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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1694-22**

JOSEPH SILVESTRI,

Plaintiff-Appellant,

v.

BOROUGH OF RIDGEFIELD,

Defendant-Respondent.

Argued April 22, 2024 – Decided May 22, 2024

Before Judges Mawla and Marczyk.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-0848-19.

Thomas D. Flinn argued the cause for appellant (Garrity, Graham, Murphy, Garofalo & Flinn, PC, attorneys; Thomas D. Flinn, on the briefs).

Joanne Venino argued the cause for respondent (Keenan & Doris LLC, attorneys; Ian C. Doris, of counsel; Joanne Venino, on the brief).

PER CURIAM

Plaintiff Joseph Silvestri appeals from the trial court's January 3, 2023 order granting summary judgment to defendant Borough of Ridgefield. Based on our review of the record and the applicable legal principles, we vacate and remand for trial.

I.

Plaintiff was employed by the Borough of Ridgefield from 1996 to 2018. He held various roles in Ridgefield and eventually became the Director of Information Technology ("IT"). Despite having an "unblemished" record, he was terminated in September 2018, purportedly for economic reasons, which precipitated this lawsuit.

On October 9, 2015,¹ plaintiff received an email alert that the Lightning Alert System at Willis Park was off-line during a storm ("The Willis Park matter"). Plaintiff determined that an individual tampered with the system and referred the matter to the Ridgefield Police Department. Paul Schaeffer, a friend of Ridgefield Councilman Javier Acosta, was charged with tampering with the Lightning Alert System during a youth football game. Plaintiff was later subpoenaed for the municipal court case but was never called to testify.

¹ Plaintiff's complaint stated the Willis Park matter happened in October 2016. However, in his deposition, he clarified the incident took place in October 2015.

Councilman Acosta was present in court on both occasions plaintiff appeared in February and March 2017.

Plaintiff contends he faced retaliation at work as a result of his whistleblowing activity because of Schaeffer's relationship with Councilman Acosta. He asserts he suffered a series of retaliatory incidents by Ridgefield ultimately resulting in his wrongful termination. Plaintiff emphasizes that the trial court focused on certain retaliatory conduct. However, the only adverse employment action he asserted in his complaint was his termination in retaliation for his protected activities in violation of the Conscientious Employee Protection Act ("CEPA"), N.J.S.A. 34:19-1 to-14, and the Exempt Firemen's Act, N.J.S.A. 40A:14-60.

In January 2016, plaintiff was informed by Ridgefield Council President Russell Castelli that he was not entitled to overtime compensation ("comp time") because he was the IT department head. He asserts he previously received comp time without question for approximately twenty years. He claims the withholding of comp time was "instigated" by Councilman Acosta following his involvement in the Willis Park matter.

In January 2018, plaintiff alleges he engaged in other protected whistleblowing activity. He testified he refused to make undocumented changes

to the time and attendance system for various employees because "there was no explanation provided for why such large adjustments were being made at the end of the year." He reported his reasons for refusing to make the adjustments to the Borough Manager. He claims he refused to participate in what appeared to be a fraud on the taxpayers of Ridgefield. Although defendant argued plaintiff adjusted the system in the past as part of his job as the IT Director, plaintiff countered the adjustments requested in January 2018 were different from the prior adjustments. Unlike the bulk adjustments, the prior adjustments were made on a temporary basis to correct inputting errors or where employees inadvertently forgot to "punch in" or "punch out." Plaintiff testified there was no "justification" and no "explanation" provided for why the January 2018 adjustments were being requested because payroll had already been certified for those periods. He noted it was not clear why adjustments were being made at that late juncture. He specifically stated "the overriding adjustments weren't warranted. There was no data to back up why [he] was . . . [asked] to make these adjustments."

Following plaintiff's refusal to make changes to the time and attendance system and the Willis Park matter, Councilman Acosta indicated he wanted an audit conducted of the IT department. Later in February 2018, Ridgefield's

Communications Committee decided to conduct an outside audit of the IT department. This was requested by, among other councilpersons, Councilman Acosta, who was not a member of the Communications Committee. Defendant claims it had concerns regarding rising costs and budgetary shortfalls coupled with plaintiff's refusal to embrace new technologies. The audit was ultimately conducted by KAB Computer Systems in 2018. Following the audit, KAB recommended that Ridgefield outsource its IT service for cost-saving purposes.

In September 2018, plaintiff was called into a meeting with the Ridgefield Administrator and its attorney, and he was advised the Mayor and Council decided to outsource Ridgefield's IT services. As a result, plaintiff's position was eliminated by ordinance in October 2018. Plaintiff notes he was not given an opportunity to respond to the audit because it was merely a pretext to having him terminated based on his whistleblower activity.

Plaintiff further asserts that he was an "exempt fireman," and his position was protected by N.J.S.A. 40A:14-60 and N.J.S.A. 40A:14-63. Although defendant maintained it had a "good faith economic reason" for eliminating plaintiff's position, plaintiff maintains he was terminated based on his protected whistleblower activities. Indeed, the Borough Administrator admitted there were no other layoffs or reductions in force throughout Ridgefield. Moreover,

plaintiff notes there is a factual dispute as to whether the decision to eliminate his position was made before or after the contract was made with the outsourced IT company.

In January 2019, plaintiff filed a complaint against Ridgefield alleging common law retaliation, CEPA violations, and a violation of the Exempt Firemen's Act. The Borough moved for summary judgment on the grounds that (1) plaintiff waived his common law retaliation claim upon filing the CEPA claim, (2) he could not prove that Ridgefield violated CEPA when it eliminated the IT Director position, and (3) Ridgefield did not violate the Exempt Firemen's Act as the elimination of the IT Director position was for a good faith economic reason.

On January 3, 2023, the trial court granted Ridgefield summary judgment. In its written opinion, the court first determined that plaintiff's CEPA claim failed because he cannot prove a prima facie case. Although plaintiff engaged in protected activity by providing information to the authorities regarding the Willis Park matter, he was unable to prove "a causal connection existed between the protected activity and the adverse employment action." The court explained that plaintiff, "following the Willis Park matter, [alleged] every action taken by Ridgefield with which he disagreed was an adverse employment action within

the definition of CEPA," and it deemed those assertions "devoid of merit." The trial court further stated that "it is clear based upon the record" that Ridgefield's elimination of plaintiff's position was "unrelated" to his involvement in the Willis Park matter or his relationship with Councilman Acosta. The court noted the claim was based on "nothing more than . . . she[e]r speculation." The trial court further commented that the elimination of plaintiff's position was justified because he continued to maintain "an antiquated [IT] system."

The court further stated Ridgefield's decision to eliminate plaintiff's position was due to budgetary shortfalls. The court noted his termination was "motivated by [the Borough's] desire to see if it could improve its efficiency and lower costs, not retaliate against [plaintiff] for his role in the Willis Park matter."

The trial court next determined that plaintiff's refusal to override adjustments to Ridgefield's time and attendance system did not amount to protected activity under CEPA. Specifically, it stated, "the [c]ourt is unconvinced by this argument and finds that his refusal to do so stemmed from his growing discontent with his treatment as an employee of Ridgefield, not his actions as a whistleblower." The court explained it was "clear from the record that adjustments to Ridgefield's time and attendance system were frequently required . . . in order to ensure that all timesheets [were] accurate" and were not

in violation of any public policy, rule, regulation, or statute. Because plaintiff "failed to identify with particularity how his refusal to continue making adjustments to the time and attendance system amounts to a protected activity[,]" which may give rise to a CEPA claim," the court found he did not engage in a protected activity.

The Exempt Firemen's claim failed because he failed to prove his firing was for political reasons. "[Plaintiff's] position as Director of IT was eliminated due to good faith economic reasons, not political reasons." The court looked to Viviani v. Borough of Bogota, 170 N.J. 452 (2002), to guide its analysis and observed:

[T]he municipality [in Viviani] had reduced its workforce within the [Department of Public Works "DPW"] by transferring trash and recycling collection to private companies with the unfortunate consequence that plaintiff's position as DPW Assistant Superintendent was abolished. The action was prompted by budget shortfalls due to excessive expenditures and a reduction in State aid. The Supreme Court found that this action was "for good faith economic reasons, and not for the purpose of terminating plaintiff's services." [Viviani, 170 N.J. at 452.]

[(Citations reformatted).]

The court concluded although plaintiff was an exempt fireman, "his termination was for bona fide economic reasons"; namely, to outsource the IT director role

"to an outside contractor with improved efficiency and at a cheaper price." The court noted plaintiff was not replaced by another Ridgefield employee.

As a result, the court dismissed plaintiff's complaint.² This appeal ensued.

II.

Plaintiff argues there are genuine issues of material fact in the record, which preclude the entry of summary judgment. He contends the trial court erred in concluding the retaliatory acts complained of were either not retaliatory or were not actionable under CEPA. Plaintiff further asserts the trial court erred in concluding he was terminated for a "good faith economic reason" under the Exempt Firemen's Act.

We review a ruling on a summary judgment motion de novo, applying the same standard governing the trial court. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016). Thus, we 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.

² The court also dismissed plaintiff's common law retaliation claim. Plaintiff does not challenge the dismissal of that claim.

Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that 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).

If there is no genuine issue of material fact, we must then "decide whether the trial court correctly interpreted the law." DepoLink Ct. Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013). The "trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference" and are reviewed de novo. Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 382-83 (2010). We view the facts in the light most favorable to the non-moving party, giving them the benefit of all favorable inferences. Globe Motor Co. v. Igdaley, 225 N.J. 469, 479 (2016) (citing R. 4:46-2(c)).

A.

Plaintiff first argues "there were many genuine issues of material fact which should have precluded the entry of [s]ummary [j]udgment" including "fact questions . . . [regarding the] justifications for terminating [his] employment by eliminating his position [and whether Ridgefield's actions] were

done . . . for good faith economic reasons, or whether they were merely pre-textual excuses for terminating him in retaliation for engaging in protected activities." Plaintiff's protected activities included appearing in court as a witness and refusing to participate in manipulating Ridgefield's time and attendance system. He contends there were factual disputes regarding whether: there were ever any legitimate issues concerning his competence; he had a reasonable good faith belief that he was being asked to violate the law by changing the time and attendance records; or he refused to do so simply because he was disgruntled, as the court suggested.

Plaintiff further argues the court wrongly determined there was no causal connection between his Willis Park protected activity and the adverse employment action. He contends he "offer[ed] much more evidence in support of his claim of causation than a temporal connection. Among other things, there is the absence of any criticism of his job performance anywhere in his employment record." He asserts the trial court failed to afford him all reasonable inferences and instead concluded he did not establish a prima facie case by resolving questions of fact and giving the benefit of favorable inferences to the defendant.

"The Legislature enacted CEPA 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.'" Dzwonar v. McDevitt, 177 N.J. 451, 461 (2003) (quoting Abbamont v. Piscataway Twp. Bd. of Educ., 138 N.J. 405, 431 (1994)). As a remedial statute, CEPA "promotes a strong public policy of the State" and "should be construed liberally to effectuate its important social goal." Battaglia v. United Parcel Serv., Inc., 214 N.J. 518, 555 (2013) (quoting Abbamont, 138 N.J. at 431). When enacted, CEPA was described "as the most far reaching 'whistleblower statute' in the nation." Mehlman v. Mobil Oil Corp., 153 N.J. 163, 179 (1998).

CEPA prohibits employers from taking "any retaliatory action" against an employee who:

- a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer, or another employer, with whom there is a business relationship, that the employee reasonably believes:
 - (1) is in violation of a law, or a rule or regulation promulgated pursuant to law . . . ; or
 - (2) is fraudulent or criminal . . . ;
- b. Provides information to, or testifies before, any public body conducting an investigation, hearing or

inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer . . . ; or

c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:

(1) is in violation of a law, or a rule or regulation promulgated pursuant to law . . . ;

(2) is fraudulent or criminal . . . ; or

(3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.

[N.J.S.A. 34:19-3.]

To establish a prima facie case under CEPA, a plaintiff must prove each of the following:

(1) he or she reasonably believed that his or her employer's conduct was violating either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy;

(2) he or she performed a "whistle-blowing" activity described in N.J.S.A. 34:19-3(c);

(3) an adverse employment action was taken against him or her; and

- (4) a causal connection exists between the whistle-blowing activity and the adverse employment action.

[Lippman v. Ethicon, Inc., 222 N.J. 362, 380 (2015) (quoting Dzwonar, 177 N.J. at 462).]

"The evidentiary burden at the prima facie stage is 'rather modest.'" Zive v. Stanley Roberts, Inc., 182 N.J. 436, 447 (2005) (quoting Marzano v. Comput. Sci. Corp., 91 F.3d 497, 508 (3d Cir. 1996)).

