

NOT TO BE PUBLISHED WITHOUT APPROVAL
FROM THE COMMITTEE ON OPINONS

JOSEPH SILVESTRI,

Plaintiff(s)

vs.

BOROUGH OF RIDGEFIELD,

Defendant(s).

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY

DOCKET NO. BER-L-848-19

CIVIL ACTION

OPINION

Argued: December 21, 2022
Decided: January 3, 2023

HONORABLE ROBERT C. WILSON, J.S.C.

Joanne Venino, Esq., appearing on behalf of Defendant, Borough of Ridgefield (from Keenan & Doris LLC)

Thomas D. Flinn, Esq., appearing on behalf of Plaintiff Joseph Silverstri (from Garrity, Graham, Murphy, Garofalo & Flinn, P.C.)

FACTUAL BACKGROUND

Plaintiff Joseph Silvestri (hereinafter “Plaintiff” or “Mr. Silvestri”) was employed by Defendant Borough of Ridgefield (hereinafter “Defendant” or “Ridgefield”) in various roles from 1997 to 2018. He began his career with Ridgefield as a 9-11 dispatcher before working his way up to Communications Director, where he was responsible for the servicing and operation of all of Ridgefield’s information technology (hereinafter “IT”). At all times relevant hereto, Mr. Silvestri was Ridgefield’s IT director.

On January 4, 2016, Mr. Silvestri was informed by Borough Council President Castelli that as the Department Head of IT, he was not entitled to overtime compensation (hereinafter “comp time”). Ten months later, on October 9, 2016, Mr. Silvestri received an email alert that the Lightning Alert System at Willis Park in Ridgefield was off-line during a storm (hereinafter the “Willis Park matter”). Mr. Silvestri determined that someone had tampered with the system,

causing it to go offline. He referred the matter to the Ridgefield police department. It was later determined that a man named Paul Schaeffer had tampered with the Lightning Alert System. Mr. Silvestri was summoned to appear in Ridgefield Municipal Court to testify regarding Schaeffer's alleged conduct; however, at no point during the criminal proceedings did Mr. Silvestri testify. Paul Schaeffer was purported by Mr. Silvestri to be a friend of Councilman Javier Acosta. Mr. Silvestri therefore speculates that Councilman Acosta thereafter developed a grudge with Mr. Silvestri from his involvement in the Willis Park matter and hypothesizes that Councilman Acosta took actions undermining Mr. Silvestri's employment.

On or around February 24, 2017, Mr. Silvestri asked Payroll Officer Isabel Meurer to enter his "earned comp time" for the prior week. This request was denied, as he had been notified over one year prior that he was not eligible for comp time due to his status as a Department Head. Further, around this time, Raymond Ramirez was appointed Borough Administrator for Ridgefield. The position did not go to Linda Silvestri, Mr. Silvestri's wife, who ostensibly wanted the position.

Then, almost another full year later, on January 19, 2018, Mr. Silvestri was called into a meeting with Borough Administrator Ramirez, Councilman Acosta, Payroll Officer Meurer, and Public Works Office Manager Mildred Rojas. He was asked to make overriding adjustments to the time and attendance system, something that was a part of his job duties and which he had previously done without issue. During this meeting, Mr. Silvestri refused to make the requested time and attendance system adjustments, claiming they were unnecessary. The adjustments were then made by another Borough of Ridgefield employee without issue.

Throughout early 2018, numerous additional claimed contentions arose between Councilman Acosta and Mr. Silvestri. In January, Councilman Acosta became angry with Mr.

Silvestri due to a malfunctioning security camera in the Ridgefield Police Department parking lot. On February 1, 2018, Councilman Acosta told Mr. Silvestri to cancel an order for Dell servers. On February 4, 2018, Mr. Silvestri was twice called and criticized by Councilman Acosta for issues stemming from a library phone project. On February 14, 2018, Councilman Acosta told Mr. Silvestri he was not satisfied with the security of Ridgefield's IT system and wanted to have an IT audit conducted.

Additionally, on February 9, 2018, Payroll Officer Meurer directed Augie Caruso of Time Systems International, the software company providing time and attendance software to Ridgefield, to stop answering Mr. Silvestri's calls. Ms. Meurer's stated justification in doing so was that she believed that Mr. Silvestri had become a disgruntled employee who could take action to sabotage Ridgefield's timekeeping system.

On March 26, 2018, Mr. Silvestri was advised that he would have to relocate his office out of the Ridgefield Police Department building. Ridgefield's reasoning in doing so was twofold. It intended on establishing a monitoring station for the high school's security cameras in the Police Department, and Mr. Silvestri's office was the only suitable room. Further, Police Chief Gallagher had concerns about the placement of Mr. Silvestri's office in the Police Department, as he frequently had outside vendors visit his office, which required them to travel through areas of the Police Department which were not open to the public.

In February of 2018, Ridgefield engaged KAB Computers (hereinafter "KAB") to conduct a review of Ridgefield's servers and IT security. Five (5) members of Ridgefield's Borough Council, as well as the Borough Administrator, approved the review due to rising IT costs and a looming budget shortfall. On July 17, 2018, on the advice of KAB, the Ridgefield Communications Committee recommended to the Mayor, Council, Borough Administrator, and

CFO of Ridgefield that the Borough should outsource its IT services to save money and improve its operating efficiency. Around this time, Ridgefield was experiencing budget shortfalls due to the creation of the Consolidation Act of the Meadowlands Commission. On September 12, 2018, Mr. Silvestri was advised by the Borough Administrator that Ridgefield would be outsourcing its IT services and eliminating his position. On October 3, 2018, an Ordinance eliminating the position of IT Director passed. At the time of the Ordinance's passing, Councilman Acosta was no longer on the Borough Council.

Mr. Silvestri filed his Complaint against Ridgefield on January 30, 2019, alleging common law retaliation (Count One); a violation of the Conscientious Employee Protection Act (hereinafter "CEPA") (Count Two); and a violation of the Exempt Fireman's Statute (Count Three).

For the reasons stated herein, Defendant's Motion for Summary Judgment is **GRANTED**.

STANDARD OF REVIEW

The New Jersey procedural rules state that a court shall grant summary judgment "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). In Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995), the Supreme Court set forth a standard for courts to apply when determining whether a genuine issue of material fact exists that requires a case to proceed to trial. Justice Coleman, writing for the Court, explained that a motion for summary judgment under R. 4:46-2 requires essentially the same analysis as in the case of a directed verdict based on R. 4:37-2(b) or R. 4:40-1, or a judgment notwithstanding the verdict under R. 4:40-2. Id. at 535-536. If, after analyzing the evidence in the light most favorable to the non-moving party, the motion court determines that "there exists a single unavoidable resolution

of the alleged dispute of fact, that issue should be considered insufficient to constitute a ‘genuine’ issue of material fact for purposes of R. 4:46-2.” Id. at 540.

RULE OF LAW AND DECISION

Mr. Silvestri Waived Count One by Filing Count Two

Mr. Silvestri may not pursue a wrongful termination claim under both common law as well as CEPA. CEPA provides, in pertinent part, that “the institution of an action in accordance with this act shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, State law, rule or regulation or under the common law.” N.J.S.A. 34:19-8. State law claims based upon the same set of facts as a CEPA claim are duplicative and are properly dismissed. Young v. Schering Corp., 141 N.J. 16, 29 (1995).

Count One of Mr. Silvestri’s Complaint, as stated above, is a common law claim for wrongful discharge. Mr. Silvestri states that he was wrongfully discharged in retaliation for his cooperation as a witness in Willis Park matter, for his refusal to manipulate the time and attendance records, and for his complaints regarding the hostile work environment he was caused to endure.

Count Two of Mr. Silvestri’s Complaint is for wrongful discharge in violation of CEPA. He cites to N.J.S.A. 34:19-3(b), alleging termination in retaliation for providing information or testifying before a public body investigating a violation of law. Mr. Silvestri’s Complaint further alleges in Count Two that his firing was due to his refusal to participate in alleged manipulation of time and attendance records for employees of Ridgefield. These allegations mirror the claims set forth in Count One.

The allegations in the Count Two CEPA claim clearly encompasses the allegations included in Count One’s common law retaliation claim. Thus, Mr. Silvestri waived his common law retaliation claim by filing the CEPA claim in Count Two of his Complaint. As such, Count

One of Mr. Silvestri's Complaint is dismissed as waived.

Mr. Silvestri's CEPA Claim Fails as to the Willis Park matter Because He Cannot Prove a *Prima Facie* Case

Mr. Silvestri cannot prove all elements required for a *prima facie* CEPA claim as to the Willis Park matter. In certain circumstances, CEPA protects an employee from retaliatory action taken by his employer. In this case, Mr. Silvestri alleges in Count Two that Ridgefield retaliated against him in violation of CEPA, specifically, in violation of N.J.S.A. 34:19-3 subsections (b) and (c). N.J.S.A. 34:19-3(b) protects an employee who 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 "Retaliatory action," defined as "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(e).

To establish a *prima facie* claim under N.J.S.A. 34:19-3(b), an employee must prove that: (1) the employee engaged in a protected activity; (2) the employee suffered an adverse employment action; (3) the adverse employment action was taken in retaliation for the employee's participation in the protected activity; and, (4) a causal connection existed between the protected activity and the adverse employment action. Dzwonar v. McDevitt, 177 N.J. 451, 462, (2003); Kolb v. Burns, 320 N.J. Super. 467, 476 (App.Div.1999).

Ridgefield has stipulated that Mr. Silvestri had engaged in a protected activity by providing information to the authorities regarding the Willis Park matter. However, pursuant to N.J.S.A. 34:19-3(b), Mr. Silvestri was required to further prove that, due to his cooperation in the Willis Park matter, he suffered an adverse employment action as defined by the statute; that a causal connection existed between the protected activity and the adverse employment action; and that he filed his Complaint within one (1) year of the adverse employment action. Mr. Silvestri has

essentially alleged that, following the Willis Park matter, every action taken by Ridgefield with which he disagreed was an adverse employment action within the definition of CEPA. The Court deems these assertions devoid of merit, for the reasons stated below.

I. The Removal of Comp Time is Not an Adverse Employment Action

On January 4, 2016, Mr. Silvestri was notified that he was no longer eligible for comp time due to his status as the head of the IT Department. This policy is explicitly laid out in the Borough of Ridgefield Personnel Policy and Procedures Manual. Same is applied indiscriminately to all Department Heads throughout the Borough of Ridgefield. Further, this policy is compliant with the Fair Labor Standards Act (hereinafter “FLSA”).

Mr. Silvestri has claimed that the January 2016 revocation of his comp time eligibility was retaliation for his cooperation in the Willis Park matter. Such an assertion comes in spite of the fact that the Willis Park matter occurred in February of 2017, and his cooperation in the criminal investigation into Paul Schaeffer’s involvement occurred in the Spring of 2017. Clearly, Mr. Silvestri was notified of his ineligibility for comp time over one (1) full year prior to the Willis Park matter and his subsequent cooperation in the investigation. As such, Mr. Silvestri cannot claim that the revocation of his comp time eligibility was an adverse employment action covered under CEPA because the adverse employment action significantly predates the protected activity.

II. Ridgefield Not Offering Linda Silvestri the Borough Administrator Position is Not an Adverse Employment Action

Mr. Silvestri further alleges that his wife, Linda Silvestri, was passed over for the position of Ridgefield Borough Administrator as a form of retaliation against Mr. Silvestri. At the outset, it is worth noting that there is no basis in the law for extending CEPA’s adverse employment actions for failing to promote the wife of the claimant. Further, Mr. Silvestri has not and cannot prove that Mrs. Silvestri would have been appointed Borough Administrator had Mr. Silvestri not

engaged in the protected activity. Regardless of the aforementioned, it is clear from the record that the appointment of Mr. Ramirez was planned prior to February of 2017, when the Willis Park matter transpired.

Mr. Ramirez, who was appointed Borough Administrator in February 2017, was approached to take the position numerous times prior to his appointment. The last time he was asked was in December of 2016, months prior to the Willis Park matter and subsequent criminal investigation. As such, the desire to appoint Mr. Ramirez as Borough Administrator predates Mr. Silvestri's protected claimed activity, and is an insufficient basis for a CEPA claim.

III. Councilman Acosta's Dissatisfaction with Mr. Silvestri's Job Performance is Not an Adverse Employment Action

The complained of conduct by Councilman Acosta does not rise to the level of an actionable adverse employment action. As previously set forth, in order to give rise to the level of a retaliatory action required for a CEPA claim, an employer's action must have either impacted on the employee's "compensation or rank" or be "virtually equivalent to discharge." Klein v. University of Medicine and Dentistry of New Jersey, 377 N.J. Super. 28, 47 (App.Div.), cert. denied, 185 N.J. 39 (2005); Hancock v. Borough of Oaklyn, 347 N.J. Super. 350, 360 (App.Div. 2002). None of the foregoing allegations affected Plaintiff's compensation or were equivalent to a discharge. Councilman Acosta's alleged conduct was not equivalent to a discharge and did not affect his compensation. A mere "bruised ego or injured pride on the part of the employee," is not actionable." Klein v. Univ. of Med. & Dentistry of N.J., 377 N.J. Super. 28, 46 (App. Div.), cert. denied, 185 N.J. 39 (2005).

During discovery, Mr. Silvestri disclosed all conduct of Councilman Acosta which he deemed to be retaliatory and therefore amounting to an adverse employment action. The complained of conduct, simply put, does not amount to an adverse employment action, but mere

dissatisfaction with a perceived underperforming employee.

The alleged adverse employment actions and hostility are as follows: In January 2018, Councilman Acosta was angry with Mr. Silvestri because a security camera focusing on the Ridgefield Police Department lot was not in working condition. On February 1, 2018, Councilman Acosta instructed Mr. Silvestri to cancel an order for Dell servers which he had previously placed. On February 4, 2018, Councilman Acosta called Mr. Silvestri twice and criticized him regarding his role in a library phone system project. On February 14, 2018, Councilman Acosta told Mr. Silvestri he was not satisfied with the security of Ridgefield's IT system and wanted to have an IT audit conducted. On March 26, 2018, Mr. Silvestri was advised that he would have to move his office out of the Ridgefield Police Department, due to Councilman Acosta's decision to repurpose the office for high school security cameras. The relocation was also deemed necessary due to the number of outside vendors which visited Mr. Silvestri in his office, which was located within a secure part of the Police Department building not otherwise accessible to the public.

The aforementioned conduct, while likely inconvenient for Mr. Silvestri, does not rise to the level of an actionable adverse employment action under CEPA.

IV. Isabel Meurer Directing Time Systems International to Ignore Mr. Silvestri's Calls is Not an Adverse Employment Action

On February 9, 2018, Mr. Silvestri learned that Payroll Officer Meurer had directed Augie Caruso, an employee for Time Systems International, to stop returning Mr. Silvestri's phone calls. Ms. Meurer admitted in deposition that she did so because she had become concerned with Mr. Silvestri's conduct as an employee of Ridgefield. She stated that, at the time, she viewed Mr. Silvestri as a disgruntled employee who might sabotage Ridgefield's timekeeping system.

There no evidence that the action taken by Ms. Meurer was at the direction of Councilman Acosta. As such, this allegation does not relate to Councilman Acosta in any way, is not related

to Mr. Silvestri's involvement in the Willis Park matter, and is not an actionable adverse employment action under CEPA.

V. The Elimination of Mr. Silvestri's Position by Statute is Not an Adverse Employment Action

Mr. Silvestri states that his position was eliminated in September of 2018 due to his role as a witness in the Willis Park matter. Mr. Silvestri's position was eliminated after Ridgefield engaged KAB to conduct an audit of Ridgefield's IT systems, which resulted in the recommendation that Ridgefield outsource its IT department for lower costs and to improve efficiency. Mr. Silvestri's position was officially eliminated on October 3, 2018, by Ordinance 2346.

"[T]he mere fact that [an] adverse employment action occurs after [the protected activity] will ordinarily be insufficient to satisfy the plaintiff's burden of demonstrating a causal link between the two." Young v. Hobart West Group, 385 N.J. Super. 448, 467 (App. Div. 2005). In Young, the Appellate Division affirmed the trial court's grant of summary judgment to the employer, holding that even as little as a four-month period between alleged protected activity and adverse employment action is not sufficient to support a *prima facie* case of employment retaliation and plaintiff would have to set forth other evidence to establish a causal link between her termination and her alleged complaints.

Ordinance 2346 eliminating Mr. Silvestri's position was passed over one (1) year after the Willis Park matter and Mr. Silvestri's subsequent appearance at Paul Schaeffer's Municipal Court trial with the intention to testify. Further, Councilman Acosta was no longer a member of the Borough Council when Ordinance 2346 was introduced and then passed.

While it is true that Ridgefield retained an outside IT consultant to conduct an audit of its IT servers and security, it is clear based upon the record that Ridgefield's purpose for doing so was

unrelated to Mr. Silvestri's involvement in the Willis Park matter or his relationship with former Councilman Acosta. That claim was based on nothing more than the sheer speculation of Mr. Silvestri.

Ridgefield's Communications Committee had myriad concerns with Mr. Silvestri's methods as director of the IT Department. Chiefly among these concerns was that Mr. Silvestri continued to maintain Ridgefield's system backup on tape equipment, an antiquated system. In spite of the Communications Committee's recommendation that Mr. Silvestri transition Ridgefield's system backup from tape equipment to cloud-based software, he refused to do so. Further, the Communications Committee wanted Mr. Silvestri to upgrade Ridgefield's PC workstations and servers himself, as Microsoft was no longer providing service for the Windows 7 operating system used throughout Ridgefield. Mr. Silvestri did not know how to do this, so he opted instead to purchase new PCs and servers at a substantial cost.

Moreover, during this time, budgetary shortfalls were hitting the Borough of Ridgefield due to a tax sharing program implemented by the Meadowlands Commission which saw Ridgefield receive only half of its anticipated payments from the Meadowlands Commission. Ridgefield's decision to retain an independent contractor to audit its IT system was shown to be motivated by its desire to see if it could improve its efficiency and lower costs, not retaliate against Mr. Silvestri for his role in the Willis Park matter.

After receiving the results of the audit from KAB, whereby it was determined that Ridgefield could improve its efficiency by outsourcing its IT services, Ridgefield understandably took this opportunity. While KAB did then receive the contract for the outsourcing of Ridgefield's IT services, this was due to it being the lowest bidder.

Thus, Mr. Silvestri cannot prove a *prima facie* CEPA claim under N.J.S.A. 34:19-3 because

the aforementioned employment actions taken against him are neither adverse employment actions, nor are they causally related to his engagement in a protected activity. As such, Ridgefield is entitled to Summary Judgment dismissing Count Two of Mr. Silvestri's Complaint.

Mr. Silvestri's Refusal to Adjust the Time and Attendance System is Not a Protected Activity to Which CEPA Applies

Mr. Silvestri further claims that his refusal to make overriding adjustments to Ridgefield's time and attendance system amounts to a protected activity thus giving rise to a CEPA claim. The Court 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. For a discussion of the requirements for a *prima facie* case under CEPA, see the discussion of same under the preceding subheading.

It is clear from the record that adjustments to Ridgefield's time and attendance system were frequently required, due to glitches in the system and other common errors committed by employees as they entered their timesheets. Prior to the January 19, 2018, meeting during which Mr. Silvestri refused to make overriding adjustments to the timesheets of Ridgefield's employees, he had routinely done so as part of his job duties. Mr. Silvestri confirmed this himself in deposition. Moreover, such adjustments, which are required in order to ensure that all timesheets are accurate and employee wages are paid accordingly, is not in violation of any public policy, rule, regulation or statute.

Mr. Silvestri has 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. Accordingly, Mr. Silvestri has engaged in no protected activity whatsoever which may form the basis for a CEPA claim against Ridgefield.

Mr. Silvestri's Firemen's Exempt Claim Fails Because He Failed to Prove His Firing was Due to Political Reasons

Mr. Silvestri's position as Director of IT was eliminated due to good faith economic reasons, not political reasons. As such, Count Three of his Complaint 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.

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

Whenever any person possessing an exempt fireman certificate holds an office, position or employment of the State, or a county or municipality or a school board or board of education 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.

Further, N.J.S.A. 40A:14-63, provides that

No department of the State government nor any board of chosen freeholders of a county, or governing body of a municipality, or a school board or board of education 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 New Jersey Supreme Court has interpreted the Firemen's Exempt Statute as authorizing governmental bodies to abolish offices held by exempt firemen "for good faith economic reasons." Viviani v. Borough of Bogota, 170 N.J. 452 (2002). In Viviani, the municipality had reduced its workforce within the 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."

In Roe v. Borough of Upper Saddle River, 336 N.J. Super. 566, 571-72 (App. Div. 2001), a case that preceded Viviani, the Appellate Court stated: For as long as the Exempt Firemen's Tenure Act in its various forms has been in effect, the protections accorded thereunder have never

been applied to prevent a bona fide, good faith governmental action, the coincidental effect of which may be the abolition of a position held by an exempt fireman who otherwise would be protected from termination. That is to say, the long-standing and consistent enforcement of the protections accorded by the various provisions of the Exempt Firemen's Tenure Act has always been in the context of governmental action ostensibly labeled for economy or other good faith basis but which, in fact, has been aimed at removing the exempt fireman or veteran.

While Mr. Silvestri 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 and stated at length herein, Mr. Silvestri'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 Roe 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.

As such, Count Three of Mr. Silvestri's Complaint is dismissed.

CONCLUSION

For the reasons stated herein, Defendant Borough of Ridgefield's Motion for Summary Judgment is hereby **GRANTED**.