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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1465-22**

CAROL SMITH,

Plaintiff-Appellant,

v.

KONICA MINOLTA BUSINESS
SOLUTIONS U.S.A., INC., and
LISA GALLAGHER,

Defendants-Respondents.

Argued September 27, 2023 – Decided October 19, 2023

Before Judges Rose and Smith.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Union County, Docket No. L-1487-19.

Daniel O. Sloan argued the cause for appellant (Law Office of Daniel O. Sloan, LLC, attorney; Daniel O. Sloan, of counsel and on the briefs).

Jennifer A. Hradil argued the cause for respondent Konica Minolta Business Solutions U.S.A., Inc. (Gibbons PC, attorneys; Kristin D. Sostowski, Jennifer A. Hradil, and Zachary B. Possess on the brief).

PER CURIAM

By leave granted, plaintiff appeals from an October 21, 2022 Law Division order dismissing her complaint under the Conscientious Employee Protection Act¹ (CEPA), N.J.S.A. 34:19-1 to -8. The trial court found plaintiff failed to show a sufficient nexus between her whistleblowing activity and her termination under N.J.S.A. 34:19-3(c). We reverse and remand for the reasons that follow.

I.

We view the facts in the light most favorable to the non-moving party, giving her the benefit of all favorable inferences. Globe Motor Co. v. Igdaley, 225 N.J. 469, 479 (2016) (citing R. 4:46-2(c)).

Defendant Konica Minolta Business Solutions (KMBS) is a New York corporation headquartered in Ramsey with a branch office in Iselin. KMBS sells and services document management technology and solutions to support businesses. Plaintiff, Carol Smith, worked for KMBS for fourteen years before her termination on April 22, 2019, primarily as a sales representative at the Iselin branch office. From the time of her initial hire in 2005, plaintiff used her personal laptop for work.

¹ N.J.S.A. 34:19-1 to 34:19-8

As a KMBS sales representative, plaintiff was assigned to certain healthcare accounts, including both the Jersey Shore University Medical Center (JSUMC) and JFK Health System/Hackensack Meridian Health (HMH) accounts. Generally, equipment was ordered on an as-needed basis after its salesforce completed a customer assessment and the customer accepted the corresponding proposal. Upon delivery, the equipment would be installed, networked, and deemed operational.

In 2018, plaintiff noticed that equipment ordering, delivery, and installation on the JSUMC account was not aligned with company policy. She voiced her concerns to some of her superiors, including Eric Berne and Vincent Pagliarello. Plaintiff's complaints went disregarded and within a matter of days, her involvement with the HMH account was limited to management of contracts for service to non-KMBS leased equipment and she was restricted from selling equipment. Despite her limited involvement on the account, plaintiff received complaints from an HMH customer about a shipment of unassembled and uninstalled equipment that resembled the fraudulent activity on the JSUMC account. Plaintiff relayed the HMH customer complaints to Pagliarello. When her supervisor again disregarded her complaints, plaintiff made a series of phone calls to a KMBS employee whistleblower hotline.

The fraudulent activity plaintiff reported included over one million dollars in equipment shipped without corresponding orders to makeshift warehouse sites so that certain KMBS employees could improperly receive sales compensation at the end of the fiscal quarter. According to plaintiff, this equipment was recorded as installed even as it sat idle in the warehouse sites. This idle equipment was improperly listed as collateral for bank loans. Once KMBS notified the banks that the equipment had been "installed," those banks considered the equipment operational. Some of the equipment orders flagged by plaintiff as suspicious had been placed by HMH sales team leaders Christine Kwik and defendant Lisa Gallagher.

Plaintiff listed her complaints about fraudulent activity at KMBS: April 2018 complaints made to Pagliarello; summer of 2018 complaints to her direct supervisor Eric Berne; a December 10, 2018 call to the whistleblower hotline; January 2019 complaints to Pagliarello; and a February 24, 2019 call to the whistleblower hotline. Plaintiff testified at deposition that she made the same complaints to her superiors that she made on February 24 to the whistleblower hotline. Similarly, both Spano and Pagliarello testified that they were aware of plaintiff's complaints regarding the HMH account.

The record shows that on February 24, 2019, the manager of the whistleblower hotline sent KMBS's human resources (HR) department a report detailing plaintiff's complaint. The report was flagged as coming from an anonymous caller, who alleged fraud and harassment at the Iselin branch where plaintiff worked. The report named Gallagher as the cause of multiple instances of harassment. The report also identified Gallagher's participation in fraudulent practices. In addition, the report names Pagliarello, Spano, and Christine Kwik, and all employees at the Iselin branch, as participating in harassment and/or complicit in the fraud.

HR director Rod McVeigh testified that he spoke with HR manager Tracy Baily about the harassment aspect of the February hotline complaint within a day of receiving the report, and Baily responded that she "was very close to something that she was in the middle of investigating anyway." After her hotline call, plaintiff claims she was met with further hostility from her supervisors. When she expressed concern about the account, they told her to "let it be," and excluded her from office meetings.

On March 5, 2019, plaintiff received an unsolicited email from Amy Rodriguez, an HMH team member supervised by Gallagher. The email attached documents which included lists of uninstalled HMH equipment that had been

improperly marked as installed. Plaintiff believed the email corroborated the acts of fraud she had complained about, and she informed Pagliarello she received it. She told him that units she sold were included on the lists.

Plaintiff did not consider the email or its attachments confidential because they were not labeled confidential, password protected, or encrypted. Plaintiff also testified at her deposition that she did not consider the email to contain confidential information as it was "simply information...under [her] jurisdiction that [she] needed to follow up on."

A month later, on April 5, 2019, KMBS terminated Rodriguez. Shortly thereafter, on April 10, Gallagher reviewed Rodriguez's emails. She flagged the email and attachments Rodriguez sent to plaintiff and reported the email to Spano. Spano, in turn, reported the email to both HR and KMBS lawyer Judy Olivero. KMBS opened an internal investigation of plaintiff on April 12, and ordered plaintiff to surrender her personal laptop pursuant to the KMBS Bring Your Own Device (BYOD) policy.

The BYOD policy was adopted by KMBS on July 2, 2015 and modified for the first time by the company on March 6, 2019, one month prior to the internal investigation of plaintiff. The newly modified policy added language permitting KMBS to seek access to an employee's personal device for "internal

investigations," while the previous policy authorized requests only in response to "legitimate discovery requests, security incidents, or court orders."

After receiving the order from HR, plaintiff offered to personally deliver her laptop to KMBS's information technology (IT) department in Ramsey so IT could search it in her presence. KMBS rejected her offer, and plaintiff asked for time to confer with family and legal counsel prior to consenting to the search. A few days later, plaintiff, through counsel, offered to provide KMBS an electronic transfer of work-related data and to delete that data from her laptop. KMBS also rejected this offer.

On April 16, 2019, plaintiff's counsel requested the entire BYOD policy and any information regarding revisions of the policy. On April 22, 2019, ten days after KMBS's initial demand for the laptop, KMBS terminated plaintiff because she refused to comply with the BYOD policy and the internal investigation.

Plaintiff's second amended complaint named KMBS and Gallagher as defendants and alleged, among other claims, CEPA violations.² KMBS answered and asserted a counterclaim for trade secret misappropriation and

² On August 31, 2022, the court granted Gallagher's summary judgment motion, dismissing plaintiff's defamation claims. Plaintiff does not appeal from this order.

computer trespass. After the close of discovery, defendants moved for summary judgment.

In its decision granting defendant's motion, the court found: plaintiff reasonably believed certain KMBS employees were violating a law or clear mandate of public policy; plaintiff's actions constituted a "whistleblowing" activity; and plaintiff's termination was an adverse employment action under N.J.S.A. 34:19-3(c). However, the court found "there [was] no record evidence to support plaintiff's 'feeling' and 'suspicion' that KMBS learned that plaintiff had anonymously called the hotline prior to the filing of this litigation." Consequently, the court concluded plaintiff failed to show a causal connection between her whistle-blowing activity and her termination. The court next found that "even if she could meet her prima facie burden," plaintiff's CEPA claim would "fail as a matter of law," because she failed to show KMBS's proffered reason for her termination was pretext for retaliation.

Plaintiff appeals, arguing that the record shows genuine issues of material fact as to CEPA's fourth prong, warranting denial of summary judgment.³

II.

³ Defendant's counterclaim is currently stayed.

We review decisions on motions for summary judgment de novo, applying the same standard as the trial court. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021) (citing Barila v. Bd. of Educ. of Cliffside Park, 241 N.J. 595, 611 (2020), and Townsend v. Pierre, 221 N.J. 36, 50 (2015)). Summary judgment is warranted where there is "no genuine issue as to any material fact challenged and [] the moving party is entitled to judgment as a matter of law." R. 4:46-2.

Thus, "on a motion for summary judgment, if the evidence of record—the pleadings, depositions, answers to interrogatories, and affidavits—together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact,' then the trial court must deny the motion." Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344, 366 (2016) (quoting R. 4:46–2(c), then citing Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995)).

"[A]t this procedural stage," if the non-moving party's evidence could establish the required elements, the "strength of [the] case" is not at issue. Id. at 367. "[The court's] task is not to weigh the evidence, not to decide who has the better case or who is more likely to succeed before the jury." Ibid. Rather, "[the court's] role is simply to view the record in the light most favorable to [the

non-moving party] and resolve whether, on that basis, a reasonable factfinder could find" in that party's favor. Ibid.

The Legislature designed CEPA to "protect and encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employers from engaging in such conduct." Allen v. Cape May Cnty., 246 N.J. 275, 289 (2021) (quoting Dzwonar v. McDevitt, 177 N.J. 451, 461 (2003)). CEPA's purpose is "to protect whistleblowers from retaliation by employers" Lippman v. Ethicon, Inc., 222 N.J. 362, 378 (2015). Consistent with that purpose, CEPA "is considered remedial legislation entitled to liberal construction." Ibid.

To establish a prima facie claim under CEPA, a plaintiff must demonstrate:

- (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 "whistleblowing" 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 whistleblowing activity and the adverse employment action.

[Allen, 246 N.J. at 290 (citing Dzwonar, 177 N.J. at 462.)]

When a plaintiff establishes a prima facie claim under CEPA, the burden of persuasion shifts to the defendant employer "to rebut the presumption of discrimination by articulating some legitimate nondiscriminatory reason for the adverse employment action." Id. at 290-91 (quoting Kolb v Burns, 320 N.J. Super. 467, 478 (App. Div. 1999)). If the employer meets that burden, the plaintiff then must prove the employer's asserted legitimate reasons were pretextual and not the real reason for the employer's discriminatory acts. Id. at 291.

III.

Because the trial court's decision is primarily based on its finding that plaintiff did not establish causation, we turn to prong four of CEPA and examine the record in that context. To satisfy that element, plaintiff had to demonstrate "evidence of circumstances that justify an inference of retaliatory motive." Romano v. Brown & Williamson Tobacco Corp., 284 N.J. Super. 543, 550 (App. Div. 195); see also Maimone v. City of Atl. City, 188 N.J. 221, 237 (2006) (noting the fourth prong "can be satisfied by inferences that the trier of fact may reasonably draw based on circumstances surrounding the employment action"). Evidence of such circumstances may include "[t]he temporal proximity of

employee conduct protected by CEPA and an adverse employment action," Maimone, 188 N.J. at 237, but "[t]emporal proximity, standing alone, is insufficient to establish causation," Hancock v. Borough of Oaklyn, 347 N.J. Super. 350, 361, 790 A.2d 186 (App. Div. 2002).

A plaintiff may present indirect or circumstantial evidence that justifies an inference of retaliation, as it is "not required that there be proof of a direct causal link between the complaint by the employee and the retaliatory action of the employer." Battaglia v. United Parcel Service, Inc., 214 N.J. 518, 558 (2013). The factfinder can draw an inference based on the totality of the circumstances in determining whether the employer had a retaliatory motive. Ibid. The factfinder can assess the supervisor's response to the complaint, such as by examining whether the supervisor decided to investigate the matter or ignore the complaint. Id. at 558-59.

Once the plaintiff establishes her prima facie case, the burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason for" its action, pursuant to the test developed under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and adopted by our jurisprudence for use in CEPA retaliation claims. Massarano v. N.J. Transit, 400 N.J. Super. 474, 492 (App. Div. 2008). If the employer articulates a nondiscriminatory reason, the plaintiff

loses the benefit of the presumption established by the prima facie case. Texas Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 255-56 (1981). To survive the employer's motion for summary judgment, the plaintiff must present "evidence which: 1) casts sufficient doubt upon each of the legitimate reasons proffered by the defendant so that a factfinder could reasonably conclude that each reason was a fabrication; or 2) allows the factfinder to infer that discrimination was more likely th[a]n not a motivating or determinative cause of" the action in question. Fuentes v. Perskie, 32 F.3d 759, 762 (3d Cir. 1994). Similar to causation, a plaintiff's evidence of pretext may be indirect or circumstantial. See Burdine, 450 U.S. at 256.

The record shows plaintiff made nearly identical complaints to her supervisors and to the whistleblower hotline regarding alleged fraudulent activity and harassment by Gallagher. The record also shows deposition testimony from McVeigh, who had been informed about plaintiff's complaints, and knew that Baily was conducting an ongoing investigation related to the anonymous whistleblower report. The inference argued by plaintiff is not unreasonable; even though plaintiff's identity was not initially known by HR when KMBS received the anonymous report, the record contains sufficient facts from which a jury could infer defendants deduced that plaintiff made the call.

The temporal proximity of plaintiff's termination to her complaints, while not conclusive, remains relevant. Plaintiff's February whistleblower activity took place just under two months before she was fired. Giving all favorable inferences to the plaintiff, a reasonable factfinder could conclude that defendant's decisionmakers were aware plaintiff was the whistleblower. Temporal proximity buttresses plaintiff's argument that such knowledge played a part in the decision to terminate her.

Defendants argue the opposite inference, that despite plaintiff's complaints to supervisors, no decisionmaker responsible for plaintiff's termination was aware plaintiff was the hotline caller until the commencement of litigation. We need not weigh the competing proofs and "decide who has the better case" at this juncture. Steinberg, 226 N.J. at 367. Competing inferences simply militate against summary judgment, as we are required to draw all inferences in favor of the non-moving party. Globe, 225 N.J. at 479.

We next consider the record in light of the trial court's finding that plaintiff did not meet her burden to show pretext. Plaintiff contends defendants had no reason to pursue an aggressive internal investigation about company data on her laptop because she had already alerted Pagliarello to the email and attachments Rodriguez sent her on March 5, 2019. The attachments were not

marked "confidential," and plaintiff did not consider them to have any information she was not authorized to have as they listed equipment she sold. A factfinder could reasonably infer there was nothing improper concerning plaintiff's receipt of non-confidential documents which were unprotected and freely exchanged.

A jury could conclude plaintiff attempted to comply with the BYOD policy when she offered to take her laptop to the IT office in Ramsey and have it examined in her presence. Pagliarello's testimony corroborates plaintiff's account in this regard. The record shows plaintiff was still waiting for the full BYOD policy, revisions, and proof of signed authorization when KMBS fired her. Viewing the evidence in a light most favorable to plaintiff, we conclude a jury could reasonably infer that the internal investigation of plaintiff and her resultant termination was pretext.

The ample record contains sufficient facts to deny summary judgment as to prong four of CEPA and pretext. In view of our decision, we need not address plaintiff's remaining claims.

Reversed and remanded.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION