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PREPARED BY THE COURT

JESSICA LYNN HUNTER, Plaintiff, v. BOROUGH OF BERGENFIELD; BERGENFIELD POLICE CHIEF MUSTAFARABBOH, individually and in his official capacity; BERGENFIELD CAPTAIN JOHN MAGGI, individually and in his official capacity; JOHN DOES 1-10 individually and in their official capacity (fictitious Bergenfield Police Superior Officers), Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO. BER-L-3500-21 Civil Action **ORDER DENYING THE BOROUGH OF BERGENFIELD'S MOTION FOR SUMMARY JUDGMENT** **Return Date: January 19, 2024**

THIS MATTER, having been presented to the Court by Trenk Isabel Siddiqi & Shahdanian P.C., attorneys for Defendants Borough of Bergenfield, Bergenfield Police Chief Mustafa Rabboh, and Bergenfield Captain John Maggi ("Defendants"), by the filing of a Motion for Summary Judgment Pursuant to R. 4:46-2; and the Court having considered the Borough's initial pleadings in support of its Motion for Summary Judgment; and the Court having considered any opposition filed by Plaintiff Jessica Lynn Hunter ("Plaintiff"); and the Court having considered the Borough's reply pleadings in further support of its Motion for Summary

Judgment; and the Court having hearing oral argument by counsel; and for the reasons set forth on the record; for good cause shown;

IT IS on this 31st day of January 2024;

ORDERED that the Borough's Motion for Summary Judgment is hereby **DENIED**; and it is further

ORDERED that a copy of this Order shall be served upon all counsel within seven (7) days hereof.

HONORABLE JOHN D. O'DWYER., P.J.CV.

X Opposed

_____ Unopposed

Please see Attached Rider.

HUNTER v. BOROUGH OF BERGENFIELD, Et al.
DOCKET NO.: BER-L-3500-21

THIS MATTER is before the Court by Defendants Borough of Bergenfield (the "Borough"), Bergenfield Police Chief Mustafa Rabboh ("Chief Rabboh"), and Bergenfield Captain John Maggi ("Captain Maggi") (collectively the "Defendants") against Plaintiff Jessica Hunter ("Plaintiff" or "Hunter"). Defendants seek summary judgment as to the New Jersey Law Against Discrimination ("NJLAD") claims by Hunter contending that Plaintiff cannot prove that she was subject to an unlawful hostile work environment, nor that she was retaliated against because of her military leave or treated disparately because of said status. Plaintiff filed opposition thereto and Defendants submitted a reply. Oral Argument took place on 1/19/24.

Defendants Arguments

Defendants argue that the central issue in this case revolves around the allocation of Plaintiff's Schedule Adjustment Days (SAD time) related to the Borough's military leave policy. This policy involves transferring officers from a 12-hour Pitman Schedule to an 8-hour Administrative Schedule during military leave. Defendants allege that Plaintiff's SAD time was reduced due to her schedule change during military leave, and her second military order in 2020 was denied due to pandemic-related issues. The Defendants contend that their actions, including the denial of the military order and the notification about the expiration of military leave benefits, do not violate NJLAD and therefore this Court should grant summary judgment.

Plaintiffs Arguments

Plaintiff argues that this Court should deny summary judgment because when the entire factual record is viewed in a light most favorable to Plaintiff, she has demonstrated disputed issues of material fact on all of her claims. Specifically, Plaintiff asserts that she has stated viable claims under the New Jersey Law Against Discrimination ("NJLAD"), N.J.S.A. 10:5-1, et seq., for:

1) a hostile work environment where the hostile conduct occurred because of Plaintiff's military service. Plaintiff contends that there are disputed issues of fact on the pervasiveness of the unlawful harassment and importantly a reasonable servicemember would believe the conditions of the workplace were altered;

2) Retaliation as Defendants analyze Plaintiff's NJLAD Retaliation claim based on selective limited set of facts under the wrong standard; and lastly

3) Disparate treatment as there is direct and circumstantial evidence to illustrate that military service leave was singled out and treated differently than non-military service for the purposes of paid leave.

Summary Judgment Standard

Motions for summary judgment are controlled by R. 4:46-2, which states, in pertinent part,

> [t]he judgment or order sought shall be rendered forthwith 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. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

R. 4:46-2(c). The standard for summary judgment motions was set forth by the Supreme Court of New Jersey in Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995), which R. 4:46-2(c) now mirrors. In Brill, the court held that

> a determination 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.

Id. at 540. The inquiry requires that "the judge . . . ask himself . . . whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Id. at 532. Where "the evidence 'is so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." Id. at 540.

Motions for summary judgment should not be granted where a credibility determination is required. "It [is] not the court's function to weigh the evidence and determine the outcome, but only to decide if a material dispute of fact existed." Parks v. Rogers, 176 N.J. 491, 502 (2003) (quoting Gilhooley v. County of Union, 164 N.J. 533, 545 (2000)). However, the court is not required to "turn a blind eye to the weight of evidence," and the opponent must show there is more than some "metaphysical doubt as to material facts." Triffin v. Am. Intern. Grp., Inc., 373 N.J. Super. 517, 523-524 (App. Div. 2004). Additionally, "[b]are conclusory assertions, without factual support in the record, will not defeat a meritorious application for summary judgment." Horizon Blue Cross Blue Shield of N.J. v. State, 425 N.J. Super. 1, 32 (App. Div. 2012) (citing Brae Asset Fund, L.P. v. Newman, 327 N.J. Super. 129, 134 (App. Div. 1999).

Hostile Work Environment Claim:

It is well-established New Jersey law that to substantiate a hostile work environment claim, a plaintiff must show that the complained of conduct: (1) would not have occurred but for the employee's [military status]; and it was (2) severe or pervasive enough to make a (3) reasonable [military member] believe that (4) the conditions of employment are altered, and the working environment is hostile or abusive. Lehmann v. Toys R Us, Inc., 132 N.J. 587, 603-04 (1993) (emphasis in original).

Defendants argue that Plaintiff's allegations do not satisfy the elements of a hostile work environment claim as the comments made by supervisors lack the necessary severity or pervasiveness per Lehmann, 132 N.J. 587 (1993). Defendants contend that the only "offensive" comments alleged by Plaintiff are **"you know Hunter, you know, I'm starting to think you don't like your job" and "she**

wants to leave again." See Certification of Kevin Barber ("Barber Cert.") at Ex. 11 Hunter Dep. Tr. 47:3-15. Further, Defendants highlight that Plaintiff incorporates much of information she learned from the deposition testimony of Deputy Chief Massey, as the basis for her belief that her work environment was sufficiently hostile.[1]

Defendants take the position that there is no direct testimony that Plaintiff knew or was aware of any of these actions, which include Deputy Chief Massey's testimony regarding the Chief and Captain being angry with the lawsuit and allegedly wanting to fire her. See Barber Cert., Ex. 3 at Tr. 36:25-37:25, 38:1-5, 39:14-40:3, 41:9-18. Also, that Captain Maggi thought the policy was "unfair" or that Hunter was making his job more difficult. Id. at Tr. 29:23-30:20, 35:3-25. Defendants contend that as there is no evidence that Plaintiff was aware of these statements, they cannot now be used to serve as a basis for Plaintiff's hostile work environment claim.

Lastly, Defendants argue that even if Plaintiff meets the first two prongs of the Lehmann test, she fails to satisfy the third and fourth prongs, which involve an objective analysis of whether a reasonable military serviceperson would believe the conduct altered the terms and conditions of employment. Defendants assert that Plaintiff's terms of employment were not materially altered, and any changes made were necessary responses to her actions. They argue that Plaintiff's reduction in SAD (Service Authorized Day) time was a result of not working the required Pitman schedule and not due to discrimination based on her military status. As a result, Defendants contend that a reasonable military serviceperson would understand the nature of police work, and that Plaintiff's active-duty military orders made it impossible to serve simultaneously as a police officer.

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[1] 1 Deputy Chief Massey has claims for reverse racial discrimination and equal protection violations currently pending against the Defendants. See Massey v. Borough of Bergenfield, et al., Civil Action No.: 2:20-cv-01942(MCA)(MAH) (D.N.J.). Plaintiff Hunter relies on Deputy Chief Massey's testimony in her Statement of Undisputed Material Facts. See Plaintiffs Statement of Undisputed Material Facts (Trans ID: LCV202486908) at ¶¶8-10, 15-22, 24, 38, 51-55, 113-114, 124-125.

Plaintiff counters by arguing that Defendants' implementation of a discriminatory military leave policy, targeting her military leave orders exclusively, and the hostile comments/ complaints by Defendant Rabboh and Defendant Maggi directly related to Plaintiff's military service satisfy the elements of a hostile work environment claim. This is because the conduct occurred as a result of her military service and when all the conduct is viewed cumulatively it meets the standard of severe and pervasive.

Specifically, Plaintiff highlights that from the start of her employment up until Defendant Chief Rabboh's promotion to Chief in the summer of 2019 and his change to Defendant BPD's military leave policy, Plaintiff took active-duty military leave at Defendant BPD without any issue or complaint. (Barber Cert., Ex. 2, Plaintiff's Answers to Interrogatories, number 7). However, Plaintiff contends that after Defendant Rabboh's promotion things quickly changed.

A. Retroactive Application of the Military Leave Policy

From August 2, 2019, through December 1, 2019, Plaintiff Hunter was on active duty orders with the New Jersey National Guard ("2019 Military Leave")(Barber Cert., Ex. 8). In connection with her 2019 Military Leave, Plaintiff Hunter was placed on active-duty military leave pursuant to Defendant BPD's policies. (Barber Cert., Ex. 8) 40. As a result, at the close of 2019, Plaintiff Hunter was entitled to an allotment of 108 SAD hours. (Barber Cert., Ex. 9). At this time, Defendant BPD's past practice was to pay all of an officer's time for military leave and as of December 2019, Defendant BPD had no written military leave policy. (Massey Dep. Tr. 16:14-24; 16:25-18:6, Ex. 3 to Barber Cert.) (Rabboh Dep. Tr. T1 36:12-37:15, Ex. 4 to Barber Cert.; Maggi Dep. Tr. T12:25- 13:3, Ex. 6 to Barber Cert.).

Upon her return, per past practice Plaintiff requested Defendant Maggi to carry over her 108 hours of SAD time from 2019 into 2020. Defendant Maggi advised Plaintiff to see Defendant Rabboh, who advised her that the department now viewed military leave the same as sick leave and that he would be reducing her 2019 180-hour balance of SAD time by 14 hours for each month she was away on military leave. (Barber Cert., Ex. 10, Request for Admissions No. 1; Rabboh Dep. Tr. T1 150:4-21; T1 151:21-152:21, Ex. 4 to Barber Cert.; November 2, 2022, Deposition Transcript of Jessica Lynn Hunter ("Hunter Dep. Tr.") 125:14- 26:12, Ex. 11 to Barber Cert.). As a result of Defendant Rabboh's reduction,

only 52 hours of Plaintiff Hunter's 108 SAD hours were carried over to 2020, resulting in a denial of 56 SAD hours. (Barber Cert., Ex. 12). Plaintiff alleges that Defendant Rabboh denied her SAD time based on his retroactive application of a military leave policy -- that did not exist but he intended to put in place -- to her 2019 Military Leave.[2] (Rabboh Dep. Tr. T1 27:19-33:17, T1 32:17, Ex. 4 to Barber Cert.; see also Barber Cert., Ex. 19, Rabboh July 15, 2022 Certification wherein he admits that he made the decision to implement the military leave policy retroactively).

Prior to the institution of its 2021 Military Leave Policy, Defendant BPD learned that Plaintiff Hunter's military duty day could be at least 12 hours per day. (Rabboh Dep. Tr. T2 31:24-33:25, Ex. 17 to Barber Cert.; Barber Cert., Ex. 13). Despite learning this information, the "new" military leave policy was applied retroactively, even though, "Bergenfield Police Department had no written rule or regulation stating that military members, when performing military duties would be compensated by the Bergenfield Police Department as if the military member worked an 8-hour shift." (Barber Cert., Ex. 10, Rabboh Request for Admissions No. 7). Further -- based entirely on the police department chain of command's testimony -- Defendant Rabboh's retroactive application of the non-existent military leave policy to Plaintiffs 2019 Military Leave was the one and only time he retroactively applied a policy at Defendant BPD. (Rabboh Dep. Tr. T1 41:21-25, Ex. 4 to Barber Cert.). Those same supervisors uniformly testified that a retroactive application of a policy was unfair and improper and created department-wide rumors. (November 22, 2022 Deposition Transcript of Lieutenant Eric Ost ("Ost Dep. Tr.") 57:9-25, Ex. 15 to Barber Cert.) (Massey Dep. Tr. 20:17-21:9, Ex. 3 to Barber Cert.).

On November 20, 2020, Plaintiff Hunter met with Defendant Chief Rabboh about the discrepancies in her time bank due to his denial of her 56 and 48 hours of SAD time. (December 20, 2022 Deposition Transcript of Chief Mustafa Rabboh ("Rabboh Dep. Tr. T2") T2 7:9-8:9, Ex. 17 to Barber Cert.). Following that meeting, based on advice of counsel, Defendant Chief Rabboh reversed his original decision to deny Plaintiff Hunter's SAD hours. (Rabboh Dep. Tr. T1 153:12-154:15, Ex. 4 to Barber

[2] Defendant BPD formally put its new military leave policy in place in May 20, 2021 -- 18 months after the decision.

Cert.; Rabboh Dep. Tr. T2 11:9-13; T2 12:8- 11, Ex. 17 to Barber Cert.; Barber Cert., Ex. 2, Plaintiff's Interrogatory No. 7). Defendant Chief Rabboh told Plaintiff Hunter that she would receive all of her (56) and (48) hours of SAD time that he previously took away. (Rabboh Dep. Tr. T1 158:1-5 5 , Ex. 4 to Barber Cert.; Rabboh Dep. Tr. T2 10:20-11:13; T2 26:5-10, Ex. 17 to Barber Cert.; Barber Cert., Ex. 16, BF000448). After he promised Plaintiff Hunter that she would receive her full 56 hours of SAD time, Defendant Rabboh then decided to only provide her with only 22 of the 56 SAD hours. (Rabboh Dep. Tr. T2 12:15-13:25; T2 25:16-26:10, Ex. 17 to Barber Cert.).

On May 20, 2021, Defendant BPD formally adopted a written military leave policy, CA-136. (Barber Cert., Ex. 26; Maggi Dep. Tr. T124:21-125:18, Ex. 6 to Barber Cert.). CA-136 that states, in relevant part:

> A. STATE MILITIA – NEW JERSEY: 1. A member of the National Guard or another component of the organized militia of New Jersey shall be entitled to a leave of absence from their respective duties without loss of pay or time during the time when the employee is ordered to active duty. This paid leave of absence shall not exceed 90 working days (720 Hours)7 (N.J.S.A. 38A:4-4).
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> 5. An officer/civilian deployed for long term active duty will be placed on the Administrative Schedule (8 Hour day) by reason of which a bank of hours will be established in the base amount of 240 hours for reservists and 720 hours for National Guard members to be used for military time off with full pay. An officer/civilian who works the 12-hour schedule will be placed on Administrative Schedule (8 hours) as a result of his/her deployment will have his/her SAD adjusted to reflect the Administrative Schedule.

(Barber Cert., Ex. 26, BF000881-BF000886)

Surprisingly, in May 2021, "Defendant Rabboh was advised by the New Jersey Department of Military Affairs that service members are on active duty 24-hours a day, 7 days a week **unless** on leave." (Barber Cert., Ex. 10, Rabboh Request for Admissions No. 13). Plaintiff contends the convenient timing of the formal adoption and application of a policy that positively categorizes an employee's hours as less than what they have worked certainly raises a question of credibility for a jury as motions for summary judgment should not be granted where a credibility determination is required because "[i]t [is] not the court's function to weigh the evidence and determine the outcome, but only to decide if a material dispute

of fact existed." Parks v. Rogers, 176 N.J. 491, 502 (2003) (quoting Gilhooley v. County of Union, 164 N.J. 533, 545 (2000)). On May 8, 2023, Judge O'Dwyer Ordered: Defendant Bergenfield Police Department's CA-136 is void and unenforceable as to Plaintiff, Jessica Hunter, as it defines a workday based on an 8-hour shift for those Defendant Bergenfield Police Department Bergenfield Police Department employees working at 12-hour Pitman Schedule. Barber Cert., Ex. 28; May 8, 2023 Order by Judge O'Dwyer. Defendants state assuming arguendo that this Court was correct on its ruling regarding the policy, it was, as the Court held, a matter of first impression. Further, Defendants contend that the record reflects that Chief Rabboh acted on Plaintiff's complaints and acted in good faith, when he seriously considered Plaintiff's requests regarding her leave and pay, while balancing the issues the BPD was facing in during the COVID-19 pandemic. See Shahdanian Cert., Ex. C at 64:4-20, 65:17 - 66:16.

Plaintiffs position is that Defendants implemented and enforced a military leave policy that categorized a "workday" to be "the period of time the employee is placed on an eight (8) hour administrative position, while deployed." (Barber Cert., Ex. 26, BF000881-BF000886) despite being advised by the New Jersey Department of Military Affairs that a "workday" for service members is 24 hours as they are on active duty 24-hours a day, 7 days a week unless on leave.

As a result, Plaintiff contends there is a clear dispute in fact regarding whether the retroactive application of the military leave policy after being cautioned against the improper characterization of hours contains the severity or pervasiveness required to rise to the level of hostile and must be decided by a jury.

B. Miliary Orders

In May of 2020, Plaintiff Hunter received military orders for active military leave from June to August 2020. (Barber Cert., Ex. 11; Hunter Dep. Tr. 40:1-13). When Plaintiff Hunter produced her military leave orders, her orders were approved as they were entered into the manpower computer program at Defendant BPD by either Defendant Maggi or Defendant Rabboh. (Barber Cert., Ex. 11; Hunter Dep. Tr. 40:14-41:20). On or about May 22, 2020, Plaintiff Hunter received an email from

Defendant Maggi that attached a letter from Defendant Maggi which Defendant Rabboh sent to Plaintiff Hunter's military commander denying Plaintiff Hunter's military leave orders. (Barber Cert., Ex. 13; HUNTER 206; see also Barber Cert., Ex. 11; Hunter Dep. Tr. 42:2-8). Following the denial of her military orders, Plaintiff Hunter was advised by her military supervisor that she could no longer be counted on to fulfill her orders. (Barber Cert., Ex. 11; Hunter Dep. Tr. 43:9-22).

In July of 2020, Plaintiff Hunter received a text message placing her on military orders to which she responded by requesting a memorandum she could present to the police department. (Barber Cert., Ex. 11; Hunter Dep. Tr. 45:16-21). Plaintiff Hunter then showed her orders to Defendant Maggi, who advised that he would review the matter with Defendant Rabboh. (Barber Cert., Ex. 11; Hunter Dep. Tr. 45:22). Later, Defendant Maggi advised Plaintiff Hunter that they contacted her military company commander who purportedly told them that Plaintiff Hunter's orders were voluntary. (Barber Cert., Ex. 11; Hunter Dep. Tr. 45:22-46:3). Defendant Maggi then told Plaintiff Hunter that her military leave had once again been denied. (Barber Cert., Ex. 11; Hunter Dep .Tr. 45:22-46:3). However, Plaintiff contends that federal law mandates that voluntary and involuntary service are both protected leave and the fact that the orders were "voluntary" is of no significance. See 38 U.S.C. §4303 ("The term 'service in the uniformed services' means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority. . . ."); 20 C.F.R. §1002.5(1) (same); 20 C.F.R. §1002.6 ("USERRA's definition of 'service in the uniformed services' covers categories of military training and service, including duty performed on a voluntary or involuntary basis, in time of peach or war.").

During OA Defendants suggested that it was impossible for them to "deny" Plaintiffs orders as the miliary has the ultimate say. Plaintiff contends that Defendants' improper denial of Plaintiff's June-August 2020 military leave orders adversely affected her status and reputation with her military chain of command because her military platoon sergeant took Plaintiff Hunter off her military leave orders in an attempt to alleviate further discrimination. (Barber Cert., Ex. 11; Hunter Dep. Tr. 42:11-16). Plaintiff contends this raises another issue of fact for the jury to decide concerning whether the orders were improperly denied causing revocation of said orders and what the consequences of their denial entailed.

C. Complaints and Hostile Comments

Plaintiff contends that she complained to Deputy Chief Massey on many occasions about the Department's mistreatment in connection with her military leave. (Massey Dep. Tr. 13:15-18:16; 18:9-20:16, Ex. 3 to Barber Cert.). Further, Plaintiff highlights that she complained to Defendant Maggi and Lieutenant Edward Ost on several occasions that it was **unfair for the department to treat military leave the same as sick leave**. (November 2, 2022 Deposition Transcript of Jessica Lynn Hunter ("Hunter Dep. Tr.") 33:6-19; Ex. 11 to Barber Cert.)[3]. On one occasion, Plaintiff Hunter came to Deputy Chief Massey's office "very upset" about Defendant Rabboh deducting time as a result of her military leave. (Massey Dep. Tr. 16:25-18:6, Ex. 3 to Barber Cert.). On another occasion, Deputy Chief Massey talked to Plaintiff Hunter in the parking lot at work about a meeting with Defendant Rabboh concerning her military service and "getting her time back" that "didn't go well." (Massey Dep. Tr. 21:10-22:16, Ex. 3 to Barber Cert.). Plaintiff highlights that Defendant Maggi told Deputy Chief Massey that "the chief would tell him to write emails or to do things in regard to a response to Hunter that he didn't necessarily agree with, but because he was a subordinate, he followed orders and did it." (Massey Dep. Tr. 32:4-20, Ex. 3 to Barber Cert.) Further, after the lawsuit was filed, Defendant Rabboh called Deputy Chief Massey and Defendant Maggi into a meeting where Defendant Rabboh was "very upset about the lawsuit and made it clear that he was not happy." (Massey Dep. Tr. 36:25- 37:25, Ex. 3 to Barber Cert.). Plaintiff highlights that Defendant Rabboh even told the Borough Administrator that "he wanted Officer Hunter fired because he was stating that she was a liar" conveniently after her repeated requests to be treated justly. (Massey Dep. Tr. 39:14- 40:3; 38:1-5, Ex. 3 to Barber Cert.).

In addition, Plaintiff contends that Defendants Rabboh and Maggi made several hostile comments and complaints directly related to Plaintiff's military service and the negative impact of her military

[3] Deputy Chief Massey testified that based on his training and experience, he "would be shocked" if Defendant BPD treated military leave the same as sick leave because "they're two totally different entities." (Massey Dep. Tr. 10:3-11:7, Ex. 3 to Barber Cert.)

service on the Bergenfield Police Department. For instance, Plaintiff contends that Defendant Maggi told Plaintiff that "the chief said if the National Guard cuts a check for all of the overtime that they create, we will have no problem sending you" and "you know Hunter, you know, I'm starting to think you don't like your job." (Barber Cert., Ex. 11; Hunter Dep. Tr. 47:9-15) (Barber Cert., Ex. 11; Hunter Dep. Tr. 46:4-10). Further, Plaintiff highlights that Defendant Maggi complained to Deputy Chief Massey that Plaintiff Hunter's military leave made his job of scheduling difficult. (Massey Dep. Tr. 29:23 - 30:10, Ex. 3 to Barber Cert.) Furthermore, Defendant Maggi would "lament" that Plaintiff Hunter's miliary leave "would provide him with more work to do, and we had other discussion about her military leave not described in that regard." (Massey Dep. Tr. 30:11-20, Ex. 3 to Barber Cert.)

Defendants contend that it is beyond dispute that as the head of the Bergenfield Police Department, Chief Rabboh has a responsibility to ensure all of the officers protecting and serving the Borough are committed to their roles. Further, they argue while Plaintiff may have subjectively interpreted their comments as attempts to question her loyalty, the law relies on an objective standard to evaluate the severity and pervasiveness requirement of a hostile work environment claim and a reasonable military serviceperson would not believe the conduct altered the terms and conditions of employment.

Plaintiff's position is that Defendants' comments and complaints pertaining to Plaintiff's loyalty and commitment do not necessarily create a hostile work environment on their own, however there is no doubt that they certainly add to the overall hostile atmosphere and per NJLAD when viewed cumulatively meet the standard of severe and pervasive.

Further, Plaintiff highlights that there is a clear dispute in material fact regarding what comments were actually made and the timeline pertaining to when Plaintiff found out about said comments. Plaintiff contends that she faced repeated hostility and Defendants allege that besides the two comments identified, nothing else is relevant as Plaintiff was unaware of what went on behind closed doors and she cannot use information that she learned after the fact to support her claims. As such, Plaintiff suggests there is a question of fact regarding how a reasonable miliary person would interpret said comments and complaints making summary judgment inappropriate at this stage. In conclusion, according to Plaintiff viewing the

totality of the harassing conduct and comments, along with their cumulative effect, she has demonstrated genuine issues of material fact that leave credibility determinations for a jury.

As a result, Plaintiff suggests the cumulative effect of the retroactive application of the discriminatory military leave policy, derogatory comments, and interference with military orders creates a severe and pervasive hostile work environment that any reasonable miliary person would be able to identify. Defendants disagree and state that even if Plaintiff meets the first two prongs of the Lehmann test, she fails to satisfy the prong which involves an objective analysis of whether a reasonable military serviceperson would believe the conduct altered the terms and conditions of employment. Plaintiff asserts that the cumulative effect of the incidents recounted support the pervasiveness of the harassment, creating a hostile work environment. Further, Plaintiff contends that a reasonable servicemember would find the discriminatory military policy, loss of SAD time, and derogatory comments hostile.

Here, granting the motion for summary judgment at this stage would be inappropriate as the pleadings, depositions, answers to interrogatories and admissions on file together with the exhibits show that there are genuine issues of material facts. A determination whether there exists a genuine issue of material fact precludes summary judgment and requires this Court to consider whether the competent evidentiary materials presented when viewed in the light most favorable to nonmoving party are sufficient to permit a rational fact finder to resolve the alleged dispute issues in favor of the nonmoving party. Here, a rational fact finder could conclude that the cumulative effect of the retroactive application of the military leave policy, derogatory comments, and "interference" with military orders creates a severe and pervasive hostile work environment that a reasonable miliary person would be able to identify. As a result, these issues of fact are genuine, and considering the burden of persuasion at trial, the evidence submitted by the parties on the motion and all legitimate inferences therefrom favoring the nonmoving party require submission of the issues to the trier of fact. Therefore, this Court must deny summary judgment on the hostile work environment claim because when viewing the facts in favor of the non-moving party there are multiple disputed material facts outlined above that raise questions of credibility for a jury to decide.

Retaliation Claim:

The LAD's anti-retaliation provision, N.J.S.A. 10:5-12(d), makes it unlawful:

> [f]or any person to take reprisals against any person because that person has opposed any practices or acts forbidden under this act or 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 LAD].

As the New Jersey Supreme Court has explained, "the protection against retaliation embodied in the LAD is broad and pervasive, and must be seen as necessarily designed to promote the integrity of the underlying antidiscrimination policies of the Act by protecting against reprisals against 'any person' who has sought to protect his or her own rights not to be discriminated against or who has acted in support of such conduct." Quinlan v. Curtiss-Wright Corp., 204 N.J. 239, 259 (2010); see also Morris, supra.

Defendants assert that Plaintiff did not suffer any retaliatory conduct, emphasizing actions short of termination may not constitute adverse employment actions. They argue that Plaintiff did not experience any adverse employment action and, therefore, cannot establish a causal link between her military service and the alleged adverse action. Defendants contend that Plaintiff's claim that she was dissuaded from fulfilling military obligations falls outside the scope of adverse employment actions. They assert that Chief Rabboh's decision to grant partial SAD hours was based on legitimate, non-retaliatory reasons. Defendants contend the record is clear that Chief Rabboh took Plaintiff's complaints seriously, and not only did he not retaliate against plaintiff, but he also acted on them by reaching out to Lieutenant Colonel Langston to gather information and then conferred with Borough officials to determine the best course of action. See Shahdanian Cert., Ex. C at 64:4-20, 65:8 – 66:16. Defendants take the position that the record reflects that Chief Rabboh acted on Plaintiff's complaints and acted in good faith, when he seriously considered Plaintiff's requests regarding her leave and pay, while balancing the issues the BPD was facing in during the COVID-19 pandemic. See Shahdanian Cert., Ex. C at 64:4-20, 65:17 - 66:16.

Plaintiff underscores the NJLAD's anti-retaliation provision, emphasizing its protection beyond employment-related acts. Plaintiff contends that Defendants incorrectly rely on an outdated legal standard, asserting that Plaintiff must show an "adverse employment action," contrary to Roa v. Roa. 200 N.J. 555, (2010) and Burlington Northern & Santa Fe Ry. v. White. 548 U.S. 53, (2006).

Plaintiff presents instances of materially adverse retaliation, such as on May 5th, fully aware that Plaintiff Hunter was stationed in Gloucester County with limited access to work email, Captain Maggi emailed her advising that, pursuant to N.J.S.A. 38:23-1 and/or N.J.S.A. 4A:6-11, her (90) days of paid military leave would expire on May 25, 2021, at which point she would be on unpaid status until her military leave was completed; she would no longer be paying into the pension system and would have to buy back her time upon her return to Defendant BPD; and her medical coverage would continue for (30) days at the end of which Plaintiff Hunter would have to apply for COBRA. (Barber Cert., Ex. 23, HUNTER 534, 535.).

Further, Plaintiff contends that Defendants retaliated against her by adversely scheduling her compensation time in connection with her military leave. On January 20, 2021, Plaintiff Hunter was placed on Deployment Orders in support of Operation COVID-19. Id. (Barber Cert., Ex. 20, HUNTER 483). Plaintiff Hunter's initial orders were to expire March 31, 2021. (Barber Cert., Ex. 20, HUNTER 483). Plaintiff Hunter had (2) SAD days off for January 20 and 21, 2021. (Hunter Dep. Tr. 92:15-93:12, Ex. 11 to Barber Cert.). When Defendant BPD placed her on military leave, they placed it around her (2) days off. (Hunter Dep. Tr. 92:15-93:12, 93:20-22, Ex. 11 to Barber Cert.). On or about April 29, 2021, Plaintiff Hunter's orders were involuntarily extended to August 12th. Barber Cert., Ex. 31, HUNTER 486). Prior to that extension, Plaintiff Hunter had requested 4 days off in July 2021. (Hunter Dep. Tr. 92:15-93:12, 93:20-22, Ex. 11 to Barber Cert.). Rather than rescinding Plaintiff Hunter's previously requested July days off, Defendant BPD placed Plaintiff Hunter's military leave around it. (Hunter Dep. Tr. 92:15-93:12, 93:20-22, Ex. 11 to Barber Cert.) Id. On April 27th, Plaintiff Hunter emailed Lieutenant Ramos (Platoon supervisor) informing him of the issue, who forwarded the email to Captain Maggi. (Barber Cert., Ex. 32, HUNTER 557). Defendant Maggi never responded to the email but told Lt. Ramos

that he added the July and January dates back into Plaintiff Hunter's time bank. Barber Cert., Ex. 33, Plaintiff's Amended Complaint, ¶111). However, Defendant Maggi did not add the (34) hours due to her from the 2019 SAD hour reduction because Plaintiff Hunter worked (8) hours when she served with the National Guard (which is not accurate). Id. at ¶112.

Here, the loss of SAD time, miscalculation of 90-paid workdays, and the refusal to reschedule SAD time, causing financial losses and detriment to medical benefits raises questions of fact pertaining to the causal connection of Defendants' alleged animus towards Plaintiffs military service. The evidence presented by both sides raises material questions of fact as Defendants assert that Plaintiff does not establish pretext or rebut their showing of legitimate, non-discriminatory reasons for decisions regarding Plaintiff's SAD time. Plaintiff contends she established a causal connection through direct evidence of Defendants' animus towards her military service, discriminatory military leave policy, and antagonistic comments. As such, when viewed in the light most favorable to the non-moving party, a reasonable fact finder could conclude either explanation for the actions outlined above as true. Therefore, as the credibility determinations must be decided by a jury summary judgment is inappropriate for the retaliation claim.

Disparate Treatment Claim:

Under the NJLAD, a disparate treatment claim can be demonstrated under one or both of two analytical paradigms: the "direct evidence" framework of Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) and the "circumstantial evidence" burden-shifting analysis under McDonnell-Douglas. The difference in the two frameworks is quality of the evidence reflecting the alleged unlawful bias. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). For disparate treatment cases, a prima facie case requires a demonstration that: (1) the plaintiff is a member of a protected class; (2) they were performing duties consistent with their employer's legitimate expectations; (3) they suffered adverse employment action; and (4) the action occurred under circumstances that could give rise to an inference of intentional discrimination. Id.; see also Zive v. Stanley Roberts, Inc., 182 N.J. 436, 447 (2005). If the

plaintiff proves the prima facie elements, "the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employer's action." Zive, 182 N.J. at 449. Then, the plaintiff has the final burden to demonstrate that "the reason articulated by the employer was merely a pretext for discrimination and not the true reason for the employment decision." Zive, 182 N.J. at 447.

Here, it is undisputed that Plaintiff was a member of a protected class however, Defendants argue that Plaintiff fails to make a requisite prima facie showing of discrimination. They contend that Plaintiff's claims lack merit, emphasizing deficiencies in elements like adverse employment action and inference of intentional discrimination. Defendants assert that comments made to Plaintiff do not establish pretext or rebut their showing of legitimate, non-discriminatory reasons for decisions regarding Plaintiff's SAD time. Plaintiff relies on both direct and circumstantial evidence to illustrate the disparate treatment. McDevitt v. Bill Good Buildings, Inc. 175 N.J. 519, (2003) and Ryder v. Westinghouse Elec. Corp. 128 F.3d 128, (1997). Plaintiff contends that Defendants implemented a discriminatory per se military leave policy that was struck down by the court and other employees were treated differently when accounting for paid leave.

Plaintiff argues that Defendants' upper management exhibited discriminatory animus towards her military service and takes the position that she has provided direct evidence of said discrimination. In this case, unlike all other types of leave, only military service was treated like sick leave for purposes of compensation. Plaintiff provides the example of Lieutenant Ost to illustrate her point. When Lieutenant Ost who was a union member, missed time off from work due to union activities, his schedule was not changed, nor did he lose time or pay. (Barber Cert., Ex. 15, Ost. Dep. Tr. 69:15- 70:1). That is to say military service leave was singled out and treated differently than non-military service for purposes of paid leave. Police officers who attend union functions are, for compensation purposes, reassigned to PBA status. Those officers who attend union functions and work the patrol division are not placed on an 8-hour Administrative Schedule when reassigned to PBA status but are compensated based on their Pitman Schedule. (Barber Cert., Ex. 3, Rabboh Dep. Tr. T1 48:18-25).

Here, Plaintiff is a member of the miliary and was performing duties consistent with her employer's legitimate expectations. Plaintiff suffered the adverse employment action where only military service was treated like sick leave for purposes of compensation and said action occurred under circumstances that could give rise to an inference of intentional discrimination. As such, Plaintiff has proved the prima facie elements the burden of production shifted to the employer to articulate a legitimate, nondiscriminatory reason for the employer's action. Here, Defendants contend that their actions were legitimate and nondiscriminatory because on an issue of first impression, the Chief coordinated with top department personnel, and reached out to the State National Guard to determine he was taking the proper course of action. See Shahdanian Cert., Ex. C at 23:8 - 25:22, 27:8-18, 92:16 - 93:8, 145:3-10. Defendants argue that it was an entirely reasonable process for deciding an issue with which the Borough had never dealt. As a result, there is a material dispute in fact that gives rise to credibility determinations which must be made by a jury when viewing the motion in the light most favorable to the non-moving party. As a result, summary judgment is inappropriate as to the disparate treatment claims because a reasonable fact finder could end up on the side of either party based on the evidence presented.