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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0415-12T2

LARRY JOHNSON,

Plaintiff-Appellant,

v.

LEE ROPER and RESIDEX, L.L.C.,

Defendants-Respondents.

Argued May 6, 2013 - Decided July 18, 2013

Before Judges Ashrafi, Espinosa, and Guadagno.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket No. L-4424-10.

Mark C.G. Lawrence argued the cause for appellant (Forman & Cardonsky, attorneys; Mr. Lawrence, of counsel and on the brief).

Stacey K. Boretz argued the cause for respondents (Lindabury, McCormick, Estabrook & Cooper, P.C., attorneys; John H. Schmidt, Jr., and Ms. Boretz, on the brief).

PER CURIAM

Plaintiff appeals from the September 10, 2012 order of the Law Division granting defendants' motion for summary judgment and dismissing his complaint brought pursuant to the

Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14, against his former supervisor, Lee Roper and employer Residex, L.L.C. (Residex). Plaintiff's complaint alleged he was terminated from his position as a truck driver after having made multiple complaints that the truck was not adequately maintained and presented a safety risk while in use on roadways. Plaintiff argues that the trial court erred in determining that he had not established a prima facie case for a CEPA violation and that his testimony and pleadings sufficiently established such a violation. We disagree and affirm.

I.

Plaintiff was employed by Residex from June 2006 through November 5, 2009, as a truck driver. His complaint alleged that between May and September 2009, he "made numerous complaints, objections and/or disclosures to employees/agents" of defendants, "particularly" defendant Lee Roper, "concerning safety and maintenance issues" with his truck. On November 5, 2009, defendants terminated plaintiff's employment.

In addition to Roper, plaintiff claimed he made complaints regarding the maintenance of his truck to two co-workers. He also alleged he reported safety issues in his daily logs. In his answers to interrogatories, plaintiff expanded on the alleged safety issues and the form of his complaints:

> Although I brought various issues to Mr. Roper's attention over this period of time, my most persistent and serious complaint was that the truck's engine would shut down periodically and without warning while I was in traffic leaving me with no power brakes or steering. Despite my complaints the problem was never fixed.
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> . . . .
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> I do recall that in September 2009, the truck went in for service after I had been complaining about the issue with the engine shutting down and a problem with the lift gate. When it came back, the problem with the lift gate had been fixed, but Mr. Roper told me the problem with the engine shutting down was too expensive to fix.
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> In October 2009, I sent a letter to Mr. Roper about the problem by certified mail. Although that letter is dated at the top "May 11, 09," that date is not true . . . . On page 3 of the letter, I mention the events of September, 2009 with Mr. Roper saying that the engine problem was too expensive to fix. According to the United States Postal Service Track & Confirm website . . . my letter was delivered at 11:02 am on October 19, 2009. At the end of the letter, I put that I was sending a copy of the letter to the D.O.T., but I did not actually send it to the D.O.T. I was just trying to get Mr. Roper's attention.
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> On November 2, 2009, Residex purchased a replacement truck. I drove the truck on November 3, 2009. . . . On November 5, 2009 Lee Roper terminated my employment with Residex. . . . I asked him "why?" and he told me that he didn't have to tell me why.

Plaintiff testified that he used the same truck four days a week at Residex and first began experiencing a problem with the

truck's lift gate sometime in 2007. Plaintiff claimed the truck developed problems with oil leakage, a gas line problem, difficulty braking, and tire issues. He later added that the problems included "losing of compression power, the issue of bubbled tire[s], the issue with braking, the issue with the emergency brake, the issue with wipers, and . . . lighting, directional signal, tailgate." One of plaintiff's complaints was that the truck had surpassed 100,000 miles -- he did not feel that any truck with so many miles is safe.

Plaintiff noted the truck's issues in his daily logs and made repeated verbal complaints to defendant Lee Roper. He testified the truck was routinely taken to a mechanic in response to his complaints of engine power loss, but the problem was never fully resolved. By contrast, his reported problems with tire bubbling, brake weakness, emergency brake slipping, wear of the windshield wipers, and lack of power in the tail lift were all remedied. The only problem not fixed "to perfection" was the loss of engine power.

When asked why he waited until October 2009 to send a letter to defendants regarding his safety concerns, plaintiff responded:

> One reason, the truck went out for repair, another truck was rented, the original truck came back. As I said before, it would come back, they would work good, and then the

> same issue would take place again, and I would still notate it down on my daily log. And one incident happened that I said I have to get the attention now. I have to let them know this truck is a death trap.

Defendants sent plaintiff's truck for repairs after he complained about a problem, with one exception. He claims they declined to fix "[t]he head gasket," telling him it was too expensive. However, after plaintiff's complaint, defendants sold the truck and purchased a new one.

Defendants offered proof that the fuel tank on plaintiff's truck, which was diagnosed as the cause of engine power loss, was replaced on November 6, 2008, and that the truck passed an inspection two months later.

Defendants also offered evidence of plaintiff's poor employee evaluation regarding his upkeep of the truck in 2006, although plaintiff claimed he did not recall ever receiving such evaluations or being informed of them. When presented with Residex documents showing he was reprimanded for inappropriate workplace attire in November 2008, plaintiff testified that he did not recognize the documents and only recalled one instance when he was told his attire was inappropriate. Plaintiff did recognize a May 2007 letter memorializing a customer complaint against him for refusing to unload the customer's product, but denied the substance of the complaint. Plaintiff also disputed

the contents of a second customer complaint dated April 2007, which included an allegation of initiating a fist fight with a customer's security guard. Plaintiff denied knowledge of any complaints from a customer for untimely deliveries. He also denied Residex's allegation that he took the company truck without permission to help his wife move, after leaving work early, complaining of a back injury.

Plaintiff claimed that Residex sold the unsafe truck in October or November of 2009, and that he used a rental truck for a brief period prior to Residex purchasing another truck, which he only used twice. Plaintiff testified that he returned from a delivery to Manhattan, was sent to Roper's office, and was told that he was being terminated. When he asked why, he was told that no reason was necessary.

Oral argument on defendants' motion for summary judgment was held before the trial court on July 17, 2012. The trial court issued its written decision on September 10, 2012.

II.

We "employ the same standard that governs trial courts in reviewing summary judgment orders." Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). A movant will be successful if he proves there are no genuine issues of material

fact and that he is entitled to judgment as a matter of law. Ibid.; Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 539-40 (1995); R. 4:46-2. In reviewing a motion for summary judgment, we view the evidence in the light most favorable to the nonmoving party. See Brill, supra, 142 N.J. at 543.

It is well-settled that the court does not weigh the evidence or make credibility determinations. Id. at 540. It is similarly vital "that when the evidence 'is so one-sided that one party must prevail as a matter of law,' [Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)], the trial court should not hesitate to grant summary judgment." Ibid.

N.J.S.A. 34:19-3 provides in pertinent part as follows:

> An employer shall not take any retaliatory action against an employee because the employee does any of the following:
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> 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:
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> (1) is in violation of a law, or a rule or regulation promulgated pursuant to law, . . . or
>
> (2) is fraudulent or criminal, . . .
>
> . . . .

> 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.

The term "retaliatory action" is defined in the statute 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).

The New Jersey Supreme Court has explained that "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.'" Mehlman v. Mobil Oil Corp., 153 N.J. 163, 179 (1998) (quoting Abbamont v. Piscataway Bd. of Educ., 138 N.J. 405, 431 (1994)). It is remedial legislation and "'courts should construe CEPA liberally to achieve its remedial purpose.'" Estate of Roach v. TRW, Inc., 164 N.J. 598, 610 (2000) (quoting Barratt v. Cushman & Wakefield, 144 N.J. 120, 127 (1996)).

Furthermore, "the Legislature did not intend to hamstring conscientious employees by requiring that they prove in all cases that their complaints involve violations of a defined public policy." Ibid. The Court has repeatedly stated that the complained-of activity need not actually violate a law or regulation or actually rise to the level of fraud or criminality, so long as the complaining employee reasonably believes that the activity does so. Id. at 613 (citing Mehlman, supra, 153 N.J. at 193-94). The Court has been explicit that "'[t]he object of CEPA is not to make lawyers out of conscientious employees.'" Ibid. (quoting Mehlman, supra, 153 N.J. at 193-94). However, not all employee complaints are protected by CEPA. See id. at 613-14 (explaining that CEPA does not concern itself with "trivial or benign employee complaints" like long lunches or personal phone calls).

The New Jersey Supreme Court recently confirmed the initial burden to establish a prima facie case rests on the plaintiff. Winters v. N. Hudson Reg'l Fire & Rescue, 212 N.J. 67, 90 (2012). The Court has clearly set forth the elements for a prima facie case of a CEPA violation, stating as follows:

> A plaintiff who brings a cause of action pursuant to N.J.S.A. 34:19-3c must demonstrate 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)).]

The first element requires the plaintiff to submit sufficient evidence to establish that he had

> an objectively reasonable belief, at the time of objection . . . that such activity is . . . harmful to the public health, safety or welfare, and that there is a substantial likelihood that the questioned activity is incompatible with a constitutional, statutory or regulatory provision, code of ethics, or other recognized source of public policy.
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> [Mehlman, supra, 153 N.J. at 193.]

Plaintiff argues on appeal that he "believed that operating the truck in its defective condition posed a serious danger to himself and the public and was in violation of Department of Transportation regulations." Plaintiff argues that the trial court erred in accepting the records and documentation of repairs to the truck over plaintiff's contradictory testimony that repairs were not made.

Defendants argue that there is no evidence that the truck driven by plaintiff was unsafe or that the problem with the

engine had not been repaired. Defendants also argue that plaintiff's act in waiting approximately five months to file his complaining letter, "because each time he informed [defendants] of a problem with the truck, they would fix it," clearly shows that he did not have an objectively reasonable belief of a violation of law or public safety.

Noting this court's plenary review of the case, defendants argue that plaintiff can establish only that he received an adverse employment action and cannot establish any of the other required elements of a prima facie case for a CEPA violation.

Operating a large truck on public highways that has an unresolved history of losing power, stopping, slowing, or otherwise impeding driver control without warning clearly creates a risk of injury to public safety. Plaintiff does not have to identify specific laws, rules, or regulations which such operation violates. See Roach, supra, 164 N.J. at 610; Mehlman, supra, 153 N.J. at 193. The central inquiry then is whether it was objectively reasonable for plaintiff to believe that defendants were engaged in and continuing such an operation of the truck at the time that he made his complaints. See Dzwonar, supra, 177 N.J. at 462; Mehlman, supra, 153 N.J. at 193. The evidence presented in the record indicates that such a belief would not be objectively reasonable.

Plaintiff testified that defendants effectuated each repair he requested, over a period spanning multiple years, before deciding to replace the truck. Although some of the mechanical problems would later recur or need to be repaired again, plaintiff did not allege that defendants refused to make necessary repairs prior to deciding to replace the truck. The maintenance records also support this fact.

Plaintiff testified that he intended to write a letter of complaint approximately five months before actually sending it, but he waited to do so because the repairs he requested were made. This fact indicates that plaintiff lacked even a subjective belief that the conduct complained of in the letter was a danger to public safety or even himself.

The substantial documentation provided by defendants, corroborated by plaintiff's own testimony, negates plaintiff's premise that the truck was operated in a defective condition. The evidence also undermines plaintiff's contention that a reasonable person could form an objectively reasonable belief that defendants were engaged in conduct dangerous to public safety or the public wellbeing. Lacking factual support for such a reasonable belief, plaintiff has failed to establish the first prong of a prima facie case for a CEPA violation. See

Dzwonar, supra, 177 N.J. at 462. Accordingly, plaintiff's complaint was properly dismissed.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION