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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2778-08T3
A-2851-08T3
A-3340-08T3

LOUIS PIANTADOSI,

Plaintiff-Appellant,

vs.

PUBLIC SERVICE ELECTRIC
AND GAS COMPANY,

Defendant-Respondent.

TODD LARMER,

Plaintiff-Appellant,

vs.

PUBLIC SERVICE ELECTRIC
AND GAS COMPANY,

Defendant-Respondent,

and

ROOSEVELT SILLS, Individually and
as a Distribution Supervisor of
PUBLIC SERVICE ELECTRIC AND GAS COMPANY,

Defendant.

ROOSEVELT SILLS and
RAMONA SILLS,

Plaintiffs-Appellants,

v.

PUBLIC SERVICE ELECTRIC & GAS
CO., INC. (ITS DIRECTORS, OFFICERS,
SERVANTS, AGENTS, AND/OR EMPLOYEES),
PSE&G VICE PRESIDENT OF GAS OPERATIONS
JEFF CISTARO, PSE&G ASSISTANT DIVISION
MANAGER JEFF CLAYTON, PSE&G EMPLOYEE
TODD LARMER, and PSE&G EMPLOYEE
LOUIS PIANTADOSI,

Defendants-Respondents,

and

PSE&G EMPLOYEE MICHAEL ROBINSON,

Defendant.

Submitted: October 6, 2010 - Decided: July 28, 2011

Before Judges Cuff, Sapp-Peterson and Simonelli.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket Nos. L-6446-06, L-6244-06 and L-5516-06.

Stern & Kilcullen, LLC, attorneys for appellant/respondent Louis Piantadosi (Andrew S. Bosin, on the brief).

Thomas B. Hanrahan & Associates and Chazen & Chazen, attorneys for appellant/respondent Todd Larmer (Thomas B. Hanrahan and David K. Chazen, of counsel; David J. Pack, on the brief).

Eric V. Kleiner, attorney for appellant Roosevelt Sills.

Gibbons P.C., attorneys for respondent Public Service Electric and Gas Company, Peter[1] Cistaro and Jeffrey Clayton (Richard S. Zackin, on the brief).

PER CURIAM

In these consolidated and back-to-back appeals,[2] we review orders granting summary judgment to defendant Public Service Electric and Gas Company (PSE&G) and denying plaintiffs' motions for summary judgment. We affirm.

Todd Larmer, Louis Piantadosi, and Roosevelt Sills were employees of PSE&G; Sills supervised Larmer and Piantadosi. Each filed a complaint seeking relief pursuant to the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. The three complaints emanate from an alleged incident that occurred at a job site on July 29, 2004, and the reaction by PSE&G to Sills' report of the actions taken by Larmer and Piantadosi against him.

According to Sills, on July 29, 2004, Larmer and Piantadosi enacted a mock lynching directed at him. Sills is African-

[1] Improperly pleaded as Jeff.

[2] By order dated June 26, 2009, we consolidated the separate appeals filed by plaintiff Todd Larmer (A-2851-08T3) and Louis Piantadosi (A-2778-08T3) and ordered that the appeal filed by Roosevelt Sills (A-3340-08T3) be calendared back-to-back with the consolidated appeals. Because the complaints filed by each man are based on a common initiating incident, we now consolidate the Sills appeal (A-3340-08T3) with the others solely for the purpose of opinion.

American; Larmer and Piantadosi are Caucasian. Sills reported the incident the next day and PSE&G immediately commenced an investigation. Although PSE&G was unable to substantiate Sills' complaint, it terminated Larmer and Piantadosi.

The two terminated men filed a grievance and soon thereafter PSE&G, Larmer, and Piantadosi agreed to submit the grievance to mutually binding arbitration in accordance with the collective bargaining agreement. The arbitrator found insufficient evidence to terminate Larmer and Piantadosi and ordered them reinstated to their former positions with back pay.

Following the reinstatement of Larmer and Piantadosi, Sills left work on medical leave, which he claimed was attributable to the stress of working with these men. PSE&G offered to transfer Sills from Oradell to Jersey City. He declined, but PSE&G decided to effectuate the transfer over his objection.

On July 26, 2006, Sills filed a complaint against PSE&G and several PSE&G employees[3] in which he alleged that PSE&G and the named employees created a hostile work environment for him due to his race in violation of the LAD (Count One); committed acts of retaliation against him in violation of the LAD (Count Two); committed acts of retaliation in violation of the Conscientious

[3] Peter Cistaro, Jeffrey Clayton, Michael Robinson, Larmer, and Piantadosi. After filing his notice of appeal, Sills dismissed all claims against Robinson.

Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14 (Count Three); intentionally harassed him (Count Four); engaged in intentional infliction of emotional distress (Count Five); negligently hired, supervised, and retained Larmer and Piantadosi (Count Six); committed acts in an attempt to effectuate a wrongful or constructive discharge (Count Seven); committed acts that amount to prima facie tort (Count Eight); portrayed him in a false light (Count Nine)[4]; and loss of consortium (Count Ten).

Louis Piantadosi filed a complaint on August 29, 2006, against PSE&G in which he sought compensatory and punitive damages for wrongful termination (Count One), reverse racial discrimination in violation of the LAD (Count Two), breach of the covenant of good faith and fair dealing (Count Three), breach of contract (Count Four), and intentional infliction of emotional distress (Count Five). Larmer filed a similar complaint, except he named Sills as a defendant and also sought relief for other unlawful employment practices by PSE&G in violation of the LAD and CEPA.

Following discovery, PSE&G filed summary judgment motions to dismiss all claims asserted by Larmer, Piantadosi, and Sills. Larmer and Piantadosi filed summary judgment motions to dismiss

[4] Sills voluntarily dismissed this claim.

Sills' claims against them. By orders dated December 28, 2008, the motion judge granted all motions. Sills' motion for reconsideration was denied on February 6, 2009.

I

On appeal, we utilize the same standard to review an order granting summary judgment as the motion judge. Atl. Mut. Ins. Co. v. Hillside Bottling Co., 387 N.J. Super. 224, 230-31 (App. Div.), certif. denied, 189 N.J. 104 (2006); Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). Thus, we must review the entire record to determine if there exists a genuine issue of material fact which precludes entry of summary judgment. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). In conducting this review, we must view all facts and the reasonable inferences that may be drawn from those facts in the light most favorable to the non-moving party. Ibid. On the other hand, "[i]f 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" to allow denial of the motion. Ibid. The following facts supporting each plaintiff's case are presented in that light.

Roosevelt Sills has worked for PSE&G since 1979. Initially employed as a laborer, Sills was promoted to a supervisory position in 1994. In 1997, Sills was transferred to the Oradell District and remained there until transferred to the Jersey City District in 2006.

Larmer commenced his employment with PSE&G in 1987 as a laborer. On July 29, 2004, he was a Street Leader in the Oradell District and Sills supervised his work.

Piantadosi commenced his employment with PSE&G in 1981. In July 2004, he was also assigned to the Oradell District and Sills supervised his work. All were assigned to repair gas leaks.

On July 29, 2004, Sills, Larmer, and Piantadosi responded to 434 Hillsdale Avenue in Hillsdale to repair a gas leak occasioned by a PSE&G crew installing a pole. PSE&G received the report of the gas leak about 4 p.m. The area in which they worked was in front of a busy nail salon. Piantadosi remarked at the worksite that the markings of utilities, known as "mark-outs," were missing or inadequate. According to Piantadosi, Sills told the crew, including Piantadosi and Larmer, to get to work in spite of the known safety concerns if utilities are not properly marked.

On July 30, 2004, Sills reported that Larmer and Piantadosi conducted a mock lynching and sang "Ring Around the Rosie" the previous day at the Hillsdale worksite. He composed a written statement and spoke to his immediate supervisor early on July 30. Sills' supervisor took his report to the engineer, who brought it to the attention of a manager and eventually the report reached Clayton, the Operation and Resource Manager. Clayton consulted two senior managers. An attorney employed by PSE&G interviewed Sills. Larmer was also interviewed on July 30. He denied the allegations and stated "it's committing suicide to do such a thing in the atmosphere of PSE&G." The employer also interviewed other workers at the worksite. None of these workers stated they heard or saw any inappropriate comments or gestures on July 29. The owner of the nail salon stated that she neither saw nor heard anything inappropriate by the PSE&G work crew. The police officer monitoring traffic at the site reported that he did not observe the incident reported by Sills. After further consultation, PSE&G terminated Larmer and Piantadosi on August 30, 2004. When deposed, Clayton testified that the managers accepted Sills' credibility, decided to support the supervisor, and believed the reprehensible nature of the conduct required termination of the two men.

Larmer and Piantadosi filed a grievance. Pursuant to the terms of the collective bargaining agreement, the men and PSE&G agreed to submit the dispute to binding arbitration. The arbitrator found PSE&G did not have just cause to terminate either man. Both men were reinstated to their former positions with back pay and seniority.

When Larmer and Piantadosi were reinstated, they returned to the Oradell District and were supervised by Sills. Sills did not protest, but Larmer made a request through his union representative not to work with Sills. A few days after both men returned to work, Sills left work for a few days because he was so upset. Sills testified that he could not work in that environment and later went on disability. On the two days that he worked when Larmer and Piantadosi worked under his supervision, he learned that union representatives called the district engineer and manager to state that Larmer and Piantadosi did not want him to come to their worksites.

Clayton and Cistaro believed the best course at that time was to separate the men. They were also concerned that they could not ensure that Sills would never have to supervise a work crew containing Larmer or Piantadosi. Because the collective bargaining agreement in effect at that time would not allow transfers of Larmer and Piantadosi from the Oradell facility,

Clayton offered Sills a transfer to Jersey City. He declined. While on leave, Clayton discussed with Sills a transfer to Jersey City three times. While he was on disability, Clayton and Cistaro decided to transfer him to Jersey City without loss of job title, responsibilities, or compensation. The transfer also did not cause a significant increase in commuting time for Sills. When he returned from disability leave, Sills reported to Jersey City.

Sills also testified that no PSE&G manager ever expressed any dissatisfaction with him for his complaint against Larmer and Piantadosi. No action was taken against him following the termination of Larmer and Piantadosi. Yet, Sills explained that he felt PSE&G retaliated against him when he was transferred to Jersey City. He explained, "they did what they have to do to please the union more than - - made me come to be the victim to some degree. I'm at Jersey City doing the best I can, but you know, I - - I'm not that happy because I always feel like I'm the victim and my reputation just follow me wherever I go, and everybody sees me at what happened in Oradell. That's all they know of me. And I had very uncomfortable feelings."

Piantadosi's claim that PSE&G imposed less severe discipline on African-American employees than on Caucasian employees is supported by a single response to an interrogatory

and documents to the identified employees from PSE&G. Piantadosi stated as follows:

> Upon information and belief, Timmie Farrow was accused of unacceptable conduct in that he fought with a co-worker who is Caucasi[a]n, yet he was not terminated;
>
> Upon information and belief, Janet Mack, engaged in aggressive and threatening behavior towards her coworkers in that she threatened to blow up the shop yet she was not terminated;
>
> Upon information and belief, Roy Brown, engaged in serious misconduct, yet he was not terminated;
>
> Upon information and belief, James Austin, engaged inappropriate conduct when he told his Supervisor who is also African-American to go see his white daddy, yet he was not terminated.

Farrow received a letter from PSE&G advising him that his conduct was unacceptable. Austin received a letter from the Area Distribution Manager that his comment undermined the leadership of supervision. Austin was also one of the employees assigned to replace Piantadosi after his termination.

Sills was the subject of three grievances filed in 1999, 2001, and 2002. On May 19, 1999, the union filed a grievance alleging Sills unfairly harassed an employee. On March 30, 2001, the union filed a grievance on behalf of the employee who was the subject of the 1999 grievance. The employee stated that Sills threatened him. On October 3, 2002, the union filed a

grievance on behalf of another employee who alleged harassment by Sills. The record reveals that the 1999 grievance was "Pulled Out as Per Nunz." The record contains no details of the 2002 grievance. The 2001 grievance states that "At the start of a meeting (3-29-01) between M. Nunziato and R. Sills (about a problem with a mark out), Mike was told the meeting was not a coaching/counseling session. When at the end of the meeting Mike said he wanted to speak with B. Wagaman, R. Sills told Nunziato if he did then it would lead to discipline. This was a threat." The record does not reveal the disposition of this grievance.

Sills alleged in his complaint that Larmer and Piantadosi made fun of his speech, interrupted him at meetings, and engaged in other disrespectful conduct before the mock lynching incident. PSE&G has no record of any complaint of racially-biased conduct by Larmer or Piantadosi or other workers at the Oradell facility other than his July 30, 2004 report of the mock lynching. Sills testified, however, that he mentioned problems to Pat Alexander, a supervisor in Oradell, several times between 1997 and 2003 about Larmer's and Piantadosi's conduct towards him. He recalled at least one or two meetings at which Alexander counseled Larmer and Piantadosi about their disrespectful conduct towards Sills. Sills testified that

Larmer referred to him as "the dark cloud" and supervisors knew he took offense to such references.

Sills also complained once to Michael Duvall, another supervisor, about Larmer using the "n" word when addressing him. Duvall responded that he was present when that comment alleged by Sills occurred but did not hear the comment. Duvall also reminded Sills that there was a good deal of commotion at that scene. Sills testified that he was generally satisfied with the efforts taken by Alexander to address his complaints, even though the conduct did not cease. He did not complain about this conduct to other supervisors.

However, on or about July 30, Sills also complained to Robert Egner, the district engineer, that Larmer made two comments to him on June 24 at a worksite that Sills considered offensive. In one remark, Larmer stated, "It just got dark in here, I have to go to the light," as Sills walked into a room. Later, Larmer told Sills the remark was not meant to be racially derogatory. Larmer also testified that he and Sills had some disputes about the progress of work at some assignments. Generally, Larmer complained that Sills would appear at a job site and "screw up your job" by changing instructions or not having procedures to proceed with the work.

II

Larmer and Piantadosi

In his December 28, 2008 written opinion, the motion judge granted summary judgment to PSE&G as to each complaint. The motion judge dismissed the reverse discrimination claim filed by Larmer and Piantadosi because they produced no evidence that the prompt investigation launched by PSE&G of Sills' claim and its prompt decision to terminate them was motivated by their race. The judge also held that a prima facie case of reverse discrimination was not established by any lack of diligence by the manager who investigated Sills' allegation or the conclusion of the arbitrator that there was insufficient evidence to support his claim. Furthermore, he held that Larmer produced nothing more than assumptions unsupported by any documentary evidence that PSE&G imposed more lenient discipline on African-American employees.

The motion judge also dismissed the CEPA claims asserted by each man because they filed their complaints well-beyond the one year statute of limitations provided by the statute. He rejected their argument that they suffered continuous retaliation after they complained to Sills about the absence of "mark outs" by refusing to reinstate them until receipt of the arbitration award on May 1, 2006. The judge also rejected their

contention that their cause of action did not accrue until that date. He also held as a matter of law that their complaint about the absence of "mark outs" is not a protected activity.

The motion judge also held that the swift investigation of Sills' complaint that led to their termination from employment cannot be considered actions against public policy and in violation of the LAD. Indeed, the judge noted that PSE&G as an employer had a responsibility to promptly investigate a complaint of racial discrimination in the workplace and to take prompt remedial action. He held that "[t]he fact that the arbitration proceeding voided the initial action of [PSE&G], does not negate the fact that the employer acted on what they believed were the true facts immediately aft[er] the incident."

On appeal, Larmer urges that this court should reverse the summary judgment dismissing his LAD claim because he successfully demonstrated a prima facie case of discrimination. He also argues that he is entitled to indemnification for the legal fees he has incurred in defending the claims asserted against him.

Piantadosi argues that he established a prima facie case of reverse racial discrimination and disparate treatment. He argues he produced direct evidence that he received more stringent treatment than African-American workers. He urges

that the summary judgment dismissing his LAD claim should be reversed.

Larmer and Piantadosi alleged that PSE&G engaged in discriminatory behavior based upon race by unlawfully terminating their employment. They argue that the motion judge erred in granting PSE&G's motion for summary judgment because he relied upon the wrong standard for analyzing reverse discrimination cases under the LAD. Each also maintains that their claims of reverse discrimination are supported by several specific events. We disagree and affirm.

The LAD prohibits unlawful discrimination against employees. In employment discrimination cases, the burden of proving a prima facie case lies with the plaintiff. State v. Segars, 172 N.J. 481, 494 (2002). When there is no direct evidence of discrimination, the Court has established a four element standard to establish a case of discriminatory discharge. First, the plaintiff must be in a protected group. Second, the plaintiff must establish he was performing his job in a manner that met his employer's legitimate expectations. Third, the plaintiff must establish that he was fired despite good job performance. Finally, the plaintiff must establish that the employer replaced him with another employee. Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 597 (1988).

Once a plaintiff produces evidence to support a prima facie case, the burden shifts to the defendant, who must then produce evidence of a legitimate, non-discriminatory reason for its actions. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142, 120 S. Ct. 2097, 2106, 147 L. Ed. 2d 105, 117 (2000); Gerety v. Atl. City Hilton Casino Resort, 184 N.J. 391, 399 (2005). This, however, only shifts the burden of production; plaintiff is still left with the burden of persuading a jury that the defendant's asserted reasons are a mere pretext and there truly was discriminatory intent. Reeves, supra, 530 U.S. 143, 120 S. Ct. at 2106, 147 L. Ed. 2d at 117.

In Erickson v. Marsh & McClennan Co., 117 N.J. 539, 550 (1990), the Court recognized these elements may be modified when appropriate. For instance, in Erickson, the Court held that, when a plaintiff is not in a protected class, the first prong of the standard is modified and the plaintiff "'must substantiate . . . that the background circumstances support the suspicion that the defendant is the unusual employer who discriminates against the majority.'" Id. at 551 (quoting Erickson v. Marsh & McClennan Co., 227 N.J. Super. 78, 87 (App. Div. 1988), aff'd in part, rev'd in part, 117 N.J. 539 (1990)). Despite plaintiffs' contentions to the contrary, we hold that the Erickson standard should be utilized to analyze this reverse discrimination claim

because Larmer and Piantadosi have submitted no direct evidence of racial discrimination by PSE&G of Caucasian employees.

Larmer and Piantadosi identify five circumstances that support their claim. Those circumstances are: ordering their termination without a thorough investigation and corroborating evidence, their termination occurred a few months after several African-American employees filed a complaint alleging racial discrimination in the PSE&G workplace, an upper level manager stated plaintiffs were fired "to do the righteous thing for the minority," African-American employees received less severe discipline than them, and someone from PSE&G offered reinstatement to Piantadosi if he implicated Larmer in the mock lynching incident. None of these circumstances can be considered direct evidence of race-based conduct against plaintiffs. We, therefore, adhere to the Erickson standard as the law governing the disposition of the summary judgment motion.

The reinstatement of Larmer and Piantadosi following a hearing before the arbitrator does not establish the first modified Erickson prong. At most, the arbitration record demonstrated that PSE&G senior managers believed the act of which Larmer and Piantadosi were accused was reprehensible and deserved termination, if true, and that PSE&G proceeded to

terminate Larmer and Piantadosi without corroborating evidence. The arbitration record also demonstrates that PSE&G conducted several interviews, consulted the legal department, and involved several senior managers in the discussion and formulation of the PSE&G response to Sills' report. PSE&G did not act precipitously. A month elapsed between Sills' report and the decision to terminate both men. While the record demonstrates that PSE&G may have been too eager to support a field supervisor, that action does not suggest, much less prove, that PSE&G favored African-American employees over Caucasians.

Other circumstances cited by plaintiffs also fail to establish the first Erickson prong, as modified, as they are no more than speculation, unsubstantiated inferences, and feelings. See Merchants Express Money Order Co. v. Sun Nat'l Bank, 374 N.J. Super. 556, 563 (App. Div.) ("[S]peculation does not meet the evidential requirements which would allow [a plaintiff] to defeat a summary judgment."), certif. granted, 183 N.J. 592 (2005), appeal dismissed, ___ N.J. ___ (2006); Oakley v. Wianecki, 345 N.J. Super. 194, 201 (App. Div. 2001) ("unsubstantiated inferences and feelings" cannot defeat a motion for summary judgment). Here, Larmer and Piantadosi provide no evidence to link the fact of the filing of a race discrimination complaint by several African-American employees

against PSE&G[5] and their termination a few months later. In Oakley, the plaintiff made a similar claim, and we held that the plaintiff did not satisfy the first Erickson prong simply by proving the existence of a lawsuit. 345 N.J. Super. 201-02. Similarly, the incidents of lesser discipline meted out to African-American employees is also no more than speculation and unsubstantiated inferences and feelings.

Moreover, when a claim of reverse discrimination is based on disparate discipline, a plaintiff must demonstrate "'[black] employees involved in acts . . . of comparable seriousness . . . were nevertheless retained . . . .'" Jason v. Showboat Hotel & Casino, 329 N.J. Super. 295, 305 (App. Div. 2000) (quoting McDonnell Douglas, 411 U.S. 792, 804, 93 S. Ct. 1817, 1825, 36 L. Ed. 2d 668, 679 (1973)). This "requires comparison between the defendant's conduct toward plaintiff and other [white employees] on one hand, and similarly situated [black] employees[.]" Ibid.

This record displays a singular lack of evidence by which this comparison could occur. The disciplinary letters cited by Larmer and Piantadosi are generally summary in nature without sufficient detail to permit the required comparisons. In

[5] The record contains only a copy of a newspaper article; PSE&G does not dispute that a complaint was filed.

addition, the incidents cited regarding Sills are grievances filed with the union by employees, not discipline imposed by the employer. Any details provided by Larmer and Piantadosi about the disciplinary incidents are also derived from inadmissible hearsay, and only admissible evidence may form the factual basis for summary judgment. El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 164 (App. Div. 2005).

The "do the righteous thing" statement attributed to Jose Cardenas, a senior manager, fails as proof for the first Erickson prong for the same reason. Neither Larmer nor Piantadosi have personal knowledge of the statement attributed to Cardenas. The record supports that plaintiffs obtained this purported evidence from the union president, who was told by a PSE&G supervisor of Cardenas' statement. Moreover, assuming that the Cardenas statement is admissible as a party admission pursuant to N.J.R.E. 803(b)(4) and Spencer v. Bristol-Meyers Squibb, 156 N.J. 455 (1998), it is not sufficient to defeat summary judgment. The admittedly hearsay statement held admissible in Spencer as a party admission was unambiguous, detailed, and named specific sources. Spencer, supra, 156 N.J. at 457, 58. Here, the statement attributed to Cardenas was ambiguous in both import and whether it expressed the corporate position on the incident or a personal opinion.

Finally, the offer to reinstate Piantadosi if he implicated Larmer contradicts the corporate zero-tolerance policy and raises questions about its belief in Sills' credibility. Yet, the offer, if proved, does not undercut the corporate policy. Rather it is indicative of the corporate commitment to root out discrimination in the work-place while pursuing discipline against the most culpable employees.

In short, the motion judge properly granted summary judgment to PSE&G and dismissed the Larmer and Piantadosi complaints. The judge properly applied the Erickson standard to evaluate Larmer's and Piantadosi's claims of reverse racial discrimination and properly found that the five circumstances cited by them did not establish the first Erickson prong.

III

Roosevelt Sills

In his discussion of Sills' claim of hostile work environment, the motion judge found that Larmer could not be considered a supervisor due to his position as a "street leader." The judge found that the record provided no basis to conclude that Larmer had any supervisory role as to Sills. In fact, Sills supervised Larmer. The judge noted that in the co-employee context, Sills was required to establish that PSE&G had notice of the prior incidents and failed to take any action.

The judge found, however, no evidence that PSE&G had knowledge of any incident other than the mock lynching incident, and promptly investigated the incident when Sills reported it. The judge also found no evidence that PSE&G management had any knowledge of past incidents. The one prior incident cited by Sills in which a racial epithet was used occurred only one month before the mock lynching incident, and Sills could not remember whether he reported the incident before the mock lynching or in conjunction with it. The judge also found that PSE&G had anti-harassment policies and reporting procedures, Sills knew the policy and procedures, and Sills did not utilize the established procedures until the mock lynching incident. Therefore, the judge held that Sills' hostile work environment claim failed as a matter of law.

Addressing Sills' LAD retaliation claim, the motion judge noted that Sills alleged three bases to support the claim. First, Sills cited harassment prior to the mock lynching incident; second, he alleged that PSE&G did not aggressively defend its decision to terminate Larmer and Piantadosi at the arbitration hearing; and third, he cited his transfer to Jersey City. As to prior incidents of harassment, the judge found that Sills did not engage in a protected activity because he never made a complaint prior to the mock lynching. As to PSE&G's

arbitration position, the motion judge found no evidence showing a causal connection between Sills' complaint about the mock lynching and the manner in which PSE&G defended its disciplinary action at the arbitration. Finally, the judge found that Sills' transfer to Jersey City occurred two years after the mock lynching incident. The judge found that the lapse of time and his employer's prompt action when it received his report of the incident did not permit a finding of a causal connection. Furthermore, Sills submitted no evidence of an adverse employment action. Citing the same facts, the judge also held that Sills' CEPA claim failed.

As to Sills' common law harassment claim, the motion judge held that this State does not recognize a common law harassment cause of action. He also held that the employer's alleged purposeful failure to prevail at the arbitration hearing and the employer's action to transfer Sills to Jersey City were not so outrageous and extreme as to support the intentional infliction of emotional distress claim.

Finally, the motion judge held that any claim for damages for negligent acts of Larmer and Piantadosi are barred by N.J.S.A. 34:15-8, which provides that all claims for negligent acts by co-employees must be pursued in the Division of Workers' Compensation. The judge also held that the constructive

discharge claim failed because Sills remained employed by PSE&G, Sills cannot resort to a prima facie tort cause of action in place of his failed LAD and CEPA actions, and the LAD does not recognize a loss of consortium claim.

A. Hostile Work Environment Racial Discrimination Claim against PSE&G and Larmer and Piantadosi.

Sills argues that the mock lynching incident was the most egregious of several incidents directed against him that created a hostile work environment for him in violation of the LAD. He asserts that the mock lynching incident alone was enough to establish a prima facie case; therefore, he contends that summary judgment in favor of defendants should not have been granted.

PSE&G argues it responded immediately and appropriately once it learned of the mock lynching incident. PSE&G maintains it had no knowledge of earlier incidents and it cannot be liable for actions by non-supervisory employees, such as Larmer and Piantadosi.

The LAD explicitly prohibits race discrimination in the workplace. N.J.S.A. 10:5-12a provides that it is unlawful

> [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, sex . . . of any individual, . . . to refuse to hire or employ or to bar or to discharge . .

> . from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment . . . .

To establish a cause of action under the LAD for racial discrimination hostile work environment, a plaintiff must demonstrate that "the complained-of conduct (1) would not have occurred but for the employee's protected status, and was (2) severe or pervasive enough to make a (3) reasonable person believe that (4) the conditions of employment have been altered and that the working environment is hostile or abusive." Shepherd v. Hunterdon Developmental Ctr., 174 N.J. 1, 24 (2002); Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 603-04 (1993).

To satisfy the first prong of the four-part test, a plaintiff must demonstrate "by a preponderance of the evidence that the impermissible conduct would not have occurred but for plaintiff's protected status." Shepherd, supra, 174 N.J. at 24. The second, third, and fourth prongs of the test are somewhat separable, but are interdependent and, therefore must be discussed as a whole. Lehmann, supra, 132 N.J. at 604. In determining whether conduct was severe or pervasive, the harassing conduct as a whole must be evaluated, not its effect on the plaintiff or the work environment. Godfrey v. Princeton Theological Seminary, 196 N.J. 178, 196 (2008); Lehmann, supra, 132 N.J. at 606-07. Neither a "'plaintiff's subjective

response' to the harassment, nor a defendant's subjective intent," controls whether a hostile work environment exists. Cutler v. Dorn, 196 N.J. 419, 431 (2008) (quoting Lehmann, supra, 132 N.J. at 604-05, 613). When determining whether the conduct would cause a reasonable person to believe the work environment is hostile, the courts must consider the cumulative effect of the conduct, not just the isolated instances of conduct. Godfrey, supra, 196 N.J. at 196; Lehmann, supra, 132 N.J. at 607. This requires an assessment of the totality of the circumstances, in which the court should consider "'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" Cutler, supra, 196 N.J. at 432 (citation omitted).

A hostile work environment is generally created by a series of inappropriate events or misconduct. See Taylor v. Metzger, 152 N.J. 490, 499 (1998). While a single incident of harassing conduct may be sufficient to create a hostile work environment, "'it will be a rare and extreme case in which a single incident will be so severe that it would, from the perspective of a reasonable [person . . .], make the working environment

hostile.'" Id. at 500 (quoting Lehmann, supra, 132 N.J. at 606-07).

In this case, if the alleged conduct occurred, this single incident would be sufficient to satisfy the severe and pervasive requirement, because it was unquestionably meant to embody a derogatory racial message. See id. at 500-03 (finding the plaintiff suffered harassment because of one instance when her supervisor called her a "jungle bunny," because the comment was "patently a racist slur, and is ugly, stark and raw in its opprobrious connotation" and "had an unambiguously demeaning racial message that a rational factfinder could conclude was sufficiently severe to contribute materially to the creation of a hostile work environment").

Here, however, Sills does not allege that PSE&G, through the acts of its management team, discriminated against him. Sills argues that PSE&G is liable for discriminatory acts by his co-workers. In this situation, employer liability for acts of co-workers hinges on whether management knew or should have known of the conduct. Heitzman v. Monmouth Cnty., 321 N.J. Super. 133 (App. Div. 1999). We explained the rule as follows:

> [a]n employer is generally liable for a hostile work environment created by a supervisor because the power an employer delegates to a supervisor "to control the day-to-day working environment" facilitates the harassing conduct. But under agency

> principles, an employer is not generally liable for harassing conduct by coworkers, "[b]ecause employers do not entrust mere co-employees with any significant authority with which they might harass a victim." Consequently, when a coworker engages in harassing conduct, the employer is liable only if "management-level employees knew, or in the exercise of reasonable care should have known, about the campaign of harassment." Moreover, it has been recognized that an employer "is unlikely to know or have reason to know of casual, isolated, and infrequent [conduct]."
>
> [Id. at 145-46 (footnote and citations omitted).]

Here Larmer and Piantadosi worked on crews supervised by Sills. In that sense, they were co-workers. They also worked in subordinate positions, and directly answered to, Sills. In Entrot v. The BASF Corp., 359 N.J. Super. 162, 174-75 (App. Div. 2003), we held that a harassing co-worker is only considered a supervisor "[i]f the co-worker had the authority to control the work environment . . . ." Therefore, PSE&G can only be responsible for a hostile work environment created by the two men if PSE&G knew or should have known about the alleged harassing conduct and failed to take action.

It is undisputed that Sills did not file a written complaint about prior incidents of racially derogatory remarks by Piantadosi and Larmer. He acknowledged that he knew he could file a written complaint or use a "hotline" to report prohibited

conduct. The record reveals an incident between Larmer and another employee, Matteo Mitchell, in which Larmer called Mitchell a "black piece of garbage" and Mitchell responded by calling Larmer "a white piece of trash." However, Sills did not witness the exchange; another person informed him about the incident.

Sills testified that he complained to Pat Alexander and Michael Duvall about several comments by Larmer and Piantadosi. He stated Alexander met with both men and counseled them about their conduct. There is no written confirmation of either the report or the response. The record also does not establish Alexander's position with PSE&G.

Sills believes Duvall heard the "dark cloud" remark. The employee denied that he heard any racially derogatory remark. The record also provides no basis to determine whether this person was a supervisory employee.

Sills was required to submit evidence beyond the pleadings to substantiate the claim that PSE&G knew or should have known of co-employee conduct that created a hostile work environment. The facts and all reasonable inferences that may be drawn from these facts in Sills' favor do not support that proposition. When Sills reported the mock lynching incident, the record does demonstrate that PSE&G acted promptly and decisively to address

his complaint. Indeed, the record is devoid of any complaint by Sills of a hostile work environment following the termination of Larmer and Piantadosi.

Moreover, there is nothing to suggest that PSE&G sought to revive the tainted workplace atmosphere following the arbitration proceeding. By contrast, the undisputed facts portray managers who appreciated Sills' distress about the ruling and anticipated the emotionally charged atmosphere that would prevail on their return to the Oradell workplace. When Sills became understandably upset about the prospect of supervising Larmer and Piantadosi, PSE&G arranged a transfer to another district with no loss in pay, seniority, or responsibilities. In addition, Sills has never disputed that the collective bargaining agreement required reinstatement of Larmer and Piantadosi and prevented a non-consensual transfer of them to another district.

In short, Sills was unable to establish that managers knew of prior incidents of racially derogatory conduct by Larmer and Piantadosi and allowed a hostile work environment to be created and to fester. The one employee to whom Sills complained took action that seemed to satisfy him at the time. He acknowledged he knew remedies existed and he did not pursue them until the mock lynching incident. Sills does not dispute that as soon as

he reported the incident, senior managers commenced an investigation which led to the termination of Larmer and Piantadosi a month later. We hold, therefore, that the motion judge properly granted summary judgment to PSE&G on the hostile environment racial discrimination claim.

We also reject Sills' argument that Larmer and Piantadosi can be individually liable for creating a hostile work environment. An individual employee may be liable under the LAD, if the employee holds a supervisory position. Herman v. Coastal Corp. 348 N.J. Super. 1, 27 (App. Div.), certif. denied, 174 N.J. 363 (2002). It is undisputed that both Larmer and Piantadosi were not supervisors.

B. Dismissal of Common Law Claims.

Alternatively, Sills argues that his common law claims, including the intentional infliction of emotional distress and harassment, should be revived once we have held that the LAD claims were properly dismissed. He relies on N.J.S.A. 34:19-8, the CEPA waiver of common law claims provision. We note, however, that the LAD does not have an analogous waiver provision. Nevertheless, we hold that all common law claims asserted by Sills were properly dismissed as a matter of law.

As a threshold matter, we do not accept the argument advanced by Larmer that the doctrine of collateral estoppel

precludes Sills' tort claims. He contends the mock lynching incident was the subject of a protracted arbitration hearing and the arbitrator found that the evidence was not sufficient to support a finding that Larmer and Piantadosi engaged in prohibited behavior.

The doctrine of collateral estoppel operates to preclude the relitigation of issues that have been previously decided. Olivieri v. Y.M.F. Carpet, Inc., 186 N.J. 511, 522 (2006). The standard for applying collateral estoppel is well settled:

> "[f]or the doctrine of collateral estoppel to apply . . . , the party asserting the bar must show that: (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding."
>
> [Id. at 521 (quoting In re Estate of Dawson, 136 N.J. 1, 20-21 (1994)).]

The doctrine applies not only to issues in the sense of those claims raised in a prior action, but to facts that were in dispute as well. Id. at 522. Additionally, reviewing courts apply collateral estoppel effect when analyzing dispositions of arbitrators as well as decisions of judges. Levine v. Wiss & Co., 97 N.J. 242, 250 (1984).

Here, the arbitrator decided that there was insufficient evidence of the mock lynching to warrant the termination of Larmer and Piantadosi. Sills, while questioned with respect to his allegations, was not a party to the arbitration proceedings. The parties in interest were PSE&G, the employer, and the Union on behalf of Larmer and Piantadosi. PSE&G was interested in justifying its action as an employer. In the end, the issue was not whether the incident occurred, but whether the employer had sufficient information to impose the ultimate discipline on these employees. Although the existence of the mock lynching was at issue during the arbitration, the parties and the interest of the victim of the incident were not entirely the same. The doctrine of collateral estoppel does not apply.

Further, despite Sills' contentions to the contrary, the language in N.J.S.A. 34:19-8 and Young v. Schering Corp., 275 N.J. Super. 221 (App. Div. 1994), aff'd, 141 N.J. 16 (1995), mandates that Sills' common law claims should not survive the dismissal of CEPA claims. Sills originally alleged claims of retaliation under CEPA and intentional infliction of emotional distress, which were dismissed in a summary judgment motion. Those are the exact type of dual claims that the Young court stated were prohibited by CEPA. Young, supra, 275 N.J. Super. at 238. Therefore, even if there were an analogous provision in

the LAD, it does not appear that it would save Sills' tort claims.

Moreover, Sills cannot establish an intentional infliction of emotional distress claim. To establish such a claim, a plaintiff must "'establish intentional and outrageous conduct by the defendant, proximate cause, and distress that is severe.'" Taylor, supra, 152 N.J. at 509 (quoting Buckley v. Trenton Sav. Fund Soc'y, 111 N.J. 355, 366 (1988)). The alleged conduct must be something more than that which is merely offensive, it 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 Buckley, supra, 111 N.J. at 366). "In general, that requires proof that 'the emotional distress . . . be so severe that no reasonable person could be expected to endure it.'" Leang v. Jersey City Bd. of Educ., 198 N.J. 557, 587 (2009) (quoting Tarr v. Ciasulli, 181 N.J. 70, 77 (2004)). Additionally, "it is extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary to provide a basis for recovery for the tort of intentional infliction of emotion distress." Griffin v. Tops Appliance City, Inc., 337 N.J. Super. 15, 23-24 (App. Div. 2001) (quotations and citations omitted). Whether a plaintiff has put

forth sufficient evidence of this type of conduct is a question of law. Buckley, supra, 111 N.J. at 367.

Here, even assuming that the mock lynching did occur, PSE&G managers did nothing that rises to the level of outrageous conduct. When informed of the incident, PSE&G immediately initiated an investigation and terminated the alleged perpetrators. Larmer and Piantadosi were reinstated only in response to an arbitration order. All parties to the arbitration agreed to binding arbitration. Sills failed to demonstrate that any of PSE&G's managers, including Clayton and Cistaro, engaged in conduct that remotely resembles the severity of that necessary to satisfy the requirements of this claim.

We also decline to address the CEPA retaliation claim. Sills' brief on appeal is confined to the dismissal of his LAD claim. Having failed to brief the CEPA claim, we consider it abandoned. W.H. Indus. v. Fundicao Balancins, Ltda, 397 N.J. Super. 455, 459 (App. Div. 2008). Sills' claim against PSE&G for negligently hiring/maintaining Larmer and Piantadosi was barred by N.J.S.A. 34:15-8. The Worker's Compensation Act provides the sole remedy under which a plaintiff may seek a remedy for negligent conduct by an employer or co-employee. Smith v. Exxon Mobil Corp., 374 F. Supp. 2d 406, 424 (D.N.J. 2005).

Sills also alleged that Larmer and Piantadosi intentionally harassed Sills through their discriminatory acts. He also asserted that PSE&G was guilty of intentional harassment because it failed to protect Sills from being victimized, discriminated against, and retaliated against for the two years prior to the complaint.

Workplace harassment can result in a successful claim under the LAD. Taylor, supra, 152 N.J. at 499-500. We have not found any authority, however, that recognizes a common law cause of action for intentional harassment by an employer. In addition, Sills presents no evidence as to any harassment at the hands of PSE&G.

Sills also maintains that he presented a prima facie case of prima facie tort. The Supreme Court has "neither upheld a prima facie tort claim nor explicitly defined its limits." Richard A. Pulaski Constr. Co. v. Air Frame Hangars, Inc., 195 N.J. 457, 467 (2008). It has, however, recognized that a viable claim could theoretically exist. Id. at 470.

The Court has noted that "'[o]ne who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances. This liability may be imposed although the actor's conduct does not come within a traditional category

of tort liability.'" Id. at 467 (quoting Taylor, supra, 152 N.J. at 522). However, a prima facie tort action may only be comprised of "'intentional, willful and malicious harms' that fall within the gaps of the law" and are generally permitted in only those infrequent situations where a plaintiff has no other applicable cause of action. Taylor, supra, 152 N.J. at 523 (quoting Trautwein v. Harbourt, 40 N.J. Super. 247, 266 (App. Div.), certif. denied, 22 N.J. 220 (1956)).

In Taylor, as is the case here, the plaintiff raised a claim of prima facie tort in addition to LAD claims for harassment and intentional infliction of emotional distress. The Court held that the plaintiff's claim was precluded based upon the following rationale:

> The LAD prohibits racial harassment in the workplace and, in this case, forbids the conduct of defendant that allegedly gives rise to the prima facie tort claim. Moreover, the tort of intentional infliction of emotional distress encompasses the conduct that in these circumstances would be targeted by a claim based on prima facie tort. Even if allegations of racial harassment were insufficient to state an LAD claim or a claim of intentional infliction of emotional distress, a prima facie tort cause of action should not be used to overcome those deficiencies. Prima facie tort should not be invoked when the essential elements of an established and relevant cause of action are missing. "Prima facie tort should not become a 'catch-all' alternative for every cause of action which cannot stand on its legs."

[Ibid. (emphasis added) (citations omitted).]

Sills asserted an LAD claim and it failed. He is precluded from pursuing a prima facie tort claim in this context.

IV

Larmer contends that PSE&G is obligated to indemnify him for the legal fees he incurred in defending Sills' claims against him. Relying on Schmidt v. Smith, 155 N.J. 44 (1998), and N.J.S.A. 34:15-72, he maintains that PSE&G is required by state law to carry insurance to indemnify its employees for liability incurred by other employees. The issue is without sufficient merit to warrant discussion in a written opinion. Schmidt is a coverage case. N.J.S.A. 34:15-72 requires an employer to obtain insurance to allow compensation to those injured at work. Neither creates a right to indemnify Larmer for his legal expenses.

V

To summarize, we hold the motion judge properly granted summary judgment to PSE&G and dismissed the complaints filed by Larmer and Piantadosi. Neither marshaled the evidence required to allow their LAD reverse discrimination claims to withstand summary judgment. We also hold that PSE&G is not obligated to indemnify Larmer for the legal fees expended by him to defend the complaint lodged by Sills. We also hold that the motion

judge properly granted summary judgment in favor of PSE&G and dismissed the hostile work environment racial discrimination LAD claim filed by Sills, as well as the various common law claims also filed by him.

Affirmed.