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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0548-09T1

KERRY L. BEESE-MUNOZ,

Plaintiff-Appellant,

v.

LOUIS M. BARBONE, ESQ.,

Defendant-Respondent.

Argued September 29, 2010 – Decided May 20, 2011

Before Judges Fuentes, Gilroy and Ashrafi.

On appeal from Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-2183-07.

Kate Carballo argued the cause for appellant (Eichen, Crutchlow & McElroy, attorneys; Christian R. Mastondrea, on the brief).

Timothy E. Annin argued the cause for respondent (Wardell, Craig, Annin & Baxter, attorneys; Mr. Annin, of counsel; Domenic B. Sanginiti, Jr., on the brief).

PER CURIAM

In this legal malpractice case, plaintiff Kerry L. Beese-Munoz appeals from the order of the Law Division granting defendant Louis M. Barbone's summary judgment motion and dismissing her case. We affirm.

Because the trial court dismissed plaintiff's cause of action as a matter of law, we discuss the salient facts in the light most favorable to plaintiff. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995); R. 4:46-2(c).

I

In October 1998, the Department of Defense (DOD) Police Department hired plaintiff to work as a civilian police officer at the Naval Air Engineering Station in Lakehurst. According to plaintiff, after being passed over for a promotion, she decided to apply for a position in the DOD fire department. She was hired by that department in March 2000.

While working in the fire department, plaintiff was allegedly subjected to harassing behavior and discriminatory statements because of her gender. Although she spoke to her supervisors on several occasions about filing a formal complaint, she was repeatedly assured that her allegations were being investigated and the problem would be resolved.

Plaintiff transferred back to the DOD police department in November 2000. The incident that formed the genesis of this case occurred on December 23, 2002. On that date plaintiff stopped her patrol car outside the DOD police department headquarters and left the vehicle with the engine still running while she briefly went inside. The car was moved to the

headquarters parking lot by another officer, and superior officers reprimanded plaintiff for her conduct, which plaintiff concedes was consistent with the Department's standard operating procedures. When plaintiff returned to her vehicle, she discovered that her watch was missing from the attaché case she had left on the front seat. She did not return to work after that day.

On December 31, 2002, plaintiff sent the following letter to the human resources department at the Naval Station:

> Due to recent occurrences in the work place[, m]y physician had placed me on medication and has placed me on off duty status. He has advised that I am not to return to work for a period of four to six weeks (4-6) due to my condition. After this time he would like me to return to his office for re-evaluation.
>
> Since this condition was brought on by occurrences at work[,] I believe that my medical condition classifies as an on the job injury. I am requesting that I continue to receive my salary while recovering and not have to use my sick or vacation time.
>
> This letter will serve as notification that I am ill for this period and will not be calling the police desk every time I am scheduled to work in order to advise of same.
>
> I have also enclosed a letter from my physician as proof. My physician does not want me to have any contact with base personnel. He feels that this would aggravate my condition. So, if there are any questions by your department[, p]lease

> contact my physician for verification only or my attorney F. Berry of Toms River.
>
> [(Emphasis in original).]

The document denoted by plaintiff as "a letter from my physician" was actually a cryptic handwritten notation on a physician's prescription pad that read: "Kerry Beese - No work 4 to 6 weeks." No other information or diagnosis was provided.

II

On December 27, 2002, plaintiff wrote a letter to then United States Senator Jon Corzine describing what she characterized as incidents of discriminatory treatment she experienced while employed at the DOD's police and fire departments. She sent copies of the letter to several individuals, including the human resources office of the Department of the Navy (DON). By letter dated January 7, 2003, DON personnel officer Susan M. Rosenberg responded to plaintiff regarding her letter to Senator Corzine.

Rosenberg informed plaintiff of "the procedures employees must follow to file a complaint of discrimination." Rosenberg apprised plaintiff that if she believed she had been discriminated against because of her gender, she had "45 days from the date [she became] aware that [she was] discriminated against to contact an EEO [Equal Employment Opportunity] Counselor and start the informal complaint process." Rosenberg

provided plaintiff with the name and phone number of EEO counselor Robin Williams. She also informed plaintiff of the procedure to file a grievance and provided plaintiff with the name and phone number of the person to speak to about this process.

Rosenberg concluded her letter with the following admonition: "These are the only authorized administrative processes for raising complaints of discrimination." Rosenberg's letter was sent certified mail; it was subsequently returned to the DON by the Postal Service marked "refused." Because the incident of discriminatory conduct alleged by plaintiff occurred on December 23, 2002, both sides agree that the forty-five-day period for initiating the informal complaint described by Rosenberg ended on February 6, 2003.

By letter dated February 14, 2003, addressed to EEO counselor Williams, plaintiff referred to telephone conversations she had had with Williams on February 12 and 13, 2003, and advised the counselor that, on orders from her physician, she could not go the Naval base to meet with her. Plaintiff also claimed that she had been unable to meet with Williams at the Naval base because of medication that prevented her from driving. She requested that Williams provide her with the information and forms she needed to file a formal EEO

complaint against "individual(s) employed with the DOD Police Department, Lakehurst."

On March 5, 2003, plaintiff again wrote to Williams to object to the counselor's telephone message giving her three days to provide Williams with a statement describing her claims of discrimination. Plaintiff rejected Williams' suggestion that she provide a statement over the telephone, stating that she was "uncomfortable" with the possibility of unknown individuals being able to listen and that she considered the suggestion "unprofessional." She requested that a representative of the Navy come to her house to take her statement. Plaintiff also indicated that she planned to file criminal harassment charges against individuals from the Naval base whom she believed had been driving around her house. Despite these misgivings, plaintiff sent Williams her written "statement" and requested the "documentation" to file a formal complaint.

Williams responded in a letter dated April 16, 2003. She informed plaintiff that several areas of plaintiff's written statement required clarification. Williams asked plaintiff to come to the base to be interviewed because, under standard EEO policy, a counselor is not permitted to go to the home of an individual wishing to file a complaint. As an accommodation, Williams suggested meeting with plaintiff "on base at a site

other than [plaintiff's] office or the EEO Office." The counselor also informed plaintiff as follows:

> As we are beyond the 30 days allotted for fact-finding you have a choice of either [sic] extending the timeframe for counseling by an additional 30 days. If you choose to extend the timeframe, I will need you to complete Enclosure 1, "Notice of Rights and Responsibilities" and schedule a time to continue our fact-finding either through a face-face meeting or via the telephone. If you are unwilling to assist me in completing the fact-finding process, you may consider this letter as notice of conclusion of the informal process. If you wish to file a formal complaint, you must complete Enclosure 2, OPMC 127123/2 Formal Complaint of Discrimination.

On April 22, 2003, plaintiff informed Williams by letter that she was filing a formal complaint and attached form OPMC 127123/2, dated April 21, 2003. This complaint was dismissed by the EEO on July 31, 2003, for the following reasons:

> As outlined in 29 CFR 1614.105(a)(1), the aggrieved must initiate contact with an EEO Counselor within 45 days of the date of the matter alleged to be discriminatory, or in the case of a personnel action, within 45 days of the effective date of the action. On 14 February 2003 you initiated contact with an EEO Counselor regarding your belief that you experienced discrimination during an incident that occurred on 23 December 2002. As contact was not made within 45 days from the date of the occurrence, your complaint is untimely.

The letter further provided that "[t]his is the final Department of the Navy decision on [the] complaint." Plaintiff

was entitled to file an appeal with the Equal Employment Opportunity Commission (EEOC) no later than thirty days after receiving the EEO decision. Although a copy of the notice or form of appeal was not included in the record before us, it appears that plaintiff filed such an appeal.

By letter dated August 12, 2003, EEO Officer Laura L. Lawson responded to plaintiff's inquiries about filing a second complaint. Lawson made clear that "[p]re-complaint, or informal counseling, may not be waived by either the agency or the complainant," and that such counseling "is an absolute prerequisite to filing a formal complaint." Lawson then addressed plaintiff's claims:

> Regarding your belief that informal counseling did not occur in your complaint dismissed in [the July 31, 2003 letter], you are mistaken. [EEO counselor Williams] conducted fact-finding based upon the limited information she received from you. It is true that Ms. Williams was unable to clarify several issues during fact-finding, as you were unwilling to meet with Ms. Williams or provide additional information regarding your statement attached to [the March 5, 2003 letter from plaintiff to Williams]. However, Ms. Williams not only attempted to meet with you or reach you by phone on several occasions, she also continued fact-finding after the date of your final interview in an effort to fill in the blanks on the issues you had presented.
>
> If you still wish to file a complaint, you must first contact [Williams] . . . so she can begin processing your claim. As

> previously stated in [letter dated August 12, 2003], Ms. Williams will work with you to arrange a mutually agreeable location outside of the Human Resources office in which to meet you.

On June 24, 2004, the EEOC dismissed plaintiff's appeal of her initial complaint, concluding that "although the agency dismissed complainant's complaint due to untimely EEO Counselor contact pursuant to 29 C.F.R. § 1614.107(a)(2), the Commission finds that the complaint is more properly dismissed for failure to state a claim pursuant to 29 C.F.R. § 1614.107(a)(1)."

The EEOC found the incident of December 23, 2002, was not "sufficiently severe or pervasive" to state a claim for harassment. The EEOC informed plaintiff that she could seek reconsideration of its decision, and of her "right to file a civil action in an appropriate United States District Court within ninety (90) calendar days" of receipt of the dismissal.

III

In October 2003, plaintiff retained defendant, Louis M. Barbone, Esq., to pursue her discrimination claims against the Lakehurst Naval Station and associated parties. On March 15, 2004, defendant drafted and filed a complaint in the District Court of New Jersey on plaintiff's behalf, naming the Acting Secretary of the Navy as defendant. The complaint alleged harassment on the basis of sex in violation of 42 U.S.C. §2000e-

16(a). At some point thereafter, the Navy moved to dismiss the complaint on three grounds: (1) improper service of process; (2) plaintiff's failure to properly exhaust administrative remedies prior to filing the complaint; and (3) failure to establish a legally valid cause of action. Defendant filed timely opposition to the Navy's motion. On October 21, 2004, Senior United States District Judge Joseph E. Irenas granted the Navy's motion and dismissed plaintiff's complaint without prejudice on the basis of improper service of process. Judge Irenas did not address the remaining two bases for dismissal raised by the Navy.

It is undisputed that defendant did not notify plaintiff of the dismissal until November 2005,[1] almost thirteen months after Judge Irenas's decision. Plaintiff alleges defendant's failure to notify her of the Federal District Court's decision in a timely fashion deprived her of the opportunity to cure the procedural deficiency cited by Judge Irenas, and thus precluded her from prosecuting her cause of action against the Navy.

Plaintiff's legal malpractice claims came before the trial court by way of defendant's motion for summary judgment.

[1] The associate at defendant's firm responsible for handling plaintiff's case was on an extended, health-related leave of absence when the dismissal order was entered. As a result, there was an apparent miscommunication within the law firm.

Defendant argued that, notwithstanding his negligent failure to notify plaintiff of the dismissal of her cause of action against the Navy, thus depriving her of the opportunity to cure the deficiency cited by Judge Irenas as the basis of his ruling, plaintiff cannot prevail in this legal malpractice case because her complaint against the Navy was substantively without merit and procedurally barred by her failure to exhaust administrative remedies. The trial court accepted defendant's argument. We agree.

A plaintiff in a legal malpractice case must establish the following three elements: (1) the existence of an attorney-client relationship creating a duty of care upon the attorney; (2) the breach of that duty; and (3) proximate causation. Conklin v. Hannoch Weisman, 145 N.J. 395, 416 (1996). Plaintiff is required to prove what is commonly referred to as "a suit within a suit" - that is, she must prove that, but for defendant's negligence, she would have recovered damages in the suit against the Navy. Garcia v. Kozlov, Seaton, Romanini & Brooks, P.C., 179 N.J. 343, 358 (2004). Stated differently, plaintiff must show that defendant's negligence was a proximate cause of her inability to successfully prosecute her case against the Navy. Albee Assocs. v. Orloff, Lowenbach, Stifelman

and Siegel, P.A., 317 N.J. Super. 211, 222-23 (App. Div.), certif. denied, 161 N.J. 147 (1999).

The trial court correctly found that defendant's negligence was not a proximate cause of plaintiff's inability to successfully prosecute a case against the Navy. Rather, it was plaintiff's failure to cooperate with EEO counselor Williams. This lack of cooperation amounted to failure to exhaust administrative remedies, thus creating an independent procedural bar to plaintiff's prosecution of her case against the Navy. The fact that Judge Irenas based his decision on a different discrete issue does not preclude the trial court in this legal malpractice action from determining a different and independent basis for dismissing plaintiff's case against the Navy. Although the trial court also found plaintiff's claims lacked substantive support, we need not reach this issue.

Affirmed.