PREPARED BY THE COURT

FILED
November 9, 2022
Hon. Joseph L. Rea, J.S.C.

RAJEH A. SAADEH, Plaintiff(s), v. **NEW JERSEY STATE BAR ASSOCIATION, and JANE & JOHN DOES 1-100 (fictitious defendants),** Defendant(s).	:	SUPERIOR COURT OF NEW JERSEY **LAW DIVISION** **MIDDLESEX** COUNTY DOCKET NO. **L-6023-21** CIVIL ACTION **ORDER**

THIS MATTER being brought before the court by **Roberto A. Rivera-Soto, Esq.** appearing for the Defendant via a Motion for Reconsideration of the June 30, 2022 order entered in this matter denying Defendant's Motion for Summary Judgment, and an identical motion being brought before the court by **Lindsay A. McKillop, Esq.** on behalf of the Plaintiff with respect to the June 30, 2022 order denying Plaintiff's Motion for Summary Judgment, and the court having read all papers submitted including the original motion papers, and both the Plaintiff and the Defendant agreeing that no issue of material fact exists and that this case should be decided as a matter of law, and this court agreeing that there is no dispute as to any material fact and that this case is ripe to be decided as a matter of law, and the court having listened to the March 11, 2022 oral argument of counsel before the Honorable Dennis V. Nieves, J.S.C., and the court having heard oral argument from counsel on November 2, 2022, and for the reasons set forth in the written decision dated November 9, 2022, and for good cause shown;

IT IS on this 9th day of November, 2022

ORDERED that both Defendant's and Plaintiff's Motions for Reconsideration are **GRANTED** pursuant to R. 4:42-2; and it is further

ORDERED that the Defendant's Motion for Summary Judgment is hereby **DENIED** (not because this court finds the existence of any material issue of fact precluding the granting of same, but rather because this court finds the Defendant's position lacking in merit as a matter of law); and it is further

ORDERED that the Plaintiff's Motion for Summary Judgment on the issue of liability is hereby **GRANTED** in accord with the allegations set forth in the Plaintiff's First Amended Complaint; and it is further

ORDERED that this matter shall proceed to trial on the issue of damages on a date to be set by the Civil Assignment Office; and it is further

ORDERED that the Plaintiff's prayer for injunctive relief is **GRANTED**, provided, however, said relief will be prospective and not immediate; and it is further

ORDERED that as any of the thirteen at-large seats (the eight on the Defendant's Board of Trustees, the two on the Defendant's Nominating Committee, and the three on the Defendant's Judicial and Prosecutorial Appointments Committee) become vacant and/or are to be filled or re-filled by the Defendant, same shall be done in a manner that does not violate the New Jersey Law Against Discrimination (in other words, every member in good standing of the New Jersey State Bar Association shall be eligible to apply for said seats); and it is further

ORDERED that a copy of this Order shall be deemed served on all counsel of record upon its posting by the Court to the eCourts case jacket for this matter. Pursuant to R. 1:5-1(a), the movant(s) shall serve a copy of this Order on all parties not served electronically within seven (7) days of the date of this Order.

HON. JOSEPH L. REA, J.S.C.

(X) opposed

NOT TO BE PUBLISHED WITHOUT

THE APPROVAL OF THE COMMITTEE ON OPINIONS

FILED
November 9, 2022
Hon. Joseph L. Rea, J.S.C.

Rajah Saadeh,

Plaintiff,

v.

New Jersey State Bar Association,

Defendant.

Superior Court of New Jersey

Middlesex County

Law Division

Docket No. MID- L-6023-21

CIVIL ACTION

Memorandum of Decision

Decided: November 9, 2022

Lindsay A. McKillop, Esq., attorney for plaintiff (The Law Office of Rajeh Saadeh, L.L.C.).

Roberto A. Rivera-Soto, Esq., attorney for defendant (Ballard Spahr, LLP).

Rea, J.S.C.

Procedural History

The plaintiff, Rajeh Saadeh, is a Palestinian Muslim American attorney and a member of the defendant, the New Jersey State Bar Association (hereinafter NJSBA or defendant). He brings this lawsuit against the defendant pursuant to the New Jersey Law Against Discrimination. (NJLAD or LAD) N.J.S.A. 10:5-1 et seq. This matter began on October 15, 2021, by way of the filing of a verified complaint together with a request for the entry of an order to show cause seeking temporary restraints (TRO). That application was denied by the trial court on November 29, 2021. On that same day the plaintiff filed a first amended complaint which was essentially identical to the original verified complaint. Both pleadings contained the same eight counts. On December 3, 2021, the plaintiff filed an emergent motion before the appellate division in order to appeal the trial court's denial of plaintiff's TRO. That application was denied by the appellate division on that same day. Later that day plaintiff brought the same application for urgent

relief before the New Jersey Supreme Court. That application was likewise denied on December 7, 2021. Thereafter, on December 20, 2021, plaintiff filed a motion for leave to appeal the November 29, 2021 denial of his request for a TRO and on January 10, 2022, the appellate division denied that application as well. The defendant filed its answer on January 3, 2022, and on January 7, 2022, the defendant filed its notice of motion for summary judgment. On January 25, 2022, the plaintiff filed opposition to the defendant's motion for summary judgment as well as a cross motion for summary judgment. On January 31, 2022, the defendant filed opposition to plaintiff's cross motion for summary judgment and reply to plaintiff's opposition to defendant's motion for summary judgment. On March 11, 2022, the trial court heard oral argument on both the defendant's motion for summary judgment as well as the plaintiff's cross motion for summary judgment. On June 30, 2022, the trial court entered two orders denying both motions for summary judgment. On July 20, 2022, the defendant filed a motion for reconsideration of the June 30, 2022 order which denied the NJSBA's motion for summary judgment. Also on July 20, 2022, the plaintiff sought leave to appeal the trial court's order of June 30, 2022 denying plaintiff's motion for summary judgment. That application was denied on August 15, 2022. On September 1, 2022, the plaintiff filed a cross motion for reconsideration of the June 30, 2022 order which denied the plaintiff's summary judgment motion. The motions for reconsideration are currently before this court.

Factual Background

The undisputed facts in this case are as follows. Regarding its Board of Trustees (BoT), the defendant, in 1989 began creating at-large seats which were reserved exclusively for members of underrepresented groups. That year, two at large seats were added to the BoT. These seats could only be filled by state bar members who were Hispanic, Asian Pacific, or African American. Members of these three groups were rotated annually through the two specified at-large seats until 1999 when a third at-large seat was created by the defendant thereby eliminating the need to rotate members of these three groups through the two designated seats. So as of 1999, there were three at-large seats on the BoT

dedicated exclusively to members of certain underrepresented groups: namely, one for a Hispanic NJSBA member, one for an African American NJSBA member, and one for an Asian Pacific NJSBA member. In 2005, the defendant added two more at-large trustee seats dedicated specifically for underrepresented groups raising the number of at-large seats to five. The two new at-large seats were reserved exclusively for one member of the NJSBA who was also a member of the LGBTQ+ community and for one member of the NJSBA over the age of 70. In September of 2008, the defendant examined the status quo of its composition of at-large seats reserved specifically for underrepresented groups and determined that the designations should remain unchanged but should be subject to periodic review. In November of 2010, the defendant created three additional at-large trustee seats (raising the total to eight) and amended its bylaws as follows:

> "This will permit underrepresented segments of the NJSBA that otherwise would not be represented on the board of trustees to be eligible for such representation. It will help provide diversity on the board of trustees to ensure that the board is truly representative of the entire NJSBA membership. The proposed amendments also require the board of trustees to determine annually which groups should be designated as underrepresented and therefore eligible to be considered for filling any vacant at-large seats that year. Currently, the bylaws permit the board of trustees to make such designations "periodically"."

Also, in November 2010 the defendant designated the following groups as being underrepresented for purposes of filling the three new seats: Hispanic, Asian Pacific, African American, members of the LGBTQ+ community, lawyers over age 70, and women. In June of 2011, the defendant voted to reconfirm the existing designations for underrepresented groups with the proviso that additional statistical information be gathered for the defendant to determine if further amendments were appropriate. One month later, after obtaining additional information, the defendant decided to specifically designate one of the three

most recently created at-large seats for a member of the NJSBA who was a woman. That left two open at-large seats which were to be filled by a member of any one of the designated underrepresented groups; namely, members who are Hispanic, African American, Asian Pacific, a member of the LGBTQ+ community, lawyers over age 70, and women. In June of 2012, 2013, 2014, and 2015 the defendant voted to maintain the status quo regarding at-large seats on the BoT. In June 2016, defendant again made some changes. At that time the specifically designated seat for lawyers over age 70 was eliminated but that category was retained as a non-designated underrepresented group. Also, a category of attorneys with disabilities was added to the underrepresented groups to be considered for the, then two, non-designated, at-large trustee seats. All other existing designations were retained. So at that time the posture of the eight at-large seats on the BoT was as follows: one seat each for NJSBA members who are Hispanic, Asian Pacific, African American, members of the LBGTQ+ community, and a woman and three non-designated at-large seats open to individuals from any of the following groups: Hispanic, Asian Pacific, African American, members of the LGBTQ+ community, women, lawyers over age 70, and attorneys with disabilities. The years 2017, 2018, 2019 and 2020 saw no additional changes regarding the eight at-large seats of the BoT reserved for underrepresented groups. Then, on September 17, 2021, the defendant added members of any diversity bar association as recognized in the defendant's policy manual to the underrepresented groups to be considered for the three non-designated (or non-specific) at-large trustee seats. The defendant retained all other existing designations. Therefore, the final and now current approved designations are: one seat each for members of the NJSBA who are Hispanic, African American, Asian Pacific, a woman, a member of the LGBTQ+ community and 3 non-designated at-large seats open to individuals from any of the following groups: Hispanic, Asian Pacific, African American, a member of the LGBTQ+ community, women, lawyers over the age of 70, lawyers with disabilities, and lawyers who are members of a diversity bar association recognized in the defendant's policy manual. That policy manual defines diversity bar association to include: Asian Pacific Lawyers of New Jersey, The Association

of Black Women Lawyers of New Jersey, The Association of Portuguese Speaking Attorneys of New Jersey, The Caribbean Bar Association of New Jersey, The Garden State Bar Association, The Haitian American Lawyers of New Jersey, The Hispanic Bar Association of New Jersey, The Korean Bar Association of New Jersey, The New Jersey Women Lawyers Association, the New Jersey Muslim Lawyers Association, and the South Asian Bar Association of New Jersey.

There are two at-large seats on the defendant's Nominating Committee (NC) and three at-large seats on the defendant's Judicial and Prosecutorial Appointments Committee (JPAC). The eligibility criteria for these five seats have mirrored, and continue to mirror, the eligibility criteria of the three non-designated at-large seats on the BoT reserved specifically for underrepresented groups as that term was/is defined by the defendant. The NC consists of a total of 15 seats, the JPAC consists of a total of 30 members, and the BoT consists of a total of 49 members.

Procedural Contentions of the Parties

Defendant maintains that R. 4:49-2 applies to these motions for reconsideration. Indeed, the defendant filed its motion for reconsideration on the 20th day after the trial court's orders, i.e., July 20, 2022. On that same day the plaintiff filed for leave to appeal the trial court's decision with the Appellate Division. The plaintiff's position is that R. 4:42-2 applies essentially because the June 30, 2022 orders are interlocutory, not final. Plaintiff further contends that because the trial court's orders are interlocutory, they are subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of justice. R. 4:42-2(b). In support of this position, plaintiff cites to Lawson v. Dewar, 468 N.J. Super. 128 (App. Div. 2021).

Legal Standard To Be Applied To These Reconsideration Motions

In the present matter, the rule governing these motions for reconsideration is R. 4:42-2(b) as opposed to R. 4:49-2 given that the June 30, 2022 orders are not final orders but rather interlocutory

orders. See Lawson v. Dewar, 128 N.J. Super. 128, 133-136 (App. Div. 2021). An interlocutory order is any order or form of decision which adjudicates fewer than all the claims as to all parties. Clearly, the trial court's orders of June 30, 2022 denying both the defendant's motion for summary judgment and the plaintiff's cross motion for summary judgment did not adjudicate all the claims as to all parties. In fact, those orders did not adjudicate any claims, therefore they were, by definition, interlocutory orders, not final orders.[1] Even if R. 4:49-2 applied in this matter, this court would not view the plaintiff's cross motion out of time, particularly given that at that relevant point in time, the plaintiff was preparing an application for leave to appeal to the Appellate Division. Fairness would require such a finding. R. 1:1-2(a). Another Superior Court judge who is now retired presided over this case up to June 30, 2022 when he entered the two orders denying both parties' summary judgment motions. It is not possible for that judge to preside over these reconsideration motions, which of course, would be preferred. R. 4:42(b). This court certainly has respect for my colleague's June 30, 2022 orders and his rulings contained therein; however, this court owes no deference to those decisions. Lawson, at 135. My predecessor states the following toward the end of his June 30, 2022 decision: "Lastly, this Court agrees with Plaintiff's position that if the 'women only' label were removed from the 'women only' … seat, women would still be eligible to obtain said seat without excluding others… This suggestion would likely solve a lot of the issues that Plaintiff alleges are present with the NJSBA, however it will also violate Defendant's constitutionally protected right to freedom of expressive association… ". Notwithstanding this finding, the original judge in this matter, anomalously, denied the defendant's motion for summary judgment. If this court finds that the June 30, 2022 orders/decision reflected erroneous rulings, then it is this court's responsibility to correct that error. Id. As noted in Lawson, "The polestar is always what is best for the pending suit; it is better to risk offense to a colleague than to allow a case to veer off course." Id.

[1] In its papers, defendant, in arguing that the June 30, 2022 orders were final orders, compares R. 4:49-2 to R. 4:42-2(a). Defendant overlooks that it is R. 4:42-2(b) that applies here.

Plaintiff in his reconsideration brief correctly notes that regarding liability, no factual issue exists for a jury to determine and there only exists a question of law. At page two of plaintiff's counsel's September 1, 2022 brief she states:

> "On liability, there is no factual issue for a jury to determine. The only question as to liability is one of law: is the NJSBA violating the Law Against Discrimination by depriving Plaintiff, but not others, of automatic eligibility to obtain [at-large] seats based on identity?"

The defendant is obviously in accord with this notion as it states at page 5 of its brief dated July 20, 2022:

> "Here, the parties conceded that there are no issues of fact that, at a trial, would require submission of the issue to the trier of fact. In those circumstances and particularly in light of the discussion that follows, the Court likewise should have concluded that there are no genuine issues of material fact here and thus should have proceeded to render its conclusions of law."

This court agrees that the issue of liability was ripe for determination immediately after the March 11, 2022 oral argument. Because this court believes that one of the summary judgment motions heard on March 11, 2022, should have been granted and the other denied, this court is rehearing the original motions for summary judgment filed in this matter *ab initio*.

Substantive Contentions of the Parties

The plaintiff, a Palestinian Muslim American attorney who is also a member of the NJSBA, contends that prior to September 17, 2021, he was excluded from eligibility for thirteen leadership seats of the defendant: namely, the eight at-large seats on the BoT, the two at-large seats on the NC, and the

three at-large seats on the JPAC. The plaintiff further contends that as of September 17, 2021, he is still ineligible for the five at-large seats reserved specifically for NJSBA members who belong to certain designated groups. He also contends that as of September 17, 2021, he is eligible for one of the three non-designated at-large seats on the BoT and for one of the two corresponding seats on the NC and for one of the three corresponding seats on the JPAC but only if he first belongs to a designated diversity bar association. In this regard, the plaintiff points out that unlike any other member of an underrepresented group (specifically: Hispanic, African American, Asian Pacific, a member of the LGBTQ+ community, women, lawyers over age 70, and lawyers with disabilities) he must first complete a prerequisite; namely, be a member of a diversity bar association before being eligible for one of the three post-September 17, 2021 non-designated at-large seats reserved for underrepresented groups as that term is defined by the defendant.

The defendant's position is multi-faceted. First, defendant contends that it is not a place of public accommodation and therefore not subject to the LAD. Second, defendant contends that even if it is subject to the LAD, the NJSBA did not engage in unlawful discrimination. Third, the defendant contends that even if it is subject to the LAD, and even if it has engaged in otherwise prohibited unlawful discrimination under the LAD, its program constitutes a bona fide affirmative action program exempt from the LAD's reach. And fourth, the defendant contends that plaintiff's claims are foreclosed by the NJSBA's federal constitutional right to freedom of expressive association.

Legal Analysis

First question: Is the NJSBA's program a quota system or is it a bona fide affirmative action plan?

The answer to this question is that the defendant's program which has evolved into the creation of 13 "at large" leadership seats reserved exclusively for members of underrepresented groups is a quota system.

Plaintiff's position is that the NJSBA's creation of 13 at-large seats reserved exclusively for members of underrepresented groups constitutes an illegal quota system. The defendant maintains that its program in this regard amounts to a bona fide affirmative action plan. A quota system is just that. It is a system wherein a certain number of spots are created or set aside to be filled ONLY by members of certain groups, to the exclusion of all others who are not members of the designated groups. A bona fide affirmative action plan contains as its premise a finding of imbalance to the detriment of (an) underrepresented group(s) and specifies the basis for that finding. Further, a legitimate affirmative action plan must set forth a goal for remediating the imbalance, and the affirmative action plan must prescribe some form of standards by which that goal will be achieved. Klawitter v. City of Trenton, 395 NJ Super. 302, 328 (App. Div. 2007). Provided a bona fide affirmative action plan is in place, then membership in an underrepresented group can be properly considered as a "plus factor" in the determination of whether a member of an underrepresented class should be chosen for an elevated position rather than an equally qualified person who is not a member of the subject underrepresented group. Id. Plaintiff takes the position that bona fide affirmative action plans have only been applied in the context of employment, education, and government. While reported caselaw may be limited to the examination of affirmative action plans in those three arenas, nothing in the caselaw specifically limits the implementation of affirmative action plans to only situations involving employment, government or education. In other words, as a matter of common sense, if the NJSBA had a bona fide affirmative action plan in place it could use membership in an underrepresented group as a "plus factor" in choosing a member of said group over a non-member of said group for some elevated or positive position within the organization.

Plaintiff's counsel, in her brief, relies heavily upon Lige v Montclair, 72 NJ 5 (1976) and Taylor v. Leonard, 30 NJ Super 116 (Ch Div. 1954). Defendant argues that the quota systems involved in both Lige and Taylor are distinguishable from the alleged quota system in this case. Defendant points out that its program provides a floor for underrepresented groups but not a ceiling. Defendant's position is that both cases relied upon by the plaintiff involve a "ceiling", in other words, a limit on how many spots a member of an underrepresented group would be eligible for. In Taylor, African Americans were only eligible for a total of 72 public housing apartments out of a total of 828 units. In Taylor, there was a "ceiling", and it was 72 housing units. In that portion of Lige which deals with firefighters, at issue was a program that required the hiring of one qualified minority applicant for every one qualified white applicant until the total number of minority firefighters on the Montclair Fire Department equals **at least** 15 persons. Lige, at 14 (emphasis added). In Lige, there was no cap on the number of minorities that could be hired by the Montclair Fire Department. There simply had to be at least 15. Likewise, in Lige, regarding the Montclair Police Department, there was a minimum, but no maximum, of African American police officers that could be promoted in that agency**.** Thus, defendant's position that Lige involved a ceiling is erroneous.[2]

As plaintiff points out, his claim is limited to the criteria used by the NJSBA for filling 13 at-large seats, and only those 13 seats. Plaintiff is correct in his observation that it is of no moment that 41 seats on the BoT, 13 seats on the NC, and 27 seats on JPAC are not discriminatory. Regarding those 13 at-large seats, one hundred percent of them can only be filled by members of underrepresented groups as that

[2] In response to the Plaintiff citing Lige in support of the proposition that what the NJSBA has in place is an illegitimate quota system, the defense states the following in its reply: "Plaintiff conveniently ignores Lige's caveat: that it does not provide an appropriate forum for evaluating the relative merits of different remedial devices, or general policy objectives such as equal employment opportunity and a qualified work force. Nevertheless, the narrow question posed by this case is of fundamental importance – the authority of the State Division on Civil Rights to utilize certain remedial devices in enforcing the constitutional proscription against invidious discrimination. [Id. at 28 (emphasis supplied)]". What defense counsel fails to point out is that this quote from Lige is part of the dissenting opinion.

term is defined by the defendant. No member of the NJSBA who is not: African American, Hispanic, Asian Pacific, a member of the LGBTQ+ community, a woman, a lawyer over the age of 70, a disabled lawyer, or a member of a designated diversity bar association is eligible to be considered for the 8 at-large seats on the BoT, the 2 at-large seats on the NC, and the 3 at-large seats on JPAC. The inclusion of members of diversity bar associations in the defendant's definition of underrepresented group occurred on September 17, 2021. Prior to that date, the plaintiff, a Palestinian Muslim American attorney, was foreclosed from obtaining any of the 13 at-large seats. After September 17, 2021, the plaintiff was eligible for consideration of the 2 at-large seats on the NC, the 3 at-large seats on JPAC, and the 3 at-large seats on the BoT that were reserved for non-specific but identified members of underrepresented groups. The problem, however, is that the plaintiff's eligibility for these seats requires him to first secure a prerequisite, i.e., membership in a specifically identified diversity bar association. The point being that if, like the plaintiff, a member's only way of securing one of these 8 (3 BoT + 2 NC + 3 JPAC) seats is to first join a diversity bar association then that member is being treated disparately because this extra step of being a member of a diversity bar association is not required of any member of the following groups: African Americans, Hispanics, members who are Asian Pacific, a member of the LGBTQ+ community, women, lawyers over the age of 70, or disabled lawyers. Regarding the remaining 5 seats on the BoT, i.e., the seats reserved exclusively for one African American, one Hispanic, one member who is Asian Pacific, one member of the LGBTQ+ community, and one woman; the plaintiff, again a Palestinian Muslim American, never was and currently is still not eligible for any of them.

One hundred percent of the members of the NJSBA who do not fit the criteria set by the defendant for the 13 at-large seats at issue are per se excluded from eligibility for those seats. Those excluded members have a zero percent chance of securing one of those 13 at-large seats. Considering that the LAD applies to everyone, those excluded members, like the plaintiff, have both a "floor" and a "ceiling", both of which is zero percent. That being said, the question of whether a diversity program amounts to a quota

system does not turn on whether the program has a "floor" and/or a "ceiling". Rather, the dispositive question is whether seats are reserved for members of certain groups to the exclusion of members of other groups. To label the defendant's program pertaining to the 13 at-large seats at issue as anything but a quota system would be disingenuous for the simple reason that only certain people can occupy those 13 at-large seats to the exclusion of everyone else.

Second question: If the defendant's program is a quota system, does it matter if the defendant is a place of public accommodation?

The answer to this question is "No".

The LAD as originally enacted in 1945 applied only to "places of public accommodation" and not to private entities. Both sides argue vociferously about whether the NJSBA is a place of public accommodation and both sides put forth very good arguments in favor of their respective positions. As Chief Justice Rehnquist notes in Boy Scouts of America v. Dale, 530 U.S. 640, 657 (2000), at footnote 3, "Four State Supreme Courts and one United States Court of Appeals have ruled that the Boy Scouts is not a place of public accommodation. (Citations omitted). No federal appellate court or state supreme court -- except the New Jersey Supreme Court in this case – has reached a contrary result." Given this division in jurisprudence, obviously the question of whether an organization is a "place of public accommodation" is a difficult one that does not need to be answered in this case. Plaintiff correctly points out that even if the NJSBA is not a place of public accommodation, it is subject to the LAD as applied to its own members. Plaintiff's counsel accurately states in her brief:

> "NJSA 10:5-12(f) was specifically amended in 1997 to add subsection 2, to account for the loophole in the LAD whereby distinctly private clubs were not subject to the LAD, which allowed such a private club to discriminate against its own members after their admission. If the NJSBA is not a place of public accommodation, then it is a private club

> that offers advantages, accommodations, facilities, and privileges to said members, including the ability to sit on the BoT, NC, and JPAC. If the NJSBA is not deemed a place of public accommodation, then under NJSA 10:5-12(f), it cannot withhold or deny privileges to its members based on protected categories, including race, color, national origin, age, sex, gender identity or expression, affectional or sexual orientation, and disability."

The 1997 amendment reads as follows: "It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination:

> Notwithstanding the definition of a "place of public accommodation" as set forth in subsection l. of section 5 of P.L. 1945, c. 169 (C. 10:5-5), for any owner, lessee, proprietor, manager, superintendent, agent, or employee of any private club or association to directly or indirectly refuse, withhold from or deny to any individual who has been accepted as a club member and has contracted for or is otherwise entitled to full club membership any of the accommodations, advantages, facilities or privileges thereof, or to discriminate against any member in the furnishing thereof on account of race, creed, color, national origin, ancestry, marital status, civil union status, domestic partnership status, pregnancy or breastfeeding, sex, gender identity, or expression, affectional or sexual orientation, disability, liability for service in the Armed Forces of the United States or nationality of such person."

N.J.S.A. 10:5-12(f)2.

Defendant's retort to this argument is to just reiterate its position that the plaintiff was not discriminated against and therefore the 1997 amendment to the LAD, that is, NJSA 10:5-12(f)(2) does not help plaintiff's cause. If that were true, then the inescapable logical conclusion would be that whether the defendant is a place of public accommodation would be of no moment. Defendant argues that the plaintiff

cannot claim he was discriminated against because he was treated the same as all other NJSBA members who were/are not eligible for those 13 at-large seats. Defendant misconstrues the Plaintiff's argument, which is, that all other members of the NJSBA similarly situated to him as far as eligibility for those 13 at-large seats, are likewise victims of discrimination.

The above-noted 1997 amendment to the LAD renders the issue of whether the defendant is a place of public accommodation immaterial.

Third question: Is a quota system always unlawful?

The answer to this question is "No", however in this case, it is.

In an artfully written dissenting opinion, Justice Mosk of the California Supreme Court wrote the following about quota systems:

> "As professor Alexander Bickel pointed out in The Morality of Consent (1975) pages 132-133: 'A quota is a two-edged device: for every one it includes it cuts someone else out…a racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice. Moreover, it can easily be turned against those it purports to help. The history of the racial quota is a history of subjugation, not beneficence. Its evil lies not in its name but in its effect; a quota is a divider of society, a creator of castes…for every person quota-ed in, another is quota-ed out. There is no way in which a numerical quota can be benign. If it favors one, it necessarily rejects another."

Price v. Civil Service Commission, 26 Cal. 3d 257 (1980) (Justice Mosk dissenting).

As plaintiff correctly points out, the LAD applies to everyone. See N.J.S.A. 10:5-4 which refers to "all persons" and N.J.S.A. 10:5-12(f)(2) which refers to "any individual". As noted in plaintiff's papers, if

there was a white person only seat or a straight man only seat on the BoT, same would be violative of the LAD; and logically the same applies for the black person only, the Hispanic person only, the Asian Pacific person only, the LGBTQ+ community member only, and the woman only seats. The LAD applies to all, irrespective of whether an individual is a member of an underrepresented group.

In answering this question about whether a quota system is lawful, it is helpful to consider Federal authority. As Judge Lisa wrote in Klawitter:

> "In addition to the New Jersey authorities we have cited, our conclusion that the adoption of a bona fide affirmative action is a prerequisite to the use of race as a plus factor is bolstered by a review of the federal jurisprudence on this subject. The New Jersey Supreme Court typically looks to federal cases involving analogous anti-discrimination provisions in interpreting state anti-discrimination laws. See Bergen Commercial Bank, *supra*, 157 N.J. at 200 ("To the extent the federal standards are useful and fair, they will be applied in the interest of achieving a degree of uniformity in the discrimination laws.") (internal quotations omitted); Shaner v. Horizon Bancorp., 116 N.J. 433, 437 ("[The LAD] standards have been influenced markedly by the experience derived from litigation under federal anti-discrimination statutes.").

Klawitter v. City of Trenton, 395 N.J. Super., at 328.

In Kirkland v. New York State Department of Correctional Services, 520 F. 2d 420, 427 (2d Cir., reh. en banc den., 531 F. 2d 5 (2d Cir. 1975) the Second Circuit limited the use of quotas to situations where there has been 1) a "clearcut pattern of long-continued and egregious racial discrimination" and 2) the effect of the reverse discrimination must not be "identifiable", namely, that it may not be concentrated on a relatively small group of non-minority persons. As noted by Judge Van Graafeiland writing for the United States Court of Appeals for the Second Circuit:

> "The most ardent supporters of quotas as a weapon in the fight against discrimination have recognized their undemocratic inequities and conceded that their use should be limited"

Kirkland, at 427 citing Blumrosen, Quotas, Common Sense, and Law in Labor Relations: Three Dimensions of Equal Opportunity, 27 Rutgers L. Rev. 675 (1974). Judge Van Graafeiland observes that "commentators merely echo the judiciary in their disapproval of the discrimination inherent in a quota system." Id.

The Lige panel applied the Kirkland two-prong test in finding that the quota system in that case was unlawful. Lige, at 19. Applying the two-prong Kirkland test in this case leads to the conclusion that the quota system in this case is unlawful. If the defendant could prevail on the first prong, i.e., that there has been a "clearcut pattern of long-continued and egregious racial discrimination", as a matter of law, the defendant's program pertaining to the 13 at-large seats cannot survive the second Kirkland prong, to wit, that the effect of the reverse discrimination must not be identifiable, namely, that it may not be concentrated on a relatively small group of non-minority persons. The effect of the reverse discrimination in this case is obviously identifiable. The casualty at a minimum is Mr. Saadeh but also includes all other members of the NJSBA who are not eligible to be considered for the 13 at-large seats at issue in this case. Therefore, the defendant's program involving the 13 at-large violates the Law Against Discrimination and the plaintiff's civil rights. The following quote from Lige is particularly applicable in this case: "As a matter of wisdom no one can quarrel with the [NJSBA's] overall purpose. It is the method which is pernicious." Lige, at 23.[3]

[3] Lige speaks in terms of "racial discrimination" and "non-minority persons". In the case *sub judice*, the defendant's program was intended to cure more than racial discrimination and, as such, was tailored to encompass in a broader sense certain identified "underrepresented groups". Notwithstanding this distinction, the logic espoused in Lige applies equally in this case. Also, at issue in Lige were non-minority persons (namely white people). In this case at issue is a Palestinian Muslim American attorney and all

In the interest of completeness, it should be noted that the LAD does sanction certain quota-based discrimination. N.J.SA. 10:5-31 to 38. This portion of the NJ LAD, which was added in 1975, permits quota-based discrimination in the context of public works contracts. See e.g., United Bldg. & Constr. Trades Council v. Camden, 88 N.J. 317 (1982), reversed and remanded, 465 U.S. 208 (1984). In that case, the City of Camden, New Jersey enacted an ordinance mandating affirmative action by private construction companies awarded public works contracts by the city government. At issue were two provisions of that ordinance: first, that there be a 25% minority hiring goal for contracts with the City of Camden; second, that 40% of the labor force in Camden public works projects be city residents. Pursuant to N.J.S.A. 10:5-36, the State Treasurer approved these requirements. The New Jersey Supreme Court unanimously held that the Treasurer's approval of these quotas was proper under the LAD. Id. The case was reversed and remanded by the United States Supreme Court, but that Court's decision dealt only with the 40% residency requirement and whether that particular ordinance violated the Privileges and Immunities Clause, Art. IV, sec. 2, cl. 1 of the United States Constitution. The New Jersey Supreme Court upheld the first ordinance regarding the 25% minority hiring goal and that ruling was not appealed to the United States Supreme Court. United Bldg. & Constr. Trades Council v. Camden, 88 N.J. 317 (1982), reversed and remanded, 465 U.S. 208 (1984). See also, Fullilove v. Klutznick, 448 US 448 (1980) (upholding federal affirmative action quotas for minority contractors).

The plaintiff has been unlawfully discriminated against by being excluded from eligibility (or "automatic" eligibility) for the 13 at-large leadership seats of the NJSBA. To reiterate, the issues in this case are centered only around those 13 at-large seats, not the entire composition of the BoT, the NC, and the JPAC. Plaintiff's counsel, in her brief provides a very helpful illustrative example to make the point that

---

other members of the NJSBA who are similarly excluded by the defendant's program, be they minority persons or non-minority persons. Again, the rationale of Lige is on all fours with the facts of this case.

the remaining 41 seats on the BoT, the remaining 13 seats on the NC, and the remaining 27 seats on the JPAC are irrelevant and immaterial. As she writes:

> "The availability of non-discriminatory, alternative seats for plaintiff is not an excuse or defense. If a restaurant designated certain tables as "white only" even if there are other tables available for non-whites, it would violate the LAD; the same principle applies to the pertinent eight seats on the BoT, two seats on the NC, and three seats on JPAC, as plaintiff is not automatically (at minimum) eligible for them, because of his identity, while others are. Just like the restaurant, the NJSBA is discriminating based on identity and violating the LAD."

Plaintiff's counsel is correct.

Fourth question: Are the plaintiff's claims foreclosed by the NJSBA's Federal constitutional right to freedom of expressive association?

The answer to this question is "No".

The defendant relies on the United States Supreme Court opinion, Boy Scouts of America v. Dale, 530 U.S. 640 (2000) for the proposition that the plaintiff's claims in this case fly in the face of the defendant's First Amendment right of freedom of expressive association. The Dale case involved an openly gay assistant scoutmaster who was ousted by the Boy Scouts of America (BSA) because he was homosexual. The BSA's position being that homosexuality was inconsistent with its message or viewpoint. Dale brought suit in New Jersey. His case went to the New Jersey Supreme Court. That court ruled that Dale must be included as a scoutmaster in the BSA. The BSA appealed to the United States Supreme Court which ruled that forcing the inclusion of Dale into the BSA's organization violated the BSA's First Amendment right of freedom of expressive association.

The Dale decision is inapposite to this case for the simple reason that Dale was about forced inclusion and this case is about forced exclusion. The case at bar centers on the plaintiff's complaint that he is not eligible for (or being treated disparately for) certain at-large leadership seats on the defendant's BoT, NC, and JPAC. In Dale, the BSA expressly rejected and expelled Dale because of his homosexuality. In this case no one suggests, and it would be absurd for anyone to even intimate on this record, that the NJSBA took steps to expressly exclude Palestinian Muslim lawyers from certain leadership seats.

The defense centers its argument on the notion that the plaintiff's claim unconstitutionally interferes with how it expresses itself in terms of achieving diversity in creating the 13 at-large seats. This argument mischaracterizes the factual backdrop and rationale of Dale. Dale alleged that he was discriminated against in violation of the NJLAD by the BSA. Likewise, Mr. Saadeh alleges that he was/is being discriminated against in violation of the NJLAD by the NJSBA. In Dale, as in this case, the focus is on the person who is alleging unlawful discrimination; not on other members of the organization who are being treated favorably to the detriment of the complaining witness. There exists no logical corollary between Dale who was fighting to be included in the BSA and Mr. Saadeh who is fighting to stop the NJSBA from excluding himself and other members of the NJSBA from certain at-large seats.

To accept defendant's Dale argument would be tantamount to giving the NJSBA carte blanche in formulating any diversity program, because, regardless of whether that program violated the NJLAD, it would be permissible because the defendant's First Amendment right would always trump the NJLAD. In other words, to accept the defendant's Dale argument would render the NJLAD meaningless. Again, it is crucial to note that Dale was about forced inclusion while this case is about forced exclusion. Notwithstanding my colleague's finding to the contrary on June 30, 2022, this court finds that there is no First Amendment impediment to the plaintiff's claims.

Summary judgment on the issue of liability is granted in favor of the plaintiff. The defendant's motion for summary judgment is correspondingly denied.

This matter shall proceed to trial on the issue of damages with a trial date to be determined by the Civil Assignment Office.

With regard to plaintiff's request for injunctive relief, same is granted but not immediately as sought by plaintiff. Plaintiff seeks an order to compel the NJSBA to immediately vacate the 13 at-large seats at issue given that they were filled in a manner violative of the LAD. While this court agrees that the defendant's program involving the 13 at-large seats is illegal, this court finds that an order entered compelling the defendant to immediately vacate those seats would unfairly put the defendant in a position of chaos. In other words, an order to immediately cease and desist would wreak havoc among the members of the NJSBA in positions of leadership and generally put the organization in a state of turmoil. Therefore, this court shall grant the requested injunctive relief prospectively. As such, as any of these 13 at-large seats become vacant or are otherwise eligible to be filled or refilled, and the defendant wishes to fill or refill these seats, then the defendant shall only do so in a manner that does not violate the LAD.

Dated: November 9, 2022

Hon. Joseph L. Rea, J.S.C.