NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5572-09T1

RUEBEN GILLETT,

Plaintiff-Appellant,

v.

FAIRLEIGH DICKINSON UNIVERSITY,

Defendant-Respondent.

Argued: March 21, 2011 - Decided: July 22, 2011

Before Judges C.L. Miniman and LeWinn.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-6050-08.

Andrew Dwyer argued the cause for appellant (The Dwyer Law Firm, L.L.C., attorneys; Mr. Dwyer, on the brief).

John K. Bennett argued the cause for respondent (Jackson Lewis LLP, attorneys; Mr. Bennett and Linda J. Posluszny, on the brief).

PER CURIAM

Plaintiff Rueben Gillett appeals from a summary judgment in favor of defendant Fairleigh Dickinson University dismissing his complaint, which alleged disability discrimination in violation

of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. We now reverse.

I.

The evidence presented by the parties on the summary judgment motion, viewed in a light most favorable to plaintiff, and drawing all inferences in his favor, Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 540 (1995), shows that he was hired for a temporary position as a senior general clerk in defendant's print shop on its Madison campus in August 2007. Later that month, he applied for a position as a Public Safety Officer (PSO). He was interviewed that October by Willie Thornton, defendant's Director of Public Safety, in the presence of Glenn Gates, Assistant Director of Public Safety, for an open PSO position. Contrary to Thornton's claims, plaintiff was not told that the position was "demanding," "excellent attendance" was important, there was a dress code, he could be fired for no reason during the ninety-day introductory period, or his employment depended on being a "quality worker."

On October 19, 2007, Thornton offered plaintiff a position as a PSO and in her offering letter stated that defendant "provides new employees with a 90-day Introductory Period. This is a time when you have an opportunity to evaluate the

university and we have an opportunity to evaluate you. We are hopeful that you will be a long time contributor to our team."

Plaintiff's first day of work was October 22 at which time he was provided with the Departmental Policy Manual. All PSOs are expected to know and comply with this policy manual. Plaintiff reviewed the disciplinary code contained in this manual, which provided that "[r]epeated absences over and above authorized University benefits and without proper documentation" were Category I offenses and would "lead to immediate termination." Among Category II offenses, which subject the offender to discipline up to and including termination, are "unsatisfactory job performance" and "failure to comply with uniform and appearance requirements." Defendant's sick-time policy, contained in the policy manual, provided:

> As much notice as possible should be given when calling out sick to ensure proper shift coverage. If you have used the 80 hours and you call out sick, you will be requested to provide a doctor's note. Failure to provide a doctor's note after you used the 80 hours will result in disciplinary action up to and including termination. Three consecutive days off sick will require a doctor's note to be submitted.

The policy manual also addressed reporting time, time records, and overtime, although plaintiff denied having reviewed this section. It provided in pertinent part:

> All Public Safety personnel will report for duty and be prepared to assume their posts at the prescribed start time of their shift. Public Safety personnel who are not prepared at the start of their shift will be considered late. Any officer with excessive lateness (as determined by the Director) will be terminated. Any officer with excessive absenteeism (as determined by the Director) will be terminated.
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> All Public Safety personnel will be required to fill out a bi monthly [sic] time sheet. At the end of the pay period, the 15th or last day of the month, all personnel are to submit the time sheet. The sheet will be verified by [the] Senior Sergeant and then submitted to the Lieutenant of Public Safety for submission to payroll. Anyone found putting any time on the sheet, which was not authorized or which they <u>did not work</u> will be terminated for falsifying time records.

The parties dispute certain alleged infractions of the policy manual occurring during the Introductory Period. According to plaintiff, some of his co-workers wore blue jeans on the overnight shifts, but on one occasion Gates told him not to do so, and he complied with this instruction thereafter. Although it is undisputed that plaintiff did not report to work on November 14, plaintiff denies that he was a "no call, no show," as Thornton alleges, because he called in to report his illness. In this respect, plaintiff's time sheet indicates he was sick that day and his semi-monthly payment voucher, approved by Lieutenant Glenn Priesmeyer, indicates that he had an eight-

hour sick day on November 14, and he worked eighty regular hours and thirty-three overtime hours during the period ending November 15. Furthermore, when Priesmeyer prepared plaintiff's performance evaluation on November 26, he rated plaintiff's attendance as "very good."

