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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3414-09T3

EILEEN ZACK,

Plaintiff-Appellant,

v.

STATE OF NEW JERSEY, STATE OF NEW JERSEY DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT, and OFFICE OF THE NEW JERSEY ATTORNEY GENERAL,

Defendants-Respondents.

Submitted December 8, 2010 - Decided March 14, 2012

Before Judges Fuentes and Nugent.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-3127-07.

Karpf, Karpf & Virant, attorneys for appellant (Jeremy M. Cerutti, on the brief).

Paula T. Dow, Attorney General, attorney for respondents (Lewis A. Scheindlin, Assistant Attorney General, of counsel; L. Benjamin Allen, Deputy Attorney General, on the brief).

PER CURIAM

Plaintiff Eileen Zack appeals from the order of the Law Division granting defendants' motion for summary judgment and dismissing her complaint that alleged discrimination under the

Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -42, and the Family and Medical Leave Act (FMLA), 29 U.S.C.A. §§ 2601-2654.[1] We affirm.

Because the trial court decided this case as a matter of law, our review is de novo. See Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). We will thus review the record developed before the trial court in the light most favorable to plaintiff, giving her the benefits of all rational inferences. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 536 (1995). In addition, defendants must show there is no genuine issue as to any material fact in dispute. R. 4:46-2(c). Mindful of this standard of review, the following facts will inform our analysis of the issues raised by plaintiff in this appeal.

I

Plaintiff began working for the New Jersey Department of Labor and Workforce Development in 1992. In 2005, she suffered a work-related accident when she struck her head on a metal cabinet. She was diagnosed as suffering from post-concussion syndrome accompanied by a hypersensitivity to light and certain odors. This caused cognitive impairment and often triggered

[1] Specifically, plaintiff alleged defendants violated 29 U.S.C.A. § 2612(a)(1).

migraine headaches. Based on these related visual and physical disabilities, plaintiff sought and was provided with various forms of accommodations.

In February 2006, plaintiff was transferred into the Employee Human Resources Services Department located on the seventh floor. She requested, as a formal accommodation, to relocate her cubicle or workstation away from a coworker who used a particular perfume. Because this relocation resulted in her being closer to the window, plaintiff also sought an accommodation to address her sensitivity to light.

ADA[2] Coordinator Christine Purcell responded to plaintiff's request for an accommodation and relocated her workstation away from the window, removed the light fixture above her cubicle, provided a glare screen for her computer, and arranged to minimize plaintiff's interaction with coworkers by assigning a one-day-a-week schedule to the only coworker in plaintiff's immediate vicinity. Plaintiff was also permitted to wear sunglasses and a hat at work. On March 22, 2006, plaintiff

[2] "ADA" refers to the American with Disabilities Act, 42 U.S.C.A. §§ 12101-12213.

signed a closure letter indicating her satisfaction with the accommodations provided to her.[3]

In February 2007, plaintiff's work unit was moved to the twelfth floor. Plaintiff sought accommodations similar to those provided to her while on the seventh floor. Defendants again responded by locating her workstation away from the windows, installing a glare screen on her computer, and removing overhead lights above her cubicle. Lights from neighboring cubicles were also considered; one cubicle did not have lights and the other cubicle's lights were turned off.

By letter dated February 21, 2007, ADA Coordinator Purcell wrote to plaintiff's neurologist Dr. John A. Detre requesting: (1) a diagnosis of plaintiff's condition; (2) a description of the nature and severity of her symptoms; (3) an opinion as to whether her medical condition would "preclude[] her from performing any of the essential functions of her job"; (4) and (5) plaintiff's specific accommodation needs.

Sometime thereafter, plaintiff presented Purcell with Dr. Detre's letter dated February 28, 2007, responding to her

[3] The only accommodation that plaintiff requested that was denied concerned a tent made of fabric that plaintiff wanted to place over her cubicle to keep out light. The building's maintenance staff determined that the tent would impede air flow, create an environment for dust mites, and constitute a fire hazard due to the flammability of the fabric.

requests. Dr. Detre indicated that he was treating plaintiff for "refractory headaches that seem to have been precipitated by a mild head injury." Dr. Detre continued that "[t]hus far," he had only had "minor success in reducing the frequency and severity of her headaches." He also could not predict how long this condition would last. He further opined that plaintiff could "probably perform her work functions when she does have a headache[,]" and may "miss work or need to leave early" when she has a headache.

Because he believed that plaintiff's headaches were "triggered by environmental factors such as odors and bright lights[,]" Dr. Detre indicated

> [i]t would be ideal if these [bright lights] could be reduced to twilight or the extent possible. The ideal situation for her cubicle would be away from bright lights and windows, and with sufficiently high partitions (8-9 Ft. high) to block out bright light from other parts of the room. It would also be helpful if odors such as perfumes or cleansers could be eliminated or reduced in the area.

In response, the State Department of Labor conducted a lighting survey to determine the lighting conditions in plaintiff's workstation. The report indicated that the term "twilight" was not a recognized scientific way of determining illumination. According to deposition testimony of David Millstein, the Assistant Deputy Director/ADA Administrator for

the Department of the Treasury, Division of Property Management and Construction within the Bureau of Special Services, a report prepared by Georgette Bunch, "a specialist in the area," indicated that "[t]he normal office lighting environment is between 20 to 50-foot candles."[4]

Plaintiff's cubicle lighting environment measured "3-foot candles at her desk and in front of her computer with the monitor on . . . ." Thus, despite the subjective nature of the term "twilight," the report indicated that the lighting conditions in plaintiff's workstation were sufficient to affirmatively respond to Dr. Detre's request. Defendants claimed that the partitions in plaintiff's cubicle could not be raised to the eight to nine feet level recommended by Dr. Detre because it created air circulation problems and blocked the visibility of emergency evacuation lights. Plaintiff asserted that the objections raised concerning the partitions involved cost and aesthetic considerations. Given our standard of review, we will accept plaintiff's version for purposes of our analysis.

On September 17, 2007, plaintiff sent an email to Purcell complaining that a cubicle located twelve feet from her

[4] Although not clearly stated, we infer from this comment that the report was referring to "candlepower," a measure of luminous intensity. Webster's II New College Dictionary 161 (2001).

workstation had been reconfigured, which, according to plaintiff, caused additional light to enter her cubicle. After investigating the matter, defendants determined that plaintiff's complaint was unfounded.

Six months after working without lights in her cubicle, Purcell informed plaintiff that she wanted to turn on one light located immediately above her work area. Purcell told plaintiff that she was having difficulty working under these conditions; other disabled employees who came to Purcell's workstation to discuss their own accommodation needs complained to Purcell about the poor lighting conditions in her cubicle. She had tried using a desk lamp, but the lamp got too hot rendering the work area uncomfortable. Purcell ultimately received approval from her superiors. On October 15, 2007, Purcell turned on one light in her cubicle. Plaintiff's objections to this arrangement were deemed unreasonable.[5]

In addition to the foregoing accommodations, plaintiff was permitted to take liberal leave under the FMLA. By August 2007, plaintiff had depleted all of her leave time, from all available sources—sick days and vacation days. She had taken a temporary

[5] On October 29, 2007, plaintiff was given a letter indicating that her action toward Purcell was "inappropriate, and if it occur[ed] again [it would be considered] an act of intimidation and [would be addressed] accordingly."

disability and family medical leave from November 2007 to February 2008. Plaintiff testified, at her deposition, that no one inhibited her or dissuaded her from taking time under family medical leave. She returned to work for five days in February 2008, and submitted her resignation, effective April 1, 2008. She claims that she could not continue to work without further accommodations, and was thus constructively discharged.

In an oral decision delivered on March 5, 2010, the trial court granted defendants' summary judgment motion and dismissed plaintiff's complaint. The trial judge ruled that the defendants had reasonably accommodated plaintiff's disability, the plaintiff suffered no adverse employment action, and that plaintiff was not constructively discharged by defendants.

II

On appeal, plaintiff argues that the trial judge erred in determining there was no genuine issue of material fact in dispute. Plaintiff argues that defendant failed to engage in an interactive process concerning accommodations between April 2007 and February 2008. Plaintiff also contends that the judge erred in determining that plaintiff was not constructively discharged and had suffered no adverse employment actions. Finally, plaintiff contends the trial judge erred by concluding that she was not retaliated against for taking FMLA leave.

In the recent case of Victor v. State, 203 N.J. 383, 388 (2010), a unanimous Supreme Court confronted the question of "whether an adverse employment consequence is an essential element of a plaintiff's claim that his employer discriminated against him by failing to accommodate his disability." Although the Court noted the difficulty in envisioning "factual circumstances in which the failure to accommodate [would] not yield an adverse consequence," id. at 421, it nevertheless opted "to refrain from resolving today the question of whether a failure to accommodate unaccompanied by an adverse employment consequence may be actionable." Id. at 422.

Despite leaving this important question unanswered, the Court in Victor provided useful guidance by reviewing the elements of a prima facie case of employment discrimination based on an alleged failure to accommodate. The Court emphasized that "[t]here is no single prima facie case that applies to all employment discrimination claims." Id. at 408. Thus, "[i]dentifying the elements of the prima facie case that are unique to the particular discrimination claim is critical to its evaluation." Id. at 410.

In a typical disability discrimination case, the first element of a prima facie case requires the plaintiff to establish he or she is part of the protected class. See ibid.

Here, plaintiff met this requirement. She was diagnosed with, and was perceived as having, a disability within the meaning of N.J.S.A. 10:5-5(q). The second element requires the plaintiff to show she was performing the essential functions of her job, with or without a reasonable accommodation. Ibid. Here, the record shows that plaintiff satisfied this element for the most part. The only exception is in the manner plaintiff responded to Purcell when the latter informed plaintiff that Purcell needed to turn on one of the lights in her cubicle. As noted, her supervisor criticized the tone of plaintiff's written response to Purcell, because it sounded intimidating and was possibly unprofessional.

Despite Victor's legacy of uncertainty, under prevailing legal standards, the third element of a prima facie for employment discrimination based on disability requires plaintiff to show she suffered an adverse employment action due to her handicap. Bosshard v. Hackensack Univ. Med. Ctr., 345 N.J. Super. 78, 91 (App. Div. 2001).[6] Plaintiff claims she suffered an adverse employment action when her requests for a reasonable

[6] We note that the Court in Victor, supra, distinguished Bosshard because the plaintiff in Bosshard had been terminated. 203 N.J. at 413 (citing Bosshard, supra, 345 N.J. Super. at 81). The Victor Court noted that another appellate panel in Tynan v. Vicinage 13 of the Superior Court of New Jersey, 351 N.J. Super. 385, 400-01 (App. Div. 2002) concluded that an adverse employment action may not be necessary. Id. at 414.

accommodation were not honored, creating a constructive discharge. This type of discharge occurs "when an employer's conduct 'is so intolerable that a reasonable person would be forced to resign rather than continue to endure it.'" Donelson v. DuPont Chambers Works, 206 N.J. 243, 257 (2011), (quoting Shepherd v. Hunterdon Developmental Ctr., 174 N.J. 1, 28 (2002)).

The question here thus turns on two elements of the prima facie case: (1) whether defendants provided a "reasonable accommodation" to plaintiff; and (2) whether plaintiff suffered the adverse employment action of "constructive discharge." The record shows that plaintiff failed to satisfy both of these requirements.

In Tynan v. Vicinage 13 of the Superior Court of New Jersey, supra, we held that "[a]n employer's duty to accommodate extends only so far as necessary to allow a disabled employee to perform the essential functions of his job. It does not require acquiescence to the employee's every demand." 351 N.J. Super. at 397 (internal quotation marks omitted). In order to determine the appropriateness of a request for an accommodation,

> the employer must initiate an informal interactive process with the employee. This process must 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.
>
> To show that an employer failed to participate in the interactive process, a disabled employee must demonstrate: (1) the employer knew about the employee's disability; (2) the employee requested accommodations or assistance for her disability; (3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and (4) the employee could have been reasonably accommodated but for the employer's lack of good faith.
>
> [Id. at 400-01 (citations omitted).]

The record here clearly shows that defendants diligently investigated plaintiff's requests and implemented an array of accommodations that directly and reasonably responded to plaintiff's specific needs. Her workstation was relocated and retrofitted, where possible, to provide plaintiff with the optimum environment to accommodate her sensitivity to light. Coworkers, including the ADA Coordinator, adjusted their work environment and personal grooming habits to accommodate plaintiff's sensitivity to perfumes.

Defendants' record of complete compliance with plaintiff's requests was affected only when those requests conflicted with work-safety issues, or, when the ADA Coordinator requested a minor adjustment to her own immediate work environment, in the form of turning on a single light located directly above her own

cubicle. Even in that case, however, every possible step was taken to ensure that plaintiff's personal work environment remained shielded from the minimal effects of this minor adjustment.

The only one of plaintiff's requested accommodations that was not met involved raising the walls of her cubicle to a height of eight or nine feet. Plaintiff claims that this was not done for purely aesthetic reasons. Accepting plaintiff's claim as valid, this single and isolated incident is insufficient, as a matter of law, to question defendants' good faith in the manner in which they interacted with plaintiff and thereafter responded to her requests for accommodations.

Given this record, no rational jury could find defendants failed to provide plaintiff with a reasonable accommodation to enable her to perform the essential function of her job. This conclusion alone is sufficient to sustain the trial court's grant of summary judgment. Because plaintiff's adverse employment action is directly related to establishing this element of her prima facie case—that defendants created an intolerable work environment by failing to provide a reasonable accommodation—this part of her case likewise fails.

As we have described here, there is no evidence that defendants violated plaintiff's rights under the FMLA. Indeed,

the record shows that plaintiff's employers were quite indulgent in permitting plaintiff to take full advantage of her legally entitled to leave.

Affirmed.