SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1571-16T3

JAMES B. O'CONNOR, Chief
of Police,

   Plaintiff-Appellant,

v.

ROBERT B. GIANGERUSO, Mayor;
LYNDHURST TOWNSHIP BOARD OF
COMMISSIONERS and TOWNSHIP OF
LYNDHURST,

   Defendants-Respondents.

_____

Argued April 19, 2018 — Decided May 3, 2018

Before Judges Simonelli, Haas and Gooden
Brown.

On appeal from Superior Court of New Jersey,
Law Division, Bergen County, Docket No.
L-7365-14.

Steven D. Cahn argued the cause for appellant
(Cahn & Parra, LLC, attorneys; Steven D. Cahn,
on the briefs).

Eric M. Bernstein argued the cause for
respondents (Eric M. Bernstein & Associates,
LLC, attorneys; Eric M. Bernstein, of counsel
and on the brief; Dominic P. DiYanni and
Stephanie M. Platt, on the brief).

PER CURIAM

Plaintiff appeals from the Law Division's December 7, 2016 order granting defendants' motion for summary judgment, and dismissing plaintiff's complaint that alleged defendants violated the New Jersey Conscientious Protection Act (CEPA), N.J.S.A. 34:19-1 to -14. We affirm.

The facts, as derived from the evidence submitted by the parties in support of, and in opposition to, the summary judgment motion, are fully detailed in Judge William C. Meehan's comprehensive written decision. Therefore, we recite only the most salient facts from that decision and, like Judge Meehan, view them in the light most favorable to plaintiff, the non-moving party. Polzo v. Cty. of Essex, 209 N.J. 51, 56 n.1 (2012) (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995)).

The Township of Lyndhurst (Township) has a "commission form of government" as permitted under the Walsh Act, N.J.S.A. 40:70-1 to -40:76-27. The five members of its Board of Commissioners (Board) are elected to serve concurrent four-year terms. N.J.S.A. 40:75-2. The Board has the legislative authority to introduce and enact ordinances for "[t]he preservation and enforcement of good government and the general welfare, order and security of the municipality." N.J.S.A. 40:72-3.

The Board assigns each of the five commissioners to head one of the Township's five departments, which include the Department of Public Affairs, the Department of Revenue and Finance, the Department of Public Safety, the Department of Public Works, and the Department of Parks and Public Property. N.J.S.A. 40:72-4 to -6. The Board also selects one of its members to serve as the mayor of the Township. At all times relevant to the present litigation, defendant Robert Giangeruso (mayor) served as Township mayor and was the Commissioner of the Department of Public Safety.

Plaintiff was the Township Chief of Police and, therefore, fell under the jurisdiction of the mayor in the Department of Public Safety. N.J.S.A. 40A:14-118. Plaintiff asserted that the mayor had "a history of interfering in the day-to-day operations of the police department." Among other things, plaintiff alleged that the mayor directed police officers away from their assigned tasks "to chauffer him;" had a lieutenant assigned to the narcotics bureau "as a reward" for the officer's "political patronage"; and later promoted this officer to a deputy chief position.

Plaintiff also maintained that in the summer of 2013, he learned that the mayor had Township employees perform contracting work for the benefit of another employee. Plaintiff reported this information to the county prosecutor, the Federal Bureau of Investigation, and the State Attorney General's Office. In 2013

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and 2014, plaintiff filed similar complaints concerning the mayor's alleged "unlawful hiring practices." Plaintiff alleged that during those years, the mayor "made specific and direct threats to 'get even' with" him.

At his deposition, the mayor stated he kept a file of the complaints plaintiff filed concerning him. He believed that plaintiff also "went to the newspapers to complain about his hiring and promotion practices and nepotism within the Township. [The mayor] also admitted that he was not happy with [plaintiff] going to the County Prosecutor's Office."

On April 22, 2014, the mayor proposed Ordinance No. 2903-14 (ordinance) for the Board's consideration. At that time, any member of the police department could be assigned off-duty overtime work, which involved the assignment of a police officer to supervise various projects, like road or utility work, performed by public or private entities. If a private entity was involved, it would reimburse the Township for the officer's overtime. No officer was guaranteed this overtime work, but it was assigned on a seniority basis. This meant that plaintiff, as the Chief of Police, would likely secure this duty before any of the less senior officers.

Under the new ordinance, the off-duty overtime assignments would only be available to "members of the police department having

a rank of patrol officer, sergeant, lieutenant, or assigned the rank of detective." The Chief of Police, Deputy Chief, and Captain would only be eligible for an off-duty overtime assignment if "no other member of the police department ha[d] volunteered to work such assignment" or if the assignment was with a "public entity, such as the Township[,] . . . New Jersey Meadowlands District, County of Bergen, Lyndhurst Board of Education, [or] State of New Jersey[.]" For those public projects, any member of the police department could be assigned to work off-duty overtime "based on seniority and without regard to rank." On May 13, 2014, the Board adopted the new ordinance.

As a result, it became more difficult for plaintiff to work overtime because the assignments were now more readily available to the less senior officers in the department. Plaintiff claimed "he lost approximately $16,000 in 2014 for overtime, $35,000 in 2015 for overtime, and over $17,000 in lost overtime through the end of July 2016."

In June 2014, plaintiff asked to be paid for his unused sick days. Although plaintiff alleged these requests were routinely granted in the past, the Township refused to pay plaintiff for his accumulated leave. The Township explained that pursuant to a March 24, 2011 amendment to plaintiff's employment contract, he

or his beneficiary were only "entitled to be paid for unused sick days upon his retirement or death."

On June 29, 2014, plaintiff filed a two-count complaint in lieu of prerogative writs against the mayor, the Board, and the Township. In count one, plaintiff argued that the ordinance interfered with his authority as police chief and, therefore, he sought to invalidate the Board's legislative enactment. In count two, plaintiff sought a declaratory judgment that the mayor's "ongoing interference with the day-to-day operations of the police department constitute[d] a violation of [plaintiff's] rights under [N.J.S.A.] 40A:14-118."

By leave granted, plaintiff later filed an amended complaint, adding a third count. In the new count, plaintiff alleged that defendants enacted the overtime ordinance and denied his request for payment for his unused sick time in retaliation for his whistle-blowing activities against the mayor in violation of the CEPA.

Defendants subsequently moved for summary judgment. At oral argument, plaintiff voluntarily dismissed counts one and two of the amended complaint and all of his claims against the mayor and the Board.

Following the argument, Judge Meehan rendered a thorough written opinion dismissing plaintiff's CEPA claim. As the judge

noted, the required elements of a successful CEPA action are well settled. Thus, in order to establish a prima facie case of retaliatory action under CEPA, a plaintiff must establish 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.
>
> [Lippman v. Ethicon, Inc., 222 N.J. 362, 380 (2015) (quoting Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003)).]

Judge Meehan first concluded "there [was] no merit to [plaintiff's] . . . claim that the Township . . . retaliated against him in June 2014 by not paying him for his accumulated unused sick days." In so ruling, the judge pointed to the terms of a March 24, 2011 Memorandum of Agreement (Memorandum) between plaintiff and the Township that amended plaintiff's employment contract. This Memorandum specifically stated that plaintiff "shall be entitled to payment for all accrued time to be paid to him or his beneficiary in an agreed upon schedule upon his retirement or death."

As the judge observed, plaintiff failed to "provide[] any evidence that the Township . . . paid him for accumulated, unused sick days after the Memorandum . . . had been signed. An employer cannot be said to be retaliating when it is following the terms and conditions of the employment agreement." Thus, plaintiff was unable to demonstrate that the Township "took an adverse employment action against him in June 2014 by not paying him for his accrued unused sick days[,]" and the judge dismissed this aspect of plaintiff's CEPA claim.

Judge Meehan then considered plaintiff's sole remaining allegation, namely, that the Township "violated [the] CEPA because as the employer of the commissioners [on the Board,] it [was] responsible for their retaliatory action of enacting an ordinance that has reduced his overall income." After finding that plaintiff was no longer asserting that the ordinance was invalid, and had dismissed all of his claims against the mayor and the Board, the judge provided two compelling reasons for determining that plaintiff's CEPA argument failed as a matter of law.

First, Judge Meehan found that the Board commissioners' action in voting on and enacting the ordinance was a legislative action for which they were protected by legislative immunity. Brown v. City of Bordentown, 348 N.J. Super. 143, 148 (App. Div. 2002). Continuing to reference our late colleague Judge Michael

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P. King's decision in <u>Brown</u>, the judge concluded that the Township

enjoyed derivative immunity for the legislative action of the

Board and its five commissioners in enacting the ordinance. <u>Id.</u>

at 151. The judge stated that

> [b]esides withholding unused sick pay pursuant
> to an employment contract, [plaintiff] has not
> alleged that the Township . . . is liable for
> any administrative or executive actions taken
> by the commissioners. In fact, there is no
> allegation that an administrative or executive
> action was taken after the [o]rdinance was
> enacted.

Because the ordinance was adopted through the normal

legislative process, affected two other senior officers in

addition to plaintiff, and did not prevent these officers from

earning overtime under appropriate circumstances, the judge held

"the evidence in the record fails to show that the [o]rdinance was

directed at a particular employee; rather it [was] nothing more

than traditional legislation" that entitled the Township to

absolute derivative legislative immunity. Therefore, the judge

dismissed plaintiff's CEPA claim based on the Board's enactment

of the ordinance.

Even if this were not the case, however, Judge Meehan found

that plaintiff also failed to establish the fourth element of a

CEPA claim -- a causal connection between the whistle-blowing

activity and the adverse employment action. The judge explained

that plaintiff

> did not provide any evidence that anyone other
> than [the mayor] was motivated to pass the
> [o]rdinance in retaliation against him. He
> has not provided any evidence regarding the
> motivation of the four other commissioners.
> [Plaintiff] also did not provide any evidence
> that [the mayor] had any influence over the
> other commissioners.

Under these circumstances, the judge concluded that plaintiff

failed to meet his "burden to prove that but for his whistleblowing

activities, a majority of the commissioners would not have voted

in favor of the [o]rdinance" and, therefore, he dismissed

plaintiff's CEPA claim. This appeal followed.

On appeal, plaintiff raises the same arguments that Judge

Meehan carefully considered and rejected in his cogent written

opinion. Thus, plaintiff asserts the judge "erred in dismissing

[his] claims pursuant to legislative immunity[,]" and "in ruling

[plaintiff] did not have sufficient evidence to prove the fourth

element of his CEPA cause of action."

Our review of a ruling on summary judgment is de novo,

applying the same legal standard as the trial court, namely, the

standard set forth in Rule 4:46-2(c). Conley v. Guerrero, 228

N.J. 339, 346 (2017). Thus, we consider, as the trial judge did,

whether "the competent evidential materials presented, when viewed

in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Town of Kearny v. Brandt, 214 N.J. 76, 91 (2013) (quoting Brill, 142 N.J. at 540). If there is no genuine issue of material fact, we must then "decide whether the trial court correctly interpreted the law." Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494 (App. Div. 2007) (citing Prudential Prop. & Cas. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div. 1998)). We accord no deference to the trial judge's conclusions on issues of law and review issues of law de novo. Nicholas v. Mynster, 213 N.J. 463, 478 (2013).

Having considered plaintiff's contentions in light of the record and applicable legal principles, we are satisfied that Judge Meehan properly granted summary judgment to defendants and affirm substantially for the reasons expressed in his December 7, 2016 written opinion.

Affirmed.

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