SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3420-15T2

MICHAEL WATTS,

Plaintiff-Appellant,

v.

TOWNSHIP OF WEST ORANGE, WEST ORANGE POLICE CHIEF JAMES P. ABBOTT, ACTING WEST ORANGE POLICE DIRECTOR ROBERT D. PARISI, WEST ORANGE CAPTAIN MICHAEL CORCORAN, WEST ORANGE POLICE LIEUTENANT THOMAS MONTESION, WEST ORANGE POLICE SERGEANTS KEVIN BOLAN, KEVIN DALGAUER, ROBERT HARTMAN, WILLIAM VARANELLI and ROBERT MARTIN, WEST ORANGE POLICE OFFICERS THOMAS BARBELLA and CHRISTOPHER JACKSIC,

Defendants-Respondents.

Argued November 15, 2017 – Decided February 20, 2018

Before Judges Fuentes, Koblitz and Manahan.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-5544-12.

Michael Confusione argued the cause for appellant (Hegge & Confusione, LLC, and The Maglione Firm, attorneys; Michael Confusione,

Dean R. Maglione and Elizabeth Bolan, of counsel and on the brief).

Mark Y. Moon argued the cause for respondents Township of West Orange, Chief James P. Abbott and Mayor Robert D. Parisi (Trenk, DiPasquale, Della Fera & Sodono, PC, attorneys; Richard D. Trenk and Mark Y. Moon, of counsel and on the brief).

Alex J. Keoskey argued the cause for respondents West Orange Captain Michael Corcoran, West Orange Police Lieutenant Thomas Montesion, West Orange Police Sergeants Kevin Bolan, Kevin Dalgauer, Robert Hartman, William Varanelli and Robert Martin, West Orange Police Officers Thomas Barbella and Christopher Jacksic (DeCotiis, FitzPatrick & Cole, LLP, attorneys; Alex J. Keoskey, of counsel; Amanda E. Miller, on the brief).

PER CURIAM

Plaintiff Michael Watts appeals an order granting summary judgment in favor of the Township of West Orange (the Township) and the individual defendants.[1] We affirm.

I.

Plaintiff was employed as a police officer with the West Orange Police Department (Department) from January 22, 2002 through December 26, 2012. During his employment, plaintiff was the subject of numerous internal affairs (IA) investigations. In

[1] The Township, Chief Abbott, Mayor Parisi are represented by Trenk DiPasquale, Della Fera & Sodono, P.C., and the remaining individual defendants are represented by DeCotiis, Fitzpatrick & Cole, LLP. While they submit separate briefs, they acknowledge that their procedural history and statement of facts are identical.

some cases the charges lodged against plaintiff were sustained and in other cases the charges were not sustained. As a consequence of the sustained charges, plaintiff was disciplined. The discipline included several suspensions, remedial training, and job transfers.

We take the following facts from the record in a light most favorable to plaintiff. Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995). In early 2011, plaintiff and other officers were advised that the Township was initiating a restructuring of the police department. The restructuring resulted in the lay off or demotion of officers in March 2011. Plaintiff alleged that on several occasions in February 2011 during patrol line-ups, supervisors advised officers not to issue summonses or arrest people, stating those essential functions financially supported the Township.

On July 22, 2011, plaintiff advised Captain Corcoran of an alleged "work stoppage scheme" to be carried out by members of the police department. Plaintiff alleged that he had been "ordered by certain supervisors not to take any proactive police actions while on duty." Plaintiff further alleged that "he has been singled out recently and given tasks/assignments by supervisors and central communication solely to keep him busy and out of service and that he has been subjected to a hostile work

environment on different dates by different personnel for attempting to perform his duties." The Department initiated an IA investigation based on plaintiff's allegations.

On July 12, 2012, an IA investigation report was generated. The report stated that 101 agency members and one former agency member were interviewed in connection with the alleged work stoppage scheme, as well as six potential civilian witnesses outside the agency. None of those interviewed had knowledge of, directed, or participated in a work stoppage scheme. The report concluded plaintiff's allegations were unfounded. Subsequent to the report's issuance, plaintiff filed a complaint seeking relief pursuant to the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14.

Plaintiff then filed a first amended complaint. The amended complaint asserted claims under: (1) CEPA; (2) breach of contract; (3) implied covenant of good faith and fair dealing; (4) negligent infliction of emotional distress; and (5) intentional infliction of emotional distress.

On August 6, 2012, Sergeant Varanelli prepared a memorandum to Lieutenant Levens, in accordance with the Attorney General Guidelines on Internal Affair Policy and Procedures,[2] regarding

[2] www.nj.gov/oag/dcj/agguide/internalaffairs2000v1_2.pdf.

his belief that plaintiff was unfit for duty, and requested a medical and psychological evaluation be conducted on plaintiff.

In September 2012, the mayor's office received a complaint from a resident regarding an interaction with plaintiff. The resident described plaintiff as a "bully officer." The complaint resulted in an IA investigation of plaintiff's "demeanor/improper conduct." In late May 2013, the IA investigation was administratively closed.

Thereafter, Lieutenant Thomas Montesion filed a partial motion to dismiss the first amended complaint in lieu of an answer. R. 4:6-2(e). The Township also filed to join in the partial motion to dismiss. In September 2012, the Township filed to join in Montesion's partial motion to dismiss. Soon after, defendants Thomas Montesion, Kevin Bolen, Kevin Dalgauer, Robert Hartman, Robert Martin, Thomas Barbella, and Christopher Jacksic filed an amended notice of motion for partial dismissal of the plaintiff's first complaint. On September 28, 2012, the motion and the amended motion were granted, dismissing counts four (breach of contract); five (implied covenant of good faith and fair dealing); six (negligent infliction of emotional distress); and seven (intentional infliction of emotional distress) of the first amended complaint.

In early October 2012, Sergeant John Morella reported that while on duty, plaintiff referred to a firehouse tower stating, "Wow, this is a great place to pick people off, I miss being behind a scope of a rifle." According to Morella, plaintiff also said:

> Did you know there is a perfect spot at the top of 80 Main [Street] to pick people off from the rear of headquarters, but don't worry you are not on that list. I will call you and tell you to call out sick the day that I do it and I will call Rolli too.

On October 5, 2012, the Township issued a Preliminary Notice of Disciplinary Action (PNDA) based on plaintiff's statements as reported by Morella. Pursuant to this notice, plaintiff was suspended pending final disposition and charged with violating N.J.A.C. 4A:2-2.3(a)(12), "other sufficient cause" for discipline.

On November 7, 2012, plaintiff underwent a "Fitness for Duty Psychological Evaluation" conducted by Dr. Betty McLendon. In her report, dated November 30, 2012, McLendon concluded that plaintiff was unfit for duty.

The following month, plaintiff received a second PNDA that notified him that his paid suspension was converted to an unpaid suspension, effective immediately, pending final disposition. Plaintiff was charged with one count of inability to perform duties, N.J.A.C. 4A:2-2(a)(3), one count of conduct unbecoming a

public employee, N.J.A.C. 4A:2-2.3(a)(6), and seven counts of other sufficient cause, N.J.A.C. 4A:2-2.3(a)(12).

A hearing was conducted on the charges over four days in January and February 2013 to determine whether there was sufficient cause to suspend plaintiff without pay. During the pendency of the hearing, plaintiff's counsel submitted a letter from Grigory S. Rasin, M.D., which stated that, "as a result of [plaintiff's] workplace harassment and/or retaliation, he is presently unfit for duty."

The hearing officer concluded in the March 22, 2013 decision that plaintiff was unfit for duty. The hearing officer also concluded that the violations of workplace violence and uniform standards of conduct independently support a decision to remove plaintiff from his position. On April 1, 2013, the Township issued a Final Notice of Disciplinary Action, which terminated plaintiff.

On August 30, 2013, plaintiff filed a second amended complaint against defendants that included one count of an alleged violation of CEPA. Defendants filed an answer.

Following extensive discovery, defendants collectively moved for summary judgment.[3] On November 16, 2015, the trial court held

[3] At plaintiff's request, discovery was extended seven times.

oral argument, after which Judge Garry J. Furnari concluded that there were unresolved issues. A trial date was set for March.

On December 18, 2015, defendants submitted supplemental briefs. Oral argument was heard on March 23, 2016. After oral argument, the judge issued an oral decision granting summary judgment in favor of all defendants. An order was entered dismissing the complaint.

II.

On appeal, plaintiff raises the following arguments under one point heading:

[POINT I]

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DISMISSING PLAINTIFF'S CEPA CLAIMS AS A MATTER OF LAW.

A. The trial court erred in limiting the adverse actions a jury can find to only plaintiff's termination.

B. The trial court contravened New Jersey law by ruling that the adverse employment actions taken against plaintiff by his supervisors and co-policemen could not be imputed to the Township of West Orange.

C. A reasonable jury can find that defendants' explanation for the adverse employment actions taken against plaintiff are unworthy of credence and mere pretext for the actual reason: to retaliate against

> plaintiff for his whistleblowing activities.
>
> D. The motivation of the individual defendants, or whether the acts taken were against the "interests" of the defendant employer, is not a requirement of a CEPA claim and not ground on which to dismiss plaintiff's claim.
>
> E. Even disregarding the individual retaliatory acts taken against plaintiff by his supervisors and co-workers, the defendant Township's failure to investigate plaintiff's complaints of retaliation and stop the continued harassment against him is affirmative indifference that also constitutes adverse employment action prohibited by CEPA.
>
> F. The trial court erred in dismissing plaintiff's CEPA claims against the individual defendants.

Our review of a grant of summary judgment is de novo, applying the same standards that governed the trial court. Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010). 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 as a matter of law." R. 4:46-2. Having considered the record in light of our standard of review, we affirm substantially

for the reasons set forth in Judge Furnari's comprehensive oral opinion. We add the following.

III.

Plaintiff argues that the judge erred when he dismissed the CEPA claims. It is well-settled that CEPA is designed to "prevent retaliation against those employees who object to employer conduct that they reasonably believe to be unlawful or indisputably dangerous to the public health, safety or welfare." Mehlman v. Mobil Oil Corp., 153 N.J. 163, 193-94 (1998); see also N.J.S.A. 34:19-3. "[T]he offensive activity must pose a threat of public harm, not merely private harm or harm only to the aggrieved employee." Mehlman, 153 N.J. at 188.

"CEPA is designed to protect employees who blow the whistle on illegal or unethical activity committed by their employers or co-employees." Estate of Roach v. TRW, Inc., 164 N.J. 598, 609-10 (2000). "So viewed, CEPA is remedial legislation. Consequently, courts should construe CEPA liberally to achieve its remedial purpose." Id. at 610 (citations omitted). "CEPA prohibits an employer from taking 'retaliatory action' against an employee for protected conduct." Maimone v. Atl. City, 188 N.J. 221, 235 (2006) (quoting N.J.S.A. 34:19-3). CEPA defines a "retaliatory action" 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." Ibid. (quoting N.J.S.A. 34:19-2(e)). 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. "Many separate but relatively minor instances of behavior directed against an employee . . . may . . . combine to make up a pattern of retaliatory behavior." Green v. Jersey City Bd. of Ed., 177 N.J. 434, 448 (2003).

To establish a cognizable CEPA claim, the Supreme Court determined that an employee must prove:

> (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.
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> [Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003).]

The judge found that plaintiff established the first element of the CEPA claim.

> In this case, plaintiff alleges that the officers of the Township of Orange [sic] were engaged in work stoppage scheme by refusing to issue summonses and make arrests in an effort to protest the Township's recent budget

> cuts. Plaintiff testified that on several occasions parole supervisors [sic] ordered him and other police officers not to engage in motor vehicles stops or arrests.
>
> In addition, plaintiff was aware that prior to the proposal going into [] effect, collective bargaining unions, officers, and supervisors of the police publicly voiced their objection to the proposal. As demonstrated by the Maimone case, an intentional refusal to engage in law enforcement could be detrimental to the safety of the community and, if true, could violate a clear mandate of public policy.
>
> Notwithstanding the argument that it wasn't the Township doing it, I'm reminded of the Higgins[4] case where it was another employee who was involved in doing something illegal. But [] for this prong it would be sufficient under any circumstance that such a report -- it appears to be sufficient -- evidence to establish a genuine issue of material fact as to whether or not the plaintiff could have reasonably believed that -- in this work stoppage scheme and that it violated the law. So plaintiff has satisfied the first element.

Concerning the second element of plaintiff's CEPA claim, the judge stated:

> In this case, [] the parties dispute at length each element of the CEPA claim, except for element two, that the plaintiff performed a whistle[-]blowing activity. At least in the initial briefing, defendants [did] not dispute that the plaintiff's initiation of the Internal Affairs investigation and his reporting of the alleged workplace stoppage

[4] Higgins v. Pascack Valley Hosp., 158 N.J. 404, 424 (1999).

> constituted a whistle[-]blowing activity within the meaning of the statute.
>
> . . . .
>
> For purposes of element two, all that is necessary is [for] plaintiff to show that he performed an activity that constitutes a whistle[-]blowing within the meaning of the statute, i.e. providing information to or testifying before a public body investigating an alleged violation of law.
>
> Here, it is undisputed that the plaintiff initiated an Internal Affairs investigation, which clearly fits the definition. Therefore, the [c]ourt concludes that the plaintiff has established the second element.

The third element, whether there was retaliatory action taken against plaintiff by defendants, was in dispute. Under CEPA, a 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). "Adverse employment action" is broadly defined in light of the remedial purposes of the statute and may include such things as "making false accusations of misconduct, giving negative performance reviews, issuing an unwarranted suspension, and requiring pretextual mental-health evaluations." Donelson v. DuPont Chambers Works, 206 N.J. 243, 257-58 (2011). It need not take the form of a single discrete action, but can be "many separate but relatively minor instances of behavior directed

against an employee that may not be actionable individually but that combine to make up a pattern of retaliatory conduct." Green, 177 N.J. at 448.

However, "not everything that makes an employee unhappy is an actionable adverse action." Cokus v. Bristol Myers Squibb Co., 362 N.J. Super. 366, 378 (Law Div. 2002) (citation omitted). "[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.'" El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 176 (App. Div. 2005) (quoting Cokus, 362 N.J. Super. at 386). Incidents that cause a "bruised ego or injured pride," Beasley v. Passaic County, 377 N.J. Super. 585, 607 (App. Div. 2005), Klein v. University of Medicine & Dentistry of New Jersey, 377 N.J. Super. 28, 46 (App. Div. 2005), or that make an employee's job "mildly unpleasant" but do not have a substantial impact on the terms and conditions of employment, Hancock v. Borough of Oaklyn, 347 N.J. Super. 350, 360, (App. Div. 2002), are insufficient to prove actionable retaliation.

With these principles in mind, based on the review of the judge's thorough examination of plaintiff's allegations of retaliation, we agree that plaintiff's termination would constitute the only actionable conduct.

Preliminarily, the judge found that the parties "conceded that the decision to terminate plaintiff's employment is a retaliatory action under CEPA." The remaining alleged adverse employment acts were aptly summarized by the court as follows: (1) insults and demeaning statements; (2) disclosure of plaintiff's participation in the IA investigation; (3) false charges and accusations; (4) loss of overtime opportunity; (5) poor performance evaluations; and (6) failure to transfer.

Workplace conflict alone does not constitute retaliation, as embarrassing and unpleasant as it may be. Beasley, 377 N.J. Super. at 607; Klein, 37 N.J. Super. at 46; Hancock, 347 N.J. Super. at 360. Furthermore, filing a CEPA complaint does not insulate an employee from ordinary supervision. See Higgins, 158 N.J. at 424 (holding CEPA does not insulate an employee from "discharge or other disciplinary action for reasons unrelated to the complaint").

Here, plaintiff's complaints of "insults and demeaning statements" do not rise to the level of retaliation. Plaintiff's particular complaints are more appropriately characterized as the sort that result in "a bruised ego or injured pride on the part of the employee," which are not actionable. Klein, 377 N.J. Super. at 46. "To reiterate, employment discrimination laws are 'not intended to be a "general civility" code for conduct in the

workplace.'" Cokus, 362 N.J. Super. at 383 (quoting Heitzman v. Monmouth Cty., 321 N.J. Super. 133, 147 (App. Div. 1999)). Moreover, as the court noted, an employer's alleged failure to maintain a complaining employee's anonymity [does] not rise to an adverse employment action. Id. at 381-82.

Plaintiff's contention that the "false charges and accusations" against him were without merit is refuted by the discovery record. Specifically, plaintiff does not and did not dispute that he made the alarming statements to Morella. These undisputed statements alone would form a sustainable basis for his termination.

> Where the affected party does not deny committing an infraction that resulted in discipline, the discipline cannot be considered "proscribed reprisal." Cf. Esposito v. [Twp.] of Edison, 306 N.J. Super. 280, 291 (App. Div. 1997) (dealing with the LAD), certif. denied, 156 N.J. 384 (1998). When plaintiffs are afforded a hearing and represented by counsel, plaintiffs "cannot claim that . . . substantiated disciplinary charges and resulting brief suspensions from work [are] retaliatory." Hancock v. Borough of Oaklyn, 347 N.J. Super. 350, 361 (App. Div. 2002), appeal dismissed as improvidently granted, 177 N.J. 217 (2003). It would require a strong showing to "transmute [a] defense to the disciplinary charges into an affirmative CEPA claim." McLelland v. Moore, 343 N.J. Super. 589, 608 (App. Div. 2001), certif. denied, 171 N.J. 43 (2002).
>
> [Beasley, 377 N.J. Super. at 607.]

We also agree with the judge that plaintiff failed to demonstrate that the failure to transfer plaintiff to a new unit constituted an adverse employment action. To the contrary, as the judge found, "the Township addressed plaintiff's concern by attempting to separate plaintiff and Sergeant Bolen."

Concerning plaintiff's allegations of lost overtime opportunity and poor performance evaluations, the judge noted that, facially, the allegations "could constitute an adverse employment action, because they may affect the terms and conditions of [] plaintiff's employment." See Beasley, 377 N.J. Super. at 608. Here, plaintiff alleged that he was denied overtime on three occasions. The judge found that the record as a whole did not support plaintiff's claims:

> For example, plaintiff alleges that Sergeant Bolen retaliated against [him] by giving him a two/five on his performance evaluation for acceptance of feedback. However, the record also reflects that the evaluation contained a total of [twenty-nine] categories of observed behaviors for which plaintiff receive above average or superior scores.
>
> Viewing this evaluation as a whole, no reasonable juror could conclude or could label this evaluation as negative merely because the plaintiff scored below average in one category out of [twenty-nine].
>
> . . . .
>
> Similarly, plaintiff alleges that he was denied overtime hours on three occasions, yet

> plaintiff merely points to three specific dates while ignoring the record as a whole which shows that during 2011 plaintiff was hired for thirteen overtime jobs until his transfer to the Special Investigations on November 12, 2011.
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> At the time of plaintiff's transfer, only five other patrol officers had more overtime hires than the plaintiff in 2011. In fact, by the time of his transfer, plaintiff has the sixth most overtime hours of all [sixty-seven] officers listed.

We agree. Except for plaintiff's termination, the other alleged acts of retaliation would not constitute a material change in the conditions of plaintiff's employment as to be actionable under CEPA. However, that plaintiff established that he was subjected to an adverse employment action by his termination, does not alone satisfy the fourth element.

An employee who claims retaliation under N.J.S.A. 34:19-3 must demonstrate "a causal connection exists between the whistle-blowing activity and the adverse employment action." Dzwonar, 177 N.J. at 462. The causal connection "can be satisfied by inferences that the trier of fact may reasonably draw based on circumstances surrounding the employment action." Maimone, 188 N.J. at 237. In drawing inferences from an employer's actions that a plaintiff claims to have been retaliatory, a factfinder takes into consideration whether those actions were based on permissible reasons. Bowles v. City of Camden, 993 F. Supp. 255, 265 (D.N.J.

1998). In doing so, the factfinder may consider any "inconsistencies" or "anomalies" that cast doubt on the employer's credibility, and raise an inference that the employer did not act for the reasons it stated. Ibid.

As noted above, plaintiff does not dispute, and in fact agrees, that he was terminated from his employment because he was mentally unfit for duty.

In Donelson, the Court held:

> an "adverse employment action" is taken against an employee engaged in protected activity when an employer targets him for reprisals — making false accusations of misconduct, giving negative performance reviews, issuing an unwarranted suspension, and requiring pre-textual mental-health evaluations — causing the employee to suffer a mental breakdown and rendering him unfit for continued employment. See N.J.S.A. 34:19-2(e).
>
> [206 N.J. at 258.]

Plaintiff posits that he was subjected to this type of adverse employment action that caused his depression and anxiety which resulted in his unfitness for duty. In rejecting this argument, the judge stated that "plaintiff does not get the benefit of the argument that he was rendered unfit for duty because of his mental condition as the plaintiff did in Donelson" because he did not establish a separate adverse employment action. Again, we agree.

Given our standard of review and providing plaintiff with all favorable inferences drawn from the discovery record, we conclude that, unlike in Donelson, plaintiff was not subjected by his employer to false accusations of misconduct, unwarranted negative performance reviews, unwarranted suspensions or pre-textual mental-health examinations. As such, plaintiff did not satisfy the fourth element and the judge correctly rejected his claim of a violation of CEPA. Dzwonar, 177 N.J. at 462.

IV.

Finally, we conclude that plaintiff's remaining arguments, not specifically addressed herein, lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.