MARYJANE PROCTOR, Plaintiff/Appellant, v. HAYDON CORPORATION; ADAM WOODS, in his capacity as President and Chief Executive Officer of Haydon Corporation; and NICOLE C. RUDEL, in her capacity as Director of Human Resources of Haydon Corporation; Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001241-23 On Appeal From: SUPERIOR COURT OF NEW JERSEY LAW DIVISION: PASSAIC COUNTY DOCKET NO.: PAS-L-524-20 Sat Below: Honorable Frank Covello, J.S.C.

BRIEF OF PLAINTIFF/APPELLANT MARYJANE PROCTOR

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I. PRELIMINARY STATEMENT

Appellant Maryjane Proctor ("Appellant") appeals the dismissal of her age discrimination and retaliation lawsuit under New Jersey's Law Against Discrimination, N.J.S.A. 10:5-1, et seq. (the "NJLAD") against her former employer, Respondent Haydon Corporation ("Respondent Haydon"), Respondent Haydon's former President and Chief Executive Officer, Adam Woods ("Respondent Woods"), and Director of Human Resources, Nicole Rudel ("Respondent Rudel") ("Respondents"). The trial court's Order and accompanying Statement of Reasons granting Respondents' Motion for Summary Judgment (the "Order") cannot withstand Appellate scrutiny as the trial court failed to accept as true the evidence supporting Appellant's position, and make all legitimate inferences which can be deduced from same. Instead, the trial court abdicated its responsibility to do so and mistakenly ruled Appellant did not suffer adverse employment action.

Appellant, a sixty-four (64) year old woman, suffered a string of adverse and retaliatory actions after being asked if she had "any thoughts on retiring." From that point onward, Respondents did everything to expel Appellant from the company, including overwhelming Appellant with work and reassigning Appellant's preferred assignments to younger employees. Respondents' disparate treatment towards Appellant eventually culminated in two pretextual performance notices, arriving shortly after Appellant received an outstanding yearly review. After receiving the

second pretextual warning notice, Appellant knew if she stayed quiet and endured the discrimination any longer, Respondents' abuse would only continue. As such, during a July 11, 2019 meeting, Appellant requested the latest performance notice be discarded. Respondents refused, however, leaving Appellant with no other choice but to consider herself terminated, further evidenced by Respondents' directive to ***collect her things and exit the building***.

The trial court improperly granted Respondents' Motion for Summary Judgment based on the notion that Appellant did not suffer adverse employment action, ruling that (1) there is no allegation of constructive discharge, and (2) even if she had, the facts did not demonstrate that she suffered adverse employment action. The court below's reasoning is unequivocally flawed. First and foremost, Appellant's Complaint alleges she was wrongfully terminated. Although Appellant did not explicitly state "constructive discharge" in her Complaint, Appellant is not required to plead constructive termination to proceed with such a claim. The allegations and facts surrounding said constructive termination, all of which are in the record by way of both Appellant's Complaint and in her deposition testimony, establish Appellant was constructively discharged and, therefore, suffered adverse employment action. Second, Rule 4:9-1 and the interpreting case law make clear that allowing amendments to pleadings should be liberally granted and without consideration of the ultimate merits of the amendment itself, and amendments to the

pleadings to conform to the evidence may be made pursuant to Rule 4:9-2 at any time. By improperly granting Respondents' Motion for Summary Judgment, however, the trial court deprived Appellant of the opportunity to do so.

Further, the trial court's reasoning that Appellant did not suffer adverse employment action, in and of itself, constitutes reversible error. When viewed in the light most favorable to Appellant, there is ample evidence for a jury to conclude Appellant suffered multiple adverse employment actions. Respondents retroactively raised performance issues for previous years, conjured pretextual performance issues to badger Appellant, issued a warning notice to just Appellant when mistakes were made by teams which she was a part of, and never investigated Appellant's age discrimination complaints. This all reached a fever point on July 11, 2019 when Respondents issued another blatantly pretextual performance warning to Appellant. When Appellant objected to this pretextual performance warning and advised Respondents if they refused to withdraw the notice, she would consider herself terminated. In response, Respondent Woods told Appellant to pack her things and exit the building, unlawfully terminating her employment.

Ultimately, the trial court's Order dismissing Appellant's complaint, which was not filed until ***over twenty-one months*** after Respondents originally filed their Motion for Summary Judgment, cannot survive Appellate scrutiny as the Order contains significant reversible errors. Reversal, therefore, is warranted.

II. PROCEDURAL HISTORY

This lawsuit is brought pursuant to the NJLAD. On or about February 13, 2020, Appellant filed a complaint and demand for trial by jury with the Superior Court of New Jersey, Passaic County, alleging she was subjected to age discrimination and retaliation in violation of the NJLAD. (Pa000005-Pa000028). On January 21, 2022, Respondents filed a Motion for Summary Judgment. The parties conducted oral argument before Judge Covello on February 22, 2022. On November 27, 2023, Judge Covello filed an Order on eCourts granting Respondents' aforementioned summary judgment motion and dismissing Appellant's complaint with prejudice. (Pa000731-749). On December 26, 2023, Appellant filed her Notice of Appeal and now seeks to reverse the Superior Court's Order erroneously granting summary judgment to Respondents and to remand this matter back to Passaic County Superior Court for further proceedings. (Pa000001-04).

III. FACTUAL BACKGROUND

A. Appellant commences employment at Respondent Haydon as a bookkeeper and is subsequently promoted to Human Resources Manager.

Respondent Haydon hired Appellant as a bookkeeper in 2006. Throughout the years, Appellant excelled in her employment and, in 2011, Respondent Haydon promoted her to Human Resources Manager ("HR Manager"). (Pa000135-137). This meant that Appellant assumed Human Resources ("HR") responsibilities on top

of her usual bookkeeping duties. (Pa000136-137). Appellant also received a raise in salary. Id. Appellant continued her position of HR Manager from that point forward, even throughout Respondent Haydon's ownership company change in or around late 2014 or early 2015. (Pa000009, Pa000257).

B. Respondent Haydon's transition to new ownership leads to severe and pervasive discrimination against its senior employees, including Appellant.

Respondent Haydon began hiring an exorbitant number of young employees who had little to no experience relevant to their positions. (Pa000009-10, Pa000217). For example, Respondent Woods hired twenty-five-year-old Sibel Kaya ("Ms. Kaya") as his personal assistant in 2018. (Pa000010, Pa000261). Ms. Kaya had no relevant job experience in an HR department, and yet, she, as well as the other new hires, were given higher salaries and assigned more valuable tasks than their older coworkers. (Pa000010, Pa000260-261). Notably, Respondent Woods delegated several of Appellant's most rewarding job responsibilities to Ms. Kaya. (Pa000010, Pa000207-208). These responsibilities included organizing workshops and assisting employees in disputes. Id. Meanwhile, Appellant was subjected to menial tasks clearly unfit for an employee of her seniority and record. (Pa000010, Pa000208).

In essence, Respondent Woods forced Appellant to watch his young assistant take over her role. Even when Appellant complained to Respondent Woods on or about November 12, 2018 as to how she felt marginalized due to her age, he ignored

her concerns. (Pa000011, Pa000273-274). However, Respondent Woods never restored Appellant's previous duties, but also, he did not even investigate her claims. (Pa000011, Pa000297). Instead, during a November 12, 2018 meeting, Respondent Woods informed Appellant they would be hiring a new HR Manager. This new hire would take charge of new, higher-level responsibilities, while Appellant would continue her mundane tasks. (Pa000012, Pa000259, Pa000273-274).

The new hire and Respondent Woods' refusal to investigate her claims left Appellant dejected, despite Appellant's complaint of age discrimination was meritorious. In fact, only one month prior to her complaint, on October 16, 2018, Respondent Woods directly inquired about Appellant's retirement, something to which she had yet to give a second thought. (Pa000011, Pa000269). Specifically, Respondent Woods sat beside Chief Financial Officer Kevin Johnson ("Mr. Johnson") and asked Appellant if she had "***any thoughts on retiring.***" Id. Appellant responded that she "had no thoughts right now about retiring." (Pa000011-12, Pa000176). That inquiry proceeded to stick with Appellant.

Subsequently, in early January 2019, Respondent Haydon hired Sid Awad ("Mr. Awad"), who was then forty-eight (48) years old, as Director of HR. (Pa000012, Pa000150, Pa000250, Pa000781). Besides the notable age difference, Respondents never gave Appellant the opportunity to apply for the Director position, choosing to only post the position externally. (Pa000257). Respondent Haydon

terminated Mr. Awad a few months later after sexual harassment allegations; still, and evincing Respondents' animus towards Appellant due to her age, the company refused to offer Appellant the opportunity to take over his responsibilities even after Mr. Awad's termination. (Pa000250, Pa000260). Instead, Respondents hired Respondent Rudel, who is, once again, significantly younger than Appellant. Id.

C. Respondents attempt to coerce Appellant's resignation by bombarding her with menial work and pretextual performance criticisms.

During this time, Respondents began assigning Appellant overwhelming amounts of paperwork on top of her regular responsibilities as HR Manager. (Pa000207-208). The endless assignments came in the wake of the aforementioned October 16, 2018 meeting and Respondent Woods' discriminatory inquiry as to Appellant's thoughts on retirement. Id. At this juncture, it was apparent to Appellant that if she did not voluntarily leave, Respondents would force her out.

Appellant immediately took notice of the unrealistic due dates and *ad hoc* requests that Respondents expected her to fulfill. (Pa000194). Appellant complained to Respondent Woods and Mr. Johnson and asked that they reassign some of the paperwork to other employees. Id. Unsurprisingly, Respondents dismissed Appellant's requests in that regard. Id. Despite the added pressure of the assignments, Appellant tackled every obstacle thrown her way and continued to perform with excellence. In fact, Appellant received a score of "Outstanding 90% Overall Rating" for her 2018 performance evaluation. (Pa000788-794). This

evaluation was prepared and signed by Mr. Johnson and delivered to Appellant on March 7, 2019. Id. In addition to that excellent score, Mr. Johnson complimented Appellant's work performance, stating that she is "always accountable and forthcoming." Id. Thus, Appellant believed she was performing well in all aspects. Id. In fact, Respondent Woods specifically testified at his deposition that Appellant was in the top 50 percent of employees at Respondent Haydon. (Pa000281). Indicative of his discriminatory animus towards Appellant, Respondent Woods admitted it was a problem Plaintiff chose to do things the "***old-fashioned way***." Id.

Nevertheless, Appellant soon saw a shift in Respondent's discussion of her performance a few months later. On April 17, 2019, after the hiring of Mr. Awad, Appellant attended a meeting with him, Mr. Johnson, and Respondent Woods. (Pa000179-180). During this meeting, Respondents issued Appellant a warning notice (the "April Notice") out of nowhere. Id. This notice was prepared by Mr. Johnson who, only a month prior, raved about Appellant's performance in her evaluation. (Pa000783). The warning specifically criticized Appellant's alleged tardiness and lack of attention to detail. (Pa000179-180). To be specific, it listed alleged issues from 2018, including mistakenly paying invoices multiple times, writing improper amounts on vendor checks, and making mistakes while issuing 1099's to Respondent Haydon's employees. (Pa000316-317, Pa000783).

During the meeting, Appellant confessed to Respondents she had a "very heavy desk and a lot of work and no help or little help." (Pa000285-286). Ever the honest employee, Appellant admitted to having a role in the mistakes. (Pa000016-17, Pa000183). Critically, it was Mr. Johnson's responsibility to approve and sign off on *all* checks issued to ensure that no minor mistakes fell through the cracks. Id. Mr. Johnson signed the return forms and attested to each check's accuracy. (Pa000183). Other employees also played a role in the duplicate payments that Appellant was taking responsibility for. (Pa000016-17, Pa000782). In fact, during Mr. Johnson's deposition, he named two such employees, but neither of them was issued warning notices or required to attend a meeting to discuss performance. Id.

None of the purported issues were ever mentioned in Appellant's 2018 performance review. (Pa000788-794). In fact, nothing in the review led Appellant to believe she had to make any improvements. Id. In response to the clearly pretextual performance critiques, Appellant sent Mr. Awad, Mr. Woods, and Mr. Johnson an email on April 17, 2019 entitled, "My Employment at Haydon." (Pa000795-799). In this email, Appellant discussed the discriminatory treatment she faced at the hands of Respondents. Id. Specifically, Appellant stated Respondent Haydon "marginalized [her] job responsibilities to the point where [her] prospects of any types of career advancements are non-existent." Id. Appellant further explained she was being targeted due to her age despite being a loyal employee, and

Respondent Woods refused to take her previous complaints seriously. Id. Like Appellant's previous complaints, Respondents failed to take any action or investigate Appellant's allegations in the aforementioned April 17, 2019 email. (Pa000297). Respondents' refusal to investigate Appellant's complaint directly violated Respondent Haydon's employee handbook requiring same.

D. Appellant ultimately objects to the increasingly hostile work environment, leading to her swift termination.

In June 2019, Respondent Haydon terminated Mr. Awad on an unrelated claim of sexual harassment and, in turn, hired Respondent Rudel to take his place. (Pa000250-251, Pa000277). On July 11, 2019, Respondents Woods and Rudel as well as Mr. Johnson called Appellant into a meeting in Respondent Woods' office. (Pa000017, Pa000192). As soon as Appellant entered the office, Respondent Rudel began bombarding her with an endless list of pretextual performance issues. (Pa000193). Respondents soon revealed that the purpose of the meeting was to discuss another warning notice (the "July Notice") that Respondent Rudel had prepared for Appellant. (Pa000193-194). Respondent Woods and Mr. Johnson stood idly by while the newly hired Respondent Rudel proceeded to harass and humiliate Appellant with falsified performance corrections, something Respondents would later claim were just "meaningful suggestions." Id.

Frustrated by Respondents' blatant attempts to coerce her resignation, Appellant stated, "Think about what you want to do." (Pa000193). Appellant then

elaborated by further stating if Respondents did not discard the July Notice, she could no longer tolerate working in such a hostile environment. Id. To be clear, Appellant never stated that she was quitting or resigning, and none of the Respondents ever asked her to reconsider her position on what she did assert. (Pa000195-196). Appellant then excused herself from the meeting and left Respondent Woods' office. (Pa000193).

Following a ten-minute pause, Respondents involved their legal counsel to discuss how to proceed. (Pa000427). Respondents then called Appellant back into the office. (Pa000193-194). In this second half of the meeting, Respondent Woods cornered Appellant with the assistance of counsel and twisted her previous words to fit his narrative. (Pa000197-198). Respondent Woods outright questioned Appellant if she would resign if Respondents did not tear up the July Notice. Id. Appellant denied she would be resigning, at which time the meeting fell silent. Id. Respondent Woods then directed Appellant to collect her belongings and leave the building. Id. Appellant understood this order to be her official termination, so she cordially shook each party's hand and wished them well. (Pa000198).

Adding insult to injury, following Appellant's termination, Respondent Rudel falsely stated via letter that (1) Appellant had an "intent to resign immediately" and (2) Respondent Haydon was accepting Appellant's verbal resignation. (Pa000800-801). Suffice to say, Respondent Rudel's comments are a mischaracterization of the

facts in the within record. Additionally, Respondents purposefully withheld necessary COBRA documentation from Appellant for nearly two months. Id.

Respondents' retaliation did not end there, as they knowingly failed to pay Appellant for approximately forty-four (44) hours of unused vacation time. (Pa000169). Nearly a year later, on or around July 7, 2020, Respondent Haydon finally issued payment to Appellant in connection with same. (Pa000804-806).

E. Appellant continues to suffer following her unlawful termination when the trial court waits nearly two (2) years to issue a decision.

Following the end of discovery, counsel for the Respondents filed a Motion for Summary Judgment on December 24, 2021. (Pa000002). Judge Covello conducted oral argument on February 22, 2022. Id. Appellant anticipated a decision soon thereafter, particularly insofar as it concerned an area of law so apt for a jury to decide. Marzano v. Computer Science Corp., Inc., 91 F.3d 497, 509 (3d Cir. 1996) (quoting Chipollini v. Spencer Gifts, 814 F.2d893, 899 (3d Cir. 1987) (stating that as a threshold matter, "summary judgment is rarely appropriate" in "[e]mployment discrimination cases," because the paramount question of why an employer took an adverse employment action against an Appellant "is clearly a factual question.")). However, the trial court's decision did not occur until November 28, 2023, ***over twenty-one (21) months*** following the February 22, 2022 oral argument. At this time, the trial court granted Respondents' Motion for Summary Judgment, dismissing Plaintiff's complaint with prejudice. (Pa000731-750).

The trial court adopted the facts and legal argument proffered by Respondents in support of their originally filed Motion for Summary Judgment. First, although Respondents' Motion for Summary Judgment contains an inaccurate recitation of facts, the trial court adopted same wholesale as part of their decision. Indeed, the Order contains approximately seven (7) and one quarter (1/4) pages of Respondents' Statement of Facts restated, verbatim, into the Order's section entitled "Facts." See (Pa000033-47, Pa000733-741). By duplicating Respondents' Statement of Facts into the Order, the trial court demonstrates its reversible error, as it improperly accepted Respondents' Statement of Facts rather than considering the facts in the light most favorable to Appellant as the non-moving party.

Moreover, when the trial court discussed Prager v. Joyce Honda, Inc., 447 N.J. Super. 124 (App. Div. 2016), a case highly distinguishable to Appellant's matter, the language utilized by the court below is nearly identical to the language in Respondents' Motion for Summary Judgment. Indeed, in a section which constitutes nearly two thirds (2/3) of a page, the trial court replicated Respondents' summary and explanation of the Prager decision, stating as follows:

> In Prager, the Appellate Division held that because the written warnings issued to the plaintiff did not state that there would be repercussions from future infractions but rather noted only the possibility of future termination or time off without pay in the event of future infractions, "plaintiff could not show she suffered an adverse employment decision [and] she [therefore] failed to establish the third element of her prima facie case of retaliation" Prager, 447 N.J. Super. at 141 citing Battaglia,

> 214 N.J. at 547,70 A.3d 602. The Appellate Division explained that even if the two written warnings were retaliatory, they could not be considered materially adverse, as they did not evidence any "tangible injury or harm." Prager, 447 N.J. Super. at 140. Also highly instructive here, the Appellate Division held that "[b]ecause [Prager] quit her job the day after receiving the warnings, it is impossible to assess their significance for her continued employment." Id. at 140. The Court further held, "Although plaintiff undoubtedly found the warnings highly distressing, her subjective response to them is not legally significant in assessing whether they were materially adverse. Id.

See (Pa000072-73, Pa000747-748). Also, in another section of the Order, the following is contained, verbatim, in both the Order and Respondents' Motion for Summary Judgment:

> It was explained to her at that meeting that Haydon was looking at succession planning, made clear that no one was suggesting that she should retire, and explained that the nature of her job and the critical functions she served would require about six months lead time to train a replacement if and when she chose to retire.

(Pa000077, Pa000749). Accordingly, by failing to view the facts most favorable to Appellant as the non-moving party and Respondents' facts and portions of their legal argument (and the verbiage therein) the trial court only further demonstrated its failure to properly weigh, let alone consider, the arguments Appellant raised in her opposition to Respondents' Motion for Summary Judgment.

IV. ARGUMENT

A. Legal Standard.

An appellate court must evaluate the trial court's grant of summary judgment through a *de novo* standard. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016). The court "must accept as true all evidence that supports the position of the party *defending against* the motion and accord that party the benefit of *all legitimate inferences,* which can be deduced therefrom." Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 536 (1995) (emphasis added). Significantly, the New Jersey Supreme Court noted "Generally we seek to afford 'every litigant who has a bona fide cause of action or defense the opportunity for full exposure of his case.'" United Rental Equip. Co. v. Aetna Life and Casualty Ins. Co., 74 N.J. 92, 99 (1977). When cases involve significant policy considerations, "maximum caution must be exercised before granting summary judgment and the issue should not be resolved until a full record is developed at trial." Sandvik, Inc. v. Statewide Sec. Sys., 192 N.J. Super. 272, 276 (App. Div. 1983).

B. The existence of genuine issues of material facts in the instant matter make the trial court's granting of summary judgment improper. (Pa000748-749)

In Appellant's case, as in many others, "summary judgment is rarely appropriate" in "[e]mployment discrimination cases" because the paramount

question of why an employer took an adverse employment action against an Appellant "is clearly a factual question." Marzano v. Computer Science Corp., Inc., 91 F.3d 497, 509 (3d Cir. 1996) (quoting Chipollini v. Spencer Gifts, 814 F.2d 893, 899 (3d Cir. 1987)). "To decide a summary judgment motion . . . [t]he trial court must not decide issues of fact; it must only decide whether there are any such issues." Nardello v. Twp. of Voorhees, 377 N.J. Super. 428, 433 (App. Div. 2005).

The law is settled that if an "Appellant can … produce evidence to cast doubt on the employer's stated reason [for termination], the case should go to trial." Marzano, supra, 91 F.3d at 509. "***Simply 'by pointing to evidence which calls into question the defendant's intent, the plaintiff raises an issue of material fact which, if genuine, is sufficient to preclude summary judgment***.'" Leahey v. Singer Sewing Co., 302 N.J. Super. 68, 79 (App. Div. 1996); see also Zive v. Stanley Roberts, Inc., 182 N.J. 436, 449 (2005) (if the plaintiff "can produce enough evidence to enable a reasonable fact finder to conclude that the proffered reason is false, plaintiff has earned the right to present his or her case to the jury"). Furthermore, "[i]n addressing [a] plaintiff's pretext claim" on a motion for summary judgment, our courts have held that, "in analyzing the evidence plaintiff offered to demonstrate pretext, the court [is] obligated to give plaintiff the benefit of all of the favorable inferences supporting that evidence." Myers v. AT&T, 380 N.J. Super. 443, 454-55 (App. Div. 2005), certif. denied, 186 N.J. 244 (2006). Importantly, "[i]t is ordinarily improper

to grant summary judgment when a party's state of mind, intent, motive or credibility is in issue." In re Estate of DeFrank, 433 N.J. Super. 258, 266 (App. Div. 2013). "Indeed, '[t]he cases are legion that caution against the use of summary judgment to decide a case that turns on the intent and credibility of the parties.'" Id. (citation omitted). "Thus, it is clear that questions of a party's state of mind, knowledge, intent or motive should not generally be decided on a summary judgment motion." Id. at 267. Moreover, employers are rarely going to dish out direct, "smoking gun" evidence of discrimination, so an employee's case will rely on circumstantial evidence. Chipollini, 814 F.2d at 899, cert. denied, 483 U.S. 1052 (1987).

The Third Circuit has held, "a play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario." Abramson v. William Paterson Coll., 260 F.3d 265, 276 (3d Cir. 2001).

The trial court improperly granted Respondents' Motion for Summary Judgment when the record is rife with disparities which are apt for a jury to decide. Only a jury may make credibility determinations of the parties and their witnesses. Yet, in the Order, the court below made several determinations of credibility. Indeed, the Order contains statements such as "there is no evidence whatsoever that Plaintiff was terminated" and "there is nothing whatsoever to support Plaintiff's claim of age discrimination." (Pa000748-749). With an extensive record containing not only an

openly ageist remark directed towards Appellant, but also, multiple (1) discrimination complaints by Appellant and (2) instances of retaliatory adverse employment action taken against Plaintiff by Respondents which culminated in her unlawful termination on July 11, 2019, it is wholly inappropriate to deny this legal claim a jury's review. By way of example, but not limitation, the following genuine issues of material fact are in dispute:

- Whether Respondents changed Appellant's work assignments to overwhelm Appellant, and issued a pretextual warning notice to Appellant after (1) Respondent Woods asked if she had "any thoughts on retiring" and (2) Appellant complained of age discrimination in the workplace;

- Whether Respondents issued another pretextual warning notice to Appellant in retaliation for her additional complaints of disparate treatment in the workplace;

- Whether Appellant ever stated that she was resigning from her position with Respondent Haydon; and

- Whether Appellant was constructively terminated based upon her age.

Accordingly, genuine disputes of material facts remain requiring a reversal of the Order and remand for further proceedings before a jury.

C. Appellant has made a *prima facie* showing of age discrimination by Respondents, rendering the trial court's Order granting summary judgment wholly improper.

To prove an NJLAD claim of discrimination, Appellant must establish a *prima facie* case of discrimination by showing: (1) she belongs to a protected class; (2) she was performing her job at a level that met her employer's legitimate

expectations; (3) she suffered an adverse employment action; and (4) others not within the protected class did not suffer similar adverse employment actions. El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 167 (App. Div. 2005).

In the Order, the trial court determined that Appellant was unable to establish her *prima facie* case primarily because she was unable to prove the third element as articulated in El-Soufi. The record is clear, however, that Appellant suffered multiple instances of adverse employment action which culminated in her constructive termination on July 11, 2019. Moreover, to the extent the trial court determined the record was unclear concerning this issue, it was required to view the facts in the light most favorable to Appellant, as the non-moving party. Since the court below failed to do so, the Order must be reversed, and the instant matter must be remanded for further proceedings before a jury.

i. Appellant satisfies the first two (2) prongs of her discrimination claim because she belongs to a protected class and was performing her job at a satisfactory level on the day she was terminated. (Pa000009) (Pa000015-17) (Pa000633-634) (Pa000637-640) (Pa000652)

The NJLAD prohibits discrimination against any employee because of their age, regardless of their age. See Bergen Commer. Bank v. Sisler, 157 N.J. 196 (1999). At the time of Appellant's unlawful termination, Appellant was sixty-four (64) years old. (Pa000633). Thus, Appellant is irrefutably entitled to protection from age discrimination during her employment with Respondent Haydon.

The second element of a NJLAD plaintiff's *prima facie* case was thoroughly explained by the New Jersey Supreme Court in the seminal case of Zive, supra, 182 N.J. at 450- 456. The inherent problem with the traditional second element in a discharge claim; to wit, the traditional *prima facie* elements arose under McDonnell Douglas "in a hiring context," and there exist "differences in a discharge situation." Id. at 450. Therefore, "although the 'objectively qualified' standard is appropriate in a hiring case in which performance has not yet occurred, a termination case necessarily involves a different approach." Id.

After surveying many federal precedents on the issue presented, Justice Long noted that in New Jersey, "the second prong in a termination case necessarily requires refinement to address the differences between failing-to-hire and firing." Id. at 454. Hence, the New Jersey Supreme Court explicitly held that, regarding the second element, ***"[a]ll that is necessary is that the plaintiff produce evidence showing that she was actually performing the job prior to the termination***." 182 N.J. at 454 (emphasis added). The Court continued, "only the plaintiff's evidence should be considered. That evidence can come from records documenting the plaintiff's longevity in the position at issue or from testimony from the plaintiff or others that she had, in fact, been working within the title from which she was terminated. Insofar as performance markers like poor evaluations are more properly debated in the second and third stages of the burden-shifting test, they do not come

into play as part of the second prong of the prima facie case." Id. at 455. Further, "[t]hus, even if a plaintiff candidly acknowledges, on his own case, that some performance issues have arisen, ***so long as he adduces evidence that he has, in fact, performed in the position up to the time of termination, the slight burden of the second prong is satisfied***." Id. (emphasis added); See N.J. Model Civil Jury Charge § 2.21(B)(5)(b) ("The plaintiff must merely prove that he or she 'was actually performing the job prior to the termination'") (quoting Zive, 182 N.J. at 454).

Appellant herein clearly meets the Zive second prong standard. Appellant was a competent employee of Respondent Haydon for nearly thirteen (13) years before she was constructively terminated. (Pa000009). During her tenure, Appellant received multiple promotions and was relied upon by Respondents to complete a variety of tasks. (Pa000009, Pa000634, Pa000652). Respondents' claims of performance issues were quite obviously pretextual and designed to coerce Appellant's resignation. (Pa000640). Notably, Appellant received an exemplary performance review in March of 2019, yet one month later, Respondents inconceivably "discovered" performance issues from 2018. (Pa000637, Pa000639-640). Despite this, Appellant continued working for Respondent Haydon, loyally committed to its organizational goals and the clients whom they serve, even at the time of her termination. (Pa000015-17, Pa000637-638). Therefore, Appellant satisfies the second element of her *prima facie* case.

ii. Appellant was treated differently and ultimately terminated from her employment by Respondents. (Pa000010-13) (Pa000015-18) (Pa000115) (Pa000192-202) (Pa000338) (Pa000637) (Pa000639-640) (Pa000642-644) (Pa000699) (Pa000748-749) (Pa000787-794)

"Discriminatory termination … that [is] attributable to invidious discrimination" is prohibited by the NJLAD. Alexander v. Seton Hall University, 204 N.J. 219, 228 (2010). Respondents terminated and/or constructively terminated Appellant during their July 11, 2019 meeting, at which time Respondents, once again, fabricated performance issues and provided Appellant with yet another pretextual warning notice. (Pa000017, Pa000642-643). When Appellant objected to the warning notice and adamantly requested that it be discarded, Respondents refused to do so. Id. When the meeting resumed after Respondents involved their legal counsel, Appellant maintained her objections to the illegitimate warning notice that was cobbled together by Respondents in a desperate attempt to coerce her resignation. (Pa000643-644). At that point, Respondent Woods demanded Appellant collect her things and leave Respondent Haydon, thereby terminating her employment. (Pa000018, Pa000643-644).

The Order mistakenly states Appellant is unable to establish she suffered an adverse employment action because (1) there is no allegation of constructive discharge by Appellant and (2) even if Appellant did so, such an allegation could not survive summary judgment. Regarding the first element, the trial court committed reversible error. At the outset, Appellant plead she was wrongfully terminated in her

Complaint. (Pa000017-18). In addition, Appellant's deposition testimony bolsters her NJLAD-based claims, including that she was constructively terminated. (Pa000192-202). Although Appellant's Complaint does not explicitly state "constructive termination," Appellant is not required to do so. The allegations and facts surrounding said constructive termination, all of which are in the record, more than sufficiently establish that Appellant was constructively discharged and, therefore, suffered adverse employment action.

Moreover, Rule 4:9-1 and the interpreting case law make clear amendments to the pleadings should be liberally granted and without consideration of the ultimate merits of the amendment itself. See, e.g., Notte v. Merchants Mut. Ins. Co., 185 N.J. 490, 500–01 (2006); Kernan v. One Wash. Park Urban Renewal Assocs., 154 N.J. 437, 456–57 (1998). Specifically, Rule 4:9-1 provides that "a party may amend a pleading... by leave of court ***which shall be freely given in the interest of justice***." (emphasis added). Our courts have held that motions for leave to amend pleadings shall be granted allowing "the broad power . . . to be liberally exercised at ***any stage*** of the proceedings, including on remand after appeal, unless undue prejudice would result." Kernan, 154 N.J. at 456–57. Our courts weigh "undue delay or prejudice that may result from the amendment against the overriding need to seek justice." Id. Amendments to the pleadings to conform to the evidence may be made pursuant to R. 4:9-2 at any time. R. 4:9-2 specifically provides:

> Such amendment of the pleadings and pretrial order as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend shall not affect the result of the trial of these issues. Id.

In this matter, Appellant filed her Superior Court complaint in February 2020. Consistent with the allegations therein, Appellant later testified at her deposition regarding Respondents' campaign of harassment, discrimination, and retaliation to which she was subjected, which was fully consummated with her unlawful termination on July 11, 2019. See R. 4:9-1 and R. 4:9-2; see also Ajamian v. Schlanger, 14 N.J. 483, 485 (1954). Appellant does not seek to amend to include new claims or allegations based upon facts and circumstances unrelated to the original pleadings. To the contrary, ***all*** of the allegations – which would incorporate the materials in Appellant's opposition to Respondents' previously filed Motion for Summary Judgment (including Appellant's argument therein concerning constructive discharge) – arise out the same facts and circumstances as the original complaint. The broad power of amendment should be liberally exercised at ***any stage*** of the proceedings unless undue prejudice would result or unless the amendment would be futile. Pressler, Current N.J. Court Rules, comment 2.1 on R. 4:9-1 (2016); see also Franklin Med. v. Newark Pub. Schs., 362 N.J. Super. 494, 506–08 (App. Div. 2003). There is simply no basis to deny Appellant the opportunity to amend, particularly given Respondents' firsthand knowledge of additional facts to be raised

in the pleadings and the liberal amendment standards. Adron, Inc. v. Home Ins. Co., 292 N.J. Super. 463, 475–76 (App. Div. 1996). As such, by granting summary judgment, Appellant was improperly precluded the opportunity to amend her complaint to conform to the evidence and, therefore, the trial court committed reversible error in that regard as well.

Appellant's allegations more than sufficiently detail the adverse employment actions she suffered due to her age. When Respondent Haydon switched its management, the new board began to replace senior employees with younger hires under the guise of "succession planning." Evidence exemplifying same includes Respondent Woods asking about Appellant's retirement and stripping her job responsibilities for mundane tasks. (Pa000010-11). Further, Respondents purposefully declined to encourage Appellant to apply for a promotion twice and ignored her complaints about feeling marginalized due to her age. (Pa000010-13).

Most notably, Respondents issued Appellant two pretextual warning notices, despite Appellant receiving an "Outstanding- 90% Overall Rating," in her annual evaluation (Pa000010). Respondent Woods himself stated that Appellant was in the top half of performers at Respondent Haydon, and to this day, has never questioned her work ethic. (Pa000338, Pa000699). Further, Appellant was the only one to receive these warning notices, but she was certainly not the only one to make the mistakes the notices alleged. (Pa000016-17, Pa000637, Pa000639-640). Needless to

say, Appellant endured invidious and intolerable discrimination because of her age, the likes of which no other employee at Respondent Haydon was forced to endure.

Although Appellant received an outstanding performance evaluation for the 2018 year, somehow, one month later, Respondents issued Appellant a warning letter for purported performance issues that occurred ***during*** 2018. (Pa000012, Pa000016, Pa000787-794). Yet, these "issues" were not included or discussed in Appellant's performance evaluation. Id. Respondents laid waiting for any slip-up by Appellant to issue her with more warning notices, and when she was called into a meeting on July 11, 2019 to discuss their latest warning notice, Appellant objected to signing the warning notice. (Pa000015, Pa000018). She insisted Respondent Woods withdraw the warning notice or else she could not continue working at Respondent Haydon. Id. When Respondent Woods demanded Appellant sign the retaliatory warning notice, Appellant refused to acquiesce to same. (Pa000016, Pa000018). No longer able to bear this burden, Appellant was constructively terminated on July 11, 2019. Id. Simply put, Appellant clearly was subjected to several adverse employment actions due to her age and because of her complaints regarding the disparate treatment in the workplace to which she was subjected.

While the record clearly establishes Appellant was subjected to adverse employment actions because of her age, the trial court failed to view these facts in the light most favorable to Appellant, as the non-moving party. In Brill, the Court

held that a determination of whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. The judge's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. Id. at 540. Credibility determinations are left to the jury. Id. It is critical that a trial court ruling on a summary judgment motion not shut a deserving litigant from her trial. Id.

Rather than allow a jury to make these credibility determinations, the court below instead improperly weighed the evidence, and determined the truth of the matter. Indeed, as part of the Order granting summary judgment, the trial court found "***there is no evidence whatsoever*** that Plaintiff was terminated. Moreover, it could not be clearer that the Plaintiff resigned from her position and refused to participate in the Defendants' corrective action plan." (Pa000748) (emphasis added). Later in the Order, the trial court stated "***there is nothing whatsoever*** to support Plaintiff's claim of age discrimination." (Pa000749) (emphasis added). Assuming, *arguendo*, it was the trial court's role to weigh the evidence and determine the truth of the matter, its conclusory determinations are contrary to the factual record. As a direct result of Respondents' discriminatory actions, Appellant could not tolerate working

in said hostile environment if Respondents did not withdraw the July Notice. (Pa000017, Pa000193). When Appellant requested Respondents discard the July Notice, Respondents refused and demanded Appellant collect her things and leave the building. Id. Accordingly, Respondents constructively terminated Appellant on July 11, 2019. (Pa000115, Pa000644).

Ultimately, weighing the evidence and determining the truth of the matter was not the trial court's role. Instead, the trial court was required to determine whether there were genuine issues of material fact, which this matter is rife with, as indicated above. Accordingly, summary judgment was improper in this matter, and the instant matter should be remanded for further proceedings.

iii. Appellant's evidence demonstrates that her termination occurred "under circumstances that give rise to an inference of unlawful discrimination." (Pa000010-11) (Pa000016-17) (Pa000634-637) (Pa000639) (Pa000641-643)

The fourth prong can be satisfied with a more flexible approach by proffering evidence showing that the termination occurred "under circumstances that give rise to an inference of unlawful discrimination." Young v. Hobart West Group, 385 N.J. Super. 448, 463 (App. Div. 2005) (internal citations omitted). Certainly, Appellant's claims include numerous facts supporting an inference of discrimination based on her age. For example, Respondent Woods transferred Appellant's rewarding job responsibilities to a younger, inexperienced employee. See (Pa000010, Pa000634-635). He also blatantly asked Appellant if she had ***"any thoughts on retiring."*** When

she answered in the negative, Respondents began to assign Appellant inordinate amounts of work to overwhelm her. (Pa000011, Pa000017, Pa000636-637). Respondents also issued Appellant pretextual warning notices following a stellar performance evaluation. (Pa000016, Pa0000639, Pa000642-643). Finally, Respondent Woods failed to investigate Appellant's complaints of age discrimination. (Pa000641-642). Thus, Appellant can establish her termination occurred under circumstances giving rise to an inference of discrimination, and the trial court's determination to the contrary is reversible error.

D. Appellant also satisfies the requisite elements necessary to prove a *prima facie* showing of retaliation under the NJLAD.

The NJLAD renders it unlawful discrimination "[f]or any person to take reprisals against any person … or to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of … any right granted or protected by this act." N.J.S.A. 10:5-12(d). The *prima facie* elements of a retaliation claim under the NJLAD requires Appellant to demonstrate:

> (1) plaintiff was in a protected class; (2) plaintiff engaged in protected activity known to the employer; (3) plaintiff was thereafter subjected to an adverse employment consequence; and (4) that there is a causal link between the protected activity and the adverse employment consequence." Victor, supra, 203 N.J. at 409.

i. Appellant satisfies the first two prongs of her retaliation claim because she is a member of a protected class and was engaged in protected activities known to her employer. (Pa000010) (Pa000012) (Pa000015) (Pa000634-635) (Pa000637) (Pa000641-642) (Pa000796-799)

As discussed above, Appellant satisfies the first element because she is a member of a protected class based on her age. As to the second prong, the NJLAD outlaws retaliation against any employee who complains about discrimination or who asserts their legal right to a work environment free from discrimination. N.J.S.A. 10:5-12(d) prohibits retaliation against any employee who "opposed any practices or acts forbidden under this act or because that person has filed a complaint…" Further, ***reasonable, good-faith complaints*** qualify as protected activity under the NJLAD; ***an employee need not prove that the prohibited activity actually occurred.*** Battaglia, supra 214 N.J. at 547 (emphasis added); Barber v. CSX Distrib. Servs., 68 F.3d 694, 701-02 (3d Cir. 1995) ("Protected activity includes formal charges of discrimination as well as informal protests of discriminatory employment practices, including making complaints to management").

Appellant satisfies the *prima facie* element for her retaliation claim because she repeatedly complained to Respondent Woods and Mr. Johnson about the discrimination she endured. During the November 12, 2018 meeting with Respondent Woods, Appellant complained that Respondent Woods' young personal assistant was given the more interesting and fun aspects of Appellant's job, while

Appellant retained primarily mundane tasks. (Pa000010, Pa000634-635). During this meeting, Respondent Woods informed Appellant he intended to hire a new HR Director, which Appellant also complained of as she felt that she, an older employee, was not given the opportunity to advance her career. (Pa000012, Pa000635). Finally, Appellant complained to Mr. Johnson and Respondent Woods when Respondents began flooding Appellant's desk with time-sensitive assignments after she told them she had no intention of retiring. (Pa000015, Pa000634-635). Appellant dispatched an email on April 17, 2019 entitled "My Employment at Haydon." In the email, Appellant stated the following, in relevant part:

> I am writing today to describe the illegal treatment and discrimination I am being subjected to at Haydon Corp. on the basis of my age…I was called into a meeting on October 16, 2018 with Adam Woods, President and Kevin Johnson, CFO. At this time, Mr. Woods asked me, out of the blue, if I had any thoughts on retiring. I was utterly shocked by this. It was clear that I was being singled out for my age even though I always did what I was supposed to do as a loyal and hardworking employee…To my knowledge, no other employees at Haydon were ever asked this…
>
> I raised concerns that I would be relegated to "step-and-fetch" activities… which is, essentially, a constructive demotion for being too old. A rather sickening situation to find one's self in…Needless to say, it was clear that I was being held to different standards than everyone else and that I was being targeted due to my age. I am really upset by all of this. I have been a loyal, hard-working employee for 13 years and always received excellent performance reviews including as recently as last month. Ever since I was asked about retiring, I have been targeted by Haydon.
>
> Obviously, the concerns I previously raised to Mr. Woods were not taken seriously as the illegal treatment and discrimination due to my

> age has only escalated since then. I am now experiencing health problems due to the stress and anxiety stemming from this and cannot bear to take it any longer. I am happy to discuss this further at a meeting because the hostility and increased scrutiny towards me is intolerable at this point.

(Pa000796-799). In response, neither Mr. Johnson nor Respondent Woods offered to investigate. (Pa000637, Pa000641-642). Indeed, at his deposition, Respondent Woods stated he felt no need to investigate Appellant's complaints and, accordingly, failed to act. Id. Therefore, not only is Appellant part of a protected class, but she engaged in protected activity by expressing good-faith complaints, all to no avail.

ii. Appellant can establish a causal link between the disparate treatment and her engagement in protected activities. (Pa000010-11) (Pa000015-17) (Pa000634-637) (Pa000639-642) (Pa000644) (Pa000748)

The NJLAD does not provide an exhaustive list of what constitutes an adverse employment action for purposes of a retaliation claim. Nonetheless, it is clear that retaliatory harassment is sufficient adverse employment action for retaliation claims. See Hare v. Potter, 220 Fed. Appx. 120, 124-135 (3rd Cir. 2007). In retaliation for her complaints of age discrimination, Respondents launched a vicious campaign of harassment against Appellant. After Appellant was asked about her thoughts on retirement and denied any plans to do so, Respondent Woods attempted to coerce Appellant's retirement or resignation. (Pa000015, Pa000637). Additionally, Respondents began diverting tasks that Appellant enjoyed away from her and to younger employees. (Pa000010, Pa000634-635). Worse, Respondents intentionally

overburdened Appellant with time-sensitive paperwork in addition to her regular HR duties. (Pa000015, Pa000637).

Respondents issued Appellant a warning letter for purported performance issues that occurred during 2018, despite Appellant receiving an outstanding 2018 evaluation. (Pa000016, Pa000640). Respondents laid waiting for any slip-up by Appellant to issue another warning notice. When she was called into a meeting on July 11, 2019 to discuss their latest pretextual warning notice, Appellant adamantly requested that Respondent Woods withdraw the warning notice or else she could no longer continue working in such a hostile environment. (Pa000017, Pa000644). Respondent Woods demanded Appellant sign said notice, but Appellant refused because the write up was illegitimate. Id. No longer able to bear this burden, Appellant was constructively terminated on July 11, 2019. Id. Appellant was, therefore, subjected to several adverse employment actions because of her complaints regarding the discrimination she endured.

In terms of the final element, "causal connection may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive." Romano v. Brown & Williamson Tobacco Corp., 284 N.J. Super. 543, 550 (App. Div. 1995). In Boles, Judge Linares determined that "a reasonable jury could find that the timing of plaintiff's termination - only three days after he attempted to return to work - is suggestive of retaliation." Boles, supra, 2014 U.S. Dist. LEXIS 41926 at *26-27. It

is appropriate to consider the temporal proximity between the protected activity and the adverse employment action when evaluating discriminatory animus by the employer. Id. at *27. Causation may be proven by "circumstantial evidence sufficient to raise the inference that [the] protected activity was the likely reason for the adverse action." Kachmar v. Sungard Data Sys., 109 F.3d 173, 177 (3d Cir. 1997) (internal quotations omitted). Evidence of temporal proximity between the protected activity and the adverse employment action may establish causation. Id.

As discussed above, the trial court held Appellant was unable to establish a *prima facie* case of age discrimination and retaliation because she could not establish she suffered an adverse employment action. (Pa000748). Undoubtedly, Appellant suffered an adverse employment action following her complaints of age discrimination. Nearly all the discrimination and retaliation Appellant was subjected to occurred after Respondent Woods asked Appellant if she had "***any thoughts on retiring.***" (Pa000011, Pa000636). When Appellant denied any plans to do so, Respondent Woods orchestrated a campaign against Appellant with the singular goal of coercing her resignation, including retroactively raising performance issues. (Pa000016-17, Pa000637, Pa000639-640). Notably, the issues listed in these performance warning notices were not mistakes made by Appellant alone, but she was the only one punished by Respondents. Id. When Appellant complained to Respondents regarding age discrimination, no investigation into Appellant's

complaints ever occurred. (Pa000641-642). When Appellant was met yet again with another bogus warning notice on July 11, 2019, she could no longer bear working in such an intolerably hostile work environment and was terminated when Respondent Woods directed her to collect her things and leave the building. Therefore, in addition to the foregoing warning notices, Appellant suffered an adverse employment action when she was constructively discharged on July 11, 2019.

E. Respondents committed adverse employment actions motivated by her age, and thus, the trial court's entry of summary judgment should be reversed.

In the ground-breaking NJLAD case Lehmann v. Toys 'R' Us, 132 N.J. 587, 603-604 (1993), the New Jersey Supreme Court outlined the elements for a hostile work environment claim. Lehmann addressed a gender discrimination claim, but the Lehmann standard has been held to apply to hostile work environment claims generally, encompassing other protected classes. Rios v. Meda Pham., Inc., 247 N.J. 1, 3 (2021). To demonstrate a successful NJLAD hostile work environment claim, an Appellant must demonstrate that:

> (1) the conduct complained of was unwelcome; (2) that it occurred because of the plaintiff's inclusion in a protected class under the NJLAD; and (3) that a reasonable person in the same protected class would consider it sufficiently severe or pervasive to alter the conditions of employment and create an intimidating, hostile, or offensive work environment. El-Sioufi, 382 N.J. Super. at 178 (citing Lehmann, 132 N.J. 587, (1993)).

A crucial factor to consider is whether the abusive conduct "unreasonably interferes with an employee's work performance." El-Sioufi, 382 N.J. Super at 178. Hostile work environment claims must be evaluated under "all the circumstances, including the frequency of the discriminatory conduct, its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Id. at 14.

i. The trial court's entry of summary judgment should be reversed because the record clearly shows that Appellant suffered adverse employment actions. (Pa000010-11) (Pa000013) (Pa000015) (Pa000178-180) (Pa000192-195) (Pa000208) (Pa000260-261) (Pa000269) (Pa000788-794)

There are no bright-line rules when determining whether the challenged employment action is indeed adverse. Mancini v. Twp. of Teaneck, 349 N.J. Super. 527, 564 (App. Div. 2002). New Jersey courts look to federal law and civil rights legislation, considering factors such as "employee's loss of status, a clouding of job responsibilities, diminution of authority, disadvantageous transfers or assignments, and toleration of harassment by other employees." Id. Additionally, "the assignment to different or less desirable tasks can be sufficient to constitute an adverse employment action and establish a prima facie case of retaliation." Id. (citing Shepherd, 336 N.J. Super. at 419-20).

Looking at the totality of the circumstances, there is sufficient evidence for a trier of fact to determine that Respondent subjected Appellant to adverse

employment actions. Respondents' age-based discrimination towards Appellant began in 2018 when they shifted her job responsibilities to new, younger employees. (Pa000010, Pa000208). The hostility became clearer when Respondent Woods blatantly asked Appellant if she had "***any thoughts on retiring***." (Pa000011, Pa000269). When Appellant responded that she had no plans to leave, Respondents began doing everything in their power to force her out. (Pa000011, Pa000178-179, Pa000192-195). From that point forward, Respondents engaged in a campaign of retaliation, which included bypassing Appellant for promotions and issuing bogus performance warnings. (Pa000013, Pa000260).

Respondents stated themselves that Appellant was a top performer and dependable employee at Respondent Haydon. (Pa000261). In fact, before Appellant's termination, she received an "Outstanding- 90% Overall Rating" in her final annual performance evaluation. (Pa000015, Pa000788-794). It was then a shock to Appellant that not once, but twice, Respondents issued her bogus written warnings complaining of her alleged work performance. (Pa000179-180, Pa000193-194). Even worse, Respondents allowed the younger, new hires to issue Appellant these notices and humiliate Appellant. (Pa000193-194). Appellant, a seasoned employee, was forced to be ridiculed and demeaned by her younger replacements on performance issues that had little to no backing. These pretextual warning notices

humiliated Appellant, and by her second one, she was well aware of Respondents' overt discriminatory animus targeted towards her.

Undoubtedly, the disparate treatment, diminution of job responsibilities, intentional overburdening with excessive, time-sensitive paperwork in addition to her regular HR duties, and pretextual performance evaluations in retaliation for her complaints about discrimination in the workplace all amount to adverse employment action by Respondents, not to mention their constructive termination of her employment on July 11, 2019. Accordingly, the trial court's grant of summary judgment for failure to establish adverse employment action should be reversed.

ii. The trial court improperly failed to recognize Appellant's constructive termination as an adverse employment action. (Pa000010-11) (Pa000016-17) (Pa000115) (Pa000178-180) (Pa000183) (Pa000192-195) (Pa000197) (Pa000207-208) (Pa000297) (Pa000731-750) (Pa000782) (Pa000788-794)

As previously noted, Respondents' adverse employment action culminated in Appellant's constructive termination on July 11, 2019. In order to establish a *prima facie* case of constructive discharge in New Jersey, a plaintiff must establish that "the employer knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign." Shepherd, 174 N.J. at 27-28. In any case, to sustain a claim of a constructive discharge, the plaintiff must provide evidence of "severe or pervasive conduct" and "conduct that is so intolerable that a reasonable person would be forced to resign rather than continue

to endure it." See Dunkley v. S. Coraluzzo Petroleum Transporters, 437 N.J. Super. 366, 383 (App. Div. 2014). A court should consider:

> the nature of the harassment, the closeness of the working relationship between the harasser and the victim, whether the employee resorted to internal grievance procedures, the responsiveness of the employer to the employee's complaints, and all other circumstances. Shepherd, 803.A.2d at 627.

The work environment fostered by Respondents was certainly one that would lead a reasonable person to resign. Considering the totality of evidence, it is abundantly clear that once Appellant dismissed the idea of retirement in October 2018, Respondents immediately did everything in their power to change her mind. (Pa000011, Pa000178-179, Pa000192-195). Before that, Respondents stripped Appellant of coveted job responsibilities and gave them to younger new hires. (Pa000010, Pa000207). Respondents proceeded to leave Appellant only menial busy-work to demean Appellant's thirteen-year tenure. (Pa000010, Pa000208). The hordes of mundane tasks Respondents assigned Appellant overwhelmed and under-stimulated Appellant, and when she complained as to said discriminatory treatment, every Respondent turned a blind eye. (Pa000011, Pa000297).

As if slowly watching her beloved job be taken away was not distressing enough, Respondents served Appellant two performance warning notices. (Pa000179-180, Pa000193-194). The notices were clearly pretextual, since they appeared on the heels of an "Outstanding" yearly review and did not concern issues

that were solely of Appellant's doing. (Pa000016, Pa000788-794). In fact, multiple other employees, such as Mr. Johnson, had a hand in the very same "mistakes," but Appellant was the only employee ever punished for same. (Pa000016-17, Pa000183, Pa000782). Nonetheless, Respondents bombarded Appellant with the warnings while simultaneously ignoring her complaints regarding the harassment, discrimination, and retaliation she was subjected to.

Respondents argued, and the trial court agreed, that Appellant's employment ended solely on her own accord with no fault from Respondents. (Pa000731-750). However, the trial court utterly failed to properly apply the *prima facie* requirements of constructive termination to Appellant's situation. While Appellant did state during the meeting that she could no longer tolerate working in such a hostile environment if the Respondents did not discard the July Notice, it was Respondents' relentless actions as articulated in detail in the record herein that led her to that point. (Pa000017, Pa000193). Unwilling to acquiesce to Respondents' discriminatory and blatant attempts to coerce Appellant's resignation, Appellant was well within her rights to no longer tolerate the campaign of disparate treatment to which she had been subjected and repeatedly complained about, all to no avail.

On July 11, 2019, Appellant was presented with a Hobson's choice; namely, either continue to endure the age discrimination Respondents perpetuated or cease employment with Respondent Haydon. The ultimatum Respondents presented

Appellant that day was not one of free will, but rather, sheer desperation following Respondents' retaliation. Respondents refused to discard the July Notice and, in turn, Appellant departed the intolerable work environment. (Pa000017, Pa000197). Respondents sealed her fate by commanding her to collect her things and leave the building. Id. Thus, Respondents constructively terminated Appellant on July 11, 2019. (Pa000115). The trial court's failure to recognize same, in addition to disregarding (1) Rule 4:9-1's liberal granting of amendments to pleadings and (2) Rule 4:9-2's allowance of amendments to the pleadings to conform to the evidence to be made at any time, all constitutes reversible error.

F. The case of Prager v. Joyce Honda, Inc. is distinguishable from Appellant's case of age discrimination and retaliation. (Pa000011) (Pa000013) (Pa000016-17) (Pa000115) (Pa000178-180) (Pa000183) (Pa000193-195) (Pa000260) (Pa000269) (Pa000285-286) (Pa000782-783)

The trial court's order for summary judgment relied heavily on Prager v. Joyce Honda, Inc., a case easily distinguishable from the instant matter. Prager v. Joyce Honda, Inc., 447 N.J. Super. 124 (App. Div. 2016). In Prager, the plaintiff alleged retaliation from her managers and constructive discharge after she had filed a complaint against a customer for sexual harassment. Id. at 130-31. For evidentiary support, the plaintiff pointed toward two written warnings which appeared on the heels of her complaint, both of which she asserted were false. Id. at 131. The court did not accept plaintiff's argument, concluding that the two warnings alone were not enough to constitute adverse employment actions nor support a claim of constructive

termination. Id. at 140. Specifically, since the warnings were essentially the only evidence the court had to go on, there was insufficient proof of harm. Id. However, the court did emphasize that "context matters," because "an act that would be immaterial in some situations is material in others." Id. Further, the court stated "that written warnings might, in some circumstances, be materially adverse to an employee—in a formal system of progressive discipline for instance." Id. In the context of Prager, the evidence she presented did not amount to adverse action and thus, summary judgment was appropriate. Id. at 142.

The instant matter is, however, entirely distinguishable from Prager. Here, Appellant experienced extensive adverse employment action which culminated in her constructive termination on July 11, 2019. To begin, while Appellant did receive two performance warnings, the notices were only a sliver of the discrimination and retaliation she endured. (Pa000179-180, Pa000193-194). The torrent of discrimination began when Respondents suddenly asked Appellant when she would be retiring. (Pa000011, Pa000269). After responding in the negative, Respondents bombarded her with excessive, mind-numbing work, while transferring her long-term projects to younger employees. (Pa000013, Pa000178-179). Further, Respondents completely overlooked Appellant for any higher-level opportunities, and affirmatively ignored her pleas and complaints when she felt overwhelmed with work. (Pa000013, Pa000260, Pa000285-286). Appellant persevered, but then

Respondents issued her two warning notices. (Pa000179-180, Pa000193-194). Unlike Prager, where the warning notices were provided over the course of a couple weeks, Appellant here endured hostility and adverse treatment for upwards of a year in the form of disparate treatment, pretextual warnings, overburdening of work in addition to her existing job responsibilities, and reduction in work responsibility value. Prager, 447 N.J. Super. at 131; (Pa000011, Pa0000115, Pa000269).

Further, Prager vastly differs from Appellant herein due to the context of the warning notices. In Prager, the plaintiff received two notices regarding incidents where she had left early without permission. Prager, 447 N.J. Super. at 131. One of the warnings involved an incident that occurred before the formal complaint which allegedly sparked retaliation, and the warning had been in the works at that same time. Id. Here, however, Appellant's warnings came after a stellar yearly review and involved incidents which occurred months prior that were not included in Appellant's yearly review. (Pa000783). Additionally, Appellant was not the sole party at fault for these performance issues. (Pa000016-17, Pa000183, Pa000782). Unlike in Prager, where the plaintiff was the only person to blame, Appellant here was only one of many employees who bore responsibility for what had transpired. Id. In fact, one of the employees was Mr. Johnson, the very same man who issued Appellant the warning. Id. Appellant was the only employee to be issued warnings

and further humiliated in formal meetings, exemplifying Respondents' clear animus towards Appellant due to her age. Id.

Finally, Appellant's case differs from Prager due to Respondents' underlying motive in issuing the notices, resulting in Appellant's constructive termination. In Prager, the plaintiff elected to resign directly after the meeting to address her concerns about the warnings. Prager, 447 N.J. Super. at 133. It was revealed plaintiff's former employer was willing to rescind the write-ups; however, Prager opted to resign completely. Id. Unlike in Prager, where the plaintiff was given the option to completely eradicate the warnings, Appellant was never given such an opportunity. Id. at 133; see also (Pa000195). Conversely, Respondents herein remained steadfast in their issuance of their last retaliatory warning, sending the clear message that they were unwilling to remediate the hostile work environment and retaliation to which she had been subjected. (Pa000193). Moreover, while the plaintiff in Prager had the option to have the warnings be a learning opportunity with no real consequences to her record, Respondents herein issued Appellant's warnings with the sole intention of punishment, motivated by nothing other than Appellant's age. Id. Any reasonable person in Appellant's position would find the warnings to be retaliatory, particularly because Respondents did not investigate her prior complaints of age discrimination. Likewise, a reasonable person in Appellant's situation would have determined they had no other choice but to end employment.

Id. Since the facts in Prager greatly differ from the case here, the trial court's analysis is improper and summary judgment should, therefore, be reversed.

G. Appellant's individual claims against Respondent Woods and Rudel should survive summary judgment because they were active participants in the discrimination and retaliation she endured.

It is unlawful discrimination "[f]or any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this act, or to attempt to do so." N.J.S.A. 10:5-12(e). "[A] supervisor can be held liable for aiding, abetting and inciting 'any of the acts forbidden under [the NJLAD].'" Cowher v. Carson & Roberts, 425 N.J. Super. 285, 302-303 (App. Div. 2012). To hold an employer liable as an aider of abettor, Appellant must show:

> (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.'" Tarr v. Ciasulli, 181 N.J. 70, 84 (2004).

Courts have found individual defendants liable under the NJLAD when (a) they act to embolden other acts of discrimination (Ivan v. County of Middlesex, 612 F. Supp 2d 546, 554 (D.N.J. 2009)); (b) they flout their duty as supervisors to act against harassment, including indifference thereto, thereby creating liability for "himself and his employer" (Hurley, 174 F.3d at 126; see also United States v. Sain, 141 F.3d 463 (3rd Cir. 1998)); or (c) when they promote the interests of the defendant employer when they harass or commit other unlawful acts under the

NJLAD against the plaintiff. Shepherd, 226 N.J. Super 395, 426-427 (App. Div. 2001), aff'd in relevant part, 174 N.J. 1 (2002).

Both Respondents Woods and Rudel used their roles in aiding and abetting the ongoing harassment, discrimination, and retaliation endured by Appellant. Respondent Woods hid his motives under the guise of "succession planning," all the while inquiring as to Appellant's retirement, overlooking Appellant for hiring opportunities, and issuing pretextual warning notices, resulting in her termination.

Respondent Rudel is liable under what New Jersey Courts recognize as the "cat's paw" theory of liability, in which "a biased subordinate, who lacks decision-making power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action." Kwiatkowski v. Merrill Lynch, 2008 N.J. Super. Unpub. LEXIS 3023 (App. Div. 2008). Even though Respondent Rudel lacked traditional decision-making powers, she was an active participant in the issuance of Appellant's warning notices and termination. Therefore, Respondents Woods and Rudel are individually liable to Appellant for the harassment, retaliation, and hostile work environment she endured.

H. The trial court's granting of summary judgment is improper because the record shows Appellant could be entitled to punitive damages. (Pa000011) (Pa000297) (Pa000636) (Pa000641-642)

To support an award of punitive damages against Respondents, the jury must find the following factors present: (1) the discrimination was "especially egregious,"

and (2) "upper management" employees participated in, or were willfully indifferent to, the wrongful conduct. New Jersey Model Civil Jury Charge 8.61. Under the NJLAD, a Court may find punitive damages are appropriate where there was actual participation in or willful indifference of upper management, and the offending conduct was especially egregious. Rendine v. Pantzer, 141 N.J. 292 (N.J. 1995).

Appellant is entitled to punitive damages because of the egregious discrimination perpetuated by upper management employees, particularly Respondent Woods, Respondent Haydon's CEO. Undoubtedly, upper management employees were not only indifferent to Appellant's discrimination, but also, they themselves actively participated in same, including Respondent Woods' audacity to ask Appellant if she had "any thoughts on retiring." Respondent Woods then began a concerted campaign to oust Appellant by creating a working environment so hostile no reasonable person could be forced to endure. (Pa000011, Pa000636).

When Appellant complained to Respondent Woods, Mr. Johnson, Respondent Haydon's CFO, and Mr. Awad, Respondent Haydon's then Human Resources director, about feeling marginalized because of her age, none of them took any measures to remediate the situation or investigate same. (Pa000641-642). Thus, a jury could reasonably award punitive damages against Respondents.

I. The trial court improperly dismissed Appellant's viable claim of Wage Theft Act violations as a matter of law. (Pa000023) (Pa000025) (Pa000029-30) (Pa000804-809)

On August 5, 2019, Acting Governor Oliver signed Bill S1790 into law, which amended New Jersey's state criminal laws and wage and hour laws to provide enforcement, penalties, and procedures for the failure to pay wages, revising various parts of statutory law, and supplementing articles 1 and 3 of Chapter 11 of Title 34 of the Revised Statutes. See Pa000023; see also New Jersey Senate Bill 1790. Specifically, Bill S1790 provides for civil and criminal penalties for employers who knowingly fail to pay wages owed to their employees. Id. Bill S1790's amendments provide a basis for an aggrieved employee to recover the full amount of any wages due, plus liquidated damages and attorney's fees. N.J.S.A. 34:11-4.10c. Bill S179 also provides a presumption against the employer for unlawful retaliatory action that occurs within ninety days of an employee instituting an action to recover the withheld wages, can only be rebutted "by clear and convincing evidence that the action was taken for other, permissible, reasons." (Pa000023).

In the instant matter, Respondents took an unlawfully retaliatory personnel action against Appellant through retaliatory termination and/or constructive termination of her employment, but also knowingly failed to pay Appellant for forty-four (44) hours of unused vacation time. (Pa000025). The missing payments constitute unpaid wages and/or monies owed to Appellant while employed with

Respondents. Id. Although Respondents did ultimately pay the amount owed for the unused vacation time, Appellant is still entitled to attorney's fees and costs related to her Wage Theft Act cause of action as a matter of law.

The trial court dismissed this count and ruled that the unpaid hours was a good faith mistake which resolved, and Appellant never sought to correct the issue prior to filing the suit. (Pa000029-30). However, Appellant was never required to put Respondents on notice prior to filing the Complaint, as Appellant's complaint was proper notice. See N.J.S.A. 34:11-4.10(c). Thus, the proverbial clock under N.J.S.A. 34:11-4.10(c) began to run once Respondents were served with the Complaint. Id. From there, Respondents had thirty (30) days to pay the violation to avoid paying damages. Id. Respondents failed to satisfy that timing requirement and issued Appellant a check for the unpaid wages almost five (5) months after the filing of Appellant's Complaint, which was served upon Respondents on February 26, 2020. (Pa000804-809). Even assuming, *arguendo*, that the unpaid vacation time was a good faith mistake as Respondents contend, they still failed to pay the amount owed within the required time limit. (Pa000029-30). Thus, Appellant is still entitled to damages and Appellant's claim should not have been dismissed.

V. CONCLUSION

Based on the foregoing, Appellant respectfully requests that this Court reverse the trial court's decision granting Summary Judgment for Respondents.

McOMBER McOMBER & LUBER, P.C.
Attorneys for Plaintiff/Appellant,
Maryjane Proctor

By: */s/ Austin B. Tobin, Esq.*
Austin B. Tobin, Esq.

Dated: August 27, 2024

MARYJANE PROCTOR, Plaintiff/Appellant, vs. HAYDON CORPORATION; ADAM WOODS, in his capacity as President and Chief Executive Officer of Haydon Corporation; and NICOLE C. RUDEL, in her capacity as Director of Human Resources of Haydon Corporation; Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001241-23 ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY LAW DIVISION: PASSAIC COUNTY DOCKET NO. PAS-L-524-20 SAT BELOW The Honorable Frank Covello, P.J.Ch.

BRIEF OF DEFENDANTS-RESPONDENTS HAYDON CORPORATION, ADAM WOODS AND NICOLE C. RUDEL

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PRELIMINARY STATEMENT

Plaintiff-Appellant Maryjane Proctor's ("Plaintiff") deposition testimony conclusively established that on July 11, 2019, she chose to end her employment at Defendant-Respondent Haydon Corporation ("Haydon" or the "Company") because of a warning notice that Haydon, Defendant-Respondent Adam Woods ("Woods"), Defendant-Respondent Nicole Rudel ("Rudel") (collectively, "Defendants") and Haydon CFO Kevin Johnson ("Johnson") attempted to address with Plaintiff that day.

> ***"[T]oday will be my last day."***
>
> - Plaintiff advising Defendants on July 11, 2019 that she was ending her employment with Haydon Corporation that day.
>
> "***I wanted the warning notice thrown in the garbage, discarded, or otherwise disposed of. And I said if that wasn't done then today will be my last day." "I wasn't accepting this under any circumstances. I made that clear to them. I wasn't accepting it and that was the end."***
>
> - Plaintiff testifying that her decision to end her employment was because Defendants would not cede to her demand that they destroy a performance warning notice that she refused to accept, and that she *"made that clear to them."*

The lower court properly determined that ***"there is no evidence whatsoever that Plaintiff was terminated. Moreover, it could not be clearer that the Plaintiff resigned from her position"*** and that it was a ***"resignation, effective immediately."***

The lower court also correctly determined that Plaintiff's deposition testimony and other undisputed record evidence conclusively established that Plaintiff was unable to show any adverse employment action, as was necessary to prove both her discrimination and retaliation claims under the New Jersey Law Against Discrimination ("LAD"). Her testimony entirely undermined her allegations of discrimination based on how work was either reassigned away from her or assigned to her. As to the former, she conceded, ***"my job responsibilities did not diminish."*** As to the latter, she testified, ***"No. I don't believe I got added tasks as a result of age discrimination, no."*** Her vague, conclusory and non-factual assertions about feeling "marginalized" or relegated to perform "step and fetch" tasks, are not supported by evidence of any change in her job responsibilities.

Regarding the two performance warning notices issued to Plaintiff, her assertions that these were "bogus" or a "pretext" for ageism are belied by her admissions to making various mistakes addressed in those notices. Furthermore, neither of those notices constituted or effectuated any change in the terms or conditions of Plaintiff's employment, notwithstanding that she may have been unhappy to receive the notices. Notably, the second of those notices, which she inexplicably responded to by ending her employment, did not state that it was a final notice and did not even make any reference to the possibility of termination

for future performance issues. As the lower court correctly determined, neither notice can qualify as an adverse employment action.

Notwithstanding the fact that Plaintiff's Complaint did not plead any failure to promote or allege that she sought or was qualified for Haydon's HR Director position, she attempted to insert such a claim when opposing summary judgment. Regardless, her testimony established that she never sought that position and never stated to Defendants any belief that she was qualified or should be hired for the position. That includes during the time she was involved in the selection and interview process to hire someone for the position.

In opposing summary judgment, Plaintiff also attempted to conjure up never pled claims of hostile work environment and constructive termination. However, as the lower court concluded, there is no record evidence of conditions that remotely approach what is needed to prove a hostile work environment or the more egregious conditions required to prove constructive termination.

Finally, Plaintiff's New Jersey Wage Theft Act ("WTA") claim was also properly dismissed on the basis that that alleged failure to pay wages was at most an inadvertent error that was corrected, and which Plaintiff never brought to Haydon's attention before filing her Complaint.

The lower court's Order granting Defendants summary judgment should be affirmed in all respects.

PROCEDURAL HISTORY

Plaintiff commenced this action by Complaint filed on February 13, 2020 in the Superior Court of New Jersey, Law Division, Passaic County (the "Complaint"). [Pa5]. The Complaint asserted the following three (3) causes of action against Defendants-Respondents: age discrimination in violation of the LAD (Count One); retaliation in violation of the LAD (Count Two); and violation of the WTA (Count Three). Defendants filed their Answer and Separate Defenses to the Complaint on April 6, 2020. [Da1]. Following discovery and by motion filed on January 21, 2022, Defendants moved before the lower court, Honorable Frank Covello, J.S.C.[1], for an Order pursuant to R. 4:46, granting Defendants summary judgment dismissal of Plaintiff's Complaint. [Pa29]. Plaintiff opposed that motion and oral argument was held before the lower court on February 22, 2022. [Tr.][2]. By Order Granting Summary Judgment and attached Statement of Reasons dated November 27, 2023, the lower court granted Defendants' motion and dismissed Plaintiff's Complaint in its entirety. [Pa731]. Plaintiff thereafter filed this appeal. [Pa810].

[1] After oral argument of the motion for summary judgment and before issuing his Order granting that motion, Judge Covello was assigned as a Judge of the Chancery Division, General Equity, Passaic County.

[2] "Tr." refers to the transcript of the oral argument hearing of Defendants' motion for summary judgment held on February 22, 2022.

STATEMENT OF RELEVANT FACTS

A. Background and Nature of the Parties

Haydon manufactures and sells metal products such as strut metal framing, rooftop supports and baseboard heating systems. [Pa7, 238]. Plaintiff was employed by the Company from 2006 until July 11, 2019, initially as its bookkeeper and last as its Human Resource Manager. [Pa135-137, 439]. Plaintiff was 64 years old at the time her employment with Haydon ended. [Pa113].

Defendant Woods began his employment with Haydon in 2007 as Vice President of Operations. [Pa238]. Ultimately Woods became the Company's President and CEO, positions he held at the time Plaintiff's employment ended. [Pa241]. Woods was 46 years old at the time Plaintiff's employment at Haydon ended. [Pa269]. Defendant Rudel was Haydon's Director of Human Resources. She began her employment with Haydon in late June 2019. [Pa373]. She was elevated to Vice President in June 2021. [Pa400]. Rudel was 51 years old when the Company hired her as Director of Human Resources and at the time Plaintiff's employment ended. [Pa399].

B. Plaintiff's Promotion to HR Administrator and then HR Manager and Haydon's Growth

Plaintiff worked as a bookkeeper for Haydon from 2006 until 2011, at which time she was made Human Resource Administrator, still retaining her

bookkeeping responsibilities and taking on additional HR responsibilities that had previously been handled by then CEO Doug Hillman ("Hillman"). [Pa136, 140, 439]. Upon being made Human Resource Administrator in 2011, Plaintiff was also given a raise and she considered this a promotion. She was 56 years old at the time of that promotion. [Pa113, 137, 141]. With that promotion, Plaintiff reported to Raj Kamdar, then CFO, with regard to her accounting duties and Hillman with regard to her HR duties. [Pa137, 138]. From that point and continuing throughout the remainder of her period of employment, Plaintiff had essentially a dual role, with various duties associated with accounting and finance and other duties associated with human resources. [Pa245].

In 2012, Woods was promoted to become Haydon's President and Hillman thereafter transferred some of his responsibilities to Woods. [Pa241, 245]. In July of that year, Haydon hired Kevin Johnson ("Johnson") as its Controller. Johnson later, in 2013, replaced Raj Kamdar as CFO, and Plaintiff was then reporting to Johnson and Woods, with Johnson as her direct supervisor. [Pa141, 309]. Johnson was 60 years old at the time Plaintiff's employment at Haydon ended. [Pa323]. In 2014, with the departure of Hillman, Woods became the Company's CEO and Plaintiff then began to report to him regarding her HR duties. [Pa245, 246, 439].

During the last several years that Plaintiff was employed at Haydon, the Company's revenues more than doubled, as the Company grew and added new

products. [Pa238, 311]. In 2019, Haydon opened a new California manufacturing facility to add to its existing New Jersey and Texas facilities. [Pa238]. By the end of Plaintiff's employment, Haydon had grown to about 230 employees. [Pa311].

C. Haydon's Need to Hire a Seasoned Human Resource Professional

Up until early January 2019, Plaintiff was Haydon's only HR personnel. [Pa139]. On November 12, 2018, Woods and Johnson spoke with Plaintiff and explained that because Haydon was growing, the Company now needed, and would be hiring, a seasoned HR professional. Plaintiff believes that Woods at the time referred to this planned new hire as an HR "Manager." [Pa142, 143, 146]. The Company's decision to hire an HR Director was made by Haydon's Board of Directors, on recommendation by Chairwoman of the Board, Patricia Wagstaff and Woods. [Pa256, 318]. Wagstaff was 54 years old at the time Plaintiff's employment at Haydon ended. [Pa446].

For the HR Director position, the Company was looking for someone with a secondary degree (*i.e.* a masters) specific to human resources or an undergraduate degree in related subject matter and human resources experience at a senior level. [Pa258, 259]. Wagstaff determined the qualifications and job description for the position. [Pa318]. The job description was prepared before the November 12, 2018 meeting occurred among Plaintiff, Woods and Johnson.

[Pa267]. Woods decided that he and Johnson would have that meeting with Plaintiff to let her know about the hiring of an HR Director and ensure that she understood that this new hire would not assume any of Plaintiff's responsibilities but rather have different responsibilities beyond what she was doing. [Pa273].

According to Plaintiff, at the time of the November 12, 2018 meeting, although her official title was Human Resource Administrator, she was commonly referred to as "HR Manager." [Pa136, 137, 139, 145, 439]. Plaintiff testified that at that meeting, Woods had a sheet of paper with a printed listing of the job responsibilities for the newly created HR position, and Plaintiff acknowledges that the task assignments "were a different scope of work than the HR function that I handled … **It was different than the tasks that I was doing**….**I don't remember any of those tasks being mine.**" (Emphasis added). [Pa144, 146]. Plaintiff did not recall that this sheet of paper listed a position title. [Pa170]. According to Plaintiff, during that meeting, Woods stated that the new HR hire "wasn't going to be affecting my position. … would not be effecting [*sic*] my tasks, my responsibilities." [Pa145, 147, 148].

On November 13, 2018, Plaintiff saw a copy of Haydon's job listing for the newly created "Director of Human Resources" position. [Pa142, 143, 448]. That same day, Woods sent Plaintiff an email referring to their meeting the day before, the Company's growing HR needs, and that she should speak with him or Johnson if she had any questions or concerns. Notwithstanding that the title

for the new HR position was "Director of Human Resources," Woods' email incorrectly referred to it as "HR Manager." [Pa139, 148, 149, 452].

Plaintiff admits that she never objected to Haydon hiring an HR Director, never sought the position for herself, and never stated any belief that she should be hired for the position. Her Complaint does not contain any allegation that she was qualified for or should have been given the HR Director position. [Pa5, 154]. With the Company growing with more employees and the consequent increase in employee matters, by late 2018, Plaintiff was spending more of her time on HR matters. Woods discussed with Johnson that Plaintiff be given a formal title promotion and Plaintiff was then formally given the new title of Human Resources Manager. [Pa257, 317, 318]. Plaintiff was 63 years old at that time. [Pa113]. A December 3, 2018 new job description for Plaintiff reflected her title change to "Human Resource Manager," where her previous job description listed her title as Human Resource Administrator. Plaintiff prepared that job description document, with Johnson approving it. There was no change in her pay or responsibilities associated with this title changed. [Pa137, 139, 140, 148, 317, 439].

Haydon's search for an HR Director ultimately resulted in the hiring of Sid Awad ("Awad"), who began his employment in early January 2019. Awad was 45 years old at that time. [Pa458]. Plaintiff testified that before Mr. Awad was hired and when the search for an HR Director was down to a few remaining

candidates, she attended interviews of those candidates, along with Woods, Johnson, Wagstaff, and Woods' assistant Sybil Kaya, and that Plaintiff reviewed the candidates' resumes in connection with those interviews. [Pa150, 153, 154, 455]. With the hiring of Awad, Plaintiff began to report to him for her HR functions and continued to report to Johnson for her accounting functions. She had no objection to that, and she knew before Awad's hiring that this was going to be her reporting arrangement. [Pa154]. Plaintiff concedes that with the hiring of Awad, *"**my job responsibilities did not diminish.**"* (Emphasis added) [Pa155].

D. The April 17, 2019 Meeting to Address Plaintiff's Admitted Mistakes

At the beginning of 2019, Plaintiff received a favorable annual performance review for the 2018 year, with Johnson providing some performance critiques in that review. [Pa211, 212, 460]. On April 17, 2019, Plaintiff was asked to meet with Awad, Johnson and Woods regarding a written Employee Warning Notice that was then being given to her (the "April Notice") for "tardiness" and "lack of review on critical controls and attention to detail." The meeting (the "April 17 Meeting") took place around 10:00 a.m. [Pa179, 180, 475]. The April Notice was prepared by Johnson. [Pa345].

With regard to tardiness, Plaintiff's 2018 annual review made reference to that issue and the April Notice points out that punctuality was a problem

discussed in that review. With regard to the lack of review on critical controls and attention to detail, the April Notice had an addendum listing 7 enumerated items/errors that were stated to have elicited the concern of members of Haydon's Board of Directors. Some of these occurred in 2018 but they were primarily discovered in 2019, after Plaintiff's 2018 annual review. They included mistakenly issuing a $40,000 payment for a $4,000 invoice; mistakenly paying another invoice three times; issuing a check for approximately $128,000 that should have been reduced by $78,000 for rejected material received from the vendor to whom the check was made payable; paying the wrong party on another invoice; mistakenly issuing two 1099s to one of the owners of Haydon; and issuing a 1099 with an incorrect social security number on it. [Pa316, 317, 336, 337,460, 475].

At the April 17 Meeting, Johnson was the one who "primarily [ ] enumerated the items … Sid Awad discussed what we were going to do to help [Plaintiff] improve her performance," and Woods spoke very little. [Pa340]. At the meeting, Plaintiff stated that she had a "very heavy desk and a lot of work and no help or little help." [Pa285, 286]. The meeting lasted about 10 minutes when Plaintiff cut the meeting short and left work for the day. She testified that at the beginning of the meeting, one of the other attendees tried to hand her the April Notice, but that she recognized it was a written warning, refused to accept it, and said, ***"I'm not taking it and I'm not signing it."*** (Emphasis added)

[Pa180]. At that time, she had no knowledge what was stated in that notice. According to Plaintiff, after mistakes referenced in that notice were then briefly discussed with her, she cut the meeting short, saying that she had a "splitting headache" and needed to go home. [Pa180, 181, 186].

Later on April 17, 2019, at around 1:30 p.m., Awad sent Plaintiff an email attaching the April Notice, stating concern about "the number of critical errors that have recently taken place" and stating that **"[w]e look forward to working with you on resolving these issues."** (Emphasis added) [Pa179, 186, 475]. At her deposition, Plaintiff acknowledged that she was at least partly at fault for the mistakes listed in the April Notice, stating her view that others also had a responsibility for the mistakes. She also attributed these errors, in part, to the Company's new software. [Pa180, 182-185]. She elsewhere testified that in 2016, Haydon switched to paperless and began using new computer software and that this change made her day-to-day work activities "vastly different." [Pa139, 205].

Regarding the April Notice's reference to a mistake that resulted in a failure to comply with California registration requirements, Plaintiff was asked if she was responsible for the mistake and she responded, "In part, yes." When then asked who else was responsible for that mistake, she responded, "Oh, I don't know." [Pa182, 183]. Of the mistake regarding Plaintiff's issuance of two 1099s to one of Haydon's owners, she was asked at her deposition whether

that was something she should have caught before the mistake occurred. She responded, "It's something that other people could have caught, too," identifying Johnson in her response. [Pa183]. Regarding Plaintiff's mistake of issuing a check for approximately $128,000 when it should have been $78,000, Plaintiff testified "Adam Woods found the check and voided it when it was presented to him for signature so the mistake was averted" by Woods. [Pa183, 184].

Sometime after leaving work early after the April 17 Meeting and on that same day, Plaintiff spoke with her attorney. [Pa131, 187, 188]. Also that same day, at 5:49 p.m., Plaintiff, with assistance from counsel, prepared an email which she sent to Woods, Johnson and Awad, asserting that she believed she was being discriminated against on the basis of her age. [Pa189]. Plaintiff did not appear for work on Thursday, April 18, 2019. The following day was Good Friday. She returned to work the following Monday. [Pa188].

E. <u>The Hiring of Rudel to Replace Awad as HR Director</u>

On April 24, 2019, Awad's short-lived employment at Haydon was terminated due to inappropriate conduct with a co-worker. [Pa250, 286]. After that, in late June 2019, Rudel was hired to replace Awad as HR Director. [Pa373]. Plaintiff did not apply for that position, and she did not state that she wanted the position. [Pa171]. Rudel was first contacted about the position by Wagstaff, who also conducted Rudel's initial interview. [Pa373, 375]. Prior to

Rudel being hired, it was explained to her that her position would be an addition to the staff and not a replacement for the existing HR Manager (*i.e.* Plaintiff) or any other position. [Pa377]. Rudel was further told how the HR Manager would report to her with regard to HR responsibilities and also have a "dotted line" report to the CFO (Johnson), because the HR manager also had accounting responsibilities. [Pa377, 378]. Plaintiff acknowledges that the hiring of Rudel did not diminish Plaintiff's responsibilities. [Pa171].

F. Plaintiff's Rash Resignation at the July 11, 2019 Meeting to Correct Performance Issues

On July 11, 2019, Plaintiff met with Rudel, Woods and Johnson in Woods' office. Plaintiff recalled that the meeting (the "July 11 Meeting") was about 20-30 minutes, including a 10 minute break, with the post-break portion being only a few minutes. [Pa192, 193]. Before the break, Rudel did all or nearly all of the talking, speaking about performance issues and the "need [for] an improvement plan," while referencing a written Employee Warning Notice (the "July Notice") that she was holding. As Plaintiff testified, prior to the break, "Adam Woods and Kevin Johnson were, for the most part, silent … I don't recall them speaking." [Pa193, 194]. As was her responsibility as both HR Director and Plaintiff's supervisor, Rudel prepared the July Notice [Pa392, 417, 479]. The notice enumerated specific errors and lapses that came to light, and the

notice and meeting were intended to address performance expectations and corrective adjustments "to help Maryjane." [Pa348, 412, 480].

Rudel tried to hand Plaintiff the July Notice at the July 11 Meeting. Plaintiff knew it was an employee warning notice, and she refused to accept it. [Pa194, 199]. As she testified, she told Rudel, Woods and Johnson multiple times during this meeting that if the July Notice was not torn up or withdrawn, ***"today will be my last day."*** (Emphasis added) [Pa195-197]. Plaintiff testified, "*I said to them, think about what you want to do and let me know.* ***I wasn't going to accept a warning notice****. I didn't want to look at it. I didn't want to sign it. I didn't want to touch it. I wanted nothing to do with it.* ***I told them that I wanted the warning notice thrown in the garbage, discarded, or otherwise disposed of. And I said if that wasn't done then today will be my last day."*** (Emphasis added) [Pa193, 195, 198]. Plaintiff concedes that when she stated ***"today will be my last day"*** unless the Company destroyed or discarded the July Notice, she meant that if that was not done that day, she was not returning to work at Haydon after that day. (Emphasis added) [Pa196].

Recalling the July 11 Meeting, Rudel testified that Plaintiff "didn't allow us to complete our discussion with her. And to talk through what our concerns were. And she was unwilling to engage in any dialogue with us about: What are things that we could do to support her? What are things that we could do to put into place that might mitigate or prevent these things from happening in the

future?" [Pa421]. The July Notice referred to the counseling that Plaintiff received in April 2019 on the importance of accuracy and appropriate controls and stated that "[s]ince then there have been 2 incidents that demonstrate that you are not improving in these areas". These incidents listed in the notice were (1) the fact that in late June 2019, it was discovered that Woods' former domestic partner had not been removed from Haydon's health and dental insurance notwithstanding Woods' instruction in December 2018 that this be done and made effective January 1, 2019; and (2) the discovery that Plaintiff had not enrolled three employees for long term disability insurance, where two had been eligible for about a year and the other for about seven months. The notice explained that the latter of these incidents exposed Haydon to potential significant liability if these employees needed this insurance. [Pa480].

Plaintiff testified that in response to Rudel speaking of certain mistakes by Plaintiff at the July 11 Meeting, Plaintiff stated that things sometimes fall through the cracks because her desk is a very busy desk and she gets many *ad hoc* requests. [Pa194, 214, 215]. Rudel told Plaintiff that she could come to Rudel to address *ad hoc* requests from others, and Rudel also offered suggestions for handling such unplanned requests. [Pa194, 215]. Plaintiff responded by stating that the solution for her busy desk and the *ad hoc* requests was to reassign some of her work to someone else. [Pa194, 215].

The July Notice included a plan for improvement. [Pa480]. It did not refer to termination or possible termination. [*Id.*]. The "Final Warning" box on the form used for the notice was not checked, and nothing in that notice referred to it being a final warning. The notice states that it was "Written Warning #2." [*Id.*]. The addendum to the notice concluded with "I believe that you can make the required changes to improve your performance. I am available to support you in any way that I can." [Pa482].

Plaintiff acknowledges that at the July 11 Meeting, Rudel may have also stated to Plaintiff that everyone at that meeting believed that Plaintiff could improve and that they would support her in those efforts. [Pa222]. Johnson recalled that when Plaintiff stated that if the July Notice was not torn up that day would be her last day working at Haydon, "we were, like, you can't be serious. That's not the whole point here. And so that's why Adam said, 'Let's take a break.'" There was a "whole back and forth trying to plead with her to cooperate with this process. So Adam said, 'Why don't you go back to your office and relax for a while, we'll take a break, and then will get back together and clear our heads.'" [Pa352, 353]. Rudel similarly recalled that "Mary Jane repeatedly indicated that if we did not tear up the written warning, that that would be her last day" and "we paused the meeting because we did not expect that as a reaction." [Pa425].

When the meeting broke, Plaintiff left Woods' office with Rudel and Johnson remaining there, and Plaintiff went back to her office. [Pa196, 293]. Woods, Johnson and Rudel then discussed their concern that "[Plaintiff] was going to leave us." As Woods testified, "[t]hat outcome was never something any of us considered before or during that meeting and I was in shock." [Pa294]. There was never any discussion about terminating Plaintiff's employment. [Pa293, 350].

After the meeting had broken for about ten minutes, Rudel went to get Plaintiff from her office and they then went back to Woods' office. [Pa193, 196, 197]. Woods then spoke about what Plaintiff had said before the break, and it was confirmed that she was resigning unless Haydon tore up or discarded the July Notice. [Pa197, 425-427]. Plaintiff testified that after the meeting resumed, ***"I said that I wanted the warning notice thrown away or today would be my last day."*** (Emphasis added) [Pa197]. Woods asked Plaintiff to reconsider that decision, and he told her that there was no intention to end her employment or make her uncomfortable, but rather that there were simply things that happened that needed to be addressed and which they would "work together to fix." [Pa295]. Woods and Johnson both pleaded with Plaintiff not to take the position that she was leaving the Company unless the July Notice was torn up, both urging Plaintiff, "Please don't do this" or similar words, but Plaintiff said, "No, that's my decision" and "I am leaving." [Pa353, 355, 427].

Woods stated that he, Johnson and Rudel were disappointed that Plaintiff was making the decision to leave the Company, he told Plaintiff "we accept your resignation," he thanked her for her time and service, and he stated that because she was leaving the Company, she could go collect her things from her office. [Pa353, 425-427]. The July 11 Meeting ended with Plaintiff shaking hands with each of Woods, Johnson and Rudel, with her wishing them all well and they wishing her well. [Pa197, 198]. Johnson recalled being "stunned by the way [the July 11 Meeting] ended." [Pa354, 355]. After collecting her belongings following the July 11 Meeting, Plaintiff left Haydon under her own volition and never returned to work there. [Pa115, 355].

Plaintiff concedes that she never offered to withdraw her demand that the July Notice be torn up, and that she never withdrew her position that absent that notice being torn up or discarded, she was not coming back to work at the Company after July 11, 2019. [Pa198]. Referring to the July Notice at her deposition, Plaintiff testified, ***"I wasn't accepting this under any circumstances. I made that clear to them. I wasn't accepting it and that was the end."*** (Emphasis added) [Pa202]. She admits that there was nothing that Haydon could have done that would have resulted in her coming back to work after July 11, 2019 and withdrawing her decision that it was her "last day" absent the Company ceding to her demand that day that the July Notice be torn up or discarded. [*Id.*].

Plaintiff also concedes that she might still be working at Haydon to this day, if not for her July 11, 2019 decision to leave the Company unless Haydon agreed to her demand that the July Notice be torn up or discarded. [Pa201, 203, 204]. She acknowledges that there was nothing in that notice about terminating her employment or about it being a final warning. [Pa200-202, 480]. She also concedes that no one ever told her that Haydon was terminating her employment, testifying, ***"No, no one said that."*** (Emphasis added) [Pa197]. She testified, ***"On July 11, I wasn't concerned about getting fired. I wasn't concerned about it whatsoever. I was concerned about getting rid of the warning notice. That was my concern."*** (Emphasis added) [Pa202].

G. Rudel's Letter Memorializing Plaintiff's Resignation and the Events of July 11, 2019

By letter dated July 23, 2019 from Rudel to Plaintiff, Rudel addressed what occurred at the July 11 Meeting, the fact the meeting was intended to agree on an action plan to correct performance issues, and the fact that Plaintiff's resignation was accepted after she multiple times stated that she was ending her employment that day unless the July Notice was destroyed or discarded. That letter also advised Plaintiff that she would be paid for unused accrued vacation and that she was eligible to continue her medical and dental insurance coverage under COBRA, and wished her well. [Pa214, 483]. Plaintiff never responded to that letter, other than with an email follow-up about possible continuation of her

health coverage under COBRA. [Pa215, 490]. Nothing in that email or any other writing sent to Haydon disputed the accuracy of Rudel's letter describing what transpired at the July 11 Meeting. [Pa490].

H. <u>The Lack of Any Evidence of Age-Based Animus</u>

Plaintiff testified that she does not recall any of Woods, Rudel, Johnson or Awad ever commenting about her age or making any derogatory age-based comment related to anyone else. [Pa203]. At the time Plaintiff's employment at Haydon ended, Woods was 46 years old, Rudel was 51 years old (that also being her age when hired), Wagstaff was 54 years old, and Johnson was 60 years old. [Pa269, 323, 399, 446]. Awad was 45 years old when he was hired and 46 when terminated. [Pa458].

Plaintiff asserts allegations about being "marginalized" or left to perform "mundane" or "menial" tasks and that some of her tasks were reassigned to others. [Pa11, 12, 15]. She concedes that none of her tasks were given to the HR Director and that she considered various responsibilities that she had for many years to be "mundane" or "boring at times." She testified, "After you do a job for many years, it's pretty much, it gets – – it's a job." [Pa206, 207]. Regarding reassignment of some of her tasks to others, she admits that she was at times overwhelmed with work before that occurred and that she remained very busy after that occurred. [Pa178, 179, 209]. In a February 5, 2019 reply email to Woods, Plaintiff stated, "I'm doing my best to get all of my task assignment

completed and to everyone's satisfaction. These are unusual and extremely busy times. I'm trying to stay ahead of it." [Pa178, 493].

As Plaintiff testified, at the July 11 Meeting, she stated that the solution for her very busy desk and the *ad hoc* requests made of her was to reassign some of her work to someone else. [Pa194, 215]. She testified that all of her work was "equally significant," and she admits that there was no situation of more significant work being reassigned away from her. [Pa209]. She further testified that responsibilities reassigned from her essentially involved planning and preparation for (not conducting) 401(k) meetings or workshops, handling some of the Worker's Compensation claims, and maintaining files containing performance evaluations. [Pa207-209].

Plaintiff did not ask anyone why any particular task was reassigned from her [Pa209]; she did not express to anyone that she wanted any particular task that was reassigned from her to be returned to her duties [*Id.*]; she does not know of any reason to believe that such a request would have been denied [Pa211]; she admits that she was never assigned a task that was not a part of her job responsibilities and which should not have been assigned to her [Pa219]; and she concedes that she does not believe that any task was assigned to her in an effort to force her out of Haydon, and stated, ***"No. I don't believe I got added tasks as a result of age discrimination, no."*** (Emphasis added). [*Id.*].

Plaintiff Complaint alleges a "campaign of discrimination against the company's older employees." [Pa9]. When asked at her deposition to identify the "older" employees subjected to this alleged "campaign," she could not identify anyone besides herself. [Pa215, 216]. She admits that she cannot identify any "older" employee that Haydon replaced with a "younger" employee. [Pa216, 217]. She asserts allegations regarding two younger employees that Haydon hired. [Pa503, 504]. One of those hires was a female industrial engineer intern who became a general manager at Haydon's Stockton, California facility. The other hire was a marketing manager. Plaintiff concedes that neither of those employees replaced any older employee, that they were hired for newly created positions, that Plaintiff was not qualified for or interested in those positions, and that Plaintiff has no knowledge of any older applicants for those positions. [Pa216, 217].

When asked if she believed that Rudel did anything with respect to Plaintiff's employment that was motivated by her age, Plaintiff responded "I have no way to know what her motivation was. ... I only knew her a few weeks." [Pa201]. Plaintiff contends that her claim of age discrimination is supported by the fact that Woods, in a brief conference room meeting with Plaintiff and Johnson on October 16, 2018, asked her, "do you have any thoughts on retiring?" [Pa11, 174, 211]. After Woods asked that, Johnson said something to the effect of, "not that we're suggesting you're retiring" and that Haydon was looking at

"succession planning" and addressing that at an upcoming Board meeting. [Pa174, 175]. Woods explained to Plaintiff that if and when she retired, Haydon would need about six months lead time to train her replacement. [Pa11, 175]. In connection with that, Plaintiff recalls that it was discussed that she handles sensitive and confidential Company information. [Pa175].

Also on October 16, 2018 and for succession planning reasons, Woods asked Johnson whether he, Johnson, had any thoughts on retiring. [Pa320]. Around that same time and for the same reasons, Woods also asked that question of various of other critical employees, in order to have a plan in place in the event any of those employees were planning to retire. [Pa268, 270, 271, 319, 321]. Those others included Ken Rosa, an Inventory Control Manager, Rich Phelan, Vice President of Operations, Demetrius Pellicier, Joann Mott, Customer Service Manager, and a New Jersey warehouse area employee named Ralph. [Pa270, 271]. Woods explained that the intention of the succession planning was to "take adequate steps to plan for a smooth transition" if certain employees had plans for retirement. [Pa269]. He further explained that he was "identifying critical positions, places where we might need to anticipate in retirement, whether or not we had somebody trained to backfill in retirement.… We're very lean, and … we don't have the luxury of having somebody who could just step in and perform the functions of most every position without

giving adequate time to anticipate that and train to hire and do a good job of ensuring business continuity." [Pa271].

While at the October 16, 2018 meeting and in response to Woods' inquiry, Plaintiff told him and Johnson that she "had no thoughts right now about retiring." [Pa176]. Woods and Johnson were "relieved" and "very happy to hear that dealing with replacing Maryjane upon retirement was something that we weren't going to be facing anytime soon." [Pa272, 322]. Other than Woods' one-time October 16, 2018 inquiry whether Plaintiff had any "thoughts on retiring," that subject or the subject of retirement was never raised with Plaintiff. [Pa176].

I. Plaintiff's Admission that Any Shortfall on Her Unused Vacation Pay Was Unintentional and Fully Corrected After She First Raised the Issue in Her Complaint

After her last day working at Haydon and on or about July 25, 2019, Plaintiff received a paycheck that included pay for 96 hours of unused accrued vacation time. [Pa487]. (the "July 2019 Paycheck"). After receiving that and prior to filing this lawsuit about seven months later, Plaintiff never informed Haydon that she believed she was still owed any additional pay. [Pa131]. In a September 9, 2019 email to Woods, Johnson and Rudel, Plaintiff inquired about COBRA information. Nothing was stated in that email about Plaintiff believing that she was owed any additional pay. [Pa490]. Plaintiff's Complaint filed on

February 13, 2020 contains the first assertion she made to Haydon that she was not paid for all unused accrued vacation time. [Pa18, 131].

Plaintiff's Complaint alleges that at the time it was filed, Haydon still owed her pay for an additional 44 hours of unused accrued vacation time. [Pa18, 25]. The Complaint further contends that the Company's alleged failure to pay Plaintiff for those unused vacation hours was intentional and retaliatory. [*Id.*]. However, at her deposition, Plaintiff conceded that any shortfall on the unused vacation pay in her July 2019 Paycheck was due to a mistake by the Company and not intentional. [Pa133, 135]. The discrepancy between the 96 hours of vacation time paid in the July 2019 Paycheck and the additional 44 hours that Plaintiff claimed to be owed involved hours of unused vacation time carried over from the prior year. [Pa166, 167].

In response to Haydon first learning from the Complaint that Plaintiff claimed she was not paid for all unused vacation time, Haydon's counsel called Plaintiff's counsel in April 2020 to resolve that issue, and this was followed by an exchange of correspondence between counsel. That included a June 15, 2020 letter from Haydon's counsel, stating that notwithstanding Haydon's belief that Plaintiff was paid for all unused vacation time, the Company agreed to then pay her for the additional 44 hours she was claiming. That letter further pointed out that had she raised this issue earlier, it would have been fully addressed and resolved, particularly given the relatively modest amount of money involved.

[Pa525]. By that letter, Plaintiff's counsel was also asked to agree to voluntarily dismiss the WTA claim upon Plaintiff's receipt of the additional vacation pay. Plaintiff's counsel's June 29, 2020 letter rejected that request. [Pa525-528].

A few days later, on or about July 2, 2020 and by check dated that day, Haydon paid Plaintiff $1,371.91, representing payment for the 44 hours of unused vacation pay that she was allegedly still owed (less legally required tax withholdings). [Pa134, 195]. Plaintiff acknowledges that with that payment, she received all vacation pay allegedly owed to her by Haydon. [Pa135]. By letter dated July 7, 2020, Haydon's counsel again requested that Plaintiff voluntarily dismiss her WTA claim. [Pa530]. By her counsel's letter dated July 22, 2020, she refused to do so. [Pa533].

LEGAL ARGUMENT

I

SUMMARY JUDGMENT STANDARD

New Jersey Court Rule 4:46-2 provides that an order granting summary judgment "shall be rendered forthwith 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 a judgment or order as a matter of law." In Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995), the Supreme Court emphasized that:

> By its plain language, Rule 4:46-2 dictates that a court should deny a summary judgment motion only where the party opposing the motion has come forward with evidence that creates a "genuine issue as to any material fact challenged." That means a non-moving party cannot defeat a motion for summary judgment merely by pointing to any fact in dispute.

Id. at 529 (emphasis in original). The Court explained that "[w]hile 'genuine' issues of material fact preclude the granting of summary judgment, R. 4:46-2, those that are 'of an insubstantial nature' do not." Id. at 530. "The essence of the inquiry" is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 536. While a court deciding a summary judgment motion does not assess credibility, "[o]f course, there is in this process a kind of weighing that involves a type of evaluation, analysis and sifting of evidential materials." Id.

When deciding a motion for summary judgment, a court must analyze the record in light of the substantive standard and burden of proof that a factfinder would apply in the event that the case were tried. Bhagat v. Bhagat, 217 N.J. 22, 40 (2014). As such, "the motion court … can[not] ignore the elements of the cause of action or the evidential standard governing the cause of action." Id. at 38. The Supreme Court summarized in Brill that "the thrust of today's decision is to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves." Id. at 541. The Court noted the

importance of the summary judgment procedure in disposing of meritless and factually unsupported claims: "protection is to be afforded against groundless claims and frivolous defenses, not only to save the antagonists the expense of protracted litigation but also to reserve judicial manpower and facilities to cases which meritoriously command attention." Id. at 542 (quoting Robbins v. Jersey City, 23 N.J. 229, 240-41 (1957)). Summary judgment is designed "to provide a prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits . . . shows not to present any genuine issue of material fact." Id. at 530 (citing, Ledley v. William Penn Life Ins. Co., 138 N.J. 627 (1995)).

In this matter, the lower court properly applied these standards in granting Defendants summary judgment dismissal of all claims.

II

THE LOWER COURT PROPERLY CONCLUDED THAT THE UNDISPUTED RECORD EVIDENCE ESTABLISHES THAT PLAINTIFF'S EMPLOYMENT ENDED BECAUSE SHE CHOSE TO END IT AND NOT BECAUSE OF ANY AGE DISCRIMINATION

Plaintiff's deposition testimony conclusively established that at the July 11 Meeting, she chose to end her employment because of the July Notice that Defendants attempted to address with her that day. She admits that multiple times while at the July 11 Meeting, she stated that she was ending her

employment with the Company that day (*i.e.* resigning or quitting) unless Defendants and Johnson agreed that day to her demand to destroy the July Notice. She repeatedly stated that if that notice was not torn up or discarded, ***"today will be my last day."*** (Emphasis added) [Pa193-198, 425-427]. While no clarification should be needed for what that means, her deposition testimony confirmed that she meant that if the July Notice was not destroyed or discarded that day, she was not returning to work after that day. As she testified, "*I said to them, think about what you want to do and let me know.* ***I wasn't going to accept a warning notice***. .... ***I told them that I wanted the warning notice thrown in the garbage, discarded, or otherwise disposed of. And I said if that wasn't done then today will be my last day."*** (Emphasis added) [Pa193, 195, 198]. ***"I said that I wanted the warning notice thrown away or today would be my last day." "I wasn't accepting [the July Notice] under any circumstances. I made that clear to them. I wasn't accepting it and that was the end."*** (Emphasis added) [Pa202].

Plaintiff further admits that there was nothing that Haydon could have done that would have resulted in her withdrawing her decision to end her employment on July 11, 2019 absent the Company immediately ceding to her demand that day to tear up the July Notice. She acknowledges that there was nothing in that notice about terminating her employment, that the notice did not state that it was a final warning or refer to the possibility of termination, and

that no one ever told her that Haydon was terminating her employment. She testified, ***"On July 11, I wasn't concerned about getting fired. I wasn't concerned about it whatsoever."*** (Emphasis added) [Pa201]. She further concedes that she might still be working at Haydon to this day, if not for her July 11, 2019 decision to immediately end her employment absent Defendants and Johnson ceding to her demand. [Pa201, 203, 204].

Plaintiff's brief argues, directly contrary to the only competent record evidence, that Defendants never asked Plaintiff to reconsider her stance that she was resigning effective immediately if the July Notice was not destroyed or discarded. [Pl. Brf.].[3] Aside from the fact that the record shows that Defendants and Johnson pleaded with Plaintiff not to resign [Pa295, 353, 427], it is immaterial whether or not Defendants tried to convince Plaintiff not to quit. Her decision was made, she was steadfast in that decision, she was not changing it, and Defendants were not obligated to try to persuade her to change her stance. It is notable that in arguing that she was not asked to reconsider her position, Plaintiff effectively concedes that she did in fact resign. She again concedes that fact where she argues (albeit a baseless argument), that "it was apparent to Appellant that *if she did not voluntarily leave*, Respondents would force her out." (Emphasis added) (Pl. Brf. 7). Also immaterial but warranting brief response is

[3] "Pl. Brf." refers to Plaintiff-Appellant's initial brief in support of this appeal.

the false and unsupported assertion in Plaintiff's brief that Woods demanded that Plaintiff sign the July Notice. [Pl. Brf. 26]. That is not supported by the citation to Plaintiff's unverified Complaint or any record evidence.

As the lower court properly determined:

> Although the Plaintiff claims that she was terminated at the July 11, 2019, meeting, when the court evaluates the facts in a light most favorable to the Plaintiff, ***there is no evidence whatsoever that Plaintiff was terminated.*** Moreover, ***it could not be clearer that the Plaintiff resigned from her position*** and refused to participate in the Defendants' corrective action plan. The Plaintiff's argument that the termination occurred when Woods advised the Plaintiff to clean out her belongings and leave the premises ignores all of the facts leading to that point. That Plaintiff had unequivocally stated that if the Notice was not torn up or withdrawn, it would be her last day. There is [no] fact dispute or interpretation of that statement that could lead a reasonable mind to conclude that it [was] anything but a resignation, effective immediately.

(Emphasis added) [Pa748, 749].

Recognizing that the evidence establishes that she resigned, Plaintiff argued, in the alternative and for the first time in her opposition to the summary judgment motion, that she was constructively terminated. As a threshold matter, her Complaint does not contain any claim or allegation that she was constructively terminated. [Pa5]. Therefore, she should not be permitted to pursue any such claim after the discovery period ended. Nevertheless, as the lower court properly found, there is no evidence of conditions that remotely approach the showing required to prove constructive termination. The court

held that "while there is no allegation of constructive discharge, even if there was, such a claim could not survive summary judgment." [Pa749].

Our Supreme Court has held that a constructive discharge under the LAD occurs when an employer knowingly permits conditions of discrimination in employment "so intolerable that a reasonable person would be forced to resign rather than continue to endure it." Shepherd v. Hunterdon Developmental Ctr., 174 N.J. 1, 28 (2002) (*quoting* Jones v. Aluminum Shapes, Inc., 339 N.J. Super. 412, 428, (App. Div. 2001)). This "standard envisions a 'sense of outrageous, coercive and unconscionable requirements,'" and "requires more egregious conduct than that sufficient for a hostile work environment claim." Shepherd, 174 N.J. at 28 (*quoting* Jones v. Aluminum Shapes, Inc., 339 N.J. Super. at 428).

The heightened standard demanded for proof of a constructive discharge claim recognizes an employee's "obligation to do what is necessary and reasonable in order to remain employed rather than simply quit." Id. (internal quotation marks omitted). Additionally, a constructive discharge claim cannot be based solely on an allegation of overzealous supervision of an employee's work so as to thwart an employer from insisting on high standards through non-discriminatory efforts. Shepherd v. Hunterdon Developmental Center, 336 N.J. Super. 395, 421 (App. Div. 2001), aff'd in part and rev'd in part by Shepherd v. Hunterdon Developmental Ctr., 174 N.J. 1, 28 (2002) citing Clowes v.

Allegheny Valley Hosp., 991 F.2d 1159, 1162 (3d Cir.), cert. denied, 510 U.S. 964, 114 S.Ct. 441, 126 L.Ed.2d 374 (1993).

Instructive here is the matter Prager v. Joyce Honda, Inc., 447 N.J. Super. 124 (App. Div. 2016), which the lower court properly relied on. In Prager, the plaintiff received two written warnings from her employer, alleged that the facts stated in those warnings were false, and asserted that this supported her claims of constructive discharge and retaliation under the LAD. The Appellate Division affirmed the Law Division's dismissal of those claims. Id. at 136-137. In doing so as to the constructive discharge claim, the Appellate Division held that even accepting as true that two written warnings received by the plaintiff were "false" and issued in retaliation for her engaging in activity protected by the LAD, such written warnings cannot support a claim of constructive discharge. Id. at 136, 137. The Appellate Division further held that such warnings cannot support a hostile work environment claim, a retaliation claim, or even constitute adverse employment action, as a matter of law. Id. at 136-37, 140-41.

In this matter, similar to Prager, even if Plaintiff could somehow show that the April Notice and July Notice were issued for retaliatory or discriminatory reasons (there is absolutely no evidence to support that), neither those two notices nor any other conditions of Plaintiff's employment at Haydon, remotely approach proof of "intolerable" conditions required to support a

constructive discharge claim. Indeed, as the lower court also found, the record demonstrates that Plaintiff was not subjected to a hostile work environment, retaliation, or even any adverse employment action (further addressed below).

The record evidence establishes that Plaintiff's employment did not end because of any discrimination, but rather because she chose to voluntarily resign.

III

THE LOWER COURT PROPERLY DETERMINED THAT PLAINTIFF CANNOT SHOW THAT SHE SUFFERED ANY OTHER ADVERSE EMPLOYMENT ACTION AND THAT HER DISCRIMINATION AND RETALIATION CLAIMS THEREFORE FAIL AS A MATTER OF LAW

In addition to reaching the obvious and only rational conclusion that ***"it could not be clearer that the Plaintiff resigned from her position"*** [Pa748], the lower court correctly determined that Plaintiff cannot show that she suffered any other adverse employment action. None of these conclusions involved the lower court engaging in any credibility determinations, as Plaintiff suggests. Indeed, as the lower court recognized, Plaintiff's unambiguous concessions in her deposition testimony compelled the conclusion that she did not suffer any adverse employment action. The court held:

> Plaintiff's ability to establish a prima facie case of age discrimination and/or retaliation both require showing that she suffered an adverse employment action. The record evidence, ***most notably her own deposition testimony***, confirm that she cannot

> make that showing. For that reason, both of her LAD claims fail as a matter of law.

(Emphasis added) [Pa748].

A. Plaintiff's Admission that the Hiring of an HR Director Did Not Diminish Her Responsibilities

Plaintiff admitted at her deposition, and she does not now dispute, the fact that none of her job responsibilities as HR Manager were reassigned to the HR Director. She conceded at her deposition that with Haydon's creation of an HR Director position, ***"my job responsibilities did not diminish."*** (Emphasis added) [Pa155].

B. The Absence of Any Claim or Allegation of a Failure to Promote, and Plaintiff's Admission that She Never Sought the HR Director Position for Which She Participated in the Interview Process

When opposing summary judgment, Plaintiff attempted to insert a never pled failure to promote claim. She seemingly attempts that again on this appeal, where she argues that Defendants "never gave Appellant the opportunity to apply for the [HR] Director position" (Pl. Brf. 6) and did not "encourage Appellant to apply for a promotion." (Pl. Brf. 25). While Plaintiff should not be permitted to pursue such a claim which she never pled, the lower court nevertheless examined the merits of this failure to promote argument and correctly found that Plaintiff never sought to apply for the HR position and never indicated that she wanted to be hired for the position. [Pa736, 739]. Nor is there

any record evidence that Plaintiff even believed she was qualified for that position.

As a threshold matter, Plaintiff should not be permitted to pursue a failure to promote claim for which Defendants had no notice during the discovery period. *See* Flynn v. Township, No. A-2889-17T2, 2020 N.J. Super. Unpub. LEXIS 342, at *30-31 (App. Div. Feb. 18, 2020) (affirming summary judgment to the defendant and stating that a hostile work environment LAD cause of action and a LAD failure to promote cause of action are separate causes of action and that the plaintiff did not plead a hostile work environment claim). As our state's Supreme Court has held, "'[w]ithout fair notice of a claim there cannot be fair play,' and a court properly dismisses a claim that was not set forth in the pleading." Bauer v. Nesbitt, 198 N.J. 601, 610 (2009). The Supreme Court, in Bauer, further stated:

> Although "[a]ll pleadings shall be liberally construed in the interest of justice," R. 4:5-7, the fundament of a cause of action, however inartfully it may be stated, still must be discernable within the four corners of the complaint. ... ***An opposing party must know what it is defending against; how else would it conduct an investigation and discovery to meet the claim?***

Id. (Emphasis added) (citation omitted).

In this matter, Defendants were never put on notice of any claim or allegation that Plaintiff believes she should have been promoted to HR Director so as to fairly inform them that discovery should be sought from Plaintiff

regarding any belief she may have that she was qualified for that position and the full factual basis for her current allegation that she was not given the opportunity to apply for that position. Notably, there is no allegation, even in Plaintiff's brief on this appeal, that she was actually qualified for the HR Director position or that she should have been promoted to the position. Indeed, the fact that Plaintiff was not claiming any failure to promote was confirmed by her deposition testimony establishing that she never sought the HR Director position and she never stated to Defendants any belief that she was qualified and/or should be hired for the position. That includes during the time she participated in the selection and interview process to hire someone for the position. [Pa5, 150, 153, 154, 171, 455].

C. Plaintiff's Admission that She Was Not Discriminated Against by Being Given Additional Work

Plaintiff admits that she was never assigned a task that was not a part of her job responsibilities and which should not have been assigned to her, or given additional tasks because of any discrimination. She testified, ***"No. I don't believe I got added tasks as a result of age discrimination, no."*** (Emphasis added) [Pa219]. Indeed, while her Complaint contains allegations about tasks being assigned away from her (addressed below), it does not allege that she was discriminated against by being given additional work. Nevertheless, and in direct contradiction with Plaintiff's Complaint and her deposition testimony, her

brief makes entirely unsupported assertions that "Respondents began assigning Appellant overwhelming amounts of paperwork on top of her regular responsibilities as HR Manager" (Pl. Brf. 7); and "Respondents began flooding Appellant's desk with time-sensitive assignments." (Pl. Brf. at 31). There is no evidence offered or existing to support any of these assertion that are entirely refuted by Plaintiff's sworn testimony.

D. Plaintiff's Inability to Point to Any Discrimination in the Form of Reassignment of Her Job Responsibilities

Plaintiff is also unable to refute the fact that her deposition testimony disproves any contention that work was assigned away from her because of age discrimination. She concedes that none of her tasks were given to the HR Director. [Pa206-207]. She testified that Woods' Executive Assistant Sibel Kaya, was merely assigned some of Plaintiff's work involving the planning and preparation for (not conducting) 401(k) meetings or workshops, handling some of the Worker's Compensation claims, and maintaining files containing performance evaluations. [Pa207-209]. She admits that she was at times overwhelmed with work before she was relieved of some of that work, and that she remained very busy after that. [Pa203, 204, 209].

In a February 5, 2019 reply email to Woods, Plaintiff stated, "I'm doing my best to get all of my task assignment completed to everyone satisfaction. These are unusual and extremely busy times. I'm trying to stay ahead of it."

[Pa203, 493]. Plaintiff testified that at the July 11 Meeting, she stated that the solution for her very busy desk and the ad hoc requests made of her was to reassign some of her work to someone else. [Pa194, 215]. She further testified that all of her work was "equally significant," and she admits that there was no situation of more significant work being reassigned away from her. [Pa209]. She concedes that she did not express to anyone that she wanted any particular task that was reassigned from her "busy desk" to be returned to her duties, and that she does not know of any reason to believe that if she asked to have that done, that her request would have been denied. [Pa209, 211].

Contrary to Plaintiff's testimony, and with no evidentiary support in the record, her brief argues that Respondents "reassign[ed] Appellant's preferred assignments to younger employees" (Pl. Brf. 1); "Respondents stripped Appellant of coveted job responsibilities and gave them to younger new hires" (Pl. Brf. 39); and Woods "strip[ed] her job responsibilities for mundane tasks." (Pl. Brf. 25). Plaintiff's own testimony confirms that these vague allegations are pure fiction. Notably, and as Plaintiff candidly testified, for many years she had come to view all of her HR Manager responsibilities as "mundane" or "boring at times," stating, "After you do a job for many years, it's pretty much, it gets – – it's a job." [Pa206, 207]. Defendants also note here Plaintiff's seeming suggestion that Sibel Kaya was paid a higher salary than Plaintiff. (Pl.

Brf. 5). That is false and contradicted by the record. Ms. Kaya's annual salary was significantly lower than the salary Plaintiff was paid. [Pa261].

E. The Warning Notices Cannot Constitute Adverse Employment Action

Plaintiff also fails to refute the fact that, as the lower court correctly held, the April Notice and July Notice (collectively, the "Warning Notices") cannot constitute adverse employment actions, as a matter of law. See Prager, 447 N.J. Super. at 141 *citing* Battaglia v. United Parcel Serv., 214 N.J. 518, 547 (2013). In Prager, the Appellate Division held that because the written warnings issued to the plaintiff did not state that there would be repercussions from future infractions but rather noted only the possibility of future termination or time off without pay in the event of future infractions, "plaintiff could not show she suffered an adverse employment decision [and] she [therefore] failed to establish the third element of her *prima facie* case of retaliation" Prager, 447 N.J. Super. at 141. The Court explained that even if the two written warnings were retaliatory, they could not be considered materially adverse, as they did not evidence any "tangible injury or harm." Prager, 447 N.J. Super. at 140.

Also highly instructive here, the Appellate Division in Prager held that "[b]ecause [Prager] quit her job the day after receiving the warnings, it is impossible to assess their significance for her continued employment." Id. at 140. The Court further held, "Although plaintiff undoubtedly found the

warnings highly distressing, her subjective response to them is not legally significant in assessing whether they were materially adverse." Id. Indeed, the Appellate Division has held that even an unfavorable written performance evaluation, unaccompanied by a demotion or similar action is insufficient to meet the requirement of an adverse employment decision. El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 169-70 (2005), *citing* Keelan v. Bell Communications Research, 289 N.J. Super. 531, 538-39 (App.Div.1996). Also notable is the fact that in this matter, the July Notice expressed a belief in Plaintiff's ability to make the necessary corrective steps. However, as the lower court recognized, Plaintiff ***"refused to participate in the Defendants' corrective action plan."*** (Emphasis added) (Decision 16).

Furthermore, while the Warning Notices cannot constitute adverse employment action, Plaintiff's deposition testimony establishes that she concedes responsibility for many of the issues/errors in those Warning Notices. As the lower court correctly found, "[t]here were valid reasons for the April Notice and July Notice, and Plaintiff's own deposition testimony supports that. She acknowledged all of the deficiencies as being factual." [Pa749]. She admits her mistake in issuing a check for approximately $128,000 when it should have instead been for about $50,000. She concedes that she was responsible "In part, yes" for the mistake regarding a failure to comply with California registration requirements. When asked to state who else was also responsible, she answered,

"Oh, I don't know." She also does not dispute that it was her error in presenting Johnson with a duplicate 1099 for signature. [Pa139, 180, 182-185, 205].

At the April 17 Meeting that Plaintiff cut short, stating that she had a "splitting headache" and leaving work early, she attributed her admitted mistakes to her "very heavy desk and a lot of work and no help or little help." [Pa180, 181, 186]. At the July 11 Meeting, she stated that things sometimes fall through the cracks because her desk is a very busy desk and she gets many *ad hoc* requests. [Pa194, 214, 215]. As she candidly stated at her deposition, "[m]istakes happen. They happen all of the time. Everyone makes mistakes. I make mistakes." [Pa180]. That is an obvious truth and relates to the important fact that Plaintiff was not terminated for these mistakes. Rather, Defendants simply raised performance issues/errors with her in order to correct things going forward.

F. The Legitimate One-Time Inquiry Whether Plaintiff Had Any Thoughts About Retirement Is Not an Adverse Employment Action and Cannot Support a Discrimination Claim

The lower court was correct in observing that, "[i]t appears that the Plaintiff's entire case for age discrimination is based upon a single conversation at an October 16, 2018 meeting that she had with Woods and Johnson, when Woods asked Plaintiff, 'do you have any thoughts on retiring?'" [Pa749]. The court also correctly observed that "[i]t was explained to [Plaintiff] at that meeting that Haydon was looking at succession planning, made clear that no one

was suggesting that she should retire, and explained that the nature of her job and the critical functions she served would require about six months lead time to train a replacement if and when she chose to retire." [*Id.*].

Merely asking any employee if they have any thoughts about retirement cannot constitute an adverse employment action. Nor does Plaintiff even contend that her once being asked this question changed any actual term or condition of her employment. Her baseless argument that this retirement question was to coerce her to retire or resign (Pl. Brf. 32) is belied by the fact that five (5) months later, she was given a very positive annual performance review [Pa461] and the subject of retirement was never raised with her again. [Pa176]. Nor does she dispute the fact that this one-time question was, at or about the same time, also posed to Johnson and various other employees who performed critical functions that would similarly require about six months lead time to train a successor if and when they chose to retire. [Pa174, 175]. There is no evidence that Plaintiff (or any other employee) was pressured to retire. There is, however, undisputed record evidence, most significantly Plaintiff's deposition testimony, establishing that she voluntarily resigned.

In further attempt to manufacture evidence of age-animus, Plaintiff argues that Haydon "transition[ed] to new ownership" in late 2014 or early 2015, and that Haydon thereafter "began hiring an exorbitant number of young employees who had little to no experience relevant to their positions" and engaged in

"severe and pervasive discrimination against its senior employees, including Appellant." (Pl. Brf. 5). This argument is a canard. It has no support in the record, and it is refuted by the record evidence, including Plaintiff's testimony. There is no evidence (or even any factual allegation) of discriminatory treatment of other employees on the basis their age.

When asked at her deposition to identify "older" employees subjected to any discrimination, Plaintiff could not identify anyone besides herself. When asked to identify any "older" employee that Haydon replaced with a "younger" employee, she was unable to identify a single person. [Pa215-217, 503, 504]. Additionally, Haydon did not transition to new ownership in late 2014 or early 2015. Rather, in and around that time, the Company's now former CEO sold his shares of stock in the company back to Haydon and some other employee shareholders exercised stock options to purchase shares in the Company. [Pa239, 240].

G. The Absence of Any Claim, Allegation, or Evidence of a Hostile Work Environment

Notwithstanding the fact that Plaintiff's Complaint does not contain any claim or allegation of a hostile work environment, she now argues that she was subjected to a hostile work environment. Respectfully, in light of her failure to plead any such claim or make any such allegation in her Complaint, she cannot be permitted to now pursue any such claim. *See* Flynn v. Township, No. A-

2889-17T2, 2020 N.J. Super. Unpub. LEXIS 342, at *30-31, *supra*. Furthermore, even if the Court does not reject her hostile work environment argument on this basis alone, this Court will nevertheless surely conclude, as did the court below, that there is no evidence that Plaintiff was subjected to conduct "sufficiently severe or pervasive to alter the conditions of employment and create an intimidating, hostile or offensive working environment." Heitzman v. Monmouth County, 321 N.J. Super. 133, 147 (App.Div.1999); El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. at 178. Indeed, there is not even an iota of evidence of any hostility that Defendants directed at Plaintiff. That is, no doubt, why she never pled a hostile work environment claim.

H. Plaintiff's Inability to Prove Retaliation

As the lower court correctly determined, because Plaintiff is unable to show that she suffered any adverse employment action, her retaliation claim fails as a matter of law. [Pa748]. Regarding her arguments that she suffered post-employment retaliation in the form of Haydon's delay in sending her COBRA information and/or Haydon's alleged underpayment of unused vacation pay in the July 2019 Check, her deposition testimony refutes that as well.

Plaintiff conceded at her deposition that the delay in Haydon sending her COBRA information ***"was a mistake"*** and not purposeful. She further testified that she did not elect to enroll in COBRA because of the cost, and that she would

have made the same decision if her receipt of the enrollment information had not been mistakenly delayed. (Emphasis added) [Pa133-135, 645]. She therefore suffered no harm from this admittedly innocent mistake. Regarding the alleged shortfall on unused vacation pay in the July 2019 Paycheck (also the subject of her WTA claim discussed below), putting aside that there is a question whether Plaintiff was entitled to receive additional unused vacation pay beyond what was included in that paycheck, she acknowledged at her deposition that any shortfall with that pay was due to ***"Mistakes"*** and not intentional.

* * *

In sum, the lower court correctly determined that the undisputed material facts establish that Plaintiff cannot prove her claims of discrimination or retaliation, as a matter of law.

IV

THE LOWER COURT PROPERLY DISMISSED PLAINTIFF'S WAGE THEFT ACT CLAIM AGAINST HAYDON

As discussed above, Plaintiff's July 2019 Paycheck included pay for 96 hours of unused accrued vacation time. After receiving that and prior to filing this lawsuit about seven months later, she never informed Haydon that she believed she was still owed any additional pay. [Pa131, 490]. This was first asserted in her Complaint. [Pa18, 131]. She concedes that any shortfall on that final paycheck was due to a mistake related to carryover of unused vacation

hours from a prior year and not intentional. [Pa133, 135]. In response to Haydon first learning of this after being served with the Complaint, the Company's counsel in this matter contacted Plaintiff's counsel to resolve that issue. This was followed by an exchange of correspondence between counsel, in which Defendants' counsel sought to have the WTA claim voluntarily dismissed upon payment of the amount at issue. Notwithstanding Plaintiff's counsel's refusal to agree to that, and notwithstanding Haydon's belief that the July 2019 Paycheck included all unused vacation time owed to Plaintiff, on or about July 2, 2020, the Company paid her for the additional $1,371.91 she was claiming. [Pa489].

Under the WTA, an employer who fails to pay the full amount of wages to an employee is liable for the unpaid wages plus an amount of liquidated damages equal to not more than 200 percent of the wages lost or of the wages due. N.J.S.A. 34:11-4.10(c). Importantly, the WTA allows an employer to avoid paying liquidated damages for first violations if the employer: (1) shows the court the violation was an "inadvertent error made in good faith"; (2) "had reasonable grounds for believing that the act or omission was not a violation"; and (3) acknowledges the violation and pays what is owed within thirty days' notice of the violation. Id.

In this matter, even assuming that Plaintiff was owed the additional unused vacation pay, it is undisputed that any failure by Haydon to pay that was

the result an inadvertent error made in good faith. It is also undisputed that Haydon was never given notice of this alleged violation before Plaintiff filed her Complaint containing this WTA claim, and that Haydon then paid the alleged shortfall. Accordingly, the lower court was correct in determining, "There are no facts to support that the pay shortfall is anything but an inadvertent error, that Plaintiff never sought to correct prior to filing this suit. Since Plaintiff has now received payment of all wages owed to [her] and there is no legal basis for imposing liquidated damages or any other damages award under Plaintiff's WTA claim, the claim should be dismissed. [Pa750].

CONCLUSION

For the reasons stated herein, Defendants respectfully submit that the lower court's Order from which Plaintiff appeals should be affirmed in all respects.

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Attorneys for Defendants-Respondents
Haydon Corporation, Adam Woods and
Nicole Rudel

By: 
Lance N. Olitt

DATED: October 23, 2024

MARYJANE PROCTOR, Plaintiff/Appellant, v. HAYDON CORPORATION; ADAM WOODS, in his capacity as President and Chief Executive Officer of Haydon Corporation; and NICOLE C. RUDEL, in her capacity as Director of Human Resources of Haydon Corporation; Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001241-23 On Appeal From: SUPERIOR COURT OF NEW JERSEY LAW DIVISION: PASSAIC COUNTY DOCKET NO.: PAS-L-524-20 Sat Below: Honorable Frank Covello, J.S.C.

REPLY BRIEF OF PLAINTIFF/APPELLANT MARYJANE PROCTOR

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I. PRELIMINARY STATEMENT

The Opposition filed by Respondents Haydon Corporation, Adam Woods, and Nicole Rudel (all collectively "Respondents") mischaracterizes both the record and the applicable law in an attempt to obscure the fact that the record in this case is replete with genuine issues of material fact related to whether Appellant suffered adverse employment action after being asked if she had "any thoughts on retiring," which culminated in her constructive termination on July 11, 2019. In granting Respondents' Motion for Summary Judgement in its entirety, the trial court committed reversible error by failing to (1) view the competent evidentiary materials in the light most favorable to Appellant and (2) grant Appellant the benefit of all reasonable inferences supporting the evidence. Specifically, the trial court improperly granted Respondents' Motion for Summary Judgment based on the notion that Appellant did not suffer adverse employment action, incorrectly ruling that (1) there is no allegation of constructive discharge, and (2) even if she had, the facts did not demonstrate that she suffered adverse employment action.

First, Appellant's Complaint specifically alleges she was wrongfully terminated. Although Appellant did not explicitly state "constructive discharge" therein, Appellant is not required to plead constructive termination to proceed with same. The allegations and facts surrounding said constructive termination, all of which are in the record by way of both Appellant's Complaint and her deposition

testimony, establish Appellant was constructively discharged and, thus, suffered adverse employment action. Rule 4:9-1 and the interpreting case law make clear that allowing amendments to pleadings should be liberally granted and without consideration of the ultimate merits of the amendment itself, and amendments to the pleadings to conform to the evidence may be made pursuant to Rule 4:9-2 at any time.

Respondents' argument, and the lower court's erroneous conclusion, that there is "no evidence whatsoever" that Appellant was terminated, ignores key facts and misinterprets the circumstances leading up to Appellant's alleged constructive termination. Similarly, the trial court's conclusion that Appellant did not suffer any adverse employment action provides further grounds for reversal. Indeed, after Respondents asked Appellant if she had "any thoughts on retiring," from that point forward, Respondents did everything they could to expel Appellant from the company, including overwhelming Appellant with work, reassigning Appellant's preferred assignments to younger employees, and completely ignoring Appellant's protests of age discrimination. When Appellant complained to Respondent Woods on or about November 12, 2018 as to how she felt marginalized due to her age, he ignored her concerns. Thereafter, Respondents began assigning Appellant overwhelming amounts of paperwork on top of her regular responsibilities as Human Resources ("HR") Manager. When she complained about the unrealistic workload,

Respondents, again, simply dismissed her complaints.

On March 7, 2019, Respondents provided Appellant with her 2018 performance evaluation wherein she received a score of "Outstanding 90% Overall Rating" for her 2018 performance evaluation. However, just over a month later, on April 17, 2019, Respondents issued Appellant a warning notice for issues that were not Appellant's sole responsibility. That same day, Appellant submitted a formal complaint explicitly alleging age discrimination. Unsurprisingly, Respondents failed to investigate or take any remedial action in response to said complaint.

To the contrary, on July 11, 2019, Respondents issued Appellant a second pretextual warning notice regarding alleged performance issues. After receiving the second pretextual warning notice, Appellant knew if she stayed quiet and endured the discrimination any longer, Respondents' calculated campaign of disparate treatment would only continue. Thus, during a meeting that day, Appellant requested that the latest performance notice be discarded. Respondents refused, however, leaving Appellant no other choice but to consider herself terminated, as further evinced by Respondents' directive to ***collect her things and exit the building***.

Ultimately, the trial court's Order dismissing Appellant's complaint, which was not filed until ***over twenty-one months*** after Respondents originally filed their Motion for Summary Judgment, cannot survive Appellate scrutiny as the Order contains significant reversible errors. Reversal, therefore, is warranted.

II. ARGUMENT

A. There is a genuine dispute of material fact as to whether Appellant suffered a constructive termination.

In arguing that Appellant's employment ended simply because she chose to end it, and not due to any age discrimination, Respondents conveniently ignore the plethora of record evidence supporting the reality that Appellant was, in fact, subjected to age discrimination and a constructive termination. As an initial matter, Respondents' argument that Appellant's Complaint does not contain a claim of constructive termination and that, therefore, Appellant should not be permitted to pursue a constructive termination claim herein does not pass muster and should be rejected by the Appellate Division.

At the outset of this matter, Appellant plead that she was wrongfully terminated in her Complaint. (Pa000017-18). In addition, Appellant's deposition testimony bolsters her claims arising out of violations of the New Jersey Law Against Discrimination, including that she was constructively terminated. (Pa000192-202). Although Appellant's Complaint does not explicitly state "constructive termination," Appellant is not required to do so. The allegations and facts surrounding said constructive termination, all of which are in the record, more than sufficiently establish that Appellant was constructively discharged and, therefore, suffered adverse employment action.

Respondents' Opposition Brief does not address the plain meaning of Rule 4:9-1 or the cases cited by Appellant in its Brief in support of the within Notice of Appeal, perhaps because the law as to same is clear. Amendments to the pleadings should be liberally granted and without consideration of the ultimate merits of the amendment itself. See, e.g., Notte v. Merchants Mut. Ins. Co., 185 N.J. 490, 500–01 (2006); Kernan v. One Wash. Park Urban Renewal Assocs., 154 N.J. 437, 456–57 (1998). Specifically, it bears repeating that Rule 4:9-1 expressly provides that "a party may amend a pleading... by leave of court ***which shall be freely given in the interest of justice***." (emphasis added). Our courts have held that motions for leave to amend pleadings shall be granted allowing "the broad power . . . to be liberally exercised at ***any stage*** of the proceedings, including on remand after appeal, unless undue prejudice would result." Kernan, 154 N.J. at 456–57 (emphasis added). Our courts weigh "undue delay or prejudice that may result from the amendment against the overriding need to seek justice." Id. Amendments to the pleadings to conform to the evidence may be made pursuant to R. 4:9-2 at any time. R. 4:9-2 specifically provides:

> Such amendment of the pleadings and pretrial order as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend shall not affect the result of the trial of these issues. Id.

In this matter, Appellant filed her Superior Court complaint in February 2020. Consistent with the allegations therein, Appellant later testified at her deposition regarding Respondents' campaign of harassment, discrimination, and retaliation to which she was subjected, which was fully consummated with her unlawful termination on July 11, 2019. See R. 4:9-1 and R. 4:9-2; see also Ajamian v. Schlanger, 14 N.J. 483, 485 (1954). Appellant does not seek to amend to include new claims or allegations based upon facts and circumstances unrelated to the original pleadings. To the contrary, ***all*** of Appellant's allegations set forth herein – which would incorporate the materials in Appellant's opposition to Respondents' previously filed Motion for Summary Judgment (including Appellant's argument therein concerning constructive discharge) – arise out the same facts and circumstances as the original complaint. The broad power of amendment should be liberally exercised at ***any stage*** of the proceedings unless undue prejudice would result or unless the amendment would be futile. Pressler, Current N.J. Court Rules, comment 2.1 on R. 4:9-1 (2016); see also Franklin Med. v. Newark Pub. Schs., 362 N.J. Super. 494, 506–08 (App. Div. 2003). There is simply no basis to deny Appellant the opportunity to amend, particularly given Respondents' firsthand knowledge of additional facts to be raised in the pleadings and the liberal amendment standards. Adron, Inc. v. Home Ins. Co., 292 N.J. Super. 463, 475–76 (App. Div. 1996). As such, by granting summary judgment, Appellant was improperly

precluded the opportunity to amend her complaint to conform to the evidence and, therefore, the trial court committed reversible error.

Moreover, despite the lower court's improper determination that there "is no evidence whatsoever that Plaintiff was terminated," there is competent evidence in the record, when viewed in the light most favorable to Appellant, for a jury to determine that Appellant was constructively terminated. (Pa000749). In fact, Respondents terminated and/or constructively terminated Appellant during their July 11, 2019 meeting, at which time Respondents, once again, fabricated performance issues and provided Appellant with yet another pretextual warning notice. (Pa000017, Pa000642-643). When Appellant objected to the warning notice and adamantly requested that it be discarded, Respondents refused to do so. Id. When the meeting resumed after Respondents involved their legal counsel, Appellant maintained her objections to the illegitimate warning notice that was cobbled together by Respondents in a desperate attempt to coerce her resignation. (Pa000643-644). At that point, Respondent Woods demanded Appellant collect her things and leave Respondent Haydon, thereby terminating her employment. (Pa000018, Pa000643-644).

Further, the July 11, 2019 warning notice did not occur in a vacuum. Rather, it was the culmination of Respondents' discriminatory actions that began in October 2018 with a blatantly ageist remark when Respondent Woods asked Appellant if she

had "any thoughts on retiring." When she answered in the negative, Respondents began to assign Appellant inordinate amounts of work to overwhelm her. (Pa000011, Pa000017, Pa000636-637). On November 12, 2018, Appellant complained to Respondent Woods that Respondent Woods' younger personal assistant was given the more interesting and fun aspects of Appellant's job, while Appellant retained primarily mundane tasks. (Pa000010, Pa000634-635). During this meeting, Respondent Woods informed Appellant he intended to hire a new HR Director, which Appellant also complained of as she felt that she, an older employee, was not given the opportunity to advance her career. (Pa000012, Pa000635).

On April 17, 2019, after receiving a clearly pretextual written warning, Appellant lodged a written complaint explicitly alleging age discrimination. (Pa000795-799). Like Appellant's previous complaints, Respondents failed to take any action or investigate Appellant's allegations in the aforementioned April 17, 2019 email. (Pa000297). It is with this context that Respondents Woods and Rudel, as well as Chief Financial Officer Kevin Johnson, called Appellant into a meeting in Respondent Woods' office on July 11, 2019, and issued Appellant yet another pretextual written warning. (Pa000017, Pa000192-193). Accordingly, rather than investigating or taking any remedial action whatsoever in response to Appellant's April 17 complaint, Respondents instead wrote Appellant up for a second time.

Appellant adamantly requested that Respondent Woods withdraw the warning notice or else she could no longer continue working in such a hostile environment. (Pa000017, Pa000644). Respondent Woods, however, demanded that Appellant sign said notice, but Appellant refused because the write up was illegitimate. Id. No longer able to bear the burden of Respondents' campaign of discrimination and retaliation in the workplace, Appellant was constructively terminated on July 11, 2019. Id.

B. When viewing the evidence in the light most favorable to Appellant, Appellant can demonstrate that she suffered adverse employment action during her employment with Respondents.

There are no bright-line rules when determining whether the challenged employment action is, indeed, adverse. Mancini v. Twp. of Teaneck, 349 N.J. Super. 527, 564 (App. Div. 2002). New Jersey courts look to federal law and civil rights legislation, considering factors such as "employee's loss of status, a clouding of job responsibilities, diminution of authority, disadvantageous transfers or assignments, and toleration of harassment by other employees." Id. Additionally, "the assignment to different or less desirable tasks can be sufficient to constitute an adverse employment action and establish a prima facie case of retaliation." Id. (citing Shepherd, 336 N.J. Super. at 419-20). Further, it is clear that retaliatory harassment is sufficient adverse employment action for retaliation claims. See Hare v. Potter, 220 Fed. Appx. 120, 124-135 (3rd Cir. 2007).

Looking at the totality of the circumstances, there is sufficient evidence for a trier of fact to determine that Respondents subjected Appellant to a number of adverse employment actions. Respondents' age-based discrimination towards Appellant began in 2018 when they shifted her job responsibilities to new, younger employees. (Pa000010, Pa000208). The hostility became clearer when Respondent Woods blatantly asked Appellant if she had "***any thoughts on retiring***." (Pa000011, Pa000269). When Appellant responded that she had no plans to leave, Respondents began doing everything in their power to force her out. (Pa000011, Pa000178-179, Pa000192-195). From that point forward, Respondents engaged in a campaign of retaliation, which included bypassing Appellant for promotions and issuing bogus performance warnings. (Pa000013, Pa000260).

Respondents stated themselves that Appellant was a top performer and dependable employee at Respondent Haydon. (Pa000261). In fact, prior to Appellant's termination, she received an "Outstanding- 90% Overall Rating" in her final annual performance evaluation. (Pa000015, Pa000788-794). It was then a shock to Appellant that not once, but twice, Respondents issued her bogus written warnings complaining of her alleged work performance. (Pa000179-180, Pa000193-194). Even worse, Respondents allowed the younger, new hires to issue Appellant these notices and humiliate Appellant. (Pa000193-194). Appellant, a seasoned employee, was forced to be ridiculed and demeaned by her younger replacements on

performance issues that had little to no backing. These pretextual warning notices humiliated Appellant, and by her second one, she was well aware of Respondents' overt discriminatory animus targeted towards her. Moreover, when Appellant submitted an written complaint explicitly alleging age discrimination on April 17, 2019, Respondents again displayed their discriminatory animus by failing to investigate Appellant's complaint or take any remedial action. (Pa000297). Rather, just a few months later, Respondents instead issued Appellant a second, pretextual written warning, that directly led to Appellant's constructive termination. (Pa000193-194).

Undoubtedly, the (1) disparate treatment, (2) diminution of job responsibilities, (3) intentional overburdening with excessive, time-sensitive paperwork in addition to her regular HR duties, (4) failure to meaningfully respond to her numerous complaints, and (5) pretextual performance evaluations in retaliation for her complaints about discrimination all amount to adverse employment action by Respondents, not to mention their constructive termination of her employment on July 11, 2019. Accordingly, the trial court's grant of summary judgment for failure to establish adverse employment action should be reversed.

While the record clearly establishes Appellant was subjected to adverse employment actions because of her age, the trial court failed to view these facts in the light most favorable to Appellant, as the non-moving party. In Brill v. Guardian

Life Ins. Co. of America, 142 N.J. 520, 540 (1995), the Court held that a determination of whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. The judge's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. Credibility determinations are left to the jury. Id. It is critical that a trial court ruling on a summary judgment motion not shut a deserving litigant from her trial. Id.

Rather than allow a jury to make these credibility determinations, the court below instead improperly weighed the evidence, and determined the truth of the matter. Indeed, as part of the Order granting summary judgment, the trial court found "***there is no evidence whatsoever*** that Plaintiff was terminated. Moreover, it could not be clearer that the Plaintiff resigned from her position and refused to participate in the Defendants' corrective action plan." (Pa000748) (emphasis added). Later in the Order, the trial court stated "***there is nothing whatsoever*** to support Plaintiff's claim of age discrimination." (Pa000749) (emphasis added). Assuming, *arguendo*, it was the trial court's role to weigh the evidence and determine the truth of the matter, its conclusory determinations are contrary to the factual record. As a direct

result of Respondents' discriminatory actions, Appellant could not tolerate working in said hostile environment if Respondents did not withdraw the July Notice. (Pa000017, Pa000193). When Appellant requested that Respondents discard the pretextual July Notice, Respondents refused and demanded Appellant collect her things and leave the building. Id. Accordingly, Respondents constructively terminated Appellant on July 11, 2019. (Pa000115, Pa000644).

In their Opposition, Respondents again rely heavily on Prager v. Joyce Honda, Inc. for the proposition that the April and July warning notices cannot constitute adverse employment action. 447 N.J. Super. 124 (App. Div. 2016). However, as Appellant made clear in her initial brief, this matter is distinguishable. In Prager, the written warnings were issued over a period of weeks, and were the only evidence identified by the plaintiff to support her claim, whereas here, and as discussed above, the "context matters," as recognized by the Court in Prager. Id. at 131.

Indeed, in this matter, Appellant endured extensive adverse employment action which culminated in her constructive termination on July 11, 2019. To begin, while Appellant did receive two performance warnings, the notices were only a sliver of the discrimination and retaliation she endured. (Pa000179-180, Pa000193-194). The torrent of discrimination began when Respondents suddenly asked Appellant when she would be retiring. (Pa000011, Pa000269). After responding in the negative, Respondents bombarded her with excessive, mind-numbing work,

while transferring her long-term projects to younger employees. (Pa000013, Pa000178-179). Further, Respondents completely overlooked Appellant for any higher-level opportunities, and affirmatively ignored her pleas and complaints when she felt overwhelmed with work. (Pa000013, 260, 285-286). Appellant persevered, but then Respondents issued her two warning notices. (Pa000179-180, Pa000193-194). Unlike Prager, where the warning notices were provided over the course of a couple weeks, Appellant endured hostility and adverse treatment for upwards of a year in the form of disparate treatment, pretextual warnings, overburdening of work in addition to her existing job responsibilities, and reduction in work responsibility value. Prager, 447 N.J. Super. at 131; (Pa000011, Pa0000115, Pa000269).

Lastly, Appellant's case is distinct from Prager in that the plaintiff in Prager resigned after the meeting about the warning despite being offered the option to have the write-ups rescinded. Id. at 133. Here, Appellant was never given such an opportunity. Instead, Respondents issued a second retaliatory warning just a few months after Appellant had submitted a formal complaint of age discrimination, signaling their unwillingness to address the hostile work environment or retaliation Appellant faced. (Pa000193). Unlike in Prager, where the warnings posed no lasting consequences, here, Respondents' actions, when viewed in the light most favorable to Appellant, could clearly be seen by a jury to be punitive and driven by age discrimination. Id. Further, with the months of prior discriminatory conduct in mind,

a reasonable person in Appellant's position would view the warnings as retaliatory and feel compelled to resign. Id. Given these significant differences, the trial court's reliance on Prager was improper, and the lower court's conclusion that the warning notices could not constitute adverse employment action, as a matter of law, was inappropriate, and summary judgment should be reversed.

III. CONCLUSION

In employment discrimination cases such as this, "summary judgment is rarely appropriate" because the paramount question of why an employer took an adverse employment action against an Appellant "is clearly a factual question." Marzano v. Computer Science Corp., Inc., 91 F.3d 497, 509 (3d Cir. 1996) (quoting Chipollini v. Spencer Gifts, 814 F.2d 893, 899 (3d Cir. 1987)). Here, the trial court failed to accept as true the evidence supporting Appellant's position and make all legitimate inferences which can be deduced from same. Instead, the trial court abdicated its responsibility to do so, and mistakenly ruled Appellant did not suffer adverse employment action. Accordingly, Appellant respectfully requests this Court reverse the trial court's decision granting Summary Judgment for Respondents.

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Dated: December 26, 2024