SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2589-21

PRINCELY ADIKIBE-EJIOQU,

Plaintiff-Appellant,

v.

PARTNERS PHARMACY,

Defendant-Respondent.

Argued September 13, 2023 – Decided October 11, 2023

Before Judges Currier, Firko and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket No. L-0552-20.

Arnold Shep Cohen argued the cause for appellant (Oxfeld Cohen, PC, attorneys; Arnold Shep Cohen, of counsel and on the brief; R. Leigh Adelman, on the brief).

Mark W. Lerner (Kasowitz Benson Torres LLP) of the New York bar, admitted pro hac vice, argued the cause for respondent (Kasowitz Benson Torres LLP, attorneys; Christopher J. Capone, of counsel and on the brief).

PER CURIAM

Plaintiff appeals from the April 6, 2022 order granting defendant summary judgment. We affirm.

Plaintiff became a licensed pharmacist in 2004 and began working for defendant that same year as a pharmacist's intern. Defendant is a "full-service medication management service provider for long-term care and sub-acute facilities."

Assigned to the Intravenous Therapy (IV) Department, plaintiff's job duties included "picking up medications that were returned from medical facilities, verifying whether orders sent back to the pharmacy ha[d] been discontinued, contacting facilities to discuss medications, and cleaning the compounding room (where medications are mixed) and the anteroom (the room where pharmacists and technicians prepare to enter the compounding room)."

According to plaintiff, he was trained by a senior technician to pick up medications that were returned to the IV Department each morning and check them for "the patient name and facility, contact the facility and speak with the patient's nurse to determine why the medication was returned and whether it needed to be replenished for the next day." If the patient did not need to replenish the medication, plaintiff stated he "was trained to label the remaining

dosages, credit the remaining [amount] to the patient, and store the returned medications to the inventory so they could be 'recycled' or used again for another patient before the medications' 'beyond[-]use' date had passed."

According to plaintiff, "if IV medications were returned to the pharmacy, they would be reused as long as they were not expired and were properly stored within twenty-four hours and used before their 'beyond[-]use' date." Any medication that could not be reused was either disposed of in a sink at the pharmacy or through a separate waste procedure.

In 2005, plaintiff was promoted to Staff Registered Pharmacist and later promoted to Overnight Registered Pharmacist. As of March 2017, plaintiff was the only IV pharmacist working the overnight shift; the other employees on the overnight shift were pharmacist technicians. Plaintiff's duties included: "entering and receiving orders sent from facilities, managing the pharmacist technicians, and compounding IV products and medications." Plaintiff's understanding was that "pharmacist technicians were trained to bring the returned IV medications to the pharmacist who would review and then direct the technician in the return procedure."

As a pharmacist, plaintiff was required to complete a United States Pharmacopeia (USP) 797[1] competency assessment each year to be permitted to enter the compounding room. The New Jersey State Board of Pharmacy has adopted the USP 797 guidelines.

Plaintiff explained the assessment "involve[d] watching online videos and answering questions, which [wa]s then followed by a practical evaluation where the supervisors would closely observe [him] from within the compounding room." The assessment would evaluate plaintiff's "garbing, hand hygiene, and aseptic technique," as well as his "transfer and measurement of IV products and needle changing procedure." He passed the USP 797 test each year and was never "disciplined or reprimanded about [his] garbing or hygiene procedure or [his] IV medication return process."

In 2017, defendant transferred plaintiff to a different location. Plaintiff stated he did not receive any additional training after the move and he "relied upon [his] background and experience as a pharmacist and [his] time at the [other location]." However, plaintiff described the new location's operations

[1] USP 797 establishes standards that apply to the preparation of "compounded sterile human . . . drugs." The standards "must be followed to minimize harm, including death, to human . . . patients . . . ." The requirements apply to pharmacists and also sets forth procedures for personal hygiene and garbing.

"were vastly different" from his prior experience. According to plaintiff, the new location was "less organized" and "set up poorly" in ways that were "antithetical to other garbing and cleanroom procedures [he] had encountered at other facilities." Plaintiff did not believe the location complied with the USP 797 regulations.

Plaintiff stated that Nitang Patel, the Director of Pharmacy and Pharmacist in Charge, approached him "on at least two occasions" in early 2018, telling plaintiff he was going to fire him. These interactions made plaintiff "uncomfortable and alarmed."

Plaintiff further stated that Patel informed him that employees who worked in different departments were not to be cross-trained, however, plaintiff "trained three other pharmacists from the general dispensing department on how to work in the IV department," which plaintiff "believe[d] . . . was part of a concerted effort to replace [him] as the IV Pharmacist and/or cause [him] to leave [his] employment . . . ." Plaintiff stated that when his former supervisor was terminated, the supervisor warned plaintiff he "would be targeted next." When plaintiff confronted Patel with this information, Patel told plaintiff the supervisor was terminated for unethical conduct and that plaintiff "should not be worried."

At some point, plaintiff became concerned about the handling of returned IV medications. He stated, "[f]or instance, when medications were returned to the . . . facility, they were dumped into a blue bin . . . and were left sitting unrefrigerated for days before someone handled them." He also observed on numerous occasions that the return bin remained filled with the same medications that were there on his prior shift. Plaintiff stated he was concerned unrefrigerated medications could be sent to patients.

On February 4, 2019, plaintiff sent Patel a text message stating: "Please kindly check the return/waste bin tomorrow morning when you get in. I feel really bad because [w]e should not be wasting so much. The return process is not working. Please kindly help. Start with driver service and walk your way up. Thanks sir."

At his deposition, Patel said his understanding of the text message was that plaintiff's "main concern [wa]s that . . . we [we]re sending [the returned medications] for destruction. . . . So, my impression [was] that he want[ed] to have a process where . . . we minimize the amount of the medication . . . sen[t] to the facility." Patel explained that all medication returned to the pharmacy was destroyed. Patel said he followed up with a supervisor, explaining there was nothing the pharmacy could do because the long-term nursing facilities

would have to let the pharmacy know "in a timely manner of the discharge or discontinuation of medication."

After Patel did not reply to the text message, plaintiff approached Patel two or three weeks later and asked "about keeping IV medications . . . in the bin and how it could be a violation that these unrefrigerated items were being left in the bin for possible redistribution." According to plaintiff, Patel "dismissed [his] concerns, said 'yeah, yeah,' and then walked away."

Patel stated plaintiff never spoke to him in person about the text message nor did plaintiff ever speak with him about any concerns regarding the manner defendant was handling expired medications. Patel explained it would be very rare for medications to sit in a return bin for several days. He stated it was the pharmacy technicians' "daily job" to make sure the medications from the return bin were discarded.

Plaintiff stated he also expressed his concerns about the medications to Kristine Hackett, a supervisor of the IV Department. Plaintiff said Hackett "did not say much in response but when [plaintiff] came back to work following this discussion, [he] noticed the return bins had been emptied." During her deposition, Hackett stated plaintiff never spoke to her "about concerns regarding the medication waste procedures." Plaintiff further stated he discussed his

concerns with his coworkers, who told him that Patel and Hackett "coordinated with the [Human Resources (HR)] Department regarding compliance matters," which led plaintiff to believe he "had properly reported [his] concerns and they would be addressed."

During his deposition, plaintiff said the last time he made a complaint about the medication storage was in February 2019. He also recalled complaining to Patel about the "extreme" cold temperature of the cleanroom, that he was working by himself which was a patient safety concern because someone "need[ed] to double-check [him]," that he felt the team was short-staffed, and that he had not been paid for the time he did not take lunch.

On April 23, 2019, Hackett conducted plaintiff's USP 797 assessment. Plaintiff stated Hackett could not directly observe the performance of the test because she

> did not enter the compounding room to observe [his] hand hygiene process, conduct the finger stick test, or otherwise closely observe any of the USP 797 competency tests as mentioned before and as required by the Board of Pharmacy, but instead stood outside the entire IV containment area, discussing politics and family with [him].

According to plaintiff, Hackett called him "a 'seasoned pharmacist'[2] and said [he] clearly knew what [he] was doing."

The following month, Hackett completed an annual performance evaluation for plaintiff, giving him a rating of 3.6 out of 5. This rating was .3 points higher than his last annual evaluation completed in April 2018. Hackett did not express any concerns about plaintiff's compliance with USP 797.

On July 3, 2019, Hackett sent plaintiff a text message with a photograph of IV totes and coolers, stating: "These IV boxes and totes all need to be replenished." Plaintiff said he was "unnerved" by the text message because he "had never received an assignment in that manner before," and the text was sent during the morning shift. The next morning, Hackett again texted plaintiff asking if he was "able to finish the boxes last night." Plaintiff replied to the text messages saying:

> Omg! That's some serious work. Most of the medicine in the cooler w[as] expired. How did this happen?
>
> It[] too[k] me [forever] to complete each task but I was able to do 3 cooler[s] not just one. We sen[t] out a cooler last night that I checked and to my understanding the label has been there for

[2] At his deposition, plaintiff stated Hackett called him a "renown[ed] pharmacist."

> about a week. What happened? Why are the technicians not doing it Kristine?

Hackett replied, "Why is this only a tech job? We are a team and why didn't you start on them?"

Hackett testified she did not share these text messages with Patel until after plaintiff filed the lawsuit. She also certified that the IV boxes in the photograph "store IV medical supplies, not medications," and the totes in the photograph "contained medications that do not require refrigeration." In Hackett's certification, she explained that "[t]he fact that expired medications were returned and purportedly 'sat in a bin for days' violates no law, rule, statute or regulation, so long as the medication is eventually destroyed." During her deposition, Hackett stated she never reprimanded plaintiff or had any issues with his performance.

According to Patel, he "conduct[ed] routine audits [every several weeks] to ensure that the [p]harmacists and [p]harmacist [t]echnicians under [his] supervision [we]re complying with all federal, state, local and internal policies and procedures, including all USP[]797 requirements." On July 5, 2019, Patel reviewed a video of the compounding cleanroom as part of a routine audit and observed plaintiff "commit[ing] multiple violations of USP[]797" on July 3, 2019, including:

> (a) entering the Cleanroom without removing or tucking away his hooded sweatshirt; (b) failing to observe required demarcation lines; (c) scratching his head and scalp and then failing to take proper precautions to ensure the sterility of the products being compounded after doing so; (d) failing to use alcohol to clean his hands; and (e) attempting to dry his hands by shaking them out over the floor.

Patel also observed that on July 2, 2019, plaintiff committed the following violations: "(a) enter[ing] the Cleanroom without removing or tucking away his hooded sweatshirt; (b) fail[ing] to don shoe covers upon entering the Cleanroom; (c) fail[ing] to use alcohol to clean his hands; and (d) fail[ing] to either wash or dry his hands."

Because Patel believed this conduct "represented a pattern," he reviewed the video recording from June 28, 2019, that showed plaintiff: "(a) enter [ing] the Cleanroom without removing his hooded sweatshirt; and (b) fail[ing] to either wash or dry his hands," along with other listed violations.

After reviewing additional video footage from June 2019, Patel found plaintiff "engaged in violations of USP[]797 on an almost daily basis." Patel stated in his deposition that plaintiff was not following the proper protocol "around [eighty] to [ninety] percent of the time" in the videos. Patel stated the violations occurred "in front of a . . . [p]harmacy [t]echnician, who [p]laintiff

was in charge of supervising, and who[se] compliance with USP[]797 [p]laintiff was responsible for ensuring."

On July 5, 2019, Patel informed Hackett of the violations and played the videos for her. Hackett agreed with Patel that the violations required plaintiff's termination. After watching the video footage, the Director of People Operations, Patricia Puentes, also agreed.

On July 9, 2019, Patel, Hackett, and Puentes met with plaintiff and terminated his employment. According to plaintiff, Patel informed him he was being terminated because he was "not following the garbing technique." Plaintiff declined the offer to review the videos at the meeting.

Patel refutes plaintiff's characterization of Patel's statement at the meeting and contends he terminated plaintiff's employment because plaintiff "was observed on video" violating proper cleanroom precautions, which Patel believed was plaintiff's daily practice. Patel stated plaintiff recorded the meeting and the recording corroborates Patel's statement.

Defendant's termination letter to plaintiff stated:

> As you are aware[,] on April 23, 2019[,] your direct supervisor Kristine Hackett observed your competency of the USP 797 standards for sterile hand washing and application procedure for our clean room. These are standards and procedures that must be met when entering the clean room to ensure the patients[']

> safety. On June 28, 2019[,] and the days that followed, it was observed that you did not adhere to said procedures and policies. As a result[,] Partners Pharmacy, LLC (the "Company") has lost confidence in your ability to continue in your role as IV Pharmacist. Consequently, your employment with the Company is terminated effective today, July 9, 2019.

In plaintiff's responses to defendant's requests for admissions, plaintiff admitted he engaged in the conduct seen in the video footage including wearing the hooded sweatshirt, not properly washing and drying his hands, and not complying with the USP 797 safety standards for garbing.

During his deposition, plaintiff stated he understood USP 797 prohibited wearing a hooded sweatshirt, but Patel had worked with plaintiff in the compounding room while plaintiff was wearing a sweatshirt and Patel had also worn a hoodie while working in the room as well. Plaintiff stated he had worn a hoodie for "years" while working for defendant.

Patel stated in his deposition that after a supervisor gives an employee a low-scoring evaluation, usually a manager or supervisor would speak to the employee and work with them to correct the issue. He said "if someone gets very bad reviews, then [he] ha[s] to make sure that this is not a surprise to the employee. . . . If it's something like that, that should have been addressed throughout the year and have it . . . document[ed]." Patel said he did not feel

plaintiff's conduct warranted discussion prior to his termination because patient health was at risk.

In February 2020, plaintiff filed a one-count complaint alleging violations of the Conscientious Employee Protection Act (CEPA), N.J.S.A 34:19-1 to -14. Defendant moved for summary judgment, contending plaintiff had not established a CEPA claim. On April 6, 2022, in a written statement of reasons and accompanying order, the court granted the motion.

In concluding plaintiff failed to present a prima facie CEPA claim, the court considered the elements required to establish a claim. As to the first element, the court stated plaintiff believed defendant was violating a public policy in failing to comply with USP 797 guidelines in leaving IV medications unrefrigerated leading to their expiration. The court found plaintiff met the second element because he performed a whistleblowing activity by "voic[ing] his reservations to his supervisors about the unrefrigerated medications . . . through text messages and in person." The adverse action of termination in July 2019 demonstrated the third element. However, in considering the fourth element, the court found there was no causal connection between plaintiff's termination and the whistleblowing action, stating "[p]laintiff['s] employment was terminated immediately after [defendant] discovered that [p]laintiff was not

complying with USP[]797 standards nor the guidelines set forth by [defendant]." He was not terminated after he voiced complaints to his superiors about the medication return process in February 2019.

Moreover, the court found, even if plaintiff met his burden of demonstrating a prima facie case, plaintiff could not demonstrate defendant's reason for termination was pretextual. The court stated, "Plaintiff cannot demonstrate that the decision to terminate his employment for repeated and blatant disregard of mandatory industry and [c]ompany safety requirements was false and that retaliation was the real reason. Plaintiff has admitted to engaging in the conduct for which he was fired."

On appeal, plaintiff asserts the court erred in finding there was no causal connection between his whistleblowing activity and his termination and in its conclusion that defendant's reason for the termination was not pretext.

Our review of a trial court's decision regarding a motion for summary judgment is de novo. Samolyk v. Berthe, 251 N.J. 73, 78 (2022). We employ the same standard as the trial court and "consider 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." Id. at 78 (quoting Brill

v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)). A motion for summary judgment shall 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 a judgment or order as a matter of law." R. 4:46-2(c).

Plaintiff contends the trial court erred in granting defendant summary judgment because he demonstrated a prima facie case of retaliatory termination under CEPA.

CEPA was enacted to "protect and encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employees from engaging in such conduct." Abbamont v. Piscataway Twp. Bd. of Educ., 138 N.J. 405, 431 (1994). CEPA prohibits an employer from taking retaliatory action against an employee who:

> a. Discloses, or threatens to disclose to a supervisor . . . 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, including any violation involving deception of, or misrepresentation to, any . . . client, patient, customer, . . . or, in the case of an employee who is a licensed or certified health care

> professional, reasonably believes constitutes improper quality of patient care . . . .
>
> . . . .
>
> 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, including any violation involving deception of, or misrepresentation to, any . . . client, patient, customer . . . or, if the employee is a licensed or certified health care professional, constitutes improper quality of patient care;
>
> . . . .
>
> (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.]

To establish a CEPA claim under subsection 3(a) or 3(c), a plaintiff must demonstrate:

> (1) that he or she reasonably believed that his or her employer's conduct was violating either a law or a rule or regulation promulgated pursuant to law;
>
> (2) that he or she performed whistle-blowing activity described in N.J.S.A. 34:19-3(a), (c)(1) or (c)(2);
>
> (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.
>
> [Allen v. Cape May Cnty., 246 N.J. 275, 300 (2021) (quoting Kolb v. Burns, 320 N.J. Super. 467, 476 (App. Div. 1999)).]

"If a plaintiff makes a prima facie showing, the burden then shifts 'to the employer to rebut the presumption of [retaliation] by articulating some legitimate [non-retaliatory] reason for the adverse employment action.'" Id. at 300 (alterations in original) (quoting Kolb, 320 N.J. Super. at 478). If the employer meets this burden, the burden then shifts back to the plaintiff to prove "'the 'employer's' stated reasons for an employment action . . . were 'a pretext for the [retaliatory] action taken by the employer.'" Ibid. (alterations in original) (quoting Kolb, 320 N.J. Super. at 478). At the summary judgment stage, "a plaintiff need only show that 'a reasonable factfinder could rationally find' the employer's purported non-pretextual reasons for taking the employment action 'unworthy of credence.'" Ibid. (quoting Kolb, 320 N.J. Super. at 478).

The trial court found plaintiff established the first three elements required to demonstrate a CEPA claim. Therefore, we need only consider the causal connection element and whether plaintiff established a prima facie case prior to the burden shifting analysis.

The fourth CEPA requirement, that a plaintiff "must show 'a causal connection . . . between the whistle-blowing conduct and . . . adverse employment action[,]' can be satisfied by inferences that the trier of fact may reasonably draw based on circumstances surrounding the employment action." Maimone v. City of Atl. City, 188 N.J. 221, 237 (2006) (alteration in original) (first quoting Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003); and then citing Est. of Roach v. TRW, Inc., 164 N.J. 598, 612 (2000)). For example, the "temporal proximity" between the employee's conduct and the adverse employment action may be considered. Ibid.

We turn then to a consideration of the circumstances. Plaintiff first expressed his concerns about the process regarding returned medications on February 4, 2019 when he sent Patel a text message. A few weeks later, plaintiff alleges he followed up verbally with Patel. He states he also raised the issue with Hackett. On July 4, 2019, plaintiff asked Hackett why the pharmacy technicians were not doing the work that Hackett was now asking him to do.

Plaintiff's employment was terminated on July 9, 2019, after Patel conducted an audit and viewed multiple days of video recordings in which plaintiff was violating defendant's and the USP 797 standards. There was no correlation between the complaints made in February 2019 and the termination.

Even considering plaintiff's July 4, 2019 text to Hackett, Patel stated he did not know about the text message prior to the termination. And Hackett stated she never raised any issues with Patel about plaintiff's job performance. Moreover, plaintiff had already engaged in the conduct seen on the video that formed the stated basis for his termination prior to texting Hackett.

Nor do other surrounding circumstances weigh in favor of a causal connection. After plaintiff's whistleblowing conduct, Hackett gave plaintiff a more favorable performance rating than he had previously received from another supervisor prior to the whistleblowing conduct. According to plaintiff, Hackett referred to him as a "renown[ed] pharmacist" on April 23, 2019. And the text messages plaintiff sent to Hackett on July 3 and 4, 2019 did not contain any complaints regarding the return of medications.

We are satisfied the court sufficiently supported its determination of a lack of a causal connection with the credible evidence in the record to find plaintiff did not demonstrate a prima facie case of a retaliatory termination. Moreover, the determination of whether there was a causal connection becomes immaterial as our review of the burden shifting analysis leads us to conclude that plaintiff did not demonstrate defendant's reason for termination was pretext.

As stated, once a plaintiff establishes a prima facie CEPA claim, the employer has the burden of rebutting the presumption of discrimination by showing a legitimate reason for the adverse employment action. Allen, 246 N.J. at 290-91 (citing Kolb, 320 N.J. Super. at 478). Then the burden shifts back to the plaintiff-employee to show "the employer's proffered reasons were a pretext for the discriminatory action taken by the employer." Id. at 291 (quoting Kolb, 320 N.J. Super. at 478).

"Pretext triggers a presumption that enables the employee to 'prove an employer's discriminatory intent through circumstantial evidence.'" Donofry v. Autotote Sys., Inc., 350 N.J. Super. 276, 291 (App. Div. 2001) (quoting Bergen Com. Bank v. Sisler, 157 N.J. 188, 209 (1999)). "One way the employee can do this is by proving that the employer's articulated reason 'was not the true reason for the employment decision but was merely a pretext for discrimination.'" Id. at 292 (quoting Sisler, 157 N.J. at 211). This means that "the factfinder is permitted to draw an inference of a guilty state of mind from a defendant's proffer of false evidence." Ibid.

Plaintiff cannot show defendant's reason for his termination was pretext. The video recordings provided irrefutable evidence that plaintiff was not performing his work in conformance with USP 797 standards. Plaintiff does not

dispute he engaged in the depicted conduct. Plaintiff was terminated on the next workday after Patel consulted with HR and received approval for the termination.

Defendant provided a legitimate non-pretextual reason for terminating plaintiff's employment. Plaintiff has failed to meet his burden that defendant "was motivated by [retaliatory] intent" in terminating him. See Viscik v. Fowler Equip. Co., 173 N.J. 1, 14 (2002) (citing Erickson v. Marsh & McLennan Co., 117 N.J. 539, 561 (1990)). Therefore, plaintiff has not demonstrated that defendant's proffered reason for terminating him was not the true reason.

The court's grant of summary judgment to defendant was supported by the correct application of the legal principles to the facts.

Affirmed.