

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION**

Docket No.: A-001300-24

WILLIAM T. LAVELL,
Plaintiff-Appellant,

v.

CAMDEN COUNTY COLLEGE,
Defendant-Respondent.

Appeal from the Superior Court of New Jersey
Law Division, Camden County
Case No.: CAM-L-002239-24
Honorable John S. Kennedy, J.S.C., Sat Below

BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This appeal asks the Court to correct a clear legal error that deprived Professor William Lavell of his right to a jury trial. Professor Lavell, a white chemistry professor at Camden County College, brought suit under the Diane B. Allen Equal Pay Act amendments to the New Jersey Law Against Discrimination (NJLAD) after discovering that two similarly situated Black colleagues have been paid tens of thousands of dollars more each year despite having demonstrably lesser academic credentials and experience. The trial court granted summary judgment to the College solely because Professor Lavell is a member of a racial “majority.” Relying on *Erickson v. Marsh & McLennan Co.*, 117 N.J. 539, 551 (1990) the court held that a white plaintiff must first produce “background circumstances” showing the employer is “the unusual employer that discriminates against the majority” and Plaintiff failed to meet this burden. 2T30-31.¹

That ruling cannot stand. On June 5, 2025, the United States Supreme Court unanimously decided *Ames v. Ohio Department of Youth Services*, 145 S.Ct. 1540 (2025), expressly abolishing the very “background circumstances” hurdle on which the court below relied, holding that the law leaves “no room for courts to impose special requirements on majority-group plaintiffs alone.” New Jersey

¹ 1T=transcript of November 22, 2024;
2T=transcript of December 6, 2024.

courts have always construed the NJLAD in lock-step with federal anti-discrimination statutes, including Title VII, unless the statutory language diverges, and it does not here. *Ames* compels reversal.

Even apart from *Ames*, the trial court’s decision is fatally flawed: (1) the Equal Pay Act is a strict-liability statute that never required proof of discriminatory intent, much less a judicially invented “background circumstances” test; (2) imposing a higher evidentiary burden on white plaintiffs contravenes the Equal Protection Clause; and (3) in any event, Professor Lavell introduced ample evidence, including the College’s own affirmative-action policies, salary-adjustment practices, and expert testimony, creating genuine issues of material fact under any standard.

Accordingly, the judgment below should be reversed, and the matter remanded for trial, free of the unconstitutional and now repudiated “background circumstances” barrier.

PROCEDURAL HISTORY

On July 22, 2024, Plaintiff filed this action asserting claims for unequal pay under the New Jersey Law Against Discrimination N.J. Stat. § 10:5-1 et seq. (“NJLAD”), as amended by the Diane B. Allen Equal Pay Act N.J.S.A § 10:5-12(t).

Defendant filed a Motion for Summary Judgment on September 16, 2024, seeking dismissal of Appellant's claims. On October 29, 2024, Plaintiff filed a motion to stay proceedings pending the United States Supreme Court decision in *Ames v. Ohio Department of Youth Services*, 145 S.Ct. 1540 (2025).

On November 22, 2024, the trial court denied Plaintiff's motion to stay. 1T. On December 6, 2024, the trial court granted Defendant's motion for summary judgment. 2T30-31.

STATEMENT OF FACTS

Plaintiff, William T. Lavell ("Plaintiff"), is a sixty-eight (68) year-old male Caucasian individual who began working for Defendant in 1995, as an Assistant Professor I of Chemistry. Pa681. Plaintiff was repeatedly promoted, ultimately reaching the role of Professor, which he still holds today. Pa479; Pa481; Pa683.

When Plaintiff applied to teach at the Defendant in 1994, he had already accumulated seven years of experience teaching chemistry as an Assistant Professor at the U.S. Naval Academy. Pa51-52. Plaintiff additionally had received degrees in his field from some of the country's most prestigious universities, a Bachelor's Degree in Chemistry from Ursinus College, a Master's Degree in Analytical Chemistry from Villanova University, and a Master's Degree and Ph.D. in Organic Chemistry from Princeton University. Pa684. In December of 1994,

Defendant officially hired Plaintiff to its Assistant Professor I role at a starting salary of \$36,000.00. Pa681; Pa695.

In contrast, when Melvin Roberts (African-American) applied to teach at the Defendant in 1990, he had never held a faculty position at any educational institution. Pa103. His only teaching experience consisted of the single semester he spent as an Adjunct Professor. Pa102-103. Moreover, Roberts' only education at that time was a Bachelor's Degree and a Master's Degree in Mechanical Engineering. Pa698. Defendant hired Roberts that same year as an Assistant Professor I at an annual rate of \$44,000.00. Pa701; Pa703.

When Defendant hired Lawrence Chatman (African-American) to teach at the Defendant in 1990, he had no prior teaching experience and his only education in his field of study was a Bachelor's Degree in Electrical Engineering. Pa124; Pa128; Pa129. However, the Defendant ultimately hired Chatman as an Assistant Professor II at a rate of \$38,000.00. Pa144.

Given Plaintiff's superior educational qualifications, Defendant should have hired Plaintiff at a higher starting level than Chatman and Roberts. Pa708-709. According to the expert testimony of Dr. Don Thompson, an appropriate starting salary for someone with Plaintiff's credentials should have been at least \$52,500. *Id.* According to Dr. Thompson, "the academic discipline group known as STEM includes Chemistry, Physics, Engineering, and Computer Science. Each of these

fields requires methods that use the scientific method and/or the mathematical method...When Lavell, Roberts and Chatman were hired by CCC, they each belonged to STEM disciplines.” Pa707. Dr. Thompson further opined that “the standard in academia for placing a newly hired college faculty member is based on three quantifiable criteria: Highest advanced degree earned in one’s discipline, Number of years of college teaching experience, and Academic publication record.” Pa763.

On September 14, 2020, Plaintiff sent Defendant an Open Public Records Act (“OPRA”) request for all position control reports from 1995-1996 through 2020-2021. Pa714. Two days later, Plaintiff received the data. After analyzing this data, Plaintiff recognized stark disparities between his compensation and that of Chatman and Roberts. According to Defendant’s Position Control Reports, in 2020, Chatman would earn \$137,157.00, Robert’s would earn \$142,606.00, while Plaintiff would receive a substantially lower salary of \$91,923.00. Pa718; Pa720.

As Professors of the sciences, Plaintiff, Chatman and Roberts were similarly situated employees. They each held the title of Professor, shared the same responsibilities, had their work performance evaluated under the same standard, and reported to the same supervisor. Pa107-108; Pa110; Pa132.

On November 24, 2020, Plaintiff submitted a detailed memorandum with a request for a salary adjustment, to Donald Borden (“Borden”), Kathleen Kane

(“Kane”), Executive Director of Human Resources, and others. Pa750- 759; Pa741. On November 30, 2020, Defendant rejected Plaintiff’s proposal in an email sent by Kane, on Borden’s behalf. Pa761.

Additionally, Defendant has demonstrated a pattern of racial bias against Caucasian individuals. Defendant’s Affirmative Action policy specifically aims to benefit “minority group applicants” seeking open job vacancies. Pa773. It additionally instructs Defendant to urge employment officers to refer “qualified minority group applicants” to them. *Id.* In Kane’s deposition, she admitted that Defendant’s Affirmative Action policy specifically sought to encourage employers to refer non-Caucasian applicants. Pa422.

Defendant’s Affirmative Action policy further specifies its intention of maintaining “qualified minority group personnel” at all job levels, and encouraging minority group Supervisors to participate in its training seminars. Pa775. Defendant’s Affirmative Action policy fails to offer the same opportunities and assurances to non-minority Caucasian individuals. Moreover, Kane testified that she would rather hire a “minority candidate” over an equally qualified Caucasian applicant. Pa431.

Additionally, although Defendant flatly denied Complainant’s request to correct his salary, it was more than happy to do so for an African American Professor, Roberts. On September 6, 2014, Roberts requested that his Professor

salary be raised from \$116,333.00 to \$123,200.00. Defendant granted his request and praised him for his service to the college. Pa780; Pa782.

ARGUMENT

I. THE TRIAL COURT’S DECISION MUST BE REVERSED BECAUSE THE U.S. SUPREME COURT OVERTURNED THE “BACKGROUND CIRCUMSTANCES” TEST. (Raised Below: Pa1; Pa2; 1T15; 2T30)

In this case, the **sole** basis for the trial court’s grant of summary judgment was that because Plaintiff was white (and part of a “majority”) he was required to “demonstrate background circumstances” that the College is the unusual employer who discriminates against the majority.² 2T30-31. Relying upon *Erickson v. Marsh & McLennan Co.*, 117 N.J. 539, 551 (1990), the trial court concluded in an oral three (3) paragraph Order, and with no analysis or discussion of the record, that Plaintiff failed to “establish” this burden. *Id.*

However, since the trial court’s decision, the background circumstances test has been overturned by the United States Supreme Court.³ On June 5, 2025, the Court **unanimously** decided *Ames v. Ohio Department of Youth Services*, 145 S.Ct. 1540 (2025), expressly abolishing the “background circumstances” test.

² This is referred to colloquially as the “background circumstances” test.

³ Plaintiff filed a motion with the trial court to stay any decision on Defendant’s motion for summary judgment pending the Supreme Court’s decision in *Ames* as it would control the outcome of Defendant’s motion. 1T4-5. The trial court denied Plaintiff’s motion. *Id.*

In *Ames*, the Court began with the text of Title VII, explaining that the “disparate-treatment provision draws no distinctions between majority-group plaintiffs and minority-group plaintiffs.” *Id.* at 1546. “[T]he standard for proving disparate treatment under Title VII does not vary based on whether or not the plaintiff is a member of a majority group...[t]he ‘background circumstances’ rule flouts that basic principle.” *Id.*

The Court also explained that the test is an “inflexible formulation” because it “uniformly subject[s] all majority-group plaintiffs to the same, highly specific evidentiary standard in *every* case....the rule effectively requires majority-group plaintiffs (and only majority-group plaintiffs) to produce certain types of evidence—such as statistical proof or information about the relevant decisionmaker’s protected traits—that would not otherwise be required to make out a *prima facie* case.” *Id.* at 1546-47. (emphasis in original).

Ames controls this case and compels reversal. New Jersey courts look to federal law for guidance about interpreting the NJLAD, specifically Title VII of the Civil Rights Act. *See Grigoletti v. Ortho Pharm. Corp.*, 118 N.J. 89, 570 A.2d 903, 911 (N.J. 1990) (holding that Title VII of the Civil Rights Act of 1964 is a “key source of interpretive authority,” and that substantive and procedural standards developed under the NJLAD “have been markedly influenced by the federal experience”); *see also Bergen Commer. Bank v. Sisler*, 157 N.J. 188, 723 A.2d 944,

949 (N.J. 1999) (when interpreting the NJLAD, New Jersey courts should look to federal cases arising under analogous provisions of Title VII of the Civil Rights Act of 1964); *Shaner v. Horizon Bancorp.*, 116 N.J. 433, 561 A.2d 1130, 1133 (N.J. 1989) (approving of the use of "federal anti-discrimination statutes" in general, and Title VII in particular, when interpreting the NJLAD).

In fact, the sole rationale used to import the “background circumstances” test into New Jersey law in the first place was that federal cases were doing the same under Title VII. In *Erickson v. Marsh & McLennan Co.*, 117 N.J. 539, 551, 569 A.2d 793, 799 (1990) the New Jersey Supreme Court adopted the “background circumstances” test for the NJLAD by pointing to federal cases incorporating the test into Title VII. “The rationale underlying this requirement, derived from its **federal counterpart**, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq....” *Id.* (emphasis added). The Court goes on to cite a series of federal cases adopting the “background circumstances” test. *See Id.* (citing *Murray v. Thistledown Racing Club Inc.*, 770 F.2d 63, 67 (6th Cir.1985); *Livingston v. Roadway Express*, 802 F.2d 1250, 1252 (10th Cir.1986); *Jasany v. United States Postal Serv.*, 755 F.2d 1244, 1252 (6th Cir.1985); *Parker v. Baltimore & Ohio R.R.*, 652 F.2d 1012, 1017 (D.C.Cir.1981); *Jones v. Slater Steels Corp.*, 660 F.Supp. 1570, 1575 (N.D.Ind.1987); *Rivette v. United States Postal Serv.*, 625 F.Supp. 768, 771 (E.D.Mich.1986)).

The Court did not base its decision on any legislative history from the New Jersey legislature or unique language in the NJLAD. Nor could it. The language of Title VII and the NJLAD are virtually identical. (*Compare* 42 U.S.C. §2000e-2(a)(1)(“fail or refuse to hire or discriminate against any individual... because of such individual’s race...”)) *with* N.J.S.A. 10:5-12(a)(“refuse to hire or employ... or discriminate against such individual... because of the race....”). Rather, the *Erickson* Court based its decision **solely** upon federal cases that had adopted the “background circumstances” test under Title VII.

Ames overruled **all** the precedents relied upon by the *Erickson* Court. Because they were the sole basis of its decision, the *Erickson* rationale no longer has any support. Accordingly, *Erickson* and its progeny are no longer good law. The “background circumstances” test has been eradicated by *Ames*. With no textual difference to justify divergent treatment, the NJLAD must track *Ames* and abandon the background-circumstances hurdle. Because the sole ground for summary judgment has vanished, reversal is mandatory. The judgment should therefore be reversed and the case remanded for trial.

**II. THE TRIAL COURT’S APPLICATION OF THE “BACKGROUND CIRCUMSTANCES” TEST VIOLATED THE EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION.
(Raised Below: Pa1; Pa2; 1T15; 2T30)**

Additionally, the trial court’s application of the “background circumstances” test violated the Equal Protection Clause of the 14th Amendment to the United States Constitution. The trial court held that Plaintiff (who is white and a member of the “majority”) was required to meet a higher burden of proof **solely** because of his race. In essence, a white plaintiff is required to demonstrate “background circumstances” that their employer is the “unusual” defendant “who discriminates against the majority”—an “addition[al]” showing that no other race must make. This violates the Equal Protection Clause.

According to the United States Supreme Court “the equal protection of the laws” guarantees “the protection of equal laws.” *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (emphasis added); *see also, e.g., Truax v. Corrigan*, 257 U.S. 312, 333-34 (1921); *Skinner v. State of Okl. ex rel. Williamson*, 316 U.S. 535, 541 (1942); *Romer v. Evans*, 517 U.S. 620, 633-34 (1996). The guarantee of “equal laws,” the Court has stressed, is “universal in [its] application.” *Yick Wo*, 118 U.S. at 369. It applies to “all persons.” *Id.* And it promises that everyone, “whether colored or

white, shall stand equal before the laws.” *Strauder v. State of W. Virginia*, 100 U.S. 303, 307 (1879).

“The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color”:
“Eliminating racial discrimination means eliminating all of it.” *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 206 (2023) (cleaned up). The government “may never use race as a stereotype or negative.” *Id.* at 213. The Fourteenth Amendment extends to “all governmentally imposed discrimination,” including in the “judicial” branch. *Palmore v. Sidoti*, 466 U.S. 429, 432 & n.1 (1984).

In his *Ames* concurrence, Justice Thomas identified the Constitutional flaw in the “background circumstances” test, explaining that the “rule is also plainly at odds with the Constitution’s guarantee of equal protection. That guarantee cannot mean one thing when applied to one individual and something else when applied to [another].” *Ames*, 145 S. Ct. at n.1.(internal quotations and citations omitted). He went on to write, “[i]n other words, courts with this rule have enshrined into Title VII’s antidiscrimination law an explicitly race-based preference: White plaintiffs must prove the existence of background circumstances, while nonwhite plaintiffs need not do so. Such a rule is undoubtedly contrary to Title VII, and likely violates

the Constitution, under which there can be no such thing as either a creditor or a debtor race.” *Id.* at 1550-51. (internal quotations and citations omitted).

This Court should reach the same conclusion as Justice Thomas. Imposing different evidentiary burdens due to a plaintiff’s race is subject to a strict scrutiny analysis because “any person, of whatever race, has the right to demand that any governmental actor ... justify any racial classification” under “the strictest judicial scrutiny.” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995) (emphasis added). Here, neither the Defendant or the trial court even attempted to justify the “background circumstances” test under a strict scrutiny analysis (nor could they).

At bottom, by imposing an additional burden on Plaintiff because of his race, the trial court violated the Equal Protection Clause. This compels reversal.

**III. THE “BACKGROUND CIRCUMSTANCES” TEST DOES NOT APPLY TO THE DIANE B. ALLEN EQUAL PAY ACT AMENDMENTS.
(Raised Below: Pa2; 2T30)**

Additionally, the trial court’s decision fails for another reason: the “background circumstances” concept does not even apply to claims under the Diane B. Allen Equal Pay Act. In all of the cases applying the “background circumstances” test to the NJLAD (eg. *Bergen Com. Bank v. Sisler*, 157 N.J. 188, 214 (1999); *Erickson v. Marsh & McLennan Co.*, 117 N.J. 539, 551 (1990)), the plaintiff was required to prove that their employer had an intent to discriminate. In fact, in a traditional NJLAD case “what makes an employer's personnel action

unlawful is the employer's intent.” *Zive v. Stanley Roberts, Inc.*, 182 N.J. 436, 446, 867 A.2d 1133, 1138 (2005).

However, under the Diane B. Allen Equal Pay Act “in order to establish liability under the Equal Pay Act, an employee does not need to establish that an employer intended to discriminate against a member of a protected class.”

*Guidance on the Diane B. Allen Equal Pay Act, *030220-Equal-Pay-Act-Guidance-Appendices-Only.pdf (nj.gov)*, Mar. 2020. It would be nonsensical for a “majority” employee to now have to prove that their employer is the “unusual employer who discriminates against the majority” when they do not have to prove intent to discriminate as part of their *prima facie* case. In essence, the trial court imposed an evidentiary burden that does not exist.

IV. PLANTIFF SATISFIED THE “BACKGROUND CIRCUMSTANCES” TEST (Raised Below: 2T30)

Even assuming *arguendo* that: *Ames* did not overrule the background circumstances test, that it did not violate the Equal Protection Clause, and it applied to claims under the Diane B. Allen Equal Pay Act, the trial court must **still** be reversed.

As noted above, a plaintiff can demonstrate "background circumstances" sufficient to raise an inference of discrimination "by establishing either that the plaintiff was better qualified for the position than the minority candidate selected

or that the defendant had some reason or inclination to discriminate against the majority class." *Bergen Commercial Bank, supra*, 157 N.J. at 214.

Here, Plaintiff provided sufficient "background" evidence to be evaluated by a jury. When ruling on a motion for summary judgment, courts must consider the evidence "in the light most favorable to the non-moving party," drawing "all legitimate inferences in favor of that party." *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 540 (1995).

Rule 4:46-2 states that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). The trial judge must decide 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*, at 540. An appellate court uses the same standard as the trial court when reviewing a trial court's decision to grant summary judgment. *Prudential Prop. & Cas. Ins. Co. v. Boylan*, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998).

In this case, the Defendant's Affirmative Action policy specifically aims to benefit "minority group applicants" seeking open job vacancies. Pa775. It

additionally instructs Defendant to urge employment officers to refer “minority group applicants” to them. *Id.* In Kathleen Kane’s deposition, she admitted that Defendant’s Affirmative Action policy specifically sought to encourage employers to refer non-Caucasian applicants. Pa422.

"A rational employer can be expected to promote the more[-]qualified applicant over the less[-]qualified, because it is in the employer's best interest to do so." *Harding v. Gray*, 9 F.3d 150, 153 (D.C. Cir. 1993). "When an employer acts contrary to its best interests, then it is proper to infer a discriminatory motive." *DeCapua v. Bell Atl.-N.J., Inc.*, 313 N.J. Super. 110, 122, 712 A.2d 725 (Law Div. 1998). In *Mills v. Health Care Serv. Corp.*, 171 F.3d 450 (7th Cir. 1999), the court considered evidence of the employer’s diversity-focused hiring practices and a pattern of promoting minority candidates over majority candidates as sufficient "background circumstances."

Additionally, Kane, testified during her deposition that she would rather hire a “minority candidate” over an equally qualified Caucasian applicant. Pa431. In *Covaleski v. Hewlett-Packard Co.*, 2016 U.S. Dist. LEXIS 79636, *23 (E.D. Pa. June 20, 2016) the court denied summary judgment in an age discrimination case because an employer’s witness admitted that he would prefer hiring a younger candidate to an equally qualified older candidate.

Additionally, although Defendant flatly denied Complainant's request to correct his salary, it was more than happy to do so for an African American Professor, Roberts. On September 6, 2014, Roberts requested that his Professor salary be raised from \$116,333.00 to \$123,200.00. Defendant granted his request and praised him for his service to the college. Pa769; Pa771.

Also, given Plaintiff's superior educational qualifications, Defendant should have hired Plaintiff at a higher starting level than Chatman and Roberts. Pa707-708. According to the expert testimony of Dr. Don Thompson, an appropriate starting salary for someone with Plaintiff's credentials should have been at least \$52,500. *Id.*

All the foregoing raises a genuine issue of material fact regarding the "background circumstances" that must go to the jury.

CONCLUSION

Plaintiff therefore respectfully asks that this court reverse the trial court's order granting summary judgment to Defendant and remand the matter for trial.

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DATED: July 30, 2025

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION**

WILLIAM T. LAVELL,

Plaintiff-Appellant

v.

CAMDEN COUNTY COLLEGE,

Defendant-Appellee.

DOCKET NO. A-001300-24

On Appeal from the Superior
Court of New Jersey, Law
Division, Camden County

Docket No. CAM-L-002239-24

SAT BELOW:

Hon. John S. Kennedy, J.S.C.

**BRIEF ON BEHALF OF DEFENDANT-APPELLEE CAMDEN COUNTY
COLLEGE**

Submitted: September 15, 2025

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PRELIMINARY STATEMENT

Resolution of this appeal can be achieved through simple application of stare decisis. Over thirty years ago, the New Jersey Supreme Court in Erickson v. Marsh & McLennan Co., 117 N.J. 539 (1990) held that, to establish a *prima facie* claim of reverse discrimination, the first prong of the McDonnell Douglas framework must be modified to require a majority-group plaintiff to show background circumstances supporting the suspicion that the defendant is the unusual employer who discriminates against the majority. The rationale underlying this element reflects congressional efforts to address the nation's history of discrimination against racial minorities. Erickson, 117 N.J. at 551. Nine years later, in Bergen Commercial Bank v. Sisler, 157 N.J. 188 (1999), our Supreme Court affirmed this standard. That precedent has been unaltered for over three decades, and our State courts have consistently upheld and reaffirmed the background circumstances standard in reverse discrimination claims.

The trial court correctly determined it is bound by Erickson, and had no authority to circumvent the New Jersey Supreme Court regardless of the Ames decision. The trial court found that Plaintiff had failed to establish background circumstances sufficient to raise an inference of discrimination. Plaintiff now appeals, arguing that Ames, a Title VII case, requires reversal of summary

judgment in this case alleging a New Jersey Law Against Discrimination (“NJLAD”) claim.

The trial court’s decision should be affirmed. First, decisions of the U.S. Supreme Court interpreting federal law are not binding on state courts construing state legislation where no federal constitutional issue is implicated. Second, the trial court did not err in finding that it was bound by our Supreme Court’s holding in Erickson. Third, the trial court properly found that Plaintiff failed to establish the requisite background circumstances to raise an inference of discrimination.

Finally, this Court need not decide what impact, if any, the Ames decision has on our State’s legal landscape because even if the background circumstances did not apply, Plaintiff cannot establish a *prima facie* claim of unequal pay under the NJLAD and the College has established the affirmative defenses set forth in N.J.S.A. 10:5-12(t).

The trial court’s decision granting summary judgment should be affirmed.

PROCEDURAL HISTORY

Plaintiff filed a Complaint in the United States District Court for the District of New Jersey on March 26, 2021 (the “federal action”). (Pa577-Pa585). Plaintiff’s federal action alleged claims of race discrimination in violation of 42 U.S.C. § 1981 (“Section 1981”) and the New Jersey Law Against Discrimination

(“NJLAD”). (Id.). Plaintiff did not allege any violation of his equal protection rights in the federal action. (Id.). On October 23, 2023, both the College and Plaintiff filed Motions for Summary Judgment. (Da1-Da3). In his Opposition to the College’s Motion for Summary Judgment, Plaintiff stipulated that he did not intend to pursue his claim under Section 1981 at trial, raising the issue of whether the District Court, in its discretion, should continue to exercise supplemental jurisdiction over Plaintiff’s NJLAD claim when the sole federal claim over which the District Court exercised original jurisdiction had been voluntarily dismissed. (Da5).

On June 27, 2024, the District Court issued an Order and Opinion declining to retain jurisdiction over the federal action by exercising its discretion under 28 U.S.C. § 1367(c)(3) and dismissed the federal action without prejudice to Plaintiff’s ability to refile his NJLAD claim in state court. (Da4-Da13). On July 22, 2024, Plaintiff refiled in the Superior Court of New Jersey a Complaint alleging, as in the federal action, his claim of race discrimination under the NJLAD, as amended by the Diane B. Allen Equal Pay Act (the “State action”). (Pa4-Pa16). Plaintiff again did not bring a claim alleging violation of his equal protection rights under the U.S. or New Jersey Constitutions. (Id.). The parties engaged in extensive discovery in the federal action and all discovery was completed. Because Plaintiff’s NJLAD claim alleged in the State action was

identical to his claim in the federal action, no further discovery was necessary to adjudicate Plaintiff's claim and, on September 16, 2024, the College moved for summary judgment. (Pa17-Pa18).

On October 29, 2024, Plaintiff filed a motion to stay the College's motion for summary judgment pending the United States Supreme Court's Decision in Ames v. Ohio Department of Youth Services. (Da14-Da15). On November 22, 2024, the trial court denied Plaintiff's motion to stay, finding that it "does not have the authority or the ability to circumvent the New Jersey Supreme Court." (1T15:19-16:1). On December 6, 2024, the trial court granted the College's motion for summary judgment, finding that, in analyzing Plaintiff's claim under the New Jersey Supreme Court's decision in Erickson, "it's clear that an employee needs to demonstrate background circumstances sufficient to raise an inference of discrimination" and Plaintiff has not established his burden in this case. (2T31:2-8). The parties attend a CASP settlement conference on April 30, 2025, which was unsuccessful. This appeal follows.

STATEMENT OF FACTS

Plaintiff is a Caucasian male who has been employed with the College since January 1995 to the present. (Pa10). In January 1995, he accepted a position as an Assistant Professor I in the chemistry department at a starting salary of \$36,000. (Pa55). Acting Dean, Dr. Margaret Hamilton, a Caucasian

woman, hired Plaintiff and set his starting salary. (Pa55, Pa68, Pa559-Pa560). Plaintiff accepted the proposed starting salary without negotiation. (Pa560). At the time, he was teaching high school Chemistry. (Pa51). Plaintiff became a member of the union upon starting his employment with the College and, throughout his tenure with the College, his compensation was governed by a Collective Negotiations Agreement (“CNA”). (Pa55-Pa59).

The Camden County College Faculty Association affiliated with the New Jersey Education Association is the sole collective bargaining agent for all full-time faculty employed by the Camden County College Board of Trustees. (Pa151). The CNA governs faculty salary and the procedures regarding grievances, promotions, increases in base salary, merit raises, salary adjustments, and the salary for a faculty member who transfers to an administration position and subsequently returns to faculty. (Pa168-Pa174, Pa187-Pa189). Each CNA provides a salary guide, which sets forth the minimum and maximum salary range for the following positions and ranking system within the College: Instructor, Assistant Professor II, Assistant Professor I, Associate Professor, and Full Professor. (Pa187). The CNA is applied equally to all faculty members regardless of race, and the College is prohibited from unilaterally adjusting a faculty member’s salary contrary to the provisions of the CNA and the exclusive bargaining agent. (Pa151, Pa453).

The CNA also sets forth the annual increases in base salary. Relevant here, the July 1, 1988 – June 30, 1991 CNA provided for three consecutive years of 7% increases in base salary. (Pa247). The July 1, 1991 – June 30, 1994 CNA provided for three consecutive years of 8% increases in base salary. (Pa315). The July 1, 1994 – June 30, 1996 CNA provided for three consecutive years of 5% increases in base salary. (Pa385).

Effective July 1, 2016, Plaintiff was offered the twelve-month, non-affiliated position of Acting Interim Dean of Math, Science and Health Careers at an annual salary of \$106,682. (Pa59-Pa60, Pa479). At the time he became Acting Interim Dean, Plaintiff's base faculty salary was \$84,228. (Pa60, Pa479). The offer letter set forth how Plaintiff's salary would change from the position of Professor to Acting Interim Dean, and how his salary would be treated upon his return from Acting Interim Dean to faculty. (Pa59, Pa479). On August 14, 2017, Plaintiff returned to his faculty position with less than 10 years' service as Acting, Interim Dean, and assumed the accompanying salary dictated by his Offer Letter and the CNA. (Pa479, Pa481). Upon his return to faculty as a Professor of Chemistry, Plaintiff's salary and compensation was again governed by the CNA. (Pa62). Plaintiff admits that, other than when he served as Acting, Interim Dean, his compensation has been governed by the applicable CNA and his year-to-year salary changes have been consistent with the CNA. (Pa63).

During the one-year period when Plaintiff served as Acting, Interim Dean, he became aware of salaries of other members of the faculty through access to position control reports. (Pa64). On September 18, 2019, after his return to faculty, he submitted a letter to his Dean, John Steiner (Caucasian), requesting an increase in his base salary. (Pa69, Pa483). In this letter, Plaintiff described the FY2018 base salaries for himself and five (5) other faculty members who were all hired at different times, in different positions, and paid different amounts. (Pa70, Pa483). Of those five individuals, one was Puerto Rican and the other individuals were all Caucasian. (Pa70). The salaries were as follows:

| Name | Rank | Department | Highest Degree | FY18 base Salary | Date of Hire |
|----------------|------------------|-------------|----------------|------------------|--------------|
| F. Gonzalez | Asst. Prof. 1 | Mathematics | M.A. | \$99,787 | Jan. 1992 |
| Teresa Smith | Asst. Prof. 2 | Chemistry | Ph.D. | \$91,550 | Sept. 1999 |
| Susan Choi | Asst. Prof. 1 | Chemistry | Ph.D. | \$90,785 | [left blank] |
| Leonid Khazan | Professor | Physics | Ph.D. | \$90,336 | Jan. 1998 |
| Gail Stewart | Professor | Biology | Ph.D. | \$87,620 | Sept. 1995 |
| William Lavell | Professor | Chemistry | Ph.D. | \$86,312 | Jan. 1995 |

(Pa70, Pa483). Nowhere in his letter did he allege that his concerns had anything to do with race. (Pa425, Pa483). After investigation of his allegations in the letter, including review of the pay history, information, and faculty base salaries of each individual identified by him, Plaintiff was advised that the salaries had been correctly determined contractually, and that there were no discrepancies

identified that were in any way improper or contrary to the contractual process and CNA. (Pa72, Pa74-Pa75, Pa425, Pa489-Pa493, Pa504).

Thereafter, upon returning to faculty, on November 24, 2020, Plaintiff submitted a request for an adjustment to his base salary in the form of a detailed memorandum to Donald Borden (Caucasian), then-College President, and to several other members of the faculty and administration. (Pa75, Pa513-Pa523). The President referred this letter to the Executive Director of Human Resources, Kathleen Kane (Caucasian). Plaintiff identified four (4) individuals as comparators: Melvin Roberts (African-American); Lawrence Chatman (African-American); Teresa Smith (Caucasian); and Susan Choi (Caucasian). (Pa70, Pa76, Pa515). All were more senior than Plaintiff, except for Professor Choi. (Id.). Plaintiff admitted that the salaries could be different because of a difference in starting salaries, but nowhere in his November 24, 2020 memo did he mention starting salaries. (Pa76). Nor did Plaintiff's memo allege that he was treated differently because he was white or include any analysis or differentiate between salaries based on race. (Pa79-Pa80).

Following receipt of Plaintiff's November 24, 2020 memo, Ms. Kane reviewed the salaries of the individuals identified by Plaintiff. (Pa428). On November 30, 2020, Ms. Kane responded to Plaintiff's request advising that following review, the College's position remained that he had been fairly

compensated throughout his career at the College, consistent with the CNA. (Pa525).

In his federal action, Plaintiff alleged—for the first time—that he was being discriminated against because of his race. (Pa577-Pa585). Plaintiff claimed that his base salary should be increased to a level commensurate with two African-American Professors, Dr. Melvin Roberts and Lawrence Chatman. (Id.). However, the difference in pay among the three professors is for reasons entirely unrelated to race. Dr. Melvin Roberts was hired at the College in September 1990 as an Assistant Professor I in CIM (Computer Integrated Manufacturing) Automation and Electronics at a starting salary of \$44,000 when hired by professors in the Engineering Department. (Pa105). Professor Lawrence Chatman was hired at the College in January 1991 as an Assistant Professor II in Engineering Technology at a starting salary of \$38,000. (Pa128-Pa129). Both Dr. Roberts and Professor Chatman were hired by William J. Wilhelm (Caucasian), then-Head of Human Resources. (Pa563-Pa567).

The CNAs from when Professors Roberts and Chatman joined the College provided larger increases than the later CNAs, including from 1988 until 1996, three (3) consecutive years of 7%, 8%, and 5% annual increases in base salary, respectively. (Pa247, Pa315, Pa385). Thus, at the time that Plaintiff joined the College in 1995, increases in salary were not as generous and he did not have

the compounding effect of the prior years as had Professors Roberts and Chatman. (Id., Pa425).

Further, central to the College's decision to hire Professors Roberts and Chatman was the fact that they were licensed engineers with private sector experience at a time when the College was expanding its Engineering program and had built a new, cutting edge, CIM building, dedicated exclusively to applied Engineering and industrial utilization of robots. (Pa101-Pa103, Pa124-Pa125, Pa446, Pa564-Pa565). Professors Roberts and Chatman were hired to oversee and serve as Professors in the CIM Program. (Id.). Their credentials as licensed engineers with private sector experience were invaluable in developing the Engineering Department, which was a critical need of the College at the time. (Pa563-Pa567). As such, the difference in pay between the professors is because they were hired at different points in time thus their starting salaries were different. (Pa105, Pa128-Pa129, Pa247, Pa315, Pa385, Pa533).

Several factors are considered by the College in making recommendations regarding starting salary including market value, industry salaries associated with the position, availability of instructors with any credentials or experience in the particular area, the likelihood that the College can attract an individual in that field, degrees attained, teaching experience, and the applicant's existing salary as well as available departmental budgets. (Pa507, Pa559-Pa561).

Annual raises in the CNA are granted on the faculty as a whole based on contractually agreed upon numbers. (Pa505). These annual raises are a percentage of a salary, and salary is quite often dependent on seniority. (Id.).

Both Dr. Roberts and Professor Chatman are licensed engineers with private sector experience prior to starting their employment at the College. (Pa101-Pa103, Pa124-Pa125, Pa446, Pa564-Pa565). At the time of their hire in the 1990s, the College sought to attract engineers to work in the engineering program in the CIM building and to further connect to the engineering industry and help students transfer their skills into the industry. (Id.) These distinctions readily explain the differences in starting salaries.

There are approximately 93 members of the faculty at the College. (Pa88). However, there are other non-Caucasian faculty members hired prior to Plaintiff who receive a salary that is lower than his. (Pa84-Pa86). Rondald O'Neil is an African-American Professor at the College, who was hired on September 1, 1994 and receives a base salary of \$86,766. (Id.) Plaintiff admits that Professor O'Neil started four months before Plaintiff, that Plaintiff's salary is higher than Professor O'Neil's salary, and that because Professor O'Neil is a member of the faculty, his duties are very similar to Plaintiff's duties. (Id.). Marie English is an African-American, Assistant Professor II of Psychology, who was hired in 1989 and receives a base salary of \$91,681. (Id.). Plaintiff admits that Professor

English “probably has similar job duties [as Plaintiff] because of her position as faculty.” (Id.).

Additionally, five (5) faculty members were hired by the College in 1995, including Plaintiff, all are White:

- Martine Howard (White) serves as an Assistant Professor II in Language & Culture. She was hired at a starting base salary of \$32,500. Her base salary as of contract year 2020 is \$79,715.
- Penny Luczak (White) serves as an Assistant Professor II in Mathematics. She was hired at a starting base salary of \$33,000. Her base salary as of contract year 2020 is \$77,717.
- Carla Monticelli (White) serves as a Professor of Mathematics. She was hired at a starting base salary of \$34,000. Her base salary as of contract year 2020 is \$90,372.99.
- Gail Stewart (White) serves as a Professor of Biology. She was hired at a starting base salary of \$36,500. Her base salary as of contract year 2020 is \$93,260.

(Pa88-Pa89, Pa549-Pa556). Thus, at the time Plaintiff joined the College in 1995, he was hired at the second-highest salary in his department as compared to the four, white female professors hired in his cohort at the same time. (Pa549-Pa556, Pa653-Pa654). His base salary at the time of hire 1995 was commensurate with the faculty members hired at the same time as him and with faculty members hired within his department. (Id.).

As of contract year 2020, Plaintiff is the second-highest paid Professor of those hired within the same cohort as Plaintiff in 1995. (Pa89, Pa549-Pa550). Plaintiff is the highest paid Chemistry Professor as compared to all White males.

(Pa549-Pa550). Plaintiff remains the second-highest paid Professor among all Chemistry Professors, with the highest paid Chemistry Professor being White:

- Susan Choi (White), Associate Professor, base salary as of contract year 2020 is \$101,326.01
- Plaintiff William Lavell (White), Professor, base salary as of contract year 2020 is \$91,924.
- Ying Mao (Asian), Assistant Professor I, base salary as of contract year 2020 is \$74,428.01
- David Nugiel (White), Assistant Professor I, base salary as of contract year 2020 is \$61,727.01.
- Roberto Feudale (White), Associate Professor, base salary as of contract year 2020 is \$60,331. (Pa89, Pa549-Pa550).

LEGAL STANDARD

An appellate court reviews the trial court's granting of summary judgment de novo, applying the same standard as the trial court. Sullivan v. Port Auth. of N.Y. & N.J., 449 N.J. Super. 276, 282 (App. Div. 2017).

Summary judgment must be granted to the moving party "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Id. The court must determine "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.” Rios v. Meadowlands Hosp. Med. Ctr., 463 N.J. Super. 280, 286 (App. Div. 2020).

“To defeat a motion for summary judgment, the opponent must come forward with evidence that creates a genuine issue of material fact.” Sullivan, 449 N.J. Super. at 282 (internal quotations omitted). “Conclusory and self-serving assertions by one of the parties are insufficient to overcome the motion.” Id. at 283. “If there is no genuine issue of material fact, we must then decide whether the trial court correctly interpreted the law.” Id.

LEGAL ARGUMENT¹

I. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT BECAUSE THE BACKGROUND CIRCUMSTANCES TEST STILL APPLIES UNDER NEW JERSEY LAW (1T6-7, 1T9-16, 2T4-13, 2T19-27)

Plaintiff argues the U.S. Supreme Court’s decision in Ames v. Ohio Department of Youth Services “abolished” the background circumstances standard and, therefore, Ames “controls this case and compels reversal.” (Pb8).

¹ Plaintiff has not articulated any argument challenging the trial court’s order denying Plaintiff’s motion to stay the College’s motion for summary judgment pending the Ames decision. Therefore, this issue has been waived. See Green Knight Capital, LLC v. Calderon, 469 N.J. Super. 390, 396 (App. Div. 2021) (“An issue not briefed on appeal is deemed waived.”). To the extent the Court considers this issue, Plaintiff’s challenge is moot as Ames has been decided. Betancourt v. Trinitas Hosp., 415 N.J. Super. 301, 311 (App. Div. 2010) (“A case is technically moot when the original issue presented has been resolved, at least concerning the parties who initiated the litigation.”). Notwithstanding, Plaintiff has not demonstrated any irreparable harm. See Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982). Defendant incorporates by reference all arguments set forth herein in support of its argument that the trial court did not err in denying Plaintiff’s request to stay pending the Ames decision.

Plaintiff argues Ames—a Title VII case—applies to Plaintiff’s claim of unequal pay arising under the NJLAD because “New Jersey courts look to federal law for guidance about interpreting the NJLAD[.]” (Id.). The U.S. Supreme Court’s decision in Ames interprets a separate federal statute and has not overruled the New Jersey Supreme Court’s interpretation of issues of purely state law.

“[D]ecisions of the United States Supreme Court interpreting federal law are not binding, however, on state courts construing state legislation where no federal constitutional issue is implicated.” See Pressler & Verniero, Current N.J. Court Rules, cmt. 3.5 on R. 1:36-3 (2025). As aptly stated by our Appellate Division:

An interpretation of federal legislation by the United States Supreme Court is not binding upon a state court’s interpretation of its own statutes . . . Of course, we are obliged to accord respect to the considered views of the federal courts, as we are to the courts of sister states, but in interpreting New Jersey law, we must give the greatest sway to our Legislature’s intendments as they are illuminated by the language of the statute at issue, the public policies underpinning the statute, and such State law precedents as are available.

Teeters v. Div. of Youth and Fam. Servs., 387 N.J. Super. 423, 429 (App. Div. 2006) (internal citations omitted).

Plaintiff asserts a claim for unequal pay under the NJLAD. (Pa9-Pa16). Ames involved a claim under Title VII. (Pb8-Pb10). Plaintiff did not bring a claim under

Title VII in this litigation. Nor is there any federal constitutional issue implicated or pled in this state action. Rather, this case involves interpretation of an issue arising under purely state law. Accordingly, neither the trial court nor this Court owe deference to the United State’s Supreme Court decision in Ames interpreting a federal claim brought exclusively under Title VII when no federal claims are at issue in this lawsuit. This Court is not bound by a decision of the U.S. Supreme Court when interpreting this State’s statutes. See Pressler & Verniero, Current N.J. Court Rules, cmt. 3.5 on R. 1:36-3 (2025); Teeters, 387 N.J. Super. at 429.

Plaintiff’s assertion that “the NJLAD must track Ames and abandon the background-circumstances hurdle” finds no support in precedent. Indeed, our Courts have not hesitated to depart from our federal counterparts if strict application of its standards would be inappropriate. See Bergen Com. Bank v. Sisler, 157 N.J. 188, 212 (1999) (citing Grigoletti v. Ortho Pharm. Corp., 118 N.J. 89, 107 (1990) (“Although this Court has recognized a need to harmonize the LAD with Title VII in order to assure a reasonable degree of symmetry and uniformity in the law, ‘we have not hesitated to depart from the McDonnell Douglas methodology if a rigid application of its standards is inappropriate under the circumstances.”))).

For example, in L.W. v. Toms River Reg’l Schs. Bd. of Educ., 189 N.J. 381 (2007), the Court addressed the issue of whether a school district may be held liable under the NJLAD when students harass another student based upon his perceived

sexual orientation and, if so, the standard of liability to be applied in such a cause of action. L.W., 189 N.J. at 389. There, the Court was tasked with determining whether the standard outlined in Lehmann v. Toys ‘R’ Us, Inc., 132 N.J. 587 (1993) employed in hostile work environment claims under the NJLAD applied to plaintiff’s claim or whether the relevant standard should mirror the “deliberate indifference” standard applied in Title VII actions. Id. at 403-04.

In declining to apply Title VII’s deliberate indifference standard to plaintiff’s claim of harassment, the Court acknowledged that although it “may look to federal jurisprudence for guidance when interpreting the LAD, [it] will not hesitate to depart ‘from federal precedent if a rigid application of its standards is inappropriate under the circumstances.’” Id. at 405 (quoting Lehmann, 132 N.J. at 600-01). Ultimately, the Court rejected the Title VII deliberate indifference standard, finding that the standard under Lehmann is applicable in the workplace and in the school setting as there are “substantial differences in scope between the LAD and Title VII,” including that Title VII was narrower than the NJLAD. L.W., 189 N.J. at 405-06.

Similarly, in Alexander v. Seton Hall University, 204 N.J. 219 (2010), the Court reviewed the timeliness of a wage discrimination complaint brought under the NJLAD, which the lower courts dismissed based on the statute of limitations analysis adopted from the United States Supreme Court’s decision in Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), addressing federal wage

discrimination claims. Alexander, 204 N.J. at 222. In declining to adopt the U.S. Supreme Court’s interpretation of the statute of limitations on wage discrimination claims in a NJLAD case, the Court concluded that there was “no persuasive reason for adopting the Ledbetter majority’s restrictive approach” to plaintiff’s NJLAD wage discrimination claim in light of settled prior case law treating payment of unequal wages in violation of New Jersey’s anti-discrimination laws as a series of actionable wrongs under the NJLAD that are subject to the two-year statute of limitations. Id. at 234-35. The Court further stated that “although we have turned for guidance to federal Title VII law when navigating new, uncharted paths as novel LAD issues have arisen . . . in the present matter, federal guidance is not necessary to settle any complicated legal issue under our LAD.” Id. at 235.

The Court’s reasoning in L.W. and Alexander applies with equal force here. As set forth below in Section II, rigid adherence to the U.S. Supreme Court’s interpretation of Ames would be inappropriate under the circumstances where, as here, the background circumstances standard is well-grounded in our jurisprudence. And for this reason—regardless of the outcome of the Ames decision—the background circumstances standard is binding precedent and still applies herein. There is no complicated legal issue, no novel issue, nor is there any ambiguity in the law which would necessitate reliance on federal guidance and interpretation of federal anti-discrimination statutes.

The U.S. Supreme Court’s decision in Ames does not align with the approach adopted by the Third Circuit in reverse race discrimination claims. Thus, while the purpose of Ames was to resolve a circuit split regarding the application of the background circumstances standard, its ruling has no impact on legal authority within our circuit because, prior to Ames, the Third Circuit did not apply this standard. Rather, the Third Circuit had already rejected the background circumstances standard. Iadimarco v. Runyon, 190 F.3d 151, 160 (3d Cir. 1999). In reviewing reverse discrimination claims under Title VII, the Third Circuit has held that in order to demonstrate a *prima facie* case in the absence of direct evidence of discrimination, a plaintiff must present “sufficient evidence to allow a reasonable fact finder to conclude (given the totality of the circumstances) that the defendant treated plaintiff less favorably than others because of [his] race[.]” Id. at 163. As such, the U.S. Supreme Court’s decision in Ames does not have nearly as significant of an impact as Plaintiff claims because the Third Circuit has already diverged from the background circumstances standard. Despite the Third Circuit rejecting the background circumstances test, the New Jersey State Courts have continued to apply it when interpreting our own State statutes when no federal claim is implicated. See, e.g., Sisler, 157 N.J. at 218; Williams v. Casino Reinvestment Dev. Auth., 2021 N.J. Super. Unpub. LEXIS 1425, at *30 (App. Div. July 13, 2021) (affirming grant of summary judgment finding plaintiff failed to establish background circumstances

test) (Da16). This further supports the notion that Ames does not alter the legal landscape of our State's precedent under the NJLAD.

To the extent that our State courts have relied on decisions from our federal counterparts, it is for persuasive and interpretative guidance only, not legal precedent. See Shepherd v. Hunterdon Developmental Ctr., 174 N.J. 1, 20 (2002) (“We have noted previously in resolving disputes under our State employment-law jurisprudence, federal case law is merely a guide.”); Rendine v. Pantzer, 141 N.J. 292, 333 (1995) (“Although we often have incorporated the reasoning of federal cases construing analogous federal statutes in our interpretation of the LAD, we have not been reluctant to depart from federal precedent when we determined it to be inappropriate.”); Alderiso v. Med. Ctr. of Ocean Cty., 167 N.J. 191, (2001) (“although we are guided by the Supreme Court's analyses of the federal statutes at issue in those cases, we must apply our State jurisprudence in the present circumstance.”). Notwithstanding, it is axiomatic that the U.S. Supreme Court's interpretation of federal legislation is not binding upon this court's interpretation of New Jersey state statutes. Teeters, 387 N.J. Super. at 429.

In sum, the trial court did not err in granting the College's motion for summary judgment finding that Plaintiff did not establish the requisite background circumstances. The U.S. Supreme Court's decision in Ames has no bearing on this

Court's analysis and our State courts are not bound by the Ames decision when interpreting our own State laws where no federal constitutional right is implicated.

II. THE TRIAL COURT DID NOT ERR IN FINDING PLAINTIFF FAILED TO DEMONSTRATE THE REQUISITE BACKGROUND CIRCUMSTANCES

The trial court correctly found that the background circumstances standard set forth by the New Jersey Supreme Court in Erickson v. Marsh & McLennan Co., 117 N.J. 539 (1990) was binding precedent, the trial court lacked the authority to circumvent the New Jersey Supreme Court's decision, and Plaintiff could not satisfy this standard. In doing so, the trial court correctly acknowledged this precedent has stood for the past 30 years and "that precedent has not changed in all that time." (1T15). The trial court found that it "does not have the authority or the ability to circumvent the New Jersey Supreme Court," that it did not have the authority "to apply some theory that the Federal Court used and apply it to the New Jersey Law Against Discrimination . . . if it is in contravention of the ruling of the New Jersey Supreme Court," id., and that "under the Erickson Supreme Court decision," Plaintiff did not demonstrate the required background circumstances. (2T31). Because the New Jersey Supreme Court has not overruled Erickson, the trial court's decision should be affirmed.

For over thirty (30) years, the background circumstances standard has been a staple of our jurisprudence and repeatedly upheld by our Courts. In

Erickson, our New Jersey Supreme Court acknowledged the need to modify the first element of the McDonnell Douglas framework to accommodate claims of reverse discrimination. The rationale for doing so, the Court noted, “reflects ‘[c]ongressional efforts to address this nation’s history of discrimination against racial minorities, a legacy of racism so entrenched that we presume acts, otherwise unexplained, embody its effect.’” Erickson, 117 N.J. at 551 (quoting Murray v. Thistledown Racing Club Inc., 770 F.2d 63, 67 (6th Cir. 1985)). The Court recognized that in reverse discrimination cases, “the rationale supporting the rebuttable presumption of discrimination embodied in the prima facie elements does not apply. Id. Thus, when a complainant is not a member of the minority, courts have generally modified the first prong of the McDonnell Douglas standard to require the plaintiff to show that he has been victimized by an ‘unusual employer who discriminates against the majority.’” Id. at 551-52.

Thereafter, in Bergen Com. Bank v. Sisler, 157 N.J. 188 (1999), the Court reaffirmed that the modified background circumstances standard advances congressional intent to protect individuals who have historically and systematically been discriminated against, and that a literal application of the McDonnell Douglas standard “would consistently fail to raise an inference of discrimination against a majority plaintiff.” Id. at 213-14.

The background circumstances standard was again reaffirmed as recently as March 2024 in a reverse race discrimination claim under the NJLAD. See Zack v. Integra Lifesciences Corp., 2024 N.J. Super. Unpub. LEXIS 468, at *1, 4 (App. Div. Mar. 21, 2024), certif. denied, 2024 N.J. LEXIS 664 (N.J. June 26, 2024). In Zack, the trial court dismissed plaintiff’s complaint on summary judgment, finding that there was no evidence that Integra was the unusual employer who had a history of discriminating against Whites. Id. at *5. The Appellate Division, in affirming dismissal, reaffirmed that our courts “have not hesitated to depart from the [McDonnell Douglas] methodology if a rigid application of its standards is inappropriate under the circumstances.” Id. at *8 (citing Sisler, 157 N.J. at 212). The Appellate Division further stated that “as an intermediate appellate court, we lack the authority to overturn Erickson [and] we are bound by Erickson and its sound reasoning, which has remained unaltered for over three decades.” Id. at *8.

Plaintiff cites no binding legal authority for his contention that the background circumstances standard does not apply to the NJLAD equal pay act amendments. (Pb13). While Plaintiff cites guidance from the Division on Civil Rights (“DCR”) regarding the Diane B. Allen Equal Pay Act, such interpretative guidance is not binding on this Court. See In re Williams, 443 N.J. Super. 532, 543 (App. Div. 2016) (“while not binding, the EEOC’s interpretative guidelines . . . constitute a body of experience and informed judgment to which courts and litigants may

properly resort for guidance.”) (internal quotations omitted); Cole v. Woodcliff Lake Bd. of Educ., 155 N.J. Super. 398, 407 (Law. Div. 1978) (“the interpretations of statutes rendered by the Attorney General, although not binding upon the court, often provide assistance to the court in construing a statute.”).

Conversely, the Appellate Division in Bento v. Plainfield Pub. Sch. Dist., in reviewing plaintiff’s unequal pay claim under N.J.S.A. 10:5-12(t), specifically affirmed the trial court’s review of the background circumstances test to plaintiff’s claim, stating that the trial judge “reiterated that the background circumstances did not show the District is an unusual employer who discriminates against the majority” and the judge found that the District satisfied the five factors under N.J.S.A. 10:5-12(t). Bento v. Plainfield Pub. Sch. Dist., 2022 N.J. Super. Unpub. LEXIS 2366, at *20 (App. Div. Nov. 30, 2022), certif. denied, 2023 N.J. LEXIS 624 (N.J. May 31, 2023).

Plaintiff has not provided any justification for the trial court or this Court to depart from settled precedent. See Luchejko v. City of Hoboken, 207 N.J. 191, (2011) (“Stare decisis carries such persuasive force that we have always required a departure from precedent to be supported by some special justification.”). The trial court was correct in finding, and this Court should similarly find, that it is bound by Erickson and the background circumstances standard until such time as it is

overruled by the New Jersey Supreme Court. Id. (“The doctrine of stare decisis [is] the principle that a court is bound to adhere to settled precedent[.]”).

The trial court did not err in finding that Plaintiff failed to establish background circumstances that the College is the unusual employer who discriminates against the majority. “An employee can demonstrate ‘background circumstances’ sufficient to raise an inference of discrimination by establishing either that the plaintiff was better qualified for the position than the minority candidate or that the defendant had some reason or inclination to discriminate against the majority class.” Sisler, 157 N.J. at 214. The trial court correctly found that Plaintiff cannot meet this burden as there is no evidence in the record demonstrating that the College had an inclination to discriminate against Whites.

First, Plaintiff’s salary at the time of his hire in 1995 was commensurate with faculty members within his hiring cohort and department. (Pa549-Pa556, Pa653-Pa654). Four individuals were hired in 1995 along with Plaintiff. He was hired at the second highest salary and remains at the second highest salary of this cohort:

- Martine Howard (White) serves as an Assistant Professor II in Language & Culture. She was hired at a starting base salary of \$32,500. Her base salary as of contract year 2020 was \$79,715.
- Penny Luczak (White) serves as an Assistant Professor II in Mathematics. She was hired at a starting base salary of \$33,000. Her base salary as of contract year 2020 was \$77,717;

- Carla Monticelli (White) serves as a Professor of Mathematics. She was hired at a starting base salary of \$34,000. Her base salary as of contract year 2020 was \$90,372.99.
- Gail Stewart (White) serves as a Professor of Biology. She was hired at a starting base salary of \$36,500. Her base salary as of contract year 2020 was \$93,260.
- Plaintiff is currently a Professor of Chemistry. He was hired at a starting base salary of \$36,000. His base salary as of contract year 2020 was \$91,924.94.

(Pa88-Pa89, Pa549-Pa556).

Second, the individuals who hired Plaintiff and set his starting base salary were all members of his same protected class, i.e., white, which negates any inference of discrimination. When a final decision maker is a member of the same protected class as the plaintiff, it negates any inference of discriminatory intent. See, e.g., Young v. Hobart W. Grp., 385 N.J. Super. 448, 461 (App. Div. 2005) (affirming summary judgment on age discrimination claim and rejecting Plaintiff’s pretext argument, in part because “both decision-makers were close in age to plaintiff”). Here, Plaintiff was hired and his salary was set by Dr. Margaret Hamilton, who is White, thereby negating any inference of discrimination. (Pa55, Pa68, Pa559-Pa560).

Third, further belying any contention that the College is the unusual employer who discriminates against the majority is the undisputed fact that Plaintiff remains the second highest paid professor among all five Chemistry Professors at the College as demonstrated by the following:

- Susan Choi's (White), Associate Professor, base salary as of contract year 2020 was \$101,326.01;
- Plaintiff William Lavell's (White), Professor, base salary as of contract year 2020 was \$91,924;
- Ying Mao's (Asian), Assistant Professor I, base salary as of contract year 2020 was \$74,428.01;
- David Nugiel's (White), Assistant Professor I, base salary as of contract year 2020 was \$61,727.01; and
- Roberto Feudale's (White), Associate Professor, base salary as of contract year 2020 was \$60,331.

(Pa89, Pa549-Pa550). Notably, the highest paid individual is also white. (Id.).

Fourth, Plaintiff fails to acknowledge that his salary as well as all salary and faculty compensation are governed exclusively by the CNA, which is applied equally to all faculty members regardless of race, and the College has no authority to unilaterally increase a faculty member's salary outside of the provisions of the CNA.

Plaintiff asserts three arguments in support of his contention that he can establish background circumstances: (1) the College's Affirmative Action policy specifically aims to benefit "minority group applicants" seeking open job vacancies; (2) Kathleen Kane testified during her deposition that "she would rather hire a 'minority candidate' over an equally qualified Caucasian applicant;" and (3) although the College "flatly denied" Plaintiff's request to correct his salary, it did so for Dr. Roberts, an African-American professor. All of Plaintiff's arguments fail.

Plaintiff does not cite to any legal authority for the proposition that the adoption of an affirmative action policy violates anti-discrimination laws. In fact, New Jersey Courts have found that implementation of an affirmative action plan **does not** violate antidiscrimination provisions of a collective negotiation agreement or the LAD. See Jersey City Educ. Ass'n, Inc. v. Bd. of Educ. of Jersey City, 218 N.J. Super. 117, 194 (App. Div.), certif. denied, 109 N.J. 506 (1987) (“implementation of a valid affirmative action plan is not the impermissible discrimination contemplated in N.J.S.A. 10:5-12[.] . . .Affirmative action hiring goals do not offend either the federal or state constitution.”).

Next, Plaintiff claims that Ms. Kane testified at her deposition that she would rather hire a “minority candidate” over an equally qualified Caucasian application. Plaintiff misrepresents Ms. Kane’s testimony and ignores portions of her testimony wherein she states that in all of her years in human resources, she has never had an instance where two candidates are exactly the same. (Pa431). Even so, our courts have held that “general comments by government officials in support of affirmative action do not establish the first modified Erickson prong” in a reverse race discrimination claim. Flynn v. Twp. of Montclair, 2020 N.J. Super. Unpub. LEXIS 342, at *30 (App. Div. Feb. 18, 2020) (affirming grant of summary judgment in reverse race discrimination claim finding that “general comments by various officials in support of affirmative action without explaining how these comments

were connected to [plaintiff's] failure to be promoted . . . are not sufficient to demonstrate the Township was discriminating against the majority.”) (Pa812); Wachstein v. Slocum, 265 N.J. Super. 6, 19 (App. Div. 1993) (“If an employer’s statements that he planned to combat discrimination and to pursue affirmative action goals were held to be an adequate basis for a finding of discrimination against a white employee, anti-discrimination laws would be turned on their head and transformed into a device for preservation of the racial status quo in the workforce.”). Thus, the testimony of Ms. Kane is insufficient as a matter of law to establish background circumstances.

Lastly, Plaintiff’s contention that the College was more than happy to grant Professor Roberts’s request for a salary adjustment refutes rather than supports his claim. Professor Roberts was continued at a salary which was below the faculty contractual guarantee in the CNA. In accordance with his contractual rights, he requested that upon his return from an administrative position to faculty, his salary would reflect the contractual increases that he was entitled to under the CNA had he not left his faculty position. (Pa778). This request required the College’s adjustment as consistent with the contractual provisions of the CNA. Unlike Plaintiff, Professor Roberts was not seeking anything other than that which he was entitled under the CNA. The College had no choice but to comply with the CNA. Notwithstanding, it

remains undisputed that at all times, Plaintiff's year-to-year salary changes, have been the same as all faculty unit members and have been consistent with the CNA.

In sum, there is no evidence in the record by which Plaintiff can demonstrate that the College is the unusual employer who discriminates against the majority. As such, the trial court did not err in granting summary judgment finding that Plaintiff could not establish the requisite background circumstances to sustain his claim.

III. THIS COURT NEED NOT DECIDE THE APPLICABILITY OF AMES BECAUSE EVEN IF THE BACKGROUND CIRCUMSTANCES STANDARD DID NOT APPLY, PLAINTIFF CANNOT ESTABLISH A CLAIM UNDER THE DIANE B. ALLEN EQUAL PAY ACT (2T3-13)

This Court need not decide what influence, if any, the U.S. Supreme Court's decision in Ames has on our State courts when reviewing reverse discrimination claims under the NJLAD because even if the background circumstances standard did not apply, Plaintiff cannot demonstrate a *prima facie* case under the Diane B. Allen Equal Pay Act and the College is entitled to the affirmative defenses set forth in N.J.S.A. 10:5-12(t).

To state a claim under the Act, a plaintiff must show: (1) they belong to a protected class; and (2) they are compensated less than those outside of their protected class who perform substantially similar work. Id. See also NJ J.I. CIV. 2.24A.

A. Plaintiff Cannot Show That He Has Been Compensated Less Than Anyone Not in His Protected Class Performing Substantially Similar Work (2T10-11)

A plaintiff “cannot pick and choose a person [he] perceives is a valid comparator who was allegedly treated more favorably, and completely ignore a significant group of comparators who were treated equally or less favorably than [he].” Simpson v. Kay Jewelers, 12 F.3d 639, 646-47 (3d Cir. 1998); English v. PNC Bank, 157 Fed. App’x 501, 504 (3d Cir. 2005) (same). Plaintiff cherry picks as comparators Professors Roberts and Chatman, who did not perform work that was substantially similar to him and blatantly ignores three classes of comparators including: (1) the other Black Professors at the College beyond Professors Roberts and Chatman; (2) faculty who were hired at the same time as Plaintiff in 1995; and (3) other professors within the Chemistry Department.

Plaintiff cannot show that Professors Roberts and Chatman are appropriate comparators as the three professors do not share similar tenure. Both Professors Roberts and Chatman were hired years before Plaintiff. Professor Roberts was hired by the College in 1990—five (5) years prior to Plaintiff. (Pa105). Professor Chatman was hired in 1991—four (4) years prior to Plaintiff. (Pa128, Pa144-Pa145). And, in the years preceding his hire, Plaintiff did not benefit from the generous

contractual increases to base salary that were afforded to Professors Roberts and Chatman under the prior CNAs. (Pa247, Pa315, Pa385).

Furthermore, the jobs of Plaintiff and Professors Roberts and Chatman are not substantially similar when viewed as a composite of skill, effort, and responsibility. Professors Roberts and Chatman are Professors in Engineering whereas Plaintiff is a Professor in Chemistry. (Pa55, Pa105, Pa107, Pa128-Pa129, Pa144-Pa145). Tellingly, Plaintiff admits that Engineering is an entirely different department than Chemistry and, at that time, was in a different Division of the College. (Pa86).

The tasks among the three Professors are different not only as they teach different material, but because it requires different education, prior experience, conduct, and skill. Central to the College's decision to hire Professors Roberts and Chatman was the fact that they were licensed engineers with private sector experience at a time when the College was expanding its Engineering program and had built a new, cutting edge, CIM building, dedicated exclusively to applied Engineering and the industrial utilization of robotics. (Pa101-Pa103, Pa124-Pa125, Pa446, Pa564-Pa565). Professors Roberts and Chatman were hired to oversee and serve as Professors in the CIM program. (Id.). Professor Roberts's and Professor Chatman's credentials as licensed engineers with private sector experience was invaluable in developing the Engineering Department, which was a critical need of the College at the time. (Pa563-Pa567).

A review of Plaintiff's credentials compared to Professor Roberts and Chatman establishes that Plaintiff does not perform substantially similar work. Professors Roberts and Chatman wrote and presented grants, scholarly articles, and developed and taught several different courses. (Pa105-Pa108, Pa132-Pa133, Pa140). Professor Roberts has taught more courses than any other faculty member at the College—teaching a total of 23 different courses—and Professor Chatman has taught about a dozen different courses at the College, developing nine of those courses on his own. (Pa108, Pa140). Conversely, at no time during his tenure with the College was Plaintiff ever a principal author of a grant application, and he has only developed approximately five courses at the College and two programs in consultation with Professor Teresa Smith. (Pa57-Pa59). Clearly, Plaintiff's credentials pale in comparison to Professor Roberts's and Chatman's such that it cannot reasonably be stated that they perform substantially similar work.

Nor can Plaintiff show that he was paid less than anyone performing substantially similar work when compared to professors within his hiring cohort and department. As set forth in Section II, (1) Plaintiff's salary upon hire was commensurate with faculty hired at the same time within his hiring cohort and commensurate with faculty within his own department; (2) he remains the second highest base paid professor in his hiring cohort and the second highest individual within the Chemistry Department, with the highest paid individual being White; and

(3) it is undisputed that Plaintiff's salary is governed exclusively by the CNA, which is applied equally to all members of the faculty regardless of race (Pa62-Pa63, Pa89, Pa549-Pa556, Pa653-Pa654).

Recently, in Bento v. Plainfield Pub. Sch. Dist., the Appellate Division applied the heightened background circumstances standard to a white plaintiff's reverse race discrimination claim under the Diane B. Allen Equal Pay Act. No. A-2127-20, 2022 N.J. Super. Unpub. LEXIS 2366, at *15-21 (App. Div. Nov. 30, 2022).² The trial court granted defendant's motion for summary judgment finding, among other things, that plaintiff did not meet the heightened standard under the McDonnell Douglas framework, and further found that defendant satisfied the five factors under N.J.S.A. 10:5-12(t). Id. at *8, *10. In doing so, the Appellate Division concluded, in relevant part, that "the salary guide is facially neutral and applies to all principals, whether they are male or female, Caucasian, African American, or Hispanic" and the plaintiff "did not proffer any evidence that the salary guide incorporated into the CBA, which was negotiated and mutually agreed to . . . was adopted for race- or gender-based discriminatory reasons." Id. at *17. The Appellate Division's logic is equally applicable here. The CNA is facially neutral and applies to all faculty members regardless of race. Plaintiff has not set forth any evidence to

² Although the Bento decision is unpublished, it is submitted herein as secondary authority for persuasive value. (Pa587-Pa594). See R. 1:36-3.

suggest that the provisions of the CNA are applied in a race-based discriminatory reason.

Even if the Court were to accept as true Plaintiff's assertion that all faculty members at the College qualify as Plaintiff's comparators simply by virtue of their titles as "professors", Plaintiff's sole selection of these two alleged comparators—out of the 93 faculty members at the College—ignores the fact that there are other Black faculty members at the College, of similar tenure, who are compensated less than Plaintiff. For example, Marie English, a Black Assistant Professor II of Psychology, was hired by the College in 1989 and currently receives a base salary of \$91,681. (Pa84-Pa86). Plaintiff admits that Professor English "probably has similar job duties because of her position as faculty." (Id.). Plaintiff admits that Professor English started approximately six (6) years prior to Plaintiff and that her salary "appears to be very similar" to Plaintiff. (Id.).

Likewise, Rondald O'Neil is a Black Professor of Business Programs, who was hired by the College in 1994 and receives a base salary of \$86,766. (Id.). Plaintiff admits that Professor O'Neil's base salary is less than Plaintiff and further admits that Professor O'Neil performs substantially similar work to Plaintiff. (Id.). Both Professors English and O'Neil are Black Professors with similar tenure that are compensated less than Plaintiff. Thus, regardless of the Ames decision, Plaintiff cannot establish a *prima facie* claim of reverse race discrimination under the Diane

B. Allen Equal Pay Act when other members outside of his protected class are compensated less than Plaintiff.

B. Even if Plaintiff Could Establish A *Prima Facie* Claim of Reverse Race Discrimination Under the Diane B. Allen Equal Pay Act, the Differential in Pay is Pursuant to the Provisions of the CNA and His Initial Hiring Salary Was Based on One or More Legitimate Bona Fide Factors Other Than Race (2T11-13, 2T20-22, 2T25)

Under the Diane B. Allen Equal Pay Act, an employer may pay a different rate of compensation “[i]f the employer demonstrates that the differential is made pursuant to a seniority system, a merit system, or the employer demonstrates:

- (1) That the differential is based on one or more legitimate, bona fide factors other than the characteristics of members of the protected class, such as training, education or experience, or the quantity or quality of production;
- (2) That the factor or factors are not based on, and do not perpetuate, a differential in compensation based on sex or any other characteristic of members of a protected class;
- (3) That each of the factors is applied reasonably;
- (4) That one or more of the factors account for the entire wage differential; and
- (5) That the factors are job-related with respect to the position in question and based on a legitimate business necessity.

Here, as set forth in Section II, all faculty salary and compensation are governed exclusively by the CNA, which is applied equally to all faculty members regardless of race, and the College is prohibited from increasing a faculty member’s

salary outside of the express language of the CNA and the exclusive negotiations' agent. (Pa151, Pa453).

Furthermore, the CNA falls directly within the seniority system contemplated by the statute. The Model Civil Jury Instructions for the New Jersey Equal Pay Act provides "in order to establish that a valid seniority system exists, defendant must show that it uses a system that gives employees rights and benefits that improve the longer they work for defendant." NJ J.I. CIV. 2.24A. "In determining whether defendant has demonstrated a valid seniority system, you should consider that a valid system ordinarily includes rules that (1) define when the seniority time clock begins ticking; (2) specify how and when a particular person's seniority may be lost; (3) define which time will count toward the accrual of seniority and which will not; (4) specify the types of employment conditions that will be governed by seniority and those that will not." Id.

The CNA proscribes how seniority among the faculty is determined according to specific criteria, including their length of full-time service as a faculty member, the length of full-time service at the College, academic rank at the time of employment, length of part-time service at the College, and present academic rank. (Pa165-Pa166). Additionally, the CNA provides how a faculty member's seniority will be treated when the faculty member transitions to an administrative position and

returns to faculty, noting that such time accrued will be credited to faculty seniority upon return to a faculty position. (Pa171).

Critically, the annual increases provided in the CNA are governed by seniority. The CNAs provide faculty members, on the payroll as of a specific date, with annual raises to their base salary based upon contractually agreed upon numbers. (Pa187-Pa188, Pa247, Pa315, Pa385). This is consistent with Dean Steiner's testimony confirming that the annual increases in the CNA are inextricably intertwined with seniority. Dean Steiner testified that the annual increases are granted on the faculty as a whole based upon contractually agreed upon numbers, and these raises in the CNA are a percentage of salary which, quite often, is dependent on seniority. (Pa505).

The differences in tenure between Plaintiff, Professor Roberts, and Professor Chatman—as well as the generous contractual increases to base salary provided to Professors Roberts and Chatman prior to the hiring of Plaintiff—readily explain the differential in pay among the Professors based upon seniority. Professor Roberts was hired by the College in 1990—five (5) years prior to Plaintiff, and Professor Chatman was hired in 1991—four (4) years prior to Plaintiff. (Pa105, Pa128, Pa144-Pa145). At the time of their hiring, the faculty contract in effect provided for three (3) consecutive years of 7% annual increases in base salary. (Pa247). The following contract granted three (3) consecutive years of 8% increases, and the next contract

granted (3) consecutive years of 5% increases. (Pa315, Pa385). At the time that Plaintiff joined the College in 1995, not only were annual increases more modest than the previous five (5) years, but Plaintiff did not benefit from the series of generous contracts afforded to faculty in the five (5) years preceding his hire. (Pa247, Pa315, Pa385, Pa425). Notably, Plaintiff seemingly acknowledges the correlation between seniority and the annual increases because he concedes the difference in salaries could be because of the different lengths of employment at the College and differences in starting salary as perpetuated by annual increases. (Pa76).

Furthermore, all five factors set forth in N.J.S.A. § 10:5-12(t)(1)-(5) are satisfied. As noted fully above, the record evidence overwhelmingly demonstrates that the difference in pay between Plaintiff and Professors Roberts and Chatman is for reasons wholly unrelated to race. The difference in pay among the Professors is due to the fact that Professors Roberts and Chatman were hired years prior to Plaintiff and thus benefited from the more generous CNAs. Moreover, bona fide factors such as their training and experience in the private sector in engineering contributed to the differences in pay.

First, Professors Roberts and Chatman were hired at a time of exponential growth in the Engineering Department and were hired to work in, and run, the brand new CIM building. (Pa101-Pa103, Pa124-Pa125, Pa446, Pa564-Pa565). In addition, both Professors were being hired from private industry. A candidate's

existing salary is frequently a factor that must be addressed or overcome to hire a person away from the private sector and into the College. (Pa565). The starting salaries of Professor Roberts and Professor Chatman were based on a range of salaries of other faculty members within the Engineering Department, and also based on what salary was needed to attract them away from private engineering to the College. (Pa566).

There was no preferential amount provided to either Professor Roberts or Professor Chatman based on race. (Id.). Both Professors Roberts and Chatman are licensed practicing engineers with private sector experience and were employed with private companies at the time of their hire, which posed a more competitive challenge for hiring them away into academia than the College usually faced when hiring those exclusively in academia. (Pa564-Pa565). Their salaries were commensurate with other engineering faculty members at the College at that time, with similar experience and credentials. (Pa566). At the time he was hired by the College, Plaintiff did not have any offers from any other colleges or universities and was working as a high school Chemistry teacher where he was working after his contract was not renewed and he had been denied tenure by the Naval Academy. (Pa51-Pa52, Pa54-Pa55).

Second, none of these bona fide factors are based on race. Plaintiff contends that he should be paid the same or more than Professors Chatman and Roberts solely

based upon degrees attained.³ (Pb17). However, these are not the criteria which Plaintiff's exclusive bargaining agent has chosen to negotiate and establish as the criteria in the CNAs. Yet, Plaintiff ignores the multitude of factors that are considered by the College in providing recommendations regarding starting salary. These include market value, industry salaries associated with the position, availability of instructors with any credentials or experience in the particular area, the likelihood that the College can attract an individual in that field, degrees attained, and teaching experience. (Pa507, Pa559-Pa561). As set forth at length above, Professors Roberts and Chatman had private sector experience as licensed engineers and were hired to work in the College's newly developed CIM Building, which was a critical need of the College at the time. These factors are entirely unrelated to race.

Third, each of the bona fide factors are applied reasonably and the difference in pay between the Professors was reasonable in light of the investment in the CIM building and growth of the engineering department at the time of their hire. Fourth,

³ Plaintiff solely relies on the expert report and testimony of Dr. Don Thompson in support of his argument that because of Plaintiff's alleged superior educational qualifications, the College should have hired Plaintiff at a higher salary than Professors Roberts and Chatman. The College moved to bar Dr. Thompson's report and testimony as an inadmissible net opinion, which was denied as moot after the District Court declined to exercise supplemental jurisdiction over Plaintiff's NJLAD claim. (Da13). The College maintains that Dr. Thompson's report and testimony is an inadmissible net opinion, which cannot be relied upon on summary judgment. See Randall v. State, 277 N.J. Super. 192, 198 (App. Div. 1994) ("Inadmissible evidence may not be used to affect the outcome of a summary judgment motion."). Nor can Plaintiff defeat a motion for summary judgment by submitting an expert report in his favor that fails to adequately address the issues in this case. See Brill v. Guardian Life Ins. Co. Am., 142 N.J. 520, 544 (1995) ("A party cannot defeat a motion for summary judgment merely by submitting an expert's report in his or her favor").

Professor Roberts's and Professor Chatman's training and experience in the private sector, coupled with their having to be enticed away from their private sector salaries to work in the growing Engineering Department and CIM building account for the wage differential. Fifth, these factors are all job-related and based on a legitimate business necessity as Professors Chatman and Roberts filled a crucial need of the College within the Engineering Department and the new, cutting edge CIM building.

As such, Plaintiff's claim under the Act fails because any differential in pay is pursuant to the express provisions of the CNA and all five factors under N.J.S.A. § 10:5-12(t)(1)-(5) have been satisfied. The trial court's decision should be affirmed.

IV. PLAINTIFF'S EQUAL PROTECTION CLAIM IS NOT PROPERLY BEFORE THIS COURT, AND EVEN IF IT WAS, IT IS BARRED BY *RES JUDICATA* AND THE ENTIRE CONTROVERSY DOCTRINE (not properly raised below).

Plaintiff's appeal raises a backdoor constitutional challenge to the Equal Protection Clause of the 14th Amendment of the U.S. Constitution that was not properly raised in the trial court. Plaintiff claims that the trial court's application of the background circumstances standard violates the Equal Protection Clause because Plaintiff, a white plaintiff, was required to meet a higher burden of proof solely because of his race – an additional showing, according to Plaintiff, that no other race must make. (Pb11). However, Plaintiff did not properly raise this claim below. He did not plead an equal protection claim in the federal action. He did not allege an equal protection claim when he refiled his NJLAD claim in

State Court. Nor did the trial court make any findings regarding Plaintiff's improper constitutional challenge. Plaintiff's citations to the record do not support that this issue was fully raised below. Because Plaintiff failed to appropriately raise this claim, it is not properly before this court and must be dismissed.

Plaintiff raised this entirely new theory of liability for the first time in his motion to stay the College's motion for summary judgment and in Opposition to the College's motion for summary judgment. But, at no point in time in the near-four years since this case was first instituted did Plaintiff ever allege that the background circumstances standard, as applied to him, violated the Equal Protection Clause of the 14th Amendment. Instead, he has steadfastly maintained that he can establish this standard. Nothing impeded upon Plaintiff's ability to raise an equal protection claim prior to summary judgment. Furthermore, all evidence and information were available to Plaintiff at the time of his federal action in order to properly raise an equal protection challenge.

Importantly, Plaintiff has never asserted a claim under the New Jersey Civil Rights Act, which is the proper mechanism by which to bring a constitutional challenge to the Equal Protection Clause of the 14th Amendment of the U.S. Constitution through a private cause of action. N.J.S.A. 10:6-2(c)).

Here, in the near-four years that this matter has been litigated, Plaintiff has *never* brought an equal protection challenge under the 14th Amendment of the U.S. Constitution. He never amended his Complaint to include an equal protection claim. No discovery was conducted regarding this alleged equal protection violation. And the College was not aware that Plaintiff was alleging an equal protection challenge until his Opposition to the College's Motion for Summary Judgment. Because Plaintiff has not brought a claim under the NJCRA, his constitutional equal protection challenge is not properly before this Court and should be dismissed. See N.J.S.A. 10:6-2(c).

To the extent that Plaintiff seeks to assert an equal protection claim under the U.S. Constitution, he is barred by *res judicata* and the entire controversy doctrine. For an action to be barred under *res judicata*, (1) the judgment in the prior action must be valid, final, and on the merits; (2) the parties in the later action must be identical to or in privity with those in the prior action; and (3) the claim in the later action must grow out of the same transaction or occurrence as the claim in the earlier one. Rippon v. Smigel, 449 N.J. Super. 344, 367 (App. Div. 2017).

“Claim preclusion applies not only to matters actually determined in an earlier action, but to all relevant matters that could have been so determined.” Watkins v. Resorts Int'l Hotel & Casino, 124 N.J. 398, 412 (1991). “For the

purposes of *res judicata*, causes of action are deemed part of a single ‘claim’ if they arise out of the same transaction or occurrence.” Id. at 413. Therefore, “if under various theories, a litigant seeks to remedy a single wrong, then that litigant should present all theories in the first action. Otherwise, theories not raised will be precluded in a later action.” Id.

The entire controversy doctrine “stems directly from the principles underlying the doctrine of *res judicata* or claim preclusion.” Bank Leumi USA v. Kloss, 243 N.J. 218, 227 (2020). “The doctrine is a broad one, more preclusive than both *res judicata* and the Restatement [(Second) of Judgments].” Id. (quoting Kozyra v. Allen, 973 F.2d 1110, 1111 (3d Cir. 1992) (alteration in original). This doctrine “embodies the principle that the adjudication of a legal controversy should occur in one litigation in only one court; accordingly, all parties involved in a litigation should at the very least present in that proceeding all of their claims and defenses that are related to the underlying controversy.” Id.; see also R. 4:30A. “In determining whether successive claims constitute one controversy for purposes of the doctrine, the central consideration is whether the claims against the different parties arise from related facts or the same transaction or series of transactions.” Ditrollo v. Antiles, 142 N.J. 253, 267 (1995).

Both *res judicata* and the entire controversy doctrine bar Plaintiff from raising a constitutional challenge under the Equal Protection Clause of the 14th Amendment that could have been presented, but was not raised, in the federal action between the same parties involving the same series of transactions. In March 2021, Plaintiff brought a federal action alleging race discrimination under Section 1981 and the NJLAD. (Pa577-Pa585). In Opposition to the College’s motion for summary judgment, Plaintiff voluntarily withdrew his sole federal claim. The district court dismissed Plaintiff’s Section 1981 with prejudice. (Da4-Da13). This dismissal with prejudice is a final judgment on the merits for purposes of claim preclusion. Velasquez v. Franz, 123 N.J. 498, 507 (1991) (“A judgment of involuntary dismissal or a dismissal with prejudice constitutes an adjudication on the merits[.]”); Jackson v. Dow Chem. Co., 518 F. App’x 99, 102 (3d Cir. 2013) (“Jackson’s voluntary dismissal with prejudice of his remaining ADA claims also operated as a final judgment on the merits for purposes of claim preclusion.”).

Plaintiff could have—and should have—raised his equal protection challenge and maintained his constitutional claim in the prior action asserting federal claims, which undoubtedly was the proper forum for a federal constitutional challenge. Because Plaintiff’s equal protection claim arises out of the same transaction and occurrence as his prior litigation in federal court,

res judicata and the entire controversy doctrine bar him from raising his constitutional challenge now. See Watkins, 124 N.J. at 412-13; R. 4:30A.

But even if this Court were to consider this claim, Plaintiff has not cited to any authority demonstrating that application of the background circumstances standard violates the Equal Protection Clause. The only support for Plaintiff's claim is the concurrence by Justice Thomas in Ames. (Pb12). But Justice Thomas's concurrence is merely dicta and not binding precedent. State v. Masi, 72 N.J. Super. 55, 58 (Law Div. 1962) (noting language in concurring opinion is not specifically binding on court, but persuasive). Furthermore, neither the majority in Ames nor Justice Thomas made any finding that application of the background circumstances is a *per se* violation of the equal protection clause.

In his concurrence, Justice Thomas suggested that “the ‘background circumstances’ rule is also plainly at odds with the Constitution’s guarantee of equal protection,” and that it “likely violations the Constitution.” (Pa839, Pa840). But there was no finding of an equal protection violation nor is there any other mention of the equal protection clause in the concurrence. Justice Thomas’s concurrence dealt solely with interpretation of the background circumstances test in a Title VII claim.

In sum, Justice Thomas’s concurrence does not compel a different result because (1) it is dicta and not binding; (2) it solely concerns interpretation of

background circumstances in a Title VII claim, not a state claim; (3) there was no finding of a violation of the equal protection clause in Ames; and (4) it does not bind this Court in reviewing Plaintiff's state-law NJLAD claim where no equal protection challenge was alleged in this case since its inception in federal court.

Moreover, the majority in Ames made no findings with respect to the Equal Protection Clause. Nor could they because this question was not before the Court. The Court granted certiorari to address "a Circuit split as to whether majority-group plaintiffs are subject to a different evidentiary burden than minority-group plaintiffs at *McDonnell Douglas's* first step." (Pa835). Whether application of the background circumstances test is a violation of the equal protection clause was not a question before the Court or the basis upon which certiorari was granted. (Pa834, Pa835). And, as argued in Section I, the Third Circuit has deviated from the background circumstances test, and our State courts have departed from the Third Circuit's interpretation. Thus, Ames does not change the trial court's or this Court's analysis. Accepting Plaintiff's argument that the majority or concurrence in Ames guide this case would run counter to precedent by our Courts, which have made clear that the rationale underlying the standard is to reflect congressional efforts to address discrimination against racial minorities. See Sisler, 157 N.J. at 213-14; Erickson, 117 N.J. at 551. Thus, Plaintiff's claim fails as a matter of law.

CONCLUSION

For all the foregoing reasons, this Court should affirm the trial court's order granting the College's motion for summary judgment and dismissing Plaintiff's Complaint with prejudice.

Respectfully submitted,
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Dated: September 15, 2025

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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION**

Docket No.: A-001300-24

WILLIAM T. LAVELL,
Plaintiff-Appellant,

v.

CAMDEN COUNTY COLLEGE,
Defendant-Respondent.

Appeal from the Superior Court of New Jersey
Law Division, Camden County
Case No.: CAM-L-002239-24
Honorable John S. Kennedy, J.S.C., Sat Below

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

This appeal turns on a simple error of law. The trial court granted summary judgment because Professor Lavell is white, applying a special “background circumstances” hurdle that raised his *prima facie* burden solely based on race. That rule is incompatible with equal-protection principles, finds no footing in the NJLAD’s text, and, after the United States Supreme Court’s unanimous decision in *Ames v. Ohio Department of Youth Services*, 145 S.Ct. 1540 (2025), cannot stand. Once that threshold mistake is corrected, the record presents triable disputes on Lavell’s Diane B. Allen Equal Pay Act claim.

Appellee’s brief is nothing more than misdirection and obfuscation. Appellee takes the remarkable position that a unanimous decision by the United States Supreme Court, *on the very issue raised in this appeal*, has no application and should be disregarded. Appellee fails to identify any language in the NJLAD that would justify departing from *Ames*. Instead, Appellee desperately urges the court to affirm on grounds that were never reached at the trial court. The emphasis on a grab bag of “alternative grounds” concedes the point: if the race-based threshold were defensible and dispositive, there’d be no need to ask this Court to resolve fact disputes on a cold record. That posture confirms why the proper course is to correct the legal standard and remand.

II. ARGUMENT

A. Ames Compels Reversal

Appellee’s primary defense of the trial court’s ruling is that this Court remains bound by *Erickson/Sisler* and that the United States Supreme Court’s unanimous decision in *Ames* is irrelevant because it interprets Title VII. But as Appellant’s opening brief explained, and Appellee does not seriously refute, New Jersey courts traditionally interpret the NJLAD in harmony with federal anti-discrimination standards where, as here, the statutes share materially similar text and purposes. *Ames* held that disparate-treatment law “draws no distinctions between majority-group and minority-group plaintiffs,” and that the “background circumstances” rule “flouts that basic principle.” *Ames v. Ohio Department of Youth Services*, 145 S.Ct. 1540, 1546 (2025). Reversal is compelled.

In all the cases Appellee cites where New Jersey courts departed from their federal counterparts, there was an independent state-based rationale for its departure (i.e. statutory text, New Jersey specific public policy, etc.)

Here, there is no such rationale. Instead, as Appellee concedes in its Brief, *Erickson* was based upon the misguided belief that the “background circumstances” test was justified due to “congressional efforts” to “address the nation’s history of discrimination against racial minorities.” Appellee’s Brief at p. 1. However, *Ames* made it clear there was **no** such congressional directive, and the

rule is contrary to the statutory text. Notably, Appellee identifies no New Jersey statutory text, purpose, or policy that would justify divergence from *Ames*. There are none.

In his Opening Brief, Appellant explained that the **sole** rationale for *Erickson* were federal court cases that were now overturned by *Ames*. Appellee ignored this argument in their opposition. The rationale in *Erickson/Sisler* was built on a house of cards, and *Ames* knocked it over. This Court should reverse, and remand for trial.

B. The Judge’s Application of the “Background Circumstances” Test is Unconstitutional

As set forth in Appellant’s Opening Brief, the trial court’s application of the “background circumstances” test violated the Equal Protection Clause of the 14th Amendment to the United States Constitution, because Appellant was required to meet a higher burden of proof **solely** because of his race. Appellant’s Brief at p. 12-14.

Appellee does not meaningfully contest the unconstitutionality of this race-based classification or address the Supreme Court cases cited in Appellant’s Brief. Instead, in essentially conceding the argument, Appellee buries at the end of their Brief a convoluted and misleading argument invoking the concepts of “res judicata” and the “entire controversy” doctrine. Appellee’s Brief at p. 43-45.

Appellee’s argument is based on the mistaken belief that Appellant’s constitutional challenge is a “new theory of liability” and he was required to plead and prove an independent constitutional count. *Id.* at p. 43. Not so. Appellant is not suing for damages under the Constitution; he is challenging **the legal rule** the court applied, one that discriminates by race. Determining whether the trial court applied the correct legal standard is a routine appellate function. That does not require a separate cause of action; it is the essence of error correction.¹

Appellant is merely challenging the trial court’s interpretation of a statute as applied to him. A new independent cause of action is not required. The United States Supreme Court has held repeatedly that a party can challenge the constitutionality of a judicial decision. *See Palmore v. Sidoti*, 466 U.S. 429, 432 & n.1 (1984) (holding that the Fourteenth Amendment extends to “all governmentally imposed discrimination,” including in the “judicial” branch); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (ruling that a judicial decision enforcing racially restrictive real estate covenants violated the equal protection clause).

C. The Background Circumstances Test Does Not Apply to the Diane B. Allen Equal Pay Act and/or Lavell Satisfied the Test

¹ Likewise, Appellee’s claim that Appellant had to sue under the NJCRA is meritless. Appellee’s Br. 43. The NJCRA is merely a remedial vehicle (like 42 U.S.C. § 1983) for damages or injunctive relief for constitutional violations. A party challenging a court’s interpretation of a statute need not plead a separate NJCRA count, and Appellee cites no authority to the contrary.

As explained in Appellant’s Opening Brief, the “background circumstances” test does not apply to the Diane B. Allen Equal Pay Act amendments to the NJLAD because plaintiffs are not required to prove discriminatory intent. *See* Guidance on the Diane B. Allen Equal Pay Act, *030220-Equal-Pay-Act-Guidance-Appendices-Only.pdf (nj.gov), Mar. 2020. Appellee dismisses these guidelines as non-binding but offers no authority for ignoring them. Instead, Appellee relies on the unpublished, non-precedential *Bento v. Plainfield Pub. Sch. Dist.*, 2022 N.J. Super. Unpub. LEXIS 2366 (App. Div. Nov. 30, 2022), which cannot bind this Court. *See* N.J. Ct. R. 1:36-3.

Bento is also legally and factually inapposite. The trial court there applied *McDonnell Douglas* and the “background circumstances” test only to plaintiff’s N.J.S.A. 10:5-12(a) claims, then separately dismissed her N.J.S.A. 10:5-12(t) claims on other grounds. On appeal, the plaintiff argued only that the amendments merged the two standards, not that “background circumstances” was inapplicable to § 12(t). Unlike in *Bento*, Appellant squarely rejects applying that test here.

Moreover, the facts differ dramatically. There, a middle school principal sought pay equal to high school principals overseeing far more students and teachers, and she never applied for the vacant high school position. By contrast, Appellant and his comparators share the same title, tenure, and responsibilities.

Even if the now-discredited “background circumstances” test applied, the record reflects, among other things: (i) superior credentials at hire compared to the two identified colleagues (Roberts and Chatman) who are outside Appellant’s protected class; (ii) higher starting salaries offered to those comparators despite inferior academic credentials and limited teaching experience; (iii) persistent, unexplained pay disparities decades later; (iv) an Affirmative Action policy specifically aimed to benefit “minority group” and “non-Caucasian” applicants (Pa422); and (v) their Human Resources Director testifying that she would rather hire a “minority candidate” over an equally qualified Caucasian applicant. (Pa431). Notably, the Appellee does not attempt to contest or distinguish *Covaleski v. Hewlett-Packard Co.*, 2016 U.S. Dist. LEXIS 79636, *23 (E.D. Pa. June 20, 2016) where the court denied summary judgment due to similar testimony. Those facts easily supply the “background circumstances” courts historically demanded.

D. The Court Should Remand for the Trial Court to Consider Appellee’s Remaining Arguments.

When a trial court applies the wrong legal standard or leaves fact-dependent issues unresolved, remand is the norm so the trial court can make findings and address alternative grounds. *See, e.g., Hill Int’l, Inc. v. Atl. City Bd. of Educ.*, 438 N.J. Super. 562, 613–14 (App. Div. 2014) (remanding for trial court to consider, in the first instance, issues not previously addressed).

The Court should: (1) vacate the order; (2) hold no race-based heightened prima facie showing applies; and (3) remand for application of the correct standards.

E. Even if the Court Evaluates the Issues Not Addressed Below, Genuine Issues of Material Fact Exist Regarding His Claims under the Equal Pay Act.

The NJLAD, as amended by Diane B. Allen Equal Pay Act, prohibits an employer from paying any employee “who is a member of a protected class at a rate of compensation, including benefits, which is less than the rate paid by the employer to employees who are not members of the protected class for substantially similar work, when viewed as a composite of skill, effort and responsibility.” N.J.S.A § 10:5-12(t).

If a member of a protected class demonstrates that they are compensated less for substantially similar work than a person who is not a member of that protected class, the employer is liable under the Equal Pay Act unless it can prove either:

1. That the pay differential is made pursuant to a seniority system or a merit system; or
2. That all five of the following are true: a) “That the [pay] differential is based on one or more legitimate, bona fide factors other than the characteristics of members of the protected class, such as training, education or experience, or the quantity or quality of production; b) That the factor or factors are not based on, and do not perpetuate, a differential in compensation based on sex or any other characteristic of members of a protected class; c) That each of the factors is applied reasonably; d) That one or more of the factors account for the entire

wage differential; and e) That the factors are job-related with respect to the position in question and based on a legitimate business necessity. A factor based on business necessity shall not apply if it is demonstrated that there are alternative business practices that would serve the same business purpose without producing the wage differential.”

N.J.S.A. § 10:5-12(t).

1. Genuine Issues of Material Fact Remain Regarding Plaintiff’s *Prima Facie* Case under the Equal Pay Act

Appellant created a genuine dispute that he performs “substantially similar work” to Professors Melvin Roberts and Lawrence Chatman under N.J.S.A. 10:5-12(t). The Allen Equal Pay Act is broader than the federal EPA and focuses on substantially similar (not identical) work, evaluated as a composite of skill, effort, and responsibility; minor differences do not defeat similarity. *Spiewak v. Wyndham Destinations, Inc.*, 2023 U.S. Dist. LEXIS 14473, *12 (D.N.J. Jan. 26, 2023); N.J. OAG, *Guidance on the Diane B. Allen Equal Pay Act* (Mar. 2020). Intent to discriminate is not required. *Id.*

Here, all three were tenured professors with the same core duties (18 contact hours/semester; ≥4 office hours/week), were reviewed under the same Partners in Learning program, worked in the same department, reported to the same dean, and, as Steiner admitted, “all faculty have the same contractual obligations.” Pa106–109, 130, 683, 722; Pa107, 110. Differences in academic field (Chemistry vs.

Engineering) are immaterial; job title or exact tasks need not match, and all fall within STEM. OAG Guidance; Pa707.

Background distinctions in grants, program development, or publications do not explain the pay gap: Chatman testified those had no effect on pay, and Borden attributed differences to starting salary, tenure length, and contract changes; performance does not affect tenured compensation. Pa133, 141, 444–455. Nor does the presence of some higher-paid protected-class members defeat the claim; the comparison is job-to-job, and one higher-paid comparator outside the class suffices. N.J. Model Jury Charge (Civ.) 2.24A; *see Grigoletti v. Ortho Pharm. Corp.*, 118 N.J. 89, 111 (1990). At minimum, whether Appellant performed substantially similar work to Chatman and Roberts is a triable issue.

2. Defendant Cannot Prove their Affirmative Defenses Under the Equal Pay Act.

After an employee establishes a *prima facie* case, the burden flips to the employer to prove by a preponderance of the evidence that a pay differential for substantially similar work is nonetheless permissible. *See* State of New Jersey, Office of the Attorney General, *Guidance on the Diane B. Allen Equal Pay Act*, [*030220-Equal-Pay-Act-Guidance-Appendices-Only.pdf \(nj.gov\)](#), Mar. 2020.

Initially, Appellee waived their affirmative defense by not pleading it in an Answer. In fact, Appellee did not file an Answer to the Complaint in this case. Because they did not include the affirmative defense in an Answer, it is waived.

See New Jersey R. Civ. Pro. Rule 4:5-4 ("A responsive pleading shall set forth specifically and separately a statement of facts constituting an avoidance or affirmative defense[.]").

**a) Appellee Admits that the Pay Differential is Not
Based on a Merit System or a Seniority System**

To prove the first affirmative defense, Defendant must establish by a preponderance of the evidence that its pay differential is based solely on a “merit system” or a “seniority system.” N.J.S.A. § 10:5-12(t). Here, Defendant’s witnesses **admitted** that the pay differential is not based on either a merit or seniority system.

First, John Steiner, Dean of Science and Math, admitted that the pay differential between the Professors was not based on “accomplishments” or “merit.” Pa505. Second, Kathleen Kane, Executive Director of Human Resources, admitted that the pay differential between the Professors was not based on “seniority.” Pa429. Third, David Edwards, Defendant’s Vice President of Academic and Student Affairs, and Don Borden, President, admitted that the compensation of Professors is not based on work performance. Pa531; Pa444.

Accordingly, by Defendant’s own sworn admissions, the first affirmative defense fails as a matter of law.

Defendant’s reliance on the CNA is likewise misplaced. There is no exception for a “collective bargaining agreement” in the Equal Pay Act. Instead,

the burden is on Defendant to prove the existence of a seniority or merit system, and that it actually caused the wage differential. Here, the difference in pay was largely due to the starting salary given to Plaintiff, Chatman, and Roberts, and perpetuated by the annual raises under the CNA. In fact, Borden conceded that the difference in pay was due to the starting salary. Pa455.

Here, the starting salaries were widely disproportionate. Under the CNA in place at the time of Chatman and Roberts' hire, the minimum annual salary for an Assistant Professor I, was \$26,450 and the maximum was \$46,288. Pa247. The minimum annual salary for an Assistant Professor II was \$23,000 and the maximum was \$40,250. Accordingly, both Chatman and Roberts' starting salaries (\$38,000 and \$44,000 respectively) were at the highest end of the salary spectrum. *Id.*

Conversely, Plaintiff was hired at a salary (\$36,000) at the bottom of the salary spectrum. Under the CNA in place at the time of Plaintiff's hire, the minimum annual salary for an Assistant Professor I, was \$33,063 and the maximum was \$65,438. Pa385.

Given Plaintiff's superior educational qualifications, Defendant should have hired Plaintiff at a higher starting level than Chatman and Roberts. Pa708-709. According to the expert testimony of Dr. Don Thompson, an appropriate starting salary for someone with Plaintiff's credentials should have been at least \$52,500.

Id. Defendant’s decision to hire Plaintiff at a lower starting salary than Chatman is made further questionable by the fact that Defendant hired Plaintiff to a higher rank, Assistant Professor I. Pa55.

According to Dr. Thompson, “the standard in academia for placing a newly hired college faculty member is based on three quantifiable criteria: Highest advanced degree earned in one’s discipline, Number of years of college teaching experience, and Academic publication record.” Pa763.

Under the Defendant’s theory, an employer could deliberately hire female employees at half the salary of male employees, but if they provided 5% raises to both groups every year, there is no liability. This is not, and cannot, be the law.

Further, adjusting Plaintiff’s pay would not violate the CNA. The CNA deliberately anticipates this very scenario and provides exemptions. Under Article III “the wages, hours, terms and conditions of employment shall be applied in a manner which is not ... discriminatory and **without regard to race.**” Pa152. (emphasis added). Additionally, Article VII states that: “nothing contained herein shall be construed to deny or restrict to any faculty member rights he/she may have under the General School Laws of the State of New Jersey, **or other applicable laws and regulations. The rights granted to faculty herein shall be deemed to be in addition to those provided elsewhere.**” Pa157. (emphasis added).

The CNA also states that “in the event that any provision of this Agreement or any application of this Agreement to any employee or group of employees shall be held contrary to law...then such provision or application shall not be deemed valid and subsisting except to the extent permitted by law...” Pa202.

Moreover, Borden conceded that it would be a “different story” if someone convinced the Defendant that it was in violation of the law and would adjust their pay accordingly. Pa455. Borden further admitted that the Defendant is not contending that the CNA supersedes federal or state law. Pa442.

b) Defendant’s Second Affirmative Defense Also Fails as a Matter of Law.

For the second affirmative defense, Defendant is required to prove **all** five of the factors listed above in the intro of Section II(E).

Here, Appellee cannot prove that the differential in pay is “is based on one or more legitimate, bona fide factors other than the characteristics of members of the protected class, such as training, education or experience, or the quantity or quality of production” or that “one or more of the factors account for the entire wage differential.” *N.J.S.A.* § 10:5-12(t).

During Steiner’s deposition, he admitted they received the same training. Pa508. Given that Appellant, Chatman, and Roberts each received the same trainings at the Appellee, Appellee cannot assert that its discriminatory pay disparity is based on training.

Appellee additionally cannot establish that its discriminatory pay disparity is based on education. Here, Appellant had an undergraduate degree in chemistry, two master's degrees in chemistry, and a Ph.D. in chemistry. In contrast, Roberts held two undergraduate degrees and a master's degrees in mechanical engineering, and Chatman [only] held an undergraduate degree in electrical engineering. In his expert report, Dr. Don Thompson explained that since Roberts and Chatman did not obtain a higher level of education within the STEM disciplines after their hire, Appellant continued to have greater educational qualifications than them throughout his time at the Appellee.

Additionally, Appellee cannot establish that the discriminatory pay disparity is based upon experience. At the time of Appellant's hire, he had seven years of teaching experience while Chatman had zero semesters of experience and Roberts only had a single semester. Pa128.

Appellee is likewise unable to establish that its discriminatory pay differential is based upon the "quality or quantity of production." Steiner conceded that pay was not based on accomplishments or merit. Pa505. He also confirmed that all faculty members "have the same contractual obligations" regarding their assigned class, office, and instructional hours. Pa502-503.

Similarly, David Edwards admitted at his deposition that the compensation of Professors is not based on work performance. Pa531. Edwards also admitted

that all full-time Professors have the same number of credit and office hours.

Pa532. Edwards then went on to explicitly **admit** that the difference in pay between Appellant, Chatman, and Roberts was not based upon the “quantity or quality of their work.” Pa543.

Accordingly, Appellee cannot establish that the pay differential “is based on one or more legitimate, bona fide factors other than the characteristics of members of the protected class, such as training, education or experience, or the quantity or quality of production” or that it was responsible for the entire disparity. *N.J.S.A.* § 10:5-12(t).

Appellee’s second affirmative defense also fails because they cannot prove that the pay differential is “based on a legitimate business necessity.” *N.J.S.A.* § 10:5-12(t). David Edwards admitted during his deposition that there was no “business necessity” for compensating Chatman and Roberts higher than Appellant. Pa546. Considering Edwards’ emphatic admission that “business necessity” was “absolutely not” the reason for the pay disparity, the second affirmative defense also fails as a matter of law.

III. CONCLUSION

For all the foregoing reasons, and those set forth in Appellant’s Opening Brief, Appellant respectfully requests that this Court reverse and remand this matter to the trial court.

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