NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0466-21

ROSEMARY BENEDUCI,

Plaintiff-Appellant,

v.
GRAHAM CURTIN, P.A.,
MCELROY, DEUTSCH,
MULVANEY & CARPENTER, LLP
and PETER M. LAUGHLIN,

Defendants-Respondents.

**APPROVED FOR PUBLICATION**

**June 9, 2023**

**APPELLATE DIVISION**

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Submitted December 6, 2022 – Decided June 9, 2023

Before Judges Sumners, Geiger and Fisher.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket No. L-2254-18.

Castronovo & McKinney, LLC, attorneys for appellant (Thomas A. McKinney, of counsel and on the briefs).

Carmagnola & Ritardi, LLC, attorneys for respondents Graham Curtin, P.A. and Peter M. Laughlin (Domenick Carmagnola, of counsel and on the brief; Anthony J. Vinhal, on the brief).

Walsh Pizzi O'Reilly Falanga LLP, attorneys for respondents McElroy, Deutsch, Mulvaney & Carpenter, LLC (Tricia B. O'Reilly, Kristin Spallanzani and Fabian N. Marriott, on the brief).

The opinion of the court was delivered by

SUMNERS, JR, C.J.A.D.

This appeal presents a question of first impression regarding whether a claim can be made under the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, where (1) an employer merges with another employer, (2) the employee does not apply for a position with the new employer, but (3) the employee contends that while all other employees were offered employment with the new employer, the employer did not extend the same offer, for reasons proscribed by the LAD.

Rosemary Beneduci appeals the Law Division order granting summary judgment dismissal of her complaint alleging wrongful termination, retaliatory termination, failure to hire, and aiding and abetting harassment based on age, disability, and use of disability leave in violation of the LAD. The motion court determined that Beneduci's former employer, defendant Graham Curtin, P.A., and the law firm it joined, defendant McElroy, Deutsch, Mulvaney & Carpenter, LLC, as well as defendant Peter M. Laughlin, Managing Partner at Graham Curtin who became a partner at McElroy, could not be held liable under the LAD based upon her claim that Laughlin did not recommend she be hired by McElroy,

as he did with other Graham Curtin employees, because she was on medical disability leave when the merger was in process.

Because of the LAD's remedial purpose, Beneduci's claim that the decision not to transition her employment from Graham Curtin to McElroy was based on discriminatory factors may constitute a viable cause of action. There are genuine disputes of material facts regarding whether defendants' decision was, in fact, discriminatory. Therefore, we reverse as summary judgment was improvident, and Beneduci should be permitted to present her claims at trial.

I.

Beneduci was a bookkeeper with Graham Curtin for almost thirty years when, at the age of sixty-six, she took a disability leave for knee surgery from March 2017 to May 2017. She reported to Laughlin, Graham Curtin's managing partner. About a month later, she took a second leave due to problems with her other knee, which led her to schedule knee replacement surgery on January 31, 2018.

While Beneduci was on leave recuperating from her surgery, Graham Curtin began the process of closing its firm. After months of negotiations, spearheaded by Laughlin, an agreement was reached whereby Graham Curtin's attorneys and support staff (hereinafter "staff") would join McElroy, except for

a few attorneys and some staff who would form their own firm. Laughlin, on behalf of Graham Curtin, and John Dunlea, on behalf of McElroy, discussed the Graham Curtin staff that would join McElroy. Dunlea approved the hiring of all staff suggested by Laughlin. Laughlin, who was to become a partner at McElroy, did not recommend hiring Beneduci. Except for Beneduci and a part-time receptionist who voluntarily retired, all Graham Curtin staff who did not go to the spinoff firm were hired by McElroy.

Prior to Graham Curtin's shutdown, Beneduci suspected her employment was going to be terminated. Laughlin telephoned her on December 13, 2017, advising her of the merger with McElroy and that, per his conversation with Jim Patterson, a McElroy lawyer who formerly worked at Graham Curtin, her employment was in a "precarious situation." Nonetheless, Beneduci told Laughlin that she expected to return to work from disability in late March or early April 2018.

After Beneduci emailed Laughlin on February 15, confirming that she expected to return to work between late March and mid-April, he invited her to lunch. During the lunch, Laughlin offered her a severance package for terminating her employment. Through her attorney's March 5 letter to Graham

Curtin and Laughlin, Beneduci rejected the severance package, and notified them of her LAD claims.

II.

In granting summary judgment to Graham Curtin and Laughlin, the motion court determined there were no material facts in dispute, and they owed her no duty to secure her employment with McElroy. The court found the record did not evince that Beneduci's superiors, namely Laughlin, considered her disability and disability leave status in deciding whether she should be hired by McElroy due to the merger. The court reasoned that "if Graham Curtin were continuing a business and had not brought . . . Beneduci back this case would go to the jury." The court, however, maintained there was no "requirement that [a business] who's closing their doors, even if they have an opportunity to give work, or help someone secure work" must do so.

The court determined Graham Curtin had no duty to secure employment for Beneduci with McElroy once Graham Curtin shut down and therefore could not be liable for the failure to do so. Holding that Graham Curtin could not be liable for discrimination, the court found that Laughlin could not have aided or abetted the same.

With respect to McElroy, the court determined Beneduci could not maintain her cause of action. The court explained:

> All of the evidence shows that well not only was there no position offered, or advertised, or that they were seeking someone for the position of bookkeeper, but that in addition, clearly, . . . Beneduci never applied, never contacted anyone at McElroy . . . never sought the work from them. And then as the deposition testimony showed, they didn't even know of her existence because . . . Laughlin didn't tell of the existence.

The court also stated it could not find any New Jersey caselaw where the LAD had been applied under similar circumstances; thus, it did not cover Beneduci's allegations.

We review a grant of summary judgment "de novo and apply the same standard as the trial court." Rios v. Meda Pharm., Inc., 247 N.J. 1, 13 (2021); see also Bove v. AkPharma Inc., 460 N.J. Super. 123, 138 (App. Div. 2019) (holding appellate review owes "no deference to the motion judge's conclusions on issues of law" (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995))). A motion judge should grant summary judgment when "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). In deciding whether a genuine issue of material fact exists, "the motion judge must 'consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.'" Green v. Monmouth Univ., 237 N.J. 516, 529 (2019) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)).

III.

Beneduci argues the court erred by construing the LAD too narrowly. She acknowledges the closing of a business and the hiring of its willing, interested employees by a succeeding business has not been addressed by our courts since the enactment of the LAD, but asserts the broad, remedial nature of the LAD mandates that it be interpreted expansively enough to apply to such a situation. In support, Beneduci argues our caselaw dictates the LAD be read broadly to embrace novel theories, such as hers. In addition, she urges us to adopt the reasoning of the Maryland Court of Special Appeals in Hawkins v. Rockville Printing & Graphics, Inc., 983 A.2d 531 (Md. Ct. Spec. App. 2009), in which the court reversed summary judgment dismissal of the plaintiff's complaint, which alleged that he "was terminated while on disability leave and the employer

closed but gave all the other employees the opportunity for new employment with the successor company yet . . . the plaintiff was singled-out and refused re-hire along with his nondisabled coworkers."

Beneduci points out that no Graham Curtin transfers were required to apply to McElroy. Rather, she argues, McElroy created new positions which did not previously exist for transitioning Graham Curtin employees. She maintains that Laughlin, who was empowered by McElroy to hire any support staff he desired and therefore acted as their agent, did not even inquire about whether a position could be created for her. In addition, Beneduci points to Patterson's statement to Laughlin that her job was in a "precarious situation." According to a Graham Curtin support staff member who went on to become head of Human Resources at McElroy, Beneduci was the only Graham Curtin staff member who was denied the opportunity to transition from Graham Curtin to McElroy.

Laughlin expressed a different perspective of Beneduci's non-employment. He deposed that Beneduci "hadn't worked for Graham [Curtin] for, you know, well on a year. In my view, which was shared by others, she had no intention of coming back." However, when asked whether Beneduci's

disability leave influenced his decision not to attempt to secure her a job at McElroy, Laughlin stated:

> It certainly played a factor. I had someone who hadn't worked for us you know approaching a year by the time the move was made. So, you know, finding a position that didn't exist for somebody that hadn't worked for us for a year was not at the top of my agenda.

Defendants contend there were no open positions for Beneduci at McElroy. They deny that Beneduci's age, disability, or disability leave had a role in any decision not to continue her employment. They also claim that other Graham Curtin employees were terminated instead of being allowed to transition to McElroy.

Defendants characterize the merger's employment process as more cooperative than does plaintiff, with Dunlea informing Laughlin what positions were available at McElroy and Laughlin suggesting matches. Additionally, they deny anyone at McElroy had any knowledge of Beneduci or her disability and deny Patterson ever told Laughlin that she was in a "precarious position."

III.

The LAD was the result of our Legislature's recognition that "[f]reedom from discrimination is one of the fundamental principles of our society." Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 600 (1993); see also Fuchilla v.

Layman, 109 N.J. 319, 334 (1988) (holding the LAD embodies the "clear public policy of this State to abolish discrimination in the work place"). According to the LAD:

> It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination . . . [f]or an employer, because of . . . disability . . . of any individual . . . to refuse to hire or employ or to bar or to discharge . . . from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment[.]
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> [N.J.S.A. 10:5-12(a).]

Therefore, "under the LAD, an employer may not base any employment decisions on discriminatory reasons." Nini v. Mercer Cnty. Cmty. Coll., 202 N.J. 98, 107 (2010).

Because the LAD was intended "to eradicate discrimination, whether intentional or unintentional," Lehmann, 132 N.J. at 604-05, it should be "liberally construed," N.J.S.A. 10:5-3. Considering the myriad of unique situations that can arise from an employment discrimination dispute, our Supreme Court has recognized the need to allow plaintiffs in LAD cases to present "novel arguments." Quinlan v. Curtiss-Wright Corp., 204 N.J. 239, 260 (2010). That said, any uncommon theory "require[s] our utmost care and

attention in order that we may be steadfast in our efforts to effectuate the Legislature's goal of workplace equality." Ibid.

We find instructive our reasoning in Garnes v. Passaic Cnty., 437 N.J. Super. 520 (App. Div. 2014). There, we concluded that even though Passaic County Sheriff's Office investigators were "at will" employees with "no expectation of continued employment," the LAD protected them from being terminated based upon their age. Id. at 532. We thus reversed summary judgment dismissal of the LAD claims, holding that the LAD does not depend on any "right or any expectation other than freedom from unlawful discrimination." Ibid. (citing Bergen Com. Bank v. Sisler, 157 N.J. 188, 199 (1999)). Consequently, the Sheriff's Office was required to make the decision of whom to employ without considering any discriminatory factors. Ibid.

A.

The motion court erred in granting summary judgment to Graham Curtin and Laughlin on the basis that they did not have an "obligation" or "responsibility" to ensure that Beneduci gain employment after the merger with McElroy. Graham Curtin and Laughlin, according to the court, had no cognizable duty to ensure Beneduci had a job after their firm closed. The proper inquiry, however, is whether Beneduci's allegations, if true, can establish that

defendants violated the LAD by denying her employment at McElroy due to her age, disability, or use of disability leave. We conclude they would.

In this case, the merging law firms' negotiations resulted in continued employment for Graham Curtin staff at McElroy for all staff who were interested, except Beneduci. She claims she wanted to work at McElroy after her disability leave ended. Laughlin contends she did not. Yet, his comments that her disability leave "certainly played a factor" and "finding a position that didn't exist for somebody that hadn't worked for us for a year was not at the top of my agenda," can be interpretated to mean that Beneduci's disability was a factor as to why she was not hired by McElroy. There are also conflicting facts with respect to the merger's process in retaining Graham Curtin's staff; the authority McElroy conveyed to Laughlin to hire Graham Curtin staff; McElroy's knowledge of Beneduci and her disability; and the reason Beneduci was not employed at McElroy because of her disability leave status. These genuine disputes of material facts should be resolved at trial by a jury. Beneduci has a viable LAD claim if she can establish the decision not to transition her employment from Graham Curtin to McElroy was based on discriminatory factors. Cf. Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344, 367 (2016)

("[A]t this procedural stage," if the non-moving party's evidence could establish the required elements, the "strength" of the case "is not at issue.").

Although not binding, we find persuasive the reasoning in Hawkins. We agree with McElroy that there are some factual distinctions between the plaintiff in Hawkins and Beneduci. In Hawkins, unlike all other employees of the old company, the plaintiff was not given a job application for employment with the new company and was told he could apply for a job with the new company. 983 A.2d at 533-34. In contrast, Beneduci did not attempt to directly apply for a job at Graham Curtin's successor firm, McElroy. Yet, no Graham Curtin staff had to apply for a job at McElroy, since their employment was continued at McElroy as part of the merger. In each case, the plaintiff was denied what was given to their colleagues: for the Hawkins plaintiff, the opportunity to apply, for Beneduci, the opportunity to transfer.

The Hawkins court pronounced that "[v]iewing the record in the light most favorable to [the plaintiff], a trier of fact could find a discriminatory failure to hire violation of the [anti-discrimination act] by [the new company] if it finds that, for [impermissible] reasons, [the new company] denied [the plaintiff] the opportunity to apply for employment." Id. at 541. This reasoning applies with

equal force here because under the remedial goals of the LAD, a person should not be excluded from consideration for employment due to a disability.

Viewing Beneduci's allegations as true, a fact-finder could conceivably find Graham Curtin and Laughlin did not consider or recommend her for employment at McElroy because she was on disability leave. This runs afoul of the protections afforded Beneduci under the LAD. The fact that Graham Curtin ceased to operate after the merger does not give them immunity from Beneduci's allegations. Given the record before us, Beneduci should have the right to present her claims against Graham Curtin and Laughlin at trial.

B.

The motion court also erred in granting summary judgment to McElroy on the basis that Beneduci did not apply for a job at McElroy. The proper inquiries, however, are whether Beneduci was denied employment at McElroy because of her disability leave and whether Laughlin acted as McElroy's agent in the employment of Graham Curtin staff. We conclude there are sufficient facts that a jury could find in the affirmative.

Beneduci argues that at the time Laughlin was orchestrating the transition of Graham Curtin's attorneys and staff to employment at McElroy, it was apparent that he would become a partner at McElroy. Citing N.J. Lawyers' Fund

for Client Prot. v. Stewart Title Guar. Co., 203 N.J. 208, 220 (2010), she contends Laughlin had apparent or actual authority from McElroy to hire everyone from Graham Curtin he wanted, thus acting as its agent. McElroy denies that Laughlin had "any authority to hire personnel for McElroy as an 'oncoming partner.'" Beneduci also contends that others at McElroy were aware of her disability leave and viewed it as detrimental to employment there, as demonstrated by Patterson's "precarious situation" remarks.

In light of Laughlin's role during the merger process and his position as partner with McElroy when the merger took effect, a fact finder could determine that Laughlin was essentially empowered by McElroy to hire any staff he desired. Beneduci's contention is bolstered by the fact that no Graham Curtin staff had to "apply" for a position at McElroy, and all Laughlin's recommendations were accepted. Although it is up to the jury to decide, it would not be farfetched for the jury to conclude Laughlin had actual or apparent authority from McElroy to make those hiring decisions, in which case his conduct is attributable to McElroy.

IV.

In granting summary judgment to defendants, we have concluded the motion court erred in ruling Beneduci did not have a LAD cause of action as a

matter of law. The court determined only that Graham Curtin and Laughlin had no duty to secure employment for Beneduci at McElroy, she did not seek a job at McElroy, and Laughlin was not acting as McElroy's agent in overseeing the transition of Graham Curtin staff to employment at McElroy. The court did not address the specifics of Beneduci's claims for wrongful termination, retaliatory termination, and aiding and abetting harassment based on age, disability, and use of disability leave. Consequently, we do not either.

Reversed and remanded. We do not retain jurisdiction.