NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5077-08T2

CHRISTOPHER BASTOS,

Plaintiff-Appellant,

v.

STATE OF NEW JERSEY; ATTORNEY GENERAL OF THE STATE OF NEW JERSEY; STATE OF NEW JERSEY - DIVISION OF STATE POLICE; SUPERINTENDENT OF THE DIVISION OF STATE POLICE; JEFFREY CRAPSER; SALVATOR DiPAOLA,

Defendants-Respondents,

and

JONNY HANNIGAN,

Defendant.

Submitted December 1, 2010 - Decided May 25, 2011

Before Judges Gilroy and Ashrafi.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-2460-03.

William H. Buckman Law Firm, attorneys for appellant (Mr. Buckman and Surinder K. Aggarwal, on the brief).

Paula T. Dow, Attorney General, attorney for respondents State of New Jersey, Attorney General for the State of New

Jersey, State of New Jersey - Division of State Police, and Superintendent of State Police (Melissa H. Raksa, Assistant Attorney General, of counsel; Vincent J. Rizzo, Jr., Deputy Attorney General, on the brief).

Sciarra & Catrambone, L.L.C., attorneys for respondents Jeffrey Crapser and Salvator DiPaola (Jeffrey D. Catrambone, of counsel and on the brief).

PER CURIAM

Plaintiff Christopher Bastos appeals from orders for summary judgment dismissing his discrimination claims against the New Jersey State Police (NJSP) and individual supervisors under whom he worked as a State Trooper for less than six months. We affirm.

As the trial judge found, plaintiff was subjected to crude and offensive conduct that created a hostile work environment, but the conduct was not because plaintiff is Hispanic. The supervisors' misconduct was directed at plaintiff because he was a new, inexperienced recruit, and they were generally abusive supervisors. The Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, prohibits discrimination because of a person's identification with certain protected classes of people. It does not provide a legal remedy against generally offensive or hostile conduct of an employer.

I.

In October 2003, plaintiff filed a complaint against the State of New Jersey, the State Attorney General, the NJSP, the Superintendent of the Division of State Police, and plaintiff's immediate State Police supervisors, Jeffrey Crapser, Salvator DiPaola, and Jonny Hannigan. Among other claims, plaintiff asserted causes of action for retaliation in violation of the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -8, disparate treatment in violation of the LAD and the New Jersey State Constitution, and retaliation, hostile work environment, and disparate impact in violation of the LAD.

After lengthy pretrial litigation, the trial court granted summary judgment dismissing all of plaintiff's claims except the CEPA claim against the institutional State defendants. On the date scheduled for trial in April 2009, plaintiff voluntarily dismissed the CEPA claim with prejudice so that he could pursue this appeal as from a final judgment. Plaintiff seeks only reinstatement of his LAD and State constitutional claims of hostile work environment and retaliation against the NJSP, Crapser, and DiPaola.

Viewed most favorably to plaintiff, see R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995), the

evidence established by the summary judgment record included the following claims of hostile work environment and retaliation.

Before being recruited to join the NJSP, plaintiff was a police officer in New York City. During his training at the NJSP Academy, another recruit said in the presence of other classmates that plaintiff was a "token" who was recruited because he was Hispanic. Plaintiff graduated from the NJSP academy in June 2002 and was assigned to the Red Lion barracks. At Red Lion, plaintiff's immediate supervisors were defendant Crapser, a staff sergeant, and defendant DiPaola, who was performing the tasks of a patrol sergeant although he did not have that rank. Defendant Hannigan, a lieutenant, was Red Lion's station commander.

In July 2002, DiPaola ordered plaintiff to keep his head shaved. Plaintiff did not believe DiPaola's order concerned his ethnic heritage. Also in July 2002, DiPaola asked plaintiff to chew tobacco with him. When plaintiff declined, DiPaola commented, "If you want to be a man, you have to chew tobacco. Don't be a pussy. I'll bet you smoke a lot of weed." Plaintiff believed that DiPaola's reference to marijuana was related to a discussion during the same time of plaintiff's Hispanic heritage, but DiPaola did not mention Hispanics when he made the reference to marijuana.

In his deposition, plaintiff testified that Crapser and DiPaola called him and other Troopers derogatory names. For example, Crapser often called him "NYPD," a reference to his prior employment. On one occasion, DiPaola referred to plaintiff as "fuzz nuts." Plaintiff also claimed that DiPaola "constantly screamed at" him, calling him "a dumb f***, a nitwit." In August 2002, DiPaola called plaintiff a "bastard" on one occasion and "bastido" on another. Plaintiff confronted DiPaola after the first incident, and DiPaola responded, "[g]et the f*** out of . . . [my] face." Plaintiff felt threatened. Other Troopers also told plaintiff DiPaola had used the word "bastido" in reference to him.

Former Trooper Lisa Bortz submitted a certification in support of plaintiff's opposition to summary judgment stating that she heard DiPaola refer to plaintiff by the word "bastido" several times when plaintiff was not present. She understood the word to be a combination of plaintiff's Hispanic last name (Bastos) and the word "bastard," and she believed DiPaola's adding the letter "o" was "meant to mimic the sound of the Spanish language." She considered the term a "racial slur." Bortz also stated that DiPaola and Crapser used derogatory nicknames in referring to other Troopers, some of which were racial slurs. For example, they referred to certain African-

American Troopers as "Busta Rhymes," "Shaft," "Snoop Dog," and "Magilla Gorilla."

Another Trooper, Douglas Kaczor, provided a statement to the NJSP that he had heard DiPaola and Crapser refer to plaintiff as "bastido" on several occasions. Plaintiff complained to him that DiPaola had called him "Chris Bastard." Kaczor stated that DiPaola had also distorted Kaczor's name, calling him "cocksore." However, Kaczor was not offended; others had done the same before he joined the NJSP. According to Kaczor, DiPaola called many male Troopers "cocksucker," but Kaczor did not attribute discriminatory purpose to that vulgarity.

During plaintiff's initial days at Red Lion, Trooper Ronald Walter was assigned as his "Trooper coach" and helped him "learn the ropes." Plaintiff complained to Walter about DiPaola calling him "bastido," indicating his frustration that DiPaola did not know the correct pronunciation of his name despite his two months at Red Lion. Plaintiff did not recall whether he told Walter he considered the reference an ethnic slur. At the conclusion of the training period, Crapser and DiPaola disclosed to others that plaintiff had not given Walter a superior evaluation and thus labeled plaintiff a "troublemaker" within the barracks.

According to plaintiff, Crapser "openly talked about Hispanics and Mexicans," telling plaintiff that "in the past . . . the State Police could easily identify Hispanics and Mexicans while doing road duty and stop them." Plaintiff felt that Crapser's statement was derogatory and directed at him.

During his tenure at Red Lion, plaintiff spoke to Crapser about his treatment by DiPaola. Plaintiff did not remember the specifics of these conversations, except that Crapser responded on at least one occasion, "keep [your] mouth shut, [your] reputation will follow [you]." Similarly, when plaintiff complained to Crapser that DiPaola was watching "soft pornography" on a television set at the station visible to the public, Crapser responded "shut [your] mouth."

In November 2002, DiPaola allegedly yelled at plaintiff that he was going to "bend [him] over and f*** [him] in the ass." Also in November 2002, because plaintiff declined to attend the station's holiday party, Crapser asked him: "Why? Do you think we're going to do bukaki[1] on your wife?" Plaintiff did not believe these statements were made with reference to his Hispanic heritage, but he considered them sexually harassing.

[1] "Bukaki" is described by the parties as a sexual act involving "multiple males" and one woman.

On November 29, 2002, Crapser and DiPaola brought plaintiff into a private room and "berated" and "screamed" at him for diverting from his assigned call to pursue a speeding vehicle. Moreover, DiPaola told plaintiff that he "wasn't a team player," and was not writing as many summonses as another Trooper. The next morning, plaintiff asked Crapser about the reasons for DiPaola's treatment of him. Crapser told him that he "was doing a good job," but he also said that "whatever [DiPaola] does is fine by me." As a result, plaintiff believed that Crapser would not do anything "to rectify the abuse." At no time during his conversations with Crapser did plaintiff express his belief that he was being mistreated because of his ethnic heritage.

On November 30, 2002, plaintiff and another Trooper were ordered to clean out the barracks refrigerator. DiPaola screamed at plaintiff for accidentally throwing away his sandwich.

On December 15, 2002, Crapser told plaintiff Lieutenant Hannigan suspected that he had made illegal radio transmissions. Plaintiff believed the allegations were fabricated to harass him. When plaintiff sought to clear the matter up with Hannigan, Crapser said that Hannigan would not want to speak with plaintiff because he "doesn't take kindly to minorities." Plaintiff admitted he was not disciplined for the incident

involving radio transmissions. He also testified that nothing indicated to him Hannigan was biased against minorities, that he had "no problems" with Hannigan, and that he had bypassed other opportunities to speak with Hannigan.

In December 2002, plaintiff complained to the Equal Employment Opportunity Commission (EEOC) about his treatment at Red Lion. On the same day, plaintiff was put in contact with a higher ranked officer of the NJSP, identified in the record only as Major Miller, and he requested a transfer from Red Lion to another barracks. Miller asked plaintiff whether he wanted to make an internal complaint, and plaintiff said he did, to which Miller responded "that [he] would be a whistleblower." Miller called plaintiff back within an hour, stating he would arrange for plaintiff to make an internal complaint.

Plaintiff was immediately transferred from the Red Lion barracks to the Netcong barracks during the week of December 23, 2002. He considered the transfer an undesirable assignment. On December 24, 2002, plaintiff filed a formal complaint with the NJSP Equal Employment Opportunity office.

From the time of his transfer to the date of his resignation from the NJSP four weeks later, plaintiff had no direct contact with Crapser and DiPaola. Crapser attempted to contact him once, leaving a voicemail message on his home phone,

which plaintiff paraphrased as "how could you have done this." While plaintiff was at Netcong, Troopers Bortz and Kaczor told him that DiPaola had allegedly made a threat that "if [plaintiff] went forward with [his] complaint that [he] would be found in an alley with a baseball bat." Bortz and Kaczor had not heard DiPaola make such a threat but had been told about it by an unidentified source. Plaintiff was frightened by the threat.

On one occasion, DiPaola called the Netcong barracks and spoke to the sergeant, saying that other Troopers were waiting for plaintiff in the back parking lot. Plaintiff went to the lot, but saw no one there. Plaintiff was apprehensive about going to the parking lot alone at night because of DiPaola's alleged threat.

Bortz also stated that Crapser made several telephone calls to Netcong to disparage plaintiff. Plaintiff felt harassed by other Troopers at Netcong, who told him there was "very bad news in the rumor mill about [him]." Plaintiff resigned from the NJSP effective January 21, 2003, six months after his graduation from the NJSP Academy. At the time of his resignation, he had already applied to return to his prior employment. He rejoined the New York City Police Department a few weeks after his resignation.

Following an internal investigation conducted by the NJSP in early 2003, Crapser and DiPaola were disciplined based on the complaints brought by plaintiff and Bortz. In their settlement agreement resulting in discipline, neither defendant admitted discriminatory intent toward plaintiff because he is Hispanic.

Viewing this record, the trial judge granted summary judgment to Crapser and DiPaola by order dated November 2, 2007. In his oral decision, the judge concluded that the evidence was insufficient to demonstrate discrimination or retaliation because of plaintiff's Hispanic heritage. He also ruled that other counts of plaintiff's complaint were not supported by the available evidence or that the statutory provisions did not provide for liability of individual defendants.

By another order and oral decision on March 14, 2008, the court denied summary judgment to the institutional defendants on plaintiff's CEPA claim but granted summary judgment dismissing the discrimination and common law claims. As previously stated, in April 2009, plaintiff elected to dismiss rather than proceed to trial on his CEPA claim and, instead, to pursue this appeal.

II.

In reviewing a grant of summary judgment, we apply the same standard under Rule 4:46-2(c) that governs the trial court. See Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J.

436, 445-46 (2007). We must "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." Brill, supra, 142 N.J. at 540.

The LAD provides that "[i]t shall be an unlawful employment practice . . . for an employer, because of the race, creed, color, national origin, ancestry,[2] . . . of any individual . . . to discriminate against such individual . . . in terms, conditions or privileges of employment." N.J.S.A. 10:5-12a. The statute does not address all types of harassing or hostile conduct attributable to the employer. It is not a code of civility for the workplace. See Mandel v. UBS/PaineWebber, Inc., 373 N.J. Super. 55, 73 (App. Div. 2004), certif. denied, 183 N.J. 213 (2005); cf. Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 80, 118 S. Ct. 998, 1002, 140 L. Ed. 2d 201, 207 (1998) (Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, prohibits workplace harassment only if members of a protected class are treated differently from non-members). The LAD requires that plaintiff show discrimination because of one

[2] We have omitted additional, non-pertinent, protected classes of people listed in the statute.

of the enumerated identifying characteristics as it pertains to him, in this case his national origin or ancestry.

To establish a prima facie claim of hostile work environment, plaintiff must show that: (1) the conduct would not have occurred "but for" his identity within a class protected by the LAD, and (2) the conduct was severe or pervasive such that (3) a reasonable person in the same protected class would believe that (4) "the conditions of employment are altered and the working environment is hostile or abusive." Cutler v. Dorn, 196 N.J. 419, 430 (2008) (quoting Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 603-04 (1993)).

In Cutler, the Supreme Court confirmed that courts must undertake an objective assessment of the allegedly harassing conduct, rather than examining the plaintiff's subjective reaction or a defendant's intent. Id. at 431. A "reasonable person standard" applies to determining whether "harassing conduct makes a work environment hostile." Ibid.

In this case, the trial court undertook an objective assessment and dismissed plaintiff's claim of hostile work environment because very few of the remarks by the supervisors were related to plaintiff's Hispanic heritage. By plaintiff's own admissions, most of the profanity and mistreatment by the

two supervisors was not ethnically-based.[3] The supervisors' conduct was offensive, hostile, and intimidating, but it was aimed similarly across racial and ethnic lines.

References to plaintiff's ethnic heritage were limited to the following: (1) another recruit at the NJSP Academy called plaintiff a "token"; (2) DiPaola said to him "I bet you smoke a lot of weed"; (3) Crapser said to plaintiff that Hispanic and Mexican motorists were easy to identify while Troopers were on road duty; (4) plaintiff was called "bastido"; and (5) Crapser told plaintiff that Lieutenant Hannigan "doesn't take kindly to minorities." Of these, only the "bastido" reference could potentially establish a prima facie case of hostile work environment.

The fellow recruit's reference at the academy cannot be attributed to these defendants. It involved no supervisor, either in its being expressed or in a failure to investigate an allegation of discrimination. See Herman v. Coastal Corp., 348 N.J. Super. 1, 27 (App. Div.), certif. denied, 174 N.J. 363 (2002); Tyson v. CIGNA Corp., 918 F. Supp. 836, 840-41 (D.N.J. 1996), aff'd, 149 F.3d 1165 (3d Cir. 1998). DiPaola's

[3] Although plaintiff also claimed sexual harassment in his arguments before the trial court, he has not pursued that claim on appeal. The sexually-charged remarks of DiPaola and Crapser we have recited were certainly vulgar but not enough to constitute sexual harassment of plaintiff.

questioning plaintiff about smoking "weed" was not tied to his Hispanic heritage, except through plaintiff's subjective perception. Although the remark occurred in the same conversation as a discussion of plaintiff's heritage, it appears more closely related to DiPaola's notion of manhood as displayed by chewing tobacco than to plaintiff being Hispanic.

Crapser's comment that Troopers were able to identify Hispanic and Mexican persons and made road stops on that basis in the past cannot be considered a slur or disparaging comment. In fact, that same understanding was the basis of efforts to eliminate "racial profiling" from NJSP practices. See State v. Lee, 190 N.J. 270, 280 (2007); State v. Soto, 324 N.J. Super. 66 (Law Div. 1996). Also, Crapser's comment about Hannigan was refuted by plaintiff's own testimony, in which he conceded that he had no problems with Hannigan and bypassed other opportunities to speak with him about discrimination at the Red Lion barracks.

Only the supervisors' use of the nickname "bastido" can be deemed a disparaging reference to plaintiff's Hispanic ethnicity. The issue is whether a claim of hostile work environment can be based on proof that DiPaola called him "bastido" once to his face and that DiPaola and Crapser made that reference behind his back on other occasions. We conclude

that the "bastido" distortion of plaintiff's name, in the context of other similar forms of adolescent mockery practiced by DiPaola and Crapser, is not sufficient evidence of a hostile work environment for which the LAD provides compensation.

In evaluating a claim of hostile work environment, courts 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 (quoting Shepherd v. Hunterdon Developmental Ctr., 174 N.J. 1, 19-20 (2002)). If sufficiently severe, a single comment can be enough to prove a hostile work environment, but only in "a rare and extreme case." Taylor v. Metzger, 152 N.J. 490, 500 (1998) (quoting Lehmann, supra, 132 N.J. at 606-07); see Flizack v. Good News Home For Women, Inc., 346 N.J. Super. 150 (App. Div. 2001).

Here, we agree with the trial court's conclusion that the use of "bastido" was not so "severe or pervasive" that plaintiff has demonstrated "a rare and extreme case," Taylor, supra, 152 N.J. at 500, permitting his claims to survive summary judgment. Unlike the racial slur in Taylor, supra, 152 N.J. at 494-95, the reference in this case was not an "unambiguously demeaning racial message. . . patently a racist slur . . . ugly, stark and

raw in its opprobrious connotation." Id. at 502-03. It was an insulting but juvenile attempt to belittle a recruit with a distortion of his name and a Hispanic overtone. At a time closer to the incident, plaintiff expressed more annoyance with the disrespect shown by DiPaola in failing to pronounce his name correctly than in the implications of the linguistic twist.

Plaintiff's evidence of a hostile work environment based on his protected status resembles more closely those cases that have rejected an LAD claim by summary judgment than those that have permitted it to be presented to a jury. Compare El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 180 (App. Div. 2005); Mandel, supra, 373 N.J. Super. at 72-73; Watkins v. Nabisco Biscuit Co., 224 F. Supp. 2d 852, 864-65 (D.N.J. 2002), with Cutler, supra, 196 N.J. at 434; Shepherd, supra, 174 N.J. at 26; Woods-Pirozzi v. Nabisco Foods, 290 N.J. Super. 252, 270-71 (App. Div. 1996); Cardenas v. Massey, 269 F.3d 251, 261-63 (3d Cir. 2001); Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1082-84 (3d Cir. 1996).

The trial court correctly granted summary judgment to defendants dismissing plaintiff's claims of hostile work environment.

III.

Defendant also contends that the evidence was sufficient to demonstrate genuine issues of fact regarding retaliation by Crapser and DiPaola because plaintiff complained about their discriminatory conduct.

N.J.S.A. 10:5-12d states that it is a violation of the LAD: "For any person to take reprisals against any person because that person has opposed any practices or acts forbidden under this act . . . ." To state a prima facie case of retaliation, plaintiff must establish that: "he was engaged in a protected activity known to . . . defendant[s]; 2) he was thereafter subjected to an adverse employment decision by . . . defendant[s]; and 3) there was a causal link between the two." Romano v. Brown & Williamson Tobacco Corp., 284 N.J. Super. 543, 548-49 (App. Div. 1995). At the prima facie stage, plaintiff bears a "rather modest" evidentiary burden of demonstrating that retaliation "could be a reason for the employer's action." See Zive v. Stanley Roberts, Inc., 182 N.J. 436, 447 (2005).

Here, plaintiff engaged in protected activity known to defendants when he filed an EEOC complaint and an internal NJSP complaint in the latter part of December 2002. Although plaintiff had spoken earlier to Crapser about DiPaola's treatment of him, plaintiff could not say that he alerted

Crapser that he was complaining of discriminatory treatment because he was Hispanic. Therefore, plaintiff cannot show that his earlier complaints included protected activity known to Crapser.

After plaintiff's formal complaints in December, he had no further communication with the supervisors at the Red Lion barracks. No adverse employment action was taken against him. There is no evidence that any supervisors at the Netcong barracks took retaliatory action, despite evidence that Crapser called to disparage plaintiff, and higher ranks of the NJSP responded appropriately to plaintiff's complaint. The NJSP honored plaintiff's request for a transfer and immediately conducted an investigation that culminated in disciplining of Crapser and DiPaola. Plaintiff suffered no adverse employment action.

With respect to the actions of DiPaola and Crapser after the complaint and transfer, the only one that could potentially be viewed as reprisal is DiPaola's alleged threat regarding a baseball bat in an alley. However, plaintiff lacked admissible evidence that DiPaola made the threat. See R. 1:6-6; Claypotch v. Heller, Inc., 360 N.J. Super. 472, 488-89 (App. Div. 2003); Jeter v. Stevenson, 284 N.J. Super. 229, 233-34 (App. Div. 1995). His witnesses, Bortz and Kaczor, had not heard the

threat themselves, and their testimony would have been inadmissible as hearsay. The other telephone calls from Crapser and DiPaola are not sufficient evidence of reprisal.

Plaintiff contends that his resignation less than one month after his transfer should be viewed as a constructive discharge from his employment with the NJSP. See, e.g., Cardenas, supra, 269 F.3d at 263. But the evidence does not support his allegations that the conditions at the Netcong barracks were intolerable such that he was compelled to resign. Plaintiff can only allege that fellow Troopers discussed rumors about what had occurred at Red Lion. That allegation is not enough to make the conditions of his employment intolerable.

The trial court correctly dismissed plaintiff's claim of retaliation under the LAD.

Finally, plaintiff's State constitutional claims do not provide any grounds for liability beyond those contained in the LAD.

Affirmed.