SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1110-15T1

BARBARA SALVERO,

Plaintiff-Appellant,

v.

CITY OF ELIZABETH,

Defendant-Respondent,

and

LIEUTENANT SOULNEER, PATRICK SHANNON, JOHN BASTARDO, DANIEL GEDDES, JOSEPH MULARZ, and JAMES COSGROVE,

Defendants.

Argued October 25, 2017 – Decided December 1, 2017

Before Judges Nugent and Geiger.

On appeal from Superior Court of New Jersey, Law Division, Union County, Docket No. L-1023-13.

Charles J. Sciarra argued the cause for appellant (Sciarra & Catrambone, LLC, attorneys; Mr. Sciarra and Deborah Masker Edwards, on the brief).

Christina M. DiPalo argued the cause for respondent (LaCorte Bundy Varady & Kinsella, attorneys; Ms. DiPalo and Robert F. Varady, on the brief).

PER CURIAM

Plaintiff Barbara Salvero appeals from an October 23, 2015 order granting summary judgment to defendant City of Elizabeth.[1] After careful consideration of the record and applicable legal principles of law, we reverse and remand for trial.

I.

Because we review this matter in the context of defendants' motion for summary judgment, our recitation of the facts is derived from the evidence submitted by the parties in support of, and in opposition to, the summary judgment motion, viewed in the light most favorable to plaintiff, and giving plaintiff the benefit of all favorable inferences. See Angland v. Mountain Creek Resort, Inc., 213 N.J. 573, 577 (2013) (citing Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523, 536 (1995)).

Plaintiff has been employed as a police officer by the City of Elizabeth since the year 2000. In 2003, she filed a lawsuit against the City and other individual defendants under the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -42,

[1] Plaintiff did oppose summary judgment being granted to the individual defendants.

claiming she was subjected to a hostile work environment based on racial and sexual harassment. The case went to trial. The jury reached a verdict of no cause of action against plaintiff on November 21, 2008.

During the pendency of the 2003 case, plaintiff was assigned to the Elizabeth Municipal Court, located in a separate building from police department headquarters. Plaintiff continued with this assignment for approximately six years after the conclusion of her lawsuit. Plaintiff testified that when she was assigned to the court, she was told by officers in the Port Authority Police that members of her department had told them to stay away from her as she could not be trusted because she was a "rat."

Plaintiff further testified to several instances of harassment that occurred after the conclusion of her 2003 lawsuit. In 2009, she was followed in the police parking area by an unmarked police car. The driver of the vehicle revved its engine and "lunged" the vehicle at her. Plaintiff did not report this incident to a superior, Internal Affairs, the Union County Prosecutor's Office, or the Attorney General.

On August 20, 2009, while plaintiff's car was parked in the police parking area, a nail punctured her tire causing a flat. When she returned to the area where she had parked her car, she

found three other nails in the space where she had parked, but no nails elsewhere. Plaintiff did not report the incident.

On June 29, 2010, while plaintiff's car was parked in the police parking area, the driver's side door was dented and there was a nail in her tire. On the same day, when she started the engine, there was a strong urine odor emanating from the air conditioning. Plaintiff did not report the incident.

Plaintiff was followed and intimidated by another unmarked police vehicle in 2011. Once again, plaintiff did not report the incident.

On January 21, 2011, plaintiff underwent surgery for injuries she sustained in an off-duty motor vehicle accident. In November 2011, plaintiff asked her PBA representative, President Bob Morris, if upon her return from surgery she could be assigned away from headquarters because of the hostile work environment that resulted from her 2003 lawsuit. Morris acknowledged there was known hostility toward her and gained approval for her to be assigned to light duty at the Municipal Court. On March 7, 2012, plaintiff was cleared for light duty and was allowed to return to work.

One of the restrictions imposed upon plaintiff's return was that she was not to make arrests. Plaintiff thought that assignment to Municipal Court would be best for her because one

officer was deployed to the courtroom while another officer was stationed immediately outside, and the officers themselves decided where they would be stationed. On March 8, 2012, while she was working at the court, plaintiff was ordered by the desk lieutenant to the front desk of headquarters. Plaintiff contacted Morris who later advised that plaintiff could remain at the court on light duty.

On March 22, 2012, plaintiff was again ordered to report to the headquarters front desk. Plaintiff reached out to Morris and the new PBA president, Richard Steinke, regarding the assignment. Morris indicated he was being retaliated against for attempting to assist her. Plaintiff testified she made an effort to contact the person in charge of assignments through her PBA representative to no avail.

In March 2012, while plaintiff was getting bail documents for a prisoner prepared at the front desk, plaintiff requested that another officer prepare the prisoner to be escorted out of the police department since she was on light duty and was not to interact with prisoners. The officer refused to assist her even though he knew about her light duty restriction.

On March 30, 2012, Lieutenant Saulnier yelled at plaintiff for allowing people up to his office even though she was not actually responsible. Saulnier also yelled that "he was tired of

you" in front of other officers. Plaintiff immediately reported the incident to her superior only to be met with ridicule and a statement that he was sick of the childish behavior, that this was high school nonsense, and further asked, "what's next, I going to have to call an ambulance for her?"

Plaintiff then contacted Anita Pritchard, the City Hall Liaison for sexual harassment and whistle-blowing, regarding the incident with Saulnier. Plaintiff believed it was appropriate, under the sexual harassment policy, to reach out to a City liaison if she felt uncomfortable reporting any incident to the police department. Pritchard had told her that it was unusual for someone from the police department to be calling the City's business administration, but agreed to meet with her anyway.

When plaintiff reported for work on April 9, 2012, prior to her meeting with Pritchard, she found an old, dirty pacifier on her work desk. Throughout the following days, plaintiff would hear baby cries and laughing when she would walk by her fellow officers.

On April 10, 2012, plaintiff met with Pritchard to discuss the incidents. Plaintiff explained to Pritchard how the 2003 lawsuit related to the threats, having no backup, and the situation with her light duty. At the end of the interview, Pritchard told

plaintiff her complaint would be given to the Business Administrator and appropriate measures would be taken.

On April 19, 2012, plaintiff met with Sergeant Geddes and Internal Affairs Officer John Bastardo for an Internal Affairs (IA) interview. The interviewers refused to allow her to discuss previous incidents of harassment as they related to her 2003 lawsuit.

On August 20, 2012, plaintiff was told by a fellow officer that high ranking officers were saying she was a "dumb bitch" and it was the goal of the department to fire her.

Plaintiff requested the results from the investigation of her complaints on two separate occasions. Eight months after the IA interview, plaintiff was faxed a one-line finding that the complaints were unfounded. Plaintiff was aware that she could have gone to the Union County Prosecutor's Office if she felt that Internal Affairs did not do a thorough investigation. She did not do so.

On April 29, 2013, one month after filing her complaint in this matter, plaintiff was notified by Sergeant McDonald that she was being put back on patrol. Upon being notified of this, she spoke to McDonald and advised him the Department was aware she was being harassed and that she was fearful to work by herself and not receive backup. Plaintiff also voiced this same complaint to

superiors. Plaintiff was officially assigned to patrol on June 3, 2013.

Plaintiff alleges multiple instances of harassment during her time on patrol. In either June or July 2013, an officer called her a "bitch" and openly said to other officers that she was "nothing but trouble[]" and "you don't want to know who that bitch is."

On July 7, 2013, plaintiff responded to a scene where two groups of individuals were assaulting each other. She did not receive backup when requested. When she called for backup, there was a delay by an officer from her department and he failed to assist plaintiff after arriving. Instead, the officer simply sat on the hood of his patrol car and watched.

On July 21, 2013, while she was working by herself, plaintiff was called to a cellblock for a prisoner that needed to go to the hospital. Plaintiff called another officer for assistance, but he did not respond. Plaintiff then had to place a call on the radio for the officer to respond, but he did not respond for over twenty minutes. During the transport, the officer did not interact with her at all.

On November 13, 2013, the Municipal Court and Municipal Prosecutor requested plaintiff call for an officer in her department to respond to the court for trial. Plaintiff called

out for him on police radio at least three times with no reply. After failing to reach the officer, plaintiff asked radio dispatch to call the officer. When dispatch did so, he immediately responded.

On December 21, 2013, when plaintiff was at a homicide scene with her partner, no one would speak to her. At the homicide scene, plaintiff was in charge of identifying the officers working at the scene and reporting their roles. None of the officers would give her their names or roles at the scene. The only way plaintiff was able to obtain the information was through her partner.

On December 29, 2013, a person became combative during an incident at a Dunkin Donuts coffee shop. Plaintiff called out over the police radio for assistance several times, but no one from her department responded. As a result, the County police had to respond to the call. It was only after County police arrived on scene that an officer from her department arrived.

Plaintiff alleges one last example of officers ignoring her and not providing necessary information for her to do her job, but does not indicate when in time this incident occurred. Plaintiff and her partner assisted another officer regarding a person arrested on an outstanding warrant. Again, the only way plaintiff

could obtain information about the person who was arrested was to get it through her partner.

During the time plaintiff was assigned to patrol from June 2013, until January 29, 2014, she made no complaints to her supervisors about not being backed up. On January 30, 2014, plaintiff submitted a private report she had written to Pritchard and Captain Colon documenting the harassment and her complaints about the department. Plaintiff further discussed with Colon that she felt she was not being treated the same as other officers and personally disclosed to him all of the alleged incidents of harassment.

On May 22, 2014, Internal Affairs interviewed plaintiff regarding the complaints in her private report. Plaintiff did not receive a copy or transcript of the interview.

The City of Elizabeth Police Department first adopted a Discrimination and Harassment in the Workplace Policy on June 16, 2015, long after the occurrence of the events relied on by plaintiff and more than two years after this case was commenced.

Plaintiff submitted a private report to a superior officer regarding a Discrimination and Harassment in the Workplace Policy test that was to be completed on the computer by each officer in the Department. The second question asked: "Are you currently aware of any situations within the Elizabeth Police Department

which are in direct violation of the Discrimination and Harassment in the Workplace policy of 2015?" Plaintiff answered "yes." The test was not capable of being passed unless the answer to the question was "no." Consequently, plaintiff failed the test. Plaintiff reported this to her superior and, when she advised she would not change her answer, he changed the test result.

On March 18, 2013, plaintiff filed a six-count complaint against defendants the City, Patrick Shannon, John Bastardo, Daniel Geddes, Joseph Mularz, and James Cosgrove. Plaintiff alleged the City violated the LAD (count one); the City violated the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14 (count two); aiding and abetting by Cosgrove (count three); aiding and abetting by Shannon (count four); employer liability (count five); and liability against the City for punitive damages (count six). The City filed an answer on May 28, 2013. On January 20, 2015, plaintiff filed an amended complaint containing the same counts. The City filed an answer on February 4, 2015.

In May 2014, plaintiff requested files from Internal Affairs relating to her complaints. These files were never produced. As a result, plaintiff served no interrogatories or notices to produce on defendant and plaintiff did not depose any of the defendants.

After three extensions, discovery closed on July 15, 2015. The last discovery order stated: "There will be no further extension of discovery." In lieu of propounding any written discovery requests and depositions plaintiff's former counsel sent informal letter requests for the relevant IA files.

Plaintiff did not move to compel or further extend discovery before the discovery end date. Plaintiff also noticed the deposition of Sergeant Maloney, the primary investigator of plaintiff's harassment complaints, and Officer Michael Tropeano, who gave a taped recorded interview in connection with the IA investigation, after discovery had already expired. Plaintiff's former counsel claimed that he did not notice the depositions earlier because he had not yet received the IA files.

On August 6, 2015, defendant finally provided plaintiff with the IA documents relating to the case, but not the recordings of any taped interviews. On October 9, 2015, the trial court entered an Order barring defendant from "introducing evidence relating to [IA] investigations into [p]laintiff's complaints unless it had produced that evidence in response to a discovery demand or court order, or it was not demanded in discovery."

On September 23, 2015, defendants moved for summary judgment dismissing plaintiff's amended complaint in its entirety.

Plaintiff opposed the motion as to the City, but not the individual defendants.

On October 23, 2015, the trial court heard oral argument on the motion. Plaintiff withdrew her CEPA claim against the City (count two). In an oral decision, the court granted summary judgment to defendants, dismissing plaintiff's amended complaint with prejudice.

The motion judge found that "plaintiff ha[d] failed to present evidence to show that her protected activity, the lawsuit from 2003, caused her to suffer a hostile work environment[]" and that "plaintiff hasn't raised a genuine issue of material fact regarding an adverse employment action . . . we're talking about several isolated incidents over a period of time which the City had no opportunity to address in any kind of timely fashion to even establish whether or not they happened." The Judge also held that "I don't see where I can maintain this suit . . . against the City. They do have a policy. It's there and the plaintiff is aware of it. Plaintiff knows what [t]o [d]o, has a lawyer to assist her at all times." This appeal followed.

Plaintiff raises the following issues on appeal: (1) summary judgment should have been denied because the material facts create inferences that would allow a reasonable jury to conclude that the City violated the LAD; (2) plaintiff engaged in protected

activities when she filed her 2003 lawsuit and this action; (3) plaintiff suffered a retaliatory adverse employment action and was subjected to a hostile work environment that was so severe and pervasive that it altered the conditions of her employment; and (4) the trial court erred in finding that the City had satisfied the requirements for an affirmative defense under Aquas v. State, 220 N.J. 494 (2015).

II.

"We review the grant of summary judgment 'in accordance with the same standard as the motion judge.'" Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016) (quoting Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)). Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the 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 Brill, supra, 142 N.J. at 528-29.

"An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c). "The inquiry is 'whether the evidence presents a sufficient disagreement to

require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Liberty Surplus Ins. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007) (quoting Brill, supra, 142 N.J. at 536). The motion judge's function is not to "weigh the evidence and determine the truth of the matter but to determine if there is a genuine issue for trial." Brill, supra, 142 N.J. at 540 (citation omitted).

"The motion court must analyze the record in light of the substantive standard and burden of proof that a factfinder would apply in the event that the case were tried." Iqdalev, supra, 225 N.J. at 480 (citations omitted). "Thus, 'neither the motion court nor an appellate court can ignore the elements of the cause of action or the evidential standard governing the cause of action." Ibid. (quoting Bhaqat, supra, 217 N.J. at 38).

III.

In order to establish a prima facie claim for retaliation under the LAD, plaintiff must demonstrate: (1) that she engaged in protected activity; (2) the activity was known to the employer; (3) plaintiff suffered an adverse employment decision; and (4) there existed a causal link between the protected activity and the adverse employment action. Battaglia v. United Parcel Serv. Inv., 214 N.J. 518, 547 (2013).

For purposes of the summary judgment motion, the City concedes that plaintiff has satisfied the first two prongs of the retaliation test. As a result of the City's concessions, our analysis will focus on prongs three and four.

N.J.S.A. 34:19-2(e) defines "retaliatory action" as "the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment." "As such, 'employer actions that fall short of [discharge, suspension or demotion], may nonetheless be the equivalent of an adverse action.'" Nardello v. Twp. of Voorhees, 377 N.J Super. 428, 433-34 (App. Div. 2005) (alteration in original) (quoting Cokus v. Bristol Myers Squibb Co., 362 N.J. Super. 366, 378 (Law Div. 2002), aff'd, 362 N.J. Super. 245 (App. Div.), certif. denied, 178 N.J. 32 (2003)). That being said, "not every employment action that makes an employee unhappy constitutes 'an actionable adverse action.'" Id. at 434 (quoting Cokus, supra, 362 N.J. Super. at 378).

Here, plaintiff does not claim that there was a loss of pay, rank, or status. Nor does she claim that she was threatened with termination, demoted, urged to resign, or asked to assume lesser job responsibilities. As a result, plaintiff must demonstrate that she was subjected to some other adverse employment action.

Plaintiff contends that she was subjected to a hostile work environment so intolerable that it altered the conditions of employment to the point that the City's actions constituted an adverse employment action. See Cokus, supra, 362 N.J. Super. at 386 (holding that while there was no evidence in the record that the defendant engaged in retaliatory conduct towards plaintiff, a hostile work environment could constitute an adverse employment action).

To establish a cause of action under the LAD for hostile work environment, a plaintiff must satisfy each part of the four-part test adopted in Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 603-04 (1993).

> Specifically, they must show 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 Development Ctr., 174 N.J. 1, 24 (2002) (citing Lehmann, supra, 132 N.J. at 603-04).]

In order to determine whether the conduct was "severe or pervasive," the court must consider "whether a reasonable person would believe that the conditions of employment have been altered and that the working environment is hostile. Thus the second,

third, and fourth prongs are, to some degree, interdependent." Ibid. (citations omitted).

In assessing a hostile work environment claim, the court must examine the totality of the plaintiff's employment environment, and should consider the frequency of the discriminatory conduct, the severity of the conduct, whether it is physically threatening or humiliating, or merely an offensive statement, and whether it unreasonably interferes with the employee's work performance. El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super 145, 178 (App. Div. 2005) (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 23, 114 S. Ct. 367, 371, 126 L. Ed. 2d 295, 302-03 (1993)). "Rather than considering each incident in isolation, courts must consider the cumulative effect of the various incidents, bearing in mind 'that each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created may exceed the sum of the individual episodes.'" Lehmann, supra, at 607 (quoting Burns v. McGregor Elec. Indus., 955 F.2d 559, 564 (8th Cir.1992). Consequently, "a discrimination analysis must concentrate not on individual incidents but on the overall scenario." Ibid. (quoting Andrews v. City of Philadelphia, 895 F.2d 1469, 1484 (3d Cir. 1990))

"Under the first prong of Lehmann, a plaintiff must show 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. Here, plaintiff contends that she is a protected person under the LAD because she filed a prior lawsuit alleging she was subjected to a hostile work environment based on racial and sexual harassment. In that respect, the LAD provides that it is unlawful "to take reprisals against any person because that person has opposed any practices or acts forbidden under [the LAD] or because that person has filed a complaint [or] testified . . . in any proceeding under [the LAD.]" N.J.S.A. 10:5-12(d).

A reasonable jury could infer that the complained-of conduct was in retaliation for her protected activities. Because plaintiff opposed conduct forbidden under the LAD by filing her prior LAD action and has linked the complained-of conduct to those protective activities, plaintiff has satisfied Lehmann's first prong for purposes of withstanding defendant's summary judgment motion. See Shepherd, supra, 174 N.J. at 24-25; Woods-Pirozzi v. Nabisco Foods, 290 N.J. Super 252, 266 (App. Div. 1996).

Here, because the harassment plaintiff alleges is not discriminatory or retaliatory on its face, plaintiff must make a prima facie showing that the harassment would not have occurred but for her protected conduct. There is no specific test for determining whether or not plaintiff has met this burden. "All

that is required is a showing that it is more likely than not that the harassment occurred because of the plaintiff's [protected conduct]." Lehmann, supra, 132 N.J. at 605. "Common sense dictates that there is no LAD violation if the same conduct would have occurred regardless of the plaintiff's [protected conduct]." Id. at 604. Plaintiff testified that the harassment was the result of her filing the 2003 litigation and her subsequent complaints to superiors.

Viewed cumulatively in a light most favorable to plaintiff, the record in this matter illustrates that plaintiff was subjected to an ongoing, repetitive, and retaliatory lack of support, lack of cooperation, and failure to timely respond to her calls for assistance, which are unique to plaintiff. On more than one occasion, plaintiff called for assistance to no avail, was required to have others call in when she needed support, and was required to speak through her partner to do her job correctly. The fact that immediate support was given after someone other than plaintiff reported such incidents supports plaintiff's claim that the same conduct would not have occurred but for her protected conduct. Given plaintiff's history at the department, which yielded her protected status, a reasonable fact-finder could conclude it was more likely than not the two conditions are connected.

The next requirement is that the alleged harassing conduct be "severe or pervasive." Lehmann, supra, 132 N.J. at 606. The Court "emphasize[d] that it is the harassing conduct that must be severe or pervasive, not its effect on the plaintiff or on the work environment. Ibid. In evaluating whether the harassment alleged was sufficiently severe or pervasive to alter the conditions of employment that results in a hostile work environment, the finder of fact shall consider the question from the perspective of a reasonable person. Id. at 611-12.

"Within the totality of circumstances, there is neither a threshold 'magic number' of harassing incidents that gives rise, without more, to liability as a matter of law nor a number of incidents below which a plaintiff fails as a matter of law to state a claim." Taylor v. Metzger, 152 N.J. 490, 499 (9998) (citations omitted). "[T]he required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct." Lehmann, supra, 132 N.J. at 607 (alteration in original) (quoting Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991)). However, there is no requirement that the harassing conduct occur closely in time.

Plaintiff alleges she was subjected to a hostile and uniquely dangerous workplace environment when assistance and backup were either not provided or significantly delayed. Not receiving needed

backup and support would make even the most reasonable person in plaintiff's situation feel like their workplace condition had shifted to one of hostility and danger. In addition, the alleged offensive conduct occurred repeatedly over a significant period of time. Consequently, a reasonable fact-finder could conclude that the effect of not receiving adequate support, cooperation, or assistance during the course of her work was sufficiently severe or pervasive to alter the conditions of employment and create a hostile work environment. Thus, plaintiff has alleged sufficient facts meeting all four prongs of the Lehmann test to survive summary judgment.

Under the fourth prong of the test for retaliation under the LAD, plaintiff must demonstrate a causal link between the protected activity and the adverse employment action, which in this case is a hostile work environment. Battaglia, supra, 214 N.J. at 547. "[T]he mere fact that [an] adverse employment action occurs after [the protected activity] will ordinarily be insufficient to satisfy the plaintiff's burden of demonstrating a causal link between the two." Young v. Hobart West Group, 385 N.J. Super. 448, 467 (App. Div. 2005) (quoting Krouse v. Am. Sterilizer Co., 126 F.3d 494, 503 (3d Cir. 1997)). "Where the timing alone is not 'unusually suggestive,' the plaintiff must set forth other evidence to establish a causal link." Ibid. For example, "where

there is a lack of temporal proximity, circumstantial evidence of a pattern of antagonism following the protected conduct can also give rise to the inference" of causation. Farrell v. Planters Lifesavers Co., 206 F.3d 271, 280 (3d Cir. 2000) (citations omitted). See also Estate of Roach v. TRW, Inc., 164 N.J. 598, 612 (2000) ("examining whether a retaliatory motive existed, jurors may infer a causal connection based on the surrounding circumstances."). Here, the alleged harassment started soon after the jury issued its verdict in the 2003 lawsuit, and continued to occur on an ongoing basis. Not only has plaintiff shown a pattern of antagonism following her protected conduct, a reasonable jury could infer a causal connection based on the nature of the offensive conduct.

Finally, we address whether the City is protected from vicarious liability for the conduct of its employees and supervisors under the facts of this case. When no tangible employment action is taken, a defending employer may assert the two-pronged affirmative defense to liability or damages adopted in Aquas. Aquas, supra, 220 N.J. at 524. To establish that defense, the defendant employer has the burden to prove, by a preponderance of the evidence, that (a) "the employer exercised reasonable care to prevent and to correct promptly [the] harassing behavior;" and (b) "the plaintiff employee unreasonably failed to

take advantage of preventive or corrective opportunities provided by the employer or to otherwise avoid harm." Id. at 524 (citing Faragher v. City of Boca Raton, 524 U.S. 775, 807, 118 S. Ct. 2275, 2293, 141 L. Ed. 2d 662, 689 (1998); Burlington Industries v. Ellerth, 524 U.S. 742, 746, 118 S. Ct. 2257, 2262, 141 L. Ed. 2d 633, 644 (1998)). The Court emphasized, however, that "the defense provides no protection to an employer whose sexual harassment policy fails to provide 'meaningful and effective harassment policies and procedures for employees to use in response to harassment.'" Id. at 522 (quoting Gaines v. Bellino, 173 N.J. 301, 317 (2002)). "The employee may rebut the elements of the affirmative defense." Id. at 524.

In Gaines, the Court found the existence of the following factors in an anti-harassment policy relevant in determining whether the policy was effective: (1) a formal prohibition of harassment; (2) formal and informal complaint structures; (3) anti-harassment training; (4) sensing and monitoring mechanisms for assessing the policies and complaint procedures; and (5) unequivocal commitment to intolerance of harassment demonstrated by consistent practice. Gaines, supra, 173 N.J. at 313 (citations omitted).

Plaintiff contends that because the City did not have a dedicated anti-harassment policy and procedures in place during

the period in question, it has not satisfied the requirements for an affirmative defense under Aquas. We agree.

Here, the policy and procedures relied upon by the City did not exist when the complained-of conduct occurred. Instead, the City implemented the harassment policy and monitoring mechanisms long after plaintiff filed this lawsuit. Plaintiff contends that even then, the City only did so to give the appearance of an effective policy rather than instituting meaningful procedures to eliminate harassment in the workplace.

The City has not shown that the policy in place during the period in question was meaningful and effective. Furthermore, the City has not provided any evidence that there was anti-harassment training or supervisors in place during the period in question. Nor has the City established that it had effective monitoring mechanisms to check the policies and complaint structures. See Gaines, supra, 173 N.J. at 313.

We further note that plaintiff appears to have utilized the limited opportunities presented to her. During the period of alleged harassment, plaintiff testifies that "according to the sexual harassment policy, if [she] felt uncomfortable reporting any incidents in the police department, that [her] option was to reach out to the liaison . . . at city hall." Consequently, plaintiff abided by the policy when she reported potentially

harassing conduct to her superiors. On this record we cannot say that plaintiff "unreasonably failed to avail herself of the employer's preventative or remedial apparatus[.]" Aquas, supra, 220 N.J. at 521 (citation omitted).

We hold that the trial court erred by concluding that defendant had established an affirmative defense to vicarious liability or damages for the harassing conduct of its employees as established in Ellerth and Faragher and adopted by the Court in Aquas. The City has not met either element of that affirmative defense. Nor has the City demonstrated that it provided meaningful and effective harassment policies and procedures for employees to use in response to harassment during the time period in question.

Viewed cumulatively, the acts alleged by plaintiff are sufficient to present a hostile work environment claim to a jury. We, therefore, vacate the order granting defendant summary judgment and remand this matter for trial.

Reversed and remanded. We do not retain jurisdiction.