NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1717-12T3

ROBERT SMITH,

Plaintiff-Appellant,

v.

MILLVILLE RESCUE SQUAD and
JOHN REDDEN,

Defendants-Respondents.

Argued November 13, 2013 – Decided June 27, 2014

Before Judges Alvarez and Ostrer.

On appeal from the Superior Court of New Jersey, Law Division, Cumberland County, Docket No. L-113-08.

Mario A. Iavicoli argued the cause for appellant.

Steven Gerber argued the cause for respondents (Gonzalez Saggio & Harlan, LLP, attorneys; Mr. Gerber, of counsel and on the brief; Ola A. Nunez, on the brief).

PER CURIAM

Plaintiff Robert Smith alleges that he was terminated from his position with defendant Millville Rescue Squad (MRS) because of his marital status and sex, in violation of the Law Against Discrimination (LAD), N.J.S.A. 10:5-12(a). He appeals from the Law Division's order, entered after the close of plaintiff's

case, involuntarily dismissing his claim under Rule 4:37-2(b), and granting defendant judgment under Rule 4:40-1. The appeal requires us to determine the scope of the "marital status" protection under LAD, in particular, whether it protects persons from discrimination because they are in the process of being divorced. We conclude that it does, and therefore reverse as to the dismissal of plaintiff's marital-status-based discrimination claim. We affirm as to the dismissal of his sex-based discrimination claim.

I.

In count one of plaintiff's February 6, 2008, complaint, plaintiff alleged that he was a victim of wrongful marital-status-based, and sex-based discrimination under LAD, and that his discharge violated his constitutional rights. In count two, he asserted a claim of common law wrongful discharge under Pierce v. Ortho Pharm. Corp., 84 N.J. 58 (1980). Well in advance of trial, the court dismissed the constitutional and common law claims in an order filed May 30, 2012. Trial before a jury commenced on the LAD claims in late October 2012.

The only witnesses in support of plaintiff's case were plaintiff himself, and a co-worker, Wally Maines. We discern the following facts from their testimony, mainly plaintiff's,

giving plaintiff all favorable inferences. Fox v. Millman, 210 N.J. 401, 428 (2012).

Plaintiff had worked for MRS for approximately seventeen years — almost seven years as a volunteer and over ten years as a paid employee — before his termination on February 17, 2006. He was an at-will employee. A certified emergency medical technician when hired, he had risen to director of operations several years before his firing. He reported directly to defendant John Redden, MRS's executive director. During plaintiff's tenure, the number of employees plaintiff supervised grew from less than ten, to over one hundred.

Plaintiff's wife was also a long-term MRS employee. Plaintiff first met his wife at MRS when she was a volunteer. She ultimately became one of four field supervisors who worked under plaintiff — although Redden evaluated her. Her mother and two sisters were also MRS employees. By 2005, MRS's total workforce was 150, which included a nursing staff that plaintiff did not schedule or supervise.

Plaintiff and his wife of over eight years separated on January 1, 2006. Plaintiff did not anticipate a reconciliation. The cause of the separation had been brewing for some time. Plaintiff had become romantically involved with a subordinate in February 2005. Plaintiff stated he did not conduct his

paramour's evaluation. His wife discovered the affair in June 2005. The woman with whom plaintiff was involved ceased working for MRS at the end of June 2005, and voluntarily resigned on January 20, 2006.

MRS management became aware of plaintiff's affair and his subsequent separation. Plaintiff's wife informed Redden of the affair shortly after her discovery. Plaintiff met with Redden afterwards to "let him know the circumstances." Plaintiff testified that he told Redden "I didn't want people to pick sides . . . . And, he said that would be the only way that . . . Millville as a whole could get through this." Redden did not direct plaintiff to discontinue the relationship and took no immediate personnel action. However, plaintiff testified, Redden "said that the one thing he can't do is he can't promise this won't affect my job. The words he used, 'All depends on how it shakes down.'" Plaintiff asserted, however, that many MRS employees had intimate relationships, some extramarital. He alleged his wife had an extramarital affair five years earlier, after which she and plaintiff reconciled.

Plaintiff rented his own apartment in late September 2005. He discussed reconciling with his wife, but "it just wasn't happening." He moved out of the marital home on New Year's Day 2006. The next day, he informed Redden, who thanked him for the

notice, and asked him to keep him apprised of any further developments.

Redden took no action until February 16, 2006. At a meeting with plaintiff on that day, Redden told plaintiff he would be terminated because he and his wife were going to go through an ugly divorce. Plaintiff testified:

> [Redden] asked if I remembered the meeting that we had in June where he said he couldn't promise this — you know, whatever happened wouldn't affect my job, depending on how things shake down. I said, "I do." He said, "Okay." He said not only does he think there's no chance of reconciliation, he feels there — it's going to be an ugly divorce. And because of this, he had to take it to the board.
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> He said if there was any chance, even the slightest chance of reconciliation, he would have held off taking my situation to the board of directors. . . .
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> He then said, "You had eight months to make things right with your wife . . . ."
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> . . . I asked him if I was the one being terminated because I'm the one that had the affair. And, "If you were to terminate me, what would the reasoning be?" He said if he had to terminate me, it would be four things. He said possible elimination of my job because of restructuring and poor work performance. And I really can't remember the other two.

Plaintiff asserted that Redden did not detail his alleged poor performance, nor describe the restructuring.

Plaintiff testified that he understood Redden to state that "if there was any chance of reconciling, even the slightest, he would have held off going to the board and discussing my situation" where "situation" meant "marital problems, . . . [and] extramarital affair." Redden gave plaintiff the option to resign. But, Redden informed plaintiff that the Board has decided to terminate him, and the decision was final. After plaintiff told Redden the next day that he would not resign, Redden terminated him.

According to the MRS board's minutes, the board met on February 7 to approve the restructuring and terminate plaintiff, whose "'work performance has been very poor for some time. And, all efforts to remediate have failed.'" According to plaintiff, after he was fired, his wife and a male employee assumed the position of operations director.

Plaintiff testified that his wife filed for divorce in March 2006; he counterclaimed; and they amicably settled the issues in dispute. A final judgment of divorce was entered in September 2006. Plaintiff remarried in 2008 to the woman with whom he became involved in 2005.

Wally Maines was a paid employee of MRS from 1996 until he voluntarily resigned his full-time position in September 2005. He was a dispatch coordinator who reported to plaintiff. Maines

and plaintiff also worked part-time for a nearby hospital. They were friends. While at the hospital together, the evening after plaintiff's termination meeting with Redden, plaintiff informed Maines that he was being fired "because of poor work performance." Maines also recalled that sometime after the termination, plaintiff indicated to him "that he was fired because Redden had indicated that he would go through an ugly divorce," however Maines later expressed uncertainty about whether plaintiff had tied his termination to the divorce the night they first spoke about the termination.

During plaintiff's case, defendants attempted to elicit evidence of plaintiff's poor performance.[1] However, the proofs were not one-sided. Plaintiff testified that he received annual raises, including in December 2005 or January 2006, after his affair and marital estrangement became known. He rarely

[1] In defense counsel's opening statement, she stated that defendants would present the testimony of Redden, the current chief administrative officer, and an outside management consultant who reviewed MRS operations in 2005 and recommended reorganization of top management titles and duties. She predicted that they would establish that plaintiff performed his job poorly, fellow workers were dissatisfied with him, he lacked the necessary skills and attitude to improve, and he was unqualified for the restructured management positions. Counsel also intended to demonstrate that MRS did not discriminate on the basis of divorced status, as it promoted to chief administrative officer a person who was separated and going through a divorce (although no representation was made that the spouse was also an employee).

received evaluations — although the employee's manual called for regular, formal evaluations — and never received a negative one. He asserted he successfully implemented a plan to reduce overtime in 2003. Maines also testified that plaintiff was a good supervisor and worked well with fellow employees.

Plaintiff conceded there were periodically problems with scheduling, in part based on his informality, but asserted that shortcomings of the computer system were also partly to blame. He also admitted that he occasionally received emails critical of his performance. Defense counsel confronted him with emails from 2001, 2003 and 2005. Maines testified on cross-examination about numerous emails and memoranda he drafted to Redden in 2003 regarding scheduling problems, which he attributed to plaintiff. Maines acknowledged on redirect that in 2003, plaintiff was tasked with drastically cutting staffing and overhead to reduce costs. He also conceded that Redden took no significant action in response to his emails.

Plaintiff also agreed that he used his business-issued cell phone for personal calls, in violation of MRS policy, but denied doing so on duty. Defendant also concurred that numerous MRS employees were divorced while employed.

After plaintiff rested, the court granted defendants' motion for dismissal under Rules 4:37-2(b), and 4:40-1. The court held that plaintiff was required to establish four prongs:

> 1. he is member of a protected class;
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> 2. he was actually performing his job at a level that met his employer's legitimate expectations prior to termination;
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> 3. he was fired nevertheless; and
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> 4. he was replaced by someone not in the same protected class or that non-protected class workers with comparable work records were retained or that he was terminated under circumstances giving rise to an inference of discrimination.[2]

The trial court found that plaintiff had failed to meet prong two, because he failed to demonstrate that he was performing, or qualified to perform, the position of chief operating officer, or director of field operations, which were newly created when he was terminated. The court also found a failure of proofs regarding factor four, because the new positions were filled by men, and his estranged wife.

[2] The court did not attribute the four-factor test to any case; although it apparently relied on a modified formulation for establishing, through circumstantial evidence, a prima facie case of discrimination, as set forth in in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668, 677 (1973). We discuss the test at greater length below.

In particular, the court held that plaintiff failed to present evidence that he was terminated because he was either married or unmarried. Rather, the court concluded, plaintiff presented proof that he was terminated because management was concerned about the likelihood of an ugly or messy divorce. At most, such proof established termination based on plaintiff's conduct or expected conduct, as opposed to his status. The court concluded that such proof did not give rise to a marital status discrimination claim.

The court held that the prima facie case regarding the sex-based discrimination claim also fell short, notwithstanding that plaintiff was fired and his wife was not. "Taken in a light most favorable to him, plaintiff's evidence shows that he was fired because of the expected impact of the divorce action" on his job performance.

Plaintiff appeals the dismissal of his LAD claims. We recognize that plaintiff included in his notice of appeal the pre-trial order dismissing his constitutional and common law claims. However, he did not address those in his initial brief. We therefore deem them waived. Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011) ("An issue not briefed on appeal is deemed waived."); Borough of Berlin v. Remington & Vernick Eng'rs, 337 N.J. Super. 590, 596 (App. Div.) ("Raising

an issue for the first time in a reply brief is improper."), certif. denied, 168 N.J. 294 (2001).

II.

A.

We apply the same standard of review as the trial court in considering a motion for involuntary dismissal at trial under Rule 4:37-2(b), or a motion for judgment under Rule 4:40-1. Frugis v. Bracigliano, 177 N.J. 250, 269 (2003) (discussing Rule 4:40-1); Luczak v. Twp. of Evesham, 311 N.J. Super. 103, 108 (App. Div.) (discussing Rule 4:37-2(b)), certif. denied, 156 N.J. 407 (1998). The motion under Rule 4:37-2(b) shall be granted if, after presenting its proofs, plaintiff "has shown no right to relief." It shall be denied "if the evidence, together with the legitimate inferences therefrom, could sustain a judgment in plaintiff's favor." Ibid.; see also Verdicchio v. Ricca, 179 N.J. 1, 30 (2004) (stating that if reasonable minds could differ after according plaintiff all reasonable and legitimate inferences, the motion should be denied); Baliko v. Int'l Union of Operating Eng'rs, 322 N.J. Super. 261, 273 (App. Div.) (stating that the appellate "court must accept as true all evidence supporting plaintiffs' claims"), certif. denied, 162 N.J. 199 (1999). The same standard applies to a motion under Rule 4:40-1. Verdicchio, supra, 179 N.J. at 30.

B.

We begin by reviewing well-established principles governing proof of a claim under LAD. A plaintiff may establish a prima facie case of discrimination through direct or circumstantial evidence. Bergen Commercial Bank v. Sisler, 157 N.J. 188, 208 (1999).

To establish a claim by direct evidence, "[t]he evidence produced must, if true, demonstrate not only a hostility toward members of the employee's class, but also a direct causal connection between that hostility and the challenged employment decision." Id. at 208 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 277, 109 S. Ct. 1775, 1804, 104 L. Ed. 2d 268, 305 (1989) (O'Connor, J., concurring)); see also A.D.P. v. ExxonMobil Research & Eng'g Co., 428 N.J. Super. 518, 533 (App. Div. 2012). The decisionmaker's statement must actually bear on the employment decision at issue and communicate "proscribed animus." McDevitt v. Bill Good Builders, Inc., 175 N.J. 519, 528 (2003). A plaintiff must show that the employer placed "substantial reliance on a proscribed discriminatory factor in making its decision to take the adverse employment action." Id. at 527; see also A.D.P., supra, 428 N.J. Super. at 533.

Once plaintiff has established discriminatory animus by direct evidence, the burden of persuasion shifts to defendant.

