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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0019-10T2

OLIVER MASSARO,

Plaintiff-Appellant,

v.

UBS, INC., STEVE SWANN,
and JOHN STEINTHAL,

Defendants-Respondents.

Submitted:[1] April 25, 2012 - Decided: May 31, 2012

Before Judges Cuff, Lihotz and St. John.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-3406-08.

Oliver Massaro, appellant pro se.

McElroy, Deutsch, Mulvaney & Carpenter, LLP, attorneys for respondent UBS Services USA LLC[2] (Francis X. Dee, of counsel and on the brief; David B. Beal, on the brief).

PER CURIAM

After fifteen months of employment at defendant UBS Services USA, LLC (UBS), plaintiff Oliver Massaro was terminated

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[1] Oral argument waived when appellant did not appear.

[2] Improperly pled as UBS, Inc.

from his employment. He filed a complaint seeking compensatory and punitive damages and attorneys' fees alleging violations of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, breach of contract, intentional infliction of emotional distress, and negligence. He appeals from an order granting defendant's motion for summary judgment and dismissing his complaint.

On appeal, plaintiff argues that there were genuine issues of material fact in support of his claim that his termination was attributable to unlawful age discrimination.[3] He also contends he presented a viable claim for punitive damages that must be resolved by a jury and that various pre-trial motions regarding discovery were wrongly decided. We disagree and affirm.

In order to address plaintiff's arguments in this appeal, our starting point is our standard of review. The motion judge entered summary judgment and dismissed plaintiff's complaint. The judge was required to review the facts, identify the undisputed facts and view the remaining facts and the inferences drawn from these facts in the light most favorable to plaintiff. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 536

[3] By the time the matter was presented to the motion judge, plaintiff abandoned all causes of action other than the age discrimination in employment claim under the LAD.

(1995). Having identified the undisputed facts and all favorable inferences in plaintiff's favor, the judge must determine whether the moving party is entitled to judgment as a matter of law. R. 4:46-2(c). We apply the same standard as the motion judge. Spring Creek Holding Co. v. Shinnihon U.S.A. Co., 399 N.J. Super. 158, 180 (App. Div.), certif. denied, 196 N.J. 85 (2008); Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998).

Applying this standard, we discern the following facts.[4]

UBS hired plaintiff as an Associate Director in the Risk Management division on September 5, 2006. He was four months shy of his fifty-first birthday.

At the beginning of his employment, Massaro reported to Albert Jesupaul, who reported to John Steinthal, Executive Director, Global Head of Secure Connectivity. Steinthal was forty-two years old; Jesupaul was forty-five years old. Massaro asserts he received a written performance review from Jesupaul in November or December 2006. Massaro claims UBS refused to produce that review, but it is undisputed that Massaro received a bonus from UBS in 2006.

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[4] In conducting our review of the record we have not considered any documents included by plaintiff in the appendix that have been ordered stricken.

On April 2, 2007, Stephen Swann, then forty years old, was hired as the Manager of the Risk Management division. Another candidate, Larry Labella, was also considered for the position. Labella was older than Swann. Massaro did not apply for this position. In June 2007, Jesupaul was transferred to a new division, and Swann became Massaro's supervisor. UBS hired Massaro to execute compliance and risk management functions. He was aware, however, that he was also expected to show initiative and "drive projects" on his own. Specifically, Massaro was assigned to a project called MORCS, an internal self-assessment of UBS's risk. The review occurred twice each year. During the assessments that took place in late 2006 and early 2007, Massaro worked with Jesupaul. During the assessments that occurred later in 2007, Massaro worked with Swann.

Each of Massaro's supervisors voiced similar opinions about his work performance. Jesupaul explained during a deposition that Massaro was

> able to do the jobs when it [was] defined for him. When you tell him what to do, then he'll be able to do it . . . . That's it. You don't get any extra effort or you don't get any -- he just do[es] this job he is asked to do . . . . It is not that [Massaro] will come and say I have this idea, you can do this like this or we can do this differently. So he doesn't take initiative to do that . . . .

Steinthal similarly observed that Massaro's job title called for him to "process improvements to the benefit of our Operations teams and in this regard, to be successful he would have needed to demonstrate leadership, management capabilities, vision, creativity, innovation. In this regard he was ineffective. However, in administrative duties and in a supporting role to his manager he was effective."

Swann also explained that "[Massaro] was always very willing to work with the people in Compliance, was always willing to support them in what they did, but he had not proven effective at taking charge of projects, driving projects to completion . . . . I was finding that [what] [Massaro] was not doing effectively was taking charge of these projects and moving them ahead effectively."

Swann performed a mid-year performance review of Massaro in 2007. The review echoes the other comments made about Massaro's work:

> [Massaro] was hired into a CS [Connectivity Services] Risk Management role in which he was expected to execute certain compliance and risk management functions, and to make significant process improvements in them. He fulfilled the first part of those expectations, in that he executed the requirements of the role, but did not take charge of the issues to make the kind of significant improvements that were hoped for.

> To his credit, [Massaro] did exceptional work in an administrative/operational role in CSRM, working long hours during an extended project crunch, and delivering the tools and the effort that made possible a significant improvement in this round of MORCS compliance. This excellent work would have earned him a higher rating if it constituted a larger part of his role requirements.
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> [Massaro's] role in CS Risk Management requires him to rise above the operational aspects of the job: to take charge of projects and process improvements and drive them to conclusion. That is the standard against which he will be rated at his end of year review.

Massaro highlights several incidents to support his allegations that UBS discriminated against him on the basis of his age. In June 2007, Massaro was moved from the third floor of his office building to the second floor, along with three other workers from the Risk Management division. The second floor included the offices of Steinthal, Swann, and Jesupaul. Steinthal testified at a deposition that he authorized the office change to bring the team closer together, as well as to conserve office space. Massaro complained that this move was an assignment "to sit at a table in the hall outside of . . . Steinthal's office . . . ." The other employees moved to the second floor with Massaro were thirty-one, thirty-three, and forty years old. Massaro complained about the move to Swann, stating that the change was a "ridiculous move" and that Massaro

had confidential information which could not be stored at his new work space. Later that day, Massaro made the same complaints to Steinthal. He never raised the issue again.

During Massaro's time at UBS, he met weekly with Steinthal, Jesupaul, and Swann to discuss pending projects for the Risk Management division. According to Massaro, Swann told him to stop attending these meetings shortly after he complained about the transfer of his work space. Massaro admits, however, that after he stopped attending these meetings, Swann "occasionally update[d] [Massaro] on issues that [Swann] felt [Massaro] needed to know." Massaro was not excluded from any other meetings during his employment.

Massaro also complained about daily meetings at 6 a.m. He conceded, however, that these meetings were scheduled to accommodate client groups in the United Kingdom and Switzerland. He cites these same complaints as evidence of retaliation related to his complaint about the relocation of his work space.

In February 2007, Jesupaul asked Massaro to create a spreadsheet that consolidated data from the MORCS system in a format different than the one MORCS automatically produced. Massaro acknowledged that he received positive feedback on these spreadsheets from Steinthal and the United Kingdom client group.

Massaro applied for two UBS positions during his employment there: Business Continuity Manager and Business Continuity Coordinator. He did not receive either position. He does not dispute that the Business Continuity Coordinator position was canceled and never filled, and that the Business Continuity Manager position was filled by Douglas Randall, who was sixty-one years old when he was hired.

Massaro cited the transfer of two other employees as evidence of age discrimination against him. Boris Yudanin and Sai Adhikari were transferred to other positions in the company. Yudanin was fifty-three years old at the time of his transfer, and Adhikari was forty years old. Massaro admits he did not apply for either position.

In Fall 2007, Haresh Patel directed Steinthal to select three employees for lay-off in order to adjust the company's business model to "the difficult business climate . . . ." Steinthal discussed the issue with Swann, who advised him that Massaro was a good choice for termination because he was "not suited to the role" for which he had been hired. UBS explained that Massaro was terminated because the duties he performed were less important to the Risk Management division than the duties performed by others in the department. Patel approved Steinthal's decision to terminate Massaro. On December 4, 2007,

Massaro was officially terminated. He was fifty-one years old. UBS did not fill plaintiff's position.

Plaintiff complains that he was not considered for promotions due to his age and that his termination is the product of age discrimination. He also asserts that he suffered retaliation after he complained about the relocation of his work space from the third to the second floor.

Plaintiff bore the burden to establish a prima facie case that he was the victim of age discrimination by his employer. Victor v. State of New Jersey, 203 N.J. 383, 408 (2010). Where, as here, plaintiff has presented no direct proof that his termination or any other action by his employer was attributable to his age, we employ the burden shifting analysis of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). The first step is to determine whether plaintiff can establish a prima facie case. Victor, supra, 203 N.J. at 408. The elements of the prima facie case vary depending on the nature of the employment discrimination claim. Id. at 408-09. For age discrimination cases, a plaintiff must demonstrate that he is a member of a protected class, that he performed his job at a level satisfactory to his employer, that he was discharged, and that he was replaced by a person sufficiently younger to permit an inference that the employer preferred a younger

employee. Bergen Commercial Bank v. Sisler, 157 N.J. 188, 210-13 (1999); Young v. Hobart W. Grp., 385 N.J. Super. 448, 458 (App. Div. 2005).

When a plaintiff, such as Massaro, also alleges a retaliation claim under the LAD, he must demonstrate that he is a member of a protected class, he engaged in protected activity known to his employer, he was thereafter subject to adverse employment action by his employer, and there is a causal link between his protected activity and his termination. Victor, supra, 203 N.J. at 409.

The evidentiary burden to establish a prima facie case is modest. Zive v. Stanley Roberts, Inc., 182 N.J. 436, 447 (2005). The purpose of the prima facie case obligation is "'to demonstrate to the court that plaintiff's factual scenario is compatible with discriminatory intent -- i.e., that discrimination could be a reason for the employer's action.'" Ibid. (quoting Marzano v. Computer Sci. Corp., 91 F.3d 497, 508 (3d Cir. 1996)).

Once a plaintiff establishes a prima facie case, the burden shifts to the employer to demonstrate a legitimate non-discriminatory reason for the employment action. Id. at 440. When the employer does so, a plaintiff can defeat summary judgment only if he produces evidence from which a jury could

find that the reason advanced by the employer was not legitimate or that it was a pretext for an unlawful employment action. Victor, supra, 203 N.J. at 408 n.9; Zive, supra, 182 N.J. at 449.

Here, plaintiff established that he was a member of a protected class. Employees over forty years of age are protected from age discrimination by the LAD and Age Discrimination in Employment Act (ADEA). Young, supra, 385 N.J. Super. at 458; 29 U.S.C.A. §§ 623(a), 631(a). Plaintiff was fifty-one when UBS terminated him. He has also produced evidence that he was performing the job for which he was hired when terminated. The quality of his performance "does not come into play on the plaintiff's prima facie case." Zive, supra, 182 N.J. at 441. Plaintiff also established the third prong of a prima facie case of age discrimination, that is, he was terminated. He has failed to prove, however, that he was replaced by a sufficiently younger person. In fact, it is undisputed that plaintiff's position has never been filled. As to his retaliation claim, assuming the exclusion from one set of regularly scheduled meetings can be considered retaliation for complaints about the relocation of his work space, plaintiff has presented no evidence that his termination was causally related

to his complaints or that the stated reason for his termination was pretextual.

Even if plaintiff had met his admittedly modest prima facie burden on the age discrimination claim, he presented no evidence from which a jury could conclude that the legitimate reason for his termination was pretextual. He does not dispute the difficult economic climate in Fall 2007. He also cannot overcome the presumption against age discrimination as a motivating factor when the employee is hired and fired while a member of the protected class. See Maidenbaum v. Bally's Park Place, Inc., 870 F. Supp. 1254, 1267 n.24 (D.N.J. 1994), aff'd, 67 F.3d 291 (3d Cir. 1995) (noting that employees hired while within a protected class are not usually "credible targets" for pretextual firing claims). This presumption is particularly strong when, as here, the same people who hired the protected employee are the same people involved in his termination and are also within the protected class themselves. Young, supra, 385 N.J. Super. 461-62; Lowe v. J.B. Hunt Transp., Inc., 963 F.2d 173, 174-75 (8th Cir. 1992). Moreover, the document relied on by Massaro to demonstrate that age motivated his termination reveals that his entire unit was comprised of persons over the age of forty.

As to his allegations of retaliation, including failure to promote, exclusion from meetings, and an early morning meeting schedule, he has produced no evidence that any one or all of these actions were attributable to his age. He conceded that one position was filled by a person older than he, that he did not apply for the other positions, and that the early meeting schedule was due to the time differences between the United States and the European locations of the other participants.

The remaining issues presented by plaintiff, including his contention that his punitive damage claim should be submitted to the jury, that certain discovery motions were wrongly decided and that the motion judge should have granted his motion for reconsideration, are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION