NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3050-11T4

VIVIAN SANKS-KING,

Plaintiff-Appellant,

v.

UNIVERSITY OF MEDICINE AND
DENTISTRY OF NEW JERSEY;
PRESIDENT DR. JOHN PETILLO;
BOARD OF TRUSTEE MEMBERS
DONALD BRADLEY; ERIC PENNINGTON;
JOHN HOFFMAN; AND, DR. FREDERICK
STERRITT,

Defendants-Respondents,

and

SONIA DELGADO; ALEX MENZA; AND
ACTING GOVERNOR RICHARD CODEY,

Defendants.

Argued November 14, 2012 - Decided July 18, 2013

Before Judges Lihotz and Ostrer.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-10130-07.

F. Michael Daily, Jr. argued the cause for appellant (F. Michael Daily, Jr., LLC, attorneys; Mr. Daily and Amy B. Sunnergren, on the briefs).

Agnes I. Rymer argued the cause for respondents (Saiber, LLC, attorneys; Joan M. Schwab and Ms. Rymer, on the brief).

PER CURIAM

Plaintiff, an African-American woman and former general counsel of the University of Medicine and Dentistry of New Jersey (UMDNJ), appeals from the trial court's decision granting summary judgment to defendants and dismissing her claim that she was terminated in violation of the Law Against Discrimination (LAD), and her constitutional rights to due process.[1] She also asserts error in the dismissal of various contract, tort, and due process claims.

For purposes of this appeal, defendants do not contest that plaintiff established a prima facie case of employment discrimination. Defendants responded that UMDNJ was compelled to terminate her employment by the Office of United States Attorney for the District of New Jersey (OUSA), which had threatened to indict UMDNJ, and agreed to enter into a deferred prosecution agreement (DPA) only on the condition that plaintiff and three other employees were terminated.

We view the principal issue on appeal to be whether OUSA's direction that UMDNJ terminate plaintiff constitutes a

[1] Plaintiff dismissed her claims against Sonia Delgado and Alex Menza (who is deceased), and consented to summary judgment in favor of then-Acting Governor Codey.

"legitimate, nondiscriminatory reason" for her termination, rebutting the presumption of unlawful discrimination created by plaintiff's prima facie case. See Bergen Commercial Bank v. Sisler, 157 N.J. 188, 210-11 (1999) (stating that "[i]n order to rebut the presumption [of discrimination], the employer in the second stage of the process must come forward with admissible evidence of a legitimate, non-discriminatory reason for its rejection of the employee").

Plaintiff presented no proof that OUSA's motivation was discriminatory, let alone that UMDNJ was aware of such motivation. We therefore conclude that defendants successfully rebutted the presumption of unlawful discrimination. As plaintiff failed to prove that her termination "was caused by purposeful or intentional discrimination," id. at 211, we affirm dismissal by summary judgment of plaintiff's LAD claim. We also affirm the court's dismissal of plaintiff's various tort and contract claims, based on plaintiff's failure to serve proper statutory notices of claim. Lastly, we affirm the dismissal of plaintiff's claim that she was denied procedural due process in connection with alleged harm to her reputation.

I.

We discern the following facts from the record, viewed in a light most favorable to plaintiff as the non-moving party.

Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). As UMDNJ's general counsel, plaintiff was an "at will" employee who could be terminated without cause. Prior to the events leading to her termination, she received positive formal evaluations on an annual basis. Among her various duties, plaintiff was responsible for the compliance department.

In 2005, OUSA began to investigate whether, in violation of law, University Hospital (UH), an entity of UMDNJ, and University Physicians Associates (UPA), a clinical practice program of full-time UMDNJ faculty, had secured payment through Medicaid for the same medical services provided through UH. In May 2001, plaintiff was informed it was likely that UH sought reimbursement for the salaries it paid physicians to service its clinics, while physicians also separately billed Medicaid for those services through UPA. Only in November 2004 did UMDNJ inform the State Medicaid program of the issue.

Plaintiff's actions in the intervening three-and-one-half years are subject to dispute. Generally, plaintiff asserts that others within UMDNJ thwarted her diligent efforts to determine whether double-billing had occurred; and if it did, which of the two entities was entitled to payment from Medicaid. She also alleged she proposed appropriate responses, but she was not authorized to compel other employees to implement them.

Plaintiff retained outside attorneys to examine the double-billing issue and suggest responses, and formed a task force to investigate the issue. She testified that she forwarded information to others.

In June 2005, OUSA launched an investigation. Eventually, a criminal complaint was drafted that alleged UMDNJ knowingly and willfully submitted numerous fraudulent cost reports to Medicaid. It alleged the UMDNJ legal department was aware of the double-billing, yet it continued.

At a December 20, 2005, meeting with the UMDNJ Board of Trustees (the Board), then United States Attorney for the District of New Jersey Chris Christie (the USANJ) stated that the university could enter into a DPA or face criminal prosecution for illegally double-billing Medicaid. A board member testified that the USANJ was critical of plaintiff.

Two days later, the USANJ met with Acting Governor Richard Codey's chief counsel, Paul Fader, and UMDNJ's outside attorney, Walter Timpone, to negotiate the DPA. According to Fader and Timpone, the USANJ demanded that UMDNJ terminate plaintiff and three other UMDNJ employees as a condition of entering into the DPA. The four included two attorneys, one of whom was plaintiff, and two compliance officers. All were women and

three were African-American. Timpone and Fader relayed the demand to UMDNJ President John J. Petillo, Ph.D.[2]

Petillo testified that Fader and Timpone told him "they were informed that we needed to terminate the employ of four individuals or the . . . deferred prosecutorial agreement would not be signed and there would be the institutional indictment." Petillo said he was told that plaintiff and the others had to be terminated by close of business that day, although he learned that they could resign instead of being fired. Petillo reached plaintiff by telephone at home and told her the USANJ required him to terminate her or to accept her resignation. Plaintiff resigned that same day.

Plaintiff alleges that white males involved in the billing issue were not forced to resign. She named New Jersey Medical School Dean Dr. Russell Joffe; Dr. Stuart Cook, who preceded Petillo as president; and UH chief financial officer James P. Lawler, CPA. However, a December 18, 2005, newspaper article reported that Lawler abruptly quit and was cooperating with federal officials. The record reflects that Joffe separated from his deanship in 2003; Cook was replaced by Petillo in 2004; and Petillo ceased serving as president in February 2006.

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[2] Plaintiff denies the demand was made, but relies solely on a hearsay objection which we address below.

Petillo certified that he terminated plaintiff not because of improper bias, but because he understood the action to be a condition of entering the DPA. Timpone and Fader also certified that they saw no indication that UMDNJ terminated plaintiff's employment for any reason other than the university's desire to avoid criminal prosecution.

Plaintiff admitted, "I don't have any facts" to support a claim that Petillo terminated her on the basis of age, race, or gender, or that anyone at UMDNJ wanted her terminated for any reason other than that OUSA demanded her termination. She admitted that, to her knowledge, Petillo only terminated her because OUSA directed him to do so, and she had no evidence to dispute OUSA's demand. She conceded, "I don't know what the U.S. Attorney's motives were" in seeking her termination. Plaintiff agrees that a criminal prosecution would have financially devastated UMDNJ and forced it to close.

After her termination, the Board approved the DPA. The DPA stated that OUSA intended to file a criminal complaint against UMDNJ, but that the USANJ would recommend that the court defer the prosecution for twenty-four to thirty-six months. Under the DPA, UMDNJ agreed to retain an independent monitor who would, among other things, conduct a search for a new general counsel. The monitor would also oversee UMDNJ's remedial measures,

conduct a "comprehensive review" of the university's policies, and make written recommendations to the Board pertaining to UMDNJ's financial management and Medicaid billing. Upon compliance with its obligations under the DPA, OUSA agreed to seek the complaint's dismissal.

The record includes documentation that the Board approved the terminations "in its ordinary course of reviewing monthly 'separation reports.'" Plaintiff was not afforded an opportunity to appear before the Board to address her termination, nor was she afforded any other pre- or post-termination hearing. She alleged this was contrary to UMDNJ practice.

Plaintiff was not granted a severance package, although she claims other terminated senior executives received one. She also did not receive full reimbursement for personal legal expenses, although she claimed certain white male employees involved in the billing issue were reimbursed.

The federal investigation of UMDNJ's billing practices and management was the subject of newspaper reports. Plaintiff alleges her reputation was harmed by several published statements that she attributed to UMDNJ. We quote from her responsive statement of undisputed material facts:

47. In the December 18, 2005 Star-Ledger, two Board members were quoted in an article as follows:

"Christopher Paladin, a UMDNJ trustee, said the central administration of the university 'appears to have gone unchecked and unchallenged for more than a decade,' and another board member, John Hoffman, who serves as chairman, added 'People should have moved on it earlier.'"

. . . .

71. December 22, 2005, the date the terminations began, The Record, based in Hackensack, N.J. printed an article in which UMDNJ and sources within UMDNJ were quoted:

"The university issued the following statement: 'We all want the same thing — a university above reproach with everyone held accountable'"; and "[a] source close to the probe said the unusual monitoring arrangement, which is more often used in cases of alleged corporate crime, will not shield individuals from possible criminal prosecution. Other sources in the Codey administration and at UMDNJ confirmed that investigators are looking at the role played by Vivian Sanks King[.]" . . .

72. Also on December 22, 2005 from the Star-Ledger is the following statement, apparently from those individual[s] who [we]re permitted to attend a closed door session:

"Christie told the board he believes Sanks King 'conspired' to cover up the Medicare and Medicaid overbilling by directing outside attorneys to redraft reports to show that UMDNJ was billing properly, according to several people who attended Tuesday's meeting with the U.S. Attorney["]. . . .

> 73. December 23, 2005 the Star-Ledger reported that "(s)eparately, the beleaguered public university forced the resignations of three of its top compliance and legal affairs officials yesterday - including Vivian Sanks Kin[g], the vice president for legal management, whose role in the Medicaid and Medicare scandal is a focal point for federal investigators. The resignations came after a closed-door meeting between Codey, U.S. Attorney Christopher Christie and UMDNJ counsel Walter Timpone. University official said no severance deals were offered in the resignations of Sanks King and compliance officials Marykate Noonan and Deirdre Henry-Taylor." . . .
>
> 74. The Star-Ledger spoke with Anna Farneski and quoted her again on December 27, 2005. The article stated "A UMDNJ spokeswoman said the administration has taken appropriate staffing actions and will continue to hold people accountable. Three people were forced to resign last week, including the university's top lawyer and two compliance officers. A second lawyer will be asked for her resignation when she returns from vacation. 'It's precisely these types of issues that have brought us to this place - problems in the legal department that never made it to the president's office,' spokeswoman Anna Farneski said."

Plaintiff admitted the published statements were true, but alleged "inferences included allowed a different impression to be taken."

On June 10, 2008, OUSA sent plaintiff a letter stating that she was not a "target," which was defined as "a person as to whom the prosecutor or the grand jury has substantial evidence linking him [or her] to the commission of a crime[.]"

Defendants did not dispute that plaintiff never appeared before a grand jury, was not questioned by OUSA, and was never charged with a crime.

II.

Plaintiff filed a twelve-count complaint in December 2007. She alleged: her discharge and replacement by a white male was race-, age-, and gender-based in violation of LAD (counts one and five); UMDNJ wrongfully disseminated damaging information about her discharge, depriving her, without due process, of her liberty interest in her reputation (count two); defendants' wrongful discharge, and denial of a forum to rebut charges, violated her right to equal protection, in violation of the New Jersey Civil Rights Act, N.J.S.A. 10:6-2 (CRA) (count three); as plaintiff fulfilled her obligations as general counsel, her discharge without a hearing violated public policy (count four); her termination breached UMDNJ's progressive discipline termination policy (count six); her termination, without a fair and thorough investigation, violated her common law rights as expressed in Pierce v. Ortho Pharmaceutical, Inc., 84 N.J. 58 (1980) (count seven); she was denied severance in violation of company-wide severance policy (count eight); defendants violated the Tort Claims Act by refusing to reimburse her legal fees (count nine); defendants knowingly and intentionally caused

plaintiff to resign (count ten); defendants intentionally and recklessly inflicted emotional distress (counts eleven and twelve).

Upon completing discovery, in 2011 defendants moved for summary judgment on all counts. After oral argument on January 10, 2012, Judge Rachel Davidson granted the motion in an oral decision the same day. The court dismissed plaintiff's race- and gender-based discrimination claims under LAD because defendants articulated a legitimate, non-discriminatory reason for terminating her – OUSA demanded her ouster – and plaintiff was "unable to marshal any evidence to rebut the articulated reason for the plaintiff's discharge." Judge Davidson rejected plaintiff's argument that Fader's and Timpone's statements to Petillo about the termination demands constituted hearsay. She reasoned that the testimony was offered merely to demonstrate its effect on Petillo's decision to terminate plaintiff. In addition, the court determined that plaintiff's inability to obtain information from OUSA about its motives was immaterial because "[t]he U.S. Attorney's Office is not a defendant in this case."

The court then dismissed plaintiff's reputation-based constitutional claim because plaintiff admitted that the allegedly defamatory statements were factually true. The court

was not persuaded by plaintiff's argument that "'inferences included allowed a different impression to be taken.'" The court dismissed plaintiff's wrongful discharge, intentional infliction of emotional distress, and severe emotional distress claims because plaintiff admitted that "she did not file a notice of tort claim or a notice of contract claim" as required by the Tort Claims Act and the Contract Liability Act. Plaintiff's claims regarding defendants' breach of company-wide discipline and severance policies, as well as defendants' failure to reimburse her for legal fees in connection with the criminal investigations, were barred by the Contract Liability Act's notice provisions.

Plaintiff now appeals and presents the following points for our consideration:

> POINT I
>
> SANKS[-]KING ESTABLISHED A STRONG PRIMA FACIE CASE FOR A FINDING OF DISCRIMINATION.
>
> POINT II
>
> THE EMPLOYER HAS FAILED TO PRODUCE A LEGITIMATE NONDISCRIMINATORY REASON FOR ITS ACTIONS.
>
> A. The Court Erred When it Allowed Inadmissible Evidence to Form the Basis for Dismissal of the Plaintiff's Case.
>
> B. The "Reason" Is Actually No Reason.

POINT III

MATERIAL ISSUES OF FACT EXISTED AS TO WHETHER THE TERMINATION OF SANKS[-]KING WAS PRETEXTUAL.

A. The Very Nature of UMDNJ's "Christie Told Us to Do It" Excuse Is So Neat, Contrived, and Unassailable That a Jury Could Reject It.

B. Others Outside of the Protected Class Not Terminated.

C. Other Evidence of Disparate Treatment.

POINT IV

THE ACTIONS OF DEFENDANTS IN TERMINATING PLAINTIFF'S EMPLOYMENT WITHOUT ANY HEARING, STIGMATIZED HER REPUTATION AND DEPRIVED HER OF HER LIBERTY INTEREST IN HER POSITION.

POINT V

DEFENDANT DENIED SANKS[-]KING DUE PROCESS WHEN I[T] FAILED TO GIVE SANKS[-]KING AN OPPORTUNITY TO BE HEARD.

III.

We review de novo the trial court's grant of summary judgment, Lapidoth v. Telcordia Tech., Inc., 420 N.J. Super. 411, 417 (App. Div.), certif. denied, 208 N.J. 600 (2011), and apply the same standard as the trial court. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). Pursuant to Rule 4:46, we "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, supra, 142 N.J. at 540.

A.

The key issue on appeal is whether OUSA's termination demand constitutes a legitimate, non-discriminatory reason for plaintiff's termination. We conclude that it does.

As we noted at the outset, under LAD, once a plaintiff establishes a prima facie case of discrimination based on circumstantial evidence,[3] the burden then shifts to the employer to articulate some "legitimate, nondiscriminatory reason" for the employer's adverse action. Bergen Commercial Bank, supra, 157 N.J. at 210-11 (discussing that plaintiff may establish prima facie case by direct evidence of discrimination, or through circumstantial evidence). If a defendant provides such a "legitimate, nondiscriminatory reason," then the burden of production shifts back to the employee to establish that the reason the defendant articulated was not the true reason for the decision. Id. at 211. The plaintiff retains the burden of persuasion. Ibid.

[3] A plaintiff meets this burden by showing that he or she (1) belongs to a protected class, (2) applied for and was qualified for the job at issue, (3) was rejected, and (4) after his or her rejection, the position remained open as the employer continued to seek applicants with the plaintiff's qualifications.

As a threshold matter, we reject plaintiff's argument that the evidence of USANJ's demand was inadmissible hearsay. Simply put, the statement attributed to the USANJ was not offered for its truth – that is, whether OUSA would indeed have prosecuted instead of entering the DPA if plaintiff were not fired. Cf. N.J.R.E. 801 (stating that hearsay is an out-of-court statement "offered in evidence to prove the truth of the matter asserted"). Rather, the statement was offered "only to show that [it was] in fact made and that the listener took certain action as a result thereof[.]" Spragg v. Shore Care, 293 N.J. Super. 33, 56 (App. Div. 1996); see also Carmona v. Resorts Int'l Hotel, Inc., 189 N.J. 354, 379 (2007) (holding that an investigative report about the plaintiff's job performance was admissible as a non-hearsay statement relevant to show that the plaintiff was terminated for non-pretextual reasons, provided the defendant demonstrated that the decision-makers were aware of the report's contents and relied on it); cf. Spencer v. Bristol-Meyers Squibb Co.,[4] 156 N.J. 455, 463 (1998) (where the plaintiff wanted to establish that her employer was prompted to deny a position by the direction of an outsider, it was "unnecessary for [the] plaintiff to show that [the outsider's] statements were truthful. The plaintiff need only show that BMS

[4] The correct spelling of the company is "Bristol-Myers Squibb."

employees were reacting to their perceived understanding of [the outsider's] statements or attitudes.").

Plaintiff argues that evidence of the termination demand should also have been excluded under N.J.R.E. 403 because, plaintiff contends, she could not verify whether or not the statement was actually made. In essence, plaintiff argues the evidence should have been excluded because it was unverifiable, or unreliable. We are unpersuaded.

N.J.R.E. 403 permits a court to exclude relevant evidence "if its probative value is substantially outweighed by the risk of . . . undue prejudice[.]" However, our Court has expressed reluctance to exclude evidence as unduly prejudicial solely on the ground that is alleged to be "highly unreliable." Spencer, supra, 156 N.J. at 464-66. In any event, the testimony of Fader, Timpone, and Petillo is not "highly unreliable evidence." It is also bolstered by Delgado's testimony that the USANJ criticized plaintiff, and the DPA requirement to seek a new general counsel. The evidence of the statement is probative of the cause of plaintiff's termination. Plaintiff has not suffered "undue prejudice" that substantially outweighs the probative value of the testimony simply because she can marshal no evidence to contradict the testimony of Fader, Timpone, and Petillo.

Having addressed the evidentiary issues, we turn to whether UMDNJ's compliance with OUSA's termination demand suffices as a legitimate, non-discriminatory reason for plaintiff's termination. We recognize that an employer may sometimes be held liable if it acts as the metaphorical "cat's paw" of a person who, with a discriminatory motive, seeks an adverse employment action against a plaintiff.[5] A supervisor, motivated by discriminatory animus, may proximately cause a negative employment action by a different manager responsible for hiring and firing. "[I]f a supervisor performs an act motivated by [discriminatory] animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable[.]" Staub, supra, ___ U.S. at ___, 131 S. Ct. at 1194, 179 L. Ed. 2d at 155 (footnote omitted). See also Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 291 (4th Cir. 2004) (adopting "cat's paw" theory); Russell v.

[5] See Staub v. Proctor Hosp., ___ U.S. ___, ___ n.1, 131 S. Ct. 1186, 1190 n.1, 179 L. Ed. 2d 144, 151 n.1 (2011) ("The term 'cat's paw' derives from a fable conceived by Aesop, put into verse by La Fontaine in 1679, and injected into United States employment discrimination law by [Judge Richard] Posner in 1990. See Shager v. Upjohn Co., 913 F.2d 398, 405 [(7th Cir. 1990)]. In the fable, a monkey induces a cat by flattery to extract roasting chestnuts from the fire. After the cat has done so, burning its paws in the process, the monkey makes off with the chestnuts and leaves the cat with nothing.").

McKinney Hosp. Venture, 235 F.3d 219, 227 (5th Cir. 2000) (same).

Although our Court has not expressly adopted the "cat's paw" principle, it has addressed the probative value of related evidence. In Spencer, supra, 156 N.J. at 463-64, the plaintiff alleged that Bristol-Myers Squibb (BMS) denied her employment because of her race and gender. The Court held the plaintiff could introduce evidence that a BMS employee told her that an important person outside the company objected to her hiring because he did not want an African-American woman of her age supervising his daughter, who worked at BMS. Id. at 457-66. Thus, the Court allowed proofs in support of a "cat's paw" theory of liability.

In Grasso v. West New York Board of Education, 364 N.J. Super. 109, 115-16 (App. Div. 2003), the plaintiff, a female, presented evidence suggesting that a school board, upon a superintendent's recommendation, hired a Hispanic male as an assistant high school principal after the principal indicated to interviewers that he wanted a Hispanic to fill the position. Without explicitly applying the "cat's paw" principle, we held there was sufficient evidence for the jury to infer that the Board's selection of the male candidate was "probably tainted"

by the superintendent's recommendation, which was affected by the principal's "discriminatory preference." Id. at 119.

Nevertheless, the "cat's paw" principle does not apply here. First, plaintiff has presented no cognizable evidence that OUSA or the USANJ was motivated by discriminatory intent; she conceded she was unaware "what the U.S. Attorney's motives were." Cf. Hill, supra, 354 F.3d at 289 (other federal appeals courts have applied the cat's paw theory "to determine employer liability for the discriminatory acts and motivations of supervisory employees"); Russell, supra, 235 F.3d at 227 ("Consequently, it is appropriate to tag the employer with an employee's age-based animus if the evidence indicates that the worker possessed leverage, or exerted influence, over the titular decisionmaker."). Second, there is no evidence that defendants were aware of such animus. By contrast, in Spencer, supra, the plaintiff presented evidence that the outsider was motivated by improper bias, and the BMS managers were aware of that when they acted on it.

As defendants presented a "legitimate, non-discriminatory reason" for terminating plaintiff, the burden of production shifted back to plaintiff to present evidence that defendants were motivated by race-, gender-, or age-based animus. In order to defeat summary judgment, plaintiff was required to (1)

"discredit[] the proffered reasons, either circumstantially or directly," or (2) "adduc[e] evidence, whether circumstantial or direct, that discrimination was more likely than not a motivating or determinative cause of the adverse employment action." DeWees v. RCN Corp., 380 N.J. Super. 511, 528 (App. Div. 2005) (internal quotation marks and citation omitted). To meet the first test, the plaintiff was required to "demonstrate such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence." Ibid. (internal citations and quotations omitted). Plaintiff has failed to meet either test.

Defendants' proffered reason for terminating plaintiff was specific, and substantiated by direct evidence. Thus, defendants' reason is distinguishable from the vague, conclusory or speculative reasons rejected in three federal cases cited by plaintiff. In Iadimarco v. Runyon, 190 F.3d 151, 166-67 (3d Cir. 1999), the court rejected the defendant's proffered explanation that the plaintiff was terminated because she was not "the right person for the job." The court in Patrick v. Ridge, 394 F.3d 311, 317 (5th Cir. 2004), rejected the defendant's assertion that the plaintiff was "not sufficiently

suited" for the position. The defendant in Prudencio v. Runyon, 986 F. Supp. 343, 348-49 (W.D. Va. 1997), speculated that the plaintiff was not hired because her name was inadvertently removed from the applicant list because of an administrative or computer error. The court rejected the reason as speculative. Id. at 350.

Defendants have not presented a "stark uncorroborated claim," as plaintiff asserts. Nor is this case like Ferdinand v. Agricultural Insurance Corp. of Watertown, New York, 22 N.J. 482 (1956), cited by plaintiff, where the court rejected a completely implausible and unsubstantiated claim.[6] Rather, defendants have presented a detailed, specific reason for the termination, supported by the direct testimony of the two individuals who heard it, and the person to whom it was conveyed, and also supported by the circumstantial evidence, including the USANJ's reported critical comments, and the provision in the DPA requiring a search for a new general

[6] Ferdinand did not involve a discrimination claim. The plaintiffs sued to recover money under a policy issued by the defendant. They alleged jewelry covered by the policy was stolen from the plaintiffs' car while parked overnight at a motel. Id. at 485. The court determined that, even though the plaintiffs' testimony was uncontroverted, the lower court should not have directed a verdict for the plaintiffs because it was "extraordinary" and "hard to understand" why $12,000 worth of jewelry would be left in an automobile, unguarded, overnight. Id. at 499-500.

counsel. Plaintiff may not overcome defendants' articulated explanation with mere "metaphysical doubt as to the material facts." Triffin v. American Int'l Group, Inc., 372 N.J. Super. 517, 523-24 (App. Div. 2004) (internal quotation and citation omitted).

Plaintiff also failed to adduce evidence sufficient to enable a fact-finder to conclude, notwithstanding defendant's professed reason for terminating her, that "discrimination was more likely than not a motivating or determinative cause of the adverse employment action." As noted, there is no direct evidence that the USANJ or defendants were motivated by discrimination. Plaintiff's reliance on alleged disparate impact does not suffice. First, plaintiff has not identified others in the legal department or the compliance department with similar responsibilities and involvement in the billing issue who were treated more favorably. Second, three of the four persons she claims were treated more favorably, who held different positions, had already separated from management positions when OUSA demanded her ouster.

In sum, Judge Davidson correctly granted summary judgment to defendants, dismissing plaintiff's LAD claims.

B.

Plaintiff argues on appeal that publication of information related to her termination — albeit true — damaged her reputation, in violation of her right to due process under the New Jersey Constitution.[7]

First, we agree with defendants that only three allegedly reputation-harming publications are attributable to defendants. In one, a UMDNJ spokeswoman reportedly said that the university was investigating its billing practices, and reportedly said, "We will incorporate any findings into our ongoing reforms" and "We will hold accountable anyone who abused the public trust." Second, a newspaper attributed to "sources in the Codey administration and at UMDNJ that investigators are looking at the role played by Vivian Sanks-King, the university's vice president for legal management." Third, an article reported,

> A UMDNJ spokeswoman said the administration has taken appropriate staffing actions and will continue to hold people accountable. Three people were forced to resign last week, including the university's top lawyer[.] "It's precisely these types of issues that have brought us to this place - problems in the legal department that never made it to the president's office," spokeswoman Anna Farneski said.

[7] Although plaintiff also refers in her brief to federal case law, her complaint clearly grounded her claim solely on her state constitutional rights.

Plaintiff relies on Doe v. Poritz, 142 N.J. 1 (1995), for the proposition that our constitution recognizes a protected interest in one's reputation. Doe did hold that one's reputation is a liberty interest triggering procedural due process protection under N.J. Const. art. I, ¶ 1. 142 N.J. at 100. However, in addressing the plaintiff's reputation claim, the Court explicitly recognized, "We deal here not with the question of substantive constitutional deprivation [of due process], for we have held there is none." Id. at 99. See also Filqueiras v. Newark Pub. Sch., 426 N.J. Super. 449, 474 (App. Div.) (noting that New Jersey has not recognized a substantive due process right to protect one's reputation, which "would require us to convert what was essentially a tort claim of defamation into something actionable under the CRA"), certif. denied, 212 N.J. 460 (2012).

Moreover, Doe addressed procedural due process claims in the context of "systematic disclosures" by the State under the community notification provisions of Megan's Law, N.J.S.A. 2C:7-6 to -11. Doe, supra, 142 N.J. at 99-100, 102 n.26. The Court considered the holding of the United States Supreme Court in Paul v. Davis, 424 U.S. 693, 701, 96 S. Ct. 1155, 1160-61, 47 L. Ed. 2d 405, 414 (1976), that reputational harm is only actionable if, in addition, there is deprivation of some

additional right or interest. Id. at 80, 102-03. The Court stated:

> According to Professor Tribe, "[T]he Court evidently believed that any contrary result would have the unthinkable consequence of federalizing the entire state law of torts whenever government officers are the wrongdoers." Laurence H. Tribe, American Constitutional Law 1397 (2d ed. 1988). That concern, however, is not present in the instant case. Finding a protectable interest in this case would not risk federalizing tort law. Plaintiff's claim is not a state defamation action. We are not here dealing with random disclosures, but with systematic disclosures following ex parte classification by local prosecutors.
>
> [142 N.J. at 102 n.26 (emphasis added).]

We have recognized that although Doe extends procedural due process protections "to personal reputation, 'without requiring any other tangible loss,' . . . this does not mean that a liberty interest is implicated anytime a governmental agency transmits information that may impugn a person's reputation." In re an Allegation of Physical Abuse Concerning L.R., 321 N.J. Super. 444, 460 (App. Div. 1999) (quoting Doe, supra, 142 N.J. at 104). In L.R., we held a hearing was not required where DYFS did not substantiate child abuse, but nonetheless expressed by "limited dissemination" some "intrinsically less damaging" concerns about the teacher's conduct. Ibid.

Even if there is a right to procedural due process, the process required must conform to the facts and circumstances. We stated in In re an Allegation of Physical Abuse Concerning R.P., 333 N.J. Super. 105, 112-13 (App. Div. 2000), that although

> a person's interest in protecting his reputation "trigger[s] the right to due process[,] [d]ue process is not a fixed concept, . . . but a flexible one that depends on the particular circumstances." [Doe, supra, 142 N.J.] at 106. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484, 494 (1972). Thus, even if a person has a constitutionally protected interest, it does not automatically follow that the person must be afforded an opportunity for an adjudicatory hearing. [(citations omitted)].

In the case before us, plaintiff has failed to justify her claim that she was entitled, as a matter of constitutional mandate, to appear before the Board "to rebut the presumptions that underlay the decision to terminate[] her." Cf. Golden v. Cnty. of Union, 163 N.J. 420, 433 (2000) (stating that assistant prosecutor may be discharged without a hearing based on at-will employment relationship). Plaintiff has not presented evidence that the Board relied on any independent fact-finding, or formed any presumptions underlying its decision. Rather, plaintiff's termination was the product of the USANJ's demand, immediately

transmitted by Fader and Timpone, and promptly implemented by Petillo.

Also, while we do not question that plaintiff suffered harm to her reputation, the major damage was principally caused by the fact she was terminated in the midst of an active and public investigation of wrongdoing by OUSA. The isolated statements by UMDNJ personnel "did not cause the kind of damage to reputation which would entitle [plaintiff] to a hearing." L.R., supra, 321 N.J. Super. at 460.

For all these reasons, summary judgment dismissing plaintiff's due process claim was proper.

C.

Lastly, we conclude the court correctly dismissed by summary judgment plaintiff's claims for severance benefits (count eight) and reimbursement of counsel fees (count nine). Those claims, along with plaintiff's other contractual or tort-based claims, were barred because plaintiff failed to serve timely notices of claim. Plaintiff argued before the trial court that the claim for severance benefits and counsel fees was not a simple contract claim. Rather, she argued the basis for the claim was that defendants discriminated against her by denying her severance benefits and fee reimbursement that they allegedly awarded similarly situated white male workers.

However, plaintiff did not plead discrimination, or reference LAD or CRA, in the counts of her complaint pertaining to severance and fees. Whereas plaintiff cites LAD in the counts pertaining to her termination, she only alleges a "breach of company-wide severance policy" in the denial of severance payments. Moreover, nowhere in the severance payments claim does plaintiff allege that she was denied severance payments based on an immutable characteristic, or that people of a different age, race, or gender received such payments. In the fee reimbursement claim, plaintiff alleged that UMDNJ violated the Tort Claims Act by refusing to provide her with legal fees in connection with state and federal investigations. There, too, plaintiff did not state facts indicating that the decision to deny her legal fees was based on discrimination. Plaintiff may not wait until a motion for summary judgment to recast her claims.

We therefore discern no reason to disturb the trial court's order dismissing by summary judgment plaintiff's complaint.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION