

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1041-10T2

JASON A. ZANGARA,

Plaintiff-Appellant,

v.

SOMERSET MEDICAL CENTER,

Defendant-Respondent,

and

MARIA GONZALEZ, HAROLD ABANU,
AND COLLEEN MACINTOSH, as
agents, servants and/or
employees of SOMERSET MEDICAL
CENTER, DULCE DELAFUENTE,
individually and as agent,
servant and/or employee of
SOMERSET MEDICAL CENTER,

Defendants.

Argued September 14, 2011 - Decided October 5, 2011

Before Judges Cuff, Waugh, and St. John.

On appeal from the Superior Court of New
Jersey, Law Division, Somerset County,
Docket No. L-1039-08.

Jason A. Zangara, appellant, argued the
cause pro se.

John C. Petrella argued the cause for
respondent (Genova, Burns & Giantomasi,

attorneys; Mr. Petrella, of counsel; Harris S. Freier, on the brief).

PER CURIAM

Plaintiff Jason Zangara appeals the order of the Law Division dismissing his complaint alleging that defendant Somerset Medical Center (SMC) discriminated against him in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Zangara worked at SMC from June 2003 until March 2008, when he was terminated. According to Zangara, he was terminated because of a disability, specifically Attention Deficit Hyperactivity Disorder (ADHD). According to SMC, he was terminated because of complaints from SMC staff that his behavior was inappropriate and unprofessional. We affirm.

I.

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

Zangara began volunteering at SMC, a non-profit hospital in Somerville, in 1999 at the age of thirteen. At that time, according to Zangara, he informed SMC employees with whom he worked that he had been diagnosed with ADHD.

Zangara continued volunteering at SMC until June 2003, when he applied for employment and was hired as an aide in the transport department, working ten hours a week. He understood that he was being hired as an at-will employee and could be

discharged by SMC at any time. As a transport aide, Zangara was responsible for taking patients from the emergency room to other floors for testing or treatment, and assisting with discharging patients. His performance as a transport aide was evaluated on June 13, 2004. He received a score of 86.25, which indicated that he "Exceeds Job Performance Standards."

Zangara graduated from high school in June 2004. In July, he successfully applied for a surgical aide position in SMC's operating room (OR). He worked approximately twenty-four hours a week. His responsibilities included preparing the materials and instruments for doctors, moving patients before and after surgery, and assisting with cleaning.

According to Zangara, he "got along with all" members of the OR staff, and "got along pretty much well" with the OR nurses. However, he recalled that he and Colleen MacIntosh, an OR group leader, "didn't mix well" because they "had two different personalities." Nevertheless, he believed that their differences did not "prevent [them] from working."

According to Lynda Orofino, associate director of the recovery room, Zangara complained to her on "numerous occasions that Colleen MacIntosh was mean to him" and about "minor disputes" he had with MacIntosh on a "frequent basis." He also complained to Kristin Petersen, his supervisor, on multiple

occasions that MacIntosh "spoke to him too roughly." According to Zangara, he "probably" complained to others that he was having difficulty working with MacIntosh.

Petersen attempted to resolve the conflict by meeting with Zangara and MacIntosh. According to Petersen, Zangara continued to complain to her, Orofino, and others "about every minor dispute that he had with Ms. MacIntosh." Petersen contemplated "pursuing disciplinary action against [Zangara] because of his inability to cooperate" with MacIntosh, but decided not to do so because she attributed his inability to cooperate with MacIntosh to "his limited experience and the high stress environment of the [OR]."

In April 2005, Zangara requested a transfer to the post-anesthesia care unit (PACU) of the OR, as a patient care technician. The position was full-time. Orofino, who managed PACU, interviewed Zangara for the technician position later that month, and subsequently approved the transfer. According to Petersen, she and Orofino granted Zangara's transfer request "[i]n an effort to give [him] a fresh start."

Zangara's transfer was effective at the end of May 2005. Zangara's duties included transporting the patients between floors and assisting staff, including PACU nurses, with patient

care. He also answered phones, entered orders into the computer, and stocked supplies in the unit.

In June 2005, Orofino evaluated Zangara's performance. She gave him a score of 82.50, which fell within the higher end of the range of "Accomplishes Job Performance Standards." In the evaluation, Orofino wrote that Zangara "works well with all PACU staff" and "[a]ssists OR staff as needed." She also described him as "an asset to the PACU staff" who "assists the staff without being asked."

According to Zangara, he was "friendly" with some of the PACU nurses prior to his transfer and was encouraged by them to apply for the position. Rhoda Gestosani was one of those nurses. However, problems arose following the transfer.

At his deposition, Zangara conceded that he had been romantically interested in Gestosani and another nurse, and that he had communicated his feelings to other PACU nurses. According to Zangara, once Gestosani discovered that he had such feelings for her, her demeanor toward him changed and she "started being difficult."

According to Gestosani, when Zangara began working at the PACU it was "nice" and an "improvement" for the PACU nurses because they did not previously have a technician. However, working with Zangara eventually became "difficult" because he

"ma[de] issues . . . of everything that everyone else did," his job performance "deteriorated," and he would sometimes not perform duties when asked.

Gestosani related that, on the night before Thanksgiving in November 2005, as she turned around to say good night to Zangara, he was standing behind her with his arms outstretched to embrace her. He said "Good-bye, Honey." Gestosani "felt creeped out" and "uncomfortable." She put her hand out and said: "[W]hy are you calling me honey? You are not my honey. You are way too young to call me honey, or people that call me honey are old people or somebody that thinks he is my boyfriend or my husband." However, Gestosani did not file a complaint with the human resources department (HR) or complain to Orofino regarding the incident.

Zangara recalled that when he, Gestosani, and another nurse were leaving SMC on the night before Thanksgiving in 2005, he put his arm around Gestosani, gave her a hug and a kiss on the cheek, and said "Happy Thanksgiving" before departing. He did not recall calling Gestosani "Honey," but admitted to kissing her without her consent. According to Zangara, Gestosani did not protest at that time. However, he noted a change in Gestosani's demeanor. He eventually realized that Gestosani acted differently because of the Thanksgiving incident.

According to Zangara, Gestosani would ignore or yell at him. He testified that "her attitude changed toward [him] when she thought [he] wanted a personal relationship with her."

According to Orofino, Zangara told her that "he attempted to hug and kiss" Gestosani in November 2005. He also complained to her that, as a result of the Thanksgiving incident, Gestosani "was no longer friendly with him and he felt that she was mean to him."

On March 7, 2006, Orofino completed a performance review for Zangara for the period January 2005 to February 2006. She gave him a score of 2.93, on a scale of 0.0 to 4.0, which indicated "Meets Expectations." Orofino characterized Zangara as "an asset to PACU" who "follows directions well."

In her certification, Orofino characterized Zangara as having developed "an infatuation" with Gestosani. Orofino testified that, when Gestosani announced she was pregnant in June 2006, Zangara "became extremely upset" and she "sent him home for the day with a referral to the Employee Assistance Program [EAP]." Orofino testified that Zangara's "job performance began to decline" at that time. At his deposition, Zangara agreed that he had become upset, took time off, and sought help from EAP when Gestosani announced her pregnancy, but

maintained he was upset to learn of the pregnancy because he "felt bad" for Gestosani due to her alleged marital problems.

On July 28, 2006, Orofino and Gestosani met with Zangara. According to Zangara, the meeting was held because "[he] realized there was an issue and [he] wanted to fix it as soon as possible." He believed that "[Gestosani] was being a jerk," but apologized to her at the meeting "to get her off [his] back and stop treating [him] like garbage." Zangara testified that his relationship with Gestosani improved "[a] little bit" after the meeting.

Although Zangara testified that no one had told him that Gestosani had accused him of ignoring her instructions, he conceded that Gestosani "probably" told him "at some point" that her anger toward him was based on his failure to adequately perform his job. According to Zangara, she criticized him frequently for taking too long to fill requests and to enter her orders into the computer.

Zangara was aware that some PACU nurses had begun to complain about his job performance in 2006. In fall 2006, he complained to Petersen and Orofino about "nurses in the PACU who he felt were mean to him." In early October 2006, he met with Orofino and Petersen. At the meeting, Zangara raised the complaints about his job performance, which he maintained came

from Gestosani. According to Zangara, he asked Orofino whether "[his] job was in jeopardy . . . based on rumors that [he] had heard," but he was told "not to worry about anything." Zangara maintains he was "not reprimanded or warned, just asked to improve" at the meeting.

Zangara also testified that Petersen and Orofino "threatened" him by telling him that, if he complained about Gestosani's behavior, she could file a complaint against him for sexual harassment. He added that Petersen also told him to "give [Gestosani] some slack because she's pregnant" and felt "uncomfortable" around him.

In October 2006, Zangara met with Maureen Schneider, the senior vice president in charge of nursing at SMC, to complain about Gestosani, Petersen, and Orofino. He complained about Petersen and Orofino's warning not to report Gestosani's behavior because she could file a complaint for sexual harassment. Schneider referred him to Deborah Carlino, the HR director.

On October 24, 2006, Zangara and his mother met with Carlino. At the time, Carlino was not aware of any complaints regarding Zangara's job performance. According to Carlino, Zangara discussed issues he had with Gestosani, but did not bring up his meeting with Orofino and Petersen or their

reference to a potential sexual harassment complaint. Carlino stated that Zangara told her that he previously had a "close relationship" with Gestosani and that he would hug her. Zangara brought up Gestosani's age, her marital status, and the Thanksgiving 2005 incident. At the end of the meeting, Carlino decided to conduct an investigation to "get the other side of the story."

Zangara also testified about a meeting he attended with Orofino and Jeanette Cowen, director of the OR, at some point after October 24, 2006. He had complained to a supervisor about a PACU nurse, and Orofino instructed him that he should contact her directly, rather than nursing supervisors, regarding such complaints. According to both Orofino and Zangara, Orofino told Zangara his behavior was contributing to a "hostile work environment" in terms of "[h]ow people work together."

In January 2007, Zangara met with Carlino and Schneider to discuss the results of Carlino's investigation into issues involving Zangara and Gestosani. According to Zangara, he was told that he "didn't do anything wrong" and he was not disciplined or criticized. He was also told that there was no finding of sexual harassment. Schneider could not recall whether she met with Zangara after Carlino concluded her

investigation, but testified that he was not disciplined following the investigation.

Carlino testified that after meeting with "a number of" Zangara's co-workers, the conclusion of her investigation was that "[Zangara] had issues relating to [his] coworkers." She identified his behavior as "passive aggressive" in that he "would ignore direct orders or direct directions from team leaders on the unit if [he] believed that [the] team leader had an issue with [him]."

According to Orofino, Zangara's performance improved after Gestosani went on maternity leave in January 2007. As a result, Orofino gave Zangara a positive evaluation when she completed a second performance review in March 2007. In the review, Orofino wrote that Zangara "[f]ollows direction of RN." Under the "performs other duties as assigned" criteria, Orofino's comments were: "Performs other tasks when asked by nurses. Never goes out of way to look for things to do by self."

In the "Key Behavior Assessment" section, Orofino noted that "[Zangara] keeps all commitments at work" and was "[a]lways willing to do the best he [could] at all times." With respect to communication, she noted: "[Zangara] comes to manager & AVP daily with problems occurring with other staff. Follows chain

of command." Under the "Teamwork" criteria, Orofino wrote that Zangara "works well with PACU staff & OR & floors."

Orofino testified that Zangara's "performance deteriorated again" when Gestosani returned from maternity leave in May 2007. On May 17, 2007, Gestosani wrote to Orofino complaining about Zangara's "inappropriate and unprofessional behavior." She added that "his insubordination and paranoid behavior [was] really compromising the flow of activity in the unit." Zangara did not recall Gestosani complaining about him in May 2007.

In late spring 2007, Zangara requested a transfer to the unit secretary position in the Ortho-Neuro department. He testified that he requested the transfer because he was "aggravated" by his relationships with the PACU nurses. After he completed a required course, Orofino approved the transfer effective June 26, 2007. Following the transfer, Zangara no longer reported to Orofino or Petersen.

As unit secretary, Zangara worked with various Ortho-Neuro nurses, including Dulce Delafuente, Lodidina Borja, Rhea Goleta, and Ruth Sigue. He testified that he had met them while working in PACU and that his friendship with them was one reason he requested a transfer to Ortho-Neuro. According to Zangara, he was "pretty close" with those four nurses and spent time with them outside of work for occasions such as birthdays and New

Years. He maintained that they all knew about his learning disability.

By early 2008, three of the nurses whom Zangara described as friends began to complain about his job performance. According to Borja, he spoke to the nurses in a "rude or disrespectful" manner on the floor. She noted instances where he yelled for nurses using the overhead paging system. According to Delafuente, Zangara failed to assist the Ortho-Neuro nurses and properly communicate with them, particularly when he was under "the pressure of being busy." Both also recalled him using his personal laptop while at work.

Delafuente maintained that she had complained to Zangara "a lot of times" about his inadequate job performance, warning him that he would lose his job if he did not improve his performance. She also testified that she had spoken with Marianna Ingrao Munsey, Zangara's supervisor, about his performance. Zangara acknowledged that Dalafuente and Borja complained to him about his yelling at them, although he did not recall complaints that he was using his laptop during work hours.

In early March 2008, Borja and Delafuente held a staff meeting with Zangara to inform him of their complaints regarding his conduct. According to Delafuente, he promised to improve.

Delafuente, Borja, and Goleta nonetheless contacted Munsey the day following the staff meeting and requested a meeting to discuss their concerns. Munsey's notes of the meeting reflected that they told her that Zangara "had poor work conduct and spoke to them and patients with a lack of respect." They also stated he was often "playing around with his personal laptop at the nursing station," which they had reported to the nursing supervisor. At the conclusion of the meeting, Munsey asked Borja, Goleta, and Delafuente to document their complaints.

Borja, Goleta, and Delafuente provided Munsey with a written statement of their complaints on March 4, 2008. The letter stated:

We are writing you this letter to inform you of our concerns regarding Jason Zangara, unit secretary Ortho-Neuro Pavilion 3-11 shift. Our unit manager, Marianna Ingrao [Munsey], has been approached regarding this and was advised to take this action. The concerns are as follows:

1. He is rude and disrespectful to his co-workers. He would most of the time yell calling for your name, which is annoying. Even in answering call bells, patients are complaining because of the way he speaks to them. Other patients who can walk would even peek outside the room just to find out who it was. Other PCA's can attest to this.
2. He was seen playing with his own laptop during work hours on a weekend. The resource nurse asked him to call for nurses who can come on the next shift for there was a short staffing. He refused and replied

that "it is not his job" instead he continued to play with laptop. Situation that time was all nurses are busy due to high [activity] and at the same time 4 nurses are only on duty with 35 patients.

3. He excludes the resource nurse most of the time in decision-making on the floor whenever there's a situation/problem in patient or room assignments. He would usually go straight to the nursing supervisor which would leave the resource nurse caught unaware of what's happening. . . . [T]here are certain situations which can be settled within the unit without the supervisor being involved.

4. When he is corrected with his mistakes, he hardly listens and accepts his mistakes. Instead, he [always has] answers and reasons with an attitude. We presented an order sheet to our nurse manager wherein the nurse involved tried to tell him what he should do but contested it. We ended [up] calling the nursing supervisor that time just to straighten out the situation which didn't really help at all.

Before we did this action, we already talked to him a lot of times. He said that he will change but nothing happened. We are just going to the same pattern that's why we seek . . . your help. We don't mean any harm on this person neither to his job.

Munsey provided the letter to her supervisor, Elizabeth Jackson, who was the director of critical care, cardiovascular, and respiratory services. Munsey and Jackson subsequently referred the letter to Carlino at HR. Munsey also spoke to Carlino regarding the complaint.

According to Carlino, she and Munsey made a joint decision that Zangara would be suspended pending an investigation into the nurses' complaints. Munsey and Jackson met with Zangara on March 4 to inform him of the suspension.

Zangara prepared a response to the complaints and gathered supporting documents, which were submitted to Munsey on March 12, 2008. Munsey forwarded the nurses' allegations and Zangara's response to Carlino. Carlino testified that Munsey conducted an investigation by speaking with individual nurses and contacted her with the results. According to Carlino, the investigation "substantiated" the problems complained about by the nurses.

Munsey's certification states that she and Carlino made a joint decision to terminate Zangara. At her deposition, however, Munsey testified that she terminated Zangara at Carlino's direction, but also that "when termination is made, it's also advised with human resources as well as whom I report to." At her deposition, Carlino denied that she or Munsey individually made the decision to terminate Zangara. She testified that a joint decision was made by management and HR. She further explained that "[t]he results of [Munsey's] investigation, along with [Zangara's] past history" were also

given to Cathy Cummings, the head of nursing, whom Carlino characterized as part of management.

SMC's discipline guidelines, known as "Corrective Action Guidelines," contained a series of steps to be utilized by management for discipline and terminations. The steps include (1) counseling, daily feedback and ongoing improvement discussions; (2) a verbal warning; (3) a written warning; (4) suspension without pay; (5) suspension pending investigation; and (6) discharge. Carlino testified that the guidelines were used by HR and management in deciding to terminate Zangara. However, she maintained that, "when there are issues that . . . impact the operation of the organization so much, then those steps may be bypassed." She explained that the guidelines were "written so that depending on the nature of the infractions, . . . steps could be bypassed" by management in consultation with HR.¹

On March 12, 2008, Munsey, Jackson, and the director of security met with Zangara in Jackson's office. Jackson informed Zangara that the investigation had been completed and that he was being terminated from his employment at SMC. Jackson provided him with a written notice of termination.

¹ We note that Zangara did not make a claim for breach of an implied contract under Woolley v. Hoffmann-La Roche, Inc., 99 N.J. 284 (1985).

After his termination, Zangara continued to be friendly with Sigue, one of the Orth-Neuro nurses whom he had characterized as a friend. According to Zangara, when he was speaking with Sigue on March 23, 2008, she informed him that she overheard Goleta, Borja, and Delafuente at a party discussing their complaints regarding his job performance. He testified that Sigue told him she overheard one of the nurses state: "He's that way because of his disability." After learning of their conversation, Zangara concluded that he had been terminated because of his learning disability.

On April 29, 2008, fourteen SMC employees, including Sigue, signed a letter addressed to Munsey stating that members of the Ortho-Neuro staff were "extremely dissatisfied" with her decision to terminate Zangara. They noted that some of the staff were unaware that the investigation had taken place and maintained that "only a select few . . . [n]urses had problems" with Zangara. They asserted that Zangara was "a good worker." They asked that the decision be re-evaluated because Zangara had been "unfairly terminated based [o]n the inaccurate complaints of a few [n]urses."

On July 8, 2008, Zangara filed a four-count complaint against SMC and four of its employees. Count I alleged that he had been terminated because of his disability in violation of

the LAD. Count II was substantially similar, but alleged that unnamed "agents, servants and/or employees" of SMC participated in the violations. Count III alleged HIPPA violations by three individual defendants as agents or employees of SMC. Count IV alleged an assault by a fourth individual defendant. Counts III and IV were subsequently dismissed and are not involved in this appeal.²

In June 2010, Zangara filed a motion for "partial summary judgment on liability." SMC filed a cross-motion for summary judgment. On October 15, 2010, the motion judge heard oral argument on the motions. She granted SMC's cross-motion and denied Zangara's motion. An implementing order was entered the same day.

This appeal followed.

II.

Zangara 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 SMC as a matter of law.

² Because the individual defendants were named only in Counts III and IV, they are also not involved in this appeal. However, we note that they are among the agents and employees referred to generally in Count II.

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 in favor of SMC, we must construe the facts in the light most favorable to Zangara in determining whether SMC was entitled to judgment as a matter of law. Liberty Surplus, supra, 189 N.J. at 445.

In analyzing claims brought under the LAD, "[o]ur Supreme Court has adopted the three-step burden-shifting analysis first

developed by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)." El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 166 (App. Div. 2005) (citing Jansen v. Food Circus Supermarkets, Inc., 110 N.J. 363, 382 (1988); Peper v. Princeton Univ. Bd. of Trs., 77 N.J. 55, 82 (1978)).

[T]he court first determines whether plaintiff has produced sufficient evidence to demonstrate the elements of his or her prima facie case. If so, then the burden shifts to the employer to produce evidence of "legitimate, non-discriminatory reasons" that support its employment actions. Once the employer has done so, the burden shifts back to plaintiff to prove that the stated reasons were a pretext for discrimination.

[El-Sioufi, supra, 382 N.J. Super. at 166 (citations omitted).]

In Nini v. Mercer County Community College, 406 N.J. Super. 547, 554-55 (App. Div. 2009), aff'd, 202 N.J. 98 (2010), in the context of an age discrimination case, we described the elements of a prima facie case as follows:

In order to successfully assert a prima facie claim of age discrimination under the LAD, plaintiff must show that: (1) she was a member of a protected group; (2) her job performance met the "employer's legitimate expectations"; (3) she was terminated; and (4) the employer replaced, or sought to replace, her. Zive v. Stanley Roberts, Inc., 182 N.J. 436, 450 (2005). In the case of age discrimination, 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 Commercial 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)). If plaintiff can establish a prima facie case, the burden of production then "shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employer's action." Zive, supra, 182 N.J. at 449. If the employer provides such a reason, plaintiff must show that the reason "was merely a pretext for discrimination." Ibid.

See also Maher v. N.J. Transit Rail Operations, Inc., 125 N.J. 455, 480-81 (1991); El-Sioufi, supra, 382 N.J. Super. at 167. Our Supreme Court has recognized that this burden is "'rather modest.'" Zive v. Stanley Roberts, Inc., 182 N.J. 436, 447 (2005) (quoting Marzano v. Computer Sci. Corp., 91 F.3d 497, 508 (3d Cir. 1996)).

The burden then switches to the employer to put forth "a legitimate, nondiscriminatory reason for the employer's action." Id. at 449. At that stage, there is no credibility or truth assessment. All the employer is required to show is that there was a legitimate explanation for its action. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05, 93 S. Ct. 1817, 1824-25, 36 L. Ed. 2d 668, 677-79 (1973). The employer "must come forward with admissible evidence of a legitimate, non-discriminatory reason for its rejection of the employee." Bergen Commercial Bank v. Sisler, 157 N.J. 188, 210 (1999).

When the employer does produce "such evidence, the presumption of discrimination" is overcome. Id. at 211.

The burden then shifts back to the plaintiff to establish "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." Zive, supra, 182 N.J. at 449. The employee

does not qualify for a jury trial unless he or she can "point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action."

[Id. at 455-56 (quoting Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994)).]

III.

The motion judge determined that Zangara had established a prima facie case of disability discrimination and that SMC had articulated a legitimate, non-discriminatory reason for its decision to terminate Zangara. We agree. The judge then determined that Zangara had failed to demonstrate a jury question on the issue of whether the reasons articulated by SMC were merely pretextual. Zangara contends that she erred in

making that determination. The disposition of this appeal turns on the resolution of that contention.³

The specific reasons set forth in the notice of termination given to Zangara on March 12, 2008 were as follows:

The staff have identified concerns with your behavior. This is not the first time this manner of behavior has been reported and documented with your conduct. Somerset Medical Center determined this pattern of behavior has not been corrected. Mr. Zangara has been fully aware of perception of his behavior.

We must examine the issue of pretext in the context of the reasons stated in that document.

In outlining the law with respect to pretext, Zangara relies in large part on our articulation of the pretext aspect of the McDonnell Douglas test in El-Sioufi, supra, 382 N.J. Super. at 173-74.

The pretext part of the McDonnell Douglas analysis requires more of a plaintiff than simple identification of an act or event that the plaintiff believes bespeaks discrimination. As our Supreme Court has held, "[t]o prove pretext, however, a plaintiff must do more than

³ Zangara argues that the motion judge applied the wrong legal standard in reaching her decision. Although we disagree, our review is, as already noted, de novo based upon the law we find to be applicable. Manalapan Realty, supra, 140 N.J. at 378. Even if an order was premised upon an incorrect basis, it will be upheld on appeal if the result was correct. Isko v. Plan. Bd. of Livingston, 51 N.J. 162, 175 (1968).

simply show that the employer's [proffered legitimate, non-discriminatory] reason was false; he or she must also demonstrate that the employer was motivated by discriminatory intent." Viscik v. Fowler Equip. Co., 173 N.J. 1, 14 (2002) (citing Erickson v. Marsh & McLennan Co., 117 N.J. 539, 561 (1990)). We have described this burden on plaintiff as one in which the 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. [Svarnas v. AT&T Communications, 326 N.J. Super. 59, 82 (App. Div. 1999) (citing Fuentes, supra, 32 F.3d at 762).]

More recently, we have reiterated that in the summary judgment context, the analysis to be undertaken is two-fold, and that a plaintiff may discharge this burden either by producing circumstantial or direct evidence that discrimination was more likely than not a motivating or determinative cause of the action or by discrediting the reason offered by the employer as the legitimate and non-discriminatory one. See DeWees v. RCN Corp., 380 N.J. Super. 511, 527-29 (App. Div. 2005) (citing Fuentes, supra, 32 F.3d at 764). Although the second of these methods may be accomplished by pointing out "weaknesses, implausibilities, inconsistencies, incoherencies or contradictions in the employer's proffered legitimate reasons," see id. at 528 (quoting Fuentes, supra, 32 F.3d at 765), the requirement that plaintiff do so as an alternative is one

that the motion judge may address in the context of the summary judgment motion. Plaintiff's burden on the pretext part of the analysis, using either approach, however, is not insignificant.

As we understand Zangara's argument, he contends that he established genuine issues of material fact with respect to both (1) "circumstantial or direct evidence that discrimination was more likely than not a motivating or determinative cause of the action" and (2) "discrediting the reason offered by the employer as the legitimate and non-discriminatory one." Id. at 173. As to direct or circumstantial evidence of discrimination, Zangara points to the following: (1) SMC employees knew about his disability and (2) the statement made to him by Sigue that she heard some of those nurses ascribing the conduct that led to his termination to his disability. As to the discrediting evidence, he points to (1) his prior positive performance reviews and (2) what he describes as a disagreement between Carlino and Munsey as to which of them made the decision to terminate him. We will address each of those issues in turn.

Carlino, who was one of the decision makers with respect to Zangara's termination, knew that Zangara had a disability similar to ADHD, as evidenced by her 2006 note stating: "Has ADD - I don't think he takes his meds." Such knowledge on the part of decision makers, however, is not necessarily indicative of

pretext. Here, the record reflects that Zangara's co-workers, including supervisors, were aware of his disability at the time he first volunteered to work at SMC in 1999. Nevertheless, he was subsequently hired as a part-time and then full-time employee, and subsequently received several transfers at his request. Given that history, we conclude that a rational jury could not find pretext on the basis of mere knowledge of Zangara's disability.

Sigue died in June 2008, prior to the filing of Zangara's complaint. Her statement that she was told by others that they attributed Zangara's behavioral problems to his disability would not be admissible at a trial, and consequently cannot be considered on a motion for summary judgment. We consider only "competent evidential materials." Brill, supra, 142 N.J. at 540; El-Sioufi, supra, 382 N.J. Super. at 164.

Sigue was neither a decision maker with respect to the termination nor was she acting as a representative of SMC when she made the statement. Consequently, her statement would not be admissible under N.J.R.E. 803(b) as the statement of a party-opponent.

We are also satisfied that the statement would not be admissible under N.J.R.E. 804(b)(6), as a trustworthy statement of a deceased declarant. The circumstances under which the

statement was made were not sufficiently trustworthy. Sigue was a personal friend of Zangara and one of the signatories of the petition seeking Zangara's reinstatement. In addition, the statement was made only to Zangara.

Even if Sigue's statement itself were admissible, the nurses whose alleged statements were reported by Sigue were not the decision makers with respect to Zangara's termination, although they were the complainants. The statement attributed to the nurses by Sigue would not, in any event, support a finding of pretext. Although one or more of the nurses may well have attributed Zangara's problematic conduct to the fact that he has ADHD, speculation about a possible explanation for the conduct they found objectionable is not, in our view, direct or circumstantial evidence of pretext in the context of this case.

The stated reason for termination was Zangara's conduct, as described by the nurses who complained to Munsey and as documented in the prior events we set forth at length in our factual recitation. The LAD does not prohibit adverse employment actions based upon problematic conduct, such as that alleged in this case, that may result from a disability. See Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 594-95 (1988).

While employed at SMC, Zangara never complained that he was being discriminated against because of his disability. He

agreed that he was told by management to go to HR if he had any complaints. In addition, Zangara never requested any accommodations based upon his ADHD disability, nor did he raise the issue of whether SMC failed to make a reasonable accommodation in his complaint.

We also conclude that there is no genuine issue of material fact with respect to the credibility of the reasons offered by SMC. While it is true that Zangara had prior positive reviews, "prior good evaluations alone cannot establish that later unsatisfactory evaluations are pretextual." Hines v. Hillside Children's Ctr., 73 F. Supp. 2d 308, 315 (W.D.N.Y. 1999) (citations and internal quotation marks omitted); accord Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 528 (3d Cir. 1992), cert. denied, 510 U.S. 826, 114 S. Ct. 88, 126 L. Ed. 2d 56 (1993).

The events that led directly to Zangara's termination began with the written complaint made by Borja, Goleta, and Delafuente in March 2008. As we have already observed, Zangara described each of them as a friend at the time he requested the transfer from PACU to the Ortho-Neuro unit. Their attitude towards him changed after they started working together.

Those nurses' complaints, which centered on his demeanor towards them and his unwillingness to follow direction, were not

the first time Zangara had personality conflicts with his coworkers. Zangara acknowledged having personality differences with MacIntosh while working in the OR during 2004 and 2005. He also acknowledged having problems with Gestosani at the PACU in 2005 and 2006. He complained to Petersen and Orofino that some of the nurses in PACU were "mean" to him in the fall of 2006. He was aware of complaints about him by others in PACU in 2006. Indeed, he was worried that his job was in jeopardy because of such complaints when he met with Orofino and Petersen in October 2006, and acknowledges that he was told to "improve" at that time. In fact, he testified that he requested a transfer from PACU to Neuro-Ortho in 2007 because he was "aggravated" by his relationships with the PACU nurses.

Zangara argues that the credibility of SMC's stated reason for his termination is significantly undercut by the inability of Munsey and Carlino to agree on who made the decision to terminate. Although their testimony might have been clearer, a fair reading of the whole testimony is that it was a joint decision, with Cummings and Munsey representing "management" and Carlino representing "HR."

Having reviewed the record with care, we are satisfied that a rational jury could not find in Zangara's favor. There may be factual disputes about details and the merits of the decision to

terminate, but the material fact as to which there is no dispute is that there was a well-documented history of personality problems between Zangara and staff members in the OR, PACU, and the Neuro-Ortho unit prior to his termination. That was the basis for Zangara's termination.

The fact that Zangara and many of his co-workers disagreed with SMC's decision to terminate him does not create a viable issue of fact with respect to pretext in this case. Generally, "an employer can legally discharge an employee without violating employment discrimination statutes 'for good reason, bad reason, or no reason at all,' as long as there is no intentional discrimination." Maiorino v. Schering-Plough Corp., 302 N.J. Super. 323, 345 (App. Div.) (quoting Walker v. AT&T Technologies, 995 F.2d 846, 850 (8th Cir. 1993)), certif. denied, 152 N.J. 189 (1997). Employers are generally free to manage their businesses as they see fit, and "are entitled to consider the long-term potential of employees when making business decisions." Young v. Hobart W. Grp., 385 N.J. Super. 448, 463 (2005); see also Viscik v. Fowler Equip. Co., 173 N.J. 1, 13 (2002). "Hence, '[t]here is no princip[le] of law that requires that a business' decision be popular with employees. As long as the decision is not based on unlawful . . . discrimination, 'the courts have no business telling [companies] . . . how to make personnel

decisions, which may be objectively or subjectively based.'" Maiorino, supra, 302 N.J. Super. at 345-46 (quoting Walker, supra, 995 F.2d at 850).


Zangara places great emphasis on the motion judge's statement that the Ortho-Neuro nurses who complained about him might not have been telling the truth, arguing that her assertion conclusively demonstrates the existence of genuine issues of material fact. That is not the law. "To prove pretext, however, a plaintiff must do more than simply show that the employer's reason was false; he or she must also demonstrate that the employer was motivated by discriminatory intent." Viscik, supra, 173 N.J. at 14. "To discredit the employer's proffered reason, however, the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent." Fuentes, supra, 32 F.3d at 765.

Having reviewed the record in light of Zangara's arguments and the applicable law, and having considered the facts in the light most favorable to Zangara, we are satisfied that a rational jury could not find that the reason for termination put forward by SMC was a pretext for discrimination or that Zangara's disability was more likely than not a motivating or

determinative factor in the decision.⁴ Consequently, we conclude that summary judgment was appropriately granted in this case.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


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⁴ We have reviewed the other issues raised in Zangara's brief, and find them to be without merit and not warranting discussion in a written opinion. R. 2:11-3(e)(1)(E).