SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2001-21

KINGSLEY OKITUAMAH,

Plaintiff-Appellant,

v.

RICHARD O'MEARA and RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY,[1]

Defendants-Respondents.

Submitted May 23, 2023 – Decided August 30, 2023

Before Judges Rose and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-2286-19.

Lawrence & Gerges, LLC, attorneys for appellant (Silvia G. Gerges, of counsel and on the briefs).

Saiber LLC, attorneys for respondents (Sean R. Kelly, on the brief).

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[1] Improperly pled as Rutgers University.

PER CURIAM

Plaintiff Kingsley Okituamah appeals from a May 18, 2021 Law Division order dismissing two counts of his complaint against defendant Rutgers, The State University of New Jersey (RU) on summary judgment. A Black male of African descent, plaintiff earned a Master of Science degree in global affairs from RU in January 2018. In his complaint, plaintiff alleged between April 2017 and June 2017, while enrolled in defendant Richard O'Meara's international law course, he was repeatedly intimidated and harassed by O'Meara because of his race and mental illness and, as such, RU violated the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -50, by creating a hostile educational environment based on plaintiff's race (count one) and mental illness disability or perceived disability (count two). Among other remedies, plaintiff sought damages for costs incurred for mental health treatment.

Plaintiff also contingently appeals from the motion court's Rule 4:6-2(e) dismissal of his aiding and abetting claim against O'Meara (count four). Plaintiff does not challenge the court's reasoning and seeks reversal of the court's

January 27, 2022 order dismissing count four only if we reverse the May 18, 2021 order.[2]

Because we conclude plaintiff failed to satisfy the elements of a hostile educational environment under the LAD, we affirm. But we do so for different reasons than those articulated by the motion judge. See T.B. v. Novia, 472 N.J. Super. 80, 93 (App. Div. 2022) (explaining that we can affirm the summary judgment orders for reasons other than those expressed by the trial court). In view of our decision, we need not address plaintiff's contingent argument regarding the court's dismissal of count four.

I.

We summarize the material facts from the summary judgment record, viewing them in the light most favorable to the non-moving plaintiff. See Richter v. Oakland Bd. of Educ., 246 N.J. 507, 515 (2021). Among other requirements, RU's global affairs master's program mandated the completion of "six core courses with grades of B (3.0) or higher." During the spring 2017 semester, O'Meara assigned plaintiff a final grade of "F" based on the "entirety

[2] Plaintiff does not challenge the May 24, 2019 dismissal of the remaining count of his complaint, which alleged violations of the New Jersey Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13 to -37, and was dismissed on RU's motion in lieu of answer.

of his record," including a plagiarized paper. O'Meara testified at deposition that RU's policy afforded professors discretion in determining the imposition of sanctions for plagiarizing an assignment. During the same semester, Professor Jun Xiang assigned plaintiff a grade of "C," for plagiarizing a paper in her class.

When deposed, plaintiff acknowledged he had committed plagiarism. He also testified about his interactions with O'Meara during that semester. For example, on March 23, 2017, plaintiff identified an email, notifying O'Meara he felt sick and a "bit depressed." Plaintiff acknowledged that O'Meara responded, "If you need help, let us know. Wishing you well." But plaintiff claimed despite O'Meara's well wishes "face-to-face, he was mean." Plaintiff elaborated: "In his office. In the class. The way he . . . behaves. Like the way he charges towards me. You know, in the class, the way I asked questions, the way he responds. He was just extremely mean." Plaintiff also described an occasion in class during which he felt O'Meara "mock[e]d" him.

Plaintiff also acknowledged an April 13, 2017 email to O'Meara, explaining that plaintiff was attempting to secure legal assistance because he had been fired from his job and, as such, would miss an upcoming class. O'Meara responded: "I'm sorry for your difficulties. Needless to say, we have

to talk about your work and performance ASAP. Please plan on coming in Monday to discuss."

Plaintiff claimed that during their ensuing meeting, O'Meara "charg[ed] towards [him]; repeatedly yelling, throwing the back of his hand on [plaintiff's] face." Plaintiff explained that O'Meara did not strike plaintiff but was "throwing his hand in the air." Plaintiff cried during the meeting, prompting O'Meara to call his assistant who, in turn, referred plaintiff to RU's "care office."

O'Meara testified that on a date he could not recall, he suggested plaintiff contact the appropriate RU department for an accommodation based on his mental health issues. O'Meara told plaintiff: "[T]hat accommodation will tell me that indeed you need more time to do this course properly, and if you give me that accommodation, then I can accommodate you and we can work out this grade, but you need to do that." Plaintiff did not do so.

On May 1, 2017, O'Meara informed plaintiff that he would not graduate in view of the grades assigned by him and Xiang. The following day, plaintiff met with Vice Chancellor Corlisse Thomas because he was "afraid" and "disturbed"; he "wanted the bullying . . . and the harassment to stop." Thomas walked plaintiff to the counseling center.

On May 3, 2017, plaintiff spoke with Sandy Reyes, the graduate school coordinator, "to discuss [his] academic problems." Plaintiff told Reyes he was "afraid for [his] life." Shortly after he left Reyes's office, plaintiff was called to the student counselor's office. Campus police responded and drove plaintiff to University Hospital. About twelve hours later, plaintiff was released and recommended for mental health treatment.

During the fall 2017 semester, James Berman, a friend and RU classmate, contacted plaintiff, claiming O'Meara "use[d] the 'N-word' in class to describe some Black kids." Berman recorded the instances as part of his notetaking during class on November 9, 2017 and November 16, 2017. Plaintiff was not enrolled in the class and, as such, did not hear the utterances.

O'Meara denied using the N-word "in [his] personal description of other people" but acknowledged he heard the recording and believed he was "attempting to explain the fact that . . . certain groups of individuals in the United States will use that term but may, in fact, not be racist." O'Meara said he "tr[ied] to define from a critical thinking point of view what is a racist; is it only defined by the use of terms, etcetera." When pressed whether it was "acceptable to call a Black person a[n N-word]," O'Meara stated, "[p]robably not." But he added, "It depends on the context."

On November 25, 2021, an anonymous person using the pseudonym, "Robert Rutgers," emailed Thomas asserting O'Meara "is spreading hate and discriminating against students through the grades he assigns, solely based on race and his prejudice mindset." The sender stated O'Meara "repeatedly used the 'N-word' during his lectures." Audio files from lectures on November 6, 2017 and November 9, 2017 were attached to the email. The sender did not mention plaintiff by name but generally referenced a student who "was ostracized and retaliated against by Dr. O'Meara." Thomas forwarded the email to Lisa Grosskreutz, Director of the Office of Employment Equity (OEE).

Although Grosskreutz responded to the email within two days, the investigation was impeded for several months until the anonymous sender disclosed plaintiff's name. On March 23, 2018, Grosskreutz contacted plaintiff via email. She noted the anonymous sender's allegations against O'Meara on behalf of plaintiff; informed plaintiff of his right to file a complaint with the OEE; and attached RU's Policy Prohibiting Discrimination and Harassment and the complaint form. Claiming he "was afraid" and felt intimidated by O'Meara's status as a retired Army general and an attorney, plaintiff did not file an OEE complaint against his former professor. The following year, on March 26, 2019, plaintiff filed his Law Division complaint.

Following the close of discovery, defendant filed the present motion. During oral argument before the motion judge, RU's attorney claimed plaintiff failed to demonstrate O'Meara's conduct satisfied the governing standard for a race-based hostile educational environment claim. RU's counsel noted plaintiff provided "no evidence whatsoever of any racially-tinged conduct or racially-tinged statement" by O'Meara while plaintiff was enrolled in his class. Further, the audio recordings provided by Berman and the anonymous sender were never authenticated. RU's counsel also argued plaintiff's refusal to participate in RU's complaint process, along with RU's policies in place and response to the complaints, entitled the university to an affirmative defense under the controlling case law. Turning to count two, RU's attorney argued there was no support in the record to demonstrate a "disability-based harassment claim."

Plaintiff's counsel countered that O'Meara spoke to plaintiff in a harassing manner, shouted at him, and pushed him while handing back a course paper. Further, whether the alleged conduct was severe or pervasive was a jury issue. Plaintiff's counsel acknowledged she "c[ould]n't point to specific things that happened" regarding race until November 2017. However, plaintiff's counsel argued, RU's conduct pertaining to the complaints about O'Meara failed to satisfy a defense.

On March 18, 2021, the judge issued a decision from the bench, granting RU's motion. Without analyzing whether plaintiff established a prima facie hostile educational environment claim under the LAD, the judge concluded RU satisfied the standards for a defense to direct and vicarious liability set forth by our Supreme Court in Aguas v. State, 220 N.J. 494, 513 (2015), and Gaines v. Bellino, 173 N.J. 301, 312-14 (2002).

Plaintiff's ensuing appeal to this court was withdrawn for lack of finality. Thereafter, a different Law Division judge granted plaintiff's motion to reinstate count four of his complaint against O'Meara, then granted O'Meara's motion to dismiss for failure to state a claim under Rule 4:6-2(e). Because the counts against RU had been dismissed, the judge reasoned that plaintiff's aiding and abetting claims against O'Meara were not viable. This appeal followed.

Plaintiff argues the motion judge erroneously determined RU established a defense to his direct or vicarious liability claims. In response, RU urges us to reject plaintiff's contentions and affirm the judge's order. Alternatively, RU contends plaintiff failed to demonstrate actionable harassment based on race or disability. Because RU's alternate argument was raised before the motion judge, and plaintiff fully addresses RU's appellate contentions in his reply brief on

appeal, we have considered it. For the reasons that follow, we affirm the order granting RU's summary judgment motion on that alternate basis.

II.

We review the trial court's grant of summary judgment de novo. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016). Employing the same standard the trial court uses, we review the record to determine whether there are material factual disputes and, if not, whether the undisputed facts viewed in the light most favorable to plaintiff nonetheless entitle defendant to judgment as a matter of law. See ibid.; Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995); see also R. 4:46-2(c). "Conclusory and self-serving assertions . . . are insufficient to overcome the motion." Puder v. Buechel, 183 N.J. 428, 440-41 (2005). We owe no deference to the trial court's legal analysis or interpretation of a statute. Palisades at Fort Lee Condo. Ass'n v. 100 Old Palisade, LLC, 230 N.J. 427, 442 (2017).

We begin our analysis by recognizing the LAD's well-established principles. The LAD provides, in pertinent part:

> All persons shall have the opportunity to obtain . . . all the accommodations, advantages, facilities, and privileges of any place of public accommodation . . . without discrimination because of race . . . [or] . . . disability . . . subject only to conditions and limitations

> applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.
>
> [N.J.S.A. 10:5-4.]

Similarly, the LAD prohibits "unlawful discrimination" by "any owner, . . . manager, . . . agent, or employee of any place of public accommodation" for "directly or indirectly . . . refus[ing], withhold[ing] from or deny[ing] . . . any person any of the accommodations, advantages, facilities or privileges thereof" based on the person's "race" or "disability." N.J.S.A. 10:5-12(f)(1). N.J.S.A. 10:5-12 explicitly proscribes discrimination in the employment context, but its protections have been extended to non-employment situations, including schools and educational settings. See L.W. v. Toms River Reg'l Schs. Bd. of Educ., 189 N.J. 381, 402 (2007) (applying LAD's prohibition against sexual harassment perpetrated by students upon their classmate in a public school setting).

Moreover, universities and colleges are expressly included in the LAD's definition of "[a] place of public accommodation." N.J.S.A. 10:5-5(l); see also Frank v. Ivy Club, 120 N.J. 73, 111 (1990) (divining the Legislature's intent "to eliminate discrimination in educational institutions" by its designation of colleges and universities among the definitions of N.J.S.A. 10:5-5(l)). As the Court stated in L.W., "our courts counsel that 'the more broadly [the LAD] is applied the greater its antidiscriminatory impact.'" 189 N.J. at 400 (alteration in

original) (quoting Ptaszynski v. Uwaneme, 371 N.J. Super. 333, 345 (App. Div. 2004)). Accordingly, we consider employment cases for guidance in addressing the issues raised on this appeal.

We derive the standard applicable to this case from the Supreme Court's analysis of discrimination in places of public accommodation in an action against a school district by a student who had alleged discrimination by fellow students on the basis of perceived sexual orientation. L.W., 189 N.J. 381. In L.W., the Court held the appropriate standard was similar to the standard of liability for hostile work environment based on sexual harassment it had previously established in Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 626 (1993). 189 N.J. at 405. In Lehmann, the Court determined an employee states a claim for hostile work environment when the employee alleges "severe or pervasive" discriminatory conduct that "create[s] an intimidating, hostile, or offensive working environment." 132 N.J. at 592.

The standard adopted by the Court in L.W. and Lehmann is equally applicable in the present context of a hostile educational environment claim under the LAD. See Morris v. Rutgers-Newark University, 472 N.J. Super. 335, 339-40, 348 (App. Div. 2022) (applying the Lehmann standard to a hostile educational environment claim filed by undergraduate student athletes against

their basketball coach). That standard requires plaintiff to "show that the complained-of conduct (1) would not have occurred but for the employee's protected status, and was (2) severe or pervasive enough to make a (3) reasonable person believe that (4) the conditions of employment have been altered and that the working environment is hostile or abusive." Shepherd v. Hunterdon Developmental Ctr., 174 N.J. 1, 24 (2002) (citing Lehmann, 132 N.J. at 603-04).

"The first element of the test is discrete from the others." Lehmann, 132 N.J. at 604. Plaintiffs must demonstrate "by a preponderance of the evidence" that they were discriminated against because of their protected status. Ibid.; see also Shepherd, 174 N.J. at 24. "Common sense dictates that there is no LAD violation if the same conduct would have occurred regardless of the plaintiff's [protected status]." Lehmann, 132 N.J. at 604.

Under the second prong, "[i]t is the harasser's conduct, not . . . plaintiff's injury, that must be severe or pervasive." Id. at 610. Whether conduct is severe or pervasive is evaluated under the totality of the circumstances, assessing, "(1) 'the frequency of all the discriminatory conduct'; (2) 'its severity'; (3) 'whether it is physically threatening or humiliating, or a mere offensive utterance'; and (4) 'whether it unreasonably interferes with an employee's work performance.'"

Godfrey v. Princeton Theological Seminary, 196 N.J. 178, 196 (2008) (quoting Green v. Jersey City Bd. of Educ., 177 N.J. 434, 447 (2003)).

Although "one incident of harassing conduct can create a hostile work environment," Taylor v. Metzger, 152 N.J. 490, 499 (1998), the Court has explained "'it will be a rare and extreme case in which a single incident will be so severe that it would, from the perspective of a reasonable [person situated as the claimant], make the working environment hostile.'" Id. at 500 (quoting Lehmann, 132 N.J. at 606-07). "Neither rudeness nor lack of sensitivity alone constitutes harassment, and simple teasing, offhand comments, and isolated incidents do not constitute discriminatory changes in the terms and conditions of one's employment." Shepherd, 174 N.J. at 25-26 (quoting Shepherd v. Hunterdon Developmental Ctr., 336 N.J. Super. 395, 416 (2001)).

A person's workplace environment is affected not only by conduct directed at that person "but also by the treatment of others." Lehmann, 132 N.J. at 611. For example: "A woman's perception that her work environment is hostile to women will obviously be reinforced if she witnesses the harassment of other female workers." Ibid.

Under the third and fourth prongs of the Lehmann standard, the Court has employed "an objective standard to exclude an 'idiosyncratic response of a

hypersensitive plaintiff.'" Shepherd, 174 N.J. at 26 (quoting Lehmann, 132 N.J. at 614); see also Rios v. Meda Pharm., Inc., 247 N.J. 1, 12 (2021) ("Settled case law relies on an objective standard to evaluate a hostile environment claim."). In assessing a hostile environment claim, the focus is "on the harassing conduct itself and 'not its effect on the plaintiff or on the work environment.'" Rios, 247 N.J. at 12 (quoting Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991)).

Against that legal backdrop, we turn to plaintiff's race-based LAD claim. As to the first Lehmann prong, RU claims plaintiff failed to authenticate the audio recording provided by "Robert Rutgers." Even accepting the substance of the recording as true, however, RU argues plaintiff's race-based harassment claim fails for three reasons: (1) plaintiff was not present in class when O'Meara uttered the N-word; (2) the N-word was used in the pedagogical sense; and (3) following OEE's investigation, the dean concluded O'Meara did not violate RU's policy. RU also asserts plaintiff failed to demonstrate the second Lehmann prong because there is no evidence in the record that the alleged conduct was "severe or pervasive."

As to the first Lehmann element, plaintiff has not presented competent evidence that O'Meara directed a racist remark to him. Plaintiff relies on an audio recording that was not authenticated. Even if the recording were

admissible in evidence, however, plaintiff was not present when O'Meara used the N-word in class. Nor has plaintiff demonstrated that the remark was made about him or that it was directed toward any Black student.

Nonetheless, assuming arguendo that plaintiff satisfied the first Lehmann prong, the motion record is devoid of any evidence that O'Meara engaged in severe or pervasive harassing conduct. Plaintiff's allegations against O'Meara are vague and contradictory. In his complaint, plaintiff asserted "O'Meara physically pushed [p]laintiff and threw the back of his hands directly on [p]laintiff's face when speaking to him." But when deposed, plaintiff back-pedaled, stating O'Meara "thr[ew] his hand in the air." Plaintiff claimed O'Meara repeatedly yelled at him during their meeting but did not disclose the words O'Meara used. Plaintiff also asserted O'Meara said if plaintiff complained about his grade, he would be expelled, but plaintiff acknowledged he committed plagiarism during his graduate studies. Given the totality of the circumstances, plaintiff failed to allege acts sufficient to meet the severe or pervasive standard. See Godfrey, 196 N.J. at 196.

Nor does the motion record support plaintiff's harassment claim based on a disability or perceived disability. In his reply brief, plaintiff asserts O'Meara failed to offer him "any extensions on assignments or any other temporary

accommodation," instead requiring plaintiff "to go get formal accommodations." However, the record reveals O'Meara suggested that plaintiff seek accommodations so that they could resolve plaintiff's grade issue. Plaintiff failed to do so. Moreover, plaintiff acknowledged that O'Meara responding to plaintiff's email about his struggles with depression, by stating: "If you need help, let us know. Wishing you well." Plaintiff therefore failed to demonstrate a prima facie claim of hostile educational environment based on a disability or perceived disability.

We conclude plaintiff's conclusory assertions failed to overcome defendant's summary judgment motion. To the extent we have not otherwise addressed plaintiff's arguments, they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.