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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3251-10T3

ROSE SOLIS,

Plaintiff-Appellant,

vs.

JAY SHER, DDS,

Defendant-Respondent.

Submitted October 31, 2011 – Decided December 5, 2011

Before Judges Parrillo and Skillman.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-7032-09.

Joseph H. Neiman, attorney for appellant.

Javerbaum, Wurgaft, Hicks, Kahn, Wikstrom and Sinins, attorneys for respondent (Gary E. Roth, of counsel and on the brief).

PER CURIAM

Plaintiff Rose Solis appeals the summary judgment dismissal of her adverse employment action based on pregnancy discrimination. We affirm.

The facts viewed most favorably to plaintiff, Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995), are as

follows. For a twenty-one month period beginning February 10, 2006 and ending November 9, 2007, plaintiff was employed as a dental hygienist by Jay Sher, DDS, LLC, a dental practice solely owned by defendant Jay Sher. Plaintiff married shortly after commencement of her employment and around May 2007, learned she had become pregnant. At the time of her discharge, she was in her eighth month of pregnancy.

On the day she was terminated, two patients complained about plaintiff's work performance and, according to defendant, these complaints were the "last straw" leading to his decision to fire her. Two days earlier, on November 5, 2007, defendant was obliged to re-treat another patient at no charge "due to plaintiff's inferior work[,]" as he had done only one month before. These re-treatments followed a number of other patient complaints expressing dissatisfaction with plaintiff's demeanor and her teeth cleaning services. Among the deficiencies cited by defendant were plaintiff's "failing to give oral hygiene instruction to patients, leaving teenagers and children alone in the chair, [and] failing to sharpen her instruments . . . ."

In addition to patient complaints, staff members criticized plaintiff's general lack of professionalism. According to defendant's financial coordinator:

> [Plaintiff] would bring patients to my desk after completing her treatment and

> 'slap' the patient's chart on my desk, turn to the patient and say 'see ya' in the most unprofessional way. . . .
>
> [Plaintiff] was trained to pass the patient off to me and to explain the importance of the next visit, but this was rarely if ever done.
>
> One Saturday morning I had a mild altercation with [plaintiff]. While walking away from me and about to enter her operatory with a patient waiting in her chair, [plaintiff] called me a 'bitch' loud enough so that I heard it while sitting at my desk approximately 20 feet away.
>
> . . . .
>
> I observed that our cancellation rate for hygiene appointments during [plaintiff's] employment tenure was quite high.
>
> . . . .
>
> Several of our patients spoke to me directly and threatened to leave the practice solely because they were unhappy with [plaintiff].

Defendant discussed her job performance with plaintiff in a series of meetings and informal discussions wherein he attempted to explain what was expected of her. Although plaintiff characterizes these reviews as favorable, defendant's contemporaneous handwritten notes of these meetings documented some of the problems he claims persisted throughout her employment. These problems became serious enough that in January 2007, four months before he learned of plaintiff's

pregnancy, defendant ran an on-line advertisement with NJJobs.com for a dental hygienist to replace plaintiff, but no one responded.

Despite concerns over plaintiff's attitude and work performance, defendant nevertheless hoped she would improve and actually expected her to return to work after her maternity leave of absence. In fact, when plaintiff first advised defendant she was pregnant in May 2007, defendant and his wife Geri, who was also his office manager, suggested that in scheduling maternity leave, plaintiff accumulate her vacation time in the event she needed to take days off should the baby get sick. This expectation on the part of defendant appeared consistent with his treatment of other staff members who had become pregnant during their tenure with his dental practice. One employee, Marcia Rigillo, had two pregnancy leaves while employed with defendant, and her position was held for her each time. Rigillo ultimately resigned toward the end of her second maternity leave to accept a significantly higher paying job after defendant declined to match her other offer. Olga Stack decided not to return to work after giving birth; however, defendant made it clear to her that she was welcomed back and that her job was available if she wanted to return.

According to plaintiff, however, these experiences made defendant less tolerant of pregnant employees. When defendant first met her husband in May 2006, shortly after their marriage, defendant remarked, "remember no babies, children are overrated." Also, upon learning plaintiff was pregnant sometime in May 2007, defendant's wife supposedly said "congratulations Mom, now I'm going to kill you." And when scheduling plaintiff's maternity leave, defendant and his wife mentioned to plaintiff previous problems with hygienists on maternity leave who never returned to work despite assurances to the contrary.

A few months after plaintiff's termination, defendant hired a new dental hygienist in February 2008. On August 25, 2009, plaintiff filed the instant complaint against defendant alleging wrongful termination because of pregnancy discrimination in violation of the New Jersey Law against Discrimination, N.J.S.A. 10-5-1 to -42 (LAD). Following defendant's answer and discovery, defendant moved for summary judgment, which the trial judge granted, reasoning:

> Perhaps the most telling proofs that Solis' termination was the unfortunately timed culmination of what Sher perceived to be poor job performance were that (a) Sher ran an online advertisement on NJJOBS.com for a dental hygienist to replace Solis before she became pregnant and (b) the termination occurred one month after Sher had to re-treat a patient at no charge due to Solis' inferior work, two days after Sher

> had to re-treat a second patient at no charge due to Solis' work, and the same day as two patients complained of Solis' work. It is simply not possible for Solis to raise an inference that Sher's legitimate and non-discriminatory reasons were fabricated or that he terminated her because of her pregnancy. Summary judgment is mandated.

We agree and affirm substantially for the reasons stated by the motion judge in his written decision of February 15, 2011. We add only the following comments.

Under the framework articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), which has been adopted in New Jersey to prove disparate treatment under the LAD, Viscik v. Fowler Equip. Co., 173 N.J. 1, 13-14 (2002), plaintiff, by all accounts, established a prima facie case of discrimination. Equally undisputed, defendant proffered a legitimate non-discriminatory reason for plaintiff's termination, namely poor job performance. See Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 600 (1988). The issue, therefore, comes down to whether or not there is sufficient evidence in the record from which a reasonable factfinder could conclude that the proffered reason for termination was a pretext for discrimination and not the true reason for the employment decision. See Zive v. Stanley Roberts, Inc., 182 N.J. 436, 449 (2005); see also Nini v. Mercer Cnty. Cmty. Coll., 406 N.J. Super. 547, 555 (App. Div. 2009), aff'd, 202 N.J. 98 (2010). In

other words, we must decide whether, viewing the evidential materials most favorably to plaintiff, together with all reasonable inferences favoring plaintiff, a rational factfinder could find that defendant's proffered reason for terminating plaintiff (poor job performance) was a pretext for the alleged true reason, intentional discrimination because plaintiff was pregnant, Bergen Commercial Bank v. Sisler, 157 N.J. 188, 211 (1999), and thus whether the wrongful motive "'was more likely than not a motivating or determinative cause of the employer's action.'" Zive, supra, 182 N.J. at 455-56 (quoting Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994)). In short, is the employer's proffered non-discriminatory reason unworthy of belief? Bergen Commercial Bank, supra, 157 N.J. at 211.

Plaintiff has offered nothing to discredit defendant's proffered reason for her discharge by demonstrating either "weakness, implausibilities, inconsistencies, incoherences, or contradictions" in defendant's proofs, including the many certifications of patients and staff consistently attesting to plaintiff's poor work performance. DeWees v. RCN Corp., 380 N.J. Super. 511, 528 (App. Div. 2005). Nor is there any proof of disparate treatment or that prior dental hygienists who became pregnant while in defendant's employ were terminated, let alone because of their pregnancy. Just the opposite, the only

other hygienists who became pregnant while so employed were asked to return, one of whom actually took two maternity leaves during the course of her employment. Moreover, the comments ascribed to defendant and his wife about plaintiff's pregnancy were, as properly found by the motion judge, "jocular in nature" and, in any event, insufficient to establish a genuinely disputed material fact as to defendant's true motivation.

A plaintiff is required to do more than merely "challenge" a defendant's articulated reason for the discharge; she must satisfy her burden of presenting competent evidence that would permit a rational fact-finder to conclude the proffered reason for discharge was false. Here, plaintiff has failed to meet that burden. Her proofs, quite simply, amount to no more than her own self-serving perception that her performance was satisfactory. Yet such assertions, without supporting evidence, are "clearly insufficient to create a question of material fact for purposes of a summary judgment motion." Martin v. Rutgers Cas. Ins. Co., 346 N.J. Super. 320, 323 (App. Div. 2002); see also Brae Asset Fund, L.P. v. Newman, 327 N.J. Super. 129, 134 (App. Div. 1999). Nor can satisfactory performance be reasonably inferred from any delay in her termination, such as plaintiff suggests, since defendant's forbearance in firing

plaintiff has been otherwise credibly explained and remains unchallenged.

It is by now well-settled that the LAD "does not prevent the termination or change of employment of any person who 'is unable to perform adequately the duties of employment, nor [does it] preclude discrimination among individuals on the basis of competence, performance, conduct or any other reasonable standards.'" Zive, supra, 182 N.J. at 446 (quoting N.J.S.A. 10:5-2.1); see also Viscik, supra, 173 N.J. at 13. That is, the LAD "acknowledges the authority of employers to manage their own businesses." Ibid. Here, affording plaintiff all favorable inferences, there is simply no evidence from which a reasonable jury could conclude that defendant's non-discriminatory reason for terminating plaintiff is unworthy of belief or that her pregnancy was the motivating factor in defendant's employment decision.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION