JAKE STOUCH & KRISTINE BODNAR, Plaintiffs, v. DEPARTMENT OF CHILD PROTECTION AND PERMANENCY, CENTER FOR FAMILY SERVICES, IAN PALUMBO, GWEN WEBER, JUANIATA FARR, MARYANN FURPHY, TIFFANY MCILLHENNY, DEBORAH JOHNSON, THERESE BENYOLA, MARION MCLAURIN, ABC CORPORATIONS 1-5 (fictitious names describing presently unidentified business entities) and JOHN DOES 1-5(fictitious names describing presently unidentified individuals), Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A – 003601 - 22 On Appeal From: Superior Court of New Jersey Law Division – Burlington County Docket No. BUR – L – 000151 – 19 Sat Below: Hon. Sander D. Friedman, J.S.C

BRIEF OF PLAINTIFF/APPELLANT KRISTINE BODNAR

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On the Brief

TABLE OF CONTENTS

TABLE OF CITATIONS

Page(s)

Cases

Statutes

TABLE OF JUDGMENTS, ORDERS & RULINGS

I. PRELIMINARY STATEMENT

The dismissal of this case was a complete miscarriage of justice, leaving an undisputed victim of sexual harassment without a remedy under the New Jersey Law Against Discrimination ("NJLAD"), N.J.S.A. 10:5-1, *et seq.* The record demonstrates that, for nearly a year, Kristine Bodnar ("Appellant"), an employee of Respondent Center for Family Services ("CFS"), was sexually harassed by Ian Palumbo, an employee of Respondent Department of Child Protection and Permanency ("DCPP"). In response to internal complaints by Appellant and co-plaintiff, DCPP employee Jake Stouch, CFS immediately interrogated Appellant (the victim) about, *inter alia*, her alleged promiscuous "attire." Then, to avoid disruption to its state-contract with DCPP, CFS punished Appellant for coming forward: ***on the same day*** CFS met with Appellant to purportedly address the sexual harassment, she was ***permanently*** transferred to another office against her will.

Putting aside the evidence of sexual harassment and retaliation, Palumbo remained in the same shared CFS-DCPP office with his conduct unchecked. Moreover, despite additional complaints of retaliation by Appellant, CFS did not even bother to investigate, let alone take remedial action, ultimately resulting in Appellant's constructive termination. And although the state concluded months later and after this lawsuit was filed that Palumbo engaged in sexual harassment in violation of state policy, DCPP did not fire Palumbo. He was not demoted. He was

not transferred. He did not attend additional sexual harassment training. Rather, ***Palumbo negotiated a three-day suspension in exchange for a full release of claims against DCPP. He then immediately received a significant promotion.***

The clear and significant evidence of sexual harassment, retaliation, and CFS's/DCPP's failure to take prompt, corrective, or appropriate remedial action designed to deter future harassment renders this matter ripe for a jury. What makes this case so tragic is that the Trial Court initially came to that very conclusion. The Trial Court correctly ruled in its August 30, 2022, Oral Opinion denying summary judgment that both organizations (certainly CFS) and individual defendants owed Appellant the duty to provide a workplace free of harassment, discrimination, and retaliation, and that a jury could readily conclude Defendants breached that duty. Infra § II ("So I will find that in the totality of the circumstances and facts that have come before this Court in a three-plus-hour oral argument, inclusive of many, many, many filings and – and the documents put forward. There are issues of facts for [the] jury to decide this case. I'm not going to dismiss the action on summary judgment for those reasons."); §VI(B)(1) ("But [] you're saying you're protecting her by taking her out of there, and Mr. Luber is saying, you know, what, you're moving her in – as a – as punishment. What am I supposed to do with these – with – with – coming from two different fact patterns of thought processes as it relates to, you know, why she was removed, why she wasn't moved? Isn't that a jury question?").

On reconsideration, the Trial Court completely and inexplicably reversed course. Without citing to any case, to any law, or to any undisputed fact, the Trial dismissed, in one fell swoop, ***all*** of Appellant's claims against ***all*** Defendants while allowing her male co-plaintiff, who was not a victim of sexual harassment but suffered retaliation for supporting Appellant, to proceed to trial. In overruling itself, the Trial Court held that ***no one*** in this case was, or ***could ever be***, held liable because Appellant and Palumbo were not technically paid by the same organization. Infra § II ("This Court can't find that the Palumbo actions taken were within the control of the CFS defendant. It is for that reason that I don't believe that CFS is an appropriate defendant in this case, and I'm going to grant the motion for summary judgment as to the CFS Defendants.")

The reconsideration ruling is a reversible error as it vitiates clear New Jersey precedent regarding employer liability under the NJLAD. See, e.g., Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 600, 623 (1993); Woods-Pirozzi v. Nabisco Foods, 290 N.J. Super. 252, 269 (App. Div. 1996) ("An employer that knows or should know its employee is being harassed in the workplace, regardless of by whom, should take appropriate action"). The Trial Court's initial ruling – that Appellant, like her co-plaintiff, is entitled to a jury trial – was correct and should be restored.

II. PROCEDURAL HISTORY[1] (Pa1-45, Pa122-60, Pa46-105, Pa180-205, Pa161-79)

On January 18, 2019, Appellant and Stouch filed their Complaint and Jury demand in the Superior Court of New Jersey, Burlington County, alleging violations of the NJLAD. (Pa1-45). Specifically, Appellant asserted claims for disparate treatment, sexual harassment, and hostile work environment discrimination due to gender and retaliation/improper reprisal under the NJLAD against CFS, DCPP, and the CFS Individual Respondents. Appellant and Stouch also asserted a claim for declaratory judgment against the DCPP Defendants, which was later transferred to the Appellate Division. On February 21, 2019, CFS Respondents filed their Answer and Affirmative Defenses to the Complaint, followed by DCPP on July 3, 2019. (Pa122-60). The First Amended Complaint was filed on February 20, 2020. (Pa46-105). CFS Respondents filed their Answer to the First Amended Complaint on February 27, 2020 (Pa180-205), followed by DCPP and Palumbo on May 19, 2020 (Pa161-79).

After the completion of discovery and motion practice, on January 7, 2022, three (3) individual motions for summary judgment were filed by Respondents. In turn, on March 16, 2022, Appellant and Stouch filed their Opposition to the Motions

[1] 1T Oral Argument on Defendants' Motion for Summary Judgment (August 30, 2022)
2T Oral Argument on Defendants' Motion for Summary Judgment (August 31, 2022)
3T Oral Argument on Defendants' Motion to Reconsider (December 19, 2022)
Pa Plaintiff/Appellant's Appendix in Support of Appeal

for Summary Judgment and filed Cross Motions for Summary Judgment. Over the course of two (2) days, on August 30, 2022, and August 31, 2022, the Honorable Sander D. Friedman, J.S.C. heard approximately four (4) total hours of oral argument from the parties on the multitude of summary judgment motions (2T, 3T).

Judge Friedman denied all motions for summary judgment, and subsequently entered an order on September 15, 2022, confirming his decision. 2T (58:21-88:22. In its original decision, the Court found that there were genuine issues of material fact regarding the allocation of control between CFS and DCPP, whether Respondents' motive for transferring Appellant was retaliatory, and whether Appellant was constructively discharged from her employment. After reviewing thousands of pages of arguments and documents, the Court specifically held:

> "So I will find that in the totality of the circumstances and facts that have come before this Court in a three-plus-hour oral argument, inclusive of many, many, many filings and – and the documents put forward. There are issues of facts for the Court – for the – for the – jury to decide this case. I'm not going to dismiss the action on summary judgment for those reasons."
>
> 2T86:15-22.

Following Judge Friedman's decision, the Respondents filed motions for reconsideration. Judge Friedman dismissed Appellant's claims with prejudice despite Respondents presenting no new evidence, facts, or case law. 3T 90:4-92:11. Specifically, the Court dismissed Appellant's claims of sexual harassment discrimination and hostile work environment, and retaliation. 3T 90:4-92:11. The

Court incorrectly reasoned, with little to no explanation and without any new evidence or information, that Palumbo's actions were not taken within the control of CFS, and therefore, all claims against CFS Respondents should be dismissed. 3T 91:15-20. The Court further held that since there was not a close enough nexus between DCPP, Palumbo, and Appellant to establish a NJLAD claim. 3T 92:9-11.

A settlement was reached between Stouch and DCPP, and a Stipulation of Dismissal was filed on July 11, 2023, in connection with the outstanding claims. Appellant's claims are now ripe for appeal, and this appeal accordingly follows.

III. FACTUAL BACKGROUND

A. The Parties. (Pa330-31, Pa333, Pa274-99, Pa487-88, Pa815-16, Pa570-71, Pa795-98, Pa230, Pa510, Pa431, Pa668)

Appellant was employed by CFS from 2016 through 2019. Appellant was a Certified Alcohol and Drug Counselor ("CADC"), working with individuals to overcome alcohol and drug addictions. (Pa230). During her employment with CFS, Appellant worked at DCPP's Burlington East office in Lumberton, New Jersey. (Pa330-31) 25:6-30:3. As of 2018, Respondent Johnson was Appellant's direct supervisor. Id. at 36:22-37:17. Appellant worked "very close" with DCPP staff on issues. Id. at 32:18-20. During 2018-19, Appellant monitored and assessed individuals who had potential substance abuse issues. (Pa333) Id. at 32:23-35:23. She also reported to DCPP caseworkers and supervisors on the status of cases. CFS employees, including Appellant, worked closely with the head of the DCPP, Furphy.

Id. Two CFS employees worked full-time at the DCCP office in Lumberton – Appellant and Andrew Solon. Id. Prior to the sexual harassment and retaliation alleged in this lawsuit, Appellant was an excellent employee and was never disciplined. (Pa335) Id. at 45:15-18. Stouch was employed by DCPP from 2015 through 2019, responsible for investigating child abuse/neglect. (Pa274-99, Pa487-88) 155:7-11-159:10.

DCPP is a public agency within the State of New Jersey, Department of Children and Families. DCPP investigates allegations of child abuse/neglect and arranges for the child's protection and the family's treatment. DCPP has two Burlington County offices, and one location in Camden County, New Jersey. (Pa815-16) 121:24-122:12. Palumbo has been employed as a senior investigator with DCPP since 2010. (Pa730) 28:2-4. Palumbo's role required him to work with CADC's like Appellant. (Pa736) Id. at 50:1-6.

CFS is a New Jersey non-profit organization that provides numerous family programs, such as addiction and recovery services, behavioral health counseling, safe and supportive housing, workplace development, victim and trauma services, early childhood education, and family support and prevention. (Pa570-71) 29:20-30:9; (Pa796-97) 42:3-49:25. CFS counselors work closely with DCPP investigators to carry out child and family support services. Id.

Appellant and Respondents' work was inextricably intertwined. CFS has "offices" and "cubicles" inside DCPP offices and CFS counselors perform "many, many" services for DCPP. (Pa796-98) 42:3-52:12. It was not unusual for Appellant to counsel individuals that had been a part of Stouch's investigations. (Pa230, Pa274-99, Pa510, Pa431) 248:19-249:7; 53:2-20. Appellant regularly communicated with DCPP employees concerning the status and maintenance of individuals' counseling and/or treatment. Id. Respondent McLaurin confirmed that CFS receives "funding" from the State and CFS employees physically work within DCPP offices. (Pa668) 51:9-25. CFS must coordinate an investigation with DCPP if there was sexual harassment committed by a DCPP employee against a CFS employee. (Pa669) Id. at 54:1-57:10, 59:3-20.

B. March 2018-November 2018: Palumbo Repeatedly Sexually Harasses Appellant. (Pa55, Pa230, Pa274-99, Pa338, Pa340-49, Pa372-74, Pa378, Pa379-80, Pa381-82, Pa431, Pa452, Pa734-35, Pa739, Pa753-54, Pa993-97, Pa1000, Pa1001-3)

In approximately March 2018, Palumbo began regularly sexually harassing Appellant. At first, Palumbo repeatedly leered at Appellant's body and commented on her physical appearance and attractiveness, e.g., stating that she was "looking good" and "pretty." (Pa230, Pa340-49, Pa993-97) 62:2-98:2. Eventually, Palumbo asked Appellant for her cell phone number, claiming it was for "work-related" purposes. Id. Instead, Palumbo sent text messages to Appellant referring to her as a

"hot babe." He also discussed "breasts" and referenced "banging." Id.[2] Palumbo also called Appellant inappropriate "pet names" such as "babe" and "hun." Id. Palumbo was texting Appellant fishing for sexual favors and hoping Appellant, in return, had the "hots" for him. (Pa994)

Palumbo also emailed Appellant telling her how "nice" she "looked" and said she was attractive. Appellant responded by telling him to "knock it off." (Pa230). If Appellant went anywhere with another male coworker, Palumbo became jealous and wanted to know why/where she was going with that male employee. Id. When Palumbo engaged in conversation, he often invaded Appellant's personal space by standing uncomfortably close to her, forcing her to step back. Id. Palumbo also went out of his way to find reasons to go to her and strike up a conversation. Id.[3]

On one occasion, Palumbo asked to go get coffee with Appellant when the office coffee pot broke. (Pa340) 62:2-24. Appellant told him that she did not want to go, but he insisted on repeatedly asking her, "Are you ready to go?" This was a red flag for Appellant, and it made her uncomfortable as she felt Palumbo was attempting to get her into his car. Id. On March 14, 2018, another email exchange between Appellant and Palumbo discussed getting coffee together, but Appellant

[2] Appellant did not socialize with Palumbo outside of work. (Pa338) 56:7-9. Appellant did not know Palumbo prior to working at the Burlington East office. Id.

[3] Appellant shared the sexually harassing text messages from Palumbo with Stouch. She did this because Stouch was the subject of some of the messages and Appellant was disturbed by the contents of Palumbo's messages. (Pa452) 134:3-9, (Pa431) 52:17-25; 53:1.

ultimately refused. (Pa342-44) 72:12-80:25; (Pa1001-3). Again, Palumbo became jealous when Appellant went to get coffee with other male employees, including Stouch. Palumbo also made jealous comments when Appellant brought coffee for the security guard. Id.

Moreover, Palumbo attempted to discuss personal matters with Appellant, such as asking about her marriage or why she did not have many pictures of her husband at work. (Pa342-45) 72:12-82:22. Palumbo also made comments about kissing Appellant, which made her uncomfortable, especially because Palumbo was married. Id. He discussed personal matters with Appellant, including sexual preferences, her clothing, and her relationship status. When Appellant tried to disengage from conversation concerning personal matters, Palumbo would immediately change the subject and begin asking work-related questions. Id.

On another occasion, Palumbo saw Appellant on her way to drop her children off at school. He then approached her and asked where she was going and why she did not stop and say hello to him. Id.; (Pa230). Palumbo even referred to Appellant "hot babe," including in text messages. (Pa994). In yet another instance, Palumbo sent a text message to Appellant to come over to his cubicle because he had a "secret" to tell her. Although Appellant refused, Palumbo enticed her to continue the conversation by telling her that the secret was about her and asking her to guess the details. During this exchange, Palumbo also made a comment about Stouch's

"ass being tight." (Pa230, Pa345-46) 85:9-89:20. Appellant went outside and spoke with Palumbo about this "secret." He told her he had been approached by Stouch, who asked Palumbo what Appellant's "situation was" (i.e., relationship status). Id.

Palumbo texted Appellant that Stouch wanted to "kiss, bang, or touch a boob," which was a misguided attempt to curry favor with Appellant. Appellant rebuffed this harassment: "Stop yourself. I ask you not to say that and thanks for not repeating." (Pa994). Palumbo made other comments about Appellant being "attractive." (Pa345-46) 85:9-89:20. Appellant felt uncomfortable and asked him to stop, but Palumbo refused. Appellant was upset, confused, and angry about Palumbo telling her that Stouch wanted to kiss, bang, touch a boob, and other sexual comments. Id. Soon after the above text, Appellant verbally told Palumbo she was uncomfortable, not to come near her, and not to make inappropriate comments. (Pa372) 193:5-23. Notwithstanding, Palumbo continued his jealous fits by falsely implying that Appellant was kissing Stouch at work. (Pa995).

On another occasion, Palumbo came into Appellant's office and made a comment about kissing her, which Appellant rejected. She responded, "Let's not go there," obviously rejecting the sexual advance. (Pa230, Pa378) 216:4-24. Appellant again repeatedly told Palumbo that his text messages and comments made were inappropriate. (Pa373) 195:2-20. Palumbo also physically touched Appellant.

(Pa348-49, Pa379) 96:25-99:2, 221:1-221:9. As a result of the harassment, Appellant blocked Palumbo's messages and calls to her cell phone. (Pa1000).

When Appellant did not respond to messages, Palumbo went looking for her at the office. On one occasion, Palumbo discovered Appellant walking into the office, so he grabbed her arm and said, "The next time I call you 'hot babe,' you respond to me." (Pa379-80) 221:18-222:9. Appellant cannot remember exactly when she blocked Palumbo's cellphone, but it was before November 20, 2018. (Pa381-82); Id. at 227-232. Appellant did not receive all of Palumbo's incessant messages because he was blocked. Id.

Palumbo's harassment persisted. While Appellant was speaking with another coworker about a pending case, Palumbo walked past her and touched her hair. He later walked by again and touched her back. (Pa348-49, Pa379) 96:25-99:2, 221:1-221:9. When Appellant was alone in her car, Palumbo parked next to her, entered through the passenger door of her car, and started asking questions about a case, despite the fact she had not been involved in any of Palumbo cases at that point. Id.

Prior to November 2018, Appellant reported the harassment to Respondent Johnson multiple times because the behavior was making her uncomfortable. (Pa346-48, Pa380) 89:7-96:24, 223:15-225:25. In response, Respondent Johnson inexplicably claimed she had to fire a previous employee who complained about sexual harassment, which made Appellant even more uncomfortable. Id. Appellant

stated that she did not know what to do about the harassment – Respondent Johnson made Appellant feel as if there was nothing she could do. Id.

Further, DCPP employees became aware of the rumor that Appellant was sleeping with someone in the office. Id. Appellant became aware that rumors were being spread. In fact, DCPP employees and the security guard informed her of the rumors as well. Respondent Johnson also knew about the rumors because of conversations she had with her in April or May 2018, but no action was taken. Id. Palumbo visited her office on multiple occasions, and coworkers informed Appellant that Palumbo came by looking for her when she was not at her cubicle. Id. Numerous employees witnessed Palumbo's behavior. Id.

On or about September 10, 2018, Palumbo continued making inappropriate comments about Appellant's appearance. He sent a text message to Appellant asking her, "Do u mind wearing stuff more like large sweatshirts and parkas?" (Pa55) ¶ 39. When Appellant asked what he meant by his comment, Palumbo explained that he "couldn't concentrate," meaning that he was distracted and sexually aroused by Appellant's appearance and body. Id. When Palumbo texted her asking her to wear parkas and large sweatshirts to work, Appellant wrote back with a question because she was annoyed and tired of reminding him to stop being inappropriate. (Pa372-74) 191:18-201:13. Appellant stated she wanted to be left alone and not made uncomfortable at work as his behavior was inappropriate. Id.

Palumbo constantly brought up Stouch in conversation and insinuated that Stouch and Appellant were involved in some sort of romantic relationship. (Pa274-99, Pa230). Shortly after Palumbo relayed the aforementioned "secret" to her, he followed up with: "Did you talk to Jake yet? I can't see you liking him and his rap music." Id. Appellant replied that she did not want to hear anything else about Stouch and asked for Palumbo to stop bringing it up. Palumbo also regularly asked Appellant if she and Stouch were sleeping together or engaging in sexual activity with one another. On one occasion, Palumbo interrupted Appellant and Stouch and said "Oh, you two are so cute together!" Id.

In another instance, Palumbo sent a text message to Appellant asking her a work-related question. When she did not immediately respond, Palumbo sent another text message stating that she "must have been busy kissing Jake." He further said that Appellant "only had time for Jake," and that he did not know "how Jake deals with you." Id. When she told Palumbo to stop saying such things because they were not true, he replied that he thought it was funny and that he "saw things." Id. As a result, false rumors spread through the office that Appellant was sleeping with someone in the office. Even her supervisors heard these rumors, but they did not take any action to remediate the situation, and thus, Appellant cut herself off from her coworkers in the office in fear that she would be terminated. Id.

At his deposition, Palumbo admitted that he had knowledge of DCPP's zero-tolerance policy for sexual harassment. (Pa735) 47:6-22. Notably, despite being disciplined for sexual harassment and violating state policy on the subject, Palumbo still refused to admit he violated such policies: "Q. Have you always complied with those policies? A. I believe I have, yes." Id. While the sexually explicit messages speak for themselves, Palumbo also refused to admit that he was attracted to Appellant. (Pa736, Pa738) Id. at 50:1-20, 59:5-7. This is despite the fact that Palumbo admitted sending Appellant a text message referring to her as a "hot babe," (Pa739) 63:1-19, 64:4-67:12, and further admitting he told Appellant that she should cover up with a "Parka" in a text message. (Pa753-54) 121:1-122:25.

Palumbo admitted that he was having trouble concentrating because of her provocative outfit when he sent the text message. (Pa754) 123:16-25. After being confronted with the text message cited above, Palumbo still believes that he did not violate any policy and his conduct did not constitute sexual harassment and suggested it Appellant's responsibility to correct his clear sexual harassment. (Pa754) 125:5-14. While Palumbo admits to the foregoing conduct and he otherwise lied to the investigator, (Pa754) 125:3-4, Palumbo denies telling Appellant that she was looking good, looking pretty, or anything of that nature. (Pa739) 62:22-25. Palumbo testified he understood the State to have a "zero tolerance" policy for sexual harassment. (Pa734) 44:17-45:8. He was unsure of when he participated in anti-

sexual harassment training and, despite being suspended for engaging in sexual harassment, he received no additional training. (Pa734) 45:9-18 ("Q: After you were suspended, did you have to take any remedial anti-sexual harassment training? A. No."). He was promoted in 2019, shortly after his suspension for sexual harassment and transfer to Burlington West. (Pa734) 43:16-25.

C. November 2018: Appellant and Stouch Report Palumbo To Human Resources/EEO; They Are Met With Immediate Retaliation. (Pa230, Pa274-99, Pa341-43, Pa345-46, Pa349-51, Pa353-55, Pa359, Pa382, Pa977-79, Pa895-96)

On November 16, 2018, Stouch's wedding took place, and thus, he was off from work. Appellant, however, was not. Around 4:00p.m., Palumbo came into to the office and said to Appellant that "it must be a really hard day" for her, referring to Stouch's wedding. Appellant did not engage, but Palumbo persisted. He said to her "stop playing dumb, you know exactly what day it is." (Pa230, Pa274-99) Palumbo continued: "I know this must be hard for you, but don't worry, I'll be there for you. Wait until Monday when Jake cuts you off. It will feel much worse then." Appellant then said "why are you saying these things to me? Jake and I are just friends." Palumbo snickered, "if you guys are friends, then why aren't you at his wedding?" Id.

On November 19, 2018, Palumbo again approached Appellant and asked how she was feeling now that Stouch was married. On November 20, 2018, Palumbo once again asked her how she was feeling know that Stouch was a married man.

That afternoon, Stouch sent a text message to Palumbo demanding that he immediately stop sexually harassing Appellant, to "keep his (Stouch's) name out of his mouth," and to stop talking about him and spreading false information or he would report the matter to EEO. Id.; (Pa977-79). Palumbo claimed the situation "was a joke" and that he did not take Stouch seriously. Id.

Stouch reported Palumbo's sexual harassment and the derogatory comments to Weber and Farr. (Pa895-96). On or about November 26, 2018, Appellant called her direct supervisor, Respondent Johnson, to report the problems with Palumbo. (Pa274-99, Pa230). Respondent Johnson responded that she had not filed a formal complaint. Respondent Johnson then became upset and raised her voice at Appellant. Respondent Johnson blamed Appellant, claiming it was her fault for talking to caseworkers. Id. Rather than investigate, Respondent Johnson told Appellant that she would be transferred. Appellant hung up the phone in disbelief. She tried to call Respondent Benyola, but there was no answer, so she left a voicemail. Id.

On the next day, November 27, 2018, at about 10:30a.m., Respondent Benyola returned Appellant's call. (Pa230). Appellant explained her concerns with Palumbo. Respondent Benyola said she would speak with her boss and call Appellant back in five minutes. Almost four hours later, Respondent Benyola called Appellant to schedule a meeting on November 29, 2018 with the head of human resources, Respondent McLaurin. Id.

On November 29, 2018, Appellant met with Respondents Benyola and McLaurin. (Pa230, Pa349-51, Pa382) 98:17-104:25, 106-109:19, 233:3-234:13. Appellant believed this meeting was to discuss her reports of sexual harassment by Palumbo. Instead, Respondent Benyola started the meeting by telling Appellant that she had received complaints about her clothing. She tried to ask for more details about these alleged "complaints," but was cut off by Respondent Benyola, who also said that Respondent Johnson had told her that she (Respondent Johnson) had previously met with Appellant and talked about her attire. Id. Appellant never had any such discussion with Respondent Johnson and explained the same to Respondent Benyola. This was first time she had ever heard about anyone complaining about her clothing, i.e., immediately after she complained about Palumbo. Id.

Although Appellant presented allegations of sexual harassment by Palumbo to Respondent McLaurin which required him to investigate, Respondent McLaurin did not do so. Respondent McLaurin claimed he did not investigate because of the lawsuit, even though lawsuit was not filed until late January 2019, nearly two months later. (Pa341-43, Pa345-46, Pa353-55) 68:12-72:9, 75:1-19, 82:9-85:22, 86:23-88:1, 115:6-117:25, 121:1-125:14 (explaining he never spoke to Bodnar after her initial complaint, nor did he ask for the text messages, despite having an obligation to investigate such matters). Due to his failure to investigate, Respondent McLaurin learned for the first time at his deposition that the state conducted its own

investigation and made findings of fact. Respondent McLaurin was shocked that the state never shared the results with CFS's HR Director. (Pa359) 139:1-145:13.

D. November 2018: Appellant Is Transferred In Retaliation For Her Complaints. (Pa230, Pa324-417, Pa367-68, Pa675, Pa655-722, Pa678-79, Pa681, Pa981, Pa999)

During the November 29, 2018 meeting, Respondents McLaurin and Benyola pressed Appellant on why she did not tell Palumbo "no" and inquired into allegations that Appellant's attire violated the address code, her "over-socialization," and her apparent "substance abuse." These complaints were made by "DCPP management." (Pa675, Pa678-79) 80:1-81:23, 93:10-22, 94:1-106:23. Respondents McLaurin and Benyola then discussed transferring Appellant– the victim. Appellant objected to the transfer, which she viewed as clear retaliation. (Pa681) 103:11-24, 118:1-120:12; (Pa230, Pa324-417) 98:17-104:25, 106-109:19, 233:3-234:13.[4] Appellant was told that she was being transferred to the Camden office. (Pa230); (Pa324-417) 98:17-104:25, 106-109:19, 233:3-23413; (Pa655-722) 105:17-113:14; (Pa981).

[4] Appellant was told to pack everything up and leave without saying goodbye to her coworkers or coordinating cases. Appellant was also questioned about the investigator "traffic" in her office. She was confused by this question as it was common that investigators came into the office regularly to ask questions and provide updates on pending cases. She was also questioned about walking around the parking lot during her breaks in the summertime. Appellant was puzzled by this question because she had walked around the outside of the building with Respondent Johnson in the past during breaks without issue. She was then alleged to have walked around the building with Palumbo, but she immediately denied that allegation. Appellant then met with another allegation – that she had been clocked sitting at a caseworker's cubicle for two hours, which was false. Appellant had never heard of these allegations prior to raising her complaints about Palumbo. (Pa230, Pa324-417) 98:17-109:19, 233:3-234:13.

On or about December 3, 2018, Appellant was transferred to the Camden office, where her new supervisor asked if she intended to move forward with a lawsuit. Id. Appellant was set up to fail as she was not provided any training concerning the Camden office's internal operations and procedures, which were different from those of her prior office. Moreover, while at the Camden office, she was also questioned multiple times by representatives of DCPP as to why she had been transferred. She was advised that they were going to call her old office to find out exactly why she had been transferred. Id.

On December 7, 2018, Appellant sent an email to Respondent McLaurin concerning her transfer and the frustrations she felt as a result. (Pa999, Pa324-417) 98:17-109:19, 233:3-234:13; (Pa655-722) 105:17-113:14. Appellant explained that as a result of all the stress and anxiety she was experiencing caused by Palumbo's sexual harassment, she had to call out of work. Appellant further advised she would be following up with her doctor. Respondent McLaurin never responded to or addressed her concerns. (Pa655-722) at 109:4-114:4.

At the Camden office, Appellant felt ostracized, and employees knew she was transferred due her sexual harassment accusations, and employees were making comments about and looking at her. (Pa367-68) 170:1-178:15. Appellant's new co-workers and managers openly discussed the EEO complaint and the sexual

harassment. Appellant did not want to divulge details of the transfer, but if she refused, her new supervisors threatened to call the Burlington office. Id.

E. December 2018-January 2019: Appellant Continued to Suffer Retaliation as a Result of Reporting the Sexual Harassment. (Pa230, Pa351-55, Pa358-60, Pa998, Pa693-95)

Appellant was also subjected to further retaliation for her complaints of sexual harassment. (Pa230) Specifically, on December 20, 2018, Appellant learned that Respondent Johnson had met with another employee and bad-mouthed her, calling her "too immature" for her position and that she was like a "drunken prom date." (Pa358-59) 135:21-138:20. A female coworker overheard the meeting and told Appellant about this meeting, and Appellant said she did not want to know more details because it was making her feel worse. Id. There were other false rumors being spread that Appellant was sleeping with multiple people in the office, that she was terminated, and she was a "whore." (Pa359-60) 141:1-143:4. Appellant promptly sent an email to Respondent McLaurin detailing such comments, and she explained that she felt that comments were made because of her complaints of sexual harassment by Palumbo. Appellant pleaded for Respondents to take remedial action to provide a safe working environment free from harassment/retaliation. (Pa998).

Respondent McLaurin recalled receiving the email but, once again, did not formally investigate, discuss the matter with Appellant, or take remedial action. (Pa693-95) 151:14-158:3. At this point, Appellant knew that Respondents'

retaliation would only persist, and her mental and emotional health was in jeopardy every single day that she entered the office. Accordingly, Appellant's physician placed her on medical leave, which was eventually extended through August 2019. (Pa351-55) 109:20-113:25, 117:5-118:10; 122:14-18.

F. January 2019-April 2019: Plaintiffs Continue To Be Subjected To Retaliation Even After This Lawsuit Was Filed and the EEO Substantiated The Complaints. (Pa1-45, Pa106-21, Pa591, Pa595-96, Pa746-53, Pa895-965, Pa908-09, Pa991-92, Pa966-76)

On January 18, 2019, Appellant's Complaint was filed in Burlington County Superior Court. (Pa1-45) . DCPP, Palumbo, Weber, and Farr were served on January 23, 2019 and January 25, 2019. CFS, and Respondents Benyola, Johnson, and McLaurin were also served on January 23, 2019 and January 28, 2019. (Pa106-21)

Even after being served with the Original Complaint, Respondents continued to subject Appellant to unlawful retaliation. For example, Appellant observed Palumbo following her outside of work. (Pa991-92). Appellant noticed that someone was following her outside of work. The individual following her was none other than Palumbo, who she observed casing her residence and driving a dark-colored Dodge RAM pick-up truck. She immediately filed a police report.

On April 10, 2019, Appellant received a letter from EEO stating the following:

> The investigation confirmed Mr. Palumbo did send inappropriate text messages of a sexual nature to Ms. Bodnar that you observed. Specifically, a test message stating that [Plaintiff Stouch] and Ms. Bodnar were "busy making kissies in the closet" and a second text message which stated that [Plaintiff Stouch] wanted to "bang, kiss or

> touch a boob." These messages sent by Mr. Palumbo to Ms. Bodnar were inappropriate.
>
> ***Based on the results of the investigation relating to this allegation, it was substantiated that there was a violation of the State Policy. Consequently, appropriate administrative action will be taken.***

(Pa895-902) (emphasis added).

The EEO letters and investigation report produced in discovery verify that Appellant and Stouch were telling the truth. Id. Although the EEO had substantiated Appellant's complaints of sexual harassment at the hands of Palumbo, she continued to be subjected to retaliation at every opportunity. Although Palumbo was suspended for four days, he appealed that decision. (Pa966-76). DCPP and Palumbo settled the suspension dispute, resulting in a three-day suspension. Id.; (Pa595-96) 125:24-128:4. Furthermore, the investigation report confirms that Palumbo lied during the investigation by failing to disclose or acknowledge sending sexual text messages to Appellant. Palumbo met with EEO investigator Outram in December 2018, after Appellant and Stouch filed their internal EEO complaint. (Pa746-48) 90:13-98:25. Palumbo denied calling Appellant "babe." Palumbo told the investigator he did ***not*** send inappropriate messages to Appellant. (Pa749) Id. at 102:16-103:121. Palumbo's lies were verified by the initial interview report. (Pa903- 65, Pa908-09)

Palumbo was interviewed a second time once the lawsuit was filed, and the text messages were made public. The lawsuit included copies of text messages that Palumbo sent to Appellant. Therein, in relevant part, Palumbo admitted that his

comment "he wants to bang or kiss or touch a boob," was made in reference to Stouch liking Appellant, and he further admitted to asking Appellant if she was "okay" after Stouch got married. Id.; (Pa591) 106:6-109:11.

After being confronted with the documentary evidence, Palumbo finally admitted that "after he was given the text messages, yeah, I realized that I did send some of these messages." (Pa749-53) 104:1-9-108:2, 111:1-121-22 (admitting the second interview was conducted three months after the first "to follow up with new information presented in the lawsuit."). Once confronted by the text messages in the second meeting, Palumbo admitted to sending the messages. Id.

G. April 2019-November 2019: Appellant Is Continually Subjected to Retaliation, And Respondents' Retaliation Ultimately Culminates In The Unlawful Termination Of Appellant's Employment. (Pa97-98, Pa230, Pa358-60, Pa374-77, Pa984-89, Pa990-92, Pa999, Pa1022-23)

While Appellant was still out on doctor-prescribed medical leave, she learned from another co-worker that someone was spreading a false rumor to new CFS employees that the reason for her retaliatory transfer to CFS's Camden office was because she was having sexual relationships with multiple people at her prior office. (Pa230, Pa358-60, Pa97-98) 135:21-143:4. Appellant immediately objected to such disgusting, vile, and false rumors, which were only made in an effort to discredit Appellant's prior (and substantiated) complaints of sexual harassment and retaliation. Id. Moreover, CFS's human resources department completely ignored

her emails regarding her employment status and whether she could apply for long-term disability while she was out on her doctor-prescribed medical leave. Id.

In furtherance of the continuing retaliation against her, CFS's human resources department did not respond to Appellant's questions or emails. (Pa999). Appellant reported the ongoing retaliation to her medical providers. One of Appellant's medical providers advised that CFS's workplace "would be a horrible environment for her future employment." (Pa230, Pa990, Pa984-89). Appellant immediately forwarded same to CFS's human resources department, who acknowledged receipt of same. Thus, as a result of Respondents' retaliation, Appellant was constructively discharged from her employment by her medical providers in or about August of 2019. Id.

However, this did not stop Appellant from being further subjected to illegal conduct and retaliation. Palumbo again stalked and followed Appellant outside of work. Id. Specifically, on or about October 28, 2019, Appellant, who was leaving Target with her husband and young son, observed the same dark-colored Dodge RAM pick-up truck following them from the Target parking lot. (Pa230, Pa374-77) 201:11-211:25; (Pa1022-23 – recordings, Pa991-92). Appellant advised her husband that she believed that Palumbo was again following her. She then turned around, looked out the back windshield of their car, and saw that it was in fact Palumbo driving the aforementioned Dodge RAM pick-up behind them. Id. Palumbo, who

lives near her residence, continued to follow her and her family well beyond where he would have needed to turn to head towards his own home. She again confirmed that it was Palumbo following behind her and her family because he then passed her vehicle and she saw him in the driver's seat of the Dodge RAM pick-up truck. Appellant contacted the police department and made a report of Palumbo stalking her. Id. Appellant went to the police station and tried to file a police report. She did not see the license plate of the vehicle but witnessed Palumbo in the truck. Id.

IV. THE MOTIONS FOR SUMMARY JUDGMENT (Pa1230-1253, Pa1255-1334)

On January 7, 2022, three individual motions for summary judgment were filed by DCPP, the CFS Respondents and Palumbo against Stouch and Appellant. Specifically, Palumbo filed a motion for summary judgment against Stouch and Appellant. The filing contained 256 total pages, including a thirty-two (32) page brief in support of the motion, twenty-one (21) separate exhibits, and a seventy-six (76) paragraph Statement of Material Facts.[5]

Similarly, on January 7, 2022, the CFS Respondents filed a motion for summary judgment against Stouch and Appellant. The filing contained 186 total pages, including a twenty-two (22) page brief, fifteen (15) separate exhibits, and a ninety-four (94) paragraph Statement of Material Facts. (Pa1230-1253).

[5] The following information is provided for procedural history purposes only as Palumbo is not a party to this appeal.

Finally, on January 7, 2022, DCPP initially filed a motion for summary judgment against Stouch and Appellant. DCPP Defendants' March 2, 2022 filing included 1,112 total pages, including a seventy-three (73) page brief, several Certifications from various State of New Jersey employees, seventy-one (71) individual exhibits, and a 224 paragraph Statement of Facts. (Pa1254-1334).

On March 16, 2022, Stouch and Appellant filed their opposition to all three defense motions for summary judgment and cross-moved for summary judgment against Palumbo, DCPP, and the CFS Respondents. The filing totaled 1,576 pages, including a 118-page brief, sixty-two (62) individual exhibits, and a 219 paragraph Statement of Material Facts.

On April 18, 2022, Palumbo submitted an eighty-four (84) page reply, which included an eighteen (18) page brief. Also on April 18, 2022, the CFS Respondents submitted a 100-page reply, which included an eighteen (18) page reply brief. On April 26, 2022, DCPP submitted a 372-page reply, which included a thirty-seven (37) page reply brief. In total, the court received and reviewed approximately ***3,686 pages*** of documents prior to deciding on the summary judgment motions filed.

Moreover, on August 30, 2022, the Court heard approximately ***two and a half (2 ½) hours*** of oral argument from the parties on the multitude of summary judgment motions. 1T. The following day, on August 31, 2022, the Court heard approximately

another ***one and a half (1 ½) hours*** of oral argument from the parties prior to rendering a decision. 2T. In total, oral argument lasted approximately ***four (4) hours***.

At the conclusion of the oral argument, Judge Friedman asked each of the parties if they had the opportunity to provide all the relevant information. All parties affirmed that they had nothing further to add. The exchange went as follows:

> THE COURT: Any – anything else? I'm afraid to ask that question again.
> MR. LUBER: No.
> MR. BIEG: No.
> MR. LUBER: Thank you, Your Honor.
> MS. LUCEY: No, Your Honor.
> MR. MUELLER: Thank you, Your Honor.
> MS. LUCEY: Thank you.

See 2T58:20-17. Additionally, Judge Friedman had the following exchange with counsel for the DCPP Defendants:

> THE COURT: . . . Do you think I have a good com – command of the facts of this case?
> MS. LUCEY: I think you do . . .

See id. at 2T39:11-14.

After a short break, Judge Friedman took approximately forty-five (45) minutes to read his entire decision into the record, which ended in Judge Friedman denying all the motions for summary judgment. See 2T58:21-88:22. Specifically, the Court stated:

> So – and I will – I will find that in the totality of the circumstances and facts that have come before this Court in a three-plus-hour oral argument inclusive of many, many,

> filings and – and the documents put forward. There's issues of facts for the Court – for the – for the jury to decide in this case. And I'm not going to dismiss the – the action on the summary judgment for those reasons.

Id. at 2T:86-15-22.

V. THE MOTIONS FOR RECONSIDERATION

Despite ***thousands of pages*** of arguments and documents submitted to the Court by the parties as part of the summary judgment motions, and approximately ***four (4) hours*** of oral argument, the Respondents essentially refiled the entirety of their summary judgment motions (including exhibits and briefs) arguing that the Court got every single ruling wrong in seeking reconsiderations. The filings for reconsideration were merely a recitation of the arguments previously made in prior briefing and at oral argument.

Although Judge Friedman noted that he originally found that there were facts in dispute, Judge Friedman reasoned that he "doesn't know if he can find" that whether CFS could be held liable for Palumbo's actions is a fact in dispute. 3T. 29:3-30:22. Ultimately, evaluating the same facts, same arguments, and same case law as he did prior, Judge Friedman found that Appellants' own employer was not the correct defendant in matter:

> This Court can't find that the Palumbo actions taken were within the control of the CFS defendant. It is for that reason that I don't believe that CFS is an appropriate defendant in this case, and I'm going to grant the motion for summary judgment as to the CFS Defendants.

3T. 91:15-20.

Judge Friedman further concluded, as to Appellant's claims against DCPP, that there was not a close enough nexus between DCPP, Palumbo, and Appellant for Appellant to bring forth a LAD claim against DCPP for Palumbo's sexual harassment 3T. 92:9-11. Thus, Judge Friedman granted DCPP's motion for summary judgment as to Appellants claims as well.

In essence, Judge Friedman found that Appellant could not bring forth claims of sexual harassment, hostile work environment, and retaliation against any of the entities and individuals responsible for providing her with a workplace free from discrimination and harassment. Judge Friedman's decision is in direct contradiction to the applicable case law, the legislative intent of the NJLAD, and his own findings on the matter just four months prior.

VI. ARGUMENT

A. This Court Must Review The Grant Of Summary Judgment *DE NOVO*, Accord No Deference To The Trial Court's Conclusions, Resolve All Factual Disputes In Appellant's Favor, And Give Appellant The Benefit Of All Favorable Inferences.

This Court reviews a lower court's holding on a Motion for Summary Judgment *de novo*. Hitesman v. Bridgeway, 218 N.J. 8, 26(2014). Accordingly, "[a] trial court's interpretation of the law and the legal consequences

that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. Of Manalapan, 140 N.J. 366, 378 (1995).

Summary judgment is appropriate where "there is no genuine issue of material fact challenged and . . . the moving party is entitled to judgment as a matter of law." R. 4:46-2. Thus, a reviewing court must determine whether "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Notably, "summary judgment is rarely appropriate" in "[e]mployment discrimination cases," because the paramount question of why an employer took an adverse employment action against a plaintiff 'is clearly a factual question.'" Marzano v. Computer Science Corp., Inc., 91 F.3d 497, 509 (3d Cir. 1996) (quoting Chipollini v. Spencer Gifts, 814 F.2d 893, 899 (3d Cir. 1987)). "The 'judge's function is not himself or herself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" Ibid. (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)).

Credibility determinations are left to the jury, not the motion judge. Ibid. "It is ordinarily improper to grant summary judgment when a party's state of mind, intent, motive or credibility is in issue." In re Estate of DeFrank, 433 N.J. Super. 258, 266 (App. Div. 2013). "Indeed, '[t]he cases are legion that caution against the

use of summary judgment to decide a case that turns on the intent and credibility of the parties.'" Id. (citation omitted). "Thus, it is clear that questions of a party's state of mind, knowledge, intent or motive should not generally be decided on a summary judgment motion." Id. at 267.

B. Appellant Demonstrated A Prima Facie Case of Hostile Work Environment and Retaliation Under the NJLAD; Moreover, The Adverse Employment Action Element Presents A Jury Question.

To prevail on a discrimination claim under NJLAD, a plaintiff must present either direct evidence of discrimination *or* circumstantial evidence of discrimination assessed under the McDonnell Douglas framework. Bergen Commercial Bank v. Sisler, 157 N.J. 188, 208 (1999). As discussed more fully below, the record is replete with facts suggesting that Appellant Bodnar was subjected to a sexually hostile work environment.

Discrimination on the basis of one's gender/sex may be proven by showing a plaintiff was "harass[ed] based solely on [his or her] gender, which create[d] a hostile and offensive work environment [] sufficient to establish a prima facie case of sex discrimination under the LAD." Muench v. Twp. of Haddon, 255 N.J. Super. 288, 292 (App. Div. 1992). In Lehmann, the New Jersey Supreme Court outlined the elements for a hostile work environment claim. Specifically, a plaintiff must demonstrate that: (1) the conduct complained of was unwelcome; (2) that it occurred because of the plaintiff's inclusion in a protected class under the LAD; and (3) that

a reasonable person in the same protected class would consider it sufficiently severe or pervasive to alter the conditions of employment and create an intimidating, hostile, or offensive work environment. El-Sioufi v. St. Peter's University Hosp., 382 N.J. Super. 145, 178 (App. Div. 2005) (citing Lehmann); Shepherd v. Hunterdon Developmental Ctr., 174 N.J. 1, 24 (1993).[6]

Under the first prong, Appellant must show by the preponderance of the evidence that the harassing conduct would not have occurred but for her gender. Woods-Pirozzi v. Nabisco Foods, 290 N.J. Super. 252, 266 (App. Div. 1996). "When the harassing conduct is sexual or sexist in nature, as with sexual comments or touchings, the but-for element will automatically be satisfied." Id. at 266 (citing Lehmann, 132 N.J. at 605) (emphasis added). Turning to the second prong, "severe or pervasive conduct must be conduct that would make a reasonable [woman] believe that the conditions ... are altered and that the ... environment is hostile." Cutler v. Dorn, 196 N.J. 419, 431 (2008) (quoting Lehmann, 132 N.J. at 604). The Court must make this assessment based upon the "totality of the circumstances." Cutler, 196 N.J. at 431. And, under the third and fourth prongs, Courts apply a "reasonable woman" standard for evaluating hostile environment sexual harassment

[6] Hostile work environment claims must be evaluated under "all the circumstances, including the frequency of the discriminatory conduct, its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Id. at 14 (quoting Cutler).

claims. Nabisco, 290 N.J. Super. at 267. This "reasonable woman," "while not hypersensitive, includes women who fall towards the more sensitive side of the spectrum of reasonableness." Id. at 267 (citing Lehmann, 132 N.J. at 613).

Moreover, to show pretext, a plaintiff "must submit evidence that either casts sufficient doubt upon the employer's proffered legitimate reason so that a factfinder could reasonably conclude it was fabricated, or that allows the factfinder to infer that discrimination was more likely than not the motivating or determinative cause of the termination decision." Crisitello v. St. Theresa School, 465 N.J. Super. 223, 240 (App. Div. 2020) (quoting El-Sioufi, 382 N.J. Super. at 173). That is, plaintiff must point towards some evidence, direct or circumstantial, from which a finder of fact could reasonably either (1) disbelieve the employer's articulated legitimate reason; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action. *Fuentes v. Perskie*, 32 F.3d 759, 764-65 (3d Cir. 1994).

With regard to retaliation, the NJLAD provides: "It shall be unlawful . . . for any person to take reprisals against any person because that person has opposed any practices or acts forbidden under this act or because he has filed a complaint, testified or assisted in any proceeding under this act . . . N.J.S.A. 10:5-12(d). The NJLAD also protects employees who have "opposed any practices or acts forbidden by the NJLAD," 18 N.J. Prac., Employment Law §4.29 (2d ed.), and Defendants may be

vicariously and directly liable to Appellant for retaliation in violation of NJLAD pursuant to N.J.S.A. 10:5-12(d). To prove a claim of retaliation, an employee must establish that: (1) the employee engaged in protected activity as defined under the NJLAD; (2) the activity was known to the employer; (3) the employee was subjected to an adverse employment decision by the employer; and (4) there existed a causal link between the protected activity and the adverse employment action. Craig v. Suburban Cablevision, Inc., 140 N.J. 623, 639-640 (1995).

1. Appellant Bodnar's Prima Facie Case of Hostile Work Environment Discrimination. (Pa895-902)

It is undisputed that Appellant was subjected to sexual harassment in Respondents' workplace by Palumbo as nearly three months after the filing of the original complaint, DCPP ***admitted*** that Palumbo's conduct constituted sexual harassment. (Pa895-902). The fact that the State's own investigation conclusively established that Palumbo subjected Appellant to a sexually hostile working environment makes Appellant Bodnar's prima facie case for her. Moreover, the record developed in this case only bolsters such conclusion.[7] See Supra Factual

[7] This evidence also supports Appellant's *prima facie* disparate treatment claim. Peper v. Princeton University Board of Trustees, 77 N.J. 55, 81 (1978). That is, but for Appellant's gender/sex, Palumbo would not have treated her in the unlawful manner described herein. Young v. Hobart W. Grp., 385 N.J. Super. 448, 463 (App. Div. 2005) (discussing McDonnell Douglas burden-shifting framework); Grande v. St. Clare's Health System, 230 N.J. 1, 17 (2017); Fleming v. Corr. Healthcare Sols., Inc., 164 N.J. 90, 101 (2000); Bergen Commer. Bank v. Sisler, 157 N.J. 188, 210 (1999). Establishment of a *prima facie* case gives rise to a presumption that the employer unlawfully discriminated against the plaintiff. Bergen Commer. Bank v. Sisler, 157 at 188. In order to rebut that presumption, the defendant must proffer a legitimate, non-discriminatory reason for the plaintiff's termination. Id.; Zive v. Stanley Roberts, Inc., 182 N.J. 436, 447 (2005)

Background § III.B (Detailing Palumbo's pervasive sexual harassment of Appellant). In sum, looking at the totality of the circumstances,[8] the undisputed record demonstrates the conduct here is precisely the type of "cancerous" harassment the NJLAD intended to eradicate. The record establishes Respondents' discriminatory conduct would not have occurred "but for" Appellant's gender/sex and that a reasonable person would consider this conduct sufficiently severe or pervasive enough to create an intimidating, hostile, or offensive environment.

There is more than ample evidence to show the asserted non-retaliatory reason for transferring Appellant is merely pretext for retaliation. It is clear that issues of fact have been raised and the determination of whether there has been a violation of the law has occurred must therefore be left to the jury. Specifically, CFS claimed that it transferred Appellant, over her objection, to "remove" her from a dangerous situation. 1T86:1-24. However, a reasonable juror could readily conclude that CFS Respondents "removed" her as punishment for interfering with its contractual relationship with DCPP.

Judge Friedman noted this fact during the August 30, 2022 Oral Argument, stating "I understand that. I – I understand that. But you know, you're – you're –

(discussing "modest" evidentiary burden).

[8] "[A]n actionable claim under the LAD based upon a hostile work environment frequently arises out of repeated incidents that take place over time and by their cumulative effect make it unreasonable and unhealthy for plaintiff to remain in that work environment." Caggiano v. Fontroura, 354 N.J. Super. 111, 126 (App. Div. 2002).

you're saying you're protecting her by taking her out of there, and Mr. Luber is saying, you know, what, you're moving her in – as a – as punishment. What am I supposed to do with these – with – with – coming from two different fact patterns of though processes as it relates to, you know, why she was removed, why she wasn't moved? Isn't that a jury question?" See 1T97:4-12.

Respondents' retaliatory motive is bolstered by (i) the timing of the retaliation, (ii) its refusal and failure to investigate, (iii) its failure to document any findings or follow-up with Appellant or DCPP, (iv) its failure to take remedial action, (v) its refusal to address follow-up complaints of retaliation after Appellant Bodnar's transfer and while she was on leave, (vi) downplaying the harassment and focusing on baseless allegations regarding Appellant's clothing and socialization, and (vii) its complete failure to follow its own policies to investigate and remediate the harassment/retaliation. At the very least, whether the actions of the CFS Respondents created a sexually harassing hostile work environment is an issue of fact for the jury to determine.

In sum, Respondents alleged legitimate non-discriminatory and non-retaliatory justifications are fraught with discrepancy, weakness, inconsistency, falsehood, and contradiction; the temporal proximity between the protected conduct, failure to follow progressive discipline, failure to discipline others, and the refusal to investigate and remediate the workplace, among other things, which supports

retaliatory motive and pretext.

2. Appellant Bodnar's Prima Facie Case of Retaliation. (Pa274-99, Pa230, Pa655-722, Pa324-417, Pa984-89, Pa990, Pa997-99, Pa1224)

An employee can show the existence of adverse employment action through 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 Green v. Jersey City Bd. of Educ., 177 N.J. 434, 448 (2003); Nardello v. Township of Voorhees, 377 N.J. Super. 428, 435 (App. Div. 2005); Beasley v. Passaic County, 377 N.J. Super. 585, 609 (App. Div. 2005).

Here, there is no dispute that Appellant had a reasonable belief that Palumbo's conduct consisted sexual harassment. Nor can Respondents dispute that Appellant engaged in protected conduct via numerous internal complaints (which triggered an EEO investigation) and the filing of this lawsuit in January 2019. It's clear that Appellant was subjected to adverse employment action in the form of involuntary transfers, unwarranted discipline, increased hostility, and constructive termination.

It is clear from the record that there are issues of fact regarding whether Respondents' conduct constituted retaliation. In response to Appellant's formal complaint with HR regarding Palumbo's sexual harassment, Appellant was met with immediate retaliation, unwarranted discipline, hostile behavior, culminating in her constructive discharge. Specifically:

- When Appellant had reported Palumbo's sexual harassment to Respondent Johnson, he berated and blamed Appellant for the predicament claiming it was Appellant's fault for speaking to her caseworkers. (Pa274-99, Pa230).
- Respondents then transferred Appellant– the victim – as a result of her complaints even after Appellant objected to such transfer. Id.
- During the same meeting where Respondents should have been investigating Appellant's complaints of sexual harassment, Respondents ignored Appellant's complaints, and instead, focused on bogus allegations regarding Appellant's attire, her "over socialization," and her apparent "substance abuse." (Pa655-722) 80:1-81:23, 93:10-22, 94:1-106:23. Such allegations were apparently made by DCPP management. Id.
- Following Appellant's retaliatory transfer, Appellant was ostracized by her coworkers, who knew she was transferred due to the sexual harassment. The same coworkers spread false, defamatory rumors that Appellant Bodnar was sleeping with someone in the office. (Pa324-417) 89:7-96:24, 223:15-225:25.
- Appellant made another complaint of discrimination and retaliation to Respondent McLaurin after Appellant had learned that Respondent Johnson called Appellant "too immature" for her position and remarking that she was like a "drunken prom date." (Pa999)(Pa324-417) 98:17-109:19, 233:3-234:13; (Pa655-722) 105:17-113:14
- Respondents once again refused to investigate Appellant's complaints, which was pure retaliation. Id.
- Respondents' human resources department completely ignored Appellant's emails regarding long-term disability while she was out on doctor prescribed leave. (Pa230); (Pa324-417) 135:21-143:4; (Pa998); (Pa997).

Moreover, Appellant's constructive discharge claim is for the jury. The New Jersey Supreme Court established the following fact-intensive standard for "constructive discharge" in Shepherd v. Hunterdon Developmental Center, "[g]enerally, a constructive discharge [] occurs when an "employer knowingly permits conditions of [] employment so intolerable that a reasonable person subject to them would resign." 174 N.J. 1, 27-28 (2002) (NJLAD case) (quoting Muench v. Township of Haddon, 255 N.J. Super. 288, 302 (App. Div. 1992). For example, in

reversing the trial court in Smith v. New Jersey Dep't of Health & Senior Servs., the Appellate division explained:

> The judge's decision was inconsistent with the summary judgment standard because she found plaintiff's allegations to be insufficient by viewing them separately rather than collectively. For example, the judge's conclusion that the alleged overbearing reprimand by a supervisor on one occasion does not meet the Shepherd standard may be sustainable when viewed alone, but when plaintiff's allegations are considered collectively—that for a lengthy period of time the employer failed to promote or pay plaintiff commensurate with her duties and that, when plaintiff complained, the reprimand and the assignment of a small cubicle followed—a factfinder could conclude that a reasonable person would find the situation had become intolerable.

No. A-4989-11T2, 2013 WL 6063587, at *2-4 (N.J. Super. Ct. App. Div. Nov. 19, 2013). (Pa1224).

This case certainly involves more than being assigned to a "small cubicle." Defendants cannot, and have not, established as a matter of law that Appellant "simply quit"—Appellant resigned because she was sexually harassed the workplace; she was retaliated against for complaining of same; her employer refused to investigate, ignored her complaints of retaliation, and failed to institute any remedial plan; employees spread false rumors she was sleeping with co-workers and wore promiscuous attire; Palumbo stalked her inside and outside of the workplace; and she transferred to a different office in direct retaliation for engaging in protected conduct. Furthermore, Appellant's constructive termination is supported by her medical providers, who advised that CFS's workplace "would be a horrible

environment for her future employment." (Pa230, Pa990, Pa984-89).

These facts are more than sufficient for a jury to decide if the conditions of Appellant's employment were altered and/or a claim of constructive discharge. Muench, 255 N.J. Super. at 302 (an objective, fact-intensive inquiry, showing that a reasonable person in the employee's position would have felt compelled to resign). At a minimum, there exists genuine issues of fact requiring decision by a jury as to whether Appellant's work environment was so intolerable that a reasonable person subjected to the same would have resigned. Nuness v. Simon & Schuster, Inc., 325 F. Supp. 3d 535 (D.N.J. 2018) (court denied summary judgement for Defendant on plaintiff's constructive discharge claim).

In sum, Respondents' unlawful discriminatory and retaliatory termination of Appellant would not have occurred but for her sex/gender and her complaints regarding the sexual harassment that she suffered at the hands of Respondents.

C. DCPP and CFS had an Obligation to Provide Appellant with a Workplace Free of Harassment, Discrimination, and Retaliation. (Pa668-70, Pa735, Pa1004-21)

CFS and DCPP both disclaim responsibility for Palumbo's harassment of Appellant. In essence, despite the fact that their organizations work hand-in-glove to carry out child and family support services, supra Statement of Facts § III(A) (discussing the CFS-DCPP working relationship), each agency claims it is immune from liability so long as the harassment involves employees of each respective

entity. This contention is baseless.

As an initial matter, CFS and DCPP's contention stands in direct contradiction to its own policies and the CFS-DCPP contract. (Pa1004-5) (indicating that CFS's policies apply to non-employees who have contact with CFS employees); (Pa1006-1021) (discussing DCPP control of CFS). Both organizations owed Appellant the duty to provide a workplace free of harassment, discrimination, and retaliation. (Pa669) 54:1-57:10, 59:3-20 (acknowledging that CFS has a duty to protect its employees from sexual harassment no matter the source); (Pa735) 48:25-49:7 (acknowledging that DCPP's policies applied to Appellant Bodnar).

It is also contrary to case law and the basic tenants of the NJLAD. For one, because there is no dispute that Appellant was an employee of CFS, the company had a duty to address Appellant's complaints and to take appropriate remedial action (as discussed above, CFS did neither). Nabisco, 290 N.J. Super. at 269 ("An employer that knows or should know its employee is being harassed in the workplace, regardless of by whom, should take appropriate action"). Simply put, Defendant CFS owed Appellant a duty to protect her from harassment and discrimination in the workplace.

In fact, the Nabisco court looked to Lehmann in drawing the link between NJLAD and federal precedent governing Title VII of the Civil Rights Act, which indicates that, "an employer can be responsible for the acts of non-employees, with

respect to sexual harassment of employees in the workplace, where the employer knows or should have known of the conduct and fails to take immediate and appropriate corrective action." Id. at 268 (citing 29 C.F.R. 1604. 11(e)). The Nabisco court held that the victim's employer was liable for the acts of an "independent contractor" because, "while the harasser may not be an employee, the victim is an employee." Id. at 270. If employees like Appellant could not hold employers responsible for the failure to address complaints of harassment and discrimination at work simply because the employer deemed its employees "independent contractors," NJLAD would be stripped of its efficacy.

As a corollary, DCPP had a duty to prevent Palumbo (and take remedial action when put on notice) from sexually harassing employees and contractors in the workplace. At a minimum, CFS and DCPP each constitute a "place of public accommodation" as set forth in N.J.S.A. 10:5-5(l). New Jersey courts have decoupled the general rule of NJLAD claim where no employment relationship from situations involving a public accommodation. See generally Thomas v. Cnty. of Camden, 386 N.J. Super. 582, 594, 902 A.2d 327, 334 (Super. Ct. App. Div. 2006) (sustaining dismissal of NJLAD claim for employment discrimination because of no employment relationship, but reversing dismissal of plaintiff's NJLAD claim under public accommodation theory).

The NJLAD guarantees all persons the opportunity to obtain all the accommodations, advantages, facilities, and privileges of any "place of public accommodation" without discrimination. Owners, managers, agents or ***employees*** of places of public accommodation who "discriminate against any person in the furnishing thereof" are in violation of the NJLAD. N.J.S.A. 10:5-12(f)(1). An act of proscribed discrimination by the NJLAD in a place of public accommodation by an employee of that place of public accommodation is actionable under the NJLAD. See Turner v. Wong, 363 N.J. Super. 186, 197-198 (App. Div. 2003) (holding that the proprietor of a donut shop's racist remarks to a customer, while not actually denying her services, were sufficient to establish a prima facie case of public accommodation discrimination); Franek v. Tomahawk Lake Resort, 333 N.J. Super. 206, 211 (App. Div. 2000) (holding that one discriminatory comment by the owner of a recreation facility was sufficient to survive summary judgment). Accordingly, because CFS and DCPP are places of public accommodation as defined under the NJLAD, they are liable to Appellant pursuant to the NJLAD. For this reason, Respondents' claims have no merit.

Finally, the fact that DCPP outsources essentials services to contractors is not dispositive on whether it owes Appellant a duty here. New Jersey also recognizes joint-employer liability. "As held in Carrier Corp. v. N.L.R.B., 768 F.2d 778, 781 (6 Cir.1985), when two or more employers exert significant control over the same

employees, that is, where they share in the determination of matters governing essential terms and conditions of employment, they are considered 'joint employers' within the meaning of the NLRB." Commc'ns Workers of Am., AFL-CIO v. Atl. Cty. Ass'n for Retarded Citizens, 250 N.J. Super. 403, 415-17, (Ch. Div. 1991) (citing Note, "Joint Employer," 18 Rutgers L.J. 863 (1987)). "Whether that kind of joint control is actually being exercised is usually a factual question." Boire v. Greyhound Corp., 376 U.S. 473, 481, (1964); see also, Zavala v. Wal-Mart Stores, Inc., 393 F. Supp. 2d 295, 329 (D.N.J. 2005) ("whether a person or corporation is an employer or joint employer is essentially a question of fact").

In this case, not only did DCPP reserve a contractual right to set a specific term or condition of employment for CFS workers, it also retained the ultimate authority on all conditions/terms of employment of CFS workers. (Pa1006-1021). That is, DCPP controlled virtually every aspect of its working relationship with CFS employees. Id. It even required CFS to comply with "all" state policies and laws, including discrimination and harassment laws, id., (Pa1007, Pa1010, Pa1013) and DCPP even reserved the right to "fine" CFS for "discrimination" that occurred in the workplace. Id.

As demonstrated above, in accordance with the contract, CFS worked hand-in-hand to perform child support services. Supra Statement of Facts § III(A). Appellant had a full-time office within DCPP's office and worked "very close" with

DCPP staff on all issues. CFS has "offices" and "cubicles" inside DCPP offices and CFS counselors perform "many, many" services for Defendant DCCP. Supra Statement of Facts § III(A) (Pa796-98, citing 42:3-52:12). Appellant also reported to DCPP caseworkers and supervisors on the status of cases and worked closely with the head of the DCPP, Furphy. Id. Palumbo's role ***required*** him to work with Certified Drug and Alcohol Counselors like Appellant. In turn, Appellant's and Respondents' work was inextricably intertwined. (Pa668-70) 51:9-25, 54:1-57:10, 59:3-20. Thus, CFS must coordinate an investigation with DCPP if there was sexual harassment committed by a DCPP employee against a CFS employee. Id.

Perhaps more significantly, New Jersey courts have emphasized that whether two entities are "joint employers" is inherently a factual question ***precluding summary judgment.*** In CWA v. Retarded Citizens, the State (one of the potential "joint employers") wanted to be dismissed because it allegedly was not an "employer." 250 N.J. Super. at 416. The Appellate Division held that such a ***motion for summary judgment would have to be denied***, given that "many fact questions remain to be resolved." Id. at 418. The Court then described the various potential disputes, emphasizing that which entity "pays the salaries . . . is not dispositive of who the employer is." Id. The Court concluded that even though some of these disputes "may involve combined questions of law and fact, . . . the point is that they

cannot be resolved in a motion for summary judgment." Id. The same result was warranted here, and the Court erred by finding otherwise on reconsideration.

D. The Court Erred Granting Defendants' Reconsideration Motions as to Appellant's Claims After Properly Denying Respondents' Motions for Summary Judgment.

Under Rule 4:42-2, interlocutory orders "shall be subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of justice." The Court erred by granting Respondents' reconsideration motions to entirely dismiss Appellant Bodnar's claims. In its original decision, the Court found that there were genuine issues of material fact with regard to the allocation of control between CFS and DCPP, whether Respondents' motive for transferring Appellant was retaliatory, and whether Appellant was constructively discharged from her employment. 2T 86:15-22.

Upon reconsideration, Respondents failed to present the Court with ***any*** new evidence, case law, or arguments to support their claim that the Court's original decision should be reversed in the interest of justice. Respondents simply argued that the Court decided wrong. In response, the Court completely dismissed Appellant's claims of sexual harassment discrimination and hostile work environment against DCPP and the CFS Respondents, and her retaliation claim against the CFS Respondents. 3T 90:4-92:11. The Court incorrectly reasoned, with little to no explanation, that Palumbo's actions were not taken within the control of CFS, and

therefore, all claims against CFS Respondents should be dismissed. 3T 91:15-20. The Court further held that since there was not a close enough nexus between DCPP, Palumbo, and Appellant to establish a NJLAD claim against DCPP even though the sexual harassment occurred in DCPP offices by a DCPP employee. 3T 92:9-11. Thus, the Court effectively reasoned that no one could be held responsible for the horrific acts of sexual harassment perpetrated by Palumbo simply because Appellant and Palumbo were not technically employed by the same organization.

The Court's decision on reconsideration is a gross misapplication of the law. CFS Respondents had an obligation as Appellant's employer to provide her with a workplace free of discrimination, regardless of whether Palumbo works for them or not. Palumbo and Appellant's work was inextricably intertwined as they shared the same office space, and CFS employees perform many services for DCPP investigators on their cases. This relationship between CFS and DCPP is the reason why Appellant was subjected to DCPP's investigation upon the issuance of Appellant's and Stouch's complaints. At the very least, whether DCPP had significant control of CFS's workplace and its' employees is a jury question.

Furthermore, CFS refused to investigate Appellant's complaints, and instead, immediately transferred her on the very same day that she made the complaint. It is Appellant's position that permanently transferring her – the victim – is an adverse employment action regardless of whether CFS had control of Palumbo. The Court

cannot outright determine the intent of CFS's transfer of Appellant by simply concluding that it was Respondents' "only option," and therefore, was not retaliatory.[9] This is a question of fact that must be determined by a jury. Indeed, the CFS Respondents did not even attempt to interact with DCPP to investigate Appellant's complaints or to determine a path forward to ensure the protection of its' CFS employees in the DCPP workplace. Instead, CFS simply moved Appellant, and failed to take any remedial action to provide a workplace entirely free from Palumbo's harassment and discrimination.

Regardless of whether CFS could terminate or discipline Palumbo themselves, CFS has a duty to protect its employees from instances of discrimination and harassment. Therefore, when they place their employees ***in the workplace of another entity*** – such as in a DCPP building - CFS has a duty to ensure that its' policies and procedures to prevent and remediate discrimination and harassment are being enforced. Otherwise, CFS Respondents would be permitting DCPP employees to sexually harass employees and contractors in DCPP offices because they are not technically employed by the same entity. This is ultimately the conclusion the Court came to within its reconsideration decision, and it is patently wrong.

[9] Moreover, this explicitly contradicts Judge Friedman's original decision regarding this issue in which he stated: "I understand that. I – I understand that. But you know, you're – you're – you're saying you're protecting her by taking her out of there, and Mr. Luber is saying, you know, what, you're moving her in – as a – as punishment. What am I supposed to do with these – with – with – coming from two different fact patterns of though processes as it relates to, you know, why she was removed, why she wasn't moved? Isn't that a jury question?" See 1T97:4-12.

Moreover, the Court's decision as to DCPP essentially states that DCPP has no liability when a third party is sexually harassed by its own employee in its own building simply because the third party is not employed by DCPP. That is simply not the law. In its original decision, the Court justly recognized the material issues of fact that were present within the record. This case concerns the most basic right of a female employee – to enjoy a workplace free from sexual harassment. If the Court's decision is allowed to stand, it will allow state and private entities to shield themselves from liability for sexual harassment by hiding behind a contract and pointing the finger at one another. It's painfully clear that the Court's decision upon reconsideration is a reversible error.

VII. CONCLUSION

Based upon the foregoing, it is respectfully requested that this Honorable Court reverse the trial court's Order granting Defendants' Motions for Summary Judgment.

Respectfully submitted,
By: /s/ ***Matthew A. Luber, Esq.***
Matthew A. Luber, Esq.
Attorney for Plaintiff/Appellant

Dated: December 13, 2023

JAKE STOUCH & KRISTINE BODNAR Plaintiffs/Appellants v. DEPARTMENT OF CHILD PROTECTION AND PERMANENCY, CENTER FOR FAMILY SERVICEES, IAN PALUMBO, GWEN WEBER, JUANIATA FARR, MARYANN FURPHY, TIFFANY MCILLHENNY, DEBORAH JOHNSON, THERESE BENYOLA, MARION MCLAURIN, ABC CORPORATIONS 1-5 (fictitious names describing presently unidentified business entities) and JOHN DOES 1-5 (fictitious names describing presently unidentified individuals) Defendants/Respondents	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003601-22 On Appeal From: Superior Court of New Jersey Law Division – Burlington County Docket No. BUR-L-000151-19 Sat Below: Hon. Sander D. Friedman, J.S.C.

BRIEF ON BEHALF OF RESPONDENTS, CENTER FOR FAMILY SERVICES, DEBORAH JOHNSON, THERSE BENYOLA and MARION MCLAURIN

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTRODUCTION

Plaintiff/Appellant Kristine Bodnar ("Plaintiff") seeks to revive her failed New Jersey Law Against Discrimination ("NJLAD"), N.J.S.A. 10:5-1 et seq., claims against her former employer, Defendants/Respondents, The Center for Family Services ("CFS"), Deborah Johnson, Therese Benyola and Marion McLaurin (the "CFS Defendants"), as well as Defendants/Respondents, Department of Child Protection and Permanency ("DCPP"), Juaniata Farr, Maryann Furphy and Tiffany McIllhenny (the "State Defendants"). As will be discussed in more detail below, Plaintiff's claims against the CFS Defendants were not supported by the undisputed facts or law. The Trial Court therefore properly dismissed plaintiff's claims against the CFS Defendants', as there was no evidence from which a reasonable jury could conclude that the CFS Defendants were liable under the NJLAD.

Procedurally, the Trial Court's reconsideration of its earlier denial of the CFS Defendants' motion for summary judgment was appropriate. As the Court rightfully concluded, the Court mistakenly held that the issue of the CFS Defendants' "control" of the DCPP employees was not an issue of fact, as no evidence has ever been produced that CFS could somehow control the DCPP workplace. Quite the contrary was true – that the CFS Defendants had no ability to dictate the terms and conditions of employment for DCPP employees. As a

threshold matter, the Court's reconsideration was entirely appropriate under the circumstances.

With that in mind, the fallacy in plaintiff's argument on appeal is best demonstrated by her continued insistence to conflate the CFS Defendants with the DCPP Defendants; and thus, attempting to hold the CFS Defendants liable for the alleged actions of the State Defendants (and, most notably, DCPP employee Defendant/Respondent Ian Palumbo ("Palumbo") who Plaintiff alleges sexually harassed her while they were both stationed at the same DCPP office in Burlington County, Burlington East). The undisputed facts in this case clearly established that CFS had no power or control over Palumbo, and therefore could not dictate his suspension, transfer or other employment action. This fact was even affirmed by Plaintiff's own counsel during argument on the motion for reconsideration.

Indeed, once CFS became aware of the serious allegations against DCPP employee, Palumbo, it took the only reasonable measure it could to end the harassment – removing Plaintiff from the DCPP Office where the alleged harassment occurred. In fact, Plaintiff herself acknowledged that if CFS could not remove Palumbo (a fact that has been established), she would have accepted the transfer. Yet, here, Plaintiff continues to argue that CFS "could have" done something differently to end the harassment, all the while failing to identify any

action that CFS could have conceivably taken to do so other than removing her from the hostile environment.

Moreover, Plaintiff has utterly failed, beyond baseless innuendos and hearsay allegations, to support her retaliation claims. Given that the undisputed record unequivocally demonstrated the CFS Defendants had no power or control over Palumbo and thus could not dictate his suspension, transfer, or other employment action, CFS' remedial action of transferring Plaintiff out of the DCPP office upon learning of the harassment was not retaliatory. Indeed, aside from Plaintiff's baseless speculation, she has not come forward with any factual basis to support her theory that CFS would have been motivated to "retaliate" against their employee for reporting the harassment. Thus, the Trial Court properly found that no basis existed in the record for a rational factfinder to impose NJLAD liability against the CFS Defendants for the alleged conduct of Palumbo or the State Defendants, and granted the CFS Defendants' motion for reconsideration.

Further, Plaintiff's attempts to buttress her harassment and retaliation claims by pointing to alleged incidents when unknown employees "told her" that other unknown employees made derogatory comments about her, is disingenuous. While it makes for good reading, the fact remains that Plaintiff, under oath, was unable to identify who made these alleged statements, even

acknowledging they could have been DCPP employees. Rather than demonstrating a viable claim under the NJLAD, these allegations, which are based on hearsay upon hearsay, demonstrate Plaintiff's desperation in trying to make some claim stick against the CFS Defendants.

Plaintiff's constructive discharge claim was also correctly dismissed since the undisputed facts demonstrated there was insufficient evidence to meet the heightened standard required to set forth such a claim under New Jersey law. Even Plaintiff's own physician contradicted her constructive discharge claim, by testifying that his intention was to have Plaintiff removed from the physical location of the harassment (the Burlington East DCPP Office), and not from the overall employ of CFS, as Plaintiff so baselessly alleged.

Finally, the Trial Court also properly dismissed the claims against the individual CFS Defendants since Plaintiff failed to produce any evidence to support her claim that they "aided and abetted" violations of the NJLAD. Indeed, much like the briefing on the summary judgment and reconsideration motions, Plaintiff has presented no argument here as to why the individual CFS Defendants were "aiders and abettors" under the NJLAD.

Here, the Trial Court properly reconsidered its previous denial of the CFS Defendants' motion for summary judgment, and correctly found no issues of fact that would preclude the dismissal of the claims against the CFS Defendants.

STATEMENT OF FACTS

Plaintiff was employed at all times relevant herein by Defendant CFS as an alcohol and drug counselor. Defendant DCPP is a public agency within the State of New Jersey Department of Children and Families. (Pa46, Plaintiff's First Amended Complaint ("Complaint"), ¶4). Defendant CFS is a New Jersey non-profit organization with a principal place of business located at 584 Benson Street, Camden, New Jersey. (Id. at ¶6). Importantly, Defendant Palumbo was employed at all times relevant herein by DCPP as a senior investigator. (Id. at ¶7). During her time working for CFS, Plaintiff worked out of the Burlington East DCPP Office in Burlington County, the same location where Defendant Palumbo worked. (Pa227, Plaintiff's Answers to Interrogatories, Par. 2)

Plaintiff alleges that in approximately March/April 2018, DCPP employee Defendant Palumbo began "regularly sexually harassing Plaintiff Bodnar": Defendant Palumbo "constantly brought up Plaintiff Stouch in conversation and insinuated that Plaintiff Stouch and Plaintiff Bodnar were involved in some sort of romantic relationship"; Palumbo made inappropriate comments and sent text messages about her appearance and inappropriately touched her arm and back; Defendant Palumbo made inappropriate comments to her about Plaintiff Stouch's wedding and responded it "was a joke" when Plaintiff Bodnar told him to stop. (Id.)

Prior to her even complaining about the alleged actions of the Palumbo, the CFS Defendants had been contacted by DCPP to report issues with Plaintiff spending too much time socializing with DCPP employees, and her attire. (Da004, Certification of Theresa Benyola, Par. 8; Da7, CFS Clinical Supervision Form signed by Plaintiff; Da1, Certification of Deborah Johnson, Par.10). DCPP employee, Claudia Azille (incorrectly referred to in depositions as "Basile"), had reported to Maryann Furphy (the DCPP Local Office Manager for the Burlington East DCPP Office), that Plaintiff was dressing inappropriately, and was spending too much time socializing with DCPP employees. (Pa564, Defendant Furphy Deposition Transcript, T242:15-T243:3, T244:16-T246:6)

Thereafter, on or about November 26, 2018, Plaintiff contacted her direct supervisor at CFS, Defendant Johnson, to report "problems" with Defendant Palumbo, but made no mention of any sexual harassment on the part of Defendant Palumbo. (Da1, Certification of Deborah Johnson, Par. 12). However, it was not until November 29, 2018, in a meeting with CFS' Head of Human Resources, Defendant McLaurin, and CFS Supervisor Benyola (to discuss the concerns raised by DCPP over Plaintiff's over socialization with DCPP employees and her attire), that Plaintiff advised, for the first time, that Palumbo had been engaged in sexually harassing conduct. (Pa324, Plaintiff

Bodnar deposition transcript, T99:21-100:1; T105:16-T106:1). As a result, the decision was made to remove Plaintiff from the potentially hostile work environment and transfer her to the DCPP Office in Camden County. (Pa227, Par. 2)

In terms of the decision to transfer Plaintiff, CFS HR Direction McLaurin explained:

> I can't leave Kristine Bodnar in an environment where she's suggesting she's being sexually harassed by a person I have no authority over. I can't suspend him. I can't change his shift. I can't do anything to him, but if I don't do something to her, I'm leaving her in harm's way. So I have to do something.

(Pa655, Defendant McLaurin deposition transcript, T119:3-10)

Plaintiff herself acknowledged that she would accept the transfer if CFS had "no control or ability" to remove Palumbo from the Burlington East DCPP Office. (Pa324, Plaintiff Bodnar deposition transcript, T103:20-T104:3, T106:2-9). Just as significant, Plaintiff admitted that her job responsibilities and salary were not changed due to the move to the Camden County Office. (Id., T106:16-T107:12)

As a result of the Plaintiff's allegations, the DCPP through the EEO, performed an investigation into the Plaintiff's claims. (Pa 899, April 4, 2019 letter from DCPP to Plaintiff). The Investigation commenced after the DCPP became aware of Plaintiff's allegations against Defendant Palumbo on

November 20, 2018, over a week prior to Plaintiff reporting same to CFS. (Id.). During that investigation, Defendant Palumbo continued to work in the Burlington East DCPP Office. (Pa723, Defendant Palumbo deposition transcript, T40:11-17). Defendant Palumbo eventually requested, and was granted, a transfer out of the Burlington East DCPP Office, which occurred ***after*** the EEO Investigation. (Id.)

In terms of the relationship between CFS and the DCPP, Defendant Furphy, the Local Office Manager, explained that CFS could not dictate the terms and conditions of employment for DCPP employees. (Pa564, Defendant Maryann Furphy deposition transcript, T248:3-5). More specifically, Defendant Furphy acknowledged that there were no circumstances where CFS could "come and tell you what to do with a DCPP employee" (Id., T247:5-11)

Plaintiff was to begin working at the Camden County DCPP Office on December 3, 2018; however, on December 7, 2018, Plaintiff emailed Defendant McLaurin and advised that, "[a]s a result of the issues that have taken place involving Ian's sexual harassment of me, I have been under an extreme amount of stress and had to call out of work today," and that she would be "following up with my doctor to address." (Pa227, Plaintiff's Answers to Interrogatories, Par. 2).

Over the ensuing several months, Plaintiff continued a medical leave of absence, which CFS extended on numerous occasions. (Da10, December 11, 2018 email from HR Representative Tara Maguire; Da12, December 14, 2018 email from HR Representative Tara Maguire; Da22-Da24, Emails of February 19, 2019, June 10, 2019 and July 10, 2019 from HR Representative Tara Maguire). CFS HR Representative McLaurin noted that Plaintiff began taking medical leaves of absences almost immediately after the November 29, 2018 meeting, and that CFS never denied Plaintiff her leave of absence requests. (Da655, Defendant McLaurin deposition transcript, T167:2-19). Plaintiff also applied for short term disability through the State of New Jersey, which CFS did not object to. (Id.) CFS assisted Plaintiff when she had questions/issues regarding her temporary disability application. (Pa, 324, Plaintiff's deposition transcript, T135:6-8; Da12, December 14, 2018 email from HR Representative Tara Maguire).

On December 20, 2018 Plaintiff sent an email to Defendant McLaurin advising that someone "overheard that my supervisor [Defendant Johnson] was saying a lot of very negative things about me. Including that I was too immature for my position and I am like a drunken prom date." (Da29, December 20, 2018 email from Plaintiff). However, when asked her deposition, Plaintiff could not identify the individual who told her of this alleged comment, nor the date when

it was allegedly made. (Pa324, Plaintiff's deposition transcript, T135:22-T136:11). Similarly, Plaintiff had alleged that "someone" started a false rumor to a new CFS employee that Plaintiff was "sleeping with multiple people in the office, and that's why I was terminated". (Id., T139:9-T141:9; Pa227, Plaintiff's Answers to Interrogatories, Par. 2). Incredibly, at her deposition, Plaintiff could not (once again) identify the "someone", the new "CFS Employee", and was forced to admit that the "someone" could have been a DCPP employee. (Id.)

As part of the claims in this matter, Plaintiff contended that ultimately, her medical provider "constructively discharged" her from CFS, "advising that Defendant CFS' workplace 'would be a horrible environment for her future employment.'" (Pa161, Par. First Amended Complaint). The Doctor's Note, dated August 30, 2019, from Doctor Joseph Sireci, specifically noted that:

> I have advised Kristine to not return to her place of employment – this would be a horrible environment for her future employment.

(Da28, August 30, 2019 Doctor's Note)

Coincidentally, the documents produced by Dr. Sireci, included "treatment records" which contains a notation from August 16, 2019 that "[Plaintiff's] lawyer feels it's best for her not to return to that particular place of employment." (Da26, Doctor Sireci Treatment Notes).

However, Dr. Sireci admitted, during his deposition, that he intended to simply have Plaintiff be removed from the physical location where the alleged harassment (i.e. the Burlington East DCPP Office), occurred as opposed to the overall employ of CFS:

> Q. Now, I want to focus on where you referenced place of employment. What were you referring to, were you referring to the physical location where the sexual harassment occurred or were you referring to something else?
>
> A. I think I -- off the top of my head, I don't know, but I think it was in reference to where things happened.
>
> Q. Where the sexual harassment occurred?
>
> A. Yeah, I believe so.
>
> Q. Did she at any point in time ever tell you that she had been -- she had been taken out of that office by her employer and moved somewhere else?
>
> A. That I don't recall whether -- no, I do not recall that.
>
> **Q. If you knew at the time that you wrote this in August of 2019, if you knew that she was no longer going to be returning to that physical location where the sexual harassment occurred, would you have still authored this note indicating that she shouldn't be returning to that place or would you be comfortable that she was going to be somewhere where there was no sexual harassment occurring.**
>
> **A. I think the second, somewhere where no sexual harassment occurred.**

(Pa873, Doctor Joseph Sireci deposition transcript, T41:4-T42:5)

PROCEDURAL HISTORY

Plaintiff's Complaint was filed on or about January 18, 2019, in the Superior Court of New Jersey, Burlington County, Law Division, alleging claims of unfair treatment, sexual harassment, hostile work environment and retaliation in violation of the NJLAD. (Pa 1-45). The CFS Defendants filed an Answer to the Complaint on or about February 21, 2019, denying the allegations therein. (Pa 122-160).

Thereafter, on February 20, 2020, Plaintiff filed a First Amended Complaint which included a claim for constructive discharge (Pa 46-105). The CFS Defendants denied the allegations in the First Amended Complaint by way of Answer filed on February 27, 2020 (Pa 180-205).

After extensive discovery, the CFS Defendants filed a Motion for Summary Judgment. On August 30, 2022 and August 31, 2022, the Honorable Sander D. Friedman, J.S.C., heard argument, which totaled approximately four (4) hours regarding the various Summary Judgment Motions that were filed, including that of the CFS Defendants.

After extensive oral argument, Judge Friedman denied the CFS Defendants' Motion for Summary Judgment. (2T 58:21-88:22). Importantly, after Judge Friedman took a considerable amount of time analyzing the claims

against the DCPP Defendants, and after he was questioned by CFS' counsel regarding their Summary Judgment Motion, Judge Friedman stated in pertinent part:

> I find an issue of fact. Is – and with the CFS claimants it – it – it deals – it deals mainly with – the – the control factor of what – what – what control that CFS had in this – in this environment and whether or not they were part and parcel.

(2T 58:21-88:22)

On or about September 28, 2022, the CFS Defendants filed a motion for reconsideration of the denial of summary judgment. (Pa1024). The crux the CFS Defendants' motion was that the trial court mistakenly denied summary judgment based upon an alleged factual issue as to CFS' ability to control and dictate the terms and conditions of State DCPP employees such as Defendant Palumbo when there was actually no evidence from which a reasonable jury could conclude that CFS had any such "control." (3T 5:23-7:1).

Following oral argument on the motions for reconsideration, which occurred on December 19, 2022, Judge Friedman ultimately granted the CFS Defendants' motion and dismissed Plaintiff's sexual harassment discrimination, hostile work environment and retaliation claims with prejudice. (Pa1199). During oral argument, Plaintiff's counsel conceded that CFS could not terminate Defendant Palumbo or change his employment status (3T 21:4-22) but essentially argued that, because other remedial measures potentially existed,

such as placing Plaintiff on paid administrative leave, CFS' decision to transfer Plaintiff must have been retaliatory. (3T 21:5-24:9).

In his ruling from the bench, Judge Friedman indicated that he had previously made a "mistake" (3T 24:19-25) and misapplied the facts of the case by finding that a jury question existed regarding whether the CFS Defendants had "control" of the State DCPP employees and had otherwise misapplied the laws regarding remedial measures taken under the LAD. (3T 91:15-20). As Judge Friedman observed, this was *not* a situation where an employer knew of harassment and failed to take evasive measures to stop it, thereby joining in with the harasser. (3T 91:5-9). As Judge Friedman aptly noted, the CFS Defendants "took evasive actions to stop [the harassment], it's just not the evasive actions that the plaintiff claimed were appropriate and the[y] claim had to be retaliatory. This Court can't do so because this Court can't find that the Palumbo actions taken were within the control of the CFS defendant." (3T 91:1-17).

Accordingly, Judge Friedman found that the CFS Defendants were entitled to summary judgment and accordingly granted same. (3T 91:17-19, Pa1199).

LEGAL ARGUMENT

POINT I. THE TRIAL COURT PROPERLY GRANTED THE MOTION FOR RECONSIDERATION. (3T 81:20-95:20; Pa1199).

A. The Standard of Review. (3T 81:20-91:20, Pa1199).

The Trial Court correctly determined, on motion for reconsideration of the Court's order denying summary judgment, that no genuine issues of material fact existed so as to preclude summary judgment on Plaintiff's discrimination and retaliation claims under the NJLAD. The review of the entry of summary judgment is *de novo* and this Court applies the same standard as the trial court. Rios v. Meda Pharm., Inc., 247 N.J. 1, 13 (2021).

When deciding a motion for summary judgment under R. 4:46-2, "the determination whether there exists a genuine issue with respect to a material fact challenged requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 523 (1995). While "genuine" issues of material fact preclude the granting of summary judgment, those that are "of an insubstantial nature" do not. Id. at 530; see also Judson v. Peoples Bank and Trust Co. of Lexfield, 17 N.J. 67, 75 (1954). When the evidence "is so one sided that one party must

prevail as a matter of law, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986), the trial court should not hesitate to grant summary judgment." Brill, 142 N.J. at 540.

The Trial Court frankly stated it had made a mistake in its prior ruling which denied summary judgment and properly granted the CFS Defendants' motion for reconsideration of that interlocutory order pursuant to the applicable standard set forth in Rule 4:42-2:

> ....any order or form of decision which adjudicates fewer than all the claims as to all the parties shall not terminate the action as to any of the claims, and it shall be subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of justice. To the extent possible, application for reconsideration shall be made to the trial judge who entered the order.

R. 4:42-2.

As our Supreme Court noted in Lombardi v. Masso, 207 N.J. 517, 534 (2011), "the trial court has the inherent power to be exercised in its sound discretion, to review, revise, reconsider and modify its interlocutory orders *at any time* prior to the entry of final judgment," and the "stringent constraints" applied to final judgments and orders under R. 4:50-1 and to reconsideration of final orders pursuant to R. 4:49-2 "do not apply to interlocutory orders." (citations omitted)(emphasis in original). "A trial judge has the inherent power to review, revise, reconsider and modify interlocutory orders at any time prior

to the entry of final judgment," and "[d]enial of summary judgment preserves rather than resolves issues; therefore, later reconsideration of matters implicated in the motion, including the reasons in support of the denial, are not precluded." Blunt v. Kapproth, 309 N.J.Super. 493, 504 (App.Div.1998).

As will be discussed in more detail below, the Trial Court was correct in granting the CFS Defendants' motion for reconsideration, as there was no genuine issue of material fact that would preclude dismissal of Plaintiff's claims against CFS. During oral argument on the motion for reconsideration, Plaintiff's counsel conceded that CFS could not terminate Defendant Palumbo or change his employment status (3T 21:4-22), but essentially argued that, because other remedial measures potentially existed, such as placing Plaintiff paid administrative leave, CFS' decision to transfer Plaintiff must have been retaliatory. (3T 21:5-24:9). Even Plaintiff's own counsel acknowledged that the Trial Court was incorrect in holding, as part of its original decision to deny summary judgment, that CFS had control over DCPP employees.

Accordingly for this reason, and those expressed below, the Trial Court was correct in reconsidering its prior Order denying CFS' motion for summary judgment.

POINT II PLAINTIFF FAILED TO PROVIDE EVIDENCE TO CREATE A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER CFS WAS LIABLE UNDER THE NJLAD. (3T81:20-95:20, Pa1199)

A. General Standards for NJLAD Claims.

The New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. ("NJLAD"), was enacted in 1945 with the sole purpose of eradicating "the cancer of discrimination." Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 600 (1993). As such, the NJLAD prohibits discriminatory employment practices. Viscik v. Fowler Equip. Co. 173 N.J. 1, 13 (2002). Discrimination claims brought under the NJLAD are controlled by the three-step burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, (1973). Under that analysis, the plaintiff must first establish a prima facie case of discrimination which then gives rise to a presumption that the employer unlawfully discriminated against the employee. Viscik, 173 N.J. at 14. In order to rebut this presumption, the employer must come forward with admissible evidence of a legitimate non-discriminatory reason for its conduct toward the employee. Goodman v. London Metals Exch., Inc., 86 N.J. 19, 31 (1981); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

The burden then shifts back to the employee to demonstrate that the employer's articulated legitimate reason is merely a pretext for discrimination by showing "that (1) a discriminatory reason more likely motivated the employer than the employer's proffered legitimate reason, or (2) the defendant's proffered explanation is 'unworthy of credence.'" Maiorino v. Schering-Plough Corp., 302 N.J. Super. 323, 347 (App. Div 1997) (citation omitted). To discredit as pretextual a defendant's proffered reasons, a "plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence, and hence infer that the employer did not act for the asserted non-discriminatory reasons." DeWees v. RCN Group, 380 N.J. Super. 511, 528-29 (App. Div. 2005).

A prima facie case of disparate treatment discrimination requires a showing that: (1) the plaintiff is a member of a protected class, N.J.S.A. 10:5-12(f)(1); (2) the defendant's actions were motivated by discrimination, see Dixon v. Rutgers, State Univ. of N.J., 110 N.J. 432, 443 (1988) (finding in the employment context that a plaintiff must show that " it is more likely than not that the employer's actions were based on unlawful considerations"); and (3) that "others not within the protected class did not suffer similar adverse ...

actions." El-Sioufi v. St. Peter's Univ., 382 N.J. Super. 145, 167 (App. Div. 2005).

Similarly, to state a claim of hostile work environment sexual harassment, an employee must demonstrate that: (1) the complained of conduct would not have occurred but for the employee's protected characteristic; (2) the conduct was severe or pervasive; and (3) a reasonable person would believe that the work environment was hostile or abusive. See, Lehmann v. Toys R Us, Inc., 132 N.J. 587, 604-606, 611–614 (1993).

The NJLAD also prohibits any person from "tak[ing] reprisals against any person because that person has opposed any practices or acts forbidden under this act or because that person has filed a complaint, testified, or assisted in any proceeding under this act...." N.J.S.A. 10:5–12(d). A prima facie case of retaliatory discharge requires evidence showing: 1) that the plaintiff was "engaged in a protected activity known to the defendant"; 2) that the plaintiff "was thereafter subjected to an adverse employment decision by the defendant"; and 3) that "there was a causal link between the two." Romano v. Brown & Williamson Tobacco Corp., 284 N.J.Super. 543, 548 (App.Div.1995). "Where the timing alone is not 'unusually suggestive, the plaintiff must set forth other evidence to establish the causal link." Young v. Hobart West Group, 385 N.J.Super. 448, 467 (App.Div.2005).

B. The Trial Court properly determined that the undisputed evidence failed to demonstrate that the CFS Defendants are liable under the NJLAD. (3T81:20-95:20, Pa1199).

1. CFS Did Not Control the DCPP Office.

At its core, Plaintiff's entire theory of liability against the CFS Defendants, centers on the discredited argument that CFS somehow controlled DCPP employees, and that CFS and DCPP were one (1) entity in the same. Indeed, that was the original justification for the Trial Court's denial of summary judgment. However, on reconsideration, the Trial Court correctly noted that it had made a mistake, realizing the undisputed facts in the case clearly and unequivocally demonstrated that the CFS Defendants had no ability to control, dictate or direct the terms and/or conditions of employment for DCPP employees. The record in this case clearly establishes the fact that CFS could only control its own employees, who just so happened to be working in DCPP Offices as vendors (providing counseling services for DCPP). Incredibly, Plaintiff's own counsel conceded this point, noting that CFS could not control the DCPP working environment. (3T 21:5-24:9)

This indisputable fact, therefore, is paramount in analyzing Plaintiff's claims under the NJLAD, as there simply was no evidence produced that would even remotely suggest that CFS, in transferring Plaintiff out of the DCPP Burlington Office, acted with any type of discriminatory or retaliatory motive.

Plaintiff's attempts to conflate CFS and DCPP as one (1) employer, is contradicted by the undisputed facts in this case, and is not supported by law. The Local Office Manager, the CFS Defendants, and even Plaintiff's counsel himself, have all acknowledged that CFS did not control DCPP employees. (Pa564. Defendant Furphy deposition transcript, T248:3-5)

There is nothing in the undisputed facts related to the CFS Defendants' conduct that would support a finding of liability against them for disparate impact or sexual harassment hostile work environment Plaintiff alleges was created by Defendant Palumbo's conduct. Simply put, while Palumbo's alleged conduct was appalling, the undisputed record demonstrates that upon learning of same, the CFS Defendants immediately took the evasive remedial action of transferring Plaintiff to a different DCPP office so that she would not have to return to the same office as her harasser. As the Court in Lehman makes clear:

> When an employer knows or should know of the harassment and fails to take effective measures to stop it, the employer has joined with the harasser in making the working environment hostile. The employer, by failing to take action, send the harassed employee the message that the harassment is acceptable and that the management supports the harasser. **("Effective" remedial measures are those reasonably calculated to end the harassment. The "reasonableness of an employer's remedy will depend on its ability to stop the harassment by the person who engaged in harassment.")**

132 N.J. 587, 623 (1993)**(emphasis added)**

Plaintiff herself conceded that if CFS could not remove Palumbo, she would have accepted the transfer. (Pa322, Plaintiff's deposition transcript, T103:20-T104:3; T106:2-9). Under the circumstances then, CFS' rationale for transferring Plaintiff was reasonable, legitimate, and made without a hint of retaliatory or discriminatory motive:

> I can't leave Kristine Bodnar in an environment where she's suggesting she's being sexually harassed by a person I have no authority over. I can't suspend him. I can't change his shift. I can't do anything to him, but if I don't do something to her, I'm leaving her in harm's way. So I have to do something.

(Pa655, Defendant McLaurin deposition transcript, T119:3-10)

Perhaps the fallacy of Plaintiff's claims in this regard is the reliance on the argument that there were "potential" measures, short of transferring Plaintiff out of the allegedly sexually harassing workplace. Yet, these alternatives would not have done what the NJLAD requires of CFS – to take effective measures to end the harassment. Lehman, 132 N.J. at 623. For example, throughout the briefings and arguments in this case, Plaintiff has continually argued that CFS "could have" started their own investigation; yet, the undisputed facts establish: (1) that the DCPP had already began a EEO Investigation into Plaintiff's claims; and (2) Palumbo continued to work in the Burlington East Office during the

pendency of the investigation. (Pa899; Pa723, Defendant Palumbo deposition transcript, T40:11-17). Thus, Plaintiff's example of a reasonable measure, would have left her in the alleged sexually harassing place of employment. Further, Plaintiff's claim that CFS should have put her out on paid leave, is so ironic, the irony is too obvious to state.

Accordingly, the Trial Court was correct in finding that CFS could not control Palumbo, and took the only reasonably effective measure it could to end the harassment – transferring Plaintiff out of the physical location where the harassment allegedly occurred.

2. Plaintiff Cannot Demonstrate Pretext

Finally, Plaintiff attempts to demonstrate pretext due to the CFS Defendants allegedly "responding to her sexual harassment allegations during the November 29, 2018 meeting", by blaming her for wearing inappropriate clothing. This claim is contradicted by the record.

Specifically, Defendant Benyola certified that a DCPP employees advised her during a telephone call on November 23, 2018 that "Plaintiff Bodnar was dressing inappropriately at work and spending too much time with DCPP workers". (Da4 ¶8). Moreover, Defendant Benyola spoke with Plaintiff on November 27, 2018 at which time Plaintiff advised that she was having "issues with Defendant Palumbo, but never reported that she was being sexually

harassed. (Id., ¶10). Prio to this, on November 10, 2018, Plaintiff was given a counseling notice indicating that the DCPP Supervisors had contacted CFS to complain about Plaintiff's attire and her socialization with DCPP workers, a fact that was confirmed by DCPP Representative Furphy. (Da7) Thus, while the topic of DCPP's reports of issues of Plaintiff's attire and socialization with DCPP employees was discussed during the November 29, 2018 meeting, it was not raised in response to her sexual harassment allegations, but rather prior to that meeting and by DCPP employees.

Under the circumstances, Plaintiff's facts do not support any claim that the CFS Defendants decision to remove Plaintiff from the DCPP Burlington Office was anything other than reasonable, legitimate and non-discriminatory/retaliatory.

3. Plaintiff presented no evidence to support her constructive discharge claim.

Plaintiff Bodnar's constructive discharge claim fails as she has not demonstrated evidence sufficient to meet the heightened, objective standard which requires "conduct so intolerable that a reasonable person would be forced to resign rather than endure it." Nuness v. Simon and Schuster, Inc., 221 F.Supp.3d 596, 604 (D.N.J.2016) (citations omitted). Additionally, Dr. Sireci's August 30, 2019 note which purportedly "constructively discharged" Plaintiff

Bodnar from her employment with CFS was premised upon his misunderstanding that Plaintiff Bodnar was still assigned to the same office as Defendant Palumbo. (Pa873, Dr. Sireci deposition transcript, T41:4-T42:5). Moreover, Plaintiff's claim that CFS ignored her after she reported the harassment is baseless. Throughout her medical leave of absence, and up until her decision to not return to CFS, CFS employees were in contact with Plaintiff, and responded to her questions. . (Da10, December 11, 2018 email from HR Representative Tara Maguire; Da12, December 14, 2018 email from HR Representative Tara Maguire; Da22-Da24, Emails of February 19, 2019, June 10, 2019 and July 10, 2019 from HR Representative Tara Maguire).

In support of her claim that she was "constructively discharged," Plaintiff Bodnar points to an alleged statement by her Supervisor (Da29) and statements supposedly told to her by co-workers that "someone" was spreading "rumors" that she was transferred to the Camden DCPP office "because she was having sexual relationships with multiple people at her prior office." (Pa277, ¶2). However, with respect to both claims, Plaintiff (during her deposition) could not identify the basic details of these alleged statements, when they were made, who told her of the alleged statements, who made the alleged statements, and even conceded it may have involved DCPP employees starting said rumors. (Pa324, Plaintiff's deposition transcript, T135:22-T136:11; T139:9-T141:9).

Aside from not constituting the type of intolerable conditions necessary to succeed on a "constructive discharge" claim, these allegations constitute hearsay. In the context of a summary judgment motion, a Trial Court must disallow the admission of hearsay statements. See Hanges v. Metropolitan Property & Casualty Insurance Co., 202 N.J. 369 (2010). Only admissible evidence may defeat summary judgment. See Claypotch v. Heller, Inc., 360 N.J. Super. 472, 488-89 (App. Div. 2003); Sellers v. Schonfeld, 270 N.J. Super. 424, 427-29 (App. Div. 1993). Here, Plaintiff could not defeat summary judgment on her "constructive discharge" claim, and instead attempted to buttress her claim through pure speculation and hearsay.

Even if the Court were to consider the hearsay statement of Plaintiff's co-worker regarding the "rumors" supposedly said about her in December 2018, that is patently not evidence of the type of intolerable conditions required to succeed on a constructive discharge claim. Such a claim requires "more egregious conduct than that sufficient for a hostile work environment claim," and, importantly, employs an objective standard such that "an employee's subjective perceptions of unfairness or harshness do not govern a claim of constructive discharge." Nuness, 221 F.Supp.3d at 604 (citations omitted). Plaintiff had "an obligation to do what is necessary and reasonable to remain employed rather than simply quit," and secondhand rumors supposedly spread

in December 2018 and purportedly unreturned emails regarding long-term disability do not come close to the "level of proof" requiring "egregious circumstances" and "outrageous, coercive and unconscionable" acts in order to establish a constructive discharge claim.[1] Dunkley v. S. Coraluzzo Petroleum Transporters, 437 N.J.Super 366,383 (App.Div.2014)(citing Zhubrycky v. ASA Apple, Inc., 381 N.J.Super. 162 (App.Div. 2005)(citing Shepard v. Hunterdon Developmental Center, 174 N.J. 1, 28 (2002)); See also, Prager v. Joyce Honda, 447 N.J.Super. 124, 136-136 (Plaintiff's "colleagues' coldness and the two [allegedly retaliatory] attendance warnings simply cannot suffice to prove a constructive discharge under New Jersey law").

Likewise, Plaintiff's claim garners no support from Dr. Sireci's August 30, 2019 note which she alleges "constructively discharged" her from employment with CFS (Da28) since it was premised upon Dr. Sireci's misapprehension that Plaintiff Bodnar was still assigned to the same office, i.e., "place of employment," as Defendant Palumbo. Dr. Sireci clarified this issue during his deposition as follows:

> Q. If you knew at the time that you wrote this in August of 2019, if you knew that she was no longer going to be returning to the physical location where the sexual harassment occurred, would you have still authored this note indicating

[1] As part of her argument, Plaintiff has alleged that CFS "ignored" her requests for information on long-term disability. CFS submits that the inadvertent failure to respond to one (1) email hardly constitutes the type of "outrageous" acts that would support a constructive discharge claim.

> that she shouldn't be returning to that place or would you have been comfortable that she was going to be somewhere where there was no sexual harassment occurring?
>
> A. I think the second, somewhere where no sexual harassment occurred.

(Pa873, Dr. Sireci's deposition transcript, T41:4-T42:5)

Plaintiff fails to prove any intolerable working conditions or that her medical provider advised her to never return to employment with CFS regardless of the office location. As such, the CFS Defendants were entitled to summary judgment as a matter of law, dismissing Plaintiff's constructive discharge claim with prejudice.

POINT III. THE COURT WAS CORRECT IN DISMISSING THE INDIVIDUAL DEFENDANTS CLAIMS UNDER THE N.J. L.A.D. (3T 81:20-95-20, PA 1199)

Plaintiff cannot establish NJLAD liability against any of the individually named CFS Defendants since there is no evidence whatsoever that they "knowingly and substantially assisted" the alleged hostile work environment or retaliation in violation of N.J.S.A. 10:5-12(e) or that they took "reprisals" against Plaintiff in violation of N.J.S.A. 10:5-12(d). Thus, there was no basis upon which to impose liability under the NJLAD against Defendants McLaurin, Benyola, or Johnson and they were entitled to summary judgment as a matter of

law. Indeed, Plaintiff does not even argue this point and appears to have abandoned said claim.

Under the NJLAD, individual liability may be imposed upon a supervisor for aiding and abetting discrimination through "active and purposeful conduct." Tarr v. Ciasulli, 181 N.J. 70 (2004). In order to hold an individual defendant liable as an "aider or abettor," the plaintiff "must show that '(1) the party whom the defendant aids must perform a wrongful act that causes and 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 assist and substantially assist the principal violation.'" Id. at 84 (emphasis added).

Here, Plaintiff cannot establish these elements. See, e.g., Tarr v. Ciasulli, 181 N.J. 70, 84 (2004). There is no evidence, or allegation, of any personal involvement by Defendant McLaurin, Benyola, or Johnson with any of the alleged misconduct or harassment of Palumbo, a DCCP employee. Far from "knowingly" and "substantially" assisting the alleged harassment, upon learning of Plaintiff's allegations they immediately shielded her from her alleged harasser by transferring her out of the Burlington East DCPP Office.

Plaintiff also fails to establish that the individual CFS Defendants took any "reprisal" against her in violation of N.J.S.A. 10:5-12(d), which prohibits

an individual from "taking reprisals against any person because that person has opposed any practices or acts forbidden under this act..." N.J.S.A. 10:5-12(d). Indeed, Plaintiff's transfer can hardy be considered an adverse employment action insofar as her pay, status and terms of her employment with CFS remained the same. (Pa324, Plaintiff deposition transcript, T106:16-T107:12). As discussed above at length, there is no evidence which demonstrates any retaliation or "reprisals" of any kind against Plaintiff by the CFS Defendants, who merely acted to remove and shield Plaintiff from the DCPP office that she claimed was a hostile work environment.

Based on the foregoing, there was no basis for the imposition of liability against the individual CFS Defendants as a matter of law and the Trial Court was correct in dismissing these claims.

CONCLUSION

For all the foregoing reasons, this Court must affirm the Trial Court's Order dismissing the claims against Defendants, The Center for Family Services, Deborah Johnson, Therese Benyola, and Marion Mclaurin,

Respectfully submitted,

MADDEN & MADDEN, P.A.,

Attorneys for Defendants-Respondents, The Center for Family Services, Deborah Johnson, Therese Benyola, and Marion Mclaurin

By: */s/ Timothy R. Bieg*
Timothy R. Bieg #024112005

Date: March 13, 2024

JAKE STOUCH & KRISTINE BODNAR, Plaintiff/Appellant, v. DEPARTMENT OF CHILD PROTECTION AND PERMANENCY, CENTER FOR FAMILY SERVICES, IAN PALUMBO, GWENDOLYN WEBER, JUNIATA FARR, MARYANN FURPHY, TIFFANY MCILHENNY, DEBORAH JOHNSON, THERESE BENYOLA, MARION MCLAURIN, ABC CORPORATIONS 1-5 (fictitious names of presently unidentified business entities), and JOHN DOES 1-5 (fictitious names of presently unidentified individuals), Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET No.: A-003601-22 ON APPEAL FROM FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BURLINGTON COUNTY DOCKET NO. BUR-L-151-19 Sat Below: Honorable Sandar D. Friedman, J.S.C. Submitted on January 10, 2023

BRIEF ON BEHALF OF STATE DEFENDANTS/STATE RESPONDENTS, DEPARTMENT OF CHILD PROTECTION AND PERMANENCY, GWEN WEBER, JUNIATA FARR, MARYANN FURPHY, AND TIFFANY MCILHENNY

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TABLE OF CONTENTS

TABLE OF JUDGMENTS

[1] "Da" refers to the Appendix filed by the State Defendants/State Respondents. "Pa" refers to the Appendix filed by Plaintiff/Appellant.

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

PRELIMINARY STATEMENT

This appeal arises out of claims by Appellant, Kristine Bodnar, that the Respondents, New Jersey Department of Children and Families, Division of Child Protection and Permanency ("DCPP") and several of its employees ("State Respondents"), engaged in workplace discrimination against her in violation of the New Jersey Law Against Discrimination ("NJLAD"). The only issue on appeal is whether Bodnar was an employee of DCPP. She was not. Accordantly, the trial court correctly granted the State Respondents' motion for reconsideration, holding that since she was solely employed by an independent contractor of DCPP, she could not maintain her NJLAD claims against the State entity or its employees. That determination should be affirmed because Bodnar's arguments are foreclosed by settled precedent.

As this court held in Pukowsky v. Caruso and its progeny, courts must consider twelve factors in ascertaining whether an individual is an independent contractor or an employee for the purposes of determining liability under the NJLAD. Bodnar failed to present a scintilla of evidence to the trial court to meet any of those factors. Nor has she made that showing here.

Rather, the record reflects that Bodnar admitted that she was an employee of Respondent Center for Family Services ("CFS"). That fact was also memorialized in an agreement between DCPP and CFS and implemented in

practice. While CFS assigned Bodnar to work at DCPP's Burlington East Local Office ("BELO"), DCPP had no authority over her. The State Respondents did not supervise Bodnar, did not assign work to her or pay her, had no ability to grant or deny her leave requests, or to determine where or when she would work. Nor was the work that Bodnar did an integral part of DCPP's business. In short, applying the Pukowsky factors, she was not an employee, so her NJLAD claims against the State Respondents were properly dismissed.

Although Bodnar attempts to obfuscate that point by alleging that DCPP and CFS were her "joint employers," she does not rely upon existing NJLAD case law to support this theory, but rather, she has created a whole new legal standard that she pulls together from various cases decided outside this jurisdiction and that do not interpret the NJLAD. In doing so, Bodnar conveniently ignores that to establish such a joint employer relationship, she must meet the Pukowsky factors as to both purported employers (here, DCPP and CFS), which she has not done for the DCPP.

Finally, even if Bodnar were a DCPP employee, the record before the trial court at summary judgment supported the existence of an irrefutable prompt and remedial defense pursuant to the case of Bouton v. BMW of North America.

For these reasons, explained in further detail below, the trial court's order granting State Respondents' Motion for Reconsideration and dismissing Bodnar's NJLAD claims against them should be affirmed.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[2]

Bodnar is a former employee of respondent CFS. (Da56; Da124; Da430-Da431; Da514-Da516).[3] On January 18, 2019, plaintiff Jake Stouch[4] and Appellant Bodnar filed a Superior Court Complaint alleging gender discrimination and sexual harassment by individual defendant Ian Palumbo (Count I), retaliation and retaliatory harassment for complaining about the sexual harassment (Count II), and seeking declaratory judgment that the "Confidentiality" provision of N.J.A.C. 4A:7-3.1 violates state law, including the First Amendment, and the NJLAD (Count III). (Pa1-Pa45).[5] Bodnar's initial complaint named the DCPP and, among other parties, the following employees of DCPP that were assigned to its BELO: Juanita Farr, Gwendolyn Weber, and Ian Palumbo. Ibid.[6] Bodnar filed a First Amended Complaint on February 20,

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[2] Because the procedural and factual history are interrelated, they have been combined for the court's convenience and to avoid repetition.

[3] Respondent CFS is represented by separate counsel in this appeal.

[4] Stouch was employed by the DCPP as a Case Worker during the relevant time period and is not a party to this appeal.

[5] Count III of the Complaint seeking declaratory judgment was transferred to the jurisdiction of the New Jersey Superior Court, Appellate Division. (Da717-Da719).

[6] Defendant Palumbo is not a party to this appeal and was represented separately by Flahive Mueller Attorneys at Law, L.L.C.

2020, adding DCPP employees MaryAnn Furphy and Tiffany McIlhenny (collectively "State Respondents"). (Pa46-Pa105).

A. Identification of the Parties

During the relevant time period, Bodnar was employed by CFS as a certified alcohol and drug counselor and was assigned to the BELO. (Pa341, at T30:21-22; Pa171 at T186:19-22; Pa671 at T64:17-22; Pa67, at T91:23- 24; Da108-Da109; Da589-Da590). Therese Johnson, Deborah Benyola, and Marion McLaurin are employed by respondent CFS and were in positions of supervisory authority over Bodnar during the relevant time period. (Da109).

Palumbo was employed as a DCPP Caseworker and was assigned to the BELO until August 8, 2019. (Da70; Da693 at T81:18-86:8). McIlhenny was a Case Work Supervisor and directly supervised Plaintiff Stouch from on or around June 2019 until Stouch's suspension and subsequent termination in December 2019. (Da6-Da7; Da 318-Da319). McIlhenny reported directly to Weber, who supervised other Case Work Supervisors within her tier of supervision. (Pa794 at T36:1-37:14; Da7-Da8). Farr occupied the same job title as Weber, and supervised Palumbo while he was assigned to the BELO. (Da8, Da680 at T26:22-23). Furphy was the Local Office Manager of the BELO during the relevant time period and was a direct supervisor to both Weber and Farr. (Pa572 at T31:7-32:25; Da8).

B. Bodnar's Independent Contractor Status

At all relevant times, CFS provided support services to DCPP as an independent contractor. (Pa571-Pa572 at T29:20-30:14; Pa795-Pa796 at T41:12-42:8, 51:5-52:2; Da109-Da114; Da681 at T32:9-19; Da591-Da609). Bodnar worked for CFS for approximately three years. (Da108-Da109; Da589-Da590). Bodnar testified at her deposition consistent with the fact that she was at all times exclusively employed by CFS. (Pa333 at T34:17-35:23; Da115-Da116). CFS' employee handbook stipulated that CFS was responsible for all terms and conditions of Bodnar's employment. (Da114-Da115; Da610-Da665). Bodnar's performance was also exclusively supervised by CFS. (Pa332 at T32:9-19; Pa333 at T34:17-35:23; Pa571-Pa572 at T29:20-30:14; Pa795-Pa796 at T41:12-42:8; Pa798 at T51:5-52:2; Da110-117; Da607). DCPP had no input into what skills Bodnar could use in accomplishing her job duties. Ibid. The equipment Bodnar used to accomplish her workplace tasks was supplied by CFS. (Pa331 at T29:6-10). Bodnar received all her pay and job benefits exclusively from CFS during her tenure. (Pa331 at T29:6-10; Da114-Da115; Da610-Da665). DCPP did not pay any social security taxes for Bodnar. Ibid. CFS also had exclusive decision-making authority to grant Bodnar's leave requests and terminate her employment. Ibid. The work that Bodnar performed (coordination of various social services for DCPP clients such as alcohol

treatment counseling for parents) was not an integral part of DCPP's business, whose employees are primarily tasked with providing for the safety and security of children. (Pa174 at T174:6-24; Da8-18; Da108-Da109; Da306-Da312; Da589-Da590; Da721-Da722; Da725). Bodnar did not accrue any benefits with DCPP, including retirement benefits. (Pa331 at T29:6-10; Da114-Da115; Da610-Da665).

Finally, the written agreement between CFS and DCPP precluded the existence of a dual employer relationship. (Da110-Da114, Da607). The terms of that contract explicitly set forth the existence of an independent contractor relationship at Section 5.14 as follows:

> Section 5.14 Independent Employment Status. Employees of Provider Agencies that Contract with the Department of Children and Families are employees of the Provider Agency, not the State.
>
> In accordance with the National Labor Relations Act, 29 U.S.C.A. 152(2) and State law, N.J.S.A. 34:13A-1 et seq., Provider Agencies are independent, private employers with all the rights and obligations of such, and are not political subdivisions of the Department of Children and Families.
>
> As such, the Provider Agency acknowledges that it is an independent Provider, providing services to [DCF], typically through a contract-for-services agreement. As independent contractors, Provider Agencies are responsible for the organization's overall functions that include the overseeing and monitoring of its operations, establishing the salary and benefit levels of its

> employees, and handling all personnel matters as the employer of its workers….
>
> …The Provider Agency acknowledges its relationship with its employees as that of employer. While the Department has an adjunct role with Provider Agencies through regulatory oversight and ensuring contractual performance, the Provider understands that the Department is not the employer of a Provider Agency's employees.
>
> (Da607 at §5.14)

C. The Investigation of Bodnar's EEO Complaint

On or about November 20, 2018, Stouch sent Palumbo a text message demanding Palumbo stop making sexually harassing comments concerning himself and Bodnar. (Da50; Da421-Da424). Palumbo reported this text message to his supervisor, Farr, because he felt it was threatening and that he was not sexually harassing anyone. (Pa743 at T78:17-20; T81:1-18; Da51; Da683-Da684 at T41:4-42:6). Farr informed Defendant Weber about the text exchange because Weber supervised Stouch. (Da52; Da685 at T46:16-23). Weber and Farr informed Furphy, the Local Office Manager, about the text exchange and Furphy instructed Weber to contact DCPP's Equal Employment Opportunity ("EEO") office for guidance on how to handle the situation. (Pa803-Pa804 at T72:5-75:5).

The EEO office instructed Weber to meet with the two individuals separately (Palumbo and Stouch) and instruct them to cease all contact with each

other – and she followed these instructions. (Pa804 at T74:4-77:3; Da52-Da54; Da685 at T46:19-23; T47:6-13; T49:15-22). During Stouch's meeting, Stouch informed Weber that he intended to file an EEO complaint against Palumbo. (Pa804-Pa805 at T77:5-79:8; Da54; Da691 at T73:9-12). Weber reported back to EEO that the meetings occurred as instructed and that Stouch intended to file an EEO complaint. (Pa341 at T67:10-68:2; Pa805 at T79:2-8; Pa807 at T86:20-23; Da54-Da55; Da425-Da426; Da683 at T39:20-25). Stouch thereafter filed an EEO complaint on November 20, 2018, alleging harassment and hostile work environment against Palumbo. (Da56; Da427-Da429). On November 23, 2018, Stouch informed DCPP's EEO office that Bodnar also wished to proceed with a complaint against Palumbo. (Da56; Da432-431). EEO opened an investigation into Stouch's and Bodnar's allegations of sexual harassment against Palumbo on the same date – November 20, 2018 – and both were investigated in parallel pursuant to DCPP's EEO policy. (Da56-Da57; Da432-Da513).

Bodnar alleged in her EEO complaint that Palumbo began harassing her in March/April 2018 both in person and in text messages. (Da58; Da441-Da451). During Palumbo's initial EEO interview on December 12, 2018, he denied inappropriate communications with Bodnar and denied sending text messages to her. (Da58-Da59; Da457-Da461). In a second interview on March 12, 2019, when confronted with a series of text messages he sent Bodnar, Palumbo then

admitted to sending them. (Da59; Da462-Da466). However, Palumbo denied discussing sexual preferences or calling Bodnar by any pet names. (Da59-Da60; Da457-461; Da462-Da466). Palumbo also consistently denied ever touching Bodnar or invading her personal space. Ibid.

After DCPP started its investigation, Bodnar met with CFS Defendants Benyola and McLaurin on November 27, 2018, to discuss various issues with her performance. (Pa349 at T98:17-T99:3; Pa671 at T64:23-T65:4; Da120). None of the performance issues discussed during the meeting originated from complaints of DCPP personnel after Bodnar filed her EEO complaint. (Pa349 at T101:5-24; Da121). During the November 27, 2018 meeting, Bodnar claimed that Defendant Palumbo had sexually harassed her at work. (Pa349 at T99:18-20; Pa684 at T114:10-13; Da121). In response to her complaint, Defendant McLaurin decided to transfer Bodnar to DCPP's Camden office. (Pa349 at T100:12-21; Pa68 at T120:2-5; Da121). No one at DCPP was consulted with nor played a part in CFS' decision to transfer Bodnar. (Pa685 at T121:14-17; Da121-Da122). There is no evidence in the record to support that the State Defendants had anything to do with Bodnar's transfer. (Pa571-Pa572; at T29:20-30:14, Pa685 at T121:14-17; Pa795 at T41:12-42:8, 51:5-52:2; Da122; Da681 at T32:9-19). Bodnar alleges no sexual harassment by Palumbo, or any other

DCPP employee, after she filed her EEO complaint against Palumbo. (Pa366-Pa370; T169:23-T182:8; Da122).

Although Bodnar alleged that she suffered a "hostile work environment" at the DCPP's Camden office, she did not indicate that the alleged harassment had anything to do with her EEO complaint. (Pa366 at T170:11-171:6, T172:3-7; Pa367 at T174:23-25; Pa369 at T178:16-T179:5; Da123). Instead, Bodnar testified that she felt uncomfortable because employees were spreading rumors about why she was transferred to the Camden office. Ibid. However, at her deposition, Bodnar failed to identify any DCPP employees that were involved in the alleged rumor mill at the Camden office, and she conceded that she did not complain about the alleged rumor mill to DCPP's EEO office. (Pa366 at T170:11-171:6, T172:3-7; Pa367 at T174:23-25; Pa369 at T178:16-T179:5; Da124).

The EEO Investigator, Rachel Outram, issued a report on August 10, 2019 in connection with her investigation of Bodnar's EEO complaint, and Deputy Commissioner, Bonny E. Fraser, Esq. authored a letter on the same date substantiating some of the conduct that Bodnar alleged against Palumbo that violated DCPP's anti-sexual harassment policy. (Da61; Da514-Da516).[7] DCPP

[7] Stouch's EEO complaint against Palumbo was not substantiated, as indicated in a separate report and letter dated August 10, 2019. (Da61-Da62, Da517-Da519).

informed CFS of the results of its investigation into Bodnar's complaint on the same date. (Da124; Da514-Da516). Bodnar's last day of work at the Camden office was on or around December 6, 2018, when she took a leave of absence. (Pa351 at T109:20-25; Da124; Da669-670). Bodnar never returned to the Camden office after she took a leave of absence. (Pa365 at T163:18-164:2; Pa696 at T163:18-164:2, Da124). Bodnar's employment with CFS was formally separated sometime afterward. (Pa689 at T135:8-17; Da125).

Palumbo was served with a Preliminary Notice of Disciplinary Action ("PNDA") recommending a 4-day suspension in connection with the substantiation of Bodnar's allegations against him. (Da62; Da520-Da522). Palumbo continued to deny most of the allegations raised in Bodnar's EEO complaint, appealed his PNDA, and finally settled his disciplinary action with a downgraded 3-day suspension. (Da62; Da523-Da525).

D. State Respondents' Motion for Summary Judgment

On January 7, 2022, State Respondents filed a Motion for Summary Judgment in this matter following the close of discovery. (Pa1254). State Respondents' argument with respect to Bodnar's claims primarily rested on the fact that DCPP was not her employer, or joint employer, pursuant to the twelve-factor test set forth in the matter of Pukowsky v. Caruso, 312 N.J. Super. 171, 180 (App. Div. 1998). (Da288-Da291). State Respondents further argued that

Bodnar's discrimination, harassment, and retaliation claims against the State Respondents were both factually and legally deficient. (Da291-Da292). State Respondents also argued that they were entitled to a prompt and remedial defense to Bodnar's NJLAD claims under Bouton v. BMW of North America, 29 f.3d 103 (3d Cir. 1994). (Da293-Da 297). Finally, State Respondents argued that Bodnar's aiding and abetting claims against the Individual State Respondents should be dismissed for the foregoing reasons. (Da298-Da299).

On August 30 and 31, 2022, the trial court held oral argument on State Respondents' motion and three other Motions for Summary Judgment filed by the other defendants in this action. (1T; 2T).[8] At the close of more than three hours of oral argument, the trial court issued an oral opinion on the record. (2T58:18-91:6).

On September 15, 2022, the trial court entered an Order denying all parties' Motions for Summary Judgment. (Da868-Da869). As to the issue of

[8] "1T" refers to the transcript of the oral argument on Respondents' motion for summary judgment held on August 30, 2022.

"2T" Refers to the transcript of the oral argument on Respondents' motion for summary judgment held on August 31, 2022.

"3T" refers to the transcript of the oral argument on Respondents' motion for reconsideration held on December 19, 2022.

Bodnar's employment status with DCPP, the trial court did not analyze each factor of the Pukowsky test but nevertheless summarily held that:

> "-- there's also an issue -- a genuine issue as to whether plaintiff Bodnar was an employee of DCPP, and this fact should be determined by the fact finder. Not so much that the employee but the employment of the -- of -- of her employment in the control of DCPP."
>
> (2T at T83:20-T84:21).

E. State Respondents' Motion for Reconsideration

On October 19, 2022, State Respondents filed a Motion for Reconsideration of the trial court's Order under Rule 4:42-2(b) – as did all the other defendants in this action. (Pa1194-Pa1195). The trial court held oral argument on December 19, 2022. (3T). At the beginning of oral argument, Bodnar's attorney stipulated that the only claim Bodnar intended to pursue against State Respondents was the retaliatory harassment claim asserted in Count II of the Amended Complaint. (3T48:1-22). Toward the very end of the oral argument, Bodnar's counsel also acknowledged Bodnar's stipulation to the dismissal of her sexual harassment claim against Palumbo asserted in Count I of the Amended Complaint. (3T72:9-73:6).

Following oral argument, the trial court issued an oral opinion and correctly applied the twelve-factor test set forth in Pukowsky, and concluded that DCPP was neither an employer, nor joint employer, of Bodnar. (3T88:5-

90:25). The trial court went on to dismiss Bodnar's unpled public accommodation discrimination claim because DCPP is not a place of public accommodation as a matter of law. (3T91:21-92:6). Since the trial court found that Bodnar was not an employee of DCPP, it did not address State Respondents' other arguments as to why she had failed to meet her legal and factual burdens at summary judgment to prove discrimination, harassment, and retaliation under the NJLAD, and subsequently entered an order dismissing the entirety of Bodnar's claims against State Respondents, with prejudice. (Pa1199-Pa1200). While Bodnar's appeal of the trial court's order dismissing her claims against State Respondents followed, her appellate brief does not appear to raise as possible error the trial court's dismissal of her claims against Palumbo. See Ab.

LEGAL ARGUMENT

The standard for appellate review on a motion for reconsideration under Rule 4:42-2(b) is generally the "abuse of discretion" standard. See Fusco v. Bd. of Educ., 349 N.J. Super. 455, 462 (App. Div.) certif. denied, 174 N.J. 544 (2002); see also Granata v. Broderick, 466 N.J. Super. 449, 468 (2016). Thus, an appellate court typically will not overturn the lower court's decision unless it has made a clear error in judgment amounting to an abuse of its discretion, which only occurs when the trial judge's decision is "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." See United States ex rel. USDA v. Scurry, 193 N.J. 492, 504 (2008). The Appellate Division's review of a trial court's decision granting summary judgment is de novo. F.K. v. Integrity House, Inc., 460 N.J. Super. 105, 114 (App. Div. 2019).

Summary judgment must be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). A genuine issue of material fact exists when "considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party,

would require submission of the issue to the trier of fact." Ibid.; see also Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) (stating that the trial court must determine whether "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party").

In applying this standard, a fact that is of "an insubstantial nature should not preclude the grant of summary judgment." See Prant v. Sterling, 332 N.J. Super. 369, 377 (Ch. Div. 1999); see also Brill, 142 N.J. at 529 ("a non-moving party cannot defeat a motion for summary judgment merely by pointing to any fact in dispute"). For a dispute to constitute a genuine issue of material fact, it must be "genuine," as well as "substantial," i.e., "true, solid, [or] real," rather than "imaginary, unreal, or apparent only." Brill, 142 N.J. at 529 (citations omitted). "[I]f the opposing party . . . offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, '[f]anciful, frivolous, gauzy or merely suspicious,' . . ." summary judgment should be granted. Ibid. (quoting Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 75 (1954)). Thus, a plaintiff facing a summary judgment motion must point to "competent" evidence to establish each and every essential element of each cause of action. Id., at 540. The failure to do so entitles a defendant to summary judgment. Ibid.

POINT I

BODNAR'S NJLAD CLAIMS WERE PROPERLY DISMISSED ON RECONSIDERATION BECAUSE SHE WAS NOT STATE RESPONDENTS' EMPLOYEE (3T88:5-90:21, 91:21-92:6).

Since the NJLAD only protects employees and not independent contractors, New Jersey courts are required to apply a fact-specific analysis to determine whether a person classified as an independent contractor is considered to be an employee protected by the NJLAD. See Pukowsky v. Caruso, 312 N.J. Super. 171, 180 (App. Div. 1998); see also, Hoag v. Brown, 397 N.J. Super. 34, 47 (App. Div. 2007). Under the test enunciated by this court in Pukowsky, courts must consider the following:

1) the employer's right to control the means and manner of the worker's performance;

2) the kind of occupation — supervised or unsupervised;

3) skill;

4) who furnishes the equipment and workplace;

5) the length of time in which the individual has worked;

6) the method of payment;

7) the manner of termination of the work relationship;

8) whether there is annual leave;

9) whether the work is an integral part of the business of the "employer;"

10) whether the worker accrues retirement benefits;

11) whether the "employer" pays social security taxes; and

12) the intention of the parties.

[Pukowsky, 312 N.J. Super. at 182-183]

In Chrisanthis v. County of Atlantic, 361 N.J. Super. 448, 466 (App. Div. 2003), the Appellate Division reviewed the application of the Pukowsky test in the context of a summary judgment motion. As this court explained, "[r]ecognizing that the NJLAD applies to employer-employee relationships only and does not protect independent contractors, the [trial] judge determined that the proofs were insufficient to establish an employment relationship between plaintiff and the County to support NJLAD liability." Id., at 450, certif. denied 178 N.J. 31 (2003). The Chrisanthis court recognized that it was in a position to make the determination regarding the potential employer/employee relationship notwithstanding that there were some facts that could support an employee status:

> In the case before us, some circumstances arguably point towards employee status, e.g., some control, provision of workplace, the contractual right of removal provision, and the alleged revocation of plaintiff's security clearance. To whatever extent these factors exist, their weight pales in comparison to that of the other factors. With respect to the most important Factor 1, any control exercised by the County is incidental to plaintiff's work as a nurse, and is for security, safety and administrative purposes. Only CHS controls plaintiff's activities as a nurse.
>
> We are convinced that no rational factfinder, applying the twelve-factor Pukowsky test, could find that plaintiff was a County employee for LAD purposes. Summary judgment was properly granted in favor of the County.
>
> [361 N.J. Super. at 466 (emphasis added)].

The same reasoning applies here. Bodnar's claims against State Respondents were properly dismissed consistent with the Appellate Division's analysis in Chrisanthis because Bodnar failed to sufficiently dispute State Respondents' argument that she was not their employee. In fact, Bodnar does not even address State Respondents' analysis under Pukowsky and its progeny in her Appellate brief. See Ab. Application of the facts of this case to the factors in Pukowsky precludes the existence of any form of employer/employee relationship between DCPP and Bodnar as a matter of law.

Rather than appeal to the case law on point for this issue, and the trial court's analysis of this case law, Bodnar appears to have created a whole new

joint employer theory for NJLAD cases. See Ab44-47. Bodnar's purported new joint employer theory for the NJLAD is completely unsupported by New Jersey case law interpreting the statute. Instead, it is supported by a number of unrelated State and federal court cases that set forth the definition of a "joint employer" in other statutory contexts – such as workers compensation law, and the National Labor Relations Act – that she self-servingly interprets so as to create a joint employer relationship between herself, DCPP, and CFS. Ibid.

Here, when the correct standard under Pukowsky is applied to Bodnar, none of the above-listed factors support that DCPP was her employer – or joint employer. Chrisanthis v. County of Atlantic, 361 N.J. Super. 448, 454-467 (App. Div. 2003) (held that a plaintiff must establish the Pukowsky factors as to **both** purported employers). Bodnar testified at her deposition consistent with the fact that CFS was her exclusive employer. (Pa333 at T34:17-35:23; Da115-Da116). Bodnar could not sufficiently dispute at summary judgment that her performance was exclusively supervised by CFS. (Pa332 at T32:9-19; Pa333 at T34:17-35:23; Pa571-Pa572 at T29:20-30:14; Pa795-Pa796 at T41:12-42:8; Pa798 at T51:5-52:2; Da110-117; Da607). The State Respondents also had no input into what skills Bodnar could use in accomplishing her job duties. Ibid. The equipment Bodnar used to accomplish her workplace tasks was supplied by CFS. (Pa331 at T29:6-10; Da114-Da115; Da610-Da665). Bodnar received all

her pay and job benefits exclusively from CFS during her tenure. Ibid. DCPP did not pay any social security taxes for Bodnar. Ibid. Nor did Bodnar accrue any benefits with DCPP, including retirement benefits. (Pa331 at T29:6-10; Da114-Da115; Da610-Da665). CFS also had exclusive decision-making authority to grant Bodnar's leave requests and terminate her employment. Ibid. The work that Bodnar performed (coordination of various social services for DCPP clients such as alcohol treatment counseling for parents) was not an integral part of DCPP's business, whose employees are primarily tasked with providing for the safety and security of children. (Pa174 at T174:6-24; Da8-18; Da108-Da109; Da306-Da312; Da589-Da590; Da721-Da722; Da725).

Finally, the service agreement between DCPP and CFS precluded the existence of a dual employment relationship with CFS employees like Bodnar. (Da110-Da114; Da607). Indeed, the very terms of the State's contract with CFS leaves no question that Bodnar was not its employee.[9] Most significantly, Section 5.14 of the State's contract with CFS spells out the independent contractor relationship with clarity, especially as to the most critical aspect of the Pukowsky test – control:

> Section 5.14 Independent Employment Status. Employees of Provider Agencies that Contract with the

[9] Section 5.04 requires that CFS indemnify the State for damages arising from CFS employees' performance of their job functions. Section 5.05 requires that CFS maintain insurance.

> Department of Children and Families are employees of the Provider Agency, not the State.
>
> In accordance with the National Labor Relations Act, 29 U.S.C.A. 152(2) and State law, N.J.S.A. 34:13A-1 et seq., Provider Agencies are independent, private employers with all the rights and obligations of such, and are not political subdivisions of the Department of Children and Families.
>
> As such, the Provider Agency acknowledges that it is an independent Provider, providing services to [DCF], typically through a contract-for-services agreement. As independent contractors, Provider Agencies are responsible for the organization's overall functions that include the overseeing and monitoring of its operations, establishing the salary and benefit levels of its employees, and handling all personnel matters as the employer of its workers….
>
> …The Provider Agency acknowledges its relationship with its employees as that of employer. While the Department has an adjunct role with Provider Agencies through regulatory oversight and ensuring contractual performance, the Provider understands that the Department is not the employer of a Provider Agency's employees.
>
> (Da607, at §5.14).

As an alternative, Bodnar asserts that she can pursue a sexual harassment claim against State Respondents under the NJLAD's public accommodation provisions, but the trial court properly rejected that argument. (Ab43). First, Bodnar never asserted a cause of action under the NJLAD's public accommodation provision in any of her Superior Court Complaints. (Pa1-Pa105). Second, even if the court were to consider this argument, it fails on the

merits because DCPP is not considered a place of public accommodation as a matter of law. See Doe v. Div. of Youth & Family Servs., 148 F.Supp.2d 462, 496 (D.N.J. 2001); Thomas v. Cnty. of Camden, 386 N.J. Super. 582 (2006); Ptaszynski v. Uwaneme, 371 N.J. Super. 333, 396 (2004).

For these reasons, the trial court's order dismissing Bodnar's Amended Complaint against State Respondents on reconsideration should be affirmed.

POINT II

EVEN IF BODNAR WAS DCPP'S EMPLOYEE, HER NJLAD CLAIMS WERE OTHERWISE LEGALLY AND FACTUALLY DEFICIENT (3T92:1-11).[10]

A. Bodnar's Discrete NJLAD Discrimination Claim was Legally and Factually Deficient.7YG

Although the trial court did not address Bodnar's discrete discrimination claim in detail because it found she was not DCPP's employee, if this Court overturns the trial court on that issue, Bodnar has still failed to make out an NJLAD claim against the State Respondents. As this court recognized, New Jersey courts analyzing discrete employment discrimination claims under the NJLAD have adopted the burden-shifting analytical framework set forth by the

[10] Although the trial court did not address Bodnar's discrimination, harassment, retaliation, and aiding abetting claims in detail at oral argument on Respondents' motion for reconsideration because it found that Bodnar was not Respondents' employee, Respondents address these arguments here in the event this court disagrees with the trial court's ruling on reconsideration as to Bodnar's employment status under the NJLAD.

United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Grande v. St. Clare's Health Sys., 230 N.J. 1 17-18 (2017). Pursuant to the McDonnell Douglas framework, the plaintiff must carry the initial burden of establishing a *prima facie* case of discrimination by showing that: (1) the plaintiff was a member of a protected class; (2) the plaintiff was performing at a level that met her employer's legitimate expectations; (3) the plaintiff suffered a discrete adverse employment; and (4) plaintiff suffered discrete adverse employment action because of her protected status. See McDonnell Douglas, 411 U.S at 802.

Not surprisingly given the unavailing nature of Bodnar's purported employer/employee relationship with DCPP, there was no evidence at summary judgment demonstrating that any of the State Respondents took any adverse employment action (termination, suspension, demotion, etc.) against her – because they in fact had no authority to do so. (Da607, at §5.14). Bodnar also stipulated to dismissal of Count I of her Amended Complaint[11] at oral argument on State Respondents' Motion for Reconsideration. (3T48:1-22).

Consequently, the trial court's order dismissing Bodnar's discrete NJLAD discrimination claim on reconsideration should be affirmed.

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[11] Count I alleged disparate treatment, sexual harassment, and hostile work environment due to gender in violation of the NJLAD.

B. Bodnar's NJLAD Harassment Claim was also both Legally and Factually Deficient.

Although the trial court did not address Bodnar's hostile work environment claim as to the State Respondents, it bears mentioning on appeal that Bodnar alleged no specific acts of sexual harassment against State Respondents and failed to establish that State Respondents should be held vicariously liable for any alleged acts of sexual harassment on the part of defendant Palumbo. Under the NJLAD, employer liability for alleged sexual harassment by an employee can be established under a theory of vicarious liability under Restatement § 219(2)(d)." Aguas v. State, 220 N.J. 494, 512 (2015). Thus, contrary to Bodnar's argument, the State Respondents cannot be strictly liable for any sexual harassment she experienced in the workplace. (Ab41). Indeed, under prevailing case law, Bodnar could only proceed on a theory that State Respondents should be held directly liable if they were allegedly negligent or reckless in discharging their duty to protect Bodnar from sexual harassment - Restatement § 219(2)(b). However, at summary judgment Bodnar failed to establish that DCPP was negligent because she was unable to show that DCPP "failed to exercise due care with respect to [] harassment in the workplace, that its breach of duty caused the plaintiff's harm, and that she sustained damages." Komlodi v. Picciano, 217 N.J. 387, 409 (2014).

Indeed, "there can be no negligence if the procedure in place to stop the harassment is effective." Bouton v. BMW of North America, 29 F3d 103 (3d Cir. 1994). In Bouton, the Third Circuit held that an effective grievance procedure which stops harassment in a timely manner shields an employer from liability for a hostile work environment. Id., at 107. "By definition, there can be no negligence if the procedure is effective." Id., at 110. The New Jersey Supreme Court subsequently adopted the "Bouton shield" for cases brought under NJLAD. Payton v. N.J. Tpk. Auth., 292 N.J. Super. 36 (App. Div. 1996) (holding that "an employer's response to an employee's complaint is central to a plaintiff's cause of action"); see also Cavuoti v. N.J. Transit Corp., 161 N.J. 107, 120 (1999) ("afford[ing] a form of safe haven for employers who promulgate and support an active, anti-harassment policy").

When evaluating whether an employer should be granted such a safe haven, relevant factors for a motion court to consider include (but are not limited to): the existence of a formal policy prohibiting harassment; the existence of both formal and informal complaint structures; and anti-harassment training. Gaines v. Bellino, 173 N.J. 301, 313 (2002). However, "the absence of such mechanisms [does not] automatically constitute negligence, nor [does] the presence of such mechanisms demonstrate[] the absence of negligence." Lehmann v. Toys 'R' Us, 132 N.J. 587, 603 (1993).

Here, Bodnar failed to marshal any evidence at summary judgment to dispute that State Respondents' response to her EEO complaint was anything but prompt and remedial. It was undisputed at summary judgement that DCPP has a robust anti-discrimination, retaliation, and harassment policy that Bodnar availed herself of. (Da50-Da62; Da735-Da741).[12] DCPP took prompt and remedial action after Bodnar filed her EEO complaint on or around November 20, 2018. (Pa672 at T67:13-T68:7; Da50-Da62; Da120; Da666-668; Da787-Da788). Specifically, her complaint was thoroughly investigated, Palumbo was found to have violated the EEO policy as to Bodnar, Palumbo was disciplined, and Palumbo's voluntary transfer request was approved shortly thereafter. (Da61-Da62; Da514-Da516; Da520-Da525).[13] Further, Bodnar failed to identify a single legitimate example of sexual harassment after her EEO complaint was resolved and her Superior Court Complaint was filed in this matter. (Pa366 at T170:11-171:6; T172:3-7; Pa367 at T174:23-25; Pa369 at T178:16-T179:5; Da123).

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[12] The Operating Agreement between DCPP and CFS stipulated that DCPP's zero-tolerance anti-discrimination/harassment/retaliation policy controlled within DCPP's workplace environment and, therefore DCPP undertook the investigation of Stouch and Bodnar's companion EEO complaints. (Da120, Da601).

[13] Stouch's EEO complaint against Palumbo was not substantiated, as indicated in a separate report and letter dated August 10, 2019. (Da61-Da62, Da517-Da519).

Bodnar's argument that DCPP somehow conceded to NJLAD liability when it substantiated Palumbo for violating its anti-sexual harassment workplace policy inappropriately conflates the *prima facie* standard for an NJLAD sexual harassment claim with the DCPP's much higher zero-tolerance anti-sexual harassment workplace policy. See Ab36-38. The trial court rightly dismissed this argument since, if this were true, no employer would ever substantiate one of its employees for violating its anti-sexual harassment workplace policy, which is the exact opposite of the NJLAD's purpose – nothing less than to root out the cancer of sexual harassment from their workplaces. (1T36:2-T37:12); see Cicchetti v. Morris Cty. Sheriff's Office, 194 N.J. 563, 588 (2008).

In tacit admission to this point, and the legal and factual insufficiency of Bodnar's sexual harassment claim against Palumbo, she stipulated to dismissal of her sexual harassment claim against him at summary judgment. (3T72:9-73:6). As Bodnar's predicate sexual harassment claim against Palumbo was dismissed by stipulation, her sexual harassment claims against State Respondents, by extension, necessarily failed.

For these reasons, the trial court's order dismissing Bodnar's sexual harassment claim against State Respondents on reconsideration should be affirmed.

C. Bodnar's NJLAD Retaliation Claim was Both Legally and Factually Deficient.

Although the Court did not reach Bodnar's discrete retaliation claim, it was ripe for dismissal at summary judgment because State Respondents took no adverse employment action against Bodnar for the reasons stated above (namely, they were not her supervisors and had nothing to do with her transfer to the Camden office). (Pa332 at T32:9-19; Pa333 at T34:17-35:23; Pa571-Pa572 at T29:20-30:14; Pa685 at T121:14-17; Pa795-Pa796 at T41:12-42:8; Pa798 at T51:5-52:2; Da110-117; Da121-Da122; Da607). As to Bodnar's retaliatory harassment claim, she failed to demonstrate at summary judgment that any of the State Respondents subjected her to harassment because she filed an EEO and/or Superior Court Complaint. In fact, the deposition transcripts in this matter reveal that the individual State Respondents and Bodnar had no significant interaction while she was assigned to the BELO. Ibid. Moreover, after Bodnar filed her EEO complaint against Palumbo, CFS immediately transferred Bodnar to DCPP's Camden office and she made no contemporaneous complaints of a hostile work environment against any DCPP employees at the Camden office. (Pa366-Pa370; T169:23-T182:8; Da122).

For the foregoing reasons, the trial court's dismissal of Bodnar's NJLAD retaliation claim in its entirety on reconsideration should be affirmed.

D. Bodnar's NJLAD Aiding and Abetting Claim was Both Legally and Factually Deficient.

Individual liability is established under the NJLAD solely through the aiding and abetting provision and only if the subject individual engages in active and purposeful conduct violative of NJLAD. See N.J.S.A. 10:5-12(e); see also Herman v. Coastal Corp., 348 N.J. Super. 1, 27 (App. Div. 2002); Cicchetti v. Morris County Sheriff's Office, 194 N.J. 563, 594 (2008); Tarr v. Ciasulli, 181 N.J. 70, 84 (2004). Here, the Individual State Respondents were properly dismissed at summary judgment because Bodnar failed to establish that any of them engaged in active and purposeful conduct that constituted discrimination, harassment, and/or retaliation. (Da62-Da108). Consequently, the trial court's order dismissing the Individual State Respondents on reconsideration should be affirmed.

POINT III

THE TRIAL COURT'S ORDER GRANTING STATE RESPONDENTS' MOTION FOR RECONSIDERATION AS TO BODNAR'S NJLAD CLAIM SHOULD BE AFFIRMED (3T81:20-95:21).

The trial court's order granting State Respondents' motion for reconsideration should be affirmed because it correctly applied the law to the undisputed facts of this case upon reconsideration. Reconsideration of interlocutory orders is governed by R. 4:42-2. See Lombardi v. Masso, 207 N.J.

517, 534 (2011) ("[T]he power of a trial court to reconsider interlocutory orders is 'rooted in common law' and 'broadly codified in R. 4:42-2 [.]'" Ducey v. Ducey, 424 N.J. Super. 68, 76 (App. Div. 2012) (quoting Lombardi, 207 N.J. at 534) (edit in original). In 2021, this court, in Lawson v. Dewar, addressed the common misconception by both practitioners and the courts as to the appropriate standard for Motions for Reconsideration of Interlocutory Order. 468 N.J. Super. 128, 134 (App. Div. 2021). This court explained:

> Rule 4:42-2 declares that interlocutory orders "shall be subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of justice." A motion for reconsideration does not require a showing that the challenged order was "palpably incorrect," "irrational," or based on a misapprehension or overlooking of significant material presented on the earlier application. Until entry of final judgment, only "sound discretion" and the "interest of justice" guides the trial court, as Rule 4:42-2 expressly states.
>
> [Lawson v. Dewar, 468 N.J. Super. 128, 134, 256 A.3d 388, 392 (App. Div. 2021)]

The holding in Lawson is not novel. In applying R. 4:42-2, this court has consistently held that courts should exercise their power to reconsider interlocutory orders "for good cause shown and in the service of the ultimate goal of substantial justice." Lombardi, 207 N.J. at 536 (quoting Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250, 257 (App. Div. 1987), certif. denied, 110 N.J. 196 (1988)); Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); Ford v. Weisman, 188 N.J. Super. 614, 619 (App. Div. 1983)

(observing that "the trial court has complete power over its interlocutory orders and may revise them when it would be consonant with the interests of justice to do so").

Here, the trial court initially failed to properly apply the undisputed facts to the law in adjudicating State Respondents' motion for summary judgment as to Bodnar's claims. Specifically, the trial court failed to apply the correct legal standard for determining whether Bodnar was an employee of DCPP. (2T, at T83:20-T84:21). On reconsideration, the trial court corrected this mistake, applied the correct legal standard, and granted State Respondents' motion for summary judgment on Bodnar's claims. (3T88:5-90:25). Contrary to Bodnar's argument, the fact that the trial court initially denied State Respondents' Motion for Summary Judgment as to her claims is of no moment since the correct standard on their motion was the "interest of justice." See Ab47-50. Indeed, the trial court acknowledged this during oral argument on reconsideration when challenged on this point by Appellant's counsel, "[e]xcept that I may have made a mistake." (3T24:20-21, T29:17-18). Here, the "interest of justice" warranted reconsideration of the trial court's initial decision because it had made a mistake, and the subsequent granting of State Respondents' Motion for Summary Judgment and dismissal of Bodnar's NJLAD claims was proper for the reasons

provided in Points I and II above. Consequently, the trial court's decision granting State Respondents' Motion for Reconsideration should be affirmed.

CONCLUSION

For the foregoing reasons, the trial court's decisions granting State Respondents' Motion for Summary Judgment and their Motion for Reconsideration should be affirmed.

GREENBAUM, ROWE, SMITH & DAVIS, LLP
Attorneys for State Defendants/State Respondents

By:_____
JEMI G. LUCEY

Dated: May 10, 2024

JAKE STOUCH & KRISTINE BODNAR, Plaintiffs, v. DEPARTMENT OF CHILD PROTECTION AND PERMANENCY, CENTER FOR FAMILY SERVICES, IAN PALUMBO, GWEN WEBER, JUANIATA FARR, MARYANN FURPHY, TIFFANY MCILLHENNY, DEBORAH JOHNSON, THERESE BENYOLA, MARION MCLAURIN, ABC CORPORATIONS 1-5 (fictitious names describing presently unidentified business entities) and JOHN DOES 1-5(fictitious names describing presently unidentified individuals), Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A – 003601 - 22 On Appeal From: Superior Court of New Jersey Law Division – Burlington County Docket No. BUR – L – 000151 – 19 Sat Below: Hon. Sander D. Friedman, J.S.C

REPLY BRIEF OF PLAINTIFF/APPELLANT KRISTINE BODNAR

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On the Brief

TABLE OF CONTENTS

Page(s)

TABLE OF CITATIONS

Page(s)

Cases

PRELIMINARY STATEMENT

The Trial Court had it right the first time when it ruled an employer's uniliteral transfer of a victim of sexual harassment presented a **jury** question. The Trial Court correctly reasoned that the determination of (i) "why" Respondent CFS transferred Appellant (i.e., whether it was retaliatory or in good faith), and (ii) whether the transfer was effective remedial action designed to prevent discrimination in the workplace, is an issue that cannot be adjudicated at summary judgment. Muldrow v. City of St. Louis, Mo., 144 S. Ct. 967, 974 (2024) (holding transfer as a form of adverse employment action under Title VII discrimination claims when the transfer results in ***some harm*** to the terms and conditions of the employee's employment); Leahey v. Singer Sewing Co., 302 N.J. Super. 68, 79 (App. Div. 2005) ("[S]imply 'by pointing to evidence which calls into question the defendant's intent, the plaintiff raises an issue of material fact which, if genuine, is sufficient to preclude summary judgment.'" (internal citations omitted); Mancini v. Twp. of Teaneck, 349 N.J. Super. 527, 564 (App. Div. 2002), aff'd as modified, 179 N.J. 425 (2004) ("disadvantageous transfers or assignments, and tolerance of harassment by other employees" constitutes adverse employment action).

This case is not a close call. The record is replete with evidence for a jury to conclude that CFS blamed Appellant - the victim - and transferred her, not in effort to take corrective action, but in an effort to silence, to punish, and to protect a

contract with DCPP. The transfer was against Appellant's will. It was immediately after (in fact on same the day) she complained of sexual harassment. CFS admittedly never investigated Appellant's concerns before, during, or after she complained. Instead, Respondents accused Appellant of bringing the harassment upon herself. The harassment never stopped. There was no follow-up by CFS whatsoever despite multiple written follow-up complaints of retaliation and ongoing harassment, resulting in a constructive discharge. On these facts and this record, it was an error for the Trial Court to deprive Appellant of her day in court. Especially where the Trial Court initially denied summary judgment on Appellant's claims and correctly ruled (at summary judgment and on reconsideration) that the jury was to decide whether Respondents discriminated and retaliated against Appellant's co-plaintiff, Stouch, ***whose entire case was based upon his complaint that Appellant was sexually harassed.***

Furthermore, the Court's reconsideration ruling provides a new avenue for employers to abdicate their responsibility to investigate and remediate the workplace. Without making any distinction between any claim (hostile working environment, discrimination, or retaliation), the Trial Court held that, as a matter of law, a state agency and its contractor are immune from liability where the harasser and the victim – who are required to work together to perform all essential functions – are employed by different entities. Without citing to a single authority, the Trial

Court ruled that Appellant is without a remedy, and neither her employer nor the entity that employed the harasser (and Stouch) could be responsible. This proposition is not, and cannot be, the law in this state.

In short, Respondents' briefs, like the lower court's decision, hinge upon factual conclusions that should have been left for the jury. Zive v. Stanley Roberts, Inc., 182 N.J. 436, 449 (2005) ("[I]f the employer proffers a reason and the plaintiff can produce enough evidence to enable a reasonable fact finder to conclude the proffered reason is false, plaintiff has earned the right to present his or her case to the jury."). Remand for trial is warranted.

I. PROCEDURAL HISTORY AND STATEMENT OF FACTS

Appellant relies upon and incorporates the Statement of Facts and Procedural History as set forth in Appellant's Brief filed on December 13, 2023.

II. ARGUMENT

A. The Jury Must Decide Whether Plaintiff was Subjected to a Hostile Work Environment and Retaliation in Violation of the NJLAD. (Pa55, Pa230, Pa274-99, Pa338, Pa340-49, Pa372-74, Pa378, Pa379-80, Pa381-82, Pa431, Pa452, Pa734-35, Pa739, Pa753-54, Pa993-97, Pa1000, Pa1001-3)

It is undisputed that Palumbo subjected Appellant to sexual harassment in Respondents' workplace.[1] The only individual who contests this fact is Palumbo

[1] See Appellant's Brief § III(B) (citing Pa55, Pa230, Pa274-99, Pa338, Pa340-49, Pa372-74, Pa378, Pa379-80, Pa381-82, Pa431, Pa452, Pa734-35, Pa739, Pa753-54, Pa993-97, Pa1000, Pa1001-3).

himself despite the record explicitly proving otherwise. The only question that remains is whether CFS and DCPP promptly and properly remediated the sexual harassment and/or whether they subjected Appellant to retaliation. As the Trial Court initially ruled, those questions are for the Jury.

1. A Jury Should Determine If Respondents' Transfer of Appellant – Which Occurred on the Same Day She Made Her Complaint of Sexual Harassment – Constitutes Retaliation. (Pa227, Pa230, Pa234, Pa681, Pa324-417,Pa655-722, Pa991-92, Pa999, Pa1022-23)

It is undisputed that CFS transferred appellant because of her complaint of sexual harassment. (Pa230); (Pa681) 103:11-24, 118:1-120:12; (Pa230, Pa324-417) 98:17-104:25, 106-109:19, 233:3-234:13. CFS simply claims that transferring Appellant in response to her complaints of sexual harassment by Palumbo cannot constitute retaliation because it was their "only effective remedial measure" feasible. See CFS Opposition Brief § II(B)(1); 1T86:1-24. At worst, CFS's transfer decision is unequivocal retaliation that punished the victim. See Muldrow, 144 S. Ct. at 974; Leahey, 302 N.J. Super. at 79; Mancini, 349 N.J. Super. at 564. At best, and as Judge Friedman himself noted during the August 30, 2022, Oral Argument, whether Appellant's transfer constitutes effective remedial action and/or retaliation ***is a jury question***. See 1T97:4-12. CFS can certainly argue to the jury that transferring Appellant to a different location was a good faith mechanism to keep the harasser, Palumbo, away from her. However, determining the intent of the transfer is for ***the***

jury, not the trial judge on summary judgment.

Further, there is no doubt that Appellant's involuntary transfer was "disadvantageous" or resulted in "some harm" to her constituting adverse employment action. Specifically:

- In response to Appellant's report of sexual harassment, Respondent Johnson yelled at Appellant that the predicament was her fault for speaking with caseworkers in the office. Immediately after ***blaming*** Appellant – the victim – for the sexual harassment she endured, Respondent Johnson told her that ***she*** would be transferred to the Camden location, giving rise to an inference of retaliation. (Pa234).
- The Camden location was well known as the worst DCPP office in the area due to its abundance of difficult cases. Appellant was "hysterical" when Respondents notified her of the transfer to the Camden location because of Camden's bad reputation regarding work conditions. Appellant told Respondents she felt that this transfer was punishment. (Pa 324) 102:17-104:10; 106:16-24; 234:6-10.
- Upon her start at the Camden location, Appellant's new supervisor asked her if she intended to proceed with a lawsuit. (Pa227); (Pa324) 98:17-104:25, 106-109:19, 233:3-234:13; (Pa 655) 105:17-113:14).
- Following Appellant's retaliatory transfer, Appellant was ostracized by her coworkers, who knew she was transferred due to the sexual harassment. The same coworkers spread false, defamatory rumors that Appellant Bodnar was sleeping with someone in the office. (Pa324-417) 89:7-96:24, 223:15-225:25.
- Appellant made another complaint of discrimination and retaliation to Respondent McLaurin after Appellant had learned that Respondent Johnson called Appellant "too immature" for her position and remarking that she was like a "drunken prom date." (Pa999) (Pa324-417) 98:17-109:19, 233:3-234:13; (Pa655-722) 105:17-113:14
- Respondents once again refused to investigate Appellant's complaints, which was pure retaliation. Id.
- Even after Appellant was transferred, she continued to be subjected to harassment and retaliation by Palumbo as he stalked Appellant outside of work before and after her termination. (Pa230, Pa374-77) 201:11-211:25; (Pa1022-23 – recordings, Pa991-92).

Continued belittling, public disparagement, and breach of confidentiality of her complaints of sexual harassment at the location where she was transferred undoubtedly constitutes "some harm" that supports Appellant's claim of retaliation.[2] And contrary to Respondents' claim, the record establishes that Appellant was continually subjected to harassment by her coworkers, supervisors, and Palumbo himself constituting continuation of the hostile work environment and retaliation.[3]

2. Respondents Subjected Appellant to Retaliation By Reprimanding Her for Her Attire. (Pa230, Pa374-77, Pa1022-23, Pa991-92)

The Trial Court's failure to analyze the entire record was also an error. R. 4:46-2(c) (summary judgment requires review of the complete record, including "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits" to determine whether a genuine issue of fact exists). For example, Respondents' claim that they did not subject Appellant to retaliation by way of reprimand about her attire after she reported Palumbo's sexual harassment in November 2018. CFS claims that Appellant was given a counseling notice on November 8, 2018, due to DCPP supervisors' complaints about her performance

[2] See DCPP Opposition Brief § II(B) (citing Bouton v. BMW of North America, 29 F. 3d. 103 (3rd Cir. 1994)). Bouton which notably indicates that effective remedial measures ***prevent further harassment*** to cure the hostile work environment. Id. at 110. Bouton does not suggest that the harassment need to be sexual in nature. Id. In any event, the Trial Court did not make any distinction between any claim (hostile working environment, discrimination, or retaliation).

[3] See also, Appellant's Brief § VI(B)(2), for a more complete picture of the retaliation Appellant experienced.

and attire. (Da7). CFS also points to a certification from Respondent Benyola which purports that Appellant was counseled about this notice on or about November 23, 2018, ***three days*** after the EEO opened an investigation into Appellant and Stouch's complaints. (Da4). DCPP similarly argues that Respondents Benyola and McLaurin counseled Appellant about her attire on November 27, 2018, as a result of complaints by DCPP supervisors that were made prior to Appellant's EEO complaint.

What Respondents conveniently fail to note is that the counseling notice issued on November 8, 2018, ***does not make any mention about Appellant's alleged "inappropriate attire."*** (Da7). The claim that the reprimand about Appellant's attire was not raised in retaliation for her complaints of sexual harassment, but instead, was preexisting and had not yet been addressed, is nonsensical. As the very document that Respondents rely upon as the basis for this reprimand makes no mention of Appellant's attire, there remains a material issue of fact as to whether the reprimand was retaliation for her complaints of sexual harassment. A jury could recognize the victim-blaming mentality in reprimanding an employee about "inappropriate attire" – without a documented basis for such complaints – mere ***days*** after the employee made complaints of sexual harassment.

3. Constructive Discharge is For the Jury. (Pa324, Pa873)

While not dispositive of all of Appellant's claims (Appellant was already subject to adverse employment action), CFS argues that Appellant's constructive

discharge claim fails because Dr. Sireci's testimony makes clear that he only advised Appellant not to return to work because he believed she was still working in the Burlington DCPP office. This argument fails for several reasons.

First, CFS's argument presumes Appellant had been permanently transferred and would never again encounter Palumbo. Remarkably, as of August 2019, CFS still had not investigated, nor had they taken any other remedial action. (Pa 324) 82:9-85:22, 86:23-88:1, 121:1-125:14, 139:1-145:13. CFS did not even follow up with DCPP regarding its investigation and corrective action for Palumbo, who was allowed to continue working at the Burlington location without discipline or change to his work conditions. Id.; (Pa723) 80:14-81:18.

Second, CFS's position is an oversimplification of Dr. Sireci's testimony. Dr. Sireci specifically stated that he did not actually recall whether he was referring to the physical location of where Palumbo worked at the time he wrote the August 30, 2019 note. (Pa873) 41:4-19. Dr. Sireci concluded based upon information provided by Appellant at the time, and the knowledge that she was experiencing a hostile work environment, that he felt there was enough information to advise her not to return to work. Id. 38:19-24. CFS's argument, at best, presents an issue for the jury.

Third, the record clearly establishes that there is at the very least issues of material fact regarding Respondents' unlawful sexual harassment, hostile work

environment, and retaliation which warrants reversal of the lower court's decision.[4] This is particularly so in light of the summary judgment standard, Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995), the requirement to construe the NJLAD liberally, Nini v. Mercer County Community College, 202 N.J. 98, 109 (2010), the inherent fact-intensive nature of employment cases, Marzano v. Computer Science Corp., Inc., 91 F.3d 497, 509 (3d Cir. 1996) (summary judgment is "rare" in employment cases), and that CFS failed to investigate or take effective remedial action to cure the discriminatory working environment, see, Velez v. City of Jersey City, 358 N.J. Super. 224, 237-38 (App. Div. 2003) (reversing summary judgment where "no investigation was conducted and no effort was made to remediate past conduct or prevent future similar conduct.")

B. Respondents are not Immune: Both are Required to Maintain a Workplace Free from Harassment, Discrimination, and Retaliation, and a Jury Could Find that they Breached this Duty.

Upon reconsideration, the trial court wrongly adopted Respondents' proffered rationales for dismissing this case – that ***neither*** Respondents are liable under the NJLAD because Appellant and Palumbo were not technically paid by the same

[4] Notably, the Trial Court did not make a distinction between ***any*** of Appellant's claims in his decision, nor did he make the determination that there were ***no issues of material fact*** warranting summary judgement. Instead, the Court broadly determined that CFS – Appellant's ***undisputed employer*** – was "not an appropriate Defendant" in this litigation. 3T. 91:15-20. The Court further broadly concluded that Appellant does not have a LAD claim against Palumbo or DCPP because there was not a close enough nexus between DCPP, Palumbo, and Appellant (despite Appellant working in DCPP's office with Palumbo throughout the entirety of her employment) 3T. 92:1-11.

organization. This proffered position is not supported by the record, is contrary to New Jersey law, and presumes numerous critical, disputed, material facts could be, or should be, adjudicated in Respondents' favor at the summary judgment stage.

1. Respondents Are Joint Employers. (Pa669, Pa796-98, Pa1004-5, Pa1006-1021)

The Trial Court held that both CFS and DCCP are not responsible for sexual harassment because the harassment involves employees of each respective entity. 3T. 91:15-92:11 (finding that CFS is "not an appropriate defendant," and Appellant did not have a "close enough nexus" with DCPP to sustain a LAD claim). Such a holding contradicts the basic tenants of the NJLAD. Woods-Pirozzi v. Nabisco Foods, 290 N.J. Super. 252, 269 (App. Div. 1996) ("An employer that knows or should know its employee is being harassed in the workplace, regardless of by whom, should take appropriate action"). For this reason, alone, reversal is warranted.

Further, while the Trial Court did not fully address the subject in its analysis, on this appeal, DCPP argues that Appellant's claim was properly dismissed because Appellant failed to meet the Pukowsky factors required for Appellant to establish a joint employer relationship. Pukowsky v. Caruso, 312 N.J. Super. 171, 180 (App. Div. 1998). However, CFS and DCPP cannot use their contractual relationship as a mechanism to shield themselves from potential liability, and even considering the Pukowsky test, it is clear that CFS and DCPP are joint employers.

First, DCPP disclaimed that it had the ability to control the manner of

Appellant's performance and supervise Appellant's work; however, the record establishes that DCPP supervisors were evaluating Appellant's performance merely two weeks prior to Appellant's complaint of sexual harassment. See (Da7). Moreover, this point directly supports the proposition that DCPP supervisors had some input into what skills Appellant could use when accomplishing her job duties if they were, by Respondents' own admission, evaluating Appellant's performance.[5] While Appellant was not paid by DCPP, it is clear from the information obtained during discovery that DCPP controlled Appellant's day to day and she was required to work in the DCPP offices, even after her retaliatory transfer. Finally, contrary to DCPP's proposition that the CFS work was not an integral part of their business, Appellant regularly worked in conjunction with DCPP employees to provide counseling services and treatment to DCPP clients. (Pa796-98) 42:3-52:12. Therefore, the facts weigh in favor of Appellant's proposition that DCPP and CFS were joint employers who ***both*** maintained a responsibility to facilitate a work environment free from discrimination and harassment. Regardless, New Jersey courts have repeatedly emphasized that whether two entities are joint employers is inherently a factual question that ***precludes*** summary judgment. See CWA v.

[5] See DCPP Opposition Brief, p. 10 (In response to Appellant's proposition that the reprimand in response to the counseling note (Da7) was retaliatory, DCPP explains "After DCPP started its investigation, Bodnar met with CFS Defendants Benyola and McLaurin on November 27, 2018, **to discuss various issues with her performance**. None of the performance issues discussed during the meeting originated from complaints of DCPP personnel ***after*** Bodnar filed her EEO complaint.")

Retarded Citizens, 250 N.J. Super. 403, 416 (Ch. Div. 1991).

Second, CFS repeatedly argues that they had "no control" over DCPP employees, and therefore, they could not do anything to investigate or remediate the situation beyond transferring Appellant to a different DCPP office. This contention is misleading and stands in direct contradiction to CFS's and DCPP's own policies and contract. Indeed, Respondent McLaurin admitted that CFS, who receives funding from the state, must coordinate an investigation with DCPP if there was if there was sexual harassment committed by a DCPP employee against a CFS employee. (Pa669) 54:1-57:10, 59:3-20. Furthermore, Respondents' contract indicates that CFS's policies apply to non-employees who have contact with CFS employees (such as Palumbo). (Pa1004-5, Pa1006-1021). CFS cannot place their employees in DCPP offices and force them to intertwine their jobs with DCPP employees, and simply throw their hands up when a DCPP employee violates CFS's sexual harassment policy. CFS and DCPP contracted to intertwine their businesses, and therefore – as expressly admitted by Respondent McLaurin – both maintain a responsibility to ensure that the workplace is free from sexual harassment, discrimination, and retaliation for ***all employees at the facility*** by conducting prompt investigations and by taking appropriate remedial action. This is the law. [6]

[6] See Appellant's Brief § VI (C).

2. Respondents Did Not Take Prompt and Appropriate Remedial Action. (Pa564, Pa655, Pa723, Pa719-729, Pa895)

CFS's argument regarding "control" of the DCPP employees is a red herring. Essentially, despite the agencies working together to carry out family and support service, each respective entity points the finger to the other for the responsibility to take prompt and appropriate remedial action.[7] CFS completely ignores their own policies and procedures in their opposition brief, and their abject failure to follow such procedures after Appellant complained about sexual harassment.

For example, although Respondent McLaurin was presented with allegations of sexual harassment by Appellant that he required him to investigate, he admittedly did not do so because the lawsuit was filed (even though the lawsuit was not filed until late January 2019, nearly two months later). (Pa655) 68:12-72:9, 75:1-19 82:9-85:22, 86:23-88:1, 121:1-125:14. CFS argues that ***they*** took appropriate action because ***DCPP*** opened an EEO investigation.[8] DCPP argues ***it*** took appropriate action because ***CFS*** transferred Appellant.[9] Respondents point the finger at one another to take on one part of their ***shared*** responsibility to investigate ***and*** remediate the situation. Respondents cannot have it both ways – they cannot claim to be

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[7] CFS Opposition Brief § II(B); DCPP Opposition Brief § I.

[8] CFS Opposition Brief § II(B)(1). Notably, Respondent McLaurin admitted he had no idea DCPP was conducting an investigation, nor did he receive the results of such investigation. (Pa655) 139:1-145:13.

[9] DCPP Opposition Brief § II(B) (arguing that DCPP took "prompt remedial action" after Appellant filed her EEO complaint by investigating and disciplining Palumbo ***six months*** after Appellant was transferred.)

separate entities that share no responsibility over the other agency's employees, but in the same breath rely upon the other agency to investigate and/or remediate their own employees' complaints of sexual harassment. Not only does this proposition directly contradict Respondents' respective policies, but it also contradicts Respondents' theories to avoid liability.

At a minimum, CFS's reliance on DCPP's investigation – ***which took six months to complete and failed to take proper corrective action***[10] – was a breach of a duty CFS owed to Appellant as their employee to ensure that CFS employees were provided a workplace free from harassment, discrimination, and retaliation. Woods-Pirozzi v. Nabisco Foods, 290 N.J. Super. 252, 269 (App. Div. 1996) ("An employer that knows or should know its employee is being harassed in the workplace, regardless of by whom, should take appropriate action"). Moreover, Respondents' proposition that the investigation was "prompt" and "remedial" is entirely illogical. DCPP's investigation took ***six months*** to complete, and despite verifying Appellant's complaints, DCPP's only remedial action was to suspend Palumbo for three days. (Pa895) DCF_Stouch000719-729; (Pa564) 125:24-128:4. Notably, Palumbo was shortly thereafter promoted. (Pa723) 43:16-25. Furthermore, CFS

[10] (Pa895) DCF_Stouch000334-41, 719-729; (Pa564) 125:24-128:4 (Respondent Furphy explaining that Palumbo was allowed to appeal his four day suspension for egregiously harassing Appellant, and successfully reduced his suspension to only three days. Palumbo was thereafter granted a voluntary transfer and promotion).

repeatedly claims that due to the lack of control, transferring Appellant was their only option. However, Respondent CFS did not even investigate to properly determine the appropriate remedial action for the situation. Instead, CFS ***immediately*** transferred Appellant to a different location, where she was subjected to additional hostilities and retaliation, and wiped their hands clean of the situation. Respondent CFS did nothing else.[11]

At the very least, the above evidence clearly calls into question Respondents' intent and the efficacy of the investigation process, thus raising an issue of material fact which precludes summary judgment. See Zive, 182 N.J. at 449. For this reason, too, the Trial Court's decision was an error, and this matter should be remanded adjudication by the jury.

III. CONCLUSION

Based upon the foregoing, it is respectfully requested that this Honorable Court reverse the trial court's Order granting Respondent Motions for Summary Judgment and remand this matter for trial.

Respectfully submitted,
/s/ *Matthew A. Luber, Esq.*
Matthew A. Luber, Esq.
Attorney for Plaintiff/Appellant

Dated: June 28, 2024

[11] (Pa655) 68:12-72:9, 75:1-19 (Respondent McLaurin, CFS's HR director, explaining he never spoke to Appellant after her initial complaint, nor did he ask for the text messages), 139:1-145:13 (Respondent McLaurin admitting he never knew the state conducted an investigation and substantiated Appellant's complaints).