(NOTE: The status of this decision is **Unpublished**.)

NOT FOR PUBLICATION WITHOUT THE

APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-0

THERESA BROWER,

Complainant-Appellant,

v.

NORDSTROM, INC.,

Respondent-Respondent.

November 13, 2014

Submitted September 22, 2014 - Decided

Before Judges Guadagno and Leone.

On appeal from the Department of Law & Public Safety, Division on Civil Rights, Docket No. EN15JB-62929.

Theresa Brower, appellant pro se.

Littler Mendelson, attorneys for respondent Nordstrom, Inc. (Edward T. Ellis and Leigh Ann Bigley, on the brief).

John J. Hoffman, Acting Attorney General, attorney for respondent New Jersey Division on Civil Rights (Charles S. Cohen, Deputy Attorney General, on the brief).

PER CURIAM

This appeal arises out of a complaint filed with the Division on Civil Rights (the Division) by complainant Theresa Brower, against her former employer, respondent Nordstrom, Inc. (Nordstrom). Brower alleged she was terminated because, before she was hired, she had filed state and federal complaints against Nordstrom for failure to hire her based on race, and that such retaliation violated N.J.S.A. 10:5-1 to -42 of New Jersey's Law Against Discrimination (LAD) and the federal Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e to 2000e-17. After investigating her claim, the Director of the Division found no probable cause to credit Brower's allegations. Brower appeals. We affirm.

I.

Nordstrom is a national fashion specialty retailer with stores in New Jersey and elsewhere. Brower first applied for a job with Nordstrom in May 2010, but Nordstrom declined

to hire her. In September 2010, Brower filed complaints with the Division and the Equal Employment Opportunity Commission (EEOC), alleging Nordstrom declined to hire her because she is black. In resolution of the 2010 complaint with the Division, Nordstrom hired Brower to work as a salesperson in the Cosmetic and Fragrance Department of its Freehold store.[1]

Brower worked as a salesperson for Nordstrom for approximately four months, until her discharge on December 5, 2011. In January 2012, Brower filed a new verified complaint with the Division. She alleged that her discharge constituted an unlawful reprisal for her 2010 complaint, that filing the 2010 complaint constituted protected activity, and that the discharge was in violation of the LAD and the Civil Rights Act of 1964.

Nordstrom denied Brower's claims of discrimination and retaliation, and maintained that her discharge was due to her numerous performance issues. The Division investigated the 2012 complaint and the Director of the Division issued a finding of no probable cause. In making its finding, the Division relied on interviews its investigator conducted with witnesses, on Nordstrom's record of complaints about Brower, and on documentation of verbal and written "coaching" of Brower by Nordstrom, including a forty-five-day new hire review ("45-day review") and an "Opportunity Check," which is what Nordstrom calls its written warnings.

After reviewing the evidence, the Division found there were issues with Brower's performance and conduct. Her poor performance resulted in complaints from customers, co-workers, and vendors regarding her lack of teamwork, failure to adhere to sales rotation procedures, and poor customer service.

Witnesses interviewed by the Division related as follows. Brower had difficulty maintaining a positive working environment with her co-workers. Brower argued over sales and discussed sales commissions in front of customers and vendors, in violation of Nordstrom

policy. She refused to help customers when it became clear the price of a customer's merchandise would yield a low commission. She refused to assist co-workers in restocking merchandise, failed to properly affix "Unique Item Identifier" stickers to merchandise, and had "problems with the [cash] register."

The witnesses for Nordstrom also stated that Brower would deny her mistakes when reprimanded. For example, Brower denied opening a new box of fragrance, despite Nordstrom surveillance footage clearly showing the contrary.

The Division's investigation revealed that, on multiple occasions prior to her termination, Nordstrom warned Brower that the above-mentioned issues did not comport with Nordstrom's expectations, which had been explained when Brower participated in Nordstrom's training program. Brower was verbally "coached" more than once, first received written notice in her "45-day review," and received a second written warning, an "Opportunity Check," on November 29, 2011. The Opportunity Check articulated Brower's various performance issues, offered suggestions on how she might improve, and warned her that failure to improve might result in termination. Brower refused to sign the Opportunity Check, but told the Division investigator that she was aware of it.

The Division's investigation also found that on December 1, 2011, only two days after Nordstrom provided Brower with the Opportunity Check, a vendor and a co-worker complained when Brower again interfered with a sale. Afterwards, Brower confronted the vendor in the stock room and told the vendor "not to ever start with [Brower] in front of a customer." The vendor reported feeling threatened and uncomfortable. Brower denied this interaction, and stated that any confrontation was the vendor's fault. However, the Division found no support for Brower's account.

The Division found that Brower was terminated on December 5, 2011, shortly after the Opportunity Check and the incident with the vendor, because she was unable to meet Nordstrom's performance and conduct standards.

The Division noted Brower failed to provide evidence that she was singled out for disciplinary action or was subjected to retaliation for filing her 2010 complaints. The Division pointed out that "many of the complaints [made about Brower] were from people with no knowledge of [Brower's] prior discrimination complaint with the Division[.]" Moreover, the Division found other Nordstrom employees were subject to the same disciplinary procedures and were similarly terminated if they failed to improve, regardless of whether they had engaged in protected activity.

The Division gave Brower the opportunity to review all information gathered throughout the investigation and to provide additional information or evidence to support her allegations. However, Brower failed to do so. She proffered one vendor as a witness, but that vendor only visited the store approximately once per month and did not witness the incidents underlying the complaints from customers, co-workers, and other vendors.

The Division found "insufficient evidence to support [Brower's] allegations that [Nordstrom] discharged her in reprisal for filing a complaint of discrimination with the Division." Rather, the Division determined that Brower "did in fact engage in repeated misconduct, which [Nordstrom] deemed serious enough to warrant her discharge." The Division concluded that there was no causal link or connection "between [Nordstrom's] actions with regard to [Brower's] discharge and any issues related to discrimination based on reprisal." Based on these findings of fact, the Director issued a formal finding of no probable cause on September 18, 2012, and closed the file. Brower appeals.

II.

Under the LAD, a person claiming unlawful discrimination has the choice to "initiate suit in Superior Court" or to file with the Division. N.J.S.A. 10:5-13. Brower elected the forum in which her claims would be examined, taking advantage of the more expeditious administrative process. See Hermann v. Fairleigh Dickinson Univ., 183 N.J. Super. 500, 504-05 (App. Div.), certif. denied, 91 N.J. 573 (1982). The Legislature established the Division to administer and enforce the State's civil rights laws. See N.J.S.A. 10:5-6. The Division has long-recognized "expertise in recognizing acts of unlawful discrimination, no matter how subtle they may be." Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 588 (1988); see also Terry v. Mercer Cnty. Bd. of Chosen Freeholders, 86 N.J. 141, 157 (1981) (noting the "unique discretion and expertise" of the Director to effectuate the policies underlying the LAD).

If a person files a complaint with the Division, the Division must conduct a "prompt investigation." N.J.S.A. 10:5-14. After the Division conducts an investigation, the Director must determine whether there is probable cause of discriminatory conduct. N.J.S.A. 10:5-14; N.J.A.C. 13:4-10.2. Probable cause exists if there is "reasonable suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that the [LAD] . . . has been violated[.]" N.J.A.C. 13:4-10.2(b). If the Director finds probable cause, and conciliation does not eliminate the alleged discrimination, or the Director determines conciliation would not be feasible, then the Director shall order a hearing. N.J.S.A. 10:5-16; N.J.A.C. 13:4-11.1. A hearing may result in the issuance of a cease-and-desist order, N.J.S.A. 10:5-17, an award of treble damages, ibid., counsel fees, N.J.S.A. 10:5-27.1, and statutory penalties, N.J.S.A. 10:5-14.1(a).

If the Director instead finds that there is no probable cause, the Director will issue a finding of no probable cause. N.J.A.C. 13:4-10.2(c). Such findings of no probable cause shall be considered final orders, N.J.A.C. 13:4-10.2(e), and may be appealed to this court, N.J.S.A. 10:5-21.

III.

We accord "a 'strong presumption of reasonableness' to an 'administrative agency's exercise of its statutorily delegated responsibilities.'" Lavezzi v. State, 219 N.J. 163, 171 (2014) (citation omitted). "[T]he Appellate Division's initial review of [the Director's] decision is a limited one. The court must survey the record to determine whether there is sufficient credible competent evidence in the record to support the agency head's conclusions." Clowes, supra, 109 N.J. at 587. "'[T]his standard requires far more than a perfunctory review; it calls for careful and principled consideration of the agency record and findings[.]'" Ibid. (citation omitted). We must give "'due regard also to the agency's expertise.'" Ibid. (citation omitted).

We may reverse the Director's decision only if "the Director's 'finding is clearly a mistaken one and so plainly unwarranted that the interests of justice demand intervention and correction[.]'" Id. at 588 (citation omitted). "Under that standard of review, an appellate court will not upset an agency's ultimate determination unless the agency's decision is shown to have been 'arbitrary, capricious, or unreasonable, or [] not supported by substantial credible evidence in the record as a whole.'" Barrick v. State, 218 N.J. 247, 259 (2014). "The burden of demonstrating that the agency's action was arbitrary, capricious or unreasonable rests upon the [party] challenging the administrative action." In re Arenas, 385 N.J. Super. 440, 443–44 (App. Div.), certif. denied, 188 N.J. 219 (2006). We must hew to our limited standard of review.

IV.

It is an unlawful employment practice under the LAD "for 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." N.J.S.A. 10:5-12(d). "When the claim arises from alleged retaliation, the elements of the cause of action are that the employee 'engaged in a

protected activity known to the [employer,]' the employee was 'subjected to an adverse employment decision[,]' and there is a causal link between the protected activity and the adverse employment action." Battaglia v. United Parcel Serv., Inc., 214 N.J. 518, 547 (2013).[2]

There is no dispute that Brower engaged in LAD-protected activity when she filed her 2010 complaint. It is similarly undisputed that Brower experienced an adverse employment action when she was terminated in December 2011. However, the Director found no probable cause to believe there was a causal link between the protected activity and the adverse employment action.

Brower has not demonstrated that the Director's finding of no probable cause was arbitrary, capricious, or unreasonable. Indeed, "sufficient credible competent evidence in the record" supports the finding. See Clowes, supra, 109 N.J. at 587. The evidence showed that Brower's work was characterized by an over-aggressive pursuit of commissions to the detriment of her other tasks, her colleagues, and Nordstrom's customers and vendors, and an inability to meet Nordstrom's reasonable performance expectations.

In the Division's investigation, Brower asserted that she was not the problem, that she actually performed well, and that her entire team at Nordstrom was against her. The Division found no evidence supporting her allegations.

On appeal, Brower makes a number of new factual allegations, but she does not appear to have made any of these allegations during the administrative investigation.

Generally, we will decline to consider issues, evidence, and facts that were never presented to the tribunal when the opportunity to present those issues was available. State v. Robinson, 200 N.J. 1, 20 (2009); see Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 452 (2007) (citing R. 2:5-4).

In any event, Brower's new allegations do not change the result. First, she asserts that a supervisor told her, "You don't have the right look" when Brower inquired about a position in the cosmetics department, but this allegation appears to be related to Brower's original 2010 complaint charging discrimination in hiring, rather than the 2012 complaint of retaliatory discharge that is before us. Second, she argues that employees knew she "was hired through Civil Rights [sic]," but the Division found many of the complaints about Brower were made by persons with no knowledge of her prior discrimination complaint. Third, she claims that she was excluded from special events, promotions, and rotating sales, but there is no evidence supporting that claim. She supplied no evidence to show she made many internal complaints to Nordstrom during the course of her employment about perceived discrimination. Finally she contends that she received "many good reviews" but that Nordstrom "only used negative complaints against her[,]" but the Division considered all of her reviews, good and bad.

Brower argues the Division erred in finding that she signed her 45-day review, saying Nordstrom "told [her] to sign it, but she refused to sign because she disagreed with the review." However the 45-day review in the record clearly bears a signature in her name. This supports the Division's finding.[3] Regardless, even if Brower refused to sign the 45-day review, it would be irrelevant because Brower does not deny awareness of its contents. Moreover, whether it was signed is immaterial to the Division's finding of no probable cause.

Thus, the Director found the record does not support any "apparent nexus" between Brower's 2010 pre-hiring complaint and her termination in December 2011. Accordingly, "[t]he Director's finding of no probable cause was not an abuse of discretion." Sprague v. Glassboro State Coll., 161 N.J. Super. 218, 225 (App. Div. 1978).

Affirmed.

[1] The 2010 complaints are not the subject of this appeal, and are only relevant in that they constitute protected activity under LAD, for which Brower claims she suffered reprisal. Further, neither the 2010 complaints, nor any documents detailing the resolution, are in the record before us.

2 "In addition, in order to recover for LAD retaliation, plaintiff must also demonstrate that the original complaint was both reasonable and made in good faith." Ibid. We assume that fact for purposes of our decision.

3 Brower did refuse to sign her November 29, 2011, Opportunity Check.
