SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3676-14T1

MICHAEL TOMPKINS,

Plaintiff-Appellant,

v.

JOHN SCOTT THOMSON, LOUIS VEGA, CHRISTINE JONES-TUCKER, CITY OF CAMDEN, CAMDEN COUNTY PROSECUTOR,

Defendants-Respondents,

and

ARTURO VENEGAS and STATE OF NEW JERSEY,

Defendants.

Argued March 2, 2017 - Decided June 26, 2017

Before Judges Lihotz, Hoffman and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Camden County, Docket No. L-6194-09.

Heidi R. Weintraub argued the cause for appellant (Weintraub & Marone, LLC, attorneys; Ms. Weintraub, on the briefs).

John C. Eastlack, Jr. argued the cause for respondents John Scott Thomson, Louis Vega, Christine Jones-Tucker and City of Camden (Weir & Partners, LLP, attorneys; Mr. Eastlack and Daniel E. Rybeck, on the brief).

Anne E. Walters, Assistant County Counsel, argued the cause for respondent Camden County Prosecutor's Office (Christopher A. Orlando, County Counsel, attorney; Ms. Walters and Howard L. Goldberg, First Assistant County Counsel, on the brief).

PER CURIAM

In 2003, the New Jersey Attorney General directed defendant, the Camden County Prosecutor (the Prosecutor) to assume control over the daily management of the Camden City Police Department (the Department). The Camden County Board of Chosen Freeholders (Freeholders) entered into a consulting agreement with defendant Arturo Venegas, engaging him as the Supersession Executive, who would oversee the operations of the Department on behalf of the Prosecutor.

Plaintiff Michael Tompkins filed a complaint alleging defendants violated the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -49. More specifically, plaintiff alleged he was the victim of discrimination and a hostile work environment as a result of conduct favoring minorities by defendants Venegas, who acted on behalf of the Department, the City of Camden (the City) and its officials. Further, he alleged the City, John Scott

Thomson, the Chief of Police, and Christiane Jones-Tucker, the City's Business Administrator, took no steps to prevent the discriminatory conduct and engaged in retaliation.[1]

Prior to trial, the Law Division judge granted the Prosecutor's motion for summary judgment, concluding there was no basis for liability because the Prosecutor was not appellant's employer. After voluntarily dismissing with prejudice all claims against Venegas, plaintiff proceeded to trial against the City and its officials. The jury returned a verdict of no cause of action.

On appeal, plaintiff argues the judge erroneously dismissed the Prosecutor from the action, urging the Prosecutor was responsible as Venegas' superior and as a "joint employer." Further, plaintiff raises several evidentiary rulings, which he maintains require a new trial.

We have considered each of plaintiff's arguments in light of the record and the applicable law. We affirm.

I.

Acting Attorney General Peter C. Harvey ordered the Prosecutor to "supersede the management, administration[,] and operation" of the Department on March 17, 2003. The Freeholders

[1] Plaintiff's claims against the State of New Jersey were dismissed on March 3, 2010. Plaintiff asserts no challenge to this order.

executed a consulting agreement with Venco, a California corporation, to engage its president, Venegas, who was to provide "law enforcement services for the Prosecutor, the Camden Police Department and County of Camden."

The agreement specified Venegas' tasks, which included: "daily management" of the Department "to the extent allowed by the law;" representing the Prosecutor "in overseeing all police department activities, reporting to the Prosecutor on deficiencies and the plan to correct them;" and to "[d]evelop policies and procedures to modernize practices in the police department to reflect generally accepted national standards[.]" More specifically, as the Supercession Executive, Venegas was to

> [a]. Set forth clear standards of performance for the police department and its employees and implement a system of progressive discipline that holds both employees and their managers accountable for performance and behavior;
>
> [b]. Support the development of managers throughout the department through mentoring and training so that a chief of police can be selected from inside the department;
>
> [c]. Bring employee groups (such as unions) into the planning and implementation process so they feel a part of the vision for policing Camden and feel rewarded for the accomplishments achieved. . . .

Plaintiff began his employment with the Department in 1986 and rose to the rank of Deputy Chief of Police, the position held

when his employment ended in 2011. Plaintiff alleged between January 2006 and January 2008, Venegas and others committed acts of discrimination toward him. The second amended complaint detailed incidents occurring between January 2006 and January 2008, which comprise the basis of his causes of action. Briefly, the discriminatory conduct alleged includes: (1) Venegas treated plaintiff in a "condescending and derogatory manner"; (2) plaintiff believed "Venegas ordered or authorized" others to break into and search his office; (3) plaintiff was arbitrarily passed over for training opportunities, which were extended instead to less senior and less experienced minority officers; (4) Venegas undermined plaintiff's authority by micromanaging his duties and repeatedly sought to have him disciplined; and (5) Venegas generally criticized his performance.

Consequences of the discriminatory conduct were also stated. Plaintiff was transferred from Deputy Chief of Operations to Deputy Chief of Technical Services. Thereafter, as result of another incident, whereby plaintiff opened a sealed envelope containing an internal affairs report investigating his conduct, plaintiff was suspended. Plaintiff challenged the suspension asserting it not only failed to comply with required Attorney General Guidelines, but also was "part and parcel of Venegas and Jones-Tucker's efforts to force [him] from his position of public

employment in order to favor minority candidates without regard to the merits of their promotion."

After a full review conducted by the Prosecutor's Office, the hearing officer concluded plaintiff's actions in opening the envelope were in part justified, and recommended plaintiff receive a written reprimand and a six-day suspension for not revealing his actions. However, Jones-Tucker rejected the hearing officer's recommendation and, instead imposed a six-month suspension, without pay.

Plaintiff alleged Chief Thomson wrongfully retaliated against him by ignoring his reports of Venegas' discriminatory conduct, and making it clear plaintiff should not return to the Department. Thereafter, the City granted plaintiff's request for medical leave and sought he undergo an independent evaluation from a "mutually agreeable" physician, prior to returning to employment. A mutually acceptable medical provider was not designated. On January 31, 2011, plaintiff's employment was terminated for being absent without leave.

II.

On appeal, plaintiff challenges the grant of summary judgment dismissing the Prosecutor's office from this action and trial rulings excluding evidence which plaintiff argues was admissible

and essential to proving his causes of action. We examine these claims.

A.

Our review of an order granting summary judgment applies the same standard utilized by the trial judge. Qian v. Toll Bros. Inc., 223 N.J. 124, 134-35 (2015). We "must review the competent evidential materials submitted by the parties to identify whether there are genuine issues of material fact and, if not, whether the moving party is entitled to summary judgment as a matter of law." R. 4:46-2(c). Bhagat v. Bhagat, 217 N.J. 22, 38 (2014); see also Townsend v. Pierre, 221 N.J. 36, 59 (2015).

Under this standard, we must construe all facts in the light most favorable to the non-moving party. Robinson v. Vivirito, 217 N.J. 199, 203 (2014). If "the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favors the non-moving party," then summary judgment is inappropriate, and matter must be submitted for review by the trier of fact. R. 4:46(c). However, summary judgment should be granted when "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 a judgment or order as a matter of law." R. 4:46-2(c); see Schiavo

v. Marina Dist. Dev. Co., 442 N.J. Super. 346, 36, (App. Div. 2015) ([We] "keep[] in mind '[a]n issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion . . . . would require submission of the issue to the trier of fact.'") (quoting R. 4:46-2(c)), certif. denied, 224 N.J. 124 (2016).

"Purely legal questions . . . are questions of law particularly suited for summary judgment." Badiali v. N.J. Mfrs. Ins. Group, 220 N.J. 544, 555 (2015) (citation omitted). In our de novo review of questions of law, we accord no deference to the motion judge's "interpretation of the law and the legal consequences that flow from established facts." Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 115 (2014). Certainly, when competing claims require us to "construe certain statutory provisions . . .[,] [a] de novo standard of review applies." Selective Ins. Co. of Am. v. Hudson E. Pain Mgmt., 210 N.J. 597, 605 (2012).

In granting the Prosecutor's motion for summary judgment, the motion judge found the evidence did not show the Prosecutor was plaintiff's employer, which at all times was the City of Camden. Finding "no fundamental employment relationship," the judge concluded the Prosecutor had no liability. Plaintiff asserts "New Jersey courts have recognized that a [plaintiff] may be deemed to

be jointly employed by two entities for purposes of protection under the LAD." Plaintiff maintains when the Prosecutor took complete control of the Department, it too became plaintiff's employer.

The LAD prohibits discrimination based on an individual's race or origin, N.J.S.A. 10:5-3, and requires proof of an intent to discriminate. See El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 179 (App. Div. 2005) (noting "because . . . the invidious nature of discrimination . . . may [make it] possible to infer an intent to discriminate, not every offensive remark, even if direct, is actionable"). The LAD, proscribes:

> an employer, because of the race, creed, color, national origin, ancestry, age, marital status, . . . or the nationality of any individual, . . . to refuse to hire or employ or to bar or to discharge or require to retire, unless justified by lawful considerations other than age, from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment. . . .
>
> [N.J.S.A. 10:5-12(a)].

Plaintiff's arguments on appeal hinge on the application of the word "employer." Ibid. "It is well settled that the goal of statutory interpretation is to ascertain and effectuate the Legislature's intent." Cashin v. Bello, 223 N.J. 328, 335 (2015). "In most instances, the best indicator of that intent is the plain

language chosen by the Legislature." Ibid. (citation omitted). We "must read words 'with[in] their context' and give them 'their generally accepted meaning.'" Ibid. (quoting N.J.S.A. 1:1-1). Statutory language is to be interpreted "in a common sense manner to accomplish the legislative purpose." N.E.R.I. Corp. v. N.J. Highway Auth., 147 N.J. 223, 236 (1996). "When a statute is ambiguous as written, however, a court may consider extrinsic sources, including 'legislative history, committee reports, and contemporaneous construction.'" Cashin, supra, 223 N.J. at 335-36 (citations omitted).

The LAD prohibits conduct occurring in the context of an employer-employee relationship. Pukowsky v. Caruso, 312 N.J. Super. 171, 184 (App. Div. 1998). The term "employer" is defined to include "the State, any political or civil subdivision thereof, and all public officers, agencies, boards or bodies." N.J.S.A. 10:5-5(e). Further, we have instructed courts "'must look beyond the label attached to [employer/employee] relationship' to determine whether an employer/employee relation exists for the purposes of bringing a hostile work environment claim." Hoag v. Brown, 397 N.J. Super. 34, 47 (App. Div. 2007). In this regard, this court developed a twelve-factor test to ascertain whether a person is an employee under N.J.S.A. 10:5-5(f). Thomas v. Cnty.

of Camden, 386 N.J. Super. 582, 595 (App. Div. 2006). The twelve factors are:

> (1) the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation -- supervised or unsupervised; (3) skill; (4) who furnishes the equipment and workplace; (5) the length of time in which the individual has worked; (6) the method of payment; (7) the manner of termination of the work relationship; (8) whether there is annual leave; (9) whether the work is an integral part of the business of the "employer"; (10) whether the worker accrues retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties.
>
> [D'Annunzio v. Prudential Ins. Co. of America, 383 N.J. Super. 270, 278 (App. Div. 2006) (citing Pukowsky v. Caruso, 312 N.J. Super. 171, 182-83 (App. Div. 1998)).]

This test "requires more than the listing of factors on each side of the ledger with victory going to the side garnering the most factors." Chrisanthis v. Cnty. of Atlantic, 361 N.J. Super. 448, 456 (App. Div. 2003). "Where there exist several indicia of employee status, the mere presence or absence of two or three of them -- without a reasoned balancing of the above factors -- cannot dictate the outcome of a summary judgment motion." Carney v. Dexter Shoe Co., 701 F. Supp. 1093, 1099 (D.N.J. 1988).

We have identified "[t]he most important of these factors is the first, the employer's right to control the means and manner of the worker's performance." Chrisanthis, supra, 361 N.J. Super.

at 455. "In analogous situations arising under federal anti-discrimination laws, the Third Circuit Court of Appeals has adopted a de facto test that measures the extent of the employer's control over the employee." Thomas, supra, 386 N.J. Super. at 596 (citing Graves v. Lowery, 117 F.3d 723, 729-30 (3d Cir. 1997)). The control test is also applied to determine the status of an employer when reviewing Title VII hostile work environment claims. See Graves, supra, 117 F.3d at 728; Ass'n of Mexican-American Educators v. California, 231 F.3d 572, 582-83 (9th Cir. 2000); Mangram v. General Motors, 108 F.3d 61, 62-63 (4th Cir. 1997); E.E.O.C. v. Illinois, 69 F.3d 167, 169 (7th Cir. 1995).

Generally, County Prosecutors have broad supervisory authority over the operations of municipal police departments. See Cherrits v. Village of Ridgewood, 311 N.J. Super. 517, 532 (App. Div. 1998). Nevertheless, as we discussed in Thomas, to apply the LAD to the putative employer's discriminatory conduct, the control test requires a party, which does not directly employ the plaintiff, to engage in conduct demonstrating it nevertheless exercised such control over a plaintiff's employment. Thomas, supra, 386 N.J. Super. at 596-97. "Indirect liability results when the defendant employer 'so far control[s] the plaintiff's employment relationship that it [is] appropriate to regard the defendant as the de facto or indirect employer of the plaintiff.

. . .'" Id. at 597 (quoting E.E.O.C., supra, 69 F.3d at 169). We cited authorities illustrating a de facto employer's qualifying conduct, such as imposing hiring requirements, controlling hirings or firings, and mandating training programs employees must complete. Id. at 596-97.

The motion judge, although acknowledging the Attorney General's order, adopted the Prosecutor's arguments and properly focused on the issues evincing control, stating:

> The checks didn't come from them. Their supervision didn't come from them. The direction didn't come from them. Their day-to-day assignments didn't come from them. And it is a hybrid of a management structure, but it . . . was . . . the court's perspective [of] that agreement, . . . [which] created the supersession executive was an example of articulating responsibility without really articulating authority. A prosecutor couldn't have called . . . plaintiff . . . and told him to do something. Venegas would have had to go through the chief himself. It's the creation of . . . a managerial overlay with no line authority, with no line responsibility. . . . Even considering [plaintiff]'s arguments, which are . . . not sufficient to carry the day in terms of any responsibility on the part of the Camden County Prosecutor's Office.

Perhaps the findings could have been more detailed, but our review of the record and the applicable law leads to the conclusion the supercession order and the Freeholders' execution of the consulting agreement with Venco did not create a legally

recognizable employment relationship between the Prosecutor and the municipal police officers, which must be present for plaintiff to pursue an action under the LAD. See Thomas, supra, 386 N.J. Super. at 594 ("[T]he lack of an employment relationship between the plaintiff and the defendant will preclude liability.").

Importantly, the consulting agreement, executed by the Freeholders, generally identified the scope of services provided without differentiation for the Prosecutor, the Department, and the City. As the motion judge found, plaintiff offers no facts showing the Prosecutor exercised authority over his employment sufficient to satisfy a conclusion the Prosecutor was his de facto employer. Venegas, in providing daily management, reported to the Chief and the City. The record contains no evidence the Prosecutor was involved with the search of plaintiff's office, the selection of officers for training and promotion opportunities, the day-to-day affairs of the Department, or plaintiff's suspension or termination. During his deposition, plaintiff agreed no acts by the Prosecutor formulated the alleged discrimination stated in his complaint. Rather, the allegations in the complaint, as supported by the record, make clear the conduct undergirding his claim of hostile work environment was attributed to Venegas, the City officials, and the Chief of Police.

Although the Prosecutor received a copy of Venegas' memorandum discussing plaintiff's transfer, the memorandum represents a memorialization of a meeting between plaintiff, Venegas, plaintiff's three operations captains, and the Manager of Public Information, who made the decisions. The Prosecutor was never asked and never actually investigated any complaints regarding plaintiff's performance, or alleged conduct warranting discipline.

Accordingly, on these limited proofs, we cannot reach the legal conclusion asserted by plaintiff that the Prosecutor stepped into the shoes of the City and served as his de facto employer. The Prosecutor exercised no acts of control over plaintiff's employment, and plaintiff offered no evidence the Prosecutor dictated the terms, conditions, discipline, and privileges of his employment. Summary judgment was properly granted dismissing plaintiff's complaint against the Prosecutor. Thomas, supra, 386 N.J. Super. at 594.

B.

Turning to claimed trial errors, plaintiff maintains the trial judge erroneously granting an in limine motion filed by the City and its employee defendants, seeking to bar evidence regarding Venegas' alleged discriminatory conduct toward plaintiff and other officers, once plaintiff voluntarily dismissed Venegas from the

suit. The City argued it did not hire Venegas, and therefore it had no liability if he committed acts of discrimination.

Plaintiff's claims against the remaining defendants were for retaliation. Specifically, he alleged they failed to take action when plaintiff complained of Venegas' acts of discrimination and suffered discipline and ultimately termination as a result.

> The LAD makes it illegal "[f]or any person to take reprisals against any person because that person has opposed any practices or acts forbidden under this act[.]" N.J.S.A. 10:5-12(d). . . . When the claim arises from alleged retaliation, the elements of the cause of action are that the employee "engaged in a protected activity known to the [employer,]" the employee was "subjected to an adverse employment decision[,]" and there is a causal link between the protected activity and the adverse employment action. Woods-Pirozzi v. Nabisco Foods, 290 N.J. Super. 252, 274 (App. Div. 1996). In addition, in order to recover for LAD retaliation, plaintiff must also demonstrate that the original complaint was both reasonable and made in good faith. Carmona v. Resorts Int'l Hotel, Inc., 189 N.J. 354, 373 (2007).
>
> [Battaglia v. United Parcel Serv., Inc., 214 N.J. 518, 546-47 (2013).]

Plaintiff relies on Woods-Pirozzi, supra, 290 N.J. Super. at 272-73, to support his argument the City, as his employer, was responsible for acts by Venegas, despite his contractor status, because it knew or should have known of his discriminatory conduct and failed to implement corrective action. Plaintiff urges

evidence of Venegas' conduct is relevant and admissible to show the City's failures.

Woods-Pirozzi reviewed the plaintiff's claims of sexual harassment by the plaintiff's supervisor and by an independent contractor. Id. at 260-63. Drawing on federal Title VII regulations, this court concluded: "An employer that knows or should know its employee is being harassed in the workplace, regardless of by whom, should take appropriate action." Id. at 269. The facts require examination of "the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees." Id. at 268.

The record shows the City had no control over Venegas. He was hired by the County, which, by order of the Attorney General, imposed its oversight for matters involving management and control of the Department. There is no dispute regarding this fact, which creates a vital distinction between this matter and the facts in Woods-Pirozzi.

The trial judge did not preclude plaintiff from presenting testimony regarding alleged retaliatory actions by the City, Chief Thomson, Venegas and Jones-Tucker. He argues, however, it was impossible to present a retaliation case without referencing the conduct he complained of by Venegas. These defendants counter,

asserting plaintiff's proofs required he show he voiced complaints in good faith with a reasonable belief Venegas was discriminating against him, and defendants engaged in an adverse employment action. They assert he was not impeded by the trial judge's evidentiary ruling from presenting these facts. A review of the extensive trial record bears out defendants' position.

Numerous witnesses, including plaintiff, testified at length regarding complaints he voiced to Jones-Tucker, the City, and Chief Thomson, which amounted to discrimination. The jury evaluated this evidence and concluded plaintiff's complaints did not rise to racial discrimination or retaliation.

Finally, we have considered plaintiff's claim the trial judge improperly applied N.J.R.E. 404(b) to exclude evidence of another officer's similar suit against the City, which claimed Venegas had also discriminated against him because he was Caucasian. We reject the arguments as unpersuasive and conclude the trial judge did not abuse his reasoned discretion.

Affirmed.