SHEENA JONES	:	SUPERIOR COURT OF NEW JERSEY
Appellant	:	APPELLATE DIVISION
	:	
v.	:	DOCKET NO. A-000157-23
	:	
THE MENTOR NETWORK;	:	On Appeal from Order granting Summary
JOHN/JANE DOES 1-10,	:	Judgment dated 8/4/2023
fictitious persons;	:	Trial Court Docket Number:
ABC CORP 1-10,	:	CAM-L-91-21
fictitious entities	:	
Appellees	:	Sat Below: Hon. Judith S. Charny
	:	

BRIEF OF APPELLANT/PLAINTIFF SHEENA JONES, APPEALING FROM THE AUGUST 4, 2023 ORDER BY THE TRIAL COURT ENTERING SUMMARY JUDGMENT AND DISMISSING PLAINTIFF'S COMPLAINT WITH PREJUDICE

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I. PRELIMINARY STATEMENT

Appellant/Plaintiff, Sheena Jones, appeals from the Superior Court's August 4, 2023 Order entering summary judgment and dismissing Plaintiff's Complaint with prejudice. For the reasons set forth below, the lower Court's Order granting summary judgment should be reversed, and this matter remanded.

II. PROCEDURAL HISTORY

Appellant/Plaintiff's Complaint[1], which set forth Appellant's claims against arising under the New Jersey Conscientious Employee Act, was filed in Camden County Superior Court on January 11, 2021. On July 7, 2023, Appellee/Defendant filed its Motion for Summary Judgment[2], to which Plaintiff/Appellant filed her Opposition[3] on July 25, 2023. Both parties filed Replies in further support of their respective positions[4]. On August 4, 2023, oral argument[5] on Defendant's Motion for Summary Judgment was heard before the Honorable Judith S. Charny, Camden County Superior Court. On the same date, August 4, 2023, Judge Charny entered an Order[6] granting Summary Judgment and dismissing Appellant/Plaintiff's Complaint with prejudice.

III. STATEMENT OF FACTS

A. Appellant's Job and Repeated Whistleblowing Activity

While working for Appellee, The Mentor Network, Appellant's job duties included cooking, cleaning, transporting clients, and distributing medication. See Plaintiff/Appellant's Deposition Transcript, Appx 390 at 41:15-22. This was not Appellant's first time in the field,

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[1] See Plaintiff's time-stamped Complaint, Appx 504.
[2] See Defendant's Motion for Summary Judgment, Appx 001.
[3] See Plaintiff's Opposition to Summary Judgment, Appx 353.
[4] See Defendant's Reply, Appx 511; see Plaintiff's Sur-Reply, Appx 558.
[5] See oral argument certified transcript, Appx 561.
[6] See 8/4/23 Order entering Summary Judgment, Appx 560.

and she had previously worked for similar organizations. Id. at 41:43-42:4. During her career, she was trained on the laws and regulations concerning abuse and neglect on residents of group homes. See Appx 391 at 42:5-9. Appellant received some of this training at The Mentor Network. Id. at 42:10-12.

Appellant testified that she complained about abuse to clients, extortion, medication mismanagement, and fraternization. See Appx 401 at 52:1-9. Appellant testified that she complained about fraternization on the job between co-workers. Id. at 52:9 to 13. Appellant testified that the fraternization escalated to abuse and neglect, because complaints about employees' conduct towards clients were ignored. Id. at 52:17 to Appx 402 at 53:6. Appellant testified that she witnessed these incidents while she was a full-time employee, and before she dropped down to *per diem* status. See Appx 392 at 43:2 to 43:10. Appellant complained about these incidents prior to dropping down to *per diem* status. Id. at 43:11-14.

Appellant believed the incidents she complained about constituted abuse and neglect in violation of New Jersey law and regulation. Id. at 43:15-21. Appellant waited to report these incidents, because she did not know how to make the complaints and she was concerned about being retaliated against. Appellant testified that she never was trained on how to make complaints by The Mentor Network. See Appx 404 at 58:5-18. Appellant complained to multiple people about these incidents, including her supervisor Eric Ferrara, his supervisor, Heather [Motley], another supervisor, Zaniel Young, and an upper-level manager, Glynda Delgado. See Appx 393 at 44:5-14; see also Plaintiff's Answers to Interrogatories at Appx 419, Appx 423, Appx 426. Appellant made verbal complaints. See Plaintiff/Appellant's deposition transcript, Appx 393 at 44:15 to Appx 394 at 45:2.

Appellant testified that she made complaints to one of her supervisors, Eric, while she was still a full-time employee. Id. at 45:7-14. Appellant testified that she made complaints to her supervisor Eric about medication not being ordered on time for clients, scheduling of appointments for the clients, and clients' cash on hand not being available. See Appx 406 at 64:23 to Appx 407 at 65:4. Appellant testified that it was hard to remember exactly when she had these conversations with Eric because there was "so many times" that she had conversations about "neglect, abuse and different things with Eric." See Appx 408 at 69:17-22. Appellant testified that she brought up the abuse and neglect regulations to Eric when complaining about the medication issues and issues surrounding clients' money. See Appx 412 at 101:1-10. When discussing the fraternization issue with Eric, Appellant mentioned that it was negatively impacting the residents. See Appx 412 at 101:17 to 25. Appellant testified that she had specific conversations with Heather about the fraternization, and about Eric holding clients' money in his possession. See Appx 409 at 82:14-25.

Heather Motley testified that a consumer's money is supposed to be stored on a debit card in a specified location in the group home, and it would be a violation for a supervisor to keep the cards on their person and for the consumers not to have access to these cards. See deposition transcript of Heather Motley, Appx 441 at 58:22 to 59:2. Appellant specifically recalls raising the issue with Heather about her dating relationship with Eric. See Appellant /Plaintiff's deposition transcript, Appx 410 at 83:19-24. Heather Motley testified that her and Eric Ferrer were family friends who would see each other outside of the workplace multiple times a month. See deposition transcript of Heather Motley, Appx 438 at 54:25 to Appx 439 at 55:23. Heather Motley testified that even though Eric Ferrer was her subordinate, she never

disclosed to anyone at The Mentor Network that he was a family friend. See Appx 440 at 57:12-17.

Susan McCarthy testified that if a subordinate is a close family friend, that should be disclosed. See deposition transcript of Susan McCarthy, Appx 450 at 36:4-20.

In November of 2019, Appellant's complaints led to a UIR being filed with the Division of Developmental Disabilities regarding a missed medical appointment for a consumer. See November 2019 DDD Incident Report, Appx 453-Appx 465. Appellant further blew the whistle on January 8, 2020, when she informed Glenda Delgado about an issue involving the mishandling of medication. See text messages from Appellant to Glenda Delgado, at Appx 467 to Appx 474, which resulted in an incident report being filed at Erial Group home. See Appx 453 to Appx 465, DDD Incident Report regarding the same incident.

B. Retaliation and Hostile Work Environment Faced by Appellant

Appellant began experiencing retaliation after she made these complaints, while she was still a full-time employee. See Plaintiff/Appellant's deposition transcript, Appx 394 at 45:23 to Appx 395 at 46:2. Appellant described the retaliation as her hours being cut, being tossed around from separate group homes, and a hostile environment when she was at work. Id. at 46:3-20. Appellant testified that the hostility interfered with her ability to do her job. Id. at 46:25 to Appx 396 at 47:2. Appellant testified that job duties were taken away from her, and she was left with undesirable job duties and responsibilities. Id. at 47:3 – 8.

Appellant further testified that her colleagues would not work with her, and avoided her even when she was performing job duties that required more than one person. Id. at 47:9-23. Appellant testified that nobody wanted to work with her. See Appx 403 at 57:13-17. Appellant believed all of this was happening because of her complaints about abuse and neglect. See Appx 397 at 48:12-15.

Appellant testified that prior to these complaints, she did not face any hostility at work. Id. at 48:16-19. Appellant testified that she was not permitted to get shifts at Cross Keys, even though a co-worker told her that shifts were available. Id. at 48:20 to Appx 398 at 49:15.

Prior to making complaints, Appellant never had problems getting shifts and was actually flagged in the system because of how much overtime and hours she worked. Id. at 49:16-21. Appellant testified that after she made the complaints, she stopped having overtime opportunities at other homes. This took place when she was still a full-time employee. See Appx 411 at 99:10 to 20. Appellant's overtime opportunities stopped after she complained to Eric and Heather. Id. at 99:21-25.

When this changed, Appellant considered it retaliation for her complaints. See Appx 398 at 49:22 to Appx 399 at 50:2. The retaliation Appellant faced impacted her decision to drop to per diem from part time, and she would have stayed full time if she was not facing retaliation. See Appx 398 at 49:25 to Appx 399 at 50:5. Appellant felt the retaliation materially changed the job and led to her enjoying her job less. Id. at 50:6-11. The situation became so bad that on January 16 ,2020 Appellant needed to go to the emergency room for anxiety. See Appellant's Medical Records, Appx 476 to Appx 494; see also Appellant's answers to interrogatories at Appx 420 (answer to interrogatory no. 4).

C. Appellant's "Silent" Termination

Shortly after this last complaint in January of 2020, Appellant was told she could not work anymore because of an issue with her background check, and nobody ever communicated with her when that issue was resolved. See Plaintiff/Appellant's deposition transcript, Appx 399 at 50:12-18. Appellant felt she was terminated from The Mentor Network because nobody ever called her to tell her she could come back and nobody offered her shifts. See Appx 404 at 58:24 to Appx 405 at 59:15.

Susan McCarthy testified that it would have been the job of the program director or the area director to call the Appellant and let her know she could come back to work. See deposition transcript of Susan McCarthy, Appx 449 at 28:15-24. This put the responsibility to call Sheena back on Glenda, on whom Appellant previously blew the whistle. Id. Susan McCarthy testified that employees were automatically terminated after 30 or 60 days of not working as a *per diem* employee. See Appx 451at 45:3-20.

Appellant only applied for jobs because she was never put back on the schedule. See Plaintiff'/Appellant's deposition transcript, Appx 400 at 51:9-12. Appellant believed she was terminated when she applied to Jewish Family & Children's Service. Id. at 51:13-19. Eventually, Appellant called Human Resources herself, who told her that the issue had been resolved and they thought she was already back on the schedule. See Appx 399 at 50:19 to Appx 400 at 51:1. However, Appellant was never put back on the schedule. See Appx 399 at 50:19 to Appx 400 at 51:8.

Appellant texted Zaniel Young, after being told by Human Resources to reach out to him. See text messages between Appellant and Zaniel Young, Appx 495 to Appx 501. Zaniel Young told Appellant he would get back to her the next day. Id. After a week, Zaniel Young wrote back to Appellant asking for her availability. Id. Then, Appellant disclosed to Zaniel that she only wanted to work as a per diem employee because of the hostile work environment and retaliation she faced. Id. Zaniel never wrote back to Appellant following her complaints of retaliation and hostile work environment.

Several weeks later on March 29, 2020 (after the COVID-19 pandemic state of emergency began) Appellant told Zaniel she would not be able to work. Id. Internal e-mails produced in discovery show that in January 2020, show that the program supervisor at the

"Cross Keys" location did not want Sheena working there because she discussed the "pending investigation" into the Erial home, directly tying her whistleblowing activity to her not getting hours. See January 17, 2020 e-mail, Appx 503.

D. Mentor Network Never Conducted an Investigation into Retaliation

Susan McCarthy testified that program directors for The Mentor Network were trained on to process complaints of retaliation. See deposition transcript of Susan McCarthy, Appx 445 at 18:6-10. Ms. McCarthy acknowledged that Appellant's text message to program director Zaniel described retaliation that should have been reported and investigated. Id. at 21:11-22. Heather Motley did not recall ever being trained on the Conscientious Employee Protection Act, or any anti-retaliation policy at her orientation. See deposition transcript of Heather Motley, Appx 432 at 25:17-23. Heather Motley testified she thought she received anti-retaliation training, but could not remember when or by whom. See Appx 433 at 26:3-15.

Heather Motley testified that as Appellant's supervisor, she never had reason to discipline her, she cannot recall any issues with her performance, and cannot recall any consumers complaining about her. See Appx 434 at 34:16 to Appx 435 at 35:2. Heather testified that nobody ever talked to her concerning any allegations of retaliation made by Appellant, and she does not believe any investigation took place. See Appx 436 at 52:19 to Appx 437 at 53:5.

E. Appellant's Criminal History and Her Eligibility to Work at The Mentor Network

Appellant testified that in her mind, accepting a plea deal was not the same as being convicted of a crime. See Plaintiff/Appellant's deposition transcript, Appx 401 at 52:2-4. Appellant testified that if the forms asked if she was ever convicted of a crime, she might not think a plea deal applied. Id. at 52:5-8. During her deposition, Appellant was asked to review her application paperwork with the Mentor Network where it asked her to disclose her criminal history. She testified that she found the paperwork "misleading," and she thought the list of

crimes provided did not include her crimes. See Appx 415 at 76:13 to 77:3. Appellant testified: "The way the question was worded was tricky in my eyes and misleading. So that could be the reason why I put 'no,' ma'am." Id. at 77:10-12.

When confronted with the list of crimes provided on the form, and asked why she did not include her crime, Appellant stated: "the wording is what I was going off of, and it just didn't specify the crime itself that I've done. So that was the only reason. But it does state that I get a criminal background check. So I agreed to that. So wouldn't that have come up." See Appx 416 at 82:21 to 83:2. Appellant testified that she thought she told the truth based on how she interpreted the documents. Id. at 83:16-17. Appellant further testified: "So, again, I just interpreted wrong. That was it. There was nothing that I was trying to hide when they were going to do a criminal background, that they could clearly see what was going on." See Appx 417 at 91:4-8.

Susan McCarthy acknowledged in her testimony that Appellant's fingerprinting was completed and that The Mentor Network had a receipt of it being done. See deposition transcript of Susan McCarthy, Appx 448 at 27:20-25. Susan McCarthy testified that the only issue was that the State had not sent back the paper that Appellant was cleared to work. Id.

The statutory framework applicable to Appellant's job allows individuals with criminal records to work, providing:

> "Notwithstanding the provisions of subsection b. of this section to the contrary, no individual shall be disqualified from employment on the basis of any conviction disclosed by a criminal history record background check performed pursuant to sections 2 through 7 of P.L.1999, c.358 (C.30:6D-64 through 69) if the individual has affirmatively demonstrated to the community agency head, or the community agency board if the individual is the community agency head, clear and convincing evidence of the individual's rehabilitation. In determining whether an individual has affirmatively demonstrated rehabilitation, the following factors shall be considered:

> (1) the nature and responsibility of the position which the convicted individual would hold, has held or currently holds, as the case may be;
> (2) the nature and seriousness of the offense;
> (3) the circumstances under which the offense occurred;
> (4) the date of the offense;
> (5) the age of the individual when the offense was committed;
> (6) whether the offense was an isolated or repeated incident;
> (7) any social conditions which may have contributed to the offense; and
> (8) any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendation of those who have had the individual under their supervision."

See N.J.S.A. 30:6D-64(2)(f).

Subsection B, referenced above, specifies individuals who have a record of conviction for crimes involving controlled substances, meaning those individuals can still work for the community agency if they follow the framework above. Id. The statutory framework further specifies which crimes would not be entitled to work approval:

> "A conviction of a crime or disorderly persons offense against children as set forth in N.J.S.2C:24-4 adversely relates to a position in a community agency that involves or would involve working directly with a person under 18 years of age. Individuals convicted of such crimes or disorderly persons offenses are permanently disqualified from such employment at a community agency."

See N.J.S.A. 30:6D-64(2)(g).

F. Appellant's Complaint for Retaliation, Hostile Work Environment, and Termination

Plaintiff/Appellant's Complaint pleads multiple adverse employment actions, stating: "Because of these complaints, Plaintiff suffered *retaliation, a hostile work environment*, and was *eventually terminated*." (Emphasis added.) See Plaintiff/Appellant's Complaint, Appx 507 at paragraph 17.

Plaintiff/Appellant's Complaint specifically pleads a right to emotional distress damages due to multiple adverse employment actions stating:

"Plaintiff suffered emotional distress, upset, and humiliation due to the retaliation, hostile work environment, and termination." See Appx 507 at paragraph 20.

IV. LEGAL ARGUMENT

POINT I

The lower Court erred in finding that Appellant was statutorily prohibited from holding her job in light of her criminal record, because the Court ignored the statutory provision for the approval process of an employee with a criminal record.

In its summary judgment motion, Appellee made the misplaced argument that Appellant was statutorily barred from being employed in her provision due to her criminal record, In fact, to the contrary, the very statute cited by Appellee provides clear instruction on the approval process for Appellant to maintain her job, even in light of her criminal record.

In support of its misplaced argument, Appellee cited two provisions as follows.

First, Appellee cited the following section of the administrative code: "A licensee shall not employ any person who has been adjudged civilly or criminally liable for abuse of a developmentally disabled person." N.J.A.C. 10:44A-2.4.

However, it is undisputed that the foregoing provision does not apply to Appellant and is therefore inapposite in this matter.

Second, Appellee cited a provision whereby a determination must be made by the Department of Human Services that the applicant is not disqualified from employment, in accordance with N.J.S.A. 30:6D-63 - 69. This statute states, in pertinent part:

"B. An individual shall be disqualified from employment under this act if that individual's criminal history background check reveals a record of conviction of any of the following crimes and offenses:

… (c)A crime or offense involving the manufacture, transportation, sale, possession, or habitual use of a controlled substance ... " Id.

The statute further states that any equivalent crime in an out of state jurisdiction would also apply. Id.

In further support of its misplaced argument that Appellant was "statutory disqualified" from holding her job position, Appellee also cited case law in its summary judgment motion.

However, importantly, Appellee completely omitted to cite the same portion of the statute above, which also provides an approval process for Appellant to hold her job even in light of her criminal record. This highly pertinent portion of the statute sets forth the following provision whereby an individual with a criminal record can maintain employment:

> " f. Notwithstanding the provisions of subsection b. of this section to the contrary, no individual shall be disqualified from employment on the basis of any conviction disclosed by a criminal history record background check performed pursuant to sections 2 through 7 of P.L.1999, c.358 (C.30:6D-64 through 69) if the individual has affirmatively demonstrated to the community agency head, or the community agency board if the individual is the community agency head, clear and convincing evidence of the individual's rehabilitation. In determining whether an individual has affirmatively demonstrated rehabilitation, the following factors shall be considered:
>
> (1) the nature and responsibility of the position which the convicted individual would hold, has held or currently holds, as the case may be;
> (2) the nature and seriousness of the offense;
> (3) the circumstances under which the offense occurred;
> (4) the date of the offense;
> (5) the age of the individual when the offense was committed;
> (6) whether the offense was an isolated or repeated incident;
> (7) any social conditions which may have contributed to the offense; and
> (8) any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendation of those who have had the individual under their supervision."

See N.J.S.A. 30:6D-64(2)(f).

Importantly, the foregoing statutory provision completely defeats Appellant's argument below that Appellant was not qualified to hold her job due to her criminal record. Under a normal after-acquired evidence analysis, a plaintiff may lose the right to pursue economic

damages from the point of discovery onward, but the claim itself is not waived and damages can still be recovered. As outlined below, the only way that a plaintiff forfeits the entire claim is if they were statutorily prohibited from holding the job at all. Appellant's summary judgment argument was misleading, in that it failed to even mention the pertinent statutory provision, cited above, which controls in this matter.

Similarly, the case law cited by Appellee in its summary judgment argument in the Court below is inapposite to this matter, as follows.

First, in support of its summary judgment argument below, Defendant cited the case of Cedeno v. Montclair State University for the proposition that there is a statutory bar to holding an employment position. However, that case is distinguishable from the matter before the Court, in two ways. In Cedeno, the plaintiff had been convicted of bribery in the course of public employment and was therefore barred from holding future government positions under the Forfeiture Statute. Cedeno v. Montclair State Univ., 163 N.J. 473 (2000) (citing N.J.S.A. § 2C:52-2d). Cedeno is distinguishable, as follows. First, Cedeno was decided based on the Forfeiture Statute, which does not provide a process for overcoming the statutory bar for employment that is provided by the controlling statute in this matter, N.J.S.A. § 30:6D-64(f). Second, the Cedeno Court stated that the policy aim of the Forfeiture Statute, specifically keeping those who had previously violated the public's trust from having an opportunity to do so again, prevailed over the allowing that plaintiff's claims to proceed to trial. Id. In the matter before this Court, Appellee made no showing that such a policy aim exists that would apply in this case.

Notably, the entire holding in Cedeno was based on the public policy against having someone convicted of bribery work in the public sector, a public policy that was embodied in the

Forfeiture Statute. Significantly, the Cedeno Court specifically weighed this public policy against the public policy in favor of letting that plaintiff's claim proceed, acknowledging the "important public policies" of CEPA and the "need to construe" the CEPA statute liberally, but ultimately finding that the policy considerations of the Forfeiture Statute outweighed the policy considerations of CEPA. Id. at 478-479. Cedeno is further distinguishable in that that case involves a public employment setting, which is not applicable in this case. For all the foregoing reasons, the public policy considerations in Cedeno simply do not apply here, because the respective controlling statutes in each case are in opposition as to the key issue of whether employees with criminal records may hold an employment position.

Also inapposite is another case cited by Appellee, in which an illegal alien brought a claim for unlawful termination. See Crespo v. Evergo Corp., 366 N.J. Super. 391 (Super. Ct. App. Div. 2004). In Crespo, that plaintiff's claim was dismissed by the Court as the laintiff was statutorily barred from legally working it the United States, and therefore was unable to sue for damages relating to her unlawful termination. However, the Crespo Court stated that had Crespo involved unlawful treatment during the course of the plaintiff's employment, as in Taylor v. Int'l Maytex, the plaintiff in Crespo may have been allowed to pursue non-economic damages. Crespo at 401 (citing Taylor v. Int'l Maytex Tank Terminal Corp., 355 N.J. Super. 482 (Super. Ct. App. Div. 2002). In the matter before this Court, Appellant properly pled a claim for a hostile work environment and is only pursing non-economic damages for her claim.

Accordingly, the Appellate Division's holding in Crespo is distinguishable from the matter before this Court in two significant ways. First, unlike the plaintiff in Crespo, Appellant was not statutorily barred from holding her job. Second, consistent with the Crespo Court stated what was permissible, Appellant is pursuing only emotional distress damages in this matter.

Finally, and equally inapposite, is the Cichetti case on which Appellee also relied, but in fact, the holding of Cichetti defeats Appellee's summary judgment argument. See Cicchetti v. Morris County Sheriff's Office, 194 N.J. 563, 585 (2008). The Cicchetti Court stated: "Our consideration of that carefully struck balance compels us to conclude that *because plaintiff was not statutorily barred from the employment he sought in law enforcement, he was not prohibited from pursuing his workplace discrimination complaint*." Id. (emphasis added). The Court further stated that whether that plaintiff would have lost his job once it was discovered, impacts the quantum of damages, but that it "may not be used to diminish an award of non-economic damages to an employee." Id. Accordingly, Cicchetti actually serves to defeat Appellee's purported summary judgment argument.

Under the summary judgment standard, Appellant's testimony must be construed in a light most favorable to her during summary judgment. Significantly, Appellant testified that she misunderstood the application question involving crimes in multiple ways, but was not trying to hide anything because she took a background check. Unlike the plaintiffs in the above cases relied on by Appellee, it is undisputed that Appellant underwent a background check. Defense witness Susan McCarthy testified at deposition that Appellant completed the fingerprint and background check, and that Appellant was cleared to work. An employee who misunderstands a form but submits to a background check is factually not the same as someone intentionally hiding and misleading an employer about a criminal record.

If Appellant's criminal record had been discovered during a background check, the law would nevertheless have permitted Appellant to work for Appellee under the controlling statutory process cited above. Although Appellee submitted evidence that it would not have hired Appellant anyway, that is after-acquired evidence that goes to the amount and type of damages –

but it does not bar Appellant's claim, as confirmed by the New Jersey Supreme Court in Cicchetti.

Appellant set forth a valid claim under CEPA. To help defend against the claim, Appellee attempted to use her past against her in every way: arguing the claim can be dismissed, attacking her credibility with the record of her criminal case, even going so low as to put the unverified statements of a cell mate into the record in this case. Appellant maintains these records are not admissible, highly prejudicial, and will seek to exclude them at trial. That is a fight for another day. With regard to the issue before this Court, it is undeniable that Appellee's summary judgment argument below was both legally and factually unsupported, as set forth above. Accordingly, the lower Court's decision, in granting summary judgment, should be reversed, and this matter remanded.

POINT II

The record supports Appellant's *prima* facie claim arising under the Conscientious Employee Protection Act ("CEPA").

The Conscientious Employee Protection Act ("CEPA") was enacted by the State Legislature to "protect and encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employers from engaging in such conduct." Abbamont v. Piscataway Township Bd. of Education, 138 N.J. 405, 431 (1994). To state a cause of action under CEPA, a plaintiff must show that she reasonably believed that the conduct of the defendant violated law, rule, or regulation, that she performed whistleblowing activity, that adverse action was taken against her, and that there is a causal connection between the whistleblowing activity and the adverse action. See Dzwoner v. McDevitt, 177 N.J. 451 (2003).

In the matter before this Court, the record clearly establishes that Appellant has a *prima facie* claim under CEPA. It is undisputed that Appellant engaged in whistleblowing activity to

multiple supervisors, both orally and in writing. Appellant was then subjected to retaliation, and a hostile work environment that became so severe that Appellant had to go to the emergency room for anxiety. In January of 2020, Appellant continued to engage in the same protected activity, resulting in documented incident reports. Shortly thereafter, Appellant was temporarily from the work schedule along with other employees, purportedly due to an issue with her paperwork. However, Appellee never contacted Appellant to be restored to the work schedule, and never contacted Appellant or assigned her any more work, even though she was eligible to be restored to the work schedule.

In the fact of the foregoing undisputed facts, Appellee nevertheless argued for summary judgment purporting there was a lack of adverse employment action or causal connection. Appellee's argument is simply contradicted by the facts in the record. Accordingly, the lower Court's decision, in granting summary judgment, should be reversed, and this matter remanded.

POINT III

The temporal proximity between Appellant's whistleblowing activities and Appellee's subsequent adverse employment actions, up to and including termination. establishes causation.

A causal connection can be satisfied by inferences the trier of fact draws from the circumstances surrounding the employee's termination. See Estate of Roach v. TRW, Inc., 164 N.J. 598, 612 (2000). One such circumstance is the temporal proximity of the protected conduct and adverse action. See Romano v. Brown & Williamson Tobacco Corp., 284 N.J. Super. 543, 550 (App. Div. 1995). Causation can also be shown by pointing to "implausibility, 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." See Kelly v. Bally's Grand, Inc., 285 N.J. Super. 422, 431 (App. Div. 1995).

In the matter before this Court, the record clearly establishes how Appellant was subjected to a hostile workplace environment following her whistleblower complaints, as testified to during Appellant's deposition. The record also includes clear documented evidence of Appellant's whistleblowing activity in November of 2019 and January of 2020. Immediately after, in January 2020, Appellee removed Appellant from the work schedule and never contacted here again to come back to work or put her back on the work schedule. More specifically, the following points establish the element of causation:

- Appellee never contacted Jones and never told Jones she could return to The Mentor Network after removing her from the schedule. The record is devoid of any evidence that Appellee ever contacted Jones, and Appellant clearly testified she was never contacted. A fact finder can use this fact to infer that the reason Appellee did not contact her was retaliatory.
- Susan McCarthy, an upper-level manager for Appellee, testified that an Area Director or Program Director should have contacted the Appellant to let her know she could return to work. However, no one from Mentor Network ever contacted Appellant. A fact finder can use this fact to infer that the reason Appellee did not contact her was retaliatory.
- The record establishes that Appellant's whistleblowing activity continued through January 8, 2020, immediately prior to Appellee putting Appellant on leave from work and then never contacting her again. A fact finder can use this highly suggestive temporal proximity to conclude that Appellant's January 8, 2020 whistleblowing complaint caused Appellee to not bring her back to work or contact her again for retaliatory reasons.
- A January 2020 e-mail shows that individuals at the Cross Keys location did not want Appellant working there, at least in part because she brought up the investigation at the

Erial Home. A fact finder can use this fact to infer that Appellant's involvement in the investigation stopped her from being called back to work at this location.

- The individuals who had the responsibility to contact Appellant in order to restore her to the work schedule were the Area Director and Program Director, pursuant to Susan McCarthy's deposition testimony. These were the same individuals – Glenda, Eric, Heather, and Zaniel, to whom Appellant made her whistleblower complaints of wrongdoing. In the case of Eric and Heather, she reported wrongdoing involving them. Therefore, a fact finder could use this evidence to find that the individuals who were responsible for bringing her back on the schedule were motivated by her whistleblowing activity not to call and bring her back, which is retaliatory.
- Heather Motley, one of the directors who should have brought Appellant back according to Susan McCarthy, was a close family friend of Eric, against whom Appellant filed multiple whistleblower complaints. A reasonable fact finder could find this provided a retaliatory motive for Appellee to fail to bring Appellant back to work.
- Based on the testimony of Susan McCarthy and Heather Motley, Appellant's complaints about the medication misuse and the mishandling of money constituted abuse and neglect. Since Appellant made multiple whistleblower complaints about the foregoing repeated illegal conduct by Appellee's other employees, a reasonable fact finder could conclude her supervisors did not want her around to engage in further whistleblowing and that this was their retaliatory motivation in failing to restore Appellant to the work schedule.
- Significantly, no investigation was ever conducted into Appellant's claims of retaliation, despite the fact she made them clearly and unequivocally to a manager. This fact,

combined with the fact that Heather Motley cannot remember any details of her anti-retaliation training, shows that Appellee does not take retaliation seriously, and a fact finder could use that as evidence of retaliatory motive.

As set forth above, the record contains ample support for a fact finder to establish causation. Appellee's summary judgment argument below ignored all of the above evidence that supports causation. However, the record as set forth above provides clear evidence of causation. Accordingly, the lower Court's decision, in granting summary judgment, should be reversed, and this matter remanded.

Moreover, the record establishes that Appellant was subjected to multiple adverse employment actions, as follows.

Even prior to the wrongful termination when Appellant was never restored to the work schedule following suspension in January of 2020, notably, Appellant was also subjected to a hostile work environment and a campaign of retaliation culminating in termination. In its argument for summary judgment below, Appellee attempted to gloss over this fact in a footnote that claimed that Appellant never brought a claim in her Complaint for these causes of action. To the contrary, Appellants filed Complaint clearly set forth a claim for "retaliation, hostile work environment, and termination," providing multiple causes of action that defeat summary judgment.

In the retaliation setting, a series of smaller actions, including actions that were not actionable on their own, can be combined to constitute an adverse employment action. See Green v. Jersey City Bd. of Educ., 117 N.J. 434, 446-447 (2003). In Green, our Supreme Court explained that a hostile work environment in particular often cannot hinge on a single act, but can instead be based on continuous conduct that occurs over a period of time. Id. Therefore,

actions that are smaller and less significant than a traditional adverse employment action can combine to constitute a material action that can be the basis of a suit. Id. In Green, the plaintiff faced a series of smaller actions that included being told she was on a "sh— list", denial of additional programs, being put in a dilapidated classroom, being told she could not make copies, being denied supplies, and being denied a key to the science lab. Id. at 440. While none of these actions alone would constitute an adverse action, the New Jersey Supreme Court held that together, these combined to constitute a hostile work environment. Id.

Further, retaliation occurs whenever an employer takes action that would "dissuade a reasonable employee" from engaging in protected activity. See Burlington Northern and Santa Fe Ry. Co. v. White, 548 U.S. 53, 60 (2006); see also Roa v. Roa, 200 N.J. 555, 575 (2010). In the matter upon appeal before this Court, Appellant testified to a hostile environment where nobody wanted to work with her. She stated that the employees would not only avoid working the same shift as her, but also would not help her. Appellant further testified that this meant there were times she needed assistance with a resident but that no one would help her. Appellant also testified that she was denied overtime shifts, and was given fewer work shifts than previously. She testified clearly that she was isolated at work. There is independent documented evidence of one of Appellee's locations, Cross-Keys, not wanting to work with Appellant because she discussed her whistleblowing activity. The hostile work environment became so severe that Appellant first requested to work *per diem*, and then later had to go to the emergency room for anxiety. Even notwithstanding the wrongful termination and, *arguendo*, accepting Appellee's mis-stated version of the facts, further contributing to the hostile work environment was the fact that when Appellant was cleared to come back to work, nobody called her, and her attempts to get put on the schedule went ignored.

The foregoing creates the following inquiry, inspired by the U.S. Supreme Court's holding in Burlington Northern: would an employee engage in protected activity if she knew that she was going to be isolated at work, overtime was going to be taken away from her, she was going to have difficulty working in assigned locations, individuals would avoid working with her, individuals would refuse to help her on two person assignments, that she would face harassment so bad she would need to go to the emergency room for anxiety and when she were cleared to work none of her supervisors would contact her to return? The answer is no, but more importantly for purposes of this appeal, the answer must be concluded by a trier of fact, not by a Court granting summary judgment.

As already stated, Appellant was effectively terminated immediately following her protected whistleblower activities, and Appellee cannot prove otherwise. Nobody ever contacted her to return to work in January of 2020. Susan McCarthy testified that it was multiple individuals' responsibility to contact her, but that nobody did. These are the same individuals to whom Appellant made whistleblower complaints, as well as some whom she reported for misconduct. When Appellant contacted human resources, it could provide no explanation as to why she was not restored to the work schedule. When Appellant spoke with Zaniel Young, a supervisor, he ignored her complaints of retaliation, and neglected to ever put her back on the schedule. Eventually and after another two months, the COVID-19 pandemic onset, and Appellant self-disclosed that she could not return to work. However, based on Susan McCarthy's testimony, she should have been automatically terminated at this point anyway.

There is a question of fact as to whether Appellant was terminated in January of 2020. Appellee cannot provide any evidence whatsoever that it ever contacted her to return to work, even though Appellee's own employee testified she should have been contacted. The record

establishes that Appellant eventually contacted a supervisor in February of 2020, and after stalling a week to get back to her and ignoring her complaints of retaliation, the supervisor never put Appellant back on the schedule. Appellee may attempt to argue that she Appellant was still in "active" status in its computer system until May of 2020. But at most, this presents a question for the fact finder, not the Court, to determine whether to believe the electronic or paper status maintained in Appellee's system, or the practical reality of Appellee never bringing Appellant back to work. Accordingly, the lower Court erred in granting summary judgment on the issue of Appellant's wrongful termination.

As set forth above, the record contains ample support for a fact finder to establish causation and that Appellant was subjected to multiple adverse employment actions, ultimately culminating in wrongful termination. Appellee's summary judgment argument below ignored all of the above evidence that supports causation. However, the record as set forth above provides clear evidence of causation. Accordingly, the lower Court's decision, in granting summary judgment, should be reversed, and this matter remanded.

V. CONCLUSION

For the reasons set forth above, this Court should reverse the lower Court's Order granting summary judgment, and remand for further proceedings.

Respectfully submitted,

MALAMUT & ASSOCIATES, LLC

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Mark R. Natale, Esq.
Attorneys for Appellant/Plaintiff, Sheena Jones

Dated: March 21, 2024

CERTIFICATION OF SERVICE

The undersigned hereby certifies that on March 21, 2024, the foregoing Appellant's Brief and Appendix were filed electronically and served on the other parties via the Court's electronic filing system. The undersigned hereby certifies that counsel for Appellant has also delivered an electronic copy of the foregoing to counsel for Appellee.

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SHEENA JONES, Plaintiff-Appellant, v. THE MENTOR NETWORK; JOHN/JANE DOES 1-10; ABC CORP. 1-10, Defendant-Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-000157-23 ON APPEAL FROM A FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION: CAMDEN COUNTY Docket No.: CAM-L-000091-21 CIVIL ACTION SAT BELOW: Hon. Judith S. Charny, J.S.C.

DEFENDANT REM NEW JERSEY, INC.'S BRIEF IN OPPOSITION TO PLAINTIFF SHEENA JONES' APPEAL

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PRELIMINARY STATEMENT

Defendant REM NJ, Inc. ("REM NJ") operates group homes for intellectually and developmentally disabled individuals who cannot care for themselves. It is undisputed that New Jersey law provides that "an individual ***shall be disqualified from employment***" with a group home, including those run by Defendant, if that individual has been convicted of "[a] crime or offense involving the . . . sale [or] possession . . . of [drugs]." N.J. STAT. ANN. § 30:6D-64(b)(1)(c) (the "Statute") (emphasis added). Plaintiff has ***not*** disputed she pleaded guilty to distributing heroin and spent at least five years in prison as a result. Plaintiff has ***not*** disputed her convictions are among those listed as disqualifying in the Statute. Plaintiff was statutorily disqualified from employment with REM NJ serving vulnerable individuals and thus not permitted to maintain a lawsuit for wrongful termination under the Conscientious Employee Protection Act ("CEPA"). *Cedeno v. Montclair State University*, 163 N.J. 473, 478 (2000). For this reason alone, the Trial Court properly granted summary judgment.

Plaintiff lied on her application for employment with REM NJ multiple times, denying she had a criminal record. One of the application documents required Plaintiff to certify ***under penalty of perjury*** that she did not have a criminal history. She lied and denied having any convictions at all. Under the

Statute, "[i]f an individual . . . refuses to consent to, or cooperate in, the securing of a criminal history record background check, the person shall be immediately removed from their person's position and the person's employment ***shall be terminated*** [.]" N.J. STAT. ANN. § 30:6D-64(d) (emphasis added). Plaintiff's lies constitute a lack of cooperation that disqualified her from employment with the Defendant as well. As such, the Statute provides two independent bases on which to affirm summary judgment in this case.

In addition, summary judgment should also be affirmed because Plaintiff cannot prevail on her CEPA claim. Plaintiff cannot recall when she made her alleged whistleblowing complaints, undermining any relevant proximity to Defendant's alleged actions. REM NJ treated Plaintiff the same as her peers and offered her several positions, all of which she rejected (rebutting her claim that Defendant wanted to get rid of her). Accordingly, Plaintiff cannot prove causation or demonstrate that Defendant's legitimate, non-retaliatory reasons for its actions were a pretext. Summary judgment should be affirmed for this reason as well.

Lastly, ***Plaintiff perjured herself*** during the course of this litigation by ***falsely certifying*** in her answers to interrogatories ***that she did not have a criminal record***. She was dishonest in her deposition testimony. Her lies perpetrate a fraud on the court and provide another basis on which to affirm.

RELEVANT PROCEDURAL HISTORY

On January 11, 2021, Plaintiff filed a Complaint against REM NJ. (Appx 585). In her Complaint, Plaintiff asserted a single cause of action – retaliation in violation of Conscientious Employee Protection Act ("CEPA") (First Count). (Appx 16).

On July 7, 2023, REM NJ filed its Motion for Summary Judgment. (Appx 585). REM NJ's Motion for Summary Judgment (the "Motion") requested that the Trial Court enter judgment in its favor based three separate and distinct grounds: (1) Plaintiff was statutorily barred from employment with REM NJ; (2) Plaintiff could not make out a CEPA *prima facie* case and could not rebut REM NJ's legitimate, non-retaliatory reasons for its actions; and (3) Plaintiff should be sanctioned because her repeated lies perpetrated a fraud on the Trial Court. (Appx 1; Appx 155).

On August 4, 2023, Honorable Judith S. Charny, J.S.C. held oral argument and granted REM NJ's Motion for Summary Judgment on three alternate grounds: 1) Plaintiff was statutorily barred from holding a job with NJ REM and thus could not proceed with a CEPA case under *Cedeno*, 2) Plaintiff could not make out a *prima facie* case under CEPA because Plaintiff failed to demonstrate the causation and the adverse employment action elements, and 3) Plaintiff

could not show that Plaintiff's legitimate non-retaliatory reasons were a pretext for retaliation. (Appx 574-75; Appx 560). Plaintiff filed this appeal. (Appx 580).

STATEMENT OF FACTS

This is a rare summary judgment motion where Plaintiff admitted to every fact in Defendant's Statement of Material Facts related to Defendant's argument that the statutory bar prohibits her claims. (Point I of this Brief) Appx 520-32 ¶¶1-39). The three items Plaintiff did not admit were related to legal interpretation of the Statute – not disputing facts of the case. (*Compare* Appx 003-15 *with* Appx 353-57). In connection with its Reply, REM NJ submitted a document that laid out in one place each of its material facts, along with Plaintiff's specific responses to each paragraph, demonstrating that Plaintiff had admitted to all material facts. (Appx 520-38). The following are the ***undisputed*** material facts that supported REM NJ's Motion for Summary Judgment, all of which Plaintiff either admitted to or failed to dispute:

A. About Defendant REM NJ

REM NJ, through its adult services program, operates group homes in New Jersey for intellectually and developmentally disabled individuals. (Appx 520 at ¶1)[1]. REM NJ's group homes offer personalized services, including: on-

[1] Factual citations are to Appx 521, which combines Defendant's Statement of Material Undisputed Facts (Appx 3) and Plaintiff's Response (Appx. 353) into one document.

call support, medication management, community integration, management of daily activities, structured activities, life skills development, and transportation. (Appx 520-21 at ¶2). These group homes are staffed with hourly Direct Support Professionals ("DSPs"), supervisory Home Managers, and other human service professionals who develop individualized service plans to help each individual resident reach new milestones. (Appx 521 at ¶3).

B. Individuals With Enumerated Criminal Convictions Are Statutorily Disqualified From Working at REM NJ's Group Homes.

REM NJ's group homes are regulated by N.J. ADMIN. CODE § 10:44A, entitled "Standards for Residences for Individuals with Developmental Disabilities." (Appx 521 at ¶4). These laws recognize that the individuals being served at REM NJ's group homes are extremely vulnerable. (Appx 521 at ¶5). Some are non-verbal or unable to communicate. (Appx 521 at ¶5). Thus, New Jersey regulations put into place a number of protections to protect the individuals being served. (Appx 521 at ¶6).

New Jersey law provides that "an individual shall be disqualified from employment" with group homes (such as those run by REM NJ) if they have been convicted of "[a] crime or offense involving the … sale, possession, or habitual use of a controlled dangerous substance as defined in the 'New Jersey Controlled Dangerous Substances Act,' P.L.1970, c. 226 (C.24:21-1 et seq)." (Appx 522 at ¶8). New Jersey law similarly disqualifies employment of

individuals convicted of such conduct under the laws of other states. (Appx 522-3 at ¶9). If REM NJ knowingly employs individuals who are disqualified from the position, it could lose its license in New Jersey. (Appx 523 at ¶10).

C. Plaintiff Lied Multiple Times on Her Employment Application Documents.

On January 9, 2019, Plaintiff applied for a job to be a DSP at one of REM NJ's group homes. (Appx 523 at ¶11). In connection with her application of employment, Plaintiff had to complete a "Criminal Disclosure Statement." (Appx 523 at ¶12). The Criminal Disclosure Statement asked, "Have you ever been convicted of a crime?" (Appx 523 at ¶13). In response, Plaintiff checked the box "no" and signed her name. (Appx 524 at ¶14). The Criminal Disclosure Statement provided Plaintiff a designated space to describe any convictions. (Appx 524 at ¶15). Plaintiff left this space blank. (Appx 524 at ¶15). On January 9, 2019, in connection with her application of employment, Plaintiff also signed an Employee Statement. (Appx 524 at ¶16). In that statement, Plaintiff attested, again, that she had never been convicted of any "[c]rime(s) involving controlled substances or other like offenses." (Appx 524 ¶17). Plaintiff also signed a third document in connection with her application of employment that dealt with her criminal history. (Appx 524 ¶18). That document, again, asked Plaintiff about her convictions under penalty of perjury, as required by N.J. STAT. ANN. § 30:6D-64(e), which requires "a sworn statement attesting that the individual has

not been convicted of any crime or disorderly persons offense as described in [the] act." (Appx 524-25 ¶19). In that document, Plaintiff again attested, ***under penalty of perjury***, that she had not been convicted of listed criminal offenses, ***including a controlled substance offense***. (Appx 525 ¶20 (emphasis added)).

D. Plaintiff's Criminal Convictions.

On January 6, 2009, Pennsylvania police arrested Plaintiff for possession of heroin inside a baseball cap. (Appx 525 at ¶21). Plaintiff had the intent to distribute it, but did not get the chance to do so because she was arrested. (Appx 525 at ¶22). The Affidavit of Probable cause describes what happened the night she was arrested. (Appx 525 ¶23). According to the Affidavit of Probable Cause, an undercover officer arranged to purchase ten bricks of heroin, and Plaintiff admitted to delivering ten bricks of heroin at the drug bust. (Appx 526 at ¶24).

In June 2009, Plaintiff pleaded guilty to the felonies of "Manufacturing, dealing, possessing, with intent to manufacture or deal" and unlawfully and knowingly, intentionally possessing. (Appx 526 at ¶25). Plaintiff understood this to be a criminal conviction. (Appx 526 at ¶27). In April 2010, as a result of her criminal convictions, the court sentenced Plaintiff to prison. (Appx 526 ¶28). Plaintiff did not recall how many years she spent in prison, but she was still in prison as of July 2014, ***more than five years*** after her initial incarceration. (Appx 527 ¶29 (emphasis added)). Plaintiff served her full sentence. (Appx 527 ¶30).

E. REM NJ Would Not Have Hired Plaintiff Had It Been Aware Of Her Criminal Convictions During Application and Would Have Terminated Her Employment As Soon As It Found Out.

Susan McCarthy ("Ms. McCarthy") was REM NJ's Executive Director from 2016 until June 1, 2023. (Appx 527 at ¶31). Ms. McCarthy did not know that Plaintiff had any criminal convictions until after she filed this lawsuit. (Appx 527 at ¶32). Had Ms. McCarthy known about Plaintiff's criminal convictions while Plaintiff was applying for her job, she would not have allowed Plaintiff to be hired. (Appx 527 at ¶33). Had Ms. McCarthy learned about Plaintiff's criminal convictions while Plaintiff was employed at Defendant, Plaintiff's employment would have been immediately terminated. (Appx 527-28 at ¶34). REM NJ has declined to hire numerous employees because of disqualifying criminal convictions. (Appx 528 at ¶35). REM NJ has also terminated numerous employees when it learned about criminal convictions or if they were convicted during their employment. (Appx 528 at ¶35). In just the past 12 months, REM NJ has disqualified (declined to hire or terminated) six individuals due to criminal convictions. (Appx 528 at ¶35).

F. Plaintiff's Other Lies.

Plaintiff lied in her Answers to Interrogatories and Amended Answers to Interrogatories in this case. (Appx 008 at ¶37). Interrogatory number nine asked Plaintiff to "***state whether you have ever been charged with, convicted of or***

plead guilty to any criminal charges." (Appx 528-29 at ¶37). Plaintiff answered "***none***." (*Id.*). This was a ***lie***. (*Id.*). Interrogatory number six asked her to identify any other lawsuit in which she was a party. (*Id.*). She answered "***none***." (*Id.*). Her answer to number six was not true. (*Id.*). She was in fact a plaintiff in another civil case. (*Id.*). ***Plaintiff certified twice that her false answers to interrogatories were true***:

> I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment. (*Id.*)

Plaintiff has also lied in past court proceedings. In 2019, the New Jersey Supreme Court reversed the convictions of two individuals convicted of murdering Plaintiff's husband because Plaintiff was found not credible. (Appx 529-30 at ¶38); *See also State v. Brown*, 236 N.J. 497 (2019). The New Jersey Supreme Court stated:

1. "[Plaintiff] gave inconsistent statements to the police." (Appx 529-30 at ¶38);

2. "[Plaintiff] filed a false police report against Brown accusing him of pointing a gun at her." (*Id.*)

3. "[Plaintiff] erroneously implicated Dawson in Crews' dying declaration." (*Id.*).

4. Plaintiff's cellmates reported that Plaintiff admitted conspiring to

kill her husband. (*Id.*)

At her deposition in this case, Plaintiff claimed she could not recall things that she should have been able to recall as a competent witness. (Appx 530-32 at ¶39). She repeatedly said she did not recall facts that she should have remembered. (*Id.*) For example:

> Q. And you really can't recall where you spent last night, like, where you slept?
> A. No. I really can't.
> Q. So sitting here under oath, you can't recall where you slept last night; is that right?
> A. I might not have went to sleep. So I don't recall.
> ***
> Q. What kind of drugs were you selling [when you were convicted]?
> A. I don't recall
> ***
> Q. When you went to prison, was that in New Jersey?
> A. No
> Q. What state was that in; do you remember?
> A. No. I don't recall.
> ***
> Q. Were you paid money as a result of your car accident?
> A. Yes.
> Q. How much were you paid?
> A. I don't recall.
> Q. Was it over $10,000?
> A. I don't recall.
> Q. Was it over $50,000?
> A. I don't recall.
> Q. Was it over a million dollars?
> A. I don't recall.
> Q. Was it over five million dollars?
> A. I don't recall.

> ***
> Q. The only thing you remember is it was serious and you didn't claim emotional distress, right?
> A. That's correct.

(*Id.*)

Plaintiff further claimed she could not recall the name or street of the restaurant where she had dinner the night before. (*Id.*) This feigned failure to recall is consistent with the New Jersey Supreme Court's finding in *State v. Brown* about Plaintiff's complete lack of credibility. (*Id.*) Plaintiff also provided inconsistent information about whether the friend she dined with the night before her deposition previously worked for Defendant. (*Id.*)

G. Plaintiff's Employment at REM NJ.

REM NJ hired Plaintiff in February 2019 to be a Direct Support Professional (DSP). (Appx 532 at ¶40). Plaintiff was originally assigned to work the day shift at the Erial group home. (Appx 532 at ¶40). In the fall of 2019, REM NJ began to review staffing at various homes and determined that since most of the individuals being served were not home during the day (because they were receiving services at a day program outside the home), REM NJ did not need a full time staff member on day shift at each home. (Appx 532 at ¶41). Accordingly, REM NJ initiated steps to eliminate the day shifts at those homes. (Appx 532 at ¶42). This change ***affected several of REM NJ's locations (and the day shift employees at those locations)***, including the Erial location where

Plaintiff worked the day shift. (Appx 532 at ¶43). This process started ***months*** before it was announced to the staff, as it involved business plans and applications to the relevant licensors. (Appx 532-33 at ¶44).

REM NJ Executive Director Ms. McCarthy, was the decision-maker of this change. (Appx 533 at ¶45). Ms. McCarthy did not consult with Glenda Delgado, Heather Motley, or Eric Ferrer in making this decision. (Appx 533 at ¶45). Plaintiff's regular day shift at the Erial group home was one of the shifts affected by Ms. McCarthy's decision. (Appx 533 at ¶46). REM NJ ***offered Plaintiff three other positions, all of which she rejected***. (Appx 533 at ¶46). Plaintiff declined and told REM NJ she needed to work a day shift. (Appx 533 at ¶47). REM NJ then ***offered*** Plaintiff a day shift at the Burlington Day Program, which had the schedule Plaintiff wanted, from 8 a.m. to 4 p.m. (Appx 533 at ¶48). Plaintiff originally took this job ***but then decided she did not want it***. (Appx 533 at ¶49). Plaintiff explained at her deposition that while at the Burlington Day Program, she got a flat tire, which led to her decision to leave the offered role:

> Q. Okay. And when did you say you didn't want to accept the day program at Burlington and you wanted to drop down and be a sub?
>
> A. When I got a flat tire, and I was on the way to the program, and I was basically told that because I called last minute, stated that I was on the side of the road, that basically I have to call with further

> notice. And I said, "Well, it's just regular wear and tear; I can't predict that my tire would have got flat."
>
> And ***then at that point, I just knew that my car wasn't capable for the wear and tear***, 40 minutes there and back every day.

(Appx 534 at ¶50 (emphasis added)).

Accordingly, Plaintiff voluntarily took per diem status. (Appx 534 ¶51). Per diems are subs who work according to agency needs and the individual's availability. (Appx 534 ¶52). They need to stay in touch with the various managers to get on the schedule at the different group homes. (Appx 534 ¶52). After Plaintiff went "per diem," REM NJ ***offered Plaintiff another full time position*** at Cross Keys, which she also declined. (Appx 534 ¶53).

After Plaintiff became a sub, on or around January 20, 2023, a routine audit revealed that fingerprint results were missing ***for a number of employees***, including the Plaintiff. (Appx 534-35 at ¶54). This issue affected approximately 20 employees and was not specific to Plaintiff. (Appx 534-35 at ¶54). ***All affected employees*** were taken off the schedule until the issue was resolved pursuant to NJ state law. (Appx 535 at ¶55). REM NJ paid Plaintiff for the time she was off the schedule. (Appx 535 at ¶56).

On February 10, 2020, Plaintiff received a job offer at Jewish Family & Children's Services, which she accepted, unbeknownst to Defendant. (Appx 535

at ¶57). Then, on February 26, 2020, Plaintiff texted a REM NJ Program Director seeking hours. (Appx 535 at ¶58). On March 2, 2020, Plaintiff sent a text message to the same Program Director stating, "I am ONLY interested in maintaining the 16 hrs a month, in order for me to uphold my position as a sub/per diem." (Appx 535 at ¶59). On March 29, 2020, she wrote to the same Program Director, stating she could not take hours because "my children are in remote learning and unfortunately I have no one to step up during my absence. I truly apologies [sic] if this caused any inconvenience[.]" (Appx 535-36 at ¶60).

On May 3, 2020, Defendant received a report that Plaintiff ran into a REM NJ staff member and a person being served out in public at a ShopRite and began loudly berating the staff member (including yelling, cursing and blocking them from leaving). (Appx 536 at ¶61). Onlookers called ShopRite security and the police came. (Appx 536 at ¶62). REM NJ reported the incident to the state of New Jersey. (Appx 536 at ¶63). REM NJ reached out to Plaintiff multiple times as part of its investigation, but Plaintiff failed to respond. (Appx 536 at ¶63).

On May 12, 2020, Ms. McCarthy emailed and sent via FedEx a letter to Plaintiff letting her know that REM NJ needed to speak with her. (Appx 536 at ¶64). Ms. McCarty's letter detailed the efforts that had been made to get in touch with her. (Appx 536 at ¶64). The letter gave Plaintiff until May 18, 2020 at 5:00 p.m. to respond. (Appx 536 at ¶64). Plaintiff did not respond and did not

participate REM NJ's investigation of this matter. (Appx 536 at ¶65). On May 19, 2020, REM NJ terminated Plaintiff's employment in connection with the incident at ShopRite. (Appx 536-37 at ¶66).

H. Plaintiff's Deposition Testimony Regarding Her Complaints to REM NJ.

Plaintiff testified clearly that the only person she ever raised issues to about anything illegal or against public policy was Glenda Delgado:

> Q. So you had -- I just want to make sure I understand. Gl[e]nda is the only person you made reports to about anything that you though was either illegal or against public policy --
> A. ***Yes.***
> Q. -- or breaking the rules? Correct?
> A. ***Correct.***
> Q. ***There's nobody else you made reports to at the defendant company; right?***
> A. ***Not that I'm aware of, ma'am.***

(Appx 537-38 at ¶67 (emphasis added)). In addition, while Plaintiff alleged she raised various issues to Glenda Delgado during her employment, Plaintiff testified she ***does not know when that occurred***:

> Q. And when's the first time you can tell me for sure that you raised an issue to Gl[e]nda?
> A. ***I don't recall.***
> Q. So you can't say for sure that you raised an issue to Gl[e]nda before your dayshift at Erial ended?
> A. Yeah, ***I cannot say. I don't recall.***
> ***
> Q. But you don't remember telling her November '19?
> A. ***I don't recall when I told her.***

…
Q. And the same thing with the other issues you listed that you reported to Gl[e]nda, ***you don't remember when you told her; right?***
A. ***Correct.***
Q. And so it might have been before; it might have been after the Erial dayshift; right?
A. ***I don't remember -- yes. Correct.***
***
Q. And when did you raise misuse of medication to Gl[e]nda?
A. ***I don't recall the date.***
Q. Was it while you were still on dayshift at Erial -- regular dayshift at Erial?
A. ***I don't recall.***

(Appx 537-38 at ¶68 (emphasis added)).

While Plaintiff purported to deny these facts, they are ***direct quotes*** of her testimony and Plaintiff failed to provide a citation to the portion of the motion record that established that the fact was in dispute. Accordingly, such denial is not proper and the facts (consisting of quotes from Plaintiff's testimony) were deemed admitted.[2] (Appx 537-38 ¶¶67-68).

[2] "[A] party cannot contradict his or her own deposition testimony in an attempt to defeat summary judgment." *Verhoorn v. Cardinal Health 110, Inc.*, No. A-2232-12T1, 2013 N.J. Super. Unpub. LEXIS 2815 (Super. Ct. App. Div. Nov. 21, 2013) (*citing Shelcusky v. Garjulio*, 172 N.J. 185, 201 (2002)); *see also* R. 4:46-2(b) ("all material facts in the movant's statement which are sufficiently supported will be deemed admitted … unless specifically disputed by citation conforming to the requirements of paragraph (a) demonstrating the existence of a genuine issue as to the fact.").

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT BECAUSE PLAINTIFF'S DRUG CONVICTION AND YEARS IN PRISON STATUTORILY BARRED HER FROM EMPLOYMENT WITH REM NJ AS A MATTER OF LAW.

A. Plaintiff Was Statutorily Barred From Holding Her Job With REM NJ As A Matter Of Law.

New Jersey law bars Plaintiff from providing care to vulnerable individuals in REM NJ's group homes. New Jersey law provides that "an individual ***shall be disqualified*** from employment" with group homes, including those operated by REM NJ, if that individual has been convicted of "[a] crime or offense involving the manufacture, transportation, sale, possession or habitual use of a controlled dangerous substance." N.J. STAT. ANN. § 30:6D-64(b)(1)(c); *see also Davis v. Devereux Found.*, 209 N.J. 269, 295 (2012) (*citing* the Statute to support the assertion that "[f]acilities are required to conduct background checks, and are prohibited from hiring individuals who have committed one in a list of enumerated crimes."); N.J. ADMIN. CODE § 10:44A-2.4 (emphasis added). The Statute makes clear that an individual convicted of such conduct under the laws of other states is also similarly disqualified from providing care to vulnerable individuals. N.J. STAT. ANN. § 30:6D-64 (disqualifying for convictions "in any other state …which, if committed in New Jersey, would

constitute any of the crimes or disorderly persons offenses described"); *see also* N.J. ADMIN. CODE §10:44A-2.4. Plaintiff was a heroin dealer and pleaded guilty to three counts related to dealing heroin. (Appx 525-27 ¶¶21-30; Appx 114 at 67:16-23). Accordingly, the Statute is clear: Plaintiff's convictions for dealing and possessing a controlled dangerous substance disqualified her from ever working with vulnerable individuals in any of REM NJ's group homes.

Plaintiff's failure to cooperate with REM NJ by lying on her employment application further disqualified her from continuing her employment with REM NJ. The Statute also requires that applicants "consent to, or cooperate in, securing of a criminal history record background check." N.J. STAT. ANN. §30:6D-64(c). The Statute is crystal clear about the individual consequences for failing to cooperate:

> the person shall be ***immediately*** removed from the person's position and the person's employment ***shall be terminated*** . . .

Id. at 30:6D-64(d) (emphasis added).

The Trial Court properly found "that statutorily . . . [Plaintiff] never should've had this job." (Appx 572 at 22:19-25). The Trial Court further appropriately noted that Plaintiff "lied . . . many times under oath about the fact that she had a criminal conviction." (Appx 572 at 22:19-25). First, Plaintiff lied on her Criminal Disclosure Statement when she answered "no" to the question,

"Have you ever been convicted of a crime?" (Appx 76; Appx 116 at 75:25-76:12). Plaintiff lied again when she signed the Employee Statement attesting that she had never been convicted of any "[c]rime(s) involving controlled substances or other like offenses." (Appx 078; Appx 117-18 at 79:7-12, 82:14-18). Finally, under penalty of perjury, Plaintiff signed a statement swearing that she had no criminal offense involving a controlled substance, as required under New Jersey law. (Appx 80-83; Appx 120 at 95:12-17, 96:1-4); *see also* N.J. STAT. ANN. § 30:6D-64(e) (requiring "a sworn statement attesting that the individual has not been convicted of any crime or disorderly persons offense as described in this act.").

B. Plaintiff Admitted To All Material Facts Related To Her Disqualification From Employment With REM NJ.

Plaintiff admitted to ***every fact*** within REM NJ's Statement of Material Facts related to the question of whether Plaintiff was statutorily barred from employment with REM NJ. (Appx 520-32 ¶¶1-39). It is undisputed that New Jersey provides "an individual ***shall be disqualified*** from employment" with group homes, including those operated by Defendant, if that individual has been convicted of "[a] crime or offense involving the manufacture, transportation, sale, possession or habitual use of [drugs]." N.J. STAT. ANN. § 30:6D-64(b)(1)(c); N.J. ADMIN. CODE § 10:44A-2.4; *see also Davis*, 209 N.J. at 295 (*citing* N.J. STAT. ANN. § 30:6D–64 to support the assertion that "[f]acilities are

required to conduct background checks, and are prohibited from hiring individuals who have committed one in a list of enumerated crimes."). It is also undisputed that New Jersey law also makes clear that an individual convicted of such conduct under the laws of other states is similarly disqualified from employment. N.J. STAT. ANN. § 30:6D-64 (disqualifying for convictions "in any other state …which, if committed in New Jersey, would constitute any of the crimes . . . described"); *see also* N.J. ADMIN. CODE §10:44A-2.4.

Plaintiff does not dispute that she was arrested with heroin in her possession, pleaded guilty to the felonies of "[m]anufacturing, dealing, possessing, with intent to manufacture or deal[,]" and "unlawfully and knowingly, intentionally possessing a controlled or counterfeit substance contrary to the Controlled Substance Act[,]" and served her full sentence in prison. (Appx 58-65; Appx 67-74; Appx 114 at 67:16-23, 68:12-20, 69:18-70:6; Appx 115 at 72:13-73:15; Appx 525 at ¶21; Appx 526-27 ¶¶25-30). Plaintiff also does not dispute that she denied she had criminal convictions three separate times in connection with her application for employment with Defendant. (Appx 523-25 ¶¶11-20). One of those times was under penalty of perjury. (Appx 524-25 ¶¶18-20). The three items Plaintiff denied in her Opposition were related to legal interpretation of The Statute. (Appx 520-32 ¶¶7, 26 and 36). Accordingly, there are **no** disputed material facts on the record regarding Plaintiff's criminal

convictions that serve as the basis of the applicable statutory bar. Given these undisputed facts, the Statute is clear: Plaintiff's convictions for dealing and possessing drugs disqualified her from ever working for Defendant's group home with vulnerable individuals. *See* N.J. STAT. ANN. § 30:6D-64.

C. The Trial Court Properly Granted Summary Judgment Because Plaintiff's Drug Conviction and Years in Prison Statutorily Barred Her From Being Employed By REM NJ.

It is well settled that when a plaintiff is statutorily barred from holding a position, she is not permitted to maintain a lawsuit under the Conscientious Employee Protection Act ("CEPA"). *See* N.J. STAT. ANN. § 34:19-1 et seq.; *Cedeno*, 163 N.J. at 478.

In *Cedeno v. Montclair State Univ.*, the New Jersey Supreme Court upheld a decision by the Appellate Division dismissing a plaintiff's New Jersey Law Against Discrimination (NJLAD) and CEPA action on summary judgment in its entirety based on the plaintiff's prior criminal conviction discovered during litigation. 163 N.J. at 477. The Court reasoned that the *Cedeno* plaintiff's NJLAD claim could not proceed because his conviction disqualified him from employment with defendant. *See id.* at 477-78. The *Cedeno* Court distinguished the facts before it from a situation where after-acquired evidence is discovered, such as a policy violation, but does not bar the employee-plaintiff from the job in the first instance. *See id.* at 478.

In arriving at its holding, the *Cedeno* Court weighed the public policy inherent to NJLAD and CEPA against the public policy inherent in the Forfeiture statute at issue there and found that "whatever value may be achieved by permitting plaintiff's case to proceed to trial is ***outweighed*** by the policy against allowing that same person to obtain public employment after having been convicted of bribery." *Id.*

In *Crespo v. Evergo Corp.*, the Appellate Division applied *Cedeno* against a private employer and confirmed that its reasoning applies in other contexts. 366 N.J. Super. 391, 394-95 (App. Div. 2004). The *Crespo* Court considered an employer's use of after-acquired evidence to defend against a former employee's claim that it discriminated against her in violation of NJLAD by terminating her employment following her maternity leave. *See id.* The employer discovered during litigation that the employee was not legally authorized to work in the United States and had presented a fraudulent social security card during the hiring process. *See id.* at 394. The employer argued it was entitled to the *Cedeno* analysis because the employee was statutorily barred from being hired. *See id.* The Appellate Division applied the *Cedeno* analysis to *Crespo*, balancing the competing policies expressed in federal immigration statutes against the employee's right to bring a discrimination suit, and concluded that the plaintiff was barred from all relief. *See id.* at 400-01.

In *Cicchetti v. Morris County Sheriff's Office*, the New Jersey Supreme Court reaffirmed *Cedeno* and *Crespo*, but determined that those cases did not apply to the facts at hand because the *Cicchetti* plaintiff was ***not*** barred by operation of law from holding his position with defendant. 194 N.J. 563, 585, 590 (2008) (finding that "unlike the facts of *Cedeno*, we are not confronted with an individual who was statutorily disqualified from being hired at all."). Rather, the *Cicchetti* plaintiff's prior offense occurred twenty years earlier, had since been expunged, and the record was devoid of evidence that the employer had a policy of not hiring applicants with a prior expunged offense. *See id.* The *Cicchetti* Court found it significant that nothing in the record suggested that the plaintiff would not have been hired had he revealed his expunged conviction to his employer. *See id.* at 586. Accordingly, after-acquired evidence in *Cicchetti* limited the plaintiff's claims, but did not serve as a complete bar. The *Cicchetti* Court explained that had the defendant had a clear and consistently applied policy of refusing to hire an individual such as Cicchetti (e.g. with an expunged conviction), the defendant could argue it should "have the benefit of the Cedeno rule," even in the absence of a statutory bar. *See id.* at 587-88 (emphasis added).

Plaintiff mistakenly attempts to distinguish *Cicchetti* by arguing the *Cicchetti* plaintiff "was not statutorily barred from the employment he sought in law enforcement[.]" (AB at pp. 14-15). However, contrary to Plaintiff's

arguments, the Statute clearly barred Plaintiff's employment here. *Cicchetti* directly supports Defendant's position because it is undisputed that Defendant would ***not*** have hired Plaintiff had she disclosed her criminal convictions during the application process. (Appx 195-96 ¶¶1, 8-11; Appx 527-28 ¶¶31-36). The Trial Court distinguished *Cicchetti* during oral argument:

> [w]e're ***not talking an expungement*** that happened 20 years ago. . . . That's why it's a little different. But this -- ***this woman went to jail for drug dealing for five years***. And it's clear from the statute that you just handed me that ***she should've never had this job***.

(Appx 572 at 23:1-6 (emphasis added)).

The sheer importance of whether or not Plaintiff had disqualifying criminal convictions is demonstrated by the fact that Defendant asked Plaintiff about past criminal convictions ***three separate times*** during the application process, and had her sign three separate documents as part of her application — to confirm that she had no prior convictions – including one she completed under oath. (Appx 75-83). The Statute prevented Plaintiff from holding the job she had with Defendant. N.J. STAT. ANN. § 30:6D-64(b)(1)(c); N.J. ADMIN. CODE § 10:44A-2.4; (Appx 196 at ¶6, 8-11). Had Defendant known that Plaintiff had these convictions while was applying for employment, it never would have hired her. (Appx 196 at ¶9). Had Defendant learned about these convictions while Plaintiff was still employed, it would have terminated her employment. (Appx

196 at ¶10). Defendant has declined to hire numerous employees because of their criminal convictions and, in just the past year, Defendant had disqualified ***six*** employees after it had learned of their past criminal convictions or convictions that occurred during their employment. (Appx 196 at ¶11). Even in the absence of a clear statutory bar (which is present here), the evidence on the record here places this case squarely under the *Cedeno* rule. *See Cicchetti*, 194 N.J. at 587-88.

Similar to *Cedeno* and *Crespo*, New Jersey law here plainly barred Plaintiff from providing care to vulnerable individuals with Defendant because she had been previously convicted for multiple drug-related felonies specifically enumerated in the Statute. (Point I(C) of this Brief; Appx 520-32 ¶¶1-39).

D. The Trial Court Properly Found that Public Policy Weighs in Favor of Dismissal Here.

As in *Cedeno*, the Trial Court here weighed the public policy inherent to CEPA against the public policy inherent to the Statute, and similarly found that the Statute's heavy public policy of protecting vulnerable individuals with developmental disabilities, who may be non-verbal or unable to communicate, outweighed the public policy espoused by CEPA. (Appx 573-75, 578 at 25:7-16; 27:24-28:12; 34:2-9); *see also Cedeno*, 163 N.J. at 478. The Trial Court's reasoning is consistent with New Jersey law and the evidence on the record and therefore should be affirmed.

The same policy considerations that motivated the Court to bar relief in *Cedeno* to protect the public from offenders—and even worse here, to protect vulnerable individuals from offenders—should apply here as well and bar Plaintiff's claims against Defendant. *See Cicchetti*, 197 N.J. at 587.[3]

Plaintiff's attempt to distinguish *Cedeno* by arguing that the Forfeiture statute at issue in *Cedeno* somehow had a more laudable policy aim than the Statute at issue here must be rejected. (Plaintiff's Brief ("AB") at pp. 12-13). Plaintiff desperately attempts to claim that no strong policy is in play here. (AB at p. 13). To the contrary, New Jersey law recognizes that the individuals being served at REM NJ's group homes are extremely vulnerable. Appx 521 at ¶5 (admitting the public policy at issue). The New Jersey Supreme Court explained the applicable public policy behind the Statute in *Davis v. Devereaux:*

> The [individuals being served] are often nonverbal and thus incapable of reporting abuse. They are dependent on their caregivers to protect them from harm. They require and deserve vigilant protection and care. Accordingly, the Legislature has determined that the

[3] *See also Camp v. Jeffer, Mangels, Butler & Marmaro*, 35 Cal. App. 4th 620 (1995) (affirming summary judgment dismissing plaintiffs' entire claim based on after-acquired evidence where employer learned during discovery that the plaintiffs had been convicted of felony conspiracy, but falsely stated on employment applications that they had never been convicted; employer had a contract with a federal agency that prohibited it to employ individuals convicted of a felony); *Egbuna v. Time–Life Libraries, Inc.*, 153 F.3d 184 (4th Cir. 1998) (en banc); *Chaudhry v. Mobil Oil Corp.*, 186 F.3d 502, 504 (4th Cir. 1999) (both holding that an "undocumented alien" is barred from maintaining an action under Title VII for alleged discrimination due to being statutorily ineligible for employment in the United States).

> relationship between residential facilities and their residents should be intensely regulated, pursuant to the strong state policy of protecting children and adults with developmental disabilities.

209 N.J. 269, 293-94 (recognizing that facilities "are prohibited from hiring individuals who have committed one in a list of enumerated crimes"). Some of the individuals being served are non-verbal or unable to communicate. Appx 521 at ¶5 (admitted by Plaintiff). The relevant statutory regulation at issue in this case regulates the ability of REM NJ's employees to come into direct contact with these extremely vulnerable individuals served. *See* N.J. ADMIN. CODE 10:44A-2.4(b) ("The purpose . . . is to establish minimum requirements for the provision of residential services to people with developmental disabilities."). This regulation, therefore, puts protections into place to protect individuals being served. Appx 521 at ¶6 (admitted by Plaintiff). Plaintiff's argument that the public policy behind the statutory bar in *Cedeno* (ensuring those convicted of bribery do not work for the government) is somehow more important than the one protecting vulnerable individuals who cannot speak up or protect themselves is patently wrong and must be rejected.

The Trial Court here also found that Plaintiff "failed to allege sufficiently egregious conduct or severity of harm" to outweigh the Statute's heavy public policy implications. *See id*. at 479. As demonstrated below, Plaintiff has not alleged any egregious facts or conduct that would outweigh the public policy

against letting a convicted felon work with vulnerable individuals. *See Cedeno*, 163 N.J. at 479 (finding allegations that the defendant caused Cedeno to have a heart attack and, then, harassed him *while he on the floor was having a heart attack* were insufficiently egregious to tip the balance in favor of Cedeno); *Crespo*, 366 N.J. Super. at 401-02 (dismissing on summary judgment "[b]because there are no "aggravated sexual harassment" or other egregious circumstances which exist here").

Here, Plaintiff's issues are compounded by the fact that she lied multiple times during this lawsuit about her convictions, including while giving false sworn answers to interrogatories wherein she lied about ever having a criminal conviction. (Appx 528-29 at ¶37). Plaintiff only admitted she had ever been convicted with a crime after Defendant discovered and brought Plaintiff's criminal history to her lawyer's attention. (Appx 37). For years, Plaintiff has perjured herself regarding her convictions, putting Defendant at risk of losing its license.[4] (Appx 523 at ¶10).

[4] Notably, the name Plaintiff used on her REM NJ application ("Sheena Jones") differs from the name under which Plaintiff was convicted ("Sheena Robinson"). (Appx 58-65; Appx 67-74; Appx 76, Appx 78, Appx 81-83). Had Plaintiff told the truth, she would not have ever been hired. (Appx 196 at ¶¶8-10).

E. The Trial Court Correctly Rejected Plaintiff's Argument That an Irrelevant Exemption Saves Her From Disqualification.

Plaintiff argues that Defendant's statutory bar argument is "misplaced" because "the very [S]tatute cited by [Defendant] provides clear instruction on the approval process for [Plaintiff] to maintain her job, even in light of her criminal record." (AB at pp. 10-12). In support, Plaintiff cites to a provision of the Statute under which an applicant ***with disqualifying convictions*** can apply to the Department of Human Services (the "Department") for an exception under ***very specific circumstances***. (AB at pp. 11-12; Appx 522 at ¶8; Appx 366-68 ¶¶76-78) (*citing* N.J. STAT. ANN. § 30:6D-64(f) and (g)) (emphasis added). Plaintiff does not argue she ever applied for this exception, or that the Department ever granted her this exception. Plaintiff simply argues that this exception exists and therefore she was not statutorily barred from holding her job. (AB at pp. 10-12).

But this exception does not apply to Plaintiff. The exception applies ***only*** "if the individual has ***affirmatively demonstrated*** to the department, ***clear and convincing evidence*** of the individual's rehabilitation." N.J. STAT. ANN. § 30:6D-64(f) (emphasis added). Accordingly, in order for the cited exception to apply, a disqualified applicant must submit an application to the Department to demonstrate ***clear and convincing evidence*** of rehabilitation. Plaintiff, however, neither submitted an application to the Department nor demonstrated evidence

of her rehabilitation. The Statute provides specific factors to be considered by the Department when assessing whether an individual met their burden to demonstrate rehabilitation. N.J. STAT. ANN. § 30:6D-64(f). Plaintiff has not put forth **any** facts to show that even if she had applied, she would have met the listed factors and, even if she could have met these factors, that the Department would have granted the exception. The cited statutory exception plainly applies ***only if*** the Department grants an exception. N.J. STAT. ANN. § 30:6D-64(f) and (g). The Statute could not be more clear that "an individual ***shall be disqualified*** from employment" if she has convictions such as those had by Plaintiff. N.J. STAT. ANN. § 30:6D-64(b). The fact that an exception -- which plainly does not apply to Plaintiff's circumstances --exists, does not change the fact that per Plaintiff's own admissions, she was statutorily barred from employment with Defendant. (Appx 76, 78, 80-83; Appx 116 at 75:25-76:12; Appx 117-18 at 79:7-12, 82:14-18; Appx 120 at 95:12-17, 96:1-4).

In a similar vein, Plaintiff attempts to distinguish *Cedeno* by wrongly claiming that the Forfeiture statute at issue in *Cedeno* "does not provide an avenue for overcoming the statutory bar for employment." (AB at p. 12). This argument fails because the Forfeiture statute does in fact provide an avenue for overcoming the statutory bar in specific circumstances if a disqualified individual obtains a waiver. *See* N.J. STAT. ANN. § 2C:51-2(e). Just as here, that

avenue was irrelevant to the final disposition of *Cedeno* because it did not apply to the plaintiff. As in *Cedeno*, the existence of an irrelevant avenue of waiver here does not prevent the application of the clear statutory bar of employment. Plaintiff has not provided evidence on the record suggesting that the Department granted Plaintiff an exception or that the exception applies to Plaintiff's circumstances in any way, shape, or form. There is nothing in the existence of an irrelevant exception that distinguishes this case from *Cedeno* and therefore, *Cedeno* applies.

The Trial Court properly found that Plaintiff "never applied for an exception….That's the difference. If she had been truthful and applied for an exception that's different. ***She never applied for exception. She lied and said she was never convicted. She's statutorily barred.*** She is statutorily barred." (Appx 573 at 24:14-21) (emphasis added). Just like in *Cedeno*, Plaintiff "was not permitted by law to occupy the position[,]" summary judgment on her CEPA claim must be affirmed. *See Cedeno*, 163 N.J. at 478.

F. Plaintiff's Argument Regarding Confusion Must Be Rejected Because The Statute Does Not Consider Intent of Disqualified Applicants.

Plaintiff does not attempt to claim that Plaintiff's responses to the employment application questions about her prior convictions were in fact accurate, only that she "misunderstood the application question[.]" (AB at p. 14). Plaintiff argues that "[a]n employee who misunderstands a form but submits

to a background check is factually not the same as someone intentionally hiding and misleading an employer about a criminal record." (AB at p. 14). Plaintiff does not cite any case law or statutory provisions in support of this argument.

The Statute does not require scienter or intent. The language of the Statute is quite simple: "an individual ***shall be disqualified*** from employment" with group homes such as those operated by REM NJ if that individual has been convicted of "[a] crime or offense involving the manufacture, transportation, sale, possession or habitual use of a controlled dangerous substance." N.J. STAT. ANN. § 30:6D-64(b)(1)(c); N.J. ADMIN. CODE § 10:44A-2.4. Plaintiff cannot hide behind her manufactured post-hoc explanation for her lies. She was statutorily disqualified and thus barred from pursuing her claim.

The Court should also reject Plaintiff's argument that the fact that she consented to a background check somehow saves her CEPA claim. (AB at pp. 14-15). Background checks are not perfect, especially in situations like this one where the individual has had multiple names and was convicted in a different state. During Plaintiff's application for employment, REM NJ asked Plaintiff questions about her past criminal convictions, not once, but ***three*** separate times. (Appx 523-25 ¶¶11-20). Plaintiff lied ***all three times***. (*Compare* Appx 523-25 ¶¶11-20 with Appx 066-74). Had Plaintiff told the truth, she would not have been hired. (Appx 196 at ¶9). The fact that the fingerprinting or the background

check did not come back with a flag for Plaintiff's out of state convictions precisely demonstrates why it was so important that Plaintiff be honest in response to conviction-related questions on her employment application. *See* N.J. ADMIN. CODE 10:44A-2.4(c)(1) (requiring REM NJ to inquire about convictions in the employment application). The fact that Plaintiff consented to a background check does not change the fact that Plaintiff had in fact been convicted, and that these convictions statutorily disqualified Plaintiff from employment with REM NJ.

In any event, the record belies this argument (and no one could possibly believe that all of Plaintiff's lies are a "misunderstand[ing].") Plaintiff lied on her application three separate times. (*Compare* Appx 523-25 ¶¶11-20 with Appx 066-74). Plaintiff attempts to belatedly justify her multiple lies during the application process by claiming that "in her mind, accepting a plea deal was not the same thing as being convicted of a crime." (AB at pp. 7-8). Plaintiff's argument must be rejected because it is simply not supported by the evidence on the record. (Appx 526 at ¶27) (admitting she understood her plea to be a criminal conviction); (Appx 528-29 at ¶37; Appx 526 at ¶27) (admitting she understood her plea to be a criminal conviction). In fact, defense counsel asked Plaintiff at her deposition whether she would answer "yes" if an employer asked whether she had any convictions, and Plaintiff responded she would answer "yes." (Appx

116 at 74:11-14) ("you would have said 'yes, I have a conviction'?" "Yes"); (Appx 116 at 74:21-75:10) (stating if an employer asked if she had convictions she would have said yes because that is the truth); (Appx 113 at 63:25-64:3) (admitting she had a conviction for heroin); (50:17-19) (admitting she had been convicted of a crime); (Appx 110 at 51:1-4) (same); (Appx 110 at 50:20-24) (same); (Appx 113 at 63:25-64:3) (same). During her deposition, Plaintiff was asked her over and over as to why she answered as she did to the application questions relating to her criminal history, and not once did Plaintiff claim it was because she did not know she had a conviction. *See id.* Plaintiff's testimony clearly shows she fully understood what Defendant's application asked of her and she chose to lie in her responses, concealing her prior disqualifying convictions.

POINT II

THE TRIAL COURT'S DECISION TO DISMISS PLAINTIFF'S COMPLAINT BECAUSE THE RECORD DOES NOT SUPPORT A *PRIMA FACIE* CEPA CLAIM WAS, IN ALL RESPECTS, CORRECT AS A MATTER OF LAW.

A. The Trial Court Properly Found That Plaintiff Failed to Show A Causal Connection Between Her Alleged Protected Activity and Any Cognizable Adverse Actions.

Plaintiff did not make out a *prima facie* case of retaliation to sustain her CEPA claim because she could not establish requisite causal connection between alleged protected activity and any cognizable adverse action. A CEPA plaintiff

can prove causation by presenting direct evidence of retaliation or circumstantial evidence that justifies an inference of retaliation. *See Zaffuto v. Wal-Mart Stores, Inc.*, 130 Fed. Appx. 566, 569 (3d Cir. 2005). Speculation is insufficient, and a plaintiff must demonstrate a factual nexus between the protected activity and the retaliatory employment action. *See Tinio v. St. Joseph Reg'l Med. Ctr.*, No. 13-829, 2015 U.S. Dist. LEXIS 44585, at *13 (D.N.J. Apr. 6, 2015). An unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action or a pattern of antagonism coupled with timing can raise an inference of causation. *See Davis v. Supervalu, Inc.*, No. 13-414, 2013 U.S. Dist. LEXIS 56341, at *6 (D.N.J. Apr. 18, 2013). In addition, the proffered evidence, viewed in totality, may suffice to create such an inference. *See Espinosa v. County of Union*, 212 Fed. Appx. 146, 153 (3d Cir. 2007).

The Trial Court properly found that Plaintiff failed to establish the causation element *prima facie* case of retaliation because "she doesn't even remember when she complained[,]" and "even looking at all of the evidence in favor of the plaintiff, . . . she doesn't remember who she spoke to when, she doesn't remember specifically what she said to anyone[.]" (Appx 567, 574 at 13:13-14:9; 27:3-8). Accordingly, the dismissal of Plaintiff's faulty CEPA claim must be affirmed.

1. The Lack of Temporal Proximity Between Plaintiff's Complaint And Any Cognizable Adverse Action Negates Any Inference of Causation.

Plaintiff's testimony clearly demonstrated that she had no idea when she engaged in her alleged whistleblowing:

> Q. And when's the first time you can tell me for sure that you raised an issue to Gl[e]nda?
> A. I don't recall.
> Q. So you can't say for sure that you raised an issue to Gl[e]nda before your dayshift at Erial ended?
> A. Yeah, I cannot say. I don't recall.
>
> Ex. S at 228:3-11.
>
> Q. But you don't remember telling her November '19?
> A. I don't recall when I told her.
> …
> Q. And the same thing with the other issues you listed that you reported to Gl[e]nda, you don't remember when you told her; right?
> A. Correct.
> Q. And so it might have been before; it might have been after the Erial dayshift; right?
> A. I don't remember -- yes. Correct.
>
> Ex. S at 233:11-234:1.
>
> Q. And when did you raise misuse of medication to Gl[e]nda?
> A. I don't recall the date.
> Q. Was it while you were still on dayshift at Erial -- regular dayshift at Erial?
> A. I don't recall.

(Appx 134 at 224:20-225).

Given that Plaintiff had absolutely no idea when she brought issues to REM NJ, she cannot possibly show temporal proximity between raising said issues and any alleged adverse actions.[5]

Plaintiff argues she has met her burden of establishing temporal proximity because she was subjected to a hostile workplace environment ***following*** her "whistleblowing activity in November of 2019 and January of 2020." (AB at p. 17). However "the mere fact that [an] adverse employment action occurs after [the protected activity]" generally will not "satisfy the Plaintiff's burden of demonstrating a causal link between the two." *Young*, 385 N.J. Super. at 467 (App. Div. 2005) (second and third alterations in original) (*quoting Krouse v. Am. Sterilizer Co.*, 126 F.3d 494, 503 (3d Cir. 1997)). There simply are no facts

[5] *See e.g. Young v. Hobart West Group*, 385 N.J. Super. 448, 467 (App. Div. 2005) (holding Plaintiff's termination four months after her complaint was not unusually suggestive, and plaintiff must set forth additional evidence to establish a causal link between her termination and complaints); *Levins v. Braccia*, No. A-4290-07T2, 2009 N.J. Super. Unpub. LEXIS 1473, at *7 (App. Div. June 16, 2009) (holding lapse of four months between protected activity and termination insufficient to support an inference of causation); *Rasmussen v. Vineland Bd. of Educ.*, No. A-0038-13T3, 2014 N.J. Super Unpub. LEXIS 2929, at *9 (App. Div. Dec. 22, 2014) (finding four-month gap insufficient to establish inference of causation); *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n.*, 503 F.3d 217, 233 (3d Cir. 2007) (finding gap of three months between the protected activity and the adverse action, without more, cannot create an inference of causation to defeat summary judgment); *Flear v. Glacier Garlock Bearkins, a Div. of Enpro Ind., Inc.*, 159 Fed. Appx 390, 393 (3d. Cir. 2005) (holding termination two months after plaintiff's protected activity did not establish sufficient connection between plaintiff's complaints and termination to deny summary judgment for employer).

of "unusually suggestive of retaliatory motive" to support any inference of causation between any reports made by Plaintiff and any adverse action and, therefore, they cannot form the basis of her CEPA claim. *See id.*

Plaintiff is unable to show **any** temporal proximity—thus negating an inference of causal connection—between her alleged whistleblowing and any action, let alone an adverse employment action, taken by REM NJ. Accordingly, Plaintiff fails to make out a prima facie case of retaliation and the Trial Court's grant of summary judgment to REM NJ should be affirmed.

2. The Evidence In The Record, When Viewed As A Whole, Negates Any Inference Of Causation.

Considered together, numerous other facts in the record further weaken any inference that Plaintiff suffered negative consequences ***because*** she engaged in alleged whistleblowing complaints.

a. Plaintiff Was Treated The Same As Her Peers.

Plaintiff was treated the same as other similarly situated employees, and the complained-of actions taken by Defendant had an equal impact on employees who did not raise similar concerns. This significantly weakens any inference that Plaintiff suffered negative consequences because she engaged in alleged whistleblowing complaints. Plaintiff alleges in her Complaint that her regular day shift was eliminated as a result of her protected activity. (Appx 506-07 at ¶12). However, it is undisputed that the eliminations affected several of

Defendant's locations and was in the works before Plaintiff ever complained. (Appx 506-07 at ¶12; Appx 197 at ¶14; Appx 146). Plaintiff also alleges in her Complaint that she was improperly taken off the schedule around January 20, 2020, but it is undisputed that this situation affected numerous other employees whose fingerprints were also missing, and was the result of a routine audit. (Appx 507 at ¶14; Appx 128-32 at 178:14-197:1; and Appx 121, 127, 130 at 107:17-23; 176:17-19; 189:15-19); *see also Hancock v. Borough of Oaklyn*, 347 N.J. Super. 350, 361 (App. Div. 2002) (dismissing Plaintiff's CEPA claim because "plaintiffs failed to demonstrate that they were treated differently from any of the other officers in the department."). Given that numerous employees besides Plaintiff, including those who did not engage in whistleblowing, were similarly affected by the action she alleges were retaliatory, Plaintiff cannot show that her complaint was the cause.

b. REM NJ Offered Plaintiff Several Positions in an Attempt to Retain Her.

Further, any would-be inference of causation is undermined because, as Plaintiff admits, Defendant offered her four different positions in an attempt to retain her. (Appx 533-34 ¶¶46-51). This significantly weakens any inference that Plaintiff suffered negative consequences because of alleged whistleblowing complaints. Defendant offered Plaintiff three shifts – "3 to 11, 11 to 9, and per diem[,]" but "none of the shifts worked for [her]." (Appx 123 at 160:6-8, 161:1-

3, 161:18-24). Plaintiff wanted to work a day shift, so Defendant then offered her the day shift at the Burlington Day Program. (Appx 124 at 162:5-17; Appx 533 ¶¶47-48). Shortly thereafter, Plaintiff left the day shift at the Burlington Day Program due to car issues and voluntarily took per diem status. (Appx 533-34 ¶¶49-51). No reasonable person could infer from Defendant's conciliatory offers that it wanted to get rid of Plaintiff. *See Moticka v. Weck Closure Systems*, 183 Fed. Appx. 343, 353 (4th Cir. 2006) (explaining that where an employer gave an employee favorable treatment after the employee engaged in protected activity, "the inference of retaliatory motive is undercut"); *Ameen v. Merck & Co., Inc.*, 226 Fed. Appx. 363, 376 (5th Cir. 2007) (finding "positive reviews and discretionary bonuses in the year following [Plaintiff's protected activity] . . . is utterly inconsistent with an inference of retaliation.").

As the Trial Court noted,

> she doesn't even allege any conduct of the . . . defendants that was retaliatory because . . . she refused positions that were offered to her[,] . . . she refused plenty of opportunities that were given to her by this company[,] . . . ***they certainly weren't retaliating if they were offering her positions***.

(Appx 567, 578 at 13:13-14:9; 34:21-35:5) (emphasis added).

c. The Decision-Maker, Ms. McCarthy, Had No Knowledge of Plaintiff's Alleged Protected Activity.

Finally, the fact that Ms. McCarthy, who made the decision to eliminate the Erial day shift, was unaware of any protected complaints made by Plaintiff at the time she made that decision negates the idea that it could have been the result of Plaintiff's complaints. (Appx 197 ¶¶17-18).[6]

d. Plaintiff Cannot Point to Anyone Who Retaliated Against Her Due to Her Complaints, Which Negates Any Inference Of Causation.

Plaintiff argues the retaliation she faced consisted of the following: "nobody wanted to work with her[,] . . . no one would help her[,] . . . [and that she] was isolated at work." (AB at p. 20). Plaintiff fails to name these faceless individuals and points to ***no*** evidence on the record that suggests that any of these nameless individuals knew anything about her alleged whistleblowing activity. Since Plaintiff has not established those allegedly mistreating her knew about her alleged whistleblowing activity, she cannot establish causation.

Plaintiff further argues that "independent documented evidence" demonstrates that the employees at "one of [Defendant's] locations, Cross-Keys, [did] not want[] to work with [Plaintiff] because she discussed her

[6] *See also Young*, 385 N.J. Super. at 466 (dismissing retaliation claim where decision-maker had no knowledge of protected activity); *Michaels v. BJ's Wholesale Club, Inc.*, No. 2:11-05657, 2014 U.S. Dist. LEXIS 83980, at *11 (D.N.J. June 19, 2014) (same).

whistleblowing activity," leading to an inference "that Plaintiff's involvement in the investigation stopped her from being called back to work at this location." (AB at pp. 17-18, 20; Appx 364 at ¶60). The cited email, however, does not support Plaintiff's arguments. (Appx 503). The email lacks any reference to (1) Plaintiff's whistleblowing activities, (2) knowledge of Plaintiff's whistleblowing activities by any employee of the Defendant involved in the issue raised by the email; or (3) any adverse action by employees at that location. The email simply shows that Plaintiff stopped by a group home and ***initiated*** a conversation about an investigation at another group home. (Appx 503). In addition, the email clearly states that the employees knew nothing about Plaintiff being off the schedule. (Appx 503). Plaintiff cannot establish who allegedly mistreated her or whether they knew about her alleged whistleblowing activity, and therefore, she cannot establish causation.

Additionally, evidence on the record directly contradicts Plaintiff's inference "that Plaintiff's involvement in the investigation stopped her from being called back to work at [Cross-Keys]." (*Compare* AB at pp. 17-18 *with* Appx 100). To the contrary, Defendant offered Plaintiff "two open 3-11 shifts . . . at [C]ross [K]eys[,]" but Plaintiff "stated she cannot comm[i]t to either shift to be a permanent staff on Cross Keys." (Appx 100). Clearly, no inference of

causation can be found here where Defendant offered Plaintiff open positions – which she chose to decline. (Appx 100).

3. Plaintiff's Causation Arguments Are Not Supported By Record Evidence.

Plaintiff argues Defendant never told her she could return to work after removing her from the schedule, leading to an inference of retaliation. (AB at pp. 17-18). However, evidence on the record shows Plaintiff on March 2, 2020, Plaintiff texted a Program Director, "I am ONLY interested in maintaining the 16 hrs a month, in order for me to uphold my position as a sub/per diem." (Appx 535 at ¶59). On March 29, 2020, Plaintiff texted the same Program Director she could not take any hours because "my children are in remote learning and unfortunately I have no one to step up during my absence. I truly apologies [sic] if this caused any inconvenience…" (Appx 535 at ¶60). Nothing here supports a finding on an inference of retaliation. To the contrary, Plaintiff appears to have let a Program Director know she only wanted minimal and then no hours.

Plaintiff argues temporal proximity between her alleged January 8, 2020 whistleblowing activity and her subsequent removal from the schedule around January 20, 2020 and subsequent failure to contact her to return is highly suggestive. (AB at p. 17). Plaintiff admitted during oral argument that the removal from schedule ***was not*** an adverse employment action. (Appx 569-70 at 17:14-22) ("Plaintiff is not alleging that [removal from the schedule]

independently was an adverse employment action because it's clear that it happened to other employees. The adverse employment action takes place afterwards."). Moreover, temporal proximity between one and two months is not unusually suggestive. *See, e.g., Schummer*, 965 F. Supp. 2d at 499 (one month is not an unusually suggestive amount of time); *Flear*, 159 Fed. Appx at 393 (two months did not establish sufficient connection between plaintiff's complaints and termination to deny summary judgment for employer). Accordingly, no inference of retaliation is present here.

As shown above, none of Plaintiff's so-called "points" fail to demonstrate facts upon which a reasonable fact finder can infer a retaliatory motive.

B. Plaintiff Admits That Her Removal From The Schedule Due To A Fingerprinting Error Was Not An Adverse Employment Action.

Plaintiff does not dispute that the reason she was taken off the schedule in January 2020 was because of a fingerprinting issue. (Appx 533-35 ¶¶46-48, 54). Further, during oral argument, Plaintiff admitted that she is not basing her CEPA claim on Defendant's removal of Plaintiff off the schedule "because it's clear that it happened to other employees." (Appx 569 at 17:11-22). Plaintiff elaborated during oral argument that "[t]he adverse employment action [on which she bases her CEPA claim] takes place ***afterwards***." (Appx 569 at 17:14-22 (emphasis added)). Therefore, Plaintiff's removal from the schedule due to the fingerprinting issue is not an adverse employment action.

C. Plaintiff's Allegations That Other Staff Did Not Want To Work With Her Was Not An Adverse Employment Action.

Plaintiff further argues she was subjected to retaliation due to "a hostile environment where nobody wanted to work with her." (AB at p. 20). Plaintiff's complaints, however, are akin to "a bruised ego or injured pride on the part of the employee," which are ***not*** actionable employment consequences under CEPA. *See Klein*, 377 N.J. Super. at 46. Moreover, "generally, harassment alone is not enough." *Cortes v. Univ. of Med. & Dentistry*, 391 F. Supp. 2d 298, 312 (D.N.J. 2005) (*citing Shepherd v. Hunterdon Develop. Ctr.*, 336 N.J. Super. 395, 419 (App. Div. 2001) rev'd in part, 174 N.J. 1 (2002)).[7]

POINT III

THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT BECAUSE PLAINTIFF FAILED TO SHOW THAT REM NJ'S LEGITIMATE, NON-RETALIATORY REASONS WERE PRETEXTUAL.

A. REM NJ Proffered Legitimate, Non-Retaliatory Reasons For The Alleged Adverse Employment Actions.

The second prong of the CEPA analysis requires REM NJ to simply proffer a legitimate, non-retaliatory reason behind the employment actions that Plaintiff complains of as retaliatory. Here, Plaintiff alleges two retaliatory acts

[7] *See also Silvestri v. Borough of Ridgefield,* No. BER-L-848-19, 2023 N.J. Super. Unpub. LEXIS 15 (Super. Ct. L. Div. Jan. 3, 2023); *Frett v. City of Camden,* No. A-1043-14T3, 2016 N.J. Super. Unpub. LEXIS 1484 (Super. Ct. App. Div. June 28, 2016); *Hancock*, 347 N.J. Super. 350. Therefore, Plaintiff's alleged "hostile work environment" is not an adverse employment action.

in her Complaint: (1) her regular Monday through Friday shift with the company changed (as a result of the elimination of the Erial day shift); and (2) she was removed from the schedule on or around January 20, 2020 (as a result of the "fingerprint issue"). (Appx 018-19 ¶¶12, 16).

REM NJ had clear and legitimate non-retaliatory reasons for the two employment actions Plaintiff contests. Regarding the elimination of the Erial location day shift, REM NJ's Executive Director Ms. McCarthy determined that multiple locations did not require the presence of a full-time staff member because their residents were not at the home during the day. (Appx 197 at ¶13). The process of eliminating those positions started months prior to the decision being announced to the staff and involved business plans and applications to relevant licensors. (Appx 197 at ¶16).

Regarding Plaintiff's removal from the schedule on or around January 20, 2023, New Jersey law required REM NJ to temporarily remove all employees from the schedule whose valid fingerprint records were revealed to be missing by a routine audit. (Appx 149 at 25:16-25; Appx 121, 127, and 130 at 176:17-19; 189:15-19; 107:17-23). REM NJ continued to pay Plaintiff during the time she was off the schedule despite being unable to work. (Appx 149 at 28:12-14). Accordingly, REM NJ is able to clearly articulate legitimate, non-retaliatory reasons for both of the actions that Plaintiff alleges to be retaliatory, thus putting

the burden—which she cannot meet—back on the Plaintiff.

Notably, Plaintiff does not dispute the legitimate non-retaliatory reasons REM NJ provided for eliminating her day shift at Erial and for removing her from the schedule for fingerprint record issues. (Appx 532-53 ¶¶41-56). Plaintiff does not dispute that she was offered a number of other positions or that the reason she was taken off the schedule was because of a fingerprinting issue. (Appx 533-34 ¶¶46-48, 54).

B. Plaintiff Failed To Show That REM NJ's Legitimate, Non-Retaliatory Reason For The Employment Actions Were Pretext For Retaliation.

Plaintiff presents **no** evidence to demonstrate that the legitimate, non-retaliatory reasons for Defendant's business actions were a pretext for retaliation. Accordingly, the Trial Court's grant of summary judgment to REM NJ on Plaintiff's CEPA claim should be affirmed.

POINT IV

IN THE ALTERNATIVE, THIS COURT SHOULD AFFIRM JUDGMENT IN FAVOR OF DEFENDANT BECAUSE PLAINTIFF'S LIES PERPETRATE A FRAUD ON THIS COURT.

A fraud on the court occurs "where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the

presentation of the opposing party's claim or defense." *E.L.C. v. D.M.F.*, No. A-3033-20, 2022 N.J. Super. Unpub. LEXIS 1955, at *13 (Oct. 21, 2022) (*quoting Triffin v. Automatic Data Processing, Inc.*, 394 N.J. Super. 237, 251 (App. Div. 2007) (*quoting Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989))). Fraud on a court does not require reliance. *Triffin*, 394 N.J. Super. 237 at 251. Separate and distinct from court rules and statutes, courts possess an inherent power to sanction an individual who abuses the legal process by committing a fraud on the court. *Id.* (*citing Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991)). A court may exercise inherent power to sanction a party when she has "acted in bad faith, vexatiously, wantonly or for oppressive reasons." *Id.* (citation omitted). The need for sanctions is heightened when the misconduct relates to the pivotal or central issue in the case.[8]

Defendant has demonstrated by clear and convincing evidence that Plaintiff has acted in bad faith by lying about her convictions not only on her job application, but also in her repeated and false answers to interrogatories

[8] *See, e.g., Perna v. Electronic Data Sys., Corp.*, 916 F. Supp. 388, 398 (D.N.J. 1995) (finding relevant "the relationship or nexus between the misconduct drawing the dismissal sanction and the matters in controversy in the case."); *Gaskill v. Abex Corp*., 2012 N.J. Super. Unpub. LEXIS 2694, *23 (App. Div. Dec. 11, 2012) (finding that where plaintiff's "deceptions and lies pierce the heart of his cause of action" such "deliberate concealment and outright lies during the discovery process richly warrant imposition of the ultimate sanction of dismissal of his complaint with prejudice.").

since this litigation started. Plaintiff's deposition is replete with examples of her feigned inability to answer. (Appx 530-32 ¶39). Her continued lies and perjury go to the lynchpin issues in this case—Plaintiff's ability to work in the job at issue here—and constitute a pattern of misconduct that amounts to fraud on this Court that warrants the sanction of default judgment. It would be impossible for a trier of fact to fairly adjudicate this matter when Plaintiff repeatedly and unabashedly continues to lie.[9] Defendant respectfully requests that the Court affirm judgment in favor of Defendant in light of Plaintiff's misconduct, lies and fraud.

[9] *See Gaskill*, 2012 N.J. Super. Unpub. LEXIS 2694 at *23 (finding sanctions of dismissal and permitting defendants to move for counsel fees and costs appropriate where plaintiff's "deceptions and lies have irretrievably obscured the truth in this case); *Qantum Communications Corp. v. Star Broadcasting, Inc.*, 473 F.Supp.2d 1249, 1270-76 (S.D. Fla. 2007) (finding that sanctions of default judgment and award of reasonable attorney fees and costs were warranted for defendants' pattern of misconduct during suit); *Chemtall, Inc. v. Citi-Chem, Inc.*, 992 F.Supp. 1390, 1410 (S.D.Ga. 1998) (entering default judgment against defendant upon finding by clear and convincing evidence that he had engaged in abusive conduct by repeatedly lying under oath at his deposition and producing misleading documents in an effort to hinder plaintiff's debt collection efforts, and stating that a lesser sanction would not suffice).

CONCLUSION

For all of the foregoing reasons, Plaintiff's appeal should be denied and the Trial Court's decision granting Defendant's Motion for Summary Judgment should be affirmed.

Respectfully submitted,

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