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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1368-10T4

THOMAS V. BOWERS, III,

Plaintiff-Appellant,

v.

THE NEW JERSEY JUDICIARY, SUPERIOR COURT OF NEW JERSEY, MONMOUTH VICINAGE, and TROY FITZPATRICK,

Defendants-Respondents.

Argued May 25, 2011 - Decided August 29, 2011

Before Judges Sapp-Peterson and Simonelli.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-8061-09.

Glenn A. Montgomery argued the cause for appellant (Montgomery, Chapin & Fetten, P.C., attorneys; Mr. Montgomery, of counsel and on the brief).

David B. Bender, Assistant Attorney General, argued the cause for respondents (Paula T. Dow, Attorney General, attorney; Lewis A. Scheindlin, Assistant Attorney General, of counsel; Mr. Bender, on the brief).

PER CURIAM

Plaintiff, an African-American, appeals from the Law Division order granting summary judgment dismissing his

discrimination complaint against defendants, the New Jersey Judiciary ("Judiciary"), Superior Court of New Jersey, Monmouth Vicinage ("Vicinage"), and Troy Fitzpatrick ("Fitzpatrick"). Plaintiff alleged that based upon his race, defendants failed initially to promote him to Acting IT[1] Manager and, later, to the permanent position. He claimed further that he was subjected to a hostile work environment and that after he filed an internal discrimination complaint, defendants engaged in retaliatory conduct that ultimately led to his termination. Defendants moved for summary judgment, arguing that plaintiff's complaint lacked substantive merit. The court conducted oral argument on October 29, 2010, and immediately thereafter granted summary judgment to defendants. The court found that plaintiff's failure-to-promote claim was time-barred, plaintiff failed to "show[] any material fact that the discrimination alleged rose to the level necessary to demonstrate a Title VII claim[,]" and that plaintiff was not subject to a retaliatory discharge.

Plaintiff filed his notice of appeal. On the same date that he filed his appellate brief, the motion judge, pursuant to Rule 1:7-4(a), filed a letter memorializing his reasons for granting summary judgment. The court stated that plaintiff

[1] Information Technology.

could not invoke the "discovery rule"[2] to maintain his claim that he was wrongfully denied appointment as the Acting IT Manager because plaintiff learned he was not appointed as the Acting IT Manager on October 27, 2005, and did not file his complaint until May 2008, more than two years beyond the statutory period for filing LAD[3] claims.

As for the failure to promote plaintiff to the IT Manager position permanently, the court noted that plaintiff, by his own admission, failed to apply for the position. As such, the court reasoned that plaintiff could not, as a matter of law, establish a prima facie case of discriminatory failure to promote.

Addressing the hostile work environment claim, the judge found that "[g]enerally, conduct must include repeated racial slurs to create a hostile work environment[,]" and that the tasks assigned to him were within his job description. The judge noted that dissatisfaction with the assigned tasks does not rise to the level of creating a hostile work environment.

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[2] The discovery rule is an equitable doctrine created by the courts to protect unsuspecting persons from statutory limitations periods during which a claim must be brought or forever lost. See Lopez v. Swyer, 62 N.J. 267, 273-74 (1973). A cause of action does not accrue under the doctrine "until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim." Id. at 272.

[3] New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -49.

Turning to plaintiff's claim that defendants engaged in retaliatory conduct after he filed his discrimination complaint, the judge found that none of the tasks assigned to plaintiff, or actions undertaken by defendants, affected his employment. Specifically, plaintiff experienced no loss in pay or any loss of promotional opportunities. Further, the judge found that defendants did not engage in any conduct that rose to the level of constructive discharge:

> The [p]laintiff's medical leave was granted as required under state and federal law. After extensions of his medical leave, he was told to return to work on September 7, 2007, and was also informed that a failure to do so would be considered job abandonment. Proper due process was provided to [p]laintiff when he failed to return to work, and he was ultimately terminated on October 2. The discharge was the result of an operational hardship of the employer, not a retaliation. Because the [p]laintiff could not meet the expectation of his employer, the [p]laintiff was terminated. For this reason, the [p]laintiff's retaliatory discharge claim was dismissed as a matter of law.

On appeal, plaintiff raises the following points for our consideration:

> POINT I
>
> SUMMARY JUDGMENT STANDARD [AND] APPLICABLE STANDARD OF REVIEW.

POINT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ITS FAILURE TO DOCUMENT ANY FINDINGS OF FACT OR CONCLUSIONS OF LAW.

POINT III

THE TRIAL COURT SHOULD NOT HAVE DISMISSED ANY CLAIM BY THE PLAINTIFF BASED ON THE STATUTE OF LIMITATIONS.

POINT IV

THE PLAINTIFF HAS PRESENTED SUFFICIENT EVIDENCE OF RACE-BASED DISCRIMINATION BY THE DEFENDANTS, AND [T]HE TRIAL COURT THEREFORE SHOULD HAVE DENIED SUMMARY JUDGMENT AND ALLOWED THE CASE TO PROCEED TO TRIAL.

POINT V

THE PLAINTIFF HAS PRESENTED SUFFICIENT EVIDENCE OF RETALIATION BY THE DEFENDANTS, AND THE TRIAL COURT THEREFORE SHOULD HAVE PERMITTED THIS CLAIM TO PROCEED TO TRIAL.

We have considered the points raised and arguments advanced in light of the applicable legal principles and reverse the grant of summary judgment dismissing plaintiff's failure-to-promote claim related to the Acting IT Manager position and remand for a Lopez[4] hearing. We also reverse the court's order granting summary judgment in connection with plaintiff's hostile work environment claim and retaliatory termination claim. We affirm the grant of summary judgment dismissing plaintiff's

[4] Lopez, supra, 62 N.J. at 275-76.

claim of failure to promote to the permanent position of IT Manager.

I.

Preliminarily, we briefly comment upon the motion judge's submission of a letter memorandum pursuant to Rule 1:7-4. We note that at the conclusion of the oral argument and the rendering of his oral decision on October 29, 2010, the motion judge, in response to an inquiry from plaintiff's counsel whether the court would issue a written decision, stated: "[I]n the event you file an appeal, I'm going to put my findings in writing under [Rule] 2:5-1[(b).]"

Under Rule 2:5-1, within fifteen days of the mailing of the notice of appeal and case information statement to the trial judge, the trial judge "may file and mail to the parties an amplification of a prior statement, opinion or memorandum made either in writing or orally and recorded pursuant to R. 1:2-2." Plaintiff filed his notice of appeal on November 15, 2010.

Having failed to file an amplification of the record in accordance with Rule 2:5-1(b), the letter submitted on January 26, 2011 "pursuant to Rule 1:7-4(a)" does not satisfy the requirements of Rule 2:5-1(b). We have previously held that a court's obligation under Rule 1:7-4 to "find facts and state conclusions of law" on every motion is not fulfilled by waiting

to see if a litigant files a notice of appeal of the court's decision. In re Will of Marinus, 201 N.J. Super. 329, 339 (App. Div.), certif. denied, 101 N.J. 332 (1985). The "[f]ailure to perform that duty 'constitutes a disservice to the litigants, the attorneys and the appellate court.'" Curtis v. Finneran, 83 N.J. 563, 569-70 (1980) (quoting Kenwood Assocs. v. Bd. of Adjustment of Englewood, 141 N.J. Super. 1, 4 (App. Div. 1976)). This is especially true where, as occurred here, the court's findings of fact and conclusions of law were filed on the same day that the brief on behalf of plaintiff was filed. Plaintiff's Point II raises, as reversible error, the court's failure to document any findings of fact or conclusions of law. Plaintiff's reply brief, however, filed on April 21, 2011, addresses the court's letter, arguing that the factual findings and conclusions of law were insufficient. Further, plaintiff contends the filing of the letter beyond the time period set forth in Rule 2:5-1(b) was prejudicial to plaintiff. However, plaintiff does not specifically identify the prejudice.

Because we are satisfied that our de novo review of the record supports the court's oral findings on October 29, 2010, as those findings relate to the grant of summary judgment dismissing plaintiff's claim of failure to promote him to the permanent IT Manger's position, and in view of our reversal of

the grant of summary judgment related to the failure to promote to the Acting IT Manager's position, the hostile work environment and the retaliatory discharge claims, we conclude the court's belated filing of its amplified statement of reasons was not prejudicial to plaintiff. We do not, however, endorse the practice utilized by the motion judge in this case, and a belated Rule 2:1-5 statement should never be used to rebut the arguments in an appellant's brief.

II.

Our review of a trial court order granting summary judgment is de novo and we apply the same standard as the trial court in determining whether there are any genuinely disputed issues of material fact sufficient to warrant resolution of the disputed issues by the trier of fact. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). Our analysis requires that we first determine whether the moving party has demonstrated that there are 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 a "light most favorable to the non-moving party[.]" Brill v. Guardian Life Ins. Co. of

Am., 142 N.J. 520, 523 (1995). Because our review of issues of law is de novo, we accord no special deference to the motion judge's conclusions on issues of law. Zabilowicz v. Kelsey, 200 N.J. 507, 512 (2009).

The salient facts relevant to the summary judgment motion, viewed in a light most favorable to plaintiff, reveal that the Vicinage hired plaintiff to fill the position of Information Technology Analyst ("ITA") 2 on November 19, 2001. His duties included helping "to consolidate the backup processes[,]" upgrading the operating systems of PCs, supervising Juan Colmenares ("Colmenares"), who was an ITA 1 at the time, and upgrading phone and email systems. He also served as the Vicinage's liaison with other agencies. Paul Saker ("Saker"), the Vicinage's IT Manager, was plaintiff's supervisor at the time plaintiff commenced his employment. Under Saker's supervision, plaintiff received favorable reviews. In particular, his reviews for 2003, 2004, and 2005 reported that plaintiff "met or exceeded all the expectations during the advisory period" and that he "should continue his good work ethic." Plaintiff was promoted to ITA 3 on February 5, 2005. Following his promotion, in addition to his previous duties,

plaintiff's responsibilities were "[m]ore focused on Lotus"[5] and handling specific projects for departments.

Beginning July 2005, Saker took an extended medical leave. He never returned from leave and retired one year later. Shortly after Saker commenced his medical leave, the Vicinage's trial court administrator ("TCA"), Marsi Perkins ("Perkins"), approached plaintiff about assuming the IT Manager's duties. At that point, plaintiff had been an ITA 3 for about seven months. There were four other ITAs in plaintiff's department: Ken Liss ("Liss"), an ITA 1; Colmenares and Kathy Lowell ("Lowell"), who were both ITA 2s, and Dean Barringer ("Barringer"), an ITA 3. Plaintiff was the only African-American in the Vicinage's IT Division. Additionally, there were no African-American IT managers in any of the fifteen judiciary vicinages throughout the state, and only one other racial minority, an Asian Indian.

On October 18, 2005, the TCA submitted a formal request to the Acting Director ("Director"), Administrative Office of the Courts ("AOC"), to appoint plaintiff as Acting IT Manager, pending Saker's return from extended sick leave. In her request, the TCA advised the Director that her request was based

[5] An "easy-to-use, single point of access to everything you need to get your work done quickly, including business applications, email, calendars, feeds and more." IBM, http://www-ol.ibm.com/software/lotus/products/notes/ (last visited July 13, 2011).

upon the recommendation from the Vicinage Assignment Judge ("AJ"). She indicated further that during Saker's absence, plaintiff "has become the lead" in performing the duties of Acting IT Manager. While awaiting a response from the Director, the Vicinage informally treated plaintiff as the Acting IT Manager and identified him as such in memoranda. While performing these duties, plaintiff supervised high profile projects, including the relocation of the Asbury Park Probation Office to Ocean Township. Plaintiff attended monthly IT Manager meetings in Trenton where he encountered the Chief Information Officer, James Rebo ("Rebo"), and the Assistant Director of Technical Services and Operations, Jonathon Massey ("Massey"), both of whom he later contended "generally would not acknowledge my presence" at meetings.

In response to the TCA's request to appoint plaintiff as Acting IT Manager, the Director sent Rebo an email on October 24 indicating, "Monmouth has made a request to appoint Thomas Bowers as IT [M]anager, retroactive to August 22 when he assumed his duties during the absence of Paul Saker. Please advise." Rebo, through email, inquired of Massey: "Do we know anything about this guy?" Massey's responding email advised:

> My first reaction is to inquire whether [Perkins] is proposing to appoint Tom on an acting basis. If not, then she should do a

> recruitment when [Saker] has officially retired.
>
> As to whether he should be appointed (selected after a posting?) on a permanent basis:
>
> 1. [The Administrative Supervisor 4 who] was involved in the recruitment when Tom was selected as an ITA[,] did NOT recommend that Tom be selected.
>
> 2. We would rank Tom in the bottom three, technically, of the IT Managers. . . . He repeatedly doesn't understand simple technical things.
>
> 3. Our work experience with Tom is not favorable. He doesn't follow standards. He is lazy and stands around and watches others do the work. (When we had four of our staff there to assist him in installing JEFIS equipment, he stood around and expected our staff to do the work.) When he encounters problems, he withholds information and doesn't tell our staff what has occurred. He doesn't read instructions from [the Administrative Supervisor 4's] staff and then asks dumb questions.
>
> 4. He made sexist remarks to and about [a staff member] when she was there working to assist him. He made it clear that he appreciated (enjoyed) her shape (backside). [The staff member] was offended at the time, but didn't report it to management.
>
> 5. Comments from [the Administrative Supervisor 4's] staff: Cocky, arrogant, lazy, weasel, creep, does what he wants, doesn’t tell the truth, chip on his shoulder.

Massey followed up with a formal memorandum two days later that stated: (1) plaintiff did not understand documentation and

instructions sent to him from the Local Area Network (LAN); (2) plaintiff "sometimes takes actions without consulting with the LAN Team"; and (3) plaintiff appeared not to understand some technical aspects of his job. The memorandum provided a number of examples in support of Massey's recommendation that plaintiff not be appointed as the Acting IT Manager for the Vicinage. Subsequently, the Director rejected the AJ's recommendation, and Perkins met with plaintiff to advise him that the recommendation was not approved. She declined Rebo's offer to send someone else to manage the Vicinage's IT Program in the interim. Instead, she elected to wait and intended to resubmit the AJ's recommendation that plaintiff be appointed to the acting position, at a later date. Plaintiff continued, albeit informally, to manage the Vicinage's IT Department.

In April 2006, plaintiff requested that Perkins resubmit his name for the acting position. She responded in writing, advising plaintiff that "resubmission for consideration on your behalf will not be forthcoming" and that the Vicinage's Operations Division Manager, Gerry Gabler ("Gabler"), would serve as the "point person" regarding "IT strategies and major vicinage initiatives."

Plaintiff filed a grievance in June 2006 seeking compensation for the additional duties he had been performing in

Saker's absence. Also in June, the Vicinage posted the vacancy for Saker's position. Plaintiff did not apply for the position, which was filled in September 2006 by Fitzpatrick.

Shortly after becoming the Vicinage's IT Manager, Fitzpatrick assigned plaintiff as the sole IT person to respond to Help Desk calls, a responsibility that appeared in the job description of various IT positions within the Judiciary. Covering the Help Desk is expressly referenced in the ITA 1 job description: "Level 1 - Information Systems Technician 1: Support computer operations, 1st line help desk assistance, or other information technology support areas." (Emphasis added). According to Fitzpatrick, this assignment was prompted as a result of discussions with Perkins. In her deposition testimony, Perkins explained the AJ had expressed concerns that "the judges felt that their needs were not responded to . . . . So we talked about putting something in place that would streamline the process, provide services first and foremost to the [AJ], then the judges." In addition to being assigned to the Help Desk, Fitzpatrick directed plaintiff to create a Help Desk manual.

According to plaintiff, in the past, the Vicinage Help Desk assignment was typically assigned to a less senior employee but was also rotated amongst all of the IT employees. By assigning

plaintiff to the Help Desk, Fitzpatrick hoped to identify trends in Help Desk issues. Because all Help Desk calls were logged, plaintiff contended that it was unnecessary to have one person, in particular him, as an ITA 3, stationed exclusively at the Help Desk.

Nonetheless, Fitzpatrick assigned plaintiff exclusively to the Help Desk and, in addition to the Help Desk manual, assigned various other projects to plaintiff that had short deadlines. Fitzpatrick told plaintiff that he was not allowed to leave his desk for any reason, but also sent plaintiff emails directing him to find someone to cover the Help Desk when he needed to leave the area. Fitzpatrick sent other emails advising that plaintiff could not delegate responsibilities to anyone, but should instead find him and he would delegate a particular duty. Some of the emails, which plaintiff viewed as intimidating and embarrassing, were copied to his co-workers.

When the Vicinage hired another ITA 3, Bradd Kemerley ("Kemerley"), a white male, plaintiff immediately noticed that Fitzpatrick treated Kemerley differently. For example, Kemerley was given minimal assignments to complete and had the freedom to move around the Vicinage. Plaintiff also learned Fitzpatrick solicited information from his co-workers about plaintiff's work ethic. For example, during his deposition, plaintiff testified

that Colmenares and Liss "came to [him] at different points stating that Mr. Fitzpatrick had come to them asking . . . if I had been involved with anything that they were working on that may have caused errors[.]" Plaintiff characterized Fitzpatrick's language towards him as "always short and curt. As [if] it was a bother to speak to me, where the others would be afforded a more courteous audience."

On May 3, 2007, plaintiff filed an EEO[6] complaint within the Vicinage alleging a hostile work environment and nepotism. Plaintiff claims that immediately thereafter Fitzpatrick commenced to assign numerous projects to him with unrealistic deadlines. On June 1, plaintiff was interviewed concerning his EEO complaint for approximately four hours. Following this interview, plaintiff alleges that Fitzpatrick summoned him to his office where Fitzpatrick proceeded to question him about his EEO complaint and assigned work projects. The meeting became heated and plaintiff left. Three days later, plaintiff filed a second EEO complaint based upon Fitzpatrick's conduct on June 1.

Plaintiff contends he experienced both mental and physical stress as a result of the events occurring at work and consulted with Dr. Joseph A. Vizzoni. Dr. Vizzoni examined plaintiff and recommended that he take medical leave from June 6 to July 1.

[6] Equal Employment Opportunity.

Dr. Vizzoni diagnosed Bowers as suffering from Anxiety Disorder, which symptoms were manifested by acute anxiety reaction.

Three days after plaintiff commenced his medical leave, Colmenares sent plaintiff an email indicating, "Now that you are not here, [Fitzpatrick] requested us to take turns in covering [the Help Desk].[] Oh, the project that you were doing and was imperative to have it done ASAP, . . . [Fitzpatrick] decided to keep it 'ON HOLD' until you return.[] So much for ASAP!!!"

On June 27, Fitzpatrick, accompanied by a Monmouth County sheriff's officer and Jack McCarthy, III ("McCarthy"), the IT Security Manager for the AOC, went to plaintiff's home to retrieve plaintiff's laptop. The circumstances that prompted this action stemmed from a report by Perkins to McCarthy's supervisor that she believed someone was hacking into her email account. According to McCarthy, prior to June 27, he was unaware of any potential security breach involving computers and laptops in the Vicinage. He first learned of Perkins' concern that someone was hacking into her computer on the morning of June 27, when he received a telephone call from his supervisor directing him to leave the security summit he was attending in New York City and travel to the Vicinage. He described his role that day as going to the Vicinage to secure "whatever evidence I felt was needed to either prove or disprove those claims." In

that regard, every laptop or computer assigned to IT staff was "brought into a room and imaged using a product called Ghost." During the ride to plaintiff's house, Fitzpatrick told him that Perkins and the AJ "requested that we go out there to get the stuff."

Perkins' version of the laptop incident was slightly different. In her deposition, she testified that there had been an attempt to access her Lotus Notes, as well as the email accounts of the AJ and EEO officer. She was unaware whether the security breach involved plaintiff, but knew that the investigation did involve Colmenares, who later admitted to hacking into the system. She indicated that the IT staff learned that plaintiff was accessing the Judiciary's email system at various times during the day while he was out on medical leave. She stated: "No one was aware why he was accessing the system. There was no need for him to access the system. That's how Tom was also tied into this process." She was unaware, however, whether plaintiff had been told not to access the system while on sick leave and she indicated that McCarthy and Fitzpatrick discussed the matter as it related to plaintiff. She also testified that Fitzpatrick was supposed to have been accompanied by the Vicinage's Human Resources Manager, Terry Mapson-Steed ("Mapson-Steed"), to retrieve plaintiff's

laptop based upon a discussion she had with Fitzpatrick after plaintiff filed his EEO complaint. She told Fitzpatrick that whenever he interacted with plaintiff regarding what he considered to be a disciplinary matter, Mapson-Steed was to be present.

During his deposition, Fitzpatrick's explanation regarding the laptop retrieval also differed from both McCarthy's and Perkins' versions. According to him, McCarthy was at the Vicinage conducting a security breach investigation that involved Colmenares. McCarthy did not tell him anything. When deposed, Fitzpatrick testified: "I wasn't really involved. [McCarthy] was on-site. He was doing an investigation. I was not part of it." He explained that he did not learn that McCarthy planned an unannounced visit to plaintiff's home to retrieve plaintiff's laptop until he received a telephone call from Perkins' secretary telling him that he was going with McCarthy to get the laptop.

Although plaintiff's laptop was retrieved and imaged that day, McCarthy did not conduct his investigation at that time. Rather, he testified that he did so "over the next week or two." He found "nothing within the laptop that made [him] feel that [he] could prove or disprove what was claimed." He authored no report regarding his investigation, and neither Perkins nor

Fitzpatrick received any follow-up report regarding the investigation as it applied to plaintiff. The laptop was never returned to plaintiff. Fitzpatrick testified that the laptop was Judiciary property and that other ITAs possessed laptops.

On June 28, plaintiff sent Fitzpatrick an email notifying him that his doctor extended his medial leave until July 30. Dr. Vizzoni recommended additional extensions, with the last recommendation calling for plaintiff to return to work October 1.

On August 30, 2007, Mapson-Steed notified plaintiff that "as of August 31, 2007, you have exhausted your FMLA[7] entitlement in its entirety." She advised plaintiff that his extended leave request was approved through September 7, but his vacation time only covered his absence through September 6. As such, if he failed to return on September 10, the Vicinage would consider his absence as "an unauthorized leave of absence, which would be subject to administrative action."

On September 4, plaintiff's counsel notified Mapson-Steed that plaintiff would not return to work until October 1, despite her notification that he would be on unauthorized leave after September 10. On September 6, Mapson-Steed responded that the

[7] Family and Medical Leave Act of 1993, 29 U.S.C.A. §§ 2601 to 2654.

Vicinage was "unable to accommodate . . . Bowers' request for personal illness leave through October 1" and that he was expected to return on September 10.

Plaintiff did not return to work on September 10. On that same day, plaintiff's counsel notified Mapson-Steed that plaintiff would not return to work until October 1 due to his condition and requested an accommodation. Mapson-Steed responded to plaintiff's counsel in writing the next day. In her letter, she advised counsel that plaintiff was expected to return to work on September 10 and that the IT Division "has experienced significant operational hardship during his absence and we are unable to accommodate continued absence through October 1[.]" She indicated that plaintiff was considered to be on an "unauthorized leave[,]" in "unpaid status[,]" and "subject to administrative disciplinary action" as of September 10.

On September 17, the Judiciary served plaintiff with a preliminary notice of disciplinary action indicating that his removal and resignation not in good standing would be effective on September 10, and he could request a hearing within ten days of receipt of the notice. The preliminary notice specified that plaintiff had not returned to work "for five or more consecutive days and is considered to have abandoned his job[.]"

On October 2, the Judiciary issued a final notice of disciplinary action to plaintiff indicating that on September 17, he was served with a preliminary notice and he did not request a hearing. The final notice specified that his removal and resignation not in good standing were effective on September 10.

On October 10, Mapson-Steed notified plaintiff that his employment was terminated as of September 10, 2007, and directed him to complete the paperwork for benefits. That same day, she sent another letter listing the charges and actions taken against him and advising of his right to appeal the final notice.

The Vicinage did not post plaintiff's vacant position until October 2008. The position was filled by a Caucasian male on January 20, 2009.

III.

Plaintiff argues that the trial judge erred by finding that his LAD claims were barred by the two year statute of limitations because he filed his complaint on May 29, 2008 and it was "plain error for the trial court to dismiss any of" his claims "arising from acts that occurred on or after May 29, 2006[.]" He further argues that his claims are not time-barred because "the limitations period on any claim in an LAD case

begins to accrue only on the date the [p]laintiff reasonably discovers acts of illegal discrimination."

To that end, plaintiff asserts that he did not discover the 2005 "defamatory and coarse memorandum by Massey" until the summer of 2006. Upon discovering the memorandum in 2006, he first realized that racial discrimination may have been the reason he was denied the appointment as Acting IT Manager. Thus, plaintiff maintains his discrimination claim began to accrue on the date he became aware of the memorandum. He contends further that the 2005 memorandum and denial of his promotion were "two pieces in a continuous, cumulative, and synergistic pattern of discriminatory conduct" which were part of a continuing LAD violation whereby the limitations period did not begin "until the date of the last act in the series." Based upon the continuing violation doctrine, plaintiff argues that "any and all claims in this case arising from the" memorandum or denial of the promotion are timely.

In finding plaintiff's claim untimely, the motion judge reasoned that "[t]he failure to promote constitutes a discrete act and that's when the statute of limitation's clock should commence." He further reasoned, "[p]laintiff was denied his position on October 27[], 2005. The statute of limitations ran on October 27, 2007. The complaint was filed in May of 2008."

The judge dismissed the failure-to-promote claim "most importantly on [a] statute of limitation[]s argument." Regarding any potential tolling, the judge stated, "[n]othing in the . . . LAD prevents a claim for which a party was unaware, in such a case the tolling [of the] statute of limitations begins at the moment when the discrimination is discovered and it brings us back to the October 27[], 2005 date."

In rejecting plaintiff's contention that the statute was tolled until he discovered Massey's 2005 memorandum in June 2006, the judge stated:

> In order for the statute of limitations to be tolled from the date of occurrence to a later date, one must actually be unaware of discrimination on that date and learn of it on the later date. The memo written by Massey is not discriminatory on its face. The memo is written by a supervisor based solely on his own experience of an employee's job performance in order to make an informed employment decision. . . . There is no mention of race[,] as the memo only discusses the plaintiff's professional qualifications. Such discussion of professional qualifications does not demonstrate discrimination in a[n] []LAD claim. Because the statute of limitations expired in October 2007, well before the filing of the complaint in May 22, 2008, this claim is barred under the statute of limitations and summary judgment was granted as a matter of law.

In order to survive summary judgment dismissing his failure to promote claims, plaintiff was required to establish a prima

facie case of discriminatory non-promotion by showing that he: (1) is a member of a class protected against discrimination under the LAD; (2) was qualified for the position he sought; (3) was denied promotion; and (4) that others having "'similar or lesser qualifications achieved the rank or position.'" Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 331 (2010) (quoting Dixon v. Rutgers, The State Univ. of N.J., 110 N.J. 432, 443 (1988)).

A. Acting IT Manager

There is no dispute that plaintiff, as an African-American, is a member of a protected class and that he sought the position of Acting IT Manager. Nor is there any dispute that plaintiff was qualified to serve in the position. The October 27, 2005 letter recommending that plaintiff not be appointed to the acting position does not state that plaintiff lacked the objective qualifications to serve as IT Manager in an acting capacity. Additionally, there is no dispute that Gabler, the person designated to serve as Acting IT Manager during Saker's absence as of April 2006, had lesser skills than plaintiff because he lacked the technical skills possessed by plaintiff to serve as Acting IT Manager.

The flaw in the court's reasoning that the October 27, 2005 memorandum was not discriminatory on its face is that the court

linked application of the discovery rule, which the court acknowledged could be applied in an LAD case, to the discovery of evidence that facially evinces racial animus. It has been repeatedly recognized by our courts, as well as federal courts, that discrimination rarely rears its ugly head directly. Rather, it typically manifests itself in subtle ways. See Castellano v. Linden Bd. of Educ., 79 N.J. 407, 420 (1979) (Handler, J., concurring and dissenting) ("Discrimination frequently goes uncorrected because it is undetected."); Caver v. City of Trenton, 420 F.3d 243, 264 (3d Cir. 2005) (recognizing that "'[t]he advent of more sophisticated and subtle forms of discrimination requires that [courts] analyze the aggregate effect of all evidence . . . including [evidence] concerning incidents of facially neutral mistreatment[.]'"); see also Cardenas v. Massey, 269 F.3d 251, 261 (3rd. Cir. 2001).

Plaintiff contends the facts underlying the opinions expressed in the October 27, 2005 memo were incorrect and without any basis. Moreover, plaintiff contends that he did not learn of the October 27, 2005 letter until June 2006 when he received discovery as part of his grievance proceeding. He claims that had he been given an opportunity to refute the contentions set forth in the October 27 letter, he would have demonstrated their inaccuracies. Assuming plaintiff could

successfully refute the contentions in the October 27 memo, and given the favorable reviews plaintiff previously received from his immediate supervisor and the recommendation from the AJ supporting his appointment as the Acting IT Manager, a reasonable inference could be drawn that the October 27, 2005 memorandum reflects racial animus. This inference is also bolstered by the email Massey sent to Rebo in response to Rebo's initial inquiry about plaintiff on behalf of the Director a few days earlier. The email contained allegations, which plaintiff also disputes.

During the EEO investigation, Massey acknowledged that he knew very little about plaintiff. The motion judge, however, found, as a fact, that the October 27, 2005 memorandum from Massey to Rebo was "written by a supervisor based solely on his own experience of an employee's job performance[.]" (Emphasis added.) There are no facts in the record to support this finding. Unquestionably, the memorandum influenced the Director's decision to reject the AJ's request to appoint plaintiff in the acting capacity. Thus, but for the court's ruling that the claim was barred by the statute of limitations, there were genuinely disputed issues of fact sufficient to defeat summary judgment on the claim that plaintiff was denied appointment to the Acting IT Manager position based solely upon

his race. This conclusion, however, does not end the analysis because there is a genuinely disputed issue of fact as to when plaintiff first learned of the October 27, 2005 letter.

As the motion judge correctly observed, the failure to promote is a discrete event. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 111, 122 S. Ct. 2061, 2071, 153 L. Ed. 2d 106, 120 (2002). See also Shepherd v. Hunterdon Developmental Ctr., 174 N.J. 1, 20-21 (2002) (adopting Morgan's analytical framework to differentiate between "discrete acts" and those acts that constitute "a series of separate acts that collectively constitute one unlawful employment practice." (internal quotation marks omitted)). Therefore, the disputed issue of when plaintiff first discovered the October 27, 2005 letter should have been the subject of a Lopez hearing. The motion judge, without first conducting a Lopez hearing, accepted defendants' version of when plaintiff's cause of action accrued, notwithstanding plaintiff's contention that he did not learn of the letter until he received it as part of discovery in June 2006. Mapson-Steed, in her deposition, acknowledged that plaintiff was provided with a copy of the memo as part of the discovery package in connection with the grievance plaintiff filed in June 2006. Perkins, however, in her statement provided as part of the EEO investigation, represented that she gave a

copy of the memo to plaintiff in November 2005 when she met with him to advise that the request for his appointment as the Acting IT Manager was denied. She stated further:

> I went through the memo point by point. Of the points made in Massey's memo[,] I probably understood his comments about the wireless access the best because we already had wireless in the [V]icinage. The comments by Massey about the [backup] and other technical points were difficult to follow. Bowers had, and shared his, responses to each of Massey's points and wanted me to take his response and challenge the AOC's decision. I explained to Bowers that I had talked with [the AJ] . . . about the issue already and we decided the assignment as Acting Manager was just a side issue and that the real issue was Bowers becoming Manager. I told Bowers that the [j]udge and I decided we would save our battle for that[,] the permanent manager position[,] explaining the difference between fighting a battle and winning the war. I am absolutely confident that I showed Bowers the October 27, 2005 Massey memorandum and had the above[-]described meeting with him within a week or two of my first receiving the memo.

The court must determine when plaintiff discovered the October 27, 2005 memorandum by conducting a Lopez hearing. If the court determines that plaintiff first learned of the October 27, 2005 letter sometime after June 2006, then his claim of failure to promote to the Acting IT Manager position survives summary judgment for the reasons we have already discussed. On the other hand, if the court concludes that plaintiff was made

aware of the contents of the October 27, 2005 letter sometime in November 2005, then his failure-to-promote claim related to the Acting IT Manager position is time-barred.

B. IT Manager

The motion judge properly granted summary judgment to defendants on plaintiff's claim of discriminatory non-promotion to the permanent position as IT Manager. There is no dispute that plaintiff failed to apply for the position, an essential element of a non-promotion claim. Peper v. Princeton Univ. Bd. of Trs., 77 N.J. 55, 82 (1978). Plaintiff claims he did not apply for the position because:

> I believed that Jon Massey and others at the AOC had made false and unfounded allegations against me to [the Director], and I believed that in doing so[,] they had acted out of a desire to discriminate against me based on race. I believe this because there would be only one reason why Jon Massey and the others would have written those untrue things about me, and that is that they did not like me. The only reason why they would not like me is because of my race, since that is essentially all they knew about me. I would perceive such hostility from them during the monthly IT Manager meetings, where they would give me the cold shoulder treatment. Based on what they had written in October of 2005, it seemed as though Massey and Rebo were going to try to block me from obtaining any management position. Furthermore, it did not appear to me that [the] TCA . . . was supporting me any longer with regard to this matter, as for example she had not given me the opportunity to refute Massey's allegations. Therefore, I

> did not believe I would get anywhere by applying for the position of IT Manager.

This explanation fails to qualify for the exception to the application requirement that the United States Supreme Court carved out for the non-applicants in International Brotherhood of Teamsters v. United States, 431 U.S. 324, 364, 97 S. Ct. 1843, 1869, 52 L. Ed. 2d 396, 433 (1977), because plaintiff has failed to show that there has been "classwide discriminatory practices" on the part of defendants from which plaintiff could reasonably conclude that applying for the position would have been an exercise in futility. Id. at 363, 97 S. Ct. at 1868, 52 L. Ed. 2d at 432. Plaintiff's subjective belief that applying for the IT Manager position would have been an exercise in futility is insufficient to relax the requirement that the aggrieved employee must have applied for the position. Moreover, to allow the mere assertion that applying for a position would have been an exercise in futility, without more, would encourage the filing of speculative claims alleging failure to promote. In the absence of evidence of some history of discriminatory practices within the Judiciary's IT operations, plaintiff's failure to apply for the position of IT Manager is fatal to his claim. Ibid.

IV.

In rejecting plaintiff's hostile work environment claim, the motion judge concluded that the facts did not support a prima facie case of hostile work environment, which requires an aggrieved party to establish that the complained-of conduct: (1) would not have occurred but for the employee's protected status; (2) was sufficiently severe or pervasive; (3) to make a reasonable person believe that; (4) the conditions of employment have been "altered and the working environment is hostile or abusive." Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 603-04 (1993). Here, the court specifically found:

> Plaintiff admits that no racial epithets were made toward him. Instead, the [p]laintiff argues that the harassing conduct by the [d]efendant was the assignment to the [H]elp [D]esk and the tasks given to him. The only incident [p]laintiff references is an alleged altercation when the [d]efendant Fitzpatrick walked by the [p]laintiff's office and threw a memo on his desk. This does not rise to the level of a hostile work environment. The [p]laintiff also claims that his assignment to the [H]elp [D]esk constituted a hostile work environment, but the facts do not support such an allegation. The [p]laintiff answered telephones in a [H]elp [D]esk capacity before Mr. Fitzpatrick's tenure and before the [H]elp [D]esk was formalized. The [p]laintiff was allowed to leave the desk, take breaks, and use the restroom. His only requirement was to ensure that someone cover for him while he was away. The sole fact that the [p]laintiff didn't enjoy his tasks does not

> rise to the level required in a hostile work environment claim. Further, the [p]laintiff's [H]elp [D]esk responsibilities were only a portion of his overall tasks. He was asked to develop a handbook for the Vicinage[,] provide a roll[-]out procedure by which computers are systematically replaced with the least disruption to the end user[,] install computers with Lexis Nexis access in the law library[,] and prepare software upgrades to be installed remotely. All of the evidence also indicates that the [d]efendant Fitzpatrick acted very politely toward the [p]laintiff. Deadlines given to the [p]laintiff were not strictly enforced, and when projects were not performed according to expectations, such as the handbook, the [p]laintiff was not disciplined, and instead, the task was assigned to another employee.

Finding that "[p]laintiff was allowed to leave the desk, take breaks, and use the restroom" as long as he "ensure[d] that someone cover for him while he was away" or finding that "Fitzpatrick acted very politely toward the [p]laintiff" because he did not strictly enforce deadlines he imposed upon plaintiff for work projects, is the equivalent of making credibility determinations at the summary judgment stage concerning genuinely disputed facts. "We cannot say that the [motion judge's] evaluation of the evidence was not a reasonable one for a trier of fact to reach. However, the [motion judge] declined to examine the possibility that defendants' 'management decisions' masked discriminatory intent." Cardenas, supra, 269 F.3d at 261.

Plaintiff testified that Fitzpatrick was curt in his interactions with him, sent him mixed messages about what he could and could not do while assigned to the Help Desk, made disparaging comments to him in the presence of his co-workers, and sent demeaning emails to him. The record reveals that the job description for the ITA 1 position specifically lists responding to Help Desk inquiries. Moreover, prior to Fitzpatrick's tenure as IT Manager, assignment to the Help Desk was rotated amongst all of the IT personnel in the Vicinage. Further, as soon as plaintiff went on medical leave, Fitzpatrick resumed the rotation schedule amongst the staff for the Help Desk. Although the job description for an ITA 3 included supervisory responsibilities, plaintiff testified that he was not allowed to delegate any responsibilities to others. At least one email in the record, which Fitzpatrick copied to other staff members, makes it clear that plaintiff had no authority to delegate and had to seek Fitzpatrick's permission if he desired to do so. Further evidence in the record documents that Fitzpatrick reached out to plaintiff's co-workers specifically to solicit complaints about plaintiff's job performance. Nothing in the record suggests that Fitzpatrick solicited comments from other employees about other workers' job performance.

Plaintiff also claims that after Kemerley was hired, Fitzpatrick assigned Kemerley a lighter workload than plaintiff and Kemerley was not confined to the Help Desk. Finally, prior to coming to the Vicinage, Fitzpatrick worked in IT in Trenton, and evidence in the record suggests that he may have been part of [the Administrative Supervisor 4's] staff. According to Massey's email to Rebo, it was [the Administrative Supervisor 4's] staff who viewed plaintiff as "[c]ocky, arrogant, lazy, weasel, creep, does what he wants, doesn't tell the truth, chip on his shoulder." Plaintiff disputes all of these characterizations. These facts, coupled with plaintiff's protected-class status and because he was the only minority in the IT Division within the Vicinage, could lead a jury to reasonably conclude that plaintiff was subjected to a race-based hostile work environment.

The motion judge noted that plaintiff admitted Fitzpatrick never subjected him to racial epithets. Nor was there any other direct evidence of racial animosity in the record. We do not find the absence of such direct evidence fatal to plaintiff's hostile work environment claim at the summary judgment stage. As we noted earlier, "the advent of more sophisticated and subtle forms of discrimination requires that we analyze the aggregate effect of all evidence and reasonable inferences

therefrom, including those concerning incidents of facially neutral mistreatment, in evaluating a hostile work environment claim." Cardenas, supra, 269 F.3d at 261-62. Analyzed in this light, we are satisfied plaintiff has presented sufficient evidence to create an inference of a race-based, hostile work environment sufficient to defeat summary judgment. The harassing conduct commenced in the fall of 2006 when Fitzpatrick became the IT Manager. Plaintiff filed his complaint in May 2008. Therefore, plaintiff's hostile work environment claim also survives dismissal based upon statute of limitations grounds.

V.

Plaintiff contends that after he filed his EEO complaints, defendants engaged in retaliatory conduct that ultimately led to his termination. N.J.S.A. 10:5-12(d) provides that it shall be an unlawful employment practice:

> For any person to take reprisals against any person because that person has opposed any practices or acts forbidden under this act or because that person has filed a complaint, testified or assisted in any proceeding under this act or to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this act.

To establish a prima facie claim of retaliation under the LAD, plaintiff must demonstrate that: (1) he engaged in a protected employee activity; (2) defendants took an adverse employment action after or contemporaneous with his protected activity; and (3) a causal link exists between his protected activity and defendants' adverse action. Henry, supra, 204 N.J. at 332. Upon demonstrating a prima facie claim of retaliation, "the burden of going forward, but not the burden of persuasion, shifts to the employer to articulate some legitimate non-retaliatory reason for the adverse action." Jamison v. Rockaway Twp. Bd. of Educ., 242 N.J. Super. 436, 445 (App. Div. 1990). Then, "the claimant-employee is afforded a fair opportunity to show by preponderating evidence that a discriminatory intent motivated the employer's action." Ibid. Next, "the employer must prove by the preponderance of the evidence that the adverse action would have been taken regardless of retaliatory intent." Id. at 446.

Demotion, termination, and loss in pay or benefits are examples of adverse employment actions for which liability may attach under the LAD. Alexander v. Seton Hall Univ., 204 N.J. 219, 228 (2010) (recognizing that discriminatory termination constitutes an adverse employment action); Roa v. Roa, 200 N.J. 555, 569 (2010) (acknowledging that a claim for retaliatory

discharge is actionable on the day it occurs); Mancini v. Twp. of Teaneck, 349 N.J. Super. 527, 564 (App. Div. 2002) (noting that "assignment to different or less desirable tasks can be sufficient to constitute an adverse employment action[.]"), aff'd, 179 N.J. 425 (2004). An "adverse employment action is not limited to changes in compensation, [but] includes the loss of significant job benefits or characteristics, such as the resources necessary for an employee to do his or her job[.]" Durham Life Ins. Co. v. Evans, 166 F.3d 139, 144 (3d Cir. 1999). However, "being closely supervised or watched does not constitute an adverse employment action that can support a claim under Title VII[.]" See also McKinnon v. Gonzales, 642 F. Supp. 2d 410, 423 (D.N.J. 2009) (quotation and internal quotation marks omitted); Lehmann, supra, 132 N.J. at 600-01 (deeming federal Title VII precedent a "key source of interpretive authority" when resolving LAD claims). Additionally, two main factors indicate the "causal link necessary for retaliation: timing and evidence of ongoing antagonism." Abramson v. William Patterson Coll., 260 F.3d 265, 288 (3d Cir. 2001).

In rejecting plaintiff's retaliation claims, the motion judge determined that: (1) the assignments given to plaintiff were part of his job description; (2) the argument between plaintiff and Fitzpatrick and the repossession of plaintiff's

laptop and key fob were not adverse employment actions; and (3) his termination was not retaliation but the result of operational hardship. As we observed earlier, we cannot conclude that the findings reached by the motion judge were unreasonable. However, the motion judge once again engaged in an evaluation of the evidence in the light most favorable to defendants without consideration of the record in the light most favorable to plaintiff, together with all favorable inferences, as he was required to do at the summary judgment stage of this action. Brill, supra, 142 N.J. at 523.

When the evidence is viewed in that light, the heated argument on the heels of plaintiff's first EEO interview and the repossession of his laptop computer and key fob shortly thereafter, are not, standing alone, adverse employment actions. However, when those incidents are coupled with the fact that his laptop, which he, along with the other Vicinage ITs, were permitted to have to work from home, was never returned, and his request for an additional two or three weeks of unpaid leave was denied, these aggregate facts reveal a series of events that unfolded in temporal proximity to plaintiff's filing of his EEO complaint.

Immediately following his first EEO interview that lasted four hours, plaintiff was called into Fitzpatrick's office,

ostensibly to discuss projects. However, during that impromptu meeting, Fitzpatrick attempted to discuss his EEO complaint. Plaintiff claimed that Fitzpatrick spoke to him in a threatening manner, prompting a second EEO complaint.

Later during the month of June 2007, while out on sick leave, Fitzpatrick, McCarthy, and a sheriff's officer arrived at plaintiff's home to repossess his laptop, ostensibly to investigate a security breach, one day after plaintiff had another interview with the EEO investigator. According to McCarthy, plaintiff's laptop was imaged that very day. Although the suspected security breach called for McCarthy to unexpectedly leave a conference in New York City and go directly to the Vicinage to conduct an investigation, he testified that after the laptop was imaged, he did not actually examine its contents until a "week or two" later, at which point he found "nothing . . . to prove or disprove" the allegations.

Both Perkins and Fitzpatrick testified that the subject of the investigation was another co-worker who later admitted to hacking into the computer. The record does not contain any explanation how plaintiff was tied into the investigation other than Perkins' testimony that "[n]o one was aware why [plaintiff] was accessing the system from home." Yet, Fitzpatrick testified that all of the ITs within the Vicinage had their own laptops

and there was no prohibition against plaintiff having his laptop at home. Further, the fact that plaintiff was given a key fob, which allows access to the Judiciary's email system from remote access, is evidence that plaintiff's possession of the laptop was with permission and presumably given to him with the expectation that, at the very least, he would be checking his emails and responding to emails off-site. Additionally, the record contains an email from plaintiff notifying Fitzpatrick that he would be checking his email while out on leave. No report was ever circulated as a result of the investigation and the laptop and key fob were never returned to plaintiff, interfering with his ability to access his emails from home.

Next, when plaintiff exhausted his paid leave status and sought an additional two to three weeks leave in an unpaid status, returning on October 1 rather than September 10 as directed, defendants denied the request, citing a "significant operational hardship." The record, however, demonstrates that defendants did not fill plaintiff's position until the following year. Although defendants point to budgetary constraints and the hiring of an ITA 1 as the reason for not replacing plaintiff, a jury could reasonably conclude otherwise. Moreover, defendants did not question the validity of plaintiff's medical leave. Plaintiff's request for an

additional two to three weeks of medical leave, albeit without pay, was a request for an accommodation for his then existing medical disability. The record is devoid of any evidence that defendants sought to accommodate this request by engaging in an interactive process with plaintiff. Victor v. State, 203 N.J. 383, 411-12 (2010); Tynan v. Vicinage 13 of Superior Court of N.J., 351 N.J. Super. 385, 400-01 (App. Div. 2002) (explaining that "the employer must initiate an informal interactive process with the employee" to determine what accommodation is necessary).

A jury could reasonably conclude that defendants' termination of plaintiff constituted a legitimate business decision. For purposes of summary judgment, however, we are satisfied plaintiff has established genuinely disputed issues of fact as to whether defendants engaged in discriminatory retaliation prohibited under the LAD. Cortes v. Univ. of Med. & Dentistry of N.J., 391 F. Supp. 2d 298, 314 (D.N.J. 2005) ("Whether UMDNJ's decision to terminate Ms. Cortes is based upon a pretextual reason, in which the true reason was discrimination based on race and/or gender, or due to a motive of retaliation against her for filing previous complaints of discrimination, presents a genuine issue of material fact requiring resolution by a jury.").

Finally, we reject defendants' contention that plaintiff essentially failed to exhaust his administrative remedies when he did not participate in the administrative proceedings terminating his employment. Ordinarily, a party is not required to exhaust administrative remedies before filing an action under the LAD. See Hernandez v. Region Nine Hous. Corp., 146 N.J. 645, 653 (1996); Ensslin v. Twp. of N. Bergen, 275 N.J. Super. 352, 372 (App. Div. 1994), certif. denied, 142 N.J. 466 (1995).

Affirmed as to dismissal of plaintiff's claim for failure to promote to the permanent IT Manager position. Reversed and remanded for trial on plaintiff's hostile work environment and retaliatory discharge claims. Remanded for a Lopez hearing on plaintiff's failure to promote to Acting IT Manager claim.

Affirmed in part, reversed in part, and remanded in part. We do not retain jurisdiction.