SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1919-21

KELLY SUTLIFF,

Plaintiff-Appellant,

v.

CLIFTON BOARD OF EDUCATION,

Defendant-Respondent.

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Submitted February 13, 2023 – Decided April 5, 2023

Before Judges Whipple, Smith, and Marczyk.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Docket No. L-3244-18.

O'Connor, Parsons, Lane & Noble, LLC, attorneys for appellant (Gregory B. Noble and R. Daniel Bause, of counsel and on the briefs).

Adams Gutierrez & Lattiboudere, LLC, attorneys for respondent (Derlys M. Gutierrez, of counsel and on the brief).

PER CURIAM

Plaintiff Kelly Sutliff appeals from the trial court's December 14, 2021 order granting summary judgment in favor of her former employer, defendant Clifton Board of Education (Clifton or District). Our review of the record and the applicable legal principles under the Conscientious Employee Protection Act[1] (CEPA) and the Law Against Discrimination[2] (LAD) requires us to affirm. Our reasoning follows.

I.

Plaintiff was employed as a Student Assistance Counselor (SAC) by Clifton from 2006 to 2018. SACs counsel students on mental health issues such as suicidal ideation, drug use, self-harm, depression, and anxiety. As such, SACs must be certified in substance awareness and hold a master's degree in counseling, psychology, or a related mental health discipline—but they need not actually be licensed as professional counselors. Plaintiff, however, was also a licensed counselor and had a private counseling practice she developed after school hours.

[1] N.J.S.A. 34:19-1 to -14.

[2] N.J.S.A. 10:5-1 to -50.

On March 27, 2018, a female high school student, H.W.,[3] was referred to plaintiff's school office. Plaintiff informed H.W. what the two discussed would be kept confidential, except in certain situations involving harm to herself or others. At this meeting, H.W. disclosed she was sexually assaulted by a fellow student the previous school year. H.W. did not disclose the assailant's name to plaintiff but told her the assailant had since graduated and was no longer present at school.

When plaintiff inquired if the sexual assault happened on school grounds, H.W. told her it had occurred elsewhere. Plaintiff asked whether H.W.'s parents knew about the incident, and H.W. said she had not told them. H.W. also stated she felt safe at home and at school, and that the assailant did not live with her.

Plaintiff told H.W. as the school counselor, she had an obligation to inform H.W.'s parents about the incident. Plaintiff, however, thought it important to give H.W. a degree of control over the situation. To that end, plaintiff permitted H.W. (together with her sister) to tell her mother first, prior to plaintiff initiating contact.

[3] We use initials to preserve confidentiality per Rule 1:38-3(c)(9).

After this meeting, plaintiff informed the school principal, Michael Doktor, of the situation. Doktor directed plaintiff to report the incident to the Division of Child Protection and Permanency (DCPP) and the local prosecutor's office, as per District policy. Plaintiff, wary of violating H.W.'s confidentiality, objected because the incident was not "child sexual abuse," which, as she understood it, involved abuse between a minor and an adult instead of two minors. Plaintiff also noted the assault did not take place on school property. Plaintiff believed assaults occurring on school property, or "child sexual abuse," required mandatory reporting, but other forms of sexual assault were subject to confidentiality rules.

Doktor disagreed. He informed plaintiff that reporting was a requirement under the District's Child Abuse Policy. The policy reads in relevant part:

> Employees . . . working in the school district shall immediately notify designated child welfare authorities of incidents of alleged missing, abused, and/or neglected children. . . .
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> The [p]rincipal or other designated school official(s)[,] upon being notified by a person having reason to believe that a child may . . . have been abused[,] . . . must notify appropriate law enforcement authorities . . . [and] cooperate with designated child welfare and law enforcement authorities in all

> investigations . . . in accordance with the provisions of N.J.A.C. 6A:16-11.1(a)[(5)].

Doktor provided plaintiff a copy of this policy.[4] Plaintiff expressed her disagreement with his interpretation, but partially acquiesced and called the DCPP to report the incident. However, she believed reporting to the prosecutor's office—without H.W.'s consent—would constitute an illegal violation of confidentiality.

Doktor explained the decision was out of plaintiff's hands. Because her work with H.W. was through the District, she needed to follow its procedure. Plaintiff again expressed her opinion reporting to the prosecutor's office would be illegal and a violation of various ethical codes. However, after a meeting with Doktor on March 29, she eventually called the prosecutor's office as directed and reported the incident.

The District was not satisfied with plaintiff's handling of the situation. Doktor met with the District's administrators and subsequently communicated to plaintiff the superintendents were "furious" plaintiff did not call the DCPP and prosecutor straightaway after speaking with H.W.

On April 13, plaintiff attended a meeting with Doktor and her union representative. She again explained her view the policy did not require a

[4] Plaintiff was previously involved in drafting this same policy.

mandatory report of the incident to authorities, and by forcing her to report, the District had forced her to breach H.W.'s confidentiality in violation of plaintiff's licensure as a counselor.

Doktor was directed by the administration to discipline plaintiff, and he showed her a copy of a letter he had drafted withholding her salary increase. Ultimately, however, Doktor did not give plaintiff the letter and declined to discipline her at that time.[5] Instead, he advised her she needed to speak directly with the assistant superintendent, who was next in the chain of command. The April 13 meeting concluded, and the union representative

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[5] Doktor testified in his deposition:

> I advised her that there were some issues with how the situation was handled. I asked for her take on the situation so she can officially share it. And she did. She explained her misgivings with reporting due to her license and also to the fact that she didn't believe that it was a reportable offense. She believed it. She absolutely believed she was genuine with that.
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> Because of that, I advised her that I was not going to levy discipline, that I believed that she had every right to bring this to [the assistant superintendent], who was the next step on the chain of command and that was my advice, that nothing was being levied at that time, but she should speak with him and appeal what the discipline would have been because she absolutely believed what she was saying. She wasn't trying to get out of anything. She wasn't trying to shirk her responsibilities.

subsequently attempted to set up a meeting between plaintiff and the assistant superintendent.

This proposed meeting never occurred. Plaintiff, distressed, left work immediately following her meeting with Doktor. Upon returning to work the following Monday, plaintiff felt "incredibly anxious" when in the building. She was afraid the incident would result in damage to her reputation, her job, and her licensure. She was also convinced she had violated H.W.'s rights. She left work early and made an appointment with her physician, believing she was having an anxiety attack. She was prescribed various medications for anxiety and depression. Her doctor also advised her to avoid the stresses associated with her work environment.

Plaintiff never returned to work for the District. Instead, she used sixty-two days of accumulated sick leave, then resigned at the end of the school year. The District never officially filed a disciplinary letter in her personnel file or withheld her salary increase.

Plaintiff subsequently brought suit against the District and filed a complaint on October 3, 2018, in which she alleged the District had retaliated against her in violation of CEPA. She also asserted common law claims of unlawful discharge in violation of public policy as well as violations of the

LAD, due to constructive termination on account of her depression and anxiety. The District moved to dismiss, arguing plaintiff failed to identify an underlying source of law on which her CEPA claims were based. The court ruled in favor of plaintiff, and the matter proceeded to discovery.

Following discovery, the District moved for summary judgment, which the court granted after oral argument on December 14, 2021. In doing so, Judge Thomas J. LaConte first addressed the CEPA claim, and reasoned:

> [Plaintiff] is saying [she's] a whistleblower. That [the District is] doing something illegal and [plaintiff is] blowing the whistle and . . . there's employment retribution because she blew the whistle on something illegal. And so far you haven't convinced me that complying with the [school district's mandatory reporting policy], which Clifton put in place pursuant to statutory requirements, [is] somehow . . . an illegal act that can be the foundational piece to a CEPA claim.

Judge LaConte then discussed the issue of whether plaintiff had in fact faced retaliation from the District which amounted to a constructive discharge:

> [I]n this case, although . . . a superintendent or the principal or both indicated that there would be some . . . pay increase withheld, . . . they would have to write a letter. They would have to petition the Board of Education to do that. They never did that. [Plaintiff] went on . . . two leaves . . . . [F]rom the middle of April until the school year ended, she wasn't there. And then at the end of the school year . . . she resigned.

Finally, the judge addressed the merits of the LAD claim:

> I also see no basis for a claim for a violation of [the] LAD . . . based upon failure to accommodate the fact that [plaintiff] was disabled. . . . [T]here's nothing in this case that indicates she was disabled, as that term is defined in . . . the LAD.

This appeal followed.

II.

We review an appeal from the decision of a motion for summary judgment de novo, applying the same standard as the motion judge. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016).

CEPA was enacted 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 prohibits "any retaliatory action against an employee" who discloses her reasonable belief the employer is "in violation of a law, or a rule[,] or regulation promulgated pursuant to law." N.J.S.A. 34:19-3(a)(1).

To plead a claim under the statute, a plaintiff must demonstrate 1) she reasonably believed her employer's conduct was violating a law, rule, or

regulation, or a clear mandate of public policy; 2) she performed a "whistle-blowing" activity described in N.J.S.A. 34:19-3(c); 3) an adverse employment action was taken against her; and 4) a causal connection exists between the whistle-blowing activity and the adverse action. Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003).

Turning to the first element, "a plaintiff must set forth facts that would support an objectively reasonable belief that a violation has occurred." Dzwonar, 177 N.J. at 464. This requires the court make "a threshold determination that there is a substantial nexus between the complained-of conduct and a law or public policy identified by the court or the plaintiff." Ibid. If satisfied, the issue proceeds to the factfinder to determine whether the plaintiff believed a violation occurred and if that belief was objectively reasonable. Id. at 464-65.

Importantly, a plaintiff need not "allege facts that, if true, actually would violate [the law]." Id. at 463. Courts "do not expect whistleblower employees to be lawyers on the spot . . . ." Chiofalo v. State, 238 N.J. 527, 544 (2019). Therefore, while an employee need not have precise knowledge of the law at the time they make a complaint, a court—in hindsight—must be able to

identify some law or public policy that could have been violated. Dzwonar, 177 N.J. at 464.

Here, plaintiff believed reporting H.W.'s sexual assault to the police or to DCPP would be a violation of her confidentiality and trust. The record indicates plaintiff understandably based that belief—at the time of the underlying events—on her professional opinion and various codes of ethical conduct. However, when considering a CEPA claim, we have an obligation to identify a firmer source of law. To that end, plaintiff suggests a patchwork of statutes combine to prohibit the school's mandatory reporting policy.

N.J.S.A. 9:6-8.9 defines "abused child" as someone "under the age of [eighteen] years whose parent, guardian, or other person having [her] custody and control [harms her]." Plaintiff correctly notes that H.W. was not harmed by a parent, guardian, or other person having custody or control over her and, therefore, what happened to her was not "child abuse" as defined in this portion of the state code.

N.J.S.A. 9:6-8.10 requires "[a]ny person having reasonable cause to believe that a child has been subjected to child abuse, including sexual abuse, . . . shall report the same immediately to [DCPP] . . . ." Plaintiff observes what

happened to H.W. was not "child abuse," so a mandatory report to the DCPP was not required by this statute.

Plaintiff also notes N.J.A.C. 6A:16-6.3 obligates mandatory reporting by school staff to law enforcement for various drug or firearm offenses but does not require the same in scenarios involving sexual assault between students. She asserts this is more evidence the Legislature intended to prohibit reporting student-on-student sexual assault without the victim's consent.

However, nothing in this statutory scheme prohibits a school from adopting a more proactive policy under which reporting sexual assault is mandatory. In fact, districts are obligated to promulgate very specific rules for a variety of scenarios under N.J.A.C. 6A:16-11.1. None prohibits disclosure in a situation like H.W.'s.

Insofar as she relies on these statutes, plaintiff asks us to construe a legislative omission—the Legislature's silence on reporting inter-student sexual assault—as an affirmative prohibition. We decline to adopt this view. The Legislature clearly proscribed certain minimum procedures school boards must follow, e.g., N.J.A.C. 6A:16-6.3, but also explicitly contemplated individualized drafting of additional rules. See N.J.A.C. 6A:16-11.1; N.J.S.A. 18A:36-25 ("All school districts shall be required to establish policies

designed to provide for the early detection of . . . abused[6] children . . . [including] provisions for the notification of the appropriate law enforcement and child welfare authorities . . . .").

The District developed a set of rules as contemplated by the statutory structure. The reporting rule was permissible and served a valid public policy objective of protecting students from foreseeable dangers, as noted by the motion judge. There is no statutory basis for plaintiff's claim.

III.

We next consider whether, in the absence of a statutory basis, a "clear mandate of public policy" might support an objectively reasonable belief that a reporting to the DCPP and law enforcement was against the law. Dzwonar, 177 N.J. at 464. Plaintiff asserts public policy favors "victim-counselor privilege" to the degree necessary to justify her CEPA claim. She directs us to N.J.S.A. 2A:84A-22.13 (Privileges Statute), a group of legislative findings and declarations concerning testimonial privileges, as evidence of a broader public policy protecting counselor-client confidentiality. The law states:

> c. In the counseling process, victims of violence openly discuss their emotional reactions to the crime. These reactions are often highly intertwined with their personal histories and psychological profile;

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[6] Section 18A:36 of the code lacks a definition of "abused children."

> d. Counseling of violence and victims is most successful when the victims are assured their thoughts and feelings will remain confidential and will not be disclosed without their permission; and
>
> e. Confidentiality should be accorded all victims of violence who require counseling whether or not they are able to afford the services of private psychiatrists or psychologists.
>
> [N.J.S.A. 2A:84A-22.13.]

When read in conjunction with the other statutes, plaintiff contends this constitutes an adequate basis to support a reasonable belief the District was violating the law in requiring her to report. We disagree for two interconnected reasons.

First, plaintiff saw H.W. in her capacity as a SAC—not as an independent licensed counselor. SAC's are not required to hold licenses and are better understood as school employees than independent practitioners subject to this statute. For example, plaintiff agrees she would be required to report an incident of "child abuse" between an adult and a student under N.J.S.A. 9:6-8.10. This would be in obvious conflict with a public policy in favor of privileges if it was construed to apply to SACs—an argument not entertained by either party.

Second, the Privileges Statute does not reflect a clear mandate of public policy. "[A] 'clear mandate' of public policy need not be enacted in a constitution, statute[,] or rule, but must nonetheless provide a definite standard by which the employer's conduct may be gauged . . . ." Hitesman v. Bridgeway, Inc., 218 N.J. 8, 33 (2014). "[T]he mandate of public policy must be clearly identified and firmly grounded and cannot be vague, controversial, unsettled [or] otherwise problematic." Id. at 34 (second alteration in original) (internal quotation marks and citation omitted).

As a matter of public policy, schools may have an affirmative obligation to report sexual assault incidents between students. See Frugis v. Bracigliano, 177 N.J. 250, 268 (2003) ("No greater obligation is placed on school officials than to protect the children in their charge from foreseeable dangers, whether those dangers arise from the careless acts or intentional transgressions of others."). Similarly, in L.E. v. Plainfield Pub. Sch. Dist., 456 N.J. Super. 336, 339-40 (App. Div. 2018), a student sued a school district, alleging in part harm suffered due to the school's delayed response after she notified a guidance counselor she had been sexually assaulted by a male student. Like H.W., L.E. reported the incident to an adult over a year after the assault. Ibid. We declined to find the school's response inappropriate because administrators

promptly reported the incident to child protective services and the police. Id. at 340.

Confidentiality between mental health practitioners and clients is an important public policy, but it does not exist in a vacuum. Adopting plaintiff's assertion would require we turn a blind eye to important, conflicting public policies involving the health and safety of public-school students. Plaintiff's claimed public policy is therefore "vague, controversial, unsettled [or] otherwise problematic." Hitesman, 218 N.J. at 34. As such, it cannot support a CEPA claim.

IV.

Plaintiff next asserts the motion judge erred in finding the District took no retaliatory action against her. She claims her prolonged leave of absence, followed by her eventual resignation at the end of the school year, were responses to an "adverse employment action" taken against her by the District. As such, she contends she was constructively discharged.

A constructive discharge occurs when an employer's retaliatory conduct "is so intolerable that a reasonable person would be forced to resign rather than continue to endure it." Shepherd v. Hunterdon Developmental Ctr., 174 N.J. 1, 28 (2002) (citation omitted). Under CEPA, "retaliatory action" means the

"discharge, suspension[,] or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment." N.J.S.A. 34:19-2. "Employer actions that fall short of [discharge, suspension or demotion], may nonetheless be the equivalent of an adverse action." Richter v. Oakland Bd. of Educ., 459 N.J. Super. 400, 418 (App. Div. 2019) (alteration in original) (quoting Nardello v. Twp. of Voorhees, 377 N.J. Super. 428, 433-34 (App. Div. 2005)).

However, "not every employment action that makes an employee unhappy constitutes 'an actionable adverse action.'" Ibid. For example, if an employer conducts an investigation of an employee, it "is not normally considered retaliation." Beasley v. Passaic Cnty., 377 N.J. Super. 585, 606 (App. Div. 2005) (citations omitted). This is because an investigation is frequently necessary to "reveal 'whether the basis for the [CEPA] complaint is reasonable.'" Id. at 606-07 (quoting Higgins v. Pascack Valley Hosp., 158 N.J. 404, 424 (1999)).

In Donelson v. Dupont Chambers Works, our Supreme Court held "an adverse employment action" can occur when an employee properly objecting to a practice under CEPA becomes a target for reprisal. 206 N.J. 243, 258 (2011). The Court specifically mentioned employer practices like "false

accusations of [employee] misconduct, giving negative performance reviews, issuing an unwarranted suspension, and requiring pretextual mental-health evaluations" which can cause an employee to suffer a mental breakdown. Ibid. "If [an] employer's retaliatory action is the proximate cause of the employee's mental unfitness for duty," the third prong of CEPA is satisfied. Ibid.

Plaintiff likens her situation to Donelson, claiming she suffered a mental breakdown due to the way the District responded to her decisions in handling the H.W. case. This includes forcing her to report to the DCPP against her will, as well as the later contemplated withholding of her annual salary increment and filing of a letter to her personnel file noting a violation of the District's child abuse reporting policy.

We disagree. Donelson only applies if an employee is, in fact, engaged in an otherwise CEPA-protected whistleblowing activity. Id. at 258. As discussed above, plaintiff is unable to establish a CEPA claim due to a lack of an identifiable statute or clear public policy that supports a reasonable belief the school was violating the law.

Furthermore, the facts do not indicate the District ever took an action to discipline plaintiff beyond a meeting with Doktor where the possibility of withholding her salary increase was discussed. The outcome of the meeting

was such that Doktor refused to discipline plaintiff at the time and instead instructed her to meet with the assistant superintendent to discuss the matter further. The Board of Education was never notified, and plaintiff's salary was never reduced. This meeting is analogous to an "investigation"—to which the employer is generally entitled. Beasley, 377 N.J. Super. at 606-07. It does not rise to the conduct at issue in Donelson. See 206 N.J. at 249-50.

The decision to refrain from meeting with the assistant superintendent was plaintiff's. The decision to resign from her position within the school district was plaintiff's. No adverse action was taken against her.

V.

Finally, plaintiff contends the District violated the LAD by failing to accommodate her depression and anxiety. To establish a prima facie claim under the LAD, a plaintiff must show: 1) she had a disability; 2) she was able to perform the essential functions of her job; 3) the employer was aware of the basic need for an accommodation; and 4) the employer failed to provide a reasonable accommodation. Royster v. State Police, 227 N.J. 482, 500 (2017).

Plaintiff cannot establish prong three. She never requested an accommodation, and there is no indication the District would have failed to

provide one had she requested it. She simply took her accumulated sick leave, without issue, and quit at the end of that period.

To the extent we have not addressed plaintiff's remaining arguments, we are satisfied they are without sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION