NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4434-09T4

ELY RODRIGUEZ,

Plaintiff-Appellant,

v.

GUEST PACKAGING, LLC, d/b/a
GUEST SUPPLY, a Delaware Limited
Liability Company, and MARK
MONAHAN,

Defendants-Respondents.

Submitted March 8, 2011 - Decided July 15, 2011

Before Judges Carchman and Waugh.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-1451-08.

Zatuchni & Associates, LLC, attorneys for appellant (David Zatuchni, on the brief).

Windels Marx Lane & Mittendorf, LLP, attorneys for respondents (Timothy J. O'Neill, of counsel and on the brief; Craig D. Gottilla, on the brief).

PER CURIAM

Plaintiff Eli[1] Rodriguez appeals an order dismissing his discrimination action against Guest Packaging, LLC (Guest), and Mark Monaghan, his supervisor, on a Rule 4:40-1 motion following the close of evidence at a jury trial. We reverse and remand for a new trial.

I.

We discern the following facts and procedural history from the record on appeal.

Guest manufactures, packages, and distributes shampoos, conditioners, mouthwash, soap and other amenities for the lodging industry. Rodriguez started working for Guest as a compounder in August 2005. He and other compounders were responsible for blending chemicals and other ingredients in a large vat, using specifications contained on a "batch card." To ensure quality control, an onsite laboratory tested samples of each batch during the mixing process.

Plaintiff worked the second shift, which was from 3:00 p.m. to 11:00 p.m. Batches were often started on one shift and then "handed off" to compounders on the following shift. When this occurred, the outgoing compounder was required to tell the

[1] Plaintiff's name is spelled as provided in his brief. Defendant Monaghan's name is also spelled according to his brief.

incoming compounder the status of the batch and any instructions for continuing the process.

According to Guest, Rodriguez's supervisors began to notice that he had performance and behavioral problems after his ninety-day introductory period ended. These problems were documented through Guest's three-part evaluation system.

On September 10, 2007, Michael Phillips, Rodriguez's direct supervisor, sent an e-mail to Monaghan recommending Rodriguez be terminated. After recounting Rodriguez's more recent disciplinary issues, Phillips explained:

> There are other concerns we have regarding Eli's attendance which have been documented & his repeated signings for OT, only to call out or not show up. We have had issues with other operators not feeling comfortable working with Eli, so much so, that one of the operators is contemplating signing a 1st shift posting just to get away from the uncomfortable atmosphere.
>
> [At] this point after Eli's recent review & these most recent events, I would suggest that Eli is not helping us move forward & we should consider termination effective immediately. . . . Again, I don't feel or have confidence in Eli turning this around & helping us, I feel like he is hurting us & holding us back. Multiple PILs, written, verbal, warnings, reviews, all have gone unnoticed by Eli.

Monaghan accepted Phillips's recommendation. On September 12, he prepared and signed the payroll form necessary to terminate Rodriguez.

Rodriguez, however, had called out sick from work on Friday, September 7, so that he could visit his doctor because of a pain in his stomach. According to Rodriguez, he had begun to experience a pain in July 2007, but waited to see a doctor because he did not want to miss work for fear of losing his job. The doctor diagnosed an umbilical hernia.

Rodriguez stayed home again on Monday, September 10, and returned to the doctor. The doctor gave him a note stating: "Mr. Rodriguez was seen in my office on 9/7/07 and 9/10/07. He is cleared to go back to work on 9/11/2007." The doctor also referred Rodriguez to a specialist.

Rodriguez saw the specialist on September 11. According to Rodriguez, the specialist told him he would need surgery to treat his condition. The specialist's notes indicate that Rodriguez was not in "acute distress" and scheduled an "elective umbilical herniorrhaphy" for September 14. Rodriguez went to Guest's human resources office, informed Guest of the diagnosis and proposed surgery, and submitted a leave of absence request due to disability. The request was approved on September 17. One of his treating physicians certified that Rodriguez would be totally disabled until October 15.

Rodriguez returned to work on October 15, at which time he testified that he was not "physically handicapped or disabled"

and intended to work a full day. According to Rodriguez, he did not ask for more leave and was not denied the right to take any further leave.

However, Rodriguez was terminated by Guest on October 15 after he returned to work. According to Rodriguez, Monaghan told him at the time that he did not want Rodriguez to become a "liability."

In February 2008, Rodriguez filed a complaint against Guest and Monaghan, alleging that (1) Guest terminated plaintiff because of his disability in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -42; (2) Monaghan aided and abetted in the disability discrimination; and (3) the termination also constituted an "unlawful interference and unlawful denial" of his rights under the Family and Medical Leave Act (FMLA), 29 U.S.C.A. §§ 2601-2654.

Defendants answered in March 2008, denying the material allegations of the complaint. Their motion for summary judgment was denied in October 2009.

The case was tried to a jury from April 26 through May 3, 2010. At the conclusion of Rodriguez's case, defendants moved for an involuntary dismissal pursuant to Rule 3:37-2(b). The trial judge denied the motion. After presenting their case, defendants moved for judgment pursuant to Rule 4:40-1. The

trial judge granted that motion. He found that Rodriguez had not provided sufficient evidence to create a jury question as to whether defendants' stated reason for terminating him, his poor performance, was a pretext for unlawful discrimination based on disability. On May 10, the judge entered a directed verdict in favor of defendants, dismissing the complaint with prejudice.

This appeal followed.

II.

On appeal, Rodriguez argues that the trial judge erred in directing a verdict in defendants' favor.[2] Defendants argue that the judge appropriately granted their motion because a reasonable jury could not have ruled in favor of Rodriguez on the basis of the facts adduced at trial.

Our review of a directed verdict pursuant to Rule 4:40-1 is de novo. Boyle v. Ford Motor Co., 399 N.J. Super. 18, 40, certif. denied, 196 N.J. 597 (2008). Like the trial judge, we "must accept as true all the evidence which supports the position of the non-moving party, according him or her the

[2] Rodriguez also argues that the judge should have either denied the motion or reserved decision, as permitted by Rule 4:40-2(a), let the jury decide the case, and then considered the motion after the trial. In light of our disposition of this appeal, we agree that the better course of action would have been to reserve decision and let the jury consider the case. Had the jury found against Rodriguez, there would have been no appeal and a second trial would not be required.

benefit of all legitimate inferences," RSB Laboratory Services, Inc. v. BSI, Corp., 368 N.J. Super. 540, 555 (App. Div. 2004). See also Verdicchio v. Ricca, 179 N.J. 1, 30 (2004); Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969). If reasonable minds could differ as to the outcome, the motion must be denied. Verdicchio, supra, 179 N.J. at 30.

In analyzing claims brought under the LAD, "[o]ur Supreme Court has adopted the three-step burden-shifting analysis first developed by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)." El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 166 (App. Div. 2005) (citing Jansen v. Food Circus Supermarkets, Inc., 110 N.J. 363, 382 (1988); Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 82 (1978)).

> [T]he court first determines whether plaintiff has produced sufficient evidence to demonstrate the elements of his or her prima facie case. If so, then the burden shifts to the employer to produce evidence of "legitimate, non-discriminatory reasons" that support its employment actions. Once the employer has done so, the burden shifts back to plaintiff to prove that the stated reasons were a pretext for discrimination.
>
> [El-Sioufi, supra, 382 N.J. Super. at 166 (citations omitted).]

In Nini v. Mercer County Community College, 406 N.J. Super. 547, 554-55 (App. Div. 2009), aff'd, 202 N.J. 98 (2010), in the

context of an age discrimination case, we described the prima facie requirement as follows:

> In order to successfully assert a prima facie claim of age discrimination under the LAD, plaintiff must show that: (1) she was a member of a protected group; (2) her job performance met the "employer's legitimate expectations"; (3) she was terminated; and (4) the employer replaced, or sought to replace, her. Zive v. Stanley Roberts, Inc., 182 N.J. 436, 450 (2005). In the case of age discrimination, the fourth element "require[s] a showing that the plaintiff was replaced with 'a candidate sufficiently younger to permit an inference of age discrimination.'" Bergen Commercial Bank v. Sisler, 157 N.J. 188, 213 (1999) (quoting Kelly v. Bally's Grand, Inc., 285 N.J. Super. 422, 429 (App. Div. 1995)). If plaintiff can establish a prima facie case, the burden of production then "shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employer's action." Zive, supra, 182 N.J. at 449. If the employer provides such a reason, plaintiff must show that the reason "was merely a pretext for discrimination." Ibid.

See also Maher v. N.J. Transit Rail Operations, Inc., 125 N.J. 455, 480-81 (1991); El-Sioufi, supra, 382 N.J. Super. at 167. Our Supreme Court has recognized that this burden is "'rather modest.'" Zive v. Stanley Roberts, Inc., 182 N.J. 436, 447 (2005) (quoting Marzano v. Computer Sci. Corp., 91 F.3d 497, 508 (3d Cir. 1996)).

The burden then switches to the defendant employer to put forth "a legitimate, nondiscriminatory reason for the employer's

action." Id. at 449. At that stage, there is no credibility or truth assessment. All the employer is required to show is that there was a legitimate explanation for its action. McDonnell Douglas, supra, 411 U.S. at 802-05, 93 S. Ct. at 1824-25, 36 L. Ed. 2d at 677-79. The employer "must come forward with admissible evidence of a legitimate, non-discriminatory reason for its rejection of the employee." Bergen Commercial Bank v. Sisler, 157 N.J. 188, 210 (1999). When the employer does produce such evidence, the presumption of discrimination is overcome. Id. at 211.

The burden then shifts back to the plaintiff to establish "by a preponderance of the evidence that the reason articulated by the employer was merely a pretext for discrimination and not the true reason for the employment decision." Zive, supra, 182 N.J. at 449. "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." Viscik v. Fowler Equip. Co., 173 N.J. 1, 14 (2002). The employee

> does not qualify for a jury trial unless he or she can "point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than

> not a motivating or determinative cause of the employer's action."
>
> [Zive, supra, 182 N.J. at 455-56 (quoting Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994)).]

"To discredit the employer's proffered reason, however, the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent." Fuentes, supra, 32 F.3d at 765.

III.

We turn first to the issue of whether Rodriguez established a prima facie case of discrimination based on disability. Although defendants concede that Rodriguez met most of the elements of a prima facie case, they contend that he was not disabled at the time he was terminated.

Rodriguez asserts that, because he was disabled when he took the medical leave and was subsequently terminated, he demonstrated all that was necessary to establish a prima facie case. Defendants, citing Clowes v. Terminix Int'l, Inc., 109 N.J. 575 (1988), and Victor v. State, 203 N.J. 383 (2010), contend that Rodriguez does not qualify as disabled because he admitted that he was not actually disabled at the time his employment was terminated.

"Disability" is defined by the LAD as follows:

> "Disability" means physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness . . . and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination . . . which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques.
>
> [N.J.S.A. 10:5-5(q).]

The LAD prohibits "any unlawful discrimination against any person because such person is or has been at any time disabled or any unlawful employment practice against such person." N.J.S.A. 10:5-4.1 (emphasis added).

Here, although Rodriguez was not disabled on the day he was actually terminated, he was disabled when the decision to terminate him was made. He had a temporary "physical disability" which prevented the "normal exercise of" a bodily function, for which he took medical leave. He required treatment for the resolution of his condition.

In addition, the LAD, which must be interpreted "liberally" to effectuate its purpose, has been interpreted to apply in cases in which an employee is not actually disabled, but the employer perceives him or her to be disabled. Andersen v. Exxon Co., U.S.A., 89 N.J. 483, 495 n.2 (1982); Rogers v. Campbell

Foundry, Co., 185 N.J. Super. 109, 112-13 (App. Div.), certif. denied, 91 N.J. 529 (1982). See also Bell v. KA Indus. Servs., LLC, 567 F. Supp. 2d 701, 707 (D.N.J. 2008) ("[E]ven if [plaintiff] was no longer suffering any effects from his injuries, he has alleged sufficient facts to plausibly support a claim based on a perception of disability.").

Here, it is not in dispute that Rodriguez actually had a hernia and took medical leave because of it. Although he was cleared to work and was not disabled on October 15, the day of his return to work, he had at one point been disabled and there was the possibility, real or perceived, that he might have additional medical problems in the future.

We turn next to the issue of whether the trial judge erred in concluding that Rodriguez did not provide sufficient evidence of pretext to get to a jury.

Evidence of pretext sufficient to permit the employee to reach a jury may be indirect, Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255-56, 101 S. Ct. 1089, 1095, 67 L. Ed. 2d 207, 216-17 (1981), such as a demonstration "that similarly situated employees were not treated equally." Id. at 258, 101 S. Ct. at 1096, 67 L. Ed. 2d at 218. A plaintiff may also establish pretext by offering "such weaknesses, implausibilities, inconsistencies, incoherencies, or

contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence,' . . . and hence 'infer that the employer did not act for [the asserted] non-discriminatory reasons.'" Greenberg v. Camden Cnty. Vocational & Technical Schs., 310 N.J. Super. 189, 200 (App. Div. 1998) (alteration in original) (quoting Fuentes, supra, 32 F.3d at 764-65). However, such evidence must be competent to demonstrate that the reason offered by the employer for the decision was, in fact, a ruse for discrimination. Fuentes, supra, 32 F.3d at 764.

The "'ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'" Jason v. Showboat Hotel & Casino, 329 N.J. Super. 295, 304 (App. Div. 2000) (quoting Burdine, supra, 450 U.S. at 253-54, 101 S. Ct. at 1093, 67 L. Ed. 2d at 215-16).

Rodriguez testified that at the time he was terminated, Monaghan told him that he did not want him to become "a liability." Monaghan denies making this statement. Consequently, there was a factual dispute as to whether the statement was actually made.

On a Rule 4:40-1 motion, the judge cannot weigh witness credibility, RSB Laboratory Services, supra, 368 N.J. Super. at

555, but must accept disputed evidence as true. Besler v. Bd. of Educ. of W. Windsor-Plainsboro Reg'l Sch. Dist., 201 N.J. 544, 572 (2010). Consequently, on appeal we must assume that Monaghan made the statement attributed to him.

The statement can be interpreted in several ways. For present purposes, one interpretation would be that Monaghan did not want Rodriguez to become a financial liability because he might seek additional medical leave or require additional treatment, or because his medical condition might cause him to be prone to further injury or medical problems. In the alternative, the statement might also have meant that Monaghan did not want Rodriguez to be a financial liability because he failed to follow safety procedures and ruined batches of product, costing the company money.

Taking Rodriguez's assertion as true and giving him the benefit of all reasonable inferences, as we are required to do, we conclude that a rational jury could have found that Monaghan made the statement and that defendants terminated Rodriguez because of his actual or perceived disability. If so, their asserted reason, poor performance at work, would have been a pretext. Consequently, we must reverse and remand for re-trial.[3]

---

[3] We do not discuss the other pretext arguments made by Rodriguez and rejected by the trial judge because, at the remand trial, (continued)

The Family and Medical Leave Act (FMLA), 29 U.S.C.A. § 2614(a)(1), requires employers to reinstate employees to positions they occupied before taking medical leave. However, an employee who takes FMLA leave is not entitled to "any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave." 29 U.S.C.A. § 2614 (a)(3)(B). If Rodriguez was terminated for reasons related to disability, he was not returned to his prior position as required by the FMLA. If he was terminated for other, non-discriminatory reasons, such as discipline or poor performance, he was not entitled to return to his position. Consequently, we reverse the dismissal of his FMLA claim, which must be determined in the context of the LAD claim.

Reversed and remanded for trial.

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

CLERK OF THE APPELLATE DIVISION

(continued)
the proofs may be different and the strength or weaknesses of those arguments may vary accordingly. Because they all go to the issue of pretext, as to which we have found a jury question with respect to Monaghan's alleged statement, we cannot conclude at this point that those arguments should be precluded. In addition, many of the facts underlying those arguments may be as or more supportive of the defendants' position.