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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3540-09T2

DOUGLAS HAMPTON,

Plaintiff-Appellant,

v.

UNIVERSITY OF MEDICINE AND
DENTISTRY OF NEW JERSEY,

Defendant-Respondent,

and

ANTHONY C. SHELTON, in his
individual and official
capacities and CARMELO V.
HUERTAS, JR., i/p/a JOHN
HUERTAS, in his individual
and official capacities,

Defendants.

Argued January 24, 2012 - Decided June 19, 2012

Before Judges Messano, Yannotti and Espinosa.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-1568-06.

Kevin M. Kiernan argued the cause for appellant (Kiernan & Campbell, attorneys; Mr. Kiernan, on the brief).

Noreen P. Kemether, Deputy Attorney General, argued the cause for respondent (Jeffrey S. Chiesa, Attorney General, attorney; Lewis A.

Scheindlin, Assistant Attorney General, of counsel; Ms. Kemether, on the brief).

PER CURIAM

Plaintiff Douglas Hampton, an African-American male, became employed as a security officer at the University of Medicine and Dentistry of New Jersey (UMDNJ or defendant) in 2002. In 2004, when he was forty-one years old, plaintiff applied for the position of public safety intern, a transitional position routinely leading to employment as an officer in UMDNJ's police force. After being interviewed, plaintiff was not offered the position. Plaintiff applied for the position again in 2005. Plaintiff did not advance beyond the initial interview stage of the process.

On February 17, 2006, plaintiff filed a complaint alleging age discrimination (Count I) and race discrimination (Count II) in violation of the New Jersey Law Against Discrimination (the LAD), N.J.S.A. 10:5-1 to -49. The complaint named UMDNJ, its former Chief of Security, Anthony Shelton, and its current Chief of Security, John Huertas,[1] as defendants. After discovery, defendants moved for summary judgment which was partially granted by order of November 11, 2009. Count II, plaintiff's

[1] Huertas identified himself at trial as "Carmelo V. Huertas, Jr."

race-based claim, was dismissed, but defendants' motion was denied as to Count I.

At trial before a different Law Division judge, defendant sought dismissal of the individual claims against Shelton and Huertas. Plaintiff's counsel indicated that he "[did not] especially care about the individuals." When asked if he was voluntarily dismissing the claims, plaintiff's counsel stated: "I think your Honor should rule on it, but I'm not . . . putting up a lot of protest." The judge dismissed Shelton and Huertas from the litigation.[2]

At trial, plaintiff proceeded on the theories of disparate treatment regarding the 2004 and 2005 hiring decisions, and discriminatory disparate impact as to the 2005 selection process. At the conclusion of plaintiff's case, defendant moved for a directed verdict on all claims. The trial judge granted the motion with respect to plaintiff's disparate impact claim, but otherwise denied the motion. Defendant then presented its case, and the jury returned a verdict in defendant's favor.

Plaintiff now appeals. We have considered the arguments raised in light of the record and applicable legal standards. We affirm.

[2] The propriety of this decision is not raised on appeal.

I.

We first turn to two evidentiary rulings by the judge that plaintiff alleges were prejudicial error in the context of substantive arguments we discuss in further detail below. The issues arose as follows.

On June 14, 2005, after not being advanced in the selection process, plaintiff filed an internal complaint with defendant's Office of Affirmative Action/Equal Employment Opportunity (AA/EEO) alleging discrimination based on age and race. Catherine Bolder, defendant's AA/EEO Associate Vice President, investigated the complaint.[3]

Bolder compiled a report dated March 3, 2006, containing her findings, conclusions, and recommendations. Bolder noted plaintiff complained that after the 2004 selection process, various individuals told him defendant "[did] not want to hire older candidates." Allegedly, Deputy Chief John Bailey made such a statement to plaintiff.

On November 10, 2005, Bailey sent Bolder a memorandum (the Bailey memo) regarding the 2004 selection process for four vacant public safety intern positions. The Bailey memo contained the ranked list of "seven (7) [recommended] officers,"

[3] Bolder's name is misspelled in the trial transcripts as "Boulder."

all of whom were already employed by defendant in some capacity. Plaintiff ranked fifth. In the memo, Bailey stated he had "informed [plaintiff] that if any other top four (4) candidates were unsuccessful in completing the requirements for appointment . . ., [plaintiff] would be the next candidate considered." Further, Bailey's memo stated:

> In reference to [plaintiff's] statement that he was not selected for the position, because [a different candidate, Jackson] was younger than he was, is a false statement. Age had no impact on the selection process for the Public Safety Intern positions.

As to the 2005 selection process, plaintiff told Bolder the process was "unfair" because irrelevant questions were asked, the questions differed for each candidate interviewed, the interviews were conducted by outside consultants, and the scoring was done in a fashion similar to the process used by the New Jersey State Police. Bolder's report stated that in 2005,

> Fourteen internal applicants applied for the position. 43% were white with 50% of the white candidates were selected. 36% of the candidates were black with none of the black candidates selected and 21% of the candidates were Hispanic with 33% selected.
>
> . . . .
>
> The average age of the selected internal candidates was 25 years with the average length of service 2.85 years. The average of the non-selected internal candidates was 32 years with 4.17 the average length of service.

The report concluded that "the selection process had a disparate impact against Black internal applicants, whose average age was older and length of service was longer than the selected internal applicants." The report recommended several changes to the interview process and that plaintiff be "[advanced] to the next stage of the process."

During pre-trial motions in limine, since defendant did not intend to call Bailey as a witness, plaintiff sought to preclude defendant's introduction of the Bailey memo on hearsay grounds. Defense counsel argued that because plaintiff intended to testify Bailey told him he did not get the position because of his age, "[t]he written statement merely counters that and is directly contradictory to the proper hearsay statement that plaintiff himself is going to offer." The judge noted,

> If you cannot cross examine . . . an individual with regard to whether his statement is an admission and you're going to allow that into evidence because it's an admission by a party, then other statements made by the same individual that contradict that out of court statement, must in all fairness, be admissible as well.

The judge ruled that plaintiff could testify about Bailey's alleged comments to him but, if he did, defendant could move the Bailey memo into evidence.

Plaintiff's counsel also indicated that he wished to call Bolder as an expert witness. The judge conducted a hearing pursuant to N.J.R.E. 104.[4] Bolder testified that the analysis in her report was "done incorrectly" because it was limited only to internal applicants, and defendant considered outside applicants for the positions in 2005. Bolder claimed the report was based in part on conversations with her superiors and Deputy Attorneys General who represented defendant and was the "result of her [superior's] efforts to try to resolve [the dispute] internally." Bolder also stated that her use of the term "disparate impact" was incorrect because "the analysis was not correct." Following the hearing, the judge ruled that Bolder could "certainly testify as to what her findings were with regard to . . . the investigation[,]" but "her opinion in this case, the conclusions and recommendations [in her report] [we]re simply not admissible."

"In reviewing a trial court's evidential ruling, an appellate court is limited to examining the decision for abuse of discretion." Hisenaj v. Kuehner, 194 N.J. 6, 12 (2008). The

[4] Plaintiff's appendix does not include the Rule 104 testimony. The transcript filed by plaintiff indicates it was not ordered. Defendant, however, has supplied the transcript as part of its appendix.

trial judge did not mistakenly exercise his discretion in making either of these rulings.

N.J.R.E. 806 provides in relevant part:

> When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked . . . by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or other conduct by a declarant, inconsistent with the declarant's hearsay statement received in evidence, is admissible although declarant had no opportunity to deny or explain it.

Plaintiff ultimately testified that Bailey told him he was not promoted in 2004 because of his age. That statement was properly admitted as an exception to the hearsay rule. See N.J.R.E. 803 (b)(3) and (4) (statement by a party's "authorized" person, or "agent or servant"). Once Bailey's hearsay statement was admitted through plaintiff's testimony, that portion of the Bailey memo that directly contradicted plaintiff's version of Bailey's statement was properly admitted.

To the extent plaintiff now contends the judge erred in not permitting Bolder to testify as an expert, or in not allowing her entire report into evidence, the argument lacks sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E). Bolder testified that she was not an expert and had never testified as an expert. She further testified that the conclusions she

reached in the report were erroneous based upon the flawed methodology she employed.

II.

Only plaintiff and Bolder testified during plaintiff's case in chief.[5] Plaintiff possessed a high school diploma, served in the United States Army from 1982 to 1986, had experience as an auxiliary police officer in Union Township and was licensed to carry a firearm. After being interviewed in 2004, plaintiff testified that Bailey told him he did not get the position because he was too old.

Plaintiff further testified that Sergeant John Kotchkowski told him that a different candidate, Jackson, was selected because Jackson "was turning 35 and they wanted to put [Jackson] in a good pension plan."[6] Plaintiff also stated that Sergeant Jeffrey Rouse told him "they were hesitant to send [plaintiff] because they had previously sent someone [to the police academy] . . . who at the time was [forty-one] years old, and he dropped

[5] We are advised that a portion of plaintiff's direct testimony was not transcribed due to a recording error. The parties attempted to reconstruct some of the testimony and have stipulated to certain facts adduced during plaintiff's direct testimony.

[6] There was subsequent testimony that police interns had the option to enroll in the Police and Fire Retirement System and only individuals younger than thirty-five years of age could become members of that pension system.

out." Plaintiff acknowledged that of the three, only Bailey was involved in the 2004 interview process.

Regarding the 2005 selection, plaintiff stated that no one mentioned his age as a reason why he did not advance past the first interview in the selection process. He was unaware of the score he obtained. Plaintiff was also unaware of the number of vacancies and the number of people who applied for the positions.

Bolder testified that the four successful candidates hired in 2004 were twenty-one, twenty-three, twenty-seven and thirty-three years old. Bolder also testified as to the factual findings contained in her report regarding the 2005 selection process. On cross-examination, defendant sought to introduce the Bailey memo over plaintiff's renewed objection. The judge overruled the objection and Bolder testified as to the contents of the Bailey memo.

Regarding 2005, Bolder stated that a single selection process was used to evaluate applicants for the "public safety intern" and "police officer positions." Bolder acknowledged that all "internal candidates" were interviewed, and external applicants were also interviewed. Bolder did not know the ages of any of the external candidates. Only those interviewed who scored above "seventy" were advanced to the next step of the

process, and, of the four candidates ultimately hired, the oldest was thirty years of age.

At the close of plaintiff's case-in-chief, the judge denied defendant's motion for a directed verdict as to plaintiff's 2004 and 2005 age-based disparate treatment claims but granted the motion as to the 2005 age-based disparate impact claim. The judge observed:

> In order to show a disparate impact the plaintiff would be required to . . . make a prima facie showing . . . that there . . . was a statistical differing impact. . . .
>
> . . . .
>
> What happened in this case is [plaintiff] didn't advance to the next step in the process and we don't know how many people over the age of 35 didn't advance to the next step of the process.

Defendant called Kotchkowski who was not involved in the 2004 or 2005 interview or selection process. Kotchkowski denied making any comments about why plaintiff did not receive the 2004 appointment or about Jackson being advanced because of pension considerations. Rouse testified that he was not involved in the 2004 or 2005 interviews. He could not recall ever making any comments to plaintiff "about why he never obtained the . . . position," or that defendant was hesitant to send him through the police academy because a prior applicant had "dropped out" at age forty-one.

Deputy Chief Christopher Michael testified that although he recalled serving on the 2004 interview panel, he could not recall plaintiff's interview. He further testified that "age [n]ever played any part . . . in terms of determining who would proceed past the initial interview."

Thomas Van Tassel, who retired from the New Jersey State Police in 2004, testified that he was hired as a consultant "to elevate the professionalism" in defendant's police force. Approximately 100 people applied for the positions in 2005. He, along with Captain Raymond K. Jones and Sergeant Alonzo Brandon III, conducted the 2005 interviews. Plaintiff's total interview score was 62.3 out of eighty, and Van Tassel confirmed that only candidates who scored above seventy were advanced to a secondary interview with the director's office.

Shelton testified that he was fifty years old when defendant hired him as an associate director in its Public Safety Department. In 1993, Shelton became the Director and remained in that title throughout the 2004 selection process. Shelton testified that he favored hiring "interns" from within defendant's security staff. He described the process:

> [Candidates would] apply to human resources and submit their application. The department . . . would then establish an interview panel. The interview panel would evaluate the candidates for the position and make notes of those interviews . . . [using]

> established criteria and guidelines . . . And then they would make their recommendations to the deputy chief . . . .
>
> The deputy chief would then go over the interview panel's recommendations and would conduct his own interviews. And after that process, the deputy chief would then come to me and we would discuss the recommendations of the panel, the deputy chief's recommendations, and I would agree or disagree with those decisions.

Shelton testified that age was not a factor employed during the 2004 selection process.

Huertas, a retired State Police major, succeeded Shelton as Director in 2005. He decided to adopt a process by which defendant would "be able to look at the best possible candidates, not only from within the department, but the university and external candidates." Huertas "picked 70 as the . . . passing score" and interviewed "all internal bidders." Huertas testified that no one on the interview panel knew an applicant's age, and he denied that plaintiff was subject to any form of discrimination.

The judge submitted a verdict sheet to the jury following his charge. "Part A" of the verdict sheet dealt with the "2004 Public Safety Intern position." The jury responded "no" to question one:

> Did Plaintiff prove by a preponderance of the evidence that UMDNJ moved individuals to the next phase of the Public Safety Intern

> process in 2004 who were outside [plaintiff's] protected class (age) and who had similar or lesser qualifications than [plaintiff]?

"Part B" of the verdict sheet referenced the "2005 Public Safety Intern position." The jury answered "no" to question five:

> Did Plaintiff prove by a preponderance of the circumstantial evidence that UMDNJ moved individuals to the next phase of the Public Safety Intern process in 2005 who were outside [plaintiff's] protected class (age) and who had similar or lesser qualifications than [plaintiff]?

III.

Regarding the 2004 selection process, plaintiff contends that he introduced both direct evidence of discrimination through the statements attributed to Bailey, Kotchkowski and Rouse, and a sufficient prima facie case of discrimination through circumstantial evidence. See Bergen Commer. Bank v. Sisler, 157 N.J. 188, 208-14 (1999) (discussing the two methods of proving age discrimination under the LAD). Plaintiff contends that defendant produced no evidence to rebut either mode of proof, except for the Bailey memo which was improperly admitted into evidence.

For the reasons already stated, the Bailey memo was properly admitted to rebut plaintiff's testimony that Bailey told plaintiff he was not advanced because he was too old. But, more importantly, even without the Bailey memo, the jury was

entitled to reject plaintiff's testimony about the conversation he allegedly had with Bailey, particularly in light of the testimony of Kotchkowski and Rouse, both of whom directly contradicted statements plaintiff attributed to them, and Shelton, who denied age played any factor in the selection process.

Plaintiff also argues that the Bailey memo was the only evidence of "a legitimate, non-discriminatory reason" why defendant failed to advance him during the 2004 selection process. Id. at 210. That is, plaintiff ranked fifth, and only four positions were available.

However, Bolder testified to these rankings during her direct testimony. In her investigative report, Bolder attributed this information to plaintiff, and there was no evidence that contradicted the fact that plaintiff ranked fifth and there were only four vacancies. In short, to the extent the Bailey memo contained information other than what was properly admitted pursuant to N.J.R.E. 806, the error was harmless.

IV.

Plaintiff next contends that with respect to the 2005 selection process, the motion judge erred in dismissing his race-based disparate impact claim, and the trial judge erred in dismissing his age-based disparate impact claim. Plaintiff

argues that "based on the Bolder Report," there was sufficient evidence for the issue to be submitted to the jury.

A claim of disparate impact "involves employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." Gerety v. Atl. City Hilton Casino Resort, 184 N.J. 391, 398 (2005). "[A] plaintiff must show that a facially neutral policy 'resulted in a significantly disproportionate or adverse impact on members of the affected class.'" Id. at 399 (quoting United Prop. Owners Ass'n of Belmar v. Borough of Belmar, 343 N.J. Super. 1, 47 (App. Div.), certif. denied, 170 N.J. 390 (2001)).

"In reviewing a summary judgment, we can 'consider the case only as it had been unfolded to that point' and the evidential material submitted on that motion." Ji v. Palmer, 333 N.J. Super. 451, 463-64 (App. Div. 2000). Defendant correctly points out that plaintiff has not furnished the record that was before the motion judge. We have refused to review on appeal issues addressed by those parts of a trial record not included in the appendix. Cmty. Hosp. Group, Inc. v. Blume Goldfaden, 381 N.J. Super. 119, 127 (App. Div. 2005); see also Pressler & Verniero, supra, comment 1 on R. 2:6-1(a) (2012)(noting appellate review

may be declined if parts of the record are not included in the appendix).

Nevertheless, because plaintiff's argument rests solely upon Bolder's opinions, we are convinced the contention lacks sufficient merit to warrant extensive discussion in this opinion. R. 2:11-3(e)(1)(E). As we have already noted, Bolder admitted her conclusions were fatally flawed by the incorrect methodology she utilized. Even if the race-based disparate impact claim survived summary judgment, it would have been properly dismissed, as was the age-based disparate impact claim, after plaintiff rested.

V.

Lastly, plaintiff contends that the jury charge was "fatally flawed" and "[t]he problems [with] the jury charge were aggravated by the jury verdict sheet." As to the charge, plaintiff argues that the judge "failed to provide the jury with a proper charge which reflected both the direct and circumstantial evidence theories," and "the . . . charge improperly required that the jury compare plaintiff's qualifications to that of the younger candidates."

After a lengthy colloquy with counsel during the charge conference, the judge acceded to plaintiff's counsel's request that he include a "direct evidence" charge regarding the 2004

selection process. Thereafter, the judge asked plaintiff's counsel if he reviewed the written proposed charge.[7] Counsel stated it "reflect[ed] the direct evidence case." The judge charged the jury as follows:

> The burden of proof in this case is on the plaintiff to establish his claim by a preponderance of the evidence. In other words, if a person makes an allegation, then that person must prove the allegation. In the event you find that the plaintiff has met his burden by direct evidence, such as statements by a decision-maker that age was a factor, then the burden of proof shifts to the defendant to show by a preponderance of the evidence that there was a legitimate business reason to advance plaintiff to the next step in the process.
>
> If you find that they've met that burden, it becomes the plaintiff's burden then to prove by a preponderance of the evidence that the business purpose was a pretext to deny advancement due to age. If the plaintiff proves to you by a preponderance of the circumstantial evidence that age was a factor in the decision making, then the defendant bears the burden of persuasion. It must persuade you that there is a legitimate business purpose for failure to advance the plaintiff. Plaintiff retains the burden of proof.

The judge distinguished the direct and circumstantial evidence theories of the case a second time:

[7] The judge's proposed written charge is not in the record, but we assume it was essentially the same as the judge ultimately gave to the jury.

Plaintiff alleges that there is direct and circumstantial evidence of age discrimination by the defendant in failing to advance him in 2004 and circumstantial evidence of the failure to advance him in 2005 . . . . The burden of proof is on the plaintiff to establish his claim by a preponderance of the evidence. . . . In the event you find that the plaintiff has met his burden by direct evidence, such as statements by a decision-maker that age was a factor, then the burden of proof shifts to the defendant to show by a preponderance of the evidence that there was a legitimate business reason to advance plaintiff to the next step.

If the plaintiff proves to you by a preponderance of the circumstantial evidence [that] age was a factor in the decision making, then the defendant bears the burden [of] persuasion. It must persuade you . . . [that] there was a legitimate business purpose for failure to advance the plaintiff. Plaintiff retains the burden of proof.

. . . .

If you find that in a circumstantial evidence case that . . . defendant has met its burden to show a legitimate business purpose for failing to advance the plaintiff, then it becomes, in a circumstantial evidence case, the plaintiff's burden to prove by a preponderance of the evidence that the business purpose was a pretext to deny advancement due to age.

. . . .

Now the plaintiff in this case claims that the defendant unlawfully discriminated against him by failing to award him the position of public safety intern in both

> 2004 and 2005 because of his age. The Defendant UMDNJ denies these allegations and instead maintains that if plaintiff was not moved to the next step of the process in obtaining the public safety intern position, it was because Mr. Hampton was not one of the top candidates to be moved along in each interview process.
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> . . . .
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> It [was] the plaintiff's burden to prove that he was at least as well qualified as the candidates chosen in the interview process. If the plaintiff fails to prove that by a preponderance of the evidence, then you should return a verdict for the defendant. If, on the other hand, you find that plaintiff was as qualified as the candidates who were chosen to move to the next step of the process based on the interviews, then you must consider whether the defendant engaged in intentional discrimination because of the plaintiff's age.

The record does not contain any specific objection to the charge, although plaintiff's counsel stated after the jury retired, "Our objections are all noted . . . ad nauseam."

A proper jury charge is a prerequisite for a fair trial. Reynolds v. Gonzalez, 172 N.J. 266, 288 (2002). When reviewing the adequacy of jury instructions, we consider the charge in its entirety. Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 418 (1997). We will only reverse when the charge inadequately conveys the law, confuses or misleads the jury. Ibid. Even erroneous instructions will be upheld if they were incapable of

"producing an unjust result or prejudicing substantial rights." Ibid. (citations omitted).

Plaintiff argues before us that the judge "failed to provide the jury with a proper charge which reflected both the direct and circumstantial evidence theories in the proper manner." However, he fails to explain why the instructions we cited were either erroneous or prejudicial.

As to plaintiff's circumstantial evidence mode of proof, he argues the charge "improperly required that the jury compare plaintiff's qualifications to that of the younger candidates." Plaintiff lodged a specific objection to this portion of the charge at trial.

When a plaintiff attempts to prove discrimination under the LAD "through circumstantial evidence . . . in a failure to hire case," he

> must first prove a prima facie case of discrimination; to do so, a plaintiff must prove the following: that plaintiff (1) belongs to a protected class, (2) applied and was qualified for a position for which the employer was seeking applicants, (3) was rejected despite adequate qualifications, and (4) after rejection the position remained open and the employer continued to seek applications for persons of plaintiff's qualifications.
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> [Zive v. Stanley Roberts, Inc., 182 N.J. 436, 447 (2005).]

In Victor v. State, 203 N.J. 383, 408-09 (2010), decided after the trial in this case, the Court phrased the fourth prong somewhat differently, i.e., "that the employer continued to seek others with the same qualifications or hired someone with the same or lesser qualifications who was not in the protected status." (Emphasis added).

Here, the judge instructed the jury that "[i]t [wa]s the plaintiff's burden to prove that he was at least as well qualified as the candidates chosen in the interview process." Any difference between the phrasing of the instruction and the case law cited was insignificant and provides no basis to reverse.

Plaintiff also argues that the verdict sheet improperly "required the jury to make a comparison between the plaintiff and other candidates." He lodged a similar objection at trial.[8]

Jury "interrogatories, like any other instructions to a jury, [are] 'not grounds for a reversal unless they [are]

[8] In his reply brief, plaintiff additionally argues that the verdict sheet misled the jury because, when the proof of discrimination rests on "direct evidence," "there is no prima facie case stage." "Raising an issue for the first time in a reply brief is improper." Borough of Berlin v. Remington & Vernick Eng'rs, 337 N.J. Super. 590, 596 (App. Div.), certif. denied, 168 N.J. 294 (2001); see also, Pressler & Verniero, supra, comment on R. 2:6-5 (collecting cases). In any event, we are firmly convinced that given the jury instructions provided, the questions as posed on the jury verdict sheet could not have led to an unjust result. R. 2:10-2.

misleading, confusing or ambiguous.'" Mogull v. CB Commercial Real Estate Group, Inc., 162 N.J. 449, 467 (2000) (quoting Sons of Thunder, supra, 148 N.J. at 418). As we have already noted, the interrogatory did not misstate plaintiff's burden in establishing a prima facie case of discrimination utilizing circumstantial evidence. We find no basis to reverse the verdict on these grounds.

Affirmed.