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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4796-09T3

LISBI ABRAHAM,

Plaintiff-Appellant,

v.

AMERICAN INTERNATIONAL GROUP, INC., NEIL FAULKNER, MARY ANN ROSS and CATHLEEN MCKENNA,

Defendants-Respondents.

Argued March 1, 2011 - Decided July 15, 2011

Before Judges Carchman, Graves and Messano.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-2836-07.

Richard J. Murray argued the cause for appellant.

Terence P. Smith (Paul, Hastings, Janofsky & Walker, L.L.P.) of the Illinois bar, admitted pro hac vice, argued the cause for respondents (Drinker, Biddle & Reath, L.L.P., and Mr. Smith, attorneys; Mr. Smith, Michael J. Sheehan of the Illinois bar, admitted pro hac vice, and Lawrence J. Del Rossi, on the brief).

PER CURIAM

On this appeal from an order dismissing a claim under the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, we address the issue of whether the failure to implement an element of a proffered nondiscriminatory reason for adverse employment action — a departmental reorganization and rearrangement of a parties' duties — raises a genuine issue of material fact sufficient to withstand a motion for summary judgment. We answer that question in the affirmative. We reverse the order dismissing the complaint and remand this matter.

These are the facts presented to the motion judge on the motion for summary judgment. Plaintiff Lisbi Abraham is a United States citizen of Indian descent. He began employment with American International Group (AIG) as a manager in February 1998 and held several positions over the next seven years, including serving as the Chief Technology Officer (CTO) of the Corporate Systems Division from May 2000 to June 2001.

In September 2005, plaintiff was elevated to the position of CTO for defendant AIG's Domestic Brokerage Group (DBG) and Information Services Group (ISG), which was under the authority of the DBG's Chief Information Officer (CIO). As CTO, plaintiff "oversaw IT architecture and strategy for the Underwriting and Claims divisions" of the DBG and had authority over enterprise

architecture, data architecture, and a performance lab. AIG described the CTO position as follows:

> To be classified in this level, the employee must be responsible for ensuring that the appropriate technological selections and decisions are made for the corporation including all information technology architecture, design, development and services, across all AIG major lines of business (LOBs), companies, branches, departments, divisions, and organizational units. This includes computer services, data resource planning, component, data and object life cycle (analysis, design and administration), infrastructure management (communications, web, and diversified server technologies; performance and capacity management). Appoint[s] Group and Divisional CTO's and is directly responsible for their performance management and compensation recommendations. This position reports to the AIG CIO.

Plaintiff's responsibilities as CTO included oversight of technology strategy and budgeting, as well as representation of DBG's underwriting and claims divisions on the "corporate CTO council." Plaintiff also played critical roles in a major software program known as the Systems Applications Products Project (SAP) as well as the Identity Management Project.

On October 3, 2005, AIG completed a functional review of the company's CTO functions. The report that emerged from this review indicated that plaintiff oversaw twenty employees engaged in either data architecture, enterprise architecture, or performance management. Of these twenty, the report recommended

that only the seven in performance management were suitable for transfer to AIGT, a centralized IT department. The report concluded that performance management required only "[m]inor application knowledge" and provided the opportunity for increased specialization and economies of scale. By contrast, data architecture "require[d] deep understanding of the [relevant] applications"; enterprise architecture "require[d] good application knowledge"; and both units were "[a]lready specialized within DBG applications." The report recommended maintaining those functions under the aegis of the DBG's CTO.

As of May 2006, defendant Neil Faulkner was the Chief Operations Officer (COO) for the DBG and had responsibility over the ISG; defendant Mary Ann Ross was a human resources executive with AIG[1]; and defendant Cathleen McKenna was a Human Resources Director within the DBG. Perry Rotella was the CIO of DBG Underwriting and plaintiff's direct superior, and Gillian Waddy was Rotella's executive assistant.

On May 9, 2006, Faulkner and McKenna met with plaintiff; Sidney Stone, a fifty-eight-year-old Caucasian Senior Information Officer (SIO) in Delivery Management; and Biren Kundalia, Stone's chief of staff and an "Asian/Pacific

[1] Ross's title is unclear. Plaintiff described her as the "Head of Human Resources" while defendants indicated that "Ross is Senior Vice President of Human Resources."

Islander." Plaintiff, Stone, and Kundalia were informed "that their employment was being terminated due to a business reorganization . . . ."

Also as a result of the reorganization, Rotella "was removed as [CIO] for DBG Underwriting," and his assistant, Waddy, was laid off. However, Rotella was not terminated, and Waddy's termination was cancelled, allowing her to assume a new position within AIG. Rotella was eventually replaced by Franco Lungo, a former SIO.

On June 26, 2006, Richard Kearns, a fellow employee, sent an e-mail indicating that he and James Klinck were "filling in for the DBG CTO function on an interim basis until the DBG CTO function is reorganized." An August 17, 2006 presentation by Klinck entitled "DBG CTO Group Reorganization Plan" indicated that AIG sought to "[e]liminate [the] former role of CTO, replaced with divisional design organizations that implement design within the corporate standards and frameworks set out by the corporate CTO."

Kearns "was transferred to ISG as an SIO" in October 2006. He resigned two months later. As of December 15, 2006, AIG maintained a job posting for an ISG Underwriting architect who would "report[] to the ISG CTO."

On June 6, 2007, plaintiff filed a four-count complaint against defendants alleging disparate treatment by AIG; that Faulkner, Ross, and McKenna "aided, abetted, incited, compelled and/or coerced the performance of . . . unlawful discriminatory employment practices within the meaning of LAD;" and that AIG's reorganization had "resulted in a significantly disproportionate and adverse impact on minority employees and protected classes . . . ."

In the course of discovery, plaintiff was deposed and indicated that AIG's reorganization "eliminated the position[s] of the only two Indians within the D.B.G./I.S.G. management team." Plaintiff further stated:

> Even though that there was a claim that this reorganization was because of redundancies and duplications of my functions with the corporate I.T. Group, I've seen no plan within AIG's documentation that shows there was ever an analysis that concluded that [there] was duplication of functions of my role, nor have I seen a plan that says taking me out of the picture, how was my role going to be replaced by the corporate I.T. Group.
>
> I also know that after I was removed from AIG, my position has subsequently been replaced by non-minority people. They don't have my title of CTO but they have the majority of my responsibilities as CTO.

Plaintiff was also questioned about his responsibilities for both the DBG claims and underwriting groups:

Q. You had responsibilities over underwriting and you had responsibilities over claims. Right?

A. Correct.

Q. . . . Describe for us your responsibilities as the CTO over D.B.G. Underwriting.

A. My responsibilities as the CTO of D.B.G. Underwriting were to review all projects within D.B.G. Underwriting for their technology and architecture as towards the corporate standards as well as the D.B.G. overall direction.

My responsibilities were to ensure that all projects were moving towards the common road map that my group had developed in terms of services, in architecture, that type of stuff.

My responsibilities were to review exceptions to AIG standards in terms of hardware and software and approve them if there was a valid reason for the exception.

My responsibilities were to represent D.B.G. Underwriting to the corporate CTO council to make sure that our needs were represented within that group, and, therefore, standards that came out of that group reflected the needs of D.B.G. Underwriting.

Q. And what were your responsibilities as group CTO over D.B.G. Claims?

A. The same exact responsibilities, just --

Q. You would say they're the same thing?

A. Yes.

Q. . . . [W]ho did you manage . . . as group CTO over D.B.G. Underwriting?

A. I managed the Enterprise Architect Group, the Data Architect Group, and the Performance Engineering Lab . . . .

. . . .

Q. So, if I were to ask you the same question with regard to your duties and responsibility as group CTO [over] D.B.G. Claims, your answer, again, is going to be the same?

A. Correct. Those are the groups I managed.

Plaintiff later explained that he "managed managers who were responsible for enterprise architecture, database architecture and performance engineering for claims and underwriting."

In addition, plaintiff discussed the function of the Corporate Systems Group:

Q. Now, the Corporate System[s] Group also approved similar projects and budgets. Is that right?

. . . .

A. Okay.

The corporate system CTO performed a similar function for the projects under his purview. They were not the same projects that were under my purview.

. . . .

> The projects that I was responsible for had to do mostly with underwriting and claim systems and the business of AIG in terms of bringing in and managing that revenue, the projects the corporate systems CTO is responsible for, had to do with the H.R. Systems, the legal systems, purchasing, those types of corporate functions.

Plaintiff also testified regarding the performance of his job functions after his departure:

> Q. What information do you have, sir, that your duties and responsibilities as CTO are now being performed by non-minority males?
>
> . . . .
>
> A. [Jim] Klinck was reviewing the architecture and design of projects prior to their approval. He was managing the enterprise and data architects.
>
> . . . .
>
> Q. Okay.
>
> Any other people?
>
> A. Richard Kearns.
>
> . . . .
>
> A. He was responsible for the architects within D.B.G./I.S.G.
>
> . . . .
>
> Q. What was the sequence, if there was a sequence?
>
> A. I believe Jim Klinck came in first, and then Richard Kearns took over from Klinck.

Plaintiff further stated that some of his duties had more recently been taken over by Ira Apsel.

Additionally, plaintiff also noted that he failed to complete an AIG form inquiring whether he "would like to be considered for opportunities within the organization" because he "was in a state of shock" after his termination. However, he stated that when he discovered that AIG was policing e-mails between him and AIG employees, he believed that "AIG did not want [him] to come back." Plaintiff also testified that he was "talking to people" about career opportunities outside of AIG in 2006 but "was not actively seeking to leave" the company.

Plaintiff also stated that he knew one other senior Asian/Pacific Islander, Kumares Pathak, who was terminated in 2006. However, plaintiff did not know Pathak's title or position and had no knowledge of the circumstances surrounding his termination.

Plaintiff offered no direct evidence of racial or ethnic bias:

> Q. . . . [H]as Neil Faulkner ever given you any reason to believe that he would discriminate against you because you're Indian?
>
> A. No.
>
> Q. He never said anything or [did] anything during the course of your

employment with the company . . . to give rise to your thinking he would discriminate against you because you were Indian, am I right about that?

A. That I'm aware of.

Q. Have you ever heard anything that would make you think that Mr. Faulkner would discriminate against you because you're Indian?

A. No.

Q. You've never heard that he made any sort of slurs or derogatory remarks about Indians, am I right about that?

A. No, I did not hear anything.

Q. And he certainly never did anything in your presence or said anything in your presence to that effect. Right?

A. That's correct.

. . . .

Q. . . . [T]here's no one in a position of authority whom you say, well, I think that person is bigoted or has demonstrated bigotry against Indians within AIG management --

A. Yes.

Q. -- am I right about that?

A. You're correct.

During her deposition, McKenna indicated that she reviewed the potential impact of the May 2006 restructuring prior to its

occurrence so she "could have an understanding of who played what role."

Ross was deposed and could not recall any involvement with plaintiff's termination. She also had no independent recollection of the reasons therefor. Nevertheless, she admitted that it was "[c]ommon practice" for human resources to receive "some sort of documentation" regarding any restructuring, and she did not recall seeing any in this case.

In response to plaintiff's interrogatories, defendants explained the circumstances surrounding plaintiff's termination as follows:

> [Plaintiff's] job was eliminated as part of a May 2006 restructuring of the information services group for the DBG Underwriting unit in which he worked, which was due to necessary duplication and redundancy of functions between DBG and corporate. Neil Faulkner made the decision to eliminate [plaintiff's] position; Cathleen McKenna and Maryann Ross were involved with the implementation of that decision. In addition to Abraham, the other affected individuals were Perry Rotella, Sidney Stone, Biren Kundalia, and Gillian Waddy.

In a later certification, Faulkner stated:

> By 2005, the ISG Underwriting group had grown into a company-within-a-company with redundant layers of management that were duplicating much of the technology oversight and strategy functions also being performed by the Corporate Systems group; e.g., oversight of general technology strategy, often on the same issues; oversight of

> enterprise architecture on the same issues; technology vendor management, often for the same vendors; duplicative Performance Labs; etc.

Faulker also indicated that the May 2006 restructuring affected five individuals:

> A. Perry Rotella, [plaintiff's] boss, was removed as [CIO] for DBG Underwriting;
>
> B. Gillian Waddy, Rotella's Executive Assistant, was laid off;
>
> C. [Plaintiff], who oversaw enterprise architecture and technology strategy but was not responsible for any specific business systems, was laid off;
>
> D. Sidney Stone, who -- as an extra layer of project management -- oversaw the delivery of major implementations but was not responsible for any specific business systems, was laid off; and
>
> E. Biren Kundalia, who functioned as Stone's "chief of staff" but was not responsible for any specific business systems, was laid off.

McKenna added in her certification that "[t]he group of employees who were considered in [the May 2006] restructuring, but who were not laid off, includes Thomas Mathias." McKenna further certified that "Mr. Mathias's national origin is Indian."

Plaintiff deposed Rachel Borenstein. She stated that in 2005 and 2006, she "was responsible for implementing a major software program," the SAP Project, which she described as "a

hundred-million-dollar project." According to Borenstein, she "saw [plaintiff] on a weekly basis," and they "communicat[ed] through e-mail extensively." She described plaintiff's role in the project as "critical" and indicated that "as a chief technology officer, he was responsible for performance, for hardware, for many technical aspects of the service that [she needed] for [the] project." Borenstein further stated that plaintiff's functions on the SAP Project were assumed piecemeal by Perry Rotella, Franco Lungo, and Jay Vaccarelli.

Plaintiff deposed Klinck, who in 2006 was Vice-President of the Office of the Chief Information Officer (OCIO). According to Klinck, OCIO was commonly referred to as "Corporate."[2] According to Klinck, plaintiff's functions were largely assumed by members of his "team," including Carol Rizzo, who took control of "[e]nterprise architecture and strategy;" Kearns, who represented D.B.G.-I.S.G. on the "CTO Council;" and David Cornelius, who shared responsibility with Kearns for "property and casualty reviews." Klinck also indicated that the SAP Project was "viewed as critical by the business."

[2] This testimony suggests that Faulkner sought to transfer plaintiff's functions to OCIO, not Corporate Systems, as he stated in his December 9, 2009 certification.

During his deposition, Faulkner explained that following a six- or seven-month review of the I.S.G., he determined that the group's structure was inefficient:

> I told Chris [Moore, a superior,] that I felt the duplication of functions, particularly the management functions, was creating a large amount of debate between the ISG teams and the Corporate Systems Group teams; that were in many cases distracting and wasting time from the project teams to get things accomplished.
>
> That the arguments between these groups about the selection of application software, software products, standards for development implementation were taking very much time and distracting the team. And that those distractions were contributing heavily to the delays and, consequently, the cost overruns associated with the ISG project team.

Based on this assessment, Faulkner explained that he recommended elimination of certain redundant "functions":

> Q. You've explained to us, then, that there were five or six functions you told Mr. Moore that you felt should be transferred to corporate; correct?
>
> A. That's correct.
>
> . . . .
>
> Q. All right. Had you decided in your mind . . . , at this point, who was going to be terminated and who was going to be transferred?
>
> A. Pretty much, yes.

> Q. So even though the names were not discussed by you or Mr. Moore in this meeting, in your mind you had some names that you felt were people who have to be terminated as part of this reorganization; correct?
>
> A. Based on their function.
>
> Q. Based on their function. And who were those?
>
> A. I felt that the CTO function, the management of that was not necessary; that the functions could be transferred to the corporate CTO environment.
>
> I felt that having someone act as an intermediate between the CIO and the group projects was unnecessary, so I felt that that individual, that position should be eliminated.
>
> . . . .
>
> Q. . . . What led you to believe at this point that termination rather than transfer to some other job was the appropriate decision?
>
> A. Because those functions were redundant to other managers.

When asked whether plaintiff's "performance" played any role in his termination, Faulkner testified that it did not. When further asked whether he had make "any derogatory statements about Asian Indians" during his time with AIG, Faulkner replied, "No."

In a letter dated March 1, 2010, plaintiff amended and supplemented his interrogatory answers and documents with

information on several AIG employees discussed in depositions. Plaintiff also cited as additional evidence of discrimination "the fact that the elimination of positions/employment of Sid Stone and Biren Kundalia, contrary to the claims of the Defendants, did not eliminate any redundancy between the Domestic Brokerage Group ISG and the Corporate OCIO."

Following discovery, defendant moved for summary judgment. In opposing the motion, plaintiff submitted a statistical analysis dated March 10, 2010, composed by Elias C. Grivoyannis, Ph. D., an associate professor of economics at Yeshiva College. Although Grivoyannis's report could only examine "actual outcomes" rather than "the process or policies of . . . employment decisions," it found "statistical[ly] significant evidence that high-level Indian managers employed with the defendant AIG in the Plaintiff's group were treated less favorably than non-Indian peer-employees in terms of terminating decisions." Grivoyannis concluded:

> All seven statistical tests described in this report indicate that managers of Indian origin were treated less favorably than similarly situated managers of Non-Indian origin in terms of being retained during the 2006 reorganization.
>
> Our statistical tests also indicate that managers of Indian original did experience a smaller chance of receiving favorable treatment on personnel decisions by AIG, et al. than [was] statistically justified.

> Their chance to be retained in the 2006 reorganization was nonexistent (zero percent). This evidence supports the Plaintiff's contention that managers of Indian origin were discriminated against because of their race. The statistical evidence establishes disparate impact as indirect evidence of race discrimination with reasonable degree of statistical certainty.

Plaintiff followed with a certification asserting that "Corporate Systems provided limited and specific services to the AIG parent company" and "did not have the capability or personnel to assume any functions of the DBG-ISG . . . ." Plaintiff also referenced a 2006 report by Klink "in which he concluded that most of the functions and service being performed within the DBG-ISG should remain there . . . ." According to plaintiff, this report showed that "the whole rationale for defendant Faulkner's claim about need to transfer the functions of the CTO office of the DBG-ISG due to redundancy/duplication of functions is simply untrue, was not supported . . . by Mr. Klinck and the OCIO itself, and was not implemented."

In addition, plaintiff reiterated that he "had 'responsibilities for business systems,'" including the SAP Project and "Identity Management Project." Nevertheless, he claimed, "a manager in the DBG-ISG who performed functions that <u>were duplicative</u> of functions of the OCIO . . . and a manager who had no responsibilities for specific business systems . . .

were not discharged by Faulkner . . . ." Both of these managers were non-Indian males. Plaintiff further stated that Thomas Mathias, an Indian employee in the DBG-ISG who was not terminated, "was not a peer or high level manager." Finally, plaintiff contended that it was "incomprehensible" that defendants did not produce any documents discussing the May 2006 reorganization.

A late deposition of Apsel revealed that he was given control over data architecture in "May or June" 2006 and application architecture in December 2006. However, Apsel stated that his title did not change. He further indicated that he represented D.B.G. on the engineering board starting in December 2006 and that his responsibilities expanded in 2007 to several areas formerly occupied by plaintiff. According to Apsel, the promotion he received to Senior Information Officer (SIO) in 2008 brought no change to his responsibilities. Apsel also testified that although there was an announcement that DBG's enterprise architecture group would be managed by OCIO, he was not aware of any of plaintiff's former functions that were actually transferred to the OCIO.

On March 30, 2010, McKenna completed a second certification indicating that Kundalia was marked as "yes" for rehire and Stone was marked as "possible." In addition, she provided

information about two managers within the ISG, Gerard P. Louis and Archana Seth, who were born in India, although plaintiff claimed that neither individual was part of the management team for the Claims Group. According to plaintiff, "[t]he presence of Mr. Louis and Ms. Seth as Managers within the Claims Group, does not change the fact that there were no Indians left on the Management Team of the DBG-ISG Claims Group after Mr. Faulkner's 'restructuring.'"

In his responding papers on the motion for summary judgment, plaintiff produced an email dated April 14, 2005, sent from Rotella to Faulkner and Mark Popolano, then AIG's "Global CIO." The email featured an article by Vir Singh entitled "Indian Call Center Workers Arrested in Theft of $425,000 from N.Y. Citibank Customers." The article described how employees of Mphasis BPO "befriended customers of Citibank and convinced them to reveal their personal identification numbers," allowing the employees to "access the customers' U.S. bank accounts and transfer[] money to banks in India."

The court, sua sponte, requested "a Certification from the appropriate representative of defendant AIG explaining the circumstances surrounding" this internal e-mail sent by Rotella. Defendants responded with an April 8, 2010 certification by Faulkner stating that AIG's "Compliance Group regularly sent

such updates on privacy and data security issues to these individuals":

> The April 2005 update contained a news article entitled "Data Security -- Indian Call Center Workers Arrested in Theft Of $425,000 From N.Y. Citibank Customers" authored by a "Vir Singh[."] Perry Rotella forwarded the April 2005 update to me and Corporate Chief Information Officer Mark Popolano. . . . While I don't specifically recall this update, it is clearly (and at that time I would have understood it to be) a heads up from Rotella regarding off shore call center vendor "Mphasis" . . . , the company identified in the article. This was particularly relevant because at that time AIG was rebidding certain contracts and was considering contracting with Mphasis to provide technical call support.

Along with this certification, defendants also provided several similar privacy and security e-mails from 2005. None of these emails had been provided in discovery and were relied on by the judge in his decision on the motion.

In deciding the motion in defendants' favor, the judge focused on the fourth prong of the LAD. The judge concluded that plaintiff had satisfied his burden under that prong by "showing that [his] job functions were distinct and survived and were performed by others" but that defendants had "met [their] burden to articulate a legitimate non-discriminatory reason for laying off the plaintiff." Furthermore, the judge concluded that plaintiff had failed to show that "the defendant[s']

proffered reason for the adverse employment action [was] a mere pretext":

> The pretext part of the [McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973),] analysis requires more from plaintiff than simpl[e] identification of an act or event that plaintiff believes bespeaks discrimination. [El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 173 (App. Div. 2005)].
>
> As our Supreme Court has held to prove pretext, however, a plaintiff must . . . do more than simply show that the employer's proffered legitimate non-discriminatory reason was false. He or she must also demonstrate that the employer was motivated by a discriminatory intent. Accordingly, the plaintiff must submit evidence that either casts doubt upon the employer's proffered legitimate reason so that a fact finder could reasonably conclude that it was fabricated or that allows the fact finder to infer that the discrimination was more likely than not [the] motivating or determinative cause of the termination decision.
>
> . . . .
>
> The plaintiff may discharge this burden either by producing circumstantial or direct evidence that discrimination is more likely than not a motivating or determinative cause of the action or by discrediting the reason offered by the employer as a legitimate and non-discriminatory one.
>
> Here, the court finds the plaintiff[] [has] failed to show such evidence of this pretext. Defendants have submitted Faulkner's supplemental certification. It gives the Court further insight into the circumstances surrounding the e-mails

> plaintiff has proffered to show proof of defendant[s'] discrimination.
>
> . . . .
>
> These e-mails do not show that defendant[s'] reason for plaintiff's termination was false. Neither do they give rise to any reasonable conclusion that plaintiff's termination was more likely than not motivated or caused by discriminatory animus on behalf of the defendant. Moreover, plaintiff's other proofs failed to show that defendant[s'] reason for terminating plaintiff was pretextual. . . . [T]he fact that plaintiff was marked as a possible rehire . . . does not give rise to a showing of pretext, nor does the fact that Faulkner did not discuss his restructuring plan with his boss . . . .
>
> Finally, the fact that the company may have been monitoring e-mails does not show a pretext. Plaintiff has offered nothing more than simple identification of an act or event that plaintiff believes bespeaks discrimination. That is insufficient.
>
> So the Court finds, based upon that failure to, under summary judgment context, show proof of pretext, plaintiff's disparate treatment theory must fail.[3]

This appeal followed.

On appeal, plaintiff asserts that the judge applied an incorrect standard in focusing on the pretext issue and

[3] The court also entered summary judgment against plaintiff's disparate impact claims, but those issues are not raised on appeal.

improperly weighed the evidence rather than evaluating it as to legal sufficiency.

We first address the standards that must be applied on a motion for summary judgment. We expand our discussion as it is particularly relevant to the issues raised on this appeal.

Summary judgment is appropriate where "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." R. 4:46-2(c). Moreover, "[a]n issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." Ibid.

As the Court has stated,

> [A] determination of whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to

> determine whether there is a genuine issue for trial."
>
> [Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986)) (alteration in original).]

"[W]hen the evidence 'is so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." Ibid. (citation omitted) (quoting Liberty Lobby, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214).

When reviewing summary judgment orders, we utilize the same standard as the trial court. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). We "first decide[] whether there was a genuine issue of material fact and, if there was not, [we] then decide whether the trial judge's ruling on the law was correct." Walker v. Atl. Chrysler Plymouth, Inc., 216 N.J. Super. 255, 258 (App. Div. 1987).

We now focus on the application of these standards to actions brought pursuant to the LAD. Among other things, the LAD prohibits employers from discharging an individual based on race or national origin. N.J.S.A. 10:5-12(a). "Because of its remedial purpose, the LAD should be construed liberally to achieve its aims." Zive v. Stanley Roberts, Inc., 182 N.J. 436,

446 (2005) (citing Franek v. Tomahawk Lake Resort, 333 N.J. Super. 206, 217 (App. Div.), certif. denied, 166 N.J. 606 (2000)).

"What makes an employer's personnel action unlawful is the employer's intent." Ibid. (citing Marzano v. Computer Sci. Corp., 91 F.3d 497, 507 (3d Cir. 1996)). Because of the difficulty of proving this element, New Jersey courts employ the burden-shifting procedure first articulated in McDonnell Douglas Corp. v. Green, supra. Henry v. N.J. Dept. of Human Servs., 204 N.J. 320, 330 (2010).

At the prima facie stage, a plaintiff need only make the "'modest'" showing that his or her "'factual scenario is compatible with discriminatory intent——i.e., that discrimination could be a reason for the employer's action.'" Ibid. (quoting Marzano, supra, 91 F.3d at 508). Under this standard, a plaintiff must show that:

> (1) she was in a protected class; (2) she was performing her job at a level that met the employer's legitimate expectations; (3) she was nevertheless discharged; and (4) the employer sought someone else to perform the same work after she left.
>
> [DeWees v. RCN Corp., 380 N.J. Super. 511, 523 (App. Div. 2005) (citing Moqull v. CB Commercial Real Estate Grp., Inc., 162 N.J. 449, 462 (2000)).]

Establishment of these four prongs "creates an inference of discrimination" that shifts the burden to the employer "to articulate a legitimate, nondiscriminatory reason for [its] action." Zive, supra, 182 N.J. at 449 (citing Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 596 (1988)). If the employer does so, "the burden of production shifts back to the employee to prove by a preponderance of the evidence that the reason articulated by the employer was merely a pretext for discrimination and not the true reason for the employment decision." Ibid. (citing Clowes, supra, 182 N.J. at 596).

"[A] plaintiff may discharge this burden either [1] by producing circumstantial or direct evidence that discrimination was more likely than not a motivating or determinative cause of the action or [2] by discrediting the reason offered by the employer as the legitimate and non-discriminatory one." El-Sioufi, supra, 382 N.J. Super. at 173 (citing DeWees, supra, 380 N.J. Super. at 527-29). This step-three burden is "not insignificant," id. at 174, but may be satisfied by "'demonstrat[ing] such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered legitimate reasons . . . that a reasonable factfinder could rationally find them unworthy of credence

. . . .'" DeWees, supra, 380 N.J. Super. at 528 (quoting Fuentes v. Perskie, 32 F.3d 759, 761-62 (3d Cir. 1994)).

The Court has acknowledged that "judicial intervention in the private employment context has a limited purpose. Anti-discrimination laws do not permit courts to make personnel decisions for employers. They simply require that an employer's personnel decisions be based on criteria other than those proscribed by law." Peper v. Princeton Univ. Bd. of Trs., 77 N.J. 55, 87 (1978). Therefore, "'a firm's business judgment of highly subjective criteria, exercised in good faith, will not be second-guessed in the absence of some evidence of impermissible motives.'" Jason v. Showboat Hotel & Casino, 329 N.J. Super. 295, 308 (App. Div. 2000) (quoting Davis v. Rutgers Cas. Ins. Co., 964 F. Supp. 560, 573 (D.N.J. 1997)).

Applying these principles here, we are of the view that plaintiff has produced evidence sufficient to allow a reasonable jury to disbelieve defendants' explanation for the termination. Defendants assert that plaintiff's position was eliminated "due to unnecessary duplication and redundancy of functions between DBG and corporate." This rationale was reinforced by Faulkner's December 9, 2009 certification, which explained that plaintiff's group was "duplicating much of the technology oversight and strategy functions also being performed by the Corporate Systems

group . . . ." When deposed, Faulkner reiterated this explanation, stating: "I felt that the CTO function . . . was not necessary; that the functions could be transferred to the corporate CTO environment."

Although Klinck and his OCIO team temporarily managed plaintiff's functions after his termination, in fact, none of plaintiff's functions were ultimately transferred. Apsel's deposition confirms this critical fact, which is contrary to the reorganization rationale posited by Faulker. The premise of terminating plaintiff focused on merging plaintiff's functions into OCIO, a circumstance that never took place.

Furthermore, Faulkner and plaintiff offered competing characterizations of plaintiff's functions. Faulkner stated that they were essentially identical to tasks performed in the OCIO, but plaintiff indicated that his role was specialized to suit the DBG's underwriting and claims systems. These are questions of fact that require resolution, not by a judge on a motion for summary judgment, but by a jury at trial.

We recognize that courts cannot and should not sit as super-personnel departments to second-guess employment decisions or even restructuring. Yet, we recognize as well that in LAD cases involving complex business structures, violations of the statute can be accomplished in subtle and nuanced ways. There

is rarely a "smoking gun" and as here, sometimes no indication of overt action. Yet, where employment action is advanced resulting in adverse impact on members of a protected class and the other elements of the four-pronged analysis are satisfied, we must scrutinize the proofs, not to finally adjudicate the merits, but to determine if a plaintiff has established a sufficient factual issue that warrants further consideration by the trier of fact. That is what we decide here. A jury may ultimately conclude that all that transpired was that defendants made a proper business decision. But the issue will be decided by a jury, not by a judge on a motion for summary judgment.

AIG's failure to transfer plaintiff's functions from the DBG-ISG to OCIO creates such an issue by permitting a reasonable inference that the explanation proffered by defendants was pretext. In addition, a reasonable jury could conclude that the DBG CTO and OCIO did not perform duplicative functions. To the extent that there are discrepancies between the testimony of Faulkner, Klinck, Apsel, and plaintiff, they are best left to a jury. Brill, supra, 142 N.J. at 540 ("Credibility determinations will continue to be made by a jury and not the judge.").

Our decision obviates the necessity to determine the other issues raised by plaintiff.

Reversed and remanded for trial.