When a plaintiff establishes a prima facie claim under CEPA, the burden of persuasion shifts to the defendant employer "to rebut the presumption . . . by articulating some legitimate nondiscriminatory reason for the adverse employment action." Allen v. Cape May Cnty., 246 N.J. 275, 290-91 (2021) (quoting Kolb v Burns, 320 N.J. Super. 467, 478 (App. Div. 1999)). If the employer meets that burden, the plaintiff then must prove the employer's asserted legitimate reasons were pretextual and not the real reason for the employer's acts. Id. at 291.

Plaintiff advanced claims under N.J.S.A. 34:19-3(b) and (c). With respect to the claim under N.J.S.A. 34:19-3(b), regarding the Willis Park matter, the trial court's decision is primarily based on its finding that he did not establish causation. The trial court noted, "it is clear based upon the record" that Ridgefield's elimination of plaintiff's position was "unrelated" to plaintiff's

involvement in the Willis Park matter or his relationship with Councilman Acosta. The court found the claim was based on "nothing more than . . . she[e]r speculation" and further commented that the elimination of plaintiff's position was justified because he continued to maintain "an antiquated [IT] system."

The trial court noted plaintiff was notified on January 4, 2016, that he was no longer eligible for comp time because he was the department head. The court was under the impression that the Willis Park matter occurred in October 2016, when in fact, according to plaintiff's deposition, it occurred in October 2015. Thus, the court incorrectly concluded the comp time discussion took place before the Willis Park matter. It is further noted plaintiff was called to testify regarding the Willis Park matter in February and March 2017.

Accordingly, the judge's conclusion that these incidents were unrelated and based on sheer speculation appears to be based on an incorrect timeline. The incidents, in fact, were closer in time to the alleged retaliatory acts than suggested by the trial court. Beyond that, viewing the facts in the light most favorable to plaintiff, his reporting of the Willis Park matter in 2015, coupled with his court appearances in February and March 2017, Councilman Acosta's subsequent request for an IT audit, and the eventual elimination of plaintiff's position in 2018, supports an inference there was a connection between the

protected activity and termination, particularly in light of his employment record. It was not appropriate for the trial court to resolve these disputed issues of fact without a trial.

We conclude the trial court usurped the role of the jury by drawing factual inferences in favor of defendant. Defendant certainly advanced arguments that could establish legitimate non-retaliatory reasons for eliminating plaintiff's position. However, viewing the facts in the light most favorable to plaintiff, there are fact issues as to whether plaintiff agreeing to act as a witness in a case against Councilman Acosta's friend prompted Acosta to request an audit of the IT department, which eventually led to plaintiff's termination despite his unblemished employment history. Of course, a jury may conclude defendant had legitimate concerns regarding Ridgefield's IT security, along with budgetary concerns. However, what is clear at the summary judgment stage is that these issues cannot be resolved given the credibility issues involved.

At this stage, "[o]ur task is not to weigh the evidence, not to decide who has the better case or who is more likely to succeed before the jury." Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344, 367 (2016). The "strength of [the] case" is not at issue. Ibid. Rather, our role "is simply to view the record in the light most favorable to [the non-moving party] and resolve whether, on that

basis, a reasonable factfinder could find" in that party's favor. Ibid. Here, the court made improper factual determinations despite the conflicting testimony. Giving all favorable inferences to plaintiff, a reasonable factfinder could conclude that causation exists. Accordingly, the court erred in granting summary judgment on this issue.

We likewise vacate the summary judgment regarding plaintiff's claim that his refusal to manipulate Ridgefield's time and attendance records resulted in his wrongful, retaliatory discharge under N.J.S.A. 34:19-3(c). The trial court found that plaintiff did not engage in protected activity under N.J.S.A. 34:19-3(c). The trial court stated, "the [c]ourt is unconvinced by this argument and finds that [plaintiff's] refusal to do so stemmed from his growing discontent with his treatment as an employee of Ridgefield, not his actions as a whistleblower." The court essentially made a finding of fact based on conflicting testimony and appears to have viewed the facts in the light most favorable to defendant—not plaintiff. In doing so, the court improvidently weighed the competing arguments as opposed to deciding if a reasonable factfinder could decide the case in plaintiff's favor pursuant to Rule 4:46-2. Therefore, we vacate the summary judgment and remand for a jury trial.

B.

Lastly, plaintiff argues that he was an exempt fireman and was not terminated for a good faith economic reason. N.J.S.A. 40A:14-60; N.J.S.A. 40A:14-63. He served the Borough of Ridgefield as a volunteer firefighter from 1989 to 1996. As an exempt fireman, he contends that he is entitled to the protection afforded by the statute. Furthermore, he asserts the trial court was misguided by concluding his position was eliminated due to good faith economic reasons. Rather, he argues Ridgefield's actions were a pretext "because [the Borough] wanted to be rid of [him]."

Contrary to defendant's argument that Ridgefield was concerned with modernizing the IT system and implementing state-of-the-art security measures, plaintiff alleges his cooperation as a witness in the Willis Park matter, coupled with his refusal to manipulate Ridgefield's time and attendance records, resulted in a sham audit followed by his wrongful, retaliatory discharge. Plaintiff's claim raises a fact question as to whether defendant had a legitimate good faith economic reason for eliminating his position. He notes "the sham audit was undertaken at the same time [he] was refusing to manipulate the [t]ime and [a]ttendance [s]ystem." He argues, "the economic reason claimed for the termination [was] merely a pretext for terminating his service without a hearing and without good cause."

N.J.S.A. 40A:14-60 provides:

Whenever any person possessing an exempt fireman certificate holds an office, position or employment of . . . [a] municipality . . . for an indeterminate term, such person shall hold his office, position or employment during good behavior and shall not be removed therefrom for political reasons but only for good cause after a fair and impartial hearing.

N.J.S.A. 40A:14-63 provides:

No . . . governing body of a municipality . . . shall abolish, change the title[,], or reduce the emoluments of any office or position held by an exempt fireman for the purpose of terminating his service.

The provisions of N.J.S.A. 40A:14-60 to -65 provide tenure to unclassified civil servants who meet the qualifications set forth in these statutes. See Smith v. Bd. of Chosen Freeholders, 139 N.J. Super. 229 (Law Div. 1976). However, tenure provided under these provisions is not absolute; a plaintiff can be terminated, despite falling under an exempt class, for good cause after a fair and impartial hearing. Further, N.J.S.A. 40A:14-65 does not require that there be widespread economic depression or mandatory retrenchment before a municipality can abolish, change the title, or reduce the emoluments of any office held by an exempt fireman. See Viviani, 170 N.J. at 454. A municipality may abolish a position or office held by an exempt fireman for any good faith economic reason. Ibid.

Here, the trial court determined that plaintiff's exempt firemen's claim failed because he did not establish his firing was due to political reasons.

Specifically, the court found:

[Plaintiff's] position as Director of IT was eliminated due to good faith economic reasons, not political reasons. As such, [c]ount [t]hree of his [c]omplaint alleging that he was terminated in violation of N.J.S.A. 40A:14-60 and N.J.S.A. 40A:14-63 must be dismissed.

. . . .

While [plaintiff] was an Exempt Fireman whose employment was protected from termination due to political reasons, his termination was for bona fide economic reasons. As is abundantly clear from the record . . . , [plaintiff's] position as IT director was ultimately abolished by ordinance due to the belief that the role could be outsourced to an outside contractor with improved efficiency and at a cheaper price. No other Ridgefield employee was then appointed IT director; the position was simply eliminated. It is clear from Viviani and Roe³ that the termination of a municipal employee in possession of an Exempt Fireman's Certificate is permitted if the termination is due to good faith economic reasons.

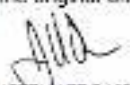
We conclude the trial court was overly solicitous of defendant's argument that plaintiff's position was eliminated due to good faith economic reasons as

³ Roe v. Borough of Upper Saddle River, 336 N.J. Super. 566, 571-72 (App. Div. 2001).

opposed to a political or retaliatory reason. Viewing the facts in the light most favorable to plaintiff, his allegations raised a fact issue as to whether his termination was for a bona fide good faith economic reason or, conversely, whether the elimination of his position was political retaliation stemming from his whistleblower activities. We part ways with the trial court's finding that it was "abundantly clear" from the record that defendant eliminated plaintiff's position for a good faith economic reason. The court accepted at face value defendant's argument that plaintiff's position was eliminated for a proper purpose without clearly addressing plaintiff's testimony. At the very least, plaintiff has raised a triable issue of fact regarding whether the elimination of his position arose from his cooperation as a witness in the Willis Park matter, his refusal to manipulate Ridgefield's time and attendance records, or as defendant contends, based on a good faith economic reason. Therefore, summary judgment on count three was improperly granted.

Vacated and remanded for trial.⁴ We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION

⁴ We intimate no views about the ultimate disposition of the merits to be tried.