SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4440-15T2

J.B., J.J., and D.D.,

Plaintiffs-Appellants,

v.

CITY OF HOBOKEN, MAYOR DAWN ZIMMER, FIRE CHIEF RICHARD BLOHM, BETTY MCLENDON, PSY.D., and COMPREHENSIVE PSYCHOLOGICAL SERVICES, P.A.,

Defendants-Respondents.

Submitted February 13, 2018 - Decided March 19, 2018

Before Judges Hoffman, Gilson, and Mayer.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-1956-14.

Law Office of Donald F. Burke, attorneys for appellants (Donald F. Burke and Donald F. Burke, Jr., on the briefs).

Hanrahan Pack, LLC, attorneys for respondents City of Hoboken and Mayor Dawn Zimmer (David J. Pack, of counsel and on the brief).

Palumbo Renaud & DeAppolonio LLC, attorneys for respondent Richard Blohm (Robert F. Renaud, on the brief).

Marshall Dennehey Warner Coleman & Goggin, attorneys for respondents Betty McLendon, Psy.D., and Comprehensive Psychological Services, P.A. (Walter F. Kawalec, III and Ryan T. Gannon, on the brief).

PER CURIAM

Plaintiffs J.B., J.D., and D.D. applied to become firefighters for the City of Hoboken (City). After taking a written exam, plaintiffs were placed on a list of eligible candidates for employment as City firefighters. However, plaintiffs were removed from that list based upon the results of their psychological evaluations. Plaintiffs filed suit in the Superior Court of New Jersey alleging violations of the New Jersey Civil Rights Act (CRA), N.J.S.A. 10:6-2, and the Law Against Discrimination (LAD), N.J.S.A. 10:5-12. By four separate orders, issued by three different judges, plaintiffs' claims against defendants were dismissed. Plaintiffs appeal the dismissal of their claims. We affirm.

The City sought to hire firefighters and asked the Civil Service Commission (Commission) to conduct written examinations and compile a list of candidates. Taking the examination with plaintiffs were the sons of defendant Richard Blohm (Blohm). Blohm was the City's Fire Chief when plaintiffs took the examination to become firefighters. Based upon the examination results,

plaintiffs were placed on a list of eligible candidates. Each candidate was ranked according to test score. J.J. was ranked number ten; D.D. was ranked number twenty; and J.B. was ranked number forty-six. One Blohm son was ranked number twenty-seven and the other Blohm son was ranked number forty-eight.

The City asked the Commission to certify more candidates from the eligible list than the actual number of firefighters the City needed to hire. The City sought a large candidate pool because some candidates would: (1) take positions with other fire departments; (2) decide not to become firefighters; or (3) be removed from the list for other reasons. The Commission then certified the specified number of eligible candidates by starting at the top of the list and continuing through the list until the requested number of candidates was reached. At no time did the City know the candidates' names or rankings.

Because the City needed to hire twenty-three firefighters, the Commission certified forty-eight candidates from the eligible list. That pool of candidates was then required to undergo additional screening, including background checks, drug screens, physical examinations, and psychological evaluations.

Because Blohm's sons were on the list of eligible candidates, defendant Mayor Dawn Zimmer (Zimmer), through the City's corporation counsel, removed him from the decision making process

for the selection of City firefighters. Zimmer designated the City's business administrator and the public safety director to select the candidates to be hired from those who successfully completed the screening processes. Blohm was instructed to forward all information and documents to the City's business administrator and public safety director, not to strike candidates from the eligible list, and to provide information on candidates who had already been removed from the list.

Despite these instructions, plaintiffs contend Blohm was improperly involved in the screening and selection process for City firefighters. Plaintiffs claim Blohm conspired to remove them from the list of eligible candidates so his sons would move up the list and be hired as City firefighters. According to plaintiffs, Blohm ordered background checks on the eligible candidates and created reports on each candidate, except for his sons, based upon the background checks. Plaintiffs also assert Blohm contacted defendant Betty McLendon, Psy.D. (McLendon)[1] to schedule psychological evaluations for the candidates, including plaintiffs. McLendon, a psychologist, evaluates candidates for

[1] McLendon is the principal and owner of defendant Comprehensive Psychological Services, P.A. (Comprehensive).

civil service jobs and Comprehensive had performed such evaluations for the City since the mid-1990s.

McLendon conducted psychological evaluations of J.B., J.J., and D.D. Each evaluation lasted approximately six hours with McLendon asking questions designed to determine each candidate's psychological fitness to perform the duties of a firefighter.

During his evaluation, J.B. told McLendon that he used drugs in the past, including smoking marijuana daily. He also reported regularly consuming alcohol. J.B. conveyed to McLendon that his application to become a City firefighter was based on scheduling needs and fear of layoffs within the City's police department, where he was currently employed. McLendon found "[J.B.]'s attitudes and practices suggest that he has a self-centered outlook and self[-]serving behaviors and reflect an individual lacking integrity and character." She noted, "[h]e did not express any real commitment to serving as a [f]irefighter other than it being better suited to his scheduling needs." McLendon concluded, "[J.B.] is psychologically unfit to serve as a [f]irefighter with the Hoboken Fire Department."

During D.D.'s evaluation, he told McLendon he had $250,000 from winning the lottery and a trust fund. Despite his financial circumstances, D.D. admitted to approximately $10,000 in outstanding debt. D.D. explained he worked as a lifeguard during

the summer and collected unemployment the rest of the year. D.D. told McLendon it "wasn't worth it" to seek other jobs. In her evaluation of D.D., McLendon found him to be "lackadaisical" and "childish." She concluded D.D. was "a highly immature individual with limited insight and poor judgment" who "has shown a lack of initiative with respect to assuming responsibilities, as was borne out by a . . . record of academic underachievement, fiscal mismanagement and limited employment." McLendon deemed D.D. "psychologically unfit to serve as a [f]irefighter with the Hoboken Fire Department."

McLendon's psychological evaluation of J.J. reported that he possessed "poor judgement, an asocial tendency and disregard for standards and law." She further found "[J.J.] has demonstrated a number of maladaptive behaviors reflecting an inability and failure to understand and adhere to standards. He has exercised poor judgment, had problems adhering to the law, and has difficulties fulfilling responsibilities as an employee." McLendon concluded, "[i]n light of this well[-]established pattern of significant adjustment issues, as well as his seeming[] lack of insight, poor judgment and remorse, [J.J.] is deemed to be psychologically unfit to serve as a [f]irefighter with the Hoboken Fire Department."

As a result of their psychological evaluations, plaintiffs were removed from the list of eligible candidates to become City firefighters.

After completing the psychological evaluations, thirteen of the original forty-eight candidates were hired as City firefighters. A Blohm son was among the candidates offered a City firefighter position. Certain individuals were removed from the list of eligible candidates for various reasons, including finding employment elsewhere, failing/refusing the drug test, failing the psychological evaluation, failing to complete the vetting process, or failing the City's residency requirement. Specifically, the other Blohm son was removed from the list for failing the residency requirement. A total of eight candidates, including plaintiffs, were removed for failing the psychological examination.

In accordance with N.J.A.C. 4A:4-6.5, plaintiffs appealed their removal from the list of eligible candidates to the Commission. In their appeal, plaintiffs asked the Commission to issue document subpoenas regarding other firefighter candidates whom plaintiffs contended should have been removed from the list of eligible candidates. The Commission declined to issue subpoenas, determining that the only relevant issues in plaintiffs' appeal were their own fitness for the position and whether they were improperly removed from the list of eligible

candidates. Five months after filing their agency appeal, plaintiffs "requested the[ir] appeals be held in abeyance pending the outcome of an action to be instituted in the Superior Court."

On April 28, 2014, plaintiffs filed a complaint in the Superior Court. Due to inactivity on their agency appeal, the Commission advised that it would take "no further action."

In their Superior Court complaint, plaintiffs alleged violations of the CRA and LAD. In lieu of filing answers, the City, Zimmer, and Blohm filed motions to dismiss plaintiffs' complaint for failure to state a claim upon which relief could be granted.

On December 1, 2014, the motion judge dismissed plaintiffs' LAD claims without prejudice, and converted Zimmer's application to a summary judgment motion. The judge reasoned that plaintiffs were not disabled to prevail on their LAD claims. In granting summary judgment in favor of Zimmer, the motion judge found plaintiffs did not, and could not, allege any activity or involvement by Zimmer to pursue their claims against her. The motion judge denied the motions to dismiss filed by the City and Blohm without prejudice pending the completion of discovery.

McLendon and Comprehensive separately filed a motion to dismiss the complaint for failure to state a claim. Plaintiffs cross-moved for leave to amend the complaint, seeking to revive

their LAD claims alleging discrimination based on a perceived, rather than actual, disability. Plaintiffs also sought to name additional City employees as defendants.

The motion judge denied the motion to dismiss filed by McLendon and Comprehensive without prejudice pending the completion of discovery. Plaintiffs withdrew their cross-motion for leave to amend the complaint.

Several months later, plaintiffs filed another motion to amend their complaint. Plaintiffs sought to amend their LAD claims to include allegations of discrimination based on a perceived disability and to name additional City employees as defendants. The City cross-moved for dismissal of the amended LAD claims. Blohm, McLendon, and Comprehensive joined in the City's cross-motion to dismiss plaintiffs' amended LAD claims.

A different motion judge denied plaintiffs' request to add new defendants, but granted plaintiffs' motion to amend their LAD claims. The motion judge explained that plaintiffs' amended complaint would be subject to defendants' pending cross-motions to dismiss. After plaintiffs filed their amended complaint with the revised LAD claims, the motion judge granted the cross-motions filed by the City, Blohm, McLendon, and Comprehensive dismissing plaintiffs' amended LAD claims with prejudice. In dismissing the

amended LAD claims, the judge determined that plaintiffs were not disabled and were not perceived as disabled by defendants.

Thereafter, Blohm and the City filed motions for summary judgment on plaintiffs' CRA claims. Around the same time, McLendon and Comprehensive filed a similar motion for summary judgment. Plaintiffs filed opposition to defendants' summary judgment motions and a cross-motion for summary judgment.

A third motion judge ruled on defendants' motions for summary judgment and plaintiffs' cross-motion for summary judgment. The motion judge granted defendants' motions for summary judgment and denied plaintiffs' cross-motion.

On appeal, plaintiffs argue the motion judges erred by: (1) granting summary judgment in favor of Zimmer prior to the exchange of discovery; (2) dismissing plaintiffs' LAD claims; (3) denying plaintiffs' cross-motion for summary judgment; and (4) granting defendants' motions for summary judgment.

We "review[ ] an order granting summary judgment in accordance with the same standard as the motion judge." Bhagat v. Bhagat, 217 N.J. 22, 38 (2014). On a motion for summary judgment, the court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, 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). However, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). Thus, "[w]hen the legal conclusions of a trial court on a . . . summary judgment decision are reviewed on appeal," we conduct a de novo review. McDade v. Siazon, 208 N.J. 463, 473 (2011).

We agree with the motion judge that plaintiffs' CRA claims fail as a matter of law because the "merit and fitness" clause of the Constitution does not constitute a "substantive" right enforceable under the CRA. We also agree with the motion judge's determination that the Civil Service Act (CSA), N.J.S.A. 11A:1-1 to 12-6, and governing regulations require plaintiffs to exhaust their administrative remedies before filing suit in the Superior Court.

Plaintiffs argue that the "merit and fitness" clause of the State Constitution creates a personal, substantive right enforceable under the CRA. Plaintiffs fail to cite a single case in support of that proposition. Plaintiffs assert that the CRA grants a cause of action to "any" person who has been deprived of "any" substantive right.

Article VII of the State Constitution provides that "[a]ppointments and promotions in the civil service of the State, and of such political subdivisions as may be provided by law, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination, which, as far as practicable, shall be competitive." N.J. Const. art. VII, § 1, ¶ 2. The CRA provides:

> Any person who has been deprived of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under color of law, may bring a civil action for damages and for injunctive or other appropriate relief.
>
> [N.J.S.A. 10:6-2(c) (emphasis added).]

Our courts have held that merit and fitness is a guiding principle, not a substantive right. See, e.g., Hackensack v. Winner, 82 N.J. 1, 42 (1980) ("A [Commission] hearing is necessary to insure that the local authority did not violate the 'merit and fitness' principle."); In re Police Chief (M201P) S. Orange Vill., 266 N.J. Super. 101, 105 (App. Div. 1993) ("We start our analysis with certain basic principles in mind. One such principle is the

constitutional mandate that '[a]ppointments and promotions in the civil service of the State . . . shall be made according to merit and fitness . . . .'" (first alteration in original) (quoting N.J. Const. art. VII, § 1, ¶ 2)). New Jersey courts have rejected constitutional due process claims asserted by civil service applicants who allege they were improperly rejected for employment positions. See In re Foglio, 207 N.J. 38, 44-45 (2011) ("No right accrues to a candidate whose name is placed on an eligible list. 'The only benefit inuring to such a person is that so long as that list remains in force, no appointment can be made except from that list.'" (citation omitted) (quoting In re Crowley, 193 N.J. Super. 197, 210 (App. Div. 1984)). Relying on these cases, we find as a matter of law that the merit and fitness clause of the State Constitution does not afford a substantive individual right under the CRA.

Plaintiffs rely on Hennessey v. Winslow Township, 183 N.J. 593 (2005) in claiming that an individual, substantive right to be appointed in accordance with "merit and fitness" principles is enforceable under the CRA. However, the plaintiff in Hennessey asserted a LAD claim, not a CRA violation. Hennessey, 183 N.J. at 598. The distinction is significant as the LAD expressly authorizes litigation in the Superior Court. See N.J.S.A. 10:5-13 ("Any complainant may initiate suit in Superior Court under

this act without first filing a complaint with the division or any municipal office . . . . Prosecution of such suit in Superior Court under this act shall bar the filing of a complaint with the division or any municipal office during the pendency of any such suit.").

Even if the merit and fitness clause created a substantive right, plaintiffs' claims fail because the CSA and regulations promulgated thereunder, N.J.A.C. 4A:1-1 to 10-3.2, require plaintiffs to exhaust their administrative remedies before filing suit. Our Supreme Court has held that the Legislature may "specifically foreclose[]" a remedy under the CRA "either expressly 'or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement.'" Tumpson v. Farina, 218 N.J. 450, 475 (2014) (alteration in original) (quoting Blessing v. Freestone, 520 U.S. 329, 341 (1997)). The Legislature created a highly specialized administrative scheme to enforce the merit and fitness clause. It is unlikely that the Legislature intended to let civil service applicants bypass the administrative process when the only claims are violations of the CSA and its regulations. See Ferraro v. City of Long Branch, 314 N.J. Super. 268, 286 (App. Div. 1998) ("[W]e do not read the New Jersey statutes and rules which protect civil servants and classified public employees to suggest that

their breach may give rise to a suit for money damages as opposed to administrative relief.").

The proper course of action for parties aggrieved by an alleged violation of the CSA is to refer those parties to the administrative agency for initial determination as a matter of primary jurisdiction. See In re Police Sergeant (PM3776V), 176 N.J. 49, 67 (2003) ("The State Constitution and the Civil Service Act charge the [Commission] . . . with primary jurisdiction in these matters."). We follow the Supreme Court's reasoning on this issue. See, e.g., Ferraro, 314 N.J. Super. at 287 (affirming dismissal of complaint alleging violations of the Civil Service Act regulations "for failure to exhaust administrative remedies," and noting further that "the breach of administrative regulations does not of itself give rise to a private cause of action"); Essex Council Number 1, N.J. Civil Service Assoc., Inc. v. Gibson, 118 N.J. Super. 583, 586 (App. Div. 1972) (holding administrative remedies "should be exhausted before a determination of law is reached"); Schroder v. Kiss, 74 N.J. Super. 229, 237 (App. Div. 1962) (affirming dismissal of complaint where "[p]laintiff's proper remedy was an administrative appeal to the Civil Service Commission, followed by possible review by the Appellate Division"); Capibianco v. Civil Serv. Comm'n, 60 N.J. Super. 307, 314 (App. Div. 1960) (approving the trial court's decision

"requiring plaintiff to exhaust his administrative remedies before the Commission").

Plaintiffs are not exempt from the requirement to exhaust their administrative remedies. Plaintiffs dispute their removal from the list of eligible candidates based upon the results of their psychological evaluations. The regulations under the CSA set forth a detailed administrative process for exactly the type of claim asserted by plaintiffs in this case. See N.J.A.C. 4A:4-6.5. Plaintiffs filed an appeal with the Commission. However, plaintiffs abandoned that review process and, instead, filed suit in the Superior Court while their appeal to the Commission was still pending. Because plaintiffs failed to exhaust their administrative remedies before the Commission, their Superior Court complaint was properly dismissed as a matter of law.

Turning to dismissal of plaintiffs' LAD claims, we find that plaintiffs failed to allege any actual or perceived disability entitling them to pursue LAD claims. Plaintiffs concede they are not actually disabled. Rather, plaintiffs contend the results of their psychological evaluations gives rise to a perceived disability claim premised on defendants perceiving plaintiffs as having a physical or mental condition that would qualify the person as disabled under LAD if the condition actually existed. See

Heitzman v. Monmouth Cty., 321 N.J. Super. 133, 142 (App. Div. 1999), overruled in part on other grounds by Cutler v. Dorn, 196 N.J. 419 (2008)).

McLendon's reports do not declare that plaintiffs suffer from any psychological disability. Consequently, plaintiffs are left to argue that defendants used the psychological evaluations as a pretext for removing them from the list of eligible candidates. Such an argument undermines plaintiffs "perceived disability" claim based on defendants' mistaken belief that plaintiffs were psychologically disabled.

Moreover, LAD expressly allows for the imposition of bona fide occupational job qualifications. See N.J.S.A. 10:5-2.1. In accordance with the regulations governing the CSA, "[a] person may be denied examination eligibility or appointment when he or she: . . . [i]s . . . psychologically unfit to perform effectively the duties of the title." N.J.A.C. 4A:4-6.1(a)(3). The regulations expressly provide that "[a]n appointing authority may request that an eligible's name be removed from an eligible list due to disqualification for medical or psychological reasons which would preclude the eligible from effectively performing the duties of the title." N.J.A.C. 4A:4-6.5(a). Consistent with the CSA's regulations, plaintiffs were removed from the eligible list of

candidates based on McLendon's evaluations deeming them "psychologically unfit" to serve as City firefighters.

We also find the dismissal of plaintiffs' claims against Zimmer was proper. Because the City operates under a mayor-council form of government, the City's business administrator, not its mayor, is responsible for administering personnel matters. Plaintiffs failed to demonstrate Zimmer had any role in the process of hiring City firefighters. In addition, plaintiffs' claim that summary judgment in favor of Zimmer was premature because of incomplete discovery is moot based upon our affirming dismissal of plaintiffs' CRA and LAD claims as a matter of law.

Affirmed.