

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2526-15T4

CARL E. LARSON,

Plaintiff-Appellant,

v.

CITY OF PATERSON, a Corporate
Body Politic of the State of
New Jersey,

Defendant-Respondent.

Argued September 18, 2017 – Decided October 26, 2017

Before Judges Messano and Vernoia.

On appeal from the Superior Court of New
Jersey, Law Division, Passaic County, Docket
No. L-4092-13.

Edward J. Nolan argued the cause for
appellant.

Jeffrey A. Kopco argued the cause for
respondent (Gordon & Rees, LLP, attorneys;
Elizabeth F. Lorell and Mr. Kopco, of counsel
and on the brief).

PER CURIAM

Plaintiff Carl E. Larson, a firefighter formerly employed by
defendant City of Paterson, appeals from an order granting summary

judgment to defendant and dismissing his complaint alleging retaliatory discharge for filing workers' compensation claims and age discrimination in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -42. Based on our review of the record under the applicable law, we affirm the dismissal of plaintiff's LAD claim, reverse the dismissal of his retaliatory discharge claim and remand for further proceedings.

I.

In our review of the record before the trial court, we accept the facts and all reasonable inferences therefrom in the light most favorable to plaintiff because he is the party against whom summary judgment was entered. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Applying that standard, the record before the trial court established the following facts.¹

¹ We are not persuaded by defendant's contention that there are no material facts in dispute because plaintiff's opposition to defendant's statement of material facts was unsupported by citations to the motion record. See R. 4:46-2(b). Although plaintiff's responses to each of defendant's separate statements of material fact did not include citations to the record, plaintiff's opposition was supported by an affidavit submitted in accordance with Rule 4:46-5(a), and included a counterstatement of material facts supported by citations to the motion record. See ibid. We accept plaintiff's version of the facts and all reasonable inferences that can be reasonably drawn from them in our consideration of the motion court's granting of defendant's summary judgment motion.

Plaintiff was employed by Paterson as a firefighter from 1987 until 2013. From 2007 through the termination of his employment in 2013, he held the title of a fire captain.

In 2010 and 2011, plaintiff filed for workers' compensation benefits for separate work-related injuries, but continued working until February 2013.

In 2008, plaintiff underwent a surgical procedure for a work-related neck injury. Following one month of recuperation, in December 2008, plaintiff was medically cleared to return to work and resumed his full-time work duties.

In March 2010, plaintiff sustained ligament damage to his left ankle while exiting a fire truck. Two months later, he returned to work without any medical restrictions.

Plaintiff filed workers' compensation claims related to his neck and ankle injuries in 2010 and 2011, respectively. At a February 13, 2013 meeting, the Paterson City Council adopted a resolution authorizing a settlement of plaintiff's workers' compensation claims for \$105,876. Fire Chief Michael Postorino and Fire Director Glenn Brown attended the city council meeting.²

² The settlement was approved by the workers' compensation court on April 2, 2013.

During the weeks following defendant's approval of the workers' compensation claims, plaintiff missed two workdays due to a non-work related back injury. While at home, he received a call from Deputy Chief Bruce Vandervoort, who informed plaintiff he needed to speak with Captain Michael Trommelon regarding a fitness-for-duty physical examination. Plaintiff immediately advised Trommelon he was ready for the physical. In response, Trommelon explained that Postorino said plaintiff was to remain off-duty. Trommelon told plaintiff to call back in a couple days.

A few days later, plaintiff again informed Trommelon he was ready for his fitness-for-duty physical. Trommelon told plaintiff that Postorino said plaintiff should remain off-duty until plaintiff heard from him.

Plaintiff then spoke with his union representative, Captain Michael Caposella, who said that due to the amount of plaintiff's compensation award and his medical report defendant was "looking to terminate [plaintiff]." Caposella advised plaintiff to arrange a meeting with Postorino.

In mid-March 2013, plaintiff met with Postorino, Deputy Chief Kevin Hancock, and Caposella. Postorino first asked plaintiff if he was wearing a recording device and plaintiff said he was not. Postorino said that if plaintiff was wearing a recording device, the meeting was over. Postorino then directly addressed

plaintiff's workers' compensation claim. Postorino said that due to plaintiff's compensation award and his medical reports, "the legal department felt [plaintiff] was a liability and therefore decided to terminate [him]." He also told plaintiff that the "city council thought [plaintiff] was so disabled or [plaintiff] worked with [his] doctors to defraud the city."

Plaintiff explained that he did not want to retire, and Postorino said, "Well, if you are telling me you are not disabled and you come back to work you are suspended without pay." Postorino also said that if plaintiff fought defendant's decision, plaintiff could go one or two years without a paycheck, and spend \$200 an hour on attorney's fees. Postorino explained that if plaintiff retired effective April 1, Postorino would keep plaintiff on administrative leave, but that if the retirement was delayed until May 1, plaintiff would be required to use administrative leave days thereby adversely affecting his terminal leave payment of \$10,000.

Plaintiff was forty-nine years of age and felt he had "no choice" but to retire because he would have been suspended without pay if he failed to do so. Postorino never said plaintiff was too old to continue working as a firefighter. Plaintiff submitted his retirement application the following day.

Plaintiff filed a complaint alleging defendant forced him to retire in retaliation for his assertion of his rights under the Workers' Compensation Act, N.J.S.A. 34:15-1 to -142, (count one), and because of his age in violation of the LAD (count two).³ After the close of discovery, the court granted defendant's motion for summary judgment and dismissed the complaint with prejudice.

In a written opinion, the court first found plaintiff's retaliatory discharge claim was barred under N.J.S.A. 10:5-27 because plaintiff sought a remedy available under the LAD. The court further found it lacked jurisdiction over plaintiff's age discrimination claim because N.J.S.A. 10:5-12.1 requires that forced retirement claims be filed exclusively with the Attorney General.⁴ The court further determined that even if it had

³ Plaintiff's complaint also asserted causes of action for aiding and abetting discrimination in violation of the LAD (count three) and tortious interference with his employment rights (count four). Plaintiff did not oppose the dismissal of those claims in response to defendant's summary judgment motion, and does not challenge the dismissal of the claims on appeal. We therefore do not address those claims here.

⁴ Claims that are subject to the requirements of N.J.S.A. 10:5-12.1 must be filed with the "Attorney General under the provisions of" N.J.S.A. 10:5-1. The Director of the New Jersey Division on Civil Rights acts for the Attorney General and receives, investigates and conducts hearings on complaints alleging LAD violations. N.J.S.A. 10:5-8(d), (g); Passaic Daily News v. Blair, 63 N.J. 474, 483-84 (1973).

jurisdiction and plaintiff's claims⁵ were not otherwise barred, plaintiff failed to sustain his burden of showing he suffered an adverse employment action or was discharged. The court found there was insufficient evidence showing plaintiff was forced to retire and that defendant instituted proceedings to terminate plaintiff's employment.

The court entered an order granting defendant's motion for summary judgment and dismissing the complaint. This appeal followed.

II.

We review a trial court's grant of summary judgment de novo. Cypress Point Condo. Ass'n v. Adria Towers, L.L.C., 226 N.J. 403, 414 (2016). Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. R. 4:46-2(c). We must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are

⁵ It is unclear whether the court's finding that plaintiff failed to present evidence he was forced to retire is limited to its analysis of plaintiff's age discrimination claim. Although the court's discussion of the issue does not include an express reference to plaintiff's retaliatory discharge claim, we broadly read the court's opinion to apply to plaintiff's retaliatory discharge claim as well.

sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill, supra, 142 N.J. at 523.

In his complaint, plaintiff alleges defendant forced him to retire in retaliation for his filing of the 2010 and 2011 workers' compensation claims that were resolved in February 2013. The court granted defendant's motion for summary judgment and dismissed the claim for three reasons. First, the court determined it lacked jurisdiction to adjudicate plaintiff's retaliatory discharge claim under N.J.S.A. 10:5-12.1. Second, the court also concluded plaintiff's common law retaliatory discharge claim was preempted by the LAD. Third, the court found that even it had jurisdiction and the claim was not preempted by the LAD, plaintiff failed to demonstrate that he suffered an adverse employment action. We address the court's findings in turn.

A. Jurisdiction

N.J.S.A. 10:5-12.1 states:

Notwithstanding any provision of law to the contrary, relief for having been required to retire in violation of the provisions of [N.J.S.A. 10:5-12], shall be available to the person aggrieved by that violation solely through the procedure initiated by filing a complaint with the Attorney General under the provisions of [the LAD].

Notwithstanding any provision to the contrary of [N.J.S.A. 10:5-17] or any other law, relief

ordered for or granted to a person in connection with his being required to retire in violation of the provisions of [N.J.S.A. 10:5-12] shall be limited to his reinstatement with back pay and interest.

[N.J.S.A. 10:5-12.1 (emphasis added).]

The court dismissed plaintiff's retaliatory discharge claim under N.J.S.A. 10:5-12.1 finding it lacked jurisdiction. The court reasoned that N.J.S.A. 10:5-12.1 permitted the assertion of a "required to retire" claim only "by filing a complaint with the Attorney General under the provisions of" the LAD. The court concluded the exclusive forum for plaintiff's retaliatory discharge claim was with the Attorney General. We disagree.

The court erred in its application of N.J.S.A. 10:5-12.1 because, by its express terms, the statute applies only to claims where an employee is "required to retire in violation of the provision of [N.J.S.A. 10:5-12]." Plaintiff's retaliatory discharge claim, however, is not based on an alleged violation of N.J.S.A. 10:5-12, and the statute does not prohibit discrimination or retaliation against an employee for asserting rights to workers' compensation benefits.⁶ Plaintiff alleges he was forced to retire

⁶ N.J.S.A. 10:5-12 prohibits employment discrimination

because of the race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status,

in retaliation for his assertion of rights under the Workers' Compensation Act, N.J.S.A. 34:15-1 to -142.

Plaintiff asserted a well-established common law cause of action unrelated to the LAD. In Lally v. Copygraphics, 85 N.J. 668, 677 (1981), the Court considered N.J.S.A. 34:15-39.1, which prohibits an employer from "discharg[ing] or in any other manner discriminat[ing] against an employee as to his employment because such employee has claimed or attempted to claim workmen's compensation benefits from such employer" The Court held "there exists a common law cause of action for civil redress for a retaliatory firing" under N.J.S.A. 34:15-39.1 for employees who are discriminated against or discharged for claiming or attempting to claim workers' compensation benefits. Id. at 670.

Plaintiff asserted a Lally common law cause of action for retaliatory discharge here. N.J.S.A. 10:5-12.1 did not deprive the court of jurisdiction because the claim is not based on an

affectional or sexual orientation, genetic information, pregnancy, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait of any individual, or because of the liability for service in the Armed Forces of the United States or the nationality of any individual, or because of the refusal to submit to a genetic test or make available the results of a genetic test to an employer

alleged violation of N.J.S.A. 10:5-12. The court erred in concluding otherwise.

B. Preemption

The court also erred by finding that plaintiff's common law retaliatory discharge claim was preempted by the LAD. The court concluded the cause of action sought a "remedy available under" the LAD and was therefore preempted under the LAD's exclusivity provision, N.J.S.A. 10:5-27, which provides that:

The provisions of [the LAD] shall be construed fairly and justly with due regard to the interests of all parties. Nothing contained in this act shall be deemed to repeal . . . any other law of this State relating to discrimination . . . except that, as to practices and acts declared unlawful by [N.J.S.A. 10:5-12] of this act, the procedure herein provided shall, while pending, be exclusive; and the final determination therein shall exclude any other action, civil or criminal, based on the same grievance of the individual concerned.

[N.J.S.A. 10:5-27.]

In making its determination, the court did not consider the nature of plaintiff's claim and the requirements of the LAD. To be sure, the LAD preempts common law claims "when a statutory remedy under the LAD exists." Catalane v. Gilian Instrument Corp., 271 N.J. Super. 476, 492 (App. Div. 1994). For example, in Catalane, we found "the plaintiff's common law claim that he was

terminated because of his age in violation of public policy" should have been dismissed because it was preempted by the LAD. Ibid.

The LAD is "intended to increase the choice of remedies for victims of discrimination." Wilson v. Wal-Mart Stores, 158 N.J. 263, 270-71 (1999). Its exclusivity provision, N.J.S.A. 10:5-27, "basically seeks to prevent parties from having a 'second bite at the apple' by pursuing the alternative route to relief." Id. at 271 (citation omitted). "It seeks to prevent duplication of efforts and forum shopping." Ibid.

"The LAD does not 'bar, exclude or otherwise affect any right or action, civil or criminal, which may exist independently of any right to redress against or specific relief from any unlawful employment practice or unlawful discrimination.'" Dale v. Boy Scouts of Am., 308 N.J. Super. 516, 542 (App. Div. 1998) (quoting N.J.S.A. 10:5-27), aff'd, 160 N.J. 562 (1999), rev'd on other grounds, 530 U.S. 640, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000). "[A]ll remedies available in common law tort actions [are] available to prevailing plaintiffs. These remedies are in addition to any provided by [the LAD] or any other statute." Ibid. (quoting N.J.S.A. 10:5-13). The LAD does not preempt actions "to vindicate particular interests in addition to or aside from those sought to be protected by a LAD action," such as common law claims for discharge in retaliation for filing workers' compensations

claims under Lally. Shaner v. Horizon Bancorp, 116 N.J. 433, 454 (1989).

Here, plaintiff has not asserted a common law cause of action for discrimination in employment and does seek a remedy existing under the LAD. See Catalane, supra, 271 N.J. Super. at 492. Plaintiff asserts a common law claim based on an alleged violation of N.J.S.A. 34:15-39.1, not the LAD. The court therefore erred in finding the retaliatory discharge claim is preempted by the LAD, and by granting defendant's motion for summary judgment dismissing the claim on that basis. Shaner, supra, 116 N.J. at 454; Dale, supra, 308 N.J. Super. at 542.

C. Adverse Employment Action

The court also addressed the merits of the retaliatory discharge claim, finding that even if it had jurisdiction and the claim was not preempted by the LAD, there were no disputed issues of material fact and plaintiff failed to present evidence sufficient to support the claim as a matter of law. Based on our review of the record, we are convinced the court erred in its assessment of the evidence and incorrectly based its conclusion on disputed issues of material fact.

In determining whether there is a genuine issue of material fact precluding the grant of summary judgment, a court must 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 factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill, supra, 142 N.J. at 540. Although we do not owe the motion court's conclusions any deference, Nicholas v. Mynster, 213 N.J. 463, 478 (2013), we should affirm a judgment if we determine the motion court's conclusions of law were correct. Henry v. N.J. Dept. of Human Servs., 204 N.J. 320, 330 (2010).

It is not the court's function to "weigh the evidence and determine the outcome" based on contested factual evidence presented by the parties. Gilhooley v. Cnty. of Union, 164 N.J. 533, 545 (2000) (citing Brill, supra, 142 N.J. at 540). It is the jury's role to decide all genuine issues of material fact in dispute between the parties. Parks v. Rogers, 176 N.J. 491, 502 (2003). A judge may "decide that a party should prevail as a matter of law" only "when the evidence is utterly one-sided" Gilhooley, supra, 164 N.J. at 545. Applying these standards, we are satisfied that there were genuine issues of material fact surrounding the termination of plaintiff's employment and, therefore, the judge mistakenly granted defendant's motion dismissing the retaliatory discharge cause of action.

To establish a prima facie case for retaliatory discharge for claiming workers' compensation benefits, an employee must prove: "(1) that he made or attempted to make a claim for workers' compensation; and (2) that he was discharged in retaliation for making that claim." Cerracchio v. Alden Leeds, Inc., 223 N.J. Super. 435, 442-43 (App. Div. 1988) (quoting Galante v. Sandoz, Inc., 192 N.J. Super. 403, 407 (Law Div. 1983), aff'd, 196 N.J. Super. 568 (App. Div. 1984)). Here, there is no dispute plaintiff made workers' compensation claims and his employment was subsequently terminated. Thus, the issue presented on defendant's motion for summary judgment was whether plaintiff presented sufficient evidence showing he was discharged in retaliation for making the workers' compensation claims.

Plaintiff does not allege that defendant directly terminated his employment. Instead, his complaint alleges defendant's purported retaliatory actions compelled his decision to retire. We read the complaint to allege that plaintiff was constructively discharged. A constructive discharge occurs when an employer engages in "severe or pervasive" conduct that is "so intolerable . . . a reasonable person would be forced to resign rather than continue to endure it." Shepherd v. Hunterdon Developmental Ctr., 174 N.J. 1, 28 (2002) (quoting Jones v. Aluminum Shapes, Inc., 339 N.J. Super. 412, 428 (App. Div. 2001)). "[T]he standard envisions

a 'sense of outrageous, coercive and unconscionable requirements.'" Ibid. (citation omitted). The heightened standard demanded for proof of a constructive discharge claim recognizes an employee's "obligation to do what is necessary and reasonable to remain employed rather than" resign or retire. Ibid. (quoting Shepherd v. Hunterdon Developmental Center, 336 N.J. Super. 395, 420 (App. Div. 2001), rev'd on other grounds, 174 N.J. 1 (2002)). The proofs required to establish a constructive discharge are not subjective in nature, but are instead objective, i.e. whether a "reasonable person" would have resigned. See ibid.; see also Muench v. Township of Haddon, 255 N.J. Super. 288, 302 (App. Div. 1992).

Here the court did not directly assess plaintiff's claim under the constructive discharge standard.⁷ Instead, the court implicitly applied the standard because it concluded plaintiff was not forced to retire and therefore was not subject to any adverse employment action for filing his workers' compensation claims.

⁷ We reject defendant's contention that plaintiff did not claim before the motion court that he was constructively discharged. Although plaintiff did not characterize the termination of his employment as a "constructive discharge" before the motion court, his complaint and his brief in opposition to defendant's summary judgment motion assert that defendant's alleged retaliatory actions forced him to retire. Those allegations constitute a constructive discharge claim. See Shepherd, supra, 174 N.J. at 28.

In our review of the record, we consider plaintiff's retaliation claim to determine if there was evidence showing he was constructively discharged sufficient to require submission of the issue to the jury. Determining if an employee suffered a "[c]onstructive discharge is a 'heavily fact-driven determination'" Ibid.

In Shepherd, the Court observed that in assessing whether an employee claiming harassment was constructively discharged, a "trial court should consider the nature of the harassment, the closeness of the working relationship between the harasser and the victim, whether the employee resorted to internal grievance procedures, the responsiveness of the employer to the employee's complaints, and all other relevant circumstances." Shepherd, supra, 174 N.J. at 28 (quoting Shepherd, supra, 336 N.J. Super. at 420). Other courts that have required to determine if an employee's resignation was the result of a constructive discharge have considered factors "including whether the employee was threatened with discharge, encouraged to resign, demoted, subject to reduced pay or benefits, involuntarily transferred to a less desirable position, subject to altered job responsibilities, or given unsatisfactory job evaluations." See, e.g., Mandel v. M&Q Packaging Corp., 706 F.3d 157, 169-70 (3d Cir. 2013); accord

Colwell v. Rite Aid Corp., 602 F.3d 495, 502-503 (3d Cir. 2010); see also Embirco v. U.S. Steel Corp., 404 F. Supp. 2d 802, 821-22 (E.D. Pa. 205) (finding evidence showing that employee had been excluded from training, suffered an unexpected reduction in his performance evaluation and supervisor's recommendation that he accept an early retirement program was sufficient to support a constructive discharge claim), aff'd, 245 Fed. App'x. 184 (3d Cir. 2007).

Here, the motion court found plaintiff did not present "evidence that he was forced to resign." The court further found plaintiff's "mere statement" he was forced to resign "is not probative in light of [his] request for retirement papers and . . . Caposela's deposition testimony" that termination proceedings under the union contract had not begun when plaintiff retired. The court reasoned that because there was evidence showing defendant could have taken action to challenge a termination or suspension without pay, a rational fact-finder could not conclude he was forced to retire.

In making its findings, the court mistakenly failed to consider all of the evidence, made credibility determinations, and relied on disputed material facts. Contrary to the court's finding, there was evidence plaintiff was forced to retire. Plaintiff testified he was capable of performing his duties, and

he had been fully performing his duties for the five-year period following his 2008 surgery and prior to the 2013 settlement of the workers' compensation cases. He twice requested a fitness for duty examination to demonstrate his ability to perform his duties following the workers' compensation settlement. Nevertheless, according to plaintiff, Postorino said defendant decided to terminate plaintiff's employment because of plaintiff's workers' compensation claims.

According to plaintiff, Postorino also said that if plaintiff was not disabled and returned to work, plaintiff would be "suspended without pay." Postorino threatened that if plaintiff fought the City's decision, plaintiff "could be out [of work] one to two years without a paycheck" and paying "\$200 an hour for attorney's fees."

Moreover, plaintiff testified Postorino said that if plaintiff did not retire by April 1, 2013, Postorino would remove plaintiff from administrative leave and force him to use accumulated leave time. That action would have reduced plaintiff's \$10,000 terminal leave payment.

Plaintiff testified that Postorino left him with "no choice" because he had a family to support and bills to pay. Plaintiff testified that in response to Postorino's statements and threatened actions, he chose to retire.

Postorino and other witnesses dispute plaintiff's version of Postorino's statements and the other circumstances leading to plaintiff's retirement. But the court was required to accept plaintiff's version of the facts as true. Brill, supra, 142 N.J. at 535. Instead, the court mistakenly discounted plaintiff's version of the events and resolved the credibility disputes in defendant's favor. See Rogers, supra, 176 N.J. at 503 (finding summary judgment should be denied when resolution of material issues of fact are dependent on credibility determinations).

Based on our review of the record, and viewing the evidence in the light most favorable to plaintiff, we are convinced a reasonable trier of fact could conclude that plaintiff was constructively discharged and forced to retire. The evidence showed Postorino refused to permit plaintiff to take a fitness-for-duty exam thereby foreclosing plaintiff's opportunity to demonstrate that he was capable of performing his duties. Postorino told plaintiff that defendant made a decision to terminate his employment. Postorino further advised plaintiff that if he attempted to return to work, he would be suspended without pay as he pursued any legal remedies. Postorino also encouraged plaintiff's retirement and discouraged plaintiff's if he retired by April 1, 2013.

By any objective measure, defendant presented plaintiff with an objectively coercive and intolerable choice: retire or face immediate termination or a suspension without pay. Postorino's statements and threats to plaintiff created circumstances "so intolerable that a reasonable person would be forced to resign rather than continue to endure" them. Shepherd, supra, 174 N.J. at 28.

We are not persuaded by defendant's argument that plaintiff was not constructively discharged because defendant did not commence formal proceedings to effectuate his termination and there were available means to challenge a suspension or termination. We are mindful that an employee claiming a constructive discharge must do "what is necessary and reasonable in order to remain employed rather than simply quit." Shepherd, supra, 174 N.J. at 28.

But here, Postorino said the termination decision was already made and, thus, there was nothing plaintiff could reasonably do to remain employed rather than retire. Moreover, Postorino said that if plaintiff attempted to continue to work, he would be suspended without pay during the period any challenge to the

suspension was waged.⁸ Postorino threatened that if plaintiff attempted to return to work he would be forced to live for years without a paycheck. Therefore, it was defendant, through its Fire Chief, that rendered recourse to any available means to challenge a suspension a wholly unreasonable option for plaintiff. Under all of the circumstances, we are convinced defendant did not present plaintiff with any reasonable alternative to an immediate retirement and thereby coerced him into doing so. The evidence presented, therefore, was sufficient to permit a rational factfinder to conclude that plaintiff was constructively discharged.

In sum, we conclude the court had jurisdiction over plaintiff's retaliatory discharge claim, the claim is not preempted by the LAD, and plaintiff presented sufficient evidence showing he suffered an adverse employment action, a constructive discharge, for submission of those issues to a jury. We reverse the court's grant of summary judgment to defendant on count one of the complaint.

⁸ We observe that Postorino statements appear to conflict. He told plaintiff that defendant decided to terminate his employment and, on the other hand, said that if plaintiff attempted to return to work he would be suspended without pay. Resolution of the conflict is unnecessary. In our view, the conflicting statements, when viewed in the light most favorable to plaintiff, support the reasonable inference that Postorino made clear that plaintiff would no longer be permitted to work for defendant and would not receive any future pay from defendant.

III.

Plaintiff next challenges the court's dismissal of his cause of action alleging he was forced to retire because of his age in violation of the LAD. The court dismissed the claim finding that it lacked jurisdiction over the claim under N.J.S.A. 10:5-21, and that plaintiff failed to present any evidence showing defendant forced plaintiff to retire because of his age. The court also found plaintiff could not establish an age discrimination claim because he did not suffer an adverse employment action.

N.J.S.A. 10:5-12 prohibits employment discrimination based on an employee's age. In pertinent part, N.J.S.A. 10:5-12 provides as follows:

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, unless justified by lawful considerations other than age, from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

[See also N.J.S.A. 10:5-4.]

"All LAD claims are evaluated in accordance with the United States Supreme Court's burden-shifting mechanism" established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817,

36 L. Ed. 2d 668 (1973).⁹ Battaqlia v. United Parcel Serv., Inc., 214 N.J. 518, 546 (2013); accord Victor v. State, 203 N.J. 383, 408 (2010). A plaintiff claiming age discrimination must first present evidence establishing a prima facie case of discrimination by showing age played a determinative role in the adverse employment action. Bergen Commer. Bank v. Sisler, 157 N.J. 188, 212-13 (1999). Upon plaintiff's demonstration of a prima facie case, the burden shifts to the employer to articulate a legitimate non-discriminatory reason for the adverse employment action. Id. at 210-11.

"In order to successfully assert a prima facie claim of age discrimination under the LAD, plaintiff must show that: (1) [he] was a member of a protected group; (2) [his] job performance met the 'employer's legitimate expectations'; (3) [he] was terminated; and (4) the employer replaced, or sought to replace, [him]." Nini v. Mercer Cty. Cmty. Coll., 406 N.J. Super. 547, 554-58 (App. Div. 2009) (quoting Zive v. Stanley Roberts, Inc., 182 N.J. 436, 450 (2005)), aff'd, 202 N.J. 98 (2010). Satisfaction of the fourth element "require[s] a showing that the plaintiff was replaced with

⁹ In cases where there is direct evidence of discrimination, the McDonnell Douglas burden-shifting analysis is not applicable. See Smith v. Millville Rescue Squad, 225 N.J. 373, 394-96 (2016) (explaining differing analyses required of discrimination claims based on direct and circumstantial evidence). Plaintiff does not offer any direct evidence of age discrimination here.

'a candidate sufficiently younger to permit an inference of age discrimination,'" Sisler, supra, 157 N.J. at 213 (quoting Kelly v. Bally's Grand, Inc., 285 N.J. Super. 422, 429 (App. Div. 1995)), or that otherwise creates an inference of age discrimination, Reynolds v. Palnut Co., 330 N.J. Super. 162, 168-69 (App. Div. 2000).

A plaintiff 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." Garnes v. Passaic Cty., 437 N.J. Super. 520, 530 (App. Div. 2014) (quoting Bergen Commer. Bank, supra, 157 N.J. at 207). "Although the discrimination must be intentional, an employee may attempt to prove employment discrimination by using either direct or circumstantial evidence." Ibid. (quoting Bergen Commer. Bank, supra, 157 N.J. at 208).

The court correctly dismissed plaintiff's age discrimination claim because he failed to establish prima facie case of age discrimination. The record is devoid of any evidence that he "was replaced with 'a candidate sufficiently younger,'" Nini, supra, 406 N.J. Super. at 554, or that otherwise permits an inference of age discrimination. Reynolds, supra, 330 N.J. Super. at 168-69. In opposition to defendant's motion, plaintiff did not present any evidence showing that his age played a role in any of defendant's

actions that caused him to retire. In contrast, plaintiff presented evidence showing only that he was forced to retire in retaliation for filing workers' compensation claims. We therefore affirm the court's dismissal of plaintiff's age discrimination claim.

Because we are satisfied plaintiff failed to present any evidence showing he was required to retire because of his age, it is unnecessary to decide if the court correctly determined that N.J.S.A. 10:5-12.1 vests exclusive jurisdiction over the claim with the New Jersey Division on Civil Rights. We offer no opinion on the issue.¹⁰

Last, we reject plaintiff's contention that the court erred by dismissing his claim of discrimination based on perceived disability. The court did not dismiss a perceived disability claim because plaintiff's complaint does not allege a cause of action for discrimination based on a perceived disability.

Affirmed in part, reversed in part. We do not retain jurisdiction.

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


CLERK OF THE APPELLATE DIVISION

¹⁰ It is also unnecessary to again consider plaintiff's argument that the court erred by finding that he did not suffer an adverse employment action. As noted, viewing the evidence in the light most favorable to plaintiff, he demonstrated that he was constructively discharged by being forced to retire. Plaintiff's age discrimination claim fails because he did not to present any evidence the constructive discharge was because of his age.