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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3831-12T3

LAMONT PRAY,

Plaintiff-Appellant,

v.

NEW JERSEY TRANSIT, INC., OPERATIONS, INC., Corporation of the State of New Jersey, ALMA SCOTT-BUCZAK, WILLIAM HEMPHILL, TERRI SILVERMAN, ADRIAN MALLOY and LEOTIS SANDERS,

Defendants-Respondents.

Argued January 28, 2014 – Decided February 24, 2014

Before Judges Reisner, Alvarez and Carroll.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-4107-11.

Fredda Katcoff argued the cause for appellant (Rabner, Allcorn, Baumgart & Ben-Asher, attorneys; Ms. Katcoff, on the brief).

Noreen P. Kemether, Deputy Attorney General, argued the cause for respondents (John J. Hoffman, Acting Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General of counsel; Ms. Kemether, on the brief).

PER CURIAM

Plaintiff Lamont Pray was employed by defendant New Jersey Transit (NJT) from 1989 until he retired in April 2011. Over

the years, he advanced to various positions within NJT. He commenced this action on May 13, 2011, alleging discriminatory treatment based on his age and gender, and retaliation, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -42. Plaintiff's complaint was dismissed on summary judgment on February 8, 2013. Reconsideration was denied on April 5, 2013. Plaintiff now appeals from those orders. For the reasons that follow, we affirm.

I.

We summarize the pertinent evidence from the motion record. Plaintiff initially began working for NJT in 1989 as a railroad laborer, performing various mechanical and electrical checks on trains prior to their departure. In 2002, after interviewing with Z. Wayne Johnson and defendant William Hemphill, plaintiff was offered a newly created Equal Employment Opportunity (EEO) Specialist position. Johnson determined that plaintiff had transferrable skills related to statistics and administrative areas enabling him to "prepare and submit the Title VI Program, write position statements, participate in mediations and carry out the entire EEO Specialist and EO/AA Administrators job tasks, with high degree of autonomy at the point of his hire in the EEO/AA Department." Johnson further noted that plaintiff's "performance status within the EEO/AA department would be

reevaluated and if performing satisfactorily at the EEO Specialist level, he would be reclassified to the Senior EO/AA Administrators' level after two years on the job."

When plaintiff became EEO Specialist, Pat Bullock, a female co-worker, was already working in the higher title of senior EO/AA diversity program administrator. Bullock had approximately twenty years' experience working as an EO/AA administrator. As an EEO Specialist, plaintiff's job responsibility was to investigate discrimination claims and write "position statements." He also attended mediations and performed Title VI work independently. Plaintiff testified that he did not receive training for the EEO Specialist position, but had a statistics background that helped him perform the requisite data analysis. Bullock exclusively handled the Title VII program administration, while plaintiff handled the Title VI program in addition to being the "independent staff statistician for both Title VI and Title VII programs."

Johnson retired in January 2003, and was replaced by defendant Alma Scott-Buczak. Plaintiff stated that he first requested reclassification in February 2004, having then worked two years in the EEO Specialist title. Plaintiff could not recall how many times he sought reclassification, but noted that he made multiple requests, formally and informally, to be

reclassified into the next highest position above EEO Specialist.

Plaintiff submitted a subsequent request to Hemphill on May 17, 2004, seeking reclassification to senior EO/AA diversity program administrator. On August 12, 2004, a performance review, conducted by Hemphill, indicated that plaintiff "occasionally exceeds expectations." On February 17, 2005, Hemphill sent Sonia Illescas, Chief EO/AA and Diversity Officer, a position reclassification memo indicating that plaintiff should be reclassified to the senior EO/AA program administrator position. Hemphill noted that plaintiff had "performed the duties and responsibilities of Senior EEO Representative because of organizational needs." On March 23, 2005, Illescas and Scott-Buczak concurred in this recommendation. Plaintiff's reclassification was delayed, however, because the compensation review committee, consisting of defendant Terri Silverman, defendant Scott-Buczak, Dana Pasczyk and defendant Adrian Malloy, determined that plaintiff did not meet the minimum requirements for reclassification. Silverman issued a memo on April 4, 2005 indicating that even though plaintiff had been promoted to the EEO Specialist position, "he did not have any prior EEO experience (minimum of two (2) years of EEO experience is required for the position)." She stated that "the

Compensation Review Committee recommends that the department re-submit this request to reclassify [plaintiff] when he meets the minimum requirements of the Senior EO/AA Diversity Program Administrator."

On November 8, 2005, Illescas requested reclassification of Bullock and plaintiff. Illescas indicated that plaintiff "has been performing the responsibilities of a senior EO/AA diversity program administrator for over two years, although his current title is EEO Specialist."

Plaintiff was formally reclassified to the senior EO/AA position in February 2006. He stated that he had the skills to perform the work required of a senior EO/AA Diversity Program Administrator because he formerly performed Title VI work. However, he admitted that he did not have four years of applied experience in EO/AA and diversity programs when he started working as an EEO Specialist.

On April 5, 2007, Jan Walden, Assistant Executive Director, Diversity Programs, sent a memo to Silverman, who served as director of the compensation department, indicating that "[t]o offset the loss of experience[d] staff, and specialized expertise needed to successfully operate, I am requesting that we begin succession planning." In that memo, Walden also recommended that plaintiff's position be upgraded from senior

EO/AA officer to principal EO/AA officer. Consequently, on May 14, 2007, plaintiff was reclassified to principal EO/AA officer.

On January 22, 2008, plaintiff wrote a memo to Walden stating that he was appealing the date of his reclassification. He stated that he had been performing "out-of-title" work for three years prior to being reclassified as a senior EO/AA diversity programs administrator, and that he should have been compensated for this "out-of-title" work in accordance with NJT policy. Plaintiff stated that he was performing the same work as two female co-workers, Sandy Durrell and Bullock, during this time. Plaintiff also noted that when NJT hired him as an EEO Specialist it implicitly accepted that he had prior experience to qualify for that position, and any future promotions should have accordingly taken that experience into consideration.

On January 24, 2008, Walden posted a new position titled "EO/AA Program Manager". Plaintiff did not apply, allowing Bullock to obtain the position, with the expectation that another position having the same title would later open up.

On February 19, 2008, plaintiff sent an email, inquiring about the status of his internal appeal, to Walden, Scott-Buczak, and Hemphill. On February 21, 2008, after conducting an investigation related to plaintiff's appeal, Malloy reported to Scott-Buczak that plaintiff did not have the requisite four

years' experience when he applied for the initial reclassification to the senior EO/AA diversity program administrator title. Malloy also stated that plaintiff was not performing the same work as his female co-workers, Bullock and Durrell. Malloy noted that unlike plaintiff, both female employees had extensive prior experience and greater job responsibilities.

Malloy indicated that her investigation also revealed that plaintiff had acquired a majority of his experience "on the job" during his training period and that his initial responsibilities consisted mainly of entry-level tasks. She opined that it was not until 2005-2006 that there was a shift in plaintiff's job responsibilities. She further noted that plaintiff's promotion from laborer to the EEO Specialist position was the result of an exception that was made to the general requirements. Based on these findings, Malloy reported that plaintiff was not entitled to retroactive compensation or consideration of his prior experience in relation to future promotions.

On April 3, 2008, plaintiff sent a memo to Walden in response to Malloy's memo, on which he copied Scott-Buczak and Hemphill. In this memo, plaintiff claimed that he was "aware of females in the HR department alone that were reclassified to significantly higher salary classifications, without prior

direct experience in the higher grade, much less having worked out of title at a professional level for [three] years." Plaintiff alleged that it appeared that a "different standard was applied to them than to me as a male." Plaintiff also urged Walden to comply with NJT's own policies regarding reclassifications and resolution of his appeal. Specifically, plaintiff made reference to the "Corporate Wide Policy and Procedure 3.29, Promotions, Demotions, Reclassifications," which according to plaintiff stated that "reclassification is when an employee's job content is comprised of work at a higher grade level that results in a 15% (14.5%) rounded increase in Hay points."[1]

On April 11, 2008, Scott-Buczak responded to plaintiff's memo, indicating that "the investigation was in depth and expedient and the conclusions [were] appropriate." Scott-Buczak reaffirmed her initial decision denying plaintiff back pay for the out-of-title work he allegedly performed.

On April 24, 2008, Walden responded to plaintiff's internal appeal, indicating that "it is not uncommon for an employee to receive additional responsibilities from his/her manager in order to prepare and develop the employee for potential

[1] In his deposition, plaintiff explained that Hay points refers to the degree of difficulty the job entails, and that "the higher the degree of difficulty, the higher the Hay points."

promotions or reclassifications in the future." Walden noted that "there is nothing substantive to support the assertion that [plaintiff was] working above [his] assigned level prior to 2006." She concluded that plaintiff's "former position(s) and salaries were appropriately and deservedly evaluated and upgraded in February 2006, and again in May 2007, which eliminates the perception of performing work for which [plaintiff was] not being monetarily compensated."

On March 1, 2009, Walden retired from NJT, and was replaced by defendant Leotis Sanders. In late 2009, two female employees, Joyce Smith and Penny Jackson, were promoted to EEO specialists.

On January 21, 2010, Bullock and plaintiff met with Sanders regarding succession/reorganization. On January 27, 2010, they sent Sanders a letter raising several concerns regarding that meeting. Specifically, plaintiff and Bullock stated that Sanders had failed to include them in the succession/reorganization plan because they were nearing retirement.

On January 28, 2010, Sanders responded to plaintiff and Bullock, to clarify their "gross misrepresentation of what transpired in that meeting and [which] does not reflect in word, nor deed, nor intention my actions prior to and comments made in

that meeting." He advised that "[b]oth of you are listed as the two succession planning candidates to the Director EO/AA position certified by me." Sanders noted that neither Bullock nor plaintiff had expressed an interest in advancement while the department reorganization was ongoing; rather they had both expressed an interest in opportunities presenting a challenge. Sanders largely denied their allegations, and noted his commitment to their advancement and success. He further stated that:

> While I had and have no interest or desire to see you leave, I did bear in mind that under such conditions, someone in either of your circumstances may at any moment choose on your own to leave without prior indication or notice. As a leader of the department, in keeping with my accountability to ensure [NJT] has a fully staffed and high functioning EO/AA department, I am obligated to consider and be aware of that.
>
> Now that you have expressed a clear interest in advancement, I am excited that we can commit to a course for how you get there from here and how you (both), Bill, and I, can work together to see your ambitions fulfilled.

On November 1, 2010, plaintiff and Bullock sent a memo to Scott-Buczak alleging that Sanders had failed to follow through on the commitments he made regarding "opportunities for growth and development" in the January 2010 letter. They noted that

the commitment made by Sanders "was exactly the same for both of us."

On December 6, 2010, Sanders issued a memo providing an update regarding plaintiff and Bullock's job responsibilities during Hemphill's temporary three-month absence due to illness. The responsibilities given to plaintiff, who was EO/AA principal at the time, were different from those given to Bullock, who was then EO/AA program manager.

On January 3, 2011, Sanders sent a detailed response to Scott-Buczak regarding the November 1, 2010 memo. Sanders noted that Bullock and plaintiff had "been adversarial and contentious" regarding his leadership. After reiterating the issues raised in the January 2010 exchange, Sanders indicated that neither plaintiff nor Bullock had, formally or informally, made their interest in career advancement known to him from February 3, 2010, until June 28, 2010.

On January 10, 2011, plaintiff wrote another memo to Sanders indicating that despite having the same job responsibilities as Bullock, he was paid $16,000 less than her. Plaintiff also stated that:

> Joyce Smith and Penny Jackson, both recently promoted from the clerical ranks with no professional experience, and, [Bullock] and I were directed to provide training to them, yet they are paid approximately only $3,000 less tha[n] I am, despite the fact that I

> have more than 9 years professional tenure in the EO/AA unit.

Plaintiff also attached a chart further supporting his position that he had the same job responsibilities as Bullock.

On January 31, 2011, Sanders shifted certain responsibilities as a result of Hemphill's temporary absence. Plaintiff was made responsible for "[c]oaching/supporting junior team members Penny Jackson and Joyce Smith on effective case management." Sanders also provided additional responsibilities to Bullock that were not provided to plaintiff. Sanders requested a salary increase for both plaintiff and Bullock commensurate with their additional temporary responsibilities, and Scott-Buczak approved an equal six per cent increase for each of them. When Hemphill returned on March 21, 2011, both their salaries were returned to their original amounts. Plaintiff's salary was returned to $63,024, while Bullock's salary returned to $79,311.

On April 3, 2011, plaintiff notified Hemphill and Sanders, among others, of his intention to retire effective April 18, 2011. Plaintiff indicated that he felt "compelled to retire" because he could "no longer work under the conditions," which were "eroding both my professional and personal well[-]being and effectiveness." On April 6, 2011, Sanders, in response, wished plaintiff the best in his future endeavors and indicated that he

was "disappointed that our on-going efforts to understand and appropriately address your concerns have not been satisfactory to you."

On May 13, 2011, plaintiff commenced this action alleging that NJT and several NJT employees[2] engaged in numerous violations of the LAD. Specifically, plaintiff alleged that defendants discriminated against him based on his gender and age (counts one and two, respectively), and that this discriminatory treatment created a hostile work environment (count three). Count four alleged disparate treatment based on plaintiff's gender and age. Plaintiff also alleged that defendants retaliated against him for complaining about the "disparity in pay, promotion and rank, as well as age and gender discrimination on multiple occasions" (count five). In count six, plaintiff alleged that upper management and supervisors "wrongfully aided and abetted Defendant's co-employees' unlawful, discriminatory, harassment, disparate treatment, disparate impact, retaliation, and denied pay and promotions in violation of" the LAD.

During his deposition, plaintiff testified that Sanders would not say "hello" to him, but he "had a good working

[2] These employees include Scott-Buczak, Hemphill, Silverman, and Malloy. Subsequently, plaintiff amended his complaint to include Sanders as a defendant.

relationship" with Hemphill. Plaintiff also stated that Scott-Buczak and Silverman did not treat him differently as a result of his attempts to obtain reclassification. He testified that there was no direct mistreatment by other employees, but that the environment was hostile because it was difficult for him to continue working for NJT knowing that Bullock was paid significantly more than him, and Smith and Jackson were paid only $3,000 less. Plaintiff also testified that "there was this kind of like standoffishness with [Sanders] when he came aboard." Plaintiff stated that this was the extent of the retaliation he was claiming. He alleged that he was discriminated against based on his age because Sanders spearheaded a succession plan and informed plaintiff and Bullock that neither of them were included because of the "Rule of 80"[3] and because they would be leaving the company soon.

On February 8, 2013, following oral argument, the Law Division entered an order granting defendants' summary judgment motion, accompanied by a comprehensive written opinion. On

[3] "Rule of 80" refers to a calculation used to determine when an employee becomes entitled to retirement, based on age and years of experience.

April 5, 2013, the court denied plaintiff's motion for reconsideration. This appeal followed.[4]

II.

The summary judgment standard is well-established. A trial court must grant a summary judgment motion if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c); see also Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529-30 (1995). "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). If the evidence submitted on the motion "'is so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." Brill, supra, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)).

[4] On appeal, plaintiff has abandoned his hostile environment claim.

When a party appeals from a trial court order granting or denying a summary judgment motion, we "'employ the same standard [of review] that governs the trial court.'" Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010) (quoting Busciglio v. DellaFave, 366 N.J. Super. 135, 139 (App. Div. 2004)). Thus, we must determine whether there was a genuine issue of material fact, and if not, whether the trial court's ruling on the law was correct. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). We review legal conclusions de novo. Henry, supra, 204 N.J. at 330.

III.

A.

We begin our analysis with plaintiff's claims based on gender discrimination (count one) and disparate treatment on account of gender (count four). Plaintiff asserts that he was discriminated against on the basis of gender with regard to pay and title because (1) NJT improperly delayed his reclassification to the Senior EO/AA administrator position even though he was performing the same duties as Bullock; (2) NJT failed to reclassify him to Program Manager even though he performed the same work as Bullock; (3) NJT failed to afford plaintiff opportunities for professional growth, in distinction

to Bullock; (4) Bullock's salary was consistently more than plaintiff's throughout his employment, and exceeded plaintiff's salary by $16,000 at the time of his retirement; and (5) NJT violated its own policy in calculating plaintiff's and Bullock's temporary increments during Hemphill's absence, in a manner that favored Bullock.

The LAD prohibits discriminatory employment practices. Viscik v. Fowler Equip. Co., 173 N.J. 1, 13 (2002). To prove employment discrimination under the LAD, New Jersey courts have adopted the burden-shifting analysis established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); Viscik, supra, 173 N.J. at 13-14. Under that analysis, a plaintiff needs to first establish a prima facie case of discrimination. Viscik, supra, 173 N.J. at 14.

To prove a prima facie case of discrimination the plaintiff must show that he or she

> (1) belongs to a protected class; (2) applied for or held a position for which he or she was objectively qualified; (3) was not hired or was terminated from that position; and that (4) the employer sought to, or did fill the position with a similarly-qualified person. The establishment of a prima facie case gives rise to a presumption of discrimination.
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> [Ibid. (citation omitted).]

The evidentiary burden for proving a prima facie case of discrimination is "'rather modest.'" Zive v. Stanley Roberts, Inc., 182 N.J. 436, 447 (2005) (quoting Marzano v. Computer Sci. Corp., 91 F.3d 497, 508 (3d Cir. 1996)). A plaintiff must only demonstrate that "discrimination could be a reason for the employer's action." Ibid. (emphasis added) (internal quotation marks omitted). This analytical framework is not meant for rigid application; rather, the "precise elements of a prima facie case must be tailored to the particular circumstances."[5] Viscik, supra, 173 N.J. at 14.

If a plaintiff presents such a prima facie case under the McDonnell construct, a burden of production, not the ultimate burden of persuasion or proof, is placed on the defendant to offer a legitimate, nondiscriminatory reason for the action. Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 142, 120 S.

[5] On appeal, NJT characterizes this as a reverse discrimination case so that consequently a heightened standard applies. Neither party appears to have raised the application of the heightened standard below, and since the trial court did not address it, it is not properly before us. In cases involving reverse discrimination, "the rationale supporting the rebuttable presumption of discrimination embodied in the prima facie elements does not apply." Erickson v. Marsh & McLennan Co., 117 N.J. 539, 551 (1990). As a result, when the employee alleging the discriminatory action "is not a member of the minority, courts have generally modified the first prong of the McDonnell Douglas standard to require the plaintiff to show that he has been victimized by an 'unusual employer who discriminates against the majority.'" Ibid. (citation omitted).

Ct. 2097, 2106, 147 L. Ed. 2d 105, 117 (2000); Barbera v. DiMartino, 305 N.J. Super. 617, 634 (App. Div. 1997), certif. denied, 153 N.J. 213 (1998); see also N.J.R.E. 101(b)(1) and (2) (defining these terms).

Once competing evidence is produced by a defendant, it becomes the plaintiff's burden under the McDonnell test to persuade the jury that the employer's asserted business reasons were only a pretext for discrimination. Reeves, supra, 530 U.S. at 143, 120 S. Ct. at 2106, 147 L. Ed. 2d at 117; see also DeWees v. RCN Corp., 380 N.J. Super. 511, 523-24 (App. Div. 2005). "To prove pretext, however, a plaintiff must do more than simply show that the employer's reason was false; he or she must also demonstrate that the employer was motivated by discriminatory intent." Viscik, supra, 173 N.J. at 14. However, in the absence of direct evidence, a jury can infer such intent based upon circumstantial evidence that proves "the defendant's explanation is unworthy of credence." Reeves, supra, 530 U.S. at 147, 120 S. Ct. at 2108, 147 L. Ed. 2d at 119; see also El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 173 (App. Div. 2005).

In order to show pretext, and thereby successfully rebut the employer's purported legitimate reason for its adverse action, a plaintiff may: "'(i) discredit[] the proffered reasons

[of the defendant], either circumstantially or directly, or (ii) adduc[e] evidence, whether circumstantial or direct, that discrimination was more likely than not a motivating or determinative cause of the adverse employment action.'" DeWees, supra, 380 N.J. Super. at 528 (quoting Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994)).

To discredit as pretextual a defendant's proffered reasons, "plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence, and hence infer that the employer did not act for the asserted non-discriminatory reasons." Ibid. (citation omitted) (internal quotation marks omitted). "[A] jury is permitted to infer discrimination on the basis of a rejection of defendant[']s reasons together with plaintiff's prima facie case." Id. at 528-29.

In granting summary judgment to NJT on plaintiff's gender discrimination claims, the trial court concluded that plaintiff made a prima facie showing of discriminatory failure to promote based on gender. The judge next found that defendants successfully rebutted plaintiff's prima facie showing by asserting that Bullock was promoted and compensated in

accordance with her experience and not based on her gender, as plaintiff alleged. The court concluded that plaintiff failed to sustain his burden when he was unable to rebut defendants' non-discriminatory reason for promoting and compensating a female employee with greater experience. The court reasoned that "[i]t is not unreasonable . . . for a jury to infer that even if the work product of two employees was equally performed, that the employee with more experience and seniority would still receive higher compensation." The court also stated that "[p]laintiff has not submitted any evidence that would allow a reasonable jury to infer that Bullock's promotions and compensation were a result of anything other than her many years' more experience than plaintiff." We agree.

Plaintiff's recurrent theme is that the salary and title disparity between he and Bullock was the product of gender discrimination. Plaintiff also places substantial reliance on his contention that he should have been compensated for work he performed outside his job title between 2004—2006.[6] However, plaintiff's arguments totally ignore the vast difference between the two employees in their work experience and job

[6] NJT argues that this claim is time-barred by the two-year statute of limitations under the LAD. See Roa v. Roa, 200 N.J. 555, 566 (2010). However, since this issue was not addressed by the motion judge, we decline to consider it on appeal.

responsibilities. It is undisputed that when plaintiff began working as an EEO Specialist in 2002, Bullock already possessed approximately twenty years' experience as an EO/AA administrator, and was working in the higher title of senior EO/AA diversity program administrator. That Bullock had a higher title, and possessed superior authority, is underscored in the November 8, 2005 memo from Illescas to Scott-Buczak requesting position reclassifications for both plaintiff and Bullock. As justification for Bullock's reclassification, the memo recites, "Additionally, [Bullock] will be responsible for directly supervising [plaintiff]." Although plaintiff and Bullock were admittedly close friends, in her deposition Bullock acknowledged that she helped mentor plaintiff, and that during the course of her career she expected that, due to her extensive experience, she would be earning more and be in a higher position than plaintiff.

"[I]n a case brought under the LAD presenting a gender-discrimination claim based on the payment of unequal wages for the performance of substantially equal work, the standards and methodology of the [Equal Pay Act (EPA), 29 U.S.C. 206(d),] should be followed." Grigoletti v. Ortho Pharm. Corp., 118 N.J. 89, 109-10 (1990). The EPA is generally applied "in a gender-discrimination claim of unequal pay for equal work whether or

not the allegations expressly or specifically assert a violation of the EPA." Id. at 103. Moreover, a claim under the EPA entails "a more exacting prima facie case standard" than a claim under the LAD. Id. at 102. The plaintiff must show that his salary was lower than "that paid by the employer to employees of the opposite sex. . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." Ibid. (citation omitted). Moreover, the plaintiff bears the burden of showing that "the work unequally recompensed was substantially equal." Ibid. (citation omitted).

After the plaintiff establishes a prima facie case under the EPA, the burden then shifts to the employer to show that the difference in pay was justified. Ibid. Most notably, under the EPA, "a defendant must establish by a preponderance of evidence one of four affirmative defenses in order to avoid liability." Ibid. The employer must show that the wage disparity was the result of "(i) a seniority system, (ii) a merit system, (iii) a system which measures earnings by quantity or quality of production, or (iv) a differential based on any factor other than sex." Ibid. Finally, the Court noted that where

> a complainant in an action brought under the LAD based on gender-discrimination fails to satisfy the standards of a prima facie case of "substantially equal" work, as prescribed

> by the EPA, but the evidence demonstrates a lesser degree of job similarity that would nonetheless satisfy the less-exacting standards of a prima facie case under Title VII, the burden that shifts to the defendant should be only the burden of production or explanation. Thus, if such a complainant is able to show only that the work is "similar," then the defendant will be required to articulate a legitimate non-discriminatory reason for the treatment of the plaintiff, and the ultimate burden of persuasion shall remain on the plaintiff.
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> [Id. at 110.]

Here, the record reflects that each NJT job announcement also included a high and low salary range. Given Bullock's abundant edge in experience, coupled with the fact that she always worked in a higher job title than plaintiff, NJT clearly established a legitimate non-discriminatory basis for Bullock's higher wages, commensurate with her higher position, or at the very least the reasons she was paid more for similar work. Also, while plaintiff makes reference to two female employees, Smith and Jackson, who were promoted within the department, he failed to establish that they were working in a position comparable to his. Moreover, while he alleged that he had more experience but was only paid $3000 more than them, as to each of their salaries he conceded at his deposition, "I really don't know what she was making." Plaintiff thus failed to meet his

burden of showing pretext, as the motion judge properly concluded.

We also reject plaintiff's contention that NJT improperly denied him a reclassification or promotion to the title of Program Manager. To the contrary, the record demonstrates that in 2008 Walden attempted to establish two such positions, but was only successful in obtaining approval for one. It is undisputed that plaintiff opted to "step aside" and not apply for the position, so as to allow Bullock to gain the promotion. Plaintiff presented no proof that NJT was thereafter able to obtain approval for that second position, or that there was funding available for his promotion or reclassification into it.

We likewise reject plaintiff's amorphous assertion that NJT failed to afford him "opportunities for professional growth," in distinction to Bullock, as well as his contention that he was unfairly treated when he and Bullock divided the Acting Director's duties during Hemphill's brief absence. Again, that Bullock's tasks in this temporary assignment deviated from plaintiff's was rationally attributable to her greater experience and background in EO/AA matters. Most notably, however, each was given an equal six percent temporary salary increase, commensurate with their additional duties during Hemphill's absence.

B.

We next turn to the motion judge's dismissal of plaintiff's claims of age discrimination (count two) and disparate treatment due to age (count four). In dismissing these claims, the court concluded that no reasonable jury could believe that NJT "placed plaintiff and other older employees on a 'succession plan' designed to induce these employees to retire." The judge found that plaintiff failed to produce "any competent evidence that proves the existence of such a plan." The court further opined that plaintiff's allegations of discriminatory conduct based on the promotion of Smith and Jackson into a lower position, as well as two other younger females who were promoted in another division, were irrelevant since plaintiff was not competing with any of these younger women. As a result, the court concluded that plaintiff failed to establish a prima facie case of age discrimination.

Both N.J.S.A. 10:5-4 and N.J.S.A. 10:5-12 prohibit discrimination based on age. N.J.S.A. 10:5-4 states that "[a]ll persons shall have the opportunity to obtain employment . . . without discrimination because of . . . age . . ., subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right." Bergen Commercial Bank v. Sisler, 157 N.J. 188, 199

(1999) (quoting N.J.S.A. 10:5-4). N.J.S.A. 10:5-12 provides that:

> It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination . . . [f]or an employer, because of the . . . age . . . of any individual . . . to refuse to hire or employ or to bar or to discharge or require to retire . . . from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.
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> [Id. at 199-200 (quoting N.J.S.A. 10:5-12).]

Where plaintiff is "alleging age discrimination under the LAD, an employee must show that the prohibited consideration [, age,] played a role in the decision making process and that it had a determinative influence on the outcome of that process." Id. at 207 (citation omitted). The discrimination may be proved by either direct or circumstantial evidence. Id. at 208.

Where an employee "attempts to prove discrimination by direct evidence, the quality of evidence required to survive a motion for summary judgment is that which if believed, proves [the] existence of [a] fact in issue without inference or presumption." Ibid. The employee must not only show that his or her employer "placed substantial negative reliance on an illegitimate criterion" but also establish that the employee's age was the deciding factor in the adverse employment decision. Ibid. Moreover, the employee must demonstrate that there was

"hostility toward members of the employee's class" in addition to a "direct causal connection between that hostility and the challenged employment decision." Ibid.

Once the employee establishes a prima facie case of age discrimination indicating that age "was a substantial factor in an adverse employment decision, the burden then shifts to the employer to show it would have made the same decision even in the absence of the impermissible consideration." Id. at 209.

Alternatively, an employee may prove age discrimination based on circumstantial evidence. Ibid. This standard is essentially the McDonnell Douglas analytical framework. Id. at 209-11. However, the fourth element of the McDonnell Douglas standard is altered in the context of age discrimination cases so as to eliminate "the requirement that the plaintiff be replaced with someone outside the protected class." Id. at 212. As such, the "fourth element of a prima facie case in an age-discrimination case properly focuses not on whether the replacement is a member of the protected class but on 'whether the plaintiff has established a logical reason to believe that the decision rests on a legally forbidden ground.'" Id. at 213 (citation omitted).

Plaintiff argues, contrary to the trial court's conclusion, that a reasonable jury could find that age was a factor in

Sanders' decision not to make provision for plaintiff in the succession/reorganization plan. The fundamental flaw in plaintiff's argument, as the motion judge correctly recognized, is that plaintiff failed to adduce any proof that he was in fact excluded, despite having had the opportunity to engage in discovery, depose defendants, and compel the production of any such exclusionary succession/reorganization plan. Rather, the competent, non-speculative evidence in the record is directly to the contrary. It is undisputed that both plaintiff and Bullock, who is older, were listed on the 2007 plan as candidates for succession to Hemphill's position as Director, EO/AA Diversity Programs. Notably, in late 2010, when Hemphill went out on medical leave, plaintiff and Bullock were selected to jointly fill that position, and there is no evidence that any other employee was even considered.

Plaintiff's additional argument that he was denied advancement opportunities also fails, since at best he was merely able to establish that younger employees were promoted into lesser positions that he previously occupied, or unspecified positions in another department for which he had not applied. The record is again devoid of any evidence that a higher job title was open or available, or that anyone else, be

they younger or older, was promoted or reclassified into a higher position for which plaintiff was then eligible.

C.

We now turn to count five, in which plaintiff alleges employment retaliation in violation of the LAD. Specifically, he claims that after he complained about gender discrimination in 2008 and age discrimination in 2010, NJT refused to reclassify him to the Program Manager position, and he received no further permanent salary increments. Also, after complaining about age discrimination, NJT did not provide him with opportunities for professional growth, and during Hemphill's temporary absence NJT apportioned work duties and salary increments inequitably between him and Bullock.

Plaintiff's claims are addressed to the LAD's anti-retaliation provision, which makes it an unlawful employment practice "to take reprisals against any person because that person has opposed any practices or acts forbidden under th[e LAD.]" N.J.S.A. 10:5-12d. "All employment discrimination claims require the plaintiff to bear the burden of proving the elements of a prima facie case." Victor v. State, 203 N.J. 383, 408 (2010). "[T]he elements of the prima facie case vary depending upon the particular cause of action." Ibid.

"Identifying the elements of the prima facie case that are unique to the particular discrimination claim is critical to its evaluation." Id. at 410. The elements of a retaliation claim under the LAD "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) (quoting Woods-Pirozzi v. Nabisco Foods, 290 N.J. Super. 252, 274 (App. Div. 1996)).

Once a plaintiff establishes these elements of a prima facie case, the burden shifts to the defendants, who "must articulate a legitimate, non-retaliatory reason" for the employment action. Romano v. Brown & Williamson Tobacco Corp., 284 N.J. Super. 543, 549 (App. Div. 1995) (citing Jamison v. Rockaway Twp. Bd. of Educ., 242 N.J. Super. 436, 445-47 (App. Div. 1990)). If the defendants successfully do so, the burden returns to the plaintiff to then demonstrate retaliatory intent motivated the defendants' actions, rather than the legitimate reason proffered. Id. at 549, 551. This may be done "either indirectly, by proving that the proffered reason is a pretext for the retaliation, or directly, by demonstrating that a retaliatory reason more likely than not motivated [the]

defendant[s'] action." Woods-Pirozzi, supra, 290 N.J. Super. at 274 (citing Romano, supra, 284 N.J. Super. at 551). We have explained:

> All that is needed is some evidence from which a factfinder could infer that the employer's proffered reason was either a post hoc fabrication or otherwise did not actually motivate the decision. A plaintiff must demonstrate weaknesses, implausibilities, inconsistencies, or contradictions in the employer's proffered reason such that a rational factfinder could find the reason unworthy of credence.
>
> [Svarnas v. AT&T Commc'ns, 326 N.J. Super. 59, 82 (App. Div. 1999) (internal citations omitted).]

Proofs necessary to demonstrate an adverse employment action include "actions that affect wages [or] benefits, or result in direct economic harm . . . . So too, noneconomic actions that cause a significant, non-temporary adverse change in employment status or the terms and conditions of employment would suffice." Victor v. State, 401 N.J. Super. 596, 616 (App. Div. 2008), aff'd in part, modified in part, 203 N.J. 383 (2010). However, "emotional factors alone cannot constitute adverse employment action." Shepherd v. Hunterdon Developmental Ctr., 336 N.J. Super. 395, 420 (App. Div. 2001), aff'd in part, rev'd in part, 174 N.J. 1 (2002). In other words, the employer's action "must rise above something that makes an employee unhappy, resentful or otherwise cause[s] an incidental

workplace dissatisfaction." Victor, supra, 401 N.J. Super. at 616. "'[T]rivial harms,'" "'petty slights, minor annoyances, and simple lack of good manners'" are insufficient. Roa, supra, 200 N.J. at 575, (quoting Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68, 126 S. Ct. 2405, 2415, 165 L. Ed. 2d 345, 359-60 (2006)). Therefore, "'unfavorable evaluation[s], unaccompanied by a demotion or similar action' or a job reassignment with no corresponding reduction in wages or status is insufficient." Victor, supra, 401 N.J. Super. at 615 (quoting El-Sioufi, supra, 382 N.J. Super. at 170).

In addition to firings or demotions, adverse employment actions have been found to include the cancellation of an employee's health insurance, Roa, supra, 200 N.J. at 575, a thirty-seven-day suspension without pay, and reassignment to more arduous and less desirable duties, Burlington N., supra, 548 U.S. at 70-74, 126 S. Ct. at 2416-18, 165 L. Ed. 2d at 361-63.

"[A] purely lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action. A transfer involving no reduction in pay and no more than a minor change in working conditions will not do, either." Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996).

In dismissing plaintiff's retaliation claim, the motion judge concluded that plaintiff could not establish that he either engaged in protected activity, or suffered an adverse employment action, and thus he failed to "make out a prima facie claim of retaliation under the LAD." The court further reasoned that plaintiff received several promotions and raises, and "was never demoted, and was actually promoted."

In affirming the result, we part company with the trial court's finding that plaintiff failed to demonstrate that he engaged in protected activity. Even though plaintiff may not have used the label "discrimination," it is nonetheless readily apparent that he couched his claims of wage disparity as being gender-based, and blamed his lack of advancement on Sanders' perceived assessment that he was close to retirement age. The trial court found, and we concur, that plaintiff initially established a prima facie showing of gender-based discrimination, although that claim ultimately proved unsuccessful. "When an employee voices a complaint about behavior or activities in the workplace that he or she thinks are discriminatory, we do not demand that he or she accurately understand the nuances of the LAD." Battaglia, supra, 214 N.J. at 548-49. Rather, "as long as the complaint is made in a good faith belief that the conduct complained of violates the LAD, it

suffices for purposes of pursuing a cause of action." Id. at 549.

Nonetheless, while we are satisfied that plaintiff engaged in protected activity, we are constrained to agree that plaintiff failed to establish that he was subjected to an adverse employment action. We have previously rejected plaintiff's vague claim that he was denied "growth opportunities." We have further noted that he declined to apply for the Program Manager position, and failed to show that another such position thereafter became open or funded. Also, as we have found, when the Director position temporarily became open, he and Bullock were chosen to share those duties, and each received the identical percentage increase in salary. Simply put, plaintiff did not establish that he was denied any promotion or reclassification, or that he suffered any adverse salary consequence as a result of engaging in protected activity. His retaliation claim therefore fails as a result.

D.

Finally, in dismissing count six, the motion judge determined that "there was no illegal activity at [NJT] for any of the individual defendants to aid or abet." On appeal, plaintiff argues that if we reverse the trial court's summary judgment determination as to "Counts One, Two, Four, and Five,"

we are similarly required to reverse on this count. However, since plaintiff has failed to establish that the individual defendants were "aiding and abetting" discrimination by NJT under the LAD, there is no basis to impose individual liability upon them. See Herman v. Coastal Corp., 348 N.J. Super. 1, 28 (App. Div.), certif. denied, 174 N.J. 363 (2002).

Affirmed.