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SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-o

DEBRA L. LEMESHOW,

Plaintiff-Appellant,

v.

PSEG SERVICES CORPORATION,

Defendant-Respondent.

November 6, 2014

Argued March 19, 2014 – Decided

Before Judges Waugh and
Accurso.

On appeal from Superior Court of
New Jersey, Law Division, Mercer
County, Docket No.

L-2779-09.

Debra L. Lemeshow, appellant,
argued the cause pro se.

Suzanne M. Klar argued the cause
for respondent (Law Offices of
William E. Frese, attorneys; Ms.
Klar, on the brief).

The opinion of the court was delivered by

ACCURSO, J.A.D.

Plaintiff Debra L. Lemeshow appeals from a summary judgment dismissing her complaint against PSEG Services Corporation for wrongful termination in retaliation for complaints of gender and age discrimination under the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Because we find that the motion record reveals material facts in dispute and that viewing the facts most favorably to plaintiff she has produced sufficient evidence to put the issue of pretext before the jury, we reverse.

We present the facts in the light most favorable to Lemeshow and give her the benefit of all favorable inferences in support of her claim. R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Lemeshow was hired in 1999 as the Manager of Small Business Energy Marketing by an affiliate of PSEG Services. She was forty-three years old. Within a year

of her employment, the affiliate was liquidated, and PSEG Services offered her the position of Manager, Business Management Support, in its Corporate Communications and Federal Affairs department under the supervision of its Director, Emma Byrne. Lemeshow accepted the position at an annual salary of \$95,000 and a potential fifteen percent annual bonus.

The following year, PSEG Services hired an outside firm to evaluate its salary structure. PSEG Services bases employee salaries on a "market reference point" or MRP. MRPs serve as target salary levels for individual positions based on the company's assessment of what employees in similar positions at other companies are paid. The company uses MRPs not only to set initial salaries, but also as part of its calculus in determining whether to award a given employee a merit-based raise. In 2001, that outside firm determined that an appropriate MRP for Lemeshow's position would be between sixty-five and seventy-five thousand dollars per year.

Lemeshow challenged that finding and repeatedly asked Human Resources to produce the copies of the job descriptions the consultant used to arrive at her MRP. In August 2001, she wrote: "I'd like to know the explanation of how a position Emma Byrne offered me on November 8, 2000, priced with a MRP of \$110,000 as a Director Business Management Support, fell to a \$65,000 MRP when the title changed to Manager Business Management Support, without changes in scope, content, reporting structure." The company refused to produce the documents. Lemeshow's own research led her to believe, and assert, that the positions relied upon were entry-level jobs not comparable to her own. After intervention by Byrne, the company agreed to set the MRP for Lemeshow's position at \$100,800 and reduce the bonus potential to ten percent.

That resolution did not placate Lemeshow, who continued to complain about her reduced bonus potential. In March 2003, Byrne told Lemeshow during her performance review that Byrne could not request another market pricing survey for Lemeshow. Lemeshow claims Byrne told her she "made a lot of money for a single woman and that Byrne had to take care of

the men with families." In April 2004, Lemeshow wrote Byrne a note stating "[s]ince you verified in your HR data when we just discussed my [bonus potential] that you treated me differently from my male counterparts, I hope that now you can address correcting my MRP and [bonus potential]." Lemeshow closed the note saying, "(I don't 'make too much \$ for a woman!')." "

Following Byrne's retirement in December 2004, Brian Smith became Lemeshow's supervisor. In March 2005, Lemeshow provided Smith with a typed chronology of the history of the changes to her MRP and bonus potential, detailing her numerous complaints. A handwritten cover note referenced the history, a recent special achievement award plaintiff had received, and stated "I think the politicians call it 'unkept promises.' I estimate the 'lost' [bonus potential] cost me approx. \$30k." In an email exchange with a colleague in Human Resources regarding the issue, Smith wrote that the company "helped Deb considerably . . . rather than diminish her, based on the agreement spelled out in the [2001] letter in response to the job evaluation. Do you think Deb understands and appreciates this now? If not, she ought to. Moreover, she ought to appreciate additionally that we, in fact, have not frozen her MRP." The colleague responded "You summed up my feelings exactly . . . and paraphrased what I communicated to her."

Lemeshow earned the highest performance rating available for 2005 and 2006. She complained to Smith that despite her exceptional performance, he gave her only a four percent merit raise instead of the ten percent he could have given her and that she was being treated unfairly compared to her male counterparts.

In 2007, Lemeshow's duties were expanded to include budget oversight for two additional departments. Her budget oversight increased from fourteen million to over twenty million with the number of employees increasing from thirty-five to fifty-nine. Smith was promoted to vice-president and Lemeshow continued to report to him, as well as to two other newly-hired vice-

presidents, one of whom was based in Washington, DC. Lemeshow became part of Smith's senior leadership team.

As part of that team, Lemeshow learned from Smith of a corporate policy that allowed any position incurring a twenty percent increase in responsibility to be re-evaluated and potentially have the employee's duties rewritten to reflect the increased workload. Lemeshow submitted a handwritten letter to Smith on August 16, 2007, stating that she "remain[ed] curious about the parameters for re-evaluations." Lemeshow wrote that her responsibilities had increased more than twenty percent, "but it appears to me that the only increased jobs are for promoting younger women and hiring men!" She closed the letter saying, "Maybe it's optics, but I find it interesting that none of us 'older women' are permitted to re-write job descriptions to reflect the new organizational responsibilities. Is there a plan for some of these too? I'm not trying to annoy you but simply have clarification. Thank you."

Lemeshow claimed that Smith was annoyed and "became visibly frustrated" by her "regular complaints that older women were being treated unfavorably compared to men and younger women." Following those complaints, Smith dropped Lemeshow's performance rating for 2007 two levels from the "exceptional" rating she had received for the prior three years. The company's Human Resources department inquired into the lowered rating because Smith had rated Lemeshow more favorably at the mid-year mark. Specifically, Smith was asked if "something occur[ed] in [Lemeshow's] performance and goal achievement" to merit the lowered rating. Smith responded that he had consulted with the other two vice-presidents to whom plaintiff reported "and both recommended no more . . . and not strongly so . . . than a fully meets for [plaintiff] for year end."

In her opposition to the company's motion for summary judgment, Lemeshow claimed that Smith's

excuse does not hold up. Both

[vice-presidents] were hired from outside PSEG sometime between March and June 2007, well into the year. Neither of them were involved in establishing my performance goals for the year. The three VPs and I never met together to discuss my role, or their expectations of my role, with respect to the new VPs. We never met for a mid-year progress review. Neither [vice-president] met with me to discuss year-end performance although I did receive notes of appreciation from members of their staffs, which I attached to my own year-end write-up.

Lemeshow claimed that she "pro-actively held monthly and quarterly review meetings with both VP's departments" as she did with Smith's department, "but [neither of the other two vice-presidents] ever showed up." She claimed Smith lowered her rating in response to her complaints that Smith was treating her less favorably than the men and younger women in the department.

On October 5, 2007, shortly after 6:30 a.m., an anonymous caller reported to PSEG Services' "Integrity Hotline" that Lemeshow "used company resources to purchase tickets to the McCarter Theatre Gala." Both PSEG Services and Lemeshow had long been supporters of this regional theater. Lemeshow's 2005 performance review noted under "Significant Accomplishments" that Lemeshow had been elected to a two-year term on McCarter's Associates Board of Trustees, Chair of its Volunteer Development Committee and a member of its Annual Fund and Gala Committee. The company actively encouraged its employees to become involved in such community organizations and Byrne encouraged and applauded plaintiff's involvement with McCarter.

PSEG Services' Corporate Responsibility Department paid for Lemeshow to attend McCarter's 2005 gala. Lemeshow claims that when she went back to that department to fund tickets to the gala for 2006, a representative told her she should use funds from her own department.¹ Lemeshow did so, annually including McCarter in the departmental budget she prepared and circulating the vendor list, which included McCarter, to all members of Smith's senior management team. Lemeshow approved check requests for the McCarter tickets in the same manner that other employees at her level approved such requests. In December 2007, Lemeshow received a "Recognizing Excellence in Volunteerism Award" for her work at McCarter from PSEG Services' Corporate Responsibility Department. The company's CEO, Ralph Izzo, presented the award to Lemeshow in December 2007. Smith attended the ceremony. Smith also approved a \$25,000 budget allocation to fund McCarter's 2007 production of "A Christmas Carol."

Following the anonymous tip, PSEG Services launched an investigation into its funding of the McCarter gala, and concluded that Lemeshow had used company funds to purchase tickets "without appropriate management approval" for three years at a total cost of \$3500. The auditor who conducted the investigation concluded that employees approving their own purchase orders within the limits of their spending authority, as Lemeshow had done, was "an ongoing corporate-wide problem." Lemeshow produced proof on the motion of a male employee in her department who had repeatedly done the same thing for similar events without repercussions. At deposition, the auditor estimated that up to fifty percent of check requests by company employees were processed incorrectly with only one signature.

After the results of the investigation were made known to members of the department, a secretary in Smith's department who processed Lemeshow's expense reports revealed that she may have improperly processed Lemeshow's requests for reimbursements for her cell phone and home Internet charges.² After the company opened an investigation into those allegations,

Lemeshow made a detailed complaint to PSEG Services' chief Human Resources officer regarding Lemeshow's long-standing complaints about being treated less favorably than the men and younger women in her department and her suspicions that the recent downgrade in her performance and the investigations by the company were connected to her prior complaints.

Following its second investigation into Lemeshow's alleged misuse of company funds, the company concluded that Lemeshow had submitted thirty-one reimbursement requests from 2003 through 2007 improperly seeking reimbursement for her home Internet service and that six of those requests had also included unauthorized reimbursement for cell phone service. Lemeshow contended that she had been required to have Internet access at home as part of a business continuity plan developed in 2001, and there was proof the company had paid for installation of home Internet service for other employees at that time. Lemeshow further contended she had followed company policy in seeking reimbursement; that the company had reimbursed her each time without question; and that she had no way of knowing that the secretary had apparently processed the requests without obtaining proper approvals. She contended the secretary had never told her of any problem with the expense requests. The total amount at issue over the four-year period was \$1859.³

After discovering the alleged improper reimbursements for Internet and cell phone usage, the company expanded its investigation to include a complete review of Lemeshow's expense account for the entire period of her employment. The auditors found no other alleged improprieties.

After receiving the auditor's conclusions, Smith recommended terminating Lemeshow's employment, although lesser sanctions were available. Following review by Human Resources, PSEG Services terminated Lemeshow based on the two audit reports. Lemeshow sued.

Although initially also alleging discrimination on the basis of gender and age, by the time of PSEG Services' motion for summary judgment, Lemeshow had narrowed her claims to retaliation. The company moved for summary judgment based on the audit reports. Lemeshow countered with her certification that she used budgeted funds from her department to purchase the McCarter tickets using the same process that other employees at her level used to secure funding for various charitable and sporting events after a manager in corporate responsibility suggested she do so. She presented proofs of other employees not obtaining a second signature on such check requests and the auditor's conclusion that the failure to obtain second signatures was "an on-going corporate-wide problem." She also presented proof that a male employee in her department had done so often with impunity.

In addition to maintaining that she followed all policies in connection with her requests for reimbursement for her Internet and cell phone, plaintiff contended that Smith had been behind the second audit investigation. Specifically, Lemeshow noted that the secretary who had processed Lemeshow's expense requests without obtaining proper approvals had only come forward after being questioned by her supervisor, who Smith lunched with every day and with whom he occasionally carpooled and socialized outside of work. Although Human Resources had recommended that the secretary be disciplined for improperly processing Lemeshow's expense requests, Smith intervened to insure that the secretary was not disciplined for her role. Noting that the anonymous tip to the hotline had come three weeks after her check request for the gala tickets had been approved and processed but months before the gala, Lemeshow expressed her belief that Smith may have orchestrated the anonymous tip as well.

In its reply, PSEG Services specifically denied Lemeshow's allegations that the manager from Corporate Responsibility told Lemeshow to use funds from her department budget for the McCarter tickets and that Lemeshow used the same process that other employees used for

funding. The company insisted that other employees had management approval for their expenditures and that Lemeshow acted without "her manager's knowledge and acquiescence."⁴

The Law Division judge allowed extended argument on the summary judgment motion and questioned both counsel at length. PSEG Services' counsel argued that there was no proof that Smith knew about Lemeshow's use of his department's funds for tickets to the McCarter gala. Lemeshow's counsel argued that the tickets were included in the department's budget and that McCarter was on the department's vendor list. She argued that Lemeshow had raised sufficient facts to put in issue whether Smith was "really behind all this" and highlighted the factual dispute over whether "Smith did or didn't know whether [Lemeshow] was using company funds to support the gala." Counsel noted that Smith "went to the HR panel to say I think she should be terminated because I never knew about this. My client says he did know about it."

Although finding that Lemeshow had met her burden of establishing a prima facie case, the judge found that PSEG Services had likewise carried its own burden to articulate a legitimate, non-discriminatory reason for Lemeshow's termination. Turning to Lemeshow's ultimate burden on the motion, the judge stated:

Plaintiff's evidence rebutting the employer's proffered legitimate reasons must allow a fact finder reasonably to infer that each of the employer's proffered non-discriminatory reasons was either a post-hoc fabrication, or otherwise did not actually motivate the employment action; that is, the proffered reason is pretext, the non-moving party must demonstrate such weaknesses, implausibilities, inconsistencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find the[m], quote, "unworthy of credence" and, hence,

infer that the employer did not act for non-discriminatory reasons.

Here I don't find there's any reasonable inference that could be made that it's a post-hoc fabrication. And as far as finding — demonstrating inconsistencies, contradictions, I don't find that there were any of those shown. Weaknesses and implausibilities, again, I can't find that. And I understand what plaintiff is saying. I understand that plaintiff is saying, well, it's kind of coincidental, you know, that this anonymous phone call comes in, but they had an anonymous hot line. And they did an investigation and they found that she violated the policy. Whether or not this — this is not a determination of what action they should have taken; should they have given her a warning, should they have looked into whether people had violated the policy. That's not the standard. The standard is, is the reason that they terminated her, the stated reason, is that so weak, implausible, inconsistent, contradicted by other evidence, and I don't see that it is.

So I don't think the plaintiff, in the burden shifting back, has met [her] burden that a reasonable fact finder could find that. For that reason, I rule to grant summary judgment to the defendant.

We review summary judgment using the same standard that governs the trial court. Murray v. Plainfield Rescue Squad, 210 N.J. 581, 584 (2012). Thus, we consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor

of the non-moving party." Brill supra, 142 N.J. at 540. Applying that standard here, we conclude that Lemeshow should have survived summary judgment.

Our courts review claims of discrimination under the LAD under the familiar burden-shifting analysis of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed.2d 668, 677-78 (1973). In a suit alleging unlawful retaliation under the LAD, a plaintiff's prima facie case consists of demonstrating: (1) that she "engaged in a protected activity"; (2) the activity was "known to the employer"; (3) she suffered "an adverse employment decision"; and (4) there existed "a causal link between the protected activity and the adverse employment action." Battaglia v. United Parcel Serv., Inc., 214 N.J. 518, 547 (2013) (quoting Woods-Pirozzi v. Nabisco Foods, 290 N.J. Super. 252, 274 (App. Div. 1996)). A plaintiff must also show that the complaint for which she claims she suffered retaliation was both reasonable and made in good faith. Carmona v. Resorts Int'l Hotel, Inc., 189 N.J. 354, 373 (2007).

Once plaintiff establishes her prima facie case, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the discharge. Zive v. Stanley Roberts, Inc., 182 N.J. 436, 449 (2005). If the employer does so, thus overcoming the presumption of an unlawful motivation, the burden shifts back to plaintiff to prove that the employer's proffered reason for the termination was merely a pretext for retaliation. See Bergen Commer. Bank v. Sisler, 157 N.J. 188, 211 (1999). "Although the burden of production shifts throughout the process, the employee at all phases retains the burden of proof that the adverse employment action was caused by purposeful or intentional discrimination," or as here, retaliation for protected activity. See Ibid.

We agree with the trial judge that Lemeshow easily established a prima facie case and reject PSEG Services' contention that she failed to demonstrate a good faith belief that she was being treated less favorably than the men and younger women in her department. The company claims

that Lemeshow's complaints were unfounded and therefore unreasonable. It misapprehends the test.

Plaintiff abandoned her claims of discrimination based on age and gender. Even if she concluded she was unable to muster the necessary proofs, her inability to prove that she was right about her complaints of discrimination is not dispositive of her retaliation claim. As the Supreme Court recently explained:

when an employee voices a complaint about behavior or activities in the workplace that he or she thinks are discriminatory, we do not demand that he or she accurately understand the nuances of the LAD or that he or she be able to prove that there was an identifiable discriminatory impact upon someone of the requisite protected class. On the contrary, as long as the complaint is made in a good faith belief that the conduct complained of violates the LAD, it suffices for purposes of pursuing a cause of action.

[Battaglia, supra, 214 N.J. at 548-49.]

Lemeshow's numerous detailed and specific complaints that she was treated less favorably than men in her department regarding her salary and bonus and that only men and younger women incurring more responsibility were able to have their positions reevaluated, easily meets this threshold.

Where we part company with the trial judge in evaluating this motion is on the proofs of pretext. The company claims it fired Lemeshow because she misused her expense account. Lemeshow contends that she did not do anything differently from her peers, and she provided

specific proof that a male peer in her department had processed check requests for similar charitable events exactly as she had done, without repercussion. PSEG Services claimed the difference was that the man had acted with the knowledge and approval of his supervisor and Lemeshow had not. Lemeshow, however, claimed that her supervisor, Smith, knew that she used department funds for the McCarter tickets and that the expenditure was included in the department's budget.

In our view, that presented a very sharp dispute of fact on a critical issue. If a jury believed Lemeshow instead of Smith, then it could easily conclude that the company's proffered reason for her termination, and indeed its reason for investigating Lemeshow, were pretext, and that Smith had retaliated against Lemeshow for her numerous complaints of discrimination. Because it is not the judge's function on summary judgment to weigh the evidence and determine the truth of the conflicting claims but only to identify the existence of such genuine disputes, Brill, supra, 142 N.J. at 540, we reverse the grant of summary judgment and remand the case for trial.

Reversed.

¹ PSEG Services disputes this. The company claims that the Corporate Responsibility Department reluctantly funded Lemeshow's attendance at the 2005 gala and refused to do so in 2006. The company specifically disputes that Lemeshow was told to use funds from her department's budget to fund tickets to the 2006 gala.

2 The secretary died before she could be deposed.

3 PSEG Services also alleged that plaintiff improperly obtained a Blackberry for work use. Lemeshow countered that the Blackberry was charged to one of the departments she serviced at the department's request after the vice-president heading the department was unable to reach Lemeshow during an emergency. The vice-president of that department disputed the approval.

4 PSEG Services buttressed its reply improperly with three certifications not served with its motion papers. See *State v. Smith*, 55 N.J. 476, 488 (deeming use of reply brief to enlarge on main argument and raise new points improper), cert. denied, 400 U.S. 949, 91 S. Ct. 232, 27 L. Ed. 2d 256 (1970). Lemeshow's counsel also objected that at least one of the certifications was based on documents not produced to plaintiff until after she had filed her responsive brief.

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