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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2255-10T1

DAMON WILLIAMS,

Plaintiff-Appellant,

v.

COSTCO WHOLESALE CORP. and
DENNIS DINGIVAN,

Defendants-Respondents.

Submitted November 9, 2011 - Decided March 12, 2012

Before Judges Payne, Simonelli and Hayden.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-551-08.

Joseph V. MacMahon, attorney for appellant.

Anjanette Cabrera (Seyfarth Shaw L.L.P.), attorney for respondents (Ms. Cabrera and Lorie E. Almon, of the New York bar, admitted pro hac vice, on the brief).

PER CURIAM

Plaintiff, Damon Williams, an African-American, sued his employer, Costco Wholesale Corporation, and supervisor, Dennis Dingivan, seeking damages for the alleged creation of a hostile work environment, failure to promote and discriminatory demotion

due to race, in violation of the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, and breach of contract.[1] Summary judgment was granted to Costco on all claims except hostile work environment, and summary judgment was granted to Dingivan on all claims. Following trial on the hostile work environment claim, the jury found that the complained-of conduct had occurred, and that it occurred because of plaintiff's race, but plaintiff had failed to prove that the conduct was severe and pervasive enough to make a reasonable person believe that a hostile work environment existed. Plaintiff has appealed, claiming that summary judgment was improperly entered and that the court abused its discretion and misapplied the law when barring certain evidence, thereby resulting in a manifest denial of justice. We affirm.

I.

The following facts were submitted to the court in connection with defendants' motion for summary judgment. Plaintiff commenced his employment at Costco's New Rochelle, New York, warehouse in 1995 and transferred to its Union, New Jersey, warehouse in April 2005, where he remained at the time

[1] Plaintiff's breach of contract claim was premised upon an alleged breach by Costco of its Warehouse Employee Agreement by permitting racial harassment to occur. It was asserted pursuant to Woolley v. Hoffman La Roche, Inc., 99 N.J. 284, modified, 101 N.J. 10 (1985).

suit was filed in January 2008. While in New Rochelle, plaintiff held a number of positions, commencing as a Freezer Stocker and, in 2001, attaining the position of Fresh Foods Supervisor.

Dingivan became Costco's New Rochelle Warehouse Manager on February 18, 2002, and remained in that position until June 2006, when he was transferred to the Union warehouse as Warehouse Manager, a position that he held until November 2008. In 2002, plaintiff asked Dingivan to be transferred to the night shift as the result of child care issues. Dingivan accommodated plaintiff's request, and at that time, promoted him from an hourly to a salaried position as Night Manager. Thereafter, plaintiff requested a transfer to Costco's Chantilly, Virginia, warehouse, but he withdrew his application after the manager there told him he would be better off remaining in New Rochelle. Between June 2003 and May 2004, plaintiff requested two lateral transfers, which were granted.

In May 2004, plaintiff alleges that he submitted a letter of intent to Dingivan regarding an Assistant Merchandise Manager position. However, he did not receive the position, and he alleges that Dingivan told him it "wasn't [his] time." The position was given to Preston Sterling, an employee who transferred from an Arizona Costco warehouse. Although

plaintiff believes that he was more qualified for the position than Sterling because he had held a variety of positions at Costco, he admitted that he did not know what positions Sterling had occupied before transferring to New Jersey. Moreover, plaintiff admitted that because of the level of the position, Dingivan was not the sole person determining who would fill it.

On April 25, 2005, plaintiff transferred to the Union warehouse, working there initially as a Foods Manager. Although the transfer required Dingivan's approval, plaintiff believes without evidence that Dingivan did not support the move.

A few months after coming to Union, plaintiff transferred laterally into the Center Merchandise Manager position. While in that position, in January 2006, "Thor," a meat department manager, referred to plaintiff, who was dark skinned, as "Midnight." Plaintiff claims that Kevin Stoms, an Assistant General Manager at the warehouse, overheard the remark, and later that day, stated: "That's you' name, Midnight." Plaintiff alleges further that on February 10, 2006, Stoms stated to him: "Midnight you have your day then there's night." Plaintiff complained to Warehouse Manager Skip Leonhard about the use of the nickname by the two Costco employees, and he allegedly responded: "People say the dumbest things." Plaintiff was asked to submit a written statement regarding the

incidents. Whether Costco adequately investigated plaintiff's complaint or properly responded to it is contested. Plaintiff notes, and Dingivan confirms that when, on November 29, 2006, plaintiff sought to see documents from his personnel file on the matter, none could be located.

However, plaintiff admits that, after the incident, Stoms never used the nickname again or made any other racial remark regarding him. In deposition, plaintiff admitted that these were the only racial remarks ever directed at him during his time at Costco. Although plaintiff faults Dingivan for not investigating the incident, Dingivan had not transferred from New Rochelle to Union at the time of the incidents or plaintiff's complaint regarding them, arriving there only in June 2006. Plaintiff has also admitted that he first informed Dingivan about the incident after his suit had been filed.

Plaintiff admits that in July 2006, he requested a demotion from the Center Merchandise Manager position in order to reduce his hours, and at that time, he accepted a non-supervisory Inventory Auditor position. He held that lesser position for approximately two months, before being given a Front End Supervisor position by Dingivan.

Defendants claim that on September 22, 2006, Karen Villahermosa, Costco's payroll clerk, received an e-mail stating

that the bank routing number used to directly deposit plaintiff's paycheck was invalid, and therefore he would not receive a "live check" for the September 22 pay period. Plaintiff claims no knowledge of this fact. Defendants claim additionally that Villahermosa informed plaintiff of the problem, gave him a copy of the e-mail, and instructed him to find out from his bank what had caused the difficulty.

Plaintiff admits that, on October 3, 2006, he wrote a check to Costco for $100, which was returned for insufficient funds on October 22. Upon learning of that fact, Dingivan issued plaintiff an Employee Counseling Notice (ECN) for "Presenting the Company with a personal check for insufficient funds, closed account, etc." An additional check, written by plaintiff on October 8, 2006, was also returned for insufficient funds, leading to the issuance of a second ECN. In a written statement, plaintiff contended that the checks bounced because Costco lost the bank routing number, and that he was not informed of that fact. Plaintiff did not inform Dingivan at the time his first check bounced that he had written a second check for cash on his account. Additionally, plaintiff stated that assistant warehouse manager Cynthia Burton had authorized him to write the checks, but she denied giving such authorization.

Defendants claim additionally that in November 2006, Dingivan received a report that a flower vendor, who was not a Costco employee, claimed to have witnessed plaintiff taking five bottles of men's cologne from a store shelf and returning them for cash. As the result of plaintiff's failure to reimburse Costco for the bounced checks, the refund transaction was blocked. The Refund Clerk then notified the Front End Supervisor, who also declined to complete the transaction. However, the Membership Supervisor determined to ignore the block and to provide plaintiff with cash, not a cash card, which would have been standard for refunds without receipts.

When plaintiff was confronted with the allegations of theft, he stated that he had been given the cologne while employed in New Rochelle. In a handwritten statement, dated November 16, 2006, he asserted:

> On Nov. 8, 2006 I returned 5 bottles of cologne to the Membership Dept. I received these items while working in New Rochelle. Before returning these items I asked Mary to get a higher authority involved due to the fact the items were used and old. She then asked the supervisor for his approval and the transaction was then taken care of. I've been employed by Costco for 10 yrs. and I never was dishonest.

Plaintiff has also claimed that the vendor, Roger Nutter, had denied that he had seen plaintiff taking anything. In support of that contention, plaintiff produced a letter from

Nutter. However, in the letter, Nutter only denies meeting with store personnel. The letter states:

> On August 8, 2007, Damon Williams called me and informed me that there was a statement in his employee file with my name on it.
>
> The statement stated that during the meeting with myself, Terrence, Tom and Dennis that I, Roger Nutter, saw Damon remove fragrances and take it from the sales floor and return it to the service desk.
>
> At no time did I have any meeting with Terrence, Tom or Dennis about Mr. Damon Williams concerning this issue.

On November 17, 2006, plaintiff was demoted from Front End Supervisor to a cashier position, and he was not permitted to write any personal checks to Costco for six months. Defendants produced in connection with their motion for summary judgment a memorandum, dated December 7, 2006, written by Dingivan to Richard Wilcox, Costco's Vice President and Regional Operational Manager for North East Region District 4, that details the check cashing and cologne refund incidents. The letter states that plaintiff was demoted with the authorization of Wilcox, and that the employment decision was based on evidence of the misuse of company funds. In his certification, Wilcox concurred that such misuse was the basis for the demotion, stating:

> Based on Dingivan's report I concluded that Williams should be demoted for the following reasons: (1) I believed Williams

> had lied about having Burton's authorization to return the checks, and had instead used his position as a supervisor to cash the checks; (2) I noted that Williams bounced checks on two separate occasions, and that he had done so the second time even after a warning; and (3) I believed that Williams knew he had a second check in the pipeline when he received the first ECN and failed to disclose it to Dingivan or to stop the second check from being processed.

