

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2637-10T2

ERIK W. MARTIN and
LYNN DEBBE-MARTIN,

Plaintiffs-Appellants.

v.

QUICK CHEK CORPORATION, trading
as QUICK CHEK FOOD STORES, JOAN
FERRY, BOB GRAYCZEK,

Defendants-Respondents.

Submitted November 10, 2011 - Decided January 18, 2012

Before Judges Fuentes and Koblitz.

On appeal from Superior Court of New Jersey,
Law Division, Ocean County, Docket No. L-
4170-08.

DeNoia & Tambasco, attorneys for appellants
(Thomas DeNoia, on the briefs).

Bonnist & Cutro, L.L.P., attorneys for
respondents (James J. Cutro, on the brief).

PER CURIAM

Plaintiffs Erik W. Martin and his wife, Lynn Debbe-Martin,
appeal from a October 1, 2010 discovery order, the subsequent
November 12, 2010 order granting summary judgment to defendants
and the January 7, 2011 denial of plaintiffs' motion to

reconsider the grant of summary judgment. Plaintiffs' complaint alleges wrongful termination and discrimination as a result of Martin's¹ Parkinson's disease and seeks remedies under New Jersey's Law Against Discrimination (NJLAD), N.J.S.A. 10:5-1 to -42, as well as several other legal theories. After reviewing the record in light of the contentions advanced on appeal, we affirm.

Martin was hired as an assistant manager for defendant Quick Chek Corporation in May 1999. Throughout Martin's employment, his supervising district leader was co-defendant Joan Ferry. Co-defendant Robert Grayczek was vice president of Quick Chek's human resources department. Martin was promoted to store manager upon Ferry's recommendation in the summer of 2000. He was diagnosed with Parkinson's disease that same year. After informing Ferry of his diagnosis, she advised him to keep his illness "hush, hush." Martin complied, and never mentioned his illness to Grayczek. Martin missed work in 2004 and 2006 due to two mini-strokes and took a two-week leave of absence in 2007 because of depression. He returned to work without repercussion after each instance.

¹ Throughout this opinion, we refer to Erik W. Martin as plaintiff because his wife's claim for lack of consortium was derivative of his claims.

In March 2008, Martin requested and received a demotion because his medical condition, combined with the lack of an assistant manager, precluded him from satisfying his work obligations.

On March 17, 2008, Martin injured his back at work.² He contacted his doctor, who instructed him to take a darvocet that was previously prescribed to Martin's mother-in-law. Martin visited the doctor the following day, at which time he was prescribed percocet to manage his pain.

Martin was well aware of Quick Chek's drug abuse policy, which required anyone injured at work to submit to a drug test. Martin took the necessary drug test on March 19, 2008. A few days later, he was contacted by the testing facility. They asked him to disclose the medications he was taking. He told them about his prescriptions, including the percocet, and also informed them about the darvocet he took on the day of the injury. Because he tested positive for darvocet without a prescription, the testing company reported a failed drug test and Quick Chek terminated Martin.

² There is an unexplained discrepancy in the dates on which plaintiff's injury occurred and his subsequent conversations with his doctor. We have used the dates provided in both the doctor's note and plaintiff's admissions to the undisputed facts.

Martin learned of his termination when he arrived at work on March 26, 2008. Five days later Martin sent a letter to Quick Chek, in which he questioned the basis for his termination. Attached to his letter was a note from his doctor indicating that he advised Martin to take darvocet on March 17 and prescribed percocet on March 18.

Grayczek testified at deposition that his decision to terminate Martin was based on the failed drug test. He further testified that in his thirteen years managing human resources for Quick Chek, he never made an exception to the company's zero-tolerance drug abuse policy. Grayczek also stated that he was not aware of Martin's Parkinson's disease until this litigation commenced.³

Martin testified that he was aware of the internal procedures available to Quick Chek employees to formally complain of unfair treatment. However, at no time prior to his termination for the failed drug test did Martin lodge such a complaint.

Judge Rochelle Gizinski determined in an oral opinion that Martin did not produce "any evidence that Quick Chek applied the

³ Prior to his motion for reconsideration, Martin produced a November 29, 2010 certification of Anthony D'Acunzi, who is now deceased, claiming that as an assistant manager for Quick Chek, he was aware that management knew of Martin's illness.

store policy [regarding drug testing] selectively or that his positive drug test would have been ignored if not for the Parkinson's disease." With regard to Martin's claim for failure to accommodate his disability, raised for the first time at his motion for reconsideration, Judge Gizinski determined that plaintiff "cannot now claim that defendant violated his rights by promptly doing exactly what he asked them to do,"--which was to demote him to the assistant manager position.

I

In response to defendants' request for summary judgment, Martin filed a motion to compel production of Grayczek's work notebook. Judge Gizinski ordered defendants to produce "every page of the notebook or a true copy thereof that mentions Erik W. Martin." Martin claims on appeal that Judge Gizinski erred by limiting discovery of Grayczek's work notebook to only the two pages containing his name.

As we noted in K.S. v. ABC Professional Corp., 330 N.J. Super. 288, 291 (App. Div. 2000),

[W]e appreciate the broad scope of permissible discovery. We understand that discovery is not limited to obtaining admissible information but, rather, includes the obtaining of any information, not otherwise privileged, that "appears reasonably calculated to lead to the discovery of admissible evidence. . . ." R. 4:10-2(a). See, e.g., Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 535

(1997). On the other hand, the scope of discovery is not infinite. It is limited by R. 4:10-2(a) to information that is "relevant to the subject matter involved in the pending action. . . ." The definition of relevancy in this context is supplied by N.J.R.E. 401. Evidence is relevant if it has a "tendency in reason to prove or disprove any fact of consequence to the determination of the action." See Payton, op cit., supra.

Grayczek's notebook contained his handwritten notes concerning confidential personnel information relating to other employees not relevant to this litigation. We find that Judge Gizinski acted within her discretion to limit Martin's access to the entire body of Grayczek's notes. See Verdicchio v. Ricca, 179 N.J. 1, 34 (2004) (noting that a trial court "is granted broad discretion in determining the relevance of evidence.").

II

Martin also argues on appeal that Judge Gizinski erred in granting summary judgment because genuine issues of material fact exist and those issues were improperly decided in defendants' favor. In considering Martin's appeal, we repeat and abide by certain fundamental principles applicable to summary judgment motions. The 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 v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995); see also R. 4:46-2(c). The court cannot resolve contested factual issues but instead must determine whether there are any genuine factual disputes. Agurto v. Guhr, 381 N.J. Super. 519, 525 (App. Div. 2005). When genuine issues of material fact are in dispute, the motion for summary judgment should be denied. Parks v. Rogers, 176 N.J. 491, 502 (2003); Brill, supra, 142 N.J. at 540. To grant the motion, the court must find that the evidence in the record "'is so one-sided that one party must prevail as a matter of law[.]'" Brill, supra, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)).

Martin points specifically to two factual inconsistencies that he alleges amount to a dispute of material facts. Martin initially indicated by way of admission of undisputed facts that he told Ferry about his Parkinson's disease diagnosis in early 2000 and was subsequently promoted in the summer of 2000 at Ferry's recommendation. At his motion for reconsideration, however, he argued that he told Ferry of his Parkinson's disease after his promotion. As a threshold matter, a court should not consider evidence provided for the first time at a motion for reconsideration. See Cummings v. Bahr, 295 N.J. Super. 374,

384-85 (App. Div. 1996). When Ferry first became aware of Martin's illness is not significant in any event because his promotion occurred eight years prior to his termination.

Martin further argues that a second factual dispute concerns whether his requested demotion involved a reduction in pay. At the time she granted summary judgment, Judge Gizinski believed that Martin's requested demotion did not involve a pay-cut. She asked both parties for clarification on the record and defense counsel indicated it was his understanding that the demotion did not involve a pay reduction. Martin's counsel did not disagree.

At his motion for reconsideration, Martin disclosed for the first time that the demotion resulted in a pay decrease from \$21.63 an hour to \$15 an hour. This new information was not significant to his claim because Martin requested the demotion and did not request any accommodation. Moreover, as this information was available at the outset of the case, but was not revealed until Martin's motion for reconsideration, Judge Gizinski need not have considered it. Id.

Contrary to Martin's argument, Judge Gizinski did not make findings contrary to the evidence timely brought to her attention. Any conflicts between her findings and evidence

brought forward belatedly at Martin's motion for reconsideration were not legally significant.

III

Additionally, Martin argues on appeal that Judge Gizinski erred in granting summary judgment because genuine issues of material fact existed as to whether his termination by defendants was contrary to NJLAD. To advance a prima facie case of discriminatory wrongful discharge under the NJLAD, a plaintiff must show that he was in a protected class, that he was performing his job at a level that met the employer's legitimate expectations, that he was nevertheless discharged, and that his employer sought someone else to perform the same work after he left. DeWees v. RCN Corp., 380 N.J. Super. 511, 523 (App. Div. 2005) (citing Mogull v. CB Commercial Real Estate Group, Inc., 162 N.J. 449, 462 (2000)). Establishment of a prima facie case "creates a presumption of discrimination." Ibid. The burden then shifts to the defendant to rebut the presumption by showing a legitimate, nondiscriminatory reason for termination. Ibid. If the defendant makes the requisite showing, the "presumption of discrimination disappears," and the burden shifts back to the plaintiff, who must prove by a preponderance of the evidence that the stated reason is mere pretext. Id. at 523-24.

Judge Gizinski found that Martin demonstrated he was in a protected class, performed his job satisfactorily and would be replaced after termination. She also found that Quick Chek had demonstrated it terminated Martin pursuant to its extremely strict drug abuse policy. Judge Gizinski then found that Martin could not demonstrate that this stated reason was a pretext for discrimination. She relied on the lack of evidence showing that Grayczek was aware of Martin's illness, and on Grayczek's prior unrelenting enforcement of the company's drug policy to reach such a conclusion.

Unquestionably, the company's drug policy was enforced in a harsh fashion against Martin. The company relied completely on the assessment of the testing company that Martin "failed" the drug test. Quick Chek operates in such a way as to delegate total discretion to interpret the drug test results to the testing company. Once deemed to have failed the drug test, an employee is terminated without exception with no apparent right of appeal. In Vargo v. National Exchange Carriers Assn., Inc., 376 N.J. Super. 364, 383 (App. Div. 2005), we held that a company need not investigate possible legal reasons for a positive drug test before taking action with regard to a prospective employee; nor should such a duty exist with respect

to existing employees. NJLAD is not offended by a private company's lack of compassion in these circumstances.

IV

Although Martin did not plead failure to accommodate in his complaint, he contends that Judge Gizinski erred in granting summary judgment on his failure to accommodate claim. Under the NJLAD, an employee must seek an accommodation for a disability to establish a cause of action for failure to accommodate. Tynan v. Vicinage 13 of the Superior Court of New Jersey, 351 N.J. Super. 385, 399-400 (App. Div. 2002) (noting that "under the law an employee must request an accommodation[]" and "must make clear that . . . assistance [is desired] for his or her disability.") (internal quotations and citations omitted) (alteration in original).

Martin did not seek any accommodation on the basis of his disability. Rather, he requested a demotion with less responsibility. We can find no legal precedent to support his argument that defendants' awareness of his Parkinson's diagnosis triggered a legal obligation on their part to disregard his explicit request for a demotion and offer an accommodation that would allow him to maintain his manager position. Martin requested the position of assistant manager and Quick Chek granted his request.

Finally, Martin argues that summary judgment in favor of defendants Grayczek and Ferry individually was improper. An employee may be held liable when he or she knowingly gives assistance or encouragement to the unlawful conduct of the employer. N.J.S.A. 10:5-12. The liability of the individuals is dependant on the unlawful conduct of the employer. Failla v. City of Passaic, 146 F. 3d 149, 155-59 (3d Cir. 1998). As summary judgment was properly granted in Quick Chek's favor, the individual supervisors can not legally be held liable.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION