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ORISTELA LOVE, **PLAINTIFF,** **VS.** **NORTH HUDSON COMMUNITY ACTION CORPORATION, CHRIS IRIZARRY, JOHN DOES 1-10, AND XYZ CORP. 1-10,** **DEFENDANTS.**	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: HUDSON COUNTY DOCKET NO.: L-1852-11 CIVIL ACTION

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

In her complaint, Plaintiff, Oristela Love, ("Love" or "Plaintiff"), alleges violations of the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 et seq. ("CEPA"), intentional infliction of emotional distress, and breach of contract claims.[1]

In this case, Love alleges that Defendants, her former employer, North Hudson Community Action Corporation, ("North Hudson" or "NHCAC") and its President and CEO, Chris Irizarry ("Irizarry"), violated CEPA when they terminated her for refusing to participate in conduct that she reasonably believed was in violation of law and fraudulent, for complaining about her supervisor's illegal and fraudulent conduct, and for refusing to retract those complaints.

In April 2010, Love, in fulfillment of her role as Director of Health Information Management, conducted the initial investigation of a patient care complaint from a Horizon HMO member that "involved the MD and concerned MD office lost record and lost blood work." ("Horizon Complaint.") (WHH Cert., Ex. M)[2]. Love obtained the medical record, reported that the medical record had always been available but that the lab results had not been available, and that the patient was next seen approximately two and one-half weeks later. In accordance with protocol, both the Director of Quality Assurance, Nishie Perez ("Perez"), and Love notified Love's supervisor, Maureen McDonough ("McDonough"), Director of Clinical Services, and Jorge Verea, M.D., ("Verea"), the Chief Medical Officer of the status of Love's investigation. Love and Perez informed McDonough and Verea that Love had completed the

[1] Love has agreed to withdraw her claims for severe emotional distress and intentional infliction of emotional distress, as well as her contract claims.

[2] Plaintiff's citations to "WHH Cert." refer to the Certification of William H. Healey, Esq. submitted by Defendants in support of the within motion.

initial investigation and had the record on her desk while Love waited to be told to which clinical staff person she should forward the file, to complete the clinical portion of the investigation; this included reviewing the patient's medical history and lab results to determine if there was any health risk to the patient as a result of the 2½ week delay in having the labs available. However, rather than assign any clinical staff to complete the clinical review of the file, McDonough demanded that Love alone complete and sign the report. Love replied that she did not know how to do that, since she did not have a clinical background, and asked if someone could work with her. However, McDonough failed to assign anyone to work with Love, and instead insisted that Love complete and sign the report, stating "You do it and sign it because we all do and sign things here. Because if we [*sic*] going to go down, we all are going to go down."

Love refused to complete and sign off on a report into the investigation of a patient complaint from a Horizon HMO member that concerned quality of care issues and which required a clinical evaluation ("Horizon Report"). Since Love did not have a clinical background and was not qualified to evaluate clinical information, Love reasonably believed that for her to complete and sign off on the Horizon Report, which required a clinical assessment of the record, would be fraudulent and violate quality of care standards and regulations governing quality of care. After Love refused to complete and sign off on the Horizon Report, Love's supervisor issued Love a warning – the first and only discipline that Love received in her 16 years as an employee at North Hudson. Love then complained to the CEO about what she reasonably believed was fraudulent and illegal conduct by her supervisor, as well as her supervisor retaliating against her for refusing to participate in such conduct, but the CEO failed to respond, conducted no investigation and took no remedial action. Thereafter, the retaliation

continued. In November 2010, Love again complained about the fraudulent and unlawful conduct and the continuing retaliation she felt was designed to set her up for termination., Defendants pressured Love to withdraw her complaints of fraud and retaliation. When Love refused to do so, Defendants terminated her on November 19, 2010, admittedly, for refusing to withdraw her complaint of fraud and retaliation.

PROCEDURAL HISTORY

Love adopts the procedural history included in Defendants' Brief.

STATEMENT OF FACTS

Love respectfully refers to her response to Defendants' purported Statement of Undisputed Material Facts.

LEGAL ARGUMENT

POINT I

STANDARD OF REVIEW

The standard of review on a summary judgment motion is well settled. When deciding a motion for summary judgment under Rule 4:46-2, the Court should deny such a motion if, when viewing the competent evidential materials presented in the light most favorable to the non-moving party, there exists a genuine issue with respect to a material fact. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 524 (1995). Additionally, by its plain language, Court Rule 4:46-2 dictates that a court should deny a summary judgment motion where the party opposing the motion has come forward with evidence that creates a "genuine issue as to any material fact challenged." R. 4:46-2. The underlying Statement of Facts and Love's responses thereto, and

Responding Statement of Disputed Material Facts, adequately displays that most if not all material facts giving rise to Love's Complaint are contested.

Additionally, the Court, when deciding Defendants' Motion for Summary Judgment, should construe all facts and other evidence in the light most favorable to the parties opposing summary judgment. Dairy Stores, Inc. v. Sentinel Publishing Co., Inc., 104 N.J. 125, 135 (1986). This is so because a party opposing such a motion should not be denied a trial unless the moving party sustains the burden of showing clearly the absence of a genuine issue of material fact.

In determining the validity of this Motion for Summary Judgment, Love respectfully submits that the trial court must not decide issues of fact, but must merely decide whether there are any such issues that are material and controverted. Judson, supra, 17 N.J. at 73; Mercer v. Weyerhaeuser Co., 324 N.J. Super. 290, 317 (App. Div. 1999) (citing Brill, supra, 142 N.J. at 540) (The appellate standard to review granting of summary judgment motion is, "whether, viewing all of the competent evidential material presented to the trial judge in a light most favorable to the non-moving party, the evidence is so one-sided that a reasonable fact- finder must resolve the disputed issue of material fact in favor of the movant."); Antheunisse v. Tiffany & Co., Inc., 229 N.J. Super. 399, 402 (App. Div. 1988) (Same standard should be applied on appeal of such issues). Under such a standard, it is beyond clear that Defendants' Motion for Summary Judgment should be denied.

As is evident from Plaintiff's Response to Defendants' Statement of "Undisputed" Material Facts, as well as Plaintiff's own Responding Statement of Disputed Material Facts, there are numerous material facts in dispute which make this matter entirely inappropriate for summary judgment. Thus, based on this issue alone, the motion should be denied.

POINT II

PLAINTIFF CAN DEMONSTRATE A PRIMA FACIE CASE UNDER THE CONSCIENTIOUS EMPLOYEE PROTECTION ACT

The New Jersey Conscientious Protection Act (CEPA), N.J.S.A. 34:19-1 et seq., is "remedial social legislation designed to promote two complementary public purposes; 'to protect and [thereby] encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employees from engaging in such conduct.'" D'Annunzio v. Prudential Ins. Co. of America, 192 N.J. 110 (N.J. 2007). As broad, remedial legislation, the statute must be construed liberally. Id. "The aim of the legislation is to encourage, not thwart, 'legitimate employee complaints.'" Gerard v. Camden County Health Services Center, 348 N.J. Super. 516, 520 (App.Div. 2002), citing Estate of Roach v. TRW, Inc., 164 N.J. 598, 610 (2000).

The relevant sections of N.J.S.A. 34:19-3 provide:

> An employer shall not take any retaliatory action against an employee because the employee does any of the following:
>
> a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer ... that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law[;] ...
>
> * * *
>
> c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:
>
> (1) is in violation of a law, or a rule or regulation promulgated pursuant to a rule...;
>
> (2) is fraudulent or criminal; or

(3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.[3]

As set forth below, Love has submitted sufficient proof to satisfy these elements.

A. LOVE'S PROOFS SET OUT A PRIMA FACIE CASE UNDER CEPA AND ESTABLISH GENUINE ISSUES OF MATERIAL FACT THAT WARRANT DETERMINATION BY A FACTFINDER

Love has offered sufficient evidence to establish each element of her prima facie case of retaliation under CEPA, N.J.S.A. 34:19-3a, c(1), c(2) and c(3). Looking at the totality of the evidence in the light most favorable to Plaintiff, sufficient genuine issues of material fact exist, and in turn warrant putting the case before a factfinder for determination.

Specifically, Love has presented ample evidence establishing that:

1. she reasonably believed that her employer's conduct was violating either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy;

2. she performed a whistle-blowing activity described in N.J.S.A. 34:19-3a, c(1), c(2), or c(3);

3. an adverse employment action was taken against her; and

4. a causal connection exists between the whistle-blower's activity and the adverse employment action.

Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003).

i. Love Reasonably Believed That Her Employer's Conduct Violated Either a Law, Rule, or Regulation Promulgated Pursuant To Law, or Clear Mandate of Public Policy

In April 2010, NHCAC received a patient care complaint from a Horizon HMO member that "involved the MD and concerned MD office lost record and lost blood work." ("Horizon

[3] Love does not contend that her CEPA claim is predicated upon testifying or giving information to a public body, and thus does not seek relief under N.J.S.A. 34:19-3b.

Complaint.") (WHH Cert., Ex. M). Love, as Director of Health Information Management, completed her proper role in the investigation of the Horizon Complaint according to her job functions and qualifications by (1) making key personnel aware of the Horizon Complaint and Horizon's request for a response (2) initiating the investigation by preparing the preliminary nonclinical portion of the report; (3) providing a copy of the medical record; and (4) proactively following up to ensure a timely response was provided. (WHH Cert., Exs. O and R). After Love completed the initial investigation, by finding that the record had not been lost, that the labs had not been available, and stating when the patient was next seen, Perez, the Quality Assurance Director, sent an email to Verea, the Chief Medical Officer, and McDonough, to follow up with them on the next step in the investigation of having clinical staff from the department in which the patient was seen look into the clinical issues, to complete the investigation. (WHH Cert., Ex. N; Pl. Tr. 130:25-131:3). However, rather than assign any clinical staff to work on the clinical issues, in accordance with protocol, McDonough asked Love to complete the investigation; McDonough did this despite the fact that, as she acknowledged during her deposition, completing the investigation and preparing the final report required a clinical evaluation which McDonough knew Love was not qualified to perform, and for Love to do so would violate quality of care standards. (MM Tr. 49:1-15; 49:17-50:19; 50:20- 51:1; 51:9-20)[4]. When Love objected to completing and signing the report because she did not have a clinical background and therefore reasonably believed that for her do so would be unethical, fraudulent and unlawful, her

[4] Plaintiff has used the same abbreviations to refer to the deposition transcripts as Defendants. The deposition transcript pages that are referred to herein are annexed to the Certification of Francine Foner, dated April 9, 2013, submitted herewith in opposition to Defendants' Motion for Summary Judgment ("Foner Cert.").

supervisor became incensed and insisted that Love "do it and it and sign it because we all do and sign things here." (Pl. Tr. 145:22-146:3).

a. Love Can Identify A Law, Rule Or Regulation That She Reasonably Believed Was Violated By Her Employer's Activity

NHCAC is a Federally Qualified Health Center ("Health Center") and thus its quality of care standards are not merely governed by internal hospital policies and procedures, but are regulated by state and federal regulations. On the state level, NHCAC is subject to New Jersey's Hospital Licensing standards contained in N.J.A.C. 8:43G-1 et seq.[5] The purpose of New Jersey's Hospital Licensing Standards is to ensure that hospitals maintain a high quality of care and to aid patients and providers in assessing the quality of care provided:

> (a) These rules and standards apply to each licensed general, psychiatric or special hospital facility. They are intended for use in State surveys of the hospitals and any ensuing enforcement actions. They are also designed to be useful to consumers and providers as a mechanism for privately assessing the quality of care provided in any acute care hospital.
>
> (b) This chapter contains rules **intended to assure the high quality of care delivered in hospital facilities throughout New Jersey**. Components of quality care addressed by these rules and standards include access to care, continuity of care, comprehensiveness of care, coordination of services, humaneness of treatment, conservatism in intervention, safety of environment, professionalism of caregivers, and participation in useful studies.

[N.J.A.C. 8:43G-1.1. (emphasis added)]

As a Health Center, NHCAC is also a publically funded agency that is mandated to comply with federal regulations, guidelines from the Department of Health and Human Services, Office of the Inspector General, and Health Resources and Services Administration ("HRSA").

[5] A Federally Qualified Health Center falls within the definition of covered hospitals under New Jersey's Hospital Licensing Standards See N.J.A.C. 8:43G-1.3.

(http://bphc.hrsa.gov/about/requirements/index.html). To qualify and receive funding as a Health Center, a facility must meet the health center program requirements set forth in the Health Center Program Statute, Section 330 of the Public Health Service Act (42 U.S.C. § 254b), Program Regulations under 42 CFR Part 51c and 42 CFR Parts 56.201-56.604 and Grants Regulations under 45 CFR Part 74. Id. Pursuant to such regulations, Health Centers must comply with a Quality Improvement/Quality Assurance (QI/QA) program to ensure the provision of high quality patient care. (Section 330(k)(3)(C) of the PHS Act, 45 CFR Part 74.25 (c)(2), (3) and 42 CFR Part 51c.303(c)(1-2); http://bphc.hrsa.gov/about/requirements/index.html#services1). The regulations also specifically require that under the QI/QA program, assessments of the quality of services provided to patients "be conducted by physicians or by other licensed health professionals under the supervision of physicians." (Id.).

Defendants' contention that Love cannot identify any rule, regulation (or public policy[6]) pertaining to quality of care is also directly contrary to NHCAC's CEO, Irizarry. As Irizarry unequivocally testified:

> Q. Now, North Hudson is bound by Federal and State regulations to ensure quality of care standards; is that correct?
>
> A. Correct.
>
> Q. And you as the CEO would take seriously North Hudson's duty to ensure quality of care; correct?
>
> A. Yes.
>
> (CI Tr. 44:14-20)

[6] Defendants' conduct in attempting to force an employee without clinical training to complete and sign off on a report which required review by a clinician would also be "incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment" under N.J.S.A. 34:19-3(c), as discussed below.

In addition, Defendants' testimony clearly reveals that defendants do ***not*** dispute that completing the Horizon Report required a clinical evaluation, that Love was not qualified to complete the report because of her lack of clinical qualifications, **or that if Love had done so, it would have been unethical and in violation of Federal and State standards**, as well as violating JCAHO standards.[7]

Irizarry testified that a patient's not receiving lab results in a timely manner creates a potential risk to the patient's health that requires investigation by a clinical person:

> Q. And when you say "results", such as blood test results?
>
> A. Correct.
>
> Q. Or any other results, any other examinations the patient may have gone under?
>
> A. Correct.
>
> Q. Because of course, you would appreciate if a patient doesn't receive their test results in a timely manner, this could cause some health issues, health concerns to that patient?
>
> A. Correct.

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[7] North Hudson's web site touts that it has on several occasions has been "accredited by the Joint Commission on Accreditation of Health Care Organizations (JCAHO)" http://www.nhcac.org/about-north-hudson.html. The JCAHO is "an independent, not-for-profit organization, The Joint Commission accredits and certifies more than 20,000 health care organizations and programs in the United States. Joint Commission accreditation and certification is recognized nationwide as a symbol of quality that reflects an organization's commitment to meeting certain performance standards." http://www.jointcommission.org/about_us/about_the_joint_commission_main.aspx. The New Jersey Licensing Standards also adopt the standards of JCAHO, as an accrediting body recognized by the Centers for Medicare and Medicaid Services (CMS) pursuant to 42 CFR Part 488, in lieu of selected licensing standards. N.J.A.C. 8:43G-1.2 Defendants' representation to the public that NHCAC is meeting these standards, when it conducts itself in a manner that is not consistent with such standards, also provides part of the factual predicate for Love's reasonable belief that her supervisor's conduct was fraudulent.

Q. And those health issues, health concerns are clinical issues; is that correct?

* * *

A. Yes.

(CI Tr., 57:4-18).

Q. Now, if there was an investigation that was done to determine if the delay in doing the patient's test results resulted in a health risk to the patient, that would be an investigation that was done with someone who had a clinical background, a medical background; is that correct? I believe you said that earlier.

A. Yes.

Q. And so the individual who would sign off on that report would be someone who has a medical background or clinical background; correct?
A. For a clinical issue, yes.

Q. You wouldn't want a person to sign off on such an investigation if they didn't have a clinical background?

A. If it was a report about a clinical delay or a delay that would harm a patient, yes.

Q. "Yes" being you wouldn't want someone to sign off on that report who did not have a clinical background?

A. Right.

(CI Tr., 59:16-60:11)

NHCAC's Chief Operating Officer, Michael Shababb ("Shababb") and McDonough also testified that they agreed that Love was not qualified to sign off on the Horizon Report, since it involved clinical issues which she was not clinically qualified to review, and that to do so would be unethical and violate quality of care standards. Shababb testified:

Q. Were you aware that Oristela did not have a clinical background?

A. Yes.

(MS Tr. 17:13-15)

Q. Did you discuss with Oristela, and you may have, what you just testified to, but just to be clear, she did not have a clinical background and therefore did not feel qualified to complete a report in response to the Horizon complaint?

* * *

A. Basically, yes. I will repeat what I think I said, which was that if it was a medical issue and she is not a medical person, that she should not respond.

(MS Tr. 42:22-43:6)

* * *

A. Whether the blood work was there or not, I think it would have to be a clinical person to make that determination as to if the doctor needed the blood work to continue treatment.

(MS Tr. 29:14-17)

Q. If she were asked to evaluate something requiring an evaluation of clinical information and to sign off on that, would you agree that would be unethical?

* * *

A. If she was asked to evaluate and sign off on it, yes, that's not her background. Yes.

Q. And it would violate hospital quality of care standards if a person without clinical qualifications completes a report requiring evaluation of clinical information?

A. If she was asked to evaluate, yes.

(MS Tr. 31:1-20)

McDonough testified:

Q. Would you agree that in order to properly respond to the Horizon complaint, North Hudson would need to investigate or evaluate the

clinical issue of whether the delay in not having the patient's test results in a timely fashion posed any risk to the patient's health?

A. Yes.

(MM Tr. 51:14-20)

Q. And you evaluated the lab results to determine whether or not the delay caused any potential risk of harm to the patient; correct?

A. Correct.

Q. And that was the evaluation that required clinical background?

A. Yes.

(MM Tr., 50:20- 51:1)

* * *

Q. So you reviewed the record in order to respond to the Horizon complaint?

A. I reviewed the record to ensure that everything was in order in terms of the quality of the record. At the time that's what I did.

Q. You determined that the delay caused no harm to the patient's health?

A. I did.

Q. And you did that based upon your clinical experience?

A. Yes.

Q. Oristela does not have clinical experience?

* * *

A. She does not.

(MM Tr., 49:1-15)

* * *

Q. So Oristela would not then be able to determine whether or not the delay in the patient's lab results being available caused any potential patient health risk?

A. No, she would not.

* * *

Q. Do you agree it would be unethical to sign off on a report requiring evaluation of clinical information if one had no clinical background?

* * *

A. Yes.

(MM Tr., 49:17-50:19)

Q. Would you agree it would violate quality of care standards if a person without clinical qualifications completed a report requiring evaluation of clinical information?

A. Evaluation of clinical information, yes.

(MM Tr., 51:9-13).

Thus, Love can identify a law, rule, or regulation that she reasonably believed Defendants violated by requiring Love to perform clinical functions for which she was not qualified. In fact, evaluation of the services provided to the patient in the Horizon Complaint was precisely the type of assessment of the quality of services provide to patients that the federal regulations cited above require "be conducted by physicians or by other licensed health professionals under the supervision of physicians, and not nonclinical staff members such as Love.

Love's complaints also concern the public policy of ensuring that complaints requiring a qualitative review of the clinical data in a patient's record be investigated by properly qualified clinical staff.

b. Love's Belief, That Defendants' Conduct Violated A Law, Rule, Or Regulation Promulgated Pursuant To Law, Or A Clear Mandate Of Public Policy, Was Reasonable

A plaintiff who brings a claim under CEPA bears the burden of articulating the law or public policy being violated, but is not required to identify the specific statute or public policy at issue. Mehlman v. Mobil Oil Corp., 153 N.J. 163, 193 (1998). The Mehlman Court noted that "[t]he object of CEPA is not to make lawyers out of conscientious employees" and thus was satisfied by a plaintiff's reasonable belief that the employer's conduct was "incompatible with a constitutional, statutory or regulatory provision, code of ethics, or other recognized source of public policy," without a more specific showing. Ibid.

As described above, Love investigated and completed the nonclinical portion of the investigation and response to the Horizon Complaint. (WHH Cert., Exs. O and R; Pl. Tr. 130:25-131:3). It was entirely reasonable for Love to believe that for her to review and evaluate the clinical portions of the patient's record, in order to determine whether the 2½ week delay in having the test results available caused any risk of harm to the patient, would violate regulations governing patient quality of care standards, since Love had no clinical background. In fact, this is exactly what Love objected to and what Defendants insisted she do. Because Love maintained her objection, Defendants retaliated against her and terminated her.

It is shocking to consider that Love was put in a position in which she was forced to choose between following a directive that was obviously fraudulent and illegal, or refusing to comply with her supervisor's demand. Even so, Love need only have a reasonable belief that the law was violated, and need not show an actual violation to satisfy this element of CEPA. Gerard,

supra, 348 N.J. Super. at, 522-523; Ivan v. County of Middlesex, 595 F. Supp. 2d 425, 469 (D.N.J. 2009), citing Roach, supra at 613; N.J.S.A. 34:19-3c(1) and c(2).

The reasonableness of Love's belief was confirmed by Irizarry, Shababb and McDonough, who each testified that they also believed that requiring Love to prepare and sign the Horizon report violated quality of care standards because that would require her to make a clinical assessment that she was not qualified to make or sign off on. (MM Tr. 49:1-15; 49:17-50:19; 50:20-51:1; 51:9-13; and 51:14-20; MS Tr. 17:13-15; 31:1-20; 42:22-43:6; CI Tr., 57:4-18; 59:16-60:11). This is not in dispute. As stated above, McDonough agreed that her asking Love to complete and sign off on the report, without further elaboration, necessarily implicated clinical functions.

McDonough disputes only the factual issue of her asking Love to complete and sign the report, contending that she only asked Love to "take a stab at it" and she would complete and sign the report. . (MM Tr. 62:25-63:1). This is entirely contrary to Love's allegations and sworn testimony that McDonough, in an intimidating and threatening manner, insisted that Love complete and sign the report herself, stating " You do it and sign it because we all do and sign things here." (Pl. Tr. 145:22-146:3). In addition, Love also testified that McDonough intimidated the clinical staff member who had taken the file to complete the clinical review, into handing over the file to Love. (Pl. Tr. 142:5-25; 172:7-15). This material fact that is hotly disputed is one of the many reasons why Defendants' application should be rejected.

Whether or not McDonough requested that Love complete and sign the report is clearly a disputed material factual issue. There is ample evidence for a jury to conclude that McDonough did in fact insist that Love complete and sign the report. In addition, Love need not prove this

fact by direct evidence; rather, a jury may decide that Love had a reasonable belief based upon the circumstances. Ivan, *supra*, 595 F. Supp. 2d at 469. Thus, this critical disputed material issue of fact alone warrants denial of summary judgment.

Love's testimony and written proofs reflect that McDonough directed Love to complete and sign the Horizon Report without the assistance of any clinical staff, which by itself suffices to create a factual dispute warranting denial of summary judgment.[8] (WHH Cert., Exs. R, Q, W; Pl. Tr. 137:13-138:4; 140:4-10). Additional evidence of this fact includes: (1) McDonough's email that directly asked Love "to prepare the report" (WHH Cert., Ex. N); (2) when Love requested assistance to prepare the report, as she did not have the background to do it, McDonough did not assign any clinical staff to work with her. (Pl. Tr., 150:16-21); (3) when Love spoke with Shababb about her concerns of what she was being requested to do in response to the Horizon Complaint, he agreed that McDonough should have assigned clinical staff to work with her and should do so in the future and that Love should not perform a clinical task if she was asked to do so. (Pl. Tr. 150:23-151:23; MS Tr. 31:1-20; 52:19-53:8); (4) McDonough's statement that she would later "review" the report did not relieve Love of having to perform clinical tasks for which she was not qualified; Love was still tasked with reviewing the patient's

[8] Plaintiff's testimony can be sufficient to create a genuine dispute about this material issue. Weldon v. Kraft, Inc., 896 F.2d 793, 800 (3rd Cir.1990) (noting that "there is no rule of law that the testimony of a discrimination plaintiff, standing alone, can never make out a case of discrimination that could withstand a summary judgment motion"); Graham v. F.B. Leopold Co., Inc., 779 F.2d 170, 173 (3rd Cir.1985) (observing that plaintiff's deposition testimony could suffice to create a genuine dispute about material issue); Waldron v. SL Indus., Inc., 56 F.3d 491, 501 (3rd Cir.1995) (stating that "Supreme Court has made it clear that self-serving testimony may be utilized by a party at summary judgment") (citing Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986)).

lab results and medical history, which she had no way of evaluating, to determine whether there was any quality of care issue in the lab results not having been available; (5) Love's written rebuttal on the retaliatory warning expressly stated that her reason for not complying with her supervisor's directive was because she was not a "clinical person" and the report required an evaluation of "clinical processes". (WHH Cert., Ex. Q); (6) Love's written complaints of April 26, 2010 and November 2, 2010 explain that her reason for not following McDonough's directive was because she was not clinically qualified to perform what required clinical tasks; (WHH Cert., Exs. R and W); (7) Shababb also testified that "at some point" he "knew that Love's reason for not writing the letter was because her background is not clinical." (MS 81:24-82:4); (8) McDonough's contention that she was not asking Love to prepare and/or sign off on the clinical portion of the report and that Love did not raise that as a reason for declining to follow McDonough's directive is also inconsistent with her testimony that at a meeting to discuss Love's refusal to prepare the report, McDonough agreed that "Oristela said it was clinical at the meeting... that referred to her wanting Nishie, who is a clinical person, to do the clinical portion of the report" and that Love wanted "somebody that was of a clinical nature to write the letter instead of herself." (MM Tr. 74:14-17; 76:11-19); and (9) McDonough also testified that even though she did not assign a clinical person to work with Love, having a clinical person work with Love was consistent with NHCAC's protocol. (MM Tr., 74:24-75:5).

In addition, Love's reasonable belief that Defendants' conduct violated a statute, rule or regulation, or public policy in the within matter is entirely distinguishable from the decisions cited by Defendants.

In Smith-Bozarth v. Coalition Against Rape and Abuse, Inc., 329 N.J. Super. 238, 244 (App.Div. 2000), the court found that there was no law, rule or regulation, or clear mandate of public policy that prohibited the head of a social services agency from obtaining unrestricted access to the files of the agency's clients. The employee objected to disclosing a client's files to the head of the social services agency based upon regulations that prohibited communication of confidential information between victims of sexual abuse and their counselors. However, the cited regulations did not prohibit an employee of a social services agency from disclosing such communications to the head of the agency. Therefore, based upon those facts, the Smith-Bozarth Court found that the cited regulation did not apply. This is entirely distinguishable from the within matter, in which there can be no dispute that NHCAC's quality of care standards are governed by regulations promulgated pursuant to law, specifically N.J.A.C. 8:43G-1 et seq., and federal regulations with which NHCAC as a Health Center is required to comply, under the Health Center Program Statute, Section 330 of the Public Health Service Act (42 U.S.C. § 254b), Program Regulations under 42 CFR Part 51c and 42 CFR Parts 56.201-56.604 and Grants Regulations under 45 CFR Part 74.

Further, NHCAC's CEO confirmed the same when he testified that North Hudson "is bound by Federal and State regulations to ensure quality of care standards." (CI Tr. 44:14-24).

In addition, the Supreme Court in Dzwonar called in to question the validity of Smith-Bozarth in so far as its holding requires that a plaintiff must allege facts that, if true, actually would violate that statute, rule, or public policy. Dzwonar, supra, 177 N.J. at 463.

Klein v. University of Medicine and Dentistry of New Jersey, 377 N.J. Super. 28 (App. Div.) *certif. denied*, 185 N.J. 39 (2005), also relied upon by Defendants, is equally inapposite to

the facts of the present case. As Defendants concede in their brief, Dr. Klein complained about the violation of internal hospital policies and failed to otherwise identify any statute, rule, or regulation promulgated pursuant to law, or clear expression of public policy, that related to the conduct complained of. While Dr. Klein referred to regulations that permitted only qualified persons to administer anesthesia and that a qualified person should be continuously present and performing or assisting in the operation, he did not claim that the Radiology Department failed to do any of these things. Id. at 43. Rather, the record was "devoid of any evidence, nor does plaintiff even allege, any state or federal regulatory violations committed by the Radiology Department for the concerns he expressed in this litigation." Id. at 44. In addition, the Klein Court found that Dr. Klein's belief of an improper quality of patient care or a violation of law or public policy in the Radiology Department was also undermined because he intended "to resume his duties upon restoration of full clinical privileges and receipt of a written acknowledgement by defendants of their confidence in his clinical skills and an apology for their actions." Id. at 44-45. Thus, such facts indicated that the dispute in Klein was simply a disagreement with the manner in which the hospital was operating one of its medical departments, which concerned space, staffing and budgetary issues, rather than the "qualification" issues covered by referenced regulations. Id at 44. As the Klein Court recognized, while "CEPA is not intended to shield a constant complainer who simply disagrees with internal operational procedures," that is only so *"provided the operation is in accordance with lawful and ethical mandates."* (emphasis added) Id. at 42-43.

The facts of Klein are clearly distinguishable from those of the present case. Unlike the plaintiff in Klein, Love did not have a mere personal disagreement with management and was

not willing to retract her retaliation claim (despite the extreme pressure by Defendants to do so) in exchange for Defendants' agreement to not terminate her and an apology. In Klein, the plaintiff failed to specifically identify any conduct of defendant that violated any rule, law, regulation or public policy. Rather, he simply asserted generally that there were staffing and space issues. In contrast, here, Love does allege and has specifically identified regulations that Defendants violated (in addition to fraudulent conduct, as discussed below) ***for the specific concerns that she expressed in this litigation***. Health Centers must comply with a Quality Improvement/Quality Assurance (QI/QA) program to ensure the provision of high quality patient care. (Section 330(k)(3)(C) of the PHS Act, 45 CFR Part 74.25 (c)(2), (3) and 42 CFR Part 51c.303(c)(1-2); http://bphc.hrsa.gov/about/requirements/index.html#services1). These regulations also specifically require that under the QI/QA program, assessments of the quality of services provided to patients "be conducted by physicians or by other licensed health professionals under the supervision of physicians." (Id.)

Unlike the situation in Klein, in which the regulations relied upon did not concern the Defendants' alleged conduct, the regulations cited herein are specifically concerning the type of conduct which Love refused to participate in because she reasonably believed it was unethical, fraudulent and in violation of laws governing quality of care standards. Evaluation of the services provided to the patient in the Horizon Complaint was precisely the type of assessment of the quality of services provide to patients that the regulations cited above require "be conducted by physicians or by other licensed health professionals under the supervision of physicians." Id.

The regulations referenced alone are consistent with numerous other medical care regulations that mandate that the individual doing a medical/clinical assessment be a qualified

medical/clinical person. See, e.g., 42 U.S.C. 1395dd, et seq. (The Emergency Medical Treatment and Active Labor Act); 42 CFR 489.24(a); social work regulations such as the Social Work Licensing Act, N.J.SA 45:15, et seq.; N.J.A.C. 13:44 et seq; N.J.S.A. 45:9-42 et seq. ("New Jersey Clinical Laboratory Improvement Act").

In addition, while Defendants attempt to minimize Love's concerns as insignificant or a mere disagreement, in fact, Love's complaint explained her specific concerns about performing clinical functions in responding to the Horizon Complaint, for which she was not qualified, not merely a general "broad brush" complaint about patient safety, or about general staffing issues, or the size or layout of the area in which she worked. Thus, Love voiced specific concerns which she reasonably believed to be in violation of the law or public policy of providing quality of care and properly addressing a particular patient complaint by assigning clinical staff to review clinical issues that the complaint implicated. See Espardinez v. Atlantic Health Sys./Atl. Health, 2009 N.J. Super. Unpub. LEXIS 3237, 10-11 (Law Div. Nov. 20, 2009) (distinguishing the "trivial" and ephemeral" complaints made by the plaintiff in *Klein* from a plaintiff who expresses concerns regarding a specific issue of patient care or treatment).

Love's belief that Defendants' conduct was fraudulent and unlawful was not based upon her own personal morals or beliefs, but was objectively reasonable. See McLelland v. Moore, 343 N.J. Super. 589, 600, (App. Div. 2001), *certif. denied*,171 N.J. 43 (2002); Warthn v. Toms River Community Memorial Hospital, 199 N.J. Super. 18, 1985 N.J. Super. LEXIS 1177 (App.Div. 1985) (distinguishing an employee's personal or moral beliefs from an objective reasonable belief that that a violation of law occurred). The objectively reasonable nature of Love's belief is further underscored by the fact that Irizarry, Shababb and McDonough all held

the same belief that asking Love to complete and sign the Horizon report would be unethical and in violation of patient quality care standards. (MM Tr. 49:1-15; 49:17-50:19; 50:20-51:1; 51:9-13; and 51:14-20; MS Tr. 17:13-15; 31:1-20; 42:22-43:6; CI Tr., 57:4-18; 59:16-60:11).

Accordingly, Love respectfully petitions the Court to find that as a matter of law Love has satisfied her burden with respect to the first element of her CEPA cause of action, and deny Defendants' Motion for Summary Judgment.

ii. Love Engaged In Protected Activity Under CEPA

CEPA specifically protects an employee who

> Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer ... that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law[;] ...
>
> [N.J.S.A. 34:19-3a]

Or who

> [o]bjects to or refuses to participate in any activity, policy or practice which the employee reasonably believes:
>
> (1) is in violation of a law, or a rule or regulation promulgated pursuant to law;
>
> (2) is fraudulent or criminal; or
>
> (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.
>
> [N.J.S.A. 34:19-3c (emphasis added).]

a. Love Engaged in Protected Activity Under N.J.S.A. 34:19-3a

In April 2010, Love refused to abide by her supervisor's demand that she perform a clinical function that she was not qualified to perform. Despite her objections and request to have someone work with her, McDonough continued to insist that Love somehow undertake this clinical task without any assistance from a clinical staff member. (WHH Cert., Ex. R; MM Tr., 74:24-75:5). In April 2010 (WHH Cert., Ex. R), and again in November 2010 (WHH Cert., Ex. W), Love disclosed this improper conduct by way of her complaints to the CEO and Human Resources Director, respectively, about being asked to perform what she reasonably believed was, in addition to being fraudulent,[9] unethical and in violation of quality of care standards. Irizarry, as CEO, oversaw the entire organization had the authority to discipline and terminate Love. (CI Tr., 32:23-33:10; 35:14-17). Despite tremendous pressure by upper management to retract her complaint, Love refused to withdraw her complaint of retaliation and it is not disputed that she was terminated solely for her refusal to withdraw her complaint. (Defendants' Statement of Undisputed Material Facts, ¶107). Love does dispute, however, that she ever verbally retracted any of her complaints. (Pl. Tr., 274:6-16; WHH Cert., Exs. Y and AA).

Defendants also erroneously assert that Love could not have disclosed the unlawful conduct because McDonough gave Love a disciplinary warning before the disclosure. Defendants again distort the record and mislead the Court by ignoring that the adverse retaliatory action was not simply the disciplinary warning, but was Love's termination. As Defendants are well aware, Love's termination occurred not long *after* Irizarry's review a second time in November 2010 of Love's complaint of McDonough's fraudulent and unlawful conduct of April 2010, and Love's refusal to participate in such conduct. (CI Tr., 137:1-9).

[9] Love's belief that such conduct was fraudulent is a separate basis for liability under N.J.S.A. 34:19-3(c)(2).

Thus, Love engaged in protected activity under N.J.S.A. 34:19-3a.

b. Love Engaged in Protected Activity Under N.J.S.A. 34:19-3c

Defendants assert that Love failed to engage in protected activity under N.J.S.A. 34:19-3c based upon their contention that the complained of conduct did not implicate a public policy or have public ramifications. When a plaintiff brings a complaint under section 3.c.(3), employees must specifically prove that their complaints involve a matter of public interest. Estate of Frank L. Roach v. TRW, Inc., 164 N.J. 598, 609 (2000). However, complaints under section 3.c(1) or 3.c(2) do not have that same requirement. Id

N.J.S.A. 34:19-3c(1) and (2) provide that a plaintiff engages in protected activity when he or she objects to participate in conduct that is "in violation of a law, or a rule or regulation promulgated pursuant to law," 3.c(1), or "is fraudulent or criminal." 3.c(2).

As discussed above, Love reasonably believed that requiring Love to complete and sign an investigation that required a qualitative review of the patient's medical history and lab results violated quality of care standards promulgated pursuant to law.

In addition, Love specifically further objected to completing an investigation that required a qualitative review of a patient's medical history and lab results, and signing her name to a report for which she was not qualified or authorized to sign, on the ground that the same would also be fraudulent. (WHH Cert., Ex. W). The five elements of common-law fraud are:

> (1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages.

Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (N.J. 1997), citing Jewish Ctr. of Sussex County v. Whale, 86 N.J. 619, 624-25, (1981). As Defendants recognize in their brief, "the specific knowledge of the legal source of the alleged fraud or crime in not required," and plaintiff need only possess a reasonable belief that the complained of activity was fraudulent or unlawful." (Defendants' Brief, p. 7). Mehlman, supra at 193-194.

Defendants assert that Love's claim that she was asked to commit a fraud occurred more than six months after the whistleblowing activity. However, the whistleblowing activity was not simply Love's refusal in April 2010 to follow her supervisor's unlawful directive. Rather, Love engaged in protected conduct by way of her complaints in April 2010 and November 2010 objecting to McDonough's unlawful conduct and requirement that Love participate in the same. While, no investigation or remedial action was taken in the interim, Defendants' own failure to address Love's complaint cannot be used against her to make it appear that she delayed in making a complaint.

Equally deceptive is Defendants' taking excerpts from Love's deposition out of context to imply that Love testified that what McDonough asked her to do was within the scope of Love's job. Love testified that investigating the lost record and preparing the initial response was within the scope of her job, because that is what she did complete and provided to McDonough. (WHH Cert., Ex. O; Pl. Tr. 118:22-119:15). However, what McDonough asked Love to then do (after Love investigated the issue of whether the record had been lost and provided that part of the response), was to complete the clinical portion of the investigation and sign off on it; for this Love was **not** qualified and this clinical assessment was **not** within the scope of her job, and Love reasonably believed to do so would be unlawful and fraudulent.

Defendants misrepresent Love's testimony to improperly imply that her responses meant that preparation of the full response to the Horizon Complaint involved no more than determining if the record had been lost and the blood work had not been available. If that were true, there would be no reason for McDonough to have asked Love to prepare a response, since Love had already investigated those issues and provided the results of that investigation to McDonough (WHH Cert., Ex. O; Pl. Tr. 118:22-119:15). Nor would there have been a reason for McDonough to respond to Love that at the meeting on April 20, 2010 to discuss the response to the Horizon report that "You do it and sign it because we all do and sign things here. Because if we going to go down, we all are going to go down." (Pl. Tr. 144:12-15). In other words, Love should have joined Defendants in participating in conduct that would "bring them down," which is effectively a euphemism for unlawful and fraudulent activity.

Love's representing to Horizon that an investigation of a complaint that raised potential quality of care issues had been properly performed when she was not qualified to perform the same would have been a knowingly fraudulent misrepresentation to Horizon on which it would have relied, to its detriment. However, even if the activity that Love refused to participate in was not actually fraudulent, that is not required, but as the statute provides, only that Love reasonably believed so. See also Gerard, supra, 348 N.J. Super. at, 522-523; Ivan v. County of Middlesex, 595 F. Supp. 2d 425, 469 (D.N.J. 2009), citing Roach, supra at 613; N.J.S.A. 34:19-3c(1) and c(2).

Nor does the fact that the report that was ultimately sent to Horizon did not expressly discuss the clinical issues negate the fact, unanimously agreed to by Defendants, that the investigation had to be completed by a clinical staff member with a medical background. In

addition, Love's duty to check a medical record to see if a certain medication was ordered, is not equivalent to what was required of Love to complete the investigation and Horizon Report. Rather, to perform the latter would have involved not just checking whether the lab results were ordered, but reviewing a patient's medical history and the lab results that were subsequently performed to determine whether there was any risk of harm to the patient caused by the 2½ week delay. Irizarry, Shababb and McDonough all agreed that such clinical review was required to respond to the Horizon Report, that Love was not qualified to perform such a clinical review, and that her doing so would be unethical and violate quality of care standards (MM Tr. 49:1-15; 49:17-50:19; 50:20-51:1; 51:9-13; and 51:14-20; MS Tr. 17:13-15; 31:1-20; 42:22-43:6; CI Tr., 57:4-18; 59:16-60:11).

Thus, Love's refusal to engage in unlawful and fraudulent activity, as demanded by her supervisor, squarely falls into the category of expressly protected conduct under N.J.S.A. 34:19-3c(1) and N.J.S.A. 34:19-3c(2).

Love's complaints also involve a matter of public interest. It cannot be denied that ensuring that complaints concerning quality of care issues are properly investigated by clinically qualified staff is a matter of public interest and concern.

Thus, Love has satisfied the second element of Love's CEPA cause of action.

iii. An Adverse Employment Action Was Taken Against Love

CEPA defines "retaliatory action" as "the discharge, suspension or, demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment." N.J.S.A. 34:19-2(e). Ivan, supra, 595 F. Supp. 2d at 473. Defendants clearly misstate, mischaracterize, and omit evidence to imply that the only retaliation

at issue was the retaliatory warning that immediately followed Love's whistleblowing activity in April 2010. Love did not only experience that retaliation, but in fact the worst retaliation possible– termination. It is that adverse action which forms the factual predicate for satisfaction of the third element of Love's CEPA claim, not merely the retaliatory warning that followed her refusal to participate in unlawful and fraudulent activity, and the continued retaliation leading up to her termination. Merely because Love's supervisor continued a campaign of retaliation against her does not change that Love was terminated shortly after her second complaint about the unlawful and fraudulent conduct in which she was asked to participate and her refusal to retract her complaint.

Nor is Defendants' contention that Irizarry had no involvement in the events of April 2010 either credible or consistent with the record. Love does not admit that Irizarry was unconnected with the whistleblowing activity. To the contrary, Love discussed the events of April 2010 and the retaliatory warning with Irizarry immediately following McDonough's giving her the warning, and he requested that she put everything writing and he would address it on the following Monday. (Pl. Tr. 167:1-17). Irizarry testified that he reviewed Love's April 26, 2010 and November 2, 2010 complaints detailing the events of April 2010. (CI Tr., 137:1-9). After doing so, he directed that Shababb terminate Love because she refused to withdraw her complaints of fraud and retaliation. (Defendants' Statement of Facts, ¶107). Thus, Love was terminated for her refusal to participate in what she reasonably believed to be unlawful and fraudulent conduct, her complaint of fraudulent and unlawful conduct, and her refusal to retract her complaint.

iv. A Causal Connection Exists Between Love's Whistle-Blowing Activity And The Adverse Employment Action

Defendants attempt to create a false impression that Love had continuing issues with McDonough and McDonough's conduct in April 2010 and retaliation that followed was just part of a series of hostile treatment by McDonough. This is nothing more than a red herring designed to detract from the fraudulent and unlawful nature of McDonough's conduct, as well as the major change that occurred in McDonough's treatment and marginalization of Love after she refused to participate in the unlawful and fraudulent conduct. Despite that McDonough was not a "warm and fuzzy" supervisor, what occurred after Love refused to follow her directive to complete and sign the report, went far beyond any prior disagreements between them and was designed to set up Love for termination. As Love testified about what was different:

> Difference (*sic*) is what she asked me to do. And that in April 2010 it was beyond to her behavior before. Now she's asking me to do something that was illegal because it was based on a documentation in the medical -- clinical documentation in the medical record of that patient
>
> (Pl. Tr. 379:19-24).

Love further testified:

> Before 2010, before the warning, actually, they were kind of no more communications kind of things. Issues. But after the incident with the warning, it was a retaliatory behavior. Maureen was holding my professional development by not sending me to those EMR meetings, training. When I was the Director of Medical Records, my department was the one that were going through transitioning into the electronic health record. I put them together. That department from the first day, it was nothing there. I develop it. I was well aware of what's the paper medical record was. So now for this transition, I was supposed to be the first one to receive that training and she didn't send me for that training.
>
> And also not giving me the support to take care of the issue that I have with Nelly,knowing that -- with what Nelly was doing there was disrupting the functioning of the department. Creating chaos in the department. Was

> impacting on patient care. Provider was calling and complaining because the labs was not in the reports. Nurses were complaining also because labs were not in the reports. And some of those reports were even abnormal reports. Maureen, as a provider, she knew better and didn't take care of that. The other thing, I believe, was inappropriate from her was instructing Sonia, as I said, to give her a report on what was going on in my department. I was the director of the department and I just telling Sonia telling me in my face that she has to instruct to Sonia. I was the director of the department. She was supposed to talk to me and not talking to Sonia. All of that is beyond what happened before that April 2010.

(Pl. Tr. 400:3-401:13)

In November 2010, Barbara Blake Kimble, Human Resources Director, raised with Love that she received a warning in April 2010 for refusing her supervisor's directive, that Love's file was being reviewed and Kimble was waiting for a letter from McDonough. Love again put her complaint of the fraudulent and unlawful conduct in which she refused to participate in writing and requested that the warning be retracted. (WHH Cert., Ex. W). Defendants then exerted tremendous effort upon Love to retract her complaint, and when she refused, and continued to maintain her complaint, Irizarry terminated her for that reason. Thus, there could not be a clearer causal connection between Love's whistleblowing activity and her termination.

v. Defendants' Purported Reason For Terminating Love Is Pretext

Finally, Love has set forth sufficient proofs for a reasonable jury to conclude that Defendants' purported reason for terminating Love was a pretext to cover up the true reason for her termination—to retaliate against her for engaging in protected whistle-blower activity.

As CEPA cases are analyzed using the framework for retaliatory discharge claims under Title VII and the LAD, the plaintiff has the ultimate burden to show that the employer's proffered reasons for terminating plaintiff are pretext for retaliation. Kolb v. Burns, 320 N.J.

Super. 467, 476-78 (App. Div. 1999) (citing Romano v. Brown & Williamson Tobacco Co., 284 N.J. Super. 543, 551 (App. Div. 1995)).

A plaintiff may show pretext by demonstrating either (1) that the defendant's articulated legitimate reasons are untrue; or (2) that intentional discrimination [or retaliation] was more likely than not a determinative factor in the decision. Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1108 (3d Cir. 1997).

Under the first prong, a plaintiff must "demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could rationally find them unworthy of credence." Id. at 1108-09. On the other hand, under the second prong, plaintiff may present evidence which if believed would allow a jury to conclude that discrimination [or retaliation] played a role in the decision making process and that it had a determinative influence on the outcome of that process. Maiorino v. Schering-Plough Corp., 302 N.J. Super. 323, 344 (App. Div. 1997); certif. denied, 152 N.J. 189 (1997).

In the present matter, there is ample evidence to suggest that Defendants' so-called legitimate reasons for termination were pretext. Although Defendants claim that Love was terminated because she allegedly recanted her claim of fraud and retaliation and that the same was a reason to terminate her, a jury could reasonably conclude that this reason is pretextual upon two grounds: First, Love's own testimony and written communications to Defendants vehemently objecting to their claim that Love ever recanted her retaliation claims.[10] Second, while Defendants claim that Love's complaint was without merit, and her refusal to withdraw

[10] See footnote 8, supra.

her complaint because they determined it to be without merit was a legitimate reason for her termination, defendants did not similarly terminate, or even discipline, at least two other employees who made what Defendants considered to be meritless complaints.

NHCAC believed that the complaints made by Love's reports Nelly Gourzis and Maribel Rodriguez against Love were without merit. (CI Tr. 210:6-21). Gourzis was not disciplined for making a meritless complaint against her supervisor. (CI Tr. 210:6-21). Gourzis was terminated by NHCAC, but her termination was not based in any part on having made a meritless complaint against her supervisor. (CI Tr. 210:6-21). Maribel Rodriguez was not terminated or otherwise disciplined for making a meritless complaint against her supervisor. (CI Tr. 210:6-21).

Accordingly, Love has set forth sufficient evidence by which a reasonable jury could conclude that a causal relationship between Love's conduct and her termination is established, and that Defendants' purported legitimate reason for terminating Love is pretext.

POINT III

LOVE HAS SET FORTH A COGNIZABLE CLAIM FOR PUNITIVE DAMAGES UNDER THE CEPA STATUTE

Love has set forth more than enough facts for a reasonable jury to conclude that Love is entitled to punitive damages as remedy for her CEPA claim, which statute explicitly provides for such damages.

CEPA specifically provides that a prevailing plaintiff may be awarded punitive damages. N.J.S.A. 34:19-5(f). The New Jersey Supreme Court has expressly held that punitive damages are available against public entities notwithstanding the Tort Claims Act. Green v. Jersey City

Bd. of Educ., 177 N.J. 434 (2003). Further, CEPA claims are expressly excluded from the punitive damages cap provided for in the Punitive Damages Act. N.J.S.A. 2A:15-5.14(c).

In determining liability for punitive damages, the same standards that apply to Law Against Discrimination ("LAD") claims are applicable to CEPA claims. Abbamont v. Piscataway Tp. Bd. of Educ., 138 N.J. 405, 419 (1994). Specifically, in a CEPA action, an employer is liable for punitive damages only in the event of actual participation or willful indifference by managerial or supervisory employees. Ibid. Additionally, the conduct complained of must be wantonly reckless or malicious. Nappe v. Anschelewitz, Barr, Ansell & Bonello, 97 N.J. 37, 49-50 (1984).

A. THE RETALIATORY CONDUCT AT ISSUE HERE WAS ENGAGED IN BY "UPPER MANAGEMENT"

In the case of Cavuoti v. N.J. Transit Corp., the New Jersey Supreme Court addressed the question of how to determine if an employee is a member of "upper management" for purposes of awarding punitive damages under the LAD. 161 N.J. 107, 121-29 (1999). Specifically, the Court noted:

> [I]t is fair and reasonable to conclude that upper management would consist of those responsible to formulate the organization's anti-discrimination policies, provide compliance programs and insist on performance policies in the workplace, who set the atmosphere or control the day-to-day operations of the unit (such as *heads of departments*, regional managers, or compliance officers). For an employee on the second tier of management to be considered "upper management," the employee should have either (1) broad supervisory powers over the involved employees, including the power to hire, fire, promote, and discipline, or (2) the delegated responsibility to execute the employer's policies to ensure a safe, productive and discrimination free workplace.
>
> [Id. at 128-29.]

Irizarry terminated Love because of her disclosure to him of what she reasonably believed to be unlawful and fraudulent conduct by her supervisor and her refusal to withdraw that complaint. It is clear based on the above definition that Irizarry, as president and CEO, was part of upper management and oversaw the entire organization. (CI Tr., 32:23-33:10). Irizarry had the authority to discipline and terminate Love. (CI Tr. 35:14-17). Further, Irizarry, McDonough and Shababb also actively participated in and/or were willfully indifferent to the termination, as, rather than address Love's complaint of fraud and retaliation, Irizarry, Shababb and McDonough insisted that Love's complaints were without merit, that she should not have used the word "retaliation" and pressured her to retract them. (Pl. Tr. 274:17-24; 374:21-375:9; MS Tr. 101:7-13; 101:18-25; 106:23-107:6). McDonough also pressured Love to "be a team player" by agreeing that she was not retaliated against (MM Tr. 166:5-13) and Shababb carried out the termination on Irizarry's behalf. (Defendants' Statement of Facts, ¶¶109-110). It is also clear that Shababb and McDonough were part of upper management, as McDonough was Love's direct supervisor with the authority to discipline and terminate Love (CI Tr. 34:12-35:13; MM Tr. 31:7-10) and Shababb had supervisory authority over Love. (MS Tr.14:13-15).

Accordingly, a reasonable jury could certainly conclude that Irizarry, Shababb and McDonough were "upper management" employees for purposes of punitive damages.

B. THE RETALIATORY CONDUCT AT ISSUE HERE AMOUNTED TO "WANTONLY RECKLESS OR MALICIOUS" CONDUCT

"To warrant a punitive award, the defendant's conduct must have been wantonly reckless or malicious." Nappe v. Anschelewitz, Barr, Ansell & Bonello, 97 N.J. 37, 49 (1984). That is, "[t]here must be an intentional wrongdoing in the sense of an 'evil minded act' or an act

accompanied by a wanton and willful disregard of the rights of another...The key to the right to punitive damages is the wrongfulness of the intentional act." Id. at 49-50. The requirement of willfulness or wantonness "may be satisfied upon a showing that there has been a deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to the consequences." Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962).

Here, Love has set forth ample facts for a reasonable jury to conclude that the conduct of Irizarry, Shababb and McDonough was wantonly malicious and willful. Irizarry admittedly terminated Love for no other reason than her maintenance of her complaint of retaliation and fraud and her refusal to retract them, even though there was never any investigation conducted into Love's complaint. (CI Tr. 153:19-154:1; 169:4-8; 178:21-24; 191:7-19). While Irizarry contends that Love verbally informed him that she was not retaliated against, Love's testimony and written communications to Irizarry vehemently dispute the same, which itself is a disputed issue of material fact that alone should preclude summary judgment.[11]

The record also reflects that Irizarry, Shababb and McDonough insisted that Love's complaint was without merit, that she should not have used the word "retaliation" and pressured her to retract her complaint. (MS Tr. 101:7-13; 101:18-25; 106:23-107:6; Pl. Tr. 274:17-21; 374:21-375:9). McDonough also pressured Love to "be a team player" and withdraw her complaint. (MM Tr. 166:5-13).

In short, Love has offered significant evidence that the conduct of Irizarry, as well as of McDonough and Shababb was a willful, deliberate attempt to retaliate against an employee for engaging in protected whistle-blower activity. Such conduct warrants punitive damages.

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[11] See footnote 8, supra.

CONCLUSION

Love has set forth ample proofs for a reasonable jury to conclude that she has met each and every element of a CEPA claim: (1) she reasonably believed that her employer's conduct was violating either a law, rule, or regulation promulgated pursuant to law, or public policy; (2); she engaged in protected conduct (3) an adverse employment action was taken against her; and (4) a causal connection exists between her protected activity and the adverse employment action.

Finally, Love has set forth a cognizable claim for punitive damages because: (1) the retaliatory conduct against Love was taken by a member of upper management, and (2) the conduct in which Defendants engaged was "wantonly reckless or malicious."

Accordingly, Defendants' motion must be denied and the within matter must be permitted to proceed to the factfinder.

Respectfully submitted,
HYDERALLY & ASSOCIATES, PC

TY HYDERALLY, ESQ.
for the Firm

Dated: 4/9/13

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