SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0484-21

RALPH NUNEZ,

Plaintiff-Appellant,

v.

MIDDLESEX COUNTY COLLEGE,

Defendant-Respondent.

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Argued January 31, 2023 – Decided March 22, 2023

Before Judges Messano and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-5558-18.

Robert A. Ballard, III argued the cause for appellant (O'Connor, Parsons, Lane & Noble, LLC, attorneys; Gregory B. Noble and Robert A. Ballard, III, of counsel and on the briefs).

Nicole M. Grzeskowiak argued the cause for respondent (Hoagland, Longo, Moran, Dunst & Doukas, LLP, attorneys; Nicole M. Grzeskowiak, of counsel and on the brief).

PER CURIAM

Plaintiff Ralph Nunez began his employment in the Facilities Department of defendant Middlesex County College (the College) in September 1996. On September 1, 2017, plaintiff reported a work-related injury to his left shoulder and was on leave until April 11, 2018, when he was cleared medically to return to work without restrictions. On April 19, the College lodged a disciplinary complaint against him, charging plaintiff with "Working Elsewhere While on Workers['] Compensation, Theft, Falsification of College Records, Possession of a Controlled Dangerous Substance, and Violations of the Public Trust."

After a pre-termination hearing before the College's Director of Facilities Maintenance, and a grievance hearing pursuant to "Step 3" of the collective negotiations agreement (CNA) between the College and the Teamsters' Union, the College terminated plaintiff.

Plaintiff filed a complaint alleging the College violated New Jersey's Law Against Discrimination (LAD), N.J.S.A.10:5–1 to -42, and N.J.S.A. 34:15-39.1, the anti-retaliation provision of the Workers' Compensation Act (WCA). The College answered, discovery ensued, and the College moved for summary judgment, essentially contending that plaintiff had failed to demonstrate a prima

facie case of unlawful discrimination or retaliation and had been properly terminated for cause.

In a terse oral opinion that lacked any analysis of relevant precedent, the Law Division judge found "the termination . . . was not motivated by any retaliatory impulse . . . but by a finding [by the College] that their employee . . . had engaged in fraud." He granted the College's motion and dismissed plaintiff's complaint.

Before us, plaintiff argues the judge "fail[ed] to conduct any analysis" and "substitut[ed his] own opinion for that of the trier of fact." Plaintiff contends that applying proper summary judgment standards and relevant precedent, he established a prima facie case of discrimination under the LAD and WCA. We agree.

I.

We review de novo the grant of summary judgment to the College applying the same standard as the motion judge. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021) (citations omitted). That standard requires us to "determine whether '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.'" Ibid. (quoting R. 4:46-2(c)). "To decide whether a genuine issue of material fact exists, the trial court must 'draw[] all legitimate inferences from the facts in favor of the non-moving party.'" Friedman v. Martinez, 242 N.J. 449, 472 (2020) (alteration in original) (quoting Globe Motor Co. v. Igdalev, 225 N.J. 469, 480 (2016)). "The 'trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.'" Town of Kearny v. Brandt, 214 N.J. 76, 92 (2013) (quoting Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

"To analyze employment discrimination claims brought under the LAD, New Jersey has adopted the 'procedural burden-shifting methodology' set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04 (1973)." Meade v. Twp. of Livingston, 249 N.J. 310, 328 (2021) (quoting Zive v. Stanley Roberts, Inc., 182 N.J. 436, 447 (2005)). "All employment discrimination claims require the plaintiff to bear the burden of proving the elements of a prima facie case." Victor v. State, 203 N.J. 383, 408 (2010). "Significantly, '[t]he evidentiary burden at the prima facie stage is "rather modest: it is to demonstrate to the court that plaintiff's factual scenario is compatible with discriminatory intent—i.e., that discrimination could be a reason for the employer's action."'"

Meade, 249 N.J. at 329 (alteration in original) (quoting Zive, 182 N.J. at 447). But "there is no single prima facie case that applies to all discrimination claims. Instead, the prima facie elements of a claim vary depending upon the particular employment discrimination claim being made." Victor, 203 N.J. at 409–10.

"The establishment of the prima facie case creates an inference of discrimination, and, at that point, the matter moves to the second stage of McDonnell Douglas, when the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employer's action." Zive, 182 N.J. at 449 (first citing Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978); and then citing Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 596 (1988)). "When the employer produces evidence of legitimate, non-discriminatory reasons for the employment action it took, the presumption of unlawful discrimination disappears." Meade, 249 N.J. at 329 (citing Bergen Com. Bank v. Sisler, 157 N.J. 188, 211 (1999)). "Finally, '[i]n the third stage of the burden-shifting scheme,' the employee must 'prove by a preponderance of the evidence that the reason articulated by the employer was merely a pretext for discrimination and not the true reason for the employment decision.'" Ibid. (alteration in original) (quoting Zive, 182 N.J. at 449).

We now apply these principles, "limit[ing] our consideration as necessary to the motion record that existed" before the Law Division judge. Innes v. Marzano-Lesnevich, 435 N.J. Super. 198, 208 (App. Div. 2014) (citing Ji v. Palmer, 333 N.J. Super. 451, 463–64 (App. Div. 2000)), aff'd in part, modified in part, 224 N.J. 584 (2016).

II.

In his complaint, plaintiff alleged the College had violated the LAD by discriminating against him because of his disability, failing to accommodate his disability, and retaliating against him after he engaged in protected activity regarding his disability.[1]

In 2017 and 2018, plaintiff directed the College's electrical department and assisted with general maintenance throughout the institution. His supervisor's annual reviews indicated plaintiff's performance was generally "superior" or "commendable" and never less than "satisfactory."

[1] Plaintiff has failed to articulate the nature of his "perceived disability" cause of action under the LAD as pled in his complaint, and he did not brief the issue on appeal. N.J. Dep't of Env't Prot. v. Alloway Twp., 438 N.J. Super. 501, 505 n.2 (App. Div. 2015) ("An issue that is not briefed is deemed waived upon appeal." (citing Fantis Foods v. N. River Ins. Co., 332 N.J. Super. 250, 266–67 (App. Div. 2000))). We deem the issue waived and affirm dismissal of plaintiff's LAD claim based on any alleged perceived disability.

Plaintiff first injured his shoulder at work in July 2017 and was out for three days. On September 1, 2017, plaintiff again reported an injury to his shoulder that was initially diagnosed as a strain. The workers' compensation doctor cleared plaintiff to return to work with restrictions that he not lift more than twenty pounds or perform overhead work. Plaintiff underwent physical therapy until November without apparent relief and was subsequently diagnosed with a partial tendon tear, requiring surgery on his rotator cuff in January 2018. Plaintiff filed a workers' compensation claim petition in November 2017 and was on leave from September 1, 2017, to April 11, 2018, during which time he received temporary disability benefits from the College's insurance carrier, Qual-Lynx.

In late September 2017, the College asked Qual-Lynx to conduct surveillance on plaintiff based on reports from other workers claiming that plaintiff was doing "work on the side." It was undisputed that plaintiff was the principal of a company, RCN Home Improvements, LLC, since 2017 and was its sole employee. Investigators followed plaintiff for seventeen days and, in their report, stated he "was not observed engaging in any work-related activity or proceeding to any presumed place of employment" for sixteen of those days. On December 1, 2017, however, an investigative report indicated that

"[plaintiff] was observed arriving at a private residence . . . retrieving an unknown item from his vehicle and reentering the residence, which appeared to be under renovation."

Qual-Lynx closed its investigation in March 2018, deciding not to pursue the matter any further. See, e.g., N.J.S.A. 34:15-57.4(b) (permitting civil recovery of workers' compensation benefits paid as a result of fraudulent misrepresentations). On April 2, 2018, plaintiff underwent a functional capacity exam, and on April 10, the workers' compensation doctor discharged plaintiff from further treatment, clearing him to return to work without restrictions.

The College requested from Qual-Lynx all reports about and surveillance video of plaintiff and conducted a criminal background check on plaintiff. The pre-termination and Step 3 grievance hearings we referenced above followed. In his May 24, 2018 written decision issued after the grievance hearing, the College's Director of Labor Relations, James P. Kinney, determined that plaintiff had

> willfully withheld his criminal background on three occasions[:] the initial application of July 1996, when he was convicted in February of 1997 (just five months after being hired at the [C]ollege), and again in March 1999 when applying for a higher-level position. [Plaintiff] would never have been hired if the [C]ollege had knowledge of his past criminal convictions.

Kinney also determined that surveillance video from December 1, 2017, showed plaintiff "retriev[ing] tools and equipment from his work van . . . while in work boots, work clothes and then proceed[ing] to" a home plaintiff "acknowledged was under renovation." Kinney concluded plaintiff had falsified college records by failing to disclose his past "criminal convictions" and that plaintiff was working elsewhere while on Workers' Compensation.[2] Both were violations of the Teamsters' Union work rules and causes for dismissal.

The employment application form plaintiff completed in 1996 asked on its second page whether he had ever "been convicted of a crime." Plaintiff answered no. Plaintiff filed a second employment application when he sought a promotion in 1999; the copy in the record is undated and unsigned. On the first page of the application, plaintiff referred the reader to an attached resume; the second page is completely blank. Responding to the pre-termination hearing decision, plaintiff said that he was not required to complete the full application and, therefore, was not asked to reaffirm his lack of a criminal record when he applied for the promotion.

[2] Kinney also concluded that plaintiff had to reimburse the College for his failure to make healthcare contributions while he was on leave, but he did not assert that this was a basis for plaintiff's termination.

It is undisputed that plaintiff's convictions in July 1996 and February 1997 were for disorderly persons offenses, not crimes. See N.J.S.A. 2C:1-4(b)(1) (explaining that disorderly persons offenses are not crimes). The deposition testimony of College officials demonstrated their complete misunderstanding of the distinction.

Plaintiff was convicted of conspiracy to possess CDS, a crime, in 1997. And, although the use or possession of CDS was cause for dismissal under the work rules agreed on by the College and the Teamsters' Union, nothing in the College's policies or the CNA required an employee to self-report a criminal conviction. Donald Drost, the Executive Director of Facilities Management, testified at deposition that the College did not have any such policy or procedure.

College officials gave conflicting testimony at deposition regarding the initiation of surveillance of plaintiff while he was on leave. Certain emails, however, indicated the College, not Qual-Lynx, requested the investigation because of the frequency of plaintiff's workplace injuries—the record contains twenty-five workplace injury reports submitted during the course of his employment and plaintiff's three prior workers' compensation petitions filed in 2003 and 2004.

In his deposition, plaintiff acknowledged that he had performed some electrical work at the home he was seen entering on December 1, 2017, but only during the summer months before he was injured. In those portions of plaintiff's deposition that are in the appellate record, he was never asked about the surveillance footage.

James DeTata, the College's Director of Facilities Management, who served as the hearing officer at plaintiff's pre-termination hearing, testified at deposition that employees were not prohibited from doing outside work or owning a business. According to DeTata, an employee would not be violating the policy prohibiting working while on leave if he did no actual work for a business that he owned. Drost, who saw the December 1, 2017 video footage, testified at deposition that it did not show plaintiff using any tools.

III.

Turning to plaintiff's LAD causes of action,

> If the claim is based upon discriminatory discharge, the prima facie case is . . . plaintiff must demonstrate: (1) that plaintiff is in a protected class; (2) that plaintiff was otherwise qualified and performing the essential functions of the job; (3) that plaintiff was terminated; and (4) that the employer thereafter sought similarly qualified individuals for that job.
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> [Victor, 203 N.J. at 409 (citing Clowes, 109 N.J. at 596–97).]

For claims of disability discrimination, to satisfy the first two prongs, a plaintiff must show that he or she (1) "qualifies as an individual with a disability"; and (2) "is qualified to perform the essential functions of the job, or was performing those essential functions, either with or without a reasonable accommodation." Id. at 410.

> To establish a failure-to-accommodate claim under the LAD, a plaintiff must demonstrate that he or she (1) "qualifies as an individual with a disability . . . "; (2) "is qualified to perform the essential functions of the job, or was performing those essential functions, either with or without reasonable accommodations"; and (3) that defendant "failed to reasonably accommodate [his or her] disabilities."
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> [Royster v. N.J. State Police, 227 N.J. 482, 500 (2017) (alteration in original) (quoting Victor, 203 N.J. at 410).]

Lastly,

> [T]he prima facie elements of a retaliation claim under the LAD requires plaintiff to demonstrate that: (1) plaintiff was in a protected class; (2) plaintiff engaged in protected activity known to the employer; (3) plaintiff was thereafter subjected to an adverse employment consequence; and (4) that there is a causal link between the protected activity and the adverse employment consequence.
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> [Victor, 203 N.J. at 409 (citing Woods-Pirozzi v. Nabisco Foods, 290 N.J. Super. 252, 274 (App. Div. 1996)).]

The motion record presents sufficient evidence of a prima facie claim under all three LAD causes of action, although plaintiff's failure to accommodate claim is limited. Plaintiff contends he was cleared to return to work on light duty in October 2017, but the College refused. He claims that even though he was eventually cleared to return to work without restrictions in April 2018, he lost wages that he could have earned had he returned on light duty. The College contends that plaintiff never sought an accommodation and was eventually returned to full duty, but it fails to address this aspect of plaintiff's failure-to-accommodate claim.

An employer's obligation to accommodate an employee's disability is not without limits, and "the LAD provides that an employer may lawfully terminate a disabled employee if the disability precludes job performance." Grande v. Saint Clare's Health Sys., 230 N.J. 1, 23 (2017) (citing N.J.S.A. 10:5-4.1). While "the LAD does not require that an employer create an indefinite light duty position for a permanently disabled employee if the employee's disability . . . renders him otherwise unqualified for a full-time, full-duty position," Raspa v. Off. of Sheriff of Gloucester, 191 N.J. 323, 340 (2007), pursuant to the statute, "an employer may reasonably limit light duty assignments to those employees

whose disabilities are both temporary and not inconsistent with the duties of the light duty assignment." Id. at 341.

The record reveals the College understood plaintiff was cleared medically to return to work on light duty. Officials rejected that option, at least in part, because they believed plaintiff's return on light duty could foment more workplace injury claims. For purposes of defeating summary judgment, plaintiff produced sufficient evidence on the failure-to-accommodate claim limited to that period between when he was able to return to work on light duty and when he did return to work without restrictions.

The crux of the College's argument when it moved for summary judgment, repeated again in opposition to plaintiff's appeal, is that plaintiff was terminated for legitimate non-discriminatory reasons, specifically that he falsified his employment applications and worked elsewhere while on medical leave. Although the College may have carried its burden "to articulate a legitimate, nondiscriminatory reason for [its] action," Zive, 182 N.J. at 449 (citing Clowes, 109 N.J. at 596), the third stage of the burden shifting analysis requires consideration of plaintiff's proof that the stated reasons were pretextual. Ibid. (citing Clowes, 109 N.J. at 596).

"[A] plaintiff may defeat a motion for summary judgment 'by either (i) discrediting the proffered reasons, either circumstantially or directly, or (ii) adducing 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)). "A plaintiff 'must submit evidence that either casts sufficient doubt upon the employer's proffered legitimate reason so that a factfinder could reasonably conclude it was fabricated, or that allows the factfinder to infer that discrimination was more likely than not the motivating or determinative cause of the termination decision.'" Crisitello v. Saint Theresa Sch., 465 N.J. Super. 223, 240 (App. Div. 2020) (quoting El-Sioufi v. Saint Peter's Univ. Hosp., 382 N.J. Super. 145, 173 (App. Div. 2005)).

Here, providing plaintiff as we must with the favorable evidence and inferences in the motion record, he carried his burden for purposes of defeating summary judgment. As we explained, plaintiff had not been convicted of a crime when he applied for a position at the College in 1996, so his answer on the application form was truthful. The College has not demonstrated plaintiff was obligated to notify it of his later disorderly persons or criminal convictions.

Based on the record before us, there are disputed material facts whether plaintiff was working at another location while on leave. Although he was surveilled for seventeen days, plaintiff was seen only once carrying tools from his van into a house under renovation. The investigators never saw plaintiff return to the house again. The proofs are not "so one-sided that [the College] must prevail as a matter of law." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 536 (1995) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251–52 (1986)).

We reverse the order granting the College summary judgment on plaintiff's LAD claims and remand the matter for trial on plaintiff's allegations of disability discrimination, failure to accommodate and retaliation. We affirm dismissal of plaintiff's LAD cause of action based on a perceived disability.

IV.

"The essential elements of a claim under N.J.S.A. 34:15-39.1 require . . . proof: '(1) that [plaintiff] made or attempted to make a claim for workers' compensation; and (2) that he was discharged in retaliation for making that claim.'" Hejda v. Bell Container Corp., 450 N.J. Super. 173, 192 (App. Div. 2017) (quoting Cerracchio v. Alden Leeds, Inc., 223 N.J. Super. 435, 442–43 (App. Div. 1988)). Like the arguments made to sustain his LAD retaliation

claim, plaintiff contends that in direct response to his workers' compensation claim, the College took a series of steps that ultimately led to his termination. The College reiterates plaintiff was fired for violations of its policies and procedures, and there was no causal relationship between plaintiff's workers' compensation claim and his termination.

The record discloses numerous actions by College officials that would allow a reasonable factfinder to find a requisite nexus. The College's Human Resources Department cast doubt on plaintiff's medical condition shortly after the September 2017 injury, going so far as to cancel plaintiff's appointment with one doctor and directing him to another who the College thought was "direct and to the point — no nonsense[,]" and who "easily recognize[d] malingering and symptom magnification." Human Resources also "advised the doctor, in strictest confidence, of the allegations of claimant working while on disability and operati[ng a] . . . motorcycle."

In April 2018, after plaintiff's functional capacity test had been administered, Qual-Lynx notified the College: "Unfortunately [plaintiff] did extremely well and passed the [Return to Work Full Duty]." Human Resources responded, proposing that plaintiff be sent for "safety training" and "sign a letter stating the amount of [workers' compensation claims] he has filed with us and

our concern for his safety." Human Resources asked Qual-Lynx: "Have you ever seen an employer do this with employees that have constantly [f]iled claims?"

We have held in similar circumstances that other plaintiffs demonstrated a prima facie case pursuant to N.J.S.A. 34:15-39.1 enabling them to survive summary judgment. See, e.g., Carter v. AFG Indus. Inc., 344 N.J. Super. 549, 557–58 (App. Div. 2001) (reversing grant of summary judgment where employee was discharged for missing a medical appointment for a job-related injury even though he was back to work full time); Cerrachio, 223 N.J. Super at 443 (concluding that the "[p]laintiff's evidence as to how [his employer] treated him after his accident, including the reference to his 'cases' and the statement that he would still be working if he was not a 'troublemaker' . . . could sustain a judgment that he was fired for filing the . . . claim").

We affirm dismissal of plaintiff's LAD discrimination claim based on a perceived disability. In all other respects, we reverse the order under review and remand to the Law Division for further proceedings consistent with this opinion.

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