

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1317-10T1

TINA SHIPE,

Plaintiff-Appellant,

v.

SAKER SHOPRITES, INC.,

Defendant-Respondent.

Argued June 8, 2011 – Decided June 29, 2011

Before Judges Cuff, Fisher and Fasciale.

On appeal from Superior Court of New Jersey,
Law Division, Mercer County, Docket No. L-
1392-08.

David J. Kenny argued the cause for
appellant (Hartsough, Kenny, Chase &
Sullivan, attorneys; Mr. Kenny, of counsel
and on the brief; Gregory J. Sullivan, on
the brief).

Philip D. Priore argued the cause for
respondent (McCormick & Priore, P.C.,
attorneys; Christina T. Williamson and Mr.
Priore, on the brief).

PER CURIAM

In this employment discrimination case, plaintiff Tina
Shipe appeals from an order granting summary judgment to
defendant Saker ShopRites. She contends that her termination
for an alleged unprofessional encounter with her superiors was a

pretext for hiring two male meat cutters to replace her. Because plaintiff established a prima facie case for sex discrimination under the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, we reverse.

Plaintiff worked as a meat wrapper and then as a meat cutter at ShopRites located in Pennington, Hamilton, and Bordentown for almost twenty years. While plaintiff was on medical leave, Saker purchased each of these stores. When she returned to work, plaintiff was the first woman ever employed by Saker as a meat cutter. Saker classified her as a new employee with a sixty-day probationary period. Plaintiff completed Saker's application for employment and received Saker's rules and regulations for employees, which stated that use of abusive language or profanity constituted grounds for termination.

She worked at each of the three stores Saker purchased for approximately two weeks before being assigned to the Bordentown store. Saker had the ability, under a collective bargaining agreement (CBA) between ShopRite supermarkets and the meat cutter's union, to assign and transfer meat cutters throughout its stores based on need.

On January 28, 2008, after being at the Bordentown store for a few days, an incident occurred involving plaintiff, the store manager Richard Trojan, and her direct supervisor, Chris

Antimary. Trojan informed plaintiff that she failed to remove bone shavings from meat that she cut and placed the meat in the wrong container on her previous shift in violation of Saker's procedure manual. Plaintiff denied that she made the mistakes, disputed that the manual addressed cutting and packaging meat, and argued with Antimary. Plaintiff contended that Antimary spoke to her in a "nasty" tone. She admitted that she was loud and upset and stated to Antimary that he "stuck it to [her]," but plaintiff denied using profanity. Trojan then informed Kevin Maroney, Vice President of Human Resources and Labor Relations, of the incident, and Maroney fired plaintiff for using profanity and being abusive. Saker then hired two male meat cutters.

Saker successfully moved for summary judgment. In an oral opinion, the judge found that Saker did not replace plaintiff and stated that Saker had a "legitimate non-discriminatory reason" to terminate her because

the record is essentially undisputed that plaintiff acted unprofessionally and inappropriately at that January 28th meeting. There may be some disagreement about . . . whether . . . there was profanity used or not, but the rules and regulations of Saker did not say it just had to be profanity[.]

This appeal followed.

On appeal plaintiff argues that she established a prima facie case for sex discrimination under McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) because (1) Saker replaced her with two males to perform the same work, and (2) Saker's reason for termination was pretextual. We agree.

When reviewing a grant of summary judgment, we employ the same legal standards used by the motion judge. Spring Creek Holding Co. v. Shinnihon U.S.A. Co., 399 N.J. Super. 158, 180 (App. Div.), certif. denied, 196 N.J. 85 (2008); Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). First, we determine whether the moving party has demonstrated that there were no genuine disputes as to material facts, and then we decide whether the motion judge's application of the law was correct. Atl. Mut. Ins. Co. v. Hillside Bottling Co., 387 N.J. Super. 224, 230-31 (App. Div.), certif. denied, 189 N.J. 104 (2006). In so doing, we view the evidence in the light most favorable to the non-moving party and analyze whether the moving party was entitled to judgment as a matter of law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523, 529 (1995). We accord no deference to the motion judge's conclusions on issues of law, Manalapan Realty, L.P., v. Township Committee of

Manalapan, 140 N.J. 366, 378 (1995), which we review de novo. Spring Creek, supra, 399 N.J. Super. at 180; Dep't of Env'tl. Prot. v. Kafil, 395 N.J. Super. 597, 601 (App. Div. 2007).

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. Viscik, supra, 173 N.J. at 13. Under that analysis, a plaintiff needs to first establish a prima facie case of discrimination. Id. at 14. In a discriminatory discharge case plaintiff must establish:

(1) that [s]he was in [a protected class];
(2) that [s]he was performing [her] job at a level that met h[er] employer's legitimate expectations; (3) that [s]he nevertheless was fired, and (4) that [the employer] sought someone to perform the same work after [s]he left. The establishment of a prima facie case gives rise to a presumption of discrimination.

[Erikson v. Marsh & McClennon Co., 117 N.J. 539, 551 (1990) (citations omitted).]

Once plaintiff establishes a prima facie case of discrimination, the burden of production shifts to defendant to prove plaintiff was terminated for a legitimate, non-discriminatory reason. Viscik, supra, 173 N.J. at 14. The burden then shifts back to plaintiff, who must establish that defendant's reasons for termination are merely pretext. Ibid.

Under this framework, "a plaintiff retains the ultimate burden of persuasion at all times; only the burden of production shifts." Ibid. (citing Andersen v. Exxon Co., U.S.A., 89 N.J. 483, 493 (1982)).

It is undisputed that plaintiff is in a protected class, performed her job at a level satisfactory to Saker's expectations, and was fired. We focus, therefore, on whether (1) Saker replaced plaintiff to perform the same work, and (2) Saker's reasons for termination were pretextual. We do so in the light most favorable to plaintiff.

It is undisputed that Saker hired two male meat cutters after it fired plaintiff. Plaintiff's job was not eliminated or merged into another position. Both males performed the same work as plaintiff. We reject Saker's argument that the males were not hired to replace plaintiff at the Bordentown store. In the two weeks that plaintiff worked after Saker became the new owner, she had moved from store to store. She worked at the store where she was needed. Under the CBA, Saker could and did assign meat cutters to different locations. It had the ability to transfer plaintiff and the males to any store as "the needs of the business require." Thus, the location of where plaintiff worked was not a critical fact when considering whether Saker replaced her. The fact that Saker fired plaintiff and replaced

her with two males to perform the same work gives rise to an inference of unlawful discrimination. Williams v. Pemberton Twp. Pub. Sch., 323 N.J. Super. 490, 503 (App. Div. 1999).

Moreover, Saker's proffered reason for terminating plaintiff -- that she used profanity and was abusive -- is disputed. Plaintiff argues that the meeting with her superiors was a "set-up" because of her sex. She denied that she was the employee who stored the meat improperly, and contends that Saker's procedure manual failed to explain which types of meat are to be stored within the various different sized containers. She asserted that Antimary initially confronted her with a "nasty" tone. Thus, genuine issues of material fact exist concerning whether Saker's reasons for termination were pretextual.

Reversed.

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


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