(NOTE: The status of this decision is **Unpublished**.)

NOT FOR PUBLICATION WITHOUT THE

APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-0

RICHARD KOWNACKI,

Plaintiff-Appellant,

v.

SADDLE BROOK BOARD OF

EDUCATION, HARRY A. GROVEMAN,

ED.D., RAYMOND G. KARATY,

ANTHONY D'ACHILLE, and

FRANK BRANNAN,

Defendants-Respondents.

May 8, 2014

Before Judges Yannotti and St. John.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-5653-10.

Samuel L. Halpern argued the cause for appellant.

Jennifer M. Herrmann argued the cause for respondents (Methfessel & Werbel, attorneys; Eric L. Harrison, of counsel and on the brief; Ms. Herrmann, on the brief).

PER CURIAM

In this employment case, plaintiff Richard Kownacki, a maintenance electrician who worked for defendant Saddle Brook Board of Education (SBBE or the Board), appeals the summary judgment dismissal of his complaint, which alleged retaliation actions in violation of the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14.[1]

On appeal, plaintiff contends, in part, that the motion judge improperly failed to view the totality of the facts most favorably to him when the court held there was no continuing course of retaliation in violation of CEPA, and he asserts that there was more than sufficient evidence to suggest a causal connection between plaintiff's actions and defendants' retaliation. We disagree and affirm.

I.

These are the pertinent facts, which we have considered in a light most favorable to plaintiff as the non-moving party. See R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). On August 1, 1998, plaintiff became employed as a maintenance electrician by SBBE and, shortly thereafter, became a member of the Saddle Brook Custodian and Maintenance Association (Association).

On February 23, 2002, plaintiff was elected president of the Association. During the first five years of his employment, plaintiff, who was the only employee performing electrical work, encountered no problems discharging his duties which consisted of maintenance tasks and electrical work.

The SBBE contracted with Bako Construction Company (Bako) for the removal of asbestos insulation in the high school. On June 11, 2003, prior to the commencement of the asbestos removal project, plaintiff wrote a letter on behalf of the Association to defendant Frank Brannan, plaintiff's supervisor and the SBBE's Supervisor of Buildings and Grounds, with a copy to defendants Anthony D'Achille, the Business Administrator and Board Secretary, and Harry A. Groveman, Ed.D, the Superintendent of the Saddle Brook Schools.

Plaintiff's letter set forth a list of concerns of the Association "regarding the removal of ceiling panels in the high school hallway for the asbestos removal project." Plaintiff stated that there is "concern that some asbestos dust and fibers may be on the ceiling panels." The letter also expressed concern about fiber glass insulation pads asking, "would proper eye, respiratory, and skin protection be provided? Will there be adequate ventilation? Will the work area be sealed off from other areas?"

Plaintiff never received a formal response to his inquiry, but on June 26, 2003, Brannan informed plaintiff that the Board formed a committee to meet with members of the Association to discuss topics of concern.

The asbestos removal project was completed on July 26, 2003. On August 4, 2003, plaintiff, Groveman, and several Board members conducted a walkthrough of the asbestos removal work area. During the walkthrough, plaintiff found chunks of pipe insulation material on a beam. Plaintiff contends Brannan appeared dismissive when plaintiff told him what he had found. Groveman and a Board member then came to the area and plaintiff got a ladder, brought down a small piece of the material and gave it to Groveman. He did so without the request of any supervisor.

Plaintiff also later acknowledged his understanding that moving asbestos can release some of it into the air. Groveman sent a sample of the material to an environmental firm for testing. Air samples were also taken which were positive for the presence of asbestos. Bako was recalled twice thereafter to perform additional cleanup. Air samples were again taken and proved negative. Thereafter, plaintiff found additional pieces of insulation material in the abatement area and contacted his county union office to report the incident. He was advised that a complaint should be filed with the county health department, which was done by the union.

As a result of the complaint, Edna Pickney, an industrial hygienist with Bergen County, investigated and issued a report on August 8, 2003. Following the issuance of the report, the Saddle Brook Health and Safety Committee (Committee) was formed with Board members, a member of the New Jersey Education Association and the Saddle Brook Education Association, plaintiff, Brannan, D'Achille and Pickney, as members. On August 30, an inspection was undertaken by the State Office of Public Employees Occupational Safety and Health and a citation violation was issued to the SBBE for failure to provide an asbestos training course to the custodial staff and for storing encapsulated asbestos in a closet without affixing warning labels.

In a letter dated September 10, 2003, Groveman advised plaintiff of a minor asbestos fiber release and that plaintiff's transport of suspected asbestos material may have contributed to the fiber release. The letter also acknowledged appreciation for plaintiff's diligence and concern**.** In response, plaintiff wrote back to Groveman and requested the superintendent to substantiate his statements by hiring an expert in the field of asbestos contamination to weigh in on the situation. Plaintiff was not disciplined for either moving the material or his responsive letter.

On October 9, 2003, the Committee elected plaintiff to be president and chairperson. On January 7, 2004, plaintiff sent Brannan a letter about suspected asbestos in a classroom, requesting appropriate action.

In the spring of 2004, a new transformer was installed in the boiler room. Plaintiff noticed that the transformer was too small and advised Brannan. Plaintiff perceived that Brannan did not sufficiently consider plaintiff's warnings, which he asserts is retaliation.

The next incident occurred on September 7, 2004, when Brannan wrote a memorandum to plaintiff asking for a detailed account of how a Uni-Lift had fallen off a truck, which response was due by "Friday September 9th." September 9th was actually a Thursday, and Brannan issued another memorandum to plaintiff stating, "Due to a typographical error you were obviously confused on what day [the report] was due." Plaintiff contends this language was demeaning and unnecessary. Plaintiff reported that his co-worker, Les Aughey, had loaded the Uni-Lift onto the truck. In response, plaintiff received a letter from Groveman stating that the accident could have been avoided if better judgment and care was exercised. Other than this letter, plaintiff did not receive any discipline for the incident. Plaintiff cites this correspondence as retaliation for his alleged whistleblowing.

In September 2004, plaintiff and co-worker, Raymond Curry, the transportation coordinator and a bus driver, got into a verbal argument. Plaintiff filed a municipal court complaint against Curry alleging that Curry threatened him. Plaintiff, Curry and D'Achille, appeared at Saddle Brook Municipal Court in response to the charges. Later, plaintiff voluntarily dismissed the charges. Plaintiff contends the SBBE took no action against Curry, but acknowledged he had no actual knowledge of that fact. He also contends that he was assigned to work for several days in an area close to the area where Curry worked.

In September 2004, someone from the Association told D'Achille that plaintiff was voted off the Committee by his Association. D'Achille did not advise plaintiff of a Committee meeting scheduled for September 22. Plaintiff confronted D'Achille that day asking why he had advised the secretary he had been voted off the Committee. D'Achille declined to answer and stated he would investigate the issue.

It appears the meeting was rescheduled for October 13, that plaintiff had not lost his position, and that he attended the Committee's meeting. Plaintiff left work without approval at approximately 10:30

a.m. on September 22, because he was upset at the way D'Achille handled the rumor that plaintiff was voted off the Committee by his own Association; that he had to work near Curry; that D'Achille sat next to Curry in municipal court; and that the administration took no action against Curry. Prior to his early exit from work, plaintiff attempted to see Groveman, but he was not available. The next day, D'Achille issued a memorandum to plaintiff directing him to schedule an appointment to explain why he left work early without authorization. Plaintiff contends that D'Achille's action demonstrates retaliation for his asbestos complaints.[2]

By email dated December 12, 2007, science teacher Kimberly Altamura wrote to defendant, Raymond Karaty, and high school principal, Jim Sarto, inquiring about the placement of the underground electric wiring near a new pond in the school's courtyard. The pond installer had indicated that the electric wiring, according to code, had to be installed at least five feet away from the pond. Plaintiff installed it closer than five feet to the pond. The administration left the decision up to plaintiff to determine where he should locate the line since he was a licensed electrician. Plaintiff did not install the line in compliance with the electrical code and therefore he had to re-dig a trench and reinstall the line in accordance with code. The improper installation led to a disciplinary hearing before the Board on June 9, 2008.

Plaintiff resigned from the Committee in February 2008, and did not make any further health or safety complaints.

In April 2008, a teacher filed a written complaint against plaintiff with the school principal, asserting that

2 On Monday March 31st, the day back from vacation I came into my classroom to find that someone had gone into my desk drawer, removed the remote control for my digital sign and changed the wording on the sign from the middle school module rotation directions to a taco bell type menu. After reviewing the classroom video camera records, it was confirmed that it was [plaintiff]. I then noticed that he had unlocked my office door and went in to my office where I keep my personal items along with confidential student records. I also keep the more expensive stock items (new video cameras, digital multi meters, robots, etc. . .) and my classroom server computer there. I could not tell what he was specifically doing. Then I saw him unlock and enter the stock room where I keep 3 other cameras, microscopes, testing equipment, digital scales, remote controlled robots, and a myriad of other supplies. There was a public

showing of the classroom arranged for that evening and with so much to do in student and display preparations I almost didn't notice the sign change. It would have been very embarrassing had I not caught the vandalism. I am very upset and feel violated that this incident happened.

On June 9, 2008, plaintiff had a disciplinary hearing before the Board where he testified in his defense and was represented by the New Jersey Education Association (NJEA). During the hearing, plaintiff discussed his decision to install the electrical wiring closer to the pond than the electrical code allowed. On the same date, as a result of the teacher's complaint, plaintiff was subject to additional disciplinary proceedings. By letter dated June 12, 2008, the Board found plaintiff guilty of both offenses. For the incident involving the electrical wiring, the Board withheld a one-time increment of $2,000 to plaintiff's pay. For the incident involving the teacher's complaint, the Board issued a formal letter of reprimand. Plaintiff did not appeal the Board's decisions, although he knew he had the right to appeal.

On March 24, 2009, plaintiff drove a red pickup truck used by the maintenance and custodial staff. On March 25, 2009, it was discovered that the truck had sustained a large dent on the left front end. On May 6, 2009, plaintiff was charged with failing to report the damage to the truck after one of plaintiff's co-workers Cory Maita, submitted a written statement saying that he saw plaintiff in the back of the football field near the scoreboard, driving in a back and forth motion. School employees went to the site, found tire tracks under the fence and red paint marks under the railing of the fence. Members of the maintenance and utility staff were interviewed, but no one admitted causing the accident. Plaintiff was also interviewed and denied knowing how the truck was damaged.

Plaintiff contested the charges and, on June 8, 2009, the Board conducted a disciplinary hearing, during which plaintiff was represented by an NJEA representative. By letter dated June 16, 2009, the Board found that plaintiff failed to report the accident and suspended him without pay for three days. Plaintiff did not appeal that decision.

Maita lost his job with the Board in June 2010. About a year later, he contacted plaintiff through Facebook. Maita claimed that he fabricated "the part [of his written statement] where [he saw plaintiff]

going forward and back by the score board," because Brannan told him that he or plaintiff was going to be blamed and recommended that Maita make up a story about plaintiff. Maita testified that he did not object to Brannan's suggestion or report Brannan to the administration because he did not want to lose his job and because he knew it would be his word against Brannan's. However, he did not advise anyone of Brannan's alleged coercion after his employment contract was not renewed or even after learning that Brannan had passed away.

Plaintiff also asserts that on November 9, 2009, several minutes before 4:00 p.m., Karaty asked plaintiff in a demeaning tone why he was standing around instead of working. Plaintiff also argues that several other incidents, not worthy of discussion in this opinion, were acts of retaliation for his whistleblowing.

In a comprehensive written opinion, the motion judge granted summary judgment to defendants. In her decision, the judge extensively reviewed each of the incidents set forth above. The judge stated that defendants alleged, and plaintiff acknowledged, that "throughout plaintiff's employment and more specifically from 2003 through 2011, plaintiff was consistently late for work. In his evaluations, aside from the recommendation that he improve his attendance and punctuality, plaintiff was never disciplined for his habitual tardiness or for the frequency of his use of sick days." The judge also noted that plaintiff's psychological expert opined that plaintiff is "hypersensitive, vigilant for any signs of criticism, and is apt to rationalize or project the blame on to others" and noted the possibility that plaintiff "overreacted to perceive slights."

The judge then addressed whether plaintiff has raised a prima facie claim pursuant to CEPA. The judge acknowledged that such claims are subject to a one-year statute of limitations. Since the complaint was filed on June 4, 2010, the judge stated that she must determine whether "all claims of retaliation alleged to have occurred before June 4, 2009 should be dismissed as time-barred or saved by the continuing tort doctrine."

After correctly setting forth the law that she would apply to the facts in this case, the judge found that many, if not most of the complained of acts, "are not more than mere offensive utterances." The judge further determined that "plaintiff has not shown that at least one of his alleged potentially actionable discriminatory acts occurred within the one-year statute of limitations, or at least one-year from June 4, 2010 when he first filed his complaint." The judge further determined that "the motion record presents occurrences that were isolated or sporadic acts and not of any continuing, non-sporadic pattern of discrimination." She found that "the allegations ascribed by plaintiff to have occurred prior to the statute of limitations are not saved by the continuing tort doctrine."

The judge then turned to the actions alleged to have incurred within the one-year statutory period, namely, plaintiff's three-day suspension following a disciplinary hearing for failure to report a large dent on the truck and a supervisor's alleged use of a demeaning tone on November 9 to ask plaintiff why he was not working before plaintiff's work day was over. The judge then addressed plaintiff's evidence in which he contended that defendants have retaliated against him as a result of the asbestos complaints in 2003. The judge found "that plaintiff has not carried his prima facie burden regarding causation, as between any alleged whistleblowing activity and the alleged retaliatory actions which is alleged to have occurred in 2009 when he was suspended."

On May 30, 2012, the motion judge granted defendants' motion and entered an order for summary judgment dismissing plaintiff's complaint. It is from that order that plaintiff appeals.

II.

In now considering plaintiff's appeal, we apply familiar principles governing summary judgment, which are likewise applied at the trial level under Rule 4:46-2(c). See Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007); Gray v. Caldwell Wood Prods., Inc., 425 N.J. Super. 496, 499-500 (App. Div. 2012). Rule 4:46-2 prescribes that summary judgment must 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." Brill, supra, 142 N.J. at 529. In undertaking this analysis, the court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill, supra, 142 N.J. at 540. When reviewing such determinations on appeal, "'[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.'" Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 382 (2010) (alteration in original) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

We start with the basic principle that "[s]tatutes of limitations are essentially equitable in nature and are designed to advance timely and efficient litigation." Montells v. Haynes, 133 N.J. 282, 292 (1993) (citing Ochs v. Fed. Ins. Co., 90 N.J. 108 (1982)). As our Supreme Court has stated:

> The purposes of statutes of limitations, oft-repeated by this Court, are two-fold: (1) to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims, and (2) to penalize dilatoriness and serve as a measure of repose.
>
> . . . .
>
> The purpose underlying any statute of limitations is to stimulate activity and punish negligence and promote repose by giving security and stability to human affairs.

[Gantes v. Kason Corp., 145 N.J. 478, 486 (1996) (internal quotation marks and citations omitted).]

CEPA is remedial legislation "designed to protect employees who 'blow the whistle' on illegal or unethical activity committed by their employers or co-employees." Beasley v. Passaic County, 377 N.J. Super. 585, 605 (App. Div. 2005) (quoting Estate of Roach v. TRW, Inc., 164 N.J. 598, 609-10 (2000)). A CEPA retaliatory action is 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." Maimone v. City of Atl. City, 188 N.J. 221, 235 (2006) (quoting N.J.S.A. 34:19-2(e) (emphasis removed)). Accordingly, an adverse employment action is not limited to a demotion, suspension, or discharge and need not result in a loss of pay. Id. at 236. "[M]any separate but relatively minor instances of behavior directed against an employee . . . may . . . combine to make up a pattern of retaliatory conduct." Green v. Jersey City Bd. of Ed., 177 N.J. 434, 448 (2003). Nevertheless, "[a]dverse employment actions do not qualify as retaliation under CEPA 'merely because they result in a bruised ego or injured pride on the part of the employee.'" Beasley, supra, 377 N.J. Super. at 607 (quoting Klein v. Univ. of Med. & Dentistry, 377 N.J. Super. 28, 46 (App. Div.) certif. denied, 185 N.J. 39 (2005)).

The statute of limitations for filing a CEPA action is one year. N.J.S.A. 34:19-5. The accrued dates for discrete acts are dates upon which the events occurred. Roa v. Roa, 200 N.J. 555, 567 (2010). Thus, "[a]n employee's CEPA claim accrues on the date of his actual demotion, suspension or termination of employment." Villalobos v. Fava, 342 N.J. Super. 38, 50 (App. Div.), certif. denied, 170 N.J. 210 (2001). "A plaintiff need not know with certainty that there is a factual basis for a claim under CEPA for the one-year limitation period to be triggered; it is sufficient that he should have discovered that he may have a basis for a claim." Id. at 49 (emphasis removed).

"Determining when the limitations period begins to run depends on when the cause of action accrued, which in turn is affected by the type of conduct a plaintiff alleges to have violated the LAD."

Alexander v. Seton Hall Univ., 204 N.J. 219, 228 (2010) (noting the accrual date of a violation under the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49). The same reasoning applies to CEPA cases which have a one-year statute of limitations period.

Under the continuing violation doctrine, "[w]hen an individual is subject to a continual, cumulative pattern of tortious conduct, the statute of limitations does not begin to run until the wrongful action ceases." Shepherd v. Hunterdon Developmental Ctr., 174 N.J. 1, 18 (2002) (quoting Wilson v. Wal-Mart Stores, 158 N.J. 263, 272 (1999)). Simply stated, "when the complained-of conduct constitutes 'a series of separate acts that collectively constitute one unlawful employment practice[,]' the entire claim may be timely if filed within two years of the 'date of which the last component act occurred.'" Alexander, supra, 204 N.J. at 229 (quoting Roa, supra, 200 N.J. at 567).

However, the continuing violation doctrine "does not permit . . . the aggregation of discrete discriminatory acts for the purpose of reviving an untimely act of discrimination that the victim knew or should have known was actionable." Roa, supra, 200 N.J. at 569. Accordingly, whether the doctrine is applicable to a particular case depends on whether the plaintiff alleged a "discrete" discriminatory act by defendant or "series of separate acts that collectively constitute one 'unlawful employment practice.'" Shepherd, supra, 174 N.J. at 19-20 (quoting National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 117, 122 S. Ct. 2061, 2074, 153 L. Ed.2d 106, 124 (2002)). The continuing violation doctrine is applicable in CEPA cases. Green, supra, 177 N.J. at 448.

To establish a cognizable claim under CEPA, an employee 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. 34:19-3(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.
>
> [Massarano v. New Jersey Transit, 400 N.J. Super. 474, 488 (App. Div. 2008) (quoting Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003)).]

Under CEPA, 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 . . .
>
> . . . .
>
> (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.
>
> [N.J.S.A. 34:19-3.]

Plaintiff's CEPA retaliation claim rests on sections c(1) and c(3).

Under CEPA, "retaliatory action" is 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). It is now firmly established that an adverse employment action can be something less than a termination, demotion or salary reduction. A withdrawal of benefits formerly provided to an employee may, in some circumstances, constitute an adverse employment action. Burlington No. & Santa De Ry. Co. v. White, 548 U.S. 53, 67-70, 126 S. Ct. 2405, 2414-16, 165 L. Ed.2d 345, 359-61 (2006); Mancini v. Twp. of Teaneck, 349 N.J. Super. 527, 564-65 (App. Div. 2002), aff'd as modified, 179 N.J. 425 (2004). "[A]ctions that affect wages, benefits, or result in direct economic harm qualify [as retaliation]. So too, noneconomic actions that cause a significant, non-temporary adverse change in employment status or the terms and conditions of employment would suffice." Victor v. State, 401 N.J. Super. 596, 616 (App. Div. 2008) aff'd in part, modified in part, 203 N.J. 383 (2010).

Here, the motion judge properly concluded the continuing violation doctrine for tolling the limitations period, Wilson, supra, 158 N.J. at 272, was inapplicable to the present case. We outlined the requisite elements of this doctrine as follows:

> To establish a continuing violation based on a series of discriminatory acts, a plaintiff must show that
>
> (1) at least one allegedly discriminatory act occurred within the filing period and
>
> (2) the discrimination is "more than the occurrence of isolated or sporadic acts of intentional discrimination" and is instead a continuing pattern of discrimination.
>
> [Bolinger v. Bell Atl., 330 N.J. Super. 300, 307 (App. Div.) (quoting Harel v. Rutgers, The State Univ., 5 F. Supp.2d 246, 261 (D.N.J. 1998), aff'd, 191 F.3d 444 (3d Cir. 1999), cert. denied, sub nom., Harel v. Lawrence, 528 U.S.

1117, 120 S. Ct. 936, 145 L. Ed.2d 814 (2000)), certif. denied, 165 N.J. 491 (2000).]

Contrary to plaintiff's assertion, there is no evidence that the actions taken by defendants were motivated by plaintiff's asbestos or other complaints, or retaliatory as a result thereof. Generally, plaintiff's contentions are fraught with hearsay, speculation, self-serving assertions or unsubstantiated conjecture. Plaintiff's suggestion that the various disciplinary actions, work assignments, or comments to him resulted from retaliation for his whistleblowing activity, rather than being exactly what they purport to be -- an attempt to appropriately discipline an employee who is resistant to authority -- lacks material basis. An objective reading of the evidential record reflects plaintiff was appropriately disciplined for real infractions, and that plaintiff overreacted to perceived slights.

"Adverse employment actions do not qualify as retaliation under CEPA 'merely because they result in a bruised ego or injured pride on the part of the employee.'" Beasley, supra, 377 N.J. Super. at 607 (quoting Klein, supra, 377 N.J. Super. at 46).

For these reasons, the motion judge correctly deemed as a matter of law that plaintiff's CEPA claims accruing before June 4, 2009 were untimely. That disposition, combined with the motion judge's other rulings, justified the complete dismissal of all of the claims plaintiff pleaded in this lawsuit.

Affirmed.

1 As of the date of the order under appeal, plaintiff remained in the employ of the SBBE as a maintenance electrician.

2 D'Achille recommended disciplinary action for plaintiff's unauthorized early exit from work, but plaintiff did not remember if he was ever disciplined.
