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RENE EDGHILL SMITH Appellant, v. NEW BRUNSWICK BOARD OF EDUCATION, AUBREY A. JOHNSON, SUPERINTENDENT OF NEW BRUNSWICK SCHOOLS, KENNETH M. REDLER, PRINCIPAL NEW BRUNSWICK HIGH SCHOOL, JOHN DOES 1-10, JANE DOES 1-10, ABC CORPORATIONS A THROUGH Z Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NUMBER: A-001642-23T1 Civil Action **AMENDED APPELLANT BRIEF** **SAT BELOW:** **HON. KEVIN SHANAHAN, P.J.Cv** **SUPERIOR COURT OF NEW JERSEY** **SOMERSET COUNTY COURTHOUSE** **DOCKET NO. SOM-L-1445-20**

LURETHA M. STRIBLING, ESQ.
JULY 13, 2024

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Transcript of Summary Judgment Proceeding which took place on May 12, 2023 before the Hon. Kevin Shanahan P.J.Cv. **(1 Transcript)**

TABLE OF JUDGMENTS

The Motion for Summary Judgment was decided on the date of January 5, 2024 at the Superior Court of New Jersey, Somerset County Courthouse before the Hon. Kevin Shanahan, P.J.Cv. The Motion for Summary Judgment was granted for New Brunswick Board of Education, Aubrey A. Johnson, Superintendent of New Brunswick Schools and Kenneth M. Redler, Principal of New Brunswick High School. **(1 Transcript, Summary Judgment Argument 5/12/2023)**

PROCEDURAL HISTORY

Appellant filed a Complaint and Jury Demand on December 1, 2020. **(Pa1, Complaint)** The Answer was filed on February 11, 2021. **(Pa27, Answer)**. The Parties were notified on May 27, 2021 that the case was listed for Mediation**. (Pa44)** A Motion to Compel Discovery was filed on the date of October 10, 2021. **(Pa47)** Opposition to the Motion to Compel Discovery was filed on October 27, 2022. **(Pa57)**. A Cross Motion to Compel Discovery was filed on October 27, 2021 and was opposed**. (Pa72)** All motions were decided on the date of November 4, 2022. **(Pa82, Pa85)** On November 30, 2022, A Motion was filed to extend discovery. **(Pa87)**. On December 8, 2022, A Cross Motion was filed to Compel Continuation of the Deposition of Plaintiff**. (Pa93)** On December 16, 2022, the Court granted the Extension of Discovery**. (Pa113)** On December 16, 2022, the Court Denied the Motion to Compel the Continuation of Deposition of Plaintiff. **(Pa115)** On the date of March 31, 2023, Defendants filed a Motion for Summary Judgment. **(Pa117)** Appellant filed Opposition to the Motion for Summary Judgment on May 2, 2023 **(Pa144)** The Court heard oral argument on the Motion for Summary Judgment and the Opposition to the Motion for Summary Judgment on May 12, 2023 and the Court entered a decision on the Motion for Summary Judgment and Opposition to the Motion for Summary Judgment on January 5, 2024. **(Pa189)**

STATEMENT OF FACTS

Rene Edghill Smith (Appellant) was hired to work at the New Brunswick School System in September of 2016. **(Pa1, Complaint, par. 12-14)**. Appellant interviewed for the position of Vice Principal for an elementary school within the New Brunswick School District but was invited by Kenneth Redler (Redler), Principal of New Brunswick High School to come and work with him because Redler was impressed with Appellant's work history and wanted her to work at New Brunswick High School**. (Pa195)** Appellant was interviewed by Redler on October 13, 2016; Appellant was then interviewed by Aubrey Johnson on October 14, 2016**. (Pa193, Pa194)** The interviews were rated and Appellant learned that she had received ratings of very good and excellent on the interviews. **(Pa193 Smith Interview Ratings)** Appellant had worked in a variety of roles in the education field and as a result had a wealth of experience working in administrative and supervisory positions. **(Pa211, Smith Dep. Transcript, T42:4-17, T48:8-9, T50:11-25, T51:1-11)** Appellant spent a number of hours at the New Brunswick High School working to enhance the educational experience for the students and provide support for the staff. **(Pa196, Smith Answer to Interrogatories, par. 7)** Appellant received evaluations with the rating of effective. **(Pa298)** The school environment was positive until January of 2019 when the Appellant had to address the statements and behaviors of some of the Caucasian teachers who engaged in actions that were

discriminatory towards the students in their classes. **(Pa196, Smith Answers to Interrogatories par 8)** In the period of time after Appellant had to address the discrimination exhibited by some of the Caucasian teachers towards their students, the work environment changed as well as the working relationship that Appellant had with Redler. **(Pa196, Smith Answers to Interrogatories, par. 26; Pa1, Complaint, par. 25)**

In January of 2019, Appellant learned from the students that one of their teachers, Ms. Deidra Arato (Arato) was routinely making statements in the class comprised of Mexican students that she was glad that Trump was going to build a wall. **(Pa1, Complaint, par.48)** The students complained to Appellant who was the supervisor Ms. Arato. **(Pa1, Complaint, par. 48-50)** Appellant notified Redler of the comments made by Ms. Arato and that she had to be disciplined. **(Pa1, Complaint, par. 50)** Redler told Appellant to meet with Ms. Arato and give her a verbal warning and Appellant did meet with Ms. Arato, counseled Ms. Arato and gave her a verbal warning. **(Pa1, Complaint, par. 50)** The working relationship with Redler changed after January 2019 and he communicated less with Appellant and in many instances avoided Appellant**. (Pa1, Complaint, par. 25)** Mr. Redler became more critical of the Appellant, conducted Observations of Appellant that did not comport with the requirements of the education statutes in New Jersey for Observations, he misconstrued statements that Appellant made in an effort to justify

his criticism of her and it became a common practice in staff meetings for Mr. Redler to tell Appellant to leave the meeting to take care of issues that arose in the school. As a result of having to leave the meetings, Appellant missed important information that was disseminated in staff meetings**.**

Paula Costlow, a teacher at New Brunswick High School engaged in the use of racial slurs in her classroom in May of 2019 wherein she repeatedly used the word Nigger (N Word)**. (Pa294, Smith Affidavit**) Some of the students recorded Ms. Costlow using the N Word and this recording was given to another teacher by the name of Da'Shana Melton (Ms. Melton). **(Pa294, Affidavit)** Ms. Melton viewed the video recording of Ms. Costlow using the N word. **(Pa294, Smith Affidavit, par. 4)** The information about Ms. Costlow and video recording of her using the N word was presented to Appellant and Ms. Shelton who was also a Vice Principal at the high school. **(Pa294, Smith Affidavit)** Ms. Costlow was supervised by and reported to Ms. Shelton and she met with Ms. Shelton and was counseled and written up**. (Pa384)** This information was forwarded by Ms. Shelton to Marnie McKoy (McKoy) on May 1, 2019. Marnie McKoy was the Assistant Superintendent of Human Resources. **(Pa294, Smith Affidavit)**. A letter and the video recording where Ms. Costlow repeatedly uttered the word Nigger was forwarded to Ms. McKoy. **(Pa294)** In the period after this incident, Mr. Redler demanded that the write-up be removed from both Ms. Costlow's personnel file and the Observation of

her work. Ms. McKoy gave the letter and video recording to Mr. Redler. On May 9, 2019, Appellant was issued a Notice of Non-Renewal of her contract for the next school year. **(Pa385, Letter of Non-Renewal)** Ms. Shelton also received a Notice of Non-Renewal of her contract for the next school year. **(Pa387)** Mr. Redler failed to follow the tenets of the policy in place at New Brunswick High School which prohibited discrimination and then terminated Appellant and Ms. Shelton after they each addressed the discriminatory and racially charged statements made by Ms. Costlow**.** Mr. Redler engaged in discrimination based on race and despite the policies in place at New Brunswick School System which prohibited discrimination in any form, Redler spent time attempting to discount and rationalize the use of the racial slur**. (Pa348, Redler Deposition 10/28/22)** The termination was retaliatory also.

It is requested that the Appellate Court reverse and remand this matter to the trial court so that the record can be completed. It is also requested that upon return to the trial court that the matter should be reassigned to another judge for completion. A request is further made that the Appellate Court consider transferring this matter to another County on return to the Trial Court.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT HEARD AND ENTERED A DECISION ON THE SUMMARY JUDGMENT MOTION DESPITE THE FACT THAT THE RECORD WAS INCOMPLETE AND AS A RESULT OF THIS, THE SUMMARY JUDGMENT DECISION SHOULD BE VACATED WITH THIS MATTER REMANDED TO THE TRIAL COURT FOR COMPLETION OF THE REMAINING WORK IN THIS MATTER. Pa115, Pa144

According to Court Rule 4:46-2(c), Proceedings and Standards on Motions, the judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact. The court shall find the facts and state its conclusions in accordance with R. 1:7-4. R. 4:46-2(c)

A court should grant summary judgment when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact challenged and that the

moving party is entitled to judgment or order as a matter of law. Brill v. Guardian Life Insurance Company of America, 142 NJ 520, 529 (1995). Summary judgment will not be appropriate if the dispute is about a material fact, is genuine and could result in a jury after hearing the evidence returning with a verdict for the non-moving party. Anderson et al v. Liberty Lobby, Inc., et al, 477 US 242 (1986). The question is whether the evidence presents a sufficient disagreement that would then require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. Id. at 247-252. The movant has the burden to exclude any reasonable doubt as to the existence of any genuine issue of material fact. Moore's Federal Practice, par. 56-15(3), cited in Judson v. Peoples Bank & Trust Co., 17 NJ 67, 74(1954). The conclusion that there are no material issues in dispute cannot be arrived at because the opposing evidence is incredible, as credibility is an issue for the trier of fact to decide. Id. at 75. The standard in viewing a motion for summary judgment is expressed by the term making a prima facie case or defense and the movant is entitled to judgment if based on the full record, the adverse party, who is entitled to have the facts and inferences viewed most favorably has failed to demonstrate the existence of a dispute which would result in a decision favoring the non-movant. Rules Governing the Courts of the State of New Jersey, p. 1486 (2022).

In making a determination on a motion for summary judgment, where the record is meager, the Court should refrain from a grant of summary judgment.

Jackson v. Muhlenberg Hospital, 53 N.J. 138 (1969). A trial court should not grant a summary judgment motion when the matter is not yet ripe and especially in those cases where discovery has not been completed. Velantzas v. Colgate-Palmolive Co., 109 N.J. 189 (1988). See also, Salomon v. Eli Lilly & Co., 98 N.J. 58 (1984).; Driscoll Const. Co. v. State, 371 N.J. Super. 304, 317, 318 (App. Div. 2004). The Court has ruled that in cases where discovery on material issues is not yet complete, the respondent must be given the chance to take discovery before the motion is disposed of. Wilson v. Amerada Hess Corp., 168 N.J. 236, 253-254 (2001). The Court also noted that where matters have been disclosed in a recent deposition, the motion for summary judgment should be adjourned to allow the party opposing the motion for summary judgment time to further explore the matters. Lenches-Marrero v. Averna & Gardner, 326 N.J. Super. 382, 387-388 (App. Div. 1999).

In the instant matter, there are material issues in dispute. The causes of action pled in this case fall squarely under the New Jersey Law Against Discrimination. Pled are Discrimination based on Race, Discrimination Based on Age, Hostile Work Environment, Harassment and Retaliation. In review of the documentary, evidentiary material, the causes of action are supported by the record and Appellant set forth important details in the Complaint that support each and every cause of action **(Pa1, Complaint)**, Appellant's Answers to Interrogatories provided a number of details which illustrate the fact that Appellant worked in a system where there

was discrimination based on race and age **(Pa196)** which is also supported by the Responses to the Document Production. Appellant's Deposition Testimony **(Pa211, Smith Deposition)** and Appellant's Affidavit **(Pa294)** support the position taken that there are material issues in dispute. Appellant received Performance Evaluations which were scored as effective. **(Pa298, Pa314)** and Summative Reports for the school years 2016 through to 2018 which were effective. **(Pa326, Pa327)** Plaintiff testified that in school year 2018-2019, she did not receive the full complement of Observations because she should have had three Observations. During the Spring 2019, Principal Kenneth Redler (Redler) testified that he deliberately did not conduct further evaluations of Appellant because she had not signed her second Observation. **(Pa330, Redler Deposition 5/11/2022, T25:4-22)** When Redler sat for deposition in the lawsuit brought by Ms. Shelton, Redler testified differently and said that he did not conduct further Observations of Appellant because he was told to no longer evaluate Appellant by the attorney for the school district. The failure to complete the Observations resulted in an inability to complete the Summative and the rating of the Plaintiff could not be determined. This failure to conduct Observations was in violation of the education statutes. **(Pa 348, Redler Deposition, 10/28/2022, T32:5-9, T33:14-25, T34:1-7)** In two separate depositions Redler gave inconsistent statements with regard to why he failed to conduct Appellant's third Observation. Redler failed to conduct the third

Observation of Appellant and then could not complete the Summative Report. Having not conducted the third Observation and Summative Report made it impossible to claim that Appellant's job performance was ineffective for school year 2018-2019. Kenneth Redler admitted in the deposition held on May 11, 2022, that he had never reprimanded Appellant for work performance nor had Appellant ever been placed on a Performance Improvement Plan. **(Pa330, Redler Deposition 5/11/2022, T26:20-23, T28:14-19)** Appellant received a Notice of Non-Renewal of her position shortly after reporting Ms. Costlow to the Superintendent of Human Resources for using the word Nigger in her class room with the strong objections of students to use of this language. **(Pa294, Smith Affidavit; Pa409, Video Recording of Costlow using N Word in Class)** Kenneth Redler admitted when asked about the impact of the use of the N word in deposition on May 11, 2022, that, the use of the N word caused an emotional reaction to this word, could alter the work environment for a Black person and could create a hostile work environment. **(Pa330, Redler Deposition 5/11/2022, T43:14-22, T44:5-14)** Appellant testified that she along with Ms. Shelton reported the use of the N word in a letter sent to Marnie McKoy with the video of Costlow using the racial slur **(Pa294, Smith Affidavit; Pa409, Video to McKoy)**. When Marnie McKoy received the Letter and Video, she failed to address the issue and instead sent the letter and accompanying video to Mr. Redler on May 7, 2019. On May 9, 2019, Mr. Redler notified McKoy to issue Letters of

Non-Renewal of the contract to Appellant and Ms. Shelton for the next school year. In the section of the document where the reasons for non-renewal needed to be documented, there was no basis provided for the non-renewal of Appellant's contract. **(Pa387, List of Employees for Contract Non-Renewal; Pa385, Letter of Non-Renewal to Smith).**

The Court in making a determination on the summary judgment motion filed by the Defendant was aware of the fact that the Appellant's deposition when taken by the Respondent was incomplete. Counsel for the Appellant did not have the opportunity to ask questions after Counsel for the Respondent finished her questioning. The reschedule of the Appellant's deposition never happened. This Counsel filed a Motion to Compel Respondent's Counsel to reschedule the deposition so that it could be completed and so that this Counsel could put her questions on the record and the Court denied this motion. **(Pa115)** Thus, the Court was aware of the fact that the record was incomplete and yet a Summary Judgment decision was made about the case anyway. When Appellant sat for deposition, the deposition started at about 10:00 A.M. and ended at about 5:30 P.M. The deposition consisted only of the questions from Respondent's Counsel. Respondents' Counsel was to reschedule the deposition so that the record could be complete and failed to do so. Appellant's Counsel had a number of questions to place on the record, however, there was no time to complete the deposition on the date of deposition. As a result, the deposition

transcript is one-sided containing only the direct questioning of the Appellant, then Plaintiff. Because this Counsel had a right to engage in redirect of the testimony given by Appellant which did not happen, the record is incomplete. Pursuant to Valentzas v. Colgate-Palmolive and other case law noted above, when the record is not complete, Summary Judgment should not be granted. This set forth a procedural basis for denial of the Motion for Summary Judgment as the record was not complete. This Counsel filed a motion to compel Counsel for the Respondents to schedule again the deposition of Appellant so that the deposition could be completed and the Court had notice that the Plaintiff's deposition had not been completed but failed to compel the deposition completion.

The documentary, evidentiary material developed in this case made it clear that there was information that supported each and every cause of action and illustrated the presence of material issues in dispute. Despite the notice given to the Court that the record was not complete with regard to Appellant's deposition, this major issue was not addressed by the trial court. There was no basis for granting Summary Judgment because the record was incomplete but this is what was done.

It is requested that the Appellate Court reverse and remand this matter to the trial court so that the record can be completed. It is also requested that upon return to the trial court that the matter should be reassigned to another judge for completion. A

request is further made that the Appellate Court consider transferring this matter to another County on return to the Trial Court.

POINT II

THE TRIAL COURT ACKNOWLEDGED IN THE SUMMARY JUDGMENT DECISION THAT THE COURT IS NOT TO ENGAGE IN WEIGHING OF THE EVIDENCE AND THEN PROCEEDED TO ENGAGE IN WEIGHING THE EVIDENCE AS WELL AS DISCOUNTING OF THE EVIDENCE TO THE APPELLANT'S DETRIMENT. Pa144, Pa113

An abuse of discretion occurs when a decision is "made without a rational explanation, an inexplicable departure from established policies, or rests on an impermissible basis." State v. RY, 242 N.J. 48, 65 (2020). See also, Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002). The abuse of discretion standard applies to disposition of discovery matters. State v. Brown, 236 N.J. 497, 521 (2019). The abuse of discretion standard also applies to denial of a motion for reconsideration. Branch v. Cream-O-Land Dairy, 459 N.J. Super. 529, 541 (App. Div. 2019) An abuse of discretion warrants a reversal. Id. at 541. The Court's function is not to weigh the evidence and determine what the truth of the matter is but instead to determine if there is a genuine issue for trial. Rios v. Meda Pharm., Inc., 247 N.J. 1, 13 (2021)

The Trial Court cited in the Summary Judgment decision the following by citing to Brill v. Guardian Life Ins. Co. of Am., "a determination whether there exists a genuine issue of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the nonmoving party. The judge's function is not himself (or herself) to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill v. Guardian Life Ins. Co. of Am. supra at 540. The Here, the Trial Court proceeded to weigh the evidence rather than assessing the pleadings to determine if there were material issues in dispute. In many instances throughout the decision, the Trial Court ignored the Appellant's position and appeared to adopt the position of the Respondents. In this case, in addressing each cause of action, the Court discussed it from the Respondent's position and then spent significant time discounting the Appellant's position which was discussed in a limited way. The weighing of the evidence was done as to each cause of action and was discussed based on what the Respondents, the movants' position was.

The Court discussed Ms. Costlow and her use of the racial slur, nigger (N word). The Trial Court was provided with video footage of Ms. Costlow using the racial slur in her class in May of 2019, however, it appears that the Trial Court failed to

review this video footage. The Appellant noted in motion papers that Ms. Costlow used the racial slur on two separate occasions which were in January and May of 2019. The Respondents deliberately and erroneously claimed that there was only one incident of use of the racial slur which was in January of 2019 and the Court appeared to adopt this despite evidence presented by the Appellant that Ms. Costlow engaged in use of the racial slur in May 2019. **(Pa409, Video Footage)** The fact that Appellant along with Ms. Shelton met with the students who were upset about the use of the racial slur by Ms. Costlow in May of 2019 was discounted by the Court despite evidence that supported Appellant's position. In fact, Appellant and Ms. Shelton made a complaint to the Superintendent of Human Resource, Ms. McKoy on May 1, 2019 about Ms. Costlow using the racial slur and video footage was sent to Ms. McKoy also. On May 9, 2019 Appellant and Ms. Shelton were notified that their contracts would not be renewed for the next school year. The failure to renew the contracts presented a material issue as to the causes of action for retaliation as well as discrimination based on race. The Trial Court spent significant time weighing the evidence to determine the truth which was improper and then discounted the best evidence in the record. to illustrate the actions of Ms. Costlow and engagement in the use of the noted racial slur. The Trial Court evidently disregarded the video footage which supported the claims of discrimination based on race and hostile work environment. The video footage was concrete evidence which supported the noted

causes of action, yet, in the decision, the Trial Court failed to even mention the video footage and the behavior of Ms. Costlow. The video footage alone supported the fact that there were material issues in dispute. This Trial Court instead engaged in weighing of the evidence and discounting the evidence which served to diminish the value of the evidence. A review of the rulings by the Trial Court illustrates repeat instances of weighing the evidence and discounting the evidence. The Trial Court discounted documentary, evidentiary material which Court Rule 4:46-2(c) references as the documents of significance at the Summary Judgment proceeding. The Court in rendering the decision used the Respondent's Statement of Material Facts including each paragraph word for word and then noted the Appellant's Responses to the Statement of Material Facts rather than engaging in an analysis of the causes of action and whether there was sufficient documentary evidentiary material in the record to support the causes of action pled. The Court then dismissed each and every cause of action despite there being a wealth of documentary evidentiary material in the record to support the causes of action. Glaringly, despite there being a video recording which was recorded by students in Ms. Costlow's class where she said out loud why can't I say nigger, you say nigger. In this footage you could hear the students responding, gasping and upset as the students told Ms. Costlow that she can't say that word. Ms. Costlow used a racial slur which creates a hostile work environment and was violative of the school policies prohibiting the

use of this language in school, yet, the Court evidently discounted this. The record also reflected the fact that when Appellant and Ms. Shelton were notified by the students and Ms. Melton, that they wanted something to be done about Ms. Costlow using the racial slur, Ms. Shelton and Appellant met with the students and then notified Marnie McKoy, the Superintendent of Human Resources of the actions of Ms. Costlow. McKoy gave the letter and video footage to Mr. Redler. This was on the date of May 7, 2019. Two days later on May 9, 2019 both Appellant and Ms. Shelton were notified that their contracts for the next school year would not be renewed. There was no basis for why there would be non-renewal, however, this adverse action was taken in close proximity to Appellant and Ms. Shelton complaining to a higher authority about the behavior of Ms. Costlow. The Non-Renewal list did not set forth the reason that Appellant was being non-renewed. Retaliation was jumping off of the page but was discounted by the Trial Court. Other causes of action were similarly subjected to weighing and rejection by the Trial Court. When the Court examined the issue of discrimination based on race, the Trial Court weighed the evidence regarding the prongs to be satisfied. The Respondents claimed that the Appellant, then Plaintiff was not performing her job properly and the Court weighed in on this claim rather than looking at the evidence presented by the Appellant. The Appellant presented ample evidence that she was performing her job including her long history in the education system, the eagerness with which she

was hired, the effective evaluations that she received, the absence of any disciplinary action and the fact that there was a failure in not renewing her contract without setting forth the basis for this action. There is no evidence in the record that Appellant was not doing her job. There is no evidence in the record that Respondents provided Appellant with courses or some support to address the alleged performance issues, yet the Trial Court took a one-sided approach, weighed the evidence from the Respondents' perspective and decided that there was a basis for dismissing the claim of discrimination based on race. The Court was required to determine if there was documentary, evidentiary material presented by the Appellant to support the cause of action of racial discrimination and failed in this endeavor. Similarly, the Court weighed the evidence regarding the issue of discrimination based on age and again adopted the position of the Respondents. Evidence was in the record regarding the issue of age discrimination and the Court ignored that evidence. The Court denied that Appellant worked in a hostile work environment and denied that the conduct that Appellant complained of was because of her age and race. The Court further minimized the Appellant's complaint of hostile work environment and harassment and while acknowledging what some of the issues were that were experienced by Appellant, weighed the evidence again and claimed that there was no basis for the claim of hostile work environment. The Court in weighing the hostile work environment claims wrote that those claims even if true could not survive summary

judgment. Again, the Trial Court had the responsibility of determining what was in the record in support of Appellant's claims and the record for Appellant's evidence and there was a failure to do so. There was no basis for dismissal of the case which again represented the Court weighing the evidence and deciding the case. The presence of documentary, evidentiary material illustrating material issues in dispute required that the case be decided by the trier-of-fact. The Court took a similar position on the issue of retaliation and what the record presented and then determined that there was no support for the cause of action of retaliation in the record. The details set forth above regarding Costlow's use of the racial slur are noted in detail. Appellant as well as Ms. Shelton engaged in protected activity by reporting the use of the racial slur nigger by Ms. Costlow to McKoy of Human Resources in the second incident in May of 2019. Marni McKoy was the Superintendent of Human Resources. On May 2, 2019, some students approached Appellant and Ms. Shelton along with a teacher, Ms. Melton. With Ms. Melton being present, they discussed the fact that Ms. Costlow had used the racial slur in class. Appellant and Ms. Shelton presented this information to Marnie McKoy including an email/letter and the audio-video recording. Ms. McKoy then provided this information to Mr. Redler. Two days later, both Appellant and Ms. Shelton received notices that their contract would not be renewed for the next school year. This evidence supported the cause of action, yet, the Trial Court weighed the evidence and discounted the retaliatory behavior

and adopted the Defendants' position that the non-renewal was based on performance despite the fact that the record is absent any documentation of performance issues or counseling. Here the Court discounted the actual evidence presented by Appellant and adopted the position of the Respondents despite the fact that there was no evidence to support the claim that there was a legitimate business reason to not renew the Appellant's contract

It is requested that the Appellate Court reverse and remand this matter to the trial court so that the record can be completed. It is also requested that upon return to the trial court that the matter should be reassigned to another judge for completion. A request is further made that the Appellate Court consider transferring this matter to another County on return to the Trial Court.

POINT III

THE TRIAL COURT ENGAGED IN BIAS IN MAKING THE SUMMARY JUDGMENT DETERMINATION WHICH FAVORED THE RESPONDENTS' POSITION AND IGNORED THE POSITION OF THE APPELLANT Pa93, Pa115

Justice has to be administered fairly by judges but it must also appear to the public that justice has been administered fairly; justice must satisfy the appearance of justice. State v. Deutsch, 34 N.J. 190, 206 (1961) quoting Offiut v. United States, 348 U.S. 11, 14 (1954). The Supreme Court noted in DeNike v. Cupo, "it is not

necessary to prove actual prejudice on the part of the court" to establish an appearance of impropriety; an objectively reasonable belief that the proceedings were not fair is sufficient to prove prejudice. DeNike v. Cupo, 196 N.J. 502 (2008). The Trial Court engaged in bias in the analysis of the arguments made in the court filing by respondents for Summary Judgment and Appellant's Opposition papers. When the Trial Court decision is reviewed, each cause of action was discussed from the Respondents' perspective with the Court agreeing to each position taken by the Respondents. The Appellant presented documentary, evidentiary material which supported each cause of action. The Court was tasked with determining if there were material issues in dispute and failed in this task. Instead, the Court spent time in analysis from the Respondents' perspective and issued a ruling from that perspective while ignoring the positions taken by the Appellant. For each cause of action, the Trial Court discussed it from the Respondents' viewpoint and wrote after this review that the Court agrees with the Respondents. As a result of the Court's biased review of the pleadings and the documentary, evidentiary material presented to the Court, and with a failure to grant all favorable inferences to the Appellant, the Trial Court reached a biased conclusion which deprived Appellant of her day in Court on the noted causes of action.

It is requested that the Appellate Court reverse and remand this matter to the trial court so that the record can be completed. It is also requested that upon return to the

trial court that the matter should be reassigned to another judge for completion. A request is further made that the Appellate Court consider transferring this matter to another County on return to the Trial Court.

POINT IV

APPELLANT PLED THE CAUSE OF ACTION OF RACIAL DISCRIMINATION WHICH WAS SUPPORTED BY THE RECORD AND THE TRIAL COURT FAILED TO ACKNOWLEDGE THIS RECORD AND AS A RESULT REACHED AN IMPROPER CONCLUSION Pa201, Pa211

In order to satisfy the cause of action for discrimination pursuant to the New Jersey Law Against Discrimination, what must be shown is: (1) the person belonged to a protected class, (2) that he was qualified for the position and was performing his job satisfactorily, (3) that he was subjected to an adverse employment action and (4) persons that are similarly situated and outside of the protected class were treated more favorably under the same set of circumstances which infers discrimination. Victor v. State, 203 N.J. 383, 410 (2010). After the Plaintiff has satisfied the elements to support discrimination based on race, the matter is then subjected to further evaluation applying the prongs set forth in McDonnell Douglas Corp. v. Green, 511 US 792, 802 (1973). Because it is difficult to prove racial discrimination as there is difficulty proving discriminatory intent, the McDonnell Douglas burden shifting process is employed to determine whether an employer has engaged in

discrimination as typically, the evidence that is possessed is circumstantial evidence of discrimination. Zive at 446-47; See Gerety v. Atl. City Hilton Casino Resort, 184 N.J. 391, 399 (2005) where the McDonnell Douglas burden-shifting framework was applied to a disparate impact claim under the New Jersey Law Against Discrimination. See also: Jansen v. Food Circus Supermarkets, Inc., 110 N.J. 363, 380 (1988) where the McDonnell Douglas process was used where the employee alleged discrimination in hiring because of protected status.

In employment of the burden shifting process, (1) the plaintiff must come forward with sufficient evidence to constitute a prima facie case of discrimination; (2) the defendant then must show a legitimate nondiscriminatory reason for its decision; and (3) the plaintiff must then be given the opportunity to show that defendant's stated reason was merely a pretext or discriminatory in its application. Dixon v. Rutgers, the State Univ. of N.J., 110 NJ. 432, 442 (1988). The evidence required of the Plaintiff is modest and must demonstrate to the court that the facts are compatible with a discriminatory intent, therefore, it is possible that discrimination could be the basis for the employer's action. Zive supra at 182. After an inference of discrimination is made, the burden then shifts to the employer to set forth a legitimate business reason for the employer's action. Dixon supra at 449. The burden then returns to the Plaintiff, the employee to prove by a preponderance of the evidence that the reason given by the employer is merely a pretext for discrimination.

Id. at 449. The Plaintiff must show that the employer's reason is untrue and also motivated by discriminatory intent. Id. at 449.

Appellant filed the cause of action of discrimination based on race. In order to prove discrimination based on race the following elements must be satisfied and were satisfied in this case: (1) Plaintiff is a member of a protected category based on race as she is African-American, (2) She was performing her job satisfactorily, (3) She was subjected to adverse employment action including hostile work environment and termination from employment and (4) the reason for being subjected to adverse employment action was based on race. McDonnell Douglas Corp. at 802. The record reflects that Caucasian Vice Principals were treated better.

The Appellant's documentary evidentiary material set forth the fact that she satisfied the noted prongs to establish discrimination based on race. The Respondents agreed that Appellant satisfied prongs 1, 3 and 4 and denied that she satisfied prong two which is that she was performing her job satisfactorily. The documentary evidentiary material presented by the Appellant supported the fact that she was performing her job satisfactorily. Appellant was not tenured in her position which meant that the Principal, Redler was required to conduct three Observations of Appellant per year and he was also to provide a Summative Report at the end of the school year. The claim that Appellant was not performing her job is erroneous. As noted, Redler testified that Appellant obtained effective scores on her Observations

and that the Summative Reports were effective at year end for the first two school years. **(Pa348, Redler Dep 10/28/22, T30:6-8, 18-22, T31:11-12; Pa298, Pa314 Observations and Pa326, Pa327, Summative Reports for 2017 and 2018; Pa211, Smith Dep. T201:8-11, T209:8-14, T209:25, T210:3-6)** In the first year of employment, September 2016 to June of 2017, Appellant was evaluated by three Observations conducted on her and a Summative Report. The indication of how well Appellant was performing is not based on segments of the Observations but instead is based on the final score for each Observation. The three Observations that were conducted on Appellant illustrated that she had scored satisfactorily and the Appellant performed her job well. **(Pa298, Pa314, Observations for 2018-2019)** The Summative Report for 2016-2017 was Effective also. **(Pa326, 2016-2017 Summative Report)**. When the school year September 2017 through June 2018 is analyzed, Appellant received Observation scores of Effective which resulted in a Summative Report which was Effective. **(Pa327, Observations 2018-2019, Pa326, 2017-2018 Summative Report)**. When September 2018 through June 2019 is analyzed, Appellant received the first Observation late and it was Effective **(Pa298, First Observation 2018-2019)** The second Observation was scored a 3.10 which was effective. **(Pa314, Second Observation 2018-2019)**. Appellant testified that the Observation scores were effective in school year 2018-2019. **(Pa211, Smith Transcript, T209:8-14, T209:25, T210:3-6)** Redler was required to conduct a third

and admitted that he did not conduct a third Observation because he was told by the attorney for the district not to conduct any more Observations of the Appellant. **(Pa 348, Redler Dep. 10/28/22, T33:22-25, T34:1-7; Pa328, Email from Johnson Re 2019 Observations)** His failure to conduct a third Observation was inconsistent with what he was required to do per the education statutes. As a result of this, any claim made that the Appellant did not receive satisfactory Observations is refuted as there was a failure to conduct the three required Observations. Further, Redler could not determine the Summative Report score for the school year 2018-2019 because he needed to factor in three Observations. **(Pa34, Redler Dep., 10/28/22, T35:4-9)**

Redler admitted to the fact that he did not reprimand Appellant at any time nor did he give her a Performance Improvement Plan. Thus, the conclusion is that Appellant performed her job satisfactorily. The laundry list cited by the Respondents is examined one by one. It was claimed that the Appellant scored Developing in some areas of her Observation and this is meaningless because it is the overall score that must be viewed in making a determination as to whether the Appellant was performing her job satisfactorily. As noted above, Observation scores were Effective and the Summative scores was Effective. **(Pa298, Pa314, Pa326, Pa327)** The claim that Appellant was not performing up to expectations was not true. The Appellant received Effective scores which is consistent with the language Meeting Expectations. There is no requirement to obtain Distinguished in order to

be determined to be meeting expectations as Distinguished is consistent with Exceeds Expectations. A score of Effective is required and indicates that Appellant was meeting expectations. **(Pa298, Pa314, Pa326, Pa327)** The claim that Plaintiff completed the Advanced Placement Form but failed to give it to Redler does not result in a conclusion that she was not performing her job. In fact, the completion of the Advanced Placement Form was not Appellant's responsibility. **(Pa348, Redler Dep. 10/28/22, T37:20-25, T38:1-18)** The claim that Plaintiff continued to send unapproved pre-conference forms to staff does not set forth a basis for non-renewal. The claim that Appellant's Observation in December of 2018 was Ineffective is inaccurate as noted above at the Observation referred to. The claim that Appellant refused to sign the December 2018 Observation Form is inaccurate. Mr. Redler was required to notify the Appellant that the Observation Form was ready and failed to do so. Further, the claim that Appellant was reprimanded is untruthful as Redler testified that he never reprimanded Appellant. **(Pa330, Redler Deposition 5/11/2022, T28:23-25, T29:1-3; Pa211, Smith Dep., T173:11-13)** It was claimed that Appellant ordered the wrong AP Testing Materials which delayed actual testing but, the Appellant was not responsible for ordering testing materials. Appellant testified that in her first two years at New Brunswick High School, she did not order testing materials and that this was usually the job of guidance counselors. Redler admitted that the Testing Coordinator was responsible for ordering AP Testing

Materials. **(Pa348, Redler Dep. 10/28/22, T44:20-25, T45:1-8; Pa211, Smith Deposition, T179:6-15, T180:14-18)**. The claim that Appellant humiliated Child Study Team members in a meeting by claiming that they did not do their job intentionally mis-stated what Appellant actually stated in the meeting which was we dropped the ball; she did not single out the Child Study Team. Appellant included herself in taking responsibility. Further, this meeting was a closed-door meeting involving faculty, therefore, there was no embarrassment for all of the members of the Child Study Team as was alleged as one person complained of this. **(Pa211, Smith Dep., T177:1-25, T178:1-16)** The claim that Appellant responded to multiple students with statements about not sleeping with them is inaccurate. A statement made to one student was taken out of context. Appellant actually stated to the student a phrase to the effect that the student woke up on the wrong side of the bed and that the student should not be disrespectful to Appellant. While Redler tried to use this statement taken out of context to discredit Appellant, he never met with Appellant about this statement which he now claims to be important. **(Pa211, Smith Deposition, T175:1-19, 22-25, T174:14-17)** The claim that Appellant planned poorly and students missed classes is inaccurate. Mandatory testing was taking place and the common practice was to use classrooms for the testing which meant that students not testing received instruction in the cafeteria. **(Pa211, Smith Deposition, T157:2-25, T158:1-2)**. The claim that Appellant was not communicating with

Redler is refuted by the evaluation that Appellant received in the first year where she received a positive score and positive comments with regard to communication. **(Pa211, Smith Dep.,T195:3-16; Pa298, Pa314, Pa326, Pa327)** Finally, the claim that Appellant did not communicate a potential threat is inaccurate. The student who made the threat was with a Child Study Team member who notified Mr. Redler of the student's comments. When the Child Study Team member left, the student was then in the custody of Appellant who stayed with the student until the student's parents picked the student up. **(Pa211, Smith Dep., T181:7-25, T182:1-25, T183:1-3)**

The Trial Court failed to review the documentary evidentiary material presented by the Appellant which refuted the claims made by the Defendants and set forth material issues in dispute which should have resulted in a denial of dismissal of the cause of action for discrimination based on race. The record made it clear that prong 2 was satisfied for proving discrimination based on race. Clearly, there was no issue with job performance so that adverse treatment and termination was likely because of race. The Trial Court failed to consider the record presented by Appellant and reached the wrong conclusion by relying on the Defendants' perspective.

It is requested that the Appellate Court reverse and remand this matter to the trial court so that the record can be completed. It is also requested that upon return to the trial court that the matter should be reassigned to another judge for completion. A

request is further made that the Appellate Court consider transferring this matter to another County on return to the Trial Court.

POINT V

APPELLANT PLED THE CAUSE OF ACTION OF AGE DISCRIMINATION WHICH WAS SUPPORTED BY THE RECORD. THE TRIAL COURT FAILED TO ACKNOWLEDGE SUPPORT IN THE RECORD AS PRESENTED BY APPELLANT ILLUSTRATING AGE DISCRIMINATION AND DISMISSED THE PROPERLY SUPPORTED CAUSE OF ACTION FOR AGE DISCRIMINATION

The cause of action of age discrimination was satisfied by the Appellant because Appellant was in a protected category based on age as she was beyond 40 years of age, she was performing her job satisfactorily as addressed at the cause of action of racial discrimination, she was subjected to adverse employment action as she was terminated from employment and Appellant was replaced by Ms. Damasceno who was less than forty years of age and Caucasian. Victor supra at 30. Redler testified at deposition that Ms. Damasceno replaced Appellant and had several years of experience working as a Vice Principal in Paterson. **(Pa348, Redler Dep 10/28/2022, T93)** Appellant having supported the position taken that the adverse acts noted above were discriminatory has satisfied the first parts of the burden-shifting requirements set forth under McDonnell Douglas. Appellant has shown that

she was a member of a protected category based on age, she was performing her job satisfactorily, she was subjected to adverse employment action as she was terminated and she was replaced by someone not in her protected category based on age who was less qualified. The record supports the fact that the Appellant satisfied all factors for discrimination based age. There was no legitimate business reason provided by the Respondents for the termination of Appellant and Appellant was replaced by someone not in the protected category based on age who was less experienced and therefore less qualified than Appellant. The Respondents made an erroneous claim when it was stated that Appellant was replaced by an African-American man. That is inconsistent with the deposition testimony of Mr. Redler who testified that Ms. Damasceno replaced Appellant.

The Trial Court failed to consider the record and documentary evidentiary material presented by the Appellant and instead adopted the position of the Respondents in total. This failure to consider the Appellant's argument as well as documentary evidentiary material is evident throughout the decision of the Trial Court. The record presented by the Appellant set forth material issues in dispute.

It is requested that the Appellate Court reverse and remand this matter to the trial court so that the record can be completed. It is also requested that upon return to the trial court that the matter should be reassigned to another judge for completion or the matter should be considered for transfer to another County.

POINT VI

APPELLANT PLED THE CAUSE OF ACTION OF HOSTILE WORK ENVIRONMENT AND HARASSMENT WHICH WAS SUPPORTED BY THE RECORD. THE TRIAL COURT FAILED TO ACKNOWLEDGE SUPPORT IN THE RECORD BY THE APPELLANT AND REACHED AN IMPROPER CONCLUSION AND DISMISSED THIS CAUSE OF ACTION, Pa1, Pa196, Pa211 at T137, T138, T264, T390; Pa264, Pa296

In Lehmann v. Toys R Us, the Court formulated the basic standard for determining whether acts of harassment in the workplace constituted sexual harassment which is in violation of the Law Against Discrimination. Lehmann v. Toys R Us, 132 N.J. 601, 603-604(1999) When a Plaintiff claims hostile work environment what must be shown is that (1) the complained of conduct would not have occurred but for the person's protected status (2) and it was severe or pervasive enough to (3) make a reasonable person in the same protected status believe that (4) the working environment was hostile and abusive. Id. at 603-604. The Lehmann Test applies generally to hostile work environment claims. Taylor v. Metzger, 152 NJ 490, 497 (1998).

The complaint of harassment must be examined under the standard of severe or pervasive conduct which provides that one incident of harassment or harassing conduct can create a hostile work environment. Id. at 499. A single episode or

instance of racial harassment can establish a hostile work environment per the severe conduct standard. Davis v. Essex Group, Inc. 937 F.2d 1264, 1274 (1991). The use of one epithet created an issue of material fact of whether plaintiff's work environment was hostile in Taylor. Taylor, supra. at 499. Whether conduct is so severe as to cause the environment to become hostile or abusive can be determined by viewing all of the circumstances and this is a determination to be made by the trier of fact. Id. at 502. The connotation of the epithet itself can materially contribute to the severity of the remarks. Id. at 502. When a remark with racial connotations is uttered by a superior, the gravity of the situation is magnified. Id. at 503. One can still have a hostile work environment even if there is no actual change in the work environment. Id. at 505. Hostile work environment claims are based on the cumulative effects of the individual acts. Shepherd v. Hunterdon Dev. Ctr., 174 N.J. 1, 19-20 (2002).

The individual acts are adverse employment actions which can be discrete or non-discrete actions; discrete actions take place on a given day and the start and finish happens on that day whereas non-discrete actions consist of a pattern or series of acts, any one of which may not be actionable as a discrete act, but when viewed cumulatively constitute a hostile work environment. National Passenger Corporation v. Morgan, 536 US 101, 122 (2002). In looking at the cause of action, it accrues on the date on which the last act occurred, notwithstanding that some of

the component acts of the hostile work environment [have fallen] outside of the statutory time period. Id. at 122. Non-discrete adverse acts are those acts which fall under hostile work environment actions; hostile work environment actions are distinguished from discrete acts and represent repeated conduct. Shepherd supra at 19. The unlawful acts do not occur on one day but occur over a series of days or years and are based on the cumulative effect of individual acts. Id. at 19.

Appellant set forth a prima facie case of hostile work environment and harassment. The complained of conduct, the adverse treatment in the workplace would not have happened but for Appellant's race, the treatment subjected to by Redler in 2019 was severe and pervasive and another African-American person in her place would believe that the workplace was hostile and abusive. The claim that Appellant did not establish that the complained of conduct had to do with race or age based on her deposition testimony must be disregarded by the Appellate Court. This is because the deposition testimony was not complete because Appellant's Counsel did not have the opportunity to question Appellant. The Respondent was supposed to reschedule the deposition for continuation but failed to do so. This appears to be a strategy employed which results in no questions by this Counsel appearing in the deposition record. It is interesting that the deposition lasted until about 5:30 P.M. and was to be rescheduled so that the testimony could be completed and it was never rescheduled. Reliance on the one-sided deposition testimony should

not be countenanced by this Court. The exhibits presented in this case establish the discrimination complained of. The complained of treatment by Redler was scrutiny when Appellant took time off from work for physician appointments. Appellant was required to bring a note, but, Caucasian employees under the same circumstances did not have to bring a note. **(Pa407).** Appellant was repeatedly directed by Redler to leave staff meetings to take care of some issue within the school while Caucasian employees were never asked to address issues within the school. Appellant was directed to assist in correcting student schedule problems which were caused by Lugo who was not reprimanded for this major fiasco which resulted in students sitting in the auditorium for months, yet, Appellant was criticized for allegedly ordering the wrong AP Testing materials. The position taken by Redler was that he did not want Costlow to be reprimanded and have a write-up in her folder but he had no difficulty issuing to Plaintiff a letter of non-renewal a week after she addressed Costlow's use of a racial slur. Appellant had a set number of staff that reported to her. It became common for Redler to allow Vice Principal Lugo who is Caucasian to discipline staff that reported to Appellant with Appellant having no knowledge of this. In one instance, Instructor Velez was terminated by Lugo for a comment he made about the inappropriate way that some female students dressed and Appellant learned of this termination later. Lugo with Redler's blessing had a problem with a statement made by a Hispanic teacher which resulted in him quickly being

terminated from employment, whereas a Caucasian teacher freely repeating the N word had differential treatment as her contract was renewed and she continued to work in the New Brunswick School System. Ms. Costlow was reported on two separate dates in 2019 for using the N word. **(Pa383 for 1/4/19 and Pa294 for 5/2019)** Committees that Appellant headed were cancelled by Redler. Appellant experienced hostile treatment from Redler not because he became more anxious in his work but because he engaged in discrimination towards Appellant based on race. In the winter of 2018 and after that time, Appellant testified that Redler became curt, his tone in communicating with Appellant changed and he was not polite to her and no longer open and available. **(Pa1, Complaint and Jury Demand; Pa196, Plaintiff's Answers to Interrogatories; Pa211, Smith Dep., T134:3-25, T135:1-10)**. Appellant testified that she was being treated in a biased way and clearly noted that in a number of circumstances, Caucasian Vice Principals were treated differently and better than she was treated when it came to being informed about issues at school. The issue was the hostile work environment created by Redler. **(Pa 211, Smith Dep., T264:1-9, T137:1-5, 10-22, T138:6-25)**

There was differential treatment and Appellant testified that there was an ever-increasing work load and she was subjected to bias by Redler. **(Pa211, Smith Dep., T137:9-10)** Appellant complained of bias against her by Redler when she met with Dr. Johnson who did nothing. **(Pa211, Smith Dep., T264:1-9)** This workload

included having to complete work that should have been completed by other Vice Principals including having to conduct Observations that should have been performed by other Vice Principals. Having to complete evaluations that should have been completed by Ms. Lugo resulted in differential treatment because Ms. Lugo was absolved of work that was her responsibility and Ms. Lugo was left to work on the scheduling problems which she caused. The workload increase and the differential treatment that Appellant experienced was based on race. The fact that Redler failed to notify Appellant that an Observation was ready for review does not entail a reprimand which is an illogical statement. There was no reprimand, however, the simple claim that Appellant had not reviewed the Observation was the result of Redler's failure to communicate that the Observation was ready for review on the platform being used. The improper motive here is the misplaced use of the word reprimand in simply discussing the fact that Redler failed to give notice that the Observation was ready for review. Appellant had to work on her vacation**. (Pa408)**

Because Appellant did not have the opportunity to complete her deposition, she was unable to testify to the discrimination that she experienced from Redler. The statements by the teachers which were racially charged were minimized by Redler and other Defendants despite the serious impact that it had on the students and Appellant. Appellant did not have to experience racially charged statements being made to her specifically per Dixon v. Rutgers to be negatively impacted by those

statements that were made by Caucasian employees. Appellant was impacted by the treatment subjected to and saw Dr. Young for counsel. **(Pa390, Dr. Young Report)**

Appellant's deposition was not completed as it is absent questioning by this Counsel, therefore, the claim that the only discrimination Appellant experienced were the comments by the teachers is inaccurate. The treatment that Appellant was subjected to denotes a hostile work environment where Appellant experienced harassment which was based on race. The Trial Court ignored the record that was presented by the Appellant, then Plaintiff. In the Trial Court analysis, there was reference to Appellant's deposition transcript, but, as noted by this Counsel, the deposition transcript was one-sided because the Appellant did not have a chance to question Appellant and the deposition was never rescheduled. The reliance on the deposition transcript provides only questioning from the Respondent and is absent clarification or further explanation by the Appellant regarding what was testified to. The Trial Court wrote that the Appellant never complained to anyone regarding the harassment which is not true as in Appellant's opposition papers it was made clear that complaints had been made to Aubrey Johnson, Superintendent of Schools. Appellant told Aubrey Johnson that she was being treated differently and that there was bias against her. The Appellant also provided notice to Marnie McKoy regarding the engagement in the use of racial slurs by Ms. Costlow with this notice being provided to McKoy after the second incident of Ms. Costlow using the word

nigger in her class to the students' dismay. The Trial Court repeatedly referenced Appellant being reprimanded by Redler which is what was stated by the Respondents, however, as noted in this Brief, when Redler was deposed by this Counsel and in another matter, he testified that he had never reprimanded Appellant. Somehow, the Trial Court ignored this testimony made by Redler under oath. Despite the record, the Trial Court wrote that there was one incident of Costlow using a racial slur which is not correct. As Appellant noted in the Summary Judgment brief and in this brief, Costlow used the word nigger in January of 2019 and at that time students complained to Ms. Shelton and Costlow was written up. In May of 2019, Costlow again used the racial slur nigger in her class to her students who could be seen and heard in the audio/video objecting to Costlow using the word nigger. It was on the date of May 1, 2019 that Appellant and Ms. Shelton notified Marnie McKoy, Superintendent of Human Resources of the actions of Costlow. The Court then appears to justify the use of racial slurs and cites to Taylor v. Metzger and notes that the racial slur used must be repeated to be actionable which is inconsistent with the position noted in Taylor with regard to racial slurs. Taylor v. Metzger supra at 490. In Taylor it is noted that uttering a racial slur just once creates a hostile work environment. Id. at 499. With regard to Arato telling students that she was happy that Trump was going to build a wall, it is noted that Appellant did not believe that this statement was discriminatory. That is not accurate, as Appellant did believe that

the statement was discriminatory because the students that it was stated to were Mexican and Hispanic.

It is requested that the Appellate Court reverse and remand this matter to the trial court so that the record can be completed. It is also requested that upon return to the trial court that the matter should be reassigned to another judge for completion. A request is further made that the Appellate Court consider transferring this matter to another County on return to the Trial Court.

POINT VII

APPELLANT PLED THE CAUSE OF ACTION OF RETALIATION WHICH RESULTED FROM APPELLANT ENGAGING IN PROTECTED ACTIVITY WHICH INVOLVED VIOLATION OF THE SCHOOL POLICY WHICH PROHIBITS DISCRIMINATION, YET THE TRIAL COURT SPENT A GREAT DEAL OF TIME REJECTING THIS CAUSE OF ACTION Pa294, Pa385, Pa394

The prima facie elements under the New Jersey Law Against Discrimination for retaliation are: (1) The Plaintiff was in a protected class; (2) The Plaintiff engaged in protected activity known to the employer; (3) The Plaintiff thereafter was subjected to an adverse employment action; (4) there was a causal link between the protected activity and the adverse employment consequence. Victor v. State, 203

N.J. 383, 409 (N.J. 2010) See also Carmona v. Resorts Int'l. Hotel, Inc. 189 N.J. 354, 371-373 (2007). See also Romano v. Brown & Williamson Tobacco Corp., 284 N.J. Super. 543, 548-49 (App. Div. 1995). Plaintiff only needs to show that retaliation could be the reason for the employer's actions which requires only a modest showing by the Plaintiff. Zive v. Stanley Roberts, Inc., 182 N.J. 436, 447 (2005).

Appellant engaged in protected activity because she was involved as was Ms. Shelton in addressing the issue where Costlow repeatedly uttered the N word in her classroom to the objection of the students and her behavior was recorded by the students and presented to Appellant and Ms. Shelton. Appellant met with the students and another teacher, Ms. Melton who presented the issue to Appellant along with the students. Ms. Shelton met with Costlow and disciplined her. Ms. Shelton and Appellant sent a letter to Marnie McKoy, Superintendent of Human Resources alerting her to what had taken place. The video recording was sent to Ms. McKoy also. **(Pa384, Letter and Video to Marnie McKoy, Pa294, Smith Affidavit)** This presentment of the use of the N word, letter and recording to Ms. McKoy was engagement in protected activity. There was violation of the policy which prohibits discrimination which is in place at the New Brunswick School System and discrimination is unlawful. The information was forwarded to Ms. McKoy on May 1, 2019. After Ms. McKoy received this information, she alerted Redler to this issue

and forwarded the recording and the letter to Redler. In the following week, on May 9, 2019, Appellant received a letter of non-renewal of her contract for the following school year. In addition, Ms. Shelton received a letter of non-renewal of her contract for the next school year. The Respondents were asked to produce the letter that Appellant and Ms. Shelton sent to Marnie McKoy after Costlow engaged in use of the racial slur nigger in the second incident that happened in May of 2019. The Respondents failed to produce this letter as well as the second recording of Costlow using the racial slur, so, to claim that Appellant was not involved in addressing this incident in May of 2019 is without merit. Similarly, the position taken by the Respondents that the use of the racial slur was not directed to anyone in particular so it had no impact is a meritless position which is not supported by the case law. Costlow having been disciplined in January of 2019 by Ms. Shelton for the use of the same racial slur knew that the use of the word was prohibited and using this word was not a teachable moment and was reprehensible, yet she used it again.

Appellant satisfied all of the prongs for the retaliation claim and this was refuted by the Respondents and was accepted by the Trial Court. On May 1, 2019, Appellant was notified of Costlow's use of the racial slur because the students were brought to her office by another teacher who had initially received the complaint from the students and had reviewed the audio/video footage. Appellant and Ms. Shelton then discussed the issue. Appellant met with the other teacher and the students and Ms.

Shelton spoke with Ms. Costlow. Then Appellant and Ms. Shelton prepared a letter to Marnie McKoy and the letter and the audio/video footage was sent to Marnie McKoy. One week later both Appellant and Ms. Shelton received notices regarding their contract non-renewals. Appellant is in a protected category based on race. Appellant engaged in protected activity by reporting the violation of the school policy which prohibits discrimination and which was violated by Ms. Costlow. **One week later, Appellant received a letter notifying her that her contract would be renewed for the next school year. (Pa385)** There is a causal link between the engagement in protected activity and the termination from employment. The record supports the facts noted regarding retaliation. Here there is a direct link between this protected activity and termination. The Respondents denied that there was a link with the Trial Court adopting this position despite the glaring evidence in the record. Clearly, Redler was motivated to non-renew Appellant because she engaged in protected activity. The Trial Court again engaged in impermissible weighing of the evidence rather than determining that there was documentary, evidentiary material in the record that supported material issues in dispute. The cause of action of retaliation was obvious based on the facts.

It is requested that the Appellate Court reverse and remand this matter to the trial court so that the record can be completed. It is also requested that upon return to the trial court that the matter should be reassigned to another judge for completion. A

request is further made that the Appellate Court consider transferring this matter to another County on return to the Trial Court.

POINT VIII

AUBREY JOHNSON WORKED AS THE SUPERINTENDENT OF SCHOOLS AND WAS ON NOTICE FROM APPELLANT THAT SHE WAS RECEIVING DIFFERENTIAL TREATMENT AND FELT THAT THERE WAS A BIAS AGAINST HER AND FAILED TO ADDRESS HER CONCERNS WHICH HE WAS ON NOTICE OF Pa1

According to N.J.S.A. 10:5-12(e), it shall be an unlawful employment practice, or as the case may be, unlawful discrimination for any person whether an employer or an employee or not to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this act or to attempt to do so. N.J.S.A. 10:5-12(e). The tort of aiding and abetting involves three elements which are: (1) the party whom the defendants aid must perform a wrongful act that causes the injury; (2) the defendant must be generally aware of his role as a part of the overall illegal or tortuous activity at the time that he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation. Halbestram v. Welch, 705 F.2d 472, 477 (DC Cir. 1983). In Hurley v. Atlantic City Police Department, the supervisor was found to have aided and abetted the Atlantic City Police Department in discriminating against Hurley as Hurley was subjected to sexual harassment and the

supervisor failed to act and address this violation. Hurley v. Atlantic City Police Department, 174 F.3d 95, 127 (1999). In Cardenas v. Massey, the supervisory employee was found to be liable for discrimination for aiding and abetting the employer's violation. Cardenas v. Massey, 269 F.3d 251 (2001). Similarly, in the more recent case of Cichetti v. Morris County Sheriff's Office, the Court ruled that the supervisor's individual liability existed for acts of discrimination or for creating a hostile work environment via aiding and abetting which applies to any person engaged in this behavior. Cichetti v. Morris County Sheriff's Office, 194 N.J. 563 (2008).

Superintendent Johnson was on notice from Appellant regarding the bias that she was experiencing and the differential treatment that she was receiving. After Appellant met with Aubrey Johnson, he failed to address the issues presented to him by Appellant and therefore, he can be held liable for the discrimination and engagement in aiding and abetting. Furthermore, Johnson is in the same office as Marnie McKoy and should have been aware of the issue with Costlow using the racial slur in this second incident, yet, he took no action. The statement that Johnson is Hispanic does not mean that he is absolved with regard to the discrimination experienced by the Appellant. Of course, the Defendants claimed that there was no aiding and abetting liability. The Court adopted this position, despite the record

presented and case law which is inconsistent with the role that the Court should undertake when presiding over a Summary Judgment proceeding.

It is requested that the Appellate Court reverse and remand this matter to the trial court so that the record can be completed. It is also requested that upon return to the trial court that the matter should be reassigned to another judge for completion. A request is further made that the Appellate Court consider transferring this matter to another County on return to the Trial Court.

POINT IX

PUNITIVE DAMAGES WERE WARRANTED IN THIS MATTER AND THE COURT REJECTION OF THIS REQUEST SHOULD BE REVIEWED BY THE APPELLATE COURT AND REVERSED BASED ON THE FACTS DELINEATED IN THIS MATTER. Pa1, Pa211

The Court considered whether punitive damages could be awarded and found that punitive damages could be awarded in Lehmann v. Toys 'R' Us, Inc., supra at 601. There were two conditions that had to be met as prerequisites to the award of punitive damages in a discrimination suit under the New Jersey Law Against Discrimination. Rendine v. Pantzer, 141 N.J. 292, 313 (1995). Those two requirements are: (1) "actual participation in or willful indifference to the wrongful conduct on the part of upper management" and (2) "proof that the offending conduct is `especially egregious." Id. at 314. Baker v. National State Bank, 161 N.J. 220 (N.J. 1999).

In this case, there was willful indifference to the actions of the teachers that engaged in discriminatory behavior. The blatant use of a racial slur by Costlow occurred in two separate incidents, one in January of 2019 and again in May of 2019. The actions of Ms. Costlow were made known to the Superintendent of Human Resources, Marnie McKoy as well as Redler. There was blatant indifference to the wrongful actions of Ms. Costlow where she repeatedly uttered the racial slur, nigger and asked the students why can't she use the word nigger. This behavior was egregious and the complaint by students in May of 2019 represented the second incident of Ms. Costlow using the racial slur. Further, as noted in Taylor v. Metzger, one utterance of a racial slur establishes a hostile work environment. Taylor and other cases of that type establish the fact that use of racial slurs is egregious. Therefore, the requirements to warrant the award of punitive damages are present in this case. Respondents predictably claimed that there are no facts to support the award of punitive damages when the actions of Costlow were well known to Respondents, so, the read is that this kind of behavior is allowed. This position taken by the Respondents was adopted by the Trial Court despite the record presented. Punitive damages are warranted and alert the offender that the behavior for which punitive damages are awarded should never happen again. The award of punitive damages is necessary to bring about the conformance of behavior and put the school system on notice that the unlawful behavior has to be addressed.

It is requested that the Appellate Court reverse and remand this matter to the trial court so that the record can be completed. It is also requested that upon return to the trial court that the matter should be reassigned to another judge for completion. A request is further made that the Appellate Court consider transferring this matter to another County on return to the Trial Court.

CONCLUSION

For all of the reasons set forth in this Brief, the Appendices, case law and court rules, it is requested that the Appellate Court reverse and remand this matter to the trial court so that the record can be completed. It is also requested that upon return to the trial court that the matter should be reassigned to another judge for completion. A request is further made that the Appellate Court consider transferring this matter to another County on return to the Trial Court.

Luretha M. Stribling
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Attorney for the Appellant

DATED: June 30, 2024

RENE EDGHILL SMITH, Plaintiff/Appellant, vs. NEW BRUNSWICK BOARD OF EDUCATION, AUBREY A. JOHNSON, SUPERINTENDENT OF NEW BRUNSWICK SCHOOLS, KENNETH M. REDLER, PRINCIPAL OF NEW BRUNSWICK HIGH SCHOOL, JOHN DOES 1-10, JANE DOES 1-10, ABC CORPORATIONS A THROUGH Z, Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001642-23 CIVIL ACTION ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY LAW DIVISION: SOMERSET COUNTY DOCKET NO. SOM-L-1445-20 SAT BELOW The Honorable Kevin M. Shanahan, A.J.S.C.

BRIEF OF DEFENDANTS-RESPONDENTS NEW BRUNSWICK BOARD OF EDUCATION, AUBREY A. JOHNSON AND KENNETH M. REDLER

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PRELIMINARY STATEMENT

Plaintiff Rene Edghill Smith ("Plaintiff") appeals from the Trial Court's award of summary judgment in favor of Defendants New Brunswick Board of Education ("NBBOE"), Superintendent Aubrey A. Johnson ("Johnson"), and Kenneth M. Redler ("Redler") (collectively, "Defendants"), and from the Trial Court's dismissal of her Complaint against the Defendants.

This action arises out of Plaintiff's former employment with the NBBOE. After her contract of employment was not renewed, Plaintiff brought a complaint against Defendants, alleging: (1) race discrimination under the New Jersey Law Against Discrimination ("LAD") [Count I]; (2) hostile work environment and harassment under LAD [Count II]; (3) retaliation under LAD [Count III]; and (4) age discrimination in violation of LAD [Count IV].

In her appeal, Plaintiff argues that the Trial Court erred by:

1. allegedly granting summary judgment when "the record was incomplete" [Point I];
2. allegedly improperly weighing the evidence and discounting evidence to Plaintiff's detriment [Point II];
3. engaging in bias and favoring the Defendants' position [Point III];
4. allegedly failing to acknowledge the record with respect to Plaintiff's race discrimination claim [Point IV];

5. allegedly failing to acknowledge support in the record for Plaintiff's age discrimination claim [Point V];
6. allegedly failing to acknowledge support in the record for Plaintiff's hostile work environment claim [Point VI];
7. allegedly "spen[ding] a great deal of time rejecting" Plaintiff's retaliation claim [Point VII];
8. by ostensibly granting summary judgment as to Johnson [Point VIII]; and
9. by dismissing Plaintiff's claim for punitive damages [Point IX].

Respectfully, the Trial Court's decision should be affirmed for the reasons expressed in the well-reasoned opinion of the Honorable Kevin M. Shanahan, A.J.S.C. (Da1-57). As the Trial Court determined, Defendants produced sufficient evidence of their race- and age-neutral justification for their decision not to renew Plaintiff's employment contract, and she failed to demonstrate a disputed material issue precluding summary judgment. As aptly detailed by Judge Shanahan:

- The record unequivocally establishes that Plaintiff cannot show that she was subjected to any hostile work environment or that the decision not to renew her employment was because of her race or age.
- The record evidence establishes that the non-renewal decision was based on Plaintiff's job performance. More specifically, despite Defendants' requests that Plaintiff improve her poor communication skills, emails with Plaintiff and

her written evaluations show that Plaintiff's performance continuously suffered with regard to her lack of communication.

- Plaintiff also exercised poor judgment, unprofessionalism and made mistakes in the execution of her duties. Plaintiff's performance deficiencies were numerous and well-documented.
- There is no record evidence whatsoever of racial animus or age bias.

For all of these reasons, Plaintiff's discrimination and harassment claims should remain dismissed. In addition, as detailed below, Plaintiff's retaliation claim under LAD [Count III] should remain dismissed because there is no record evidence to support any claim that she was subjected to retaliation for engaging in activity protected by LAD. In sum, there are no facts or law to support Plaintiff's claims.

To the extent Plaintiff contends discovery was incomplete, this argument is untimely and also lacks merit because she cannot establish that further discovery would somehow supply the missing elements of her causes of action. Accordingly, the Complaint should remain dismissed in its entirety, with prejudice.

PROCEDURAL HISTORY

Plaintiff filed her initial Complaint on December 1, 2020 alleging various violations of LAD by the Defendants (the "Complaint"). (Pa1-Pa25). Defendants filed their Answer to the Complaint on February 11, 2021. (Pa27-Pa43). The Court ordered the parties to mediation by notice dated May 26, 2021. (Pa44).

By letter dated April 8, 2022, with Plaintiff's counsel's consent, Defendants requested a 60-day extension of discovery. (Da58). The discovery period was extended to July 6, 2022. (Da59). The parties thereafter sought another extension of discovery, which was granted, and by Order dated July 5, 2022, the discovery period was extended 177 days to allow for the completion of discovery. (Da60). Thereafter, Plaintiff's deposition was conducted remotely on August 17, 2022. (See Pl. Tr.).

By letter dated September 27, 2022, Plaintiff submitted another Consent Order to extend discovery, which *she* prepared—wherein she did not indicate that her deposition still needed to be completed. (Da62). On September 29, 2022, the Court signed that Consent Order. (Da63). In that Consent Order, the December 31, 2022 discovery deadline was extended to February 28, 2022, for the completion of *Defendants'* depositions (not Plaintiff's) and any expert discovery. (Ibid.).

On October 10, 2022, Defendants moved to compel certain discovery from Plaintiff. (Da65). Plaintiff opposed that motion (Pa57-71) and cross-moved to compel discovery (Pa72-81). Plaintiff, however, did not request that the Court compel the continuation of her own deposition. (Ibid.) Following oral argument, on November 4, 2022, the Court granted Defendants' Motion to Compel Discovery (Pa82-84), and partially granted Plaintiff's Cross-Motion (Pa85-86).

On November 30, 2022, Defendants moved for another extension of discovery. (Pa87-92). On December 8, 2022, and for the first time since her

deposition was taken on August 17, 2022, Plaintiff, by cross motion, sought to compel her own deposition at Defendants' expense. (Pa93-101). Following oral argument, on December 16, 2022, the Court granted Defendants' motion and denied Plaintiff's cross motion. (Pa113-116). Significantly, Plaintiff did not move the Trial Court to reconsider that decision nor did she file an interlocutory appeal. Plaintiff also did not move to extend discovery again for the purpose of conducting any further discovery.

Discovery was complete, as the parties exchanged written discovery and conducted depositions. Following the close of the discovery period on March 31, 2023, Defendants moved for summary judgment seeking to dismiss the Complaint. (Pa117-143, Da88-389). Plaintiff opposed the motion (Pa144-188), and Defendants responded appropriately (Da400-468). On May 12, 2023, the parties argued the motion before the Honorable Kevin M. Shanahan, A.J.S.C. By Order dated January 5, 2024, the Trial Court granted Defendants' motion for summary judgment, thereby dismissing the Complaint, in its entirety and with prejudice. (Pa189-190, Da1-57). On February 4, 2024, Plaintiff filed a Notice of Appeal.

STATEMENT OF FACTS

Defendants briefly summarize the pertinent facts of record, which are thoroughly recounted in the Trial Court's comprehensive written opinion. (Da1-57). Plaintiff worked at the NBBOE for three years from 2016 to 2019 as one of four

Vice Principals at the New Brunswick High School (the "High School"). (Da101-127). Plaintiff, a Black woman, was 56 years old at the time Defendants hired her. Plaintiff was not tenured, so her employment was governed by employment contracts, each with a one-year term. (Da124-127). At the end of the 2018-2019 school year, the NBBOE and Johnson decided not to renew Plaintiff's employment, following Redler's recommendation for her non-renewal. Plaintiff was 59 years old at that time. (Pa20 ¶101, Da89-90).

There is nothing in the record to reflect that any racist or ageist remarks were ever made by Plaintiff's supervisors or the decisionmakers. Plaintiff conceded this fact during her deposition. (Pl. Tr. 237:8-24). There is no evidence that preferential treatment was given to employees not in the same protected class as Plaintiff. To the extent Plaintiff believes Redler's lack of communication towards the end of her employment constituted discrimination, she testified that the other Vice Principals and other staff shared similar complaints. (Pl. Tr. 224:21 to 225:13; 226:3-14; 227:15-229:19). Plaintiff also admitted that she was not the only Vice Principal who was dissatisfied with receiving a low score on an observation from Redler—Vice Principal Suznovitch (Caucasian) experienced the same. (Pl. Tr. 209:4-15; 235:2-20). The record shows that Redler emailed all of his Vice Principals to ensure all observations are completed, that the other Vice Principals—like Plaintiff—were required to perform additional observations as part of a team effort (Da280), and that

to the extent Plaintiff took over additional observations for which Vice Principal Lugo ("Lugo") was previously responsible, it was because Lugo was busy with student scheduling. (Pl. Tr. 130:2-4, 317:20 to 321:1).

It is also significant that Redler, who recommended Plaintiff's nonrenewal, also made the decision—just three years earlier—to hire Plaintiff in the first instance and specifically brought her on to work with him at the High School, at a time when her race and age were obvious to him. (Pl. Tr. 115:21 to 116:24; Da97-100).

Plaintiff's retaliation claim is based on remarks made by two different teachers to students on two separate occasions. The first that took place in the second-half 2018, when it was reported to Plaintiff by others that a teacher, Deirdre Arato ("Arato") "stated to her class that she was in support of Trump building a wall" (*i.e.*, the "Arato Comment"). (Pl. Tr. 238:14-24). Arato made that comment in front of her students (not Plaintiff), and Plaintiff—who supervised Arato—gave her a verbal warning. (Pl. Tr. 238:14-24; 241:19-22). No one disputes that the comment was made or that the teacher deserved admonishment for it.

The second incident involved a different Vice Principal's one-time interaction with Paula Costlow ("Costlow"), a tenured 17-year veteran teacher who had no other disciplinary issues. (Pl. Tr. 258:1-7). Specifically, in January 2019, Costlow used the "n" word in front of her students in response to a student using the "n" word first and then she questioned why the student could use the "n" word with impunity when

it would be inappropriate for her to use it (the "Costlow Incident"). (Da274). Two students complained to Vice Principal Michelle Shelton ("Shelton")—not Plaintiff—and it was Shelton who issued Costlow a written reprimand and spoke with Costlow. (Da272; Pl. Tr. 252:1-7, 253:18-21). Again, no one has disputed that Costlow said the racial slur or that a reprimand was warranted. That written reprimand remains in Costlow's personnel file. (Ibid.). Redler expressly indicated that he supported the discipline and he met with Costlow and her union representative after the incident. (Redler Tr.[1] 62:21-24; 116:3-9). The indisputable record evidence establishes that aside from the Costlow Incident, there were no other racial slur incidents involving anyone. (Pl. Tr. 258:1-3; Redler Tr. 128:1-2).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS BECAUSE THERE ARE NO MATERIAL FACTS IN DISPUTE AND THE LAW IS IN THEIR FAVOR

As this appeal requires a review of a decision on summary judgment, this Court derives the facts from the evidence submitted by the parties in support of, and in opposition to, the summary judgment motion, and which must be viewed in the light most favorable to Plaintiff as the party who opposed entry of

[1] "Redler Tr." refers to the transcript of the deposition of Kenneth Redler, conducted on October 28, 2022.

summary judgment. Edan Ben Elazar v. Macrietta Cleaners, Inc., 230 N.J. 123, 135 (2017). The principles governing a motion for summary judgment have been stated countless times. The purpose of summary judgment, of course, is to provide a prompt and inexpensive means of disposing a claim. As stated many years ago by Chief Justice Vanderbilt:

> It is designed to cut through sham and frivolity . . . and lay the case before the trial court in its true light. If, when so viewed, there appears to be no genuine triable issue of fact, the relief should be granted.

[Monmouth Lumber Co. v. Indemnity Insurance Co. of North America, 21 N.J. 439, 448 (1956).]

Summary judgment is used to pierce groundless claims and preserve judicial resources for cases which meritoriously command attention. Robins v. Jersey City, 23 N.J. 229, 240-41 (1957). Where there is only one reasonably justifiable conclusion to be made from undisputed facts, summary judgment is proper. Lima & Sons, Inc. v. Borough of Ramsey, 269 N.J. Super. 469 (App. Div. 1994). Litigants should be spared the expense of an unnecessary trial where no genuine issue of material fact exists. Robins, supra, 23 N.J. at 241; Costello v. Ocean Cnty. Observer, 136 N.J. 594, 605 (1994) (calling summary judgment an "important tool for disposing of non-meritorious … lawsuits").

A genuine issue of material fact in opposition to summary judgment must be shown by "affidavits" or other "competent proof," and not "by oral argument

or briefs filed with the court, neither of which are verified." Raday v. Bd. of Ed. of Manville, 130 N.J. Super. 552, 556 (App. Div. 1974). Also, "mere allegations in the pleadings without affidavit or other evidentiary support may not prevent the rendering of the judgment." N.J. Mortg. & Inv. Corp. v. Calvetti, 68 N.J. Super. 18, 25 (App. Div. 1961). As the Supreme Court has instructed, "if [the opposing] party offers 'fanciful, frivolous, gauzy or merely suspicious allegations of fact in support of the claim,' the court is justified in granting summary judgment." Maher v. N.J. Transit R.O., 125 N.J. 455, 477-78 (1991) (citing Judson v. Peoples Bank & Tr. of Westfield, 17 N.J. 67, 74 (1954)).

In an appeal of an order granting summary judgment, appellate courts employ the same standard of review that governs the trial court. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016). As only a legal issue is involved in the absence of a genuine factual dispute, that standard is *de novo*, and the trial court rulings are not entitled to any deference. Inv'rs Bank v. Torres, 243 N.J. 25, 50 (2020); Manalapan Realty, L.P. v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995). Thus, the appellate court should first decide whether there was a genuine issue of material fact, and if none exists, then decide whether the trial court's ruling on the law was correct. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998).

Here, a review of the record reveals that there is no actual dispute as to the material statements of fact that support the dismissal of all of Plaintiff's claims. In sum, because there are no disputed material facts, and because the law is in Defendants' favor (as demonstrated below), the Trial Court's granting of summary judgment was warranted and should remain undisturbed.

POINT II

PLAINTIFF'S ARGUMENT THAT THE TRIAL COURT ERRED AND ENGAGED IN BIAS BY FAVORING DEFENDANTS' POSITION AND IMPROPERLY WEIGHING THE EVIDENCE IS MERITLESS AND NOT SUPPORTED IN THE RECORD

Plaintiff's arguments that the Trial Court erred and demonstrated bias by (a) favoring Defendants' arguments in support of their motion for summary judgment and ignoring Plaintiff's position, and (b) discounting and weighing the evidence to Plaintiff's detriment, are meritless. Plaintiff has failed to show how the judge improperly weighed the evidence. All legitimate inferences were viewed favorably to Plaintiff; she simply failed to provide sufficient evidence to support her claims, as detailed below. Plaintiff offers no evidence to suggest bias in the Trial Court's handling of discovery or the summary judgment motion. Panitch v. Panitch, 339 N.J. Super. 63, 71 (App. Div. 2001). The mere allegation of bias provides no basis to warrant relief. The trial judge's unfavorable decision to a party, rendered in what he conceives to be a discharge of his judicial duty, is not evidence of bias. Ex parte

Hague, 103 N.J. Eq. 505, 511 (1928).

POINT III

SUMMARY JUDGMENT DISMISSING PLAINTIFF'S RACE AND AGE DISCRIMINATION CLAIMS [COUNTS I AND IV] WAS WARRANTED BECAUSE SHE CANNOT ESTABLISH (A) SHE WAS PERFORMING HER JOB AT A LEVEL THAT MET HER EMPLOYER'S LEGITIMATE EXPECTATIONS, OR (B) THAT HER NON-RENEWAL OCCURRED UNDER CIRCUMSTANCES THAT GIVE RISE TO AN INFERENCE OF UNLAWFUL DISCRIMINATION

Counts I and IV of the Complaint allege race and age discrimination, respectively, in violation of LAD. The trial court was correct to dismiss these claims because Plaintiff cannot prove she was performing her job at a level that met her employer's legitimate expectations. Plaintiff also cannot show that Defendants' reasons for her non-renewal are pretext for discrimination as the circumstances surrounding that decision do not give rise to an inference of discrimination.

To prove a *prima facie* case of discrimination, a plaintiff must prove she: (1) was in the protected group; (2) was performing her job at a level that met the Defendants' legitimate expectations; (3) was nevertheless fired; and (4) Defendants sought someone to perform the same work after she left. Zive v. Stanley Roberts, Inc., 182 N.J. 436, 450 (2005). However, the "fourth element of a plaintiff's *prima facie* case requires a showing that the challenged employment decision (*i.e.*, failure

to hire, failure to promote, wrongful discharge) took place under circumstances that give rise to an inference of unlawful discrimination." Williams v. Pemberton Twp. Pub. Sch., 323 N.J. Super. 490, 502 (App. Div. 1999) (citation omitted). Circumstances that give rise to an inference of discriminatory motive include actions or remarks made by decisionmakers that evidence discriminatory animus, preferential treatment given to employees not in the same protected class, a pattern of recommending the plaintiff for positions for which she is not qualified and not for positions for which she is well-qualified, or from the timing or sequence of events leading to termination. See Chertkova v. Conn. Gen. Life Ins. Co., 92 F.3d 81, 91 (2d Cir. 1996) (collecting cases), cert. denied, 531 U.S. 1192 (2001).

If a plaintiff can establish a *prima facie* case, "a presumption arises that the employer unlawfully discriminated against the plaintiff." Zive, 182 N.J. at 450 (citing Grande v. St. Clare's Health Sys., 230 N.J. 1, 17-18 (2017)). The burden then flips to the employer to establish "the reasonableness of the otherwise discriminatory act or [to advance] a non-discriminatory reason for the employee's discharge." Id. (citations omitted). If an employer can show a legitimate non-discriminatory reason for its decision, "'the plaintiff must then be given an opportunity to show that defendant's stated reason was merely a pretext or discriminatory in its application.'" El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 166 (App. Div. 2005) (quoting Dixon v. Rutgers, 110 N.J. 432, 442 (1998)).

There is no dispute that Plaintiff is a member of a protected group (she is Black and over the age of 40) and that she was terminated (through non-renewal). Plaintiff, however, cannot establish the second element of her *prima facie* case based upon the record—that she was performing her job at a level that met Defendants' legitimate expectations. Further, although Defendants hired someone else to perform the same work after Plaintiff left, her non-renewal did not take place under circumstances that give rise to an inference of unlawful discrimination.

A. Plaintiff Cannot Establish She Was Performing Her Job at a Level That Met Defendants' Legitimate Expectations

Plaintiff cannot establish the second element of her *prima facie* case—*i.e.*, that she was performing her job at a level that met Defendants' legitimate expectations. It is insufficient to *argue* that Plaintiff was qualified for the position of Vice Principal and previously received "Effective" Observations scores. There is no policy that requires renewal of non-tenured staff simply because she received an "Effective" rating. (Da406 ¶12). Observations are only part of the evalution of an employee's overall job performance and are not the only factor in deciding whether someone is performing to expectations (Id. ¶13). In fact, the record shows that Plaintiff failed to perform at her prior positions with other employers, as well, resulting in discipline and termination of her prior employment. (Pl. Tr. 52:10 to 54:22; 56:17 to 57:18; 118:23-24). Plaintiff's contract with NBBOE was not renewed because her job performance did not meet NBBOE's standards, as follows:

1. Plaintiff's annual evaluation summary for 2016-2017 showed Plaintiff was merely "Developing" in nearly all areas evaluated (with "Proficient," "Accomplished" and "Distinguished" being better scores she did not receive), except for only two discrete areas in which she was marked "Proficient." (Da137-152).

2. All of Plaintiff's evaluations documented the fact that throughout her three years of employment with NBBOE, she was not performing up to expectations because she never received a single mark for "Distinguished" in any category, she received marks for merely "Developing" in nearly every single category and was at best "Proficient" in some, but never all categories. (Pl. Tr. 192:8-20; Da153-212, 214-251, 253-270; Pa314-325).

3. In November 2018, Plaintiff completed the Advanced Placement® ("AP") exam form incorrectly and failed to give it to Redler until just two days before it was due back to the College Board, when she had it since October 15, 2018. (Da286).

4. Plaintiff continued to send unapproved pre-conference forms to staff even though she was reminded a "second time" that "only approved forms were to be used," as brought to Redler's attention by a staff member. (Da287).

5. Plaintiff's Observation in December 2018 resulted in a score of 2.64, which was only considered "Developing" (neither proficient, nor accomplished nor distinguished) and in Redler's view this was "ineffective." (Da257; Redler Tr. 114:23-24).

6. Plaintiff refused to acknowledge receipt of her December 2018 Observation by signing it as required until she received a written reprimand from Redler in March 2019. (Pl. Tr. 169:22 to 170:10; 221:21-24, 237:4-7, 309:24 to 310:4)

7. Plaintiff did not properly handle AP testing. She ordered the wrong testing materials and did not check them before the test was scheduled, so testing was delayed and additional material had to be ordered, resulting in "a very big cost" to the district. (Redler Tr. 35:13 to 36:2; 45:3-6).[2]

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[2] Notwithstanding her unsupported assertions on appeal that ordering AP testing was not her responsibility, email correspondence from January 2019 and

8. In September 2018, Plaintiff humiliated child study team ("CST") members in front of the entire faculty of 145 employees "by announcing that they did not do their job during scheduling to identify classes for students with IEP's," when she should have reprimanded them in private or addressed her concerns with the CST members' supervisors. (Redler Tr. 36:3-5; 46:1 to 47:23, 177:22 to 178:16; Da287).

9. Plaintiff inappropriately responded to *multiple students on separate occasions*, wherein she told the students she "didn't sleep" with them, and acknowledged that she wrote that she told a student "I don't know who [you] slept with last night" in that student's discipline report, which is viewable to the parent and stays on the child's record so a college could see it. Plaintiff received a verbal warning for same. (Redler Tr. 36:10 to 37:5; 39:20 to 41:2; 175:1 to 176:25; Da297, 301).

10. Several students missed instructional time as a result of Plaintiff's poor planning when it came to scheduling for testing. What Plaintiff should have done was select teachers that did not have a class during testing time so the students are not displaced. (Redler Tr. 37:8-10; 43:6-9).

11. On one occasion, Plaintiff placed students in the auditorium instead of their classrooms where they watched movies because the "teachers weren't able to teach the curriculum they were supposed to be teaching[.]" She also used the auditorium when it was not approved. (Redler Tr. 41:15-19; Da287).

12. On another occasion, Plaintiff displaced students from their classroom because of her poor scheduling of AP testing, and while she kept those students in the cafeteria and they were missing instructional time, she offered them extra credit that "had nothing to do with what was being taught in the classroom" without conferring with or notifying the students' teachers, which put the teachers "in a bad light." (Redler Tr. 37:12-16; 41:21 to 43:1).

13. At his deposition, Redler explained that after her first year of employment, Plaintiff failed to adequately communicate with Redler. In the documents he submitted in support of Plaintiff's non-renewal, Redler stated that Plaintiff (a) "[d]oes not communicate information related to programs and initiatives she

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April 2019 between Plaintiff and Redler shows she was well aware she was responsible for ordering the AP testing materials. (Da449).

is in charge of"; (b) "[d]oes not communicate testing information with the principal"; (c) "has not made me aware of any issues or irregularities during AP testing" and that he "ha[s] asked without receiving a response" from her; (d) "[d]oes not communicate important information related to students and families related to academics and discipline," and that "[t]his has been addressed during Administrative Team Meetings and privately" with Plaintiff. (Da286-287).

14. Redler's concern regarding Plaintiff's failure to communicate was also documented in her evaluations—all of which were completed by him—which Plaintiff acknowledged during her deposition. (Da136-270, 276; Pa326-327; Pl. Tr. 198:1-23; 200:3-23).

15. Plaintiff did not communicate a potential serious threat to the school, students and staff on December 20, 2018, when a student said they will "shoot up the building." (Da295-296; Pl. Tr. 181:7-10).

The record, therefore, contains an abundance of evidence of Defendants' legitimate business reasons for not renewing Plaintiff's contract. Based on the above, and Plaintiff's own sworn admissions, she was not performing her contractual duties and responsibilities as set forth in the Vice Principal job description. (See Da94-96). Plaintiff does not dispute several of Defendants' legitimate reasons for her non-renewal. Specifically, at her deposition, she admitted as follows:

1. In her first year of employment, Plaintiff admitted she received marks for only "Developing" in nearly all areas evaluated, and she received no marks for "Accomplished" or "Distinguished." She also admitted that for her first year of employment, she received a rating of 2.8 which was at the "low end" of the range of effective, which is 2.65 to 3.49. (Pl. Tr. 192:8-20; Pl. Tr. 195:3 to 196:12; Da153-212; Pa326).

2. Plaintiff admitted that, in her NBBOE performance evaluations from 2016 to 2019, she received marks for "Developing" in nearly every single category, she did not receive a single mark for "Distinguished" in any category, and was at best "Proficient" in some categories on certain evaluations. (Pl. Tr. 185:2

to 202:5).

3. Plaintiff admitted that when she completed the AP forms, Redler had indicated to her that she completed the forms incorrectly and gave them to Redler just two days before the forms were due back to the College Board. (Pl. Tr. 179:20 to 180:5).

4. Plaintiff admitted that her Observation from December 2018—which was before the Costlow Incident—ultimately resulted in her receiving a rating of 2.64, which is an "Ineffective" rating, and a lower rating than she had in her prior years of employment. (Pl. Tr. 209:4-15).

5. Plaintiff admitted she failed to sign off on her December 2018 Observation (even though she admitted she received the completed Observation on January 28, 2019) until she received a written reprimand from Redler in March 2019. (Pl. Tr. 169:22 to 170:10; 171:1-10; 221:21-24, 237:4-7, 309:24 to 310:4).

6. Plaintiff admitted that a member of the CST told Redler "they felt embarrassed" by announcing to staff at a meeting that the "adults dropped the ball," which implicated the CST members. (Pl. Tr. 177:22 to 178:16).

7. Plaintiff admitted she documented in a student's discipline log that she told the student "I don't know who she slept with last night, but she didn't wake up with me this morning," and that at the time she said that to the student, she did not think it was inappropriate. (Pl. Tr. 175:1 to 176:25).

8. Plaintiff admitted that in her January 9, 2018 evaluation—during her second year of employment—Redler counseled Plaintiff under "recommended action" that she document walk-throughs, share that information with him, create an open dialogue with administration to share initiatives and programs, and collaborate with others. (Pl. Tr. 196:15-22; 198:1-23; Da215-232).

9. Plaintiff admitted that when she was evaluated in June 2018 (at the end of her second year of employment), Redler counseled Plaintiff under "recommended action" that she should communicate frequently in person or via e-mail to pass information to him, and that she continue to work on minimizing loss of students' instructional time. (Pl. Tr. 198:24 to 200:23; Da245).

10. At her deposition, Plaintiff admitted that Redler essentially reprimanded her for not immediately notifying him when a student indicated they will "shoot

up the building." (Pl. Tr. 181:7-10).

These critical admissions are fatal to Plaintiff's ability to support her claims. Redler also testified that his decision not to renew Plaintiff was based "strictly" on her "job performance." (Redler Tr. 115:16-24).

Thus, there is not a shred of evidence to even suggest a discriminatory motive or that Redler's reasons for recommending Plaintiff's non-renewal or the NBBOE's following that recommendation are a pretext for discrimination. Plaintiff's *prima facie* case for both age and race discrimination consequently fail as a matter of law. Because Plaintiff does not dispute several of Defendants' legitimate reasons for her non-renewal, she cannot satisfy her *prima facie* burden to establish disparate treatment under LAD.

For this initial reason, Plaintiff's disparate treatment claims under LAD should remain dismissed.

B. Plaintiff Cannot Establish That Her Non-Renewal Occurred Under Circumstances That Give Rise to an Inference of Unlawful Discrimination

Plaintiff also cannot satisfy the fourth element of her *prima facie* case because she is unable to show her non-renewal occurred under circumstances that would give rise to a reasonable inference of discrimination. Plaintiff conceded at her deposition that there is nothing in the record to reflect any racist or ageist remarks were ever made by Plaintiff's supervisors or the decisionmakers. (Pl. Tr. 237:8-24). There is

no evidence that preferential treatment was given to employees not in the same protected class as Plaintiff. Indeed, to the extent Plaintiff alleges Redler's lack of communication constituted discrimination, she testified that the other Vice Principals and other staff (regardless of race) shared similar complaints about Redler. (Pl. Tr. 224:21 to 225:13; 226:3-14; 227:15-229:19). Plaintiff admitted both she *and* Caucasian Vice Principal Suznovitch were dissatisfied with receiving low scores on observations from Redler. (Pl. Tr. 235:2-20). The record shows that Redler emailed all of his Vice Principals (not just Plaintiff) to ensure observations would be completed, and to the extent Plaintiff assumed Lugo's observations, it was because Lugo was swamped with student scheduling—a task singular to her, and for which Plaintiff was not responsible. (Pl. Tr. 130:2-4, 317:20 to 321:1). Redler, who recommended Plaintiff's nonrenewal, was also the one to hire her, when it was obvious what her race and age were. (Pl. Tr. 115:21 to 116:24; Da97-100). These indisputable facts cannot support an inference of discrimination.

Finally, the mere sequence of events leading to Plaintiff's non-renewal belie any inference of discriminatory animus. See Williams, 323 N.J. Super. at 502; Chertkova., 92 F.3d at 91. Plaintiff testified that in the "second half of 2018," she told Redler that it was reported to her by others that a teacher, Arato "stated to her class that she was in support of Trump building a wall" (*i.e.*, the Arato Comment). (Pl. Tr. 238:14-24). Plaintiff gave Arato a verbal warning and spoke to Redler about

it. (Pl. Tr. 238:14-24; 241:19-22). That Plaintiff received notice of her non-renewal in May 2019—at least several months after she made Redler aware of the Arato Comment—is not "unusually suggestive" of an improper motive, and there is no evidence to establish a causal link between her termination and her reporting of the Arato Comment.

Moreover, there are so many other facts in the record that belie any hint of discriminatory motive. For example, other staff members who were terminated were *not* members of Plaintiff's protected class for race or age. Plaintiff admitted that the employment contracts of Solomon Charlie (in his 30s) and Mary Murray (Caucasian) were also not renewed. (Pl. Tr. 304:18 to 305:9; 306:15-24). In 2019, Defendants also terminated Luis Vela (a Latino male teacher) and Patricia George (a Caucasian female). (Id.; Da334 at No. 30). Redler testified that all staff discipline when he was Principal was made to staff of "different races, different ages, male, female gender." (Redler Tr. 129:5-18). He also testified, "I was fair to everybody. I treated everybody equally. There was no discrimination." (Redler Tr. 118:14-15). The fact that other staff not in the same protected classes as Plaintiff were also disciplined, terminated and did not receive better treatment, eviscerates her discrimination claim. See Ewell v. NBA Props., 94 F. Supp. 3d 612, 624 (D.N.J. 2015).

To the extent that Plaintiff points exclusively to the fact that Costlow has not

been terminated as evidence of discrimination, her comparison is inapposite because Costlow is not similarly situated. "[T]o be considered similarly situated, comparator employees must be similarly situated in all relevant respects." Wilcher v. Postmaster Gen., 441 F. App'x 879, 881-82 (3d Cir. 2011). A court considers whether the plaintiff and the comparator had similar job responsibilities, were subject to the same standards, worked for the same supervisors, and engaged in comparable misconduct. Id. at 882; McCullers v. Napolitano, 427 F. App'x 190, 195 (3d Cir. 2011). Costlow was not similarly situated to Plaintiff for several reasons: (1) Costlow did not engage in the same conduct as Plaintiff; (2) Costlow was tenured,[3] Plaintiff was not; (3) Costlow had no other complaints before or since the Costlow Incident, whereas Plaintiff repeatedly engaged in the same inappropriate conduct with multiple students on separate occasions[4]; and (4) Costlow is neither an administrator nor Vice Principal like Plaintiff. Thus, how NBBOE disciplined Costlow does not justify a

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[3] The process for terminating tenured staff is more complex than and very different from the non-renewal process for non-tenured staff. (Da405 ¶¶7-11).

[4] Plaintiff claims without any support in the record that Costlow used the racial slur again in May 2019 (Pb47), but the record shows that Costlow used the slur only once in January 2019, and that the January 2019 incident was merely *reported* to *McKoy* in May 2019. No one testified that Costlow said the "n" word on two separate dates, and the documentary evidence shows there was only one write-up and only one incident, which was never repeated by Costlow. Even Plaintiff's own affidavit refers to one incident (Pa294-95 ¶4), and later at her deposition Plaintiff realized she was mistaken about the date the incident occurred (Pl. Tr. 253:18-21).

conclusion of disparate treatment.

Furthermore, one of the two Vice Principal positions that became available after Plaintiff's and Shelton's non-renewals was filled by a Black person; this shows race played no role in the decision process. (Pl. Tr. 292:17 to 293:4). This demonstrates Plaintiff's inability to satisfy the fourth element of her *prima facie* case. See Williams v. Pemberton Twp. Pub. Sch., 323 N.J. Super. 490, 503 (App. Div. 1999). Moreover, Redler testified (1) he did not experience any of the same performance issues with either of the new Vice Principals that he had with Plaintiff, and (2) the new Black Vice Principal remains employed by NBBOE. (Pl. Tr. 292:17 to 293:4) (Redler Tr. 133:4 to 134:3). That the Vice Principal of the same protected class remains employed by NBBOE, several years later, further proves that race was not a factor in any employment decisions.

In addition, Plaintiff cannot establish her age discrimination claim. *Both* of the two Vice Principal positions that became available after Plaintiff's and Shelton's non-renewals were filled by persons over 40 years old (52 and 46); this shows age played no role in the decision process. (Da405 ¶¶3-4).[5] This demonstrates Plaintiff's inability to satisfy the fourth element of her *prima facie* case. Moreover, there is a

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[5] Plaintiff contends—without citing anything in the record—that she was "replaced by someone not in the protected category based on age who was less experienced and therefore less qualified" (Pb39). The record refutes this baseless assertion. (See Da403-406, 411-413).

"presumption against age discrimination as a motivating factor when the employee is hired and fired while a member of the protected class," because employees who are "hired while within a protected class are not usually 'credible targets' for pretextual firing claims." Massaro v. UBS, Inc., No. A-0019-10T2, 2012 N.J. Super. Unpub. LEXIS 2880, at *11-12 (App. Div. May 31, 2012) (citing Maidenbaum v. Bally's Park Place, Inc., 870 F. Supp. 1254, 1267 n.24 (D.N.J. 1994), aff'd, 67 F.3d 291 (3d Cir. 1995)), certif. denied, 212 N.J. 463 (2012). This presumption in favor of the employer "is particularly strong when, as here, the same people who hired the protected employee are the same people involved in [the] termination and are also within the protected class themselves." Id. Defendants Redler and Johnson are the same decisionmakers who interviewed and hired Plaintiff. (Pl. Tr. 115:21 to 116:24; Da98-100). Redler is also *older* than Plaintiff. (Pl. Tr. 132:7-9). The fact that Redler made the decision to hire Plaintiff when she was 56 years old, which is only three years younger than she was when he recommended to Johnson that her contract not be renewed "counters *against* an inference of age discrimination," and it is "illogical" to suggest age was the reason for the termination. Young v. Hobart W. Grp., 385 N.J. Super. 448, 461 (App. Div. 2005) (emphasis added).

Finally, Plaintiff was able to and did present her reasons for objecting to her non-renewal at a hearing in front of the full Board of Education—whom Plaintiff admitted was compromised of Black members (Pl. Tr. 291:7-10) —but the Board

nevertheless agreed with and adopted the recommendation to not renew her contract another year based on all of the evidence before it. (Pl. Tr. 289:10-23). The Board's file, which includes handwritten notes from its closed hearing sessions related to Plaintiff, detail some of the *bona fide* performance-related factors Redler relied upon in deciding not to renew Plaintiff's contract. (Da291-298, 303-21). That a neutral group of people adopted Redler's recommendation that Plaintiff's employment not be renewed for another year after hearing from her personally constitutes further evidence that the business reasons underlying her non-renewal were legitimate and non-discriminatory.

To accept Plaintiff's characterization of her non-renewal as racially-motivated is to infer a racial overtone in every employment decision and every interaction between a supervisor and an employee of different racial background. It would also permit an individual's *subjective* perception and reaction to determine the *objective* question of the decisionmaker's liability. See Williams, 323 N.J. Super. at 503. "The law should not find divisions where none exist." Id. In brief, a careful review of the record unequivocally shows that none of the actions by Defendants were in any way racially- or age-motivated. For these reasons, her LAD discrimination claims should remain dismissed.

C. Defendants Had Legitimate, Non-Discriminatory Reasons for Plaintiff's Non-Renewal and Plaintiff Cannot Show Those Reasons to be Pretextual

Even assuming *arguendo* Plaintiff could make out a *prima facie* case, the record shows Defendants had a legitimate non-discriminatory basis for her non-renewal. A careful and searching review of this record leads to only one reasonable conclusion—that Plaintiff has not sustained her burden. On the contrary, the evidence in the record is overwhelming that any and all actions taken against Plaintiff by Defendants were based on legitimate, non-discriminatory reasons related exclusively to her poor job performance.

Under the burden-shifting framework, if an employer can show a legitimate non-discriminatory reason for its decision, to prevail, a plaintiff must show "that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Young, 385 N.J. Super. at 460 (quotation marks and citation omitted). Plaintiff cannot meet that burden because the same decisionmakers who were involved in the decision to terminate her employment also hired her, and the very individual who recommended her for non-renewal is older than she. Id. at 460-61. Plaintiff's age discrimination claim fails for these additional reasons and should remain dismissed.

POINT IV

SUMMARY JUDGMENT DISMISSING PLAINTIFF'S HOSTILE WORK ENVIRONMENT AND HARASSMENT CLAIM [COUNT II] WAS WARRANTED BECAUSE (A) THERE IS NO EVIDENCE PLAINTIFF WAS TARGETED BASED ON HER RACE OR AGE, (B) SHE CANNOT ESTABLISH SEVERE OR PERVASIVE CONDUCT ON THE PART OF DEFENDANTS, AND (C) SHE CANNOT ESTABLISH THAT A REASONABLE PERSON WOULD BELIEVE THE CONDITIONS OF EMPLOYMENT WERE HOSTILE OR ABUSIVE

Count II alleges hostile work environment and harassment in violation of LAD. To prove a hostile work environment harassment claim under LAD, a plaintiff must establish a *prima facie* case of discrimination by showing that the conduct: (1) would not have occurred *but for* Plaintiff's protected status; and it was (2) severe or pervasive enough to make a (3) *reasonable* person believe that (4) the conditions of employment were altered and the working environment was hostile or abusive. Taylor v. Metzger, 152 N.J. 490, 498 (1998); Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 603-04 (1993). If a plaintiff establishes a *prima facie* case, a rebuttable presumption arises that the harassment occurred because of the plaintiff's protected status. Woods-Pirozzi v. Nabisco Foods, 290 N.J. Super. 252, 267 (App. Div. 1996).

Plaintiff's LAD harassment claim fails for various reasons. The undisputed facts (primarily based upon her deposition testimony) establish that the complained-of conduct had nothing to do with Plaintiff's race or age. In addition, Plaintiff cannot

establish that the conduct was severe or pervasive or that a reasonable person would have believed the conditions of the work environment became hostile or abusive. Indeed, the only conduct complained of pertains to Plaintiff's workload and a perceived lack of communication from Redler. Such conduct does not remotely approach what is legally required to establish a hostile work environment. Consequently, Plaintiff cannot satisfy the *prima facie* requirements for a hostile work environment claim, and her LAD harassment claim fails as a matter of law. Count II should, therefore, remain dismissed.

A. There is No Evidence That Plaintiff Was Harassed Because of Her Race or Age

As stated above, to prove a claim of harassment under LAD, Plaintiff must first establish a *prima facie* case of discrimination by showing that the harassment "would not have occurred but for the employee's [protected status]" Johnson, 2022 N.J. Super. Unpub. LEXIS 1137, at *16. Plaintiff testified she never complained to anyone that Redler subjected her to derogatory remarks, insults or any verbal abuse. (Pl. Tr. 303:2-11). Rather, Plaintiff claims that her interactions with Redler changed over time, and he avoided communicating with her, ignored her, gave her increased work assignments, scrutinized her, and reprimanded her for not signing her December 2018 evaluation. (Pa13-17). The record evidence, however, shows that none of the alleged "harassing" conduct was because of Plaintiff's race or age but for legitimate reasons.

With regard to Plaintiff's allegations that her interactions with Redler changed, that he avoided communicating with her and ignored her, Plaintiff testified that when Redler became more "anxious" in his own new role "being principal to the high school," he became less "available" to her (and others) to ask questions, that he seemed more busy and more "stressed" because of "the things that were being asked of him from central office," and yet he was still sometimes courteous. (Pl. Tr. 133:8 to 136:3). Plaintiff further testified that there was "a lack of communication and [she] just felt biased. Like there was a bias," because she "felt as if [she] was the last one to know." (Pl. Tr. 137:1-11). When pressed for specifics at her deposition to support her claim, Plaintiff testified that Vice Principal Suznovitch (not in the same protected class as Plaintiff) would learn of scheduling changes sooner than she did. However, she admitted that Suznovitch learned of these changes when he and Redler met with guidance counselors on a weekly basis because "Redler had put him at guidance to assist with cleaning up the issue we had with scheduling." (Pl. Tr. 140:19 to 141:21). Plaintiff also admitted that it would be expected that Suznovitch would learn something in his meetings with guidance counselors before she did because he was in charge of guidance and meeting with them weekly whereas she was not. (Pl. Tr. 141:22 to 142:3). Moreover, Plaintiff admitted that the other Vice Principal not in the same class as her, Ms. Lugo, would naturally have become aware of scheduling changes before Plaintiff did "because she made them" and that Lugo

would communicate those changes to Plaintiff if they affected or otherwise involved Plaintiff. (Pl. Tr. 142:4-9; 44:1-15). Furthermore, Plaintiff testified that when she felt Lugo made changes to the schedule that affected her, Plaintiff did not tie that action to her age or race; rather, she believed that the changes "might have been just pertaining to [the] grades" that she was in charge of. (Pl. Tr. 145:1-14). With regard to scheduling changes for which Plaintiff was not provided advance notice, she testified she complained to Redler that she disagreed with the decisions made, but she denied ever advising him that she felt Lugo was singling her out in any way. (Pl. Tr. 148:25 to 150:2).

With regard to allegations that Redler gave her increased assignments, Plaintiff admitted that her workload and responsibilities increased the longer she was employed with NBBOE after she had a chance to acclimate, as would be expected with any position. (Pl. Tr. 106:17 to 107:1). As for Redler asking her to complete observations on additional staff and reassigning work to Plaintiff that were either his or others' responsibilities, she admitted that the job description for her position as Vice Principal indicated that one of her duties would be to "complete additional assignments as directed by the principal" and that she would also be responsible for "[p]erforming other duties which may be assigned by his/her superior(s) under authority of the Board of Education." (Pl. Tr. 319:4 to 320:4; Da94-96). Notably, Plaintiff does not allege she was assigned any task that was outside of her job

responsibilities. Plaintiff also testified that she, and all other Vice Principals, were required to perform additional observations in order to meet a deadline as part of a team effort, and when she was assigned additional evaluations that had first been assigned to Lugo, it was "because [Lugo] was [busy] scheduling"—a task that Plaintiff was not assigned and which was only assigned to Lugo, no one else. (Pl. Tr. 130:2-4, 317:20 to 321:1). As noted above, Plaintiff also admitted that Suznovitch, a non-Black Vice Principal, was assigned additional responsibilities that she was not (*i.e.*, to meet with guidance weekly to help resolve scheduling issue). (Pl. Tr. 140:19 to 141:21). Thus, there is nothing in the record to evidence Plaintiff was singled out in any way for extra work because she is Black or due to her age.

With regard to Plaintiff's claim that Redler harassed her by reprimanding her for not signing her December 2018 evaluation, Plaintiff admitted that she did not sign her observation even though she knew she "was supposed to sign it to say that [she has] seen it" and not that she agreed with it. (Pl. Tr. 169:22 to 170:10; 221:21-24, 237:4-7, 309:24 to 310:4). Although Plaintiff now asserts *post hoc* she felt the reprimand was unjustified, she admitted that she never once tried to speak to Redler about the reprimand after she received it, and the only communication she had with him about it was a brief email response wherein she simply indicated she did not know the observation was complete. (Pl. Tr. 171:1-10). Furthermore, Plaintiff

admitted that the only person she actually spoke to about the reprimand was Shelton, not even Human Resources or a union representative. (Pl. Tr. 172:4-24). Thus, to the extent Plaintiff felt she was "harassed" by the reprimand, the circumstances under which it occurred, and her subsequent lack of contemporaneous complaint or other response thereto, do not warrant any inference of improper motive behind it.

Most significantly, Plaintiff admitted that neither Redler, nor Johnson, nor anyone else employed by the NBBOE ever said anything about her or to her that she felt or viewed was inappropriate or discriminatory; rather, the only statements that were made which she felt were "inappropriate" were made by teachers to students. (Pl. Tr. 237:8-24; 238:6-12). Moreover, each teacher in each instance was either spoken to or reprimanded in some way by either Plaintiff or another Vice Principal. (Pl. Tr. 238:14-24; 241:19-22; 252:1-7; Da272). Further, Costlow's use of the n-word was not directed at anyone in particular, let alone Plaintiff, as it was part of a discussion with students about the use of that word in general. Thus, it is not disputed that to the extent any racial slurs were made, they were uttered by a teacher—neither Redler nor Johnson—and were never made in Plaintiff's presence nor directed at her. Similarly, with regard to Arato's political statement about agreeing with Trump's wall, while perhaps the comment may be viewed by some as anti-Hispanic or merely anti-immigration, the statement cannot be viewed as anti-Black or ageist.

Finally, when asked during her deposition if there is anything else Plaintiff

believed evidenced race discrimination by Defendants, she responded that other than the above-referenced student-initiated complaints pertaining to teachers' conduct, "***No. Not to my knowledge.***" (Pl. Tr. 279:14-24). Given the undisputed evidential record, no reasonable jury could infer any racial animus motivated Defendants in their actions regarding Plaintiff. Nor is there any evidence in the record to suggest age-based animus, as Plaintiff pointed to no ageist remarks (Pl. Tr. 237:8-24) and acknowledged that Redler is older than Plaintiff. (Pl. Tr. 132:7-9).

For these reasons, Plaintiff's harassment claim should remain dismissed.

B. Plaintiff Cannot Establish the Alleged Conduct was Severe or Pervasive or That Her Work Environment Became Hostile or Abusive

Even if we assume *arguendo* Plaintiff could establish the first prong of her *prima facie* case, there is no material issue of fact that the complained of conduct by Defendants cannot be considered "severe or pervasive" under the law. Plaintiff cannot establish that the conduct at issue was severe or pervasive *enough* to make a *reasonable* person believe that the conditions of employment were altered such that the work environment became hostile or abusive.

Under the law, it is the alleged harasser's conduct which must be "pervasive or severe" to survive summary judgment, not the alteration of the conditions of employment. Muench v. Twp. of Haddon, 255 N.J. Super. 288, 299 (App. Div. 1992). The following cases set forth the contours of the "severe or pervasive"

element: Taylor, 152 N.J. at 502-03 (concluding that patently racist slur spoken publicly by supervisor created jury question on whether comment was sufficiently severe); Heitzman v. Monmouth Cnty., 321 N.J. Super. 133, 148 (App. Div.1999) (concluding that anti-Semitic comments by supervisor did not constitute severe or pervasive conduct because they were not directed against plaintiff, were sporadic and casual, and did not involve any physical threat or humiliation, and that anti-Semitic comment by coworker directed at plaintiff was not actionable); Leonard v. Metropolitan Life Ins. Co., 318 N.J. Super. 337, 345 (App. Div. 1999) (concluding that comments about plaintiff's disability uttered by supervisor created genuine issue of material fact on severe or pervasive requirement); Woods-Pirozzi, 290 N.J. Super. at 270-71 (concluding that jury question existed on "severe or pervasive" requirement where supervisor "frequently" said to plaintiff, "you're a woman and a pain in my ass," that supervisor called plaintiff a "loser" about "once or twice a week," and that he said to her "you're so emotional, it must be PMS time" about "twice a month"). LAD is not a "general civility code;" therefore, "discourtesy or rudeness should not be confused with racial harassment," and "a lack of racial sensitivity does not, alone, amount to actionable harassment." Mandel v. UBS/PaineWebber, Inc., 373 N.J. Super. 55, 73 (2004) (citation omitted).

Applying those parameters to the record facts, Plaintiff's allegations underlying her hostile work environment claim were insufficient to survive

summary judgment. Aside from the January 2019 Costlow Incident, there were no other *racial* slur incidents. (Pl. Tr. 258:1-3; Redler Dep. 128:1-2). Nor has Plaintiff identified a single ageist remark by anyone, let alone her supervisor. Aside from Costlow's use of a racial slur, Plaintiff points to Redler's lack of communication as somehow harassing. However, if a supervisor's "rudeness," "lack of sensitivity," "coldness" and "lack of civility" cannot qualify as "severe or pervasive" conduct under LAD, then no more could Redler's lack of communication, particularly given the absence of any nexus between the conduct and Plaintiff's protected class.

Even when viewed cumulatively, the acts alleged by Plaintiff were plainly insufficient to present a hostile work environment claim to a jury. The record shows that Plaintiff has not alleged a single ageist remark by anyone, let alone her supervisor. The single incident involving Costlow's use of a racial slur does not come close to creating an actionable hostile work environment. In reality, for the work environment to be actionable on the basis of racial harassment, there must be *repeated* racial slurs. Taylor, 152 N.J. at 500 (collecting cases and also observing that "[s]ome courts have found that a particularly offensive remark, if not repeated, will *not* be sufficient to establish a hostile work environment."). Although Defendants understand Plaintiff's discomfort in hearing about a teacher's use of the "n" word in her classroom, it was done outside of Plaintiff's presence and not by her supervisor or anyone with decision-making authority. The Trial Court

appropriately *objectively* considered the conduct by Defendants to determine whether it was discriminatory and harassing. Lehmann, 132 N.J. at 612 ("An objective reasonableness standard better focuses the court's attention on the nature and legality of the conduct rather than on the reaction of the individual plaintiff").

The record warrants only one reasonable conclusion—that Defendants supported the disciplinary action taken by Plaintiff vis-à-vis Arato for her *politically*-charged statement to students, and the disciplinary action taken by Shelton vis-à-vis Costlow for her use of a *racial* slur in front of students. Indeed, Costlow's written reprimand remains in Costlow's file. There is no evidence that either disciplinary action was ineffective or that further was necessary but not taken. Indeed, there is nothing in the record to suggest that any other racist or offensive comments were made by either teacher after they were so disciplined.

On balance, no reasonable jury could conclude that Defendants' actions or inaction could be seen as severe, pervasive, hostile or abusive under the governing legal standards. For these reasons, Plaintiff cannot make out a *prima facie* case of hostile work environment as a matter of law, and no presumption that the alleged harassment occurred because of her race or age is warranted. Woods-Pirozzi, 290 N.J. Super. at 267. Count II, therefore, should remain dismissed.

* * *

For all of these reasons, Plaintiff cannot prove that she was subjected to a

hostile work environment. Therefore, Count II should remain dismissed.

POINT V

PLAINTIFF'S RETALIATION CLAIM [COUNT III] WAS APPROPRIATELY DISMISSED AS SHE WAS NOT ENGAGED IN ANY PROTECTED ACTIVITY AND SHE CANNOT ESTABLISH ANY CAUSAL NEXUS

In Count III, Plaintiff asserts a LAD retaliation claim. Under LAD, it is unlawful for an employer to discharge an employee in retaliation for a complaint concerning unlawful discrimination in the workplace. N.J.S.A. § 10:5-12(d). To establish her *prima facie* case, the record must show that Plaintiff was in a protected class, she engaged in protected activity known to the employer, she was thereafter subjected to an adverse employment consequence, and a causal link between the protected activity and the adverse employment action. Victor v. State, 203 N.J. 383, 409 (2010). Notably, "'the mere fact that [an] adverse employment action occurs after [a protected activity] will ordinarily be insufficient to satisfy the plaintiff's burden of demonstrating a causal link between the two.'" Young, 385 N.J. Super. at 467 (quoting Krouse v. Am. Sterilizer Co., 126 F.3d 494, 503 (3d Cir. 1997)). "Where the timing alone is not 'unusually suggestive,' the plaintiff must set forth other evidence to establish the causal link." Id. (citations omitted). If she establishes her *prima facie* case, "the burden then shifts to defendant to articulate a legitimate, non-retaliatory reason for the action." Shepherd v. Hunterdon Dev. Ctr., 336 N.J.

Super. 395, 418 (App. Div. 2001), rev'd in part on other grounds and aff'd on this ground o.b., 174 N.J. 1 (2002). To survive summary judgment when Defendants have provided "'legitimate, non-discriminatory reasons for its action, the plaintiff must point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action.'" Romano v. Brown & Williamson Tobacco Corp., 284 N.J. Super. 543, 551 (App. Div. 1995) (quoting Fuentes v. Perskie, 32 F.3d 759, 764-65 (3d Cir. 1994)). To defeat a motion for summary judgment, Plaintiff must point to evidence *in the record* that could

> "allow a factfinder reasonably to infer that each of the employer's proffered non-discriminatory reasons ... was either a post hoc fabrication or otherwise did not actually motivate the employment action (that is, the proffered reason is a pretext). [To do so,] the non-moving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence, ... and hence infer that the employer did not act for [the asserted] non-discriminatory reasons."
>
> [Ibid.]

Here, Plaintiff's LAD retaliation claim should remain dismissed because she cannot prove that she engaged in any protected activity, she cannot establish a causal nexus between the protected activity and her non-renewal, and cannot show Defendants' legitimate reasons for her non-renewal were a pretext for

discrimination.

A. Plaintiff Cannot Prove that She Engaged in Any Protected Activity

Plaintiff alleges she was retaliated against "[a]s a result of the reports made to supervisors regarding violation of the policies prohibiting discrimination[.]" (Pa19). Plaintiff's alleged protected activity is comprised of (1) her reporting to Redler of a teacher's statement supporting Trump building a wall, and (2) Plaintiff's *presence* at Shelton's meeting with students regarding the Costlow Incident, which *Shelton*—not Plaintiff—reported. (Pa19). However, "[n]ot every complaint or report entitles its author to protection from retaliation[.]" Davis v. City of Newark, 417 F. App'x 201, 202 (3d Cir. 2011). "[F]or a complaint to amount to 'protected activity,' it must implicate an *employment* practice made illegal" under the law. Id. (emphasis added). See also Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc., 450 F.3d 130, 135 (3d Cir. 2006) ("Opposition" to discrimination can take the form of "informal protests of discriminatory *employment practices*, including making complaints to management." (emphasis added)). Under its anti-retaliation provision, LAD prohibits employers from taking "reprisals against any person because that person has opposed any practices or acts forbidden under [LAD]." N.J.S.A. § 10:5-12(d). The acts forbidden under LAD include an employer's refusing to hire or employ an individual, barring or discharging an individual from employment, and discriminating against such individual in compensation or in terms, conditions or

privileges of employment because of their "race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy or breastfeeding, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait of any individual, or because of the liability for service in the Armed Forces of the United States or the nationality of any individual, or because of the refusal to submit to a genetic test or make available the results of a genetic test to an employer." N.J.S.A. § 10:5-12(a). Based on the factual record, Plaintiff cannot establish she even engaged in any protected activity.

First, with regard to the Arato Comment that Plaintiff reported to Redler about Trump building a wall, although likely insensitive and inappropriate in a school setting, the teacher's professed support of Trump for building a wall, by itself without more, is not necessarily racist. Thus, Plaintiff's reporting of that comment by a teacher does not constitute a protest of discriminatory employment practices. Indeed, Plaintiff acknowledged during her deposition that when speaking with Arato about the comment, she "informed her as an agent of the school, she is to stay neutral and not share her personal feelings in regards to ***politics*** with the students." (Pl. Tr. 238:14-24; 241:19-22) (emphasis added). By her own admission, therefore, Plaintiff did not believe the Arato Comment was racist or otherwise discriminatory. Thus, she was not complaining to Redler about a discriminatory employment practice

when she told him about the political Arato Comment. Because Plaintiff failed to identify any conduct proscribed by LAD, she did not engage in a "protected activity" and cannot establish her retaliation claim. See Davis, 417 F. App'x at 203.

Second, Plaintiff's *presence* at Shelton's meeting with students regarding the Costlow Incident, which *Shelton*—not Plaintiff—reported, also cannot constitute protected activity because her employer knew nothing about it. As discussed above, the Costlow Incident related to a teacher's use of a racial slur in front of her students (not directed at anyone in particular) in what she had perceived was a teachable moment, and not out of any animus. Furthermore, the written reprimand of Costlow, dated January 4, 2019, upon which Redler was copied, was from Shelton alone, not Plaintiff. Nor was there any mention of Plaintiff in the written account of the Costlow Incident in the reprimand. (Da272; Pl. Tr. 252:1-7; 253:18-21). The factual record also establishes that although Shelton later sent an email reporting the January 2019 Costlow Incident to Dr. Marnie McKoy ("McKoy") (the "Shelton's Costlow Report"), Plaintiff was not referred to in the email, she was not copied on the email, she did not send the email, and Shelton did not "sign" the email on behalf of Plaintiff either. (Pa384). Defendants, therefore, were completely unaware Plaintiff was involved in the Costlow Incident. Indeed, Redler testified that he did not know Plaintiff was involved in reporting the Costlow Incident and also did not recall seeing Plaintiff referred to in Shelton's Costlow Report. (Redler Tr. 66:21-25; 84:4-

9, 14-19). Thus, even assuming *arguendo* that Plaintiff did provide assistance to Shelton in drafting the email, as there is no evidence in the record that Plaintiff's employer knew of *her* involvement, she cannot establish the second element of a *prima facie* case of retaliation: that she was engaged in protected activity *known to the employer*.

Moreover, to the extent Plaintiff had a good faith and reasonable belief one of the district's own policies was violated, she never reported such a violation pursuant to any of those policies. At all relevant times during Plaintiff's employment, the NBBOE maintained anti-retaliation and anti-discrimination policies (District Policy Nos. 3381 (Pa392-93) and 1550 (Pa394-95), respectively). The anti-retaliation policy provides that "[an] employee who has reason to believe that the Board has engaged in an illegal activity or an activity contrary to public policy must report that belief in writing to the Assistant Superintendent for Personnel …" (Pa394-95). The District also maintained a "healthy workplace environment" policy, which provides in relevant part: "Employees who believe the conduct prohibited by this policy has been directed toward them or to another employee of the school district shall submit a written report to the Superintendent of Schools." (Da132). Plaintiff never availed herself any of the district policies and never reported any perceived discrimination or retaliation during her employment or before the Board when she sought to appeal her non-renewal. (Pl. Tr. 217:2-6; 289:10-23; 300:24 to 301:9; 303:2-14). Nor did

Plaintiff ever file a grievance with her union at any time (Pl. Tr. 217:2-6), even though a grievance procedure was available to her and detailed in Article III of the union's contract with the NBBOE (Da106-110). Plaintiff conceded at her deposition that she did not speak to anyone in administration, including Johnson, about any perceived discrimination or retaliation, nor did she make a complaint about Johnson during her employment. (Pl. Tr. 213:1-9; 227:3-9; 281:23 to 282:14). She also denied ever complaining to anyone that Redler subjected her to derogatory remarks, insults or any verbal abuse. (Pl. Tr. 303:2-11). Thus, the record plainly shows Plaintiff never engaged in any protected activity.

B. Plaintiff Cannot Establish a Causal Nexus Between Any Protected Activity and an Adverse Employment Action

The alleged retaliatory adverse employment action by Defendants is Plaintiff's non-renewal, of which she received written notice on May 9, 2019. (Pa385-86). That action, however, was not the result of Plaintiff engaging in a protected activity—and there is no evidence to suggest otherwise. Instead, the non-renewal was based exclusively on Plaintiff's failure to adequately perform her job to Defendants' legitimate expectations. These failings are well-documented, in Plaintiff's evaluations and otherwise, and there is absolutely no evidence to support a claim that Johnson's and the Board's ultimate decision to follow Redler's recommendation of non-renewal was retaliatory

With regard to the Arato Comment, it is undisputed that Plaintiff's reporting

of it to Redler occurred in 2018. Plaintiff received notice of her non-renewal on May 9, 2019. Thus, there is no temporal proximity or nexus. There are also no facts in the record that would otherwise justify an inference that the non-renewal was somehow related to Plaintiff's reporting of the Arato Comment.

Furthermore, with regard to Plaintiff's second basis for her retaliation claim—Shelton's Costlow Report—there is no temporal proximity to establish the required nexus. It is undisputed that the Costlow Incident itself and the discipline of Costlow occurred in January 2019. After reviewing Shelton's January 4, 2019 written reprimand of Costlow during her deposition, Plaintiff recollected that Shelton spoke with Costlow in January of 2019. (Pl. Tr. 253:18-21). Because Plaintiff's non-renewal was implemented by Redler in May 2019, and approved by NBBOE months after that, there is no temporal proximity. To the extent that Plaintiff relies on her later assistance with drafting Shelton's May 2019 email to McKoy to support her retaliation claim, there is no evidence by which a trier-of-fact could reasonable infer any improper motive because Plaintiff's employer, including Redler, was unaware she was involved in Shelton's reporting of the Costlow Incident to McKoy. Although "in evaluating whether an employer acted pursuant to a retaliatory motive, jurors are permitted to draw an inference from all of the circumstances relating to the decision," Battaglia v. United Parcel Serv., Inc., 214 N.J. 518, 558 (2013), not every inference is reasonable. Redler's non-renewal recommendation could not have been

motivated by something he was unaware of. As there is no direct or circumstantial evidence from which one could reasonably infer the non-renewal was in response to any protected activity of Plaintiff, her retaliation claim fails as a matter of law.

C. Defendants Had Legitimate, Non-Discriminatory Reasons For Plaintiff's Non-Renewal

Even if either of the alleged reports could satisfy Plaintiff's burden of establishing a *prima facie* case of retaliation, her claim fails under the burden shifting framework because Defendants had legitimate, non-retaliatory reasons for not renewing her employment contract. As detailed above, because Plaintiff's job performance did not meet Defendants' legitimate expectations, her contract was not renewed. Indeed, Plaintiff admitted to the conduct underlying several of Defendants' legitimate reasons for non-renewal. Thus, Plaintiff's retaliation claim was properly dismissed because a factfinder cannot reasonably disbelieve Defendants' articulated legitimate reasons for her non-renewal or believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of her non-renewal. Romano, 284 N.J. Super. at 551.

* * *

For these reasons, Plaintiff cannot prove she was retaliated against for any protected activity, Count III fails as a matter of law and should remain dismissed.

POINT VI

THE LAD CLAIMS AGAINST JOHNSON WERE PROPERLY DISMISSED

The record evidence is devoid of any fact which suggests that Johnson somehow encouraged or facilitated any aspect of the alleged harassment by Redler, that he was present when the conduct occurred, or that he could have somehow foreseen and prevented it. There is no record evidence that Plaintiff or anyone brought it to Johnson's attention that Plaintiff believed she was being harassed in any way. Indeed, Plaintiff conceded at her deposition that she did not speak to anyone in administration, including Johnson—whom she perceived to be Hispanic (Pl. Tr. 133:3-4)—about any perceived discrimination or retaliation, nor did she make any complaint about Johnson during her employment. (Pl. Tr. 217:2-6; 289:10-23; 300:24 to 301:9; 303:2-14). It is clear that Plaintiff named Johnson as a defendant simply because he was a decisionmaker in the non-renewal process. For the above reasons, however, Plaintiff cannot prove that the non-renewal decision was motivated by any discriminatory animus.

LAD provides for personal liability of supervisory employees when they "aid, abet, incite, compel or coerce" the harassment of another. N.J.S.A. § 10:5-12(e)). Therefore, for liability to attach, Johnson would to have been "generally aware of his role as a part of an overall illegal or tortious activity at the time that he provides assistance; … [and he] must [have] knowingly and substantially assist[ed] the

principal violation." Tarr v. Bob Ciasulli's Mack Auto Mall, Inc., 181 N.J. 70, 84 (2004) (quotation marks and citation omitted). Indeed, "[w]hether a defendant provides 'substantial assistance' to the principal violator" is based upon the following factors: "(1) the nature of the act encouraged, (2) the amount of assistance given by the supervisor, (3) whether the supervisor was present at the time of the asserted harassment, (4) the supervisor's relations to the others, and (5) the state of mind of the supervisor." Id.

When measured against the legal standard for individual liability under LAD, there is nothing in the record which provides a basis for such liability. For this reason, in addition to Defendants' arguments for dismissal of the LAD claims above, there is no legitimate basis for a finding of aiding and abetting liability as to Johnson. Counts I, II, III and IV were appropriately dismissed for this additional reason.

POINT VII

THE RECORD EVIDENCE DOES NOT PROVIDE A COGNIZABLE BASIS FOR PUNITIVE DAMAGES

Punitive relief is an extraordinary remedy and may only be awarded where a defendant's offending conduct was wanton, malicious, or especially egregious. Herman v. Sunshine Chem. Specialties, Inc., 133 N.J. 329, 337 (1993); Cavuoti v. N.J. Transit Corp., 161 N.J. 107 (1999). In Rendine v. Pantzer, 141 N.J. 292, 313-14 (1995), the Court described the conduct that is sufficiently egregious to warrant punitive damages as "wantonly reckless or malicious," and "an intentional

wrongdoing in the sense of an 'evil-minded act' or an act accompanied by a wanton and wil[l]ful disregard of the rights of another[.]" The court added, "the key to the right to punitive damages is the wrongfulness of the intentional act." Id.

Here, if the Court somehow finds there to be a triable issue of fact as to any of Plaintiff's claims, the record evidence demonstrates that there are no facts that could possibly warrant the extraordinary relief of punitive damages. Accordingly, Plaintiff's request for punitive damages, in every Count of the Complaint, should remain dismissed as a matter of law.

POINT VIII

PLAINTIFF IMPROPERLY AND UNTIMELY SEEKS TO APPEAL THE COURT'S DECEMBER 2022 ORDER DENYING HER MOTION TO COMPEL DEFENDANTS TO CONTINUE HER DEPOSITION

In her Notice of Appeal and Civil Case Information Statement, Plaintiff noted that she only appeals from the Trial Court's January 5, 2024 Order, granting summary judgment to Defendants. Plaintiff, however, now contends that the Trial Court's December 16, 2022 Order (the "December Order") denying her motion to compel Defendants to continue Plaintiff's deposition for a second day was error. However, "only the orders designated in the notice of appeal … are subject to the appeal process and review." W.H. Indus., Inc. v. Fundicao Balancins, Ltda, 397 N.J. Super. 455, 458 (App. Div. 2008) (citing Sikes v. Twp. of Rockaway, 269 N.J.

Super. 463, 465-66 (App. Div.), aff'd o.b., 138 N.J. 41 (1994)). Therefore, Plaintiff is not entitled to review of the December Order. Ibid. Furthermore, Plaintiff only requested the transcript from argument on the motion for summary judgment—not the December 16, 2022, transcript, wherein the Trial Court set forth its findings of fact and conclusions of law on the record for its December Order. (Pa115-116). Thus, Plaintiff has failed to provide this Court with a complete record for review.

Even if this Court ignores these fatal defects to Plaintiff's argument, it is nonsensical for her to argue that discovery was incomplete because she could not question her own client. Counsel was always in the unique position of having unlimited access to her client and could have obtained a supplemental affidavit from her if she thought it would have helped defeat summary judgment. The discovery period ended on March 31, 2024, *after* ***three*** *extensions*. After Plaintiff's motion to compel the continuation of her deposition was denied, Plaintiff did not seek any further extension of discovery, nor did she appeal that December Order.

Furthermore, Plaintiff fails to specify how the continuation of her deposition would change the outcome of this case. Badiali v. N.J. Mfrs. Ins. Grp., 220 N.J. 544, 555 (2015) (party opposing summary judgment because discovery is incomplete must "demonstrate with some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action"). Plaintiff suggests that her counsel "had a number of questions to place on the record" (Pb19),

but omits what specific testimony would have been elicited and how that would have changed the outcome. Minoia v. Kushner, 365 N.J. Super. 304, 307 (App. Div. 2004) ("discovery need not be undertaken or completed if it will patently not change the outcome."). To the extent Plaintiff contends that she "was unable to testify to the discrimination that she experienced from Redler," this is a farce, and certainly not supported in the record, as this topic was fully explored at her deposition. (Pl. Tr. 213:1-9, 227:3-9, 237:8-24, 238:6-12, 258:1-3, 279:14-24, 281:23 to 282:14).

In sum, there is no basis to conclude the Trial Court erred. The Trial Court correctly granted Defendants' motion for summary judgment because Plaintiff's LAD claims are not viable. It is impossible to discern how any additional questioning of Plaintiff would have altered that outcome.

CONCLUSION

For the foregoing reasons, we respectfully request the Court to confirm the Trial Court's granting of summary judgment in favor of Defendants.

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DATED: October 7, 2024

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RENE EDGHILL SMITH Appellant, v. NEW BRUNSWICK BOARD OF EDUCATION, AUBREY A. JOHNSON, SUPERINTENDENT OF NEW BRUNSWICK SCHOOLS, KENNETH M. REDLER, PRINCIPAL NEW BRUNSWICK HIGH SCHOOL, JOHN DOES 1-10, JANE DOES 1-10, ABC CORPORATIONS A THROUGH Z Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-001642-23T1 Civil Action **APPELLANT REPLY BRIEF** **SAT BELOW:** **HON. KEVIN SHANAHAN, P.J.Cv.** **SUPERIOR COURT OF NEW JERSEY** **SOMERSET COUNTY COURTHOUSE** **DOCKET NO. SOM-L-1445-20**

LURETHA M. STRIBLING, ESQ.

October 25, 2024

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APPELLANT'S RESPONSE TO PRELIMINARY STATEMENT

Appellant Rene Edghill Smith filed a Complaint after her wrongful termination from employment at the New Brunswick Board of Education. The causes of action were Discrimination Based on Race, Hostile Work Environment and Harassment, Retaliation and Discrimination Based on Age which are pled under the New Jersey Law Against Discrimination (NJLAD). There existed no support in the record regarding race and age neutral decisions to not renew the contract for the Appellant.

The Appellate Court is not bound by the interpretation and application of the law made by the Trial Court. The Trial Court failed to recognize the evidence that supported the Appellant's case and as a result, the decision reached did not comport with the evidence and the application of the case law. As a result, the Appeal was appropriately filed. There are material issues in dispute. There was sufficient information presented to determine that the non-renewal of the Appellant's contract was discriminatory based on race and was a retaliatory action because one week prior, a Caucasian teacher, Ms. Costlow was reported and was disciplined for engagement in use of a racial slur, the N word. The Appellant had been previously praised by Mr. Redler for her effective communication. Further, the written evaluation total score is the determinant of whether the Appellant was meeting expectations. In each observation performed on the Appellant she met expectations.

The improper interpretation of each segment of the observation is an incorrect reading of this document because it is the overall score that determines if the employee is effective. There were no performance deficiencies as noted in the effective observations. Further, the strategy employed at the Plaintiff's deposition which did not allow time for Appellant's Counsel to ask Appellant questions on redirect of the Appellant resulted in the deposition being incomplete. It was error to dismiss the Complaint with Prejudice as the work was not complete. The documentary evidentiary material presented should have resulted in a finding in favor of the non-movant.

APPELLANT'S RESPONSE TO PROCEDURAL HISTORY

The Appellant will rely upon the Procedural History provided in the Appellant's Brief. The Appellant at the Trial Court filed a Motion to Compel Counsel for the Defendants to schedule the deposition of Plaintiff again for completion which was denied by the Court. Counsel for the Defendants held an initial deposition that lasted from 10:00 A.M. until 5:45 P.M. and per the communication with Defendants' Counsel regarding the Plaintiff's deposition continuing, it was stated by Counsel for the Defendants that she would schedule another day for deposition. The deposition was not scheduled for continuation of testimony. As a result, the Plaintiff was deprived of the opportunity to answer questions on redirect and complete the record. The Trial Court was notified that the Plaintiff's deposition had not been

completed and failed to grant Plaintiff's Motion to Compel Continuation of the Deposition. The decision to conduct the summary judgment motion with knowledge that the deposition transcript only included questioning from Counsel for the Defendants was inconsistent with the case law on this subject per Velantzas v. Colgate-Palmolive Co., 109 N.J. 189 (1988) which provides that the trial court should not grant a summary judgment motion when discovery has not been completed. In addition, per Wilson v. Amerada Hess Corp., in cases where discovery on material issues is not yet complete, the respondent must be given the chance to take discovery before the motion is disposed of. Wilson v. Amerada Hess Corp., 168 N.J. 236, 253-254 (2001).

STATEMENT OF FACTS

The evidence of discrimination against Appellant is evident in the fact that there were a number of Caucasian teachers who engaged in making discriminatory statements to the students of color and Mr. Redler appeared to protect these educators. Ms. Arato taught a class that consisted of Mexican students and she stated to her class that she was glad that Trump was building a wall. This statement was discriminatory based on race and also served to terrorize students with undocumented parents as students feared returning home to find that their parents had been taken into custody by ICE. Ms. Giordano taught a class of mainly African-American students and made discriminatory statements. Ms. Giordano said to these

students, where do you think you are at, in the jungle? This statement was offensive to the African-American students and Caucasian class mates and Ms. Giordano was reported to the Appellant, her supervisor by African-American and Caucasian students. The Appellant disciplined Ms. Giordano for this discriminatory statement. Ms. Costlow engaged in the use of the N word in her class with students in January of 2019 and was written up by her supervisor, Vice Principal Shelton. There was a video of Ms. Costlow engaging in use of the N word in January of 2019 because, the students in her class recorded her. Ms. Costlow engaged in the use of the N word again in May of 2019 which was recorded by the students and this repeat use of a racial slur was brought to the attention of teacher Dashauna Melton. Ms. Melton accompanied the students to Appellant's office and this use of the racial slur was reported to Appellant and Ms. Shelton. The behavior of Ms. Costlow was reported by Ms. Shelton and Appellant to Marnie McKoy, Superintendent of Human Resources. The video recording from May 2, 2019 was provided to Ms. McKoy, with a letter. Ms. McKoy did not address this discriminatory behavior which served to create a hostile school environment. The letter and video were sent to Mr. Redler by Ms. McKoy on May 2, 2019. On the date of May 9, 2019, Ms. Shelton and Appellant were given Notices of Non-Renewal of their contracts. It was learned that Ms. Costlow and her union rep met with Mr. Redler after she was written up by Ms. Shelton to have the write up received in May 2019 removed from her employee file.

It was further learned that Mr. Redler ordered the write up removed from Ms. Costlaw's Performance Evaluation. Counsel for the Respondents mis-states the number of times that Ms. Costlow engaged in the use of the racial slur as Counsel claimed that Ms. Costlow used the racial slur once. Ms. Costlow engaged in the use of the racial slur during her class twice, once in January of 2019 and once in May of 2019. Despite this engagement in violation of the school policy which prohibits discrimination and harassment, Ms. Costlow's contract was renewed. When Mr. Redler was deposed in the Shelton case in February of 2022, he was questioned about whether there were any issues with Appellant's job performance and whether Appellant had been reprimanded and he responded that there had been no issues and no reprimand. **(Pa330,Redler Deposition, 5/11/22, T28:23-25, T29:1-3)** Redler was questioned about whether Appellant had been provided with a remedial program or performance improvement program and he responded no. **(Pa330, Redler Deposition, 5/11/22, T26:20-23, T28:14-19)** With this testimony which supports the fact that the Appellant was performing her job satisfactorily, the non-renewal of her contract was not because of poor job performance and it suggests that Appellant was subjected to discrimination based on race and retaliation which were the reasons that her contract was not renewed.

POINT I

THE TRIAL COURT FAILED TO ADHERE TO THE STANDARD TO BE EMPLOYED IN MAKING A DETERMINATION ON A MOTION FOR SUMMARY JUDGMENT

Respondent noted the Summary Judgment standard per Court Rule 4:46-2(c) and it is claimed here that there was a failure to follow the Summary Judgment standard. The issue at that juncture is whether there are material issues in dispute. There were material issues in dispute, however, the Trial Court failed to follow that standard. There was a failure to recognize that there was no evidence in the record which supported the claimed basis for non-renewal of Appellant's contract. There was a failure to recognize the evidence in the record, specifically the video recording of Ms. Costlow using the racial slur to the dismay of the students in her class who said to Ms. Costlow, you cannot use that word**. (Pa409, Video Footage)** The material issue here is whether the non-renewal of the contracts for two African-American Vice Principals was the result of retaliation, where the non-renewal notice was given one week after a Caucasian teacher, Ms. Costlow had been reported by Appellant and Ms. Shelton for use of the N Word in her classroom. Another material issue in dispute was whether the non-renewal of Appellant's contract was the result of discrimination against Appellant based on race and age. The other material issues in dispute set out in the Appellant Brief are relied on in this legal argument..

POINT II

THE TRIAL COURT RELIANCE ON AND INCLUSION OF THE RESPONDENT'S STATEMENT OF UNDISPUTED MATERIAL FACTS IN THE DECISION SET FORTH AN APPEARANCE OF BIAS.

The Trial Court use of the Respondent's Statement of Undisputed Material Facts word for word in the Statement of Reasons set forth an appearance of bias. In addition, the Trial Court failure to grant Appellant's Motion to Compel the Completion of the Plaintiff's Deposition showed bias. It is customary for the Counsel for the deponent to have an opportunity to question the deponent on redirect at deposition to address some of the questions posed by Counsel for the Defendants. It is not the norm for Counsel for the deponent to schedule the deposition of her client. The Trial Court appeared to exhibit bias which favored the Defendants. It is requested that this matter be reversed and remanded, that Appellant's deposition be completed and that the matter be scheduled for trial.

POINT III

THE APPELLANT, THEN PLAINTIFF SATISFIED THE CAUSES OF ACTION OF DISCRIMINATION BASED ON AGE AND DISCRIMINATION BASED ON RACE WHICH WAS DISREGARDED BY THE TRIAL COURT.

The factors to be satisfied to support the cause of action of Discrimination Based on Age were set forth in Appellant's Brief and were disregarded by the Court. The factors noted were: (1) Plaintiff was in a protected category based on age because she was beyond the age of forty years old. (2) Plaintiff received effective ratings on observations and summative reports for 2017 and 2018. Plaintiff received two effective Observations for school year ending 2019. Mr. Redler testified that he was told by the attorney for the New Brunswick Board of Education to not perform the third observation and summative report in 2019. Appellant received effective Observation scores for 2019. **(Pa348, (Redler Deposition 10/28/22, T30:6-8, 18-22, T31:11-12, Pa298, Pa314, Pa326, Pa327)** Mr. Redler testified that the determinant factor in measuring how an employee was faring in the performance of the job was the performance evaluations, the Observations and summative reports. (3) Plaintiff was subjected to adverse employment action because she was non-renewed and was terminated from employment. (4) Plaintiff was replaced by a Caucasian woman, Ms. Damasceno who was less than forty years old with less experience than Appellant. Victor v. State, 203 N.J. 383, 410 (2010). The claim that an African-American man was hired to fill Appellant's position is erroneous. Of note here is that Appellant was interviewed for a Vice Principal position at the middle school, however, Mr. Redler was impressed with Appellant's wealth of experience per her employment history and asked that she come and work with him at the New

Brunswick High School **(Pa195, Pa193)** Aubrey Johnson interviewed Appellant and was impressed with her credentials also. **(Pa194)** The contrived listings that claim that Appellant was not performing her job are refuted by the Observation and Summative scores which were effective, Appellant had never been reprimanded, was never sent for courses to aid in improvement in her job performance and was not put on a Performance Improvement Plan by Redler. **(Pa330, Redler Deposition, 5/11/22, T26:20-23, T28:14-19)** Appellant has addressed the claims that she was not performing her job listed in paragraphs 1-15 in the Appellant's Brief. Some of the claims listed have been embellished and some of the claims are not issues when it comes to students sitting for state mandated tests. One need only look at the comments in the Observations conducted on Appellant in 2017, 2018 and 2019 to conclude that her communication was effective. Furthermore, it is expected that educators and Vice Principals satisfy the category Meets Expectations on Observations and summative reports which were the scores Appellant received. There is no requirement that Vice Principals attain scores which would result in a rank of Accomplished or Distinguished.

Appellant has set forth sufficient information in the Appellant's Brief that satisfy the standard for the cause of action of Discrimination Based on Race. Id. at 410. The information provided illustrates the fact that Appellant was treated less favorably than the Caucasian Vice Principals. Appellant testified that she would

learn of assignments required by Redler at a later time than the Caucasian Vice Principals learned of the assignments and had less time to complete the time sensitive assignments. Appellant has satisfied the factors to prove Discrimination Based on Race because Appellant was in a protected category based on race, she performed her job satisfactorily, she was subjected to adverse conditions in the workplace and the Caucasian Vice Principals Lugo and Susnovich were treated more favorably than she was. As noted above, the non-renewal of Appellant's contract came on the heels of Appellant and Ms. Shelton reporting Ms. Costlow for the use of the N word in May of 2019. Appellant's non-renewal was discrimination based on race. The contrived reasons set forth by Respondent were not supported by the evidence and do not support legitimate business reasons for the non-renewal. The conclusion reached is that the contract non-renewal was discriminatory based on race and age.

The satisfaction of the prima facie case for Discrimination Based on Age and Discrimination Based on Race were glaringly evident in the record. The Trial Court failed to recognize the presence of the documentary, evidentiary material which supported Discrimination Based on Age and Discrimination Based on Race. Respondents have not set forth a legitimate business reason for the non-renewal of Appellant's contract. Per McDonnell Douglas, the conclusion that has to be reached is that Respondents engaged in Discrimination Based on Age and Discrimination

Based on Race. McDonnell Douglas Corp. v. Green, 511 U.S. 792 (1983). This matter should be reversed and remanded with the requirement that the Appellant's deposition be completed and that the matter then be scheduled for trial.

POINT IV

APPELLANT WAS SUBJECTED TO A HOSTILE WORK ENVIRONMENT AND HARASSMENT WHICH IS ADEQUATELY NOTED IN THE APPELLANT'S BRIEF.

Appellant thoroughly set forth in the Appellant's Brief the many circumstances that happened in 2019 with regard to Redler. The information contained in the Appellant's Brief is reiterated here. In the documentary, evidentiary material in this case, Appellant set forth numerous adverse events that she experienced which supports the factors for hostile work environment and harassment as noted in the Appellant's Brief. The Vice Principals Susnovich and Lugo received favorable treatment from Mr. Redler and Appellant was treated unfavorably. Appellant was subjected to close scrutiny by Redler and was often left out of the loop with assignments that she was expected to complete. There was disregard for Appellant because Ms. Lugo with approval from Redler was allowed to discipline teachers that reported directly to Appellant. Ms. Lugo terminated a teacher that reported to Appellant without her knowledge or input. Appellant complained to

Aubrey Johnson, Superintendent that there was bias against her and Johnson failed to address this issue**. (Pa211, Smith Deposition, T264:1-9)** Appellant noted that the interaction with Redler became negative after she disciplined Caucasian teachers who engaged in discrimination in interactions with students. Appellant satisfied all of the factors to establish hostile work environment and harassment. The Appellant was in a protected class, she was performing her job and was met with adversity which was pervasive and other persons of the same status as Appellant would believe that the environment had become hostile and abusive. Lehmann v. Toys R Us, 132 N.J. 601 (1999). Sufficient information has been pled in the Appellant's Brief and this Reply Brief which support the position that this matter should be reversed and remanded, Appellant's deposition must be completed and trial should happen.

POINT V

APPELLANT HAS SATISFIED THE CAUSE OF ACTION OF RETALIATION AS SET OUT IN THE APPELLANT'S BRIEF WHICH WAS NOT RECOGNIZED BY THE TRIAL COURT

Appellant set forth details regarding the retaliation claim which are included in the record and documented in the Appellant's Brief which support this claim. As noted previously, on May 2, 2019, Ms. Melton and students from Ms. Costlow's class came to speak with Appellant and Ms. Shelton because Ms. Costlow was using

a racial slur, the N Word. Per Taylor v. Metzger , the use of a racial slur creates a hostile work environment. Taylor v. Metzger, 152 N.J. 490 (1988). On May 2, 2019, the actions of Ms. Costlow were video recorded by the students with details documented in a letter to Marnie McKoy, the Superintendent for Human Resources. The video of Ms. Costlow using the N word was also sent to Ms. McKoy. After the letter from Appellant and Ms. Shelton was received by Ms. McKoy, McKoy gave the letter and video to Redler. Seven days later, both Ms. Shelton and Appellant were provided with written notice that their contracts would not be renewed. On the document that lists all of the persons being non-renewed, adjacent to Appellant's name, the reason for the non-renewal is not documented. The area on the form adjacent to Ms. Shelton's name also lacks documentation of the reason for the non-renewal. There is a causal nexxus between the Appellant and Ms. Shelton engaging in protected activity by making a complaint about the use of the racial slur by Ms. Costlow in a letter to Ms. McKoy which was sent with the video of Ms. Costlow using the N word and the non-renewal of their contracts for the next school year. There was no legitimate reason provided for the non-renewal of the contracts for the next school year, therefore, the non-renewal was retaliation for engagement in protected activity which was notification to McKoy of Costlow using the N Word.

It is requested that the Appellate Court find that the claim of retaliation is satisfied and reverse and remand for completion of deposition and trial.

POINT VI

THE CLAIMS AGAINST AUBREY JOHNSON ARE VIABLE AS HE AS SUPERINTENDENT SHOULD HAVE BEEN AWARE OF CIRCUMSTANCES THAT APPELLANT HAD TO DEAL WITH AND SHOULD HAVE ADDRESSED APPELLANT'S CONCERNS.

Appellant testified that she complained of a bias against her by Redler in a meeting with Johnson. Johnson understood Appellant's concerns and took no action to find out what was transpiring between Appellant and Redler. Johnson did nothing although he was the best person to address the issues presented to him by Appellant because he was the Superintendent of New Brunswick Schools. As a result of this, Johnson allowed the conditions that Appellant worked under to worsen.

As noted in the Appellant Brief, Johnson aided and abetted the wrongful actions of Redler which violated the policies prohibiting discrimination and harassment. It is requested that the decision reached at the Trial Court be reversed and remanded for completion of Appellant's deposition and then trial.

POINT VII

PUNITIVE DAMAGES ARE WARRANTED AS SET FORTH IN THE APPELLANT'S BRIEF.

Appellant will rely upon the Appellant's Brief in response to the view that punitive damages are not warranted. The actions of the Respondents set forth a basis for award of punitive damages.

POINT VIII

APPELLANT IS APPEALING THE ENTIRE RULING FROM BELOW WHICH INCLUDES ALL OF THE ACTIONS OF THE TRIAL COURT.

Inherent in this Appeal is the fact that the Court made a decision on an incomplete record. The failure to make sure that the record was complete resulted in a decision on an incomplete record. The caselaw cited in the Appellant's Brief in the discussion of the Summary Judgment standard makes it clear that the Summary Judgment proceeding is to take place when the work is completed. Plaintiff's deposition was not completed. Per communication between Counsel on the day that Appellant was deposed, Ms. Stein for the Defendants stated at 5:45 P.M. "we are going to have to do a second session anyhow because I never got Mr. Young's records, so we will have to follow-up with a second session." **(Pa211, Smith Deposition, T234:19-22)** Ms. Stein was told that I had follow-up questions. Ms. Stein was told by this Counsel "when you have the second session, you can finish your questioning hopefully and then I will have my follow-up questions and that will take care of Ms. Edghill's deposition." **(Pa211, Smith Deposition, T326:19-22).**

It is requested that the Appellate Court reverse and remand this matter to the Trial Court, require that the Appellant complete her deposition and then this matter should be scheduled for trial. Appellant's Counsel must be provided with the opportunity to question Appellant on redirect at the deposition to be scheduled. This Counsel and Appellant were deprived of the redirect at the deposition and as a result, the deposition transcript is one-sided and incomplete.

The statement made by Respondents that the position taken that Plaintiff was not able to testify to the discrimination subjected to by Redler as being a farce simply delineates the fact that Respondents disregarded deposition protocol and benefitted. There is no farce here. It is requested that the Appellate Court reverse and remand this matter for completion of Appellant's deposition with the requirement that the trial must take place thereafter.

CONCLUSION

For all of the reasons set forth in this Reply Brief, Appellant's Brief, the case law, court rules and Appendices, it is requested that this matter be reversed and remanded to the trial court for completion of Appellant's deposition followed by a trial because of the material issues in dispute.

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