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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0427-10T4

KEITH ARMSTRONG,

Plaintiff-Appellant,

v.

CITY OF JERSEY CITY, CITY OF
JERSEY CITY POLICE DEPARTMENT,
and THOMAS J. COMEY, individually
and in his capacity as Chief of
the City of Jersey City Police
Department,

Defendants-Respondents.

Argued October 17, 2011 - Decided January 20, 2012

Before Judges A. A. Rodríguez, Ashrafi and Fasciale.

On appeal from Superior Court of New Jersey,
Law Division, Hudson County, Docket No.
L-4031-08.

Jeffrey D. Catrambone argued the cause for
appellant (Sciarra & Catrambone, L.L.C.,
attorneys; Mr. Catrambone, of counsel and on
the brief).

Stevie D. Chambers, Assistant Corporation
Counsel, argued the cause for respondents
(William C. Matsikoudis, Corporation
Counsel, attorney; Mr. Chambers, on the
brief).

PER CURIAM

Plaintiff Keith Armstrong, a detective employed by the Jersey City Police Department ("the JCPD"), appeals from an order granting summary judgment to defendants and dismissing his discrimination lawsuit. We affirm.

I.

Plaintiff, who is African-American, filed a six-count complaint in 2008 against Jersey City, the JCPD, and Police Chief Thomas Comey. He asserted claims of race discrimination, hostile work environment, and retaliation under the New Jersey Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1 to -49, and also claims of State and federal constitutional violations of his rights to free speech and equal protection. Absent from plaintiff's complaint was any claim that his employment had been terminated, that he had been demoted or passed over for promotion, or that he had lost pay. He alleged that his civil rights were violated because an internal affairs investigation of his off-duty conduct was racially motivated and because defendants had harassed him and retaliated for his complaining about the investigation. According to plaintiff, the discrimination and harassment included denying him the opportunity to remain on the night shift, requiring that he undergo a fitness-for-duty examination, placing him on modified duty, and demeaning him in the presence of others.

In reviewing a grant of summary judgment, we apply the same standard under Rule 4:46-2(c) that governs the trial court. See Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007). We must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Viewed most favorably to plaintiff, the summary judgment record established the following facts.

Plaintiff began working as a Jersey City police officer in 1994. He was promoted to detective in 2004 and was assigned to the major case squad. He had no serious complaints with the JCPD or his supervisors until the internal affairs unit of the JCPD began investigating difficulties he was having with his neighbors.

From 1996 to 2006, the JCPD had received twenty-eight complaints from citizens about plaintiff, an unusually large number. Most of the complaints were from plaintiff's Jersey City neighbors, who were also African-American. The neighbors claimed that plaintiff targeted them for minor infractions in the neighborhood, such as traffic, parking, and municipal snow

removal violations. For example, while off duty in 2005, plaintiff had issued summonses to two neighbors for shoveling snow into the street. Plaintiff had also become involved in an argument with a neighbor about moving a car. On that occasion, plaintiff called police headquarters for help, and uniformed patrol officers arrived. After further argument with the neighbor, plaintiff personally issued motor vehicle tickets to the neighbor, including one for failing to produce a driver's license although the neighbor had displayed his license to the uniformed officers.

In August 2006, an African-American Assistant Prosecutor employed by the Middlesex County Prosecutor's Office complained to the JCPD through a third party about plaintiff's conduct toward her family, who were his neighbors. About the same time, an African-American Jersey City Councilwoman called the JCPD to report problems that plaintiff was having with other neighbors.

As a result of these complaints, Captain Brian O'Callahan of the JCPD internal affairs unit scheduled a meeting with plaintiff for August 11, 2006. Plaintiff later alleged in his discrimination lawsuit that two sergeants who were waiting together with him for the meeting harassed him and acted in an unprofessional and demeaning manner by saying that many neighbors were upset at him and he should consider moving.

The meeting with O'Callahan did not go well. O'Callahan testified in deposition that he told plaintiff he had received complaints and asked plaintiff to explain the circumstances. According to O'Callahan, plaintiff was "defensive and accusatory from the first moment." Plaintiff said that his neighbors were criminals, and they were harassing him. Plaintiff accused several unnamed JCPD officers of incompetence and dereliction of duty in that they had failed to help him when he called for police action in his neighborhood. Plaintiff also accused O'Callahan of attempting to intimidate him at the meeting by slamming plaintiff's internal affairs file on the desk.

Plaintiff testified in deposition that O'Callahan accused him of having "anger issues" and "demeanor problems" and compared him to another officer who had recently been fired as a result of misconduct, which included shooting incidents. Plaintiff considered the comparison to be offensive and racially motivated, although he acknowledged at his deposition that the fired officer was Caucasian. When plaintiff stated to O'Callahan that his neighbors had committed criminal mischief on his property, O'Callahan suggested that plaintiff install cameras to record future incidents. O'Callahan also suggested that plaintiff call his supervisors before engaging in any police function with the neighbors while off duty and that the

JCPD would respond with plainclothes officers. Plaintiff took offense at O'Callahan's advice because he inferred that O'Callahan was suggesting police conduct contrary to proper procedures. He believed that O'Callahan's remarks were racist, that O'Callahan would not have given similar advice to a detective who might have resided in the "Heights."

As a result of the combative meeting, O'Callahan intended to place plaintiff on the JCPD's employee monitoring program. Plaintiff's supervisor in the major case squad, Lieutenant Michael Kelly, objected to O'Callahan's proposed action. O'Callahan decided to investigate the matter further and did not place plaintiff on the monitoring program.

On August 29, 2006, Lieutenant Edward Shinnick and Sergeant Mark Miller visited plaintiff's property and interviewed two of his neighbors about a dispute pertaining to a property line and easement. Plaintiff observed the officers' arrival and went out to his front step as they were speaking to the neighbors. Shinnick directed the neighbors into their residence and went in with them to continue the interview. Miller remained outside and spoke to plaintiff. When Shinnick returned, he offered to shake plaintiff's hand, but plaintiff refused because he believed Shinnick had not been respectful to him. Shinnick appeared upset and shouted at plaintiff to "stop talking" and

also said "I'll deal with you when you get back" to work from vacation. Plaintiff perceived this incident as harassing treatment and believed that race factored into Shinnick's behavior toward him.

In October and November 2006, plaintiff requested permission from Lieutenant Kelly to review his internal affairs file. His November 1, 2006 communication stated that his request was "made in response to ongoing harassing communications" by O'Callahan, Shinnick, Miller, and other officers of the internal affairs unit. Lieutenant Kelly instructed Sergeant Kevin Guy of the major case squad to interview plaintiff about his allegations of harassment. Sergeant Guy later stated that plaintiff refused to provide any specific information about his allegations of harassment, instead referring to pending litigation although no lawsuit had been filed at that time. Sergeant Guy and Police Chief Thomas Comey advised plaintiff to file his complaint with the Jersey City Business Administrator. Plaintiff did not do so because he feared further harassment.

During November 2006 through January 2007, the night shift for the major case squad was terminated, initially because of holiday schedules and subsequently because the number of detectives in the squad decreased. Plaintiff and three other

officers had been working the night shift. During the transitional period, plaintiff requested to remain on night shift duty because of personal hardship. His request was denied. Inspector Kenneth Teschlog, a supervisor in the JCPD, told plaintiff he could permanently transfer out of the major case squad if he so desired. In January 2007, plaintiff was transferred to the North District precinct, where he worked the night shift. Plaintiff alleged in his lawsuit that his request to remain on the night shift was initially denied because of racial discrimination.

On December 19, 2006, plaintiff became involved in an argument with a neighbor. According to plaintiff, he witnessed an accident in front of his house and reported it to police headquarters. Plaintiff testified at his deposition that the neighbor threatened him for unknown reasons. Several JCPD officers arrived, and the neighbor was arrested for making terroristic threats. Meanwhile, another neighbor whom Lieutenant Shinnick had previously interviewed called Shinnick and accused plaintiff of instigating an unjust arrest in the neighborhood. Shinnick monitored the police radio transmissions of the incident. Plaintiff testified in deposition that the officers on the scene learned that internal affairs was listening to their communications, and the officers decided to

release the arrested neighbor on a summons after conferring with their superior officer. Plaintiff alleged that Shinnick's interference with the police arrest was motivated by racial bias against him.

Two days after that incident, on December 21, 2006, Captain O'Callahan issued a report to Chief Comey requesting that plaintiff be ordered to undergo a fitness-for-duty examination. In early January 2007, Chief Comey ordered plaintiff to undergo a psychological examination to determine whether he could continue to serve as a detective.

On January 8, 2007, plaintiff was examined by Doctor Guillermo Gallegos at the Institute for Forensic Psychology, which conducts all psychological examinations for the JCPD. The testing consisted of an extensive diagnostic interview, psychological tests, and review of plaintiff's internal affairs record. In his report to O'Callahan, Dr. Gallegos described plaintiff as rigid, authoritarian, and suspicious. He stated that plaintiff demonstrated "blurred boundaries between his interests as a private citizen, and [the] responsibilities of a police officer," and the doctor was concerned with plaintiff's "apparent proclivity to use the authority of his role as a police officer to exert punishment on those he perceives as having crossed him in any way in his private life." Dr.

Gallegos concluded that plaintiff was not fit for regular duty and recommended that he be assigned to light duty.

Chief Comey placed plaintiff on modified duty on January 18, 2007, and ordered that he attend psychotherapy over six months before he would be reinstated to regular duty as a detective. Plaintiff was assigned to the Alcohol and Beverage Control ("ABC") squad and ordered to surrender his service weapon. O'Callahan testified in deposition that officers who were found unfit for duty were placed on modified duty rather than administrative leave so that they could continue to receive their salary. Plaintiff remained on modified duty until Dr. Gallegos issued a report on July 30, 2007, recommending that plaintiff could return to his regular assignment. Plaintiff was transferred back to his prior shift in the North District precinct in August 2007.

Plaintiff alleged in his discrimination complaint that he learned in February 2007 that internal affairs complaints about him were being circulated around the JCPD and that some unknown person referred to him as "the angry black guy." Plaintiff never saw such a circulated report or heard the quoted reference, but he was told about them by another detective.

Plaintiff also alleged that he submitted a request for overtime in March 2007 while on the ABC squad, but the request

was never answered. Other ABC officers were receiving overtime, but plaintiff did not know whether officers on modified duty were eligible for overtime.

While on modified duty, plaintiff learned that there had been a development in a cold case that he had worked on while with the major case squad. Plaintiff asked Lieutenant Kelly for permission to attend at the site of the investigation. Kelly obtained approval from Inspector Teschlog but was told to stay with plaintiff at all times while at the site. The same day, plaintiff overheard a related conversation between Inspector Teschlog and Sergeant Scerbo about driving plaintiff to the site. Scerbo told Teschlog not to worry, that he would "get a signed receipt for [plaintiff] when [he] get[s] over there." Plaintiff took offense at this remark and considered it demeaning. He complained to his supervisor at the ABC unit about the remark, and Scerbo subsequently apologized to him.

While at the site of the investigation on April 2, 2007, plaintiff began walking away from Lieutenant Kelly, and Kelly told him to "come back over" and to "stay next to [him] where [he could] see [him], just in case [Teschlog] comes by looking for you." Plaintiff was extremely embarrassed by Kelly's remarks.

In May 2007, plaintiff complained to his commanding officers at the ABC squad that his duties were unduly restricted as a result of the internal affairs investigation. O'Callahan wrote to plaintiff that his restrictions were consistent with the Police Chief's recommendation. Plaintiff then submitted a four-page memorandum to his ABC supervisor on July 6, 2007, in which he referred to the events we have described. For the first time in a communication with JCPD officials, plaintiff said that he was being discriminated against because of his race. One year later, plaintiff filed his discrimination lawsuit.

II.

For employment discrimination claims, a burden-shifting analysis is usually applied as established by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010); Zive v. Stanley Roberts, Inc., 182 N.J. 436, 447 (2005). Under that analysis:

- (1) the plaintiff must come forward with sufficient evidence to constitute a prima facie case of discrimination;
- (2) the defendant then must show a legitimate non-discriminatory reason for its decision; and
- (3) the plaintiff must then be given the opportunity to show that defendant's stated

reason was merely a pretext or discriminatory in its application.

[Dixon v. Rutgers, The State Univ. of N.J., 110 N.J. 432, 442 (1988).]

The elements of a plaintiff's prima facie case will "vary depending upon the particular employment discrimination claim being made." Victor v. State, 203 N.J. 383, 409-10 (2010). In a claim of disparate treatment, the plaintiff's prima facie burden requires evidence that: (1) plaintiff belongs to a protected class; (2) plaintiff was performing his job at a level that met his employer's legitimate expectations; (3) plaintiff suffered an adverse employment action; and (4) others not within the protected class did not suffer similar adverse employment actions. El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 167 (App. Div. 2005). The evidentiary burden of proving a prima facie case is "'rather modest.'" Zive, supra, 182 N.J. at 447 (quoting Marzano v. Computer Sci. Corp., 91 F.3d 497, 508 (3d Cir. 1996)). A plaintiff must only demonstrate that "'discrimination could be a reason for the employer's action.'" Ibid.

If a claimant presents such a prima facie case under the McDonnell Douglas test, the burden shifts to the employer to produce evidence of a legitimate, non-discriminatory reason for its action. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S.

133, 142, 120 S. Ct. 2097, 2106, 147 L. Ed. 2d 105, 117 (2000); Jansen v. Food Circus Supermarkets, Inc., 110 N.J. 363, 382 (1988); Barbera v. DiMartino, 305 N.J. Super. 617, 634 (App. Div. 1997), certif. denied, 153 N.J. 213 (1998).

Once the employer produces evidence of a non-discriminatory reason, the burden of persuasion shifts back to the plaintiff to prove by a preponderance of the evidence that the employer's asserted reason was only a pretext or that the action was otherwise discriminatory. See Reeves, supra, 530 U.S. at 146-47, 120 S. Ct. at 2108-09, 147 L. Ed. 2d at 119-20; Jansen, supra, 110 N.J. at 382; see also N.J.R.E. 101(b)(1) and (2) (defining "burden of persuasion" and "burden of producing evidence").

In this case, our recitation of the relevant facts reveals the weaknesses of plaintiff's claims. Although plaintiff believed the actions of JCPD supervisors and officers were motivated by racial bias and retaliation, he presented no evidence that he was treated any differently from other employees because of his race. He can point to no actual evidence of disparate treatment of him as an African-American, or retaliation for his complaints. Moreover, the legitimate, non-discriminatory reasons for defendants' actions are manifest in the record, and plaintiff has no evidence by which a rational

jury could be persuaded that those reasons were a pretext for racial discrimination.

Plaintiff has presented nothing but his subjective feelings to indicate that the internal affairs investigation by Captain O'Callahan and Lieutenant Shinnick was motivated by his race. No evidence in the record tends to show that a police detective of another race would have been treated differently from the treatment of plaintiff. The internal affairs unit was obligated to investigate the numerous complaints brought by plaintiff's neighbors. Plaintiff has no evidence of racial animus and motivation in the initiation or conduct of the investigation.

Nor was evidence presented to establish that ordering plaintiff to undergo a fitness-for-duty examination and his temporary assignment to modified duty were adverse employment actions motivated by racial or retaliatory reasons. Defendants presented evidence that Chief Comey had ordered fifty-one fitness-for-duty examinations and that he had placed fifty-six officers on modified duty in about a five-year period. Plaintiff was not treated differently from other employees.

Moreover, plaintiff was not terminated or demoted, and he did not lose any pay. After six months of modified duty, he was restored to his prior position as a detective in the North District precinct. The evidence in this case was a far cry from

that described in Donelson v. DuPont Chambers Works, 206 N.J. 243, 249-50, 258 (2011), where the plaintiff in a whistle-blower lawsuit alleged that his employer had made false accusations of misconduct against him, gave him negative performance reviews, unjustifiably suspended him, and required three independent and pretextual mental-health evaluations before allowing him to return to work. The employer's conduct in Donelson had caused the plaintiff to suffer a mental breakdown and rendered him unfit for continued employment. In this case, considering the undisputed record that numerous citizens' complaints had been made against plaintiff, the actions of the JCPD were not evidence of disparate or retaliatory treatment. Plaintiff never refuted the legitimate, non-discriminatory reasons for the JCPD's actions.

With respect to his claim of hostile work environment, plaintiff was required to show: (1) that the harassing conduct would not have occurred "but for" the fact that he is African-American, and that (2) the conduct was so severe or pervasive that (3) a reasonable African-American person would believe that (4) "the conditions of employment are altered and the working environment is hostile or abusive." Cutler v. Dorn, 196 N.J. 419, 430 (2008) (quoting Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 603-04 (1993)). In Cutler, the Court confirmed that the

assessment of the allegedly harassing conduct must be from an objective point of view, rather than the plaintiff's subjective beliefs. Id. at 431.

In this case, plaintiff alleges that the internal affairs investigation itself caused a pervasively hostile environment for him to perform his job. But the JCPD acted lawfully and indeed was obligated to investigate the citizens' complaints. The fact that the JCPD investigated plaintiff's conduct while off duty could not itself establish a hostile work environment in violation of the LAD, given the undisputed evidence of numerous citizen complaints against plaintiff.

An actionable claim for a discriminatory hostile work environment frequently arises from repeated incidents that take place over time and by their cumulative effect make it unreasonable and unhealthy for the plaintiff to remain in that work environment. Caggiano v. Fontoura, 354 N.J. Super. 111, 126 (App. Div. 2002). A single event can also be so patently offensive that it could constitute severe conduct and prove a hostile work environment. Taylor v. Metzger, 152 N.J. 490, 499 (1998). It is, however, a "rare and extreme case in which a single incident will be so severe that it would, from the perspective of a reasonable [person], make the working environment hostile." Lehmann, supra, 132 N.J. at 606–07.

Summary judgment should be granted when the plaintiff fails to show that the complained of conduct occurred as a result of his protected classification, such as his race. See El-Sioufi, supra, 382 N.J. Super. at 180. Merely relying on his subjective belief that comments and conduct were racially motivated is not sufficient. See Lehmann, supra, 132 N.J. at 612. Plaintiff's allegations of harassment are neither tied to evidence of racial animus nor so pervasive or severe that a reasonable African-American would view them as hostile racial discrimination rather than unpleasant aspects of his job.

Other than the rumored reference to plaintiff as "the angry black guy," the remarks that plaintiff alleges were harassing and hostile had no racial content. Plaintiff was offended because he believed he was disrespected as a law enforcement officer, but such offense does not equate with a racially-hostile work environment. See id. at 606. Plaintiff did not present any evidence of racial motivation in O'Callahan's investigation of his neighbors' complaints, Shinnick's yelling at him for attempting to participate in the questioning of his neighbors, Shinnick's monitoring of police transmissions, Comey's referral of plaintiff for a fitness-for-duty examination, Teschlog's order that plaintiff stay near supervisors while at the site of an investigation and Kelly's

resulting remark to plaintiff to stay nearby, or Scerbo's sarcastic comment that he would "get a signed receipt" for plaintiff after taking him to the site of the investigation. Viewed objectively and reasonably, these incidents and remarks were racial discrimination and harassment only in plaintiff's opinion; they clearly were not severe or pervasive, racially-hostile events. See Herman v. Coastal Corp., 348 N.J. Super. 1, 19-23 (App. Div.), certif. denied, 174 N.J. 363 (2002).

With respect to "the angry black guy" characterization, even if that remark could be equated to the highly offensive racial slur that prompted the Court's decision in Taylor, supra, 152 N.J. at 495, plaintiff did not produce admissible evidence that the remark was actually made or heard by internal affairs investigators or other supervisors. At best, his evidence demonstrated a rumor revealed by the hearsay statement of another detective. Assuming that plaintiff could prove at a trial that the comment was made by some unknown person, insensitive remarks by co-workers are not sufficient for a claim of discrimination. For a plaintiff to have a claim of hostile work environment, the employer or its supervisors must either participate in or fail to take action to prevent such remarks. See Herman, supra, 348 N.J. Super. at 26-27; Tyson v. CIGNA Corp., 918 F. Supp. 836, 840-41 (D.N.J. 1996), aff'd, 149 F.3d

1165 (3d Cir. 1998). In the absence of racial epithets or similar derogatory remarks about plaintiff that were known to supervisors, plaintiff cannot prove that such a hostile work environment was permitted to exist at the JCPD that a reasonable African-American detective would have considered the working conditions to be hostile, abusive, and racially discriminatory.

Plaintiff also failed to produce a prima facie case of retaliation under the LAD. The LAD makes it a violation:

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 . . . under this act, or to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of . . . any right granted or protected by this act.

[N.J.S.A. 10:5-12d.]

To prove retaliation, plaintiff must show a causal link between his activity that was protected by the LAD and an adverse employment action. Victor, supra, 203 N.J. at 409.

Here, the adverse employment actions alleged by plaintiff occurred from August 2006 through the spring of 2007. Yet, it was only after the spring of 2007 that plaintiff communicated to JCPD supervisors that he believed those actions were racially motivated. Before then, plaintiff alleged harassment, but not that he was being discriminated against because of his race. He did not allege racial discrimination when he requested his

internal affairs file in November 2006, and he declined to explain his allegations of harassment to Sergeant Guy, who was assigned to interview him. Chief Comey and Sergeant Guy advised plaintiff to file his complaints with the Jersey City Business Administrator, but he did not do so. Only in July 2007, when he wrote his four-page complaint to his ABC supervisor did plaintiff allege racial discrimination. The acts of harassment and retaliation that plaintiff alleges in this lawsuit preceded that complaint. Especially because the racial discrimination alleged was a subjective belief of plaintiff rather than overt and readily recognizable acts of racial hostility, there could be no retaliation for activity of plaintiff protected by the LAD until he actually complained.

Finally, plaintiffs' claims of equal protection violations were without merit for the same reasons as his claims under the LAD. His claim that defendants violated his constitutional right of free speech lacks sufficient merit for discussion in a written opinion. R. 2:3-11(e)(1)(E).

Affirmed.

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


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