NOT FOR PUBLICATION
WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

LAMONT PRAY, Plaintiff v. NEW JERSEY TRANSIT, INC., OPERATIONS, INC., Corporation of the State of New Jersey, ALMA SCOTT-BUCZAK, WILLIAM HEMPHILL, TERRI SILVERMAN, ADRIAN MALLOY, LEOTIS SANDERS, et al., Defendants	:	SUPERIOR COURT OF NEW JERSEY ESSEX COUNTY DOCKET NO.: ESX-L-4107-11 **OPINION**

Decided: February 8, 2013

By: Thomas R. Vena, J.S.C.

Oral argument was held before this Court on February 8, 2013. Noreen P. Kemether, Esq., Deputy Attorney General appeared on behalf of defendants. Jamison M. Mark, Esq. of the Mark Law Firm, LLC appeared on behalf of the plaintiff Lamont Pray.

DISCUSSION

This is defendant New Jersey Transit's motion for summary judgment seeking dismissal with prejudice of plaintiff's complaint. Plaintiff Lamont Pray has brought suit against his former employer, New Jersey Transit, alleging discriminatory treatment based

on his age and gender in violation of the New Jersey Law Against Discrimination ("LAD") N.J.S.A. § 10:5-1 et seq.

The facts of this case are numerous and complex. For the sake of clarity and brevity, a summary of the relevant facts will suffice as pertinent background information. Plaintiff began working with NJ Transit in 1989 as a laborer. Throughout his tenure with defendant, he advanced within the company. In February 2002, plaintiff was appointed Equal Opportunity/Affirmative Action ("EO/AA") Specialist. Later, in 2006, plaintiff was reclassified as Senior EO/AA & Diversity Programs Administrator. Plaintiff was again reclassified in 2007 to Principal EO/AA Officer. Thereafter, plaintiff temporarily assumed the position of Co-Director of the EO/AA department from December 2010 through March 2011.

Plaintiff alleges that he was entitled to each of his promotions before the actual promotions came. Plaintiff also alleges that once promoted, he was compensated less than other employees with similar job titles and duties, because of his age and/or gender.

Motions for summary judgment are governed by Rule 4:46-2, which requires a court to grant summary judgment upon a moving party's showing "that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment or order as a matter of law." In Brill v. Guardian Life Insurance, 142 N.J. 520 (1995), the New Jersey Supreme Court propounded the standard for granting summary judgment under R. 4:46-2, holding that the judge must consider, "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged dispute in favor of the non-moving

party." The burden is placed on the movant to exclude any reasonable doubt as to the existence of any genuine issue of material facts and all inferences of doubt are drawn against the moving party in favor of the opponent. Heller v. Hartz Mountain Industries, 270 N.J. Super. 143, 149 (Law Div. 1993).

Count One of plaintiff's complaint alleges gender discrimination in violation of the LAD N.J.S.A. § 10:5-12. Claims brought pursuant to this statute are judged according to the burden-shifting analysis prescribed by McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). See Bergen Commercial Bank v. Sisler, 157 N.J. 188 (1999). This analysis includes three stages. First, a plaintiff must be able to provide a prima facie case of discrimination. Beatty v. Miller, 366 N.J. Super. 69, 74 (App. Div. 2004). Once plaintiff proves a prima facie case, the burden then shifts to the employer who must "come forward with admissible evidence of a legitimate non-discriminatory reason for its rejection of the employee." Bergen, 157 N.J. at 210. If an employer is able to produce such evidence and rebut the presumption of discrimination, the burden shifts back to the plaintiff to show "by a preponderance of the evidence that the legitimate nondiscriminatory reason articulated by the defendant was not the true reason for the employment decision, but was merely a pretext for discrimination." Id. at 211.

The first step for plaintiff then, in this case, is to establish a prima facie case of discrimination based on his gender. A plaintiff makes such a case by demonstrating that he "(1) belongs to a protected class, (2) applied for and was qualified for a position for which the employer was seeking applicants and was not accepted, (3) was rejected despite adequate qualifications, and (4) the employer filled that position with a person from outside the protected class who had similar or lesser qualifications." Beatty at 74-

75. This test, although specifically applicable to failure-to hire claims of discrimination, is "equally applicable to other forms of employment discrimination." Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 82 (1978). Thus, a plaintiff alleging discriminatory failure to promote based on gender must be able to show that a similarly situated person outside plaintiff's protected class; i.e., a member of the opposite sex, received promotions that were denied to plaintiff. See Peper, 77 N.J. at 84.

Plaintiff here has made a prima facie showing of discriminatory failure to promote based on gender. Plaintiff alleges that he was not promoted as quickly nor paid as much for the same positions as a female co-employee, Pat Bullock, despite each having adequate qualifications. See Ex. A to Plaintiff's Opposition. Defendants rebut this presumption by pointing to the fact that Ms. Bullock had more than twenty years' experience in the EO/AA field when she began her career at NJ Transit, while plaintiff had none. Defendants assert that plaintiff's and Bullock's differences in compensation and promotions were simply the result of rewarding the employee with far more experience. Defendants argue that an employee's experience in the EO/AA field, rather than sex or gender, influenced employees' compensation and promotions.

The defendants having successfully rebutted plaintiff's prima facie claim of gender discrimination, the burden now shifts back to plaintiff to show that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Greenberg v. Camden County Vocational and Technical Schools, 310 N.J. Super. 189, 199-200 (App. Div. 1998) (quotations omitted). Specifically:

> the 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.' Greenberg, 310 N.J. Super. at 200 (App. Div. 1998) (citations omitted).

Plaintiff has not carried his burden of rebutting defendant's proffered legitimate reason for not promoting plaintiff as quickly or paying plaintiff as much as Bullock. All of the "evidence" of plaintiff's claim for gender discrimination can reasonably be explained by the fact that Bullock had many years more experience than plaintiff and so she was compensated and promoted accordingly. For example, plaintiff references a memo from Adrian Malloy, a supervisor, attached to Plaintiff's Opposition as Ex. L, where Mr. Malloy states that "…while all the work Lamont performed was important to the success of the department, it…did not reach that of Pat Bullock until 2005." It is not unreasonable to for a jury to infer that even if the work product of two employees was equally performed, that the employee with more experience and seniority would still receive higher compensation. Additionally, plaintiff points to the fact that "[p]laintiff was passed over for Ms. Bullock when Transit's Jan Walden, then Executive Ass. Director of Diversity Programs, advised Plaintiff that he was not going to be promoted in March 2008 in lieu of promoting Bullock." See Plaintiff's Opp. Brief at 13. Simply stating this fact does not overcome the presumption that Bullock was promoted because of her superior experience, not her sex. Essentially, plaintiff's argument for gender discrimination boils down to the fact "that at each step, Ms. Bullock – someone of a different gender – was classified ahead of Pray. See Plaintiff's Opp. Brief at 13. As was

just stated, this fact alone does not overcome the presumption that defendants did not promoted plaintiff because of his gender. Plaintiff has not submitted any evidence that would allow a reasonable jury to infer that Bullock's promotions and compensation were a result of anything other than her many years' more experience than plaintiff. Having failed to submit any evidence that would allow a reasonable jury to find gender discrimination in violation of the LAD, summary judgment is granted as to Count One of plaintiff's complaint and is dismissed with prejudice.

Count Two of plaintiff's Complaint alleges unlawful discrimination against plaintiff because of plaintiff's age. Plaintiff essentially alleges that defendant placed plaintiff and other older employees on a "succession plan" designed to induce these employees to retire. However, no reasonable jury could believe that such a plan existed because plaintiff has not produced any competent evidence that proves the existence of such a plan. Plaintiff relies on his own statements and references to a plan, but with no evidence of the actual existence of such a succession plan, there can be no prima facie case of age discrimination. Further, plaintiff's references to Joyce Smith and Penny Jackson, two younger clerical staffers who were promoted to EO/AA Officers, as well as references to Lauren Williams and Lisa Marie Cordigan, who were also younger than plaintiff and received promotions in the Disadvantage Business Enterprises Division of NJ Transit are wholly irrelevant. First, in 2010, at the time of that promotion, plaintiff already held the title of EO/AA Officer so he was not competing with any of these younger women. Furthermore, there is no evidence whatsoever that plaintiff ever sought a position within the Disadvantage Business Enterprises Division. Any promotion of an employee younger than plaintiff there has absolutely no bearing on plaintiff. Having not

produced any evidence that defendant illegally discriminated against plaintiff based on his age, summary judgment is granted as to Count Two of the Complaint, and it is dismissed with prejudice.

Count Three of Plaintiff's Complaint alleges that plaintiff was subjected to a hostile work environment because of his age and sex, in violation of the LAD. The New Jersey Supreme Court set forth a four pronged test that a plaintiff must satisfy in order to state a claim for hostile work environment under the LAD.

> [T]he complained of conduct (1) would not have occurred but for the employee's [protected trait]; and it was (2) severe or pervasive enough to make a (3) reasonable person believe that (4) the conditions of employment are altered and the working environment is hostile or abusive. Lehmann v. Toys R Us, Inc., 132 N.J. 587 (1993).

Further, "the alleged conduct must be extreme enough to amount to a change in the terms and conditions of employment." Heitzman v. Monmouth County, 321 N.J. Super. 133, 147 (App. Div. 1999). Rather than focusing on plaintiff's subjective complaints to an allegedly hostile workplace, the inquiry is whether a reasonable person in plaintiff's position would consider the workplace acts and comments made to, or in the presence of, plaintiff to be sufficiently severe or pervasive to alter the conditions of employment and create a hostile working environment. See Cutler v. Dorn, 196 N.J. 419, 430 (2008). Moreover, the focus is on the conduct itself, not the effect it allegedly had on plaintiff, nor the defendants' intent in engaging in the alleged conduct. Cutler, 196 N.J. at 431.

Here, plaintiff has not demonstrated any conduct that would lead an objectively reasonable person in plaintiff's position to believe that plaintiff was subjected to a hostile work environment based on his age and gender. Plaintiff noted in his deposition that he felt his workplace was hostile because he was not making as much money as other

employees, and other employees who plaintiff felt were less qualified than he were making almost as much as plaintiff. See Plaintiff's Deposition, Ex. C to Defendant's Certification of Counsel in Support of motion, 44:3-45:7. Plaintiff also alleges that Leotis Sanders, a supervisor at NJ Transit would ignore plaintiff at work. See Plaintiff's Dep, 41:2-15. Plaintiff's subjective feelings concerning both the payment of his co-workers and Mr. Sanders's failure to say hello to plaintiff do not reach the level of severe or pervasive harassment based that would make a reasonable person in plaintiff's position to experience a hostile work environment based on plaintiff's age and gender. Summary judgment is granted as to Count 3 of the Complaint and it is dismissed with prejudice.

Count Four of plaintiff's complaint alleges disparate treatment based on plaintiff's age and gender in violation of the LAD. A review of the pleadings reveals that much of this count overlaps with Counts One and Two, discussed above. Therefore, for the reasons discussed above as to Counts One and Two, summary judgment is granted as to Count Four.

Count Five of plaintiff's complaint alleges unlawful retaliation, in violation of the LAD, N.J.S.A. § 10:15-1. Specifically, plaintiff alleges that in retaliation for his numerous complaints about pay disparity and requests for reclassification, defendants did not promote plaintiff timely, and did not compensate him properly.

A plaintiff establishes a prima facie case of retaliation under the LAD by pointing to evidence showing (1) that he engaged in protected activity known to the employer, (2) that following the protected activity, the employer took adverse action against him, and (3) that a causal link exists between the protected activity and the employer's action. Woods-Pirozzi v. Nabisco Foods, 290 N.J. Super. 252, 274 (App. Div. 1996). A

"plaintiff need not provide direct evidence that the employer acted for discriminatory reasons in order to survive summary judgment. [He] need only point to sufficient evidence to support an inference that the employer did not act for its proffered non-discriminatory reasons." Kelly v. Bally's Grand, Inc., 285 N.J. Super. 422, 431-432 (App. Div. 1995). In an LAD retaliation case, to overcome a motion for summary judgment, a "plaintiff need only raise a genuine issue of fact with regard to the employer's actual motive." Romano v. Brown & Williamson. Tobacco Corp., 284 N.J. Super. 543, 551 (App. Div. 1995).

In the present case, plaintiff cannot establish a prima facie case of retaliation. First, plaintiff cannot show that he engaged in any "protected activity" as required by the LAD. To qualify as protected activity, plaintiff must demonstrate that his underlying discrimination complaint was reasonable and made in good faith. Carmona v. Resorts Int'l Hotel, 189 N.J. 354, 373 (2007). Having already determined that no reasonable factfinder could find age or gender discrimination, plaintiff's complaints to Transit that he was making less than Bullock and not being promoted at the same time as Bullock, as a result of his age and gender do not qualify as good-faith reasonable complaints.

However, even assuming that plaintiff could establish that he engaged in protected activity, plaintiff still cannot establish a prima facie claim of retaliation because he cannot establish that he suffered an "adverse action." To satisfy this second prong of a prima facie claim of retaliation, an adverse employment action must be "materially adverse to a reasonable employee." Burlington Northern & Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006); See also, Roa v. Roa, 402 N.J. Super. 529, 540-41 (App. Div. 2008) (adopting the Burlington standard for New Jersey LAD claims) rev'd in part on

other grounds, 200 N.J. 555 (2010). "The employer's actions must be harmful to the point that they could dissuade a reasonable worker from making or supporting a charge of discrimination." Burlington, 548 U.S. at 57.

Here, plaintiff cannot show an adverse employment action because he cannot show that he was fired or even ever demoted. On the contrary, plaintiff received promotions and eventually rose to the position of Principal EO/AA Officer, and temporarily was Co-Director of the EO/AA Department. Plaintiff also received pay raises with each promotion. Maintenance of the status quo does not rise to the level of "adverse employment action" as required by the LAD. Because plaintiff was never demoted, and was actually promoted, he cannot show adverse employment action, and as such, cannot make out a prima facie claim of retaliation under the LAD. Accordingly, summary judgment as to Count Five is granted.

Count Six of plaintiff's complaint alleges that employees within the "Upper-Management" and supervisors within NJ Transit aided and abetted defendants' alleged unlawful discrimination against plaintiff in violation of N.J.S.A. § 10:5-12. For "aiding and abetting" liability to be imposed against an individual, "(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his or her role as part of an overall illegal or tortious activity at the time that he/she provides the assistance; [and] (3) the defendant must knowingly and substantially assist the principal violation." Tarr v. Ciasulli, 181 N.J. 70, 84 (2004). Factors that aid a Court's determination of such liability include (1) the nature of the act encouraged, (2) the amount of assistance given by the supervisor, (3) whether the supervisor was present at the time of the asserted harassment, (4) the supervisor's

relations to the others, and (5) the state of mind of the supervisor. Hurley v. Atlantic City Police Dept., 174 F. 3d 95, 127 (3rd Cir. 1999).

Here, it is clear that there can be no aiding and abetting liability imposed on any of the individual defendants. Since no reasonable factfinder could conclude that plaintiff suffered any discrimination, whether in the form or age, gender, or retaliation, it follows that there was no illegal activity at Transit for any of the individual defendants to aid or abet. For that reason, plaintiff cannot establish any of the three prongs of a prima facie claim of aiding and abetting , and summary judgment is granted as to Count Six.

For the foregoing reasons, summary judgment is granted and plaintiff's complaint is dismissed in its entirety.