NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0582-21
A-0583-21

KEVIN MORRIS, JASMINE DANIELS, SHAREE GORDON, JADE HOWARD, ADAYSHIA MCKINNON, SARAH SCHWARTZ, and ARRIANA WILLIAMS,

Plaintiffs-Appellants/
Cross Respondents,

v.

RUTGERS-NEWARK UNIVERSITY, GERALD MASSENBURG, MARK GRIFFIN, and WILLIAM ZASOWSKI,

Defendants-Respondents/
Cross-Appellants.

APPROVED FOR PUBLICATION

June 2, 2022

APPELLATE DIVISION

Argued March 15, 2022 – Decided June 2, 2022

Before Judges Fisher, DeAlmeida and Smith.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-3280-17.

Kevin E. Barber argued the cause for appellants/cross-respondents (Niedweske Barber LLC, attorneys; Kevin

E. Barber, Peter J. Heck, and Patrick Lucignani, on the briefs).

Jane A. Rigby argued the cause for respondents/cross-appellants Rutgers-Newark University, Gerald Massenburg and Mark Griffin (McElroy, Deutsch, Mulvaney & Carpenter, LLP, attorneys; Jane A. Rigby, of counsel and on the briefs; Seth Spiegal, on the briefs).

James J. O'Hara argued the cause for respondent/cross-appellant William Zasowski (Tompkins, McGuire, Wachenfeld & Barry LLP, attorneys; James J. O'Hara, of counsel and on the briefs; Richard A. Ulsamer and James P. Kearns, on the briefs).

The opinion of the court was delivered by

FISHER, P.J.A.D.

Plaintiffs Sharee Gordon, Adayshia McKinnon, Jade Howard, Arianna Williams, and Sarah Schwartz were students at Rutgers-Newark University[1] and on the roster of the school's 2014-15 women's basketball team. Plaintiff Jasmine Daniels was a student and former player on the team who acted as the team's manager that season. And plaintiff Kevin Morris was the head coach but out on

[1] Rutgers-Newark is a regional campus of Rutgers, The State University of New Jersey. Rutgers University-Newark, https://www.rutgers.edu/newark (last visited Feb. 18, 2022). Rutgers-Newark has its own athletics program, under which teams compete in the National Collegiate Athletic Association's Division III. Rutgers Athletics, https://www.rutgers.edu/athletics (last visited Feb. 18, 2022).

a medical leave for the season in question.[2] Plaintiffs commenced this action for damages under the Law Against Discrimination, N.J.S.A. 10:5-1 to -50, because of various alleged acts or omissions of defendants Rutgers-Newark University, William Zasowski, who was the team's interim head coach that season, Mark Griffin, the Athletic Director, and Gerald Massenburg, the Associate Provost at Rutgers-Newark in charge of student life and activities, including athletics.

Defendants' summary judgment motion produced mixed results, causing both sides to seek leave to appeal. In permitting these interlocutory cross-appeals, we have undertaken to examine plaintiffs' argument that the trial judge erred by granting summary judgment for defendants on the retaliation claims asserted by four plaintiffs,[3] claiming the judge's interpretation of N.J.S.A. 10:5-12(d) was impermissibly narrow. On the other hand, we also consider defendants' argument that the judge erred by not dismissing more of the complaint. Defendants specifically argue plaintiffs' claims of a hostile educational environment should have been dismissed, that the judge failed to

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[2] Morris's claim is not relevant to the issues now before this court, so in using "plaintiffs" we mean to refer only to plaintiffs Daniels, Gordon, Howard, McKinnon, Schwartz, and Williams.

[3] Howard, Daniels, Williams, and Schwartz.

conduct an individualized analysis for each plaintiff's claim, and that plaintiffs cannot satisfy the severe or pervasive prong of the test adopted by our courts in such matters.

After careful consideration, we reverse those parts of the order under review that granted summary judgment on portions of the complaint.

I

Plaintiffs' complaint as amended includes plaintiffs' LAD claims of a hostile educational environment, disparate treatment, and retaliation. After years of discovery, defendants moved for summary judgment on all counts, and the motion judge rendered a decision that dismissed parts of the complaint. The judge also denied cross-motions for reconsideration.

To put the issues and factual contentions in proper perspective, we first consider how plaintiffs identify themselves. Gordon, who was twenty-one years old at the start of the 2014-15 season, refers to herself as an "African-American . . . lesbian"; she was a two-year starter and team captain. McKinnon, who was nineteen years old at the start of the season, identifies as a "Black . . . bi[sexual]";[4] she played on the team during her freshman and sophomore years

[4] At her deposition, McKinnon refers to herself as "Bi," which we assume was intended to mean bisexual.

but did not continue to play after the 2014-15 season ended. Howard and Williams were both twenty-one years old at the start of the 2014-15 season and identified themselves as "African-American . . . lesbian[s]." Howard was a four-year starter and team captain. Williams played for four years and was a team captain. Schwartz was twenty years old at the start of the season and identifies as a "Hispanic . . . heterosexual." Daniels, the team manager that year, identifies as a "gay, Black female."

On July 28, 2014, on behalf of the team, Gordon wrote to Massenburg requesting a "question and answer meeting" with him, Griffin, and Nancy Cantor,[5] to discuss the team's concerns about the potential hiring of Zasowski as interim head coach. That letter was prompted by several comments team members heard Zasowski make while he was an assistant coach of the men's basketball team. Zasowski was alleged, among other things, to have referred to members of the men's team as "pussies," "bitches," and "retard[s]," and to have asked members of the men's team whether they were on their "period." That same day, Williams, on behalf of the team, emailed Massenburg requesting a meeting with players and administration to discuss Zasowski's hiring. The next

[5] Nancy Cantor is the Chancellor of Rutgers-Newark.

day, Massenburg responded that he "welcome[d] the opportunity to meet with [Williams] and [her] teammates."

In furtherance of these communications, Cantor requested that Lisa Grosskreutz, Director of the Office of Employment Equity (the OEE) at Rutgers-Newark, schedule a meeting with some of the players to discuss their concerns. Grosskreutz could not recall whether she ever scheduled a meeting or reached out to the team to discuss their options for such a meeting. Around the same time, Bimpe Fegeyinbo, an African-American graduate assistant of the team, emailed Massenburg to express her concerns over Zasowski's hiring; Massenburg forwarded Fegeyinbo's email to both Griffin and Peter Englot, Chief of Staff for Cantor. That same day, Fegeyinbo met with Massenburg and Griffin and expressed her concerns about the hiring of Zasowski; she also informed Griffin she received phone calls from several players expressing their concerns about Zasowski.

Despite these complaints and an alleged desire to hear out the players, Rutgers-Newark officially named Zasowski interim head coach on July 30, 2014. On August 1, 2014, Howard emailed Massenburg stating, in part, that the team "will not meet with the interim coach or start any type of preseason activities until we meet with [Massenburg], Mark Griffin, Chancellor Nancy

Cantor, [the team] and the Women's Tennis team." That same day, Massenburg responded to Howard's email stating that he and Englot would meet with the team the following Tuesday, August 5, 2014, but that Cantor could not attend as she was out of town. Englot then emailed Howard, asking about the nature of the concerns to be discussed at the August 5 meeting. Howard responded, in part, that what they:

> would like to address would be the profanity our athletic director, Mark Griffin uses. Anyone can confirm his constant inappropriate use of profanity. We would also like to address his use of ethnic and homophobic slurs, highly inappropriate comments made towards female athletes, and gender equity issues.

On the evening of August 1, 2014, Grosskreutz emailed Massenburg and Englot stating her opinion that Rutgers-Newark should consider opening an investigation into Howard's claims regarding Griffin. On August 4, 2014, Grosskreutz emailed Howard, briefly explaining Rutgers-Newark's policies prohibiting harassment and discrimination and sending Howard a complaint form, telling her to fill it out if she wished to formally file a complaint. Also on that day, Howard confirmed, by email to Englot, a rescheduled meeting of the team, the women's Tennis team, Fegeyinbo, Massenburg, and Englot set for August 11, 2014.

On August 5, 2014, Grosskreutz served Griffin with a formal complaint and emailed Howard to notify her of the OEE's investigation into Griffin.[6] As a result, Englot cancelled the previously scheduled meetings. Grosskreutz selected Emily Springer as the investigator of the complaints regarding Griffin.

Springer issued an investigative report, which memorialized that she found no violation of the school's Policy Prohibiting Discrimination and Harassment, though Springer did note:

> [Griffin] may not have always behaved in a "gentlemanly" manner in that his language is self-admittedly "colorful," and it was noted that he makes "off color" comments. Given [Griffin's] high profile position . . . it is recommended that Mr. Griffin be cautioned to henceforth exhibit a greater degree of mindfulness with regard to appropriate and professional workplace speech.

Notably, the report did not reference any of the concerns raised about the hiring of Zasowski as interim head coach, even though both Howard and Williams attempted to discuss these concerns with Springer during her investigation.

On September 18, 2014, Grosskreutz informed Griffin that the investigation had been completed and that the complaint was dismissed because

[6] As plaintiffs note in their papers, the investigation by the OEE, implemented by Grosskreutz, dealt only with the team's concerns regarding Griffin and did not reference any of the concerns raised regarding the hiring of Zasowski as interim head coach.

no violation of the school's policies by Griffin had been found. On October 2, 2014, Grosskreutz informed Howard that the investigation into Griffin had been completed and "any appropriate action has been taken." Grosskreutz gave a copy of the investigator's report to Griffin but not to Howard or anyone else on the team.[7]

With Zasowski as their head coach for the 2014-15 season, plaintiffs began noting several issues right from the outset, in particular his use of certain language and profanities. Prior to the start of the season, Zasowski had a one-on-one meeting with Williams. During that meeting, he asked Williams to identify the players who were gay. Williams refused. Zasowski then asked whether a former player was gay as well as "who on the men's team [] she [was] sleeping with." Again, Williams refused to answer. Williams later told Howard about the meeting.

Plaintiffs also allege that during one practice Zasowski referred to Gordon and another player, Jasmine Lombard, as "nappy-headed sisters" who "comb their hair with firecrackers." Zasowski made these comments to Lombard, who

[7] Plaintiffs claim that Grosskreutz violated Rutgers-Newark's policies by failing to provide a copy of Springer's report to Howard and other team members.

informed only Howard. The "firecracker" comment was also heard by Schwartz and assistant coach Lauren Jimenez.

Prior to Rutgers-Newark's winter break in 2014, McKinnon had a meeting with Zasowski during which, in reference to Howard and Gordon, he said to McKinnon: "I know that this is my last year with th[is] group of dykes, and there's no telling when we'll have th[is] group of dykes again, as good as them." McKinnon informed two other players – neither of which is a party – about Zasowski's comments but did not inform the rest of the team out of concerns over team morale.

Plaintiffs also allege several incidents of Zasowski aiming other derogatory and hostile language at individuals other than plaintiffs. For example, plaintiffs allege that in front of the team Zasowski referred to two male assistant coaches – Derryck Alexander and Fateen Belfield – as "dickheads." He also referred to opposing players as "bitches" and a female referee as a "cunt" and a "bitch."

On January 28, 2015, the team held a players-only meeting following its game against Montclair State University,[8] during which:

[8] Schwartz is the only plaintiff who did not attend the January 28 meeting.

- Lombard told the team about Zasowski referring to her and Gordon's hair as "nappy" and that she and Gordon were "nappy haired sisters";

- Lombard told the team that Zasowski said she "combed her hair with firecrackers";

- McKinnon told the team that Zasowski referred to Howard and Gordon as "dykes";

- Williams told the team Zasowski asked her who on the team was gay.

Gordon informed the team she planned on confronting Zasowski about what they discussed.

On January 29, 2015, Gordon approached Zasowski and spoke with him about what was said at the January 28 meeting. According to Gordon, Zasowski denied ever having made the comments at issue.

After the conversation between Zasowski and Gordon, an assistant coach informed McKinnon that Zasowski wanted to speak with her. The two met in Zasowski's office; he asked McKinnon what she said at the players-only meeting and she informed Zasowski that she mentioned his comment about Howard and Gordon being "dykes." Zasowski called McKinnon a liar in front of others and told her to leave his office and take her jersey off because she was no longer a member of the team.

After his meeting with McKinnon on January 29, Zasowski told Griffin that "McKinnon had to go." Zasowski also cancelled practice on the evening of January 29. Gordon had started every prior game. After the meeting, she never started again and played less frequently.

The next day, Zasowski called a team meeting during which he referred to the comments attributed to him at the players-only meeting and said he felt "his character [was] being attacked." Zasowski, to each player individually, denied having made the comments. Plaintiffs allege Zasowski made veiled threats at the meeting, telling each player, "they are not required to play" on the team and, if they wanted to continue to play, they had "to move past the situation."

On January 31, 2015, the team played The College of New Jersey. As a rule, players were to be in the locker room thirty minutes prior to game time. This time the team was not present in the locker room at the appointed time. When they finally arrived, Zasowski said:

> I don't know why I'm doing this. You all told me we moved past this. Your actions today are not saying that. At the end of the day, this isn't going to work. If this is your choice, we'll end the season right now.

The team went on to play that evening but, at some point during the game, Zasowski allegedly stopped coaching and simply remained seated on the bench.

The team lost and Zasowski hastily left the arena visibly upset at what transpired. On his way home, Zasowski spoke with Griffin and told him he had "[two] choices." He could either "end the season, or . . . cut . . . Gordon."

The team made the New Jersey Athletic Conference playoffs that season. Gordon had been absent from two practices prior to the first playoff game against Rowan University. As a result, Zasowski instructed Alexander to remove Gordon's jersey from the locker room so she could not participate in the next game. On game day, February 21, 2015, when Zasowski saw Gordon get on the team bus, he told Jimenez and Alexander to remove her. Gordon told Jimenez and Alexander that if Zasowski wanted her off the bus he would have to come tell her personally. Zasowski did just that, but Gordon refused to depart. When Zasowski threatened to call campus security, Howard and Williams responded that they too would get off the bus if Gordon was removed. As a compromise, Gordon agreed to attend the game and wear a jersey but not play.

Once the season ended, Rutgers-Newark undertook another investigation, this time into the complaints about Zasowski's behavior throughout the season. Grosskreutz appointed Nina Vij to conduct the investigation. She ultimately reported that Zasowski "more likely than not" made the "nappy-headed sisters,"

"firecracker," and "dyke" comments,[9] but Zasowski and Rutgers had not thereby created a hostile educational environment.

II

In considering plaintiffs' claims of a hostile educational environment, the judge found that only McKinnon heard Zasowski's comments about Gordon's and Howard's sexual orientation, only Williams was asked by Zasowski who on the team was gay, and only Williams, Schwartz, and Daniels heard Zasowski refer to a female referee as a "cunt." The judge found those facts were sufficient to create an issue of fact as to whether "a reasonable person [would believe] the conditions of education have been altered, and that the environment is hostile or abusive." He therefore denied defendants' motion as to the hostile-environment count.

As to plaintiffs' claims of retaliation, the judge found an issue of fact about whether Gordon and McKinnon could prove the required elements. For example, the judge observed that plaintiffs claimed Gordon confronted Zasowski about what was said at the players-only meeting in late January 2015 and Gordon did

[9] Vij's report did not reference other comments made by Zasowski, such as his referring to a female referee as a "cunt," his calling male assistants "dickheads," or the allegedly sexist statements he made to the men's team while he was an assistant coach.

not start the game against The College of New Jersey or against any other team thereafter. And the judge noted that plaintiffs alleged McKinnon, who also spoke with Zasowski after the players-only meeting, only played in three games the rest of the season. Finding this sufficient to demonstrate retaliation, the judge denied defendants' motion on the retaliation claim but only as to Gordon and McKinnon. The judge granted the motion insofar as retaliation was asserted by Howard, Daniels, Williams, and Schwartz. In essence, the judge found there was no evidence that these other four engaged in a protected activity because they never "[came] forward and complained" or did anything for which they could suffer an adverse action.

III

Concerning plaintiffs' claims of a hostile educational environment, defendants argue the judge erred by "lump[ing] all of the [s]tudents' claims together and refer[ing] it to a jury to sort out" instead of "ruling on the merits of [each] [s]tudent's individual claim." In short, defendants argue plaintiffs' hostile-environment claims required an individualized, not a cumulative, analysis. They also argue the judge erred by failing to separately analyze the evidence pertaining to the protected traits of race and sexual orientation.

To establish a viable hostile-environment claim under the LAD, a student-plaintiff must show the complained-of conduct: "(1) would not have occurred but for the [student's] protected status, and was (2) severe or pervasive enough to make a (3) reasonable person believe that (4) the conditions of [education] have been altered and that the [educational] environment is hostile or abusive." Shepherd v. Hunterdon Developmental Ctr., 174 N.J. 1, 24 (2002).

Rather than look to all the allegations of hostility and abuse and how they impacted all the plaintiffs, defendants have taken a divide-and-conquer approach, arguing that the claims must be examined plaintiff-by-plaintiff. In support, defendants predominantly rely on an earlier unpublished opinion from this court. That decision, of course, is not precedential and may not be cited by this court. See R. 1:36-3.

Moreover, the theory defendants espouse through their reliance on that nonprecedential opinion seems inconsistent with the jurisprudence developed by opinions that are precedential. For example, the Supreme Court has held that a hostile-environment claim may be based "on the cumulative [e]ffect of individual acts," Green v. Jersey City Bd. of Educ., 177 N.J. 434, 447 (2003) (alteration in original), and it has also recognized that, "[r]ather than considering each incident in isolation, courts must consider the cumulative effect of the

various incidents, bearing in mind that each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the . . . environment created may exceed the sum of the individual episodes," Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 607 (1993) (internal quotation marks omitted).

Moreover, we see nothing in our jurisprudence that would support the contention that a hostile environment cannot be formed in the mind of one member of a protected class even if the event or events that gave rise to that belief were directly experienced by another. Accepting the truth of plaintiffs' allegations and providing them with all reasonable inferences, Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995), we must accept as true that hostile words or actions against one would become known and indirectly experienced by all in this tight-knit group. The very nature of plaintiffs' undertaking – being on a basketball team, practicing and traveling together, communicating with each other on and off the court – renders it reasonable and logical for those who have allegedly created a hostile environment to understand that attacking one was to attack all. Perhaps, when all the evidence is in, a jury might not find this to be so, but at this stage of the proceeding the judge correctly appreciated that when Zasowski said something inappropriate or hostile to one

player that it would be taken as hostility toward all. The judge recognized what is alleged to have occurred here, observing:

> that McKinnon is the one who heard the comment from the coach [about] the sexual orientation of Gordon and Howard. They were, obviously, the subject of those particular questions. Williams gets asked the question by the coach . . . who on the team is gay. . . . [A]nd the issues with regards to Schwartz and Daniels, as well as Williams, because, apparently, they've all – in fact, the – the coach made the comments with regard to a female referee, using the "C" word.

Not only did the judge not commingle the facts as they related to each plaintiff but it appears that he well understood how plaintiffs were entitled to reach the conclusion that abusing one of them was abusing all of them.

Defendants also argue the judge erred by failing to analyze separately the evidence pertaining to the protected categories of race and sexual orientation, as required when one or more plaintiffs assert claims of a hostile environment relating to more than one protected trait. If we accept, as we must, the truth of plaintiffs' allegations, the factual record reveals a coach hostile to many groups. Plaintiffs have attributed to him statements that reveal hostility toward gays, African-Americans, and women. Is he really entitled to have his alleged venomous comments watered down in the eyes of the court or the factfinder by placing those comments in separate, watertight categories? Should the law

recognize, as defendants would have us hold, that a member of one protected group cannot feel the sting of a hostile statement made toward a member of another protected group? We think not. Certainly, so long as the plaintiff is a member of a protected group that has been attacked, she would be entitled to claim the environment has been made hostile as the result of her having heard or learned of toxic statements directed toward those in other protected groups. We see nothing in the LAD itself or in our existing jurisprudence that would require a contrary holding.

The Supreme Court of the United States has, in this same setting, cautioned against the application of "mathematically precise test[s]," and recognized that a claim of a hostile environment must always be evaluated "by looking at all the circumstances." Harris v. Forklift Sys., Inc., 510 U.S. 17, 22-23 (1993). The accumulated circumstances here include all Zasowski's alleged comments and actions whether they pertained to race, gender, or sexual orientation. Indeed, proof of a hostile environment could be enhanced by other comments or actions, even when not specifically aimed at the individual's protected trait. For example, while our Supreme Court has held that a hostile-environment claim cannot be based on the "mere utterance of an . . . epithet which engenders offensive feelings," Taylor v. Metzger, 152 N.J. 490, 501

(1998) (quoting Harris, 510 U.S. at 21), the fact that an epithet was hurled may be evidential in establishing a hostile environment when combined with other more actionable comments or actions. This is what is meant by a consideration of "all the circumstances" that is required. Defendants' argument that courts must chop up allegations into small groups is the exact opposite of what the LAD requires for proof of a hostile environment.

To be sure, as defendants point out, the Supreme Court has recognized that other bad acts by the alleged perpetrator may enhance a plaintiff's claim of a hostile environment but only when the other act was "witnessed" by the plaintiff. Godfrey v. Princeton Theological Seminary, 196 N.J. 178, 202 (2008). In so holding, the Godfrey Court quoted its opinion in Lehmann, 132 N.J. at 611, where it said that "[a] woman's perception that her work environment is hostile to women will obviously be reinforced if she witnesses the harassment of other female workers" (emphasis added by the Godfrey Court). Yet, in making this statement, Lehmann relied on Hicks v. Gates Rubber Co., 833 F.2d 1406, 1416 (10th Cir. 1987), which did not appear to place that had-to-be-witnessed condition on the use by a plaintiff of evidence of the harassment of others. We assume the Court meant what it said in Godfrey even though the question has been answered differently by federal courts when applying similar federal laws

prohibiting discrimination. See Schwapp v. Town of Avon, 118 F.3d 106, 111 (2d Cir. 1997); Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321, 335 (6th Cir. 2008); see also Hargrave v. Cnty. of Atl., 262 F.Supp.2d 393, 415 (D.N.J. 2003) (recognizing that "[t]he fact that a plaintiff learns second-hand of a racially derogatory comment or joke by a fellow employee or supervisor also can impact the work environment").

In any event, while we are bound by Godfrey, we do not believe it was intended to encompass these circumstances. Godfrey expressed concern for the rampant use of office gossip. Here, plaintiffs were members of a small, unified subset of the student body, the women's basketball team. In speaking with the team captain, for example, Zasowski must have understood that his words would reach others and that the others would be affected by his words. He may have even intended the listener's dissemination of his words to the other team members. In short, the words spoken to one member of the small group were the functional equivalent of saying those words to all. So, while Godfrey generally prevents a hostile-environment plaintiff from eliciting evidence that another member of her protected class was similarly harassed – unless the plaintiff actually witnesses the harassment – this case, unlike Godfrey, consists of claims asserted by members of a small group and the evidence in question comes from

within that small, identifiable group. We, thus, conclude that the Godfrey holding was not likely intended to preclude these plaintiffs from eliciting evidence of similar conduct experienced by other team members even if they did not personally witness it.

Plaintiffs are entitled to pursue their hostile-environment claims, and we reject the arguments defendants have raised to the contrary in their cross-appeal.

IV

In their appeal, plaintiffs argue the judge erred in granting partial summary judgment by dismissing the retaliation claims of Howard, Daniels, Williams, and Schwartz, through what they claims is an unduly "narrow[] interpret[ation]" of N.J.S.A. 10:5-12(d). They claim that this provision's standing requirement should be broadly applied and ought to include third-party reprisals. In response, defendants argue that retaliation against one team member cannot be imparted to other team members and that none of the plaintiffs suffered a materially adverse action. We disagree.

To establish a prima facie case of retaliation under the LAD, plaintiffs must show: (1) they engaged in protected activity; (2) the activity was known to defendants; (3) they suffered adverse action by defendants; and (4) there was a

causal link between the protected activity and the adverse action. Battaglia v. United Parcel Serv., Inc., 214 N.J. 518, 547 (2013).

To start, we note that N.J.S.A. 10:5-12(d) states that it is unlawful discrimination:

> For any person to take reprisals against any person because that person has opposed any practices or acts forbidden under [the LAD] or because that person has sought legal advice regarding rights under [the LAD], shared relevant information with legal counsel, shared information with a governmental entity, or filed a complaint, testified or assisted in any proceeding under [the LAD] 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].

Plaintiffs correctly argue that these LAD protections against retaliation are to be understood as being broad in scope and are to be afforded "to those who 'assist' in a proceeding." Quinlan v. Curtiss-Wright Corp., 204 N.J. 239, 259 (2010). "[T]he LAD operates not only to fight discrimination wherever it is found, but to protect those who assist in rooting it out." Id. at 260.

Indeed, this broad reach is demonstrated by the Court's holding in Craig v. Suburban Cablevision, Inc., 140 N.J. 623 (1995). There, plaintiffs were all former members of the defendant's door-to-door sales department and were all either family members or close friends outside of work. Id. at 626. After one

plaintiff (Susan) filed suit against the defendant in a separate action alleging a failure to promote based on her gender and disability, the door-to-door sales department began experiencing reprisals in the form of workplace harassment and, eventually, termination in lieu of accepting lower-paying positions. Id. at 626-27. Other members of the department sued alleging, in part, retaliation. Their retaliation claims were dismissed but, on appeal, we reversed, holding that "as co-workers and co-employed relatives, [the plaintiffs] could maintain a retaliatory-discharge claim under the LAD." Id. at 629.

In reviewing our decision, the Supreme Court found the door-to-door sales department was a "small and cohesive" unit, of which the plaintiffs constituted a substantial part. Id. at 630. The plaintiffs alleged it was that cohesiveness, and their support of Susan in her suit for discrimination that led the defendant to terminating their employment. Ibid. The Court found that the plaintiffs were "innocent victims," having experienced adverse actions based on their closeness to Susan as opposed to any protected activity engaged in by those plaintiffs. Id. at 632. The Court noted that reprisals against such innocent victims "can be coercive, even when the coercion is unintentional," id. at 632-33, and ultimately held that the plaintiffs had standing to bring suit under N.J.S.A. 10:5-12(d), because:

> [t]o deny standing to the co-workers would encourage employers to take reprisals against the friends, relatives, and colleagues of an employee who have asserted an LAD claim. Through coercion, intimidation, threats, or interference with an employee's co-workers, an employer could discourage an employee from asserting such a claim. In this context, we doubt that the Legislature would want us to bar the aggrieved co-workers from the courthouse by denying them standing to sue.
>
> [Id. at 630-31.]

We find Craig to be highly analogous to what plaintiffs allege here. First, plaintiffs point out the numerous instances of protected activity engaged in by some of them. For example, Howard wrote several emails to complain about the behavior of Griffin and Zasowski, and once a formal investigation was opened, Williams attempted to discuss her concerns with the investigator. But regardless of the actions taken by plaintiffs, or the inactions as defendants would argue, there is little doubt that all plaintiffs, as members of the team along with Gordon and McKinnon, had standing to bring their retaliation claims under Craig, even assuming no protected activity was directly engaged in by those plaintiffs.

Defendants focus on the players who they claim did not experience any adverse consequences because of the actions involving Gordon and McKinnon. While defendants acknowledge that both Gordon and McKinnon experienced some retaliation in the form of reduced playing time, they argue those actions

cannot support the retaliation claims of other plaintiffs. This argument not only ignores Craig's holding but also minimizes the effect retaliatory actions against one or two members of a "small and cohesive" team may have on all members of the team. In short, a jury could find that the actions taken against Gordon and McKinnon could have the effect of dissuading others from exercising their rights under the LAD, and such conduct is violative of the LAD.

Defendants attempt to distinguish Craig by pointing out that the plaintiffs there experienced an adverse employment action in the form of termination, and plaintiffs here, as student-athletes, have not experienced any "actionable harm." At best, that argument only points out the differences in the two environments.[10] That is, while plaintiffs were not terminated from a job or even, as relevant to their environment, suspended or expelled, there still may be found on this record an adverse effect brought about by the conduct alleged. For example, there is no

[10] To the extent defendants are arguing plaintiffs did not suffer damages because of any retaliation perpetrated against themselves, Gordon, or McKinnon, it is well-established that a defendant who engages in retaliation is liable for all damages proximately caused to the plaintiff. Donelson v. DuPont Chambers Works, 206 N.J. 243, 247-48 (2011). Further, it is the jury that is "responsible for determining the quantum of damages." Orientale v. Jennings, 239 N.J. 569, 589 (2019). The LAD permits a jury to award compensatory damages for emotional distress stemming from the unlawful conduct of the defendant. See Battaglia, 214 N.J. at 551-52. Here, plaintiffs argue that their damages are premised on loss of athletic opportunities, educational opportunities, and emotional distress. If proven, this is compensable.

dispute that at least one practice was cancelled after Zasowski learned of the team meeting on January 28, 2015, and a jury could find that this action affected all the plaintiffs. They also assert that Zasowski failed to coach games throughout the season and that, through his retaliatory acts of benching Gordon and McKinnon, he hurt the team's chances of success which, in turn, constituted a deprivation of educational opportunities. And they argue adverse actions when Zasowski, instead of bringing the complaints raised at the January 28 team meeting to the OEE, angrily confronted the team about what was said, thus putting them in fear of unwarranted punishment. This may pale in comparison to a loss of employment as suffered by the Craig plaintiffs, but it is adverse action nonetheless.

Plaintiffs primarily rely on the plain language of N.J.S.A. 10:5-12(d), which states that "[i]t shall be an unlawful employment practice . . . [f]or any person . . . to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of . . . any right granted or protected by this act." Clearly, if what plaintiffs have alleged is proven, a jury could find that plaintiffs experienced the type of intimidation, threats, or interference with their education and educational experience covered by this provision. Plaintiffs further argue that, because the alleged intimidation, threats, and coercion came from

Zasowski, who in his role as head coach held supervisory authority over plaintiffs, the gravity of his actions is magnified. See Taylor, 152 N.J. at 503-04. We are satisfied plaintiffs provided sufficient evidence of adverse action to survive summary judgment.[11]

In the final analysis, whether there was one or more acts of retaliation depends on the particular circumstances. As the Court held in Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 69 (2006), "[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." When viewing the "constellation of surrounding circumstances" in the light most favorable to plaintiffs, we are satisfied that the pleaded facts are sufficient to create a genuine issue about adverseness.

[11] Defendants also argue that plaintiff Daniels does not have a "conceivably legitimate basis to assert a retaliation claim" because Daniels was the team manager, not a player, and thus was not affected by Zasowski's refusal to coach or threat to cancel the season. This mistakenly minimizes the role of a team manager and the benefit gleaned by Daniels through her management of the team as an undergraduate student. Along with the educational experience that comes from working with coaches and players in a managerial capacity, Daniels could have used this role as an opportunity to build a professional resume prior to graduation. Whether the consequences are sufficiently material to support the claim is for a jury to decide.

* * *

To summarize, we conclude that the judge mistakenly found defendants were entitled to a summary judgment dismissing the retaliation claims of Howard, Daniels, Williams, and Schwartz, and we reverse that part of the order under review. The judge, however, correctly denied summary judgment as to the other claims that are the subject of these interlocutory appeals.

To the extent we have not discussed other arguments raised in the appeal or the cross-appeal, it is because we have found those arguments to have insufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION