SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1270-15T2

ANTONY CARCHIA,

Plaintiff-Appellant,

v.

DIRECTOR KENNETH C. GREEN, individually and in his official capacity, and STATE OF NEW JERSEY DEPARTMENT OF CORRECTIONS, EDNA MAHAN CORRECTIONAL FACILITY FOR WOMEN,

Defendants-Respondents.

Submitted September 14, 2016 – Decided October 6, 2016

Before Judges Alvarez and Accurso.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-867-13.

McLaughlin & Nardi, LLC, attorneys for appellant (Pauline M.K. Young and Maurice W. McLaughlin, on the brief).

Christopher S. Porrino, Attorney General, attorney for respondents (Lisa A. Puglisi, Assistant Attorney General, of counsel; Jennifer I. Fischer, Deputy Attorney General, on the brief).

PER CURIAM

Plaintiff Antony Carchia appeals from summary judgment dismissing his complaint alleging violations of the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14, and the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. We affirm.[1]

Plaintiff was a senior corrections officer at Edna Mahan Correctional Facility for Women for nearly twelve years. In 2011, two years before he was deemed to have abandoned his job, prison officials received several complaints by him and about him. He complained about another officer's smoking, about spouses working together on the same shift, that other officers referred to him as a "nigger lover," that one officer had slammed a gate in his face and another had refused to take a key from him, that his fellow officers were plotting to get him fired and that a white officer was allowed to make up his own hours. Other officers complained that plaintiff had engaged in

[1] The trial court also granted summary judgment on plaintiff's claims under the New Jersey Civil Rights Act (CRA), N.J.S.A. 10:6-1 to -2, Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58 (1980), "respondeat superior & Monnell liability," intentional infliction of emotional distress and for punitive damages. Plaintiff has not briefed any of those issues on appeal. We accordingly deem them abandoned. See Bacon v. N.J. State Dep't of Educ., 443 N.J. Super. 24, 38 (App. Div. 2015), certif. denied, 224 N.J. 281 (2016); see also Pressler & Verniero, Current N.J. Court Rules, comment 5 on R. 2:6-2 (2016) ("It is, of course, clear that an issue not briefed is deemed waived.").

odd behaviors such as entering a bathroom in the vicinity of a female officer and urinating without closing the door, pretending to box and flexing his biceps while watching prisoner meal movements, circling the employee parking lot while writing, or feigning to write in a black book, engaging in coughing fits around the officer of whose smoking he complained when the officer was not smoking and pretending to talk on a telephone located near a metal detector at the prison.

The prison's Equal Employment Division investigated plaintiff's complaints and prison officials stripped plaintiff of his service weapon pending a fitness-for-duty evaluation. The psychologist evaluating plaintiff cleared him for return to duty but did not recommend that his service weapon be restored. Instead, the psychologist recommended that plaintiff be reevaluated after his complaints had been fully investigated.

A little over two months later, plaintiff failed to deliver a cash box to the mailroom. It was later found in the trunk of the car plaintiff had been driving. Ordered to write a report about the incident, plaintiff complained he was too sick to complete the task. Prison officials reported that it took plaintiff all morning to complete the report in which he claimed not to have remembered receiving the cash box and complained about his treatment by other officers. Prison officials

supervising plaintiff claimed he was behaving bizarrely, repeatedly going to his car to make phone calls and asking for help. After plaintiff completed his report, prison officials sent him to Hunterdon Medical Center for evaluation. Plaintiff claims to remember nothing about that episode.

Three days later, plaintiff parked his car in an unauthorized area near the lineup room and came into the room in an agitated manner reading aloud a text message received from another officer, which stated "What's going on Tony you good nigga?"[2] Plaintiff then punched out a window with his fist and smashed two windows with his head. He then picked up a shard of glass and held it to his neck while announcing he was going to make them all happy by killing himself. A lieutenant managed to restrain plaintiff, and he was admitted to an inpatient psychiatric unit where he remained for several days.

Plaintiff never returned to work. He failed to return FMLA (Family & Medical Leave Act) forms requesting leave and did not respond to a subsequent letter advising him he would be considered absent without permission if he did not execute and return the paperwork necessary to process a disability retirement. Approximately two months after his last day at

[2] The text was from a fellow officer with whom plaintiff was very friendly, socializing outside of work and texting frequently.

work, he received a preliminary notice of discipline charging him with abandoning his position. Plaintiff responded by submitting the FMLA forms and filing an application for a disability retirement. Plaintiff requested a hearing on the disciplinary charge but failed to appear on the date scheduled. The hearing officer sustained the charge that plaintiff had abandoned his job and the penalty of resignation not in good standing. The prison's Equal Employment Division failed to substantiate any of plaintiff's complaints. Plaintiff filed his Law Division complaint two months after the effective date of his resignation not in good standing.

Judge Hurd heard defendants' motion for summary judgment. Viewing the evidence in the light most favorable to plaintiff, Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995), the judge considered each of plaintiff's complaints to prison officials about smoking, nepotism, failure to adequately investigate his complaints, discrimination by association, his testimony at a PBA hearing about the white officer who allegedly set his own hours, his complaints to the Equal Employment Opportunity Commission and the Division on Civil Rights,[3] and his

[3] Plaintiff apparently admitted at deposition that he never actually filed complaints with either agency.

report of favoritism for Caucasian officers in bid and shift assignments.

Following the Supreme Court's mandate that a trial court considering a claim brought pursuant to N.J.S.A. 34:19-3c "must make a threshold determination that there is a substantial nexus between the complained-of conduct and a law or public policy," Dzwonar v. McDevitt, 177 N.J. 451, 464 (2003), the judge found only three of plaintiff's complaints could claim a close relationship with a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy: the complaint about nepotism, his allegations of being discriminated against because of his association with a protected class and his complaint of favoritism shown to white officers in bids and shifts.

Satisfied that with regard to those three claims, plaintiff had established the first two elements of a CEPA action, namely, that he reasonably believed that the prison had violated the executive branch's ethics rules against nepotism, and had otherwise engaged in or failed to prevent racial discrimination in the workplace, and that he performed a "whistle-blowing" activity described in N.J.S.A. 34:19-3 by making oral complaints to a supervisor or written complaints to the Equal Employment Division, see Dzwonar, supra, 177 N.J. at 462 (setting forth the

four elements of a CEPA action), the judge turned to consider the third element, whether plaintiff suffered an adverse employment action.

CEPA prohibits an employer from taking retaliatory action against an employee because of whistle-blowing activity. N.J.S.A. 34:19-3. "Retaliatory action" is defined as "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. 34:19-2e. Having reviewed plaintiff's several different allegations of adverse employment actions including being prohibited from patrolling a certain parking lot, the slamming of gates in his face, being left out of a conversation, and taunts by fellow officers, the judge found that only his suspension and subsequent termination could constitute adverse employment actions under CEPA. See El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 176 (App. Div. 2005) ("[I]n order to be actionable, an allegedly retaliatory act must be 'sufficiently severe or pervasive to have altered plaintiff's conditions of employment in an important and material manner.'" (quoting Cokus v. Bristol Myers Squibb Co., 362 N.J. Super. 245, 246 (App. Div.), certif. denied, 178 N.J. 32 (2003))).

Ultimately, however, Judge Hurd concluded that plaintiff could not establish the fourth element of his prima facie case, a causal connection between the whistle-blowing activity and the adverse employment action.[4] See Dzwonar, supra, 177 N.J. at 462. Noting the absence of any direct evidence linking plaintiff's complaints to his suspension and termination, the judge determined

> [t]he issue is what circumstantial evidence could a fact finder use to somehow connect without speculation these whistleblowing activities with the alleged — with the adverse employment action. . . .
>
> I don't see how without speculation I would be able to conclude that there was some type of causal connection. Nonetheless, even if there was, turning to the issue of whether the State's proffer, legitimate, non-discriminatory reasons were valid or not, the Plaintiff hasn't shown that there was any implausibilities, or any inaccuracies, or any doubt cast about the Defendant[']s or the State's proffered reason for the discipline and the resignation not in good standing.

Judge Hurd also granted summary judgment to defendants on plaintiff's LAD claims, finding plaintiff could not establish a

[4] We note that plaintiff submitted no expert testimony in support of his allegations that the hostile work environment perpetrated by defendants caused him to develop a mental illness and disability which ultimately led to his termination. Because such claims generally require expert testimony to establish, see N.J.R.E. 702; Mullarney v. Bd. of Review, 343 N.J. Super. 401, 408 (App. Div. 2001), defendants were entitled to summary judgment on that theory.

prima facie case of discrimination based on disability, race association or hostile environment. The judge found plaintiff had made no showing that any disability he had contributed to the adverse employment actions he suffered. Generally, a plaintiff alleging a disability not readily apparent must present expert testimony to prove the existence and overall employment impact of his disability. See Viscik v. Fowler Equip. Co., 173 N.J. 1, 16 (2002); Wojtkowiak v. Motor Vehicle Comm'n, 439 N.J. Super. 1, 15-17 (App. Div. 2015); Domurat v. Ciba Specialty Chems. Corp., 353 N.J. Super. 74, 90 (App. Div.), certif. denied, 175 N.J. 77 (2002). Plaintiff offered no expert testimony to establish any mental or emotional problem or its effect on his job performance.

The judge further found there was no evidence from which a jury could infer that discrimination based on race association caused any of the adverse employment outcomes. See O'Lone v. N.J. Dep't of Corr., 313 N.J. Super. 249, 255 (App. Div. 1998). In addition, the judge found no evidence that the employer's reason for terminating or disciplining plaintiff were a pretext for discrimination.

Regarding the hostile environment claim, the judge found plaintiff could not show that the harassment he claims he suffered was sufficiently egregious to create a hostile work

environment. He also ruled the prison's anti-harassment policy shielded it from direct liability and none of the alleged harassers were supervisors so as to create vicarious liability. See Aquas v. State, 220 N.J. 494, 512 (2015); Gaines v. Bellino, 173 N.J. 301, 312-14 (2002).

Having reviewed the entire record and considered plaintiff's arguments on appeal, we find that none warrants discussion in a written opinion. R. 2:11-3(e)(1)(E). We affirm for the reasons set forth on the record in Judge Hurd's decision from the bench on November 10, 2015.

Affirmed.