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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3045-12T1

DEBORAH E. BIRD,

Plaintiff-Appellant,

v.

HOMEGOODS, THE TJX COMPANIES, INC., THE TJX COMPANIES, INC. d/b/a and/or t/a HOMEGOODS, and SHAWN BENJAMIN,

Defendants-Respondents.

Argued January 7, 2014 – Decided April 3, 2014

Before Judges Reisner and Alvarez.

On appeal from the Superior Court of New Jersey, Law Division, Hunterdon County, Docket No. L-111-11.

Deborah L. Mains argued the cause for appellant (Costello & Mains, P.C., attorneys; Ms. Mains, on the brief).

Scott Rabe (Seyfarth Shaw LLP) of the New York bar, admitted pro hac vice, argued the cause for respondents (Robert T. Szyba (Seyfarth Shaw LLP), Dov Kesselman (Seyfarth Shaw, LLP), of the New York bar, admitted pro hac vice, and Mr. Rabe, attorneys; Messrs. Szyba, Kesselman and Rabe, of counsel and on the brief).

PER CURIAM

Plaintiff Deborah E. Bird appeals from the summary judgment dismissal of her complaint, in which she alleged her employer created a hostile work environment contrary to the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -42. Plaintiff, who is Caucasian, was employed as an assistant store manager (ASM) by defendant HomeGoods, a retail store chain that is a division of defendant the TJX Companies, Inc. Plaintiff's supervisor, commencing January 2010, was defendant Shawn Benjamin, who is African-American. Plaintiff contends the court erred in deciding the summary judgment motion because it misapplied the legal standard for assessment of her hostile work environment claim. Plaintiff also alleges the court erred in denying her motion for reconsideration. We affirm the dismissal of plaintiff's complaint and the denial of reconsideration.

The facts recounted below are taken from the summary judgment record. As did the trial judge, we view them in the light most favorable to plaintiff. See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995).

Plaintiff commenced her employment at HomeGoods in 2002. She was promoted to the position of ASM in 2004. Her performance reviews from 2008 and 2009 indicated that she "me[]t expectations." In 2010, however, plaintiff scored a 52 out of a

possible 100, the lowest score she had received. That performance review was signed by Benjamin's predecessor, the same manager who signed the 2009 review.

On the "talent grids"[1] for July 2009 and February 2010, plaintiff received "Cs" in the areas of performance as well as potential. These scores made her ineligible for promotion, were a downgrade from her prior scores, and placed her in the lowest category of employee performance.

When Benjamin first began working as an ASM at the same store as plaintiff, the two had no conflicts. The problems developed only after Benjamin became plaintiff's supervisor.

Starting in 2010, plaintiff began to receive written formal notices documenting declining work performance. She disputed many of them, claiming that Benjamin's constant yelling prevented her attainment of professional goals. The district manager was involved in the review process along with Benjamin, and advised plaintiff that despite her desire to "do a good job," she was not meeting job expectations.

[1] A talent grid table was used by HomeGoods, and the TJX Companies, Inc., to evaluate the potential and performance of the ASMs in the entire region. These rankings were then used in making decisions regarding promotions. Both performance and potential were each given a letter grade, A, B, C, with A being the highest rating, and C being the worst.

It is undisputed that as a supervisor, Benjamin was unprofessional in her conduct towards everyone, regardless of race. She belittled, mocked, and screamed at employees, in public and in private. As a result, various complaints were made about Benjamin to the HomeGoods human resource office because of her management style, including by an African-American employee. Only one employee was spared, Jessica Alicea, who was Benjamin's friend.

On October 22, 2010, Alicea allegedly yelled at plaintiff in front of customers and other employees about the condition of her work area. As a result, plaintiff felt that Alicea was now also "ganging up on [her]." Plaintiff walked out of the store, contacted the district manager and the human resources office, and requested a transfer. Although plaintiff, Benjamin, and the district manager subsequently met regarding plaintiff's concerns, she was not transferred.

Plaintiff denies being told at that meeting — or at any other time — that if she walked off the job again, defendants would consider her to have left employment. Approximately two weeks later, on November 16, 2011, plaintiff walked off the job a second time, complaining that Benjamin had yelled at her unfairly, and that the confrontation was probably overheard by other employees.

After plaintiff left the store on November 16, she called the regional human services officer who had attended the earlier meeting. She explained she was not quitting her job, but only wanted to be transferred. Later, the district manager informed plaintiff that HomeGoods would accept her resignation, would not object to her application for unemployment benefits, but would not transfer her.

When deposed, plaintiff could not remember the date of the first incidents which led her to conclude that Benjamin's conduct was motivated by race. Once when her cell phone rang within Benjamin's earshot, Benjamin remarked that the music plaintiff used as a ringtone was "so white." Although plaintiff acknowledged the comment was not made in the context of any dispute, plaintiff thought it was "peculiar," and "felt belittled by it[,] . . . . [and] felt like why would [her] music have something to do with — why would [Benjamin] comment on [her] choice of song?" She could not recall if Benjamin was her supervisor at the time.

Plaintiff also alleged that Benjamin constantly criticized her and belittled her. She recalled a June 28, 2010 meeting with Benjamin about her job performance, during which Benjamin gave her a "long list" of problem areas. When plaintiff attempted to dispute many of the items, Benjamin ignored her.

Plaintiff refused to sign the form acknowledging these alleged performance deficiencies, as she knew the list would lead to some employment action against her.

As plaintiff was leaving, she said to Benjamin, "[w]hat kind of a power trip are you on anyway?" According to plaintiff, Benjamin responded, "I'm not on any power trip you white b---h." Plaintiff walked out of the office. She later drafted a letter describing the incident, which she read over the phone to the assistant vice president of human resources. She did not actually send it, fearing retaliation. Benjamin denied ever referring to plaintiff in that fashion.

On another occasion, Benjamin commented to plaintiff that she did not anticipate any problems with the human resources office because she had met the head of the department, who was also an African-American woman. Plaintiff said she felt "confused by this statement," and it triggered her conviction that Benjamin's conduct towards her was at least partially based on race.

Plaintiff's opinion that Benjamin's conduct was at least partially racially motivated was bolstered when she overheard Benjamin yell at another Caucasian ASM, although she admitted not knowing the reason Benjamin was angry. Nonetheless, she

believed the attacks against her and the employee were motivated by race, because they were the only two Caucasian managers.

Benjamin told plaintiff she was "stupid" and an "idiot," and that despite the fact she had been with the company for years, she "still kn[ew] nothing." Benjamin also complained about her, in the presence of others, in conversations with Alicea.

Laura Lella, an employee who was deposed on plaintiff's behalf, stated that while Benjamin was rude to everyone, she yelled at plaintiff in front of customers and other employees, "[p]robably every day." But, according to Lella, Benjamin ridiculed everyone and made racial comments to people of different races. For example, Lella overheard Benjamin saying something to the effect of "I might have a problem with them, they're white." On another occasion, Lella heard Benjamin say "I can get away with more, they're Spanish, they don't know better." For that reason, Lella denied that Benjamin focused on plaintiff because of her race, since Benjamin made "racially inappropriate" comments about employees of all races.

Another employee described how Benjamin told two African-American employees, "[d]o you think you can do this a little faster, don't CP it." When the employee asked Benjamin what

"CP" meant, Benjamin answered that it stood for "colored person."

In his December 21, 2012 decision granting summary judgment, the judge concluded that plaintiff had not been able to establish that race was the reason for Benjamin's harassment. The incidents plaintiff relied upon did not demonstrate particular "racial animus towards plaintiff," in light of the fact Benjamin yelled at and belittled employees of all races. He noted that many of the store employees reported being "hesitant" to discuss work-related issues with Benjamin because she was so aggressive in her responses. The judge therefore opined: "while it is apparent that [] Benjamin's management style was less than tactful, it is not apparent that her conduct was done on the basis of race."

The only statement Benjamin made that he considered even approached demonstrating racial animus was when Benjamin called plaintiff a "white b---h." In context, the remark was less egregious, however, as it was made in response to plaintiff's combative question to her supervisor, "what kind of a power trip are you on anyway?"

Furthermore, the court reasoned, the comment, unlike the one made in Taylor v. Metzger, 152 N.J. 490 (1998),[2] the case upon which plaintiff principally relied in opposing the motion, was made during a private meeting as opposed to in a public setting. The comment was not unprovoked. Thus that statement did not create a hostile work environment as defined by Lehmann v. Toys 'R' Us, 132 N.J. 587 (1993),[3] even when added to the other two incidents.

Lastly, the court found that Benjamin's "less than ideal management style" was inflicted upon everyone in the workplace. Since the LAD was not enacted to create "a general civility code for conduct in the workplace," Heitzman v. Monmouth County, 321 N.J. Super. 133, 147 (App. Div. 1999), more was required, and the plaintiff therefore failed to demonstrate a prima facie case.

When the judge denied the application for reconsideration of the dismissal of plaintiff's complaint, he reiterated that the singular phrase Benjamin allegedly said at her in a private

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[2] Taylor held that sometimes a single utterance of an epithet, under some circumstances, can create a hostile work environment. There, the sheriff of the county referred to the plaintiff, an African-American sheriff's officer, as a "jungle bunny" in the presence of another.

[3] Lehmann announced the new test to determine a claim for hostile work environment sexual harassment. Lehmann, supra, 132 N.J. at 603-04.

meeting with plaintiff was insufficient to satisfy plaintiff's burden under LAD. Plaintiff had not established that "but for her race, [] Benjamin would not have belittled or harassed her." Hence plaintiff failed to meet the standard for reconsideration found in Rule 4:49-2 as the court's reasoning was not plainly incorrect, it had not failed to consider evidence, nor did plaintiff provide any new information. The motion was denied.

We review a trial judge's grant of summary judgment applying the same standard as did the court in the first instance. We ask whether there are disputed material facts, and whether the ruling was correct on the law. Mandel v. UBS/PaineWebber, Inc., 373 N.J. Super. 55, 71 (App. Div. 2004), certif. denied, 183 N.J. 213 (2005). In this case, no material facts are in dispute. The issue is whether the court properly applied the relevant legal standard to the undisputed facts.

We agree with the judge's articulation of the standard under LAD. A plaintiff must demonstrate that the 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 [person of the same race as the employee] believe that (4) the conditions of employment are altered and the working environment is hostile or abusive." Taylor, supra, 152

N.J. at 498 (adopting the test formulated for sexual harassment claims in Lehmann, supra, 132 N.J. at 603-04).

Certainly, as was true in Taylor, there are cases in which a single incident can suffice. The circumstances must be so extreme, however, as to actually, "from the perspective of a reasonable [person situated as the claimant], make the working environment hostile." Supra, 152 N.J. at 500 (internal citations and quotation marks omitted). In Taylor, the plaintiff was casually greeting her supervisor, while he walked past with another employee, when the supervisor hurled an explicit, repulsive racial epithet at her. Id. at 495. In terms of creating a hostile workplace, there is no comparison.

In this case, the phrase a "white b----" is not so extreme as the term in Taylor. And, arguably, it was prompted, although not excused, by plaintiff's disrespectful remark to her supervisor. Alone, however, it would not make a reasonable person in plaintiff's position conclude her work atmosphere was racially charged and hostile.

Plaintiff knew that Benjamin's demeanor towards all employees was disparaging at best. Plaintiff was also well aware of the fact that Benjamin had effectively created a hostile work environment for everyone at that store, not for

racial reasons, but because of her demeaning and offensive conduct towards all the employees.

Other employees complained to human resources about Benjamin, and, at times, other employees would call plaintiff to ask her questions regarding their job responsibilities because they were afraid to ask Benjamin. Thus Benjamin's hostility towards plaintiff on this record appears no different than her disdain for all her employees, with the exception of her friend Alicea.

Furthermore, we do not consider, even in combination, the three allegedly racially charged remarks made by Benjamin to be as egregious as the singularly offensive, unprovoked, and public comment made by the employer in Taylor. We agree with the trial judge that, as a matter of law, plaintiff cannot demonstrate that Benjamin's conduct would not have occurred but for her race, nor that the conduct was so severe or pervasive that a reasonable person of the same race would believe that the work environment was hostile or abusive for that reason. See id. at 498.

Motions for reconsideration are granted when a court's reasoning is plainly incorrect, a court fails to consider evidence, or new information is available. See Town of Phillipsburg v. Block, 380 N.J. Super. 159, 175 (App. Div.

2005); R. 4:49-2. None of those grounds were established by plaintiff. In light of our discussion regarding summary judgment, we do not discuss this point on appeal. See R. 2:11-3(e)(1)(E).

Affirmed.