NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4223-08T2

MICHAEL R. BUCCILLI,

Plaintiff-Appellant,

v.

STATE OF NEW JERSEY, DAVID JILLSON, FRANCIS DONLAN, BRIAN REILLY, GEORGE MALAST, DONALD IZZI, MICHAEL LURAKIS, and JOSEPH R. FUENTES,

Defendants-Respondents.

Submitted September 27, 2010 – Decided April 6, 2011

Before Judges Rodríguez and Grall.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-6664-05.

Jacobs & Barbone, attorneys for appellant (Louis M. Barbone, of counsel; Eric H. Lubin, on the brief).

Paula T. Dow, Attorney General, attorney for respondents (Lewis A. Scheindlin, Assistant Attorney General, of counsel; Christina M. Glogoff, Deputy Attorney General, on the brief).

PER CURIAM

New Jersey State Police Trooper Michael R. Buccilli appeals from the March 19, 2009, order of the Law Division dismissing his Conscientious Employee Protection Act (CEPA)[1] retaliation claim, and granting summary judgment to defendants State Of New Jersey, David Jillson, Francis Donlan, Brian Reilly, George Malast, Donald Izzi, Michael Lurakis, and Joseph R. Fuentes (collectively "State defendants"). We affirm.

These are the facts, viewed in the light most favorable to Buccilli. See Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995); R. 4:46-2(c). On April 19, 2005, Buccilli reported to the shooting range wearing a Class B uniform with a yellow service bar sewn upon the sleeve. These bars are informally referred to in the State Police community as "snot bars." A fellow trooper informed him that service bars are not allowed on Class B uniforms. Another trooper called the Bass River Squad and told them that Buccilli showed up to shoot "out of uniform." Buccilli immediately removed the yellow bar from the uniform and continued his shooting practice. Several instructors made "jovial comments" about the incident throughout the remainder of the shoot. Buccilli "believe[d] they were joking and were not trying to intentionally upset [him.]"

[1] N.J.S.A. 34:19-1 to -8.

When Buccilli reported to work three days later, he logged onto the Computer Aided Dispatch (CAD) system and noticed an entry that "said something to the effect of Trooper Buccilli . . . had snot bars sewn onto his civilian clothes." He also found several yellow sticky notes taped all around his mailbox and locker. Buccilli considered this to be a joke relating to the service stripe incident. Inside the locker, however, Buccilli found that someone had painted a yellow stripe onto the left sleeve of his uniform.

Buccilli reported the incident to his immediate supervisor, but asked the supervisor not to tell anyone else because he was afraid of being "harassed, ostracized, [or] blackballed" for being a "rat." Nevertheless, the supervisor reported the incident to Staff Sergeant Randik. On April 23, 2005, Buccilli told Randik that he did not wish to formally report the incident because he "did not want to be ostracized and labeled as a troublemaker at the station." Subsequently, Lieutenant David Jillson spoke to Buccilli about the "rumor" he heard about the uniform incident. Buccilli "declined to advise [him] of any problems."

The next day, Randik told Buccilli he would be given two days to work on his overdue work reports. For the next three weeks, Buccilli worked on the reports but was often out sick.

One day while Buccilli was working on his reports, he heard SFC Francis Donlan comment to Jillson that "negative performance notices should be issued to personnel who had outstanding reports." Buccilli thought the comment was directed at him. He explained to Donlan that his reports were late because he had a medical condition that kept him out of work and he had an excessive volume of reports to write that month. Donlan responded that this was "no excuse" and threatened to put a negative review in his file. The reports were eventually completed. Buccilli received no discipline for their lateness.

In April 2005, Buccilli attended a squad meeting. Randik noted that several troopers were delinquent in their log book entries and ordered the squad to update the log book immediately. Buccilli was one of these troopers. His last entry was dated March 21, 2005, more than five weeks earlier.

From April 29, 2005, until May 18, 2005, Buccilli was not at work because he either had scheduled time off, or was ill. He did come in on two days when he worked to complete the overdue reports. Upon his return on May 18, 2005, he found a negative progress note in his mailbox stating that "Buccilli is counseled for failure to maintain/update vehicle impound entry." Eight other troopers also received a negative progress note for

the same reason. After receiving the progress note, Buccilli went to Jillson to grieve the progress note.

He told Jillson about the April 22 locker/uniform incident, which he had discussed with Randik. Jillson acceded to Buccilli's request not to initiate an investigation. However, about an hour later, Jillson informed Buccilli that "he had no choice but to make an internal investigation."

Jillson reported the complaint to the Office of Professional Standards (OPS). Because the persons involved in the locker/uniform incident could not be identified, Jillson could not notify any individual troopers that they were subject to an OPS investigation. He did speak individually to supervisory sergeants to advise them that he "didn't want to see a repeat of that type of incident." As to Buccilli's negative progress note, Jillson interviewed Buccilli and Rankin, and ultimately upheld the contents of the progress note.

According to Buccilli, his coworkers treated him differently after he reported the locker/uniform incident. In one instance, Buccilli noticed that a fellow Trooper "placed a lunch order while at the station and included everyone at the station except [him.]" In another incident, Buccilli entered the station and passed by Donlan and another Trooper, whose conversation ceased. Donlan looked directly at Buccilli.

Buccilli waved hello, but Donlan did not acknowledge the gesture. The other Trooper turned his back away from Buccilli.

