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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2505-09T2

HARRY FORMICA,

Plaintiff-Appellant,

v.

ATLANTIC CITY BOARD OF EDUCATION, jointly, severally and in the alternative, and FREDERICK P. NICKLES,

Defendants-Respondents.

Submitted February 7, 2011 - Decided August 2, 2011

Before Judges Grall, LeWinn and Coburn.

On appeal from Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-4590-06.

Van Syoc Chartered, attorneys for appellant (Sebastian B. Ionno, on the brief).

Marks, O'Neill, O'Brien & Courtney, P.C., attorneys for respondents (Frances Wang Deveney and Melissa J. Brown, on the brief).

PER CURIAM

Plaintiff Harry Formica, the supervisor of Special Services for defendant Atlantic City Board of Education, appeals from an

order granting the Board and defendant Frederick P. Nickles, its superintendent, summary judgment on Formica's claims of retaliation and failure to accommodate in violation of the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -42. We affirm the grant of summary judgment as to Formica's failure-to-accommodate claim, but reverse as to his retaliation claim.

In September 2003, Formica was approached by a subordinate, Alison Devinney, and told that Barry Caldwell, the Board's assistant superintendent for operations, had sexually harassed her. Formica contacted his supervisor and arranged to be present when Devinney reported the incident with Caldwell.

Formica alleges that after Devinney reported Caldwell's harassing conduct, the Board began to retaliate against him. The Board's retaliatory actions can be divided into two categories: those that relate to Formica's pay and those that do not. We state the facts in the light most favorable to Formica, aware that the Board disputes much of this account. See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

Formica first claims that in July 2003, the Board conspired to improperly grant him a pay raise, which was later successfully challenged by his union. According to Formica, when he was first hired as a supervisor in 2001, he was placed on "step one" of the Board's pay scale despite having nineteen

years of previous experience in student administration at the college level. In 2003, the Board decided that Formica should have been started at "step three" and advanced him on the pay scale accordingly. But rather than adopt a resolution explaining that Formica's sudden salary increase was an adjustment to his initial step, the Board included the increase without comment in a chart of approved salaries distributed after the July meeting.

Formica's raise was challenged as an unfair labor practice by his union before the Public Employment Relations Commission (PERC). Formica concedes that his raise as adopted was unlawful, but contends that if the Board had drafted and approved an appropriate resolution, the union's challenge would not have succeeded.

Although the foregoing events occurred before Formica engaged in the conduct that he alleges led to retaliation, Formica points to events subsequent to his protected conduct as well. In July 2005, the Board and Formica's union reached a tentative settlement of the PERC complaint. The tentative settlement retroactively removed Formica's increase in salary and required him to repay it to the Board. The Board immediately began withholding money from Formica's paychecks although the tentative settlement was not yet finalized.

Formica complained to the Board but was rebuffed. Thomas Kirschling, the Board's assistant superintendent for human resources, told Formica that "he had no time" to discuss the issue with him, and Nickles told Formica to "get lost." Formica then complained to the Board's labor attorney, who agreed that the withholdings were illegal and promised that he would speak to Nickles about it. The record does not reveal whether that discussion took place, but, if it did, nothing came of it. According to Formica, $19,000 was recouped by the Board through withholdings.[1] The final agreement between the Board and Formica's union, settling the union's grievance, ultimately did not require Formica to repay his improper raise. Instead, Formica was to be kept at his current step until the 2006-2007 school year.

The last alleged retaliatory action affecting Formica's pay occurred at the November 8, 2005 Board meeting. According to Rochelle Salway, a Board member at the time, the Board was in closed session and discussing an increase in salary step for Formica.[2] During the discussion, Nickles told the Board that

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[1] This figure is likely incorrect, because the total amount of the improper raise was only approximately $12,000.

[2] Formica's brief calls it a "stipend or salary increase." Salway initially testified that the matter under discussion was a stipend or a salary increase for Formica; she could not

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Formica was sabotaging his administration by giving "false testimony" about Devinney. Nickles was against an increase in step for Formica, and his opposition was because of Formica's participation in the Devinney investigation. In Salway's opinion, Nickles was retaliating against Formica because "Fred [Nickles] was a very determined individual and you do not go against Fred for anything." Salway claimed that Formica ultimately did not get the step increase under discussion.

The non-pay-related retaliatory actions Formica alleges are varied. Primarily, Formica claims that the Board retaliated against him by moving his office. In 2005, his office was moved from the administration building to a set of temporary trailers. He did not object to this move, finding it more convenient for him. To the contrary, he alleges that the Board retaliated when it moved him out of the trailers and to the sixth floor of a new administration building. According to Formica, he was never told why he was being moved. Formica's sixth-floor office is inconvenient for him because he has difficulty walking and would be unable to evacuate the building on his own during an emergency. While there is an elevator in the building and it works most of the time, it is not operational during a fire.

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remember which. But she later recalled that "it had to do with the steps [on the pay scale]."

Thus, one time when there was a fire in the building, Formica had to walk down the stairs, which took him thirty minutes. Formica admitted, however, that he was able to perform all the tasks of his job from his office.

Despite Formica's complaint about his office location, when he presented a "504 plan"[3] to the Board's 504 coordinator, he agreed to a plan that listed moving his office to a different floor as the third of three options that would accommodate his need. The "preferred option" to address Formica's disability was to give him a parking space closer to the building, with an evacuation plan that includes a means to transport him in emergencies. Formica admits that the Board provided him with all the accommodations he requested in his plan. He alleges, however, that Nickles retaliated against him by unduly holding up approval of the plan. It took Nickles three months to approve the plan, whereas it normally takes one to three days for him to do so. The 504 coordinator told Formica that Nickles had the plan on his desk and that there was no problem with it, but that Nickles just was not signing it. While waiting for approval of the 504 plan, Formica found that he could use, for

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[3] A "504 plan" is a reference to section 504 of the Federal Rehabilitation Act of 1983, 29 U.S.C.S. §§ 707-796 and the Americans with Disabilities Act of 1990, 42 U.S.C.S. §§ 12101-12213. A 504 plan, therefore, is a plan for how the Board will accommodate under those acts an employee's disabilities.

free, parking meters near the administration building that were closer to his office than the space he was going to be assigned as part of the 504 plan. Even after the 504 plan was approved, Formica never used his assigned space. He admitted that as of the time of his deposition, he did not need his 504 plan's accommodations.

The final acts of non-pay-based retaliation can be summarized. Formica alleges that the Board failed to investigate a break-in of his office; that the Board failed to investigate a letter sent by an attorney retained by Caldwell threatening to sue Formica for defamation for claiming that Caldwell sexually harassed female employees; that he has been ridiculed and ostracized by Nickles and Kirschling; has been denied training opportunities and a fax machine; and that one of his students' classrooms was moved at the last minute, requiring him to do an additional twenty-four hours of work to notify his students' parents of the change.

In spite of all of this, Formica admitted that his responsibilities have not been materially altered since he was hired and that both Nickles and the Board have been supportive of him in his efforts to expand the district's special education programs.

I

We first consider whether the trial court erred in finding that there were no material facts in dispute and that the Board was entitled to judgment as a matter of law on Formica's retaliation claim. We review the trial court's determination using the same standards. Kramer v. Ciba-Geigy Corp., 371 N.J. Super. 580, 602 (App. Div. 2004). To determine whether there is a genuine issue of material fact, we 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 fact-finder to resolve the alleged disputed issue in favor of the non-moving party." Brill, supra, 142 N.J. at 540.

An employee alleging retaliation under the LAD must establish that (1) he engaged in a protected activity known to the employer, (2) he was subjected to adverse employment action by the employer, and (3) there was a causal link between the two. Victor v. State, 203 N.J. 383, 409 (2010); Wachstein v. Slocum, 265 N.J. Super. 6, 19 (App. Div.), certif. denied, 134 N.J. 563 (1993). If a prima facie showing is made, "the burden of going forward, but not the burden of persuasion, shifts to the employer to articulate some legitimate non-retaliatory reason for the adverse action." Jamison v. Rockaway Twp. Bd. of

Educ., 242 N.J. Super. 436, 445 (App. Div. 1990). The employee then must prove by a preponderance of evidence that the employer's asserted reason is a pretext and that a discriminatory reason is more likely. Ibid.

The Board does not dispute – at least for purposes of this appeal – that Formica engaged in protected conduct when he helped Devinney report Caldwell's alleged sexual harassment. Instead, it disputes whether Formica suffered an adverse employment action, or, if he did, whether there is a causal link between him helping Devinney and the adverse action he suffered. Although there is no bright-line rule separating adverse employment actions from mere minor workplace annoyances, Mancini v. Twp. of Teaneck, 349 N.J. Super. 527, 564 (App. Div. 2002), aff'd as mod. on other grounds, 179 N.J. 425, 439 (2004), any change in an employee's salary constitutes an adverse employment action. Beasley v. Passaic County, 377 N.J. Super. 585, 608 (App. Div. 2005). Thus, any of Formica's three pay-related allegations, if established and proven to have a causal link to his helping Devinney, are sufficient for him to prevail on his retaliation claim. We turn to them first.

A

We can swiftly dispose of Formica's claim that the Board retaliated against him by adjusting his salary step in an

improper manner. He was given the raise at the July 2003 Board meeting; Devinney did not report harassment by Caldwell until September 2003. It is impossible for the Board to have been retaliating against Formica for protected conduct that had not yet occurred.

