SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3005-18

MICHAEL STONNELL,

Plaintiff-Appellant,

v.

STATE OF NEW JERSEY, NEW JERSEY STATE POLICE, ACTING LIEUTENANT DAVID LABRIOLA, individually and in his official capacity for the STATE OF NEW JERSEY and NEW JERSEY STATE POLICE, LIEUTENANT JAMES KNOELLER, individually and in his official capacity for the STATE OF NEW JERSEY and NEW JERSEY STATE POLICE, SERGEANT RODNEY GOODSON, individually and in his official capacity for the STATE OF NEW JERSEY and NEW JERSEY STATE POLICE, STAFF SEREANT HEATH WELSH, individually and in his official capacity for the STATE OF NEW JERSEY and NEW JERSEY STATE POLICE, CHRIS DEMAISE, individually and in his official capacity for the

STATE OF NEW JERSEY and NEW JERSEY STATE POLICE, RONALD KIRBY, individually and in his official capacity for the STATE OF NEW JERSEY and NEW JERSEY STATE POLICE, SUPERINTENDENT COLONEL RICK FUENTES, individually and in his official capacity for the STATE OF NEW JERSEY and NEW JERSEY STATE POLICE, CAPTAIN RAYMOND JACOBS, individually and in his official capacity for the STATE OF NEW JERSEY and NEW JERSEY STATE POLICE, and MAJOR ROBERT YAISER, individually and in his official capacity for the STATE OF NEW JERSEY and NEW JERSEY STATE POLICE,

Defendants-Respondents.

Submitted February 28, 2022 – Decided May 23, 2022

Before Judges Messano and Rose.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-1943-15.

Castellani Law Firm, LLC, attorneys for appellant (David R. Castellani, on the brief).

Matthew J. Platkin, Acting Attorney General, attorney for respondent (Jane C. Schuster, Assistant Attorney General, of counsel; Stephanie R. Dugger, Deputy Attorney General, on the brief).

PER CURIAM

Plaintiff Michael Stonnell was a trooper with the New Jersey State Police (NJSP) from 1993 until his retirement on January 1, 2018. On January 29, 2015, plaintiff filed a complaint in the Law Division naming the State of New Jersey, New Jersey State Police (NJSP), and several individual State Police officers as defendants. Plaintiff alleged defendants violated the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -50 (the LAD), by creating a hostile work environment and failing to promote plaintiff because of his "disability/handicap and/or age." He also alleged defendants violated the Workers' Compensation Law (WCL), specifically N.J.S.A. 34:15-39.1, by failing to promote him in retaliation for plaintiff asserting rights under the WCL. Plaintiff further claimed defendant violated his state constitutional rights to "freedom of speech and political association," "equal protection and due process," and the constitutional guarantee of "Merit and Fitness in the promotion of State Police Officers."

After discovery, defendants moved for summary judgment. In a comprehensive oral decision, the Law Division judge granted defendants' motion and dismissed plaintiff's complaint. The judge reviewed the allegations supporting plaintiff's claim of a hostile work environment based on his disability, specifically skin cancer. She concluded plaintiff failed to establish

defendants' conduct was "related to [plaintiff's] disability," or that it was "extreme enough to amount to a change in the terms and conditions of employment." The judge also considered plaintiff's retaliation claim, and concluded plaintiff suffered no "adverse job actions" by defendants. She also concluded plaintiff failed to establish "a causal link" between the filing of his workers' compensation petitions and "alleged retaliatory conduct" by defendants. The judge did not, however, independently analyze plaintiff's LAD claim that defendants failed to promote him based upon his disability.

Plaintiff now appeals. Although couched in three separate points, plaintiff's essential contention is the motion record contained sufficient evidence of material factual disputes foreclosing summary judgment on his employment discrimination, hostile work environment, and retaliation claims under the LAD related to his disability, perceived disability, or use of medical leave.[1] Plaintiff argues the judge failed to properly consider the record evidence supporting his claims and urges us to reverse and remand the matter to the Law Division for trial.

[1] Plaintiff's brief makes no arguments regarding dismissal of his LAD claims based on alleged age discrimination, or dismissal of claims under the WCL and New Jersey's Constitution. An issue not briefed is deemed waived on appeal. Pullen v. Galloway, 461 N.J. Super. 587, 595 (App. Div. 2019). We therefore do not address dismissal of those claims in this opinion.

Defendants urge us to affirm, asserting there are no genuine material factual disputes, and plaintiff failed to establish a prima facie case of disability discrimination, hostile work environment, or retaliation for engaging in protected activity under the LAD. Defendants also argue plaintiff's claims involving defendants' conduct prior to January 2013 are time-barred under the LAD's two-year statute of limitations.

We have considered these arguments in light of the record and applicable legal principles. We affirm.

I.

When reviewing the grant of summary judgment, we apply the "same standard as the motion judge." Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016) (quoting Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)).

> That standard mandates that summary judgment be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."
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> [Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016) (quoting R. 4:46-2(c)).]

We focus only on the motion record before the judge. Ji v. Palmer, 333 N.J. Super. 451, 463–64 (App. Div. 2000).

Like "the trial court[, we] must '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.'" Friedman v. Martinez, 242 N.J. 449, 472 (2020) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)). We owe no deference to the motion judge's legal analysis or interpretation of a statute. The Palisades At Fort Lee Condo. Ass'n v. 100 Old Palisade, LLC, 230 N.J. 427, 442 (2017) (citing Zabilowicz v. Kelsey, 200 N.J. 507, 512 (2009)).

Discrimination based on an employee's disability, or perceived disability, is illegal under the LAD. N.J.S.A. 10:5-4; Victor v. State, 203 N.J. 383, 410 (2010) (the LAD includes one "who is perceived as having a disability" within the class protected under the statute); see also Dickson v. Cmty. Bus Lines, Inc., 458 N.J. Super. 522, 532 (App. Div. 2019) ("LAD claims based upon a perceived disability still require 'a perceived characteristic that, if genuine, would qualify a person for the protections of the LAD.'" (quoting Cowher v. Carson & Roberts, 425 N.J. Super. 285, 296 (2012))).

Under "[t]he first step of [the] . . . framework" adopted by the Court, to sustain an employment discrimination claim under the LAD based on disability or perceived disability, "a plaintiff [must] establish a prima facie case." Grande v. Saint Clare's Health Sys., 230 N.J. 1, 17 (2017) (citing Jansen v. Food Circus Supermarkets, Inc., 110 N.J. 363, 382 (1988)). The elements of a prima facie case "will 'vary depending on the particular employment discrimination claim being made.'" Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 331 (2010) (quoting Victor, 203 N.J. at 409–10).

With respect to an allegation of discrete discriminatory conduct by the employer, in this case, the failure to promote, plaintiff must show he was disabled, or perceived to be disabled, within the meaning of the LAD; he was qualified for the position or rank; he was denied promotion; and another with "similar or lesser qualifications achieved the rank or position." Ibid. (quoting Dixon v. Rutgers, 110 N.J. 432, 443 (1988)).

In Dickson, we said:

> To prevail on a hostile work environment claim, a plaintiff must show "(1) that [he or she] is in a protected class; (2) that [he or she] was subjected to conduct that would not have occurred but for that protected status; and (3) that it was severe or pervasive enough to alter the conditions of employment."

> [458 N.J. Super. at 531 (alterations in original) (quoting Victor, 203 N.J. at 409).]

In Royster v. New Jersey State Police, we said:

> To state a prima facie case of retaliation under NJLAD . . . , a "plaintiff must show that 1) [he or] she was engaged in a protected activity known to defendant; 2) [he or] she was thereafter subjected to an adverse employment decision by the defendant; and 3) there was a causal link between the two."
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> [439 N.J. Super. 554, 575 (App. Div. 2015), aff'd as mod., 227 N.J. 482 (2017) (alterations in original) (quoting Woods-Pirozzi v. Nabisco Foods, 290 N.J. Super. 252, 274 (App. Div. 1996)).]

"LAD claims are subject to the two-year statute of limitations contained in N.J.S.A. 2A:14-2(a)." Alexander v. Seton Hall Univ., 204 N.J. 219, 228 (2010). "[D]iscrete acts of discrimination, such as termination or a punitive retaliatory act, are usually readily known when they occur and thus easily identified in respect of timing." Ibid.; see also Roa v. Roa, 200 N.J. 555, 567 (2010) ("[A] 'discrete retaliatory or discriminatory act occur[s] on the day that it happen[s].'" (second and third alterations in original) (quoting AMTRAK v. Morgan, 536 U.S. 101, 110 (2002))). However, when a plaintiff alleges a violation of the LAD based on an ongoing discriminatory hostile work environment, "the entire claim may be timely if filed within two years of 'the

date on which the last component act occurred.'" Alexander, 204 N.J. at 229 (quoting Roa, 200 N.J. at 567).

With these standards in mind, we review the motion record in a light most favorable to plaintiff.

II.

Plaintiff initially served as a road trooper in various NJSP stations in the southern part of the state until 2006, when, pursuant to his request, he was transferred to the Atlantic City Marine Bureau station. In 2009, plaintiff injured his ankle on duty, underwent surgery, and was returned on "light duty" in 2010. However, he injured his other ankle while visiting the troop doctor, suffered injuries to his shoulder, and developed tendinitis in both arms from his work on the NJSP boat.

Plaintiff filed two workers' compensation petitions in March 2011. In May, he was "placed out of duty" and ordered into the NJSP Employee Assistance Program (EAP). Although plaintiff's complaint alleged this was caused by "work[-]related stress including a diagnosis of anxiety and depression," during his deposition plaintiff attributed this stress, anxiety and depression to his "ex-wife and . . . daughters," and a dispute with a neighbor that resulted in litigation. He returned to work again on light duty in early 2012.

In 2013, plaintiff was diagnosed with skin cancer and underwent oral chemotherapy treatment. He took a three-week medical leave of absence, and his doctor recommended plaintiff be "removed from the marine environment." Plaintiff informally considered a "mutual transfer," i.e., where he and another trooper would essentially switch assignments with plaintiff going to the NJSP unit at Atlantic City Airport, close to his home. Defendant Acting Lieutenant David Labriola, plaintiff's supervisor at the time, testified at deposition that had plaintiff formally sought the transfer, he would have approved it, but plaintiff never submitted the transfer request.

Instead, NJSP transferred plaintiff in November 2013 to a new unit located at Division Headquarters in West Trenton, far from his home. Plaintiff testified in his deposition this was "punishment," because he never asked for that specific transfer, and the position was in a "special unit" routinely "posted" throughout NJSP. Sergeant Karl Brobst testified at deposition that sometimes transfers were made as "punishment."

Plaintiff acknowledged during his deposition that he was not subject to a hostile work environment after his transfer to West Trenton. In July 2014, plaintiff "blew out [his] left knee" while training for the NJSP physical. He was

out of work as a result, and, in September 2014, plaintiff was on "stress leave" and did not return to work until his retirement in 2018.

Plaintiff's discriminatory failure to promote claim begins with actions in 2011. He alleged defendants failed to promote him at that time because of his physical ailments. NJSP Standard Operating Procedure C-20 (C-20) requires all members to pass the "physical fitness test" to be eligible for promotion, although the policy also recognizes "a temporary medical or physiological problem" would not automatically disqualify a member. "Promotional eligibility for such members w[ould] be determined by the Superintendent on a case by case basis." Plaintiff and Brobst testified they knew of three situations where a trooper was promoted despite non-compliance with C-20, although the circumstances of the non-compliance and promotions are not in the record. Nevertheless, in November 2011, despite plaintiff's then commanding officer, defendant Lieutenant James Knoeller, stating he was unable to fully evaluate plaintiff for promotion because of his absence on leave, Knoeller recommended plaintiff for promotion.

Labriola, who was the Commander of the Marine Station and plaintiff's supervisor upon his return to work in 2012, issued plaintiff a negative performance notice. When deposed, plaintiff acknowledged he failed to perform

the required task. Plaintiff claimed Labriola singled him out, since plaintiff heard of no one else receiving a negative review for such a minor infraction.

Yet, plaintiff acknowledged Labriola recommended him for promotion in March 2012, and, one year later, Labriola elevated plaintiff one level on the NJSP "promotional ranking tier" levels. Brobst and Sergeant Vincent Damiani both testified at their depositions, however, that Labriola paid special attention to plaintiff's use of sick time and medical leave and often expressed his dissatisfaction with plaintiff's absences.

In September 2012, plaintiff received a negative performance review from defendant Sergeant Rodney Goodson, because plaintiff refused over the course of three days to don his "dry suit," protective apparel used when entering the water. Plaintiff testified he refused because he knew from the previous year the suit was leaking, and he worried about drowning because he would not have a floatation device. Plaintiff said Goodson yelled at him and was "very hostile."

Major Robert Yaiser testified at deposition that he inquired of Labriola why plaintiff, despite his seniority, was not promoted; Labriola said plaintiff was not C-20 compliant and had been out on sick leave.

In December 2013 and December 2014 plaintiff advanced another level to promotional ranking to tier two. However, he was ineligible for promotion

because of a pending internal investigation initiated by Labriola in September 2013. Despite a direct order from defendant Sergeant Heath Welsh to contact the Medical Services Unit regarding leave to receive treatment from his dermatologist for his skin cancer, plaintiff refused, resulting in the investigation. In July 2015, at the conclusion of the departmental investigation, plaintiff was reprimanded for violating NJSP rules by disobeying a direct order.

In his deposition, plaintiff testified that he did call someone at medical services about the need for treatment for his skin cancer. In his brief, plaintiff also points to alleged inconsistencies between Labriola's deposition testimony and his reports to Internal Affairs; according to plaintiff, these inconsistencies demonstrate Labriola's discriminatory "motive" in initiating the investigation to prevent plaintiff's promotion during the many months between the initiation of the complaint and the reprimand. Plaintiff acknowledges he was aware of the ability to report defendants' alleged discrimination to NJSP's EEO officer but did not do so because that would have been "career suicide."

III.

Although the judge did not address the timeliness of plaintiff's various causes of action under the LAD, we do so to provide context for the rest of our

decision and set the framework for what is cognizable on appeal.[2] Any discrete act of discrimination, such as a failure to promote, is cognizable if it occurred after January 29, 2013, that is, within two years of the filing of plaintiff's complaint. The same is true regarding plaintiff's claims of retaliation under the LAD. Plaintiff's hostile workplace LAD claim is cognizable if "the last component act occurred" after January 29, 2013. Alexander, 204 N.J. at 229 (quoting Roa, 200 N.J. at 567).

LAD Discrimination — Failure to Promote

Plaintiff's failure to promote claim was limited to denial of a promotion after January 28, 2013, because of his disability, skin cancer, and necessary treatment for the condition. Seen through this prism, plaintiff's claim of disability discrimination under the LAD for failing to promote him to sergeant was properly dismissed.

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[2] The briefs filed by the parties in the Law Division are not part of the record on appeal. See R. 2:6-1(a)(2) (generally prohibiting the inclusion of trial court briefs in the appellate record). However, one exception to this Rule is when there is a question whether an issue, germane to the appeal, was raised in the trial court. Ibid. Here, on appeal, defendants assert the statute of limitations as a partial defense to plaintiff's specific claims. To assure ourselves that the issue was indeed raised in the trial court, we examined the public record of filings in the Law Division, which reveal defendants asserted the statute of limitations as a partial defense to some of plaintiff's allegations. Before us, plaintiff did not answer defendants' argument regarding application of the statute of limitations by filing a reply brief.

Plaintiff revealed the need to take leave to treat his skin condition sometime in the summer of 2013. Our review of the record reveals that plaintiff identified a promotional opportunity became available sometime in 2013 or 2014. In his deposition, plaintiff said even though his superiors "sent the paperwork up to promote [him] to sergeant," he was not promoted because of the outstanding internal affairs investigation. Plaintiff never identified who actually received the promotion he allegedly was denied.

Although "[t]he evidentiary burden at the prima facie stage is 'rather modest,'" Henry, 204 N.J. at 331 (quoting Zive v. Stanley Roberts, Inc., 182 N.J. 436, 447 (2005)), plaintiff was required to adduce some evidence that for whatever reason, he was not promoted and someone of "similar or lesser qualifications achieved the rank or position." Dixon, 110 N.J. at 443 (emphasis added). He failed to do so.

Assuming arguendo plaintiff carried the initial burden of presenting a prima facie case of discrimination in failing to promote, the burden shifted to defendants to "articulate a legitimate, nondiscriminatory reason for [their] actions." Henry, 204 N.J. at 331 (quoting Zive, 182 N.J. at 449). Defendants clearly did so, because plaintiff was ineligible for promotion while the internal affairs complaint was under investigation.

"Subsequently, 'the burden of production shifts back to the employee to prove by a preponderance of the evidence that the reason articulated by the employer was merely a pretext for discrimination and not the true reason for the employment decision.'" Ibid. (quoting Zive, 182 N.J. at 449). "The burden of proof 'remains with the employee at all times,' and if the plaintiff cannot meet his or her obligation . . . , the employer will prevail on summary judgment." Id. at 331–32 (first quoting Zive, 182 N.J. at 450; then citing Zive, 182 N.J. at 456).

Here, to demonstrate the investigation over his failure to report to medical services was pretextual, plaintiff claimed he never was told to "report" to medical services, only to contact them, and he did. However, there is no corroboration for this assertion other than plaintiff's testimony. Indeed, the investigation demonstrated that plaintiff did not report to medical services, and the person he supposedly spoke with could not recall any such conversation. Moreover, the internal affairs investigation actually resulted in a reprimand. At his deposition, plaintiff claimed the case was "dismissed" before an Administrative Law Judge, and he never agreed to "the findings." However, plaintiff's bald protestations of innocence do not raise a material factual dispute about whether defendants' investigation was a pretext given the ultimate issuance of a reprimand for violating a direct order.

LAD Hostile Work Environment

As noted, plaintiff conceded that after his transfer to West Trenton in November 2013, he was not subjected to discriminatory conduct related to his skin cancer, see Dickson, 458 N.J. Super. at 531, and "was severe and pervasive enough to make a reasonable person in [plaintiff]'s shoes believe that the conditions of employment had been altered and the working environment had become hostile and abusive." Id. at 534 (quoting Leonard v. Metro. Life Ins. Co., 318 N.J. Super. 337, 344 (App. Div. 1999)).

The "last component act" of plaintiff's hostile work environment claim is difficult to discern, that is, whether defendants' alleged discriminatory conduct occurred between January 29, 2013, when the two-year statute of limitations began to run, and November 2013 when the transfer occurred. In March 2013, Labriola recommended plaintiff for promotion. The internal affairs investigation began in September. For reasons already expressed, the initiation of an internal affairs investigation that resulted in a written reprimand for plaintiff's violation of a direct order could not, as a matter of law, be the "last component act" of a hostile work environment claim.

As for events prior to initiation of the investigation, it suffices to say that plaintiff's generalized accusations of hostility by Labriola, Goodsen and others,

even if corroborated, and of disparate levels of attention directed at him for prior use of sick time, medical leave, stress leave, or workers' compensation claims, were not, as the motion judge found, "severe and pervasive conduct . . . in violation of the law." With the exception of the initiation of the internal affairs investigation, none of defendants' conduct was based directly upon plaintiff's disability, i.e., his skin cancer and necessary treatment for that condition. The hostile work environment claim was properly dismissed.

LAD Retaliation

Plaintiff's LAD retaliation claim required him to demonstrate he "engaged in a protected activity [under the LAD] known to defendant[s]," and they retaliated against him between January 29, 2013, and the filing of his complaint. See Royster, 439 N.J. Super. at 575. An individual "engages in a protected activity under the LAD when that person opposes any practice rendered unlawful under the LAD." Dunkley v. S. Coraluzzo Petroleum Transporters, 437 N.J. Super. 366, 377 (App. Div. 2014) (quoting Young v. Hobart W. Grp., 385 N.J. Super. 448, 466 (App. Div. 2005)).

As noted, plaintiff never made a complaint to the appropriate NJSP personnel about an alleged violation of the LAD. However, plaintiff sought leave for treatment of his skin cancer in the summer of 2013 as an

accommodation for his disability, and defendants obviously knew of that request at some point, because it spurred the internal affairs investigation. We assume arguendo this may have been sufficient to establish the first prong of a retaliation complaint.

However, the motion judge found plaintiff suffered no adverse employment action in retaliation for his leave request.[3] We agree.

We have said:

> [A]n employer's adverse employment action must rise above something that makes an employee unhappy, resentful or otherwise cause an incidental workplace dissatisfaction. Clearly, actions that affect wages, benefits, or result in direct economic harm qualify. So too, noneconomic actions that cause a significant, non-temporary adverse change in employment status or the terms and conditions of employment would suffice.
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> [Victor v. State, 401 N.J. Super. 596, 616 (App. Div. 2008), aff'd as mod. on other grounds, 203 N.J. 383 (2010).]

[3] We note that plaintiff never asserted a failure to accommodate his disability claim under the LAD. We recognize that the prima facie case in support of a failure to accommodate claim does not require a plaintiff prove an adverse employment action. See, e.g., Richter v. Oakland Bd. of Educ., 459 N.J. Super. 400, 416 (App. Div. 2019) (recognizing an adverse employment action is not a required element of a failure to accommodate LAD claim). A retaliation claim does.

For reasons already expressed, the internal investigation that resulted in a reprimand does not raise a material factual dispute supporting plaintiff's LAD retaliation claim.

Moreover, it is undisputed plaintiff suffered no reduction in rank or pay upon transfer to West Trenton. Plaintiff was transferred to the Special Operations Section, in the Infrastructure Protection Unit, which was still in the NJSP Marine Bureau. Other than the location's greater distance from his home, plaintiff suffered no adverse consequences from the transfer. And, as already noted, once assigned to West Trenton in November 2013, plaintiff admittedly suffered no hostility from others in the workplace, as he purportedly did while assigned to the station in Atlantic City.

The motion judge noted that the transfer to West Trenton could not have been the required adverse employment action because it was spurred by plaintiff's doctor's recommendation that he no longer work outdoors. We take this to mean that even if the transfer could be considered an adverse employment action, defendants proffered a "legitimate, non-retaliatory reason for the decision." Young, 385 N.J. Super. at 465 (quoting Romano v. Brown & Williamson Tobacco Corp., 284 N.J. Super 543, 549 (App. Div. 1995)). We agree. Plaintiff's claim that the transfer to a distant location was "punishment"

is insufficient to establish a material disputed fact demonstrating defendants' "legitimate reason was merely a pretext for the underlying discriminatory motive." Id. at 465 (quoting Romano, 284 N.J. Super. at 549).

Affirmed.