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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2102-09T3

CANDICE DUNCAN,

Plaintiff-Appellant,

v.

VERIZON, JEFFERY MCFARLAND,
MARY FOSTER, PATRICIA FOSTER,
CECILIA MEADE, THOMAS CROWDER
and MARQUITA CARTER,

Defendants-Respondents.

Submitted October 4, 2010 – Decided July 11, 2011

Before Judges A. A. Rodríguez, Grall and LeWinn.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, L-1368-08.

Eldridge Hawkins, attorney for appellant.

Day Pitney, attorneys for respondents (Mary B. Rogers and Micala Campbell Robinson, on the brief).

PER CURIAM

Plaintiff Candice Duncan appeals from the November 20, 2009 order granting summary judgment and dismissing all of her claims against defendants Verizon and Verizon employees Jeffrey

McFarland, Mary Foster, Patricia Foster, Cecilia Meade, Thomas Crowder and Marquita Carter. We affirm.

DUNCAN'S FACTUAL ASSERTIONS

The following material facts are viewed in the light most favorable to Duncan. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Duncan, an African American woman, began working for Verizon as a sales consultant in June 2000. In April 2006, Duncan began working as an executive assistant for defendant McFarland, Verizon's Marketing Director. At the time, defendant Crowder was the Marketing Group's Vice President. Cecilia Meade was his executive assistant.

Approximately a week after Duncan began working for McFarland, she attended a three-day team meeting in Florida. There she met Prentice Parrish, a fellow Verizon employee. He suggested to Duncan and other Verizon employees that they all "go to dinner" if he was "ever in New Jersey."

In September 2006, Duncan, Parrish, McFarland, and another employee, Robin Brown, attended a Verizon-sponsored event for the Congressional Black Caucus (CBC) at a nightclub in Washington, D.C. At one point during the event, Parrish placed his hand on Duncan's lower back and said "you know I've liked you since Florida", and "I'm feeling you." Duncan told Parrish that she was engaged and "happy at home." Parrish responded,

"you can't blame a brother for trying." Duncan did not find Parrish's behavior objectionable.

Nonetheless, McFarland learned of the incident from Brown who was seated nearby and called Duncan that same day to discuss it. According to Duncan, McFarland told her that Parrish had a number of questionable credit card charges. He also said, "I'm going to call and report this to the ethics [unit] and have a security investigation started." Then he said, "[n]ow I need you to go along with me on this because — and I'll take care of you." Duncan did not report McFarland's request to the compliance manager who handled a subsequent investigation regarding Parrish's behavior at the CBC.

Shortly after the CBC event Parrish initiated the following instant message exchange with Duncan:

> Prentice: hey - can I call you?
>
> Duncan: I am about to get on a call in 1 minute . . . whats up?
>
> Prentice: 2 things. first, i was disappointed that we didn't kick it at CBC. I really wanted to feel you out a little bit more since we don't talk that much. Second, i wanted to know where [McFarland] is today. i need to call him.
>
> Candice: He is on travel… so you cant talk to him. . . . and i told you i am engaged and i am REALLY happy at home.
>
> Prentice: I remember. I'm not a home wrecker. just wanted to talk.

Six months later Duncan met with McFarland for her annual performance review. According to Duncan, McFarland told her that she "was marked P for performing because only one person could be the lead in the admin pool and that was Cecilia [Meade]. He said we all agree she's performing above par and I had to get P for performing." McFarland also complained that his travel arrangements were pushed aside while Duncan worked for others; that she failed to enter time reports in a timely fashion; and that her payroll paperwork was not completed. According to Duncan, McFarland "was never happy about anything. . . . He was unhappy if I bought him a ham sandwich, even though he asked me for it."

Another manager, defendant Carter, also had problems with Duncan's performance. At one point Carter accused Duncan of causing her to be late to a meeting because Duncan failed to accurately manage her calendar. Carter and other managers were also unhappy because Duncan failed to timely handle expense reports, which caused their corporate credit cards to incur late fees. According to Duncan, she "never got around to it" because she had too much other work to do. Duncan's own corporate card was cancelled because Duncan never paid the late fees, despite being instructed to do so.

Duncan got married and returned to work on July 19, 2007. On August 29, 2007, Duncan started calling in sick. She stayed out of work until November 5, 2007. According to procedure, Duncan emailed her managers the first five days of her absence to notify them that she was sick. Duncan did not email again after the first few days because she stated that "at that point you're on short-term disability." After the sixth day of Duncan's absence, McFarland called Duncan several times. She did not answer his calls or listen to her voicemail. Duncan called Kristal Wilson, a human resources manager, to report that McFarland was calling her. Wilson told her that she should call McFarland back. McFarland requested that Security initiate an absence fraud investigation after he conducted a routine home visit to confirm that Duncan was ill but found that she was not home.

On September 13, 2007, Duncan went to a Chinese restaurant for take-out lunch. On the way, McFarland called her five times on her cell phone. While at the restaurant, she saw McFarland outside. They made eye contact and McFarland went into the barber shop next door. After Duncan left the restaurant, she encountered McFarland when he pulled up next to her car at a traffic light. They rolled down their car windows to talk and McFarland told her that he needed to speak to her about work

related issues. Duncan called McFarland the next day. In a telephone conversation the following day, McFarland asked Duncan when she would be returning to work.

On September 26, 2007, Duncan called Verizon's Equal Employment Opportunity (EEO) hotline to report that McFarland followed her to the Chinese restaurant and kept calling her personal cell phone number. She also complained that Williams told McFarland that Duncan had called her to ask whether it was appropriate for a manager to call her at home, despite the fact that Williams told Duncan she would keep the conversation confidential. Duncan also reported the incident at the CBC with Parrish. She said that McFarland encouraged her to lie to Security about what transpired. However, Duncan did not complain about a hostile work environment.

On November 9, 2007, Duncan was interviewed by an ethics manager. Duncan said that she had "cried every day since this all began and that she was afraid of being retaliated against." She said that many people in the office were aware of the absence fraud investigation and that Meade and another employee were questioning others about her whereabouts.

Duncan also alleged that when she first began working for McFarland, he told her that "[w]hen you come in, even before you take off your coat you are to go into my office and make it look

like I am here." She further alleged that McFarland, Carter, and Crowder engaged in a pattern of violating the expense and reimbursement policy and used a corporate car without the proper approval.

On November 15, 2007, Duncan was interviewed by two security managers. She confirmed the details she shared in the November 9 interview. This time, she also said that McFarland had used inappropriate language on two occasions. First, when she was having a hard time reaching one of McFarland's employees, he told her,

> "You tell [him] I don't care if he was having an orgy with his wife and four other women and is about to bust a nut. You tell him to answer his phone when I call. I don't pay his phone bill for him not to answer when I call."

On the second occasion, Duncan was sitting at her desk and had her desk drawer open. McFarland noticed her breakfast cereals in the drawer and said, "[i]f you keep eating this cereal the junk in your trunk will explode and your fiancé wont want you anymore."

Duncan also reported that in March 2007, she charged approximately $535 on her corporate credit card to pay for a surprise party for McFarland's birthday. She said Meade told her to make the expense look legitimate. Duncan decided to voucher the expense as a conference luncheon. She invited the

conference attendees to the luncheon, but is unsure whether any actually attended.

In her deposition, Duncan claimed that McFarland would also make complaints about women, such as "women don't know how to control [their] anger" and "[y]ou women don't know how to just sit back and relax and let us take the lead like we are supposed to." Duncan also said that towards the beginning of her term as his executive assistant, McFarland told her that Crowder did not like her because he did not like "the little black girl supporting the big black man."

When Duncan returned to work in early November 2007, she asked defendant Foster to reassign her to the Irvington location. In her deposition testimony Duncan explained that she was fine working as McFarland's executive assistant from Irvington or from home; she just did not want to "see him or any of the other people listed as [defendants.]" As there was no executive assistant position available in Irvington, Foster told Duncan to stay at home (with pay) until a new location was found. Duncan was then relocated and worked for a new director for about a month.

In late November 2007, Duncan was notified that her position was eliminated pursuant to Verizon's reduction in force (RIF) and that if she was not placed in another position within

thirty days, she would be terminated. According to Verizon, Duncan was selected to be "riffed" because she: had very little executive assistant experience; was tardy or absent without notification or approval on many occasions; did not follow expense guidelines; had performance issues with multiple managers; was not completing time input/payroll for designated personnel in 2007; and had not "developed the required skill set for the job." She was terminated on December 28, 2007.

Duncan sued all defendants alleging racial and gender discrimination, hostile work environment, and retaliation in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -42 (count one); breach of implied covenant of good faith and fair dealing (count two); violation of Article 1, Paragraphs 1, 18, and 19 of the New Jersey Constitution (count three); and reckless and intentional infliction of severe emotional distress (count five). Count four alleged invasion of privacy only as to defendant McFarland.

Following discovery, defendants moved for summary judgment on all counts. Duncan cross-moved for summary judgment on the LAD claims. The judge entered an order granting judgment as to all remaining defendants and dismissing the complaint with prejudice.

Duncan appeals contending that defendants' motions for summary judgment "should have been denied because issues of material facts and credibility issues exist"; she also asserts that summary judgment should not have been granted as to her claims of reckless and intentional infliction of severe emotional distress; "false light"; breach of implied covenant of good faith; disparate treatment on the bases of race, color, gender; retaliation; and hostile work environment on the basis of race, color and gender. We disagree.

In reviewing the grant of a motion for summary judgment, we apply the same standard utilized by the trial courts. Jolley v. Marquess, 393 N.J. Super. 255, 267 (App. Div. 2007) (citing Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998)). Summary judgment should be granted if the evidence presented in support of and in opposition to the motion for summary judgment disclose no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. R. 4:46-2; Brill, supra, 142 N.J. at 540. Applying that standard here, we conclude that the judge correctly granted summary judgment to defendants as to all claims. The proofs presented by Duncan in opposition to the motions against her, do not establish a prima facie case for any of her claims. Therefore, pursuant to Brill

each defendant was entitled to judgment. Ibid. The same applies to Duncan's cross-motion.

HOSTILE WORK ENVIRONMENT CLAIM

The LAD, protects an individual from discrimination, based on race, sex, or other protected status, that creates a hostile work environment. See Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 601 (1993). To establish a prima facie case of hostile work environment based on sexual harassment, a claimant must prove that "the complained-of conduct (1) would not have occurred *but for* the employee's gender; and it was (2) *severe or pervasive* enough to make a (3) *reasonable woman* believe that (4) the conditions of employment are altered and the *working environment is hostile or abusive*." Id. at 603-04. This test applies generally to all hostile work environment claims. Cutler v. Dorn, 196 N.J. 419, 430 (2008) (citing Taylor v. Metzger, 152 N.J. 490, 497 (1998)).

Hostile work environment actions are "'different in kind'" from claims based on discrete acts of discrimination and instead "'are based on the cumulative [e]ffect of individual acts'" of harassment. Shepherd v. Hunterdon Devtl. Ctr., 174 N.J. 1, 19 (2002) (quoting AMTRAK v. Morgan, 536 U.S. 101, 115, 122 S. Ct. 2061, 2073-2074, 153 L. Ed. 2d 106, 124 (2002)). Whether harassing conduct makes a workplace hostile is determined by the

reasonable person standard and it is "the *harassing conduct* that must be severe or pervasive, not its effect on the plaintiff or on the work environment." Lehman, supra, 132 N.J. at 606. "Thus, 'severe or pervasive' conduct must be conduct that would 'make a reasonable [person] believe that the conditions of employment are altered and [that the] working environment is hostile.'" Cutler, supra, 196 N.J. at 431 (alteration in original) (quoting Lehman, supra, 132 N.J. at 604).

Here, Duncan alleges that the following comments or incidents establish the existence of a hostile work environment based on her sex: McFarland told her to stop eating cereal or she'd have too much "junk in her trunk"; McFarland said that "women don't know how to control [their] anger" and should let men "take the lead"; McFarland tried to convince her not to get married and became "abrupt" after she did so; and McFarland "stalked" her by calling her several times on her personal cell phone and by showing up at the Chinese restaurant.

We agree with the judge's finding that "even assuming that McFarland made [the alleged] comments . . . they are insufficient as a matter of law to establish a hostile work environment." Further, the judge found that it is "undisputed that [McFarland] never asked Duncan to go on a date with him, have a relationship with him, or engage in sexual intercourse

with him" and that Duncan did not complain that his comments were gender-related or sexual in nature in when she called the EEO hotline.

Duncan next argues that the judge should not have dismissed her hostile work environment claim based on racial harassment. This argument is based on a comment made by McFarland, attributing to Crowder a certain hostility towards her, i.e., that Crowder did not like "the little black girl supporting the big black man." The judge found this comment was not sufficient as a matter of law to constitute a hostile work environment. We agree.

Although Duncan may have found the comments and behavior by the defendants objectionable, the judge correctly noted that the LAD is not a guideline for workplace civility. Herman v. Coastal Corp., 348 N.J. Super. 1, 22-23 (App. Div.), certif. denied, 174 N.J. 363 (2002); see also Shepherd v. Hunterdon Dev. Ctr., 336 N.J. Super. 395, 416 (App. Div. 2001) (observing that "[n]either 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"), aff'd in part, rev'd in part, 174 N.J. 1 (2002). "Although a person is legally entitled to a work environment free of hostility, she is not entitled to

a perfect workplace, free of annoyances and colleagues she finds disagreeable." Lynch v. New Deal Delivery Serv., 974 Fed. Supp. 441, 452 (D.N.J. 1997).

RETALIATION CLAIM

Pursuant to N.J.S.A. 10:5-12(d), it is unlawful to "take reprisals against any person because that person has opposed any practices or acts forbidden [pursuant to the LAD]." To establish a prima face case of retaliation pursuant to the LAD, a claimant must show: "(1) that she engaged in protected activity; (2) the activity was known to the employer; (3) plaintiff suffered an adverse employment decision; and (4) there existed a causal link between the protected activity and the adverse employment action." Young v. Hobart West Group, 385 N.J. Super. 448, 465 (App. Div. 2005).

It is obvious from the review of Duncan's proofs that, although the expense voucher misuse may have violated company policy, that misuse did not violate the LAD. See N.J.S.A. 10:5-3 (outlining illegal actions pursuant to the LAD). Duncan was not engaging in a protected activity and cannot be the basis for an LAD claim.

DISPARATE TREATMENT ON THE BASIS OF A PROTECTED STATUS CLAIM

The burden for establishing a prima facie case of discrimination in violation of the LAD is "'rather modest.'"

Zive v. Stanley Roberts, Inc., 182 N.J. 436, 447 (2005) (quoting Marzano v. Computer Science Corp., 91 F.3d 497, 508 (3d Cir. 1996)). The claimant must show that: "(1) plaintiff is a member of a protected class; (2) plaintiff was performing her job at a level that met her employer's legitimate expectations; (3) she 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) (citing Maher v. N.J. Transit Rail Operations, Inc., 125 N.J. 455, 480-81 (1991)).

"Establishment of a prima facie case gives rise to a presumption that the employer unlawfully discriminated against the employee." Bergen Commercial Bank v. Sisler, 157 N.J. 188, 210 (1999). The burden then shifts to the defendant, who must rebut that presumption by producing "admissible evidence of a legitimate, non-discriminatory reason for its rejection of the employee." Ibid. "Where an employer produces such evidence, the presumption of discrimination disappears." Id. at 211.

The burden then shifts back to the claimant to establish "by a preponderance of the evidence that the reason articulated by the employer was merely a pretext for discrimination and not the true reason for the employment decision." Zive, supra, 182 N.J. at 449. "To prove pretext, however, a plaintiff must do

more than simply show that the employer's reason was false; [the plaintiff] must also demonstrate that the employer was motivated by discriminatory intent." Viscik v. Fowler Equip. Co., 173 N.J. 1, 14 (2002) (citing Erickson v. Marsh & McLennan Co., 117 N.J. 539 (1990)).

Duncan appears to be arguing that Crowder's comment to McFarland that he did not like the "little black girl supporting the big black man" is proof that her race was a motivating factor in her inclusion in the RIF. Duncan had been transferred and was not McFarland's assistant anymore. Thus, there was no logical connection between the comment and the RIF.

Verizon has presented a legitimate non-discriminating reason for terminating Duncan's employment by citing her performance. Duncan has not offered any evidence that could lead a fact finder to reasonably "believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." Zive, supra, 182 N.J. at 456. In order to show that the proffered reasons for her inclusion in the RIF were pretextual, Duncan would need to show that McFarland conspired with Crowder to give her a poor performance review that Crowder could then use months later as justification for the termination. See, e.g., Bumbaca v. Twp of Edison, 373 N.J. Super. 239, 252 (App. Div. 2004) (summary

judgment granted to defendant where, to rebut the legitimate, non-discriminatory reason for hiring, the plaintiff was required to show that doctors and officials conspired to "rig" the outcome of psychological exam used to determine suitability for hiring), certif. denied, 182 N.J. 630 (2005). There is no evidence to support that inference.

IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING CLAIM

It is undisputed that Duncan was an at-will employee and that Verizon's Code of Business Conduct did not create an implied contract. In fact, it specifically includes a disclaimer that no contract was formed. Therefore, Verizon could fire Duncan for a "good reason, bad reason, or no reason at all pursuant to the employment-at-will doctrine." Witkowski v. Thomas J. Lipton Inc., 136 N.J. 385, 397 (1994) (citing English v. College of Medicine & Dentistry, 73 N.J. 20, 23 (1977)). Here, the judge correctly found that Verizon's Code did not create a contract and thus the common law implied covenant of good faith and fair dealing was not applicable.

Duncan attempts to argue on appeal that "[t]here is a dispute, as to whether or not defendants' manual with the disclaimer clause was in fact the manual distributed to everyone." This argument was not raised below and thus Duncan did not preserve it for appeal. See State v. Arthur, 184 N.J.

307, 327 (2005); Pressler & Verniero, Current N.J. Court Rules, comment 2 on R. 2:6-2 (2011). Further, Duncan testified in her deposition that she was familiar with the Code and what it required.

CONSTITUTIONAL CLAIMS

As for the constitutional claims, the judge noted that "[i]t is unclear what constitutional claims are violated here." He also ruled that ancillary claims which are within the LAD's reach may not be brought separately.

On appeal, Duncan does not clarify what constitutional deprivation she is claiming. Given the fact that Duncan has identified neither the specific constitutional deprivations, nor the facts that allegedly differ from the LAD claims, we conclude that the issue was not raised in the Law Division. See Arthur, supra, 184 N.J. at 327; Pressler & Verniero, supra, comment 2 on R. 2:6-2.

FALSE LIGHT/INVASION OF PRIVACY CLAIM

Duncan argues that the judge erred in dismissing her false light claim. We disagree.

In order to succeed on a false light claim, a claimant must demonstrate that:

> [o]ne . . . gives publicity to a matter concerning another that places the other before the public in a false light [and]

> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.
>
> [Romaine v. Kallinger, 109 N.J. 282, 294-95 (1988) (alteration in original) (emphasis added) (quoting Restatement (Second) of Torts § 652E).]

The judge found that "[p]laintiff has not provided any facts to establish the elements of a false light claim in the complaint or even in opposition to the defendant's motion for summary judgment." The judge concluded that "even assuming that the [Duncan] could prove publicity, [Duncan] cannot prove falsity or that the publicity gave rise to a false public impression because she was being investigated for absence fraud." Duncan's claim stems from her allegations that other executive assistants in the office knew of the absence fraud investigation that was a true fact.

INTENTIONAL INFLICTION OF SEVERE EMOTIONAL DISTRESS CLAIM

Duncan argues that the judge erred in dismissing her intentional infliction of emotional distress claim. However, she fails to present a prima facie claim of intentional infliction of emotional distress.

In order to prevail on an intentional infliction of emotional distress claim, a claimant must show: (1) intentional or reckless conduct; (2) the conduct was extreme and outrageous; (3) the conduct proximately caused the plaintiff's emotional distress; and (4) the emotional distress was severe. Buckley v. Trenton Sav. Fund Soc'y., 111 N.J. 355, 366 (1988). The defendant's conduct must be "'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" Ibid. (quoting Restatement (Second) of Torts § 46 comment d). Additionally, the claimant's emotional distress must be "'so severe that no reasonable [person] could be expected to endure it.'" Ibid. (quoting Restatement (Second) of Torts § 46 comment j).

Duncan claims she suffered headaches, anxiety, and sleep disturbances. These are insufficient as a matter of law to sustain and intentional infliction of emotional distress claim. Ibid. (holding that as a matter of law, headaches, loss of sleep, and aggravation do not amount to severe emotional distress).

DUNCAN'S REMAINING CLAIMS

Duncan also contends that the judge's unrelated dismissal of her constitutional claims exceeded his discretionary powers

resulting in a manifest denial of justice. We conclude that this contention lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Moreover, Duncan argues that she "states a claim against all defendants" and maintains that the court improperly dismissed the LAD claims against the individual defendants for "aiding and abetting" discrimination. We disagree.

Duncan did not raise this argument in the Law Division and therefore, this court should decline to consider it. Arthur, supra, 184 N.J. at 327; Pressler & Verniero, supra, comment 2 on R. 2:6-2. Moreover, because summary judgment was properly granted to Verizon, the corporate defendant, summary judgment was also appropriate for the individual defendants as aiders and abettors. See Monaco v. Am. Gen. Assur. Co., 359 F.3d 296, 307, n 15 (3d Cir. 2004) ("[I]nasmuch as we hold that the district court correctly granted summary judgment to the corporate defendants, any claim [plaintiff] brought against the individual defendants for aiding and abetting fails as well.").

Affirmed.

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

CLERK OF THE APPELLATE DIVISION