NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1040-09T2

VICKI PALMER,

Plaintiff-Appellant/
Cross-Respondent,

v.

SHORE CULINARY LLC D/B/A
THE MILL AT SPRING LAKE
HEIGHTS, DON RODGERS AND
TAMAR TOLCHIN,

Defendants-Respondents/
Cross-Appellants.

Argued October 19, 2010 - Decided April 18, 2011

Before Judges Graves, Messano and Waugh.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-2004-07.

Michael F. O'Connor argued the cause for appellant/cross-respondent (McMoran, O'Connor & Bramley, attorneys; Bruce P. McMoran, of counsel; Mr. O'Connor and Justin D. Burns, on the brief).

Thomas A. Linthorst argued the cause for respondents/cross-appellants (Morgan, Lewis & Bockius, LLP, attorneys; Mr. Linthorst, of counsel; Sean P. Lynch, on the brief).

PER CURIAM

Plaintiff Vicki Palmer appeals from the grant of summary judgment to defendants Shore Culinary, LLC, d/b/a The Mill at Spring Lake Heights (The Mill), Don Rodgers and Tamar Tolchin (collectively, defendants). Plaintiff contends that the motion judge misapplied summary judgment standards and her complaint should be reinstated since "a reasonable jury could find that defendants discriminated against [her] because of her age." Plaintiff further argues that Rodgers and Tolchin "may be held [individually] liable as aiders and abettors of unlawful discrimination" and her complaint against them should also be restored. Lastly, plaintiff contends that the judge erred in dismissing her claim under the New Jersey Wage Payment Law, N.J.S.A. 34:11-4.1 to -4.14 (the WPL).

In addition, when they sought summary judgment, defendants moved to strike certain portions of plaintiff's opposition, arguing it violated N.J.S.A. 43:21-11(g) (providing that in the context of claims for unemployment benefits "[a]ll records, reports and other information obtained from employers . . . shall not be subject to subpoena or admissible in evidence in any civil action or proceeding other than one arising under this chapter"). Having granted summary judgment in their favor, the motion judge denied defendants' motion to strike as moot. Defendants have cross-appealed from that order.

When reviewing a grant of summary judgment, we employ the same standards used by the motion judge. Atl. Mut. Ins. Co. v. Hillside Bottling Co., Inc., 387 N.J. Super. 224, 230 (App. Div.), certif. denied, 189 N.J. 104 (2006). We first determine whether the moving party has demonstrated there were no genuine disputes as to material facts. Ibid.

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to 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.
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> [Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).]

We then decide "whether the motion judge's application of the law was correct." Atl. Mut. Ins., supra, 387 N.J. Super. at 231. In doing so, we owe no deference to the motion judge's legal conclusions. Ibid. (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

We have considered the arguments raised in light of the record and the above-cited legal standards. We affirm the grant of summary judgment to defendants. We dismiss the cross-appeal as moot.

I.

We discern the following facts from the motion record.

Plaintiff was born in January 1952. She began working at The Mill, a restaurant and banquet facility in Spring Lake Heights, in September 1986 as the marketing director. In June 2001, Tolchin, the president of Shore Culinary, along with a business partner, Anthony Cirillo, purchased The Mill.[1] Tolchin wanted plaintiff to continue the tasks she was performing under the prior owner, including organizing and marketing special events and "doing a newsletter." Tolchin gave plaintiff a $10,000 raise, increasing her salary to $39,000.

After suffering significant operating losses in 2003 and 2004, The Mill retained Rodgers as an outside consultant in August 2004 to improve banquet sales and overall financial performance. In June 2005, Tolchin called a staff meeting and introduced Rodgers. Soon thereafter, Rodgers asked plaintiff to prepare a detailed marketing plan for The Mill.

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[1] The record is unclear as to Cirillo's ownership interest, if any. In her deposition, Tolchin testified that Cirillo was supposed to be a shareholder of Shore Culinary, but that "[h]e never fully vested . . . so he actually never bought into it as we had agreed that he was going to do." However, it is apparently undisputed that Cirillo acted as a general manager for some time during plaintiff's tenure and remained actively involved in the sale of small group functions booked at The Mill.

On August 11, 2005, plaintiff wrote a three-page single-spaced email to Rodgers, with a copy to Tolchin, reiterating some of the marketing techniques already being used, and explaining "why [she] c[ould not] work on the kind of 'Marketing Plan' that [Rodgers] [was] apparently looking for." Plaintiff indicated that she lacked the time because she was working on "a long list of projects." She suggested that Rodgers hire "someone devoted full time to marketing and sales" and implement "an increased advertising budget." Plaintiff concluded the e-mail: "If you in fact hire someone to pursue that type of marketing plan, and if I get some administrative help to free up some of my time, I would be happy to work with that individual . . . ."

In October 2005, Tolchin hired two new sales representatives. She also promoted plaintiff to sales manager and placed her in charge of the sales department. Plaintiff's salary was increased to $42,500, plus a $50 commission on each party booked by the department.

Almost a year later, in early September 2006, The Mill terminated its banquet manager for "performance issues." He was forty-five years of age. Tolchin asked plaintiff if she would accept a promotion and take on the added responsibilities of banquet manager. Rodgers opposed the idea because "he felt [The

Mill] needed a full[-]time banquet manager." Plaintiff was "hesitant" but accepted after Tolchin pleaded with her and agreed that plaintiff "could delegate the job responsibilities." Plaintiff became "[c]atering director" and received a $7500 raise to compensate her for the additional duties.[2]

In October 2006, Tolchin advised the managerial staff at The Mill that she would be limiting her on-site presence and Rodgers would be taking a more active role in daily operations, including the authority to hire and fire employees. In a memo, dated October 25, 2006, Tolchin asked the staff to "[p]lease give Don your full cooperation whenever I am unavailable."

Rodgers testified at deposition that wedding sales "increased very substantial[ly]" in 2006. During her deposition, Tolchin agreed it was "fair to say" that wedding sales increased because of plaintiff's performance.

However, defendants claim that problems arose once Rodgers became more involved in operations at The Mill. In her deposition, plaintiff acknowledged that while she told Rodgers "[she] would support him" in his efforts to "improve the

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[2] In his deposition, Rodgers denied that the title "director of catering" ever existed, although it is undisputed that plaintiff's promotion to fill the position of the former banquet manager required her to perform additional duties and at other points in the record defendants refer to the position as "[c]atering [d]irector."

business," she did not think Rodgers "necessarily appreciated . . . the experience that [she] had and the knowledge that [she] brought to the table and he just really wanted things done his way."

Rodgers testified that he, Cirillo and Tolchin discussed terminating plaintiff as early as 2005. Cirillo believed plaintiff and her staff "weren't selling enough and that there was a lot of resistance to change." Rodgers characterized plaintiff's attitude as one of "stubbornness" or "[t]hat's not the way we do things." According to defendants, tensions between Cirillo and plaintiff continued.

Tolchin testified that after plaintiff began performing her additional duties as banquet manager, "it was obvious that [plaintiff] was uncomfortable with her new position and she would make other people around her uncomfortable . . . . She voiced her opinion loudly. She let people know she was not happy."

In late 2006, Rodgers noted errors in marketing materials that plaintiff had approved and brought them to her attention. Defendants produced a memo that Rodgers used as an agenda for a meeting he had with plaintiff on November 7, 2006. One of the items on the agenda included a discussion of plaintiff's

"attitude," noting that she "[m]ust demonstrate a more upbeat positive less combative attitude."

Plaintiff claimed that she never saw the memo until this litigation commenced. Nonetheless, plaintiff acknowledged in her deposition that she met with Rodgers in November 2006 and that he urged her to "demonstrate a more upbeat, positive, less combative attitude[.]" Plaintiff, however, denied that she had "a negative . . . attitude." She also acknowledged that she and Rodgers discussed the mistakes in the marketing materials, but she characterized them as "little bli[]ps in a much bigger picture."

In January 2007, plaintiff met with Rodgers. She believed the purpose of the meeting was to discuss a "new marketing plan and the sales department moving forward for the year." Instead, Rodgers told plaintiff that "he had some good news and some bad news." Rodgers informed plaintiff that The Mill was hiring a full-time banquet manager, probably Rodgers' son, to replace her, and rescinding plaintiff's $7500 raise. Rodgers also told plaintiff that she was relieved of the responsibilities of organizing special and networking events so that she could focus on marketing and sales. As a result, plaintiff claims that she anticipated losing an additional $6000 per year in commissions earned from "networking proceeds."

Plaintiff testified that she was "completely shocked," "upset and outraged" by Rodgers' decision. She told Rodgers that while it was acceptable to hire a full-time banquet manager, "[she] would hand in [her] resignation" "if [he] eliminate[d] the special events" and the additional money she received from them. Plaintiff "was completely insulted" because she "was hired . . . 20 years ago" to do special events, and had "created them, marketed them, made them successful, and ran them."

Rodgers told plaintiff that she could potentially earn more money "through a new commission plan." Plaintiff testified the plan "was extremely complicated" with unrealistic sales goals. More importantly, plaintiff believed that she "would not see or realize a lot of the commissions that [Rodgers] was referring to" because they were paid on smaller parties booked by Cirillo, not plaintiff and her staff. Plaintiff testified that she was "dissatisfied" with the new compensation plan and angry, acknowledging that she felt "the company was more concerned about the bottom line rather than with [her] personal feelings and [her] 20 some odd years with The Mill."

Plaintiff asked for a meeting with "the owner" to discuss her concerns and "where [her] job was going." Rodgers told plaintiff he would take her concerns to the owners, but no

meeting was ever scheduled. The next day, plaintiff drafted a resignation letter but never submitted it to Tolchin or Rodgers.[3]

On January 21, 2007, Rodgers sent plaintiff an email noting, "We are all hopeful that things will work out for you with The Mill"; he attached a detailed memo. The memo explained plaintiff's "[r]esponsibilites and [c]ompensation." We quote from it at length:

> As discussed . . . your job responsibilities and compensation will be modified for 2007. . . . [I]t is necessary that your sales and marketing efforts be directed toward building the banquet and ala carte sales volume with greater emphasis on creating new opportunities beyond wedding business, while continuing to increase wedding sales as well. . . . [I]n order for The Mill to achieve it's [sic] 2007 sales goals . . . your responsibilities must be reduced to allow you to focus your full efforts on sales and marketing functions. . . . Your base weekly salary will be at the annualized rate of $42,500 with a commission plan in accordance with the attached outline that will provide approximately $30,475 in annual commissions provided that the sales goals of

[3] The letter was retrieved from plaintiff's work computer on the day of her termination. It was addressed to Tolchin and stated:

> I was advised by Don Rodgers last evening that you wish to eliminate my [n]etworking pay along with the recent raise you gave me to oversee your banquet department. Please be advised that you may have both of those back in addition to the rest of my salary.
>
> I hereby tender my resignation from all of my positions at The Mill . . . .

> The Mill are achieved. In addition you will have an unlimited potential to earn significantly more based upon the successful performance of your sales department.
>
> Your many years of experience with The Mill are valued and we believe that, as you were successful in assisting in building the wedding business, that you could also be successful in increasing the sales activity in non-wedding banquet and ala [c]arte sales and continue to enhance your personal earnings opportunities as well.
>
> While you have expressed an unwillingness to have your job responsibilities reduced and compensation formula changed, the ownership and I believe that a re-focusing of your efforts on the sales and marketing functions is necessary to increase sales. . . .
>
> Hopefully you will accept your modified role and continue as an integral part of the sales and marketing team of The Mill. Considering the importance of your job function to the development of the sales effort we would appreciate your decision by . . . January 24th.

Rodgers also reminded plaintiff that her employment "remain[ed] at-will" and "may be terminated at anytime with or without notice and with or without cause, provided that such termination does not violate state or federal law."

On January 24, plaintiff replied via e-mail. She "found both the manner and tone" of Rodgers' memo "surprising and disappointing in light of [her] long tenure with th[e] business." Plaintiff believed that "in the very least, [she

should have] be[en] included in . . . discussions with respect to changes in [her] job responsibilities." Plaintiff told Rodgers that a "large portion" of the new compensation plan was not "realistically attainable" because it involved bookings that would not be made by her "'sales team.'" Plaintiff continued, "So clearly and simply stated, I am being rewarded for my successful hard work, loyalty and dedication . . . with a cut in pay." Plaintiff concluded:

> Apparently you come from a very sterile corporate environment as evidenced by the last paragraph of your Memo stating that my employment may be terminated. . . . The Mill, up until now, did not operate this way; apparently now it is. Since I am being given no options, I will move forward with you new "modified" responsibilities and compensation plan for me. You can let me know how and when you wish to proceed.

The next day, plaintiff sent Tolchin an email advising that she had told another employee, Patricia Kliegerman, a part-time banquet captain who also assisted plaintiff in her administrative duties, that her hours would be reduced because a new banquet manager was being hired. Plaintiff asked Tolchin to give Kliegerman "a heads up if any more of her hours are to be cut." Tolchin responded to plaintiff, "Why would you assume this would [a]ffect [P]atty or choose to [a]larm her without being certain that she'd be [a]ffected?"

Tolchin testified at her deposition that she "was very upset" and, after speaking with Rodgers and Cirillo, decided to terminate plaintiff even though "it wasn't an easy decision to come to." Tolchin explained:

> I was at the point where I felt we could no longer please [plaintiff] and she was not going to be receptive to any changes in her job responsibilities, especially when they involved money. I was trying very hard to build the business. I was losing money. I had a lot of people employed that were relying on me.
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> Just the fact that this memo came was really what put me in the position where I felt that I was being sabotaged, that [plaintiff] was showing some sort of power towards me that she could control my employees whether I liked it or not.
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> I was . . . helpless, and I kind of felt that if I did not let [plaintiff] go, it would be creating a toxic environment.

Rodgers did not want to terminate plaintiff but Tolchin was adamant.

On January 27, Tolchin and Rodgers met with plaintiff. Plaintiff testified that Tolchin immediately said, "This is one of the hardest things I've ever had to do." Plaintiff asked incredulously whether she was being fired and, if so, why. Although she was "in[] a state of shock," plaintiff recalled that Tolchin said, "You are dividing the sales team." Plaintiff blamed Rodgers, telling Tolchin, "[t]his is his fault, this is

his influence over you." Rodgers wanted plaintiff to stay at least two more weeks. But Tolchin told plaintiff she was "going to override him" and advised plaintiff she could leave that day. Tolchin told plaintiff, "I will have your severance package ready for you at the end of the week."

Neither Rodgers nor Tolchin could recall if plaintiff was given a reason for her termination at the meeting. Tolchin testified that she "d[id]n't think we had time." Rodgers testified that as soon as Tolchin told plaintiff "[t]his is very difficult for me," plaintiff "interrupted and asked, [']If you called me in to . . . fire me . . . it's okay, I'll leave now.[']"

Shortly thereafter, Rodgers' son, Donald, was promoted to banquet manager. He was twenty-two years old at the time, had been employed at The Mill for several years, and, according to Rodgers, had served as a banquet captain for "150, 200 weddings and had hands on experience." Rodgers testified that no other employee was considered for the position, no external job search was conducted and the decision to promote his son was made by Tolchin.

Amanda Anton, then age thirty and working for plaintiff in the sales department, became "sales team director" and, according to Rodgers, assumed most of plaintiff's sales

responsibilities. Rodgers testified that Tolchin decided to promote Anton and that no other candidates were considered. Anton received a raise such that her compensation was commensurate with plaintiff's salary prior to assuming the banquet manager's duties.

When seeking summary judgment, defendants contended that plaintiff's total work responsibilities were actually divided amongst seventeen existing employees of varying ages, all of whom were already employed by The Mill. They supplied a table, listing the employee, his/her age and job responsibilities. Plaintiff disputed this assertion, claiming that some of the people on the list were performing these tasks before plaintiff's termination, and that four of the employees were not employed by The Mill when she was terminated.

At the time of her termination, plaintiff and her sales staff had booked thirty-nine parties and there is no dispute that she was entitled to receive $1950 in commissions. On January 30, 2007, plaintiff emailed Tolchin asking when her severance check could be picked up. Tolchin responded that she had "a release form" for plaintiff "to approve" before giving her the severance pay. On February 17, 2007, plaintiff again emailed Tolchin asking when she would receive her commission check. Tolchin responded, "[w]hen all the paperwork is

complete." Rodgers testified that Tolchin instructed him to withhold the commission check in early March 2007 while "[she and plaintiff] were working on a separation agreement."

On April 25, 2007, plaintiff filed a complaint naming The Mill and Rodgers as defendants. Plaintiff alleged age discrimination by The Mill and its agent, Rodgers, in violation of the Law Against Discrimination, N.J.S.A. 10:5-1 to -49 (the LAD). Plaintiff also alleged that Rodgers had tortiously interfered with her "employment relationship."

In November 2008, plaintiff amended her complaint adding Tolchin as a defendant. The amended complaint alleged: that The Mill had discriminated against plaintiff based upon her age in violation of the LAD; that Rodgers and Tolchin aided and abetted The Mill in violating the LAD; that The Mill and Tolchin violated the WPL by failing to pay plaintiff her commissions; and breach of contract.

It is undisputed that on December 4, 2008, The Mill paid plaintiff the commissions she was due.

On April 3, 2009, defendants moved for summary judgment and to strike portions of plaintiff's opposition. We briefly digress to discuss the material that was the subject of defendants' motion to strike.

Following her termination, plaintiff applied for unemployment benefits but was notified by the Department of Labor (DOL) that a telephonic fact-finding interview was necessary to determine her eligibility because "[y]ou may have been separated [from employment] for misconduct in connection with your work." Plaintiff alleged that defendants advised (DOL) that she was "terminated for 'misconduct,'" though, in reply to plaintiff's opposition to summary judgment, defendants denied that DOL's notification was "based upon any information provided by" them. A fact-finding hearing took place and Rodgers testified on behalf of The Mill.[4]

At his deposition, Rodgers testified that before plaintiff was on the conference call, he told the DOL hearing officer that "[w]e initially thought or felt that the separation was mutual." He also told the hearing officer about plaintiff's notice to Kliegerman that her hours would be diminished and that plaintiff "didn't have responsibility or authority to do that." However, Rodgers also testified that he told the hearing officer that plaintiff had not been terminated "for insubordination."

Plaintiff contended that Rodgers told the hearing examiner that she was terminated because of a "personality conflict."

[4] The record does not contain any transcript of the telephonic hearing.

But plaintiff's citation to the record in support of this proposition reveals Rodgers' answer at deposition was equivocal. Rodgers admitted that the hearing officer "may have asked was there a personality conflict[?]" Rodgers could not recall how he answered, but acknowledged that he may have answered, "There may have been, or [y]ou might characterize it that way." Plaintiff filed a certification indicating that Rodgers never told the hearing officer she was terminated for "dividing the sales force or because of the incident with . . . Kleigerman."

After oral argument on defendants' motions, the judge issued an extensive fifteen-page written opinion. Regarding plaintiff's age discrimination claim the judge concluded:

> Plaintiff has failed to set forth even a minutia of evidence establishing that the [d]efendants['] proffered non-discriminatory reasons for her termination were pre-textual. Plaintiff . . . testified that neither Tolchin nor Rodgers ever made any disparaging remarks about [p]laintiff or her age. Plaintiff merely attempts to qualify [d]efendants['] actions as pre-textual. Plaintiff alleges that no one would terminate such a long term relationship based on one incident unless there was some pre-textual reason. Unfortunately, such an accusation does not satisfy the [p]laintiff's burden of proof. . . . [T]he court does not find that the fact that two employees, younger than [p]laintiff, assumed her responsibilities is evidence of [an LAD] claim. The two employees . . . had been employed . . . at The Mill prior to September 2006 when [defendants] promoted [p]laintiff to the position of Catering

> Director. Defendants merely used in[-] house personnel to fill a vacant position left by [p]laintiff's termination. They did not seek out younger people to fill that position. As such, the court finds no evidence of a pre-textual reason for [p]laintiff's termination. Accordingly, [p]laintiff's LAD claim must fail as a matter of law.

The judge also concluded that any individual claims against Rodgers and Tolchin as aiders and abettors of The Mill's discriminatory conduct should be dismissed because plaintiff failed to prove any "unlawful act" was committed.

Finally, the judge addressed plaintiff's claim under the WPL. He concluded that "[p]laintiff's only remedy would be to obtain timely payment of [her] commissions from her employer." He noted that The Mill paid the commissions, albeit "676 days after [plaintiff's] termination." The judge concluded that he "w[ould] not address the issue of outstanding interest as there was no express contract between the parties and thus no private cause of action under N.J.S.A. 34:11-4.7." He "le[ft] it to the parties to determine the issue of interest on the commissions."

On October 6, 2009, the judge entered two orders, granting defendants summary judgment and concluding that defendants'

motion to strike was moot in light of his decision.[5] This appeal and cross-appeal followed.

II.

Plaintiff argues that she established a prima facie case of age discrimination under the LAD because defendants terminated her at age fifty-five and replaced her with two younger individuals "with zero management experience." Plaintiff further contends that for purposes of defeating summary judgment, she established that defendants' proffered non-discriminatory reasons were pre-textual and "[u]nworthy of [c]redence." Plaintiff argues that the motion judge failed to properly apply summary judgment standards by ignoring facts in her favor and relying on defendants' version of events.

We begin with some basic principles that inform our review.

"All employment discrimination claims require the plaintiff to bear the burden of proving the elements of a prima facie case." Victor v. State, 203 N.J. 383, 408 (2010). "If the claim is based upon discriminatory discharge, . . . 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

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[5] The order granting summary judgment is not in the record, although the judge references it in his second order and the parties apparently do not dispute that one was entered.

terminated; and (4) that the employer thereafter sought similarly qualified individuals for that job." Id. at 409 (citing Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 596-97 (1988)). In age discrimination claims brought under the LAD, "courts have modified the fourth element to require a showing that the plaintiff was replaced with 'a candidate sufficiently younger to permit an inference of age discrimination.'" Bergen Commer. Bank v. Sisler, 157 N.J. 188, 213 (1999) (quoting Kelly v. Bally's Grand, Inc., 285 N.J. Super. 422, 429 (App. Div. 1995)).

"What makes an employer's personnel action unlawful is the employer's intent." Zive v. Stanley Roberts, Inc., 182 N.J. 436, 446 (2005). "To address the difficulty of proving discriminatory intent, New Jersey has adopted the procedural burden-shifting methodology articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)." Id. at 447 (citations omitted). "The establishment of the prima facie case creates an inference of discrimination . . . and, at that point, the matter moves to the second stage of McDonnell Douglas, when the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employer's action." Id. at 449 (internal citation omitted) (citing Clowes, supra, 109 N.J. at 596). "In

the third stage of the burden-shifting scheme, the burden of production shifts back to the employee to prove by a preponderance of the evidence that the reason articulated by the employer was merely a pretext for discrimination and not the true reason for the employment decision." Ibid.

"[I]f the employer proffers a non-discriminatory reason, plaintiff does not qualify for a jury trial unless he or she can 'point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action.'" Id. at 455-56 (quoting Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994)); see also Sisler, supra, 157 N.J. at 211 (quotations omitted) (noting in the context of an age discrimination claim that "[a]n employee may meet this burden either by persuading the court directly that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence").

The motion judge correctly focused on the third stage of the McDonnell-Douglas burden-shifting analysis. The parties acknowledge this is the critical issue on appeal. Plaintiff contends that she produced sufficient evidence to resist summary

judgment by raising a material factual dispute as to whether The Mill's non-discriminatory reasons for terminating her were pre-textual, characterizing them as "[e]ver-[c]hanging." Defendants counter, as they did below, that plaintiff has failed to raise sufficient evidence to permit a reasonable factfinder to conclude their reasons were a pretext for unlawful discrimination; thus, plaintiff has failed to present a jury question as to whether her termination was more likely motivated by her age.

The Third Circuit has set forth the appropriate analysis as follows:

> [A] plaintiff who has made out a prima facie case may defeat a motion for summary judgment by <u>either</u> (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 <u>each</u> 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.
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> [Fuentes, supra, 32 F.3d at 764-65 (citations and quotations omitted).]

"We have adopted and consistently applied this standard[,]" DeWees v. RCN Corp., 380 N.J. Super. 511, 528 (App. Div. 2005), which we now apply to facts at hand.

Plaintiff did not "adduc[e] evidence, whether circumstantial or direct, that discrimination was more likely than not a motivating or determinative cause of the adverse employment action." Fuentes, supra, 32 F.3d at 764. Indeed, the evidence in the record is to the contrary.

Plaintiff was immediately given a raise when Tolchin bought The Mill; at the time, she was forty-nine years old. Thereafter, she was given increased responsibilities and her

compensation was increased accordingly. At age fifty-four, plaintiff was assigned the banquet manager's responsibilities when the prior manager, nine years plaintiff's junior, was fired. In Young v. Hobart West Group, 385 N.J. Super. 448, 461 (App. Div. 2005), we noted that "[c]ourts have rejected age discrimination claims when a plaintiff was both hired and fired while a member of the protected age group." (citing Lowe v. J.B. Hunt Transp., Inc., 963 F.2d 173, 175 (8th Cir. 1992)).

Plaintiff admitted that her age was never discussed, nor did anyone at The Mill ever disparage older workers in general. She admitted that The Mill had never discriminated against her prior to her first meeting with Rodgers in January 2007. Plaintiff produced no other witnesses to supply direct or circumstantial evidence of discriminatory animus.

In her deposition, plaintiff contended there was "a pattern" of firing older upper management employees at The Mill. She identified two other people beside herself as proof of the pattern. However, plaintiff admitted that one, Valente, "voluntarily quit" and was actually re-hired by The Mill before he was fired at some point after plaintiff's termination. The second, Guerra, was "in his late 50s" when he was fired as The Mill's general manager; plaintiff admitted that Guerra was replaced by a man of the same, or even older, age.

Plaintiff's argument therefore devolves to whether she "demonstrate[d] 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." Id. at 765. In large part plaintiff contends that she met her burden because defendants provided different reasons for her termination at different times.

For example, plaintiff claims that at the termination meeting, Tolchin told her she was being terminated because she was dividing the sales team. Plaintiff asserts that reason was false, noting that Tolchin admitted she had received no direct complaints from the sales staff and that plaintiff's reorganization ideas were successful.

However, plaintiff acknowledged tension between herself and Cirillo over the booking of smaller parties and entitlement to commissions as a result. In her deposition, plaintiff acknowledged that after being promoted to sales manager in October 2005, she had no problems with Rodgers or Tolchin, but there "were problems that I felt needed to be addressed." She identified those "problems" as the "situation that existed in the sales department with Mr. Cirillo doing sales of one nature and my girls doing sales of another nature and the problems that

created." The issue became "[w]ho was [going] to get which sales calls" because that determined whether plaintiff and her staff would receive commissions.

Plaintiff also acknowledged that she opposed Rodgers' new commission structure because she believed it would not result in greater commissions for herself precisely because of Cirillo's activities. Whatever Cirillo's official duties were, it is clear from the record that Tolchin relied upon his advice, conferring with him before she decided to fire plaintiff. The fact that plaintiff ultimately, and begrudgingly, accepted the new commission structure does not defeat an inference that Tolchin believed plaintiff was a divisive force.

Plaintiff next claims that defendants never raised "the Kliegerman incident" as a reason for her termination. That is apparently undisputed, although Rodgers acknowledged he may have mentioned the incident to the DOL hearing officer. What is clear from the record, however, is that Tolchin determined plaintiff should be fired the very next day after receiving plaintiff's email.

As she explained in greater detail in her deposition, Tolchin viewed plaintiff as being "[un]receptive to any changes in her job responsibilities, especially when they involved money," and "that [Tolchin] was being sabotaged, that

[plaintiff] was showing some sort of power towards [Tolchin] that [plaintiff] could control [the] employees whether [Tolchin] liked it or not." A fair reading of Tolchin's deposition testimony is that she viewed the incident as the proverbial "straw that broke the camel's back" in a much larger dispute over how the business was conducted.

In this regard, plaintiff acknowledged that she viewed Rodgers as exerting influence over Tolchin, that Rodgers failed to appreciate plaintiff's experience at The Mill, and that "he just really wanted things done his way."

Plaintiff also argues that other reasons were given for her termination at the DOL hearing, further demonstrating that defendants' proffered reasons for her termination were not worthy of credence. We consider the issue without reaching the merits of defendants' cross-appeal because even if this evidence were properly before the motion judge, it does not make plaintiff's argument any more persuasive.

Plaintiff notes, for example, that Rodgers claimed she was terminated by "mutual agreement," further observing that defendants' answer to her complaint made a similar claim. Plaintiff asserts that Rodgers ultimately told the hearing officer that plaintiff was terminated because of a personality dispute.

Defendants' claim that plaintiff's employment was terminated by mutual consent was a disputed issue. Plaintiff admitted telling Rodgers at the first meeting in January 2007 that she would rather resign than lose her "networking" events and the commissions she received from them. Rodgers testified that plaintiff offered to "leave" at the very start of the termination meeting days later. Neither he nor Tolchin could recall if they provided plaintiff with any specific reason for her termination at the meeting. The same day, defendants found plaintiff's resignation letter in her computer.

Regarding any "personality conflict," plaintiff claims that Tolchin and Rodgers admitted that she got along with the staff and that they received no specific complaints. However, plaintiff's interpretation of the term "personality conflict" is crabbed and unrealistic. The personality dispute was not between plaintiff and other members of the staff. It was between plaintiff and Rodgers, someone whom she admittedly believed did not value her long years of experience, brought a "corporate" sensibility to The Mill, imposed a commission structure that would likely reduce plaintiff's compensation and had significant influence over Tolchin. In the email that immediately followed her first meeting with Rodgers, despite ultimately agreeing to remain an employee of The Mill, plaintiff

characterized the reorganization as a "cut in pay" in reward for her long and faithful service.

We contrast the evidence that plaintiff has marshaled to "demonstrate [the] weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in The Mill's non-discriminatory reasons for her termination, Fuentes, supra, 32 F.3d at 765, with the type of evidence we have recognized as sufficient in other cases. For example, in DeWees, supra, 380 N.J. Super. at 529-30, the plaintiff demonstrated that other poorly-performing young, male employees were retained while she was fired. When the plaintiff's supervisor testified regarding his efforts to relocate her within the company, the plaintiff produced the testimony of those who were allegedly contacted; they denied that the supervisor ever made such efforts. Id. at 530. We also noted the "'somewhat sexist comment[s]'" plaintiff's supervisor made before her actual termination. Id. at 531.

In Greenberg v. Camden Cnty. Vocational and Technical Schs., 310 N.J. Super. 189, 192 (App. Div. 1998), the plaintiff was not offered tenure at age forty-eight. The defendant claimed that she was not rehired because of unsatisfactory concerns noted in her prior evaluations. Id. at 195. We concluded that the plaintiff raised a factual dispute as to

whether this was a pretext for age discrimination by demonstrating there were no such concerns raised in her latest evaluation; that other, younger teachers were offered tenure despite having worse evaluations; that a fellow teacher of similar age who had no negative evaluations was not rehired; and that a statistical pattern existed over several years demonstrating younger teachers were offered tenure and older teachers were not. Id. at 204-07.

Plaintiff in this case marshals no such compelling facts. To the extent she alleges that she was not a divisive force on the sales staff or that she had no "personality conflict" with others, we note that to some extent her own testimony belies such an assertion. More importantly, we have noted in the context of affirming summary judgment dismissing an LAD claim,

> [A] firm's business judgment of highly subjective criteria, exercised in good faith, will not be second-guessed in the absence of some evidence of impermissible motives. [W]e must be mindful that judicial intervention in the private employment context has a limited purpose. Anti-discrimination laws do not permit courts to make personnel decisions for employers. They simply require that an employer's personnel decisions be based on criteria other than those proscribed by law.
>
> [Jason v. Showboat Hotel & Casino, 329 N.J. Super. 295, 308 (App. Div. 2000) (second alteration in original) (citation and internal quotation marks omitted).]

After thoroughly reviewing the record in this case, we conclude that summary judgment was properly granted.[6]

III.

We turn to plaintiff's claim under the WPL. She acknowledges that The Mill belatedly paid all the commissions she was due. However, she argues she is entitled to recover "[s]tatutory [p]enalties" under the WPL. We disagree.

Under the WPL,

> [W]henever an employee . . . leaves employment for any reason, the employer shall pay the employee all wages due not later than the regular payday for the pay period during which the employee's . . . cessation of employment . . . took place, as established in accordance with [N.J.S.A. 34:11-4.2] . . . .
>
> [N.J.S.A. 34:11-4.3.]

Commissions are included in the statute's definition of wages. N.J.S.A. 34:11-4.1. Wages must be paid at least twice each month no more than ten working days after the end of the pay period. N.J.S.A. 34:11-4.2. Any employment agreement that violates the WPL "shall be deemed to be null and void." N.J.S.A. 34:11-4.7. And, "every employee with whom any agreement in violation of this section . . . shall have a right

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[6] As a result, we need not address plaintiff's second point on appeal, i.e., that Rodgers and Tolchin aided and abetted The Mill's violation of the LAD.

of civil action against any such employer for the full amount of his wages in any court of competent jurisdiction in this State." Ibid.

The WPL further provides:

> Any employer who knowingly and willfully violates [the statute] shall be guilty of a disorderly persons offense and, upon conviction for a violation, shall be punished by a fine of not less than $100 nor more than $1,000. Each day during which any violation of this act continues shall constitute a separate and distinct offense.
>
> [N.J.S.A. 34:11-4.10.]

Administrative penalties, collectible by the Department of Labor, are also available "[a]s an alternative to or in addition to any other sanctions provided by law for violations of [the WPL]." Ibid.

"[U]nless expressly provided by the [WPL], employers may not withhold or divert any portion of an employee's wages." Rosen v. Smith Barney, Inc., 393 N.J. Super. 578, 585 (App. Div.), certif. denied, 192 N.J. 481 (2007), aff'd, 195 N.J. 423 (2008). We have recognized an employee's private right of action under the WPL to collect wages wrongfully withheld even in the absence of any employment agreement. Winslow v. Corp. Exp., Inc., 364 N.J. Super. 128, 136-37 (App. Div. 2003). However, no decision has recognized an aggrieved employee's

right to collect anything more than "the full amount of his wages." N.J.S.A. 34:11-4.7.

Plaintiff relies upon on our decision in Lally v. Copygraphics, 173 N.J. Super. 162 (App. Div. 1980), aff'd, 85 N.J. 668 (1981). There, we held "that an employee who claims to have been the victim of retaliatory discrimination, in violation of N.J.S.A. 34:15-39.1," for pursuing a workers' compensation claim "may elect to pursue either a judicial or administrative remedy." Id. at 181-82. We acknowledged the ability of an aggrieved employee to seek more than the "limitation of the private remedy [of] loss of wages and reinstatement" provided by the statute, id. at 179, and recognized the right to sue for compensatory and possibly punitive damages. Id. at 181. We did not, however, recognize the employee's ability to collect the statutory quasi-criminal fines or administrative sanctions provided by the statute.

Moreover, in affirming our decision, the Supreme Court noted that "[t]he statutory declaration of the illegality of such a discharge underscores its wrongful and tortious character for which redress should be available. Such a cause of action is strongly founded in public policy which, in this case, is reflected in the statutory prohibitions themselves." Lally,

supra, 85 N.J. at 670 (citing Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 66-73 (1980)).

Certainly absent proof of invidious discrimination, an evil specifically addressed by N.J.S.A. 34:15-39.1, we cannot conclude that the Legislature intended the private remedy provided under the WPL to be expanded beyond the plain language of the statute. We also find no authority for permitting plaintiff to collect the statutorily-permitted quasi-criminal penalties.

Affirmed. The cross-appeal is dismissed as moot.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION