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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5048-10T3

JANET OFORI,

Plaintiff-Respondent,

v.

UNIVERSITY OF MEDICINE AND
DENTISTRY OF NEW JERSEY,

Defendant-Appellant.

Argued January 18, 2012 - Decided September 10, 2012

Before Judges Payne, Reisner and Hayden.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-1208-08.

Peter D. Wint, Assistant Attorney General, argued the cause for appellant (Jeffrey S. Chiesa, Attorney General, attorney; Lewis A. Scheindlin, Assistant Attorney General, of counsel; Mr. Wint, on the brief).

Thomas A. McKinney argued the cause for respondent (Castronovo & McKinney, L.L.C., attorneys; Mr. McKinney and Megan F. Porio, on the brief).

PER CURIAM

Defendant, the University of Medicine and Dentistry of New Jersey (UMDNJ), appeals from a verdict against it in a workplace

discrimination action based on racial animus brought by plaintiff, Janet Ofori, a Ghanaian advanced practice nurse employed in the hospital's emergency department.

I.

The facts are sharply in dispute. According to defendant, on November 19, 2007, plaintiff became angry about a work assignment and the discovery that she had mislabeled lab work, and she reacted by slamming down the emergency room's staffing book, banging the lunchroom door, and refusing to correct the mistaken work. As a consequence of the lab work problem, supervisor Kathy Ennis was notified of what had occurred by co-worker Maryann Sadler, and both Ennis and supervisor Christine McCallion met with plaintiff to discuss the matter. Plaintiff claimed that she was informed at the meeting that co-worker Barbara Carroll had also notified Ennis of the problem. Plaintiff admitted that she was upset by her co-workers' conduct in informing plaintiff's supervisor.

The central incident occurred on November 21, 2007. Defendant claimed that, on that day, plaintiff refused to treat a number of fast-track patients, rejected a patient that had been assigned to the fast track, ignored instructions that the patient be returned to the fast track, and sought to close the

fast track unit early. This conduct was reported by Sadler to plaintiff's supervisor, Ennis, at approximately 10:30 p.m.

While assigned to the fast track unit, plaintiff left her assigned location on a number of occasions to go to the Medical Screening Exam (MSE) Room, which was being staffed by Carroll. There, medical technician Claudette Ward observed plaintiff kicking Carroll's chair several times while Carroll was sitting in it, as well as kicking her pocketbook. Additionally, plaintiff opened the door to the MSE room with such force that it struck Sadler in the back. Carroll complained to Ennis. Approximately twenty minutes later, as Carroll was locking the MSE door and preparing to leave for the night, plaintiff started banging on it, and when given entry, an altercation between the two erupted that included shouting and cursing. Ward witnessed plaintiff approaching Carroll "like a raging bull," and Assistant Nurse Manager Edwin Pineda witnessed the two women arguing as the altercation concluded. However, the altercation itself was heard, but not seen. It occurred behind a locked door and was not observed by any hospital employee.

Although both women informed Pineda that they were not injured, early in the morning after the fight, the women sought medical attention. Plaintiff was found by an emergency room doctor to have a small wound on her cheek and tenderness to her

scalp. Plaintiff also claimed that Carroll broke her glasses. Carroll was diagnosed by a nurse practitioner as suffering from anxiety resulting from the events and possible muscle strain.

Both women filed complaints on the Human Resources hotline maintained on behalf of the hospital. Although plaintiff's complaint was initially racially neutral, three days after it was submitted, she amended it to state that Carroll, a white woman, had told her to "[g]o back from where you came from."

An investigation was undertaken by Christine McCallion, Director of the emergency department, who was a white woman with an unblemished thirty-year history of employment by UMDNJ. Her prior contact with plaintiff consisted of involvement in a performance evaluation on August 30, 2007, in which plaintiff received a satisfactory rating. There was no evidence of prior animosity between the two women.

After McCallon collected statements and e-mails and conducted interviews, which contained no allegation or evidence of racial bias, she forwarded the materials to Damilola Fasehun, an African-American attorney with the UMDNJ's Office of Legal Management and a member of UMDNJ's Disciplinary Review Committee (DRC), a committee comprised of the Director of Labor Relations, the Associate Vice-President of the Affirmative Action Office, a compliance representative and a representative from the Legal

Department, Fasehun. Three of the four members of the Committee were African-American women; the other was a Caucasian woman.

Fasehun recommended that plaintiff be placed on unpaid administrative leave, which occurred. On November 29, 2007, McCallion made a recommendation, seconded by Ennis, that plaintiff be terminated, which occurred on December 4, 2007, following a DRC meeting. Although the termination decision was made by the DRC, McCallion wrote the letter informing plaintiff that she had been fired. Plaintiff remained out of work for six months. Carroll was not disciplined in any fashion.

On December 10, 2007, plaintiff filed a municipal court complaint against Carroll, and for the first time, she alleged that Carroll had called her a "black bitch" during their altercation. Carroll filed a cross complaint. However, both complaints were voluntarily dismissed at a later date.

Plaintiff's version of the relevant evidence differed sharply from defendant's. She claimed that the fight on November 21 was instigated by Carroll, who slammed plaintiff's head into a wall and scratched her face, causing significant injuries to plaintiff, allegedly consisting of a wound to her face, a concussion, a contusion to the back of the head and broken glasses. She alleged that Carroll called her a "black

bitch" as well as suggesting her return to Africa. She alleged additionally that Carroll suffered no injuries.

Nonetheless, plaintiff claimed that despite her injuries, McCallion determined that Carroll did not assault plaintiff without questioning Carroll as to her role in the fight, interviewing plaintiff's treating physician, obtaining her medical records, or verifying whether Carroll had used racial epithets. At trial, McCallion testified that plaintiff's injuries were self-inflicted after the fight had occurred.

Plaintiff also alleged that McCallion manufactured excuses to fire her, including her mislabeling of lab work, presence in an unauthorized area, misconduct, and closing down the fast track unit prematurely and without authorization. Plaintiff further alleged that McCallion's treatment of Carroll was disparate. She was never suspended, she was permitted to continue work during the investigation, and she received no disciplinary sanctions.

Following trial, the jury returned a verdict in plaintiff's favor, awarding $135,000 for past lost wages, $250,000 for future lost wages, and $100,000 for emotional distress. During trial, the judge denied defendant's motions for a directed verdict at the close of plaintiff's evidence and at the close of trial. Following the jury's verdict, the trial judge denied

motions for judgment notwithstanding the verdict (JNOV) and a new trial or remittitur. A fee award of $185,352 plus an enhancement of $64,173 was entered. UMDNJ has appealed.

II.

On appeal, UMDNJ first argues that the trial judge erroneously failed to grant its motion for JNOV because plaintiff failed to demonstrate that it intentionally discriminated against her on the basis of race and/or national origin and failed to show that its reasons for terminating her employment were pretextual. Alternatively, defendant argues that the jury's verdict constituted a miscarriage of justice, and that the trial judge erred in denying its motion for a new trial.

The test for consideration of a motion for JNOV is whether

> "the evidence, together with the legitimate inferences therefrom, could sustain a judgment in * * * favor" of the party opposing the motion, i.e., if, accepting as true all the evidence which supports the position of the party defending against the motion and according [her] the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ[.]
>
> [Dolson v. Anastasia, 55 N.J. 2, 5 (1969) (quoting R. 4:37-2(b)).]

If such is the case, the motion must be denied. Ibid.

As explained by the Dolson Court, the test for granting a new trial differs.

> The trial judge's obligation on a motion for a new trial because the verdict is said to be against the weight of the evidence is quite a different and more difficult one. It is clear that such a motion may be properly granted although the state of the evidence would not justify the direction of a verdict. A process of evidence evaluation, — "weighing" —, is involved, which is hard indeed to express in words. This is not a pro forma exercise, but calls for a high degree of conscientious effort and diligent scrutiny. The object is to correct clear error or mistake by the jury. Of course, the judge may not substitute his judgment for that of the jury merely because he would have reached the opposite conclusion; he is not a thirteenth and decisive juror. . . . [W]hat the trial judge must do is canvass the record, not to balance the persuasiveness of the evidence on one side as against the other, but to determine whether reasonable minds might accept the evidence as adequate to support the jury verdict * * * .
>
> [Id. at 6 (citations omitted).]

As part of that process the trial judge must take into account not only the proofs of record, but also the credibility of witnesses and the intangible feel of the case gained from presiding over it. Ibid. A verdict should only be overturned under this standard if it "clearly and convincingly appears that there was a manifest denial of justice under the law." Id. at 7 (citation omitted).

Although the appellate standard for reviewing the trial judge's action is essentially the same as that applicable to the trial judge, we must give deference to the trial judge's credibility determinations and his feel of the case. Ibid.

In opposition to defendant's position that there was insufficient evidence of disparate treatment, plaintiff cites to evidence (1) that plaintiff complained to defendant that she was assaulted by Carroll, called a "black bitch" and told to "go back to Africa"; (2) although there were no witnesses to the actual assault and those hearing it claimed both parties were yelling at each other, plaintiff was automatically deemed the aggressor; (3) plaintiff had injuries, confirmed by a UMDNJ doctor, whereas Carroll had none; (4) during the investigation, plaintiff was suspended without pay, whereas Carroll was permitted to continue work; (5) McCallion recommended only that plaintiff be terminated, and did not recommend that Carroll be disciplined; and (6) plaintiff and Carroll were equally situated, differing only in race.

With respect to pretext, plaintiff notes defendant's contention that on several occasions, she walked to the MSE, but so did Sadler, a white co-worker, and she was not disciplined. Defendant claimed that plaintiff refused to treat fast-track patients and claimed the unit was closing early. However,

plaintiff offered evidence at trial of a good-faith basis for her belief that McCallion directed that fast track be closed at 10:00 p.m. Additionally, Carroll closed the MSE room early, but was not disciplined. As a final matter, plaintiff notes defendant's claim that she kicked Carroll's chair and purse and opened the MSE door with sufficient force to hit Sadler in the back. But, evidence at trial provided grounds for the jury to conclude that all those actions were simply accidental.

Following our review of the record, we are satisfied, under the standards that we have articulated, that the trial judge did not err in denying defendant's motion for JNOV or a new trial. While the evidence was certainly sufficient to have supported a verdict in defendant's favor, we cannot say that, when we view the evidence supporting plaintiff's position as true, and give her the benefit of all inferences that can reasonably be derived from that evidence, a jury could not have found in her favor. Similarly, we do not find clear and convincing evidence of a manifest denial of justice under the law.

III.

Defendant UMDNJ also claims error resulting from the trial judge's restriction on the testimony of its witness, attorney Damilola (Lola) Fasehun. The issue arose in the following fashion. Prior to trial, plaintiff's attorney took the

deposition of supervisor McCallion. During that deposition, McCallion disclosed that she had recommended that plaintiff be terminated and that she had spoken to Fasehun about the case. The following exchange then occurred:

> Q. And what did Lola tell you – say about your recommendation for termination.
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> [DEFENSE COUNSEL] Objection to the form of the question.
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> [PLAINTIFF'S COUNSEL] It has nothing to do with – Lola was acting in her capacity as consultant.
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> [DEFENSE COUNSEL] She was acting in her capacity as attorney for UMDNJ. It's attorney-client privileged.
>
> [PLAINTIFF'S COUNSEL] Simply because someone is an attorney doesn't mean it's attorney-client privileged.
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> [DEFENSE COUNSEL] Exactly, but you can't ask about the communication, but if they're asking in the capacity of an attorney, then you can't go in there. The other individuals [DRC Board members] weren't.

Defense counsel also asserted the attorney-client privilege when plaintiff's counsel sought to ask: "Did Lola ever ask you if anything should be done regarding Barbara Carroll?" Fasehun was not named as a fact witness in pre-trial exchanges until seven days before trial, and her deposition was not taken.

At trial, defendant called Fasehun as a witness. Plaintiff objected, arguing lack of notice and discovery, and claiming

that defendant, having asserted the attorney-client privilege, could not waive it at this late juncture. The trial judge agreed, ruling that Fasehun could testify, but that she would not be permitted to testify to any advice that she had provided as an attorney. When asked to clarify the ruling, the judge stated that Fasehun would not be permitted to testify about any recommendations or communications she made to McCallion, any agent or member of the DRC, or any other agent or employee of UMDNJ. Fasehun's testimony conformed to those limitations, and did not address the substance of what occurred in plaintiff's case before the DRC. Although defendant had identified other DRC members as potential witnesses, none was called.

On appeal, defendant argues that the judge's determination to limit Fasehun's testimony in the manner that he did constituted an abuse of his discretion, prejudicial to defendant, because it precluded defendant from explaining the deliberations undertaken by the DRC in reaching its decision to permit plaintiff's termination. We disagree, finding support for the judge's position in Todd v. South Jersey Hospital System, 152 F.R.D. 676 (D.N.J. 1993), cited by plaintiff, which in a similar circumstance involving a last-minute waiver of the attorney-client and self-critical analysis privileges, stated:

> it is clear under the rules of discovery, and in a general consideration of fairness,

> that the party could not at the last moment before trial, or at trial, suddenly determine to waive the privilege and begin upon those materials in its defense. If a party uses materials in the pursuance of its defense, to which it holds a privilege or as to which some bar to production otherwise exists, the waiver of the privilege and the production of such documents within the ordinary course of discovery must take place. As with the attorney-client privilege, the possessor of the privilege must, in effect, respect that privilege himself, and not act to disclose such privilege[d] information. To both rely upon a privilege and at the same time rely upon the privileged information in a defense is a result which no privilege, neither attorney-client nor self-critical analysis can support.
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> [Id. at 688.]

See also Aysseh v. Lawn, 186 N.J. Super. 218, 230-32 (Ch. Div. 1982) (requiring waiver of any attorney-client privilege before trial, and precluding testimony by an attorney when that did not occur, thereby precluding meaningful discovery).

On the basis of the present record, we are unable to determine whether any of the evidence that defendant sought to introduce through Fasehun was, in fact, not privileged. See Payton v. N.J. Tpk. Auth., 148 N.J. 524, 550-51 (1997). However, if it were, we have been offered nothing to suggest that another DRC member could not have provided testimony equivalent to that of Fasehun. We therefore find no reversible error.

IV.

At the conclusion of the trial, and again, following a jury question, the judge gave the following "cat's paw" instruction to the jury over defendant's objection:

> Defendant, University of Medicine and Dentistry of New Jersey, may be liable for discrimination if you determine that a bias[ed] subordinate employee influenced the final decision maker to trigger a discriminatory employment action.
>
> The plaintiff can establish discrimination by demonstrating that an individual other than the ultimate decision maker influenced the termination decision based on discriminatory animus.
>
> Subordinate bias comes into play when an allegedly biased subordinate accomplishes her discriminatory goals by misusing the authority granted to her by the employer. For example, the authority to monitor performance, report disciplinary infractions, and recommend employment actions.
>
> The plaintiff at all times bears the ultimate burden of convincing you that it's more likely than not that the defendant engaged in intentional discrimination. . . .

On appeal, defendant contends that the instruction was improper because there was no evidence that McCallion bore any discriminatory animus toward plaintiff. However, for the reasons that we have stated in connection with our affirmance of the trial judge's determination to deny defendant's motions for JNOV and a new trial, we reject this argument. Viewing the

evidence in a light most favorable to plaintiff, we find a sufficient factual predicate for the charge to warrant its use.

Defendant also argues that the charge as given did not conform to that required by the United States Supreme Court in Staub v. Proctor Hospital, ___ U.S. ___, 131 S. Ct. 1186, 179 L. Ed. 2d 144 (2011), in that it did not include a proximate cause requirement. Staub was an appeal from a determination by the Seventh Circuit Court of Appeals that defendant was entitled to judgment as a matter of law on plaintiff's claim of violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA), an act that the Court likened in language and interpretation to federal Title VII law. At issue was the proper construction of statutory language permitting a finding of liability when the employer engaged in actions, such as termination of employment of a member of a uniformed service, when the person's membership "is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership." 38 U.S.C.A. § 4311(c). In the case before the Court there was evidence that two of Staub's supervisors were hostile to Staub's service in the Army Reserves, and that, after one supervisor had issued an allegedly unfounded Corrective Action disciplinary warning, the other supervisor had unjustifiably reported him for

committing conduct prohibited by the Corrective Action. Id. at ___, 131 S. Ct. at 1189, 179 L. Ed. 2d at 150. The vice-president of human resources, relying on the supervisor's accusation and her own review of Staub's personnel file, fired him. Ibid. There was no evidence that the vice-president held any animus toward plaintiff. Staub nonetheless sued, and at trial, claimed cat's-paw liability. His jury award was reversed by the Seventh Circuit, which was in turn reversed by the Supreme Court.

The Court held that

> Animus and responsibility for the adverse action can both be attributed to the earlier agent (here, Staub's supervisors) if the adverse action is the intended consequence of that agent's discriminatory conduct. So long as the agent intends, for discriminatory reasons, that the adverse action occur, he has the scienter required to be liable under USERRA. And it is axiomatic under tort law that the exercise of judgment by the decisionmaker does not prevent the earlier agent's action (and hence the earlier agent's discriminatory animus) from being the proximate cause of the harm. Proximate cause requires only "some direct relation between the injury asserted and the injurious conduct alleged," and excludes only those "link[s] that are too remote, purely contingent, or indirect." Hemi Group, LLC v. City of New York, 559 U.S. 1, ___, 130 S. Ct. 983, [989], 175 L. Ed. 2d 943, 951 (2010) (internal quotation marks omitted). We do not think that the ultimate decisionmaker's exercise of judgment automatically renders the link to the supervisor's bias "remote" or "purely

> contingent." The decisionmaker's exercise of judgment is also a proximate cause of the employment decision, but it is common for injuries to have multiple proximate causes. See Sosa v. Alvarez-Machain, 542 U.S. 692, 704, 124 S. Ct. 2739, [2750,] 159 L. Ed. 2d 718[, 736] (2004). Nor can the ultimate decisionmaker's judgment be deemed a superseding cause of the harm. It can be thought "superseding" only if it is a "cause of independent origin that was not foreseeable." Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 837, 116 S. Ct. 1813, [1818,] 135 L. Ed. 2d 113[, 120-21] (1996) (internal quotation marks omitted).
>
> [Id. at ___, 131 S. Ct. at 1192, 179 L. Ed. 2d at 153 (footnote omitted).]

Otherwise, an employer could isolate the firing official from an employee's supervisors, thereby shielding the adverse employment decision from claims of discrimination based on recommendations of supervisors that were "*designed and intended*" to produce the adverse action. Id. at ___, 131 S. Ct. at 1192-93, 179 L. Ed. 2d at 153-54. However, if an employer's investigation results in an adverse action for reasons unrelated to the supervisor's original biased action (a matter as to which the employer has the burden) then the employer will not be liable. Id. at ___, 131 S. Ct. at 1193, 179 L. Ed. 2d at 154. In other words, if the supervisor's act, motivated by discriminatory animus that is intended by the supervisor to cause an adverse employment action, is a proximate cause of the

ultimate employment action, the employer is liable. Id. at __, 131 S. Ct. at 1194, 179 L. Ed. 2d at 155.

After establishing the proper legal framework for analysis of the matter, the Court determined, on the basis of the factual record, that the Seventh Circuit's judgment had to be reversed. Id. at ___, 131 S. Ct. at 1194, 179 L. Ed. 2d at 155. However, it continued:

> It is less clear whether the jury's verdict should be reinstated or whether Proctor is entitled to a new trial. The jury instruction did not hew precisely to the rule we adopt today; it required only that the jury find that "military status was a motivating factor in [Proctor's] decision to discharge him." . . . Whether the variance between the instruction and our rule was harmless error or should mandate a new trial is a matter the Seventh Circuit may consider in the first instance.
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> [Id. at ___, 131 S. Ct. at 1194, 179 L. Ed. 2d at 155-56.]

On remand and after comparing the charge given in Staub with the language adopted by the Supreme Court, the Seventh Circuit determined that "the variance between the instruction given to the jury and the Court's new iteration of the rule was not harmless error[,]" and it granted a new trial. Staub v. Proctor Hosp., 421 Fed. Appx. 647, 648 (7th Cir. 2011).

We are not persuaded that such a result should occur in this case. As is clear from plaintiff's counsel's summation,

plaintiff's entire case was that McCallion conducted a biased investigation, taking Carroll's word over plaintiff's because of race, and that her investigation provided the grounds for the DRC's determination that plaintiff should be fired. Thus, the facts differ from those of Staub, where the contention was that the plaintiff's supervisors were affirmatively trying to terminate his employment because they were hostile to his obligations as a military reservist. Id. at ___, 131 S. Ct. at 1189, 179 L. Ed. 2d at 150. Although it might have been better practice for the trial judge to have explicitly required the jury to find that McCallion's biased investigation was "a proximate cause" of the DRC's decision, we are satisfied that the judge's use of the term "influenced" — the term utilized by the Third Circuit in Abramson v. William Paterson College of New Jersey, 260 F.3d 265, 286 (3d Cir. 2001) and cited in Grasso v. West New York Board of Education, 364 N.J. Super. 109, 118 (App. Div. 2003), certif. denied, 179 N.J. 312 (2004) — conveyed the same concept and, in the circumstances of this case, did not constitute plain error.[1]

Further, we reject the argument that the jury could not properly apply the charge because of lack of evidence regarding

[1] We note that defendant did not object to the specific language of the judge's charge, but only to its applicability.

the DRC's decisionmaking process. As we have previously noted, witnesses other than Fasehun were available who could have addressed that issue. They did not testify.

V.

We find no merit in defendant's arguments that the damages awarded to plaintiff for emotional distress were excessive and that the award of counsel fees was in error. These contentions to not warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION