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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3212-10T4

LORENZO SHOCKLEY,
WAYNE EVANS and
ARMOND HARRIS,

Plaintiffs-Appellants,

v.

THE COLLEGE OF NEW JERSEY, RAYMOND
SCULLY, MATTHEW MASTROSIMONE, and
KEVIN MCCULLOUGH,

Defendants-Respondents.

Argued: December 7, 2011 - Decided: March 27, 2012

Before Judges Axelrad and Ostrer.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-1596-08.

Mark Pfeffer argued the cause for appellants (Goldenberg, Mackler, Sayegh, Mintz, Pfeffer, Bonchi & Gill, attorneys; Mr. Pfeffer, on the brief).

Noreen P. Kemether, Deputy Attorney General, argued the cause for respondent The College of New Jersey (Paula T. Dow, Attorney General, attorney; Lewis A. Scheindlin, Assistant Attorney General, of counsel; Ms. Kemether, on the brief).

Joseph A. Carmen argued the cause for respondents Raymond Scully, Matthew Mastrosimone and Kevin McCullough.

PER CURIAM

Plaintiffs, a police officer and two security officers employed by The College of New Jersey (TCNJ or the College), appeal from the trial court's order granting summary judgment and dismissing with prejudice their complaint against three supervisors and the College alleging a hostile work environment due to racial discrimination and retaliation under the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -42, and seeking punitive damages. Plaintiffs argue they established a prima facie case as to both causes of action and presented sufficient evidence that TCNJ was not shielded from liability based on its anti-discrimination policy, and also presented sufficient evidence to support a claim for punitive damages, in all instances to withstand summary judgment. We disagree and affirm.

I.

On June 26, 2008, plaintiffs Lorenzo Shockley, Wayne Evans, and Armond Harris filed suit against TCNJ and their supervisors Raymond Scully, Matthew Mastrosimone, and Kevin McCullough[1] in the Law Division asserting LAD violations of a hostile work environment based on racial discrimination and retaliation. In

[1] The individuals are primarily referred to as defendants or by their names, and occasionally are referred to as the "individual defendants," depending on the context.

August 2010, TCNJ filed a motion for summary judgment seeking to dismiss plaintiffs' complaint, joined in by the individual defendants. Plaintiffs submitted opposition and filed a cross-motion seeking partial summary judgment against TCNJ. Following oral argument on October 1, 2010, the parties were given an opportunity to provide written submissions to the court. Judge Darlene J. Pereksta rendered an oral decision on February 1, 2011, granting summary judgment to all defendants, dismissing plaintiffs' complaint with prejudice, and denying plaintiffs' cross-motion, memorialized in an order of the same date. This appeal ensued.

On appeal, plaintiffs argue:

> POINT I
> PLAINTIFFS HAVE ADDUCED SUFFICIENT PROOFS TO ESTABLISH A PRIMA FACIE CASE OF RACIAL DISCRIMINATION UNDER THE NEW JERSEY LAW AGAINST DISCRIMINATION.
>
> POINT II
> THERE ARE SUFFICIENT PROOFS TO DEMONSTRATE THAT TCNJ'S ANTI-DISCRIMINATION POLICY WAS NOT EFFECTIVE, NOT WELL PUBLICIZED, AND NOT FOLLOWED.
>
> POINT III
> THERE IS SUFFICIENT EVIDENCE OF RETALIATORY CONDUCT UNDER NJLAD.
>
> POINT IV
> THERE IS SUFFICIENT EVIDENCE OF WILLFUL INDIFFERENCE BY UPPER MANAGEMENT TO SUPPORT A CLAIM FOR PUNITIVE DAMAGES.

Based on our review of the record and applicable law, we are not persuaded by plaintiffs' arguments and affirm.

II.

The facts presented in the record viewed in the light most favorable to plaintiffs, the non-moving party, Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995), are as follows. Shockley, Evans and Harris are all employed by TCNJ. Both Shockley and Harris are African-American and Evans is Jamaican. Shockley began working as a police officer in 2006, and Evans and Harris began working as security officers in approximately 1997 and 2001, respectively. Plaintiffs have not been the only African-Americans working as security or police officers at the College throughout their employment, although they were in 2006.

The individual defendants are all Caucasian and employed by TCNJ. Scully has been employed since 2001, and was promoted from police officer to sergeant in 2006. McCullough has been employed since 2002, and was promoted from police officer to sergeant in 2009. Mastrosimone has been working as a police officer for TCNJ since 2003. The individual defendants were plaintiffs' supervisors at times, though the record is not clear as to the length and extent of these relationships.

Extensive depositions were taken in 2010. The individual parties were deposed, as well as the following TCNJ employees:

Associate Vice President of Human Resources (HR), Vivian Fernandez; Associate Director of HR, Donald Gordon; Vice President of Facilities Management, Construction and Campus Safety, Curt Heuring; Security Officer Anthony James Fresco; Security Officer James Nazario; Sergeant Marcie Montalvo; and Police Officer James Lopez.[2]

Plaintiffs alleged the following, when viewed in the totality, constituted a prima facie case of a hostile work environment under the LAD: (1) day-to-day conduct of being given the "cold shoulder"; (2) "keyed" radio communications; (3) false accusations of sleeping on the job; (4) unnecessary reprimands; (5) harder tasks and denial of back-up; and (5) racial slurs. The following is the primary testimony and evidence that plaintiffs presented in each category.

The "Cold Shoulder"

Shockley stated in depositions that "[a]lmost from the beginning" of his employment, Scully gave him the cold shoulder and would not say "good morning" to him, and one morning he asked everyone in the room except him if they wanted take-out coffee. On another occasion in 2006 when he was a new officer,

[2] These are the only depositions reflected in our record. It is unknown whether other depositions were taken in the litigation. No affidavits or certifications are contained in our record so we assume none were presented with the summary judgment motion.

when Scully was covering for Shockley's regular supervisor, and Shockley was talking to himself under his breath about something Scully had instructed him to do, he told Shockley "very loudly" that he should do things Scully's way when he was in charge. Shockley also claimed Mastrosimone treated him in a rude or disrespectful manner by rolling his eyes and ignoring him when Shockley entered the room and greeted him. Harris explained he felt he was "invisible," describing how he would walk into a room, say hello, and rarely receive a response. Evans testified that, overall, he felt he and Harris were being treated "different" by defendants who, for example, would tell them to leave for a call "in a very rude way" or if he or Harris "call[ed] about something, they would not respond or respond when they [felt] like it." Officer Lopez noted in depositions his observations of defendants ignoring Shockley while speaking to an officer next to him. He also observed defendants publicly critiquing Shockley's police reports by making fun of misspelled words.

"Keyed" Radio Calls

None of the plaintiffs testified about keyed radio transmissions; they relied on the deposition testimony of Police Officer Lopez and Security Officer Nazario. The officers explained the term "keying" described an interference that would

occur whenever an officer activated his or her microphone while another officer was speaking over the radio, causing static and disrupting the radio transmission so it was garbled and inaudible. There was no allegation this ever happened to Shockley and no testimony regarding the dates or frequency of these incidents. Officers Lopez and Nazario stated it happened to them, but it seemed to happen to Harris and Evans more often than to others.

No witness claimed to have observed anyone deliberately keying radio transmissions. Officer Lopez stated, however, that the problem started happening to him the first "[f]ew weeks after [he] started as a security officer" when the individual defendants and Officer Mike Lacocious were working on the same shift. Officer Nazario suggested that the individual defendants and Sergeant Santiago were more likely to be working when Evans and Harris were interrupted, and would "have the ability to key their mikes."

False Accusations of Sleeping on the Job

Shockley related in depositions an incident when McCullough reported him for sleeping in his patrol car while on duty, although he was never disciplined for the incident. Shockley denied the allegation but admitted there were times that he, like other officers, slept in his vehicle while on duty. Harris

and Evans were also written up on one occasion for sleeping on the job. Evans explained that while on patrol one night he and Harris went in to check an empty basement dormitory room. He believed Harris had an ankle sprain; he related that Harris had taken off his shoes, was sitting in a chair, and had stretched his feet out, rubbing his ankle. Evans had walked to the other side of the building. As Evans was returning, he observed McCullough entering with another person and showing him a telephone line. Evans greeted them, but they ignored him and left the building. McCullough apparently reported that the two men were laying across chairs, sleeping in the dark while on duty. Harris expressed concern that he was not given the chance to explain his side of the story to his supervisor before the incident was reported. Evans and Harris internally grieved the charges and no discipline was imposed.

Unnecessary Reprimands

Shockley discussed an occasion in which he and former Sgt. Steven Flemmings (a Caucasian officer) were running on the treadmill at the gym after hours when Mastrosimone and McCullough told them they were not supposed to be there. He understood that other officers used the gym although he had no personal knowledge of that fact, and he believed there was a recent policy stating that officers were allowed to do so

provided they showed identification. A blotter entry was then written about the incident. Shockley said he felt "targeted," though he acknowledged the officer was "doing his duty" by recording the incident.

Shockley related that on one occasion Lt. Lopez (not the same person as Officer Lopez) questioned him about harassing two female students based on a report that it had been a "black officer." Shockley denied the allegations, stating to his supervisor that the term might have referred to Sgt. Santiago who was Hispanic. Nothing further was presented in the record regarding this incident. Shockley was only disciplined once while at TCNJ, resulting from his acknowledged failure to secure his off-duty weapon and leaving it on the hood of a patrol car while he took a personal phone call.

Shockley explained he was told by several people, including Officers John Turner, Lopez, and Nazario, to "watch [his] back." He claimed Officer Turner specifically told him, "I don't know why [defendants] don't like you . . . I'm going to let you know, just watch your back, watch your duties, these guys are out to get you fired."

Evans described an incident on an unknown date where he called Mastrosimone as back-up when he observed apparently underage students transferring closed containers of beer from a

car to a duffel bag. Mastrosimone came to the scene, questioned the students, concluded they were "of age," and let them go. Evans claimed Mastrosimone then reprimanded him for calling him and left the scene. Evans explained he felt he was discriminated against because he was "pretty sure" other officers had called Mastrosimone for alcohol incidents, and he was "pretty sure they [weren't] treated the way [he] was treated." However, when Evans was specifically asked by defense counsel how that incident related to race discrimination and whether he knew "for a fact that there were other calls with young people with alcohol that he treated security officers differently," Evans conceded, "not that I recall."

Harris complained of an instance where Mastrosimone reported that he neglected his duties by failing to escort a student home in the rain. Harris explained he requested dispatch send a vehicle patrolman to escort the student or have the student remain indoors until the severe lightning storm passed as Harris was on foot patrol. Although dispatch agreed, Harris later discovered he had been written up for neglect of duty for failing to respond to provide the escort. Harris was not disciplined for this incident "other than the permanent stain . . . on the police blotter."

Harder Tasks and Denial of Back-up

Shockley testified he was given harder tasks than other officers. He claimed on one occasion he was denied back-up when he responded to a radio call from Scully involving a possible assault. However, he acknowledged the fight that was planned never occurred because the employer let the potential victim leave early. Moreover, Evans also responded to the call. Shockley also made the general statement that Scully gave him foot patrol more often than other officers.

Racial Slurs

Plaintiffs never heard any defendant utter racial epithets or refer to any of them by derogatory nicknames. Their allegations about the use of racially charged nicknames and slurs arose out of defendants' communications with other employees.

Defendants and some of their friends were called by the nickname "the A-Team." Shockley related that "[s]everal years ago" Sgt. Flemmings told him that members of the "A-Team" referred to Flemmings and Shockley as "Crockett and Tubbs" after characters on the Miami Vice television show. According to Sgt. Flemmings, the nickname was "making light" of the fact that he and Shockley "worked well together." Sgt. Flemmings also told Shockley that the "A-Team" had described him and his prior

African-American partner, Officer Richard Cook, as "salt and pepper," and they "look[ed]" at him and Shockley "the same way." Shockley viewed these terms as derogatory because he was "black" and Sgt. Flemmings was "white."

Shockley further stated that "several years ago" Sgt. Flemmings told him Officer Lacocious once used the "N word" in referring to him. Shockley was upset, but decided to "let it roll off [his] shoulders." He also related that in 2007 a former dispatcher, Christine Labina, a Caucasian, informed him that "those guys" made derogatory remarks about him and his daughter who was in the hospital, but she "put them in their place." Shockley stated that she provided no specifics about the statements. No one else told Shockley he was referred to in a derogatory manner by anyone at TCNJ.

Evans and Harris stated that Officer Lopez told them the individual defendants had referred to them as "chocolate chip[s]" and "shadow[s]." Lopez relayed to Evans that, while he was training, Scully asked him, "have you seen the two shadows tonight[?]" Evans took the word "shadow" to be a substitute for the "N word." Evans also stated that two years prior, Sgt. Montalvo told him and Harris that defendants were calling them "names" but he did not know "if she heard it directly from them or someone [told] her."

Scully had heard the term "chocolate chips" before Shockley started, but not in reference to plaintiffs. He explained,

> we had two security officers that walked around and they actually referred to themselves as Ponch and John. I believe that was Nazario and Lawrence, and then they used to call themselves chips. And then somewhere along the line you just starting hearing [Evans] and [Harris] referred to as that.

While Mastrosimone indicated in his deposition he had heard the term "chips," he had never heard the terms "chocolate chips" or "shadows" until plaintiffs filed their formal complaint.

Officer Lopez was the only officer who testified at his deposition as having heard Scully use the term "shadows" when talking to McCullough. He "[thought] they were describing Officers Harris and Evans . . . [b]ecause there was an on-going behavior where these, this core group of officers were trying to catch these two officers doing something wrong[]" and there was an accusation made about them sleeping on duty. He was a passenger in Scully's patrol car when Scully turned up the radio and exited the vehicle to speak with the other two defendants. Officer Lopez related that he opened his window and heard Scully state "something to the effect of have you seen the shadows." He assumed Scully meant Harris and Evans because they had just arrived on shift. Officer Lopez heard someone say, "no, we

haven't seen them yet," and he related that "they chuckled about it."

There was considerable deposition testimony regarding plaintiffs' internal complaints and TCNJ's ensuing remedial action. Shockley decided to "put pen to paper" in early to mid-2007 following his conversation with the dispatcher, and Lt. Lopez who told him to file a complaint with HR. He apparently spoke with Associate Director Gordon in March or April; no details were provided other than that Gordon might have "had to go to a meeting or something" and they "were supposed to get back to each other."

Shockley stated that around the same time he spoke with Fernandez, HR's Associate Vice President, who said she would start an investigation. He related that he told Fernandez about the racial slurs he heard from Sgt. Flemmings, and how he felt disrespected. According to Shockley, no one ever asked him whether he wanted to file a formal complaint during the spring of 2007.

Fernandez stated in depositions that Shockley first came to see her in the summer of 2007. She explained that most of the conversation centered around his personal problems at home and his daughter's medical condition. Shockley then mentioned that he did not like the way he was being treated, noting that

"Scully would go out for coffee or something and not invite him." According to Fernandez, he left her office stating he would write up additional concerns and send them to her, which he never did.

Shockley then recalled speaking with Heuring, the Vice President of Campus Safety, in the summer, possibly in July 2007, because he wanted to request a transfer. Shockley explained he was feeling uncomfortable and did not like the treatment he was getting. He told Heuring he had not heard back from Fernandez. Shortly thereafter, he noticed his co-workers were being called to Fernandez's office and several told him they were being interviewed. Shockley was interviewed by Fernandez in November 2007.

Evans stated that at some unknown time he told Kathy Leveton, who was in charge of the police department before Heuring, about the discriminatory comment by Officer Lacocious, and she promised him it would never happen again. He related that he and Harris complained to Lt. Rizzo and Lt. Lopez that defendants were "bothering" them and treating them "different," but he did not mention the rumors of racial slurs. However, Evans did note that during a meeting with Gordon to contest the report that he was sleeping on the job, he first expressed the belief that the report was racially motivated. Gordon promised

to investigate and subsequently wrote him a letter stating the claim of discrimination was unfounded.

Harris claimed that "during the previous matter"[3] he told Gordon he believed he and Evans were being treated unfairly by defendants because they were black, and Gordon responded, "if what you are saying is true, that these guys could lose their jobs, do you really think I'm going to let these three guys lose their jobs and all you are looking at is a three-day suspension?" Harris also reported Officer Lopez's comments about defendants' racial slurs to Sgt. Montalvo, the Administrative Sergeant at the time, who referred the matter to Heuring who set up a meeting with Harris and Evans. Harris believed that Officer Nazario and Sgt. Montalvo were also present. Harris explained that they expressed their concern about the "chocolate chip and shadow" comments they had heard about and the treatment that they had been receiving, and Heuring advised he would have Gordon investigate their allegations.

Gordon's deposition testimony and documentary evidence placed in the record at that time established he did not receive

[3] It is difficult to tell exactly when Harris is referring to, but based on the three-day suspension he is most likely referencing his hearing regarding the sleeping-on-the-job incident.

notice of the sleeping-on-the-job report about Evans and Harris until April 3, 2007, and Gordon met with them to hear their appeal of the proposed discipline on June 14, 2007. He did not recall the sleeping incident hearing, nor of Harris or Evans raising allegations of racial discrimination. However, on June 27, 2007, Gordon wrote to Harris and Evans stating he had investigated their complaint that "[they did] not have a good relationship with Officer McCullough and that both he and [Sgt.] Scully were disrespectful of [them]," and found insufficient evidence to establish a hostile work environment. However, he encouraged them to come forward if they had any further information to support that claim.

Fernandez described how she became involved in the discrimination investigation. She received a complaint on Evans' and Harris' behalf from Sgt. Montalvo, via Heuring, around October 2007. When Heuring mentioned defendants' names, she recalled her previous conversation with Shockley about general concerns, and requested he meet with her to tell her about specific incidents. Presumably around this time plaintiffs filed formal complaints, although the parties' briefs contain no specific reference to this fact and the complaints are not contained in our record.

Fernandez's December 2007 report references a complaint by Evans and Harris, and a separate complaint by Shockley. Her summary of the Evans-Harris complaint lists their allegation that defendants "engaged in discriminatory behaviors in violation of the State Policy Prohibiting Discrimination in the Workplace." Evans and Harris specifically alleged they were called nicknames, were treated differently, felt intimidated, felt they were being plotted against for filing a complaint against Officer Lacocious based on rumors they heard, were not involved or integrated at work and were spoken to in a disrespectful and intimidating manner. The report reflected that Shockley's complaint raised similar allegations, alleging he was sent out on calls without appropriate back-up, was addressed in a manner that was disrespectful and was yelled at publicly, was falsely accused of sleeping on the job, felt he was being mistreated, and was told to "watch his back."

Fernandez interviewed multiple complainants, respondents, and witnesses, including every full-time member of the TCNJ Police Department, and concluded her investigation within sixty days. She noted that Officer Lopez was the primary source of information as he served as both a police and a security officer, and she credited his testimony. Fernandez explained that, as a temporary step "immediately upon commencing the

investigation[,]" the work shifts were changed to assure that defendants did not work with plaintiffs "without having another person responsible."

As Fernandez explained in her deposition, she could not corroborate certain claims made by plaintiffs. For example, the tape recording of the call purportedly ordering Shockley to report to the scene of the fight without back-up did not corroborate his account of being sent to a dangerous call but, rather, "sounded very much like a routine go and see what is happening call" and there was no corroboration of the claim that Harris was "written up" by Mastrosimone for failing to escort a student during a storm. She also stated that her report noted Sgt. Montalvo's and Officer Nazario's statements about hearing the term "chocolate chips" and she found the use of the term discriminatory, but she concluded, "[t]he problem was that [she] couldn’t connect those terms specifically to [defendants]."

Nevertheless, Fernandez discredited defendants' testimony, because of the "inconsistencies and contradictions in [their] testimony, and the fact that there was third party corroboration of many of the allegations of discriminatory treatment of

[plaintiffs] and Sgt. Montalvo[4] and retaliatory treatment for the early 2007 complaint against another Police Officer[.]" She concluded that "[e]ven if some of their conduct was intended [to be] humorous," defendants had engaged in conduct which "represent[s] violations of the State's Policy Prohibiting Discrimination in the Workplace constituting discrimination based upon race, and ethic origin." The report recommended letters of reprimand for all three defendants, with two-day suspensions for Mastrosimone and McCullough and a six-day suspension for Scully. Disciplinary actions were taken against defendants as recommended by the Fernandez report and the suspensions were upheld by TCNJ on appeal. Fernandez also recommended Discrimination and Sexual Harassment training for the entire Police Department, and supervisory training for all supervisors required to implement the anti-discrimination policy.

Each of the plaintiffs acknowledged, following the conclusion of the investigation, that the specific instances of discriminatory conduct stopped; however, they still felt they were being "ignored." Evans elaborated that since they filed their internal complaints, McCullough would say "hi" but Scully

[4] Sgt. Montalvo filed a complaint regarding gender discrimination, which was also found in the investigation, but she is not a party to this suit.

and Mastrosimone would speak with him only if someone else was around. Fernandez testified in her deposition that she was not made aware of any retaliation following the investigation and, to the contrary, plaintiffs told her that "things had gotten better[,]" namely, they "were as they always should have been" after letters were issued to defendants regarding her investigation.

New Jersey has a policy prohibiting discrimination in the workplace which is applicable to all State employees and thereby effective at TCNJ. Under the policy, TCNJ is required to distribute the anti-discrimination policy to all new employees, as well as disseminate it to all other employees annually. Although the policy is contained in our record (the State Policy), there is little to no reference to it in the depositions or arguments presented on appeal.

Shortly after conclusion of the investigation, plaintiffs filed this lawsuit, alleging a race-based claim of a hostile work environment and retaliation for their complaints in violation of the LAD. Judge Pereksta entered summary judgment in favor of defendants, finding plaintiffs failed to make a prima facie showing of discrimination. She discussed the specific instances complained of by plaintiffs and noted the hearsay nature and defendants' denial of the racial slurs,

concluding that, based on an objective standard, plaintiffs failed to meet their burden of proof to show "severe or pervasive" racially harassing conduct rather than "incivility alone" in the workplace. With regards to TCNJ's liability, the judge found that even if plaintiffs could make a prima facie case, "the prompt and remedial action taken by the College after the plaintiffs lodged their complaints serves as a defense to any potential liability." She further found plaintiffs never pled their retaliation claim with any specificity, noting the shift change was not a remedial measure, but was only done during the investigation.

III.

A.

We first note our standard of review. Summary judgment should be granted when "the pleadings, depositions, answers to interrogatories and admissions on file, together with 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." R. 4:46-2(c). To determine whether a genuine issue of fact exists on the record, a judge must decide "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. However, "[b]are conclusions in the pleadings, without factual support in tendered affidavits, will not defeat a meritorious application for summary judgment." U.S. Pipe & Foundry Co. v. Am. Arbitration Ass'n, 67 N.J. Super. 384, 399-400 (App. Div. 1961). "[W]hen the evidence is so one-sided that one party must prevail as a matter of law, . . . the trial court should not hesitate to grant summary judgment." Brill, supra, 142 N.J. at 540 (internal quotation marks and citation omitted).

When reviewing a grant of summary judgment, we employ the same standards used by the motion judge under Rule 4:46. 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 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). We accord no deference to the motion judge's conclusions on issues of law, which we review de novo. Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 382-83 (2010); Manalapan Realty, L.P., v. Twp. Comm. of Manalapan, 140 N.J.

366, 378 (1995); Dep't of Envtl. Prot. v. Kafil, 395 N.J. Super. 597, 601 (App. Div. 2007).

B.

Based on our independent review of the record and applicable law, we are satisfied plaintiffs failed to establish a prima facie case of a hostile work environment. Accordingly, summary judgment dismissal of this count was appropriate.

The LAD prohibits discrimination, because of race, color, national origin, ancestry, age, sex, or nationality, among other things. N.J.S.A. 10:5-3. Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 603-04 (1993), describes the framework for determining whether or not harassment in the workplace constitutes discrimination in violation of the LAD. See also Taylor v. Metzger, 152 N.J. 490, 498 (1998). "When a black plaintiff alleges racial harassment under the LAD," he or she must demonstrate that "the defendant's 'conduct (1) would not have occurred but for the employee's [race]; and [the conduct] was (2) severe or pervasive enough to make a (3) reasonable [African-American] believe that (4) the conditions of employment are altered and the working environment is hostile or abusive.'" Ibid. (alterations in original) (quoting Lehmann, supra, 132 N.J. at 603-04).

"To establish a cause of action under the LAD based on a hostile work environment, plaintiffs must satisfy each part of [the] four-part test." Shepherd v. Hunterdon Dev'l Ctr., 174 N.J. 1, 24 (2002). Where there are multiple plaintiffs, the court must also assess each plaintiff's claim separately, based upon the evidence unique to that plaintiff. Shepherd v. Hunterdon Dev'l Ctr., 336 N.J. Super. 395, 419-22 (App. Div. 2001), aff'd in part, rev'd in part on other grounds, 174 N.J. 1 (2002).

Hostile work environment claims are different than discrete discrimination allegations in that they are based on the cumulative effect of several incidents. Green v. Jersey City Bd. of Ed., 177 N.J. 434, 447 (2003) (citing Shepherd, supra, 174 N.J. at 19-20). "Rather than considering each incident in isolation, courts must consider the cumulative effect of the various incidents, bearing in mind that each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created may exceed the sum of the individual episodes." Lehmann, supra, 132 N.J. at 607 (internal quotation marks and citations omitted).

In assessing a hostile work environment claim, the court must examine the totality of the plaintiff's employment environment, and should consider the frequency of the

discriminatory conduct, the severity of the conduct, whether it is physically threatening or humiliating, or merely an offensive statement, and whether it unreasonably interferes with the employee's work performance. El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 178 (App. Div. 2005) (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 23, 114 S. Ct. 367, 371, 126 L. Ed. 2d 295, 302-03 (1993)).

Under the first prong of the Lehmann test, plaintiffs must establish "by a preponderance of the evidence that the impermissible conduct would not have occurred but for [their] protected class." Shepherd, supra, 174 N.J. at 24; Lehmann, supra, 132 N.J. at 604. The "defining element" of a hostile work environment claim is whether the protected characteristic was the cause of the harassment. See Herman v. Coastal Corp., 348 N.J. Super. 1, 20 (App. Div.), certif. denied, 174 N.J. 363 (2002).

Plaintiffs must do more than point to "[p]ersonality conflicts, albeit severe" with a supervisor outside their protected class and "lump [together] random incidents and disagreements" to satisfy the second prong of severe and pervasive. Id. at 20, 23. To meet the third and fourth prongs, plaintiffs must demonstrate conduct that is objectively hostile, not merely subjectively offensive; "[w]hat is illegal is a

'hostile work environment' not an 'annoying work environment.'" Id. at 23 (internal citation omitted). See also Lehmann, supra, 132 N.J. at 613-14 (noting that courts have established an objective standard in order to exclude "idiosyncratic response[s] of a hypersensitive plaintiff").

Furthermore, as noted by the trial court, a hostile work environment claim cannot be based upon statements made outside of the presence of a plaintiff. See, e.g., Cutler v. Dorn, 196 N.J. 419, 433 (2008) (focusing the inquiry on whether demeaning and derogatory comments that are "said to, or pointedly in the presence of" the plaintiff satisfies as harassing conduct for a discrimination claim); Godfrey v. Princeton Theological Seminary, 196 N.J. 178, 201 (2008) ("[t]o satisfy the severe-or-pervasive element of a hostile work environment claim, a plaintiff must marshal evidence of bad conduct of which [he or] she has firsthand knowledge"); Fitzgerald v. Stanley Roberts, Inc., 186 N.J. 286, 319 (2006) (holding that gossip evidence is inadmissible to prove a hostile work environment claim).

On appeal, plaintiffs argue they have adduced sufficient evidence of conduct of which they have first-hand knowledge that "goes well beyond the bounds of mere civility" to withstand summary judgment. They reiterate the following specific instances or topics: the keyed radio communications, denial of

back-up for dangerous duties, false accusations of sleeping on the job, unnecessary public humiliation and reprimands, and day-to-day conduct of being giving the "cold shoulder" and the "invisible man" treatment. We disagree.

Plaintiffs' brief respecting this issue contains no analysis of the testimony and evidence presented. None of the plaintiffs testified about the keyed radio calls; they relied solely on the deposition testimony of Officers Lopez and Nazario. There was no allegation, nor evidence in the record, that Shockley's radio communications were ever garbled, and thus he is unable to state this claim. Contrary to plaintiffs' asserted "fact" in their brief, Evans and Harris produced no evidence that any problems they had with their radio transmissions were the result of intentional acts by defendants. Rather, Officers Lopez and Nazario stated only that the problem occurred more often when the individual defendants, among others, were on duty. Moreover, although they expressed the general belief that it happened more frequently to Harris and Evans, Officers Lopez and Nazario, who are not African-American, acknowledged they had also be been subjected to frequent interruptions.

Again, though framed in terms of all plaintiffs, the only one who alleged any facts in support of a denial of back-up

claim was Shockley. Contrary to plaintiffs' assertion, when assessing this claim, the judge did not improperly weigh the evidence; she applied the Brill standard of affording plaintiffs all favorable inferences. The court was required to evaluate whether the facts offered by plaintiffs in support of this claim were "immaterial or of an insubstantial nature, a mere scintilla, 'fanciful, frivolous, gauzy or mere suspicious.'" Brill, supra, 142 N.J. at 529 (internal citation omitted). The judge had ample basis to conclude the facts as alleged by Shockley were insubstantial, as he only cited one instance, which appeared to be for a potential fight, and his claim of disparate treatment was mere suspicion, as Evans arrived on the scene shortly thereafter, apparently in response to the same radio transmission. Moreover, no evidence was offered, even in Shockley's own testimony, to suggest that a Caucasian officer was ever treated differently in similar circumstances.

Shockley admitted to sleeping in his patrol car at times while on duty; however, no disciplinary charges were ever filed. Evans and Harris were reported for sleeping on the job only once, by McCullough. Although they claim the report was false, and they apparently were successful in their departmental grievance, the testimony is inadequate to support the contention that McCullough knowingly lied in order to harass them because

of their race. The two plaintiffs admit McCullough found them in an empty campus dormitory basement while they were supposed to be on evening patrol. Moreover, Evans acknowledged that Harris was sitting on a chair with his shoes off and foot up when McCullough entered the room.

Shockley's claim that he was falsely accused of harassing female students is similarly baseless. Lt. Lopez informed Shockley that the department received a complaint that a black officer had harassed two female students. Shockley was not identified by name as the harassing officer and his denial was accepted immediately. Moreover, there was not even a suggestion that Shockley believed the report came from anyone other than the "young ladies."

Plaintiffs provide no factual basis for their claim that defendants' cold shoulder and invisible man treatment unreasonably interfered with their work performance, nor any legal basis for their claim that, in essence, a heightened standard of communication and trust is required for security personnel. We are satisfied the record amply supports Judge Pereksta's findings that the type of "discourteous[ness] and rudeness" alleged by plaintiffs, considered in the totality, although annoying and frustrating, is insufficient to establish a prima facie claim of severe or pervasive race-based harassment

creating a hostile work environment. See Heitzman v. Monmouth Cnty., 321 N.J. Super. 133, 147 (App. Div. 1999) ("Discourtesy or rudeness should not be confused with racial [or ethnic] harassment." (alteration in original) (internal quotation marks and citation omitted)).

As pointed out by the trial court, plaintiffs concede they never heard any racial slurs; this conduct was identified only through rumors. As recognized by the previously cited case law such as Godfrey, supra, 196 N.J. at 201-02, plaintiffs may not rely on "gossip evidence" to demonstrate a hostile work environment. Moreover, these hearsay allegations of comments not "made to, or in the presence of" plaintiffs, are irrelevant to performing an objective analysis of a hostile work environment claim. See Cutler, supra, 196 N.J. at 430-31; Lehmann, supra, 132 N.J. at 613.

C.

The court properly rejected plaintiffs' argument of judicial or collateral estoppel regarding Fernandez's internal investigation, finding the individual defendants violated TCNJ's anti-discrimination policy, and ensuing disciplinary proceedings. See Hennessey v. Winslow Twp., 183 N.J. 593, 604-05 (2005) (holding preclusion is not warranted where a court is making an independent review of an employer's investigation in a

LAD case). We further note that the State Policy does not directly reference the LAD and does not require that the LAD be violated before the hiring authority takes corrective action. Rather, it expressly includes a disclaimer permitting the hiring authority to "address any unacceptable conduct that violates this policy, regardless of whether the conduct satisfies the legal definition of discrimination or harassment."

Plaintiffs vary their argument slightly on appeal, explaining they do not rely on the findings of investigation, but on the evidence and statements of witnesses contained in Fernandez's report, which corroborates plaintiffs' complaint of racial discrimination. According to plaintiffs, "[t]hat document, and the evidence contained therein, is alone sufficient to warrant reversal of the trial court's decision." Plaintiffs provide no legal support for this assertion, although in oral argument they claimed the statements in the internal report were admissible as vicarious admissions under N.J.R.E. 803(b)(4), namely, "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship[.]"

We disagree. Defendants denied to Fernandez that they made any of the racial slurs, and denied plaintiffs' specific allegations of discriminatory conduct. Nor is the internal

report a public record, report, or finding within hearsay exception N.J.R.E. 803(c)(8). See Muench v. Twp. of Haddon, 255 N.J. Super. 288, 305-06 (App. Div. 1992) (holding that a report of findings by the New Jersey Division of Civil Rights did not qualify for that hearsay exception in a discrimination case brought under the LAD). Through the admission of the report, plaintiffs are seeking to supplement the record and bolster their case with inadmissible statements that were not made by any of the deponents in connection with this litigation or by individuals who were not deposed and who did not submit affidavits. For example, plaintiffs' statement of facts refers several times to observations by a "Sergeant Bell," who was not deposed and submitted no affidavit, with citations only to Fernandez's report.

The statements and conclusions in Fernandez's report are not admissible for the "truth of the matter." See N.J.R.E. 801(c). They may only be considered in the context of what TCNJ did in asserting a remedial defense. Accordingly, the internal report is not competent evidence, alone or in conjunction with the discovery, to defeat summary judgment on plaintiffs' LAD claims. See Lyons v. Twp. of Wayne, 185 N.J. 426, 436-37 (2005) (holding that a summary judgment motion may not be decided on the basis of hearsay documents); Wang v. Allstate Ins. Co., 125

N.J. 2, 15-16 (1991) (holding that "reiterated [] hearsay statements" do not constitute "evidence" sufficient to overcome summary judgment).

D.

The trial court was also factually and legally correct in its alternative finding that even if plaintiffs could demonstrate a prima facie case of a hostile work environment, TCNJ was shielded from liability under the standard established in Bouton v. BMW of North America, Inc., 29 F.3d 103, 110 (3rd Cir. 1994), based on its prompt and thorough investigation. See also Payton v. N.J. Tpk. Auth., 292 N.J. Super. 36, 46 (App. Div. 1996) (adopting the Bouton shield in New Jersey and holding that an "effective, properly enforced anti-harassment policy" can shield an employer from liability), aff'd on other grounds, 148 N.J. 524 (1997).

Employers can be held liable for the discriminatory actions of their employees. As explained in Lehmann,

> [w]hen an employer knows or should know of the harassment and fails to take effective measures to stop it, the employer has joined the harasser in making the working environment hostile. The employer, by failing to take action, sends the harassed employee the message that the harassment is acceptable and that the management supports the harasser. Effective remedial measures are those reasonably calculated to end the harassment. The reasonableness of an employer's remedy will depend on its ability

> to stop harassment by the person who engaged in harassment.
>
> [Supra, 132 N.J. at 623 (internal quotation marks and citations omitted).]

Contrary to plaintiffs' assertion, employers are not held strictly liable for such conduct; rather, they are held vicariously liable. Ibid.

The court in Lehmann addressed the issue of supervisory harassment, noting it is a fact-sensitive inquiry. Id. at 624. Finding employer liability depends upon a variety of considerations, including whether or not the employee acted within the scope of his or her employment, if the employer contributed to the harm through negligence or authorization of the harassing conduct, whether the employer has actual or constructive notice of the conduct, or if the employer negligently or recklessly failed to have a policy banning such behavior with a mechanism in place for prompt remedial measures. Ibid.

We disagree that plaintiffs raised a material issue of fact as to whether TCNJ had an effective, properly enforced anti-harassment policy. It is undisputed TCNJ had an anti-discrimination State Policy in place, which was provided to each employee at the commencement of employment. Plaintiffs set forth in their factual findings that the policy was not

distributed annually, there was no initial training for employees, and there was no required refresher training, but their argument on this point focuses on a challenge to the promptness and effectiveness of the investigation.

In order to measure an employer's response to a complaint, the following should be considered: the extent of the investigation, the timing of the investigation relative to the employee's complaint, the information gathered from the investigation, the employer's evaluation of the information, and the action taken. Payton, supra, 292 N.J. Super. at 46. Plaintiffs have failed to present competent evidence that TCNJ repeatedly ignored their complaints about racial discrimination by defendants. In some instances, plaintiffs kept silent, and at other times they couched their complaints in ambiguous terms that did not convey to TCNJ personnel a racial discrimination element. Moreover, contrary to plaintiffs' assertions, the deposition testimony reveals that TCNJ promptly and thoroughly responded to plaintiffs' complaints of discrimination upon learning the complaints were race-based.

Shockley testified he made a deliberate decision not to complain in 2006 when he heard a rumor that Officer Lacocious had used the "N word" to refer to him. There is no record of his complaining about the alleged insufficient back-up incident,

nor did Shockley testify he made any claim of race discrimination when Lt. Lopez discussed with him the reports that a "black officer" was harassing students and that he was sleeping on the job. Shockley admittedly did not decide to put "pen to paper" until around March 2007, in response to the rumor regarding comments made about him and his daughter's illness, when he spoke with Lt. Lopez, who referred him to HR. Shockley may have spoken with Gordon, though briefly, but provided no specifics beyond noting they were supposed to get back to each other.

Shockley then met with Fernandez, though they have different recollections of the date — Shockley recalls it occurred around March and Fernandez testified it happened in the summer. Fernandez recalled their conversation centering around personal issues, and he merely mentioned an instance when Scully did not ask him if he wanted coffee, thus she was not aware his concerns were race-based. When he told her he would get back to her with more specific details, he never followed up. However, Shockley apparently had the impression Fernandez would initiate an investigation after their first meeting. At worst, there was mutual confusion during this initial meeting, and when additional information came to light a few months later and Fernandez was directed to pursue an investigation by Heuring,

she reached out to Shockley and vigorously investigated his claims.

Evans and Harris claimed they first raised the race discrimination issue with Gordon during their hearing for the sleeping allegation. The record reveals that a letter recommending discipline was not issued until April 3, 2007, and the meeting with Gordon did not occur until June 14, 2007. This belies plaintiffs' allegations that they repeatedly complained about race discrimination to TCNJ's HR personnel between March and June 2007, and HR failed to appropriately respond. Harris' vague statement that Gordon seemed dismissive of his suggestion that defendants' unfair treatment of him and Evans was race-based and appeared to discourage him from pursuing a claim is also undermined by the facts. Testimony from both Evans and Gordon confirms that Gordon responded to Evans and Harris by letter about ten days later, advising there was insufficient evidence to substantiate their claim at that time and encouraging them to "move forward" with any further information indicating a "hostile work environment."

It is undisputed that promptly upon Harris reporting the rumors of the racial slurs to Sgt. Montalvo in late summer or fall of 2007, she referred the matter to Heuring, who had a meeting with Evans, Harris, and several other officers. He then

directed Fernandez to perform an internal investigation. TCNJ immediately put into place an interim remedial work schedule for the benefit of plaintiffs. Fernandez responded diligently and thoroughly, completing her investigation and report within sixty days, a reasonable time under the circumstances, and TCNJ responded with immediate disciplinary action against defendants.

E.

Plaintiffs' proofs of a reprisal or adverse employment action are also woefully inadequate. Thus, Judge Pereksta correctly found plaintiffs failed to establish a prima facie case of retaliation justifying summary judgment dismissal of this count.

In order to establish a prima facie case of retaliation under LAD, N.J.S.A. 10:5-12(d), the employees must demonstrate: "(1) that [they] engaged in protected activity; (2) the activity was known to the employer; (3) [the employees] suffered an adverse employment decision; and (4) there existed a causal link between the protected activity and the adverse employment action." Young v. Hobart W. Grp., 385 N.J. Super. 448, 465 (App. Div. 2005). Once a plaintiff establishes a prima facie case, the employer may then come forward with a legitimate, non-discriminatory reason for such employment decision. Ibid. This then shifts the burden back to the plaintiff to demonstrate that

the pretext underlying the decision was in fact discriminatory. Ibid. Retaliatory action is one which would dissuade a reasonable person from bringing a claim of discrimination, and thus must be more than slight annoyances or a lack of good manners. Roa v. Roa, 200 N.J. 555, 575 (2010) (citing Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68, 126 S. Ct. 2405, 2415, 165 L. Ed. 2d 345, 359-60 (2006)).

Plaintiffs' claims of retaliatory conduct are that Shockley was assigned "extra work" by defendants after he filed the complaint and "lost overtime assignments" while Evans and Harris "continue[d] to be ostracized." Shockley's proof of the extra work is a singular sentence in his deposition with no specifics, and he provided vague, speculative testimony regarding the amount of overtime he believed he lost. Moreover, Shockley admitted, and Judge Pereksta noted, that during the two-month period of Fernandez's investigation, Shockley was unable to volunteer for overtime shifts that would have placed him under the supervision of defendants, which was an interim precautionary measure, not retaliation by TCNJ.

Fernandez noted that plaintiffs told her after the complaint was lodged, "things had gotten better." Even if they were ostracized by defendants, such behavior does not rise to the level of an adverse employment decision to establish the

second prong of the retaliation analysis. As noted in Roa, such "trivial harms" and "petty slights" are not enough to dissuade the reasonable person from engaging in such protected action. Supra, 200 N.J. at 575 (citing Burlington, supra, 548 U.S. at 68, 126 S. Ct. at 2415, 165 L. Ed. 2d at 359-60).

F.

We turn now to plaintiffs' final argument, namely that their punitive damages claim should have been submitted to the jury. Plaintiffs claim Gordon's failure to report discrimination complaints to HR and his "active[]" attempt to "squelch the complaints because of the perceived impact it may have on the wrongdoers" as well as the lack of publication, training, and enforcement of the anti-discrimination policy, evidence willful indifference by upper management, warranting a claim for punitive damages. We are not so persuaded.

There is a greater threshold than mere negligence for determining whether a cause for punitive damages exists for employer liability. Lehmann, supra, 132 N.J. at 624. There are two prerequisites for awarding punitive damages to employees in a discrimination suit: "(1) actual participation in or willful indifference to the wrongful conduct on the part of upper management and (2) proof that the offending conduct [is] especially egregious." Cavuoti v. N.J. Transit Corp., 161 N.J.

107, 113 (1999) (alteration in original) (internal quotation marks and citation omitted). What is essential in order to sustain a claim of punitive damages is some involvement by a member of the upper management. Id. at 117.

The test for egregiousness is satisfied when a plaintiff proves "an intentional wrongdoing in the sense of an 'evil-minded act' or an act accompanied by a wanton and willful disregard for the rights of [plaintiff]." Quinlan v. Curtiss-Wright Corp., 204 N.J. 239, 274 (2010) (alteration in original) (quoting Rendine v. Pantzer, 141 N.J. 292, 314 (1995)). Alternatively, a plaintiff can prove conduct is especially egregious if "actual malice" is proven. Quinlan, supra, 204 N.J. at 274 (quoting Herman v. Sunshine Chem. Specialties, 133 N.J. 329, 337 (1993)). Factors to consider in this determination are the likelihood the conduct would cause harm, the employer's awareness or disregard for the harm, the employer's behavior after he or she learns the conduct could cause harm, and the duration of the harmful conduct. Quinlan, supra, 204 N.J. at 274.

As previously discussed, plaintiffs' allegations respecting Gordon are not supported in the record. Nor have plaintiffs provided competent evidence that any other members of TCNJ's upper management acted with "willful indifference" towards them

or exhibited conduct that is "especially egregious" to warrant a claim for punitive damages. Accordingly, summary judgment was appropriately granted on this count.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION