MARILYN RYAN, Plaintiff-Appellant,

v.

TOWNSHIP OF MOUNT OLIVE, STEVEN RATTNER, and ROBERT GREENBAUM, Defendants-Respondents.

No. A-5768-08T1.

Superior Court of New Jersey, Appellate Division.

Argued: March 17, 2010.
Decided: September 24, 2010.

Glenn A. Montgomery argued the cause for appellant (Montgomery, Chapin & Fetten, P.C., attorneys; Mr. Montgomery, of counsel; Gary Ahladianakis, on the brief).

Eric L. Harrison argued the cause for respondents (**Methfessel** & **Werbel**, attorneys; Mr. Harrison, of counsel; Michelle M. Schott, on the brief).

Before Judges Cuff and Waugh.

PER CURIAM.

Plaintiff Marilyn Ryan served as the Assistant to the Mayor (Assistant) of the Township of Mount Olive (Township) from January 26, 2004 to December 18, 2006, when her position was eliminated. Township officials cited budgetary concerns as the reason for the elimination of her position. In her complaint, plaintiff alleges that she was discharged and asserts that her discharge was grounded on her age, gender, and political affiliation. She also alleges retaliation for filing a workers' compensation claim and invoking her rights under the Family Medical Leave Act (FMLA), 29 U.S.C.A. §§ 2601 to 2654. She appeals from an order granting summary judgment to defendants and dismissing her complaint in its entirety. We affirm.

Plaintiff was initially hired by defendant's Township on August 1, 2001, as a part-time clerk typist. On June 3, 2002, she became a Special Projects Coordinator. On January 1, 2004, near the time the newly-elected mayor, Richard De La Roche, took office, she was promoted to the position of Assistant. Plaintiff's job responsibilities as Assistant included supporting the Mayor and the Business Administrator and doing other clerical work. Plaintiff's prior position, Special Projects Coordinator, was not filled and was eliminated the following year. Plaintiff assumed some of the job responsibilities of that position.

There is some dispute about the circumstances of plaintiff's appointment to the Assistant position. Plaintiff alleges she was selected for this promotion, that her selection displaced the incumbent Assistant, and a position in the local government was found for the displaced Assistant at the same salary. Defendants, however, allege the prior Assistant was transferred to the position of Planning Consultant for the municipal planning board to fill a supervisory void and that plaintiff was promoted to Assistant to fill the vacancy created by the transfer.

In support of plaintiff's claim of gender discrimination, plaintiff refers to a statement made by defendants Robert Greenbaum and Steven Rattner, both of whom served as elected members of the Township Council. Plaintiff learned that Greenbaum and Rattner discussed her position at the March 12, 2005 budget meeting. Plaintiff obtained a copy of a recording of this public meeting and listened to several comments between Greenbaum and Rattner about her position. It is not disputed that Greenbaum told Rattner that he favored elimination of plaintiff's position. In response to this suggestion, Rattner responded, "this is going to be fun," and laughed. During a recess, Greenbaum and Rattner continued their conversation about plaintiff's position. This conversation was also recorded. Greenbaum referred to plaintiff's job as "fluff" and "useless to the township." He referred to plaintiff as a "cheerleader."

Plaintiff filed a complaint with the Township Business Administrator about their March 2005 Budget Meeting comments. She alleges she was told she "really shouldn't make a fuss over it because then the council would really rattle [her] cage." Councilwoman Colleen Labow testified at her deposition that the comments were not directed at plaintiff but at her position and other positions in the Township.

Plaintiff also relies on a July 26, 2006 incident at a local blood drive. She stated that as she reviewed her husband's donor questionnaire, Rattner leaned over and said "Why? Are you looking for a second job as a hooker?" Rattner denied ever making that statement or any other statement to plaintiff that day.

Plaintiff also relates a third unpleasant experience with Rattner that occurred as she delivered a contract to the Township Clerk. She states Rattner was in the Clerk's office and insisted on telling her the source of recent sewer problems. She states that Rattner blocked her exit from the Clerk's office and told her that "most of these sewer systems . . . [are] clogged up with women's panties and personal products, you know, that cause the grinder machinery to become gummed up . . . ." Plaintiff found the comment disgusting.

Rattner does not dispute that he made this or a similar statement, but denied the statement was directed specifically at plaintiff. He insists the Clerk asked a question about a recent bill, and Rattner offered him an explanation that was overheard by plaintiff.

In further support of her gender discrimination claim, plaintiff states that Jim Buell, another councilman, criticized her at a public meeting about an email she sent at the request of the Mayor about an effort to recall him. She alleges that Buell stated that plaintiff should be "RICO'd" for theft of services for sending the email.

Plaintiff also alleges that the Business Administrator told her that Greenbaum was cursing and threatening to bury her and had submitted an Open Public Records Act request for her time and attendance records, and a private log sheet that recorded the reasons for certain doctors' visits.

During her deposition, plaintiff stated that she believed that these encounters and statements evidenced that she was treated differently than a man "because of the types of things that they said about [her]." She also opined that she did not believe that "they would have as easily dismissed a man or tried to undermine a man."

In support of plaintiff's age discrimination claim, plaintiff identified another statement made by Greenbaum at the March 2005 budget meeting that evidenced a desire to replace her with a younger employee. She relates a statement by Greenbaum to Rattner in which he allegedly stated, "If we eliminate [plaintiff's] position that will help with Christie [Stachnick]. That is where the cut has to be. They are going to have to drop her salary too." Rattner allegedly responded, "this is gonna be fun."[1]

Stachnick is a woman who was in her thirties at the time of plaintiff's termination; plaintiff was fifty-nine years of age at that time. According to the Business Administrator's affidavit in support of defendants' motion for summary judgment, forty-seven women worked for the Township in 2008, of whom eleven were two years younger, the same age, or older than plaintiff. Plaintiff was the oldest of three women who worked in the Township office that housed the mayor, members of council, and the clerk.

In support of her claim of political affiliation discrimination, plaintiff argues in her brief on appeal that she served as Assistant to a mayor who was recalled in the November election. She asserts that the recall was a significant political event in the Township that precipitated "extensive disputes and litigation for several months" before her termination.

In the midst of budget disputes and effort to recall the mayor for whom she worked, plaintiff was hospitalized on September 26, 2006, due to difficulty breathing, chest pain, and elevated blood pressure. She alleges that her doctors informed her that her condition was attributable to job-related stress. Stachnick, who served as benefits coordinator for the Township, filled out a workers' compensation incident report. Plaintiff filed a workers' compensation claim and complains that Stachnick advised her that her medical records would not remain confidential if she pursued this claim. Plaintiff's workers' compensation claim was denied.

On October 4, 2006, plaintiff went on medical leave. She was scheduled to return to work on December 27, 2006. On November 6, 2006, the incumbent mayor was recalled and another person was elected mayor. On December 18, 2006, the Township Council approved the 2007 budget. The budget eliminated two positions: Assistant and Township Electrical Inspector.

Stachnick assumed many of plaintiff's responsibilities while plaintiff was on medical leave. The Township Administrator had recommended elimination of plaintiff's position to the newly-elected mayor and the Township Council because Stachnick easily performed her job as Benefits Coordinator and plaintiff's job tasks while plaintiff was on leave.

I

Plaintiff filed a four count complaint against defendant's Township, and Councilmen Rattner and Greenbaum. In Count One, plaintiff asserted that her termination was in retaliation for exercising her rights under the FMLA. In Count Two, she alleged her termination was caused by her exercise of her rights to workers' compensation and disability benefits. In Count Three, plaintiff alleged hostile work environment gender, age, and disability discrimination. In Count Four, plaintiff alleged breach of contract.[2]

Following discovery, defendants filed a motion for summary judgment. Plaintiff did not oppose summary judgment on Count Four, the breach of contract claim. The motion judge granted defendants' motion in its entirety. In his opinion, the motion judge held that plaintiff was required to satisfy the four-prong test announced in Lehmann v. Toys "R" Us, Inc., 132 N.J. 587, 603-04 (1993) to establish her "sexual harassment/hostile work environment claim." He assumed for purposes of the motion that Greenbaum's and Rattner's statements to and about plaintiff were sexist, but determined the working environment was not affected. The motion judge found that the public nature of the three outside-of-the-workplace comments could not cause or contribute to a hostile or abusive work environment. The judge also found that the comments were "certainly not pervasive enough to constitute an actionable claim," or severe enough to support this claim. The judge also held that the single reference to her as a "hooker" was certainly in "poor taste" but not the rare and extreme comment that can be considered severe because "Rattner was not a supervisor or manager of the plaintiff." Rattner's discussion of the problems plaguing the sewer system may have been "crude," but represented his view of the cause of the problem and her reaction to his opinion was "irrelevant."

Finally, the motion judge found that Greenbaum's description of her job as "fluff" was directed at the nature of the position rather than plaintiff's performance of that position. Moreover, plaintiff failed to submit any evidence that this statement, made twenty-one months before elimination of the position, had any "effect on altering the conditions of her employment."

Addressing her gender discrimination claim, the motion judge held that plaintiff failed to establish a prima facie case of termination under circumstances giving rise to an inference of discrimination. He noted that the position was not abolished until after the election, and the position has not been restored. Furthermore, the person who assumed some of the former responsibilities of the position is a woman, and another position held by a man was also abolished at the same time.

The motion judge also held that plaintiff did not establish a prima facie case of age discrimination. He noted she was one of three women who worked in the administrative offices at the municipal building, "she was under the supervision of the Mayor as were forty-one other women," and eleven other women in other departments of municipal government were the same age, older, or two years younger than plaintiff. The judge also found no one replaced plaintiff, the Township established a legitimate non-discriminatory reason for her termination, and plaintiff failed to produce any evidence of pretext.

Addressing the FMLA claim, the judge held that the statute does not guarantee reinstatement at the end of a leave, and the employer established that plaintiff would not have been retained if she had not taken leave and there was no equivalent position for her to assume on her return from leave. Finally, the motion judge held that plaintiff submitted no evidence of retaliation for pursuing her workers' compensation or FMLA remedies.

On appeal, plaintiff argues that she submitted evidence to establish a prima facie case in support of her gender, and age hostile environment discrimination claims; the gender, age, and political affiliation discrimination claims; her FMLA claim, and the workers' compensation retaliation claim. Plaintiff also argues that the motion judge failed to address her political affiliation discrimination claim. We affirm.

II

The New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, explicitly states that it is unlawful discrimination

> [f]or an employer, because of the race, creed, color, national origin, ancestry, age, martial status, . . . affectional or sexual orientation, . . . sex . . . of any individual, . . . to refuse to hire or employ or to bar or to discharge . . . from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment . . . .
>
> [N.J.S.A. 10:5-12(a).]

While the act specifically prohibits employment discrimination based on sex, it is silent on the subject of sexual harassment. Lehmann, supra, 132 N.J. at 600. Nonetheless, our Supreme Court has looked to federal precedent construing Title VII of the

Civil Rights Act of 1964, 42 U.S.C.A. 2000e to 2000e-17, for guidance on interpreting the LAD and has determined that sexual harassment is a form of discrimination prohibited by the LAD. Id. at 600-01.

The Court in Lehmann, set forth a four-prong test that a plaintiff must fulfill to establish a prima facie claim of hostile work environment sexual harassment: "the complained-of-conduct (1) would not have occurred but for the employee's gender; and it was (2) severe or pervasive enough to make a (3) reasonable woman believe that (4) the conditions of employment are altered and the working environment is hostile or abusive." Id. at 603-04. To satisfy the first element, the plaintiff must show "by a preponderance of the evidence that she suffered discrimination because of her sex." Id. at 604. If the complained of behavior is sexual in nature, such as unwanted sexual comments or touching or comments about the lesser abilities of women, the "but-for-element" is automatically satisfied. Id. at 605. The conduct, however, need not be overtly sexual to satisfy the first prong. Tartaglia v. UBS PaineWebber, Inc., 197 N.J. 81, 126 (2008). When the form of harassment is not obviously sexual, the plaintiff has the additional burden of making a prima facie showing that "it is more likely than not that the harassment occurred because of plaintiff's sex." Lehmann, supra, 132 N.J. at 605.

The second, third, and fourth prongs of the standard are separable but interdependent and, therefore, must be discussed as a whole. Id. at 604. In determining whether conduct was severe or pervasive, the harassing conduct as a whole must be evaluated, not its effect on the plaintiff or the work environment. Godfrey v. Princeton Theological Seminary, 196 N.J. 178, 196 (2008); Lehmann, supra, 132 N.J. at 606. Neither a "`plaintiff's subjective response' nor a defendant's subjective intent," is controlling over whether a hostile work environment exists. Cutler v. Dorn, 196 N.J. 419, 431 (2008) (quoting Lehmann, supra, 132 N.J. at 604-05, 613). When determining whether the conduct would cause a reasonable person to believe the work environment is hostile, the courts must consider the cumulative effect of the conduct, not just the isolated instances of conduct. Godfrey, supra, 196 N.J. at 196 (2008); Lehmann, supra, 132 N.J. at 607. This requires a totality of the circumstances assessment, in which the court should consider "'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" Cutler, supra, 196 N.J. at 432 (quoting Green v. Jersey City Bd. of Ed., 177 N.J. 434, 447 (2003)).

While a single incident of harassing conduct may be sufficient to create a hostile work environment, "'it will be a rare and extreme case in which a single incident will be so severe that it would, from the perspective of a reasonable [woman], make the working environment hostile.'" Taylor v. Metzger, 152 N.J. 490, 500 (1998) (quoting Lehmann, supra, 132 N.J. at 606-07).

Here, there are three instances of conduct which, considered singly or together, do not establish a prima facie showing of sexual harassment. The comments at the March 2005 budget meeting were not sexual in nature. Greenbaum's comments that plaintiff's job was "useless" and "fluff" were mere expressions of his opinion of the position and its function. The reference to plaintiff's role as that of a "cheerleader" is not sexual in nature. Although a cheerleader is commonly a woman, there is no indication that there was any sexual innuendo. Plaintiff alleges that the word "cheerleader" "when heard by a reasonable woman, is clearly a sex-based comment since it connotes a cheerleader as being a female of low intelligence whose position is one that has no actual or direct involvement as the outcome of the event." This is plaintiff's subjective opinion of the word. Plaintiff offers no evidence to support this connotation and, on its face, the comment is not sexual. Even if the term cheerleader does comport with plaintiff's proposed definition, Greenbaum is entitled to believe that plaintiff's position has no real effect on the Township's overall success as a township and that the position contributed nothing. He is even entitled to believe that plaintiff is of low intelligence, as long as it is not because she is a woman. Further, Greenbaum's comments were not made to plaintiff or in plaintiff's presence.

Rattner's description of the source of recent sewer system clogs is not a sexual comment. A simple reference to women's underwear is not a sexual comment. Considered in context, it is perhaps an unpleasant but potentially accurate account of a problem. See Cutler, supra, 196 N.J. at 431. Further, although plaintiff may not have wanted to hear the comments, and was annoyed and disgusted by having to do so, that does not rise to the level of harassment. See Herman v. Coastal Corp., 348 N.J. Super. 1, 23 (App. Div.) ("Although a person is legally entitled to a work environment free of hostility, she is not entitled to a perfect workplace, free of annoyances and colleagues she finds disagreeable. In short, what is illegal is a `hostile work environment,' not an `annoying work environment.'"), certif. denied, 174 N.J. 363 (2002).

The final instance advanced by plaintiff occurred at the Township blood drive when Rattner asked plaintiff, "Why? Are you looking for a second job as a hooker?" This statement was undoubtedly in poor taste; yet, it alone does not rise to the level of harassment. In Taylor, the Court found that the plaintiff suffered harassment because of a single racially charged epithet uttered by her supervisor. 152 N.J. at 500. In that case the Court found that the comment was a "patently a racist slur, and is ugly, stark

and raw in its opprobrious connotation." Id. at 502-03. Rattner's remark, while inappropriate and tasteless, did not rise to the same level as the racial slur in Taylor.

Further, only one of the three instances occurred while plaintiff was at work. Greenbaum and Rattner were the President and Vice President of the Council, respectively, but did not work with plaintiff regularly, nor were they officials to whom she directly reported.

III

Plaintiff claims that she was unlawfully terminated based upon gender discrimination because of the comments made by Rattner and Greenbaum during the March 2005 budget meeting when Greenbaum referred to plaintiff's position as "fluff" and that of a "cheerleader." We disagree.

To prove a prima facie case of gender discrimination, a plaintiff must prove that "1) she is a member of a protected class; 2) she was performing the job at a level that met [her employer's] expectations; 3) she was terminated; and 4) she was terminated under circumstances that give rise to an inference of. . . discrimination. Young v. Hobart West Group, 385 N.J. Super. 448, 463 (App. Div. 2005).

As with the age discrimination issue discussed infra, the only element that is at issue in this case is the fourth element. Here plaintiff presents no evidence to show that she was terminated for reasons of gender discrimination. While the conversations between Rattner and Greenbaum clearly indicate that they thought her position should be eliminated, which presumably would lead to plaintiff's termination, there is nothing to suggest they wanted to do so because she was a woman. Plaintiff's statement that she believed she was "possibly" terminated because of her gender because of "the types of things they said about [her]" and the belief that they would not have so "easily dismissed a man or try to undermine a man," is insufficient to satisfy the fourth element.

IV

Plaintiff alleges that she was terminated as a result of age discrimination. She cites her age, fifty-nine, and the age of the woman who assumed some of her responsibilities, thirty-two. She also asserted "certain council members are friendlier with some of the younger staff members and employees."

To establish a prima facie claim of age discrimination, a plaintiff must satisfy a four-prong test: "1) he or she belonged to a protected class by reason of his or her age; 2) he or she was performing the job to the employer's satisfaction; 3) he or she was subjected to some adverse employment action; and 4) he or she was replaced by someone young enough to warrant an inference of age discrimination." Spinks v. Twp. of Clinton, 402 N.J. Super. 465, 482 (App. Div. 2008), certif. denied, 197 N.J. 476 (2009).

The only prong at issue is the fourth prong as the Township does not dispute prongs 1, 2 or 3. The Township maintains that plaintiff was not replaced, and plaintiff maintains that whether or not she was replaced is a question of fact for a jury to decide. However, plaintiff cannot dispute that her position was eliminated in the 2007 budget. While portions of her job responsibilities were absorbed by the Benefits Coordinator, who was in her thirties, no one assumed her position. The Benefits Coordinator position already existed at the time plaintiff was terminated. Thus, there is no factual dispute as to plaintiff being replaced. Further, as pointed out in defendant's brief, plaintiff's status as the oldest person in her office does not establish that she was terminated because of her age. Admittedly, the information provided by defendants regarding the number and ages of women employed by the municipality in 2008 is not directly probative of the situation in 2006. On the other hand, plaintiff failed to raise any issue that the 2008 information did not accurately reflect employment of women in 2006. In 2008, the year after elimination of plaintiff's position, the Township employed eleven women who were either two years younger, the same age, or older than plaintiff, including a woman who was eighty-three years old. As such, we are presented with a record in which approximately 25% of the women employed by defendant municipality were the same age or older than plaintiff. In short, plaintiff has not established a prima facie claim on the issue of age discrimination.

V

Plaintiff also claims that the motion judge erred by failing to address her political affiliation discrimination claim. Although not expressly mentioned in her complaint, plaintiff argues in her brief, "that the ongoing animus that led to the recall of the form[er] Mount Olive Township Mayor, Richard De La Roche, was a significant event in Mount Olive politics that was the subject matter of extensive litigation for many months before [her] termination . . . . The plaintiff was previously promoted to the position of Assistant to the Mayor by the recalled Mayor, Richard De La Roche." In support of this claim, plaintiff relies on all of the statements made to her and about her and her position that she advances in support of her other discrimination claims. She also asserts that her position as Assistant did not require a specific political affiliation, and she was viewed as politically aligned to the recalled Mayor.

We do not quarrel with the law recited by plaintiff governing claims brought by public employees pursuant to 42 U.S.C.A. § 1983 to address discrimination based on political affiliation. Branti v. Finkel, 445 U.S. 507, 519, 100 S. Ct. 1287, 1295, 63 L. Ed. 2d 574, 584 (1980); Elrod v. Burns, 427 U.S. 347, 373, 96 S. Ct. 2673, 2689, 49 L. Ed. 2d 547, 565 (1976). To support a claim of political affiliation discrimination, a public employee must prove "(1) that the employee works for a public agency in a position that does not require a political affiliation, (2) that the employee maintained an affiliation with a political party, and (3) that the employee's political affiliation was a substantial or motivating factor in the adverse employment decision." Robertson v. Fiore, 62 F.3d 596, 599 (3d Cir. 1995) (footnote omitted). Accord Laskaris v. Thornburgh, 733 F.2d 260, 265 (3d Cir.), cert. denied, 469 U.S. 886, 105 S. Ct. 260, 83 L. Ed. 2d 196 (1984); Perez v. Cucci, 725 F. Supp. 209, 238-39 (D.N.J. 1989), aff'd, 898 F.2d 139 (1990). The employer bears the burden of proving the position is one for which party affiliation is an appropriate requirement. Robertson, supra, 62 F.3d at 599 n.2. The limitation on public employers making personnel decisions based on political affiliation applies equally to intra-party political alignments or disputes as well as inter-party political disputes. Id. at 599-600.

We are reluctant to address this issue based simply on the reference to "privileges of employment" in Count 1 of plaintiff's complaint and the fleeting reference to discrimination based on her political affiliation during oral argument of the motion. These references were not calculated to provide sufficient notice to defendants that plaintiff's grievance included political affiliation discrimination.

Plaintiff blithely argues that such a claim was broadly encompassed in her LAD claim, but we disagree. Citing Todaro v. County of Union, 392 N.J. Super. 448 (App. Div. 2007), plaintiff argues that the LAD recognizes such a claim. That is not the case. The political discrimination claim in Todaro was founded on 42 U.S.C.A. § 1983 not the LAD. Id. at 454. Moreover, N.J.S.A. 10:5-4 makes no mention of political discrimination, and LAD and § 1983 claims are not fungible claims.

Plaintiff did not brief this issue in the trial court and defendants were deprived of the opportunity to respond factually and legally to this claim. Thus, the record is barren of information about the people who have held the position, any qualifications for the position, and the identity of the appointing authority, i.e., Mayor, Council, or Mayor and Council. These and other factors are germane to whether political affiliation of the incumbent is an appropriate requirement. The casual and belated nature of the assertion of this claim counsels against consideration for the first time on appeal.

We do not, as a matter of course, consider claims or arguments in support of properly asserted claims that have not been raised in the trial court. Nieder v. Royal Indemn. Ins. Co., 62 N.J. 229, 234 (1973). Here, the political affiliation discrimination claim advanced by plaintiff on appeal was not so plainly presented in the pleadings to allow defendants to readily infer the assertion of such a claim. We decline to entertain the issue for the first time on appeal.

VI

Plaintiff contends that defendants retaliated against her for taking medical leave under FMLA.[3] She alleges that she established enough proof to sustain this claim. Plaintiff notes that the Township Council adopted the 2007 municipal budget when she was on leave, and defendants Rattner and Greenbaum knew of her leave status. She also cites defendant Greenbaum's knowledge of her workers' compensation claim.

The Township maintains that plaintiff did not establish a prima facie claim of violation of the FMLA, because she was not terminated as a result of taking leave, but due to budgetary constraints, and she would have been terminated regardless of her leave status.

FMLA affords employees the right to twelve weeks of leave during any twelve month period for certain family and/or health related matters. 29 U.S.C.A. § 2612(a)(1). When an employee returns from leave, he/she is generally entitled to be restored to

his/her old position or an equivalent position. 29 U.S.C.A. § 2614(a)(1)(A). That right, however, is not absolute, because employees are not entitled to "any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken leave." 26 U.S.C.A. § 2614(a)(3)(B). Thus, FMLA does not guarantee restoration of employment. Yashenko v. Harrah's NC Casino Co., 446 F.3d 541, 547 (4th Cir. 2006); Parker v. Hahnemann Univ. Hosp., 234 F. Supp. 2d 478, 485 (D.N.J. 2002).

To establish a prima facie case for FMLA retaliation by the employer, the employee must show: "(1) she availed herself of a protected right under the FMLA; (2) she was adversely affected by an employment decision; and (3) there is a causal connection between the employee's protected activity and the employer's adverse employment action." Parker, supra, 234 F. Supp. 2d at 488. Once plaintiff established a prima facie case, the employer can defeat claims of retaliation by showing that the employee would have been terminated even if she was not on leave. Yashenko, supra, 446 F.3d at 547.

Here, the evidence put forth by plaintiff proves nothing more than defendants' knowledge of plaintiff's medical leave and that she had filed a worker's compensation claim. It does not establish this knowledge in any way affected their decision to terminate her or her position. Simply knowing that an employee is out on leave when a decision to terminate is made, without more, does not prove that the employee was terminated because of that leave. Further, this record demonstrates the Council members had considered elimination of plaintiff's position as early as March 2005 and considered the position superfluous. In short, plaintiff failed to establish any causal link but her leave status and elimination of her position.

VII

Plaintiff maintains that she satisfied the two-prong test to establish a prima facie claim of retaliation from filing a workers' compensation claim. She filed the claim on October 10, 2006, and was discharged on December 18, 2006, while still on disability leave. She further argues that her claim is supported by Councilwoman Labow's testimony that she knew of no other Township employee terminated while on disability.

To establish a prima facie claim for unlawful retaliatory discharge arising from a workers' compensation claim, a plaintiff must show: "(1) that [she] made or attempted to make a claim for workers' compensation; and (2) that [she] was discharged in retaliation for making that claim." Galante v. Sandoz, Inc., 192 N.J. Super. 403, 407 (Law Div. 1983), aff'd, 196 N.J. Super. 568 (App. Div. 1984), appeal dismissed, 103 N.J. 492 (1986). Timing alone cannot establish that an employee was terminated for filing a workers' compensation claim. Morris v. Siemens Components, Inc., 928 F. Supp. 486, 493 (D.N.J. 1996).

The only other evidence advanced by plaintiff was advice provided by Christie Stachnick, the Benefits Coordinator. We hesitate to hold that accurate guidance about the availability of some records may be considered a retaliatory act.

Plaintiff also suggests this is retaliatory conduct that also violated the LAD. This issue, like the political affiliation discrimination claim, was not pled in her complaint or raised in any way before the trial court. We decline to address this issue as defendant has had no opportunity to respond to the issue. In re Bell Atl.-N.J., Inc., 342 N.J. Super. 439, 442-43 (App. Div. 2001).

Affirmed.

[1] We use the word "allegedly" because we have not been provided with the tape or a transcript of the tape, and neither Rattner nor Greenbaum admit or deny that this interchange occurred.

[2] Plaintiff also pled a fifth count entitled "John Doe Count." The complaint was never amended to name any John Doe defendants.

[3] Plaintiff did not assert a claim pursuant to the New Jersey Family Leave Act, N.J.S.A. 34:11B-1 to -16.