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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4980-09T4

SANDY AVILES,

Plaintiff-Appellant,

v.

BIG M, INC., a corporation,

Defendant-Respondent,

and

MARINA AMAYA, individually,

Defendant.

Argued January 24, 2011 – Decided March 8, 2011

Before Judges Rodríguez and LeWinn.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-1254-08.

Alan L. Krumholz argued the cause for appellant (Krumholz Dillon, PA, attorneys; Mr. Krumholz, on the brief).

Stanley L. Goodman argued the cause for respondent (Fox Rothschild, attorneys; Mr. Goodman, of counsel; Mr. Goodman and Keith A. Reinfeld, on the brief).

PER CURIAM

Plaintiff Sandy Aviles appeals from the June 20, 2008 order terminating her claim pursuant to the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14, against her employer Big M, Inc. (Mandee), the owner of Mandee, a women's apparel retail store. She also appeals from two February 8, 2010 orders dismissing the remaining claims against Mandee and denying restoration of the CEPA claim. We affirm.

We review the facts presented on the summary judgment motions in the light most favorable to Aviles, and give her the benefit of all favorable inferences. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 536 & 540 (1984).

Aviles was hired by Mandee in May 1996 as a sales associate in its West New York store. By March 2007, she was promoted to manager of that store.

On December 31, 2007, a dressing room attendant notified Aviles that a customer, later identified as Lissete Farfan, had been in the dressing room for an extended period of time, and was making noises in the dressing room that sounded like she was trying to remove security tags from the merchandise. Farfan had entered the dressing room with three garments and emerged with one. Aviles found some merchandise tags in the dressing room after Farfan left. She approached Farfan and asked what happened to the other garments she brought into the dressing

room. According to Aviles, Farfan said that she did not steal anything and offered to let Aviles search her handbag. Aviles declined, saying that was not her job. Aviles claimed that she neither touched Farfan nor called the police because she was not sure that Farfan had stolen anything.

Aviles called her district manager, Victor Firavanti, about this situation. Firavanti told her not to call the police. When Farfan exited the store, the merchandise alarm was activated, indicating that a security tag was still attached to an item.

Two days later, Farfan called Mandee's customer service department to complain about her treatment by Aviles. The message was forwarded to Firavanti who then called Farfan to apologize for the incident.

A few days later, Mandee regional manager Ronda Hisiger called Farfan to discuss the complaint. Farfan told Hisiger that Aviles accused her of stealing and told her that "it was company policy to search her." Hisiger prepared a report, indicating that Farfan claimed that Aviles rummaged through her handbag.

Mandee requires all employees to attend loss prevention training and view their loss prevention video at the start of their employment and at the company's annual meetings for those

stores that have high levels of theft. Aviles acknowledged that she viewed the loss prevention video on at least two occasions. Mandee's loss prevention video provides four criteria that a store manager must follow before detaining or confronting a suspected shoplifter. The manager must:

> (1) personally observe the shoplifter conceal company owned merchandise;
> (2) know the exact location of the concealed merchandise;
> (3) maintain constant surveillance of the person after the concealment has occurred; and
> (4) make sure that person makes no effort to pay for the merchandise before leaving the store.

There is no written rule that states whether a manager is allowed to look into a customer's handbag.

Firavanti and Hisiger met with Michael Bush, director of human resources, Jim Selwood, director of loss prevention, and Rona Korman, general counsel, to discuss the incident. The meeting participants decided to further investigate Farfan's allegations. According to Selwood, the group agreed that if the allegations contained in Hisiger's report were true, Aviles would be fired because she violated company policy.

Firavanti and Hisiger visited Aviles at the West New York store. Hisiger questioned Aviles about what occurred during the December 31, 2007 incident. Hisiger reported to Bush that Aviles admitted to confronting Farfan and asking to search her

bag. Bush instructed Hisiger to terminate Aviles for violating company policy.

Aviles sued Mandee, alleging wrongful termination and violations of CEPA and the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Mandee moved to dismiss the complaint for failure to state a claim. Subsequently, Aviles moved to amend her complaint to add fellow employee Marina Amaya as a defendant and to add three additional counts for breach of an implied contract of good faith and fair dealing; wrongful termination of her employment in violation of public policy; and libel.[1] Judge Mary K. Costello dismissed Aviles' CEPA claim and granted her motion to amend her complaint.

In a pre-trial deposition, Farfan testified that Aviles was waiting outside the dressing room when she exited. Aviles asked to look inside Farfan's bag but she refused. Farfan stated that Aviles tried to grab her bag but she snatched it away. Aviles followed her from the dressing room to the cash register. Farfan felt embarrassed and humiliated by Aviles' actions. She asked one of the employees to speak to Aviles' manager. One of the employees gave Farfan the customer service telephone number. At the cash register, Farfan showed the inside of her handbag to

[1] The libel claim against Amaya was tried to a jury, which returned a no cause of action verdict.

Aviles and the employees behind the register. Her handbag was never opened until she opened it at the cash register. Aviles looked into the handbag when Farfan opened it.

After the conclusion of discovery, Mandee moved for summary judgment to dismiss the remainder of Aviles' claims. Aviles opposed Mandee's motion and moved to reinstate her CEPA claim. Judge Costello issued a written opinion on February 8, 2010, dismissing the remaining claims against Mandee and denying Aviles' motion to reinstate the CEPA claim.

Aviles appeals arguing that the judge erred in: (1) dismissing her CEPA claim because her action in confronting the suspected shoplifter was protected; (2) granting summary judgment on her common law claim for improper retaliatory discharge in violation of public policy; and (3) granting summary judgment on her claim that Mandee breached the covenant of good faith and fair dealing because of the contractual nature of her employment relationship with Mandee.

We begin our analysis by noting that, "[i]n New Jersey, an employer may fire an employee for good reason, bad reason, or no reason at all under the employment-at-will doctrine." Witkowski v. Thomas J. Lipton Inc., 136 N.J. 385, 397 (1994) (citing English v. Coll. of Med. & Dentistry, 73 N.J. 20, 23 (1977)). The only exceptions are when there is a claim that the employer

has violated CEPA; the LAD; or there is an implied contract based on an employee manual pursuant to the holding in Wade v. Kessler Inst., 172 N.J. 327, 339 (2002).

THE CEPA CLAIM

Aviles argues that her actions in confronting Farfan who she believed was shoplifting, were protected pursuant to CEPA and therefore, her claim should not have been dismissed by the trial court. Aviles argues that the protection afforded to employees by CEPA in reporting criminal actions of employers that has been interpreted as covering reporting of illegal actions of co-employees, should be extended to protect employees who report the wrongdoing of the employer's customer. We disagree.

The Supreme Court has noted that "CEPA codified the common-law cause of action, first recognized in Pierce v. Ortho Pharm. Corp., 84 N.J. 58, 72 (1980), which protects at-will employees who have been discharged in violation of a clear mandate of public policy." Higgins v. Pascack Valley Hosp., 158 N.J. 404, 417-418 (1999). "Thus, the CEPA establishes a statutory exception to the general rule that an employer may terminate an at-will employee with or without cause." Ibid. (citing Pierce, supra, 84 N.J. at 65). N.J.S.A. 34:19-3 provides in pertinent part:

An employer shall not take any retaliatory action against an employee because the employee does any of the following:

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, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, in the case of an employee who is a licensed or certified health care professional, reasonably believes constitutes improper quality of patient care; or

(2) is fraudulent or criminal, including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity;

. . . .

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, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any

> governmental entity, or, if the employee is a licensed or certified health care professional, constitutes improper quality of patient care;
>
> (2) is fraudulent or criminal, including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity; or
>
> (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.

"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).

In order to establish a prima facie CEPA claim, a plaintiff must show 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 the him or her; and (4) a causal connection exists between the whistle-blowing activity and the adverse employment action.

> [Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003) (citing Kolb v. Burns, 320 N.J. Super. 467, 476 (App. Div. 1999)).]

A plaintiff "need not show that his or her employer or another employee actually violated the law or a clear mandate of public policy." Ibid. (citing Gerard v. Camden Cnty. Health Servs. Ctr., 348 N.J. Super. 516, 522 (App. Div.), certif. denied, 174 N.J. 40 (2002)).

Here, Aviles confronted a customer of her employer who she believed was committing an act of shoplifting in violation of N.J.S.A. 2C:20-11. Aviles points to the holding of the Court in Higgins interpreting N.J.S.A. 34:19-3c, to extend protection to employees who disclose information related to illegal activities perpetrated by co-employees. 158 N.J. at 419. Aviles argues that the Higgins holding also extends protection to employees who engaged in whistle-blowing activity based on the actions of third parties such as customers. We disagree.

In support of her position, Aviles notes the expansive reading of the CEPA statute by the court in Hernandez v. Montville Twp. Bd. of Educ., 354 N.J. Super 467 (App. Div. 2002), aff'd. 179 N.J. 81 (2004). In Hernandez, the court reinstated a jury verdict in a case where the plaintiff, an elementary school janitor, reported the school's failure to timely remedy unsanitary and unsafe conditions. Id. at 477. In

addition, Aviles points to Potter v. Vill. Bank of N.J., 225 N.J. Super 547 (1988), a pre-CEPA case where the plaintiff, a bank manager, was fired for reporting suspected money laundering by his superiors. The court in Potter noted that "[i]t stands to reason that few people would cooperate with law enforcement officials if the price they must pay is retaliatory discharge from employment. Clearly, that would have a chilling effect on criminal investigations and law enforcement in general." Id. at 560. Aviles also points to decisions by courts in other jurisdictions upholding whistle-blower protections based upon public policy considerations of facilitating the reporting of criminal activity. See Schlichtig v. Inacom Corp., 271 F. Supp. 2d 597 (D.N.J. 2003); Nettis v. Levitt, 241 F.3d 186 (2d Cir. 2001); Palmateer v. Int'l. Harvester Co., 421 N.E.2d 876 (Ill. 1981). However, all of the cases cited by Aviles involve situations where an employee reported the wrongdoing of a fellow employee. Aviles cites no authority that extends whistle-blower protection to reporting wrongdoing of third parties.

We reject her argument and agree with Mandee's argument that Aviles' confrontation of a suspected shoplifter does not constitute a whistle-blowing activity pursuant to the CEPA. A plaintiff's job duties cannot be considered whistle-blowing conduct. See Massarano v. N.J. Transit, 400 N.J. Super. 474,

491 (App. Div. 2008) (holding that a plaintiff that was merely carrying out her employer's designated responsibilities in reporting what she believed was improper disposal of documents, did not qualify for whistle-blower status). Aviles cannot establish a prima facie case based on the elements set forth in Dzwonar because she does not allege that she "reasonably believed that . . . her employer's [or fellow employees'] conduct was violating either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy." 177 N.J. at 462. Aviles does not challenge Mandee's loss prevention guidelines, which require that an employee investigating shoplifting follow certain procedures, as violative of CEPA. In fact, Aviles asserts that she followed those guidelines.

THE PIERCE CLAIM

Aviles argues that the judge erred in granting summary judgment on her claim that her actions in prevention of shoplifting invoked a clear mandate of public policy and her conduct was protected under the common law principles of Pierce, supra, 84 N.J. 58. We disagree.

The Supreme Court "first recognized a common law cause of action for retaliatory discharge" in Pierce. Tartaglia v. UBS PaineWebber, Inc., 197 N.J. 81, 102 (2008) (citing Pierce,

supra, 84 N.J. at 72). "[A]n employee has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy." Pierce, supra, 84 N.J. at 72. The Court in Pierce reasoned that "[a]n employer's right to discharge an employee at will carries a correlative duty not to discharge an employee who declines to perform an act that would require a violation of a clear mandate of public policy." Ibid. The Court further noted that:

> In recognizing a cause of action to provide a remedy for employees who are wrongfully discharged, we must balance the interests of the employee, the employer, and the public. Employees have an interest in knowing they will not be discharged for exercising their legal rights. Employers have an interest in knowing they can run their businesses as they see fit as long as their conduct is consistent with public policy.
>
> [Id. at 71.]

Although "the Legislature enacted [CEPA], effectively creating a statutory cause of action for retaliatory discharge," it "did not entirely supplant Pierce." Tartaglia, supra, 197 N.J. at 103. "Instead, the Legislature recognized the continuing viability of the common law cause of action as an alternate form of relief, but included a statutory provision that deems the filing of a CEPA complaint to be an election of remedies." Ibid. (citing N.J.S.A. 34:19-8).

In an effort to establish the continuing viability of such causes of action, Aviles points to several cases where courts have upheld the common law protection against retaliatory termination pursuant to the Court's decision in Pierce. See Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988) (stating that "public policy of the State of New Jersey should protect those who are in good faith pursuing information relevant to a discriminatory discharge"); Cerracchio v. Alden Leeds Inc., 223 N.J. Super. 435, 446 (App. Div. 1988) (finding that "the reporting of unsafe conditions in the workplace by an employee is action in furtherance of [a] firmly held policy"); Macdougall v. Weichert, 144 N.J. 380, 399 (1996) (recognizing that "conduct that is directed against constitutionally-protected activity may violate a clear mandate of public policy, even though it may not offend any other statutory or legal standard" when a plaintiff was fired for voting against the interests of his employer at a council meeting); Ballinger v. Del. River Port Auth., 172 N.J. 586, 602 (2002) (holding that the common law cause of action was viable in a case where an employee was fired for reporting stealing by fellow employees to the police).

Aviles contends that the prevention of shoplifting is a clear mandate of public policy. However, she was not fired for

preventing shoplifting, but for violating Mandee's internal loss prevention policy. As stated already, Aviles does not argue that the loss prevention policy violates a clear mandate of public policy.

COVENANT OF GOOD FAITH AND FAIR DEALING CLAIM

Aviles also contends that the judge erred in granting summary judgment on her claim that Mandee "breached the covenant of good faith and fair dealing because it terminated her employment when she acted in accordance with the terms of the employer's manuals and training." Aviles argues that, because she was acting within the parameters of company policy, her employer's termination of her employment constitutes a breach of the covenant of good faith and fair dealing. Aviles' claim is without merit.

As stated already, in this State an employer may terminate an employee at will for good reason, bad reason, or no reason at all. Witkowski, supra, 136 N.J. 3 at 397 (citing English, supra, 73 N.J. at 23). However, "[a]n employment manual may alter an employee's at-will status by creating an implied contract between an employer and employee." Wade, supra, 172 N.J. at 339 (citing Woolley v. Hoffmann-La Roche, Inc., 99 N.J. 284, 297-98, modified on other grounds, 101 N.J. 10 (1985)). The Court in Woolley held that "absent a clear and prominent

disclaimer, an implied promise contained in an employment manual that an employee will be fired only for cause may be enforceable against an employer even when the employment is for an indefinite term and would otherwise be terminable at will." 99 N.J. at 285-286. "Whether an employment manual creates an enforceable contract is a question of law or fact depending on the given case." Wade, supra, 172 N.J. at 339. Nevertheless, "[a]n effective disclaimer by the employer may overcome the implication that its employment manual constitutes an enforceable contract of employment." Nicosia v. Wakefern Food Corp., 136 N.J. 401, 412 (1994) (citing Woolley, supra, 99 N.J. at 309). Aviles points to no provision in Mandee's employment manual that she claims creates a contractual relationship.

Although it is "true that in New Jersey an employer can discharge an 'at will' employee at any time and for any reason, this principle is a consequence of the fact that the length of an 'at will' employee's engagement is not controlled by contract." Nolan v. Control Data Corp., 243 N.J. Super. 420, 429 (App. Div. 1990). "In the absence of a contract, there is no implied covenant of good faith and fair dealing." Ibid. (citing Noye v. Hoffmann-La Roche Inc., 238 N.J. Super. 430, 433 (App. Div. 1990)). Thus, "New Jersey courts have not invoked the implied covenant of good faith and fair dealing to restrict

the authority of employers to fire at-will employees." Citizens State Bank of N.J. v. Libertelli, 215 N.J. Super. 190, 194 (App. Div. 1987) (citing Woolley, supra, 99 N.J. at 290-292).

Here, Aviles argues that the covenant of good faith and fair dealing:

> (1) arises from the employment relationship; (2) is manifested or demonstrated in employee manuals and policy writings; (3) was allegedly violated by the conduct of the Mandee at bar; and (4) should give rise to a cause of action, allowing tort damages for violation of the covenant resulting in, or constituting, a wrongful termination of employment.

Without citing authority, Aviles contends that "the fact that an employment be at will, whether by writing or orally, does not negate the existence of the contractual relationship for as long as it lasts." We are not persuaded.

Aviles signed an acknowledgement form which prominently stated that her "employment can be terminated by [her] or the Company, at any time with or without prejudice." Thus, she was an "at-will" employee at the time her employment was terminated and cannot invoke the covenant of good faith and fair dealing in asserting wrongful termination of her employment.

Affirmed.