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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5157-10T3

ADAM SHAIN,

Plaintiff-Appellant,

v.

HEL LIMITED, HEL, INC.,
JASBIR SINGH, Individually,
RUSSELL G. LEE, Individually,
and REBECCA SWEENEY, Individually,

Defendants-Respondents.

Argued February 14, 2012 - Decided March 2, 2012

Before Judges Parrillo, Skillman and Hoffman.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-2849-08.

Kevin G. Boris argued the cause for appellant (Shain, Schaffer & Rafanello, attorneys; Richard A. Rafanello, of counsel; Mr. Boris, on the briefs).

Ravi Sattiraju argued the cause for respondents (The Sattiraju Law Firm, attorneys; Mr. Sattiraju, of counsel and on the brief).

PER CURIAM

This is an appeal from a summary judgment dismissing plaintiff's hostile work environment claim under the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -38, and related breach of contract claim.

Plaintiff was employed by defendant HEL, Inc. as a salesman. Defendant Dr. Jasbir Singh, who was based in the United Kingdom, was the Managing Director of HEL. Defendant Rebecca Sweeney was the General Manager of HEL, and reported directly to Singh; as part of her supervisory role, Sweeney oversaw employees' use of the company expense account. Defendant Russell Lee was the Director of Sales at HEL. Plaintiff's LAD claim is based on a series of emails exchanged between Sweeney, Lee, plaintiff, and Singh in June 2008, which are described immediately below. Plaintiff's breach of contract claim is based on documents relating to plaintiff's compensation, which are discussed later in this opinion.

On June 7, 2008, Singh and Sweeney exchanged emails in which Sweeney expressed concern that plaintiff was abusing his access to the company expense account. In her email, Sweeney stated:

> . . . Adam is by far the biggest challenge. He has little or no regard for anybody other than himself. He constantly interrupts and wants or demands immediate action no matter

> what. He inserts himself in every single thing -- even personal conversations AND he always pushes the expense thing to the max. He has never once had a dinner under $50, has never stayed in a "moderate" hotel and on and on!!! He always "finds" reasons to justify this and it is always a fight -- because he NEVER relents until I just say NO!

Throughout the day of June 25, 2008, Sweeney and Lee exchanged emails regarding plaintiff's performance at HEL. In one of her emails to Lee, Sweeney remarked:

> Can I just say something I shouldn't to you here – he is SUCH A JEW! In a BAD way. He's what gives Jews a bad name.
> He's smarter
> He's better
> He's owed
> He will do anything to keep from opening his wallet – right down to not eating!!!! And I am DEAD serious here!!! That's why he expenses every single thing he can because he won't pay anything!
> I have not seen him bring one single thing into this office in all the time he's been here – period. (that he paid for)
> IF he does bring something in he expenses it . . .
>
> Not like EVERY SINGLE OTHER PERSON
>
> I could go on and on and on……
>
> Even [Singh] said that 99% of the issues we have had with him really stem from money – and he wondered what could have caused him to be that way???
>
> I COULDN'T say to him what I just did to you – that HE is what gives Jews a bad name!!!

Although plaintiff was not a recipient of this email, he accessed the email through a company database while attempting to view Lee's calendar, which was available to HEL employees. Plaintiff testified at his deposition that he probably did not have authority to read other employees' business-related emails.

After reading this email, plaintiff forwarded it to Singh in the United Kingdom. Plaintiff demanded Sweeney's termination and cited sections of the employee handbook which prohibit discriminatory behavior. The next day, June 26, 2008, Singh responded:

> For sure the comments are not sensible and I too want to deal with it properly. I passed the email for advice to an organi[z]ation in England which deals with racist matters and especially Jewish or anti-[Semitic] problems.
>
> The advise [sic] I got was that the comments are not anti-[Semitic]; primarily because she at no time generali[z]ed about Jewish people nor does she imply that Jewish people behave in this way. The comments reflect ignorance and some lack of thought, rather than racism. Frankly the view was that it was a foolish and rather thoughtless thing to write bearing in mind the sensitivity of such issues these days.
>
> I will be guided by these comments and just wanted to let you know that I have taken your request seriously. Also, it is my intention to take some further action and you will become aware of that in due course, hopefully soon.

That same day, Singh spoke by telephone with both plaintiff and Sweeney. Singh apologized to plaintiff on behalf of the company for the incident and told him it "shouldn't have occurred." However, Singh also told plaintiff that in view of Sweeney's previous good record with the company, he had decided not to terminate her. In his telephone call to Sweeney, Singh informally reprimanded her for the offensive language in her email to Lee.

Later that day, Sweeney apologized to plaintiff for the comments made in her email. Plaintiff responded by a letter which refused to accept Sweeney's apology. This letter concluded by stating:

> With this letter, I consider this a closed matter. I do not expect nor want any sort of rebuttal. You do your job. I will do mine.
>
> Obviously, I do not agree with how HEL handled this matter. You should have been terminated or at least suspended and directed to a sensitivity training course.
>
> Finally, my focus now, as it was before and always will be, is to give HEL 110% of my effort to increase sales to our maximum potential. HEL has had a strong history and if I have anything to do about it, will have a strong and lucrative future.

On June 30, 2008, Singh sent Sweeney a formal letter of reprimand which stated:

> After reviewing the allegations of Adam [Shain], following your private email to Russ Lee, I feel that it is necessary to remind you verbally, and in writing, that HEL does not condone, nor will tolerate, any comments that can be construed as negative towards any person based on religious beliefs or ethnic background. Any such comments are grounds for disciplinary procedures up to and including termination.
>
> Regarding the specific email incident, I have sought external (independent) advice by which I am guided. Also I have considered the fact that you have willingly offered your apology to Adam. In addition, I have taken into consideration your past record which to the best of my knowledge had been exemplary and I do believe you when you say that it was not your intention to be racist. As a consequence, I feel it would be inappropriate to terminate your employment though I have to stress that there will be no further warnings.
>
> I have noticed no change in Adam's behavior and nor has Russ -- I therefore assume that he too has put the incident behind him and is getting on with his job. This is important as it is not easy to manage a small office if people stop communicating.

Although Singh did not send a copy of this letter to plaintiff, Singh notified plaintiff by telephone that he had reprimanded Sweeney.

On September 1, 2008, plaintiff resigned from HEL to take a higher paying position with another company. Plaintiff's resignation letter did not refer to the anti-Semitic comments in Sweeney's email to Lee, and plaintiff did not testify at his

deposition that he resigned from HEL because of the email. Plaintiff did testify in that deposition that Sweeney's email contained the only derogatory comments about his being Jewish made by any HEL representative during the course of his employment. Plaintiff also testified that he felt he had "a good relationship with Dr. Singh" throughout his employment and "was comfortable approaching him." Following plaintiff's resignation, Singh sent him an email expressing disappointment that he had decided to leave HEL "when you are clearly doing so well."

Plaintiff subsequently brought this action asserting a hostile work environment discrimination claim under the LAD and a breach of contract claim for alleged unpaid commissions against HEL, Singh, Sweeney and Lee. Following discovery, in the course of which plaintiff, Singh, Sweeney and Lee were all deposed, defendants filed a motion for summary judgment. The trial court granted the motion by an oral opinion, which stated in part:

> It's a one-time incident. I find that there was a policy in place to [address] that one-time incident. That policy was utilized by Mr. Shain. He went to Dr. Singh and Dr. Singh took action and the behavior ended.
>
> To say that Dr. Singh by his statement, well, I don't think that was anti-Semitic and I believe he relied on some outside

> organization. Whether they were right or wrong, his statement to Mr. Shain, I don't think that was anti-Semitic, but it was inappropriate. It is offensive. It shouldn't have been said. I'm taking steps to stop it.
>
> . . . .
>
> There was an immediate and effective response. It was a single incident.
>
> . . . .
>
> . . . Mr. Singh was very attentive to remedying this. He didn't sit on it for any length of time. He didn't say, well, let's see if it happens again. He took steps to stop it.

The court also granted summary judgment dismissing plaintiff's breach of contract claim.

I.

In a case involving a LAD claim for the alleged maintenance of a hostile work environment based on religious faith or ancestry, "the inquiry is whether a reasonable person of plaintiff's religion or ancestry would consider the workplace acts and comments made to, or in the presence of, plaintiff to be sufficiently severe or pervasive to alter the conditions of employment and create a hostile working environment." Cutler v. Dorn, 196 N.J. 419, 430 (2008). "Whether harassing conduct makes a work environment hostile is assessed by use of a

reasonable person standard." Id. at 431. "Making that assessment requires an examination of the totality of the circumstances." Ibid. Although a hostile work environment discrimination claim may be established by harassing conduct that is either "pervasive" or "severe," the establishment of such a claim generally involves a showing of a "pervasively" hostile environment created by "the cumulative impact of separate successive incidents." Id. at 432.

This case did not involve such pervasive discriminatory conduct. Plaintiff acknowledged at his deposition that he never heard any derogatory comments about his being Jewish either before or after the Sweeney email.

Plaintiff argues that the email Singh sent him in response to his complaint about the Sweeney email constituted a "ratification" of Sweeney's discriminatory comments because that email stated that "an organi[z]ation in England" with which Singh consulted had advised him that Sweeney's comments "are not anti-[Semitic], primarily because she at no time generali[z]ed about Jewish people nor does she imply that Jewish people behave in this way." Although this statement indicates that Singh or the organization he consulted with failed to appreciate that Sweeney's comments were in fact anti-Semitic, it does not indicate that Singh ratified or condoned those comments. To the

contrary, Singh expressed his disapproval of the comments, characterizing them as "foolish," "thoughtless," and reflecting "ignorance." He also advised plaintiff of his "intention to take . . . further action" and shortly thereafter advised plaintiff he had reprimanded Sweeney. Thus, regardless of Singh's characterization of Sweeney's comments, he expressed strong disapproval of them to plaintiff and took effective steps to prevent a recurrence of the conduct about which plaintiff had complained. Moreover, Singh testified that he had a "good relationship" with Sweeney throughout his employment with HEL. Therefore, the record would not support a finding that Singh ratified Sweeney's anti-Semitic comments or that plaintiff thought Singh had condoned those comments.

The question, therefore, is whether the hostile work environment created by Sweeney's email was sufficiently "severe," by itself, to establish a hostile work environment discrimination claim. Initially, we note that Sweeney's anti-Semitic comments were not made to plaintiff's face but rather behind his back, and that plaintiff only became aware of the comments because he retrieved an email that Sweeney did not intend for him to see. Moreover, the person who made the comments was not the head of the company but rather one of two immediate supervisors to whom plaintiff reported. And that

person, Sweeney, was immediately reprimanded for her comments by the head of the company, Singh, and then apologized to plaintiff.

An isolated discriminatory comment will be found to support a hostile work environment discrimination claim only in "a rare and extreme case in which a single incident will be so severe that it would, from the perspective of a reasonable [person situated as the claimant], make the working environment hostile." Taylor v. Metzger, 152 N.J. 490, 500 (1998) (quoting Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 606-07 (1993)). The Court concluded that such a claim was stated where a Caucasian county sheriff referred to an African-American sheriff's officer as a "Jungle Bunny" in her presence in front of other members of the sheriff's department and later badgered her for interpreting his remark as a racial slur and refusing to accept his offer of a written apology. Id. at 500-08. In reaching this conclusion, the Court relied upon the fact that this highly offensive racial slur was made by the plaintiff's ultimate supervisor, the county sheriff, that it was made in the presence of another supervising officer, that the sheriff criticized the plaintiff for interpreting the comment as a racial slur and was reluctant to apologize. Id. at 501-18. The Court also noted that when plaintiff "told her co-workers of defendant's comments, they

laughed, and one apparently mocked her[,]" and "[t]hereafter, her co-employees acted coolly towards her; she was labeled a trouble-maker." Id. at 507-08.

In less extreme circumstances, our courts have held that isolated discriminatory comments are insufficient to establish a hostile work environment discrimination claim. See, e.g., El-Sioufi v. St. Peter's Univ., 382 N.J. Super. 145, 178-80 (App. Div. 2005); Mandel v. UBS/Paine Webber, Inc., 373 N.J. Super. 55, 72-74 (App. Div. 2004). In El-Sioufi, we observed that "[t]he cases in which a single statement has sufficed for purposes of creating a triable question about hostile work environment, however, have uniformly involved an outrageous and offensive statement made by a supervisor directly to the complaining subordinate[,]" and that "[s]uch a factual scenario is highly unusual." 382 N.J. Super. at 179.

This is obviously not such a "highly unusual" case. Unlike in Taylor, the discriminatory comment was not made by plaintiff's ultimate supervisor, Singh; the comment was not made directly to plaintiff; Singh promptly reprimanded Sweeney; and Sweeney promptly apologized to plaintiff for her comments.

Therefore, the trial court correctly concluded that no reasonable trier of fact could find that defendants subjected plaintiff to a hostile work environment that violated the LAD.

Moreover, because there is an insufficient factual foundation for finding a violation of the LAD, there is also no basis for finding that plaintiff's resignation constituted a constructive discharge.

II.

We turn next to plaintiff's claim that HEL breached his employment contract by failing to pay him commissions that he had earned before his resignation. Initially, we note that plaintiff refers to his resignation as a "termination" of his employment, in violation of the LAD. We have concluded for the reasons set forth in section I of this opinion that the trial court correctly dismissed plaintiff's LAD claim and that plaintiff was not constructively discharged. Therefore, we do not need to decide whether plaintiff would have been entitled to additional commissions if he had been constructively discharged.

Plaintiff was hired by HEL in May 2006 at a salary of $50,000 per annum. The letter from Lee offering plaintiff employment with HEL stated that "the exact structure of commissions and bonuses" in addition to this salary were "in the process of being updated and changed" and that how this "will work out . . . is not entirely known at this point."

On September 19, 2006, Lee sent plaintiff another letter, which stated that commissions would be governed by the following rules:

> Commission is paid on a sliding percentage scale on a yearly fiscal basis.
>
> Our fiscal year runs from July 1 to June 30.
>
> Commission is paid only on completed projects within a fiscal year. That mean[s], the system should be delivered and 100% invoiced in the same year. For projects that do not get completed in time, they will roll-over into the next fiscal year.

This letter also indicated that "for the current fiscal year," i.e., for July 1, 2006 through June 30, 2007, HEL would use the following structure for the calculation of commissions:

> [On] the first $1MM (MM=Million) sold: The percentage rate is 0.350% of sales.
> At $1MM, each of you will earn $3,500
>
> From $1MM to $4MM:
> The percentage rate is 1.05% of sales.
> Each of you will earn $10,500 per $1MM sold.
>
> . . . .
>
> For sales above $4MM:
> The percentage rate is 1.6% of sales.
> Each of you will earn $16,000 per $1MM sold.

On August 23, 2007, Lee sent plaintiff a letter with respect to his compensation package for fiscal year 2008, i.e., for June 1, 2007 through June 30, 2008, which stated in part:

> BASE SALARY: $60,000 beginning January 1, 2008
>
> No commission on the First $500K.
>
> From $500K-$1MM (MM=Million) sold:
> The percentage rate would be 2% of territorial sales.
> At $1MM, you would earn $10,000
>
> From $1MM to $2MM:
> The percentage rate is 3% of territorial sales.
> At $2MM, you would earn an additional $30,000
>
> From $2MM and above:
> The Percentage rate would be 2% of territorial sales WITH NO CAP.

Plaintiff argues that under these provisions he was entitled to commissions on any projects that he was working on as of the date of his resignation even though the customer orders were not delivered and invoiced until after his resignation. HEL contends that this claim to additional commissions was foreclosed by HEL's commission compensation policy expressed in the September 19, 2006 letter from Lee that "commission is paid only on completed projects within a fiscal year," which means that a system must be "delivered and 100% invoiced" before the commission is earned. Plaintiff responds that the September 19, 2006 letter applied only to his compensation for the 2007 fiscal year and not to his

compensation for the 2008 fiscal year, which was governed by Lee's August 23, 2007 letter.

We note that the August 23, 2007 letter only applied to fiscal year 2008, which expired on June 30, 2008, two months before plaintiff's resignation. The record does not contain any later writing establishing plaintiff's compensation for the 2009 fiscal year, which began on July 1, 2008. However, the parties seem to assume that plaintiff's compensation continued to be governed by Lee's August 23, 2007 letter until superseded by a subsequent communication relating to the 2009 fiscal year.

The question, therefore, is whether the rules concerning the earning of commissions set forth in Lee's September 19, 2006 letter continued to apply during the 2008 and 2009 fiscal years. Lee's August 23, 2007 letter did not deal with the subject of how and when commissions were earned. Consequently, in our view, the only reasonable interpretation of Lee's series of informal letters concerning plaintiff's compensation is that the principles set forth in the September 19, 2006 letter continued to govern the earning of commissions in subsequent years.

Furthermore, plaintiff's deposition testimony confirmed his understanding that he earned commissions only when the sales he made were invoiced and paid:

> Q. Okay. So I just want to be crystal clear.

P-8 [the September 19, 2006 letter] was in effect, the commission pool structure was in effect, for the commission year starting June '06 to July '07?

A. Correct.

Q. And then P-9 [the August 23, 2007 letter] was in effect from August -- from June '07 to July '07 -- '08 and then from -- sorry -- from June '07 to June '08, P-9 would have been -- controlled the terms?

A. Yes.

Q. Okay. Along with the September 19th, '06 letter.

And the only change from 2008 going forward was that there was 3 percent on the 2 million and above, correct?

A. Correct.

. . . .

Q. Okay. So when [was] the sale paid?

A. When the sale occurred, I would then become eligible. So whenever the PO, the purchase order, came into the door, it was my sale and, therefore, I became eligible for that commission and then the commission would finally be paid upon their final payment.

Q. Okay. Once they made their final payment, that's what would have to happen for you to get the payment from HEL?

A. Unless prior -- there were some instances where prior to payment commission was paid.

> Q. Okay, but those were exceptions. The general rule was upon the customer making the payment, then you would get the commission payment from HEL?
>
> A. Correct.

It is undisputed that as of the September 1, 2008 date of plaintiff's resignation, only $271,000 worth of the projects that plaintiff was working on had been delivered and invoiced. Consequently, under the commission rules set forth in Lee's September 19, 2006 letter and the commission schedule set forth in Lee's August 23, 2007 letter, the trial court correctly concluded that plaintiff had not yet earned any commissions during the 2009 fiscal year and was not entitled to commissions on sales that were completed after his resignation.

Finally, because plaintiff's entitlement to commissions was established by his employment contract, he is not entitled to commissions on sales completed after his resignation based upon principles of quantum meruit or unjust enrichment. See C.B. Snyder Realty Co. v. Nat'l Newark & Essex Banking Co. of Newark, 14 N.J. 146, 162-63 (1953).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION