EUGEN SCHENFELD, Plaintiff, v. INTERNATIONAL BUSINESS MACHINES (IBM), JOHN KELLY, ZACHARY LEMNIOS, LARRY O'CONNELL, JOHN DOES 1-10, and ABC CORPORATIONS 1-10, Defendants.	SUPERIOR COURT OF NEW JERSEY MIDDLESEX COUNTY – LAW DIVISION DOCKET NO.: MID-L-7334-18 Civil Action **ORDER**

THIS MATTER having been opened to the Court by both parties for an Order, pursuant to R. 4:46, for summary judgment; and the Court having considered the moving papers, and any papers filed in opposition thereto, and any papers submitted in reply, and having heard the parties for oral argument on January 21, 2022; for the reasons set forth in the accompanying written opinion, and for good cause having been shown;

IT IS ON THIS 23rd DAY OF FEBRUARY 2022, ORDERED AS FOLLOWS:

ORDERED that Defendant IBM, Defendant John Kelly, and Defendant Zachary Lemnios' motion for summary judgment is **DENIED** as to Plaintiff's claim for unlawful discrimination in violation of the New Jersey Law Against Discrimination; and it is further

ORDERED that Defendant IBM, Defendant John Kelly, and Defendant Zachary Lemnios' motion for summary judgment is **GRANTED** as to Plaintiff's claim for failure to hire in violation of the New Jersey Law Against Discrimination; and it is further

ORDERED that Defendant Larry O'Connell's motion for summary judgment is **GRANTED** and all claims against him as an individual are dismissed with prejudice; and it is further

ORDERED that Plaintiff's motion for summary judgment is **DENIED**; and it is further

ORDERED that a copy of this Order shall be served upon all counsel upon its upload to eCourts. Pursuant to R. 1:5-1(a), movant shall serve a copy of this Order on all parties not electronically served within seven (7) days of the date of this Order.

Hon. Alberto Rivas, J.S.C.

FILED
FEBRUARY 23, 2022
HON. ALBERTO RIVAS, J.S.C.

EUGEN SCHENFELD

Plaintiff,

v.

INTERNATIONAL BUSINESS MACHINES (IBM), JOHN KELLY, ZACHARY LEMNIOS, LARRY O'CONNELL, JOHN DOES 1-10, and ABC CORPORATIONS 1-10,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MIDDLESEX COUNTY

DOCKET NO. MID-L-7334-18

Civil Action
OPINION

HONORABLE ALBERTO RIVAS, J.S.C.

I. FACTUAL AND PROCEDURAL HISTORY

In 2018, Plaintiff Eugen Schenfeld was terminated as part of a reduction-in-force by his business unit, IBM Research ("Research"). On November 13, 2018, Plaintiff commenced this action alleging that IBM terminated him and failed to rehire him due to his age, in violation of the New Jersey Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1 *et seq*. Plaintiff has also alleged that three individually named defendants, Larry O'Connell, John Kelly, and Zachary Lemnios, aided and abetted alleged LAD violations.

A substantial, and often contested, amount of discovery has been exchanged between the parties throughout this litigation. In relation to this pending motion and cross-motion for summary judgment, the parties each submitted a voluminous number of exhibits and certifications in support of their papers and appeared before this court on January 21, 2022 for oral arguments.

We glean the following facts, allegations, and chronological narrative from the parties' submitted statements of material facts, mindful that credibility determinations have not been made.

A. Plaintiff's Work on IBM's "Hardware Cloud"

IBM's Research unit explores technology for potential new IBM products and services. The Research unit itself has multiple departments and organizations focusing on various technical areas. In 1998, IBM hired Plaintiff, aged forty (40) at the time, as a Research Staff Member. In 2012, Plaintiff was moved to a department within Research under then Vice President T.C. Chen. Plaintiff thereafter worked in department titled Science & Solutions ("S&S"), later renamed Science & Technology ("S&T") and renamed again as the Physical Sciences and Government Programs ("PS&GP").

From 2012 through his termination, Plaintiff worked on a theoretical hardware architecture for data centers called the "Hardware Cloud". Plaintiff has admitted that he did not invent the concept of disaggregated data centers, but rather the "Hardware Cloud" was his proposed solution to the data center matter. Through Plaintiff's own statements, the work being conducted was collaborative in nature.

On August 16, 2015, John Kelly sent an email to Plaintiff reprimanding him for his alleged disparagement of colleagues. Kelly's reprimand included a direct request to cease the disparagement, a reiteration of the idea that collaboration was necessary for the success of the project, and that Kelly did not want to read/listen to the disparagement anymore.

On or about March 18, 2016, Human Resources conducted an investigation after a complaint was filed by James Speidell, an IBM employee assigned to assist Plaintiff with building a mockup of the "Hardware Cloud". Following the investigation, Dario Gil, then Vice President of S&T and Plaintiff's second-level manager, sent an e-mail to Plaintiff admonishing him for his "unacceptable behaviors", which included "degrading comments about fellow employees' knowledge and intelligence" and "inappropriately using senior executive names as implicit support or threats to achieve your goals." Saravay Cert., Ex. E, IBM-Email-Prod0000049-50. The e-mail also included a request that Plaintiff confine himself to his work generating patents and IP, work only with small teams, and to act and behave as an individual contributor rather than a supervisor. The email also stated that "failure to comply with these expectations and requests will jeopardize your position at IBM." Following this email, Plaintiff cancelled meetings and stated that he would no longer act as the leader of the team working on patent applications.

A memo dated September 7, 2016, signed by Plaintiff, stated that he had violated proper workplace behavior by engaging in the same conduct referred to in Gil's March 18, 2016 e-mail. This memo also stated that Plaintiff had failed "to follow management direction as indicated in Dario Gil's email to you on 3/18/16". IBM included language in the memo that "future violation of this, or any other IBM condition of employment, may lead to your immediate dismissal." Saravay Cert., Ex. I, IBM-Email-Prod0000649.

In 2017, Zachary Lemnios, then sixty-two (62) years old, replaced Dario Gil as Vice President of S&T, which was subsequently renamed PS&GP. In this role, Lemnios acted as a second-level manager of Plaintiff.

On August 29, 2017, Plaintiff submitted a draft proposal to present his "Hardware Cloud" concept at the March 2018 IBM Think Conference. Though at the time, there was not a working prototype of the "Hardware Cloud", Speidell opined that the approximate cost to complete the mockup, transport it to and from the conference, and assemble and dissemble it would be $87,200. Lemnios did not give approval to generate a functioning prototype and insisted that the project be put on hold.

B. Plaintiff's 2018 Work Plan

On January 10, 2018, Lemnios sent Plaintiff an email requesting that he forward "2-3 charts (total) several days before we meet that summarize what you plan to work on in 2018, the impact you plan to drive in IBM, and how you plan to accomplish this." Saravay Cert., Ex. E, IBM-Email-Prod0001707-1710. Five days later, on January 15, 2018, Lemnios sent a follow-up email to Plaintiff requesting the same information contained in the January 10th correspondence.

After hearing from Speidell that Plaintiff had "committed the display of 5 large rack systems at the IBM Think conference in Las Vegas", Lemnios sent an email to Plaintiff on January 17, 2018 instructing him to stop all work related to the 2018 IBM Think conference and to "prepare a summary of your 2018 project plans and goals with specific detail of what resources you need, what you plan to do, what milestones you plan to achieve, and what impact you plan tohave on the IBM Company. I'd like to see this by Friday, 1/19." Saravay Cert., Ex. K, IBM-Email-Prod00001683. On January 21, 2018, Lemnios repeated the request to see the full scope of Plaintiff's planned objectives for 2018.

On January 29, 2018, Plaintiff argued in an email to Lemnios that he lacked the technical expertise necessary to understand the full value of his work and wrote that "it seems to me you

are in the dark as you keep shooting blindly in all directions hoping to hit something." Lemnios Cert., Ex. L, IBM-Email-Prod0001359-1364. This email also included the three charts that Lemnios had asked Plaintiff to produce; Lemnios later alleged that the charts lacked the type of specificity that he had asked Plaintiff for. It was not until February 16, 2018 that Lemnios again asked Plaintiff for a summary of his 2018 work plan. This request was in anticipation of a quarterly meeting between Lemnios and John Kelly.

On February 26, 2018, Plaintiff provided Lemnios with charts that included a list of possible projects. On the following day, February 27, 2018, Lemnios responded that he needed a specific outline of what Plaintiff intended to accomplish in 2018 and a corresponding program plan and schedule with relevant milestones.

C. Plaintiff's Selection for IBM'S 2018 Resource Action

In the fourth quarter of 2017, Research developed its strategic plan for 2018, known as the "Fall Plan." The Fall Plan anticipated an overall increased investment in artificial intelligence that would need to be offset by resource/other spending reductions. Research determined that a resource action should be proposed as one method of expense reduction. On February 9, 2018, Research was authorized to proceed with the resource action.

Over the next few weeks, several managers in Research, including Varun Gupta (Director of Human Resources for Research, Sophie Vanderbroek (Chief Operating Officer of Research), and Dario Gil began to preliminarily identify employees potentially eligible for separation in the Resource Action, which was designated "CDRS" and has also been referred to as Project Concord. On February 20, 2018, Gil suggested that Lemnios consider Plaintiff for the Resource Action because Gil believed his work could be eliminated from the mission of PS&GP. This suggestion was initially opposed by Lemnios.

On February 16, 2018, Dan Bellor, an HR partner within Research, sent an email to Lemnios looking to determine if he would be interested in including one or two employees for staffing reduction pursuant to Project Concord. Lemnios advised Bellor that he was not interested in participating in any staff reductions within his department.

On February 20, 2018, a working group consisting of human resources managers and several Vice Presidents met to discuss the 2018 Project Concord selection process. That day, Bellor sent an email to the working group indicating that Lemnios was not interested in submitting a name for the Resource Action. Later that day, Gil sent an email to Bellor and other

members of the working group that suggested that Plaintiff be considered for the Resource Action. The next day, this email was forwarded to Lemnios who reiterated that he did not believe that Plaintiff should be included in the Resource Action.

On February 22, 2018, Gupta met one-on-one with Arvind Krishna, the then-Director of Research, to review a preliminary list of employees being considered for the Resource Action. Following this meeting, Gupta sent an email to Sophie Vanderbroek indicating that he sought to have Plaintiff included on the proposed list. During the course of his deposition, Plaintiff alleges that Gupta indicated that Krishna directed Plaintiff be placed on the Resource Action list.

On February 28, 2018, Bellor completed a Resource Action worksheet indicating that Plaintiff had been selected. The following day, March 1, 2018, Bellor replaced the initial worksheet submitted to the project office. On March 2, 2018, Bellor submitted an updated worksheet to the project office indicating that Plaintiff was selected due to work elimination rather than the previous worksheet which had indicated that Plaintiff was selected due to position elimination.

Despite his initial opposition, by March 2, 2018, Lemnios identified Plaintiff as a potential candidate for the Resource Action. On March 22, 2018, Lemnios sent an email to Kelly stating that he had met with Arvid Krishna and that he has made the decision to place Plaintiff on the Resource Action list. On March 29, 2018, Lemnios informed Plaintiff that he had decided to eliminate his work and select him for the Resource Action. Lemnios also informed Plaintiff by letter that he could apply for other IBM positions, but that IBM would not displace another IBM employee to fit him into a role. This letter also informed Plaintiff that if he did not transfer to a new role in IBM, his last day of work would be June 27, 2018. It is undisputed that Plaintiff did not formally apply for any open position at IBM either before or after his employment ended.

Though he did not formally apply for a position at IBM, Plaintiff did informally ask several IBM employees about other positions available. One of these employees was James Sexton, who reported to Michael Resonfield, about a possible position on the CORAL 2 project; he also sent messages to Giovanni Pacifici and Larry O'Connell, about unspecified positions. Rosenfield and Sexton alleged that they had no open positions in the CORAL 2 project and were not interested in Plaintiff. Pacifici and O'Connell simply did not respond to Plaintiff's inquiry.

Following Plaintiff's termination, IBM filed multiple patents that identified Plaintiff as a co-inventor. Furthermore, Plaintiff has alleged that IBM has continued to do research on the use

of disaggregated technology in datacenters, Plaintiff's area of expertise. Most recently IBM has introduced a new product known as POWER10, a large new computer processor which is specifically compatible to be used in a disaggregated memory environment.

D. Facts Related Specifically to Defendant Larry O'Connell

In 2018, Larry O'Connell was working in IBM's Global Markets business unit as Vice President of Global Technical Leadership and Global Techline. Global Markets, which employed technical sellers responsible for selling all IBM products, was a business unit separate from Research. In addition to his Vice President position, O'Connell served as IBM's Senior Location Executive ("SLE") for Central and Southern New Jersey. The SLE role was an unpaid, volunteer position that allegedly focused on communicating information to employees about local activities and location-specific topics, such as office holiday closures.

Plaintiff does not recall ever meeting O'Connell in person and he was not aware that Plaintiff had been selected for a resource action until he received an email from Plaintiff on October 25, 2018 – this email asked Mr. O'Connell for help finding a suitable position within IBM. O'Connell never replied to Plaintiff's email.

II. Defendant's Argument

A. Plaintiff Was Not Replaced By A Younger Candidate

Assuming for the sake of this motion that Plaintiff can satisfy the first three elements to establish a prima facie case of age discrimination, Defendants argue that Plaintiff cannot establish the necessary fourth prong – that he was replaced by a younger candidate. See Young v. Hobart W. Grp., 385 N.J. Super. 448, 458 (App. Div. 2005). The record indicates that no one, let alone a younger candidate, replaced Plaintiff or his "Hardware Cloud" work in PS&GP.

Anticipating that Plaintiff will argue he was replaced because of the introduction of the POWER10 processor, Defendants argue that, without dispute, the POWER10 work was not Plaintiff's type of work. Plaintiff admitted that he performed no product development work and he did not design, engineer, or program the POWER10. Defendants allege that Plaintiff's assumption that his ideas somehow contributed post-termination to the development of POWER10 is merely a self-promoting assumption that is devoid of fact and insufficient to create any genuine dispute about whether he was replaced.

Defendants also argue that the fact that employees in IBM's Research Europe division performed research on disaggregated datacenters after Plaintiff's termination is irrelevant as

these employees did not work in PS&GP, the only unit relevant for discerning whether Plaintiff was replaced. Even if the employees in Ireland were relevant, Defendants posit that their mere absorption of some of Plaintiff's prior work would not demonstrate that he was replaced in the manner required to establish a LAD claim.

In discussing the patents submitted by IBM following Plaintiff's termination, Defendants argue that the mere completion of a patent application by others is insufficient as a matter of law to establish Plaintiff was replaced. Preparing and filing patent applications takes time, meaning patent applications may be filed and issued years after the underlying innovation work is completed. Patents related to the "Hardware Cloud" are no exception; they reflected past work done by Plaintiff and his co-inventors – they were not plans for future work to be accomplished following Plaintiff's termination.

As a second point, Defendants argue that the ages of the employees IBM terminated and retained as part of the Resource Action preclude any inference of age discrimination. Defendant notes that, contrary to federal law, there is no specific age threshold in New Jersey and therefore to infer age discrimination, the court must examine how the plaintiff's age compares to the ages of the employees who were terminated and retained. Plaintiff was fifty-nine (59) when he was selected for the Resource Action and sixty (60) on the day of his termination.

Of the sixteen (16) U.S. employees in Research who were terminated in the Resource Action, six (6) were in their forties (40s); after the Resource Action, over three-hundred (300) U.S. employees in Research were aged sixty (60) or older. Defendants argue that these numbers do not provide that type of inference of age discrimination necessary to defeat a motion for summary judgment. Furthermore, the mere hiring of younger employees, which Defendants admitted took place, does not give rise to the inference of discrimination.

Defendants argue that there is no nexus between the new hires and Plaintiff's termination as there is no evidence that any newly hired employee replaced Plaintiff. To the contrary, the record indicates that Research was increasing its investment in AI and engaged in the Resource Action to invest in new employees with different skill sets. Defendant maintains that a change in strategy is a legitimate basis for a reduction in force. Brader v. Biogen Inc., 983 F.3d 39, 57 (1st Cir. 2020). The critical analysis is whether Plaintiff was older or younger than the employees IBM terminated and retained as part of the Resource Action; that analysis belies any inference of discrimination.

B. Defendants Have Provided a Legitimate, Non-Discriminatory Reason for Plaintiff's Termination

Even if Plaintiff could establish a prima facie case of discrimination, Defendants maintain that they have provided a legitimate, non-discriminatory reason for his discharge. They argue that eliminating an employee's position "as a cost reduction measure" is a legitimate, non-discriminatory reason for termination. See Young, 385 N.J. Super. at 460. Similarly, a "rethinking of business strategy and company priorities", such as focusing on certain areas of research over others, is lawful and permissible. Brader, 983 F.3d at 51-52, 57.

Defendants argue that those same rationales apply here; Research conducted the Resource Action in order to align its workforce with its evolving strategic plan, which was to focus more on AI. Through the Resource Action, Research eliminated non-strategic positions and work to counterbalance the cost of hiring employees with new and different skills. Plaintiff in particular was selected by Lemnios for the Resource Action after he concluded that Plaintiff's work could be eliminated entirely from PS&GP. Defendants argue that Plaintiff could not construct a viable work plan and that his "Hardware Cloud", which did not have a functioning prototype, had a limited future contribution and therefore the work should be eliminated from PS&GP.

Though he may disagree with Lemnios about the viability and value of his work, Defendants argue that Plaintiff's subjective self-assessment cannot be used to undercut Lemnios' rationale. "An employee's own view of her performance ... is not at issue in an alleged discrimination case. What is significant is the perception of the decisionmaker. Absent discrimination, a company is privileged to make business judgments on an employee's status." Johnson v. Penske Trucking Leasing Co., 949 F. Supp. 1153, 1172 (D.N.J. 1996). The LAD does not grant a court authorization to second guess employers in their assessment of their employees.

C. Plaintiff Cannot Establish Pretext

With respect to discriminatory motive, Defendants argue that Plaintiff has repeatedly maintained that IBM's discriminatory animus is demonstrated by an Equal Employment Opportunity Commission ("EEOC") Letter of Determination ("LOD" regarding the EEOC's investigation of age discrimination. However, under the EEOC's own regulation, "a determination finding reasonable cause is based on, and limited to, evidence obtained by the Commission and does not reflect any judgment on the merits of allegations not addressed in the determination." 29 C.F.R. § 1601.21.

Furthermore, Defendants argue that none of the charges identified in the LOD relates to Plaintiff nor did Plaintiff himself ever file a charge with the EEOC. The LOD does not identify any witnesses or documents that the EEOC reviewed and does not describe facts in a manner similar to what is described in this pending motion. Thus, as irrelevant and inadmissible material, the EEOC LOD cannot help Plaintiff in this motion for summary judgment.

Defendants argue that the fact the alleged decisionmakers here are older than Plaintiff negates any inference of age discrimination. See Young, 385 N.J. Super. at 461. With respect to their articulated reasons for Plaintiff's termination, Defendants argue that IBM was entitled, under the law, to rebalance its workforce to fulfill their strategic plan. As previously explained, the mere fact that some of the new employees were younger than Plaintiff cannot, without more, give rise to pretext. See Ezold v. Wolf, Block Schorr, and Solis-Cohen, 983 F.2d 509, 542-43 (3rd Cir. 1992).

D. Failure to Hire Claim

Defendants argue that Plaintiff, as a matter of law, cannot establish several elements of his prima facie failure-to-hire claim.

i. **Plaintiff Did Not Formally Apply For Any Open Positions at IBM**

At the outset, Defendants note that it is undisputed that Plaintiff did not apply for any open positions at IBM, either before or after his employment ended, even though he was told that he would be able to apply for IBM positions. Defendants argue that this failure to formally apply for a position precludes Plaintiff's claim as a matter of law. See Murray v. Beverage Distribution Center, Inc., 757 F. Supp. 2d 480, 488 (D.N.J. 2010). Defendants argue that they have no legal obligation to affirmatively search for a position on Plaintiff's behalf; the burden to apply for alternative, open positions fell squarely on Plaintiff.

ii. **Plaintiff Cannot Demonstrate There Was An Open Position For Which He Was Qualified**

Defendants argue that Plaintiff's informal inquiries about possible open positions should not count as a formal application; however, assuming the court views them as such, Plaintiff cannot show that there were open positions for which he was qualified. Plaintiff claims that, while at IBM, he asked Lemnios Kelly, and James Sexton about transferring into Rosenfield's DCS organization to work on the CORAL 2 project. However, there is no evidence of an open position in DCS, let alone one which Plaintiff was qualified. Rather, in the months before the

Resource Action, Rosenfield stated that he was not interested in Plaintiff transferring to DCS nor was he interested in Plaintiff's ideas.

While Plaintiff may view himself as qualified, Defendants argue that DCS had the right to evaluate his qualifications and disagree with his self-assessment.

Plaintiff also emailed Larry O'Connell and Giovanni Pacifici about potential openings within IBM. The email to O'Connell asked to "help me find a suitable position with IBM", though no specific position was expanded upon in the email. Defendants argue that there is nothing before the record indicating that O'Connell had any open position or one in which Plaintiff was qualified. Pacifici's group, on the other hand, was working on software and not "the architecture" and therefore the facts again do not establish that there was an open position available for Plaintiff. Plaintiff is not a software programmer or an engineer.

iii. **The Ages of Employees Who Were Hired For Alternative Positions and Those Who Failed to Hire Plaintiff Preclude an Inference of Age Discrimination**

Defendants note that of the twenty-one (21) employees who were identified for the CDRS, five (5) found other positions within IBM. Their ages were fifty-one (51), fifty-seven (57), sixty (60), sixty-six (66), and forty-six (46). They argue that the fact IBM rehired three employees older than or around the same age as Plaintiff precludes a finding of age discrimination in rehiring. These same facts also disprove Plaintiff's assertion that hiring was effectively "frozen".

Defendants lastly argue that the ages of the supervisors Plaintiff claims discriminated against him in hiring preclude an inference of age discrimination. In 2018, John Kelly was sixty-four (64), Mike Rosenfield was sixty (60), James Sexton was sixty-one (61), Larry O'Connell was sixty-four (64), Zachary Lemnios was sixty-three (63), and Giovanni Pacifici was sixty (60). Given these indisputable facts, Defendants argue that Plaintiff cannot establish an inference of age discrimination.

E. Complaint Against Larry O'Connell Should be Dismissed

Defendants argue that O'Connell did not, in his capacity of Senior Location Executive of Central of Southern New Jersey, supervise or manage Plaintiff. As an unpaid volunteer, O'Connell communicated information to employees about various local opportunities. This limited responsibility did not make him Plaintiff's supervisor.

Defendants also argue that, as a matter of law, O'Connell cannot be liable for Plaintiff's allegedly discriminatory termination because the undisputed evidence establishes that he was not involved at all in Plaintiff's selection for the resource action. O'Connell worked in a separate business unit and Plaintiff has conceded that the decisions about which employees within Research were selected for the resource action was made entirely within Research. O'Connell did not receive any notification that Plaintiff had been selected for a resource action and in fact did not even know until contacted by Plaintiff himself. At no point, was O'Connell aware of Plaintiff's age.

As to the failure to hire claim, Defendants argue that Plaintiff has amassed no evidence that O'Connell had any open positions for which Plaintiff was qualified. To the contrary, O'Connell did not hire any new employees in 2018 or 2019, let alone someone younger than Plaintiff. To the extent Plaintiff predicates his claim based on O'Connell's lack of response to his email seeking assistance, Defendants argue that this cannot amount to knowing and substantial assistance as a matter of law.

III. Plaintiff's Argument

A. Plaintiff Can Establish a Prima Facie Case of Age Discrimination

Plaintiff argues that Defendants, in their motion for summary judgment, have set forth incorrect elements that the plaintiff needs to establish. Moreso, the entire premise of Defendants' motion, that he cannot prove the fourth element of his prima facie case, is inherently flawed as this is a reduction-in-force case that does not require a plaintiff to prove that their employment was replaced by a substantially younger employee. See Model Jury Instruction 2.23. Plaintiff argues that it is undisputed that this matter relates to a reduction in force.

Plaintiff cites to Clowes v. Terminex International Inc., 109 N.J. 575, 596 (1988), to support his position that the McDonnell Douglas analysis employed in discrimination cases is not designed for rigid application and instead must be tailored to the unique facts of each particular case. They argue that here, the proper analysis would be the elements set forth in Model Jury Instruction 2.23.

Plaintiff maintains that it is undisputed that he is clearly a member of a protected category, which satisfies the first element of his prima facie claim. He argues that the second element in a reduction in force case is whether younger employees similarly situated were treated more favorably. Plaintiff notes that, based on discovery in this case, all employees in the

Research division that were terminated as part of the 2018 resource action were over forty (40). He further argues that resource actions undertaken in both 2016 and 2017 also only terminated employees over forty (40). Since the younger employees were not selected for termination, they were treated more favorably than their older counterparts.

Plaintiff argues that there is direct evidence that Defendants were hiring new employees at the same time they were engaged in a divisional, and company-wide layoffs. The data provided by Plaintiff's expert, Paul Gazaleh, shows that the overwhelming majority of new hires in 2017, 2018, and 2019 were under forty (40) years of age. When questioned concerning this data, Arvind Krishna, the director of IBM Research in 2018, candidly explained their preference for new college graduates since they perceived that these prospective employees had skills that were not readily apparent in the existing workforce. Plaintiff argues that, based on this data, the only conclusion is that older employees were treated less favorably than their younger colleagues.

B. Defendants Cannot Produce a Sufficient Legitimate Business Reason For Termination

Plaintiff argues that a close review of the evidence surrounding this case establishes numerous questions of fact surrounding Defendants continued claim that Plaintiff was terminated because his work was being eliminated, and whether or not this termination was related to the larger decision making involved in the resource action.

Plaintiff disputes that Zachary Lemnios unilaterally made the decision to terminate him and argues that there is a significate factual dispute concerning who the actual decision maker was surrounding the issue of termination. Plaintiff points to a series of emails that clearly demonstrate Lemnios was against Plaintiff's termination – this opposition was allegedly maintained *after* Lemnios had completed a detailed review and realignment of his entire unit. Lemnios' opposition to terminating Plaintiff persisted for weeks after his name was submitted to the project office as part of the final Resource Action list.

Plaintiff also points to a series of communiques between Bellor and Lemnios where it is revealed that Lemnios disagreed with the decision to place Plaintiff on this list and even specifically raised legal concerns regarding this. Furthermore, Lemnios confirmed in his deposition that he understood Krishan had directed the inclusion of Plaintiff on the list and it was Bellor's job to get Lemnios on board with this decision.

Following Lemnios' continued refusal to go along with the termination of Plaintiff, there was a meeting between HR Director, Varun Gupta and Krishna on February 22, 2018. Plaintiff points to Gupta's direct testimony to acknowledge that he agrees with Lemnios' position that Krishna directed Plaintiff to be placed on the Resource Action list. Plaintiff argues that by March 2, 2018, at the direction of Krishna, Plaintiff was placed on the final Resource Action list even though Lemnios was still opposed to his inclusion.

Plaintiff argues that although Lemnios has claimed to have made the decision to terminate Plaintiff, there are serious questions concerning the credibility of this testimony which preclude summary judgment at this time. It is Plaintiff's position that the decision to terminate his employment was made by Krishna, after strong advocation from Dario Gil, and that the various witnesses and named individual Defendants in this matter are covering up Krishna's involvement due to the fact that Krishna is now Chief Executive Officer (CEO) of IBM.

Plaintiff maintains that all evidence in this case demonstrates that Gil and Gupta, two individuals substantially younger than he, made and supported the decision to terminate his employment. Gupta then met with Krishna on February 22, 2018, and following that meeting it was decided that Plaintiff should be part of the Resource Action. According to Plaintiff, Krishna was unable to make a rational fact-based decision to eliminate Plaintiff's work since he repeatedly testified in his deposition that he was unfamiliar with the nature of Plaintiff's work. Plaintiff notes that this narrative presents significant factual and credibility questions that must be decided by a jury.

Plaintiff also notes that there is direct evidence that challenges the credibility of Lemnios' testimony. Lemnios claims to have made the decision to terminate Plaintiff and also claims that he wrote key parts of Plaintiff's termination letter. However, Plaintiff has provided evidence that the termination letter included language that "was given to thousands of IBM employees." Plaintiff argues that this not a trivial or peripheral point, but is evidence that would allow a jury to conclude that Lemnios is not telling the truth on the critical language in this letter. If he is not telling the truth about the letter, he may have been deceptive in other parts of his testimony.

Plaintiff argues that there are also serious questions concerning the integrity of the resource action selection process. He argues that IBM ignored their own internal guidelines in creating the resource action list. In Plaintiff's particular case, there were a series of different worksheets that allegedly changed the reasons for why Plaintiff was selected. Plaintiff posits that

there were three different worksheets completed between February 28th and March 2nd, 2018, however only two of these worksheets have been produced during discovery. Plaintiff argues therefore that here is an issue with evidence spoilation related to the missing worksheet and that are entitled to the remedy espoused in Rosenblit v. Zimmerman, 166 N.J. 391 (2001).

In addition to the allegedly questionable activity regarding multiple work sheets justifying Plaintiff's selection, Plaintiff argues that the Defendants position that he was terminated because his work was eliminated is categorically false. Plaintiff points to a conversation in March 2018 when Plaintiff was involved in conversations with upper-level management who were allegedly seeking Plaintiff's involvement with IBM Cloud. In March 2018, David Kenny, Senior Vice President of IBM Cloud wrote to Plaintiff that they were working on building a strong team between Research and Cloud and wanted Plaintiff involved. In addition, Bryson Koehler, the Chief Technology Officer (CTO) for IBM Cloud wrote to Plaintiff on March 22, 2018 noting that his input moving forward "is sought after and helpful." Plaintiff Enclosure 22.

Furthermore, in the fall of 2017, Lemnios conducted a detailed evaluation and realignment of his strategy area and concluded that there was a high degree of importance in IBM's Research into Cloud and/or datacenters within his strategy area. Plaintiff argues that Lemnios recognized Plaintiff's work as important technology and that he had a particular expertise in the area of how to build efficient datacenter systems.

In addition to the numerous patents that Plaintiff notes were filed after Plaintiff's termination, Plaintiff argues that IBM continues to do research in Plaintiff's area long after his termination. Plaintiff was described by Gil as a "one hundred percent [a] cloud researcher." Plaintiff argues cloud technology is a key area for IBM and that Defendants admitted during discovery that at least one employee hired subsequent to Plaintiff's termination did research work in his specific area. Plaintiff Enclosure 30. Therefore, Plaintiff argues, there are substantial questions of credibility as to whether or not IBM eliminated Plaintiff's work after his termination.

Plaintiff argues that an employee need not prove his termination was solely based upon issues concerning discrimination or retaliation. Here, Plaintiff does not challenge the legitimacy of the Defendants reduction in force. Their position is simply that the decision-making process was tainted by unlawful age discrimination. Plaintiff notes that there are often "mixed motives"

explaining why a defendant employer has taken an adverse action. A plaintiff need only prove that discriminatory reasons were involved in the decision-making process, not that discrimination was the only reason for the employer's actions. Rendine v. Pantzer, 276 N.J. Super. 387 (App. Div. 1994).

C. The Court Should Dismiss Defense Motion to Dismiss Failure to Hire Claim and Grant Plaintiff's Cross-Motion for Summary Judgment

Plaintiff notes that Defendants' motion is based on the claim that he did not formally apply for a position within IBM either before or after his termination. However, as explained by Plaintiff in his deposition, a long-term employee applying "as if he were off the street" was not an effective way to secure a position within IBM. It was also Plaintiff's understanding that since he was selected for the Resource Action, he could not be hired back by IBM – he argues that this position is specifically supported by the internal documents contained within his personnel file which state he is not eligible for re-hire. Plaintiff argues that a formal application is not a necessary element of a failure to hire claim, especially in light of the fact that IBM classified him as a no-rehire.

Plaintiff argues that his work clearly continued at IBM and that he sought a position in Rosenfeld's group at IBM, though Rosenfeld decided to hire "five post docs" rather than him. Plaintiff also spoke directly with John Kelly, who informed him that he would not find him a position within IBM.

Plaintiff also notes, relying on his earlier factual recitation, that he was well recognized as having an expertise in cloud and that cloud continued to be a relevant field at IBM. Thus, Plaintiff argues that he was well qualified to continue his research work, but IBM chose to hire substantially younger employees to do the same work, which raises a strong inference of age discrimination.

D. Complaint Against Larry O'Connell

Plaintiff has specifically alleged that O'Connell, as the Senior Location Executive in New Jersey, had specific administrative responsibilities regarding the plaintiff and other New Jersey employees. Plaintiff has further alleged that O'Connell was well aware of the unlawful nature of the Defendants' resource action and failed to properly report this information to New Jersey State officials.

A Senior Location Executive has the responsibility to "ensure that IBM programs and services are administered consistently in the interest of both employees and the company."

Plaintiff Enclosure 33. Plaintiff argues that this would include the 2018 resource action which significantly affected New Jersey employees including Plaintiff.

Plaintiff does not allege O'Connell was an active participant in the decision-making process to include him in the Resource Action. However, Plaintiff alleges that O'Connell was part of IBM's plan and scheme to cover up their actions regarding age discrimination which are relevant to his complaint.

IV. Legal Analysis

Summary judgment will be granted if, viewing the evidence in the light most favorable to the non-moving party, "there is no genuine issue of material fact and 'the moving party is entitled to a judgment or order as a matter of law.'" Conley v. Guerrero, 228 N.J. 339, 346 (2017) (quoting Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016)). To determine whether there are genuine issues of material fact, the court 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." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406 (2014) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)).

"An issue of material fact is 'genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inference therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.'" Grande v. St. Clare's Health Sys., 230 N.J. 1, 24 (2017) (quoting Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)). Factual issues of an unsubstantial nature are insufficient to preclude the granting of summary judgment. Brill, *supra,* 142 N.J. at 540. At this point in the litigation, with all favorable inferences given to the Plaintiff, the presence of any credibility questions with respect to material issues would preclude this court from granting summary judgment.

"In a case alleging age discrimination under the LAD, an employee must 'show that the prohibited consideration, age, played a role in the decision-making process and that it had a determinative influence on the outcome of that process.'" Bergen Commercial Bank v. Sisler, 157 N.J. 188, 214-15 (1999) (quoting Maiorino v Schering-Plough Corp., 302 N.J. Super. 323, 344 (App. Div. 1997). In the absence of direct evidence, a plaintiff's claim of age discrimination must be analyzed under the burden shifting paradigm established in McDonnell Douglas Corp. v.

Green, 411 U.S. 792 (1973). This analytical framework requires an employee to first establish a prima facie case. See Zive v. Stanley Roberts, Inc., 182 N.J. 436, 447-50 (2005). The elements of a LAD plaintiff's prima facie case vary depending upon the discrimination alleged and the employment action taken.

To successfully assert a prima facie case of age discrimination under the LAD, a plaintiff must typically demonstrate: "(1) he was a member of a protected group; (2) his job performance met the 'employer's legitimate expectations'; (3) he was terminated; and (4) the employer replaced, or sought to replace, him." Nini v. Mercer Cty. Comm. C., 406 N.J. Super. 574, 554 (App. Div. 2009), aff'd 202 N.J. 98 (2010) (quoting Zive, *supra*, N.J. 436 at 450). The evidentiary burden to establish a prima facie case of disparate treatment is "rather modest: it is to demonstrate to the court that plaintiff's factual scenario is compatible with discriminatory intent – i.e., that discrimination *could* be a reason for the employer's action." Id at 447 (quoting Marzano v. Computer Sci. Corp., 91 F.3d 497, 502 (3d Cir. 1996)). For purposes of this summary judgment motion, the court, cognizant that the evidentiary threshold to establish a prima facie case is "not onerous", finds that Plaintiff has met this initial burden. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

As an initial matter, it is undisputed that Plaintiff, terminated at the age of sixty (60), was a member of a protected class. Furthermore, the record before the court indicates that Plaintiff was not included in the original Resource Action list generated by IBM. Plaintiff's absence from the initial list is buttressed by the fact that Zachary Lemnios, who assumed supervision over Plaintiff in November 2017, did not highlight any *performance* deficiencies related to Plaintiff in the lead up to the Resource Action. Evidence has also been provided that Lemnios initially challenged the inclusion of Plaintiff in the Resource Action and cautioned others at IBM that such a course had the potential to bring legal ramifications. There was, however, evidence of some divergence in the direction that Plaintiff wanted to procced with respect to his research and the direction IBM wanted to pursue with respect to applications involving the "cloud." Even considering this internal dispute related to future corporate initiatives, the court finds, for the purposes of this motion, that Plaintiff was performing appropriately and to the legitimate expectations of his employers prior to his termination. There were also allegations made against Plaintiff related to his treatment of, and demeanor towards, subordinates and colleagues at IBM; this evidence does not render Plaintiff's job performance unsatisfactory.

Unlike the first three prongs, the fourth prong of Plaintiff's prima facie case was heavily contested by the parties. The court initially notes that Defendants have misapplied the applicable standard to evaluate a prima facie case in this particular context. In reduction-in-force cases, such as the instant matter, the prima facie elements are modified. See Baker v. Nat'l State Bank, 312 N.J. Super. 268, 289 (App. Div. 1998). In Baker, the Appellate Division adopted the reasoning of Marzano, *supra*, 91 F.3d at 502, for age discrimination claims under the LAD. Id.

> [In Marzano], the court noted that the Third Circuit Court of Appeals has relaxed the fourth prong of the prima facie case in the reduction-in-force situation, so that a plaintiff whose position was eliminated need not show that he or she was replaced, but must show that the employer retained someone outside the protected class. The court declined to impose the requirement of additional evidence because "[i]t would topple the complex evidentiary edifice constructed by the Supreme Court, and impose on plaintiff the very burden that McDonnell Douglas sought to avoid-that of uncovering a smoking gun," or producing direct evidence of discrimination.

Id at 289-90. Therefore, a plaintiff who is unable to show that he was replaced by a sufficiently younger worker can still establish the fourth element of his prima facie case where there is otherwise an *inference* of age discrimination. See Petrusky v. Maxfli Dunlop Sports Corp., 342 N.J. Super. 77, 82 (App. Div.) cert. denied, 170 N.J. 388 (2001). At this stage, a "prima facie case is to be evaluated solely on the basis of the evidence presented by the plaintiff, irrespective of defendants' efforts to dispute that evidence." Zive, *supra,* 182 N.J. at 448 (citations omitted). Based on the ages of the employees retained and terminated as part of the Resource Action, as well as the communications between senior-level IBM executives in the lead up to Plaintiff's termination, the court finds that Plaintiff has presented a scenario that gives rise to an inference of age discrimination in his selection for termination. Thus, he has established his prima facie case.

Once a plaintiff establishes his prima facie case, the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for the discharge. See Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 596 (1988). The employer, however, only carries the burden

of production, not the burden of persuasion. See Greenberg v. Camden Cnty. Vocational & Tech. Sch., 310 N.J. Super. 189, 199 (App. Div. 1998). "It is sufficient if the employer's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." Id. IBM took the preliminary position that Plaintiff has failed to produce any direct evidence of age discrimination. The quandary with this argument, however, is that direct evidence of discriminatory intent is exceedingly rare. See Zive, *supra*, 182 N.J. at 448. The very purpose of the test elucidated in McDonnell Douglas was to avoid placing the burden on a plaintiff to uncover direct evidence that amounted to "a smoking gun." Baker, *supra*, 312 N.J. at 290.

Nevertheless, IBM has maintained throughout this litigation that Plaintiff was terminated as part of an overall reduction of employees that extended beyond the business unit that Plaintiff operated within. IBM asserted that it was shifting its technological focus to artificial intelligence and due to this strategy realignment, Plaintiff's skill-set and experience rendered him expendable. Per IBM, the inclusion of Plaintiff in the Resource Action was predicated on the incompatibility between the work plan submitted by Plaintiff and the company-wide technological shift that was about to unfold. Consequently, Defendants have provided a legitimate business reason for terminating Plaintiff.

At this point in the court's analysis, once the employer articulates a nondiscriminatory reason for termination, the plaintiff loses the benefit of the presumption established by the prima facie case. See Burdine, *supra*, 450 U.S. at 255-56. The plaintiff, however, can "respond by showing the employer's proffered reason was merely pretext for the discrimination." Gerety v. Atl. City Hilton Casino Resort, 184 N.J. 391, 399 (2005). The Third Circuit has set forth the appropriate analysis in determining whether a plaintiff has produced sufficient evidence to rebut the employer's alleged legitimate reason for its adverse action. See Fuentes v. Perskie, 32 F.3d 759 (3d Cir. 1994).

> [A] plaintiff who has made out a prima facie case may defeat a motion for summary judgment by *either* (i) discrediting the proffered reasons, either circumstantially or directly, or (ii) adducing evidence, whether circumstantial or direct, that discrimination was more likely than not a motivating or determinative cause of the adverse employment action.
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> . . . [T]o avoid summary judgment, the plaintiff's evidence rebutting the employer's proffered legitimate reasons must

> 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 discredit the employer's proffered reason, however, the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent. Rather, the non-moving plaintiff 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.

Id at 764-65 (citations and quotations omitted). Courts throughout this state have "adopted and consistently applied this standard." DeWees, *supra*, 380 N.J. Super. at 528. Therefore, in the context of a summary judgment motion, if the rebuttal presented by the plaintiff supports an inference of discrimination, then the motion must be denied since all favorable inferences must be accorded to the nonmoving party. If the proffered rebuttal evidence implicates issues of credibility, this court is precluded from granting summary judgment.

Here, the Plaintiff points to several facts in the record that he claims calls into question the proffered rationale put forward by IBM. One of the disputed issues in this case was who ultimately made the decision to include Plaintiff in the Resource Action. It is undisputed that when the original list was initially developed, Plaintiff was not included. Though there were discussions between IBM executives and the Plaintiff as to the direction of Plaintiff's work for the upcoming year, at no time was anyone suggesting that the field in which Plaintiff operated was subject to imminent discontinuation. This is further evidenced by Lemnios request that Plaintiff update and produce his work plan for 2018.

As discussed previously, there is some evidence that Lemnios initially pushed back against Plaintiff's inclusion in the proposed Resource Action and raised some concerns regarding the legal impact of such a decision. Despite this factually supported background, IBM asserted that it was Lemnios who ultimately had a change of heart to include Plaintiff in the Resource

Action. However, there is evidence in the record that supports an inference that the decision to terminate Plaintiff was made by Arvid Krishan following a meeting between Krishna and Varun Gupta, then Director of Human Resources. The evidence reveals meetings that took place between individuals who were not the Plaintiff's direct supervisors and that these employees were the individuals who consistently forced the issue with respect to the Plaintiffs termination. Two of the participants in the decision-making process were Dario Gil and Gupta, who were both younger than the Plaintiff. With respect to the role that Krishna played in terminating the Plaintiff, there is some evidence that he was unfamiliar with Plaintiff's various work products. Despite this, the given reason for Plaintiff's removal was the very nature of the antiquated work that he did.

The shift between Lemnios' initial opposition to Plaintiff's inclusion in the Resource Action and his eventual position to allow Plaintiff's employment to be severed implicates issues of credibility and thus precludes the granting of summary judgment. Another potential credibility question centers around the worksheets used to identify employees and the reason for their inclusion in the Resource Action.[1] There is a question as to how the worksheets were completed and the justifications provided for the inclusion of the Plaintiff in the worksheets. For example, in one of the worksheets, the reason listed for Plaintiff's inclusion was "position" elimination. In a subsequent worksheet, "work" elimination was listed as the basis for Plaintiff's inclusion. IBM has proffered its explanation for this discrepancy, but again, this is an issue whose resolution will turn on credibility findings. In discrimination cases, the absence of any direct evidence requires an assessment of circumstantial evidence, which can be probative. The presence or non-presence of circumstantial evidence is, by its nature, dependent upon resolving issues related to credibility. Based on the foregoing, IBM's motion to dismiss on summary judgment grounds is denied.

Larry O'Connell, an IBM employee, was named as a direct defendant by Plaintiff in his complaint. Mr. O'Connell worked in the Global Markets department, a separate business unit distinct from that of the Plaintiff. Mr. O'Connell was not a supervisor in Plaintiff's proverbial chain of command, but merely acted as a liaison between IBM and its New Jersey employees, communicating information such as social activities, volunteer options, and location specific

[1] The defendant submitted an unrequested exhibit following oral arguments on this issue. The court made the decision not to review the submitted document as it would have necessitated potential further argument and briefing.

information (such as office closures). Plaintiff, a New Jersey-based employee of IBM, received the communications sent by Mr. O'Connell.

Plaintiff claims that Mr. O'Connell had "administrative oversight" over his employment. He further alleges that Mr. O'Connell participated in the reduction-in-force procedure and had a duty to report information related to this workforce reduction to relevant New Jersey authorities. Plaintiff claims that Mr. O'Connell had information regarding the unlawful and discriminatory acts engaged in by IBM and that he assisted in the coverup of IBM's discriminatory practices with respect to older employees. Plaintiff suggested that Mr. O'Connell's position is analogous to that of a mandatory reporter and his failure to report IBM's wrongful behavior with respect to age discrimination makes him potentially liable as an aider and abettor.

To maintain his claim against Mr. O'Connell, Plaintiff must establish that he was an aider and abettor under the LAD. In order to meet this standard, Plaintiff must establish that Mr. O'Connell engaged in "active and purposeful" conduct. Tarr v. Ciasulli, 181 N.J. 70, 83 (2004). In Tarr, our Supreme Court noted:

> In order to hold an employee liable as an aider or abettor, a plaintiff must show that (1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as a part of an overall illegal or tortious activity at the time that he provides the assistance; and (3) the defendant must knowingly and substantially assist the principal violation.

Id. at 84 (quoting Hurley v. Atlantic City Police Dep't, 174 F.3d 95, 127 (3d Cir. 1999), cert. denied, 528 U.S. 1074 (2000). Factors that aid a court's determination of such liability include (1) the nature of the act encouraged, (2) the amount of assistance given by the supervisor, (3) whether the supervisor was present at the time of the asserted harassment, (4) the supervisor's relation to the others, and (5) the state of mind of the supervisor. See Hurley, *supra*, 174 F.3d at 127.

There is no dispute that Mr. O'Connell was not Plaintiff's direct supervisor. Furthermore, there has been no evidence produced showing that Mr. O'Connell played any role in the Resource Action that forms the basis of Plaintiff's complaint. Even assuming Mr. O'Connell was aware that many of the employees terminated in New Jersey were over forty-years (40) old, that

knowledge alone does not impose or create liability for him under the LAD. There is no concomitant duty to file any reports with the New Jersey Department of Labor upon the discovery of alleged illegal employment acts committed by IBM. The record is devoid of any admissible evidence that Mr. O'Connell engaged in any activity or behavior to make possible or facilitate unlawful age discrimination against the Plaintiff. The mere allegations of the complaint are not sufficient to defeat the motion for summary judgment filed on behalf of Mr. O'Connell. Therefore, the court will grant the motion to dismiss claims filed individually against Mr. O'Connell.

An additional motion has been made to dismiss Plaintiff's failure to hire claim. To establish a prima facie case for a failure to hire under the LAD, a plaintiff must show that he "(1) belongs to a protected class, (2) applied and was qualified for a position for which the employer was seeking applicants, (3) was rejected despite adequate qualifications, and (4) after rejection the position remained open, and the employer continued to seek applications for persons of plaintiff's qualifications." Bergen Commercial Bank, *supra*, 157 N.J. at 210. IBM argues that in the absence of any formal application by the Plaintiff for a specific position within IBM, Plaintiff cannot establish a prima facie case and therefore they are entitled to judgment as a matter of law. To further support this position, IBM notes that some employees who were included in the Resource Action were able to obtain other positions within IBM and continue their employment. This group contains employees who were over the age of forty at the time of their initial termination.

A plaintiff's failure to submit a formal application may prove a fatal obstacle in establishing his prima facie case. Yet, a plaintiff need not formally apply if he was deterred from applying due to the discriminatory practices of the employer, or "had a real and genuine interest" in the job "but reasonably believed that a formal application would be futile." Newark Branch NCAAP v. Town of Harrison, 907 F.2d 1408, 1415 (3d Cir. 1990) (citing Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 367 (1977)). Plaintiff concedes the fact that he did not submit a formal application to any department within IBM. Instead, the record indicates that Plaintiff made several informal inquiries to various individuals at IBM seeking their assistance in finding him an open position.

Plaintiff has presented evidence that following his inclusion in the Resource Action, his personnel file contained a notation that he was not to be re-hired. There is no disagreement that

the "do not hire" label was appended to Plaintiff's personnel file, however there is disagreement as to its meaning and significance. IBM indicates that Plaintiff was not precluded from being rehired due to this designation, but rather the classification merely triggered an additional pre-hire review process. Plaintiff argues that such a designation made a formal application futile. Yet, what is decidedly absent from the record is any indication that Plaintiff was *aware* of this designation at the time he made informal inquiries pertaining to job openings.

A general interest in being rehired without submitting a formal application is not enough to establish a prima facie case of age discrimination when the futility of such a formal application was only ascertained by the employee during the course of discovery pertaining to the instant litigation. At the time of his informal inquiries, Plaintiff may have believed that such a formal application was inappropriate given his long tenure with IBM and that such informal inquiries were to his strategic advantage. However, no evidence has been produced to show that Plaintiff made the conscious decision to forgo a formal application because of the "do not hire" notation in his personnel file. The presumptive logic utilized by Plaintiff cannot override his burden to establish a prima facie case. The futile-gesture doctrine codified by the Supreme Court in Int'l Bhd. of Teamsters was not meant to encompass situations where the Plaintiff did not formally submit an application due to his own reasoned judgment. The inability of Plaintiff to establish a prima facie case forces this court to dismiss his failure to hire claim.

For the reasons set forth herein, Plaintiff's motion for summary judgment is also denied.