SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0519-22

ROBERT MONTGOMERY,

Plaintiff-Appellant,

v.

ATLANTIC CITY ELECTRIC COMPANY, PEPCO HOLDINGS, LLC, and EXELON CORPORATION,

Defendants-Respondents.

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Submitted February 1, 2023 – Decided March 10, 2023

Before Judges Firko and Natali.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Cumberland County, Docket No. L-0268-22.

Jacobs & Barbone, PA, attorneys for appellant (David A. Castaldi, on the briefs).

Montgomery McCracken Walker & Rhoads LLP, attorneys for respondents (William K. Kennedy and Alexandra S. Jacobs, on the brief).

PER CURIAM

By way of leave to appeal, plaintiff Robert Montgomery, who was formerly employed by defendants Atlantic City Electric Company (ACE), Pepco Holdings, LLC (PH), and Exelon Corporation (Exelon) (collectively defendants), challenges an August 29, 2022 Law Division order dismissing count one of his two-count complaint under the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14. Count two alleges private defamation and is not the subject of this appeal. For the reasons that follow, we reverse and remand for further proceedings.

I.

We conduct a de novo review of a trial court's dismissal of a complaint pursuant to Rule 4:6-2(e). Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021). "A reviewing court must examine 'the legal sufficiency of the facts alleged on the face of the complaint,' giving the plaintiff the benefit of 'every reasonable inference of fact.'" Ibid. (quoting Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 108 (2019)). "If the complaint states no claim that supports relief, and discovery will not give rise to such a claim, the action should be dismissed." Dimitrakopoulos, 237 N.J. at 107. We owe no deference to the motion court's legal conclusions. Id. at 108.

We apply the same standard as the motion court. Malik v. Ruttenberg, 398 N.J. Super. 489, 494 (App. Div. 2008).

ACE is a State-regulated public utility company. PH is a utility holding company. Exelon is an energy holding company. ACE is a subsidiary of PH, and PH is a subsidiary company of Exelon. Plaintiff was employed by ACE as a supervisor.[1] He retired from "an exemplary" thirty-year career with Verizon as a frontline supervisor. According to the complaint, plaintiff moved from ACE's Cape May operations location to the Bridgeton operations location, where he served as the acting manager. Plaintiff's job duties included overseeing the overhead department and the trouble department. At Bridgeton, plaintiff "spearheaded company initiatives" and sought to improve service, which entailed development of a storm response plan. Plaintiff also served on ACE's operation's diversity, equity, and inclusion council.

Les Jones was a troubleman under plaintiff's supervision in the Cape May and Bridgeton locations. In October 2020, Jones moved to Delaware and began leaving work early to drive home. He was verbally reprimanded by a manager

[1] In his complaint, plaintiff alleges "defendants" hired him. In his merits brief, plaintiff contends "defendants" hired and terminated him. In contrast, in their merits brief, defendants contend plaintiff worked for ACE. Nevertheless, this inconsistency is not germane to our opinion because PH and Exelon are parent companies of ACE.

for doing so. In June 2021, Jones requested more overtime hours "owing to his new house." On July 28, 2021, Jones accepted a dispatch call prior to the start of his shift, which typically began at 7:00 a.m. Upon arrival at the job site, Jones was told he was not needed. Jones, however, remained on the clock. That day, plaintiff checked the GPS[2] on Jones's ACE work truck, which indicated Jones's truck was parked in the same location on defendants' property "for several hours." Plaintiff reported the situation to his manager, who advised plaintiff to investigate the location.

Upon arrival, plaintiff observed Jones sleeping in his work truck in the driver's seat with the engine running, air conditioning on, and dashboard lights covered. "Reasonably believing" Jones was "stealing time," plaintiff reported Jones because he was "told to go home and instead remained on the clock," and "slept for the night." In a text message, Jones acknowledged the sleeping incident to plaintiff. It can reasonably be inferred plaintiff's reference to Jones "stealing time" denotes a theft of defendants' money, or fraudulently obtaining defendants' money, by clocking in when told not to, and then sleeping and performing no work while clocked in, for the purpose of obtaining wages to which Jones had absolutely no entitlement.

[2] Global Positioning System.

Plaintiff reported Jones's sleeping incident to his manager "dutifully and truthfully." Defendants contend plaintiff complained that Jones was "napping" during work hours. Jones was ultimately suspended for the sleeping incident based upon the "consensus call" of all managers and directors involved with disciplinary proceedings. Jones blamed plaintiff for "singling him out" and then filed a discrimination complaint against plaintiff.

An Exelon "ethics panel" interviewed plaintiff regarding Jones's complaint. Plaintiff denied "ever doing, seeing, or hearing anything remotely discriminatory." Plaintiff never heard anything further about Jones's complaint against him. Jones "avoided" plaintiff thereafter and told him, "I hate phony people." On February 14, 2022, defendants fired plaintiff, who inquired about the basis for his termination. An Exelon human resources employee told plaintiff, "We can't tell you" but it was a "tough decision" and alluded to the Jones "investigation."

That same day, the Exelon human resources employee sent plaintiff a letter stating that his termination was based on alleged "violations of Employee Standards of Conduct, Exelon Code of Business Conduct, and Company policy, which independently or in combination warrant termination." The letter did not specify the policies plaintiff allegedly violated. According to plaintiff, "news

of his termination quickly spread" amongst ACE employees, who "knew that his termination involved . . . Jones."

The next day, PH executives published a letter to all PH and ACE employees stating the February 14 terminations of plaintiff and another individual "were based on acts of inequitable treatment and behaviors that created an unwelcome workplace environment." Plaintiff contends defendants "casted" him as a "supervisor" who unfairly treated employees, and he was retaliated against by being terminated to "send a message." Plaintiff maintains the statements contained in the letter injured his reputation and implied he committed a "racially-motivated or discriminatory act."

Plaintiff also contends he "truthfully" reported Jones's stealing time, which constitutes theft by deception under N.J.S.A. 2C:20-4,[3] and defendants retaliated against plaintiff by firing him. In dismissing plaintiff's CEPA claim, the court stated that plaintiff's conduct in reporting Jones for sleeping on duty "is not a whistle-blowing activity" designed to benefit the health, safety, and welfare of the public, citing Feldman v. Hunterdon Radiological Associates, 187 N.J. 228, 239 (2006). The court found plaintiff's report to his manager involving

[3] N.J.S.A. 2C:20-4 provides "a person is guilty of theft if [they] purposely obtain property of another by deception."

Jones involved "individualized conduct of an employee against his employer" and not "whistle-blowing activity" under CEPA, relying on our Supreme Court's holding in Estate of Roach v. TRW, Inc., 164 N.J. 598, 613 (2000).

On appeal, plaintiff contends the court erred in dismissing his CEPA claim because he pled sufficient facts to establish prima facie, he reasonably believed Jones's stealing company time was unlawful or fraudulent, or both, under N.J.S.A. 34:19-3. Plaintiff specifically argues the court failed to give him every reasonable inference of disputed fact and instead made an improper credibility determination that he could not have a reasonable belief that stealing time was unlawful or fraudulent, warranting reversal. Plaintiff also asserts he was not given an opportunity to develop a record to support his claims. We agree.

II.

Motions to dismiss under Rule 4:6-2(e) "should be granted only in rare instances and ordinarily without prejudice." Smith v. SBC Commc'ns Inc., 178 N.J. 265, 282 (2004). This standard of review "is a generous one." Green v. Morgan Props., 215 N.J. 431, 452 (2013).

> [A] reviewing court "searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." At this preliminary stage of the litigation the Court is not concerned with the ability of

> plaintiffs to prove the allegation contained in the complaint. For purposes of analysis plaintiffs are entitled to every reasonable inference of fact. The examination of a complaint's allegations of fact required by the aforestated principles should be one that is at once painstaking and undertaken with a generous and hospitable approach.
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> [Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989) (citations omitted).]

To establish a prima facie case under CEPA, a plaintiff must prove:

> (1) [they] reasonably believed that [their] employer's conduct was violating either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy;
>
> (2) [they] performed a "whistle-blowing" activity described in N.J.S.A. 34:19-3(c);
>
> (3) an adverse employment action was taken against [them]; and
>
> (4) a causal connection exists between the whistle-blowing activity and the adverse employment action.
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> [Lippman v. Ethicon, Inc., 222 N.J. 362, 380 (2015) (quoting Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003)).]

"The evidentiary burden at the prima facie stage is 'rather modest . . . .'" Zive v. Stanley Roberts, Inc., 182 N.J. 436, 447 (2005) (quoting Marzano v. Comput. Sci. Corp., 91 F.3d 497, 508 (3d Cir. 1996)). Once a plaintiff establishes the four CEPA elements, the burden shifts to the defendant to

"advance a legitimate, nondiscriminatory reason for the adverse conduct against the employee." Klein v. Univ. of Med. & Dentistry of N.J., 377 N.J. Super. 28, 38 (App. Div. 2005). "If such reasons are proffered, plaintiff must then raise a genuine issue of material fact that the employer's proffered explanation is pretextual." Id. at 39.

CEPA prohibits employers from retaliating against an employee who:

> a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer . . . that the employee reasonably believes:
>
> > (1) is in violation of a law, or a rule or regulation promulgated pursuant to law . . . ; or
> >
> > (2) is fraudulent or criminal . . . ;
>
> b. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer . . . ; or
>
> 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 . . . ;
> >
> > (2) is fraudulent or criminal . . . ; or

> (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 (emphasis added).]

Here, plaintiff claims the termination of his employment violated N.J.S.A. 34:19-3(c) based on his objection to Jones's crime or fraud.

In relevant part, CEPA prohibits retaliatory conduct by an employer against an employee who "[o]bjects to . . . any activity, policy, or practice which the employee reasonably believes . . . is in violation of a law" or "fraudulent or criminal." N.J.S.A. 34:19-3(c)(1) to -3(c)(2). Fraudulent or criminal activity includes "any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity." N.J.S.A. 34:19-3(c)(2).

CEPA was enacted to prevent retaliatory action when an employee blows the whistle on improper activities, "not to assuage egos or settle internal disputes at the workplace." Klein, 377 N.J. Super. at 45. CEPA defines "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." N.J.S.A. 34:19-2(e).

Here, plaintiff asserts his whistle-blowing activity occurred when he truthfully and dutifully reported to his manager what he reasonably believed was fraudulent activity of Jones. Plaintiff asserts the court erred because CEPA provides "protection to employees if they reasonably believe that the activity complained of is 'fraudulent or criminal' even when the activity does not rise to the level of an actual crime," citing Roach, 164 N.J. at 613.

Plaintiff also relies upon our Supreme Court's holding in Chiofalo v. State, which held "[a] plaintiff is required only to 'set forth facts that would support an objectively reasonable belief that a violation has occurred.'" 238 N.J. 527, 542 (2019) (quoting Dzwonar, 177 N.J. at 464). Based on his objection to Jones's activity, plaintiff reasonably believed Jones committed either theft under N.J.S.A. 2C:20-4 or fraud, and defendants' motion to dismiss should have been denied. Plaintiff claims Jones's conduct is both criminal and fraudulent "in the ordinary sense" of the word and is therefore, a legitimate basis for a CEPA claim. He also claims Jones was reprimanded for repeatedly leaving work early and trying to accrue overtime; therefore, this was not "an isolated incident."

Fraudulent activity is sufficient to meet CEPA's first prong regardless of whether the activity actually amounts to a crime. Roach, 164 N.J. at 613. The plaintiff need only reasonably believe that the conduct was fraudulent. Ibid.;

see also Gerard v. Camden Cnty. Health Servs. Ctr., 348 N.J. Super. 516, 523-24 (App. Div. 2002) (finding that while the plaintiff could not point to a "particular violation" of law, summary judgment should not have been granted for the defendant because the plaintiff believed the activity was fraudulent and violated some civil service right).

Our New Jersey Supreme Court has analyzed CEPA's first prong in Chiofalo, 238 N.J. at 544-45. There, the Court discussed Battaglia v. United Parcel Service, Inc., 214 N.J. 518 (2013), which treated fraud as if it "was readily apparent if factually supported," even though the plaintiff did not cite a specific law that was violated. Chiofalo, 238 N.J. at 544. There is "no case that requires plaintiff to precisely cite the statutory source of perceived criminal activity." Ibid.

However, the Court stated that it was "better practice" to identify the legal basis of the criminal or fraudulent activity, even though those activities are "often apparent and commonly recognizable." Ibid. Nonetheless, the Court emphasized that whistleblowers are not expected "to be lawyers on the spot; once engaged in the legal process, and with the assistance of counsel or careful examination by the court, however, the legal underpinnings for claimed behavior that is perceived as criminal or fraudulent should be able to be teased out

sufficiently for identification purposes." Id. at 544-45. While there is conduct that is "so obviously criminal that one need not pinpoint a Title 2C provision to avoid dismissal of a CEPA claim," the plaintiff still needs to provide the basis of their claim if the defense questions their sources of law. Id. at 545.

Applying these standards, we are satisfied that plaintiff presented sufficient evidence to meet the requirements of the first prong of the CEPA test and survive a Rule 4:6-2(e) motion to dismiss. Plaintiff reported Jones was stealing time and specified the statute—N.J.S.A. 2C:20-4—that Jones violated. Moreover, theft constitutes a fraudulent act. This is sufficient evidence supporting plaintiff's reasonable belief Jones's actions constituted both criminal and fraudulent activity under CEPA. The court incorrectly determined that plaintiff's report of Jones's conduct was "not a whistleblowing activity," and Jones's sleeping on duty was not "a crime against society." The court erred in finding Jones's conduct was a "minor infraction" as defined in Roach, that mandated dismissal.

Minor infractions are generally insufficient to support a finding that the complaining employee had a reasonable belief that fraud or criminal activity had occurred. Roach, 164 N.J. at 613. The Court in Roach observed that "[i]f an employee were to complain about a co-employee who takes an extended lunch

break or makes a personal telephone call . . . [it] would be hard pressed to conclude that the complaining employee could have 'reasonably believed' that such minor infractions represented unlawful conduct as contemplated by CEPA." Ibid. CEPA's intent is not to "spawn litigation concerning the most trivial or benign employee complaints," but rather to "protect those employees whose disclosures fall sensibly within the statute." Id. at 613-14.

Here, however, Jones's alleged misconduct was not a "minor infraction," that was insufficient to support a reasonable belief he committed a crime or fraud. In any event, whether Jones's actions supported a reasonable belief he committed a crime or fraud is a fact issue to be decided by a jury or fact finder rather than a motion to dismiss on the pleadings. Based on plaintiff's allegations in count one of his complaint and because we must "search[] the complaint in depth and with liberality to ascertain whether a fundament of a cause of action may be gleaned even from an obscure statement of claim," Printing Mart, 116 N.J. at 746, we consider count one of the complaint as one asserting a cause of action under CEPA.

The record shows Jones was reprimanded for repeatedly leaving work early to drive home to Delaware and that he was trying to obtain more overtime to pay for his new home. This was not an isolated incident. Therefore, the court

mistakenly granted defendants' motion to dismiss count one of the complaint. We conclude that plaintiff established Jones's conduct was not a "minor infraction." Therefore, plaintiff satisfied the first prong of CEPA, and count one of his complaint is reinstated.

Any arguments made by plaintiff we have not expressly addressed are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Reversed and remanded. We do not retain jurisdiction.