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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1643-12T2

STEPHEN HORAN,

Plaintiff-Appellant,

v.

VERIZON NEW JERSEY INC., a corporation or business organization, and RAYMOND J. KUTERKA, individually and/or as servant, agent or employee of VERIZON NEW JERSEY INC.,

Defendants-Respondents.

Argued: April 2, 2014 – Decided: April 29, 2014

Before Judges Fuentes, Simonelli and Haas.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-7635-10.

Edward F. Szep argued the cause for appellant (Law Offices of Emanuel S. Fish, attorney; Mr. Szep and Emanuel S. Fish, on the briefs).

Mary B. Rogers argued the cause for respondents (Day Pitney LLP, attorneys; Ms. Rogers and Jeffrey A. Gruen, on the brief).

PER CURIAM

Plaintiff Stephen Horan appeals from the Law Division's November 16, 2012 order granting summary judgment and dismissing

his claim that, contrary to an implied contract requiring progressive discipline, he was wrongfully terminated from his position as an Area Operations Manager (AOM) by his employer, defendant Verizon New Jersey, Inc. (Verizon) based upon age discrimination in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -42. We affirm.

We summarize the pertinent evidence from the motion record. Plaintiff worked as one of three AOMs in the Hudson/Bergen District of Verizon's Installation and Maintenance Organization. As an AOM, plaintiff supervised six local managers. Each of these managers supervised a garage, from which technicians were dispatched to install FiOS internet, television, and other services for Verizon customers.

Verizon required its technicians to keep accurate paper and electronic time sheets. The local managers for each garage had to approve these time sheets. Verizon then used the time sheets to measure the productivity of each AOM's geographical area by determining the number of FiOS installations per day completed by the technicians in that area. Unfortunately, some of Verizon's local managers discovered that they could artificially increase their technicians' productivity by encouraging them to miscode their work or by altering the codes themselves after the time sheets were submitted.

In late 2009, Verizon's Regional Operations Staff conducted an audit to investigate anonymous calls from local managers who alleged that other managers were misusing the time reporting codes to boost their productivity results. The audit revealed timekeeping irregularities in all three geographical areas of the Hudson/Bergen District. With regard to the area plaintiff supervised, the audit showed that two of the managers had "unlocked" the electronic time sheets submitted by their technicians, changed the codes to artificially inflate their productivity, and then approved the altered time sheets.

Plaintiff's supervisor, Operations Director Raymond Kuterka, instructed plaintiff to prepare disciplinary letters to be sent to the two managers. Plaintiff drafted the letters and, upon review, Kuterka instructed plaintiff to add a warning that such continued misconduct would result in further discipline that could include termination. Plaintiff revised the letters as directed. The letters were dated January 8, 2010. Plaintiff signed the letters on January 11, 2010, but he never delivered them to the two managers. Nevertheless, plaintiff faxed signed copies of the letters to Kuterka, thus representing that he had delivered them.

The results of the audit were provided to Verizon's Office of Ethics and Business Conduct, which turned the matter over to

the Security Department (Security), which then conducted a statewide investigation that was not limited to plaintiff's area or to the Hudson/Bergen District. Security identified ninety-nine local managers statewide who had timekeeping discrepancies. From these managers, Security found that twenty-two had five or more incidents of potentially false time reporting. Security interviewed all twenty-two of these managers and the AOMs to whom they reported. Plaintiff was one of these AOMs, along with four others. All six of plaintiff's local managers were interviewed due to the number of discrepancies discovered in the time records they had approved. Security also interviewed plaintiff's supervisor, Kuterka, and a director of another district.

Each employee was questioned by two Security investigators, who prepared a Memorandum of Interview (MOI), summarizing the interview. The employees also had the opportunity to provide a written statement that was attached to their MOI. Pursuant to Security's policy, the investigators' notes of the interviews were destroyed after the MOI was completed.

Each of the six local managers supervised by plaintiff provided handwritten statements to Security. In these statements and throughout their interviews, the managers stated that plaintiff pressured them to improve the productivity of

their technicians and threatened their jobs if this did not occur. While none of the managers stated that plaintiff told them directly to miscode the time sheets, several told the investigators that plaintiff instructed them to "get creative" with their time recording, which they inferred meant that they should cheat on the coding.

With regard to the disciplinary letters plaintiff was directed to issue in January 2010, the two managers told Security that they never received the letters plaintiff had represented to Kuterka had been faxed to them. When Security interviewed plaintiff, he initially failed to give the investigators the January 8, 2010 letters he prepared for the two managers. When the investigators confronted plaintiff with the letters they had obtained from Kuterka, he admitted that he never sent them to the two managers as he had represented, stating, "Listen, I screwed up. I was supposed to deliver the letters and never got to it." While plaintiff denied instructing the managers to falsify the time sheets, he admitted that he placed pressure on them to increase their productivity and threatened their jobs if they did not meet his goals.

At the conclusion of its investigation, which took over 1900 hours to complete, Security provided a written report to the Verizon Corrective Action Committee (the Committee), which

determined whether a violation of Verizon's Code of Conduct had occurred and the appropriate disciplinary action. The Committee was comprised of four individuals, whose ages ranged from forty-three to forty-nine.

The Committee decided to terminate plaintiff's employment because he (1) lied to Kuterka about sending the disciplinary letters to two of his local managers; (2) improperly threatened his employees' jobs; and (3) instructed the managers to "get creative" in coding and approving their technicians' time sheets. The Committee did not solicit Kuterka's input, and Kuterka testified at his deposition that he did not know plaintiff might be terminated until after the Committee made its decision. He also testified that his only involvement was to provide Security with the letters plaintiff had faxed to him. Consistent with the Committee's decision, Kuterka sent a letter to plaintiff on June 10, 2010, advising him that he was terminated. In pertinent part, the letter stated:

> The findings of a Security investigation involving time reporting violations concluded that you violated the Verizon Code of Conduct by creating an environment where employee[s'] job security was threatened if they failed to meet productivity objectives. The inappropriate direction and misguidance that you provided your team resulted in miscoding of time reporting. You also signed disciplinary letters, making it appear that the information had been issued to the affected employee[s], and failed to

> provide the most recent disciplinary letters to [S]ecurity during the investigation. Your behavior demonstrates a severe lack of integrity and judgment.

Plaintiff was forty-nine years old at the time of his termination.

In addition to plaintiff, Verizon terminated two of plaintiff's local managers: one, age fifty-three, and the other, age forty-six. Another manager, age fifty-six, received a written warning and a fifty percent reduction in a "short-term incentive payment" (STIP). The remaining three managers, age forty-six, age fifty-seven, and age thirty-nine, were given written warnings.

Verizon also terminated a local manager, age forty-two, who worked for another AOM. It initially proposed to terminate another local manager, age forty-seven, from another area, but later determined to give him a written warning and a fifty percent reduction in his STIP.

Of the remaining fourteen managers whom Security interviewed, seven were given written warnings and a fifty percent reduction in their STIPs. One of these managers was thirty-eight years old, with the others ranging in age from forty-two to fifty-one years old. Verizon gave written warnings to the other managers, who ranged from age thirty-eight to fifty-two.

After Verizon terminated plaintiff, Kuterka split plaintiff's area between the two remaining AOMs in the Hudson/Bergen District. One of the AOMs was forty-five years old and the other was thirty-four. In July 2010, Verizon reorganized the Hudson/Bergen District so that it would only have two AOMs in the future and Kuterka assigned what had been plaintiff's region to the thirty-four-year-old AOM. In January 2011, another employee, age thirty-five, returned from maternity leave and replaced that AOM who, in turn, assumed responsibility for the returning employee's prior duties.

On September 13, 2010, plaintiff filed a complaint against Verizon and Kuterka, alleging that his termination violated an implied contract of employment that provided for progressive discipline. Plaintiff also alleged discriminatory treatment based upon his age in violation of the LAD.[1] Verizon and Kuterka answered and discovery ensued. After discovery was completed, Verizon and Kuterka moved for summary judgment and, following oral argument on November 16, 2012, the Law Division judge entered an order, accompanied by an oral decision, granting the motion and dismissing plaintiff's complaint.

[1] Plaintiff also raised a number of other claims against defendants, which were dismissed by the trial judge. Plaintiff does not raise these claims on appeal and, accordingly, we do not address them further in this opinion.

With regard to plaintiff's implied contract claim, the judge found that Verizon had included an effective disclaimer in its Code of Conduct, which made clear that employees, like plaintiff, were at-will employees who could be terminated at Verizon's discretion, so long as there was no intentional discrimination. The judge also held that plaintiff did not establish a prima facie case of age discrimination under the LAD because he could not show that he was targeted for investigation because of his age. This appeal followed.

On appeal, plaintiff argues the judge erred in finding there was no implied contract requiring progressive discipline and in finding no violation of the LAD. He also argues defendants destroyed evidence in the form of the interview notes made by the Security investigators and that the judge should have inferred, based upon this spoliation, that plaintiff "was not responsible for any time sheet cheating." We disagree.

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). Thus, we consider, as the trial judge did, "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J.

436, 445-46 (2007) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 536 (1995) (internal quotation marks omitted). 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." R. 4:46-2(c). 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 review issues of law de novo and accord no deference to the trial judge's conclusions on issues of law. Nicholas, supra, 213 N.J. at 478.

As he did in the Law Division, plaintiff argues that Verizon had an unwritten progressive discipline policy which provided that employees could not be terminated for a first violation of the company's Code of Conduct. The record does not support plaintiff's claim.

It is well-settled that, absent a contractual arrangement to the contrary, employment is at-will. Bernard v. IMI Sys., Inc., 131 N.J. 91, 106 (1993). An at-will employee may be discharged from employment for any reason with or without cause,

Woolley v. Hoffmann-La Roche, Inc., 99 N.J. 284, 290 (1985), subject to the specific protections afforded by such laws as the LAD, and the termination does not otherwise violate public policy. Pierce v. Ortho Pharm. Corp., 84 N.J. 58, 72 (1980). In addition, "an implied promise contained in an employment manual that an employee will be fired only for cause may be enforceable against an employer even when the employment is for an indefinite term and would otherwise be terminable at will" unless the employment manual has "a clear and prominent disclaimer[.]" Woolley, supra, 99 N.J. at 285-86. "[T]he reasonable expectations of [the] employee[]" is the key factor when determining if the employment manual contains an implied promise to terminate employment only for cause. Witkowski v. Thomas J. Lipton, Inc., 136 N.J. 385, 393 (1994).

Plaintiff conceded in his deposition that Verizon had no written policy stating that an employee could only be terminated for cause or that an employee could not be terminated for a first violation of Verizon's Code of Conduct. Instead, plaintiff asserted a Woolley claim, contending that such a policy was implied based upon his belief that, because he had received satisfactory performance evaluations each year, he could not be terminated.

However, Verizon's Code of Conduct contained a specific disclaimer, which it contends was sufficient to rebut any possible implied promise that plaintiff's employment could only be terminated for cause and with progressive discipline. We agree.

To be effective, a disclaimer must clearly advise the employee that the employer has the power to terminate employment "with or without good cause." Woolley, supra, 99 N.J. at 309. The disclaimer must also be "in a very prominent position." Ibid. The requirement of prominence may be satisfied in a variety of ways so long as it is "separated from or set off in a way to attract attention." Nicosia v. Wakefern Food Corp., 136 N.J. 401, 415 (1994). Ways to give a statement prominence include bold lettering, italics, capital letters, underlining, color, bordering, or highlighting or any other presentation that would "make it likely that it would come to the attention of an employee reviewing it." Id. at 415-16. "[T]he requirement of prominence can be satisfied in a variety of settings, and . . . no single distinctive feature is essential per se to make a disclaimer conspicuous[.]" Id. at 416.

The disclaimer set forth in Verizon's Code of Conduct meets this standard. The disclaimer provides:

> **Legal Notice**
>
> This Code of Conduct is not an employment contract. Adherence to the standards of the Code of Conduct is a condition of continued employment. This Code does not give you rights of any kind, and may be changed by the company at any time without notice. Unless governed by a collective bargaining agreement, employment with Verizon is "at will," which means that you or Verizon may terminate your employment for any reason or no reason, with or without notice, at any time. This at-will employment relationship may not be modified except in a written agreement signed by the employee and an authorized representative of Verizon.

The disclaimer could not have been clearer. It plainly states that an employee, like plaintiff, is at-will and subject to termination at any time and for any reason. Moreover, the disclaimer appears on page three of the Code, at the bottom of the introductory section; is set off prominently from the rest of the text; and is prefaced by a clear, bold-type heading that states "**Legal Notice.**" This written disclaimer clearly negates plaintiff's implied contract claim.

Plaintiff next argues that, even if his implied contract claim lacks merit, his termination was impermissibly based upon his age in violation of the LAD. Again, we disagree.

Both N.J.S.A. 10:5-4 and N.J.S.A. 10:5-12 prohibit discrimination based on age. N.J.S.A. 10:5-4 states that "[a]ll persons shall have the opportunity to obtain employment . . .

without discrimination because of . . . age, . . . subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right." N.J.S.A. 10:5-12 provides that:

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

Where an employee is "alleging age discrimination under the LAD, [he or she] must show that the prohibited consideration[, age,] played a role in the decision making process and that it had a determinative influence on the outcome of that process." Bergen Commercial Bank v. Sisler, 157 N.J. 188, 207 (1999) (second alteration in original) (citation and internal quotation marks omitted). The discrimination may be proved "by either direct or circumstantial evidence." Id. at 208.

Where an employee "attempts to prove discrimination by direct evidence, the quality of evidence required to survive a motion for summary judgment is that 'which if believed, proves [the] existence of [a] fact in issue without inference or presumption.'" Ibid. (alterations in original) (emphasis omitted) (quoting Castle v. Sangamo Weston, Inc., 837 F.2d 1550,

1558 n.13 (11th Cir. 1988)). The employee must not only show that his or her employer "placed substantial negative reliance on an illegitimate criterion" but also establish that the employee's age was the deciding factor in the adverse employment decision. Ibid. Moreover, the employee must demonstrate that there was "hostility toward members of the employee's class" in addition to a "direct causal connection between that hostility and the challenged employment decision." Ibid.

Here, plaintiff did not assert that he had direct evidence of age discrimination by Verizon. Instead, he argued that the circumstantial evidence in the motion record supported his claim that Security's investigation report was merely a pretext to disguise Verizon's true motive in terminating his employment. We review pretext cases under the construct developed by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05, 93 S. Ct. 1817, 1824-26, 36 L. Ed. 2d 668, 677-79 (1973).

> That framework requires the plaintiff to demonstrate a prima facie case of discrimination, following which the burden shifts to the defendant to demonstrate a legitimate business reason for the employment decision. If the employer does so, the burden shifts again and the plaintiff is required to demonstrate that the reason proffered is a mere pretext for discrimination.
>
> [Victor v. State, 203 N.J. 383, 408 n.9 (2010).]

To establish a prima facie case of discriminatory discharge on the basis of age, a plaintiff must demonstrate that he or she: (1) is in the protected class; (2) was performing the job at a level that met the employer's legitimate expectations; (3) was nevertheless discharged; and (4) was replaced with "a candidate sufficiently younger to permit an inference of age discrimination." Bergen Commercial Bank, supra, 157 N.J. at 210-13.

We agree with the Law Division judge's determination that plaintiff failed to meet the fourth prong of this test. When Verizon terminated plaintiff's employment, he was not replaced by a younger employee. Instead, his job duties were redistributed between the two remaining AOMs. The simple distribution of a terminated employee's work among existing employees, who may be younger, by itself, does not rise to the level of a prima facie showing that the discharge was because of age, and thus unlawful. See Young v. Hobart West Grp., 385 N.J. Super. 448, 459-60 (App. Div. 2005). Moreover, while one of the AOMs was thirty-four years old, the other was only four years younger than plaintiff. Thus, there is nothing in the circumstances of how plaintiff's job functions were handled after his termination from which a discriminatory animus can be inferred.

Nevertheless, assuming plaintiff established a prima facie case of age discrimination under the McDonnell Douglas construct, he did not carry his burden of demonstrating that Verizon's reason for terminating him was pretextual. To raise a genuine factual dispute as to whether an employer's facially legitimate employment action is a pretext for discrimination, a plaintiff may "show[] that (1) a discriminatory reason more likely motivated the employer than the employer's proffered legitimate reason, or (2) the defendant's proffered explanation is 'unworthy of credence.'" Maiorino v. Schering-Plough Corp., 302 N.J. Super. 323, 347 (App. Div.) (quoting Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256, 101 S. Ct. 1089, 1095, 67 L. Ed. 2d 207, 217 (1981)), certif. denied, 152 N.J. 189 (1997). On the other hand, a "plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent." Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994).

Verizon conducted a lengthy statewide investigation into how its AOMs and local managers were coding the technicians' time. When Verizon discovered that two managers who reported to plaintiff had improperly changed their technicians' time sheets,

Kuterka ordered plaintiff to send them strong disciplinary letters. However, plaintiff did not send the letters as instructed and misrepresented to Kuterka that he had done so. Plaintiff also threatened his managers' jobs if they did not meet their productivity goals and directed them to "get creative" with their records. These were clearly legitimate business reasons for terminating plaintiff's employment.

Plaintiff submitted no evidence from which a jury could determine that this months-long investigation was a pretext for age discrimination or that his age played any role in Verizon's decision. By itself, the fact that plaintiff was forty-nine years old is an insufficient basis to demonstrate that Verizon discriminated against him. Plaintiff argues that he was the oldest AOM who was disciplined. However, he was also the only AOM in the Hudson/Bergen District whose local managers all became subjects of the investigation due to the rampant coding discrepancies discovered in their records. Security also interviewed five local managers, who were as old or older than plaintiff, and who were not terminated.

Plaintiff argues that the Committee was aware of his age at the time the decision to terminate him was made because the Director of Human Resources prepared a chart listing the age, race, and gender of each of the interview subjects. However,

the director compiled this list after the Committee made its disciplinary decisions and did so in order to review the impact of the discipline on certain Equal Employment Opportunity categories.[2] Plaintiff also ignores the fact that the four members of the Committee were all within the protected class. Thus, a jury could not conclude from this evidence that the Committee based its decision concerning plaintiff on his age.

Plaintiff alleges that Kuterka treated the younger AOMs better than him, but he provided only hearsay accounts of such preferential treatment. In any event, there is nothing in the record to indicate that Kuterka, who was not a member of the Committee, was involved in the decision to terminate plaintiff. Plaintiff also argues that two former employees filed age discrimination suits against Verizon, thus demonstrating a possible motive or intent to discriminate against members of the protected class. However, one of these employees was terminated as a result of a reduction in force, rather than for misconduct. The other employee's law suit arose from the Committee's decision to terminate him based upon the findings of the Security report. The fact that a single, comparable law suit had been filed would not enable a jury to infer discrimination.

[2] At her deposition, the director testified that she found no impact.

Plaintiff's remaining arguments on this point consist of attacks on the manner in which Security conducted its investigation and the soundness of the findings it made. However, the LAD does not authorize courts to "second-guess" employers, their choice of "performance standards," or their assessments of whether employees satisfied them. Ditzel v. Univ. of Med. & Dentistry of N.J., 962 F. Supp. 595, 604 (D.N.J. 1997); Andersen v. Exxon Co., U.S.A., 89 N.J. 483, 496 (1982).

Finally, plaintiff argues that the judge should have suppressed the Security report because the investigators destroyed their notes after interviewing the subjects. In the alternative, plaintiff argues that "[b]y destroying their handwritten notes, [Verizon's] Security investigators spoliated relevant evidence that would have created an inference in favor of [plaintiff] that he was not responsible for any time sheet cheating." This argument lacks merit.

A spoliation claim arises when a party in a civil action has hidden, destroyed, or lost relevant evidence and thereby impaired another party's ability to prosecute or defend the action. Rosenblit v. Zimmerman, 166 N.J. 391, 400-01 (2001); Manorcare Health Servs., Inc. v. Osmose Wood Pres., Inc., 336 N.J. Super. 218, 226 (App. Div. 2001). As the Supreme Court held in Rosenblit, where the party seeking the discovery

ultimately receives it, either from the recalcitrant party or from another available source, a spoliation order or inference is not appropriate. Rosenblit, supra, 166 N.J. at 411.

Here, the Security investigators destroyed their notes after completing and documenting each interview in the MOI. However, as the Law Division judge found, each of plaintiff's local managers gave handwritten statements as part of the interviews. These statements were appended to the MOI for each employee. In addition, the employees were all available for deposition. Under these circumstances, we discern no basis for disturbing the judge's rejection of plaintiff's spoliation claim.

In sum, we conclude that plaintiff proffered no evidence, direct or circumstantial, from which it could be inferred that a discriminatory reason was more likely than not a substantial factor in Verizon's decision to terminate his employment. A reasonable factfinder, viewing the competent evidential materials in a light most favorable to plaintiff, could not have ruled in his favor. Accordingly, summary judgment dismissing plaintiff's complaint was properly entered.

Affirmed.