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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2295-09T2

TERRI COLLINS,

Plaintiff-Appellant,

v.

BEAUTY PLUS TRADING
COMPANY, INC.,

Defendant-Respondent.

Submitted January 25, 2012 - Decided March 23, 2012

Before Judges Cuff and Lihotz.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-1196-08.

Law Offices of J. Edward McCain, III, attorneys for appellant (Zakia E. Moore, on the brief).

Aronsohn, Weiner & Salerno, P.C., attorneys for respondent (Gerald R. Salerno, of counsel; Fred H. Bicknese, on the brief).

PER CURIAM

Plaintiff Terri Collins appeals from the December 4, 2009 summary judgment dismissal of her complaint, alleging discrimination in violation of the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, and other claims against her

former employer, defendant Beauty Plus Trading Company. We affirm.

The facts are derived from evidence submitted by the parties in support of, and in opposition to, defendant's summary judgment motion, viewed in a light most favorable to plaintiff. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). In January 2007, plaintiff, a former radio station advertising sales representative, interviewed with Jay Choi, defendant's marketing manager, and Chung Moo Lee, defendant's president, to discuss possible employment. Because Lee was not fluent in English, the meeting was conducted in a mix of English and Korean, with Choi translating and interpreting between plaintiff and Lee as needed.

Defendant, which sold wigs, hair weaves, and related hair products to retailers, discussed an ethnic marketing position with plaintiff, an African American. In subsequent telephone conversations between plaintiff and Choi, the "particulars" of plaintiff's potential employment were further discussed and agreed upon.

At a second meeting between plaintiff, Choi, and Lee, plaintiff presented a written document outlining her salary and benefit requests. Following these negotiations, defendant

offered plaintiff a position and the parties later signed an employment agreement on January 29, 2007.

The document outlined plaintiff's "annual gross salary [in] the amount of $60,000.00[,]" for a four-day workweek, Monday through Thursday, 10 a.m. to 5 p.m. Further, defendant agreed to "provide health insurance for [plaintiff], however, [defendant] and [plaintiff had to] pay half each . . . for the rest of [plaintiff's] family members." Following a six-month probationary period, if plaintiff was retained, defendant agreed to provide her with dental insurance. Finally, defendant agreed to provide plaintiff with a laptop computer and a cellular phone, and to reimburse gasoline and tolls at the daily rate of $34. Nothing in the document addressed plaintiff's title, position, or responsibilities.

A second document entitled "Company Employment Agreement" set forth the provisions of a non-compete agreement precluding plaintiff's employment with "other hair companies" for two years following separation from defendant's employment.

Plaintiff maintained these documents did not reflect the agreed terms of employment she reached with Choi. She did not dispute the document governed the agreed upon salary, length of workweek, laptop and cell phone provisions, and the non-compete restrictions, but argued she never agreed to pay half of the

insurance costs for her children's health insurance, did not negotiate for dental insurance, or agree to be subject to a probationary period. Plaintiff also testified defendant agreed to provide her with her own office, title her Vice President of Ethnic Marketing, and afford her a business expense account. When plaintiff complained these items were not in the written agreement, Choi stated, "don't worry about it[.]"

Plaintiff's direct supervisor was Lee. She and other managers reported daily to Lee's office for meetings, during which she, and others who did not speak Korean, required interpreter services as "ninety percent" of the meetings were conducted in Korean. At other times, plaintiff worked with Lee directly and their conversations where mostly in English. Plaintiff asserts she voiced complaints about the use of Korean during meetings, as she felt left out.

Plaintiff explained she had a "professional . . . normal cool working relationship" with Choi. She stated her "issue[s]" with Choi included that she "didn't have an office," or "a business account," while other male managers had expense accounts, and "as a manager[,] she had to request supplies." Plaintiff believed Choi "did not respect the fact that [she] was a woman in management." This belief was not based on disparaging comments or actions, rather, plaintiff stated "it

was evident." Plaintiff articulated a belief she experienced "subtle" discrimination, which stemmed from the rejection of African American models she presented for advertisements in favor of others with smaller noses, hips, and lips. Plaintiff acknowledged the models chosen by Choi and Lee were a result of defendant's pre-existing "marketing strategy as it related to what they thought beauty was, and that was light-skinned black women with skinny noses and little lips and skinny faces." However, to plaintiff these model selections were "very disrespectful, very discriminatory and very offensive, because black is beautiful in all shades."

Because of the "informality" of the company, plaintiff voiced her concerns through "a whole lot of verbal complaining." Further, she kept a log of them on her laptop computer, which was surrendered when she left her employment. She did not elaborate on the specifics of these complaints.

By early May 2007, Choi was fired and replaced by another employee, Sammy Lee. Conflicts soon developed between plaintiff and Sammy. In an "interoffice memorandum" dated May 14, 2007, plaintiff outlined discontent with Sammy:

> Sammy Lee displayed unprofessional communication. He raised his voice disrespectfully and mentioned that "he would resign if I didn't resign" and also stated that "we will see who would be let go[."] His behavior was unprofessional. I was

> hired as Vice President of Ethnic Marketing by Mr. Chang Moo Lee to evaluate current marketing strategies and to make/implement recommendations concerning the same. His behavior makes me uneasy. Vice President of Ethnic Marketing is a management position that should be respected. In addition, I reiterated to him that I was Vice President of Ethnic Marketing and he stated that my position is of no consequence because Jay Choi no longer is employed by [defendant] - his exact words was "that was before[."] I will not tolerate his verbal abuse, nor will he treat me in a demeaning or disrespectful way. I am in Management. I was hired by Mr. Chang Moo Lee to provide [ten plus] years of marketing expertise and consumer behavior expertise. I refuse to have my position minimized and disrespected.
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> . . . [A] communication problem[] . . . exist[s] because most meetings are conducted in Korean. If this communication problem - disrespectful and unprofessional behavior with Sammy continues and speaking Korean during a meeting which concerns marketing and my professional job duties persists, I will be forced to resign from this organization.

That same day, plaintiff sent a second "interoffice memorandum" complaining of "another incident" involving Sammy, stating:

> I will not tolerate Mr. Sammy Lee['s] verbal abusiveness. While you were at the bank, he had another outburst against me. This is humiliating and insensitive. I am requesting that you have a discussion with him to rectify this situation. I will be treated in a professional manner at this office . . . . He is very insulting. I went to him about an idea, we were in a meeting. I told him it was rude to speak in Korean if I am in a meeting with him. He speaks fluent English and thus we can

> communicate and make the best decisions for the company.

When questioned regarding the nature of remarks that prompted these letters, plaintiff could not recall the specifics, stating only that it was "something very mean and sensitive [sic]" that was "abusive enough and humiliating enough that [she] put it in writing."

The memoranda were directed to Young June Hwang, defendant's general and human resources manager. Thereafter, Hwang met with plaintiff and Sammy, encouraging each of them to get along with one another as they were colleagues.

When plaintiff arrived at work on May 22, 2007, she had no internet access. She had made up her mind to resign and submitted a resignation letter on May 22, 2007. In her letter, plaintiff explained she was "faced with many unnecessary company related challenges and broken promises," which were outlined as follows:

- Business Expense Account - effective upon [first] day of hire; as of today, not received
- Office space; effective upon [first] day of hire; as of today, not received
- Exclusion from Management Meetings
- Lack of interpretation/interpreter/ communication

- Inability to perform basic duties; lack of office supplies, denial of website access on 5/22/07
- Compensation for business travel; as of today, not received
- Marketing Managers' disrespect, demeaning attitude, and unprofessional conduct
- No Policy/Procedural Manual in place
- Lack of Complaint Process/ Confidentiality
- Fear of professional retaliation if a complaint is made

Defendant accepted plaintiff's resignation on May 26, 2007.

Plaintiff filed her seven count amended complaint on January 22, 2009. She alleged breach of contract, negligent infliction of emotional distress, intentional infliction of emotional distress, defamation, negligent misrepresentation, and invasion of privacy by unauthorized use of likeness. Following discovery, defendant moved for summary judgment.

In an oral opinion, the motion judge considered each of plaintiff's claims. We limit our discussion to plaintiff's challenges on appeal regarding the dismissal of her claims for discrimination and invasion of privacy.

The motion judge found no basis for a hostile work environment claim because "English-speaking people" were not a

protected class under the LAD and plaintiff was aware from the commencement of her employment that defendant's employees were predominately Korean speaking, and therefore, the use of Korean by defendant's employees in plaintiff's presence did not occur "but for her race." Further, the motion judge rejected plaintiff's claims of hostile discharge. The judge found plaintiff failed to show "the conditions of the employment situation were severe or pervasive, and so intolerable that a reasonable person subject to them would resign." Defendant's rejection of plaintiff's proffered models was found to be a discretionary determination, not conduct creating an intolerable working environment. The four comments attributed to Sammy, although "rude[,]" were also found insufficient to satisfy plaintiff's burden of proof.

The court also considered plaintiff's invasion of privacy claim grounded on the use of her voice narrating instructions on a video explaining how to use a new product. Plaintiff suggests it was "not a part of [her] job duties" to provide her voice in this way, she was not provided additional compensation, and when she agreed to participate, she was not told the product would be launched by releasing the video on YouTube. The motion judge concluded the video was a work product and plaintiff had no

"right to now . . . claim that . . . an invasion of privacy [or] . . . that [defendant is] not allowed to use that work product."

In our de novo review of a trial court's grant or denial of summary judgment, we apply the same standard as the trial court. Chance v. McCann, 405 N.J. Super. 547, 563 (App. Div. 2009). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). Accord Taylor v. Metzger, 152 N.J. 490, 495 (1998). In our review, we decide whether a genuine issue of material fact has been presented, and if not, we undertake an independent review of whether the motion judge's application of the law was correct, noting the "interpretation of the law and legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Plaintiff appeals from the summary judgment dismissal of her complaint, arguing the motion judge incorrectly applied the governing legal standards when reviewing the evidence presented. Plaintiff maintains she offered sufficient proofs to defeat defendant's motion and present her claims of hostile work

environment, constructive discharge, and invasion of privacy to a jury. We disagree with each of these contentions.

We reject as without merit plaintiff's contention "the court applied . . . a heightened burden of production" requiring her to meet the preponderance of the evidence standard rather than the sufficient showing of evidence standard applicable in these matters. R. 2:11-3(e)(1)(E). We add these brief comments.

"Among the prohibited forms of employment discrimination [under the LAD] is harassment, based on race, religion, sex, or other protected status, that creates a hostile work environment." Cutler v. Dorn, 196 N.J. 419, 430 (2008) (citing Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 601 (1993)). An African American plaintiff alleging racial harassment resulting in a hostile work environment

> must prove that "the [defendant's] conduct (1) would not have occurred but for the employee's [race]; and [the conduct] was (2) severe or pervasive enough to make a (3) reasonable [African American] believe that (4) the conditions of employment are altered and the working environment is hostile or abusive."
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> [Ibid. (quoting Lehmann, supra, 132 N.J. at 603-04) (emphasis removed).]

"Language, by itself, does not identify members of a suspect class." Soberal-Perez v. Heckler, 717 F.2d 36, 41 (2d

Cir. 1983), cert. denied, 466 U.S. 929, 104 S. Ct. 1713, 80 L. Ed. 2d 186 (1984). However, it is conceivable that disparate treatment because of one's language could be related to race or national origin discrimination. See Garcia v. Gloor, 618 F.2d 264, 268 (5th Cir. 1980) (providing "[l]anguage may be used as a covert basis for national origin discrimination"), cert. denied, 449 U.S. 1113, 101 S. Ct. 923, 66 L. Ed. 2d 842 (1981).

Here, nothing links defendant's employees' use of their native language to plaintiff's race. Plaintiff offers no facts to suggest Lee, Choi, or Sammy reverted to Korean to utter racial or ethnic slurs. In fact, plaintiff's claims do not even show the use of Korean was to exclude her from the conversation. Lee interviewed plaintiff with the assistance of an interpreter. Further, even though some meeting conversations were in Korean, plaintiff and other English speaking employees were given translation assistance. In short, plaintiff's assertion that the court "ignored [p]laintiff's stated membership in a protected class . . . i.e. African American female" is baseless. See Rosario v. Cacace, 337 N.J. Super. 578, 585-86 (App. Div. 2001) (dismissing a LAD claim alleging termination for violating a workplace English-only rule because the plaintiff could not show the rule "was used as a surrogate for discrimination on the

basis of national origin, ancestry, or any other prohibited grounds").

Similarly, we reject the suggestion plaintiff's model choices were rejected because of discriminatory intent. The evidence does not demonstrate plaintiff's models were not chosen because their traits resembled hers. Also, she admitted Choi and Lee never made critically disparaging comments regarding her choices. They simply preferred other models, who plaintiff would have rejected.

Defendant's subjective determination of an appealing image for marketing its products was discretionary, not discriminatory. Lee, as defendant's president, had successfully operated the company for years. His desire to maintain a proven marketing strategy rather than accede to plaintiff's newly offered suggestions reflects a business decision, which in no way contributes to a hostile work environment.

Plaintiff also argues the evidence presented was sufficient to support her constructive discharge under the LAD. We disagree.

A claim for constructive discharge must be supported by evidence the employer knowingly permitted the continuation of discriminatory conditions in employment which were "so intolerable that a reasonable person subjected to them would

resign." Muench v. Twp. of Haddon, 255 N.J. Super. 288, 302 (App. Div. 1992) (internal quotation marks and citation omitted). Relevant considerations include the employee's efforts to remain employed, the closeness of the relationship between the harasser and the employee, the employee's use of internal grievance procedures, the employer's responsiveness to the complaints, and all other relevant circumstances. Shepherd v. Hunterdon Developmental Ctr., 174 N.J. 1, 28 (2002).

The Court in Shepherd addressed the distinction between claims for a hostile work environment and constructive discharge. Ibid. While similar, "a constructive discharge claim requires more egregious conduct than that sufficient for a hostile work environment claim[,]" as it includes "conduct that is so intolerable that a reasonable person would be forced to resign rather than continue to endure it." Ibid.

Plaintiff's failure to proffer evidence constituting a hostile work environment defeats any possibility of demonstrating she experienced a constructive discharge. Plaintiff has articulated two incidents involving Sammy, both of which occurred on the same day. The statements suggest an unprofessional rivalry and contain hints of animus, but those characteristics do not render them discriminatory or supportive of a constructive discharge. Plaintiff describes the

"communication problem with Sammy" as "unprofessional communication" that was "disrespectful" and "abusive." She never suggests Sammy's actions or statements were discriminatory. Further, Hwang responded to her concerns by discussing them with her and Sammy and advising the discordant conduct should cease. Plaintiff does not report Sammy's behavior continued and she resigned approximately one week later. Therefore, we will not disturb the motion judge's conclusion that the facts presented were insufficient to establish a claim of constructive discharge.

Finally, plaintiff maintains the trial court erred in dismissing her claim for damages resulting from the invasion of her privacy by the unauthorized use of her likeness. Specifically, the narrated product video was posted on the internet without her express permission. Defendant contends plaintiff has no appropriation claim because she is not a celebrity, and alternatively, contends copyright law preempts her claim. Following review, we conclude plaintiff has not presented a prima facie case of appropriation, thereby warranting dismissal of her complaint.

The tort of invasion of privacy precludes the appropriation of one's name or likeness, Rumbauskas v. Cantor, 138 N.J. 173, 180 (1994), recognizing "a person has an interest in [his or

her] name or likeness 'in the nature of a property right.'" Castro v. NYT Television, 370 N.J. Super. 282, 297 (App. Div. 2004) (quoting Restatement (Second) of Torts, § 652C cmt. a (1977)). A prima facie case for invasion of privacy by appropriation of likeness requires a plaintiff to establish: (1) the defendant appropriated the plaintiff's likeness, (2) without the plaintiff's consent, (3) for the defendant's use or benefit, and (4) damage. See Faber v. Condecor, Inc., 195 N.J. Super. 81, 86-90 (App. Div.) (setting forth the elements of the tort of invasion of privacy through the appropriation of one's likeness), certif. denied, 99 N.J. 178 (1984).

In Castro, supra, the plaintiffs sued a cable network after their names and images were broadcast during the television show "Trauma: Life in the ER[.]" 370 N.J. Super. at 287-88. Rejecting the plaintiffs' claims, this court explained "[t]he broadcast of videotape footage on a television show does not give a person who has been videotaped the right to maintain an action for appropriation of his or her likeness[.]" Id. at 297. The court reasoned:

> "[n]o one has the right to object merely because his name or his appearance is brought before the public, since neither is in any way a private matter and both are open to public observation. It is only when the publicity is given for the purpose of appropriating to the defendants' benefit the commercial or other values associated with

> the name or the likeness that the right of privacy is invaded."
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> [Ibid. (quoting Restatement (Second) of Torts, supra, § 652C cmt. d.]

Like Castro, plaintiff's participation in the video and defendant's subsequent publication of the instructional video on YouTube does not give rise to a claim for appropriation. While plaintiff can show that defendant appropriated her likeness by using her voice in the instructional video, she cannot show it was used without her consent or used to "'tak[e] advantage of h[er] reputation, prestige, or other value associated with h[er], for purposes of publicity.'" Faber, supra, 195 N.J. Super. at 87 (quoting Restatement (Second) of Torts, supra, § 652C cmt. d). Plaintiff's narration of the video was incidental and in no way contributed to the commercial purpose of the video. For example, plaintiff's voice was not a celebrity endorsement independently drawing viewers because of her participation in the video. Further, plaintiff's job responsibilities as Vice President for Ethnic Marketing would likely require her participation in the creation of marketing videos for new products. Finally, plaintiff impliedly consented to defendant's use of her voice in the instructional video through her actions in recording the narration in the first place. It would be inequitable to allow her to claim defendant

appropriated her likeness when she willingly contributed her voice to the video within the scope of her employment.

Having addressed each argument advanced by plaintiff on appeal, we conclude there is no basis to interfere with the order granting defendant's motion for summary judgment.

Affirmed.