SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2518-21

WARREN SCHREINER,

Plaintiff-Appellant,

v.

TOMS RIVER SURGERY CENTER, LLC, USP NEW JERSEY, INC., and ROSANNE JANTOS,

Defendants-Respondents.

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Argued September 18, 2023 – Decided October 12, 2023

Before Judges Mawla, Marczyk, and Chase.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-1891-19.

Charles J. Kocher argued the cause for appellant (McOmber, McOmber & Luber, PC, attorneys; Charles J. Kocher, Matthew A. Luber, and Jeffrey D. Ragone, on the briefs).

Carmen DiMaria argued the cause for respondents (Ogletree, Deakins, Nash, Smoak & Stewart, PC,

attorneys; Carmen DiMaria and Leslie A. Lajewski, on the brief).

PER CURIAM

Plaintiff Warren Schreiner appeals from a March 22, 2022 order granting summary judgment to defendants United Surgery Partners ("USP"), Toms River Surgery Center ("TRSC"), and Rosanne Jantos. Schreiner argues the court erred in finding his claim failed under the Conscientious Employee Protection Act ("CEPA"), N.J.S.A. 39-1 to -14. Schreiner claims he produced sufficient evidence of a prima facie case and that the reasons for his termination were pretextual. We affirm.

I.

Schreiner worked for USP as an administrator at TRSC beginning in October 2017. TRSC is an ambulatory surgery center. USP manages and partially owns TRSC. Schreiner was responsible for coordinating, directing, and controlling all aspects of the operating functions, process, and staff of TRSC. He directly supervised several clinical and office employees, including business office manager Paige Morgan.

In December 2017, Schreiner was alerted by two business office staff to "odd adjustments being made to patients' accounts." He reviewed the discrepancies and discovered approximately $8,000 in cash received from

patients had not been posted to the patients' accounts. Instead, the amounts had been "adjusted off." Responsibility for receiving customer payments fell to front desk staff and business office personnel, including Morgan.

Schreiner reported the issue to Laura Panzera, who was USP's Director of Service Delivery. Panzera investigated the matter in March 2018, with Schreiner's assistance. It was confirmed the money was missing, attributed to lax cash handling procedures at the front desk. However, the investigation did not determine who took the money. Morgan's password was used for the adjustments, but the password was in plain view on her desk for anyone to see and use. On April 23, 2018, Schreiner issued Morgan a written warning for violating the company's cash-handling policy. Schreiner testified that at the time, he believed Morgan had violated the company cash-handling policy to the detriment of TRSC and USP, but he was not aware she had violated any statute or regulation.

Jantos was hired in April 2018 and became Schreiner's supervisor. She became immediately concerned about his performance. According to Jantos, Schreiner was "messy and disorganized," failed to dress appropriately for his job, and made "odd and concerning comments." In addition, she received numerous complaints about Schreiner from other employees and third parties,

including an outside vendor who submitted a written complaint regarding an inappropriate comment Schreiner made about the vendor's daughter. Jantos learned Schreiner belittled staff nurses, failed to ensure the availability of an instrument necessary for surgery, and failed to follow office fire safety procedures. She also learned of employees resigning and citing Schreiner as the reason during their exit interviews.

Jantos contacted Human Resources ("HR") on August 6, 2018, to inquire about terminating Schreiner. HR instead recommended issuing a final written warning and asked Jantos to complete an Employee Disciplinary Action Form ("EDAF") to present to Schreiner. On August 8, Jantos presented Schreiner with the EDAF containing enumerated incidents spanning from May 24 through August 6, 2018. Jantos directed Schreiner to respond with a written corrective action plan. When Schreiner returned the plan on August 13, Jantos found it lacked details as to "when, what, where and how this plan will be carried out, what the follow-up of the plan would be with dates, [and] who would be involved."

Issues with Schreiner's performance persisted throughout August. The employee hotline received an anonymous complaint about Schreiner violating safety protocols. Schreiner failed to produce minutes of a staff meeting as

required. He misrepresented to Jantos conversations with a member of USP's HR team and misrepresented to a TRSC board member an incident with an outside vendor. He failed to review New Jersey safety standards for ambulatory surgery centers, as had been requested of him. On August 14, Jantos approached HR a second time about terminating Schreiner, noting four nursing staff members were "ready to walk" if he remained on. The HR representative responded USP needed to "weigh the risk of a potential wrongful termination lawsuit versus the well-being of the center/staff."

Meanwhile, in August 2018, Schreiner was filling in for Morgan, who was on an extended medical leave. While completing a monthly reconciliation of the office's cash log, Schreiner noticed amounts listed in the log as deposited that were not appearing on the bank statement. Upon further investigation, Schreiner found approximately $24,000 in suspicious credits and write-offs to patient accounts. Unbeknownst to Jantos, Schreiner alerted Panzera. On September 6, 2018, Schreiner also alerted Dr. Richard J. Borgatti, Jr. chairman of the TRSC board, about the missing money. Dr. Borgatti encouraged Schreiner to continue to investigate the discrepancies.

As before, at the time he reported these discrepancies, Schreiner believed company rules had been broken, but was not sure a law, rule, or

regulation had been violated. He later testified at his deposition "[i]t would appear to me from a layman's point of view that it would be embezzlement," but did not recall stating as much to Panzera directly. Schreiner never discussed the matter with Jantos.

On September 5, 2018, Jantos requested a conference call with the TRSC board for the following evening, to discuss terminating Schreiner. The next day, Jantos contacted HR a third time, notifying them of her recommendation to terminate Schreiner and attaching a second EDAF detailing the continued performance issues that had arisen since the first EDAF. HR approved Schreiner's termination at 4:24 p.m. on September 6, 2018, prior to Jantos' scheduled conference call with the TRSC board.

Minutes before Jantos was to join the conference call, Panzera contacted Jantos and informed her of the accounting discrepancies. This conversation with Panzera was the first time Jantos learned of any problems with cash missing from TRSC, or of Schreiner's involvement in reporting or investigating the problem.

During the ensuing conference call, which included both Panzera and Dr. Borgatti, the TRSC board approved Jantos' decision to terminate Schreiner. During the call, Dr. Borgatti told the others that Schreiner had informed him

"money was missing" from the facility. Jantos told Dr. Borgatti an investigation into the missing money would be completed right away.

Jantos terminated Schreiner the following day. As Schreiner was collecting his belongings, he told Jantos cash was missing from TRSC. Jantos replied that she already knew this information. On the same day Schreiner was terminated, Panzera initiated a second investigation into the missing cash. This resulted in Morgan's termination from TRSC approximately one week later, by Jantos, and TRSC/USP filing a police report in connection with the missing money.

Schreiner sued defendants alleging unlawful termination in violation of CEPA. Schreiner alleged he had complained on numerous occasions of "ongoing unlawful conduct," and reported it to Panzera. He claimed Jantos terminated him to protect Morgan's job and "to cover up the unlawful embezzlement occurring at the Toms River Location . . . ." Defendants filed an answer and raised affirmative defenses, including Schreiner's disciplinary actions and termination were for legitimate, non-retaliatory reasons.

After the close of discovery, defendants moved for summary judgment. The trial court granted the motion finding Schreiner had failed to adduce evidence sufficient to support his prima facie CEPA case, namely that: he

believed workplace activity was in violation of a statute, regulation, or public policy; he had "object[ed] to, or refuse[d] to participate" in the violative activity; and there was a causal connection between his reports of the missing money and his termination.

The trial court noted Jantos had already decided to terminate Schreiner before she was finally informed he had reported accounting discrepancies. The court found Schreiner's theory of Jantos' retaliatory motive to be based only on his own speculation and inadmissible hearsay evidence. Even if Schreiner's prima facie case had been established, he had not put forward any evidentiary support for the proposition defendants' documented reasons for terminating him were pretextual.

II.

Appellate review of a trial court's grant of summary judgment is de novo, applying the same standard as the trial court. Samolyk v. Berthe, 251 N.J. 73, 78 (2022). Summary judgment is appropriate when it appears there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. R. 4:46-2; Brill v. Guardian Life Ins. Co., 142 N.J. 520, 532 (1995). The facts and all reasonable inferences drawn from them are viewed "in favor of the non-moving party." Friedman v. Martinez, 242

N.J. 450, 472 (2020) (quoting Globe Motor Co. v. Igdaley, 225 N.J. 469, 480 (2016)). To the extent the grant or denial of summary judgment is premised on the admissibility of evidence, an appellate court reviews the trial court's underlying evidentiary determination for an abuse of discretion. State v. Garcia, 245 N.J. 412, 430 (2021).

A non-movant cannot survive summary judgment merely by relying on factual disputes "of an insubstantial nature." Brill, 142 N.J. at 529 (quoting Judson v. Peoples Bank & Tr. Co. of Westfield, 17 N.J. 67, 75 (1954)). Speculation as to material facts is insufficient to defeat a motion for summary judgment. See Merchs. Express Money Ord. Co. v. Sun Nat'l Bank, 374 N.J. Super. 556, 563 (App. Div. 2005). Inadmissible hearsay "cannot be considered evidence in the summary judgment record showing a disputed issue of fact . . . ." Chicago Title Ins. Co. v. Ellis, 409 N.J. Super. 444, 457 (App. Div. 2009).

III.

Schreiner's complaint cited N.J.S.A. 34:19-3(a) and (c). Under Higgins v. Pascack Valley Hospital, 158 N.J. 404, 419 (1999) Schreiner's claim falls under subsection (c), as his complaint was that a subordinate was taking money, not that the employer did anything wrong. In regard to subsection (c),

our Supreme Court has distilled the elements of a prima facie CEPA case to require a plaintiff to demonstrate:

> (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;
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> (2) [they] performed a "whistleblowing" activity described in [the CEPA statute];
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> (3) an adverse employment action was taken against [them]; and
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> (4) a causal connection exists between the whistleblowing 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 fourth prong "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). A plaintiff need not show a "direct causal link" between the whistleblowing activity and the retaliation. Battaglia v. United Parcel Serv. Inc., 214 N.J. 518, 558 (2013). Circumstantial evidence may include "[t]he temporal proximity of employee conduct protected by CEPA and an adverse employment action,"

Maimone, 188 N.J. at 237. However, "[t]emporal proximity, standing alone, is insufficient to establish causation." Hancock v. Borough of Oaklyn, 347 N.J. Super. 350, 361 (App. Div. 2002). Temporal proximity, on its own, will only support an inference of causation when the facts "are so 'unusually suggestive of retaliatory motive.'" Young v. Hobart W. Grp., 385 N.J. Super. 448, 467 (App. Div. 2005) (quoting Krouse v. Am. Sterilizer Co., 126 F.3d 494, 503 (3d Cir. 1997)). The causal link ordinarily cannot be satisfied simply because the adverse action occurred after the protected activity. Ibid.

Schreiner argues he adduced evidence of pretext and temporal proximity, which satisfy the fourth causation prong. He maintains the trial court erred because issues of Jantos' motive should have been for a jury to determine.

Defendants counter that given Jantos' lack of knowledge of Schreiner's reporting of the accounting discrepancies, no reasonable factfinder could find the requisite causal connection between the gap in her knowledge and Schreiner's termination. Even though Panzera and Dr. Borgatti had prior knowledge of the complaints, there was no evidence this "made a difference" in the board's decision. Defendants assert Schreiner's allegation that Jantos was motivated by a friendship with Morgan to cover up an unknown embezzlement at TRSC was based on nothing but Schreiner's own speculation

and inadmissible hearsay evidence. They contend Schreiner's attempts on appeal to rehabilitate the hearsay evidence cannot overcome the deferential abuse of discretion standard under which evidentiary determinations are reviewed. Defendants also argue Schreiner's continued, documented performance issues were legitimate, non-retaliatory reasons for his termination, and Schreiner did not put forward any evidence these reasons were a pretext.

Schreiner misapprehends the distinction between evidence sufficient to satisfy the causation element and evidence of pretext. Under CEPA's burden-shifting framework:

> [o]nce a prima facie case is established, the burden of persuasion is shifted to the employer to rebut the presumption of discrimination by articulating some legitimate nondiscriminatory reason for the adverse employment action. Upon such a showing by the employer, [a] plaintiff has the ultimate burden of proving that the employer's proffered reasons were a pretext for the [retaliatory] action taken by the employer.
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> [Kolb v. Burns, 320 N.J. Super. 467, 478 (App. Div. 1999).]

After a defendant produces evidence of legitimate reasons for the adverse action, the plaintiff loses the benefit of the initial presumption his prima facie case afforded him. Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S.

248, 255-56 (1981) (discussing burden-shifting in Title VII cases). "[T]he burden of proving the actual [retaliation] lies at all times with the plaintiff." Bray v. Marriott Hotels, 110 F.3d 986, 990 (3d Cir. 1997).

Evidence of pretext is not, as plaintiff argues, one of two alternative means of satisfying the fourth prong of the prima facie case. Rather, it is a separate evidentiary burden placed upon a CEPA plaintiff after the defendants have rebutted the presumption afforded the plaintiff if, and only if, they have already adduced sufficient evidence to support their prima facie case.

Relying on Estate of Roach v. TRW, Inc., 164 N.J. 598 (2000), Schreiner maintains a CEPA action can lie even when the person terminating the plaintiff was unaware of the whistleblowing activities. In Roach, the Supreme Court affirmed a verdict awarding damages to a CEPA plaintiff where one of the supervisors making the termination decision had no prior knowledge of the plaintiff's whistleblowing activities. Id. at 611-12. The Court found the jury had been presented with evidence of another supervisor, directly involved in the whistleblowing, who may have influenced the termination decision by giving a mediocre performance review, and with evidence of other, similarly situated employees who had not been subject to

adverse employment action. This evidence, the Court reasoned, allowed for an inference of causation by a reasonable factfinder.

This case in not like Roach. Here, there is no evidence of Panzera or Dr. Borgatti influencing Jantos' decision to terminate Schreiner. Jantos' decision was preceded by her repeated requests to HR and her request for the September 6 conference call, all of which predate any communication with Panzera or Dr. Borgatti about Schreiner's activities. Absent other evidence "unusually suggestive" of retaliation, Schreiner cannot rely alone on the fact that he was fired after reporting the missing money. While it is true that the whistleblowing activities were discussed immediately prior to and during the final conference call, this temporal proximity alone is not enough to allow for an inference of causation.

Schreiner also posits that summary judgment can be inappropriate "where an action or defense requires determination of a state of mind or intent, such as claims of waiver, bad faith, fraud or duress." Pressler & Verniero, Current N.J. Court Rules, cmt 2.3.4 on R. 4:46-2 (2023). While evidence of causation and evidence of a supervisor's motive can be intertwined in a CEPA case, the general rule does not relieve plaintiffs of their evidentiary burden. To prove a CEPA claim, the plaintiff must show that the "retaliatory

discrimination was more likely than not a determinative factor in the decision." Kolb, 320 N.J. Super. at 479 (quoting Bowles v. City of Camden, 993 F. Supp. 255, 262 (D.N.J. 1998)). Plaintiff's burden as recently described by the Court in the context of a gender discrimination case is as follows: "Although the burden of production shifts throughout the process, the employee at all phases retains the burden of proof that the adverse employment action was caused by purposeful or intentional [retaliation]." Meade v. Twp. of Livingston, 249 N.J. 310, 330 (2021) (emphasis added) (quoting Bergen Com. Bank v. Sisler, 157 N.J. 188, 211 (1999)).

Here, the only evidence Schreiner adduced of a retaliatory motive for Jantos to cover up the embezzlement was his own speculative belief that Jantos and Morgan were friends. As the trial court noted, this belief was based only on inadmissible hearsay statements by unknown, unidentified declarants. All the other evidence available pointed to no unusual relationship between Jantos and Morgan. At the time of Schreiner's reports and termination, Morgan had not yet been identified as the perpetrator, and Morgan was herself terminated by Jantos a week after Schreiner's departure.

USP and TRSC had no reason to exhibit animus about an employee's reporting behavior that benefitted USP and TRSC. Indeed, Dr. Borgatti

encouraged Schreiner to continue his investigation. USP and TRSC benefitted by Schreiner's discoveries. Therefore, there is no genuine issue of material fact about the cause of Schreiner's termination. The competent evidentiary record and all reasonable inferences to be drawn from it fail to show genuine and material factual questions regarding the fourth CEPA prong.

Even if Schreiner had produced sufficient evidence to support his prima facie case, he failed to produce any evidence of pretext to rebut the defendants' legitimate, documented, non-retaliatory reasons. As with evidence of causation, a plaintiff's evidence of pretext can be indirect or circumstantial. Mandel v. UBS/PaineWebber, 373 N.J. Super. 55, 75 (App. Div. 2004) (using the burden-shifting framework in a disparate treatment context). A plaintiff may show pretext using evidence, which

> either casts sufficient doubt upon the employer's proffered legitimate reason so that a factfinder could reasonably conclude it was fabricated, or that allows the factfinder to infer that discrimination was more likely than not the motivating or determinative cause of the termination decision. . . . All that is needed is some evidence from which a factfinder could infer that the employer's proffered reason was either a post hoc fabrication or otherwise did not actually motivate the decision.
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> [Svarnas v. AT & T Commc'ns, 326 N.J. Super. 59, 82 (App. Div. 1999) (citing Fuentes v. Perskie, 32 F.3d 759, 762, 764 (3d Cir. 1994)).]

Schreiner could not adduce any evidence of a post hoc fabrication, chiefly because of the timeline of events. Jantos' lack of prior knowledge of Schreiner's reports when she decided to terminate him, together with the dated incidents and disciplinary action forms, make a post hoc fabrication factually impossible. There was nothing in the record from which a reasonable factfinder could conclude Jantos, USP, or TRSC fabricated the incidents described in Schreiner's disciplinary write-ups, or to find these incidents did not actually motivate the decision to terminate Schreiner.

Schreiner's claim fails as a matter of law. The trial court's decision to grant summary judgment to defendants was proper.

Affirmed.