Nonetheless, plaintiff contends that his demotion as the result of the bounced checks was unauthorized, and that he should have only received two Employee Counseling Notices.[2] He also believes that his demotion was the result of the cologne incident. Further, he asserts, on the basis of Nutter's denial of a meeting with Costco employees, that Dingivan manufactured the entire cologne incident in order to take an adverse employment action against him. Plaintiff also believes that his race was a factor in the demotion, basing that belief on the claim that he did not "have the best of relations" with Dingivan, and he believed that Dingivan wanted "to make an

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[2] Costco's Employee Agreement provides:

> 1. Disciplinary Demotions
>
> Disciplinary demotions occur after at least two prior documented Employee Counseling Notices for poor job performance within the three-month period preceding the demotion or preceded by serious misconduct which could have resulted in termination of employment.

example out of [him]." In further support of that contention, plaintiff states that supervisors Jeanette Diaz and Lucy Soto cashed checks with insufficient funds and were not disciplined. However, plaintiff does not know on how many occasions they did so, and he has no evidence as to whether they were disciplined or not. He knows only that they were not demoted.

In April 2007, while plaintiff was working as a forklift driver, Dingivan offered him a temporary promotion to the position of Temporary Foods Supervisor, because the person holding that position, Mark Condy, was commencing paternity leave. Dingivan stated that he was doing so because of plaintiff's good performance and his desire to give plaintiff another chance. Plaintiff accepted the position, and has admitted that he signed an Employee Information Change form that indicated the position was temporary. When Condy returned in August 2007, he regained his supervisory position, and plaintiff returned to his job as a forklift driver. However, plaintiff was inadvertently paid as a supervisor for an additional six weeks. Dingivan recognized the error while away from the warehouse. Upon doing so, he contacted the payroll department and requested that the proper adjustment be made. Defendants contend that the payroll clerk mistakenly reclassified plaintiff as a Stocker (an improper two-step demotion). When she

presented the paperwork to plaintiff, he refused to sign it. However, upon Dingivan's return, the error was immediately corrected and plaintiff was classified as a Cashier. Plaintiff, in contrast, claims that the error was intentional, and that Dingivan sought to trick him into agreeing to the demotion by presenting him with paperwork that he was not expected to read.

On October 7, 2007, plaintiff submitted a written complaint to management at the Union warehouse, demanding that it investigate alleged racist remarks made by Jorge Perez, as well as plaintiff's removal from the position of Temporary Foods Supervisor. In connection with Perez, plaintiff alleged that, approximately two months before his complaint, Julio Rodriguez had overheard Perez stating, in Spanish, "all blacks are lazy, and they should hire more Hispanics because they would get more [work] out of them." Plaintiff also claimed that his removal from the Temporary Foods Supervisor position was an "unfair demotion" that Perez learned of, before plaintiff was informed, thereby breaching confidentiality.

Dingivan assigned Assistant Warehouse Manager Jim Keating to investigate Williams's complaint. As a result, Keating interviewed plaintiff, Rodriguez, Perez, and all nonsupervisory employees that reported to Perez and the office personnel. Keating reported that, three days before plaintiff's complaint,

plaintiff and Perez had engaged in a heated argument after another employee told plaintiff that Perez had reported that plaintiff had said negative things about him. Plaintiff then accosted Perez and accused him of lying. Perez, in turn, accused plaintiff of using profanity during the argument. Perez reported the incident to Assistant Warehouse Manager Sean Boatright, who investigated the matter and concluded that plaintiff's conduct did not warrant discipline. He thus did not permit Perez to issue an ECN.

Defendants claim that plaintiff's claim of discrimination could not be substantiated, since Keating's investigation of plaintiff's complaint regarding Perez and the confrontation between the two men, occurring between October 9 and 17, 2007, revealed corroboration of racial comments only by plaintiff's close friend, Rodriguez, the person who initially mentioned Perez's alleged comments to plaintiff. Perez stated to Keating that plaintiff's complaints may have been motivated by the fact that Perez refused plaintiff's request that he make a statement to plaintiff's attorney supporting plaintiff's claim that Costco engaged in racist practices. Perez also stated that plaintiff may have been motivated by the fact that Perez reported him and others for buying food at the store's restaurant without clocking out. Keating could not corroborate plaintiff's

statement that his "demotion" was announced to others two days before he was informed. However, the investigation suggested that rumors that a supervisor was to be demoted were circulated.

Plaintiff, on the other hand, notes that, in an undated letter from Keating to plaintiff, Keating stated with respect to the "racist slurs" made by Jorge Perez that:

> we do have enough evidence to substantiate your allegation. Witnesses have said that Jorge has used inappropriate language in front of them. This is something that we are continuing to investigate fully and Jorge will be subject to disciplinary action according to the Employee Agreement 2007. As we continue with the investigation of Jorge, we will offer you an opportunity to work in an area of your choice.

However, plaintiff was not moved, and Perez was not disciplined.

Further, on November 8, 2007, Perez was notified in writing that:

> We have investigated the allegations of workplace discrimination that have been made against you. We are unable to conclude from our investigation that you committed any acts in violation of our policy prohibiting workplace discrimination. Because of the nature of the allegations, we are also unable to make any conclusive determination that you did <u>not</u> commit any such act. We appreciate your acknowledgment that the allegations, if true, would be a basis for, and would result in, discipline against you.

Perez was further informed that, if racist allegations were to arise in the future, the present allegations could be taken into

account in evaluating his conduct, and that violation of the company's anti-harassment policy would result in disciplinary action up to and including immediate termination. Plaintiff testified in deposition that he and Perez previously had been friendly, and that although Perez was cleared of the allegations, he apologized to plaintiff personally for the misunderstanding, and the two subsequently ate lunch together.

Plaintiff takes the position that, as a result of Rodriguez's report, Perez should have been disciplined or terminated. Instead, he was retained as a supervisor, and plaintiff was required to interact with him. However, it does not appear from the record that Perez held a supervisory position over plaintiff.

Plaintiff claims that in this period of time, he again expressed an interest in a posted supervisor position. However, Costco hired a Caucasian male for the job who was soon thereafter promoted to an unposted manager position at Costco's Edison store. In total, he claims that, while in New Rochelle, he submitted a letter of interest for a promotion to the position of Administration Manager but that he was not interviewed, and the position was awarded to a Caucasian woman from outside the company. He was denied a promotion to Receiving Manager while in New Rochelle that was awarded to a

woman named "Freddie." He claims that he was also wrongfully denied a promotion to Merchandise Manager, although he does not know who received the position.

While in Union, plaintiff claims he was wrongfully denied promotion to a Foods Manager position. He believes the position was awarded to an outside candidate, Mike Warren, who, plaintiff now concedes, had been General Manager of a national pet supply retailer. Additionally, he alleges that at some point he was denied a promotion to Hard Lines Manager that was awarded to an outside candidate, Steve McBride, who, plaintiff concedes, had been manager of the dairy department of a national supermarket chain. He also claims to have been denied promotion to Center Manager, a position given to Christian Spada, who had previously been employed by Costco as a manager and had returned to the Union warehouse as an hourly employee. However, when that position again became vacant, and while plaintiff's lawsuit was pending, plaintiff was given the Center Manager position. Plaintiff has no proof that he possessed superior qualifications to any of the persons hired for jobs for which he applied.

As stated, summary judgment was granted by the court on plaintiff's claims against Costco of failure to promote, discriminatory demotion, and breach of contract, as well as plaintiff's claims against Dingivan of aiding and abetting.

After oral argument, the court held that plaintiff was unable to establish prima facie proof supporting his claims of discriminatory failure to promote, which were premised on his unsubstantiated opinion that he was more qualified than successful candidates for the positions. The court held with respect to plaintiff's allegation of discriminatory demotion from Front End Supervisor that, although plaintiff had made out a prima facie claim, Costco had established a business reason for its decision arising from plaintiff's misuse of check-cashing privileges, and that plaintiff had failed to establish that Costco's business reason was pretextual. The court also granted summary judgment on plaintiff's claim of breach of contract, determining that there was no evidence of Costco's failure to enforce an employment contract. And finally, the court granted summary judgment to Dingivan, finding no evidence that he had aided or abetted discriminatory actions. The court declined to grant summary judgment with respect to defendant's hostile work environment claims based on the "Midnight" episode and Perez's comments regarding African-Americans.

In response to a motion by Costco for reconsideration of the court's decision on the hostile work environment claim, the court held that a separate hostile work environment action did not lie against Costco on the basis of the Perez incident, since

his alleged discriminatory statement was hearsay. Additionally, the court held that evidence of the Perez incident could not be introduced at time of trial in support of plaintiff's claim of a hostile workplace environment. Defendants also advanced an affirmative "safe harbor" defense under Gaines v. Bellino, 173 N.J. 301 (2002), based on its antidiscrimination and antiharassment policies. However, the court rejected that defense, and its denial was not appealed.

Prior to trial, Costco made three motions in limine. In the first, it moved to confirm the exclusion of any testimony concerning the statement made by Perez, claiming that the statement, repeated to plaintiff after being overheard by another employee, constituted double hearsay that had been properly deemed inadmissible. Additionally, Costco argued that the probative value of the alleged statement was substantially outweighed by its prejudicial impact. The court granted Costco's motion, but left the door open for plaintiff to make reference to the existence of another racial incident and investigation, to the extent that it would show whether Costco had effective policies in place to deal with such occurrences. Additionally, Costco moved to exclude evidence proffered by plaintiff in a pre-trial submission concerning plaintiff's claims of discriminatory failure to promote and discriminatory

demotion as to which summary judgment had been granted. That motion was granted. Costco also moved to exclude evidence of racial discrimination charges filed before the Equal Employment Opportunity Commission (EEOC) by three other Costco employees. The EEOC dismissed all charges, informing the parties that it "[was] unable to conclude that the information obtained establishe[d] violations of the statutes [that it enforces]." Costco argued that plaintiff had no personal knowledge of the charges, two of which were filed by employees in warehouses where he did not work and one predated his employment in Union. Therefore, the evidence was more prejudicial than probative. The court agreed.

During the argument on the in limine motions, plaintiff proffered a March 10, 2006 letter from an employee, Giuliano Farina, addressed to "To Whom It May Concern," accusing Stoms of saying that Farina's black supervisor was lazy and that "those people" were lazy. Farina alleged that he had complained to Leonhard, who dismissed the episode without investigation. The court permitted plaintiff's counsel to call Farina as a witness at trial concerning the handling of his discrimination complaint, ruling that such testimony was probative of whether Costco had effective policies and procedures in place to deal with discrimination. However, the court barred plaintiff from

informing the jury of the content of Farina's letter or Stoms's alleged statements.

Trial of plaintiff's hostile work environment claim, arising from the "Midnight" incidents, resulted, as we stated previously, in a finding by the jury that the complained-of conduct had occurred, and that it had occurred because of plaintiff's race. However, the jury found that plaintiff had failed to prove that the conduct was severe or pervasive enough to make a reasonable person believe that a hostile work environment existed. This appeal followed.

II.

On appeal, plaintiff argues that the trial court should not have granted summary judgment on his claims of failure to promote, discriminatory demotion, and breach of contract — matters that we review under the same standard as that employed by the trial court. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). Thus, we first decide whether, after viewing the competent evidential materials presented in the light most favorable to the non-moving party, "there exists a 'genuine issue' of material fact that precludes summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). "If there exists a single, unavoidable resolution of the alleged

disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of [the summary judgment rule]." Ibid. (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 213 (1986)). If we find no issue of material fact under Brill's procedures, we then decide whether the trial court's ruling was correct as a matter of law. Walker v. Atl. Chrysler Plymouth, Inc., 216 N.J. Super. 255, 258 (App. Div. 1987).

A. Plaintiff's claims of failure to promote

Plaintiff has cited three instances of what he claims to have been discriminatory failure to promote when plaintiff was employed at Costco's New Rochelle warehouse in a period more than two years before he filed his complaint in January 2008. We find those claims to be barred by the two-year statute of limitations applicable to LAD claims. See Montells v. Haynes, 133 N.J. 282, 292 (1993). We reject plaintiff's argument that Costco's conduct in this regard can constitute a continuing tort. The Court has held that, for discrete acts, including failure to promote, "'each . . . incident of discrimination . . . constitutes a separate actionable "unlawful employment practice."'" Shepherd v. Hunterdon Developmental Ctr., 174 N.J. 1, 19 (2002) (quoting AMTRAK v. Morgan, 536 U.S. 101, 114, 122

S. Ct. 2061, 2073, 153 L. Ed. 2d 106, 122 (2002)). See also id. at 20-21 (applying analytical framework of Morgan to the LAD). Thus, the statute of limitations commenced on the day that each allegedly discriminatory act occurred, and because more than two years elapsed between each of the acts and the filing of plaintiff's complaint, his claims of discrimination in promotion arising while he was employed in New Rochelle are barred.

Plaintiff has also claimed three instances of discriminatory failure to promote, occurring while he was employed in the Union warehouse, consisting of his unsuccessful attempts to attain the positions of Foods Manager and Hard Lines Manager, and his initial attempt to attain the position of Center Manager — a position that he was subsequently given after the job again became vacant.

In a LAD claim such as this in which only circumstantial evidence exists to demonstrate discrimination, our courts apply the three-step burden-shifting framework articulated by the United States Supreme Court in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). See Zive v. Stanley Roberts, Inc., 182 N.J. 436, 447-49 (2005). Pursuant to McDonnell-Douglas,

> "(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 non-

> discriminatory 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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> [Henry v. N.J. Dept. of Human Servs., 204 N.J. 320, 331 (2010) (quoting Dixon v. Rutgers, the State Univ. of N.J., 110 N.J. 432, 442 (1988)).]

The burden of proof "'remains with the [plaintiff] at all times,'" and if the plaintiff cannot satisfy that burden, "the employer will prevail on summary judgment." Id. at 331-32 (quoting Zive, supra, 182 N.J. at 450).

The prima facie case for failure to promote includes four evidentiary prongs. The plaintiff must show

> (1) that []he is a member of a class protected by the anti-discrimination law; (2) that []he was qualified for the position or rank sought; (3) that []he was denied promotion, reappointment, or tenure; and (4) that others . . . with similar or lesser qualifications achieved the rank or position.
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> [Id. at 331 (citing Dixon, supra, 110 N.J. at 443).]

The burden at the prima facie stage is "rather modest." The plaintiff need show only that the alleged "'factual scenario is compatible with discriminatory intent — i.e., that discrimination could be a reason for the employer's action.'" Ibid. (quoting Zive, supra, 182 N.J. at 447 (citations omitted)). The prima facie burden is low in order to give the

plaintiff "'the right, as in a poker game, to require the employer to show its hand — that is, to offer an explanation other than discrimination why the employee suffered an adverse employment action.'" Zive, supra, 182 N.J. at 449 (quoting Marzano v. Computer Sci. Corp., 91 F.3d 497, 508 (3d Cir. 1996)).

As the trial court found when granting summary judgment, plaintiff's evidence met the first three prongs required to set forth a claim of discriminatory failure to promote. However, we find the trial court to have been correct in determining that plaintiff failed to present evidence that he was passed over in favor of "others . . . with similar or lesser qualifications." Dixon, supra, 110 N.J. at 443. Plaintiff bore the burden of showing this prong was satisfied. Peper v. Princeton Univ. Bd. of Tr., 77 N.J. 55, 84-85 (1978).

It is undisputed that, at times relevant to this suit, plaintiff was unaware of the qualifications of the successful candidates for the Union warehouse positions of Foods Manager, Hard Lines Manager and Center Manager. Further, he made no showing that would suggest that any of these three positions were given to people with comparable or lesser qualifications. He only claims that the Union positions all "went to people who are not African-American," and that in two instances, Dingivan

hired from outside the company, rather that following a "general policy" of hiring from within.

The mere fact that the positions for which plaintiff applied were filled by persons who were not African-American does not suffice to meet plaintiff's burden. Zive, supra, 182 N.J. at 446 ("The LAD prevents only unlawful discrimination . . . it does not . . . preclude discrimination among individuals on the basis of competence, performance, conduct or any other reasonable standards."). Further, plaintiff's opinion that he was most qualified is insufficient, given his ignorance of the qualifications of the comparators.

Even if we were to assume that plaintiff offered prima facie evidence of Costco's discriminatory failure to promote him, his case would fail under a McDonnell-Douglas analysis. If a prima facie claim is established, "the burden of going forward, but not the burden of persuasion, shifts to the employer to articulate some legitimate . . . reason for the adverse action." Chou v. Rutgers, the State Univ. of N.J., 283 N.J. Super. 524, 538-39 (App. Div. 1995), certif. denied, 145 N.J. 374 (1996). The employer need only articulate a reason that, if taken as true, would be legitimate; it "need not prove that the tendered reason actually motivated its behavior[.]" Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994). Then, the

burden of producing evidence returns to the plaintiff. We have held:

> To defeat a motion for summary judgment . . . when the defendant answers the plaintiff's prima facie case with legitimate, nondiscriminatory reasons for its action:
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> > [T]he plaintiff's evidence rebutting the employer's proffered legitimate reasons must allow a factfinder reasonably to infer that each of the employer's proffered non-discriminatory reasons, . . . , was either a post hoc fabrication or otherwise did not actually motivate the employment action (that is, the proffered reason is a pretext) . . . . [To do so,] the non-moving [party] 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."
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> > [Fuentes v. Perskie, 32 F.3d 759, 764-765 (3d Cir. 1994) (citations omitted).]
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> . . . .
>
> The standard, then, is "whether evidence of inconsistencies and implausibilities in the employer's proffered reasons for discharge reasonably could support an inference that the employer did not act for non-discriminatory reasons, not whether the evidence necessarily leads to [the] conclusion that the employer did act for discriminatory reasons." Chipollini v.

> Spencer Gifts, Inc., 814 F.2d 893, 900 (3d Cir.), cert. dismissed, 483 U.S. 1052, 108 S. Ct. 26, 97 L. Ed. 2d 815 (1987) . . . .
>
> [Greenberg v. Camden Cnty. Vocational and Technical Schools, 310 N.J. Super. 189, 200-01 (App. Div. 1998).]

In the present matter, Costco has articulated a legitimate reason for awarding each of the positions to candidates other than plaintiff. Costco has supplied a certification from Dingivan stating that, while manager of the Union warehouse, he recruited individuals from outside of Costco who had senior level management experience in the retail industry, because he believed they were the most qualified candidates for the positions at the time. He stated that the position of Foods Manager was given to a person who previously had been General Manager of a national pet supply retailer; the position of Hard Lines Manager was given to the former manager of the Dairy Department of a national supermarket chain; and the position of Center Manager was given to a returning Costco employee with managerial experience. Plaintiff has not made any showing that would cast doubt on these justifications, and as a consequence, we find entry of summary judgment to have been proper.

B. Plaintiff's claim of discriminatory demotion.

At oral argument on summary judgment, plaintiff's counsel withdrew allegations that plaintiff's removal from the position

of Temporary Foods Supervisor upon the return from paternity leave of the person occupying that position on a permanent basis was discriminatory. As a consequence, the only demotion at issue in the case was plaintiff's demotion following the check cashing and cologne incidents.

A claim of discriminatory demotion, like one for discriminatory failure to promote, must satisfy the burden-shifting analysis of McDonnell-Douglas, commencing with the establishment of a prima facie case. Casseus v. Elizabeth Gen. Med. Ctr., 287 N.J. Super. 396, 406 (App. Div. 1996). Thus, plaintiff must present evidence that he is a member of a protected class, he was qualified for the job, he was negatively affected by Costco's employment decision, and that he was treated less favorably than employees who were not within the protected class. Mandel v. UBS/PaineWebber, Inc., 373 N.J. Super. 55, 70 (App. Div. 2004), certif. denied, 183 N.J. 213-14 (2005).

Although we find that plaintiff offered evidence to meet the first three prongs, he failed to meet the fourth. In connection with the check cashing incident, plaintiff has pointed to two other Costco employees who allegedly also had checks returned and were not demoted. However, in deposition, plaintiff admitted he did not know when their alleged conduct

had taken place or whether they had received ECNs. Further, he has offered no evidence as to whether their conduct was repetitive, as plaintiff's was, or whether it involved a failure to disclose to management that a second check was in the pipeline that was also expected to be returned for insufficient funds. Additionally, he offered no evidence that either woman had engaged in other conduct at the time that they bounced checks that could have affected the discipline imposed.

Plaintiff, however, was additionally involved in the cologne incident at approximately the same time that his checks were returned for insufficient funds. Although plaintiff has asserted that Dingivan fabricated the charges relating to that incident, plaintiff has admitted that he returned three-year-old opened bottles of cologne to Costco for additional cash, at a time when plaintiff had not repaid Costco for the amounts that he owed the store on his two returned checks. Plaintiff has offered no evidence to suggest that any other employee, having committed such acts, was treated more favorably. We therefore affirm the order of summary judgment on this claim.

C. Claim against Dingivan

Plaintiff argues additionally that the trial court erred in dismissing Dingivan as a defendant in connection with his promotion and demotion claims. However, we find it unnecessary

to reach that issue, having found no grounds for liability in connection with those claims.

D. Breach of contract claim

In his complaint, plaintiff alleged a cause of action for breach of contract based on principles established by the Supreme Court in Woolley v. Hoffmann-La Roche, Inc., 99 N.J. 284, modified, 101 N.J. 10 (1985). Defendants sought summary judgment on that claim, which was granted without opposition. As a result, we decline to address any issues relating to that claim on appeal, finding that plaintiff failed to preserve them. We only note that plaintiff's claim is premised upon Costco's anti-harassment policy set forth in the company's Warehouse Employee Agreement. Such statements of policy have been held insufficient to support a breach of contract claim. Monaco v. Am. Gen. Assur. Co., 359 F.3d 296, 308-09 (3d Cir.) (finding the claim duplicative of statutory discrimination claims), cert. denied, 543 U.S. 814, 125 S. Ct. 62, 160 L. Ed. 2d 19 (2004); Catalane v. Gilian Instrument Corp., 271 N.J. Super. 476, 492 (App. Div.) (holding that common-law claims should not be submitted to the jury when a statutory remedy is available), certif. denied, 136 N.J. 298 (1994).

III.

Plaintiff appeals additionally from the court's evidentiary rulings following Costco's motions in limine, claiming that the court erred in precluding testimony regarding the substance of Perez's overheard statements regarding African-Americans, in similarly precluding testimony regarding the substance of Farina's complaint regarding comments by Stoms,[3] in barring evidence regarding claims dismissed on summary judgment of discriminatory demotion and failure to promote, and in barring evidence of claims by others of racial discrimination that the EEOC had found to be unsubstantiated. The court's rulings, plaintiff contends, hamstrung his ability to demonstrate the existence of a hostile work environment at Costco and materially contributed to the jury's no-cause verdict.

We disagree with plaintiff's claims of error. The alleged statement of employee Perez, which was claimed to have been overheard by Rodriguez and repeated by him to plaintiff, constituted inadmissible double hearsay as to which no exception to the hearsay rule applies. Beasley v. Passaic Cnty., 377 N.J. Super. 585, 602 (App. Div. 2005); N.J.R.E. 802. It was thus properly barred.

[3] The court permitted testimony regarding the adequacy of Costco's response to the claims.

With respect to Farina, his letter to "To Whom It May Concern" suggests that he complained to Leonhard regarding alleged statements by Stoms that an African-American supervisor was "lazy" and that "those people" are "lazy," interpreting the latter statement as applying to African-Americans. However, in the circumstances described, the import of the statement was unclear. Further, plaintiff failed to proffer any evidence that Farina's letter was delivered to anyone, and if so, what response was received. Finally, the comment was, like that reported by Rodriguez, hearsay in nature. In the circumstances, we conclude that the court did not abuse its discretion in finding the statement inadmissible. Benevegna v. Digregorio, 325 N.J. Super. 27, 32 (App. Div. 1999), certif. denied, 163 N.J. 79 (2000).

We similarly find that the court did not abuse its discretion in declining to permit introduction, in support of plaintiff's claim of a hostile work environment, of the evidence that plaintiff had unsuccessfully advanced as proof of his claims of wrongful demotion and failure to promote. Because those claims had been dismissed as factually unsupported in determinations that we have affirmed, the evidence was not relevant to a claim of racial bias or hostility.

As a final matter, we find no relevance to claims by others of racial discrimination that were presented to the EEOC and found to have been unsubstantiated – one at the Union warehouse arising from alleged conduct by a different supervisor in 2004 before plaintiff transferred to that location and the other two arising from alleged conduct at the East Hanover warehouse.

As a consequence, we find no basis for ordering a new trial with respect to plaintiff's claim of a hostile work environment.

Affirmed.