NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1111-14T2

SAMANTHA ISHAGE,

Plaintiff-Appellant,

v.

PNC BANK CORP. and
THERESA CANADA,

Defendants-Respondents.

Submitted January 5, 2016 – Decided February 8, 2016

Before Judges Reisner and Leone.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-5367-12.

Costello & Mains, P.C., attorneys for appellant (Deborah L. Mains, on the brief).

Locke Lord, L.L.P., and Jonathan R. Shank of the Massachusetts bar, admitted pro hac vice, attorneys for respondents (Marcy A. Gilroy and Mr. Shank, on the brief).

PER CURIAM

Plaintiff Samantha Ishage appeals from a September 19, 2014 order granting summary judgment dismissing her Conscientious Employee Protection Act (CEPA) complaint against her employer, defendant PNC Bank Corp. (PNC), and its manager Theresa Canada.

Our review of a summary judgment order is de novo, using the same standard employed by the trial court. Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 405 (2014). We determine whether there are material facts in dispute and if not, whether the undisputed facts, viewed in the light most favorable to the non-moving party, nonetheless entitle the moving party to judgment as a matter of law. Id. at 405-06; Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). After reviewing the record with that standard in mind, we conclude that summary judgment was properly granted. The employer presented a legitimate reason for terminating plaintiff's probationary employment, and plaintiff failed to produce evidence that the employer's explanation was a pretext for retaliation.[1] See Winters v. N. Hudson Reg. Fire and Rescue, 212 N.J. 67, 90 (2012); Kolb v. Burns, 320 N.J. Super. 467, 478 (App. Div. 1999). Accordingly, we affirm.

I

On May 21, 2012 PNC hired plaintiff as an in-store financial consultant at a branch of the bank located inside a

[1] We decline to address plaintiff's alternate theory that the record showed "mixed motive" retaliation. Plaintiff did not present that argument to the trial court and we will not entertain it for the first time on appeal. See Alloway v. Gen. Marine Indus., L.P., 149 N.J. 620, 643 (1997); Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973).

supermarket in Lyndhurst. PNC terminated plaintiff's employment on August 17, 2012, which was the last day of her probationary period.[2]

During her employment, plaintiff participated in two incidents which arguably constituted whistle-blowing because they involved bringing alleged fraudulent acts to the attention of the bank's management. In the first incident, plaintiff reported to Canada, a sector manager,[3] that the bank's branch manager had given a customer false information about an available interest rate. Canada was already aware of the incident when plaintiff told her about it. Canada arranged for a prompt investigation, and the branch manager was disciplined. In the second incident, plaintiff reported to the branch's assistant manager that one of plaintiff's fellow employees had given a customer false information about a financial incentive for opening an account. Again, the bank's internal investigation unit investigated the incident and the employee was disciplined. Plaintiff contended that she was fired for participating in these incidents.

---

[2] When she was hired, plaintiff was notified in writing that if her job performance did not progress "at an acceptable level" during the probationary period, the employer could fire her at will without following its normal corrective action policy.

[3] The sector manager was responsible for overseeing several banks, one of which was the Lyndhurst branch.

PNC's defense was that plaintiff was fired for poor job performance. On the motion record, there was no dispute that an in-store financial consultant was required to drum up business for the bank by convincing potential customers to open new checking accounts and apply for credit cards and loans. As part of that process, a consultant was required to walk through the supermarket aisles and obtain information (customer profiles) from potential bank customers who were shopping in the market.

PNC produced legally competent evidence that plaintiff was terminated because she resisted going into the supermarket to recruit customers; she did not produce a sufficient number of customer profiles; and she did not produce enough new checking accounts, credit card accounts, and loans. Defendant produced Canada's contemporaneous notes documenting the problems with plaintiff's work performance. Plaintiff did not produce evidence to dispute the shortcomings in her performance.

PNC produced testimony that Canada, and not the branch manager, made the decision to fire plaintiff, although the branch manager told Canada that he believed plaintiff should be terminated for poor performance. Another bank employee, who also told management about the wrongdoing by the branch manager, was not fired.

II

CEPA, N.J.S.A. 34:19-1 to -14, protects an employee who "[d]iscloses . . . to a supervisor" an activity by the employer that she "reasonably believes" constitutes fraud. N.J.S.A. 34:19-3(a). The proof paradigm under CEPA follows the three-step process used in discrimination cases under the Law Against Discrimination, N.J.S.A. 10:5-1 to -49. See Winters, supra, 212 N.J. at 90. To establish a prima facie case of a CEPA violation, N.J.S.A. 34:19-3(c), a plaintiff must present evidence that

> (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 v. McDevitt, 177 N.J. 451, 462 (2003)).]

We conclude that the evidence, viewed most favorably to plaintiff, presented a prima facie case under CEPA, albeit not a particularly strong one. However, plaintiff's case foundered on the next two steps of the proof paradigm:

> The burden of production then shifts "to the employer to articulate some legitimate,

> nondiscriminatory reason" for the adverse employment action. Once the employer does so, "the presumption of retaliatory discharge created by the prima facie case disappears and the burden shifts back to the [employee]." At that point, the employee must convince the fact finder that the employer's reason was false "and that [retaliation] was the real reason." The ultimate burden of proof remains with the employee.
>
> [Winters, supra, 212 N.J. at 90 (citations omitted).]

As previously noted, PNC presented a legitimate, non-retaliatory explanation for terminating plaintiff, i.e., her unsatisfactory work performance. On this record, plaintiff failed to produce evidence that the employer's reason for terminating her was "false 'and that [retaliaton] was the real reason.'" Ibid. In her brief, plaintiff implies that the decision was not fair because she did not have enough time to learn the job. However, the issue is not whether the decision was unfair, but only whether it was motivated by retaliatory animus. See Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994). Summary judgment was properly granted.

Affirmed.