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| **DOMINICK D. CARPINELLI, STEWART WEINSTEIN, JOSEPH BERTINI, NICHOLAS NASSAN, WILLIAM SHERSHIN, EDWARD DAILEY AND ELI Y. BRELLO, JR.**<br>**Plaintiffs,**<br><br>**vs.**<br><br>**L3 COMMUNICATIONS CORPORATION, CHRISTOPHER CLAYTON, JOHN DOES 1-10, AND XYZ CORP. 1-10,**<br>**Defendants.** | SUPERIOR COURT OF NEW JERSEY<br>LAW DIVISION: BERGEN COUNTY<br>DOCKET NO.: BER-L-9878-00<br><br>CIVIL ACTION<br><br>Date: April 12, 2001<br>Time: 9:00 a.m.<br>Judge : |

**PLAINTIFF'S BRIEF IN OPPOSITION**
**TO DEFENDANTS' MOTION TO DISMISS AND PLAINTIFF'S CROSS MOTION FOR ATTORNEYS' FEES AND COSTS**

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## I. PRELIMINARY STATEMENT

Defendant, L-3 Communications Corporation's ("L-3" or "defendant") motion to dismiss is fatally defective for many reasons enumerated herein. Because L-3's motion is so fatally defective, plaintiffs, Dominick D. Carpinelli ("Carpinelli"), Stewart Weinstein ("Weinstein"), Joseph Bertini ("Bertini"), Nicholas Nassan ("Nassan"), William Shershin ("Shershin"), Edward Dailey ("Dailey") and Eli Y. Brello, Jr. ("Brello") (hereinafter collectively the "plaintiffs") put L-3 on R. 1:4-8 notice of the sanctions request contained herein by way of correspondence. Exhibit "1". Since February 28, 2001, the date this correspondence was transmitted, plaintiff has received no response to said correspondence.

Plaintiffs brought suit in their complaint to allege causes of action for age discrimination; age discrimination disparate treatment; age discrimination disparate impact; retaliation; and negligent hiring, supervision, retention, and training; a violation of the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 et seq. ("CEPA"); breach of contract; breach of implied contract; breach of the implied covenant of good faith and fair dealing; and interference with business relations.

Plaintiffs allege that defendants treated plaintiffs illegally due to plaintiffs' advanced age. Hyderally Cert. Ex. 1 (Complaint ¶¶ 29, 31, 32, 34, 35, 36, 41-51). When plaintiffs complained about such treatment, they were terminated in retaliation of their complaints of age discrimination and unfair treatment. Hyderally Cert. Ex. 1 (Complaint ¶¶ 33, 37,38, 40) Further, these plaintiffs had contractual agreements that they entered into when Honeywell was acquired by L-3. These agreements were violated when L-3 terminated them without payment of severance Hyderally Cert. Ex. 1 (Complaint ¶ 40). Based upon plaintiffs' complaints, L-3 stated that an

investigation would occur. L-3 subsequently violated their common law duties of good faith and fair dealing towards plaintiffs by terminating plaintiffs without conducting such an investigation. Hyderally Cert. Ex. 1 (Complaint ¶ 39). Thus, plaintiffs' Complaint clearly sets forth facts that separately support each of the causes of action plaintiff alleges.

L-3 states that, "[p]ursuant to CEPA, the initiation of a CEPA action waives all other actions and claims arising from the same allegations and remedies. As such, counts one through five and nine and ten, must be dismissed as they assert claims which arise from the same allegations as the plaintiff's CEPA claim." Hyderally Cert. Ex. 2 (L-3's Motion at pg. (unnumbered) *sic* 1). Because defendants' argument is so clearly devoid of merit based on a rudimentary analysis of case law in this area of the law and so lacking merit based on the factual allegations of the complaint, defendants' motion to dismiss must be denied and plaintiffs' cross motion for sanctions must be granted.

## II. STATEMENT OF FACTS

Plaintiffs were previously long term employees of Honeywell' Space and Navigation Division that was divested to L-3 on or about October-December, 1999 as part of a negotiated agreement. Hyderally Cert. Ex. 1 (Complaint ¶¶ 12-18). Throughout convoluted negotiations, L-3 displayed an age-ist animus towards older employees of Honeywell. However, these employees were hired by L-3 on January 30, 2000 as part of a negotiated agreement. Hyderally Cert. Ex. 1 (Complaint ¶¶ 19-27). L-3's age-ist animus towards the plaintiffs continued as L-3 took actions to include but not be limited to: statements that plaintiffs were getting "windfalls" and "double dipping" because

they received Honeywell pensions and L-3 salaries. Hyderally Cert. Ex.1 (Complaint ¶ 29); pre-selecting plaintiffs for departments and positions that would be terminated Hyderally Cert. Ex. 1 (Complaint ¶ 32); filling its management positions with younger employees rather than older more senior staff members Hyderally Cert. Ex. 1 (Complaint ¶34); excluding older employees from meetings, canceling medical insurance coverage, missing paydays, refusing to pay bonuses, making improper payroll deductions, being non-responsive to requests for information and/or action, refusing to pay the costs for older employees and their spouses to attend meetings while paying such costs for younger employees, failing to acknowledge the presence of older employees at meetings, treating older employees rudely and inappropriately, and taking actions to make older employees feel uncomfortable Hyderally Cert. Ex. 1 (Complaint ¶ 35); making age-ist remarks to include but not be limited to words to the effect of: "We are tired of seeing ambulances pull up to the front door"; "If it were up to me, I would get rid of all you old guys"; "Critical positions will not be filled by people who are eligible for retirement"; "Programs will improve after they got rid of the retirees"; "Old man"; "We are getting younger better people who are not eligible for immediate retirement to fill positions"; and "Aren't you guys going to be gone soon anyway."Hyderally Cert. Ex. 1 (Complaint ¶ 36).

On or about May 31, 2000, L-3 chose to lay off plaintiffs and a disparate percentage of older employees. Hyderally Cert. Ex. 1 (Complaint ¶ 41). Many of the Plaintiffs were among the oldest in their departments and were the only ones in their respective departments laid off. Hyderally Cert. Ex. 1 (Complaint ¶ 42). Many of the Plaintiffs' job duties were performed by younger employees subsequent to their lay-off. Hyderally Cert. Ex. 1 (Complaint ¶ 43). Upon information and belief, although only 15% of the total staff was laid off in May, 2000, 25% of the

retirement eligible group from Honeywell were laid off. Additionally, 80% of the total employees laid off were over 40 years of age. Hyderally Cert. Ex.1 (Complaint ¶ 44). Plaintiffs ages varied from 57 to 65. Hyderally Cert. Ex. 1 (Complaint ¶¶ 45-51). The above allegedly illegal actions of L-3, gives rise to plaintiff's allegations that L-3 discriminated against them based on their age in contravention of the New Jersey Law Against Discrimination, N.J.S.A. §§ 10:5-1, *et seq.* ("LAD").

Additionally, plaintiffs complained about such actions and were retaliated against for making such complaints by being terminated. Hyderally Cert. Ex. 1 (Complaint ¶ 37) Further, in May 2000, Plaintiffs obtained counsel to send L3 correspondence that they believed they were the target of age discriminatory actions. Hyderally Cert. Ex. 1 (Complaint ¶ 38). Plaintiffs were discharged soon thereafter. Hyderally Cert. Ex 1 (Complaint ¶ 1). Such actions clearly support a cause of action pursuant to CEPA.

Many high level managers engaged in illegal actions to include treating plaintiffs in a disparate manner due to their age and making derogotory comments aimed at plaintiffs because of their advanced age and/or making derogatory comments about older employees at the workplace. Hyderally Cert. Ex. 1 (Complaint ¶¶ 35-38). Although plaintiffs complained about such actions and comments, nothing was done in response to their complaints. Hyderally Cert. Ex. 1 (Complaint ¶ 39) Thus, the Complaint clearly sets forth a separate cause of action for negligent hiring, retention, training, and supervision.

Subsequently, Defendants stated that an investigation would occur. However, no such investigation occurred to the knowledge of Plaintiffs. Hyderally Cert. Ex. 1 (Complaint ¶ 39). On or about May 31, 2000, L3 terminated the Plaintiffs without the payment of severance. Hyderally

Cert. Ex. 1 (Complaint ¶ 40). Such actions *inter alia* clearly support a common law cause of action under a duty of good faith and fair dealing and a tortious interference with contractual relations or prospective economic advantage.[1]

Plaintiffs had contractual agreements when they began working for L-3. Plaintiff's Cert. at ¶1. These agreements were entered into because plaintiffs believed that they would be entitled to work for L-3 for a lengthy time period. Plaintiff's Cert. at ¶2. Thus, L-3 breached its contractual obligations to plaintiffs when it illegally terminated plaintiffs. Thus, plaintiffs clearly state a cause of action for implied breach of contract and or breach of contract.

## III. ARGUMENT

### A. LEGAL STANDARD FOR MOTION TO DISMISS

[1]Although plaintiffs termed this cause of action as tortious interference with business relations, defendant is clearly on notice that plaintiff has plead a cause of action for tortious interference with contractual relations or prospective economic advantage as noted in defendant's motion. (Motion at IV,E).

A motion to dismiss must be "denied if the evidence, together with any legitimate inferences to be drawn therefrom, could sustain a judgment in the petitioner's favor. Consequently, it is clear that at this point of the proceeding all logical inferences must be given to the petitioner, for benefit of any doubt must be resolved in petitioner's favor." B.M. v. Union County Regional High School, 95 N.J.A.R. 2nd (EDA) 149, *5 (OAL Decision 1995). Furthermore, the motion to dismiss "is limited to examining the legal sufficiency of the facts alleged from the face of the complaint" and plaintiff is entitled to every reasonable inference of fact in "a generous and hospitable approach" to the plaintiff. " Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989) (citation omitted). Since this is a preliminary stage of the litigation, the court should not concern itself with the ability of plaintiff to prove any allegation contained in the complaint but rather assume that all such allegations are true. Somers Const. Co. v. Board of Educ., 198 F. Supp. 732, 734 (D.N.J. 1961). Thus, plaintiff is entitled to every reasonable inference of fact. Independent Dairy Workers Union v. Milk Drivers Local 680, 23 N.J. 85, 89 (1956). As noted in Pressler, *Current N.J. Court Rules* comment 2 on *R.* 4:6-2 (1995), "Every reasonable inference is therefore accorded the plaintiff and the motion granted only in rare instances and ordinarily without prejudice." As such motions are usually brought at the earliest stages of litigation, they should be granted in 'only the rarest instances'" Lieberman v. Port Authority, 132 N.J. 76, 79, 622 A.2d 1295 (1993), cautioning: "(*Quoting* Printing Mart-Morristown v. Sharp Electronics, *supra*, 116 N.J. at 772, 563 A.2d 31).[2] Based upon such a standard, defendant's motion to dismiss must fail.

**B. MOTION TO DISMISS DEFECTIVE AS IT IS NOT IN COMPLIANCE WITH R. 4.62**

[2]This case making specific reference to R. 4:6-2(e) type motions. Because defendants do not allude to a specific rule in support of their motion, it is difficult to discern the specific grounds for defendants' motion.

Rule 4.62 clearly states that a motion to dismiss must be made *before* pleading. Defendants' motion to dismiss was filed *after* defendants filed their answer.[3] The only issues that may be raised within 90 days after service of the answer pertain to jurisdictional issues or sufficiency of process. R.4:6-3. Defendants' motion does not fit into such categories; accordingly, the motion is defective and must be denied. R. 4:6-3.

## C. DEFENDANTS ARE ON R. 1:4-8 NOTICE THAT THEIR MOTION TO DISMISS IS FRIVOLOUS

On March 1, 2001, plaintiff sent correspondence to defendants' counsel requesting that they withdraw all or certain parts of their motion as the motion was clearly frivolous and violated R. 1:4-8. Hyderally Cert. Ex. 3 (March 1, 2001 correspondence). Since that date, plaintiff has received no response from defendants and defendants have not withdrawn any part of their motion let alone the motion in its entirety. Thus, plaintiffs respectfully request attorneys fees and costs in having to respond to defendants' motion to dismiss.

## D. CEPA AND LAD ARE SEPARATE CLAIMS THAT ARE OFTEN FOUND IN ONE COMPLAINT AND DO NOT PREEMPT OR OTHERWISE WAIVE ONE ANOTHER

### 1. Law Against Discrimination

In 1945, when the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 *et seq.* ("LAD") was first enacted, the New Jersey Supreme Court held that it was a statute of the highest

[3] In fact, plaintiffs gave their consent to defendants filing a responsive pleading out of time. Defendants specifically agreed to file a responsive pleading if plaintiff consented to allow them to file said pleading out of time. Subsequently defendants filed an Answer.

order whose "purpose is 'nothing less than the eradication of the cancer of discrimination.'" Fuchilla v. Layman, 109 N.J. 319, 334,(*quoting* Jackson v. Concord Co., 54 N.J. 113, 124 (1969), *cert.denied sub nom.* University of Medicine & Dentistry of N.J. v. Fuchilla, 488 U.S. 826, 109 S.Ct. 75, 102 L.Ed.2d 51 (1988). The statute was viewed as the protector of the very essence of seeking employment which was "recognized as and declared to be a civil right." N.J.S.A. 10:5-4. In the monumental case of Lehmann v. Toys R US, Inc., the New Jersey Supreme Court held that "the LAD was enacted to protect the fundamental principle of our society of a discrimination-free workplace as well as the protection of the civil rights of individual aggrieved employees" such as the plaintiffs. Lehmann v. Toys R Us, Inc. , 132 N.J. 587 (1993) *citing* Fuchilla, *supra*, 109 N.J. at 335. In fact, the Supreme Court of this State has repeatedly ruled that the NJLAD is remedial social legislation that "is deserving of a liberal construction." Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 590 (1988).

Further, in interpreting the application of discrimination statutes (such as the LAD) in New Jersey, the state courts have utilized "federal law as a key source of interpretive authority," to determine the substantive and procedural standards that control such claims. Williams v. Pemberton Township Schools, 323 N.J. Super. 490, 498 (App. Div. 1999) Thus, New Jersey courts have looked to McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), to begin the analysis of discrimination claims and making appropriate adjustments due to the underpinning facts. In this vein of looking to federal law, New Jersey courts have time and again looked to the standard set forth by the United States Supreme Court in establishing the elements of a prima facie case of unlawful discrimination under the LAD. Grigoletti v. Ortho Pharmaceutical Corp., 118 NJ 89, 97, 107-108 (1990).

In 1973, the United States Supreme Court held that the standard to establish a prima facie case for disparate treatment unlawful discrimination was that the plaintiff must demonstrate by a preponderance of the evidence that he or she (1) belongs to a protected class, (2) applied and was qualified for a position for which the employer was seeking applicants, (3) was rejected despite adequate qualifications, and (4) after rejection the position remained open and the employer continued to seek applicants for persons of plaintiff's qualifications.[4] Grigoletti, *infra, citing* McDonnell Douglas, *supra*.

The necessity of having to prove this fourth prong has been the source of a great deal of litigation and legal interpretation. However, the courts have held that in certain factual situations, such as in the facts *sub judice*, this fourth prong is not required. *See* Pepe v. Rival Co., 85 F. Supp. 2d 349, 365 (D.NJ 1999)(In an age discrimination case, if plaintiff was not replaced, he need only show that a younger employee was retained or treated more favorably); Williams v. Pemberton Township Schools, *infra* at 502-503 (plaintiff may satisfy the fourth prong by showing that the adverse employment action took places under circumstances that give rise to an inference of unlawful discrimination other than that the plaintiff was replaced by a younger employee); Maher v. New Jersey Transit Rail Operations, Inc., 125 N.J. 455, 480-81 (1991) (plaintiff has only to show that employer sought someone to perform the same work after plaintiff was removed to satisfy fourth prong); Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 597 (1988) (plaintiff satisfies fourth prong by showing that employer continued to seek replacements with same or lesser qualifications); Erickson v. Marsh & McLennan Co., 117 N.J. 539, 550-51, 553-54 (1990) (*adopting* 4-part test of Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979) (employer still sought replacement with same skills thus demonstrating a continued need for the services and skills of plaintiff)); Lloyd v. Stone Harbor , 179 N.J. Super. 496, 520-21 (Ch. Div. 1981); Oare v. Midlantic National Bank/Merchants, 54 FEP at 1532-33.

[4] Including this fourth prong in no way prejudices or otherwise affects plaintiffs' rights to later argue the inapplicability of the fourth prong to the facts *sub judice*.

Disparate impact claims are generally proven by showing that the facially neutral employment practice has an undue or harsh impact on older employees that cannot be justified by business necessity. "In such cases, proof of discriminatory motive... is not required." Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 81-82 (1978) (*quoting* Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977) (citations omitted).

Under a general age discrimination cause of action, plaintiff must simply prove that he is a member of the protected class, he was qualified for the job or was performing the job at a level that met the employer's legitimate expectations, and adverse action was taken against him.

**2. CEPA claim.**

It is beyond clear that the elements that give rise to a CEPA claim are different from the elements that give rise to a LAD claim. Plaintiffs may maintain their CEPA argument because they objected to and disclosed an activity which plaintiffs reasonably believed violated the law or public policy. Higgins v. Pascack Valley Hospital, 307 N.J. Super. 277, 296-300 (App.Div.) *cert. granted* 156 N.J. 405 (1998); Abbamont v. Piscataway Twp. Bd. of Educ., 138 N.J. 405, 424 (1994); Mayer, "N.J.'s Whistleblower Act," 119 N.J.L.J. 353 (1987). To state a case under CEPA, plaintiffs must merely allege that they were engaged in an activity protected by CEPA, they engaged in a whistle blowing activity protected under CEPA, they were subjected to an adverse employment decision, and that there was a causal connection between the two. *See* Kolb v. Burns, 320 N.J. Super. 467, 476-479 (App. Div. 1999); Blackburn v. United Parcel Service, Inc., 179 F.3d 81, 92 (3d Cir. 1999) (citations omitted); Carlino v. Gloucestor City High School, 57 F. Supp. 2d 1, 35 (D. N.J. 1999); Bowles v. City of Camden, 993 F. Supp. 255, 262 (D. N.J. 1998). Under CEPA, plaintiffs must thus only reasonably believe that L-3 was engaging in age discrimination. There is no requirement to prove the elements of a prima facie age discrimination case. *See* Mehlman v. Mobil Oil Corp., 153 N.J. 163, 193 (1998) (plaintiff must have objectively reasonable belief, specific knowledge of the precise source of public policy is not required); Regan v. City of

New Brunswick. 305 N.J. Super. 342, 355 (App. Div. 1997)(plaintiff need not know the "precise contours and components of the public policy"); Blackburn v. United Parcel Service, Inc., *infra* (plaintiff must have only reasonable belief that illegal activity was occurring or imminent); Fineman v. New Jersey Dep't of Human Servs., 272 N.J. Super. 606, 610-611 & n.2 (App. Div.), *cert. den'd* 138 N.J. 267 (1994) (plaintiff's belief must be objectively reasonable); Abbamont v. Piscataway Twp. Bd. of Educ., *infra* at 423-424 (plaintiff must have "reasonable, objective" belief).

**3. Defendant's argument is frivolous as the elements necessary to prove a CEPA claim are different from the elements necessary to prove a LAD claim.**

As is readily apparent from the analysis above, no courts require that plaintiff argue retaliation to prove an employment discrimination cause of action. Further, defendants do not cite to one case that states that a CEPA claim preempts a LAD claim. Defendants cannot cite to such a case because no such case exists. No such case exists because the argument is nonsensical.

Defendants cite to Young v. Shering Corp., 141 N.J. 16 (1995), as the paramount case to support their argument. However, Young, *supra*, clearly states that CEPA waives only retaliation claims found generally in public policy. The Court found that a narrow interpretation of CEPA's waiver clause was "consistent with the Legislature's inferred intent, and consistent with the expressed remedial purpose of the entire CEPA statute, and ... that the waiver provision **applies only to those causes of action that require a finding of retaliatory conduct** that is actionable under CEPA. Young v. Shering Corp., *infra* at 29(emphasis added). The Court then specifically found that a claim under the Equal Pay Act (EPA), 29 U.S.C.A. § 206, and the New Jersey Law Against Discrimination (NJLAD), N.J.S.A. 10:5-1 to -42, were **not waived** by

alleging a violation of CEPA because retaliatory discharge was not an element of proof required to support those claims. Young v. Shering Corp., *infra* at 30 (emphasis added) (*citing* Casper v. Paine Webber Group, Inc., 787 F.Supp. 1480, 1509-1510 (D.N.J.1992); Flaherty v. The Enclave, 255 N.J.Super. 407, 413-14, 605 A.2d 301 (Law Div.1992)); s*ee* Amerada Hess Corp. v. Director, Div. of Taxation, 107 N.J. 307, 322, 526 A.2d 1029 (1987), *aff'd,* 490 U.S. 66, 109 S.Ct. 1617, 104 L.Ed.2d 58 (1989); a*ccord* Catalane v. Gilian Instrument Corp., 271 N.J.Super. 476, 493, 638 A.2d 1341 (App.Div.), *certif. denied,* 136 N.J. 298, 642 A.2d 1006 (1994).

Further, the court in Young held that "a literal reading of the statute should not be invoked because we are thoroughly convinced the Legislature did not intend to penalize former employees by forcing them to choose between a CEPA claim and other legitimate claims that are substantially, if not totally, independent of the retaliatory discharge claim." Young v. Shering Corp., *infra* at 25-26 (*citing* State v. Haliski, 140 N.J. 1, 16, 656 A.2d 1246 (1995); State v. State Troopers Fraternal Ass'n, 134 N.J. 393, 417-18, 634 A.2d 478 (1993)).

As stated above, the legal elements to prove a LAD claim are completely independent and different from proving a claim under CEPA. Certainly, it would be ludicrous to even assert that factual allegations that are made in the Complaint in support of the legal claim may in some way mutate the claim or otherwise modify the legal elements necessary to prove the statuatory claim.

In fact, the Young court clearly held that:

> "[t]he passage of such remedial protection would be weakened or compromised if it would foreclose a legitimate cause of action arising from the same underlying factual circumstances but, nonetheless, not include or involve the **retaliatory conduct that is essential** to the CEPA claim. It would be paradoxical to interpret the waiver provision literally to hold that although the employee has claims independent of a time-barred CEPA claim, the mere filing of the CEPA claim requires dismissal of all other claims. We reject defendant's literal reading of the

> waiver provision because, as Judge Learned Hand said, "[t]here is no surer way to misread any document than to read it literally."
>
> Young v. Shering Corp., *infra* at 26 (emphasis added) (*citing* Guiseppi v. Walling, 144 F.2d 608, 624 (2d Cir.1944), *aff'd sub nom.* Gemsco, Inc. v. Walling, 324 U.S. 244, 65 S.Ct. 605, 89 L.Ed. 921 (1945)).

Thus, defendants totally misinterpret and misapply Young as the case is clearly about the CEPA preemption of a common law Pierce cause of action vice LAD claims.[5] The Court held that, "[a]lthough the enactment of CEPA did not abolish the Pierce common-law cause of action, we are persuaded that the Legislature intended that the N.J.S.A. 34:19-8 waiver prevent an employee from pursuing both statutory and common-law retaliatory discharge causes of action. It thus sought to curtail essentially cumulative remedial actions." Young v. Shering Corp., *infra* at 27 (*citing* Abbamont v. Piscataway Twp. Bd. of Educ., 238 N.J.Super. 603, 605, 570 A.2d 479 (App.Div.1990), *aff'd,* 138 N.J. 405, 650 A.2d 958 (1994)). The Court ruled this way in large part because the CEPA cause of action requires less pre-litigation actions than did the common law. Young v. Shering Corp., *infra* at 27. This is completely consistent with the court's finding in Dondero wherein the Court ruled that, "this means that the institution of an action pursuant to CEPA precludes a plaintiff from bringing a common law action against his employer for retaliatory conduct under Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58 (1980)." Dondero v. Lenox, No. 89-3083 (CSF), Slip Op. at 3 (D.N.J. November 21, 1989).

The defendants' misinterpretation of Young is even more perplexing when the Young Court specifically held that "the internal structure of the waiver provision also supports its narrow

[5] In *Pierce* the New Jersey Supreme Court held that an employee who has been discharged in retaliation for doing or refusing to do an act protected by "a clear mandate of public policy" may maintain a suit against her employer. Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58 (1980).

application. It states clearly, at the beginning, that nothing in CEPA shall affect the legal rights, privileges and remedies of an employee. N.J.S.A. 34:19-8." Young v. Shering Corp., *infra* at 27-28.

Defendants' citation to Young as the paramount case in support of their application without putting the Court on notice of the rest of the case cited above gives rise to plaintiff's correspondence and request for attorneys' fees and costs as appropriate sanctions. Defendants' attempt to sidestep and never directly address the issue that the elements to prove a LAD claim are different from the elements to prove a CEPA claim are further reasons to grant plaintiff's cross-motion as plaintiffs are represented by a small plaintiff's firm that does not have the time or resources to respond to such frivolous applications.

**4. Retaliation Claim**

The Courts have also specifically held, that even where plaintiffs allege a cause of action under CEPA and retaliation under the LAD, no claim preclusion or waiver exists. *See*, Hurley v. The Atlantic City Police Department, et al., 1995 WL 854478 (1995 D.N.J.).

In Hurley, the court analyzed Young and determined that the finding in Young did not support Defendants' contention "that the CEPA waiver provision bars plaintiff's claims for retaliation under the NJLAD." Id. at *12. The court specifically held that "the waiver provision applies only to those causes of action that require a finding of retaliatory conduct that is actionable under the CEPA. The waiver exception does not apply to those causes of action that are substantially independent of the CEPA claim." 1995 WL 413266, at *7. The Hurley court specifically held that CEPA requires proof of retaliation and discharge while " NJLAD retaliation claim pursuant to N.J.S.A. 10:5-12(d) requires proof of retaliation, it does not require proof of

discharge." Id. at *12; *Cf.* Casper v. Paine Webber Group, Inc., 787 F. Supp. 1480, 1509-10 (CEPA waiver provision does not apply to NJLAD claim where NJLAD claim is based on alleged gender discrimination and CEPA claim is based on alleged retaliation for threatening to report that discrimination). "Therefore, the CEPA will not bar plaintiff's NJLAD retaliation claims." Hurley at *12.

