BARBARA SHERIDAN v. EGG HARBOR TOWNSHIP

NOT FOR PUBLICATION WITHOUT THE

APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-05394-13T2

BARBARA SHERIDAN,

Plaintiff-Appellant,

v.

EGG HARBOR TOWNSHIP BOARD

OF EDUCATION,

Defendant-Respondent,

and

TERRI CHASE,

Defendant.

January 7, 2016

Submitted October 13, 2015 - Decided

Before Judges Sabatino and Accurso.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-5966-12.

Costello & Mains, P.C., attorneys for appellant (Deborah L. Mains, on the brief).

Marshall Dennehey Warner Coleman & Goggin, attorneys for respondent (Ashley L. Toth, Richard L. Goldstein, and Walter F. Kawalec, III, on the brief).

PER CURIAM

This employment discrimination case involves claims of perceived disability based on obesity. Plaintiff Barbara Sheridan was employed as a custodian for defendant Egg Harbor Township Board of Education ("the District"). She contends that the District unfairly discharged her because of her obesity, in violation of the Law Against Discrimination ("the LAD"), N.J.S.A. 10:5-1 to -49. Plaintiff asserts that the District lacked a legitimate non-discriminatory reason to justify her discharge. She also contends that her floor supervisor, co-defendant Terrie1 Chase, made repeated disparaging comments about her weight at work, creating a hostile work environment that entitles her to additional damages.

The District contends that it discharged plaintiff for nondiscriminatory business reasons, based on objective indications that she was too heavy to perform her job duties adequately or safely. In particular, Chase had observed plaintiff exhibiting signs of overexertion as she attempted her work tasks, such as shortness of breath and a flushed face. Chase reported those symptoms, allegedly concerned that plaintiff might be unable to climb ladders, have trouble climbing stairs, and injure herself or others while attempting her duties.

As authorized by N.J.S.A. 18A:16-2, the District arranged a fitness-for-duty examination ("FDE"), administered by an independent physician. The District terminated plaintiff after she failed several portions of that examination. The District contends that the FDE results justify its decision to discharge plaintiff. The District further argues that Chase's comments to plaintiff about her weight were essentially benign and, in any event, were not sufficiently severe or pervasive to create a hostile work environment actionable under the LAD.

Plaintiff counters by arguing that the District's stated reasons for discharging her were pretextual. She maintains that the lifting tests and other components of the FDE that she

was unable to pass were too stringent, asserting that they did not fairly correspond to her official job description or her actual day-to-day job duties. Plaintiff stresses that she had competently performed her job for over eight years, and that her difficulties with portions of the FDE did not warrant her discharge. Plaintiff also charged that Chase aided and abetted her employer's discriminatory acts.

After reviewing the deposition transcripts, the examining doctor's FDE report, and other materials in the record, the trial court granted defendants' summary judgment motion dismissing plaintiff's claims in their entirety. Although the court agreed that plaintiff established a prima facie case of perceived disability discrimination, it concluded that defendants satisfied their burden of showing legitimate nondiscriminatory reasons for discharging her. In addition, the court ruled that plaintiff failed to show those reasons were pretextual. The court likewise rejected the aiding and abetting allegation, noting that Chase had no decision-making power over plaintiff's employment. The court also found no viable hostile work environment claim deriving from Chase's comments about plaintiff's weight.

In considering plaintiff's appeal, we abide by certain well-settled principles applicable to summary judgment motions. The 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 v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995); see also R. 4:46-2(c). The court itself cannot resolve contested factual issues but instead must determine whether there are any genuine factual disputes. Agurto v. Guhr, 381 N.J. Super. 519, 525 (App. Div. 2005). If there are materially disputed facts, the motion for summary judgment should be denied. Parks v. Rogers, 176 N.J. 491, 502 (2003); Brill, supra, 142 N.J. at 540. To grant the motion, the court must find that the evidence in the record "'is so one-sided that one party must prevail as a matter of law.'" Brill, supra, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)).

Our review of an order granting summary judgment must observe the same standards, including our obligation to view the record in a light most favorable to the non-moving parties, here plaintiff. See W.J.A. v. D.A., 210 N.J. 229, 238 (2012). We give no special deference to a trial judge's assessment of the documentary record, as the decision to grant or withhold summary judgment does not hinge upon a judge's determinations of the credibility of testimony rendered in court, but instead amounts to a ruling on a question of law. See Manalapan Realty, L.P. v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995) (noting that no "special deference" applies to a trial court's legal determinations).

The substantive law under the LAD that governs plaintiff's claims is also well established. The LAD declares that it is "an unlawful employment practice or an unlawful discrimination '[f]or an employer, because of the . . . disability . . . of any individual . . . to discharge . . . or to discriminate against such individual . . . in terms, conditions of privileges of employment[,]' 'unless the nature and extent of the disability reasonably precludes the performance of the particular employment[.]'" A.D.P. v. ExxonMobil Research and Engineering Co., 428 N.J. Super. 518, 531 (App. Div. 2012) (quoting N.J.S.A. 10:5-4.1, 12(a)) (alterations in original) (emphasis added) (citation omitted). The LAD does not prohibit "the termination or change of the employment of any person who in the opinion of the employer, reasonably arrived at, is unable to perform adequately the duties of employment[.]" Ibid. (alteration in original) (quoting N.J.S.A. 10:5-2.1).

These principles can apply even if the plaintiff's disabled status is perceived rather than genuine. Our courts have long recognized that discriminating against an individual on the basis of a perceived disability is unlawful under the LAD. See, e.g., Andersen v. Exxon Co., 89 N.J. 483, 446 (1982) (affirming a finding of employment discrimination under the LAD where an employer declined to hire an employee on the mistaken belief that a physical handicap disabled him from satisfying the position's requirements); see also Cowher v. Carson & Roberts, 425 N.J. Super. 285, 294-96 (App. Div. 2012) (discussing New Jersey's longstanding anti-discrimination protections for individuals perceived as being disabled). "[T]hose [persons who are] perceived as suffering from a particular handicap are as much within the protected class as those who are actually handicapped." Rogers v. Campbell Foundry Co., 185 N.J. Super. 109, 112 (App. Div.), certif. denied, 91 N.J. 529 (1982).

The present case arose from perceptions that plaintiff, by virtue of her weight, was disabled due to obesity. As a matter of law, the handicap of obesity whether actual or perceived is protected under the LAD. See Gimello v. Agency Rent-A-Car-Sys., Inc., 250 N.J. Super. 338, 354, 365 (App. Div. 1991).

The trial court correctly determined, as a threshold matter, that plaintiff is a member of a protected class under the LAD. Namely, plaintiff has demonstrated that defendants perceived her as being disabled because of apparent obesity. Indeed, defense counsel conceded during the motion argument "a perceived disability in this instance" because "[o]therwise, there would hardly [have been] any reason for [the District] to have requested [plaintiff to undergo] the [FDE] in the first place."

A plaintiff in an employment discrimination case may establish liability by either "direct" or "indirect" proofs. Direct evidence of discrimination is "evidence 'that an employer placed substantial reliance on a proscribed discriminatory factor in making its decision to take the

adverse employment action[.]'" A.D.P., supra, 428 N.J. Super. at 533 (alteration in original) (quoting McDevitt v. Bill Good Builders, Inc., 175 N.J. 519, 527 (2003)). Such direct evidence set forth "must, if true, demonstrate not only a hostility toward members of the employee's class, but also a direct causal connection between that hostility and the challenged employment decision." Ibid. Courts have recognized that such direct evidence of discriminatory animus is rarely present. Id. at 531-32.

By comparison, a plaintiff's burden of proving discrimination by indirect means is less demanding. In order "[t]o address the difficulty of proving discriminatory intent" in LAD cases through direct evidence, our state has adopted the "procedural burden-shifting methodology" that the United States Supreme Court established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), for adjudicating similar claims of discrimination under federal statutes. Zive v. Stanley Roberts, Inc., 182 N.J. 436, 447 (2005). This framework allows a plaintiff to prove her case through circumstantial evidence. Ibid.

Under this burden-shifting framework, a plaintiff must first prove a prima facie case of discrimination. Ibid. Once a prima facie case is established by the plaintiff, an inference of discrimination is created. Id. at 449. Thus, at the second stage of the analysis, the defendant must, by burden of production, "articulate a legitimate, non[-]discriminatory reason for the employer's action." Ibid. After the defendant has done so, at "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.

Although the "burden of production shifts throughout" the McDonnell-Douglas analysis, "the employee at all phases retains the burden of proof that the adverse employment action was caused by purposeful or intentional discrimination." Bergen Commerical Bank v. Sisler, 157 N.J. 188, 211 (1999). In order to meet this burden, a "'plaintiff need not prove that [the protected characteristic] was the sole or exclusive consideration' in the determination to discharge [the employee]; rather, [the plaintiff] need only show 'by a preponderance of the evidence that it made a difference in that decision.'" Ibid. (quoting Murray v. Newark Hous. Auth., 311 N.J. Super. 163, 174 (Law Div. 1998)).

As the trial court correctly found, the present case is most appropriately analyzed as one entailing indirect evidence of discrimination and, as such, is subject to the McDonnell-Douglas burden-shifting construct. The only reason cited by plaintiff's employer for terminating her was her failure to pass the FDE, thereby indicating that she is physically incapable of performing the tasks associated with her duties as a school custodian. No

direct evidence shows that the District's decision-makers fired plaintiff because of discriminatory animus against obese employees.

The trial court then proceeded to the burden-shifting analysis. As we have already noted, the court correctly found that plaintiff easily met her burden of showing membership in a protected class and discriminatory action taken against her. The burden thus shifted to defendants to set forth a legitimate non-discriminatory reason for plaintiff's discharge.

With one major caveat, we agree with the trial court as to this second step of the analysis as well. Given the observations of plaintiff breathing heavily and turning red while performing certain tasks at work, there was a legitimate reason to require her to submit to an FDE. Assuming, for the sake of discussion, that the FDE corresponded fairly to plaintiff's job functions, its results could provide a legitimate, objective basis for the District's decision-makers to conclude that she was physically unable to complete the tasks required of her and thus posed a safety risk when on the job.

We diverge from the trial court's reasoning, however, with respect to the third step of the burden-shifting test on the question of pretext. The court stated that "[n]othing in the record demonstrates that [the District's] non-discriminatory reason [for terminating plaintiff] was implausible[.]" In particular, the court placed significant reliance on the adverse results of the FDE. That reliance, however, may well have been misplaced.

Viewing, as we must, the record on summary judgment in a light most favorable to plaintiff as the non-moving party, we glean from that record genuine issues of material fact as to whether the FDE fairly measured the physical skills needed for plaintiff to perform her daily tasks as a custodian.

The District provided the FDE testing company with a job description detailing the physical tasks allegedly required for custodians. That job description included a requirement for "lifting and carrying objects weighing as much as [seventy-five] pounds up to [fifty] yards as a regular part of the job."

Plaintiff underwent the FDE in April 2012. The examiner's report states that, although plaintiff could satisfactorily sit, stand, walk, push, pull, carry, and bend/stoop, she did not meet the job requirements when it came to above shoulder lifts, double chair lifts, chair floor lifts, balance, climbing stairs, and crawling. Consequently, the reviewing physician concluded that plaintiff did "not demonstrate the capability to safely meet the requirements of her job as custodian."

Notably, the official job description that existed when plaintiff began working as a custodian for the District substantially differed from the description provided in 2012 to the FDE examiner. Plaintiff's official job description indicated that custodians must have the ability "to lift over [fifty] pounds, to shovel snow and to use heavy cleaning and grounds maintenance equipment." This description requires twenty-five pounds fewer than the description provided to the examiner. In fact, we suspect that reasonable jurors could conclude that the more strenuous exercise of lifting seventy-five pounds for fifty yards, as was tested in the FDE here, is not a fair or realistic physical expectation to have for a school custodian.

Furthermore, plaintiff's floor supervisor Chase conceded at her deposition that the only time she could remember when custodians would be required "to actually lift up an object weighing [seventy-five] pounds" was "twice a year" when the custodians would lift boxes of copy paper. In those rare occasions, the custodians would take a box "off the pallet, put it onto [a] cart that had wheels," take the cart upstairs, and unload the box "onto other pallets" upstairs. Thus, plaintiff's failure to complete the lifting portions of the FDE might not have truly or fairly reflected her actual ability to complete the job. Additionally, the FDE did not specifically require plaintiff to climb a ladder, which was one of Chase's main complaints about plaintiff and her alleged inability to perform her job. The record suggests that the real reason that plaintiff allegedly refrained from using a ladder may have stemmed from Chase's statement that she "would break the ladder so [she] should stay off [of] it." Moreover, Chase testified that she had no reason to believe plaintiff refused to use the ladder because she was "physically incapable of using [a] ladder," but rather merely because she herself had "never seen [plaintiff] physically actually up on a ladder."

Chase's other main complaint about plaintiff's physical abilities was that she supposedly was unable to move cafeteria tables. Yet plaintiff passed both the "[p]ush" and "[p]ull" portions of the FDE. Chase also had alleged that plaintiff was unable to "bend over to pick something up from [the] floor." To the contrary, plaintiff passed the "[b]end/[s]toop" portion of the FDE.

The record thus presents numerous reasons to doubt whether plaintiff's failure to complete certain portions of the FDE fairly and accurately reflected an inability to perform her daily work tasks capably. In fact, the District's reliance on the FDE is further undermined by plaintiff's evidence that she performed her duties for eight years without documented deficiencies.

The trial court did acknowledge in its written opinion plaintiff's arguments that "the job description provided to the physician for the evaluation may have had discrepancies or was

not an accurate[] reflection of the demands of the job." Nonetheless, the court rejected those arguments as falling short of marshalling evidence that "clear discriminatory intent" produced plaintiff's discharge.

We do not perceive this record as that cut-and-dried. Applying the Brill standard for summary judgment motions, we conclude there are genuine issues of material fact as to whether plaintiff's failure to pass portions of the FDE supplied a sufficient legitimate basis for her discharge after eight years of apparently satisfactory service. There is a reasonable basis for a jury to find in this case that the test results were not, in fact, a valid basis for terminating plaintiff and that, as she argues, those proffered reasons were pretextual.

We likewise conclude that the court's dismissal of plaintiff's hostile work environment claims was premature. The basic test for evaluating such a claim looks to whether: (1) the harassing conduct would not have occurred but for the plaintiff's protected characteristic, (2) the conduct was severe or pervasive enough to make, (3) a reasonable person in that protected class believe that, (4) the conditions of employment were altered and the working environment was hostile or abusive. Taylor v. Metzger, 152 N.J. 490, 498 (1998) (citing Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 603-04 (1993)). On a summary judgment motion to dismiss such a claim, the "issue is whether a rational fact finder could determine that a [workplace harasser's] conduct occurred because of [a plaintiff's protected characteristic]" and that "a reasonable [member of the plaintiff's protected class] would consider the conduct sufficiently sever or pervasive to alter the conditions of employment and create an intimidating, hostile, or offensive working environment." Leonard v. Metropolitan Life Ins. Co., 318 N.J. Super. 337, 344 (App. Div. 1999) (quoting Lehmann, supra, 132 N.J. at 603-04).

"Severity and workplace hostility are measured by surrounding circumstances." Taylor, supra, 152 N.J. at 506. In assessing hostile work environment claims, "all the circumstances" must be looked at "including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Green v. Jersey City Bd. of Educ., 177 N.J. 434, 447 (2003) (quoting Shepherd v. Hunterdon Developmental Ctr., 174 N.J. 1, 19-20 (2002)). Comments made by a harasser need not be plentiful to present an actionable claim of hostile work environment if the limited comments are severe enough. Leonard, supra, 318 N.J. Super. at 345. In fact, "[e]ven a single derogatory remark may be sufficiently severe to produce a hostile work environment." Ibid.

Recently, our Supreme Court made clear that employers may be "vicariously liable, in accordance with the principles of agency law, for . . . harassment committed by a supervisor that results in a hostile work environment." Aguas v. State, 220 N.J. 494, 498-99 (2015). When a supervisor "acts beyond 'the scope of his or her employment, the employer will be vicariously liable if the employer contributed to the harm through its negligence, intent or apparent authorization of the harassing conduct, or if the supervisor was aided in the commission of the harassment by the agency relationship." Ibid. (quoting Lehmann, supra, 132 N.J. at 624).

For cases where an employee seeks damages for being subjected to a hostile work environment, "the Court declined to hold an employer strictly liable for . . . harassment committed by its employee." Id. at 509. Rather, "the Court adopted as the measure of employer liability a fact-sensitive standard derived from the law of agency." Id. at 509-10. Those agency principles examine, among other things, whether the employer "violated a non-delegable duty" and whether the harasser "purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he [or she] was aided in accomplishing the tort by the existence of the agency relation." Id. at 511 (citing Restatement (Second) of Agency 219 (1958)).

Here, although plaintiff's floor supervisor Chase evidently had no decision-making authority in causing her discharge, there are genuine issues of material fact as to whether the District should be liable under agency principles for Chase's alleged negative remarks about plaintiff's obesity. In addition, genuine fact issues exist as to whether the remarks were stated at all and whether they were "severe and pervasive" enough to rise to the level of a hostile work environment. Without detailing each of them here, plaintiff identified at least eight incidents in which Chase made disparaging comments or queries to her about her weight, often in the presence of co-workers. Plaintiff contends these remarks by her supervisor made her feel humiliated or embarrassed. Although the defense plausibly contends that the remarks were benign, jurors could reasonably consider them instead to be demeaning, severe, and pervasive. Hence, this claim must be restored as well and summary judgment vacated.

Summary judgment dismissing plaintiff's complaint is consequently vacated and the matter is remanded for trial.

1 The caption used by appellant misspells Chase's first name.