SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5072-15T2

KAREN MURPHY,

Plaintiff-Appellant,

v.

MOUNTAIN CREEK RESORT, INC., CRYSTAL SPRINGS RESORT, INC., LINDSEY SPASOVA, JENNIFER KUCHARIK and LYNELLE SENSBACH,

Defendants-Respondents.

Argued November 28, 2017 - Decided December 18, 2017

Before Judges Carroll and Mawla.

On appeal from Superior Court of New Jersey, Law Division, Sussex County, Docket No. L-0090-14.

Michael F. Rehill argued the cause for appellant (Michael F. Rehill, attorney; Michael F. Rehill and Lane Biviano, of counsel and on the briefs).

Stefani C. Schwartz argued the cause for respondents (Schwartz Simon Edelstein & Celso, LLC, attorneys; Stefani C. Schwartz, of counsel and on the brief; Erica M. Clifford, on the brief).

PER CURIAM

Plaintiff Karen Murphy appeals from a January 28, 2016 order granting defendants summary judgment, and a June 10, 2016 order denying her motion for reconsideration. We affirm.

The following facts are taken from the record. Plaintiff was employed in the accounts payable department of defendant Mountain Creek Resort, Inc. (Mountain Creek) for sixteen years. She was terminated on December 11, 2012, after raising her voice at her supervisor when she learned she had been denied time off on Christmas Eve. Plaintiff was fifty-eight years old at the time.

After plaintiff was terminated, her supervisor, Lindsey Spasova, fulfilled her job duties. Thereafter, four individuals were hired, some of whom took over plaintiff's job assignment. When plaintiff learned of the hiring through former co-workers, she filed a complaint in the Law Division alleging age discrimination in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to 49, wrongful termination, hostile work environment, retaliation, and aiding and abetting discrimination against Mountain Creek, Crystal Springs Resort (Crystal Springs), and several individual employees. The complaint also alleged violation of the New Jersey Civil Rights Act (CRA), N.J.S.A. 10:6-1 to -2.

Defendants filed a motion for summary judgment, which the motion judge granted. The motion judge found plaintiff failed to

establish a prima facie case of age discrimination. He found plaintiff had no personal knowledge of the ages of the individuals who replaced her. The motion judge found plaintiff did not present evidence of a discriminatory motive or animus as plaintiff conceded none of the defendants had commented about or alluded to her age. He also found no basis for an aiding and abetting claim because there was no evidence any of the defendants encouraged or assisted in wrongful discriminatory conduct.

The motion judge found plaintiff could not sustain an LAD claim against Crystal Springs because she was employed by Mountain Creek, which was a separate entity. He found no prima facie case under the CRA because all defendants were private individuals or businesses, and were not acting under color of law or other governmental authority.

Plaintiff filed a motion for reconsideration. Her motion was heard by a different judge and it was denied. The judge found plaintiff had cited no new facts or law that were unavailable at the time the court heard the motion for summary judgment to warrant reconsideration. This appeal followed.

I.

Our review of an order granting summary judgment is de novo. Graziano v. Grant, 326 N.J. Super. 328, 338 (App. Div. 1999). "[W]e review the trial court's grant of summary judgment . . .

under the same standard as the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016). The court considers all of the evidence submitted "in the light most favorable to the non-moving party," and determines if the moving party is entitled to summary judgment as a matter of law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). The court may not weigh the evidence and determine the truth of the matter. Ibid. If the evidence presented "show[s] that there is no real material issue, then summary judgment should be granted." Walker v. Atl. Chrysler Plymouth, 216 N.J. Super. 255, 258 (App. Div. 1987) (citing Judson v. Peoples Bank and Tr. Co. of Westfield, 17 N.J. 67, 75 (1954)). "[C]onclusory and self-serving assertions by one of the parties are insufficient to overcome [summary judgment]." Puder v. Buechel, 183 N.J. 428, 440-41 (2005).

Motions for reconsideration are left to the discretion of the trial judge. Fusco v. Bd. of Educ., 349 N.J. Super. 455, 462 (App. Div. 2002); Marinelli v. Mitts & Merrill, 303 N.J. Super. 61, 77 (App. Div. 1997). "[W]here there is a denial of a motion for reconsideration, the standard . . . is 'abuse of discretion.'" Marinelli, 303 N.J. at 77 (quoting Cummings v. Bahr, 295 N.J. Super. 374, 389 (App. Div. 1996)).

II.

Plaintiff claims the trial court erred by determining she did not establish a prima facie case under the LAD because she could not know the age of the employees who replaced her. We disagree.

The LAD states it is an unlawful employment practice

> [f]or an employer, because of the . . . age . . . of any individual . . . to discharge . . . unless justified by lawful considerations other than age, from employment such individual or to discriminate against such individual . . . in terms, conditions or privileges of employment[.]
>
> [N.J.S.A. 10:5-12(a)].

To establish a prima facie case of discriminatory discharge based on age discrimination under the LAD plaintiff must establish she: (1) belongs to a protected class; (2) "was performing h[er] job [duties] at a level that met [the] employer's legitimate expectations"; (3) was nevertheless fired; and (4) "[the employer] sought someone to perform the same work after [s]he left." Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 597 (1988) (alteration in original) (quoting Loeb v. Textron, Inc., 500 F.2d 1003, 1014 (1st Cir. 1979)).

Once plaintiff establishes these four elements, the burden shifts to defendants to demonstrate a legitimate, non-discriminatory reason for her termination. Zive v. Stanley Roberts, Inc., 182 N.J. 436, 449 (2005). Then, "[i]f the employer

articulates a legitimate reason for its employment decision, the burden again shifts to the plaintiff to show that the employer's articulated reason was not the true motivating reason, but was merely a pretext to mask the discrimination." Kelly v. Bally's Grand, Inc., 285 N.J. Super. 422, 430 (App. Div. 1995).

The motion judge concluded plaintiff established the first three prongs under Clowes, 109 N.J. at 597, but failed to establish the fourth prong. "The fourth element of a prima facie case in an age-discrimination case properly focuses . . . on 'whether the plaintiff has established a logical reason to believe that the decision [for termination] rests on a legally forbidden ground.'" Bergen Commercial Bank v. Sisler, 157 N.J. 188, 213 (1999) (quoting Murphy v. Milwaukee Area Tech. Coll., 976 F. Supp. 1212, 1217 (E.D. Wis. 1997)). Therefore, plaintiff must demonstrate she "was replaced with a 'candidate sufficiently younger to permit an inference of age discrimination.'" Bergen, 157 N.J. at 213 (quoting Kelly, 285 N.J. Super. at 429).

Plaintiff claims she carried this burden by submitting her former supervisor Spasova's deposition testimony, which stated three younger employees had been hired to perform the work plaintiff had previously performed. Spasova testified:

> Q: After [plaintiff] was terminated, did you hire other employees to work in your office?

A: To work in the office, yes.

Q: Who did you hire?

A. Several people were hired. Lauren Przybylinski.

Q: What position was she hired for?

A: She was an AP [accounts payable] clerk for Crystal Springs Golf.

Q: Okay. And approximately what was her age, twenties? Thirties?

A: Twenties.

Q: Anybody else?

A: Brittany Garrett.

Q: And what position was she hired for?

A: An AP clerk.

Q: And what was her age bracket roughly?

A: Twenties.

. . . .

Q: Anybody else that you hired after [plaintiff] was terminated?

A: Gloria Mello. She came to us as a temp and was eventually hired on full.

. . . .

Q: Was there anyone else that was hired after [plaintiff] was terminated?

. . . .

A: Very soon — before I left, there was another clerk hired, Dana.

. . . .

Q: Approximately how old was she, what category?

A: Thirties, maybe forties.

We find no material evidence these individuals were hired to replace plaintiff. The deposition testimony offered by plaintiff demonstrates one of the hires was for Crystal Springs Golf, which was not plaintiff's employer. Furthermore, the limited deposition testimony relied upon by plaintiff does not offer any evidence these individuals were hired to replace her. Rather, the evidence demonstrates these individuals were hired sometime after plaintiff's employment ended.

Indeed, plaintiff testified at her deposition she was unaware if anyone had in fact replaced her. She believed her supervisor had taken over her duties. Moreover, plaintiff was unaware of the ages of any of the individuals who were hired after she left. Specifically, plaintiff testified as follows:

Q: It's your allegation after you were terminated you were replaced, correct?

A: Yes.

Q: Okay. Who replaced you?

A: I don't know . . . I don't know how to answer this question only because at first [my

> supervisor] I believe was kind of, like, filling in, you know, because they were down one person.

Therefore, the motion judge correctly concluded plaintiff failed to produce sufficient evidence she was replaced by a younger candidate to establish a logical inference of age discrimination.

This conclusion is also underscored by defendants proffering a legitimate, non-discriminatory reason for plaintiff's termination. Moreover, the record lacks evidence of a discriminatory motive for plaintiff's termination.

The Supreme Court has stated when considering an employer's grounds for termination courts should be conscious at-will employees may be fired "for any reason[,] or no reason[,] whatsoever, be it good cause, no cause, or even [a] morally wrong cause." Woolley v. Hoffmann-La Roche, 99 N.J. 284, 290 (1980). Once an employer has offered a legitimate reason for plaintiff's termination, the burden shifts back to plaintiff to "either (1) discred[it] the proffered reasons, . . . or (2) adduc[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, 761-62 (3d Cir. 1994)). Plaintiff must demonstrate the employer did not

act for the asserted non-discriminatory reasons by offering evidence, which discredits the employer. Ibid.

Here, the motion judge found:

> The event that gave rise to the alleged discrimination came from a discrepancy event between co-workers regarding certain days off from work due to the holidays. This event took place on December 11, 2012[,] and [p]laintiff was terminated later that day. According to the [p]laintiff, none of the [d]efendants ever commented to her about her age or ever alluded to [p]laintiff's age. This Court finds that there is nothing that would allow a rational factfinder to hold that [d]efendants' decision to terminate [p]laintiff was motivated in any way by discriminatory animus.

We agree with the motion judge's assessment. Plaintiff has offered no evidence that the reason for her termination was motivated by her age or any other discriminatory animus.

Plaintiff claims the motion judge erred by concluding she was not an employee of Crystal Springs. She claims Mountain Creek is wholly owned by Crystal Springs, and defendants Jennifer Kucharik, Lynelle Sensbach, and Lindsey Spasova were Crystal Springs employees. Plaintiff argues Mountain Creek's employee handbook references Crystal Springs, and the employee's signature page for acknowledging receipt of the handbook bears a Crystal Springs title. Plaintiff argues the motion judge failed to analyze the "overall economic realities" of the relationship between plaintiff

and Crystal Springs pursuant to Hoag v. Brown, 397 N.J. Super. 34 (App. Div. 2007).

In order to assert a claim for discrimination under the LAD plaintiff must make a claim against her employer. N.J.S.A. 10:5-12(a). Here, the motion judge concluded plaintiff's employer was Mountain Creek — not Crystal Springs. We agree there was ample evidence demonstrating Mountain Creek was plaintiff's employer.

Plaintiff testified at her deposition she was never employed by Crystal Springs. Specifically, she stated:

> Q: . . . Was there a time that you then became employed by Crystal Springs?
>
> A: I don't — I don't think I was ever employed by Crystal Springs.
>
> Q: Okay. So they were never your employer?
>
> A: I don't believe so.
>
> Q: Okay.
>
> A: I think I was always under Mountain Creek.

Moreover, plaintiff's reliance on Hoag is misguided because that case involved an employment dispute between an independent contractor and the State Department of Corrections. Hoag, 397 N.J. Super. at 48. We noted the relationship was "[i]n the context of an individual . . . who provides professional or specialized services" under a "non-traditional employment relationship." Id. at 47-48. Many of the factors we assessed in Hoag turned on the

nature of the plaintiff's employment as an independent contractor. Here, plaintiff was not an independent contractor and there were no circumstances surrounding plaintiff's employment that would render it non-traditional. As a result, Hoag is inapposite to plaintiff's case.

Plaintiff claims she adduced prima facie evidence defendants created a hostile work environment in which other employees aided and abetted Mountain Creek to discriminate against her. Plaintiff states her deposition testimony established instances of disparate treatment because the office environment was comprised of cliques of younger employees in which she was not included.

"[I]ndividual liability of a supervisor for acts of discrimination or for creating or maintaining a hostile environment can only arise through the 'aiding and abetting' mechanism that applies to 'any person.'" Cicchetti v. Morris Cty. Sheriff's Office, 194 N.J. 563, 594 (2008) (quoting N.J.S.A. 10:5-12(e)). Under the LAD, "aiding and abetting 'require[s] active and purposeful conduct.'" Id. (quoting Tarr v. Ciasulli, 181 N.J. 70, 83 (2004)). Therefore,

> in order to hold an employee liable as an aider or abettor, a plaintiff must show that "'(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the

> assistance; [and] (3) the defendant must knowingly and substantially assist the principal violation.'"
>
> [Id. (quoting Tarr, 181 N.J. at 84)].

As the motion judge concluded, plaintiff offered no evidence of conduct by any of the named defendants that would qualify as aiding and abetting. Plaintiff testified at her deposition none of the individual defendants ever made any comments about her age. Our review of the record demonstrates, aside from generalized statements by plaintiff that she felt targeted by the office cliques, there is no specific example of either a hostile work environment or aiding and abetting to support a prima facie showing of discrimination.

Plaintiff alleges she was discharged in retaliation for complaining to her supervisor about alleged disparate treatment. She claims her supervisor's denial of the requested time off for Christmas Eve was disparate treatment, and alleges defendants mischaracterized her reaction to the denial of her request as insubordination. She argues defendant's decision to terminate her by mischaracterizing her conduct was retaliation.

To demonstrate a prima facie case of retaliatory discharge plaintiff must establish: "(1) she was engaged in a protected activity known to the defendants; (2) she was thereafter subjected to an adverse employment decision; and (3) there was a causal link

between the two." Hughes v. Home Depot, Inc., 804 F. Supp. 2d 223, 227 (D.N.J. 2011) (quoting Reyes v. McDonald Pontiac GMC Truck, 497 F. Supp. 614, 619 (D.N.J. 1998). Here, plaintiff fails to establish a prima facie case for retaliation.

Plaintiff testified at deposition she yelled at her supervisor because she was frustrated that she had to work a half day on Christmas Eve. Plaintiff's testimony characterized her discussion with her supervisor as hostile. She stated: "yea maybe [other employees] thought I was being rude."

Plaintiff's outburst was not a formal grievance or complaint of discriminatory behavior, which would be protected under the LAD, but was a complaint regarding a denied holiday time request. See Reyes, 997 F. Supp. at 619 (holding plaintiff did not provide evidence of a protected act where she complained generally regarding workplace animosity and did not complain of the alleged discriminatory conduct). For these reasons, no prima facie evidence of retaliation was put forward by plaintiff. The order granting defendants summary judgment was appropriately granted.

III.

Lastly, plaintiff argues the motion judge who denied her motion for reconsideration erred, ostensibly, for the same reasons as the motion judge who denied summary judgment. We disagree.

Motions for reconsideration are granted in "those cases which fall into that narrow corridor in which either (1) the court has expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the court either did not consider, or failed to appreciate the significant of probative, competent evidence." Fusco, 349 N.J. Super. at 462 (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)). Motions for reconsideration should be granted only upon a showing of mistake of fact, law, or failure to thoroughly consider or understand the record. Ibid.

The judge who considered plaintiff's reconsideration motion concluded she failed to demonstrate there was a material dispute of fact that the judge who granted summary judgment had overlooked. The judge stated the denial of summary judgment "was not based upon 'palpably incorrect or irrational basis'" and "[p]laintiff supplies no additional probative evidence in this instant application to remedy the evidentiary failure in this matter."

On appeal, plaintiff broadly argues "it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence." As we have detailed above, plaintiff failed to demonstrate a prima facie cause of action for the claims asserted in her complaint. Because

we have determined summary judgment was appropriate, the reconsideration motion was also properly denied.

Affirmed.