NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2018-09T3

STEVEN E. CENTOFANTI,

Plaintiff-Appellant,

v.

DAYS INN OF AMERICA, INC.,

Defendant,

and

BOJCZUK ENTERPRISES, STEFAN
BOJCZUK and MARKIAN HAMULAK,

Defendants-Respondents.

Argued November 15, 2010 - Decided April 15, 2011

Before Judges Grall and LeWinn.

On appeal from Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-399-07.

Charles Z. Schalk argued the cause for appellant (Mauro, Savo, Camerino, Grant & Schalk, P.A., attorneys; Mr. Schalk, of counsel and on the brief).

David J. Sprong argued the cause for respondents (Becker Meisel, L.L.C., attorneys; Steven R. Weinstein, of counsel and on the brief; Mr. Sprong and Daniel L. Pascoe, on the brief).

PER CURIAM

Plaintiff Steven E. Centofanti filed a complaint seeking damages from his employer for alleged violations of the New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-1 to -8 (CEPA) and the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -42 (LAD). Centofanti appeals from a grant of summary judgment in favor of his employers and supervisors, defendants Bojczuk Enterprises, Stefan Bojczuk, and Markian Hamulak.[1] The trial judge granted summary judgment because she concluded that Centofanti could not establish that he was terminated — an essential element of both claims.

We conclude that Centofanti's evidence was adequate to raise a genuine dispute of material fact as to termination. Accordingly, we reverse and remand for further proceedings.

Defendant Stefan Bojczuk owns and operates the Days Inn of Bridgewater (the Inn) through Bojczuk Enterprises. The business

[1] All other claims have been resolved. Because Centofanti's complaint included a claim under the federal Family and Medical Leave Act, defendants removed the action to federal district court. The district court dismissed the federal claim on the ground that Bojczuk did not have a sufficient number of employees to be subject to the federal law and returned defendant's state law claims to the Law Division. Centofanti voluntarily dismissed his claims against Days Inn of America, Inc.

was established by Stefan's father and left to Stefan in his father's will.

Centofanti was hired as the Inn's chief engineer in September 20, 2004, about one month before Stefan's father died. Joseph Bencivenga, the Inn's general manager, described Centofanti as an "excellent employee in job performance as well as guest services" and "very experienced in all areas of the hotel." Although Centofanti was never given written notice of any problem with his job performance, in early October 2005, Centofanti left work for three weeks after he and Stefan argued about leaking pipes. He took vacation time, returned and then resumed his work as chief engineer.

It is not clear whether Stefan was managing the Inn when Centofanti returned to work. Following the death of Stefan's father, Stefan's step-siblings challenged the will and alleged that Stefan was misusing and misappropriating the Inn's property and funds. John Richardson, Esq. was appointed by the court to administer the estate, and the judge subsequently granted Richardson's application to bar Stefan from managing the Inn pending an investigation and review by a forensic accountant.

Centofanti, aware of the will contest, contacted Richardson to report theft and other conduct by Stefan that he thought unlawful. Richardson arranged for Centofanti to be deposed in

late October 2005. During his deposition, Centofanti said that Stefan employed family members and allowed them to falsify time records; purchased goods for his personal use with the Inn's credit card; assigned the Inn's employees to do work at his home on company time; and used the Inn's petty cash to pay personal bills.

Bencivenga was deposed in November 2005. Like Centofanti, he testified about Stefan's misappropriation of the Inn's assets.

Stefan was aware of Centofanti's complaint to Richardson. On November 30, 2005, Stefan filed pleadings in the will contest attacking Richardson's allegations against him by asserting that they "were based on a statement that he received from Steven Centofanti, a disgruntled former employee who quit after being reprimanded by Stefan." In response, Richardson relied on the deposition testimony given by Centofanti and Bencivenga.

On December 12, 2005, while Stefan was barred from managing the Inn, Centofanti was given a $2000 raise.

On January 5, 2006, Stefan and his step-siblings reached a settlement in the will contest, which required Stefan to make certain payments to them. The same day, the restraints against Stefan's involvement in the Inn's affairs were lifted. Stefan

was at the Inn on January 5, 2006, and saw Centofanti. According to Stefan, he did not know why Centofanti was there.

On the same day, Centofanti's podiatrist completed a medical certificate for him to submit in connection with an application for disability effective from January 6, 2006 through March 6, 2006. In June 2005, that doctor had recommended surgery to correct Centofanti's hammer-toe deformity and thereby address its progressive debilitating effects. In June, Centofanti indicated he would have the operation but did not schedule it, yet by January 2, 2006, Centofanti was ready to proceed. Thus, when Stefan resumed control of the Inn, Centofanti was not working. Bencivenga was terminated after Stefan's return.

Centofanti was not paid by the Inn after January 6, 2006. He received disability benefits from that date until March 27, 2006, the date his podiatrist had cleared him to return to work. Mark Hamulak, a member of Stefan's management team, knew Centofanti was on medical leave and was cleared to return to work. Centofanti appeared for work on March 27, 2006, and he met with Hamulak and gave him the release from his podiatrist. The release indicated that Centofanti could perform "light duty" with no "prolonged standing." Knowing that Centofanti's job required him to be on his feet most of the day, Hamulak told

Centofanti he would mark him in for working that day but asked him to leave and told him he would need more information from his doctor. Stefan knew that Hamulak and Centofanti talked about "some papers" Centofanti had, but he did not "get involved." He explained: "When you work, you work, when you left, you left and didn't tell me." It appears that Stefan was referring to Centofanti's departure after their argument, but that is not clear.

According to Hamulak, he sent Centofanti home because he wanted to know what Centofanti could and could not do. He called Centofanti's doctor and asked for more "paperwork," but he never spoke with the doctor or received a response. Hamulak recalled having another conversation with Centofanti. He admitted that when that conversation ended he believed Centofanti was not "sure what [Hamulak] needed from the doctors." Hamulak also admitted that he told Centofanti he might have to go through the Inn's insurer and undergo evaluation by their doctors to see what duties he could perform before returning to work. Defendants presented no evidence of any efforts they made to acquire more information or arrange, or allow Centofanti to arrange, an evaluation by another doctor.

By Centofanti's account, he called Hamulak at least twice a day and left numerous messages on his phone and with the Inn's

front desk on March 29, 30 and 31, 2006. He did not call again after March 31. Apart from the conversations Hamulak recounted, Centofanti said he received no response.

On April 25, 2006, Centofanti's doctor cleared him for unrestricted duty. Although Centofanti conceded that he had never been told or notified that he was terminated, Centofanti did not notify the Inn that he had been cleared for full duty because he had concluded that he was terminated when Hamulak ignored his phone calls.

According to Hamulak, the Inn carried Centofanti on its payroll until he was granted unemployment compensation. Hamulak acknowledged that the State notified the Inn of Centofanti's application for unemployment benefits, but the Inn did not oppose that application.

On the foregoing evidence, the trial judge concluded that Centofanti could not proceed on his CEPA or LAD claims because the evidence was inadequate to permit a jury to find that he was terminated. We cannot affirm that determination.

In reviewing a grant of summary judgment, this court applies the same standards as the trial court. Kramer v. Ciba-Geigy Corp., 371 N.J. Super. 580, 602 (App. Div. 2004). In assessing the evidence presented on the motion, a court must give the non-moving party the benefit of all favorable evidence

and inferences. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). In this case, the question is whether defendants are entitled to summary judgment as a matter of law or whether there is a genuine dispute of material fact that must be resolved by a jury. Id. at 540.

Without doubt, a plaintiff must show an adverse employment action to establish the retaliation required to prove a CEPA claim and the discrimination required to prove an LAD claim of discrimination based on disability, rather than an employer's failure to reasonably accommodate a disability. See Victor v. State, 203 N.J. 383, 408-09, 413, 421-22 (2010) (noting that plaintiffs claiming employment discrimination based on disability are generally obligated to show an adverse employment action but concluding that the LAD's broad remedial purposes suggest elimination of obligation where the claim is based on failure to offer a reasonable accommodation); Maimone v. City of Atl. City, 188 N.J. 221, 235 (2006) (noting that CEPA requires proof of "'retaliatory action'" which is defined as "'the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment'" (quoting N.J.S.A. 34:19-2(e)).

Centofanti's complaint relies on termination to establish this critical element of his claims.[2]

Defendants argue that the evidence presented on the motion requires a jury to find that defendant was not terminated but simply left work without first taking reasonable steps necessary to remain employed. We disagree.

The evidence we have summarized above, viewed in the light most favorable to plaintiff, is adequate to permit a jury to find that Centofanti did everything he could reasonably do to return to work but was effectively, if silently, terminated by Hamulak's failure to give him any direction about what he needed to do to return to work.[3] Centofanti reported for work on the date expected, and he was told to leave because more information

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[2] On appeal Centofanti presents an argument based on his employer's failure to accommodate his disability, but his complaint does not include such a claim. Accordingly, we will not address the issue.

[3] Defendants contend that Centofanti's affidavit stating that he was terminated must be disregarded as a sham because it is inconsistent with his deposition testimony admitting that he was never notified that he was terminated. The argument lacks sufficient merit to warrant extended discussion in a written opinion. R. 2:11-3(e)(1)(E). It suffices to note that Centofanti does not allege that he was told he was terminated, and there is no inconsistency between his affidavit and his testimony. See Shelcusky v. Garjulio, 172 N.J. 185, 194-99, 201 (2002) (noting that a defendant should not be subjected to the burden of a trial based upon sham facts and concluding that courts may grant summary judgment when an affidavit inconsistent with deposition testimony creates a sham factual dispute).

about his capacity to perform was needed. Hamulak later told Centofanti he had tried but had been unable to reach Centofanti's doctor, but Hamulak admitted that Centofanti did not know what information he needed. Nevertheless, Hamulak did nothing to inform Centofanti so he could acquire and submit the information himself. Moreover, Hamulak also admitted that he told Centofanti he might have to submit to an evaluation by another doctor selected by defendants or their insurer, but he did not arrange an examination or tell Centofanti how he could do that. Finally, despite the ambiguity Hamulak created about the circumstances under which Centofanti could return to work, Hamulak did not respond to Centofanti's follow-up phone calls placed over a three-day period, and defendants did not oppose Centofanti's application for unemployment benefits.

Jurors believing Centofanti's testimony and giving him the benefit of all reasonable inferences could reasonably conclude that Hamulak's conduct communicated termination as effectively as a written notice. Accordingly, this grant of summary judgment, which was entered on the ground that Centofanti could not establish an adverse employment action, must be reversed.

Defendants argue that the judge properly declined to draw an inference of termination from their failure to oppose Centofanti's application for unemployment benefits. We

disagree. Like the trial judge, defendants rely on N.J.S.A. 43:21-11(g), which states:

> All records, reports and other information obtained from employers and employees under this chapter, except to the extent necessary for the proper administration of this chapter, shall be confidential and shall not be published or open to public inspection other than to public employees in the performance of their public duties, and shall not be subject to subpena or admissible in evidence in any civil action or proceeding other than one arising under this chapter . . . .

The statute has no relevance here, even assuming an employer's failure to oppose a claim for unemployment compensation is protected as "information obtained from" an employer. Hamulak disclosed the employer's position during his deposition. The fact that the information may also be included in a record that is inadmissible would not preclude Hamulak from giving testimony based on his personal knowledge.

Defendants also rely on Olivieri v. Y.M.F. Carpet, Inc., 186 N.J. 511, 529 (2006), which holds that unemployment compensation determinations cannot be given "collateral estoppel effect." In that case, the employer opposed the employee's application for unemployment. Id. at 517-18. The issue was "whether the employee's successful application for unemployment compensation benefits should be given collateral estoppel effect so as to preclude the employer from claiming in the CEPA action

that the employee voluntarily left her employment." Id. at 513. Here, the question is quite different — whether the employer's decision to refrain from opposing the application gives rise to a permissive inference that the employer did not think Centofanti voluntarily left work. Olivieri has no relevance here.

Defendants urge us to consider an alternative basis for affirming the grant of summary judgment. Focusing on Centofanti's restriction to "light duty" and contending that he was sent home because he could not do his work, defendants contend that Centofanti cannot rebut their non-retaliatory and non-discriminatory reason for any adverse employment action.

We reject this argument because the employer's "reason" does not explain how Hamulak concluded that Centofanti was not able to perform his job as chief engineer when he admitted that he did not know what Centofanti could or could not do. Defendants' evidence of a non-retaliatory and non-discriminatory motive is not so one-sided as to entitle them to judgment as a matter of law. Brill, supra, 142 N.J. at 540.

Reversed and remanded for further proceedings.