On December 3, plaintiff was again out of work. His time sheet and the Semi-Monthly Payment Voucher for the period ending December 15 indicate that December 3 was a sick day, which was approved by Sergeant Liz Quinones. Although Thornton characterized this day as a "no show, no call," plaintiff certified that he called to report his absence. Plaintiff further asserted that he accrued one sick day per month and, having been employed by defendant since August 2007, had not exceeded his accrued sick days as of December 15.[1]

On December 17, plaintiff slipped on ice during an evening shift while on tour with Quinones and, unbeknownst to him, tore his rotator cuff when he attempted to avoid falling by grabbing a railing.[2] Quinones had remained in the vehicle and was not

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[1] In a July 15, 2004, memorandum from Ann DeMeskey, Assistant Director of Human Resources, to all non-union, non-faculty employees, which was attached to plaintiff's certification, she explained that employees earned seven sick and three personal days per year, one per month, and could earn additional time based on their work schedule.

[2] That injury did not immediately result in any absence from work as plaintiff worked full shifts from December 17 through 20.

with plaintiff when he fell. When plaintiff returned to the vehicle, he informed Quinones that he had almost fallen on ice.

According to a Public Safety Call Off Form, on December 22 plaintiff called Officer Nyameshie to report that he would be out sick the following day due to a stomach virus. He did not report to work on December 23, although he did work from December 24 through 27. As of this point, plaintiff had not exceeded his accrued sick days.

On December 29, plaintiff called out sick for the following day,[3] advising Quinones that he would bring in a note from his doctor, Dr. Patel, at Morristown Memorial Hospital. While there, he told Patel about his earlier near fall at work and complained of continuing pain. Patel determined that plaintiff had injured his rotator cuff, and instructed him to report the injury to work, and go out on temporary disability.[4] Plaintiff left the hospital and went straight to work, where he related this information to Quinones and gave her the hospital paperwork. Quinones said she would forward the report to Thornton.

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[3] He had not been scheduled to work on December 28 and 29.

[4] Defendant complains that this information is inadmissible hearsay, but it was not offered to prove its truth; it was offered to explain his subsequent actions. It was not, therefore, inadmissible. N.J.R.E. 803(c); State v. Long, 173 N.J. 138, 152 (2002).

On December 30, plaintiff called out sick for January 1, 2008, and did not return to work thereafter. He was not able to see his own physician, Dr. Philip Woodham, until January 3, 2008, at which time Woodham put him out of work indefinitely due to his right rotator cuff injury.[5] In the meantime, plaintiff informed Gates of his medical condition.

On January 3, Gates returned plaintiff's call and acknowledged that he understood that plaintiff would not be returning to work for at least a week due to his shoulder injury. Gates asked him to fax a doctor's note confirming his absence to Denise Williams, Thornton's assistant. He also asked that the accident be documented by email or some other writing. Accordingly, plaintiff faxed his doctor's note to Williams on January 3 and sent Gates a written explanation of his accident.

Sometime before January 8, plaintiff was contacted by Dan Nelson, the adjuster for defendant's workers' compensation carrier, who instructed him to see the workers' compensation doctor, Dr. Clifford Schob. Before doing so, on January 10 plaintiff signed his December 31 pay voucher. He had completed it sometime in advance of December 31 with his anticipated schedule, indicating that he had worked eight hours on December

[5] This note was produced by defendant during plaintiff's deposition; he did not have a copy of it.

23 and was off on December 28 and 29. He also indicated he was at Morristown Memorial Hospital on December 30 at 4:44 a.m. and was out of work on December 31 for a medical reason. These two latter entries were stricken and the word "sick" written next to both stricken entries with Thornton's initials next to each change. Thornton also struck the entry for December 23 and initialed the strikeout. It is not known when she made these changes, although plaintiff certified they were all made before he signed the voucher on January 10. Thornton signed the form on January 14, 2008. Written across the bottom were the words "did not work on the following days 12/23, 12/29, 12/30, 12/31."

On January 11, Dr. Schob gave plaintiff a corticosteroid injection in his right shoulder, and prescribed physical therapy and medication. Plaintiff was permitted to return to work on light duty on January 14 and was to return to Dr. Schob's office in seven to ten days. As instructed, plaintiff went to physical therapy at the Kessler Institute for Rehabilitation, the physical therapy provider approved by defendant's workers' compensation carrier. Throughout this time, plaintiff remained in constant communication with Nelson and his supervisors, and he followed all instructions with respect to his injury and treatment.

Based on Dr. Schob's recommendation, plaintiff contacted defendant sometime after January 11 to ascertain whether he could return to work on light duty. This may have occurred on a Monday in January, presumably January 14, when plaintiff went to Thornton's office to pick up his paycheck, and discussed his shoulder injury, his temporary disability, and his return to work on a light duty assignment with Thornton and Gates. From Thornton's demeanor, she seemed to be aware of his status and expressed no surprise or curiosity about it. Plaintiff believed she must have been aware of it from his communications with Quinones, Gates, and Nelson. At the very least, she became aware of his situation at this time. Later that day, plaintiff received a voice mail message on his mobile phone from a Sergeant Sims, who said that she had spoken with Priesmeyer and that he wanted him to call Gates the next day. Before plaintiff reached Gates, he received a call from a friend, Katia Leonidis, who told him she had heard he was about to be fired.

Plaintiff called Thornton on January 15 and she confirmed that he was being fired. He asked why, and she responded that he would receive a letter in the mail explaining the reasons for his termination; she refused to offer any explanation over the phone. No letter was forthcoming. On January 16, plaintiff received a telephone call from Nelson, who advised that he had

placed a call to Thornton about a light duty position and was still awaiting a response. At no time during his employment was plaintiff ever given any warnings or otherwise subject to any progressive discipline.

Plaintiff was terminated from employment effective January 14, allegedly due to "absen[ce] from work without excuse on at least five (5) occasions during his probationary period"; failing to report to work on December 30, 2007; failing to notify defendant that he would be absent on and after January 2, 2008; falsification of "time records by reporting having worked an eight-hour shift on December 23, 2007, when he had in fact called out of work that day"; "twice report[ing] for work in blue jeans, contrary to the dress code, after having been instructed and warned not to do so"; poor performance as a PSO, based on his appraisal indicating that he needed improvement in most categories; and poor judgment, inappropriate excitability, and inability to manage and resolve conflicts based on one confrontation he had with another PSO and plaintiff's outraged presentation of that conflict to Thornton's assistant.

Defendant moved for summary judgment. In a disputed certification supporting this motion, Thornton certified that she interviewed plaintiff for an open PSO position, that it was her "standard practice and procedure to explain the importance

of excellent attendance to all interviewees for a PSO position," and she so instructed plaintiff. She also advised plaintiff that he could be terminated during the probationary period without defendant "giving a reason for doing so." She instructed plaintiff that he was to wear business causal dress when he was on duty, "i.e., khakis and a button-down shirt." Thornton certified that plaintiff indicated he understood these requirements.

Shortly after plaintiff began his employment, Thornton alleged that she observed him wearing blue jeans to work. Thornton told Gates to address this violation with plaintiff, and she presumed that he did so. Nevertheless, Thornton again observed plaintiff wearing blue jeans during his shift.

With respect to plaintiff's absence on November 14, Thornton explained that he was considered a "no call, no show" because there was no Public Safety Call Off Form for that date. The same was true with respect to his absences on December 3 and 31. As to plaintiff's absence on December 30, Thornton certified that he never submitted the doctor's note he indicated he would bring to work.

In his opposing certification, plaintiff emphasized that the attendance policy did not state that an employee could be terminated for "excessive absences" but only for "[r]epeated

absences over and above authorized University benefits and without proper documentation." Thus, he did not violate this policy. He also supplied doctor's notes when he had accumulated "three consecutive days of absence due to illness," as the policy required. Specifically, he gave the December 30 documentation from the hospital to Quinones, who said she would forward it to Thornton, and gave his doctor's January 3 note, which he provided in response to Gates' request. He further emphasized that from December 30 through January 14, no one employed by defendant indicated to him that anything was wrong.

As to his time sheets, defendant repeated his deposition testimony that it was common practice to fill out the time sheets in advance with the scheduled hours, and correct it after the fact to reflect the actual hours worked. He pointed out numerous dates where this occurred in November and December. He explained that he never had an opportunity to correct his time sheet for the week ending December 31 because he was out on disability before the week ended. By January 10 when he was given the card to sign and submit, changes had been made on it. No one discussed the changes with him and Thornton did not raise the issue when he picked up his paycheck on January 14.

As to his performance evaluation, he pointed out that there were many positive comments and, although he was rated as

needing improvement, there were no unsatisfactory ratings. His overall rating was a "69," which was at the very top of the needs improvement rating, one point below "good." He noted that the only basis for Thornton's belief that his performance worsened after this evaluation was his absence on disability.

Finally, as to the issue with the coworker, plaintiff explained the circumstances leading to the conflict and his presentation of that conflict to his supervisors. He asserted that those facts and the absence of any criticism of him at the time belied defendant's reliance on this event to justify termination.

II.

At oral argument on the summary judgment motion, defendant argued that plaintiff could not demonstrate that he had been terminated because of his disability as he had no proof that the decision maker was aware of his disability or that he had been replaced by a non-disabled worker. Further, defendant argued that, even if plaintiff made out a prima facie case of discrimination, plaintiff could not rebut defendant's legitimate nondiscriminatory reasons for terminating his employment.

Plaintiff responded that he was not unfailingly required to prove that he was replaced by a person outside the protected class and that the circumstances of his termination gave rise to

an inference of discrimination due to the timing of his termination and the absence of any disciplinary notices. As to pretext, he argued that he need only demonstrate sufficient deficiencies in defendant's proof of legitimate reasons to permit a reasonable fact-finder to find them unworthy of belief and infer that the employer did not act for non-discriminatory reasons.

Defendant responded that plaintiff's certification was a sham and full of hearsay and post hoc rationalizations. It pointed out that, because plaintiff's position was a probationary one, he could have been terminated at any time. It further argued that it was not required to warn plaintiff before ending his employment as an at-will employee.

The judge found that plaintiff had satisfied three elements of a claim of discrimination and as to the fourth element noted that "plaintiff's argument may be sufficient with regard to a prima facie case of disability discrimination." He went on to note that, because "the termination took place shortly after plaintiff suffered his alleged injury[, that] could possibly lead a fact[-]finder into finding an inference of unlawful discrimination." The judge then addressed the issue of pretext.

> [I]n articulation of its legitimate non-discriminatory reasons for the action in terminating [plaintiff], the defendant has

set forth the following non-discriminatory reasons:

First, plaintiff was on a 90-day probationary period. The [c]ourt would recognize that . . . being [on] probation . . . does not give license to discriminat[e], but I will address that in a minute.

Second, the plaintiff demonstrates the appraisal job certification of late November, which was signed . . . December 2nd or 3rd, 2007.

And third, the defendant's timecards, which . . . plaintiff does explain away, but the [c]ourt . . . has some issues with that certainly, because it's considered a policy infraction by the defendant, . . . as they argue, and the excessive absenteeism.

And that's substantiated by the evidence . . . defendant put forth on the record with regard to their burden which triggers the shift back towards . . . plaintiff, and thereafter, . . . plaintiff must prove by a preponderance of the evidence that the reasons articulated were a pretext for discrimination and not the true reasons for the employment decision.

The [c]ourt looks at the totality of the employment, the totality of the situation, and does find, as a matter of fact, that there was an issue with regard to absenteeism, and some explained, some not. And in any event, to a new employee, as the [c]ourt said during oral argument, . . . the burden is on that employee to put their best foot forward, and it's rather cavalier to say, well . . . you get X number of sick days, and . . . therefore, that begs forgiveness and you're allowed to use those days. And that's simply not the case, and the employment assessment or appraisal that was conducted, the [c]ourt finds to be

> determinative of the fact that sets forth a non-pretextual basis for the plaintiff's termination. And the [c]ourt finds the plaintiff, therefore, has failed to meet the burden as is set forth and articulated in Zive[6] and the holding by the New Jersey Supreme Court therein.
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> And despite plaintiff's rebuttals [of the] suggested legitimate non-discriminatory reason[s] for the termination of . . . plaintiff's employment, the [c]ourt is satisfied there is no competent evidence in the record that plaintiff can point to to substantiate these rebuttals that were raised in the certification.
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> And, therefore, plaintiff's certification does not satisfy the standard of the preponderance of the evidence to which the burden under Zive is placed on the plaintiff; and, therefore, the Court finds those arguments made by the defendant are persuasive and grants summary judgment in favor of . . . defendant[.]

III.

Plaintiff contends that he established a prima facie case of disability discrimination under the LAD, requiring submission of his claims to a jury for determination. Next, he asserts that he demonstrated that defendant's reasons for terminating his employment were a pretext for discrimination based on his temporary disability because: (1) a reasonable jury could find that defendant's reasons were false; (2) the judge erred in refusing to credit his certification since the sham-affidavit

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[6] Zive v. Stanley Roberts, Inc., 182 N.J. 436 (2005).

doctrine does not apply, no evidence was required beyond his own certification, and he did not rely on hearsay evidence; and (3) his evidence established that defendant's reasons were false because its shifting reasons alone are evidence of pretext and its claims of poor performance are "simply false." Last, plaintiff asserts that probationary employees are entitled to the same protections under the LAD as long-term employees and are not held to a different standard.

In reviewing a ruling on a summary-judgment motion, we apply the same standard as that governing the trial court. Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007); Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998).

Summary judgment is appropriate if there is no genuine issue as to any material fact in the record.

> The judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.
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> [R. 4:46-2(c).]

In determining whether there is a "genuine issue" of material fact precluding summary judgment, we "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact[-]finder to resolve the alleged disputed issue in favor of the non-moving party." Brill, supra, 142 N.J. at 540. In other words, we treat the non-moving parties' assertions of fact as true and "grant all the favorable inferences to the non-movant." Id. at 536. However, assertions that are conclusive and self-serving are insufficient to defeat a summary-judgment motion. Puder v. Buechel, 183 N.J. 428, 440-41 (2005).

The determination then is whether the evidence "'is so one-sided that one party must prevail as a matter of law.'" Brill, supra, 142 N.J. at 536 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)). "If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of Rule 4:46-2." Id. at 540.

It is readily apparent from the judge's decision that he did not apply these principles of law to the evidence before him. When he found that there were some absences that were not

explained, he made a fact-finding that essentially rejected plaintiff's sworn statement that he called a supervisor each time he was absent and that no issue had ever been raised with him about his absences until January 14. Instead, the judge should have credited plaintiff's sworn statement and inferred that the supervisor failed to complete the required Public Safety Call Off Form. The same problem surrounds the judge's rejection of plaintiff's evidence that he did not exceed his accrued sick days until he was out on disability from a work-related injury. Only the ultimate fact-finder can determine that an employee is not permitted to use accrued sick days without risking discipline, yet the judge usurped this function.

IV.

N.J.S.A. 10:5-12(a) bans discrimination based on disability:

> It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination . . . [f]or an employer, because of the . . . disability . . . of any individual . . . to discharge . . . from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment . . . .

Direct proof of discrimination is rarely found. Maiorino v. Schering-Plough Corp., 302 N.J. Super. 323, 344-45 (App. Div.), certif. denied, 152 N.J. 189 (1997). As a consequence, disability discrimination, like other forms of illegal

discrimination, can be proven through circumstantial evidence. Id. at 345. Plaintiffs must follow the three-step, burden-shifting paradigm of 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).

First, the plaintiff must establish a prima facie case of disability discrimination by showing that: (1) "he or she qualifies as an individual with a disability, or who is perceived as having a disability, as that has been defined by statute[,]" (2) "he or she is qualified to perform the essential functions of the job, or was performing those essential functions, either with or without a reasonable accommodation," (3) he or she was terminated, and (4) "the employer thereafter sought similarly qualified individuals for that job." Victor v. State, 203 N.J. 383, 409-10 (2010).

Here, plaintiff established that (1) he was a disabled worker, id. at 410; (2) he was performing his job duties and responsibilities, Zive, supra, 182 N.J. at 454; (3) he was terminated, Victor, supra, 203 N.J. 409; and (4) defendant thereafter sought to hire another person to fill his position, ibid. Thus, plaintiff raised a presumption of discrimination. Mullen v. N.J. Steel Corp., 733 F. Supp. 1534, 1548 (D.N.J. 1990). In other words, plaintiff demonstrated that his "factual

scenario is compatible with discriminatory intent——i.e., that discrimination could be a reason for the employer's action." Zive, supra, 182 N.J. at 447 (internal quotation marks omitted).

Second, the burden of production (rather than persuasion) shifts to the employer to articulate "a legitimate, nondiscriminatory reason" for firing the employee. Bergen Commercial Bank v. Sisler, 157 N.J. 188, 210-11 (1999). If the employer produces such evidence, as defendant did here, the presumption of discrimination is overcome. Id. at 211.

Third, the burden shifts back to 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). That is, there must be evidence "that either casts sufficient doubt upon the employer's proffered legitimate reason so that a fact[-]finder could reasonably conclude it was fabricated, or that allows the fact[-]finder to infer that discrimination was more likely than not the motivating or determinative cause of the termination decision." Svarnas v.

AT&T Commc'ns, 326 N.J. Super. 59, 82 (App. Div. 1999); accord Maiorino, supra, 302 N.J. Super. at 347. It is this third prong that is at issue here.

V.

It is clear that, taken at face value, plaintiff's certification and the exhibits submitted by both parties created a jury issue respecting whether defendant's reasons for terminating his employment were a pretext for discrimination. Defendant took no disciplinary action against plaintiff, not even a warning, until shortly after he was placed on temporary disability, although his alleged infractions all occurred well before that event. In fact, defendant acknowledges that it fired plaintiff at least in part because he was absent from work, which of course was because he was disabled. See, e.g., DePalma v. Bldg. Insp. Underwriters, 350 N.J. Super. 195, 215 (App. Div. 2002) (finding inference of discrimination where plaintiff terminated shortly after seeking family leave); Cinelli v. U.S. Energy Partners, 77 F. Supp. 2d 566, 578 (D.N.J. 1999) (finding inference of discrimination where plaintiff terminated shortly after disclosing he had cancer). We also note that the termination of his employment due to his absences was at least arguably inconsistent with the Policy Manual and the memorandum from DeMeskey. Yet, defendant contends that

plaintiff's evidence is not worthy of belief because his certification was a sham.

A.

Although the judge discredited plaintiff's opposing certification, he did not conclude that it was a sham, contrary to defendant's responding argument. On appeal, defendant contends that we should so find and affirm on this basis. The sham-affidavit doctrine has its genesis in Perma Research & Dev. Co. v. Singer Co., 410 F.2d 572 (2d Cir. 1969). There, the Second Circuit recognized that deposition testimony is likely to be more reliable than an affidavit because the deponent was subject to cross-examination; therefore, a judge may disregard the conflicting affidavit. Id. at 578. "If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." Ibid.

Our Supreme Court in Shelcusky v. Garjulio, 172 N.J. 185, 194-96 (2002), considered adoption of this doctrine and in doing so reviewed the state and federal jurisdictions employing some version of it. The Court made note of the limitations some jurisdictions have placed upon the doctrine. Id. at 196-98. It

also noted that some jurisdictions rejected the doctrine as an interference with the jury's function of deciding credibility, although a commentator found that concern overbroad. Id. at 198-99 (quoting 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 2726 (3d ed. 1998)).

In adopting the sham-affidavit doctrine, the Court expressed "confiden[ce] that trial courts have the ability to distinguish sham affidavits from affidavits that raise a genuine issue of material fact" and concluded that the "doctrine calls for the trial court to perform an evaluative function that is consistent with [the] holding in Brill." Id. at 201. It is not, however, to be applied "mechanistically." Ibid.

> Critical to its appropriate use are its limitations. Courts should not reject alleged sham affidavits where the contradiction is reasonably explained, where an affidavit does not contradict patently and sharply the earlier deposition testimony, or where confusion or lack of clarity existed at the time of the deposition questioning and the affidavit reasonably clarifies the affiant's earlier statement.
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> [Id. at 201-02.]

Applying those principles, the Court found that the affidavits the plaintiff submitted in opposition to summary judgment were not sham affidavits because there was no real inconsistency and the "plaintiff had a plausible explanation for any perceived inconsistency in his representations to the

court." Id. at 202. It was "not a case where a party has 'flatly contradicted' his prior sworn testimony." Ibid. (quoting Martin v. Merrell Dow Pharm., Inc., 851 F.2d 703, 705 (3d Cir. 1988)). A comparison of the plaintiff's statements demonstrated that they were "not 'inherently irreconcilable,' and [did] not implicate the sham affidavit doctrine." Ibid. (quoting Tippens v. Celotex Corp., 805 F.2d 949, 954 (11th Cir. 1986)). The Court pointed out that "[c]ases granting summary judgment based on inconsistent affidavits generally have involved clear contradictions." Id. at 202-03. Additionally, other portions of the plaintiff's statements were consistent with each other. Id. at 203. Finally, the "plaintiff's second certification sought to clarify his previous representations." Id. at 204.

We applied Shelcusky in Hinton v. Meyers, 416 N.J. Super. 141, 150 (App. Div. 2010). There, the plaintiff's Portee[7] claim had been dismissed on summary judgment because he made no contemporaneous observation of the injury inflicted on his infant daughter. Id. at 147. In support of his motion for reconsideration, the plaintiff flatly contradicted his earlier deposition testimony, claiming that he was immediately aware on hearing screams and crying from outside the building in which he

[7] Portee v. Jaffee, 84 N.J. 88 (1980).

was sitting that his daughter had been seriously injured. Id. at 149. He "offered no explanation for the two different versions." Id. at 150. We found the two versions of events "sharply different" and the deposition testimony revealed no confusion or lack of clarity. Ibid. As a consequence, we concluded that the judge on reconsideration did not abuse her discretion in rejecting the last certification. Ibid.

See also Carroll v. N.J. Transit, 366 N.J. Super. 380, 388 (App. Div. 2004) (flat contradiction as to the alleged presence of a witness may be disregarded); Optopics Labs. Corp. v. Sherman Labs., Inc., 261 N.J. Super. 536, 547 (App. Div. 1993) (flat contradiction as to nature of an agreement may be disregarded); Martin v. Merrell Dow Pharm., Inc., 851 F.2d 703, 705-06 (3d Cir. 1988) (flat contradictions without explanation may be disregarded); Mosior v. Ins. Co. of N. Am., 193 N.J. Super. 190, 195 (App. Div. 1984) ("Plaintiff cannot create an issue of fact simply by raising arguments contradicting his own prior statements and representations.") (cited with approval by Shelcusky, supra, 172 N.J. at 201)).

Defendant contends that there are seven instances of inconsistencies between plaintiff's certification and his earlier deposition testimony. First, plaintiff stated in paragraph 7 of his certification that "I was never told during

the interview that my continued employment depended on me being a 'quality worker.'" Defendant urges this statement is contradicted by plaintiff's deposition testimony where he was examined respecting what he was told about the evaluations that would be done during his ninety-day probationary term. He responded, "If I was a quality worker——I don't know. I mean, I didn't have this discussion (emphasis added)." On further questioning, he responded, "Basically what I'm trying to say to you is I guess if I was a quality worker that everything would be fine (emphasis added)." When asked who said that, plaintiff responded, "I was saying that I guess that if I was a quality worker, then everything would be fine. We never had a conversation about if this happened, then I'll be fired or anything like that. That was never the case (emphasis added)." We find no flat contradiction or inherently irreconcilable conflict between the certification and deposition testimony.

Second, defendant stated in paragraph 11 of his certification that "when I returned to the car, I told [Quinones] that I fell and had injured myself." In his deposition, plaintiff was asked, "When you got back in the car [after you fell] did you tell [Quinones] about it?" He replied, "Yes, I believe so." When asked if he had a specific recollection of telling her he had fallen, he testified, "Yes, I

told her that it was very icy out there and it's very slippery and I told her that . . . I almost had fell and bust my face. I think I told her." This is certainly not a patent and sharp conflict. The deposition testimony was not even equivocal until the last statement, which followed an insinuation in a question that Quinones had denied being told about plaintiff's near fall. The sham-affidavit doctrine does not apply to this statement.

Third, plaintiff certified in paragraph 16 that "I also reached out during this time [December 30 to January 3] directly to my supervisors and in particular, Assistant Director Gates, to keep him informed of my medical condition, and also to find out if I could return to work on a light[-]duty assignment." In his deposition, when asked if he ever told anyone about his fall other than Quinones, he replied, "I don't recall who I told." When pressed about whether he told anyone, he replied, "I don't recall that." This statement too is simply not a flat contradiction.

Fourth, plaintiff in paragraph 18 of his certification stated that on or after January 3, 2008, "[i]n compliance with Assistant Director Gates' instructions, I faxed to Denise Williams (secretary to Director Thornton) my doctor's note, explaining that I would be out of work due to the injury to my shoulder." However, at his deposition, when presented with the

January 3 note from his doctor that his return to work was undetermined, plaintiff testified that he did not remember ever having seen it previously, that he did not recall submitting it to anyone employed by defendant, and he did not know how it might have been submitted to defendant. Although the judge certainly could have disregarded this particular portion of plaintiff's certification under the sham-affidavit doctrine because plaintiff did not explain how his new-found recollection was triggered, the judge was still required to infer that defendant received this note in due course, as it was produced by defendant, not plaintiff. Therefore, even if he rejected this portion of plaintiff's certification, its exclusion should not have been determinative.

Fourth, in paragraph 23 of his certification, plaintiff stated, "Consistent with the instructions that I was given by [defendant's] own physician, I contacted [defendant] about the possibility of returning to work on a light[-]duty assignment." In paragraph 25, he stated, "I also raised the question [with Thornton and Gates] of whether I could return to work on a light[-]duty assignment, but I did not get any response." At his deposition when asked if he had requested any reasonable accommodation, plaintiff testified that his doctor was going to send him back to work, but he did not know if it was full duty.

He denied remembering anything more specific about the nature of the request. Once again, even if this portion of plaintiff's certification could be disregarded because he did not explain his new-found recollection of events, the judge still had before him the workers' compensation doctor's release of plaintiff to return to work on a light-duty schedule. These recommendations do not exist in a vacuum——they are communicated to the employer by the doctor and the adjuster. Plaintiff was entitled to an inference that defendant knew of this information.

Fifth, in paragraphs 17 and 25 of his certification, plaintiff averred that Thornton asked him "to send him something to document in writing the fact of the slip and fall" and he had a conversation with Thornton and Gates in which they "discussed my injury to my shoulder, and the fact that I was out of work on temporary disability." However, in his deposition, he denied having any recollection of whether he told anyone or whom he told that he had fallen and injured himself on December 17, 2007. Because we do not know why plaintiff has suddenly recalled this information, the judge could have disregarded it. However, he was still required to infer that Thornton and Gates knew of plaintiff's injury and temporary disability from the undisputed fact that defendant referred plaintiff to its workers' compensation carrier, treatment was provided, and he

was placed on temporary disability. The employer is not in a vacuum when this occurs.

Sixth, with respect to plaintiff's time sheet, he stated in paragraph 51 of his certification that "sometimes the hours for a particular day or week would be pre-filled out." However, defendant urges that in his deposition he testified that he would sometimes pre-fill the hours for a particular day when he arrived at work and then completed the card with the actual hours worked at the end of the day. Plaintiff certainly did not mention pre-filling the hours for a week, but neither was he questioned about that. As such, there was no patent conflict.

Last, in paragraph 68 of his certification, plaintiff averred that he alerted Gates, Priesmeyer and Sims to a conflict he had with another employee and "[i]n doing so, I was simply trying to follow the chain of command, and what I understood to be proper protocol, to raise any concerns about harassment or threatening behavior with my superiors." However, in his deposition testimony, he described a conversation he had with Williams in which he said that he was going to take the other employee to court if he continued to harass him and that he wanted her to alert Thornton to the situation. He admitted he should first have discussed the situation with Priesmeyer, but he was not around so he went to see Gates, but he was also not

around. This, like the other inconsistencies, merely goes to defendant's credibility because it is undisputed that plaintiff did alert Williams to the conflict and there is a dispute as to the nature of the communication as well as the nature of the conflict with the coworker.

We decline to invoke the sham-certification doctrine to affirm summary judgment in this matter. None of the inconsistencies justifies the entry of summary judgment in favor of defendant. Although there are clearly credibility issues with respect to the evidence offered by both parties, those issues must be resolved by a jury, not a judge on a summary judgment motion.

VI.

Defendant also argued that plaintiff's certification was "self-serving" and the judge rejected it in part because plaintiff did not submit corroborating evidence, such as documents and certifications from coworkers other than plaintiff's friend. However, "[p]laintiff's testimony is sufficient to create a genuine dispute about [a material] issue." Fleming v. Corr. Healthcare Solutions, Inc., 164 N.J. 90, 102 (2000). Plaintiff's certification alone was sufficient to defeat summary judgment and was no more self-serving than that of Thornton. Waldron v. SL Indus., Inc., 56 F.3d 491, 501

(3d Cir. 1995); accord Weldon v. Kraft, Inc., 896 F.2d 793, 800 (3d Cir. 1990); Jackson v. University of Pittsburgh, 826 F.2d 230, 235-36 (3d Cir. 1987). It was sufficient to raise a triable issue of whether the stated reasons were false and a mere pretext for discrimination.

Reversed.

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

CLERK OF THE APPELLATE DIVISION