Casper, *supra* and Hurley, *supra*, thus stand for the exact opposite proposition that defendants' maintain in their moving papers. Yet neither case is referenced in defendants' brief.

**E. CEPA CLAIM DOES NOT AFFECT NEGLIGENT HIRING, RETENTION, SUPERVISION AND TRAINING CLAIM**

Defendant states that "this claim is based upon retention of employees who allegedly retaliated against the Plaintiffs. As the claim requires similar proof, and relies upon the same facts, it is waived by instituting a CEPA claim." (Motion at IV, A, 2) Not only is such an argument incredulous, but the defendant's failure to cite to any case law to support such an allegation further supports the frivolousness of the statement.

A claim for negligent hiring, retention, supervision and training simply requires actual or imputed knowledge of an employer, foresee ability of harm, and causation. DiCosala v. Kay, 91 N.J. 159 (1982); *See, e.g.*, Bennett v. T&F Distributing Co., 117 N.J. Super. 439 (App. Div.1971), *cert. den'd*, 60 N.J. 350 (1972). Thus, if an employer has actual or imputed knowledge that employees are engaging in acts of discrimination, it was foreseeable that such acts would result in an adverse employment action to employees, and the discrimination had some causal link to the adverse employment action, then the employee has made out a claim for negligent hiring, retention, training, and supervision. *See* DiCosala v. Kay, *supra*. The elements to prove a CEPA claim are completely separate from the elements necessary to prove a negligent hiring, retention, training, and supervision claim as stated above.

F. BREACH OF GOOD FAITH AND FAIR DEALING IS PREMISED ON DISCRIMINATION AND RETALIATION

Defendants claim that the claim requires " *[sic*] that bad faith as a necessary element be pled and proved. The only allegation which attempts to constitute bad faith is the retaliation. As such, this claim is essentially a retaliation claim in disguise and is waived by CEPA." (Motion at IV, A, 2). It is almost mind numbing that an attorney would make such a claim. It is mind deadening to think that an attorney would not modify his position based upon a letter threatening the imposition of sanctions if he went forward with such a frivolous argument.

Defendants claim that the only allegation which attempts to constitute bad faith is the retaliation. If it were not for the rest of defendant's brief, one would think this was inadvertent administrative error. However, when viewed in context of its brief, this type of obvious factual misstatement which attempts to shroud the court's eyes from the very gravamen of plaintiffs' complaint -- namely age discrimination -- warrants sanctions as respectfully requested in plaintiffs' cross-motion.

G. BREACH OF CONTRACT, BREACH OF IMPLIED CONTRACT, BREACH OF GOOD FAITH AND FAIR DEALING AND TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS CLAIMS ARE PROPER CLAIMS

New Jersey is a state that construes pleadings liberally. District Council 47, 795 F.2d at 313. This follows the federal procedural rules which "do not require a claimant to set out in detail

the facts upon which he bases his claims." Conley v. Gibson, 355 U.S. 41, 45-46, 47 (1957). Indeed, dismissal for failure to state a claim upon which relief can be granted is disfavored by the courts. Johnsrud v. Carter, 620 F.2d 29 (3d Cir.1980). In fact, the test for determining the adequacy of a pleading is whether a cause of action is "suggested" by the facts. Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192, 536 A.2d 237 (1988). Thus, the courts have repeatedly held that it should search "the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." Di Cristofaro v. Laurel Grove Memorial Park, 43 N.J.Super. 244, 252, 128 A.2d 281 (App. Div.1957).

It is noteworthy to make reference to the fact that Defendants have admitted that plaintiffs have pled the requirements of a breach of contract, implied breach of contract, breach of good faith and fair dealing and tortious interference with business relations causes of action sufficiently as defendants filed an answer.

**1. Breach of Contract**

Defendants only complaint related to the breach of contract issue is that plaintiffs do not state the basis of the formation of the contract, its essential terms, or how it was allegedly breached. What defendants are omitting is that they are on notice of plaintiff's allegation,[6] they

[6]Under R.4:6-4, a party may move for a more definite statement only if the party cannot reasonably be required to frame a responsive pleading. Of course, defendant has already filed an answer.

have the right to depose plaintiffs and take discovery, and complaints are notice pleading type documents.

**2. Implied Breach of Contract**

Defendants contend that the Complaint does not allege a cause of action for implied breach of contract even though defendants filed their answer. Plaintiff's Complaint does allege that "Defendants drafted and entered into individual contracts with Plaintiffs" Hyderally Cert. Ex. 1 (Complaint ¶ 87) as defendant stated in their moving papers. Further, plaintiff believes that defendants do maintain a handbook that may contain a policy pertaining to employment discrimination. Plaintiff's Cert. at ¶3. Additionally, plaintiffs believes that the individual contracts were violated by the treatment of defendants. Plaintiff's Cert. at ¶4. Further, plaintiffs believed and were told that their employment would be secure. Plaintiff's Cert. at ¶5. As the New Jersey Supreme Court found that "an implied contract of employment may be contained in an employment manual," certainly such a cause of action may exist, as defendants concede in their moving papers. *See* Woolley v. Hoffman-LaRoche, Inc., 99 N.J. 284 (1985). Certainly, discovery will prove helpful to fully uncover whether this is a viable cause of action. However, defendants' attempt to request the court to dismiss this action is premature as no such discovery has taken place.

**3. Breach of the implied covenant of good faith and fair dealing**

The New Jersey courts have of course recognized causes of action for good faith and fair dealing. Moore v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.,1990 WL 105765 *2 (D.N.J.) July 16, 1990. Defendants main contention is that plaintiff has not plead that defendants acted in bad faith. A cursory reading of the Complaint shows that it is replete with references to age-ist

actions and comments of defendants. Certainly it should go without saying that such actions and comments demonstrate bad faith. Hyderally Cert. Ex. 1 (Complaint ¶¶ 19-27, 29, 32, 34-36, 41-44). Thus, plaintiffs have adequately plead the breach of the implied covenant of good faith and fair dealing. However, in an abundance of caution, plaintiffs state that defendants entered into contracts with plaintiffs and defendants had implied contracts with plaintiffs, and defendants acted in bad faith in the performance of such contracts. Plaintiff's Cert. at ¶6. Thus, under the facts plead in plaintiff's complaint and the accompanying certifications, plaintiffs have adequately plead a cause of action for the breach of the implied covenant of good faith and fair dealing. Peck v. Imedia, Inc., 293 N.J. Super. 151 (App. Div. 1996); Moore v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.,1990 WL 105765 (D.N.J. 1990).

**4. Breach of the tortious interference with business relations**.

Defendants are on notice of the allegation even if it should have been termed tortious interference with contractual relations or a prospective economic advantage as defendants assert in their moving papers. Defendants are on sufficient notice of the allegation, as they filed an answer.[7] In an overabundance of caution, plaintiffs state that a contractual relationship existed between plaintiffs and defendants. Plaintiff's Cert. at ¶7. Plaintiffs had a reasonable expectation of economic advantage. Plaintiff's Cert. at ¶8. Defendants discriminatory and/or retaliatory actions have interfered with the contract or expectancy. Plaintiff's Cert. at ¶9. Thus, plaintiffs have

[7] It is of interest to note that the sole case defendants cite in support of this part of their argument refers to the common law cause of action as intentional interference with prospective contractual relationship. Printing Mart Morristown v. Sharp Elecs., Corp. 116 N.J. 739 (1989).

adequately alleged a cause of action for breach of the tortious interference with business relations. Printing Mart Morristown v. Sharp Elecs., Corp. 116 N.J. 739 (1989).

## CROSS MOTION

**Plaintiff Should Be Awarded Attorneys' Fees and Costs in Having to Contest this Motion.**

As clearly demonstrated above, defendants motion to dismiss does not meet the standards of a good faith pleading. Plaintiff's counsel requested that defendants withdraw parts if not all of their motion. Plantiff has received no response to this request other than that defendants would not withdraw their motion. Thus, for the reasons stated above and in Plaintiff's Opposition papers, incorporated herein, Plaintiff cross-moves for attorneys' fees and costs as appropriate sanctions.

## CONCLUSION

Defendant's motion in part and in whole is so frivolous that it warrants the Court granting attorneys' fees and costs as sanctions as well as any other relief the Court deems equitable and just. A CEPA claim is clearly legally and factually different from proving the discrimination claim. To even argue to the contrary is to argue against the very bedrock of New Jersey jurisprudence. The remainder of defendant's arguments especially those pertaining to the waiver of claims of LAD retaliation, negligent, hiring, training, supervision, and retention, and the duties of good faith and fair dealing because of the allegation of CEPA are only continued reasons why defendant's motion warrants this Court granting sanctions against defendant.

Dated: March ___ , 2001

Place: Teaneck, NJ

DAVIS SAPERSTEIN & SALOMON
A PROFESSIONAL CORPORATION

By: _____
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