In addition, a reasonable jury could not credit Salway's testimony that Formica was denied a step increase at the November 2005 Board meeting. Under the terms of the PERC settlement between the Board and Formica's union, Formica was ineligible to receive a step increase until the 2006-2007 school year. It is therefore impossible for a reasonable jury to credit Salway's testimony in light of the clear documentary evidence to the contrary. While we are mindful that on a motion for summary judgment we cannot weigh the evidence or judge the credibility of the witnesses, see Parks v. Rogers, 176 N.J. 491, 502 (2003), a material issue of fact does not exist when the evidence regarding the fact is "so one-sided that one party must prevail as a matter of law." Brill, supra, 142 N.J. at 536. As between Salway's equivocal and uncertain testimony and the unequivocal and unambiguous PERC settlement, no reasonable jury confronted with the record that we have been given could believe Salway's testimony that Formica was denied a step increase at the November 2005 Board meeting. We emphasize that our holding

is only as to whether Formica was denied a step increase at the November 2005 Board meeting; Salway's other testimony – such as Nickles stating that Formica was attempting to sabotage Nickles' administration, is not subject to refutation by documentary evidence and therefore must be credited for the purposes of summary judgment.

We do not agree with the trial court that the Board was entitled to summary judgment on Formica's claim regarding the money the Board allegedly unlawfully withheld from his paycheck. The final PERC settlement did not authorize the withholdings and the Board does not offer any explanation for why Formica had funds withheld. Moreover, Formica's conversations with Nickles, Kirschling, and the Board's labor attorney all inferentially support his claim that the withholdings were done with a retaliatory motive. If there was a legitimate explanation for the withholdings, one of the three people Formica spoke to should have given it to him. If the withholdings were an administrative oversight – for example, as a result of a misunderstanding as to whether the PERC settlement was final – one would expect that the Board would acknowledge as much and promptly rectify its mistake. But neither happened, which would allow a reasonable jury to infer that the Board had no legitimate reason for withholding the money and that it was

instead motivated by a desire to retaliate against Formica. Nickles' statement that Formica was "sabotaging" his administration – although made after the withholdings were taken – suggests that Nickles harbored a desire to retaliate against Formica for his participation in Devinney's complaint ever since the complaint was made. As a result, Formica's claim regarding the Board unlawfully withholding money from his paycheck is sufficient to reach a jury and the trial court erred in granting summary judgment to the Board on Formica's retaliation claim.

B

Formica has not presented a genuine issue of material fact, however, as to whether the Board's non-pay-related retaliatory actions led, either separately or collectively, to an adverse employment action. To be an adverse employment action, "an allegedly retaliatory act must be sufficiently severe or pervasive to have altered plaintiff's conditions of employment in an important and material manner." El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 176 (App. Div. 2005) (internal quotations omitted). "Terms and conditions of employment 'refer[] to those matters which are the essence of the employment relationship.'" Beasley, supra, 377 N.J. Super. at 608 (quoting Twp. of W. Windsor v. Pub. Employment Relations Comm'n, 78 N.J. 98, 110 (1978)).

While the non-pay-related actions that Formica complains of may have made his job less pleasant or more difficult, none of them led to a change in his job that affected the essence of his employment relationship with the Board. The LAD is not "a general civility code for conduct in the workplace," Heitzman v. Monmouth County, 321 N.J. Super. 133, 147 (App. Div. 1999) (internal quotations omitted), overruled on other grounds, Cutler v. Dorn, 196 N.J. 419 (2008), and "not every employment action that makes an employee unhappy constitutes an actionable adverse action." Nardello v. Twp. of Vorhees, 377 N.J. Super. 428, 434 (App. Div. 2005) (internal quotations omitted). Formica has the same job with the same responsibilities as when he was hired, and he admitted that the Board has been supportive of his efforts to expand the special education programs in the district. His displeasure with his supervisors and unhappiness with his office are not the types of problems that the LAD was designed to address.

II

Formica's claim that the Board failed to accommodate his difficulty walking is without sufficient merit to warrant extended discussion in a written opinion. R. 2:11-3(e)(1)(E). Formica is entitled only to reasonable accommodations so that he can perform the essential functions of his job; he is not

entitled to have the Board acquiesce to his every demand. Tynan v. Vicinage 13 of Superior Court of N.J., 351 N.J. Super. 385, 397 (App. Div. 2002). If getting down the stairs in the event of an emergency is deemed to be sufficiently related to Formica's essential job functions, that issue was addressed in the accommodation plan that he accepted. Indeed, Formica admitted that he was able to perform all of his job functions from his sixth-floor office. As such, the trial court properly granted defendants summary judgment on Formica's claim of handicap discrimination based on a failure to accommodate.

III

To summarize, we find that only Formica's claim that the Board retaliated against him by withholding money from his paycheck is sufficient to survive summary judgment. On remand, the trial court should limit the factual controversy to this particular incident and direct that the scope of the trial be similarly limited. See R. 4:46-3.

Affirmed in part; reversed in part; and remanded.

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

CLERK OF THE APPELLATE DIVISION