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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1367-11T2

WALTER KEITH HAHN and ELIZABETH ANN HAHN,

Plaintiffs-Appellants,

v.

MAYOR JUN CHOI, EDISON TOWNSHIP DEPARTMENT OF PUBLIC SAFETY (DIVISION OF POLICE), BRIAN COLLIER, THOMAS BRYAN, and MARK ANDERKO,

Defendants-Respondents.

Argued May 31, 2012 - Remanded June 12, 2012
Reargued January 29, 2013 - Decided July 26, 2013

Before Judges Fisher, Alvarez, and Waugh.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-9105-09.

Theodore Campbell argued the cause for appellants.

Eric L. Harrison argued the cause for respondents (Methfessel & Werbel, attorneys; Mr. Harrison, of counsel; Leslie Koch, on the briefs).

PER CURIAM

Plaintiff Walter Keith Hahn appeals the dismissal of his claim against defendants for violation of the Conscientious

Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14. We affirm.

I.

We discern the following facts and procedural history from the record on appeal.

Hahn began his employment as a patrolman with the Edison Township Police Department (Department) in January 1995. He became a detective in September 1996. He was assigned to the Middlesex County Prosecutor's Narcotics Task Force (Task Force). In the fall of 1998, Hahn returned to the Department and was assigned to investigate "narcotics, gambling and prostitution offenses."

Starting in September 2001, Hahn became an official of Local 75 of the New Jersey State Policemen's Benevolent Association. His role was to "represent the local union on the state level, at state meetings, county meetings" and to act as a "liaison between the local association and the state association." In 2002 or 2003, Hahn became chair of the local's grievance committee, and was "in charge of filing grievances and following up with the eventual outcome."

In 2004, Hahn was assigned to serve as the school resource officer (SRO) at Edison High School. The SRO position entailed full-time duty at the high school "[i]nvestigat[ing] any related

crime in the school or with any juveniles related to the high school or the junior high school."

In the fall of 2008, Hahn was again transferred to the Task Force. He returned to the Department in March 2009, and was then assigned to the afternoon shift as a patrolman. He contends that those two transfers, and other actions referred to in the complaint and during discovery, were in retaliation for complaints he made to his supervisors, activity which he contends was protected under CEPA.

In November 2009, Hahn filed a complaint against Edison Township Mayor Jun Choi, the Department, Director Brian Collier, Police Chief Thomas Bryan, and Captain Mark Anderko. He alleged that defendants violated CEPA through adverse employment actions, such as transferring him to undesirable assignments and suggesting that he not even bother applying for promotion, because he engaged in whistleblowing activities.[1]

In August 2011, after completion of discovery, defendants filed a motion for summary judgment. Following oral argument on October 6, the motion judge granted summary judgment and dismissed all claims against defendants.

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[1] Hahn's complaint included other causes of action which were also dismissed. Those dismissals have not be raised on this appeal. Hahn's wife, Elizabeth Ann Hahn, was named as a plaintiff based on a per quod claim.

Hahn appealed the dismissal of his CEPA claim. We denied Hahn's motion to supplement the record with documents that had not been before the motion judge. In June 2012, we temporarily remanded the case to the motion judge for a clearer articulation of findings of fact and conclusions of law. R. 1:7-4(a); R. 4:46-2(c). In addition to filing supplemental briefs with the permission of the judge, Hahn submitted additional documents.

In August, the motion judge issued a written opinion with more detailed findings of fact and conclusions of law. He concluded that Hahn's "varied and diverse complaints and grievances could not as a matter of law be reasonably construed to rise to the level of whistle-blowing necessary to establish a prima facie CEPA cause of action." He also concluded that Hahn's reassignment from detective to patrolman did not constitute an adverse employment action. We allowed the parties to file supplemental briefs addressing the motion judge's written opinion.[2]

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[2] We did not, however, authorize the submission of additional appendix material that was not before the motion judge on the original motion for summary judgment. Rule 2:5-4 requires "[t]he record on appeal" to "consist of all papers on file in the court or courts . . . below." "[A]n Appellate Court will not consider evidentiary material which was not part of a record below." Harris v. Middlesex Cnty. Coll., 353 N.J. Super. 31, 48 (App. Div. 2002) (striking portions of plaintiff's appendix which were not part of the trial record at defendant's request); see also N.J. Div. of Youth & Family Servs. v. M.M., 189 N.J. (continued)

II.

On appeal, Hahn argues that the motion judge erred in determining that he had not made out a prima facie case for a CEPA violation and in determining that there was no adverse employment action.

CEPA provides, in relevant part, that

> [a]n employer shall not take any retaliatory action against an employee because the employee does any of the following:
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> > 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 . . . ;
> >
> > . . . 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

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(continued)
261, 278 (2007) ("Our scope of review . . . is limited to whether the trial court's decision is supported by the record as it existed at the time of trial."). To the extent some of the documents at issue were before the motion judge on the limited remand with the judge's consent, we conclude that they are not relevant to the issues on which we have decided the appeal.

> (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.
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> [N.J.S.A. 34:19-3.]

"The purpose of CEPA . . . . is 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." Abbamont v. Piscataway Twp. Bd. of Educ., 138 N.J. 405, 431 (1994).

A valid CEPA claim has four requirements: (1) the employee "reasonably believed that his or her employer's conduct was violating either a law, rule, or regulation . . . , or a clear mandate of public policy"; (2) the employee "performed a 'whistle-blowing' activity" specified in N.J.S.A. 34:19-3; (3) the employer took "an adverse employment action" against the employee; and (4) "a causal connection exists between the whistle-blowing activity and the adverse employment action." Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003). "CEPA does not require that the activity complained of . . . be an actual violation of a law or regulation, only that the employee 'reasonably believes' that to be the case." Estate of Roach v. TRW, Inc., 164 N.J. 598, 613 (2000).

We review a grant of summary judgment under the same standard as the motion judge. Rowe v. Mazel Thirty, LLC, 209 N.J. 35, 41 (2012). We must determine whether there are any genuine issues of material fact when the evidence is viewed in the light most favorable to the non-moving party. Id. at 38, 41. "The inquiry is 'whether the evidence presents a sufficient disagreement to require submission to a [finder of fact] or whether it is so one-sided that one party must prevail as a matter of law.'" Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 536 (1995)) (internal quotation marks omitted). "[T]he legal conclusions undergirding the summary judgment motion itself" are reviewed "on a plenary de novo basis." Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 385 (2010).

As a threshold matter in considering a CEPA claim, a court "must 'first find and enunciate the specific terms of a statute or regulation, or the clear expression of public policy, which would be violated if the facts as alleged are true.'" Dzwonar, supra, 177 N.J. at 463 (quoting Fineman v. N.J. Dep't of Human Servs., 272 N.J. Super. 606, 620 (App. Div.), certif. denied, 138 N.J. 267 (1994)). More specifically, there must be "a substantial nexus between the complained-of conduct and a law or

public policy identified by the court or the plaintiff." Id. at 464. In that regard, it is important to note that "[union] bylaws are not a 'law, rule or regulation' pursuant to CEPA, but rather 'a contract between the union and its members.'" Id. at 469 (quoting Ackley v. W. Conference of Teamsters, 958 F.2d 1463, 1476 (9th Cir. 1992)).

With respect to a violation of public policy, New Jersey has described a clear mandate of public policy as encompassing "the United States and New Jersey Constitutions; federal and state laws and administrative rules, regulations, and decisions; the common law and specific judicial decisions; and in certain cases, professional codes of ethics." MacDougall v. Weichert, 144 N.J. 380, 391 (1996). "A salutary limiting principle is that the offensive activity must pose a threat of public harm, not merely private harm or harm only to the aggrieved employee." Mehlman v. Mobil Oil Corp., 153 N.J. 163, 188 (1998).

The closest Hahn comes to identifying a clear expression of public policy is his allegation that he complained about the transfer of certain captains and the promotion of others to that rank. Hahn contends that Choi held a meeting during the summer of 2008 at which he stated that "[h]e was interested in getting rid of the most senior employees, and was open to suggestions if anyone had any ideas how he could achieve his goal." According

to one of the certifications in the record, "several [s]enior [c]aptains over the age of 50 were transferred to positions of lesser authority and replaced with several [c]aptains under the age of 50 who were given significantly more authority."

Under some circumstances, that conduct might amount to age discrimination pursuant to N.J.S.A. 10:5-12(a). See Kelly v. Bally's Grand, Inc., 285 N.J. Super. 422, 434-35 (App. Div. 1995); see also Bergen Commer. Bank v. Sisler, 157 N.J. 188, 217-18 (1999) ("[T]he overriding purpose of anti-discrimination legislation is to correct a significant societal problem which, in the context of age discrimination, is the discrimination against older workers in favor of their younger counterparts."). A review of the record, however, convinces us that age discrimination was not the reason for Hahn's complaints about the promotions and transfers.

Hahn's own deposition testimony makes clear that his concern was that Choi was promoting "all his people," by which he meant individuals "involved with his campaign," at a time when the Department's number of patrol officers shrank from 215 to 184. "[A]s our numbers dropped, we had [fewer] patrol[men] working on the road, but we had more bosses inside," so he complained to "[e]veryone and anyone" and spoke "quite frequently" with Choi. Hahn felt that "the entire command staff

turned against [him] because they didn't want to hear that they didn't need ten captains and my argument was simply, a captain in Edison is making . . . $180,000 a year plus benefits." When asked about "older existing captains who were reassigned to positions of less authority and responsibility," Hahn responded: "Well, I'm sure I meant once the mayor promoted all his people and I say 'his people' because they were all involved with his campaign and worked for him politically. Once he promoted them, the other more senior captains were transferred."

We see nothing in the record to suggest that Hahn intended or was understood to be complaining about age discrimination.[3] At their core, his complaints related to promotions, assignments, and operations of the Department, which are the prerogative of the chief of police under N.J.S.A. 40A:14-118. There was no belief on Hahn's part, at the time, that his supervisors were engaged in age discrimination and no "substantial nexus" between his complaints about the promotions and age discrimination.

Hahn also points to his complaints concerning a delay of more than twenty days in obtaining a warrant to test the blood of a criminal suspect who had said he was HIV-positive on behalf

[3] Other than age discrimination, Hahn points to no other clear expression of public policy in connection with the issue of the promotions and transfers.

of a police officer who was exposed to the suspect's blood. Hahn suspected that the delay was in retaliation for that officer's complaints several years earlier about a co-worker he thought was intoxicated. The police officer expressed his concerns about the delay to Hahn, who complained to his superiors about the failure to issue the warrant more promptly. Hahn cites no specific expression of public policy involved in his complaints about the relatively brief delay in obtaining the blood test.

Finally, Hahn points to his expression of concern about the placement of video recording equipment in the Department's patrol cars. Again, he does not point to a clear expression of public policy implicated in his complaint. Even if N.J.S.A. 39:3-74, which prohibits individuals from "driv[ing] any motor vehicle with any sign, poster, sticker or other non-transparent material upon the front windshield," could be considered such a public policy, the record is bereft of any evidence that there was even an arguable safety issue involving the placement of the equipment in this case.

Because we conclude that the motion judge correctly determined that Hahn failed to make a prima facie showing of a CEPA violation, we need not reach the issue of whether the personnel actions about which Hahn complains were taken in

retaliation for CEPA-protected activity. For that reason, we also deny Hahn's post-argument motion to supplement the record. The documents at issue do not address the issue of whether his complaints were protected by CEPA.

Affirmed.