying on facts outside the pleadings — contained in plaintiff's certification submitted in opposition to the Office's motion — converted the Office's motion to dismiss pursuant to Rule 4:6-2(e) to a motion for summary judgment. We therefore abide by our familiar standard of review that mandates summary judgment be granted if the court determines "there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). We consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party" in consideration of the applicable evidentiary

standard, "are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). We review the trial court's decision in these matters de novo, and afford the trial court ruling no special deference. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016).

The trial court observed plaintiff's complaint set forth two facts — his transfer and the change of his office car from a Dodge Durango to a Chevy Impala[1] — which were insufficient to sustain his CEPA claim. The court found plaintiff maintained "his position and rank, with full pay and full benefits," reflecting "a lateral transfer rather than an adverse employment action"; the transfer arguably improved plaintiff's working hours; and "his physical arrangements were unchanged." The court ruled plaintiff "failed to substantiate his claim regarding damage to his [professional] reputation," opining, "[c]onsiderable questions of fact and law exist as to whether such a proffer is even possible under these circumstances." Finally, the court rejected plaintiff's argument that the transfer deprived him of overtime wages because such

[1] Plaintiff conceded at oral argument that the change of vehicles was "not determinative."

remuneration was "unreliable and speculative and cannot be relied upon to determine the wholesale loss in compensation."

To successfully prove a claim under CEPA, a plaintiff must demonstrate:

> (1) that he . . . reasonably believed that his . . . employer's conduct was violating either a law or a rule or regulation promulgated pursuant to law; (2) that he . . . performed whistle-blowing activity described in N.J.S.A. 34:19-3[(a), (c)(1), or (c)(2)]; (3) an adverse employment action was taken against him . . .; and (4) a causal connection exists between the whistle-blowing activity and the adverse employment action.
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> [Mosley v. Femina Fashions, Inc., 356 N.J. Super. 118, 127 (App. Div. 2002).]

The "retaliatory action" proscribed by CEPA, N.J.S.A. 34:19-3, not only includes a whistle-blowing employee's "discharge, suspension or demotion," but also "other adverse employment action taken against an employee in the terms and conditions of employment," N.J.S.A. 34:19-2(e). We have interpreted "[t]erms and conditions of employment" as "those matters which are the essence of the employment relationship," including the "length of the workday; increase or decrease of salaries, hours, and fringe benefits; physical arrangements and facilities; and promotional procedures." Beasley v. Passaic Cty., 377 N.J. Super. 585, 608 (App. Div. 2005) (citations omitted) (quoting Twp. of W. Windsor v. Pub. Emp't Rel. Comm'n, 78 N.J. 98, 110 (1978)). Thus, an

employer's actions other than discharge, suspension or demotion "may nonetheless be the equivalent of an adverse action." Nardello v. Twp. of Voorhees, 377 N.J. Super. 428, 433-34 (App. Div. 2005) (quoting Cokus v. Bristol Myers Squibb Co., 362 N.J. Super. 366, 378 (Law Div. 2002), aff'd o.b., 362 N.J. Super. 245 (App. Div. 2003)).

In Nardello, 377 N.J. Super. at 434-35, we applied our Supreme Court's discussion — albeit in dicta — of this issue in reversing the dismissal of a police lieutenant's CEPA claim, although he was not discharged, suspended or demoted, and suffered no reduction in pay:

> "Retaliation," as defined by CEPA, need not be a single discrete action. Indeed, "adverse employment action taken against an employee in the terms and conditions of employment" can include . . . many separate but relatively minor instances of behavior directed against an employee that may not be actionable individually but that combine to make up a pattern of retaliatory conduct.
>
> [Green v. Jersey City Bd. of Educ., 177 N.J. 434, 448 (2003) (quoting N.J.S.A. 34:19-2(e)).]

The complaint and plaintiff's certification presented much more evidence than that found by the trial court. We determine the evidence, viewed under the proper lens, sufficiently presents an adverse employment action, the sole issue to be determined here.

Plaintiff's extensive training and experience gained during his twelve-year assignment as a forensic detective with the New Jersey State Police Crime Scene Investigation Unit led to his employment with the Office's forensic unit, which he joined with the alleged understanding that he would be able to utilize his acquired forensic skills post-retirement from the NJSP. He worked in the Office's forensic unit from August 2007 until his transfer in February 2015,[2] during which time he continued his involvement in a number of forensic professional associations, to which he "devoted thousands of hours" as a student and instructor in the field.

While we are cognizant that "not every employment action that makes an employee unhappy constitutes 'an actionable adverse action,'" Nardello, 377 N.J. Super. at 434 (quoting Cokus, 362 N.J. Super. at 378), plaintiff's transfer, viewed in the light most favorable to him, was objectively "demeaning," see id. at 435-36. Although still a detective in the fugitive squad, he is unable to continue to use and develop his expertise in the forensic field — in which he has developed a proven reputation. That forensic detectives are not like other police detectives is buttressed by plaintiff's extensive training; his qualification

[2] Other portions of the record set the transfer date as March 2015.

as an expert in various courts; and by his averment that no other detective was transferred from the Office's forensic unit during his nine-year tenure. That the transfer to a less desirable post was demeaning is also buttressed by plaintiff's contention that, when asked for an explanation for the transfer, his lieutenant said, "everybody does time in the penalty box." We also note this transfer — in effect now for over three years — is not temporary.

Contrary to the Office's contention that plaintiff has not suffered a loss in pay, and the trial court's finding that overtime is too nebulous to consider in determining such a loss, plaintiff's proffer of his overtime earnings for the three years prior to his transfer, and for the year of his transfer, show a diminution in the amount of overtime compensation amounting to thousands of dollars — a benefit that was steadily available to plaintiff as a crime scene investigator.[3] Our Supreme Court, in Maimone v. City of Atlantic City, 188 N.J. 221, 235-36 (2006), held "any reduction in an employee's compensation" is an adverse employment action. In Maimone, the plaintiff-officer's transfer from detective to patrol duties "resulted in a 3% reduction in his compensation" and "[i]n addition, [his testimony] that detectives have an

[3] We also note plaintiff alleges a loss of "comp time," but contends that proof of same would have to be gleaned from internal Office compensation documents.

opportunity to earn substantially more overtime than officers assigned to patrol duty" were part of the proofs that resulted in the Court's conclusion that "this alleged reduction in compensation and loss of other benefits as a result of plaintiff's transfer from his detective position to patrol duty could support a finding that he suffered an 'adverse employment action.'" Id. at 236-37 (emphasis added).

We previously recognized the Court's emphasis in Green that 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. Consistent with that purpose, CEPA must be considered 'remedial' legislation and therefore should be construed liberally to effectuate its important social goal."
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> [Nardello, 377 N.J. Super. at 435 (quoting Green, 177 N.J. at 448).]

Mindful of that tenet, we perceive sufficient facts, when viewed in the proper light, to prove an adverse employment action. We are constrained to reverse the dismissal of plaintiff's action and remand this matter for further proceedings.

Reversed and remanded.