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| JOSE ROBLES,<br><br>Plaintiff,<br><br>v.<br><br>MULLICA TOWNSHIP and JOHN DOES 1-5 AND 6-10,<br><br>Defendants. | SUPERIOR COURT OF NEW JERSEY<br>LAW DIVISION – ATLANTIC COUNTY<br><br>DOCKET NO.: ATL-L-871-14<br><br>Civil Action<br><br>**BRIEF IN SUPPORT OF DEFENDANT MULLICA TOWNSHIP'S MOTION FOR SUMMARY JUDGMENT** |

## PROCEDURAL HISTORY

The Complaint was filed on March 10, 2014. Plaintiff Robles sued Mullica Township under the New Jersey Law Against Discrimination alleging discrimination based on race, racial harassment and retaliatory harassment. (See Complaint) (Baxter Decl., Exhibit "A") An Answer was filed on behalf of Mullica Township on April 17, 2014 denying the allegations. (See Answer) (Baxter Decl., Exhibit "B")

The normal discovery process followed with the exchange of interrogatories, documents and depositions of the plaintiff and various representatives of Mullica Township. The discovery end date in the case was September 9, 2015. The matter has been listed for trial on Monday, November 30, 2015. The defendant Mullica Township is now moving for summary judgment as plaintiff has failed to meet his burden of demonstrating that a violation of the NJ LAD has occurred.

## PRELIMINARY STATEMENT

The Township of Mullica gave the plaintiff an opportunity when he was hired as a part-time laborer in 2011 after being unemployed for two years. He had no experience as a laborer as he spent most of his adult career working on a casino floor.

The incident at the heart of his claim of discrimination occurred in 2012. He alleges that a co-employee, Karl Chase, used a racial epithet directed at African Americans. Apparently this epithet was not directed at plaintiff as he describes himself as a dark skinned Puerto-Rican. Immediately after the plaintiff complained to his shop steward and his supervisor, the Township performed an investigation. The plaintiff, Chase and an alleged witness were separately interviewed. The superintendent of Public Works held a meeting with all his employees. He read from the sections of the employee manual concerned with discrimination and harassment and reiterated the strict Township policies on the issue. He informed the employees that such language, if used, was not condoned by the Township and in the future would cause any employee to be subject to discipline.

Karl Chase denied making the comment described by Robles and the independent witness stated that he did not hear it. Therefore, the Robles complaint did not result in any discipline to Chase.

The plaintiff interviewed for the position of light equipment operator, a full-time position with benefits, despite the fact that he did not have the necessary qualifications, (ironically unknown to the Township until his deposition in this matter.) The job required either a high school diploma or a GED neither of which the plaintiff possessed. He was not hired for the position and asserts that his failure was the result of discrimination by the Township.

In the summer of 2013, Robles was a spotter for an employee attempting to back up a chipper truck. Unfortunately, he failed to adequately perform his job, an accident occurred and Township equipment was damaged. Robles received a written reprimand. He did not believe the reprimand was appropriate and contacted his union representative several weeks later. The Township clerk and the superintendent of Public Works met with the union representative who indicated he would follow up if there was merit to the plaintiff's allegations but never did.

The plaintiff, after consultation with his sister-in-law and friends, decided to sue the Township. Once word spread that Robles was going to sue (and he made no secret of his intentions) other employees became apprehensive. Some employees complained to the new superintendent, Steve Sperlak, that Robles was not "carrying his weight."

The plaintiff admits that he has never been suspended, suffered any kind of wage loss or received any other written reprimand. The plaintiff never filed a written complaint against anyone, his verbal complaint against Karl Chase was thoroughly investigated by the Township. The only written complaint filed during this period of time was by an employee, Ronald Kahn, against the plaintiff for allegedly spreading rumors that Kahn was a racist. The Township investigated by interviewing the plaintiff, Kahn and another individual. The plaintiff denied the allegations and the complaint was found to be not proven. There were no repercussions for the plaintiff.

Robles has never received any kind of medical or psychiatric treatment as a result of the alleged discrimination he suffered. He admits that from November 2013 until the present things have gotten much better, there have not been any actions, words, etc. since then, which he considers hostile or improper. He has no intention of leaving his employment with the Township and has not applied for jobs elsewhere.

## STATEMENT OF FACTS

Mullica Township has been sued by one of its current employees, Jose Robles, under the New Jersey Law Against Discrimination, (LAD). Mullica Township has a written employee manual which is presented to all employees upon being hired. The manual contains a strong anti-discrimination policy and contains instructions for filing complaints with the Township by employees when they believe they have been aggrieved or subject to discrimination. (See Personnel Manual bates-stamped 0001-00064)

The plaintiff who resides in Hammonton, New Jersey applied for a position as a part-time laborer with Mullica Township in 2011. Previously he had been a long time worker in the casino industry in Atlantic City but had been laid off in 2009 as a result of the economy. (Robles dep., 10:5; 12:7-19)

Although he had no experience as a laborer he was hired by the Township in 2011. His job involved working 56 hours every two weeks and he was paid $10 an hour to start. Basically his duties involved such activities as weed whacking, working at the transfer (recycling station), filling potholes, mowing and operating a snow plow. (Robles dep., 16:1-23) Robles remains working at Mullica Township as a part-time laborer making $11.10 an hour. (Robles dep., 17:20-25; 18:1-7)

The initial incident which led to the filing of this lawsuit occurred in 2012 when he was working with another Public Works employee Karl Chase, a part-time laborer. According to plaintiff he was in a truck with another laborer, Ronald Kahn, Chase was following in a separate truck. At some point they were driving near a hunting/deer club building and there appeared to be some wires hanging. When the plaintiff asked

what was the purpose of the wires or ropes, Chase supposedly said: "to hang niggers." (Robles dep., 44:17-24; 45:1-10; 45:15-23)

The plaintiff told Karl not to talk like that in front of him. The plaintiff is not African-American, he describes himself as a dark skinned Puerto-Rican. (Robles dep., 45:2-4; 54:13)

At some point after the Chase comment was made, Robles reported it to Steve Sperlak, then the shop steward, Sperlak told him that he was going to tell the superintendent Matt Ayers about the comment. Once the superintendent heard about the comment it was reported to Kim Johnson, the Township Clerk, and an investigation was begun. Although Robles did not wish to make a written complaint, Johnson considered his statement a verbal complaint which should be investigated. Matt Ayers told her that he would convene a departmental meeting to speak to all of the employees to inform them that the Township did not condone discrimination of any kind. (Johnson dep., 26:15-16; 27:1-21)

Both Johnson and Ayers spoke to Chase and Robles separately and then later together. They spoke with Ronald Kahn and asked if he had heard the comment. Chase denied making the comment and Kahn said that he did not hear any sort of racial comment. (Johnson dep., 28:12-18; 29:19-24)

It was ultimately decided that it was a "he said/she said" kind of situation because there was no eyewitnesses and therefore, there was no discipline issued to Karl Chase. (Johnson dep., 37:6-10)

Ayers told all of the employees at the meeting that there would be no tolerance for such language. He warned the employees that if it happened again disciplinary actions would be taken. (Ayers dep., 16:24-25; 17:1-16)

Ayers believed that there was nothing else that he could have done in light of the denials by Chase and the lack of witnesses. During the remaining months of his tenure, he did not hear of any other complaints of a similar nature. (Ayers dep., 19:10-14)

Plaintiff has cited to several other incidents which he believes demonstrate a hostile work environment that he was subjected to in Mullica Township. One such incident occurred when he believed that Steve Sperlak was showing favoritism to two white residents at the transfer station who were allowed to stand around and talk for some time but later when two Hispanic men and a black man were at the station, Sperlak yelled at them to get out of there because they were taking too much time unloading trash. (Robles dep., 47:16-18; 48:9-25)

Plaintiff objected to a remark made by Steve Sperlak which occurred when there was work being performed which involved scaffolding and the fact that employees should be wearing harnesses. Supposedly Sperlak said something about hanging himself, the plaintiff confronted Sperlak saying "that you shouldn't be making a joke about it." (Robles dep., 52:7-18)

The plaintiff remembered Ronald Kahn sometime saying that he would get rid of Mexicans and also commenting that Puerto-Ricans steal gas. (Robles dep., 54:2-3; 77:10-13)

Ironically it was Ronald Kahn that filed the only written complaint against anyone during this time period. He filed a complaint against the plaintiff because he believed that the plaintiff was spreading rumors that he, Kahn, was a racist. (Kahn dep., 15:17-22) This complaint was investigated by Kim Johnson as per the Township policy, Robles was interviewed as was Kahn and again it was found to be a "he said/she

said" type thing. Therefore, there was no finding against Robles as a result of that complaint. (Johnson dep., 37:4-10)

Plaintiff believes that he was unfairly issued a written reprimand in August 2013. This occurred when his supervisor found that the plaintiff had failed to adequately "spot" as another employee was backing up a Township vehicle. A collision occurred and Township equipment was damaged. The written reprimand was dated August 13, 2013. (Robles dep., 72:21-25)

The plaintiff did not believe that he deserved the reprimand because he asserted that it was the fault of the driver. Only after receiving the reprimand did the plaintiff correspond with his union representative complaining about his treatment in Mullica Township. (Robles dep., 71:20-25)

Although the union representative later met with the Township Clerk and the Superintendent and presented then with the plaintiff's letter, he never followed up despite stating that he would perform his own investigation and take action on behalf of the plaintiff if he thought there was any merit to his complaints. (Robles dep., 74:22-25; 75:1-8) (Johnson dep., 64:8-13; 67:2-9)

The plaintiff believes that Sperlak unfairly criticized him for his failure to complete work assignments, etc. (Robles dep., 43:2-3; 75:9-14; 76:15-25) He believes that Sperlak deliberately did not call him by his proper name Jose rather he used names such as "Jesus," "Hector," etc. and sometimes appeared to be speaking Spanish. However, after Jose complained, Sperlak stopped calling him by the wrong name. (Robles dep., 43:5-9; 43:14-25; 44:1-16; 56:4-12)

The incidents described by the plaintiff occurred from the fall of 2012 until November 2013. The plaintiff admits that since November 2013 he cannot remember

any acts that he considered to be harassment of any kind from anyone at Mullica Township. He now says that he gets along much better with the other employees in the department and even gets along with his supervisor Steve Sperlak.

The plaintiff has never been suspended nor has he lost any income as a result of any actions taken by Mullica Township. He continues to work as a part-time laborer. He has never sought any medical or psychological treatment for any problems he claims that occurred at Mullica Township. (Robles dep., 42:9-19) Other than applying for another part-time position with the Atlantic County Utility Authority, he has never sought any employment with any other employer since he first began working at Mullica Township in 2011. (Robles dep., 20:4-24)

## LEGAL ARGUMENT

### I. Standard For Summary Judgment

New Jersey Court Rule 4:46-2 provides that summary judgment is to be granted when:

> 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.

The New Jersey Supreme Court in the leading case of Brill v. Guardian Life Insurance Company of America, 142 N.J. 520 (1995) set forth the standard for granting summary judgment. As the Supreme Court stated:

> Under this new standard, a determination of whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider 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.

142 N.J. at 540.

The question is still whether there was a genuine issue as to a material fact challenged, id. at 523, but the Brill standard permits a weighing of evidence to determine if there is a genuine issue of material fact. Id. at 536.

Additionally, the Brill court stated: "The thrust of today's decision is to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves." Id. at 541. As the Supreme Court reasoned "to send a case to trial, knowing that a rational jury could reach but one conclusion, is indeed 'worthless' and will 'serve no useful purpose.' Id. (quoting Judson v. People's Bank & Trust, 17 N.J. 67, 77 (1954)).

Because the plaintiff will not be able to prove his claims of discrimination summary judgment dismissing the Complaint is appropriate.

## II. The Facts That the Plaintiff Cites In Support Of His Claims.

All of the plaintiff's claims brought under the New Jersey Law Against Discrimination (LAD) are predicated upon certain incidents which occurred primarily during 2012 and ultimately ended in November 2013. Plaintiff admits that there have been no incidents since November 2013 which would support any claims under the LAD. The plaintiff has not been demoted, terminated or suspended at any time during his employment with Mullica Township.

The facts that plaintiff relies upon to make out some kind of claim under the LAD are as follows:

- Thc incident involving Karl Chase and his alleged statement to the plaintiff that the wires and ropes at a hunting club facility were for hanging niggers.
- The incident occurring at the transfer station of Mullica Township that plaintiff believes demonstrates prejudice on the part of Steve Sperlak, his supervisor. Supposedly Sperlak told individuals of color to move as they were taking up too much time but did not tell two white residents to leave even though they had spent the same amount of time at the transfer station.
- The occasions when Steve Sperlak called the plaintiff "Jesus," "Hector," etc. instead of by his proper name Jose.

- The incident occurring after the Chase comment when Sperlak spoke about the proper way to use a harness when working on poles, the plaintiff thought that Sperlak was trying to be funny by talking about hanging himself.
- Comments by Ronald Kahn that "if he was president, he would get rid of the Mexicans."
- The receipt of the written reprimand in August 2013 admonishing the plaintiff for his failure to properly "spot" while another employee was backing up a Township vehicle which resulted in damage to the vehicle.
- Comments supposedly made by Ronald Kahn about Puerto-Ricans stealing gas.
- Plaintiff's failure to be awarded the position of light equipment operator.
- The plaintiff's belief that his supervisor Steve Sperlak is too hard on him and criticizes his work ethic.

An analysis of the case law surrounding the LAD reveals that the totality of these incidents spread over a year and a half do not support a valid claim under the LAD.

## III. The Plaintiff Has Failed to Demonstrate That He Was Subjected To A Hostile Work Environment

A hostile work environment claim follows the same burden shifting analysis as other discrimination claims under the LAD: (1) the plaintiff must come forward with sufficient evidence to constitute a prima facie case of discrimination; (2) the defendant then must show a legitimate, non-discriminatory reason for its decision; and (3) the plaintiff must then be given the opportunity to show that defendant's stated reason was

merely a pretext or that it was discriminatory in its application. Dixon v. Rutgers, The State Univ. of N.J., 110 N.J. 432 (1980).

A plaintiff must show that the conduct complained of would not have occurred but for the employee's membership in a protected class, and that the conduct was severe or pervasive enough to make a reasonable person believe that the conditions of employment were altered and the working environment was hostile or abusive. Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587 (1993); Taylor v. Metzger, 152 N.J. 490 (1998). To support a claim, the conduct must be sufficiently pervasive or severe. In some cases, a single incident can trigger liability if the incident is severe enough. Id. at 499.

In Metzger, the plaintiff, an African-American woman was working as a Sheriff's Officer in the Office of the Burlington County Sheriff. At one point while she was undergoing fire arm's training she encountered the defendant Sheriff Henry Metzger, who in response to her saying hello turned to a fellow officer and stated "there's the jungle bunny". The plaintiff believed the remark to be demeaning and a derogatory racial slur. Id. at 495. Eventually she became a nervous wreck. Later when she confronted the Sheriff, he harassed her and badgered her for interpreting the remark as a racial slur and brought her to tears on several occasions. Ibid.

Following the incident the plaintiff did not lose any income but eventually lost her position as a floor supervisor. The incident caused her severe emotional distress and she consulted a psychiatrist and became to suffer from insomnia, nightmares and was eventually diagnosed with "post-traumatic stress disorder." Metzger, 152 N.J. at 497.

The Court cited to Lehmann, supra for the doctrine that although it was certainly possible that a single incident if severe enough can establish a prima facie case of a hostile work environment, it would be an extremely rare and extreme case. Id. at 500. The Court eventually found that the use of a racial epithet directed at the plaintiff was exacerbated by the fact that it was uttered by a supervisor or superior officer. The Court specifically noted that the defendant was not an ordinary co-worker of plaintiff; rather he was the Sheriff which greatly magnified the gravity of the comments. Id. at 503. Eventually the Court held that in this unique case the circumstances that the insult was a racist slur directed against the plaintiff, uttered by the chief ranking supervisor of her employer and made in the presence of another supervising officer was sufficient to establish the severity of harassment and altered the conditions of plaintiff's work environment. Ibid.

In our case the remarks allegedly made by Chase and Kahn were made by co-employees, not the Superintendent of Public Works. Even more importantly, unlike in Taylor, there was an immediate response by the defendant Township, involving an investigation and departmental meeting reiterating the Township's strong policy against discrimination and harassment of any kind. The importance of the employer reacting quickly to complaints by a plaintiff is crucial in analyzing whether the employer can be found responsible under the doctrine of *respondeat superior*. *Respondeat superior* liability for hostile environment claims exists when:

> The defendant knew or should have known of the harassment and failed to take prompt remedial action. Thus, if a plaintiff proves that management-level employees had actual or constructive knowledge about the existence of a sexually hostile environment and failed to take prompt and adequate remedial action, the employer will be liable.

Giordano v. William Paterson College of New Jersey, 804 F.Supp. 637, 643 (D.N.J. 1992) Another factor to be considered, not just in hostile work environmental claims but in all LAD claims, is whether or not there is in existence a grievance procedure and a policy against discrimination. Ibid.

It is important to consider that Karl Chase's comment on its face, although reprehensible, was not directed at plaintiff's Puerto-Rican ancestry. The plaintiff is not a protected member of the "class" affected by such a comment.

Courts have held that the conduct creating a hostile work environment must be so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community. Buckley v. Trenton Sav. Fund Soc'y, 111 N.J. 355, 365-67 (1988). However, liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. Prospect St. Tenants Ass'n v. Sheva Gardens, Inc., 227 N.J. Super. 449 (App. Div. 1988).

The LAD is not a "general civility code . . . [D]iscourtesy or rudeness should not be confused with racial harassment," and "a lack of racial sensitivity does not, alone, amount to actionable harassment." Mandel v. UBS/Paine Webber, Inc., 373 N.J. Super. 55 (App. Div. 2004). A court must consider the "totality of circumstances" to determine whether the conduct at issue is sufficiently extreme. Metzger at supra 152 N.J. at 501.

It cannot be disputed that the Township immediately took action in response to the plaintiff's report of Chase's comment. This was the only complaint made by the plaintiff about comments by co-workers other than telling Steve Sperlak to use his correct name. He did testify in his deposition about comments made by Ronald Kahn

about Mexicans and Puerto-Ricans but never reported them to Mullica Township. 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' "; a lack of "racial or ethnic sensitivity does not, alone, amount to actionable harassment." Mandel, 373 N.J. Super. at 73.

Summary judgment has been upheld rejecting a hostile work environment claim of a female federal agent who submitted evidence of a taunting emailed video of a female subject being tasered; comments about her appearance in tight jeans; and disparate access to certain work assignments and facilities. See Sala v. Hawk, 481 Fed.Appx. 729, 735 (3d Cir.2012). Robles allegations do not even rise to that inadequate level.

In our case an investigation was immediately undertaken and involved interviewing the plaintiff, the alleged speaker of the racial slur as well as a witness named by the plaintiff. Unfortunately there was no independent verification of the comment. However the Supervisor of Public Works called for a general meeting of all members of the Department of Public Works during which the superintendent reviewed the anti-discrimination policy contained in the personnel manual. These actions along with the existence of a grievance procedure and a policy against discrimination demonstrate that the Township had policies in effect and followed those policies once Robles complained about Chase's comment. (See Giordano v. William Paterson College, supra 804 F.Supp. at 643, 644, wherein the importance of the employer adopting such policies is discussed.)

As the plaintiff's claim of a hostile work environment is simply not supported by the facts described above, this claim must be dismissed.

## IV. There Are No Facts Justifying A Claim of Race Based Discrimination.

The plaintiff alleges that he was the subject of retaliation because he received a written reprimand for his failure to protect Township equipment. He complains that he was treated differently because of his race because he failed to receive a promotion to light equipment operator. For the following reasons the facts offered by the plaintiff do not support any of those claims and certainly do not give rise to claims under the LAD.

LAD retaliation claims follow the burden shifting framework established in McDonnell Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d, 668 (1973). Under that framework, the plaintiff must first establish a prima facie case of discriminatory retaliation. To do so, a plaintiff must demonstrate that: (1) he engaged in a protected activity known by the employer; (2) he suffered an adverse employment action; and (3) his participation in the protected activity caused the retaliation. Craig v. Suburban Cablevision, Inc., 140 N.J. 623 (1995). A LAD plaintiff bears the burden of proving that his original complaint, i.e. the protected activity that triggered the retaliation, was made reasonably and in good faith. Carmona v. Resorts Int'l Hotel, Inc., 189 N.J. 354 (2007). An unreasonable, frivolous, bad-faith, or unfounded complaint is not a basis for retaliation liability under the LAD. Id. at 530.

Once the plaintiff has met his initial burden, the defendant must articulate a legitimate, non-retaliatory reason for the adverse action. Young v. Hobart West Group, 385 N.J. Super. 448 (2005). Then, "the plaintiff must come forward with evidence of a discriminatory motive of the employer, and demonstrate that the legitimate reason was merely a pretext for the underlying discriminatory motive." Id. at 465.

To state a prima facie case of discriminatory retaliation is not necessarily an onerous requirement but the plaintiff has failed to do so. He complains that he received a written reprimand (which in actuality had no adverse employment results) apparently because he complained about the comment made by Karl Chase. It should be noted that the written reprimand was issued because of a specific incident which has been documented by the Township in which the plaintiff was a spotter while a co-employee was backing up a truck. Ultimately, the truck collided with another object causing damage and the Township had to expend funds to repair the property. A decision was made by the Superintendent of Public Works, Steve Sperlak, that it was the plaintiff's fault and he received a written reprimand. This reprimand occurred at least nine months after the incident involving Karl Chase and the complaint made by plaintiff. If the written reprimand was much closer in time to the complaint registered by the plaintiff perhaps causation could be inferred, i.e. protected conduct that is "closely followed" by the adverse action can support a LAD claim. House v. Carter-Wallace, 232 N.J. Super. 42 (1989). But the proximity raising an inference of discrimination on its own must be "very close." See Gloucester County School District v. Breeden, 532 U.S. 268, 273, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001). The mere fact that certain events proceeded the adverse employment action is insufficient to support an inference of a retaliatory notice. El-Siouf v. St. Peters University Hospital, 382 N.J. Super. 145 (App. Div. 2005). The adverse employment action in our case, i.e. reprimand, did not "closely follow" the protected activity, it occurred nearly nine months later. See Young v. Hobart West Group, supra at 461.

Thus the plaintiff is unable to demonstrate that the issuance of the reprimand and the reasons for it were a pretext for discrimination:

> While there may be factual disputes relating to the circumstances of [her] termination, Plaintiff's burden is to demonstrate that "[Defendant's] reasons were a pretext for discrimination, not a pretext for something else." Scott v. Allied Waste Sucs. Of Bucks-Mong, 2010 U.S. Dist. LEXIS 136202, 201 WL 5257643, at [*]4 (E.D.Pa. Dec. 23, 2010)(emphasis added).

A plaintiff must show more than the defendant's decision to demote was wrong or mistaken but must demonstrate that it was so plainly wrong that it cannot have been the employer's real reason. (Keller, 130 F.3d at 1108)("a plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent or competent.")

As is argued above the plaintiff cannot establish a prima facie case of retaliation but even if he had, the LAD would never less fail because he cannot show that the proffered reason for the written reprimand was pretextual. To demonstrate pretext, the employer must show that the employer's reason for the adverse employment act are "weak, incoherent, implausible, or so inconsistent that a 'reasonable factfinder' could rationally find them unworthy of credence." Sarullo v. U.S. Postal Service, 352 F.3d 789, 800 (3d Cir. 2003). To prove pretext "a plaintiff may not simply show that the employer's reason was false but also must demonstrate that the employer was motivated by discriminatory intent." Zive v. Stanley Roberts, Inc., 182 N.J. 436 (2005); see also Viscik v. Fowler Equip. Co., 173 N.J. 1 (2002). The employer is entitled to summary judgment if, after proffering a non-discriminatory reason for its decision, plaintiff cannot "point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reason; or (2)

believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." Zive, 182 N.J. at 450.

Courts do not sit to second guess employment decisions, however wrong, merely whether they are decisions being made from a prohibited motive, see Maddox v. City of Newark, 50 F.Supp.3d 606, 626 (D.N.J. 2014). Although, the plaintiff obviously disagreed with the receipt of the reprimand, because there was a plausible reason for the issuance of the reprimand and the lack of proximity to the alleged protected activity, the issuance of the reprimand, does not support a claim under the LAD.

Furthermore, complaints made by the plaintiff to the Township Clerk about his workload do not support an LAD claim. Workload complaints are not protected activity under the LAD's anti-discrimination provision. Young v. Hobart West Group, supra at 467. The plaintiff admits that he is not satisfied with the fact that he is a part-time laborer and does not receive benefits that full-time laborers receive. He complained several times to the Township Clerk that he did not believe that he should be filling out reports concerning his daily workload nor should he work at the transfer station. However, the issue is not workload assignments but workplace discrimination. See Maddox v. City of Newark, supra at 626.

It is indeed ironic that only after receiving the written reprimand the plaintiff complained to his union representative and presented his letter of August 26, 2013 listing his complaints against various individuals at the Township. Again the response of the Township to the contact from the union representative is important. The clerk and the supervisor met with the union representative who indicated to them that he was going to perform his own investigation and pursue the plaintiff's complaints if he

found any justification for them. It should be noted that the union representative did not pursue it further.

The plaintiff argues that he was not promoted to the position of light equipment operator based upon his ethnicity. He alleges that the position was given to Larry Prince, who is white. It should be noted that four individuals interviewed for this position. The written notice issued by the Township for the position of light equipment operator required that the applicant have either a high school diploma or a GED. Although the plaintiff failed to meet the posted qualifications in that he had neither, the Township did interview him (not knowing his failure to meet the requirements). A decision was made to hire the individual with more experience and more of a technical background. Thus, no argument can be made that the requirement to have a high school diploma or a GED was specifically used to prevent the plaintiff from receiving a promotion. The facts simply do not support a claim that discrimination occurred in the failure to hire plaintiff as he was not qualified for the position.

Finally it must be remembered that even the plaintiff admits that after November 2013 he cannot recall any acts of any kind that would support a claim pursuant to the LAD. He has not applied for jobs with other employers and by his own admission, gets along with his fellow employees and supervisor.

Although plaintiff has made a series of allegations against the Township based upon some incidents, he cannot cite to facts that would justify defeating this motion for summary judgment and taking the matter to trial. While the plaintiff may be unhappy with his position as a part-time laborer and disagree with his supervisor as to his job duties, those facts alone do not give rise to a claim under the LAD.

## CONCLUSION

For all of the above reasons, the motion for summary judgment made on behalf of the defendant Mullica Township should be granted dismissing the Complaint with prejudice.

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Dated: