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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3922-19**

**BARBARA LOYAL,**

**Plaintiff-Appellant,**

**v.**

**BJ'S WHOLESALE CLUB, INC.  
and TEMY VARUGHESE,**

**Defendants-Respondents.**

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Argued September 16, 2021 – Decided May 2, 2022

Before Judges Fuentes and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-0415-18.

Christopher W. Hager argued the cause for appellant (Hager Law, LLC, attorneys; Christopher W. Hager, on the briefs).

Ryan W. Jaziri (Morgan, Brown, & Joy, LLP) of the Massachusetts and Connecticut bars, admitted pro hac vice, argued the cause for respondents (Stevens & Lee, PC, and Ryan W. Jaziri, attorneys; Ryan W. Jaziri and Wade D. Koenecke, of counsel and on the brief).

## PER CURIAM

Plaintiff Barbara Loyal appeals from two Law Division orders: (1) the May 18, 2020 order granting summary judgment dismissal of her employment discrimination complaint to her former employer, BJ's Wholesale Club, Inc. (BJ's), and a BJ's manager, Temy Varughese; and (2) the May 6, 2019 order denying reconsideration of the denial of her motion to compel BJ's production of its litigation hold documents. Because the record supports the motion judge's finding that there were no genuinely disputed issues of material fact with respect to plaintiff's claims and defendants are entitled to summary judgment as a matter of law, and because we discern no abuse of discretion in the judge's denial of plaintiff's motion for reconsideration, we affirm.

### I.

We derive the following facts from evidence the parties submitted in support of and opposition to the summary judgment motion, "giv[ing] the benefit of all favorable inferences to plaintiff[]." Angland v. Mountain Creek Resort, Inc., 213 N.J. 573, 577 (2013) (citing Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995)).

Loyal began working at BJ's in 1995. Initially, BJ's hired Loyal as a cashier but promoted her to a supervisory role after about a year. After working

in various capacities, Loyal eventually became a Member Services Supervisor in the Customer Service Department, a position she held until she was fired in 2017. Prior to the incident that led to her termination, BJ's had recognized Loyal for her decades of contributions to the company's success. Moreover, according to a July 2, 2017 performance review, Loyal met or exceeded expectations for all key review metrics and had an overall performance rating of "Often Exceeds Expectations."

The incident that precipitated Loyal's termination occurred on September 14, 2017. Loyal, then a sixty-three-year-old African American, was temporarily working the front door, which meant she was responsible for checking customers' receipts as they exited the store, an assignment with which she had been occasionally tasked in the past. A divider separated the front door into entrance and exit sides, and Loyal stood on the exit side. While Loyal was checking receipts, two customers approached and asked where they could find gift cards. As Loyal explained where to find the gift cards, another customer exited the front door, on the entrance side, carrying two fifty-inch televisions in a shopping cart. Later, BJ's would come to believe that the customers who inquired about the gift cards were working as a shoplifting team with the individual who exited with the televisions.

Another BJ's employee, Elnathan Brackenridge, saw the person leave with the televisions. Brackenridge went to Loyal and asked whether she had noticed what happened and checked for a receipt. At her deposition, Loyal explained that although Brackenridge was not then certified to cover the front door, Loyal asked Brackenridge to takeover at the front door, while she went to the parking lot to ask the individual who left with the televisions for a receipt. Loyal also acknowledged that she did not notify a store manager about the shoplifter as protocol required, but maintained she did not have access to a walkie-talkie at that moment. According to Loyal, she entered the parking lot, saw the person with the televisions, and said, "Hey, you didn't show me your receipt." Loyal said the individual ran away without responding and abandoned the merchandise. Loyal then recovered the televisions and returned to the store.

Defendant Varughese, who was then an Asset Control Manager, certified that Assistant Operations Manager John Attia informed him about the incident and instructed him to investigate by "reviewing the relevant surveillance footage." As a result of the investigation, on September 15, Varughese emailed Regional Asset Protection Manager Michele Grimes and explained that Loyal had missed a shoplifter exiting with two fifty-inch televisions. He also attached still images from the CCTV footage and added that Loyal "decide[d] to run after

the [shoplifter] in [the] parking lot and [en]danger[ed] herself and all other team member[s]."

General Manager Tina Reseter certified that she spoke to Loyal about the incident on September 15 for about twenty minutes and that Loyal explained what had happened "from her perspective." Additionally, Reseter said she "personally reviewed" the CCTV footage. Reseter certified that she had "several serious concerns" regarding how Loyal handled the September 14 incident. Reseter's primary concern was the safety risk Loyal created by going after the shoplifter. At her deposition, Loyal acknowledged that Reseter raised this safety concern during their conversation about the incident. However, Reseter also expressed concern over the fact that Loyal "initially missed the two televisions leaving the club[,] . . . failed to notify a manager of the incident[,] and . . . left an uncertified employee . . . covering the front while she went into the parking lot."

In addition, Reseter emphasized that BJ's had specific guidelines for addressing shoplifting incidents, which provided:

- Never struggle, chase or touch an individual; instead allow the person to pass and write down a description.
- If an individual enters a vehicle, step into the vestibule area and write down the license plate

number and description of the vehicle, if safe to do so.

- Do not go into the parking lot for any reason.
- Contact the Asset Protection Manager or Manager-on-Duty via the two-way radio if assistance is needed.

[(emphasis added).]

Reseter stated she conferred with former Personnel Manager Jessica Cordova about Loyal's conduct during the September 14 incident and determined Loyal should be fired. On September 20, Cordova emailed Director of Field Human Resources Jennifer Lynch to request approval for Loyal's termination. Along with the request, Cordova forwarded a copy of Varughese's email, which she received from Varughese on September 19.

Lynch certified that she reviewed the CCTV footage and stated it "clearly showed . . . Loyal exiting the club into the parking lot after the customer and returning to the club with the merchandise." On September 21, Lynch forwarded Cordova's separation request to Regional Asset Protection and Safety Manager Eric Burgess and asked if he was aware of the incident. Burgess responded that he had not been aware and offered the following assessment:

Obviously[,] the fact that she missed two [TV]'s going through is a concern and then going out to the parking lot after them is obviously an issue as well. I would

typically suggest a separation based on the dollar value. I know she is punching a member[']s receipt when [the merchandise] goes out[,] but her view doesn't appear to be obstructed to the point she should've missed two [TV]'s. Had she seen it and notified a manager obviously that would be different.

Lynch replied to Burgess that she also supported separation. However, Lynch said she planned to inquire about Loyal's work performance history because Loyal was a long-term employee.

Lynch certified that she reviewed Loyal's employee file and noted two disciplinary actions from 2017 – the first was a written warning Loyal had received in April because a cashier she had assisted improperly rang up merchandise, and the second was a coaching Loyal received in June for failing to ensure a customer order was ready for pick up on time. Lynch also certified there was another disciplinary action in Loyal's file "going back several years" but did not specify the date or issue. On September 22, Lynch emailed Cordova to say she supported separation.

On September 23, Loyal met with Attia and Merchandise Specialist Ada Bonilla, who was Loyal's direct supervisor, and learned she was being fired. At the meeting, Attia presented a separation document for Loyal to sign, which included a narrative describing the reasons for her termination. The narrative referred to the September 14 incident, as well as the April warning and June

coaching incidents. Loyal said she refused to sign the document because it mischaracterized the September and April incidents. Subsequently, BJ's filled Loyal's former position with a nineteen-year-old employee.

On September 29, 2017, Loyal's attorney sent a letter to Reseter requesting that BJ's "preserve any and all recordings (video, audio), electronic communications (email, text message, etc.), and all other potential evidence of the circumstances surrounding and/or basis for terminating . . . Loyal's employment." On January 18, 2018, Loyal filed a seven-count complaint against BJ's and Varughese alleging defendants had violated the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to – 49. The complaint included counts for age discrimination (count one); race discrimination (count two); disability discrimination (count three); failure to reasonably accommodate (count four); hostile work environment (count five); and retaliation (count six). Additionally, the complaint alleged Varughese "aided and abetted" BJ's wrongful conduct and was individually liable for damages (count seven).

The complaint stated that Varughese, an upper-level manager, was closely involved in Loyal's firing. It asserted Varughese "ghost wrote" the separation of employment document Attia presented at the termination meeting. Moreover, the complaint alleged Varughese "clandestinely manufactured" the written



warning Loyal received in April and "concocted" the June customer pick up issue that resulted in the coaching. According to the complaint, Varughese had a history of singling Loyal out and treating her with "hostility in the workplace," including criticizing "how she wore her uniform badge" and denying her "necessary breaks" despite knowing she had "diabetes[]" which required insulin injections." Further, Loyal claimed Varughese treated younger employees differently. At her deposition, Loyal said she complained about Varughese's age discrimination to Bonilla, whom Loyal described as a "very nice manager," but mentioned it to no one else. Moreover, Varughese was the only BJ's employee Loyal accused of discrimination. Reseter and Lynch both certified they were unaware of any harassment, discrimination, or retaliation complaints Loyal had raised while working at BJ's.

While discovery was ongoing, defendants produced two CCTV video excerpts of the September 14 incident. One excerpt showed Loyal standing inside the store dealing with the two customers as the shoplifter exited with the televisions. It also showed Loyal later re-entering the store with the merchandise. The other video showed Loyal exiting the store and returning from the parking lot with the televisions.

In response to plaintiff's interrogatory regarding destroyed documents, defendants admitted "that as a result of the system's automatic overwriting of the September 14, 2017 CCTV footage, th[e] original footage [wa]s no longer available." In another interrogatory response, defendants explained that BJ's CCTV footage was automatically overwritten "approximately every [ninety] days." However, defendants denied "there was any relevant or discoverable footage on the original" beyond what was captured in the excerpts already provided. Loyal contended that BJ's records policy did not support defendants' claims about the ninety-day automatic overwriting of CCTV footage and moved to amend her complaint, adding an eighth count with claims of fraudulent concealment and spoliation of evidence. The judge granted the motion, which was unopposed.

As the litigation proceeded, the parties contested several discovery issues. Pertinent to this appeal, Loyal moved to compel production of all litigation hold letters defendants had distributed to employees. Defendants maintained the letters were privileged and not discoverable, absent a preliminary showing of spoliation. At oral argument on December 11, 2018, Loyal's counsel argued that if the judge opted not to order production of the letters, Loyal was at least entitled to know what categories of electronically stored information (ESI) BJ's

told employees to preserve and what actions it directed employees to undertake. Although the judge denied the motion, he agreed that defendants should identify the categories of information BJ's had preserved and the actions taken to do so. The judge left open the possibility that the letters could become discoverable if the record developed to show a "failure to preserve relevant information."

Loyal subsequently filed a motion for reconsideration based on new information learned during Attia's February 1, 2019 deposition. At his deposition, Attia stated that he signed a document one or two months after Loyal was fired, which instructed him to preserve documents related to Loyal's termination. At the reconsideration hearing, Loyal's counsel argued that the delay in issuing the litigation hold was presumptive evidence of spoliation. Loyal's counsel also claimed that forty seconds of footage that would have shown exactly what transpired when Loyal first exited the store was missing from the video excerpts defendants provided. The judge, however, disagreed. After reviewing Rule 4:49-2's standard for granting a motion for reconsideration, the judge reasoned that Attia's deposition testimony did not establish any spoliation because defendants had already produced all the relevant video footage.

The judge explained:

I think the relevant video has been produced. The entire video, which I just reviewed shows what . . . happened. The second video that does not show her leaving, shows her coming back. I don't see any relevance in the video where she is seen on the first video walking out and then there would be an approximate, I don't know, [fifteen], [twenty] feet of what would have shown her leaving the store, but then that's all that video would have captured.

If you wait, it does show her coming back with the TV's. So that's . . . no showing of spoliation, in my view. So I don't see that that triggers disclosure of the [l]itigation [h]old [l]etters.

Additionally, the judge admonished the parties for failing to cooperate during discovery. Addressing both parties, the judge said:

[Y]ou're spending all this time and money and the [c]ourt's time on things that should be worked out, but if you can't work it out, I'll plow through it and I'll do the job, but I promise you, from this date on, I anticipate discovery motions.

Whoever is acting improperly on a discovery motion and that's a full and complete compliance with the rules, is going to be sanctioned with attorney's fees.

I'm not saying it's plaintiff, I'm not saying it's . . . defendant[s]. I don't think either of you have worked all that well, certainly not well together.

. . . .

The [c]ourt by the way, is not conducting anymore case management conferences. You work these problems out . . . understanding the warning . . .

that was given before about discovery motions[;]  
someone is leaving this court sanctioned if I get a  
discovery motion because this has to end . . . .

The parties did not object to the judge's admonition.

Following the close of discovery, defendants moved for summary judgment. Although Loyal opposed the motion, she nonetheless voluntarily dismissed her racial discrimination, disability discrimination, and failure to accommodate claims. The parties argued the motion on May 8, 2019, and the judge delivered an oral decision via Zoom ten days later. Although problems with the recording rendered portions of the audio indiscernible for the transcriber, the transcript shows that after recounting the parties' arguments, the judge analyzed Loyal's remaining LAD claims, applying the framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) for proving employment discrimination claims with circumstantial evidence.

First, the judge determined that Loyal established a prima facie case of age-based employment discrimination. Next, the judge found that defendants "articulated a legitimate non-discriminatory basis for [Loyal's] termination," namely her conduct on September 14. Lastly, the judge determined that no reasonable factfinder could conclude that defendants' explanation was pretextual, given BJ's documented policies prohibiting employees from pursuing

shoplifters into the parking lot and Loyal's deposition testimony admitting she entered the parking lot to confront the individual about showing a receipt. Additionally, the judge concluded that any age-based animus of Varughese did not taint the decision to terminate Loyal because Reseter and Lynch conducted independent investigations into the September 14 incident before making their decision. Therefore, according to the judge, defendants were entitled to summary judgment dismissal of the age-based discrimination count.

Turning to the next claim, the judge concluded Loyal did not establish a prima facie retaliation claim. First, the judge noted Loyal did not specify in her deposition testimony that she told Varughese she believed she was treated differently because of her age. Also, the judge observed there was at least a six-month gap between when Loyal complained about Varughese's conduct and when she was fired. The judge stated no reasonable jury could infer a causal connection between any complaints Loyal raised about disparate treatment and the subsequent decision to fire her. However, the judge reasoned that even if a reviewing court found Loyal established a prima facie retaliation claim, defendants had still "articulated a legitimate, non-discriminatory reason" for their decision that Loyal could not show was pretextual. Therefore, the judge granted defendants summary judgment on the retaliation count.

Likewise, the judge determined Loyal's hostile work environment claim failed because no reasonable factfinder could conclude Varughese's harassing conduct was so severe, physically threatening, or humiliating to constitute a cognizable claim. Further, the judge held Varughese was not liable for aiding or abetting because Loyal's termination was not wrongful. Finally, the judge concluded Loyal's fraudulent concealment claim failed because BJ's had no obligation to disclose CCTV footage beyond what it had already provided.

In this ensuing appeal, Loyal argues the judge: (1) should have granted reconsideration of her motion to compel production of all litigation hold letters based upon new evidence gleaned from Attia's deposition; (2) usurped the role of a jury in deciding her age discrimination and retaliation claims; and (3) erred in dismissing the fraudulent concealment claim.<sup>1</sup> Also, Loyal contends the judge's warnings about discovery sanctions and the poor quality of the summary judgment decision transcript violated her due process rights, presenting other grounds for reversal.

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<sup>1</sup> Loyal does not appeal the dismissal of her hostile work environment claim.

## II.

We review a grant of summary judgment applying the same standard used by the trial court. Steinberg v. Sahara Sam's Oasis, L.L.C., 226 N.J. 344, 366 (2016). That standard is well-settled.

[I]f the evidence of record – the pleadings, depositions, answers to interrogatories, and affidavits – "together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact," then the trial court must deny the motion. On the other hand, when no genuine issue of material fact is at issue and the moving party is entitled to a judgment as a matter of law, summary judgment must be granted.

[Ibid. (citations omitted) (quoting R. 4:46-2(c)).]

We give no "special deference" to a trial court's interpretation of the law. Manalapan Realty, L.P. v. Twp. Comm., 140 N.J. 366, 378 (1995).

"We review the trial court's denial of plaintiff's motion for reconsideration for abuse of discretion." Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). A court abuses its discretion "when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378, 382 (App. Div. 2015) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)).



Unlike reconsideration motions to alter or amend final judgments and final orders, which are governed by Rule 4:49-2, a motion for reconsideration of an interlocutory order, as here, is governed by Rule 4:42-2. Lawson v. Dewar, 468 N.J. Super. 128, 134 (App. Div. 2021). Rule 4:42-2 "declares that interlocutory orders 'shall be subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of justice.'" Ibid. (quoting R. 4:42-2); see also Pressler & Verniero, Current N.J. Court Rules, cmt. 3 on R. 4:42-2 (2022) ("[A]n order adjudicating less than all the claims is subject to revision in the interests of justice at any time before entry of final judgment.").

#### A. Loyal's Motion for Reconsideration

Applying these principles, we discern no abuse of discretion in the judge's denial of Loyal's reconsideration motion. The judge determined that Attia's deposition testimony regarding delays in the distribution of litigation hold letters was irrelevant to any potential spoliation of the CCTV footage, given that defendants had already produced the relevant video footage. Spoliation is "the destruction or the concealment of evidence by one party to impede the ability of another party to litigate a case." Jerista v. Murray, 185 N.J. 175, 201 (2005). Because the video defendants produced showed the conduct underlying Loyal's termination, namely her leaving the store and returning from the parking lot with

the merchandise, all of which Loyal admitted in her deposition, we agree with the judge's assessment that there was no failure to preserve relevant evidence and thus no preliminary showing of spoliation to trigger disclosure of the litigation hold letters.

We recognize that the judge applied the wrong standard in denying plaintiff's reconsideration motion. The "standard cited by the . . . judge that requires a showing that the challenged order was the result of a 'palpably incorrect or irrational' analysis or of the judge's failure to 'consider' or 'appreciate' competent and probative evidence did not apply to the motion before the . . . judge." Lawson, 468 N.J. Super. at 134 (citation omitted) (quoting Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996)). Indeed, unlike "the methodology employed when a motion is based on Rule 4:49-2" to which the Cummings standard applies, "only 'sound discretion' and the 'interest of justice' guides the trial court" on a Rule 4:42-2 motion. Lawson, 468 N.J. Super. at 134. Nonetheless, we are satisfied that the decision was correct under the Rule 4:42-2 standard, and we may rely on grounds other than those expressed by the judge to affirm an order. See Ellison v. Evergreen Cemetery, 266 N.J. Super. 74, 78 (App. Div. 1993) ("[A]ppeals are taken from judgments, not from

oral opinions or reasons," and "an order or judgment will be affirmed on appeal if it is correct, even though the judge gave the wrong reasons for it.").

### B. Loyal's LAD Claims

The LAD provides it is unlawful for an employer "to discharge . . . or . . . discriminate against [an] individual in compensation or in terms, conditions or privileges of employment" on the basis of age or other protected characteristics. N.J.S.A. 10:5-12(a). New Jersey courts utilize the McDonnell Douglas burden-shifting framework to evaluate LAD claims, requiring plaintiffs first to establish a prima facie discrimination claim. Viscik v. Fowler Equip. Co., 173 N.J. 1, 13-14 (2002). To demonstrate a prima facie age discrimination claim, a plaintiff must show: "(1) she belongs to a protected class; (2) she performed her job at a level that satisfied [the employer's] legitimate expectations; (3) she was discharged; and (4) she was replaced by 'a candidate sufficiently younger to permit an inference of age discrimination.'" Young v. Hobart W. Grp., 385 N.J. Super. 448, 458 (App. Div. 2005) (quoting Bergen Com. Bank v. Sisler, 157 N.J. 188, 213 (1999)).

Importantly, "[t]he evidentiary burden at the prima facie stage is 'rather modest: it is to demonstrate to the court that plaintiff's factual scenario is compatible with discriminatory intent – i.e., that discrimination could be a

reason for the employer's action." Zive v. Stanley Roberts, Inc., 182 N.J. 436, 447 (2005) (quoting Marzano v. Comput. Sci. Corp., 91 F.3d 497, 508 (3d Cir. 1996)). Also, "the prima facie case is to be evaluated solely on the basis of the evidence presented by the plaintiff, irrespective of defendants' efforts to dispute that evidence." Id. at 448.

If a plaintiff demonstrates a prima facie claim, the burden "shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse employment action." Viscik, 173 N.J. at 14. If the employer articulates a legitimate reason for its action, "the burden shifts back to the plaintiff to show that the employer's proffered reason was merely a pretext for discrimination." Ibid. To prove pretext, a plaintiff must show the proffered reason was false, and "the employer was motivated by discriminatory intent." Ibid.

Here, the judge concluded Loyal established a prima facie age discrimination claim but failed to show defendants' reasons were pretextual. Loyal, however, asserts there were genuine issues of material fact related to the issue of pretext that should have precluded the judge from granting summary judgment.

As noted by our Supreme Court, a plaintiff can demonstrate genuine issues of material fact exist in discrimination cases by "point[ing] to some evidence,

direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action." Zive, 182 N.J. at 455-56 (quoting Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994)). However, "[i]f it is clear that that obligation cannot be met, defendants will prevail at summary judgment." Id. at 456.

We agree with the judge that Loyal failed to meet her burden. Loyal's allegation that Varughese masterminded her termination for discriminatory reasons is not supported by the record. The contemporaneous email exchange between Lynch and Burgess, where they discussed the September 14 incident, clearly showed they both had legitimate and independent concerns about Loyal's conduct. Loyal presented no evidence to suggest otherwise. Moreover, the concerns Lynch and Burgess expressed in the email exchange are consistent with BJ's stated reasons for firing Loyal.

Furthermore, the circumstantial evidence of Varughese's influence, namely the email and photos sent to management, would not lead a reasonable juror to believe that Varughese had somehow manipulated Reseter and Lynch into firing Loyal. Again, Reseter and Lynch both certified that they

independently reviewed the relevant CCTV footage before making their decision, and the record does not suggest Varughese was meaningfully involved in their decision-making process. Consequently, Loyal has not shown that material issues of fact precluded granting summary judgment to defendants on her age discrimination claim.

A similar analysis applies to Loyal's retaliation claim. See Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 332 (2010) ("A claim of retaliation follows essentially the same burden-shifting approach . . ."). A plaintiff can establish a prima facie case of retaliation under the LAD by demonstrating: "(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 v. State, 203 N.J. 383, 409 (2010).

We agree with the judge that Loyal did not establish a prima facie retaliation claim. Undoubtedly, raising concerns about unlawful age discrimination in the workplace is a protected activity under the LAD. See N.J.S.A. 10:5-12(d) (prohibiting "reprisals against any person because that person has opposed any practices or acts forbidden under this act"). Thus, if

Loyal showed how her complaints to Bonilla about Varughese's alleged discriminatory conduct were possibly a cause of her termination, she would have established a prima facie retaliation claim. See Zive, 182 N.J. at 447. However, she did not.

Critically, Loyal presented no evidence to suggest that Varughese or anyone else was aware that she had complained of age discrimination to Bonilla.<sup>2</sup> Further, Loyal never claimed Bonilla retaliated against her; to the contrary, Loyal emphasized at her deposition that Bonilla had always treated her well. Consequently, we have no basis for inferring that the decision-makers knew of any protected activity by Loyal or that Loyal's complaints led to her termination. See Young, 385 N.J. Super. at 467 ("[T]he mere fact that [an] adverse employment action occurs after [the protected activity] will ordinarily be insufficient to satisfy the plaintiff's burden of demonstrating a causal link between the two." (second and third alterations in original) (quoting Krouse v. Am. Sterilizer Co., 126 F.3d 494, 503 (3d Cir. 1997))). Even if Loyal had established a prima facie retaliation claim, her failure to show pretext is fatal to her claim.

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<sup>2</sup> Notably, in opposing the summary judgment motion, Loyal submitted Bonilla's deposition transcript in which Bonilla also denied being aware of Loyal's age discrimination complaints.

Because summary judgment dismissal of Loyal's discrimination and retaliation claims was proper, summary judgment dismissal of the aiding or abetting claim against Varughese was also appropriate.

[I]n order to hold an employee liable as an aider or abettor, a plaintiff must show that "(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; [and] (3) the defendant must knowingly and substantially assist the principal violation."

[Tarr v. Ciasulli, 181 N.J. 70, 84 (2004) (second alteration in original) (quoting Hurley v. Atl. City Police Dep't, 174 F.3d 95, 127 (3d Cir. 1999)).]

Because there was no wrongful conduct, there can be no individual liability. See N.J.S.A. 10:5-12(e) (imposing individual liability under the LAD "[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").

### C. Loyal's Fraudulent Concealment Claim

To prevail on a fraudulent concealment claim, a plaintiff must demonstrate:

(1) That defendant in the fraudulent concealment action had a legal obligation to disclose evidence in connection with an existing or pending litigation;



- (2) That the evidence was material to the litigation;
- (3) That plaintiff could not reasonably have obtained access to the evidence from another source;
- (4) That defendant intentionally withheld, altered or destroyed the evidence with purpose to disrupt the litigation;
- (5) That plaintiff was damaged in the underlying action by having to rely on an evidential record that did not contain the evidence defendant concealed.

[Tartaglia v. UBS PaineWebber Inc., 197 N.J. 81, 118 (2008) (quoting Rosenblit v. Zimmerman, 166 N.J. 391, 406-07 (2001)).]

Here, we agree with the judge that Loyal's fraudulent concealment claim was ripe for summary judgment dismissal because any additional CCTV footage was immaterial to the case. BJ's stated it fired Loyal because she left the store to confront a shoplifter in the parking lot, thus violating store policy. The videos defendants provided showed the shoplifter exiting with the televisions, Loyal departing the store soon after, and then returning from the parking lot with the televisions. Moreover, Loyal testified at her deposition that she entered the parking lot and asked the shoplifter for a receipt, which prompted the individual to run off. These facts formed the basis of BJ's non-discriminatory reason for terminating Loyal, and we are satisfied that no additional video footage would

have been relevant to establishing pretext. Accordingly, the judge correctly granted summary judgment dismissal of the claim.

#### D. Loyal's Due Process Rights

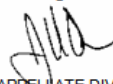
We acknowledge the constitutional right to access to the courts embedded in the Due Process Clause of the Fourteenth Amendment. Rosenblum v. Borough of Closter, 333 N.J. Super. 385, 389-90 (App. Div. 2000). Moreover, we have previously observed that, under certain circumstances, a "judge's comments about motion practice implicate due process concerns." Zehl v. City of Elizabeth Bd. of Educ., 426 N.J. Super. 129, 139 (App. Div. 2012). However, those concerns are not present here. The judge expressed frustration over the parties' lack of cooperation and warned that he would sanction any party that did not comply with the discovery rules. As our Supreme Court has observed, "[i]f the discovery rules are to be effective, courts must be prepared to impose appropriate sanctions for violations of the rules." Abtrax Pharms., Inc. v. Elkins-Sinn, Inc., 139 N.J. 499, 512 (1995). We see no constitutional infringement in the judge's admonition.

Likewise, under the circumstances, the quality of the transcript of the judge's summary judgment ruling does not implicate due process concerns. Because court operations were severely curtailed due to the COVID-19

pandemic, the decision was placed on the record via Zoom. In compliance with Rule 1:7-4, the judge delivered an oral decision stating his findings of fact and conclusions of law. Admittedly, problems with the audio recording led to a poor-quality transcript with numerous "indiscernible" notations. However, the majority of the judge's reasoning is captured in the transcript, and Loyal does not identify any passages in the transcript that were so unclear that she could not address them on appeal. Moreover, our review of "a grant of summary judgment [is] de novo." F.K. v. Integrity House, Inc., 460 N.J. Super. 105, 114 (App. Div. 2019). Consequently, we conclude the transcript quality did not substantially prejudice Loyal or infringe her right to access the courts so as to deprive her of due process.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION