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JOSE ROBLES, Plaintiff(s), vs. MULLICA TOWNSHIP and JOHN DOES 1- 5 AND 6-10, Defendant(s).	SUPERIOR COURT OF NEW JERSEY ATLANTIC COUNTY/LAW DIVISION CIVIL ACTION DOCKET NO: ATL-L-871-14

PLAINTIFF'S RESPONSE TO DEFENDANT'S SUMMARY JUDGMENT MOTION

On the Brief:
Drake P. Bearden, Jr.

I. INTRODUCTION

Since Plaintiff Jose Robles began working as a part-time laborer with Mullica Township he has be subjected to discrimination and harassment on a regular basis. His supervisor regularly referred to Plaintiff as Hector, Carlos and Jesus, despite Plaintiff's constant reminders that is not his name. Plaintiff's co-worker told him that ropes at a local hunting store were for hanging Plaintiff and "hanging niggers." Plaintiff called him a "spic," and told him he cannot have a gas code because he is Puerto Rican and might steal gas. He has witnessed his supervisor discriminate against non-white residents, and heard his supervisor say he does not recognize Martin Luther King Day because he's "not black." These were just some of the comments Plaintiff heard on a regular basis.

Plaintiff made complaints on multiple occasions about these racist comments. However, instead of taking actions to stop the harassment, Plaintiff's supervisor told him he would make his life a "living hell" for making the complaints. Then he proceeded to do just that. He ordered Plaintiff's coworkers to write him up for every possible infraction, disciplined Plaintiff for an accident caused by his coworker, and gave Plaintiff a much worse performance evaluation then he received before. The retaliation and discrimination culminated with Plaintiff being denied a promotion to a full time employee on multiple occasions in favor of white individuals who did not complain about discrimination.

The evidence in this matter establishes Plaintiff was subjected to a racially hostile work environment, was discriminated against because of his race and retaliated against when he made complaints about the harassment. For all of the forgoing reasons Plaintiff respectfully requests this Honorable Court rule in his favor and deny Defendant's Motion for Summary Judgment.

II. STATEMENT OF FACTS

For the purposes of this brief, Plaintiff adopts all of the facts alleged in his response to the Defendant's Statement of Undisputed Facts and the Plaintiff's Counterstatement of Facts in support of this brief.

III. LEGAL ARGUMENT

A. Standard of Review

Summary Judgment is proper only 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." N.J.R. 4:46-2. When deciding on a motion for summary judgment under the New Jersey Rules, the determination as to whether there exists a genuine issue with respect to a material fact challenged requires the motion judge to consider whether the competent evidential materials presented when viewed in light most favorable to the non-moving party in consideration of the applicable evidentiary standard are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. *Brill v. Guardian Life Insurance Company of America*, 142 N.J. 520, 523 (1995).

The inquiry that the court must engage in 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 Insurance Corp., Inc. v. Nowell Amoroso, P.A.*, 189 N.J. 436, 445-46 (2007). When the court reviews the facts, "it is not the same kind of inquiry that a fact finder (judge or jury) engages in when assessing the preponderance of credibility of evidence." *Id.* at 446. When the court summarizes the facts in a motion for summary judgment, the court does so in the light most favorable to the plaintiff, giving the plaintiff the benefit of all

favorable inferences in support of his or her claims. *Suarez v. E. Int-L Coll.*, 428 N.J. Super 10, 18-19 (App. Div. 2012).

Given all the evidence presented in this matter, a reasonable trier of fact could find that Plaintiff was subjected to severe and pervasive racial harassment and retaliation and was discriminated against because of his race and retaliated against in violation of the New Jersey Law Against Discrimination ("LAD").

B. Racial Hostile Work Environment

The New Jersey Law Against Discrimination ("LAD") prohibits employers from discriminating against employees, based on, among other things, race. N.J.S.A. § 10:5-1 et seq. The New Jersey Supreme Court has held that LAD protects employees from racial discrimination in the workplace. *Lehmann v. Toys R Us, Inc.*, 132 N.J. 587, 601 (1993).

To state a claim for hostile work environment, a plaintiff must establish that the complained-of conduct (1) would not have occurred but for the employee's race; and it was (2) severe or pervasive enough to make a (3) reasonable person of Plaintiff's race believe that (4) the conditions of employment are altered and the working environment is hostile or abusive. *Id.* at 603-04. Regarding the second, third and fourth factors, the court has held that "the second, third, and fourth prongs, while separable to some extent, are interdependent. One cannot inquire whether the alleged conduct was severe or pervasive without knowing how severe or pervasive it must be." *Id.* at 604 (internal quotations omitted). The conduct must be severe or pervasive enough to make a reasonable person of that race believe that the conditions of employment are altered and his working environment is hostile. *Id.*

1. The Racial Comments Made By Defendant And Its Employees Were Racial In Nature And Therefore, The But-For Element Is Satisfied

The New Jersey Supreme Court has held that "When the harassing conduct is sexual or sexist in nature, the but-for element will automatically be satisfied." *Lehmann* 132 N.J. at 605. Therefore, the same standard applies in race discrimination claims that if the conduct is racial in nature, the but-for element is satisfied. Where comments are made about "the lesser abilities, capacities, or the proper role of members" of the protected category, the Plaintiff has established that the harassment occurred because of that protected category. *Id.* at 605. The comments made by Defendant and its employees were clearly race-based and racial in nature. The comments included referring to Plaintiff as Hector, Carlos and Jesus when that is not his name, , making a comment about hanging Plaintiff and hanging "niggers," suggesting Plaintiff supervise only the black Day Reporter's, referring to Plaintiff as a "spic," stating the President of the United States should get all of the "Mexicans" out of the country, stating Plaintiff did not have a gas card because he was Puerto Rican and would steal the gas, and a statement by Plaintiff's supervisor that he does not recognize Martin Luther King day because he is not black. (See Plaintiff's counterstatement of material facts hereinafter referred to as "CMF" ¶¶ 11-13, 14-17, 76-81, 85.)

In its motion, Defendant does not even appear to argue the harassing comments were not racist in nature. Therefore, a reasonable trier of fact could find that the comments were made because of Plaintiff's race.

2. A Reasonable Trier Of Fact Could Find That Defendant's Conduct Was Sufficiently Severe or Pervasive To Alter The Conditions Of Plaintiff's Work Environment

(a) Court must consider the cumulative effect of the incidents of harassment

In establishing hostile work environment claims, "most plaintiffs claiming hostile work environment . . . harassment allege numerous incidents that, if considered individually, would be

insufficiently severe to state a claim, but considered together are sufficiently pervasive to make the work environment intimidating or hostile." *Lehmann* 132 N.J. at 607. The required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct. *Id.* 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." *Id.*

The New Jersey Superior Court has also held that when harassment in engaged in by the Plaintiff's supervisor, that adds to the severity of the harassment. In finding defendant's harassment to be severe and pervasive in *Leonard v. Metro. Life Ins. Co.*, 318 N.J. Super. 337 (App. Div. 1999), the court reasoned that "the severity of the remarks was underscored by the fact that they were uttered by plaintiff's supervisor, who has a unique role in shaping the work environment and preventing and rectifying invidious harassment in the work place." *Id.* at 345 (internal quotations omitted). Considering the cumulative effect of the various incidents of harassment Plaintiff was subjected to, and the fact that several of the comments and actions were performed by or condoned by his supervisor, and the severity of those comments, a reasonable trier of fact could find that the harassment the Plaintiff was subjected to was severe or pervasive.

(b) The cumulative effect of the incidents of harassment establish a hostile work environment in this matter

In *Taylor v. Metzger*, 152 N.J. 490, 498 (1998) the New Jersey Supreme Court held that when a black employee was called a "jungle bunny" on one occasion, that comment by itself was sufficient to survive a summary judgment motion in a LAD hostile work environment claim. 152 N.J. at 506. The court equated being called a "jungle bunny" to being called a "nigger." The court reasoned that, "The use of the term 'nigger' has no place in the civil treatment of a

citizen . . . Likewise, when defendant called plaintiff a 'jungle bunny,' he may have stepped beyond our civilized community's bounds of decency. A jury should determine whether defendant's remark was outrageous or merely an insult." *Id.* at 506 (internal citations omitted). In holding so, the *Metzger*, court also cited to a 7th Circuit opinion in *Rodgers v. W.-S. Life Ins. Co.*, 12 F.3d 668, (7th Cir. 1993) as to the impact of the word "nigger". *Id.* The court in *Rodgers* held that "Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as 'nigger' by a supervisor in the presence of his subordinates." *Rodgers*, 12 F.3d at 675; *accord Metzger*, 152 N.J. at 506.

The harassment Plaintiff was subjected to is significantly more than what the plaintiff was subjected to in *Metzger*. Plaintiff was subjected to the following harassment while employed with Defendant: (1) his supervisor Sperlak referred to him as Hector, Carlos, Jesus and other traditional Hispanic names from the time he began working there around September 2012, until the time Plaintiff filed his lawsuit in March 2014; (2) in October 2012, Plaintiff's coworker Karl Chase stated that deer hanging ropes were for hanging Plaintiff and hanging "niggers"; (3) less than two weeks after Plaintiff reported this comment to Sperlak, he made a joke in front of Plaintiff and other employees about hanging himself; (4) in or around October 2012, Plaintiff witnessed Sperlak discriminate against three non-white residents (two Hispanic and one black) who were attempting to empty trash at the Township by first instructing Plaintiff to kick them off the property and then calling the cops on them when they had done nothing wrong; (5) when Plaintiff complained to the Municipal Clerk, Johnson, about Chase's hanging "niggers" comment, Johnson responded that if he thought that was bad he should hear what the women in her office say; (6) in the summer or fall of 2013, Plaintiff's coworker Kahn suggested that he

supervise the white Day Reporters and Plaintiff supervise the black ones; (7) Kahn stated to the Day Reporters about Plaintiff, "I heard the spic didn't get the promotion;" (8) Kahn stated to Plaintiff on several occasions that if he was President he would kick all of the Mexicans out of America; (9) Kahn told Plaintiff that the reason Plaintiff did not have a gas pass code was because Plaintiff was Puerto Rican and might steal the gas; (10) Plaintiff's supervisor Sperlak was asked if the employee's had off for Martin Luther King Jr. day and responded "I'm not black." (CMF ¶¶ 11-13, 14-17, 20-24, 25-29, 30-31, 76-81, and 85.)

(c) Defendant's argument that the harassment Plaintiff was subjected to was not severe or pervasive is not supported by the facts

Defendant argued in its Motion "Accepting as true that the comments that plaintiff objected to were made, they do not rise (or sink) to the level of a hostile work environment; quite simply there is no 'pattern' giving rise to a hostile work environment claim. A claim cannot be established by 'epithets or comments which are merely offensive.'" (Def Brief, p. 14 (internal citations omitted).) This argument by Defendant is erroneous for several reasons. First, as the New Jersey Supreme Court held in *Metzger*, a plaintiff does not have to establish a "pattern" of harassment. *Metzger*, 152 N.J. at 506. Furthermore, as the court held in *Metzger*, when the harasser uses words such as "nigger" or "jungle bunny" in reference to an employee, those are not "merely offensive" comments. When Plaintiff's coworkers used the words "niggers" and "spic" to refer to Plaintiff they clearly "stepped beyond our civilized community's bounds of decency" and therefore "A jury should determine whether defendant's remark was outrageous or merely an insult." *Id.*

Given the nature and severity of the comments made to Plaintiff, and the fact that they were made by, or condoned by his supervisor and other members of management, a reasonable trier of fact could find the comments made were severe or pervasive.

3. As Reasonable Trier of Fact Could Find That Defendant Is Liable For The Harassment Plaintiff Was Subjected To

The New Jersey Courts have held that an employer is liable for the harassment of a third party where an employer (1) knew or should have known about the harassment and failed to take effective remedial action, *Woods-Pirozzi v. Nabisco Foods*, 290 N.J. Super. 252, 269 (App. Div. 1996); (2) where a defendant delegates power to a supervisor, and that supervisor uses that power to harass an employee, *Lehmann*, 132 N.J. at 620; and (3) where a defendant is negligent in failing to promulgate an effective and practical anti-harassment policy. *Gaines v. Bellino*, 173 N.J. 301, 318 (2002).

(a) Defendant knew or should have known about the harassment Plaintiff was subjected to and failed to take prompt and effective remedial action to stop it

The New Jersey Superior Court held in *Woods-Pirozzi* that "An employer may also be responsible for the acts of *non-employees,* with respect to . . . harassment of employees in the workplace, where the employer **(or its agents or supervisory employees)** knows or should have known of the conduct and fails to take immediate and appropriate corrective action." 290 N.J. Super at 268 (emphasis added). Effective remedial measures are "those reasonably calculated to end the harassment." *Lehmann*, 132 N.J. at 623. The "reasonableness of an employer's remedy will depend on its ability to stop harassment by the person who engaged in harassment." *Id.*

Defendant's supervisory employees knew about the harassment Plaintiff was subjected to, because one of the supervisory employees, Sperlak, was one of the harassers. (CMF ¶¶ 11-13; 20-24 85.) Furthermore, Plaintiff complained about the harassment on the following

occasions: (1) Plaintiff complained to Sperlak and Ayers when Sperlak called Plaintiff Hector, Carlos and Jesus; (2) Plaintiff complained to Sperlak, Johnson and Ayers about Chase's "hanging niggers" comment, and Sperlak's racial discrimination; (3) Plaintiff wrote a letter that his union representative provided to Johnson regarding harassment; and (4) Plaintiff complained to Kahn about the "spic" comment, which Kahn brought to the attention of Johnson. (CMF ¶¶ 11-13, 30-31, 70-75, 78.)

Defendant failed to take prompt and effective remedial measures to stop the harassment. This is clear because the harassment continued after Plaintiff's complaint to Sperlak and to Johnson. (CMF ¶¶ 11-13, 76-85); *see Lehmann*, 132 N.J. at 623 ("[The] reasonableness of an employer's remedy will depend on its ability to stop harassment by the person who engaged in harassment.") Defendant failed to take the proper steps under its own discrimination policy when Plaintiff made his first complaint to Johnson. She initially joked that Plaintiff should hear what people in her office say, when he told her about the "hanging niggers" comment. (CMF ¶ 31.) Johnson then failed to explain the complaint policy to Plaintiff, did not tell him he could make a written complaint, failed to create a file for the complaint as required by the policy, never read back her notes to Plaintiff to confirm their accuracy as required by the policy, and never told the other people she interviewed, Kahn and Chase, they cannot retaliate against Plaintiff. (CMF ¶¶ 31, 33, 37-44.) Johnson admitted that the Township did not conduct *any* investigation at all after Plaintiff made a second complaint through his union representative. (CMF ¶¶ 73-75.)

Therefore, the Defendant knew or should have known about the harassment and failed to take prompt and effective remedial action to stop it.

(b) A reasonable trier of fact could find that Defendant delegated authority to Sperlak who then used that authority to harass Plaintiff

Sperlak was Plaintiff's direct supervisor and then Director of Public Works at the time he harassed Plaintiff. (CMF ¶ 7-8, 11-13, 20-29, 45-50, 85.) As such, Sperlak had a unique role in shaping the work environment and preventing and rectifying invidious harassment in the work place. *See Leonard*, 318 N.J. Super. at 345. Sperlak used this authority to shape the environment by openly calling the Plaintiff names other than his own, making other discriminatory comments to the Plaintiff in front of his coworkers and members of management, and retaliating against Plaintiff for making complaints. (CMF ¶ 7-8, 11-13, 20-29, 45-50.) Because Sperlak was delegated the authority first as Plaintiff's supervisor then as the Director of Public Works, and used that position to create a hostile work environment, a reasonable trier of fact could find that the Defendant is liable for Sperlak's actions.

(c) A reasonable trier of fact could find that Defendant failed to promulgate an effective and practical anti-harassment policy

In *Gaines*, the New Jersey Supreme Court held that the issue of whether the defendant promulgated a sufficient anti-harassment policy was a question for the jury. 173 N.J. at 318. The court held in *Gaines* that despite the plaintiff's failure to file a formal complaint, the defendant could still be held liable for being "negligent in combating the creation of a sexually discriminatory hostile work environment by failing to establish meaningful and effective policies and procedures for employees to use in response to harassment." *Id.* The court further held that the defendant's failure to monitor the effectiveness of its policy could also allow a reasonable trier of fact to find liability of the defendant. *Id.*

A reasonable trier of fact could find Defendant failed to promulgate an effective anti-discrimination policy. Defendant had a written anti-discrimination and anti-harassment policy. However, as articulated above, Defendant failed to follow that policy when Plaintiff made complaints about discrimination and harassment. Furthermore, a reasonable trier of fact could

find Defendant's employees were not properly trained on that policy. Prince testified that he has never seen the policy, does not know if it is in writing and was never trained on the policy. (CMF ¶¶ 89-90.) Kahn testified he does not know one way or another if there was a policy. (CMF ¶ 93.) Ayers, who was the Director, testified he never received training on the policy. (CMF ¶¶ 91-92.) Johnson, the Municipal Clerk since 2004, testified she received training on the policy but does not know how long ago, or when the last time that training occurred. (CMF ¶ 94.)

(d) Defendant's reliance on the recent decision in *Aguas* to establish that liability does not exist is misplaced

Defendant argues in its Motion that under the recent decision in *Aguas v. State*, 220 N.J. 494 (2015) it should not be liable for the harassment Plaintiff was subjected to. (Def Mot., p. 13-14.) However, the opinion in *Aguas* establishes Defendant *should* be liable for the harassment. The *Aguas* opinion held that:

> In a hostile work environment sexual harassment case under the LAD in which the plaintiff alleges employer vicarious liability under *Restatement* § 219(2)(d), the plaintiff has the initial burden of presenting a prima facie hostile work environment claim. If no tangible employment action has been taken against the plaintiff, the defendant employer may assert the two-pronged affirmative defense of *Ellerth* and *Faragher*. To establish that defense, the defendant employer has the burden to prove, by a preponderance of the evidence, *both prongs of the affirmative defense*: **first, that the employer exercised reasonable care to prevent and to correct promptly sexually harassing behavior; and second, that 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 (emphasis added). Defendant fails to meet both prongs. Plaintiff clearly took advantage of corrective opportunities by making multiple complaints to Defendant about harassment. Furthermore, for the reasons articulated in Plaintiff's Counterstatement of Material Facts and this brief, a reasonable trier of fact could find Defendant failed to exercise reasonable care to prevent and correct racial discrimination.

Because Defendant knew about the harassment and failed to take prompt and effective remedial measures to stop it, delegated authority to Sperlak which he used to harass Plaintiff, and failed to promulgate an effective anti-discrimination and anti-harassment policy, a reasonable trier of fact could find that Defendant is liable for the harassment Plaintiff was subjected to.

C. Retaliation

The LAD makes it illegal for any person to take reprisals against any person because that person has opposed any practices or acts forbidden under the act. *N.J.S.A.* 10:5–12(d). All LAD claims are evaluated in accordance with the United States Supreme Court's burden-shifting mechanism. *Battaglia v. United Parcel Serv., Inc.*, 214 N.J. 518, 546 (2013). When the claim arises from alleged retaliation, the elements of the cause of action are (1) that the employee engaged in a protected activity known to the employer; (2) the employee was subjected to an adverse employment action; and (3) there is a causal link between the protected activity and the adverse employment action. *Woods–Pirozzi* 290 *N.J.Super.* at 274. Defendant does not appear to argue the first factor that Plaintiff engaged in protected activity that was known to the employer. (Def Brief, p. 16.) Therefore, Plaintiff will only address the second and third factors for the purpose of this brief.

1. A Reasonable Trier Of Fact Could Find Plaintiff Suffered From An Adverse Employment Action As Such Has Been Defined By New Jersey Courts

New Jersey Courts have recognized that a plaintiff can bring a retaliatory hostile work environment claim. *See e.g. Green v. Jersey City Bd. of Educ.*, 177 N.J. 434, 448 (2003); *Nardello v. Twp. of Voorhees,* 377 N.J. Super. 428, 436 (App. Div. 2005) (recognizing retaliatory hostile work environment claim). A retaliatory hostile work environment exists where an employee takes an adverse employment action in the form of "many separate but

relatively minor instances of behavior directed against an employee that may not be actionable individually but that combine to make up a pattern of retaliatory conduct." *Green*, 177 N.J. at 448. Although the *Green* case involved the Conscientious Employee Protection Act ("CEPA"), the New Jersey Supreme Court acknowledged the similarities between the LAD and CEPA for the purpose of retaliatory hostile work environment claims reasoning that "The whistleblower statute, like LAD, is a civil rights statute. Its purpose is to protect and encourage employees to report illegal and unethical workplace activities and to discourage public and private sector employers from engaging in such conduct." *Id.* at 443.

In *Nardello*, the New Jersey Superior Court held that the plaintiff could establish he suffered "adverse retaliatory actions by his employer" even where he was not "discharged, suspended or demoted." 377 N.J. Super. at 436. In *Nardello*, the plaintiff was subjected to the following adverse actions:

> In 1999, plaintiff obtained the third highest rank in the department-a lieutenant. As a lieutenant, he was in charge of the SWAT team. Plaintiff set forth several instances beginning in 1999 where he was forced to inform superiors of cover-ups and alleged misconduct. Because of this, plaintiff claims he was: denied permission to obtain firearms instructor training relative to his membership on the SWAT team; coerced to resign as leader and a member of the SWAT team; denied the ability to work on crime prevention programs; and removed from the detective bureau, with his authority to supervise taken away. He also claims he was given demeaning jobs for his rank

Id. at 435-36. The court held that "when the facts are viewed in a light most favorable to him, a jury could draw an inference that he suffered a series of adverse retaliatory actions by his employer." *Id.* at 435. In holding so, the court reasoned that

> We are mindful that plaintiff suffered no reduction in pay during the course of his employment. He claims among other things, however, that he suffered emotional distress as a result of his employer's actions. As our New Jersey Supreme Court recently noted in a case brought under the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 to -42, "the Legislature intended victims of discrimination to obtain

> redress from mental anguish, embarrassment, and the like, without limitation to severe emotional or physical ailments."

Id. (*quoting Tarr v. Ciasulli,* 181 *N.J.* 70, 81 (2004)).

The adverse employment actions Plaintiff was subjected to were much more severe than those in *Nardello*. Immediately after Plaintiff made his complaint about harassment, his coworkers began alienating him in the workplace. (CMF ¶ 36.) The retaliation escalated to a new level once Ayers left and Sperlak became the Director on March 7, 2013. (CMF ¶¶ 45-46.) Sperlak told Plaintiff if he complained to Johnson again he would make Plaintiff's life a "living hell." (CMF ¶¶ 47.) He then proceeded to do just that for the next year. The retaliation included the following: (1) telling Plaintiff he would make his life a living hell if Plaintiff complained again; (2) telling Plaintiff Sperlak was the boss and one or two write-ups and Plaintiff was "out of here;" (3) threating to write Plaintiff up "constantly;" (4) denying Plaintiff's application for a full-time position on two separate occasions; (5) telling all of Plaintiff's coworkers to write down everything Plaintiff does wrong; (6) unfairly disciplining Plaintiff for an accident that occurred while his coworker was driving; (7) documenting that Plaintiff "deliberately" caused damage to the property, when he had no evidence Plaintiff had done so; and (8) giving Plaintiff an unjustified poor job evaluation when he received a good evaluation and a raise in the past. (CMF ¶¶ 45-69; 82-84.)

Given all of these facts, a reasonable trier of fact could find that Plaintiff was subjected to an adverse employment action as a result of engaging in protected activity.

2. A Reasonable Trier Of Fact Could Find There Is A Causal Connection Between Plaintiff's Protected Activity And The Adverse Employment Actions He Was Subjected To

Where a plaintiff can establish temporal proximity between the protected activity and the adverse employment action it is often sufficient to raise the inference that the plaintiff's protected

activity was the likely reason for the adverse action. *Rogers v. Alternative Res. Corp.*, 440 F. Supp. 2d 366, 376-77 (D.N.J. 2006) (*citing Kachmar v. SunGard Data Sys., Inc.,* 109 F.3d 173, 177 (3d Cir.1997)). A plaintiff may also establish causation, even where there is a lack of temporal proximity, with circumstantial evidence of a pattern of antagonism following the protected conduct, or other evidence such as inconsistent reasons for termination, evidence casting doubt on reasons proffered for termination, and a change in demeanor after a complaint of discrimination. *Id.*

In this matter, Plaintiff has established a causal connection between his protected activity and Defendant's retaliatory treatment of him. The day after a meeting was held regarding Plaintiff's complaints, his coworkers began to ignore him in the workplace. (CMF ¶ 36.) Sperlak testified that he was "upset" Plaintiff made a complaint about him during the Harassment Complaint Meeting. (CMF ¶ 34.) Furthermore, there is no evidence Defendant had any problem with Plaintiff's job performance prior to his complaint. In fact, Plaintiff received a good evaluation and a raise in September 2012 prior to his complaint. (CMF ¶ 84.) However, after Plaintiff's complaint, Sperlak instructed his coworkers to write down every single problem they had with Plaintiff's job performance, and Plaintiff received a poor job evaluation. (CMF ¶¶ 64-67; 83.)

There is also direct evidence that Sperlak's hostility was because of Plaintiff's complaint. Sperlak told Plaintiff if he made another complaint he would make his life a "living hell." (CMF ¶ 47.) Plaintiff can also establish that Defendant's reasons for its adverse actions are inconsistent. Plaintiff was written up and disciplined for an accident caused while his coworker was driving. His coworker was not disciplined. Furthermore, the discipline stated Plaintiff "deliberately" caused damage to company property. However, Sperlak acknowledges he does

not know if Plaintiff deliberately did so, but wrote that on the discipline anyway. (CMF ¶¶ 67-69.)

For all of these reasons a reasonable trier of fact could find the adverse employment actions Plaintiff was subjected to were because of his complaints about discrimination and harassment. Because Plaintiff can establish he engaged in protected activity, was subject to adverse employment actions subsequent to that activity, and a causal connection exists between the activity and the adverse employment actions, a reasonable trier of fact could find Plaintiff was retaliated against in violation of the LAD.

C. Race Discrimination

To establish a *prima facie* case of discrimination under the LAD a plaintiff must establish that (1) plaintiff was a member of a protected class; (2) plaintiff was qualified to perform the essential functions of the position of employment; (3) plaintiff suffered an adverse employment action; and (4) another individual outside the protected class was not subject to the same action. *Viscik v. Fowler Equip. Co.*, 173 N.J. 1, 13-14 (2002).

The LAD follows the framework "set forth in *McDonnell Douglas Corp. v. Green,* 411 *U.S.* 792, 93 *S. Ct.* 1817, 36 *L.Ed.*2d 668 (1973), recognizing that that framework is to be adapted to the circumstances of the claim." *Jason v. Showboat Hotel & Casino*, 329 N.J. Super. 295, 303, (App. Div. 2000). "Under *McDonnell Douglas,* the employee first must demonstrate a *prima facie* case of discrimination; the burden of producing evidence then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the action." *Id.*

"The employee then gets a fair opportunity to show that the employer's stated reason was in fact pretext or that the action in question occurred under circumstances which give rise to an inference of unlawful discrimination." *Id.* (internal citations omitted). "Once a defendant has

met its burden of production of a legitimate reason for the discharge, the plaintiff is afforded the opportunity to show that a discriminatory intent motivated the defendant's actions, and not the legitimate reason offered by defendant." *Id.* at 304. A Plaintiff may do this "indirectly, by proving that the proffered reason is a pretext for the retaliation, or directly, by demonstrating that a discriminatory reason more likely than not motivated defendant's action." *Id.*

1. Plaintiff Has Established All Of The Elements For A Prima Facie Case For Racial Discrimination

In its Motion, Defendant does not appear to argue Plaintiff cannot meet his burden to establish a *prima facie* claim for race discrimination. (See Def Brief pp. 15-16.) Defendant appears to only argue Defendant's had a legitimate non-discriminatory reason for any adverse employment actions. Therefore, Plaintiff will only briefly address the *prima facie* elements in this section of this brief.

Plaintiff is a member of a protected class as a "dark skinned-Puerto Rican." He is qualified to work as a laborer, and he suffered an adverse employment action when Defendant unfairly disciplined him, and refused to promote him to a full-time position. *See Jason*, 329 N.J. Super., at 303 (holding that "treating white employees more leniently than black employees for similar infractions can be a violation of the New Jersey Law Against Discrimination"). Finally, all of his similarly-situated white coworkers were promoted to full time positions at the Public Works Department, while Plaintiff was not.

2. Plaintiff Can Establish Defendant's Proffered Non-Discriminatory Reasons For Not Promoting Him To Full-Time Is Pretext For Discrimination

In June 2013 Plaintiff was notified that Defendant was going to post a position for a full-time laborer. (CMF ¶ 51.) Full time laborer was a position that existed in the Public Works Department in the past. (CMF ¶ 62.) When Defendant learned Plaintiff was going to apply for

the position, it changed to a light equipment operator position. (CMF ¶¶ 51-52.) Plaintiff was interviewed for this position, which demonstrates he met the basic requirements to fill the position. (CMF ¶¶ 53-54.) One of the requirements was that the employee have a CDL, which Plaintiff had. However, a white individual, Larry Prince, who did not have a CDL was hired for the position. (CMF ¶¶ 55-56.) At the time Prince applied, not only did he not have a CDL, but he was not even an employee of the Township. (CMF ¶ 56.) Subsequently, another full-time position opened, but Russ Smith, who is also white, was hired for that position. (CMF ¶ 60.)

Defendant argues in its brief that Plaintiff was not hired for a full-time position because another more qualified white person was hired instead. (Def Brief p. 20.) Defendant argues that the position also required a high school diploma or GED equivalent. (*Id.*) Plaintiff does not have either, but Defendant claims in its brief it did not know that at the time he was interviewed. Therefore that cannot be the reason he was denied the position. However, Johnson testified the reason Plaintiff did not receive the job was because he did not meet the high school diploma requirement. (CMF ¶ 61.)

The inconsistencies in changing the job being posted, and the reasons given by Defendant for why Plaintiff was not hired, along with the evidence of racial discriminatory animus toward Plaintiff outlined at length in this brief are sufficient to allow a reasonable trier of fact to find Defendant's proffered non-discriminatory reasons for not promoting Plaintiff to a full-time position to be pretext for discrimination.

Because Plaintiff can establish a *prima facie* case for race discrimination and a reasonable trier of fact could find Defendant's proffered non-discriminatory reason for not promoting Plaintiff is pretext for discrimination, Plaintiff's race discrimination claim should not be dismissed.

IV. CONCLUSION

While working at Defendant, Plaintiff was subjected to a hostile work environment because of his race, a dark-skinned Puerto Rican. The harassment consisted of being called Hector, Carlos, and Jesus, despite the fact that his name is Jose, being told deer hunting ropes were for hanging him and hanging "niggers," being called a "spic" being told he could not have a gas card because he was Puerto Rican and might steal gas, among other things. When he complained about the harassment, his job was threatened, he was unfairly disciplined, and denied a promotion to a full-time employee.

For all of these reasons, and those articulated at length in Plaintiff's brief, Plaintiff respectfully requests this Honorable Court rule in favor of Plaintiff and deny Defendant's Motion in it entirety.

Date: 1/11/16

Drake P. Bearden, Jr.