SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0353-21

HOLLY M. SCHOENBERG,

Plaintiff-Appellant,

v.

THE DEVEREUX FOUNDATION, d/b/a DEVEREUX ADVANCED BEHAVIORAL HEALTH, and KATRINA NICHOLS,

Defendants-Respondents.

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Argued on January 25, 2023 – Decided May 17, 2023

Before Judges Enright and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law Division, Gloucester County, Docket No. L-0931-19.

Matthew A. Luber and R. Armen McOmber argued the cause for appellant (McOmber, McOmber and Luber, PC, attorneys; Matthew A. Luber, Jeffrey D. Ragone, and Meghan A. Pazmino, on the briefs).

Kayla L. Louis argued the cause for respondents (Brown & Connery, LLP, attorneys; Kathleen E. Dohn and Kayla L. Louis, on the brief).

PER CURIAM

In this employment discrimination action, plaintiff Holly M. Schoenberg appeals from a September 24, 2021 order granting summary judgment to defendants The Devereux Foundation d/b/a Devereux Advanced Behavioral Health (Devereux)[1] and Katrina Nichols (Devereux defendants). We affirm.

We derive the facts from the summary judgment motion record. Schoenberg began her employment with Bellwether Behavioral Health (Bellwether) in October 2018 at Helms Avenue (Helms Program) in Swedesboro. As a full-time direct support professional, she assisted developmentally disabled persons with vocational activities, daily needs, and tasks for $14.00 per hour. Schoenberg's assigned work shift was from 8:00 a.m. to 4:30 p.m., Monday through Friday.

In November 2018, Schoenberg became pregnant. She told her manager and staff members assigned to the classrooms. Human Resources was notified,

[1] Devereux is a nonprofit behavioral healthcare organization operating in New Jersey.

and Schoenberg's maternity leave was scheduled to begin on July 1, 2019 since her due date was July 26, 2019.

In May 2019, discussions were held within Devereux, concerning the State of New Jersey's closure of Bellwether's programs. Thereafter, the State closed the Bellwether programs, which were eventually acquired by other healthcare entities.

In June 2019, prior to Devereux's acquisition of the Helms Program, job fairs were held for Bellwether employees and other persons interested in employment with Devereux. All Bellwether employees who sought employment with Devereux were considered new employees, required to submit an employment application and references, and complete other pre-employment requirements such as: an interview, a drug test, a physical exam, fingerprints, a child and patient abuse search clearance, and a two-week orientation class. If hired, Bellwether employees were subject to a new pay scale, new benefits, and were not guaranteed the same Bellwether location or shift.

On June 12, 2019, Schoenberg, then eight months pregnant, submitted an employment application during a Devereux fair given at Helms Avenue and was interviewed by Anna Bishop, Devereux's hiring manager. Schoenberg told Bishop of the scheduled July 1 maternity leave. Bishop said "that shouldn't be

a problem. It would be fine," and marked the maternity leave on her interview sheet. She also asked to be assigned to the Helms Program with the same work shift.

On June 26, 2023, Nichols, a Devereux Recruitment Specialist, called Schoenberg and offered her the direct support professional position at the Helms Program, with the same work shift. Schoenberg was offered $14.28 per hour, as evidenced by a "New Hire Checklist" Nichols completed for Schoenberg, which included this hourly rate, as well as Schoenberg's initials and years of experience as "HS/2y3m." According to Nichols, Schoenberg verbally accepted the employment offer and was told a drug test and orientation training had to be scheduled.

In her deposition, Schoenberg later recalled Nichols's tone "wavered" once she began discussing her maternity leave. In describing Nichols's tone, Schoenberg stated Nichols "went from confidently offering [Schoenberg] a position to now questioning, like . . . something [Schoenberg] said made her kind of question how [Nichols] was supposed to answer [her]." When Schoenberg asked if her maternity leave with Bellwether would roll over to Devereux, Nichols told her that she would check and get back to her.

Nichols immediately contacted her supervisor, Debra Nessenthaler, Director of People Operations, and informed her of Schoenberg's question concerning the rollover of Bellwether benefits to Devereux. Nessenthaler advised Nichols that any accumulated sick time did not roll over because Schoenberg would be considered a "day-one employee" and Devereux would not have acquired Bellwether programs before her scheduled maternity leave. Nessenthaler further advised Nichols that Devereux could not guarantee a specific schedule or shift since Schoenberg would be on maternity leave when Devereux acquired Bellwether. When Schoenberg was cleared to return to work, Devereux would determine her schedule based on availability.

Schoenberg subsequently testified during a deposition that Nichols called her back within "five minutes" of ending the call with Nessenthaler and stated, "pretty much everything that [they] talked about in the previous phone call was kind of null and void, and that . . . they wouldn't be offering [her] the same position." Schoenberg sought clarification and stated Devereux had offered her a job and rescinded the offer. According to Schoenberg, Nichols said that was correct. When Schoenberg told Nichols she felt that the offer was rescinded "because of being pregnant," Nichols replied, "it wasn't because [plaintiff] was

pregnant; it was because of [her] maternity leave." Schoenberg told Nichols she felt as if she were being discriminated against.

However, when deposed, Nichols testified she informed Schoenberg during the call that Devereux would hold the direct support professional position, but the company could not hold or guarantee her preferred location or work shift. Nichols asked Schoenberg for an estimated date of return from maternity leave.

The next day, Schoenberg recorded her telephone call with Nichols. Nichols advised Schoenberg she spoke to her superior for clarification about the offer because Schoenberg was a Bellwether employee, who would be on maternity leave before Devereux had control over Bellwether's programs. When Nichols asked Schoenberg for an estimated return to work date, she responded she did not know. Schoenberg stated she would be on leave four to six weeks before her due date, six to eight weeks after birth, and maybe take additional bonding time with her newborn.

Nichols advised Schoenberg that Devereux would give her an offer letter based on the return date, and "they would work [her] into a schedule after [she] was cleared," but they needed a return date to schedule her training. Nichols then asked Schoenberg if she anticipated returning sometime in September and

Schoenberg replied, "[y]eah." Based on her response, Nichols told Schoenberg she would be scheduled for training in September.

Schoenberg then sought clarification from Nichols and asked, "so you're not offering me a position now after like you've learned everything; correct?" Nichols responded, "[n]o, no, no. No, no, no, no. No. We are offering, we're going to work around that schedule. So[,] either way you still would have to get cleared." Nichols restated Devereux would schedule her training into September and Schoenberg would have to complete all the pre-employment requirements for new hires. Nichols further restated Schoenberg could not be guaranteed the Helms Program or work shift. Lastly, Nichols further clarified that Devereux was not holding the vocational program for Schoenberg because the program would not be acquired by July 1.

On July 2, 2019, Schoenberg emailed Nessenthaler with the subject "[c]omplaint of job offer revoked." In the email, she detailed the initial and recorded phone calls with Nichols and stated that she felt the rescinded offer was "blatant discrimination and retaliation." Schoenberg also stated she had advised Nichols that she would return in "August or September."

Nessenthaler promptly responded to Schoenberg and requested her telephone number. Nessenthaler wrote, "I will give you a call tomorrow. We

have every intention of bringing you on after your medical leave." Schoenberg did not respond to the email to provide her phone number, as there was "no reason for [her] to believe that someone in HR would [not] have access to that information."

On July 8, 2019, Schoenberg's attorney sent a litigation hold email to Devereux. In reply to counsel's email, Nessenthaler stated she did not receive a reply to the July 2 email to Schoenberg. Nessenthaler also wrote, "[t]his has all been a misunderstanding. Please respond as I have proof via [email] that we intended to offer her the position." Counsel did not respond to Nessenthaler's email.

Schoenberg gave birth on July 13, 2019; thereafter she began a job search. While on maternity leave, she neither provided Devereux with a return-to-work date nor accepted the written employment offer.

On July 18, 2019, Nessenthaler mailed a signed offer of employment letter to Schoenberg. The letter stated, "[w]e are pleased to offer you the position of [d]irect [s]upport [p]rofessional at Devereux Advanced Behavioral Health." Additionally, the letter offered to "cover the cost of [her] COBRA payments if she currently ha[d] Bellwether health insurance while she wait[ed] for her Devereux health benefits to be effective." The letter acknowledged Schoenberg

was on "a leave of absence" and again asked that she provide an "approximate return to work date." The letter informed her orientation would be scheduled once Devereux received the estimated return date. Schoenberg also was advised once Devereux confirmed her experience, her pay rate would be discussed in "detail," but the "starting hourly rate was $14.00."

On July 22, 2019, Devereux acquired the Helms Program, one of ten Bellwether programs. Thereafter, a second, but unsigned offer of employment letter was mailed to Schoenberg, to which she did not respond.

Schoenberg began a new position with a different healthcare entity on November 18, 2019.

On August 2,2019, Schoenberg filed a complaint against the Devereux defendants alleging disparate treatment and hostile work environment discrimination due to gender, pregnancy, and retaliation in violation of the New Jersey Law against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Following Devereux defendants' answer and discovery, Schoenberg moved for summary judgment and Devereux defendants cross-moved for summary judgment. After hearing argument on the cross-applications on September 24, 2021, the judge entered an order denying Schoenberg's motion and granting summary judgment to Devereux defendants. In reaching this conclusion, the judge explained:

> what is most damning about [p]laintiff's claim is her own, undisputed testimony that she no longer wanted the job. Whether [p]laintiff was justified in being distrustful of Devereux is not dispositive in this case. An offer was made, and even if revoked, the subsequent communications from Devereux all indicated that the job was [p]laintiff's. Qualified as the offer may have been, [p]laintiff cannot assert that the job was revoked when Devereux agents guaranteed her a position. Even if [p]laintiff were initially discriminated against, [d]efendants rectified their actions through their ensuing conduct. There is no authority under Beasley that [p]laintiff may consider and reasonably reject the offer of employment. In sum, it appears [p]laintiff had no right to refuse the offer and should have responded affirmatively. Indeed, such a rationale in the law appears sound.

The judged pointed out the "controversy feature[d] factual disputes regarding the early communications between [Schoenberg] and . . . Nichols." He determined it was undisputed defendants "cured any potential revocation with continued assurances to [Schoenberg] that she had the job." The judge noted Devereux's reliance on Beasley v. Passaic Cnty., 377 N.J. Super. 585, 607 (App. Div. 2005), for the principle that a rescission of an adverse employment action that makes a plaintiff whole cannot be grounds for an employment discrimination claim, and determined that was "exactly what occurred" in Schoenberg's case based on the motion record.

Further, the trial judge explained the record demonstrated Nichols apologized to Schoenberg for any misunderstanding, reassured her, and again confirmed she had the position. The judge noted Schoenberg did not respond to Nessenthaler's July 2 email and July 18 offer letter. He also found Schoenberg did not "outright dispute" the communications she had with Nichols or Nessenthaler but "couch[ed] [her] retort in the original alleged discrimination." Lastly, he concluded "[r]egardless of whether [p]laintiff's job offer was rescinded or if there was just uncertainty surrounding it, it [was] undisputed . . . [d]efendants cured any potential adverse employment action" by their "subsequent action towards her."

On appeal, Schoenberg presents the following contentions for our consideration: a prima facie case of discrimination was established; the adverse employment action prong presented a jury question; and the trial judge erred in finding Devereux's action after the "job revocation" made Schoenberg "completely whole."

We review a trial court's grant of summary judgment de novo. Samolyk v. Berthe, 251 N.J. 73, 78 (2022). "Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.'" Friedman v. Martinez, 242 N.J. 449, 471-72 (2020) (quoting R. 4:46-2(c)). In reviewing a summary judgment order, we consider the evidence in the light most favorable to the non-moving party. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

It is well established "[t]he LAD . . . prevents an employer from discriminating against an employee based on . . . pregnancy." Gerety v. Atl. City Hilton Casino Resort, 184 N.J. 391, 406 (2005) (citing Gilchrist v. Bd. of Educ. of Haddonfield, 155 N.J. Super. 358, 368-69 (App. Div. 1978)). To establish discrimination under the LAD, and satisfy the first prong of burden shifting established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), and adopted by our Supreme Court in Viscik v. Fowler Equip. Co., 173 N.J. 1, 13-14 (2002), a plaintiff must demonstrate that she "(1) belongs to a protected class; (2) applied for or held a position for which . . . she was objectively qualified; (3) was not hired or was terminated from that position; and (4) the employer sought to, or did fill the position with a similarly-qualified person." Gerety, 184 N.J. at 399 (citation omitted).

It is undisputed that Schoenberg, as a pregnant woman, was a member of a protected class under the LAD. See N.J.S.A. 10:5-4, -5(ll). Thus, she satisfied the first two prongs.

We conclude, despite Schoenberg's contentions to the contrary, she failed to satisfy the third and fourth prongs. Thus, we are not persuaded the judge erred in finding there were no genuine issues of material fact from which a jury could conclude she established a prima facie case of discrimination.

As to the third prong, Schoenberg did not dispute defendants offered her the position and reassured her on multiple occasions of Devereux's intention to hire her. Instead, she contends Devereux did not make her "whole" and did not "guarantee her a job." Schoenberg's contention is unsupported by the record. The evidence offered to demonstrate Devereux's "revocation" of the employment offer is limited to her self-serving deposition testimony. Nichols and Nessenthaler confirmed by telephone, email, and letters that Schoenberg had the position, but Devereux could not guarantee the program. Schoenberg was told on multiple occasions that once she was cleared to return to work from maternity leave, orientation would be scheduled. As aptly noted by the trial judge, as "[q]ualified as the offer may have been, [Schoenberg] cannot assert that the job was revoked when Devereux agents guaranteed her a position."

Therefore, the record lacks competent evidence that Schoenberg's job offer was rescinded.

Even assuming Devereux engaged in discriminatory conduct by "revoking" the offer in the second June 26 phone conversation between Schoenberg and Nichols, Devereux cured any potential revocation with Nichols's continued assurances to Schoenberg in the subsequent phone conversation, and the emails and letters from Nessenthaler that she had the job. Therefore, we are satisfied the trial judge appropriately relied on Beasley and determined Devereux cured the perceived revocation with multiple assurances and confirmations by Devereux, which Schoenberg repeatedly ignored. 377 N.J. Super. at 607.

Regarding the fourth prong, the motion record demonstrated Schoenberg offered no proofs that Devereux filled the director support professional position with a similarly qualified person.

Therefore, the trial judge appropriately determined Schoenberg had not established a prima facie case of discrimination under the LAD. Further, even if the judge had found discriminatory conduct on the part of Devereux, Devereux produced a legitimate, non-discriminatory reason for not holding or guaranteeing the work location or work hours for Schoenberg during her leave

of absence: the acquisition of Bellwether was not complete when the employment offers were made; and Schoenberg was not a Devereux employee. Thus, Schoenberg would have been obliged to prove that the articulated non-discriminatory reason was not the true reason for the "adverse employment action," but rather was a pretext for discrimination. McDonnell Douglas, 411 U.S. at 802-04; Gerety, 184 N.J. at 399. She failed to do so.

"To prove pretext . . ., a plaintiff must do more than simply show that the employer's reason was false; [they] must also demonstrate that the employer was motivated by discriminatory intent." Viscik, 173 N.J. at 14. Throughout the process, "[t]he burden of proof . . . remains with the employee at all times." Zive v. Stanley Roberts, Inc., 182 N.J. 436, 450 (2005) (citing Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 596 (1988)). Having reviewed the record, and considered Schoenberg's failure to establish a prima facie case of discrimination, we conclude the judge properly determined Schoenberg failed to defeat Devereux's summary judgment motion.

To the extent we have not specifically discussed any remaining arguments raised by Schoenberg, we conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.