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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MARCIA DOUGLAS, **PLAINTIFF,** **VS.** **TRY US HEALTHCARE COMPANY, A TRI US AGENCY CORP., JOHN DOES 1-10, AND XYZ CORP. 1-10,** **DEFENDANTS.**	**CIVIL ACTION NO.: 12-2206 (MCA)** **BRIEF IN SUPPORT OF MOTION TO QUASH OFFER OF JUDGMENT** **RETURNABLE: April 15, 2013** *Filed Electronically*

I. INTRODUCTION

Under case law precedent, public policy, and Court Rules, Offers of Judgment are impermissible in fee-shifting cases involving a Conscientious Employee Protection Act (CEPA) claim. Despite this, Defendants have served an Offer of Judgment on Plaintiff, even though the crux of Plaintiff's case against Defendants involves a CEPA claim. Moreover, in addition to violating the law, the Offer of Judgment at issue here is vague and ambiguous.

Thus, Defendants have put Plaintiff in the precarious position of having to accept or

reject their Offer of Judgment within the 14-day deadline stipulated under Fed. R. Civ. P. 68. Because the fee-shifting of an offer of judgment threatens to bankrupt the Plaintiff, she cannot afford to simply ignore the Offer of Judgment, even if she is confident that it is unenforceable. Yet, the Offer of Judgment is so ambiguous and unfair that it is inequitable to put the Plaintiff in a position where she must reject an offer that could later come back and penalize her. So that the Defendants cannot unfairly utilize the threat of fee-shifting against the Plaintiff throughout the remainder of this litigation, it is necessary for the Court to rule now that the Offer of Judgment is unenforceable, and therefore quashed.

II. STATEMENT OF RELEVANT PROCEDURES

The initial Complaint was filed on or around April 12, 2012, and the First Amended Complaint, which included Plaintiff's CEPA claim, was filed on or around August 20, 2012. The parties have exchanged written discovery. Defendants served their Offer of Judgment on Plaintiff on or about March 7, 2013. Under Fed. R. Civ. P. 68, Plaintiff must accept or reject the Offer of Judgment within 14 days of service. There are currently no court dates scheduled for this matter.

III. STATEMENT OF FACTS RELEVANT TO THE THIS MOTION

The Certification of Counsel is annexed to the Motion, and all statements in that Certification are incorporated by reference herein.

IV. LEGAL ARGUMENT

A. THE OFFER OF JUDGMENT FILED BY THE DEFENDANTS IS UNENFORCEABLE, AND THEREFORE SHOULD BE QUASHED BY THE COURT.

1. The Offer of Judgment should be quashed because under the case law precedent, public policy and Court Rules, Offers of Judgment are impermissible in fee-shifting cases involving a Conscientious Employee Protection Act (CEPA) claim.

2. The Offer of Judgment should be quashed because it is vague and ambiguous, and does not reflect a meeting of the minds as required under contract principles.
   a. The Offer of Judgment does not address non-monetary claims made by the Plaintiff;
   b. The Offer of Judgment does not permit Plaintiff's counsel to seek fee enhancement, as permitted by the relevant statutes;
   c. The Offer of Judgment is unreasonable because it does not represent Defendants' *total* liability.

In her brief, Plaintiff will provide factual and legal support for each of the objections set forth above.

1. **The Offer of Judgment should be quashed because under the case law, public policy and Court Rules, Offers of Judgment are impermissible in fee-shifting cases involving a Conscientious Employee Protection Act (CEPA) claim.**

Offers of Judgment violate the public policy underpinning fee-shifting statutes, like CEPA. Thus, the Courts have held that Offers of Judgment are impermissible in CEPA cases, and at the crux of the present case is a CEPA claim. In her Complaint, Plaintiff maintains that she complained to Defendants that they were not paying her lawful overtime, and in retaliation for Plaintiff making these good-faith complaints and filing suit, Defendants terminated her.

CEPA is a civil rights statute, and its fee-shifting provision was enacted in order to protect whistleblowing employees, like the Plaintiff here, who might not otherwise be able to afford to bring CEPA claims against their employers. Under CEPA's fee-shifting provision, prevailing employees can win reasonable costs and attorney's fees from their employers. N.J.S.A. 34:19–5. Although employers can also seek attorney's fees, they must meet a much higher standard, and are required to show that the plaintiff's claim "was without basis in law or in fact." N.J.S.A. 34:19–6.

Due to the public policy underpinning fee-shifting statutes, the Courts have held that Offers of Judgment are impermissible in these types of cases. Offers of Judgment inherently violate the public policy underlying a CEPA claim, because they would allow defending

employers to circumvent the strict standard that CEPA imposes on them for recovering attorney's fees. Some of the case law and Court Rules prohibiting Offers of Judgment in fee-shifting cases are recent, and therefore a brief review of the history may be useful to this Court.

The tension between the public policy supporting Offers of Judgment and the public policy supporting fee-shifting in public interest, civil rights cases has been the subject of Court analysis for decades. As early as 1978, the U.S. Supreme Court ruled that a prevailing party defending a claim based on a statute with a fee-shifting provision may recover its attorneys' fees in a Title VII action only if the plaintiff's claim is "frivolous, unreasonable, or groundless." Christiansburg Garment Co., v. E.E.O.C., 434 U.S. 412, 422 (1978); E.E.O.C. v. L.B. Foster Co., 123 F.3d 746, 751 (3d Cir. 1997).

The Third Circuit Court of Appeals was even clearer on the issue. It devised a bright line rule that if the party defending a claim makes an offer of judgment in a fee-shifting case which is rejected and the plaintiff receives a verdict in its favor and an award of damages, the party defending the claim can never recover its attorneys' fees, even if the damage award is less than amount offered. Le v. University of Pennsylvania, 321 F.3d 403, 411 (3d Cir. 2003).

Following the Third Circuit's decision in Le, the state Appellate Division addressed similar concerns about New Jersey's Offer of Judgment rule. In the unpublished case of Sferlazza v.Washington Township School District, A-4351-01T1 (App. Div. 2003), the Appellate Division suggested that New Jersey, by statute or rule, consider the tension between the offer of judgment rule and fee-shifting statutes. Sferlazza, Id. at 8.

The Supreme Court Rules Committee did indeed review the problem and, in 2004, amended the New Jersey State Court Rule so that it directly prohibited any recovery under an offer of judgment where it would conflict with a fee-shifting statute. The Rule, R.4:68-3(c)(5) states:

(c) No allowances shall be granted if . . . (4) a fee allowance would conflict with the policies underlying a fee-shifting statute or rule of court, . . .

In a 2009 case, the State Supreme Court directly addressed the Rule's application to claims under CEPA, holding Offers of Judgment to be ineffective in CEPA cases. The Supreme Court carefully explained its holding:

> The trial judge and the Appellate Division properly recognized the applicability of the fee-shifting exception to a CEPA case. Indeed, although CEPA entitles a prevailing employee to the benefits of fee shifting, the Act does not permit a prevailing employer to receive an award of fees except in a narrow band of cases in which "the court determines that an action brought by an employee under this act was without basis in law or in fact." N.J.S.A. 34:19–6. In other words, under CEPA, the employer must be vindicated and the employee must have proceeded without basis in law or in fact in order for the employer to recover fees. Those are the only circumstances under which the Legislature declared that an employer may be awarded fees under that statute. On its face, that standard is significantly higher than that contained in Rule 4:58–3, which would permit an award to an employer who has not been vindicated. Because a rule can never trump a statute, it is clear that an employer cannot obtain an award of fees under the offer-of-judgment rule where the employer would not be entitled to such an award under CEPA.
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> Best v. C&M Door Controls, Inc., 200 N.J. 348, 358-59 (2009).

Thus, although the fee-shifting language of CEPA does allow prevailing employers to win fees "in a narrow band of cases," the employers must meet a stricter standard in order to recover these fees. Id. Moreover, the Courts have made it clear that, unless the action was brought in bad faith, the provision of payment to the "prevailing party" only applies to Plaintiffs. See Christiansburg Garment Co., v. E.E.O.C., supra at 422.

The Supreme Court has held that New Jersey supports three fundamental reasons for the fee-shifting:

> First, they are designed to address the "problem of unequal access to the courts." Second, they are intended to provide the individuals, whose rights are being protected by the statutes, with the resources to enforce those rights in court. Finally, they operate so as to "[e]ncourag[e] adequate

> representation [which] is essential" to ensuring that those laws will be enforced. In addition, we observed that fee-shifting provisions "are designed ... to promote respect for the underlying law and to deter potential violators of such laws."
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> Walker v. Giuffre, 209 N.J. 124 (2012), citing and quoting Coleman v. Fiore Bros., 113 N.J. 594 (1989).

The federal counterpart to New Jersey's Offer of Judgment Rule is Fed. R. Civ. P. 68. Although the federal rule does not include the state rule's specific language prohibiting Offers of Judgments in fee-shifting cases, the federal rule should be read narrowly so as to avoid a conflict with the substantive state law of CEPA. Moreover, as noted above, the U.S. Supreme Court and the Third Circuit, along with the New Jersey State Supreme Court, have all nullified Offers of Judgment when it comes to fee-shifting cases.

Thus, the present Offer of Judgment should be quashed because an Offer of Judgment may not be used to frustrate the purpose of fee-shifting in a CEPA claim, and under the case law precedent, the Court should not permit an Offer of Judgment to remain on file that seeks to shift the fees to a plaintiff in a fee-shifting public interest lawsuit.

2. The Offer of Judgment should be quashed because it is vague and ambiguous, and does not reflect a meeting of the minds as required under contract principles.

The Second Circuit has determined that Fed. R. Civ. P. 68 ("Rule 68") offers of judgment are to be "construed according to ordinary contract principles." See Goodheart Clothing Co. v. Laura Goodman Enters., 962 F.2d 268, 272 (2d Cir. 1992). Should some ambiguity exist in the language of a Rule 68 offer, that ambiguity must be resolved against the defendant. See Shapiro v. Credit Prot. Ass'n I, Inc., 53 F. Supp. 2d 626, 628 (S.D.N.Y. 1999).

The contract nature of Rule 68 requires a meeting of the minds between parties. See Greenwood v. Stevenson, 88 F.R.D. 225, 229-30 (D.R.I. 1980) (because offer is contractual in

nature, meeting of the minds must occur for binding acceptance); Davis v. Chism, 513 P.2d 475, 481 (Alaska 1973) (acceptance of offer of judgment forms a contract). Accordingly, Rule 68 requires an offer to be sufficiently definite so that acceptance of the offer will indicate a meeting of the minds on the essential terms of the contract. See Id. Because Rule 68 offers have a binding effect when refused as well as when accepted, each party must have a clear understanding of the terms of the offer in order to make an informed choice not to accept it; ambiguous offers should therefore be clarified or stricken to further purposes of Rule 68 and to protect the ability of the parties to make reasonable decisions regarding the litigation. Boorstein v. New York, 107 FRD 31, 3 FR Serv 3d 29 (criticized in Williams v. Greifinger, 1999 US Dist LEXIS 5785).

Here the Offer of Judgment is vague and ambiguous, and there is no meeting of the minds as required under contract principles because the Offer of Judgment a) does not address non-monetary claims; b) does not permit Plaintiff's counsel to seek fee enhancement, as permitted by the relevant statutes; and c) is unreasonable as it does not represent Defendants' total liability.

a. The Offer of Judgment does not address non-monetary claims made by the Plaintiff.

The Offer of Judgment should be quashed, because it does not address equitable claims made by the Plaintiff. These include equitable, non-monetary remedies such as reinstatement and injunction against future retaliation as available under CEPA, N.J.S.A. 34:19-5. Moreover, this omission creates an ambiguity in the terms of the offer, and the Court would have to determine the intent of the parties. Accordingly, the Offer of Judgment should be quashed.

b. The Offer of Judgment does not permit Plaintiff's counsel to seek fee enhancement, as permitted by the relevant statutes.

While the Offer of Judgment offers to pay "plaintiff's...attorney fees," it makes no mention of contingency enhancement. Since prevailing plaintiffs are entitled to a contingency enhancement, the omission would cause another ambiguity in which the Court would have to determine the intent of the parties. The Defendants will argue that they intended to limit the counsel fees, and the Plaintiff will argue that counsel fees should include a contingency enhancement.

New Jersey courts have made it clear that attorneys who accept public interest cases, such those with CEPA claims, should receive an additional amount of compensation in the form of a multiplier of the lodestar. The New Jersey Supreme Court established the use of the multiplier in Rendine v. Pantzer, 141 N.J. 292, 333-45 (1995). The purpose of this contingency enhancement to is to take into consideration the risk that Plaintiff's attorneys take in pursuing public interest cases on a contingent basis. Id. at 337-38.

The Rendine Court discussed the range of lodestar enhancements:

> We conclude that contingency enhancements in fee-shifting cases ordinarily should range between five and fifty-percent of the lodestar fee, with the enhancement in typical contingency cases ranging between twenty and thirty-five percent of the lodestar. Such enhancements should never exceed one-hundred percent of the lodestar, and an enhancement of that size will be appropriate only in the rare and exceptional case in which the risk of nonpayment has not been mitigated at all, i.e., where the "legal" risk constitutes "an economic disincentive independent of that created by the basic contingency in payment * * *[and] the result achieved * * * is significant and of broad public interest." [citation omitted]
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> Enhancements of that magnitude will be reserved for cases of that description in which no prospect existed for the attorney to be compensated by payment of a percentage of a large damages award, and in which the relief sought was primarily equitable in nature. Obviously, we remain willing to revisit the issue if presented with compelling evidence that our perception of the proper range of contingency enhancements is inconsistent with the relevant market and therefore is obstructing the availability of competent counsel to conduct fee-shifting litigation.
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> Rendine, at 343-44.

The Offer of Judgment restricts recovery of counsel fees, and therefore violates public

policy. Moreover, the Offer of Judgments' failure to specify the inclusion of a contingency enhancement creates an ambiguity and does not reflect a meeting of the minds, thereby violating contract principles. Accordingly, the Offer of Judgment should be quashed.

c. The Offer of Judgment is unreasonable because it does not represent Defendant's *total* liability.

An Offer of Judgment must be reasonable in its terms. Util. Automation 2000, Inc. v. Choctawhatchee Elec. Coop., Inc., 298 F.3d 1238, 1240-1241 (11th Cir. Ala. 2002) ("FRCP 68 encourages plaintiffs to accept *reasonable* offers . . . [which] prompts both parties to a suit to evaluate the risks and costs of litigation, and to balance them against the likelihood of success upon trial on the merits."). For an offer of judgment to be reasonable, the terms proposed should represent the defendant's total liability, which reflects "both the damages caused by the challenged conduct and the costs then accrued." Marek v. Chesny, 473 U.S. 1, 6 (U.S. 1985) (denying attorney costs to § 1983 plaintiffs after it had rejected a Rule 68 offer of judgment for $100,000 and after being rewarded with $60,000 at trial - an amount less than the judgment offer).

Unlike in Marek v. Chesny, Defendants' offer of judgment here for $15,000 does not even come close to reflect their total liability, because the offer does not address all the damages caused by Defendants' conduct. The Plaintiff in this action filed a claim of relief seeking damages for unpaid overtime, lost wages and benefits, back pay and front pay, retaliation, humiliation, mental and emotional distress, and punitive damages. The overtime damages alone approximate $58,000, and the liquidated damages awarded under FLSA would approximate another $58,000. Backpay would add on another $53,000 to damages. Thus, without even adding in all the emotional distress and punitive damages as well as the attorney's fees and costs, Plaintiff's compensatory damages approximate $169,000. Thus, Defendant's offer of judgment for $15,000 comes woefully short of addressing Plaintiff's

total claims. Because the offer of judgment in this case does not come close to addressing Defendant's total liability, it should be construed as unreasonable and must thus be quashed.

V. CONCLUSION

The Court should quash the Offer of Judgment because under the case law precedent, public policy, and Court Rules, Offers of Judgment are impermissible in fee-shifting cases involving a CEPA claim. In addition, the Court should quash the Offer of Judgment because it is vague and ambiguous. Moreover, the Offer of Judgment fails to reflect a meeting of the minds as required under contract principles because it does not address non-monetary claims made by the Plaintiff, does not permit Plaintiff's counsel to seek fee enhancement, as permitted by the relevant statutes, and is unreasonable because it does not represent Defendants' total liability.

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DATED: March 18, 2013

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