

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5668-07T1

LAURIN STAHL,

Plaintiff-Appellant,

v.

STATE OF NEW JERSEY DEPARTMENT
OF HUMAN SERVICES,

Defendant-Respondent.

Submitted September 29, 2009 - Decided October 19, 2009

Before Judges Lisa, Baxter and Alvarez.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-1876-05.

S. Robert Freidel, Jr., attorney for appellant (Mr. Freidel and Eileen Ryan, on the briefs).

Anne Milgram, Attorney General, attorney for respondent (Melissa H. Raksa, Assistant Attorney General, of counsel; Robert P. Preuss, Deputy Attorney General, on the brief).

PER CURIAM

Plaintiff Laurin Stahl appeals from a June 20, 2008 order that denied her motion for reconsideration of an order issued on May 9, 2008. The May 9, 2008 order granted the summary judgment

motion of defendant, Department of Human Services (DHS), to dismiss plaintiff's complaint on grounds of a violation of the applicable two-year statute of limitations. We affirm.

I.

In April 2001, plaintiff was transferred to the Division of Youth and Family Services' Office of Revenue Development (ORD), where she held the position of Program Support Specialist. Initially, plaintiff experienced no problems with her fellow employees. In June 2002, however, a union representative began to receive complaints from ethnic minorities within the ORD unit that plaintiff was discriminating against them. Shortly thereafter, a meeting was held to discuss those complaints; plaintiff was not asked to attend the meeting.

On or about June 13, 2002, Bill Henderson, plaintiff's immediate supervisor, notified his superiors that a member of plaintiff's unit heard some of plaintiff's fellow employees, during a private party, and in the food court during lunch, refer to plaintiff as a "dyke" and a "nazi dyke," and comment that they would not work for a "dyke" supervisor. Later that month, plaintiff attended a meeting requested by the employees she supervised to discuss their complaints that her management style was too rigid and that she had discriminated against minorities.

On July 5, 2002, plaintiff filed her first complaint against DYFS with the agency's equal employment opportunity/affirmative action (EEO/AA) officer, alleging a hostile work environment. She complained of secret union meetings between upper management and select members of her unit, during which plaintiff alleged she had been called a "nazi." Some six weeks later, on August 19, 2002, plaintiff submitted a reassignment request, citing a hostile work environment. A week later, a supervisor removed the ORD from plaintiff's supervision and reassigned her to work at a contract agency, Maximus. Although reassigned, plaintiff retained her title and salary. At the same time, the supervisor designated a new manager of the unit, selecting a person who had been deemed a poor manager and who had therefore previously been removed from that position.

On August 30, 2002, plaintiff filed a second EEO/AA complaint, alleging that she had been subjected to retaliation as a result of her previously-filed discrimination complaint. Plaintiff asserted that she had been relieved of her responsibilities as supervisor and transferred to Maximus soon after her sexual orientation was revealed to supervisors without her consent.

For approximately one month of the time plaintiff worked at Maximus, she was assigned to work with a former subordinate to "make copies" and perform data entry. She was also assigned several fiscal tasks, which plaintiff claimed were impossible to complete. In September 2002, an employee of the Adoption Resource Center in Voorhees told plaintiff she heard discriminatory remarks based on plaintiff's sexual orientation from members of plaintiff's former unit, ORD.

In November 2002, plaintiff was relieved of the responsibility of completing her former subordinates' performance reviews. At the same time, she was involuntarily transferred to the Accounting Department of DYFS, where she was responsible for providing clerical support, a duty which was considerably less prestigious than her original position as Program Support Specialist. Plaintiff alleges the transfer to the Accounting Department was retaliatory and demeaning, because it was below her skill level. Plaintiff was also subjected to being trained by a lower-level employee and was required to complete menial tasks, such as the cataloging of returned checks. Plaintiff performed those duties for approximately one year.

Moreover, once plaintiff was transferred to the Accounting Department in November 2002, her new work station was

considerably smaller than her former supervisory cubicle, and, although required to work beyond her normal office hours, plaintiff was denied overtime compensation. She was also assigned to a work station that was in proximity to women who wore perfume that triggered an allergic reaction, even though her sensitivity to perfumes was well-known.

On March 18, 2005, plaintiff filed a four-count complaint against defendant, alleging discriminatory retaliation and a hostile work environment in violation of the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. In the first two counts, she asserted that defendant retaliated against her because she had filed internal complaints alleging discrimination. She also alleged a hostile work environment. The third count alleged the same LAD violations, but against fictitious parties. The fourth count alleged defendant negligently failed to train and oversee the supervisors and employees who had discriminated against her.¹ The only paragraph in the entire four-count complaint to specify a date was

¹ Neither party, either in the Law Division or on appeal, has focused its arguments on the negligence count of plaintiff's complaint; nor has plaintiff asserted that the trial court erred when it dismissed the negligence count. An issue not briefed is deemed waived. In re Freshwater Wetlands Gen. Permit No. 16, 379 N.J. Super. 331, 334 n.1 (App. Div. 2005). Consequently, we do not consider the negligence count.

paragraph five, which alleged that plaintiff filed her first EEO/AA complaint on July 5, 2002.

On April 11, 2008, at the completion of the discovery period, defendant moved for summary judgment on the ground that plaintiff's claims were barred by the statute of limitations. In particular, defendant asserted that, as provided by N.J.S.A. 2A:14-2,² the applicable statute of limitations for a violation of the LAD is two years. Defendant argued that plaintiff's hostile work environment and retaliatory discrimination claims, which arose under the LAD, accrued no later than November 2002, when plaintiff was transferred to the Accounting Department and stripped of her former supervisory responsibilities. Thus, defendant argued, plaintiff was required to file her complaint within two years, specifically, no later than November 2004. Because plaintiff did not file her complaint until March 18, 2005, defendant argued that plaintiff's complaint was filed well outside the applicable two-year limitations period, and was subject to dismissal.

In opposition to defendant's motion, plaintiff argued that she continued to be subjected to a hostile work environment and

² N.J.S.A. 2A:14-2 provides: "Every action at law for an injury to the person caused by the wrongful act . . . of any person within this state shall be commenced within 2 years next after the cause of any such action shall have accrued."

to discriminatory treatment well after March 18, 2003, and therefore her complaint alleged unlawful conduct within the applicable two-year limitations period. At the motion hearing, she argued that her demeaning duties in the Accounting Department, where she performed menial tasks well below her pay grade, continued after March 2003. Plaintiff pointed to the humiliation of "everyday, . . . go[ing] in and . . . hav[ing] to work for people that . . . you used to supervise [I]t's all about humiliating a person."

The judge rejected plaintiff's argument that the continuing degradation and humiliation plaintiff suffered as a result of her November 2002 transfer to the Accounting Department constituted a "continuing violation" that prevented the statute of limitations from running on March 18, 2005. The judge held that the continuing degradation and humiliation -- even though it continued into 2003 and 2004 -- could not rescue plaintiff's complaint from a statute of limitations violation because the November 2002 transfer constituted a "discrete act" that triggered the immediate running of the statute. Finding that her complaint, not filed until March 18, 2005, was therefore filed outside the applicable two-year limitations period, Judge Mathesius granted defendant's motion and dismissed plaintiff's complaint on May 9, 2008. On June 20, 2008, the judge denied

plaintiff's subsequent motion for reconsideration, concluding that his May 9, 2008 order was not issued upon a "palpably incorrect or irrational basis," and he had not overlooked, or "fail[ed] to appreciate[,] the significance of probative competent evidence."

II.

In reviewing a trial court's grant of summary judgment, this court applies the same standard. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). The trial court's legal conclusions are subject to de novo review. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

A court should grant summary judgment "if 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). An issue of fact is considered 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." Ibid.

In other words, the trial court must determine whether the evidence presented, "when viewed in the light most favorable to the non-moving party," is "sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Where "there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue [is] insufficient to constitute a 'genuine' issue of material fact for purposes of Rule 4:46-2." Ibid. In undertaking that analysis, we recognize that disputed issues "of an insubstantial nature," or those that are merely "'gauzy,'" Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954), cannot overcome a motion for summary judgment.

Plaintiff's complaint was dismissed because of a violation of the applicable statute of limitations, not because she failed to present factual allegations that were sufficient to state a cause of action under the LAD. Therefore, we limit our discussion of the substantive provisions of the LAD to only the general framework necessary for evaluation of the statute of limitations issue. To establish a prima facie hostile work environment claim under the LAD, 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 Developmental Ctr.,
174 N.J. 1, 24 (2002).]

We turn now to the central issue raised by this appeal: whether the allegedly continuing indignities and humiliation plaintiff suffered in the months after her November 2002 demotion and transfer to the Accounting Department constitute a continuing pattern of harassment and discrimination that would cause the statute of limitations to begin to run only on the day the last act of such ongoing humiliating and discriminatory treatment occurred. Stated differently, if the discriminatory treatment that was the result of plaintiff's November 2002 transfer, and which continued well past March 2003, sweeps within it all of the allegedly unlawful acts that began as early as November 2002, then plaintiff's complaint could survive defendant's summary judgment motion. If, instead, the demotion is deemed a discrete act of discrimination that causes the statute of limitations to begin to run at the moment of the demotion, then none of the days and months thereafter, when plaintiff suffered the effects of that November 2002 demotion, would save her complaint from the statute of limitations violation.

In Shepherd, supra, 174 N.J. at 18-19, the Court adopted the continuous violation analysis that the United States Supreme Court developed in National Railroad Passenger Corporation v. Morgan, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002). Relying on Morgan, the Court explained the difference between a continuing pattern of harassment that causes a hostile work environment and a discrete act of discrimination. Ibid. The difference is critical, because in the former case the statute of limitations begins to run only upon the occurrence of the last hostile act, while in the latter case -- where a discrete act of discrimination occurs -- the statute of limitations begins to run on the day the act takes place. In Shepherd, the Court held that the continuous violation doctrine applied where the alleged harassment was marked by "individual incidents common to the same two supervisors and related to the same basic subject, with no one incident constituting a discrete, stand-alone claim," and where one of the incidents occurred within the statute of limitations period. Id. at 21-22.

In Morgan, the Supreme Court identified a number of discrete discriminatory actions where the statute of limitations begins to run as soon as such events occur: "termination, failure to promote, denial of transfer, or refusal to hire," as well as wrongful suspension, wrongful discipline, denial of

training and wrongful accusation. 536 U.S. at 114-15, 122 S. Ct. at 2073, 153 L. Ed. 2d at 122-23. In keeping with Morgan, our Supreme Court held that "[a]n unwelcome job transfer clearly constitutes a discrete act." Shepherd, supra, 174 N.J. at 27. The Third Circuit Court of Appeals reached a similar result in O'Connor v. City of Newark, providing "the following non-exhaustive list of discrete acts for which the limitations period runs from the act: termination, failure to promote, denial of transfer, refusal to hire, wrongful suspension, wrongful discipline, denial of training, wrongful accusation." 440 F.3d 125, 127 (3d Cir. 2006).

Plaintiff does not cite any contrary authority. Instead, ignoring the Court's clear holding in Shepherd that "[a]n unwelcome job transfer," 174 N.J. at 27, clearly constitutes a discrete act for which the statute of limitations immediately begins to run, plaintiff attempts to circumvent the Shepherd holding. She does so by asserting that because she was continually subjected to the effects of defendant's discriminatory conduct, the statute of limitations did not start to run at the time of her November 2002 transfer to the Accounting Department. Shepherd instructs otherwise. Ibid. We thus conclude that the statute of limitations had already run on claims arising from plaintiff's November 2002 demotion and

transfer at the time she filed her complaint on March 18, 2005. We thus affirm the judge's conclusion that plaintiff's claims regarding the unwelcome November 2002 transfer were barred by the statute of limitations because the statute expired in November 2004, several months before plaintiff filed her complaint on March 18, 2005.

Thus, as Judge Mathesius properly held, plaintiff's entire complaint was subject to dismissal on statute of limitations grounds unless other allegations of plaintiff's complaint, unrelated to the November 2002 transfer, occurred after March 23, 2003 and were therefore within the applicable two-year period of limitations. We turn now to that issue.

At oral argument on defendant's summary judgment motion, plaintiff asserted that, subsequent to March 18, 2003, defendant's office of EEO/AA avoided its obligation to properly investigate her complaints of discrimination by actively trying "to come up with reports that don't corroborate what went on." Had plaintiff been able to raise a "genuine issue of material fact," Brill, supra, 142 N.J. at 540, her contentions concerning a deliberate refusal by defendant to fairly investigate her complaints could have been sufficient to survive defendant's motion because a portion of the conduct at issue did occur within the two-year period of limitations.

We turn to a review of the record to assess plaintiff's allegations on this issue. Plaintiff filed three EEO/AA complaints. She filed the first on July 5, 2002, concerning the secret union meetings between upper management and select members of her unit; the second on August 30, 2002, alleging retaliation for the previously-filed discrimination complaint, and asserting that she had been relieved of her responsibilities as supervisor only because she complained of discriminatory treatment; and the third on October 13, 2002, in which she contended that her assignment to Maximus, and being forced to work with a former subordinate performing menial photocopying and data entry tasks, was also retaliatory and discriminatory.

The EEO/AA officer assigned to investigate plaintiff's three complaints, John Zajac, never completed a report and did not recall taking any notes during the interview process. Consequently, on December 19, 2002, a different employee, Bernard Oates, was designated as the EEO/AA officer responsible for investigating plaintiff's complaints. All of Zajac's inattention to plaintiff's three complaints lies outside the two-year limitations period. On April 14, 2003, Oates issued a report detailing his findings of fact, which resulted from his interviews of eleven individuals. Oates determined that none of

plaintiff's allegations could be substantiated.³ Thus, because Oates's report was issued on April 14, 2003, and plaintiff's Law Division complaint was filed on March 18, 2005, any discriminatory conduct related to the issuance of Oates's April 14, 2003 report had the capacity to fall within the applicable two-year statute of limitations. We therefore turn to a review of plaintiff's 163-paragraph counterstatement of material facts that she submitted in opposition to defendant's summary judgment motion, see R. 4:46-2(b), to determine what allegations, if any, she made concerning Oates's conduct.

Of those 163 paragraphs, numbers forty-six through eighty-one are prefaced by the heading, "Investigation of plaintiff's complaints conducted by John Zajac." In this series of paragraphs, plaintiff refers to Zajac's deposition testimony, in which he conceded that he had not fully investigated plaintiff's complaints, even though according to plaintiff, he "knew all about the derogatory remarks against [her]." She also asserts

³ Later, on August 29, 2003, Alma Joseph, an assistant commissioner for DHS, issued a determination letter concluding that plaintiff's complaints were unsubstantiated. On September 9, 2004, plaintiff filed an appeal of Joseph's determination letter to the Merit System Review Board (Board), which granted plaintiff a hearing on her appeal, noting that it was "troubled by DHS' delay in investigating" the matter. The Board pointed to "dispute[s] of facts" that could not be resolved on the record and referred the matter to the Office of Administrative Law (OAL) for a hearing. Although not supported by the record, plaintiff states she ultimately withdrew that appeal.

that he had not issued a report at the time Oates replaced him in December 2002.⁴ However, Zajac's conduct, no matter how potentially actionable it may have been, lies outside the limitations period.

As to Oates, the latter portion of Oates's investigation, and the issuance of his April 2003 report, come within the two-year statute. However, not one of plaintiff's 163 paragraphs makes any reference to Oates, much less to any ostensibly discriminatory conduct on his part. We recognize that Oates's investigation and report, if he had relied on Zajac's inadequate investigation, might have then constituted a "continuing violation," Shepherd, supra, 174 N.J. at 21-22, thereby sweeping within it all of Zajac's ostensibly unlawful conduct that lies outside the statute of limitations. However, plaintiff makes no such allegations, and, indeed, never mentions Oates or his investigation at all.

Thus, plaintiff's claim before the Law Division during oral argument that the inadequate investigation of her EEO/AA complaints occurred during the applicable two-year limitations period is belied by the very written opposition that she

⁴ Plaintiff asserts Oates replaced Zajac in October 2002, even though the record establishes that Oates replaced Zajac on December 19, 2002. The difference is immaterial, as both lie outside the two-year limitations period.

submitted to the judge. The judge rightly viewed the portion of plaintiff's opposition that addressed the investigation of her EEO/AA complaints as failing to raise the genuine issue of material fact that Brill requires. Instead, plaintiff's opposition constitutes the "gauzy" and "insubstantial" opposition that judges are expected to reject. Judson, supra, 17 N.J. at 75.

Therefore, the only two bases upon which plaintiff sought to avoid defendant's statute of limitations defense are both insufficient: the ongoing harassment and humiliation in 2003 and 2004 because it arose from plaintiff's unwelcome transfer to the Accounting Department in November 2002, which itself caused the statute of limitations to start running immediately; and the inadequate EEO/AA investigations because nothing in the record raised a genuine issue of material fact on the question of whether Oates's investigation, which was the only one to fall even partially within the limitations period, was performed in a discriminatory manner.

On appeal, plaintiff points to allegedly discriminatory conduct that occurred after the summary judgment hearing and was not contained within her complaint. Such information was not before the motion judge and we consequently decline to consider it. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973).

As to the denial of plaintiff's motion for reconsideration, plaintiff has failed to demonstrate that the judge's decision of May 9, 2008 "overlooked" any "controlling decisions" or reached erroneous conclusions, as required by Rule 4:49-2.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



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