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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0462-11T2

LUIS PAULINO,

Plaintiff-Appellant,

v.

MERRILL LYNCH, PIERCE, FENNER
& SMITH INC., a/k/a MERRILL LYNCH
& CO., INC.,

Defendant-Respondent.

Submitted September 19, 2012 - Decided October 4, 2012

Before Judges Sabatino and Fasciale.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-9397-09.

Piro, Zinna, Cifelli, Paris & Genitempo, P.C., attorneys for appellant (Alan Genitempo, on the brief).

McElroy, Deutsch, Mulvaney & Carpenter, LLP, attorneys for respondent (Francis X. Dee, of counsel and on the brief; Jane A. Rigby and Linda B. Celauro, on the brief).

PER CURIAM

Plaintiff Luis Paulino appeals from an order granting summary judgment to Merrill Lynch, Pierce, Fenner & Smith, Inc., a/k/a Merrill Lynch & Co., Inc., (defendant) dismissing his complaint alleging race and national origin employment

discrimination, hostile work environment, and retaliatory discharge, in violation of the New Jersey Law Against Discrimination (the LAD), N.J.S.A. 10:5-1 to -49. We affirm.

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, an immigrant from the Dominican Republic, worked for defendant as a machine operator at defendant's facility in Piscataway for approximately eleven and a half years. He received a raise nearly every year and a bonus every year, including a month before he was laid off.[1] In August 2008, Bank of America acquired defendant and, as a result, defendant commenced a work-force reduction at the Piscataway location. In

[1] Plaintiff admitted that he did not receive raises in 2002 and 2003 due to "the problems with the Twin Towers."

January 2009, defendant notified plaintiff that his position would be eliminated effective March 27, 2009 as part of the reduction. Although plaintiff did not work for defendant after January 2009, defendant paid him full wages and benefits through June 28, 2009. By November 2010, defendant closed the facility.

In April 2005, plaintiff and sixteen other individuals had filed a lawsuit (the 2005 lawsuit) against defendant.[2] In November 2008, the court severed the 2005 lawsuit, requiring that each individual file a new complaint. The severance order required that each complainant "set[] forth [in the new complaints] the allegations that only he or she has [against defendant]," and that each new complaint "shall be deemed to have been filed as of the filing date of [the 2005 lawsuit], which is April 29, 2005." In November 2009, plaintiff filed his complaint (the 2009 complaint) against defendant.

To support his claims of discrimination, hostile work environment, and retaliatory discharge, plaintiff alleged that defendant (1) denied him light duty work in the aftermath of a 2002 back injury; (2) changed his 2003 midyear performance evaluation by adding unfavorable ratings; (3) issued him

[2] The allegations generally included hostile work environment, retaliation, and adverse employment actions against Hispanic employees, in violation of the LAD.

disciplinary warnings for failure to perform work; (4) issued him a lower raise in 2005 compared to non-Hispanic employees; (5) failed to issue a raise with corresponding grade level changes; (6) issued a rating change on his 2005 performance evaluation; (7) gave a lower raise to him than to those at lower pay levels; (8) allowed a supervisor to yell at him in August 2006; (9) denied him a promotion to a quality control position; (10) criticized his attitude in November 2007; (11) issued him an unfair performance evaluation in 2007; (12) issued a warning to him in 2008 for attempting to recruit other employees to make complaints against supervisors; and (13) terminated him.

In April 2011, defendant moved for summary judgment and argued that plaintiff's claims under the LAD were time-barred; that plaintiff failed to establish a prima facie case of employment discrimination, hostile work environment, and retaliatory discharge; and that plaintiff failed to take advantage of its anti-discrimination policies and complaint procedures.

The judge conducted oral argument, granted defendant's motion, and issued a comprehensive fifteen-page written opinion dated August 17, 2011. The judge meticulously addressed each of plaintiff's thirteen allegations separately, rather than considering them as a pattern of discriminatory conduct, and

concluded that plaintiff failed to establish a prima facie case of employment discrimination, hostile work environment, or retaliatory discharge. This appeal followed.

On appeal, plaintiff argues that the judge erred by failing to (1) consider "all of the evidence together" as a pattern of discriminatory conduct, rather than addressing each alleged incident separately; and (2) view the evidence in the light most favorable to him. Defendant maintains that plaintiff's claims are time-barred and plaintiff failed to establish a prima facie case under the LAD.

At the outset, we reject defendant's contention that plaintiff's employment claims are time-barred. Although LAD claims are typically subject to a two-year statute of limitations, see Montells v. Haynes, 133 N.J. 282, 292-93 (1993), an exception exists where a plaintiff is subject to a pattern of discriminatory conduct, see Shepherd v. Hunterdon Developmental Ctr., 174 N.J. 1, 6-7, 23-24 (2002) (involving a hostile work environment claim);[3] see also Alexander v. Seton Hall Univ., 204 N.J. 219, 235 (2010) (holding that "[e]ach payment of . . . discriminatory wages . . . constitutes a renewed separable and actionable wrong that is remediable under

[3] Here, plaintiff's hostile work environment claims and claims of adverse employment actions are intertwined.

the LAD"). Under the "continuing violation" doctrine, a plaintiff "may pursue a claim for discriminatory conduct if he or she can demonstrate that each asserted act by a defendant is part of a pattern and at least one of those acts occurred within the statutory limitations period." Shepherd, supra, 174 N.J. at 7. Giving plaintiff all favorable inferences that the alleged discriminatory acts were part of a pattern or plan, as we must at this stage of the litigation, see Brill, 142 N.J. at 540, we treat plaintiff's claims as timely because at least one of the alleged events occurred within two years of the filing of the 2005 lawsuit.

I.

We begin by summarizing the applicable provisions of the LAD. "The purpose of the LAD is to eradicate discrimination." Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 604-05 (1993). The LAD prohibits discrimination on the basis of race or national origin. Specifically, N.J.S.A. 10:5-12 provides:

> It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination:
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> a. For an employer, because of the race, creed, color, national origin, ancestry, age, marital status . . . of any individual . . . to refuse to hire or employ or to bar or to discharge or require to retire, unless justified by lawful considerations other than age, from employment such individual or to discriminate against such individual in

> compensation or in terms, conditions or privileges of employment . . . .

The traditional methodology applied to claims of employment discrimination is the burden-shifting test 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); see Myers v. AT&T, 380 N.J. Super. 443, 452-53 (App. Div. 2005), certif. denied, 186 N.J. 244 (2006). The McDonnell Douglas test requires:

> (1) proof by the plaintiff of the prima facie elements of discrimination; (2) production by the employer of a legitimate, non-discriminatory reason for the adverse employment action; and (3) demonstration by plaintiff that the reason so articulated is not the true reason for the adverse employment action, but is instead a pretext for discrimination.
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> [Myers, supra, 380 N.J. Super. at 452 (citing McDonnell Douglas, supra, 411 U.S. at 802, 93 S. Ct. at 1824, 36 L. Ed. 2d at 677).]

The evidentiary burden for proving a prima facie case of discrimination is "'rather modest.'" Zive v. Stanley Roberts, Inc., 182 N.J. 436, 447 (2005) (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. (quoting Marzano, supra, 91 F.3d at 508). Such a prima facie case includes four elements:

> (1) [plaintiff] was in a protected class; (2) [plaintiff] was performing [his or her] job at a level that met the employer's legitimate expectations; (3) [plaintiff] was nevertheless discharged;[4] and (4) the employer sought someone else to perform the same work after [he or she] left.
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> [DeWees v. RCN Corp., 380 N.J. Super. 511, 523 (App. Div. 2005).]

If a plaintiff presents such a prima facie case under the McDonnell Douglas construct, a burden of production, not the ultimate burden of persuasion or proof, is placed on the defendant. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142, 120 S. Ct. 2097, 2106, 147 L. Ed. 2d 105, 117 (2000); Barbera v. DiMartino, 305 N.J. Super. 617, 634 (App. Div. 1997), certif. denied, 153 N.J. 213 (1998); see also N.J.R.E. 101(b)(1), (2) (defining these terms). Thus, once competing evidence is produced by a defendant, it becomes the plaintiff's burden under the McDonnell Douglas test to persuade the jury, through either evidence of the discrimination itself or by proof that the employer's asserted business reasons were only a pretext, that the discrimination actually happened. Reeves, supra, 530 U.S. at 146-47, 120 S. Ct. at 2108-09, 147 L. Ed. 2d at 119-20; see also DeWees, supra, 380 N.J. Super. at 523-24.

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[4] Or, as in this case, was subject to discriminatory treatment. Cf. Zive, supra, 182 N.J. at 447 (applying the four-prong prima facie case in the context of discriminatory hiring).

Applying these principles of law, we conclude that plaintiff failed to establish a prima facie case of employment discrimination regarding any of his claims, whether considered separately or as a pattern of conduct by defendant. Plaintiff is unable to show that he met defendant's expectations, defendant replaced him, or that defendant's employment action was a pretext for discrimination.

In several instances, plaintiff failed to demonstrate credibly that he was performing at a level that "met the employer's legitimate expectations." DeWees, supra, 380 N.J. Super. at 523. For example, he (1) admitted that he may have taken six unscheduled days off, which entitled defendant to issue a lower evaluation in 2003; (2) conceded that he did not complete the work requested by his supervisors, which warranted a written warning; (3) received low performance review ratings in 2007 because he did not meet his supervisors' work-related expectations and possessed a bad attitude; and (4) failed to comply with defendant's complaint procedures, which resulted in the issuance of another warning. There is sufficient, uncontradicted evidence in the record that by November 2007

plaintiff was not performing his job to the satisfaction of his employer.[5]

Furthermore, plaintiff has not proven that he was subjected to discriminatory conduct. For example, plaintiff provides no credible evidence that he received a raise lower than non-Hispanic workers, or that he requested, was entitled to, and was denied light duty work. Additionally, plaintiff was not eligible to receive a promotion because, admittedly, he was not fluent in English and fluency was a prerequisite for the position in question.

Finally, plaintiff has not shown that defendant's employment action was a pretext for discrimination. As the indisputable result of a merger, defendant commenced a company-wide reduction in work force at the Piscataway facility. Although some of the employees were relocated, non-Hispanic employees were laid off, including plaintiff's former boss. Thus, there is insufficient evidence that defendant

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[5] We reject defendant's argument that plaintiff abandoned his raise and evaluation claims for failure to address them before the judge. Although a claim may be considered abandoned when a party bearing the burden of proof fails to pursue or argue it below, see Bailey v. Driscoll, 34 N.J. Super. 228, 242 (App. Div.), aff'd in part, rev'd in part on other grounds, 19 N.J. 363 (1955); accord Mandel, New Jersey Appellate Practice ch. 33:4-1 (2011), plaintiff's counsel raised the claims in his certification to the judge, attaching deposition testimony that related to these pleaded contentions.

discriminated against Hispanics. And, plaintiff is unable to establish that anyone was hired to replace him. See Shelcusky v. Garjulio, 172 N.J. 185, 207 (2002) (noting that bare assertions, unsupported by affidavits, are insufficient to overcome a meritorious summary judgment motion).

II.

Plaintiff contends that his thirteen separate claims, taken together, support his allegation that defendant subjected him to a hostile work environment. We disagree.

To demonstrate a claim of hostile work environment, plaintiff must show: (1) that the harassing conduct would not have occurred "but for" the fact that he is Hispanic, and that (2) the conduct was so severe or pervasive that (3) a reasonable Hispanic 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, supra, 132 N.J. at 603-04). In Cutler, the Court confirmed that an objective assessment of the allegedly harassing conduct must be made, rather than examining the plaintiff's subjective beliefs or a defendant's intent. Id. at 431.

An actionable claim for hostile work environment discrimination frequently arises from repeated incidents that

take place over time and, through their cumulative effect, make it unreasonable and unhealthy for a 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.

Courts must review claims of hostile work environment in light of the totality of circumstances. El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 178 (App. Div. 2005); see also Cutler, supra, 196 N.J. at 431. The inquiry here is whether a reasonable person of plaintiff's protected class, a Hispanic, would consider the alleged discriminatory conduct "'to be sufficiently severe or pervasive to alter the conditions of employment and create an intimidating, hostile or offensive working environment.'" El-Sioufi, supra, 382 N.J. Super. at 178 (quoting Heitzman v. Monmouth Cnty., 321 N.J. Super. 133, 147 (App. Div. 1999)).

The court must "evaluate severity and pervasiveness by considering the conduct itself rather than the effect of the

conduct on any particular plaintiff." Id. at 178-79. The factors to be considered include "'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" Shepherd, supra, 174 N.J. at 19-20 (quoting Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 116, 122 S. Ct. 2061, 2074, 153 L. Ed. 2d 106, 124 (2002)). "[T]he plaintiff need not personally have been the target of each or any instance of offensive or harassing conduct," and harassing conduct directed towards other employees is relevant to the determination of whether a plaintiff would perceive a work environment as hostile. Lehmann, supra, 132 N.J. at 611.

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 harassing remarks. See Tyson v. CIGNA Corp., 918 F. Supp. 836, 840-41 (D.N.J. 1996), aff'd, 149 F.3d 1165 (3d Cir. 1998); Shepherd, supra, 174 N.J. at 26-27. There is no such credible evidence here, even viewing the record in the light most favorable to plaintiff.

Plaintiff provides no evidence that his supervisors ignored his complaints or made racially insensitive comments about

Hispanics.[6] In fact, there is insufficient evidence to show that plaintiff complained to individuals in the human resources department, or to any manager, about racial discrimination. Again, plaintiff cannot rely on unsupported assertions to overcome defendant's summary judgment motion. See Shelcusky, 172 N.J. at 207.

Moreover, even considering his thirteen allegations together, the alleged conduct was not "severe or pervasive" enough to warrant a finding that the work environment was hostile, including any comments superiors may have made in the presence of other Hispanics, but not witnessed by plaintiff. As the judge noted, comments allegedly made in the presence of other Hispanics do not legally bear on whether defendant created a hostile work environment. See Lehmann, supra, 132 N.J. at 611 (noting that "[e]vidence of . . . harassment directed at other women is relevant to both the character of the work environment and its effects on the complainant," but only when that female plaintiff witnesses the harassment).

[6] He alleged that one individual mentioned to people in the mail department that "new brains and new ideas are needed," and later stated that he would only hire "people who were of sound mind and knew how to think." Plaintiff did not demonstrate how these alleged comments are racially motivated.

III.

Regarding plaintiff's retaliation claim, pursuant to the LAD, it is unlawful:

> 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.
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> [N.J.S.A. 10:5-12(d) (emphasis added).]

To establish a prima facie case of such unlawful retaliation, a plaintiff must demonstrate that (1) he engaged in a protected activity with defendant's knowledge; (2) he was subsequently terminated or suffered adverse employment actions; and (3) there is a causal link between (1) and (2). Romano v. Brown & Williamson Tobacco Corp., 284 N.J. Super. 543, 548-49 (App. Div. 1995); accord Kluczyk v. Tropicana Prods., Inc., 368 N.J. Super. 479, 493 (App. Div. 2004). In determining whether a "causal link" exists, courts consider, among other things, the proximity in time between the protected conduct and the adverse action. Cf. Romano, supra, 284 N.J. Super. at 550.

Once the plaintiff has demonstrated a prima facie case, the defendant must establish a "legitimate, non-retaliatory"

explanation for the termination or adverse action. Id. at 549. Finally, the plaintiff must present evidence of the defendant's "discriminatory motive" in order to prove that the explanation offered is "merely a pretext for the underlying discriminatory motive." Ibid. "In the context of surviving summary judgment, plaintiff need only raise a genuine issue of fact with regard to the employer's actual motive." Id. at 551.

Even if plaintiff were able to establish a prima facie case, which he has not done, defendant would still have been entitled to prevail because it had a legitimate, non-retaliatory explanation for terminating plaintiff, and plaintiff presented no credible evidence that defendant's explanation was pretextual. Moreover, plaintiff made no complaints to defendant about discrimination – that is, plaintiff did not engage in a protected LAD activity that might have triggered retaliatory action. Although plaintiff complained several times to defendant's human resources department, his complaints were not related to racial discrimination.

We reject the notion that defendant fired plaintiff because he was one of the sixteen individuals who filed the 2005 lawsuit. The lapse in time between the 2005 complaint and the 2009 firing, in addition to the systematic layoffs arising from the merger, indicates that there is no "causal link" between the

two events. See Romano, supra, 284 N.J. Super. at 548–50. Regardless of whether the 2005 action is considered as the predicate protected activity, defendant established a legitimate, non-retaliatory explanation for the termination, and plaintiff failed to show that his termination was pretextual. Instead, he makes bare allegations that defendant hired three people to replace him. One of the employees who allegedly "replaced" plaintiff is Hispanic. These unsubstantiated allegations are inadequate to overcome summary judgment under the Brill standard.

We have reviewed the record and briefs of counsel and conclude that plaintiff's remaining arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.