NOT FOR PUBLICATION
WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

NANCY SAMIEL, Plaintiff v. PARAMOUNT HOTEL GROUP, Defendants	:	SUPERIOR COURT OF NEW JERSEY ESSEX COUNTY DOCKET NO.: ESX-L-1976-11 **OPINION**

Decided: January 25, 2013

By: Thomas R. Vena, J.S.C.

Oral argument was held before this Court on January 25, 2013. M. Elizabeth Duffy of the Law Offices of Daly, Lamastra & Cunningham appeared on behalf of defendant Paramount Hotel Group. Michael C. Crowley of the law firm Crowley & Crowley appeared on behalf of the plaintiff Nancy Samiel.

DISCUSSION

This is defendant Paramount Hotel Group's motion for summary judgment. Plaintiff Nancy Samiel filed suit against defendant under the New Jersey Law Against Discrimination ("LAD") N.J.S.A. § 10:5-1 et seq. alleging age discrimination, retaliatory discharge, and discrimination on the basis of a perceived disability.

Plaintiff worked as an Accounts Payable Manager for Defendant from 2000 until 2009. Plaintiff was 52 years old at the time of her hiring. Plaintiff was diagnosed with

cancer in 2005 and again in 2007. Periodically during this time, plaintiff took off time from work for chemotherapy treatments. Also in 2007, defendant saw a decrease in its business when it lost eighteen (18) hotel management contracts. As a result in this decrease in business, defendant laid off nine (9) employees and transferred one (1) employee from full-time to part-time in April and May 2007. Plaintiff was unaffected by these personnel changes. Additionally, as a result of continued loss in business, defendant laid off additional employees in 2008. Five (5) employees were terminated and one (1) employee was transferred from full-time to part-time. Again, plaintiff was unaffected by these personnel changes and continued to work as a full-time employee. Finally, as a result of additional lost business, defendant laid off one (1) employee and transferred plaintiff and another employee from full-time to part-time in March 2009.

By plaintiff's own admission, in June, 2009, plaintiff wrote a note to Phyllis G. Doloff, defendant's Vice President of Human Resources. The note states, in pertinent part:

> My problem was that the check I received every week was too little. I could barely manage to pay my bills. I had no extra money. I couldn't go to the movies, I couldn't get my hair done, I couldn't get my clothes from the cleaners. I had to eat junk food. I couldn't even afford my medications or vitamins. My take-home pay was $387 a week. So on June 5th I told Louise [Ponce] that I couldn't afford to work for Paramount anymore. Unemployment pays $587 a week and with a COBRA payment of $534 I was still ahead of the game (See Plaintiff's deposition, Def. Ex. B, 47:17–48:24; Def. Ex. F).

Plaintiff also admits that Ms. Ponce tried to persuade plaintiff to stay at least until she found other employment. One June 12, 2009, plaintiff told Louise Ponce that "…[she] didn't feel [she] had any choice but to leave." See Def. Ex. F. Lousie Ponce then sent out an email stating that plaintiff had resigned and had given three (3) weeks' notice. See

Def. Ex. C, pg. D44. Plaintiff met with Ethan Kramer, president of Paramount Hotel Group, and Phyllis Doloff, plaintiff's supervisor, on June 23, 2009. As a result of that meeting, Mr. Kramer informed plaintiff that he was accepting her resignation effective immediately.

Motions for summary judgment are governed by Rule 4:46-2, which requires a court to grant summary judgment upon a moving party's showing "that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment or order as a matter of law." In Brill v. Guardian Life Insurance, 142 N.J. 520 (1995), the New Jersey Supreme Court propounded the standard for granting summary judgment under R. 4:46-2, holding that the judge must consider, "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged dispute in favor of the non-moving party." The burden is placed on the movant to exclude any reasonable doubt as to the existence of any genuine issue of material facts and all inferences of doubt are drawn against the moving party in favor of the opponent. Heller v. Hartz Mountain Industries, 270 N.J. Super. 143, 149 (Law Div. 1993).

In this case, there is no genuine issue of material fact, and no reasonable jury could conclude that plaintiff was terminated, since, by plaintiff's own admission, once she began work as a part-time employee, it was more lucrative for plaintiff to resign her employment and collect unemployment benefits. Since plaintiff cannot make out a prima facie case of discrimination under the LAD, and for the reasons discussed further below, plaintiff's complaint as well as her claim for punitive damages is dismissed.

Count I of plaintiff's complaint alleges age discrimination in violation of the New Jersey LAD N.J.S.A. § 10:5-12. Plaintiff alleges that she was both demoted from full-time to part-time because of her age, and eventually discharged in violation of the LAD because of her age. Plaintiff cannot establish a prima facie case on either allegation.

First, as to plaintiff's contention that she was demoted to part-time because of her age, a "reduction in hours of employment is considered a reduction in force." Klinger v. Board of Educ., 190 N.J. Super. 354, 357 (App. Div. 1982). Baker v. Nat'l State Bank, 312 N.J. Super. 268 (App. Div. 1998) adopted the standard set forth in Geldreich v. American Cyanamid Co., 299 N.J. Super. 478 (App. Div. 1997) for establishing a prima facie case under a reduction in force theory. The applicable standard states that plaintiff must show that: (1) plaintiff was a member of a protected class; (2) plaintiff was qualified for the position at issue; (3) plaintiff suffered adverse employment action; and (4) the employer retained an employee sufficiently younger than the plaintiff who was similarly situated. Baker v. Nat'l State Bank, 312 N.J. Super. 286, 290 (App. Div. 1998). Baker also held that "a plaintiff whose position was eliminated need not show that he or she was replaced, but must show that the employer retained someone outside the protected class. Baker, 312 N.J. Super. at 289 (App. Div. 1998).

In this case, plaintiff has not carried her burden of showing a prima facie case of age discrimination in her reduction in hours. It was not until the third round of lay-offs and transfers from full to part-time that plaintiff was reduced to part-time. Prior to that, other younger employees were let go or transferred from full to part-time. Even viewing plaintiff's claim in light of the relaxed rule annunciated in Baker, plaintiff's claim fails. At the time that plaintiff was reduced to part time, the only similarly-situated employee

was Dianne Cannon, who was 57 years old at the time. Ms. Cannon was transferred to part-time at the same time as plaintiff, and was not promoted back to full-time until plaintiff resigned. Plaintiff therefore cannot show that defendant retained someone outside the protected class, and her claim for age discrimination in her transfer from full-time to part-time fails as a matter of law.

As for plaintiff's claim that she was discharged on the basis of her age, plaintiff again fails to meet an essential element of a prima facie case. In order to establish a prima facie case of discharge on the basis of age discrimination, the plaintiff must show: "[1] that he was in the protected . . . group, [2] that he was performing his job at a level that met his employer's legitimate expectations, [3] that he nevertheless was fired, and [4] that [the employer] sought someone to perform the same work after he left." Geldreich v. American Cyanamid Co., 299 N.J. Super. 478, 489 (App. Div. 1997) (citing Erickson v. Marsh & McLennan Co., Inc., 117 N.J. 539, 551 (1990)).

Here, plaintiff's claim fails because it cannot reasonably be disputed that plaintiff resigned, rather than was fired. Plaintiff's deposition transcript, as well as her own note, conclusively demonstrate that she elected to leave defendant's employ after being transferred from full to part-time, believing that it would be more lucrative to do so. Plaintiff did this despite warnings from co-workers that she ought not leave until she had secured other employment. That Ethan Kramer accepted plaintiff's resignation effective immediately at the June 23, 2009 meeting is irrelevant, as plaintiff had already resigned and given three weeks' notice. As no reasonable jury could determine that plaintiff was discharged, rather than resigned, plaintiff's claim for unlawful discharge on the basis of her age fails as a matter of law.

Count II of plaintiff's complaint alleges retaliatory discharge for her opposition to practices or acts forbidden by the LAD. A plaintiff makes a prima facie claim for retaliatory discharge when he or she shows "1) he was engaged in a protected activity known to the defendant; 2) he was thereafter subjected to an adverse employment decision by the defendant; and 3) there was a causal link between the two." Romano v. Brown & Williamson Tobacco Corp., 284 N.J. Super. 543, 548-549 (App. Div. 1995).

First, as noted above, no reasonable jury could find that plaintiff suffered any adverse employment decisions by the defendant because plaintiff resigned, rather than was terminated. Plaintiff argues that she engaged in protected activity by complaining on numerous occasions once she was placed on part-time status. Since there is nothing in the record to demonstrate that plaintiff engaged in protected activity prior to being transferred to part-time status, no reasonable jury could conclude that plaintiff's transfer from full-time to part-time was an illegal, retaliatory move. Further, no reasonable jury could conclude that the end of plaintiff's employment with defendant was because of defendant's illegal retaliatory actions because, not only did plaintiff voluntarily resign, she did so against the advice of her co-workers, such as Louise Ponce, who tried to convince plaintiff to remain with defendant. Having not made out a prima facie case for illegal retaliatory discharge, Count II of plaintiff's complaint is dismissed.

Count III of plaintiff's complaint alleges wrongful discharge on the basis of perceived disability, in violation of the LAD. "Disability discrimination claims are different from other kinds of discrimination claims." Victor v. State, 203 N.J. 383, 410 (2010). A plaintiff makes a prima facie showing of disability discrimination by showing that: (1) plaintiff qualifies as an individual with a disability, or one who is perceived as

having a disability; (2) plaintiff is qualified to perform the essential functions of the job, or was performing the essential functions, either with or without reasonable accommodation; (3) plaintiff was terminated; and (4) the employer thereafter sought similarly qualified individuals for that job. Victor, 203 N.J. at 409, 410.

Again, first and foremost, plaintiff's claim for wrongful discharge based on a perceived disability fails because plaintiff cannot meet the third prong that plaintiff was terminated. There can be no dispute based on the record that plaintiff resigned her employment, rather than was terminated. Failure to meet each prong of a wrongful discharge claim is fatal to plaintiff's case.

Moreover, plaintiff has pointed to nothing in the record that could lead a rational fact-finder to conclude that plaintiff was discriminated against based on a disability or perceived disability. Plaintiff alleges that she was discriminated against in violation of the LAD because of her status as a two-time cancer survivor. Plaintiff was treated for cancer in 2005 and again in 2007 and early 2008. Plaintiff was not impacted by the first round of personnel changes in 2007, nor was she impacted by the second round of personnel changes in 2008. It was not until March, 2009 that plaintiff was transferred to part-time. By plaintiff's own admission, at that time, plaintiff was healthy, working full time, and had no disability.

Plaintiff does refer to an alleged incident that occurred "shortly after" plaintiff returned to work after receiving cancer treatment in 2007, where an employee put tin foil on the wall of plaintiff's cubicle, at the recommendation of "psychic advisor" in a misguided effort to repel the so-called "evil spirits" that were responsible for plaintiff's cancer. See Cert. of Plaintiff Nancy Samiel, ¶¶ 10-12. However, this alleged action is not

enough to defeat defendant's motion for summary judgment, as it occurred more than two years before the applicable statute of limitations, and is therefore time-barred. LAD claims are subject to a two-year statute of limitations. Montells v. Haynes, 133 N.J. 282, 292 (1993). Therefore, as this case was filed on March 4, 2011, anything alleged to have happened prior to March 4, 2009 is immaterial. Plaintiff concedes as much in her brief in opposition to the motion, saying "No claim set forth in the complaint arises out of actions taken prior to the demotion, thus there is no occasion for applying the statute of limitations in this case." Plaintiff's Brief in Opposition at 6. However, even if the Court were to consider the alleged tin foil incident, the record is clear that plaintiff was unaffected by the second round of layoffs and transfers to part-time in 2008 after the alleged incident occurred. It was not until March 2009, a year after plaintiff's cancer treatments, and after continued loss of business that plaintiff was transferred to part-time. No reasonable fact-finder could conclude that plaintiff's demotion to part-time in March 2009 was because of a discriminatory intent based on her cancer as a perceived disability. Accordingly, Count III of plaintiff's complaint is dismissed.

For the foregoing reasons, the Court finds that no reasonable jury could find that plaintiff was wrongfully demoted or discharged in violation of the LAD. Accordingly, plaintiff's complaint is dismissed in its entirety.