SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2697-21

PETER KALLOO,

Plaintiff-Appellant,

v.

NEW YORK NEW JERSEY RAIL, LLC,

Defendant-Respondent.

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Submitted on February 15, 2023 – Decided May 26, 2023

Before Judges Currier and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-4312-21.

Caitlin Duffy (Borrelli & Associates PLLC), attorney for appellant (Caitlin Duffy, on the briefs).

Michael Farbiarz, General Counsel, Port Authority of New York and New Jersey Law Department, attorney for respondent (Nicholas Mino, on the brief).

PER CURIAM

This is an age discrimination action under the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -50. Plaintiff Peter Kalloo appeals the Law Division's March 25, 2022 order granting summary judgment to defendant New York New Jersey Rail, LLC (NYNJR). We affirm.

I.

We discern the facts from the motion record. In October 2008, plaintiff was hired as a locomotive engineer by James Christie, a general manager with defendant NYNJR, a wholly owned by the Port Authority of New York and New Jersey (PANYNJ).[1] Plaintiff was assigned to the Greenville Yard in Jersey City and his responsibilities included performing inspections, monitoring track conditions, and ensuring all train operators adhered to protocols, rules, and regulations.

Plaintiff, sixty-one, was part of a three-person crew which included twenty-two-year-old James Lada, Jr., a conductor, and twenty-three-year-old Joseph Tufariello, a brakeman.

In a handwritten statement, Lada stated he and plaintiff were arguing on April 15, 2021, which escalated into a fight. Lada said plaintiff became upset

[1] After plaintiff began employment with defendant, he became a member of the Seafarer's International Union (SIU).

when Lada and Tufariello did not put the brakes on train cars after they moved the cars around the yard. Lada stated plaintiff "got in [his] face," "yelled," and "bumped [him]" off the engine. Tufariello grabbed plaintiff to prevent plaintiff from kicking him off the engine. Lada did not immediately report the incident because he "didn't want to keep fighting" with plaintiff and "it wasn't like [Lada's] life was at risk."

On April 18, 2017, plaintiff and Lada were paired as engineer and crew conductor on a train. During his deposition, Lada testified he saw a car approaching the Port Jersey crossing when the train was approximately twenty feet from the crossing. While standing next to plaintiff, Lada instructed him to slow the train down. Lada said plaintiff "didn't blow his horn, . . . didn't have his whistle on[,] . . . [and] didn't slow down." Lada stated the train was only three feet from the car when he got the driver's attention. The car stopped, narrowly avoiding a collision. Lada asked plaintiff why he did not slow down. Plaintiff told him the "[car] had the stop sign" and "stop being a pussy."

The next day, Lada informed Christie of the train incident. The same day, Christie held a safety briefing on crew safety and communication at the Greenville Yard crew trailer with plaintiff, Lada, Richard Pezzano, Lawrence Kurdes, and Joseph Tufariello to address his concern about "non-

communication" between the crew members, which could cause safety issues for the crew. After Christie left, plaintiff called Lada a "rat, [and] snitch" and yelled at him. He then "got in [Lada's] face," and bumped him with his chest.

Tufariello, Pezzano, and Kurdes witnessed the altercation and provided statements which corroborated Lada's version of the events. Kurdes stated that after the safety meeting, he saw plaintiff "verbally abuse" Lada. According to Kurdes, plaintiff said, "Here's some cheese for the rat." He then walked behind Lada and bumped him twice in the back. Richard Pezzano, an engineer, reported no previous issues with plaintiff but also said he saw plaintiff bump Lada twice in the back and told Christie.

Tufariello's statement was consistent with the actions witnessed by Kurdes and Pezzano on April 19. He corroborated Lada's version of the April 15 incident with plaintiff. He stated plaintiff "curs[ed]" and "yell[ed]" at them for not setting the hand brakes when the rail cars were moved. Lada was standing on the engine stairs and climbed up the ladder, and plaintiff "chest bumped" him. According to Tufariello, Lada grabbed plaintiff to "hang on" but he tried to "shove" Lada off the stairs. As Tufariello "grabbed" plaintiff away from Lada, plaintiff attempted to kick Lada in the face.

Christie also provided a handwritten statement noting the safety briefing was held after receiving complaints from the crew. He stated he was also advised of plaintiff's "abusive behavior" toward the crew members. Plaintiff was directed to go home and "cool down" before returning to work on Monday.

Donald Hutton, the hiring manager, reviewed the handwritten statements and interviewed Lada, Tufariello, Kurdes, and Pezzano. He issued an incident report which indicated the cause for termination as "Creating a Threatening and Hostile Work Environment"; "Placing the General Public in Risk"; and "Verbal and Physical Assault (Toward co-SIU Employees)" under the collective bargaining agreement (CBA) between SIU and the Federal Railroad Administration (FRA). Under Article 25 of the CBA, "[e]mployees may be subject to immediate termination of employment for . . . [v]erbal or physical [a]ssault." The incident report also noted SIU and plaintiff were to be notified regarding termination.

On April 19, Hutton terminated plaintiff by telephone. Plaintiff subsequently received a letter informing him that he was terminated for cause based on: (1) gross violation of established work and industry safety rules and procedures on April 19, 2017, that resulted in creating a threatening and hostile work environment at the Greenville Yard in violation of the SIU CBA, Article

25; and (2) on April 18, 2017, placing the general public at risk at a railroad crossing by defying an instruction to stop the railcar in violation of the FRA. SIU initiated a grievance which defendant denied, upholding plaintiff's termination.

During his deposition, plaintiff denied "defying" Lada's instruction to stop the engine from crossing a road, from coming within three feet of a car or calling Lada a derogatory name. According to plaintiff, the April 18 facts as set forth in his termination letter were "not truthful." Plaintiff also denied physically threatening or bumping Lada and calling him a rat "[t]hat day." and the "disagreement" with Tufariello on April 18.

Additionally, plaintiff testified Christie told him to "communicate with the crew more" to which he replied that he did. Plaintiff also stated Christie did not identify any complaints specific to him.

Plaintiff also testified that at the time of his termination, he was the oldest engineer or conductor employed with defendant. Plaintiff neither filed a grievance nor proceeded to arbitration. After plaintiff's termination, Tufariello was moved into the engineer position after becoming qualified in mid-April 2017.

Plaintiff filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC) on November 17, 2017, alleging age discrimination. The EEOC issued a letter of determination, finding there was insufficient evidence to establish discrimination.

Thereafter, plaintiff filed a complaint in federal district court against defendant and PANYNJ, asserting violations of the Age Discrimination Employment Act (ADEA), 29 U.S.C. § 621-34, and LAD. He later dismissed the ADEA and NJLAD claims against the PANYNJ and the ADEA claim against defendant. The district court dismissed the LAD claim without prejudice, declining to exercise supplemental jurisdiction.

Plaintiff filed a complaint in the Law Division, seeking damages based on an alleged violation of LAD. Lastly, the court found defendant moved for summary judgment in lieu of filing an answer. Plaintiff opposed the motion.

After hearing oral argument, the trial judge entered an order March 25, 2022 accompanied by a written opinion granting defendant's summary judgment motion. The court found plaintiff had not met his burden to show a violation of LAD. The court found "the motion record [did] not contain facts that establish[ed] that the defendant's reason for terminating plaintiff was pre-text and that plaintiff's age played any role in the decision to terminate plaintiff."

The court also stated "undisputed facts establish[ed] that defendant had a legitimate, non-discriminatory reason for plaintiff's discharge, and plaintiff ha[d] not set forth any legitimate dispute as to pre-text." The court concluded "there were two independent reasons for terminating plaintiff as set forth in the termination letter and that plaintiff ha[d] not established that the reason for the termination was pretextual."

On appeal, plaintiff contends the trial court erred by finding no material question of fact as to whether defendants asserted a non-discriminatory reason for his termination. He further contends the trial judge correctly found plaintiff made a prima facie case, but erroneously concluded plaintiff had not raised a factual question as to pretext, citing: a "shifting explanation" for terminating plaintiff; "record evidence" that the altercation never occurred; defendant replacing plaintiff "with significantly younger employees"; and defendant's admission that "plaintiff was too old for the job."

II.

We review a grant of summary judgment de novo. Samolyk v. Berthe, 251 N.J. 73, 78 (2022). We apply the same standard as the trial court in our review of summary judgment determinations. Lee v. Brown, 232 N.J. 114, 126 (2018). "Summary judgment is appropriate 'when no genuine issue of material

fact is at issue and the moving party is entitled to a judgment as a matter of law.'" Ibid. (quoting Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344, 366 (2016)).

Under that standard, summary judgment is appropriate 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." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-29 (1995) (quoting R. 4:46-2). "An issue of material fact is 'genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.'" Grande v. St. Clare's Health Sys., 230 N.J. 1, 24 (2017) (quoting Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)). We must give the non-moving party "the benefit of the most favorable evidence and most favorable inferences drawn from that evidence." Est. of Narleski v. Gomes, 244 N.J. 199, 205 (2020) (quoting Gormley v. Wood-El, 218 N.J. 72, 86 (2014)).

The LAD prohibits employment discrimination based on an employee's age. N.J.S.A. 10:5-12. Specifically, N.J.S.A. 10:5-12(a) provides:

> 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[.]

New Jersey courts rely on the burden-shifting test articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973), and adopted by our Supreme Court in Viscik v. Fowler Equip. Co., 173 N.J. 1, 13-15 (2002), in assessing a claim based on age discrimination. See, e.g., Zive v. Stanley Roberts, Inc., 182 N.J. 436, 447 (2005). Thus, a plaintiff claiming age discrimination must first present evidence establishing a prima facie case of discrimination. Victor v. State, 203 N.J. 383, 408 (2010).

"[T]o 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 Cnty. Cmty. Coll., 406 N.J. Super. 547, 554 (App. Div. 2009) (quoting Zive, 182 N.J. at 450). Satisfaction of the fourth element "require[s] a showing that the plaintiff was replaced with 'a candidate sufficiently younger to permit an inference of age discrimination.'" Bergen Com. Bank v. Sisler, 157

N.J. 188, 213 (1999) (quoting Kelly v. Bally's Grand, Inc., 285 N.J. Super. 422, 429 (App. Div. 1995)).

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 Cnty., 437 N.J. Super. 520, 530 (App. Div. 2014) (first alteration in original) (quoting Bergen Com. Bank, 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 Com. Bank, 157 N.J. at 208).

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. Bergen Com. Bank, 157 N.J. at 209-10. If a defendant shows a legitimate non-discriminatory reason for the adverse action, the burden shifts back to the plaintiff to show the employer's proffered reasons were pretextual. Id. at 210-11.

We are satisfied plaintiff did not establish a prima facie case of age discrimination. He satisfied the first prong as a member of a protected class based on his age and as the most senior employee. Plaintiff also satisfied the

third prong, but his termination was based on a violation of the CBA and not discrimination based on his age.

However, he failed to meet his burden as to the second and fourth prongs. As to the second prong, the record demonstrates plaintiff failed to meet defendant's expectations through his job performance, based on the physical altercation, threats and hostile working environment corroborated by his four co-workers. Lastly, plaintiff failed to demonstrate that he was replaced by a younger employee as required under the fourth prong. Rather, his duties were reassigned to an existing employee who was already trained as an engineer. See Young v. Hobart W. Grp., 385 N.J. Super. 448, 459-60 (App. Div. 2005) (finding plaintiff failed to state a prima facie case where her duties were absorbed by coworkers). Tufariello began his training to become an engineer in December 2016, well before plaintiff's termination, and became certified in April 2017. These facts do not support an inference that plaintiff was replaced with a younger employee.

Having resolved plaintiff did not establish a prima facie case, we need go no further. However, for the sake of completeness, we analyze plaintiff's remaining arguments.

Defendant satisfied its burden to show a legitimate reason for the termination. There is ample competent evidence in the record to support plaintiff's termination based on a violation of the CBA and placing the general public at risk by failing to stop at the rail crossing within three feet of a car. Thus, in order to survive summary judgment, plaintiff must prove the employer's reason for discharge was pretextual.

"To prove pretext, a plaintiff may not simply show that the employer's reason was false but must also demonstrate that the employer was motivated by discriminatory intent." Zive, 182 N.J. at 449 (citing Viscik, 173 N.J. at 14). The plaintiff must persuade the court "he was subjected to intentional discrimination." Ibid. (citing Baker v. Nat'l State Bank, 312 N.J. Super. 268, 287 (App. Div. 1998)).

Here, plaintiff alleges four reasons why the firing was pretextual: first, defendant "shifted its reason for why" it fired plaintiff; second, the alleged altercation never occurred; third, defendant was training Tufariello prior to the incident and never hired anyone thirty years or older to work as a conductor, brakeman, or engineer; and fourth, Christie allegedly told plaintiff a different forty- to fifty-year-old candidate was too old to be hired for a position.

We are unpersuaded. Plaintiff does not offer any proofs to support his contention of discriminatory intent nor does he create a genuine dispute of fact as to the altercation. Lada, Pezzano, Tufariello, and Kurdes all testified to witnessing the altercation. Christie likewise testified that he was informed of the altercation shortly after its occurrence. Statements of each worker were taken independently and separately, and the witnesses also testified to substantially the same details as contained in their written statements. Plaintiff submits nothing more than a self-serving denial of the altercation to rebut the evidence proffered by defendant.

Insubstantial arguments based on assumptions or speculation are not enough to defeat a summary judgment motion. "'[C]onclusory and self-serving assertions by one of the parties are insufficient to overcome' summary judgment motions." Dickson v. Cmty. Bus Lines, Inc., 458 N.J. Super. 522, 529 (App. Div. 2019) (quoting Puder v. Buechel, 183 N.J. 428, 440-41 (2005)); see also Hoffman v. AsSeenOnTV.com, Inc., 404 N.J. Super. 415, 426 (App. Div. 2009) (quoting Merchs. Express Money Ord. Co. v. Sun Nat'l Bank, 374 N.J. Super. 556, 563 (App. Div. 2005)) ("Competent opposition [to a summary judgment motion] requires 'competent evidential material' beyond mere 'speculation' . . . .").

Plaintiff's remaining claims are similarly based on self-serving assertions. He makes a self-serving allegation that video evidence would exculpate him, but there is no contradictory video evidence in the record.

Nor are we convinced by plaintiff's bald assertion that defendant intentionally trained Tufariello as an engineer to replace him. Plaintiff does not cite to any evidence in the record. Thus, plaintiff's argument lacks merit.

To the extent we have not discussed any of plaintiff's remaining arguments, we deem them to be without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.