

**United States Bankruptcy Court  
Southern District of New York**

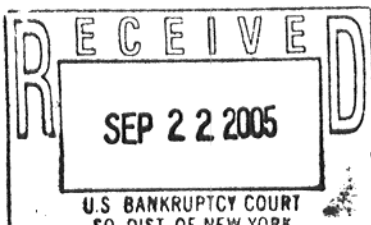
In re	:	Case No. 04-13638 (RDD)
RCN CORPORATION, et al.	:	Chapter 11
Debtors,	:	(Jointly Administered)
Address: 105 Carnegie Center	:	
Princeton, NJ 08540	:	
Employer's Tax Identification	:	
(EIN) Nos.: 22-349853	:	

CERTIFICATION OF JON W. GREEN, ESQ. IN SUPPORT OF CREDITOR, MARIE DEWEES'S MOTION FOR AN ORDER VACATING ORDER NOVEMBER 16, 2004 VACATING EXPUNGMENT OF CREDITOR'S MARIE DEWEES CLAIM AND MODIFYING AUTOMATIC STAY PURSUANT TO 11 U.S.C. SECTION 362 (d) TO ALLOW THE NEW JERSEY SUPERIOR COURT TO DETERMINE THE VALUE OF THE CLAIM.

I, JON W. GREEN, of full age hereby certifies as follows:

1. I am an attorney at law of the State of New Jersey, the State of New York and of the federal district court for the Southern District of New York and am the attorney for the Creditor, Marie DeWees. In such capacity, I am fully familiar with the facts that I am about to relate below.

2. I, and my firm, represent Marie DeWees in the matter of *Marie DeWees v. RCN Corporation, et al.*, Docket Number MID-L-3645-02, which was filed in the Law Division, State of New Jersey, and County of Mercer on or about January 12, 2000. The filed complaint alleges that Ms. DeWees was terminated from her employment on January 13, 1998 because of illegal gender and age discrimination which, if proven to be true, violates the New Jersey Law Against Discrimination, N.J. Stat. Ann. 10:5-1, et. seq.



3. The state court case was litigated up to the time that trial was to commence. However, on February 5, 2003, the Law Division granted summary judgment to the defendants and dismissed Ms. DeWees's state court complaint with prejudice. Ms. DeWees filed a Notice of Appeal on February 14, 2003 and then all the parties subsequently filed their appellate briefs.

4. While the appeal was pending, defendant RCN Corporation had filed Chapter 11 bankruptcy on May 27, 2004.

5. Marie DeWees sent her Proof of Claim via Federal Express to the Clerk's Office on July 26, 2004 for filing on July 27, 2004. (See **Ex. 1** attached hereto.)

6. On or about August 2, 2004, Ms. DeWees filed a motion with this Court seeking an Order of this Court to lift the automatic stay so that this Court may abstain in favor of the New Jersey courts to determine the value of the debt that the debtor RCN Corporation may owe to Ms. DeWees and for a bridge order to extend the filing deadline for Ms. DeWees to file an adversarial complaint. (See Docket entry #137). Counsel for the debtor and the undersigned had telephone consultations and agreed to enter into a consent order to lift the automatic stay to allow the New Jersey Superior Court, Appellate Division to go forward and decide creditor's appeal. Ms. DeWees agreed to withdraw her motion for a bridge order and a Consent Order was executed and filed with this Court on October 12, 2004. (See **Ex. 2** attached hereto and Docket entry # 295).

7. The debtor, RCN Corp. filed its motion to expunge Ms. DeWees claim on October 7, 2004. (See Docket Entry # 281). After receipt of the paper Notice, the undersigned telephoned debtor's counsel, specifically Grenville Day, Esq. of Skadden Arps, who had the undersigned had previously dealt with on the consent order to lift the automatic stay, asking RCN to hold in abeyance its motion to expunge Ms. DeWees' claim since RCN had previously

agreed to lift the automatic stay by consent order to allow Ms. DeWees to go forward with her New Jersey appeal. The reasoning was that if the New Jersey Appellate Division affirmed the entry of summary judgment against Ms. DeWees, the case would be over anyway and the matter had already been briefed and orally argued so a decision was expected soon. Mr. Day, after checking with someone, presumably his client, agreed and he said that he would call in the adjournment of the motion to the Court. The undersigned followed up with a call to the law clerk, whose name I can't remember, before the return date of the motion, i.e. November 16, 2004. The law clerk said he would take care of it and put off the motion as to Ms. DeWees. He also said that follow-up correspondence was not necessary.

8. On July 15, 2005, the New Jersey Appellate Division reversed the entry of summary judgment in favor of RCN finding there was sufficient evidence submitted that if believed by a jury could hold RCN Corp. and individual defendants, David McCourt and Michael Mahoney liable under the New Jersey Law Against Discrimination and remanded the case for trial. (See **Ex. 3** attached hereto.) The undersigned, who has at best a surface knowledge of bankruptcy law, then tried to secure bankruptcy counsel's advice without much success until this past week as to the status of Ms. DeWees' claim in this Court.

9. The undersigned did learn of the debtor's motion to enter a confirmation plan but never received a copy of the plan.

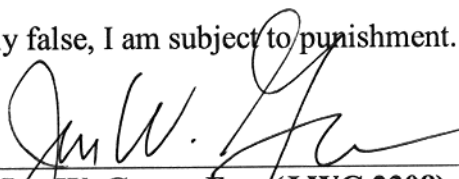
10. On September 14, 2005, in preparation for a scheduled settlement telephone conference that day with RCN's General Counsel, Steve Bogiages, the undersigned spent several hours going over the PACER filings with regard to this case and discovered that this Court had expunged Ms. DeWees' claim on November 16, 2004 which was entered on the docket. (See

Docket Entry # 391 and related Docket entry # 281). Ms. DeWees claim is contained in Exhibit E of Docket entry # 281.)

11. At no time did the undersigned or Ms. DeWees ever receive a copy of this Order expunging her claim.

12. While recognizing that the debtor has emerged from Chapter 11 bankruptcy, nevertheless, Ms. DeWees asks the Court to vacate it expungement order entered on the docket on November 17, 2004 and that the automatic stay be lifted so that the matter can be tried in the New Jersey Superior Court to determine the value of the claim. It is the undersigned's understanding that Class E claims are those of general unsecured creditors and that there was a specific sum dedicated to pay these claims in accordance with the Confirmation Plan's terms. Additionally, it would be advantageous to try the case in state court because there are also outstanding claims remaining against the former CEO of RCN Corp., David McCourt and former RCN President Michael Mahoney as they were the decision-makers who fired Ms. DeWees back in 1998 that will be part of the same trial.

I certify that the foregoing statements made by me are true. I am aware that if any foregoing statements made by me are willfully false, I am subject to punishment.



**Jon W. Green, Esq. (J WG 2308)**  
**Green & Savits, LLC**  
**35 Airport Road – Suite 350**  
**Morristown, NJ 07960**  
**(973) 695-7777**  
**Attorney for Marie DeWees**

**Dated: September 20, 2005**



CORPORATION CLAIMS PROCESSING  
Box 5043, BOWLING GREEN STATION  
YORK, NY 10274-5043

RCN Corporation, et al., Debtors.	Chapter 11 Case No. 04-13638 (RDD) (Jointly Administered)
Debtor Against Which Claim is Held CORPORATION	Case No. of Debtor Case No: 04-13638(RDD)

**Caution:** This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A request for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.

Name and address of Creditor:

APID: 1-F6-188  
RCN (MERGE.DBF.SCHED\_NO) SCHEDULE #: 638001420\*  
MARIE DEWEES  
70 VAN LIEUS ROAD  
RINGOES NJ 08551

Phone number:

Internet or other number by which creditor identifies debtor:

☐ Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.

☐ Check box if you have never received any notices from the bankruptcy court in this case.

☐ Check box if the address differs from the address on the envelope sent to you by the court.



Your claim is scheduled by the Debtor as:  
\$0.00 UNSECURED  
UNLIQUIDATED  
DISPUTED  
CONTINGENT

Check here if this claim:

☐ replaces ☐ amends a previously filed claim, dated: \_\_\_\_\_

Basis for Claim

- ☐ Goods sold  
☐ Services performed  
☐ Money loaned  
☐ Personal injury/wrongful death  
☐ Taxes  
☐ Other \_\_\_\_\_ (explain)

- ☐ Retiree benefits as defined in 11 U.S.C. § 1114(a)  
☒ Wages, salaries, and compensation (fill out below)

Last Four Digits of your SS#: \_\_\_\_\_

Unpaid compensation for services performed

from 1/13/98 to 2/29/00  
(date) (date)

Date debt was incurred:

1/13/98 - 2/29/00

3. If court judgment, date obtained:

N/A

Total Amount of Claim at Time Case Filed: \$ 4,525,000.00 + 0 (secured) + 0 (unsecured priority) = \$4,525,000.00 (Total)  
If all or part of your claim is secured or entitled to priority, also complete Item 5 or 7 below.

Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.

Secured Claim.

Check this box if your claim is secured by collateral (including a right of setoff).

Brief Description of Collateral:

- ☐ Real Estate ☐ Motor Vehicle  
☐ Other \_\_\_\_\_

Value of Collateral: \$ \_\_\_\_\_

Amount of arrearage and other charges at time case filed included in secured claim, if \$ \_\_\_\_\_

Unsecured Nonpriority Claim: \$ 4,525,000.00

Check this box if: a) there is no collateral or lien securing your claim, or b) your claim exceeds the value of the property securing it, or c) none or only part of your claim is entitled to priority.

7. Unsecured Priority Claim.

☐ Check this box if you have an unsecured priority claim

Amount entitled to priority \$ \_\_\_\_\_

Specify the priority of the claim:

- ☐ Wages, salaries or commissions (up to \$4,925), earned within 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. § 507(a)(3).  
☐ Contributions to an employee benefit plan - 11 U.S.C. § 507(a)(4).  
☐ Up to \$2,225 of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507(a)(6).  
☐ Alimony, maintenance, or support owed to a spouse, former spouse, or child - 11 U.S.C. § 507(a)(7).  
☐ Taxes or penalties owed to governmental units - 11 U.S.C. § 507(a)(8).  
☐ Other Specify applicable paragraph of 11 U.S.C. § 507(a)(\_\_\_\_\_).

Credits: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.

Supporting Documents: Attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien.

DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, explain. If the documents are voluminous, attach a summary.

Date-Stamped Copy: To receive an acknowledgment of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.

Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any):

2/3/04

Marie Dewees

Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

**RIDER TO PROOF OF CLAIM**

1.	Estimated Damages:	\$3,250,000.00
2.	Estimated pre-judgment interest from 1/13/00 to present at 5 per cent per annum	975,000.00
3.	Estimated attorneys' fees and costs through completion	<u>300,000.00</u>
	Total	\$4,525,000.00





UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

-----	x
--	:
	:
In re	: Chapter 11
	:
	: Case No. 04-13638 (RDD)
RCN CORPORATION, <u>et al.</u> ,	:
	: (Jointly Administered)
Debtors.	:

----- x  
-

**STIPULATION AND ORDER APPROVING  
MODIFICATION OF THE AUTOMATIC STAY TO ALLOW  
SUPERIOR COURT OF NEW JERSEY--APPELLATE  
DIVISION TO DECIDE MARIE DEWEES'S APPEAL**

RCN Corporation ("RCN") and certain of its direct and indirect subsidiaries, debtors and debtors-in-possession in the above-captioned cases (collectively, the "Debtors"), and Marie DeWees (together with the Debtors, the "Parties"), hereby agree and stipulate (the "Stipulation"), subject to Bankruptcy Court approval, as follows:

WHEREAS, on January 12, 2000, Marie DeWees initiated a lawsuit against RCN styled Marie DeWees v. RCN Corporation, et al.; Superior Court of New Jersey Law Division, Mercer County (the "New Jersey State Court"), Case No. MID-L-3645-02 (the "State Court Litigation") alleging employee discrimination based on illegal gender and age discrimination; and

WHEREAS, RCN previously filed a Motion for Summary Judgment requesting dismissal of the State Court Litigation; and

WHEREAS, on February 5, 2003, the New Jersey State Court granted RCN's Motion for Summary Judgment and dismissed the State Court Litigation with prejudice; and

WHEREAS, on February 14, 2003, Marie DeWees filed a Notice of Appeal (the "Appeal") with the Superior Court of New Jersey—Appellate Division (the "Appellate Division"); and

WHEREAS, the Parties have both fully briefed the Appeal; and

WHEREAS, on December 17, 2003, the Appellate Division heard oral arguments with respect to the Appeal; and

WHEREAS, on May 27, 2004 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under Chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"); and

WHEREAS, the Debtors continue to manage and operate their businesses as debtors-in-possession pursuant to Bankruptcy Code sections 1107 and 1108; and

WHEREAS, on August 2, 2004, Marie DeWees filed a Motion For an Order Modifying Automatic Stay Pursuant to 11 U.S.C. Section 362(d) And For an Extension of the Deadline to File an Adversary Complaint Pursuant to 11 U.S.C. 523(a)(6) (the "Lift Stay Motion") (Dkt. No. 137) requesting, inter alia, lifting of the automatic stay for the purposes of

determining the value of Marie DeWees's employment discrimination claim or in the alternative modification of the automatic stay in order to allow the Appellate Division to decide the Appeal; and

WHEREAS, on or about August 6, 2004, Marie DeWees sent Creditor, DeWees' Notice to Produce Documents; and

WHEREAS, the Parties wish to resolve the Lift Stay Motion among themselves without any admission of liability and to avoid the expense of further litigation; and

WHEREAS, RCN has consented to modification of the automatic stay imposed by section 362(a) of the Bankruptcy Code for the limited purpose of allowing the Appellate Division to decide the Appeal but for no other purpose; and

WHEREAS, such resolution of the Lift Stay Motion is in the best interests of the Parties and the bankruptcy estate; and

WHEREAS, RCN intends to seek Bankruptcy Court approval of this Stipulation.

NOW, THEREFORE, in consideration of the foregoing recitals which are incorporated herein by reference, the terms, conditions, and mutual agreements set forth herein, and other good and valuable consideration, the sufficiency and receipt of which are hereby acknowledged and subject to Bankruptcy Court approval;

IT IS HEREBY STIPULATED AND AGREED by and between the Debtors on the one hand, and Marie DeWees on the other, as follows:

1. The terms and conditions of this Stipulation, and the obligations of the Parties hereunder, shall become effective only upon entry of this Stipulation as an order of the Bankruptcy Court.

2. The automatic stay imposed by section 362(a) of the Bankruptcy Code is hereby modified for the limited purpose of allowing the Appellate Division to decide the Appeal but for no other purpose.

3. The Lift Stay Motion is dismissed without prejudice, and may be refiled only after the Appellate Division decides the Appeal.

4. This Stipulation shall bind and inure to the benefit of the Parties, the Parties' respective administrators, assigns, successors in interest, officers, directors, shareholders (solely in their capacity as shareholders), agents, independent contractors, attorneys, employees, subsidiaries, parent corporations, sibling corporations, affiliates, partners, and beneficiaries and each of them.

5. Each Party hereto expressly represents and warrants that the individual executing this Stipulation on its behalf is fully authorized by such Party to execute this Stipulation and bind such Party.

6. This Stipulation constitutes the entire agreement between the Parties hereto and supersedes all oral or written agreements entered into either prior to or contemporaneously with this Stipulation. This Stipulation may not be modified except by written agreement dated subsequent to the date of this Stipulation and signed by all Parties hereto. No waiver of

any of the provisions of this Stipulation shall constitute a waiver of any other provision of this Stipulation.

7. This Stipulation may be executed in any number of counterparts, each of which shall be deemed an original, but all of which, taken together, shall constitute one and the same instrument.

8. The Bankruptcy Court shall retain jurisdiction over the Parties hereto and this Stipulation including, without limitation, for the purposes of interpreting, implementing, and enforcing its terms and conditions.

9. In the event this Stipulation is not approved by the Bankruptcy Court, this Stipulation shall have no force or effect, and nothing herein shall constitute an admission or be used against any of the Parties hereto for any reason.

IN WITNESS WHEREOF, each of the Parties to this Stipulation has caused a counterpart of this Stipulation to be executed and delivered by its duly authorized signatory as of the date indicated below.

STIPULATED AND CONSENTED TO:

Dated: September 17, 2004

SKADDEN, ARPS, SLATE, MEAGHER  
& FLOM LLP

By: /s/ D.J. Baker  
D. J. Baker (DB 0085)  
(Member of the Firm)  
Frederick D. Morris (FM 6564)  
Four Times Square  
New York, New York 10036-6522  
(212) 735-3000  
Attorneys for Debtors and  
Debtors-in-Possession

Dated: September 13, 2004

By: /s/ Jon W. Green  
Jon W. Green (JWG 2308)  
Green & Savits, LLC  
35 Airport Road—Suite 350  
Morristown, NJ 07960  
(973) 695-7777  
Attorneys for Marie De Wees

So Ordered This 12<sup>th</sup> day of October, 2004

/s/Robert D. Drain  
UNITED STATES BANKRUPTCY COURT



NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3034-02T3

MARIE DEWEES,

Plaintiff-Appellant,

and

PAMELA PERNOT,<sup>1</sup>

Plaintiff,

v.

RCN CORPORATION, DAVID MCCOURT,  
MICHAEL MAHONEY, and KENNETH  
KNUDSEN,

Defendants-Respondents.

---

Argued April 19, 2005 – Decided **JUL 15 2005**

Before Judges Kestin, Alley and Fuentes.

On appeal from Superior Court of  
New Jersey, Law Division, Mercer County,  
Docket No, L-175-00.

Jon W. Green argued the cause for appellant  
(Green Lucas Savits & Marose, attorneys;  
Mr. Green and Glen D. Savits, of counsel  
and on the brief).

Cynthia M. Jacob, argued the cause for

---

<sup>1</sup> Pamela Pernot's complaint, also alleging gender and age discrimination, was severed in March 2002 on defendants' motion. She thereafter settled her case.



respondents (Collier, Jacob & Mills, attorneys;  
Ms. Jacob, of counsel and on the brief;  
Franco Mazzei, on the brief).

PER CURIAM

Plaintiff Marie DeWees appeals from the dismissal of her cause of action alleging gender and age discrimination in violation of our State's Law Against Discrimination. N.J.S.A. N.J.S.A. 10:5-12(a). The Law Division granted defendants' summary judgment motion, concluding that plaintiff had not produced sufficient evidence to show that defendants' proffered business reasons for her termination (poor performance and a personality conflict with her superior) were pretextual.

In this appeal, plaintiff argues that the motion judge erred when he applied an incorrect standard on summary judgment, weighing the evidence rather than giving her the benefit of the proffered evidence and its reasonable inferences. After reviewing the record and considering the applicable law, we agree with plaintiff and reverse.

I

Plaintiff was fifty years old at the time she was terminated from her position as RCN's senior vice president of customer service in 1998, after approximately eight years of service. She was the top-ranking woman in the company at the time of her termination.

Defendant Michael Mahoney was, at all times relevant to the issues raised here, president of RCN Corporation, a provider of cable and long-distance telephone service. Defendant David McCourt was RCN's Chief Executive Officer. Kenneth Knudsen, another RCN executive, was originally named as a defendant. Plaintiff did not pursue her claims against him.

Plaintiff started working for C-Tec, RCN's predecessor, in May 1990 as manager of marketing and ad sales, earning \$42,055 per year. After several promotions and salary increases, she became director of development in February 1995, earning \$77,500; vice president of marketing in August 1995, earning \$97,500; and senior vice president of customer sales in February 1997, earning \$125,000. She was the only woman vice president in the company.

#### A

##### Evidence of Pattern of Discriminatory Treatment

In 1996, plaintiff complained that her salary was lower than it should have been in 1995 and 1996. In response, she was told that she would be "taken care of" at bonus time. Although she received a substantial bonus in 1996, she claimed that it was completely due to her work in a "special project," and thus unrelated to any attempt at income parity. RCN president Mark

Haverkate, her supervisor until 1995, noted that in 1996 her salary was the lowest in her "band."

According to plaintiff, McCourt told her that Mahoney wanted to reduce the extraordinary bonus that she received in 1996 for her work on a special project, but did not want to reduce similar bonuses received by two male executives. In his deposition, Mahoney denied having any problems with plaintiff's 1996 bonus.

Plaintiff testified that McCourt commented, upon introducing her to someone, that she had "balls." She took this vulgarity to mean that she was tough. She further indicated that other people had used this term to describe her before, but she was "a little shocked" and "taken aback" that the CEO would introduce her this way. According to plaintiff, this remark was indicative of a male-centric "atmosphere," where "[y]ou had to be one of the guys to make it at RCN. And I was not."

Plaintiff described Mahoney's attitude toward women as "[e]litist" and "dismissive." She characterized Mahoney's demeanor as "bothered" by her "challenges" to some of the things that he did. He also would ignore her at meetings and "looked through you like you weren't there."

Plaintiff described an incident in which she met Mahoney on the stairs and asked him how he was; he answered that he was

"really stressed." When she asked, "Is there anything I can do to help," Mahoney replied, "I guess you can just quit." In a subsequent deposition, plaintiff changed this testimony to indicate that Mahoney said that "he guessed that he could always quit." She added, however, that she took this comment as "an innuendo to mean that I could quit. He had no intention of quitting." Plaintiff explained that she interpreted Mahoney's remark this way because "[t]hey were making my job really difficult," and there were rumors that her superiors were trying to force her to resign.

In late 1996, plaintiff testified that she was talking with Lorraine Reddington (RCN's controller), when Mahoney "snickered" and said: "Well, imagine the two of you talking about technical issues." According to plaintiff, this remark revealed Mahoney's sexist attitudes toward women, in that "technical issues" are beyond the understanding of women.

When Mahoney became president of RCN in June or July of 1997, McCourt decided to remove both plaintiff and Haverkate from marketing and sales. He made this decision because "subscriber gains, access lines gains and numbers that were being achieved were not in line with the plan and were not in line with the growth rate that he had expected from them." Mahoney testified that he did not want plaintiff to remain in

operations because her experience was in marketing and sales, and "we had a tremendous problem at RCN with provisioning customers, getting customers that had signed up for sales on to her network as billable customers." McCourt directed Mahoney to take over operations, and agreed with Mahoney's suggestion to hire someone new to assist.

McCourt accepted Mahoney's suggestion to move plaintiff to customer service. Mahoney explained that "customer service was a problem big enough that McCourt was getting multiple letters a day complaining." Mahoney removed John Gdovin, who was thirty-five years old, from customer service in October 1997, but Gdovin "kept the programming responsibilities that he always had and also assumed responsibility for Cable Michigan," a part of C-Tec. According to Haverkate, McCourt chose plaintiff as "the best person in the company" to manage customer service. She had taken over management of the New York office and turned it around "from horrible to pretty good."

Haverkate described McCourt's management style as involving "a lot of mix-up and changes going on all the time." He said that McCourt

managed the company almost like a soccer team, and he . . . expected that people would play whatever roles or positions that he thought was the best lineup at any given period of time.

And . . . he had a tendency to elevate people to a higher status than maybe they deserved at the time . . . . And then time would go by and . . . they would make a mistake or they fumbled the ball . . . and they would go, boom, right down to the bottom and would be . . . in the doghouse.

But that happened to everybody. It was a continual thing and people adapted to it . . . But the reality was that you had to play on the team . . . .

\* \* \* \*

When people were in the doghouse they didn't get too depressed about it because you work hard and times will change and they'll get back out.

Plaintiff testified that McCourt told her that "customer service was all fucked up, and that because I had an operations, marketing and sales background and no one else in the company did, that I could straighten it out." She explained that she had a "crown jewel job," which she loved, and McCourt asked her to accept a "job in the black hole" with accountability but no authority. Thus, she believed that she was "set up to fail."

Plaintiff initially declined the customer service offer. She accepted in June or July 1997, after Knudsen assumed her marketing responsibilities. In August 1997, Mahoney hired forty-two-year-old Scott Jarus, who assumed plaintiff's other responsibilities. Plaintiff reported directly to Jarus.

Plaintiff described Jarus as sarcastic and belittling. She believed he was carrying out Mahoney's orders "[b]ecause no one could be that nasty and enjoy it." According to plaintiff, although Jarus was condescending toward men, he was worse with women.

Under Jarus, plaintiff claims to have been unable to obtain "the tools and resources" needed to adequately perform her customer service responsibilities. Mahoney corroborated, in part, plaintiff's claims in this respect. He admitted that plaintiff did not have the authority to increase staff and meet her department's infrastructure needs. Jarus denied a number of proposals made by plaintiff, including a plan to develop an incentive plan.

She testified that Jarus would assign projects directly to people who reported to her, without informing her, and then hold her accountable for their outcome. At least on one occasion, Jarus directed plaintiff's secretary to look for her when she was not at her desk, including following plaintiff into the restroom. Jarus would ostensibly forget that plaintiff had informed him when she would be out of the office, and failed to include her or invite her to meetings.

Plaintiff testified that Mahoney asked her to agree that customer service should report to him. When she responded that

she needed to think about it, Mahoney falsely told McCourt that plaintiff had agreed. As to plaintiff's performance, Mahoney acknowledged that she opened a customer service center in Princeton as directed, and characterized her efforts in this respect as adequate. He disagreed, however, with her approach to the customer service problem, which was to increase the size of the staff. He admitted that he did not have "enough time" to ascertain what was wrong with customer service before he left in March 1998.

B

The Termination

In October 1997, C-Tec divided into three separate companies: RCN, Cable Michigan, and CTCO (Commonwealth Telephone Company). McCourt remained as chair of all three companies. RCN became plaintiff's employer. According to plaintiff, her reviews during her tenure at C-Tec/RCN were "superior or exceptional." When she began reporting to Mahoney four months later, "I went from being a superior employee to getting terminated." Haverkate, who supervised plaintiff until she became senior vice president of customer sales in February 1997, corroborated that her performance was excellent.

According to Mahoney, in September and October 1997, Jarus expressed concern about plaintiff's lack of cooperation and



communication. In December 1997, Jarus told Mahoney that he could no longer work with plaintiff. Mahoney said that he approached several senior executives -- Haverkate, Knudsen, Gdovin, Mike Adams, and Dhiraj G. Gulati -- to find another position for plaintiff in the company. None were interested. He thus decided to terminate plaintiff. McCourt told him: "That's your decision."

Gulati and Adams both denied that Mahoney asked them about a position for plaintiff in their departments. According to Haverkate, there were other positions that plaintiff could have taken, because the company was growing fast and had "a history of musical chairs and people taking different roles." According to Haverkate, since plaintiff's termination, "lots of people have come and gone at the senior level positions." When Haverkate attempted to talk to Mahoney, he refused to see him. McCourt also declined to talk to Haverkate about plaintiff's termination.

Mahoney terminated plaintiff on January 13, 1998. His reasons for doing so were twofold: "her deteriorating work performance, coupled with her personality conflict with her supervisor, Scott Jarus, and other RCN employees." According to Mahoney, Jarus assumed her duties as head of customer service. Mahoney left operations in March 1998. Defendants hired Jeanne

Daniels, a fifty-four-year-old woman, in June 1998 to replace plaintiff.

C

Stock Option Plan as a Part of Damages

According to Jonathan Paules, RCN's manager of executive compensation and stock options, plaintiff received 10,000 shares of C-Tec stock under the 1994 stock option plan. Two thousand of these shares vested on January 3, 1996. Another 2,000 shares vested on January 3, 1997, and another 2,000 on January 3, 1998, before plaintiff's termination on January 13.

According to plaintiff, Mahoney intentionally delayed her receipt of her 1994 stock options. Haverkate told her that Mahoney, who had to approve her options, wanted to decrease the number of her options, and increase her "strike price." According to plaintiff, Gulati was granted options on the same day, and Mahoney did not want to increase his "strike price."

Paules testified that plaintiff received 20,000 shares of C-Tec stock under the 1996 stock option plan. Because none of the shares had vested at the time of her termination on January 13, 1998, they were cancelled. Plaintiff asserted that her "first round of options" from 1996 would have vested thirty days after her termination.

Mahoney admitted that when he terminated plaintiff in January 1998, he was aware that she had options that were about to vest, but he did not consider keeping her on the payroll until that time because "there was never a policy or a situation in the company where we did that for anyone." Despite Mahoney's explanations, Haverkate characterized the timing of plaintiff's termination (a month before her options would have vested) as "punitive." Haverkate was also aware of employees who, although terminated, had been allowed to stay on the payroll until their options vested.

## II

We will begin our analysis by reaffirming basic principles of appellate review. We review a summary judgment order by employing the same standard that governs trial courts. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div. 1998). Because our review involves a purely legal analysis, we are not obligated to defer to the trial court's legal conclusions. Illva Saronno Corp. v. Liberty Hill Realty, Inc., 344 N.J. Super. 443, 450 (App. Div. 2001).

Summary judgment is appropriate if "there is no genuine issue as to any material fact challenged and . . . the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). Without assessing credibility, weighing the

evidence, or determining its truth, the motion judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

Under N.J.S.A. 10:5-12a, it is an unlawful employment practice "[f]or an employer, because of the . . . age . . . [or] sex . . . of any individual . . . to discharge . . . from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment." We note that the motion judge correctly acknowledged McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), as the case controlling the evaluation of defendant's motion.

Where there is no direct evidence of discrimination, the plaintiff-employee must first establish a prima facie case by showing that: (1) she was in a protected class; (2) she was performing her job at a level that met the employer's legitimate expectations; (3) she was nevertheless discharged; and (4) the employer sought someone else to perform the same work after she left. Mogull v. CB Commercial Real Estate Group, Inc., 162 N.J. 449, 462 (2000). Here, the court determined that plaintiff

established each prong of her prima facie case: she was a member of a protected class (female and age fifty); she was performing her job in a satisfactory manner; she was discharged; and someone replaced her.

Establishment of the prima facie case creates a presumption of discrimination. The burden then shifts to the employer to produce evidence of a legitimate, nondiscriminatory reason for plaintiff's discharge. Ibid.; Bergen Commercial Bank v. Sisler, 157 N.J. 188, 210 (1999). Here, the motion judge determined that defendants articulated two such nondiscriminatory reasons: (1) plaintiff's alleged unsatisfactory performance in customer relations; and (2) her personality conflict with Jarus.

Once the employer produces evidence of a legitimate reason for the discharge, the presumption of discrimination disappears, and the burden shifts back to plaintiff to prove that the employer's reasons were a pretext for discrimination. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515, 113 S. Ct. 2742, 2751-52, 125 L. Ed. 2d 407, 422 (1993); Mogull, supra, 162 N.J. at 462; Sisler, supra, 157 N.J. at 210-11. The ultimate burden of proof always remains with the plaintiff. St. Mary's, supra, 509 U.S. at 518, 113 S. Ct. at 2753, 125 L. Ed. 2d at 423; Sisler, supra, 157 N.J. at 211.

### III

Defendants contend that the judge erred in determining that plaintiff established her prima facie case, and that this is an alternative ground for affirming the summary judgment. According to defendants, plaintiff did not prove the second and fourth prongs of the prima facie case, because her job performance was not satisfactory and defendants replaced her with another, older woman.

We reject defendants' argument. "The burden of establishing a prima facie case of disparate treatment is not onerous"; the function of the prima facie case is to eliminate "the most common nondiscriminatory reasons for the plaintiff's rejection." Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253-54, 101 S. Ct. 1089, 1094, 67 L. Ed. 2d 207, 215-16 (1981). We agree with the motion judge that the record, considered in the light most favorable to plaintiff, shows that she was performing her job at a level that met her employer's reasonable expectations.

When considering a plaintiff's job performance for the purpose of her prima facie case, the standard is whether she was "objectively qualified" for the position. Pilkington v. Bally's Park Place, 180 N.J. 262 (2004); Baker v. Nat'l State Bank, 312 N.J. Super. 268, 285 (App. Div. 1998), aff'd and remanded, 161

N.J. 220 (1999); Greenberg v. Camden Cty. Vocational & Tech. Schs., 310 N.J. Super. 189, 203 (App. Div. 1998). Here, plaintiff was employed by RCN and its predecessor, C-Tec, for approximately eight years, although not in the customer service position from which she was terminated. Nevertheless, plaintiff had been vice president of marketing for eighteen months before she was promoted to senior vice president of customer service. According to Haverkate, who supervised plaintiff until her promotion to vice president, her performance was excellent. Mahoney acknowledged that plaintiff's performance was satisfactory during her first few months in customer service. This was sufficient proof that plaintiff was objectively qualified for her job.

#### IV

Defendants also contend that plaintiff failed to satisfy the fourth prong of the prima facie case, that defendants sought someone else to perform the same work after she left. Moquill, supra, 162 N.J. at 462. In support of this argument, defendants complain that the judge did not consider a supplemental certification submitted by Paules, their manager of executive compensation and stock options, which, according to defendants, "contained information regarding Ms. Daniels."

Paules's certification did not pertain to Daniels. It merely listed 323 employees who were terminated or resigned from RCN from October 1997 through December 1999, and who lost their unvested stock options at the time of their termination. Moreover, the motion judge correctly determined that Daniels's status as a member of both of plaintiff's protected classes (age and gender) was not probative because Mahoney, who terminated plaintiff, did not hire Daniels.

Unless a plaintiff is claiming reverse discrimination, it is unnecessary to show a replacement outside of the protected class in order to satisfy the fourth prong of the prima facie case. Pivirotto v. Innovative Sys., Inc., 191 F.3d 344, 353 (3d Cir. 1999) (a woman claiming that she was discharged because of her gender need not show that she was replaced by a man); Wright v. L-3 Communications Corp., 227 F. Supp. 2d 293, 301 (D.N.J. 2002) ("the fourth McDonnell Douglas element is satisfied in traditional cases if the employer sought others to perform the same work that the plaintiff performed after the plaintiff was terminated"); Petrusky v. Maxfli Dunlop Sports Corp., 342 N.J. Super. 77, 82 (App. Div.), certif. denied, 170 N.J. 388 (2001) ("it is erroneous, in an ordinary case of age discrimination in employment, to use reference to a particular replacement employee as the only means for satisfying the customary fourth



element of the prima facie showing"); Reynolds v. Palnut Co., 330 N.J. Super. 162, 168 (App. Div. 2000) (a plaintiff asserting a traditional age discrimination claim need not show that he was replaced by someone younger). But see Swider v. Ha-Lo Indus., Inc., 134 F. Supp. 2d 607, 625 (D.N.J. 2001) ("in order to satisfy the fourth prong of the McDonnell Douglas prima facie case, plaintiff must show that he was replaced by someone sufficiently younger to create an inference of unlawful age discrimination"); Warner v. Fed. Express Corp., 174 F. Supp. 2d 215, 220-21 (D.N.J. 2001) (applying this standard to a LAD age discrimination case).

V

The factfinder is, of course, free to reject defendants' nondiscriminatory reasons for the discharge, and infer the ultimate fact of intentional discrimination from all of the evidence presented in a case. St. Mary's, supra, 509 U.S. at 511, 113 S. Ct. at 2749, 125 L. Ed. 2d at 418. "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." Ibid.

Plaintiff's prima facie case, together with rejection of the defendants' reasons, "does not compel judgment for the plaintiff." Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 146, 120 S. Ct. 2097, 2108, 147 L. Ed. 2d 105, 119 (2000). We have adopted the analysis in Reeves. See Blume v. Denville Tp. Bd. of Educ., 334 N.J. Super. 13, 29-34 (App. Div. 2000) (reinstating jury verdict in plaintiff's favor and vacating trial court's grant of defendant's motion to set aside verdicts because plaintiff's evidence supported a finding of discrimination on the basis of a handicap); Mattiello v. Grand Union Co., 333 N.J. Super. 12, 17 (App. Div.), certif. denied, 165 N.J. 677 (2000) (affirming a jury verdict in favor of defendant-employer, because the judge correctly charged the jury that it may, but not must, find in favor of plaintiff, on an age discrimination claim, if it finds that defendant's proffered reason is not believable).

The Court in Reeves explained: "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." 530 U.S. at 147, 120 S. Ct. at 2108, 147 L. Ed. 2d at 119-20.

Defendants rely on Viscik v. Fowler Equip. Co., 173 N.J. 1, 14 (2002), a handicap discrimination case, in which the Supreme

Court held that after the employer articulates a legitimate, nondiscriminatory reason for its adverse action,

the burden shifts back to the plaintiff to show that the employer's proffered reason was merely a pretext for discrimination. To prove pretext, however, a plaintiff must do more than simply show that the employer's reason was false; he or she must also demonstrate that the employer was motivated by discriminatory intent . . . . Thus, under the McDonnell Douglas framework, a plaintiff retains the ultimate burden of persuasion at all times . . . .  
(Internal citations omitted.)

Defendants' reliance on Viscik is misplaced, because the Supreme Court in that case did not address the standard for a motion for summary judgment. In Viscik, defendant appealed after a jury verdict, and the issues were whether plaintiff had established a handicap (obesity) and whether there were errors in the jury charge. Id. at 12. The Court was emphasizing that the ultimate burden of proof was upon plaintiff and did not consider a plaintiff's burden on a motion for summary judgment.

The Third Circuit, however, has established the standard, on a motion for summary judgment, for determining whether a plaintiff alleging discrimination has produced sufficient evidence to rebut the employer's alleged legitimate reason for its adverse action. Fuentes v. Perskie, 32 F.3d 759, 761-62 (3d Cir. 1994). In Fuentes, the court held that a plaintiff may defeat a motion for summary judgment "by either (i) discrediting

the proffered reasons, either circumstantially or directly, or (ii) adducing evidence, whether circumstantial or direct, that discrimination was more likely than not a motivating or determinative cause of the adverse employment action." Id. at 764.

As to the first means of proof, the Fuentes court explained:

the non-moving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them "unworthy of credence," Ezold [v. Wolf, Block, Schorr & Solis-Cohen], 983 F.2d 509, 531 (3d Cir. 1992), cert. denied, 510 U.S. 826, 114 S. Ct. 88, 126 L. Ed. 2d 56 (1993)], and hence infer "that the employer did not act for [the asserted] non-discriminatory reasons." Josey v. John R. Hollingsworth Corp., 996 F.2d 632, 638 (3d Cir. 1993).

[Id. at 765 (other citations omitted; footnote omitted.)]

We have adopted and consistently applied this standard. See, e.g., Kolb v. Burns, 320 N.J. Super. 467, 478 (App. Div. 1999) (teacher alleged that superintendent of schools retaliated against her for testifying for a handicapped student regarding his placement); Greenberg, supra, 310 N.J. Super. at 200 (teacher alleged age and gender discrimination in denial of tenure); and Romano v. Brown & Williamson Tobacco Corp., 284

N.J. Super. 543, 551-52 (App. Div. 1995) (employee alleged retaliatory discharge for testifying on behalf of a co-employee in her sexual harassment case).

Unfortunately, the motion judge here did not apply this standard. The judge addressed only the second of the two alternative ways in which plaintiff could defeat the motion for summary judgment: by adducing direct or circumstantial evidence that "discrimination was more likely than not a motivating or determinative cause" of plaintiff's discharge. Fuentes, supra, 32 F.3d at 764. He did not consider either that plaintiff might have discredited defendants' proffered reasons, or that a jury is permitted to infer discrimination on the basis of a rejection of defendants' reasons together with plaintiff's prima facie case. Reeves, supra, 530 U.S. at 147, 120 S. Ct. at 2108, 147 L. Ed. 2d at 119-20; St. Mary's, supra, 509 U.S. at 511, 113 S. Ct. at 2749, 125 L. Ed. 2d at 418.

Although the motion judge articulated the correct standard, he did not actually consider whether plaintiff had produced sufficient evidence to enable a jury to find that defendants' proffered reasons for her termination were false, which might also constitute circumstantial evidence of discrimination. Instead, as plaintiff points out, he focused throughout his opinion on whether each incident or piece of plaintiff's

evidence alone could be the basis for an inference of discrimination.

The judge viewed defendants' preferential treatment of young men, reassigning them to other positions instead of discharging them for unsatisfactory performance, as insufficient to constitute "an LAD violation." He failed to recognize, as a jury is entitled to do, that this is also an inconsistency, incoherency or weakness in defendants' explanation that they terminated plaintiff for unsatisfactory performance. Nor did the judge analyze any of the specific instances of this disparate treatment, which must be "viewed in the light most favorable" to plaintiff. Brill, supra, 142 N.J. at 540.

Thirty-five-year-old Gdovin was plaintiff's predecessor as manager of customer services. Despite his failure in that role, defendants assigned him responsibility for one of the spin-off companies, Cable Michigan, while he continued his duties in programming. Jarus, to whom plaintiff reported, was accountable for the poor condition of customer service, but was retained when plaintiff was discharged. Mahoney, to whom Jarus reported, admitted that he was unable to develop a solution to the customer service problems, but was also retained when plaintiff was discharged.

There are other facts supporting plaintiff's argument, that a rational jury could reject defendants' non-discriminatory reasons for her termination. Mahoney disagreed with plaintiff's approach to the customer service problems, but he was unable to present any alternative approach. Jarus did not permit plaintiff to develop an employee incentive plan, and rejected all of her proposals. Mahoney admitted that plaintiff did not have the authority to increase staff and meet her department's infrastructure needs. All of these explanations, of course, may also be used by a jury to find in favor of defendants. They are not a basis, however, to dismiss plaintiff's case as a matter of law.

The contradiction between Mahoney's testimony that he attempted to find plaintiff another position in the company, and the denials of three of the executives whom Mahoney said he approached further discredit defendants' job-performance explanation. Defendants' counter argument, that the availability of another position in the company is irrelevant, is unavailing, because the absence of another position was not one of their proffered reasons for plaintiff's termination.

The second reason that defendants advanced for plaintiff's termination was her personality conflict with Jarus. In his

analysis, the motion judge did not consider plaintiff's contradictory evidence.

Defendants are incorrect that plaintiff admitted a personality clash with Jarus. To the contrary, she said that it was an "oversimplification" that she and Jarus "were not a good fit." She described Jarus as a nasty, belittling, sarcastic, and condescending person, who rejected her proposals, undermined her authority, required her to report her location at all times, and excluded her from meetings. If a jury credits plaintiff's account, it could rationally find that Jarus's behavior was so extreme that it went beyond a personality conflict, and that defendant's explanation was thus unworthy of belief.

A rational jury could find that plaintiff discredited each of defendant's three alleged legitimate, nondiscriminatory reasons for her termination. Brill, supra, 142 N.J. at 540. The evidence on each of defendants' three proffered reasons was not "so one-sided" that defendants "must prevail as a matter of law." Ibid. (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)).

In addition, plaintiff produced some evidence that Mahoney was prejudiced against women and treated men more favorably, which, as defendants stress, was insufficient to advance a claim



for a hostile work environment, but which supports her claim that he discriminated against her when he terminated her.

Mahoney "snickered" and commented that plaintiff and another woman were discussing "technical issues." The judge acknowledged that this was "somewhat sexist" but dismissed it as "isolated" and a "passing comment" that occurred well before plaintiff's termination and did not "play a role" in that decision.

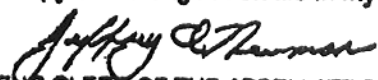
In Reeves, an age discrimination case, the Court of Appeals discounted "age-related comments" of one of the decision makers because he did not make the comments in the context of plaintiff's termination. 530 U.S. at 152, 120 S. Ct. at 2111, 147 L. Ed. 2d at 123. The Supreme Court admonished that the Court of Appeals "failed to draw all reasonable inferences in favor of petitioner." Ibid.

Here also, the "somewhat sexist" comment, although not directly related to plaintiff's termination, revealed Mahoney's arguable discriminatory animus. According to plaintiff, Mahoney also had an "elitist" and "dismissive" attitude toward women. This comment and attitude, taken together with Mahoney's (1) desire to reduce plaintiff's 1996 bonus, while failing to consider similar action against two male executives; (2) delay of plaintiff's 1994 stock options; and (3) desire to reduce

plaintiff's number of options and increase her strike price, while not seeking to change the stock-option terms of male executives, together provide a sufficient record from which a jury could draw a rational inference of discrimination.

Reversed and remanded.

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

  
ACTING CLERK OF THE APPELLATE DIVISION