NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0359-14T4

RHONDA HOBSON,

Plaintiff-Appellant,

v.

MSO ISAAC TREMMEL, individually and as servant, agent and/or employee of defendant, ANN KLEIN FORENSIC CENTER, JUDY CRAWFORD, NURSING DIRECTOR, individually and as agent, servant and/or employee of defendant, ANN KLEIN FORENSIC CENTER, MARION WATKINS, DIRECTOR OF MEDICAL SECURITY, individually and as agent and/or employee of defendant ANN KLEIN FORENSIC CENTER, and ANN KLEIN FORENSIC CENTER, individually its agents, servants, and/or employees,

Defendants-Respondents.

Argued September 16, 2015 – Decided September 30, 2015

Before Judges Alvarez, Ostrer and Haas.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-2296-13.

Michael E. McMahon argued the cause for appellant (Miller & Gaudio, P.C., attorneys; Frank S. Gaudio, on the brief).

Jennifer I. Fischer, Deputy Attorney General, argued the cause for respondents (John J. Hoffman, Acting Attorney General, attorney; Melissa H. Raksa, Assistant

Attorney General, of counsel; Ms. Fischer, on the brief).

PER CURIAM

Plaintiff Rhonda Hobson appeals from the Law Division's August 4, 2014 order granting summary judgment to defendants and dismissing her complaint alleging that defendants violated the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, by subjecting her to a hostile work environment, sexual harassment, and retaliation.[1] We affirm.

I.

The following facts are derived from the evidence submitted by the parties in support of, and in opposition to, the summary judgment motion, viewed in a light most favorable to plaintiff, the non-moving party. Polzo v. Cty. of Essex, 209 N.J. 51, 56 n.1 (2012) (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995)).

Ann Klein Forensic Center (AKFC) is a 200-bed psychiatric hospital serving a patient population that requires a secured environment. As a State facility, AKFC is subject to the State's Equal Employment Opportunity (EEO) policy, "the New Jersey State Policy Prohibiting Discrimination in the Workplace." In addition to the State's EEO policy, AKFC has

[1] Plaintiff also asserted claims for common law battery and intentional infliction of emotional distress.

implemented a supplemental in-house policy prohibiting discrimination in the workplace. AKFC gives each of its employees a copy of these policies and provides in-house training during orientation. Employees also receive regular refresher training and updates on the policies.

AKFC's policy on discrimination in the workplace states that "[a]ll forms of unlawful employment discrimination . . . are prohibited and will not be tolerated . . . ." The policy further states that "[a]ll employees have the right and are encouraged to immediately report any violations of State Policy Prohibiting Discrimination in the Workplace." Information is provided in the policy on the reporting process employees should follow if they perceive they are the victims of discrimination.

On January 23, 2006, plaintiff began working as a charge nurse at AKFC. Plaintiff received copies of the policies prohibiting discrimination in the workplace and she attended regular training classes concerning these policies.

Prior to February 17, 2010, plaintiff alleged that defendant Isaac Tremmel,[2] a medical security officer employed by AKFC, sexually harassed her while the two were working in the hospital. When asked to provide the dates of any incidents of

[2] Defendant Tremmel is sometimes referred to as "Trammell" in the depositions. We refer to him as "Tremmel" in this opinion in order to be consistent with the pleadings filed by the parties.

sexual harassment, however, plaintiff could not do so. Plaintiff testified at her deposition that Tremmel asked her out "once or twice" and she refused. Plaintiff also asserted that Tremmel "leered" at her "[e]very time" he saw her at work. However, she stated that Tremmel "never made any unwanted sexual remarks to" her. Plaintiff did not report any of these alleged incidents to her supervisors.

In addition, plaintiff alleged that, on one occasion, Tremmel "came into the team room" and stood in her path. As she "went to go around him[,]" plaintiff stated that Tremmel "grabbed me, picked me up[,] and walked me back in the other direction of the door that I was trying to get out of." Tremmel did not say anything to plaintiff during this incident, and plaintiff did not report it to her supervisors.

Director of Nursing Crawford was one of plaintiff's supervisors at AKFC. At her deposition, Crawford stated that "[a]nyone who hears" about an incident of sexual harassment was required to report it to a supervisor. Prior to February 17, 2010, Crawford testified that plaintiff never advised her of any of her encounters with Tremmel and had never alleged that she was being subjected to sexual harassment. No other employees ever complained to Crawford about Tremmel.

When asked about Tremmel's behavior on the job, Crawford testified that Tremmel "acts silly a lot. He's been silly for years. Silly behavior." As an example of this "silly behavior," Crawford stated that she saw Tremmel "pass one of the nurses one day and yell[], 'I'm going to marry you.'" Crawford also stated that "[s]ometimes" Tremmel would "go over and hug some people and they allow him to. Nobody -- well, some people just say, 'Get Lost,' or 'Get out of here,' and he does. But some people allow him to be friendly like that."

Crawford testified that Tremmel would sometimes stand in the way of employees and block their paths. On approximately two occasions, Tremmel did this to her. Crawford described Tremmel as "one of those guys if he sees you get annoyed that he'll keep doing something to be irritating, like that kind of personality." Crawford never heard Tremmel make any "[s]exually suggestive remarks" and had never seen him "leer[] at a woman[.]"

On February 17, 2010, plaintiff went into the glass-enclosed control room, which looks out onto the unit where the patient rooms are located. There are portholes in the glass walls through which personnel in the control room may speak to patients on the other side. Tremmel and another officer were in

the control room talking when plaintiff arrived.[3] Plaintiff told Tremmel she needed to interview a patient and Tremmel called the patient to the porthole.

After completing her interview, plaintiff turned to leave the control room. At that point, plaintiff alleged that Tremmel "got up" and "stood in front of the doorway[.]" Plaintiff told Tremmel that she needed to leave, but he said nothing in response and "just leered at [plaintiff] standing there in the doorway." Tremmel then walked toward plaintiff, pinned her arms down by her sides, walked her backwards, and then bent her "backwards over the desk and proceeded to lay his body on top of" plaintiff. Plaintiff stated she "was screaming for help and yelling for [Tremmel] to get off of" her. The other officer "just stood there" looking at plaintiff and Tremmel. Plaintiff asserted that a third officer came and stood by the window to watch, but he also did nothing to assist her. Plaintiff testified that Tremmel "eventually got off of" her and she left the control room. As she did, she told Tremmel she "was writing him up for what he did."[4]

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[3] Tremmel and the officer were in a dating relationship at the time of the February 17, 2010 incident.

[4] Tremmel denied assaulting plaintiff and asserted that plaintiff initiated the contact by opening her arms to hug him and then (continued)

Plaintiff contacted her supervisor, who told her to prepare a report concerning the incident. The next day, Crawford and the other supervisors met with plaintiff, who declined medical treatment and stated that she "just wanted to be covered in case any further injury had occurred." The supervisors forwarded plaintiff's allegations to Deputy Clinical Administrator Elias, who met with Tremmel and instructed him not to have any further contact with plaintiff.

An EEO investigator reviewed plaintiff's allegations and, because touching was alleged, he forwarded the matter to the Department of Human Services (DHS) Police for a criminal investigation. Crawford kept plaintiff apprised of the progress of the criminal investigation and advised her that she and Tremmel would continue to work on different shifts. Crawford also sent a letter to plaintiff advising her that Tremmel had been "directed to have no form of contact with [her] pending the investigations."

Plaintiff alleged that, in spite of Crawford's instructions, she encountered Tremmel at work approximately three times after she filed her complaint. On each occasion, plaintiff testified that Tremmel would "leer" and "stand and

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(continued)
pulling him on top of her. The other employees present during the incident supported Tremmel's account.

stare at [her] as [she] was coming down the hall," but never spoke to her. Plaintiff reported these incidents to her supervisor, who told plaintiff to stay in the nursing area and not to go down the hall where Tremmel might be stationed.

As a result of its investigation, the DHS Police did not bring any criminal charges against Tremmel, and plaintiff did not file any charges independently. Thereafter, the AKFC EEO office conducted its own investigation and, after interviewing plaintiff and the officers, found no credible evidence that Tremmel sexually harassed plaintiff. AKFC subsequently granted plaintiff's request to transfer to another facility.

On August 20, 2013, plaintiff filed a nine-count complaint against AKFC, Tremmel, Crawford, and AKFC's Director of Medical Security alleging hostile work environment, sexual harassment and gender discrimination, retaliation, intentional infliction of emotional distress, and common law battery.[5] Following the completion of discovery, defendants filed a motion for summary judgment, which plaintiff opposed.

Following oral argument, the trial judge rendered an oral opinion, granting defendants' motion and dismissing plaintiff's

[5] On August 8, 2011, plaintiff filed a similar complaint in the United States District Court for the District of New Jersey. That court dismissed plaintiff's federal claims and declined to exercise pendent jurisdiction over plaintiff's state law claims.

complaint "in its entirety with prejudice." The judge reviewed plaintiff's factual contentions and accepted them as true for purposes of the motion. With regard to plaintiff's hostile work environment claim, the judge stated that the February 17, 2010 incident "was the first incident that she reported to her supervisors." The judge found that, when plaintiff did so, AKFC immediately followed its employment discrimination policies, promptly addressed plaintiff's complaint, and ensured that plaintiff and Tremmel would no longer work together. Thus, the judge concluded that AKFC had no "actual or constructive notice of the harassment" until the February 17, 2010 incident occurred and, when it received notice, AKFC promptly addressed the matter.

In response to plaintiff's argument that Crawford was aware of Tremmel's past actions, the judge stated that Crawford "didn't see it as sexual harassment. She saw it as silly behavior." The judge found it significant that no one had previously complained about Tremmel and, therefore, "[t]here's absolutely no -- been no showing, no support that the employer was put on any notice that people felt that this was a hostile work environment caused by Officer Tremmel's actions or behavior."

The judge also found that plaintiff failed to prove her retaliation claim because there was "no showing of an adverse employment action." The judge also dismissed plaintiff's remaining claims, finding that she had not presented any evidence that AKFC "knew that there was this behavior going on by Tremmel and did nothing to remedy it, or did not take plaintiff's allegations seriously." This appeal followed.

II.

On appeal, plaintiff argues that the trial judge ignored the evidence she presented, primarily through Crawford's deposition testimony, that Crawford had "actual or constructive notice of the hostile work environment" in which she worked. Plaintiff also asserts that there was a factual dispute concerning the February 17, 2010 incident and Tremmel's alleged prior conduct and, therefore, summary judgment was inappropriate. We disagree.

Our review of a ruling on summary judgment is de novo, applying the same legal standard as the trial court. Townsend v. Pierre, 221 N.J. 36, 59 (2015). "Summary judgment must be granted 'if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is

entitled to a judgment or order as a matter of law.'" Town of Kearny v. Brandt, 214 N.J. 76, 91 (2013) (quoting R. 4:46-2(c)).

Thus, we consider, as the trial judge did, 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.'" Ibid. (quoting Brill, supra, 142 N.J. at 540). If there is no genuine issue of material fact, we must then "decide whether the trial court correctly interpreted the law." Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494 (App. Div. 2007), certif. denied, 195 N.J. 419 (2008). We accord no deference to the trial judge's conclusions on issues of law and review issues of law de novo. Nicholas v. Mynster, 213 N.J. 463, 478 (2013).

To establish a prima facie case of hostile work environment sexual harassment, a female plaintiff must show that the alleged conduct occurred "because of her sex and that a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an intimidating, hostile, or offensive working environment." Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 603 (1993). There are two primary categories of claims that arise from the alleged sexual harassment of employees: "a direct cause of action against the employer for

negligence . . . under Restatement § 219(2)(b) . . . [and] vicarious liability under Restatement § 219(2)(d)." Aquas v. State, 220 N.J. 494, 512 (2015) (citing Restatement (Second) of Agency, § 219 (1958)).

An employer who fails to take measures to protect employees from a hostile work environment may be liable under negligence principles. Lehmann, supra, 132 N.J. at 621-22. Specifically, an employer may be held liable if it negligently failed to have an effective sexual harassment policy in place. Cerdeira v. Martindale-Hubbell, 402 N.J. Super. 486, 491 (App. Div. 2008) (citing Lehmann, supra, 132 N.J. at 621-23). To defend itself against a claim of negligence, "an employer's implementation and enforcement of an effective anti-harassment policy," is "a critical factor in determining negligence . . . ." Aquas, supra, 220 N.J. at 499. In Gaines v. Bellino, 173 N.J. 301, 313 (2002), the Court found the existence of the following factors in an anti-harassment policy relevant in determining whether that policy was effective: a formal prohibition of harassment; formal and informal complaint structures; anti-harassment training; sensing and monitoring mechanisms for assessing the policies and complaint procedures; and unequivocal commitment to intolerance of harassment demonstrated by consistent practice.

In addition to being potentially liable for negligence for failing to take measures to prevent sexual harassment in the workplace, an employer may also be vicariously liable for a supervisor's actions if he or she sexually harasses another in the workplace. Lehmann, supra, 132 N.J. at 619-20. However, an employer can insulate itself from vicarious liability for sexual harassment. The Aquas Court very recently recognized an affirmative defense approved by the United States Supreme Court in Burlington Industries v. Ellerth, 524 U.S. 742, 765, 118 S. Ct. 2257, 2270, 141 L. Ed. 2d 633, 655 (1998), and Faragher v. City of Boca Raton, 524 U.S. 775, 807-08, 118 S. Ct. 2275, 2292-93, 141 L. Ed. 2d 662, 689 (1998). Aquas, supra, 220 N.J. at 499. To get the protection of this affirmative defense, an employer must prove by a preponderance of the evidence that: (1) it "exercised reasonable care to prevent and to correct promptly [the] sexually harassing behavior;" and (2) "the plaintiff employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer or to otherwise avoid harm." Id. at 524.

Applying these principles here, we discern no basis for disturbing the trial judge's determination to dismiss plaintiff's complaint. Plaintiff concedes, as she must, that AKFC had a formal policy prohibiting workplace harassment, a

well-defined complaint procedure, and a comprehensive training program for employees concerning the policy. As soon as the February 17, 2010 incident occurred, plaintiff invoked the policy by reporting it to her supervisors. These supervisors promptly addressed plaintiff's complaint by directing Tremmel to have no further contact with plaintiff, referring the matter to the DHS Police, and conducting its own investigation. Thus, the judge properly found that defendants were protected from plaintiff's claims by the affirmative defense our Supreme Court established in Aquas.

We also agree with the trial judge that the record does not support plaintiff's claim that AKFC had constructive knowledge of prior incidents of alleged sexual harassment by Tremmel toward other employees. Plaintiff acknowledges that she never reported any incident of alleged sexual harassment to Crawford or any of her other supervisors. For her part, Crawford testified that she never heard Tremmel make any sexually suggestive comments to any other employee and had never observed him "leering" at anyone. While Crawford saw Tremmel "go over and hug some people," she also stated, "[i]t's like that's the way they greet all the time."

Crawford described Tremmel's behavior as "silly" and stated that he liked to "annoy" other employees. However, no employee,

including plaintiff, ever complained about his conduct or alleged that it constituted "sexual harassment." Neither plaintiff nor Crawford could give specific dates for any of the prior incidents, and their testimony indicates the prior incidents were sporadic, rather than pervasive.

As our Supreme Court has explained, the LAD does not create a "sort of civility code for the workplace[.]" Battaglia v. United Parcel Serv., Inc., 214 N.J. 518, 549 (2013). Rather, it advances "[f]reedom from discrimination." Id. at 546. Thus, the boorish behavior Tremmel exhibited in this case "did not rise to the level required to demonstrate a discriminatory hostile work environment." See Heitzman v. Monmouth Cty., 321 N.J. Super. 133, 148 (App. Div. 1999).

Finally, plaintiff's argument that there were factual disputes that prevented summary judgment lacks merit. As required by Rule 4:46-2(a), defendants submitted a "statement of material facts" with their motion for summary judgment, which plaintiff adopted in her response. The trial judge accepted these facts as true for purposes of her consideration of the motion pursuant to Polzo, supra, 209 N.J. at 56 n.1.

Affirmed.