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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4024-09T2

VICTOR E. SASSON,

Plaintiff-Appellant,

v.

NORTH JERSEY MEDIA GROUP INC.,
BARBARA JAEGER and JENNIFER BORG,

Defendants-Respondents,

and

STEPHEN BORG, FRANK SCANDALE,
and DEIRDRE SYKES O'NEIL,

Defendants.

Argued March 16, 2011 - Decided June 16, 2011

Before Judges Ashrafi, Nugent and Newman.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-9325-07.

Joshua L. Weiner argued the cause for appellant (Law Offices of Weiner & Weiner LLC, attorneys; Mr. Weiner, of counsel and on the brief).

Samuel J. Samaro argued the cause for respondents (Pashman Stein, attorneys; Mr. Samaro, of counsel and on the brief; Maxiel L. Gomez, on the brief).

PER CURIAM

Plaintiff Victor Sasson appeals from an adverse jury verdict in his age discrimination lawsuit against his former employer, North Jersey Media Group ("NJMG"), and several of its management employees. We affirm.

I.

In 1979, plaintiff began working as a reporter for The Record, a newspaper published in Hackensack by defendant NJMG. He received several promotions in the early stages of his career but was later rejected for other promotions. In particular, when he was sixty-one years old in 2006, plaintiff applied for the position of food editor but was not selected. The position was given to an applicant who was in his early thirties. In 2008, plaintiff's employment was terminated when he was not permitted to apply for a new position following a corporate restructuring of the publishing company.

Before his termination, in December 2007, plaintiff had filed a pro se complaint in Bergen County Superior Court alleging violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. In pre-trial proceedings, the trial court dismissed plaintiff's allegations of discrimination pre-dating December 2005 as barred by the applicable two-year statute of limitations. See N.J.S.A. 2A:14-2; Montells v. Haynes, 133 N.J. 282, 292 (1993). Plaintiff's final amended

complaint tried before a jury included two claims: age discrimination in violation of the LAD for denying him promotion to food editor in June 2006 (count one), and unlawful retaliation in violation of the LAD for giving him a negative employment review in October 2006 and for terminating him in May 2008 (count two). At trial, the defense alleged that plaintiff was not promoted and was later terminated because he had a history of unprofessional behavior, as documented in his personnel file. The jury returned a verdict in favor of defendants.

Plaintiff now appeals, raising two issues. He argues error in defense counsel's references in cross-examination and summation to certain internet blog entries plaintiff wrote after his employment with NJMG ended. He also asserts error in admission of his performance reviews that pre-dated 2005. To evaluate those issues, we summarize additional evidence presented at the trial.

After obtaining a master's degree in journalism and working at other newspapers, plaintiff began with The Record at the age of thirty-four as a reporter covering local news. He soon applied for and received a position covering the Superior Court in Passaic County. In the 1980s, plaintiff applied for and

received a promotion covering the federal courthouse. In his early years, he received positive performance reviews.

Plaintiff was then promoted to general assignment reporter. It was at about this time that he began receiving negative comments in some of his performance reviews. In a 1985 performance review, when plaintiff was forty years old, his supervisor made the following comments:

> The other day side editors are displeased with Victor's productivity level and they are concerned about his complaining attitude toward his work. He often gripes about assignments and he is always irked when asked to fill in on another person's beat, a task that naturally falls to him because he is one of two general-assignment reporters.
>
> . . . .
>
> Perhaps part of his grousing stems from his frustration at being closely-supervised and unable to develop his own ideas. Whatever the reason I would like Victor to try to think more positively about his assignments in the next year and try to quicken the pace of his enterprise writing.

Two years later, the same supervisor commented:

> Victor also gained a reputation among the night editors as being difficult to work with. On one or two occasions he has been extremely rude to rewriters who called him on stories. He later apologized and the situation appears to have improved lately, but he still has that image to live down.

In 1987, plaintiff was transferred to the business news department. In a March 1989 review, a different supervisor included the following comments about plaintiff's performance:

> Victor is a veteran reporter who recently marked his 10th year with the Record. He has considerable skills as a reporter and a news writer, and is a font of knowledge about business and general skills.
>
> Victor's main problem is consistency and perseverance. Over alternative months he can be the department's most effective and least-effective reporter.
>
> When working on subjects of his choosing, mainly concerning the automotive industry, he can be a stylish and gifted writer, but on other assignments he is equally ineffective and superficial. He is resistant to many assignments and can be combative and abrasive with the assistant business editor.

Subsequently, based on his performance as a temporary fill-in for the assistant business editor, plaintiff's supervisor and other employees encouraged him to apply for an assignment editor position. To do so, he was required to work on the copy desk at night for two years to gain editing experience.

In 1991, plaintiff began applying for assignment editor jobs. He was turned down for several positions, and perceived that the individuals actually selected were younger and less experienced than he. In about 1994, he was given the opportunity to "try out" for an assignment editor position,

which required him to do assignment editing for one or two hours per night in addition to his copy editing responsibilities. In a 1995 review, plaintiff's supervisor gave him the rating "needs improvement." The supervisor commented:

> Victor's work as a copy editor is unsatisfactory. Over the last year, the slots have repeatedly pointed out recurring problems in his editing and headline writing and have asked him to improve. In addition, toward the end of the evening when the deadline files are finished and the rest of the copy desk is working on advance files, Victor at times has simply gathered his things and sat idly waiting to be dismissed. More than once, the slots have had to ask him to pitch in and do his share of the advance files. This indicates a poor attitude in addition to poor editing.
>
> Every copy editor makes mistakes at times. When an editor generally does good work, an occasional mistake is understandable. However, mistakes tend to be the rule rather than the exception in Victor's work, despite the fact that he has many years of experience and despite many admonitions from his supervisors.

Comments from a different supervisor in the same review noted that "Victor has been competent in moving stories destined for page A3 and behind, but we have not given him much A1 copy because he tends not to work it hard enough." That supervisor also stated: "[i]t would be great . . . if he checked in when he gets to work each day, to determine if his editing services are needed immediately. Right now, he uses the first half hour of

his shift to eat." Based on this review, plaintiff was placed on probation for three months and was relieved of his assignment editing duties so that he could concentrate on his copy editing.

In April 1995, during his probationary period, plaintiff was informed that "his work had slipped from the level of the first month of probation, and his job was in jeopardy." In May 1995, NJMG received a letter from an attorney alleging that plaintiff was the victim of age discrimination.

Plaintiff's probationary period was extended because "he had not shown significant improvement in the final month of the three-month period," and he was informed that he would lose his job if his work did not improve. At the end of the extended probationary term, he was given a satisfactory rating.

A specific negative incident was recorded in plaintiff's personnel file in September 1995. On Yom Kippur, plaintiff was not sick but he took a sick day off. He did not follow the company policy of using a personal day for the religious holiday because he believed it was discriminatory that Jewish employees were not given the day off. The next day, plaintiff's supervisor met with him to discuss his absence. He "responded to her in a hostile manner and walked out before she concluded the discussion." The following day, the managing editor wanted to speak with plaintiff in her office. Plaintiff refused to

attend without being first informed what the meeting was about. He relented on threat of immediate suspension. A memorandum from the managing editor to plaintiff concluded as follows:

> You are immediately returned to probationary status and you must consider the suspension of 9/27/95 as final warning that further rude or unprofessional behavior, poor performance, or violation or any other rule or policy, will result in immediate termination of your employment.

In a November 1999 review, a new supervisor rated plaintiff as meeting or exceeding expectations in all but one area, "Enticing the Readers." Under the category "Teamwork," the supervisor noted:

> Victor has earned the respect of his colleagues at the copy desk with his hard work, team spirit, and helpfulness. But he gets himself embroiled in disputes outside the desk, and in doing so, he hurts himself and the rim. . . .
>
> . . . .
>
> This is an area in which Victor should "exceed expectations," what with all his experience and with his strong efforts in helping others. But he treads close to a rating of "below expectation." There is no reason for this. He is hurting himself and undercutting all the good he does.

In a July 2000 review, plaintiff was rated as meeting or exceeding expectations in all areas. In a section entitled "Goals/Development Plan," his supervisors commented:

> Exemplary behavior in all instances. His missteps have been few, but Victor has to keep his attitude positive at all times. His back-and-forth with fellow staffers must seek compromise on the disputes involved. He must be cordial and not show frustration early, no matter how trying the moment.

Five years later, in July 2005, plaintiff was rated "below expectations" in two areas. Regarding "initiative," his supervisors noted:

> Victor's work can be solid, and he does a lot of it -- right up to deadline. However, he tends to shut down before the end of his shift. And we mean shut down. He has been known to literally turn his computer off, sometimes 45 to 50 minutes before the end of his shift.

As to "professionalism," they commented:

> Most often Victor conducts himself in a professional manner. However, from time to time he disappoints us. He needs to temper his approach when dealing with colleagues on the news and assignment desks. . . .
>
> . . . .
>
> Victor balks at particular assignments and desk procedures and/or company rules. . . .
>
> . . . .
>
> We had been encouraged for a while by Victor's ability to keep his frustrations in check. We've been disappointed by his recent attitude. Every few months there is a recurrence.

In early 2006, plaintiff applied for the open position of food editor. He had written some freelance articles for the

food section and considered the opening his "dream job." Defendant Barbara Jaeger, the features editor, interviewed four candidates, including plaintiff. She eventually selected a candidate who was in his early thirties and had recently worked for The Record as a layout/copy editor and was at the time of the interviews the managing editor of another newspaper. At trial, Jaeger testified she did not select plaintiff because she had "concerns over his ability to get along with others and take that sort of role in the department . . . supervising others, making assignments, et cetera." She had spoken to plaintiff's supervisor and other employees on the floor about his work. She also had concerns about plaintiff's assignment editing and his "vision for the food section."

When he learned he was not selected, plaintiff sent the following email to Jaeger: "Barbara: I think you made the wrong decision. No one knows the New Jersey food scene as well as me. Thanks. P.S. I will be re-assessing whether I can continue to write for the [food] section." Plaintiff subsequently reneged on an agreement to write two food stories although he had already put in photo assignments and filed expense reports, and the two stories were budgeted. After plaintiff was not chosen for the position of food editor, he filed a complaint with the

Equal Employment Opportunity Commission alleging he was the victim of age discrimination.

On October 25, 2006, plaintiff sent an email to the publisher of the newspaper, Stephen Borg, criticizing a photograph chosen for publication in the newspaper. The following day, plaintiff received a performance review which rated him "below expectations" in professionalism. His supervisors described several instances of allegedly unprofessional behavior, including sending the email to the publisher the previous day, plaintiff's reaction to being denied the position of food editor, and his making disparaging remarks about a reporter at a newsroom-wide staff meeting.

A year later, in a review dated October 15, 2007, plaintiff was rated as "meeting expectations" for professionalism. His supervisors noted, in part:

> At the start of the year, we put Victor on notice about the highly inappropriate behavior he displayed in his last review period. We have seen improvement despite a handful of flare-ups. There must be no backsliding. Victor must be professional and cooperative at every turn. We're talking zero tolerance.

The review then went on to note a recent incident in which plaintiff complained aloud about being given a sports-related assignment.

In December 2007, plaintiff filed his pro se lawsuit in the Superior Court alleging LAD violations.

In February and March 2008, plaintiff again sent emails to the publisher and to the paper's editor criticizing aspects of their job performance and the work of others. As a result of these emails, the company's general counsel, defendant Jennifer Borg, requested and reviewed plaintiff's personnel file. Borg and the vice-president in charge of personnel agreed that plaintiff should be given a final warning about unprofessional and insubordinate conduct. In her testimony at trial, Borg explained that she read plaintiff's performance reviews "going as far back as 1985" to make sure the warning was the right decision and based on more than "just relying on . . . the history for the last year-and-a-half."

In April 2008, plaintiff was given the final warning document in a meeting with Borg and the managing editor. The document recounted instances of unprofessional behavior from 2005 through 2008. It concluded:

> This is a final, written warning for continued inappropriate and unprofessional behavior in the workplace. Any future incidences of inappropriate, unprofessional, insubordinate and/or disrespectful conduct or comments will result in immediate termination of your employment.

Later that month, plaintiff was informed about a corporate reorganization that had been planned for several months. NJMG had decided to consolidate certain functions of two of its newspapers, The Record and The Herald News, including the copy desks. All jobs in the affected areas would be eliminated, new jobs would be created, and employees would be able to apply for these new positions. Plaintiff was informed that he would not be able to apply for a new position because he was not an employee in good standing. His last day of employment was May 30, 2008.

In 2009, plaintiff started an internet blog site entitled Eye on the Record, much of which was critical of The Record. Over plaintiff's objections, the trial judge permitted defense counsel to use two blog entries in cross-examining plaintiff and in the defense summation.

Plaintiff's November 17, 2009 blog entry included the following: "This paper also contains columns by Road Warrior John Cichowski and Mike Kelly, both of whom are so far over the hill, you can no longer see the hill." Plaintiff's January 22, 2010 blog entry stated in relevant part:

> How many older male columnists does The Record need? Today, columns by Kevin DeMarrais, Harvy Lipman, Mike Kelley, John Cichoswki and Peter Grad appear in the former Hackensack daily, which got rid of

> its only black and only Hispanic columnists, and one of its early female columnists.

Also, witnesses associated with defendants made extensive reference in their testimony to the performance reviews of plaintiff pre-dating 2005 as quoted in this opinion. Plaintiff objected to use of the earlier performance reviews since his claims of discrimination were limited by the court to those from December 2005 to the time of his termination.

II.

As our recitation of evidence relevant to this appeal shows, the issues raised by plaintiff challenge the admissibility of evidence that was highly damaging to his claims of age discrimination and retaliation. The evidence from plaintiff's blogs and the historical evidence of his performance reviews supported defendants' position at trial that plaintiff was not the victim of age discrimination, but instead, that the employer's decisions were based on his problematic job performance over many years.

"Traditional rules of appellate review require substantial deference to a trial court's evidentiary rulings." Benevenga v. Digregorio, 325 N.J. Super. 27, 32 (1999), certif. denied, 163 N.J. 79 (2000) (quoting State v. Morton, 155 N.J. 383, 453 (1998)). Appellate review is limited "to examining the decision for abuse of discretion." Hisenaj v. Kuehner, 194 N.J. 6, 12

(2008); see also Estate of Hanges v. Met. Prop. & Cas. Ins. Co., 202 N.J. 369, 382 (2010) (collecting appellate cases under several rules of evidence applying the abuse of discretion standard of review). A trial court can be said to have abused its discretion when "its finding was so wide of the mark that a manifest denial of justice resulted." State v. Carter, 91 N.J. 86, 106 (1982).

Plaintiff asserts the blog entries constitute "specific instances of conduct" that were impermissibly used as evidence of his character and to attack his credibility, in violation of N.J.R.E. 405 and N.J.R.E. 608. He also argues that the trial court should have at least given a limiting instruction on the limited admissibility of this evidence for impeachment purposes.

We find no merit in plaintiff's arguments. The blogs were not admitted as character evidence. They were relevant to plaintiff's credibility as an age discrimination plaintiff and his claim for damages arising from unlawful discrimination.

Before trial, plaintiff filed a motion in limine to exclude the admission of any of his blog entries. Defense counsel contended that the blogs were admissible as relevant to the issue of plaintiff's mitigation of damages, arguing that the occupational expert for the defense would testify that the blogs would cause a prospective employer in the writing field not to

hire plaintiff after he was terminated from NJMG. The trial judge said he would conduct a hearing under N.J.R.E. 104 to determine whether the blog entries were admissible. Such a hearing, however, was not held.

Instead, the next time the issue arose was before defense counsel's cross-examination of plaintiff. After hearing brief argument, the judge barred the use of some of the blogs proffered by the defense but permitted counsel to cross-examine plaintiff regarding the two blog entries dated November 17, 2009 and January 22, 2010, that we have quoted. The judge reasoned that those entries contained age-related comments about employees of The Record and those entries were relevant to plaintiff's credibility. We agree with the judge's ruling.

The blogs were admissible to impeach the good faith of plaintiff's claim that he had been damaged as a result of defendants' alleged age discrimination. Although the defense did not call an occupational expert to testify at trial, defense counsel cross-examined plaintiff's occupational expert about plaintiff's efforts to secure another job after his termination by NJMG. That evidence was relevant to the economic damages plaintiff claimed in the loss of his job and income. In the course of cross-examination, defense counsel properly used the blog entries to challenge the reasons given by the occupational

expert for plaintiff's inability to secure similar work with another employer.

In addition to their relevance to plaintiff's claim of economic damages and the defense of failure to mitigate damages, the blogs were highly relevant to plaintiff's claims for compensation for non-economic damages. A successful claim of LAD discrimination or retaliation permits a plaintiff to recover money damages for emotional distress. See N.J.S.A. 10:5-3, Rendine v. Pantzer, 141 N.J. 292, 312-13 (1995). Such damages include mental anguish, humiliation, embarrassment, and loss of personal dignity. Tarr v. Ciasulli, 181 N.J. 70, 81 (2004). The blogs were relevant to demonstrate that plaintiff did not suffer such damages since he was engaged in demeaning the work of other journalists because of their age.

Plaintiff argues that the blogs should have been excluded under N.J.R.E. 403 because their probative value was substantially outweighed by their inflammatory and prejudicial nature. Although the trial judge did not explicitly make findings on the record performing a "balancing test" under N.J.R.E. 403, we find no abuse of discretion in declining to exclude the evidence under that rule. See Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 492 (1999) (trial court's ruling under N.J.R.E. 403 is not reversible unless the court "palpably abused

its discretion, that is, that its finding was so wide [of] the mark that a manifest denial of justice resulted").

Plaintiff relies primarily on the holding of Green that evidence of the plaintiff's racial bias in that case should have been excluded under N.J.R.E. 403 because it was highly inflammatory. Id. at 501-02. Green, however, was not a discrimination case. The plaintiff in that case was seeking compensation for physical injuries caused in an automobile accident. Defense counsel's cross-examination making reference to racial bias had no relevance to the plaintiff's injuries and was intended only to sully the plaintiff's character in the jury's eyes. In contrast, a discrimination plaintiff's bias pertaining to the same allegations of discrimination that he has brought is highly relevant in assessing the bona fides of his claims of injury and entitlement to compensation.

Finally, since plaintiff did not ask for a limiting instruction after the judge ruled the two blogs admissible, there was no plain error, see R. 2:10-2, in the absence of a limiting instruction. This is especially so because the evidence was relevant and admissible both for substantive and impeachment purposes.

Nor was any error committed in admission of plaintiff's performance reviews pre-dating 2005. Plaintiff argues the

historical performance reviews were not relevant because defendants did not rely upon them in refusing to promote him in 2006 and in terminating him in 2008. Defendant Jennifer Borg testified, however, that she reviewed and relied on the entire history of plaintiff's performance reviews in approving the final warning leading to his termination.

Additionally, defense counsel convincingly proffered that the entire twenty-nine year history of plaintiff's employment with NJMG was relevant in refuting plaintiff's testimony that he had a stellar record of achievement as a journalist. In his direct testimony, plaintiff recounted his early work history as a reporter and editor, testifying that he had performed admirably and received positive reviews.

The historical evidence was relevant to the issue of whether defendant had a non-discriminatory reason for declining to select him for the position of food editor in 2006 and to offer him a position after the corporate reorganization in 2008. The trial judge did not abuse his discretion in ruling that the jury should have the whole history of plaintiff's employment with NJMG and that the evidence was relevant to issues properly before the jury regarding the reasons and motivations for the adverse employment actions defendants took against plaintiff.

Finally, contrary to plaintiff's arguments, the performance reviews were not inadmissible hearsay in a discrimination case alleging unlawful motivation for decisions of the employer. See El-Sioufi v. St. Peters Univ. Hosp., 382 N.J. Super. 145, 164-65 (App. Div. 2005) (employment records may be admissible for a non-hearsay purpose, such as showing "the reasonableness and good faith of defendants' conduct"). They were admissible under N.J.R.E. 803(c)(6) as business records establishing supervisors' evaluations of plaintiff's work performance.

Affirmed.