SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1525-22

JOHN F. O'CONNELL,

Plaintiff-Appellant,

v.

NEW JERSEY TURNPIKE AUTHORITY, LINDA LORDI CAVANAUGH, JOHN O'HERN, MARY ELIZABETH GARRITY, DIANE SCACCETTI, and JAMES S. SIMPSON,

Defendants-Respondents.

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Argued May 6, 2024 – Decided May 24, 2024

Before Judges Sabatino, Marczyk, and Chase.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-8340-11.

Christina Vassiliou Harvey argued the case for appellant (Lomurro, Munson, LLC, attorneys; Richard Galex, of counsel; Christina Vassiliou Harvey, of counsel and on the briefs; Andrew Broome, on the briefs).

Walter P. Laufenberg argued the cause for respondent New Jersey Turnpike Authority (McElroy, Deutsch, Mulvaney & Carpenter, LLP, attorneys; Seth Spiegal, of counsel and on the brief).

PER CURIAM

In this employment discrimination action, plaintiff John O'Connell appeals from a December 16, 2022 order granting summary judgment to defendant New Jersey Turnpike Authority ("NJTA"). We affirm.

O'Connell began working for the NJTA in 2002 as one of about ten staff attorneys in the Law Department. He previously served in the United States Navy until 1997 and re-entered military service in 2003 via direct appointment to the New Jersey Air National Guard. While working for the NJTA between 2003 and 2012, plaintiff was called to active duty on multiple occasions, serving a total of 2,188 days.

In November 2011, O'Connell initiated suit in State court against the NJTA and several individual defendants. He alleged his supervisors at the NJTA held back promotions and salary increases due to his duty-related absences, harassed him to provide copies of his military orders to support his requests for leave, and refused to assign him work when the dates of his upcoming deployments neared. He alleged another NJTA employee harassed him by editing photographs on two occasions to appear as if he was attending political

events in his military uniform. He alleged that upon returning from active duty, a co-worker commented his return meant "the war must be over." Plaintiff also alleged his pension account was erroneously slated for termination for non-payment of contributions, he was given less than a week's notice the personal belongings in his vacant office would be boxed, his access to the NJTA building was restricted while he was on leave, and the NJTA limited his ability to access Department of Defense ("DOD") websites from work.

These actions, according to plaintiff, violated the New Jersey Law Against Discrimination ("NJLAD"), N.J.S.A. 10:5-1 to -50, by discriminating based on his protected class as a member of the military, creating a hostile work environment, and also amounted to an intentional violation of his civil rights under the State Constitution, N.J. Const. art. I, ¶ 5. Additionally, he brought a claim for negligent infliction of emotional distress ("NIED").

Defendants removed the matter to federal court under federal question jurisdiction because of plaintiff's invocation of Title 10 of the United States Code, which governs the armed forces, and also because his pension was governed by the Employee Retirement Income Security Act of 1974 ("ERISA").

In November 2012, all plaintiff's claims as against the individual defendants and his NIED claim as against all parties were dismissed by way of

stipulation in district court. The NJTA moved for summary judgment on the remaining NJLAD and State constitution claims, which the district court granted in April 2015. Plaintiff appealed the summary judgment dismissal, and without reaching the merits of plaintiff's appeal, the Third Circuit vacated and remanded the matter to State court, finding the district court did not have subject-matter jurisdiction over the NJLAD and State constitution claims. O'Connell v. New Jersey Tpk. Auth., 649 F. App'x 280 (3d Cir. 2016). The NJTA moved again for summary judgment on the two remaining claims in State court, and in December 2022, following oral argument, the trial court granted the NJTA's motion and dismissed plaintiff's remaining claims with prejudice.[1]

The trial court explained:

> The [c]ourt does not agree that the supervisor requesting documentation for prior absences, and assigning less work for someone scheduled for an extended leave, reassigning his . . . unused office, . . . and a pension payment hiccup, are events that occurred but for his military status.
>
> Those are events that may happen to any employee, especially one who is absent for extended periods of time.

[1] The trial court noted it had reviewed Judge Salas's District Court opinion granting summary judgment to defendants but emphasized it had conducted an independent analysis of the evidence and law.

The court then ruled although O'Connell did set forth some facts indicating the challenged conduct would not have occurred but for his military service, "the conduct is not so severe or pervasive that a reasonable military service person would consider the work environment hostile." It reasoned "most of the incidents are undermined by the record, when viewed . . . objectively."

