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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4287-10T2

SHERYL LOZO-WEBER,

Plaintiff-Appellant,

v.

STATE OF NEW JERSEY,
DEPARTMENT OF HUMAN
SERVICES, NEW LISBON
DEVELOPMENTAL CENTER,
and BRIAN KELLY,

Defendants-Respondents.

Submitted February 8, 2012 - Decided April 13, 2012

Before Judges Fuentes, Graves and J.N. Harris.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-1043-08.

Swartz Swidler, LLC, attorneys for appellant (Justin L. Swidler, on the brief).

Jeffrey S. Chiesa, Attorney General, attorney for respondents (Lewis A. Scheindlin, Assistant Attorney General, of counsel; Ivo Becica, Deputy Attorney General, on the brief).

PER CURIAM

Plaintiff Sheryl Lozo-Weber appeals from a summary judgment order dated March 4, 2011, dismissing her complaint. For the reasons that follow, we affirm in part and reverse in part.

Plaintiff, a Caucasian female, was employed by the Department of Human Services (DHS) as a principal occupational therapist at the New Lisbon Developmental Center (NLDC) from November 2003 to April 2009. In January 2004, plaintiff began exhibiting symptoms of lupus, which included "red bumps on [her] skin" and feeling "very fatigued." Plaintiff stated that the red bumps did not affect her work and the fatigue interfered "a little bit," but "it didn't stop [her] from working." Plaintiff was diagnosed with lupus in July 2004.

Plaintiff alleged in her complaint that throughout her employment at NLDC, she "noticed [that d]efendants discriminated against African[-]American and other minority employees." Plaintiff's first supervisor at NLDC was Turner, an African-American female. Soon after plaintiff was hired, Turner was suspended because of allegations that she falsified patient evaluations and missed certain deadlines. At that time, plaintiff did not feel that Turner's suspension was discriminatory, but following subsequent incidents, she "saw a pattern" and "knew [Turner's suspension] was more than work performance." When Turner was suspended, plaintiff claims she "supported" Turner by telling other NLDC employees that Turner was "an excellent therapist" and that the stated reasons for her suspension were "false."

Defendant Brian Kelly, a Caucasian male, became plaintiff's supervisor in the summer of 2004 following Turner's suspension. Beth Cooper, a Caucasian female, was an occupational therapist with plaintiff but acted as an unofficial "liaison" between Kelly and staff.

In August 2004, an African-American employee named Quinones was suspended for allegedly sleeping while at work. Plaintiff was "not sure" whether Quinones's suspension was motivated by race, but she believed he was suspended because "he was verbally supporting [Turner]" and "[h]e would speak out about how wrong it was for her to be suspended." For example, during a conversation in the office parking lot, Quinones expressed his belief to plaintiff and several other employees that Turner's suspension could have been motivated by her position at NLDC or her race.

In October 2004, an African-American occupational therapist named Jacob was fired. Plaintiff described Jacob as "an excellent occupational therapist." Plaintiff believed that Jacob's firing was discriminatory because Cooper told plaintiff that she and Kelly "suspected that [Jacob] was conversing with [Turner]." Plaintiff also overheard a Caucasian employee make the comment, "two down, some more to go," referring to Turner's suspension and Jacob's firing.

Additionally, Kelly was notified in October 2004 that Simon-Moise, an NLDC employee of Haitian descent, and Quinones had filed discrimination complaints against him with DHS's Equal Employment Opportunity Officer.

In November 2004, five NLDC employees were relocated to an office building that, according to plaintiff, did not have air conditioning, computers, or phones. Those employees were Simon-Moise; Sulit, an Asian male; Galang, an Asian female; Kudar, a Caucasian male; and Rizzo, a Caucasian male. Plaintiff believed the relocation was "motivated by these individuals' race because the action of moving all these employees had the effect of creating a nearly all-white physical therapy office, with the exception of a single Asian independent contractor." Also, plaintiff stated during her deposition that she believed the relocation was discriminatory because of certain "[c]omments that were made" by NLDC staff. For example, plaintiff alleged that following the relocation, Cooper said, "Now they're all cleaned out, we can have peace in this office." Plaintiff further alleged that she was told by a co-worker that Cooper had said "that she would like the rehab department to be all white." When plaintiff asked Kelly why the employees had been relocated, he "wasn't able to tell" her.

Soon thereafter, Galang was fired. Plaintiff believed that Galang's dismissal was discriminatory because she was "part of the group" that had been relocated in November 2004, and because "she worked closely with that group of people." Plaintiff also stated during her deposition that, in general at NLDC, there were "a lot of verbal sarcastic things said out loud in her presence" that referred to race or national origin, but she could not "recall all of them."

Plaintiff believed that Kelly "operate[d] in a discriminatory manner" because "the people that got suspended, fired and removed were . . . part of the minority, and the Caucasian people in the office were permitted to do things that . . . they should have gotten in trouble for, but never did." For example, a Caucasian male employee "would curse out loud" and told plaintiff to "shut the F up" in front of Kelly with no consequence. In addition, no disciplinary action was taken against a Caucasian female employee who, like Quinones, fell asleep at work. According to plaintiff, pictures of this employee sleeping were "the joke of the office," and Kelly "would just shake his head and laugh" when he saw them.

Plaintiff claims that she "voiced [her] opinion on how [she] did not think that this was right to numerous people in the office," including Kelly and Cooper, although she did not

explicitly use the word "discrimination." During one conversation in particular, Cooper told plaintiff that Kelly had said that plaintiff "needed to align herself with the right side." Cooper also warned plaintiff to "stay away from" Quinones.

Plaintiff was on disability leave from November 14, 2004, to sometime in March 2005. On April 27, 2005, Kelly completed plaintiff's annual performance review for the period of March 1, 2004, through February 28, 2005. Kelly gave plaintiff a "pass" (the highest option available) in all fourteen performance categories, and he gave her a "final evaluation rating" of "satisfactory" (the highest option available). Kelly also noted that plaintiff had "exceeded all job requirements."

Sometime in 2005, plaintiff made her first written complaint to Kelly. In an email, plaintiff informed Kelly that she had a "humongous workload," that she was "asked to do special projects at the same time," that her work was "constantly being audited," and that she was "falsely told" that there were "problems" with her work. Plaintiff also made a verbal complaint to Cooper regarding similar problems.

Plaintiff was on maternity leave and then disability leave due to lupus from February 14, 2006, to August 31, 2006. On October 12, 2006, Kelly completed plaintiff's annual performance

review for the period of March 1, 2005, through February 28, 2006. Once again, plaintiff received the highest possible rating in all of the performance categories and an overall "satisfactory."

At some point, plaintiff was approached by Quinones and asked if she "would be willing to speak with his attorney" regarding "the move of everybody" and what she "witnessed while working" at NLDC. Plaintiff agreed to do so and during that meeting she discussed her concerns regarding the treatment of minority employees.

On October 30, 2006, Simon-Moise, Turner, Quinones, Jacob, and Sulit (the Simon-Moise plaintiffs) filed a lawsuit against DHS, NLDC, Kelly, and Cooper alleging discrimination and retaliation in violation of the LAD (the Simon-Moise lawsuit).[1] Plaintiff's name was explicitly mentioned in the complaint, most notably in paragraph eighty, which stated:

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[1] Defendants in the Simon-Moise lawsuit were served with a summons and the complaint on May 8, 2007. The record does not provide an explanation for the delay between the filing of the complaint and service on defendants.

Depositions in the Simon-Moise lawsuit began in November 2008 and continued into May 2009. Although plaintiff was not deposed in that matter, she stated that she was willing to provide such assistance. The Simon-Moise lawsuit never reached trial——Turner's claim was withdrawn; Sulit's and Jacob's claims were dismissed on summary judgment; and Simon-Moise's and Quinones's claims were settled during pretrial motions on March 10, 2011.

> [Cooper] continued to police the activities of all employees. In or about August 18, 2004, [Cooper] told Sherry Lozo-Weber that administration is talking about the blonde in OT [occupational therapy] who talks to ... Quinones and that she [Cooper] hopes that when it comes down to the wire she will do the right thing and pick the right side. That statement was a direct signal to Lozo-Weber that she needed to be concerned about who she spoke to and the status of her job at NLDC.

On February 27, 2007, plaintiff sent an email to her union representative, Dennis Segal, to give him "advanced warning" of what she believed would be a "deliberate attempt to discredit" her because NLDC "administration" had been "recently made aware" that she was "named as a witness" in the Simon-Moise lawsuit. Plaintiff stated in her email to Segal that she was "shocked" when Kelly told her on February 23, 2007, that there were "numerous complaints" regarding her work. Plaintiff stated that she wished to "discuss with [Segal] what options [were] available to [her] to protect [her] from this obvious tactic."

Plaintiff believed that Kelly's statement regarding her work performance was in retaliation for her support of the Simon-Moise plaintiffs. When asked to define "support" during her deposition, plaintiff stated, "If it came up in conversation, I would say it was wrong, I was against what was happening."

Plaintiff alleged that Kelly retaliated against her by assigning her "more stressful jobs," and he "recruited" Kristen Lally, another NLDC employee, to audit her "continuously." Plaintiff also alleged that Kelly created a hostile work environment by asking other NLDC employees to write negative statements about her. Plaintiff claimed that Waters told her to "watch" herself because Kelly was "after her," and that Waters "caught [Kelly] watching [plaintiff] from a window." Plaintiff also claimed that Cooper told two new NLDC employees about the Simon-Moise lawsuit, that they should "stay away from" plaintiff because she was "on their side," and that a new employee could "jeopardize his job by associating with [plaintiff]." According to plaintiff, she was given extra work and her "whole career changed" at NLDC because she was "perceived as a vocal supporter of the minority employees."

On April 27, 2007, Kelly completed plaintiff's annual performance review for the period of March 1, 2006, through February 28, 2007. Though Kelly had told plaintiff that he had numerous complaints regarding her work performance, he gave her the highest rating of "pass" in all of the performance categories and, like all previous performance evaluations, Kelly gave plaintiff a final evaluation of "satisfactory."

On October 24, 2007, Kelly completed plaintiff's interim performance review for the period of March 1, 2007, through February 28, 2008. Once again, plaintiff received the highest possible ratings, and during his deposition, Kelly acknowledged that he never gave plaintiff a negative performance review.

In October 2007, plaintiff noticed that her timesheets were being removed from the folder in the office where they were normally kept; she believed this may have happened "more than" twenty times. When plaintiff approached Kelly and asked him if she could "lock up the folder" with a secretary or put the folder "in a safer place," Kelly told her that the folder could not be moved and that she would have to "recollect" what she did and "rewrite it on another timesheet."

On January 9, 2008, NLDC issued a preliminary notice of disciplinary action against plaintiff, which contained the following charges: (1) neglect of duty; (2) falsification; and (3) actual or attempted theft of State property. A disciplinary hearing was held on May 19, 2008. Plaintiff appeared with a union representative and Kelly appeared on behalf of management, with Cooper, Lally, and one other NLDC employee as witnesses. In a written decision on June 6, 2008, the hearing officer found that "[t]he only sustainable charge" was that plaintiff arrived at work sometime after 8:00 a.m. on December 20, 2007; however,

she wrote on her timesheet that she arrived at 7:30 a.m. The hearing officer also stated that she was "initially reluctant" to accept plaintiff's allegation that her timesheets would "disappear" from the file; however, based on the fact that Kelly presented the timesheets as evidence at the hearing, the hearing officer concluded that they were "either given to him by a third party, or he took them from the file himself."

The hearing officer recommended that "the charges be dismissed." On June 13, 2008, DHS issued a final notice of disciplinary action confirming that all of the charges against plaintiff were dismissed; plaintiff was awarded $21,001.10 in back pay.

On July 17, 2008, plaintiff submitted a request for a leave of absence without pay to the NLDC Human Resources Department due to "lupus flare-ups," which made it "physically impossible to get out of bed." In a supporting certification, plaintiff's treating physician confirmed that plaintiff was incapacitated and unable to work "due to the nature of [her] disease, discoid lupus, which is a chronic condition," with frequent "episodes of incapacity." The doctor also estimated that plaintiff would be incapacitated for "at least one year."

Plaintiff was granted a leave of absence pursuant to the Family and Medical Leave Act (FMLA), 29 U.S.C.A. §§ 2601-2654,

from July 21, 2008, through October 10, 2008. While on leave, plaintiff filed suit against defendants on September 19, 2008, alleging discrimination and retaliation.

Due to the severity of her medical condition, plaintiff was not able to return to work on October 10, 2008. On February 19, 2009, NLDC approved plaintiff's "request for a leave of absence without pay through April 12, 2009." However, NLDC's approval letter stated that it could not approve an extension beyond April 12, 2009, because of the "operational needs" of plaintiff's position. The letter also noted that if plaintiff was unable to return to work by April 12, 2009, she could "resign in good standing," meaning she would "have the ability to request placement on the reemployment list within three years when/if [she was] physically capable of returning to work." However, if plaintiff did not return to work on April 13, 2009, and "no action" was taken by her, her absences would be "unauthorized" and NLDC would characterize her resignation status at the time of separation as "not in good standing."

On April 10, 2009, plaintiff's doctor sent a handwritten note to NLDC stating that plaintiff's symptoms had "not stabilized" and that plaintiff could not return to work until "approximately May 29, 2009." After this letter, neither plaintiff nor her doctor provided NLDC with additional documents

or information regarding plaintiff's medical condition. Plaintiff did not return to work on April 13, 2009.

On April 21, 2009, NLDC sent a certified letter to plaintiff, (which plaintiff claims she did not receive), concerning the extension of plaintiff's leave of absence through April 12, 2009, and acknowledging receipt of plaintiff's doctor's handwritten note. NLDC reiterated that due to its operational needs, it could not extend plaintiff's leave of absence beyond April 12, 2009.

On May 15, 2009, NLDC issued a preliminary notice of disciplinary action charging plaintiff with, among other things, a violation of N.J.A.C. 4A:2-6.2(c), which provides that an employee who has not "returned for duty for five or more consecutive business days following an approved leave of absence shall be considered to have abandoned his or her position and shall be recorded as a resignation not in good standing." The preliminary notice further stated that plaintiff was required to notify NLDC within fourteen days if she desired a departmental hearing. Plaintiff did not request a hearing and her resignation, effective April 17, 2009, was declared "not in good standing."

In plaintiff's third amended complaint, which was filed in June 2010, plaintiff alleged "actual and perceived handicap

discrimination" and failure to accommodate under the LAD (counts one and six); retaliation under the LAD and 42 U.S.C.A. § 1981 (counts two, three, and seven); violations of the First Amendment to the United States Constitution (count four); and unspecified violations of the New Jersey Constitution (count five).

In December 2010, defendants filed a motion for summary judgment, which was heard on March 4, 2011. During oral argument, plaintiff only addressed her retaliation and failure-to-accommodate claims. The Law Division granted defendants' motion for summary judgment and dismissed plaintiff's complaint "in its entirety."

With regard to plaintiff's retaliation claims, the court reasoned as follows:

> I'm going to dismiss the retaliation claim. I think . . . you have . . . potentially a strong case here on the other factors with respect to causation and what not, but you don't even get there, or the issue of pretext, potentially, but you don't even get there if the protected activity know[n] to defendant doesn't satisfy . . . the LAD standards.
>
> And, that's why I tried to really focus on this in terms of what the complained of conduct was, and the protected activity here was. And, what we have here, that's why I'm glad we had this oral argument to clarify, is the fact that your client's name is mentioned three times in a complaint and I went through the complaint and read each

> paragraph and the one that we focused on here, it's really hard for me to understand exactly . . . what's going on there.
>
> But . . . giving all inferences in your favor on that topic, it doesn't indicate to me that if Mr. Kelly was reading this, in 2007, he would know, even giving all inferences . . . in favor [of] your client, that he would know that she was participating in assisting in, in anyway helping Ms. Simon in her lawsuit.
>
> [J]ust because her name is mentioned in that complaint doesn't make it protected activity. There has to be something more. And that's why I tried to develop what all this other stuff was because I spent last night reading your opposition a couple times. And, so, I was trying to figure out how all this fit together.
>
> And, I understand your point about the perception that it would give him, when he read the complaint, but I'm still not satisfied and once again giving all inferences in your favor, that what happened back in 2005, maybe even 2004, would have affected his perception in such a way, two years later, that it would have, for a reasonable fact finder, let them conclude that he knew that she was somehow assisting Simon in her lawsuit.
>
> So, with all due respect, I'll dismiss the retaliation claim.

With regard to plaintiff's failure-to-accommodate claim, the court stated:

> I'm going to dismiss the disability claim.
>
> The facts as they are here, giving all reasonable inferences in favor of the plaintiff . . . indicated that they

> accommodated her disability in a very reasonable way by giving her . . . four different extensions, to address the . . . doctors' notes that they were getting.
>
> These doctor's notes turned out to not be real dates. So, the issue then is . . . this May 29th date that she says she can maybe return or the doctor says . . . once again, that doesn't appear, giving all inferences in your favor, based on the record before me, that that is a bona fide return to work date.
>
> [J]ust looking at the deposition transcript that was cited, in terms of whether she could return to work then, or not . . . it's clear she couldn't. So . . . there's no indication, then, that that was a bona fide day that she would come back.
>
> The law does not require the State or an employer to keep open a position indefinitely. And, what [we have] here, under these circumstances, is an indefinite leave of absence. It was continuing for months and months and months. Doctor's notes coming on, dates coming on, she doesn't return. The State's actions were completely reasonable, even giving all inferences in favor of the plaintiff here to terminate her employment. I think they were being very fair by extending the position open this long.

On March 25, 2011, plaintiff filed a notice of appeal to this court.

We conclude from our examination of the record that plaintiff's arguments regarding her failure-to-accommodate claim are without sufficient merit to warrant extended discussion, Rule 2:11-3(e)(1)(E), and we affirm summary judgment on that

issue. However, we also conclude that there are material facts in dispute regarding plaintiff's retaliation claims and we reverse the summary judgment on those claims.

"Summary judgments are to be granted with extreme caution." Allstate Redevelopment Corp. v. Summit Assocs., 206 N.J. Super. 318, 326 (App. Div. 1985). Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). Summary judgment should not be granted if "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).

When deciding a motion for summary judgment, the trial court "must accept as true all the evidence which supports the position of the party defending against the motion and must accord him [or her] the benefit of all legitimate inferences which can be deduced therefrom, and if reasonable minds could differ, the motion must be denied." Lanzet v. Greenberg, 126

N.J. 168, 174 (1991) (citation omitted). A party opposing a motion for summary judgment "is not to be denied a trial unless the moving party sustains the burden of showing clearly the absence of a genuine issue of material fact." Allstate, supra, 207 N.J. Super. at 327.

When reviewing an order for summary judgment, an appellate court applies the same standard as the trial court. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div. 1998), certif. denied, 154 N.J. 608 (1998). The appellate court "first decides whether there was a genuine issue of material fact and, if there was not, it then decides whether the trial judge's ruling on the law was correct." Walker v. Alt. Chrysler Plymouth, 216 N.J. Super. 255, 258 (App. Div. 1987).

It is not the court's function to "weigh the evidence and determine the outcome," but rather it is "to decide if a material dispute of fact existed." Gilhooley v. Cnty. of Union, 164 N.J. 533, 545 (2000). It is the jury's function to decide all genuine issues of material fact in dispute between the parties. Parks v. Rogers, 176 N.J. 491, 502 (2003) (quoting Gilhooley, supra, 164 N.J. at 545) (reversing the Appellate Division's affirmance of the trial court's grant of defendants' motion for summary judgment because the "Appellate Division

'resolved a dispute on the merits that should have been decided by a jury'").

Whether or not a party knew or had reason to know a particular fact or piece of information is an issue that must be decided by the jury if the evidence could reasonably support either conclusion. See e.g., ibid.; Allstate, supra, 206 N.J. Super. at 327-28 (reversing the trial court's grant of defendant's motion for summary judgment after finding "factual matters in dispute" because one party claimed it was "unaware" of a particular fact at issue); Fed. Ins. Co. v. Hausler, 108 N.J. Super. 421, 426-27 (App. Div. 1970) (finding the trial court's grant of summary judgment "an inappropriate remedy in the circumstances" because "[t]he matter should have been fully tried to determine" whether a party "knew or reasonably should have known" of a particular fact at issue in the case). Moreover, a motion for summary judgment "should not ordinarily be granted where an action or defense requires determination of a state of mind." Prudential Prop. & Cas. Ins. Co. v. Karlinski, 251 N.J. Super. 457, 466 (App. Div. 1991). See also Cumberland Mut. Fire Ins. Co. v. Beeby, 327 N.J. Super. 394, 402-05 (App. Div. 2000); Jones v. Jones, 242 N.J. Super. 195, 206 (App. Div.), certif. denied, 122 N.J. 418 (1990).

The LAD provides, in part, that it is 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 because that person has filed a complaint, testified or assisted in any proceeding under this act or to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by the act.
>
> [N.J.S.A. 10:5-12(d).]

"Because of its remedial purpose, the LAD should be construed liberally to achieve its aims." Zive v. Stanley Roberts, Inc., 182 N.J. 436, 446 (2005) (citing Franek v. Tomahawk Lake Resort, 333 N.J. Super. 206, 217 (App. Div. 2000)).

"What makes an employer's personnel action unlawful is the employer's intent." Ibid. (citing Marzano v. Computer Sci. Corp., 91 F.3d 497, 507 (3d Cir. 1996)). "To address the difficulty of proving discriminatory intent, New Jersey has adopted the procedural burden-shifting methodology articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)." Id. at 447.

To establish a prima facie case for retaliation under the LAD, a plaintiff must show:

> (1) she was engaged in a protected activity known to the defendant; (2) she was thereafter subjected to an adverse employment decision by the defendant; and (3) there was a causal link between the two.

[Woods-Pirozzi v. Nabisco Foods, 290 N.J. Super. 252, 274 (App. Div. 1996).]

Also, as a "prerequisite" for a retaliation claim, the plaintiff "bear[s] the burden of proving that he or she had a good faith, reasonable basis for complaining about the workplace behavior." Tartaglia v. UBS PaineWebber, Inc., 197 N.J. 81, 125 (2008).

If a plaintiff establishes a prima facie case, the burden of production shifts to the defendant "to articulate a legitimate reason for the decision." Woods-Pirozzi, supra, 290 N.J. Super. at 274. If the defendant does so, the burden of production shifts back to the plaintiff to "show that a retaliatory intent, not the proffered reason, motivated the defendant's actions." Ibid. "Plaintiff may do this either indirectly, by proving that the proffered reason is a pretext for the retaliation, or directly, by demonstrating that a retaliatory reason more likely than not motivated defendant's actions." Ibid.

In the present case, there is no direct evidence that defendants had knowledge of plaintiff's meeting with the Simon-Moise plaintiffs and their attorney. However, there is indirect evidence that supports plaintiff's retaliation claims. Defendants were served with a copy of the Simon-Moise lawsuit on May 8, 2007. In his deposition, Kelly stated that he first saw

the complaint in "May of 2007" when he was called into a meeting with the CEO, his supervisor, and the head of human resources. Kelly stated that he "read through" the complaint the day he received it.

Kelly also stated that he "made a copy" of the lawsuit for Cooper and discussed it with her "right after" that meeting. In addition, Cooper acknowledged during her deposition that she and Kelly "most likely" talked about paragraph eighty, but that she did not think it was true. When Kelly was asked at his deposition whether he thought plaintiff "was, at least according to [the Simon-Moise] lawsuit, going to be a witness who had information that would be helpful to plaintiffs," he responded in the negative. Kelly also stated that when he first read the complaint, he never "even thought about witnesses or any of that," and that he "felt that most of it was fabricated."

Nevertheless, plaintiff argues that a reasonable jury could infer that Kelly and Cooper knew that plaintiff spoke with the Simon-Moise plaintiffs' attorney because the complaint described details of a conversation that had allegedly taken place between plaintiff and Cooper. Because Cooper knew that she had not spoken to the Simon-Moise plaintiffs' attorney, she would have concluded that plaintiff had. Therefore, plaintiff contends she

produced enough evidence to convince a reasonable jury that Kelly knew she had assisted the Simon-Moise plaintiffs.

During her deposition, plaintiff testified she was "sure" that Kelly and Cooper knew of her "support for" her co-workers whom she felt were being discriminated against, and that she was opposed to "what was being done to certain people." According to plaintiff, if the issue "came up in conversation, [she] would say it was wrong, [and she] was against what was happening." Based on the record before us, we find that a jury could reasonably conclude defendants knew of plaintiff's general support for the Simon-Moise plaintiffs. In addition, the trial court failed to address plaintiff's claim that she was subjected to discriminatory practices and policies in retaliation for filing the present lawsuit. Thus, contrary to the conclusion of the trial court, defendants failed to demonstrate "a single, unavoidable resolution" on the factual issue of whether defendants knew of plaintiff's protected activity. Brill, supra, 142 N.J. at 540.

With regard to plaintiff's failure-to-accommodate claim, we uphold the trial court's grant of defendants' motion for summary judgment and add only the following comments. Plaintiff admitted during her deposition that when she requested a leave of absence on July 17, 2008, she did not know when she would be

able to return to work. Also, plaintiff's physician stated that the duration of plaintiff's "incapacity" was "at least one year."

After plaintiff exhausted her FMLA benefits on October 10, 2008, NLDC granted plaintiff an extension of her leave of absence; however, it informed plaintiff that due to the "operational needs of [her] position," it could not approve an extension beyond April 12, 2009. The note from plaintiff's doctor dated April 10, 2009, stated that plaintiff could not return to work "until approx[imately] May 29, 2009," but this was only an estimate and plaintiff was in fact not able to return to work on that date. During her deposition, plaintiff stated that she could not provide a definite date when she would have returned to work because her employment had been terminated.

Under these circumstances, the trial judge correctly concluded that plaintiff was not entitled to an "indefinite leave of absence" and that NLDC's actions were "reasonable." See Svarnas v. AT&T Commc'ns, 326 N.J. Super. 59, 79 (App. Div. 1999) (stating that "an indefinite unpaid leave is not a reasonable accommodation, especially where the employee fails to present evidence of the expected duration of her impairment").

Plaintiff waived the right to challenge the trial court's dismissal of the following claims because they were not briefed on appeal: "New Jersey Law Against Discrimination (Actual & Perceived Handicap Discrimination)" (count one); "Violations of the United States Constitution, Amendment 1 (Retaliation)" (count four); and "Violations of the New Jersey Constitution (Retaliation)" (count five). See, e.g., 539 Absecon Blvd., L.L.C. v. Shan Enters. Ltd. P'ship, 406 N.J. Super. 242, 272 n.10 (App. Div.), certif. denied, 199 N.J. 541 (2009) (citing In re Bloomingdale Convalescent Ctr., 233 N.J. Super. 46, 48 n.1 (App. Div. 1989)); see also Pressler & Verniero, Current N.J. Court Rules, comment 4 on R. 2:6-2 (2012) ("It is, of course, clear that an issue not briefed is deemed waived.").

Reversed and remanded in part; affirmed in part.