SHARON HUSSAIN, Plaintiff, v. ALLIES, INC.; JUANITA SMULLEN; TRACEY WILSON; ANNE KREEGER; ANITA BOGDEN; CHRISTINE COCUSO; ERICA HILL, ABC CORPORATIONS 1-5 (fictitious names describing presently unidentified business entities); and JOHN DOES 1-5 (fictitious names describing presently unidentified individuals), Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001532-23 On Appeal From: Superior Court of New Jersey Law Division – Mercer County Docket No. MER-L-001898-22 Sat Below: Hon. R. Brian McLaughlin, J.S.C.

BRIEF OF PLAINTIFF/APPELLANT SHARON HUSSAIN

McOMBER McOMBER & LUBER, P.C.
54 Shrewsbury Avenue
Red Bank, NJ 07701
(732) 842-6500 Phone
Attorneys for Plaintiff/Appellant, Sharon Hussain

Peter D. Valenzano – NJ ID #037892010
pdv@njlegal.com
Of Counsel and On the Brief
R. Armen McOmber – NJ ID #018251998
ram@njlegal.com
Of Counsel and On the Brief
Tiffany M. Yacullo – NJ ID #370662021
tmy@njlegal.com On the Brief

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Rules

Other Authorities

TABLE OF JUDGMENTS, ORDERS & RULINGS

I. PRELIMINARY STATEMENT

Plaintiff Sharon Hussain ("Plaintiff") appeals the dismissal of her whistleblower retaliation lawsuit under New Jersey's Conscientious Employee Protection Act ("CEPA") N.J.S.A. § 34:19-1 in favor of her former employer, Defendant Allies Inc. ("Defendant Allies") and her direct supervisors, Juanita Smullen ("Defendant Smullen"), Tracey Wilson ("Defendant Wilson"), Anne Kreeger ("Defendant Kreeger"), Anita Bogden ("Defendant Bogden"), and Christine Cocuso ("Defendant Cocuso")(collectively the "Defendants"). As discussed below, the Honorable R. Brian McLaughlin, J.S.C.'s ("Motion Judge") ruling on the Defendants Motion to Dismiss at the pleading stage cannot withstand the slightest scrutiny. This is because the Motion Judge abdicated his duty and responsibility to view the Complaint in the light most favorable to the non-moving party, Plaintiff.

The facts of this whistleblower retaliation claim are short but compelling. Here, Plaintiff worked as a Support Manager at Defendants' group home for developmentally disabled individuals. In this role, Plaintiff observed understaffing and training issues in violation of N.J.A.C. § 10:44A, among other issues, leading her to complain to Defendants about same. What followed was a torrent retaliation, culminating in Plaintiff's unlawful termination on March 25, 2022.

At the initial stage of litigation, the Motion Judge must review the Complaint

under a Rule 4:6-2(e) motion through the "essential test" of "whether a cause of action is '**suggested**' by the facts." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746, 563 A.2d 31 (1989)(emphasis added). See also Green v. Morgan Properties, 215 N.J. 431, 451, 73 A.3d 478 (2013). The reviewing court must search the Complaint "in depth and with liberality to ascertain whether the fundament of a cause of action **may be gleaned** even from an obscure statement of claim, opportunity being given to amend if necessary." Id. (citing Di Cristofaro v. Laurel Grove Mem'l Park, 43 N.J. Super. 244, 252, 128 A.2d 281 (App. Div. 1957)). However, the Motion Judge failed to adhere to this standard, as Plaintiff was not afforded "every reasonable inference" undertaken with a "generous and hospitable approach." Green, supra, 215 N.J. at 452, 73 A.3d 478 (quoting Printing Mart, supra, 116 N.J. at 746, 563 A.2d 31). Instead, the Motion Judge based the entirety of his dismissal on the basis that Plaintiff's complained of conduct did not have a "substantial nexus" to law or public policy. To the contrary, Plaintiff very clearly identified N.J.A.C. § 10:44A in her Complaint, which spoke to Plaintiff's concerns about staff reductions and training at Defendants' establishment, which in turn demonstrated the underlying public policy interests in keeping the developmentally disabled residents safe and properly cared for through this enactment.

Significantly, the New Jersey Supreme Court "[g]enerally seek[s] to afford

'every litigant who has a bona fide cause of action or defense the opportunity for full exposure of his case.'" United Rental Equip. Co. v. Aetna Life and Casualty Ins. Co., 74 N.J. 92, 99 (1977). Unfortunately, Plaintiff did not have this opportunity. Rather, the trial judge erred by dismissing Plaintiff's Complaint and denying Plaintiff the opportunity to file an Amended Complaint.

As this case involves significant policy considerations, "maximum caution [should have been] exercised before granting summary judgment [or in this case, a motion to dismiss] and the issue should not be resolved until a full record is developed at trial." Sandvik, Inc. v. Statewide Sec. Sys., 192 N.J. Super. 272, 276 (App. Div. 1983) (citing Jackson v. Muhlenberg Hosp., 53 N.J. 138, 142 (1969)). Simply put, the record is too bare, with many material facts in dispute, thus requiring further discovery and ultimately causing the dismissal decision to be wholly inappropriate at this time. As such, Plaintiff respectfully requests this court reverse the Motion Judge's holding and remand this matter for a jury trial.

II. PROCEDURAL HISTORY. (PA000001-PA000094).[1]

Plaintiff filed her Complaint on November 1, 2022 in the New Jersey Superior Court, Law Division, Mercer County. (PA000001-PA000058). Thereafter, Plaintiff properly served the Defendants, and defense counsel filed a Motion to Dismiss the

1 T = Transcript of December 20, 2023 Motion to Dismiss Oral Argument

Complaint ("Motion" or "Motion to Dismiss") on December 12, 2022. (PA000059-PA000060). On January 10, 2023, Plaintiff filed a Cross Motion to Amend the Complaint ("Cross Motion"). (PA00061-PA000080). Following this, on January 16, 2023, Defendants filed their Reply Brief (collectively along with the "Motion" and "Cross Motion," referred to as the "Motions"). These Motions were expected to be heard on January 20, 2023. However, the Court neglected to schedule oral arguments for same until December 20, 2023, **338 days** after Defendants' Motion to Dismiss was filed.

To be sure, Plaintiff attempted numerous times to advise the Court about the outstanding Motions, which often proved futile. For example, after calls to the Court did not address the issue, Plaintiff submitted correspondence regarding the outstanding Motions and oral argument request on March 3, 2023. (PA000081-PA000082). Plaintiff continued to call the Court thereafter, but to no avail. Therefore, again on July 6, 2023, Plaintiff submitted her second written correspondence regarding the pending Motions and need for oral argument. (PA000083-PA000084). Without any word from the Court following this second notice, on October 5, 2023, Plaintiff submitted a third correspondence regarding the Motions and requested oral argument. (PA000085-PA000086).

PA = Plaintiff Sharon Hussain's Appendix before the Appellate Division

While Plaintiff made efforts to schedule oral argument with the Court, Plaintiff and Defendants' counsel also engaged in several conversations regarding the mediation of this matter as the Court remained unresponsive. However, on November 16, 2023, the Court scheduled oral argument for Defendants' Motion to Dismiss and Plaintiff's Cross Motion to be heard on December 20, 2023. On December 20, 2023, the Motion Judge in fact heard oral arguments from both parties, and ultimately reserved his decision. (T4:1-42:7). On January 10, 2024, after **394 days** had passed since the filing of the Motion to Dismiss, the Motion Court granted Defendants' Motion, and denied Plaintiff's Cross Motion to Amend the Complaint. (PA000087-PA00094). The trial court issued a statement of reasons in support of same. (PA000088-PA000092).

This Appeal follows.

III. FACTUAL BACKGROUND

A. Plaintiff's Complaint. (PA000001-PA000058).

i. Plaintiff Was A Competent and Diligent Employee, Loyally Dedicated to Defendant Allies and the Patients They Serve. (PA000001-PA000058).

This matter involves an action brought by Plaintiff against Defendant Allies, Defendant Smullen, Defendant Wilson, Defendant Kreeger, Defendant Bogden, Defendant Cocuso, and Defendant Hill. (PA000001-PA000058). On or about

September 14, 2020, Plaintiff commenced employment with Defendant Allies as a Support Manager. (PA000005). As part of Defendant Allies' Residential Services, Defendant Allies has developed over 150 group homes throughout New Jersey for individuals with special needs to live in. Plaintiff was hired to work in Defendant Allies' group homes. Id. At all times throughout her employment, Plaintiff performed her job responsibilities competently and diligently, loyally dedicated to Defendant Allies and the individuals they serve. (PA000006).

ii. Plaintiff's Previously Collegial Work Environment Took a Turn For The Worse After She Felt Compelled To Complain About What She Reasonably Believed To Be Violations Of Law, Rule, and Regulation. (PA000006- PA000009).

Throughout the entirety of Plaintiff's employment, Plaintiff noticed and complained to management about several issues she reasonably believed to be in violation of law, rule, regulation and/or public policy. (PA000006). First, Defendant Allies did not have a policy in place regarding the proper ratio of staff members to individuals. Same was necessary to ensure adequate care was consistently given to each disabled individual. Id. Plaintiff initially became aware of this issue when several of her co-workers were forced to work alone, caring for up to four individuals at once. Id. Plaintiff reasonably believed this policy to be in violation of N.J.A.C. § 10:44A-2.8(b). Id.

This presented serious problems for staff and the patients at Defendant Allies' group homes. Id. For example, if an individual had to be escorted to the bathroom, other individuals would be left unsupervised until the staff member returned, and individuals who were left unsupervised were more likely to get hurt. Id. When Plaintiff brought her concerns regarding the ratio of staff to individuals to Defendant Cocuso, Defendant Cocuso gave Plaintiff the run around and simply told Plaintiff there is no set ratio. Id. Defendant Cocuso completely ignored Plaintiff's valid concerns for the individuals at Defendant Allies' safety and wellbeing. Id.

Further, Defendant Cocuso blamed this issue on the fact Defendant Allies was consistently understaffed, and she took no responsibility for any understaffing issue. (PA000007). Similarly, Plaintiff complained that staff was frequently sent from one group home to another in an attempt to combat Defendant Allies' understaffing issue in direct violation of N.J.A.C. § 10:33A-2.8(b). Id. Pursuant to N.J.A.C. § 10:33A-2.8(b), "Reduction of staff coverage … shall be justified in writing and sent to the licensing agency and the appropriate Regional Assistant Director's Office for approval." Id.

When Defendants switched employees around to different locations, nothing was solved, as a fully staffed group home where staff was later transferred out was then left understaffed as well. Again, nothing was done to remedy the understaffing

after Plaintiff complained about same. Id.

Second, Plaintiff also became aware that staff was working without being properly trained to do so, in direct violation of N.J.A.C. § 10:44 A-2.7(a). Id. N.J.A.C. § 10:44 A-2.7(a) states in pertinent part:

> Basic staff training programs shall either be offered by the Division, or provided by the licensee after obtaining approval from the Division, to ensure staff competency. Within 120 days of employment, each employee shall successfully complete New Jersey Pre-Serviced Training that shall address, at a minimum,
>
> 1. Overview of developmental disabilities,
> 2. Medication training,
> 3. Preventing abuse and neglect,
> 4. American Red Cross Standard First Aid Training (and have a valid certificate on file); and
> 5. Cardiopulmonary resuscitation training (and have a valid certificate on file).

Id.

As a Support Manager, Plaintiff frequently travelled to group homes to assist Direct Support Professionals ("DSPs") in caring for individuals who were part of Defendant Allies' programs. (PA000008). The role of a DSP is extremely critical to the function of the group home and involves a tremendous amount of "hands on" work. Id. For example, DSPs are responsible for cooking and cleaning for individuals, dressing individuals, and administering medications. Id. However, the training DSPs receive is limited to watching videos upon being hired. Id. Despite this, Plaintiff routinely heard

DSPs mentioning they were never trained properly and that they did not know how to do things such as test an individual's blood sugar, a task DSPs are responsible for. Id.

Plaintiff went to management and suggested that after a DSP begins working, a nurse should accompany the DSP to a group home and demonstrate proper procedures in real time so as to comply with N.J.A.C. § 1044 A-2.7(a). Id. Once again, Plaintiff's suggestion was ignored even though it arose from a valid concern about the individual participants of Defendant Allies' safety. Id.

In addition to Defendants' flagrant violations of the law, their management was deficient in other ways as well. For example, there was once a fire at one of Defendant Allies' group homes which resulted in an individual's death. Id. Defendants did their best to shield all employees from knowing exactly what caused the fire, or from knowing any other details about it. Id. Defendants routinely told Plaintiff the fire occurred because the staff member who was working in the home at the time was smoking. Id. However, the employee who worked in the home where the fire occurred did not smoke. Id. Nevertheless, Defendants implemented a new policy that employees could not smoke less than thirty (30) feet from any home. Id. After this incident, Plaintiff noticed Defendants' attitude toward her change. (PA000009).

iii. Defendants First Retaliate Against Plaintiff by Denying Her Requests for Leave. (PA000009-PA000010).

Plaintiff was entitled to a certain amount of paid time off ("PTO") each year. Id. During one holiday season, Plaintiff worked on Thanksgiving, Christmas Day, and New Year's Day. Id. Due to Plaintiff's willingness to work on the holidays, she requested from Defendant Smullen and Defendant Wilson an additional three days of PTO. Id. Defendant Smullen and Defendant Wilson granted Plaintiff three extra days of PTO without issue. Id. In fact, Plaintiff consistently worked eighty (80) hour weeks and therefore she had the ability to take off without it affecting her already accumulated time off. Id. Accordingly, Plaintiff's next request for PTO directed at Defendant Smullen and Defendant Wilson was for the purpose of picking her daughter up from college. Plaintiff requested two days for same. Id.

However, this time, in an act of retaliation toward Plaintiff, Defendants denied Plaintiff's second request for PTO. Id. Defendant Smullen informed Plaintiff that she did not have the additional days to take off. Id. Believing she did in fact have available days off, Plaintiff told Defendant Smullen that she was incorrect. Id. Rather than taking the time to verify Plaintiff's amount of PTO, Defendant Smullen referred Plaintiff to Defendant Wilson, the Manager of Schedules. Surprisingly, when Plaintiff talked to Defendant Wilson, Defendant Wilson agreed with Defendant Smullen that Plaintiff did not have the ability to take the additional days off. Id.

Plaintiff still did not believe this was correct, so she followed up with Ms. Shah

who worked in the payroll department. (PA000010). Ms. Shah confirmed with Plaintiff that she did have enough time for her additional PTO request, and that Defendants Smullen and Wilson were wrong to tell her otherwise. Id. Frustrated that Defendants were denying her earned PTO, third, Plaintiff complained to the New Jersey Department of Labor ("DOL") by filing a complaint regarding Defendants improper and retaliatory initial denial of her PTO request. Id.

iv. Defendants Escalate The Retaliation Against Plaintiff After Her DOL Complaint and Continued Business Practice Complaints. (PA000010- PA000011).

After Plaintiff's complaints about the unlawful practices and her eventual filing of her DOL complaint, Defendant Hill immediately placed Plaintiff on a development plan without reasonable justification. Id. On March 25, 2022, Plaintiff had a meeting with Defendants Kreeger, Bogden and Cocuso, whereby Plaintiff sought to address why she was being disciplined and placed on a development plan. Id. During this meeting, Defendants would not let Plaintiff speak. Defendants told Plaintiff she was being placed on a development plan due to two write-ups that were present on her disciplinary record. Id.

Investigations were conducted regarding the allegations surrounding both write-ups and all allegations were proven **false**. Id. Therefore, the write-ups Defendants were referencing should have been removed from Plaintiff's disciplinary record long

ago. Id. Specifically, one write-up occurred after a parent's allegation that Plaintiff choked their child. This was found to be **false**. Id. The second write-up arose from Nyewin, a former co-worker's complaints that Plaintiff often cursed and spoke to her inappropriately. Id. This too was proven to be **false** when employee Ella Colavita submitted a letter substantiating Nyewin's allegations against Plaintiff were **untrue**. (PA000011). Despite this, Defendants refused to remove the old and **untrue** allegations from Plaintiff's disciplinary record. Id.

Defendants then showed Plaintiff a picture of her smoking outside of a garage and told her she was not following the new fire code. Id. Plaintiff recognized the photo as being taken in June 2021, well **before** the new fire code went into effect. Id. Confused, Plaintiff asked why this issue was not addressed with her in June 2021 and why Defendants were now bringing this photo up, nearly nine (9) months later. Id. In response, Defendants claimed Plaintiff had an aggressive demeanor, and without further explanation, terminated Plaintiff from her position with Defendant Allies. Id.

Suffice to say, Defendants resorted to baseless criticism to try and dispose of Plaintiff for complaining to the DOL and management about mistreatment and safety concerns. Id. In fact, Plaintiff's former coworker Ms. Smith told the Plaintiff that Defendants were trying to get rid of Plaintiff for calling and complaining to the DOL. Id. Clearly, Plaintiff was terminated in blatant retaliation for her complaint to the

DOL, as well as her complaints about Defendants violation of N.J.A.C § 10:44A-2.8(b) and N.J.A.C. § 10:44 A-2.7(a). Id. As a result of her termination, Plaintiff experienced and continues to experience significant economic and emotional distress damages. Id.

B. Defendants' Motion to Dismiss And Plaintiff's Cross Motion to Amend. (PA000006-PA000008)(PA000059-PA000080).

On December 13, 2022, Defendants filed a Motion to Dismiss Plaintiff's well pleaded Complaint. (PA000059-PA000060). Particularly important to this juncture, Defendants argued that Plaintiff's: (1) CEPA claim in Count One failed due to an alleged lack of establishing a "reasonable belief" that Defendants were violating law, rule, regulation, or public policy; and (2) the Pierce claim of wrongful discharge in Count Two is barred under CEPA's waiver provision.

On January 10, 2023, Plaintiff opposed Defendants' Motion and filed the Cross Motion to Amend the Complaint. (PA000061-PA000080). Overall, Plaintiff argued she sufficiently pled facts to establish both a valid CEPA claim and wrongful discharge claim in violation of public policy. In doing so, Plaintiff pointed to specific facts within the Complaint showing: (1) Plaintiff held a reasonable belief Defendants conduct violated either a law, rule, regulation, or public policy; (2) Plaintiff performed a "whistle blowing" activity due to same; (3) Defendants took adverse employment

action against Plaintiff following her whistle blowing activity; and (4) a causal connection existed between the whistle blowing and adverse employment action.

Specifically, Plaintiff pointed to particular facts in the Complaint about her awareness of Defendants' failure to adhere to a proper staff ratio and proper staff training under N.J.A.C. § 10:44A which required adequate care was consistently given to each resident individual. (PA000006-PA000007). For example, Plaintiff knew having other resident individuals, who were developmentally disabled, left alone unsupervised while staff escorted another resident to the bathroom was a significant safety concern. Id. Plaintiff also voiced concerns about the frequency in movement between the understaffed facilities, and the insufficient staff training in various situations, such as administering medication and preventing abuse or neglect. (PA000007-PA000008). Such facts corresponded to the regulations set forth in Plaintiff's Complaint, and thus formed her objectively reasonable belief that Defendants were violating the law, rule, regulation, and its underlying public policy. (PA000006-PA000008).

On January 16, 2023, Defendants filed a Reply Brief to Plaintiff's Opposition and Cross Motion, largely reiterating their previous arguments from the initial filing. Indeed, Defendants maintained their position that the cited to regulations were not "closely related" to Plaintiff's complained of conduct, thereby no "substantial nexus"

was apparent.

At oral argument on December 20, 2023, the Motion Judge heard both parties' respective positions. Defendants argued:

> Plaintiff must demonstrate a reasonable belief that Defendants were violating a law, rule, regulation, or public policy, and the Court must identify a legal authority that closely relates to the complaint of conduct…I don't think a person, a…reasonable person looking at either of [Plaintiff's cited to] provisions would come away thinking that what Plaintiff complained about was in violation of these code provisions.

(T5:15-8:2).

Rejecting this position, Plaintiff reminded the Motion Judge of the importance of reviewing Plaintiff's Complaint under the very liberal standard set forth on a motion to dismiss. Indeed, Plaintiff noted:

> [The motion to dismiss] standard…limits the Court to examining the facts in the complaint, accepting that as true and giving Plaintiff every favorable inference and an…opportunity to amend prior to dismissing any count of the complaint under Printing Mart-Morriston…this is a very liberal and generous standard, and **if there are any doubts, they must be resolved against the moving party.**

(T9:18-10:1). Further, Plaintiff argued:

> The Supreme Court in Mehlman…clearly stated CEPA's goal is, quote, not to make lawyers of conscientious employees but rather to prevent retaliation against those employees who object to employer conduct that they

> reasonably believe to be unlawful. In turn, it is not the actual occurrence of a violation of an authority or public policy, but rather the existence of a reasonable belief to the effect that such authority or policy has been breached under Mehlman and Estate of Roach, which is exactly what we have here. Plaintiff reasonably believed that these regulations were being violated based on the lack of staffing, the inappropriate training, and the…movement of the direct…professionals from one group home to another.

(T11:4-11:20).

Plaintiff went on to conclude,

> The public policy is underlying these laws…to keep…developmental groups properly staffed for safety purposes and to ensure no individuals are being hurt, whether it's the residents or the caretakers. Now, specifically, Plaintiff very clearly had a reasonable belief that Defendant Allies did not have a policy in place regarding the proper ratio of staff members to individuals in violation of…10:44A-2.8b…and this reasonable belief was based on her awareness of a proper ratio of staff members to individuals was necessary to ensure adequate care was consistently given to each resident…which is the exact public policy underlying these codes. And if you take a look at the purposes of these codes, it specifical states that these codes are to establish **minimum requirements for residential services to serve people with developmental disabilities.**

(T12:2-12:22)(emphasis added). See also N.J.A.C. 10:44A-1.1(a).

Ultimately, after the arguments were presented from both sides, the Motion Judge reserved his decision and advised an order with a statement of reasons would be

provided on a later date. (T41:16-41:20).

C. Order Granting Defendants' Motion to Dismiss. (PA000087-PA000094).

On January 10, 2024, the Motion Judge rendered an order granting Defendants' Motion, and another order denying Plaintiff's Cross Motion. (PA000087-PA000094). In doing so, the Motion Judge provided a Statement of Reasons for this decision. (PA000088-PA000092). Particularly, the Motion Judge reasoned, "Motions to dismiss are only granted in the **'rarest of circumstances'**" and "a complaint will survive a motion to dismiss if a **broad reading gives rise to a mere suggestion of a cause of action."** (PA000088) (emphasis added). The Statement of Reasons went on to state the elements of a CEPA violation, and a Pierce claim of retaliation, respectively. (PA000088-PA000089).

Thereafter, the Motion Judge addressed Plaintiff's CEPA claim, finding:

> [T]here is no substantial nexus between the complained of conduct and a law or public policy identified by the plaintiff. Plaintiff does not offer another statute/public policy or additional facts in its proposed Amended Complaint to link the complained of conduct to a law or public policy. Therefore, this Court grants Defendant's motion as to Count 1.

(PA000091).

With respect to Count Two, the Motion Judge found, "the plaintiff has not successfully established a clear and well-grounded mandate of public policy. Similar to her CEPA claim, she relies on regulations that are limited to her alleged complaints

and do not reasonably express a distinct mandate of public policy…Therefore, this Court grants Defendant's motion as to Count 2." (PA000091-PA00092).

The Motion Judge concluded, "for the foregoing reasons, the motion to dismiss is granted in its entirety." (PA000092).

IV. ARGUMENT

A. Legal Standard (Not raised below).

An appellate court's review of the trial court's dismissal order for failure to state a claim is de novo. A reviewing court applies a plenary standard of review from a trial court's decision to grant a motion to dismiss. Flinn v. Amboy Nat. Bank, 436 N.J. Super. 274 (App. Div. 2014). See also Gonzalez v. State Apportionment Comm'n, 428 N.J. Super. 333, 349, 53 A.3d 1230 (App. Div. 2012) The appellate court owes **no deference** to the trial court's conclusions.

"In reviewing a complaint dismissed under Rule 4:6-2(e) [the] inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746, 563 A.2d 31 (1989) (citing Rieder v. Dep't of Transp., 221 N.J. Super. 547, 552, 535 A.2d 512 (App. Div. 1987)). The "essential test," Green v. Morgan Properties, 215 N.J. 431, 451, 73 A.3d 478 (2013), **is "whether a cause of action is 'suggested' by the facts."** Printing Mart, supra, 116 N.J. at 746, 563 A.2d 31 (quoting Velantzas v. Colgate-

Palmolive Co., 109 N.J. 189, 192, 536 A.2d 237 (1988))(emphasis added). A reviewing court **"searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary."** Id. (citing Di Cristofaro v. Laurel Grove Mem'l Park, 43 N.J. Super. 244, 252, 128 A.2d 281 (App. Div. 1957))(emphasis added).

Further, in Rule 4:6-2(e) dismissals, "the [c]ourt is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint." Ibid. (citing Somers Constr. Co. v. Bd. of Educ., 198 F. Supp. 732, 734 (D.N.J. 1961)). Rather, "'plaintiffs are entitled to every reasonable inference of fact[,]' . . . and '[t]he examination of a complaint's allegations of fact required by the aforestated principles should be one that is at once painstaking and undertaken with a generous and hospitable approach.'" Green, supra, 215 N.J. at 452, 73 A.3d 478 (quoting Printing Mart, supra, 116 N.J. at 746, 563 A.2d 31).

Significantly, the New Jersey Supreme Court noted that, "[g]enerally we seek to afford 'every litigant who has a bona fide cause of action or defense the opportunity for **full exposure of his case.**'" United Rental Equip. Co. v. Aetna Life and Casualty Ins. Co., 74 N.J. 92, 99 (1977) (quoting Robbins v. Jersey City, 23 N.J. 229, 240-41 (1957))(emphasis added). When cases involve significant policy considerations,

"maximum caution must be exercised before granting summary judgment [or in this case, a motion to dismiss] and **the issue should not be resolved until a full record is developed** at trial." Sandvik, Inc. v. Statewide Sec. Sys., 192 N.J. Super. 272, 276 (App. Div. 1983) (citing Jackson v. Muhlenberg Hosp., 53 N.J. 138, 142 (1969))(emphasis added).

B. CEPA Generally.

"CEPA is remedial legislation entitled to liberal construction, with the purposes of protecting whistleblowers from retaliation by employers and discouraging employers from engaging in illegal or unethical activities." Lippman v Ethicon, Inc., 222 N.J. 362, 378 (2015); Abbamont v. Piscataway Twp. Bd. Of Educ., 138 N.J. 405, 431 (1994)(emphasis added). CEPA's purpose, as pronounced by the New Jersey Supreme Court, "is to protect and encourage employees to report illegal or unethical workplace activities and to discourage . . . employers from engaging in such conduct." Id. at 443. "In this instance, any fair analysis of CEPA's scope must 'begin . . . by looking at the statute's plain language, which is generally the best indicator of the Legislature's intent.'" Id. at 380-381; Donelson v. DuPont Chambers Works, 206 N.J. 243, 256 (2011); DiProspero v. Penn, 183 N.J. 477, 492, (2005).

CEPA specifically provides that:

An employer shall not take any retaliatory action against an employee because the employee does any of the following:

a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer, or another employer, with whom there is a business relationship, that the employee reasonably believes:

(1) **is in violation of a law, or a rule or regulation promulgated pursuant to law**, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, **in the case of an employee who is a licensed or certified health care professional, reasonably believes constitutes improper quality of patient care**; or

(2) is fraudulent or criminal, including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity.

b. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer, or another employer, with whom there is a business relationship, including any violation involving deception of, or misrepresentation to, any

shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, in the case of an employee who is a licensed or certified health care professional, provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into the quality of patient care; or

c. **Objects to**, or refuses to participate in any activity, **policy or practice which the employee reasonably believes**:

(1) is in violation of a law, or a rule or regulation promulgated pursuant to law, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, **if the employee is a licensed or certified health care professional, constitutes improper quality of patient care;**

(2) is fraudulent or criminal, including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity; or

(3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.

[N.J.S.A. 34:19-3.](emphasis added).

CEPA's goal "is '**not to make lawyers out of conscientious employees but rather to prevent retaliation against those employees who object to employer conduct that they reasonably believe to be unlawful or indisputably dangerous to the public health, safety, or welfare**.'" Dzwonar v. McDevitt, 177 N.J. 451, 464 (2003)(emphasis added). As the New Jersey Supreme Court has made clear:

> The core value that infuses CEPA is the legislative determination to protect from retaliatory discharge, those employees who, believe that public interest overrides the interest of the organization they serve, publicly blow the whistle because the organization is involved in corrupt, illegal, fraudulent or harmful activity.

Mehlman v. Mobil Oil Corp., 153 N.J. 163, 187-88 (1998) (internal quotes and citation marks omitted). Indeed, this Honorable Court should be guided by these principles, and the underlying policy interest of CEPA, when deciding Plaintiff's appeal.

1. Plaintiff Has Pled And Proffered A Sufficient Factual Basis To Establish A Prima Facie Case Under CEPA. (PA000001-PA000015).

In order to establish a prima facie CEPA claim, a plaintiff must demonstrate: (1) she reasonably believed that her employer's conduct was violating either a law, rule, or regulation promulgated pursuant to law *or* a clear mandate of public policy; (2) she engaged in a protected activity; (3) an adverse employment action was taken against her; and (4) a causal connection exists between the protected activity and the

adverse employment action. Dzwonar, supra, 177 N.J. at 464; Maimone v. City of Atlantic City, 188 N.J. 221, 230 (2006) ("These requirements must be liberally construed to effectuate CEPA's important social goals."). **"The evidentiary burden at the prima facie stage is 'rather modest.'"** Zive v. Stanley Roberts, Inc., 182 N.J. 436, 447 (2005)(emphasis added). As the New Jersey Supreme Court aptly explained, "consistent reaffirmance of the plaintiff's light evidentiary burden acknowledges that requiring greater proof would generally prevent a plaintiff from accessing the tools, i.e., evidence of the employer's motivation, necessary to even begin to assemble a case." Id. at 436.

a. The Unlawful Activity. (PA000001-PA000015).

As to the first requirement of a CEPA claim, it has consistently been held that as a legal inquiry, the court must determine if there is a "substantial nexus between the complained-of conduct and a law of policy identified by the court or the plaintiff." Hitesman v. Bridgeway, Inc., 218 N.J. 8, 30 (N.J. 2014) (citing Dzwonar, 177 N.J. at 464). Critically, once this initial inquiry is satisfied, it is a question for the jury to determine "whether the plaintiff actually held such a belief and, if so, whether it was reasonable." Id. Courts have construed a "substantial nexus" to mean "closely relates" and find that a judgment for a defendant should be entered when "no such law or policy is forthcoming." Dzwonar, 177 N.J. at 463.

Moreover, in Dzwonar, it is important to note that plaintiff, an arbitration officer who was discharged for mishandling executive board meeting minutes and for insubordination, asserted retaliation for expressing her opinion that by failing to read minutes at general membership meetings, the board denied members the right to participate, deliberate, and vote in union matters as prescribed by the Labor Management Reporting and Disclosure Act (LMRDA). Id. at 456-58, 828 A.2d at 896-97. In evaluating Dzwonar's claim, the Court analyzed the specific rights afforded and conduct proscribed by the cited provisions of the LMRDA and found no relationship between her claims and the statute. Id. at 468, 828 A.2d at 903-04. The Court concluded that plaintiff's dispute merely concerned a disagreement regarding access to information and the adequacy of the union's internal procedures, thus she did not possess an objectively reasonable belief the LMRDA was being violated. Id. at 467-68, 828 A.2d at 903-04.

However, the New Jersey Supreme Court has explicitly rejected the notion that a plaintiff must present facts, that if true, would violate the respective statute, rule, or public policy. Id. at 464. Instead, courts will reject claims that rely upon "a broad-brush allegation" pursuant to the idea that a Plaintiff cannot seek protection under CEPA for disagreeing with their employer's *lawful* policies, procedures, or priorities. Klein v. Univ. of Med. & Dentistry of N.J., 377 N.J. Super. 28, 42-43 (App. Div.

2005) (asserting CEPA was "not intended to shield a constant complainer who simply disagrees with the manner in which the hospital is operating one of its medical departments, provided the operation is in accordance with lawful and ethical mandates"); see also Young v. Schering Corp., 275 N.J. Super. 221, 237 (App. Div. 1994) (CEPA "was not intended to provide a remedy for wrongful discharge for employees who simply disagree with an employer's decision, where that decision is entirely lawful"), aff'd, 141 N.J. 16 (1995).

Significantly, Plaintiff must emphasize the above-mentioned case law relates to matters which were at **the summary judgment and/or trial stage** when reaching its conclusion, in contrast to Plaintiff's matter which was at the **very initial pleading stages of litigation**. As such, this case law provides a starting point for determining whether complained of conduct closely relates to a law or public policy, but Plaintiff also respectfully requests the Court to bear in mind the generous and hospitable approach the Court must be guided by at this nascent stage. Indeed, the Court must afford Plaintiff every reasonable inference upon review of her Complaint, and upon doing so, the Court surely must reverse the Motion Judge's dismissal ruling. Green, supra, 215 N.J. at 452, 73 A.3d 478.

Specifically, Plaintiff's complained of conduct, the continuous understaffing issue and Defendants' lack of training, coupled with her reports to the DOL, easily

have a "substantial nexus… [to] a law of policy identified by the court or the plaintiff." Hitesman v. Bridgeway, Inc., 218 N.J. 8, 30 (N.J. 2014) (citing Dzwonar, 177 N.J. at 464). (PA000001-PA000015). To be sure, Plaintiff cites in her Complaint N.J.A.C. § 10:44A-2.8(b)("'Reduction of staff coverage … shall be justified in writing and sent to the licensing agency and the appropriate Regional Assistant Director's Office for approval.'") and N.J.A.C. § 10:44 A-2.7(a)("'Basic staff training…shall address, at a minimum…(2)medication training; (3)preventing abuse and neglect…'"). (PA000006-PA000008). Overall, these regulations have an ultimate purpose of "establish[ing] minimum requirements…of residential services to people with developmental disabilities." N.J.A.C. § 10:44 A-1.1.

Certainly, by Plaintiff complaining about the constant understaffing and frequent movements of individuals from one understaffed facility to another "closely related" to N.J.A.C. § 10:44A-2.8(b) requirements because the reduction in staff coverage needed prompt **justification in writing** and **approval** by several authorities before implementing the coverage. (PA000007). Indeed, although Plaintiff was unaware whether such requirements were fulfilled by Defendants, the underlying notion of the regulation and Plaintiff's complaints remain clear: a lack of staffing coverage is not justifiable unless made in writing and approved by the respective authorities, otherwise the minimum requirements of such a facility would be

noncompliant and the safety and well-being of the developmentally disabled residents would be a risk.

Similarly, Plaintiff's complaints about inadequate training also "closely relates" to N.J.A.C. § 10:44 A-2.7(a) because the staff training established minimum requirements for training such as medication training, preventing abuse and neglect, and other subject areas; again, Plaintiff particularly stated in her Complaint Defendants' employees were unable to properly take a resident's blood sugar, which goes directly to the required training on medication and preventing abuse/neglect as required by the training requirements set forth in N.J.A.C. § 10:44 A-2.7(a).2 (PA000007-PA000008)

Furthermore, a closer review of the regulation N.J.A.C. § 10:44A leads to the understanding that the Commissioner of Human Services, who created the standards set forth in N.J.A.C. § 10:44A, adopted said rules and regulations to carry out the purposes set forth by the State Council on Developmental Disabilities under N.J.S.A. § 30:1AA. Within this legislation, the public policy underlying N.J.A.C. § 10:44A is derived from the following:

> …Increasing numbers of individuals with developmental disabilities are living, learning, working and participating in

2 In addition to properly administering medication, the taking of a resident's blood sugars also relates to preventing abuse and neglect because the improper administration of same can lead to bruising and harm on the developmentally disabled resident.

> all aspects of community life…there is an increasing need for a **well-trained workforce** that is able to provide the services, supports and **other forms of direct assistance that are required to enable the [developmental disabled] individuals to carry out…activities.**

N.J.S.A. § 30:1AA-1.1(j). In addition, N.J.S.A. § 30:1AA-1.2(i) also articulates, "..[the] living options for individuals with disabilities must be monitored… [to] the extent of compliance with **quality assurance standards by entities providing the options.**" Simply put, these policy interests reaffirm the importance of N.J.A.C. § 10:44A and how same closely related to Plaintiff's complained of conduct regarding the staffing and training which assisted the developmentally disabled residents at Defendant Allies.

At this juncture, the Court does not require Plaintiff to present facts, that if true, would violate the respective statute, rule, or public policy, and clearly, discovery is necessary to further develop the record. Dzwonar, 177 N.J. at 463. Nonetheless, unlike Dzwonar where the plaintiff generally pointed to provisions about enforcing members rights when complaining about the failure to read minutes at general membership meetings, Plaintiff's complained of conduct in this instance regards staffing and training for developmentally disabled individuals which is **precisely prescribed** in New Jersey regulations, and further grounded in relevant public policy interests which established those regulations, thus demonstrating a "substantial nexus" between the

two. Accordingly, the relation between the two is a far cry from any "broad-brush allegations" which Defendants seemingly argued in their Motion and the Court incorrectly affirmed through its dismissal. Id. at 456-58, 828 A.2d at 896-97. See also Klein v. Univ. of Med. & Dentistry of N.J., 377 N.J. Super. 28, 42-43 (App. Div. 2005).

Therefore, the record established a "substantial nexus" between Plaintiff's complained of conduct and the regulations cited to in the Complaint to pass this initial inquiry stage by the Court. Hitesman v. Bridgeway, Inc., 218 N.J. 8, 30 (N.J. 2014). As such, the Motion Judge failed to appreciate same based on the above-mentioned case law, especially considering the "cause of action [was] 'suggested' by the facts" and Plaintiff was "entitled to every reasonable inference of fact" in the Complaint. Printing Mart, supra, 116 N.J. at 746, 563 A.2d 31. See also Green, supra, 215 N.J. at 452, 73 A.3d 478.

b. Plaintiff Engaged in Protected Activity. (PA000006-PA00000010).

Under CEPA, and as mentioned, per se protected conduct is covered by one who: "objects to…any activity, policy or practice which the employee reasonable believes: (1) is in violation of a law, or a rule of regulation promulgated pursuant to law." N.J.S.A. § 34:19-3(c)(1). Thus, plaintiffs who object, or refuse to participate in the aforementioned conduct, have engaged in **protected activity** under the statute. Id.

(emphasis added).

In this matter, Plaintiff engaged in protected activity when she objected to the constant staff reductions and poor training practices of Defendants' establishment. (PA000006-PA00000008). Specifically, Plaintiff brought these concerns to the management of Defendant Allies, who simply brushed her concerns aside and failed to provide any meaningful response or redress. Id.

Following these complaints, Plaintiff quickly observed Defendants did not honor Plaintiff's earned time off thereafter. (PA000009). For this reason, Plaintiff eventually filed a complaint with the DOL. (PA000009-PA000010). Thus, Plaintiff has met this element based on a reading of the record.

c. The Adverse Employment Action. (PA000006-PA000011).

Pursuant to the CEPA statute, "[t]he definition of retaliatory action speaks in terms of completed action. Discharge, suspension or demotion are final acts." Keelan v. Bell Communications Research, 289 N.J. Super. 531, 539 (App. Div. 1996). In contrast, if the plaintiff does not allege a discharge, suspension, or demotion, the "conduct must be serious and tangible enough to materially alter the employee's terms and conditions of employment or adversely affect her status as an employee." Cortes v. Univ. of Med. & Dentistry of N.J., 391 F. Supp. 2d 298, 312 (D.N.J. 20015) (citing Calloway v. E.I. DuPont de Nemours & Co., No. 98-669, 2000 WL 1251909, *8 (D.

Del. Aug. 8, 2000)). Plaintiffs need not endure financial hardship for a court to find an adverse employment action. Ivan v. County of Middlesex, 595 F. Supp. 2d 425, 471 (Dist. Ct. 2009). Instead, courts have determined, "a pattern of conduct by an employer that adversely affects an employee's terms and conditions of employment can qualify as retaliation under CEPA." Beasley v. Passaic County, 377 N.J. Super. 585, 609 (Sup. Ct. 2005).

The record establishes Plaintiff experienced adverse employment action from Defendants following her objectively reasonable concerns about Defendant Allies's understaffing and lack of training issues for its employees. (PA000006-PA000011). For instance, Defendants took adverse employment action against Plaintiff through: (1) ignoring her various workplace complaints; (2) initially denying her PTO request despite her entitlement of same through working on various holidays for Defendants; (3) placing Plaintiff on a pretextual developmental plan based on debunked allegations; and (4) wrongful termination. (PA000009-PA000011). Simply put, these actions constitute the material altering of Plaintiff's terms and conditions of her employment, which only led to the final retaliatory act of termination. Id. See also Cortes, 391 F. Supp. 2d at 312. See also Keelan, 289 N.J. Super. at 539.

Therefore, Plaintiff's Complaint and the record abundantly reflects she has met the element of adverse employment action required under CEPA and respective case

law.

d. The Causal Connection. (PA000009-PA000011).

A prima facie showing of causation is established where the plaintiff produces evidence that "[i]t is 'more likely than not' that his statutorily protected conduct . . . was a 'determinative or substantial motivating factor in [the defendant's] decision to terminate his employment.'" Schlichtig v. Inacom Corp., 271 F.Supp. 2d 597, 609 (D.N.J. 2003). A plaintiff may do so by presenting "either direct evidence of retaliation or circumstantial evidence that justifies an inference of retaliation." Zaffuto v. Wal-Mart Stores, Inc., 130 Fed. Appx. 566, 569 (3d Cir. 2005).

Temporal proximity is "one circumstance that may support an inference of a causal connection." Maimone, 188 N.J. at 237; see Romano v. Brown & Williamson Tobacco Corp, 284 N.J. Super. 543, 550 (App. Div. 1995). Other circumstantial evidence supporting a finding of causation is evidence that "demonstrates such **weaknesses**, implausibilities, **inconsistencies**, incoherencies, or **contradictions** in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence, and hence infer that the employer did not act for the asserted non-retaliatory reasons." Kolb v. Burns, 320 N.J. Super. 467, 478 (App. Div. 1999)(emphasis added). Such evidence need not be viewed in a

vacuum. In fact, the **"proffered evidence, looked at as a whole, may suffice to raise the inference."** Kachmar, 109 F.3d at 177 (emphasis added).

The record establishes a causal connection between Plaintiff's protected activity and Defendants' adverse employment action within the Complaint. Specifically, after Plaintiff continually voiced her concerns and then filed her DOL complaint, Defendants escalated the adverse employment action by placing Plaintiff on a pretextual development plan. (PA000009-PA000010). This plan, which was based on two disciplinary write ups on Plaintiff's record, was inconsistent and contradictory as both write ups were proven **false** and **should have been removed from Plaintiff's record**. (PA000010-PA000011). Nonetheless, Defendants then claimed Plaintiff violated the smoking policy, yet another pretextual accusation and further inconsistency, upon review of a nine (9) month old photo of her smoking outside the establishment in June 2021. Id. Once again, Plaintiff debunked this accusation when observing the time frame of said photo, which was before Defendants' smoking policy came into effect. (PA000011). Finally, after observing Defendants' pretextual reasoning for Plaintiff's development plan was faulty at best, Defendants insisted Plaintiff had an "aggressive demeanor" and terminated her without further explanation. Id. This caused Plaintiff significant economic harm and emotional distress as a result. Id.

Clearly, Plaintiff has demonstrated a causal connection that "[i]t is 'more likely than not' that [her] statutorily protected conduct . . . was a 'determinative or substantial motivating factor in [Defendants'] decision to terminate [her] employment'" based on this timeline of events. Schlichtig, 271 F.Supp. 2d at 609. The direct evidence of retaliation outlined above, and the circumstantial evidence of retaliation based on the lackluster explanations for Plaintiff's "performance issues" only points to an inference of retaliation and wrongful termination on the part of Defendants. Zaffuto, 130 Fed. Appx. at 569. Thus, such prima facie claims, when reviewing the Complaint as a whole, suffices to raise the inference of retaliation, and requires the reversal of the Motion Judge's dismissal order. Kachmar, 109 F.3d at 177.

C. The Pierce Claim.(PA000006-PA000009).

In the seminal case of Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58 (1980), the Supreme Court first enunciated a cause of action against an employer for retaliatory termination in violation of public policy. "The sources of public policy include **legislation**; **administrative rules**, **regulations** or decisions; and judicial decisions." Id. at 72 (emphasis added). "[E]mployees can bring wrongful discharge claims only if they can identify an expression that equates with a clear mandate of public policy and if they can show that they were discharged in violation of that public policy." MacDougall v. Weichert, 144 N.J. 380, 391 (1996).

The State Legislature partially codified the Pierce claim when it ratified CEPA, but it did not abolish Pierce claims. Young v. Schering Corp, 141 N.J. 16, 27 (1995). Indeed, CEPA expressly includes the following election of remedies clause:

> Nothing in this act shall be deemed to diminish the rights, privileges, or remedies of any employee under any other federal or State law or regulation or under any collective bargaining agreement or employee contract; except that the institution of an action in accordance with this act shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, State law, rule or regulation or under the common law.
>
> [N.J.S.A. 34:19-8.]

Moreover, sources and parameters of public policy are not susceptible to hard and fast rules, as "the judiciary must define the cause of action in case-by-case determinations." Pierce, 84 N.J. at 72, 417 A.2d 505. Although outright violations of criminal and civil statutes invariably will constitute practices incompatible with clear mandates of public policy, the outer limits of that phrase has long been understood as follows:

> Public policy has been defined as that principal of law which holds that no person can lawfully do that which **has a tendency to be injurious to the public or against the public good.** The term admits of no exact definition…. Public policy is not concerned with minutiae, but with **principles.**

Schaffer v. Federal Trust Co., 132 N.J. Eq. 235, 240-41, 28 A.2d 75

(Ch.1942)(emphasis added). See also Mehlman, 153 N.J. at 187. The "clear mandate" of public policy that Pierce requires [,]" is "a matter of weighing competing interests." Hennessey v. Coastal Eagle Point Oil Co., 129 N.J. 81, 99 (1992). "[T]he mandate of public policy [must] be clearly identified and firmly grounded[,]" MacDougall, 144 N.J. at 391, 677 A.2d 162, and "**must be one that on balance is beneficial to the public."** Hennessey, 129 N.J. at 100, 609 A.2d 11.

Here, the record has established Plaintiff's concerns in Defendant Allies's group home were firmly grounded from sources of law and public policy under N.J.A.C. § 10:44 and other statutes which created same. MacDougall, 144 N.J. at 391, 677 A.2d 162. Of course, these sources for public policy are not susceptible to hard and fast rules, and the Court can define said cause of action in a "case-by-case determination." Pierce, 84 N.J. at 72, 417 A.2d 505. Because Plaintiff complained about staff reduction and poor training to Defendants, upon weighing the competing interest of the underlying public policy for same, it is indisputable these concerns upon review of the policy interests within N.J.A.C. § 10:44 and N.J.S.A. § 30:1AA on balance **benefit the public at large**, **and particularly those who have developmental disabilities and reside in group homes such as Defendant Allies**. Hennessey, 129 N.J. 81, 99-100 (1992). (PA000006-PA000009).

Therefore, the Motion Judge's determination that Plaintiff did not "identify a clear mandate of public policy" is incorrect based on *supra* as the "cause of action [was] 'suggested' by the facts" and Plaintiff should have been "entitled to every reasonable inference" based on the reading of her Complaint. Printing Mart, supra, 116 N.J. at 746, 563 A.2d 31. See also Green, supra, 215 N.J. at 452, 73 A.3d 478. Accordingly, the Court must reverse the trial court's ruling in this regard.

V. CONCLUSION

For these reasons, this matter should be reversed in its entirety and remanded for trial.

Respectfully submitted,

/s/ Peter D. Valenzano
Peter D. Valenzano, Esq.
McOMBER McOMBER & LUBER, P.C.
Attorneys for Plaintiff/Appellant, Sharon Hussain

Dated: June 14, 2024

SHARON HUSSAIN, *Plaintiff-APPELLANT*, v. ALLIES, INC.; JUANITA SMULLEN; TRACEY WILSON; ANNE KRIEGNER; ANITA BOGDEN; CHRISTINE COCUSO; ERICA HILL; ABC CORPORATIONS 1-5 (fictitious names describing presently unidentified business entitites); and JOHN DOES 1-5 (fictitious names describing presently unidentified individuals), *Defendants-Appellees*.	SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION CIVIL ACTION DOCKET NO.: A-001532-23 ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION-MERCER COUNTY DOCKET NO. MER-L-001898-22 SAT BELOW: HON. R. BRIAN McLAUGHLIN, J.S.C.

APPELLEES ALLIES, INC., JUANITA SMULLEN, TRACEY WILSON, ANNE KRIEGNER, ANITA BOGDEN, CHRISTINE COCUSO, AND ERICA HILL'S BRIEF IN OPPOSITION TO APPELLANT SHARON HUSSAIN'S APPEAL OF THE NEW JERSEY SUPERIOR COURT'S DISMISSAL WITH PREJUDICE OF PLAINTIFF'S COMPLAINT

Of Counsel and on the Brief:
Michael R. Miller, Esquire
N.J. ID No. 085662013

Ryan P. Dickinson, Esquire
N.J. ID No. 379672021

MARGOLIS EDELSTEIN
170 S. Independence Mall W.
Suite 400E
Philadelphia, PA 19106
Attorneys for Defendants-Appellees Allies, Inc., Juanita Smullen, Tracey Wilson, Anne Kriegner, Anita

Bogden, Christine Cocuso, and Erica Hill

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Rules

TABLE OF JUDGMENTS, ORDERS, AND RULINGS

I. PRELIMINARY STATEMENT

Appellees, Allies, Inc., Juanita Smullen, Tracey Wilson, Anne Kriegner, Anita Bogden, Christine Cocuso, and Erica Hill (collectively, "Appellees"), file this Brief in Opposition to Appellant, Sharon Hussain's ("Appellant") appeal of the Superior Court of New Jersey's dismissal with prejudice of Appellant's Complaint. Rather than addressing the fundamental legal flaw of her Complaint—that the complained-of conduct in her Complaint does not closely relate to the legal authorities she cites—Appellant spends the majority of her brief merely reiterating arguments made to the Superior Court that were found wanting in the first instance. Simply put, the Superior Court's decision was correct, and Appellant's arguments do nothing to illustrate that the Superior Court's decision was in error. As Plaintiff's Complaint is fundamentally incapable of establishing either a close relationship for a CEPA claim or a clear mandate of public policy for a Pierce claim, her appeal must be denied.

II. PROCEDURAL HISTORY

On November 11, 2022, Plaintiff filed a Complaint in the New Jersey Superior Court, Mercer County Division. (See PA000001) On December 12, 2022, Defendants filed a Motion to Dismiss the Complaint for Failure to State a Claim. (PA000059) On December 20, 2023, Judge R. Brian McLaughlin held oral argument on Appellee's

Motion, and on January 10, 2024, Judge McLaughlin dismissed the Complaint with prejudice. (PA000087)

III. STATEMENT OF FACTS[1]

Pursuant to R. 2:6-4(a), Appellees incorporate by reference Appellants Statement of Facts in the Factual Background section of Appellant's Motion.

IV. LEGAL STANDARD (not raised below)

On appeal, a motion to dismiss is reviewed *de novo*. Sashihara v. Nobel Learning Cmtys., Inc., 461 N.J. Super. 195, 200 (App. Div. 2019) A motion under R. 4:6-2(e) is a statement by a defendant that there is no legal claim alleged by the plaintiff. A court is "to approach with great caution applications for dismissal under R. 4:6-2(e) for failure to state a claim on which relief may be granted." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 771-72 (1989). The court is to search the complaint in depth to determine if a claim is even suggested in the papers. Id. at 746. The court is not concerned with plaintiff's ability to prove the allegations but rather only that a cause of action can be gleaned from the complaint. Id.; Smith v. SBC Commc'ns, Inc., 178 N.J. 265, 282 (2004).

[1] Appellees set forth the relevant facts alleged in the Complaint for purposes of this Appeal only and reserve the right to respond to and deny all facts and allegations if the Appeal is granted.

All facts alleged in the complaint are to be taken as true. Craig v. Suburban Cablevision, 140 N.J. 623, 625 (1995). These allegations must be reviewed with great liberality, and all inferences resolved in favor of the plaintiff. Commc'n Workers of Am. v. Whitman, 298 N.J. Super. 162, 166-67 (App. Div. 1997). However, it should be remembered that discovery is intended to lead to facts supporting or opposing a legal theory, not to the formulation of one. Camden Cnty. Energy Recovery Assocs., L.P. v. N.J. Dep't of Envtl. Prot., 320 N.J. Super. 59, 64 (App. Div. 1999). Legal sufficiency requires allegation of all the facts that the cause of action requires. Cornett v. Johnson & Johnson, 414 N.J. Super. 365, 385 (App. Div. 2010). Without such allegations, the claim must be dismissed. Id. (emphasis added).

Generally, if a matter is to be dismissed under R. 4:6-2(e), "(it) should be without prejudice to a plaintiff filing an amended complaint." Printing Mart, 116 N.J. at 772. However, when the plaintiffs have not offered either a certification or a proposed amended pleading that would suggest their ability to cure the defects of the complaint, and it appears to the court that the opportunity to amend would be futile, the appellate court has found it proper to dismiss the complaint with prejudice. Johnson v. Glassman, 401 N.J. Super. 222, 246-47 (App. Div. 2008). Amendment remains a matter addressed to the court's sound discretion. Id.

Furthermore, "[a] thoroughly deficient complaint--a complaint that completely omits the underlying basis for relief--cannot be sustained as a matter of fundamental fairness." Bauer v. Nesbitt, 198 N.J. 601, 610 (2009). A defendant must be able to ascertain, investigate, and defend a claim raised against it. Id. A court, as well, is "not bound to accept as true a legal conclusion couched as a factual allegation." Papasan v. Allain, 478 U.S. 265, 286 (1986).

V. LEGAL ARGUMENT

Plaintiff's Complaint contains two counts: (1) an alleged violation of CEPA; and (2) wrongful termination in violation of public policy. Both counts, however, are devoid of factual allegations, consist of little more than bare legal conclusions, and fail to state a claim upon which relief can be granted.

A. Count One of Appellant's Complaint Under CEPA Fails to State a Claim Upon Which Relief Can Be Granted (PA000089-91).

A *prima facie* case of discriminatory retaliation under CEPA requires a plaintiff to establish:

> (1) a reasonable belief that the employer's conduct was violating either a law, rule, regulation or public policy; (2) he or she performed a "whistle blowing" activity as described in N.J.S.A. 34:19-3a or c; (3) an adverse employment action was taken against him or her; and (4) a causal connection existed between his whistle-blowing activity and the adverse employment action.

Klein v. Univ. of Med. and Dentistry of New Jersey, 377 N.J. Super. 28, 38 (App. Div.) (citing Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003), *cert. denied,* 185 N.J. 39 (2005). "A plaintiff who brings a claim pursuant to N.J.S.A. 34:19-3c need not show that his or her employer or another employee actually violated the law or a clear mandate of public policy. Instead, the plaintiff simply must show that he or she "reasonably believes' that to be the case.'" Dzwonar, 177 N.J. at 462 (citations omitted). "As long as a reasonable basis exists for a complaint about misconduct, whether of the employer or of a co-employee, the complaining employee should not be exposed to retaliation by the employer." Higgins v. Pascack Valley Hosp., 158 N.J. 404, 425 (1999).

However, "the mere identification of an authority does not alone provide adequate support for an objectively reasonable belief that a violation has occurred," Hitesman v. Bridgeway Inc., 430 N.J. Super. 198, 213 (App. Div. 2013), and "[n]o cognizable violation can occur if the authority relied upon is not one specified in the statute." Id. at 215. Instead, "[b]efore a CEPA claim may be submitted to a jury, the court must identify a legal authority recognized in the statute 'that closely relates to the complained-of conduct[,]' and 'make a threshold determination that there is a substantial nexus between the complained-of conduct and a law or public policy identified. . . .'" Id. at 211, quoting Dzwonar, 177 N.J. at 464.

i. Count One fails to state a claim for a CEPA violation because withholding PTO is not an act of retaliation (argued but not ruled on).

Plaintiff's Complaint alleges that she was retaliated against twice—when she was mistakenly told that she had no available PTO and when she was subsequently terminated. Addressing first Plaintiff's contention regarding PTO, Plaintiff states that "in an act of retaliation toward Plaintiff, Defendants [Smullen and Wilson] denied Plaintiff's second request for PTO." (PA000009 at ¶ 43). Plaintiff again raises this argument in her appeal. (See Appellant's Brief at 9-11) (hereinafter "App. Br.")

CEPA defines "retaliatory action" as "the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment." N.J.S.A. § 34:19-2(e). Therefore, an employer's action that is less than a discharge, suspension, or demotion may be actionable under CEPA. Anderson v. City of E. Orange, 2022 N.J. Super. Unpub. LEXIS 419, at *9 (App. Div. Mar. 15, 2022), citing Nardello v. Twp. of Voorhees, 377 N.J. Super. 428, 433-34(App. Div. 2005). To be considered actionable, the conduct must be "sufficiently severe or pervasive to have altered plaintiff's conditions of employment in an important and material manner." El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 176 (App. Div. 2005).

Therefore, "[t]he denial of a singular request for vacation does not constitute an actionable adverse employment action." Robinson v. N. Am. Composites, 2017 U.S. Dist. LEXIS 86223, at *16 (D.N.J. June 6, 2017) (alteration added); see also Fraternal Order of Police, Lodge 1 v. City of Camden, 842 F.3d 231, 241 (3d Cir. 2016) (affirming district court's determination that cancellation of vacation is not an adverse employment action); Mieczkowski v. York City Sch. Dist., 414 F. App'x 441, 445-47 (3d Cir. 2011) (affirming district court's determination that plaintiff had not suffered adverse employment actions where, among other things, plaintiff was "arbitrarily asked to cancel vacation days"); Viggiano v. State of New Jersey, 136 F. App'x 515, 518 (3d Cir. 2005) (finding that plaintiff suffered no adverse employment actions where defendant "den[ied] him time off for personal and medical reasons"); Tucker v. Merck & Co., 131 F. App'x 852, 857 (3d Cir. 2005) (holding that requiring employee to take vacation day rather than personal day did not constitute an adverse employment action).

Here, Plaintiff's Complaint does not even allege that her request to take PTO was ultimately denied, instead alleging that Defendants Smullen and Wilson mistakenly conveyed to Plaintiff that she did not have any PTO and that this mistake was later corrected by Ms. Shah. (See PA000009-10 at ¶¶ 45-47) As suggested in Robinson and its supporting case law, even if Plaintiff alleged

that her PTO denial was in some way motivated by protected activity, that would not be sufficient to support a CEPA claim.

Ultimately, the alleged facts do not demonstrate conduct "sufficiently severe or pervasive to have altered plaintiff's conditions of employment in an important and material manner" and Plaintiff's allegations cannot form the basis of an adverse employment action. Further, Plaintiff's allegation that this mistake was retaliatorily motivated is little more than a legal conclusion. Therefore, Count One fails to state a claim for a CEPA violation insofar as it rests on "withholding" PTO as withholding PTO is not an act of retaliation.

ii. Count One fails to state a claim for a CEPA violation because N.J.A.C. § 10:44A-2.8(b) cannot provide the basis for a "reasonable belief" that Defendants were violating a law, rule, regulation or public policy.

Appellant alleges that Appellees did not have a policy in place regarding the proper ratio of staff members to individuals at its group homes, that she first became aware of this issue when several of her coworkers were forced to work alone, caring up to four individuals at once, and that "[s]he reasonably believed this policy to be in violation of N.J.A.C. § 10:44A-2.8(b). (PA000006 at ¶¶ 19-20) Further, Plaintiff alleges that Allies' alleged practice of moving staff from one group home to another to combat

staffing shortages is a "direct violation" of N.J.A.C. § 10:44A-2.8(b). (PA000007 at ¶ 24) N.J.A.C. § 10:44A-2.8(b) provides:

> Reduction of staff coverage as specified in the Annex A shall be justified in writing and sent to the licensing agency and the appropriate Regional Assistant Director's Office for approval.
>
> 1. Documented approval(s) by the Interdisciplinary Team that an individual or individuals can be left alone for specific amounts of time shall be submitted as evidence justifying modification of staff coverage.
>
> 2. Reduction of staff coverage shall be jointly reviewed and approved by the Regional Office and the licensing agency prior to implementation by the licensee, based on (b)1 above.
>
> 3. A written response shall be provided by the Division within 15 working days, documenting any conditions which must be met as part of the approval of the reduction of staff coverage.

Plaintiff's Complaint does not allege that Defendants failed to justify reductions in staff coverage to a licensing agency or the Regional Assistant Director's Office. In fact, Plaintiff **admits** in her appeal that "Plaintiff was unaware whether such requirements were fulfilled by Defendants…" (App. Br. at 27) Rather, Plaintiff alleges that this provision requires a group home to maintain certain staffing levels and that moving employees from one home to another is a "direct violation" of its provisions. (App. Br. at ¶ 24)[2] Clearly, the authority provided by Plaintiff

[2]Note that in her Appeal Brief, Plaintiff references N.J.A.C. § 10:33A-2.8(b) rather than N.J.A.C. § 10:44A-2.8(b). However, this appears to be a typographical error as the language referenced in ¶ 25 of the Appeal Brief is found at N.J.A.C. §

does not "closely relate" to the complained-of conduct in her Complaint, nor does a "substantial nexus" exist between the complained-of conduct and the law. Rather, Plaintiff appears to have grabbed the nearest regulation mentioning staffing in a post-hoc attempt to attack her lawful termination. Judge McLaughlin correctly applied the regulation cited by Appellant to the conduct alleged by Appellant, noting

> N.J.A.C. § 10:44A-2.8(b) stipulates that any reduction in staff coverage should be accompanied by a written justification and subsequent approval from the relevant authorities. However, the plaintiff's argument does not center on the absence of justifications for these reductions but rather on her belief that maintaining specific staffing levels is mandatory according to this regulation. The plaintiff has cited a regulation that does not establish staffing ratios to substantiate her reasonable belief that the defendants' staffing ratios violated the law. Additionally, she has referred to a regulation that does not address the relocation of employees from one location to another to support her belief that the defendants' staff reassignments amounted to a violation of the law.

(PA000090) As the lower court's application of the caselaw to Plaintiff's Complaint was sound, Appellees urge this Court to hold that N.J.A.C. § 10:44A-2.8(b) could not have provided Plaintiff with a reasonable belief that Defendants were violating the law.

In her appeal, and in an attempt to bolster her inadequate claim, Plaintiff cites to N.J.S.A. § 30:1AA-1.1(j) and N.J.S.A. § 30:1AA-1.2(i) as demonstrations of "the public policy underlying

---

10:44A-2.8(b), and Appellant previously references N.J.A.C. § 10:44A-2.8(b) in ¶ 20.

N.J.A.C. § 10:44A...” (App. Br. at 28) Interestingly, Plaintiff did not raise this argument in her opposition to Defendants’ motion to dismiss. Not only does this further demonstrate Plaintiff’s attempt to backfill her inadequate pleadings, but this argument cannot be considered by this Court. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (“It is a well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.”)

Regardless, even if this Court could consider this argument, neither N.J.S.A. § 30:1AA-1.1(j) nor N.J.S.A. § 30:1AA-1.2(i)is curative of the lack of a substantial nexus between the conduct complained of in Plaintiff’s Complaint and N.J.A.C. § 10:44A. N.J.S.A. § 30:1AA-1.1(j) merely states that those working with individuals with developmental disabilities need to be “well trained”—it says nothing about what this training might entail or what would constitute a “well trained” employee. Further, this code provision has no connection to N.J.A.C. § 10:44A-2.8, which pertains to justifying staff coverage to appropriate state agencies. Similarly, N.J.S.A. § 30:1AA-1.2(i) states:

> Efforts undertaken to maintain or expand community-based living options for individuals with disabilities must be monitored in order to determine and report to appropriate

> individuals and entities the extent of access by individuals with developmental disabilities to those options, and the extent of compliance with quality assurance standards by entities providing the options.

Again, this code provision has no relation to N.J.A.C. § 10:44A, sets no minimum standards or requirements, and is perhaps as broad and ambiguous a code provision as could be provided by Appellant. Put simply, if such broad, unrelated, and nonspecific provisions are permitted to sustain a CEPA claim, then the "substantial nexus" test becomes obsolete and CEPA's reach becomes limitless. However, under the well-established "substantial nexus" test, there exists no substantial nexus between Plaintiff's complained-of conduct and N.J.A.C. § 10:44A, and the dismissal of Count One of Plaintiff's Complaint must be affirmed.

iii. Count One fails to state a claim for a CEPA violation because N.J.A.C. § 10:44A-2.7(a) cannot provide the basis for a "reasonable belief" that Defendants were violating a law, rule, regulation or public policy.

Plaintiff alleges that Direct Support Professionals ("DSPs") at Allies routinely complained about not being properly trained, that the training they receive is limited to watching videos, and that they did not know how to perform tasks such as testing an individual's blood sugar, a task that they are responsible for. (PA000008 at ¶ 29-31) These facts, Plaintiff alleges, formed her reasonable belief that Defendants were in violation of N.J.A.C. §

10:44 A-2.7(a). (PA000008 at ¶ 32) N.J.A.C. § 1044 A-2.7(a) provides that:

> Basic staff training programs shall either be offered by the Division, or provided by the licensee after obtaining approval from the Division, to ensure staff competency. Within 120 days of employment, each employee shall successfully complete New Jersey Pre-Service Training that shall address, at a minimum:
>
> 1. Overview of developmental disabilities;
> 2. Medication training;
> 3. Preventing abuse and neglect;
> 4. American Red Cross Standard First Aid Training (and have a valid certificate on file); and
> 5. Cardiopulmonary resuscitation training (and have a valid certificate on file).

Again, none of the facts alleged by Plaintiff correspond to the regulations she contends formed the basis of her reasonable belief that Defendants were violating the law. Plaintiff does not allege that DSPs were not trained in any of the five categories listed, nor does N.J.A.C. § 1044 A-2.7(a) state that watching videos is an insufficient training method. Further, while Plaintiff contends that DSPs routinely complained about not being properly trained, absent from her allegations are facts demonstrating that any of these complaints came from employees over the 120-day limit or that any of these complaints pertained to the five categories listed in N.J.A.C. § 1044 A-2.7(a). Plainly, the authority provided

by Plaintiff does not "closely relate" to the complained-of conduct in her Complaint. Once more, Judge McLaughlin correctly analyzed whether a close relationship exists between Appellant's complained-of conduct and the regulation she cites, finding that

> the regulation cited by the plaintiff does not comport with the specific facts she presents as the basis for her reasonable belief in the defendants' violation of the law. The plaintiff's claims do not assert that DSPs were inadequately trained in the five specific categories outlined in N.J.A.C. § 10:44A-2.7(a) nor does the regulation explicitly address the suitability of video-based training methods. Furthermore, the plaintiff's allegations lack evidence to show that any of these complaints extended beyond the 120-day limit.

(PA000091) As the lower court's application of the caselaw to Plaintiff's Complaint was sound, Appellees urge this Court to hold that N.J.A.C. § 1044 A-2.7(a) could not have provided Plaintiff with a reasonable belief that Defendants were violating the law.

B. Appellant's *Pierce* Claim in Count Two fails to state a claim upon which relief can be granted as Appellant fails to identify a clear mandate of public policy.

In the seminal case of Pierce v. Ortho Pharm. Corp., 84 N.J. 58 (1980), the Supreme Court held that "an employee has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy." Id. at 72. Sources of public policy can include legislation, administrative rules, regulations or decisions, and judicial decisions. Id. "A basic requirement of the wrongful discharge cause of action is that the mandate of

public policy be clearly identified and firmly grounded." Macdougall v. Weichert, 144 N.J. 380, 391 (1996); see, e.g. Potter v. Village Bank, 225 N.J. Super. 547, 558-60 (App. Div. 1998) (holding that discharge of bank president for reporting suspected illegal money laundering by bank directors violated clear mandate of public policy; "few people would cooperate with law enforcement officials if the price they must pay is retaliatory discharge from employment."), certif. denied, 113 N.J. 352 (1988); Cerracchio v. Alden Leeds, Inc., 223 N.J. Super. 435, 446 (App. Div.1988) (holding that "under Pierce, an employee in New Jersey may maintain a private action in tort or contract for retaliatory discharge as a result of the filing of an OSHA complaint because such discharge contravenes our public policy"); Kalman v. Grand Union Co., 183 N.J. Super. 153, 157-59 (App. Div. 1982) (holding that discharge of pharmacist for refusing to violate state administrative regulation requiring pharmacist to be present at all times pharmacy operates for business and for reporting his employer's intended violation pursuant to statutory provision and his professional code of ethics would violate clear mandate of public policy); O'Sullivan v. Mallon, 160 N.J. Super. 416, 418-19, 390 A.2d 149 (Law Div.1978) (holding that complaint alleging that plaintiff x-ray technician was fired for refusing to perform catheterizations, which she could not legally perform, stated a cause of action).

However, "[a] vague, controversial, unsettled, and otherwise problematic public policy does not constitute a clear mandate." Macdougall, 144 N.J. at 392. Indeed,

> An employer remains free to terminate an at-will employee who engages in grousing or complaining about matters falling short of a "clear mandate of public policy" or who otherwise interferes with the ordinary operation of the workplace by expressions of personal views on matters of no real substance. Baseless complaints or expressions of purely personal views about the meaning of public policies will not meet the test for a "clear mandate" regardless of the manner or mode in which they are voiced.

Tartaglia v. UBS PaineWebber, Inc., 197 N.J. 81, 109 (2008) Therefore, "[i]f an employee does not point to a clear expression of public policy, the court can grant a motion to dismiss." Pierce, 84 N.J. at 73.

Here, Plaintiff alleges that "[d]uring the course of her employment, Plaintiff reported and complained about Defendants' unlawful behavior," Defendants terminated her as the result of her protestations, and that "[t]he acts of Defendants constitute a wrongful discharge in violation of public policy." (PA000079 at ¶¶ 78-79) However, Plaintiff fails to establish a mandate of public policy that is clearly identified and firmly grounded. Instead, as with her CEPA claim, she cites regulations that have little relevance to the complaints she allegedly made, and which cannot reasonably be said to express a clear mandate of public policy.

Specifically, N.J.A.C. § 10:44A-2.8(b) does not evince a clear public policy that group homes have a set staffing ratio or that moving employees from one home to another is prohibited. Nor does N.J.A.C. § 10:44A-2.7(a) establish a clear public policy that employees must have training in blood sugar testing or that training videos are an insufficient means by which to train employees. In short, when read with the cases above in which a clear expression of public policy was found, it becomes abundantly apparent that Plaintiff has not identified a mandate of public policy that renders her termination unlawful. Judge McLaughlin properly ruled that Appellant did not establish a clear mandate of public policy, finding that

> She relies on regulations that are limited to her alleged complaints and do not reasonably express a distinct mandate of public policy. In particular, N.J.A.C. § 10:44A-2.8(b) does not clearly indicate a public policy mandating specific staffing ratios in group homes or prohibiting the relocation of employees between homes. Likewise, N.J.A.C. § 10:44A-2.7(a) does not establish a clear public policy requiring employee training in tasks like blood sugar testing or condemning the use of training videos.

(PA000091) Therefore, Count Two of Plaintiff's Complaint was appropriately dismissed by the Superior Court, and Appellees urge this Court to affirm the dismissal.

C. Leave to Amend the Complaint was Properly Denied by the Lower Court.

In her appeal, Plaintiff does not separately argue that the Superior Court improperly denied her cross-motion for leave to amend her Complaint. However, to the extent that argument is advanced in her appeal, it is without merit. Generally, if a matter is to be dismissed under R. 4:6-2(e), "(it) should be without prejudice to a plaintiff filing an amended complaint." Printing Mart, 116 N.J. at 772. However, when the plaintiffs have not offered either a certification or a proposed amended pleading that would suggest their ability to cure the defects of the complaint, and it appears to the court that the opportunity to amend would be futile, the appellate court has found it proper to dismiss the complaint with prejudice. Johnson, 401 N.J. Super. at 246-47. Amendment remains a matter addressed to the court's sound discretion. Id.

Plaintiff's proposed Amended Complaint is nearly indistinguishable from Plaintiff's original Complaint and only amends irrelevant and inconsequential portions of the Complaint. Importantly, the Amended Complaint fails to identify statutes with a substantial nexus to Plaintiff's complained-of conduct or to plead allegations demonstrating that Plaintiff's termination violated a clear mandate of public policy. (See PA000066-80) In short, Plaintiff's proposed Amended Complaint was little more than Plaintiff attempting to make inconsequential changes to her Complaint to forestall it being dismissed. Therefore, as

permitting amendment of the Complaint would have been futile, the lower Court properly denied Plaintiff's cross-motion with prejudice, (see PA000092), and Appellees urge this Court to do the same.

VI. CONCLUSION

For the foregoing reasons, the Appellees respectfully request that this Honorable Court deny Appellant's appeal and affirm the ruling by the Superior Court.

Respectfully submitted,

MARGOLIS EDELSTEIN

/s/ Ryan P. Dickinson
Ryan P. Dickinson, Esq.
ID No. ID No. 379672021
Attorneys for Defendants-Appellees Allies, Inc., Juanita Smullen, Tracey Wilson, Anne Kriegner, Anita Bogden, Christine Cocuso, and Erica Hill

Dated: July 16, 2024

SHARON HUSSAIN, Plaintiff, v. ALLIES, INC.; JUANITA SMULLEN; TRACEY WILSON; ANNE KREEGER; ANITA BOGDEN; CHRISTINE COCUSO; ERICA HILL, ABC CORPORATIONS 1-5 (fictitious names describing presently unidentified business entities); and JOHN DOES 1-5 (fictitious names describing presently unidentified individuals), Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001532-23 On Appeal From: Superior Court of New Jersey Law Division – Mercer County Docket No. MER-L-001898-22 Sat Below: Hon. R. Brian McLaughlin, J.S.C.

REPLY BRIEF OF PLAINTIFF/APPELLANT SHARON HUSSAIN

McOMBER McOMBER & LUBER, P.C.
54 Shrewsbury Avenue
Red Bank, NJ 07701
(732) 842-6500 Phone
Attorneys for Plaintiff/Appellant, Sharon Hussain

Peter D. Valenzano – NJ ID #037892010
pdv@njlegal.com
Of Counsel and On the Brief

R. Armen McOmber – NJ ID #018251998
ram@njlegal.com
Of Counsel and On the Brief
Tiffany M. Yacullo – NJ ID #370662021
tmy@njlegal.com
On the Brief

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

ARGUMENT

1. The Record Unequivocally Demonstrates Plaintiff Complained About What She Reasonably Believed To Be Defendants' Violation Of Applicable Law and Regulation, Which Is Rooted In Firm Public Policy. (PA000006-PA000008). (PA000088).

In their Opposition Brief, Defendants Allies Inc. ("Defendant Allies"), Juanita Smullen ("Defendant Smullen"), Tracey Wilson ("Defendant Wilson"), Anne Kreeger ("Defendant Kreeger"), Anita Bogden ("Defendant Bogden"), and Christine Cocuso ("Defendant Cocuso") (collectively the "Defendants") largely misconstrue Plaintiff's Complaint to self-servingly assert the authority cited by Plaintiff does not "closely relate" to the complained of conduct, and does not create a "substantial nexus" between the complained of conduct and the law. Resp. Br. 9-10. Both assertions, which were incorrectly agreed upon by the Trial Court, must be reversed as it is known (and the Trial Court further agrees in its Statement of Reasons), "a complaint **will [and should] survive** a motion to dismiss if **a broad reading gives rise to a mere suggestion of a cause of action.**" (PA000088). See also Camden Cty. Energy Recovery Assocs. Ltd. P'ship v. N.J. Dep't. of Envtl. Prot., 320 N.J. Super. 59, 65 (App. Div. 1999).

CEPA's goal "is not to make lawyers out of conscientious employees, but rather to prevent retaliation against those employees who object to employer conduct that they reasonable believe to be unlawful[.]" Mehlman v. Mobil Oil Corp., 153 N.J. 163, 193-94 (1998). It "is not the actual occurrence of a violation of the

promulgated authority or public policy**, but rather the existence of a reasonable belief to the effect that such authority or policy has been breached."** Id.; see also Estate of Roach v. TRW, Inc., 164 N.J. 598, 613 (2000); Blackburn v. United Parcel Serv., Inc., 3 F.Supp.2d 504, 514 n.5 (D.N.J. 1998); aff'd on other grounds, 179 F.3d 81 (3d Cir. 1999).

The Trial Court judge herein, Honorable R. Brian McLaughlin, J.S.C. ("Judge McLaughlin"), unequivocally erred by finding Plaintiff's complaints to Defendants pursuant to N.J.A.C. § 10:44A-2.8(b) and N.J.A.C. § 10:44 A-2.7(a) did not allege the specific regulation details outlined within, which is in direct contravention to CEPA's objective pursuant to Mehlman. 153 N.J. at 193-94. Defendants attempt to somehow justify the Trial Court's blatant error by reiterating the regulations "could not have provided Plaintiff with a reasonable belief that Defendants were violating the law." See Resp. Br. 10. Such arguments are misplaced and palpably incorrect upon review of relevant case law and bearing in mind the "generous and hospitable approach" courts must be guided by during a motion to dismiss at the pleading stage. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746, 563 A.2d 31 (1989).

With respect to the first requirement of CEPA, courts must determine a "substantial nexus between the complained of conduct and a law or public policy identified by the court or plaintiff." Hitesman v. Bridgeway, Inc., 218 N.J. 8, 30 (N.J.

2014). Courts have construed "substantial nexus" to mean "closely relates" and find that a judgment for a defendant **should only** be entered when **"no such law or policy is forthcoming.**" Dzwonar v. McDevitt, 177 N.J. 451, 463 (2003). Notably, with respect to improper quality of patient care outlined in CEPA's N.J.S.A. § 34:19-3(c)(1), a plaintiff asserting an employer's conduct is incompatible with a mandate of public policy concerning public health must **"identify authority that applies to the 'activity, policy, or practice' of the employer."** Hitesman, 218 N.J. at 11.

As articulated in the Complaint, Plaintiff complained of several improper quality of patient care standards at Defendant Allies. (PA000006-P000008). Specifically, Plaintiff complained to Defendants about: (1) the continuous understaffing of group homes, in violation of N.J.A.C. § 10:44A-2.8(b); and (2) the lack of staff training regarding medication training and preventing abuse/neglect, in violation of N.J.A.C. § 10:44 A-2.7(a). (PA000006-PA000008). Significantly, through these regulation citations in Plaintiff's Complaint, she has "identified authority **that applies to** the 'activity, policy, or practice' of [Defendants' establishment]." Hitesman, 218 N.J. at 11.

Furthermore, Plaintiff has also identified public policy underlying the regulations, which Plaintiff brought to the Trial Court's attention at oral argument. In fact, Plaintiff's counsel argued at oral argument the public policy underlying Plaintiff's cited to regulations is to "**keep…developmental groups properly**

staffed for safety purposes…[and] proper ratio of staff members to individuals was necessary to ensure adequate care was consistently given to each resident or individual." See T:12:2-12:16. Counsel went on to state the public policy surrounding Plaintiff's complaints were to "…**establish minimum requirements for residential services to serve people with developmental disabilities**." T:12:18-12:22. These arguments were based on the understanding of N.J.S.A. § 30:1AA-1.1(j) and N.J.S.A. § 30:1AA-1.2(i), which both speak to the public policy within Plaintiff's complaints to Defendants, namely to have a "well-trained workforce that is able to provide the services, supports, and other forms of assistance…to enable the [developmental disabled] individuals to carry out…activities," and monitor these individuals, "to the extent of compliance with quality assurances standards by entities providing the [group home] options."

Although Defendants claim Plaintiff "backfill[ed] her inadequate pleadings [by citing to N.J.S.A. § 30:1AA-1.1(j) and N.J.S.A. § 30:1AA-1.2(i)]…[and] this argument cannot be considered by th[e] Court," both assertions are flatly wrong as Plaintiff (1) argued this public policy at the pleading stage, and (2) such policy "closely relate" and has a "substantial nexus" to Plaintiff's complained of conduct. Dzwonar, 177 N.J. at 463.

a. Plaintiff's reliance on N.J.A.C. § 10:44A-2.8(b) "closely relates" to her complained of conduct regarding consistent understaffing at Defendant Allies. (PA000006). (PA000089-PA000090).

Despite Plaintiff's identification of authority applying to Defendants' activities in their group homes, Defendants reiterate the need for Plaintiff to precisely state in her Complaint that "Defendants failed to justify reductions in staff coverage to a licensing agency or the Regional Assistant Director's office" under the requirements of N.J.A.C. § 10:44A-2.8(b). See Resp. Br. 9. The details of what steps Defendants must take for understaffing should have held no moment to the Trial Court in its decision, and should hold no moment to this Honorable Court today, as the regulation is unambiguous that staff reductions require **several additional steps**, including: (1) documented approval by Interdisciplinary Team for modifications of coverage; (2) joint approval by both the Regional Office and licensing agency **before implementation;** and (3) a written response within fifteen (15) working days **documenting conditions which must be met for the staff reduction**. (PA000089-PA000090). See also N.J.A.C. § 10:44A-2.8(b). Needless to say, it is unreasonable for Defendants and the Trial Court to require Plaintiff, an employee, to know whether Defendants followed the precise protocol for its understaffing pursuant to N.J.A.C. § 10:44A-2.8(b). Rather, as Plaintiff's Complaint states "staff was frequently sent from one group home to another in an attempt to combat Defendant Allies' understaffing issue," it goes without saying Defendants could not have seriously complied with N.J.A.C. § 10:44A-2.8(b) by (1) receipt of documented approval by the Interdisciplinary Team, (2) receipt of **joint** approval by both the

Regional Office and licensing agency **before staff reduction implementation**, and (3) received a written response within fifteen (15) days and complied with the conditions required therein, if they continuously sent staff from one group home to another on a daily basis. (PA000006). See also N.J.A.C. § 10:44A-2.8(b).

Nonetheless, regardless of the detailed protocols in N.J.A.C. § 10:44A-2.8(b), Plaintiff's complaints to Defendants still conform to the public policy surrounding the regulation; to wit, a lack of proper staffing undermines the quality assurances standards necessary for Defendants to provide developmentally disabled individuals to carry out their daily functions and activities at the group home. See N.J.S.A. § 30:1AA-1.2(i) and N.J.S.A. § 30:1AA-1.1(j). For the foregoing reasons, Plaintiff has and continues to set forth the "substantial nexus" between her complained of conduct and the regulation prescribed in N.J.A.C. § 10:44A-2.8(b).

b. Plaintiff's reliance on N.J.A.C. § 10:44 A-2.7(a) "closely relates" to her complained of conduct regarding lack of proper training at Defendant Allies. (PA000008). (PA000090-PA000091).

Defendants also contend "none of the facts alleged by Plaintiff correspond to the regulations…[which form] her reasonable belief that Defendants were violating the law [with respect to N.J.A.C. § 10:44 A-2.7(a)]." See Resp. Br. 13. Again, such assertion is misplaced.

Plaintiff alleges in her Complaint that several Direct Support Professionals ("DSPs") were not properly trained and could not attend to basic medication tasks

such as testing an individual's blood sugar. (PA000008). This occurred because Defendants' training of DSPs merely involved watching videos. Id. Plaintiff complained about the poor DSP training to Defendants, as she reasonably believed this violated N.J.A.C. § 10:44 A-2.7(a). The regulation requires "basic staff training programs…to ensure staff competency…[which] shall address, at a minimum:…(2) medication training; (3) preventing abuse and neglect…" N.J.A.C. § 10:44 A-2.7(a).

Again, Defendants and the Trial Court misconstrue case law and insist Plaintiff "d[id] not allege that DSPs were not trained in any of the five categories listed, nor does [the regulation] state that watching videos is an insufficient training method." Resp. Br. 13. (PA000090-PA000091). Plaintiff need not allege the details which form the unlawfulness of Defendants' actions as CEPA "is not to make lawyers out of conscientious employees" Mehlman, 153 N.J. at 193-94. So long as Plaintiff "identified authority **that applies to** the 'activity, policy, or practice'" of Defendants, being basic training to ensure staff competency, is sufficient at the prima facie stage. Hitesman, 218 N.J. at 11. (PA000008).

Moreover, the Complaint does describe the staff incompetency by DSPs failing to simply test blood sugar on diabetic individuals at Defendant Allies, which goes to the regulation's training on "medication" and "preventing abuse and neglect." See N.J.A.C. § 10:44 A-2.7(a). Plaintiff reiterated this assertion at oral argument when clarifying, **"testing blood sugar…of individuals is so important**

[because] if you do it inappropriately, it causes bruising…and injures these individuals. And that, would specifically, go to the abuse and neglect aspect of [N.J.A.C. § 10:44 A-2.7(a)].” T39:1-39:9.

Plaintiff’s complaints also conform to the public policy surrounding N.J.A.C. § 10:44 A-2.7(a); to wit, poor or insufficient training of DSPs undermines the services and direct assistance required for Defendants’ employees to provide developmentally disabled individuals to carry out their daily functions and activities at the group home. See N.J.S.A. § 30:1AA-1.2(i) and N.J.S.A. § 30:1AA-1.1(j). Accordingly, when reviewing the Complaint with a “generous and hospitable approach,” which Judge McLaughlin should have done at the trial level, it is clear Plaintiff has identified both law and public policy that “closely relates” to her complained of conduct to establish a prima facie CEPA claim. Printing Mart-Morristown, 116 N.J. at 746. Dzwonar, 177 N.J. at 463. Hitesman, 218 N.J. at 11.

2. The Complaint Establishes A Prima Facie Showing That Defendants Took Adverse Employment Towards Plaintiff, Which Includes Defendants’ PTO Misrepresentations, Issuing Plaintiff A Baseless Developmental Plan, Holding Hostility Towards Plaintiff, and Terminating Plaintiff Following Her Whistleblowing Complaints. (PA000001-PA000058)(argued but not ruled on).

Defendants further rely upon the notion that Plaintiff was not subject to any “retaliation” because “withholding PTO is not an act of retaliation.” Resp. Br. 6. This isolated assertion by Defendants is boldly misconstrued, as Plaintiff points to

several examples, not just one example, of retaliation within her well-pled Complaint. (PA000001-PA000058).

As previously discussed, a reviewing court must "search[omit] the complaint **in depth and with liberality** to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim…" Di Cristofaro v. Laurel Grove Mem'l Park, 43 N.J. Super. 244, 252, 128 A.2d 281 (App. Div. 1957). Similarly, to ascertain whether a complaint pleads a good cause of action, separate paragraphs may not be taken out of context, and **the entire complaint must be read together**. Kurtz v. Oremland, 24 N.J. Super. 235 (Ch. Div. 1952).

Pursuant to CEPA, our Courts have long held that "[W]hat constitutes an 'adverse employment action' must be viewed in light of the **broad remedial purpose** of CEPA, and our charge to **liberally construe the statute to deter workplace reprisals against an employee speaking out against a company's illicit or unethical activities."** Donelson v. DuPont Chambers Works, 206 N.J. 243 (2011)(emphasis added). Thus, adverse employment action is not limited to a demotion, suspension or discharge, and need not result in loss of pay. Maimone v. Atl. City, 188 N.J. 221, 235, 903 A.2d 1055 (2006) (quoting N.J.S.A. 34:19-3). In fact, New Jersey Courts recognize retaliatory action can take the form of **"many separate but relatively minor instances of behavior directed against an employee that may not be actionable individually but that combine to make up**

a pattern of retaliatory conduct." Green v. Jersey City Bd. of Educ., 177 N.J. 434, 447 (2003) (recognizing that a hostile work environment claim can be brought under CEPA)(emphasis added).

Although the Trial Court did not rule on the issue, it is evident Defendants subjected Plaintiff to several forms of retaliation following her whistleblowing complaints. (PA000001-000058). For instance, after the complaints, Defendant Cocuso ignored Plaintiff's valid concerns and essentially told her there was "no set ratio," but then blamed the issue on Defendant Allies for being "consistently understaffed." (PA000006-PA000007). Thereafter Plaintiff worked several holiday shifts which required her additional PTO days under Defendants' policy. (PA000009). When Plaintiff brought such request to Defendants, both Defendant Smullen and Defendant Wilson denied Plaintiff's PTO request as they claimed she did not have the available days off. Id. When Plaintiff followed up with additional personnel and filed a New Jersey Department of Labor ("DOL") grievance, it was then determined Plaintiff did have enough PTO. (PA000010). Afterward, in another act of retaliation, Defendants disciplined Plaintiff and placed her on a developmental plan based on two (2) **false** write-ups. Id. After Plaintiff complained the plan was based on accusations which were proven false, Defendants retaliated again by then claiming Plaintiff's plan resulted because of her "aggressive demeanor" and

"smoking outside." (PA000010- PA000011). Defendants ultimately terminated Plaintiff in this meeting. Id.

Undeniably, the facts set forth above and as articulated in Plaintiff's Complaint demonstrate the various retaliation Plaintiff endured during employment with Defendants. (PA000001-PA000058). Simply put, by Defendants: (1) overlooking Plaintiff's concerns; (2) insisting on Plaintiff's PTO denial; (4) issuing Plaintiff a fabricated developmental plan; (4) harassing Plaintiff about her "conduct" in at the developmental plan meeting; and (5) terminating Plaintiff at that same meeting, effectively demonstrates the **"many separate but relatively minor instances of behavior directed against [Plaintiff]…[which] combine to make up a pattern of retaliatory conduct"** by Defendants. Green, 177 N.J. at 447. Maimone, 188 N.J. at 235. (PA000006- PA000011).

Overall, despite Defendants' contentions, Plaintiff is not asserting that simply the "withholding of PTO" is the only act of retaliation committed by Defendants. Instead, it is the several instances in which Defendants created a "sufficiently severe or pervasive" alteration of Plaintiff's conditions of employment, leading to her termination, which is the basis for the retaliatory action. El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 176 (App. Div. 2005). Therefore, although Judge McLaughlin did not rule in this regard, this Court should find Plaintiff has made a prima facie showing of adverse employment action in her Complaint.

3. The Complaint Establishes A Prima Facie Pierce Claim Because Plaintiff Has Identified Several Mandates of Public Policy In Support of Her Concerns to Defendants. (PA000001-PA000058). (PA000091-PA000092).

Pierce v. Ortho Pharmaceutical Corp. held, "an employee has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy." 84 N.J. 58, 72 (1980). Sources of public policy include legislation, administrative rules, regulations or decision, and judicial decisions. Id.

However, Defendants, as well as the Trial Court, mistakenly assert, "Plaintiff fails to establish a mandate of public policy that is clearly identified and firmly grounded." Resp. Br. 16. (PA000091-PA000092). To the contrary, Plaintiff has cited numerous laws, regulations, and public policy, in particular N.J.A.C. § 10:44A-2.8(b), N.J.A.C. § 10:44 A-2.7(a), N.J.S.A. § 30:1AA-1.1(j), and N.J.S.A. § 30:1AA-1.2(i), which all demonstrate her reasonable belief that Defendants violated law and regulation regarding understaffing and proper staff training for competency at Defendants' group homes. These authorities are firmly grounded in New Jersey law and regulation and directly address Plaintiff's complaints to Defendants. (PA000006-PA000008). Following Plaintiff's whistleblowing complaints concerning the regulations/public policy, Defendants retaliated and terminated Plaintiff's employment. (PA000001-PA000058), this Court must reverse the Trial Court's decision in dismissing Plaintiff's Pierce claim.

4. Defendants Failed To Timely Submit Their Opposition Brief Pursuant To R. 2:6-11.

As a procedural matter, Defendants filed their Opposition Brief on July 16, 2024. This filing is beyond the thirty (30) day requirement under R. 2:6-11. See Defendants-Respondents' Brief (hereinafter "Resp. Br."). Specifically, under R. 2:6-11(a), a respondent "**shall** serve and file an answering brief and appendix, if any, **within 30 days after the service of the appellant's brief."** R. 2:6-9 states the Court may order a brief's dismissal should it not substantially conform to the rules, such as R. 2:6-11.

Here, the Clerk of the Appellate Division approved Plaintiff-Appellant's filed Brief and Appendix on June 14, 2024. During this time, Defendants-Respondents were served with the Brief and Appendix by notice of the docket, and through hard copy, thus placing Defendants on notice their opposition brief is due within thirty (30) days, or by Monday, July 15, 2024.[1] Defendants failed to substantially comply with the requirement prescribed by R. 2:6-11(a), and filed their Opposition late on July 16, 2024. With such disregard to the Court's rules, the Court should suppress Defendants' Opposition Brief, and make its ruling solely based on Plaintiff-Appellant's filings.

[1] To be clear, thirty (30) days from June 14, 2024 would result in a Sunday, July 14, 2024 due date. For this reason, Plaintiff looks to the next weekday, Monday, July 15, 2024 as the due date.

CONCLUSION

Based on the foregoing, and the reasons set forth in Plaintiff's Appellate Brief, Plaintiff requests a reversal of the Trial Court's decision granting Defendants' Motion to Dismiss Plaintiff's Complaint, and further reverse the denial of Plaintiff's Motion to Amend her Complaint.

McOMBER McOMBER & LUBER, P.C.
Attorneys for Plaintiff, Sharon Hussain

By: */s/ Peter D. Valenzano*
PETER D. VALENZANO, ESQ.

Dated: July 29, 2024