BRENDA GROSLINGER v. TOWNSHIP OF WYCKOFF

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APPELLATE DIVISION

DOCKET NO. A-5861-07T25861-07T2

BRENDA GROSLINGER, Plaintiff-Appellant, v. TOWNSHIP OF WYCKOFF and JOHN YDO,

Defendants-Respondents.

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Argued May 13, 2009 - Decided

Before Judges Rodr guez, Payne and Newman.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-4019-06.

Jennifer L. Gottschalk argued the cause for appellant (Oxfeld Cohen, attorneys; Sanford R. Oxfeld, of counsel; Ms. Gottschalk, on the brief).

Ruby Kumar-Thompson and Raymond R. Wiss, argued the cause for respondents Township of Wyckoff and John Ydo (Thomas B. Hanrahan & Associates and Wiss & Bouregy, attorneys; Mr. Hanrahan and Mr. Wiss, of counsel and on the briefs; Ms. Kumar-Thompson and Melissa Kanbayashi, on the briefs).

The decision of the court was delivered by RODR GUEZ, A. A., P.J.A.D.

Plaintiff Brenda Groslinger appeals the July 3, 2008 order granting summary judgment in favor of defendants John Ydo (Ydo) and Township of Wyckoff (Township). We affirm.

Groslinger was a police officer with the Wyckoff Police Department (WPD) for several years. In 2005, she informed her supervisor that she was pregnant and that her doctor recommended she be reassigned to non-patrol duties. She was assigned to a floating dispatcher position that required her to work an irregular schedule. Groslinger asserts she suffered health consequences from working this schedule. She also asserts her coworkers made inappropriate comments based on her gender and her pregnancy.

Groslinger filed a grievance with the Township Administrator alleging she had been subjected to discrimination and harassment in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. The grievance concluded with Groslinger's voluntary placement in an accommodated position.

Groslinger thereafter filed a complaint in the Law Division alleging she had been subjected to gender discrimination and sexual harassment in violation of the LAD and retaliation in violation of the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14. Defendants moved for summary judgment and, following a hearing, the judge dismissed the complaint, finding in part that Groslinger's LAD claims were waived by her voluntary acceptance of modified duties following the grievance. Groslinger appealed.

These are the salient facts. Groslinger became pregnant with her first child in September 2003. At no time has the WPD ever had a "light duty" policy for patrol officers unable to perform the duties of their positions. However, Ydo placed Groslinger in a vacant dispatcher position, subject to her doctor clearing her to perform the duties of the position. Groslinger had worked as a civilian dispatcher prior to becoming a patrol officer. Because there were two vacant dispatcher positions at that time, Groslinger was able to work a regular shift throughout her pregnancy.

Groslinger became pregnant with her second child in August 2005 and again requested a modified duty schedule commensurate with her doctor's recommendations. As with her first pregnancy, Ydo reassigned Groslinger to "various administrative/dispatch functions," conditioned on her doctor's approval. Ydo confirmed this arrangement in a letter to Groslinger, noting that in light of the "unprecedented and temporary nature" of the reassignment, "shift changes are possible, and more than likely, due to the 'as needed' basis of some of your new functions." Groslinger did not sign this letter, stating she first wished to consult with an attorney.

Groslinger's second pregnancy was more difficult to accommodate than her first because there were no longer any vacant dispatcher positions. There were gaps in the dispatcher schedule that Groslinger filled. However, Ydo also had to accommodate the per diem workers who normally filled these shifts to ensure the workers would still be available after Groslinger returned to regular duty. Accordingly, Groslinger received an irregular schedule and occasionally worked a 3 p.m. to 11 p.m. shift followed by a 7 a.m. to 3 p.m. shift the next day.

Pursuant to the Township sick leave policy, codified by the Township Administrator in April 2006, Township employees were entitled to fifteen sick days per year, which could accumulate from year to year in the event of a long-term illness. A pregnant employee was entitled to unpaid leave only to the extent authorized pursuant to the Family Medical Leave Act (FMLA) and/or the New Jersey Family Leave Act (FLA).

In September 2005, she requested that her doctor, Leonard Nicosia, M.D., write her a note. The note stated: "[Groslinger] cannot fulfill her duties as a police officer due to her pregnancy. She is unable to return to work as of [September 14, 2005, and] until released for duty from this office."

Without speaking to anyone, Groslinger left this note on Ydo's desk and did not report to work for the next five days. When Ydo requested that Groslinger's doctor specify which duties she could not perform, the doctor responded with a letter stating: "After reviewing the civil dispatcher activities/job functions list, we see no reason for her to be unable to do the civil dispatcher's position at this time." Ydo ordered Groslinger back to work. Ydo additionally requested that Groslinger account for her absence from work

and initiated an investigation. Groslinger claimed this investigation was intended to harass and discriminate against her. No disciplinary action was brought against her.

Groslinger returned to work. On March 1, 2006, she obtained a doctor's note excusing her from work. She gave birth on March 31, 2006. She invoked the FMLA, the FLA, and personal leave to care for the baby until the following September. Groslinger was informed that, in light of her eight years of service, she was entitled to a total of 128 sick days through the end of 2006. Because she had already utilized 101 sick days, she had twenty-seven sick days remaining. She was paid for all the sick time she used in 2005 and 2006.

Groslinger alleges that, while she was pregnant, she was subjected to a hostile workplace environment based on several encounters with other WPD officers. Because Ydo was on vacation when Groslinger initially disclosed her second pregnancy, she spoke with the acting chief of the department, Captain Benjamin Fox. Fox stated that light duty was unavailable and indicated Groslinger might not receive paid sick leave if she took time off, "because you are not sick, you are not injured, you are pregnant, and I don't know what category that falls in that you would be compensated for not coming to work." He suggested Groslinger could avoid working by getting pregnant every year for five years.

Around the same time, Captain Ken Hagedorn sent out a general email stating it was unlikely Groslinger would work any more patrol shifts that year, so all other requests for personal time would have to accommodate for the lack of personnel.

At some point a police secretary, Beverly Smith, said words to the effect of, "Screw her, cut off her pay, and let her sue us." Ydo learned of the remark during the Township Administrator's investigation and verbally admonished Smith for the remark. The Township Administrator later sent Smith a written letter of reprimand.

Two detectives, Joseph Soto and Daniel Kellogg, said words to the effect of, "If you expect to be hired here, you better put your uterus in a jar and show it to the Chief," implying the WPD would not hire a patrol officer likely to become pregnant. When Ydo learned of the incident, he verbally admonished both Soto and Kellogg and sent them each a written warning, informing them that such comments violate WPD rules and regulations. He ordered them to attend additional sexual harassment training.

In September 2005, Groslinger filed a grievance with the Township Administrator based on the conduct of her fellow officers. She alleged she had been subjected to harassment and discrimination on account of her pregnancy in violation of the WPD collective bargaining agreement, the LAD, and the FLA, and that the investigation into her use of sick leave was retaliatory, in violation of CEPA.

On November 2, 2005, Groslinger signed a letter agreeing to accept a modified duty schedule on terms substantially identical to those in the letter Ydo sent on August 25, 2005. Subsequently, the Township Administrator issued a recommendation addressing Groslinger's grievance, which the Township accepted and endorsed in a resolution. The Administrator found no negative motivation in Hagedorn's email regarding requests for personal leave, but recommended Ydo review the incident with Hagedorn. The Township Administrator found Fox and Groslinger's accounts of their discussion about her request

for accommodated duty irreconcilable, but recommended Ydo review the incident with Fox. The Administrator found Smith's comment reflected poor judgment and recommended Smith be reassigned to another department. He found Soto and Kellogg's alleged "uterus in a jar" discussion inappropriate and recommended that they receive a written reprimand and that they attend sensitivity training. Finally, the Administrator found no merit to the allegation that Ydo had initiated the investigation into Groslinger's use of sick time to harass and intimidate her.

Regarding Groslinger's allegations that the WPD granted requests for sick time in a discriminatory manner, the Administrator found no discriminatory intent where Groslinger's doctors never said she would be unable to perform her assigned duties and where Ydo followed the same procedures used during Groslinger's first pregnancy.

In November 2005, Ydo sent a department-wide memorandum reiterating the Township's zero-tolerance policy regarding harassment and discrimination. The memo described the procedure for reporting alleged violations and emphasized that both false allegations and substantiated violations would result in disciplinary action.

The matter was also submitted for arbitration. The arbitrator found in favor of Groslinger. The Law Division vacated the arbitrator's award as exceeding the power of the arbitrator and violating public policy. In a companion case, Groslinger appealed. Twp. of Wyckoff v. PBA Local 261, 409 N.J. Super. 344 (App. Div. 2009). The appeal issue focused on the standard governing the arbitrator's decision to define the breadth of the dispute submitted by the parties. There, the issue referred to violations of the CBA without limiting reference to specific provisions of the CBA. We held that the arbitrator's interpretation of the collective bargaining agreement and the issue submitted was reasonably debatable. Id. at 358. Therefore, we reversed and reinstated the arbitrator's award.

Groslinger filed the present complaint in Superior Court alleging she had been subject to harassment and discrimination in violation of the LAD and retaliation in violation of CEPA.

In connection with this litigation, Groslinger submitted a certification asserting, in part, that:

Although, to my knowledge, no accommodated male officer had been ordered to perform civilian duties such as dispatching, I was content with this accommodation.

However, my schedule as a dispatcher quickly became a health concern and impacted upon my pregnancy. My shifts were erratic. Sometimes I worked the 7 AM to 3 PM shift and sometimes I worked the 3 PM to 11 PM shift. There were consecutive days when I would be ordered to work the 3 PM to 11 PM shift followed by the 7 AM to 3 PM shift. This provided only an eight-hour layover between the shifts.

In addition, my schedule was highly erratic with regards to days off, and I rarely had consecutive days off.

The short layover was difficult for me given the physical demands of pregnancy. When reporting for a 3 PM to 11 PM shift, followed by a 7 AM to 3 PM shift, I noticed health impacts on me. I felt very fatigued and that I had not had sufficient sleep because of the short, eight-hour layover.

During my first pregnancy in 2003-2004, my doctor instructed me that I was a "higher-risk pregnancy" because I was [thirty-eight] years old and my family had a history of diabetes. Therefore, throughout my first and second pregnancies, I was diligent about my health.

During my second pregnancy, as a result of the inconsistencies in my work schedule while dispatching, in addition to other factors, I was frequently getting sick. I had colds, respiratory infections, and problems with my stomach and bowels. I realized that I should not continue to work an inconsistent, erratic schedule, or else there would be continued impacts on my health and, potentially on the health of my fetus.

Following oral argument, the judge entered an order granting summary judgment to the defendants. In a written opinion, he found Groslinger had not made out a prima facie case showing an adverse employment action where:

[T]he plaintiff's conduct in executing the November 2, 2005 agreement waived her right to bring the above claims. The court is convinced that the plaintiff was never required to perform administrative or dispatch duties, but instead, requested said duties due to her pregnancy. The plaintiff cannot bring a claim alleging disparate treatment due to a reassignment that she requested herself.

The judge further found Groslinger's CEPA claims were barred by her LAD claims.

Groslinger appeals, arguing:

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

Summary judgment is appropriate where the moving party is entitled to judgment as a matter of law and there are no issues of material fact in dispute. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995); R. 4:46-2(c). On a motion for summary judgment, all facts must be viewed in the light most favorable to the non-moving party. Brill, supra, 142 N.J. at 540.

Here, we agree with the judge's determination that Groslinger's accession to the November 2, 2005 agreement waived her right to bring her LAD claims. Groslinger was assigned to modified duties at her own request. By signing the agreement, she acknowledged that reassignment was contingent on department need, that she might not receive a regular schedule or regular duties, and that her reassignment was contingent on receiving clearance from her doctor. In fact, when she signed the agreement she had already been serving as a dispatcher and should have been aware of the scheduling irregularities and the potential impact on her health.

With regard to whether Groslinger established a prima facie claim of disparate treatment, the judge granted defendants' motion for summary judgment. For the sake of completeness, however, we will address the merits of Groslinger's individual claims.

Groslinger contends:

PLAINTIFF ESTABLISHED A PRIMA FACIE CASE OF GENDER DISCRIMINATION BEFORE THE MOTION COURT BELOW.

The LAD prohibits an employer from taking an adverse employment action against any individual on the basis of "race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait[.]" N.J.S.A. 10:5-12(a).

To establish a prima facie case of discrimination under the LAD, a plaintiff must establish: 1) she is a member of a protected class; 2) she was performing her job at a level meeting her employer's legitimate expectations; 3) she was subject to an adverse employment action; and 4) the adverse employment action took place under circumstances giving rise to an inference of unlawful discrimination. Young v. Hobart West Group, 385 N.J. Super. 448, 463 (App. Div. 2005). LAD claims may be based on circumstantial evidence. Maiorino v. Schering-Plough Corp., 302 N.J. Super. 323, 344-45 (App. Div.), certif. denied, 152 N.J. 189 (1997).

Although we have held pregnancy discrimination is a form of gender discrimination, Gilchrist v. Bd. of Educ. of Haddonfield, 155 N.J. Super. 358, 368 (App. Div. 1978), employers are not required to carve out a "special exception" for pregnant employees, and a gender-neutral leave policy will not constitute discrimination. Gerety v. Atl. City Hilton Casino Resort, 184 N.J. 391, 406-07 (2005). Employers are required only to treat employees who are members of a protected class equally with non-protected class employees; members of a protected class are not entitled to preferential treatment. Id. at 405-06.

Groslinger's doctor twice certified she was able to perform dispatch duties while pregnant, and she did not suffer any change in condition rendering her unable to perform these duties. She claims that complications in her pregnancy were attributable, however, to the irregularity of the shifts she had to work.

Although Groslinger submitted extensive records of WPD's history of granting sick leave to other police employees, nothing in these records suggests she was treated any differently from her male counterparts. Male officers requesting extended sick leave were also subject to the Township's policy of allowing only fifteen sick days per year. They too were required to submit doctor certifications when they sought to take an extended period of sick leave, and they were required to submit doctor certifications before returning to work. Officers found capable of returning to active duty were ordered back to work and were given modified duties when they were not yet able to return to full, active patrol status. These modified duties were similar to the administrative and dispatch duties Groslinger performed and were contingent on WPD needs at the time. There is nothing to indicate that a male officer who performed fill-in dispatcher duties would not have been subjected to irregular shifts in the same manner as Groslinger. Temporary reassignment to other duties, even where that reassignment was undesired, does not constitute an adverse employment action. Shepherd v. Hunterdon Dev. Ctr., 174 N.J. 1, 27 (2002).

Although Groslinger was not entirely happy with her modified duty schedule, there is nothing in the record to suggest she was treated differently from her male counterparts. Nor is there any evidence in the record to suggest she was subject to an adverse employment action on the grounds that she is female or was pregnant.

Therefore, we conclude that Groslinger has not made out a prima facie claim of gender discrimination pursuant to the LAD. Our decision to affirm the dismissal of Groslinger's LAD claim is not contradictory to our conclusion in the companion case, Twp. of Wyckoff, supra, 409 N.J. Super. 344. There the factual basis for the arbitrator's conclusion was not challenged. As noted previously, the parties' focus was upon the arbitrator's interpretation of the issue presented to him. The arbitrator found a contractual violation of the discrimination provision in the collective bargaining agreement. Id. at 351.

Here, we are judging the record before the Law Division on summary judgment and applying it against a legal standard. The motion record does not support a finding of discrimination in violation of the LAD. We note that Groslinger complained primarily about her schedule during the second pregnancy. She felt that she was treated differently than during the first pregnancy. However, it is undisputed that during the first pregnancy there was a daytime dispatcher's position available. There was no such vacancy during the second pregnancy. We also note that according to Groslinger, "no accommodated male officer had been ordered to perform civilian duties, such as dispatching," but she was "content with the accommodation." She did not, however, allege that male officers, if any, who performed the dispatch position due to a physical condition, were treated differently with respect to scheduling. Indeed, she cannot base a discrimination claim on the hypothesis that male officers would have been treated differently had they been filling in as civilian dispatchers.

Groslinger next contends:

PLAINTIFF ESTABLISHED A PRIMA FACIE CASE OF SEXUAL HARASSMENT BEFORE THE MOTION COURT BELOW.

As the Supreme Court noted in Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587 (1993), in a hostile work environment case, "the harassing conduct need not be sexual in nature; rather, its defining characteristic is that the harassment occurs because of the victim's sex." Id. at 602. The Supreme Court has articulated a four-prong test for hostile workplace claims: "the complained-of conduct (1) would not have occurred but for the employee's gender; and it was (2) severe or pervasive enough to make a (3) reasonable woman believe that (4) the conditions of employment are altered and the working environment is hostile or abusive. Id. at 603-04. The Court noted the second, third and fourth prongs are interdependent. Id. at 604.

The Court also noted that, with regard to the second prong, "it is the harassing conduct that must be severe or pervasive, not its effect on the plaintiff or on the work environment." Id. at 606. The severity and pervasiveness aspects stand in inverse proportion to one another: greater severity requires less pervasiveness to establish a prima facie claim. Id. at 607.

Here, Groslinger predicates her hostile workplace claim on four separate incidents: Fox's suggestion that she could avoid working by staying pregnant; Smith's "screw her, cut off her pay, and let her sue us" comment; Soto and Kellog's "uterus in a jar" comment; and Hagedorn's email regarding requests for personal leave. None of these incidents is attributed to Ydo, the WPD, the Township, or to a supervisor, except for Fox's comment. So, to establish a claim under the LAD, Groslinger must prove the defendants were aware of the harassing conduct and failed to respond. Heitzman v. Monmouth County, 321 N.J. Super. 133, 146 (App. Div. 1999). As to Fox, it was recommended by the Township Administrator that Ydo review the incidents with him. Even if this brief encounter with Groslinger was considered, it would not rise to the level of a hostile work environment, as a matter of law.

Even assuming that each of these other acts rose to the level of harassing conduct, there is nothing in the record to suggest Ydo or the Township's response was inadequate. The Township Administrator conducted a full investigation into Groslinger's claims and issued recommendations for corrective action. Ydo personally reviewed the incidents with Fox, Smith, Hagedorn, Soto, and Kellogg and issued verbal admonishments to Smith, Kellogg, and Soto. He also sent separate written warnings to Kellogg and Soto regarding their comments and ordered them to attend additional sexual harassment training. Ydo additionally issued a department-wide memo reminding employees of the Township's zero-tolerance policy for sexual harassment. Therefore, we conclude that Groslinger failed to establish a hostile workplace claim for compensatory damages.

Groslinger next contends:

PLAINTIFF ESTABLISHED A PRIMA FACIE CASE OF RETALIATION UNDER CEPA BEFORE THE MOTION COURT BELOW.

To establish a prima facie CEPA claim, plaintiff must show: 1) she engaged in a protected activity known to defendants; 2) she was subjected to an adverse employment action by defendants after she engaged in the protected activity; and 3) there was a causal connection between the protected activity and the adverse employment action. Romano v. Brown & Williamson Tobacco Corp., 284 N.J. Super. 543, 548-49 (App. Div. 1995).

Groslinger predicates her CEPA claim on Ydo's decision to investigate her use of sick time, which she claims was undertaken in retaliation for her refusal to sign the August 25, 2005 letter agreement regarding her accommodated duty.

This assertion is problematic for several reasons. First, it does not appear that Groslinger's refusal to sign the letter agreement was a "protected action," as this term generally encompasses an act bringing unlawful conduct to the attention of a higher authority or refusing to participate with the employer in an illegal act. N.J.S.A. 34:19-3. Certainly Groslinger was privileged not to sign the letter, but the terms of her modified duty assignment were neither illegal nor did they violate the LAD. Groslinger's refusal to sign was not a protected act as contemplated under CEPA.

Groslinger's second problem is the causal link. Ydo initiated an investigation when Groslinger did not attend work for five days despite her doctor's certification that she was able to work. Although the

investigation began after Groslinger refused to sign the August 25 letter, there is no direct link between the investigation and Groslinger's unauthorized use of leave when she was not sick or injured.

Finally, although Ydo initiated the investigative process, no actual investigation took place and no disciplinary action was brought against Groslinger. An employee cannot claim a minor disciplinary action constitutes an adverse employment action, particularly where the employee committed the underlying infraction. Klein v. Univ. of Medicine & Dentistry of N.J., 377 N.J. Super. 28, 45-46 (App. Div.), certif. denied, 185 N.J. 39 (2005); Esposito v. Twp. of Edison, 306 N.J. Super. 280, 291 (App. Div. 1997), certif. denied, 156 N.J. 384 (1998). Therefore, we conclude that Groslinger's CEPA claim is without merit.

Finally, Groslinger contends:

PLAINTIFF GROSLINGER DID NOT WAIVE HER STATUTORY RIGHTS UNDER THE [LAD].

Because Groslinger has not established a prima facie case for any of her claims, we do not reach this issue.

The judge properly granted summary judgment to the defendants dismissing all of Groslinger's claims for lack of a legal or factual basis.

Affirmed.

29 U.S.C.A. 2601-2654.

N.J.S.A. 34:11B-1

As defendants note, this would have to be the other way around: the CEPA claims would bar the LAD claims.

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