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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0853-10T2

RAYMOND PICHLER,

Plaintiff-Appellant,

v.

JERSEY ELEVATOR CO., INC. and
JOHN SWEENEY, JR.,

Defendants-Respondents.

Argued November 15, 2011 - Decided April 5, 2012

Before Judges Payne, Reisner and Hayden.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-5965-08.

Thomas DeNoia argued the cause for appellant (DeNoia & Tambasco, attorneys; Mr. DeNoia, on the brief).

Lance N. Olitt argued the cause for defendants (Mandelbaum, Salsburg, Lazris & Discenza, P.C., attorneys; Mr. Olitt and William H. Healey, on the brief).

PER CURIAM

Plaintiff, Raymond Pichler, the former Vice-President of Jersey Elevator Co., Inc. and the head of its maintenance department who was terminated from his employment on June 12,

2008, appeals from an order of summary judgment in favor of the company and its President, John Sweeney, Jr., on claims of breach of express employment contract, defamation, breach of the implied covenant of good faith and fair dealing, and violations of the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. On appeal, he raises the following issues:

> POINT I
>
> THE COURT ERRED BY FAILING TO GIVE ALL FAVORABLE INFERENCES TO, AND VIEW THE EVIDENCE IN A LIGHT MOST FAVORABLE TO APPELLANT, AND ADJUDICATED MATERIAL ISSUES [OF] FACT AS TO WHICH THERE IS GENUINE DISPUTE.
>
> POINT II
>
> THE MOTION JUDGE MISAPPLIED AND, IN SOME INSTANCES COMPLETELY IGNORED, THE SUBSTANTIVE LAW GOVERNING APPELLANT'S CLAIMS.
>
> POINT III
>
> THE COURT ERRED IN FINDING THAT THE PLAINTIFF WAS AN AT-WILL EMPLOYEE AS THERE ARE AMPLE MATERIAL ISSUES OF FACT IN DISPUTE FROM WHICH A TRIER OF FACT COULD REASONABLY CONCLUDE THAT AN EXPRESS EMPLOYMENT CONTRACT EXISTED, OR IN [THE] ALTERNATIVE, AT A MINIMUM, AN IMPLIED CONTRACT.
>
> A. Express Employment Contract Claim.
>
> 1. Plaintiff could only be terminated for just cause based on both the intent of the parties and language of the Contract.

2. Although the Contract was for an undefined term, Plaintiff could only be terminated for just cause.

3. Defendants have failed to establish just cause for terminating plaintiff.

B. Implied Contract and Implied Covenant of Good Faith and Fair Dealing Claims.

1. Woolley Implied Employment Contract.

2. Implied Employment Contract.

[C.] Covenant of Good Faith and Fair Dealing Claim.

POINT IV

THE COURT ERRED IN DISMISSING THE PLAINTIFF'S CLAIMS FOR DISCRIMINATION AS THERE ARE AMPLE MATERIAL ISSUES OF FACT IN DISPUTE FROM WHICH A TRIER OF FACT COULD REASONABLY CONCLUDE THAT DEFENDANT VIOLATED THE NJLAD.

1. Plaintiff's Failure to Accommodate Disability Claim.

2. Plaintiff's Disparate Treatment Disability Claim.

3. LAD Claim Against Sweeney.

POINT V

THE MOTION JUDGE ERRED IN FAILING TO APPLY THE SHAM AFFIDAVIT DOCTRINE TO THE POST-DISCOVERY CERTIFICATION SUBMITTED BY SWEENEY.

We affirm.

I.

The record discloses that Jersey Elevator, founded in 1974, is in the business of maintaining, repairing, modernizing, and installing elevators. In 1993, plaintiff was hired by Sweeney as a mechanic. Shortly before that date, the company had severed its union affiliation, and as a consequence, it was seeking non-unionized employees. At the time, it employed four to six field employees and three in the office. Its gross revenue was less than two million dollars. When hired, plaintiff was offered an ownership interest in the company under terms that were memorialized in an employment contract, executed in September 1995.

The contract provided, in paragraph two of the agreement, that:

> Employee agrees to perform faithfully, industriously, and to the best of Employee's ability, experience, and talents, all of the duties that may be required by the express and implicit terms of this Agreement, to the reasonable satisfaction of Employer.

The agreement additionally provided for a specified amount of weekly compensation, and stated that if employee salaries were increased: "All Employees who are also Shareholders of the Employer will receive the same percentage salary increase." Provisions existed for profit-sharing and for a stock bonus, offered over time until twenty-five percent of the company's

shares had been distributed to plaintiff. The remaining shares were to be transferred or sold by the company's founder, Michael Sweeney, to his son John, the present President. In consideration for the total compensation package specified in the agreement, plaintiff "agree[d] to pledge his personal assets as collateral for any loan for which the Employer [Jersey Elevator], in its sole discretion, [might] apply for the benefit of Employer's business."

The agreement contained a non-competition clause and a "TERM/TERMINATION" provision that stated:

> Employee's employment under this Agreement shall be for an unspecified term.

It also contained an integration clause, and it required that any amendments to the agreement be "made in writing and . . . signed by both parties." A summary of terms at the end of the agreement stated, among other things, "EMPLOYMENT TERM UNSPECIFIED."

Additionally, Jersey Elevator had an employee handbook that plaintiff acknowledged receiving. The handbook commenced with the statement that its contents were informational only, and that:

> [n]either this handbook, nor any other communication by a management representative, whether oral or written, is intended to create a contract of employment. Jersey Elevator is an At-Will employer.

> This means that the employer or employee are [sic] free to end the employment relationship at any time, with or without cause.

The handbook contained a "Prohibition Against Harassment" that included "activities outside the workplace and off hours." Violations would be considered misconduct, resulting in disciplinary action "up to and including termination." The handbook also contained a grievance procedure, the third step of which specified review by the company president, whose written decision would be final and binding.

During the years of plaintiff's employment, the business prospered. By 2006, its gross revenue was in excess of five million dollars, and it employed thirty-four to thirty-five employees, of whom twenty-five worked in the field.

The early years of plaintiff's employment appear to have been uneventful. However, commencing in 2006, changes in plaintiff's personality, which he denies, were noted by company employees and reported to Sweeney. In general, plaintiff was perceived as creating a hostile work environment by directing insulting, demeaning, derogatory, and embarrassing comments to various employees while in the presence of others. A number of employees reported that plaintiff appeared to be drunk when on the telephone and in person. A supplier voiced a similar concern that plaintiff was drinking while on the job. Plaintiff

denied that he drank at work, although he appears to have consumed alcohol on a social basis and he admitted to sometimes having a drink at lunch.

In deposition testimony, plaintiff's adult daughter confirmed that her father's temperament had changed in the period commencing in 2005 or 2006, and that at times, he had exhibited a violent temper, which he took out on various objects, but not people. As the result of her father's temper, the daughter moved out of the house for a period of time, but had moved back in by 2008. Plaintiff's adult son, who was employed by Jersey Elevator as a mechanic's helper, similarly confirmed that in 2005 or early 2006, he started to notice mood swings on his father's part, and he testified that on occasion, he appeared to be intoxicated.

In his deposition, Sweeney testified that he perceived plaintiff to be good at his job, and he confirmed that the company had never received a client complaint regarding plaintiff or lost business as the result of plaintiff's conduct. Nonetheless, he attributed various specific personnel problems to plaintiff's personality change. Sweeney claimed that in November 2006, Jeff Fichera, an allegedly excellent maintenance foreman, resigned after ten years of employment by Jersey Elevator, stating that mistreatment by plaintiff was the cause.

In January 2007, Pichler fired Tom DiNapoli, a maintenance mechanic, allegedly after DiNapoli admitted to plaintiff that he had complained to Sweeney regarding plaintiff's conduct. When Sweeney offered DiNapoli his job back, he allegedly stated: "[L]ife was too short to work for an asshole like Ray." DiNapoli, in fact, sued Jersey Elevator, alleging a hostile work environment, and the action was settled for an undisclosed sum.

In September 2007, Dennis Lotter, a maintenance foreman, and Mike Palmer, a maintenance mechanic, allegedly confronted Sweeney with their complaints regarding plaintiff. At the time, Palmer had obtained another job, but Sweeney was successful in convincing both men to stay with the company.

Plaintiff has denied the conduct alleged by Sweeney as well as the allegations that he was intoxicated. He testified that he did not consider himself disabled, and he had no reason to believe that others thought him to be disabled. However, he admitted that Lotter confronted him on two occasions, accusing him of smelling of alcohol. Additionally, plaintiff admitted that there were times when he would be asleep in the truck outside the company's offices, although he claimed these episodes were not alcohol-related. He also admitted that, on one occasion, an employee complained that plaintiff had

forgotten that he had scheduled a job, and as a result, he erroneously rescheduled it.

Plaintiff acknowledged that, in September 2007, Sweeney had discussed with him the fact that he appeared to be drinking at work. Additionally, plaintiff acknowledged that Sweeney had led him to understand that Lotter and Palmer were about to leave as the result of his conduct. Plaintiff also acknowledged an additional, longer, conversation with Sweeney in January 2008 regarding his perceived alcohol abuse and the fact that employees had complained that he sounded drunk on the telephone. Plaintiff testified at his deposition that he "probably" responded that he would see a doctor, and "probably" told Sweeney that he would keep him informed of the results, but that he had not done so.

On the morning of Saturday, June 7, 2008, a dispute arose between plaintiff and his son over the son's failure to assist in household chores. Matters escalated, and plaintiff tried to throw the son out of the house. During the course of the altercation, plaintiff took a hammer to the son's sandblasting equipment, damaging it. Additionally, according to both plaintiff's son and daughter, he threatened to shoot the son in the head. The police report contains an admission by plaintiff to uttering that threat. Although the seriousness of the threat

is disputed, the record establishes that, at the time, plaintiff possessed a .32 caliber handgun and a pellet rifle with scope, both of which were in the house. Eventually, plaintiff called the police but, upon their arrival, plaintiff was arrested, charged by the police with terroristic threats and criminal mischief, taken to the police headquarters for processing, and then released on his own recognizance. However, as a condition of his release, he was ordered not to have contact with either his son or his daughter. The daughter was advised by the police to contact them if further disturbances should occur. The son, whom the police considered to be the victim, declined to obtain a restraining order. However, he testified at his deposition that, when his father was arrested, no one was urging that the police not do so.

Plaintiff returned home and, early on Sunday morning, he conducted a family meeting to inform his son and daughter what was expected of them in terms of household responsibilities. According to the police report, plaintiff then removed the circuit breakers, disabling the air conditioning in ninety-degree heat; periodically turned off the power in various areas of the residence; and tore the cable connection from the wall. In his deposition, the son denied that the circuit breakers were removed or that the cable connection was disrupted, but he

admitted that the power was turned off and that the air conditioning was disrupted. He also admitted that plaintiff disassembled his bed, and the daughter testified that plaintiff took a hatchet to it.

As the result of plaintiff's conduct, the daughter called the police, who, according to their report, arrived at 8:30 a.m. Plaintiff was again arrested on charges of harassment and violation of the conditions of his release. Plaintiff was jailed. Upon the daughter's disclosure that there were weapons in the house, they were confiscated by the police. The son again refused to obtain a temporary restraining order, but one was issued to plaintiff's wife.

At his deposition, both plaintiff's son and daughter sought to down-play the two incidents, and both testified that they were unrelated to alcohol, although their statements regarding alcohol and other conduct by plaintiff are contrary to the police's observations as reflected in the police reports. Tellingly, the son testified at his deposition that he did not try to bail out his father, who remained in the Ocean County Jail for five days from June 8 to 12, 2008.

Sweeney testified that, on Monday June 9, plaintiff's son arrived at work and stated to him, upon inquiry, that "[M]y father was drinking all day, and then he threatened to blow my

f***ing head off." According to Sweeney, these incidents were "the last straw," and as a consequence, he determined to terminate plaintiff's employment. On the following day, Sweeney went to plaintiff's residence to retrieve the company's truck, and on June 12, upon plaintiff's release from jail, he informed him by telephone that his employment had ended effective June 9 as the result of plaintiff's violation of the company's anti-harassment policy. A written termination letter was sent on the same day. Plaintiff was replaced by Lotter as head of the maintenance department. The position of vice-president was not filled.

The record contains the report of Neil R. Holland, M.D., plaintiff's treating neurologist, who stated that in September 2007, plaintiff had consulted with him as the result of slurred speech and two accusations of intoxication at work, one in January 2007 and another in September 2007. Plaintiff was reported as stating that he had been described as "having slurred speech, glazed eyes, and appeared drunk." Plaintiff denied drinking alcohol at work. Since plaintiff was not then symptomatic, the doctor was unable to treat him. The doctor continued:

> I didn't hear from him again until July 2008, at which point he scheduled a follow-up appointment. He told me that things had escalated since I had seen him in the fall

> with more accusations of intoxication and abnormal behavior at work, culminating in a fight between him and his adult son, and an intervention by the police. He told me that after that, he had been dismissed from work. He told me at that visit that he continued to have episodes, including one when he was in jail when the other prisoners had become concerned that he looked unwell. He had had some angry behavior and had looked very red in his face. Based on that history, I wondered if he might be having seizures manifesting as rage attacks.

Following testing, plaintiff was diagnosed as suffering from left anterior temporal lobe epilepsy that the doctor thought "may" have accounted for his abnormal behavior. Plaintiff was placed on medication, and his condition "markedly improved."

Nonetheless, on December 18, 2009, plaintiff filed suit against his former employer and Sweeney. After the discovery period had ended, plaintiff moved for partial summary judgment. Defendants responded with their own summary judgment motion, which was granted by the trial court. Plaintiff's motion was denied. This appeal followed.

II.

We first address plaintiff's claims that his termination was discriminatorily motivated by the unfounded belief that he was an alcoholic. In making this claim, plaintiff alleges two

forms of disability discrimination under the LAD: failure to accommodate and disparate treatment.

We are satisfied that this case is not one that is susceptible to analysis under a theory of failure to accommodate. As the Court stated in Viscik v. Fowler Equipment Co., 173 N.J. 1, 19-20 (2002):

> Reasonable accommodation is only an issue in a handicap discrimination case in two instances. The first is the case in which a plaintiff affirmatively pleads failure to reasonably accommodate as a separate cause of action. See, e.g., Seiden v. Marina Associates, 315 N.J. Super. 451, 462 (Law Div. 1998) (quoting Wooten v. Acme Steel Co., 986 F. Supp. 524, 526-27 (N.D. Ill. 1997) (noting there are "two distinct categories of disability discrimination" claims: (1) "a claim alleging discrimination . . . including a failure to reasonably accommodate an employee's known disability" and (2) "a claim for disparate treatment discrimination, i.e., treating a disabled employee differently . . . because of his disability") (citations omitted)). The second is the case in which an employer, rather than defending on the grounds that the employee was terminated for legitimate, non-discriminatory reasons, proffers the employee's inability to perform the job as a defense. See, e.g., Svarnas v. AT&T Communications, 326 N.J. Super. 59, 74-75 (App. Div. 1999) ("An exception to accommodation exists where an employer reasonably determines that an employee because of a handicap cannot presently perform the job even with an accommodation").

In Viscik, the Court held that the plaintiff had failed to present a reasonable accommodation case, but instead had proffered a pretext one, noting that Viscik had not pled the lack of a reasonable accommodation nor requested such an accommodation from her employer, Fowler. Id. at 20. Further, the employer had never argued that a reasonable accommodation was impossible, but instead had relied on the plaintiff's poor work ethic as its rationale for Viscik's termination. Ibid. As the Court noted: "If that contention was true, Fowler had no duty to reasonably accommodate her." Ibid.

Similarly, in the present matter, the lack of a reasonable accommodation was not pled, and Jersey Elevator never claimed that it terminated plaintiff because he was perceived to be an alcoholic. When asked if that was his belief, Sweeney, the person solely responsible for plaintiff's termination, consistently stated that he believed that plaintiff's consumption of alcohol during the work day impaired his performance. He consistently declined to state that he believed plaintiff to be an alcoholic.[1]

[1] We recognize that alcoholism has been found to be a disability. Clowes v. Terminex Int'l, Inc., 109 N.J. 575, 593-94 (1988). Additionally, we recognize that, to demonstrate discrimination based on disability, the employer must perceive the employee as disabled, but the perception need not be (continued)

Further, plaintiff has adamantly denied that he consumed alcohol during working hours, except on occasion at lunch, and he has contended throughout the litigation that he was not disabled and was not perceived to be disabled. As a consequence, he never sought a reasonable accommodation, and given his position that alcohol was not the root of his problem, it is difficult to perceive what reasonable accommodation could have been offered or what benefit it would have conferred.

We choose, therefore, to apply a disparate treatment analysis to the facts as set forth in the record. See N.J.S.A. 10:5-12a. A prima facie case for disparate treatment has four elements: "(1) the complainant was handicapped within the meaning of the law; (2) the complainant had been performing his or her work at a level that met the employer's legitimate expectations; (3) the complainant nevertheless had been . . . fired; and (in the case of discriminatory transfer or discharge) (4) the employer had sought another to perform the same work after complainant had been removed from the position." Maher v. N.J. Transit Rail Operations, 125 N.J. 455, 480-81 (1991).

In cases alleging disparate impact, the burden-shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93

(continued)
accurate. See Rogers v. Campbell Foundry, Co., 185 N.J. Super. 109, 112 (App. Div.), certif. denied, 91 N.J. 529 (1982).

S. Ct. 1817, 36 L. Ed. 2d 668 (1973) is applicable. Viscik, supra, at 13-14. Under that analysis, once plaintiff has established a prima facie case, the burden of going forward shifted to Jersey Elevator to articulate a legitimate, non-discriminatory reason for the adverse employment action. Id. at 14. After that occurred, the burden shifted back to plaintiff to show that Jersey Elevator's proffered reason was merely a pretext for discrimination. Ibid. "To prove pretext, however, a plaintiff must do more than simply show that the employer's reason was false; he or she must also demonstrate that the employer was motivated by discriminatory intent." Ibid. Plaintiff retained the ultimate burden of persuasion throughout. Ibid.

Our review of the record in this case leads us to conclude that, even if we assume that plaintiff offered a prima facie case of discrimination, plaintiff did not demonstrate that the reason proffered by Sweeney as the "last straw" was pretextual. In that regard, plaintiff did not refute the fact that Jersey Elevator had an anti-harassment policy that applied to the workplace and elsewhere and that plaintiff's son, was an employee of the company over whom plaintiff had direct supervisory control. Further, plaintiff did not refute the fact that on both Saturday June 7 and Sunday June 8, he was arrested

for domestic violence against his son; on both days, he displayed excessive and uncontrolled anger; he destroyed personal property belonging to his son; and that as a result of his conduct plaintiff's wife was issued a temporary restraining order. Additionally, plaintiff did not refute the fact that, following the June 8 episode, he was jailed, his family did not bail him out, and he remained in custody until June 12, thereby missing four days of work. Further, plaintiff did not refute that this conduct took place at a time when workplace complaints regarding his temperament and unjustified mistreatment of employees were rife. While other employees may, on occasion, have consumed alcohol during the workday that impaired their performance without incurring disciplinary action, none engaged in conduct of a nature that led to significant jail time and absence from work.

As we held in Barbera v. DiMartino, 305 N.J. Super. 617, 636-40 (App. Div. 1997), certif. denied, 153 N.J. 213 (1998), conduct that is criminal or quasi-criminal in nature, despite its connection with a protected condition, need not be accorded special treatment under the LAD. "[E]mployers subject to laws protecting the handicapped and disabled nonetheless should be able to take appropriate action on account of egregious or criminal conduct of an employee, regardless [of] whether the

employee's disability contributed to the conduct." Id. at 638-39 (citing Den Hartog v. Wasatch Academy, 909 F. Supp. 1393, 1402 (D. Utah 1995), aff'd, 129 F.3d 1076 (10th Cir. 1997)).

Here, the conduct in question did not occur in the workplace. However, it was directed at an employee, and constituted an alarming escalation of conduct that had been reported to be occurring in the workplace for a period of two and one-half years. In these circumstances, we are satisfied that Jersey Elevator demonstrated just cause for plaintiff's termination that was not proven by plaintiff to have been a pretext for discrimination. We therefore find that summary judgment on plaintiff's LAD claim against Jersey Elevator was properly granted.

We similarly find no basis for an independent claim against Sweeney under the LAD. Such liability can be imposed on an individual supervisor such as Sweeney only if he can be found to have been an aider or abettor pursuant to N.J.S.A. 10:5-12e. However, there is no evidence that he acted in that capacity. Leang v. Jersey City Bd. of Educ., 198 N.J. 557, 576 (2009); Cicchetti v. Morris Cnty. Sheriff's Office, 194 N.J. 563, 594 (2008).

III.

Before the trial court, the parties extensively litigated whether the termination of plaintiff's employment was governed by his employment contract and required a finding of good cause for that employment action or whether he was an at-will employee. Although those arguments have been raised again on appeal, we find no need to address them, having found good cause for termination to have been demonstrated by Jersey Elevator in this case.

We have reviewed plaintiff's remaining arguments in light of the record and applicable precedent, and we find none of sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(A) and (E).

Affirmed.