SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0204-21

VALERIE MADER, and
JAMES MADER,

Plaintiffs-Appellants,

v.

EDISON TOWNSHIP (POLICE DEPARTMENT), THOMAS BRYAN, KENNETH SCHRECK, INSTITUTE FOR FORENSIC PSYCHOLOGY, and COMPREHENSIVE PSYCHOLOGICAL SERVICES, P.A.,

Defendants-Respondents,

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Argued December 13, 2022 – Decided February 21, 2023

Before Judges Geiger and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-2699-19.

Theodore Campbell argued the cause for appellants.

Sean P. Joyce argued the cause for respondents Edison Township (Police Department), Thomas Bryan, and

Kenneth Schreck (Carmagnola & Ritardi, LLC, attorneys; Sean P. Joyce, of counsel and on the brief).

Salvatore D'Elia III argued the cause for respondent Comprehensive Psychological Services, P.A. (Lewis, Brisbois, Bisgaard & Smith, LLP, attorneys; Malinda A. Miller, of counsel and on the brief; Salvatore D' Elia III, on the brief).

Robert T. Gunning argued the cause for respondent Institute for Forensic Psychology (Morrison Mahoney, LLP, attorneys; Robert T. Gunning, on the brief).

PER CURIAM

Plaintiff, Valerie Mader, appeals from an August 12, 2021 order entered by Judge Thomas D. McCloskey granting summary judgment dismissal of her claims under the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -50. Plaintiff also appeals from a March 3, 2021 discovery order entered by another judge that shielded the notes of Gina Longarzo, an attorney hired by Edison Township, as protected work product prepared in anticipation of litigation. After carefully reviewing the record in light of the applicable legal principles and the arguments of the parties, we affirm the summary judgment dismissal of plaintiffs' complaint for the reasons explained in Judge McCloskey's comprehensive forty-three-page written opinion. We likewise affirm the discovery order.

I.

We need only briefly summarize the pertinent facts and procedural history, which are thoroughly recounted in Judge McCloskey's opinion. Plaintiff was employed as a police officer by the Edison Police Department (EPD). She complained to her superiors that over the course of nearly a year, she and her then-boyfriend, now-husband, received hundreds of text messages and a letter accusing her of engaging in intimate relationships with her co-officers. The EPD initiated an Internal Affairs (IA) investigation. The investigation into the alleged harassment examined twenty-three separate incidents and entailed fourteen interviews with at least ten different witnesses.

Of the twenty-three allegations, all but two were deemed to be unfounded due to a lack of supporting evidence. Plaintiff and her husband refused to turn over their cell phones, preventing investigators from recovering the pertinent text messages, which had been deleted. Plaintiff claimed forensic examination of their cell phones would invade their privacy.

Some allegations were also deemed unfounded because plaintiff and her husband gave inconsistent accounts and because, in an interview with the IA investigators, plaintiff stated she did not believe several of the incidents were harassment. In addition to the allegations that were deemed unfounded due to

lack of evidence, the IA report found several allegations suspicious because they were not reported sooner.

As a result of plaintiff's conduct during the investigation, the police chief referred her for a fitness-for-duty evaluation (FFDE). Dr. Lewis Schlosser of the Institute for Forensic Psychology evaluated plaintiff and found her to be "psychologically unfit for duty." Dr. Schlosser recommended plaintiff undergo at least six months of treatment and then be reevaluated.

As a result of that initial evaluation, plaintiff was suspended on May 2, 2017. She was reevaluated by Dr. Betty McLendon of Comprehensive Psychological Services in January 2018. Dr. McLendon also found plaintiff "psychologically unfit" for duty.

Plaintiff was terminated in May 2018. The reasons given for her termination were "incapacity," "excessive absenteeism," and "conduct unbecoming of a police officer."

Plaintiff filed her initial complaint in April 2019 and filed an amended complaint on May 1, 2019 seeking relief under the LAD and the New Jersey Civil Rights Act, N.J.S.A. 10:6-1 to -2, as well as asserting common law claims for intentional infliction of emotional distress and interference with prospective

economic advantage.[1] Plaintiff claimed her termination was a result of gender discrimination and retaliation facilitated by Edison Township employees and the psychological consultants.

During the ensuing discovery process, a Law Division judge conducted an in camera review of the investigation file of the attorney who had been retained by Edison Township. The discovery judge ruled that notes in the file were protected work product. Discovery was completed on March 17, 2021. Thereafter, each defendant moved for summary judgment. Judge McCloskey granted each motion.

Plaintiff raises the following contentions for our consideration:

> POINT I
>
> THE LAW DIVISION ERRED IN GRANTING SUMMARY JUDGMENT DISMISSING THE PLAINTIFF'S CLAIM UNDER THE NEW JERSEY LAW AGAINST DISCRIMINATION BASED UPON PLAINTIFF'S GENDER.
>
> POINT II
>
> THE LAW DIVISION ERRED IN GRANTING SUMMARY JUDGMENT DISMISSING THE

[1] On appeal, plaintiff only raises issues pertaining to the LAD claims. "An issue that is not briefed is deemed waived upon appeal." Petro v. Platkin, 472 N.J. Super. 536, 567 (App. Div. 2022) (quoting N.J. Dep't of Env't Prot. v. Alloway Twp., 438 N.J. Super. 501, 505 n.2 (App. Div. 2015)).

PLAINTIFF'S CLAIM OF RETALIATION UNDER THE LAD.

POINT III

THE LAW DIVISION ERRED IN GRANTING SUMMARY JUDGMENT DISMISSING THE PLAINTIFF'S AID AND ABET CLAIM.

POINT IV

THE LAW DIVISION COMMITTED ERROR BY SHIELDING DEFENDANT['S] INVESTIGATION AS WORK PRODUCT.

II.

We review orders granting summary judgment de novo and apply the same standard as the trial court. Lee v. Brown, 232 N.J. 114, 126 (2018). Summary judgment will be granted if "there is no genuine issue of material fact and 'the moving party is entitled to a judgment or order as a matter of law.'" Conley v. Guerrero, 228 N.J. 339, 346 (2017) (quoting Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016)); see also R. 4:46-2(c).

To determine whether there are genuine issues of material fact, we 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." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406 (2014) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)).

"An issue of material fact is 'genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.'" Grande v. St. Clare's Health Sys., 230 N.J. 1, 24 (2017) (quoting Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)). Factual issues of an unsubstantial nature are insufficient to preclude the granting of summary judgment. Brill, 142 N.J. at 540. Brill further instructs that if the evidence in the record "'is so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." Ibid. (citation omitted).

Turning to the substantive legal principles raised in this appeal, our Supreme Court has adopted the three-part McDonnell Douglas[2] analysis "as the method for analyzing LAD claims." El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 166 (App. Div. 2005). That test provides:

> (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;

[2] McDonnell Douglass Corp. v. Green, 411 U.S. 792 (1973).

> and (3) the plaintiff must then be given the opportunity to show that [the] defendant's stated reason was merely a pretext or discriminatory in its application.
>
> [Ibid. (citing Dixon v. Rutgers, the State Univ. of N.J., 110 N.J. 432, 442 (1988)).]

To make a prima facie case of gender discrimination, the plaintiff must show (1) the plaintiff is a member of a protected class; (2) the plaintiff was qualified and performing the essential functions of the job; (3) the plaintiff was subjected to an adverse employment action; and (4) the employer thereafter sought similarly qualified individuals for that job. Victor v. State, 203 N.J. 383, 409 (2010) (citing Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 596–97 (1988)).

Importantly, "[w]here an officer is not guaranteed a negative evaluation upon entering the psychiatrist's office, merely being required to undergo an evaluation does not harm the officer's employment opportunities." Caver v. City of Trenton, 420 F.3d 243, 256 (3d Cir. 2005) (applying the New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-1 to -14, which has an analogous adverse employment action requirement); see also Benningfield v. City of Houston, 157 F.3d 369, 376 (5th Cir. 1998) (holding that referral of police officer for an FFDE "was not an adverse employment action. Rather, the referral was designed to gather facts to form the basis for an employment decision"). Moreover, the Caver court noted the importance of giving deference

to a police department's decision to order an FFDE because of the obvious need for "mentally stable" police officers. 420 F.3d at 256 n.11.

III.

We next apply the foregoing legal principles to the present facts. Judge McCloskey ruled plaintiff could not make a prima facie case of discrimination or retaliation for four reasons: (1) she was not able to perform her essential duties as evidenced by the FFDEs; (2) there was no causal connection between plaintiff's protected activity and her suspension and termination because the IA investigation and the FFDEs were "intervening acts" separating her protected complaint from the adverse employment actions; (3) plaintiff's "unfounded" complaint was not a good faith protected activity capable of being the prerequisite for a LAD retaliation claim under Carmona v. Resorts Int'l Hotel, Inc., 189 N.J. 354, 373 (2007); and (4) there was no evidence that plaintiff's gender played a role in the adverse employment actions.

The judge added that even if plaintiff could make a prima facie case, defendants had a legitimate non-discriminatory explanation. Judge McCloskey ruled EPD acted reasonably in conducting its investigation of plaintiff's claims and, once experts deemed plaintiff unfit for duty, EPD was justified in suspending and terminating her. The judge concluded his analysis by explaining

that plaintiff offered no evidence to demonstrate any weakness in EPD's explanation and that the evidence indicated EPD accommodated plaintiff during the investigation.

We agree that plaintiff failed to establish a prima facie case because the reports by Drs. Schlosser and McLendon—which have not been controverted by expert opinion or testimony—found plaintiff unfit for duty. That circumstance served as the basis for the suspension and termination. Importantly, the record clearly shows that plaintiff's expert, Dr. Melissa Marano, did not opine that the determinations by Drs. Schlosser and McLendon were in error. To the contrary, when Dr. Marano was asked at her deposition whether she had "any reason to believe that any of the . . . doctors . . . that saw [plaintiff] for a fitness-for-duty evaluation were . . . incorrect in their determination," she answered, "[n]o."

As Judge McCloskey aptly noted, Dr. Marano's January 2019 finding that plaintiff was fit for duty in an administrative role has no bearing on EPD's decision to terminate her in May 2018. We add that plaintiff's allegations that Drs. Schlosser and McLendon were biased and conspiring with EPD—an allegation Judge McCloskey deemed "tantamount to rank speculation"—are not based on sufficient "competent evidence" to create a genuine factual dispute. See Davis, 219 N.J. at 406.

Plaintiff's retaliation claim is similarly flawed. The prima facie elements of a LAD retaliation claim are: "(1) plaintiff was in a protected class; (2) plaintiff engaged in protected activity known to the employer; (3) plaintiff was thereafter subjected to an adverse employment consequence; and (4) that there is a causal link between the protected activity and the adverse employment consequence." Victor, 203 N.J. at 409 (citing Woods-Pirozzi v. Nabisco Foods, 290 N.J. Super. 252, 274 (App. Div. 1996)).

We reiterate that ordering an FFDE is not itself an adverse employment action. Caver, 420 F.3d at 256. Therefore, the relevant actions by EPD are the suspension and termination of plaintiff. Those actions were not the result of plaintiff's protected activity of lodging a complaint. Instead, they were caused by the determinations of Drs. Schlosser and McLendon that plaintiff was unfit for duty. Because neither of those evaluations are shown to be invalid by competent evidence, EPD's reliance on them was not improper.

In sum, even granting plaintiff all legitimate inferences, her discrimination and retaliation claims are too speculative to survive summary judgment review given plaintiff produced no evidence to show the FFDEs that led to the adverse employment actions were incorrect. We add that without a principal LAD violation by the employer, there can be no liability for aiding and

abetting. See Cicchetti v. Morris Cnty. Sheriff's Off., 194 N.J. 563, 594 (2008); N.J.S.A. 10:5-12(e).

IV.

We next address plaintiff's contention regarding the discovery order that protected the notes of the attorney hired by Edison Township. Plaintiff claims the discovery judge erred in stating that Longarzo was retained "after a Notice of Tort Claim was filed." Plaintiff is correct that Longarzo was retained prior to the filing of plaintiff's claim. However, that misstatement does not warrant reversing the judge's determination that the notes were made in anticipation of litigation.

An appellate court's review of discovery rulings is limited. See State v. Brown, 236 N.J. 497, 521–22 (2019). We "generally defer to a trial court's disposition of discovery matters unless the court has abused its discretion or its determination is based on a mistaken understanding of the applicable law." Id. at 521 (quoting Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011)). "The abuse of discretion standard instructs us to 'generously sustain [the trial court's] decision, provided it is supported by credible evidence in the record.'" Id. at 522 (alteration in original) (quoting Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 384 (2010)). It is well settled that "an order

or judgment will be affirmed on appeal if it is correct, even though the judge gave the wrong reasons for it." Lascurain v. City of Newark, 349 N.J. Super. 251, 275 (App. Div. 2002) (quoting Ellison v. Evergreen Cemetery, 266 N.J. Super. 74, 78 (App. Div. 1993)); see also Do-Wop Corp. v. City of Rahway, 168 N.J. 191, 199 (2001).

Rule 4:10-2(c) provides that a party may obtain documents prepared by another party "in anticipation of litigation" only if "the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means."

Plaintiff filed her initial complaint in April 2019. Longarzo certified that she began her investigation in March 2018—by which point plaintiff had already been suspended for almost a year. Further, when plaintiff underwent the second FFDE in January 2018, she was already represented by counsel. It is, therefore, entirely reasonable to infer that both sides were anticipating litigation, even though plaintiff had not yet filed her complaint or tort claim notice.

Accordingly, the discovery judge did not abuse his discretion in finding Longarzo "was retained in anticipation of litigation." Absent an abuse of

discretion, there is no basis upon which to reverse the discovery ruling. See Brown, 236 N.J. at 521.

To the extent we have not specifically addressed them, any remaining arguments raised by plaintiff lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

Affirmed.