FILED, Clerk of the Appellate Division, August 04, 2023, **A-002397-22**, **AMENDED**

JEANNETTE ANDREULA, Plaintiff, v. THE BOARD OF EDUCATION OF THE TOWNSHIP OF NUTLEY, DR. JULIE GLAZER, LORRAINE RESTEL, JANINE SARNO, CHARLES KUCINSKI, LISA DANCHECK MARTIN, JOHN DOE ADMINISTRATORS AND STAFF 1-10, AND ABC BOARD MEMBERS 1-10, SAID NAMES BEING FICTITIOUS, Defendant,	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION** **DOCKET NO: A-0002397-22** **APPEAL SOUGHT FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION,ESSEX COUNTY DOCKET NO: ESX-L-6740-21** **SAT BELOW: HON. BRIDGET A. STETCHER, J.S.C.**

BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT JEANNETTE ANDREULA'S APPEAL

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PRELIMINARY STATEMENT

Plaintiff/Appellant Jeannette Andreula ("Plaintiff" or "Andreula") now appeals the lower court's orders fully granting Defendants-Respondents' various motions to dismiss Plaintiff's September 3, 2021 Complaint ("2021 Lawsuit"). Despite the lower court's express finding that Plaintiff had pled all of the required elements and facts of her cause of action, it inexplicably proceeded to dismiss the Complaint for failure to state a claim. This Court should reverse the lower court's order granting the motions to dismiss and order this case to proceed below.

Plaintiff alleged that Defendants, a local public school district, its superintendent, a principal, and fellow staff members, engaged in a pattern of unlawful retaliation against Plaintiff in violation of the New Jersey Law Against Discrimination ("NJLAD"). Plaintiff alleged that the retaliation was caused by Plaintiff having commenced a (still pending) lawsuit in 2016 under the NJLAD against the local public school district (and some of the same defendants) alleging that the transfer of Plaintiff violated the NJLAD's anti-retaliation provisions. Plaintiff obtained a preliminary injunction on July 29, 2016 prohibiting the transfer, an injunction that remains in effect to this day. Defendants are alleged in the 2021 Lawsuit to have orchestrated phony allegations and an internal investigation against Plaintiff, who has an unblemished thirty year teaching history, because Plaintiff was succeeding in her earlier 2016 lawsuit and because any other retaliation such as

termination, demotion, or transfer, would have violated the existing preliminary injunction Plaintiff alleged these actions are and were designed to dissuade Plaintiff (and others for that matter) from making or supporting a charge of discrimination, *i.e.*, an adverse employment action in the context of retaliation claims.

Granting the motions to dismiss the 2021 Lawsuit, the Lower Court wrote that "**Plaintiff alleges correctly that the act of filing [the 2016 lawsuit] is a protected activity," and that "[w]hen affording all reasonable inferences to Plaintiff that the complained of activity constitutes a pattern of retaliation, Plaintiff may have established the second element of her *prima facie* case**." [17a] (emphasis added). That finding should have resulted in denial of Defendants' pre-answer motions to dismiss. Yet, the lower court dismissed the 2021 Lawsuit on the grounds that Plaintiff had not adequately pled an NJLAD cause of action.

By dismissing the 2021 Lawsuit at the pleadings stage, the lower court failed to apply the applicable standard on a motion to dismiss and substituted its own judgment for that of the trier of fact. The sum and substance of the lower court's errors are: (1) finding that Plaintiff did not establish a *prima facie* claim of retaliation under the NJLAD; (2) finding that the doctrine of qualified immunity applies to claims brought against the individual defendants under the NJLAD; and (3) finding that the individual defendants were not aiders and abettors under the NJLAD. This Court should reverse the lower court's orders granting of dismissal to Defendants.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

A. Background on 2016 Lawsuit and Preliminary Injunction.

Plaintiff, a thirty year teacher at the Lincoln School, initiated her first lawsuit on June 17, 2016 ("2016 Lawsuit") against The Board of Education of Nutley ("Defendant BOE"), then Superintendent Russell Lazovick ("Defendant Lazovick"), and the Principal Lorraine Restel ("Defendant Restel"). 215a, ¶ 30. Plaintiff alleged she was being involuntarily transferred from her long time position as a third grade teacher at the Lincoln School location, to another school location to teach fifth grade – a grade she had never taught in over twenty-five years. 216a, ¶ 37. Plaintiff alleged that this involuntary transfer (the first of its kind at the school for any teacher), was instituted shortly after Plaintiff was required to participate in an internal discrimination investigation arising out of a discrimination complaint made by another teacher against then Principal Restel. Id. Plaintiff responded truthfully to questions asked of her during the investigation, which were supportive of the teacher's allegations of discriminatory treatment. Id.

Following initiation of the involuntary transfer, Plaintiff filed an Order to Show Cause and a Complaint alleging claims for retaliation under the NJLAD, individual liability under the NJLAD, failure to accommodate and engage in the interactive process under the NJLAD, and violation of the New Jersey Conscientious

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[1] Plaintiff has combined these components of the brief into one section.

Employee Protection Act. 218a, ¶ 46. On July 29, 2016, the court granted a preliminary injunction (the "Injunction"). 218a, ¶ 45. The Injunction orders that the Defendants shall maintain the status quo, such that Plaintiff shall continue to teach third grade, in the same location and classroom as in the prior school year, at the Lincoln School within the Nutley School System and Defendants shall not interfere with Plaintiff's participation in all Lincoln School events. 34a, ¶ 49; 40a, ¶ 94. The Injunction was in place during the events that occurred following Plaintiff's initiation of the 2016 Lawsuit, which form the basis of Plaintiff's 2021 Lawsuit. The Injunction remains in place to this day (over seven years later).[2]

B. Background on the 2021 Lawsuit.

The 2021 Lawsuit, initially filed on September 3, 2021 and amended on November 18, 2021, alleges that Defendants retaliated against Plaintiff for her initiation of the 2016 Lawsuit, which resulted in the issuance of the Injunction. Although Defendants were prevented from transferring Plaintiff and from disrupting the status quo, Plaintiff alleges that Defendant BOE, new Superintendent Dr. Julie

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[2] The 2016 lawsuit is captioned Andreula v. The Board of Education of the Township of Nutley, et al., ESX-L-4254-16, and is scheduled for trial on September 25, 2023. That case will too be in this Appellate Division after the trial. That is because the Court in that case (same court, different judge) had twice denied defendants' motion for summary judgment on April 5 and October 15, 2019 on Plaintiff's NJLAD retaliation claims. But then, on December 2, 2021, over two years later, with no change in law and no change in facts, the Court granted summary judgment dismissing Plaintiff's NJLAD retaliation claim on a motion to reconsider.

Glazer ("Defendant Glazer"), Defendant Restel, Janine Sarno ("Defendant Sarno"), Charles Kucinski ("Defendant Kucinski"), and Lisa Dancheck Martin ("Defendant Dancheck Martin"), otherwise engaged in a campaign to retaliate against Plaintiff. 210a, ¶ 1.

Plaintiff alleges that were many instances over a period of years that, when considered collectively, demonstrate a pattern of unlawful retaliation under the NJLAD. These included Defendant Restel's alleged: (1) refusal to provide Plaintiff with copies of her students' PARCC scores, although she provided them to other teachers; and (2) actions to prevent Plaintiff from bonding with her colleagues by rotating her grade-level teaching partners at least three (3) times while staff in other grades remained consistent. 219a to 223a. In addition, and more importantly, the 2021 Lawsuit also alleges two glaring retaliatory actions that occurred in late 2020 and 2021.

1. Disparate Treatment Relating to District Policy 1648.

First, Plaintiff alleges the disparate application of District Policy 1648, an policy that governed the use of masks in school during the COVID-19 pandemic. 223a through 231a. District Policy 1648 mandates use of face masks unless outside the building or during snack time, and mandates that the "school district shall prepare and support teaching staff members in meeting the social, emotional, health, and academic needs of all students throughout the implementation of the Plan." 230a,

¶¶ 121-22. Plaintiff alleges that to her knowledge, she is the only teacher who received a formal disciplinary meeting and letter in her file regarding violation of District Policy 1648. 230a, ¶ 126. Plaintiff is aware that other teachers, including Defendant Sarno, had been the subject of multiple reports to the administration, including Principal Restel, for failure to wear a mask in accordance with District Policy 1648. 222a-223a, 230a-231a. But Defendant Sarno was not disciplined as a result of these reports. 230a, ¶ 125.

In contrast, a similar report about Plaintiff resulted in a meeting with the Superintendent on November 20, 2020, involvement of Union representatives, and a formal discipline letter in Plaintiff's personnel file ("Disciplinary Meeting"). 227a-229a. Not only did Plaintiff plead that the ultimate issuance of a discipline letter was retaliatory, given that other teachers did not receive the same treatment, but Defendants' institution of the Disciplinary Meeting and what happened at the Disciplinary Meeting was part of the pattern of retaliation. 223a through 231a.

Specifically, Plaintiff alleges that she was only notified about the Disciplinary Meeting the day before, without the subject of the meeting being disclosed as required by school policy. 223a, ¶ 86. Defendant Restel did not disclose the subject of the Disciplinary Meeting in response to a further inquiry from Plaintiff, and failed to do so even after she was directed to do so by the Union representative. 224a, ¶¶ 89-91. Plaintiff was allegedly issued a Weingarten Rights notice, but her attorney

was prevented from appearing at the Disciplinary Meeting, and after much back-and-forth, Plaintiff's counsel was expressly told by Defendant BOE's General Counsel that the meeting was ***not*** a disciplinary meeting. 227a, ¶ 100. But Plaintiff alleges that this representation was false, given that she ultimately received a disciplinary letter in her file after the meeting. 229a, ¶ 118.

The events that comprise the Disciplinary Meeting also form the basis of Plaintiff's retaliation allegations. The Disciplinary Meeting was attended by Michael Stoffers (Nutley Education Association Vice President), Victoria Gonzalez (Lincoln School Union Representative and School Nurse), Allyson Gardener (Lincoln School Union Representative and Resource Room ELA Partner), Defendant Glazer, and Defendant Restel. 227a, ¶ 103. Defendant Restel claimed that on November 16, 2020, her secretary reported to Ms. Gonzalez that Plaintiff was not wearing a mask while seated and that some of her students were not wearing a mask. Id. at ¶ 105. However, both Defendants Glazer and Restel then raised multiple other violations by Plaintiff, without informing Plaintiff or the Union Representatives that they intended to do so. 228a-229a. For example, Defendant Glazer claimed that this was the second report about Plaintiff, who was also the subject of a complaint by the mother of a virtual student. 228a, ¶ 108. Defendant Glazer could not answer any details about the complaint, but only claimed that several school administrators had questioned people as a result of the complaint. Id. at ¶ 109. Yet, Plaintiff had not

been questioned, and her only interaction with administrators regarding masks was with Ms. Gonzalez in response to the November 16, 2020 complaint. Id. at ¶ 110.

Following Defendant Glazer's revelation of a different complaint, Defendant Restel then claimed that she had been aware of Plaintiff sitting without a mask on another occasion, but she never took steps to correct or educate Plaintiff. 229a, ¶ 113. Plaintiff alleged that at the Disciplinary Meeting, neither Ms. Gardener nor Ms. Gonzalez had been aware of these other complaints. Id. at ¶ 114. What is more, Ms. Gonzalez stated that there had been no other incidents after her direction to Plaintiff to comply with District Policy 1648 following the November 16, 2020 complaint. Id. at ¶ 116. Ms. Gardener also stated her believe that if any previous complaints had been addressed with Plaintiff, the November 16, 2020 incident may not have occurred. Id. at ¶ 115. Despite all of this, Plaintiff was informed at the Disciplinary Meeting that she would receive a disciplinary letter ("Disciplinary Letter"). Id. at ¶ 117. And this is despite the fact that General Counsel for the school claimed that this was not a disciplinary meeting. 227a, ¶ 100.

The Disciplinary Letter was dated November 19, 2020, a day before the Disciplinary Meeting, and only raises the November 16, 2020 incident, but not the other incidents claimed by Defendant Glazer and Defendant Restel to have occurred. 229a, ¶ 119. Plaintiff also alleges that she later learned from the Union Representatives that Defendant Restel openly conceded that Plaintiff and Defendant

Sarno were not treated similarly in response to violations of District Policy 1648. 231a, ¶ 131.

2. Sham Investigation Based On Defendant Sarno's Complaint.

The second overt example of Defendants' retaliatory treatment against Plaintiff is the handling of a complaint brought by Defendant Sarno, culminating in a third-party investigation spearheaded by Defendants Kucinski and Dancheck Martin, who are members of Defendant BOE. 231a, ¶ 132. Plaintiff's allegation in the 2021 Lawsuit is not that an investigation should not have occurred. Rather, Plaintiff alleges that the investigation was conducted improperly, depriving her of an ability to meaningfully participate, such that it was a sham and retaliatory investigation. Id. at ¶ 133.

Plaintiff learned of Defendant Sarno's complaint, stemming from four separate alleged incidents, on March 9, 2021, in an email from a third-party investigator, Philip Stern (an attorney not acting in his attorney capacity), who stated that he was performing an investigation at Defendant BOE's behest. 232a, ¶ 134. Plaintiff was allegedly informed by Mr. Stern that he wanted to complete his investigation and report as soon as possible, and while she was denied the presence of an attorney, he stated that she was entitled to Union representation under the Weingarten Rule. Id. at ¶ 137. Plaintiff also alleges that in conversations with Plaintiff's counsel, Mr. Stern represented that the interview would be recorded and

that she would have an opportunity to correct the transcript before the investigation concluded. 233a, ¶ 142. Mr. Stern allegedly represented that the investigation had ”nothing to do” with the 2016 Lawsuit, and on that basis Plaintiff appeared for the interview without an attorney. 232a, ¶ 139.

The interview occurred over one month later, on April 13, 2021 (“Interview”). Victoria Gonzalez and Allyson Gardener were also present during the Interview. 233a-234a. At that time, Mr. Stern displayed a written complaint from Defendant Sarno, which allegedly had never been provided to Plaintiff and has still never been provided to Plaintiff. 234a, ¶ 147. At the Interview, Mr. Stern referred to the four incidents as Incident A, Incident B, Incident C, and Incident D. 234a.

As to Incident A, Defendant Sarno claimed that in the 2019-2020 school year, Plaintiff persistently asked her to change a student’s grade, prompting a loud verbal altercation in the hallway. 234a, ¶ 150-152. Plaintiff denied the events that formed the basis of Incident A, stating to Mr. Stern that it never happened. Id. As to Incidents C and D, they occurred during the fall of 2020. 234a, ¶ 154. Plaintiff denied Defendant Sarno’s version of events, provided a detailed accounting of the incidents, and identified other individuals who would have more knowledge, as well as documents that would support Plaintiff’s version of events. 234a-236a. As to Incident B, Plaintiff could not meaningfully respond to Mr. Stern’s questions during the Interview. 236a, ¶ 170. That is because the investigator previously represented

that the investigation had nothing to do with the 2016 Lawsuit. 232a, ¶ 139. Yet, Incident B was expressly based upon the 2016 Lawsuit, with Defendant Sarno claiming she had been mistreated by Plaintiff so that Plaintiff could further her 2016 Lawsuit. 236a-237a.

Plaintiff also alleges that Mr. Stern also made many representations at the end of the Interview regarding his next steps, many of which did not happen. He stated that Plaintiff would learn the results of the investigation, but she never did. 238a. He stated that he would keep her attorneys apprised of the contents of his final report, but he did not. Id. He stated that he would talk to the individuals with knowledge that Plaintiff raised, but to Plaintiff's knowledge he did not do so. Id. He said he would obtain additional documents from Plaintiff and/or Ms. Gardener, but he did not. Id.

Plaintiff's counsel reached out to Mr. Stern on May 13, 2021, over one month after the interview, to provide the additional documents, identify additional individuals to interview, and to seek the status of the investigation. 239a. Mr. Stern did not respond to that request, and did not respond to a subsequent letter on May 18, 2021. Id. Defendant BOE also failed to respond to Plaintiff's Open Public Records Act ("OPRA") request seeking the information related to Defendant Sarno's complaint, which was sent on June 8, 2021. Id. As of September 3, 2021 (the date of filing the 2021 Lawsuit), Defendant BOE still had not responded, and only

responded on October 28, 2021, with redacted invoices from Mr. Stern. 240a, ¶ 201. Mr. Stern's redacted invoices reveal the following information: (1) he was involved in the investigation for six (6) weeks before notifying Plaintiff; (2) he only conducted one interview other than Plaintiff's Interview, despite representing that he would speak with the individuals that Plaintiff identified; (3) it took him over three-and-a-half months to prepare a report, with numerous revisions; and (4) he conducted three investigation meetings. 232a, 241a.

Two months after her interview, on June 15, 2021, Plaintiff received a transcript of her interview for review and comment, but alleges that it was largely illegible and contained critical errors. 240a. For example, the transcript did not identify the speaker in many instances, and failed to differentiate between speakers. Id. Consequently, in order to allow Plaintiff to provide meaningful substantive comments, her counsel sent a request for a certified transcript and supporting documents, including Defendant Sarno's complaint about Plaintiff. Id. Mr. Stern never responded, did not provide a new transcript, and Plaintiff never learned of the results of the investigation. 241a.

C. 2021 Lawsuit and Motions to Dismiss.

On September 3, 2021, Plaintiff filed a Complaint, which was amended on November 18, 2021 ("Amended Complaint"), alleging retaliation under the NJLAD, 10:5-12(d). 25a-71a, 210a-252a. Plaintiff also alleged individual liability under the

NJLAD against Defendants Glazer, Restel, Sarno, Kucinski, and Dancheck Martin. Id. While Plaintiff alleged other claims, such as violation of the Open Public Records Act (Counts Eight and Nine), these are not the subject of the instant appeal. Rather, Plaintiff is only appealing the Lower Court's dismissal of Counts One, Two, Three, Four, Five, Six, and Seven of the Amended Complaint.

In lieu of answering Plaintiff's Amended Complaint, Defendants filed Motions to Dismiss on October 26, 2021 (Defendants Kucinski and Dancheck Martin), October 28, 2021 (Defendants BOE and Restel), and November 11, 2021 (Defendants Glazer and Sarno) (collectively referred to herein as "Motions to Dismiss"). 72a-209a. The substantive arguments in the Motions to Dismiss were largely that Plaintiff had failed to plead a claim for which relief could be granted under the NJLAD due to an alleged lack of materially adverse employment action, and that aider and abettor individual liability could not exist without an underlying violation of the NJLAD. Id. Plaintiff opposed the respective Motions to Dismiss on December 7, 2021. 255a. Reply papers were filed by the Defendants on December 13, 2021. 325a.

The Lower Court conducted oral argument on the Motions to Dismiss on January 7, 2022. During the oral argument, the Lower Court asked why the allegations in the 2021 Lawsuit could not be joined into the 2016 Lawsuit, necessitating application of the entire controversy doctrine, which was not an

argument raised by any of the Defendants in the Motions to Dismiss. T10:7-14. The Lower Court was informed by Plaintiff's counsel that the allegations in the 2021 Lawsuit were separate and apart from the 2016 Lawsuit, although Plaintiff would not oppose joining them into one action if the Court chose to do so. T10:19-11:12.

During oral argument, Plaintiff's counsel specifically raised that one of the primary differences between Plaintiff's 2021 Lawsuit and much of the applicable published and unpublished case law is the existence of the Injunction, which largely preserves the status quo as to Plaintiff, and which is critical to the analysis of whether Plaintiff sustained an adverse employment action. T33:1-23. Counsel also raised that Plaintiff is entitled to all reasonable inferences, and that the allegations in the pleadings, against the backdrop of the Injunction preserving the status quo, show a pattern of retaliatory activity under the NJLAD. T33:23-34:16. Counsel raised that if an employer cannot transfer Plaintiff, or take other action to disrupt the status quo, it may take other measures to impact the circumstances of an employee. T35:1-11. Counsel also raised the disparate application of school policies, and the sham investigation, and specifically noted that the method of conducting the investigation was the retaliation at issue, not the fact that an investigation was conducted. T36:1-40:19, T42:16-22. Finally, counsel argued that many of the case law relied upon by the Defendants weighed the degree of seriousness of the adverse action, which needed to be considered differently in this matter, given the presence of the

Injunction. T52:11-24.

On February 28, 2023, over one year later, the Lower Court issued its orders as well as a written decision (the "Motion to Dismiss Decision") entirely granting the motions to dismiss filed by Defendants. 3a-24a.

STANDARD OF REVIEW

At primary issue during this appeal are orders dismissing Plaintiff's complaint as to all Defendants. Appellate review of a Motion to Dismiss is de novo. Frederick v. Smith, 416 N.J. Super. 594, 597 (App. Div. 2010) (citing Seidenberg v. Summit Bank, 348 N.J. Super. 243, 250 (App. Div. 2002). "A complaint should be dismissed for failure to state a claim pursuant to Rule 4:6-2(e) only if 'the factual allegations are palpably insufficient to support a claim upon which relief can be granted.' " Ibid. (quoting Rieder v. State Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987)). "This standard requires that 'the pleading be searched in depth and with liberality to determine whether a cause of action can be gleaned even from an obscure statement.'" Ibid. (quoting Seidenberg, 348 N.J. Super. at 250); see also Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989).

Motions to dismiss for failure to state a claim must "be accorded... meticulous and indulgent examination" and, accordingly, "such motions... should be granted ***in only the rarest of instances***." Printing-Mart Morristown v. Sharp Electronics Corp., 116 N.J. 739, 772 (1989) (emphasis added). The reviewing court must "view the allegations with great liberality and without concern for the plaintiff's ability to prove the facts alleged in the complaint." Sickles v. Cabot Corp., 379 N.J. Super. 100, 106, (App. Div.), certif. denied, 185 N.J. 297, 884 A.2d 1267 (2005). Applying this standard, motions to dismiss are for failure to state a claim are "granted only in

rare instances and ordinarily without prejudice." Pressler, Current N.J. Court Rules, comment 4.1.1 on R. 4:6-2(e) (2010).

Thus, if simply "the fundament of a cause of action may be gleaned" from the Complaint at issue, then the pleading cannot be dismissed for failure to state a claim. NCP Litig. Trust v. KPMG LLP, 187 N.J. 353, 365 (2006). To that end, it is therefore the duty of the trial court to "search the complaint in depth and with liberality" to identify the asserted causes of action pursuant to the above standards. Lieberman v. Port Authority of N.Y. and N.J., 132 N.J. 76, 79 (1993) (internal quotation omitted). Moreover, when the Court considers a R. 4:6-2(e) motion, it must ***assume that the non-movant's allegations are true and give that party the benefit of all reasonable inferences***, such that the motion must be denied if a "generous reading" as much as "suggests a cause of action." Smith v. SBC Communications, Inc., 178 N.J. 265, 282 (2004) (emphasis added); see also Burg v. State, 147 N.J. Super. 316, 319, 371 A.2d 308 (App. Div.) (citing Rappaport v. Nichols, 31 N.J. 188, 193, 156 A.2d 1 (1959)), certif. denied, 75 N.J. 11 (1977).

LEGAL ARGUMENT

I. THE LOWER COURT ERRED WHEN IT FOUND THAT PLAINTIFF DID NOT ESTABLISH A *PRIMA FACIE* CASE OF RETALIATION AGAINST DEFENDANT BOE AND DISMISSED COUNT ONE OF THE AMENDED COMPLAINT (8a).

Under the NJLAD, it is unlawful retaliation to engage in any of three prohibited behaviors:

> For any person to take reprisals against any person because that person has [(1)] opposed any practices or acts forbidden under this act or [(2)] because that person has filed a complaint, testified or assisted in any proceeding under this act or [(3)] to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this act.

See N.J.S.A. § 10:5-12(d).

Plaintiff must prove allege the following elements to state a claim for retaliation under the NJLAD: (1) she engaged in a protected activity known to the defendant; (2) that she thereafter suffered an adverse employment decision; and (3) that there was a causal connection between the protected activity and the adverse employment action. Woods-Pirozzi v. Nabisco Foods, 290 N.J. Super. 252, 274 (App. Div. 1996). With respect to adverse employment decisions, all that is required is that, with respect to action at issue, a "***reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of***

discrimination." See Roa v. Roa, 200 N.J. 555, 574 (2010), (internal quotation omitted) (emphasis added).

In determining whether Plaintiff pled that *prima facie* elements of an NJLAD claim, the lower court did not address the third prong of the *prima facie* test. 5a-18a. And the lower court found that as to the first prong, "Plaintiff alleges that the act of filing the [2016 Lawsuit] is a protected activity, which is correct. Therefore, Plaintiff may have established the first prong of a claim for retaliation." 8a. Thus, the entirety of the lower court's determination rested on the second prong of an NJLAD cause of action; *i.e.*, whether the Plaintiff suffered an adverse employment action.[3] In that regard, Plaintiff plainly alleged – both the law and facts – an adverse employment action.

In the Motion to Dismiss Decision, the Court stated that "Plaintiff has not established the second prong, that she suffered an adverse employment action" to justify a determination that Count One was dismissed as to Defendant BOE. 8a. Yet, later, when evaluating Plaintiff's claims against Defendants Glazer and Sarno, the Court conceded that "[**w]hen affording all reasonable inferences to Plaintiff that**

[3] In one statement, with no analysis, the lower court also wrote that "Plaintiff has failed to show how any of the [retaliatory] acts have even a remote relationship to the filing of the [2016 Lawsuit]." 9a. But, Plaintiff pled that the retaliatory conduct did not begin until after she filed the 2016 Lawsuit and was granted the Injunction, including the rotation of her teaching partners, and then continued most recently through a sham investigation wherein one of the complaints against Plaintiff by Defendant Sarno directly related to the 2016 Lawsuit. 218a, ¶ 47 and 237a, ¶ 175.

the complained of activity constitutes a pattern of retaliation, Plaintiff may have established the second element of her *prima facie* case." 17a (emphasis added). The lower court has two contradictory findings in this its decision regarding the adverse employment action.

The lower court erred in finding that Plaintiff had not adequately pled the second prong of an NJLAD claim in two respects: (1) it acted as the trier of fact with respect to evaluating the retaliatory actions pled by Plaintiff; and (2) it did not consider the scope of the Injunction when considering whether the retaliatory actions were materially adverse.

A. The Lower Court Erred By Failing to Assume the Truth of the Retaliatory Actions Pled by Plaintiff (8a-9a, 17a).

When viewed in the context of the motion to dismiss standard, and affording all reasonable inferences to Plaintiff, and assuming that her allegations are true, the Plaintiff pled a series of retaliatory actions following the following of her 2016 Lawsuit and the issuance of the Injunction that would be materially adverse to a reasonable employee. Plaintiff alleged that Defendants' retaliatory actions included multiple examples of disparate treatment by Defendant Restel over a period of years, such as rotation of grade-level teaching partners and refusal to provide access to information received by other teachers. 218a.

What is more, Plaintiff also alleged that Defendants' retaliatory actions culminated in two incidents that highlight Plaintiff's disparate treatment. First, the

alleged disparate application of District Policy 1648, including a Disciplinary Meeting where unsubstantiated allegations were raised by Defendants Glazer and Restel for the first time and a issuance of the Disciplinary Letter that was written before the meeting occurred. 222a through 231a. Restating each of these allegations, the lower court expressly acknowledges that "Plaintiff claims that District Policy 1648 was applied differently to her than to coworkers." 8a.

Second, Plaintiff alleged an investigation instituted by Defendant BOE, including Defendants Kucinski and Dancheck Martin, after Defendant Sarno submitted a complaint about Plaintiff involving four separate incidents was conducted in a retaliatory manner. 231a through 242a. Specifically, Plaintiff alleged that she was wholly deprived of the opportunity to meaningfully participate, which evidenced that the investigation was nothing more than a sham. Id.

When considering these allegations of retaliatory treatment, the lower court did not assume them to be true, as it was required to do. Instead, the lower court, without any discovery having occurred in the case and at the pleading stage, acted as if it was the trier of fact, and found as follows:

- "[B]eing reprimanded for failing to comply with the District COVID-19 mask policy, specifically, for allowing her students to take their masks off while seated, does not rise to the level of 'materially adverse' because the entire

school district, and its teachers, were provided with the mask-regulations far in advance of the alleged violations" 9a;

- "Plaintiff cannot establish that enforcing the mask policy is not in and of itself within the purview of the Nutley BOE for protection of teachers, students, and staff" Id.; and
- "Even if the Affirmative Action investigation was retaliatory – ***which is was not*** – the Board and its members are protected by qualified immunity" Id. (emphasis added).

The lower court also found that certain alleged actions by Defendants, such as the sham investigation, constituted "protected conduct." 10a. In doing so, the lower court's ruling makes it so that an employer's investigation of an employee complaint can never constitute retaliation under the NJLAD, irrespective of how the investigation is conducted. That is simply not a finding that is supportable by the case law or the NJLAD.

The lower court erred by failing to presume the truth of Plaintiff's allegations, contrary to the standard on a motion to dismiss, which is generous to Plaintiff and affords her with all reasonable inferences. Plaintiff alleged multiple activities with specific descriptions to demonstrate why each action evidenced disparate or retaliatory treatment. The lower court was obligated to assume that these allegations

were true. Smith, 178 N.J. at 282. The record demonstrates that the court did not do that.

B. The Lower Court Erred By Failing to Consider the Injunction When Determining Whether the Retaliatory Actions Were Materially Adverse (5a, 9a).

The lower court also failed to consider the scope of the Injunction when determining whether any of the retaliatory actions pled by Plaintiff were materially adverse. Indeed, the Injunction is not mentioned in the Motion to Dismiss Decision at all, except for in the Statement of Facts. 5a. The significant of the Injunction cannot be overstated: Defendants were obligated to maintain the status quo and were not allowed to take certain actions as a result, which would include moving Plaintiff's room or changing her teaching assignment (or transferring/terminating/demoting Plaintiff). Thus, with the Injunction was in place, there were limited ways that Plaintiff's employment could be impacted. Yet, without any mention of the Injunction that prevented certain actions by Defendants, the lower court found that Plaintiff's employment status remained unperturbed, such that no material alteration had occurred, even though a Disciplinary Letter was issued. 9a. The lower court also found that Plaintiff was not affected by the sham investigation because the results were not released, which misses the point entirely. Id. But this all ignores that the Injunction prohibited other adverse actions.

Ultimately, the lower court erred by failing to perform a nuanced analysis of the pleadings and apply the concepts expressed in the case law against the backdrop of those facts. At the pleadings stage, when Plaintiff is to be afforded all reasonable inferences and a generous review must be given, the lower court failed to consider what could constitute a materially adverse action when the Injunction prevented certain actions. In multiple similar cases, this Court reversed dismissals of pleadings at the motion to dismiss stage by holding that allegations of various acts can be taken as a whole, such that the plaintiff may be considered to have suffered an adverse employment action in the terms and conditions of employment. See e.g., Clarke v. Atlantic City Bd. of Educ., 2010 WL 4107750, *5 (N.J. App. Div. Dec. 8, 2009) (holding that the plaintiff's LAD retaliation cause of action withstood a motion to dismiss when the plaintiff alleged that he was relocated in the building, when he was the only employee whose request to develop a 504 plan was denied, and by refusing to negotiate a new employment contract unless he agreed to abrogate an earlier settlement); see also Nead v. Union County Educ. Services Com'n, 2011 WL 166245 (N.J. App. Div. Jan. 20, 2011) (reinstating an LAD and CEPA complaint where the employer, a school, was alleged to have retaliated against the plaintiff, a teacher, by filing a bad faith report of child abuse without asking the plaintiff for any details prior to doing so, where the employer argued that the conduct was protected because it was required by law to report a student's abuse allegation); see also

Royster v. New Jersey State Police, 2007 WL 4441103 (N.J. App. Div. Dec. 20, 2007) (reversing the trial court's dismissal of the complaint for failure to state a claim, where the plaintiff's complaint alleged NJLAD racial discrimination and retaliation, where the plaintiff alleged he was given a poor performance evaluation following his report of disparate treatment he gleaned by virtue of his job as a staff investigator).

As this case law demonstrates, context matters, and the lower court erred by failing to consider the Injunction, which prohibited many of the actions that the lower court described as materially adverse.

C. The Lower Court Erred By Failing to Consider the Standard Set by Roa v. Roa (7a-8a).

The lower court failed to apply the prevailing NJLAD retaliation standard, and consider Plaintiff's allegations within that standard. Specifically, the lower court barely mentioned the New Jersey Supreme Court's decision in Roa v. Roa, 200 N.J. 555 (2010), which adopted the broad retaliation standard announced by the U.S. Supreme Court under Title VII in Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006). Roa found that the scope of unlawful (and hence actionable) retaliatory conduct under the LAD is broader than the employment relates acts prohibited with regard to discrimination claims under the LAD. Roa, 200 N.J. at 575; see also Prager v. Joyce Honda, Inc., 447 N.J. Super. 124, 139 (App. Div. 2016). Instead, as it relates to whether or not the retaliatory action was materially adverse,

the only cases that the lower court raised were El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145 (App. Div. 2005) and Spinks v. Township of Clinton, 402 N.J. Super. 465 (App. Div. 2008). 17a. These cases were both decided before Roa and should not have been used as a basis for the decision.

In Burlington, as recited by Roa, the U.S. Supreme Court held: "in addressing the question of how harmful an act of retaliatory discrimination must be in order to fall within the provision's scope, the Court held that a plaintiff must show that ***a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination***." See Roa, 200 N.J. at 574 (internal quotation omitted) (emphasis added). The Roa Court found that by that standard, the plaintiff's claim that his health insurance was cancelled in retaliation for reporting the sexual harassment of female employees, thereby causing him to experience stress and anxiety, was sufficient to meet the threshold of an independent cause of action under the NJLAD. Id. at 575-76.

More importantly, the Roa ruling was in response to an argument from the defendants that the cancellation of the plaintiff's insurance was not actionable under the NJLAD given that it allegedly did not harm his actual employment. As to the NJLAD, the Roa Court noted that the conduct of the retaliator under the NJLAD is generally referred to as "reprisals," and that the Legislature specifically expressed

an intention to construe the NJLAD liberally. Id. at 573. As to Title VII's antiretaliation provision, the Roa Court analyzed numerous federal cases extending Title VII's protections to retaliatory actions that are not materially adverse to employment and that fall short of ultimate employment decisions but that could support a retaliation claim. Id. at 573-74. "Context matters" because "an act that would be immaterial in some situations is material in others." Burlington, 548 U.S. at 69 (internal citations omitted). With the Injunction in place, context certainly mattered here, but the Court did not consider it at all.

The scope of actions that can support NJLAD retaliations claims is extremely broad and can include a pattern of retaliatory actions. The Appellate Division addressed the significance of a pattern of retaliatory treatment in Nardello v. Township of Voorhees, a CEPA case, which also stemmed from the plaintiff's involvement in an internal investigation. See Nardello v. Township of Voorhees, 377 N.J. Super. 428, 431 (App. Div. 2005). The lower court did not consider the findings in Nardello, where this Court reversed the trial court's summary judgment dismissing a complaint brought under CEPA, finding that "while plaintiff was not discharged, suspended or demoted, when the facts are viewed in a light most favorable to him, a jury could draw an inference that he suffered a series of adverse retaliatory actions by his employer." Id. at 435; see also Green v. Jersey City Bd. of Educ., 177 N.J. 434, 448 (2003) ("'Retaliation,' as defined by CEPA, need not be a

single discrete action. Rather, adverse employment action taken against an employee in the terms and conditions of employment . . . can include, as it did in this case, many separate but relatively minor instances of behavior directed against an employee that may not be actionable individually but that combine to make up a pattern of retaliatory conduct"); see also O'Keefe v. State, 2007 WL 1975603 (N.J. App. Div., July 10, 2007) (reversing the summary judgment dismissal of a CEPA claim and holding that the jury could find that a pattern of retaliatory conduct, including filing of groundless EEO complaints, constituted an adverse employment action). And the Nardello case was decided before the New Jersey Supreme Court's Roa decision and the U.S. Supreme Court's Burlington decision, both of which made clear the wide scope of actions that constitute retaliation under the NJLAD and Title VII.

When considering the retaliatory actions pled by Plaintiff, against the backdrop of the Injunction mandating that Defendants maintain the status quo, and factoring in the Roa standard, it is clear that Plaintiff successfully pled the second prong of an NJLAD action. As such, the Court's dismissal of Count One as to Defendant BOE should be reversed.

II. THE LOWER COURT ERRED IN DISMISSING COUNT FOUR AGAINST DEFENDANT RESTEL (9a-10a).

The lower court ruled in error that Defendant Restel could not be individually liable under the NJLAD as an aider and abettor.

The NJLAD also makes it unlawful "for any person, whether an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this Act." N.J.S.A. 10:5-12(e). Plaintiff must show that the party whom the defendant aids performed a wrongful act that causes injury, the defendant was generally aware of his role as part of the overall illegal or tortious activity at the time assistance is provided, and the defendant knowingly and substantially assists the principal violation. Id.

First, reversal is warranted because the lower court relied on many of the same justifications that led to the dismissal of Count One against Defendant BOE, including that issuance of the Disciplinary Letter was not materially adverse. This was error for the same reasons that Plaintiff as already articulated, and are incorporated herein by reference. Second, reversal is warranted because the lower court found that Plaintiff did not establish an underlying claim of retaliation by Defendant BOE. However, should this Court find that the dismissal of Count One warrants reversal, this justification would fail.

Finally, the lower court erroneously found that Plaintiff failed to establish that Defendant Restel was aware of having a part in any illegal activity. Even a cursory

FILED, Clerk of the Appellate Division, August 04, 2023, **A-002397-22**, **AMENDED**

review of the Amended Complaint refutes this finding, given that Defendant Restel is the individual behind many of the Plaintiff's alleged retaliatory actions, and Plaintiff alleges that she knowingly and substantially assisted in various retaliatory actions, including the rotation of grade-level teaching partners, as well as the Disciplinary Meeting and resulting Disciplinary Letter. 219a-231a, 245a. Plaintiff's allegations regarding Defendant Restel must be accepted as true for the purposes of evaluating the motion to dismiss.

For all of these reasons, the lower court's dismissal of Count Four as to Defendant Restel should be reversed.

III. THE LOWER COURT'S ERRED IN DISMISSING COUNTS THREE AND FIVE AS TO DEFENDANTS GLAZER AND SARNO (14a-18a).[4]

The lower court ruled in error that Defendants Glazer and Sarno could not be individually liable under the NJLAD as aiders and abettors. First, reversal is warranted because the lower court relied on many of the same justifications that led to the dismissal of Count One against Defendant BOE, including that issuance of the Disciplinary Letter was not materially adverse. This was error for the same reasons that Plaintiff as already articulated, and are incorporated herein by reference.

In addition, reversal is warranted because the lower court found that Plaintiff did not establish an underlying claim of retaliation by Defendant BOE. However, should this Court find that the dismissal of Count One warrants reversal, this justification would fail.

The lower court also erroneously found that Plaintiff failed to establish that Defendants Glazer and Sarno were aware of having a part in any illegal activity. Even a cursory review of the Amended Complaint refutes this finding, given that Defendant Glazer is the individual behind many of the Plaintiff's alleged retaliatory actions, and Plaintiff alleges that she knowingly and substantially assisted in conducting the Disciplinary Meeting, which resulted in the issuance of the

[4] As to Defendant Sarno, Plaintiff believes that discovery is warranted to determine if she is an employer under the NJLAD, as opposed to a coworker. See Tarr v. Ciasulli, 181 N.J. 82-83 (2004).

Disciplinary Letter. 228a. Similarly, Defendant Sarno is the one who lodged the complaint that raised both the 2016 Lawsuit and three other issues. 235a. Thus, Plaintiff's allegations regarding Defendants Glazer and Sarno must be accepted as true for the purposes of evaluating the motion to dismiss.

The lower court also erroneously relied on El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145 (App. Div. 2005) and Spinks v. Township of Clinton, 402 N.J. Super. 465 (App. Div. 2008), two pre-Roa cases, to find that Defendant Glazer was obligated to authorize the sham investigation and thus could not be held liable. 17a. Once again, these cases should be disregarded, as they do not incorporate the findings in Roa. Under Roa, context matters, and evaluation of the alleged retaliatory activities must be viewed within the appropriate context, against the backdrop of the Injunction. Also, once again, the lower court ignored that Plaintiff's pleadings relate to the method the investigation was conducted, not the investigation itself. 261a, ¶ 133.

This critical distinction was not considered by the lower court, which found that Plaintiff did not allege that Defendant Glazer had any involvement with the sham investigation beyond authorizing it. 17a. The irony here is that Plaintiff would have no way of knowing Defendant Glazer's involvement, given that the Defendants possess all of the requisite information, and only responded to her OPRA request in a limited fashion. But, there is simply no information in the pleadings to suggest

that Defendant Glazer was not involved. To the contrary, the Court was required to accept as true Plaintiff's allegations that Defendants Glazer and Sarno allegedly knowingly and substantially assisted in the retaliatory conduct. It did not do so. For all of these reasons, the lower court's dismissal of Counts Three and Five as to Defendants Glazer and Sarno should be reversed.

IV. THE LOWER COURT ERRED IN DISMISSING COUNTS SIX AND SEVEN AS TO DEFENDANTS KUCINSKI AND DANCHECK MARTIN (10a-14a).

The lower court ruled in error that Defendants Kucinski and Dancheck could not be individually liable under the NJLAD as aiders and abettors. First, reversal is warranted because the lower court relied on many of the same justifications that led to the dismissal of Count One against Defendant BOE. This was error for the same reasons that Plaintiff as already articulated, and are incorporated herein by reference.

In addition, reversal is warranted because the lower court found that Plaintiff did not establish an underlying claim of retaliation by Defendant BOE. However, should this Court find that the dismissal of Count One warrants reversal, this justification would fail.

The lower court also erroneously found that Plaintiff failed to establish that Defendants Kucinski and Dancheck Martin were aware of having a part in any illegal activity. Even a cursory review of the Amended Complaint refutes this finding, given that Defendants Kucinski and Dancheck Martin knowingly and substantially assisted in retaliating against Plaintiff by authorizing the sham investigation, spanning over six months, where the investigator did not give Plaintiff an opportunity to meaningfully respond to a legible transcript and did not interview any of the individuals that she identified with knowledge, despite saying he would do both things. 231a-242a, 246a-247a. Thus, Plaintiff's allegations regarding

Defendants Kucinski and Dancheck Martin must be accepted as true for the purposes of evaluating the motion to dismiss.

Reversal is also warranted as to Defendants Kucinski and Dancheck Martin based on the Lower Court's erroneously reliance on El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145 (App. Div. 2005) and Spinks v. Township of Clinton, 402 N.J. Super. 465 (App. Div. 2008), two pre-Roa cases. As this is already extensively discussed as to Defendant Glazer, Plaintiff incorporates the same argument by reference.

Finally, lower court erroneously found that Defendants Kucinski and Dancheck Martin are entitled to qualified immunity for authorizing the sham investigation. But the qualified immunity defense, a defense to federal civil rights claims and state law Title 59 claims, does not apply to NJLAD claims. See Brown v. City of Bordentown, 348 N.J. Super. 143, 150-51 (App. Div. 2002); Miller v. New Jersey, 144 Fed. Appx. 926 (3d Cir. 2005) (citing Rodriguez v. Torres, 60 F. Supp. 2d 334, 354 (D.N.J. 1999) (noting that the analysis related to the qualified immunity defense in the context of federal claims does not apply to NJLAD claims)).

The lower court ignored that Plaintiff complained about the method of conducting the investigation, which she alleges was done in a retaliatory manner. 231a, ¶ 133. Moreover, Plaintiff has argued that Defendants Kucinski and Dancheck Martin are liable as aiders and abettors under the NJLAD. T45:9-14. For all of

these reasons, the lower court's dismissal of Counts Six and Seven to Defendants Glazer and Sarno should be reversed.

CONCLUSION

For all of the reasons set forth herein, Plaintiff requests:

(1) The lower court's Orders on Motion to Dismiss be reversed as to the dismissal of Counts One, Three, Four, Five, Six, and Seven;

(2) Alternatively, the Court should vacate the Orders on Motion to Dismiss and remand the matter to the lower court with instructions regarding the applicable Roa standard; and

(3) Such other and further relief as this Court deems just, equitable, and proper.

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Dated: August 4, 2023

FILED, Clerk of the Appellate Division, October 05, 2023, **A-002397-22**, AMENDED

JEANNETTE ANDREULA, Plaintiff/Appellant vs. THE BOARD OF EDUCATION OF THE TOWNSHIP OF NUTLEY, DR. JULIE GLAZER, LORRAINE RESTEL, JANINE SARNO, CHARLES KUCINSKI, LISA DANCHECK MARTIN, JOHN DOE ADMINISTRATORS AND STAFF 1-10, AND ABC BOARD MEMBERS 1-10, said names being fictitious, Defendant(s)/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-0002397-22 Civil Action **ON APPEAL FROM** SUPERIOR COURT OF NEW JDERY LAW DIVISION : ESSEX COUNTY DOCKET NO.: ESX-L-6740-21 Sat Below: Hon. Bridget A. Stetcher, J.S.C.

BRIEF OF RESPONDENTS CHARLES KUCINSKI AND LISA DANCHECK MARTIN IN OPPOSITION TO APPEAL OF APPELLANT JEANNETTE ANDREULA.

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PRELIMINARY STATEMENT

The trial court correctly granted the motion to dismiss the Complaint pursuant to Rule 4:6-2(e), in lieu of an Answer, submitted by Defendants/Respondents Charles Kucinski and Lisa Dancheck Martin in response to the Complaint filed by Plaintiff/Appellant Jeannette Andreula. Mr. Kucinski was the President of the Board of Education of the Township of Nutley and Ms. Martin was the Vice President at all times relevant to the Complaint.

Plaintiff's claims against Mr. Kucinski and Ms. Martin sound in the unfounded assertion that they are aiders and abettors of discrimination and retaliation allegedly perpetrated against the Plaintiff. The claims are based on the contention that they aided and abetted the Board of Education of the alleged retaliation by virtue of their being members of the defendant Board of Education that authorized an investigation into defendant Janine Sarno's employment claims against Plaintiff. The alleged unlawful conduct of these defendants is limited to their authorizing an investigation into a complaint of another employee.

Plaintiff does not allege she has been damaged in any way by these defendants' alleged conduct and she does not allege that these defendants took any adverse employment action against her. Moreover, Plaintiff's Complaint fails to articulate a factual basis to show that these defendants violated her rights by being

party of a public body that authorized an investigation into another employee's complaints concerning her employment.

The trial court correctly found that Plaintiff's claims fail, as a matter of law, and correctly dismissed the Complaint as to these defendants pursuant to Rule 4:6-2(e) for failure to state a claim upon which relief can be granted.

STATEMENT OF FACTS

In or about June 2016, Plaintiff filed a Verified Complaint and Order to Show Cause in the Superior Court of New Jersey, Essex County, Chancery Division, naming the Board of Education of the Township of Nutley, Russell Lazovick, and Lorraine Restel as Defendants. (Pa27a, ¶13). The 2016 lawsuit is referred to herein as the First Lawsuit or the 2016 Lawsuit. On or about September 3, 2021, Plaintiff filed the Complaint that is the subject of this appeal. The 2021 Complaint is hereinafter referred to as the Second Lawsuit or the 2021 Lawsuit.

Plaintiff's Complaint in the 2021 Lawsuit alleges that the 2016 Lawsuit included claims of Retaliation in violation of the Law Against Discrimination ("LAD"), Violation of the New Jersey Conscientious Employee Protection Act ("CEPA"), Failure to Accommodate a Disability and Failure to Engage in the Interactive Process under the LAD, Individual Liability Against Russell Lazovick pursuant to the LAD and CEPA, and Individual Liability Against Lorraine Restel pursuant to the LAD and CEPA. (Pa28a, ¶16). Plaintiff alleges that the Defendants

in the Second Lawsuit retaliated against her in connection with the filing of the First Lawsuit. (Pa29a, ¶18). Plaintiff alleges that all claims as alleged in the First Lawsuit are proceeding to trial, with the exception of her CEPA claims. (Pa34a, ¶50, n.1).

Thus, the Second Lawsuit alleges retaliation against Plaintiff for filing the first lawsuit. Plaintiff's Complaint in the Second Lawsuit consists of approximately 280 paragraphs and twelve separate counts. The Complaint contains numerous irrelevant and superfluous passages. (See Pa25a – Pa70a).

The Complaint in the Second Lawsuit alleges that defendants Charles Kucinski ("Kucinski") and Lisa Dancheck Martin ("Martin") are aiders and abettors of discrimination and retaliation allegedly perpetrated against the Plaintiff on the basis of their being members of the defendant Board of Education that allegedly authorized an investigation of defendant Janine Sarno's employment complaints against Plaintiff. (See Pa61a (Count Six); Pa62a (Count Seven)).

Plaintiff does not allege a factual basis for her damages claims arising from the investigation into Ms. Sarno's complaints or that Martin and Kucinski had any involvement other than authorizing an investigation into a complaint of another employee.

Plaintiff's alleged factual basis for her claims is set forth in the Nature of the Action and Factual Allegations sections of her Complaint. Plaintiff alleges that the Board of Education and its members retaliated against her for bringing a lawsuit and

alleging that they defamed her. (See Pa25a, ¶1). Plaintiff's Complaint reiterates the claims that form the basis of the allegations as set forth in the 2016 Lawsuit. (See Pa31a – Pa34a, ¶¶36-50). These allegations have no relevance to the 2021 Lawsuit, are redundant to the allegation as set forth in the First Lawsuit.

Moreover, Plaintiff devotes approximately forty-five (45) paragraphs of the Complaint to her allegations concerning a November 19, 2020, request to attend a virtual meeting, Plaintiff's assertion that she was not initially told the purpose of the meeting, Plaintiff's demand that her attorney be permitted to represent her at the meeting, assurances received by Plaintiff that it was not a disciplinary meeting, the nature of the meeting in which concerns regarding claims that Plaintiff and some of her students were not wearing masks, Plaintiff's allegations concerning the claimed ambiguity of the mask policy, and her belief that defendant Sarno was not disciplined for her failure to wear a mask. (See Pa38a – Pa46a, ¶¶85-130).

Plaintiff's allegations concerning Kucinski and Martin arise from her claim that these Board members authorized an investigation into complaints raised by defendant Janine Sarno. (See Pa61a (Count Six); Pa62a (Count Seven)). Plaintiff alleges that she learned about the investigation after receiving a letter from the investigator, Philip Stern. (Pa46a, ¶132). Plaintiff alleges that during a Zoom interview that was conducted in connection with Ms. Sarno's complaints, the investigator, Mr. Stern, showed her Ms. Sarno's written complaint. (Pa48a, ¶145).

Plaintiff alleges that Ms. Sarno's complaint asserted (a) Sarno complained that during the 2019-2020 school year, Plaintiff asked her to change a grade in Sarno's library media class (Pa49a, ¶146); (b) Sarno alleged that Plaintiff "teamed with a Board member as part of a claimed bullying attack as an attempt to tarnish Defendant Sarno's reputation (Pa51a, ¶¶166-167); (c) Sarno complained that in the Fall of 2020, Plaintiff was not present in the virtual classroom when she should have been and did not leave the in-class students with adequate activities to occupy them once they completed their work (Pa49a, ¶¶152-153); and (d) Sarno complained that in the Fall of 2020, and (d) Sarno "accused Plaintiff of fueling an anti-special class agenda, and targeting Defendant Sarno as a result (Pa51a, ¶163).

PROCEDURAL HISTORY

In or about June 2016, Plaintiff filed a Verified Complaint and Order to Show Cause in the Superior Court of New Jersey, Essex County, Chancery Division, naming the Board of Education of the Township of Nutley, Russell Lazovick, and Lorraine Restel as Defendants. (Pa27a, ¶13). The matter was subsequently transferred to the Law Division where it was assigned Docket Number ESX-L-4254-16. (Ibid.). That action, hereinafter referred to as the "First Lawsuit," remains pending and is currently scheduled for trial on October 16, 2023. (Pa34a, ¶50).

More than five years later, on or about September 3, 2021, Plaintiff filed a Complaint in the instant matter. The instant matter is hereinafter referred to as the

"Second Lawsuit," naming as defendants The Board of Education of the Township of Nutley, Dr. Julie Glazer, Lorraine Restel, Janine Sarno, Charles Kucinski, Lisa Dancheck Martin, and John Doe Administrators, Staff, and Board Members. (See Pa25a).

Counts Six and Seven of the Complaint are directed at defendants Charles Kucinski ("Kucinski") and Lisa Dancheck Martin ("Martin"). (See Pa61a to Pa62a). Count Six of the Complaint alleges individual liability under the LAD against Kucinski. (See Pa61a). Count Seven of the Complaint alleges individual liability under the LAD against Martin. (See Pa62a).

On October 26, 2021, Kucinski and Martin moved to dismiss the Complaint pursuant to Rule 4:6-2(e), in lieu of an answer. (Pa72a). (Each of the other defendants also moved to dismiss the Complaint pursuant to Rule 4:6-2(e) at or about the same time). By Order filed February 28, 2023, the trial court granted the defendants' motions to dismiss the Complaint in its entirety pursuant to Rule 4:6-2(e). (Pa21a). The trial court filed a Consolidated Statement of Reasons in support of its Orders on these defendants' motion, as well as on the Orders concerning the motions to dismiss filed by the other defendants in this matter. (Pa5a).

As to Defendants Kucinski and Martin, the trial court found that these defendants are entitled to qualified immunity with regard to the claims brought against them. The trial court found that Plaintiff alleged defendants Kucinski and

Martin violated the LAD by authorizing an investigation with regard to Defendant Sarno's complaint against Plaintiff. Plaintiff alleged that the investigation was retaliatory. (Pa12a). The trial court found that "the actions of these Defendants were required responses to a complaint of another employee which, by the very nature of their jobs, they were required to investigate. Accordingly, these Defendants are shielded from liability based on qualified immunity." (Pa12a).

The trial court continued, providing the basis for dismissal of Counts Six and Seven of the Complaint as to Defendants Kucinski and Martin. (Pa12a). The Court found that Plaintiff alleges that these defendants are individually liable under the LAD for retaliation. (Pa12a). The trial court found that Plaintiff failed to establish individual liability as to these defendants because they were "obligated to authorize an investigation. An employer must be free to investigate complaints of employee misconduct without fear of NJLAD liability. (Pa13a (citing Spinks v. Township of Clinton, 402 N.J. Super. 364, 484 (App. Div. 2009))). Moreover, the trial court found that Counts Six and Seven of the Complaint

> allege individual liability as aiders and abettors under NJLAD, but the action Plaintiff complains of concerns the affirmative action investigation and complaint, which did not necessarily constitute an adverse employment action as the result remains pending. Additionally, the facts do not align with the factors set forth in Hurley [v. Atlantic City Police Dep't,, 174 F.3d 95, 127 (3d Cir. 1999)] to sufficiently show that these Defendants, individually, had any involvement with the complained of alleged retaliation *beyond* authorizing an investigation they were duty bound to approve.

[Pa13a-Pa14a (emphasis in original)]

The Court's February 28, 2023, Orders granted the Rule 4:6-2(e) motions of each defendant. (See Pa3a through Pa24a). Plaintiff filed an Amended Notice of Appeal on August 4, 2023. (Pa394a).

STANDARD OF REVIEW

Appellate review of a dismissal of a complaint for failure to state a claim upon which relief can be granted pursuant to Rule 4:6-2(e) is de novo. See MTK Food Servs., Inc. v. Sirius Am. Ins. Co., 455 N.J. Super. 307, 311 (App. Div. 2018). The Court will affirm dismissal of a "complaint if it has failed to articulate a legal basis entitling plaintiff to relief." Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005).

Pursuant to Rule 4:6-2(e), a complaint that fails to state a cause of action upon which relief may be granted should be dismissed. See Jenkins v. Region Nine Housing Corp., 306 N.J. Super. 258, 263 (App. Div. 1997), certif. denied, 153 N.J. 405 (1998). Courts, of course, afford the non-moving party all reasonable inferences, but "[d]ismissal is warranted where the factual allegations are palpably insufficient to support a claim upon which relief can be granted." Rieder v. State Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987).

While courts must accept "all well-pleaded facts as true," they "need not credit a complaint's bald assertions or legal conclusions." In re Burlington Coat Factory

Sec. Litig., 114 F.3d 1410, 1429 (3d Cir. 1997). A complaint "cannot survive a motion to dismiss where the claims are conclusory or vague and unsupported by particular overt acts." Delbridge v. Office of Pub. Defender, 238 N.J. Super. 288, 314 (Law Div. 1989).

Indeed, "a court is not required to accept unsupported evidentiary conclusions and unwarranted inferences." Insight Global, LLC v. Collabera, Inc., 446 N.J. Super. 525, 528 (Ch. Div. 2015) (citing Nostrame v. Santiago, 213 N.J. 109, 129 (2013)). "[V]ague conclusory allegation[s]" are "not enough" to survive a motion to dismiss. Zoneraich v. Overlook Hosp., 212 N.J. Super. 83, 101 (App. Div. 1986). In short, a party cannot "file a conclusory complaint to find out if [a claim] exists." Printing-Mart Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 768 (1989) (quoting Zoneraich, 212 N.J. Super. at 101-02).

For the reasons set forth herein, this Court should affirm dismissal of the Complaint as to defendants Dancheck and Martin pursuant to Rule 4:6-2(e).

LEGAL ARGUMENT

POINT I

DISMISSAL OF THE COMPLAINT SHOULD BE AFFIRMED AS TO DEFENDANTS KUCINSKI AND MARTIN BECAUSE THEY ARE ENTITLED TO QUALIFIED IMMUNITY FOR THEIR OFFICIAL ACTIONS.

Qualified immunity is a doctrine that shields government officials from a suit for civil damages when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Qualified immunity "is an immunity from suit," the right to avoid the rigors and costs of trial. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (emphasis omitted). Whether an official is covered by qualified immunity is a matter of law to be decided by a court, "preferably on a properly supported motion for summary judgment or dismissal." Wildoner v. Borough of Ramsey, 162 N.J. 375, 387 (2000) (emphasis added); see also Pearson v. Callahan, 555 U.S. 223, 232 (2009). "Qualified immunity balances two important interests -- the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." Pearson, 555 U.S. at 231.

> For a right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523, 531 (1987). The Third Circuit has "'adopted a broad view of

> what constitutes an established right of which a reasonable person would have known.'" Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 726 (3d Cir.1989) (quoting Sourbeer v. Robinson, 791 F.2d 1094, 1103 (3d Cir.1986), cert. denied, 483 U.S. 1032, 107 S. Ct. 3276, 97 L. Ed. 2d 779 (1987)). Officials are expected to "'apply general, well-developed legal principles,'" in "analogous factual situations." Ibid. (citations omitted). The Third Circuit "does not require 'relatively strict factual identity' between applicable precedent and the case at issue." Ibid. (citation omitted); see also Ryan v. Burlington Cnty., 860 F.2d 1199, 1208-09 (3d Cir.1988) ("'Although officials need not predic[t] the future course of constitutional law, they are required to relate established law to analogous factual settings.'" (alteration in original) (internal quotation marks omitted) (quoting People of Three Mile Island v. Nuclear Regulatory Comm'rs, 747 F.2d 139, 144 (3d Cir.1984))), cert. denied, 490 U.S. 1020, 109 S. Ct. 1745, 104 L. Ed. 2d 182 (1989).

Gormley v. Wood-El, 218 N.J. 72, 113-14 (2014).

Qualified immunity is "an immunity from suit rather than a mere defense to liability." Saucier v. Katz, 533 U.S. 194, 200 (2001) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)), overruled in part on other grounds, Pearson v. Callahan, 555 U.S. 223, 236-43 (2009). "[Q]ualified immunity ordinarily is a question of law to be decided by the court." Baskin v. Martinez, 243 N.J. 112, 128 (2020); see also, Winberry Realty P'ship v. Borough of Rutherford, 247 N.J. 165, 186 (2021).

Qualified immunity "'gives government officials breathing room to make reasonable but mistaken judgments' by 'protect[ing] all but the plainly incompetent or those who knowingly violate the law.'" Morillo v. Torres, 222 N.J. 104, 116-17 (2015) (quoting City & Cnty. of S.F. v. Sheehan, 575 U.S. 600, 611 (2015)).

Appellant incorrectly asserts that qualified immunity is not applicable to claims brought under the LAD. (See Pb35). The cases cited by Appellant do not support her assertion. In Brown v. City of Bordentown, 348 N.J. Super. 143 (App. Div. 2002), the court held that "legislative immunity 'has long been recognized in Anglo-American law' and has 'a venerable tradition.'" Id. at 148. Legislative immunity has been "preserved in actions under both the LAD and §1983." Id. at 148-49. There is "a sound basis for legislative immunity as a defense to an LAD claim." Id. at 149.

Appellant also incorrectly relies on Miller v. New Jersey, 144 Fed Appx. 926 (3d Cir. 2005), in support of her erroneous assertion that qualified immunity does not apply to LAD claims. (See Pb35). In Miller, the court cites to Rodriguez v. Torres, 60 F. Supp. 2d 334, 354 (D.N.J. 1999). Miller, 114 Fed Appx. at 929. The portion of the Rodriguez decision relied on by the Miller court merely states that the Rodriguez court's qualified immunity analysis as set forth in Section B of the decision did not apply to the pendent state claims. Rodriguez, 60 F. Supp. at 354. Section B of the decision addressed the plaintiff's hostile work environment claim pursuant to 42 U.S.C §1983. See Rodriguez, 60 F. Supp. 2d at 342. The Rodriguez court's analysis addressed the plaintiff's contention of a pattern of retaliatory harassment. See id. at 344. The court's qualified immunity analysis in Section B focused on whether the plaintiff could pursue a cause of action for retaliatory

harassment under the First Amendment. Id. at 350. Following what it refers to as its "exhaustive analysis," the Rodriguez court found that the defendant was entitled to qualified immunity on plaintiff's claim of retaliatory harassment brought pursuant to 42 U.S.C. §1983. Id. at 352. Addressing the plaintiff's NJ LAD retaliation claims, the Rodriguez court held that its qualified immunity analysis of the plaintiff's retaliation claims brought under the First Amendment did not apply to the LAD claim. Id. at 354. The Rodriguez court did not find that qualified immunity does not apply to LAD claims. It merely found that its First Amendment qualified immunity analysis did not apply to the plaintiff's LAD claims. See id. Appellant's assertion that qualified immunity is not available to an LAD defendant is not supported by the law.

Here, Plaintiff's claims against defendants Kucinski and Martin assert that they violated Plaintiff's rights through the exercise of discretionary procedural activities, specifically their authorization of an investigation into an employee complaint. The authorization of the investigation was a discretionary act in the course of their official duties. Pursuant to N.J.S.A. 59:3-2, public employees are not liable for the exercise of such discretion. N.J.S.A. 59:3-2 provides:

> a. A public employee is not liable for an injury resulting from the exercise of judgment or discretion vested in him;
>
> b. A public employee is not liable for legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial nature;

> c. A public employee is not liable for the exercise of discretion in determining whether to seek or whether to provide the resources necessary for the purchase of equipment, the construction or maintenance of facilities, the hiring of personnel and, in general, the provision of adequate governmental services;
>
> d. A public employee is not liable for the exercise of discretion when, in the face of competing demands, he determines whether and how to utilize or apply existing resources, including those allocated for equipment, facilities and personnel unless a court concludes that the determination of the public employee was palpably unreasonable.
> Nothing in this section shall exonerate a public employee for negligence arising out of his acts or omissions in carrying out his ministerial functions.
>
> [N.J.S.A. 59:3-2]

For the foregoing reasons, defendants Kucinski and Martin respectfully submit that they are immune from suit for the conduct alleged. The trial court correctly dismissed of Counts Six and Seven of the Complaint as a matter of law pursuant to Rule 4:6-2(e) as to defendants Kucinski and Martin finding that they are shielded from liability for Plaintiff's claims based on qualified immunity because "the actions of these Defendants were required responses to a complaint of another employee which, by the very nature of their jobs, they were required to investigate." (See Pa11a-Pa12a). These defendants respectfully submit that this Court should affirm dismissal of all claims against Defendants Kucinski and Martin on Qualified Immunity grounds.

POINT II

THE COURT SHOULD AFFIRM DISMISSAL OF PLAINTIFF'S LAD CLAIMS AS ALLEGED IN COUNTS SIX AND SEVEN AS TO DEFENDANTS KUCINSKI AND MARTIN.

Counts Six and Seven allege that Defendants Kucinski and Martin are individually liable under the NJLAD for retaliation. The only conduct alleged as to Kucinski and Martin is their authorization of an investigation. For the reasons set forth in the trial court's statement of reasons, as well as those set forth herein, this Court should affirm dismissal of Counts Six and Seven as to Defendants Kucinski and Martin. (See Pa12a-Pa13a).

a. Dismissal of Plaintiff's Claims for Aiding and Abetting LAD Violations Should Be Affirmed Because Plaintiff Did Not Plead Sufficient Factual Allegations to Sustain That Claim.

The LAD makes it unlawful "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." N.J.S.A. 10:5-12(e). To hold an employee liable for aiding and abetting an LAD violation, a plaintiff must show:

> (1) the party whom the defendant aids must perform a wrongful act that causes injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; [and] (3) the defendant must knowingly and substantially assist the principal violation.

Tarr v. Ciasulli, 181 N.J. 70, 84 (2004). To determine whether an individual provided substantial assistance, courts consider five 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." Ibid. (citing Restatement (Second) of Torts § 876(b) comment d).

