SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

COLLEEN SCHEUER, Plaintiff/Appellant, vs. RMTS, LLC and CARMINE FRANCA, Individually, Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-000272-23 On Appeal from the Superior Court of New Jersey, Law Division, Hudson County DOCKET NO.: HUD-L-4383-21 Anthony V. D'Elia, J.S.C. Sat Below

BRIEF OF PLAINTIFF/APPELLANT, COLLEEN SCHEUER

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PRELIMINARY STATEMENT

The trial court erred in granting Defendant/Respondents' motion for summary judgment, thereby dismissing Plaintiff/Appellant's Complaint in its entirety. Plaintiff/Appellant, Colleen Scheuer (hereinafter "Plaintiff" or "Ms. Scheuer") was formerly employed by Defendant/Respondent, RMTS, LLC (hereinafter "RMTS" or "Defendant"). Defendant unlawfully terminated Ms. Scheuer in direct response to her request to work from home because of the Covid-19 pandemic. As a result, Plaintiff filed suit against RMTS and Carmine Franca, individually[1] asserting causes of action for violation of the New Jersey Laws Against Discrimination ("NJLAD") and common law retaliation.

By way of background, fear and worry stemming from the COVID-19 pandemic were circulating in the early weeks of March 2020. In multiple text messages to her direct supervisor, sent on March 12th and 13th, Ms. Scheuer expressed having "anxiety" relating to the COVID-19 pandemic and noted the general fear and anxiety in the RMTS office as well.

Plaintiff was particularly concerned by working in person, as well as using public transportation to travel from New York City to the RMTS office located in

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[1] Claims against Defendant Franca were dismissed with prejudice and Plaintiff does not seek appeal from that aspect of the decision.

Jersey City, because she reasonably believed she was at an increased risk of severe illness from COVID-19 due to a history of obesity. Continuing to mandate its employees work in person contravened public policy aimed at protecting public health and safety, as well as mitigating the spread of COVID-19.

As a result, by way of email dated March 13, 2020, Ms. Scheuer wrote, **"Dear Leadership, Since we have the ability to efficiently work remotely, requiring us to come into the office during a pandemic unnecessarily risks our health."** In immediate response, Defendant terminated Ms. Scheuer, stating, "Thank you for your email and thank you for your service at RMTS. Be safe and good luck in your future." This was not only a rash decision, but an unlawful one, in violation of the NJLAD and constituted common law retaliation.

At the close of discovery Defendant moved for summary judgment, which the trial court granted. The trial court supported this decision with a disjointed opinion on the record which plainly overlooked the requisite caselaw and facts presented. More pointedly that decision is erroneous because:

1) Plaintiff identified various sources of public policy, forming the basis of her common law retaliation claim pursuant to Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58 (1998). Yet the trial court narrowly interpreted public policy, placing greater emphasis on the trial court's own recollections of the Covid-19 pandemic, rather than the multiple sources

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of public policy which mandate a safe and healthy work environment, underpinning Plaintiff's request to work from home; and.

2) Plaintiff suffered from anxiety and obesity, both of which qualify as "disabilities" as defined by the NJLAD. In finding otherwise, the trial court failed to apply the broad legal analysis warranted under the NJLAD. The trial court also refused to view facts in a light most favorable to Plaintiff.

For these reasons, as detailed at length below, summary judgment was improper, and the trial court must be reversed.

PROCEDURAL HISTORY

On or about November 11, 2021, Plaintiff's counsel filed a Complaint and Jury Demand in the Superior Court of New Jersey, County of Hudson, Law Division. Pa001-9. The Complaint asserted a claim for common law retaliation. Id. On or about February 11, 2022, Defendant filed a motion to dismiss the Complaint in lieu of an Answer wherein they argued the Plaintiff failed to identify any specific law, regulation or clear mandate of public policy to support a Pierce v. Ortho, supra, claim. Pa010. Plaintiff cross-moved to file an Amended Complaint. On May 13, 2022, Judge Veronica Allende, denied Defendant's motion to dismiss for failure to state a claim, and by Order of the same date granted Plaintiff's motion to file an Amended Complaint. Pa013-16.

Plaintiff thereafter filed an Amended Complaint on May 18, 2022. Pa017. Plaintiff's Amended Complaint added causes of actions for disability discrimination, failure to accommodate and failure to engage in the interactive process, all in violation of the New Jersey Laws Against Discrimination. Id. Defendants filed an Answer to same on August 24, 2022. Pa029.

On or about June 12, 2023, Defendant filed a Motion for Summary Judgment. Pa043. Plaintiff filed opposition to the Motion for Summary Judgment. Pa163-572. A Reply Brief was thereafter filed by Defendant. Judge Anthony D'Elia heard oral argument of the motion on August 14, 2023, at which time the trial court granted Defendant's Motion for those reasons set forth on the record. T1-46.[2]

Plaintiff's counsel filed a Notice of Appeal on September 27, 2023. Pa578. On February 7, 2024, the Appellate Division entered a Scheduling Order. Plaintiff filed a motion for a thirty (30) day extension to file the Appellant's Brief. Pa585. The request for an extension was granted by electronic notice.

STATEMENT OF FACTS

Plaintiff's employment with RMTS

Plaintiff began employment with RMTS in August 2018 as a claim's analyst, determining whether medical insurance claims were payable. Pa199, PSOF ¶1. In

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[2] In reference to the transcript of August 14, 2023.

this role, reported directly to Jennifer Iannotti and Ronald Geck. Id., PSOF¶2 Plaintiff was a good employee, who never received any written warnings during her employment with RMTS. Id., PSOF ¶5 & 6.

Plaintiff's Health

Plaintiff is a 5'9" female with a weight ranging between 250 and 350 pounds. Pa200, PSOF ¶8. Plaintiff's Body Mass Index (BMI) and obesity was something "that came up a lot in conversation" at RMTS. Id., PSOF ¶9. Plaintiff's weight was compounded by a back injury she sustained in 2018, which required surgery. Id., PSOF 10 The injury led to paralysis in her right leg and foot nerve, referred to as "drop foot". Id. In 2018, Plaintiff saw specialists with regard to her back injury and losing weight, testifying that "those things sort of intersected." Id. Since leaving her employment with RMTS, Plaintiff began treatment for her BMI which includes Semaglutide injections on a weekly basis. Id., PSOF ¶12. Plaintiff was diagnosed with high blood pressure sometime prior to 2018. Pa201, PSOF ¶14 Plaintiff had a history of being more susceptible to respiratory infections, flu and sinusitis because of her underlying health conditions. Id., PSOF ¶15.

Plaintiff was initially diagnosed with generalized anxiety sometime in or around 2008, when she was a teenager. Id., PSOF ¶16. Plaintiff treated for anxiety and grief between 2018 and 2019 at Soho MD. Id., PSOF ¶17. After her termination from RMTS Plaintiff treated with psychiatrist, Dr. Eran Feit for depression, anxiety,

sleeplessness and worry. Id., PSOF ¶18. Dr. Feit prescribed Plaintiff medication relating to same. Id. Plaintiff testified that she disclosed that fact that she suffered from anxiety, and previously treated for same, to Ms. Iannotti. Id., PSOF ¶19.

COVID-19 Pandemic

As of January 30, 2020, the World Health Organization ("WHO") declared COVID-19 a "Public Health Emergency of International Concern." Pa201, PSOF ¶20. In response to same, by way of Executive Order No. 102 dated February 3, 2020, New Jersey Governor Philip Murphy established a Coronavirus Task Force. Id., PSOF ¶21. In this Executive Order, Governor Murphy described COVID-19 as a severe, potentially fatal respiratory illness that could result in Pneumonia, acute respiratory distress syndrome, septic shock and multi-organ failure. Id.

In February 2020, the Centered for Disease Control and Prevention ("CDC") issued Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019. Pa202, PSOF ¶22; Pa464. Therein the CDC provided in part, "All employers need to consider how best to decrease the spread of acute respiratory illness and lower the impact of COVID-19 in their workplace…" Pa202, PSOF ¶22.

By way of Executive Order No. 103, dated March 9, 2020, Governor Murphy declared a State of emergency and public health emergency. Id., PSOF ¶23. That Executive Order provided in part,

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> "WHEREAS, Coronavirus disease 2019 ("COVID-19") is a contagious, and at times fatal, respiratory disease caused by the SARS-CoV-2 virus; and
>
> ***
>
> WHEREAS, on January 30, 2020, the International Health Regulations Emergency Committee of the World Health Organization declared the outbreak a public health emergency of international concern, which means an extraordinary event which is determined to constitute a public health risk to other States through the international spread of diseases and to potentially require a coordinated international response," and thereafter raised its global risk assessment of COVID-10 from "high" to "very high";
>
> ***
>
> WHEREAS, it is critical to prepare for and respond to suspected or confirmed COVID-19 cases in New Jersey, to implement appropriate measures to mitigate the spread of COVID-19, and to prepare in the event of an increasing number of individuals requiring medical care or hospitalization; and
>
> ***
>
> WHEREAS, the spread of COVID-19 within New Jersey constitutes an imminent public health hazard that threatens and presently endangers the health, safety, and welfare of the residents of one or more municipalities or countries of the State..."

By way of Executive Order No. 103, on March 9, 2020 Governor Murphy declared COVID-19 a Public Health Emergency and State of Emergency. Pa203, PSOF ¶24. The Order further declared that the International Health and Regulations Emergency committee of WHO declared the outbreak a public health emergency requiring an international response. Id.

On March 11, 2020, WHO declared Covid-19 a global pandemic. PSOF 25 On March 13, 2020, the President of the United States declared a national state of emergency. Pa203, PSOF ¶26.

On March 16, 2020, Governor Murphy issued Executive Order 104 which suspended in-person K-12 education, suspended operations of certain business "where large numbers of individuals gather in close proximity" and put into place certain social distancing measures. Id., PSOF ¶27. This Executive Order provided in part,

> "WHEREAS, social mitigation strategies for combatting COVID-19 requires every effort to reduce the rate of community spread of the disease; and
>
> ***
>
> WHEREAS, to mitigate community spread of COVID-19, it is necessary to limit the unnecessary movement of individuals in and around their communities and person-to-person interactions in accordance with CDC and DOH guidance." Id.

On March 19, 2020, Governor Murphy issued two more Executive Orders, announcing changes to upcoming elections due to Covid-19 and enacting a moratorium on removal of individuals due to evictions or foreclosures, directly relating to the Covid-19 pandemic. Id., PSOF 28.

On March 21, 2020, one week after Plaintiff was terminated, Governor Murphy issued his stay-at-home Executive Order (referred to herein as the "Stay at Home Order"). Pa204, PSOF ¶29.

Plaintiff first learned of Coronavirus in January or February 2020. PSOF 30 In the early weeks of March 2020 there was discussion in the RMTS office about Covid-19, including the exchange of news reports surrounding Covid-19. PSOF 31 According to Plaintiff by approximately March 13th, there was a great deal of anxiety in the workplace surrounding Covid-19, which was expressed in-person and via text message. Id., PSOF ¶31.

Considering her medical history, Plaintiff believed she was in a class of people at risk of severe illness relating to Covid-19, because of her obesity. Id., PSOF ¶32 Plaintiff formed this belief based upon news reports that certain high-risk categories included obesity. Id. In February and early March of 2020, news outlets including USA Today, CNN and the NY Times, were reporting that certain high-risk conditions were associated with becoming very sick or dying from Covid-19. Those high-risk conditions included but were not limited to obesity. Id., PSOF ¶33. In "The Urgent Questions Scientists are Asking About Coronavirus," NYTimes.com reported "Along with getting a grasp on the level of severity is figuring out susceptibility, or who is at most risk for injection. The data so far indicates that this would include older adults, the obese and people with underlying medical conditions." Pa534. In another article from NYTimes.com dated February 29, 2020, it was reported that data from China indicated the people at highest risk relating to Covid-19 included "those with heart disease, chronic lung disease, diabetes and obesity. Pa547. In

reporting "Who is at most risk of becoming very sick or dying", an article from USAtoday.com provided that "according to the CDC" high risk conditions included severe obesity." Pa483. The CDC has reported that obesity worsens the outcomes from Covid-19. Pa558.

Plaintiff was concerned for public health, public safety, as well as her own personal health and safety, in light of the Covid-19 pandemic. Pa207, PSOF ¶44. Plaintiff testified as to her serious concerns about continuing to work in person at RMTS in light of the Covid-19 pandemic stating,

> "At that time, there were a lot of reports from various news sources and health organizations that I was in a class of people at risk. So maybe this sounds extreme and we have to remember the time it was extreme. I wasn't scared of contracting COVID. I was scared of dying of COVID. The most innate human fear one can have. And I expressed that concern via text to my direct report, Jennifer Iannotti, who at the time, was working remotely to protect her health." Pa205, PSOF ¶38.

Plaintiff directly expressed this fear and anxiety to her direct supervisor. On March 12, 2020, text messages were exchanged in a group text between Plaintiff, Ms. Iannotti, Shay Woods and Candice Leger. Pa205-206, PSOF ¶39. Defendant ***admitted*** to the exchange of these texts.

- In a text from Ms. Iannotti asked, "How is it going?" to which Plaintiff responded in part "…***trying to manage my own coronavirus anxiety***". Id.

- In that same group text chain Plaintiff again mentioned her anxiety relating to Covid-19 stating, "***I'm having anxiety***". Id.
- In this text conversation Ms. Iannotti asked "Have you all spoken to [Geck] about this? Do you need me to? I am happy to do so. I can make your concerns known. I just need to know them." Plaintiff responded, "***We are all very scared and anxious***." Id.

Plaintiff also engaged in a private text communication with Ms. Iannotti on or about March 12, 2020. Pa206-207, PSOF ¶41.

- Plaintiff relayed "I have this dull chest pain from the anxiety I think lol." Id.
- Plaintiff relayed, "so stressed and I know a lot of it is irrational" Id.
- In response Ms. Iannotti stated, " I understand. I mean all the public schools are still open in the city. That has to mean something, right? I don't know." Id.
- Plaintiff stated in this text communication, "if the cases increase like they are, I think the rational to not work from home has to be more convincing." Id.
- In this text communication Ms. Iannotti encouraged Plaintiff to be more communicative about her concerns regarding COVID 19. Id.

- Plaintiff stated, "It's rising stress and anxiety." Id.
- Plaintiff stated, "we will be more communicative and proactive and encourage others to do so as well" to which Iannotti responded, "I think that is a good idea." Id.

Plaintiff considered her communications with her direct supervisor, Ms. Iannotti, as an official request for an accommodation to work from home in light of the Covid-19 pandemic[3]. Pa201, PSOF ¶43. No one from RMTS followed up with her as to these express concerns. Id., PSOF ¶43 & PSOF ¶45.

At 4:19 PM on March 13, 2020, Plaintiff sent an email to RMTS leadership, stating "Since we have the ability to efficiently work remotely requiring us to come into the office during a pandemic unnecessarily risks our health." Id., PSOF ¶46. Although Plaintiff authored the email, it was collaboratively sent on behalf of Plaintiff and five (5) other RMTS employees- Britney Randolph, Candice Leger, Fenny O'Hara, Joana Martins and Shay Woods. Id., PSOF ¶47.

Ms. Iannotti testified that she interpreted this March 13th email as "unclear," an "ultimatum" or a "demand." Pa208, PSOF ¶49. However, Ms. Iannotti did nothing to follow up to gain clarity as to the intention of this email. Id. Geck

[3] The trial court found it to be as well. T34:9-21.

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interpreted this email as relaying a concern for health and wellbeing, but did not attempt to reach out to Plaintiff to understand the reasoning. Id., PSOF ¶50.

Plaintiff relayed her concerns to her employer and expected an engagement process that "never occurred." Id., PSOF ¶51. Rather, approximately one hour and thirty-four minutes later, at 5:53PM on March 13, 2020, Carmine Franca, the Vice President of Underwriting for RMTS since 2018, responded to Plaintiff's email terminating the employment of Plaintiff, as well as all other signatories of that email. Id., PSOF ¶52.

RMTS made no attempt to accommodate Plaintiff in response to her email. Id., PSOF ¶53. Mr. Franca did not follow up with Plaintiff to understand the purpose of her email or why Plaintiff felt continuing to come into the office unnecessarily risked her health. Pa209, PSOF ¶54.

On March 14, 2020, Plaintiff emailed Mr. Geck and Ms. Iannotti in follow up to the March 13, 2020 email of Mr. Franca, stating,

> Ron and Jen,
>
> Carmine's response can be read as a termination notice. Is that interpretation correct?
>
> For reasons he does not articulate, he seems upset that six female employees were concerned about contracting COVID-19 one hour after the President declared a National Emergency.

> My remote login which I had previously tested and worked effectively yesterday appears to have been disabled last night after Carmine responded to us.
>
> I have no intention of abandoning my responsibilities. **Requiring us to commute into the office when it is clear in the attached email stream that we can easily work remotely, is causing emotional distress and unnecessarily risking our health.** Pa364 (Emphasis added).

Mr. Geck responded to Plaintiff's email of March 14th that same day, stating,

> Colleen,
>
> Yes it is a termination. The company determined it is in its best interests to continue working in the office. There are contingency plans in the event the building or a government order eliminated our ability to report to the office. Your email yesterday is interpreted as an insubordinate demand that is inconsistent with the decision to continue working in our building unless and until we are told otherwise. Pa364.

Working from home would not pose an undue burden upon Defendant.

As of March 12, 2020, Plaintiff had the capability to work from home. Pa210, PSOF ¶63. As of March 12, 2020, RMTS was ready to work remotely should the need arise. Id., PSOF ¶64. Plaintiff testified "our jobs were done through emails and virtual software, so they had the ability to work from home at the time of her request". Pa211, PSOF ¶65. Working from home would not create an undue hardship on Defendant. Id., PSOF ¶66.

Reemployment after termination

The other signatories to the March 13th email were offered reemployment by RMTS within a week of termination. Pa211, PSOF ¶67. Plaintiff was not offered

reemployment at the same time the other women were contacted. Id. Plaintiff only received an offer of reemployment from RMTS after she had retained counsel in this matter. Id., PSOF ¶68. Plaintiff did not interpret the offer of reemployment as unconditional, because RMTS insisted that she apologize for her behavior should she wish to become reemployed. Id. Mr. Geck claimed that the other women were offered reemployment because after speaking with Ms. Randolph, Ms. Leger, Ms. O'Hara and Ms. Woods they indicated that Plaintiff drafted the March 13th email, the language of which did not comport to what they agreed to and they did not agree with the wording and substance of that email. Id., PSOF ¶69. However, at least according to Ms. Woods and Ms. Randolph, they confirmed that the March 13th email was a collective effort. Id., PSOF ¶70. Ms. Woods nor Ms. Randolph ever suggested to Mr. Geck that they did not consent to the wording or the substance of that email. Id.

LEGAL ARGUMENT

POINT I

SUMMARY JUDGMENT SHOULD NOT BE GRANTED WHERE, AS HERE, THERE ARE GENUINE ISSUES OF MATERIAL FACT

Summary judgment is not appropriate unless there is "no genuine issue as to any material fact." R. 4:46-2(c). In deciding a motion for summary judgment, the court must review any factual disputes, and draw all reasonable inferences from the record in favor of the non-moving party. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 536 (1995). The "pleadings, depositions, answers to interrogatories, and admissions on file, [and any] affidavits" must show that there is no "genuine issue as to any material fact challenged" in order to warrant the "stringent remedy" of summary judgment. Shanley & Fisher, P.C. v. Sisselman, 215 N.J. Super. 200, 211 (App. Div. 1987). Further, "the papers supporting the motion are [to be] closely scrutinized, and the opposing papers [are to be] indulgently treated." Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74-75 (1954). "If there is the slightest doubt as to the existence of a material issue of fact, the motion should be denied." Shanley & Fisher, P.C., supra, 215 N.J. Super. at 211. In short, summary judgment should be denied unless the right thereto appears so clearly as to leave no room for controversy. Id.

A court must not substitute itself for the fact-finding role of the jury. All factual determinations, and in particular, all "[c]redibility determinations, will continue to be made by a jury and not the judge." Brill, supra, 142 N.J. at 540. It is equally well-established that when a case turns upon a party's intent or state of mind, summary judgment is particularly inappropriate. "[I]ssues hinging upon a party's mental state are not appropriate for resolution by way of summary judgment." J.L. v. J.F., 317 N.J. Super. 418, 433 (App. Div. 1999) (citation omitted); see also Carmichael v. Bryan, 310 N.J. Super. 34, 47 (App. Div. 1998) ("a court should be 'particularly hesitant' to apply the summary judgment model when dealing with a 'subjective element[] such as intent") (internal citation omitted). See generally Pressler, Current N.J. Court Rules Comment 4:46-2 (motion for summary judgment "should ordinarily not be granted where an action or defense requires determination of a state of mind or intent"). For this reason, in employment cases involving claims of retaliation, summary judgment is almost never appropriate. As the Third Circuit stated in reversing a grant of summary judgment, "summary judgment is in fact rarely appropriate" in employment cases because they center on the employer's motivation. Marzano v. Computer Science Corp., 91 F.3d 497, 509 (3d Cir. 1996). Applying this requisite standard of review herein, summary judgment was clearly improper.

POINT II

PLAINTIFF IDENTIFIED CLEAR PUBLIC POLICY IN SUPPORT OF HER COMMON LAW RETAILIATION CLAIM (T35:3-45:6)

Plaintiff engaged in protected activity when she complained to Defendant that "requiring us to come into the office during a pandemic unnecessarily risks our health." There are various sources of public policy- from broader mandates of health and safety in the workplace, to more pointed directives aimed at protecting the public and limiting the spread of Covid-19 which prompted Plaintiff's request. Despite this overwhelming support the trial court erroneously held there was no identifiable source upon public policy which formed the basis of Plaintiff's common law retaliation claim.

In the seminal case of Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58 (1998), the New Jersey Supreme Court held that, "an employee has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy."

There is an unequivocal public policy mandating employers provide a safe and healthful place of employment to their employees. Violation of this mandate has been held to be an adequate foundation for a Pierce wrongful-discharge claim. See Cerracchio v. Alden Leeds, Inc., 223 N.J. Super. 435 (App.Div. 1988); see also Mehlman v. Mobil Oil Corp., 153 N.J. 163 (1998). This policy compelling

employers to provide a safe and healthy workspace is grounded in case law, as well as State statutes.

Statutes and Regulations

N.J.S.A. 34:6A-3 requires employers within the State of New Jersey to provide such a safe and healthy workplace for their employees. More specifically,

> Every employer shall furnish a place of employment which shall be reasonably safe and healthful for employees. Every employer shall install, maintain and use such employee protective devices and safeguards including methods of sanitation and hygiene and where a substantial risk of physical injury is inherent in the nature of a specific work operation shall also with respect to such work operation establish and enforce such work methods, as are reasonably necessary to protect the life, health and safety of employees, with due regard for the nature of the work required.

N.J.S.A. 34:5A-33(a) likewise provides that every employer "provide each of its employees with employment and a place of employment which are free from recognized hazards which may cause serious injury, physical harm or death."

COVID-19 guidelines and Executive Orders

Our Supreme Court has recognized that the COVID-19 pandemic is an extraordinary situation justifying extraordinary responses. See generally New Jersey Republican State Comm'n v. Murphy, 243 N.J. 574, 580-81 (2020) (upholding the constitutionality of the COVID-19 Emergency Bond Act because the requirement that borrowing must "meet an emergency" extended to "true disaster" of a pandemic). Our Appellate Division has acknowledged a "clear national and

state public policy to combat the health threats posed by COVID-19." See In re City of Newark, 469 N.J. Super. 366, 382 (App. Div. 2021)(Relying on this public policy in supporting a municipality's authority to implement a vaccination mandate.)

There is guidance from the CDC and multiple Executive Orders that COVID-19 is hazardous to human health, imposing upon employers and the public at large to take actions to mitigate the spread. Plaintiff raised express concerns that continuing to require employees to come into work in light of COVID-19 posed considerable health risks, and irresponsibility flouted concerted efforts to mitigate the spread of COVID-19. At the time of the complained conduct there was scientific consensus that exposure to COVID-19 was hazardous to human health. It was also known that one of the best defenses in slowing the spread of COVID-19 was social distancing.

New Jersey Governor Philip Murphy issued a number of Executive Orders both before and after Plaintiff complained which are informative on this issue. These Executive Orders accepted CDC guidelines, emphasized the significant health threats posed by COVID-19 and emphasized the need to take every effort to mitigate the spread of COVID-19.

As of January 30, 2020, Governor Murphy declared COVID-19 as a "Public Health Emergency of International Concern." On February 3, 2020, Governor Murphy issued Executive Order No. 102, establishing a Coronavirus Task Force.

The Coronavirus was described by Governor Murphy as a severe, potentially fatal respiratory illness that could result in Pneumonia, acute respiratory distress syndrome, septic shock and multi-organ failure. The Center for Disease Control and Prevention ("CDC") identified that there were individuals with certain medical conditions who would be more likely to get severely ill from COVID-19, requiring hospitalization, intensive care, a ventilator to help them breathe and/or death.

By way of Executive Order No. 103, on March 9, 2020 Governor Murphy declared COVID-19 a Public Health Emergency and State of Emergency. The Order further declared that the International Health and Regulations Emergency committee of WHO declared the outbreak a public health emergency requiring an international response.

By March 13, 2020, COVID-19 had spread worldwide and was classified as a pandemic. Per the website, on March 11, 2020 statement from the WHO reads,

> "In the past two weeks, the number of cases of COVID-19 outside China has increased 13-fold, and the number of affected countries has tripled. There are now more than 118,000 cases in 114 countries, and 4,291 people have lost their lives, Thousands more are fighting for their lives in hospitals. In the days and weeks ahead, we expect to see the number of cases, the number of deaths, and the number of affected countries climb even higher. WHO has been assessing this outbreak around the clock and we are deeply concerned both by the alarming levels of spread and severity, and by the alarming levels of inaction. We have therefore made the assessment that COVID-19 can be characterized as a pandemic."

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On March 16, 2020, Governor Murphy issued Executive Order 104 which suspended in-person K-12 education, suspended operations of certain business "where large numbers of individuals gather in close proximity" and put into place certain social distancing measures. Again, Governor Murphy reiterated the serious health risks associated with COVID-19. On March 21st, just days after Plaintiff's termination, Governor Murphy issued Executive Order No. 107, the Stay-at-Home Order. This Stay at Home Order expanded the shut down and provided, in part, that "all businesses ...in the State, whether closed or open to the public, must accommodate their workforce, wherever practicable, for telework or work from home arrangements" and "should make their best efforts to reduce staff on site to the minimal number necessary to ensure that essential operations can continue."[4]

Undoubtedly, there was a public policy favoring strong COVID-19 mitigation measures during the height of the pandemic. Based upon what was being reported to the public, the CDC guidance and the aforementioned Executive Orders, Plaintiff held a reasonable belief that Defendants were required to implement safety protocols not only to protect their employees, but to protect the health, safety and welfare of the public at large.

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[4] RMTS purportedly went remote at some point after this March 21, 2020 Executive Order. Nonetheless, Plaintiff was not contacted to return to work. Pa211, PSOF ¶67-68.

The overwhelming weight of evidence demonstrates an applicable public policy. Yet, the trial court focused solely on the fact that Stay-at-Home Order, mandating broad sweeping stay-at-home directives, was not issued until after Plaintiff's email and therefore arguably irrelevant to establish public policy. This is incorrect. According to our case law, the Stay-at-Home Order is a relevant and proper consideration for this Court.

The Supreme Court in Mehlman v. Mobile Oil Corp provided the analysis for identifying the source and scope of a clear mandate of public policy. In reversing the grant of summary judgment, the Supreme Court held that plaintiff had sufficiently established a clear mandate of public policy that he reasonably believed would be violated. This was so, even though at the time of plaintiff's underlying objections there was no statute or governmental regulation that expressly prohibited the conduct in question. There, the Supreme Court in Mehlman drew support from a variety of sources, including regulations that came into effect after plaintiff's complaint, to find a source of public policy. The Court recognized that sources and parameters of public policy are "not susceptible to hard and fact rules", but rather "public policy has been defined as that principal of law which holds that no person can lawfully do that which has a tendency to be injurious to the public or against the public good. The term admits of no exact definition…Public policy is not concerned with minutiae, but with principles." Melhman, 153 N.J. at 187 (internal quotations

omitted). The Melham Court added that while we look generally to laws rules, regulations and judicial opinions as sources for public policy, those sources are not exclusive. Rather, "a salutary limiting principle is that the offensive activity must pose a threat of public harm." Id. at 188.

Application of the Mehlman analysis is appropriate herein, because there is significant evidence demonstrating that exposure to COVID-10 is hazardous to human health. Plenty of guidance already existed by the time of Plaintiff's email, from the CDC, WHO, as well as national and state declarations, evidencing a commitment to minimizing exposure to COVID-19 (even before a stay-at-home Order was in place in New Jersey).

Significantly concerned by the health and safety risked posed by COVID-19, and keenly aware of the massive efforts to slow the spread of COVID-19 already underway, Plaintiff wrote her superiors, on behalf of herself and other coworkers, stating "requiring us to come into the office during a pandemic unnecessarily risks our health." Defendants admit that Plaintiff was immediately and directly fired as a direct result of this email. The refusal to permit working from home, coupled with her termination in retaliation for voicing said concern, violated "a clear national and state public policy to combat health threats posed by COVID-19."

Based upon what was being reported to the public, CDC guidance and various executive orders, Plaintiff held believed that continuing to require its workforce to

come into the office posed serious risks to the health, safety of welfare, not only to herself, but other RMTS employees, and ultimately the general public.

Despite this overwhelming support the trial court held there was no identifiable source upon public policy which formed the basis of Plaintiff's common law retaliation claim. Not only did the trial court ignore numerous sources of public policy, but it spent significant time focusing instead on its own experiences and anecdotal recollections. The trial court focused extensively on the fact that the courthouse and schools were still open on the day Plaintiff sent her email request. T38:12-25. (albeit they would both go fully remote within just days of Plaintiff's request to work from home). "On January 30th there's a public health emergency declared. I know this because I was in, I was in St. John in February and everybody was still going to work and everybody was still going on a plane and I caught COVID in that airport when everybody was on top of each other down in St. John. And that was towards the end of February, early March." T9:18-10:4. "So there's a public health emergency declare, but no businesses were closed down. The businesses were operating. The courthouse was open. We were doing trials in January." Id. "If you Google it you'll find that the courthouses were not officially shut down and working remotely until after these people were fired, not before, just for the record. That's not in the motion papers, but I looked that one up." T10:1-14.

In so holding the trial court 1) ignored broader public policy beyond just a Stay-at-Home Order; 2) failed to properly consider the relevance of the impending Stay-at-Home Order; and 3) erred in deferring to its own personal experiences and anecdotal references. As stated above, there are various sources of public policy, beyond the Stay-at-Home Order, which mandate a healthy and safe workplace. The trial court did not cite them. Even if the Stay-at-Home Order was imminent but not enacted, it is still a viable source of public policy. Seven days after Plaintiff sent her email this Order mandated non-essential business closed and RMTS went remote. In light of the declared states of emergency, CDC guidelines, new reports and prior Executive Orders, Ms. Scheuer reasonably suspected that a work from home mandate was extremely imminent. RMTS did not call Plaintiff back to work as a result. As recognized by the Melhman court, sources and parameters of public policy are "not susceptible to hard and fact rules", but rather "public policy has been defined as that principal of law which holds that no person can lawfully do that which has a tendency to be injurious to the public or against the public good. The term admits of no exact definition…Public policy is not concerned with minutiae, but with principles." Melhman, 153 N.J. at 187. Finally, a trial court's reliance on its personal experiences or anecdotal reference can be problematic, particularly when it overshadows the weight of the evidence presented.

POINT III

PLAINTIFF SUFFERED FROM A "DISABILITY" AS DEFINED BY THE NJLAD. IN HOLDING OTHERWISE, THE TRIAL COURT APPLIED THE RELEVANT CASE LAW TOO RESTRICTIVELY AND FAILED TO VIEW THE FACTS IN A LIGHT MOST FAVORABLE TO PLAINTIFF (T22:2-30:11; T32:20-35:6)

A. Legal standard of defining "disability" under the NJLAD

Plaintiff asserted three distinct violations of the New Jersey Laws Against Discrimination ("NJLAD")- discrimination, failure to accommodate and failure to engage in the interactive process. Pa022-24. Whether Plaintiff suffered from a "disability" is fundamental to each of these claims. The trial court incorrectly held that Plaintiff did not qualify as "disabled" under the NJLAD and therefore could not invoke the protection of the NJLAD. T22:2-30:11; T32:20-35:6. At all times relevant hereto, Plaintiff suffered from anxiety and obesity. Under the applicable liberal standards, these medical conditions qualify as "disabilities" deserving of protection under the NJLAD.

To establish a *prima facie* case of disability discrimination, plaintiff is required to offer evidence that 1) she was in the protected group; 2) she was performing her job at a level that met the employer's expectations; 3) she nevertheless was fired; and 4) the employer sought someone to perform the same work after she left. Cloews v. Terminix Int'l, Inc., 109 N.J. 575, 597 (1988). In a reasonable accommodation case, the first three listed elements satisfy plaintiff's

initial burden of proof. Bosshard v. Hackensack Univ. Med. Ctr., 345 N.J. Super. 78, 91(App.Div. 2001).

To prove a reasonable accommodation case under the NJLAD, a plaintiff must establish that: (1) plaintiff had a disability; (2) plaintiff performed or could have performed the essential functions of the job, either with or without a reasonable accommodation; (3) defendant was aware of plaintiff's need for a reasonable accommodation; (4) there was an accommodation that would have allowed plaintiff to perform the essential functions of the job, and (5) defendant denied the accommodation. Victor v. State, 203 N.J. 383, 414 (2010).

To show an employer failed to participate in the interactive process, a handicapped employee must demonstrate: 1) employer knew about employee's disability; 2) employee requested accommodation or assistance for her disability; 3) employer did not make a good faith effort to assist employee in seeking accommodations; and 4) the employee could have been reasonably accommodated but for the employer's lack of good faith. Tynan v. Vicinage 13 of the Superior Court, 351 N.J. Super. 385, 397-98, cert. denied, 183 N.J. 215 (2005).

All three causes of action require Plaintiff establish a "disability" to establish a *prima facie* case. It is well-settled that the burden of proving an initial case of discrimination is "not onerous." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). Instead, the evidentiary burden at the *prima facie* stage is

"rather modest: it is to demonstrate to the court that plaintiff's factual scenario is compatible with discriminatory intent—i.e., that discrimination *could* be a reason for the employer's action." Zive v. Stanley Roberts, Inc., 182 N.J. 436, 447-449 (App.Div. 2005) (internal citations omitted); See also Torre v. Casio, Inc., 42 F.3d 825, 829 (3d Cir.1994) (describing *prima facie* case as "relatively simple"); Massarsky v. Gen. Motors Corp., 706 F.2d 111, 118 (3d Cir.1983) (describing *prima facie* case as "easily made out"); Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 81 (1978) (writing "the standard for presenting a *[p]rima facie* case cannot be too great lest rampant discrimination go unchecked."). Indeed, plaintiff may establish his slight burden at the *prima facie* stage with *"*de minimis evidence.*"* Kelly v. Sun Microsystems, Inc., 520 F.Supp.2d 388, 402-403 (D. Conn. 2007). Moreover, the courts have recognized that *"*the prima facie case is to be evaluated solely on the basis of the evidence presented by the plaintiff, irrespective of defendants' efforts to dispute that evidence.*"* Zive, supra, 182 N.J. at 447. "Establishment of the prima facie case gives rise to a presumption that the employer unlawfully discriminated against the applicant." Goodman v. London Metals Exchange, Inc. 86 N.J. 19, 31 (1981).

The NJLAD is remedial legislation, intended "to eradicate the cancer of discrimination, protect employees, and deter employers from engaging in discriminatory practices," including discrimination based upon disability. Acevedo

v. Flightsafety Int'l, Inc., 449 N.J. Super. 185, 190 (App. Div. 2017) (internal quotations omitted).

In line with its remedial purposes, the NJLAD defines "disability" very broadly. The trial court erred in failing to recognize and apply this broad standard. The legislature first amended the NJLAD in 1972, to include "handicap" as a prohibited basis for job-related decision-making and in 1978 amended the pertinent language to read:

> All of the provisions of the act to which this act is a supplement shall be construed to prohibit any unlawful discrimination against any person because such person is or has been at any time handicapped or any unlawful employment practice against such person, unless the nature and extent of the handicap reasonably precludes the performance of the particular employment. N.J.S.A. 10:5-4.1

Our statute defines "handicapped" as:

> suffering from physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness including epilepsy, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment or physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device, or from any mental, psychological or developmental disability resulting from anatomical, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques. N.J.S.A. 10:5-5(q).

The New Jersey Supreme Court has held that the legislation is not limited to "severe" disabilities or disabilities "perceived [to] severely limit the individual in

performing work-related functions." Andersen v. Exxon Co., 89 N.J. 483, 494 (1982) (Internal citations omitted). Rather, the Court found that "(t)he paramount purpose of the statute is to secure to handicapped individuals full and equal access to society, bounded only by the actual physical limits that they cannot surmount." Andersen, 89 N.J. at 495. In so holding, the Court noted that "it would be ironic indeed for the individual only slightly handicapped to be denied coverage under the act while more restricted individuals are accorded protection." Id.

NJLAD's definition of handicap or disability does not require that the condition result in permanency or a substantial limitation on a major life activity. Tynan v. Vicinage 13 of the Superior Court, supra; Failla v. City of Passaic, 146 F.3d 149, 154 (3d. Cir. 1998). Rather, the definition of "handicapped" found in the NJLAD "clearly encompasses handicapped or disabled people who do not have a substantial or permanent impairment at the time of the alleged discrimination." Soules v. Mount Holiness Memorial Park, 354 N.J.Super. 569, 574 (App. Div. 2002).

Accordingly, New Jersey courts have found a "broad array of medical conditions to be handicaps under the LAD, including obesity, alcoholism, epilepsy and drug addiction. By defining the term handicap broadly, the Legislature intends to focus scrutiny not on whether a particular employee's limitations qualify for protection, but on the work-site actions taken in light of whatever physical or mental

limitations the worker presents." Tynan, supra, 351 N.J. Super. at 398-99. The NJLAD seeks to ensure that individuals are distinguished based on "…merit, rather than skin color, age, sex or gender, or any other measure that obscures a person's individual humanity and worth." Tynan, supra., citing Enriquez v. W. Jersey Health Sys., 342 N.J.Super. 501, 527 (App. Div.), cert. denied, 170 N.J. 211 (2001).

"It is well established that the NJLAD should be 'liberally construed "in order to advance its beneficial purposes."" Calabotta v. Phibro Animal Health Corp., 460 N.J.Super. 38, 61 (App. Div. 2019) (internal quotations omitted). The more broadly the NJLAD is applied, the greater its anti-discriminatory impact. Id. (Internal citations omitted); see also Tynan supra, 351 N.J.Super. at 398 ("Because the purpose of the [N]LAD] is 'to secure to handicapped individuals full and equal access to society, bounded only by the actual physical limits that they cannot surmount,' the Act besides being quite broad must also be liberally construed.").

B. Plaintiff's generalized anxiety qualifies as a "disability" under the NJLAD

At all times relevant hereto, Plaintiff was diagnosed with and treated for generalized anxiety. She informed Defendant of this, and expressly reported that the Covid-19 pandemic triggered this anxiety. To find Plaintiff's anxiety does not qualify as a "disability" is against the weight of the law and the evidence.

Pursuant to N.J.S.A. 10:5-5(q), there are two specific categories of handicap: physical and non-physical. To establish a psychological disability, the plain language of the NJLAD requires a party to prove that he or she is suffering from "any mental" or "psychological . . . disability" that is a result of a "psychological, physiological, or neurological condition[]" that either "prevents the typical exercise of any bodily or mental functions **or** is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques." N.J.S.A. 10:5-5(q) (emphasis added).

Our courts have held that various mental health disorders qualify as disabilities under the NJLAD, like depression, post-traumatic stress, anxiety and other psychotic disorders. Domurat v. Ciba Specialty Chems. Corp., 353 N.J.Super. 74, 89 (App. Div. 2002); see also Tynan, supra, 351 N.J.Super. at 398-99.

Here, Ms. Scheuer was first diagnosed with generalized anxiety as a teenager. Pa201, PSOF ¶16. She treated with various mental health professionals for many years, before, during and after her employment with RMTS. Id. at PSOF ¶17-18.

The fear, severity and uncertainty of the pandemic exacerbated this anxiety. This is evidenced by Plaintiff's repeated reports to her supervisor of anxiety relating to COVID-19. In the days prior to her termination Plaintiff reported her anxiety at least five times to her direct supervisor, Ms. Ionnotti:

- I am "…trying to manage my own coronavirus anxiety". Pa205, PSOF ¶39(a).
- "I'm having anxiety". Id. at (b).
- "We are all very scared and anxious." Id. at (e).
- "I have this dull chest pain from the anxiety I think". Pa206, PSOF ¶40(a)
- I am "so stressed and I know a lot of it is irrational". Id. at (b).
- In referring to COVID-19, Plaintiff stated, "It's rising stress and anxiety." Id. at (f).

The trial court noted that it did not bother to look at these text messages, ("There's no citation to any single page of exhibit E in the brief, so I didn't read them." T20:21), even though Plaintiff referenced these texts with proper citation to the record in her Counter Statement of Facts. Defendants **admitted** receipt of these texts, which the trial court refused to acknowledge[5]. See Defendant's response to the cited statement of facts. Pa573, ¶39 & 41.

The trial court made several findings of fact relating to Plaintiff's anxiety that are blatantly contradicted by the record. For example,

1) The trial court incorrectly found that "there were no complaints made to the employer [regarding Plaintiff's anxiety] before March 13." (T22:2-3); "I don't see any evidence in this motion record that [Plaintiff] complained of

[5] While Defendant admitted receipt of these texts, they alleged that the texts were "interpreted as jokes". Pa573, PSOF ¶19. This is a material dispute of fact for a jury to consider.

anxiety prior to the employer firing her" (T21:3-5; T29:3-12); and "My conclusion is that the employer did not know about the anxiety." (T24:15-16). On March 12, 2020, the day before her termination, Plaintiff sent several texts, referenced above, to Ms. Ionnotti expressly conveying her anxiety. PSOF39 & 41. Defendant admitted receipt of these texts. This conclusion by the trial court misinterprets the facts and fails to view them in a light most favorable to Plaintiff.

2) The trial court incorrectly found "There is nothing in the motion record to support a finding that I could see that, that the employer was aware she was getting treatment for anxiety. There's nothing in the motion to support any evidence that she was even getting treated for any depression or anxiety except for her testimony that maybe sometime at about two---or the interrogatory answers that sometime in about 2018 or '19 she was seeing a psychiatrist for some undisclosed anxiety issues." T29:3-12. Defendant admitted that Plaintiff treated for anxiety and grief in 2018 and 2019. Pa201, PSOF ¶17 and Pa573, ¶17. Plaintiff further certified that she treated with various mental health professionals for her generalized anxiety in 2021 and 2023. P563.

Plaintiff was diagnosed with generalized anxiety, treated for general anxiety and Defendant was aware of this. The trial court was required to view these facts in a light most favorable to Plaintiff and failed to do so.

C. Obesity, particularly rendering Plaintiff in a high-risk category as it relates to Covid-19, also qualifies as a "disability" under the NJLAD

Plaintiff also suffers from obesity. Without any substantive reasoning placed on the record, the trial court concluded "I see no evidence presented from the plaintiff that [her termination] was because of her obesity." T32:21-22. Before the trial court could even conclude whether the adverse employment action was

"causally related", it failed to analyze whether Plaintiff's obesity qualified as a "disability" under the NJLAD. The inquiry of whether Plaintiff fell into a protected category is distinct from whether she can establish a causal connection. In this regard the trial court's conclusion is unclear, but nonetheless wrong.

In this instance obesity qualifies as a disability for two reasons. First, Ms. Scheuer is 5'9" with a weight fluctuating between 250 and 350 pounds.[6] Pa563. She has struggled with her weight since ten years old. Pa563. Plaintiff's obesity was readily apparent and therefore places Plaintiff in a protected class. Her weight had direct effects on her health and well-being. Plaintiff testified that her obesity was historically linked to an increased risk for respiratory illness, sinitus and flu. Pa201, PSOF ¶15. Plaintiff injured her spine badly after years of chronic back problems and spinal stenosis from years of high BMI and inability to lose weight. She had lumbar radiculopathy, disc excursion and disc herniations. Pa562-563. The pinching on her nerves resulted in drop foot syndrome. Id. Her mobility was further compromised by this injury, and in turn Plaintiff gained approximately fifty (50) pounds due to increased immobility. Id. There is a reciprocal relationship between Plaintiff's weight and her overall health. Plaintiff testified that her bodily injury

[6] According to www.nhlbi.nih.gov this correlates to a BMI fluctuating between 36.9 and 44.3.

exacerbated her weight gain. Therefore, Plaintiff established that her obesity is caused by bodily injury. Viscik v. Fowler Equipment Co., 173 N.J. 1, 17 (2002).

Second, obesity placed Plaintiff in a high-risk category for severe illness from Covid-19. Under the liberal interpretation of the NJLAD, and the unique circumstances presented by COVID-19, Plaintiff's obesity should qualify as a disability.

When obesity increases susceptibility to other illnesses and thus prevents the normal exercise of any bodily or mental functions, it should be considered a disability under NJLAD. According to the CDC, COVID-19 presented greater health risks to certain individuals with underlying health conditions, such as obesity. While arguably today the link between obesity and COVID-19 is one deserving of judicial notice, the link between the two was certainly reported in the early months of the pandemic. Pa464-562; 573-576. Based upon reporting at the time, in conjunction with Plaintiff's understanding of her own medical health history, she had reasonable concerns that her weight put her at heightened risk for severe illness relating to COVID-19.

No New Jersey Courts have considered this question in the context of the relatively new phenomenon of Covid-19. However, other jurisdictions have. Specifically, some federal courts have held that susceptibility to severe illness as a result of COVID-19 may constitute a disability under the Americans with

Disabilities Act (ADA). Since the NJLAD is construed more broadly than the ADA, the NJLAD should likewise protect employees in New Jersey for the same.

In Silver v. City of Alexandria, 470 F. Supp. 3d 616 (W.D. La. 2020) the district court upheld an injunction allowing the plaintiff to attend work meetings remotely. The court held that the plaintiff's heart condition made him more susceptible to contracting Covid-19. Id at 618. The court found that the plaintiff had a qualifying disability under the ADA "in substantial part, from the existence of the COVID-19 pandemic in our nation, and the existence of his obvious co-morbidities." Id at 622. The court rejected the defendant's argument that the plaintiff was not entitled to claim he was disabled because the disabilities claimed were only COVID related, or that his disabilities were only situational due to the pandemic. Id. Instead, the court adopted a "totality of the circumstances evaluation". Id. The court applied this evaluation and held that:

> "[n]either the ADA nor the Rehabilitation Act contain any language to limit application to certain environmental or health-related situations. . . . The determination of a qualifying disability in this case cannot be looked at in a vacuum. . . . [I]n light of the pandemic's existence, [it] is the proper way to make the disability determination here." Id.

In Peeples v. Clinical Support Options, Inc., 487 F. Supp. 3d 56 (D. Mass. 2020) the court held that a plaintiff with asthma was considered disabled under the ADA because the plaintiff was "at a higher risk for serious illness or even death" if they contracted COVID-19. Id at 63. The court noted that it found "persuasive this

limited precedent addressing the standard for determining whether an individual has an impairment that substantially limits a major life activity, thus rising to the level of a disability, during this pandemic." Id.

In People First of Ala. V. Merrill, 491 F. Supp. 3d 1076 (N.D. Ala. 2020) citizens of Alabama brought suit claiming that certain voting procedures in Alabama violated the ADA during the COVID-19 pandemic. Id. The court rejected the defendant's argument that plaintiffs were not disabled under the ADA "because the Plaintiffs' own choice – not a physical or mental impairment – limit their major life activities." Id at 1158. The court instead found that,

> "CDC guidance supports a finding that it is the plaintiffs' or their members' underlying medical conditions, not their personal choices, that impact their ability to interact with others or work during the COVID-19 pandemic. And, because the ADA must be broadly construed, the court must consider the circumstances and impact of the State's current public health emergency when determining whether the plaintiffs' physical impairments substantially limit a major life activity. Put different, as Judge Dee Dress aptly stated, the determination of a qualifying disability in this case cannot be looked at in a vacuum. **Thus, the court concludes that in the context of the COVID-19 pandemic, the plaintiffs' or their members' physical impairments are a qualifying disability under the ADA because their impairments substantially limit the major life activities of interacting with others or working."** Id. (Emphasis added)

The determination of whether Plaintiff has a disability should be based on totality of the circumstances, including heightened risks of an impairment caused by pandemic. Plaintiff has a history of obesity, which was known to Defendant. The CDC references obesity as a "common, serious and costly chronic disease. Obesity,

Race/Ethnicity, and COVID-19 | Overweight & Obesity | CDC. Adults with excess weight are at a greater risk from COVID—19, with the CDC noting it may triple the risk of hospitalization from COVID. The CDC noted a study of Covid-19 cases suggests that risks of hospitalization, intensive care admission, invasive mechanical ventilation, and death are higher with increasing BMI. Id. "The increased risk for hospitalization or death was particularly pronounced in those under age 65." Id.

In light of the intended breadth of the NJLAD, it would follow that New Jersey should likewise recognize this as a protected disability.

POINT IV

THE TRIAL COURT REPEATEDLY FAILED TO CONSIDER RELEVANT FACTS SUPPORTED BY THE RECORD (T15:21-25:16)

The trial court admittedly disregarded facts asserted by Plaintiff in opposition to the motion for summary judgment, amounting to reversible error. The trial court criticized Plaintiff's opposition papers as not properly citing to the record, stating,

> "plaintiff's opposition brief, which should have specific citations to it. That's what the rule requires on summary judgment motions, does not have specific citations to anything in the motion record to support the various statements such as anxiety." (T22:4-20)

The trial court continued,

> "why is this important that there be specific citations? So that in his reply brief to be fair to the other side that the defendant can then say that's not what the exhibit says...the defense attorney was given no opportunity to do that because there were no specific citations to the...motion record." Id.

This is simply untrue. Plaintiff complied with R. 4:46-2(a), which provides in "part,

> The motion for summary judgment shall be served with a brief ***and a separate statement of material facts*** with or without supporting affidavits. ***The statement of material facts shall set forth in separately numbered paragraphs a concise statement of each material fact as to which the movant contends there is no genuine issue together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted.*** The citation shall identify the document and shall specify the pages and paragraphs or lines thereof or the specific portions of exhibits relied on." (Emphasis added)

With her Opposition brief, Plaintiff included a Counter Statement of Material Facts with seventy (70) separate paragraphs all citing to the record[7]. Pa199. Counsel attached the referenced documents as Exhibits A through T to the Certification of Kristen Ragon, Esq. submitted in opposition to the motion for summary judgment. Pa216-562. The Counter Statement of Facts was incorporated by reference directly into the brief. Pa163. Defendants had the opportunity to respond to these statements in their Reply brief and did just that with their own response to Plaintiff's Counter Statement of Facts. Pa573.

Despite compliance, the trial court completely disregarded Plaintiffs statement of facts, supported by the record. By way of example,

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[7] It is also noteworthy that Plaintiff responses to Defendant's statements of fact likewise had the required direct citation to the record. Pa192-198.

- Despite direct citation to Exhibit E in Plaintiff's Statement of Facts, the trial court abruptly concluded, "There's no citation to any single page of exhibit E [which was a true copy of the text message chain between Plaintiff and Jennifer Iannotti, attached to the Ragon Certification submitted in opposition to summary judgment] in the brief, so I didn't read them" T20:20-22.
- When counsel for Plaintiff attempted to direct the trial court to the properly cited statement of facts during the oral argument, the trial court refused "I'm not looking at the statement of facts now….I'm not going through it to see if the statement of facts even say what you said they say." T23:10-25. More specifically, counsel for Plaintiff attempted to direct the court to admitted statements of facts, wherein Defendant acknowledges receiving text messages conveying anxiety. The trial court rebuffed counsel. T23:10-25:16.

A trial court is required to consider the evidence presented. While the trial court may be critical of the manner in which counsel for Plaintiff presented that evidence, the required statement of facts with citation to the record was incorporated into the brief. The trial court had an obligation to consider all the facts presented to it and view those facts in a light favorable to Plaintiff.

POINT V

THE OVERWHELMING WEIGHT OF EVIDENCE DEMONSTRATES THAT TERMINATION WAS PRETEXTUAL (T33:5-13 & T34:1-8)

While the trial court was wrong in holding Plaintiff was not disabled for purposes of the NJLAD, it was certainly suspicious of Defendant's behavior. Defendant's bad acts provide relevant context for this Court's review.

First, the temporal proximity of termination demonstrates a casual connection. Plaintiff was terminated within two hours of expressing her concerns. The temporal proximity between Plaintiff's conduct and the adverse employment action is unusually suggestive of retaliatory motive and thus a causal link may be inferred. See Budhun v. Reading Hosp. & Med. Ctr., 765 F.3d 245, 258 (3d Cir. 2014).

Plaintiff was immediately and without question terminated for sending the email: "Dear Leadership, Since we have the ability to efficiently work remotely, requiring us to come into the office during a pandemic unnecessarily risks our health." The trial court found it "pretty obvious and any reasonable juror would conclude that they didn't like her response and they fired her because she was not coming back to work." T33:5-7.

Defendant claimed Plaintiff's termination was justified, characterizing this March 13th email as a "demand", an "ultimatum" and/or "insubordination." This

proffered reasoning is unworthy of belief. First, the context of this email does not support Defendant's position. Although more than three years have passed since our nation was first introduced to the COVID-19 pandemic, we cannot forget those first weeks of fear, uncertainty and panic. News sources covered the pandemic constantly, flooding its viewers with information on the cause, symptoms, spread, and devastating toll of this pandemic worldwide. Plaintiff was justifiably concerned and felt strongly that her employer was aware of those concerns.

Defendant never followed up with Plaintiff to discuss the intent of this email before qualifying it as "insubordination" and terminating her immediately. This is of particular concern since RMTS did not know Plaintiff to be a demanding, insubordinate employee. Rather, she was a good employee, with no history of insubordination. Pa200, PSOF ¶5-6. The baseless qualification was completely juxtaposed to her prior work history and character.

Finally, the other signatories of this email were initially terminated alongside Plaintiff but almost immediately offered their jobs back.[8] Pa211, PSOF ¶67-70. RMTS never contacted Plaintiff. If Defendant genuinely viewed this communication as an insubordinate demand, it is nonsensical that it would extend

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[8] The trial court stated, "In my view [Defendant] may have retaliated against her separately from the other five because I think there's a genuine issue of material fact---as to whether the proffered reason as to why they didn't offer her reemployment was pretextual." T33:7-13. But concluded that as Plaintiff did not fall within any protected category she could not pursue her NJLAD claims. T34:1-8.

reemployment to all signatories but the author, Plaintiff. This position is incoherent, inconsistent or contradictory.

Assuming *arguendo* that Defendant met its burden of establishing a legitimate reason to terminate Plaintiff, "the burden shifts back to plaintiff to prove by a preponderance of the evidence that the stated reasons were a pretext for discrimination, i.e. that the reasons were false *and* that discrimination was the real reason." Barone v. Gardner Asphalt Corp., 955 F.Supp. 337, 344 (D.N.J. 1997) citing Goodman, supra, at 32. Therefore, the trier of fact "may nevertheless be persuaded by that evidence and its inferences combined with that deduced from the respondents, that the employer's proposed explanation is unworthy of belief and is nothing more than a mere pretext for unlawful discrimination." Goodman, supra, at 33. "The evidence rebutting the employer's proffered legitimate reasons must allow a fact finder reasonably to infer that each of the proffered non-discriminatory reasons… was either a post hoc fabrication or otherwise did not actually motivate the employment of this action." Greenberg v. Camden Cnty. Vocational & Technical Schs., 310 N.J.Super. 189, 200 (App.Div.1998) (internal quotations omitted). In other words, Plaintiff must prove that "the prohibited consideration played a role in the decision-making process and that it had a determinative influence on the outcome of the process." Greenberg, supra, at 198 quoting Maiorino v. Schering-Plough Corp., 300 N.J. Super. 323, 344 (App.Div.), certif. denied, 150 N.J. 189 (1997).

Generally, to do this, the plaintiff need only "demonstrate such weaknesses, implausibility, inconsistencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence and infer that the employer did not act for [the asserted] non-discriminatory reasons." Fuentes v. Perskie, 32 F.3d 759,763 (3d Cir. 1994). However, what constitutes evidence of pretext varies given the factual circumstances of each case. See Edwards v. Schlumberger-Wall Servs., 984 F.Supp. 264, 283 (D.N.J.1997) (Although plaintiff failed to show that defendant's proffered reason for laying her off was "incoherent, inconsistent or contradictory," plaintiff survived summary judgment by offering sufficient circumstantial evidence "allowing a reasonable fact finder to believe that [defendant's] account does not provide the whole story, and that [plaintiff's] gender was more likely than not a motivating or determinative factor in the layoff decision.) At the summary judgment stage, the burden is relatively low. Wesley v. Palace Rehab. & Care Ctr., L.L.C., 3 F. Supp. 3d 221, 233 (D.N.J. 2014)(internal citations omitted). A plaintiff who has already established a *prima facie* case need only point to evidence that the defendant's proffered reason is a pretext for discrimination. Id. It is without question that Defendant's proffered reason was pretext.

CONCLUSION

Defendants terminated Plaintiff immediately in response to her expressed concerns for the health and safety of herself and others in light of the Covid-19 Pandemic. Defendant's actions were blatant and unlawful. The trial court erroneously dismissed these causes of action on summary judgment. The trial court failed to appreciate the facts, and as is clear from the written transcript, did not allow counsel for Plaintiff the opportunity to fully argue these points and direct the trial court to the relevant portions of the record that support her claim.

Based upon the totality of evidence, a jury, and respectfully not the trial court, should decide the merits of Plaintiff's claims. Summary judgment must be reversed.

Respectfully submitted,
GOLDMAN, DAVIS
KRUMHOLZ & DILLON, P.C.

By:
Kristen Ragon

DATED: April 24, 2024

COLLEEN SCHEUER, Plaintiff- Appellant, v. RMTS, LLC and CARMINE FRANCA, Individually, Defendants- Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Appellate Docket No. A-000272-23 Submission Date: May 24, 2024 On Appeal from a Final Judgment of the Superior Court Law Division, Civil Part, Hudson County dated August 14, 2023 Sat Below: Hon. Anthony V. D'Elia, J.S.C. Trial Court Docket No. HUD-L-4383-21

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PRELIMINARY STATEMENT

The Trial Court correctly granted Defendants'/Respondents' Motion for Summary Judgment. Plaintiff/Appellant, Colleen Scheuer ("Appellant"), has misrepresented the facts and law in this case in an attempt to manufacture a cause of action where there is none. However, as properly occurred in the court below, a full reading of the evidence presented in this matter can only lead to one conclusion, that summary judgment for Respondent on all counts is warranted.

Appellant is a twenty-nine-year-old self-described millennial (a generational status she unconvincingly and unsuccessfully attempts to use as an excuse for a lack of clarity in certain purported communications to her employer). In the early days of COVID-19, before the existence of any government lockdown orders, Appellant took immediate issue with her employer RMTS, LLC ("Respondent") not yet transitioning to a fully remote work environment (as the decision as to Carmine Franca is not under appeal, Respondent is used in the singular herein). On March 13, 2020, despite having just met with her employer on its plans towards transitioning to remote work, she expressed her anger with Respondent's structured approach by inciting a select group of coworkers to join her in demanding that collectively they be able to immediately work from home because they felt they could at that instance.

All were fired for being insubordinate. Only in her Complaint, well after the fact, did Appellant allege that there was some sort of New Jersey public policy that required Respondent to immediately switch to a remote workforce, even in the absence of any government lockdown orders.

Appellant, again after the fact, also alleges (this time in an amended Complaint) she was somehow disabled during her employment and that Respondent should have accommodated her by allowing her to work from home. The only problem—she wasn't disabled under applicable law, never previously mentioned to anyone associated with the Respondent the existence of any disability, and never requested any assistance or accommodation from Respondent for her now alleged supposed disabilities. Only years later in her amended Complaint does Appellant allege for the first time, without any supporting medical documentation, that she was disabled because she was obese, had high blood pressure, and was suffering from a generalized anxiety disorder. Even given the two years this matter was before the lower court, Appellant could not produce a single document demonstrating the existence of any of her alleged conditions.

With respect to her allegations she suffers from a generalized anxiety disorder, Appellant points to fragments of informal off color conversations exchanged between her and a group of her coworkers that casually included the

word "anxiety". That is it. Nothing more. Why? She wasn't suffering from any sort of disabling generalized anxiety disorder. No doctor says she was. She also acknowledges she wasn't under any medical care for any form of anxiety at the time of her termination. Not only that, she even certified to Respondent's insurance carrier upon hire that she did not have any mental or nervous disorders (or high blood pressure for that matter- another condition she references after the fact, even though similarly she wasn't under any medical care for the same).

As for her obesity, Appellant's obesity is not a question of fact. Appellant was not thin when she was hired by Respondent. Nor was she thin at any time during her employment with Respondent. Indeed, she has been overweight since childhood. But she also was not disabled. Appellant never mentioned even once to her supervisors that she had a purported disability. Appellant admits that she was not undergoing any medical care for ANY condition in the run up to her demand to work from home.

In short, Appellant is heavy. Respondent concedes that fact. But her body shape was not a disability. She never said she was disabled. No medical professional said she was disabled. To hold Respondent legally liable for not acquiescing to Appellant's and her colleagues' demand (none of whom alleged or mentioned a "disability" in their collective demand letter) to work from home prior to the government lockdown would be an extreme injustice.

PROCEDURAL HISTORY

Appellant filed the initial Complaint in this matter with the Hudson County Superior Court Law Division, Civil Part, on or about November 11, 2021. Pa001–Pa009. On February 11, 2022, Respondent moved to dismiss the Complaint. Pa010. In response, Appellant filed an opposition and motion to amend the Complaint. Pa013–Pa016. Respondent's Motion to Dismiss was heard on May 13, 2022. *Id.* The Honorable Veronica Allende, J.S.C, denied the Respondent's motion and simultaneously granted Appellant's Motion to Amend the Complaint. *Id.* Following the close of discovery, Respondent filed a motion for summary judgment on all counts on June 12, 2023. Pa043. On July 25, 2023, Appellant filed an opposition brief. Pa163–Pa572. On July 31, 2023, Respondent filed a reply brief and response to counter statement of facts. Pa573–Pa576. Oral argument was conducted on August 14, 2023, at the conclusion of which the Honorable Anthony V. D'Elia, J.S.C. granted Respondent's motion as to all counts and dismissed Appellant's Complaint in the entirety with prejudice. T1-46.

Appellant filed a notice of appeal on September 27, 2023, as to the counts directed at RMTS, LLC. Pa578.

STATEMENT OF FACTS

RTMS is a managing general underwriter providing stop loss underwriting services related to health insurance. Pa046; DSOF ¶ 1. The Company is an equal employment opportunity employer and has strict policies against discrimination. Pa046; DSOF ¶ 2. RMTS's handbook prohibits discrimination against any person because of their race, color, creed, religion, sex, national origin, disability, age, or any other characteristic protected by law. Pa046; DSOF ¶ 3. Appellant was hired as a Claims Analyst by RMTS in August 2018. Pa047; DSOF ¶ 4. Appellant worked for RMTS in this role until March 13, 2020. Pa047; DSOF ¶ 5.

As of March of 2020, Appellant reported to Ronald Geck. Pa047; DSOF ¶ 6. Ms. Iannotti was responsible for some day-to-day monitoring of the claims department and for ensuring work on insurance claims had been completed and for assigning new claims to Appellant. Pa047; DSOF ¶ 7. Mr. Geck was Ms. Iannotti's direct supervisor. Pa047; DSOF ¶ 8. RMTS did not have a separate human resources department in March of 2020. Pa047; DSOF ¶ 9.

Appellant resided at 316 and then 318 8th Street, Jersey City for a majority of her employment at RMTS, within a 35-minute walk of the RMTS office. Pa047; DSOF ¶ 10. In February or March of 2020, Appellant moved to her boyfriend's apartment located at 435 West 31st Street, New York City, New

York. Pa047; DSOF ¶ 11. He is a business executive that worked from home. Pa256.

On Thursday March 12, 2020, text messages were exchanged on a group text message chain between Appellant, Ms. Iannotti, Shay Woods, and Candice Leger. Pa047; DSOF ¶ 12. In the text message chain Appellant stated that the employees' concerns were brought up and that the situation is fluid. Pa047; DSOF ¶ 13. As part of this text chain Appellant stated "def they are divas I'm having anxiety may need a donut" to which Ms. Iannotti stated "So it is all business as usual?" and Plaintiff responded "definitely." Pa048; DSOF ¶ 14.

Shay Woods stated that the employees had been informed that they "will likely only work from home if the city or the building instructs is [sic] to shut down." Pa048; DSOF ¶ 15. Ms. Iannotti responded "I know they are watching the situation very closely. There isn't a map for this because it hasn't happened before. And i [sic] hope you know I am willing to step in and do all I can for you all. I am sorry I am not with you right now." Pa048; DSOF ¶ 16. Ms. Iannotti, as Appellant was aware, had requested an accommodation and had been approved to work from home due to an actual medically diagnosed disability. Pa247–Pa248. Appellant responded, "Candice really spoke up with our concerns to Ron- Thank you for reaching out." Pa048; DSOF ¶ 17.

The referenced meeting occurred between Ronald Geck, Senior Vice President of Claims for RMTS, and the employees of the claims department including, Appellant, Britney Randolph, Candice Leger, Fenny O'Hara, Joana Martins, Shay Woods, Adkika Butler, and Kylie Williams. Pa048; DSOF ¶ 18. At this meeting Mr. Geck listened to employee concerns about COVID-19 and discussed the processes that RMTS was working to put into place as well as the company's decision that they would keep the office open unless ordered to close. Mr. Geck also informed the employees that they were allowed to adjust their schedules if they had concerns about traveling on mass transit. Pa048; DSOF ¶ 19. During the meeting, employees expressed concerns about mass transit during rush hour times and as a result they were given permission to alter the scheduled hours. No concerns about being in the office or office building were brought up by the employees. Pa048; DSOF ¶ 20. At no time during this meeting did any employee communicate the existence of any reason that would prevent them from being able to report to the office including any medical or mental disability. Pa049; DSOF ¶ 21.

Later that same day, at 4:07 p.m., Carmine Franca e-mailed the employees information regarding RMTS's work from home plan in case it became necessary to allow employees to work from home. Pa049; DSOF ¶ 22. On Friday March 13, 2020, at 4:19 p.m. Appellant e-mailed Ronald Geck, Jennifer Iannotti,

and Carmine Franca on behalf of herself and Britney Randolph, Candice Leger, Fenny O'Hara, Joana Martins, and Shay Woods stating "Dear Leadership, Since we have the ability to efficiently work remotely, requiring us to come into the office during a pandemic unnecessarily risks our health. Thanks, Colleen Scheuer, Britney Randolph, Candice Leger, Fenny O'Hara, Joana Martins, Shay Woods." Pa049; DSOF ¶ 23.

In response to this e-mail, Carmine Franca replied to Colleen Scheuer, Britney Randolph, Candice Leger, Fenny O'Hara, Joana Martins, and Shay Woods "Hello All, Thank you for your email and thank you for your service at RMTS. Be safe and good luck in the future." Pa049; DSOF ¶ 24. Plaintiff stated that her e-mail was interpreted as insubordination by RMTS. Pa049; DSOF ¶ 25.

Colleen Scheuer, Britney Randolph, Candice Leger, Fenny O'Hara, Joana Martins, and Shay Woods were terminated by RMTS by way of this e-mail. Each of the employees, including the Appellant, were eventually offered their positions back at the company. Pa049; DSOF ¶ 26.

Appellant, after the fact, now states she has high blood pressure, generalized anxiety disorder, and a high BMI. Pa050; DSOF ¶ 27. Appellant was treated at SohoMD in Jersey City in 2018 and 2019, for a period during which she was grieving for her stepfather after his passing. Pa050; DSOF ¶ 28. Appellant stopped treatment in May of 2019. Pa050; DSOF ¶ 29. Appellant

stated that she did not remember a diagnosis from SohoMD. "I don't have their case notes. So I don't know their diagnosis." Pa050; DSOF ¶ 30. Critically, Appellant has produced nothing from SohoMD or other healthcare provider that states that she was (or is) suffering from a generalized anxiety disorder. Pa223–Pa224.

Appellant never received treatment other than from SohoMD during the duration of her employment. Pa050; DSOF ¶ 31. Appellant never directly communicated that she was diagnosed as obese or had high blood pressure to RMTS. Pa050; DSOF ¶ 32. Appellant could not recall what her blood pressure is or if she had actually been diagnosed with high blood pressure, nor could she provide any documentation of her having such a condition. Pa050; DSOF ¶ 33. During her employment at RMTS, Appellant was not taking medication for any of her alleged conditions. Pa050; DSOF ¶ 34.

Appellant never discussed any risks of coronavirus with a medical professional during her employment at RMTS. Pa050; DSOF ¶ 35. Appellant's sole communications related to anxiety were to Ms. Iannotti in the form of joking and sarcastic text messages. The messages stated: "def they are divas I'm having anxiety may need a donut" and "Joana is out of toilet paper, Kylie and Brit just kinda pissed, Fenny unbothered lol. Shay just switched to panic mode

everyone stocking up on Amazon I have this dull chest pain from my anxiety, I think, LOL." Pa051; DSOF ¶ 36.

Appellant never required an accommodation to perform her duties. Pa051; DSOF ¶ 37. Appellant never requested an accommodation for any condition during her employment. Pa051; DSOF ¶ 38. Appellant only discussed BMI and obesity with primary care providers and did not receive treatment until 2023, a few years after her termination from employment. Pa051; DSOF ¶ 39. Upon hire Appellant certified on her insurance applications that she did not suffer from high blood pressure or a mental or nervous disorder. Pa051; DSOF ¶ 40. Her reasoning: Appellant stated "maybe I didn't want to check off so many boxes and seem undesirable." Pa051; DSOF ¶ 41.

Appellant has attempted to allege additional medical conditions via affidavit in her opposition to summary judgment. However, Appellant has failed to provide any documentary evidence of her conditions other than self-serving personal affidavits. Pa563. Additionally, Exhibit P to Appellant's counsel's affidavit is not a true copy of the news article published on March 5, 2020, entitled "The basics on the Coronavirus: What you need to know as the US becomes the new epicenter of COVID-10 [sic]," but is rather a modified article which was released on April 10, 2020. *Id.*; Da001–Da008. Notably, the original article did not mention obesity as a risk factor. *Id.* The certification misleads the

reader to believe that obesity was included as a factor in available non-opinion pieces in March of 2020. *Id.* Exhibit T from the CDC was published in September of 2020, well after the events giving rise to this matter. *Id.* Additionally, at no point in time did Appellant state that she had in fact reviewed any article that spoke to obesity as a risk factor, recalling only that she had potentially read an article about COVID-19 interactions with different blood types, but nothing relating to obesity. Pa228.

LEGAL ARGUMENT

POINT I

SUMMARY JUDGMENT IS APPROPRIATE AS THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT AND DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW.

Summary judgment must be granted where, as here, the pleadings, depositions, answers to interrogatories, together with any affidavits, show that there is no genuine issue as to any material fact and that Defendants are entitled to judgment as a matter of law. N.J. Court R. 4:46-2(c). The New Jersey Supreme Court has expressly "encourage[d] trial courts not to refrain from granting summary judgment when the proper circumstances present themselves." *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 541–42 (1995), *holding modified*, *Schneider v. Simonini*, 163 N.J. 336 (2000). "Trial courts must keep in mind that the summary judgment rule should be applied so as to serve two competing jurisprudential philosophies." *Brill*, 142 N.J. at 541 (citing *Robbins v. Jersey City*, 23 N.J. 229, 240 (1957)).

> As this Court observed over a quarter of a century ago: On the one hand is the desire to afford every litigant who has a bona fide cause of action or defense the opportunity to fully expose his case.... On the other hand, protection is to be afforded against groundless claims and frivolous defenses, not only to save antagonists the expense of protracted litigation but also to reserve judicial manpower and facilities to cases which meritoriously command attention.

Id. While it is crucial that a court not "shut a deserving litigant from his [or her] trial . . . it is just as important that the court not allow harassment of an equally deserving suitor for immediate relief by a long and worthless trial." *Id.* (internal quotations omitted). "The trial court must scrutinize the opposition to summary judgment and deny judgment only if the opponent can demonstrate more than the suggestion of a factual dispute." *Delacruz v. Alfieri*, 447 N.J. Super. 1, 9, 145 A.3d 695, 699 (Law. Div. 2015); *see also Brill*, 142 N.J. at 539–40. "The burden of opponents in response to a summary judgment motion is to show the court: (1) a bona fide dispute, over a (2) material fact, and (3) that enough evidence exists in favor of that position that a rational factfinder could resolve that dispute in their favor by the burden of proof that will be applied at trial." *Delacruz*, 447 N.J. Super. at 9 (citing *Brill*, 142 N.J. at 540).

Moreover, in determining the existence of a genuine issue of material fact, "'conclusory and self-serving assertions' in certifications without explanatory or supporting facts will not defeat a meritorious motion for summary judgment." *Hoffman v. Asseenontv.com, Inc.*, 404 N.J. Super. 415, 425–26 (App. Div. 2009) (quoting *Puder v. Buechel*, 183 N.J. 428, 440 (2005)). Therefore, the nonmoving party must offer "concrete evidence from which a reasonable juror could return a verdict in his favor . . . ." *Housel for Housel v. Theodoridis*, 314 N.J. Super. 597, 604 (App. Div. 1998). Appellant's arguments are inapposite to this

requirement as they strictly rely on self-serving certifications to support arguments and Appellant has not, and cannot, point to any concrete evidence which supports any of her allegations. As such, there is no genuine issue of material fact requiring a trial in this matter and Respondent is entitled to judgment as a matter of law.

POINT II

APPELLANT FAILED TO IDENTIFY ANY PUBLIC POLICY IN SUPPORT OF HER PIERCE CLAIM

Appellant attempts to re-advance a theory that in early March of 2020, absent any stay-at-home orders, all employees were entitled to work from home. However, as the trial court correctly ruled, no such clear mandate of public policy existed at the time of Appellant's termination. Appellant's argument fails as the result is untenable and not in line with established case law. Under Appellant's theory every employer in the absence of lockdown directives of their applicable local, state, and federal governments would be liable in tort for simply requiring employees to come to work.

Such an interpretation is not in line with the established case law of this Court and the courts of New Jersey, which in creating, and refining, the common law cause of action under *Pierce*, have repeatedly reinforced the need for an actual violation or contravention of "a clear mandate of public policy." *Arterbridge v. Wayfair, LLC*, No. 1:21-CV-13306, 2022 WL 577956, at *5

(D.N.J. Feb. 25, 2022), *aff'd*, No. 22-1547, 2023 WL 3243986 (3d Cir. May 4, 2023) (citing *Pierce v. Ortho Pharm. Corp.*, 84 N.J. 58 (1980)). In defining "public policy", the *Pierce* court provided a non-exhaustive list of sources for public policy mandates, including legislation; administrative rules, regulations or decisions; and judicial decisions. While this list was non-exhaustive, the court unequivocally stated that to support a common law cause of action under *Pierce*, a specific mandate of public policy must be clearly identified. *Pierce*, 84 N.J. at 72. A vague, controversial, unsettled, and otherwise problematic public policy does not constitute a clear mandate." *MacDougall v. Weichert*, 144 N.J. 380, 392 (1996).

"Unless an employee at-will identifies a clear, specific expression of public policy, that employee may be discharged with or without cause." *Campione v. Arizona Beverages USA*, No. A-1186-22, 2024 WL 65482, at *4 (N.J. Super. Ct. App. Div. Jan. 5, 2024) (internal citations omitted); *see also MacDougall*, 144 N.J. at 391 (1996). Further, "to support a *Pierce* claim, a plaintiff must show that he or she made a sufficient expression of a disagreement with a corporate policy, directive, or decision based on a clear mandate of public policy derived from legislation, administrative rules, regulations, decisions, or judicial decisions." *Campione*, 2024 WL 65482, at *5. As the court below

properly concluded, no such public policy was in place at the time of Appellant's termination.

There is not a CEPA case. Appellant's heavy reliance on *Mehlman v Mobile Oil Corp.*, is misplaced. 153 N.J. 163 (1988). *Mehlman* pertained solely to the interpretation of Section 3c.(3) of the Conscientious Employee Protection Act (CEPA), a more expansive cause of action than a common law *Pierce* claim. CEPA provides a cause of action for employees who reasonably believe that activity may be "an actual violation of a law or regulation" which is a much broader view than under the application of the *Pierce* standard as discussed above and as such the court's analysis in *Mehlman* has limited value here. *Est. of Roach v. TRW, Inc.*, 164 N.J. 598, 613 (2000). Appellant's argument that future regulatory authorities could be considered in determining the existence of public policy is misplaced, and without specific citation, however, in *Mehlman* not only was the court considering the application of a far more expansive statute in the context of widely accepted scientific standards (as well as nine other sources of policy), the court was discussing Mehlman's belief regarding existing Japanese regulatory standards. This point is moot however, as again, *Mehlman* was considering the application of a statute with a far broader application than a common law *Pierce* claim which is limited to protection "from wrongful discharge when the discharge is contrary to a clear mandate of public policy. *Id.*

at 610; *see also Arterbridge*, 2022 WL 577956, at *5 (quoting *Dzwonar v. McDevitt*, 177 N.J. 451, 461 (2003)). Unlike in CEPA claims, a litigant asserting a *Pierce* claim must point to an actual (not reasonable belief of a) violation or contravention of a specific and clear mandate of public policy in effect at the time of the complained of action, Appellant cannot therefore point to a public policy that did not exist.

"[T]he existence of a clear mandate of public policy is an issue of law." *Arterbridge*, 2022 WL 577956, at *5 (quoting *Mehlman v. Mobil Oil Corp.*, 707 A.2d 1000, 1012 (N.J. 1998)). In evaluating a *Pierce* claim, courts must consider the "interests of the employee, the employer, and the public." *MacDougall*, 144 N.J. at 390. Appellant, in bringing a common law *Pierce* claim, "bears a 'heavy burden' in proving that their terminations violated such a clear mandate." *Arterbridge*, 2022 WL 577956, at *5 (quotations omitted); *Pierce*, 84 N.J. at 69. This burden exists "because employers are generally entitled to 'run their businesses as they see fit as long as their conduct is consistent with public policy.'" *Arterbridge*, 2022 WL 577956, at *5 (quoting *Pierce*, 417 A.2d at 511).

Appellant has failed to identify the existence of any clearly mandated public policy which was purportedly violated by Respondent in this matter. Further, to allow the Appellant to advance such a ludicrous theory would have the effect of penalizing every law-abiding business which continued to require

employees to report for work in line with all government guidance and requirements. In order to advance her argument, Appellant relies heavily on vague references to executive orders identifying uncertainty surrounding COVID-19, which were not subject to notice and comment (like other forms of settled public policy) and, significantly, none of which required any employers to allow their employees to work from home or stated that individuals with certain conditions were more susceptible to COVID-19. On the contrary, public knowledge on the subject, as well as her employer's knowledge, was unsettled, not clear, and continually evolving. Pa058; Geck Dep. T. 32:16–24 (Testifying no knowledge that underlying conditions made individuals more susceptible to COVID-19 until at least a year after Appellant's termination).

Courts have continually and routinely determined that the type of logic advanced by Appellant in this case does not state a sufficiently clear mandate as required to support a *Pierce* claim. *See, e.g.*, *Warner v. United Nat. Foods, Inc.*, 513 F. Supp. 3d 477 (M.D. Pa. 2021) (granting a motion to dismiss under similar Pennsylvania law because plaintiff could not identify a clear mandate of public policy articulated by governor's executive orders regarding COVID-19 testing); *Valdivia v. Paducah Ctr. for Health & Rehab., LLC*, 507 F. Supp. 3d 805 (W.D. Ky. 2020) (granting a motion to dismiss under similar Kentucky law because plaintiff could not identify a clear mandate of public policy articulated by state

administrative regulations or governor's executive orders regarding COVID-19 testing).

Further evidencing the lack of substantiation for Appellant's *Pierce* claim, courts have even routinely rejected "claims where an employer terminated a symptomatic employee for missing work due to pending test results and medical instructions to quarantine." *Arterbridge*, 2022 WL 577956, at *6; *see Warner*, 507 F. Supp. 3d 484–85 (finding sympathy for, but rejecting, plaintiff's argument that his termination for being absent when medically instructed to quarantine violated public policy); *Hermes v. Okla. Arthritis Ctr.*, No. 20-00871, 2021 WL 3540322, at *5–6 (W.D. Okla. June 8, 2021) (rejecting wrongful termination in violation of public policy claim under Oklahoma law and holding that executive orders related to COVID-19 testing did not constitute a clear mandate of public policy).

The basis of Appellant's claim is her termination for an insubordinate e-mail sent by her and other employees (who were similarly terminated) in which they demanded to work from home prior to the existence of any federal, state, or local mandate requiring her employer to do so. This is essentially the same issue that was present in *Pierce*, wherein the plaintiff disagreed with the employer's actions, not on the basis of an identifiable public policy, but based upon her own subjective beliefs. As evidence thereof, Appellant does not, and

cannot, reference the existence of any actual public policy upon which Appellant stakes her belief that the actions of Respondent were in contravention to nor has she identified any such policy in her discovery responses or during her deposition. As of the date of her termination no mandate, no executive order, or other requirement existed which restricted the ability of an employer to require its workforce to report to the office. *See* N.J. Exec. Order No. 102; N.J. Exec. Order No. 103.

Appellant cannot point to any actual violation or contravention of a clear mandate of public policy to support her claim and Appellant's CEPA argument regarding application of future Executive Orders does not fit with the required analysis under *Pierce,* which applies an entirely different, and narrower, standard. Notably, when directly asked which policy her Complaint was referring to, Appellant responded "I would assume that was in regards to there being like a national emergency declared, perhaps, and, you know, New Jersey public schools being closed." Pa247; Pl. Dep. T. 50:08–11. Yet, it is noteworthy that even public schools were open at the time of Appellant's termination. Exec. Order No. 104.

POINT III

APPELLANT FAILED TO ESTABLISH THE EXISTENCE OF ANY DISABILITY

A. Appellant has Failed to Demonstrate a Prima Facie Case under the NJLAD.

In order to maintain a case of discrimination pursuant to the NJLAD, Appellant must first establish the elements of a *prima facie* case of discrimination, which she cannot. A *prima facie* case requires Appellant to evidence that "(1) [she] belongs to a protected class; (2) she was performing her job at a level that met her employer's legitimate expectations; (3) she suffered an adverse employment action; and (4) others not within the protected class did not suffer similar adverse employment actions." *El-Sioufi v. St. Peter's Univ. Hosp.*, 382 N.J. Super. 145, 167 (App. Div. 2005); *see Maher v. New Jersey Transit R.O. Inc.*, 125 N.J. 455, 480–81 (1991); *Jansen v. Food Circus Supermarkets, Inc.*, 110 N.J. 363, 382 (1988). In the present matter the analysis terminates at the first step. Appellant did not, and cannot, meet her burden of demonstrating her membership in a protected class.

Appellant argues that the lower court erred in failing to recognize and apply the broad standard of disability under the NJLAD. However, this is not the case at all. Appellant's argument focuses on the definition of disability and whether her alleged disabilities should be covered under such definition. However, Appellant is glossing over the fact that there is no evidence of these conditions existing during her employment at all. As such, the court correctly found that the Appellant had not provided any evidence that her alleged conditions actually existed at all. Therefore, Respondent respectfully requests this Court affirm the lower court's decision.

Appellant cannot meet the bare requirements of her *prima facie* case as she has not established the existence of a disability covered under the NJLAD. Appellant did not produce any documentation supporting the existence of any of her alleged disabilities and testified that she has no medically imposed physical limitations. Pa050–Pa051; DSOF at ¶¶ 33; DSOF at ¶¶ 29; 34; 37–38. Rather, her Brief relies solely on the unsupported assertions and self-serving declarations, none of which were ever communicated during her employment. Appellant never mentioned a disability or health condition to her employer, was not under medical care for any disability in the months leading up to the separation of her employment, and never requested an accommodation or assistance due to any alleged disability or health condition. Appellant never claimed that she was limited in the performance of her duties by any condition nor is there any evidence to demonstrate that her employer knew or perceived her to have any sort of a disability (other than recognizing that she was heavy set, the existence of which as a matter of law is not a disability in and of itself). Moreover, any inference that she was discriminated against is additionally negated by the fact that she participated in a group e-mail with other co-workers, none of whom are alleged of being disabled but each of whom were terminated along with her for their insubordination.

Even if Appellant could satisfy her initial burden, which she cannot, Appellant cannot point to any comparators outside of her alleged protected class

were treated differently. *See Chirino v. City of Hoboken*, No. A-5576-16T1, 2019 WL 3852543, at *7 (N.J. Super. Ct. App. Div. Aug. 16, 2019) ("Plaintiff must present comparator evidence sufficient to prove that he or she is similarly situated to his or her comparators, and that these employees have been treated differently or favorably by their employer." (internal quotations omitted)). Here, every employee included on the insubordinate e-mail was terminated at the same time and in the same e-mail as Appellant, thereby eliminating any inference of disparate treatment. Further, the subject email made no allegation whatsoever that Appellant or any of the other employees were disabled or suffering from an underlying heath condition—as such, Appellant cannot point to any comparators that were treated differently nor can she argue that the e-mail was a request for accommodation. Consequently, since Appellant can neither demonstrate the existence of a protected disability nor comparators that were treated more favorably, Respondent is entitled to summary judgment as a matter of law.

B. <u>Appellant cannot establish the existence of generalized anxiety</u>.

Appellant again ignores the fact that she has provided no documentation demonstrating the existence of a generalized anxiety disorder or the Respondent's knowledge of such purported condition. As to this unsupported barebones allegation as to generalized anxiety, a condition which Respondent disputes the existence of, Appellant has been unable to provide any substantiation for the allegation other than

to state that during the course of her employment she saw a therapist after the death of her stepfather because she "felt [she] was going through a grieving process." Pa050; DSOF at ¶¶ 27–31. This temporary treatment for grief and anxiety, without medication, ended in 2019 following her grieving process. Pa050; DSOF at ¶ 29. Outside of those few visits relating to grieving her stepfather, there is not a single piece of evidence to substantiate her allegations that she suffered from any disabling condition of anxiety. Likewise, upon hire she certified to an insurance carrier that she did not suffer from a mental or nervous disorder. Pa051; DSOF at ¶ 40. When confronted as to why she did not do so, she ludicrously replied that maybe she didn't want to seem undesirable. Pa051; DSOF at ¶¶ 40–41.

Notwithstanding all these allegations, Appellant never once communicated to her employer that she was disabled due to obesity, high blood pressure, or anxiety or that she needed any assistance because of such purported conditions. Pa051; DSOF at ¶¶ 37–38. The only items Appellant points to (and upon which she rests her entire case) are an e-mail from Appellant and several of her coworkers and so-called communications to Jennifer Iannotti in a group text message chain, admittedly presented as jokes, which, when presented in full rather in the edited fashion in which Appellant frames them state:

- "quiet seems like Big East is cancelled Sam can't go to Amsterdam trying to manage my own coronavirus anxiety haha."

- "Def. They are divas. I'm having anxiety. May need a doughnut."
- "I have this dull chest pain from the anxiety, I think, LOL"

Appellant's only response as to why her jokes should not be interpreted as jokes is because she is a "millennial" and therefore it's part of her "culture" to send "LOL" with earnest thoughts. Pa311; Pl. Dep. T. 107-05–T107-08. However, Appellant attempts to mislead this Court by removing all context from these text messages on Page 34 of her Brief. Further, despite Appellant's assertions that the lower court did not review the text messages, the court was reviewing the messages in real time and reading some of those messages into the record as that statement was made. Rather than ignoring the messages, the lower court actually requested that Appellant's counsel identify a citation to any specific message which supported notice to the Respondent of Appellant's alleged anxiety. Appellant's counsel could not do so.

These text messages constitute the only communications from Appellant on the subject. Neither these texts nor the e-mail communicated the existence of a disabling condition or a request for accommodation of the same. To wit, Appellant's failure to present substantive evidence of her disability coupled with her inability to establish a causal connection between her purported disability and her termination is fatal to her claims—in sum, she cannot establish a *prima facie* case for her LAD claim.

C. Obesity is not a disability under the NJLAD as a matter of law.

Appellant's claims under the NJLAD fail because she cannot demonstrate the existence of a disability. Appellant attempts to circumvent this by pleading her weight as a disability. However, "[t]here is no protected class [under the LAD] based solely on one's weight." *Dickson v. Cmty. Bus Lines, Inc.*, 458 N.J. Super. 522, 528 (App. Div. 2019) (affirming summary judgment against plaintiff, weighing approximately 500–600 pounds, on grounds that obesity is not a disability under LAD); *see also Schiavo v. Marina District Developmental Co.*, LLC, 442 N.J. Super. 346, 375 (App. Div. 2015). Dickson's weight was found not to be a disability under the NJLAD even though he was almost forty years old, weighed almost 600 pounds, and could not even "bend over to take off his shoes." *Dickson*, 458 N.J. Super. at 527. Conversely, at the time of her termination, Appellant was twenty-nine years old, 5'9" and weighed anywhere from 250-300 pounds (according to her), walked to work occasionally while living in New Jersey (until at some point in March of 2020, right before she demanded that her employer let her work from home, when she moved out of state from New Jersey to her boyfriend's $7,000 a month apartment in Manhattan, without informing her employer or any governmental authority), and was not impeded in any way by her weight. Pa241; *See* DSOF at ¶¶ 37; 38.

In addition, Appellant has not produced any medical documentation supporting the allegation that she has been diagnosed or treated for obesity (even though directed to do so in Defendant's Request for Production No. 14) and peculiarly testified that obesity is something that is only generally talked about and treated through primary care. Appellant further admitted that any treatment for her obesity began in April 2023, years after her termination. Pa241; SUMF at ¶ 39. Bewilderingly, Appellant appears to claim that Respondent should have assumed that she was disabled based upon her appearance. However, to do so would require Respondent to violate the NJLAD by assuming she was disabled and then treating her differently than other employees. Appellant cannot accuse the Respondent of discriminating against her when it acted in a neutral manner towards her appearance.

In an attempt to circumvent this settled law that obesity in and of itself is not a disability, Appellant alleged that she suffered from high blood pressure and now upon appeal attempts to throw every possible condition she can think of at the wall to see if anything will stick. However, during her deposition she could not recall her blood pressure, did not remember any treatment for high blood pressure, and testified that she has never taken medication for high blood pressure. Similar to her allegations regarding obesity, she has not produced any medical documentation that she suffers from high blood pressure or other conditions, even though directed to

do so. As referenced supra, Appellant even certified to an insurance carrier that she did not have high blood pressure. The only reference to high blood pressure, or any other condition, is in Appellant's self-serving and unsubstantiated statement made years after the fact. Pa563–Pa564. In an effort to create a cause of action for Appellant is now alleging the existence of a back pain, however, in her affidavit she identifies her obesity as the cause of this back pain (obesity which existed since age ten and throughout her employment). She even admits that her job with the Respondent was actually a reasonable accommodation for her back issues. Pa073. This is the opposite of what the law requires to support a claim for perceived disability, which is for obesity to be the result of the disabling condition and not vice versa as the Appellant attempts to allege here. *Dickson*, 458 N.J. Super. at 531 ("We agree with the judge that plaintiff failed to meet this threshold requirement under the LAD because his obesity was not a disability caused by a bodily injury, birth defect, or illness."). "LAD claims based upon a perceived disability still require 'a perceived characteristic that, if genuine, would qualify a person for the protections of the LAD.'" *Id.* at 532 (quoting *Cowher v. Carson & Roberts*, 425 N.J. Super. 285, 296 (2012)).

Ultimately, Appellant alleges Respondent failed to accommodate these unsubstantiated purported disabilities. Nonetheless, Appellant has not demonstrated that Respondent was ever put on notice, a failure that is fatal to her claims.

Significantly, not only did she never mention a disability to the employer, she even affirmatively certified in insurance paperwork at the time of hire that she did not suffer from either a mental or nervous disorder or high blood pressure (which flies in the face of the allegations made in her amended Complaint). Pa095; DSOF at ¶¶ 40–41. While no "magic words" are required, Appellant "**must make clear that [she] wants assistance for [her] disability**. In other words, the employer must know of both the disability and the employee's desire for accommodations for that disability." *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 313 (3d Cir. 1999) (emphasis added); *see also Victor v. State*, 203 N.J. 383, 415 (2010) ("To show that an employer failed to participate in the interactive process, a disabled employee must demonstrate: 1) the employer knew about the employee's disability; 2) the employee requested accommodations or assistance for his or her disability … ."). The e-mail upon which Appellant relies states in its entirety: "Since we have the ability to efficiently work remotely, requiring us to come into the office during a pandemic unnecessarily risks our health." Pa365. This e-mail communicates at most a generalized expression of concern about COVID-19, with no reference to any disabilities or underlying health conditions and anger on behalf of a group of employees that did not get their way with management. This was a demand, plain and simple, that they be allowed to work from home because of COVID-19 and not because of any disability or underlying health condition that might make them more

susceptible of complications from COVID-19. There is simply no logical pathway to reasoning that this e-mail provides any indication that Appellant is either stating she is disabled or that she is requesting an accommodation for a disability.

POINT IV

APPELLANT'S COUNSEL ATTEMPTS TO PLACE THE BLAME FOR ITS ERRORS UPON THE TRIAL JUDGE

Despite the de novo standard of review on appeal, Appellant seeks to attack the reasoning of the trial court judge. *See Est. of Zoto v. Cellco P'ship*, No. A-2307-20, 2023 WL 2670713, at *2 (N.J. Super. Ct. App. Div. Mar. 29, 2023) ("We conduct a de novo review of an order granting a summary judgment motion, *Gilbert v. Stewart*, 247 N.J. 421, 442 (2021), and we apply 'the same standard as the trial court,' *State v. Perini Corp.*, 221 N.J. 412, 425 (2015)."). However, as with Appellant's other arguments, Point IV of Appellant's Brief contains several misrepresentations of the case below. While the trial court did criticize Appellant's drafting and referenced her poor responsiveness during oral argument, the court repeatedly stated that it had reviewed all the documents filed by counsel in the matter. T3-13–T3-14. As explained thoroughly by the trial court:

> I read the briefs. I read all my summary judgment dispositive motion briefs and anything else that might be of interest or more complicated. I don't leave it to my law clerk.

> I look at the briefs to point to the record, the motion record that supports whatever you say in the brief. You did not give me many citations, if any, to a lot of things. For example, you say that she treated - - plaintiff "treated for anxiety before". That's at your brief, page 13 of 29 on eCourt paging system. No citations to the record.

T15-6–T15-16. Despite Appellant's attempted reframing, the court below repeatedly questioned Appellant as to whether there was any actual evidentiary support for her allegations that she was diagnosed or treated for anxiety while employed by Respondent. However, Appellant could not provide any support other than barebones allegations without any documentary evidence. In the exchange in question, the lower court had asked Appellant to identify any specific citations to medical records supporting her allegations of anxiety, the Appellant could not identify any. As the lower court correctly concluded "No medical record, no citation to anything to support that statement . . . No citation to anything. For all I know you made all of that up." T16-17–T16-24. Appellant's counsel responded on the record regarding this failure.

Despite being chastised for failing to include proper citations in her brief, the lower court did in fact discuss all of the text messages in question during the hearing, which Appellant has again misrepresented to this Court by cutting off the full conversations which show that the messages were clearly communicated in jest as part of a larger conversation amongst her coworkers. Contrary to Appellant's assertions the trial court did review all the evidence in the record,

including the text messages in question. Yet, they clearly do not purport to be what Appellant contends they are. However, Appellant only wanted the lower court to ignore the fact that, to the contrary, she had provided absolutely no evidence supporting her allegations regarding the existence of any disability.

POINT V

THERE IS NOT A SINGLE IOTA OF EVIDENCE THAT DEMONSTRATES PRETEXT

Appellant misleadingly suggests that the trial court was curious about the actions of Respondent when not immediately rehiring Appellant, but omits the remainder of the trial court's analysis which states that there is no evidence in the record that Appellant was in a protected class or had identified a clear mandate of public policy so any further analysis was unnecessary. Appellant then goes on to outright misrepresent some of the facts of the case below. Appellant was offered her job back. Pa088; Pl. Dep. T. 75:13–16. Appellant's framing of the actual timeline of events is also misleading as Appellant chose to send her e-mail after an all-employee meeting between Ronald Geck, Senior Vice President of Claims for RMTS, and the employees of the claims department and in response to a follow-up e-mail from Mr. Franca outlining RMTS's plans for potential remote work. Appellant's argument falls flat as her allegation that a discriminatory animus existed is contradicted by the fact that all the employees on the e-mail exchange were terminated, not just Appellant.

If an employee can establish a *prima facie* case of discrimination, the burden then shifts to the employer to articulate legitimate, non-discriminatory reasons for its actions. This burden is not onerous, and an employer must only provide "clear and reasonably specific reasons" for its actions. *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 258 (1981). Appellant's allegations make it appear as if she were terminated in a vacuum, this is not the case. Appellant was but one of six employees who were terminated by Respondent at the same time and for the same reason, insubordinate conduct. Appellant must offer some credible evidence that would convince a finder of fact that Respondent's proffered reasons are not true or that other similarly situated employees who were not of the same protected class were treated differently. Appellant has not provided any credible evidence to those points and cannot prove pretext here. To prove that the legitimate, nondiscriminatory reason is a pretext "a plaintiff may not simply show that the employer's reason was false but must also demonstrate that the employer was motivated by discriminatory intent." *Zive v. Stanley Roberts, Inc.*, 182 N.J. 436, 449 (2005) (citing *Viscik v. Fowler Equip. Co.*, 173 N.J. 1, 14 (2002)); *see also St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 510–11 (1993). Appellant has provided absolutely zero evidence to demonstrate that the termination of her and five other employees

was pretext nor has she produced any evidence to show that a comparator was treated differently.

POINT VI

APPELLANT'S *PIERCE* CLAIM IS PREEMPTED

It is well settled law that a plaintiff cannot advance a common law wrongful discharge claim if it does not "seek to vindicate interests independent from those protected by the LAD." *Bosshard v. Hackensack University Medical Ctr.*, 345 N.J. Super. 78, 90 (App. Div. 2001); *see also Catalane v. Gilian Instrument Corp.*, 271 N.J. Super. 476, 492 (App. Div. 1994) ("[T]he Supreme Court does not intend to allow a supplementary common law cause of action where NJLAD provides a remedy . . . because there already exists a statutory remedy for plaintiff, it would be inappropriate for this court to extend New Jersey common law in this case."). Here, even though Respondent is entitled to summary judgment on Appellant's NJLAD claims, her allegations do not seek to vindicate an interest independent from the NJLAD and are therefore preempted.

New Jersey Supreme Court precedent requires, and New Jersey state and federal courts routinely grant, dismissal of common law public policy causes of action if they are based on the same facts that support a discrimination claim under the NJLAD. *See Santiago v. City of Vineland*, 107 F. Supp. 2d 512, 567

(D.N.J. 2000) (a "common law claim for wrongful discharge in violation of public policy are preempted when a statutory remedy under the NJLAD exists"); *Mason v. Zoom Tech., Inc.*, No. A-0727-08T3, 2010 WL 3075556, at *8 (N.J. Super. Ct. App. Div. Aug. 3, 2010) (finding that the plaintiff's Pierce claim was properly dismissed because it "relie[d] upon claims of harassment that lie with the scope of the LAD"). Appellant asserts the same facts and allegations in support of her NJLAD and common law *Pierce* claims, providing no evidence or facts to separate the two, therefore, Appellant's argument as to her common law claim is preempted.

CONCLUSION

There is no genuine issue of material fact and summary judgment dismissing the Plaintiff's Complaint was the appropriate disposition of this case. First, no jury can interpret Appellant's e-mail on behalf of herself and five of her colleagues as a request for a reasonable accommodation for a disability. It wasn't a request at all. Rather, it was a demand without any mention of a disability affecting her or her co-workers. Second, Appellant failed to demonstrate a *prima facie* claim of discrimination by failing to demonstrate the existence of a disability through evidence beyond self-serving declarations. Third, Appellant has failed to demonstrate that Respondent's reasons for her termination were pretextual. Fourth, Appellant has not met her heavy burden in

proving that her termination violated a clear mandate of public policy. Therefore, Respondent respectfully requests that the Appellate Division affirm the Trial Court's decision.

Dated: May 24, 2024

Respectfully submitted,
DarrowEverett LLP

By: /s/Kevin P. Gildea
Kevin P. Gildea

FILED, Clerk of the Appellate Division, June 10, 2024, **A-000272-23**

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

COLLEEN SCHEUER, Plaintiff/Appellant, vs. RMTS, LLC and CARMINE FRANCA, Individually, Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-000272-23 On Appeal from the Superior Court of New Jersey, Law Division, Hudson County DOCKET NO.: HUD-L-4383-21 Anthony V. D'Elia, J.S.C. Sat Below

REPLY BRIEF OF PLAINTIFF/APPELLANT, COLLEEN SCHEUER

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PRELIMINARY STATEMENT

On March 13, 2020, in the wake of national and state emergencies relating to the Covid-19 Pandemic, Plaintiff wrote Defendant superiors stating, "**Since we have the ability to efficiently work remotely, requiring us to come into the office during a pandemic unnecessarily risks our health**." This request emanated from Plaintiff's concerns about the health and safety of her workplace, along with contracting and/or regulating the spread of Covid-19. Without making a single inquiry into these concerns, or the underlying reasons for same, Defendant immediately fired Plaintiff and her co-signatories. Defendant reconsidered and rehired all other signatories, but for Plaintiff, within days. These actions are egregious, and Defendant must be held accountable.

To distract from its own discriminatory and unlawful acts, Defendant depicts Plaintiff as an entitled millennial, inciting a demand to work from home. This is a complete mischaracterization of Plaintiff, who like most people was genuinely fearful as the pandemic swept across the globe, and a complete mischaracterization of her request. An employer should be prohibited from retaliating and discriminating against employees who raise concerns about health and safety in the workplace.

Our anti-retaliation and discrimination laws, codified by the New Jersey Laws Against Discrimination (NJLAD) and Pierce v. Ortho Pharm Corp., 84 N.J. 58 (1980), are construed broadly to eradicate this type of unlawful behavior by

employers. The trial court failed to apply this broad construction, and wrongfully dismissed Plaintiff's claims. In view of the applicable facts and law, reversal of this decision is necessary.

LEGAL ARGUMENT

POINT I
PLAINTIFF HAS IDENTIFIED A PUBLIC POLICY IN SUPPORT OF HER PIERCE CLAIM

Plaintiff made a very specific request to work remotely due to the pandemic and health risks associated with same, stating "**Since we have the ability to efficiently work remotely, requiring us to come into the office during a pandemic unnecessarily risks our health**." This qualifies as protected activity. Broad public policies, such as the general right to work in a healthy and safe environment, as well as more pointed policies arising from the unfolding pandemic, are implicated by this straightforward request. Defendant admits it terminated Plaintiff as a direct result of her plea. Defendant cannot be immunized from liability for its blatantly unlawful action. Such immunization would run afoul of the broad construction of the Pierce doctrine.

Defendant applies a very narrow construction of the law, erroneously adopted by the trial court, arguing that the absence of a formal lockdown order is fatal to Plaintiff's claim. First, in doing so the trial court ignored broader public policies implicated by the right to a safe and healthy workplace detailed already in Plaintiff's

moving brief. Second, the impending lockdown order, alongside already enacted Executive Orders aimed at curtailing the rapidly spreading pandemic, also establish a clear mandate of public policy.

Executive Orders, in effect at the time of Plaintiff's email, establish clear public policy directed at protecting the health and safety of New Jersey citizens and mitigating the spread of Covid-19. Relevant excerpts are as follows:

- Covid-19 was identified as a "severe, potentially fatal respiratory illness that can result in pneumonia, acute respiratory distress syndrome, septic shock and multi-organ failure" Executive Order No. 102, Pa419.
- "Outbreaks of the virus in the United States…are being addressed through a combination of quarantining, medical monitoring and community engagement" Id.
- "The rapidly evolving outbreak…requires State officials to continuously monitor developments…to take necessary and appropriate actions to ensure that residents of New Jersey remain safe and secure" Id. at Pa420.
- "If Covid-19 spread in New Jersey at a rate comparable to the rate speak in other affected areas, it will greatly strain the resources and capabilities of county and municipal governments…" Executive Order No. 103, Pa424.

- "The State has been working closely with the CDC, local health departments and healthcare facilities to monitor, plan for and mitigate the spread of Covid-19 within the State." Id. at Pa425.
- "The spread of Covid-19 within New Jersey constitutes an imminent public health hazard that threatens and presently endangers the health, safety and welfare of the residents…" Id. at Pa426.

In addition to these Executive Orders, on Monday March 16th (three days after Plaintiff's email and immediate termination) the Stay At Home Order issued. Pa431-39. These Executive Orders cumulatively establish a clear public policy for purposes of a common law retaliation claim.

Defendant attempts to differentiate Mehlman v. Mobil Oil Corp., 153 N.J. 163 (1998), arguing that Pierce applies an "entirely different, and narrower" standard than CEPA. New Jersey courts have rejected such an interpretation. See Mehlman, 153 N.J. at 193 (In declining to read CEPA narrowly, the Court reasoned "caselaw has identified relatively unfamiliar sources, including clauses of the federal and state constitutions, as sources of public policy for purposes of **Pierce** or CEPA claims." (Emphasis added)(internal citations omitted); See also Hennessey v. Coastal Eagle Point Oil Co., 129 N.J. 81 (1992) (finding that the Pierce wrongful-discharge cause of action was "broader than defendant" contended and was not restricted to "violations of statutory rights" and "a clear mandate of public policy

must be one that on balance is beneficial to the public"); see also Ballinger v. Del. River Port Auth., 172 N.J. 586, 604 (2002) ("the sources of public policy include legislation; administrative rules, regulations or decisions; and judicial decisions as well as professional codes of ethics under certain circumstances.")

Both CEPA and Pierce require identification of a "clear public policy." CEPA is no broader in the way it defines public policy. Mehlman provides lengthy guidance on what generally qualifies as public policy. There, our Supreme Court recognized, "because the sources and parameters of public policy are not susceptible to hard and fast rules, 'the judiciary must define the cause of action in case-by-case determinations.'" Mehlman, 153 N.J. at 187. (internal citations omitted).

In acknowledging this latitude in identifying sources of public policy, the Mehlman Court confirmed that imminent regulatory authorities should be considered in determining the existence of public policy. See Mehlman, 153 N.J. at 191 ("Evidence of governmental regulation subsequent to… [the alleged retaliation]… also corroborated Mehlman's testimony that the sale of gasoline with more than five percent benzene was hazardous to human health.") After all, the dynamic nature of public policy, particularly in terms of the quickly evolving public policy on Covid-19 relative to Plaintiff's termination, demonstrates how future regulatory changes influence our understanding of public policy.

Despite this direct guidance by our Supreme Court, Defendant directs this Court to unreported federal and out-of-state decisions which have no precedential value. For example, Defendant relies heavily on the unreported District Court decision of Arterbridge v. Wayfair, LLC, 2022 WL 577956 (D.N.J. February 25, 2022) but the facts are clearly distinguishable from this instant case. In Arterbridge, "Plaintiff allege[d] that Defendant terminated him because he violated a company policy when he returned to work while still awaiting results from a COVID-19 test." Id. at *4. "Plaintiff argue[d] that this policy, coupled with his understanding that Defendant would not offer paid leave to employees waiting for test results . . . violated a clear public policy mandated articulated through guidance issued by the CDC and through public statements by Governor Murphy." Id. In Arterbridge the plaintiff did not cite guidance that "require[ed] businesses to adopt any particular testing protocol or to pay employees who are required to stay home pending test results." Id. And "none of the relevant federal or state legislation passed during that pandemic required any such actions by an employer." Id. Importantly, the court did not definitively decide whether statements by elected officials were proper sources for a mandate of public policy (though they did say it was dubious). Id. Instead, the court noted that even accepting these statements by Governor Murphy as a clear mandate of public policy, it was still "unclear to the court what about defendant's actions amounted to a violation of Governor Murphy's encouragement to get tested." Id. Conversely here,

Plaintiff clearly lays out the statements and guidance by public officials, and a stay-at-home order implemented just a few days after her termination, which establish a clear mandate of public policy aimed at mitigating the spread of Covid-19 and keeping its citizens safe. Arterbridge is just not applicable here.

In Warner v. United Nat. Foods, Inc., 513 F. Supp. 3d 477 (M.D.Pa. 2021), a Pennsylvania case cited by Defendant, the court granted a motion to dismiss under Pennsylvania law because plaintiff could not identify a clear mandate of public policy articulated by governor's order regarding Covid-19 testing. There, defendant argued that Plaintiff's claim must be dismissed because executive orders relating to the Covid-19 Pandemic were not sources from which clear pronouncements of public policy could derive. Id. The Warner Court agreed, stating "we have not identified any case to support the proposition that an executive order alone can articulate the Commonwealth's public policy." Id. at 484.

New Jersey courts, on the other hand, have been very clear about the breadth from which we can derive public policy. Sources of public policy are not exclusive, so long as the offensive activity poses a threat of public harm. Clearly, there is an overwhelming public interest in combatting and mitigating Covid-19.

In Cupi v. Carle BroMenn Med. Ctr., 2022 U.S. Dist. LEXIS 46555(C.D. Ill. Mar. 16, 2022), the court interpreted mandatory COVID-19 mitigation policies to be an adequate source of public policy to sustain a claim for retaliatory discharge.

Therein, plaintiff's termination for adhering to Covid-19 procedures frustrated public policy favoring compliance with OSHA's general mandate to provide a safe workplace. Id. at *3-5 (Internal citations omitted); see also United States v. Pitt-Des Moines, Inc., 168 F.3d 976, 982 (7th Cir. 1999) (OSHA's general duty clause, § 654(a)(1), "requires employers to protect their own employees from obvious hazards even when those hazards are not covered by specific safety regulations imposed by the Act."); see also Palmateer v. International Harvester Co., 85 Ill. 2d 124 (Ill. 1981) ("There is no public policy more important or more fundamental than the one favoring the effective protection of the lives and property of citizens.").

Public policies relating to Covid-19 have encompassed a range of measures aimed at mitigating the spread of the virus and protecting public health. Our Courts, in supporting these policies, have recognized the extraordinary nature of the pandemic. This Court identifies public policy on a case-by-case basis. The overwhelming weight of evidence confirms that Plaintiff has identified a clear mandate of public policy.

POINT II
PLAINTIFF IS DISABLED AS DEFINED BY THE NJLAD

Defendant claims that Plaintiff cannot establish a *prima facie* case of disability discrimination because she does not qualify as disabled. Defendant alleges that Plaintiff: (1) did not produce documentation of her disabilities; (2) did not mention her disabilities to her employer; (3) was not under medical care for a disability in the

months leading up to her separation; (4) never claimed that she was limited due to her disabilities; and (5) that there are no comparators because everyone who was a part of the email was terminated. These proclamations have no legal or factual support in the record.

Plaintiff had a history of treatment for anxiety, which she conveyed to her employer, and obesity, which was readily apparent. See Viscik v. Fowler Equip. Co., 173 N.J. 1, 18 (2002) ("where the existence of a handicap is not readily apparent, expert medical evidence is required."); Place II Condo. Ass'n, Inc. v. K.P., 256 N.J. 472, 487 (2024) (the Court noted that a disability is not readily apparent when it is "non-observable").

There is no legal requirement, and Defendant cites none, that an employee must inform her employer of her disabilities, nor is there a requirement that she be under medical care for a disability immediately before termination. Nonetheless, Plaintiff did inform Defendant of her anxiety. While Defendant may question the veracity of that information- that creates a material dispute of fact which prohibited the trial court from granting summary judgment. Plaintiff also acknowledged medical treatment for anxiety prior to her termination in her answers to Interrogatories. She reserved the right to call any treating medical professional at the time of trial.

Plaintiff can also satisfy the comparator requirement, because even though Defendant initially terminated all signatories to the email, Defendant hired back

everyone except for Plaintiff, almost immediately. The trial court found these actions highly suspicious. Defendant ignores this fact completely, understandably so given the inferences that can be drawn. The comparator evidence strongly demonstrates pretext. "Evidence of pretext sufficient to permit the employee to reach a jury may be indirect, such as a demonstration 'that similarly situated employees were not treated equally.'" Jason v. Showboat Hotel & Casino, 329 N.J. Super. 295, 304 (App. Div. 2000)(citations omitted).

POINT III
PLAINTIFF'S CLAIMS ARE NOT PREEMPTED

Plaintiff's Pierce claim is not preempted by her LAD claims. The claims would only be preempted if identical to the LAD claim. Common law claims arising out of the same facts are not preempted when they seek to vindicate interests independent of those protected by the LAD. Bosshard v. Hackensack Univ. Med. Ctr., 345 N.J. Super. 78, 90 (App. Div. 2001). The Pierce claims are based on the common law claims of violation of public policy and her LAD claims are based on discrimination. These legal theories are aimed at vindicating different interests.

CONCLUSION

The facts of this case are as unique as they are offensive. They must be viewed liberally. They are designed to protect employees by deterring employers from engaging in discriminatory and retaliatory practices. Both the NJLAD and Pierce common law claims should be construed liberally to advance their beneficial

purposes. Under this broad construction Plaintiff 1) has identified a clear mandate of public policy; and 2) qualifies as disabled. The trial court erred in holding otherwise and must be reversed.

Respectfully submitted,
GOLDMAN, DAVIS
KRUMHOLZ & DILLON, P.C.

s/ Kristen Ragon

By:______________________________
Kristen Ragon

DATED: June 10, 2024

Cupi v. Carle BroMenn Med. Ctr.

United States District Court for the Central District of Illinois, Peoria Division

March 16, 2022, Decided; March 16, 2022, Filed

Case No. 1:21-cv-01286

Reporter
2022 U.S. Dist. LEXIS 46555 *; 2022 WL 808209

MARIA E. CUPI, Plaintiff, v. CARLE BROMENN MEDICAL CENTER, Defendant.

Prior History: *Cupi v. Carle Bromenn Med. Ctr., 2022 U.S. Dist. LEXIS 7562, 2022 WL 138632 (C.D. Ill., Jan. 14, 2022)*

Counsel: [*1] For Maria E Cupi, Plaintiff: George Svoboda, THE LAW OFFICE OF GEORGE W. SVOBODA, Wadsworth, IL.

For Carle BroMenn Medical Center, Defendant: Brian Michael Smith, LEAD ATTORNEY, HEYL ROYSTER VOELKER & ALLEN, Champaign, IL; Mitchell Joseph Kavanagh, HEYL ROYSTER VOELKER & ALLEN, Peoria, IL.

Judges: JOE BILLY McDADE, Senior United States District Judge.

Opinion by: JOE BILLY McDADE

Opinion

ORDER & OPINION

This matter is before the Court on Plaintiff Maria E. Cupi's Motion seeking leave to file an amended complaint. (Doc. 13). The Motion has been fully briefed and is ripe for review. For the following reasons, the Motion is granted.

BACKGROUND

In January 2022, the Court dismissed Plaintiff's claim alleging retaliatory discharge because she failed to invoke a clearly mandated public policy; the Court permitted her to seek leave to file an amended complaint if she was able to cure this deficiency. (Doc. 12 at 10-14). Plaintiff now seeks leave to file an amended complaint that, *inter alia*, claims her termination violated the general mandate that employers provide a work environment free from hazards that cause "or are likely to cause death or serious physical harm to [their] employees" found in the Occupational Safety and Health Act of 1970 (OSHA), *29 U.S.C. § 654(a)(1)*. (Doc. 13).

DISCUSSION [*2]

As stated in the Court's Dismissal Order, "[t]o state a claim for retaliatory discharge, an employee must plead that (1) the employer discharged the employee, (2) the discharge was in retaliation for the employee's activities, and (3) the discharge violates a clearly mandated public policy." *Roberts v. Bd. of Trustees of Cmty. Coll. Dist. No. 508, 2019 IL 123594, ¶ 23, 135 N.E.3d 891*. The Court previously held Plaintiff had satisfied the first two elements at this stage of the proceedings. Plaintiff now attempts to cure her failure to satisfy the third element by invoking OSHA's general mandate that employers provide a safe and healthy work environment, *see 29 U.S.C. § 654(a)(1)*. Defendant opposes the Motion, arguing Plaintiff has not adequately connected OSHA's general mandate to her particular set of facts and also that her termination is unlike those in *Wheeler v. Caterpillar Tractor Co., 108 Ill. 2d 502, 485 N.E.2d 372, 92 Ill. Dec. 561 (1985)*, and *Palmateer v. Int'l Harvester Co., 85 Ill. 2d 124, 421 N.E.2d*

876, 52 Ill. Dec. 13 (1981). (Doc. 16 at 3-6).

"The tort [of retaliatory discharge] seeks to achieve 'a proper balance . . . among the employer's interest in operating a business efficiently and profitably, the employee's interest in earning a livelihood, and society's interest in seeing its public policies carried out.' " *Fellhauer v. City of Geneva, 142 Ill. 2d 495, 507, 568 N.E.2d 870, 876, 154 Ill. Dec. 649 (1991)* (quoting *Palmateer, 85 Ill. 2d at 129*). Though the tort has been applied in limited scenarios, the Illinois Supreme Court has used rather broad language in describing its [*3] application. According to the court, "[w]hen a discharge contravenes public policy in any way[,] the employer has committed a legal wrong.' " *Palmateer, 85 Ill. 2d at 130*. It described the meaning of "public policy" as follows:

> There is no precise definition of the term. In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively. It is to be found in the State's constitution and statutes and, when they are silent, in its judicial decisions.

Id. That said, the court has not consistently required public policy to be explicitly expressed on the books. In *Palmateer*—where the tort was applied to protect a whistleblower—the court noted there was "[n]o specific constitutional or statutory provision requir[ing] a citizen to take an active part in the ferreting out and prosecution of crime," but nevertheless concluded "public policy favors citizen crime-fighters." *Id. at 132*. It went on to state: "There is no public policy more important or more fundamental than the one favoring the effective protection of the lives and property of citizens." *Id.*

The Court finds, contrary to Defendant's argument, OSHA's general mandate is sufficiently connected to Plaintiff's claim [*4] at this stage of the proceedings. During the COVID-19 pandemic, the Department of Labor and several states, including Illinois, issued regulations and standards per OSHA's general mandate implementing measures to mitigate the risk of transmitting the virus in the workplace. *See, e.g., Coronavirus Disease (COVID-19) Regulations*, Dept. of Labor, https://www.osha.gov/coronavirus/standards (last visited Mar. 16, 2022). Moreover, the Department of Labor specifically advised that the "General Duty Clause . . . which requires employers to furnish to each worker 'employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm' " applies "to preventing occupational exposure to SARS-CoV-2." *Id.* (quoting *§ 654(a)(1)*); *see also United States v. Pitt-Des Moines, Inc., 168 F.3d 976, 982 (7th Cir. 1999)* (OSHA's general duty clause, *§ 654(a)(1)*, "requires employers to protect their own employees from obvious hazards even when those hazards are not covered by specific safety regulations imposed by the Act."). Courts have interpreted mandatory COVID-19 mitigation policies to be an adequate source of public policy to sustain a claim for retaliatory discharge in Illinois. *See, e.g., Johnson v. Gerresheimer Glass Inc., No. 21-CV-4079, 2022 U.S. Dist. LEXIS 5984, 2022 WL 117768, at *8-9 (N.D. Ill. Jan. 12, 2022)*; *see also Palmateer, 85 Ill. 2d at 132* ("There is no public policy more important [*5] or more fundamental than the one favoring the effective protection of the lives and property of citizens.").

The Court further finds the facts alleged by Plaintiff fit within the parameters set by the Illinois Supreme Court. Accepting as true Plaintiff's allegations, as is required at this stage of the proceedings, her story is as follows. On October 2, 2020, she registered a fever, a symptom of COVID-19. (Doc. 13-1 at 3). She called into Defendant's COVID-19 hotline—which was created to ensure a safe and healthy workplace during the COVID-19 pandemic as required by *OSHA, § 654(a)(1)*—and was directed to stay home; she followed that instruction. (Doc. 13-1 at 3-5). She was then terminated upon her return to work, and this absence was cited as one reason for her termination. (Doc. 13-1 at 5-6). This story holds together and plausibly indicates

FILED, Clerk of the Appellate Division, June 10, 2024, **A-000272-23**

Plaintiff's termination was, in part, retaliation for her absence mandated by Defendant's COVID-19 policy, which was implemented to comply with Defendant's duty under OSHA to provide a safe and healthy workplace, *§ 654(a)(1)*. The Court's previous finding that these allegations are sufficiently similar to those alleged in *Wheeler* remain unchanged. (*See* doc. 12 at 11-12).

Defendant [*6] nevertheless claims it was in compliance with the OSHA general mandate, as evidenced by its hotline and the fact it directed Plaintiff to stay home while feverish. However, whether Plaintiff was in compliance with the OSHA general mandate is not the operative question.

> In both *Kelsay[v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353, 23 Ill. Dec. 559 (1978)*,] and *Palmateer*, the court recognized that an employer could effectively frustrate a significant public policy by using its power of dismissal in a coercive manner. In those circumstances, recognition of a cause of action for retaliatory discharge was considered necessary to vindicate the public policy underlying the employee's activity, and to deter employer conduct inconsistent with that policy.

Fellhauer, 142 Ill. 2d at 508. The operative question is therefore whether Plaintiff's termination for complying with Defendant's COVID-19 procedures frustrated the public policy favoring strong COVID-19 mitigation measures during the height of the pandemic, as mandated by OSHA. By terminating Plaintiff for being absent on October 2, Defendant implies Plaintiff should have come to work on that day. Requiring employees to work while presenting COVID-19 symptoms clearly frustrates and undermines that public policy. And even without that implication, Defendant [*7] terminated Plaintiff for adhering to its own COVID-19 mitigation procedures. That in and of itself offends public policy.

Because the Court finds Plaintiff's allegations fit within the parameters set by the Illinois Supreme Court, the Court rejects Defendant's contention that Plaintiff's theory expands the tort of retaliatory discharge. There is simply no cognizable difference between complying with the rules and refusing to break them in this instance; Plaintiff's act of remaining home while feverish is equivalent to refusing to work while feverish. The only difference between this case and *Wheeler* on this point is that, unlike in *Wheeler*, Defendant instructed Plaintiff to comply with the applicable rule rather than violate it, so Plaintiff did not have to explicitly refuse to work while feverish. But that difference in no way undermines the key analogy to *Wheeler*: both claimants were terminated for their decision to stand by the applicable rules. Terminating an employee for following the rules is as problematic as terminating an employee for refusing to break them.

At this stage of the proceedings, Plaintiff has adequately alleged a claim for retaliatory discharge. Plaintiff's Motion to Amend/Correct (doc. [*8] 13) is therefore GRANTED. Plaintiff is directed to correct the issues identified in Defendant's Response and file her Amended Complaint within seven (7) days of the date of this Order.

SO ORDERED.

Entered this 16th day of March 2022.

/s/ Joe B. McDade

JOE BILLY McDADE

United States Senior District Judge

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