(NOTE: The status of this decision is **Unpublished**.)

NOT FOR PUBLICATION WITHOUT THE

APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-0

TITO VENEGAS,

Plaintiff-Respondent,

v.

COSMETIC ESSENCE, L.L.C.,

Defendant-Appellant.

February 13, 2015

Argued February 3, 2015 - Decided

Before Judges Fisher, Accurso and Manahan.

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

L-4030-11.

John C. Cleary (Vedder Price, P.C.) argued the cause for appellant (Mr. Cleary and Marc B. Schlesinger, attorneys; Mr. Cleary, Mr. Schlesinger and Jonathan A. Wexler(Vedder Price, P.C.) of the New York bar, admitted pro hac vice, on the brief).

David A. Kaplan argued the cause for respondent.

PER CURIAM

Defendant Cosmetic Essence, L.L.C. appeals, on leave granted, from the denial of its motion for summary judgment dismissing Plaintiff Tito Venegas's complaint under the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. We reverse.

The material facts are undisputed and easily summarized. Cosmetic Essence is a contract manufacturer and packager of cosmetic products with plants in Holmdel, Ridgewood and, until its closure in 2011, Teterboro. Plaintiff worked at the Ridgewood plant from 1995, when he was forty-eight years old, until his termination in 2011 at sixty-four. Under the titles of maintenance helper or porter, plaintiff cleaned bathrooms and other parts of the plant, threw away cardboard and trash, loaded empty pallets onto trucks, arranged cylinders, and unloaded chemicals from trucks using a forklift.

Beginning in 2009, the company instituted a series of reductions in force that continued into 2010 and 2011. During 2011, the company closed its Teterboro facility, resulting in over one

hundred employees losing their jobs, and laid off twenty-eight percent of its workforce at the Ridgewood plant in four rounds of layoffs occurring in March, April, August and December. Plaintiff was laid off in April along with four other employees.

Plaintiff's supervisor testified at deposition that the general manager of the Ridgefield plant told him in March 2011 he would have to identify two employees from among the indirect labor in the manufacturing department whose positions would be eliminated and responsibilities absorbed by the remaining workers. Indirect labor consists of employees, such as material handlers and porters, who do not manufacture or work directly with the company's products. Of the five material handlers and porters in the manufacturing department, the supervisor selected defendant, who was the only porter, and a material handler for layoff. The supervisor explained he selected the material handler because he could perform only limited functions, was not able to perform stockroom inventory and one of his major responsibilities, handling the shipping of bulk materials to another of defendant's plants, would no longer be required, thus making much of his job unnecessary.

According to the supervisor, he selected plaintiff for layoff because plaintiff's skills were largely limited to cleaning, he was not able to be cross-trained to assume material handler responsibilities,[1] and the remaining material handlers in the manufacturing department, as well as the porters in other departments, could assume the cleaning duties that plaintiff had been performing. Plaintiff disputes that explanation and claims he was selected because of his age.

Plaintiff was sixty-four when he was selected for layoff. The material handler laid off with him was fifty-five. The ages of the three employees plaintiff's supervisor did not select for layoff were sixty-six, sixty-four and forty-five years old. Accordingly, the other employee laid off with plaintiff was ten years younger than he was and the company retained an employee who was two years older than he was, one his same age and one nineteen years younger. Plaintiff had the most seniority of any in the group.

Plaintiff contended that he should not be compared to others in his department but to others in the porter title across the Ridgefield plant. The other porters were sixty-four, fifty-eight and forty-six years old. None was laid off when plaintiff was. Plaintiff further notes that of the five employees let go in April 2011, he was the second oldest. The others were sixty-eight, fifty-six, fifty-four, and twenty-nine years old. Although admitting the company's several reductions in force, plaintiff denied they were caused by declining revenues and insisted that plaintiff's proffered reasons for his layoff were a pretext for age discrimination.

The judge explained his reasons for denying the motion as follows.

> I think this is going to be a very subtle and intriguing, interesting jury trial because it may be that Defendant Cosmetic Essence operated completely in good faith in putting together a structure. They had to eliminate some people and they did it in a fair even-handed way without a discriminatory purpose or intent or impact. But the subtleties that are potentially in a large corporation to carry out these things to sometimes help the bottom line by removing older people, sometimes they're more expensive, that to me has to be evaluated, in this case, by a jury. There are many ways to depict statistics . . . . And you can manipulate statistics in such a way as to favor yourself and make it look good. . . .
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> So I'm not saying that there was a misuse of statistics by either side in this case, but the inferences that could be drawn really have to be determined to me by a fact-finder. And I do agree with [plaintiff's counsel] that the case involves: Is the manner in which the employer operated and conducted this particular layoff situation, is it

> pretextual? They certainly are sophisticated enough to know how to set it up so it doesn't look like there's age discrimination. And so the question is: Is their manner of doing this which resulted in Mr. Venegas' being laid off after 16 years? And apparently, he had more seniority than somebody who was older, but did not get laid off. So I think it's a factual issue that has to be determined.

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 evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Liberty Surplus Ins. Corp., Inc. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 536 (1995)). In considering application of the LAD to the facts adduced on the motion, our review is de novo without deference to any interpretive conclusions we believe mistaken. Nicholas v. Mynster, 213 N.J. 463, 478 (2013); Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

In order to prove a discriminatory discharge claim by indirect evidence 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 (1973), a plaintiff's prima facie case consists generally of demonstrating: (1) he is in the protected group; (2) he was performing his job at the time of the discharge; (3) he nevertheless was fired; and (4) the employer sought someone to perform the same work after he left. Zive v. Stanley Roberts, Inc., 182 N.J. 436, 450, 454 (2005). Once plaintiff establishes his prima facie case, the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for the discharge. Id. at 449.

If the employer does so, thus overcoming the presumption of discrimination, the burden shifts back to plaintiff to prove that the employer's proffered reason for the termination was merely a pretext for discrimination. Bergen Commercial 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." Ibid.

Because defendant concedes plaintiff's age, and that he was competent, dependable and performing his job at the time of his discharge, there is no dispute that plaintiff easily established the first three elements of his prima facie case. See Zive, supra, 182 N.J. at 450, 454. The parties' dispute is over the fourth element, what it requires plaintiff to show and whether plaintiff made the showing.

There is no single prima facie case for all the varied types of employment discrimination claims. Although generally similar, the elements vary depending on the type of claim alleged. Victor v. State, 203 N.J. 383, 408-09 (2010). In an age case, the fourth element has generated the most controversy.

Both the Age Discrimination in Employment Act (ADEA), 29 U.S.C.A. § 623(a) and § 631(a), and the LAD ban employment discrimination on the basis of age, although the ADEA limits the protected class to those forty and older. Sisler, supra, 157 N.J. at 215. The United States Supreme Court has explained, however, that because the ADEA bans discrimination on the basis of age, and not discrimination against those forty and older, "there can be no greater inference of age discrimination (as opposed to '40 or over' discrimination) when a 40-year-old is replaced by a 39-year-old than when a 56-year-old is replaced by a 40-year-old." O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 312, 116 S. Ct. 1307, 1310, 134 L. Ed.2d 433, 438 (1996). Accordingly, the Court has held that "[b]ecause it lacks probative value, the fact that an

ADEA plaintiff was replaced by someone outside the protected class is not a proper element of the McDonnell Douglas prima facie case." Ibid.

Our Supreme Court quoted that language with approval in noting that "[t]he fourth element of a prima facie case in an age-discrimination case properly focuses not on whether the replacement is a member of the protected class but on 'whether the plaintiff has established a logical reason to believe that the decision rests on a legally forbidden ground.'" Sisler, supra, 157 N.J. at 213 (quoting Murphy v. Milwaukee Area Technical College, 976 F. Supp. 1212, 1217 (E.D. Wis. 1997)). The Sisler Court concluded, "[t]hus, under the LAD, which specifies no qualifying age, courts have modified the fourth element to require a showing that the plaintiff was replaced with 'a candidate sufficiently younger to permit an inference of age discrimination.'" Ibid. (quoting Kelly v. Bally's Grand, Inc., 285 N.J. Super. 422, 429 (App. Div. 1995) (quotation omitted)).

Plaintiff argues that there is no requirement that he demonstrate that he was replaced by a "sufficiently younger" candidate and distinguishes Sisler because it is a reverse-discrimination case not involving a reduction in force. Although plaintiff is correct on both points, the Court has since held in a reduction in force case that a plaintiff who failed to establish that the company retained a sufficiently younger worker in the same position as plaintiff failed to establish the fourth element of his prima facie case. See McDevitt v. Bill Good Builders, Inc., 175 N.J. 519, 523, 526 (2003). Although we have held in a discharge case that a plaintiff unable to show that he was replaced by a sufficiently younger worker could still establish the fourth element of his prima facie case, see, e.g., Reynolds v. Palnut Co., 330 N.J. Super. 162, 168 (App. Div. 2000), that is only possible where the prima facie case otherwise creates an inference of age discrimination. Ibid.; see also Petrusky v. Maxfli Dunlop Sports Corp., 342 N.J. Super. 77, 82 (App. Div.) (explaining "[t]he focal question is not necessarily how old or young the claimant or his replacement was, but rather whether the claimant's age, in any significant way, 'made a

difference' in the treatment he was accorded by his employer"), certif. denied, 170 N.J. 388 (2001).

Plaintiff's prima facie case founders on the fourth element because he is unable to establish, through defendant's retention of a sufficiently younger worker or otherwise, an inference of age discrimination. See Garnes v. Passaic Cnty., 437 N.J. Super. 520, 538 (App. Div. 2014) (finding prima facie case in reduction in force case where fifty-seven year old established he was laid off while other younger employees earning as much or more were retained); Young v. Hobart W. Grp., 385 N.J. Super. 448, 458-60 (App. Div. 2005) (finding no prima facie case where forty-eight year old terminated in cost cutting measure was not replaced, although younger employees assumed her duties, and could not show age played a significant part in termination).

Of the five material handlers and porters in plaintiff's department, one was two years older than plaintiff, one the same age, one nine years younger and one nineteen years younger. Plaintiff, along with one of the younger workers, was laid off and his duties absorbed by one older worker, one of his same age and one younger worker. Given that the employer laid off, along with plaintiff, a worker ten years younger than he while retaining workers both older and younger, this scenario does not give rise to an inference of age discrimination in the selection of workers for layoff. It simply does not suggest, much less establish, "a logical reason to believe that the decision rest[ed] on a legally forbidden ground." Sisler, supra, 157 N.J. at 213 (internal quotation omitted).

Even were we to conclude that plaintiff should be compared to porters working throughout the Ridgewood plant instead of to the porters and material handlers in his department, and thus that he might be able to satisfy his prima facie burden, (because while one of the retained porters was his age, two were younger, one significantly so), but see Young, supra, 385 N.J. Super. at 458-60 (declining to find prima facie case when plaintiff not replaced, although duties

of the position absorbed by younger employees), defendant would still be entitled to summary judgment.

Plaintiff's supervisor explained he selected plaintiff for layoff because he had the most limited skills, and his duties could most readily be assumed by the remaining members of the department. That explanation satisfied defendant's intermediate burden to articulate a legitimate, non-discriminatory reason for the discharge. The burden then shifted back to plaintiff to prove pretext. Sisler, supra, 157 N.J. at 210. A plaintiff attempting to stave off summary judgment at this stage must present sufficient evidence to

> allow a factfinder reasonably to infer that each of the employer's proffered non-discriminatory reasons, . . . , was either a post hoc fabrication or otherwise did not actually motivate the employment action (that is, the proffered reason is a pretext) . . . . [To do so,] the non-moving [party] must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them "unworthy of credence," . . . and hence infer "that the employer did not act for [the asserted] non-discriminatory reasons."
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> [Greenberg v. Camden Cnty. Vocational & Technical Schs., 310 N.J. Super. 189, 200 (App. Div. 1998) (quoting Fuentes v. Perskie, 32 F.3d 759, 764-65 (3d Cir. 1994)).]

Applying this standard to plaintiff's proofs, he plainly failed to produce sufficient evidence to put the issue of pretext before the jury. Plaintiff's evidence of pretext consisted of his assertion

that defendant's financial condition was not so dire as to require the layoffs imposed and that deposition testimony by plaintiff's supervisor and others detailing shortcomings in plaintiff's performance undermined defendant's proffered reason for his discharge. Defendant's assessment of its financial condition and whether its declining revenues required it to reduce its labor force is a management decision beyond the purview of the anti-discrimination laws. Jason v. Showboat Hotel & Casino, 329 N.J. Super. 295, 308 (App. Div. 2000); Kelly v. Drexel University, 94 F.3d 102, 109 (3d Cir. 1996). The deposition testimony of defendant's witnesses as to plaintiff's performance revealed only minor issues unrelated to plaintiff's ability to perform the job or his age and no way undermined defendant's explanation as to why defendant was selected for layoff.

Because plaintiff failed to present any evidence from which a reasonable jury could conclude that defendant's decision to eliminate his position in a reduction in force was a pretext for age discrimination, we conclude the trial judge erred in denying defendant's motion for summary judgment. In denying the motion, the judge pointed to no evidence that would give rise to an inference that defendant's explanation of why plaintiff was laid off was either a post hoc fabrication or otherwise did not actually motivate the elimination of plaintiff's position.[2] See Greenberg, supra, 310 N.J. Super. at 200. Because our review of the record reveals no such evidence, we reverse the denial of summary judgment and remand for entry of an order granting the motion and dismissing the complaint in its entirety.[3]

Reversed and remanded for further proceeding in accordance with this opinion. We do not retain jurisdiction.

1 Plaintiff nowhere disputes the supervisor's testimony that he attempted unsuccessfully to cross-train plaintiff to perform a greater range of tasks. Instead, he claims the supervisor failed to produce any written documentation of that fact.

2 Although the trial judge made reference to plaintiff possessing more seniority than other workers retained, dismissals based on seniority are not the equivalent of dismissals based on age discrimination. Sisler, supra, 157 N.J. at 220. Cf. Anderson v. CONRAIL, 297 F.3d 242, 250 (3d Cir. 2002) ("ADEA is not a bumping statute . . . .").

3 Defendant moved for summary judgment on plaintiff's entire complaint, which in addition to the age claim included counts for breach of contract, claims against fictitious parties, retaliation and punitive damages. It argued in this court that summary judgment was improperly denied on those claims as well. Because plaintiff failed to respond to those points in his brief, we deem them waived. See Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011).