> If the employee does produce direct evidence of discriminatory animus, the employer must then produce evidence sufficient to show that it would have made the same decision if illegal bias had played no role in the employment decision. In short, direct proof of discriminatory animus leaves the employer only an affirmative defense on the question of "but for" cause or cause in fact.
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> [Fleming v. Corr. Healthcare Solutions, Inc., 164 N.J. 90, 100 (2000) (internal quotation marks and citation omitted).]

We have recognized that proof of discrimination through direct evidence is unusual. Bergen Commercial Bank, supra, 157 N.J. at 209-10. In recognition of that fact, the United States Supreme Court formulated the so-called McDonnell Douglas test, whereby a plaintiff may establish, through circumstantial evidence, a prima facie case of discrimination, or a "presumption of discrimination." Id. at 210.

However, it is important to recognize that where a plaintiff proves discrimination by direct evidence, "the McDonnell Douglas analysis does not apply." A.D.P., supra, 428 N.J. Super. at 533. See also Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121, 105 S. Ct. 613, 621-22, 83 L. Ed. 2d 523, 533 (1985) (stating, in connection with claim under the Age Discrimination in Employment Act, 29 U.S.C.A. § 623a(1), "the McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination"). A plaintiff may

proceed to trial on a direct case, even if he cannot meet the requisites of the McDonnell Douglas test. See McDevitt, supra, 175 N.J. at 526.

Under the McDonnell Douglas test, a plaintiff must establish a prima facie case by satisfying a four-pronged test that our courts have modified to suit particular forms of discrimination in particular settings. Victor v. State, 203 N.J. 383, 408-10 (2010).

> If the claim is based upon discriminatory discharge . . . [the] plaintiff must demonstrate: (1) that plaintiff is in a protected class; (2) that plaintiff was otherwise qualified and performing the essential functions of the job; (3) that plaintiff was terminated; and (4) that the employer thereafter sought similarly qualified individuals for that job.
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> [Id. at 409.]

If the plaintiff satisfies that four-pronged test, creating a "presumption of discrimination," then "[t]he defendant . . . bears the burden of rebutting that presumption by articulating a legitimate and non-discriminatory reason for the termination." Zive v. Stanley Roberts, Inc., 182 N.J. 436, 458 (2005); Bergen Commercial Bank, supra, 157 N.J. at 210-11. However, the burden of persuasion remains with the plaintiff. Once the defendant rebuts the presumption of discrimination, the plaintiff must "not simply show that the employer's reason was false" or

pretextual, "but must also demonstrate that the employer was motivated by discriminatory intent." Zive, supra, 182 N.J. at 449.

C.

Before considering whether plaintiff established a prima facie case, by direct or circumstantial evidence, we must interpret the scope of the protection afforded by the provision barring discrimination based on marital status. LAD states: "It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination . . . [f]or an employer, because of the . . . marital status . . . of any individual . . . to refuse to hire or employ or to bar or to discharge . . . such individual . . . ." N.J.S.A. 10:5-12(a). See also N.J.S.A. 10:5-4 ("All persons shall have the opportunity to obtain employment . . . without discrimination because of . . . marital status . . . .").

The statute does not define "marital status." Our courts have not expressly addressed whether the term encompasses status as a divorced person, or a person about to be divorced. The legislative history is also un-illuminating on the subject. Marital status was included by way of a Senate amendment, without recorded explanation, to legislation originally drafted to add only sex-based discrimination within LAD. See Senate

Amendments to Assembly Bill No. 403, 194th Leg. (April 27, 1970), L. 1970, c. 80, § 14.

Some states that also ban marital-status-based discrimination have defined the term broadly, expressly including divorce. See, e.g., 775 Ill. Comp. Stat. 5/1-103(J) (2014) ("'Marital status' means the legal status of being married, single, separated, divorced or widowed."); Minn. Stat. § 363A.03, subd. 24 (2014) ("'Marital status' means whether a person is single, married, remarried, divorced, separated, or a surviving spouse and, in employment cases, includes protection against discrimination on the basis of the identity, situation, actions, or beliefs of a spouse or former spouse."); Wash. Rev. Code § 49.60.040(17) (2013) ("'Marital status' means the legal status of being married, single, separated, divorced, or widowed.").

Other states have expressly limited the scope of the term to the status of being married and unmarried. See, e.g., Haw. Rev. Stat. § 378-1 (2013) ('"Marital status' means the state of being married or being single."); Neb. Rev. Stat. § 48-1102(12) (2013) ("Marital status shall mean the status of a person whether married or single."). However, several states, like New Jersey, do not provide a definition. See, e.g., Cal. Gov't Code §12940 (Deering 2014); Conn. Gen. Stat. § 46a-60 (2014); Fla.

Stat. § 760.10 (2013); Mich. Comp. Laws § 37.2202 (2014); see also Alaska Stat. § 18.80.220 (2013) (not defining "marital status" but expressly barring discrimination based on "marital status [or] changes in marital status").

Our Legislature chose not to restrictively define "marital status." In the absence of a narrow definition, we reject the trial court's interpretation that "marital status" encompasses only two states of being: married, and unmarried. Rather, we accord LAD a liberal reading in view of its remedial purpose. Quinlan v. Curtiss-Wright Corp., 204 N.J. 239, 259 (2010). We apply the statute "'to the full extent of its facial coverage.'" Bergen Commercial Bank, supra, 157 N.J. at 216 (quoting Peper v. Princeton Univ. Bd. of Trs., 77 N.J. 55, 68 (1978)). We are guided by "the underlying purpose of anti-discrimination laws to discourage the use of categories in employment decisions which ignore the individual characteristics of particular applicants." Ibid. (internal quotation marks and citation omitted).

Consequently, we interpret "marital status" to encompass the state of being divorced. Divorce unquestionably affects marital status. Particularly given modern trends, it would significantly undermine the marital status protection, if an employer could freely discriminate against persons who choose to divorce. Over one-fourth of women divorce within ten years of

their first marriage. Ctrs. for Disease Control and Prevention, Cohabitation, Marriage, Divorce, and Remarriage in the United States 7 (2002). When separation is also considered, the percentages increase to over thirty percent after ten years, and almost fifty percent after twenty years. Id. at 8, 93. As one commentator has stated, interpreting LAD, "Whether a particular individual is married, single, divorced or widowed cannot be a consideration in the terms and conditions of that individual's employment." 1 Christopher P. Lenzo, Employment Litigation in New Jersey 12.04(4) (2013) (emphasis added).

"Marital status" necessarily embraces stages preliminary to marriage — one's engagement to be married. The term also covers stages preliminary to marital dissolution — separation and involvement in divorce proceedings. The apparent purpose of the ban on marital-status-based discrimination is to shield persons from an employer's interference in one of the most personal decisions an individual makes — whether to marry, and to remain married. See, e.g., Belanoff v. Grayson, 471 N.Y.S.2d 91, 94 (App. Div. 1984) (holding that discrimination against an engaged but not yet married employee is actionable as marital status discrimination under New York Human Rights Law). We have also recognized that discrimination against someone undergoing a change in status — in one case, a male-to-female transsexual —

may violate LAD's prohibition against sex-based discrimination. See Enriquez v. W. Jersey Health Sys., 342 N.J. Super. 501, 515-16 (App. Div. 2001).

D.

Applying the foregoing principles, and according plaintiff all favorable inferences, plaintiff established a prima facie case, through direct evidence, of discrimination based on marital status. Plaintiff testified that Redden told him he would be terminated because he and his wife were going to go through an ugly divorce. Although Redden apparently required the Board's approval, giving plaintiff favorable inferences, the decision was Redden's.

We reject the notion that plaintiff was terminated not because of an imminent divorce, but because of the impact the divorce was expected to have on his ability to perform in his job. MRS terminated plaintiff because of stereotypes about divorcing persons — among other things, they are antagonistic, uncooperative with each other, and incapable of being civil or professional in each other's company in the workplace. Redden fired plaintiff to avoid the feared impact of an "ugly divorce" on the workplace; and because plaintiff failed to reconcile with his wife over an eight-month period.

LAD does not bar an employer from taking employment action against a divorcing employee who actually demonstrates antagonism, incivility, or lack of professionalism. That would constitute an employment action based on a person's conduct, not his or her status. See N.J.S.A. 10:5-2.1 (permitting discrimination "on the basis of competence, performance, conduct or any other reasonable standards" (emphasis added)). However, here, MRS responded not to any actual proved conduct. Rather, it acted on a fear, apparently based in stereotype, that such conduct would follow. MRS's assumption that a divorcing person is unable to perform his or her job is functionally the same as an employer's prohibited assumption that a female worker cannot perform certain physical labor, or a worker of a certain age lacks the energy to complete assigned tasks.

"The essence of discrimination . . . is the formulation of opinions about others not on their individual merits, but on their membership in a class with assumed characteristics." Jansen v. Food Circus Supermarkets, Inc., 110 N.J. 363, 378 (1988). "The invocation of stereotypes to justify discrimination is all too familiar. Indeed, the story of discrimination is the story of stereotypes that limit the potential of men, women, and children who belong to excluded groups." Dale v. Boy Scouts of Am., 160 N.J. 562, 618 (1999),

rev'd on other grounds, 530 U.S. 640, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000). See also Price Waterhouse, supra, 490 U.S. at 251, 109 S. Ct. at 1791, 104 L. Ed. 2d at 288 (stating that the Title VII ban on sex-based discrimination is "intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes" (internal quotation marks and citation omitted)).

We have recognized that an employer may terminate an employee because of a family relationship to another employee, even if the relationship in a selected case is marital. Thomson v. Sanborn's Motor Express, Inc., 154 N.J. Super. 555, 561 (App. Div. 1977). Anti-nepotism policies do not run afoul of LAD's proscription against marital-status-based discrimination. Ibid. They are not targeted at persons based on marital status. In Thomson, the policy affected parents and children, and siblings, among others, with equal force. Id. at 558.

However, MRS cannot avoid LAD's reach by arguing that in this case, both the soon-to-be-divorcing employee and his spouse worked in the same place. The reason for the termination was the prospect of divorce and its presumed effects, not the spouses' common employer. An employer may not disparately treat employees who engage in the same behavior, because of their marital status. For example, an employer may not penalize

married employees who engage in extramarital affairs, but not unmarried employees who engaged in sexual activity. Slohoda v. United Parcel Serv., Inc., 193 N.J. Super. 586, 589-92 (App. Div.), certif. denied, 97 N.J. 606 (1984).

Likewise, an employer cannot accept the presence of married couples in the workplace, but reject divorcing couples. MRS did not terminate plaintiff because he was related to a fellow employee. That relationship was tolerated for several years. MRS terminated plaintiff because of a change in the status of that relationship — from married to soon-to-be divorcing, and the predicted, but unproved, impact of that status change on the participants' ability to perform their jobs.

We also reject the argument that the presence of other divorced or divorcing employees — as plaintiff conceded — undermines plaintiff's claim. Plaintiff's claim involves a subset of divorcing employees — those married to a fellow employee. The employer allowed married couples on its payroll, but not divorcing couples. The employment action therefore fell within the reach of LAD.

E.

We briefly address plaintiff's claim of sex-based discrimination. Plaintiff's counsel conceded at oral argument that the case was "very thin" and he did not vigorously oppose

the motion. Nonetheless, plaintiff asserts the trial court erred, given the stage of the case and the inferences that must be drawn in his favor. Plaintiff relies principally on the fact that MRS retained his wife, and not him, to avoid the potential of two divorcing spouses in the same workplace.

Plaintiff's case was a circumstantial one. He attributed no anti-male statement or rationale to Redden. Therefore, the McDonnell Douglas test applies. However, our Court has modified the first prong of the four-part test when a claim is made by a man in a sex-based discrimination case, inasmuch as women have historically suffered discrimination in pay and opportunities. Erickson v. Marsh & McLennan Co., 117 N.J. 539, 551 (1990).

> In reverse discrimination cases, the rationale supporting the rebuttable presumption of discrimination embodied in the prima facie elements does not apply. Thus, when a complainant is not a member of the minority, courts have generally modified the first prong of the McDonnell Douglas standard to require the plaintiff to show that he has been victimized by an unusual employer who discriminates against the majority.
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> [Ibid. (internal quotation marks and citation omitted).]

In Erickson, the Court held that the plaintiff's proof that he was replaced by his supervisor's female paramour was insufficient, by itself, to meet the first prong. Id. at 559.[3]

We reach the same conclusion here. Plaintiff presented no evidence to establish that MRS was the "unusual employer" who favors women over men for positions of authority. Indeed, plaintiff established that men — Redden and himself — held the two high ranking positions at MRS of executive director and director of operations. According to plaintiff, his duties were reassigned to a man as well as a woman, his wife. Given plaintiff's failure of proofs regarding prong one, we need not address the parties' arguments with respect to the remaining three prongs.

F.

In sum, we conclude plaintiff established a prima facie case of marital-status-based discrimination, through direct evidence, sufficient to defeat defendants' motion for dismissal. However, plaintiff failed to present, through circumstantial evidence, a prima facie case of sex-based discrimination.

[3] The Court recognized that in cases involving some professions, where men have historically been absent, the first prong as modified, may require "clarification." Id. at 552. However, no such clarification is needed here.

Reversed in part and affirmed in part, and remanded. We do not retain jurisdiction.