NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1602-10T1

MARC LIEBESKIND,

Plaintiff-Appellant,

v.

COLGATE-PALMOLIVE CO.,

Defendant-Respondent,

and

TRANSNET CORP.,

Defendant.

Submitted April 24, 2012 - Decided May 1, 2012

Before Judges Baxter, Nugent and Carchman.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-010353-06.

Marc Liebeskind, appellant pro se.

Morgan, Lewis & Bockius, L.L.P., attorneys for respondent (Thomas A. Linthorst and Valerie E. Manos, on the brief).

PER CURIAM

Following our remand, plaintiff Marc Liebeskind appeals an October 29, 2010 Law Division order that dismissed his complaint against defendant Colgate-Palmolive Company (Colgate), after the

judge held that the complaint failed to state cognizable claims for relief under the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, and the Conscientious Employment Protection Act (CEPA), N.J.S.A. 34:19-1 to -8. The judge concluded that, as a matter of law, plaintiff had not established a cause of action for either age discrimination under the LAD or retaliation under CEPA. We affirm.

I.

Plaintiff was employed by defendant Transnet Corporation (Transnet)[1] as a computer technician from February 1998 to December 2005, providing technical support to Transnet's customers, including Colgate. The contract between Colgate and Transnet obligated Transnet to provide computer support services at Colgate's Manhattan headquarters and at its technology center in Piscataway, where Transnet technicians provided computer services at a Colgate Help Desk on Colgate premises.

Although Colgate reserved the right to request Transnet to replace an employee who "fail[ed] to perform in a satisfactory manner," and Transnet agreed to do so if Colgate provided supporting reasons, Colgate had no authority to directly remove or terminate a Transnet employee, even if Colgate deemed the

[1] Although plaintiff named Transnet as a defendant in his complaint, he made no allegations against Transnet, stating he named the company as a defendant "for discovery purposes" only.

employee's performance unsatisfactory. Pursuant to the contract, Transnet billed Colgate monthly for the services provided by Transnet's employees. Transnet paid salary and benefits, and issued a W-2 to plaintiff and the other Transnet employees assigned to the Colgate Help Desk in Piscataway.

From 2001 to 2005, plaintiff sent a series of emails to the Colgate manager in charge of the Help Desk, complaining that his Help Desk colleagues smelled of smoke, which bothered him because he had "asthma and a sensitivity to tobacco smoke." He asked the Colgate manager to seat him elsewhere.

In September 2005, Colgate opted not to renew its agreement with Transnet, choosing to instead hire its own technicians for full-time jobs. Plaintiff applied for one of the new positions, and was interviewed, but Colgate did not offer him employment. When its contract with Colgate ended in September 2005, Transnet was unable to find new work for plaintiff, and plaintiff's employment relationship with Transnet came to an end. Plaintiff and Transnet executed a release, under which, in exchange for payment of an undisclosed sum of money, plaintiff released Transnet from any potential claims arising from unlawful employment practices prohibited by the LAD or CEPA. The agreement did not release any possible claims plaintiff may have had against Colgate.

In a September 5, 2006 letter to Colgate, plaintiff alleged that Colgate refused to hire him in 2005 in retaliation for his complaint that cigarette smoke had aggravated his asthma. He also alleged that Colgate had refused to accommodate his disability, which he identified as asthma. Colgate investigated the claims plaintiff asserted in his September 2006 letter, and at the conclusion of its investigation, deemed plaintiff's accusations unfounded.

On December 26, 2006, plaintiff filed the complaint that is the subject of this appeal. The complaint alleged the same facts plaintiff asserted in his September 5, 2006 letter to Colgate, but added one event suggesting a claim for age discrimination, which was set forth in the twelfth paragraph. In relevant part, plaintiff's complaint alleged:

> 5. Interviews were scheduled for the plaintiff and others. There were four people conducting the interviews: JoAnn Murphy, who was identified as the hiring manager, and three other Colgate employees: Anthony Nuzzo, Frank Lynch, and Latasha Kempadoo.
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> 6. Towards the end of December 2005, JoAnn Murphy announced who Colgate had chosen to hire. Plaintiff was not one of them, even though he was considered one of the best members of the group, better qualified than some of his colleagues that Colgate hired, and had made substantial contributions to the company that exceeded that of some of his colleagues. She also stated that those not hired would be considered for the other

positions in the Morristown and New York locations.

7. One of plaintiff's colleagues, Ayman Mohommed, was asked to interview in New York, and was hired to work there, but plaintiff was not even given the opportunity to interview for that position.

8. Plaintiff has a disability. He has asthma, and a sensitivity to tobacco smoke. His sensitivity is to the degree that even the odor of tobacco smoke on someone's clothing could cause him to become symptomatic.

. . . .

12. After plaintiff's employment was terminated, he called the telephone previously assigned to him, and learned that one of his former and younger colleagues had replaced him.

13. Plaintiff was a member of a protected class, and engaged in protected activity. Plaintiff alleges that the defendant Colgate engaged in unlawful employment practices and discriminated and retaliated against him through its employment and hiring practices.

As is evident, plaintiff's complaint did not identify the nature of the discriminatory acts for which plaintiff sued Colgate. Instead, plaintiff alleged broadly that Colgate had "discriminated and retaliated against him through its employment and hiring practices." The complaint also failed to identify either Colgate or Transnet as his employer, alleging only that plaintiff was a "contractor" who performed work "exclusively" for Colgate.

In November 2007, during the pretrial discovery period, plaintiff moved to compel Colgate to answer interrogatories. His supporting certification stated, for the first time, that his causes of action against Colgate included LAD and CEPA violations "based on age, disability, . . . failure to accommodate, disparate treatment, [and] hostile work environment." Plaintiff certified that although his "complaint presently does not perfectly plead each [such] allegation, it [was his] intention to amend the [c]omplaint to make it conform to the evidence as may be needed." At no time prior to the scheduled discovery end date of June 5, 2008, did plaintiff seek leave to amend the complaint.

At the hearing on plaintiff's motion to compel discovery, the judge asked Colgate how many of the seven Piscataway Help Desk technicians Colgate had hired after Colgate terminated the contract with Transnet. Colgate responded that "six were ultimately hired." Plaintiff was the only individual from the Piscataway Help Desk whom Colgate did not hire. Colgate listed the ages of the individuals ultimately hired in Piscataway as twenty-six, thirty-seven, thirty-eight, forty, twenty-six and forty-eight. Of the eight individuals who applied for the position but were not hired, four were in their thirties, one in

his twenties, another in his early forties, and the ages of the remaining two applicants were unknown.

After discovery ended, Colgate moved for partial summary judgment; and on May 9, 2008, the judge granted Colgate's motion, thereby dismissing plaintiff's LAD claims for disability discrimination and failure to accommodate plaintiff's alleged asthma disability. The judge expressly rejected plaintiff's claim that Colgate was a place of public accommodation. A month later, on June 6, 2008, the judge denied plaintiff's motion to extend discovery, reasoning that "Colgate was dismissed from case on summary judgment." Plaintiff appealed both orders.

We affirmed the trial court's grant of partial summary judgment to Colgate, concluding that even when plaintiff's proofs were given an indulgent reading, the evidence in the record could not support plaintiff's claims of discrimination and public accommodation. Liebeskind v. Colgate-Palmolive Co., No. A-5054-07 (App. Div. June 11, 2010) (slip op. at 5-7). We also affirmed the judge's conclusions that the evidence did not support the existence of a disability under the LAD, and that Colgate had not perceived plaintiff as suffering from a disability. Id. at 3. We stated:

> [E]ven if we assume . . . that asthma can constitute a disability under the LAD, and even if we accept plaintiff's claim that his medical records indicate that he had asthma,

> we cannot overlook his failure to provide a report from a medical expert indicating that his particular condition was a disability. Where, as here, "the existence of a handicap is not readily apparent, expert medical evidence is required." Viscik v. Fowler Equip. Co., 173 N.J. 1, 16 (2002). On this issue, the judge's findings of fact were fully supported by the evidence, and since he applied the correct legal principle, we have no ground on which to base disagreement. R. 2:11-3(e)(1)(A). The judge also correctly recognized that the evidence failed to support plaintiff's claim that Colgate-Palmolive perceived him as being handicapped. Here, plaintiff relies on the accommodations made as a result of his complaints. However, evidence of accommodation does not provide adequate support for a claim that an employer viewed someone as disabled. See Heitzman v. Monmouth [Cnty.], 321 N.J. Super. 133, 142 (App. Div. 1999), overruled on other grounds, Cutler v. Dorn, 196 N.J. 419 (2008). Here, the evidence clearly showed that those individuals who accommodated plaintiff's complaints never believed that he was disabled. Consequently, we are obliged to reject plaintiff's claim that the judge erred in dismissing his discrimination claim.
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> [Id. at 2-3.]

We also affirmed the judge's finding that, even assuming that plaintiff was disabled under the LAD, his claim that Colgate failed to accommodate his disability could not survive because Colgate was not his employer:

> With respect to plaintiff's failure to accommodate claim, we note the complete absence of substantive evidence indicating that he was employed by Colgate-Palmolive.

Indeed, to the contrary, the evidence showed overwhelmingly that his employer was TransNet Corp., a provider of information technology services to, among others, Colgate-Palmolive.

Pursuant to a written agreement, TransNet provided its services to Colgate-Palmolive as an independent contractor, and these parties agreed that the technical representatives assigned by TransNet to the Colgate-Palmolive site were not "employees of Colgate-Palmolive." These TransNet employees, including Liebeskind, were hired and supervised by TransNet, which paid their salaries and retained the rights of dismissal or reassignment. TransNet also supplied these employees with medical and dental benefits, life insurance, disability benefits, and vacation and sick days. Although Colgate-Palmolive supplied the equipment and workplace[,] and although Liebeskind worked in this facility for five of his seven years with TransNet, those factors are not sufficient to establish an employment relationship with Colgate-Palmolive. Furthermore, Liebeskind's work, information technology, was not an integral part of Colgate-Palmolive's business, which was the manufacture and distribution of personal care products. Rather, it was precisely the type of service provided by TransNet. Consequently, under the principles set forth in Pukowsky v. Caruso, 312 N.J. Super. 171, 182-83 (App. Div. 1998), we are obliged to approve the judge's determination that Liebeskind was not employed by Colgate-Palmolive. Since only employees are entitled to pursue an action against an employer under the LAD, id. at 180, Liebeskind's action for failure to accommodate fails.

[Id. at 3-5.]

Lastly, we affirmed the judge's finding that Colgate was not a place of public accommodation under the LAD, reasoning:

> We affirm, as well, the judge's rejection of plaintiff's claim that the plant where he worked was a place of public accommodation. In fact, it is a private, highly secure facility to which the public is not invited. It does not fit within any of the places of public accommodation listed in the LAD. N.J.S.A. 10:5-5(1). Nor is it such a place under the definition set forth in Thomas v. County of Camden, 386 N.J. Super. 582, 591 (App. Div. 2006).
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> [Id. at 5.]

Despite affirming the dismissal of most of plaintiff's causes of action, we remanded the matter to the Law Division because the complaint "suggested two other causes of action," which the trial court had not addressed, namely a claim for "failure to hire based on age discrimination under the LAD and a claim under [CEPA]." Id. at 6. Deeming the trial court's order interlocutory, we granted leave to appeal nunc pro tunc, and remanded for a determination on the merits of those two unresolved claims. Id. at 7.

On remand, pursuant to Rule 4:6-2(e), Colgate moved to dismiss plaintiff's CEPA and age discrimination causes of action for failure to state a claim upon which relief could be granted. At the conclusion of oral argument on October 29, 2010, the judge granted Colgate's motion. As to the CEPA claim, the judge

ruled that because Colgate was not plaintiff's employer, as a matter of law, Colgate had no liability to plaintiff for Colgate's refusal to renew the Transnet contract. For that reason, Colgate's non-renewal of the contract could not be deemed a retaliatory action under CEPA that punished plaintiff for seeking accommodation of his asthma. The judge stated:

> [T]he CEPA claim fails because it is clear . . . in the Appellate [Division's] decision that the plaintiff in this case was not an employee of Colgate. Furthermore, plaintiff's claim that Colgate's decision not to renew its contract with Transnet was an employment action against the plaintiff and illegal termination, as this Court finds, is incorrect.
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> Colgate's decision not to renew its contract with Transnet does not give rise to any cause of action by plaintiff against the party not a party to that contract. Therefore, as to that particular claim, since he is not an employee of Colgate and it was really a situation he was an employee of Transnet, the CEPA claim must fail.

As to the LAD age discrimination claim, the judge held that:

> Plaintiff's complaint alleges that after plaintiff's employment was terminated he learned that one of his former and younger colleagues had replaced him when he called his previously . . . assigned telephone. The mere fact that one of plaintiff's younger colleagues answered plaintiff's phone this court finds is not sufficient to state a claim for discrimination. I'm citing [Petrusky v. Maxfli Dunlop Sports

> Corp., 342 N.J. Super. 77, 81-82 (App. Div. 2001)].
>
> The focal point is not necessarily how old or young the plaintiff or his replacement was, but rather whether the claimant's age in any significant way made a difference in the treatment he was accorded by his employer.

On October 29, 2010, the judge issued a confirming order dismissing plaintiff's complaint with prejudice, as the age discrimination and CEPA claims that the judge rejected were all that remained of plaintiff's original complaint.

On appeal, plaintiff argues that: 1) the dismissal of his LAD and CEPA claims was error that must be reversed on appeal; 2) because our affirmance of the dismissal of his failure to accommodate claim under the LAD was error, we are obliged to reconsider that opinion and remand for reinstatement of the dismissed claims; 3) the judge should have converted Colgate's motion to dismiss into a motion for summary judgment, and should have permitted further discovery; and 4) the judge should not have entertained Colgate's motion, as Colgate waived the right to file such a motion when it answered plaintiff's complaint.

II.

When presented with a Rule 4:6-2(e) motion to dismiss for failure to state a claim, the motion must be denied if the facts alleged in the complaint, if accepted as true, are legally

sufficient to state a cause of action. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989). In ruling on such a motion, the judge is obliged to afford a plaintiff, "every reasonable inference of fact," as the test for determining the adequacy of a pleading is whether a cause of action is suggested by the facts alleged. Ibid. The "examination of a complaint's allegations of fact . . . should be one that is at once painstaking[,] and undertaken with a generous and hospitable approach." Ibid. If matters outside of the pleadings are presented and not excluded, the judge must treat the Rule 4:6-2(e) motion as one for summary judgment, and must afford the parties a "reasonable opportunity to present all material pertinent to such a motion." R. 4:6-2.

We owe no deference to the trial judge's conclusions of law, which we review de novo. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Here, the parties each filed certifications with the court, and relied on numerous statements made to the court in the prior hearings. At the October 29, 2008 hearing on Colgate's motion to dismiss, the judge did not state whether he had excluded these materials from his review of Colgate's motion. But, even assuming that the judge considered these materials, he was not required to convert the motion to dismiss into a motion for

summary judgment, even though these materials lay "outside of the pleadings." See Hoffman v. Hampshire Labs, Inc., 405 N.J. Super. 105, 113 (App. Div. 2009) (observing that certifications will not convert a motion to dismiss into a summary judgment motion when such certifications are used to determine whether the complaint alleged a cognizable claim).

We now address plaintiff's procedural claims, that the judge erred by granting Colgate's Rule 4:6-2(e) motion because a defendant is obliged to file such a motion "prior to the first responsive pleading"; and the court should have afforded him an opportunity to amend his complaint after further discovery to conform it to "new evidence."

As to the first argument, a Rule 4:6-2(e) motion to dismiss is not required to be made before the first responsive pleading. Rule 4:6-7 provides that a motion for failure to state a claim "may be made in any pleading . . . or by motion for summary judgment or at the trial on the merits." See also Pressler and Verniero, Current N.J. Court Rules, comment 1 on R. 4:6-7 (2012) (stating that a defense under Rule 4:6-2(e) "may be raised as late as trial").

As to the second argument, plaintiff did not file a motion to amend the complaint at any time in the prior proceedings, or at any time following our June 2010 remand. He also did not

seek an adjournment of the motion to enable him to furnish other materials, nor did he establish on remand what further discovery was necessary to defeat defendant's motion to dismiss for failure to state a claim. Indeed, a court is not obliged to deny a motion to dismiss under Rule 4:6-2(e) even if more discovery could have established the claim. See Edwards v. Prudential Prop. & Cas. Co., 357 N.J. Super. 196, 202 (App. Div.) (holding that a motion for failure to state a claim upon which relief may be granted "may not be denied based on the possibility that discovery may establish the requisite claim; rather, the legal requisites for [the] . . . claim must be apparent from the complaint itself"), certif. denied, 176 N.J. 278 (2003). Moreover, plaintiff had already had the benefit of full discovery. For these reasons, we reject plaintiff's claims concerning the procedures on remand, and now address plaintiff's substantive contentions.

III.

In pertinent part, the LAD statute states:

> It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination:
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> a. For an employer, because of the . . . age, . . . of any individual, . . . to refuse to hire or employ or to bar or to discharge or require to retire, unless justified by lawful considerations other than age, 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).]

To prove a cause of action under the LAD for age discrimination in hiring, a plaintiff must establish the elements of a prima facie case, and must show by a preponderance of the evidence:

> (1) that plaintiff falls within a protected class; (2) that plaintiff was qualified for the work for which he or she applied; (3) that plaintiff was not hired; and (4) that the employer continued to seek others with the same qualifications[,] or hired someone with the same or lesser qualifications who was not in the protected status.
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> [Victor v. State, 203 N.J. 383, 408-9 (2010).]

Applying the Victor test, we are willing to assume that plaintiff satisfies its first three prongs, because at age fifty, he was in a protected class;[2] he was qualified for the position, as the work in question was substantially the same as

[2] We have held that individuals younger in age than plaintiff are deemed to be in a protected class for purposes of establishing that element of an age discrimination claim. See Young v. Hobart W. Group, 385 N.J. Super. 448, 458 (App. Div. 2005) (finding such status when the plaintiff was age forty-eight); Reynolds v. Palnut Co., 330 N.J. Super. 162, 168 (App. Div. 2000) (noting that the plaintiff was in a protected class at age forty-nine); Greenberg v. Camden Cnty. Voc. & Tech. Sch., 310 N.J. Super. 189, 201 (App. Div. 1998) (finding the same for a plaintiff who was forty-eight years old).

the work he was doing before Colgate terminated the Transnet contract; and Colgate did not hire him. But giving plaintiff's complaint the indulgent treatment that Printing Mart, supra, 116 N.J. at 746, requires, we conclude that plaintiff's complaint fell short of satisfying the fourth Victor prong. Plaintiff did not plead his age, and in the entire complaint, he asserted only that a "younger" person replaced him. Even affording plaintiff the "generous and hospitable approach" that Printing Mart, ibid., requires, a cause of action based on failure to hire is not "suggested," ibid., by the facts plaintiff alleged in his complaint.

Moreover, under the fourth Victor prong, plaintiff is required to allege some form of comparison evidence that, if true, would establish "that others . . . with similar or lesser qualifications achieved the rank or position." Dixon v. Rutgers State Univ., 110 N.J. 432, 443 (1988). Although plaintiff acknowledges that in a failure to hire case, a plaintiff must show that the employer hired someone with similar or lesser qualifications, he has not addressed this requirement, arguing instead only that Colgate "hired others to perform the same work as plaintiff." In advancing that argument, plaintiff appears to confuse the fourth prong in a failure to hire case with that in a wrongful discharge case. In wrongful discharge cases, the

fourth prong is satisfied by proof that "the employer sought others who performed the work after the complainant had been removed." Reynolds, supra, 330 N.J. Super. at 168. In a failure to hire case, a plaintiff must show that the employer hired someone with similar or lesser qualifications. Ibid. Plaintiff has not addressed this requirement, arguing instead only that Colgate "hired others to perform the same work as plaintiff."

Here, despite the Dixon requirement, plaintiff has not alleged any facts in his complaint concerning the qualifications of the others who were hired. On remand, when opposing Colgate's Rule 4:6-2(e) motion, plaintiff compared his qualifications to only the qualifications of a forty-year-old man whom Colgate hired as part of the group of six. Plaintiff argued that he was more qualified for the position than that individual.[3] Contrary to plaintiff's assertion that his qualifications were superior to the forty-year-old man whom Colgate hired, the successful applicant's qualifications surpassed plaintiff's. Unlike plaintiff, who worked in the field of information technology only since 1996, the successful applicant became a senior technician in information technology in 1989, and served as a supervisor at Transnet since 1994.

[3] That individual's resume is included in plaintiff's appendix.

Colgate does not dispute that plaintiff was the only person from the Technology Center not hired for the open positions, and that he was the oldest person considered. Nonetheless, as we have already concluded, plaintiff has not alleged facts in the complaint on which an age discrimination based on the failure to hire claim could rest. At no point did plaintiff move to amend his complaint to adequately state such a claim, even though he continued to assert below that he was alleging a claim for age discrimination based on the failure to hire him. For that reason, dismissal of plaintiff's complaint was correct, particularly because the discovery period had already come to an end. See Banco Popular N. Am. v. Gandi, 184 N.J. 161, 166 (2005) (holding that "if the complaint states no basis for relief[,] and discovery would not provide one, dismissal is the appropriate remedy"). We affirm the dismissal of plaintiff's LAD claim for failure to hire based on age discrimination.

IV.

Next, plaintiff contends that the court erred by dismissing his CEPA retaliatory discharge claim, and by failing to make its own findings of fact rather than relying on the dicta in Liebeskind, supra, slip op. at 6.

CEPA "is intended to encourage employees to speak up about unsafe working conditions that violate the law or public policy

and provide protection for those who do so." Donelson v. DuPont Chambers Works, 206 N.J. 243, 255-56 (2011) (emphasis added). A plaintiff, however, must qualify as an employee. Here, plaintiff was unquestionably an independent contractor.

To resolve whether an "independent contractor" is an "employee" for purposes of CEPA, the court must consider the following factors:

> (1) the employer's right to control the means and manner of the worker's performance; (2) the kind of occupation--supervised or unsupervised; (3) skill; (4) who furnishes the equipment and workplace; (5) the length of time in which the individual has worked; (6) the method of payment; (7) the manner of termination of the work relationship; (8) whether there is annual leave; (9) whether the work is an integral part of the business of the "employer;" (10) whether the worker accrues retirement benefits; (11) whether the "employer" pays social security taxes; and (12) the intention of the parties.
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> [D'Annunzio v. Prudential Ins. Co. of Am., 192 N.J. 110, 123 (2007) (quoting Pukowsky, supra, 312 N.J. Super. at 182-83).]

Here, the court did not engage in a D'Annunzio analysis to find that plaintiff was not employed by Colgate for purposes of CEPA. Ordinarily, this may be error; however, the circumstances in this case are unique. The trial court had determined, in the prior proceeding, that, under Pukowsky, supra, 312 N.J. Super. at 182-83, Colgate was not plaintiff's "employer" under the LAD.

We had already affirmed that finding in Liebeskind, supra, slip op. at 5. The judge's finding, and our affirmance, are significant because the test for determining whether an independent contractor is an "employee" under the LAD is precisely the same test as that under CEPA:

> [I]n order that CEPA's scope fulfill its remedial promise, the test for an "employee" under CEPA's coverage must adjust to the specialized and non-traditional worker who is nonetheless integral to the business interests of the employer. We reaffirm that the Pukowsky test fulfills that purpose. The test is familiar and addresses most routine questions in respect of the status of an individual as either an independent contractor or employee.
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> [D'Annunzio, supra, 192 N.J. at 124-25.]

Thus, because analyzing whether one is an "employee" under CEPA requires the same analysis as under the LAD, had the trial court considered the factors from D'Annunzio on remand for purposes of CEPA, it would have reached the same conclusion as it did under the LAD. As a result, the court did not commit reversible error by failing to consider D'Annunzio, when it had already determined that plaintiff did not satisfy the test for an "employee" under Pukowsky. In fact, we alluded to the natural consequence of the trial court's conclusion in this regard, when we noted in dicta that the CEPA claim would not be

viable because Colgate was not plaintiff's employer. Liebeskind, supra, slip op. at 5-6.

On remand, the judge correctly held that the CEPA claim was not viable. Plaintiff's complaint had failed to state any facts that, if accepted as true, would be sufficient to find that he was Colgate's employee under the Pukowsky test. Transnet hired and supervised plaintiff, paid his salary and benefits and alone had the right to dismiss or reassign him. It supplied equipment to Colgate, although the extent to which it did so is unknown, and the job plaintiff performed as a computer technician was not an integral part of Colgate's business as a manufacturer and distributor of personal care products, but was exactly the service provided by Transnet. Moreover, the Transnet-Colgate agreement specifically provided that Transnet contractors were not Colgate's employees. Although Colgate primarily supplied the equipment and workplace, and plaintiff worked at Colgate for five of his seven years with Transnet, these two facts are merely incidental to the Transnet-Colgate relationship, and do not likely outweigh the substantial evidence indicating that plaintiff was not Colgate's "employee."

Plaintiff alleged in the complaint that he was employed by Transnet, was a "resident contractor" with Colgate, and had filed a successful wage claim against Transnet. Also, he

claimed that "Colgate had full control over . . . [his] work, and treated him like an employee," and that he was "economically dependent on the Colgate contract with Transnet." But even assuming the truth of each of the allegations, they fail to establish that he was an employee under Pukowsky.

While Colgate could control plaintiff's daily work assignments, the "means and manner" of the work were directed in part by the Colgate-Transnet agreement that Transnet had negotiated. Transnet had a duty to evaluate plaintiff's performance, and to ensure that he complied with Colgate's employment policies. If plaintiff did not comply with Colgate's policies, Colgate could request that Transnet reassign someone else to the position, but could not fire him. Further, although plaintiff's salary may have been paid by Transnet from the earnings generated from its contract with Colgate, Colgate's decision not to renew the Agreement did not directly result in plaintiff's unemployment. His job opportunities were controlled by Transnet, which could have assigned him to another site, but instead laid him off a month later due to a lack of available positions. Such facts demonstrate plaintiff's economic dependence on Transnet, not Colgate.

Accordingly, plaintiff has failed to plead facts sufficient to support a determination that he was an "employee" under CEPA.

He has also failed to show that he could amend the complaint to state a cognizable claim under CEPA for a retaliatory discharge. The judge correctly dismissed plaintiff's CEPA claim with prejudice.

V.

Finally, plaintiff maintains that the trial court's findings that we affirmed in the first appeal, Liebeskind, supra, were unsupported. Those findings resulted in the May 9, 2008, dismissal of his disability discrimination, and failure to reasonably accommodate claims brought pursuant to the LAD. He therefore argues that this panel should revisit the other panel's interlocutory ruling, and disregard it as "clearly erroneous." Conversely, defendant has urged this court's adherence to the prior decision as the "law of the case."

Under the law of the case doctrine, when one court is faced with a decision on the merits by an equal court on the identical issue, the decision should be respected "during the pendency of that case." Lanzet v. Greenberg, 126 N.J. 168, 192 (1991). The doctrine is a "discretionary rule of practice and not one of law." Brown v. Twp. of Old Bridge, 319 N.J. Super. 476, 494 (App. Div.), certif. denied, 162 N.J. 131 (1999). Nevertheless, "an interlocutory ruling by the Appellate Division generally is not subject to review on direct appeal." Lombardi v. Masso, 207

N.J. 517, 539 (2011). The direct appeals panel will revisit the interlocutory appellate decision only upon a showing of either new evidence or controlling authority, or that the decision was "clearly erroneous." Sisler v. Gannett Co., 222 N.J. Super. 153, 159 (App. Div. 1987), certif. denied, 110 N.J. 304 (1988). Finding no error in our prior opinion, we decline to reconsider it.

Affirmed.