SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

TIMOTHY BURKHARD, Plaintiff/Appellant, v. CITY OF PLAINFIELD, DEPUTY CHIEF PIETRO MARTINO, AND JOHN DOES 1-50, INCLUSIVE, FICTICIOUSLY NAMED DEFENDANTS, JOINTLY, SEVERALLY, AND IN THE ALTERNATIVE, Defendants/Respondents.	Civil Action DOCKET NO. A-003173-22 On Appeal from Superior Court Law Division – Union County Docket No.: UNN-L-2356-20 SAT BELOW: Honorable Mark P. Ciarrocca, P.J. Cv.

PLAINTIFF/APPELLANT'S BRIEF AND APPENDIX IN SUPPORT OF APPEAL

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STATEMENT OF FACTS

Plaintiff Timothy Burkhard is a City of Plainfield Firefighter. He is of maternal Asian parentage; his mother and mother's family being of Philippine national origin and ethnicity. Plaintiff has been a Plainsfield Firefighter since July 31, 2018. He has no higher rank or seniority within the department.

Individually named Mr. Pietro Martino—presently retired—was deputy chief of the entire Plainsfield Fire Department in March of 2020, when the conduct forming the subject matter of this litigation occurred. As set forth in Plaintiff's complaint, Plaintiff and the rest of his shift were, on or around March 13, 2022, in attendance at a Covid-19 training program being conducted by Mr. Martino. Plaintiff briefly dozed off during the training. Defendant Martino then approached Plaintiff, squinted his eyes in a caricature of Asian facial features, and asked Plaintiff if he had just returned from Wuhan. Nineteen (19) firefighters were in attendance and witnessed this conduct. Among the firefighters in attendance was Selket Damon; a battalion chief who was not merely a coworker to Plaintiff but had rank and authority over him. Also in attendance were five Lieutenants.

Plaintiff advised his union president, Corey Henry, and vice president, Hassan Sanders, between the date of the incident and his next shirt, which was four days after the incident. (Pa 50, at 74:1-5 and 75:4-13) During this time, Mr. Henry and Mr. Sanders

spoke with Director Childress. (Pa 50, at 75:15-18) The union representatives relayed to Plaintiff that Director Childress requested Plaintiff submit a letter, or M-13, addressed to the Director explaining the incident. (Pa 50, at 75:19-23) On March 17, 2020, Plaintiff submitted the requested letter to Director Childress. (Pa 50, at 76:13-16)

The results of the event left Plaintiff feeling "insulted", and caused Plaintiff severe stress which led him to not want to return to the workplace. (Pa 51, at 81:5-14) On March 21, 2020, Plaintiff met with Director Childress who went over the letter Plaintiff submitted and promised it would be forwarding the complaint to HR. (Pa 52, at 83:21-84:7; and Pa52, at 85:25 – Pa 53, 86:11)

Battalion chief Damon did not immediately perceive Martino's comments as problematic, interject, or raise any complaints regarding same. On or around March 20, 2020, Damon finally spoke to Plaintiff about the incident and informed him that he would not have to sit in training with Defendant Martino again. (Pa49, at 71:4-15; and Pa 55, at 96:3-16) Damon then began investigating his complaints regarding same several days after-the-fact; only after Damon had heard from multiple other firefighters in attendance at Defendant Martino's Covid training that the conduct they had there witnessed was outrageous, and that Plaintiff was visibly upset by it. (Pa 55, at 94:14-25, and Pa 56, at 98:1) Multiple firefighters

thereafter wrote witness statements affirming that they had heard the comment and saw Martino squinting. (Pa 209, at 44:16-23) Director Kenneth Childress further testified in his deposition that Defendant Martino admitted to him it was a squint:

Q: "Did he [Martino] admit to making the squinting eye gesture?"

A: "Yes."

Q: "Did he [Martino] deny that he was squinting and say he was just closing his eyes?

A: No.

(Pa 90, at 44:21 – 45:1)

On April 6, 2020, Plaintiff had a meeting with Director Childress, his union representatives, Jason Armstead, and Deputy Chief Franklin. (Pa 57, at 103:20 – 104:6, 105:9-13) During the meeting Plaintiff was informed that Defendant Martino would be discipled. (Pa 58, at 106:10-21) Plaintiff was not told what form of discipline Defendant Martino would be subjected to. (Pa, at 106:19-21).

Yet, while discipline was promised, Defendant Martino was never actually subjected to any form of discipline. Defendant Martino took a leave in advance of his pending retirement. (Pa 91, at 46:3 - 47:3, 48:6-14) Defendant City of Plainfield never served Defendant Martino with a letter stating the discipline he would

face due to the racially discriminatory comments and actions he subjected Plaintiff to. (Pa 91, at 46:15-47:3)

Following the unlawful discrimination that Plaintiff was subjected to in violation of the LAD, Plaintiff filed a Complaint alleging claims for violations of his rights under the LAD. (Pa 1-Pa 5)

Following the conclusion of discovery, Defendant City of Plainfield filed a Motion for Summary Judgment. (Pa 13-Pa 14) Defendants reasoning for seeking summary judgment was due to their position that: (1) there was no genuine issue as to any material fact in accordance with the summary judgment standard set forth by Brill, (2) Plaintiff's allegedly failed to set forth a prima facie case of hostile work environment due to race because Plaintiff failed to show the comment was motivated by Plaintiff's race nor was it severe or pervasive, (3) Plaintiff's allegedly failed to set forth a prima facie case of discrimination in violation of the LAD due to race,(4) Plaintiff claims should be dismissed because the Defendant allegedly took immediate action in connection with anti-harassment policies following plaintiff's internal complaint, and (5) Plaintiff was not entitled to compensative or punitive damages. (Pa 256-Pa 257)

Plaintiff opposed the Defendant's motion for summary judgment asserting that: (1) Plaintiff sufficiently established a prima facie case under the LAD for hostile work environment on the basis

of race, (2) there are material facts under dispute as to whether or not Defendants actually maintained an effective anti-discrimination policy, and/or took immediate action in connection with their purported anti-discrimination policies following plaintiff's internal complaint, (3) the Defendant's argument that the Plaintiff cannot establish the involvement of supervisors or upper management is contrary to the facts of this matter and without merit, and (4) Defendants failed to meet the summary judgment standard set forth under Brill. (Pa 257)

The trial judge denied the Defendant's motion for summary judgment. The trial judge determined that a prima facie case of under the LAD for hostile work environment due to race was sufficiently established. The Court found the first element was met because there was a material fact in dispute as to whether the comment was made due to the Plaintiff's heritage. The Court determined the second element was established because there is a material fact in dispute as to whether the comments made during the one-time incident could be considered severe and pervasive. Finally, the court found the third and fourth element were met because a reasonable factfinder could determine that the comment would alter the environment of a reasonable person in Plaintiff's protected class. (Pa 254-Pa 264)

Following the trial courts decision, Defendant's filed a motion to reconsider the denial of summary judgment. (Pa 265-Pa

266) In their motion, Defendant alleged that reconsideration was appropriate because the court erred in not considering the city's affirmative defense regarding its well-established anti-discrimination and harassment policies. (Pa 273)

Plaintiff opposed the Defendant's motion for reconsideration asserting that: (1) the motion was untimely filed, and (2) the Defendant did not meet the standard under R. 4:49-2 as the Defendant did not show an abuse of discretion or error in oversight in the denial of the Defendant's motion for summary judgment. (Pa 273)

After hearing oral argument on Defendant Plainfield's Motion for Reconsideration (T1), the trial judge granted the Defendant's motion for reconsideration and reversed their previous order that denied Defendant's motion for summary judgment. (PA 271-Pa 282) The Court maintained that there were material facts in dispute as to whether Plaintiff was subjected to a hostile work environment in violation of the LAD due to his race. (Pa 280-Pa 281) However, the Court determined that the City did have an effective anti-discrimination policy and enforced the policies promptly. (Pa 281-Pa 282) The trial court erred in this decision as the policy was not effective in stopping the discrimination, nor was it enforced promptly as Defendant Martino was never admonished or reprimanded for his racially motivated conduct. Further, the harasser

Defendant Martino was the person in the Department assigned to train its members on the anti-discrimination policy.

PROCEDURAL HISTORY

Plaintiff Timothy Burkhard filed his Complaint on July 23, 2020, alleging violations of his rights under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et. seq. ("LAD"). (Pa 1) Specifically, Plaintiff alleged he was unlawfully discriminated against by his employer, City of Plainfield, due to his Asian ancestry. (Pa 1- Pa 3) Plaintiff named as an individual Pietro Martino, the former Deputy Chief of the City of Plainfield Fire Department, whom made the discriminatory comments directed at Plaintiff. (Pa 1)

Upon the completion of discovery, Defendants City of Plainfield and Pietro Martino filed their own respective Motion for Summary Judgment on February 3, 2023. (Pa 13-Pa 14)

Plaintiff filed his oppositions to both of the Defendant's Motion for Summary Judgment on February 21, 2023. (Pa 178-Pa 181)

Defendant's filed a response to opposition on February 27, 2023. (Pa 257)

The Court heard oral argument on March 10, 2023. On March 13, 2023, the Corut entered an Order and decision dismissing Plaintiff's Complaint against Defendant Martino with prejudice but denied summary judgment to Defendant City of Plainfield. (Pa 254)

Defendant City of Plainfield filed a Motion for Reconsideration of the denial of summary judgment on April 20, 2023. (Pa 265-Pa 268)

Plaintiff filed his opposition to Defendant City of Plainfield's Motion for Summary Judgment on May 4, 2023. (Pa 273)

Defendant City of Plainfield filed a response to opposition on May 8, 2023. (Pa 273)

The Court heard oral argument on May 12, 2023. (T1) On May 19, 2023, the Corut entered an Order and decision reversing its previous order denying Defendant City of Plainfield's Motion for Summary Judgment and dismissed Plaintiff's Complaint against Defendant City of Plainfield with prejudice. (Pa 271)

This appeal followed with Plaintiff filing his Notice of Appeal and Case Information Statement on June 21, 2023, with amended versions (correcting an error and uploading the Order granting Mr. Pietro's motion for summary judgment) being filed on July 5, 2023, and July 12, 2023. (Pa 283-Pa 286)

LEGAL ARGUMENT

I. LEGAL STANDARD

The standard set forth to review an appeal of a trial court's order granting summary judgment is a de novo standard under the same standard of the trial court. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, P.A., 224 N.J. 189, 199(N.J. 2016). In Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995), the New Jersey Supreme Court explained the summary judgment standard as follows: "a determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to 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. The judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." It should be kept in mind that the mere existence of issues of fact does not preclude summary judgment unless a view of those facts most favorable to the opposing party adequately grounds some claim for relief. Bilotti v. Acurate Forming Corp., 39 N.J. 184 (1963).

In Brill, the Supreme Court of New Jersey adopted the standard for summary judgment used by the Federal Courts. The Brill Court

instructed the motion judge to engage in an analytical process essentially the same as that necessary to rule on a motion for directed verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 536. The Brill Court emphasized that the thrust of its decision is "to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves." Id. at 541.

II. IN DENYING SUMMARY JUDGMENT THE TRIAL COURT CORRECTLY DETERMINED THAT THE PLAINTIFF ESTABLISHED A GENUINE MATERIAL FACT IN DISPUTE AS TO WHETHER HE WAS SUBJECTED TO A HOSTILE WORK ENVIRONMENT IN VIOLATION OF THE NJLAD DUE TO HIS RACE AND ERRED IN REVERSING THAT DETERMINATION ON RECONSIDERATION. (Pa280-282)

The New Jersey Law Against Discrimination ("LAD") was first enacted in 1945, and its purpose is "nothing less than the eradication of the cancer of discrimination." Lehmann v. Toys R Us, Inc., 132 N.J. 587, 626 A.2d 445 (1993), *see also* Fuchilla v. Layman, 109 N.J. 319, 334, 537 A.2d 652, cert. denied sub. nom., University of Medicine & Dentistry of New Jersey v. Fuchilla, 488 U.S. 826, 109 S. Ct. 75, 102 L.Ed 2d 51 (1988). The LAD codified at N.J.S.A. 10:5-1 to -49 provides, in pertinent part:

> It shall be an unlawful employment practice, or ... an unlawful discrimination . . . [F]or an employer, because of the race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual

> orientation, genetic information, pregnancy or breastfeeding, sex, gender identity or expression . . . to refuse to hire or employ or to bar or to discharge or require to retire, unless justified by lawful considerations . . . "from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment. . . .
>
> N.J.S.A. 10:5-12.

The employer has an affirmative duty under the law to take aggressive steps to avoid and prevent discrimination of all types. Since 1993, when the New Jersey Supreme Court decided Lehmann, supra, the law has required that employers take preventative steps and that a negligent failure to do so is a basis for liability under the LAD. "Given the foreseeability that [discrimination] may occur, the absence of effective preventive mechanisms will present strong evidence of an employer's negligence." Id.

A Plaintiff can establish a claim for unlawful employment discrimination under the LAD through either direct or circumstantial evidence. A.D.P. v. Exxonmobil Research & Eng'g Co., 428 N.J. Super. 518, 531 (N.J. Super. 2012). When an employee attempts to prove discrimination by direct evidence, the quality of evidence required to survive a motion for summary judgment is that 'which if believed, proves [the] existence of [a] fact in issue without inference or presumption. Bergen Commercial Bank v. Sisler, 157 N.J. 188, 208 (N.J. 1999); *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989). A court must consider whether

a statement made by a decisionmaker associated with the decision-making process actually bore on the employment decision at issue and communicated proscribed animus. McDevitt v. Bill Good Builders, Inc., 175 N.J. 519, 528 (N.J. 2003). A Plaintiff must produce evidence that an employer based substantial reliance on a proscribed discriminatory factor in making its decision to take the adverse employment action. Id. at 527.

Once established, the burden of persuasion shifts to the Defendant. Id. If the employee does produce direct evidence of discriminatory animus, the employer must then produce evidence sufficient to show that it would have made the same decision if illegal bias had played no role in the employment decision. Fleming v. Correctional Healthcare, 164 N.J. 90, 100 (N.J. 2000). In short, direct proof of discriminatory animus leaves the employer only an affirmative defense on the question of "but for" cause or cause in fact. Id.

Under the McDonnell-Douglas test, a plaintiff must establish a prima facie case by satisfying a four-pronged test that our courts have modified to suit particular forms of discrimination in particular settings. Victor v. State, 203 N.J. 383, 408-10 (2010).

> There is no single prima facie case that applies to all employment discrimination claims. Instead, the elements of the prima facie case vary depending upon the particular cause of action. For example, the prima facie elements for a complaint arising from the failure to hire, regardless of whether that

> claim is based on race, sex or handicap, are: (1) that plaintiff falls within a protected class; (2) that plaintiff was qualified for the work for which he or she applied; (3) that plaintiff was not hired; and (4) that the employer continued to seek others with the same qualifications or hired someone with the same or lesser qualifications.
>
> Id. at 409.

Iin order to rebut the presumption of discrimination raised by plaintiff's prima facie case, the employer must come forward with evidence of a legitimate, nondiscriminatory reason for the adverse employment action. Murray v. Newark Housing Authority, 311 N.J. Super. 163, 173 (N.J. Super. 1998); *see also* Zive v. Stanley Roberts, Inc., 182 N.J. 436, 458 (N.J. 2005) (The defendant then bears the burden of rebutting that presumption by articulating a legitimate and non-discriminatory reason for the termination). If the defendant establishes a legitimate and non-discriminatory reason for the termination the burden shifts back to the plaintiff to show that the reasons advanced by the defendant are a pretext for discrimination. Id.

By contrast, circumstantial evidence typically includes statements such as 'statements by non-decisionmakers, statements by decisionmakers unrelated to the contested employment decision, and other stray remarks. Okakpu v. Irvington Bd. of Educ., No. A-1967-20 (N.J. Super. App. Div. Jul 18, 2022) (slip op. at 10).

Meanwhile, in Lehmann, the Supreme Court articulated a framework of the elements that must be demonstrated by a plaintiff claiming a violation of the LAD based on hostile work environment. Lehmann, 132 N.J. at 604-04. For the purposes of establishing and examining a cause of action, the Plaintiff must show: the complained-of conduct (1) would not have occurred but for the employee's protected status; and it was (2) severe or pervasive enough to make a (3) reasonable person of the same protected class believe that (4) the conditions of employment are altered and the working environment is hostile or abusive. Id. It is important to note that it is the harassing conduct that must be severe **or** pervasive; Plaintiff need not prove that her injury was severe, nor need she prove that the alteration of conditions of employment was itself severe. Taylor v. Metzger, 152 N.J. 490, 499 (N.J. 1998) (citing, Lehmann v. Toys R Us, Inc., 132 N.J. 587 (1993); Muench v. Township of Haddon, 225 N.J. Super. 288, 299 (App. Div. 1992); Rendine v. Pantzer, 141 N.J. 292, 312 (1995) (Finding that a LAD Plaintiff can recover for emotional distress even without an expert report.) (emphasis added).

When considering a claim of hostile work environment under the LAD, the test is fact sensitive, and the court must review the totality of circumstances presented. El-Sioufi v. St. Peter's Univ., 382 N.J. Super. 145, 178 (N.J. 2005). The inquiry is whether a reasonable person in the plaintiff's protected class 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. Dunkley v. S. Coraluzzo Petroleum Transporters, 437 N.J. Super. 366, 376(N.J. Super. 2014). Determining the severity or pervasiveness of the conduct: requires an assessment of the totality of the relevant circumstances, which involves examination of (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 Seminary, 196 N.J. 178, 196 (N.J. 2008). In Taylor v. Metzger **the New Jersey Supreme Court held that even one racial epithet voiced by a supervisor, if sufficiently severe, can create a hostile work environment under the LAD.** Taylor 152 N.J. at 499 (emphasis added).

Here, the trial court properly concluded that the single incident Plaintiff was subjected to did create a genuine issue of material fact as to whether Plaintiff was subjected to a hostile work environment in violation of the LAD due to his race. Considering the standard set forth by Lehmann, Plaintiff sufficiently meets the factors to establish such a claim. Foremost, Plaintiff must show that the complained of conduct would not have occurred but for the employee's protected status. The protected

status or class that Plaintiff falls under is through his race, as he is a part of the Asian-American community. It is undisputed that Plaintiff fell asleep during COVID-19 training and was awoken by Mr. Pietro squinting his eyes and asking him, "If [he] just got back from Wuhan, [China]". Defendants will allege that Mr. Pietro did not know Plaintiff's racial background. This is disputed as Plaintiff clearly states in his deposition that as Plaintiff was confident ". . . that most of the department, if not all of the department knew I was being that I'm the only Asian in the department". (Pa, at 62:14-18). However, even with that being said, the LAD is not an intent-based statute. C.V. v. Waterford Twp. Bd. of Educ., No. A-24-2022 (N.J. Sep 12, 2023) (slip op. at 18) (**print out**). The intent of Mr. Pietro's comment, whether intended to offend Plaintiff or not, is irrelevant. Defendants are not shielded from establishing a violation of the LAD under the first prong because Mr. Pietro didn't know that his comment would offend Plaintiff due to his Asian ancestry. Therefore, the actions of Mr. Pietro do establish a genuine issue of fact material fact as to whether Plaintiff was subjected to a hostile work environment in violation of the LAD due to his race.

Next, the determination is whether the actions were severe or pervasive enough for a reasonable person of the same protected class to believe that the conditions of employment are altered, and the working environment is hostile or abusive. The lower court

determined that "Although Defendant Martino's conduct was a single isolated event, a reasonable factfinder could determine that the comment made in a particularly sensitive time, the COVID-19 pandemic, was severe and pervasive enough to be considered a rare and extreme case contemplated by the Supreme Court in Lehmann." (Pa 264)

Taylor v. Metzger is directly on point as to when these elements are satisfied by one single but particularly severe incident of a high-level defendant supervisor harassing a lower-level Plaintiff in an overtly racial manner. The central issue in Taylor was whether a single derogatory racial comment directed against a subordinate by a supervisor could create a hostile work environment under the LAD. The Plaintiff in Taylor was an African American Burlington County sheriff's officer. Id. at 495. The individually named Defendant was the Sheriff of Burlington County. Id. Defendant Sheriff, in the presence of an Undersheriff, called Plaintiff a "jungle bunny." Id. Defendant testified that he was not aware "jungle bunny" was an offensive slur, and that it was not his intention in using the term "jungle bunny" to harass Plaintiff on the basis of her race. Id. at 496. Rather, "jungle bunny" was a phrase that he had heard while in the Marine Corp and that he believed referred to persons wearing camouflage fatigues. Id. Plaintiff did not lose any income, her job duties remained

unchanged, and no further incidents of racial slurs were alleged. Id. at 497.

The trial court initially entered summary judgment for the defendants, citing the "insufficiency of Plaintiff's allegations." Id. at 508. The case was appealed up to the Supreme Court of New Jersey, which reversed the lower Courts and held that Plaintiff had alleged a prima facie case for hostile work environment under the LAD. Id. at 520. In so holding our Supreme Court relied upon the overtly racial nature and connotation of the underlying incident, the rank and authority of the persons involved, the fact that the comment was made by one supervisor in the presence of another, and the fact that the very individuals involved were the individuals who should have been responsible for maintainin

> The circumstances — that the insult was clearly a racist slur, that it was directed against plaintiff, that it was uttered by the chief ranking supervisor of her employ, the Sheriff of Burlington County, and that it was made in the presence of another supervising officer — were sufficient to establish the severity of the harassment and alter the conditions of plaintiff's work environment.
>
> Taylor 152 N.J.at 507.
>
> A supervisor has a unique role in shaping the work environment… Here, defendant did more than merely allow racial harassment to occur at the workplace, he perpetrated it. That circumstance, coupled with the stark racist meaning of the remark, immeasurably increased its severity.

> The Sheriff of Burlington County is a high-ranking law enforcement officer. That fact is of significance when evaluating the effect of his remark on a subordinate. Any remark from such an individual carries with it the power and authority of the office.
>
> Taylor 152 N.J.at 504-505.
>
> We do not hold that a single racial slur spoken by a stranger on the street could amount to extreme and outrageous conduct. But, a jury could reasonably conclude that the power dynamics of the workplace contribute to the extremity and the outrageousness of defendant's conduct.
>
> Taylor 152 N.J.at 511.

The test of severity adopted by the Court in Taylor applies in the pending matter. The same considerations support a finding that the incident set forth in Plaintiff's complaint is of adequate severity to satisfy the severe or pervasive requirement of the LAD.

III. THE TRIAL COURT ERRED IN GRANTING RECONSIDERATION AS THE POLICY WAS NOT EFFECTIVE IN STOPPING THE DISCRIMINATION, NOR WAS IT ENFORCED PROMPTLY AS DEFENDANT MARTINO WAS NEVER ADMONISHED OR REPRIMANDED FOR HIS RACIALLY MOTIVATED CONDUCT. (Pa280-282)

Defendants' sole basis for deeming that they were not liable for the conduct that Defendant Pietro engaged in comes under a belief that they have an affirmative defense as they allege the city had a well-established anti-discrimination and harassment policies. Yet, this belief runs counter to the actions of Defendant.

In Dunkley, supra, the five elements used to determine if an employer has a proper anti-discrimination and/or anti-harassment policy considers: (1) it maintained a policy of anti-harassment and anti-discrimination in writing; (2) it set forth both formal and informal complaint procedures; (3) mandatory training for supervisors and training for all employees; (4) sensing or monitoring mechanisms; and (5) an unequivocal commitment from the top that is not just in words but backed up by consistent practice. Dunkley 437 N.J. Super. at 376. Absence of effective preventative measures would present strong evidence of an employer's negligence in respect of the duty of due care to prevent harassment in the workplace. Gaines v. Bellino, 173 N.J. 301, 313(N.J. 2002).

No one can dispute that Defendant investigated the initial claim of discrimination that Plaintiff was subjected to. In fact, the issue revolves around the fifth prong. Defendants must show that they have an unequivocal commitment from the top that is not just in words but backed up by consistent practice. Here, the Defendant failed to show that they have an unequivocal commitment from the top that is not just in words but backed up by consistent practice.

It is unequivocally undisputed that Defendant failed to discipline Defendant Pietro for the racially motivated conduct he engaged in. Under the theory set forth by Defendant, they could investigate any claim of harassment in the workplace in violation

of the LAD and be shielded from liability as they have 'wiped their hands clean of the matter'. How Defendants can allege they have an unequivocal commitment from the top that their policy is not just in words but backed up by consistent practice is absurd when individuals who allege such harassment are not disciplined. The anti-harassment is not a one-step policy that simply consists of an investigation. Conversely, it is a two-step policy – i.e. investigate the claim and then discipline if the investigation corroborates the claims.

Defendants will claim that due to Defendant Pietro's leave of absence, mixed with his retirement, they were unable to discipline him. Yet, Defendants could have done something. Defendant could have sought the retirement of Defendant Pietro to be stayed pending the investigation and disciplinary charges. Defendant could have also sought the New Jersey Department of Personnel to suspend the retirement benefits pending the outcome of the disciplinary charges. See N.J.A.C. 17:1-1.13(a)(4). Defendant's didn't even have anyone sign the disciplinary letter that was prepared on April 7, 2020. (Pa 249-Pa 249) This is despite Defendant Pietro not retiring until January 31 or February 1, 2022. (Pa 152, at 98:8-11) In fact, Defendant Pietro states in his testimony:

> Q. Were you interviewed as a part of this investigation?
> A. Not that I can recall.
> Q. Were you ever presented with any result of the investigation?

> A. I was not.
> Q. Were you ever reprimanded by anyone over this incident?
> A. I was not.
> Q. I know we are a little bit shaky on what the term discipline means, but were you ever disciplined in any way as a result of this incident?
> A. No I was not.
>
> (Pa 147, at 78:13-79:2)

Thus, there is a genuine dispute as to a material fact as to whether Defendant is able to establish an affirmative defense under a theory that they had a proper anti-harassment policy in effect. The Trial Court correctly denied summary judgment and erroneously granted reconsideration reversing its prior decision.

IV. CONCLUSION.

For the foregoing reasons, Plaintiff respectfully requests that the decision of the trial court granting reconsideration and dismissing Plaintiff's Complaint should be reversed and the within matter should be remanded for trial.

Respectfully submitted,
IONNO & HIGBEE, ATTORNEYS AT LAW

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Dated: December 11, 2023

TIMOTHY BURKHARD, Plaintiff/Appellant, v. CITY OF PLAINFIELD, DEPUTY CHIEF PIETRO MARTINO, AND JOHN DOES 1-50, INCLUSIVE, FICTICIOUSLY NAMED DEFENDANTS, JOINTLY, SEVERALLY, AND IN THE ALTERNATIVE, Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Appellant Docket No.: A-003173-22 ---------- Sat Below: Hon. Mark P. Ciarrocca, J.S.C. Docket No: UNN-L-2356-20 On appeal from the Order entered on May 19, 2023 from the Superior Court of New Jersey, Law Division, Union County

APPENDIX OF DEFENDANT-RESPONDENT, CITY OF PLAINFIELD

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February 21, 2023

VIA ECOURTS AND REGULAR MAIL

Honorable Mark P. Ciarrocca, P.J. Cv.
Union County Courthouse
Superior Court of New Jersey
2 Broad Street, 9th Floor Tower
Elizabeth, NJ 07207

Re: Timothy Burkhard v. City of Plainfield, et al.
Docket No: UNN-L-002356-20

Dear Judge Ciarrocca:

This office represents Plaintiff, Timothy Burkhard, in the above-captioned matter. Please accept this letter brief in lieu of a more formal brief in opposition to Defendants' Motion for Summary Judgment.

PRELIMINARY STATEMENT

This is a straightforward hostile work environment matter arising under the New Jersey Law Against Discrimination (LAD). The matter follows the classic fact pattern of Taylor v.

could be severe enough to create a hostile work environment must be viewed in light of the public sentiment and trends in popular prejudice which existed at the time of the incident.

Each of the aforementioned points will be further discussed at length following Plaintiff's recitation of facts. For the aforementioned reasons, Defendants have failed to present meritorious arguments warranting dismissal of Plaintiff's claims and it is respectfully submitted that the motion must be denied.

RESPONSE TO DEFENDANTS' STATEMENT OF FACTS

1. Admitted.
2. Admitted.
3. Admitted.
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16. Admitted that Plaintiff so testified.

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19. Admitted that Plaintiff so testified.

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54. Admitted that Plaintiff so testified.

55. Admitted that Plaintiff so testified.

56. Admitted that Plaintiff so testified.

57. Admitted only that Defendants purported to conduct an investigation into Plaintiff's complaints. Denied that said investigation was properly handled or that Defendants ultimately took any remedial actions with the result(s) of same.

58. Admitted only that Defendants purported to conduct an investigation into Plaintiff's complaints. Denied that said investigation was properly handled or that Defendants ultimately took any remedial actions with the result(s) of same.

59. Admitted only that Defendants purported to conduct an investigation into Plaintiff's complaints. Denied that said investigation was properly handled or that Defendants ultimately took any remedial actions with the result(s) of same.

60. Admitted only that Defendants purported to conduct an investigation into Plaintiff's complaints. Denied that said investigation was properly handled or that Defendants ultimately took any remedial actions with the result(s) of same.

61. Admitted only that Director Childress so testified. Denied that any discipline was ever actually administered as a result of the purported belief that said discipline was warranted.

62. Admitted that Defendant Martino was never served with the purported letter of reprimand that Defendants produced in discovery. Denied that Defendants have set forth a true, accurate, or credible rationale for why Defendant Martino was never served with the purported letter of discipline insofar as Defendants claim: "the reprimand was never served on him because during that time many members of the department were dealing with covid and the Director had to prioritize his actions."

63. Admitted that Defendants maintained said antidiscrimination policy in writing. Denied that upper management level personnel maintained workplace policies in practice or provided a culture of leadership which effectuated and enforced same.

64. Admitted that Defendants maintained said antidiscrimination policy in writing. Denied that upper management level personnel maintained workplace policies in practice or provided a culture of leadership which effectuated and enforced same.

65. Admitted that Defendants maintained said antidiscrimination policy in writing. Denied that upper management level personnel-maintained workplace policies in practice or provided a culture of leadership which effectuated and enforced same.

66. Admitted that employees of the Defendant are trained on their written antidiscrimination policy. Denied that upper management level personnel maintained workplace policies in practice or provided a culture of leadership which effectuated and enforced same.

67. Admitted that employees of the Defendant are trained on their written antidiscrimination policy. Denied that upper management level personnel maintained workplace policies in practice or provided a culture of leadership which effectuated and enforced same.

68. Admitted that Defendants maintained said antidiscrimination policy in writing. Denied that upper management level personnel maintained workplace policies in practice or provided a culture of leadership which effectuated and enforced same.

69. Admitted that Defendants maintained said antidiscrimination policy in writing. Denied that upper management level personnel maintained workplace policies in practice or provided a culture of leadership which effectuated and enforced same.

70. Admitted that employees of the Defendant are trained on their written antidiscrimination policy. Denied that upper management level personnel maintained workplace policies in practice or provided a culture of leadership which effectuated and enforced same.

71. Admitted that employees of the Defendant are trained on their written antidiscrimination policy. Denied that upper management level personnel maintained workplace policies in practice or provided a culture of leadership which effectuated and enforced same.

72. Admitted that Defendants maintained said antidiscrimination policy in writing. Denied that upper management level personnel maintained workplace policies in practice or provided a culture of leadership which effectuated and enforced same.

73. Admitted that Defendants maintained said antidiscrimination policy in writing. Denied that upper management level personnel maintained workplace policies in practice or provided a culture of leadership which effectuated and enforced same.

PLAINTIFF'S STATEMENT OF MATERIAL OF FACTS

[redacted]

TIMOTHY BURKHARD, Plaintiff/Appellant, v. CITY OF PLAINFIELD, DEPUTY CHIEF PIETRO MARTINO, AND JOHN DOES 1-50, INCLUSIVE, FICTICIOUSLY NAMED DEFENDANTS, JOINTLY, SEVERALLY, AND IN THE ALTERNATIVE, Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Appellant Docket No.: A-003173-22 ---------- Sat Below: Hon. Mark P. Ciarrocca, J.S.C. Docket No: UNN-L-2356-20 On appeal from the Order entered on May 19, 2023 from the Superior Court of New Jersey, Law Division, Union County

DEFENDANT-RESPONDENT, CITY OF PLAINFIELD'S, MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF-APPELLANT'S APPEAL

Matthew R. Tavares, Esq.
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Of counsel and on the brief

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Attorneys for Defendant-Respondent, City of Plainfield

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LIST OF PARTIES

Party Name	Appellate Party Designation	Trial Court/ Agency Party Role	Trial Court/Agency Party Status
TIMOTHY BURKHARD	Appellant	Plaintiff	Participated Below
CITY OF PLAINFIELD	Respondent	Defendant	Participated Below

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

PRELIMINARY STATEMENT

In this appeal, the Plaintiff-Appellant, Timothy Burkhard, ("Appellant") contends that the trial court's decision to grant reconsideration of its prior denial of summary judgment and ultimately grant summary judgment was a mistake. A full review of Appellant's arguments and of the record demonstrates that Appellant's beliefs, though, are unsupported by the factual evidence.

The Appellant's claims first rely on the theory that if a *prima facie* case for discrimination is set forth at summary judgment, the analysis of liability should cease, and the claims should proceed to trial. On reconsideration, the trial court correctly determined that the analysis must also incorporate affirmative defenses set forth by the City. Here, the City maintained an affirmative defense by demonstrating the maintenance and use of an effective anti-discrimination and anti-harassment policy. The facts were undisputed as to the policy, training, and investigation related to same. Appellant's departure is solely based on his disagreement with the outcome. However, this subjective feeling of the Appellant is not dispositive of the effectiveness of the policy at issue nor is it a legal basis for reversal. Indeed, the record at the trial court was clear: the City of Plainfield is entitled to an affirmative defense to vicarious liability pursuant to factors set forth in Dunkley.

For the reasons set forth more fully below, it is respectfully requested that this Court affirm the trial court's grant of reconsideration and summary judgment.

PROCEDURAL HISTORY

On July 23, 2020, Plaintiff-Appellant, Timothy Burkhard, filed a complaint ("Complaint") against the City of Plainfield ("City") and Pietro Martino ("Martino") alleging violations of the New Jersey Law Against Discrimination ("NJLAD") through a race-based hostile work environment. Pa1.

The City filed its answer denying Appellant's allegations and setting forth several affirmative defenses including: affirmative defense 17 which provides "Defendant at all times conducted a diligent and prompt investigation of any claims of discrimination, harassment, hostile work environment or retaliation made by Plaintiff" and affirmative defense 21, which provides "[t]he City, at all relevant times, maintained an effective anti-harassment/discrimination policy." Pa8-12.

Following discovery, the City and Martino each filed their respective motions for summary judgment to dismiss Appellant's Complaint. Pa13. On March 13, 2023, the Court granted Martino's summary judgment, but denied the City's motion for summary judgment. Pa254.

On April 20, 2023, the City filed its motion for reconsideration on the grounds that the trial court improperly and erroneously failed to consider the City's affirmative defense against vicarious liability based on its anti-harassment and anti-discrimination policies enacted and enforced at the time of the incident. Pa265.

Following oral argument on the matter, on May 19, 2023, the trial court granted reconsideration and reversed its denial of summary judgment from March 13, 2020 in favor of granting summary judgment to the City. Pa271.

Then on June 21, 2023, Appellant filed his notice of appeal with this court. Pa283.

COUNTERSTATEMENT OF FACTS

Timothy Burkhard ("Appellant") was hired as a firefighter for the City of Plainfield in July of 2018. He currently serves in that same role. Pa2 at ¶7; Pa38, T28:3-12. Appellant is of Asian descent, as he testified that his mother is from the Philippines. His father is of Irish descent. Pa48, T67:19-T68:9.

Appellant attended the Middlesex Academy and graduated in September 2018. Following his graduation, Plaintiff began his probationary year of service as a full-time firefighter. Pa36, T21:21-24; Pa37, T25:1-4. On June 19, 2019, Appellant received workplace harassment training through the City of Plainfield. The training was presented by an outside hiree. Pa43, T47:9-48:15, T49:8-17; Pa63. He further testified to receiving several other anti-harassment and anti-discrimination training courses through the City during his career. Pa44, T50:8-9. Appellant received a copy of the employee handbook during his probationary period. Pa42, T44:2121-23.

The City's employment handbook includes an anti-discrimination policy, which provides, in part:

> The City of Plainfield is committed to the principle of equal employment opportunity and anti-discrimination pursuant to Title VII of the 1964 Civil Rights Act…Under no circumstances will the City of Plainfield discrimination on the basis of sex, race, creed, color religion, national origin, ancestry, age, marital or political status, affectional or sexual orientation, domestic partnership status, civil union status, atypical hereditary, cellular or blood trait, genetic information, disability…liability for service in the United States armed forces, gender identity or expression, and/or other characteristics protected by law…If any employee or prospective employee feels they have been treated unfairly, they have the right to address their concern with their supervisor, or if they prefer their Department Head, the Personnel Director, the City Administrator, or the office of the Corporation Counsel.

Pa121-122. The employment handbook further provides an anti-harassment policy which states: "if an employee is witness to or believes to have experienced harassment, immediate notification of the supervisor or other appropriate person should take place" and refers employees to the "Employee Complaint Policy." Pa123-124. The Employee Complaint Policy set forth that the City "has a no tolerance policy towards workplace wrongdoing" and further provides:

> [e]mployees desiring to file a complaint regarding any of the above mentioned terms and conditions of employment should utilize the grievance procedures outlined in their union contract, or the Municipal Code (whichever is applicable); or the appeal process/procedures in accordance with the provisions of the New Jersey Administrative Code, Title 4A.

Pa125-126.

Plainfield Fire Director, Kenneth Childress, testified that the Fire Department conducts annual anti-discrimination and anti-harassment trainings since the time he became Director in 2019. Pa96, T67:13-68:2. Annual anti-discrimination and anti-harassment training for the Plainfield Fire Department was also confirmed by Deputy Chief Joseph Franklin. Pa116, T70:16-71:11. Not only are trainings mandated on the topic, but the City's anti-discrimination and anti-harassment policies are prominently posted in the second-floor hallway in all three Fire Department buildings in the same location as the required OSHA posting and other important workplace documents. Pa96, T68:11-69:5; Pa116, T71:12-24.

The Incident

Appellant's claim of discriminatory conduct revolves around a single incident that occurred on March 13, 2020. Pa44, T53:2-11. Appellant states that:

> On that date the whole shift was receiving training on COVID-19, the pandemic and the dangers of it, more like training about, like, precautionaries and basic knowledge and awareness. Towards the end of the lecture and training I apparently fell asleep for ten seconds or so, I mean I don't know a specific time, and I woke up to Martino asking me if I just got back from Wuhan, mocked me with a face with squinting eyes.

Pa44, T53:15-25. Co-Defendant, Pietro Martino, a Deputy Chief in the Plainfield Fire Department, was the instructor of the Covid-19 training on that date. Pa45, T55:8-10. When asked, Appellant was unaware of whether Martino made the

comment due to his race and was not sure if Martino even knew his race. Pa47, T62:12-23, T64:7-13. Appellant testified that while his employment file stated that he was of Asian descent, he was unaware of whether Martino ever reviewed his employment file or if any document existed that would have identified Appellant's race or nationality. Pa47, T64:7-13. Additionally, Appellant testified that he did not outwardly display anything that would identify his ancestry. Pa51, T79:14-80:10. Appellant further acknowledged the possibility that the comment made by Martino was made because the topic the training was the origins of Covid-19. Pa47, T63:3, T64:17. Indeed, Appellant had never heard Martino make any similar comments prior to this incident. Pa47, T63:17. It should be noted that City records show that Martino had been trained in anti-harassment and anti-discrimination as recently as May 2019. Pa154.

Appellant was concerned with Martino's comment because he felt that he was being "ridiculed" by a high-ranking officer and the impact that such ridicule could have on Plaintiff's career. Pa46, T60:10-20. However, he testified that after the incident, several firefighters went into the lunchroom and discussed the incident with him. Pa47, T65:15-25. He further testified that he received support from the department following the incident. Pa48-49, T69:2-70:20.

It is important to note that prior to this incident, Appellant admitted that he and Martino had a "respectful" and "professional" relationship. Pa61, T120:23-

121:17. Indeed, their relationship was limited. Throughout Appellant's probationary period, he would rotate between stations and supervisors. Pa37, T25:7-9, T27:1. Appellant could only recall Martino serving as his Battalion Chief for a few months in the beginning of Appellant's career. Pa40, T35:6-20. During that time, Appellant testified that they did not interact very often, only when it was required. Id. at T37:5-8, and 15. Appellant further testified that there was no particular reason why he "never got personal" with Martino. Pa41, T38:14-15; T39:16-22; and T40:5-10.

The Fire Department's Internal Investigation

Between the date of the incident and Appellant's next shift, which was four days later, Appellant advised his union president, Corey Henry, and vice president, Hassan Sanders, of the incident that occurred on March 13, 2020. Pa50, T74:1-5 and T75:7-13. His union representatives then spoke with Director Childress. It was relayed to Appellant that Director Childress requested that he submit a letter, or a document otherwise known as an M-13, addressed to the Director explaining the incident. On March 17, 2020, Appellant submitted an M-13 to Director Childress. Pa50, T75:21-22, T76:3-6; see also Pa78.

Though during this time, Appellant described feeling "insulted", under stress, and unsure if he wanted to return to work, he admitted that he had received nothing but support from the Fire Department. Pa51, T81:5-20. In fact, Appellant testified that approximately one week after the incident, or approximately two shifts after the

incident, his Battalion Chief, Selket Damon, approached him to discuss the incident. He described his conversation with Battalion Chief Damon as follows:

> I spoke with her about the incident approximately, like two shifts after. And I was sitting house watch, which is our front door desk, and this was immediately after -- or this was the evening after I sat in on a second training with Martino. And she came downstairs. And, I assume, maybe she heard or that I was very bothered in there, and she offered her support and she was consoling with me, like, which was -- it was nice of her, I thought. She talked -- we talked about it.
> . . .
> From what I can recall, she was -- she assured me that if I felt uncomfortable at any -- that I didn't have to sit in anymore training with him if I felt uncomfortable, that it would be okay and stuff like that. That's a slideshow training, that I don't have to do it, and we could always do it on the side if you feel more comfortable with. So that was – and she was like sympathizing with me, kind of saying how... you know, how she was the first woman and that she went through things and differences. So she was sympathizing with me, and I was able to tell her how I felt.

Pa45, T56:24-57:2; Pa49, T71:4-15; and Pa55, T96 :3-16. He acknowledged that he appreciated Battalion Chief Damon speaking with him and offering him the opportunity to do trainings without Martino. He stated that Battalion Chief Damon noticing him made him "feel good." Pa55, T96:17-97:3. While he was apprehensive to approach his Battalion Chief about the incident for fear of sounding like he was "complaining" more, he admitted that no one had done anything to make him feel that he was "complaining too much or that [he] was a bother of any sort." Pa56,

T98:22-99:2. Instead, "nobody ever went against [him]. They always agreed." Pa56, T99:3-10.

On March 21, 2020, Appellant's next shift, he met with Director Childress in his office at the Director's request. Pa52, T83:21-84:7. Appellant described the meeting as follows:

> During that conversation we went over the letter and we spoke about it, what happened. He agreed that it shouldn't have happened. He sympathized with me and he made some comments about how it's not like he's my friend and we're not -- he knows that we're not personal, me and Martino. And eventually he assured me that he would be taking my complaint to City Hall or personnel, essentially HR, I believe, and then he reassured me shortly after that he was going to do it that day.

Pa52-53, T85:25-86:11. During this meeting, Appellant was advised that an investigation into the incident would commence. Pa53, T87:9-13; and Pa56, T101:3-9. Appellant learned that as part of the investigation, other department members, were also asked to submit M-13's, describing what transpired on as they recalled the incident. Pa56, T102:23-103:1.

Indeed, on March 17, 2020, Director Childress instructed Deputy Chief Franklin, who was the Deputy Chief of Operations, to begin an investigation into Appellant's complaint. Pa89-90, T41:10-42:3; Pa109, T42:19-43:3. Deputy Chief Franklin conducted the investigation by gathering documents such as witness statements and any other proofs related to the incident. Pa89-90, T42:4-43:9. Deputy

Chief Franklin instructed Battalion Chief Damon to gather information by getting M-13's from all witnesses to the incident. Pa110, T47:10-23. Because Deputy Chief Franklin and Deputy Chief Martino maintained the same rank, Director Childress interviewed Martino regarding the incident. Pa90, T44:10-16. Director Childress stated that during his interview with Martino, Martino admitted that he said it, but that he "didn't mean it in that manner." Pa90, T44:17-20.

Following receipt of the documents and information gathered by Battalion Chief Damon and Deputy Chief Franklin, and after interviewing Martino, Director Childress reviewed all of the information and concluded that discipline was warranted for the incident. Pa90, T43:4-16; Pa90-91, T45:25-46:2. Director Childress further testified that a written reprimand was prepared for Martino as a result of the investigation. However, the reprimand was never served on Martino because during that same time period, many members of the department were dealing with the onset of Covid-19 or had gotten ill from Covid-19 and the Director felt he had to prioritize his actions. Within that same month, Defendant Martino went on terminal leave in advance of his retirement. Pa91, T46:3-47:3; T48:1-14; see also Pa118. Director Childress further testified that prior to Martino's retirement he advised him that his actions were "improper." Pa91, T48:1-24.

On or about April 6, 2020, Appellant returned to Director Childress' office with his union representative, Jason Armstead, and Deputy Chief Franklin wherein he described:

> A. During the meeting he told me that -- the director was talking to me, he said that the investigation was completed, that he couldn't tell me what his discipline would be, but he would assure me that he would be receiving some sort of -- what was it -- some sort of, like, training -- or not training or -- I don't know. I forget. I don't know how to explain it. I kind of brain froze. He wouldn't -- they couldn't tell me his discipline, but he would be receiving some sort of counseling. That's what it was. And they also -- him and Deputy Chief Franklin, they commended me, telling me that it takes a lot to put it on paper because not a lot of people have the confidence to do that. The director was saying how people historically would wait 20 years down the road to make a complaint and say, hey, this guy did this to me. And I just -- I reassured them that it bothered me enough that I wanted to let them know what kind of people they have working for them.
>
> Q. Were you satisfied with the fact that they -- with them commending you for coming forward?
>
> A. Yeah, satisfied to an extent.
>
> Q. Okay. What's the extent?
>
> A. I felt recognized, so that felt good.

Pa53, T87:22-88:3, Pa57, T104:1-7; T105:9-13 ; and Pa58, T106 :10-107 :13.

Appellant further testified that after the meeting, he felt a sense of confidence that his complaint was addressed:

> A. As far as feelings, like, I did feel a sense of confidence being that it took a lot to write that letter and that I felt assured that something was going to happen --or something right was going to happen.
>
> . . .
>
> Q. Did the meeting with Childress change any of that? Did it make you confident that something was actually going to happen?
>
> A. It did. It did after his assurance of him going to -- his agreement, primarily, and then that he was going to take it to the city, I felt that I did the right thing.

Pa53, T88:22-89:1 and T89:18-24.

Appellant testified that he had no other complaints about or interactions with Martino, though Appellant did attend another Covid-19 training conducted by Martino within two weeks of the incident. Pa52, T85:5-9; Pa54, T92:9-19: T91:12-14: T93:4-13.

Following the incident and investigation into same, Appellant testified that he was not aware of negative comments about his complaint other than unspecified chatter and gossip. Pa58-59 T109:16-110:2. Appellant never complained of any gossip to his superiors. Pa59, T110:18. He testified that he was not aware of any other "mocking comments" other than those alleged to have been made by Martino. Pa52, T82:4-9. Though he testified to some awkwardness from members of the

department who were not on his shift, this again was unspecified by Appellant. Pa59, T112:14-19. Appellant admitted that he was not disciplined as a result of his complaint, nor did he lose pay, receive any demotion, or suffer any loss of benefits. Pa59, T111:8-18; Pa60, T114:4; and P43, T46:9-20.

Despite his uneasiness about the incident and belief if would negatively impact his career, Appellant testified that he was nominated for and voted into the position of assistant treasurer for his union, FMBA Local 7, in 2021. Pa41, T40:21; T41:12-25. Importantly, as a result of the incident, Appellant did not acquire any medical leave, nor did he receive any treatment, including therapy or mental health treatment. Pa59, T110:21-24.

Denial of Summary Judgment and Grant of Reconsideration.

On March 13, 2023, the trial court denied the City's motion for summary judgment. Pa254. In denying summary judgment, the trial court's opinion set forth numerous findings regarding the incident of March 13, 2020. Notably, the trial court's opinion provided that the incident was reported by Appellant, which led to a City investigation:

> On March 17, 2020, Burkhard submitted a letter, or M-13, explaining the incident at the request of the Fire Department Director. A written reprimand was prepared for Defendant Martino as a result of the investigation, but the reprimand was never served due to issues with COVID-19 and Defendant Martino's terminal leave in advance of his retirement. Despite the incident, Burkhard

> maintained that he received support from the Department regarding the incident and stated that his tenure with the Fire Department was not impacted by the incident or his subsequent complaint.

Pa256. Absent from the opinion, however, was any discussion by the trial court of the City's affirmative defense regarding its anti-harassment and anti-discrimination policies and its enforcement of those policies. See generally Pa254-264. As a result, the City moved for reconsideration. Pa265.

On reconsideration, the trial court granted the City's motion and in turn granted summary judgment dismissing Appellant's Complaint. Pa271. In its background discussion within the Opinion, the trial court noted:

> Following the incident, Plaintiff advised his union president of the incident leading to a City investigation. On March 17, 2020, Plaintiff submitted a letter, or M-13, explaining the incident at the request of the Fire Department Director. A written reprimand was prepared for Defendant Martino as a result of the investigation, but the reprimand was never served due to issued with COVID-19 and Defendant Martino's terminal leave in advance of his retirement. Despite the incident, Plaintiff maintained that he received support from the Department regarding the incident and stated that his tenure with the Fire Department was not impacted by the incident or his subsequent complaint.

Pa 273.

The trial court noted that Appellant's arguments centered on the premise that there were grounds for denial of summary judgment on the issue of liability "even if

there was no reasonable dispute that the City maintained policies for reporting and investigating same."

In its analysis of the arguments and law, the trial court concluded that reconsideration must be granted. "Under Lawson only sound discretion and the interest of justice guides the trial court…Here the Court did not consider the City's affirmative defense to vicarious liability in its written opinion. Thus, the Court finds that denial of the City's motion…was improper." Pa 280. The trial court then supplemented its analysis. Though the trial court affirmed its finding that an issue of fact existed related to the incident itself, the trial court pointed out:

> [I]n cases where no tangible employment actions have been taken against the Plaintiff, the employer has an affirmative defense to vicarious liability, requiring proof that (1) the employer exercise reasonable care to prevent and to correct promptly any harassing behavior; and (2) that the employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer or to otherwise avoid harm. See Aguas, 220 N.J. at 524.
>
> Here, the City maintained an effective anti-harassment policy to prevent and to correct promptly the alleged discriminatory acts by Defendant Martino. The City's employment handbook provides an anti-discrimination policy, which state, in part: "Under no circumstances will the City of Plainfield discriminate on the basis of sex, race, creed, color, religion, national origin, ancestry, age, marital or political status, affectional or sexual orientation, domestic partnership status, civil union status, atypical hereditary, cellular or blood trait, genetic information, disability"…Additionally, the Employee Complaint

> Policy (within the employment handbook) states that: "[e]mployees desiring to file a complaint regarding any of the above mentioned terms and conditions of employment should utilize the grievance procedures outlined in their union contract, or the Municipal Code…; or the appeal process/procedures in accordance with the provisions of the New Jersey Administrative Code, Title 4A"…The City conducts annual anti-discrimination and harassment trainings, and the policies are posted in all buildings operated by the Fire Department. Defendant Martino testified that he received training from the City on several occasions before the incident. Plaintiff also testified that he received trainings on June 19, 2019, and at least on one other occasion. Furthermore, Plaintiff's internal complaint was lodged with the City shortly after the incident on March 17, 2020, and investigation began immediately thereafter. Plaintiff was satisfied that he was being recognized and that his complaint was being addressed. The investigation was prompt and completed over the court of three and a half weeks. A written reprimand was prepared for Defendant Martino as a result of the investigation, but the reprimand was never served due to Martino's terminal leave in advance of his retirement. However, Defendant Martino's effective retirement prior to the issuance of discipline is not dispositive regarding whether the City maintained an effective anti-harassment policy. Notably, Plaintiff did not experience any further discriminatory acts and suffered no change in his position. Thus, the record evidence demonstrates that the City not only maintained an effective policy and complaint procedure, but it also enforced the policies promptly. Thus, reconsideration is warranted, here, and the Court must reconsider its March 13, 2023, Order denying the City's motion for summary judgment. Accordingly, the Court must grant summary judgment in favor of the City and dismiss Plaintiff's Complaint with prejudice.

Pa281-282.

Following the Order on reconsideration, Appellant filed his notice of appeal and case information statement with this Court on June 21, 2023. Pa283; Pa287.

POINT I

STANDARD OF REVIEW.

ON APPEAL FROM A GRANT OF SUMMARY JUDGMENT, THE APPELLATE COURT EMPLOYS THE SAME STANDARD OF REVIEW AS THE TRIAL COURT. (ISSUE NOT RAISED BELOW).

In reviewing a trial court's decision on summary judgment, an appellate court reviews the matter with the same standard applied by the trial court. Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010). "[T]he appellate court should first decide whether there was a genuine issue of material fact, and if none exists, then decide whether the trial court's ruling on the law was correct." Id.

In Brill v. The Guardian Life Insurance Company of America, 142 N.J. 520 (1995), the New Jersey Supreme Court held:

> [A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to 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 fact finder to resolve the alleged disputed issue in favor of the nonmoving party…If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient

> to constitute a 'genuine' issue of material fact for purposes of Rule 4:46-2. The import of our holding is that when the evidence 'is so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment.
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> [142 N.J. at 540 (citing Liberty Lobby v. Anderson, 477 U.S. 242, 250-52 (1986)).]

The thrust of the Brill decision was to encourage trial courts not to refrain from granting summary judgment when proper circumstances present themselves. Id. at 541. While the New Jersey Supreme Court recognized the importance of not shutting a deserving litigant from trial, it stressed that it was just as important that the court not "allow harassment of an equally deserving suitor for immediate relief by a long and worthless trial." Id. (*quoting* Judson, 17 N.J. at 77). To send a case to trial, knowing that a rational jury can reach but one conclusion, would be "worthless" and "will serve no useful purpose." Brill, 142 N.J. at 541.

Although moving papers supporting a summary judgment motion are closely scrutinized with all inferences of doubt drawn against the moving party, once a movant demonstrates a *prima facie* right to summary judgment, the burden shifts to the non-moving party. R. 4:46-5. The non-moving party must counter the summary judgment motion with competent evidential material to show a genuine factual dispute. Robbins v. Jersey Township, 23 N.J. 229, 241 (1957). R. 4:46-5 provides:

> When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but must respond by affidavits…setting forth specific facts showing that there is a genuine issue for trial.

Thus, the opponent of a summary judgment motion must show controverting facts, not merely bare assertions, representations or allegations in pleadings without affidavit or other evidentiary support. The opponent must clearly establish the existence of a genuine issue of material fact. The failure to discharge this duty entitles the movant to summary judgment. Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 74-75 (1954).

Here, the trial court initially denied summary judgment. However, the trial court then exercised its discretion in reconsidering the denial of summary judgment. This reconsideration was appropriate and just in the circumstances. After reconsidering, the trial court clearly reviewed the facts as presented under the summary judgment standard and found no genuine issue of material fact as to the City's affirmative defense. Accordingly, reconsideration was appropriately granted and summary judgment, as a result, was appropriately granted. For the reasons below, this Court should affirm the decision of the trial court to grant reconsideration and ultimately grant summary judgment.

POINT II

THE TRIAL COURT CORRECTLY RECONSIDERED ITS MARCH 13, 2023 ORDER AND CORRECTLY ENTERED SUMMARY JUDGMENT BASED ON THE CITY'S AFFIRMATIVE DEFENSE. (Pa271-282).

As the trial court properly found, Appellant's claims must fail because the City produced evidence in the record to demonstrate that it was entitled to the affirmative defense that it maintained and utilized an effective anti-harassment and anti-discrimination policy at the time of the incident. While the trial court initially denied summary judgment on March 13, 2023, it correctly reconsidered same when it noted that the issue of the City's affirmative defense was raised at summary judgment, but the record was devoid of any analysis or consideration of same. Pa280.

As an initial matter, while Appellant's argument focuses much on the initial denial of summary judgment, same is irrelevant for the purposes of the within appeal. This appeal, ostensibly, is centered on the grant of reconsideration and the subsequent grant of summary judgment. It should be noted that the City did not seek reconsideration of the trial court's underlying determination that summary judgment could not be granted as issues of material fact existed relating to the race-based hostile work environment claims. The City has also not filed a cross-appeal related to the initial denial of summary judgment. By doing so, the City did not admit the

conduct, or the potential liability associated with same. Instead, the City believed, rightfully, that the facts in the record offered the City immunity from liability.

The focus of the reconsideration motion, and what should be the focus of this discussion, is the City's proffered and proven affirmative defense, which shields it from vicarious liability. So, while Appellant spills much ink on the argument that a dispute of fact existed as to liability in general, this argument is a red herring. This focus is not only unavailing, but also demonstrative of Plaintiff's overall failure to demonstrate how the trial court's decision was incorrect.

A. The Court Correctly Reconsidered Its March 13, 2023 Order Pursuant to R. 4:42-2.[1] (Pa274).

The trial court was correct in determining that it could reconsider it's denial of the City's motion for summary judgment, pursuant to R. 4:42-2. As the trial court stated: "[u]ntil entry of final judgment, only 'sound discretion' and the 'interest of justice' guides the trial court if reconsideration is sought of an interlocutory order. Lawson v. Dewar, 468 N.J.Super. 128, 134 (App.Div.2021)." Pa274. The trial court further found "Rule 4:42-2 declares that interlocutory orders 'shall be subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of justice.'" Id.

[1] Appellant's Case Information Statement suggests that he is appealing the Court's procedural basis for reconsideration. The City notes that Appellant's Brief does not make any such argument and thus should be deemed waived. In order to not waive its own arguments as to same, the City makes the within argument.

In this instant matter, while the trial court granted Martino's motion for summary judgment, it denied, in full, the City's motion for summary judgment. In so doing, the summary judgment decision was not "final", but instead was interlocutory. Thus, the standard of review did not require the trial court to find a "palpably incorrect", "irrational", or "failure to appreciate the significance of probative, competent evidence." See Cummings v. Bahr, 295 N.J.Super. 374, 384 (App.Div.1996). Instead, the trial court only needed to find that sound discretion and interest of justice warranted reconsideration. Pa280.

Here, the trial made such findings and concluded:

> [O]nly 'sound discretion' and the 'interest of justice' guides the trial court if reconsideration is sought of an interlocutory order. Here, the Court did not consider the City's affirmative defense to vicarious liability in its written opinion. Thus, the Court finds that denial of the City's motion for summary judgment was improper, and the Court will supplement its analysis.

Pa280.

The findings of the trial court with respect to its authority to reconsider its initial denial of summary judgment were both an exercise of sound discretion and in the interest of justice. Notably, the Appellant does not dispute that these issues were argued before the trial court at summary judgment, but were nevertheless not found in the written opinion. As there can be no genuine dispute as to the exercise of

reconsideration under R. 4:42-2, the City submits that the trial court was correct to exercise its discretion to reconsider.

B. The Trial Properly Found that the City Had Established An Affirmative Defense Against Vicarious Liability under Dunkley. (Pa280-282).

Appellant's argument on appeal of reconsideration boils down to a dispute as to whether the City adequately presented evidence in the record establishing the fifth prong under the five prong Dunkley test for establishing an affirmative defense to liability. However, while Appellant bases his argument on what he believes the City "could have" done in this matter, his subjective opinion is of no consequence when considering what the City actually did in addressing his claims of discrimination. A full objective review demonstrates that reconsideration and ultimate grant of summary judgment on the basis of the City's affirmative defense was appropriate.

"An employer's vicarious liability for the conduct of a supervisor occurs if the employer negligently or recklessly failed to have an explicit policy that bans…harassment and that provides an effective procedure for the prompt investigation and remediation for such claims." Dunkley v. S. Coraluzzo Petroleum Transporters, 437 N.J.Super. 366, 379 (App.Div.2014); see Lehmann, supra, 132 N.J. at 621 (to impute liability to an employer for the acts of its employees, "a plaintiff may show that an employer was negligent by its failure to have in place, well-publicized and enforced anti-harassment policies, effective formal and informal

complaint mechanism structures, training, and/or monitoring mechanisms"); see also Aguas v. State, 220 N.J. 494 (2015) (finding that under New Jersey law, an employer has a duty to take remedial measures to stop and prevent harassment and providing employer's the ability to assert an affirmative defense to hostile work environment under the LAD if they can prove: 1) "exercised reasonable care to prevent and correct promptly any [] harassing behavior," and 2) "the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.").

The circumstances detailed in Dunkley are on point to the within matter. In Dunkley, the plaintiff, a truck driver, sued his employer for discrimination and retaliation after he claimed to have been subject to discriminatory conduct by his on-road trainer, a fellow truck driver for the employer. The plaintiff stated that the fellow truck driver made numerous race-based comments that were directed to or in the presence of Plaintiff. After not reporting for work, the plaintiff met with the employer's safety coordinator, safety director, and regional safety manager to discuss his concerns. Plaintiff recounted a list of incidents that occurred and was promptly given a new trainer. He also had no further instances of alleged discrimination after the change in trainers. The trial court granted summary judgment to the employer and dismissed the complaint. Dunkley, supra, 437 N.J.Super. at 370-373. Plaintiff then appealed.

The Appellate Division noted that the trial judge found that the plaintiff had presented a *prima facie* case of hostile work environment. However, the trial judge determined that the plaintiff had not sustained his burden of proof for the employer's vicarious liability because the plaintiff could not prove that the employees "supervisors knew about and ignored, participated in or failed to take action to prevent such harassing conduct." Id. at 378. Plaintiff had argued that the on-road trainer qualified as a supervisor and that *ipso facto* vicarious liability could be established. The Appellate Division found that: "if the determination of Harrington's supervisory status was the only test to impose vicarious liability upon defendant, summary judgment would have been prematurely granted. However, Lehmann and its progeny make clear vicarious liability is dependent upon additional facts." Dunkley, supra, 437 N.J.Super. at 379.

The Court continued its analysis by first looking at whether the employer "negligently or recklessly failed to have an explicit policy that…bans harassment and that provides an effective procedure for prompt investigation and remediation for such claims." Ibid. (citing Toto v. Princeton Tp., 404 N.J.Super. 604, 616 (App.Div.2009). The Appellate Division found that the defendant produced its employee handbook, which contained an explicit policy prohibiting harassment, that employees were familiar with the policy, and that the policy described the complaint

procedure and investigation process. Id. at 380-381. Ultimately, the Appellate Division found:

> Employers that effectively and sincerely put five elements into place are successful as surfacing…harassment complaints early, before they escalate. The five elements are: policies, complaint structures, and that includes both formal and informal structures; training, which has to be mandatory for supervisors and managers and needs to be offered for all members of the organization; some effective sensing or monitoring mechanisms, to find out if the policies and complaint structures are trusted; and then, finally, an unequivocal commitment from the top that is not just in words but backed up by consistent practice.

Id. at 381 (quoting Lehmann, supra, 132 N.J. at 621).

The Appellate Division concluded that the trial judge was correct in analyzing the evidence, which showed:

> defendant adopted a formal anti-harassment policy and an anti-discrimination policy and developed a complaint procedure and investigation process. Plaintiff, as well as all other employees hired by defendant, received and acknowledged reading the handbook. Further, plaintiff admitted these policies were discussed during his initial two-day in-class training. No evidence suggests plaintiff was unable to voice his complaints or that they went unaddressed because of an ineffective policy.

Ibid.

Notably, the Appellate Division addressed that while in hindsight, there could be improvements to the process or supervisor's training on the issues, the Court could not conclude that the "methods used here fail to meet established standards."

Ibid. Importantly, "plaintiff's own report that after meeting with his supervisors, he did not experience any further discriminatory harassment and suffered no change in his position, duties or compensation, demonstrated the policy's effectiveness." Id. at 381-382.

The Dunkley matter straddled the New Jersey Supreme Court's decision in Aguas. Following the Aguas decision, the Dunkley Court was tasked with reviewing, *inter alia*, whether the vicarious liability could now be established against an employer because the alleged harasser/discriminator was a supervisor. The Appellate Division affirmed its prior ruling that the employer had successfully set forth an affirmative defense. Dunkley v. S. Coraluzzo Petroleum Transporters, 441 N.J.Super. 322, 327 (App.Div.2015). The Appellate Division found that:

> [a]lthough Lehmann and its progeny never expressly 'address[ed] the analytical framework under which an employer's anti-harassment policy may be considered in a hostile work environment harassment claim involving a supervisor, the Court noted 'that [same] jurisprudence strongly supports the availability of an affirmative defense, based on the employer's creation and enforcement of an effective policy against sexual harassment.

Id. at 329 (quoting Aguas, supra, 220 N.J. at 514). The Aguas Court "adopted what is known as the *Ellerth/Faragher* test for defending claims alleging vicarious liability for supervisory harassment under Restatement §219(2)(b), thus allowing employers to plead, as an affirmative defense, the adoption and enforcement of an

effective policy against sexual harassment so long as the employee suffered no tangible employment action." Ibid. quoting Aguas, 220 N.J. at 523-24.

In this matter, the record on summary judgment was clear. There was no dispute that the City maintained an anti-harassment and anti-discrimination policy at the time of incident. The policy is clear and unequivocal:

> Under no circumstances will the City of Plainfield discrimination on the basis of sex, race, creed, color religion, national origin, ancestry, age, marital or political status, affectional or sexual orientation, domestic partnership status, civil union status, atypical hereditary, cellular or blood trait, genetic information, disability…liability for service in the United States armed forces, gender identity or expression, and/or other characteristics protected by law…If any employee or prospective employee feels they have been treated unfairly, they have the right to address their concern with their supervisor, or if they prefer their Department Head, the Personnel Director, the City Administrator, or the office of the Corporation Counsel.

Pa121-122.

The City's employment handbook further provides an anti-harassment policy which provides that "if an employee is witness to or believes to have experienced harassment, immediate notification of the supervisor or other appropriate person should take place." It then refers employees to the "Employee Complaint Policy." Pa123-124. The Employee Complaint Policy provides that the City "has a no tolerance policy towards workplace wrongdoing." It further provides that:

> [e]mployees desiring to file a complaint regarding any of the above mentioned terms and conditions of employment should utilize the grievance procedures outlined in their union contract, or the Municipal Code (whichever is applicable); or the appeal process/procedures in accordance with the provisions of the New Jersey Administrative Code, Titla 4A.

Pa125-126.

This evidence was indisputable on summary judgment. It was further indisputable when it was presented to the trial court on reconsideration. Appellant admitted that he had received training and the City produced evidence that its employees received annual anti-discrimination and anti-harassment training. Pa26-28, ¶ 63-73 cmpr. to Da1-5 ¶63-73. The Plaintiff admitted that he had received the employee handbook. Id. at ¶9. He further admitted that his complaint was lodged with the City on March 17, 2020, his first shift after the incident and that the investigation began immediately thereafter. Id. at ¶28, 31-33, and 57. Plaintiff was satisfied that he was being recognized and that his complaint was being addressed. Id. at ¶41-42. There was similarly no dispute that the investigation included Fire Department officials meeting with numerous individuals over the course of three and a half weeks before reaching its conclusion. Id. at ¶34. The evidence indisputably showed that the City not only maintained a policy and complaint procedure, it enforced same swiftly. Much like in Dunkley, the City took pro-active steps once the complaint was lodged. It ensured that Plaintiff was not subject to similar conduct.

Plaintiff admitted that he never suffered further discriminatory conduct. Id. at ¶46 and 55. He also admitted that he received significant support from his platoon. Id. at ¶26 and 30. In Dunkley, such evidence was considered a demonstration of the policy's effectiveness. Same can, and should, be said here. Director Childress personally lauded Plaintiff for his willingness to come forward with the internal complaint. Id. at ¶32.

The trial court noted that consideration of these arguments were missing within its summary judgment denial. Pa280. On reconsideration the trial court reviewed these very facts and concluded:

> [I]n cases where no tangible employment actions have been taken against the Plaintiff, the employer has an affirmative defense to vicarious liability, requiring proof that (1) the employer exercise reasonable care to prevent and to correct promptly any harassing behavior; and (2) that the employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer or to otherwise avoid harm. See Aguas, 220 N.J. at 524.
>
> Here, the City maintained an effective anti-harassment policy to prevent and to correct promptly the alleged discriminatory acts by Defendant Martino. The City's employment handbook provides an anti-discrimination policy, which state, in part: "Under no circumstances will the City of Plainfield discriminate on the basis of sex, race, creed, color, religion, national origin, ancestry, age, marital or political status, affectional or sexual orientation, domestic partnership status, civil union status, atypical hereditary, cellular or blood trait, genetic information, disability"…Additionally, the Employee Complaint

> Policy (within the employment handbook) states that: "[e]mployees desiring to file a complaint regarding any of the above mentioned terms and conditions of employment should utilize the grievance procedures outlined in their union contract, or the Municipal Code…; or the appeal process/procedures in accordance with the provisions of the New Jersey Administrative Code, Title 4A"…The City conducts annual anti-discrimination and harassment trainings, and the policies are posted in all buildings operated by the Fire Department. Defendant Martino testified that he received training from the City on several occasions before the incident. Plaintiff also testified that he received trainings on June 19, 2019, and at least on one other occasion. Furthermore, Plaintiff's internal complaint was lodged with the City shortly after the incident on March 17, 2020, and investigation began immediately thereafter. Plaintiff was satisfied that he was being recognized and that his complaint was being addressed. The investigation was prompt and completed over the court of three and a half weeks. A written reprimand was prepared for Defendant Martino as a result of the investigation, but the reprimand was never served due to Martino's terminal leave in advance of his retirement. However, Defendant Martino's effective retirement prior to the issuance of discipline is not dispositive regarding whether the City maintained an effective anti-harassment policy. Notably, Plaintiff did not experience any further discriminatory acts and suffered no change in his position. Thus, the record evidence demonstrates that the City not only maintained an effective policy and complaint procedure, but it also enforced the policies promptly. Thus, reconsideration is warranted, here, and the Court must reconsider its March 13, 2023, Order denying the City's motion for summary judgment. Accordingly, the Court must grant summary judgment in favor of the City and dismiss Plaintiff's Complaint with prejudice.

Pa281-282.

Appellant's arguments before this court rest upon his belief that the fifth prong under Dunkley was not satisfied because he believes the City could have done more to prove its "unequivocal commitment." This, however, is nothing more than subjective disagreements with the effectiveness of the policy.

First, Appellant's arguments appear to be that because a *prima facie* case had been established and affirmed by the trial court, the analysis should stop there and no affirmative defense can be presented on the City's behalf. This is contrary to the very purpose of the affirmative defense and is further contrary to what court's have routinely found, i.e., the affirmative defense is very much an aspect that can be reviewed and determined at the summary judgment stage. Indeed, in Dunkley, the Appellate Division affirmed summary judgment by the trial court on the basis of the affirmative defense despite the trial court finding that a *prima facie* case of discrimination had been demonstrated by plaintiff. Dunkley, supra, 437 N.J.Super. at 378. The affirmative defense, if demonstrated on the record, permits the City here to receive summary judgment in its favor. There is no requirement that the City, despite its proofs, then proceed to trial to prove the matter again. The trial court is not devoid of authority to grant summary judgment on the basis of the affirmative defense and the Appellant offers no authority for same.

Moreso, Appellant complains that the discipline was not issued and that City could have held up Martino's retirement or pension benefits. Frankly, this is neither

here nor there. The Appellant's beliefs in the effectiveness of the policy are not part of any analysis under the test reviewed in Dunkley. The City set forth demonstrative proof at that it met these elements: (1) it maintained a policy of anti-harassment and anti-discrimination in writing; (2) it set forth both formal and informal complaint procedures; (3) mandatory training for supervisors and training for all employees; (4) sensing or monitoring mechanisms; and (5) an unequivocal commitment from the top that is not just in words but backed up by consistent practice. None of these factors require the Appellant to agree with the outcome. The trial court correctly considered these factors and noted how complete the record was as to each element. Appellant's subjective feelings about additional actions that the City could have taken requires authority that he does not have in this circumstance. His disagreement, notwithstanding, the City unequivocally demonstrated all requisite elements for the application of the affirmative defense. Accordingly, the trial court's decision was proper and should be affirmed.

CONCLUSION

For the reasons set forth above, the trial court's decisions were soundly based in law and correctly determined even in the light most favorable to the Plaintiff. It is respectfully requested that this Court affirm the trial courts granting of reconsideration and concurrent granting of summary judgment in favor of the Respondent, City of Plainfield.

Respectfully submitted,
RAINONE COUGHLIN MINCHELLO, LLC

By: _____
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Date: March 27, 2024