

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3377-10T1

DARYL MURRAY,

Plaintiff-Appellant,

v.

THE HONICKMAN GROUP d/b/a BEVERAGE  
DISTRIBUTION CENTER, INC., also  
d/b/a PEPSI-COLA and NATIONAL BRAND  
BEVERAGES, LTD, and NANCY RODRIGUEZ,

Defendants-Respondents,

and

GWEN DOLCEAMORE, THE WORKPLACE GROUP,  
INC., SARA SALVATORE, individually  
and as an employee for The Workplace  
Group, Inc., DICE HOLDINGS, INC.,  
d/b/a DICE.COM, and MONSTER.COM,

Defendants.

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Argued October 30, 2013 – Decided November 12, 2013

Before Judges Fuentes, Fasciale and Haas.

On appeal from the Superior Court of New  
Jersey, Law Division, Burlington County,  
Docket No. L-1998-07.

Daryl Murray, appellant, argued the cause  
pro se.

Anthony B. Haller, of the Pennsylvania Bar,  
admitted pro hac vice, argued the cause for  
respondents (Blank Rome, LLP, attorneys; Mr.

Haller, Stephen M. Orlofsky, Jennifer Hale  
Eagland and Julie E. Reid, on the brief).

PER CURIAM

Plaintiff, an African-American, appeals from an order granting summary judgment to Beverage Distribution Center, Inc. (BDCI) and Nancy Rodriguez (collectively referred to as "defendants") dismissing his complaint alleging racial and sex discrimination and unlawful retaliation in violation of the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Plaintiff also appeals from several interlocutory orders. We affirm.

Plaintiff alleged that BDCI failed to hire him as an EDI Coordinator, an AS400 Operator, and a MIS Project Manager. Plaintiff also alleged that defendants retaliated against him, and that Rodriguez (a former BDCI employee) aided and abetted the alleged LAD violations.<sup>1</sup> Defendants denied these allegations and moved for summary judgment. The court granted the motion and concluded that plaintiff failed to demonstrate a prima facie case under the LAD and dismissed plaintiff's case.

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<sup>1</sup> In addition to this complaint, which plaintiff amended on four occasions, plaintiff filed related lawsuits against BDCI (1) with the New Jersey Division of Civil Rights (DCR), which he later withdrew; and (2) in the United States District Court for the District of New Jersey. The district court granted summary judgment to BDCI and the United States Court of Appeals for the Third Circuit affirmed. Murray v. Bev. Distrib. Ctr., No. 11-1938 (3d Cir. 2013).

On appeal, plaintiff argues primarily that there are disputed issues of material fact that preclude summary judgment. After a thorough review of the record and consideration of the controlling legal principles, we conclude that plaintiff's arguments are without sufficient merit to warrant extended discussion in a written opinion. R. 2:11-3(e)(1)(E). We add the following comments.

In reviewing a grant of summary judgment, we apply the same standard under Rule 4:46-2(c) that governs the trial court. Wilson ex rel. Manzano v. City of Jersey City, 209 N.J. 558, 564 (2012). We must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Against this standard, we conclude that the judge did not err.

To present a prima facie case of discrimination under the LAD, plaintiff must show, by a preponderance of the evidence, that: (1) he is a member of a protected class; (2) he applied and was qualified for the job for which BDCI was seeking applicants; (3) despite his qualifications, he was rejected; and (4) after his rejection, the position remained open and BDCI

continued to seek applicants with plaintiff's qualifications. Andersen v. Exxon Co., U.S.A., 89 N.J. 483, 492 (1982); Williams v. Pemberton Twp. Pub. Sch., 323 N.J. Super. 490, 498 (App. Div. 1999). BDCI must then rebut the presumption of undue discrimination by articulating some legitimate, nondiscriminatory reason for its rejection of plaintiff. Anderson, supra, 89 N.J. at 493. Upon such a showing by BDCI, plaintiff must then prove by a preponderance of the evidence that the reason articulated by BDCI was not the true reason for the employment decision, but a mere pretext for discrimination. Ibid.

The record demonstrates that plaintiff did not apply for the EDI Coordinator position. Rather, he wrote BDCI and stated that

[a]t first glance of the enclosed resume, you might question why I would consider a position paying far below my experience and expertise. The answer to your question is that I would not unless your company were willing to consider my flexible proposal.

I would be interested in this position at the maximum advertised salary, if I could negotiate this position and salary on a part-time basis. Not more than 24 hours and/or 3-days per week.

If this is something that is possible[,] [f]eel free to consider my credentials.

Otherwise, thank you for your time and attention.

There is also a lack of competent evidence that plaintiff applied for the position of AS400 Operator, which BDCI offered to an African-American male. Regarding the position of MIS Project Manager, plaintiff refused to participate in BDCI's assessment process for job applicants. Thus, the judge did not err by concluding that plaintiff failed to make a prima facie case under the LAD. The judge found correctly, based on plaintiff's own admissions, that plaintiff did not apply for these positions and refused to participate in the hiring process.

To establish a prima facie case of unlawful retaliation under the LAD, plaintiff must demonstrate that (1) he engaged in a protected activity with BDCI's knowledge; (2) he was subsequently terminated or suffered adverse employment actions; and (3) there is a causal link between (1) and (2). Romano v. Brown & Williamson Tobacco Corp., 284 N.J. Super. 543, 548-49 (App. Div. 1995); accord Kluczyk v. Tropicana Prods., Inc., 368 N.J. Super. 479, 493 (App. Div. 2004). Upon the assertion of a legitimate non-retaliatory reason for the adverse action by BDCI, plaintiff must show, by a preponderance of the evidence, that BDCI's conduct was nonetheless motivated by discriminatory reasons. Romano, supra, 284 N.J. Super. at 549.

The judge found that after plaintiff filed his DCR complaint, BDCI encouraged plaintiff to complete the application process; however, plaintiff refused. We note that plaintiff also failed to engage in the assessment process before and after he filed his DCR complaint. As the judge stated "[i]f anything, [plaintiff] was the recipient of preferential treatment as a result of filing a claim with the [DCR]."

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION