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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3834-09T1

DONNA BROOKS,

Plaintiff-Appellant,

v.

STATE OF NEW JERSEY, STATE OF NEW JERSEY MOTOR VEHICLE COMMISSION,

Defendants-Respondents,

and

OFFICE OF THE NEW JERSEY ATTORNEY GENERAL and SHARON ANN HARRINGTON, Chief Administrator of the New Jersey Motor Vehicle Commission,

Defendants.

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Submitted May 24, 2011 - Decided September 8, 2011

Before Judges Carchman, Graves, and Waugh.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-1618-07.

Swartz Swidler, L.L.C., attorneys for appellant (Justin L. Swidler, on the brief).

William P. Flahive, attorney for respondents.

PER CURIAM

Plaintiff Donna Brooks appeals an order of the Law Division granting summary judgment in favor of defendants State of New Jersey (State) and the New Jersey Motor Vehicle Commission (MVC). She contends that the motion judge erred in dismissing her claims under the federal Family and Medical Leave Act (FMLA), 29 U.S.C.A § 2601 to § 2654, and the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. We reverse the dismissal of Brooks's claims of retaliatory demotion and discharge under the FMLA and LAD, as well as her claims of discriminatory demotion and discharge under the LAD. We affirm the dismissal of her claim for interference with her FMLA rights.

I.

We discern the following facts and procedural history from the record on appeal.

Brooks started working for the State of New Jersey in 1988. In December 2003, she was provisionally promoted to the title of Personnel Assistant 4 (PA4), with an annual salary of $49,184.09. At that time, she was working at the Department of the Treasury (Treasury). As a PA4, Brooks was expected to function as a professional without the need for constant supervision and direction. She was advised that "[i]n order to gain permanent status in this title, you must file for and pass

the examination and be recommended for appointment." She was further advised that she "continue[d] to have permanent status in [her former] title Technical Assistant Personnel [(TAP)], and ha[d] a right to return to that title if [she was] not appointed permanently to the [PA4] title."

On January 9, 2006, Brooks transferred from Treasury to MVC's human resources section. She retained the provisional title she received while working at Treasury. Brooks was initially assigned to assist Desiree Hardwick, who had been the coordinator of MVC's personnel evaluation system (PAR/PES) since 2005. Brooks's primary duties included ensuring that employee evaluations were entered into the PAR/PES database correctly and in a timely manner (within three days to two weeks of their receipt). She was also assigned to work with MVC management and the Department of Personnel (DOP) to address problems and provide training concerning the evaluation process, as necessary. In addition, Brooks was expected to assist on an as-needed basis with pension and benefits applications, as well as with payroll and time-keeping.

According to Brooks, there was an extensive backlog in the PAR/PES assignment when she arrived at MVC. After Hardwick was transferred to another assignment, Brooks took over as the

PAR/PES coordinator.[1] She maintains that she spoke to her then manager, MaryBeth Longo, about her need for additional training, but that Longo was unresponsive. Longo denied that Brooks made such a request.

Brooks suffers from sickle cell disease, a condition causing intermittent debilitating episodes of pain that often require bed rest or hospitalization. During calendar year 2006, Brooks took twenty-seven days of medical leave pursuant to the MVC's leave policy. In 2006, MVC's personnel policy with respect to FMLA leave contained the following provision:

> 1. NJ Motor Vehicle Commission employees who have been employed for one year are eligible for leave under [FMLA] . . . .
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> 2. The (FMLA) provides twelve (12) weeks of leave in a twelve-month (12) period for the employee's own serious health condition . . . . Employees are considered eligible for FMLA if they have worked a minimum of 1250 hours immediately before the requested leave date. . . .
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> . . . .
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> 7. FMLA . . . may be taken consecutively, or on an intermittent or reduced work schedule. . . .

Brooks began her first FMLA leave on May 30, 2006, and was out of work through June 30, 2006. On July 17, she started her

[1] It is unclear from the record exactly when Hardwick was transferred and Brooks assumed primary responsibility for the PAR/PES program.

second FMLA leave, which lasted through August 31, 2006. On December 4, Brooks took a third FMLA leave and remained out of work through January 19, 2007. Consequently, although the FMLA authorized only twelve weeks (sixty days) of leave per year, Brooks received fifteen weeks and three days (a total of seventy-eight days) of FMLA leave over the course of seven months in 2006, plus an additional three weeks (fifteen days) in January 2007. During 2006, she worked 117 complete days, between twenty-three and twenty-four weeks, at MVC.

While Brooks was out on her third FMLA leave, her new unit supervisor, Tania Morgan, and Longo's successor as her manager, Donna Ingram, concluded that the PAR/PES program was in disarray.[2] Morgan found evaluations dating back to 2004 that had not been entered into the computer or filed. Morgan and Ingram arranged for Marlene Mizsak, a PA4 who had served as the PAR/PES coordinator between 2003 and 2005, to assume the coordinator role in January 2007. When Brooks returned from her FMLA leave on January 22, 2007, she was reassigned to work primarily in payroll, although she was still required to assist with PAR/PES data entry.

[2] Morgan testified that Brooks was the PAR/PES coordinator in November 2006 when she became her supervisor.

According to Mizsak, the PAR/PES program was backlogged in January 2007. She trained Brooks and several other employees to help her with data entry. Mizsak did not have any problems with Brooks's performance, although she claimed that Brooks had difficulty coordinating her work assignments and characterized her as the slowest of her trainees at data entry.

Between January and March 2007, Ingram, Morgan, and Robin Liebeskind, MVC's Director of Human Resources, held several meetings regarding Brooks's performance at the level of a PA4. According to Ingram, no one held Brooks accountable for work that was not completed when she was ill, but "when she was here, it didn't appear that she understood or had done the things that you expect [sic] her to do as part of the coordinating group for the PAR/PES program." Ingram concluded that Brooks was not meeting deadlines, taking appropriate initiative, or performing the "coordinating" aspect of the job. Morgan, however, believed that Brooks was successfully performing her revised duties when she returned from her leave in January 2007.

According to Ingram, Liebeskind gave her and Morgan the option of rescinding Brooks's provisional appointment or working with her to help her improve, and they decided to rescind the provisional appointment. Liebeskind confirmed that Morgan and Ingram made the decision to return Brooks to her prior title.

Morgan, however, asserted that Liebeskind actually made the decision. Morgan also maintained she would have made Brooks's PA4 title permanent.

According to Ingram, Liebeskind also asked her to "feel out" whether there was any truth to the rumor that Brooks was considering retiring on disability. Ingram subsequently spoke to Brooks on March 1, 2007, and advised her that, if she chose to retire at that time, her retirement benefits would be calculated in accordance with her provisional status as a PA4. Brooks, however, maintains that Ingram advised her that, if she did not voluntarily retire on disability, she was going to be demoted because she took too many leaves and the MVC needed someone who would be present at work. Ingram denied issuing such an ultimatum.

The day after her conversation with Ingram, Brooks requested a meeting with Liebeskind. At the meeting, she told Liebeskind that Ingram had issued an ultimatum to her. Liebeskind advised her that no one was trying to force her to retire, but that the decision had been made to return her to her permanent title based upon her inability to work at the PA4 level, at which she was being compensated. According to Brooks, Liebeskind "hinted around" that the MVC "need[ed] somebody here all year . . . long to do [her] job." When Brooks complained

that she had not received sufficient training on the PAR/PES system to perform her job successfully, Liebeskind replied that she had been given plenty of time to learn the job or to ask for assistance.

Mizsak retired on March 1, 2007. Morgan directed Brooks to "take the lead" with respect to the PAR/PES program on a temporary basis. Shortly thereafter, another employee was assigned to serve as the new PAR/PES coordinator.

On March 14, Brooks met with Morgan to review her interim evaluation for the period August 1, 2006, to July 31, 2007. Morgan evaluated Brooks as a PA4 and awarded her eighteen out of thirty points, which gave her an interim performance rating of "commendable." Had she received three fewer points, she would have been deemed "unsatisfactory."

Morgan justified her rating of Brooks as follows:

> [Brooks's] supervision changed effective November 17, 2006. [Brooks] is primarily responsible for maintaining, and entering PAR/PES within specified time frames. She was also assigned to coordinate the statewide Toy and Coat Drive. On December 4, 2006, she went on medical leave and was unable to coordinate either program and see them through to completion. While [Brooks] was on leave it was discovered that PAR/PES dating back to the 2004 cycle were neither entered nor filed. This resulted in deadlines not being met and issues not being resolved. It does not appear that a significant amount of progress or effort had been made to organize and maintain the

> PAR/PES program efficiently. [Brooks] was also assigned to coordinate [the] 2006 Toy and Coat Drive during the last two weeks of November. She demonstrated motivation in gathering information from the statewide Coordinator, ensuring that dates, timeframes and flyers, were confirmed and coordinated, however, shortly after being assigned to coordinate the drives [Brooks] went out on medical leave. When [Brooks] returned from leave, it seemed that [she] had difficulty coordinating work assignments with the new PAR/PES coordinator which hindered progress in developing an effective PAR/PES maintenance system. One incident occurred on February 28, 2007 that involved [Brooks's] telling the PAR/PES coordinator to do the work herself. On February 29, 2007, the PAR/PES coordinator went on medical leave leaving [Brooks] to take the lead in the PAR/PES program. She was instrumental in training three of her co-workers, and assisting with getting the PARS organized and developing a filing system. She also expressed an interest in assuming other duties and assisting with special programs. [Brooks] expressed on February 22, 2007 . . . that on average 100 PARS could be entered daily. [Brooks] is being held accountable to ensuring that she and others in our team are entering at least 75 PARS daily, once they are fully trained. In the past two weeks [Brooks's] attitude and motivation levels have drastically increased. She is very cooperative and appears to recognize her role in the success of the PAR program. She has inquired with DOP on several occasions to assist in solving inquiries and problems, and has made positive contributions to the Team thus far.

According to Morgan, Liebeskind had urged her to give Brooks a negative review because she had received reports that Brooks was not getting her work done and that she was constantly

on the phone and leaving early. Liebeskind wanted these items reflected in Brooks's review. Morgan, in contrast, believed that her interim review of Brooks was fair. Nevertheless, she acknowledged that she had spoken to Brooks about her excessive phone usage. Ingram approved the interim review prepared by Morgan.

In mid-March 2007, Brooks learned that she had passed the civil service examination for the PA4 position and that she was one of the top three candidates.[3] In a memorandum dated March 29, 2007, however, Ingram officially notified Brooks that she was being returned to her prior permanent title of TAP, effective April 14, 2007. Brooks's salary was adjusted downward to $51,994.95.[4] MVC did not hire anyone to fill the PA4 position that had been held by Brooks on a provisional basis.

Ingram and Liebeskind insisted that Brooks was not actually demoted, because she had never been made permanent in the title PA4. Nevertheless, Morgan asserted that it was unusual for an employee in a provisional title who had passed the requisite exam not to be made permanent.

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[3] See In re Foglio, ___ N.J. ___, ____ (2011) (slip op. at 15-17) (discussing the so-called "Rule of Three" in the context of civil service promotions).

[4] As of January 2007, Brooks's salary as a P4 had increased to $56,951.42.

Brooks experienced another acute pain episode and was out of work from May 7 to June 8. Although she applied for FMLA leave for that period, her request was denied because MVC took the position that she had exceeded her FMLA entitlement, having worked only 873.5 hours between May 1, 2006, and April 30, 2007.[5] As a result, her records reflected an unpaid leave of twenty-five days. Brooks was out of work again from June 25 through August 2, resulting in an additional twenty-one full days and five and one-half hours of unpaid leave.

On June 23, just before she started her second leave, Brooks filed a three-count complaint against the MVC, the State, the Office of the Attorney General, and Sharon Ann Harrington in her capacity as the MVC's chief administrator. She alleged violations of the LAD (count one), the FMLA (count two), and the New Jersey Family and Medical Leave Act (NJFMLA), N.J.S.A. 34:11B-1 to -16 (count three). Brooks eventually amended her complaint to add an additional count alleging a further violation of the FMLA. An affidavit of service, filed August 1, 2007, indicates the MVC was served on July 23, 2007.

Ingram and Morgan were transferred to new positions in July 2007 and August 2007, respectively. Longo, who resumed her

[5] According to the timesheets included in the record, seven hours equals one day. Brooks therefore worked 124 days and five and a half hours between May 1, 2006, and April 30, 2007.

former position as Brooks's manager, met with Liebeskind in late July or early August to discuss Brooks's job performance. They decided to send Brooks for an Independent Medical Exam (IME) upon her return to work because of her repeated absences and resulting failure to complete her work on time. On August 7, Brooks was informed that she had been scheduled for an IME with Phillip Reid, M.D., so that Reid could "evaluate and advise the [MVC] on [her] ability to perform [her] duties as a [TAP], serving in a full time position."

Reid examined Brooks on August 9. In his subsequent report, Reid concluded that Brooks was neither physically nor intellectually unfit for employment. Reid continued:

> [T]he reality of [Brooks's] underlying disease and its typical manifestations may make her unfit for certain positions. Her SC disease is an inherited, genetic condition and will therefore be life long. The disease is characterized by intermittent flare up[s] of symptoms (primarily diffuse bone pain) interspersed with periods of time with little or no symptoms. If her past history is predictive we can anticipate pain crises (or some other manifestation of her disease such as a serious infection) 3-4 times each six months and these flares may result in hospitalization that lasts for more than one week with absenteeism from work during this time. Therefore any position [Brooks] holds should have significant redundancy in personnel with similar training who would be able to assume her duties during her absences. It would not be advisable (or realistic) for her to assume a work position where she is required

> to reliably be present each day in a position where she is the only employee who can perform a necessary task. In addition, to the extent that high stress levels may contribute to developing pain crises high stress jobs should also be avoided.

On August 24, Brooks received a copy of her final evaluation for the rating period August 1, 2006, to July 31, 2007. In the final version, she was evaluated as a TAP and was awarded fifteen out of thirty points, which gave her a final performance rating of "unsatisfactory." There is a dispute about the preparation of the evaluation. Although Morgan was listed as the rater, she denied that she had rated Brooks. According to Brooks, Morgan told her that she was ordered by Longo to "fail" her. According to Morgan, Longo told her that she was instructed by Liebeskind to give Brooks a negative review.

The final evaluation justified Brooks's rating as follows:

> It was challenging assessing [Brooks's] performance due to her being on leave from 7/17/06-8/31/06, 12/4/06-1/21/07, 5/7/07-6/10/07 and 7/2/07-8/3/07. Because her attendance was inconsistent, it was difficult for her to fully develop and be proficient in one particular assignment. Since the majority of the duties in our unit are of a time sensitive nature, there were times when [Brooks] would be out and health benefit and retirement applications were left on her desk unprocessed causing a delay in employee's retirements and or delay in processing of health benefits. Also, [Brooks] required a few days of re-

> integration back into the work process which involve[d] re-training in basic job functions like retirements certifications and health benefits processing. At times given the shortness of staff and recovery from [Brooks's] leaves, the constant duplication of training and re-integration is time consuming and affects the overall production of the team. Due to absences, [Brooks's] productivity has been low for the current rating cycle.
>
> Each time that [Brooks] returns from leave, however, she demonstrates a willingness and eagerness to assist and help within the unit. Once re-trained she is an asset in many basic areas like covering the desk, certifying retirement and health benefit applications, and entering PARS. These are very basic duties, the challenge is developing [Brooks] in more technical and difficult duties within our unit to enable her to work up to a higher level of performance, rather than the very basic level that she is currently working [sic]. [Brooks's] current working title, Technical Assistant, requires her to work in multiple tasks with varying levels of difficulty. [Brooks] can be a greater asset to the team, once she is able to consistently perform in various essential duties, that allow for a progressive development and knowledge of more difficult and time sensitive duties, such as providing technical advice and assistance on retirements, pre-payments, purchase verifications, separations, assisting with payroll, new hire orientation, and health benefits.

Brooks took minimal time off between August 3 and October 31, 2007. According to Longo, Brooks was capable of performing as a TAP in the fall of 2007. Although she thought there were other employees available to provide backup in the event Brooks

needed to take additional leave, Longo maintained that it was impossible for other employees to pick up where Brooks left off because of her level of disorganization. According to Longo, Brooks made many errors, was unproductive, failed to meet deadlines, and used the telephone excessively. In Longo's view, human resources was not a good fit for Brooks.

On November 2, 2007, Liebeskind met with Patrick DiMattia, an MVC administrator responsible for overseeing employee leaves of absence, Morgan, Cindy Yammine, a supervisor in the MVC's leave and accommodation unit, and David Millstein, the State's Americans with Disabilities Act (ADA) administrator, to discuss Reid's report.[6] They determined that Brooks could not continue as an active employee of MVC. They decided initially to ascertain whether Brooks would voluntarily apply for a disability retirement. In the event she refused, they decided that she would be placed on involuntary medical leave and that MVC would then apply for disability retirement on her behalf.

[6] DiMattia insisted he was not aware of Brooks's lawsuit at this time and that, in fact, he did not learn of the suit until August 2008. Millstein, too, insisted that he knew nothing of her lawsuit in November 2007, and that he only learned of it in late 2008 or early 2009. Morgan likewise maintained that she was unaware of Brooks's suit in 2007 and that it was not discussed during the November 2, 2007, meeting. Liebeskind, however, testified at her deposition that she "probably" discussed Brooks's lawsuit with DiMattia, but could not remember when.

On November 7, 2007, Millstein, Morgan, and DiMattia met with Brooks and apprised her of Reid's recommendations. They further advised her that the work limitations identified by Reid could not be accommodated by MVC due to its reduced level of staffing and its operational needs. They instructed Brooks to consider filing for disability retirement and informed her that, if she declined to do so, MVC would do so on her behalf. They also told Brooks that she would be placed on a medical leave of absence as of November 19, 2007.

When Brooks declined to file for a voluntarily disability retirement, MVC placed her on medical leave and filed an application for disability retirement on her behalf. She was not replaced. In June 2008, the Division of Pensions notified MVC that it had denied the application for a disability retirement for Brooks.

On July 14, 2008, Liebeskind identified a position within MVC that met the parameters for employment suitable for Brooks outlined by Reid. DiMattia subsequently offered the position to Brooks, who accepted. On August 16, 2008, Brooks began working as a Support Services Representative 1 at the specially approved salary of $55,161.41, which was commensurate with her former permanent TAP title.

Following discovery, defendants moved for summary judgment in 2010. Oral argument took place on March 5, 2010. During the argument, Brooks voluntarily dismissed her claims against Harrington and the Attorney General. She also voluntarily dismissed count three of the amended complaint, her claim under the NJFLMA. The motion judge entered an order granting summary judgment to the remaining defendants on March 23, 2010. He placed an oral decision on the record the same day.

This appeal followed.

II.

Brooks argues on appeal that the motion judge erred in granting summary judgment because there were genuine issues of material fact that precluded a determination in favor of defendants as a matter of law.

It is well-established that our review of a trial judge's conclusions of law is de novo. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995) ("A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference."). Consequently, we review a grant of summary judgment de novo, applying the same standard governing the trial court under Rule 4:46-2(c). Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 539-40 (1995); Chance v. McCann, 405 N.J.

Super. 547, 563 (App. Div. 2009) (citing Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007)).

In addressing a motion for 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; see also R. 4:46-2(c). Because the motion judge granted summary judgment to defendants, we must construe the facts in the light most favorable to Brooks in determining whether defendants were entitled to judgment as a matter of law. Liberty Surplus, supra, 189 N.J. at 445.

A.

We first address Brooks's claims of retaliation for having taken FMLA leave or for filing suit alleging interference with her FMLA rights, or both. There is no dispute that Brooks suffered from sickle cell disease and its intermittent, debilitating symptoms or that she took several FMLA leaves as a result. The issue is whether she presented a sufficient case of retaliation for exercising her FMLA rights or filing suit, or both, to warrant a jury trial.

An employer is prohibited from unlawfully discriminating against employees who have used FMLA leave. 29 U.S.C.A. §

2615(a)(1) and (2). The LAD protects employees with disabilities, including an "atypical hereditary cellular or blood trait" such as sickle cell disease. N.J.S.A. 10:5-12(a). It is an unlawful employment practice "[f]or an employer, because of [such a condition] of any individual . . . to discharge . . . from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment." N.J.S.A. 10:5-12(a); Mosley v. Femina Fashions, Inc., 356 N.J. Super. 118, 129-30 (App. Div. 2002), certif. denied, 176 N.J. 279 (2003). It is also unlawful under the LAD for any person to "take reprisals against any person because that person has . . . filed a complaint, testified or assisted in any proceeding under this act." N.J.S.A. 10:5-12(d).

To establish a prima facie case of retaliation under the FMLA and LAD, a plaintiff must show that she was engaged in a protected activity known to the defendant, that she was thereafter subjected to an adverse action by the defendant, and that there was a causal link between the protected activity and the adverse action taken. Parker v. Hahnemann Univ. Hosp., 234 F. Supp. 2d 478, 488 (D.N.J. 2002); Shepherd v. Hunterdon Developmental Ctr., 336 N.J. Super. 395, 418 (App. Div. 2001), aff'd in part and rev'd in part on other grounds, 174 N.J. 1

(2002). If the defendant employer asserts a legitimate, non-retaliatory reason for the adverse action, a plaintiff must show, by a preponderance of the evidence, that the defendant's conduct was nonetheless motivated by retaliatory reasons. Parker, supra, 234 F. Supp. 2d at 488-89; Shepherd, supra, 336 N.J. Super. at 418.

The motion judge determined that Brooks had made out a prima facie case of retaliation. Specifically, the judge found that: (1) taking FMLA leave and filing the lawsuit were both protected activities; (2) a demotion, a forced medical exam, and termination constituted adverse actions; and (3) causation was indicated by the fact that all of the adverse actions occurred relatively soon after she engaged in those protected activities.

The motion judge next determined that defendants had presented legitimate, nondiscriminatory reasons for their decisions to demote, medically evaluate, and terminate Brooks. He then determined that Brooks had failed to establish that MVC's stated reasons were pretextual. Brooks argues that the timing of her demotion, the statements made by Ingram and Liebeskind regarding her excessive leave, and her lack of responsibility for the PAR/PES backlog were indicative that MVC's stated reasons for her demotion were pretextual.

A plaintiff may present evidence of inconsistencies and implausibilities in a defendant's proffered nondiscriminatory reasons in order to establish that those reasons are pretextual. Greenberg v. Camden Cnty. Vocational & Tech. Sch., 310 N.J. Super. 189, 204 (App. Div. 1998). Here, for example, the record suggests there was an existing backlog with respect to PAR/PES program when Brooks joined MVC in January 2006 and that backlogs had been a chronic problem prior to Brooks's arrival. When Morgan was assigned to oversee the PAR/PES program, she found unprocessed evaluations dating back to 2004. In addition, Morgan gave Brooks a satisfactory review in March 2007, just before she was demoted, and also testified at her deposition that she had been in favor of making the promotion permanent rather than demoting Brooks. While it is true that Morgan only supervised Brooks for a relatively brief period, during most of which she was not serving as the PAR/PES coordinator, Ingram had approved Morgan's review.

Brooks correctly argues that the motion judge erred in disregarding the March 2007 statements attributed to Ingram and Liebeskind to the effect that Brooks took too many leaves and that the MVC needed workers who could be present year round. Those statements would be admissible at trial as statements by a party opponent. N.J.R.E. 803(b)(4); Spencer v. Bristol-Meyers

Squibb Co., 156 N.J. 455, 461-62 (1998). Such comments, if made by those who ultimately decided to demote Brooks, could be considered evidence of pretext by a finder of fact. Grasso v. W. N.Y. Bd. of Educ., 364 N.J. Super. 109, 118 (App. Div. 2003), certif. denied, 179 N.J. 312 (2004).

The motion judge also erred in concluding that the temporal proximity between Brooks's FMLA leave and her demotion could not be used both to establish causation and to discredit the MVC's proffered nondiscriminatory reasons for her demotion. Parker, supra, 234 F. Supp. 2d at 493 (citing Jalil v. Avdel Corp., 873 F.2d 701, 709 (3d Cir. 1989), cert. denied, 493 U.S. 1023, 110 S. Ct. 725, 107 L. Ed. 2d 745 (1990)). Whether or not the temporal proximity here is "'unusually suggestive of retaliatory motive,'" Young v. Hobart W. Grp., 385 N.J. Super. 448, 467 (App. Div. 2005) (quoting Krouse v. Am. Sterilizer Co., 126 F.3d 494, 503 (3d Cir. 1997)), it must be considered in connection with Brooks's claim of pretext.

Although we disagree with the motion judge's determination that sending Brooks for an IME was an "adverse action," we view it as a factor to be weighed in determining pretext. To be actionable, an action must have been "materially adverse" to a plaintiff. Roa v. Roa, 200 N.J. 555, 575 (2010). "Determining whether an action is materially adverse necessarily requires a

case-by-case inquiry." Blackie v. Maine, 75 F.3d 716, 725 (1st Cir. 1996).

Brooks relies on Bell v. Potter, 234 F. Supp. 2d 91, 96-97 (D. Mass. 2002), in which the district court concluded that the jury was entitled to find that the plaintiff, who apparently was not suffering from a known medical condition, was subjected to an adverse action when she was sent for a psychological examination to determine her fitness for duty shortly after she filed an EEO complaint. Other courts, however, have found that being ordered to undergo a psychological evaluation does not constitute an adverse employment action as a matter of law. Caver v. City of Trenton, 420 F.3d 243, 256 (3d Cir. 2005); Breaux v. City of Garland, 205 F.3d 150, 158 (5th Cir.), cert. denied, 531 U.S. 816, 121 S. Ct. 52, 148 L. Ed. 2d 21 (2000).

Here, it is conceded that Brooks was absent from work for significant periods in 2006 and early 2007, and then for five weeks in May to June 2007, all because of her disability. A little more than two weeks after her return to work in June 2007, she experienced another acute pain episode and was absent for an additional four-plus weeks of work. During the latter absence, Liebeskind and Longo decided to send Brooks for an IME. There are no facts in the record to support a finding that they had knowledge of Brooks's lawsuit at the time they made that

decision. In light of Brooks's considerable absences, Liebeskind and Longo may well have had legitimate reasons to seek guidance regarding the state of her health and her ability to continue her employment at MVC.

With respect to the dismissal of Brooks's claim that she was terminated for filing the lawsuit and taking FMLA leave, we conclude that Brooks presented sufficient evidence of pretext to avoid dismissal of her claim on summary judgment. That evidence included (1) the temporal proximity between the filing of the lawsuit and her termination; (2) Liebeskind's admission that she was probably aware of the lawsuit at the time the decision to terminate Brooks was made; (3) Reid's conclusion that Brooks was capable of working, provided there were others who could readily assume her duties when she was out; (4) the testimony from Morgan, Ingram, and Longo that, when she was at work, she did not have any problems performing her duties as a TAP, and also that there were back-up employees for when Brooks was absent; and (5) Liebeskind's admission that she did not know whether Brooks was adequately performing her job between August and November 2007.

In addition, there is the question of whether MVC was able to make a reasonable accommodation in lieu of termination. Victor v. State, 203 N.J. 383, 423 (2010) ("[R]easonable

accommodation refers to the duty of any employer to attempt to accommodate the physical disability of the employee.") (citation and internal quotation marks omitted). Such an accommodation is not, however, required if the employee is unable to perform essential job functions. Hennessey v. Winslow Twp., 368 N.J. Super. 443, 452 (App. Div. 2004), aff'd, 183 N.J. 593 (2005). Reasonable accommodation need not include indefinite part-time work schedules. Muller v. Exxon Research & Eng'g Co., 345 N.J. Super. 595, 606 (App. Div. 2001), certif. denied, 172 N.J. 355 (2002). See also Victor, supra, 203 N.J. at 423.

At the time of Brooks's termination, MVC took the position that it could not accommodate Brooks because of its low staffing level. However, it subsequently found a position for her in July 2008. We cannot determine on this record whether the subsequent rehiring was in the nature of a subsequent remedial measure, possibly subject to exclusion under N.J.R.E. 407, because it is not clear whether the position was available at the time of Brooks's termination or whether it only became available later.

For all of these reasons, we reverse the dismissal of Brooks's claims for retaliatory demotion and termination.

B.

We next address Brooks's claims for discriminatory demotion and termination under the LAD. To establish a prima facie case of discriminatory demotion or discharge based upon disability under the LAD, a plaintiff must establish that: (1) she was in a protected class; (2) she was otherwise qualified and performing the essential functions of the job and meeting her employer's expectations; and (3) she was demoted or terminated. Depending upon circumstances, she may also be required to demonstrate that the employer thereafter sought a similarly qualified individual for the position. Victor, supra, 203 N.J. at 409-16; Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 596-97 (1988); Casseus v. Elizabeth Gen. Med. Ctr., 287 N.J. Super. 396, 406 (App. Div. 1996). An inability to perform the essential requirements of a job is a legitimate reason under the LAD to demote or discharge an employee. Casseus, supra, 287 N.J. Super. at 406. However, the employer also has an obligation to provide a reasonable accommodation. Victor, supra, 203 N.J. at 423.

Once a plaintiff has established a prima facie case, a presumption arises that the employer engaged in unlawful discrimination. Andersen v. Exxon Co., 89 N.J. 483, 492-93 (1982). The burden then shifts to the employer to rebut the

prima facie case by articulating legitimate nondiscriminatory reasons for its action. McDonnell Douglas v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668, 678 (1973). The plaintiff must then prove by a preponderance of the evidence that these reasons are merely pretextual. Andersen, supra, 89 N.J. at 493.

The motion judge determined that Brooks failed to make out a prima facie case of discriminatory demotion or termination because she had not established that she had performed to defendants' expectations. The judge concluded that MVC was entitled to expect consistent and regular work attendance. Although Brooks's absences were attributable to a disability recognized by the LAD, the judge held that the significant number of absences "fundamentally undermined [Brooks's] ability to make any kind of progress in her job." Even if Brooks was fit to perform the duties required of her position when she was well, the judge pointed to the fact that she was unable to complete specific assignments, such as the coordination of the toy and coat drives, PAR/PES data entry, and the processing of health and retirement benefit applications, in a timely manner because of her lengthy absences.

Defendants argue that we should uphold that decision, citing Svarnas v. AT&T Communications, 326 N.J. Super. 59 (App.

Div. 1999). In Svarnas, we held that an employer is not required to tolerate an employee's chronic, sporadic, and excessive absenteeism, even if the absences are related to a disability recognized under the LAD. We recognized that "reasonably regular, reliable, and predictable attendance is a necessary element of most jobs," and that "[a]n employee who does not come to work cannot perform any of her job functions, essential or otherwise." Id. at 78. The necessary level of attendance is "a question of degree depending on the circumstances of each position." Ibid.

Here, however, the first decision was to demote Brooks, not to terminate her. Lack of competence, rather than excessive absence, was the proffered reason for the demotion. The reasons outlined by the motion judge related to her inability to perform her duties because of absence, rather than lack of competence. Consequently, reasons related to absence are not applicable to the claims concerning the demotion. In addition, Morgan gave Brooks a favorable performance review just prior to her demotion. She also disagreed with the decision to demote.

With respect to the termination, there were disagreements among the supervisors as to whether Brooks was performing satisfactorily after her demotion. Morgan also disagreed with respect to the termination. Liebeskind did not know the level

of her performance at the time the decision to terminate was made, but was probably aware of the lawsuit. And, as noted above, there are issues with respect to MVC's ability to provide a reasonable accommodation so that Brooks would not have to be terminated.

Consequently, we conclude that there were genuine issues of material fact precluding summary judgment on the LAD discrimination claims.

C.

We next address Brooks's claim that MVC interfered with her right to take FMLA leave in 2007. Under the FMLA, eligible employees are "entitled to a total of 12 workweeks of leave during any 12-month period" if the employee has a "serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C.A. § 2612(a)(1)(D). There is no dispute that Brooks has such a "serious health condition."

According to 29 U.S.C.A. § 2611(2)(A), an eligible employee is one who has been employed "(i) for at least 12 months by the employer with respect to whom leave is requested" and "(ii) for at least 1,250 hours of service with such employer during the previous 12-month period." An employer may calculate the twelve-month period in which an employee may take FMLA in any

one of the following four ways: (1) the calendar year; (2) any fixed "leave year," such as a fiscal year; (3) a "twelve-month period counting forward from an employee's first day of leave taken;" or (4) a "rolling twelve-month period measured backward from the date an employee uses any FMLA leave." Hill v. Underwood Mem'l Hosp., 365 F. Supp. 2d 602, 605-06 (D.N.J. 2005) (internal quotation marks omitted) (quoting 29 C.F.R. § 825.200(b)).

An employer must affirmatively choose one of the above methods, and simply including the statutory language contained in 29 U.S.C.A. § 2612(a)(1)(D) in employee materials does not provide an employee with sufficient notice of the employer's choice. Bachelder v. Am. W. Airlines, Inc., 259 F.3d 1112, 1129 (9th Cir. 2001); Hill, supra, 365 F. Supp. 2d at 606-09. This is the case even though it has been acknowledged that the rolling method of calculation most literally tracks the statutory language. Bachelder, supra, 259 F.3d at 1129. If an employer fails to inform its employees of its choice, it will be deemed to have failed to have selected a calculation method and the method "'that provides the most beneficial outcome for the employee'" will be used. Ibid. (quoting 29 C.F.R. § 825.200(e)).

It is unlawful for an employer to "interfere with, restrain, or deny the exercise of or the attempt to exercise" any entitlement under the FMLA. 29 U.S.C.A. § 2615(a)(1). To establish a prima facie case of interference, a plaintiff must establish that: (1) she is eligible under the FMLA; (2) her employer is subject to the FMLA; (3) she was entitled to an accrued leave under the FMLA; (4) she gave notice to the defendant employer of her intention to take such leave time; and (5) she was denied the leave to which she was entitled. Parker, supra, 234 F. Supp. 2d at 483. A plaintiff need not demonstrate that she was treated differently than other employees. Callison v. City of Philadelphia, 430 F.3d 117, 119 (3d Cir.), cert. denied, 546 U.S. 876, 126 S. Ct. 389, 163 L. Ed. 2d 174 (2005).

Because the language contained in MVC's FMLA policy tracks the language of 29 U.S.C.A. § 2612(a)(1)(D), it was not sufficient to notify MVC employees of the MVC's chosen calculation method under Bachelder and Hill. Nevertheless, even applying Brooks's preferred method of calculating her FMLA entitlement (the calendar year), she was not qualified for FMLA leave during the weeks at issue because she had not worked the requisite 1250 hours during the calendar year 2006.

Relying on a United States Department of Labor Opinion Letter concerning intermittent FMLA leave, Brooks argues that

she was not required to have worked for 1250 hours during the prior year. We disagree.

The opinion letter provides as follows:

> The intermittent leave concept assumes alternating periods of absence from and presence at work for the same FMLA-qualifying reason. If each such absence were treated as a separate period of FMLA leave, requiring an employee to reestablish eligibility with each absence, there would have been no need for Congress to codify the concept of intermittent leave. Thus, it is our position that the 1,250-hour eligibility test is applied only once, on the commencement of a series of intermittent absences, if all involve the same FMLA-qualifying serious health condition during the same 12-month FMLA leave year. The employee in such a case remains entitled to FMLA leave for that FMLA reason throughout that 12-month period, even if the 1,250-hour calculation is not met at some later point in the 12-month period during the series of related intermittent absences.
>
> [(Emphasis added).]

Because Brooks is claiming entitlement to a calendar FMLA leave year, the leave she requested in May 2007 had to be considered as the first in a new series of intermittent leaves for 2007 and not the latest in a series of leaves dating back to May of 2006. For that reason, she had to establish that she worked 1250 hours prior to May 7, 2007, rather than May 30, 2006. In essence, Brooks cannot rely upon a calendar year in order to gain access to additional FMLA leave time and then attempt to utilize a

rolling calendar year in order to achieve the requisite number of qualifying hours.

Because Brooks cannot establish that she worked 1250 hours prior to May 7, 2007, her claim that she was wrongly denied FMLA leave time must fail. We also note that, although the two leaves at issues were unpaid, Brooks was permitted to take them. 29 U.S.C.A. § 2612(c) and (d) do not require that all FMLA leave be paid. Consequently, we affirm the order on appeal in that respect.

D.

Finally, Brooks argues that the motion judge erred in dismissing the State as a party defendant.

Pursuant to N.J.S.A. 39:2A-4(a), the MVC is "constituted as an instrumentality of the State exercising public and essential governmental functions, and the exercise by the commission of the powers conferred by this act shall be deemed and held to be an essential governmental function of the State." When it was created, the employees of the prior Division of Motor Vehicles were transferred to MVC and "retain[ed] their present career service employment status and their collective bargaining status, including all rights of tenure, retirement, pension, disability, leave of absence, or similar benefits" and all "[f]uture employees of the commission [were to] be hired

consistent with the provisions of Title 11A of the New Jersey Statutes and the rules promulgated thereunder." N.J.S.A. 39:2A-5(a).

As previously noted, when Brooks transferred from Treasury to MVC, she retained her provisional title. When MVC considered her termination, Millstein, a non-MVC, State employee, was involved in the process. The MVC's argument that Millstein is not a defendant misses the point. None of the individuals involved in the decision-making process concerning Brooks's employment are defendants. Primary liability in employment discrimination is based on the actions of the employer, which necessarily acts through its supervisory personnel. See Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 619-20 (1993).

On the present record, we cannot say that the State is not a proper party, inasmuch as Brooks was ultimately a State employee and a non-MVC, State employee was involved in the decision to terminate her. The State has cited no cases for the proposition that the State is not a proper party in a discrimination action in which a State employee is the plaintiff, even if the appointing authority is an "in but not of" entity such as MVC.

Consequently, we reverse the dismissal of the State as a party defendant as to those claims we are reinstating.

III.

In summary, we have concluded that there are genuine issues of material fact precluding dismissal of Brooks's claims for retaliatory demotion and termination under the FMLA and the LAD and discriminatory demotion and termination under the LAD.

This is a complicated case factually, and the issues presented by Brooks's discrimination claims are highly fact-sensitive. There is no issue that Brooks suffered from a medical condition that was periodically disabling. There is also no issue that she took extensive leave time because of that condition. There are material factual disputes about (1) whether Brooks was performing adequately in her provisional position, (2) whether some of the MVC decision makers were motivated by her having taken FMLA leave or the filing of her lawsuit, or both, (3) whether Brooks was performing adequately after her demotion, and (4) whether MVC was able to provide reasonable accommodation due to its level of staffing.

Our decision is based upon the record before the motion judge. We have determined that, on the present record, those issues preclude summary judgment.[7] Whether facts are presented

[7] There may be additional factual issues precluding summary judgment. We need not identify all such issues in determining that summary judgment was not warranted.

at trial so as to permit all or some of the claims to go to a jury must be determined at that time.

For the reasons set forth above, we affirm the order on appeal to the extent it dismissed the claim of interference with FMLA rights, but reverse as to all other issues. We remand to the Law Division for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.