In May 2005, Buccilli began an assignment rotation to the Criminal Investigations Office (CIO). Buccilli's participation was scheduled to last two twenty-eight-day cycles. However, in early June 2005, Captain Cosgrove sent an email to station commanders throughout the State notifying them that all CIO assignments would end at the end of the first cycle, and no other Troopers would be assigned to the CIO. Thus, Buccilli's assignment to the CIO ended early.

Beginning June 3, 2005, Buccilli went out on sick leave for several months. After thirty days of absence, Buccilli was placed on administrative absence. After more than a month had passed, Dr. Lurakis, the State Police's Regional Division Physician, contacted Buccilli's private physician, Dr. Marmar, because Buccilli had twice refused requests for copies of his medical records. Dr. Lurakis noted that "Dr. Marmar was shocked that this Trooper has been out [two] months. He never authorized it, "and did not think the condition required absence from duty. Buccilli was ordered to attend an appointment with the Environmental & Occupational Health Science Institute to determine his duty status.

Buccilli was assigned to light duty in Troop A Headquarters and Lieutenant Brian Reilly told him to report on January 9, 2006. However, on January 8, 2006, Buccilli called Reilly and reported being sick. Buccilli received a note from his personal physician stating that he should return to work on February 9, 2006, and later received a second note stating that he should return to work on March 9, 2006. On February 15, 2006 Colonel Joseph R. Fuentes wrote Buccilli to notify him that he "will not reappoint [Buccilli] to a succeeding enlistment term." Buccilli never returned to work prior to the end of his term of employment.

Buccilli sued the State, alleging a CEPA violation claim.[2] After discovery was completed, the State defendants moved for summary judgment. Judge William E. Nugent issued an order granting summary judgment to the State defendants on the CEPA claim. The judge found that, as a matter of law, aside from the termination of his employment, there was no adverse employment action taken against Buccilli and no element of causation established between the termination and any protected conduct.

On appeal, Buccilli contends that "the totality of the circumstances show that genuine issues of material fact exist as

[2] Buccilli also filed a Law Against Discrimination Claim, pursuant to N.J.S.A. 10:5-1 to -42, which he later abandoned.

to whether defendants, by their actions, were in violation of CEPA." He argues specifically that adverse employment actions were taken against him in retaliation for his whistle-blowing activity and that these actions are causally related to Buccilli's whistle-blowing activity. We disagree.

The purpose of CEPA, "is 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). Accordingly, CEPA provides in part:

> An employer shall not take any retaliatory action against an employee because the employee does any of the following:
>
> . . . .
>
> 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.
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> [N.J.S.A. 34:19-3.]

To establish a prima facie case of unlawful retaliation under CEPA, a plaintiff must establish 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. 34:19-3c; (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.
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> [Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003) (citing Kolb v. Burns, 320 N.J. Super. 467, 476 (App. Div. 1999)).]

CEPA should be construed liberally to effectuate the legislative goal of encouraging employees to report unethical or illegal workplace activities. Green v. Jersey City Bd. of Educ., 177 N.J. 434, 448 (2003).

In granting summary judgment, Judge Nugent found that Buccilli failed to establish that an adverse action was taken against him or that there was a connection between his whistle-blowing and the alleged actions taken against him. We concur with the judge that "there's really not any nexus that can be demonstrated between the report of this paint on his shirt sleeve and these other instances."

Summary judgment should 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 judgment or order as a matter of law." R. 4:46-2(c). We use the same summary judgment standard that is used by trial courts. Jolley v. Marquess, 393 N.J. Super. 255, 267 (App. Div. 2007) (citing Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998)).

A reviewing court must determine "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, supra, 142 N.J. at 540. All favorable inferences are given the non-moving party. Id. at 536. However, a court should not hesitate to grant the motion for summary judgment if the evidence "'is so one-sided that one party must prevail as a matter of law.'" Id. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)).

Applying that standard here, we affirm. After a careful review of the proofs and the briefs, we conclude that Judge Nugent's application of the law was correct. See Jolley, supra, 393 N.J. Super. at 267; Manalapan Realty, L.P. v. Twp. Comm. of

Manalapan, 140 N.J. 366, 378 (1995). CEPA defines a "retaliatory action" as a "discharge, suspension or demotion of an employee, or any other adverse employment action taken against an employee in the terms and conditions of employment." N.J.S.A. 34:19-2(e). However, "not every employment action that makes an employee unhappy constitutes 'an actionable adverse action.'" Nardello v. Twp. of Voorhees, 377 N.J. Super. 428, 434 (App. Div. 2005) (quoting Cokus v. Bristol Myers Squibb Co., 362 N.J. Super. 366, 378 (Law Div. 2002), aff'd, 362 N.J. Super. 245 (App. Div.), certif. denied, 178 N.J. 32 (2003)). No such showing was made here.

In addition, an employee who claims retaliation must also demonstrate that "a causal connection exists between the whistle-blowing activity and the adverse employment action." Dzwonar, supra, 177 N.J. at 462. The causal connection "can be satisfied by inferences that the trier of fact may reasonably draw based on circumstances surrounding the employment action." Maimone v. City of Atlantic City, 188 N.J. 221, 237 (2006). Here, the facts permit no such reasonable inferences. We agree with Judge Nugent that Buccilli's termination is too far removed in time from his protected acts to draw a causal connection between them.

Affirmed.