VIVIAN SHNAIDMAN v. STATE OF NEW JERSEY DEPARTMENT OF HUMAN SERVICES DIVISION OF MENTAL HEALTH SERVICES ANN KLEIN FORENSIC CENTER GLENN FERGUSON

Superior Court of New Jersey, Appellate Division.

VIVIAN SHNAIDMAN, Plaintiff–Appellant, v. STATE OF NEW JERSEY, DEPARTMENT OF HUMAN SERVICES, DIVISION OF MENTAL HEALTH SERVICES, ANN KLEIN FORENSIC CENTER, and GLENN FERGUSON, Defendants–Respondents.

DOCKET NO. A–4120–11T4

Decided: April 26, 2013

Before Judges Fisher and Leone. David H. Kaplan argued the cause for appellant. Jacqueline Augustine, Deputy Attorney General, argued the cause for respondents (Jeffrey S. Chiesa, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Ms. Augustine and Kathryn J.H. Boardman, Deputy Attorney General, on the brief).

Plaintiff Vivian Shnaidman worked at the Ann Klein Forensic Center (Center) of the Division of Mental Health Services of the Department of Human Services (DHS) of the State of New Jersey (collectively referred to as the State entities). She later sued the State entities and Clinical Director Glenn Ferguson. Her complaint alleged that defendants failed to promote her, retaliated against her, and created a hostile work environment, all in violation of the Law Against Discrimination (LAD), N.J.S.A. 10:5–1 to –49. She appeals the grant of summary judgment for defendants. We affirm the summary judgment on her failure to promote claim and in part on her retaliation claim, but reverse the summary judgment on her remaining LAD claims.

I.

Plaintiff is a board-certified psychiatrist. Beginning in 1998, she worked at the Adult Diagnostic and Treatment Center (ADTC) at Avenel, where she worked with M.M. and T.C. In May 2004, she left the ADTC to work at the Center's Special Treatment Unit (STU) in Avenel, where M.M. and T.C. were then working. Dr. Ferguson, who headed the STU, hired her as a clinical psychologist, tasked with treating residents, evaluating whether persons needed to be involuntarily committed, and testifying in court in Kearny.

Plaintiff describes the atmosphere at the STU as "a big free-for-all where anybody could say anything they wanted at any time to anyone," and "[t]he majority of what was said, if it did not directly concern work, was something that was sexually inappropriate." She alleges that "the entire atmosphere there was very harassing." She complains that a male, J.C., was promoted to be director of psychiatry, instead of her. Thereafter, she asked to be reassigned to the Therapeutic Community team headed by T.C.

From September 2005 through October 2006, plaintiff filed a series of complaints to DHS's Office of Equal Employment Opportunity (EEO). Plaintiff claims she was retaliated against because of her complaints. On February 28, 2007, DHS informed plaintiff that EEO's investigation had found that her complaints were uncorroborated and denied by Dr. Ferguson, J.C., and M.M. In May 2007, plaintiff resigned, believing that M.M. and others were trying to build a case to fire her.

II.

Plaintiff filed this complaint alleging violations of the LAD by failure to promote, hostile work environment, and retaliation. Plaintiff also alleged breach of contract, common law retaliation, and assault and battery. Defendants' answer asserted various defenses, including the statute of limitations, and failure to give timely notices of claim under the notice provisions of the Tort Claims Act and the Contractual Liability Act. See N.J.S.A. 59:8–8; N.J.S.A. 59:13–5.

Defendants moved for summary judgment. After hearing argument, the trial court ruled against plaintiff on her LAD claims. The court also held that "[t]he contract and tort claims fail because of the exclusivity provision, [1] as well as the failure to comply with the notice provisions." The court granted summary judgment, and dismissed the complaint with prejudice, on March 16, 2012.

Plaintiff appeals the order granting summary judgment on her LAD claims. She does not challenge summary judgment on the contract and tort claims.

III.

We must hew to our standard of review, which is the same summary judgment standard that the trial court had to apply. Summary judgment must be granted if "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). To decide whether there is a genuine issue of material fact, the trial court must determine "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are 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). "The 'judge'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.' " Ibid. (citation omitted).

Because "appellate courts 'employ the same standard [of review] that governs the trial court,' " we review the issue de novo, and the "trial court rulings 'are not entitled to any special deference.' " Henry v. New Jersey Dept. of Human Services, 204 N.J. 320, 330 (2010) (citations omitted). "[T]he appellate court should first decide whether there was a genuine issue of material fact, and if none exists, then decide whether the trial court's ruling on the law was correct." Ibid.

IV.

Plaintiff's first claim under the LAD asserts a discriminatory failure to promote. Plaintiff alleges that defendants promoted a male psychiatrist to the position of Director of Psychiatry, instead of her, even though she was more qualified. Plaintiff conceded in the trial court that the promotion of the male psychiatrist, J.C., occurred in February 2005. Plaintiff, however, did not file her complaint until August 22, 2007.

Although defendants asserted a statute of limitations defense in their answer, they did not raise it in their motion for summary judgment. In their motion reply brief, however, defendants argued for the first time that the failure to promote claim was barred by the two-year personal-injury statute of limitations, N.J.S.A. 2A:14–2. At oral argument on the motion, plaintiff complained that she had "had no meaningful opportunity to respond formally to that issue." Although the court initially stated that it would instead address the substance of her claim, the court ultimately granted summary judgment based on the statute of limitations.

The Supreme Court has made clear that "the two-year personal-injury statute of limitations should apply" to "all LAD claims." Montells v. Haynes, 133 N.J. 282, 286 (1993). In Shepherd v. Hunterdon Developmental Ctr., 174 N.J. 1 (2002), the Court explained that "discrete acts, 'such as . failure to promote, . are easy to identify,' " and that each such act "constitutes a separate actionable 'unlawful employment practice.' " Id. at 19 (quoting Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114, 122 S.Ct. 2061, 2073, 153 L. Ed.2d 106, 122 (2002) (citation omitted)). The Court held that a plaintiff's cause of action accrues on the day on which such an individual act occurs. Id. at 39.

The promotion of J.C. was announced to plaintiff shortly after it occurred. When she complained, and Dr. Ferguson told her that J.C. was better qualified than she was, she said that was "ridiculous." She immediately thought of it as gender-based discrimination, and explicitly so asserted in her September 13, 2005 letter to the EEO. Nonetheless, she did not file her complaint within two years of the promotion.

It was improper for defendants to raise the statute of limitations argument for the first time in a reply brief, to which plaintiff had no right and little time to respond. R. 1:6–2(a) (a "motion shall state . the grounds upon which it is made"); see R. 1:6–3(a), 1:6–5, 4:46–1; see also Borough of Berlin v. Remington & Vernick Eng'rs, 337 N.J.Super. 590, 596 (App.Div.), certif. denied, 168 N.J. 294 (2001). Nonetheless, despite having the right and the time to respond in her appellate briefing, plaintiff has not proffered any argument that the failure to promote claim was filed within the statute of limitations. At oral argument, plaintiff's counsel with commendable candor conceded that plaintiff had no factual basis for such an argument that she would have presented, had she been given the opportunity, and that it would be a poor expenditure of time to remand for an

inevitably successful summary judgment motion. Accordingly, we affirm summary judgment on the failure to promote claim.

V.

Plaintiff's complaint alleged that defendants fostered a hostile work environment, and failed to take reasonable steps to correct it, in violation of the LAD. She claims that that hostile work environment was created by T.C.'s requests for oral sex, by colleagues discussing their treatment of sexually violent predators, and by other words and actions. Because the first two categories raise distinct legal issues, we will discuss them separately.

A. T.C.'s Solicitations.

In opposition to summary judgment, plaintiff alleged that T.C. repeatedly asked her for oral sex. She testified in deposition that he had wanted oral sex and had touched her inappropriately even when she was at the ADTC, and after she joined the STU he began explicitly and repeatedly asking her for a "blow job" in the winter of 2004–05. Plaintiff mentioned this conduct in her complaints to the EEO office, but conceded that she kept her complaints "vague" and never identified T.C. by name, because "I didn't really want him to get into trouble." [2]

The trial court stated that it was "going to disregard . [T.C.'s] direct statements to" plaintiff, because she had refused to identify T.C. by name "verbally, in writing, or otherwise." The court emphasized:

Ferguson was begging [plaintiff] to say who is this because they wanted to investigate it. And, I don't think any rational fact finder could conclude on the evidence here that the employer . somehow has constructive knowledge or even [could] guess as to about who this is.

The trial court was correct that plaintiff's written complaints failed to identify T.C. by name as her harasser:

☐ In a September 13, 2005 letter to the EEO office, plaintiff said that "[o]ne male coworker asks me for oral sex at least once a week," that "[b]ecause we are friends and I sort of know he is not being serious ., I let it go," but that "he is soon to become one of my many bosses, and as my program coordinator, he really needs to stop asking me."

☐ In a May 18, 2006 email to Dr. Ferguson, she cited "a particular supervisor's requests for and references to various sexual acts." [3]

Although plaintiff's email and letter do not name T.C., they do disclose that her harasser was a male coworker who became her program coordinator and her supervisor. According to plaintiff, T.C. was the only male program coordinator who supervised her. Therefore, contrary to the trial court's ruling, a rational jury could find that defendants had actual or constructive knowledge that her alleged harasser was T.C.

Plaintiff's failure to identify T.C. by name, however, does raise a valid issue. Indeed, plaintiff's complaints repeatedly cited but did not name other harassers.[4] The LAD, and EEO and internal complaint procedures, are meant to address and correct serious discrimination. They are not meant to be a guessing game of "Twenty Questions."

Under the LAD, " 'when a coworker engages in harassing conduct, an employer is liable only if "management-level employees knew, or in the exercise of reasonable care should have known, about the campaign of harassment," ' " and allowed it to continue. Herman v. Coastal Corp., 348 N.J.Super. 1, 25 (App.Div.) (quoting Heitzman v. Monmouth County, 321 N.J.Super. 133, 146 (App.Div.1999) (citation omitted)), certif. denied, 174 N.J. 363 (2002). Similarly, when a supervisor engages in sexually-harassing conduct outside the scope of his authority, an employer may be liable "if the employer had actual or constructive notice of the harassment." Lehmann v. Toys 'R' Us, 132 N.J. 587, 624 (1993). The United States Supreme Court has a similar rule under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e to 2000e–17. "An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it." Burlington Indus. v. Ellerth, 524 U.S. 742, 759, 118 S.Ct. 2257, 2267, 141 L. Ed.2d 633, 651 (1998).

In Ellerth and its companion case, Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 141 L. Ed.2d 662 (1998), the Court recognized that employees' failure to inform their employers of the identity of their harassers may provide an affirmative defense to a hostile work environment claim under Title VII. In Ellerth, the plaintiff claimed that a mid-level supervisor demanded sexual favors, but the plaintiff "did not inform anyone in authority about [the mid-level supervisor's] conduct," and in fact "chose not to inform her immediate supervisor . because 'it would be his duty as my supervisor to report any incidents of sexual harassment.' " 524 U.S. at 748–49, 118 S.Ct. at 2262–63, 141 L. Ed.2d at 645. The Court held that, where no tangible employment action had been taken by the supervisor against the employee, an "employer may raise an affirmative defense to liability or damages," if the employer can prove by a preponderance of the evidence "two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." 524 U.S. at 765, 118 S.Ct. at

2270, 141 L. Ed.2d at 655. The Court added that a demonstration of an employee's "unreasonable failure to use any complaint procedure provided by the employer . will normally suffice to satisfy the employer's burden under the second element of the defense." Ibid. Accord Faragher, supra, 524 U.S. at 807–08, 118 S.Ct. at 2293, 141 L. Ed.2d at 689.

We first acknowledged this affirmative defense in Heitzman, supra, 321 N.J.Super. at 146 & n.3, 149. Our Supreme Court quoted Heitzman 's discussion of the defense in Cavuoti v. N.J. Transit Corp., 161 N.J. 107, 117 n.1 (1999), and has ruled that an employer "is entitled to assert the existence of an effective anti-sexual harassment workplace policy as an affirmative defense to vicarious liability," Gaines v. Bellino, 173 N.J. 301, 320 (2002). Finally, in Entrot v. BASF Corp., 359 N.J.Super. 162, 166 (App.Div.2003), we stated that "[t]o resolve this appeal we are required . to determine the availability to an employer of the defense recognized by the United States Supreme Court in Faragher " and Ellerth. We ruled that "[t]here is no barrier to the application of a Title VII defense to an LAD action." Id. at 188. We found that BASF Corp. could not invoke the defense, however, because it had taken a tangible employment action, namely constructive discharge. Id. at 192–93.[5]

Plaintiff's non-disclosures must be evaluated in the context of this affirmative defense. Her refusal to name T.C. is evidence supporting the second element of the affirmative defense. Also, apparently after T.C. repeatedly requested oral sex, plaintiff requested to join his Therapeutic Community unit, thus making him her supervisor.[6] Even assuming, however, that such evidence was sufficient to establish the second element of the affirmative defense, it was not enough to justify summary judgment on her claims regarding T.C.

To establish the affirmative defense, a defendant must also satisfy the first element, "that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior." Ellerth, supra, 524 U.S. at 765, 118 S.Ct. at 2270, 141 L. Ed.2d at 655. On that element, defendants do not claim, and the trial court did not find, that they are entitled to summary judgment. Therefore, it was inappropriate to disregard plaintiff's claims concerning T.C. in granting summary judgment on her hostile work environment claim.

The trial court was correct, however, to analyze plaintiff's harassment claims individually to see if a defense could apply because of her refusal to name her harasser. Where a plaintiff alleges multiple harassers or harassments, and with regard to some harasser or some harassment "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise," ibid., but takes advantage of such opportunities regarding other harassers or harassments, the affirmative defense may apply to the former even though it is inapplicable to the latter. Accordingly, if defendants offer sufficient evidence at trial to justify an appropriate jury instruction on the affirmative defense regarding some but not all of plaintiff's allegations of harassment, the trial court should instruct that the jury should disregard those allegations if the jury finds that defendants have proven the affirmative defense.

T.C.'s alleged statements to plaintiff are sufficient to make summary judgment inappropriate. The trial court recognized, and defendants do not dispute, that T.C.'s alleged statements "are incredibly offensive and would certainly make a hostile work environment." Because we thus must remand her hostile work environment claim for trial, we comment only briefly on plaintiff's remaining bases for that claim.

B. Comments Relating To The Sexually Violent Predators.

Plaintiff and her colleagues worked in the Special Treatment Unit, examining, evaluating, and treating sexually violent predators confined there. Plaintiff complained about comments relating to STU residents, for example:

☐ When plaintiff said she was concerned that a resident was staring at her, and had brushed against her, M.M. told her that the resident liked bukkake, a practice in which men ejaculate into the face of helpless women, and advised her that when she saw him she should keep her mouth closed.

☐ In discussing the dangerousness of a resident from India, M.M. commented that "Indian women don't suck d—k but American women do."

☐ After a fire in a resident's room, M.M. commented, "I guess [he] was not given a lubricant and the friction from his masturbating must have set the fire."

Defendants argue that it is necessary to consider that employees at the STU are treating sexually violent predators, making sexual discussion unavoidable, and making sexual "gallows humor" a necessary coping mechanism.

Plaintiff herself acknowledged to her supervisors that "we work in an unusual environment and a certain amount of sexual innuendo is part of the job and how we all relieve stress." She told the EEO office that "I understand that if you work in a sex-offender facility, you need to have a high tolerance for crude, sexually explicit remarks." She testified that "when you work with sex offenders . there's a lot of inappropriate banter that, under the circumstances, becomes appropriate."

Our hostile work environment standard is flexible enough to account for such circumstances. In Lehmann, the Supreme Court held that "[t]o state a claim for hostile work environment sexual harassment, a female

plaintiff must allege conduct that occurred because of her sex and that a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an intimidating, hostile, or offensive working environment." 132 N.J. at 603.

[T]he test can be broken down into four prongs: the complained-of conduct (1) would not have occurred but for the employee's gender; and it was (2) severe or pervasive enough to make a(3) reasonable woman believe that (4) the conditions of employment are altered and the working environment is hostile or abusive.

[Id. at 603–04.]

This test permits consideration of the unusual situation posed by a claim of a sexually-hostile work environment in a workplace devoted to the care of sexually violent predators. Regarding the first prong, "[c]ommon sense dictates that there is no LAD violation if the same conduct would have occurred regardless of the plaintiff's sex," for example, "if a supervisor is equally crude and vulgar to all employees, regardless of their sex." Id. at 604.[7] In the second prong, "[w]hether conduct is 'severe or pervasive' requires an assessment of the totality of the relevant circumstances." Godfrey v. Princeton Theological Seminary, 196 N.J. 178, 196 (2008). Under the third prong, the jury must consider a reasonable woman "in the plaintiff's position." Lehmann, supra, 132 N.J. at 592. For the fourth prong, " 'whether an environment is "hostile" or "abusive" can be determined only looking at all the circumstances.' " El–Sioufi v. St. Peter's Univ. Hosp., 382 N.J.Super. 145, 179 (App.Div.2005) (quoting Heitzman, supra, 321 N.J.Super. at 147 (citation omitted)).

These circumstances include the nature of the workplace. Oncale v. Sundowner Offshore Servs. Inc., 523 U.S. 75, 81–82, 118 S.Ct. 998, 1003, 140 L. Ed.2d 201, 208–09 (1998) (stating that a football player's environment is not hostile "if the coach smacks him on the buttocks as he heads onto the field — even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office"); Cutler v. Dorn, 390 N.J.Super. 238, 253–54 (App.Div.2007) ("the nature of the environment is an important factor to be considered"), aff'd in part, rev'd in part, 196 N.J. 419, 435 (2008). Thus, the test's four prongs allow consideration of the nature of the workplace — here, to treat and discuss sexually violent predators — in determining whether comments related to the residents can be considered harassing. The trial court should craft its instructions accordingly.

C. Other Claims Of Hostile Work Environment.

After disregarding plaintiff's allegations regarding T.C. the trial court held that her remaining allegations of harassment failed to establish a hostile work environment:

[L]ooking at the totality of these statements, many of which cannot be considered as something that have to do with her gender, . but even if they did have something to do with her gender, these would be the type of slights and inconveniences that would not subject somebody to a hostile work environment claim, which as we know from the case law, is a fairly high standard. I don't think a rational fact finder could conclude that it meets the standard of a hostile work environment claim.

We need not review this ruling. The trial court acknowledged that plaintiff's allegations against T.C. would themselves be sufficient to establish a hostile work environment, so trial is required on plaintiff's claim of a hostile work environment.

We nonetheless note that plaintiff testified in her deposition to dozens of acts of sexual harassment. For example:

☐ J.C. told plaintiff that "since you are the only female psychiatrist, it is your job to be the mother and take care of the rest of us and do all the extra work." He and others referred to her as the "mommy psychiatrist." Defendants concede those comments relate to her gender.

☐ M.M., observing a picture plaintiff had drawn, told her that "I won't even talk about the sexual implications" of the picture, and "I won't even mention the pubic hair."

☐ M.M. would find ways to get too close and bump into her, and intentionally brushed her breast with his arm.

☐ When plaintiff and J.C. were meeting with male psychiatrists, they would make comments like, "did you see my orgasmatron," and "[a]fter I get my prostate exam, I kiss my doctor."

☐ T.C. asked attendees at a meeting with plaintiff whether, if they could have only one kind of sex for the rest of their lives, they would choose oral or genital sex, to which a male screamed "anal."

☐ A psychiatrist said to plaintiff, "it's good that you're losing weight now. Now your husband has his Ph. D., he's probably going to leave you."

"When evaluating the severity or pervasiveness of the harassing conduct, 'the cumulative effect of the various incidents' must be considered." Godfrey, supra, 196 N.J. at 196 (quoting Lehmann, supra, 132 N.J. at 607). " 'Severe or pervasive' conduct, therefore, can be established by citing 'numerous incidents that, if considered

individually, would be insufficiently severe.' " Cutler, supra, 196 N.J. at 432 (quoting Lehmann, supra, 132 N.J. at 607).

VI.

Plaintiff's final LAD claim is for retaliation in violation of N.J.S.A. 10:5–12(d). Plaintiff's complaint alleged that defendants retaliated against her by intimidating her, treating her disparately, concocting performance issues, and making her work environment unbearable. Plaintiff alleged that they did so because of her claims of discrimination in her EEO complaints starting in September 2005, and because she protested the failure to promote.

The trial court properly agreed that the EEO complaints were protected activity. See Woods–Pirozzi v. Nabisco Foods, 290 N.J.Super. 252, 275 (App.Div.1996). The court nonetheless granted summary judgment, ruling that the alleged adverse actions, even viewed in their totality, could not "add up to an alteration of the terms and conditions of her employment." The court added that, even drawing all favorable inferences, it could not find a causal connection between the EEO complaints and the allegedly adverse actions "besides the fact that many of these things occurred after the filing," but "the connection in time isn't enough here."

To show a prima facie case of retaliation under the LAD, plaintiff must "demonstrate that: (1) plaintiff was in a protected class; (2) plaintiff engaged in protected activity known to the employer; (3) plaintiff was thereafter subjected to an adverse employment consequence; and (4) that there is a causal link between the protected activity and the adverse employment consequence." Victor v. State, 203 N.J. 383, 409 (2010); see Henry, supra, 204 N.J. at 332.

Our Supreme Court recently held that to prove an adverse employment action, "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have "dissuaded a reasonable worker from making or supporting a charge of discrimination." ' " Roa v. Roa, 200 N.J. 555, 575 (2010) (quoting Burlington Northern & Santa Fe Ry. v. White, 548 U.S. 53, 61, 68, 126 S.Ct. 2405, 2411, 2415, 165 L. Ed.2d 345, 355, 359 (2006) (citations omitted)). Adverse employment actions include cancelling an employee's health insurance, Roa, supra, 200 N.J. at 575, a thirty-seven-day suspension without pay, and reassignment to more arduous and less desirable duties, Burlington Northern, supra, 548 U.S. at 70–74, 126 S.Ct. at 2416–18, 165 L. Ed.2d at 361–63. However, " 'trivial harms,' " " 'petty slights, minor annoyances, and simple lack of good manners' " are insufficient. Roa, supra, 200 N.J. at 575 (quoting Burlington Northern, supra, 548 U.S. at 68, 126 S.Ct. at 2415, 165 L. Ed.2d at 359–60).

In her deposition and her appellate brief, plaintiff asserts that, after she filed her EEO complaints, she was retaliated against in numerous ways. With one exception, they do not rise to the level of an adverse employment action. First, she claims that she received unfavorable performance evaluations which included "fabricated complaints about my work performance." [8] Unfavorable evaluations, however, generally are insufficient to demonstrate an adverse employment action. Victor v. State, 401 N.J.Super. 596, 615 (App.Div.2008) (quoting El–Sioufi, supra, 382 N.J.Super. at 170), aff'd as modified, 203 N.J. 383 (2010).[9]

Second, plaintiff notes that she received written and verbal warnings.[10] Plaintiff conceded, however, that she was not suspended and did not lose pay or benefits due to these warnings. Generally, investigations and warnings do not rise to the level of adverse employment. Spinks v. Twp. of Clinton, 402 N.J.Super. 465, 484 (App.Div.2008), certif. denied, 197 N.J. 476 (2009).[11]

Third, plaintiff claims that M.M. berated her over her work performance, calling her stupid, incompetent, arrogant, bipolar, borderline, and a bitch. Like Title VII, however, the LAD "does not set forth 'a general civility code for the American workplace.' " Roa, supra, 200 N.J. at 575 (quoting Burlington Northern, supra, 548 U.S. at 68, 126 S.Ct. at 2415, 165 L. Ed.2d at 359–60 (citations omitted)). Under the LAD, epithets, insults, rudeness, and even severe personality conflicts are generally insufficient to establish a hostile work environment. Taylor v. Metzger, 152 N.J. 490, 500–02 (1998); Herman, supra, 348 N.J.Super. at 20–22; Heitzman, supra, 321 N.J.Super. at 147. No case has found it enough for an adverse employment action.

Fourth, plaintiff claims that, to enable a newly-hired male psychiatrist to move in, she was moved out of a window office and relocated to a very small office, allegedly so she could work more closely with the Therapeutic Community. However, an office move generally does not rise to the level of an adverse employment action. Bradley v. Atl. City Bd. of Educ., 736 F.Supp.2d 891, 896, 901 & n.25 (D.N.J.2010) (LAD).[12]

Fifth, plaintiff also contends that she was subjected to rules that did not apply to male psychiatrists, namely that her work had to be reviewed, she had to return from Kearny to Avenel to take care of work, and she was occasionally not allowed to go to lunch.[13] These are " 'petty slights and minor annoyances' " which "are insufficient to constitute an adverse employment action." Roa, supra, 200 N.J. at 575 (citation omitted).[14]

Sixth, plaintiff claims retaliation because of defendants' "toleration of harassment." Mancini v. Township of Teaneck, 349 N.J.Super. 527, 564 (App.Div.), remanded, 174 N.J. 359, reaff'd, 354 N.J.Super. 282

(App.Div.2002). "[G]enerally, harassment alone is not an adverse employment action." however. Shepherd v. Hunterdon Developmental Center, 336 N.J.Super. 395, 419 (App.Div.2001), aff'd in part, rev'd in part, 174 N.J. 1 (2002).

Plaintiff asserts that those alleged retaliatory acts, if individually insufficient to constitute adverse employment actions, are sufficient if considered in the aggregate. We agree with the trial court that those claimed acts of retaliation do not amount to an adverse employment action, even if "considered cumulatively." Mancini, supra, 349 N.J.Super. at 565. He wrote that despite the adverse comments in her evaluations, the warnings, M.M.'s berating, her office move, the alleged harassment, and the other alleged retaliatory acts, plaintiff remained doing the same work without loss of pay or benefits, and remained able to make frequent charges of discrimination. More importantly, we do not believe that a reasonable jury could find that those accumulated actions could have " 'dissuaded a reasonable worker from making or supporting a charge of discrimination.' " Roa, supra, 200 N.J. at 575 (citation omitted).15

Plaintiff does raise one claim of retaliation that could rise to the level of an adverse employment action. She contends that she received threats of termination. She focuses on one of T.C.'s statements, made when she was moved to the smaller, windowless office, that "they're just f* *king with you," and that "[i]f you don't want to get fired, just do what they say. Just keep a low profile and . you can keep your job."

We believe that such a threat can be an adverse employment action under the test adopted in Burlington Northern and Roa. Prior to Burlington Northern, some courts of appeals had ruled that a threat to terminate was insufficient to be an adverse employment action because it was not an "ultimate employment decision." Mattern v. Eastman Kodak Co., 104 F.3d 702, 708 (5th Cir.), cert. denied, 522 U.S. 932, 118 S.Ct. 336, 139 L. Ed.2d 260 (1997); see Manning v. Metropolitan Life Ins. Co., 127 F.3d 686, 689, 692 (8th Cir.1997). The United States Supreme Court rejected that test in Burlington Northern, supra, 548 U.S. at 60–67, 126 S.Ct. at 2410–14, 165 L. Ed.2d at 355–59.16 Instead, the Court ruled that "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have "dissuaded a reasonable worker from making or supporting a charge of discrimination." ' " 548 U.S. at 68, 126 S.Ct. at 2415, 165 L. Ed.2d at 359 (citations omitted). Although Burlington Northern did not involve a threat of discharge, the Court commented: "A reasonable employee facing the choice between retaining her job (and paycheck) and filing a discrimination complaint might well choose the former." 548 U.S. at 73, 126 S.Ct. at 2418, 165 L. Ed.2d at 362–63.17

We agree with this common-sense application of the Burlington Northern test, which our Supreme Court adopted in Roa. Furthermore, the statutory language and purposes behind the test support this application.

First, in the LAD, as in Title VII, "[t]he language of the substantive [anti-discrimination] provision differs from that of the antiretaliation provision in important ways." Burlington Northern, supra, 548 U.S. at 61, 126 S.Ct. at 2411, 165 L. Ed.2d at 355–56. Like Title VII, the LAD's anti-discrimination provision forbids discrimination "in compensation or in terms, conditions or privileges of employment." N.J.S.A. 10:5–12(a); see 42 U.S.C.A. § 2000e–2(a)(1). In the LAD, as in Title VII, "[n]o such limiting words appear in the antiretaliation provision." Burlington Northern, supra, 548 U.S. at 62, 126 S.Ct. at 2412, 165 L. Ed.2d at 356. Thus, "the antiretaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment." Burlington Northern, supra, 548 U.S. at 64, 126 S.Ct. at 2412–13, 165 L. Ed.2d at 357; see Roa, supra, 200 N.J. at 573 ("Given that the Legislature has specifically expressed an intent that the LAD 'be liberally construed,' N.J.S.A. 10:5–3, reading into the statute an unstated exclusion cannot be countenanced.").

Furthermore, the LAD's anti-retaliation provision makes it unlawful

[f]or any person to take reprisals against any person because that person has opposed any practices or acts forbidden under this act . or to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of . any right granted or protected by this act.

[N.J.S.A. 10:5–12(d) (emphasis added).]

Thus, it expressly encompasses both threats of reprisal and actual reprisal.

Second, the anti-discrimination and anti-retaliation provisions require different protections to achieve their purposes. An employer's threat of discharge, which causes an employee to choose to keep her job rather than exercising her rights under the LAD, defeats the purpose of the anti-retaliation provision, even if it does not affect the compensation, terms, conditions or privileges of employment protected by the anti-discrimination provision. Burlington Northern emphasized that Title VII

depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses. "Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances." Interpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act's primary objective depends.

[548 U.S. at 67, 126 S.Ct. at 2414, 165 L. Ed.2d at 359 (citation omitted).]

This rationale "applies with equal force to the LAD," and "is consistent with the express language of the LAD, as well as the broad remedial purposes underlying it." See Roa, supra, 200 N.J. at 574. Therefore, for all these reasons, a threat of termination can be an adverse employment action under the anti-retaliation provision of the LAD.

After discussing T.C.'s alleged threat of termination at length, the trial court ruled that plaintiff was not retaliated against because she could not show "an alteration of the terms and conditions of her employment." As set forth above, that is no longer required for retaliation after Roa.

We must view the evidence "in the light most favorable" to plaintiff, " 'accept as true all the evidence which supports' " plaintiff, and give her " 'the benefit of all legitimate inferences which can be deduced therefrom.' " Brill, supra, 142 N.J. at 535, 540 (quoting Lanzet v. Greenberg, 126 N.J. 168, 174 (1991)). Under that generous standard of review, summary judgment should not have been granted on plaintiff's claim that T.C.'s alleged threat of termination was LAD retaliation.

That does not mean that T.C.'s statements necessarily qualify as an adverse employment action under Roa.

[T]he significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed."

[Burlington Northern, supra, 548 U.S. at 69 (quoting Oncale, supra, 523 U.S. at 81–82, 118 S.Ct. at 1003, 140 L. Ed.2d at 209).]

Here, there are genuine issues of material fact that must be resolved to determine if T.C.'s statements constitute an adverse employment action: (1) whether T.C.'s statements occurred before or after plaintiff began sending letters to the EEO office in September 2005; (2) if T.C. made these statements while still her coworker, or after he became her program coordinator and her supervisor; (3) whether the statements were a threat to terminate or just general advice; and (4) whether T.C. had authority to terminate, or was conveying a threat from a supervisor who had that authority.

Finally, there is a genuine issue of material fact whether "there is a causal link between the protected activity and the adverse employment consequence." Victor, supra, 203 N.J. at 409.

Only where the facts of the particular case are so "unusually suggestive of retaliatory motive" may temporal proximity, on its own, support an inference of causation. Where the timing alone is not "unusually suggestive," the plaintiff must set forth other evidence to establish the causal link.

[Young v. Hobart West Grp., 385 N.J.Super. 448, 467 (App.Div.2005) (citation omitted).] 18

The trial court saw nothing "that draws a causal connection," besides the alleged occurrence of retaliation after plaintiff's EEO letters, "but the connection in the time isn't enough here." Again, it is disputed when T.C.'s statements were made. It is difficult, moreover, to rule out that the timing was unusually suggestive, as plaintiff sent letters and emails opposing alleged discrimination with great frequency,19 at least after August 2005.20 Therefore, we reverse the grant of summary judgment on plaintiff's retaliation claim solely to the extent she alleges threat(s) to terminate for protected activity.21

VII.

Accordingly, we vacate the order under review to the extent that it grants summary judgment on plaintiff's hostile work environment claim, and on her retaliation claim based on the alleged threat(s) to terminate. We remand for trial solely on those claims in accordance with this opinion.22 We affirm the order to the extent that it grants summary judgment on the remainder of her retaliation claim, and on her failure to promote claim.

Affirmed in part, vacated in part, and remanded.

FOOTNOTES

1. FN1. See N.J.S.A. 10:5–27.

2. FN2. Plaintiff explained that T.C. was her friend, that he was "hypersexual," and that she "didn't take it seriously" because it was "more his problem" and she "didn't think it really had anything to do with me."

3. FN3. T.C. also discussed with plaintiff his sex life, asked about her sex life, and made sexual comments at meetings. Plaintiff testified that she complained verbally to J.C. about T.C.'s "sexual innuendo and sexual banter." Plaintiff's counsel conceded, however, that she did not mention him by name as the person demanding oral sex.

4. FN4. For example, plaintiff emailed Dr. Ferguson on April 9, 2005, complaining that "there is a certain psychologist who can't seem to keep his hands off me." Dr. Ferguson responded that "I definitely need to know about the psychologist you refer to in your email. I'll do everything I can to make sure it stops asap!" In the May 18, 2006 email to Dr. Ferguson, she also complained about "a psychiatrist colleague's continual sexually suggestive comments to me." Dr. Ferguson responded that, "[i]n order to address this accusation, I ask that you provide additional information so that I may take appropriate action." Plaintiff could not recall answering Dr. Ferguson's requests.

5. FN5. Accord Pa. State Police v. Suders, 542 U.S. 129, 140–41, 124 S.Ct. 2342, 2351, 159 L. Ed.2d 204, 216 (2004).

6. FN6. See Andreoli v. Gates, 482 F.3d 641, 648 (3d Cir.2007) (the plaintiff's accepting a job on the same shift as the alleged harasser is relevant to the affirmative defense).

7. FN7. Plaintiff claims that this element is automatically established here because she alleges inappropriate sexual remarks. However, Lehmann ruled that this element is automatically satisfied only "[w]hen the harassing conduct is sexual or sexist in nature." 132 N.J. at 605. The nature of this workplace can be considered in determining whether sexual remarks were harassing.

8. FN8. Although all of plaintiff's performance evaluations gave her passing or satisfactory grades, she cites her agreement in her March 6, 2006 evaluation that she should "[d]ecrease a tendency to personalize program issues and become involved in petty arguments with supervisors," and comments in her December 7, 2006 interim evaluation that she had difficulty with orders from her supervisors and that she was harsh and critical.

9. FN9. See, e.g., Hill v. City of Pine Bluff, 696 F.3d 709, 715 (8th Cir.2012) ("commencing performance evaluations, or sending a critical letter that threatened appropriate disciplinary action, or falsely reporting poor performance" is insufficient).

10. FN10. On May 10, 2006, plaintiff received a verbal warning for being disrespectful and argumentative with a nurse. On May 11, 2006, she was issued a written reprimand for not following instructions by talking strategy with the Public Defender rather than the Deputy A.G., and by submitting a revised report without prior consultation with a supervisor. On July 7, 2006, she was officially reprimanded for admittedly possessing a cellphone inside the STU. On October 20, 2006, she received a preliminary notice of disciplinary action for again submitting a report without prior consultation, and for not attending required meetings. On January 23, 2007, she received a preliminary notice of disciplinary action for failure to complete evaluations of a resident.

11. FN11. See, e.g., Harper v. C.R. Eng., Inc., 687 F.3d 297, 307 (7th Cir.2012); Hancock v. Borough of Oaklyn, 347 N.J.Super. 350, 360–61 (App.Div.2002) (CEPA).

12. FN12. See, e.g., Barber v. C1 Truck Driver Training, LLC, 656 F.3d 782, 797–98 (8th Cir.2011).

13. FN13. In addition, plaintiff in her deposition claimed a greater caseload, stricter scheduling, and the "[c]apricious" denial of days off, specifically her request to go to a conference, and her request to take a three-week vacation in early 2007 that she took anyway.

14. FN14. See Klein v. UMDNJ, 377 N.J.Super. 28, 46 (App.Div.2005) (requiring the plaintiff's work to be reviewed, even if demeaning, "does not meet the statutory definition of a retaliatory act" under CEPA), certif. denied, 185 N.J. 39 (2005).

15. FN15. Thus, we need not rule on whether the trial court properly found insufficient evidence of causation for those acts.

16. FN16. The Court also rejected, id., the test used in the Third Circuit, which required an adverse employment action that " 'alters the employee's compensation, terms, conditions, or privileges of employment, deprives him or her of employment opportunities, or adversely affects his or her status as an employee.' " Moore v. City of Philadelphia, 461 F.3d 331, 341 (3d Cir.2006) (quoting Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir.1997)).

17. FN17. The Court, in a later case where the employee's fiancé was fired, similarly stated: "We think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiance would be fired." Thompson v. N. Am. Stainless, LP,_U.S._, _, 131 S.Ct. 863, 868, 178 L. Ed.2d 694, 699 (2011).

18. FN18. See Maimone v. City of Atl. City, 188 N.J. 221, 237 (2006) (transfer of an employee within a month of his complaint was sufficient temporal proximity under CEPA).

19. FN19. Plaintiff sent EEO letters on September 13, 2005, October 6, 2005, November 14, 2005, December 1, 2005, December 14, 2005, February 7, 2006, October 30, 2006, and emails to her supervisors on April 8,

2005, May 18, 2006, June 16, 2006, August 14, 2006, January 26, 2007, and February 6, 2007.

20. FN20. Plaintiff claims that she earlier verbally complained about the failure to promote, which occurred in February 2005. She does not claim that she verbally raised gender discrimination, however. See Henry, supra, 204 N.J. at 335. It was not sufficient that she said that it was "ridiculous" that J.C. was more qualified than she was. See Barber v. CSX Distrib. Servs., 68 F.3d 694, 702 (3d Cir.1995) (a letter expressing dissatisfaction over someone else receiving a promotion is not protected activity because it did not allege age discrimination).

21. FN21. Plaintiff also notes that J.C. said that "there were people there who didn't want [her] there," but he would look out for her if she continued to help him do his job; and that M.M. threatened her "that I wouldn't have my job," but she could not remember "what [M.M.] was threatening me about." If plaintiff on remand claims that these statements were also threats to terminate, she may attempt to present sufficient proof thereof at trial.

22. FN22. Plaintiff may pursue her claims for aiding and abetting and punitive damages to the extent they relate to her remaining LAD claims.

PER CURIAM