SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2307-20

Estate of DRINI ZOTO,[1]

Plaintiff-Appellant,

v.

CELLCO PARTNERSHIP, d/b/a VERIZON WIRELESS, INC., a foreign profit corporation, VERIZON COMMUNICATIONS, INC., a foreign profit corporation,

Defendants-Respondents,

and

NARMADA PULIPATI, individually, MARY JELINEK, individually, and ALLISON SOBIN, individually,[2]

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[1] Regrettably, Drini Zoto passed away on April 6, 2022, during the pendency of this appeal. On May 24, 2022, we granted the Estate's motion to substitute as plaintiff/appellant.

[2] Defendants Narmada Pulipati, Mary Jelinek, and Allison Sobin were dismissed from the case as per an order entered on August 26, 2020, and are not participating in this appeal.

Defendants.

Argued January 12, 2023 – Decided March 29, 2023

Before Judges Vernoia, Firko, and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-0367-18.

Brian F. Curley argued the cause for appellant.

John T. McDonald argued the cause for respondents (Reed Smith LLP, attorneys; John T. McDonald and Saranne E. Weimer, of counsel and on the brief).

PER CURIAM

In this employment discrimination and retaliation case, plaintiff Estate of Drini Zoto (plaintiff or Zoto) appeals from a March 8, 2021 order granting defendants Cellco Partnership (Cellco) and Verizon Communications, Inc.'s (Verizon) (collectively defendants) motion for reconsideration of an order denying defendants' motion for summary judgment. In granting the reconsideration motion, the court awarded defendants summary judgment on plaintiff's claims defendants violated the New Jersey Law Against Discrimination (NJLAD), N.J.S.A. 10:5-1 to -50, by unlawfully terminating his employment based on his age, disability, and in retaliation for engaging in protected activity, and his termination was unlawful as violative of New Jersey

public policy (counts one and three of the complaint).[3] Having considered plaintiff's arguments in light of the record and controlling legal principles, we affirm.

I.

We review a trial court's order on a reconsideration motion under an abuse of discretion standard. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). "Motions for reconsideration are governed by Rule 4:49-2, which provides that the decision to grant or deny a motion for reconsideration rests within the sound discretion of the trial court." Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378, 382 (App. Div. 2015). Reconsideration "is not appropriate merely because a litigant is dissatisfied with a decision of the court or wishes to reargue." Palombi v. Palombi, 414 N.J. Super. 274, 288 (App. Div. 2010). Rather, reconsideration

> should be utilized only for those cases which fall into that narrow corridor in which either (1) the [c]ourt expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence.

[3] Plaintiff voluntarily dismissed the retaliation claim under the Conscientious Employee and Protection Act (CEPA), N.J.S.A. 34:19-1 to -14, (count two) in the complaint with prejudice on January 27, 2020. Thus, the grant of summary judgment resulted in a dismissal of the entire complaint.

> [Ibid. (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)).]

"Thus, a trial court's reconsideration decision will be left undisturbed unless it represents a clear abuse of discretion." Pitney Bowes, 440 N.J. Super. at 382.

The party moving for reconsideration may "point out 'the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred.'" Cap. Fin. Co. of Del. Valley, Inc. v. Asterbadi, 398 N.J. Super. 299, 310 (App. Div. 2008) (quoting R. 4:49-2). The moving party may also bring additional information to the court's attention "in furtherance of [an] argument that the judge had expressed [their] decision on an incorrect basis." Id. at 310-11. "In short, a motion for reconsideration provides the court, and not the litigant, with an opportunity to take a second bite at the apple to correct errors inherent in a prior ruling." Medina v. Pitta, 442 N.J. Super. 1, 18 (App. Div. 2015).

We conduct a de novo review of an order granting a summary judgment motion, Gilbert v. Stewart, 247 N.J. 421, 442 (2021), and we apply "the same standard as the trial court," State v. Perini Corp., 221 N.J. 412, 425 (2015). In considering a summary judgment motion, "both trial and appellate courts must view the facts in the light most favorable to the non-moving party," which in this case is plaintiff. Bauer v. Nesbitt, 198 N.J. 601, 604 n.1 (2009). Summary

judgment is proper if the record demonstrates "no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment . . . as a matter of law." Burnett v. Gloucester Cnty. Bd. of Chosen Freeholders, 409 N.J. Super. 219, 228 (App. Div. 2009) (quoting R. 4:46-2(c)). Issues of law are subject to the de novo standard of review, and the trial court's determination of such issues is accorded no deference. Meade v. Twp. of Livingston, 249 N.J. 310, 326-27 (2021); Kaye v. Rosefielde, 223 N.J. 218, 229 (2015).

Our review of an order granting summary judgment requires our consideration of "the competent evidential materials submitted by the parties to identify whether there are genuine issues of material fact and, if not, whether the moving party is entitled to summary judgment as a matter of law." Bhagat v. Bhagat, 217 N.J. 22, 38 (2014). Here, we discern the following facts from our review of the parties' Rule 4:46-2 statements and the record of the proceedings before the motion court.

A. Zoto's Employment with Cellco

In 2013, at the age of fifty-eight, Zoto began full-time employment with Cellco "Wireless" as an electronic systems engineer and computer programmer as an at-will employee. Zoto had a Ph.D. in this field. His job entailed "managing computer systems and data" in an office setting. Cellco is owned by

Verizon, a traditional "landline" telephone company. In mid-April 2016, Verizon's union employees went on strike.[4] The striking union employees were responsible for maintaining landline telephone, internet, and television services. In response to the strike, Verizon assigned Zoto and "hundreds" of other Cellco employees to perform roles outside their usual job assignments, known as emergency work assignments (EWAs), to avoid service disruptions.

Verizon first sought volunteers for the EWAs. Zoto's supervisor, Narmada Pulipati, inquired as to whether Zoto was willing to volunteer for an EWA. Zoto advised that he would perform extra work in his field of expertise—computer programming. Pulipati's supervisor, Mary Jelinek, met with Zoto and told him he could be assigned an EWA having physical requirements, such as moderate to heavy lifting, working outdoors, climbing ladders, telephone poles, and rooftops. Pulipati advised Suzanne Sturgess, the work stoppage coordinator, that Zoto and another employee were available for an EWA. Sturgess never met Zoto and did not know his age, gender, or any other personal

[4] In the complaint, the date of the strike is stated as April 18, 2016. In plaintiff's counterstatement of facts submitted with the summary judgment and reconsideration motions, however, the strike date is listed as April 13, 2016. This discrepancy is not germane to our decision.

information about him. Zoto's work as an electronic systems engineer was office-based and focused on computer tasks without any physical component.

Pulipati chose Zoto to "involuntarily" undertake a short-term EWA at Verizon. Sturgess then assigned Zoto to an EWA as a field telephone pole lineman, for "IM Tech FiOS Res/Bus," which involved traveling "to customer locations to install, remove, program, and troubleshoot fiber optic services for residential and business customers." The EWA job description noted the work potentially required physical requirements such as a seventy-two-hour work week, heavy lifting, working in elevated positions, and climbing ladders and telephone poles outside in all types of weather conditions.

Zoto expressed that, at then sixty years old, he was in "reasonably good health," but suffered from high-blood pressure, vertigo, and had a fear of heights. Therefore, Zoto felt he could not perform the functions of a field telephone pole lineman without "jeopardizing" his safety and the safety of fellow co-workers.

According to Verizon, EWAs are mandatory and may only be avoided if an "exception" is submitted by an employee for a "legitimate reason."

Exceptions include medical and non-medical reasons.[5] If an employee sought an exception approval, they had to submit the restriction request on Verizon's online portal, and if a medical exception was requested, provide a medical authorization to a third-party administrator, AllOne Health. If AllOne Health approved the medical restriction request, Verizon either provided an accommodation for the EWA, reassigned the employee, or allowed the employee to return to their regular job.

On April 19, 2016, Pulipati told Zoto that he should "sign off" on the EWA, and Zoto expressed his concern and lack of understanding about the EWA. Later that day, Zoto sent an email to Pulipati and Jelinek stating his objection to the assigned EWA. He met with a human resources representative, Allison Sobin, about his concerns. Sobin asked Zoto if he would accept a different EWA, and he responded he would need to review the details of a new EWA first.

At his deposition, Zoto conceded that Sobin, Pulipati, and Jelinek instructed him to apply for an exception to the EWA through the online portal,

[5] Non-medical exceptions are available in the following categories: child-care or dependent-care issues; military, community emergency services, religious obligations, or public safety obligations; on-call for Verizon legal, regulatory, book closing, safety, health, or environmental obligations; student enrolled in a degree program; or a legal obligation such as jury duty.

and warned him that he would be "terminated" if he refused the EWA and was not granted an exception. Zoto also testified he was unable to enter the proper information to submit an exception because he could not find a category associated with his claimed age-related restrictions from the portal's available options to explain why he could not perform the EWA. It is undisputed that Zoto never applied for an exception. Zoto claimed he fully complied with the requirements set forth in the Cellco "Wireless" EWA Handbook.

According to Zoto, on April 20, 2016, Jelinek told him that no exception would be made for him, and he would be terminated if he did not accept the EWA. Zoto claimed he continued to email and speak to his supervisors about obtaining an exception but did not receive a response. Thereafter, he received a notice to report to Leesburg, Virginia for EWA training. Zoto was "upset" about being assigned the EWA, which involved physical labor instead of an office-based assignment. He told his supervisor he was "declining" the EWA and suggested that Verizon utilize unemployed individuals to do the job. On April 21, 2016, Zoto emailed Jelinek and Pulipati that he would not accept the EWA.

On April 22, 2016, Sobin informed Zoto he had no other option—he could either accept the EWA or be fired. Zoto received confirmation that he was

enrolled in EWA training courses on April 24, 2016, and training was set to begin on April 27, 2016, in Virginia. The next day, Zoto was terminated effective April 22, 2016. Jelinek testified Zoto was terminated based on "job abandonment." In September 2016, Kuldeep Vaishnav, who was thirty-eight years old at the time, replaced Zoto at Cellco.

B. The Law Division Action

On March 20, 2018, Zoto filed a three-count complaint in the Law Division[6] alleging: (1) discrimination, failure to accommodate, and retaliation under the NJLAD (count one); (2) retaliation under CEPA (count two); and (3) common law wrongful termination (count three). Following a period of discovery, plaintiff voluntarily dismissed count two in the complaint and defendants moved for summary judgment seeking to dismiss counts one and three, the remaining counts in the complaint. In support of their motion for summary judgment, defendants contended Zoto did not establish prima facie claims for disparate treatment and failure to accommodate under NJLAD based on disability. Defendants highlighted Zoto testified at his deposition that he was not disabled, and therefore, he could not proceed with these claims on the basis

[6] The complaint was originally filed on August 15, 2016, but was dismissed without prejudice and refiled.

of a "non-existent" disability. Due to Zoto's own admissions and never presenting medical evidence to support that he was disabled, defendants stated there was no material issue of fact for a disability claim to proceed at the onset.

Defendants also argued Zoto failed to establish a prima facie claim of disparate treatment under the NJLAD based on age discrimination. Defendants claimed Zoto was informed of the exception process but did not apply and refused to undertake the EWA. Highlighting that Zoto admitted his age was not a consideration in their termination decision, defendants argued Zoto failed to show his employer had the requisite knowledge to act in a discriminatory manner. Defendants asserted Zoto attempted to conflate his age and disability, noting that "age is not a disability."

As to the NJLAD retaliation and common law wrongful discharge claims, defendants alleged Zoto never notified his employer that he was unable to perform the work due to his disability or age. Instead, defendants pointed to Zoto's emails, which referenced that he did not want to learn a new job by undertaking the EWA. Defendants argued that Zoto never engaged in a "protected activity" under the NJLAD; he simply refused a valid EWA and failed to follow their exception process. Defendants represented that 241 employees were given EWAs and 108 sought some type of exception. 102 employees were

aged forty and older, and seventy-eight employees applied for medical exceptions. Eighteen of the seventy-eight employees were denied the medical exception.

In opposition to defendants' motion for summary judgment, Zoto argued his involuntary EWA to replace a striking union member at Verizon, a business entity other than Cellco, was discriminatory and retaliatory. Zoto contended that defendants' process for granting an EWA exception was "arbitrary and capricious," and there was no mention in the Cellco "Wireless" EWA handbook stating an EWA was "mandatory." According to Zoto, the policy set forth in the Cellco "Wireless" EWA handbook "was not to require, or even request, disclosure of medical information," by an employee when applying for an EWA exception. Despite Zoto emailing his employer asking for a different, "less physical" EWA, he claimed defendants failed to engage in the required interactive process for an accommodation because he was terminated within two days of his objection.

Zoto asserted defendants violated the NJLAD by failing to screen its employees "based on age and physical ability for the telephone pole lineman position," and that they wrongfully terminated him because he could not safely perform the job requirements of a telephone pole lineman due to his age. Zoto

contended defendants were not entitled to summary judgment because of these factual issues.

Following oral argument, the motion court denied defendants' motion and entered a memorializing order on August 26, 2020, accompanied by a written statement of reasons.[7] The court concluded there were genuine issues of material fact as to the process of filing an EWA accommodation and as to whether Zoto was improperly terminated, precluding the grant of summary judgment to defendants.

On September 15, 2020, defendants moved for reconsideration of the August 26, 2020 order. Plaintiff opposed the motion. In a comprehensive written decision, the court concluded it had erred in denying defendants' motion for summary judgment. The court recognized its prior decision was based on a "palpably incorrect and irrational basis." In its reconsideration decision, the court highlighted that Zoto was not disabled under the NJLAD and "has never been deemed disabled by a medical doctor." The court rejected his argument that old age implies a disability, especially when Zoto represented he was in

[7] The order incorrectly states that "plaintiff's motion for summary judgment is denied." This was a clerical error as defendants moved for summary judgment. The court's written statement of reasons correctly identifies defendants as the movants.

"reasonably good health." The EWA exception data analyzed by the court did not show that members of Zoto's age bracket were "negatively impacted," as he contended. In fact, the court emphasized it revealed the opposite—the majority of employees who were terminated for EWA-related reasons were substantially younger than Zoto. The EWA data failed to demonstrate that employees in Zoto's age group were treated less favorably than younger employees.

Regarding Zoto's NJLAD retaliation claim, the court relied upon an email he wrote stating, "this is completely a new profession that for my age is not simple to learn and perform even for one day. . . . Based on age and the reasons above, I respectfully decline to participate in [the EWA]." The court highlighted Zoto referenced the difficulty of learning a new job at his age without any objection to age discrimination, and therefore, he was not engaging in a protected activity, warranting summary judgment on the retaliation claim.

The court also found Zoto's wrongful termination claim failed because he was an at-will employee who was terminated for his refusal to accept the EWA, and not because of his age. The court noted Zoto admitted that defendants did not consider his age when terminating him, and therefore, his age discrimination claim failed. And, since Zoto was not engaging in protected activity under the

NJLAD, his claim for retaliation could not be established. The court granted summary judgment and dismissed the remaining counts of the complaint.

On appeal, plaintiff argues the court erred in reconsidering its decision and granting summary judgment to defendants. Plaintiff claims it satisfies the prima facie elements of disparate treatment under the NJLAD based on disability or age because Zoto belonged to a protected class, was objectively qualified and performing his job, and was replaced by a younger individual.[8] Plaintiff also argues it establishes a failure to accommodate claim under the NJLAD based on disability because Cellco failed to engage in the interactive process. In addition, plaintiff avers the court erred in dismissing the retaliatory termination claim under the NJLAD. Lastly, plaintiff claims the common law wrongful discharge and punitive damages claims were dismissed in error, warranting reversal.

II.

"The [NJ]LAD's goal is 'nothing less than the eradication of the cancer of discrimination.'" Meade, 249 N.J. at 327-28 (quoting Raspa v. Off. of Sheriff of Gloucester, 191 N.J. 323, 335 (2007)). It is well-established that "[t]he

[8] Plaintiff states it "is not appealing the dismissal of the claim for disparate impact, but continues to assert that the statistical evidence of disparate impact is evidence in support of the disparate treatment claim." As plaintiff concedes it is not appealing dismissal of the disparate impact claim, we have not addressed this claim in our opinion.

[NJ]LAD is remedial legislation that should be liberally construed to advance its purposes." Id. at 328 (first alteration in original) (quoting Rios v. Meda Pharm., Inc., 247 N.J. 1, 10 (2021)).

The NJLAD prohibits employment practices and discrimination based on, among other categories, an employee's "race, creed, color, national origin, ancestry, age, . . . sex, gender identity or expression, [or] disability." N.J.S.A. 10:5-12(a). An employer is liable for damages resulting from its practices or discrimination that violate the NJLAD. Woods-Pirozzi v. Nabisco Foods, 290 N.J. Super. 252, 267 (App. Div. 1996).

But because "direct evidence of discrimination is often" difficult to find, courts apply a burden-shifting analysis to determine the viability of a discrimination claim in the absence of direct evidence Myers v. AT & T, 380 N.J. Super. 443, 452-53 (App. Div. 2005). "The familiar elements of th[is] analytical framework" are as follows:

> (1) proof by plaintiff of the prima facie elements of discrimination; (2) production by [defendant] of a legitimate, non-discriminatory reason for the adverse . . . action [or inaction]; and (3) demonstration by plaintiff that the reason so articulated is not the true reason for the adverse . . . action [or inaction], but is instead a pretext for discrimination.
>
> [Id. at 452.]

Under that framework, a plaintiff must first and foremost prove the elements of their prima facie case. Victor v. State, 203 N.J. 383, 408 (2010). The plaintiff's "evidentiary burden at the prima facie stage is 'rather modest: it is to demonstrate to the court that plaintiff's factual scenario is compatible with discriminatory intent—i.e., that discrimination could be a reason for the [defendant]'s action,' . . . irrespective of defendant['s] efforts to dispute [plaintiff's] evidence." Meade, 249 N.J. at 329 (first quoting Zive v. Stanley Roberts, Inc., 182 N.J. 436, 447 (2005); and then quoting id. at 448). Only after a plaintiff successfully establishes a prima facie case will a presumption arise "that the [defendant] unlawfully discriminated against the plaintiff." Grande v. Saint Clare's Health Sys., 230 N.J. 1, 18 (2017) (quoting Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 596 (1988)).

"There is no single prima facie case that applies to all employment discrimination claims." Victor, 203 N.J. at 408. Rather, the elements a plaintiff must prove are defined by "the particular cause of action." Ibid. NJLAD discrimination claims share similar, broad elements, regardless of the particular cause of action, which a plaintiff is required to prove, including: (1) they are a member of a class protected by the NJLAD; (2) they were qualified for a benefit offered by the defendant; (3) defendant denied plaintiff the benefit sought; and

(4) others, who are not members of the same protected class, with the same qualifications received the benefit sought. See, e.g., id. at 408-09.

Here, plaintiff argues Zoto was sixty years old, in reasonably good health, but "suffered the infirmities that accompany aging." Plaintiff contends Zoto "reasonably believed he was being subjected to discrimination based on his age," and that he was a member of a protected class under the NJLAD "by virtue of his age . . . and health conditions/disabilities." Plaintiff conflates the disparate treatment claim based on disability and the age discrimination claim in count one of the complaint. We address them separately.

A. Disparate Treatment Based on Disability

The NJLAD defines disability as a

> physical or sensory disability, infirmity, malformation, or disfigurement which is caused by bodily injury, birth defect, or illness including epilepsy and other seizure disorders, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impairment, deafness or hearing impairment, muteness or speech impairment, or physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device, or any mental, psychological, or developmental disability, including autism spectrum disorders, resulting from anatomical, psychological, physiological, or neurological conditions which prevents the typical exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by

> accepted clinical or laboratory diagnostic techniques. Disability shall also mean AIDS or HIV infection.
>
> [N.J.S.A. 10:5-5(q).]

"Where 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).

The analysis of disparate treatment claims relies on the burden-shifting framework the Supreme Court established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Zive, 182 N.J. at 447. A prima facie case of disparate treatment requires a demonstration that: (1) the plaintiff belongs to a protected class; (2) they were "performing [their] duties at a level that met [their] employer's legitimate expectations; (3) [they] were nevertheless terminated;" and (4) "the employer sought to, or did fill the position with a similarly-qualified person." Id. at 450. If the plaintiff proves the prima facie elements, "the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employer's action." Id. at 449. Then, the plaintiff has the final burden to demonstrate that "the reason articulated by the employer was merely a pretext for discrimination and not the true reason for the employment decision." Ibid.

Zoto testified "I have not been disabled. And I told you that I've never been disabled." The court found "[p]laintiff interchanges being of older age

with having a disability; however, being of old age does not mean that a person is disabled." The record is devoid of any medical documentation or expert opinion establishing Zoto suffered a disability as defined in N.J.S.A. 10:5-5(q). Zoto conceded he never submitted documentation of a medical disability to defendants. Plaintiff has not satisfied the first prong of a prima facie claim based on a disability. Therefore, based upon our de novo review, plaintiff's disparate treatment claim based on disability discrimination alleged in count one of the complaint was properly dismissed summarily by the court on reconsideration.[9]

B. Age Discrimination Claim

Plaintiff also contends Zoto was subject to disparate treatment based on his age and that the prima facie elements of an age discrimination claim were established because: (1) when Zoto was selected for the telephone pole lineman

[9] The court correctly granted summary judgment on all of plaintiff's disability discrimination claims, including its failure to accommodate and retaliation claims, due to Zoto's admission that he did not have any disability. Regarding the retaliation claim, Zoto's emails dated on April 19 and 21, 2016, do not amount to opposing an unlawful practice under the NJLAD, N.J.S.A. 10:5-12(d), as they fail to reference age discrimination or being treated differently based on his age. See Melick v. Twp. of Oxford, 294 N.J. Super. 386, 397-98 (App. Div. 1996) (finding that the trial court did not err in concluding that "protected activity" included the plaintiff's complaints to their employer about disability discrimination). Instead, the emails refer to Zoto's personal objections of the EWA based on his experience and age. We address the failure to accommodate claim in more detail below.

EWA, this decision fundamentally altered the terms and conditions of his employment with Cellco; and (2) he was terminated due to his age.

"In a case alleging age discrimination under the [NJ]LAD, an employee must 'show that the prohibited consideration[, age,] played a role in the decision making process and that it had a determinative influence on the outcome of that process.'" Bergen Com. Bank v. Sisler, 157 N.J. 188, 207 (1999) (second alteration in original) (quoting Maiorino v. Schering-Plough Corp., 302 N.J. Super. 323, 344 (App. Div. 1997)). "The evidentiary burden at the prima facie stage is 'rather modest: it is to demonstrate to the court that plaintiff's factual scenario is compatible with discriminatory intent—i.e., that discrimination could be a reason for the employer's action.'" Zive, 182 N.J. at 447 (quoting Marzano v. Comput. Sci. Corp., 91 F.3d 497, 508 (3d Cir. 1996)).

Plaintiff's claim that Zoto was treated disparately because of age was based entirely on his subjective belief that defendants knew or should have known that he could not perform the telephone pole lineman job at the age of sixty. When asked to disclose the factual basis for that claim, Zoto was unable to provide any evidence his age could be a reason for either the EWA assignment or the termination of his employment. And, Zoto offered no evidence that defendants or their employees were aware of his age when assigning the EWA.

In essence, plaintiff incongruously argues defendants should have favored Zoto based on his age by not assigning him to an EWA on that basis, while ignoring such a decision is expressly prohibited by the NJLAD.

Given this lack of evidence that Zoto was treated differently because of his age, plaintiff failed to satisfy its initial burden under the McDonnell Douglas standard. No reasonable jury could find that Zoto was terminated because of his age when they made the EWA assignment and later terminated his employment due to his failure to follow the EWA exception process. The court properly dismissed the age discrimination claim, noting Zoto

> advised in an email he was not accepting the assignment. [Zoto was] an at-will employee who cannot establish that his membership in a protected class played any part in an employment decision . . . even if this fact was disputed, it would not change the outcome of the case.

Plaintiff produced no evidence that defendants' reasons for terminating Zoto were pretextual. Nor has plaintiff demonstrated that defendants were motivated by discriminatory intent. Therefore, the age discrimination claim set forth in count one of the complaint was properly dismissed.

III.

Equally unavailing is plaintiff's argument that defendants failed to reasonably accommodate Zoto under the NJLAD. Plaintiff asserts defendants

failed to engage Zoto "in the legally required interactive process" of reasonable accommodation, and could have assigned him to an office-based EWA or selected another employee to perform the EWA at issue.

New Jersey courts have consistently held that the NJLAD "requires an employer to reasonably accommodate an employee's handicap." Tynan v. Vicinage 13 of Superior Ct., 351 N.J. Super. 385, 396 (App. Div. 2002); see also Viscik, 173 N.J. at 11. A failure to accommodate claim is a subset of a NJLAD discrimination claim. Bosshard v. Hackensack Univ. Med. Ctr., 345 N.J. Super. 78, 90-91 (App. Div. 2001). To prove a failure to accommodate claim against an employer, a plaintiff must demonstrate that they: (1) "had a [NJ]LAD handicap; (2) [were] qualified to perform the essential functions of the job, with our without accommodation; and (3) suffered an adverse employment action because of the handicap." Id. at 91. "An employer's duty to accommodate extends only so far as necessary to allow 'a disabled employee to perform the essential functions of [their] job. It does not require acquiescence to the employee's every demand.'" Tynan, 351 N.J. Super. at 397 (quoting Vande Zande v. State of Wis. Dep't of Admin., 851 F. Supp. 353, 362 (W.D. Wis. 1994)).

An employee's request for an accommodation need not be in writing or even use the phrase "reasonable accommodation." Id. at 400 (quoting Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 313 (1999)). The employee is not required to use magic words or expressly state they are seeking accommodation, but they "must make clear that . . . assistance [is desired] for [their] . . . disability." Ibid. (first alteration in original) (quoting Jones v. United Parcel Serv., 214 F.3d 402, 408 (3d Cir. 2000)). The employer must engage in "an informal interactive process with the employee." Ibid. (citing 29 C.F.R. § 1630.2(o)(3)). This requires the employer to

> identify the potential reasonable accommodations that could be adopted to overcome the employee's precise limitations resulting from the disability. Once a handicapped employee has requested assistance, it is the employer who must make the reasonable effort to determine the appropriate accommodation.
>
> [Ibid. (internal citations omitted).]

Here, the court found on reconsideration that Zoto presented no evidence he was disabled, thus "[d]efendants had no legal obligation to accommodate him." The court ruled that even if there exists a genuine issue of material fact as to the process of filing for accommodation, it would not change the outcome of the case because Zoto did not have a disability entitling him to an accommodation. The court was correct in its analysis. See Victor, 203 N.J. at

422 (holding that since there was no evidence in the record of the plaintiff being disabled, the plaintiff's "proofs on the prima facie case for failure to accommodate . . . would fail on the first prong, without regard to how we articulate any of the other elements of his proofs"); Viscik, 173 N.J. at 17 (noting that "regardless of what category of handicap, physical or non-physical, that is invoked by a plaintiff, each and every element of the relevant statutory test must be satisfied").

IV.

Plaintiff also argues the wrongful discharge claim was improperly dismissed because there is a genuine issue of material fact as to whether Zoto was terminated for refusing to perform an action that violates public policy. Plaintiff contends the court erred in concluding Zoto was not wrongfully discharged and finding he was terminated because he refused the telephone pole lineman EWA.

"An employee who is wrongfully discharged may maintain a cause of action in contract or tort or both." Pierce v. Ortho Pharm. Corp., 84 N.J. 58, 72 (1980). The tort action is "based on the duty of an employer not to discharge an employee who refused to perform an act that is a violation of a clear mandate of public policy." Ibid.

> The sources of public policy include legislation; administrative rules, regulations or decisions; and judicial decisions. In certain instances, a professional code of ethics may contain an expression of public policy. However, not all such sources express a clear mandate of public policy.
>
> [Ibid.]

The Court recognized "the wrongful discharge cause of action only after balancing the interests of the employee, the employer, and the public." MacDougall v. Weichert, 144 N.J. 380, 390 (1996). And the common law action exists in balance with the idea that "[e]mployers have an interest in knowing they can run their businesses as they see fit as long as their conduct is consistent with public policy." Ibid. (quoting Pierce, 84 N.J. at 71). Wrongful discharge claims often focus on "retaliation that directly relates to an employee's resistance to or disclosure of an employer's illicit conduct" or "retaliation [that] is based on the employee's exercise of certain establishing rights." Id. at 393.

A Pierce common law wrongful discharge claim is preempted by an identical NJLAD claim. See Bosshard, 345 N.J. Super. at 90 (noting a claim "would nonetheless be barred because it does not seek to vindicate interests independent of those protected by the [NJ]LAD"). "[S]upplementary common law causes of action may not go to the jury when a statutory remedy under the [NJ]LAD exists." Catalane v. Gilian Instrument Corp., 271 N.J. Super. 476, 492

(App. Div. 1994). Since plaintiff's NJLAD discrimination and retaliation claims do not survive summary judgment, plaintiff's Pierce claim is not barred.

Here, plaintiff alleges Verizon's violation of public policy is based on the New Jersey Health and Safety Act (HSA), which provides:

> Every employer shall furnish a place of employment which shall be reasonably safe and healthful for employees. Every employer shall install, maintain and use such employee protective devices and safeguards including methods of sanitation and hygiene and where a substantial risk of physical injury is inherent in the nature of a specific work operation shall also with respect to such work operation establish and enforce such work methods, as are reasonably necessary to protect the life, health and safety of employees, with due regard for the nature of the work required.
>
> [N.J.S.A. 34:6A-3.]

Plaintiff contends that the EWA violates the HSA because Zoto "reasonably believed he would be placing himself and others at risk because of his inability to perform the physical requirements of the involuntary EWA."

The court rejected plaintiff's HSA argument and properly focused on the undisputed fact that Zoto was not terminated because of his age, but for his "refusal to assume the EWA" and his "failure to follow instructions in requesting an exception." Plaintiff has not demonstrated Zoto was wrongfully discharged

for refusing to perform an action that violates public policy. The court properly dismissed this claim.

There is no evidence in the record that defendants violated the HSA. First, Zoto's emails to Pulipati and Jelinek on April 19 and 21, 2016 object to learning and performing a new job "outside [of his] own organization" without any concern pertaining to safety. In any event, defendants had an exception process allowing employees such as Zoto to avoid the EWAs that could pose a danger to their health and in effect, pose a risk to others. Notably, Zoto testified he was instructed to submit an exception through the online portal, but he failed to do so. If Zoto's health was jeopardized by assuming the EWA, he could have followed his employer's instructions for requesting an exception, which would have allowed AllOne Health to evaluate his medical records and defendants to determine whether he receive an accommodation.

As previously noted, on appeal, plaintiff also argues the court erred in dismissing the punitive damages claim. In light of our decision to affirm the court's grant of summary judgment to defendants, these arguments are now moot. See Cinque v. N.J. Dep't of Corrs., 261 N.J. Super. 242, 243 (App. Div. 1993) (citing Oxfeld v. N.J. State Bd. of Educ., 68 N.J. 301, 303-04 (1975)). Any decision on those issues will have no practical effect.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION