NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5697-10T2

FRANCIS CORNACCHIULO,

Plaintiff-Appellant,

v.

ALTERNATIVE INVESTMENT
SOLUTIONS, L.L.C.,

Defendant-Respondent.

Argued March 5, 2012 - Decided June 19, 2012

Before Judges A. A. Rodríguez and Ashrafi.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-3191-11.

James E. Burden argued the cause for appellant (Smith Mullin, P.C., attorneys; Neil Mullin, of counsel and on the brief; Mr. Burden, on the brief).

James H. Forte argued the cause for defendant (Saiber, L.L.C., attorneys; Mr. Forte, on the brief).

PER CURIAM

Plaintiff Francis Cornacchiulo appeals from a June 13, 2011 order dismissing his employment discrimination complaint pursuant to N.J.S.A. 10:5-27, the election of remedies and

exclusivity provision of New Jersey's Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -42. We affirm.

I.

Plaintiff began working as a senior vice president for defendant Alternative Investment Solutions, L.L.C., in July 2008. He was involuntarily terminated from his employment in April 2009. On June 30, 2009, he filed a "Charge of Discrimination" with the Equal Employment Opportunity Commission (EEOC), an agency of the federal government, alleging discrimination on the basis of an unspecified disability.

A day later, on July 1, 2009, plaintiff filed with the EEOC an "Addendum to Charge of Discrimination" by which he elected to file the same claim of disability discrimination simultaneously with the New Jersey Division on Civil Rights (NJDCR). The Addendum stated that the EEOC had a "Worksharing Agreement" with the NJDCR "to provide individuals with an efficient procedure to facilitate the dual filing of charges of employment discrimination with both the EEOC and NJDCR under appropriate New Jersey State and Federal Laws." In a section of the document with the subheading "Verified Addendum to Charge of Discrimination," plaintiff placed an X next to a line indicating that he was filing a claim for discrimination based on disability under New Jersey statutes N.J.S.A. 10:5-4.1 and

-29.1. He signed the document, thus adopting statements verifying the accuracy of his allegations of discrimination.

The EEOC notified defendant-employer of the discrimination charge. It subsequently received information from both parties about plaintiff's claims. On October 16, 2009, the EEOC issued a letter stating it had examined plaintiff's claims and was "unable to conclude that the information establishes a violation of federal law . . . ." The EEOC stated it had completed its processing of the charge, and it issued a document entitled "Dismissal and Notice of Rights" to inform plaintiff of his right to file a lawsuit under federal law, such as under the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 to 12213, within ninety days of the EEOC notice. Plaintiff did not file a federal lawsuit.

On January 12, 2010, the NJDCR issued a letter stating that it had received the charge of discrimination filed by plaintiff, and that plaintiff's claims would be processed under a "Worksharing Agreement" by the EEOC, not by the NJDCR. The letter also stated:

> Once the Equal Employment Opportunity Commission has made a determination concerning that charge and closes its file, the Division on Civil Rights ordinarily adopts the EEOC's determination. However, upon application, and for good cause shown, the Division on Civil Rights will review a no reasonable cause determination by the

> EEOC to ensure that it comports with standards under the Law Against Discrimination.

No further activity occurred on the matter until plaintiff retained an attorney and filed a complaint and jury demand in the Superior Court on April 8, 2011, claiming violation by defendant of the LAD. The complaint alleged that certain executives of defendant-employer had learned plaintiff had been diagnosed with multiple sclerosis and was suffering with the symptoms of that disease during his several months of employment. The executives had allegedly embarked on and executed a plan to terminate plaintiff for purported inadequate performance when, in fact, he had performed well in his position. Moreover, the motivation of defendant-employer was to facilitate better terms on a key man insurance policy for executives that the employer was seeking to purchase.

On April 29, 2011, the NJDCR issued a letter addressed to the attorney for defendant-employer, which stated: "Please be advised that the Equal Employment Opportunity Commission (EEOC) has informed the Division on Civil Rights of the closing of its file on the above reference[d] charge. Therefore, a

determination has been made and the Division on Civil [R]ights is closing its file on the same basis."[1]

On May 18, 2011, defendant filed a motion in the Law Division in lieu of an answer to plaintiff's complaint to dismiss the lawsuit with prejudice for failure to state a claim upon which relief can be granted. R. 4:6-2(e). In support of its motion, defendant submitted the documents we have described and contended that plaintiff was barred from filing a lawsuit under the LAD because he had filed a charge of discrimination with the NJDCR and that agency had rendered a final determination on plaintiff's claim.

On May 23, 2011, the attorney for plaintiff wrote to the NJDCR disputing that plaintiff had filed an administrative complaint with that agency but also withdrawing "out of an abundance of caution" any charge that plaintiff may be deemed to have filed with the NJDCR.

The Law Division heard argument on defendant's motion to dismiss the Superior Court action and granted it by means of an order and a written decision dated June 13, 2011. Plaintiff appeals from that order and decision.

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[1] On its face, the NJDCR's letter of April 29, 2011, does not indicate that a copy was sent to plaintiff or his attorney.

II.

The LAD prohibits discrimination by an employer based on disability. N.J.S.A. 10:5-4, -4.1, -12a, -29.1. An aggrieved employee has the option of seeking redress by filing a complaint in court to initiate a lawsuit or by filing an administrative charge of discrimination with the NJDCR. N.J.S.A. 10:5-13; Hernandez v. Region Nine Hous. Corp., 146 N.J. 645, 652 (1996). A charge of discrimination with the NJDCR will not provide the same range of remedies as a lawsuit in the Superior Court, see Maczik v. Gilford Park Yacht Club, 271 N.J. Super. 439, 452-53 (App. Div.), certif. denied, 138 N.J. 263 (1994), but it may have the advantage of faster results and less expense than a lawsuit, Wilson v. Wal-Mart Stores, 158 N.J. 263, 270 (1999); Sprague v. Glassboro State Coll., 161 N.J. Super. 218, 226 (App. Div. 1978).

The LAD, however, does not permit an aggrieved employee to pursue remedies both before the NJDCR and in court. The election of remedies and exclusivity provision of the LAD states that the statutory administrative "procedure . . . shall, while pending, be exclusive; and the final determination therein shall exclude any other action, civil or criminal, based on the same grievance of the individual concerned." N.J.S.A. 10:5-27. Thus, the filing of an administrative charge of discrimination

before the NJDCR is an exclusive election of potential remedies that bars the filing of a lawsuit based on the same claims. Ibid.; Hernandez, supra, 146 N.J. at 652, 656.

Although a claimant may withdraw his NJDCR charge and pursue judicial remedies instead, Aldrich v. Manpower Temp. Servs., 277 N.J. Super. 500, 505 (App. Div. 1994), certif. denied, 139 N.J. 442 (1995), he may "switch forums only before a final determination has been rendered." Hernandez, supra, 146 N.J. at 656; accord Wilson, supra, 158 N.J. at 270.

Unlike the LAD, federal civil rights laws do not provide that the final determination of the EEOC precludes a subsequent lawsuit. Hernandez, supra, 146 N.J. at 658, 660. That is so because federal civil rights laws do not contain an exclusivity or election of remedies provision as does the LAD and are in fact designed to work in progression from an administrative claim to a potential judicial action. Id. at 653-54.

In this case, plaintiff contends he only filed a charge of discrimination with the EEOC and did not understand he was also filing a claim with the NJDCR that would bar judicial remedies under the LAD. However, the Addendum that plaintiff signed on July 1, 2009, states that plaintiff was filing a charge with the NJDCR. It describes the purpose of the document "is to permit the charging party to complete the process of filing a

discrimination charge with the NJDCR." The form has express provisions verifying the claimant's charges before the NJDCR, and those charges are designated by reference to the State statutes. We reject plaintiff's argument that he did not file a verified charge of discrimination with the NJDCR.

Plaintiff also argues, in accordance with the holding of Wilson, supra, 158 N.J. at 270-71, that his NJDCR charge does not bar his Superior Court lawsuit because: (1) he withdrew the NJDCR charge, and (2) the NJDCR did not take any action on his administrative claim and did not issue a final determination. We reject these contentions. The facts here are different from the circumstances of Wilson, where the Court permitted the plaintiff's lawsuit to proceed because she withdrew her administrative claims before the NJDCR had taken any action. Ibid. Here, the NJDCR issued a final determination letter on April 29, 2011, and plaintiff did not withdraw his NJDCR charge until twenty-five days later, on May 23, 2011.

The NJDCR's April 29 letter provided notice that the State agency had adopted the determination of the EEOC and closed its file on the same basis as the federal agency. That final determination was consistent with the NJDCR's initial notification mailed on January 12, 2010, which alerted the parties that, under a worksharing agreement between the federal

and State agencies, the determination of the EEOC was usually adopted by the NJDCR.

Because the NJDCR issued a final determination before plaintiff withdrew his administrative charge, plaintiff's lawsuit was barred by N.J.S.A. 10:5-27. Plaintiff's recourse was a right to appeal the NJDCR's final determination pursuant to N.J.S.A. 10:5-21. Defendant states in its brief that plaintiff has in fact filed an appeal under the latter statute from the NJDCR's final determination.

Plaintiff contends that he received inadequate and misleading information from the EEOC about the effect of his executing the Addendum to initiate the dual-filed NJDCR charge of discrimination. He argues the Addendum did not inform him that he was waiving his right to a jury trial in the Superior Court and his right to seek punitive damages by means of a lawsuit if he could prove his claims of discrimination. See Maczik, supra, 271 N.J. Super. at 452-53.

While we are sympathetic to plaintiff's argument that the Addendum did not adequately inform him about the rights he was waiving, it would be inappropriate to alter the legal effect of the applicable statutes simply because plaintiff acted without the advice of an attorney in filing his dual charges of discrimination before both the federal and State agencies. Had

plaintiff proceeded directly to the NJDCR and filed his charge there without the advice of an attorney, the exclusivity bar of the LAD would apply. His filing a dual charge with the federal agency does not bring about a different result.

Furthermore, the exception that plaintiff seeks from application of the statute may have unintended negative consequences on the ability of the federal and state governments to engage in worksharing agreements for purposes of efficiency and cost-savings, and it might potentially affect the viability of dual charges that are filed only before one agency or the other. Cf. Allstate Ins. Co. v. Skolny, 86 N.J. 112, 119 (1981) (Pashman, J., concurring) ("It was Justice Holmes who said, 'if it is a bad rule, that is no reason for making a bad exception to it.'" (quoting Ayer v. Phila. & Boston Face Brick Co., 34 N.E. 177, 178 (Mass. 1893))).

We note finally that plaintiff has not argued that the NJDCR failed to provide him with notice of his rights under the LAD, as it is required to do. N.J.S.A. 10:5-13. The statute provides that, upon receiving a charge of discrimination:

> the [NJDCR] shall notify the complainant on a form promulgated by the director of the [NJDCR] and approved by the Attorney General of the complainant's rights under this act, including the right to file a complaint in the Superior Court to be heard before a jury; of the jurisdictional limitations of the [NJDCR]; and any other provisions of

> this act, without interpretation, that may apply to the complaint.
>
> [Ibid.]

Neither party has included in the appellate record a form as referenced in the quoted statute, and the January 12, 2010 letter of the NJDCR providing initial notification of receipt of plaintiff's discrimination charge is addressed to defendant-employer and does not indicate it was also sent to plaintiff. We have neither a factual record nor legal argument regarding the effect, if any, of a failure of the NJDCR to comply with the statutory requirement of informing a complainant of his rights. On this record, we must assume that plaintiff had notice of the January 12, 2010 letter from the NJDCR, but that he took no steps to challenge before that agency the earlier determination of the EEOC that his claim did not establish a violation of discrimination laws.[2]

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[2] The copy of the January 12, 2010 letter contained in plaintiff's appendix on appeal is addressed to defendant-employer and does not indicate on its face that a copy was also sent to plaintiff. Nowhere in his initial brief or reply brief does plaintiff make reference to this letter from the NJDCR. Significantly, although defendant's motion to dismiss in the trial court and its responding brief on the appeal before us referred to the January 12, 2010 letter, plaintiff did not dispute having received a copy of the letter and thus having been advised at that time that the NJDCR would follow the lead of the federal agency on his claims and that he could request further review by the NJDCR if he was dissatisfied with the EEOC's determination. In other words, our record indicates that

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The trial court correctly dismissed plaintiff's complaint under N.J.S.A. 10:5-27 because he filed an administrative charge of discrimination with the NJDCR and that agency issued a final determination before plaintiff withdrew his administrative claim.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION

(continued)
plaintiff had notice of additional administrative remedies before the NJDCR that he did not pursue.