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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3079-11T3

RAMON CUEVAS and JEFFREY
CUEVAS,

Plaintiffs-Respondents,

v.

WENTWORTH GROUP, WENTWORTH
PROPERTY MANAGEMENT
CORPORATION, and ARTHUR
BARTIKOFSKY,

Defendants-Appellants.

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3 Argued May 14, 2014 – Decided

Before Judges Sapp-Peterson, Maven and Hoffman.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County,

Docket No. L-2728-09.

Paul A. Rowe argued the cause for appellants (Greenbaum, Rowe, Smith & Davis, LLP, and Fox Rothschild, LLP, attorneys; Mr. Rowe, of counsel and on the brief; Aron M. Schwartz and Maja M. Obradovic, on the brief).

« Citation Data

Jeffrey S. Mandel argued the cause for respondent Ramon Cuevas (Cutolo Mandel, LLC, attorneys; Mr. Mandel, of counsel and on the brief).

John J. Piserchia argued the cause for respondent Jeffrey Cuevas and joins in the brief of respondent Ramon Cuevas.

PER CURIAM

In this appeal, defendants, The Wentworth Group (Wentworth Group), Wentworth Property Management Corporation (Wentworth), and Arthur Bartikofsky (collectively referred to as "defendants"), appeal from the jury verdict finding they subjected plaintiffs, Ramon and Jeffrey Cuevas,[1] to discrimination, prohibited under the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, and the approximate $2,500,000 in compensatory and punitive damages awarded to plaintiffs, who are brothers. We affirm in part, vacate in part, and remand for a new trial on economic damages.

I.

We derive the salient facts from the trial record. Plaintiffs filed their complaint against defendants after they were both terminated from their positions with Wentworth within one month of each other in December 2007 and January 2008,

respectively. In their complaint, they alleged defendants subjected them to a hostile work environment based upon their Hispanic heritage; and, when they complained, they were terminated. They sought compensatory and punitive damages, as well as equitable relief. Defendants denied the allegations, claiming plaintiffs' terminations were performance-based. They also denied the existence of a hostile work environment.

Wentworth Group is a holding company for three property management companies. Its president and principal is Michael Mendillo. One of the three management companies is Wentworth. Mendillo is also the president and chief operating officer for Wentworth.

3 In May 2005, Wentworth hired Ramon as one of its five or six regional vice presidents. He was the only Hispanic regional vice president. He was responsible for the "Gold Coast" properties, which were the "most lucrative" in the high-rise division of properties managed by Wentworth. Ramon was expected to "bring[] on new high[-]rises" and "maintain[] existing high-rises." His starting base salary was $95,000. He also received a $750 monthly car allowance, health benefits for him and his wife, and the company paid for his cell phone and business expenses. In addition, he received performance-based quarterly bonuses, which were between $500 and $1000, based upon activity from the contractors. In 2006, his base salary increased to approximately $100,000, and in 2007, it increased to $105,000. He received a $3000 bonus in 2005 and a bonus in excess of $20,000 in 2006. In his performance evaluation for the period May 1, 2005 through April 14, 2006, he received an excellent rating. During his entire period of employment with Wentworth, he never received a written reprimand. Although Ramon had hiring authority, he did not have the authority to fire any employees.

Approximately one year before he was terminated, Ramon

started reporting directly to Arthur Bartikofsky. At the time, Bartikofsky was the executive vice president. Ramon attended meetings with Bartikofsky, Mendillo, the director of human resources, the regional vice presidents, and other Wentworth executives, about every six weeks, and there were conference calls at least once a month. The meetings were "a little on the casual side," and the office would bring in lunch.

Ramon testified that "all of a sudden" there were "comments about the type of food that was being offered[,]" such as "there's no Mexican restaurants in the area, we can't get burritos or tacos, and then there would be laughter." Ramon did not understand it at first but "it kept going . . . once that door was opened by [Bartikofsky]." It became "more and more frequent" and "it really got uncomfortable." Ramon also found it embarrassing when comments were made in front of people he supervised. He could not recall who made any specific comments, and at what meeting or how many comments were made.

Ramon responded to some of the comments "more than once" by saying that he was "not a big burrito fan," with the hope that they were "taking the hint because you don't want to sit there." He explained to the jury that he had "never made six figures" before, and was thinking now he "had a title" and "was doing well;" he was "embarrassed" and just tried to "go with it." The comments began after Bartikofsky "took control" of the meetings.

According to Ramon, if music was playing while participants were waiting for a conference call to begin, someone would comment, "[d]oes somebody have something a little more to

Ramon's taste? Do you think maybe we could get a little Mariachi or salsa music in the background?" If they were planning a networking event with entertainment, it was " [l]et's have Ramon look through his Rolodex. Maybe, you know, he has a salsa band, a Mariachi band [and] he can perform."

Ramon described other inappropriate comments. For example, if a Hispanic bus boy poured water at a restaurant, "somebody would joke and do a double take and go, 'Oh, wow, could have been your twin. I thought maybe that was your . . . brother.'" When Bartikofsky would be taking care of a restaurant check, "they would be looking at the check and saying, 'Well, if we can't make the payment, I'm sure there's somebody in the back, you know, Ramon can join his father and you guys can wash dishes and I don't have to pay the bill.'" On one occasion, in a Portuguese restaurant in Newark following an event, the comment was made, "I'm going to walk with Ramon 'cause nothing will happen because he's with his people" and "I'm sure he has a switchblade[.]" There were other comments about how they thought he had "a little Taco Bell Chihuahua dog."

Ramon was "the only Hispanic, the only person of color," and he explained that he tried to "ride the fine line of not creating an ugly atmosphere that I'm presenting and making it awkward." Ramon testified that "there [were] even times when [he] said if I wear a really ugly tie one day, can we just make fun of the tie and give me a break on something else?" He testified comments were made by Wentworth's top executives: Bartikofsky, Larry Sauer, Jim Magid, Alan Trachtenberg, Neil Macky, and Darlene Rasmussen.

Ramon stated the offensive comments were also made at networking events in front of industry people, vendors,

contractors and other managers. He found the comments to be "just embarrassing," but did not "want to give it credence by explaining what's going on." He continued to try to respond to the comments "without throwing [his job] away" or being confrontational by saying, "I get it. I enjoy all music. You feel free to put country on if you'd like." His other approach was not to respond at all because he "didn't want to sound like [he] was trying to defend [himself]." He told the jury he did not want to risk losing his salary, car allowance, medical benefits, and the annual bonuses. He explained the comments, however, "just chopped [him] down day by day, month by month" and he "just was scared."

He acknowledged that he never made a formal complaint, despite having received Wentworth's employee manual, being aware of Wentworth's anti-discrimination and anti-harassment policy, and the process for reporting incidents. He explained that he never formally complained because "[t]he president/CEO was in the room when it happened. The HR person was in the room when it happened. The executive vice president was in the room when it happened." He pointed out that comments were also made when Trachtenberg, the "in-house counsel and regional director," was in the room. He therefore chose to express how he felt about the comments, "a multitude of times in a multitude of different ways," by saying "Guys, I get it. Can we move on? Can we do something else?" He explained he was concerned that the response would then be "Ramon's a little hypersensitive so boys stop," and he did not want to lose his job. He did not find the comments "funny at all[.]" He did not "want to be a punchline."

Ramon testified Wentworth "bragged" that "this company

had no ceiling" and Mendillo told him about "creating new divisions" and "hiring from within." Ramon wanted to grow with the company but, "all of a sudden," he read in the company newsletter that Sauer, who is Caucasian and one of Wentworth's regional vice presidents, was promoted to vice president of business development. Ramon stated the position was "never posted anywhere" or mentioned, and, had it been posted, he would have applied for it. According to Ramon, Sauer "lost multiple properties every year, and he always lost more than he gained."

Under cross-examination, Ramon testified he could not apply for the vice president of business development position because "it was never offered to [him]." The position was created about six months before he was terminated. Ramon did not know if the position had a higher salary but the position did have more responsibilities because Sauer emailed him giving him "directives." Ramon's final salary was $104,545.

3 In December 2005, Mendillo met Jeffrey at a networking event after Ramon had mentioned that Jeffrey was unhappy at his place of employment. Mendillo agreed to "pass him onto one of our executives," Neil Macky, regional vice president of Wentworth's central New Jersey operations. Macky offered Jeffrey a position as a portfolio manager. Jeffrey accepted the position and managed six communities. Jeffrey's starting salary was $50,000. He received no health benefits, commissions, or car allowances. After one year, his salary increased to $55,000. He was also asked to be "part of the A-team meetings" after just four months with Wentworth. The A-team worked closely with the regional vice presidents to develop ways to run the region "more efficiently, come up with better ways of training, and of course, marketing well." In July 2007, he became an executive director.

When Jeffrey was promoted in 2007, he started attending

executive meetings, where Ramon would also be in attendance. He attended approximately four or five meetings between July 2007 and December 4, 2007. During each meeting, he heard Bartikofsky call his brother "Rico Suave" and "it was actually the Rico Suave brothers when [Jeffrey] got there." Jeffrey did not respond, and Ramon said only "guys, enough, let's move on." Rasmussen, the "head of HR," would refer to Jeffrey and Ramon as "the Latin Lovers" at every meeting; Macky would make comments about Mexican food; and Sauer would make comments about salsa music and dancing. The comments were specific to Ramon and Jeffrey, and their Hispanic heritage.

Jeffrey described other comments, such as: (1) now that the two "Spanish brothers are here, we don't need to hire a salsa band"; (2) "we need to order more Mexican food 'cause now we've got two as opposed to one, we're going to need . . . another Chihuahua"; and, (3) during a conference call discussing an upcoming trip to Atlantic City, Jeffrey recalled Macky "alluded to the fact that we would be safe because Ramon was there and he would, of course, have his switchblade with him, because, of course, he's Spanish." Jeffrey could not specifically state who said what on a specific date or at a specific meeting because the comments were "too numerous."

One week before Jeffrey's termination, Bartikofsky, to whom he reported, angrily yelled at him for being late and told him to get his act together. He did so in front of a subordinate, causing Jeffrey to feel "humiliated." Shortly thereafter, on November 30, 2007, he had an impromptu meeting with Trachtenberg, the in-house counsel and regional director. He told Trachtenberg about the incident with Bartikofsky and asked Trachtenberg to speak to Bartikofsky, so Trachtenberg could find out what he had done wrong. At that point he

decided to "go whole hog," and told Trachtenberg about all of the offensive comments made and to express his belief that they were being directed at him and at Ramon, because they were Hispanic.

Jeffrey testified that he felt the comments were "like a slap in the face," and found them "extremely degrading." He stated the comments affected his confidence.

He discussed the comments with Ramon but they did not know what to do or who to talk to since "[e]verybody that you could go to is part of those meetings, including an HR person." He did not think it was just "good-natured ribbing" because they did not do it to anybody else.

Jeffrey shared his concerns about the comments with his wife. She supported his decision to "either quit or complain and suffer the repercussions of complaining, which would be termination." When asked what effect "these events" had on him, Jeffrey responded:

> Well certainly, immediately after, you know, you fall into depression obviously. You lose your confidence. Your ego is shattered because you, you think you're a professional. You think that you're being judged solely on your merits, solely on your performance. And you realize that just wasn't the case.
>
> So now again, you have to second guess all your current and previous business relationships to say gosh, you know, if it happened there at Wentworth, is it possible that's going to happen again. So I'm always leery, always almost like watching over my shoulder. I can never really truly be, you know, honest with myself or, or, or [sic] think the person in front of me is honest. That's a horrible way to live.
>
> I want to trust people. I want to, you know, feel like people are being honest and

> trustworthy to me. And now I don't. So I'm tainted, I'm tarnished now because of this.

Four days after complaining to Trachtenberg, Bartikofsky and Sauer walked into Jeffrey's office and shut the door. Jeffrey said "hi guys, what's up? I don't think we have a meeting scheduled." They responded, "We don't. We need to terminate your employment effective immediately." Jeffrey testified he was shocked and thought it was a "sick joke" at first, but Bartikofsky said, "I'm not kidding. The company is going in a different direction and you're not part of it." Jeffrey asked if there was another reason why, since they had just given him a $10,000 raise four weeks earlier "based on performance" and it did not make sense. He also asked whether he could go back to his position as portfolio manager and they said "we're just going to let you go." They also said that they would pay him for the rest of the week if he "promise[d] not to make a scene" or "vandalize . . . your computer or any other things as you're walking out the door."

He testified he sat through a meeting to give them "an itemized account of [his] three remaining sites" but there was no "exit interview." According to Jeffrey, up until that date, he had never received any complaints or criticisms about his performance on the job. He never got anything in writing or any kind of termination letter to explain why he was fired and did not learn until the trial that Wentworth was claiming he was fired for performance issues. He characterized his departure from his office as the "walk of shame," because everyone already knew. He described the hour-long drive home during which he tried to figure out how to tell his wife that he was fired three weeks before Christmas.

When Ramon, learned his brother had been fired, he was

"stupefied" and "stumped." After realizing that it was not a joke, Ramon was "incensed" and "enraged." Ramon called Mendillo to find out what Jeffrey did wrong and why the process for discipline in the employee handbook had not been followed, but he did not get any answers. Jeffrey later learned that he was replaced by a Caucasian male named Hank Johns.[2] Johns was a pest control supervisor who Jeffrey believed, previously, had never been to a board meeting or managed a property. Nonetheless, Wentworth started Johns as "an executive director in charge of an entire region, in charge of . . . 20-plus people without any kind of prior experience whatsoever."

Jeffrey testified the termination was "a shock to [his] system" and "ruined [his] confidence." He felt as if he was "almost limping along life [sic]" and he was "not the same person" he had previously been.

Under cross-examination, Jeffrey agreed he "never actually treated" with a psychologist or psychiatrist or physician in connection with his emotional distress. He also acknowledged that after his termination, he maintained contact with Sauer and became "Facebook friends" with Rasmussen, once she left Wentworth, because he thought continuing the connections might result in a sales lead.

Two months following his termination, Jeffrey secured employment with Affordable Quality Cleaning Company as a sales representative, and was still employed with the company at the time of the trial. He testified he earned $25,000 his first year with the company. Later in his testimony, Jeffrey stated that he earned $50,000 or $60,000 in his first year depending on the commissions. He earned $80,000 in 2009 and $90,000 in 2010, from a combination of salary and commissions.

Jeffrey testified that although he was able to "get back on [his] feet," he preferred to have stayed at Wentworth because "the potential was, was certainly more." He believed he was "on the fast track" to becoming a regional vice president "and all the perks that that gets." He explained his current job was with a smaller company, with twenty-seven employees and it was "[s]usceptible to the economy." He did not think he would "make six figures there."

On New Year's Day, approximately three weeks following Jeffrey's termination, Bartikofsky called Ramon and asked to meet at a rest area. When Ramon arrived, he walked up to Bartikofsky, who was standing with a Caucasian male, Chris Tensen, the person who replaced him. Bartikofsky handed Ramon an envelope and said, "Don't bother sitting down, you're terminated, here." Ramon walked away because he "had no idea how to respond to that." According to Ramon, Tensen had been the president of Wentworth's construction division, which closed when it failed.

The letter, dated January 2, 2008, stated Ramon was terminated because he had been approaching customers for "separate compensation" and, also, for releasing confidential information on how vendors were bidding on jobs. Attached to the letter was a memo, also dated January 2, detailing other reasons for his termination and included a list of fifteen clients who either had a negative perception about him or who had expressed their dissatisfaction with him. The letter also attributed Wentworth's loss of accounts from these clients to Ramon's performance.

Ramon disputed that every property listed in the letter that Wentworth lost, "was 100 percent because of [him]." He testified that over the preceding two-year period, he "went

from a $3000 bonus to almost a $20,000-something bonus" based on the commissions for new projects and properties he brought in and he had "never gotten anything in writing saying that [his] performance was anything less than excellent." He stated he was never advised orally or in writing that his position at Wentworth was at risk.

Ramon had not been aware of any investigation with authorities and had never been asked about any of the allegations contained in his termination letter. He also denied ever asking a vendor for separate compensation or a "kickback," and explained the boards for the properties that Wentworth managed made the decision as to which vendors to hire for the company. He told the jury that he first learned the identity of the company or person from whom he allegedly sought a kickback at the time his deposition was taken in connection with the litigation. Ramon also denied sending reports or e-mails to "authorities" and stated that during the course of the litigation Wentworth did not produce any documents to support this allegation.

On cross-examination, Ramon agreed that, at some point during his employment, he lost four properties, but not five, as indicated in his termination letter. He disagreed that the loss of accounts under his responsibility was a reflection on his performance. On redirect, he testified he lost the four properties because of complaints about the way Wentworth handled its "financials."

Ramon testified that his firing did not cause him to develop a "bleeding ulcer," but he did become "more lethargic" and "kind of felt beaten down." He "just felt, like, despondent in a sense" and was too embarrassed to even talk to his wife about it. He did not want to go out and was "on the

edgier side" and argued with her. The stress caused "a lot more friction" and "things just started . . . to deteriorate." The "stress and the frustration" about paying bills after he was terminated also caused arguments. She filed for divorce a few months after he was fired.

Because he was on unemployment at the time his ex-wife filed for divorce, Ramon testified that he had to move to a friend's apartment where he slept on a sofa in the spare room for $100 per week. He stated that "[g]oing from my home and this job and everything to being 45 years old, sleeping [in] a spare room on a spare bed, paying $100 a week in rent, and visiting [his] mother 'cause she passed away in October from breast cancer," affected him psychologically. He described feeling depressed and being afraid he could lose everything again. He also expressed concern about the lingering effects on his reputation since he still saw the same people at networking events and wished he "didn't have that stigma" and "awkwardness" of being accused of wrongdoing. On cross-examination, Ramon agreed that he had not been treated by a physician, psychiatrist or psychologist for any of the problems about which he testified.

Ramon applied for unemployment, which "took a little long because [Wentworth] tried to block" his claim. He "[e]ventually" received his benefits. About one month following his termination, Ramon received a job offer from Taylor Management, but the offer was rescinded after Mendillo told Taylor Management Ramon had been terminated for misconduct. Ramon then accepted a position in sales and project management with Supreme Metro Asphalt and Concrete (Supreme Metro) about "three to four months later;" his first paycheck was dated February 17, 2008. His salary was $85,000.

Ramon left Supreme Metro in October 2008, to work for Becht Engineering, but he was laid off "because of the economy." His salary with Becht was $85,000. He had worked there for about seven or eight months, and earned approximately $60,000 in 2008, with no benefits, car or phone allowance, or bonuses.

Ramon went back on unemployment in 2009, because he was unable to find another job. He tried to start his own consulting business, but he was bound by "a two-year non-compete with Wentworth," and the business was unsuccessful. In August 2009, he was hired by a management company called Association Advisors. He testified his total income in 2009 was "maybe [$]15, [$]20,000." He earned about $45,000 from Association Advisors in 2010, but still had no health benefits, bonuses or car allowance. At the time of trial in 2011, Ramon was still working for Association Advisors at an annual salary of $65,000, but with no benefits other than a cell phone. He claimed he made a mistake during his deposition when he testified his starting salary at Association Advisors was $80,000 and that it increased to $95,000 per year. Ramon agreed that he actually declined health benefits because he was covered under his wife's policy until the divorce. He explained that he declined health benefits because he could not afford the cost of the benefits. He did not have any documentation detailing his job search efforts following his termination from Wentworth.

Ramon testified that he received some money from the sale of his former marital home and from his mother's estate; he purchased a house about three months before the trial. He remarried about two months before the trial. He stated he was still experiencing anxiety because Association Advisors is a

very small company and, unlike Wentworth, is dependent upon its one female owner for survival.

Mendillo, in his testimony denied making or hearing any derogatory remarks about plaintiffs. He also disputed Ramon's claim that he was his supervisor. He stated Ramon reported directly to Bartikofsky during the entire period of his employment at Wentworth. He testified Ramon's and Jeffrey's terminations were both performance-based. According to Mendillo, clients complained about Ramon, expressed they were dissatisfied with his work, believed there was "no substance there." Mendillo had no written records related to Ramon's poor performance. Nor did he have any minutes from board meetings with clients reflecting their criticisms of Ramon. He testified that all of the complaints he received about Ramon were oral. He stated there had been e-mails complaining about Ramon, but they could not be located and may have been lost when the business moved in 2010. In addition, he testified that documents were purged after Ramon left. While acknowledging the bonuses Ramon received, he denied they were performance-based. Instead, he testified the bonuses were "based on properties that [they] shifted into [Ramon's] region.

According to Mendillo, in either October or November of 2007, he received a phone call from Julio Bendezu, the executive vice president of a vendor, Premier Security, asking for a meeting. He met with Bendezu that same day. Bendezu told him that Ramon had solicited him to "work out an arrangement on properties that he would bring to their firms and through our services that they would work out a financial relationship, anywhere from a three to five percent fee for that." He said Ramon told him that he had the same type of relationship with

his former employer, Delta Maintenance or Delta Services. Mendillo testified that he was "taken back" and when combined with the performance issues, decided it was "time to unwind the relationship."

According to Mendillo, he and Bendezu met four or five times through the end of the year. He included Dave Arnold, the president of Premier in the discussions. Mendillo found the information "compelling" because "there was no ax to grind with this company" and he felt he adequately investigated the allegation internally. He and Bartikofsky made the decision to terminate Ramon. On cross-examination, Mendillo agreed the company had purchased or "absorb[ed]" competitors as a way "to enter a new market." He also agreed that it was "on the radar" to absorb or incorporate Premier but claimed there had been "no serious" discussions yet.

Mendillo described Ramon's termination letter as "self-explanatory." He stated the letter detailed the "clear breakdown of the performance side," including properties lost, and the separate allegation of soliciting a fee from Premier. He told the jury the decision to terminate Ramon had nothing to do with his race. On cross-examination, Mendillo claimed that Ramon was "going right down that path to being terminated" even without the allegation of the kickback. When asked for documentation of the performance issues, Mendillo referenced a "watch list." He could not recall when Ramon started losing properties.

According to Mendillo, the Wentworth Group did not discriminate against Hispanics and that about forty percent of the Wentworth Group was Hispanic, which translated to about 800 of the total 2000 employees being Hispanic at the time of the trial. As for Wentworth, he testified that approximately

twenty percent of the employees were Hispanic, none of whom were in upper management positions.

Mendillo testified that Ramon was first replaced by Tensen, who had been with the company for more than fifteen years, starting as a regional manager and then as an executive. Tensen had left the company for about six months to work as an executive with a large landscaping company but was then brought back to oversee the construction and maintenance division of the company. Tensen worked in that position for six or seven years and then got Ramon's position after the company decided to "get out of that business." With respect to Ramon's failure to promote claim, Mendillo denied the role he created and to which he appointed Sauer was a promotion. He testified that he created the role of vice president of business development and marketing to grow the business. He explained the position was not posted and was not "an opportunity for a promotion. . . . In fact, it was . . . a job where any executive that took it had to take a pay cut because now it was on a low base with the potential opportunity to make money assuming new business came in." He felt Sauer was the "better fit by far" for the position and Ramon "wasn't even thought of for that role." When presented with an e mail he sent at the time congratulating Sauer on his "promotion" to vice president of business development, he admitted, "based on the letter," Sauer was promoted.

Mendillo testified he was not involved in the decision to terminate Jeffrey. Bartikofsky told him that it "wasn't working." He described Jeffrey as a "great guy, nice guy, who was unable to make and execute decisions." He expressed that he was surprised when he learned that Jeffrey had complained about "derogatory comments." He stated Wentworth replaced

Jeffrey with a Caucasian male, who came from the pest control industry and that the individual was hired because of his leadership skills and understanding of the industry.

Bartikofsky, who had been with Wentworth properties for more than twenty years and who became its president in 2008, denied making or hearing any racially derogatory remarks directed towards plaintiffs or Hispanics. He attributed plaintiffs' termination to their work performance only, stating he "lost confidence" in Ramon after ten out of twenty four accounts for which Ramon was responsible "were in trouble" during a twelve-month period. Although he could not recall reprimanding Ramon during his employment, he considered the letter prepared at the time of his termination the equivalent of a reprimand. He stated that representatives of three clients, Versailles, Briarcliff, and Whitehall, specifically asked that he not bring Ramon to meetings. He also identified other clients, Portofino, River Ridge, and Bristol as clients who complained about Ramon. He did not, however, have any records, e-mails, or letters regarding complaints about Ramon from clients. He explained that the clients' complaints were oral. He was not sure whether any written documentation existed.

Likewise, Bartikofsky testified that Jeffrey was unable to "effectively supervise." He had no official documents or performance evaluations related to Jeffrey's performance or lack thereof, other than a November 29, 2007 e-mail that Jeffrey authored. In that e-mail Jeffrey stated that he found it challenging to manage people who had more experience than he did in the property management field, and that he was "having a hard time with his job." He testified that he did not put Jeffrey back in his old position because it was not

available but told Jeffrey that Wentworth would hire him again if a suitable position became available. He described the Caucasian, who replaced Jeffrey, as having had executive experience for many years.

Plaintiffs subpoenaed two witnesses, both former Wentworth employees to testify, Nicole Costa-Frei and Sherry O'Keefe. According to Costa-Frei, she worked at Wentworth for eight years as a property manager and then in an "executive position with no title." During her employment she heard Bartikofsky make "an inappropriate comment based on race[.]" She could not recall the specific time frame when the comment was made but recalled that on the occasion the comments were made Bartikofsky had requested that she accompany Ramon to a property in Jersey City. Bartikofsky said to her, "I know, it's a very bad neighborhood, but just follow Ramon's lead, he'll take care of you, he's one of them." The remark confused her because she was from Jersey City, so she asked Bartikofsky what he meant. Bartikofsky responded, "[h]e's like, oh, there's a lot of Spaniards there, so you might not want to venture out at lunchtime." He commented further to her that "Ramon is Spanish himself, so just follow his lead." He also told her, for lunch, "just have Ramon order tacos for you, he's good at that."[3] Costa-Frei did not recall hearing such comments from any other members of Wentworth's upper management.

O'Keefe worked for Wentworth for more than ten years before being laid off two months before the trial commenced. She worked as a property manager for a high-rise building. She too was on the "A-Team and emerging leaders" with Ramon. She reported directly to Ramon, during his tenure. She never heard any negative comments about him from clients. As a property

manager, she solicited bids and presented proposals to the property's board. Although, Ramon, as a regional vice president, could make recommendations for particular property vendors, he never pressured her to "push any particular vendor over another." She never heard anyone accuse Ramon of "taking a kickback or soliciting a bribe" and she never heard any complaints made directly about Ramon from board members on any properties.

As part of the "A-Team," O'Keefe explained that she participated in meetings and conference calls with Ramon, Mendillo, Bartikofsky, Sauer, and other executives. When asked if she recalled hearing comments about race, or Hispanics, she did not recall the specifics, but stated "there were jokes about certain people, jokes about maybe Larry Sauer, jokes about Ramon, but it was done in a joking fashion." She also testified there "may have been some talk about the food selection" and dancing the "merengue." O'Keefe said she once "made a comment jokingly" and could tell that Ramon was annoyed. She did not attend the executive meetings that happened every four to six weeks and claimed Bartikofsky was not at the meetings where she recalled hearing jokes about food.

Bendezu, who was no longer at Premier Security, testified on behalf of defendants. He confirmed that, at some point in 2007, he met with Mendillo to tell him about the "impression that [he] had received[,]" after a conversation with Ramon. Specifically, he was under the basic impression that "if Premier received accounts, Wentworth accounts, that [Premier] would issue him a three percent [sic]." Thereafter, he had two discussions about this issue and other matters. He had no documentation that Ramon attempted to accept a kickback. He

also stated Ramon released confidential information on the process of bidding to Premier. He also testified that Mendillo told him about the lawsuit and that he was "going to need [him] one day."

The remaining witnesses who were called to testify on behalf of Wentworth, all of whom were still Wentworth employees, except one, denied hearing any derogatory remarks at any of the executive meetings they attended and at which Ramon or Jeffrey or both were also present. In addition, Trachtenberg, in his testimony, denied that Jeffrey came to him on November 30, 2007, to complain about derogatory remarks attributed to Bartikofsky. He testified that had Jeffrey reported his complaints to him, he would have done something about it.

The jury deliberated over a two-day period and upon reaching its verdict, unanimously returned a verdict in favor of plaintiffs on their claims of race-based hostile work environment. They also unanimously found that upper management knew or should have known of the racial harassment and failed to stop it, and that Bartikofsky specifically, knowingly and substantially assisted defendants in creating a racially hostile work environment. By a vote of six to one, the jury found defendants unlawfully retaliated against Ramon because he complained of and/or opposed unlawful harassment and/or discrimination based on his race and that defendants engaged in intentional discrimination against him by terminating him because of his race. Its verdict in favor of Jeffrey on this same retaliation claim was unanimous. The jury unanimously found Ramon failed to prove his claim based upon failure to promote.[4]

The jury unanimously awarded Ramon (1) $632,500 for past lost

earnings; (2) $400,000 for future lost earnings; and (3) $800,000 for compensatory damages for mental pain and emotional distress. Likewise, the jury unanimously awarded Jeffrey (1) $150,000 for past lost earnings; (2) $0 for future lost earnings; and (3) $600,000 for compensatory damages for mental pain and emotional distress.

Outside the presence of the jury, the court found that punitive damages could be assessed against both Wentworth and Bartikofsky personally, and that Wentworth Group and Wentworth should be separately considered for punitive damages awards. After a brief trial, the jury, by a vote of six to one, awarded Ramon $50,000 in punitive damages against Wentworth and $2500 against Bartikofsky. By the same vote, the jury awarded Jeffrey $30,000 in punitive damages against Wentworth and $2500 against Bartikofsky. By a vote of seven to zero as to both plaintiffs, the jury found that no punitive damages should be paid by Wentworth Group.

3 On August 22, 2011, defendants moved for a judgment notwithstanding the verdict (JNOV), new trial, or remittitur. On August 31, 2011, defendants moved for a stay of enforcement of the August 12, 2011, order. The court denied both motions.

3 On November 13, 2011, Jeffrey moved for a tax gross-up on economic damages and for attorneys' fees and costs. On November 15, 2011, Ramon moved to compel production of insurance policies. On November 30, 2011, defendants moved pursuant to Rule 4:24-3 for post-trial discovery, contending that defendants were unable to respond to plaintiffs' application because Ramon failed to provide discovery. The court granted Ramon's motion to compel production of insurance policies, ordering defendants to provide such policies within ten days. The court denied defendants' motion for post-trial discovery. The court granted Jeffrey's motion for tax enhancement.

With respect to attorneys' fees, the court awarded Ramon $194,163.96, plus a thirty percent contingency fee multiplier in the amount of $58,249.18, but denied his application for enhancement of his economic awards for tax consequences. The court additionally awarded Ramon $871 in costs. The court awarded $207,716 in counsel fees to Jeffrey, plus $62,314.80, representing a thirty percent contingency fee multiplier. The court granted Jeffrey's request for enhancement of his economic awards for tax consequences. The court awarded $6213, representing the negative federal tax impact of $4893 and state tax impact of $1320 as the result of the $150,000 back pay award. The court awarded Jeffrey $1565 in costs. Finally, the court ordered that post-judgment interest in favor of both plaintiffs would accrue as of January 13, 2012. The present appeal followed.

On appeal, defendants raise the following points for our consideration:

> POINT I: HOSTILE ENVIRONMENT CLAIM
>
> THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTION TO DISMISS THE HOSTILE ENVIRONMENT CLAIM AT THE CLOSE OF PLAINTIFFS' CASE AND FOR JNOV BECAUSE THE COMPLAINED OF CONDUCT WAS NEITHER SUFFICIENTLY SEVERE NOR PERVASIVE TO HAVE ALTERED THE WORKING CONDITIONS OF EITHER PLAINTIFF.
>
> POINT II: DISCRIMINATORY TERMINATION CLAIMS
>
> THE TRIAL COURT ERRED IN FAILING TO GRANT DEFENDANTS' MOTION FOR A JNOV OR A NEW TRIAL ON PLAINTIFFS' CLAIMS THAT THEIR EMPLOYMENT WAS TERMINATED AS THE RESULT OF DISCRIMINATION ON THE BASIS OF RACE SINCE THE JURY'S VERDICT ON THOSE CLAIMS DEFIES ALL LOGIC AND REASON, IS CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE, AND CONSTITUTES A

MISCARRIAGE OF JUSTICE.

POINT III: THE RETALIATION CLAIM

A. PLAINTIFFS FAILED TO ESTABLISH A PRIMA FACIE CASE OF RETALIATION AND THE TRIAL COURT THEREFORE SHOULD HAVE GRANTED DEFENDANTS' MOTION TO DISMISS THAT CLAIM AT THE CLOSE OF PLAINTIFFS' CASE OR, IN THE ALTERNATIVE, SHOULD HAVE GRANTED DEFENDANTS' MOTION FOR A JNOV.

B. THE COURT FAILED TO INSTRUCT THE JURY CORRECTLY WITH RESPECT TO PROTECTED ACTIVITY. THIS CONSTITUTED PLAIN ERROR SINCE A CORRECT INSTRUCTION COULD HAVE RESULTED IN A DIFFERENT OUTCOME. DEFENDANTS ARE THEREFORE ENTITLED TO A NEW TRIAL ON THE RETALIATION CLAIM.

POINT IV: REFUSAL TO ENFORCE TRIAL SUBPOENA

THE TRIAL COURT'S REFUSAL TO ENFORCE DEFENDANTS' TRIAL SUBPOENA AND NOTICE IN LIEU OF SUBPOENA PERTAINING TO RAMON'S EARNINGS/INCOME SEVERELY PREJUDICED DEFENDANTS' ABILITY TO IMPEACH RAMON'S CREDIBILITY, RESULTED IN AN EXCESSIVE BACK PAY AWARD, AND THUS CONSTITUTED REVERSIBLE ERROR.

POINT V: BACK PAY

EVEN IF THE JURY ACCEPTED PLAINTIFFS' TESTIMONY REGARDING THEIR EARNINGS, THE BACK PAY AWARDS HAVE NO BASIS IN THE EVIDENCE, ARE GROSSLY EXCESSIVE, AND REFLECT JURY BIAS.

POINT VI: FRONT PAY

THERE WAS INSUFFICIENT EVIDENCE FOR THE JURY TO AWARD FRONT PAY TO RAMON CUEVAS AND THE TRIAL COURT SHOULD HAVE SET THE AWARD ASIDE OR, AT A MINIMUM, GRANTED DEFENDANTS' MOTION FOR A NEW TRIAL.

POINT VII: EMOTIONAL DISTRESS DAMAGES

THE JURY'S $1.4 MILLION AWARD OF DAMAGES FOR EMOTIONAL DISTRESS BEARS NO CORRELATION TO THE MEAGER TESTIMONY PRESENTED BY PLAINTIFFS IN SUPPORT OF SUCH DAMAGES. THE JURY VERDICT SHOCKS THE CONSCIENCE AND THE TRIAL COURT ERRED IN FAILING TO SET IT ASIDE OR REMIT IT.

A. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE EMOTIONAL DISTRESS DAMAGE AWARDS.

B. PLAINTIFFS' COUNSELS' ARGUMENT TO USE THE TIME UNIT RULE LIKELY LED THE JURY TO AWARD DAMAGES FOR FUTURE EMOTIONAL DISTRESS DESPITE THE LACK OF EXPERT TESTIMONY AS TO PERMANENCY.

C. THE IRRATIONAL BACK AND FRONT PAY AWARDS REQUIRE SETTING ASIDE OF THE EMOTIONAL DISTRESS AWARDS.

D. THE TRIAL COURT'S DECISION ON DEFENDANTS' MOTION [FOR] JNOV IS NOT ENTITLED TO DEFERENCE.

POINT VIII: ERRONEOUS EVIDENTIARY RULINGS

THE TRIAL COURT ERRONEOUSLY PERMITTED PLAINTIFFS' COUNSEL TO QUESTION BARTIKOFSKY AND IN-HOUSE COUNSEL/HR DIRECTOR ALAN TRACHTENBERG ABOUT DEFENDANTS' POST-LAWSUIT HANDLING OF AND RESPONSE TO THE COMPLAINT. THE ENSUING QUESTIONING CREATED THE CLEAR POTENTIAL FOR JUROR CONFUSION AND IRREPARABLY PREJUDICED DEFENDANTS.

POINT IX: CLAIMS AGAINST WENTWORTH GROUP

THE TRIAL COURT ERRED IN FAILING TO DISMISS THE CLAIMS AGAINST WENTWORTH GROUP AND IN REFUSING TO PROVIDE DEFENDANTS' REQUESTED JURY INSTRUCTION REGARDING THE IDENTITY OF PLAINTIFFS' EMPLOYER.

POINT X: AIDING AND ABETTING LIABILITY

AS THE PRINCIPAL HARASSER OR DISCRIMINATOR, BARTIKOFSKY COULD NOT "AID AND ABET" HIS OWN CONDUCT.

POINT XI: PUNITIVE DAMAGES

THE PUNITIVE DAMAGES AWARD IS UNFOUNDED AND SHOULD BE VACATED.

II.

Motions for judgment, whether made under Rule 4:37-2(b) at the close of the plaintiff's case[5], under Rule 4:40-1 at the close of evidence, or under Rule 4:40-2(b) after the verdict, are "governed by the same evidential standard: 'If, accepting as true all the evidence which supports the position of the party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could

differ, the motion must be denied . . . .'" Verdicchio v. Ricca, 179 N.J. 1, 30 (2004) (quoting Estate of Roach v. TRW, Inc., 164 N.J. 598, 612 (2000)) (citations omitted). A judge is not to consider "the worth, nature or extent (beyond a scintilla) of the evidence," but only review "its existence, viewed most favorably to the party opposing the motion." Dolson v. Anastasia, 55 N.J. 2, 5-7 (1969). An appellate court must essentially adhere to the same standard when reviewing the judge's action. Frugis v. Bracigliano, 177 N.J. 250, 269 (2003). We review the findings de novo, using the same standard applied in the trial court. See Turner v. Wong, 363 N.J. Super. 186, 198-99 (App. Div. 2003) (appellate courts review grants of summary judgment de novo under standard that applied at trial).

A. Hostile Work Environment

Defendants urge that in order to sustain a cause of action for hostile work environment, a plaintiff must establish that the complained of conduct was sufficiently severe or pervasive to have altered the working conditions of the employee. In this instance, defendants contend there were no racial epithets, threats, or intimidation, physical or otherwise. At best, defendants urge, plaintiffs were subjected to only "a lack of sensitivity" or "simple teasing," which occurred "on a handful of occasions," conduct which cannot be said to have altered the workplace.

"To establish a cause of action under the LAD based on a hostile work environment, plaintiffs must satisfy each part of a four-part test." Shepherd v. Hunterdon Developmental Ctr., 174 N.J. 1, 24 (2002). A plaintiff must prove that the conduct "(1) would not have occurred but for the employee's protected

status, and was (2) severe or pervasive enough to make a (3) reasonable person believe that (4) the conditions of employment have been altered and that the working environment is hostile or abusive." Ibid. "A plaintiff need not show that the employer intentionally discriminated or harassed [him], or intended to create a hostile work environment." Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 604 (1993). "[I]t is the harassing conduct that must be severe or pervasive, not its effect on the plaintiff or on the work environment." Id. at 606. "The plaintiff's injury need be no more tangible or serious than that the conditions of employment have been altered and the work environment has become abusive." Id. at 610.

Defendants' characterization of the comments to which plaintiffs testified they were repeatedly subjected reflects a narrow view of the workplace discrimination the LAD is designed to eliminate. The LAD was never intended to be a general workplace civility code. Battaglia v. United Parcel Serv., Inc., 214 N.J. 518, 549 (2013) (stating the LAD was never created as some "sort of civility code for the workplace where only language fit for polite society will be tolerated"). There is, in this record, ample evidence to support the jury's conclusion that defendants repeatedly subjected plaintiffs to a racially-motivated hostile work environment within the meaning of the LAD.

We need not recount all of the derogatory comments to which plaintiffs' testified they were subjected. When viewed in the light most favorable to plaintiffs, the evidence presented revealed that both plaintiffs were subjected to numerous comments from several sources, including their supervisor Bartikofsky, and other top executives, that were specific to

their Hispanic heritage and said in front of Wentworth's owner, Mendillo, and other members of upper management. Specifically, Ramon testified that, once Bartikofsky opened the door, the comments increased and it was embarrassing when it was done in front of those he supervised. There were comments about food, music, and dancing that related to his Hispanic heritage, and he was equated with the busboy or dishwasher in a restaurant and street criminals in Newark. Comments were also made at networking events in front of industry people, vendors, contractors and other managers, which were "just embarrassing."

Other witnesses corroborated at least some of plaintiffs' testimony. For instance, Costa-Frei heard Bartikofsky make "an inappropriate comment based on race" on the job. O'Keefe testified that "there were jokes about certain people" and about "the food selection" and dancing the "merengue."

In short, despite blanket denials from defendants' and their witnesses, there was sufficient evidence for a jury to make credibility determinations and to find that defendants created or allowed a racially hostile work environment to exist for both plaintiffs. The evidence supports that the comments to which plaintiffs were subjected were based upon their Hispanic heritage. The evidence also supports the finding that the comments were not isolated, but instead, sufficiently severe or pervasive to have led plaintiffs to reasonably conclude the conditions their employment had been altered and their work environment had become hostile." Lehmann, supra, 132 N.J. at 610.

B. Discriminatory Termination

Defendants next claim the trial court erred when it failed to

grant a JNOV in connection with the jury's favorable verdict on plaintiffs' claims of discriminatory termination. Defendants urge the verdict on these claims "defies all logic and reason, is contrary to the overwhelming weight of the evidence, and constitutes a miscarriage of justice." They argue that "no reasonable jury could have concluded that race discrimination played a determinative role in the termination decisions." Defendants also claim that the "same actor inference" against discrimination should have been applied in this case because Ramon was hired and fired by the same person (Mendillo) and the same two people (Sauer and Bartikofsky) were involved in the decision to promote and fire Jeffrey. Thus, they argue that it was "irrational and illogical" for the jury to have found discriminatory termination on the facts as presented, which included Ramon's admission that Mendillo did not discriminate against him and Jeffrey's admission that he was having difficulty managing people who had more experience than he did.

In assessing discrimination claims under the LAD, our courts employ a three-step, burden-shifting analysis developed under the federal anti-discrimination laws. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed.2d 668, 677 (1973); Peper v. Princeton Univ. Bd. of Trs., 77 N.J. 55, 81-82 (1978). First, the court must decide whether the employee has established a prima facie wrongful discharge. Mandel v. UBS/PaineWebber, Inc., 373 N.J. Super. 55, 70 (App. Div. 2004), cert. denied, 183 N.J. 214 (2005). Once the employee has established a prima facie case of wrongful discharge, the burden of production, that is, of articulating a legitimate, non-discriminatory reason for the employment decision, shifts to the employer. Ibid. If the employer satisfies its burden of production, the plaintiff employee

must then establish, by the preponderance of the evidence, facts sufficient to infer that the defendant's proffered reason was not the true reason for the discharge, but rather a pretext to impermissibly discriminate. Ibid.

It is the third prong of the burden-shifting analysis that is at issue here, as both plaintiffs established they are members of a protected class, held positions for which they were both objectively qualified, but were terminated and replaced by Caucasians who were similarly or less qualified; and, defendants articulated that their discharges were performance-based, a non-discriminatory reason. Viscik v. Fowler Equipment Co., 173 N.J. 1, 14 (2002) (citing Andersen v. Exxon Co., U.S.A., 89 N.J. 483, 493 (1982)). Measured under the JNOV standard of viewing the evidence in the light most favorable to plaintiff, substantial, credible evidence supports the jury verdict on this issue.

The trial court found the evidence unquestionably demonstrated that defendants failed to document any performance-based issues as to either plaintiff. There is no requirement under the LAD that Wentworth maintain written records documenting poor performance. Nonetheless, the absence of such records is a factor for the jury's consideration in determining whether a discriminatory animus was the real or true reason for plaintiffs' termination. See El-Sioufi v. St. Peter's University Hosp., 382 N.J. Super. 145, 165 (App. Div. 2005) (noting "[s]uch records are especially relevant in the context of employment discrimination claims"); see also Fuentes v. Perskie, 32 F.3d 759, 766 (3d Cir. 1994) ("An employer which documents its reasons for taking adverse employment actions can often be more suitably described as sensible than devious.").

Defendants never met with plaintiffs to discuss the issues and did not provide any documents that would show that defendants pointed out plaintiffs' poor performances during their employment. The only witnesses to testify as to plaintiffs' poor performances were the same individuals who plaintiffs' testified created the hostile work environment. Notably, with respect to Ramon, defendants did not present, as witnesses, any clients or former clients who expressed dissatisfaction with Ramon and, as the trial court observed, Bendezu only testified "for four entire minutes" on direct examination as to the critical issue of Ramon's alleged solicitation of a kickback. Bendezu's brief testimony did not include details of when Ramon approached him or what was specifically said to him. Instead, Bendezu, conveyed his "impression" about his discussion with Ramon to Mendillo, who in turn, never confronted Ramon.

Defendants, for the first time on appeal, raise the "same actor inference," claiming that it was "an absurdity to suggest that Mendillo, who hired Ramon, was hostile to Hispanics after pursuing him for nearly two years," and that it is "irrational" to then find that Mendillo fired Ramon because of his race, especially in light of Ramon's admission that Mendillo did not discriminate against him. Defendants have misstated the record and oversimplified the issue.

It is true that cases such as Proud v. Stone, 945 F.2d 796, 798 (4th Cir. 1991), have found that "the fact that the employee was hired and fired by the same person within a relatively short time span . . . . creates a strong inference that the employer's stated reason for acting against the employee is not pretextual." This inference is a rebuttable inference, which if applied here, was clearly rebutted by the

absence of any records documenting plaintiffs' poor performance. On the other hand, Ramon's bonuses and Jeffrey's promotion and bonus was evidence from which the jury could reasonably conclude both men were performing more than satisfactory in their respective positions.

III.

Turning to plaintiffs' retaliatory discharge claims, defendants argue that plaintiffs' evidence was "insufficient as a matter of law to establish that either of them engaged in protected activity" and they failed to present evidence that Bartikofsky knew of the claimed protected activity. Specifically, they argue neither Ramon nor Jeffrey "reported or complained of discrimination at all, much less in 'sufficiently specific terms' so as to put the alleged retaliator (Bartikofsky) on notice." They also argue that the trial court failed to properly instruct the jury as to protected activity and that this failure constituted plain error entitling them to a new trial. We reject these contentions.

Jeffrey specifically complained to Trachtenburg, who at the time was in-house counsel. Four days after Jeffrey formally complained, he was terminated. When Ramon learned of his brother's discharge, he confronted Mendillo to find out what happened and to inquire why the process for discipline had not been followed. He did not get an answer and was fired less than one month after that. The jury's verdict reflects that it credited plaintiffs' testimony and we discern no basis in this record to conclude otherwise.

With respect to the jury charge on the retaliation claims, when read as a whole, contrary to defendants' contention,

there is no question the jury understood plaintiffs' claims of harassment and/or discrimination were in dispute. The court instructed the jury on the elements of harassment and/or discrimination in connection with the hostile work environment and discrimination claims. It was not necessary to re-instruct the jury on the elements of those claims in its jury instructions on the retaliation claim. In connection with that claim the court instructed the jury that it had to determine whether "defendants terminate[d] plaintiffs because of the plaintiffs' complaint of, and/or opposition to the unlawful harassment and/or discrimination." Further, for purposes of plaintiffs' retaliation claims, it was not relevant whether the complained-of conduct was true or untrue, only whether the plaintiffs had a good faith belief that it was true. Battaglia, supra, 214 N.J. at 549.

IV.

Defendants argue that the awards of $800,000 to Ramon and $600,000 to Jeffrey in emotional distress damages "are extraordinary given the paucity of supporting evidence" and should be set aside or reduced as they "shock the conscience." They claim the court erred when it failed to grant their motion for a JNOV on this aspect of damages because it is undisputed plaintiffs were not treated by any doctors, subjected to any physical violence, physical injury, were employed with Wentworth for a short time, and found new employment quickly. They also contend the awards were "inflated as a result of plaintiffs' counsels' improper argument to the jury to factor in future emotional distress on a time-unit basis" despite the lack of expert testimony as to any permanent injury.

"Trial and appellate courts are loath to second-guess a

damages award rendered by a jury" because "quantifying pain-and-suffering damages into dollars is 'not susceptible to scientific precision' and . . . a jury must be accorded 'a high degree of discretion' in doing justice in such matters." Besler v. Bd. of Educ. of W. Windsor-Plainsboro Reg'l Sch. Dist., 201 N.J. 544, 576 (2010) (quoting Johnson v. Scaccetti, 192 N.J. 256, 279-80 (2007)). Thus, a damages award should not be overturned "unless it is so clearly disproportionate to the injury . . . that it may be said to shock the judicial conscience." Johnson, supra, 192 N.J. at 281.

In other words, in accordance with Rule 4:49-1(a), a court should deny a motion for remittitur unless it is "'clearly and convincingly' persuaded that it would be manifestly unjust to sustain the award." Ibid. "In deciding whether to grant a remittitur, the court must accept the evidence in the light most favorable to the plaintiff . . . and must articulate its reasons . . . by reference to the trial record." Ibid. So long as an award is reasonably supported by the record, it should not be altered. Jastram ex rel. Jastram v. Kruse, 197 N.J. 216, 229-30 (2008). On appeal, we employ the same standard of review as that used by the trial court, keeping in mind that we "must give due 'deference to the trial court's feel of the case.'" Besler, supra, 201 N.J. at 577 (quoting Johnson, supra, 192 N.J. at 282). Measured under these standards, we find no basis to disturb the jury's award for plaintiffs' emotional distress suffered as a result of defendants' discriminatory conduct.

In ruling on defendants' motion, the court started with the premise that a jury's verdict is presumptively correct, and, viewing the evidence in the light most favorable to plaintiffs, the court found the award for emotional distress

damages to be "reasonable based on the testimony of the plaintiffs [and] their emotional distress suffered." The court explained that the "award of hundreds of thousands of dollars says to this [c]ourt that the jury's decision was well reasoned, well thought out, and not excessive. It says to this [c]ourt that the jury sought to accomplish its goal of compensating the plaintiffs for their emotional distress, no more, no less." Further, the court observed, "[t]his was not a case of a runaway jury" and there was "no miscarriage of justice with the jury's verdict." The court also opined that "[p]laintiffs were convincing in their testimony about how they were made to feel while experiencing the harassment and the distress they endured once terminated by the defendants" and the jury "had a basis for believing the plaintiffs."

The court ruled that it would not disturb the jury's verdict, which it found was "generous" but, which it also found, "did not shock the judicial conscience." The court also noted that the jury was "extremely attentive throughout the trial" and "fully understood this matter" as evidenced by their verdict in favor of defendants on the failure to promote claim, the decision to award no punitive damages against Wentworth Group and the small punitive damage award against Bartikofsky individually. The court expressed that plaintiffs "presented extremely well" and "appeared to be genuine, earnest, and credible in their presentation of their testimony."

Defendants do not dispute that emotional distress damages are available in LAD cases, but they argue that without independent corroborative proof or a showing of resulting physical or psychological symptoms, the award may be nominal. We disagree.

In enacting the LAD, the Legislature found that

> because of discrimination, people suffer personal hardships . . . includ[ing]: economic loss; time loss; physical and emotional stress; and in some cases severe emotional trauma, illness, homelessness or other irreparable harm resulting from the strain of employment controversies; relocation, search and moving difficulties; anxiety caused by lack of information, uncertainty, and resultant planning difficulty; career, education, family and social disruption; and adjustment problems, which particularly impact on those protected by this act. Such harms have, under the common law, given rise to legal remedies, including compensatory and punitive damages. The Legislature intends that such damages be available to all persons protected by this act and that this act shall be liberally construed in combination with other protections available under the laws of this State.
>
> [N.J.S.A. 10:5-3.]

In construing the Legislature's statutory intent, our Court has held, the "the Legislature intended victims of discrimination to obtain redress for mental anguish, embarrassment, and the like, without limitation to severe emotional or physical ailments." Tarr v. Ciasulli, 181 N.J. 70, 81 (2004) (emphasis added).

> To suffer humiliation, embarrassment and indignity is by definition to suffer emotional distress. Emotional distress actually suffered in that manner by the victim of proscribed discrimination is compensable without corroborative proof, permanency of response, or other physical or psychological symptoms rendering the emotional distress severe or substantial. The quantum of compensation, which may be nominal . . . is dependent upon the relevant factors we have identified including the duration of the discriminatory conduct, its public nature, and its content and may be enhanced by such additional proofs of indicia of suffering as plaintiff may adduce.

[Ibid.]

A. Non-economic damages

With respect to non-economic damages specifically, it is well-settled there is no gauge for them, especially in cases arising under the LAD. Johnson, supra, 192 N.J. at 279. The standard of proof for measuring emotional distress damages in discrimination cases "is 'far less stringent' than for a common law claim for intentional infliction of emotional distress." Klawitter v. City of Trenton, 395 N.J. Super. 302, 335-36 (App. Div. 2007) (quoting Tarr, supra, 181 N.J. at 82). A plaintiff in a discrimination case "may recover all natural consequences of the wrongful conduct, including emotional distress and mental anguish arising out of embarrassment, humiliation, and other intangible injuries[,]" without accompanying medical proof, necessary to recover for such injuries in a common law personal injury action. Tarr, supra, 181 N.J. at 82. Suffering such consequences of discrimination

> is by definition [] suffer[ing] emotional distress. Emotional distress actually suffered in that manner by the victim of proscribed discrimination is compensable without corroborative proof, permanency of response, or other physical or psychological symptoms rendering the emotional distress severe or substantial. The quantum of compensation . . . is dependent upon . . . duration of the discriminatory conduct, its public nature, and its content and may be enhanced by such additional proofs of indicia of suffering as [the] plaintiff may adduce.
>
> [Id. at 81 (quoting Tarr v. Ciasulli's Mack Auto Mall, 360 N.J. Super. 265, 276-77 (App. Div. 2003), aff'd in part, rev'd in part on other grounds, supra, 181 N.J. at 70).]

Thus, the absence of medical or expert testimony on the extent of the emotional distress suffered was not fatal to plaintiffs' claimed entitlement to emotional distress damages. Ramon testified that he was "more lethargic," "felt beaten down," "despondent" and was too embarrassed to talk to his wife. He described how the stress caused friction in his marriage and his wife filed for divorce a few months after he was fired. Ramon also testified that defendants tried to block his unemployment claim and he lost his first job offer after Mendillo told them he had been terminated for misconduct.

Jeffrey testified that defendants' actions affected his confidence and he fell into a depression. He felt "tarnished" and was not able to trust people. He felt as if he was "almost limping along life [sic]" and was "not the same person [he] was." Although he was able to find work quickly, he testified that it was with a much smaller company, which was "[s]usceptible to the economy" and he did not have the potential to "make six figures there."

Despite the myriad of cases cited by defendants where courts reduced the damage awards in cases of discrimination, the Supreme Court has cautioned against engaging in such comparisons and ruled that the Appellate Division "must refrain from merely substituting its differing opinion without appropriate deference to the trial court." Ming Yu He v. Miller, 207 N.J. 230, 236 (2011). The Court's reasoning in He merely reflects a reiteration of the long-held "general principle that trial courts should not interfere with jury-damage awards unless so disproportionate to the injury as to shock the conscience." Tarr, supra, 181 N.J. at 79 (citing Baxter v. Fairmont Food Co., 74 N.J. 588, 596–97 (1977). This reasoning "applies with equal force to awards of emotional

distress damages in LAD cases."

Thus, although the jury's awards were generous, the trial court explained its reasons for not finding that the awards were excessive or so high as to shock the judicial conscience.

B. Time-Unit Rule

Defendants' contention that the plaintiffs' reference to the time-unit rule in summation, Rule, 1:7-1(b) (or Rule) somehow led the jury to award damages for future emotional distress is without merit. The Rule provides:

> In civil cases any party may suggest to the trier of fact, with respect to any element of damages, that unliquidated damages be calculated on a time-unit basis without reference to a specific sum. In the event such comments are made to a jury, the judge shall instruct the jury that they are argument only and do not constitute evidence.

3 In March 2011, four months prior to the start of trial, plaintiffs' counsel placed defendants on notice of plaintiffs' counsel's intention to argue the time-unit rule in summation. Defense counsel did not object at that time. At trial, defense counsel stated:

> I don't have an objection, Your Honor, to that proposed instruction. I will say that I don't necessarily, having now taken a look at the time unit rule in some more detail, that this is a case involving permanent injury and that it's appropriate. With that said, I don't have an objection to the instruction, per se.

Defendants, in their brief, cite to our unpublished decision in Battaglia v. United Parcel Serv., Inc., No. A-0226-09 (App. Div. Aug. 12, 2011) (slip op. at 1), to support their contention that plaintiffs' counsel impermissibly injected recovery for plaintiffs' future emotional distress, although

no expert testimony or other corroborative evidence of permanency was presented at trial. The Supreme Court granted cross-petitions for certification, Battaglia v. United Parcel Serv., Inc., 209 N.J. 232 (2012), and affirmed that part of our decision where we concluded damage claims based upon future emotional distress must be supported by evidence of permanency, typically through expert testimony or other corroborative evidence. Battaglia, supra, 214 N.J. at 553-55.

Because this issue was not raised at trial, we review the claimed error under the plain error standard, see Rule 2:10-2, namely whether reference to the time unit in closing in the absence of expert testimony was capable of producing an unjust result. Ibid. Measured under this standard, we cannot conclude plain error occurred here.

First, defense counsel initially suggested the Rule did not "necessarily" apply because the case did not involve "permanent injury." On the other hand, defense counsel then voiced no objection "per se" to the court's charging the jury on the Rule; therefore, in advance of plaintiffs' counsel's closing, defense counsel voiced no objection to plaintiffs' counsel's reference to the Rule during summation or to the court's instruction related to that Rule. Consequently, defense counsel either invited the error, or, at best was equivocal in her objection. Second, unlike the plaintiff in Battaglia, the court did not instruct the jury, in the context of awarding damages for emotional distress, to consider plaintiffs' "age" and "life expectancy." Battaglia, supra, 214 N.J. at 554. Third, plaintiffs' counsel's reference to the time-unit rule was brief.

Thus, while plaintiffs' counsel should have been precluded from arguing the time-unit rule during trial because it had

the potential to inject the issue of damages for future emotional distress in the deliberative process, without the requisite expert testimony or other corroborative evidence, the error was harmless. Finally, the court instructed the jury that the attorneys' arguments were not evidence.

V.

Turning to the awards for back pay and front pay, defendants contend that these awards bore no correlation to the evidence and should be set aside. The jury awarded Ramon $632,500 in back pay, and $150,000 in back pay to Jeffrey. It awarded $400,000 in front pay to Ramon, and no front pay to Jeffrey. As to Jeffrey's award, we agree with defendants' contention. As to Ramon, we agree the award must be set aside, but for different reasons.

"The basic purpose of awarding back pay is to make the discriminatee whole by reimbursement of the economic loss suffered, though it should correlatively discourage and deter unlawful discrimination." Gimello v. Agency Rent-A-Car Sys., 250 N.J. Super. 367 (App. Div. 1991) (quoting Goodman v. London Metals Exch., Inc., 86 N.J. 19, 34-35 (1981)). Ordinarily back pay accrues from the date of discharge to the date of the decision and is reduced by interim earnings. Ibid.

"'Front pay' is a concept that attempts to project and measure the ongoing economic harm, continuing after the final day of trial, that may be experienced by a plaintiff who has been wrongfully discharged in violation of anti-discrimination laws." Quinlan v. Curtiss-Wright Corp., 425 N.J. Super. 335, 350 (App. Div. 2012), rev'd, 204 N.J. 239 (2010). It is available as "a potential source of recovery in employment discrimination and wrongful discharge cases," such as this

one, and "may be awarded by a jury." Id. at 351-52.

Jeffrey's salary at the time of his termination was $65,000. After his termination in early December 2007, he commenced employment two months later. He earned commissions only, in that first year, and presented conflicting testimony as to his actual earnings, which were either $25,000, or between $50,000 and $60,000. Accepting that he only earned $25,000, his total economic loss was $40,000. The $150,000 award in back pay to Jeffrey, represented more than twice as much as his actual loss. In addition, he earned $80,000 in 2009 and $90,000 in 2010. Thus, Jeffrey was earning more at his post-termination employment than he likely would have earned had he remained at Wentworth. Because back pay awards are not intended to afford a windfall to a prevailing plaintiff, the trial court erred in denying defendants' JNOV motion as to the jury's award of back pay to Jeffrey.

Turning to Ramon, the court did not explain its reasons for concluding that the back pay awarded to him was reasonable. With regard to front pay, the court in its denial of defendants' post-verdict motion for a JNOV stated that it utilized the "$65,000 figure in its analysis, even though this figure contradicted his prior deposition testimony," as a starting point for assessing the reasonableness of the $400,000 front pay award. While there is no yardstick by which to measure damages for non-economic losses, there are objective factors that may be considered in the determination of the appropriate amount of back pay and front pay.

Back pay is measured from the date of discharge to the date of the verdict, and reduced by any income earned in the interim. Gimello, supra, 250 N.J. Super. at 367. With regard to front pay,

> [g]enerally, in awarding front pay, the following factors are relevant: (1) the employee's future in the position from which she was terminated; (2) her work and life expectancy; (3) her obligation to mitigate her damages; (4) the availability of comparable employment opportunities and the time reasonably required to find substitute employment; (5) the discount tables to determine the present value of future damages; and (6) 'other factors that are pertinent in prospective damage awards.'
>
> [Id. at 352 (quoting Suggs v. ServiceMaster Educ. Food Mgmt., 72 F.3d 1228, 1234 (6th Cir. 1996) (additional internal citations omitted)).]

Defendants contend they were "severely prejudiced" in their ability to impeach Ramon's credibility, which they claim resulted in an excessive award of back pay damages. In this regard, Ramon's failure to produce the tax returns, as he had agreed to do, is relevant to our discussion of his economic damages.

It is undisputed that less than two weeks before trial commenced, defendants served Ramon with a notice in lieu of subpoena requiring him to produce his tax returns at trial. It is also undisputed that during discovery defendants sought these documents and Ramon responded that the information would be provided. However, there is no evidence defendants filed a motion to compel or otherwise attempted to enforce the subpoena until mid-trial.

Defendants did not raise the issue of the notice in lieu of subpoena until the cross-examination of Ramon regarding his post-termination positions and income earned therefrom. When plaintiffs' counsel objected to the questions, the court directed counsel to sidebar, where defendants' attorney raised the issue of the notice in lieu of subpoena. The court said

only "I am not dealing with it right now" and "[i]f that information has not been provided during the course of discovery, this is not an issue that we're going to dispute right now." It is unclear why the court chose not to address the notice in lieu of subpoena, or allow defendants to ask Ramon about his tax returns, which he had failed to provide in discovery or in response to the notice in lieu of subpoena.

Defense counsel cross-examined Ramon regarding discrepancies between his deposition testimony about the amount of income he earned following his discharge and his trial testimony, where the amount of income he purportedly earned was significantly lower than his earnings according to his deposition testimony. Beyond Ramon's testimony, however, there was no other evidence presented to support his claimed entitlement to back pay or front pay. Thus, the significance of the tax returns cannot be minimized. While defendants should have filed a motion to compel the production of the tax returns during the discovery period, it is undisputed that Ramon agreed to provide the documents. Further, when the notice in lieu of subpoena was served, plaintiffs' counsel did not move to quash the subpoena. Therefore, it was not unreasonable for defendants to expect that the subpoenaed documents would be produced at trial.

A trial ultimately is a search for the truth. Graham v. Gielchinsky, 126 N.J. 361, 370 (1991). Although defendants were not diligent in pursuing this discovery, the trial court should have addressed plaintiffs' non-compliance with the notice in lieu of subpoena, for two reasons. First, non-compliance, in the absence of a motion to quash the subpoena, is an affront to the court and subject to the imposition of sanctions pursuant to Rule 1:2-4. See also Gonzalez v. Safe &

Sound Sec. Corp., 185 N.J. 100 (2005) (holding the trial court should have warned the plaintiff, who had been ordered to testify the court, but failed to do so, that he faced the immediate dismissal of his complaint if he refused to do so). Second, Rule 1:9-2 permits the court to direct that objects designated in the subpoena or notice be produce[d] as late as "prior to the time when they are to be offered in evidence and may upon their production permit them or portions of them to be inspected by the parties and their attorneys[.]"

Taking a brief recess to address Ramon's noncompliance with the notice in lieu of subpoena would not have unduly delayed the trial, and would have aided more meaningful appellate review. Because Ramon's sole evidence on his economic losses was his testimony, the credibility of his testimony in this regard was critical. Unless excluded for other reasons, defendant's untimeliness in seeking enforcement of the notice in lieu of subpoena mid-trial could have been addressed in a less prejudicial manner. Abtrax Pharms. v. Elkins-Sinn, 139 N.J. 499 (1995). It would be purely speculative to suggest that the failure to produce the tax returns had little or no impact upon the jury's ability to fairly evaluate the evidence presented on back pay and front pay in reaching its verdict.

Defendants were entitled to present to the jury the documentary evidence it believed was necessary to test the credibility of Ramon's claimed post-termination income. We review a trial court's discovery and evidentiary rulings under an abuse of discretion standard. Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 374 (2010). In this instance, we conclude the trial court mistakenly exercised its discretion when it failed to address Ramon's non-compliance

with the notice in lieu of subpoena, which failure had the clear capacity to cause an unjust result. R. 2:10-2. Therefore we vacate the award of back pay and front pay to Ramon, and remand for a new trial on these claims.

VI.

Defendants contend the trial court erred in denying their motion to dismiss the aiding and abetting claim asserted against Bartikofsky because he cannot, as a matter of law, aid and abet himself, and both plaintiffs testified that Mendillo did not discriminate against them. Plaintiffs agree that Bartikofsky cannot aid and abet himself but claim that Bartikofsky aided and abetted others. Specifically, plaintiffs argue that Bartikofsky "set the stage for comments" at the meetings and this "discriminatory conduct" was in the presence of Mendillo and upper management. Since Mendillo was involved in Ramon's termination, a reasonable jury could conclude that "Bartikofsky aided and abetted the conduct of decision-makers."

In response to defendants' motion to dismiss Bartikofsky from the lawsuit, the court advised the parties how it intended to instruct the jury on this issue. Specifically, the court stated the jury would be instructed that "in order to hold Arthur Bartikofsky liable, plaintiff must show that, one, Arthur Bartikofsky was generally aware of his role in the overall illegal, unlawful, or tortious activity at the time that he provided the assistance; and, two, Arthur Bartikofsky knowingly and substantially assisted in discriminating against the plaintiffs." The court found this to be "entirely" an issue of fact for the jury to decide. We agree.

3 N.J.S.A. 10:5-12(a) prohibits unlawful discrimination only by an

"employer." An individual employee or supervisor is not considered an employer under the LAD definitions. Tarr v. Ciasulli, supra, 181 N.J. at 83. However, N.J.S.A. 10:5-12(e) makes it unlawful "[f]or any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this act," and such conduct may result in personal liability. Tarr v. Ciasulli, supra, 181 N.J. at 83. An employee may be liable as an aider or abettor if a plaintiff establishes that:

> "(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; [and] (3) the defendant must knowingly and substantially assist the principal violation."
>
> [Id. at 84 (quoting Hurley v. Atl. City Police Dep't, 174 F.3d 95, 127 (3d Cir. 1999), cert. denied, 528 U.S. 1074, 120 S. Ct. 786, 145 L. Ed. 2d 663 (2000)).]

Aiding and abetting liability requires "active and purposeful conduct." Id. at 83.

Plaintiffs' aiding and abetting claims were largely based on their own testimony about discriminatory comments and conduct in the meetings run by Bartikofsky and attended by Mendillo and upper management. That testimony was disputed by defendants and the subject of extensive cross-examination. However, for each plaintiff, by a vote of seven to zero, the jury found that Bartikofsky specifically knowingly and substantially assisted defendants in creating a racially hostile work environment. The record supports this finding.

Specifically, Ramon testified that the comments increased in frequency "once that door was opened by [Bartikofsky]" and the comments began after Bartikofsky "took control" of the

meetings. He testified the comments were not only made by Bartikofsky, but by other members of upper management in attendance at these meetings and that these senior executives never said anything about the comments, leading Ramon to believe "everybody figured it was just a free for all." Similarly, Jeffrey testified that he and Ramon were referred to as "the Latin Lovers" at every meeting, comments were made about Mexican food, salsa music and dancing, and the comments were specific to Ramon and Jeffrey and their Hispanic heritage. We are convinced that on this record, the jury could, and did, find that Bartikofsky, as a supervisor of both plaintiffs, aided and abetted the discriminatory conduct of others. Thus the trial court did not err when it denied defendants' motion to dismiss the aiding and abetting claim against Bartikofsky.

VII.

Defendants additionally contend there was insufficient evidence to support the jury's award to Ramon, $52,500, and to Jeffrey, $32,500, in punitive damages against Wentworth and Bartikofsky in connection with their "hostile work environment and retaliatory or discriminatory termination claims, much less that the conduct was 'egregious.'" In response, plaintiffs contend the punitive damages awards were "far from shocking under the facts of this case."

"The decision to award or deny punitive damages, prejudgment interest and attorney's fees rests within the sound discretion of the trial court." Maudsley v. State, 357 N.J. Super. 560, 590 (App. Div. 2003). "Thus, the trial court's decision on these three issues must be reviewed under the abuse of discretion standard." Ibid. Nonetheless, "punitive damages are not automatically available simply on

the basis of a LAD violation. Instead, a plaintiff must still show exceptional or outrageous action to recover such damages." Maiorino v. Schering-Plough Corp., 302 N.J. Super. 323, 353 (App. Div.), certif. denied, 152 N.J. 189 (1997). Consistent with case law in other contexts, for example, Nappe v. Anschelewitz, Barr, Ansell & Bonello, 97 N.J. 37, 48-49 (1984), a punitive damage award requires evidence of "particularly egregious conduct." Conduct is "especially egregious" if it is intentional, "evil-minded," or wantonly reckless or malicious. Rendine v. Pantzer, 141 N.J. 292, 314-16 (1995); Maiorino, supra, 302 N.J. Super. at 353 (holding a plaintiff may recover punitive damages under the LAD on a showing of exceptional or outrageous conduct). An award of compensatory damages is a statutory predicate for an award of punitive damages. N.J.S.A. 2A:15-5.13(c).

Finally, in addition, in a LAD case against an employer, a plaintiff's claim for punitive damages must be supported by evidence of "actual participation [in the prohibited conduct] by upper management or willful indifference" on its part. Lehmann, supra, 132 N.J. at 624-25. Upper management has been defined by the court as "those responsible to formulate the organization's anti-discriminatory policies, provide compliance programs and insist on performance." Cavuoti v. N.J. Transit, 161 N.J. 107, 128-29 (1999). It does not include every individual in a position of supervision over a plaintiff. Id. at 125, 129.

In denying defendants' motion, the court stated:

> It's this court's position that there was clear and convincing evidence provided at trial that certainly Jeffrey complained about the harassment. And it was for the jury to decide if Ramon actually complained about harassment, and the jury decided that -- that issue clearly. It was for the jury to decide if

> Ramon and Jeff actually complained of the harassment because there was conflicting testimony.
>
> As stated before any argument by defendant stating that Jeff was subject to only three or four instances of harassing comments is completely mischaracterized. However, a review of all the evidence at trial shows clear testimony from both plaintiffs of constant and repeated harassing and discriminatory comments made by both upper management and made by other employees of -- in front of upper management.
>
> Both plaintiffs made credible witnesses. Plaintiffs also testified to positive employee evaluations. Defendants lacked any documentation of plaintiff's poor performance and lacked proper proofs in support of their case.
>
> Based on the evidence at trial and for the aforementioned reasons, plaintiffs are able to meet the necessary criteria under [Rendine v. Pantzer[6]] for an award of punitive damages. There was clear, credible testimony of . . . "actual participation by upper management or willful indifference," as there was proof that the conduct was, . . . "especially egregious."

Participation by upper management and especially egregious behavior are the dispositive elements, which must be established in order to recover punitive damages under the LAD. Lehmann, supra, 132 N.J. at 624-25. Especially egregious conduct must be more than the discriminatory conduct itself. Ibid.

Whether conduct is especially egregious is extremely fact-sensitive. Cavuoti, supra, 161 N.J. at 113. Based upon our review of the record, we conclude plaintiffs' evidence meets the standard that we have set. This evidence included that

defendants regularly conducted meetings during which the racially offensive comments were made. Ramon, without directly expressing his objection to these comments, nonetheless responded in a manner that conveyed his objection. Indeed, O'Keefe, in her testimony, recalled comments about food and dancing the merengue, and that although the comments were made jokingly, she could tell Ramon was annoyed.

Next, upper management was not only present when these comments were made, but the jury obviously credited plaintiffs' testimony that they were active participants in creating and maintaining the hostile work environment; or, at the very least, upper management knowingly acquiesced in allowing the hostile work environment to persist. Moreover, it was undisputed that Wentworth lacked meaningful Hispanic representation in its management positions, and that shortly after Jeffrey complained to Trachtenberg about the offensive comment, he was fired. Finally, when Ramon questioned the decision, he was fired shortly thereafter.

> Although the concept of egregiousness does not lend itself to neat or precise definitions, our jury instructions on punitive damages identify several considerations that bear on the question. See New Jersey Model Civil Instruction § 8.61 (Punitive Damages–LAD Claims). The evidence that the Model Charge instructs the jury to consider includes the likelihood that the conduct would cause serious harm, the actor's awareness or reckless disregard of the likelihood of such harm, the actor's behavior after he or she learned that the conduct would be likely to cause harm, the duration of the wrongful conduct and the acts, if any, undertaken to conceal the wrongful conduct.

[Quinlan, supra, 204 N.J. at 274.]

Giving all favorable legitimate inferences to plaintiffs, as

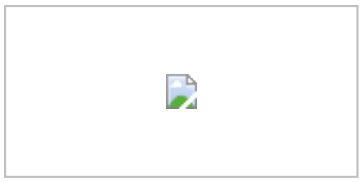
we are required to do in a motion for JNOV, the record reveals that plaintiffs were subjected to persistent disparaging comments about their heritage, and that after Jeffrey complained about the comments he and Ramon were each terminated shortly thereafter.

VIII.

In Point VIII, defendants contend the trial court erred when it permitted plaintiffs to question witnesses about defendants' conduct once they learned plaintiffs had filed their complaint. In Point X, defendants urge the court erred when it failed to dismiss the claims asserted against Wentworth Group and also refused to instruct the jury as to the identity of plaintiffs' employer. We have considered these two points in light of the record, arguments of counsel, and applicable legal principles and conclude they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

In light of our decision vacating the economic award to plaintiffs, we vacate the counsel fees and costs awarded, without prejudice to the court reinstating these awards upon further consideration following retrial on economic damages. In addition, because we have set aside the award of back pay to Jeffrey, we vacate the tax gross-up on the economic damages awarded to Jeffrey in the amount of $6213.

The judgment in favor of plaintiffs is affirmed in part, vacated in part and remanded for a new trial on economic damages consistent with this decision.



1 Because plaintiffs share the same surname, we refer to them individually throughout this opinion by their first names. In doing so, we intend no disrespect.

2 Johns was also referred to as Johnson and Jones in the record.

3 Bartikofsky first testified that the comments about race that Costa-Frei testified to "never happened." He later testified that he did not recall having such a conversation with her but it was possible.

4 Ramon has not cross-appealed the jury's verdict on this claim.

5 Defendants' dismissal of plaintiffs' hostile work environment claims at the end of plaintiffs' case-in-chief. The court denied the motion.

6 Rendine v. Pantzer, supra, 141 N.J. at 313.
