



Winkel v. Spencer Gifts

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NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

Submitted: September 14, 2009

Before Judges Lisa and Fall.

Plaintiff William J. Winkel, Sr. appeals from the summary judgment dismissal of his age discrimination complaint against defendants Spencer Gifts, L.L.C.; Steve Silverstein, President and C.E.O. of Spencer Gifts, L.L.C.; Isaac Silvera, Vice President and C.F.O. of Spencer Gifts, L.L.C.; Pallidin Group, Inc.; Pallidin GBLLC Universal Studios, Inc., t/a NBC Universal; and fictitiously-named individuals and entities. We affirm.

The facts in this appeal are derived from evidence submitted by the parties in support of, and in opposition to, the summary judgment motion, viewed in a light most favorable to plaintiff. *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 540 (1995). Spencer Gifts, L.L.C., headquartered in Egg Harbor Township, New Jersey, operates hundreds of specialty gift stores in the United States, Canada and the United Kingdom. Plaintiff, who was born in 1947, was employed by Spencer Gifts as an at-will employee from June 6, 1968 until April 8, 2004, when his position as Divisional Vice-President of Information Services was eliminated, and he was discharged at the age of fifty-seven. The reason given for his termination was that the Information Technology Division of Spencer Gifts had been reorganized as a cost-savings measure following its acquisition by Gordon Brothers, LLC and Pallidin Capital Group, Inc. in June 2003. In April 2004, plaintiff had been reporting to Barry Orr, also age fifty-seven, another Divisional Vice-President of Information Services, who also served as the company's Chief Information Officer (C.I.O.). Kylie Helvie then replaced Orr as C.I.O., and identified redundancies and inefficiencies in the Information Technology Division. Helvie decided to restructure the Division, including a recommendation that plaintiff's position be eliminated. That recommendation was supported by Steve Silverstein, the company's C.E.O., and Isaac Silvera, its C.O.O. and C.F.O. However, following his termination, plaintiff continued to provide consulting services to Spencer Gifts as an independent contractor until sometime in late May, 2004, when he stopped working because he and Spencer Gifts were unable to reach a formal consulting agreement.

On July 29, 2005, plaintiff filed a two-count complaint against defendants in the Law Division. In count one, plaintiff alleged defendants violated the New Jersey Law Against Discrimination (NJLAD), N.J.S.A. 10:5-1 to -49, by terminating his employment based upon his age. In count two,



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plaintiff presented a claim for severance pay. Defendants moved for entry of summary judgment seeking dismissal of both counts of the complaint. In an order entered on October 24, 2008, the trial court granted defendants' summary judgment motion, dismissing all age discrimination claims contained in count one. The order also provided, as follows:

The Defendants' Motion for Summary Judgment dismissing Count Two of the Plaintiff's complaint containing allegations of breach of implied contract for failure to pay severance benefits to Plaintiff upon his separation from employment with Defendants is hereby denied as to the 1996 MCA, Inc. Severance Pay Plan and the 1987 Spencer Gifts Severance Policy only. As to any and all other severance policies identified by the Plaintiff during this litigation, the Defendants' Motion for Summary Judgment is granted.

Following entry of the October 24, 2008 order, at the request of counsel, the Law Division issued an order on November 3, 2008,¹ which provided that the current severance pay claim pending by Plaintiff in the above matter is dismissed with prejudice subject to reopening without opposition from the Defendants once the age discrimination Appeal has concluded. The severance pay claim will be reopened and will remain at the current status as it presently had prior to the dismissal. This Order is entered without costs and without fees and the Defendants' Offer of Judgment is stayed pending whatever Appeals will follow.

Plaintiff then filed a notice of appeal on November 12, 2008, from that portion of the October 24, 2008, order dismissing the age discrimination claim contained in count one of his complaint. The notice of appeal also incorrectly stated that "[a]ll matters were disposed of by Order of [the judge] on November 3, 2008."

We pause at this juncture of our opinion to express our displeasure with this procedure. Clearly, the October 24, 2008 order was interlocutory as it failed to dispose of all claims as to all parties. See R. 2:2-3(a)(1) (permitting appeals as of right from final judgments of the Superior Court trial divisions); *Grow Company, Inc. v. Chokshi*, 403 N.J. Super. 443, 450 (App. Div. 2008); *Township of Piscataway v. South Washington Avenue, LLC*, 400 N.J. Super. 358, 365-66 (App. Div. 2008); *Janicky v. Point Bay Fuel Co.*, 396 N.J. Super. 545, 549-50 (App. Div. 2007); *Parker v. City of Trenton*, 382 N.J. Super. 454, 458 (App. Div. 2006) (dismissing the appeal as interlocutory, noting "if we treat every interlocutory appeal on the merits just because it is fully briefed, there will be no adherence to the Rules, and parties will not feel there is a need to seek leave to appeal from interlocutory orders"); *Mango v. Pierce-Coombs*, 370 N.J. Super. 239, 245 n. 1 (App. Div. 2004). Moreover, we have specifically condemned, as "manifestly an improper maneuver to evade the rule against interlocutory appeals in the absence of leave granted[,] the back-door procedure employed here by the November 3, 2008 order in dismissing plaintiff's claim "with prejudice," yet being "subject to reopening without opposition" upon completion of the appeal from that portion of the complaint dismissed on summary judgment. *Ruski v. City of Bayonne*, 365 N.J. Super. 166, 168-69 (App. Div. 2002).



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Although a dismissal of this appeal would be fully appropriate, we may also grant leave to appeal nunc pro tunc when the interests of justice would be best served by that course. *Township of Piscataway*, supra, 400 N.J. at 366; *Caggiano v. Fontoura*, 354 N.J. Super. 111, 125 (App. Div. 2002). In light of the age of this case and the significant amount of work undertaken in presenting this matter to us, we hesitate to penalize the litigants for the disappointing failure of the attorneys and trial court to adhere to the clear guidelines promulgated by our court rules and case law. Accordingly, we grant leave to appeal nunc pro tunc. See R. 2:2-4.

In granting summary judgment dismissing plaintiff's age discrimination claims, the motion judge stated in pertinent part:

I'm going to grant this motion for summary judgment. I'm going to grant it because having looked at the context of the *Petrusky v. Maxfli Dunlop Sports Corp.*, 342 N.J. Super. 77 (App. Div.), cert. denied, 170 N.J. 388 (2001)] decision and a number of other decisions, I want to frame the issue so it's clear and narrow for purposes of appeal. There is insufficient evidence on this motion record to create a triable issue as to whether the plaintiff can prove... one of the elements of the prima facie case. I understand the jury charge and what the jury gets is a little bit different than the analytical model for summary judgment. But part of this analytical model is that the plaintiff has to show to establish a prima facie case as the fourth element that the employer sought others to perform the work after the complainant has been removed. I agree with the defendants' interpretation of that language that the employer has to seek others in the sense of either hiring and possibly, for example, if somebody advertised internally, does someone want to have this position, that would fulfill the requirement. But if the employer unilaterally dissolves a position and then redistributes the work to others in the... company's employment presumptively requiring those people to do a little bit more work than they did before, I don't believe a prima facie case has been established.

The judge went on to state that had plaintiff established a prima facie case of age discrimination, he would have denied summary judgment because he was satisfied there had been presented material issues of fact on the issue of pretext.

On appeal, plaintiff presents the following arguments for our consideration:

POINT I

THE TRIAL COURT MOTION JUDGE COMMITTED REVERSIBLE ERROR BY MISCONCEIVING THE LAW REGARDING THE KIND OF PROOFS AN EMPLOYMENT AGE DISCRIMINATION PLAINTIFF MAY ESTABLISH TO SATISFY THE INFERENCE OF DISCRIMINATION ELEMENT OF THE CAUSE OF ACTION.

POINT II



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BASED UPON ITS FINDING THAT THERE IS EVIDENCE THAT PLAINTIFF'S DUTIES WERE DISTRIBUTED TO SIGNIFICANTLY YOUNGER EMPLOYEES THE TRIAL COURT SHOULD HAVE DENIED DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

Although we affirm the grant of summary judgment, we do so for reasons other than those expressed by the motion judge. See *Isko v. Planning Bd. of Township of Livingston*, 51 N.J. 162, 175 (1968) (holding that a judgment will be affirmed on appeal if it is correct, even though the judge gave the wrong reasons).

In reviewing an order granting summary judgment, we apply the same standard as employed by the motion judge. *Prudential Prop. & Cas. Ins. Co. v. Boylan*, 307 N.J. Super. 162, 167 (App. Div.), cert. denied, 154 N.J. 608 (1998). Accordingly, we must decide whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.... If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2. [Brill, *supra*, 142 N.J. at 540.]

Therefore, "the essence of the inquiry... is... '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.'" *Id.* at 536 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 2512, 91 L.Ed. 2d 202, 214 (1986)).

We begin our analysis by restating the following, well-settled principles. Enacted in 1945, "[t]he 'overarching goal of the [LAD, N.J.S.A. 10:5-1 to -49] is nothing less than the eradication 'of the cancer of discrimination.'"" *Zive v. Stanley Roberts, Inc.*, 182 N.J. 436, 446 (2005) (quoting *Fuchilla v. Layman*, 109 N.J. 319, 334 (1988) (quoting *Jackson v. Concord Co.*, 54 N.J. 113, 124 (1969), cert. denied, 488 U.S. 826, 109 S.Ct. 75, 102 L.Ed. 2d 51 (1988))). More specifically, "[t]he LAD is one of New Jersey's leading legislative pronouncements that set forth 'the familiar proposition that the clear public policy of this State is to eradicate invidious discrimination from the workplace.'" *Carmona v. Resorts International Hotel, Inc.*, 189 N.J. 354, 370 (2007) (quoting *Craig v. Suburban Cablevision, Inc.*, 140 N.J. 623, 630 (1995)). Therefore, "[b]ecause of its remedial purpose, the LAD should be construed liberally to achieve its aims." *Zive*, *supra*, 182 N.J. at 446 (citing *Franek v. Tomahawk Lake Resort*, 333 N.J. Super. 206, 217 (App. Div. 2000)).

Pursuant to N.J.S.A. 10:5-12, [i]t shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination:

a. For an employer, because of the... age... of any individual... to discharge... or to discriminate against such individual in compensation or in terms, conditions or privileges of employment[.]



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What makes an employer's personnel action unlawful is the employer's intent. *Marzano v. Computer Sci. Corp.*, 91 F. 3d 497, 507 (3d Cir. 1996). However, discrimination is not usually practiced openly. "Employment discrimination cases thus suffer from the difficulty that inheres all state-of-mind cases -- the difficulty of proving discriminatory intent through direct evidence, which is often unavailable." *Zive*, supra, 182 N.J. at 446. Accordingly, whether a discriminatory intent exists must be determined by examining what was done, and what was said in the circumstances of an entire transaction. *Parker v. Dornbierer*, 140 N.J. Super. 185, 189 (App. Div. 1976). Since direct proof of discrimination is not often found, discrimination cases can be proven through circumstantial evidence. *Greenberg v. Camden County Vocational and Technical Schools*, 310 N.J. Super. 189, 198 (App. Div. 1998). As our Supreme Court has noted:

"All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult.... There will seldom be 'eyewitness' testimony as to the employer's mental processes." *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716, 103 S.Ct. 1478, 1482, 75 L.Ed. 2d 403, 411 (1983). To be sure, there are occasionally cases involving the "proverbial 'smoking gun.'" *Marzano v. Computer Sci. Corp.*, 91 F. 3d 494, 507 (3d Cir. 1996)]. However, our legal scheme against discrimination would be little more than a toothless tiger if the courts were to require such direct evidence of discrimination. As we explained in *Chipollini v. Spencer Gifts, Inc.*, 814 F. 2d 893, 899 (3d Cir. 1987), "we do not require direct proof of... discrimination because it is often unavailable or difficult to find.... 'Even an employer who knowingly discriminates on the basis of [protected status] may leave no written records revealing the forbidden motive and may communicate it orally to no one.'" 814 F. 2d at 899 (citing *LaMontague v. American Convenience Products, Inc.*, 750 F. 2d 1405, 1410 (7th Cir. 1984)).

[*Zive*, supra, 182 N.J. at 446-47 (quoting *Marzano*, supra, 91 F. 3d at 507).]

Therefore, in order to fairly address the difficulty of proving discriminatory intent, in *Clowes v. Terminix International, Inc.*, 109 N.J. 575, 597 (1988), our Supreme Court generally adopted the procedural burden-shifting methodology in discrimination cases articulated by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973). In analyzing employment discrimination cases, New Jersey courts have traditionally sought guidance from the substantive and procedural standards established under federal law. *Viscik v. Fowler Equipment Co., Inc.*, 173 N.J. 1, 13 (2002).

This burden-shifting methodology permits an employee to prove an employer's discriminatory intent through circumstantial evidence "to compensate for the fact that direct evidence of intentional discrimination is hard to come by." *Bergen Commercial Bank v. Sisler*, 157 N.J. 188, 209-10 (1999) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271, 109 S.Ct. 1775, 1802, 104 L.Ed. 2d 268, 301 (1989) (O'Connor, J., concurring)). See also *Parker*, supra, 140 N.J. Super. at 189 (recognizing that discrimination is not usually practiced openly and intent must be found by examining what was done and said in the circumstances of the entire transaction). "The familiar elements of that analytical



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framework, often referred to as the burden-shifting or pretext analysis, are (1) proof by plaintiff of the prima facie elements of discrimination; (2) production by the employer of a legitimate, non-discriminatory reason for the adverse employment action; and (3) demonstration by plaintiff that the reason so articulated is not the true reason for the adverse employment action, but is instead a pretext for discrimination." *Myers v. AT&T*, 380 N.J. Super. 443, 452 (App. Div. 2005), certif. denied, 186 N.J. 244 (2006) (citing *McDonnell Douglas*, supra, 411 U.S. at 802, 93 S.Ct. at 1824, 36 L.Ed. 2d at 677).

However, New Jersey courts "have never embraced the McDonnell Douglas test literally, invariably or inflexibly[.]" recognizing "that the McDonnell Douglas criteria 'provide only a general framework for analyzing unlawful discrimination claims and must be modified where appropriate.'" *Grigoletti v. Ortho Pharmaceutical Corp.*, 118 N.J. 89, 98 (1990) (quoting *Erickson v. Marsh & McLennan*, 117 N.J. 539, 550 (1990)). Therefore, the McDonnell Douglas test is not designed for rigid application, and the precise elements of a prima facie case must be tailored to the particular circumstances. *Clowes*, supra, 109 N.J. at 596-97. Our case law has evolved accordingly.

In an age-discrimination case, a plaintiff must establish that age, as a prohibited consideration, played a role in the decision-making process and had a determinative influence on the outcome. *Reynolds v. The Palnut Company*, 330 N.J. Super. 162, 167 (App. Div. 2000); see also *Miller v. CIGNA Corp.*, 47 F. 3d 586, 597 (3d Cir. 1995). In *Maiorino v. Schering-Plough Corp.*, 302 N.J. Super. 323, 346-47 (App. Div.), certif. denied, 152 N.J. 189 (1997), we described the methodology for analyzing an age discriminatory-discharge claim under the NJLAD in the absence of direct evidence, as follows:

To establish a prima facie case of age discrimination, a plaintiff must show that "(1) he was a member of the protected class; (2) he was performing the job at the level that met the employer's legitimate expectations; (3) he was discharged; and (4) the employer sought another to perform the same work after the complainant had been removed from the position." *Catalane v. Gilian Instrument Corp.*, 271 N.J. Super. 476, 496-97 (App. Div.), certif. denied, 136 N.J. 298 (1994). Once the plaintiff establishes a prima facie case, a presumption is created that the employer unlawfully discriminated against the applicant. *Andersen v. Exxon Corp.*, [89 N.J. 483, 492-93 (1982)]....

The burden then shifts to the defendant employer to rebut the presumption of discrimination by articulating a legitimate, nondiscriminatory reason for the adverse employment action. *Andersen v. Exxon Corp.*, supra, 89 N.J. at 493. The defendant employer, however, only carries the burden of production, rather than persuasion, to show a legitimate, nondiscriminatory reason for its action: "It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Texas Dep't of Community Affairs v. Burdine*, [450 U.S. 248, 254, 101 S.Ct. 1089, 1094, 67 L.Ed. 2d 207, 216 (1981)] (footnote omitted). The defendant employer need not prove that its proffered reason actually motivated its behavior because throughout this burden shifting model, the burden of proving intentional discrimination always remains with the plaintiff employee. *Martinez v. National Broadcasting Co.*, 877 F. Supp. 219, 228 (D.N.J. 1994).



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After the defendant employer has sufficiently set forth a legitimate, nondiscriminatory reason for the adverse employment action, the plaintiff then has the burden of persuasion to show that the defendant's proffered reason is merely a pretext, i.e., that it was not the true reason for the employment decision. *Andersen v. Exxon Corp.*, supra, 89 N.J. at 493. A plaintiff may accomplish this by showing that (1) a discriminatory reason more likely motivated the employer than the employer's proffered legitimate reason, or (2) the defendant's proffered explanation is "unworthy of credence." *Texas Dep't of Community Affairs v. Burdine*, supra, 450 U.S. at 256, 101 S.Ct. at 1095, 67 L.Ed. 2d at 217.

Here, the motion judge focused on the fourth element of the prima facie requirement, "that the employer sought others to perform the work after the complainant has been removed[,]" concluding that "if the employer unilaterally dissolves a position and then redistributes the work to others in the... company's employment presumptively requiring those people to do a little bit more work than they did before, I don't believe a prima facie case has been established." We agree with the conclusion granting summary judgment, but disagree with this analysis because it fails to address the focal issue underlying the fourth element requirement for a prima facie case of age discrimination.

In *Williams v. Pemberton Twp. Pub. Schs.*, 323 N.J. Super. 490, 500-03 (App. Div. 1999), we had occasion to address the fourth element, in particular, the necessity of establishing that plaintiff was replaced by someone outside plaintiff's protected class. As we noted, in *Erickson v. Marsh & McLennan Co., Inc.*, 117 N.J. 539, 555 (1990), a reverse sex discrimination case, the Court found that plaintiff's reliance on a change in personnel, without a specific showing that the employer replaced plaintiff with a qualified person of the opposite sex, was insufficient. *Williams*, supra, 323 N.J. Super. at 500. In *Bergen Commercial Bank v. Sisler*, supra, a reverse age discrimination case, the Court recognized that the fourth element of a prima facie case had been modified to require plaintiffs to show that they were "replaced with 'a candidate sufficiently younger to permit an inference of age discrimination.'" 157 N.J. at 213 (quoting *Kelly v. Bally's Grand, Inc.*, 285 N.J. Super. 422, 429 (App. Div. 1995)).

In *Williams*, supra, we stated:

In light of the various contexts in which employment discrimination cases arise, we consider it unwise to require a plaintiff to establish unfailingly as part of the prima facie case that plaintiff was replaced by an individual outside plaintiff's protected class. The appropriate fourth element of a plaintiff's prima facie case requires a showing that the challenged employment decision... took place under circumstances that give rise to an inference of unlawful discrimination. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1094, 67 L.Ed. 2d 207, 215 (1981); *Chertkova v. Connecticut Gen. Life Ins. Co.*, 92 F. 3d 81, 91 (2d Cir. 1996); *Quaratino v. Tiffany & Co.*, 71 F. 3d 58, 65 (2d Cir. 1995). That formulation permits a plaintiff to satisfy the fourth element in a variety of ways. *Chertkova*, supra, 92 F. 2d at 91 (setting forth the various ways in which plaintiffs



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have satisfied the fourth prong).

Under this approach, a showing that a plaintiff was replaced by an individual outside the protected class could support an inference of unlawful discrimination. Similarly, a plaintiff who was replaced by an individual within the protected class but could show other circumstances indicating unlawful discrimination would not be unfairly precluded from presenting a case.... [323 N.J. Super. at 502-03.]

Therefore, a plaintiff can establish the fourth element in the traditional way by showing replacement by an individual outside the protected class, or in a nontraditional way. *Id.* at 503. And, in *Reynolds v. Palnut Co.*, 330 N.J. Super. 162, 168 (App. Div. 2000), we held that a plaintiff "need not show that he was replaced by someone sufficiently younger. Rather, plaintiff must show that he was a member of a protected class, that he was performing the job at a satisfactory level, that he was discharged, and that the employer sought others to perform the work after the complainant had been removed." (Emphasis in original; citing *Mariorino*, *supra*, 302 N.J. Super. at 346).

Here, there is no dispute that after plaintiff's discharge following elimination of his position there was no one hired to replace him younger or older. Plaintiff has argued, however, that the duties once performed by him had been redistributed among existing employees outside his protected class, i.e., significantly younger, thus satisfying the fourth prong. Defendants have argued there is no evidence in the record delineating plaintiff's duties at the time of his termination, nor any evidence demonstrating that existing, substantially younger employees assumed those duties. Rather, defendants note it was only after cessation of plaintiff's consulting work as a project manager at the end of May 2004 that his project-manager duties were then redistributed among younger, existing employees.

In any event, we conclude that the focus of the motion judge in evaluating the fourth prong was too narrow. "Unless a plaintiff is claiming reverse discrimination, it is unnecessary to show a replacement outside of the protected class in order to satisfy the fourth prong of the prima facie case." *DeWees v. RCN Corporation*, 380 N.J. Super. 511, 525 (App. Div. 2005). See also *Petrusky v. Maxfli Dunlop Sports Corp.*, *supra*, 342 N.J. Super. at 82 (holding that "[i]t is erroneous, in an ordinary case of age discrimination in employment, to use reference to a particular replacement employee as the only means for satisfying the customary fourth element of the prima facie showing").

Thus, the fourth prong of the prima facie showing can be satisfied by proof that the plaintiff's age, in any significant way, made a difference in the treatment plaintiff was accorded by the employer. *Ibid.* (citing, *inter alia*, *Maxfield v. Sinclair Int'l*, 766 F. 2d 788, 792 (3d Cir. 1985) ("[T]he fourth element of the McDonnell Douglas test could be satisfied by proof of either replacement by someone outside the protected class or by someone younger or by other proof that the discharge was because of age." (emphasis supplied)), cert. denied sub nom., *Sinclair Int'l v. Maxfield*, 474 U.S. 1057, 106 S.Ct. 796, 88 L.Ed. 2d 773 (1986)).



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Consistent with our case law, we can certainly conceive of circumstances in evaluating an age discrimination claim where the fourth prong can be satisfied when an employer eliminates an employee's position, discharges that employee, and then redistributes that employee's work among existing younger employees. However, the simple distribution of a terminated employee's work among existing employees, who may be younger, by itself, does not rise to the level of a *prima facie* showing that the discharge was because of age, and thus unlawful. That is so because the issue is not whether the protected individual is replaced by a new employee, or whether existing employees assume the work following his or her departure; rather, the issue to be decided in evaluating the fourth prong requirement of a *prima facie* case is whether the adverse employment action took place under circumstances that give rise to an inference of unlawful discrimination. *Williams, supra*, 323 N.J. Super. at 502-03. In addressing that issue, the motion court must review, evaluate and weigh the entire record presented to determine whether an inference of unlawful discrimination exists.

We have examined the record on appeal in detail to determine whether there are circumstances that give rise to an inference of an age-discriminatory animus. We are satisfied that based on the record in this case, plaintiff cannot establish that his age played a significant role in the elimination of his position and his resulting discharge. In fact, there is significant evidence to the contrary. The record overwhelmingly supports the conclusion that plaintiff's position was eliminated as the result of a reorganization of the Informational Services division, and as a cost reduction measure. Prior to the elimination of plaintiff's position, there were two divisional vice presidents within that division, and the second vice president, who was retained, was the same age as plaintiff. The record is clear that following plaintiff's discharge, Spencer Gifts did not seek a replacement for plaintiff, and no new position was created to assume all or any part of plaintiff's former duties as Divisional Vice President of Information Services. Although plaintiff contends that his former duties were absorbed by existing employees who were significantly younger, our review of the record demonstrates there is no evidence to support that position, despite a lengthy and intensive period of discovery. At one point in his findings, the motion judge did state "there is evidence that the duties that he previously performed were distributed to a number of other employees, [who] at least appear to have been significantly younger than him." Although we cannot find support in the record for that conclusion, even if it were so, that fact must be coupled with other circumstances to establish an inference of a discriminatory animus; here, there are none.

What the record does show is that following plaintiff's discharge in April 2004 as Divisional Vice President of Information Services, Spencer Gifts engaged plaintiff as an independent contractor for the consultant position of "project manager" of a temporary transition project. When the parties reached an impasse concerning a formal written consulting agreement, plaintiff resigned from the project manager position in late May 2004. Following plaintiff's departure, his project-manager duties were assumed by existing employees Barbara Handy and Donna Matteucci; the record does not indicate whether these two employees were younger or older than plaintiff. However, assuming they were significantly younger, those circumstances do not give rise to an inference of age discrimination. The record discloses that Handy had been involved in the transition project from its



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inception, and Matteucci, a member of plaintiff's former staff, assumed a supporting role for Handy on the project.

There is nothing in the circumstances of this case from which a discriminatory animus can be inferred. Termination at age fifty-seven by itself is an insufficient basis to formulate an inference of discriminatory intent. There must be some showing that the prohibited consideration of age played a role in the employment decision.

We also conclude that plaintiff's reliance on *Torre v. Casio, Inc.*, 42 F. 3d 825 (3d Cir. 1994), is misplaced. That case involved an allegation that plaintiff, at age fifty-nine, was transferred to a dead-end position, and then terminated as part of a reduction in force. *Id.* at 827-28. The facts of that case disclosed that following plaintiff's transfer, two younger employees in jobs comparable to his were retained in their positions, and those younger employees subsumed plaintiff's duties. *Id.* at 831. "Furthermore, younger people were retained when [plaintiff] was terminated." *Ibid.* The employer also acknowledged that it had attempted to fill the position from which plaintiff had been transferred, and advertised the opening, only ceasing its efforts when it became economically unsound to hire a replacement. *Ibid.* In reversing the District Court's grant of summary judgment, the Court of Appeals found that plaintiff had created a material fact issue concerning whether he had been transferred from his position to a dead-end job that had already been effectively eliminated before he was transferred to it, and whether his transfer and subsequent termination were part and parcel of an age-discriminatory scheme. *Id.* at 831-32. Those circumstances certainly raised the requisite inference of a discriminatory intent.

Here, however, plaintiff has proffered no evidence, direct or circumstantial, from which it could be inferred that a discriminatory reason was more likely than not a substantial factor in the elimination of his position and his resulting discharge. A reasonable factfinder, viewing the competent evidential materials in a light most favorable to plaintiff, could not have ruled in his favor; accordingly, summary judgment dismissing plaintiff's complaint for failure to establish a *prima facie* case of unlawful age discrimination was properly entered.

Affirmed.

1. The November 3, 2008 order was entered by a different judge than the motion judge.

