NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2129-12T2

ROBERT URBANSKI and
DONNA URBANSKI, his wife,

Plaintiffs-Appellants,

v.

TOWNSHIP OF EDISON,
MAYOR JUN CHOI,
BRIAN COLLIER,
EDISON POLICE DEPARTMENT,
CHIEF THOMAS BRYAN,
LIEUTENANT JOSEPH SHANNON,
CAPTAIN JOHN DAUBER,
RONALD GERBA and
SERGEANT DOMINICK MASSI,

Defendants-Respondents.

Argued November 19, 2013 – Decided January 17, 2014

Before Judges Reisner, Ostrer and Carroll.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-4201-09.

Theodore Campbell argued the cause for appellants.

Christopher J. Killmurray argued the cause for respondents Township of Edison, Mayor Jun Choi, Brian Collier, Chief Thomas Bryan and Ronald Gerba (Hoagland, Longo, Moran

Dunst & Doukas, L.L.P., attorneys; Mr. Killmurray, of counsel; Joseph A. Palumbo, on the brief).

John F. Gillick argued the cause for respondent Lieutenant Joseph Shannon (Martin Kane Kuper, attorneys; Mr. Gillick, on the brief).

Marc D. Mory argued the cause for Captain John Dauber and Sergeant Dominick Massi (Dvorak & Associates, L.L.C., attorneys; Lori A. Dvorak, of counsel; Amanda E. Miller, on the brief).

Mitchell B. Jacobs argued the cause for respondents as to covered claims (Cleary Giacobbe Alfieri Jacobs, L.L.C., attorneys; Mr. Jacobs, of counsel; Paul L. LaSalle, on the brief).

PER CURIAM

Plaintiffs Robert and Donna Urbanski[1] appeal from the dismissal of their complaint on summary judgment motions filed by defendants. Specifically, they appeal from the following orders: an August 27, 2010 summary judgment order dismissing all of their claims against defendants Sergeant Dominick Massi and Captain John Dauber on statute of limitations grounds; an August 11, 2011 order dismissing their claims under the Conscientious Employee Protection Act (CEPA) against all remaining defendants, Township of Edison, Mayor Jun Choi, Brian

[1] Because Robert Urbanski claimed the primary injury, while his wife Donna's claim was derivative, we will refer to Robert as "plaintiff."

Collier, the Edison Police Department, Chief Thomas Bryan, Lieutenant Joseph Shannon and Ronald Gerba; and a November 30, 2012 order dismissing their claim against defendants Bryan, Shannon, and Township of Edison for intentional infliction of emotional distress.

For the reasons that follow, we affirm.

I

On May 11, 2009, plaintiff filed a complaint asserting several causes of action against all of the named defendants. The complaint set forth factual allegations "common to all counts." According to the complaint, plaintiff was an Edison police officer, hired in 1999.[2] Early in 2005, his partner on the police force began having marital problems and emotional problems that were interfering with the partner's ability to do his job. On February 3, 2005, the partner called plaintiff and threatened to harm the partner's wife and her boyfriend. Plaintiff reported the call to his supervisors, Sergeant Massi and Captain Dauber. The next day the supervisors called plaintiff into a meeting, during which he gave them a more complete description of the threats the partner made, the partner's drinking problem, and his concern that the partner

[2] At some point after September 2008, plaintiff retired on disability, due to a back injury he had suffered in 2007.

could not safely perform his job. Thereafter, the partner was not relieved of duty and allegedly continued to show up for work intoxicated.

According to the complaint, on March 11, 2005, the partner was involved in an incident in which he locked himself in his police car and threatened to commit suicide with his service weapon (the suicide incident). Plaintiff was able to talk the partner into surrendering. The next day, plaintiff was called into a meeting with Lieutenant Bryan of Internal Affairs,[3] to "complete a report on what transpired the night before." When plaintiff told Bryan that the partner's problems had been going on since February 3, 2005, Bryan asked plaintiff why "a report was not done prior to this." Plaintiff told Bryan that he had reported the incident to Massi and Dauber and that Massi had taken notes for a "Supervisor's Report." However, Bryan checked and found that Massi had not filed a report.

A few days later, Massi met with plaintiff, threatened to give him unfavorable assignments, and threatened to "bounce" plaintiff and the partner out of the Traffic Division if plaintiff complained to Dauber. Plaintiff believed that Massi was angry because Bryan had questioned Massi about his failure to file a report.

[3] Bryan was later appointed Chief of Police.

Plaintiff alleged that, thereafter, he suffered various forms of retaliation, including: in 2005, Massi gave him an undesirable work assignment for a week; in 2005, Massi and Dauber made false allegations that caused him to undergo a fitness for duty exam; in the summer of 2006 an insulting comment was posted about plaintiff on the NJ.com website; in January 2007, plaintiff was ordered to attend a weight loss seminar; in February or March 2008, someone in the police department gave inaccurate information to the Department's workers' compensation insurer concerning plaintiff's pending claim of a back injury; and in February 2008, after he transferred into a new unit, his supervisors criticized his police reports and required him to make revisions.

Plaintiff further alleged that in September 2008, a suspect bled on him and his then-partner Officer Luistro. The suspect needed to be tested for HIV and hepatitis to determine whether the officers had been exposed to those diseases, but the Police Department delayed getting a blood warrant for almost a month. The blood test revealed that the suspect had neither HIV nor hepatitis.

Eventually, the Department conducted an internal investigation concerning plaintiff and Luistro's exposure to the blood, and the delay in getting a blood sample from the suspect.

Shannon admitted that he was responsible for the delay and apologized.

Based on those factual allegations, plaintiff asserted that defendants violated CEPA by retaliating against him for reporting the partner's "unlawful and/or indisputably dangerous conduct." The alleged CEPA reprisals included failing to timely obtain a blood sample from the suspect. In other counts of the complaint, plaintiff alleged "retaliation in violation of New Jersey common law"; negligence; intentional infliction of emotional distress with respect to the delayed blood test; and loss of consortium.

During discovery, plaintiff testified that after he first told Massi and Dauber about the partner's problems, and told them he believed the partner should be taken "off the road," they advised him that they were addressing the situation by giving the partner time off in the afternoons to attend counseling. However, according to plaintiff, the partner continued to come to work intoxicated or hung over, and he pointed this out to Massi and Dauber several times before the suicide incident. Plaintiff asserted that he believed Massi began retaliating against him after the suicide incident, because plaintiff had told Bryan that Massi knew about the partner's drinking and psychological problems and failed to make

a report to Internal Affairs. According to plaintiff, Massi told him not to reveal to Bryan that Massi and Dauber had been letting the partner attend counseling instead of reporting him to Internal Affairs.

Following discovery, defendants moved for summary judgment. The motions were heard by two different judges. The first motion judge granted summary judgment in favor of Massi and Dauber, because their alleged reprisals occurred in 2005 and the complaint, filed in 2009, was beyond the one-year CEPA statute of limitations, N.J.S.A. 34:19-5. He also dismissed the negligence and common law reprisal claims as barred by the Workers' Compensation Act. That judge also dismissed the CEPA complaint against Bryan and the other defendants charged with reprisal in the blood warrant incident, after finding that plaintiff's 2005 conduct did not constitute "whistle-blowing" under the statute.

The first judge initially also dismissed the intentional infliction of emotional distress (IIED) claim relating to the blood test, on the ground that filing the CEPA claim acted as a waiver of common law claims based on the same facts. See N.J.S.A. 34:19-8.[4] However, the judge later changed that ruling,

[4] The CEPA waiver provision, N.J.S.A. 34:19-8, states: "[T]he institution of an action in accordance with this act shall be (continued)

reasoning that since he had dismissed the CEPA claim, the CEPA cause of action was not "available" to plaintiff and hence no longer served as a bar to other causes of action.

The case was then assigned to a second judge for trial. The second judge entertained an in limine motion from defendants which, in effect, was a motion to reconsider the first judge's ruling on the CEPA waiver issue. The second judge concluded that the CEPA claim was based on the same facts as the IIED claim, and both claims had been the subject of extensive discovery. She reasoned that, under those circumstances, the IIED claim was barred even if the CEPA claim was eventually dismissed on summary judgment. The second judge distinguished Crusco v. Oakland Care Center Inc., 305 N.J. Super. 605 (App. Div. 1997), which held that where a CEPA claim was dismissed as untimely at the beginning of the lawsuit, the plaintiff's other causes of action were not barred.

At the oral argument on November 29, 2012, the second judge stated that the first judge decided that plaintiff had "no prima facie case" as to CEPA and therefore "made a substantive ruling as [to] the CEPA claim." Plaintiff's counsel responded "Yeah,

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(continued)
deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, State law, rule or regulation or under the common law."

he - - he did." He then stated that the first judge's reasoning was that "because we did not have a prima face case the claim was never available." Plaintiff's counsel did not argue that the CEPA claim was dismissed on statute of limitations grounds, or that it was in fact untimely.

II

We review summary judgment orders de novo, using the same legal standard as the trial court. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). We "first decide whether there was a genuine issue of material fact, and if none exists, then decide whether the trial court's ruling on the law was correct." Henry v. Dep't of Human Servs., 204 N.J. 320, 330 (2010).

CEPA is remedial legislation intended to protect employees who engage in certain whistle-blowing activity. The statute provides in pertinent part that:

> An employer shall not take any retaliatory action against an employee because the employee does any of the following:
>
> . . . .
>
> 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, . . . or
>
> . . . .
>
> (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.]

A plaintiff proceeding under section 3(c) must prove that:

> (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) he or she performed a "whistle-blowing" activity described in N.J.S.A. 34:19-3c; (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.
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> [Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003).]

A CEPA plaintiff must produce evidence from which the court can "identify a . . . public policy that closely relates to the complained-of conduct" and which the employee reasonably believed the employer was violating. Id. at 463-64. A public policy violation includes employer conduct that is "'indisputably dangerous to the public health, safety or welfare.'" Id. at 464 (quoting Mehlman v. Mobil Oil Corp., 153 N.J. 163, 193-94 (1998)); see Lippman v. Ethicon, Inc., 432 N.J.

Super. 378, 408 (App. Div. 2013) (finding that the plaintiff "engaged in whistle-blowing when he objected to his employer's tactic of delaying the recall of dangerous defective medical products").

However, the trial court must closely scrutinize the proofs to weed out meritless complaints:

> [I]t is critical to identify the evidence that an aggrieved employee believes will support the CEPA recovery with care and precision. Vague and conclusory complaints, complaints about trivial or minor matters, or generalized workplace unhappiness are not the sort of things that the Legislature intended to be protected by CEPA.
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> [Battaglia v. United Parcel Serv., Inc., 214 N.J. 518, 559 (2013).]

To avoid the litigation of duplicative reprisal-related claims, CEPA provides that the "institution" of a CEPA lawsuit "shall be deemed a waiver of the rights and remedies available under any other . . . State law, rule or regulation or under the common law." N.J.S.A. 34:19-8. The waiver provision is to be narrowly construed, consistent with CEPA's remedial purpose. Young v. Schering Corp., 141 N.J. 16 (1995). To that end, "the waiver provision applies only to those causes of action that require a finding of retaliatory conduct that is actionable under CEPA." Id. at 29. As the Court recently observed, "[b]y pursuing a CEPA claim, a plaintiff waives any alternative remedy

that would otherwise have been available for the same retaliatory conduct, although not at the expense of pursuing other causes of action that are substantially independent of the CEPA claim." Battaglia, supra, 214 N.J. at 556 n.9. Thus, for example, contract claims for severance pay or tort claims for defamation, which are based on different evidence from that supporting the CEPA claim and do not require a showing of reprisal, are not barred by the waiver provision. Young, supra, 141 N.J. at 31.

On this appeal, plaintiff focuses on the viability of his claims concerning the 2008 blood warrant incident. He contends that: his CEPA claim was, or should have been, dismissed as untimely, and therefore the CEPA waiver provision did not bar his common law claims; he should be able to pursue his IIED and common law retaliation claims; and he should be permitted to pursue his CEPA claim if we determine that it was timely filed. We conclude that these arguments are without merit and, except as addressed herein, they do not warrant discussion. R. 2:11-3(e)(1)(E).

In his first point, plaintiff makes the somewhat unusual argument that his CEPA complaint was in fact untimely and, therefore, should have been dismissed on statute of limitations grounds. From that premise, he further argues, relying on

Crusco, supra, that his IIED claim is not barred by the CEPA waiver provision.

We agree with the second motion judge that Crusco is not on point here. In that case, the plaintiff pled a CEPA cause of action, but promptly withdrew it after the defendant filed a motion to dismiss on statute of limitations grounds, in lieu of filing an answer. The CEPA claim was not the subject of discovery and was not decided on the merits. In that context, we observed:

> [A]n employee who is barred from making a CEPA claim has no remedy under the Act and cannot, therefore, be seen to have any options from which to elect. Thus, when this plaintiff erroneously pled an unavailable CEPA claim, no bar could attach in respect of any other available claims of wrongful discharge. The second count, as originally formulated, had no more legal effect than a smudge on the face of the complaint.
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> In the particular circumstances of this case, there may also be an alternative basis for viewing plaintiff's other employment rights remedies not to be subject to the CEPA waiver. Under R. 4:9-1, plaintiff was permitted, without seeking the consent of her adversaries or leave of court, to amend her complaint "as a matter of course at any time before a responsive pleading [was] served." This complaint was amended before issue was joined. It may well be, even for plaintiffs with live CEPA claims, that a withdrawal of a CEPA cause of action before issue is joined--especially before any demonstrable prejudice accrues to the named defendants--nullifies any election of

> remedies that may have occurred by operation of N.J.S.A. 34:19-8.
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> [Crusco, supra, 305 N.J. Super. 612 (citation omitted).]

In Ballinger v. Delaware River Port Authority, 172 N.J. 586 (2002), the Supreme Court confirmed that Crusco "was decided correctly." Id. at 602. The Court then answered the question "'whether the statutory waiver is applicable if the CEPA claim is withdrawn or otherwise concluded prior to judgment on the merits.'" Id. at 601-02 (citation omitted). The Court concluded that the waiver did not apply in those situations. However, the specific holding in Ballinger applies where a plaintiff erroneously pleads an "'unavailable CEPA claim.'" Id. at 602 (citation omitted). In that case, the plaintiff sued a bi-state authority which, as a matter of law, was not subject to CEPA. In that situation, filing the CEPA claim did not bar the plaintiff from also pursuing common law causes of action.

Neither Crusco nor Ballinger is on point here. In this case, the CEPA claim was extensively litigated through interrogatories, depositions and the filing of multiple motions. And, contrary to plaintiff's argument, the CEPA claim against Bryan, Shannon and the Township was dismissed on the merits. Moreover, because the CEPA complaint was filed in 2009, it was

timely with respect to the 2008 "blood warrant" incident. As decided by the trial court, it was not an "unavailable" claim.

In his second point, plaintiff begins by asserting that "[t]he substance" of the first motion judge's August 11, 2011 order "should be affirmed with some minor amendments." His explanation for that proposition is unclear. However, he appears to be contending that he asserted sufficient facts to support a claim of a continuing CEPA violation, extending from 2005 through 2008. He also asserts that Shannon, "the main culprit in the 2008 blood warrant matter, was involved in shielding Dauber and Massi in 2005." However, his citation to the record does not support that contention. Alternatively, plaintiff contends that, even if his CEPA claim is untimely, he should be able to assert a common-law reprisal claim of a continuing violation under Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 72 (1980).

In his third point, plaintiff argues that, if we agree that his CEPA claims are not time-barred, his proofs "are sufficient to establish a prima facie whistleblower claim." In that connection, he contends that complaining about his partner being drunk on duty and emotionally disturbed and his supervisor's failure to properly address the situation, concerned an important public policy issue. He also contends that he

produced sufficient evidence of adverse employment action (including being given an undesirable work assignment and having to undergo a fitness-for-duty examination) to establish a pattern of harassing, retaliatory conduct by his superiors. He further argues that "the only question is whether the pattern was consistent enough to [pass] the statute of limitation test."[5]

Focusing first on plaintiff's allegations concerning the events that occurred in 2005, we agree that, viewed in the light most favorable to him, he complained to his superiors about an issue that implicated a serious public safety issue. A policeman who carries a gun and is assigned to traffic patrol, presents a serious risk to public safety if he is on the job while intoxicated and suffering from serious emotional problems. The record supports an inference that, when plaintiff advised Massi and Dauber that his partner threatened the partner's wife, was reporting for work drunk, and was suffering from depression, they should have reported the partner to Internal Affairs and

[5] In a subpoint labeled "continued discovery," plaintiff also asserts that in the trial court, his attorney objected to the summary judgment motions on the grounds that discovery was incomplete. However, in his appellate brief, he does not explain what further discovery he needed or how it might have changed the outcome of the motions. See Auster v. Kinoian, 153 N.J. Super. 52 (App. Div. 1977) (in opposing summary judgment, it is insufficient to assert that discovery is incomplete, without specifying what further discovery is needed and why it is relevant).

removed him from his patrol assignment. Instead, it can be inferred that they "covered up" for the partner and arranged for him to attend counseling. When plaintiff brought this to Bryan's attention, he could fairly be said to have blown the whistle on his immediate superiors. Further, the supervisors' response — giving him a week's worth of undesirable assignments, which Massi characterized as "punishment," and causing him to undergo a fitness-for-duty exam during which he was given desk duty and deprived of his service weapon — could be characterized as a CEPA-prohibited reprisal.

However, those actions occurred in 2005, considerably more than a year before plaintiff filed his 2009 complaint. In his Point I, plaintiff concedes — and we agree — that he failed to produce evidence of a continuing pattern of reprisal. Under CEPA, prohibited adverse action may consist of subjecting a whistle-blowing employee to a hostile work environment. Green v. Jersey City Bd. of Educ., 177 N.J. 434 (2003).

> "Retaliation," as defined by CEPA, need not be a single discrete action. Indeed, "adverse employment action taken against an employee in the terms and conditions of employment," N.J.S.A. 34:19-2e, can include, . . . many separate but relatively minor instances of behavior directed against an employee that may not be actionable individually but that combine to make up a pattern of retaliatory conduct.
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> [Id. at 448.]

Where a plaintiff establishes such a course of retaliatory conduct, constituting a continuing violation, the one-year statute of limitations starts to run on the date of the last retaliatory act. Id. at 437-38.

In this case, we conclude that there was insufficient proof of a continuing, hostile work environment so as to extend the limitations period. Instead, there were relatively few incidents, occurring as much as a year apart. Further, some of the incidents plaintiff claims were retaliatory were clearly not connected to this case. For example, the weight-loss memo was not only given to plaintiff but was given to nine other officers who, like plaintiff, were somewhat overweight. There was no evidence that any of those officers were whistle-blowers, and plaintiff admits the memo was almost immediately rescinded. There was no evidence that the nasty internet comment was posted by a police officer or by anyone connected with the events concerning plaintiff's partner. Nor did plaintiff have any legally competent evidence that the allegedly inaccurate information about his workers' compensation claim came from anyone connected with the events surrounding his complaint about the partner.

Finally, plaintiff did not present evidence to establish an inference that the 2008 blood warrant incident was a reprisal.

First, plaintiff and a fellow officer were both exposed to the suspect's blood during the arrest. Both officers were given unpleasant preventive medication to take pending the results of the suspect's blood test. There was no evidence that the fellow officer was a whistle-blower, and yet he was also affected by the delay. In other words, the evidence does not support an inference that plaintiff was singled out and treated differently from a non-whistleblower, which is a hallmark of a reprisal. Instead, the evidence supports the conclusion that the delay was due to oversight and miscommunication between Shannon and his supervisor concerning which of them was to prepare the necessary paperwork. The Police Department initiated an Internal Affairs investigation, which resulted in Shannon taking responsibility for the delay. Plaintiff produced no evidence that Shannon harbored retaliatory animus toward him. Consequently, plaintiff's timely CEPA complaint concerning the blood warrant was properly dismissed on the merits.

We also agree with the second trial judge that, because the CEPA complaint was litigated and decided on the merits, plaintiff was barred from pursuing his IIED claim.[6] The factual premise behind the IIED claim was the same as the CEPA claim —

[6] We reach the same conclusion about plaintiff's purported Pierce claim.

that plaintiff's superiors retaliated against him by intentionally delaying the blood warrant application, thus causing plaintiff emotional anguish while he waited for the test results. Indeed, absent the evidence about whistle-blowing and reprisal, plaintiff would not be able to establish that defendants had a motive for the allegedly intentional delay. The IIED count was the same claim with a different legal label and was barred by N.J.S.A. 34:19-8. See Beasley v. Passaic Cnty., 377 N.J. Super. 585, 610 (App. Div. 2005); Cokus v. Bristol Myers Squibb Co., 362 N.J. Super. 366, 390 (Law Div. 2002), aff'd o.b., 362 N.J. Super. 245 (App. Div.), certif. denied, 178 N.J. 32 (2003).

Affirmed.