As this case has traveled through both the federal and state courts and the parties are familiar with the specific allegations, we recount only the following pertinent excerpts from the trial court's opinion where it went through O'Connell's individual arguments in support of his hostile work environment claim and rejected each one:

> Even though conduct for the . . . photos was a . . . prank, which may not have been in good taste, it does not appear that the person who engaged in that, who's doing the plaintiff a favor by working on non-workrelated photographs on work time, can rise to a level that a (indiscernible) person could consider — would consider hostile.
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> And the copies — the request for copies of military (indiscernible) not (indiscernible) to, quote, mess with the plaintiff. It was to verify payroll. A request the [c]ourt does not find exorbitant.
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> The requests for specific days – even plaintiff admitted the request did not support his allegation of harassment. Again, not assigning work when the plaintiff was going to be away for an extended period

> of time, is not hostile treatment, (indiscernible) his military service.
>
> The pension issue, when identified, was corrected and he did not suffer any material damage as a result. It appears that all the matters were corrected, and (indiscernible) presumably (indiscernible) whatever pension he is entitled to . . . for his time in the service. Arguments regarding salary differentials undermined by the (indiscernible) fairness of his salary increases that he did receive during his course of his employment with the [NJTA].
>
> He received four salary increases and earned more than other[s] in his department, and that does not infer discriminatory activity that would constitute a [hostile] work environment.
>
> Again, the miscellaneous statements made by (indiscernible) supervisors, were not objectively harassing. They fall in the category of single offhand comments that do not rise to the level of severe or pervasive conduct.
>
> The [c]ourt concludes the plaintiff has failed to show severe pervasive conduct resulting in a hostile work environment. Therefore[,] the [NJTA] motion for summary judgment is thereby granted.

This appeal followed, in which plaintiff argues: the NJTA's actions were sufficiently severe or pervasive, considering the totality of the circumstances, to create a hostile work environment; the NJTA violated its own anti-harassment policy; plaintiff has made out a claim for constitutional violation; his entire

claim is timely; and he successfully made out a prima facie claim for punitive damages.

We review de novo a trial court's disposition of a motion for summary judgment, applying the same standard used by the trial court. Samolyk v. Berthe, 251 N.J. 73, 78 (2022). 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). "To decide whether a genuine issue of material fact exists, the trial court must 'draw[] all legitimate inferences from the facts in favor of the non-moving party.'" Friedman v. Martinez, 242 N.J. 450, 472 (2020) (alteration in original) (quoting Globe Motor Co. v. Igdalev, 225 N.J. 469, 480 (2016)). "The court's function is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" Rios v. Meda Pharm., Inc., 247 N.J. 1, 13 (2021) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)). "Summary judgment should be granted, in particular, 'after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party

will bear the burden of proof at trial.'" Friedman, 242 N.J. at 472 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)).

The NJLAD prohibits employers from engaging in unlawful employment practice or discrimination by refusing to hire, discharging, or discriminating against individuals in "compensation or in terms, conditions[,] or privileges of employment" based on the individual's protected status. N.J.S.A. 10:5-12(a). "[L]iability for service in the Armed Forces of the United States" is a protected status. Ibid. See also N.J.S.A. 10:5-3.

To establish a prima facie claim for a hostile work environment under NJLAD, a plaintiff 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 Dev. Ctr., 174 N.J. 1, 24 (2002) (citing Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 603–04 (1993)). "[T]here is no LAD violation if the same conduct would have occurred regardless of the plaintiff's [protected status]." Lehmann, 132 N.J. at 604.

"Within that framework, a court cannot determine what is 'severe or pervasive' conduct without considering 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." Shepherd, 174 N.J. at 24 (citing Lehmann, 132 N.J. at 604). Courts examine "the totality of the relevant circumstances, . . . (1) 'the frequency of all the discriminatory conduct'; (2) 'its severity'; (3) 'whether it is physically threatening or humiliating, or a mere offensive utterance'; and (4) 'whether it unreasonably interferes with an employee's work performance.'" Godfrey v. Princeton Theological Seminary, 196 N.J. 178, 196 (2008) (quoting Green v. Jersey City Bd. of Educ., 177 N.J. 434, 447 (2003)). Where a plaintiff alleges "numerous incidents that, if considered individually, would be insufficiently severe to state a claim", Lehmann, 132 N.J. at 607, courts must consider "the cumulative effect" which "may exceed the sum of the individual episodes." Cutler v. Dorn, 196 N.J. 419, 431 (2008).

The complained-of conduct must be assessed "by use of a reasonable-person standard, which was adopted to keep the test for harassing conduct tied to reasonable community standards and yet allow for its evolution as societal norms mature." Godfrey, 196 N.J. at 197 (citing Lehmann, 132 N.J. at 603-04, 612).

We must keep in mind "'the LAD is remedial legislation intended to "eradicate the cancer of discrimination" in our society[,]' and should therefore be liberally construed 'in order to advance its beneficial purposes.'" Smith v. Millville Rescue Squad, 225 N.J. 373, 390 (2016) (alteration in original) (quoting Nini v. Mercer Cnty. Cmty. Coll., 202 N.J. 98, 115 (2010)). The Legislature declared "discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State." Rios, 247 N.J. at 9 (quoting N.J.S.A. 10:5-3). "The law is thus intended to protect 'the civil rights of individual aggrieved employees' as well as 'the public's strong interest in a discrimination-free workplace.'" Ibid. (quoting Lehmann, 132 N.J. at 600).

Plaintiff argues the NJTA's actions were sufficiently severe, considering the totality of the circumstances, to create a hostile work environment. At the outset, this position misapprehends one of the trial court's primary reasons for dismissing plaintiff's claims as it first found the record insufficient to establish the first prong of the Lehmann test, namely whether the complained-of events occurred "but for" plaintiff's military service, not the interrelated second, third, and fourth prongs as to the nature of the actions and their alteration of the working conditions as viewed by the reasonable service member. The court then

found even to the extent plaintiff's military service was the but-for cause of the complained-of actions, those incidents did not rise to the "severe or pervasive" standard necessary to sustain a hostile work environment claim.

The evidence, even when viewed with plaintiff receiving all presumptions in his favor, reflects a generally benign relationship between plaintiff and various NJTA supervisors, interspersed with administrative requests and unprofessional conduct and comments over the course of several years, though not rising to the severity or pervasiveness required to create a hostile work environment. The conduct was not severe or chronic and did not interfere with his job performance. Moreover, no reasonable factfinder could conclude differently.

First regarding the doctored photos, they were created by a "friendly" co-worker, were not seen by anyone other than those individuals plaintiff showed them to, and did not have an adverse impact on plaintiff's professional career or military career even though plaintiff claims they could have. Plaintiff continued his friendship with the photographs' creator, and there is no indication such conduct was repeated. At most, the photos were "a mere offensive utterance." Godfrey, 196 N.J. at 196 (quoting Green, 177 N.J. at 447). Likewise, there is no evidence that, except for possibly one person, anyone else was present to hear

the co-worker's, "the war must be over" remark, and plaintiff did not file a formal complaint regarding this comment.

Plaintiff also acknowledged there were a "handful of dates" he took as military leave that were "unaccounted for." It is undisputed that it is generally appropriate for an employer to request documentation for military leave. See Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. § 4312(a)(1). While USERRA allows the service member to give "advanced written or verbal notice," ibid., the "[DOD] regulations under USERRA provide guidance to service members that 'strongly recommends' that advance notice be given in writing, while acknowledging that verbal notice is sufficient." 70 Fed. Reg. 242, p.75256 (Dec. 19, 2005). These requests for documentation occurred sporadically over a period of twenty-one days in 2009 while plaintiff was on military leave. Thus, the trial court properly concluded, these requests were "to verify payroll," and "not . . . to . . . mess with the plaintiff." Plaintiff's allegations of denial of access to DOD websites, restricted building access, purposefully delayed pension payments, and issues surrounding his vacation time and salary are undermined by the record when viewed objectively.

Plaintiff's allegations regarding "salary differentials" must be viewed in light of the fact that he has received salary increases, and that there is no evidence showing he was given less favorable increases, let alone a less favorable increase motivated by animus toward service in the armed forces. Therefore, the trial court properly found plaintiff's "[a]rguments regarding salary differentials [were] undermined by the . . . fairness of his salary increases that he did receive" and that "[h]e received four salary increases and earned more than other[s] in his department."

Plaintiff's additional claim he made out a prima facie case the NJTA violated his rights under art. I, ¶ 5 of the New Jersey Constitution, because the NJTA's actions denied him the right to fulfill his military duty without discrimination also fails. He bases this claim on the same allegations that supported his LAD claim. Plaintiff cites no legal authority that an LAD hostile work environment claim based on military service doubles as a constitutional claim or that the New Jersey Constitution otherwise affords him any relief under the instant facts. The same analysis and conclusion leading to dismissal of his LAD claims apply to his constitutional claim, and therefore we find the trial court was correct to dismiss this count.

To the extent we have not specifically discussed any remaining arguments, we conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.