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JERSEY CITY IAFF LOCAL 1066,	:	**SUPERIOR COURT OF NEW JERSEY: APPELLATE DIVISION**
	:	**DOCKET NO.: A-000448-23T1**
Plaintiff/Appellant,	:	
	:	**Civil Action**
	:	
	:	**ON APPEAL FROM:**
v.	:	**Superior Court, Law Division, Hudson County**
	:	
CITY OF JERSEY CITY,	:	**SAT BELOW:**
	:	**Honorable Kimberly Espinales-Maloney, J.S.C.**
Defendant/Respondent	:	
	:	**Date of Submission: December 8, 2023**

PLAINTIFF/APPELLANT JERSEY CITY LOCAL 1066's BRIEF IN SUPPORT OF APPEAL

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PRELIMINARY STATEMENT

The City of Jersey City penalizes Firefighters who request or take a temporary medical leave of absence. Utilizing medical or sick leave is a protected absence safeguarded by the New Jersey Law Against Discrimination.

When Firefighters avail themselves of medical leave they engage in a right that is granted or protected by the NJLAD and therefore engage in protected conduct.

Jersey City penalizes Firefighters who request medical leave by rendering them:

A. Ineligible for promotion; and,

B. Subject to discipline or penalty points which leads to discipline

The Firefighter's Union, IAFF Local 1066, asserted two core causes of action in this case. The first concerns the City's adoption and application of a policy in which it renders Firefighters *ineligible* for promotion if they avail themselves of medical leave protected under the NJLAD. This policy *directly* violates the New Jersey Law Against Discrimination.

The second cause of action asserts that the City's medical leave policy, General Order 19-16, punishes Firefighters for requesting and taking medical leave for "three (3) or more illnesses within any twelve (12) month period of time" or "short periods of being absent on sick leave" regardless of the nature and legitimacy of the medical leave usage. The disciplinary penalties are progressive and may lead to suspension and/or termination. Such a policy directly violates the NJLAD and simultaneously

interferes with rights protected by the NJLAD. Where an employer interferes with "any person in the exercise or enjoyment of a protected right" such acts of the employer constitute unlawful retaliation,

Local 1066 requests that the policies be found unlawful and enjoined.

PROCEDURAL HISTORY

This matter was initiated by Amended Complaint on May 8, 2023. (Pa8)

The Defendant, City of Jersey City, filed an Notice of Motion to Dismiss for Failure to State a Claim on July 31, 2023. (Pa63)

Plaintiff opposed a Motion by brief on August 29, 2023. (Pa166)

The trial court granted the Motion to Dismiss on September 13, 2023. (Pa1).

The trial court issued a Memorandum of Decision in support of its dismissing the Amended Complaint. (Pa3)

A Notice of Appeal was filed on October 12, 2023. (Pa271)

Transcript of September 8, 2023 to be noted as 3T.

Any prior transcripts are unrelated to the Amended Complaint under review.

STATEMENT OF FACTS

The Plaintiff, Jersey City IAFF Local 1066, is a Labor Organization and Association representing Firefighters employed by the City of Jersey City. (Pa8 and Pa10). Plaintiff filed an amended complaint on May 8, 2023, alleging that the City adopted and applied a policy in which it unilaterally rendered Firefighters in eligible for promotion if they availed themselves of medical leave. (Pa9). The Plaintiff alleged that such a policy violated the New Jersey Law Against Discrimination. (Pa9)

Additionally, Plaintiff asserted a cause of action which claimed that the City's sick leave disciplinary policy punished Firefighters for utilizing statutory entitled medical or sick leave. (Pa9). Plaintiff claimed that Firefighters who utilized statutory medical or sick leave are perceived to be disabled under the terms of the New Jersey Law Against Discrimination. (Pa10)

Plaintiff asserted that in July 2022, the City implemented a policy in which Firefighters were declared ineligible for promotion if they availed themselves of any type of medical leave whether it such medical leave was work related or not. (Pa11).

At least one (1) Firefighter, R.M., was denied a promotion to Captain because he was on medical leave for an injury which incurred on the job. (Pa11). Fire Fighter R.M. had eighteen (18) years of service and had been included in the list of employees then eligible for promotion to Captain. (Pa11). At the time when the promotions were to be made Fire Fighter R.M. requested and was granted was medical leave. (Pa11-

Pa12). Fire Fighter R.M. showed up for the promotional ceremony with his family and was advised that he would not be promoted because he was on medical leave. (Pa12).

In a letter to the City dated July 20, 2022, IAFF Local 1066 complained to the City that it had implemented a policy of rendering unit members ineligible for promotion if they were on medical leave. (Pa12)

Local 1066 also asserted that Fire Fighter R.M. should be accommodated and that all similarly situated Firefighters (those on sick or injury leave now and in future) should be accommodated as well. (Pa13)

Fire Fighter R.M. had been injured in the line of duty and was placed on medical leave due to his work related injuries in which the City's physician had indicated an expected return to full duty within a few weeks. (Pa13). Local 1066 asserted that Fire Fighter R.M.'s status as a temporarily disabled employee like similar Firefighters placed him under the protected status under the laws of New Jersey including the Law against Discrimination as he was perceived to be a disabled person under the NJLAD. (Pa14). Local 1066 requested an accommodation for Fire Fighter R.M. and similarly situated Firefighters. (Pa14). Local 1066 claimed that Fire Fighter R.M. and similar Firefighters were denied promotional eligibility by the City and denied an equal opportunity for promotion because of their actual and perceived disabilities.(Pa14)

Local 1066 asserted that the City must either accommodate such Firefighters or prove that they cannot be accommodated after conducting a thorough individualized factual assessment of the individuals' ability to safely perform the essential functions of the position without undue hardship to the City (Pa14 - Pa15).

Defendant never accomplished any individual assessment for R.M. or any other Association unit member and will continue to decline to do so in the future. (Pa15).

The Association claimed that the failure to conduct individual assessments such as that to which R.M was entitled denies similar situated persons with perceived disabilities employment opportunities because of the disability. (Pa15).

Local 1066 demanded that Fire Fighter R.M. and similar situated members be accommodated and made whole including retroactive promotion if they were declared ineligible simply because the availed themselves of medical leave. (Pa16). The City denied Local 1066's request on behalf of Fire Fighter R.M. and other similarly situated Firefighters. On August 17, 2022, the City indicated that:

> "it would be absurd for the City to promote an individual out on sick/injury leave and pay the individual additional salary when the individual is not able to return to work and carry out the functions of the position. Contrary to the regulations you cite, none required the City to make a promotion to an individual unable to perform they essential functions of the new position". (Pa17)

Local 1066 asserted that the City was incorrect that an accommodation (such as a short period of medical leave) would not allow Fire Fighter R.M. or similarly situated Firefighters to perform the duties of a promotional position. (Pa18)

Local 1066 claimed that an extension of an accommodation was clearly possible because the City had already extended medical leave on a temporary basis which is a common accommodation under the NJLAD. (Pa18). The City similarly stated to the Association that;

> "it is not a reasonable accommodation to promote an individual unable to perform the duties of the position and there is no law that requires otherwise. When the subject Firefighter returns to work, able to perform the duties of his position, including the essential functions as Fire Captain, the City will consider his promotion." (Pa18).

Local 1066 asserted that the aforementioned letter acknowledges that the City would not promote any Firefighters who are on medical or sick leave and that this was the City's official policy both now and into the future. (Pa18). Local 1066 asserted that the City will never consider any Firefighter eligible for promotion simply because he is out on temporary sick leave and that this punishes an employee simply for availing themselves of medical leave. This in turn violates the NJLAD. (Pa19)

Local 1066 asserted that the City establish a policy of refusing eligibility of Firefighters for promotion when they are on medical leave regardless of the nature of

the disability. Local 1066 asserted that even if a Firefighter was merely perceived to be disabled the promotion would still be denied. (Pa19)

Local 1066 also asserted that the City punishes Firefighters through General Order 19-6, which is an established policy subjecting Firefighters to discipline simply for requesting and taking medical leave to which they are entitled under the law. (Pa 23)

The Department defines excessive sick leave which subjects a Firefighter to punishment as "short period of being absent on sick leave". (Pa20). The General Order adopted indicates that employees will be subject to discipline pursuant to Section 6.3.4 of the policy for "three (3) or more illnesses within any twelve (12) month period of time". (Pa23)

As a result, each time a Firefighters takes 3 medical or sick leaves within a year, they are subjected to a stacking or progressive discipline which begins with a reprimand and thereafter increases to loss of compensatory days and finally to termination. (Pa24-Pa25). Local 1066 asserted that the Rules and Regulations as listed are void on the face where they punish Firefighters simply because the Firefighter legitimately utilized medial leave which is protected activity under the NJLAD. (Pa25)

Local 1066 claimed that sick leave may only be utilized for illness or injury pursuant to state regulation and that therefore such leave is ipso facto protected activity under the New Jersey Law Against Discrimination which provides that

perceived disabilities trigger the protection of the NJLAD. (Pa25).

Local 1066 asserted that pursuant to **N.J.S.A.** 11A:6-5, Firefighters are entitled to fifteen (15) sick days per year on an accumulating basis to be used for illness or injury. (Pa25-Pa26). Local 1066 asserted that such Firefighters therefore have a right to utilize sick leave which may be used for illness or injury as a matter of law. (Pa27). Local 1066 challenged the General Order which penalizes employees simply for taking medical leave for illness or injury and claim that such actions violate the New Jersey Law Against Discrimination. (Pa27).

Local 1066 claimed that the City acknowledged that it would not accommodate any union member regardless as to the nature of their injury or illness however short in duration or minor in seriousness either for promotion or for sick leave usage. Local 1066 asserted that Firefighters who are perceived as holding a disability must be accommodated under the NJLAD and **N.J.A.C.** 13:13-2.5(b). (Pa34). Local 1066 asserts that its Association unit members were perceived to be or disabled and/or handicapped within the meaning of the NJLAD and they were qualified to perform the essential functions of the position. (Pa36). Local 1066 also asserted that Association unit members suffered and will continue to suffer in the future adverse employment actions because of their perceived disabilities/handicaps and that the employer's actions in denying promotional eligibility is a material adverse change in the terms and conditions of employment. (Pa36). Local 1066 asserted that when unit members utilize

sick or injury leave they are considered to be disabled under the LAD and perceived as being disabled. (Pa37). Local 1066 asserted that the impacted unit members were qualified to perform the essential functions of the position because they had been deemed eligible for promotion but suffered an adverse employment action because of their sick/injury leave status. (Pa40).

Local 1066 claimed that the City violated the NJLAD by failing to conduct individual assessments in investigating each employees' health status so that it could determine whether or not a reasonable accommodation could be made. (Pa41). Local 1066 similarly claimed that the particular General Order 19-16, has been responsible for issuing violations for excessive absenteeism under it's policy provisions.

Local 1066 has claimed that the policy is arbitrary and capricious as the standards "of a short period of illness" are unknowable. Local 1066 asserted that the Department established a sick leave policy which punishes Firefighters for the legitimate use of medical or sick leave. (Pa54). Local 1066 asserted that the sick leave policy disciplines employees simply based upon a mathematical amount of sick leave utilized in violation of the NJLAD. (Pa55).

Local 1066 also asserts that Firefighters were penalized for the proper use of sick leave based upon an arbitrary mathematical formula which was arbitrary and capricious. (Pa57-Pa58).

Local 1066 requested in its prayer for relief that the policies related to medical leave be declared unlawful and enjoined. (Pa58) [1]

[1] The foregoing are the most relevant facts in this matter. Plaintiff adopts and incorporates all of the factual averments in its amended complaint for purposes of this appeal.

POINT I

THE TRIAL COURT DID NOT PROPERLY CHARACTERIZE OR CONSTRUE PLAINTIFF'S COMPLAINT CONCERNING THE CHALLENGED PROMOTIONAL POLICY (Pa5)

Jersey City has established a policy in which it denies promotion to those firefighters who request and receive a temporary medical leave of absence.

Such activity is protected activity under the New Jersey Law Against Discrimination.

> [W]hen a disabled employee requests and then takes a temporary medical leave of absence, said employee avails himself of a right that is "granted or protected by [the NJLAD]," and thus engages in protected conduct. See **N.J.S.A.** 10:5-12(d)
>
> **Boles v. Wal-Mart Stores, Inc.**, Civil Action No. 12-1762 (JLL), 2014 U.S. Dist. LEXIS 41926, at *23 (D.N.J. Mar. 26, 2014)

In this case medically disabled Firefighters, who request and are granted statutory sick leave due to disability or illness, are rendered ineligible for promotion. Indeed, once they miss their "promotional window" it is possible that they may never be promoted.

Plaintiff has challenged this policy as facially discriminatory or directly discriminatory. (ie.: the policies are void where they exhibit a facial violation of the provisions of the NJLAD.) The actions of the employer may also be considered retaliatory. If an employer interferes with "any person in the exercise or enjoyment of a protected right" then **N.J.S.A.** 10:5-12(d) renders such conduct an illegal retaliatory act.

Instead of construing plaintiff complaint in its totality the trial court relied upon a sole paragraph in Plaintiff complaint at ¶ 19 (pa13) which concerned an assertion that the City failed to accommodate. See trial court decision at (Pa5) ¶ 19 within plaintiff's complaint was a very minor aspect of Plaintiff's claims. Plaintiff claimed that the promotional policy was discriminatory on its face and that the rejection of promotional eligibility was direct discrimination and ipso facto a failure to accommodate. In other words the facial discriminatory ineligibility foreclosed the obligation to accommodate altogether.

The Trial Court relied upon a *McDonnell-Douglas* burden shifting analysis which is not applicable to the Association's primary claim of direct discrimination.

The Trial Court further failed to recognize, let alone assess, the factual claims made within Plaintiff's complaint. The Trial Court was obligated to accept Plaintiffs allegations as true and its failure to do so was error.

As stated within Plaintiff's complaint there are two core policies which violate the NJLAD. The first policy to be challenged discriminates against disabled Firefighters in terms of promotional eligibility.

The interference with Firefighter's rights to medical leave is primarily a case of "direct" or "facial" violation of the NJLAD. As a "direct" or facial assertion of discrimination it is controlled by the Court's holding in **Smith v. Millville Rescue Squad**, 225 N.J. 373, 394 (2016) which stated:

> In order to establish a prima facie case of employment discrimination by direct evidence, the plaintiff must produce evidence "that an employer placed substantial reliance on a proscribed discriminatory factor in making its decision to take the adverse employment action[.]" Direct evidence of discrimination may include evidence "of conduct or statements by persons involved in the decision making process that may be viewed as directly reflecting the alleged discriminatory attitude." (Citations omitted)
>
> **Smith v. Millville Rescue Squad**, 225 N.J. 373, 394 (2016)

What occurred in **Smith**, is precisely analogous to the conduct and policy cited by Plaintiffs as unlawful. Jersey City is relying upon a proscribed discriminatory factor in determining promotional eligibility. The discriminatory factor in this case is each Firefighter's actual or perceived disability — and their need to request and take

medical leave to recover.

As stated within ¶ 11 (Pa11) of Plaintiff's Amended Complaint, among many other similar paragraphs citing similar facts:

11. "On or about July 2022, the City implemented a policy wherein Union members were rendered ineligible for promotion if they avail themselves of any type of injury or sick leave, work related or non work related." (Pa11)

40. The City has established a policy of refusing the eligibility of firefighters for promotion when they are on paid sick or injury leave regardless of the nature of the illness or disability. (Pa19)

90. In this matter Association unit members are either perceived to be or are disabled/handicapped within the meaning of the New Jersey Law Against Discrimination. (Pa36)

Plaintiff clearly articulated that the Defendant established a policy rendering disabled Firefighters ineligible for promotion and makes it clear that the Defendant placed substantial (if not complete) reliance on this proscribed discriminatory factor in making its decision to take the adverse employment action. This satisfies the test laid out in **Smith**, supra.

This case is also similar to the facial policy challenged within **Delanoy v. Tp. of Ocean**, 245 N.J. 384, 402 (2021) ("[I]t is apparent that the Maternity SOP applied to **Delanoy** was facially invalid * * * [O]n its face, the Maternity SOP constituted a

per se violation of the PWFA's prohibition of unfavorable treatment of pregnant employees.")

The LAD prohibits any unlawful discrimination against any person because such person is or has been at any time disabled. The LAD defines disability to include a "physical disability [or] infirmity . . . caused by bodily injury . . . or illness . . . ." **N.J.S.A.** 10:5-5(q). "Illness or bodily injury" is the same criterion which Firefighters assert and claim when they utilize medical or sick leave.

The complaint *sub judice* is primarily a "direct evidence" case as opposed to the *McDonnell-Douglass* circumstantial case analysis cited by the trial court. As noted by our Supreme Court, "where there is direct evidence of discrimination, the *McDonnell-Douglas* analysis does not apply." **Smith**, supra, 225 N.J. at 396.

In **A.D.P. v. ExxonMobil Research & Eng'g Co.**, 428 N.J. Super. 518, 533 (App. Div. 2012) the Appellate Division stated the standard for "direct evidence" case and held:

> Direct evidence of discrimination is evidence "that an employer placed substantial reliance on a proscribed discriminatory factor in making its decision to take the adverse employment action[.]

In this matter the Defendant placed complete and full reliance upon its decision to deny promotional eligibility upon a proscribed discriminatory factor - namely that

a Firefighter had availed himself of medical leave and was ill or disabled (or perceived as disabled) under the provision of the NJLAD.

The Defendant's statements and actions, clarified through its representatives, confirmed that it would never promote a Firefighter who was disabled and on medical leave on the date a promotion was to occur. This is direct evidence of reliance upon a proscribed discriminatory factor in undertaking the adverse employment action.

The "burden shifting analysis" advanced by the Defendant and the Trial Court is therefore inapplicable to this matter. Similarly, the Defendant's motive for its policies is irrelevant.[2] Instead, the burden of persuasion shifts to the employer, to prove that even if it had not considered the proscribed factor, the adverse employment action would still have occurred. Plaintiff asserts that declaring Firefighters ineligible simply because they are perceived to be disabled, or are disabled, directly violates the NJLAD.

> [W]hen a plaintiff produces evidence that an employer placed substantial reliance on a proscribed discriminatory factor in making its decision to take the adverse employment action, the burden of persuasion shifts to the

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[2] The NJLAD adopts the analysis applicable to Title VII cases. "under Title VII, when a policy is "discriminatory on its face," the defendant's motive is irrelevant. [T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination. (Citations omitted) **Feemster v. BSA Ltd. P'ship,** 548 F.3d 1063, 1070 (D.C. Cir. 2008)

> employer to prove that even if it had not considered the proscribed factor, the employment action would have occurred **McDevitt v. Bill Good Builders, Inc.**, 175 N.J. 519, 527 (2003)

The Plaintiff has asserted a claim of direct facial discrimination against promotionally eligible Firefighters. The burden therefore shifts to the employer. The City has not even asserted that it considered anything but the proscribed factor - the temporary disability of medical leave. Indeed, the City proudly affirms its acts and position as legitimate in all respects.

The Association brings claims asserting that the promotional ineligibility policy applicable to Firefighters on sick or injury leave is directly unlawful or unlawful on its face.

Furthermore, discrimination against Firefighters for requesting and taking medical leave is an act which interferes with the "exercise or enjoyment of a protected right". **N.J.S.A.** 10:5-12(d)

> [W]hen a disabled employee requests and then takes a temporary medical leave of absence, said employee avails himself of a right that is "granted or protected by [the NJLAD]," and thus engages in protected conduct. See **N.J.S.A.** 10:5-12(d)
>
> **Boles v. Wal-Mart Stores, Inc.**, Civil Action No. 12-1762 (JLL), 2014 U.S. Dist. LEXIS 41926, at *23 (D.N.J. Mar.

26, 2014)

By taking adverse action (rendering Firefighters ineligible for promotion) in response to the exercise of a protected right, Defendant's actions are properly characterized as retaliatory.

> When the claim arises from alleged retaliation, the elements of the cause of action are that the employee "engaged in a protected activity known to the [employer,]" the employee was "subjected to an adverse employment decision[,]" and there is a causal link between the protected activity and the adverse employment action.
> **Battaglia v. United Parcel Serv., Inc**., 214 N.J. 518, 547 (2013)

In this case Plaintiff easily satisfies the elements of retaliation under the NJLAD.

The Association additionally asserts claims that the promotional policy exists as an arbitrary and capricious exercise of Defendant's municipal authority.

A Plaintiff may always challenge a policy adopted by a municipality that violates the law. In this case the New Jersey Law Against Discrimination grants a private cause of action to any "person", including labor organizations, who challenge policies or the application of such policies as violative of the New Jersey Law Against Discrimination.

In this case the Association has standing to bring its claims on behalf of all of its impacted members.[3]

Declaratory Judgement actions are the appropriate vehicle to challenge municipal policy. Municipalities are granted the general power to provide for the employment necessary for the efficient conduct of their affairs. See **N.J.S.A.** 40:48-1(3) and 2.

It is the long established legal rule that all powers delegated to municipalities must be exercised reasonably and not arbitrarily and they must not contradict statutes adopted by the State. **Kennedy v. City of Newark**, 29 N.J. 178, 184-185 (1959.

Under the facts of this case the City's promotional policy is a direct violation of the NJLAD. The City relied upon a proscribed discriminatory factor in making its decision to take the adverse employment action against Firefighters - ie. rendering them ineligible for promotion.

Not only is the City Policy violative of the NJLAD it is also an arbitrary exercise of municipal agency. The promotional policy is an obviously unreasonable and arbitrary exercise of delegated power, and hence illegal. See, **Ebler v. Newark**, 54 N.J. 487, 490-91 (1969). (Policy which denied sick leave benefits to Jewish police

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[3] The importance of representative standing as an efficient procedural vehicle for addressing the common rights of association members is well-recognized in New Jersey. See N.J. **Citizen Action v. Riviera Motel Corp.**, 296 N.J. Super. 402, 415 (App. Div. 1997) (stating that "New Jersey courts take a broad and liberal approach to standing") The IAFF has a strong interest in vindicating the rights of its members.

officers declared void)

> "It is the long established rule . . . that all powers delegated to municipalities must be exercised reasonably and not arbitrarily."

We also note that rendering persons ineligible for promotion simply because they avail themselves of medical leave provided under Civil Service law violates the laws of New Jersey. See, **N.J.S.A.** 11A:6-15. "A leave of absence shall not disqualify an applicant for a promotional examination."; **N.J.A.C.** § 4A:10-1.1(c) "No person or appointing authority shall obstruct a person's lawful opportunity to participate in the selection and appointment process...."; **N.J.A.C.** 4A:10-1.1 " No person or appointing authority shall violate the provisions of Title 11A, New Jersey Statutes, or Title 4A"

In this case the City's actions are arbitrary where they deny promotional eligibility to disabled persons or persons perceived to be disabled. This is an abuse of discretion. Where such policies are arbitrary and violate the NJLAD, and other New Jersey Laws, directly, and facially, they are subject to nullification as a matter of law.

POINT II

THE TRIAL COURT APPLIED THE WRONG LEGAL TESTS TO PLAINTIFF'S CLAIMS (Pa5)

The Trial Court analyzed this matter under the traditional *McDonnell Douglas* burden shifting analysis for individual plaintiffs. The Trial Court recited this standard as:[4]

> "In a LAD disability discrimination case, a plaintiff must establish: (1) he was a member of a protected class (i.e., disabled within the meaning of the LAD; (2) he was qualified to perform the essential functions of the job; (3) he was terminated or otherwise suffered an adverse employment action because of his disability; and (4) that the employer thereafter sought similarly qualified individuals for that job. See **Victor v State**, 203 N.J. 383, 409 (2010). (Pa5)

This test was improperly applied in this case where the labor organization, as an association, brought claims under the NJLAD as a *direct* or facial violation of the NJLAD. Nevertheless, Plaintiff still satisfied the test applied by the trial court when it presented a representative plaintiff, R.M. within its pleading.

In a direct discrimination case a Plaintiff need only establish that "an employer placed substantial reliance on a proscribed discriminatory factor in making its decision

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[4] The trial court incorrectly cited the test within Victor v. State which is more accurately stated as (1) plaintiff was in a protected class; (2) plaintiff engaged in protected activity known to the employer; (3) plaintiff was thereafter subjected to an adverse employment consequence; and (4) that there is a casual link between the protected activity and the adverse employment consequence. **Victor v State,** 203 N.J. 383, 409 (2010)

to take the adverse employment action.", **Smith v. Millville Rescue Squad**, 225 N.J. 373, 394 (2016) .

Moreover, in a retaliation case Plaintiff need only prove that "the employee "engaged in a protected activity known to the [employer,]" the employee was "subjected to an adverse employment decision[,]" and there is a causal link between the protected activity and the adverse employment action." **Battaglia v. United Parcel Serv., Inc.**, 214 N.J. 518, 547 (2013)

As noted, Plaintiff brought this claim as an incorporated association. It is not unusual for an associational interest group to bring a discrimination claim on behalf of its members. See **Dial, Inc. v. City of Passaic**, 443 N.J. Super. 492, 513 (App. Div. 2016) where a handicapped Association brought suit against the City challenging the validity of an ordinance which the Association claimed violated the New Jersey Law Against Discrimination.

See **NAACP v. N. Hudson Reg'l Fire & Rescue**, 665 F.3d 464, 468 (3d Cir. 2011) (Association challenged fire department's residency requirement which was permanently enjoined because it had a disparate impact on African-American applicants.)

In **Pa. State Troopers Ass'n v. Miller**, 621 F. Supp. 2d. 246 (2008) where the State Troopers Association challenged a sick leave policy which violated the ADA.

Under the NJLAD a labor organization or association is entitled to the statutes protections and may assert claims under the Act. Pursuant to **N.J.S.A**. § 10:5-5 "Person" includes one or more individuals, partnerships, *associations*, organizations, [and] *labor organizations*...."

As stated in the NJLAD any "person" may initiate a complaint in the Superior Court.

Any complainant, including any person (including labor organizations), claiming to be aggrieved by an unlawful employment practice or an unlawful discrimination...may initiate suit in Superior Court. **N.J.S.A**. § 10:5-13

In this case the Trial Court failed to apply the correct analytical test. But even if the test invoked by the trial court (**Victor v. State**, 203 N.J. 383, 409 (2010)) was fairly applied Plaintiff would still prevail.

(1) Plaintiff asserted that its impacted members were in a protected class - they were known to be or perceived to be disabled when they requested medical leave

(2) Plaintiff asserted that its impacted members engaged in protected activity known to the employer - which was requesting and taking leave for a disability or illness;

(3) Plaintiff's impacted members were subjected to an adverse employment consequence - ineligibility for promotion and/or discipline; and

(4) that there is a causal link between the protected activity (leave based on perceived disability) and the adverse employment consequence - ineligibility for promotion or

discipline.

The Trial Court simply did not apply the asserted facts to either a direct evidence case or even a McDonnell-Douglas burden shifting analysis.

Instead the Trial Court focused on whether individual Firefighters were "*adequately* accommodated".

> "Plaintiff argues that the Defendant has not adequately provided disability accommodations to firefighters who have taken sick or injury leave." (Trial Court decision, page 3) (Pa5)

The NJLAD does not contemplate an "adequately accommodated" test. Moreover, this is not an accurate description of what Plaintiff alleged as its cause of action. What Plaintiff alleged was that the City policy was facially unlawful and furthermore that the City was refusing to engage in the interactive process of potential *reasonable* accommodation, altogether, as a matter of policy. It is this blanket refusal, as a matter of policy, which constitutes a violation of the act. Indeed there was never even an attempt to accommodate, let alone a failure to "adequately accommodate" as the Trial Court suggested.

But the Trial Court fell short in even recognizing the individual which the Association presented as a representative Plaintiff of the entire Association, namely, Fire Fighter R.M., who indeed, was directly discriminated against, retaliated against

and not even considered for reasonable accommodation.

R.M., like all other Firefighters, was never even considered for possible accommodation, as the policy contemplates complete disqualification from any possibility of promotion. The policy, as applied, simply will not accommodate Firefighters who are on medical leave.

Last, the Trial Court fails to properly characterize plaintiff's claims asserting:

> "Plaintiff's argument, essentially, states that any individual who takes a single sick day would be considered disabled within the meaning of the NJLAD. Such a reading of the statute would be inconsistent with the intent of the Legislature". (Trial Court decision, pg, 4.) (Pa6)

This assertion is in error. "[T]aking a disability/medical leave is protected by the NJLAD.", **Yobe v. Renaissance Elec., Inc**., 32 Am. Disabilities Cas. (BNA) 1015 | 2016 WL 614425 Civil Action No. 15-3121(FLW), 2016 U.S. Dist. LEXIS 18227 (D.N.J. Feb. 16, 2016) citing **Nusbaum v. CB Richard Ellis, Inc**., 171 F. Supp.2d 377, 388 (D.N.J. 2001).

"A "request" for sick leave qualifies as a request for a reasonable accommodation. **Pizzo v. Lindenwold Bd. of Educ**., 31 Am. Disabilities Cas. (BNA) 982, Civil Action No. 1:13-cv-03633 (JBS/JS), 2015 U.S. Dist. LEXIS 41499, at *35 (D.N.J. Mar. 31, 2015)

The "taking" of the sick day triggers the protections of the NJLAD because it

is an event by which an employee is *perceived to be disabled.* Taking medial leave is in itself protected activity under the NJLAD. Penalizing employees because they do so is retaliatory and an unlawful act whether the medical leave is for a single day or many days.

In this case employees taking medical leave are perceived to be disabled and therefore are being declared ineligible for promotion. It is the perception or actual knowledge of disability which then motivates the employer toward adverse action, which is precisely what Plaintiff alleges in this case.

Simply taking medical leave can indeed be a form of disability accommodation. Retaliating against employees for availing themselves of such medical leave *additionally* violates the NJLAD.

The Trial Court also asserted that:

> Plaintiff failed to provide that those named in the Amended Complaint: (i) are qualified to perform the essential function of the job (ii) were terminated or otherwise suffered an adverse employment action due to disability; and (4) that the employer thereafter sought similarly qualified individuals for that job. Plaintiff's complaint is silent regarding these matters." (Trial Court decision, pg. 4) (Pa6)

It is clear that the Trial Court missed the following paragraphs in Plaintiff's amended complaint.

> 90. In this matter Association unit members are either perceived to be or are disabled/handicapped within the meaning of the New Jersey Law Against Discrimination.
>
> 91. Association Unit members were qualified to perform the essential functions of the position of employment.
>
> 92. Association Unit members suffered and will continue to suffer in the future adverse employment actions because of their perceived disability/handicap.
>
> 93. The employers actions in denying promotional eligibility due to perceived or actual disability or handicap is a material adverse change in the terms and conditions of employment. (Pa36)

The trial court did not take these factual averments into account even though the foregoing facts were repeated throughout Plaintiff's compliant. After failing to consider Plaintiff's factual claims (above) the Trial Court thereafter found that;

> "Plaintiff failed to establish a prima facie case of failure to accommodate disability because the Plaintiff has not established the elements of such." (Trial Court decision, pg. 4) (Pa6)

First Local 1066 claimed direct discrimination. Second, the Plaintiff nevertheless did in fact establish the elements of a failure to accommodate even though this was not the main thrust of Plaintiff's claims. As noted, "a reasonable accommodation....may take the form of a temporary leave of absence", **Boles v. Wal-Mart Stores, Inc**., Civil Action No. 12-1762 (JLL), 2014 U.S. Dist. LEXIS 41926, at *24 (D.N.J. Mar. 26, 2014)

Plaintiff reiterates that it brings facial and direct claims of discrimination attached to the policy itself. In such cases the court may proceed summarily - even before serious adverse harm has been established. For instance, if the City promulgated a policy or ordinance which stated: "No person with a handicap or disability will be eligible for employment by the City", this Court would not have to wait for a harmed plaintiff to emerge in order to address the unlawful ordinance. The court could enjoin the policy summarily as a facial violation of the NJLAD. And that is precisely what Plaintiff requests in this matter.

POINT III

THE TRIAL COURT NEVER ADDRESSED PLAINTIFF'S CAUSE OF ACTION CONCERNING THE UNLAWFUL POLICY OF PENALIZING PROTECTED LEAVES (Never Addressed by Trial Court) (Pa50)

Jersey City penalizes Firefighters who take medical leave protected under the NJLAD pursuant to the disciplinary sections of Sick Leave policy General Order 19-16.

The policy defines excessive sick leave which subjects a Firefighter to punishment as "short period of being absent on sick leave". (Complaint) (Pa20). The General Order then indicates that employees will be subject to discipline pursuant to Section 6.3.4 of the policy for "three (3) or more illnesses within any twelve (12) month period of time". (Pa23).

Simply taking medical leave 3 times in a year subjects an employee to automatic punishment. The first time a Firefighter requests and takes medical leave he is assessed one penalty point. The third time a Firefighter takes medical leave he is assessed with a disciplinary penalty which can range from a reprimand to termination. As noted earlier, requesting and taking medical leave is a protected activity under the NJLAD.

> [T]aking a disability/medical leave is protected by the NJLAD.

Yobe v. Renaissance Elec., Inc., 32 Am. Disabilities Cas. (BNA) 1015, supra.

See also **Boles v. Wal-Mart**, No. 12-1762, 2014 U.S. Dist. LEXIS 41926, at *22 (D.N.J. Mar. 26, 2014)(denying summary judgment because the NJLAD's "anti-retaliation provision now compels this Court to conclude that the requesting and taking of medical leave are protected activities under the NJLAD."); **Guinup v. Petr-All Petroleum Corp.**, 786 F. Supp. 2d 501, 514 (N.D.N.Y. 2011) ("[T]aking medical leave is a protected activity within the meaning of the ADA."); **Dove v. Cmty. Educ. Ctrs., Inc.**, No. 12-4384, 2013 U.S. Dist. LEXIS 170081, at *63 (E.D. Pa. Dec. 2, 2013) ("[N]umerous courts have recognized that a request for [and taking] a leave of absence for medical treatment may constitute a request for a reasonable accommodation under the ADA" and thus constitutes a protected activity).

The "Sick Leave Injury Procedures Policy" General Order 19-16, cited in Plaintiff's complaint is unlawful where it contradicts the New Jersey Law Against Discrimination (NJLAD) as well as New Jersey Civil Service Laws (and the analogous Federal laws such as the Americans with Disabilities ACT (ADA))[5]

---

[5] In adjudicating disability discrimination claims under the NJLAD, our courts have regularly looked to cognate principles under the ADA and related federal law for guidance. **Dial, Inc. v. City of Passaic**, 443 N.J. Super. 492, 513 (App. Div. 2016)

The policy at issue defines excessive sick leave or absence as "three (3) or more illnesses within any twelve (12) month period of time."

Thus, anytime a Firefighter uses sick leave 3 times in any year he/she is punished under a "no fault policy" with automatic discipline. Each time he seeks a medical leave he is assessed an absence infraction point.

Anytime a Firefighter uses sick leave, no matter how legitimate, for three or more times in a year, discipline is automatic and it "stacks" as progressive discipline throughout an officers career. One could be sick one day in January, one day in July and one day in December - clearly not excessive or abusive use of sick leave - but, according to the employer - these 3 isolated days of sick leave would constitute excessive absenteeism warranting a reprimand and then potentially progressive discipline up to termination. Such a policy clearly interferes with the right to take medical leave under the NJLAD and is unlawful on its face.

Moreover, assigning an absence infraction or attributing penalty points towards a penalty for legally protected absences is unlawful.

The employers "Sick Leave Injury Procedures Policy" 19-16 as interpreted by the City, also violate the Civil Service law - both statutorily and on a Regulatory basis.

N.J.S.A. 11A:6-5. (Sick leave), provides:

> Full-time State and **political subdivision employees shall receive a sick leave credit of no less than** one working

> day for each completed month of service during the remainder of the first calendar year of service and **15 working days in every year thereafter.** Unused sick leave shall accumulate without limit.

The implementing Civil Service Regulation of this statute provides that such sick leave may be used for "illness or injury".

> § **4A:6-1.3** (Sick leave) provides in relevant part:
> (a) [F]ull-time local employees shall be entitled to a minimum of annual paid sick leave as follows:
>
> * * *
>
> [A]t the beginning of each calendar year in anticipation of continued employment, employees shall be credited with 15 working days.
>
> * * *
>
> (f) Unused sick leave shall accumulate from year to year without limit,
>
> * * *
>
> (g) Sick leave may be used by employees who are unable to work because of:
>
> 1. **Personal illness or injury** (see **N.J.A.C.** 4A:6-21B for Federal family and medical leave);
>
> 2. Exposure to contagious disease (see **N.J.A.C.** 4A:6-1.21B for Federal family and medical leave);

N.J.A.C. § 4A:6-1.3

When Jersey City Firefighter's avail themselves of the foregoing rights to medical leave the employer automatically assigns an absence infraction or penalty points. Attributing a penalty to a legally protected absence is unlawful.

Jersey City Firefighters are entitled to a minimum of 15 sick days a year which they may utilize for illness or injury as protected by statute - **N.J.S.A.** 11A:6-5 .

Interpreting the "Sick Leave Injury Procedures Policy" 19-16 so as to penalize Firefighters for utilizing such statutory leave is unlawful.

General Order 19-16 penalizes employees simply because they are exercising their right to sick leave for illness or injury. Such a policy is void on its face and is similarly an illegal retaliatory act because the employer is interfering with "any person in the exercise or enjoyment of a protected right." **N.J.S.A.** 10:5-12(d)

Use of statutory sick leave in this case is a "protected absence" under the New Jersey Law Against Discrimination (NJLAD) and the Americans with Disabilities Act.

The NJLAD largely follows the EEOC's guidance applicable to the Americans with Disabilities Act 42 U.S.C. §12111(9)(B).

The EEOC has stated in its 2016 policy document that protected leave may not be penalized:

> When an employee requests leave, or additional leave, for a medical condition, the employer must treat the request as

> one for a reasonable accommodation under the ADA. (Pa275, Pa280)
>
> An employer may not penalize an employee for using leave as a reasonable accommodation. Doing so would be a violation of the ADA because it would render the leave an ineffective accommodation; it also may constitute retaliation for use of a reasonable accommodation. (Pa275, Pa280)

Moreover, if other Fire Department employees are granted leaves such as vacation or compensatory time, without penalization, such disparate treatment would similarly violate the ADA and NJLAD.

> Penalizing an employee for use of leave as a reasonable accommodation may also raise a disparate treatment issue if the employer grants similar amounts of leave to non-disabled employees but does not penalize them. (Pa275, Pa292)

The employer does grant similar leave to non disabled employees without fear of penalty. In this case the employer does not penalize employees for absences caused by 3 instances of compensatory time or 3 instances of vacation leave - it only penalizes for 3 instances of medical leave. Such treatment is discriminatory on its face. Moreover, the City does not penalize employees by rendering ineligible for promotion if they are on vacation or using a compensatory day. A Firefighter is only ineligible

for promotion if he takes medical leave.

The employer therefore treats protected medical leave disfavorably as contrasted with vacation or compensatory leave. This is disparate treatment under the ADA and the NJLAD.

POINT IV

PREVIOUS APPELLATE HOLDINGS HAVE FOUND SIMILAR NO FAULT POLICIES TO BE ARBITRARY AND UNREASONABLE (Pa52)

The employers method of application of the "Sick Leave Injury Procedures" Policy 19-16 is inherently arbitrary and capricious and therefore unreasonable.

Aside from violating Civil Service laws and the NJLAD the City disciplinary policy relating to sick leave is also arbitrary because it fails to consider wether the sick leave taken was legitimate. The Appellate Division has struck policies where "the assigned [sick leave] rating is a merely mathematical consequence and unaffected by the reason for the absence. In addressing a similar arbitrary history of analyzing sick leave, the Appellate Division in **Montville Township Board of Education**, N.J.P.E.R. Supp. 2d ¶140 (1985), rejected an arbitrary rating system which did not take into consideration the use of sick leave in proper circumstances. The Appellate Division in **Montville** concluded that merely assigning a rating based upon a mathematical consequence was an arbitrary act by a governmental entity.

> "A rating so assigned is, in our view, arbitrary. We are therefore persuaded that the local board's action is indeed unreasonable." **Montville Twp. Educ. Ass'n v. Montville Twp. Bd. of Educ.**, No. A-1178-84T7, 1985 N.J. Super. Unpub. LEXIS 11, at *5 (App. Div. Dec. 6, 1985), N.J.P.E.R. PERC Supp. 2d ¶140 (1985)

In this case the employer attaches a presumption that the sick leave was punishable regardless if it was used for a legitimate illness or injury.

By attaching a presumption of illegitimacy the employer's application of its sick leave policy is arbitrary and unreasonable as **Montville**, has determined.

In this case the medical leave policy is an arbitrary exercise of municipal power and is therefore void. As such the sick leave policy at issue should be enjoined.

POINT V

THE TRIAL COURT ERRED IN FINDING THAT INDISPENSABLE PARTIES WERE NOT NAMED (Pa6)

There are no other indispensable parties which should be named in this action. The Defendant sought to characterize this matter as pitting individual Firefighters against each other for promotional eligibility. In the zero-sum game suggested by the Defendant an eligible Firefighter who was not on medical leave might prevail over a Firefighter who is ineligible for promotion simply because he was on medical leave on a temporary basis. But this is not the case. The Association seeks equality under the Law for all Firefighters and seeks equal application of the New Jersey Law Against Discrimination to all Firefighters who were temporarily disabled due to medical, sick or injury leave. The Association does not seek to diminish the rights and interests of any Firefighter - it simply seeks equality under the law for Firefighters effected by the City's unlawful promotional eligibility policy - now and into the future. The City has unfairly discriminated against these Firefighters simply because they were on sick or injury leave. This does not put Firefighter against Firefighter and there is no reason why any individual Firefighter needs to be named in this action.

The same claim that indispensable parties were not named were rejected by the Court in a similar challenge to a promotional process which violated New Jersey

statutory law. In **Williams v. Borough of Clayton**, 442 N.J. Super. 583, 594-95 (App. Div. 2015) the Appellate Division stated:

> We also reject the Borough's contention that plaintiff's omission of Perna and Forchion as co-defendants requires dismissal of the complaint. We are mindful that the UDJA provides that "[w]hen declaratory relief is sought, all persons having or claiming any interest which would be affected by the declaration shall be made parties to the proceeding." **N.J.S.A.** 2A:16-56. See also **Gotlib v. Gotlib**, 399 N.J. Super. 295, 313, 944 A.2d 654 (App. Div.2008) (implementing this principle).
>
> Although the Borough is correct that the court could not adjudicate the individual rights of the other candidates in their absence, Plaintiff brought this action for declaratory relief under **N.J.S.A.** 2A:16-52 against the Borough. He clearly did so to assure that the Borough itself would not pursue an appointment process based upon an incorrect conception of the applicable statutes and their appoint-from-within eligibility requirements. The final declaratory order issued by the trial court was directed at the Borough, not at any other applicants.
>
> * * *
>
> In sum, a declaration and reaffirmation of the statutory restrictions that the Borough must heed in the hiring process can be fairly issued without requiring the

participation of the other applicants.

Williams v. Borough of Clayton, 442 N.J. Super. 583, 594-95 (App. Div. 2015)

Neither the trial court nor the Defendant cite to any other interested parties who would adversely be impacted. In this case the union, acting on behalf of all of its members, adequately represents any impacted persons particularly when all that it asks is compliance with the law.

POINT VI

PLAINTIFF CORRECTLY BRINGS THIS MATTER AS A DECLARATORY JUDGEMENT ACTION (Pa3)

The purpose of the Declaratory Judgments Act, is "to settle and afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." **N.J.S.A.** 2A:16-51.

Associations regularly have challenged Fire Department policies which are unlawful. See, **NAACP v. N. Hudson Reg'l Fire & Rescue**, 665 F.3d 464, 468 (3d Cir. 2011) (Association challenged fire department's residency requirement which was permanently enjoined because it had a disparate impact on African-American applicants.)

Courts have reasoned that if a policy, regulation or ordinance is invalid on its face, interest groups must be able to present such a matter such that a Court may review its legality so that the impacted parties may be properly guided. Plaintiff's challenge to an ordinance or policy on the grounds that it violates a statute is maintainable as a Declaratory Judgment action. **Bell v. Twp. of Stafford**, 110 N.J. 384, 390-91 (1988).

Additionally Rule 4:42-3 provides: "A judgment for declaratory relief, if appropriate, is not precluded by the existence of another appropriate remedy." R. 4:42-3.

The Declaratory Judgments Act, **N.J.S.A.** 2A:16-53, expressly confers standing on a person whose legal rights have been affected by a municipal ordinance. Our courts have acknowledged that the Act should be liberally construed and administered in order to carry out its purpose. See **New Jersey Banker's Ass'n v. Van Riper**, 1 N.J. 193, 198 (1948); **Rego Indus., Inc. v. American Model Metals Corp.**, 91 N.J. Super. 447, 454 (App. Div.1966).

In this case the Association brings a Declaratory Judgment Action underpinned by the NJLAD. However, a statutory cause of action linked to the NJLAD is not needed to challenge governmental action; one aggrieved by improper official action also has a constitutional right to seek judicial review. **N.J. Dental Ass'n v. Metro. Life Ins. Co.**, 424 N.J. Super. 160, 166 (App. Div. 2012)

The instant matter is similar to another promotional case which also sought a declaratory judgement where a promotional process violated the law. In that case the court "recognized" that prospective harm in this situation stems from concerns that the Borough must "comply with the law." See **Williams v. Borough of Clayton**, 442 N.J. Super. 583, 592 (App. Div. 2015)

The Association's ability to challenge the legality of the promotional policy in question does not turn on whether an individual can or may assert some type of an individual claim. A cause of action is presented when a Plaintiff seeks relief for injury or loss suffered as a consequence of a violation of a statute or to compel another party

to comply with a statute.

Plaintiff brings this claim, as an Association, on behalf if itself and all of its members, whom it lawfully represents. Plaintiff's associational standing is not challenged. Therefore, all of its members are championed and the association is obligated as a matter of law under its "duty of fair representation" to treat all members equally - which it expressly seeks in this case.

Plaintiff brings its claim on behalf of itself and all of its members, each of whom has an interest in the unlawful policies at issue, both retrospectively, but particularly, prospectively, as the violations are ongoing and continuous.

POINT VII

SPECIAL RULES OF INTERPRETATION APPLY TO NJLAD CLAIMS (Pa6)

The NJLAD recognizes a disability discrimination claim, not only for employees who have had a disability at any time, but also for those who are "perceived as or believed to be a person with a disability, whether or not that individual is actually a person with a disability." **N.J.A.C.** 13:13-1.3

Under the NJLAD, the 'perceived disability' doctrine applies when an employer believes the employee has a physical or mental condition that would qualify the person as disabled under the NJLAD if the condition actually existed. The statutory definition of "disability" under the NJLAD is exceptionally broad in scope, and includes any "physical disability [or] infirmity . . . which is caused by bodily injury . . . or illness." **N.J.S.A**. 10:5-5(q); However, "[u]nlike the definition of disability under the 'actually disabled' prong of the ADA definition of disability, [the] NJLAD does not require that a disability restrict any major life activities to any degree." See also **Tourtellotte v. Eli Lilly & Co.**, 636 F. App'x 831, 848 (3d Cir. 2016) ("The NJLAD defines disability in a broader sense than does federal law."). **Boyd v. Riggs Distler & Co.**, Civil Action No. 1:20-CV-14008-KMW-EAP, 2022 U.S. Dist. LEXIS 233060, at *26 (D.N.J. Dec. 29, 2022)

The NJLAD is remedial legislation, intended "to eradicate the cancer of discrimination" protect employees, and deter employers from engaging in discriminatory practices. "Because workplace discrimination is "still a pervasive problem in the modern workplace, even 'novel arguments' advanced by victims . . . 'require our utmost care and attention.'" **Calabotta v. Phibro Animal Health Corp.**, 460 N.J. Super. 38, 60-61 (App. Div. 2019)

Because this case concerns claims under the New Jersey Law Against Discrimination, "special rules of interpretation also apply." **Nini v. Mercer Cty. Cmty. Coll.**, 202 N.J. 98, 108 (2010). "When confronted with any interpretive question" pertaining to the New Jersey Law Against Discrimination, our Courts "must recognize" the New Jersey Law Against Discrimination's pronouncement of its broad public policy goals. **Smith v. Millville Rescue Squad**, 225 N.J. 373, 390 (2016).

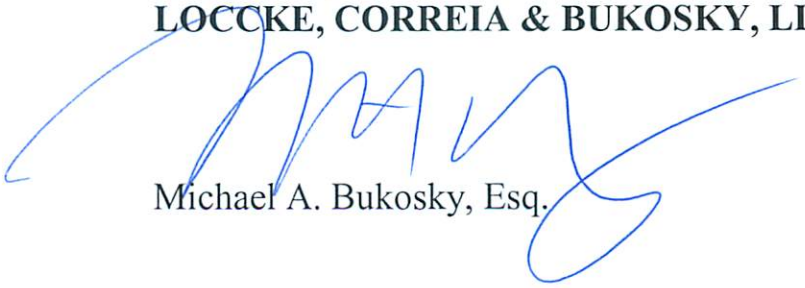
The New Jersey Law Against Discrimination's broad and strong language provides ample support for Plaintiff's ability to prosecute its claims in this case. **N.J.S.A.** 10:5-4 states that, "[a]ll persons shall have the opportunity to obtain employment . . . without discrimination . . . . This opportunity is recognized and declared to be a civil right.". Moreover, **N.J.S.A.** 10:5-5(a) defines the term "person" as "one or more individuals, partnerships, associations, organizations, [and] labor organizations....." The statute's plain language notably includes associations and labor organizations.

In this case Plaintiff simply seeks that its members be able to utilize medical leave without penalization by promotional ineligibility or disciplinary penalty.

CONCLUSION

For all of the above reasons the trial court's decision dismissing plaintiff's amended complaint should be reversed with directions to apply the NJLAD in a manner properly informed by the Appellate decision when it renders its decision herein.

Respectfully submitted,
LOCCKE, CORREIA & BUKOSKY, LLC.



Michael A. Bukosky, Esq.

Date: December 8, 2023

JERSEY CITY IAFF LOCAL 1066, Plaintiff/Appellant, v. CITY OF JERSEY CITY Defendant/Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-000448-23 ON APPEAL FROM: SEPTEMBER 13, 2023 ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE SAT BELOW: HON. KIMBERLY ESPINALES-MALONEY, J.S.C. BELOW DOCKET NO.:HUD-L-3451-22

APPELLATE BRIEF AND APPENDIX OF

DEFENDANT/RESPONDENT CITY OF JERSEY CITY

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PRELIMINARY STATEMENT

In this action, Plaintiff-Appellant IAFF Local 1066 previously advanced claims against Defendant-Respondent City of Jersey City for alleged failure to accommodate disability in violation of the New Jersey Law Against Discrimination (LAD). On May 3, 2023, Plaintiff's First Amended Complaint was dismissed. Plaintiff filed a Second Amended Complaint and again advanced claims for alleged failure to accommodate disability. Counts 1-4 remained specious and/or hypothetical as pled and otherwise failed to state a claim for failure to accommodate/disability discrimination. Plaintiff merely alleged that there had been, or speculated that there may be in the future, instances where the City has or may have failed to accommodate unidentified Plaintiff members who were on leave. The City again moved to dismiss. On September 13, 2023, Judge Espinales-Maloney entered an Order dismissing Plaintiff's Second Amended Complaint without prejudice. (Pa1).

The Trial Court correctly concluded that Plaintiff had not sufficiently pled the elements of disability discrimination under the NJLAD. In that regard, the Court noted that Plaintiff made only "vague assertions" that unnamed firefighters referenced in the Complaint "have a disability because they have taken sick or injury leave." In so doing, the Court highlighted that no disability for any purported member had been identified, just generalized claims of sick days taken. The Court

concluded that Plaintiff had failed to adequately plead/identify even the most basic of *prima facie* elements of a LAD claim.

Plaintiff's appeal is smoke and mirrors intended to distract from the simple and obvious fact that Plaintiff again failed to set forth a *prima facie* case of failure to accommodate/disability discrimination as to any person (let alone the multiple members as was generally alleged), and there was no party in interest in this case to whom the equitable and monetary relief sought could have been awarded.

Plaintiff's Second Amended Complaint failed to satisfy the most basic of notice pleading requirements and would have deprived the City of the ability to effectively defend against such allegations. The City could not have even issued compulsory discovery demands to the persons purportedly "wronged" since they were neither parties nor identified. If ever identified, the City would have had to subpoena them – yet – they could be awarded monetary damages and equitable relief as sought by Plaintiff? How could the City know if it had a statute of limitations defense? Assess and argue that the unidentified persons did not suffer from a qualifying disability? Etc. In so proceeding, Plaintiff has not cited one LAD case where the Court said a party could advance a failure to accommodate/disability discrimination case without identifying the person(s) allegedly discriminated against and how. There is no authority to this effect. Plaintiff plainly could not advance a *prima facie* case or convince any member to do so. This was IAFF's third try.

The Second Amended Complaint was also subject to dismissal pursuant to R. 4:6-2(f) based on Plaintiff's failure to join indispensable parties. Plaintiff demanded that unidentified alleged "affected Union members" be promoted retroactively to an unidentified higher position/rank and with "full seniority benefits and other emoluments of the position." The relief sought rendered other fire fighters who were promoted and received seniority and other benefits obvious interested parties. Such other firefighters were indispensable parties, since Plaintiff sought, directly or indirectly, to affect such other person's promotions and/or standing/place with respect to seniority/benefits. The City also raised that Plaintiff sought equitable and compensatory damages for unnamed individuals who were not joined and questioned to whom would or could such relief be awarded to? Joinder was also required under Rule 4:28-1(a)(2)(ii), since if Plaintiff were successful, the City would have been subject to risk of incurring inconsistent obligations.

Nevertheless, Plaintiff again failed to name/join such persons in its third iteration of its Complaint. The Trial Court thus appropriately found that Plaintiff had failed to join indispensable parties that would be "necessary to [any] judgment" in this action. The Trial Court's conclusion was factually and legally correct and Plaintiff's appeal presents no basis to disturb same.

For these and other reasons detailed herein, the Trial Court's Order dismissing Plaintiff's Second Amended Complaint should be affirmed.

PROCEDURAL HISTORY

Plaintiff/Appellant International Association of Fire Fighters Local 1066 ("Plaintiff") filed a Complaint in Superior Court, Hudson County, against Defendant/Respondent City of Jersey City ("City" or "Defendant") on October 17, 2022, although same was not effectively served on the City until sometime later. (Pa249). On January 26, 2023, Plaintiff filed an Amended Complaint ("First Amended Complaint"). Plaintiff's Case Information Statement in this case has always identified this matter as a New Jersey Law Against Discrimination ("LAD") case. (Da001).

On February 16, 2023, the City filed a motion to dismiss Plaintiff's First Amended Complaint for failure to state a claim upon which relief can be granted and for failure to join indispensable parties. On May 3, 2023, the Honorable Kimberly Espinales-Maloney, J.S.C. granted the City's motion and dismissed Plaintiff's First Amended Complaint without prejudice. (Da002-Da007).

On June 6, 2023, Plaintiff filed a motion to restore this action and for leave to file a Second Amended Complaint. In so doing, Plaintiff's counsel certified that the Second Amended Complaint "is identical in all respects [to the dismissed Complaint] except for a few clarifications of fact which were previously presented during the earlier motion practice." (6/6/23 Certification of Michael Bukosky, Esq. at ¶12). The Court issued an Order without opinion on June 23, 2023, granting

Plaintiff's motion for leave to amend, but indicating that the Plaintiff's motion had been "unopposed." (Da008). On July 11, 2023, the Court issued an Amended Order indicating that Plaintiff's motion for leave to amend had in fact been "opposed" by Defendant. (Da010).

On July 31, 2023, the City filed a motion to dismiss Plaintiff's Second Amended Complaint for failure to state a claim pursuant to R. 4:6-2(e), and for failure to join indispensable parties pursuant to R. 4:6-2(f). (Pa63).

On September 13, 2023, Judge Espinales-Maloney entered an Order dismissing Plaintiff's Second Amended Complaint without prejudice. (Pa1). The Court's Memorandum of Decision noted that the Complaint was being dismissed "without prejudice as to let Plaintiff proceed with this litigation in a proper manner." (Pa3). The Trial Court concluded that Plaintiff had not sufficiently pled the elements of disability discrimination under the NJLAD. In that regard, the Court noted that Plaintiff made only "vague assertions" that unnamed firefighters referenced in the Second Amended Complaint "consisting of those now and in the future" "have a disability because they have taken sick or injury leave." In so doing, the Court highlighted that no disability for any purported member was identified anywhere in the Complaint, just generalized claims of sick days taken. (Pa3-4). The Court concluded that Plaintiff had failed to adequately plead/identify even the most basic

of *prima facie* elements of a LAD claim, i.e., that any member alluded to in the Second Amended Complaint fell within a protected class. (Pa4).

The Trial Court also concluded that Plaintiff failed to adequately plead other *prima facie* elements of a disability discrimination/failure to accommodate case with respect to the unidentified members alluded to, e.g., that they were qualified to perform the essential functions of the job, that they were terminated or otherwise suffered an adverse employment action due to disability, etc. (Pa4). Judge Espinales-Maloney further and in sum concluded that "Plaintiff has failed to establish a *prima facie* case of failure to accommodate a disability because Plaintiff has not established the elements of such." Id.

The Trial Court also found that Plaintiff had failed to join indispensable parties that would be "necessary to [any] judgment" in this action. By way of example, the Court noted that Plaintiff sought LAD compensatory damages for claimed instances of unidentified members being subjected to discrimination; yet, there was no appropriate party in interest in the case to whom such damages could be awarded. (Pa4).

For all of these reasons, the Trial Court concluded that the "defects in the Amended Complaint are more than enough to warrant dismissal at this stage" and, as such, that the Court would not address the other arguments of counsel. (Pa4).

On October 12, 2023, Plaintiff filed the present Notice of Appeal. (Pa271).

COUNTERSTATEMENT OF FACTS

Plaintiff is a union consisting of non-supervisory fire fighters employed by the City. (Pa8 at ¶8).

Counts I-III – Alleged Failure to Accommodate Disability as to Unidentified Alleged Affected Members in Violation of the NJLAD

Plaintiff claimed the City implemented a policy in July 2022 rendering Union members ineligible for promotion "if they avail themselves of any type of injury or sick leave." (Pa11 at ¶11). Plaintiff claimed this "policy" was relied upon in July 2022 to deny one Union member a promotion to Captain when he was on "sick/injury leave," identifying him only as "R.M." (Pa11 at ¶12). Plaintiff alleged the City "fails to accommodate Union members who can perform the essential duties of the position but need a **brief accommodation** to either heal or convalesce from what **may otherwise be** an ephemeral illness or injury," and then listed purported **"examples"** without any information or allegations that such "examples" are fact or have occurred. (Pa28-29 at ¶71-72). Plaintiff asserted that the "policy fails to engage in any sort of interactive process," but set forth no facts as to any claimed interactive process failure as concerned any actual instance or person (barring, arguably, "R.M."). (Pa29 at ¶73).

Similarly, Plaintiff alleged that the claimed policy "discriminates against Union members who are injured at work and whose recovery and time on sick/injury

leave extends beyond a promotional date," but failed to identify such "members" and the pertinent alleged circumstances. (Pa29 at ¶74).

Plaintiff alleged that "R.M." was "placed on sick/injury leave" but did not identify any condition suffered from or that same qualified as a disability under the LAD. (Pa11 at ¶12-14). Plaintiff did not specify for what period/dates "R.M." was allegedly in need of reasonable accommodation, that he made a request for accommodation to his employer, to whom, when and the type of accommodation sought, or that such request was denied, by whom, when and the details of same. (Pa8-Pa55).

"R.M." is City Fire Captain Richard Mulligan. Plaintiff's counsel's R. 4:5-1 Certification stated that he "understands that at least one firefighter may have brought an individual claim to protect his own individual interests with the Division of Civil Rights." (Pa54 (p. 54)). On April 1, 2023, Mulligan dual-filed a complaint/charge with the New Jersey Division on Civil Rights (DCR) and Equal Employment Opportunity Commission (EEOC). (Pa127-128). The matter remains pending before the DCR. Mulligan's election of the DCR administrative remedy deprived the Court of jurisdiction as concerned a LAD claim as related to him. Id.

This was raised and part of the first motion to dismiss proceedings as well.[1] Thus, counsel's R. 4:5-1 Certification was less than forthcoming, to say the least. (Pa54).

Plaintiff alleged that the City "is denying the opportunity to obtain employment to all impacted Fire Fighters because of disability" and "fails to make reasonable accommodation to the limitations of the disabled/handicapped," but failed to identify any fire fighters so implicated, who have not been hired, who have a qualifying disability under the law, were in need of reasonable accommodation, made a request for accommodation, to whom, when and the type of accommodation sought, that such request was denied, by whom, when and the details of same. (Pa37-38 at ¶97-98).

Plaintiff alleged that the City "cannot demonstrate that the accommodation would impose an undue hardship," but failed to identify who it was referring to, when and why they were in need of accommodation, what was the accommodation sought, what particular facts and circumstances of the particular case led to Plaintiff's conclusion of absence of undue hardship, etc. (Pa38 at ¶99, 101).

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[1] Plaintiff referred to the pending DCR matter brought by Firefighter Mulligan on page 54 of the Second Amended Complaint. Of course, materials referred to in a complaint may be considered without converting a R. 4:6-2 motion to dismiss into one for summary judgment. Pressler, N.J. Court Rules, Comment 4.1.2, R. 4:6-2; N.J. Sports Prod., Inc. v. Bostick Promotions, LLC, 405 N.J. Super. 173, 178 (Ch. Div. 2007).

Plaintiff alleged that the "size of the business can accommodate the affected Union members," that the "operations are not effected," that the "cost of the accommodation is minimal to the City," and that the City "would not be required to waive any essential requirements of the job," but failed to identify any particular member who had a disability under the law, when and why they were in need of accommodation, what was the accommodation sought, the actual or potential impact of the requested accommodation on operations and how it related to the essential functions of the member's job, etc. (Pa39 at ¶102-105).

Plaintiff alleged that the "affected Union members" are "qualified to perform the essential functions of the position," but did not identify the particular alleged members, their jobs/assignments, qualifying disabilities, limitations and durations of same, etc. (Pa40 at ¶107).

Plaintiff seemingly speculated in alleging that the unidentified "affected Union members" are "suffering an adverse employment action because of their disability **if** the City fails to promote them." (Pa40 at ¶108) (emphasis added).

Plaintiff repeatedly asserted that unidentified past or future/speculative alleged affected members "**may** be easily accommodated," but failed to identify any particular alleged member, the qualifying disability involved, their limitations and the severity and durations of same, the nature of the request for accommodation made, when and to whom, etc. (Pa42, 46, 49) (emphasis added).

Plaintiff claimed the City had violated the LAD by "failing to provide a reasonable accommodation" to the unidentified alleged "affected Union members" and stated it brings this action "to compel[ ] the City to promote" such "affected Union members." (Pa40-41 at ¶109, 111).

In terms of relief sought, Plaintiff demanded that the unidentified alleged affected "Association members" who have been "denied eligibility for promotion" be "made whole" (i.e., promoted as asserted, e.g., in ¶111, to some unidentified higher rank/position) and with "full seniority and other emoluments of the position." Pa42-43).

Counts II and III of the Second Amended Complaint simply advance claims for damages pursuant to Plaintiff's LAD failure to accommodate claim (Count I).

Count IV – NJLAD Claims Premised on Fire Department General Order 19-16

Count IV of Plaintiff's Second Amended Complaint is captioned "Establishment and Application of Unlawful Sick Leave Policy. (Pa50).

Plaintiff claimed the City Fire Department established General Order 19-16 relating to sick leave and has been applying same in an "arbitrary and capricious" manner" in "issuing violations" for excessive absenteeism. (Pa43-44 at ¶119-123). No one Plaintiff member was identified, nor is such person's sick leave record/dates, the reason(s) for same or a description of how General Order 19-16 has been applied to their circumstance. (Pa50-Pa60).

Plaintiff alleged that the operation of General Order 19-16 has resulted in the arbitrary "fine" of a loss of compensatory days to unidentified alleged fire fighters. (Pa53 at ¶129). Plaintiff further claimed unidentified fire fighters had been "fined/penalized" with loss of compensatory days without just cause or due process in violation of N.J.S.A. 40A:14-19, and that same constituted "arbitrary and capricious action" by the City. (Pa53-54 at ¶130-133).

Plaintiff claimed employees are "not provided with notice or an opportunity to be heard" under General Order 19-16 and that violations have been "applied arbitrarily and capriciously." (Pa54-56 at ¶135-138, 143). Plaintiff asserted that this constitutes an "impermissible penalty under the [LAD]." (Pa55-56 at ¶139, 142). Plaintiff claimed that, "in many cases," employees have utilized sick leave "protected under the LAD" and the City was "obligated to accommodate such employees." (Pa 48-49 at ¶140-141). As in Count I, Plaintiff advanced a claim against the City in Count IV for failure to accommodate disability/disability discrimination but failed to identify any particular alleged member; the qualifying disability involved; their limitations and the severity and duration of same; the nature of the request for accommodation made, when and to whom; that such request was denied, by whom, when and the details of same. (Pa58 at ¶149).

LEGAL STANDARD

The Appellate Division "applies the same standard as the trial court to determine whether to grant or deny a motion to dismiss for failure to state a claim." Malik v. Ruttenberg, 398 N.J. Super. 489, 493–94 (App. Div. 2008). In this regard, the Appellate Division has recognized that a motion to dismiss a complaint for failure to state a claim "may not be denied based on the possibility that discovery may establish the requisite claim; rather, the legal requisites for plaintiffs' claim must be apparent from the complaint itself." Edwards v. Prudential Prop. & Cas. Co., 357 N.J. Super. 196, 202 (App. Div. 2003).

Rule 4:6-2(e) permits a Defendant to move to dismiss a Complaint for "failure to state a claim upon which relief can be granted." Pursuant to Rule 4:6-2(e), "a court must dismiss the Plaintiff's Complaint if it has failed to articulate a legal basis entitling Plaintiff to relief." Sickles v. Cabot Corp., 379 N.J. 100, 106 (App. Div.), certif. denied, 185 N.J. 297 (2005) (citation omitted). A motion to dismiss under Rule 4:6-2(e) "must be evaluated in light of the legal sufficiency of the facts alleged in the Complaint." Id. (quoting Donato v. Moldow, 374 N.J. Super. 475, 482 (App. Div. 2005)). In considering such a motion, the court accepts as true the facts alleged in the Complaint. Darakjian v. Hanna, 366 N.J. Super. 238, 242 (App. Div. 2004).

In evaluating motions to dismiss, courts consider "allegations in the Complaint, exhibits attached to the Complaint, matters of public record, and

documents that form the basis of a claim. Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183, (2005). In that vein, a court may consider documents referenced in the Complaint "without converting the motion into one for summary judgment." E. Dickerson & Son, Inc. v. Ernst & Young, LLP, 361 N.J. Super. 362, 365 n. 1 (App. Div. 2003) aff'd, 179 N.J. 500 (2004); Buck v. Hampton Twp. Sch. Dist., 452 F.3d 256, 260 (3rd Cir. 2006)(trial court may consider "documents that are attached to or submitted with the complaint, and any matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, and items appearing in the record of the case.")

Alternatively or additionally, pursuant to R. 4:6-2(f), a defendant is permitted to move to dismiss a complaint for "failure to join a party without whom the action cannot proceed, as provided by R. 4:28-1." As the Rule indicates, a motion to dismiss for failure to join an indispensable party is evaluated under the provisions of Rule 4:28-1. That Rule governs joinder of indispensable parties, as further explained in Point III below.

A plaintiff's obligation in opposition to a motion to dismiss is not to prove the case, but "to make allegations, which, if proven, would constitute a valid cause of action." Sickles, 379 N.J. Super. at 106 (citation omitted). A motion to dismiss tests the pleadings of the plaintiff to determine whether he has pled sufficient allegations to support a cause of action. Printing Mart v. Sharp Electronics, 116 N.J. 739, 746

(1989). A Complaint may be dismissed for failure to state a claim if it fails to articulate a legal basis entitling the plaintiff to relief. Hoffman v. Hampshire Labs, Inc., 405 N.J. Super. 105, 112 (App. Div. 2009). See also, Rieder v. State Dept. of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987) ("[D]ismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted.").

Here, Judge Espinales-Maloney's Order dismissing Plaintiff's Second Amended Complaint should be affirmed in accordance with Rule 4:6-2(e) and/or Rule 4:6-2(f) since Plaintiff failed to set forth a *prima facie* case of disability discrimination/failure to accommodate on this its third iteration of its Complaint, and because Plaintiff failed/refused to join other individuals as to whom Plaintiff (1) sought individual LAD remedies and/or (2) asserted actual or potential adverse interests against. As such, the Trial Court appropriately found that the Second Amended Complaint failed to articulate a legal basis entitling Plaintiff to relief and it was appropriately dismissed.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT'S ORDER DISMISSING THE SECOND AMENDED COMPLAINT SHOULD BE AFFIRMED AND PLAINTIFF'S APPEAL DENIED BECAUSE THE WITHOUT PREJUDICE ORDER APPEALED FROM IS NOT A FINAL ORDER UNDER RULE 2:2-3(a)(1)

Plaintiff appeals from the Trial Court's September 13, 2023 Order dismissing Plaintiff's Second Amended Complaint without prejudice. (Pa1). Moreover, the Court's accompanying Memorandum of Decision plainly stated that the "Amended Complaint is dismissed without prejudice as to let Plaintiff proceed with this litigation in a proper manner," not that Plaintiff was foreclosed by the Court's September 13 Order and Decision. (Pa3).

Pursuant to Rule 2:2-3(a)(1), an appeal may be taken to the Appellate Division as of right "from final judgments of the Superior Court trial divisions." It is well established that an order dismissing a pleading without prejudice generally is not a final order subject to appellate review as of right under the Rule. See Kwiatkowski v. Gruber, 390 N.J. Super. 235, 236-237 (App. Div. 2007); Woodward-Clyde Consultants v. Chemical and Pollution Sciences, 105 N.J. 464, 472 (1987); Malhame v. Borough of Demarest, 174 N.J. Super. 28, 30-31 (App. Div. 1980).

Here, since the Trial Court's dismissal of Plaintiff's Complaint was without prejudice and the Court identified errors in Plaintiff's pleading and failure to advance/plead a *prima facie* case, the Trial Court's Order is not "final" and

appealable as of right. As a result, Plaintiff's appeal should be summarily dismissed on this basis alone.

POINT II

THE TRIAL COURT'S ORDER DISMISSING COUNTS I-III OF PLAINTIFF'S SECOND AMENDED COMPLAINT SHOULD BE AFFIRMED SINCE THE COURT CORRECTLY FOUND THAT PLAINTIFF FAILED TO STATE A CLAIM OF DISABILITY DISCRIMINATION/FAILURE TO ACCOMMODATE DISABILITY

In Counts 1-3 of the Second Amended Complaint, Plaintiff alleged failure to accommodate a purported disability in violation of the LAD (Counts II and III simply relate to claimed damages for a LAD violation). As discussed below, Counts 1-3 of the Second Amended Complaint were specious and/or hypothetical as pled and otherwise failed to state a claim for failure to accommodate disability.[2] In addition, as to the only member referenced with any level of specificity (albeit still inadequate), the Trial Court did not have jurisdiction over any discrimination claims as pertained to him since he elected to pursue his claims before the Equal Employment Opportunity Commission and the New Jersey Division on Civil

[2] Plaintiff's LAD claims were specious, to say the least. To the extent, through its Complaint, Plaintiff was really seeking to challenge prior municipal action in the form of a promotion, it was required to bring an action in lieu of prerogative writs pursuant to Rule 4:69 within 45 days of such action. The failure to do so also warranted dismissal of Plaintiff's Second Amended Complaint.

Rights, a fact that Plaintiff was well aware of and was obtuse about in the R. 4:5-1 Certification to the Second Amended Complaint. (Pa61-62).

As an initial matter, we noted that because not germane to the City's motion and arguments, the City avoided lengthy argument in its submissions regarding Plaintiff's false claims of established City "policy," that the City had allegedly stated it will never accommodate any employee ever, and other irrational hyperbole that only further lead to the questioning of Plaintiff's credibility in this matter. As we also noted, such silence or omission should not, of course, be construed as agreement. Indeed, Plaintiff never even included the referenced Sick Leave Policy/General Order 19-16 in its submissions, since same belies many of its "factual" claims in this action.

A plaintiff alleging failure to accommodate under the LAD must "first present the prima facie elements required in any LAD disability discrimination claim." Victor v. State, 401 N.J. Super. 596, 614 (App. Div. 2008), aff'd as modified, 203 N.J. 383 (2010); Tynan v. Vicinage 13 of Superior Court, 351 N.J. Super 385, 400 (2002). In a LAD disability discrimination case, a plaintiff must establish: (1) he was a member of a protected class (i.e., disabled within the meaning of the LAD); (2) he was qualified to perform the essential functions of the job; (3) he was terminated or otherwise suffered an adverse employment action because of his disability; and (4) that the employer thereafter sought similarly qualified

individuals for that job. See Victor v. State, 203 N.J. 383, 409 (2010); Victor, 401 N.J. Super. at 614-615 (citing, Jones v. Sch. Dist., 198 F.3d 403, 411 (3d Cir.1999)); Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 597 (1988).[3] Once a plaintiff successfully demonstrates a *prima facie* case, the burden of production shifts to the defendant. Id. However, the "mere assertion of discrimination unsupported by any facts is not sufficient to shift the burden to the employer[.]" Reilly v. Prudential Property and Cas. Ins. Co., 653 F. Supp. 725, 730 (D.N.J. 1987).

In addition to proving such *prima facie* elements, a plaintiff must further support the second element that the employee could perform the essential functions of employment with reasonable accommodation." Victor, 401 N.J. Super. at 614-615. Specifically, "the employee **must show the employer was informed of the disability, the employee requested accommodation, the employer made no good faith effort to assist, and the accommodation could have been reasonably achieved**." Id. at 614-615 (emphasis added). Indeed, the employer's obligation to reasonably accommodate "is only triggered when the employer is made aware of the handicap and the employee requests an accommodation." Grubb v. Garbutt, 2010 WL 3516847, *4 (App. Div. 2010) (citing Tynan, 351 N.J. Super. at 400-401) (UNPUB DEC. attached to the RSC Cert. as Exh. B). While there may be no

[3] Element three was recently clarified by the New Jersey Supreme Court in Richter v. Oakland Bd. of Educ., 246 N.J. 507, 531-532 (2021)(tangible adverse employment action need not be demonstrated).

particular form required, the employee must "make clear that...assistance [is desired] for his or her disability." Id. Where no request is made and/or the employer is unaware of the need for accommodation, a failure to accommodate claim cannot be sustained. See, e.g. Victor, 203 N.J. 423-525 (affirming Appellate Division ruling that the plaintiff failed to establish *prima facie* case for failure to accommodate where plaintiff could not demonstrate he sought a reasonable accommodation); Grubb, 2010 WL 3516847, *4-6 (the request must be "sufficiently clear that it conveys to the employer the employee's request that an accommodation be attempted to address the employee's disability").

As concerns any request for reasonable accommodation of a qualifying disability, it is axiomatic that an employee's ability to perform the job and reasonable accommodation are concepts that **"must be assessed on an individual basis."** N.J.A.C. 13:13-2.5(a)(emphasis added). Further, NJLAD regulation states that "the determination of whether an employer has failed to make reasonable accommodation **will be made on a case-by-case basis**." N.J.A.C. 13:13-2.5(b)(emphasis added). See also Barboza v. Greater Media Newspapers, 2008 WL 2875317 (D.N.J. 2008) (also noting the absence of "bright-line rules" in this area).

Here, in support of its failure to accommodate claim, Plaintiff merely alleged that there have been, or speculated that there may be in the future, instances where the City had or may have failed to accommodate unidentified Plaintiff members who

were on leave. In this regard, Plaintiff repeatedly referred to affected union members (plural). Yet, nowhere in the Amended Complaint did Plaintiff set forth any of the following:

- the individuals allegedly denied reasonable accommodation
- the condition(s) of any such individual as a qualifying disability under the LAD
- the work-related limitations of any such individual due to any such condition suffered from and the duration and dates of same
- that any such individual was in need of any accommodation to allow him to perform the essential functions of his job
- that any such individual requested a reasonable accommodation, when and from whom
- identification of any specific form of accommodation that any such individual was in need of and any effective alternative forms of accommodation
- that the City denied the request made by any such individual, when, by whom and the reasons given.

Plaintiff minimally had to set forth a *prima facie* case as to any members advanced herein and who allegedly suffered discrimination in this regard since, as set forth above, "the determination of whether an employer has failed to make reasonable accommodation will be made on a case-by-case basis." If such instances did exist, Plaintiff's Second Amended Complaint, like its predecessor, failed to satisfy the most basic of notice pleading requirements and deprived the City of the

ability to effectively respond and defend against such allegations. See R. 4:5-2 ("a pleading which sets forth a claim for relief…shall contain a statement of the facts on which the claim is based, showing that the pleader is entitled to relief"); Hoffman, 405 N.J. Super. at 112; Rieder, 221 N.J. Super. at 552; Spence-Parker, 656 F. Supp.2d at 505; Scheidt v. DRS Tech., Inc., 424 N.J. Super. 188, 193 (App. Div. 2012). For example, how could the City know if it had a statute of limitations defense, since no persons, dates or events were identified? How could the City assess and argue that the unidentified persons allegedly subjected to discrimination did not suffer from a qualifying disability? Or that they failed to seek an accommodation? In fact, the Complaint was devoid of any specific allegation which, if true, would have demonstrated that any IAFF member fell into a protected class under the LAD.

Plaintiff again points to its reference to "R.M." in its Complaint to attempt to demonstrate satisfaction of a *prima facie* case. To be clear, the City's position was and is that several of the elements outlined above are absent from the Second Amended Complaint as concerns "R.M." as well. That notwithstanding, as the Trial Court correctly construed, "R.M." is of no moment and any discrimination claim by or relating to him was outside of the Court's jurisdiction. Indeed, any specious LAD claim advanced as concerns "R.M." had to be dismissed for a further reason. In this regard, R.M.'s election of the New Jersey Division on Civil Rights (DCR)

administrative remedy deprived the Court of jurisdiction as concerned a LAD claim as related to him (and such facts and arguments were previously advanced during the first motion to dismiss proceedings).[4]

The LAD prohibits employment discrimination on the basis of race, national origin, ancestry, age, sex, sexual orientation, marital status, disability and other protected characteristics. N.J.S.A. §10:5-12. In seeking redress for such unlawful employment practices, an aggrieved party may file a verified complaint with the DCR or file suit in New Jersey Superior Court. N.J.S.A. §10:5-13; Garfinkel v. Morristown Obstetrics & Gynecology Associates, P.A., 168 N.J. 124, 130-131 (2001) ("The choice of forum established by the LAD is an integral feature of the statute."). The LAD requires that a party elect between an action in the Law Division of the Superior Court and the DCR administrative proceeding. N.J.S.A. §10:5-27; Garfinkel, 168 N.J. at 130-131. If a plaintiff elects the latter, he is barred from bringing a judicial action based on the same alleged misconduct while the DCR investigation is ongoing and after the DCR has rendered its determination. N.J.S.A.

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[4] The City raised before the Trial Court, what reason is there for some Plaintiff member to be identified by initials only? What was Plaintiff trying to conceal? This, combined with R.M.'s DCR filing and Plaintiff's obtuse R. 4:5-1 Certification, raised the specter that R.M. never consented to this action or to be "represented" in this manner, wherein Plaintiff advanced claims, and sought damages, purportedly to vindicate R.M.'s individual rights. This also raised the question: Were any of these purported numerous unidentified members aware of, and approved of, this litigation? Was that why this now third iteration of Complaint continued to be entirely specious and void of detail?

§10:5-27 (providing that "the procedure herein provided shall, while pending, be exclusive; and the final determination therein shall exclude any other action, civil or criminal, based on the same grievance of the individual concerned."); Long v. Lewis, 318 N.J. Super. 449, 457 (App. Div. 1999) ("a plaintiff who has unsuccessfully pursued a LAD claim in the Division on Civil Rights may not thereafter relitigate the claim in the Law Division.").

In this case, on April 1, 2023, City Fire Captain Richard Mulligan ("R.M.") dual-filed a complaint/charge with the DCR and EEOC. (Pa127). As such, Mulligan was barred from bringing or maintaining a judicial action based on the same alleged misconduct while a DCR matter is ongoing. N.J.S.A. §10:5-27. It goes without saying that Plaintiff IAFF could not advance or maintain a claim in Superior Court on his behalf (and which sought individualized compensatory damages under the LAD) that could not be brought or maintained by Mulligan himself. This fact may be why Plaintiff sought to mask "R.M.'s" identity herein. At base, the City posited why would Plaintiff advance "R.M." again in its Second Amended Complaint when it knew "R.M." had elected for the DCR/EEOC? At that point, to do so, was a knowing disregard of New Jersey law. As such, the Second Amended Complaint was improper and a further waste of the Trial Court's time.

As summarized above, the Trial Court concluded that Plaintiff had not sufficiently pled the elements of disability discrimination under the NJLAD. In that

regard, the Court noted that Plaintiff made only "vague assertions" that unnamed firefighters referenced in the Second Amended Complaint "consisting of those now and in the future" "have a disability because they have taken sick or injury leave." In so doing, the Court highlighted that no disability for any purported members was identified anywhere in the Complaint, just generalized claims of sick days taken. (Pa3-4).

The Court also correctly rejected a basis of Plaintiff's claims/Complaint that any individual who takes a sick day is considered disabled within the meaning of the NJLAD. (Pa4). Indeed, Plaintiff's counsel again asserted during oral argument in this matter that anyone who calls out and utilizes a sick day/leave "is disabled." See 9/8/23 Transcript of Motion, T13-22. On appeal, Plaintiff doubles down on this incorrect statement of law and cites several cases, none of which support Plaintiff's assertion that it adequately pleaded its LAD claims. Rather, those cases involved identified individuals with identified disabilities advancing claims of discrimination/failure to accommodate based on the particular instances/circumstances presented. See, e.g., Boles v. Wal-Mart Store, Inc., 2014 WL 1266216 (D.N.J. Mar. 26, 2014) (UNPUB DEC.) (disability discrimination/failure to accommodate action brought by former employee who developed large and dangerous ulceration on leg that required extended absence and was terminated some six months later when sought to return to work)(Pizzo v.

Lindewold Bd. of Educ., 2015 WL 1471943 (D.N.J. Mar. 31, 2015)(UNPUB DEC.) (FMLA and LAD action brought by former employee who suffered from bipolar disorder, requested and took FMLA leave and extensions to same, and was terminated based on employer's understanding that she would be out indefinitely; the court noted there was no dispute that the plaintiff was disabled due to her diagnosis or that she was terminated due to her absence as of a given date). At most, these cases stand for the proposition that a temporary leave of absence can be a reasonable accommodation when requested by a disabled employee and based on the facts and circumstances of the particular case. That principle does nothing to "save" Plaintiff's specious claims.

The Court concluded that Plaintiff had failed to adequately plead/identify even the most basic of *prima facie* elements of a NJLAD claim, i.e., that any member alluded to in the Second Amended Complaint fell within a protected class. (Pa4). In that regard, and further highlighting Plaintiff's own confusion during the underlying motion practice, Plaintiff's counsel defended the Second Amended Complaint by asserting that he did not have to prove (or seemingly specifically allege) that any individual has a disability. (T13-14). In so doing, Plaintiff completely confused its own claims, the *prima facie* elements of its asserted claims, and the "perceived as" concept under the LAD. In this case, Plaintiff's Complaint alleged unspecified individuals were disabled and were subject to discrimination/failure to accommodate

based on same. To defend its failure and inability to set forth the who/what/when/how of any such instance by claiming such failures are excused because such unidentified persons/instances "could have been" perceived as disabled only highlights the deficiencies in Plaintiff's pleading. First, that argument is contrary to Plaintiff's own Complaint. In addition, even if there were a legitimate claim that a Plaintiff member suffered adverse employment action due to perceived disability status, Plaintiff's Complaint still fails to set forth who was so perceived? When? How? What adverse action was experienced? Etc.

The Trial Court further correctly concluded that Plaintiff failed to adequately plead other *prima facie* elements of a disability discrimination/failure to accommodate case with respect to the unidentified members alluded to, e.g., that they were qualified to perform the essential functions of the job, that they were terminated or otherwise suffered an adverse employment action due to disability, etc. (Pa4).[5] Judge Espinales-Maloney further and in sum concluded that "Plaintiff has failed to establish a *prima facie* case of failure to accommodate a disability because Plaintiff has not established the elements of such." Id.

Plaintiff failed to set forth a *prima facie* case as to anyone, let alone numerous "affected Union members" as was alleged. The Trial Court thus correctly found that

[5] Again, it is the "qualified" element cited by the Trial Court (element 2) that a plaintiff must further support in a failure to accommodate case with the additional details outlined above. Victor, 401 N.J. Super. at 614-615.

Counts I-III of Plaintiff's Second Amended Complaint failed to state a claim upon which relief could be granted and the Trial Court's order of dismissal should be affirmed.

POINT III

THE TRIAL COURT APPROPRIATELY DISMISSED COUNT IV OF PLAINTIFF'S SECOND AMENDED COMPLAINT SINCE THE COURT CORRECTLY FOUND THAT PLAINTIFF FAILED TO STATE A CLAIM OF DISABILITY DISCRIMINATION/FAILURE TO ACCOMMODATE DISABILITY

As detailed in the Counterstatement of Facts above, Count IV of Plaintiff's Second Amended Complaint again claimed that the City had failed to accommodate the disabilities of unidentified employees through the application of General Order 19-16.[6] (Pa55-58 at ¶139-142, 149). As in Count I, Plaintiff purported to advance a claim for failure to accommodate disability, but failed to identify any particular alleged member; the qualifying disability involved; their limitations and the severity and duration of same; the nature of the request for accommodation made, when and to whom; that such request was denied, by whom, when and the details of same; etc. While Plaintiff used the terms "prima facie" case of disability discrimination in its

[6] Note that, on February 10, 2023, Plaintiff filed with the Public Employment Relations Commission (PERC) for arbitration of the same matter as envisioned/pleaded in Count IV of the Amended Complaint. In its Request for a Panel of Arbitrators, Plaintiff identified its grievance to be arbitrated as "discipline without just cause/use of sick leave class action grievance."

Complaint, Plaintiff again failed to set forth a *prima facie* case as concerns any one individual/member, let alone as to numerous affected members. Accordingly, Count IV of Plaintiff's Second Amended Complaint likewise failed to state a claim for disability/discrimination/failure to accommodate disability under the LAD and was appropriately subject to dismissal for the same reasons as Counts 1-3. See R. 4:5-2; Hoffman, 405 N.J. Super. at 112; Rieder, 221 N.J. Super. at 552; Spence-Parker, 656 F. Supp.2d at 505; Scheidt, 424 N.J. Super. at 193 (mere conclusory allegations insufficient). Indeed, this is what the Trial Court appropriately found and there is no basis to disturb that decision. (Pa3-4). The Trial Court's September 13, 2023 Order should thus be affirmed.

POINT IV

PLAINTIFF'S ARGUMENTS THAT THE TRIAL COURT MISCONSTRUED ITS CLAIMS ARE FALSE BUT EVEN IF ITS DIRECT EVIDENCE ARGUMENTS ARE CONSIDERED THEY STILL DO NOT SUPPORT PLAINTIFF'S CLAIM OF ADEQUACY OF THE COMPLAINT

Plaintiff argues the Trial Court misconstrued its claims as failure to accommodate claims and that the Court relied on a "sole paragraph" of its Complaint to do so. (Pb12-13). Not so. Plaintiff's own Complaint makes plain that it advanced this case as one for failure to accommodate unspecified disabilities of unspecified individuals in unspecified instances. (See Pa8-Pa62 at ¶17, 19, 24, 25-30, 70—75, 86-93, 95-111, 134, 141, 149, etc.). Plaintiff even generally pleads the same *prima*

facie elements cited by the City and relied upon by the Trial Court (just as to no identified person/instance/disability/request/denial/etc.), and then states that "[t]he Union has met the *prima facie* elements required in any [NJLAD] disability discrimination claim." (Pa36-39 at ¶90-106). In "summing up," Plaintiff alleges that "the City has violated the New Jersey Law Against Discrimination by failing to provide a reasonable accommodation to the affected Association members," and by "fail[ing] to engage in the required interactive process thereby failing to extend and provide a reasonable accommodation to the affected Association members" (Pa 40-41 at ¶109-110). Plaintiff further posits that it brings this matter to "compel[ ] the City to promote or otherwise accommodate the affected Union members." (Pa 41 at ¶111). As is plain, Plaintiff indeed framed this case as one for failure to accommodate disability.

Plaintiff otherwise argues that its claim regarding a purported "promotional policy" was a direct evidence case and, as such, the McDonnell-Douglas burden-shifting framework was not applicable and it was error for the Trial Court to apply same. (Pb13-14, 22). Again, Plaintiff's argument and conveniently "shifting" claims is defeated by its own Complaint, as summarized above. Plaintiff pleaded the same *prima facie* elements/standards cited by the City and relied upon by the Trial Court and then alleged that "[t]he Union has met the *prima facie* elements required." That

notwithstanding, Plaintiff's "direct evidence" arguments are immaterial and present no basis to disturb the Trial Court's ruling in any event.

Plaintiff cites several mixed motives cases, seemingly arguing that such construct (where applicable) eliminates the need to identify/plead a party allegedly discriminated against, that they had a qualifying disability, that a party in interest requested and was denied an accommodation, etc. (Pb14-16). Not so – and that is not what the courts found or recognized in Smith, Delanoy or ADP.

First, contrary to Plaintiff's arguments, it has not demonstrated direct evidence of discrimination by the City (although we recognize that such issue is not one for motion to dismiss per se). In addition, the present case is principally one for alleged failure to a accommodate disability under the LAD, which has its own particularized proof structure as set forth in Point II above. Nevertheless, even if the standards cited by Plaintiff applied, the plaintiff would still have to advance and demonstrate "that the employer placed substantial reliance on a proscribed discriminatory factor in making its decision to take the adverse employment action." Smith v. Millville Rescue Squad, 225 N.J. 373, 394 (2016). The evidence must demonstrate a "direct causal connection between that hostility and the challenged employment decision." Id. Once a plaintiff demonstrates direct evidence of discriminatory animus, "the employer must then produce evidence sufficient to show

that it would have made the same decision if illegal bias had played no role in the employment decision." Id. at 395.

Here, Plaintiff IAFF does not identify the person(s) allegedly subjected to a discriminatory factor, what the "decision" was that was made as to them and when, what adverse action was taken against that person and when, etc. None of the cases cited by Plaintiff excuse such omissions and indicate that same is a proper and adequate pleading.[7] For example, in Smith v. Millville Rescue Squad, employee Robert Smith brought an action claiming he was terminated due to his marital status in violation of the LAD. There was no mystery person, conduct, or alleged adverse action withheld from the complaint and which a court found adequate on challenge. In Delanoy v. Twp. of Ocean, 245 N.J. 384 (2021), the plaintiff-police officer brought a claim for discrimination in violation of the Pregnant Workers Fairness Act, claiming specific conduct as applied to her constituted a failure to accommodate pregnancy under that law. Again, there was no mystery person, conduct, or alleged adverse action withheld from the complaint and which a court found adequate on challenge. The same holds true in A.D.P. v. ExxonMobil Research, 428 N.J. Super. 518 (App Div. 2012), which involved an action by a specific employee who was

[7] In this regard, note the absurdity of Plaintiff's arguments such as that the burden shifted to Defendant to prove "the adverse employment action would still have occurred." (Pb17). What adverse employment action? Plaintiff failed and refused to identify any. How could we address what Plaintiff is entirely unable or unwilling to plead?

terminated following alcohol testing and where the evidence was that she was only subjected to random testing because she had voluntarily disclosed that she was an alcoholic. The cases cited simply do not support Plaintiff's claim of "adequacy" of the Second Amended Complaint, nor do they present any basis to disturb the Trial Court's decision.

POINT V

TO THE EXTENT PLAINTIFF NOW ATTEMPTS TO CLAIM IT ASSERTS NON-LAD CLAIMS, SUCH CLAIMS WOULD BE SUBJECT TO DISMISSAL IN ANY EVENT FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES AND/OR NONCOMPLIANCE WITH THE TORT CLAIMS ACT

As with other submissions in this case to date, Plaintiff's presentation on appeal is confusing. There is at least the suggestion that there are non-LAD claims in this case. During the first motion to dismiss proceedings, it was queried what Count IV was/was for and, given the vagaries of same, various arguments were presented by the City. In response, Plaintiff insisted in briefs and at oral argument that Count IV was nothing other than another LAD count. There was no contrary position taken by Plaintiff in connection with the underlying motion to dismiss. (See T1 – T22). In fact, Plaintiff's brief in opposition to the City's motion to dismiss Plaintiff's Second Amended Complaint repeated much of Plaintiff's "clarification" in this regard, i.e., that Plaintiff's claims were LAD claims. (See, e.g., Pa173-174, 191, 195-196, 200). Accordingly, the City did not advance other arguments as to the

specious allegations set forth in Count IV, nor did the Trial Court need to address any such other amorphous allusions to claims (if any).

Of course, to the extent Count IV did purport to be some claim other than a specious LAD failure to accommodate claim, Count IV would be subject to dismissal since Plaintiff failed to plead that it exhausted its administrative remedies under the parties' collective negotiations agreement. N.J.S.A. 34:13A-5.3; Saginario v. Attorney General, 87 N.J. 480, 491 (1981); Red Bank Bd. of Educ. V. Warrington, 138 N.J. Super. 564, 572 (App. Div. 1976); Thompson v. Joseph Cory Warehouses, Inc., 215 N.J. Super. 217, 220-21 (App. Div. 1987).

To the extent Plaintiff's Brief alludes some non-LAD, non-contract claim through its generalities devoid of any detail/instance, such "other" claim would sound in tort. Plaintiff fails to plead compliance with the New Jersey Tort Claims Act and, therefore, any alleged tort claim(s) also could not have been sustained and would have been subject to summary dismissal. See N.J.S.A. 59:8-3, N.J.S.A. 59:8-8; Dep't of Transp. v. PSC Res., Inc., 159 N.J. Super. 154, 158 (Law Div. 1978); Lassoff v. New Jersey, 414 F. Supp. 2d 483, 489-490 (D.N.J. 2006).

POINT VI

THE TRIAL COURT APPROPRIATELY DISMISSED PLAINTIFF'S SECOND AMENDED COMPLAINT GIVEN PLAINTIFF'S FAILURE AND REFUSAL TO JOIN PARTIES WITHOUT WHOM THIS ACTION COULD NOT PROCEED

In terms of relief sought, Plaintiff's Second Amended Complaint again sought to compel the retroactive promotions of unidentified alleged "affected Union members" to some unidentified higher position/rank and with "full seniority benefits and other emoluments of the position." (Pa40-41 at ¶109, 111). Plaintiff repeatedly alleged that multiple alleged violations had occurred and unidentified members affected, albeit without any details or identified individuals for any such instance. (Pa 38-40 at ¶100, 101, 104, 105, 107, 108, 109). The City also raised that Plaintiff sought equitable and compensatory damages for unnamed individuals who were not named/joined in the case. (Pa41-43). Defendant thus questioned, who would or could such relief be awarded to given the posture of the case? Certainly not the Plaintiff/Union.

Rule 4:6-2(f) permits a defendant to move to dismiss a complaint if a plaintiff fails to join an indispensable party. Rule 4:28-1 governs joinder of indispensable parties. The Rule requires a person to be joined as a party to an action:

> if (1) in the person's absence complete relief cannot be accorded among those already parties or (2) the person claims an interest in the subject of the action and is so situated that the disposition of the action in the

> person's absence may either (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or other inconsistent obligations by reason of the claimed interest.

Under this Rule, a party is indispensible if "he has an interest inevitably involved in the subject matter before the court and a judgment cannot justly be made between the litigants without either adjudging or necessarily affecting the absentee's interest." Allen B. DuMont Labs., Inc. v. Marcalus Mfg. Co., 30 N.J. 290, 298 (1959). See also Ellison v. Schenck, Price, Smith & King, 280 N.J. Super. 169, 176-78 (App. Div. 1995) (defendant should have been joined in previous lawsuit as an indispensable party where disposition in prior action could have impaired its ability to protect itself from damages and victory by plaintiffs in the prior action could have subjected another party to a substantial risk of incurring inconsistent obligations).

"Whether a party is indispensable depends upon the circumstances of the particular case." Allen B. DuMont Labs., 30 N.J. at 298. Courts evaluate indispensability "from the point of view of the absent party and in consideration of whether or not his rights and interests will be adversely affected." Pressler and Verniero, Current N.J. Court Rules, comment 3.1 on R. 4:28-1 (2015) (citing La Mar-Gate, Inc. v. Spitz, 252 N.J. Super. 303 (App. Div. 1991)). "'Whenever feasible, the persons materially interested in the subject matter of an action . . . should be joined as parties so that they may be heard and a complete disposition made.'"

Id. at cmt. 1 (quoting Advisory Committee's Note to 1966 amendment of Fed. R. Civ. P. 19). Failure to join an indispensable party can subject a plaintiff's complaint to dismissal. Rule 4:6-2(f).

In this case, Plaintiff alleged that unidentified affected members had been denied promotions and/or appropriate rank/place in terms of "seniority benefits and other emoluments of the[ir] positions." For this purpose, it is of no moment that Plaintiff's Second Amended Complaint failed to identify the individuals allegedly adversely affected by a LAD violation, nor those whom Plaintiff's action might adversely impact if Plaintiff were to be successful. The relief Plaintiff requested established that those other individuals who could be so adversely impacted by Plaintiff's action are indispensable parties, since Plaintiff seeks, directly or indirectly, to affect such other person's promotions and/or standing/place with respect to seniority benefits and "other emoluments" of their positions. The same holds true for those who Plaintiff's action sought to benefit, since the Complaint sought LAD compensatory and equitable relief for such unidentified persons. (Pa41-43). Specifically, under Rule 4:28-1(a)(2), each such person has an interest in the subject of this action in the form of their positions/promotions, pay and benefits. In addition, under R. 4:28-1(a)(1), given Plaintiff's arguments and the relief sought, if Plaintiff were successful it is difficult to envision how complete relief could be

accorded absent such parties against whom Plaintiff advances apparent adverse interests.

The allegations in Plaintiff's Second Amended Complaint further established that subsections (i) and (ii) of Rule 4:28-1(a)(2) were satisfied. Under Rule 4:28-1(a)(2)(i), disposition of this action in the absence of such persons would impair and/or impede their respective abilities to protect their interests in their positions/promotions and compensation/benefits. Without being parties to this matter, such individuals would have no opportunity to protect such interests. Indeed, based on the allegations of the Second Amended Complaint, and if Plaintiff was successful in obtaining the requested relief, there were individuals who could be demoted and/or reduced in terms of seniority or other benefits without ever having the chance to represent themselves in this matter. Those persons would have been unable to protect their interests since Plaintiff did not join them in this matter. Such a scenario required those firefighters (who must be known to Plaintiff) to be joined as defendants under Rule 4:28-1(a)(2)(i). However, Plaintiff repeatedly failed to do so and improperly asserted in its R. 4:5-1 certification that Plaintiff has no knowledge of other parties that need be joined in this matter. (Pa61-62). Indeed, this issue had been previously raised with Plaintiff during the first motion to dismiss proceedings. Accordingly, Plaintiff's Second Amended Complaint was subject to dismissal on this basis as well. Rule 4:6-2(f).

Joinder was also required under Rule 4:28-1(a)(2)(ii). If Plaintiff were successful in this action and obtained an order from the Court requiring the City to demote other individuals and/or reduce them in terms of seniority or other benefits, the City would have been subject to substantial risk of incurring inconsistent obligations. On the one hand, the City would have obligations to the persons alluded to by Plaintiff in this action (if ever specified) should Plaintiff have been successful. On the other hand, the City promoted individuals in due course and they acquired seniority and other benefits accordingly and, if such promotions and/or rank/timing/place were undone, the City may have been subject to claims from those adversely affected individuals. The City would thus have been subject to obvious risk of incurring inconsistent obligations absent Plaintiff's joinder of these individuals. Consistent with R. 4:28-1(a)(2)(ii), Plaintiff should have therefore named/joined as defendants the specific individuals who could have been adversely impacted by Plaintiff's action in terms of promotion and/or seniority or other benefits. Plaintiff should have also joined those individuals whom its action sought to benefit by way of the demanded LAD equitable and compensatory damages. Plaintiff's failure to again do so also required the dismissal of its Second Amended Complaint. R. 4:6-2(f).

In short, the City asserted that the individuals who would/could be adversely impacted by Plaintiff's action (and who were known to Plaintiff) are indispensable

parties because the relief as sought by Plaintiff could not justly be awarded without necessarily affecting their respective interests.[8] Allen B. DuMont Labs., 30 N.J. at 298. Nonetheless, Plaintiff again failed to name/join such persons in its third iteration of its Complaint and, as a result, Plaintiff's Second Amended Complaint was appropriately subject to dismissal. The Trial Court thus appropriately found that Plaintiff had failed to join indispensable parties that would be "necessary to [any] judgment" in this action. (Pa4). By way of example, the Court noted that Plaintiff sought LAD compensatory damages for claimed instances of unidentified members being subjected to discrimination; yet, there was no appropriate party in interest in the case to whom such damages could be awarded. (Pa4).

Plaintiff's appeal again relies on Williams v. Borough of Clayton, 442 N.J. Super. 583 (App. Div. 2015), in seeking to avoid its responsibilities with respect to indispensable parties. (Pb40-41). The Williams case was not a LAD case and did address the pertinent Court Rules dealing with the failure to join indispensable parties. In addition, in that case, no one had been appointed/promoted to the Chief's position in issue such that the plaintiff-officer's lawsuit might impact or upset a promotion or seniority already awarded. Rather, the plaintiff brought the action prior

[8] In its Opposition to the City's first motion to dismiss, Plaintiff stated direct involvement in all alleged instances alluded to in its Complaint; thus, the potentially adversely impacted individuals were known and readily available to Plaintiff. (Pa130-132).

to even the start of the promotional testing process. Thus, the case is inapposite and does not present the same issues and concerns (and potential detriment to absent parties) as the present case.

Plaintiff also again argues that it does not seek "to diminish the rights and interests of any firefighter." (Pb39). Well, that's now how it works and Plaintiff knows that. Plaintiff's Second Amended Complaint again sought for unidentified alleged "affected Union members" to be promoted retroactively to an unidentified higher position. (Pa41-43). By extension, that would affect other fire fighters who were previously promoted and presumably at times when Plaintiff claims the unidentified fire fighters should have been promoted. The Second Amended Complaint again sought for unidentified alleged "affected Union members" to be promoted with "full seniority benefits and other emoluments of the position." By extension, this would have affected other firefighters who may presently have seniority over the unidentified members and would be "jumped" should Plaintiff have been successful in this action and obtained equitable and compensatory damages for the unidentified Plaintiff members. If ever there was a case where, at the outset, it was clear that Plaintiff had failed to join indispensable parties, this was it. Yet, Plaintiff refused time and again to take appropriate steps to address this circumstance. As such, the appropriate consequence recognized by the Trial Court

was dismissal. The Trial Court's conclusion was legally correct and should be affirmed.

POINT VII

THIS LAD DISABILITY DISCRIMINATION CASE COULD NOT BE SUSTAINED UNDER THE DECLARATORY JUDGMENT ACT AND WAS APPROPRIATELY SUBJECT TO DISMISSAL ON THIS BASIS AS WELL

Plaintiff asserts that its claims were for a declaratory judgment under the LAD and that that this action was appropriately brought under the Declaratory Judgment Act, N.J.S.A. 2A:16-51 ("Act"). (Pb42-44). The Trial Court did not dismiss Plaintiff's Second Amended Complaint on the basis that its claims were not appropriately framed/brought as a declaratory judgment action. (Pa3-7). Nevertheless, since Plaintiff opens the door to this issue for litigation on appeal, such claims as framed are inappropriate, could not be sustained and were appropriately dismissed.

The New Jersey Supreme Court has emphasized that "even the broadest view of the scope of the Act suggests that discretion should be exercised against granting declaratory relief where another remedy would be more effective or appropriate." Adams v. Atlantic City, 26 N.J. Misc. 259, 261-262 (1948); see also Elizabethtown Water Co. Consol. v. Bontempo, 67 N.J. Super. 8, 12 (App. Div. 1961) (explaining that "refusal of declaratory relief may also be justified where there is a more effective

remedy."); Giua v. Closter, No. 019457-2012, 2013 WL 12497892 (N.J. Tax Ct. Nov. 19, 2013) (slip op. at *4). As explained in Giua,

> The [New Jersey Supreme] Court went on to strongly caution against allowing a declaratory judgment action to supplant administrative or other statutory procedures for relief. Id. Thus, "[t]he doctrine that a litigant must first exhaust his administrative remedies before he seeks judicial review is widely recognized and has been the subject of extended discussion." Central R.R. v. Neeld, 26 N.J. 172, 178 (1958). The same principle is formalized in the New Jersey Rules of Court at R. 4:69-5, which states: "Except where it is manifest that the interest of justice requires otherwise, actions under R. 4:69 shall not be maintainable as long as there is available a right of review before an administrative agency which has not been exhausted."

Giua, No. 019457-2012, 2013 WL 12497892, (slip op. at *4). Further ,"It is clear that relief by way of a declaratory judgment should be withheld when the request is in effect an attempt to have the court adjudicate in advance the validity of a possible defense in some expected future lawsuit." Donadio v. Cunningham, 58 N.J. 309, 325 (1971).

To the extent Plaintiff advanced this is a declaratory judgment action and not a LAD case per se, the above principles dictated that the Court choose not to grant declaratory relief in this matter even if any issue was properly presented. Any individual who believed they had been discriminated against as a result of a purported policy or City action maintained the right to bring an employment action

against the City. That was and is a more effective and appropriate remedy than proceeding on some unspecified Plaintiff request for declaratory relief in the Complaint. If this were/is a declaratory judgment action, the record is devoid of any information reflecting that the unspecified individuals whose actual rights were allegedly implicated in this matter (but who were not parties to this litigation) had exhausted their administrative remedies regarding those issues (including under General Order 19-16 itself, which Plaintiff repeatedly references and which includes process/procedures not pleaded in the Complaint as to any member).

It also must be otherwise highlighted that Plaintiff sought remedies in the Second Amended Complaint that are not appropriate for a declaratory judgment action. In this regard, Plaintiff sought equitable and monetary LAD remedies for un-named and not present parties (e.g., promotions, seniority placement/benefits, compensatory damages for economic loss, consequential damages, etc.). (Pa41-43). **It goes without saying that there was no plaintiff present in the case as to whom such remedies could have been awarded. Certainly, they would not and could not be awarded to Plaintiff-Union.** This alone makes plain that, to the extent Plaintiff argued/argues that its claims are really just a declaratory judgment action, such claims were not appropriate, could not be sustained and would be appropriately subject to dismissal on this basis as well.

In addition, the cases cited by Plaintiff are inapposite and do not stand for the proposition that a declaratory judgment action is the appropriate or permitted vehicle to address alleged instances of individuals having been discriminated against in violation of the LAD. (e.g., Bell v. Twp. of Stafford, 110 N.J. 384 (1988) (action by a property owner challenging an ordinance that prohibited billboards within a zoning district as unconstitutional); New Jersey Banker's Ass'n v. Van Riper, 1 N.J. 193 (1948) (association of banks and savings institutions sought decree as to constitutionality of acts dealing with escheat of unclaimed bank deposits; the court found they were not authorized or legally competent to maintain the action); Rego Indus., Inc. v. American Model Metals Corp., 91 N.J. Super. 447 (App. Div. 1966) (dispute between two corporations over contracts the plaintiff sought to have rescinded; court found the case was beyond point of justiciable controversy since parties had already reached stage where rights had been allegedly breached); Williams v. Borough of Clayton, 442 N.J. Super. 583 (App. Div. 2015) (non-LAD case brought by plaintiff-police officer regarding still vacant Chief position).

Accordingly, since any Plaintiff claims framed as a declaratory judgment action should be subject to dismissal as improperly brought, Plaintiff's argument that this is a declaratory judgment action that excuses its *prima facie* case failures is of no moment and presents no basis to disturb the Trial Court's decision.

CONCLUSION

In light of all the foregoing, Defendant City of Jerey City respectfully submits that the Trial Court's Order was entirely supported by the record and the law and should be affirmed.

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City of Jersey City

/s/ Ryan S. Carey

By: _____
Ryan S. Carey, Esq.

Dated: January 22, 2024

JERSEY CITY IAFF LOCAL 1066	: SUPERIOR COURT OF NEW JERSEY : APPELLATE DIVISION
Plaintiff/Appellant	: DOCKET NO.: A-000448-23
v.	:ON APPEAL FROM :SEPTEMBER 13, 2023
CITY OF JERSEY CITY,	:ORDER DISMISSING COMPLAINT :WITHOUT PREJUDICE
Defendant/Respondent	: SAT BELOW: HON. KIMBERLY : ESPINALES-MALONEY, J.S.C.
	: BELOW DOCKET NO.: HUD-L-3451-22

REPLY BRIEF ON BEHALF OF PLAINTIFF/APPELLANT JERSEY CITY IAFF LOCAL 1066

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Appellant's responses to Respondent's argument track Respondent's Point headings in their numerical sequence.

STATEMENT OF FACTS

Plaintiff brought this claim as an association on behalf of *all its members*, each of whom are affected and impacted by the unlawful policies sought to be addressed. This impact is ongoing and prejudicial to Local 1066's unit members.

Amendment of the complaint to name individual members is both judicially improvident and futile.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ORDER IS A FINAL JUDGEMENT UNDER RULE 2:2-3A1

The Defendant alleges that the Decision of the superior Court was not a "final order" pursuant to Rule 2:2-3A1. This is incorrect. All claims as they relate to Appellant have been dismissed. Any amendment would be futile and duplicative

The cases is relied upon by the Defendant, **Kwiatkowski v. Gruber**, 390 N.J. Super (App. Div. 2007),**Woodward-Clyde Consultants v. Chemical and Pollution Sciences, Inc.**, 105 N.J. 464 (1987), and **Malhame v. Borough of Demarest**, were all cases which were either dismissed without prejudice because of a failure to comply with *discovery rules* or a case in which the Appellant sought only review of the trial Judges' decision which sought review of "only portions" of the opinion of the Trial Judge. Therefore it was not an appeal not of a judgment but an appeal of parts of an opinion -

in other words - not of a final decision.

Plaintiff is the master of its claim. "The party who brings a suit is master to decide what law he will rely upon". See **Beneficial National Bank v. Anderson**, 539 U.S. 1 (2003).

A claim of direct discrimination is the most appropriate manner of addressing the issues at hand as it was for the Association within **Dial, Inc. v. City of Passaic**, 443 N.J. Super. 492, (App. Div. 2016) which also declined to assert claims for individuals impacted by the discrimination alleged in that case. Neither the Defendant nor the trial court ever challenged Plaintiff's Associational standing in this case.

Why the trial court dismissed the matter "without prejudice" was not revealed in its decision. Presumably it was to allow an opportunity to bring individual claims. It is futile to name individual members where a facial challenge is brought. Either the policy is unlawful or it is not. As noted the Association understands such claims to be unwarranted and both futile and duplicative in this case. The Association brought its claims as an Association and all of its claims were dismissed on a final basis against the Association.

POINT II

PLAINTIFF PRESENTED A VALID CLAIM OF DISABILITY DISCRIMINATION UNDER THE NEW JERSEY LAW OF DISCRIMINATION ("NJLAD")

The employer administers two types of "no fault" attendance policies which are facially unlawful under the NJLAD. Those "no fault" policies were revealed as follows:

(1) Ineligibility for promotion if an employee avails himself of a medical leave of absence
(2) Any three occurrences of use of medical leave results in automatic discipline up to termination

When Association members request medical leave the employer certainly becomes aware that they are experiencing a kind of injury or illness which sounds, at least in part, as a *perceived* disabling condition under the auspices of the NJLAD. ("requesting and taking of medical leave are protected activities under the NJLAD" **Boles v. Wal-Mart**, No. 12-1762, 2014 U.S. Dist. LEXIS 41926, at *22 (D.N.J. Mar. 26, 2014); See similar cases at Pb26-27

The request to take medical leave is a protected act. Based upon the employer's "no fault" attendance rules this protected act is subject to automatic penalty.

Even though the employer is on notice of protected activity, the employer, as a matter of policy, has, and will always, decline to engaged in any type of interactive process of accommodation. Doing otherwise would undermine the very purposes and intent of the "no fault" attendance rules - which is to discipline automatically without inquiry. The ineligibility for promotion while on medical leave is similarly "no fault" and "automatic".

As such, the employer, as a matter of policy, will never make a good faith effort, or any effort, to assist the employee in seeking accommodations. This is a matter of policy even though the employer has an affirmative obligation to initiate an interactive inquiry. (See 29 C.F.R. § 1630.2(o)(3)) It of course obvious that the Association's

members could be "accommodated" with a short period of convalescence but for the employer's lack of good faith. The challenged policies, by their very nature as "no fault", violates the NJLAD by penalizing employees for the protected activity of simply requesting and taking a medical leave of absence.

This ongoing and continuous application of the "no fault" attendance policy interferes with and penalizes employees for exercising their right to request and take medical leave which as protected activity under the Act.

The NJLAD makes it an illegal retaliatory act, if an employer interferes with "any person *in the exercise or enjoyment of a protected right.*" **N.J.S.A.** 10:5-12(d)

In this case the employer interferes with the protected right of a medical leave by administering its no fault attendance policies so that it penalizes employees for doing so.

The no fault attendance policy puts employees to an unlawful choice. If they exercise their rights to a medical leave of absence for a protected illness or injury they will be subject to the no fault policy. Alternatively employees are coerced to forbear from taking what would ordinarily be protected leave. The no fault policy attendance policy penalizes workers for missing work even if they are exhibiting COVID-19 symptoms, or have a contagious disease, for fear of punishment. Similarly, an injury which requires further recuperation will have to be foregone and the employee must subject itself to the risk of exacerbation. Employees thus will arrive for their shifts while sick or unhealed for fear of losing their promotion, their jobs, or their paychecks.

This type of passive coercion and interference with medical leave rights violates

the NJLAD where it interferes with "the exercise or enjoyment of a protected right". **N.J.S.A.** 10:5-12(d) guarantees protection of "*any right* granted" under the statute.

In that connection, plaintiffs properly plead a prima facie case of retaliation under the NJLAD. First, (1) unit members engaged in a protected activity (requesting and taking medical leave) that was known to the employer; (2) that they were subjected to an adverse employment action as a result of the "no fault" attendance policies; and (3) that there is a clear causal link between the activity and the adverse action. See **Battaglia v. United Parcel Serv., Inc.**, 214 N.J. 518, 526 (2013)

Jersey City firemen regularly seek medical leave for both injuries and illnesses under Civil Service statutes. When they avail themselves of this statutory benefit they subject themsleves to the no fault attendance policies and may be penalized for legitimate and necessary use of medical leave.

Disability under either the NJLAD or Civil Service statute share identical definitions. A "disability" under the NJLAD is defined as any "physical disability [or] infirmity . . . which is caused by bodily injury . . . or illness." **N.J.S.A.** 10:5-5(q). Civil Service Regulations extend medical leave for "personal illness or injury", **N.J.A.C.** § 4A:6-1.3(g)(1) and **N.J.S.A.** 11A:6-5. In either case when requesting such leave the employee is perceived as "disabled".

When a disabled employee requests and then takes a temporary medical leave of absence, said employee avails himself of a right that is protected under both the NJLAD and Civil Service Law which are coextensive statutes. See **N.J.S.A.** 10:5-12(d)

The ongoing administration of the no fault attendance policy upends this protective framework and excoriates the protections of both the NJLAD and concomitantly, Civil Service Statute, both directly and indirectly.

There can be no doubt that the employers actions are actions taken against Association members "because of a disability" either actual or perceived.

As long as even a single protected medical leave of absence is counted against an employee in an adversarial manner the discrimination is "in-part" due to an actual *or perceived* disability protected under the NJLAD.

In every instance of requested medical leave the perceived disability is more than enough evidence to reasonably suggest that the employer had knowledge of each members various medical conditions and that disciplining its employees or rendering them ineligible for promotion is likely to have been motivated, at least in part, on acts which violate the law.

POINT III

THE TRIAL COURT NEVER ASSESSED PLAINTIFF'S COUNT IV AND THEREFORE ITS DISMISSAL WAS IMPROPER

Count IV of Plaintiff's complaint asserts that the City policy, was facially deficient and violated both state statute under the Civil Service and simultaneously the New Jersey Law Against Discrimination. The claims in Count IV asserted that a "no fault" attendance policy was an arbitrary and capricious exercise of government authority and violated the NJLAD. Accordingly the policies were void. The Trial Court never addressed the claims in Count IV and therefore the arguments advanced by the

Defendant that Count IV was *properly* dismissed do not stand upon reason.

POINT IV
THE TRIAL COURT MISCONSTRUED PLAINTIFF'S CLAIMS AND DID NOT CONSIDER PLAINTIFF'S CLAIMS OF DIRECT OR FACIAL DISCRIMINATION

Plaintiff very plainly and succinctly asserted claims of direct or facial discrimination. If Plaintiffs' claims of direct discrimination are taken as true it follows *ipso facto* that all of the Firefighters were not reasonably accommodated - indeed they were each arbitrarily designated as ineligible for *any* consideration of accommodation. The failure of the reasonable accommodation" in this case was not due to discrete facts surrounding individuals which would invoke a burden shifting *McDonnell Douglas* analysis. The failure to reasonably accommodate occurred because there was a direct and deliberate predetermination by the employer that it would *never* accommodate regardless of the underlying circumstances. This is the precise factual allegation asserted by the Plaintiff which the Defendant *must accept as true* for purposes of this Appellate review.

The Defendant's attempt to shoehorn Plaintiff's claims into a series of factually disputed discrete incidents of the dozens of "failures to accommodate Appellant's individual members" both contort and misshape Plaintiff's claims. Where a policy, on its face, proscribe any accommodation, as an iron rule, it is facially violative of the NJLAD and is an example of a direct discrimination against the individuals and employees which it impacts.

POINT V
PLAINTIFF HAS NO OBLIGATION TO EXHAUST

ANY ALLEGED ADMINISTRATIVE REMEDIES

"[T]he NJLAD does not have an exhaustion of remedies requirement." **Weisberg v. Realogy Corp.**, No. 12-30 (JLL), 2012 U.S. Dist. LEXIS 38931, at *7 (D.N.J. Mar. 22, 2012).

Failure to exhaust administrative remedies is not a defense to an NJLAD claim. **Hernandez v. Region Nine Hous. Corp.**, 146 N.J. 645, 684, 684 A.2d 1385 (1996). Plaintiff does not plead a tort. Plaintiff seeks a judgment, declaratory *or otherwise*, finding that the challenged policies involving "no fault" penalties for use of medical leave are violative of the NJLAD as well as an arbitrary and capricious exercise of municipal powers and a violation of the public policy of New Jersey.

POINT VI
THERE ARE NO ADDITIONAL PARTIES WHICH ARE REQUIRED TO BE JOINED IN THIS ACTION

In an analogous challenge to an unlawful promotions policy this court recognized that it was not necessary to name any and all potentially impacted individuals within an action which seeks a government actor to simply "comply with the law." **Williams v. Borough of Clayton**, 442 N.J. Super. 583, 592 (App. Div. 2015)

Plaintiff asserts standing as an Association which neither the defendant nor the trial court challenged. Within **Crescent Park Tenants Asso. v. Realty Equities Corp.**, 58 N.J. 98, 105 (1971) our Supreme Court held that an association has standing to sue "in order to protect their [members] interests".

As in **Dial**, supra, 443 N.J. Super. 492, Association members choose to act

through their Association to advance and assert claims on behalf of its individual members. The Association is a "person" for purposes of the NJLAD standing to ensure that their members are not discriminated against and the instant claim which seeks to enjoin the employer to "comply with the law" does not invoke a requirement that all of the Association's members be inter-pleaded.

POINT VII
PLAINTIFF'S CLAIMS MAY APPROPRIATELY BE RESOLVED AS A DECLARATORY JUDGMENT CLAIM

There has been a continual attempt to contort Plaintiff's claims and to shoehorn them into a procedural straight-jacket more to Defendant's liking. The appropriate characterization of Plaintiff's claims are that they are actions predicated upon a violation of the NJLAD as a *statutory action.* This is the same type of "facial" challenge which a similar Association brought as Declaratory Judgement action on behalf of handicapped drivers within **Dial, Inc. v. City of Passaic**, 443 N.J. Super. 492, 495-96 (App. Div. 2016). Similar to the Association in this case, **"Dial"** was a disability rights organization which made a facial challenge of an ordinance which discriminated against its disabled members in violation of the NJLAD.

The UDJA is an especially appropriate method for resolving "any question of construction or validity arising under . . . [a] statute." **N.J.S.A.** 2A:16-53

That being said, the NJLAD claims may stand alone as simply an action to enjoin acts which discretely violate the NJLAD as a statutory action. Rule 4:5-7 states that "no

technical forms of pleading are required. All pleadings shall be liberally construed in the interest of justice."

There is certainty that defendants will injure Plaintiff's members in the same manner in the future as they have in the past. The main thrust of Plaintiff complaint is not a retrospective claim - it is an actual controversy which seeks to clarify and settle the legal relations at issue and enjoin the unlawful "no fault" attendance policies.

The Association, as a "person" under the NJLAD brings an action to address ongoing, continuous and institutional claims of discrimination and to enjoin the recurrence of the discriminatory policy which impacts all of its members who are similarly situated. The likelihood of recurrent injury is certain and the Association has an interest in assuring that the members of its organization are protected against unlawful acts of the employer. Even if not considered a Declaratory Judgment action " one aggrieved by improper official action has a constitutional right to seek judicial review". **N.J. Dental Ass'n v. Metro. Life Ins. Co.**, 424 N.J. Super. 160, 166 (App. Div. 2012).

POINT VIII
ASSOCIATION UNIT MEMBERS MAY NOT BE PENALIZED FOR LAWFULLY USING MEDICAL LEAVE

It is axiomatic that public employees should not be penalized for lawfully utilizing leave to which they are entitled by State Statute. This legal doctrine has been adopted by the Courts of Pennsylvania and this same principle should be applied in New Jersey. In **White v. Department of Corrections**, 110 Pa. Commonwealth Ct. 496, (Pa. Cmwlth.

1987), cert. den., 518 Pa. 628 (1988) the court held that a public employer could not punish employees for using validly earned benefits.

> [W]e believe that an employee cannot be penalized for using an earned benefit in a lawful manner. Again, we emphasize that the [employer] does not contend that the sick leave was improper, but merely excessive, despite the fact that [the employee] had the sick leave time accrued. If, as the [employer] asserts, it must keep its staffing at high levels for security purposes, it has other options to discourage abuse of sick leave such as requiring employees to produce written medical excuses. No such requirement was placed upon [this employee], although he did produce such documentation for seven of his eleven absences. The [employer] cannot punish employees for using validly earned benefits.

The decision above correlates with the Appellate Division decision which found similarly on slightly different grounds. In **Montville Township Board of Education**, N.J.P.E.R. Supp. 2d ¶140 (1985), the Court found it unreasonable to penalize employees who validly utilized sick leave. **Montville** also considered a "no fault" attendance policy and found it arbitrary and unreasonable as a matter of law and thereby an improper act. ("[An employer] cannot accept as reasonable an attendance evaluation system which would determine a teacher's attendance evaluation rating solely upon the basis of the accumulative number of days of absence, regardless of the circumstances of the absences or a teacher's previous attendance history.")

Penalizing an employee for the lawful use of a sick or medical leave benefit is unreasonable and arbitrary. Such a policy is not a proper exercise of municipal action and should be declared void.

POINT IX
THIS COURT MAY PROPERLY LOOK TO GUIDANCE FROM THE EEOC

In terms of disability analysis the NJLAD largely follows the EEOC's guidance applicable to the Americans with Disabilities Act 42 U.S.C. §12111(9)(B). (" In adjudicating disability discrimination claims under the NJLAD, our courts have regularly looked to cognate principles under the ADA and related federal law for guidance.")**Dial, Inc. v. City of Passaic**, 443 N.J. Super. 492, 513 (App. Div. 2016)

In interpreting the ADA the Federal EEOC has regularly found "no fault" attendance policies, similar to the one under challenge in this case, to facially violate the ADA. The EEOC has stated in its 2016 policy document ("Employer-Provided Leave and the Americans with Disabilities Act")[1] (See Table of Authorities) that protected leave may not be penalized:

> An employer may not penalize an employee for using leave as a reasonable accommodation. Doing so would be a violation of the ADA because it would render the leave an ineffective accommodation; it also may constitute retaliation for use of a reasonable accommodation.

The EEOC has also stated in its May 19, 2016 policy document that punishing some employee who utilize protected leave and not punishing others for other types of leave constitutes disparate treatment.

> Penalizing an employee for use of leave as a reasonable accommodation may also raise a disparate treatment issue if the employer grants similar amounts of leave to non-disabled

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employees but does not penalize them.

The employer in this case does grant similar leave to non-disabled employees without fear of penalty. It does so when it extends vacation leave or compensatory time leave without threat of penalization. Such disparate treatment violates the ADA and NJLAD.

In one EEOC case a company fired an employee for exceeding the permissible number of attendance points despite the fact she provided medical excuses for her absences and despite the fact the leave was approved. The EEOC stated:

> "An employer's refusal to accommodate an employee who requests a defined period of intermittent medical leave for treatment of a disability -- which would permit the employee to return to work in the immediate future -- is a widely recognized violation of the law,"[2] (See Table of Authorities)

Similarly, within **U.S. EEOC v. Mueller Industries, Inc.**, Case No. 2:18-cv-05729-FW-GJS, the EEOC asserted that the employer violated federal law by implementing an attendance policy that assigned points to employees' absences, regardless of reason. Effectively, under **Mueller's**[3] (See Table of Authorities) policy once a certain number of points were accumulated, the employee was terminated. The EEOC stated in that case:

> "Such conduct violates the Americans with Disabilities Act (ADA)."

See also **U.S. EEOC v. Autozone, Inc.**, 141 F. Supp. 3d 912, 917 (N.D. Ill. 2015) (Employers attendance policy under which employees were assessed points and eventually discharged because of absences, including disability-related absences declared unlawful by EEOC).

The EEOC cases provide cognate guidance in this case. Many other states have either legislatively or judicially eliminated "no fault" attendance policies which discriminate against employees. (e.g. Wash. Admin. Code § 296-128-660(1); Cal. Lab. Code § 233(a)") There is also a national movement to eradicate such policies in both the public as well as the private sector[4] (See Table of Authorities). New York specifically clarified its discrimination laws to outlaw "no fault" attendance policies. New York now provides that it is unlawful to penalize "any legally protected absence" See NYCLS § 215 Article 7 ("(a) No employer... shall ...penalize...any employee...because such employee has used any legally protected absence pursuant to federal, local, or state law"

Both New York and New Jersey have a shared history in the manner in which they apply and interpret their anti-discriminatory statutes. ("Both laws prohibit, among other things, employers from...discriminating against employees on the basis of...disability.", **Robins v. Max Mara, U.S.A., Inc.**, 923 F. Supp. 460, 464 (S.D.N.Y. 1996).

Jersey City Firefighters have the right to enjoy legally protected time off from their jobs to address certain medical needs without penalty. Use of statutory medical leave to

address illness or disability protected under the NJLAD or ADA is a protected act which cannot be punished as a matter of law..

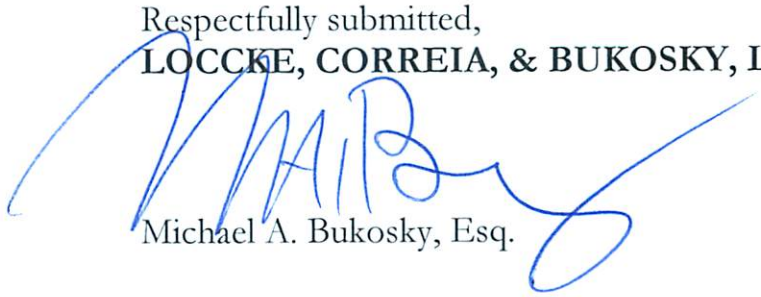
The employers interpretation of its policy in which it assigns an absence infraction or attributing penalty points towards a penalty for such legally protected absences violates the Civil Service law, and the NJLAD as it applies the principles of the ADA.

CONCLUSION

Plaintiff is entitled to a liberal interpretation of its complaint and must be given the benefit of all favorable inferences that reasonably may be drawn even where a cause of action is merely suggested by the facts or may be gleaned from an obscure statement of claim. The complaint should be viewed in depth and with liberality and this court should find that Plaintiff's fundamental causes of action are well established under the law.

Special rules of interpretation also apply to NJLAD claims. When confronted with any interpretation of the NJLAD the Court should seek to advance the broad remedial goals which are intended to eradicate the cancer of discrimination. Even novel arguments require the utmost care and attention to ensure that employers are deterred from engaging in discriminatory practices.

Respectfully submitted,
LOCCKE, CORREIA, & BUKOSKY, LLC



Michael A. Bukosky, Esq.

Dated: February 8, 2024