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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3207-10T2

JO MICELI,

Plaintiff-Appellant,

v.

LAKELAND AUTOMOTIVE
CORPORATION,

Defendant-Respondent.

Submitted October 3, 2011 - Decided October 19, 2011

Before Judges Sabatino and Fasciale.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Docket No. L-1869-09.

Jo Miceli, appellant pro se.

Montgomery, Chapin & Fetten, P.C., attorneys for respondent (Tina C. Ma, on the brief).

PER CURIAM

Plaintiff Jo Miceli appeals from an order granting summary judgment to her employer, defendant Lakeland Automotive Corporation (Lakeland). She argued that Lakeland subjected her to a hostile work environment based on her gender. The trial court concluded that Miceli failed to establish a prima facie

case under the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. We affirm.

Lakeland employed Miceli as its only female car salesperson between August 2006 and June 2007. The thrust of her lawsuit is directed towards the conduct of two other Lakeland employees over the span of a couple of months. She contended that on three occasions a male co-worker abused, belittled, and harassed her, and that her male sales manager permitted the hostile work environment to continue and generally treated her abusively by speaking to her in an angry, belittling, and condescending manner.

On March 2, 2007, Miceli and her co-worker argued because Miceli assisted two customers in a row against company policy. The co-worker yelled at her that she was "going to get hers" and that her "day is coming." Miceli emailed both her sales manager and the chief operating officer, and notified them about the incident.[1] The manager immediately warned the co-worker that "[a]ny further or similar issues or threats (verbal as well as physical) will result in immediate termination."

On March 14, 2007, Miceli learned that on her day off, the co-worker serviced one of Miceli's existing customers. Miceli

[1] She also filed a police report and alleged that she was threatened by the co-worker, but she informed the police that she did not wish to pursue the matter.

reported the incident and the sales manager responded by returning the customer to her.

On May 18, 2007, the co-worker removed car keys from Miceli's desk without her permission. She viewed the keys on his desk, questioned him about the incident, and asked him "why are you acting like an animal?" She testified during deposition that the co-worker replied, "Kiss my ass. . . . I'll act like an animal and show you how animals act, so you better be very afraid." Miceli reported the matter to her sales manager, and he again warned the co-worker that any further incidents or threats would result in termination. There were no further incidents between Miceli and the co-worker.

On June 30, 2007, Miceli voluntarily stopped reporting to work for Lakeland. Two weeks later she notified Lakeland that she could no longer sell cars due to injuries she sustained in a February 2007 accident. She never returned to work.

In June 2009, Miceli filed a hostile work environment complaint against Lakeland. After answering the complaint, Lakeland filed a motion for summary judgment. During oral argument, Miceli provided to the judge the best example of how the sales manager acted abusively towards her. The following exchange occurred:

The Court: And what would he say?

> Miceli: He would be very abusive.
>
> The Court: Like what, what would he say, you're a lousy sales person or what?
>
> Miceli: No, he never said anything like that, but if I had done something wrong, he didn't take me into his office and -- and speak to me about it. He would just openly just blow off steam right in front of everyone else.
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> The Court: Like what? I mean he didn't literally blow off steam, he made statements. What would he say?
>
> Miceli: He made statements that, you know you're not supposed to do these things, we can get fined $500 for this. He said, you know, this is not the way to do it. Instead, just take me into the office and tell me what I did wrong.

The judge asked her if the sales manager treated the other salespeople this way and she said "[m]ight have but I don't know." Although the judge was inclined to grant the first motion, he denied it, stating that "it would seem to me that the conduct . . ., while it is impolite, while it is boorish, while it is probably reflective of a lack of human kindness, does not seem to be predicated upon . . . sexist conduct." In his statement of reasons for denying the summary judgment, the judge stated that "[f]urther discovery needs to be done to determine if the complained-of conduct occurred because of [Miceli's] gender."

After the discovery end date, Lakeland renewed its summary judgment motion and the judge dismissed the case. He stated that Miceli did not present any additional proofs "that the conflicts and altercations between herself and both the sales manager and the co-worker were motivated by her gender," other than her "blanket assertions."

On appeal, Miceli makes the following points in her pro se brief:

> POINT I
> THE EMPLOYER HAD THE DUTY TO BE PROACTIVE AND/OR TAKE THE PROPER ACTION TO ELIMINATE A PATTERN OF CONDUCT CONSTITUTING A HOSTILE WORK ENVIRONMENT N.J.L.A.D. THE EMPLOYER FAILED TO TAKE REMEDIAL ACTION AND MUST BE HELD RESPONSIBLE.
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> POINT II
> THE COMPLAINED OF CONDUCT ACTUALLY OCCURRED. THE COMPLAINED OF CONDUCT CONSTITUTES SEXUAL HARASSMENT. THE COMPLAINED OF CONDUCT DID OCCUR BECAUSE OF PLAINTIFF'S SEX.
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> POINT III
> THE CONDUCT WAS SUFFICIENTLY SEVERE OR PERVASIVE ENOUGH TO MAKE A "REASONABLE WOMAN" BELIEVE THAT THE WORKING CONDITIONS WERE ALTERED AND THAT THE WORKING ENVIRONMENT WAS INTIMIDATING, HOSTILE OR ABUSIVE.
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> POINT IV
> THE TRIAL COURT ACCEPTED AND DID ALLOW INADMISSIBLE EVIDENCE TO ENTER OR STAY IN VIOLATION OF [RULE] 4:24-1(C).

We have considered all of Miceli's arguments and find them to be unpersuasive.

When reviewing a grant of summary judgment, we employ the same legal standards used by the motion judge. Spring Creek Holding Co. v. Shinnihon U.S.A. Co., 399 N.J. Super. 158, 180 (App. Div.), certif. denied, 196 N.J. 85 (2008); Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). First, we determine whether the moving party has demonstrated that there were no genuine disputes as to material facts, and then we decide whether the motion judge's application of the law was correct. Atl. Mut. Ins. Co. v. Hillside Bottling Co., 387 N.J. Super. 224, 230-31 (App. Div.), certif. denied, 189 N.J. 104 (2006). In so doing, we view the evidence in the light most favorable to the non-moving party and analyze whether the moving party was entitled to judgment as a matter of law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523, 529 (1995). We accord no deference to the motion judge's conclusions on issues of law, Manalapan Realty, L.P., v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995), which we review de novo. Spring Creek, supra, 399 N.J. Super. at 180; Dep't of Envtl. Prot. v. Kafil, 395 N.J. Super. 597, 601 (App. Div. 2007).

To establish a prima facie case of gender-based hostile work environment under the LAD, a female plaintiff must demonstrate that "the complained-of conduct (1) would not have

occurred but for the employee's gender; and it was (2) severe or pervasive enough to make a (3) reasonable woman believe that (4) the conditions of employment are altered and the working environment is hostile or abusive." Cutler v. Dorn, 196 N.J. 419, 430 (2008) (quoting Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 603-04 (1993)) (emphasis omitted). We view the evidence most favorably to plaintiff, as required on a motion for summary judgment. Brill, supra, 142 N.J. at 540.

We agree with the motion judge that there are no genuine issues of material fact that the complained-of conduct would not have occurred but for her gender. Miceli is "required to show by a preponderance of the evidence, i.e., that it is more likely than not, that the harassing conduct would not have occurred but for her sex." Woods-Pirozzi v. Nabisco Foods, 290 N.J. Super. 252, 266 (App. Div. 1996). "Common sense dictates that there is no LAD violation if the same conduct would have occurred regardless of [Miceli's] sex." Lehmann, supra, 132 N.J. at 604.

The sales manager's abrasiveness was not limited to Miceli. In Miceli's deposition testimony she stated that "[e]veryone complained about [the sales manager]." Miceli admitted that the sales manager treated another male co-worker "extremely abusive[ly]" and "very condescending[ly]." She explained that the sales manager "had anger issues and he had rage." She

defined rage as "[w]hen someone goes ballistic [and] can't [act with] control." By anger, she stated that she meant "[j]ust an angry person all together." She stated that yet another male co-worker complained that the sales manager treated him "in a belittling fashion," and that the co-worker also complained about the sales manager.

Similarly, there is no evidence to suggest that the co-worker's conduct, although rude and obnoxious, was motivated by gender. "Personality conflicts, albeit severe, do not equate to hostile work environment claims simply because the conflict is between a male and female employee." Herman v. Coastal Corp., 348 N.J. Super. 1, 20-21 (App. Div. 2002) (citation omitted).

Nor is there any genuine issue of material fact that the complained-of conduct was so "severe or pervasive" as to constitute a hostile work environment. The inquiry is whether a reasonable person of Miceli's gender would consider the workplace acts to be sufficiently severe or pervasive to alter the conditions of employment and create a hostile work environment. The incidents of harassment are analyzed under the totality of the circumstances, in that courts do not consider each separate event, but rather the "'cumulative effect of [the] individual acts.'" Cutler, supra, 196 N.J. at 431 (quoting Green v. Jersey City Bd. of Educ., 177 N.J. 434, 447 (2003));

Lehmann, supra, 132 N.J. at 607. We focus on the harassing conduct itself, not Miceli's subjective reaction or the subjective intent of the sales manager or co-worker. Cutler, supra, 196 N.J. at 431; Lehmann, supra, 132 N.J. at 606.

In Woods-Pirozzi, supra, 290 N.J. Super. at 269-70, the victim's co-workers and supervisors sexually harassed her over the course of three and a half years. The comments of her co-workers and supervisors referenced and related to the victim's sex. Id. at 270. The frequency of the comments varied, occurring sometimes as often as twice a week or twice a month. Ibid. We reversed summary judgment for the employer and concluded that a reasonable juror could certainly find the behavior pervasive. Id. at 270-71.

In contrast, the three specific instances involving the co-worker occurred over a two-month period. The sales manager addressed each incident, returned Miceli's customer to her, and warned the co-worker that he would be terminated if problems continued. The co-worker returned the keys to Miceli and there were no further incidents involving him. Although the sales manager acted rudely to everyone, and the co-worker remarked "kiss my ass" and "I'll act like an animal," under the totality of the circumstances and applying the reasonableness standard, we conclude that this conduct was not so sufficiently severe or

pervasive that a reasonable woman would consider the workplace conditions were altered to create a hostile work environment.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION