NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5021-09T4

CARRIE JOHNSON,

Plaintiff-Appellant,

v.

NEW JERSEY DEPARTMENT OF CORRECTIONS, STATE OF NEW JERSEY, and DEVON BROWN, COMMISSIONER, DEPARTMENT OF CORRECTIONS, individually and in his official capacity,

Defendants-Respondents.

Submitted September 13, 2011 - Decided October 28, 2011

Before Judges Fisher, Baxter and Nugent.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-1606-07.

Eric S. Pennington, P.C. and Alan Dexter Bowman, P.A., attorneys for appellant (Eric S. Pennington, of counsel and on the brief).

Capehart & Scatchard, P.A., attorneys for respondents New Jersey Department of Corrections and State of New Jersey (Robert J. Hagerty, of counsel; Laurel B. Peltzman, on the brief).

Greenberg, Dauber, Epstein & Tucker, P.C., attorneys for respondent Devon Brown (Linda G. Harvey, of counsel; Ms. Harvey and Megan Halverson Trexler, on the brief).

PER CURIAM

Plaintiff Carrie Johnson, an African-American woman who had been employed by defendant Department of Corrections in many positions since 1977, most recently as Assistant Commissioner of the Division of Programs and Community Service, appeals the summary judgment -- entered in favor of the Department, as well as in favor of defendant Devon Brown, the Department's Commissioner -- dismissing her discrimination complaint. After close examination of the record and the issues, we conclude that plaintiff's contention that she was terminated because her employment was apolitical was unsupported by law and fact. And her factual presentation was so inadequate as to fail to give rise, as a matter of law, to an inference of discrimination not only because Brown, who made the decision to terminate her employment, is also African-American, but also because plaintiff was immediately replaced by an African-American woman.

The record reveals that Brown terminated plaintiff's relationship with the Department in September 2005. Defendants asserted that termination was warranted because plaintiff had utilized inmates at East Jersey State Prison to make floral arrangements for a luncheon for 600 members of plaintiff's sorority. Following the termination, plaintiff filed a complaint with the Equal Employment Opportunity Commission and

later, on June 28, 2007, commenced this action. The complaint, and its later amendments, alleged that, because of her age, race, gender, and political affiliation, plaintiff was subjected to retaliation and reprisals in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -42, the New Jersey Civil Rights Act, N.J.S.A. 10:6-1 to -2, and common law and constitutional principles. At the conclusion of a period of discovery, the Department and Brown filed summary judgment motions, which plaintiff opposed. The trial judge granted both motions for reasons contained in an oral opinion.

Plaintiff appealed, presenting the following arguments for our consideration:

> I. THE DISMISSAL OF [PLAINTIFF'S] STATE CIVIL RIGHTS CLAIMS CONTRADICTS THE PLAIN MEANING OF THE NEW JERSEY CIVIL RIGHTS STATUTE.
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> II. THE DISMISSAL OF [PLAINTIFF'S] LAD CLAIMS UNDERMINES THE BROAD REMEDIAL PURPOSES OF THE LAD TO HOLD THE NJDOC AND ITS COMMISSIONER ACCOUNTABLE FOR ENSURING THAT ITS EMPLOYEES ARE NOT DISCRIMINATED AGAINST.
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> III. MIXED MOTIVES.[1]
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> IV. THE TRIAL COURT ERRED BY FINDING THAT DEVON BROWN COULD NOT AID AND ABET THE

[1]We have renumbered the points in plaintiff's brief because the point entitled "Mixed Motives," appearing in the brief between what the plaintiff designated as Points II and III, was not numbered by plaintiff.

DISCRIMINATORY CONDUCT OF INDIVIDUALS WHO WERE NOT NAMED AS DEFENDANTS.

V. THE DOC AND DEVON BROWN VIOLATED PUBLIC POLICY BY TERMINATING PLAINTIFF'S EMPLOYMENT BECAUSE OF HER ASSOCIATION, OR LACK THEREOF, WITH CERTAIN STATE OFFICIALS.

VI. THE COURT ERRED BY REINSTATING THE ANSWER AND DEFENSES OF DEFENDANT NJDOC AND THE STATE OF NEW JERSEY, WITHOUT MONETARY SANCTIONS, ABSENT THEIR COMPLIANCE WITH PRIOR COURT ORDERED DISCOVERY.

We find insufficient merit in these arguments to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We add only the following regarding Points I and II.

In support of her arguments in Point I, plaintiff claims she was not a political appointee, did not publicly identify with any particular political party, and her employment was terminated because she refused to support the candidates of one particular party. Relying on Galli v. New Jersey Meadowlands Commission, 490 F.3d 265 (3d Cir. 2007),[2] plaintiff contends that

[2]In the trial court, plaintiff relied on the test enunciated in O'Connor v. Steeves, 994 F.2d 905 (1st Cir. 1993), and did not cite Galli or urge adoption of Galli's holding in this case. Consequently, the Department contends that we should not countenance this issue, citing Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). We decline to consider whether the argument that this claim should be considered by resort to Galli has been waived or decide whether the ostensibly different test contained in O'Connor should be adopted because plaintiff's claim must fail even if we apply what for her is the more favorable Galli test.

her termination violated the speech and association guarantees of the First Amendment. We disagree.

In Galli, the divided court of appeals recognized a three-part test to establish a claim of discrimination based on political patronage. The court held that, to make out a prima facie case, a plaintiff must show that he or she was (1) employed "at a public agency in a position that does not require political affiliation," (2) "engaged in constitutionally protected conduct," and (3) the conduct was "a substantial or motivating factor in the government's employment decision." Id. at 271. Plaintiff's long tenure at the Department suggests she held a position that did not require political affiliation, so the first factor may be assumed to have been established. Plaintiff, however, was unable to substantiate the presence of the other two factors. The facts in the record, when viewed in the light most favorable to her, Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995), suggest only that plaintiff's lack of political affiliation played a role solely in the sense that Brown felt more secure in terminating her than others with political backing. That is by no means the same thing as a termination based on the fact that the employee did not affiliate with a certain political party. Defendants' expressed reason for terminating plaintiff was her unethical conduct -- as

found by the independent Ethics Commission -- for improperly using inmate labor and Department resources. There is no evidence and there is no reasonable inference to be drawn from any evidence that plaintiff's employment was terminated substantially because she had engaged in constitutionally protected conduct.

We also find no merit in plaintiff's argument in Point II that the trial court erred in dismissing her discrimination claims based on either her race or gender or both.

Because the LAD is remedial social legislation -- the "essential purpose" of which "is the eradication of the cancer of discrimination," Quinlan v. Curtiss-Wright Corp., 204 N.J. 239, 258 (2010) -- it is "deserving of a liberal construction." Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 590 (1988). As explained by our Supreme Court, the LAD is "an expression of public policies that requires us to strike a new balance between the rights of the employee to be free from workplace discrimination and the rights of the employer to make legitimate hiring and firing decisions." Cicchetti v. Morris Cnty. Sheriff's Office, 194 N.J. 563, 588 (2008).

In applying the LAD to a claim for wrongful termination, our courts have applied the federal McDonnell Douglas[3] standard, which requires that:

> (1) the plaintiff must come forward with sufficient evidence to constitute a prima facie case of discrimination; (2) the defendant then must show a legitimate nondiscriminatory reason for its decision; and (3) the plaintiff must then be given the opportunity to show that defendant's stated reason was merely a pretext or discriminatory in its application.
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> [Dixon v. Rutgers, The State Univ. of N.J., 110 N.J. 432, 442 (1988); see also Henry v. Dep't of Human Servs., 204 N.J. 320, 331 (2010).]

When a discriminatory termination is alleged, the prima facie case must include evidence that plaintiff (1) belongs in a protected class, (2) was qualified and performed the job's essential functions, but (3) was nevertheless terminated, and (4) that the employer thereafter sought similarly qualified individuals for plaintiff's job. Zive v. Stanley Roberts, Inc., 182 N.J. 436, 457-58 (2005). If these elements are established, "the burden of production then shifts to the employer to rebut the prima facie case by articulat[ing] some legitimate, nondiscriminatory reason for the employee's rejection." Clowes, supra, 109 N.J. at 597. The plaintiff is then accorded an

[3]McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

opportunity to prove by a preponderance of the evidence that the articulated, legitimate, nondiscriminatory reason "was not the true reason for the employment decision but was merely a pretext for discrimination." Ibid.; see also Zive, supra, 182 N.J. at 457-58. Notwithstanding this shifting burden of production, the "ultimate burden of persuasion that the employer intentionally discriminated against the employee remains with the employee at all times." Clowes, supra, 109 N.J. at 597.

In applying these standards, as well as the same summary judgment standard applied by the trial judge, Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007), we conclude that plaintiff failed to present evidence of a prima facie case of discrimination based on race or gender. Following termination, plaintiff, an African-American woman, was replaced by an Africa-American woman. Although it is true that being replaced by a person within the plaintiff's protected class is not a complete bar to a presentation of the prima facie case, a plaintiff in that situation must demonstrate "other circumstances indicating unlawful discrimination," otherwise "an employer, as a defensive measure, may replace a plaintiff with an individual from the plaintiff's protected class after the commencement of litigation." See Williams v. Pemberton Twp. Pub. Schs., 323 N.J. Super. 490, 502-03 (App. Div. 1999). There

is no evidence, however, to support the claim that plaintiff's immediate replacement with another African-American woman occurred because of defendants' concerns about future litigation.

The judge's reasons for granting summary judgment were sufficient, but we note the additional fact that plaintiff's employment was terminated by a supervisor of the same race. Although our courts have yet to address the significance of this circumstance, some federal courts, with which we generally agree, have recognized that an inference of unlawful racial discrimination may be significantly diminished by the fact that the employer's decision-maker was a member of the same race as the plaintiff. See Dungee v. Northeast Foods, Inc., 940 F. Supp. 682, 688 n.3 (D.N.J. 1996); Taylor v. Procter & Gamble Dover Wipes, 184 F. Supp. 2d 402, 413 (D. Del. 2002); Anderson v. Anheuser-Busch, Inc., 65 F. Supp. 2d 218, 229 (S.D.N.Y. 1999), aff'd, 229 F.3d 1135 (2d Cir. 2000). The undisputed circumstances that plaintiff's employment was terminated by an African-American man, and that she was replaced by an African-American woman, severely weaken if not entirely eviscerate her

attempt to present a prima facie case of racial discrimination through the anecdotal circumstances alleged.[4]

Moreover, defendants articulated a legitimate reason for plaintiff's termination -- her ethical violation for using prisoners and Department resources to render to her a personal service. Plaintiff failed to produce a scintilla of evidence to suggest that this substantial and legitimate reason for her termination was merely a pretext for discrimination.

For these reasons, and because we have found insufficient merit in plaintiff's other arguments to warrant discussion in a written opinion, R. 2:11-3(e)(1)(E), the order under review must be affirmed.

Affirmed.

[4]For example, among other things, plaintiff alleged -- and defendants disputed -- that Brown: stated on an occasion that he was "harder on individuals with melanin in their skin"; asserted that degrees conferred by "historically black colleges and universities" were inferior to those conferred by "majority" institutions; and made comments to plaintiff about southern culture, witchcraft and voodoo, which plaintiff felt were racially and sexually discriminatory. Plaintiff was certainly entitled to an assumption that these allegations were true, but they are of such little weight -- when attributed to an African-American superior -- as to be insufficient, as a matter of law, to give rise to an inference of discrimination.