SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1703-21

HOPE MOSER,

Plaintiff-Appellant,

v.

THE STREAMWOOD COMPANY and SCOTT LEONARD,

Defendants-Respondents.

Argued February 1, 2023 – Decided July 13, 2023

Before Judges Gooden Brown and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Docket No. L-1342-21.

Patricia A. Barasch argued the cause for appellant (Schall & Barasch, LLC, attorneys; Richard M. Schall and Patricia A. Barasch, on the briefs).

Walter F. Kawalec, III, argued the cause for respondents (Marshall Dennehey Warner Coleman & Goggin, attorneys; Lawrence B. Berg, Mari I. Gangadean, and Walter F. Kawalec, III, on the brief).

PER CURIAM

In this employment dispute, plaintiff Hope Moser appeals from the Law Division's January 12, 2022 order granting defendants' motion for summary judgment. We reverse and remand for trial.

We discern the following facts from the record. Plaintiff was an assistant property manager at the Madison Court apartments. Defendant, the Streamwood Company ("Streamwood"), managed apartment communities and commercial properties throughout southern New Jersey, including the Madison Court apartments. While plaintiff worked for Streamwood, she reported to defendant Scott Leonard, Streamwood's regional manager and son of Streamwood's founder and owner.

In early January 2021, Leonard instructed plaintiff to check "no" on all housing screening form questions asking whether the form was being completed as a Section 8 housing application. Plaintiff believed checking "no" on the forms, as instructed, would make her complicit in violating New Jersey's Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1 to -49, which prohibits housing discrimination against prospective Section 8 tenants.

Plaintiff objected and advised Leonard that she would not comply with his directive. In response, Leonard emailed plaintiff on January 12, 2021,

explaining that, because the subject properties are "a market rate property . . . [versus] a [S]ection 8 property[,] . . . [she] should not select '[S]ection 8 applicant'" on the forms. Despite Leonard's assurances, plaintiff maintained her belief that compliance with Leonard's directive was illegal.

On January 14, 2022, plaintiff again refused to comply with the directive; Leonard became angry and told plaintiff, "things don't look good for you." Plaintiff considered Leonard's statement to be a threat; ultimatum; and "Hobson's choice"[1]—i.e., either participate in her employer's scheme to violate LAD or resign.

As a result of her January 14th conversation with Leonard, plaintiff began experiencing acute anxiety. Plaintiff did not attempt to speak with upper management, seek outside advice on the issue, or discuss the matter with Leonard again. Rather, plaintiff sought medical treatment for her anxiety and "was placed on medical leave by her medical provider through February 15, 2021." Following completion of her medical leave, plaintiff resigned.

[1] Our Supreme Court has described a Hobson's choice as having "no choice at all." N.J. Div. of Youth & Fam. Servs. v. I.S., 202 N.J. 145, 151 (2010); see Hobson's Choice, Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/hobson's_choice (defining a Hobson's choice as "[t]he necessity of accepting one of two or more equally objectionable alternatives.").

On May 5, 2021, plaintiff filed the instant complaint, alleging that defendants constructively discharged her, in violation of the New Jersey Conscientious Employee Protection Act ("CEPA"), N.J.S.A. 34:19-1 to -8. At the close of discovery, defendants filed a motion for summary judgment on November 17, 2021.

On January 12, 2022, the judge heard argument on the matter and ultimately granted defendants' motion for summary judgment, reasoning that:

> [T]he question really is, in this matter the sole allegation is a single comment on one occasion by [] Leonard that, "[t]hings don't look good for you," is that enough to sustain a CEPA claim? Number [o]ne, there was no action taken by defendant in any way to alter her job, nor was she ordered to engage in illegal activity. The comment was just, "[t]hings don't look good for you." That day [] plaintiff left the office and never returned. There were no further actions or comments made to her and she didn't take all reasonable steps necessary to remain employed once she had that comment.
>
> She didn't go to a supervisor. Although he was her immediate supervisor and maybe the regional supervisor, he was an employee. . . . [S]he didn't take any action. She walked out of the office that day and never returned. And the question is, and it's a close call, but I think that summary judgment needs to be granted here because I don't think a reasonable jury could–and taking everything in plaintiff's best interest, I don't think that a reasonable jury could conclude that the one comment itself was–with no action being taken by [] plaintiff after that comment, there were no further

> actions or comments, and I don't think that any reasonable juror could find that the alleged singular comment could possibly rise to the level of outrageous, coercive[,] and unconscionable conduct required under CEPA.

This appeal followed. On appeal, plaintiff raises the following arguments:

> POINT I.
>
> GIVEN THAT A REASONABLE JURY COULD FIND THAT DEFENDANTS MADE CLEAR TO PLAINTIFF THAT THEY WERE CONDITIONING HER CONTINUED EMPLOYMENT ON HER WILLINGNESS TO JOIN WITH THEM IN ACTIVELY VIOLATING THE NEW JERSEY LAW AGAINST DISCRIMINATION, THE TRIAL COURT ERRED IN GRANTING SUMMMARY JUDGMENT—TAKING FROM A JURY THE ISSUE OF WHETHER DEFENDANTS CONSTRUCTIVELY TERMINATED PLAINTIFF'S EMPLOYMENT WHEN PLAINTIFF DECIDED THAT SHE HAD NO CHOICE BUT TO LEAVE HER EMPLOYMENT RATHER THAN JOIN IN DEFENDANTS' VIOLATION OF THE LAW.
>
> > A. As A Result of Its Applying A Constructive Discharge Standard Used Only In Hostile Work Environment Cases To The Facts Of The Present Case—One Where Plaintiff Is Not Alleging Defendants Subjected Her To A Hostile Work Environment But Rather Conditioned Her Continued Employment On Her Willingness To Violate The Law—The Trial Court Erred In Granting Defendants' Motion For Summary Judgment[.]

B. The Trial Court Also Erred In Deciding As A Matter Of Law A Second Issue That Should Have Been Left To A Jury: Whether Plaintiff, Before Resigning Her Employment Had, Or Had Not, "Taken All Reasonable Steps Necessary To Remain Employed."

Rule 4:46-2(c) provides that a motion for summary judgment must 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." The court must "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." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

In applying this standard, a motion judge may not abrogate the jury's exclusive role as the finder of fact. Suarez v. E. Int'l Coll., 428 N.J. Super. 10, 27 (App. Div. 2012). "The court's function is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" Rios v. Meda Pharm., Inc., 247 N.J. 1, 13 (2021) (quoting Brill, 142 N.J. at 540).

"To decide whether a genuine issue of material fact exists, the trial court must 'draw[] all legitimate inferences from the facts in favor of the non-moving party." Friedman v. Martinez, 242 N.J. 450, 472 (2020) (alteration in original) (quoting Globe Motor Co. v. Igdalev, 225 N.J. 469, 480 (2016)). We review the trial court's grant or denial of a motion for summary judgment de novo, applying the same standard used by the trial court. Stewart v. N.J. Tpk. Auth./Garden State Parkway, 249 N.J. 642, 655 (2022); Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021).

In the instant matter, we are tasked with analyzing the judge's application of CEPA, which has been described as the most "far reaching 'whistleblower statute' in the nation." Battaglia v. United Parcel Serv., Inc., 214 N.J. 518, 555 (2013) (quoting Mehlman v. Mobil Oil Corp., 153 N.J. 163, 179 (1998)). Our Supreme Court has explained that "CEPA is 'remedial legislation[]' [that] 'should be construed liberally to effectuate its important social goal'—'to encourage, not thwart, legitimate employee complaints.'" Donelson v. DuPont Chambers Works, 206 N.J. 243, 256 (2011) (quoting Dzwonar v. McDevitt, 177 N.J. 451, 463 (2003)).

Here, the sole cause of action in plaintiff's complaint was an alleged violation of CEPA, which "prohibits an employer from taking 'any retaliatory

action against an employee' who engages in certain protected activity." Donelson, 206 N.J. at 256 (quoting N.J.S.A. 34:19-3). "Thus, an employer may not retaliate against an employee who '[d]iscloses . . . to a supervisor or to a public body an activity, policy or practice of the employer . . . that the employee reasonably believes . . . is in violation of a law, or a rule or regulation promulgated pursuant to law.'" Ibid. (alterations in original) (quoting N.J.S.A. 34:19-3(a)). "Nor may an employer retaliate against an employee who '[o]bjects to . . . any activity, policy or practice which the employee reasonably believes . . . is in violation of a law, or a rule or regulation" or "is incompatible with a clear mandate of public policy concerning the public health, safety or welfare[.]" Ibid. (alterations in original) (quoting N.J.S.A. 34:19-3(c)). In this regard, it is irrelevant whether the employee was correct in believing that the underlying action was unlawful or incompatible with a mandate of public policy, so long as the employee's belief was reasonable. Dzwonar, 177 N.J. at 464.

To establish a prima facie case for a claim brought under CEPA, a plaintiff must show:

> (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]
>
> (2) he or she performed a "whistle-blowing" 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 whistle-blowing activity and the adverse employment action.
>
> [Lippman v. Ethicon, Inc., 222 N.J. 362, 380 (2015) (quoting Dzwonar, 177 N.J. at 462).]

At issue here is the third CEPA element, which requires plaintiff to demonstrate that "an adverse employment action was taken against . . . her" by defendants. Ibid. Under N.J.S.A. 34:19-2(e), "retaliatory action" is defined 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." However, "[w]hat constitutes an 'adverse employment action' must be viewed in light of the broad remedial purpose of CEPA." Donelson, 206 N.J. at 257.

Our Supreme Court has held that, for purposes of a CEPA violation, "[a] discharge encompasses not just an actual termination from an employment, but

[2] Defendants do not contest the reasonableness of plaintiff's belief that Leonard's directive was violative of certain prohibitions established by LAD.

a constructive discharge." Ibid. "A constructive discharge occurs when the employer has imposed upon an employee working conditions 'so intolerable that a reasonable person subject to them would resign.'" Daniels v. Mut. Life Ins. Co., 340 N.J. Super. 11, 17 (App. Div. 2001) (quoting Muench v. Twp. of Haddon, 255 N.J. Super. 288, 302 (App. Div. 1992)). However, "not every employment action that makes an employee unhappy constitutes 'an actionable adverse action.'" Richter v. Oakland Bd. of Educ., 459 N.J. Super. 400, 418 (App. Div. 2019). In fact, we have held that "[t]he phrase 'intolerable conditions' conveys a sense of outrageous, coercive[,] and unconscionable requirements." Jones v. Aluminum Shapes, Inc., 339 N.J. Super. 412, 428 (App. Div. 2001). Moreover, "[f]or purposes of . . . retaliatory discharge, an employee is expected to take all reasonable steps necessary to remain employed." Zubrycky v. ASA Apple, Inc., 381 N.J. Super. 162, 166 (App. Div. 2005).

"Constructive discharge is a 'heavily fact-driven determination[.]'" Muench, 255 N.J. Super. at 302 (quoting Levendos v. Stern Ent., Inc., 860 F.2d 1227, 1230 (3rd Cir. 1988)). In making that determination, courts will consider all circumstances, including the nature of the employer's conduct. Shepard v. Hunterdon Developmental Ctr., 174 N.J. 1, 28 (2002).

Guided by these legal principles, we find that the judge's grant of summary

judgment was unwarranted. Contrary to the judge's assessment, it was not a "single comment" that induced plaintiff to resign. Rather, it was her employer's repeated insistence, in the face of plaintiff's objections, that she engage in actions she reasonably believed were in violation of LAD leading up to, and in conjunction with, the comment that induced plaintiff to resign.

Based on the circumstances surrounding this matter, we find that a reasonably jury could conclude that defendants' conduct rose to the level of outrageousness required under CEPA and that plaintiff took "all reasonable steps necessary to remain employed." See Zubrycky, 381 N.J. Super. at 166. In that regard, we find it significant that Leonard, plaintiff's immediate supervisor, is the son of Streamwood's founder and owner. Thus, any reasonable step to remain employed would have required plaintiff to report Leonard's comment, "[t]hings don't look good for you," to defendant's father, who is next in the chain-of-command. Therefore, a jury could conclude that such a requirement is not a "reasonable step[]," as it would have been unlikely to ameliorate plaintiff's grievance.

Given the fact that the judge found this matter was a "close call," equity should have weighed in favor of the non-moving party on a motion for summary judgment.

Reversed and remanded for trial.

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

CLERK OF THE APPELLATE DIVISION