These defendants did not perform a wrongful act that caused an injury. The allegation against these defendants is that they performed their jobs, as they were duty-bound to do, and authorized an investigation into employment complaints against Plaintiff brought by another defendant, Defendant Sarno. Further, dismissal should be affirmed, as a matter of law, because the actions of these defendants in authorizing an investigation did not cause Plaintiff any damages. As found by the trial court, Defendants Kucinski and Marting did not have "any involvement with the complained of alleged retaliation beyond authorizing an investigation they were duty bound to approve." (Pa14a (emphasis in original)). Finally, no actions are alleged to have been taken against Plaintiff as a result of the investigation into the Sarno complaints.

b. **Defendants Kucinski and Martin had a duty to authorize an investigation into the Sarno Complaints.**

Counts Six and Seven of the Complaint allege individual liability against defendants Kucinski and Martin, respectively, as aiders and abettors under the LAD. Counts Six and Seven allege that these defendants, "[b]y virtue of being a member of the Defendant Board of Education that retained Mr. Stern to conduct an

investigation of Defendant Sarno's claims against Plaintiff [are] individually liable as [aiders and abettors] of the discrimination and retaliation perpetrated against the Plaintiff." (Pa61a-Pa62a (Complaint, ¶¶238, 240)). The allegations to which Plaintiff refers in Counts Six and Seven are alleged in paragraphs 131 through 210 of the Complaint. (See Pa46a to Pa55a). Plaintiff alleges that (a) Sarno complained that during the 2019-2020 school year, Plaintiff asked her to change a grade in Sarno's library media class (Pa49a, ¶146); (b) Sarno alleged that Plaintiff "teamed with a Board member as part of a claimed bullying attack as an attempt to tarnish Defendant Sarno's reputation (Pa51a, ¶¶166-167); (c) Sarno complained that in the Fall of 2020, Plaintiff was not present in the virtual classroom when she should have been and did not leave the in-class students with adequate activities to occupy them once they completed their work (Pa49a, ¶¶152-153); and (d) Sarno "accused Plaintiff of fueling an anti-special class agenda, and targeting Defendant Sarno as a result (Pa51a, ¶163).

Counts Six and Seven thus allege that defendants Kucinski and Martin aided and abetted the Board of Education in discrimination in violation of the LAD, by being part of the body that authorized an investigation of the Sarno complaints as alleged in paragraphs 131 through 210 of the Complaint. The trial court correctly dismissed these claims as a matter of law.

Government entities have a duty to investigate complaints as allegedly raised by Defendant Sarno. "[A] government agency's negligent failure to conduct a prompt investigation of a complaint constitutes 'a failure] to enforce [a] law' within the intent of N.J.S.A. 59:2-4 and N.J.S.A. 59:3-5." Reaves v. State, Dep't of Law & Pub. Safety, Div. on Civil Rights, 303 N.J. Super. 115, 116-17 (App. Div. 1997). "An employer must be free to investigate complaints of employee misconduct without fear of LAD liability." Spinks v. Township of Clinton, 402 N.J. Super. 465, 484 (App. Div. 2008). It is "[o]nly when the investigation results in some real detriment, such as a suspension, demotion, or termination, should the aggrieved employee be able to invoke the protection of the LAD." Id. (citations omitted). Plaintiff does not allege that she was suspended, demoted or terminated. To the contrary, she alleges: "To this date, Plaintiff (through her counsel or otherwise) has not been informed of the status of the investigation and believes that Mr. Stern still has not interviewed any of the persons Plaintiff identified above." (Pa55a, ¶206). As alleged in the Complaint, Plaintiff has not suffered any real detriment as a result of the investigation.

The trial court correctly found that Plaintiff has not suffered an adverse employment action as a result of the Affirmative Action investigation complained of. (Pa13a). As found by the court, the "District's application of the Covid-19 policy, the continued rotation of Plaintiff's grade-level partners, and her involuntary

reassignment have not resulted in an adverse employment action, even if they were not to the Plaintiff's liking." (Pa13a). The court further correctly found that "Plaintiff has failed to establish individual liability as to these defendants because they were nevertheless obligated to authorized." (Pa13a). "An employer must be free to investigate complaints of employee misconduct without fear of NJLAD liability." (Pa13a (emphasis in original) (citing Spinks v. Township of Clinton, 402 N.J. Super. 465, 484 (App. Div. 2009)).

This Court should affirm dismissal of Plaintiff's LAD aiding and abetting claims against these defendants, as alleged in Counts Six and Seven of the Complaint, for failure state a claim upon which relief can be granted.

c. **Plaintiff's LAD Claims as to these defendants must be dismissed, as a matter of law, because no adverse employment action was taken against Plaintiff.**

Appellant asserts that the Court should not consider Respondents' arguments that rely on the holdings in the El-Sioufi v. St. Peter's University Hosp., 382 N.J. Super. 145 (App. Div. 2005), and Spinks v. Twp. of Clinton, 402 N.J. Super. 465, 484 (App. Div. 2008), because these cases were decided before the N.J. Supreme Court's decision in Roa v. Roa, 200 N.J. 555 (2010). (See Pb26; Pb35). Appellant does not, however, present any arguments supporting the assertion that El-Sioufi and Spinks do not remain good law for the propositions they are cited for by Respondents. Appellant's assertion that the holdings in El-Sioufi v. St. Peter's

University Hosp., 382 N.J. Super. 145 (App. Div. 2005), and Spinks v. Twp. of Clinton, 402 N.J. Super. 465, 484 (App. Div. 2008), are no longer valid law is incorrect as a matter of law.

Appellant asserts, without addressing the specific propositions for which these Defendants cite to El-Sioufi and Spinks, that because those cases were decided before the Supreme Court decision in Roa v. Roa, 200 N.J. 555(2010), the decisions should be disregarded by the Court. (See Pb26; Pb35). To be clear, Plaintiff cites to no decision overturning the holdings in El-Sioufi and Spinks. Moreover, the Appellate Division has cited to El-Sioufi and Spinks as authority on these issues in cases decided after 2010, the year of the Roa decision. For example, in Lovett v. Flemington-Raritan Reg'l Board of Educ., 2013 N.J. Super. Unpub. LEXIS 2683 (App. Div. November 6, 2013) (unpublished)), the Appellate Panel, citing Spinks, 402 N.J. Super. at 484, held:

> Thus, the filing of a disciplinary action, in and of itself, is not sufficient to qualify as an adverse employment action. … Similarly, an employer's investigation of potential employee misconduct does not rise to the level of an adverse employment action; "[o]nly when the investigation results in some real detriment, such as a suspension, demotion, or termination, should the aggrieved employee be able to invoke the protection of the LAD."
>
> [Pa336a]

In Casano v. Livingston Bd. of Educ., 2014 N.J. Super. Unpub. LEXIS 2377 (App. Div. October 2, 2014) (unpublished)), the Appellate Panel, citing El-Sioufi, 382 N.J. Super. at 169-70, held:

> "Although [plaintiff] asserts that her unfavorable job evaluations were the result of discrimination, we have held in a related context that an unfavorable evaluation, unaccompanied by a demotion or similar action, is insufficient [to establish an adverse employment action]." El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 169-70, 887 A.2d 1170 (App. Div. 2005). Further "without more, an employer's filing of a disciplinary action cannot form the basis of a LAD complaint." Shepherd v. Hunterdon Dev. Ctr., 174 N.J. 1, 26, 803 A.2d 611 (2002).
>
> [Pa347a]. [1]

Lovett and Casano were decided approximately 3 and 4 years, respectively, after the Court's 2010 decision in Roa v. Roa, Thus, contrary to Plaintiff's assertion as set forth in her Appellant's brief, the legal principles that are articulated in El-Sioufi and Spinks that are relied upon by Defendants Kucinski and Martin cite to continue to be binding precedent on the Court. Appellant has not provided the Court with any authority in support of her assertion that the cases cited by these Defendants "should be disregarded."

[1] Copies of the unpublished opinions, Lovett v. Flemington-Raritan Reg'l Board of Educ., 2013 N.J. Super. Unpub. LEXIS 2683 (App. Div. November 6, 2013) and Casano v. Livingston Bd. of Educ., 2014 N.J. Super. Unpub. LEXIS 2377 (App. Div. October 2, 2014), are included in Appellant's Appendix at 332a and 341a, respectively, pursuant to Rule 1:36-3.

Spinks and El-Sioufi are good law and support the trial court's decision dismissing the LAD claims brought against Martin and Kucinski as a matter of law.

> An employer must be free to investigate complaints of employee misconduct without fear of LAD liability. Only when the investigation results in some real detriment, such as a suspension, demotion, or termination, should the aggrieved employee be able to invoke the protection of the LAD.
>
> [El-Sioufi v. St. Peter's University Hosp., 382 N.J. Super. 145, 169-70 (App. Div. 2005)]. Cf. Beasley v. Passaic County, 377 N.J. Super. 585, 606, 873 A.2d 673 (App. Div. 2005) (in the CEPA context, 'an investigation of an employee is not normally considered retaliation').

Spinks v. Twp. of Clinton, 402 N.J. Super. 465, 484 (App. Div. 2008). To constitute an adverse employment action under the NJLAD, the action must "rise above something that makes an employee unhappy, resentful or otherwise cause[s] an incidental workplace dissatisfaction." Victor v. State, 401 N.J. Super. 596, 615 (App. Div. 2008). See also El-Sioufi, 382 N.J. Super. 170-71 (holding that unfavorable job evaluations and reassignment to another job did not constitute an adverse employment action under the NJLAD).

Moreover, although not directly relevant to Plaintiff's claims against these defendants, Plaintiff's Complaint does allege claims of adverse employment action based upon her transfer and a letter of reprimand allegedly put in her file. As discussed by the Court in Plaintiff's First Lawsuit, "the transfer from one school or grade level is not automatically adverse" and "the Court must consider the totality

of the Circumstances." (See Pa84a at p.12 (citing Burlington Northern & Santa Fe Railroad v. White, 548 U.S. 53, 71 (2006)). The Court in the First Lawsuit explained that Plaintiff in the First Lawsuit "does not allege any diminution in salary or benefits. "While it may be inconvenient, the transfer alone does not qualify as an adverse employment action." (Pa89a at pp. 22-23). The Court in the First Lawsuit therefore ruled that the transfer did not support a claim that an adverse employment action was taken against Plaintiff. (Pa92a at pp. 28-29).

With regard to the letter of reprimand, though not relevant to Plaintiff's allegations concerning the authorization into the investigation of Defendant Sarno's complaints, the Appellate Division expressly holds that written letters of reprimand do not constitute adverse employment actions as a matter of law. See Prager v. Joyce Honda, Inc., 447 N.J. Super. 124, 139-40 (App. Div. 2016) (holding that the "two written warnings the dealership provided to plaintiff are insufficient to establish she suffered an adverse employment action under the LAD," the plaintiff produced no proof of any tangible injury or harm, and that the plaintiff's subjective response to the warnings "is not legally significant in assessing whether they were materially adverse.").

Here, with regard to her LAD claims against defendants Kucinski and Martin, Plaintiff has failed, as a matter of law, to allege a viable cause of action. These defendants had a duty to authorize the investigation into the complaints raised by

Defendant Sarno. Plaintiff was not disciplined in any way whatsoever with regard to Defendant Sarno's complaints. To the extent that Plaintiff feels that the investigation was not conducted properly, such subjective feelings are not actionable under the LAD.

As summarized Appellant's Brief, Plaintiff alleged that Kucinski and Martin "knowingly and substantially assisted in retaliating against Plaintiff by authorizing the sham investigation, spanning over six months, where the investigator did not give Plaintiff an opportunity to meaningfully respond to a legible transcript and did not interview any of the individuals that she identified with knowledge, despite saying he would do both things. (See Pb34). Appellant alleges no involvement or participation by these defendants into the investigation other than their authorization of the investigation. Appellant's claims against Defendants Kucinski and Martin do not arise from a claim that they initiated any action against her, but rather, that Kucinski and Martin, in the exercise of their discretion as Board members, authorized an investigation into complaints submitted by defendant Sarno. (See Pa231a at ¶132).

Appellant concedes this point, asserting that her allegation is that "Kucinski and Martin knowingly and substantially assisted in retaliating against Plaintiff by authorizing the sham investigation.." (Pb34 (emphasis added)). These claims are not supported by the law. When a plaintiff's claim "arises from alleged retaliation,

the elements of the cause of action are that the employee 'engaged in a protected activity known to the [employer,]' the employee was 'subjected to an adverse employment decision[,]' and there is a causal link between the protected activity and the adverse employment action." Battaglia v. United Parcel Serv., Inc. , 214 N.J. 518, 547 (2013). Appellant concedes that an adverse employment action is necessary to support an LAD retaliation claim. (See Pb18-Pb20).

Defendants Kucinski and Martin, as members of the Board of Education, had a duty as a matter of law to investigate the complaints allegedly raised by Defendant Sarno. Reaves v. State, Dep't of Law & Pub. Safety, Div. on Civil Rights, 303 N.J. Super. 115, 116-17 (App. Div. 1997). "An employer must be free to investigate complaints of employee misconduct without fear of LAD liability." Spinks, 402 N.J. Super. at 484.

Plaintiff does not allege that any adverse employment action was taken against her as a result of the investigation. To the contrary, Plaintiff alleges: "To this date, Plaintiff (through her counsel or otherwise) has not been informed of the status of the investigation." (Pa55a, ¶206). No adverse employment action is alleged to have occurred as a result of the investigation into the Sarno Complaint. Therefore, Plaintiff cannot, as a matter of law, establish the second and third elements of the Battaglia analysis – she cannot establish that an adverse employment action was taken against her as a result of the alleged retaliation, and it follows, she cannot

establish a causal relationship between the protected activity and the adverse employment action because there was no adverse employment action. See Battaglia, 214 N.J. at 547.

As a final point on this topic, Plaintiff relies extensively on the holding in Roa v. Roa, 200 N.J. 555(2010). The Roa Court discussed the United States Supreme Court decision in Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006) in which the Burlington Court held that to sustain its burden in connection with a Title VII retaliatory discrimination claim, "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.''" Roa, 200 N.J. at 575 (internal citations omitted). The Roa Court continued, explaining that the Burlington Court "purposely used the adjective 'materially' because"

> it is important to separate significant from trivial harms. Title VII, we have said, does not set forth "a general civility code for the American workplace." An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience. The antiretaliation provision seeks to prevent employer interference with "unfettered access" to Title VII's remedial mechanisms. It does so by prohibiting employer actions that are likely "to deter victims of discrimination from complaining to the EEOC," the courts, and their employers. And normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence.
>
> [Roa, 200 N.J. at 575, quoting Burlington, 548 U.S. at 68]

The Roa Court therefore relied on Burlington in support of its holding that the Roa plaintiff's retaliatory discharge claim was not actionable. See Roa, 200 N.J. at 575-76.

Applying the Roa holding to the instant matter, notwithstanding that Plaintiff's claims as to defendants Kucinski and Martin should be dismissed because Plaintiff does not allege that she was subjected to an adverse employment action as a result of the investigation and because their only involvement in the matter was the authorization of an investigation they were duty-bound to authorize, dismissal of the claims should also be affirmed because the "petty slights" and "minor annoyances" Appellant alleges in her Complaint do not, as a matter of law, rise to the level of "materially adverse" actions.

The trial court properly dismissed Plaintiff's LAD claims as to defendants Kucinski and Martin as a matter of law pursuant to Rule 4:6-2(e).

CONCLUSION

For the foregoing reasons, Respondents Kucinski and Martin respectfully submit that this Court should affirm the Trial Court's Order dismissing the Complaint as to Defendants Charles Kucinski and Lisa Dancheck Martin.

Respectfully submitted,

O'TOOLE SCRIVO, LLC
Attorneys for Respondents Charles Kucinski and Lisa Dancheck Martin

By:______________________________
Kenneth B. Goodman

Dated: October 5, 2023

JEANNETTE ANDREULA, PLAINTIFF-APPELLANT, v. THE BOARD OF EDUCATION OF THE TOWNSHIP OF NUTLEY, DR. JULIE GLAZER, LORRAINE RESTEL, JANINE SARNO, CHARLES KUCINSKI, LISA DANCHECK MARTIN, JOHN DOE ADMINISTRATORS AND STAFF 1-10, AND ABC BOARD MEMBERS 1-10, SAID NAMES BEING FICTITIOUS, DEFENDANTS-RESPONDENTS.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-002397-22 Civil Action ON APPEAL FROM FINAL ORDER OF SUPERIOR COURT OF NEW JERSEY, LAW DIVISION: ESSEX COUNTY DOCKET NO. ESX-L-6740-21 SAT BELOW: HON. BRIDGET A. STECHER, J.S.C.

DEFENDANTS – RESPONDENTS DR. JULIE GLAZER AND JANINE SARNO'S BRIEF IN OPPOSITION TO PLAINTIFF'S APPEAL

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PRELIMINARY STATEMENT

In this appeal, Plaintiff Jeannette Andreula ("Plaintiff" and/or "Andreula"), contests the well-reasoned decision of the trial court dismissing all claims as against all defendants. In doing so, Plaintiff's appeal fails to set forth a reasonable basis to overturn the trial court's dismissal.

Since the inception of this case, Defendants maintained that Plaintiff failed to plead facts sufficient to state a cause of action under any legal theory. Notwithstanding the filing of two complaints, Plaintiff's claims remained devoid of critical facts necessary to state a claim under the New Jersey Law Against Discrimination for the simple reason -- no such facts exist.

Contrary to Plaintiff's contentions, the trial court performed a nuanced analysis of Plaintiff's allegations, applied well-settled legal principles, and correctly determined that Plaintiff (1) failed to sufficiently plead two of the three elements of a claim for retaliation under the New Jersey Law Against Discrimination, namely, an adverse employment action and a causal connection between any of the alleged wrongful conduct and the filing of Plaintiff's first lawsuit five years earlier; (2) cannot state a cognizable claim for individual liability as against her co-worker, Defendant Janine Sarno; and (3) failed to sufficiently plead facts against Defendant Dr. Julie Glazer so as to satisfy the pleading standard for aider and abettor liability. This, despite having availed

herself of two bites at the proverbial apple. Put directly, blanket assertions, supposition, and self-serving extrapolations, in the absence of a well-pled factual foundation, are insufficient to state a claim under even the most liberal application of New Jersey law. The trial court recognized the lack of legal merit to Plaintiff's claims and properly dismissed Plaintiff's Amended Complaint in its entirety.

The trial court's dismissal of this matter was proper and in accordance with well-settled New Jersey law and should be affirmed.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

I. The First Lawsuit

In June 2016, Plaintiff filed a Complaint and Order to Show Cause against the Nutley Board of Education ("Nutley BOE"), former Superintendent Russell Lazovick, and Principal Lorraine Restel (the "First Lawsuit" and/or "Andreula I")[2]. 215a, ¶ 30. In the First Lawsuit, Plaintiff sought to estop the defendants from involuntarily transferring her from her position as a third-grade teacher at Lincoln School to another location to teach fifth grade. 216a-217a, ¶ ¶ 37, 43.

---

[1] Because the Procedural History and Statement of Facts are closely intertwined, they are being combined to avoid repetition and for the convenience of the Court.

[2] Plaintiff's First Lawsuit is captioned, Andreula v. The Board of Education of the Township of Nutley, et al., ESX-L-4254-16.

In or about June 2016, the trial court issued a preliminary injunction preventing the transfer of Plaintiff. 218a, ¶ 45.

The First Lawsuit remains pending. 215a, ¶ 30. **Neither Defendant Dr. Julie Glazer ("Defendant Glazer") nor Defendant Janine Sarno ("Defendant Sarno") were ever named parties in the First Lawsuit.**

II. The Instant Lawsuit

More than five (5) years later, on September 3, 2021, Plaintiff filed the instant lawsuit (hereinafter referred to as the "Instant Lawsuit"), against the Nutley Board BOE and other members of the Nutley school district, including Defendants Glazer and Sarno, alleging she was subjected to acts of wrongdoing in retaliation for filing the First Lawsuit. 215a, ¶ 31.

Plaintiff's original Complaint (the "Original Complaint") in the Instant Lawsuit asserted twelve causes of action, five of which were asserted against Defendants Glazer and Sarno. 25a, ¶¶ 211-280. Based on the lack of any factual or legal basis for the claims asserted against Defendants Glazer and Sarno, on November 5, 2021, Defendants Glazer and Sarno moved to dismiss the Instant Lawsuit for failure to state a claim. 188a. All other defendants likewise moved to dismiss the Instant Lawsuit for failure to state a claim. 72a, 96a, 171a.

Shortly thereafter, on November 18, 2021, Plaintiff filed a First Amended Complaint (the "Amended Complaint"). 210a. In doing so, Plaintiff withdrew

four counts of her complaint, leaving a single cause of action against Defendants Glazer (Count Three) and Sarno (Count Five) for individual aider and abettor liability under the New Jersey Law Against Discrimination ("NJLAD"). 244a, ¶¶ 232-233; 245a-246a, ¶¶ 236-237. The factual predicate in support of Plaintiff's claims against Defendants Glazer and Sarno remained the same. Defendants Glazer and Sarno's motion to dismiss remained.

III. <u>Plaintiff's Factual Allegations</u>

The factual allegations set forth in the Amended Complaint as against Defendants Glazer and Sarno are de minimis. Moreover, so much of what Plaintiff asserts throughout her Statement of Facts (Pb3-Pb15), particularly with regard to the alleged "disparate treatment relating to District Policy 1648," is simply a regurgitation of that which was pled in her Amended Complaint based "upon information and belief". None of these factual allegations are tangible. Rather, such statements consist solely of baseless and conclusory generalizations and hyperbole.

A. <u>Plaintiff's Claims Against Defendant Julie Glazer</u>

Defendant Glazer is the Superintendent of the Nutley School District. 211a, ¶ 4. Plaintiff's entire claim against Defendant Glazer is premised upon Glazer's attendance at a virtual administrative meeting to address allegations that Plaintiff had violated District Policy 1648, regarding face masks ("District

Policy 1648" and/or "District Mask Policy"). The meeting occurred on November 20, 2020, in the midst of the COVID-19 pandemic. In addition to Defendant Glazer, those in attendance at the meeting included the Nutley Education Association Vice President, two Union Representatives, defendant Principal Lorraine Restel, and Plaintiff. 223a, ¶ 86; 227a, ¶ 103.

The incident precipitating the meeting occurred on November 16, 2020, and arose from a report by the school secretary claiming that Plaintiff and some students were observed not wearing masks during an in-person class. 227a, ¶ 105. After Principal Restel detailed the November 16, 2020 incident during the meeting, Defendant Glazer revealed that the November 16, 2020 incident was the second report concerning Plaintiff's compliance with the District Mask Policy. 228a, ¶ 107. In doing so, Defendant Glazer recounted a previous call to the central office by a mother of a virtual student who stated that Plaintiff and some students were not wearing masks during class. 228a, ¶ 108.

Following the meeting, Plaintiff received a letter in her personnel file from Principal Restel documenting the November 16, 2020 incident, only. 229a, ¶ 118. The letter did not reference the prior alleged policy violations revealed during the November 20, 2020 meeting. 229a, ¶ 119. Further, the letter did not impose any discipline as a result of Plaintiff's violation of the District Mask Policy.

Throughout the Statement of Facts section of Plaintiff's brief, Plaintiff boldly asserts that the District Mask Policy was disproportionately applied to her. Pb5. Particularly, Plaintiff alleges that "other teachers, including Defendant Sarno, had been the subject of multiple reports to the administration ... for failure to wear a mask ... but Defendant Sarno was not disciplined as a result of these reports," (Pb6), "the ultimate issuance of a discipline letter was retaliatory, given that other teachers did not receive the same treatment," (Pb6), and that "Defendant Restel openly conceded that Plaintiff and Defendant Sarno were not treated similarly in response to violations of [the District Mask Policy]." Pb8-9. However, review of the Amended Complaint reveals that such allegations were simply pled "upon information and belief" and do not constitute actual tangible facts, but rather Plaintiff's subjective beliefs and innuendo. 223a, ¶ ¶ 81, 83; 230a, ¶ ¶ 125, 126; 231a, ¶ 129.

Significantly, nowhere in the Amended Complaint or Plaintiff's brief does she deny removing her face mask or permitting her students to remove their face masks during in-person instruction. Similarly, Plaintiff does not deny she was required to wear a face mask during the global pandemic and in accordance with the District Mask Policy. Defendant Glazer's mere attendance at and participation in the November 20, 2020 administrative meeting forms the entire basis of Plaintiff's cause of action against Defendant Glazer. Particularly,

Plaintiff denied having knowledge regarding the prior report of Plaintiff's mask policy violation and felt it should not have been mentioned during the November 20, 2020 meeting. 228a, ¶ 110. Again, other than a letter documenting the November 16, 2020 incident, Plaintiff did not sustain any repercussions or disciplinary action as a result of Plaintiff's violation of the District Mask Policy.

B. Plaintiff's Claims Against Defendant Janine Sarno

Defendant Sarno is the Library Media Specialist and Language Literacy Intervention teacher for the Nutley Public School District. 380a-381a, ¶ ¶ 3-4. Defendant Sarno has never had any supervisory authority over Plaintiff or any other teacher or employee within the district. 381a, ¶ ¶ 5-6.

Plaintiff's claim against Defendant Sarno is premised upon an affirmative action complaint Sarno initiated against Plaintiff and for which an internal investigation was conducted. 231a, ¶132. Plaintiff does not allege that an investigation should not have occurred. Rather, she claims that "the investigation was conducted improperly, depriving her of an ability to meaningfully participate, such that it was a sham and retaliatory investigation." Pb9, 231a, ¶133. Significantly, **neither Defendant Glazer nor Defendant Sarno were involved in the investigation**. The investigation of the claims comprising the administrative complaint was conducted solely by a third-party investigator. 232a, ¶ 134; 233a ¶¶ 140, 144; 234a, ¶146.

Notably, at the time Plaintiff filed the Instant Lawsuit, Plaintiff was unaware of the status and/or results of the investigation, and most certainly had not sustained any repercussions or disciplinary action as a result of Defendant Sarno's administrative complaint or the investigation thereof. 241a, ¶ ¶ 212, 217.

IV. Defendants' Motion to Dismiss the Instant Lawsuit

Given Plaintiff's continued failure to state a viable cause of action despite filing an Amended Complaint, Defendants Glazer and Sarno requested that the trial court consider their motion to dismiss as originally filed. On January 7, 2022, the parties appeared for oral argument before the Honorable Bridget A. Stecher, J.S.C. T1-T57. In a carefully reasoned opinion which followed on February 28, 2023, Judge Stecher concluded that Plaintiff failed to state a cognizable claim under the NJLAD. 5a. In so finding, the Court accepted and adopted the arguments proffered by Defendants in their respective motions to dismiss. Seemingly recognizing the nature of the deficiencies in Plaintiff's claims, together with the fact Plaintiff had already exercised her right to amend her pleadings, the trial court dismissed this action in its entirety with prejudice. Orders to this effect were entered on February 28, 2023. 3a, 19a, 21a, 23a. It is from these Orders of dismissal that Plaintiff now seeks appellate review. 394a.

STANDARD OF REVIEW

The appellate division reviews a trial court's dismissal of a complaint for failure to state a cause of action de novo, applying the same standard under Rule 4:6-2(e) that governed the trial court. Frederick v. Smith, 416 N.J. Super. 594, 597 (App. Div. 2010); Smerling v. Harrah's Entm't, Inc., 389 N.J. Super. 181, 186 (App. Div. 2006) (the Appellate Division's review is plenary from an order dismissing a complaint pursuant to R. 4:6-2(e)).

The standard that applies to the review of complaints in the context of a motion to dismiss for failure to state a claim is an indulgent one. Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 771-72 (1989). While trial courts are cautioned not to dismiss a complaint under R. 4:6- 2(e) where a cause of action is suggested by the facts and a theory of actionability may be articulated by way of amendment, Muniz v. United Hsps. Med. Ctr. Pres. Hsp., 153 N.J. Super. 79, 82-83 (App. Div. 1977), dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted. Rieder v. Dept. of Transportation, 221 N.J Super. 547, 552 (App. Div. 1987). Thus, "a court must dismiss the plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief." Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005); Camden County Energy Recovery

Assocs., L.P. v. New Jersey Dep't of Envtl. Prot., 320 N.J. Super. 59, 64 (App.Div.1999).

Applying these principles to the case at bar, the trial judge properly disposed of Plaintiff's palpably insufficient claims. We are certain that on independent review of Plaintiff's Amended Complaint, this Court will agree that one is incapable of extrapolating a claim under the NJLAD based on the factual predicate set forth therein. As such, the trial court's ruling should be affirmed and Plaintiff's instant appeal denied in its entirety.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY DISMISSED ALL CLAIMS AGAINST DEFENDANTS GLAZER AND SARNO AS THE SAME FAIL AS A MATTER OF LAW (14a-20a)

Plaintiff's Amended Complaint sought to assert a single cause of action against Defendants Glazer and Sarno for individual aider and abettor liability under the NJLAD. 244a-246a. The trial court properly determined Plaintiff's claims against Defendants Glazer and Sarno fail because: (1) Defendant Sarno cannot be held individually liable because she is not a supervisor, but rather a coworker of the Plaintiff, **a fact conceded by Plaintiff at the trial level not once, but twice** (17a-18a); and (2) the allegations against Defendant Glazer, with respect to her participation in an administrative meeting, do not rise to the

requisite level of substantial assistance or encouragement so as to constitute aiding and abetting under the NJLAD. 16a.

Moreover, New Jersey law is clear that in order to find an individual employee liable for aiding and abetting liability, the employer must first be found liable under the NJLAD. See Ivan v. County of Middlesex, 595 F.Supp.2d 425, 463 (D.N.J. 2009) (for a defendant to be individually liable for aiding and abetting, the employer must also be liable under the LAD); Tarr v. Ciasulli, 181 N.J. 70, 82-83 (2004) (there is no individual employee liability under the LAD unless the employer is first found liable). Thus, as explained infra at Point II, Plaintiff's failure – and inability – to state a claim for retaliation as against Nutley BOE in the first instance, served as a third basis for the trial court's dismissal of all claims against Defendants Glazer and Sarno. As noted by the trial court:

> The Complaint's failure to establish a *prima facie* case of retaliation as against Defendant Nutley BOE proves fatal to the remaining claims of individual aider and abettor liability. [10a]
>
> **********
>
> Defendant Glazer is not individually liable as an aider and abettor, because the Nutley BOE – namely the party she allegedly aided – is not liable for retaliation because the Nutley BOE did not retaliate against Plaintiff. [16a]

Judge Stecher's well-reasoned decision should be affirmed in all respects.

A. PLAINTIFF CANNOT ESTABLISH INDIVIDUAL LIABILITY AGAINST DEFENDANT SARNO, AS CONCEDED BY PLAINTIFF AT THE TRIAL LEVEL (17a-18a, DGSa1[3], T16-4-21, T43-10-15)

Plaintiff's appeal of the dismissal of Count Five is perplexing given that Plaintiff conceded, on two occasions, her inability to establish liability against Defendant Sarno since Sarno is not Plaintiff's employer and has no supervisory authority over Plaintiff. **Plaintiff conceded there is no viable claim in both Plaintiff's brief in opposition to Defendants' motions to dismiss and during oral argument on Defendants' motions.** Particularly, in her opposition brief, Plaintiff stated:

> Plaintiff concedes that to the extent that Defendant Sarno is not an employee with supervisory authority, she cannot be held individually liable under the NJLAD. Absent a certification, however, from her or a supervisor, it would be inappropriate to dismiss Sarno from the case at this point.
>
> [DGSa1, Fn. 4[4]]

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[3] The designation "DGSa" refers to Defendants Glazer and Sarno's Appendix.

[4] Mindful of R. 2:6-1(a)(2) regarding the general prohibition against the inclusion of briefs in the appendix, an excerpt from Plaintiff's brief in opposition to Defendants' motions to dismiss filed below is included here given the trial court's reference to same in its Consolidated Statement of Reasons (17a-18a), and to illustrate Plaintiff's concession on the inviability of Plaintiff's claims against Defendant Sarno. Only the portion of Plaintiff's brief germane to this issue is included in Defendants Glazer and Sarno's Appendix.

In reply to the opposition, Defendants provided Plaintiff's counsel with a Certification by Defendant Sarno in which she states, in no uncertain terms, that she has never had any supervisory authority over Plaintiff or any other teacher or employee of the Nutley Public School District. 381a, ¶¶ 5-6.

Thereafter, during oral argument before the trial court, Plaintiff's counsel conceded the claims against Defendant Sarno cannot survive:

> MR. LAMPARELLO: [W]ith respect to Sarno, at first, if you look at the opposition that was filed, plaintiff concedes that if Sarno is not a supervisory employee that there is no claim for aider and abettor liability against her. Again, Sarno is the library media specialist. In connection with filing our reply brief, we submitted to the Court a certification from Ms. Sarno confirming this fact. I'm not sure whether plaintiff at this juncture is ready to concede that the certification is satisfactory and that there would be no aiding or abetting liability against Ms. Sarno that can kind of put that claim to - - to rest at this point, but I would submit to the Court that a librarian or library media specialist has no supervisory authority over the plaintiff teacher and that there can be no basis to have any type of aiding and abetting liability with respect to her.
>
> [T16-4-21]
>
> MS. WOODS: As to Defendant Sarno, and I believe it was Mr. Lamparello that asked me to respond as to the certification, generally we would accept that, Your Honor. We did read the certification on the reply brief, and I acknowledge what we indicated in our opposition.
>
> [T43-10-15]

Plaintiff cannot be permitted to backpedal on appeal. This Court need look no further than Plaintiff's opposition brief and the transcript of the oral argument to find that the trial court's dismissal of Count Five must be affirmed. Indeed, the trial court made a consistent finding in this regard:

> Defendant Sarno cannot be held individually liable because Defendant Sarno is not an employer under the NJLAD, but rather, a coworker of the Plaintiff…Plaintiff concedes the issue as to Defendant Sarno, as she cannot be held individually liable under the NJLAD.
>
> [17a]

Notwithstanding Defendant Sarno's sworn Certification and Plaintiff's concessions, Plaintiff appeals the dismissal of Count Five, professing a need for discovery to determine whether Defendant Sarno is in fact an employer under the LAD, as opposed to a coworker. Pb31. The claim was voluntarily conceded and appropriately dismissed. Plaintiff cannot be allowed to subject Defendants to an impermissible fishing expedition. See Justiano v. G4S Secure Solutions, Inc., 291 F.R.D. 80, 83 (D.N.J. 2013) ("Discovery should not serve as a fishing expedition during which a party searches for evidence to support facts not yet pleaded"); Edwards v. Prudential Prop. and Cas. Co., 357 N.J. Super. 196, 202 (App. Div. 2003) ("the motion [to dismiss] may not be denied based on the possibility that discovery may establish the requisite claim; rather, the legal requisites for plaintiffs' claim must be apparent from the complaint itself");

Glass v. Suburban Restoration Co., 317 N.J. Super. 574, 582 (App. Div. 1998) ("It has long been established that pleadings reciting mere conclusions without facts and reliance on subsequent discovery do not justify a lawsuit"); Rieder v. Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987) (dismissal is mandated where a factual allegation is palpably insufficient to support a claim upon which relief can be granted). Thus, Plaintiff's attempt to save her lawsuit by suggesting that discovery will create a cause of action is manifestly wrong and without basis in law.

To the extent this Court is willing to consider Plaintiff's abandoned arguments with regard to claims against Defendant Sarno (which it should not), Defendants respectfully submit that the Court's dismissal of Count Five was proper and conforms with well-settled New Jersey law.

Our Supreme Court has held that an individual employee is not an "employer" under the LAD. Tarr, 181 N.J. at 83. Only supervisors can be found individually liable under the LAD. N.J.S.A. 10:5-12(e) (discussing individual liability under the LAD); Tyson v. CIGNA Corp., 918 F. Supp. 836, 840-41 (D.N.J. 1996) (LAD does not impose individual liability upon non-supervisory employees); Ivan v. County of Middlesex, 612 F.Supp.2d 546, 553 (D.N.J. 2009) ("That aiding and abetting liability can only be applied to supervisors, and not to co-employees, further confirms that the aiding and abetting provisions are

intended to assure that violations of the LAD are appropriately remedied"); Herman v. Coastal Corp., 348 N.J. Super. 1, 27-28 (App. Div. 2002) (dismissing individual liability claims against non-supervisory employee).

In this case, Defendant Sarno is the Library Media Specialist and Language Literacy Intervention teacher for the Nutley Public School District. 222a, ¶ 80; 380a-381a, ¶¶ 3, 4. In such capacity, Defendant Sarno is Plaintiff's co-worker. Indeed, Defendant Sarno certified that she does not now, nor has she ever, had any supervisory authority over Plaintiff or any other teacher or employee of the Nutley Public School District for that matter. 381a, ¶¶ 5, 6. Thus, in accordance with New Jersey law, Defendant Sarno cannot be held individually liable under N.J.S.A. 10:5-12(e).

Moreover, it is worth highlighting that Defendant Sarno was not a party to Plaintiff's First Lawsuit, had no involvement in the administrative meeting regarding Plaintiff's violation of the District Mask Policy, and, other than filing an administrative complaint against Plaintiff, for which she enjoys immunity, Defendant Sarno had no involvement whatsoever in the investigation of the administrative complaint. In both her pleadings and her moving brief, Plaintiff admits the investigation itself was not retaliatory. Rather, Plaintiff disputes the manner in which the investigation was conducted. Pb9, Pb14, Pb32. However, by her own admission, the investigation was conducted by an entirely

independent third party. Thus, even if there was any doubt as to Defendant Sarno's lateral (as opposed to supervisory) position, Plaintiff's claim against Defendant Sarno still fails given the dearth of a factual predicate to establish aider and abettor liability under the NJLAD. (See infra at Section I (B)).

The trial court recognized these glaring deficiencies in Plaintiff's purported claims against Defendant Sarno and properly dismissed Count Five of the Amended Complaint. Such dismissal should be affirmed.

B. PLAINTIFF'S AMENDED COMPLAINT FAILS TO PLEAD FACTS SUFFICIENT TO SATISFY THE STANDARD FOR AIDER AND ABETTOR LIABILITY AGAINST DEFENDANT GLAZER (14a-18a)

Plaintiff's entire claim against Defendant Glazer is premised upon her attendance at a November 20, 2020 meeting regarding Plaintiff's violation of the District Mask Policy, during which Defendant Glazer mentioned a prior report of a similar mask violation by Plaintiff, for which Plaintiff was never disciplined. 223a, ¶ 86; 227a-228a, ¶¶ 103-105; 228a, ¶¶ 107-108; 229a, ¶¶ 118-119. This purported factual predicate is entirely insufficient to satisfy the pleading requirement for aiding and abetting under the NJLAD.

The Supreme Court has defined "aiding and abetting" to set a high bar for the imposition of individual liability under the NJLAD. To that end, in order to hold an employee liable as an aider or abettor, a plaintiff must show that:

> (1) The party whom the defendant aids must perform a wrongful act that causes an injury;
>
> (2) The defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; and
>
> (3) The defendant must knowingly and substantially assist the principal violation.

Tarr, 181 N.J. at 84.

The words aiding and abetting "require active and purposeful conduct" in aid of a wrongdoer. Cicchetti v. Morris County Sheriff's Office, 194 N.J. 563, 594 (2008); see also, Tarr, 181 N.J. at 83 (explaining "aiding and abetting" liability to require performance of wrongful act, awareness of illegality, and knowing and substantial assistance to principal violator). It requires **knowingly giving substantial assistance or encouragement** to the unlawful conduct of the employer. Failla v. City of Passaic, 146 F.3d 149, 157-58 (3d Cir. 1998) (emphasis supplied). Merely having "some role, knowledge, or involvement in the wrongful conduct" is insufficient to substantiate a claim for aiding and abetting liability against an individual employee. Ivan v. County of Middlesex, 595 F.Supp.2d 425, 462 (D.N.J. 2009); Shepherd v. Hunterdon Developmental Ctr., 336 N.J. Super. 395, 425 (App. Div. 2001), aff'd in part, rev'd in part, 174 N.J. 1 (2002). In Shepherd, the court noted that to "aid or abet" under the LAD, "the individual must willfully and knowingly associate himself or herself with

the unlawful act, and seek to help make the act succeed. The defendant must share the same intent as the one who actually committed the offense." Id. at 424.

The Amended Complaint is devoid of any facts suggesting Defendant Glazer "aided and abetted" or otherwise provided substantial assistance and/or encouraged any other person to engage in wrongful conduct against Plaintiff. This is especially true given that Plaintiff cannot establish the Nutley BOE performed any illegal or tortious activity in the first instance. See 17a ("Additionally, Plaintiff has failed to establish what, if any, illegal or tortious activity was taken by Defendant Nutley BOE").

Standing alone, the acts attributed to Defendant Glazer fall woefully short of the "active and purposeful conduct" that courts have held is required to constitute aiding and abetting for purposes of allocating individual liability. Fatal to Plaintiff's claim is the complete absence of any facts demonstrating that Defendant Glazer willfully and/or knowingly associated with any unlawful act. The trial court recognized such pleading deficiency.

> Glazer was present at the meeting involving the violation of District Policy 1648; however, the complaint fails to establish the remaining elements of aider and abettor liability.
>
> **********
>
> Defendant [Glazer] was not aware of playing any role in aiding and abetting an illegal or tortious activity and

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> there is no actual support that she had given knowing and substantial assistance in the principal violation.
>
> **********
>
> The Complaint fails to otherwise plead facts to suggest she was involved, even unknowingly, in *any* wrongful conduct, let alone facts showing her encouragement or substantial assistance of the alleged conduct. Employees are not liable as aider and abettor merely because they were present; rather, a knowing and substantial assistance of a wrongful act, coupled with awareness of the underlying acts illegality, is required.
>
> **********
>
> The Complaint fails to state a claim as to aider and abettor liability of defendant Glazer.
>
> [16a]

The trial court properly found Plaintiff's claim for individual liability as against Defendant Glazer fails on its face and, accordingly, dismissed Count Three. The dismissal should be affirmed.

POINT II

THE TRIAL COURT PROPERLY FOUND PLAINTIFF FAILED TO STATE A CLAIM FOR RETALIATION UNDER THE NEW JERSEY LAW AGAINST DISCRIMINATION (6a-10a, 16a)

In order to bring a claim of retaliation under the NJLAD, a plaintiff must show that: (1) he/she was engaged in a protected activity known to the defendant; (2) he/she was subjected to an adverse employment decision by the

defendant; and (3) there was a causal connection between the protected activity and the adverse employment decision. N.J.S.A. 10:5-12(d); Woods-Pirozzi v. Nabisco Foods, 290 N.J. Super. 252, 274 (App. Div. 1996).

Plaintiff's failure to adequately plead two of the three requisite elements, namely an adverse employment action and a causal connection between any of the actions complained of and the filing of Plaintiff's First Lawsuit in 2016, is fatal to Plaintiff's claims under the NJLAD. See Lehmann v. Toys R Us, Inc., 132 N.J. 587 (1993). The trial court recognized such and correctly found that Plaintiff failed to state a prima facie case of retaliation under the NJLAD. 8a-9a.

A. THE TRIAL COURT CONSIDERED, AND PROPERLY REJECTED, PLAINTIFF'S CLAIM THAT SHE SUFFERED AN ADVERSE EMPLOYMENT ACTION (8a-9a, 16a-17a)

On appeal, Plaintiff avers that the trial court "erred in finding that Plaintiff had not adequately pled the second prong of a NJLAD claim." Pb20. Despite Plaintiff's contention, the trial court indeed performed a nuanced analysis of Plaintiff's allegations, applied well-settled legal principles, and aptly determined that Plaintiff's allegations fell far short of satisfying the second element of a claim for retaliation under the NJLAD, namely, an adverse employment action.

1. **The Trial Court Applied the Correct Legal Standard in Assessing the Sufficiency of Plaintiff's Pleading. (7a-17a)**

In her brief, Plaintiff claims "the lower court failed to apply the prevailing NJLAD retaliation standard, and consider Plaintiff's allegations within that standard." Pb25. Particularly, Plaintiff contends the court erred in applying El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145 (App. Div. 2005) and Spinks v. Township of Clinton, 402 N.J. Super. 465 (App. Div. 2008), and should have, instead, applied the standard articulated in Roa v. Roa, 200 N.J. 555 (2010). Plaintiff's argument is erroneous.

Indeed, the trial court's application of El-Sioufi and Spinks was proper given that Roa did not overturn such decisions. Plaintiff suggests, without citing to any legal authority, that El-Sioufi and Spinks should be completely disregarded by the Court simply because they predated Roa v. Roa. Pb26. Yet, Plaintiff points to no authority overturning these two decisions. Despite Plaintiff's preference for the Roa decision, the fact remains that the holdings in both El-Sioufi and Spinks remain authoritative and have been cited by the Appellate Division in numerous cases since Roa was decided in 2010, and as recently as five (5) months ago. See, e.g., Onukogu v. New Jersey State Judiciary Essex Vicinage, 2023 WL 3162175 (App. Div. May 1, 2023)(citing to El-Sioufi)(DGSa5); Schuster v. State, 2023 WL 2994239 (App. Div. April 19, 2023) (citing to Spinks)(DGSa19). Thus, the legal principles articulated in El-

Sioufi and Spinks most certainly continue to be authoritative legal precedent. It is further noteworthy to mention that the trial court's reference to El-Sioufi and Spinks was limited. To that end, the trial court cited El-Sioufi for the proposition that, "an investigation…without more, does not constitute an adverse employment action under the NJLAD," and cited to Spinks for the principle that, "an employer must be free to investigate complaints of employee misconduct without fear of NJLAD liability." 13a, 17a.

While Plaintiff staunchly implores this Court to apply the holding in Roa, she overlooks the fact that the trial judge did indeed reference Roa in her well-reasoned opinion (7a, 13a 17a). The Roa court applied the "materially adverse" standard adopted in Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006), which requires a plaintiff to show that "a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Roa, 200 N.J. at 575 (quoting Burlington, 548 U.S. at 61)). As explained by the Roa court, Burlington "purposely used the adjective 'materially' because it is important to separate **significant** from **trivial** harms." Roa, 200 N.J. at 575 (quoting Burlington, 548 U.S. at 68) (also recognizing that the provision's standard for judging harm must be objective) (emphasis added). To that end, "[a]n employee's decision to report

discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience." Id. In so holding, the Supreme Court emphasized that the antiretaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm. Burlington, 548 U.S. at 67.

In this case, Judge Stecher assessed Plaintiff's allegations in the context of the "materially adverse" standard espoused in both Roa and Burlington, and duly found that such allegations failed to constitute an adverse employment action sufficient to state a claim for retaliation under the NJLAD. 8a.

Plaintiff misconstrues the holdings in Roa and Burlington. Ironically, Plaintiff takes the phrase "context matters" completely out of context. In stating that "context matters," the Burlington court provided specific examples, none of which are remotely analogous to Plaintiff's claims in this case. By way of illustration, the court found that "a schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children." Burlington, 548 U.S. at 69. The court, likewise, found that "a supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a

reasonable employee from complaining about discrimination." Burlington, 548 U.S. at 69.

Here, Plaintiff failed to explain how the purported acts of wrongdoing were materially adverse to a reasonable person. Roa, 200 N.J. at 575; Burlington, 548 U.S. at 61. Plaintiff failed to show any discernible injury or harm flowing from either the meeting regarding Plaintiff's violation of the District Mask Policy or the investigation of the allegations set forth in Defendant Sarno's administrative complaint. This is to be contrasted with the facts presented in Roa and Burlington, wherein the Supreme Court held the employer's actions could well serve as a deterrent to the filing of a discrimination complaint and, as such, were materially adverse so as to constitute retaliation. In Roa, defendant cancelled plaintiff's health insurance which caused plaintiff and his wife "financial problems, damaged their credit rating, subjected them to constant calls from debt collectors, and caused them a tremendous amount of stress and anxiety." Roa, 200 N.J. at 575. In Burlington, "the plaintiff suffered a more arduous job assignment and the financial effects of a thirty-seven-day suspension without pay." Burlington, 548 U.S. at 71-72. The facts in Roa and Burlington stand in stark contrast to the Instant Lawsuit wherein Plaintiff has not identified any injury or harm whatsoever.

Plaintiff argues on appeal that, "the scope of actions that can support NJLAD retaliation claims is extremely broad and can include a pattern of retaliatory actions." Pb27. Simply because the standard may be broad does not mean Plaintiff automatically satisfies it. While a pattern of retaliatory conduct can support a LAD retaliation claim, in this case, the trial court considered and properly rejected Plaintiff's claim finding that Plaintiff failed to sufficiently plead a pattern of retaliatory actions. See 13a ("Plaintiff complains of a pattern of retaliatory activity comprised of 'disparate treatment from her Principal, disproportionate discipline related to the application of a vague Covid-19 policy, and a sham investigation related to another employee's unfounded complaints' ... The District's application of the Covid-19 policy, the continued rotation of Plaintiff's grade-level partners, and her involuntary reassignment, have not resulted in an adverse employment action, even if they were not to Plaintiff's liking").

Further, contrary to Plaintiff's contention, there is no contradiction in the trial court's opinion. Pb19-20. Rather, the court unequivocally found, in no uncertain terms, that "Plaintiff has not established the second prong, that she suffered an adverse employment action." 8a. In doing so, the trial court highlighted the following:

> Plaintiff cannot show that her wages or benefits were affected. Nor can she show that a significant, non-

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temporary adverse change in her employment status or terms of her employment were affected. [8a]

****

[B]eing reprimanded for failing to comply with the District Covid-19 mask policy, specifically, for allowing her students to take their masks off while seated, does not rise to the level of "materially adverse" because the entire school district, and its teachers, were provided with the mask regulations far in advance of the alleged violation. [9a]

****

Plaintiff likewise fails to establish how the reprimand itself materially affects or alters her employment status, compensation, benefits, or otherwise. Therefore, the aggrieved conduct was not retaliatory. [9a]

****

Plaintiff also complains that the Board's investigation 'following an unfounded complaint based on four separate incidents' was retaliatory ... Plaintiff failed to establish a prima facie case of retaliation as to this act because Plaintiff was not cited, reprimanded, or otherwise affected by the investigation as those results are outstanding and her employment status remains unperturbed. [9a]

****

A generous reading of the Complaint fails to establish that Plaintiff was retaliated against because she has not, objectively, suffered a materially adverse employment decision. [10a]

****

> Plaintiff has not sufficiently alleged that she suffered an adverse employment action pursuant to N.J.S.A. 10:5-12(a). [17a]

In accordance with the well-settled law of this State, the facts pled by Plaintiff are simply insufficient to state a claim for retaliation under the NJLAD. See Shepherd v. Hunterdon Dev. Ctr., 174 N.J. 1, 26 (2002) ("without more, an employer's filing of a disciplinary action cannot form the basis of a LAD complaint"); El-Sioufi, 382 N.J. Super. at 176 (unfavorable job evaluations and reassignment to another job did not constitute an adverse employment action under the NJLAD); Spinks, 402 N.J. Super. at 485–86 ("An employer must be free to investigate complaints of employee misconduct without fear of LAD liability. Only when the investigation results in some real detriment, such as a suspension, demotion, or termination, should the aggrieved employee be able to invoke the protection of the LAD."). Rather, as noted by the trial judge, "[a]lthough Plaintiff feels the alleged wrongs to have negatively altered her employment, her subjective assessment of the facts is not legally significant to determine whether she was retaliated against." 9a. Indeed, "[t]he Complaint is rife with allegations that rise only to the level of an employee that is dissatisfied with her employer," (10a), which is insufficient to satisfy the materially adverse pleading standard. Roa, 200 N.J. at 575; Burlington, 548 U.S. at 61. Put directly, being required to attend a meeting to address a policy violation and being the

subject of an investigation of an administrative complaint is not materially adverse and does not automatically satisfy the standard regardless of how broad it is to be interpreted.

Given Plaintiff's failure to show an adverse employment action, her claim for retaliation under the NJLAD fails as a matter of law. The trial court's decision should be affirmed.

2. The Trial Court Correctly Applied the Standard Under R. 4:6-2(e) in Dismissing Plaintiff's Amended Complaint (6a, 8a-10a, 12a-14a, 16a-17a)

Plaintiff asserts on appeal that she "pled a series of retaliatory actions following … her 2016 Lawsuit and the issuance of the Injunction that would be materially adverse to a reasonable employer," (Pb20), but that "the lower court erred by failing to presume the truth of Plaintiff's allegations." Pb22. One thing resonates, simply because Plaintiff's counsel says it does not make it true. Contrary to Plaintiff's contentions, the trial court did assume the allegations were true, but found they were insufficient to state a prima facie case of retaliation under the NJLAD, which is indeed the court's function on a R. 4:6-2(e) motion to dismiss for failure to state a claim.

Plaintiff claims she suffered a pattern of retaliatory activity consisting of having to attend a meeting to discuss Plaintiff's violation of the District Mask Policy, being subject to an investigation regarding an administrative complaint

filed against Plaintiff by a fellow employee, rotation of Plaintiff's grade-level partners, not having emails responded to by Defendant Restel, and not being provided with her students' PARCC scores. While the trial court accepted the allegations as true for purposes of the motions (6a)[5], the court determined such allegations are simply insufficient to constitute an adverse employment action under the law. While the court on a motion to dismiss is required to assume the truth of the plaintiff's factual allegations, the court is not required to accept the embellishments and extrapolations of counsel and the court is most certainly not obligated to accept plaintiff's supposition, innuendo, and legal conclusions that such alleged factual assertions constitute an adverse employment action and/or retaliation.

Contrary to Plaintiff's contention that "the lower court failed to apply the applicable standard on a motion to dismiss and substituted its own judgment for that of the trier of fact," (Pb2), the trial court correctly reviewed and parsed Plaintiff's claims and properly deemed them to be deficient as a matter of law. In doing so, the trial judge correctly applied the standard under Printing Mart, both approaching Glazer and Sarno's dismissal application with great caution

[5] "In considering a motion to dismiss under R. 4:6-2(e), the court must accept the facts as asserted in the pleading as true and give the pleader the benefit of all inferences that may be drawn in its favor." 6a.

and affording Plaintiff's Amended Complaint great liberality. In fact, the trial court's analysis in this matter could not have been more exhaustive and indulgent. In a thoughtful, cogent, and well-reasoned opinion, the trial judge concluded that even the most generous reading of the factual allegations in the complaint, accepting same as true and affording Plaintiff the benefit of all inferences drawn therefrom, does not reveal any factual or legal basis entitling Plaintiff to relief as against Defendants Glazer and Sarno. There is no mistaking the trial judge correctly applied the motion to dismiss standard, parsed the factual allegations set forth in Plaintiff's Amended Complaint, and properly found that same failed to satisfy the requisite pleading standard for retaliation under the NJLAD.

3. Plaintiff's Assertion that the Trial Court Failed to Consider the Scope of the Injunction is Erroneous. (5a, 8a-10a, 16a-17a)

Plaintiff is under the mistaken belief thar the injunction renders her unassailable and/or otherwise immune from any disciplinary action. This is patently incorrect and none of the case law cited by Plaintiff supports such proposition. Pb24-25.

Despite the existence of an injunction issued five years earlier in an entirely separate matter, Plaintiff is still required to abide by all district rules and policies. In other words, an injunction is not a shield permitting Plaintiff to do whatever she pleases.

Throughout her brief, Plaintiff refers extensively to the preliminary injunction that was issued by the trial court in Plaintiff's First Lawsuit. Importantly, the subject injunction was not produced by Plaintiff's counsel nor attached to any of the pleadings or motions below, and, as such, is not a part of the record on appeal. According to Plaintiff's Amended Complaint, the injunction that was issued in or about June/July 2016 simply "prevent[s] the transfer of Plaintiff" from her position as third-grade teacher at the Lincoln School to fifth-grade teacher at a different school within the district. Pb3; 218a, ¶ 45; 219a-220a, ¶¶ 56, 58; 225a, ¶ 95 (citing the preliminary injunction as "preventing the transfer of Plaintiff"). Importantly, while Plaintiff argues the "significance of the Injunction" obligated Defendants to maintain the status quo and prohibited Defendants from "moving Plaintiff's room or changing her teaching assignment (or transferring/terminating/demoting Plaintiff)[,]" none of these things occurred here nor are they alleged in Plaintiff's Amended Complaint. Rather, Plaintiff claims retaliation in the form of having to attend a meeting to discuss Plaintiff's violation of the District Mask Policy, being subject to an investigation regarding an administrative complaint filed against Plaintiff by a fellow employee, rotation of Plaintiff's grade-level partners, not having emails responded to by Defendant Restel, and not being provided with her

students' PARCC scores. 219a, ¶¶ 53-54; 219a-220a, ¶ 56; 227a-228a, ¶ 105; 231a, ¶ 132.

Plaintiff intimates that the mere existence of the injunction precluded Defendants from addressing Plaintiff's violation of the District Mask Policy and investigation of the events underlying an administrative complaint filed against Plaintiff. In doing so, Plaintiff and/or her counsel misapprehends the import of the injunction. Indeed, the injunction in no manner whatsoever shields Plaintiff from being the subject of an internal complaint or investigation nor does it give Plaintiff carte blanche to act in any way she pleases including disregarding district rules and policies. Notwithstanding the existence of the injunction, the district and its administrators are authorized to take action in furtherance of the orderly operations and management of the school district. Stated otherwise, Plaintiff is still subject to investigation, corrective action and/or discipline where appropriate, particularly where there are concerns involving the health, safety and welfare of students and staff in the midst of an unprecedented global pandemic. To that end, the injunction does not render plaintiff bulletproof nor the district paralyzed.

Irrespective of the existence of the injunction, none of the alleged acts of wrongdoing constitute an adverse employment action. The trial court agreed and ruled accordingly. Such ruling should be affirmed.

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B. THE TRIAL COURT CORECTLY FOUND THAT PLAINTIFF FAILED TO PLEAD FACTS SUFFICIENT TO DEMONSTRATE A CAUSAL LINK BETWEEN THE ALLEGED WRONGFUL ACTS AND THE FILING OF PLAINTIFF'S FIRST LAWSUIT (9a)

Plaintiff's failure - and inability - to demonstrate an adverse employment action served as a sufficient basis alone to warrant dismissal of Plaintiff's NJLAD claims. Nevertheless, contrary to Plaintiff's contention, the trial court went on to assess the third element of a claim for retaliation under the NJLAD. Pb19. In doing so, the trial court expressly found that there was no relationship between Plaintiff's alleged acts of retaliation and the filing of the First Lawsuit.

> Plaintiff has failed to show how any of the above acts have even a remote relationship to the filing of Andreula I. [9a]

Plaintiff's failure to plead and establish a remote relationship, let alone a causal relationship, is dispositive and fatal to her claim.

The trial court properly dismissed Plaintiff's NJLAD retaliation claim as a result of her failure to adequately plead two of the three requisite elements. 9a. The dismissal should be affirmed.

CONCLUSION

Plaintiff has failed to demonstrate any grounds warranting reversal of the trial court's dismissal of this action. For these reasons, it is respectfully requested that this Court deny Plaintiff's appeal and affirm the trial court's dismissal of Counts Three and Five as against Defendants Dr. Julie Glazer and Janine Sarno with prejudice.

Respectfully submitted,

Chasan Lamparello Mallon & Cappuzzo, PC
Attorneys for Defendants-Respondents,
Dr. Julie Glazer and Janine Sarno

By:__________________________________
Philip W. Lamparello, Esq.

Dated: October 5, 2023

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JEANNETTE ANDREULA, Plaintiff, v. THE BOARD OF EDUCATION OF THE TOWNSHIP OF NUTLEY, DR. JULIE GLAZER, LORRAINE RESTEL, JANINE SARNO, CHARLES KUCINSKI, LISA DANCHECK MARTIN, JOHN DOE ADMINISTRATORS AND STAFF 1-10, AND ABC BOARD MEMBERS 1-10, said names being fictitious, Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-0002397-22 ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY-LAW DIVISION-ESSEX COUNTY DOCKET NO.: ESX-L-6740-21 SAT BELOW: HON. BRIDGET A. STECHER, J.S.C.

BRIEF AND APPENDIX OF DEFENDANTS-RESPONDENTS, NUTLEY BOARD OF EDUCATION AND LORRAINE RESTEL

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On the Brief

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PRELIMINARY STATEMENT

> *"An employer must be free to investigate complaints of employee misconduct without fear of LAD liability.* Spinks v. Township of Clinton, 402 N.J. Super. 465, 484 (App. Div. 2008); see also El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 170 (App. Div. 2005).

The fact that a plaintiff files a lawsuit against her employer does not mean she can then ignore basic employment policies, nor does the lawsuit insulate a plaintiff from being subjected to disciplinary procedures. The Trial Court below properly held that Plaintiff-Appellant failed to establish a claim for NJLAD retaliation against the Nutley Board of Education and Individual Defendant Lorraine Restel where Plaintiff-Appellant failed to establish an adverse employment action, and further failed to establish any causal connection between the alleged retaliatory act(s) and the filing of Plaintiff's Complaint in 2016, many years before. For the reasons set forth herein, this Court must affirm the Trial Court's dismissal of Plaintiff's Complaint.

PROCEDURAL HISTORY

Plaintiff-Appellant, an elementary school teacher, initially filed her first lawsuit on June 17, 2016, against the Nutley Board of Education, then Superintendent Russell Lazovick and Principal Lorraine Restel. (Pa27). Plaintiff alleged that she was being subjected to a transfer to another teaching position within her certification within the same school district in retaliation

for serving as one of many witnesses in a discrimination investigation arising out of a discrimination complaint made by another teacher. (Pa27; Pa28). Upon learning of the transfer, Plaintiff-Appellant filed an Order to Show Cause and Complaint alleging claims for retaliation under the New Jersey Law Against Discrimination ("NJLAD and/or "LAD") and the New Jersey Conscientious Employee Protection Act ("CEPA"). (Pa28). Plaintiff-Appellant also alleged a claim for failure to accommodate under the NJLAD. (Pa28). The Trial Court entered a preliminary injunction ordering that Plaintiff was not to be transferred. (Pa28). Plaintiff would continue to teach third grade in the same building and in the same classroom as the prior school year. There is no allegation that Defendant-Respondents in any way violated the injunction, which has remained in place since July of 2016. (Pa35)

The first suit proceeded through discovery and was the subject of significant motion practice. By Order and Opinion dated October 20, 2021, the Trial Court granted Defendants' Motion for Reconsideration, and entered Summary Judgment dismissing Appellant's NJLAD retaliation claim. (Pa78-Pa95). The Court found that Plaintiff-Appellant's transfer between two different grades within the same school district and within the teacher's certification, an action explicitly permitted by the relevant collective bargaining agreement, was not an adverse employment action within the

meaning of the NJLAD. (Pa89). It should be noted that Appellant had voluntarily dismissed Appellant's CEPA claim. The only claim presently pending in the first lawsuit is Plaintiff's failure to accommodate claim. A trial on that claim is scheduled to proceed on September 25, 2023.

On or about September 3, 2021, more than five years after filing the initial lawsuit, Plaintiff-Appellant filed the matter that is the subject of the present appeal ("Andreula II"). (Pa25). With her second lawsuit, Plaintiff-Appellant alleged retaliation in violation of the NJLAD as well as violations of the Civil Rights Act (Count X) and a violation of the Open Public Records Act (Counts VIII and IX). (Pa25-Pa70). The lawsuit was filed against the Nutley Board of Education, Lorraine Restel, Dr. Julie Glazer, Janine Sarno, Charles Kucinski, and Lisa Dancheck Martin. (Pa25). On October 26, 2021, Defendants Kucinski and Dancheck Martin moved to dismiss Plaintiff's Complaint. (Pa72). On October 28, 2021, Defendants Nutley Board of Education and Restel moved to dismiss Plaintiff's Complaint pursuant to Rule 4:6-2(e). (Pa96; Pa171). On November 5, 2021, Defendants Glazer and Sarno moved to dismiss Plaintiff's Complaint. (Pa188).

On November 18, 2021, in contravention of New Jersey Court Rules, without leave of Court and without consent of the parties, while the Motions to Dismiss were pending, Plaintiff-Appellant filed an "Amended Complaint."

(Pa210). By correspondence dated November 19, 2021, Defendants Nutley Board of Education and Restel advised that they would not be responding to the Amended Complaint, and that the Amended Complaint contained the same deficiencies that were the subject of the pending Motions to Dismiss. (Da1-Da2).

The Trial Court heard oral argument on the Defendants' Motions to Dismiss on or about January 7, 2022. By order and written opinion dated February 28, 2023, the Trial Court dismissed all Counts of Plaintiff's *Amended* Complaint as to all Defendants. (Pa3-Pa23). On April 14, 2023, Plaintiff filed the within Appeal. (Pa394)

STATEMENT OF FACTS

In June of 2016, Jeannette Andreula, filed a lawsuit against the Nutley Board of Education, Principal Lorraine Restel and others. (Pa27). On October 20, 2021, the Honorable Stephen L. Petrillo dismissed Plaintiff's core claim that her 2016 transfer to another school within the district to teach the fifth grade constituted an adverse employment action. (Pa89).

On September 3, 2021, <u>more than five years after</u> her initial lawsuit, Plaintiff filed the matter that is the subject of this appeal. (Pa25). The Complaint set forth twelve separate causes of action, was comprised of an exhausting 280 paragraphs and contained impertinent, irrelevant and

inflammatory language. (Pa25-Pa70). The Complaint largely regurgitated the allegations and facts from the lawsuit Plaintiff filed more than five years ago. (Pa25-Pa70). In searching the 280-paragraph Complaint, Plaintiff alleged that she suffered the following "actions", which she claimed to be "adverse":

(a) Principal Restel did not respond to ***one email*** Plaintiff sent in October of 2018 (Pa34);

(b) Principal Restel did not provide Plaintiff with her students' PARCC scores in November of 2018 (Pa34);

(c) The other third grade teachers (not plaintiff) have been "routinely changed" (Pa35);

(d) Another teacher's request to teach third grade at Lincoln School was denied (Pa36);

(e) Principal Restel did not stop by Plaintiff's classroom to say hello in March of 2021 (Pa37);

(f) Plaintiff was not informed that she could bring the students to the cafeteria for mask breaks rather than outside for their breaks (Pa37);

(g) Plaintiff had to attend a meeting, where she was provided with the a Union representative, for violation of the mask wearing policy (District Policy 1648) for which a letter was placed in her file in November of 2020 (Pa38-Pa45); and

(h) Another teacher filed an Affirmative Action Complaint against Plaintiff in March of 2021 (Pa46-Pa55).

Plaintiff alleged that the above actions constitute acts of retaliation forbidden by the NJLAD (Pa56).

LEGAL ARGUMENT

PLAINTIFF'S COMPLAINT WAS PROPERLY DISMISSED PURSUANT TO RULE 4:6-2(e) WHERE PLAINTIFF'S COMPLAINT FAILED TO STATE A CLAIM FOR WHICH RELIEF COULD BE GRANTED AS TO DEFENDANTS NUTLEY BOARD OF EDUCATION AND PRINCIPAL LORRAINE RESTEL (Pa3; Pa6; Pa9)

Pursuant to New Jersey Court Rule 4:6-2, a plaintiff's complaint must be dismissed where it fails to state a claim upon which relief can be granted. A "defendant is as entitled to be speedily rid of baseless claims." Horton v. American Inst. for Mental Studies, 145 N.J. Super. 550, 552 (Law. Div. 1976). Case law requires prompt adjudication of a motion to dismiss where the public interest is at stake. See Enourato v. New Jersey Building Authority, 182 N.J. Super. 50 (App Div.), aff'd 90 N.J. 396 (1982).

In deciding a Motion to Dismiss pursuant to R. 4:6-2, the plaintiff's complaint must be searched in depth and with liberality to determine if a cause of action can be gleaned. Every reasonable inference is accorded the Plaintiff. See Printing Mart v. Sharp Electronics, 116 N.J. 739, 746 (1989). However, a defendant's motion to dismiss may be granted where the Complaint states no basis for relief and discovery would not provide one. Energy Rec. v. Dept. of Env. Prot., 320 N.J. Super. 59, 64 (App. Div. 1999) aff'd o.b. 170 N.J. 246 (2001). In viewing Plaintiff's lengthy Complaint in the light most favorable to Plaintiff, despite its breadth, the Trial Court below appropriately determined

Plaintiff's Complaint failed to state a cause of action against the Nutley Board of Education and Principal Lorraine Restel. Plaintiff's Complaint was properly dismissed as to the Board of Education and Principal Restel where the Court held that "a *prima facie* case of retaliation has not been established." (Pa7).

A. DISMISSAL OF PLAINTIFF'S NJLAD RETALIATION CLAIMS WAS PROPER WHERE PLAINTIFF COULD NOT ESTABLISH A *PRIMA FACIE* NEW JERSEY LAW AGAINST DISCRIMINATION CLAIM

In a retaliation case under the New Jersey Law Against Discrimination (NJLAD), a plaintiff must demonstrate that the employee engaged in a protected activity known to the employer, the employee was subjected to an adverse employment decision, and there is a causal link between the protected activity and the adverse employment action. Battaglia v. United Parcel Serv., Inc., 214 N.J. 518, 547 (2013).

There is no dispute that filing a lawsuit alleging discrimination is a protected activity within the meaning of the NJLAD. The Trial Court below properly made that determination. However, even when reviewing the Complaint with liberality, and viewing the facts in the light most favorable to Plaintiff, the Trial Court appropriately held Plaintiff simply did not allege any adverse employment action within the meaning of the NJLAD, and thus could not establish the second required element to establish an NJLAD retaliation

claim. Even if Plaintiff could identify an adverse action (and she cannot), the Trial Court also properly held that "Plaintiff has failed to show how any of the…acts have even a remote relationship to the filing of Andreula I." (Pa9). Where Plaintiff failed to allege sufficient facts to establish two essential elements of a *prima facie* NJLAD retaliation claim, and the absence of one element is fatal, the Trial Court's dismissal of Count I of Plaintiff's Amended Complaint against the Nutley Board of Education and Lorraine Restel must be affirmed.

1. WHERE PLAINTIFF COULD NOT ESTABLISH AN ADVERSE EMPLOYMENT ACTION AS A MATTER OF LAW, COUNTS I AND II OF PLAINTIFF'S AMENDED COMPLAINT WERE PROPERLY DISMISSED

To constitute an adverse employment action under the NJLAD, the action must "rise above something that makes an employee unhappy, resentful or otherwise cause[s] an incidental workplace dissatisfaction." Victor v. State, 401 N.J. Super. 596, 615 (App. Div. 2008). See also El-Sioufi v. St. Peter's University Hospital, 382 N.J. Super. 145 (App. Div. 2005)(holding that unfavorable job evaluations and reassignment to another job did not constitute an adverse employment action under the NJLAD). The United States Supreme Court in Burlington Northern and Sante Fe Ry. Co. v. White, resolved issues between Circuits and determined that the "anti-retaliation provision protects in individual not from all retaliation, but from **retaliation that produces injury**

or harm." 548 U.S. 53, 67 (2006)(emphasis added). In Burlington, the Supreme Court agreed with the "formulation set forth by the Seventh and the District of Columbia Circuits" and held that "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse…". Id. at 68. The Supreme Court stated specifically that "[w]e speak of *material* adversity because we believe it is **important to separate significant from trivial harms**." Id. at 67 (emphasis added). In viewing the allegations of Plaintiff's Complaint, if assumed to be true, Plaintiff did no more than allege trivial harms and could not demonstrate any adverse employment action within the meaning of the NJLAD. In searching the voluminous 280-paragraph Complaint with liberality, Plaintiff alleged that she suffered the following "adverse actions" over the past five years:

(a) Principal Restel did not respond to ***one email*** Plaintiff sent in October of 2018 (Pa34);

(b) Principal Restel did not provide Plaintiff with her students' PARCC scores in November of 2018 (Pa34);

(c) The other third grade teachers (not plaintiff) have been "routinely changed" (Pa35);

(d) Another teacher's request to teach third grade at Lincoln School was denied (Pa36);

(e) Principal Restel did not stop by Plaintiff's classroom to say hello in March of 2021 (Pa37);

(f) Plaintiff was not informed that she could bring the students to the cafeteria for mask breaks rather than outside for their breaks (Pa37);

(g) Plaintiff had to attend a meeting, where she was provided with the a Union representative, for violation of the mask wearing policy (District Policy 1648) for which a letter was placed in her file in November of 2020 (Pa38-Pa45); and

(h) Another teacher filed an Affirmative Action Complaint against Plaintiff in March of 2021 (Pa46-Pa55).

These are trivial harms, many of which actually have nothing at all to do with Plaintiff-Appellant (transfer of other third grade teachers/another teacher's denied request for a specific grade/school position). Even if accepted to be true, these acts do not rise to the level of forbidden actions under the NJLAD.

Despite Plaintiff-Appellant's argument to the contrary, the Trial Court expressly relied upon the standard in <u>Burlington</u> in analyzing whether the acts complained of by Plaintiff were sufficient to establish a retaliation claim under the NJLAD. The Court noted **"[a]s set forth in <u>Burlington</u>, an adverse employment action must be 'materially adverse to a reasonable employee...".** (Pa8)(emphasis added). Plaintiff-Appellant's argument that the Court failed to consider this "broad standard" is therefore entirely without merit.

Plaintiff argued that the letter in her file regarding the violation of the district's mask-wearing policy (which she does not deny violating) was an act of retaliation. New Jersey case law, however, explicitly holds that "[a]n investigation or even an unfavorable personnel report without more does not constitute adverse employment action under the NJLAD." El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 170 (App. Div. 2005). "An employer must be free to investigate complaints of employee misconduct without fear of LAD liability." Spinks v. Township of Clinton, 402 N.J. Super. 465, 484 (App. Div. 2008). Additionally, it is **"[o]nly when the investigation results in some real detriment, such as a suspension, demotion, or termination, should the aggrieved employee be able to invoke the protection of the LAD**." Id (citations omitted)(emphasis added). See Paradisis v. Englewood Hospital and Medical Center, 2016 WL 4697337 (D.N.J. 2016) at *10 ("An investigation alone, without material consequences to an individual's employment, is not an adverse employment action"); see also Campbell v. Supreme Court of New Jersey, 2014 WL 7343225 (D.N.J. 2014) at *6 ("[T]he filing of a disciplinary action or an investigation into potential misconduct does not qualify as an adverse employment action in and of itself."). (Pa125).

In the matter of Hernon v. Webb-McRae, the District of New Jersey dismissed plaintiff's NJLAD retaliation claim finding that an "investigation into his [plaintiff's] altercation with a public defender does not constitute an actionable adverse employment action" within the meaning of the NJLAD. See Hernon v. Webb-McRae, 2018 WL 4204440 (D.N.J. 2018) at *4. (Pa133).

Here, Plaintiff alleges that a letter was placed into her file following a meeting addressing Plaintiff's violation of the district's mask-wearing policy. Plaintiff's union representative was present. There is no indication that the letter or the investigation into the violation resulted in a termination, suspension, demotion or in any way materially altered the terms of her employment. Therefore, the Trial Court below properly determined that Plaintiff did not suffer an adverse employment action.

This Court has held that written letters of reprimand do not constitute adverse employment actions. In Prager v. Joyce Honda, Inc., plaintiff filed suit alleging retaliation and constructive discharge after a change in her work environment after she complained about inappropriate touching by a customer. 447 N.J. Super. 124 (App. Div. 2016). At the conclusion of her case, the trial court dismissed Prager's claims, and the Appellate Division affirmed the dismissal. Id. at 127.

Prager was a receptionist at Joyce Honda. A customer of the dealership leaned over the counter and tugged on her sleeve, exposing her bra. Id. at 128. The customer that committed the offensive act was a "good customer" in that he purchased approximately twenty vehicles from the dealership over the years. Id. Plaintiff attended a meeting with her managers about whether she wanted to press charges against the customer. She testified that she left the meeting feeling discouraged and concluded that her employer would be disappointed if she made a complaint. Id. Days later, plaintiff decided that she would like to press charges and advised her employer. Id. at 129. After doing so, plaintiff was called into a meeting felt that the general manager was upset. However, the police were contacted by the dealership so that plaintiff could file her complaint. Prager testified that *after* she complained "the work environment changed." Id. at 130-31. She felt that people were avoiding her. Id. Additionally, a week after the complaint was filed, she "received two written warnings for leaving work early without permission." Id. at 131. One warning pertained to an incident that occurred four days before she made the complaint, but was not documented until after she complained.

The Appellate Division examined whether the two written warnings in Prager's personnel file constituted adverse employment actions within the meaning of the NJLAD. Id. at 139-140. This Court held that the "**two written**

warnings the dealership provided to plaintiff **are insufficient to establish she suffered an adverse employment action under the LAD**." Id. at 140(emphasis added). While this Court held that a written warning might under certain circumstances be materially adverse (i.e. where there is a formal system of progressive discipline), the Court found that "these particular warnings posed no harm to plaintiff at all". They did not constitute adverse actions within the meaning of the NJLAD. Id. In so finding, the Court held that the "plaintiff produced absolutely no proof of any tangible injury or harm". Id. The Court also noted that, although "plaintiff undoubtably found the warnings highly distressing, **her subjective response to them is not legally significant in assessing whether they were materially adverse**." Id (emphasis added). In Prager, only one of the warnings referenced repercussions to flow from future infractions, and even that noted only the possibility, not the probability, of time off without pay or termination. Id. at 141. This Court concluded that because the plaintiff could "show no discernible injury or harm flowing from these two written warnings" the written warnings did not constitute adverse employment actions. Id. "Because plaintiff could not show she suffered an adverse employment decision, she failed to establish the third element of her *prima facie* case of retaliation" and therefore her claim under the NJLAD was properly dismissed. Id.

Here, Plaintiff could not demonstrate any harm from the letter contained in her file. She did not allege that the letter contained a threat of further discipline if violations continued. Therefore, the letter, even if considered to be a "written reprimand", without more, is insufficient as a matter of law to establish an adverse employment action. Although Plaintiff may have found the letter to be upsetting, "her subjective response" is simply not legally sufficient.

Plaintiff has attempted to portray the written letter as a "disciplinary action". However, even if the action was a disciplinary action, and it was not, that alone does not constitute an adverse employment action. An "employer's filing of a disciplinary action cannot form the basis of a LAD complaint because an employee who has complained about discrimination does not thereafter obtain 'immunity from…basic employment policies or disciplinary procedures.'" Coward v. Englewood, 2019 WL 570080 (App. Div. 2019) at *4 citing Shepherd v. Hunterdon Development Ctr., 174 N.J. 1 (2002). (Pa140). The filing of her first lawsuit did not cloak Plaintiff in a blanket of immunity in which she could not be reprimanded, disciplined or, as here, fail to comply with basic district-wide policies, and then attempt to use the NJLAD as a dagger. The alleged disciplinary action as alleged by Plaintiff, is simply insufficient to establish a cause of action under the NJLAD.

The unpublished decisions cited by Plaintiff-Appellant do not support the argument that Plaintiff established an adverse employment action. Plaintiff-Appellant mischaracterizes the holding in Roa v. Roa, in an effort to support Plaintiff-Appellant's unfounded argument that the "scope of unlawful retaliatory conduct under the LAD is broader than the employment relates acts prohibited with regard to discrimination claims under the LAD." (Pb25). Plaintiff-Appellant misstates the holding in Roa v. Roa, 200 N.J. 555 (2010).

In the matter of Roa v. Roa, 200 N.J. 555, 574 (2010), the New Jersey Supreme Court held the following: "We take our lead from *Burlington* and from the cited federal cases. Like the Appellate Division, we are satisfied that the Supreme Court's holding that Title VII creates a distinct cause of action for retaliatory conduct that need not be related to the workplace applies with equal force to the LAD." In Roa, the Supreme Court determined that the cancellation of health insurance benefits although "not directly related to his present or future employment is not disqualifying and he may pursue a retaliation claim based thereon." Id.

Further, Plaintiff-Appellant disregards New Jersey case law which holds that to "establish a prima facie case ***of retaliation or discrimination*** under the LAD, an employee ***must prove that he suffered an adverse employment consequence***." Jamison v. Rockaway Twp. Bd. of Educ, 242 N.J. Super. 436,

445 (App. Div. 1990) as cited by Nead v. Union County Educational Services Com'n, 2011 WL 166245 (App. Div. 2011)(emphasis added). Even if broad consideration is given to the allegations set forth in Plaintiff's Complaint, even if all taken together, the actions simply do not rise to the pattern of retaliatory conduct the LAD was designed to protect against as a matter of law. See Victor v. State, 401 N.J. Super. 596, 615 (App. Div. 2008) and see also El-Sioufi v. St. Peter's University Hospital, 382 N.J. Super. 145 (App. Div. 2005).

In the matter of O'Keefe v. State, Dept. of Labor, 2007 WL 1975603, after making a complaint, the plaintiff suffered a demotion with less pay and received verbal threats ("this is your friend back there getting people to go after me and I'm going to cut his f[]ing head off" which were not investigated by his employer). These actions are nothing like the allegations Plaintiff made here. In the matter of Clarke v. Atlantic City Bd. of Educ., 2010 WL 4107750, defendants

> "engaged in particularly egregious retaliation, by relocating the plaintiff, who has difficulty ambulating and uses a power scooter and cane for mobility, from a location which accommodated the plaintiff's disability by being in close proximity to the bathroom and which had no doors or other obstructions, to an office on the sixth floor of the building, which is no longer in close proximity to the bathroom and does not have the same reasonable accommodations as the plaintiff's prior office. The plaintiff has also had to be evacuated from the building using the stairwell in

> case of emergencies; his current location forces him to navigate more than one floor. The plaintiff has also requested that defendant Nickles develop a 504 plan for the plaintiff which request Nickles has refused; plaintiff is the only employee for whom a 504 plan has not been prepared once requested.
>
> No reasonable justification has been provided by the defendants for the relocation or refusal to accommodate the plaintiff's disability.

See Clarke v. Atlantic City Bd. Of Educ. at *5. Here, Plaintiff Andreula does not allege the type of egregious conduct which was alleged in Clarke.

The matter of Nead v. Union County Educational Services Com'n is also easily distinguishable from the present matter. In Nead, the alleged acts of retaliation included the filing of a false report that plaintiff abused a student. Nead v. Union County Educational Services Com'n, 2011 WL 166245 (App. Div. 2011) at *3. Clearly, the issuance of a false report that a teacher abused a child, among other retaliatory acts alleged by Nead, is far more egregious than any instance of retaliation alleged by Plaintiff here.

The matter of Royster v. N.J. State Police is also easily distinguishable from the present matter. 2007 WL 4441103 (App. Div. 2007). In Royster, plaintiff alleged that he was denied certain promotions for his numerous complaints. There is no dispute that the denial of promotions constitute adverse employment actions under the LAD. Such allegations were not made in this case.

Lastly, Plaintiff-Appellant's argument that because an injunction was in place preventing Plaintiff's transfer to another classroom or assignment to teach another grade somehow modifies Plaintiff's burden to establish an adverse employment action is illogical and without support. First, despite Plaintiff-Appellant's argument to the contrary, the Court did acknowledge the existence of the injunction, as set forth in the Court's written opinion. (Pa5). Furthermore, this issue was raised by Plaintiff during oral argument and was considered by the Court below. (1T35:3-37:2). Simply because Plaintiff-Appellant is unhappy with the outcome, does not mean that the analysis was in any way deficient. Rather, the Court extensively reviewed, and considered each and every allegation of Plaintiff-Appellant's voluminous Amended Complaint, in determining whether or not a *prima facie* cause of action was pleaded, and appropriately determined one was not. (Pa3-Pa23).

2. PLAINTIFF DID NOT ESTABLISH ANY CAUSAL CONNECTION BETWEEN ANY ALLEGED ADVERSE EMPLOYMENT ACTION AND THE FILING OF HER FIVE-YEAR-OLD LAWSUIT

Even if Plaintiff could establish an adverse employment action (and she could not), she certainly did not establish a causal connection between the 2016 lawsuit and any claim of adversity. Plaintiff complained that (i) Restel failed to respond to an email in 2018, (ii) failed to stop by and say hello to Plaintiff in March of 2021, and (iii) the Board of Education issued a

"disciplinary" letter to her in November of 2020. She claims this is all in retaliation for the filing of her first lawsuit in June of 2016.

In the matter of Watkins v. Nabisco, plaintiff filed suit against his former employer alleging retaliation for making a complaint that he was being discriminated against due to his race. 224 F. Supp. 2d 852 (D.N.J. 2002). Watkins filed suit alleging violations of NJLAD, Title VII and §1981. Id. at 852. In Watkins, the first document demonstrating that Nabisco was aware of Watkins' complaints was a memorandum dated October of 1996. Id. at 872. Watkins was later terminated in January of 1998. Id. Based upon the timeline, the Court determined "that the protected activity Watkins engaged in during 1996 is **temporally remote** from his termination over a year later." Id. (emphasis added). "Accordingly, Watkins 'can prevail only if a reasonable jury could find that [Nabisco] engaged in a pattern of antagonism' in the period between his…complaints [to Mancini] and his firing." Id (citation omitted).

In support of Watkins' argument that Nabisco demonstrated a "pattern of antagonism", he argued that Mancini "set him up" for failure by making him perform punitive work. For example, Watkins was made to create functional specifications for software projects that already had been completed, and would be made to work all night to finish assignments, and then was told the

work was no longer needed. Id. at 872. The Court held that even these actions, which are grave on their face, if true, were ***insufficient*** to establish a pattern of antagonistic behavior. Id. If having to work all night on a useless effort is insufficient, how can the failure to answer an email, or to say hello, be anything but trivial?

Here, the alleged actions identified by Plaintiff occurred *years* after Plaintiff filed her first lawsuit. As such, like in Watkins, these alleged adverse actions are too temporally remote. To establish a causal connection, Plaintiff would have to demonstrate a pattern of antagonism. Here, many of the alleged actions also have nothing to do with Plaintiff, but rather involve transfers and the denial of transfers of other teachers within the school. The failure of Principal Restel to respond to one email years after the filing of the lawsuit, coupled with the other allegations, is simply insufficient to establish a "pattern of antagonism" in a setting where "temporal proximity" is missing. Therefore, the Trial Court below appropriately determined that Plaintiff failed to show even a "remote relationship" between the alleged acts and the filing of Plaintiff's Complaint. Therefore, dismissal of Plaintiff's NJLAD claims against Defendants Nutley Board of Education and Lorraine Restel must be affirmed.

B. COUNT IV OF PLAINTIFF'S AMENDED COMPLAINT WAS PROPERLY DISMISSED WHERE PLAINTIFF DID NOT ESTABLISH THAT DEFENDANT RESTEL WAS AN "AIDER AND ABETTOR OF DISCRIMINATION"

Where Plaintiff did not sufficiently plead a cause of action for a violation of the NJLAD, the Trial Court below properly dismissed the individual claims against Defendant Lorraine Restel. Where there was no violation of the New Jersey Law Against Discrimination, there simply could be no liability as to Defendant Principal Restel as an "aider and abettor." (Pa10)("The Complaint's failure to establish a *prima facie* case of retaliation as against the Defendant Nutley BOE proves fatal to the remaining claims of individual aider and abettor liability. Claims as to Defendant Restel are not given an exception.")

In order to hold an employee liable as an aider or abettor, a plaintiff must show that (1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his [or her] role as part of an overall illegal or tortious activity at the time he [or she] provided assistance; and (3) the defendant must knowingly and substantially assist the principal violation. See Tarr v. Ciasulli, 181 N.J. 70, 84 (2004). In examining the liability of individual defendants under the NJLAD, the New Jersey Supreme Court "has held that the words aiding and abetting 'require

active and purposeful conduct.'" Cicchetti v. Morris County Sheriff's Office, 194 N.J. 563, 594 (2008) citing Tarr v. Ciasulli, 181 N.J. 70, 83 (2004).

The Trial Court below analyzed Plaintiff's claims against Restel, acknowledging that there could be no cause of action against Restel where the claim of retaliation against Defendant Nutley BOE did not survive. (Pa10). The Court below reiterated that Plaintiff's Complaint is "rife with allegations that rise only to the level of an employee that is dissatisfied with her employer" and even a "generous reading of the Complaint fails to establish that Plaintiff was retaliated against because she has not, objectively, suffered a materially adverse employment decision." Id.

In the present matter, Plaintiff failed to demonstrate that Restel was an "aider and abettor" where Plaintiff could not establish that the Board of Education performed any "illegal or tortious activity" and even if there was a finding that the Board of Education did so, Plaintiff did not show that Defendant Restel knowingly and substantially assisted the principal violation. Therefore, Plaintiff's NJLAD claim against Lorraine Restel individually was properly dismissed.

CONCLUSION

For the reasons set forth at length above, the Trial Court's dismissal of Counts I and IV of Plaintiff's Amended Complaint, dismissing all claims against Defendants Nutley Board of Education and Lorraine Restel, must be affirmed.

Respectfully submitted,

PIRO, ZINNA, CIFELLI, PARIS & GENITEMPO, LLC
Attorneys for Defendants, Board of Education & Lorraine Restel

By: s/Kristen Jones
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Dated: October 5, 2023

FILED, Clerk of the Appellate Division, October 20, 2023, **A-002397-22**, **AMENDED**

JEANNETTE ANDREULA, Plaintiff, v. THE BOARD OF EDUCATION OF THE TOWNSHIP OF NUTLEY, DR. JULIE GLAZER, LORRAINE RESTEL, JANINE SARNO, CHARLES KUCINSKI, LISA DANCHECK MARTIN, JOHN DOE ADMINISTRATORS AND STAFF 1-10, AND ABC BOARD MEMBERS 1-10, SAID NAMES BEING FICTITIOUS, Defendant,	**SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION** **DOCKET NO: A-0002397-22** **APPEAL SOUGHT FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION,ESSEX COUNTY DOCKET NO: ESX-L-6740-21** **SAT BELOW: HON. BRIDGET A. STETCHER, J.S.C.**

REPLY BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT JEANNETTE ANDREULA'S APPEAL

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1ra Unpublished decision in Boria v. Bowers, 2009 WL 902421 (E.D. Penn. Mar. 31, 2019)

24ra Unpublished decision in Kircher v. Penn. State Police Dept., 2016 WL 4379143 (M.D. Penn. Aug. 17, 2016)

73ra Unpublished decision in Mathias v. Billet-Barclay, 2019 WL 568903 (M.D. Penn. Feb. 12, 2019)

FILED, Clerk of the Appellate Division, October 20, 2023, **A-002397-22**, **AMENDED**

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PRELIMINARY STATEMENT

Defendant/Respondents' ("Defendants") Oppositions ignore the discrepancies in the lower court's rulings, fail to address many of the points argued by Plaintiff/Appellant Jeannette Andreula ("Plaintiff" or "Andreula"), presume facts that are outside of the pleadings, and disregard the applicable standard on a motion to dismiss. What is more, by lavishing blanket praise on the lower court's ruling, Defendants conveniently gloss over the unique facts present in Plaintiff's case; namely, the existence of the July 29, 2016 preliminary injunction ("the Injunction") that Plaintiff was awarded in her initial lawsuit against some of the Defendants. And, although Defendants highlight the lower court's dismissal of a portion of Plaintiff's initial lawsuit, they don't mention that the lower court also left the Injunction in place, which is still in effect to this day.

Both Defendants and the lower court fail to apply the facts of Plaintiff's case, as set forth in the pleadings, to the case law. Plaintiff pled that the Injunction requires Defendants to maintain the status quo, such that Plaintiff shall continue to teach third grade, in the same location and classroom as in the prior school year, at the Lincoln School within the Nutley School System and Defendants shall not interfere with Plaintiff's participation in all Lincoln School events. 34a, ¶ 49; 40a, ¶ 94. Plaintiff's pleadings clearly set forth that Defendants, who were prevented by the Injunction from taking certain actions against her, engaged in a pattern of

retaliatory activity due to her filing of the initial lawsuit, calculated to dissuade Plaintiff from prosecuting that lawsuit, thereby causing her harm in the form of anxiety, pain, and suffering. 242a, ¶¶ 222-224; 243a, ¶¶ 225-231. In response to these pleadings, Defendants' Oppositions largely ignore the Injunction entirely. And, even a cursory review of the opinion reveals that the Injunction did not factor into the lower court's decision, since it is not mentioned at all, except for in the Statement of Facts. 5a. Bizarrely, Defendants claim that Plaintiff uses the Injunction to shield her from scrutiny as an employee. Not only is this conclusion contrary to even the broadest reading of the pleadings, but it minimizes the true significance of the Injunction.

The lower court erred, on pre-answer motions to dismiss, when it failed to give Plaintiff all favorable inferences. The lower court's error led to the improper dismissal of Plaintiff's lawsuit before any discovery. The lower court's dismissal should be reversed, and case should proceed with discovery.

LEGAL ARGUMENT

I. DEFENDANTS LARGELY DO NOT DISPUTE THE LOWER COURT'S ERRORS (8a, 9a, 17a).

Defendants implicitly admit the lower court's numerous errors of law and discrepancies, as highlighted by Plaintiff, by failing to directly address them in any meaningful fashion. These admissions include the following:

- Defendants do not address the two contradictory findings in the lower court's opinion regarding Plaintiff's pleadings as to an adverse employment action. The lower court initially stated that "Plaintiff has not established the second prong, that she suffered an adverse employment action" to justify a determination that Count One was dismissed as to Defendant BOE. 8a. Yet, later, when evaluating Plaintiff's claims against Defendants Glazer and Sarno, the Court conceded that **"[w]hen affording all reasonable inferences to Plaintiff that the complained of activity constitutes a pattern of retaliation, Plaintiff may have established the second element of her prima facie case."** 17a (emphasis added).
- Defendants do not address the lower court's failure to presume all of Plaintiff's pleadings as true, which is what is required at the motion to dismiss stage. Plaintiff highlighted a number of instances where the

lower court acted as a trier of fact, and Defendants do not meaningfully dispute any of these. For example, the lower court found as follows:

- "[B]eing reprimanded for failing to comply with the District COVID-19 mask policy, specifically, for allowing her students to take their masks off while seated, does not rise to the level of 'materially adverse' because the entire school district, and its teachers, were provided with the mask-regulations far in advance of the alleged violations" 9a;
- "Plaintiff cannot establish that enforcing the mask policy is not in and of itself within the purview of the Nutley BOE for protection of teachers, students, and staff" Id.; and
- "Even if the Affirmative Action investigation was retaliatory – ***which is was not*** – the Board and its members are protected by qualified immunity" Id. (emphasis added).

The arguments made by Defendants are premised on the assumption that Plaintiff's allegations are not true. For example, Defendants Glazer and Sarno highlight that Plaintiff's allegations related to the disproportionate application of the District Mask Policy were only pled "upon information and belief". *Def's Br., pg. 4.* This contradicts the applicable standard on a motion to dismiss, which required the lower court to provide Plaintiff with all reasonable inferences and assume the

truth of her allegations. See Smith v. SBC Communications, Inc., 178 N.J. 265, 282 (2004). By failing to directly address the lower court's errors, Defendants admit that they were made. As such, Plaintiff's appeal should be granted.

II. DEFENDANTS CANNOT DISPUTE THE LOWER COURT'S FAILURE TO CONDUCT A NUANCED ANALYSIS OF THE FACTS TO DETERMINE WHETHER THE RETALIATORY ACTIONS WERE MATERIALLY ADVERSE (5a, 8a, 9a, 17a).

Defendants each tout the lower court's sole mention of the Injunction – in the Statement of Facts, no less – as proof that the lower court considered it when determining whether Plaintiff properly pled a pattern of retaliatory actions that were materially adverse. *Def. BOE and Restel Br., pg. 19; Def. Glazer and Sarno Br., pg. 31;* 5a. Defendants also erroneously contend that Plaintiff believes that the Injunction renders her immune from disciplinary actions. *See, e.g, Def. BOE and Restel Br., pg. 15.* These arguments lack any credibility and should be disregarded.

Once again, Defendants' arguments are based on the presumption that Plaintiff's pleadings are false, by improperly arguing at the motion to dismiss stage that the discipline and investigation were warranted and appropriate. To be clear, Plaintiff never pleads that she is above reproach because of the Injunction. Instead, she pleads a pattern of retaliatory actions, including the disproportionate application of the District's Mask Policy, which resulted in a formal meeting and disciplinary letter in her file but no discipline for other violators, and an investigation that was conducted in an improper matter, such that it was a sham. 230a, 231a. Contrary to

Defendants' mischaracterizations, what is missing from Plaintiff's pleadings is any allegation that the Injunction shielded her from legitimate investigation or discipline.

When it suits Defendants, they reference the Injunction as evidence of Plaintiff's belief that she is above reproach. Yet, when analogizing Plaintiff's facts to the case law, Defendants conveniently do not mention the Injunction at all. *See Def. BOE and Restel Br., pgs. 11-18.* And it is undeniable that the lower court also did not consider the Injunction when analogizing the facts pled by Plaintiff to applicable case law, given that it is never mentioned in the Court's actual analysis. 7a, 8a, 9a. Instead, both the lower court and Defendants apply the pattern of retaliatory actions pled by Plaintiff to the case law and reach the conclusion that Defendants' actions were not materially adverse. 8a. But these conclusions were made in a vacuum, without ever considering the actions that Defendants could not take due to the Injunction.

A robust analysis of Plaintiff's unique case would have required an application of the specific facts in the pleadings (including the Injunction) to the concepts set forth in Roa v. Roa, 200 N.J. 555 (2010), which adopted the broad retaliation standard announced by the U.S. Supreme Court under Title VII in Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006). The lower court failed to do this, and Defendants simply recite case law without ever acknowledging the critical fact that the Injunction necessarily limited the scope of their potential

retaliatory actions. 7a, 8a, 9a. It seems that if Defendants had their way, there would be a finite list of prohibited actions, such that no other actions taken by an employer could be considered materially adverse. The case law is not so pedantic, and the Roa Court found that an obscure action – such as cancellation of health insurance – could be considered materially adverse, acknowledging that the Legislature expressed an intention to liberally construe the LAD. See Roa, 200 N.J. at 572-576. "Context matters" because "an act that would be immaterial in some situations is material in others." Burlington, 548 U.S. at 69 (internal citations omitted).

According to Defendants Glazer and Sarno, Plaintiff takes the phrase "context matters" out of context. *Def.'s Br., pg. 24.* Funnily enough, Defendants' application of the case law to the facts in this case does not provide any context at all, given that they never factor in the Injunction. For example, Defendants argue that the cases relied upon by Plaintiff are distinguishable because the retaliation in those cases are far more egregious than the retaliatory acts pled by Plaintiff. *Def.'s BOE and Restel Br., pg. 18.* In doing so, Defendants conceal the critical point that there are certain actions that they were legally prohibited from taking against Plaintiff. What is more, the cases relied upon by Plaintiff are merely examples of instances where the Appellate Division applied the facts of the pleadings to the prevailing standard and reversed dismissals of pleadings at the motion to dismiss stage. See, e.g., Clarke v. Atlantic City Bd. of Educ., 2010 WL 4107750, *5 (N.J. App. Div. Dec. 8, 2009);

see also Nead v. Union County Educ. Services Com'n, 2011 WL 166245 (N.J. App. Div. Jan. 20, 2011); see also Royster v. New Jersey State Police, 2007 WL 4441103 (N.J. App. Div. Dec. 20, 2007). But those cases are not intended to provide an exhaustive list of materially adverse actions. Instead, the Appellate Division in those cases does exactly what Plaintiff is asking to be done here: an application of the prevailing standard to the unique facts of her case. In contrast, what Defendants are really saying is that the presence of the Injunction, which requires them to maintain the status quo as it relates to Plaintiff's employment, shields them from any further NJLAD scrutiny. This result is untenable.

Defendants also largely address each of the retaliatory actions pled by Plaintiff individually, disregarding the significance of a pattern. See, e.g., Nardello v. Township of Voorhees, 377 N.J. Super. 428, 435 (App. Div. 2005); see also Green v. Jersey City Bd. of Educ., 177 N.J. 434, 448 (2003); see also O'Keefe v. State, 2007 WL 1975603 (N.J. App. Div., July 10, 2007).

Defendants repeatedly emphasize that El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145 (App. Div. 2005) and Spinks v. Township of Clinton, 402 N.J. Super. 465 (App. Div. 2008) are good law, and have not been overturned. *See, e.g, Def.'s Glazer and Sarno Br., pg. 22.* But Defendants cannot deny that these cases were decided before Roa v. Roa, which sets forth the prevailing standard for NJLAD retaliation actions. Critically missing from the lower court's analysis is any

application of the principals set forth in Roa to the facts of Plaintiff's case. 8a, 9a. What is more, the other cases cited by Defendants are distinguishable, in that they either failed to consider Roa, were decided at the summary judgment stage, after discovery had been conducted, or relate to different claims. See e.g., Hernon v. Webb-McRae, 2018 WL 4204440 (D.N.J. Sept. 4, 2018) (granting a motion for summary judgment); see also Prager v. Joyce Honda, Inc., 447 N.J. Super. 124 (App. Div. 2016) (addressing an appeal from an involuntary dismissal at trial but acknowledging that a fact-specific analysis is required to place the retaliatory actions in context by stating "[t]o be clear, we accept that written warnings might, in some circumstances, be materially adverse to an employee—in a formal system of progressive discipline for instance"); see Coward v. Englewood, 2019 WL 470080 (App. Div. 2019) (affirming summary judgment, where there was unrebutted evidence that the plaintiff committed infractions that prompted disciplinary action); see Casano v. Livingston Bd. of Educ., 2014 WL 4916845 (App. Div. Oct. 2, 2014) (addressing a hostile work environment claim); Lovett v. Flemington-Raritan Regional Board of Educ., 2013 WL 5925615 (App. Div. Nov. 6, 2013) (addressing an age discrimination complaint alleging constructive discharge).

Finally, Defendants claim that Plaintiff has failed to show any injury or harm. *See Def.'s Glazer and Sarno Br., pg. 25; see Def.'s BOE and Restel Br., pg. 15.* Once again, this case is at the motion to dismiss stage, and Plaintiff has pled that the

disproportionate application of the Mask Policy and rotation of grade level partners has caused her to be singled out and to endure the continued threat of a sham investigation where she was not permitted to meaningfully participate, such that these actions caused damages such as anxiety, pain and suffering. 221a, ¶ 68; 230a, ¶ 136; 241a, ¶ 217; 243a. And, as it relates to the investigation itself, Defendants' claim that the investigation never concluded in any negative result to Plaintiff ignores the point. Plaintiff's allegations highlight the sham nature of the investigation, and allege that retaliatory action included, in part, that Plaintiff was never informed of the results. 241a, ¶ 218.

III. THE LOWER COURT DID NOT MAKE A CREDIBLE FINDING REGARDING CAUSAL CONNECTION (9a).

Defendants emphasize the lower court's finding that "Plaintiff has failed to show how any of the above acts have even a remote relationship to the filing of [the initial lawsuit]." *Def.'s BOE and Restel Br., pg. 19;* 9a. This paltry sentence does not amount to a sufficient consideration of whether or not the retaliatory actions pled by Plaintiff are causally connected to the filing of her initial lawsuit. Once again, this matter is at the motion to dismiss stage, and Plaintiff adequately pled a causal connection, given that she alleges that the retaliatory activities began after she filed her initial lawsuit and continued throughout the pendency of that lawsuit. 219a, ¶ 52. The retaliatory activities pled by Plaintiff span a period of years, like the yearly rotation of grade level partners since the issuance of the Injunction. 221a, ¶ 67. One

of the incidents complained about by Defendant Sarno, which prompted the sham investigation, is that Plaintiff was attempting to further her case in the initial lawsuit by targeting her. 237a, ¶ 173. Given all of this, Plaintiff sufficiently alleged a causal connection at the pleadings stage, and, the lower court erred by failing to perform even the most rudimentary analysis with respect to causal connection.

IV. THE LOWER COURT ERRED IN FINDING THAT DEFENDANTS KUCINSKI AND DANCHECK-MARTIN ARE ENTITLED TO QUALIFIED IMMUNITY (10a-14a).

Defendants Kucinski and Dancheck Martin erroneously claim that the cases relied upon by Plaintiff do not support that the doctrine of qualified immunity is inapplicable to claims brought under the NJLAD. *Def.'s Br., pg. 12.* For example, they cite Brown v. City of Bordentown, 348 N.J. Super. 143, 148-149 (App. Div. 2002), noting that the Court held that legislative immunity has been "preserved in actions under both the LAD and § 1983." In doing so, Defendants conflate the doctrines of absolute legislative immunity and qualified immunity.

Defendants also claim that Plaintiff has miscited Miller v. New Jersey, 144 Fed. Appx. 926 (3d Cir. 2005), by arguing that the case relied upon by the Court, Rodriguez v. Torres, 60 F. Supp. 2d 334, 354 (D.N.J. 1999), only found that the First Amendment qualified immunity analysis did not apply to LAD claims. *Def.'s Br., pgs. 12-13.* This interpretation of a single sentence made by the Court in Rodriguez differs from the conclusion reached by the Third Circuit in Miller, which cited to the

same sentence to reach the clear conclusion that, in relation to the dismissal of an NJLAD claim: "qualified immunity is inapplicable to a state law cause of action." Miller, 114 Fed. Appx. at *2. Other courts within the Third Circuit have cited to Miller for this same proposition. See Mathias v. Billet-Barclay, 2019 WL 568903 (M.D. Penn. Feb. 12, 2019) ("The defendants contend that they are entitled to quasi-judicial immunity and qualified immunity, doctrines which apply to only federal claims") (73ra); Kircher v. Penn. State Police Dept., 2016 WL 4379143 (M.D. Penn. Aug. 17, 2016) ("However, qualified immunity is inapplicable to a state law cause of action") (internal quotation omitted) (24ra); Boria v. Bowers, 2009 WL 902421 (E.D. Penn. Mar. 31, 2019) ("Because wrongful death is a state law claim, qualified immunity does not apply") (1ra). Notably, Defendants have not cited to any case law applying the doctrine of qualified immunity to an NJLAD cause of action.

In addition, even if the doctrine of qualified immunity applied to NJLAD causes of action, Defendants conveniently disregard the analysis undertaken by the Appellate Division in Brown with respect to legislative immunity. For example, the Appellate Division noted that with respect to legislative immunity, status alone does not shield an individual from liability claims, and that one of the defendants acted "in an administrative or executive capacity, or simply on his own, in promoting and influencing a discriminatory hiring, as opposed to his immunized legislative role, he can be held liable under the LAD." Brown, 348 N.J. Super. at 150; see also

Greenman v. City of Hackensack, 486 F. Supp. 3d 811, 835 (D.N.J. 2020) (finding that alleged discriminatory acts are not legislative in nature, such that two council members did not enjoy absolute legislative immunity with respect to those acts). Here, the lower court's decision is not premised on any such consideration, and did not appreciate that Plaintiff was not complaining of the investigation itself, but instead was complaining about how the investigation, as authorized by Defendants Kucinski and Dancheck Martin, was conducted. 11a, 12a. That the lower court did not understand the nature of Plaintiff's complaint with respect to the investigation is highlighted by its continued insistence that the results remain pending. 13a, 14a.

The lower court was required to accept as true Plaintiff's pleadings that Defendants Kucinski and Dancheck Martin knowingly and substantially assisted in retaliating against Plaintiff by authorizing the sham investigation, spanning over six months, where the investigator did not give Plaintiff an opportunity to meaningfully respond to a legible transcript and did not interview any of the individuals that she identified with knowledge, despite saying he would do both things. 231a-242a, 246a-247a. Reversal is warranted because the lower court failure to properly assess the qualified immunity defense in the context of an LAD claim.

V. THE LOWER COURT ERRED IN DISMISSING NJLAD CAUSES OF ACTION AGAINST THE INDIVIDUAL DEFENDANTS (9a-18a).[1]

The lower court ruled in error that the individual defendants could not be liable under the NJLAD as an aider and abettor. Defendants argue that they cannot be individually liable under the NJLAD due to Plaintiff's failure to adequately plead a cause of action against Defendant BOE. First, the lower court erroneously found that Plaintiff had not adequately pled an NJLAD cause of action against Defendant BOE, for the reasons set forth herein. To the extent that the Individual Defendants' arguments are premised upon this justification, these arguments necessarily fail.

Secondly, Plaintiff adequately pled that each of the Individual Defendants participated in the retaliatory actions against her, as is clear from a review of her pleadings. For example, Defendant Restel is the individual behind many of the Plaintiff's alleged retaliatory actions, and Plaintiff alleges that she knowingly and substantially assisted in various retaliatory actions, including the rotation of grade-level teaching partners, as well as the Disciplinary Meeting and resulting Disciplinary Letter. 219a-231a, 245a. Additionally, Defendant Glazer is the individual behind many of the Plaintiff's alleged retaliatory actions, and Plaintiff alleges that she knowingly and substantially assisted in conducting the Disciplinary

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[1] As to Defendant Sarno, Plaintiff reiterates that discovery is warranted to determine if she is an employer under the NJLAD, as opposed to a coworker. See Tarr v. Ciasulli, 181 N.J. 82-83 (2004).

Meeting, which resulted in the issuance of the Disciplinary Letter. 228a. Similarly, Defendant Sarno is the one who lodged the complaint that raised both the 2016 Lawsuit and three other issues. 235a. Plaintiff has also argued that Defendants Kucinski and Dancheck Martin are liable as aiders and abettors under the NJLAD. T45:9-14. In this regard, Plaintiff's pleadings relate to the method the investigation was conducted, not the investigation itself. 261a, ¶ 133. Reversal is warranted in this circumstance, as Plaintiff's allegations as to each of these Individual Defendants must be accepted as true for the purposes of evaluating the motion to dismiss.

CONCLUSION

For all of the reasons set forth herein, and in Plaintiff's initial papers, Plaintiff requests: (1) the lower court's Orders on Motion to Dismiss be reversed as to the dismissal of Counts One, Three, Four, Five, Six, and Seven; (2) alternatively, the Court should vacate the Orders on Motion to Dismiss and remand the matter to the lower court with instructions regarding the applicable Roa standard; and (3) such other and further relief as this Court deems just, equitable, and proper.

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Dated: October 19, 2023