AL TABEI, SANDRA TOTH; FRANK VIERING; MARY ROMANO; JAMES CURRY; CHRIS IRELAND; MARA KRAFT; ADEL SOLIMAN; ROGER MONTALVO; STEVEN MOKIENKO; RICHARD GOLDING; LYDIA BANEK; TOMAS RAMIREZ; WILLIAM PROCEOPIO; PAUL LEBRON; JOHN MACCHIAROLA; SHARON MULHERN; DONALD DIVINCENZO; SEBASTIAN DIMAEGLIO; JAY BERKIN; LINDA VIERECK; CHRIS DESALLE; MALGORZATA HUNTBACH; WILLIAM SMITH; LYUBOMIR ALEKSANDROV; JERONIMO REYES; MICHELLE MANCINI; KIM HALDEMAN; EDDISON GIRALDO; PATRICK HILLARD, MICHAEL SMITH, ANTHONY VETRANO, MICHAEL COONEY, FREDERICK RENZULLI, JO-ANN SCHWENDEMANN, WENDY MCGAFFNEY, GARY WEISMAN,

Plaintiff-Appellant,

vs.

BALLY'S PARK PLACE, LLC d/b/a BALLY'S ATLANTIC CITY; JOSEPH GIUNTA and CORI EDLEY,

Defendants-Respondents.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO.: A-002299-23

Civil Action

ON APPEAL FROM AN ORDER OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION, ATLANTIC COUNTY

Sat Below:

HON. J. Ralph A. Paolone, J.S.C.
Docket No.: ATL-L-269-18

BRIEF IN SUPPORT OF PLAINTIFF'S APPEAL OF THE LOWER COURT'S ORDER GRANTING SUMMARY JUDGEMENT

O'CONNOR, PARSONS, LANE & NOBLE, LLC
Debra D. Tedesco, Esq. (#026021997)
959 South Springfield Avenue
Springfield, New Jersey 07081
Tel. No. (908) 928-9200
dtedesco@lawnj.net
Attorneys for Plaintiff-Appellant

Gregory B Noble, Esq.
Robert A. Ballard, III, Esq.
R. Daniel Bause, Esq.
Debra D. Tedesco, Esq.
Of Counsel and on the Brief.

TABLE OF CONTENTS

PAGE

ORDERS BEING APPEALED

1. Judge J. Ralph A. Paolone's Orders Granting Summary Judgment in Favor of Defendants Bally's Park Place, LCC d/b/a Bally's Atlantic City; Joseph Giunta; and Cori Edley dated July 18, 2023; August 22, 2023; and September 13, 2023. (Pa25-60).

2. The Transcripts of Oral Arguments on Defendants' Motions for Summary Judgment have been electronically filed with the Court.

TABLE OF APPENDIX

TABLE OF AUTHORITIES

Case Law **Page**

TABLE OF AUTHORITIES CONTINUED

Rules

Statutory Provisions

PRELIMINARY STATEMENT

This appeal arises from the trial court's complete and utter failure to properly analyze Plaintiffs' claims of age discrimination. Instead of conducting a burden shifting analysis of Plaintiffs' claims, which was required under law, the Trial Court Judge substituted his own opinions and beliefs about age discrimination law for those of the trier of fact, which is exactly what our courts have found constitutes reversible error time and time again. As will be discussed at length herein the Trial Court's analysis is fundamentally flawed, and its decision to grant summary judgment in favor of Defendants and dismiss Plaintiffs' claims with prejudice must be reversed.

A person need only take a quick glance over the qualifications instilled by defendants Bally's Park Place, LLC, et al. ("Bally's") for the casino's new flagship bar, the Boardwalk Saloon, to recognize one glaringly obvious thing – the casino sought to make it as difficult as possible for older employees to obtain shifts within the newly opened bar. While some of the requirements seemingly did not hinge on the age of the bartender seeking employment there, others stood out as benchmarks that effectively weeded out older employees in one way or the other, providing the casino with the younger workforce they were looking for. This discriminatory plan is further exposed when even the slightest scrutiny is applied to these qualifications, with business necessity falling to the wayside and clearing the way

for a jury to determine that in fact defendants were discriminating against plaintiffs on the basis of age in violation of the New Jersey Law Against Discrimination ("LAD"). As such, and based upon the arguments set forth herein, defendants are certainly not entitled to summary judgment at this time and in fact it is plaintiffs who are entitled to same given the clear discriminatory scheme perpetuated by casino management.

PROCEDURAL HISTORY

This appeal arises from the trial court granting Defendants' motions for summary judgment. (Pa25-60).

On February 18, 2018, Plaintiffs filed a complaint against Bally's Park Place, LCC d/b/a Bally's Atlantic City; Joseph Giunta; and Cori Edley, alleging violations of the New Jersey Law Against Discrimination ("LAD") for age discrimination. (Pa1-14). On May 14, 2018, Defendants filed their Answer with jury demand. (Pa15-21). On May 3, 2023, Defendant filed a motion for summary judgment.

Defendants raised the following arguments: (1) Plaintiff cannot make a prima facie case of age discrimination; (2) The Bar Smarts and testing criteria had no disparate impact on age; and (3) Plaintiff has failed to establish evidence supporting any aiding and abetting liability against Joe Giunta and Cori Edley.

Plaintiffs opposed the motions and oral argument was held before the Honorable J. Ralph A. Paolone, J.S.C. on July 14, 2023; August 11, 2023; and August 28, 2023. (T1, T2 and T3).[1] Then on July 18, 2023; August 22, 2023; and September 13, 2023, Judge Paolone entered an Order granting Defendants' motions for summary judgment, and dismissing Plaintiffs' Complaint, with prejudice, in its entirety. (Pa25-60). In essence, Judge Paolone found that Defendants' workplace practices were not discriminatory as to age. (Ibid.)

As a result, Plaintiff filed a Notice to Appeal on March 14, 2024, appealing the trial court's order granting summary judgment in favor of the Defendants and dismissing Plaintiffs' complaint with prejudice. (Pa458-540).

STATEMENT OF FACTS

Relevant Parties

Appellant Plaintiffs are a group of eighteen (18) male and female bartenders who worked at various bars within defendants', Bally's Park Place, LLC, et al. (hereinafter "Bally's" or "Defendants") casinos/resorts in Atlantic City New Jersey.

[1] The transcript of oral argument of Summary Judgment motion held Honorable J. Ralph A. Paolone, J.S.C. on July 14, 2023 has been uploaded separately and hereby referred to as "T1." The transcript of oral argument of Summary Judgment motion held Honorable J. Ralph A. Paolone, J.S.C. on August 11, 2023 has been uploaded separately and hereby referred to as "T2." The transcript of oral argument of Summary Judgment motion held Honorable J. Ralph A. Paolone, J.S.C. on August 28, 2023 has been uploaded separately and hereby referred to as "T3."

Specifically, the group consists of Lydia Banek; Jay Berkin; James Curry; Donald DiVincenzo; Eddison Giraldo; Kim Haldeman; Paul Lebron; John Macchiarola; Wendy McGaffney; Roger Montalvo; Sharon Mulhern; William Procopio; Tomas Ramirez; Jeronimo Reyes; Michael Smith; Anthony Vetrano; Linda Viereck; Francis Viering (hereinafter collectively referred to as "the Appellant Plaintiffs"). Each of the Appellant Plaintiffs' factual backgrounds will be detailed within a subsequent individual section of the statement of facts below.

Defendant, Bally's, is a hotel and casino resort chain that opened "the Boardwalk Saloon," as its new flagship bar in Atlantic City, New Jersey (hereinafter "BWS") in early 2016. The subsequently named individuals all occupied managerial roles at Bally's. Defendant, Cori Edley (hereinafter "Edley") alternatively served as Beverage Manager and Regional Beverage Operations Manager at Bally's around the time the BWS opened until her employment ended in or around December 2021. (Pa25). In her positions with Bally's, Edley had supervisory authority over Appellant Plaintiffs. (Pa26). Importantly, Edley created the document relating to the bartender qualifications for BWS, but it was ultimately approved by defendant, Joseph Guinta (hereinafter "Guinta") and "passed around" to the members of the collaborative team. In short, Edley created the document, but Guinta had final approval over the criteria. (Pa454-455).

Guinta was employed by Caesar's and worked as the Vice President of

Beverage at Bally's during the relevant time period herein. In this role, Guinta was responsible for restaurant and bar concepts, as well as overseeing day-to-day operations. (Pa452-453). Guinta established the concept for the BWS, which he testified meant a "collaborative role in the things that we were trying to accomplish there." (Pa453). Other individuals involved were John Dougherty; Kevin Ortzman; Lou Domino; Brian Coppola; and Cori Edley. (Id.) Guinta testified that a series of meetings were held to discuss the "roadmap" of the BWS; the ideas from these meetings were reduced to writing in a "critical path document." (Id.) Notably, Appellant Plaintiffs requested a copy of this document on multiple occasions, but Defendants failed to produce same; on April 10, 2023, Defendants claimed this document was not in their possession**.** **(**Id.); (Pa22-24). Just as significantly, despite admitting that Defendants received a complaint from Appellant Plaintiffs' Union complaining that the qualifications for BWS were discriminatory based on age, Guinta conceded there were never any discussions amongst the collaborative team about whether the qualifications were in fact discriminatory. (Pa457).

In addition, the following Bally's employees provided relevant and dispositive testimony regarding BWS' discriminatory qualifications. Rich Tartaglia (hereinafter "Tartaglia") served as Corporate Counsel for Bally's, Caesars, and different related entities from around 2003 forward. (Pa172). Monique Tarves (hereinafter "Tavares") worked at Bally's from 2013 until 2020 as Regional Labor

and Employee Relations Manager and Regional Recruitment and Onboarding Manager. (Pa177).

In addition, John Dougherty (hereinafter "Dougherty") worked for Caesars and Bally's from September 2011 until January 2022 in a variety of capacities. (Pa186-187). Notably, Dougherty worked as a multi-venue manager and Beverage Operations Manager, where he oversaw the day-to-day operations of the BWS. (Id.) Jerry Beaver (hereinafter "Beaver") worked for Bally's beginning in or around 1990 in a variety of capacities, most recently serving as Director of Food and Beverage since approximately 2008, with several other intermittent assignments. (Pa196-197). In this position, Beaver had oversight of the bars at Bally's. (Id.)

The Boardwalk Saloon Opens With Ageist Qualifications

Defendant Bally's maintained the following qualifications for employees to work at the new BWS: (1) passing the Bar Smarts and (2) Cicerone modules/exams (two (2) attempts allowed in a six (6) month period); (3) bull riding safety training; (4) choreography training; (5) working flair training; (6) wearing assigned costume(s); (7) maintenance of weight proportional to height; (8) food service from assigned outlets; and (9) service as a social media/PR ambassador (i.e. Facebook, Twitter, etc.) (Pa61-64). It must be noted that all three (3) job qualification notices dated December 24, 2015, July 29, 2016, and November 26, 2016, state that a

bartender must maintain "weight proportionate to height" to work in the BWS. (Id.) Similarly, the job description for the "Bartender Entertainer" position states that a BWS bartender must maintain "[h]eight proportionate to weight and physically fit appearance." (Id.) Interestingly, these three (3) jobs postings and the job description do not maintain any information and/or standard related to the maintenance of a certain body fat range and/or percentage. (Id.)

It is important to understand that, in order to get work, bartenders at Bally's would "bid" on various shifts within the different bar locations of the Casino based on seniority and certifications. (Pa118-119). Tellingly, before the opening of the BWS, all of the Appellant Plaintiffs were qualified to work at all of the various bars within Bally's. (Pa98). However, during the conceptualization of the BWS, the position of bartender entertainer was created, which is where the qualifications that prevented the Appellant Plaintiffs from bidding into BWS came into play. (Pa98-99). Shockingly, if an employee wanted to work at and/or bid into shifts at the BWS they would have to meet each qualification. (Pa100). The subsequent paragraphs detail each qualification in turn.

The Boardwalk Saloon Qualifications Completely Lack Any Justification or Business Necessity

The first qualification needed to work at the BWS was the passing of the Bar Smarts learning program. Bar Smarts was a learning program regarding beer, wine, and spirits that involved a test at the end of the course, which could be taken at

home. (Pa101). The initial timeframe to take and pass Bar Smarts was between Christmas Eve and New Year's Eve of 2015. (Id.)

The second qualification was the Cicerone craft beer certification; materials were allegedly accessible online for a test to be taken on premises; but Bally's did not provide any. (Pa101-102). Despite requests for Bally's to provide study guides for the Bar Smarts and Cicerone tests, Bally's refused, claiming that employees could download and purchase their own online. (Pa181). Interestingly, despite Defendants requiring these tests and qualifications**,** there was no difference between the drinks at Mountain Bar (one of the other Bally's bars) and BWS—could get beer or any drink at either bar interchangeably. (Pa295). While it is true that the menus may have been different on paper, there was no actual difference in the drinks that were served. (Id.)

The third qualification was the bull riding safety training. This qualification was allegedly formulated because the staff allegedly needed to understand how to ride the bull safely. (Pa102-103). Notably, it was a requirement that bartenders actually be physically able to ride the bull in order to qualify for the BWS. (Pa178). Although Defendants required this training, the mechanical bull was not operated by any bartenders**,** but instead by a set of non-union employees. In fact, Dougherty indicated that the bull riding training requirement was unnecessary for bartenders at the BWS. (Pa189). Moreover, Beaver was not even aware of this

requirement, and did not know "how or why" a bartender would be required to undergo bull riding training because "they didn't operate the bull" and he never saw them doing so. (Pa197-198).

The fourth qualification was choreography training. This qualification was allegedly formulated to get bartenders to dance behind the bar and on the floor, with certain choreographed dance moves. (Pa189-190). However, neither Dougherty nor Beaver ever saw bartenders engaging in choreographed dance at the BWS**.** (Pa189-192).

The fifth qualification was working flair, which involved performing tricks with the bottles or bar equipment, including throwing certain things in the air, catching certain things and other "showmanship items." (Pa104). However, like choreography training, neither Dougherty nor Beaver ever saw bartenders engaging in working flair at the BWS**.** (Pa189, Pa199).

The sixth qualification was serving as a social media/PR ambassador, which required bartenders at the BWS to post certain events at the bar on their social media. (Pa106-107). However, in practice, bartenders were merely encouraged to post and were not required or monitored. (Pa190). Beaver was not aware that social media posting was a requirement. (Pa199).

The seventh qualification was wearing assigned costume(s), which involved wearing leather vests and jeans/shorts. (Pa104). Bartenders were required to wear

this uniform "comfortably and confidently." (Pa107).

The eighth requirement was having a weight proportionate to height, which required that people of a given height fall into a weight range and/or meet a certain Body Mass Index (BMI). (Pa105). Height and weight and/or BMI were allegedly monitored throughout one's employment and people were disqualified from the BWS if they fell out of the qualifying range. (Pa105-106). Interestingly, John Dougherty indicated that an employee's height proportionate to weight had no effect on one's ability to work behind a bar. (Pa190).

The ninth requirement was food service, which required bartenders to serve food from certain designated areas. (Pa106).

Notably, in or around 2022, under new ownership, the requirements of weight proportionate to height and the bull riding training were discontinued as qualifications. (Pa173). Moreover, although a complaint was made on behalf of the older employees that the various qualifications for the BWS were discriminatory based upon age, no investigation was ever initiated by Bally's into same. (Pa182).

A BMI/Height Proportionate to Weight Requirement is Discriminatory Based Upon Age

Appellant Plaintiffs' expert Dr. Janet Schebendach, PhD, RDN, a registered dietician nutritionist, issued a report on July 20, 2021, as to the specific query of "[w]hether maintenance of BMI/height proportionate to weight becomes more difficult with age and, if so, why that is." (Pa73-77). Ultimately, Dr. Schebendach

concluded that "[t]here is sufficient cross-sectional and longitudinal data to suggest that maintenance of BMI/height proportionate to weight becomes more difficult with age." (Id.) This conclusion was made to a reasonable degree of certainty and was attributed to "age-related loss of stature, and changes in hormonal status (e.g., estrogen and testosterone) that impact body composition and metabolic rate." (Id.) Particularly, a person's BMI/height proportionate to weight increases as a person ages because people lose height as they grow older—inflating BMI/height proportionate to weight. (Id.) The only way to offset this loss of height is through weight loss, which also complicated by age, resulting in an overall difficulty maintaining weight as one ages. (Id.)

Dr. Schebendach also made comments specific to Bally's BMI qualifications, explaining that there was no evidence that Bally's was employing protocol to accurately measure the subject individuals, which could artificially inflate BMI. She further stated that the BMI chart employed by Bally's did not account for other important factors. (Id.) Thus, even assuming arguendo, that Bally's BMI chart somehow compensated for age generally, it did not adequately compensate for age-related challenges in maintaining weight. (Id.) As such, an older person would have to maintain the same weight throughout their life in order to meet the qualifications set out. (Id.) This is extremely difficult because as one ages maintaining a weight proportionate to height is very problematic due to the

aforementioned difficulties. (Id.) Moreover, a person's body fat percentage may rise as they age, given that "age-related changes in hormone status result in decreased lean body mass and increased body fat." (Id.)

Although Bally's BMI test contains certain charts that discuss "BODY FAT RANGES FOR STANDARD ADULTS" and includes age ranges, the chart in no way adjusts and/or analyzes age in determining what BMI category a person would fall into. (Pa68-71). An example BMI test provided by Bally's verifies this fact, as a BMI of 29.3 for a 55-year-old female employee simply indicates "overweight see chart." (Id.) This does not adjust for age in determining what BMI constitutes overweight. (Id.)

The Ageist Qualifications Accomplish Their Discriminatory Intent at the Boardwalk Saloon

The following chart details the date of birth of all Appellant Plaintiffs, the approximate open date of the BWS, as well as the age of each Plaintiff at the approximate open date of the BWS:

Name	DOB	Age	Appx Open Date	Relevant Age
McGaffney	2/29/1960	63	2/15/2016	55
Procopio	3/13/1942	81	2/15/2016	73
M. Smith	4/14/1966	57	2/15/2016	49
Curry	1/24/1959	64	2/15/2016	57
Mulhern	5/8/1962	61	2/15/2016	53
Lebron	4/3/1968	55	2/15/2016	47
Berkin	2/10/1962	61	2/15/2016	54
Macchiarola	8/8/1963	59	2/15/2016	52

Viering	11/26/1956	66	2/15/2016	59
Haldeman	3/2/1967	56	2/15/2016	48
Montalvo	3/3/1966	57	2/15/2016	49
Viereck	7/28/1961	61	2/15/2016	54
Vetrano	10/20/1975	47	2/15/2016	40
Reyes	7/20/1961	61	2/15/2016	54
Ramirez	4/7/1953	70	2/15/2016	62
Giraldo	9/27/1971	51	2/15/2016	44
DiVincenzo	2/10/1962	61	2/15/2016	54
Banek	5/18/1962	61	2/15/2016	53
Average Age		**60.67**		**53.17**

(Pa65-67). As can be seen, the average age of Plaintiffs when BWS opened was approximately **53.17** years old. (Id.)

The next chart details the date of birth of all employees who worked at BWS as well as their age when hired to work at BWS:

Name	**DOB**	**Age**	**Appx Open Date/Hire Date/Adjusted Hire Date**	**Relevant Age**
Alfieri	4/28/1977	46	3/2/2016	38
Branciforti	1/3/1988	35	2/15/2016	28
Cantz	8/10/1978	44	2/15/2016	37
Caruso	1/8/1972	51	2/15/2016	44
Davletshina	1/29/1985	38	6/15/2016	31
Deutsch	10/12/1991	31	9/19/2018	26
Devlin	11/5/1979	43	3/2/2016	36
Duncan	4/3/1987	36	2/9/2017	29
Fichter	12/27/1992	30	2/22/2016	23
Gradevska	5/1/1983	40	3/20/2017	33
Hanson	1/23/1961	62	12/28/2016	55
Higgs	12/29/1988	34	2/20/2019	30

Hilliard	6/4/1971	51	2/15/2016	44
Italian	8/14/1992	30	12/27/2017	25
Koeser	3/2/1985	38	2/15/2016	30
Lemoine	8/16/1988	34	9/19/2018	30
Mauriello	5/24/1974	48	5/31/2016	42
Miller	12/8/1990	32	5/11/2016	25
Mills	2/24/1986	37	2/15/2016	29
Penelski	5/9/1979	44	2/15/2016	36
Renzulli	8/20/1971	51	6/14/2017	45
Robles	12/17/1998	24	6/16/2019	20
Roman	6/23/1969	53	2/15/2016	46
Romano	8/28/1956	66	2/15/2016	59
Ryzhkov	3/28/1988	35	5/24/2017	29
Scheck	9/26/1996	26	11/27/2017	21
Seltzer	2/17/1995	28	1/14/2015	19
Tran	6/15/1991	31	2/20/2019	27
Vazquez	2/23/1995	28	1/25/2016	20
	Average Age	**39.52**		**33**

(Id.) As can be seen, the average age of bartenders hired to work at BWS was approximately **33** years old. (Id.) Defendant, Edley (Beverage Manager and Regional Beverage Operations Manager) testified that she recalled all of these employees and did not dispute their ages at the time they were hired. (Pa122-124).

Bally's Allegedly Makes an Exception to BMI for One Bartender, Richard Roman

Significantly, Tarves (Bally's Regional Labor and Employee Relations Manager and Regional Recruitment and Onboarding Manager) testified that she became aware that a grievance was brought on behalf of an employee named Richard

Roman, who was a "very fit individual", and failed the BMI but requested an exception be made by using a "body fat index." (Pa179). Tarves further indicated she believed an alternative test was used, as that employee ended up working at the BWS. (Id.)

Defendants' Discriminatory Actions Substantially Undercut Older Employees Earning Capabilities

Generally speaking, a bar that generates more revenue gives a bartender a better opportunity to make more money in tips than a bar that generates less revenue. (Pa97). Prior to the BWS opening, the Mountain Bar generated the most revenue at Bally's. (Pa188). However, the BWS was intended to become the flagship bar with the highest revenue in the Wild West area of Bally's. (Pa200). Eventually, as expected, the BWS built momentum and the Mountain Bar's revenue began to suffer—especially once the Mountain Bar's hours were changed to weekends only. (Id.)

Appellant Plaintiffs retained an economic expert report from Kristin K. Kucsma, M.A. for an economic loss determination under the following parameters:

> For the purpose of this analysis, we calculate the economic loss beginning February 12, 2016, and continuing through November 30, 2021. At the request of counsel, we have reviewed provided information regarding historical hours, wages, and compensation from tips from the members of the Class in this matter, and, along with published information from the Agreement covering their employment, have created a model of the economic loss experienced by a representative employee who, but for the wrongdoing in this matter,

> could have obtained employment at the Boardwalk Saloon, for the time period noted above.

(Pa78-91). Based upon a review of applicable information, Ms. Kucsma determined that a representative employee, shut out of BWS, had a total economic loss of $884,800, which included Adjusted Straight Time Earnings of $153,898, Adjusted Overtime Earnings of $6,881, Adjusted Reported Tips of $160,991, Adjusted Unreported Tips of $248,031, Health Insurance of $51,977 and Compensation for Excess Taxes of $263,022. (Id.)

Specific Factual Background for Each Appellant Plaintiff

Wendy McGaffney

Appellant Plaintiff Wendy McGaffney (hereinafter "McGaffney") was born on February 29, 1960, she was and remains 5 foot, 5 inches tall and 195 pounds. (Pa203, 207). McGaffney initially worked at Bally's from in or around 1979 to 1982, and then returned as a bartender in 2006. (Pa204). McGaffney has never bid into the BWS. (Pa205). Notably, McGaffney passed Bar Smarts but never took Cicerone because she was told she had to be a certain BMI, and, therefore did not see the point in taking the test. (Pa206). McGaffney indicated that maintaining weight proportionate to height was more difficult as she got older as it was harder to lose weight. (Pa207). McGaffney also indicated that her age was an impediment to serving as a social media/PR ambassador because she was "not very tech savvy." (Pa208).

John Macchiarola

Appellant Plaintiff John Macchiarola (hereinafter "Macchiarola") was born on August 8, 1963, he was and remains 5 foot, 10 inches tall and approximately 250 pounds, but his weight fluctuates frequently. (Pa212, 218). Macchiarola has worked at Bally's as a bartender since in or about 2001. (Pa213). Macchiarola has never bid into the BWS. (Pa214). Notably, Macchiarola passed Bar Smarts. (Pa215). Macchiarola was told he was not allowed to bid into the BWS due to his BMI, and because there were people lighter/skinnier than him that were denied with priority over him on the seniority list. (Pa214). In fact, Macchiarola began the process of taking Cicerone but midway through stopped, due to the fact he wasn't going to meet the BMI requirement. (Pa215-216). Furthermore, Macchiarola indicated that the bull riding training qualification, choreography training, and performing flair would be difficult due to his age because of the physical nature of the activities. (Pa217). Notably, Macchiarola never even saw bartenders performing choreographed dances or performing flair behind the bar. (Id.)

Francis Viering

Appellant Plaintiff Francis Viering (hereinafter "Viering") was born on November 26, 1956, he is 6 foot, 2 inches tall, and used to be 6 foot, 3 inches tall, and is about 220 pounds. (Pa212, 218). Viering has been a bartender at Bally's since in or around 1979. (Pa223). Notably, Viering completed both Bar Smarts and

Cicerone, paying around $200 for an extensive Cicerone training course. (Pa225). Viering never bid into the BWS because he never became fully qualified. Specifically, he did not take the BMI test as he knew he would not pass and would thus have to lose weight. (Pa226-227, 229). Viering is not aware of anyone working flair at the BWS. (Pa227). Viering noted that the BWS had limited craft beers despite requiring Cicerone and that BWS employees were generally given more leeway on things such as attendance. (Pa230-231).

Linda Viereck

Appellant Plaintiff Linda Viereck ("Viereck") was born on July 28, 1961, she is 5 foot, 5 inches tall and weighs approximately 125 pounds. (Pa257, 264). Viereck worked for Claridge Casino since 1990 as a bartender, becoming a Bally's employee once they purchased Claridge. (Pa259). Viereck never bid into the BWS. (Pa260). Notably, Viereck passed both Bar Smarts and Cicerone. (Pa261-262). Another Bally's bartender provided Viereck with study materials which he paid for. (Pa262). Viereck was never offered bull riding training; in fact, with her back issues, Viereck does not believe she could ride the bull. (Pa263). As such, Viereck spoke to Edley and asked if she must ride the bull to work in BWS, to which Edley answered in the affirmative. (Pa263-264). Viereck was never offered choreography training. (Pa264). Viereck indicated she would not be able to do flair training due to age-related arthritis in her hand. (Pa264-265).

Michael Smith

Appellant Plaintiff Michael Smith (hereinafter "Smith") was born on April 14, 1966. (Pa279). Smith worked as a bartender at Claridge Casino before Bally's purchased them, he started working for Bally's in or around 2000. (Pa280-281). Knowing he was 270 pounds at the time and therefore would not pass the BMI qualification, Smith did not even attempt to sign up to take Bar Smarts or Cicerone, he was and remains 5 foot, 7 inches and has weighed between 248 and 275 pounds since 2016. (Pa283-284, 286, 288). Furthermore, the bull riding training discouraged Smith from taking the tests as he could not ride the bull because of his age. (Pa286-287). Smith noted that he saw Cicerone as pointless because the bars at Bally's did not sell many craft beers. (Pa285). He also noted that at least one bartender at BWS had been provided leniency due to being overweight. (Pa289-290).

Anthony Vetrano

Appellant Plaintiff Anthony Vetrano (hereinafter "Vetrano") was born on October 20, 1975, he is 5 foot, 8 inches tall and weighed between approximately 165 and 180 pounds in 2016. (Pa296, 301). Vetrano started with Bally's in or around 1994 until 2000, and then returned in 2002 as a bartender. (Pa297-298). Vetrano never took Bar Smarts because he was given the "runaround" when he tried to take it; he would ask about the test and was told by superiors that they

would post it—then it would never be posted. (Pa299). Notably, if Vetrano had been able to take Bar Smarts he would have. (Pa300).

William Procopio

Appellant Plaintiff William Procopio (hereinafter "Procopio") was born on March 13, 1942, he was and remains 5 foot, 11 inches tall and weighed between 240 and 260 pounds since 2016. (Pa305, 315-316). Procopio worked at Bally's from in or around 1995 until 2018. (Pa307-308). Procopio noted that the opening of the BWS cut into bartender's hours at the Mountain Bar and had a ripple effect on the seniority list inasmuch as bartenders were forced into other bids. (Pa309). Notably, Procopio was never offered a bid into the BWS, he was never offered the chance to take Bar Smarts, and he was never provided with the signup sheet. (Pa311-312, 314). Procopio explained he was too old to take bull riding training. (Pa313).

Tomas Ramirez

Appellant Plaintiff Tomas Ramirez (hereinafter "Ramirez") was born on April 7, 1953, he was and remains 5 foot, 8 inches tall and approximately 175 pounds. (Pa319, 324). Ramirez worked at Bally's as a bartender from in or around 1994 until 2017. (Pa320). Ramirez did not make efforts to pass Cicerone because he saw other older employees having issues with it and realized he would not meet

the other BWS qualifications because of his age. (Pa321-322). Ramirez indicated that it was difficult to maintain weight proportionate to height as he got older; that the bull riding training may be difficult due to his age because of the physical nature of the activity; and that flair training would be difficult due to his age as well. (Pa323-324).

Jeronimo Reyes

Appellant Plaintiff Jeronimo Reyes (hereinafter "Reyes") was born on July 20, 1961. (Pa327). Reyes commenced employment with Bally's in or around 1990. (Pa328). Reyes never bid into the BWS. (Pa329). Notably, Reyes signed the interest sheet but never heard anything about the BWS. (Pa332). Reyes never followed up about the BWS after signing the interest sheet because of the requirements. Namely, he was concerned about his age with regard to flair, choreography, and bull riding training; ultimately realizing he could not qualify. (Pa332-333). Reyes also indicated that the weight requirement was prohibitive due to his age. (Pa333).

Sharon Mulhern

Appellant Plaintiff Sharon Mulhern (hereinafter "Mulhern") was born on May 8, 1962, she was and remains 5 foot, 5 inches tall and has weighed between 140 and 155 pounds since 2016. (Pa351, 355). Mulhern started with Bally's as a bartender in or around 2002. (Pa349). Mulhern did not sign the interest sheet or

take the tests for the BWS because of the BMI and bull riding qualifications (she knew she couldn't ride the bull due to her age and injury concerns); she chose to wait and see what happened with the qualifications hoping they may be changed. (Pa350-351, 356). The bull riding requirement made no sense to Mulhern since none of the BWS bartenders ever rode the bull. (Pa354). Unfortunately, Mulhern saw other older co-workers denied from working at the BWS due to the weight requirement and knew that she would never work there. (Pa352). Mulhern remembers and believes that Edley made a comment to her about being slow due to her age. (Pa353). Interestingly, Mulhern would often discuss and confer with the younger BWS bartenders, and they never knew anything about any tests required to work at BWS, Mulhern also noted, as many others have, that the Mountain Bar and the BWS sold the same products. (Pa354, 357).

Paul Lebron

Appellant Plaintiff Paul Lebron (hereinafter "Lebron") was born on April 3, 1968, he was and remains 5 foot, 10 inches tall and was 220 pounds in 2016. (Pa360, 365). Lebron worked at Bally's as a bartender from in or around 1997 until 2018. (Pa361-362). Lebron never bid into any shifts at the BWS. (Pa363). Lebron indicated that a bull riding requirement would be prohibitive due to his age because of the physical nature of the activity; he also indicated that a flair training

requirement was prohibitive due to his age because his hand and eye coordination was not the same as when he was younger. (Pa364).

Roger Montalvo

Appellant Plaintiff Roger Montalvo (hereinafter "Montalvo") was born on March 3, 1966, he was and remains 5 foot, 8 inches tall and has weighed approximately 290 pounds. (Pa374, 378). Montalvo commenced employment with Bally's as a Porter in or around 1989, becoming a full-time bartender in 1991. (Pa375). Notably, Montalvo took and passed both Bar Smarts and Cicerone, purchasing study guides for Cicerone that cost approximately $199.00. (Pa376). Montalvo did not participate in the bull riding training as he could not do it due to his neck surgery and at that point in his life did not want to risk his health. (Pa377-378). As such, Montalvo disregarded the remaining qualifications necessary to bid into the BWS, his supervisor, Leanne Rando, told him that he had to ride the bull to work at BWS. (Pa378-379). Montalvo testified that his ability to ride the bull decreased with age; that his age affected his ability to take choreography training; and that his ability to maintain weight proportionate to height decreased with age. (Pa378, 380).

Lydia Banek

Appellant Plaintiff Lydia Banek (hereinafter "Banek") was born on May 18, 1962, she was and remains 5 foot, 10 inches tall and about 205 pounds. (Pa386, 393). Banek commenced employment at Bally's on or around March 15, 1991. (Pa387-388). Notably, Banek passed both Bar Smarts and Cicerone, she also signed the interest sheet for the BWS as she was always looking for new opportunities. (Pa389-390, 397). In regard to the other qualifications: Banek was never offered bull riding training, and nonetheless does not think bartenders should be riding the bull; Banek was never asked to participate in choreography training and she did not know it was being offered (had she known she would have signed up); Banek explained that working flair would be difficult due to her age because her hand eye coordination had gotten worse with age; she explained that if she wore the tank top it would scare people, because it is not appropriate for older people to wear such clothes; she found the social media requirements difficult because she is not good at social media due to her age; and, finally, she knew she would not pass the weight/height requirements due to her age and the fact that she put on weight as she got older. (Pa392-393, 394, 396). Banek notes that she never saw older people working at the BWS, and she never saw bartenders dancing or riding the bull while working at the BWS. (Pa395-396).

Donald DiVincenzo

Appellant Plaintiff Donald DiVincenzo (hereinafter "DiVencenzo") was born on February 10, 1962, he was and remains 5 foot, 11 inches tall and weighed over 200 pounds since 2016; he started working at Bally's in 2002. (Pa400, 402). Notably, DiVincenzo never registered for the tests because of the bull riding requirement and the social media requirement—he advised his supervisors how concerned he was about riding the bull. (Pa401). He does not have any social media. (Id.) DiVincenzo also discussed his concerns about the BMI and weight requirements with his supervisors; he indicated that he could not meet the weight requirements and would need to lose about thirty-five (35) pounds to qualify. (Pa402-403).

James Curry

Appellant Plaintiff James Curry (hereinafter "Curry") was born on January 24, 1959, he is 5 feet, 8 inches tall, but is shrinking with age, and has been between 165 and 168 pounds since 2016; he became employed at Bally's in or around June of 1981. (Pa406-408). Notably, Curry began the Bar Smarts course but could not finish it because he went out sick and, when he returned, it was no longer available to him. (Id.,Pa409). Curry made it clear that his age prevented him from bull riding training and working flair as he has arthritis and is injury prone due to his age, he

also explained how his age makes losing weight difficult because his metabolism is slowing. (Pa408, 409).

Kim Haldeman

Appellant Plaintiff Kim Haldeman (hereinafter "Haldeman") was born on March 2, 1967, she was and remains 5 foot, 11 inches and is 215 pounds; she started working with Bally's in or around December 2002. (Pa412, 415-416). Notably, Haldeman completed 3/5 levels of the Bar Smarts course but never finished the rest or Cicerone because she knew she could not meet the weight requirements or ride the bull. (Pa413, 414). Haldeman's back issues, which are related to her age, prevent her from bull riding, she also has issues maintaining her weight proportionate to her height given her age. (Pa415, 416). Interestingly, Haldeman was told by management many times that she could not work in the BWS. (Pa417).

Eddison Giraldo

Appellant Plaintiff Eddison Giraldo (hereinafter "Giraldo") was born on September 27, 1971, he was and remains 5 feet, 7 inches tall and has weighed between 176 and 182 pounds; he began working at Bally's in or around 2010. (Pa424, 428). Giraldo is unsure if he ever completed Bar Smarts. (Pa427-428). Giraldo had no knowledge that there was an interest sheet for the tests, and

management never told him about it. (Pa429). Notably, Giraldo never completed bull riding safety training because his age prevented him from being physically able to ride the bull. (Pa427). Likewise, he testified that his age prevents him from maintaining his weight proportionate to his height but that he lost weight due to stress at times. (Pa428, 430).

Jay Berkin

Appellant Plaintiff Jay Berkin (hereinafter "Berkin") was born on February 10, 1962, he was and remains approximately 5 feet, 11 inches tall and weighs about 170 pounds; he became employed at Bally's in or around 2002. (Pa433-434, 437). Notably, Berkin did not take the tests because he saw what was happening with other bartenders and felt if other bartenders did not qualify physically then he would not either, he never signed the interest sheet for the same reason and because he was concerned about riding the bull. (Pa435, 438-439). Berkin never participated in the bull riding training because of his concern regarding his age and the risk to his back. (Pa436).

LEGAL ARGUMENT

I. STANARD OF REVIEW.

R. 4:46-2 provides that a Court shall only grant summary judgement "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgement as a matter of law."

The determination of whether there is a genuine issue with respect to a material fact requires the motion Judge to consider whether the competent evidential material presented, when viewed in light most favorable to the non-moving party in consideration of the applicable evidentiary standard, is sufficient to permit a rational fact-finder to resolve the disputed issue in favor of the non-moving party. Brill v. Guardian Life Insurance Co., 142 N.J. 520, 523 (1995). The crux of the holding in Brill is that when evidence is "so one-sided that one party must prevail as a matter of law, the trial court should not hesitate to grant summary judgement." Id. at 540. However, a court should deny summary judgement where the opposing party comes forward with evidence that creates a genuine issue as to any material fact challenge. Id. at 529.

The appellate court utilizes the same standard of review as the trial court. Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016). First, the appellate court

must decide whether there was a genuine issue of material fact. Walker v. Alt. Chrysler Plymouth, 216 N.J. Super. 225, 258 (App. Div. 1987). If no genuine issue exists, the appellate court must next determine whether the trial court's ruling on the law was correct. Ibid.

II. THE TRIAL COURT ERRED IN DENYING APPELLANT PLAINTIFFS' MOTIONS FOR SUMMARY JUDGEMENT AS DEFENDANTS IMPOSED A PER SE DISCRIMINATORY QUALIFICATION WITHOUT JUSTIFICATION THAT HAD AN UNDISPUTED ADVERSE IMPACT ON THE APPELLANT PLAINTIFFS.

The trial court erred in denying the Appellant Plaintiffs' motions for summary judgment as to their age discrimination claims given the fact that Defendants instituted ***per se*** discriminatory qualifications without justification. Appellant Plaintiffs respectfully request that, when considering the claims of age discrimination set forth in the case *sub judice,* the Appellate Court focus upon the LAD's broad mandate of "the eradication 'of the cancer of discrimination' in the workplace." Bergen Commercial Bank v. Sisler, 157 N.J. 188, 199 (1999). In pursing this mandate, the LAD aims "to protect not only the civil rights of individual aggrieved employees but also to protect the public's strong interest in a discrimination-free workplace." Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 600 (1993). As the New Jersey Supreme Court stated in Lehmann, "[f]reedom from discrimination is one of the fundamental principles of our society. Discrimination . . . is 'peculiarly repugnant in a society which prides itself on judging each

individual by his or her merits.'" Id. As such, the LAD "shall be liberally construed in combination with other protections available under the laws of this State." N.J.S.A. 10:5-3; see also Craig v. Suburban Cablevision, Inc., 274 N.J. Super. 303, 309 (1995).

There are two types of claims that could constitute violations of the LAD for age discrimination – disparate impact and disparate treatment. Here, the record below is clear: it is readily apparent that Defendants' instituted *per se* discriminatory qualifications for shifts at the Boardwalk Saloon. Therefore, the trial court erred when it denied the Appellate Plaintiff's motions summary judgment as Defendants should have been held liable for their clear and obvious violations of the LAD.

A. Defendants' Qualifications for the Boardwalk Saloon Had a Discriminatory Disparate Impact on the Appellant Plaintiffs and Thus Defendants Are Subject to Liability.

As for a claim of disparate impact, analysis of same generally applies a less stringent standard than a claim of disparate treatment, which is discussed at length below. Specifically, the New Jersey Supreme Court has generally applied the federal standard for such claims, indicating that such claims involve "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." Gerety v. Atl. City Hilton Casino Resort, 184 N.J. 391, 400

(2005) (quoting Peper v. Princeton Univ. Bd. of Trs., 77 N.J. 55, 81–82 (1978). Therefore, the reason why the standard for such a claim is less stringent is that an aggrieved employee need not prove discriminatory motive, rather they must only show that "a facially neutral policy" resulted in a significant adverse impact on a particular class of individuals. Id. at 399. This test has been applied when considering hiring criteria, as it is clear that the LAD "forbids the use of any employment criterion, even one neutral on its face and not intended to be discriminatory, if, in fact, the criterion causes discrimination as measured by the impact on a person or group entitled to equal opportunity." Garcia v. Gloor, 618 F.2d 264, 270 (5th Cir.1980).

However, one thing is clear – given that an employee such as each of the Appellant Plaintiffs needed to meet ***each and every separate qualification*** to "qualify" for a position at the Boardwalk Saloon and that Defendants cannot proffer any sufficient justification for such qualifications, there is no factual dispute as to the fact that such criteria adversely impacted the class of older individuals represented by the Appellant Plaintiffs cumulatively. Specifically, Bally's maintained the following qualifications for individuals who were attempting to work at the Boardwalk Saloon and required each person to meet each and every criterion without exception to be able to bid into the newly opened bar:

- Passing of the Bar Smarts and Cicerone modules/tests (with two (2)

attempts allowed in a six (6) month period)

- Bull Riding Safety Training
- Choreography Training
- Working Flair Training
- Wearing assigned costume(s)
- Maintenance of weight proportionate to height
- Food service from assigned outlets
- Service as a Social Media/PR Ambassador (i.e. Facebook, Twitter, etc.)

(Pa1, 100, 452-456). Prior to the opening of the Boardwalk Saloon, the bartenders at Bally's could "bid" into shifts at all other bar locations within the casino based upon seniority; however, when the Boardwalk Saloon was opened, a new position of "bartender entertainer" was created which was unique in requiring the aforementioned qualifications to be met in order for bartenders to "bid" into the bar. (Pa98-99, 104-105, 118). Therefore, these qualifications are the crucial piece in this case inasmuch as they created a barrier for entry for older employees as discussed herein.

Notably, and lending to the theory that the qualifications were formulated for some discriminatory purpose in maintaining a younger workforce in the Boardwalk Saloon, while management admitted to formulating the requirements and creating a "critical path document" for the "roadmap" of what the Boardwalk Saloon sought

to accomplish, Defendants have indicated that this crucial document is no longer within their possession. (Pa1, 95-96, 452, 456). This failure by Defendants to provide this key piece of evidence only lends to the argument that the qualifications were manifested for an improper purpose.

While one need only to look at these qualifications on their face and the vagueness surrounding how management formulated same to see that they were clearly targeted at getting younger bartenders in the Boardwalk Saloon and in fact were the source of a complaint filed on behalf of the Appellant Plaintiffs that went uninvestigated by Defendants, stricter scrutiny reveals the clear discriminatory purpose of same. (Pa182, 457). Particularly, one requirement stands out as ageist more so than the rest – the requirement that the Boardwalk Saloon bartenders maintain a certain weight proportionate to height. (Pa105, 173). In fact, registered dietician nutritionist Dr. Janet Schebendach, PhD, RDN maintains to a reasonable degree of certainty that "[t]here is sufficient cross-sectional and longitudinal data to suggest that maintenance of BMI/height proportionate to weight becomes more difficult with age." (Pa73-77). This conclusion was attributed to several factors, including "age-related loss of stature, and changes in hormonal status (e.g., estrogen and testosterone) that impact body composition and metabolic rate." (Id.) Furthermore, the testimony of the relevant plaintiffs in this case reflected the difficulties that were experienced in maintaining weight as in line with Dr.

Schebendach's conclusions. (Pa207, 214, 215, 218, 226-227, 239-240, 240, 241, 246-247, 253, 275, 324, 333, 340, 341, 344-345, 352, 350-351, 356, 380, 382, 394, 396, 402, 403, 409, 413-414, 416, 428, 430, 435, 438-439, 446-447). Notwithstanding this expert opinion, at the trial level Defendants made the confusing argument that their use of the BMI chart allegedly compensated for differences in age amongst applicants. However, although two of the charts within a document provided by Bally's contains some form of analysis of *body fat* ranges apparently adjusted and/or broken down by age groupings, those charts are not relevant to the separate *body mass index* (BMI) chart, which is important given that Bally's specifically used BMI, and not some body fat analysis, in deciding who qualified to work in the Boardwalk Saloon. (Pa1, 105-106, 68-71). Given that the BMI chart itself in no way attempts to compensate and/or adjust based upon age, Defendants' argument that they essentially leveled the playing field for older employees is completely baseless despite the inclusion of the completely irrelevant body fat analysis in the subject document. (Id.) In fact, an example BMI test provided by Bally's in this case verifies this fact, as a BMI of 29.3 for a 55-year-old female employee indicates "overweight see chart," with the reference obviously verifying that 29.3 would fall within the "OVERWEIGHT" category of the BMI chart without reference to any sort of qualification under the entirely separate body fat index, thus verifying that the BMI chart was the sole governing

test utilized by Bally's. (Id.)

In fact, while Defendants appear to suggest that some form of body fat index was used in addition to the BMI chart, there is no reference to same in any of the formal documentation detailing the qualifications within the Boardwalk Saloon. (Pa1). Notably, all three (3) job qualification notices dated December 24, 2015, July 29, 2016 and November 26, 2016 state that a bartender must maintain "weight proportionate to height" to work in the Boardwalk Saloon. (Id.) Similarly, the job description for the "Bartender Entertainer" position states that a Boardwalk Saloon bartender must maintain "[h]eight proportionate to weight and physically fit appearance." (Id.) These three (3) job postings and the job description do not maintain any information and/or standard related to maintenance of a certain body fat range and/or percentage or, if same somehow did apply, what that standard was to be applied. (Id.) Nonetheless, defense witness Tarves indicated an anecdotal piece of evidence that an exception was made for employee Richard Roman, who was a "very fit individual," to use the body fat index instead of BMI; however, no detail was provided by Tarves has to how, if or when this alleged exception to the clear qualifications outlined in Defendants' documents was applied to other employees, including Appellant Plaintiffs, and what form this alleged exception took. (Pa179). Therefore, and given the scant lack of details provided as to this alleged exception, including as to when or how this was applied to the group of

Appellant Plaintiffs in this case, Defendants suggests that we must trust such documentary evidence, which maintains no mention of any body fat index whatsoever and rather relies solely upon the BMI measurement.

Furthermore, and noting that Dr. Schebendach relied upon such documentary evidence maintaining that BMI governed such qualifications, rather than some anecdotal and unclear testimony, in authoring her report, Dr. Schebendach also addressed certain issues relating to BMI and body fat percentage maintenance in her report. Specifically, a person's BMI/height proportionate to weight increases as a person ages due to the fact that people will lose height as they grow older, thus inflating BMI/height proportionate to weight given that this factor becomes lower. (Pa73-77). Therefore, the only way to offset this loss of height is through weight loss, which is also complicated by a person's age due to the fact that older people tend to have a decreasing metabolic rate and loss of metabolically active tissue as they get older, which results in difficulty maintaining weight that can be attributed to less available energy expenditure as someone ages. (Id.) This issue was also complicated due to Dr. Schebendach's concerns over the process that Bally's employed to accurately measure BMI amongst employees. (Id.) Notably, Dr. Schebendach also maintained that "age-related changes in hormone status result in deceased lean body mass and increased body fat" in older individuals, which is a change that would naturally cause a person's body fat percentage to rise. (Id.)

In summarizing her medical opinion, Dr. Schebendach provided an example which showed the fatal flaws in the BMI chart allegedly employed by Bally's:

Weight Status	Age (yrs.)	Height (inches)	Weight (Lbs.)	BMI	BMI Category
Maintenance	25	65	135	22.5	Normal
	65	63	135	23.9	Normal
Gain	25	65	135	22.5	Normal
	65	63	145	25.7	Overweight

(Id.) Particularly, even taking a logical leap to assume *arguendo* that Bally's BMI chart allegedly had some form of compensation for age, this process was still defective and did not adequately adjust for age-related changes given that an older person would have to maintain the same weight over the course of their life in order to meet the qualifications set out, which would be difficult due to the aforementioned difficulties older people being able to maintain their weight even despite their shrinkage in statute. (Id.) Simply put, even if an effort was allegedly made to compensate for the age of an employee in measuring their BMI, this effort was not close to sufficient and unfairly prejudiced the older employees who sought and/or were measured.

Lastly, and especially considering that this non-existent compensation would still fall well short of leveling the playing field for the Appellant Plaintiffs and the older members of the subject class, even assuming *arguendo* some form of body fat exception and/or compensation was sufficient, it would not account for the glaring disparity in the age of the qualifying employees as discussed below. Simply put, even if same existed, Defendants cannot rely upon an allegedly tailored, compensating system for BMI measurement or otherwise to suggest that the Boardwalk Saloon process was not discriminatory when same clearly led to the drastic disparity as discussed further herein inasmuch as same still came up short as to the issue of equality despite Defendants' alleged efforts.

Therefore, there can be no other conclusion that this height/weight requirement, which was necessary for a bartender to be able to bid into the Boardwalk Saloon, was geared to slant towards younger employees at the expense of the group of older employees represented by the class of plaintiffs in this case. As such, while technically "facially neutral" on its face, this requirement was clearly maintained by Defendants to exclude older employees from the Boardwalk Saloon and in fact accomplished this adverse effect as discussed at length below. Given that Defendants also cannot justify this requirement as a business necessity and given that this requirement alone would exclude older employees, it is abundantly clear that Appellant Plaintiffs have established a claim of adverse

impact at this time. Gerety, 184 N.J. at 400.

Notwithstanding this establishment of this adverse impact claim by the height/weight requirement in and of itself, the other job requirements for the Boardwalk Saloon also reflect a discriminatory sheen that cannot be ignored and further establish Appellant Plaintiffs' claims of age discrimination. Specifically, as reflected by the testimony of the Appellant Plaintiffs, the ancillary requirements of bull riding, choreography training, working flair and being a social media ambassador all were discriminatory in nature and had the effect of discouraging efforts to attempt to qualify beyond the height/weight requirement given that such requirements were extremely prohibitive based upon age. (Pa208, 217, 235, 236, 237, 246, 252, 263, 264, 265, 270, 274, 273-275, 293, 313, 323, 324, 330, 331, 351, 354, 364, 378, 379, 380, 382, 383, 391-392, 393, 401, 408, 413-415, 420, 421, 427, 436, 438, 439, 442, 443). While it only took one non-qualitive requirement to bar Appellant Plaintiffs and others from working at the Boardwalk Saloon, it is clear that they also cumulatively had the effect of discriminating against older employees such as Appellant Plaintiffs.

With these discriminatory qualifications in mind, a look towards the results of such criteria establishes that defendants' discriminatory efforts to ensure a younger workforce was a rather resounding success, as a clear significant adverse impact has been felt by the class of older employees that make up the plaintiffs in

this case as a result of these "facially neutral" policies. Gerety, 184 N.J. at 399. Specifically, when looking at the average ages of the plaintiffs who were denied bidding rights and/or shifts at the Boardwalk Saloon as opposed to individuals who were allowed to work there, an enormous gap exists that showcases the disparate impact of the policies:

	Plaintiff's Denied BS Bidding/Shifts	BWS Employees[2]	Difference in Age
Average Age	59.56	39.48	**20.08**
Average Age at Relevant Time[3]	52.16	33	**19.16**

(Pa34-67, 122-124). As such, based upon this analysis, it is clear that the discriminatory criteria had a clear adverse impact on older employees as represented by the class of plaintiffs in this matter. Simply put, the statistics don't lie in this regard, and it is clear that Appellant Plaintiffs were denied the right to work at the far more lucrative Boardwalk Saloon, disparately creating a workforce

[2] Note: Information for one (1) BWS employee was not provided by defendants during discovery and therefore they were not included in this analysis.

[3] For purposes of this analysis, relevant time is either the approximate open date of the Boardwalk Saloon (2/15/16), known hire date at the Boardwalk Saloon as provided by defendants and/or adjusted hire date as provided by defendants. In fact, and given that certain exact dates are unknown, this data point skews in favor of defendants given that the ages at the given date may tend to be lower than their actual BWS start date and/or the dates of denial of opportunities for the plaintiff class.

that was nearly twenty (20) years younger on average. See Cohen v. Univ. of Med. & Dentistry of N.J., 2013 WL 6839509, *1 (D.N.J. Dec. 30, 2013) (finding individuals ranging from 7 to 22 years younger to be outside an individual's protected class). Therefore, Appellant Plaintiffs have easily established, from the factual evidence, that Defendants' alleged "facially neutral" policies created a significant disparate impact on the relevant older employees, thus entitling Appellant Plaintiffs to a ruling on liability at this time. Gerety, 184 N.J. at 399.

In addition to this establishment of an unjustified adverse impact, Appellant Plaintiffs put forth further evidence of such discriminatory motive that enhances the instant argument that they were entitled to summary judgment on the issue of liability in this case. Specifically, several instances underscore the discriminatory qualifications discussed at length above:

- An older employee who actually qualified for the Boardwalk Saloon felt targeted in that position and pressured to no longer bid into the bar, including when Edley made a comment to her that she must wear "age-appropriate" shorts while at the bar, meaning that she did not want to see her in shorter shorts because she was older. (Pa251, 254).
- Edley made a comment to an older employee implying that she was working slow due to her age. (Pa353).
- When an older employee approached Edley about the Boardwalk Saloon

qualifications, she simply laughed at him and indicated that he "wouldn't be one of those to work that bar" and to "not waste [his] time" before threatening to call security if he didn't leave. (Pa338-340).

- Management would provide leniency to younger bartenders and were often seen joking with them while older bartenders were not treated that way. (Pa231, 345). Younger bartenders at the Boardwalk Saloon would also indicated that they knew nothing about the tests they would take. (Pa357).
- Edley once made a comment in or about 2015 regarding the Beach Bar bartenders that year that "we got a really hefty crew this year." (Pa346).

Given this clear disparate impact, Appellant Plaintiffs also highlighted the drastic effect same had upon them. Specifically, the Boardwalk Saloon was intended to be and indeed became the flagship bar at Bally's, gaining momentum and leading to higher earning potential for those bartenders who were allowed to work there. (Pa97, 188, 200). In fact, Appellant Plaintiffs' economic expert considered various factors contributed to an extensive economic loss for a representative older employee such as Appellant Plaintiffs, determining that such an individual in any of plaintiffs' shoes had a loss of $884,800 as a result of not being permitted to work in the Boardwalk Saloon for the subject time period. (Pa78-91). As such, the impact of Defendants' discriminatory acts cannot be understated.

Furthermore, and succinctly establishing that the qualifications for the Boardwalk Saloon were discriminatory in nature and meant to target older individuals, it is abundantly clear that there was no "business necessity" to most, if not all, of the qualifications, further solidifying such liability under the LAD. Particularly, almost every single qualification for the Boardwalk Saloon was inexplicable, applied in bad faith and/or completely unnecessary in a manner that only underscores the discriminatory intent and effect behind same.

For one, while Defendants continue to suggest that the Bar Smarts and Cicerone exams were necessary qualifications, bartenders were oftentimes given the run-around about the exams; not provided sufficient study materials by Defendants to facilitate their passage; and not permitted leniency in passing or even taking the tests like younger bartenders, who admitted not even passing the tests, leading to what can only be called bad faith application of these requirements. (Pa101, 102, 181, 225, 235, 245, 262, 269, 273, 274, 312, 314, 332, 337, 341, 338-340, 368-370, 376, 408, 409, 420, 429, 441, 448, 449). Furthermore, and more importantly, there was no justification whatsoever to require passage of such exams given that the Boardwalk Saloon did not serve beer, cocktails and/or spirits that the other bars at Bally's, including the Mountain Bar, also did not serve and which had been served by the subject bartenders for years. (Pa188, 230, 285, 342-344, 354). Therefore, there was certainly no "business necessity" to make

these tests a required qualification for the Boardwalk Saloon.

Secondly, and reflective upon the most discriminatory requirement for the Boardwalk Saloon, the height/weight requirement was allegedly not actually monitored as allegedly required by Defendants' qualifications, allowing certain employees to slip through the cracks while Appellant Plaintiffs and others were denied bids. (Pa106, 239, 242, 248, 289, 290, 382, 383, 443). Additionally, while being discriminatory in force and effect as discussed above, the day-to-day manager of the Boardwalk Saloon John Dougherty underscored the lack of necessity for this requirement in indicating that in no way does a person's height proportionate to weight have any effect whatsoever on a bartender's ability to work behind a bar. (Pa186, 187, 190). In fact, this requirement lacked such justification to the point that same was discontinued by Bally's sometime in or about 2022, highlighting the lack of such reasoning from the start. (Pa173).

Furthermore, the requirement that bartenders be able to physically ride a mechanical bull was also completely unnecessary and was in fact further overtly discriminatory against older employees who were more susceptible to injury than their younger counterparts as discussed by the various members of the plaintiffs' class. (Pa102, 103, 178, 217, 235, 236, 246, 252, 263, 264, 270, 274, 287, 293, 313, 323, 330, 331, 351, 354, 364, 378-380, 382, 383, 391, 392, 395, 396, 408, 413-415, 420, 421, 427, 436, 438, 439, 442). In fact, Bally's management

specifically maintained that this requirement was completely unnecessary given that bartenders did not have any role in operating the mechanical bull, which was in fact not even placed near the Boardwalk Saloon, and never actually rode the bull during business hours. (Pa113, 189, 190, 198, 443). Food and Beverage Director Jerry Beaver went so far as to say he was not even aware that this was a requirement as he did not know "how or why" a bartender would undergo such training given that they did not operate the bull. (Pa196-198). As such, while maintaining no necessity whatsoever, this bull-riding requirement, which was clearly focused on discouraging older employees from attempting to qualify, is rather just more evidence of the discriminatory nature of the criteria provided for the Boardwalk Saloon position and was in fact removed as a qualification at some point. (Pa103, 173).

Similarly, the requirements of working flair and choreography were not only further discriminatory on their face in seeking to discourage older employees from pursuing a position at the Boardwalk Saloon, but they both had no business justification as well. (Pa61-64, 98-105, 113, 118, 119, 181, 186-192, 196-199, 217, 246, 264, 265, 274, 275, 323, 324, 330, 331, 364, 380, 392, 408, 420, 421, 442, 443). In fact, Food and Beverage Director Beaver and the day-to-day manager of the Boardwalk Saloon Dougherty indicated that they never witnessed bartenders at the Boardwalk Saloon engaging in working flair and/or choreographed dance while

they worked at the Boardwalk Saloon. (Pa186, 187, 196, 197, 103, 104, 189, 192, 199, 442, 443). As such, these qualifications, while certainly appearing to discriminate against older employees, were completely unnecessary to the operation of the Boardwalk Saloon and the requirements of bartenders within same.

Lastly, and identical to the arguments above, the qualification that bartenders at the Boardwalk Saloon be social media ambassadors was also discriminatory and not reflective of any necessary bar operations. (Pa106, 107, 190, 199, 208, 393, 401). Specifically, bartenders at the Boardwalk Saloon were not required to post on social media and same was not monitored whatsoever by Defendants, thus exposing same as a mere pretext rather than a good-faith requirement for employment at the bar. (Pa106, 107, 190, 199).

As such, it is readily apparent that Defendants' qualifications for the Boardwalk Saloon had a disparate and discriminatory impact on the class of older individuals that make up the Appellant Plaintiffs. Given that Defendants proffer no legitimate non-discriminatory reason to have such qualifications, and specifically the BMI requirement, it was the Appellant Plaintiffs, and not Defendants, that were entitled to summary judgment at the trial level on the issue of liability under a disparate impact theory. Therefore, Appellant Plaintiffs respectfully request that the lower court's orders granting summary judgment in favor of Defendants be

reversed at this time and that summary judgment be granted in favor of the Appellant Plaintiffs.

III. DEFENDANTS WERE NOT ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' AGE DISCRIMINATION CLAIMS.

As incorporating the above arguments as to the discriminatory nature of the Boardwalk Saloon requirements and assuming *arguendo* the Appellate Court is inclined to affirm the denial of summary judgment in favor of Appellant Plaintiffs, it is nonetheless clear that Defendants were certainly not entitled to summary judgment on the Appellant Plaintiff's age discrimination claims as there is a factual dispute as to whether there was discriminatory disparate treatment stemming from the subject qualifications.

Generally speaking, a claim of disparate treatment under the LAD is viewed through the framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Under this framework, the Appellant Plaintiffs must first establish a prima facie case of discrimination, which creates a presumption of such discrimination that shifts the burden to the employer to articulate a "legitimate, nondiscriminatory reason for" the adverse action it took. McDonnell Douglas, 411 U.S. at 802. If the employer satisfies this burden, the plaintiff must then submit some evidence that could demonstrate that the employer's "legitimate" reasoning for its action was merely pretext for discrimination. Id. at 804. In order to

accomplish this, a plaintiff must merely proffer evidence showing "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" as to the proffered reason. Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir.1994).

As to the *prima facie* case in a case such as same involving a pseudo "failure to hire" claim, a plaintiff must merely establish: (1) that plaintiff falls within a protected class; (2) that plaintiff was qualified for the work for which he or she applied; (3) that plaintiff was not hired; and (4) that the employer continued to seek others with the same qualifications or hired someone with the same or lesser qualifications who was not in the protected status. Andersen v. Exxon Co., 89 N.J. 483, 492 (1982). However, the New Jersey Supreme Court made clear that "there is no single *prima facie* case that applies to all discrimination claims" and that the "elements of a claim vary depending upon the particular employment discrimination claim being made." Victor v. State, 203 N.J. 383, 409–10 (2010). Therefore, while application of the *prima facie* elements may vary, at the end of the day, the requirement of a prima facie case is to provide some evidence that creates a question of fact as to whether the "plaintiff endure[d] an adverse employment consequence as a result of the discriminatory act." Id.

In resolving this issue, it is important to note that in considering whether a plaintiff has met their *prima facie* burden under the LAD, "courts have recognized that the *prima facie* case is to be evaluated **solely on the basis of the evidence**

presented by the plaintiff, irrespective of defendants' efforts to dispute that evidence." Zive v. Stanley Roberts, Inc., 182 N.J. 436, 448 (2005) (citing Cline v. Catholic Diocese of Toledo, 206 F.3d 651, 661 (6th Cir.2000)).

In the instant appeal, it is undisputed that each of these Appellant Plaintiffs satisfied prongs (1), (3) and (4) inasmuch as they were in a protected class as to their age respectively; that these Appellant Plaintiffs were not hired/allowed to bid for shifts at the Boardwalk Saloon; and that Defendants sought others not in the protected class to bid into/work such shifts at the Boardwalk Saloon. See Point I above; (Pa222, 257, 374, 386). Still, the trial court, held, wrongly, that each of these Appellant Plaintiffs did not satisfy the prong two (2) of *prima facie* elements as they were not qualified for the work for which he or she applied and as such there was no adverse employment action taken. (T1, T2 and T3). In so doing, the trial court held that the Appellant Plaintiffs either "voluntarily withdrew" or failed to apply and/or qualify for the position. Id.

It is respectfully submitted that the trial court erred in each of these holdings as the Appellant Plaintiffs were effectively prohibited from bidding into the Boardwalk Saloon by Defendants. Without more, such prohibition constitutes an adverse employment action and, thus, satisfies Prong (2) of the *prima facie* elements. First, as to Appellant Plaintiffs Banek, Montalvo, Viereck and Viering the trial court held that, notwithstanding the fact that each of these Appellant

Plaintiffs passed Bar Smarts and Cicerone, they did not satisfy Prong (2) because they did apply for and/or were not qualified the position at the Boardwalk Saloon. (T1). The trial court's decision, however, should be reversed as Defendants cannot submit that no discrimination took place when the criteria they point to as to suggest that these Appellant Plaintiffs were not qualified for the position *were in fact discriminatory to begin with*. Particularly, and as discussed at length above, the qualifications applied to prospective employees had a distinct discriminatory impact on older employees and were applied in a manner that further showcased such discriminatory intent without any business justification. See Point II above.

For example, as to Appellant Plaintiff Banek at least two qualifications stood in the way of her gaining the right to bid into the Boardwalk Saloon – her height proportionate to weight and the working flair requirement. (Pa392-394, 396). Specifically, and although she was seemingly never offered the other trainings necessary to bid into the bar, Banek, who is approximately 5 foot, 10 inches tall and weighs about 205 pounds, would not have been able to pass the BMI requirement based upon the chart utilized by Bally's. (Pa68-71, 391, 392). Banek also indicated that she was aware that she would not pass the BMI qualification and had difficulties with weight gain as she got older. (Pa396).

Furthermore, Banek also testified that she had lost hand-eye coordination as she aged and thus was not a good candidate for working flair training. (Pa392).

Banek also indicated that she was not a good candidate for being a social media ambassador given that younger people were more adept at same and that if she wore the required uniform it would not be appropriate given her age. (Pa392-393). It was because of all these roadblocks that Banek indicated she never saw older people working within the Boardwalk Saloon. (Pa395).

Likewise, as to Appellant Plaintiff Montalvo, at least three qualifications stood in the way of him gaining the right to bid into the Boardwalk Saloon – his height proportionate to weight, the choreography requirement and the bull riding requirement. (Pa377-380). Specifically, Montalvo, who is approximately 5 foot, 8 inches tall and weighs about 290 pounds, would not have been able to pass the BMI requirement based upon the chart utilized by Bally's. (Pa378, 68-71). Montalvo indicated that he had difficulties maintaining his weight as he got older. (Pa380).

Furthermore, Montalvo also testified that he was told he would have to ride a mechanical bull in order to gain access to the Boardwalk Saloon, which he was not able to due at that point in his life for concerns over a neck surgery he required as he got older. (Pa377, 379). Montalvo testified that his ability to take on such a task as riding a bull decreased with his age. (Pa380). Lastly, Montalvo also indicated that his age would also have a bearing on his ability to pass choreography training for similar concerns as the bull-riding training. (Id.).

Similarly, as to Appellant Plaintiff Viereck, at least two qualifications stood in the way of Viereck gaining the right to bid into the Boardwalk Saloon – the bull-riding requirement and the working flair requirement. (Pa263-265). Specifically, Viereck was never offered bull-riding training despite inquiring as to same; however, if she was offered same, she did not believe that she could complete it due to back issues. (Pa263-264). Furthermore, while also never being offered choreography training, Viereck also testified that she would not be able to do working flair training due to age-related arthritis in her hand. (Pa264-265).

Finally, as to Francis Viering, at least one qualification stood in the way of Viering gaining the right to bid into the Boardwalk Saloon – his height proportionate to weight. (Pa225-229). Specifically, and although he had seemingly soured on working at the bar given the requirements, Viering would not have passed the BMI test given that he stood 6 foot, 2 inches tall and weighed approximately 220 pounds. (Id.). In fact, Viering knew he would not meet this criterion without losing substantial weight and thus never bid into the Boardwalk Saloon. (Id.).

Just as significantly, as to Appellant Plaintiffs, Reyes and Curry there is no dispute that these Appellant Plaintiffs made clear their intention and desire to work in the Boardwalk Saloon bar, as they signed the interest sheet designating same. (T2). Still, the trial Court found that each of these Appellant Plaintiffs failed to

establish an adverse employment action and thus satisfy prong (2) of the *prima facie* test. (T2). It cannot be ignored that each Appellant Plaintiffs they had been employed as bartenders with Bally's for many, many years (Curry approximately 42 years, and Reyes 12-13 years). (Pa405-410, 326). There is also no evidence that the aforementioned Appellant Plaintiffs had any alleged performance issues during their many years of employment with Defendants. Further, the drinks served at the Boardwalk Saloon were the exact same drinks that were served at every other bar within the Bally's casino. (Pa188, 230, 285, 342-344, 354). Therefore, there is simply no legitimate argument as to why these Appellant Plaintiffs were qualified to serve these same drinks that he had been serving for many years at other bars within Bally's, yet not "qualified" to serve them at the Boardwalk Saloon.

As such, and substantially due to the completely unnecessary qualifications creating a discriminatory disparate impact as discussed above, summary judgment in favor of Defendants was certainly not appropriate at the trial court level. See Point II above (outlining the discriminatory disparate impact the subject qualifications created as to older employees such as Appellant Plaintiffs). Put simply, amongst other reasons, Defendants formulated the subject qualifications with discriminatory intent as established by the substantial disparate impact and the fact that there is seemingly no justification whatsoever to same as discussed at length above. Therefore, any suggestion that the qualifications, including the BMI

and bull-riding requirements specifically, were not discriminatory and were instead necessary for the operation of the Boardwalk Saloon is rebutted by the evidence in this case.

While it is true the remaining Appellant Plaintiffs did not pass Bar Smarts and Cicerone and they did not sign the interest sheet, the trial court nevertheless erred when it entered summary judgment against them (and all of the Appellant Plaintiffs) as the qualifications that all of the Appellant Plaintiffs were required satisfy for employment ***were discriminatory to begin with***. First, and as discussed at length above, the qualifications applied to prospective employees had a distinct discriminatory impact on older employees and were applied in a manner that further showcased such discriminatory intent without any business justification. See Point II above. As such, it is readily apparent that Appellant Plaintiffs have at least presented sufficient genuine issues of fact as to their claims of age discrimination under the LAD.

Furthermore, and only serving to underscore the discriminatory nature of the subject qualifications, in addition to the clear disparate impact felt which showcases the clear discriminatory motive, the qualifications themselves were applied in a disparate fashion, thus further establishing a claim of disparate treatment under the LAD. For instance, while Defendants continue to suggest that the Bar Smarts and Cicerone exams were necessary qualifications, bartenders were

oftentimes given the run-around about the exams, not provided sufficient study materials by Defendants to facilitate their passage and not permitted leniency in passing or even taking the tests like younger bartenders, who admitted not even passing the tests, leading to what can only be called bad faith application of these requirements. (Pa101, 102, 181, 225, 235, 245, 262, 269, 273, 274, 312, 314, 332, 337-341, 368-370, 376, 408, 409, 420, 429, 441, 448, 449). Secondly, and as further reflective upon the most discriminatory requirement for the Boardwalk Saloon, the height/weight requirement was allegedly not actually monitored as allegedly required by Defendants' qualifications, allowing certain younger employees to slip through the cracks while Plaintiffs and others were denied bids. (Pa105-106, 239-242, 248, 289-290, 382, 443). As such, even setting aside the discriminatory impact of the qualifications themselves, it is readily apparent that such qualifications were also applied in a disparate way to further ensure that older employees were caught and prevented from working at the bar while younger employees were allowed to slip by, thus showcasing the discriminatory nature of the qualifications.

It is also important to note that while Defendants contended that the prerequisite of passing both the Bar Smarts and Cicerone exams were necessary because bartenders would be serving craft beers and "more involved" cocktails, the record reflects that the bartending required of the bartenders at the Boardwalk

Saloon was no different than that required of bartenders at other outlets:

- Cori Edley admitted that craft beers were served at the Mountain Bar, where several Plaintiffs worked at the time that the Boardwalk Saloon opened. (Pa97).
- Edley testified that a lot of drinks made at the bars at Bally's were made "from the gun," meaning a mix that required no additional mixology. (Pa112-113).
- Edley also testified that there was no standard on how to make certain cocktails across all Bally's bars and that it ultimately "depend[ded] on the bartender." For example, it was an acceptable practice at Bally's to make a Bloody Mary either with fresh tomato juice or mix from the bottle depending on preference. (Ibid.)
- Edley explained that "you can't change a bartender that's been doing it for how many years, how many days, whatever the case. It's muscle memory. So, you know, you can make the suggestion, but they're still going to do it their way." She further explained the bartenders would not be disciplined for making drinks "their way." (Ibid.)
- John Dougherty, the individual responsible for the day-to-day operations of the Boardwalk Saloon, testified that the beers and cocktails being offered at the Boardwalk Saloon and Mountain Bar were

"interchangeable." He further stated that "you could make pretty much any drink at either bar, you could order pretty much any beer at either bar." (Pa188).

- According to Plaintiff Sharon Mulhern, the Boardwalk Saloon and the Mountain bar sold the same products. (Pa354).

These facts demonstrate that there is simply no dispute as to whether or not the Appellant Plaintiffs were qualified to tend bar at the Boardwalk Saloon. The Bar Smarts and Cicerone exams were superfluous and arbitrary, having no bearing on actual ability to perform the essential functions of the position. It is therefore evident that these "qualifications" were implemented as an additional roadblock to keep older employees from being able to bid into the Boardwalk Saloon.

Indicative of this fact, Defendants permitted individuals that did not pass the Bar Smarts and Cicerone exams to work as bartenders at the Boardwalk Saloon. Plaintiff Frederick Renzulli, who worked at the Boardwalk Saloon, certified that numerous servers, who were not Bar Smarts and Cicerone certified as allegedly required by Bally's, tended bar at the Boardwalk Saloon regularly. For instance, Renzulli has provided video proof of a food server by the name of Selena Vasquez working as a bartender at the Boardwalk Saloon. (Pa440-444). Notably, Ms. Vasquez's name does not appear on the list of "bartenders and/or servers who worked at the Boardwalk Saloon from 2015 through June of 2019" supplied by

Defendants in discovery. (Pa65-67).

Mr. Renzulli also provided video evidence of servers by the name of Jocelyne and Ebony working as bartenders at the Boardwalk Saloon. (Pa440-444). There are no individuals by the name of Jocelyne or Ebony on the list of bartenders that worked at the Boardwalk Saloon provided by Defendants. Likewise, Jocelyne and Ebony's names do not appear on the Cicerone pass list or any documents related to Bar Smarts or Cicerone. (Pa194-201). The same is true of a food server by the name of Sabria. (Pa440-444). This evidence shows that Defendants applied the "qualifications" set forth for bartending at the Boardwalk Saloon in a discriminatory fashion towards Plaintiffs. It is clear that the Bar Smarts and Cicerone tests were not actually required to work as a bartender in this outlet, proving that Plaintiffs were qualified to work in this bar and would have but for the discriminatory qualifications.

If this were not enough to demonstrate the discriminatory application of these so-called qualifications, the documents supplied by Defendants show that Defendant Cori Edley registered at least seventy thousand dollars ($70,000) in credit card sales each year for the years 2017, 2018 and 2020. (Pa61-64). When asked about these sales, Cori Edley admitted that she bartended on occasion. However, **Edley also admitted that she bartended at the Boardwalk Saloon despite not being certified in Bar smarts and Cicerone**. (Pa120). This fact alone

proves that the qualifications of being Bar Smarts and Cicerone certified were applied in a discriminatory manner and in no way relate to an employee's ability to perform the role of a bartender at the Boardwalk Saloon. There is no credible argument that Plaintiffs were not qualified to work in this outlet but for the discriminatory qualifications of riding the mechanical bull, keeping weight proportionate to height, choreographed dance training, working flair training and serving as a social media ambassadors.

As discussed elsewhere herein, there was no justification whatsoever for the qualifications that were developed for the Boardwalk Saloon. Particularly, almost every single qualification for the Boardwalk Saloon was inexplicable, applied in bad faith and/or completely unnecessary in a manner that only underscores the discriminatory intent and effect behind same. See Point II above. Moreover, the trial Court had already determined that whether or not these prerequisites were designed to create a younger workforce and whether they discriminated against older employees were "**material questions of fact for a jury to determine**." As such, there is certainly no dispute that substantial questions of material fact exist such that the lower court's orders granting summary judgment in favor of Defendants must be reversed at this time.

In the end, there is certainly no dispute that substantial questions of material fact exist such that the trial court's orders granting summary judgment in favor of

Defendants must be reversed at this time.

IV. DEFENDANTS EDLEY AND GIUNTA ARE NOT ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' AIDING AND ABETTING CLAIM.

The LAD provides for liability against individuals in their capacity as aiders and abettors of their employers' violation of the statute, including as to such claims as age discrimination. See N.J.S.A. 10:5-12(e). In viewing such claims, the aiding and abetting analysis merely requires a finding of "active and purposeful conduct" on behalf of an individual defendant. Tarr v. Ciasulli, 181 N.J. 70, 83 (2004). To find such "active and purposeful conduct," a plaintiff must demonstrate:

> (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. Atlantic City Police Department, 174 F.3d 95, 127 (3rd Cir. 1999)) (internal citations omitted). While not being responsible under the LAD as an "employer," an individual defendant **can** be held liable for aiding and abetting such an employer (a separate party) in violating the LAD. See Hurley, 174 F.3d 95; Baliko v. Stecker, 275 N.J. Super. 182, 191 (App. Div. 1994) (holding in a LAD case against a union that "[i]f one [union] member assists, supports, encourages, and supplements the efforts of another… individual members may be

liable as aiders and abettors").

As such, while Defendants argue that Defendants Edley and Giunta do not qualify as "aider and abettors" under the LAD, it is clear from discovery that Appellant Plaintiffs have met the *prima facie* standard of such claims. Therefore, these claims should have been permitted to proceed.

Specifically, as uncovered during discovery, the record clearly reflects genuine factual issues as to Appellant Plaintiffs' satisfaction of each *prima facie* element. Specifically: (1) the corporate Defendants discriminated against Appellant Plaintiffs by maintaining the subject discriminatory qualifications that had a blatant disparate impact on older employees as discussed at length above ; (2) Defendants, Edley and Giunta were aware of their roles as supervisors and/or members of management, in directly formulating the discriminatory qualifications for the Boardwalk Saloon amongst other members of management; and (3) Defendants Edley and Giunta knowingly and substantially assisted in the unlawful acts committed by their employers inasmuch as they directly formulated the subject discriminatory qualifications which in turn caused the disparate impact as discussed above. See Point I above; (Pa1, 95-96, 98-99, 101, 452, 456).

As such, as the prima facie elements for aiding and abetting have clearly been met, summary judgment was inappropriate. It is readily apparent from the facts gleaned during discovery that both Defendants, Edley and Giunta aided and

abetted their employers' commission of age discrimination as relating to the qualifications surrounding the Boardwalk Saloon. Therefore, the lower court's orders granting summary judgment in favor of Defendants must be reversed at this time.

CONCLUSION

Based on the foregoing, Plaintiff respectfully submits that this Court reverse the trial court's orders granting summary judgment in favor of Defendant and reinstate Plaintiffs' Complaint in its entirety.

/s/ Debra Tedesco

DEBRA TEDESCO

AL TABEI, SANDRA TOTH; MARY ROMANO; CHRIS IRELAND; MARA KRAFT; ADEL SOLIMAN; STEVEN MOKIENKO; RICHARD GOLDING; SEBASTIAN DIMAEGLIO; CHRIS DESALLE; MALGORZATA HUNTBACH; WILLIAM SMITH; LYUBOMIR ALEKSANDROV; MICHELLE MANCINI; PATRICK HILLARD, MICHAEL COONEY, FREDERICK RENZULLI, JO-ANN SCHWENDEMANN, and GARY WEISMAN,

Plaintiffs,

and

FRANK VIERING; JAMES CURRY; ROGER MONTALVO; LYDIA BANEK; TOMAS RAMIREZ; WILLIAM PROCEOPIO; PAUL LEBRON; JOHN MACCHIAROLA; SHARON MULHERN; DONALD DIVINCENZO; JAY BERKIN; LINDA VIERECK; JERONIMO REYES; KIM HALDEMAN; EDDISON GIRALDO; MICHAEL SMITH, ANTHONY VETRANO, and WENDY MCGAFFNEY, individually for themselves and on behalf of those similarly situated,

Plaintiffs-Appellants,

v.

BALLY'S PARK PLACE, LLC d/b/a BALLY'S ATLANTIC CITY; JOSEPH GIUNTA, both individually and in his management capacity; CORI EDLEY, both individually and in his management capacity,

Defendants-Respondents,

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2299-23

ON APPEAL FROM:
SUPERIOR COURT OF NEW JERSEY
LAW DIVISION,
ATLANTIC COUNTY
DOCKET NO. ATL-L-269-18

SAT BELOW:
HON. RALPH A. PALONE, J.S.C.

Civil Action

BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS, BALLY'S PARK PLACE, LLC d/b/a BALLY'S ATLANTIC CITY, JOSEPH GIUNTA, AND CORI EDLEY

and
CEOC, LLC d/b/a CAESARS ENTERTAINMENT CORPORATION; BOARDWALK REGENCY, LLC; HARRAH'S ILLINOIS, LLC; SOUTHERN ILLINOIS RIVERBOAT/CASINO CRUISES, LLC; JANE DOE I-V (these names being fictitious as their present identities are unknown); JOHN DOE I-V (these names being fictitious as their present identities are unknown); XYZ CORPORATION I-V (these names being fictitious as their present identities are unknown),
Defendants.

Amy E. Rudley, Esq. (NJ 019082004)
Jennifer B. Barr, Esq. (NJ 021091998)
COOPER LEVENSON, P.A.
1125 Atlantic Avenue - 3rd Floor
Atlantic City, NJ 08401
jbarr@cooperlevenson.com
Telephone: (609) 344-3161
Attorneys For Defendants-Respondents,
Bally's Park Place, LLC d/b/a Bally's Atlantic City,
Joseph Giunta, and Cori Edley

On the Brief: Jennifer B. Barr, Esq.
Date submitted: April 2, 2025

TABLE OF CONTENTS

TABLE OF CONTENTS TO THE APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

Rules

PRELIMINARY STATEMENT

Defendant-Respondent Bally's Park Place, LLC ("Bally's") planned to open the Boardwalk Saloon at its Wild West property in 2015. Bally's created new positions for bartender entertainers to staff the Boardwalk Saloon. The requirements for a bartender entertainer included passing bartending exams, training to operate the mechanical bull that would be prominently featured at the Boardwalk Saloon, learning choreography to entertain patrons, learning to use flair while making drinks to create a memorable bartending experience, becoming a social media ambassador to promote the Boardwalk Saloon, and maintaining a weight proportionate to height.

Plaintiffs claim that the requirements for the bartender entertainer position were somehow discriminatory based on age. Yet Plaintiffs admitted that age had no effect on their ability to pass the bartending exams, learn how to ride and to operate the mechanical bull, learn choreography, make drinks with flair, or post on social media.

The sole issue in the instant appeal is whether the requirement to maintain weight proportionate to height is discriminatory based on age. Plaintiffs claim that weight increases with age and therefore the requirement to maintain a certain weight is discriminatory. When assessing whether bartender entertainers' weight was proportional to their height, Bally's adjusted the

requirement to reflect the average increase in weight with age. One criteria utilized by Bally's measured body mass index ("BMI") which simply evaluates height and weight to assess whether the ratio is within a healthy range. Another criterion relied upon by Bally's referenced a table entitled Body Fat Ranges for Standard Adults which considers age along with height and weight to assess whether an individual's weight is within a healthy range for their age. Bartender entertainers were required to satisfy one of the two criteria for measuring weight proportionate to height. Because Bally's accounted for age-related weight gain, Plaintiffs cannot prove a claim for age discrimination.

Plaintiffs argue disparate treatment based on age. Yet Plaintiffs in the instant appeal did not otherwise qualify for a position as bartender entertainer, regardless of weight. Most Plaintiffs simply failed to take the required bartending exams. A few determined that a prior physical injury, not age, prevented them from some of the more physical requirements such as riding the mechanical bull or choreography. Without proof that they were otherwise qualified for the position, their disparate treatment claims fail.

Plaintiffs also contend that the employment criteria for the Boardwalk Saloon had a disparate impact on older prospective bartender entertainers. Proving a disparate impact in an age discrimination claim is particularly challenging. However, Plaintiffs cannot demonstrate that the criteria for

bartender entertainers more harshly impact older bartenders, and that the criteria cannot be justified by business necessity. Plaintiffs testified that, aside from the weight requirement, their age did not prevent them from satisfying the requirements for bartender entertainer. However, the record lacks evidence that the weight requirement impacted older bartenders. Only three Plaintiffs overall (that is, three of the original 37 plaintiffs) failed to satisfy the weight requirement. This evidence is insufficient to show that the weight requirement negatively affected older prospective bartender entertainers overall. Additionally, Plaintiffs' expert opinion failed to consider that the standard actually utilized by Bally's adjusted for age. As such, Plaintiffs cannot prove a disparate impact claim.

As there is no viable claim for age discrimination, the individual claims against Defendants-Respondents Joseph Giunta and Cori Edley fail. There is no evidence that either individual acted in any way discriminatory.

The trial court properly granted Bally's motions for summary judgment. Defendants-Respondents Bally's, Joseph Giunta, and Corey Edley respectfully request that this court affirm the trial court's orders granting summary judgment.

PROCEDURAL HISTORY

Plaintiffs-Appellants Frank Viering, James Curry, Roger Montalvo, Lydia Banek, Tomas Ramirez, William Procopio, Paul Lebron, John Macchiarola, Sharon Mulhern, Donald Divincenzo, Jay Berkin, Linda Viereck, Jeronimo Reyes, Kim Haldeman, Eddison Giraldo, Michael Smith, Anthony Vetrano, and Wendy McGaffney (collectively "Plaintiffs"), along with other plaintiffs not participating in the instant appeal, filed a Complaint on February 8, 2018, alleging violations of the New Jersey Law Against Discrimination ("LAD") for age discrimination (First Count), and Aiding and Abetting Liability (Second Count). (Pa1).[1]

Bally's, Mr. Giunta, and Ms. Edley (collectively "Defendants" or "Bally's) filed motions for summary judgment as to all 37 plaintiffs. The summary judgment motions were filed and argued in four groups. The first group included non-appealing plaintiffs Sebastian DeMeglio, Chris Ireland, and Malgorzata Huntbach (the "first group"), whose summary judgment motions were argued at a hearing on June 30, 2023. Although the trial court denied Defendant's motion for summary judgment as to the first group's claims for

[1] Pb – Plaintiffs' Brief
Pa – Plaintiffs' Appendix
Da – Defendants' Appendix
1T – Transcript dated July 14, 2023 (summary judgment–second group)
2T – Transcript dated August 11, 2023 (summary judgment–third group)
3T – Transcript dated August 28, 2023 (summary judgment–fourth group)

disparate treatment as well as aiding and abetting in separate orders and written opinions dated June 30, 2023, the trial court granted Defendants' summary judgment motions as to the first group's claims for disparate impact. (Da1 to Da56). The three plaintiffs in the first group did not participate in the instant appeal.

The second group included, among other non-appealing plaintiffs, Plaintiffs Banek, Montalvo, Viering, and Viereck (the "second group"). Defendants' summary judgment motions as to the second group were argued on July 14, 2023. (1T). The trial court granted Defendants' summary judgment motions as to Plaintiffs' claims for disparate treatment, disparate impact, and aiding and abetting in separate orders dated July 18, 2023 for the reasons set forth in the record. (Pa59, 1T60-19 (Banek); Pa29, 1T72-18 (Montalvo); Pa39, 1T80-2 (Viering); Pa53, 1T85-22 (Viereck)).

The third group included, among other non-appealing plaintiffs, Plaintiffs Macchiarola, McGaffney, Reyes, Divincenzo, Curry, and Haldeman (the "third group"). Defendants' summary judgment motions were argued on August 11, 2023. (2T). The trial court similarly granted Defendants' summary judgment motions as to Plaintiffs' claims in separate orders dated August 22, 2023 for the reasons set forth in the record. (Pa45, 2T26-16 (Macchiarola); Pa37, 2T29-16

(McGaffney); Pa47, 2T37-8 (Reyes); Pa55, 2T49-2 (Divincenzo); Pa41, 2T50-16 (Curry); Pa43, 2T53-23 (Haldeman)).

The fourth and final group included Plaintiffs Smith, Vetrano, Procopio, Ramirez, Mulhern, Lebron, Giraldo, and Berkin (the "fourth group"). Defendants' summary judgment motions were argued on August 28, 2023. (3T). As it had done with the second and third groups, the trial court granted Defendants' summary judgment motion as to Plaintiffs' claims in separate orders dated September 13, 2023 for the reasons set forth in the record. (Pa33, 3T7-21 (Smith); Pa57, 3T8-20 (Vetrano); Pa31, 3T10-23 (Procopio); Pa25, 3T11-21 (Ramirez); Pa27, 3T12-22 (Mulhern); Pa35, 3T14-3 (Lebron); Pa51, 3T14-20 (Giraldo); Pa49, 3T15-17 (Berkin)).

Plaintiffs from the second group, Banek, Montalvo, Viering, and Viereck, moved for reconsideration, which was argued on August 28, 2023. The trial court denied those Plaintiffs' motion for reconsideration, for the same reasons previously set forth in the record. (3T29-12 to 30-1).

Plaintiffs timely filed Notices of Appeal. (Pa458). This court consolidated the appeals in an order dated August 15, 2024.

STATEMENT OF FACTS

Bally's is an Atlantic City casino. Defendant Cori Edley was at all relevant times the Director of Food and Beverage at Bally's, implemented requirements for

the bartender entertainer positions and had supervisory authority over Plaintiffs. (Pa96). Defendant Joseph Giunta was at all relevant times the Vice President of Beverage at Bally's and oversaw day-to-day operations. (Pa452).

Plaintiffs were at all relevant times employed by Bally's as union bartenders, represented by a Collective Bargaining Unit ("CBU") known as Unite Here! Local 54. (Pa553-560).

In 2015, Bally's planned to open a new bar called the Boardwalk Saloon, making available 10 new union bartending positions. (Pa64). In furtherance of Bally's plan, on December 24, 2015, Bally's posted an interest sheet with the list of requirements for Boardwalk Saloon bartender entertainers so that existing bartenders could indicate interest in qualifying to work in the new Boardwalk Saloon. (Pa61). New positions at the Boardwalk Saloon required union employees to bid" for those positions, and the positions were filled based on seniority. (Pa61).

Bally's vision for the new Boardwalk Saloon, according to the job description, was for bartender entertainers to maintain "an upbeat and positive attitude" and to create "positive energy with gestures" and sustain "enthusiasm from one interaction to the next." (Pa64). The bartenders would anticipate needs and provide "fast, fun, friendly, fresh and flawless service." (Pa64). Bally's intended for bartender entertainers to create "a fun and exciting bar experience" and a "party atmosphere." (Pa64).

The Boardwalk Saloon included a craft beer menu with a fully trained staff who could explain the different types of craft beer and who could direct guests toward suitable beer. (Pa455). As such, the new bartender entertainer positions for the Boardwalk Saloon required bartenders to take and pass both the Bar Smarts and Cicerone Level 1 ("Cicerone") classes and written examinations, among other requirements. (Pa64).

Bar Smarts is a comprehensive learning program that covers beer, wine, and spirits. The program describes how each type of beverage is created and their historic usage. (Pa101). Bally's provided an access code to existing bartender employees to take the Bar Smarts course after they signed the Boardwalk Saloon interest sheet, provided a detailed guide on how to access the material, and explained that the exam would only test information that is taught through videos and reading material on the Bar Smarts website. (Pa562). The beverages that were to be served at the Boardwalk Saloon were more complex than at other Bally's bars. As such, bartenders at the Boardwalk Saloon would be expected to, for example, create syrups such as a birch simple syrup for whiskey sours, and to mix cocktails using egg white powders which including shaking the beverage to properly emulsify the egg white. (Pa101).

Cicerone completion was also required for bartenders at the Boardwalk Saloon. Cicerone is a beer server certification that instructs bartenders on, among

other things, brewing methods, appropriate glassware for certain beer, the Alcohol By Volume ("ABV") of certain genres of beer, and the International Bitterness Units ("IBU") of different types of beer. (Pa101). Bally's planned on serving craft beer not available at most other locations at Bally's, with the exception of Guy Fieri's Chophouse, which on-site restaurant also required the bartenders to take and pass Bar Smarts and Cicerone. (Pa101). Bally's informed interested bartender employees that all training instruction in order to take the Cicerone exam was offered for free on the Cicerone website, and provided a full downloadable syllabus which detailed the material on which an interested bartender would be tested. (Pa102).

In addition, bartenders interested in working at the new Boardwalk Saloon were required to complete mechanical bull riding safety training, choreography training, working flair training, agree to wear the required costume, maintain weight proportionate to height, as well as serve as a social media ambassador (such as posting on Facebook, Instagram, Snap Chat, and X). (Pa64).

Each requirement for bartender entertainers at the Boardwalk Saloon was aligned with Bally's vision for the bar. Regarding the requirement that the bartender entertainers take and pass Bar Smarts and Cicerone, Ms. Edley testified that the specialty cocktails at the Boardwalk Saloon were "a bit more involved" and the beer list was much more "extensive" as it included craft beers unavailable at other bars at Bally's. (Pa101). Mechanical bull safety training was required because "the staff

needed to understand how to ride the bull safely and…be able to determine if there was a safety issue prior to getting onto the mechanical bull." (Pa103). Choreography training was required so that the bartender entertainers at the Boardwalk Saloon would have "a good time" with the customers, "dancing behind the bar, and really just going with the music that was provided." (Pa103 to 104). Flair training was about "showmanship" such as "throwing a tin in the air," "throwing a napkin across a bar top so that it kind of skips like a rock," and to "pull the bottle up, let it go, and you catch it." (Pa104). The ultimate purpose of the bartender entertainer was to build a new customer base and create a memorable experience. (Pa104).

Regarding the requirement that bartender entertainers maintain a weight proportionate to height, Ms. Edley testified that the purpose for that criteria was to ensure the bartenders were "physically fit to complete the duties that were assigned." (Pa105). Ms. Edley testified that bartender entertainers for the Boardwalk Saloon were required to satisfy one of two standards: either the height to weight ratio or the BMI index. She explained that the height to weight ratio required employees at the Boardwalk Saloon to maintain weight within a range for their height. (Pa105). The weight range increased with age, according to the chart utilized by Bally's to assess whether the height to weight ratio was within a healthy range for the specific age. (Pa68). The BMI index accounted for the individual's muscle mass that would

contribute to increase weight. (Pa105). An on-staff nurse was tasked with measuring both height to weight ratio as well as BMI index. The height to weight ratio as well as the BMI index were monitored twice per year, and if an employee was outside of the range for either standard, they were given time to fall within the standards. (Pa105 to Pa106).

Bartending shifts at Bally's are based upon seniority pursuant to the Collective Bargaining Agreement ("CBA.") At least twice each year, shifts are posted and bartenders can place bids on those shifts. (Pa98).

Plaintiffs in the instant appeal did not qualify to work at the Boardwalk Saloon. Thereafter, the 18 Plaintiffs in the instant appeal, along with other plaintiffs not part of this appeal, filed a Complaint. (Pa1).

Plaintiffs' Complaint alleged two counts. The First Count claimed violations of the LAD, alleging that Defendants "did not hire and/or transfer plaintiffs and similarly situated older employees to a more desirable position and instead hired and/or transferred younger, less experienced employees based on certain discriminatory 'criteria' and for other discriminatory reasons." (Pa8). According to Plaintiffs, they "were denied the aforementioned position on account of their age." (Pa8). The Second Count alleges aiding and abetting, claiming that Defendants acted in concert to discriminate against Plaintiffs. (Pa10).

Plaintiffs proffered the report and testimony of Dr. Janet Schebendach. (Pa73). Dr. Schebendach's query was limited to "whether maintenance of BMI/height proportionate to weight becomes more difficult with age and, if so, why that is." (Pa73). Dr. Schebendach opined that one's weight typically increases with age, which impacts the BMI index, but neglected to include any reference to the other height to weight standard utilized by Bally's.

The weight-related requirement for the Boardwalk Saloon was simply the "maintenance of weight proportionate to height." (Pa580). When considering whether an employee maintained a proportional weight to height, as indicated by Ms. Edley in her deposition testimony (Pa105 to Pa106), Bally's considered ***two*** different standards: (1) the Tanita table entitled "Body Fat Ranges for Standard Adults," which is based on research by Dr. Dympna Gallagher and clearly adjusts for age; and (2) the BMI index table. (Pa68). Dr. Schebendach acknowledged that Bally's used both standards – Body Fat Range for Standard Adults and BMI – in assessing weight proportionate to height. (Da59).[2] However, Dr. Schebendach's

[2] Defendants included excerpts from the deposition testimony of Dr. Schebendach in the reply briefs submitted with the second group as the deposition transcript was not yet available to include with the moving briefs. However, Dr. Schebendach's deposition testimony (as it appeared in, for example, Banek's reply brief) was omitted from Plaintiffs' appendix in the instant appeal, and is therefore included in Defendants' appendix. (Da57). It is uncontested that Defendants included Dr. Schebendach's entire deposition testimony as an Exhibit for reply briefs filed for the first group, whose claims for disparate impact Judge Pallone dismissed in the written opinions dated June 30, 2023. (Da1).

report only considered the BMI index. (Pa73 to Pa75; Pa636). Dr. Schebendach testified that her report refers to a hypothetical individual who, between the ages of 25 and 65, lost two inches in height and maintained the same weight. This hypothetical individual would move from a normal BMI to an overweight BMI. However, Dr. Schebendach did not address whether the Body Fat Range for Standard Adults (Dr. Gallagher's table), which increases the healthy weight range with age, would consider the same hypothetical individual overweight at age 65. (Da60).

After discovery ended, Defendants filed motions for summary judgment. Defendants argued that the record evidence did not support LAD claims for either disparate treatment or disparate impact, and similarly did not support the aiding and abetting claim.

A. Disparate Impact Claims

The first group of summary judgment motions sought to dismiss the Complaint as to plaintiffs not involved in this appeal: DiMeglio, Ireland, and Huntbach. Those plaintiffs' LAD claims were separately analyzed as disparate treatment and disparate impact claims. The trial court granted Defendants' summary

judgment motion as to the first group's claims for disparate impact as well as aiding and abetting. (Da1 to Da56).[3]

Regarding the first group's disparate impact claims, the trial court noted that, in order to establish such a claim, plaintiffs must show that a facially neutral policy resulted in a significantly disproportionate or adverse impact on members of the affected class. Thereafter, the burden shifts to the employer to show that the employment action was not discriminatory on the basis of age. (Da16).

The trial court noted the qualifying criteria included passing the Bar Smarts and Cicerone exams, a measurement of height-to-weight ratio (referred to by the trial court as BMI), bull riding safety training, choreographed dance training, working flair training, and the requirement that bartenders serve as social media public relations ambassadors. (Da17).

The three plaintiffs in the first group passed the bartending tests "and admitted their age had no impact on their ability to take and pass the tests." The "only qualification at issue for these [three] plaintiffs is the BMI testing," as those three plaintiffs failed the height to weight ratio requirement. (Da17).

[3] The trial court's written opinions for the first group of plaintiffs, DiMeglio, Ireland, and Huntbach, use identical language in dismissing Plaintiffs' claims for disparate impact. Defendants have included the three orders and opinions from the first group, but will cite to the language in the opinion dismissing DiMeglio's claims, which is representative of the opinions relating to the first group.

However, the court noted that only six plaintiffs out of the original 37 plaintiffs named in the Complaint were weighed by Bally's nurse. Of those six plaintiffs, three plaintiffs passed the height to weight ratio requirement, and only three failed the weight ratio requirement. Stated otherwise, only three plaintiffs out of 37 plaintiffs did not pass the height to weight ratio requirement. As such, the trial court determined that only those three plaintiffs "were adversely impacted by this test." (Da17).

The trial court further opined that "[n]one of the Plaintiffs [in the first group] were disqualified to work at the Saloon for failing" the other qualifying criteria, such as the bull riding training, choreography training, working flair training, or social media skills. Although the three plaintiffs in the first group claimed "that the 'cumulative effect' of the qualifying criterial had a disparate impact upon them, they present no evidence supporting this claim." (Da17). The trial court concluded that this "small subset of [three] plaintiffs" who failed the height to weight ratio requirement "does not represent a big enough group to claim there was a disparate impact" in the required qualifications to work at the Boardwalk Saloon. (Da17).

The trial court concluded that, as to the three plaintiffs in the first group, "summary judgment is granted as to any disparate impact claim." (Da17).

None of the plaintiffs in the first summary judgment group appealed. During the summary judgment hearing for the second group, including Plaintiffs Banek,

Montalvo, Viering, and Viereck, the trial court stated that the remaining Plaintiffs similarly had no disparate impact claims. During the hearing for the second group on July 14, 2023, counsel for Bally's specifically asked whether one of the non-appealing plaintiffs in that group, Frederick Renzulli, whose motion was the first to be addressed by the trial court on July 14, had a disparate treatment claim. Counsel for Bally's reminded the trial court that it had denied the first group's disparate impact claims, and questioned whether Renzulli's disparate impact claims must be addressed. (1T25-11 to 16). The trial court responded that Renzulli "doesn't have a disparate impact claim." (1T25-17 to 18). The next non-appealing plaintiff, Mary Romano, similarly "does not have a disparate impact claim." (1T37-25 to 38-1). As such, the trial court agreed that the disparate impact claims would not need to be specifically addressed in the remaining orders. (1T25-15 to 16).

The trial court adopted its prior determination set forth in the court's written opinions dated June 30, 2023 (Da16 to Da17) and dismissed Plaintiffs' disparate impact claims.

B. Disparate Treatment and Aiding/Abetting Claims

Plaintiffs in the instant appeal claim that Bally's violated the LAD by failing to place them as bartender entertainers at the Boardwalk Saloon allegedly based on Plaintiffs' age, and that Mr. Giunta and Ms. Edley aided and abetted this purported age discrimination. The trial court dismissed Plaintiffs' claims and dismissed the

Complaint with prejudice as to all counts in the Complaint. The trial court assessed each Plaintiff's facts separately and determined that the record evidence did not support a claim for disparate treatment under the LAD, or for aiding/abetting discrimination.

Lydia Banek

Plaintiff-Appellant Lydia Banek became a bartender at Bally's in or around 1996 or 1997. (Pa386). In 2015, her seniority position was 19. (Pa874).

Banek testified that she took and passed the Bar Smarts exam. (Pa389). However, Bally's records indicate that Banek failed the Bar Smarts exam. (Pa389). Banek also claims she passed the Cicerone test. (Pa391).

The trial court noted that Banek "did not sign up to bid into the bar because she already knew the criteria for weight; she wouldn't pass." (1T61-17 to 19).

Although Banek testified that she thought she signed the interest sheet, she did not hear back about safety training for the mechanical bull. (Pa391). She testified that there was nothing about her age that would have prevented her from participating in the bull riding safety program. (Pa392).

Banek never participated in choreography training, although she admitted that nothing about her age would have prevented her from participating in that training. (Pa392). Banek also did not participate in flair training, but testified that she wanted to try flair bartending although her hand-eye coordination may be impacted by her

age. She also admitted that she should not assume that she would be unable to complete flair training as she had not actually attended any flair training. (Pa392).

Banek testified that she was willing to wear the assigned costume. She also testified that nothing about her age prevented her from serving food. (Pa392 to Pa393). Banek stated that, with training, anyone could learn to post on social media. (Pa393).

The trial court determined that Banek "did not continue with the process" to qualify for the position, and that she voluntarily withdrew because she did not belived she would satisfy the height to weight ratio. (1T62-13 to 22). As such, because Banek did not proceed with further action to qualify for the position, summary judgement was warrented in Defendants' favor for disparate treatment and for aiding and abetting. (Pa59).

Roger Montalvo

Plaintiff-Appellant Roger Montalvo began working as a bartender in around 1991. In 2015, his seniority number was 13. (Pa874; Pa379; 1T73-1 to 2).

Montalvo took and passed the Bar Smarts exam, and conceded that nothing about his age would have prevented him from passing the Bar Smarts exam. (Pa376). Montalvo also took and passed the Cicerone exam, and also conceded that his age would not have prevented him from passing. (Pa376 to Pa377).

However, Montalvo failed to satisfy the remaining criteria for employment at the Boardwalk Saloon. He chose not to take the mechanical bull safety training because he had previous neck surgery. He testified that his age did not prevent him from taking the mechanical bull safety training course, but it was instead his prior neck injury. (Pa377, Pa379, Pa380). He never asked if he could be excused from the bull riding safety course. (Pa379).

Montalvo admitted that nothing about his age would have prevented him from participating in choreography training, working flair, or serving food. (Pa378). Further, nothing about his age would have prevented him from being a social media ambassador (Pa378) or maintaining his weight proportionate to his height (Pa378).

Montalvo testified that neithter Ms. Edley nor Mr. Giunta ever said anything inappropriate to him about his age. (Da63, Da64).[4]

The trial court found that Montalvo chose to withdraw from applying for the position at Boardwalk Saloon because of his neck injury, not because of his age. The court found that there was "no adverse employment action" because Montalvo "failed to apply for the job." (1T74-6 to 9). Bally's did nothing to disqualify Montalvo. (1T74-13).

[4] In their appellate appendix, Plaintiffs omitted portions of certain Plaintiffs' depositions that were submitted to the trial court as part of Defendants' summary judgment motions. The omitted pages from the depositions are included in Defendants' appendix.

The court granted Defendants' summary judgment motion as to Montalvo for the LAD claims for disparate treatment. (1T74-20 to 21). As there was no discrimination, the trial court granted Defendants' summary judgment motion as to aiding and abetting. (Pa29 to Pa30).

Frank Viering

Plaintiff-Appellant Frank Viering ("Viering") had been working at Bally's since 1979. (1T75-9). In 2015, Viering's seniority list number was 2. (Pa874).

Viering took and passed the Bar Smarts exam (Pa225) and the Cicerone exam (Pa225). However, Viering took the Cicerone exam approximately two years after the Boardwalk Saloon opened. (Pa226).

Viering admitted that he had no interest in working at the Boardwalk Saloon because he believed he would be required to lose 20 pounds, as he was approximately 6'2" tall and weighed 220 pounds. (Pa228).

However, Viering did not complete the bull riding safety training, not because of his age, but rather because he admitted he had a back problem for the 40-year duration of his employment at Bally's. (Pa226 to Pa227).

Viering further admitted that his age did not prevent him from engaging in choreography training (Pa227), flair bartending (Pa227), wearing the assigned costume (Pa228), or serving as a social media ambassador (Pa228).

In fact, Viering stated that even if he met all of the criteria to work at Boardwalk Saloon in 2016, he still would not have bid or would have been interested in working there due to the fact that it was a new concept and might have been "a dud." (Da67 to Da68).

Viering admitted that he never heard either Ms. Edley or Mr. Giunta say anything inappropriate about Viering's age. Viering testified that the only "evidence" of age discrimination is his own personal experience, without identifying anything specific. (Da69 to Da70).

The trial court found that Viering effectively failed to apply for the position at the Boardwalk Saloon. The trial court cited Viering's testimony that he "never tried to bid on working at the Boardwalk Saloon" because he knew that he "would have to lose 20 pounds." (1T80-15 to 18). He never asked Bally's for reasonable accommodations, or whether he could be exempt from the bull riding safety training because of his back. (1T80-19 to 24). Viering admitted that he could not ride the mechanical bull because of his back, not because of his age. (1T80-22 to 25). Moreover, the trial court found it significant that Viering testified that he did not want to bid on the Boardwalk Saloon and then discover that he did not like it "and be stuck for ten months." (1T81-7 to 9). He also testified that his wife had been involved in an accident at the same time the Boardwalk Saloon was opening and

Viering attributed her health as yet another reason why he was not interested in placing a bid at a new venue. (1T81-9 to 14).

The trial court concluded that Viering had not established a *prima facie* claim for age discrimination as he did not bid for the position, and Viering believed his back, not his age, prevented him from qualifying for the position. Viering "was not rejected by Bally's. And he wasn't rejected by Bally's because he didn't apply." (1T83-3 to 11). The trial court granted summary judgment in Bally's favor for disparate treatment, as well as for aiding and abetting. (Pa39 to Pa40).

Linda Viereck

Plaintiff-Appellant Linda Viereck was at all relevant times a bartender at Bally's. (Pa259). In 2015, her seniority number was 39. (Pa874).

Viereck took and passed the Bar Smarts exam. (Pa261). She also took and passed the Cicerone exam. (Pa262). However, Viereck informed Ms. Edley that she was not interested in mechanical bull riding because of a prior back injury. (Pa264). Viereck testified that her age did not prevent her from participating in mechanical bull training or choreography training. (Pa263 to Pa264). Her arthritis in her hands, however, caused her to believe she would be unable to participate in working flair training, but did not ask anyone at Bally's if she could be excused from this requirement. (Pa264). Viereck testified that nothing about her age would have

prevented her from serving food or participating as a social media ambassador. (Pa264).

Viereck would have passed the height proportional to weight requirement in 2016. (Pa264).

Viereck testivied that neither Ms. Edley nor Mr. Giunta ever said anything inappropriate to her about her age. (Pa265).

The trial court found that, while she passed the Bar Smarts and Cicerone exams, and maintained an appropriate height to weight ratio, she had back issues which prevented her from bull riding, and arthritis that prevented flair work. (1T86-8 to 12; 1T87-9 to 11). Viereck did not request accomodations for her back injury or for her arthritis. (1T86-14 to 16; 1T87-16 to 17).

The trial court found it significant that Ms. Edley specifically asked Viereck if she was going to apply to be a bartender entertainer at the Boardwalk Saloon. Viereck responded that if she would have to ride the bull, she would not bid for the position. (1T86-17 to 87-2). Viereck never put in a bid because of her back injury, which is unrelated to age. (1T88-16 to 17).

Accordingly, the trial court determined that Viereck did not establish a *prima facie* claim for disparate treatment based on age, and granted summary judgment to Defendants for disparate treatment and aiding and abedding. (Pa53 to Pa54).

John Macchiarola

Plaintiff-Appellant John Macchiarola was at all relevant times employed at Bally's as a union bartender. In 2015, his seniority number was 30. (Pa874).

Macchiarola took and passed the Bar Smarts exam. (Pa215). However, he began the Cicerone course but never completed it and did not take or pass the exam. (Pa215). Macchiarola admitted that his age did not prohibit him from taking the courses or passing the exams. (Pa215).

Macchiarola testified that neither Ms. Edley nor Mr. Giunta had ever spoken or acted in any discriminatory matter to him about his age. (Da73 to Da74).

The trial court determined that Macchiarola "willfully withdrew his application." (2T26-17 to 18). He did not complete Cicerone once he discovered there was a height to weight ratio requirement. The trial court determined there was no adverse employment action as Macchiarola did not complete the requirements for bidding. (2T26-21 to 23). The trial court granted summary judgment to Defendants for disparate treatment and for aiding and abedding. (Pa45 to Pa46).

Wendy McGaffney

Plaintiff-Appellant Wendy McGaffney worked as a bartender at Bally's. (Pa204). In 2015, her seniority number was 56. (Pa874).

McGaffney took and passed the Bar Smarts exam. (Pa206). However, McGaffney never attempted to take the Cicerone exam. (Pa206).

McGaffney testified that neither Ms. Edley nor Mr. Giunta acted in any discriminatory way towards her regarding her age. (Da77 to Da78).

The trial court found that McGaffney did not complete the Cicerone exam and thus was not qualified to bid, and therefore there was no adverse employment action. (2T29-23 to 30-6). The trial court granted summary judgment to Defendants for disparate treatment and for aiding and abetting. (Pa37 to Pa38).

Jeronimo Reyes

Plaintiff-Appellant Jeronimo Reyes had been employed as a bartender at Ballys for approximately 13 years. (Pa328). In 2015, his seniority number was 55 (Pa874), and in 2020, his seniority number was 35. (Pa332).

Reyes signed the interest sheet for the Boardwalk Saloon. (Pa332). He never heard anything about the position at the Boardwalk Saloon thereafter and did not follow up with inquiries about the position. (Pa332). His understanding was that bartenders at the Boardwalk Saloon would be required to dance, juggle bottles, and operate the mechanical bull, yet Reyes was uncertain he could perform the required job description so he did not follow up. (Pa332).

Reyes testified that he believed he would pass the height to weight ratio requirement for the position. (Pa334).

At his deposition, Reyes testified that neither Ms. Edley nor Mr. Giunta made any references to his age. (Pa332 to Pa333).

The trial court determined that Reyes never bid to work at the Boardwalk Saloon, according to his own testimony. (2T38-4 to 6). Reyes testified that he had issues with his feet that would prohibit the choreography, so he "let it go" after signing the interest sheet and did not bid. (2T38-4 to 18).

The trial court granted summary judgment to Defendants for disparate treatment and for aiding and abetting. (Pa47 to Pa48).

Donald Divincenzo

Plaintiff-Appellant Donald Divincenzo worked for Bally's as a bartender from 2007 to the time of his layoff in March 2020, and voluntariliy retired in April 2021. (Pa400). In 2015, Divincenzo's seniority number was 33. (Pa874).

Prior to the opening of Boardwalk Saloon, Plaintiff was occasionally laid off because he did not have enough seniority to bid on any positions. (Pa404).

Divincenzo testified that he was aware of the requirements to bid for a position at Boardwalk Saloon, and knew that satisfiying the requirements would allow him to bid on the position. (Pa402). Although Divincenzo would have liked to work at Boardwalk Saloon, he did not register for the required courses or enroll in any required training programs. (Da80). As a result, he never took the required tests, let alone pass any of them. (Pa401).

He believed that he would not meet the criteria for bull riding. He also was unsure if he would meet the weight requirement as he had not asked his health care providers whether his weight fell within a healthy range. (Pa403).

During his deposition, Divincenzo did not recall any comments or remarks by any supervisor or manager at Bally's referring to his age. (Da81).

The trial court found that Divincenzo failed to take the required exams, and therefore took no steps to bid for the Boardwalk Saloon. (2T49-3 to 11). The trial court granted summary judgment to Defendants as to Divincenzo's disparate treatment claim and aiding and abetting claims. (Pa55 to Pa56).

James Curry

Plaintiff-Appellant James Curry had been employed as a bartender at Bally's at a lobby bar since 1981. (Pa407). In 2015, he was number 4 on the seniority list. (Pa874).

Curry started the Bar Smarts course, but never completed the course work, and never took the exam. (Pa408). He admitted that there was nothing about his age that would have prevented him from pasing Bar Smarts. (Pa408).

He admitted that nothing about his age would have prevented him from participating in general training programs at Bally's. (Da84). Curry conceeded that Ms. Edley never said anything to him regarding his age, and that Mr. Giunta never

said anything to Curry which Curry felt was inappropriate and he had no facts or evidence to support any of his claims against Giunta. (Da85 to Da86).

Curry testified that there was no evidence that either Mr. Giunta or Ms. Edley discriminated against him other than establishing criteria to work in the Boardwalk Saloon. (Da85 to Da86).

The trial court found that Curry's failure to follow through on the Bar Smarts course resulted in an abandonment of a bid for a position at the Boardwalk Saloon, warranting summary judgment in Defendants' favor for disparate impact claims and for aiding and abedding claims. (2T50-16 to 25; Pa41-42).

Kim Haldeman

Plaintiff-Appellant Kim Haldeman had been employed as a bartender at Bally's since 2007. (Da88 to Da89). In 2015, Haldeman's seniority number was 58 (Pa874), and in 2016, it was 47. (Pa418).

Between 2015 and 2018, Haldeman was working as an on-call bartender because she did not have enough seniority to bid on any other positions except during the busy summer season. (Da90).

Haldeman began the Bar Smarts exam in 2014 but chose not to complete the course at that time. (Pa415). She did not attempt to retake Bar Smarts after the announcement for the Boardwalk Saloon. (Pa415). Haldeman admitted that there was nothing about her age that would have prevented her from taking the Bar Smarts

course or passing the exam. (Pa413). She also admitted that she was unqualified to work at the Boardwalk Saloon because she did not pass the Bar Smarts exam. (Da90). Similarly, Haldeman did not take or pass the Cicerone exam. (Pa416).

Haldeman testified that neither Ms. Edley nor Mr. Giunta had ever acted in a discriminatory manner due to age. (Pa417).

The trial court determined that Haldeman "did not take primary steps to apply to bid into the Saloon." (2T53-25 to 54-1). She did not sign the interest form, and "abandoned" her efforts to pass Bar Smarts. (2T54-2 to 9). No adverse employment action was taken that prohibited her from working at the Boardwalk Saloon. (2T54-10 to 11). Accordingly, the trial court granted summary judgment to Defendants as to her claims for disparate treatment and for aiding and abetting. (Pa43 to Pa44).

Michael Smith

Plaintiff-Appellant Michael Smith worked at Bally's since Bally's purchased Claridge. (Pa279). In 2015, Smith's seniority number was 45 (Pa874), and in 2021, his seniority number was 26 or 27. (Pa288).

Smith never spoke with anyone in managmeent about the Boardwalk Saloon or the criteria for bartender eligibility at the Boardwalk Saloon. (Pa283). Smith never took Bar Smarts. (Pa283). Smith admitted that he did not believe his age would prevent him from taking and passing Bar Smarts or Cicerone. (Pa285 to Pa286). He testified that he did not think he would satisfy the height to weight

requirements for a bartender at Boardwalk Saloon as he weighed 270 pounds. (Pa283 to Pa284).

The trial court determined that failure to take and pass the required exams resulted in a failure to bid at the Boardwalk Saloon, and thus there was no adverse employmetn action taken by Bally's. The trial court granted summary judgment to Defendants for Smith's claims alleging disparate treatment and for aiding and abetting. (3T7-25 to 8-19; Pa33 to Pa34).

Anthony Vetrano

Plaintiff-Appellant Anthony Vetrano had worked at Bally's as a bartender since approximately 2002. (Pa296 to Pa298). In 2015, Vetrano's seniority number was 46. (Pa874).

Vetrano never took nor passed the Bar Smarts exam. (Pa299). He admitted that there was nothing about his age which would have prevented him from suessfully passing Bar Smarts. (Pa300). Similarly, Vetrano did not take or pass Cicerone, and admitted that nothing about his age prevented him from passing Cicerone. (Pa299 to Pa300). He testified that he was unsure whether he should have taken the Bar Smart or Cicerone exams because others with higher seniority were not passing the exams. (Pa299).

Regarding weight, Vetrano admitted that nothing about his age would have prevented him from maintaining weight proportionate to his height. (Pa301).

Vetrano testified that neigher Ms. Edley nor Mr. Giunta ever acted in any way discriminatory towards him based on his age. (Da92).

The trial court determined that failure to take and pass the required exams resulted in a failure to bid at the Boardwalk Saloon, and thus there was no adverse employment action taken by Bally's. The trial court granted summary judgment to Defendants for Vetrano's claims alleging disparate treatment and for aiding and abetting. (3T10-14 to 22; Pa57 to Pa58).

William Procopio

Plaintiff-Appellant William Procopio worked at Bally's from 1995 until 2018. (Pa307 to Pa308). His seniority number in 2015 was 25. (Pa874).

Procopio testified that he never saw the memo posted by Bally's on December 24, 2015 about the Boardwalk Saloon. (Pa313 to Pa314; Da95). He did not sign the interest sheet indicating he was interested in working at the Boardwalk Saloon. (Da96).

Procopio never took Bar Smarts or Cicerone. (Pa312). He admitted that nothing about his age would have prevented him from taking and passing a test related to craft beer making beverages or making beverages. (Pa312).

While he testified that he made an attempt to speak with Ms. Edley about the Boardwalk Saloon, he admitted that he did not know when he made the attempt, where they spoke, or what was said. (Da94). Procopio never heard either Ms. Edley

nor Mr. Giunta say anyting that was discriminatory about age, although Mr. Giunta was once "rude" but he did not recall the statement made by Mr. Giunta. (Da97).

The trial court determined that failure to take and pass the required exams resulted in a failure to bid at the Boardwalk Saloon, and thus there was no adverse employment action taken by Bally's. The trial court granted summary judgment to Defendants for Procopio's claims alleging disparate treatment and for aiding and abetting. (3T11-12 to 20; Pa31 to Pa32).

Tomas Ramirez

Plaintiff-Appellant Tomas Ramirez worked at Bally's as a bartender in 1997 until he left Bally's in 2017, and had been working at a service bar for his last 3 years at Bally's. (Pa320). In 2015, his seniority number was 22. (Pa874).

Ramirez never took the Bar Smarts course. (Pa322). Ramirez also did not take the Cicerone course. (Pa322). Ramirez admitted that he did not pass either Bar Smarts or Cicerone. He admitted that there was nothing about his age that prevented him from taking and passing either Bar Smarts or Cicerone. (Pa323).

During his deposition, Ramirez testified that he had back problems that may have impacted his ability to participate in mechanical bull riding safety training, but never questioned anyone at the union or any of his supervisors as to what the training entailed. (Pa323).

Neither Ms. Edley nor Mr. Giunta ever said anything to Ramirez that were inappropriate or discriminatory regarding age. (Pa105; Da100 to Da101).

The trial court determined that failure to take and pass the required exams resulted in a failure to bid at the Boardwalk Saloon, and thus there was no adverse employment action taken by Bally's. The trial court granted summary judgment to Defendants for Ramirez's claims alleging disparate treatment and for aiding and abetting. (3T12-15 to 21; Pa25 to Pa26).

Sharon Mulhern

Plaintiff-Appellant Sharon Mulhern has worked as a bartender for Bally's since 2002. (Pa349, Pa355). In 2015, her seniority number was 32. (Pa874).

Mulhern testified that she had no concerns about her ability to take or pass a test relating to craft beer or making beverages. (Pa354). However, she did not take the Cicerone test. (Pa356).

Mulhern did not sign the sheet indicating her interest in working at the Boardwalk Saloon. (Pa350). She testified that she never brought her concerns about the weight requirement to the attention of any supervisor or manager at Bally's, and she never computed her own BMI. (Pa352).

She testified that, on one occasion, Ms. Edley indicated that Mulhern was woking slowly, and Mulhern interpreted that comment as one regarding Mulhern's

age. (Pa353). However, Mulhern did not testify that neither Ms. Edley nor Mr. Giunta said anything specifically about Mulhern's age. (Pa353, Pa355).

The trial court determined that failure to take and pass the required exams resulted in a failure to bid at the Boardwalk Saloon, and thus there was no adverse employment action taken by Bally's. The trial court granted summary judgment to Defendants for Mulhern's claims alleging disparate treatment and for aiding and abetting. (3T13-17 to 25; Pa27 to Pa28).

Paul Lebron

Plaintiff-Appellant Paul Lebron was born in 1968, and had been working at Bally's from 1997 until his termination in either 2017 or 2018. (Pa362). In 2015, Lebron's seniority number was 27. (Pa874).

Lebron never took Bar Smarts, citing computer access issues with his home computer. (Da103). Likewise, Lebron never took Cicerone. (Da103). He admitted that his age did not prevent him from taking or passing either exam. (Da103). Lebron admitted that failure to take both classes prevented him from satisfying those criteria required to be placed as a bartender entertainer at the Boardwalk Saloon. (Pa364). Lebron further admitted that he did not attempt to satisfy the remaining criteria to work at the Boardwalk Saloon as he did not take either Bar Smarts or Cicerone. (Pa364). However, he testified that he was active on Facebook and

Instagram and could have learned how to post as a social media ambassador. (Pa363).

He testified that he could not recall any instance where Ms. Edly acted in a discriminatory matter towards him because of his age, and that Mr. Giunta never said anything discriminatory to Lebron about his age. (Da104).

The trial court determined that failure to take and pass the required exams resulted in a failure to bid at the Boardwalk Saloon, and thus there was no adverse employment action taken by Bally's. The trial court granted summary judgment to Defendants for Lebron's claims alleging disparate treatment and for aiding and abetting. (3T14-3 to 19; Pa35 to Pa36).

Eddison Giraldo

Plaintiff-Appellant Eddison Giraldo had been working at Bally's as a bartender for approximately 7 years at the time of his 2020 deposition. (Pa423-424). In 2015, Giraldo's seniority number was 65. (Pa874).

For the duration of his employment at Bally's, Giraldo worked as an on-call bartender. (Da106). He was unsure if he ever took or passed the Bar Smarts exam. (Pa426 to Pa427). Giraldo never took the Cicerone course. (Pa427). As such, Giraldo admitted that he did not satisfy the requirements for a position at the Boardwalk Saloon. (Pa427). He conceded that there was nothing about his age that

would prevent him from taking and passing Bar Smarts or Cicerone. (Pa427 to Pa428).

Giraldo testified that neither Ms. Edley nor Mr. Guinto ever acted in a discriminatory manner toward him because of age. (Da107).

The trial court determined that failure to take and pass the required exams resulted in a failure to bid at the Boardwalk Saloon, and thus there was no adverse employment action taken by Bally's. The trial court granted summary judgment to Defendants for Giraldo's claims alleging disparate treatment and for aiding and abetting. (3T15-0 tp 16; Pa51 to Pa52).

Jay Berkin

Plaintiff-Appellant Jay Berkin had been working as a bartender for Bally's since 2002, and, as of the date of his deposition in the instant matter, remained employed at Bally's. (Pa433 to Pa434). In 2015, Berkin's seniority number was 38. (Pa874).

Berkin never took the Bar Smarts or Cicerone exams. (Pa435 to Pa436). He testified that there was nothing about his age that would have prevented him from taking and passing either Bar Smarts or Cicerone. (Pa436). Similarly, although Berkin testified that his age would not have prevented him from participating in choreography training, Berkin did not participate in the training. (Pa436). Nor was there anything about his age that would have prevented him from flair training, but

did not do so. (Pa436). Berkin admitted that nothing about his age would prevent him from wearing the uniform required for Boardwalk Saloon, serving food while bartending, or serving as a social media ambassador. (Pa436 to Pa437).

Berkin testified that neither Ms. Edley nor Mr. Giunta ever said anything inappropriate to him about his age, nor had she ever engaged in conduct that was discriminating against him because of his age. (Da109 to Da110).

The trial court determined that failure to take and pass the required exams resulted in a failure to bid at the Boardwalk Saloon, and thus there was no adverse employment action taken by Bally's. The trial court granted summary judgment to Defendants for Berkin's claims alleging disparate treatment and for aiding and abetting. (3T16-5 tp 13; Pa49 to Pa50).

LEGAL ARGUMENT

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment or order as a matter of law." R. 4:46-2(c). The Appellate Division uses the same standard as the trial court to evaluate a summary judgment appeal. Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016).

When deciding a motion for summary judgment, the court should consider "whether the competent evidential materials presented, when viewed in the light

most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). The "mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Id. (citation omitted). "[W]hen the evidence 'is so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." Mandel v. UBS/PaineWebber, Inc., 373 N.J. Super. 55, 71 (App. Div. 2004), certif. denied, 183 N.J. 213 (2004) (quoting Brill, supra, 142 N.J. at 540).

A court must decide a motion for summary judgment based only upon the "factual assertions...that were...properly included in the motion[s] [for] and [in opposition to...summary judgment" pursuant to Rule 4:46-2. Kenney v. Meadowview Nursing & Convalescent Ctr., 308 N.J. Super. 565, 573 (App. Div. 1998). When a "record is barren of any evidence...other than [Plaintiff's] own self-serving assertion," it is "clearly insufficient to create a question of material fact" necessary to defeat a motion for summary judgment. Martin v. Rutgers Cas. Ins. Co., 346 N.J. Super. 320, 323 (App. Div. 2002) (emphasis added). See also Purder v. Buechel, 183 N.J. 428, 440-41 (2005).

POINT I
THE TRIAL COURT PROPERLY DISMISSED PLAINTIFFS' DISPARATE TREATMENT CLAIMS

Plaintiffs allege disparate treatment, yet the record lacks evidence to support a *prima facie* claim as Plaintiffs were not qualified to bid for bartender entertainer at the Boardwalk Saloon.

In Gerety v. Atl. City Hilton Casino Resort, 184 N.J. 391 (2005), the Court recognized that there are two theories of workplace discrimination: disparate treatment and disparate impact. Disparate treatment is "the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere facts of differences in treatment." Id. at 398 (citing Peper v. Princeton Univ. Bd. Of Trustees, 77 N.J. 55, 81-82 (1978). Proof of disparate treatment follows the burden shifting test set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Gerety, supra, at 399.

To prove a *prima facie* claim of discrimination for disparate treatment, the plaintiff must demonstrate that he or she (1) belongs to a protected class; (2) applied for or held a position for which he or she was objectively qualified; (3) was not hired or was terminated from that position; and (4) the employer sought to, or did fill the position with a similarly-qualified person. Andersen v. Exxon Co., 89 N.J. 483, 492

(1982). The burden then shifts to the employer to prove a legitimate, non-discriminatory reason for the employment action. Id. at 493. Plaintiff can then respond by showing the employer's proffered reason was merely pretext for discrimination. Ibid.

In the instant matter, Plaintiffs lack evidence demonstrating that they were objectively qualified for a position as a bartender entertainer at the Boardwalk Saloon. In order to further the concept for the new bar, Bally's required that the employees take and pass the Bar Smarts and Cicerone exams. Additional criteria, which were aligned with Bally's vision for the bar, included mechanical bull safety training to safely operate the on-site mechanical bull; choreography training so the bartenders could not only serve food and beverages but also entertain patrons; flair training so that the bartender entertainers would create a memorable experience for customers; and maintaining a healthy weight proportional to height in order to remain capable of the physical demands of the position.

Ms. Edley testified that the bartender entertainers furthered the concept for the Boardwalk Saloon. Passing the Bar Smarts and Cicerone exams were required because the drinks that would be served at the Boardwalk Saloon were "a bit more involved" and the beer list was much more "extensive." (Pa101). Mechanical bull safety training was required because "the staff needed to understand how to ride the bull safely and…be able to determine if there was a safety issue prior to getting onto

the mechanical bull." (Pa103). Choreography training was required so that the bartenders at the Boardwalk Saloon would have "a good time" with the customers, "dancing behind the bar, and really just going with the music that was provided." (Pa103 to 104). Flair training was about "showmanship." (Pa104). Ms. Edley testified that the purpose for maintaining weight proportionate to height was to ensure the bartender entertainers were "physically fit to complete the duties that were assigned." (Pa105). The ultimate purpose of the Boardwalk Saloon, and the requirements for the bartender entertainers, was to build a new customer base and create a memorable experience. (Pa104).

All of the Plaintiffs in the instant appeal failed to satisfy the criteria to qualify for the position of bartender entertainer at the Boardwalk Saloon. The second group of Plaintiffs whose summary judgment motions were heard on July 14, 2023 (including Banek, Montalvo, Viering, and Viereck) all passed at least one of the two required exams. However, they failed to satisfy the other criteria. They did not attend mechanical bull training, choreography, or flair training, and did not see the Bally's nurse to check their height and weight.

For example, Banek never participated in the bull training, even though there was nothing about her age that would have prevented her from doing so. (Pa391). She did not participate in choreography or flair training. (Pa392). Montalvo never took the mechanical bull training because of his prior neck injury (Pa375, 379-380),

and never took choreography or flair training. (Pa378). Viering similarly did not take bull training because of his back, and did not complete the other training in choreography or flair. (Pa226-227). Viering additionally testified that he would not have placed a bid at the Boardwalk Saloon because it was a new concept and might be "a dud." (Da67 to Da68). Viereck also had a bad back and did not participate in bull training. She believed her arthritis would prevent her from flair work. She did not participate in choreography training. (Pa228). Without evidence that they were otherwise qualified to perform the job requirements, Plaintiffs in the second group cannot demonstrate that they were objectively qualified for the position.

The remaining Plaintiffs in the third and fourth groups, including Macchiarola, McGaffney, Reys, Divincenzo, Curry, Haldeman, M. Smith, Vetrano, Procopio, Ramirez, Mulhern, Lebron, Giraldo, and Berkin, were equally as unqualified for a position as bartender entertainer. Of these two groups of Plaintiffs, only Macchiarola and McGaffney took Bar Smarts (Pa215, Pa206). All of these Plaintiff did not satisfy any of the other criteria, including passing the Cicerone exam, participating in training for mechanical bull safety, choreography, and flair work. None of these Plaintiffs measured their height and weight with the nurse at Bally's.

None of the 18 Plaintiffs can demonstrate they were qualified for a position as bartender entertainer, and cannot satisfy the second prong of their *prima facie*

claim for disparate treatment which requires Plaintiffs to show that they applied for a position for which they were objectively qualified. Andersen v. Exxon Co., supra, 89 N.J. at 492. As such, the trial court properly determined that Plaintiffs abandoned their bid for a position as bartender entertainer at Boardwalk Saloon, and as such there is no evidence to prove they qualified for the position.

Additionally, Bally's opened only 10 positions for bartender entertainer at the Boardwalk Saloon. Bally's could only employ 10 of the qualified bartenders who satisfied the criteria for bartender entertainers at Boardwalk Saloon, based on seniority. (Pa98). Qualified bartenders with greater seniority (a lower seniority number) successfully bid for the limited positions. Plaintiffs in the instant appeal, with the exception of Viering and Curry, who were in the top ten in seniority, and Montalvo and Banek, who were in the top twenty, were much too low on the seniority list to be successful in their bid. Stated otherwise, even if Plaintiffs otherwise qualified to be a bartender entertainer, most Plaintiffs lacked seniority to secure one of the 10 positions at the Boardwalk Saloon.

Plaintiffs claim that they were prohibited from bidding for the position of bartender entertainer at the Boardwalk Saloon. (Pb49). Yet Plaintiffs do not dispute that they did not qualify for the bartender entertainer position. For example, although Banek claims she passed both exams despite evidence to the contrary, Banek admitted she "was not a good candidate for working flair training" and

testified that she never participated in flair work training. (Pb50; Pa392). There is no evidence that Banek satisfied the criteria for a bartender entertainer. As a result, there is no evidence that she was objectively qualified for the position.

Similarly, Plaintiffs cannot prove that Montalvo was objectively qualified, as he testified that a neck injury, not age, prevented him from riding the mechanical bull and performing choreography. (Pa377, Pa379, Pa380). Montalvo did not train for mechanical bull riding, and did not ask for any exceptions from that requirement. (Pa379). Montalvo admitted that his age did not prohibit him from participating in mechanical bull training, choreography training, or flair training, or any of the other requirements, including weight. (Pa378-379).

The other Plaintiffs similarly testified that they failed to complete the training required for a position as a bartender entertainer. By their own admissions, Plaintiffs were not qualified to bid for a position at the Boardwalk Saloon.

Plaintiffs instead stress that the criteria for bartender entertainer were discriminatory to begin with. (Pb54). Such a claim does not satisfy any of the *prima facie* claim for disparate treatment.

Absent evidence to prove a *prima facie* claim, the trial court properly granted summary judgment to Defendants and dismissed Plaintiffs' claims for disparate treatment based on age.

POINT II
THE TRIAL COURT PROPERLY DISMISSED PLAINTIFFS' DISPARATE IMPACT CLAIMS

Disparate impact is the other theory of workplace discrimination noted by the Gerety Court. Disparate impact "involves employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." Gerety, supra, at 398. A disparate impact claim does not require proof of the employer's discriminatory motive. Ibid. (citing Peper, supra, at 82). Instead, a disparate impact theory requires proof that "a facially neutral policy 'resulted in a significantly disproportionate or adverse impact on members of the affected class.'" Ibid. (quoting United Prop. Owners Ass'n of Belmar v. Borough of Belmar, 343 N.J. Super. 1, 47 (App. Div.) certif. denied, 170 N.J. 390 (2001). Even if a plaintiff presents a *prima facie* disparate impact claim, the burden shifts to the employer "to show that its employment action was not discriminatory on the basis of age or other proscribed considerations." Giammario v. Trenton Bd. of Educ., 203 N.J. Super. 356, 363 (App. Div.), certif. denied, 102 N.J. 336 (1985). Disparate impact claims in New Jersey are guided by proof requirements set forth in 42 U.S.C. §2000e-2(k). Ibid. (citing Esposito v. Edison, 306 N.J. Super. 280, 289-90 (1997), certif. denied, 156 N.J. 384 (1998)).

Thus, in New Jersey, following the federal proof requirements, the burden of proof in disparate impact cases requires the following:

> a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.
>
> [42 U.S.C. §2000e-2(k)(1)(A)(i).]

Plaintiffs' *prima facie* claim for disparate impact requires proof that the employment practice causes a disparate impact on a protected group. Thereafter, the burden shifts to the employer to prove that the challenged practice is job related and consistent with business necessity.

However, the federal statute does not apply to disparate impact based on age. As such, in Giammario, supra, the Appellate Division noted that some commentators argue that the disparate impact analysis should not be applied in age discrimination cases. 203 N.J. Super. at 363. Courts that have applied the disparate impact theory to age discrimination have required a stronger showing of plaintiff's *prima facie* claim, or by a more detailed analysis of the record. Kephart v. Inst. of Gas Tech., 630 F.2d 1217, 1224, 1219 (7th Cir. 1980). The reason for a heightened proof of plaintiff's *prima facie* claim is that, without discriminatory intent, discharged employees will typically be replaced with younger individuals as "older employees are constantly moving out of the labor market, while younger ones move in." Ibid.

Statistics that might otherwise help prove discriminatory intent are not significant in age discrimination cases unless the disparities in treatment are pronounced. Ibid.

Despite the skepticism noted in Giammario, supra, regarding the propriety of applying a disparate impact theory to age discrimination claims, the Appellate Division in Esposito v. Township of Edison, 306 N.J. Super. 280 (App. Div. 1997), certif. denied, 156 N.J. 384 (1998), applied the disparate impact theory to plaintiff's age discrimination claims. In Esposito, police officers claimed that the department's criteria for promotions had a disparate impact on police officers over forty years old. Id. at 281. The Appellate Division, citing the proof requirements set forth in 42 U.S.C. §2000e-2(k), determined that the record did not support a finding that the criteria for promotions, which was primarily a written examination and college credits, "was not directly related to legitimate and altogether appropriate qualifications for promotion." Id. at 290-91.

The disparate impact test applies to hiring criteria. Rosario v. Cacace, 337 N.J. Super. 578, 587 (App. Div.2001) (citing Griggs v. Duke Power Co., 401 U.S. 424 (1971)). However, "[a]n adverse effect on a single employee, or even a few employees, is not sufficient to establish disparate impact." Massarsky v. Gen. Motors Corp., 706 F.2d 111, 121 (3d Cir.), cert. denied, 464 U.S. 937 (1983).

Here, Plaintiffs rely primarily on a disparate impact theory of recovery, and argue that the impact of the criteria for the position of bartender entertainer upon

older bartenders is *per se* discrimination. The record evidence does not support their claims.

The trial court assessed Plaintiffs' disparate impact claims as applied to the three non-appealing plaintiffs in the first summary judgment group. Those three plaintiffs passed the Bar Smarts and Cicerone exams, but after being weighed by a Bally's nurse, failed the criteria that their weight be proportional to their height. (Da17).

The trial court noted that, of the 37 plaintiffs captioned in the Complaint, only six plaintiffs were measured by the Bally's nurse for height and weight. Of those six plaintiffs, only three failed to satisfy the weight proportional to height criteria. As such, the trial court concluded that only three of the 37 plaintiffs were adversely impacted by the weight requirement: "Only these 3 plaintiffs out of the entire universe of Bally's employees were adversely impacted by this [height to weight ratio] test." (Da17). The trial court concluded that this "small subset of plaintiffs" who failed to maintain weight proportional to height "does not represent a big enough group to claim there was a disparate impact" in the required qualifications to work at the Boardwalk Saloon. (Da17). The trial court decision regarding disparate impact to the first group of plaintiffs was applied to the Plaintiffs in the instant appeal. (1T25-17 to 18; 1T37-25 to 38-1; 1T25-15 to 16).

In addition, Plaintiffs failed to provide any analysis regarding any non-plaintiff employees and outside applicants who may have ultimately been employed at the Boardwalk Saloon. Such data is typically asserted to support a disparate impact claim, but is absent in the instant appeal.

The trial court correctly determined that the record does not support a claim that the criteria for the Boardwalk Saloon, including passing the required exams, maintaining a weight proportional to height, participating in mechanical bull training, choreography training, and flair training, had a significantly disproportionate or adverse impact on members of the affected class. Gerety, supra, at 399.

Plaintiffs primarily challenge the requirement to maintain weight proportional to height as disproportionally impacting Plaintiff's class. However, there is no evidence that Plaintiffs were affected by this requirement. For example, Plaintiffs in the second summary judgment group, Banek, Montalvo, Viering, and Viereck, all passed at least one of the two required exams. But Banek, whose records indicate she failed Bar Smarts (Pa389), did not proceed with the bidding process. (1T61-17 to 19). Banek did not participate in the mechanical bull training, choreography training, or flair training, and testified that age would not have affected her ability to complete that training. (Pa392). Banek's potential employment as a bartender

entertainer was impeded by her failure to complete the training, not because of her weight or her age.

Montalvo, Viering, and Viereck admitted they had physical injuries that would have prevented them from completing the requirements, wholly unrelated to age. They testified that age would not have impacted their ability to pass any of the exams or complete the bull, choreography, or flair training. (Pa378; Pa227-228; Pa263-264). Their potential employment at the Boardwalk Saloon was not affected by the weight requirement, or by their age.

The remaining Plaintiffs failed one or both bartending exams, and otherwise withdrew from the bidding process. Plaintiffs were not offered positions at the Boardwalk Saloon because they either did not satisfy, or failed to even attempt to satisfy, the criteria for employment at the Boardwalk Saloon, not because of their weight or their age.

Plaintiffs have insufficient data to support their theory that the criteria for working at the Boardwalk Saloon had a negative impact based on age. However, even if they could prove their *prima facie* claim for disparate impact, which they cannot do, Bally's had legitimate business necessity for requiring Boardwalk Saloon bartenders to pass the required exams, maintain a height to weight ratio, and participate in mechanical bull, choreography, and flair training.

Regarding the requirement that the bartender entertainers take and pass Bar Smarts and Cicerone, Ms. Edley testified that the specialty cocktails at the Boardwalk Saloon were "a bit more involved" and the beer list was much more "extensive" as it included craft beers unavailable at other bars at Bally's. (Pa101). Mechanical bull safety training was required because "the staff needed to understand how to ride the bull safely and…be able to determine if there was a safety issue prior to getting onto the mechanical bull." (Pa103). Choreography training was required so that the bartenders at the Boardwalk Saloon would have "a good time" with the customers, "dancing behind the bar, and really just going with the music that was provided." (Pa103 to 104). Flair training was about "showmanship" such as "throwing a tin in the air," "throwing a napkin across a bar top so that it kind of skips like a rock," "pull the bottle up, let it go, and you catch it." (Pa104). The ultimate purpose of the bartender entertainer was to build a new customer base and create a memorable experience. (Pa104). Regarding the requirement that bartender entertainers maintain a weight proportionate to height, Ms. Edley testified that the purpose for that criteria was to ensure the bartenders were "physically fit to complete the duties that were assigned." (Pa105). No reasonable juror would determine based on the record evidence that Bally's did not have a legitimate business reason for the criteria for working at the Boardwalk Saloon.

An employer, specifically a casino, is permitted under the LAD to require its employees to maintain a certain weight. Schiavo v. Marina Dist. Dev. Co., LLC, 442 N.J. Super. 346, 383 (App. Div. 2015), certif. denied, 224 N.J. 124 (2016) (holding "the evidence fails to present a cognizable claim of facial discrimination based on defendant's…weight policy. [The court did] not read the LAD to bar as discriminatory an employer's appearance policy requiring an associate, representing a casino business to the public, must remain fit and within a stated weight range."). Additionally, "[a]n adverse effect on a single employee, or even a few employees, is not sufficient to establish disparate impact." Massarsky, supra, 706 F.2d at 121.

Plaintiffs argue that only one criterion was particularly "ageist more so than the rest" which was the requirement that bartender entertainers maintain their weight proportional to their height. (Pb33). Indeed, Plaintiffs testified unanimously that none of the other criteria were impacted by age, such as passing the required exams, mechanical bull training, choreography training, and being a social media ambassador. Plaintiffs' disparate impact claim turns on whether Plaintiffs proffered evidence that the height-to-weight ratio requirement had a disparate impact, but the record evidence does not support their theory.

Plaintiffs rely on the report submitted by their expert Dr. Janet Schebendach. (Pb33). Dr. Schebendach opined that BMI is affected by age, as height may decrease with age. Dr. Schebendach's hypothetical individual lost two inches in stature by

age 65, which seems extraordinary. Yet if this hypothetical individual maintained the same weight between age 25 and 65, yet shrunk two inches, their BMI would dramatically increase. However, Dr. Schebendach never considered the other standard utilized by Bally's in addition to the BMI standard: Body Fat Range for Standard Adults. (Pa68; Pa636). Ms. Edley testified that the Bally's nurse tested both the height to weight ratio as well as BMI. Bartender entertainers were required to maintain weight either within the range for their height as depicted in the table for Body Fat Range for Standard Adults, or within the range for BMI as depicted in the BMI table. (Pa68; Pa105). Ms. Edley testified that the purpose for maintaining a healthy weight was so that bartenders would be "physically fit to complete the duties that were assigned." (Pa105). Yet Dr. Schebendach opined only that BMI increased with age. Dr. Schebendach failed to address the data in the Body Fat Range for Standard Adults, even though she acknowledged that Bally's utilized both tables to assess whether bartender entertainers maintained a healthy weight proportional to height. (Da60). Dr. Schebendach's opinion in her report does not support Plaintiffs' claim that the weight requirement for bartender entertainers had a discriminatory impact based on age as her opinion fails to account for Bally's use of the Body Fat Range for Standard Adults, which table does, in fact, make upward adjustments for a healthy weight with age. (Pa68).

The record evidence fails to support Plaintiffs' disparate impact theory of age discrimination. Only three of the original 37 plaintiffs were disqualified for bidding for the position of bartender entertainer because of their weight. Plaintiffs overwhelmingly testified that age had no effect on the other criteria, such as passing the exams, choreography, mechanical bull training, flair work, or being a social media ambassador. Dr. Schebendach's opinion fails to address the standards Bally's used to assess whether bartender entertainers maintained a weight proportional to height. The trial court correctly determined that the record evidence was insufficient as a matter of law to support Plaintiffs' claims that the criteria for employment as a bartender entertainer at the Boardwalk Saloon disproportionately affected older applicants. Accordingly, Judge Pallone correctly dismissed Plaintiffs' disparate impact claims as to all Plaintiffs.

POINT III
THE TRIAL COURT PROPERLY DISMISSED PLAINTIFFS' AIDING AND ABETTING CLAIMS

Plaintiffs allege individual clams for aiding and abetting against Mr. Giunta and Ms. Edley. The record lacks any evidence that either individual engaged in any discriminatory conduct towards any Plaintiff. Plaintiffs have failed to identify a single instance or conduct whether either Ms. Edley or Mr. Giunta ever said anything to them or anyone else about their age. Plaintiffs are unable to maintain an action under the NJLAD against Ms. Edley or Mr. Giunta individually.

CONCLUSION

For the reasons set forth above, Defendants Ballys, Joseph Giunta, and Cori Edley respectfully request that this court affirm the trial court's orders granting summary judgment to Defendants and dismissing Plaintiffs' Complaint.

Respectfully submitted,

COOPER LEVENSON, P.A.

By: _____

Dated: April 2, 2025

Jennifer B. Barr, Esquire
Attorneys for Defendants-Respondents, Bally's Park Place, LLC d/b/a Bally's Atlantic City, Joseph Giunta, and Cori Edley

NG-C2N3CBX6 4893-0588-7986.4 File #52333-37

AL TABEI, SANDRA TOTH; FRANK VIERING; MARY ROMANO; JAMES CURRY; CHRIS IRELAND; MARA KRAFT; ADEL SOLIMAN; ROGER MONTALVO; STEVEN MOKIENKO; RICHARD GOLDING; LYDIA BANEK; TOMAS RAMIREZ; WILLIAM PROCEOPIO; PAUL LEBRON; JOHN MACCHIAROLA; SHARON MULHERN; DONALD DIVINCENZO; SEBASTIAN DIMAEGLIO; JAY BERKIN; LINDA VIERECK; CHRIS DESALLE; MALGORZATA HUNTBACH; WILLIAM SMITH; LYUBOMIR ALEKSANDROV; JERONIMO REYES; MICHELLE MANCINI; KIM HALDEMAN; EDDISON GIRALDO; PATRICK HILLARD, MICHAEL SMITH, ANTHONY VETRANO, MICHAEL COONEY, FREDERICK RENZULLI, JO-ANN SCHWENDEMANN, WENDY MCGAFFNEY, GARY WEISMAN,

Plaintiff-Appellant,

vs.

BALLY'S PARK PLACE, LLC d/b/a BALLY'S ATLANTIC CITY; JOSEPH GIUNTA and CORI EDLEY,

Defendants-Respondents.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO.: A-002299-23

Civil Action

ON APPEAL FROM AN ORDER OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION, ATLANTIC COUNTY

Sat Below:

HON. J. Ralph A. Paolone, J.S.C.
Docket No.: ATL-L-269-18

REPLY BRIEF IN SUPPORT OF PLAINTIFF'S APPEAL OF THE LOWER COURT'S ORDER GRANTING SUMMARY JUDGEMENT

O'CONNOR, PARSONS, LANE & NOBLE, LLC
Debra D. Tedesco, Esq. (#026021997)
959 South Springfield Avenue
Springfield, New Jersey 07081
Tel. No. (908) 928-9200
dtedesco@lawnj.net
Attorneys for Plaintiff-Appellant

Gregory B Noble, Esq.
Robert A. Ballard, III, Esq.
R. Daniel Bause, Esq.
Debra D. Tedesco, Esq.
Of Counsel and on the Brief.

TABLE OF CONTENTS

PAGE

ORDERS BEING APPEALED

1. Judge J. Ralph A. Paolone's Orders Granting Summary Judgment in Favor of Defendants Bally's Park Place, LCC d/b/a Bally's Atlantic City; Joseph Giunta; and Cori Edley dated July 18, 2023; August 22, 2023; and September 13, 2023.

2. The Transcripts of Oral Arguments on Defendants' Motions for Summary Judgment have been electronically filed with the Court.

TABLE OF AUTHORITIES

Case Law **Page**

LEGAL ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGEMENT.

Throughout Defendants' Opposition Brief they argue Appellant Plaintiffs (*hereinafter* "Plaintiffs") "were not qualified to bid for bartender entertainer at the Boardwalk Saloon" and thus the Trial Court properly dismissed Plaintiffs' claims. (Defendants' Opposition Brief at 39; 44.) This argument completely fails to appreciate that Defendants' qualifications, which needed to be met in their entirety, were themselves discriminatory and had a disparate impact on Plaintiffs. Defendants' argument simply restates the Trial Court's flawed analysis of Plaintiffs' claims. It was impossible for Plaintiffs to ever be qualified under a set of requirements that were specifically designed to prevent older employees from working at the Boardwalk Saloon.

These qualifications had the effect of outright precluding and/or discouraging the class of older Plaintiffs from working at the Boardwalk Saloon. As a reminder, it is undisputed that all Plaintiffs satisfied prongs (1), (3) and (4) of their *prima facie* case as they were in a protected class (age); they were not hired/allowed to bid into the Boardwalk Saloon; and Defendants sought others, not in the protected class, to bid into such shifts. Accordingly, the central issue on appeal is prong (2) whether Plaintiffs were qualified for the position to which they applied. The Trial Court wrongly held that the Plaintiffs were not qualified for the

work they applied to and/or that they "voluntarily withdrew" from the position. Respectfully, this fails to understand that in order to be "qualified" Plaintiffs had to pass each and every ageist qualification. It is no surprise that Plaintiffs did not pass all these requirements—which were specifically tailored for the purpose of keeping older employees out of the Boardwalk Saloon.

While these qualifications may appear neutral on their face, they fell much more harshly on Plaintiffs and acted as a total barrier to entry for the boardwalk entertainer position. The Trial Court failed to conduct the burden shifting analysis of Plaintiffs' claims, as required under the law. Instead, the Trial Court Judge substituted his own opinions about age discrimination law and the evidence in this case for those of the trier of fact. Our courts have determined that this failure constitutes reversible error countless times. It remains that Defendants' qualifications were ageist, totally lacked any legitimate business purpose, and adversely impacted Plaintiffs' ability to earn. Accordingly, Defendants are subject to liability and the Trial Court's granting of summary judgment in favor of Defendants must be reversed at this time.

A. Disparate Impact and Disparate Treatment.

Under the law, the analysis of a disparate impact claim generally applies a less stringent standard than a claim of disparate treatment. The New Jersey

Supreme Court has made it abundantly clear that "there is no single *prima facie* case that applies to all discrimination claims" and that the "elements of a claim vary depending upon the particular employment discrimination claim being made." Victor v. State, 203 N.J. 383, 409-10 (2010). Therefore, while the elements of a *prima facie* case may vary, the fundamental requirement is to provide some evidence that creates a question of fact as to whether the "plaintiff endure[d] an adverse employment consequence as a result of the discriminatory act." Id.

Generally speaking, a claim of disparate treatment under the LAD is viewed through a burden shifting analysis. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). As for the *prima facie* case involving a pseudo "failure to hire" claim a plaintiff must merely establish" (1) that plaintiff is a member of a protected class; (2) that plaintiff was qualified for the work which he or she applied; (3) that plaintiff was not hired; (4) that the employer sought/hired others with the same or less qualifications and/or hired someone outside of the protected class. Anderson v. Exxon Co., 89 N.J. 483, 492 (1982).

The qualifications that Defendants created for employees to bid into boardwalk entertainer at the Boardwalk Saloon were discriminatory and adversely impacted Plaintiffs because they precluded them from working at the Boardwalk Saloon and thus diminished their earnings/potential to earn. The qualifications consisted of:

- Passing of the Bar Smarts and Cicerone modules/tests (with two (2) attempts allowed in a six (6) month period)
- Bull Riding Safety Training
- Choreography Training
- Working Flair Training
- Wearing assigned costume(s)
- Maintenance of weight proportionate to height
- Food service from assigned outlets
- Service as a Social Media/PR Ambassador (i.e. Facebook, Twitter, etc.)

(Pa1, 100, 452-456.)

First, and clearly establishing that the qualifications were discriminatory and meant to target older employees, these qualifications completely lacked any legitimate business necessity. While Defendants would have this court believe that "[n]o reasonable juror would determine… that Bally's did not have a legitimate business reason for the [qualifications]," the record indicates the exact opposite. (Defendants' Opposition Brief at 51.) Indeed, most, if not all the qualifications completely lacked any business necessity. Without Defendants articulating a true business necessity it is perfectly logical that a reasonable juror would determine

that Bally's had no legitimate reason for the qualifications. Moreover, Plaintiffs want to remind the Court that Defendants admitted to creating a "critical path document" for the "roadmap" of the Boardwalk Saloon… yet, for whatever reason, Defendants no longer possess this document. (Pa1, 95-96, 452, 456.) The failure by Defendants to provide this crucial piece of evidence, which explains the specific reasons why the subject qualifications were created, greatly lends to the argument that the qualifications were manifested for an improper purpose.

As to the requirement of passing Bar Smarts and Cicerone, Defendants allowed younger bartenders leniency in passing or even taking the tests (they could bid in without the tests); gave older bartenders the "runaround" regarding the exams (and did not let them bid in unless the passed both tests and all the other qualifications); and did not provide sufficient study materials to facilitate their passage. (Pa101, 102, 181, 225, 235, 245, 262, 269, 273, 274, 312, 314, 332, 337, 341, 338-340, 368-370, 376, 408, 409, 420, 429, 441, 448, 449.) This leads to the conclusion that these tests were not at all a business necessity, but rather formulated for the sole purpose of precluding older bartenders from bidding in. Defendants even admit in their Opposition that the alleged "specialty cocktails" (which they allege required the passing of these tests in order to serve) at the Boardwalk Saloon were only "a bit more involved" than the drinks at the other bar locations. (Defendants' Opposition Brief at 9; 40; 51.)

Next, the weight proportionate to height requirement was not even monitored, allowing certain employees to slip through the cracks while Plaintiffs and others were denied; manager John Dougherty indicated that a person's weight proportionate to height in no way had any effect on their ability to bartend; and this alleged "necessary" qualification was discontinued in or about 2022, highlighting its utter lack of necessity from the start. (Pa106, 173, 186, 187, 190, 239, 242, 248, 289, 290, 382, 383, 443.) This qualification was the most discriminatory and clearly had an adverse impact on Plaintiffs.[1]

Next, regarding the bull riding safety training, management themselves indicated that this requirement was completely unnecessary given that bartenders did not have any role in operating the bull whatsoever. (Pa113, 189, 190, 198, 443.) The Food and Beverage Director himself even stated he had no idea "how or why" a bartender would ever require this type of training. (Pa196-198.) This demonstrates that the sole purpose of this qualification was to prevent the older class of Plaintiffs (who, because of their age, struggled to ride a mechanical bull) from bidding in.

Next, regarding the flair training/choreography training, management indicated that this qualification was completely unnecessary considering that they

[1] This is discussed at length in Plaintiffs' Moving Brief. See report of Dr. Janet Schebendach, PhD, RDN. This report explains how difficult is it to maintain weight proportionate to height as one ages.

never witnessed bartenders at the Boardwalk Saloon engaged in working flair and/or choreographed dance while they worked their shifts. (Pa186, 187, 196, 197, 103, 104, 189, 192, 199, 442, 443.) Again, this indicates that the sole purpose of this qualification was to prevent older bartenders (who were not able to engage in advanced dancing and movements) from bidding in.

Finally, regarding the requirement of social media ambassadors, despite Defendants labeling this a business necessity, bartenders at the Boardwalk Saloon were not actually required to post anything and same was not even monitored by management—highlighting its utter lack of business necessity and its targeting of the older, less tech-savvy, Plaintiffs. (Pa106, 107, 190, 199.)

Considering the foregoing, a reasonable juror would certainly be able to find that Bally's completely lacked a business justification for imposing the Boardwalk Saloon qualifications. There are sufficient material facts at issue here. Defendants cannot hide behind an alleged business necessity when the record so clearly demonstrates the utter lack of same.

As explained above, a quick look over the qualifications coupled with the vagueness surrounding their creation makes it clear that they were formulated by Defendants to get younger bartenders into the new Boardwalk Saloon—and to keep older ones out. Defendants' discriminatory efforts were a resounding success.

These discriminatory qualifications led to a clear and significant adverse impact on Plaintiffs. They were unable to bid into the Boardwalk Saloon and accordingly lost out on the lucrative opportunities that came with it. A quick look at the average age of those permitted to work at the Boardwalk Saloon, compared to that of the Plaintiffs reveals an enormous discrepancy (19.16 average difference in age [2]).

In their Opposition Brief, Defendants try to represent the qualifications as objectively fair measurements of skill and merit which needed to be met before a bartender could bid into the Boardwalk Saloon. This is a total mischaracterization. These qualifications were not fair measurements of skill (they didn't even have a legitimate business purpose). In actuality, they were unfair, bizarre, and unequally applied requirements specifically tailored to make it as hard as possible for older bartenders to bid into the Boardwalk Saloon.

Notably, these qualifications didn't just have a discriminatory impact, they were also applied in a discriminatory fashion. Defendants permitted at least four employees who never passed the exams to work as bartenders at the Boardwalk Saloon (and these employees' names were interestingly omitted from the lists of Boardwalk Saloon Bartenders submitted by Defendants in discovery). (Pa65-67, 194-201, 440-444.) However, Defendants did not allow Plaintiffs to bid in unless

[2] See Appellant Plaintiffs' moving brief at 40 for average age chart.

they met each and every discriminatory qualification. Permitting younger bartenders to bid in without meeting all the qualifications while precluding older ones is the very definition of discrimination.

To summarize, there was no legitimate justification whatsoever for the qualifications that were developed for the Boardwalk Saloon. Every qualification was either applied in a bad faith and/or completely unnecessary manner, or totally pointless (other than to preclude older employees). The fact that the qualifications lacked any business necessity paired with the fact that they were not uniformly applied and contained bizarre requirements that were much harder to conform with the older an employee gets, clearly underscores the discriminatory intent and effect behind same. Importantly, the Trial Court determined that the questions of whether these qualifications were created to garner a younger workforce at the Boardwalk Saloon and whether they discriminated against older employees were "material questions of fact or a jury to determine." Accordingly, there are substantial questions of material fact at issue here such that the Trial Court's orders granting summary judgment in favor of Defendants must be reversed at this time.

B. Aiding and Abetting.

Under the LAD, the aiding and abetting analysis requires some finding of "active and purposeful conduct" on behalf of an individual defendant. Tarr v. Ciasulli, 181 N.J. 70, 83 (2004). To that end, a plaintiff must demonstrate:

> (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. Atlantic City Police Department, 174 F.3d 95, 127 (3rd Cir. 1999)) (internal citations omitted).

In their Opposition Brief, Defendants state that "[t]he record lacks any evidence that either individual engaged in any discriminatory conduct towards any Plaintiff." (Defendants' Opposition Brief at 54.) However, this is false. Plaintiffs meet all three elements and thus substantiate a claim of aiding and abetting against Defendants Edley and Giunta. (1) the corporate Defendants discriminated against Plaintiffs with the subject discriminatory qualifications leading to a blatant disparate impact; (2) Edley and Giunta were aware of their supervisory role in directly formulating the discriminatory qualifications; (3) Edley and Giunta knowingly and substantially assisted in the unlawful acts committed by the corporate Defendants to the extent that they directly formulated the subject qualifications which in turn caused the disparate impact. (Pa1, 95-96, 98-99, 101, 452, 456.) Accordingly, Plaintiffs met the *prima facie* elements of an aiding and abetting claim under the LAD, and summary judgment as to these issues was

inappropriate. Plaintiffs respectfully request this Court reverse the Trial Court's granting of summary judgment in favor of Defendants at this time.

CONCLUSION

Based on the foregoing, Plaintiff respectfully submits that this Court reverse the Trial Court's orders granting summary judgment in favor of Defendants and reinstate Plaintiffs' Complaint in its entirety.

Respectfully submitted,

/s/ Debra Tedesco

DEBRA TEDESCO

Dated: May 13, 2025