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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0734-10T3

KEITH SEQUEIRA,

Plaintiff-Appellant,

v.

PRUDENTIAL EQUITY GROUP LLC; PRUDENTIAL REAL ESTATE AFFILIATES INC.; RICHARD HORTON III, individually and in his capacity as manager; WACHOVIA SECURITIES LLC; WILLIAM H. GOECKELER, individually and in his capacity as an employee supervisor; LAURA HAK, individually and in her capacity as an employee supervisor; THOMAS F. DALY, individually and in his capacity as an employee supervisor; BRIAN BEGLEY, individually and in his capacity as an employee supervisor; KENNETH PARDUE, individually and in his capacity as an employee supervisor; ROBERT E. MORRISSEY, JR., individually and in his Capacity as an employee supervisor; ANTHONY McQUEEN, individually and in his capacity as an employee supervisor; BRAND MEYER, individually and in his capacity as an employee supervisor; DAVID J. KOWACH, individually and in his capacity as an employee supervisor; DANIEL LUDEMAN, individually and in his capacity as an employee supervisor; DAVID MONDAY, individually and in his capacity as an employee supervisor; JAMES E. HAYS, individually and in his

capacity as an employee supervisor; E. KENNEDY THOMPSON, individually and in his capacity as an employee supervisor; DAVID CARROLL, and in his capacity as employee supervisor; MICHAEL J. CARROLL, individually and in his capacity as an employee supervisor; MARGE CONNOLLY, individually and in her capacity as an employee supervisor; TERESA RODDY, individually and in her capacity as an employee supervisor; JOHN PUZIO, individually and in his capacity as an employee supervisor; and PRUDENTIAL FINANCIAL INC.,

Defendants-Respondents.

Submitted September 30, 2014 – Decided October 9, 2014

Before Judges Reisner, Haas and Higbee.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-179-08.

Keith Sequeira, appellant pro se.

Morgan, Lewis & Bockius, LLP, attorneys for respondents Prudential Equity Group LLC, Prudential Real Estate Affiliates Inc., Richard Horton, III, and Prudential Financial Inc. (René M. Johnson and Michelle S. Silverman, on the brief).

Fisher & Phillips, LLC, attorneys for respondents Wachovia Securities, LLC, William H. Goeckeler, Laura Hak, Thomas F. Daly, Brian Begley, Kenneth Pardue, Robert E. Morrissey, Jr., Anthony McQueen, Brand Meyer, David Kowach, Daniel Ludeman, David Monday, James E. Hays, E. Kenneth Thompson, David Carroll, Michael J. Carroll, Marge

Connolly, Teresa Roddy, and John Puzio (Rosemary S. Gousman, on the brief).

PER CURIAM

Plaintiff appeals from the August 26, 2010 order of the Law Division granting summary judgment to Wachovia Securities LLC, and the individual defendants employed by that entity (collectively Wachovia or the Wachovia defendants), and dismissing his complaint alleging, among other things, discrimination and unlawful retaliation in violation of the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. He also appeals from a second August 26, 2010 order denying his motion to file a fourth amended complaint. We affirm.

In 1998, Prudential Securities, Inc. (PSI)[1] hired plaintiff to work as a financial advisor. Plaintiff was primarily interested in marketing one-person 401(k) retirement plans to self-employed sales professionals associated with a Prudential affiliate, Prudential Real Estate Affiliates, Inc. (PREA). Between 1999 and 2003, plaintiff stated that, on four occasions, he heard his branch manager make a racial or stereotypical comment about an employee.

In July 2003, Prudential Financial, Inc., which was PSI's parent company, entered into a joint venture with Wachovia

[1] This entity later changed its named to Prudential Equity Group (PEG).

Securities, which resulted in the formation of Wachovia. From that point forward, plaintiff was a Wachovia employee. After the merger, plaintiff continued to focus his business on marketing the individual 401(k) accounts. Like all financial advisors, plaintiff's compensation was based entirely on commissions. Plaintiff's former branch manager continued in a similar position in the new company.

In 2005, plaintiff notified his branch manager that he had a problem with Wachovia's policy of providing a waiver of certain fees for senior citizens. He asked that Wachovia waive a termination fee for a client's spouse, even though she did not meet the age requirement for the program. Plaintiff alleged that the senior discount was "a flagrant example of age-based — and therefore, unlawful — discrimination against my client." Wachovia's legal department looked into plaintiff's allegation and advised him that the senior discount program was not illegal.

A managing director began working with plaintiff on his continued plan to market the individual 401(k) accounts. The director provided plaintiff with a lap-top computer, paid his expenses, and assigned a part-time sales associate to assist him. However, the manager eventually realized that an individual retail broker, like plaintiff, could not handle the

volume of individual accounts that were being created due to the "administrative and operational issues associated with such accounts." The director believed that a third-party vendor was needed to handle the administrative aspects of the accounts, so that plaintiff could concentrate his efforts on marketing the accounts. In addition, plaintiff was continuing to use the old forms Prudential had used to set up the accounts, which added to the administrative costs because "hundreds of plans [were] being set up using incorrect documentation" which subsequently needed to be corrected.

Through the summer of 2005, several Wachovia managers met with plaintiff to attempt to address these issues. Wachovia agreed to "book" the old Prudential documents into the computer system in place of the Wachovia plan documents, but this process was extremely time consuming and, therefore, costly. Wachovia also agreed to waive certain fees for plaintiff's existing clients.[2] After these meetings, however, plaintiff continued to use the Prudential forms to initiate accounts and, in 2006, Wachovia had to complete "a manual amendment mailing to hundreds of plans that had been manually processed for [plaintiff] because of improper documentation and account opening

[2] Wachovia did not waive these fees for any other financial advisor's clients.

procedures."

In early 2006, the managing director determined he could no longer support plaintiff's efforts with respect to the individual 401(k) accounts because they were not profitable for the company. The branch manager concurred and again encouraged plaintiff to transition the accounts to a third-party outside vendor and focus on the more traditional accounts marketed by all of the other Wachovia financial advisors.[3] Plaintiff refused to do so.

In the summer of 2006, Wachovia advised plaintiff it could no longer waive fees on new individual 401(k) accounts "because of the small account balances and the amount of work required to open these accounts." Indeed, hundreds of plaintiff's accounts had "0" or minimal balances and, therefore, Wachovia was not earning any money on the accounts. Plaintiff submitted a series of lengthy documents to his supervisors arguing in favor of maintaining this book of business. In response, Wachovia agreed to waive fees for certain accounts where plaintiff had already promised the client a waiver. However, the company could no longer continue to waive fees in all cases. Wachovia again insisted that plaintiff begin to transition the accounts to a

[3] Plaintiff was the only Wachovia financial advisor who was attempting to market individual 401(k) accounts.

third-party vendor for handling. However, plaintiff continued to market the accounts.

In October 2006, plaintiff had a disagreement with another financial advisor. Plaintiff alleged the advisor "stormed into" his office, turned off the air conditioner, and "screamed" at him. Plaintiff filed a written complaint; it was investigated by the Wachovia Human Resources officer; and the branch manager was instructed to conduct a documented counseling session with the other employee. The branch manager immediately did so.

In December 2006, plaintiff filed charges of discrimination with the Equal Employment Opportunity Commission (EEOC). Plaintiff certified he informed his branch manager of the complaint on January 4, 2007. The branch manager stated he was not aware of the complaint until the following month.

On February 2, 2007, the branch manager met with plaintiff and advised him that Wachovia "would no longer support his business of individual 401(k) plans." The manager stated that "[a]fter months of trying to help [plaintiff] with the administrative and operational issues, including providing special documents for [plaintiff's] clients and waiving certain fees, the operational and administrative issues continued." On February 8, 2007, plaintiff sent an email to the branch manager and a number of other individual Wachovia defendants advising

them that he had filed an EEOC complaint.

In April 2007, the branch manager sent a memo to plaintiff advising that he needed to transition the individual 401(k) accounts out of Wachovia by August 31, 2007. In his memo, the manager explained:

> As you are aware, I have worked with you and with individuals within Wachovia Retirement Services in an attempt to find a workable solution so that you could continue to handle the individual 401K business. This business, as you know, is extremely paperwork intensive and often involves opening accounts for, and taking in and making disbursements for, accounts with less than $200 in assets. In our attempt to make this situation work, I have hired part time assistants for you as well as attempting to utilize firm resources to assist in the day to day handling of these many small accounts. . . . I have often advised that . . . it would be best for the firm and these 401K clients if you were to retain a third party vendor to handle the accounts. Doing so would have enormous benefits to all parties: 1) you would continue to get paid on this business going forward. . . ; 2) utilization of a third-party vendor would free your time up to pursue the non-401K business with these clients as well as to pursue and develop lines of business that will assist you in developing a strong, ongoing book of business[;] 3) the 401K clients will benefit as they will enjoy a seamless transition and will be serviced by a provider who is set up to handle this type of business, resulting in less delays to the end users and greater client service and satisfaction.
>
> Unfortunately, as I advised you in early February, it has become clear that we can

> not continue to handle the individual 401K business despite our best efforts to attempt to do so. I have requested that you contact the plan clients to begin the transition process to a third-party vendor of your choosing. You have not done this. Accordingly, please be advised that we have determined that the 401K business must be transitioned out by August[] 31, 2007. . . . If you do not make arrangements, we will contact the plans and work with them to transition to vendors of their choice.
>
> Finally, please be advised this is the firm's final decision on the matter. You are to cease contacting senior management regarding these issues. Should you have any further questions or concerns, they are to be directed to me. I remain ready and willing to assist you in channeling your energy and time into putting together a productive business plan and, ultimately, a productive business.

However, plaintiff continued to refuse to transfer the unprofitable individual accounts to an outside vendor. In December 2007, months after the August 2007 deadline, the branch manager told plaintiff not to open any new individual retirement accounts.

In May 2008, a new manager was assigned to plaintiff's office. Plaintiff asked the manager to look into his 401(k) business. Plaintiff also told the manager that he had filed an EEOC complaint. In August 2008, the manager sent plaintiff an email stating, in part:

> As you are aware I have an open door policy and was surprised that you think I am

> treating you any different than any other FA [financial advisor] in my complex, which I am not. I indicated the EEOC complaint is between you and the prior Complex Manager. I have not reviewed the complaint nor plan too [sic], I have reviewed some of the action plans regarding the 401K business.
>
> In reviewing the 401k business, it is very labor and operational intense. The check deposits into clients['] accounts is a manual process that involves the look-up of client accounts. This business would be better serve [sic] by a third party vendor specializing in the 401 business. Further, there is a letter by [the former branch manager] and sign [sic] by you stating that this business would be transitioned to a 401k provider by August 31, 2007. I will complete my research on your 401k business shortly and develop a plan on how we are going to handle it moving forward. Most of the operational situations arise from these labor intensive 401k accounts.

The manager subsequently met with plaintiff and believed that "plaintiff was satisfied with the meeting."

On October 8, 2008, while still employed by Wachovia, plaintiff filed a third amended complaint against the Prudential companies and one of their employees (the Prudential defendants) and against Wachovia and a number of its individual employees. Plaintiff alleged discrimination based on his race "Race (Asian)," "Color (Brown)," "National Origin (Indian)," "Ancestry (Goan)," "Age (53 years)," and "Nationality (Pakistani)," as well as claims of retaliation and hostile work environment.

In November 2008, the Prudential defendants filed a motion to dismiss the complaint for failure to state a claim. On January 23, 2009, the court dismissed all of plaintiff's claims against the Prudential defendants, and later denied plaintiff's subsequent motion for reconsideration.[4]

In March 2010, the Wachovia defendants filed a motion for summary judgment. Plaintiff opposed the motion and filed a cross-motion to file a fourth amended complaint alleging Wachovia had wrongfully terminated his employment. On August 26, 2010, the motion judge granted Wachovia's motion for summary judgment and dismissed all of plaintiff's claims against the Wachovia defendants. In a thorough oral opinion, the judge found that all of Wachovia's actions in regard to plaintiff's

[4] Plaintiff's October 18, 2010 notice of appeal does not reference the January 23, 2009 order dismissing all of his claims against the Prudential defendants. In his brief, however, plaintiff has raised arguments concerning the January 23, 2009 order and the Prudential defendants filed a brief in response. "It is a fundamental [principle] of appellate practice that we only have jurisdiction to review orders that have been appealed to us." State v. Rambo, 401 N.J. Super. 506, 520 (App. Div.), certif. denied, 197 N.J. 258 (2008), cert. denied, 556 U.S. 1225, 129 S. Ct. 2165, 173 L. Ed. 2d 1162 (2009). Therefore, we will limit our review to the August 26, 2010 orders listed in the notice of appeal. 1266 Apartment Corp. v. New Horizon Deli, Inc., 368 N.J. Super. 456, 459 (App. Div. 2004) ("[O]nly the judgment or orders designated in the notice of appeal . . . are subject to the appeal process and review").

book of business were based upon legitimate, non-discriminatory business decisions. The judge stated:

> The Court finds that [the manager]'s decisions as to plaintiff were based on a two year history of administrative problems with . . . [plaintiff's] one person 401(k) accounts. The issues were discussed with the plaintiff. It was suggested he transfer the accounts because management wished plaintiff to focus on traditional brokerage accounts.
>
> And so, I find that those were business decisions. Moreover, even if the plaintiff was able to establish an adverse employment action, . . . [and] the evidence in the record is insufficient in this case for a reasonable trier of fact to conclude that[,] . . . the defendants have met their burden of production of a legitimate non-discriminatory reason by establishing the reasons for [the manager]'s business decision for plaintiff to focus on traditional brokerage accounts.

As to plaintiff's retaliation claims, the judge determined that plaintiff did not have a reasonable good faith belief that the Wachovia defendants were engaging in any unlawful employment practices, and that Wachovia's actions were based upon legitimate business considerations. The judge also found that all plaintiff's remaining claims, including his allegation that Wachovia had created a hostile work environment and violated his constitutional rights, lacked merit.

Finally, the judge denied plaintiff's motion to file a fourth amended complaint. A trial date had already been set and

the judge found that the filing of another amended complaint would unreasonably delay the matter. In addition, the judge advised plaintiff that he could always "file another action" to contest his termination. This appeal followed.

On appeal, plaintiff argues primarily that there are disputed issues of material fact that preclude summary judgment and that the motion judge did not properly consider his arguments. After a thorough review of the record and consideration of the controlling legal principles, we conclude that all of plaintiff's arguments are without sufficient merit to warrant extended discussion in a written opinion. R. 2:11-3(e)(1)(E). We add the following comments concerning plaintiff's employment discrimination and retaliation claims.

Our review of a ruling on summary judgment is de novo, applying the same legal standard as the trial court. Nicholas v. Mynster, 213 N.J. 463, 477-78 (2013). Summary judgment must be granted 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.'" Town of Kearny v. Brandt, 214 N.J. 76, 91 (2013) (quoting R. 4:46-2(c)). Thus, we consider, as the motion judge did, whether "'the

competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.'" Ibid. (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). If there is no genuine issue of material fact, we must then "decide whether the trial court correctly interpreted the law." Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494 (App. Div. 2007), certif. denied, 195 N.J. 419 (2008). We accord no deference to the trial judge's conclusions on issues of law and review issues of law de novo. Nicholas, supra, 213 N.J. at 478.

The LAD prohibits discriminatory employment practices. Viscik v. Fowler Equip. Co., Inc., 173 N.J. 1, 13 (2002). To prove employment discrimination under the LAD, New Jersey courts have adopted the burden-shifting analysis established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668, 677 (1973); Viscik, supra, 173 N.J. at 13-14. Under that analysis, the plaintiff must first present sufficient evidence to establish a prima facie case of unlawful discrimination. Dixon v. Rutgers, 110 N.J. 432, 442 (1988) (citing McDonnell Douglas Corp., supra, 411 U.S. at 807, 93 S. Ct. at 1826, 36 L. Ed. 2d at 680); Peper v. Princeton Univ. Bd. of Trs., 77 N.J. 55, 82-83 (1978)). The defendant

then has the burden to present evidence establishing a legitimate, non-discriminatory reason for its employment action. Dixon, supra, 110 N.J. at 442 (citing Peper, supra, 77 N.J. at 83). If the defendant presents such evidence, the burden shifts back to plaintiff to prove that the defendant's proffered reasons are merely a pretext for unlawful discrimination. Ibid. (citing Peper, supra, 77 N.J. at 83).

Like the motion judge, we view the evidence in the light most favorable to the non-moving party and will assume for purposes of this opinion that plaintiff met his burden of presenting evidence under the first prong of this test. Brill, supra, 142 N.J. at 540. Moving to the second prong, it is clear that Wachovia presented overwhelming evidence that all of its actions regarding plaintiff and his accounts were based on legitimate business considerations. Since 2005, the individual 401(k) accounts were beset with administrative and operational issues. The accounts were labor intensive and took too much time to set up and monitor, especially since plaintiff refused to use the proper forms to create the accounts. In addition, many of the clients put little, if any money, into the accounts, which meant that Wachovia lost money on them. Between 2005 and 2008, Wachovia continued to work with plaintiff on ways to

address these issues but, after several years, it determined the accounts could no longer be maintained.

In order to show pretext under the third prong of the McDonnell Douglas test, and thereby successfully rebut the employer's purported legitimate reason for its adverse action, a plaintiff may: "'(i) discredit[] the proffered reasons [of the defendant], either circumstantially or directly, or (ii) adduce[e] evidence, whether circumstantial or direct, that discrimination was more likely than not a motivating or determinative cause of the adverse employment action.'" DeWees v. RCN Corp., 380 N.J. Super. 511, 528 (App. Div. 2005) (quoting Fuentes v. Perskie, 32 F. 3d 759, 764 (3d Cir. 1994)). The "plaintiff must demonstrate such weaknesses, implausibilities, 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.'" Ibid. (citation omitted).

In an attempt to prove Wachovia's reasons for getting out of the individual 401(k) business were pretextual, plaintiff argues that he heard a branch manager make four racial and stereotypical remarks about employees prior to 2003, and that he had a disagreement with a co-worker in 2006 and felt bullied as

a result. However, plaintiff was unable to show how any of these isolated incidents affected Wachovia's decisions regarding the individual 401(k) accounts. The branch manager's alleged remarks occurred before Wachovia became plaintiff's employer and Wachovia immediately addressed the issue plaintiff raised about his co-worker.

We are convinced from our review of the record that plaintiff failed to present sufficient evidence to show that Wachovia's reasons for its employment actions were a pretext for unlawful discrimination. As stated above, Wachovia no longer wished to support the individual 401(k) program and it presented compelling business reasons for this decision. Therefore, the motion judge properly dismissed plaintiff's employment discrimination claim.

Plaintiff's claim of employment retaliation in violation of the LAD also lacks merit. The LAD bans "reprisals against any person because that person has opposed any practices or acts forbidden under this act or because that person has filed a complaint" to enforce "any right granted or protected by this act." N.J.S.A. 10:5-12(d). To claim retaliation in violation of the LAD, employees must show that "(1) they engaged in a protected activity known by the employer; (2) thereafter their employer unlawfully retaliated against them; and (3) their

participation in the protected activity caused the retaliation." Craig v. Suburban Cablevision, Inc., 140 N.J. 623, 629-30 (1995). Upon the assertion of a legitimate non-retaliatory reason for the adverse action by the employer, a plaintiff must show, by a preponderance of the evidence, that the employer's conduct was nonetheless motivated by discriminatory reasons. Romano v. Brown & Williamson Tobacco Corp., 284 N.J. Super. 543, 549 (App. Div. 1995).

Plaintiff asserts the Wachovia defendants unlawfully retaliated against him by directing him to stop marketing the individual 401(k) plans after he: (1) complained about the senior discount program in 2005; (2) submitted documentation in support of his desire to continue marketing individual retirement accounts in 2006 and 2007; and (3) filed an EEOC complaint in late 2006. However, the record does not support this contention. Wachovia's legal department reviewed plaintiff's complaint about the senior discount program and found nothing illegal. It communicated these findings to plaintiff. Wachovia also waived certain fees for some of plaintiff's other clients, thus belying his assertion that Wachovia took adverse employment action after he complained about the senior discount.

While plaintiff submitted a great deal of documentation to Wachovia concerning the individual 401(k) program, none of it contained any allegations of discrimination. Moreover, Wachovia continued to work with plaintiff after it received the documentation.

Finally, Wachovia had expressed serious concerns about the ongoing viability of the individual 401(k) program long before plaintiff filed his complaint with the EEOC and his complaints in this matter. Therefore, we conclude that plaintiff failed to demonstrate that any of Wachovia's business decisions were motivated by discriminatory reasons or undertaken to retaliate against plaintiff for any protected activity.

As for the balance of any of plaintiff's arguments not expressly discussed above, they are also without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.