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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JOSE FRIAS, **PLAINTIFF,** **VS.** **AL & JOHN, INC. d/b/a GLEN ROCK HAMS, GLEN ROCK HAMS, INC., JOHN DOES 1-10, AND XYZ CORP. 1-10** **DEFENDANTS.**	**Hon. Stanley R. Chesler, USDJ** **Civil Action No: 2:09-cv-1360 (SRC)(MAS)**

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO FED. R. CIV. P. 56

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PRELIMINARY STATEMENT

Defendant Al & John, Inc. d/b/a Glen Rock Hams, Glen Rock Hams, Inc. ("Defendant" or "Al & John") have moved the Court for the entry of summary judgment on each of Plaintiff Jose Frias' ("Plaintiff" or "Frias") claims. To be entitled to summary judgment, there must be no material facts in dispute and the moving party must be entitled to judgment as a matter of law. Defendant fails to meet this burden here. Accordingly, for the reasons set forth below, Defendant's Motion for Summary Judgment must be denied.

Frias has set forth ample proofs for a reasonable factfinder to determine that Defendant engaged in unlawful discrimination because of Frias' glaucoma, shoulder/back/arm injuries, and stroke, in violation of the New Jersey Law Against Discrimination ("NJLAD"). N.J.S.A. 10:5-1 *et seq.* Frias further establishes sufficient evidence of Defendant's failure to accommodate his disability, despite his repeated requests and pleas, when he was transferred to a position entailing heavy lifting, animal blood splattering into Plaintiff's face and eyes, and physically demanding labor.

Likewise, Frias establishes sufficient proofs for a reasonable factfinder to find that Defendant retaliated against him. Frias worked for Defendant for approximately ten years without incident. But, when Defendant began noticing Frias' medical needs, Frias was subjected to repeated transfers and was left to languish without health insurance for months at a time. Ultimately, Frias lodged a formal complaint through his attorney. Two days after the complaint, Frias was injured and Defendant was advised that Frias would not be fully recuperated for one month. Frias was terminated the following day.

Frias also establishes sufficient facts to establish that Defendant's conduct constitutes a violation of the Employee Retirement Income Security Act of 1974 ("ERISA") § 510, 29 U.S.C. §

1140. Frias establishes specific facts showing that Defendant's management transferred Frias' position, fully aware that such transfer would directly cause Frias to lose his healthcare benefits. Management knew of Frias' disabilities and medical needs, and saw this as an opportunity to cause Frias to resign his employment. Despite Defendant's position that the transfer was solely due to Frias being replaced by a new machine, the explanation is belied by facts showing that Defendant specifically intended to transfer Frias and disrupt his ERISA-protected healthcare benefits.

Thus, Frias has established more than ample direct and circumstantial evidence of discrimination, retaliation, failure to accommodate, and intentional interference with his healthcare benefits. Construing the evidence in the light most favorable to the non-movant, as it must, the Court should conclude that Defendant has not met the weighty burden necessary to warrant summary judgment, and must allow the within matter to proceed to trial.

SUPPLEMENTAL STATEMENT OF FACTS

Plaintiff refers the Court to the attached Plaintiff's Responsive Statement of Material Facts for a comprehensive recitation the material facts in this matter. A summary of Plaintiff's supplemental facts follows.

Frias began working for Defendant in October 1996 at about the age of 51 and worked for Defendant for about nine years without any significant medical issues and a reputation for being a consistent, and generally problem-free employee. [Szyba Cert. Ex. 1 (hereinafter "Frias Dep.") 9:12-14, 68:14-16; Szyba Cert. Ex. 3 (hereinafter "Madjarcic Dep.") 33:15-21; Szyba Cert. Ex. 2 (hereinafter "Udrija Dep.") 62:10-12.] Then, in 2005, Frias was diagnosed with glaucoma. [Frias Dep. 23:21-25.]

Less than year later, in 2006, Frias was injured at work when a drunk forklift operator lost control of the vehicle and crushed him, requiring Frias to undergo surgery and take medical leave. [Frias Dep. 79:17 to 80:13, 84:4-18.] Frias shoulder, arm, and back injury required him to take medical leave, which was extended to last over three months by Defendant, and during which time Frias was denied health insurance coverage. [Frias Dep. 84:13-15 to 86:20.]

On September 17, 2007, as a result of being denied medical insurance coverage and thus being unable to take the proper preventative medications, Frias had a stroke. [Frias Dep. 150:3-12; *see also* Frias Dep. 36:17-20.] About this time, management's attitude towards Frias "changed" as and Frias' supervisors began complaining that Frias would "go to too many doctors." [Frias Dep. 46:13-22; 109:21.]

In October 2007, approximately one month after Frias' stroke, Frias was transferred from his union position as a bone chip separator to a nonunion position as a "helper" in the packaging department. [*See* Frias Dep. T 9:12-14]. This transfer meant Frias was no longer eligible for the union healthcare insurance plan, and was sole reason for Frias losing his union health insurance. [Udrija Dep. 37:3-5.] The transfer also constituted a demotion, as Frias was transferred from a union position requiring some specialized training and skill, to that of a nonunion "helper"—a position requiring no skill or training, and that "[a]nybody could do it." [Frias Dep. 11:8-12, 18:23-24, 20:20-21; Udrija Dep. 16:5-6.]

John Udrija ("Udrija"), the plant manager, was the person who decided to transfer Frias and admits that he knew such transfer would specifically cause Frias to lose his union benefits. [Udrija Dep. 37:3-5.] Udrija transferred Frias despite Frias having more experience and seniority than two other employees who were not transferred. [Frias Dep. 70:13-18.] Thus, the facts make clear that

Defendant intended to transfer Frias to remove him from the insurance plan in which he was enrolled. [Frias Dep. 109:12-15.]

After Frias was removed from the union, he was kept off all insurance plans for several months until Defendant unilaterally enrolled him in a lesser plan established for nonunion "helpers." [Frias Dep. 116:4-11, 128:8-25; Udrija Dep. 36:6-24, 42:3-25.] Frias objected immediately upon discovering he was no longer being covered by health insurance, and went so far as filing a grievance with his union. [Frias Dep. 118:19-23.]

In November 2008, less than one year after Frias' began objecting to his removal from the union health insurance, Defendant transferred Frias into the recycling department to make Frias' employment unbearable in an effort to get rid of Frias. [Frias Dep. 121:14-17.]

The recycling department is known among employees for being extremely physically demanding and is considered one of the least desirable positions at Al & John. [Frias Dep. 63:15-19, 123:7-9.] Frias' duties included "struggl[ing]" with blood-soaked cardboard boxes to put them through a recycling machine. [Frias Dep. 57:22 to 63:10.] Animal blood from the boxes splattered into Frias' eyes while he was working, which harmed his eyes and aggravated his glaucoma. [Frias Dep. 23:8-11, 24:20 to 25:1.] Frias repeatedly requested protective eyewear, explaining that the animal blood splatter hurt his eyes. [Frias Dep. 22:15-19, 23:8-13, 124:17-21.] But, Frias was refused the requested eye protection, despite other employees of Defendant being given eye protectors. [Frias Dep. 21:25 to 22:2, 40:14 to 41:10, 124:22 to 125:8.]

Frias also repeatedly requested assistance with the physical aspects of the recycling position, which included retrieving bloody boxes and up-to-62-pound wooden pallets from another department and transporting them into the recycling area, breaking down the boxes, lifting the 20-

something pound boxes overhead, and then lifting the wooden pallets to stack them. [Frias Dep. 57:24 to 67:12.; Udrija Dep. 67:13-16.]

Frias' supervisor in the recycling department, Milan Madjarcic ("Madjarcic"), admits that he Frias asked for help "every time" Madjarcic spoke to him. [Madjarcic Dep. 65:11-17.] Management admits that Frias specifically requested "to go back to the ready-to-eat packing area because [he was] hurt." [Udrija Dep. 65:13-16; Madjarcic Dep. 65:11-17; *see also* Frias Dep. 63:20-24.] Frias also provided management with notes from his doctor relating to his disabilities and openly discussed his doctor visits with management, confirming that Defendant was put on notice of Frias' specific disabilities. [Frias Dep. 34:5-8, 57:22 to 58:1, 138:18-20, 77:6-11; *see* Szyba Cert. Ex. 4-9.]

Frias' disabilities consisted of his glaucoma, back problems, shoulder pain, his debilitated arm, and his heart problems resulting from his stroke. [Frias Dep. 23:8-11; 133:13-19; 148:7-13.] Because of these disabilities, Frias requested specific accommodations so that he could continue working for Defendant, as he had for approximately eleven years leading up to this point. Frias requested eye protectors to shield his eyes from splattering blood because of his glaucoma. [Frias Dep. 22:15-19, 23:8-13, 124:17-21.] Frias requested for a position in another department, like the packaging department, where performance of the assigned duties did not implicate his disabilities, as was true for the preceding eleven years of his employment. [Udrija Dep. 65:13-16; *see also* Frias Dep. 63:20-24.] Frias also consistently requested help with the performance of his duties in the recycling position. [Madjarcic Dep. 65:11-17.] Defendant refused to provide any of the requested accommodations.

Instead, Defendant increased Frias' responsibilities by giving him less time in which to do the job than was given to others—Frias was given eight hours while others were given ten hours. [Frias

Dep. 66:26 to 67:9.] Defendant then decided that Frias had performance issued and harangued Frias daily. [Frias Dep. 67:2-9.] When Frias asked for help, Madjarcic would merely tell him to "hurry up" and "work faster." [Frias Dep. 66:10-16; Madjarcic Dep. 80:2-8; Udrija Dep. 90:9-24.] Udrija would stand close to Frias' work area and laugh at Frias' struggling. [Frias Dep. 66:16-18.]

Frias repeatedly asked for a transfer to another department, as Defendant accommodated other employees in that department. [Udrija Dep. 65:13-16; *see also* Frias Dep. 63:20-24.] Frias lodged a formal, detailed written complaint, copies of which were sent to Defendant's managers, on November 18, 2008. [Frias Dep. 149:21-24; *see* Szyba Cert. Ex. 11.] This complaint detailed Defendant's discriminatory actions, pattern of antagonism, and retaliation, and formally requested the specific accommodation of transferring Frias out of the physically demanding recycling position. [Szyba Cert. Ex. 11.]

On November 20, Frias injured his shoulder while working and had to be taken for treatment by a co-worker. [Frias Dep. 139:23 to 140:21. 144:1-9; Udrija Dep. 82:1-10.] The clinic where Frias was taken released him that same day, but prescribed medication and a course of physical therapy. [Stoneburner Cert. Ex. I.] Further, the clinic reported to Defendant that Frias suffered: "shoulder/upper arm strain," "shoulder pain," and a "sprain of unspecified site of shoulder and upper arm." [*Id.*] The clinic further informed Defendant that Frias was not expected to make a full recovery until approximately December 20, 2008. [*Id.*]

The following day, November 21, Frias was terminated. [Frias Dep. 147:1-4.]

STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Summary judgment is appropriate only "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). On a summary judgment motion, the moving party first must show that no genuine issue of material fact exists. *Celotex v. Catrett*, 477 U.S. 317, 323 (1986). Thus, the Court must first decide whether there are "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The moving party's initial burden is satisfied only if it can show that there are no disputes over facts "that might affect the outcome of the suit under the governing law." *Id.* at 248. The moving party's failure to establish the requisite undisputed material facts "will properly preclude the entry of summary judgment." *Id.*; *see also Kapossy v. McGraw-Hill, Inc.*, 921 F. Supp. 234, 239 (D.N.J. 1996).

The burden then shifts to the non-moving party to present evidence that a genuine issue of material fact exists. *Celotex*, 477 U.S. at 324. Per Fed. R. Civ. P. 56(e), the non-moving party must "go beyond the pleadings" to designate "specific facts showing there is a genuine issue for trial," as supported by affidavits, depositions, and other documents on file. *Celotex*, 477 U.S. at 324; *Big Apple BMW, Inc. v. BMW of N. Am., Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992) ("to raise a genuine issue of material fact . . . the [non-moving party] need not match, item for item, each piece of evidence proffered by the movant," but rather "must exceed the 'mere scintilla' threshold"), cert. denied, 507 U.S. 912 (1993).

When weighing the evidence presented, "[t]he evidence of the nonmovant is to be believed,

and all justifiable inferences are to be drawn in [his] favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Pennsylvania Coal Association v. Babbit*, 63 F.3d 231, 236 (3d Cir. 1995).

In deciding a motion for summary judgment, the Court's role is not to evaluate the evidence and decide the truth of the matter, but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249. Credibility determinations are within the province of the factfinder. *Big Apple BMW*, 974 F.2d at 1363.

In the within matter, Defendant has failed to carry the initial burden of establishing the absence of disputed material facts. Further, Plaintiff has presented sufficient additional direct and circumstantial evidence in support of his position to establish genuine issues of fact requiring determination by a factfinder. Accordingly, these genuine issues of material fact compel the denial of the instant Motion for Summary Judgment.

LEGAL ARGUMENT

POINT I

GENUINE ISSUES OF MATERIAL FACT EXIST REGARDING DEFENDANT'S FAILURE TO ACCOMMODATE PLAINTIFF'S DISABILITY

A. PLAINTIFF ESTABLISHES THAT HE WAS DISABLED

Frias provides more than ample evidence, as reflected in the factual synopsis noted above, to support a finding that he has a protected disability under the NJLAD and was subjected to illegal discrimination and retaliation. It is, in fact, almost incredulous that Defendants would file a motion for summary judgment which is why counsel for Plaintiff objected to Defendant's request for leave to file its motion. It is noteworthy how barren Defendant's motion is of the relevant facts that set forth the factual predicate for Plaintiff's claim of disability discrimination and retaliation. Defendant is forced to take such action in its desperate attempt to pull the wool over the Court's eyes and avoid being held liable for its illegal actions. In fact, Defendant's motion is so bereft of merit, that the undersigned does not even require a separate certification from Plaintiff. As the Court is well aware, this is commonly required, as Defendant is the one who affects the content of the plaintiff's deposition by controlling the questions presented. However, the factual predicate to Plaintiff's claim of disability discrimination and retaliation is so strong, that no such certification is required. Thus, we respectfully submit that this is not even a close call requiring the denial of Defendant's Motion for Summary Judgment.

To establish a *prima facie* case of disability discrimination under the NJLAD, a plaintiff must establish that: (1) he is disabled within the meaning of the NJLAD; (2) he was qualified for the job; (3) he suffered an adverse employment action; and (4) the employer replaced the plaintiff with someone else. *Nieves v. Individualized Shirts*, 961 F. Supp. 782, 796 (D.N.J. 1997) (citing *Maher v.*

N.J. Transit Rail Operations, 125 N.J. 455, 480-81, 593 A.2d 750 (1991)).

A *prima facie* claim of failure to accommodate a plaintiff's disability consists of only the first three of the above elements, and not the fourth. *See Conoshenti v. Public Service Elec. & Gas Co.*, 364 F.3d 135, 150 (3d Cir. 2004) (quoting *Bosshard v. Hackensack University Medical Center*, 345 N.J. Super. 78, 91 (App. Div. 2001)); *Seiden v. Marina Assocs.*, 315 N.J. Super. 451, 718 A.2d 1230 (App. Div. 1998).

Defendant's sole argument in support its request for summary judgment with regard to Frias' claim under the NJLAD is that he was not "disabled" within the meaning of the NJLAD. Thus, Plaintiff's submission is likewise limited to the first element of Plaintiff's NJLAD case.

Under the NJLAD, "'[d]isability' means a physical disability [or] infirmity . . . caused by bodily injury . . . or illness . . . , and which shall include, but not be limited to, any degree of paralysis . . . lack of physical coordination, blindness or visual impediment . . . or physical reliance on a . . . remedial appliance or device . . . ." N.J.S.A. 10:5-5(q). "Because the purpose of the LAD is 'to secure to handicapped individuals full and equal access to society, bounded only by the actual physical limits that they cannot surmount,' the [NJLAD] besides being quite broad must also be liberally construed." *Tynan v. Vicinage 13 of Superior Court*, 351 N.J. Super. 385, 398, 798 A.2d 648 (App. Div. 2002) (citing *Andersen v. Exxon Co.*, 89 N.J. 483, 495, 446 A.2d 486 (1982)). This broad definition and liberal construction is in line with the Legislature's intention to "focus scrutiny not on whether a particular employee's limitations qualify for protection, but on the work-site actions taken in light of whatever physical or mental limitations the worker presents." *Id.* The NJLAD is therefore designed "to ensure that distinctions between people are 'made on the basis of merit, rather than skin color, age, sex or gender, or any other measure that obscures a person's individual

humanity and worth.'" *Id.* at 398-99 (citing *Enriquez v. W. Jersey Health Sys.*, 342 N.J. Super. 501, 527, 777 A.2d 365 (App. Div.), *certif. denied*, 170 N.J. 211, 785 A.2d 439 (2001)).

This philosophy and purpose, as espoused by New Jersey's courts, allows for an expansive and inclusive view of what constitutes a disability. *See, e.g.*, *Failla v. City of Passaic*, 146 F.3d 149, 154 (3d Cir. 1998) (discussing a "back condition that was aggravated by night shift work" due to "dampness and coldness of the night air, as well as the increased stress associated with the busier night shift"); *Tynan*, 351 N.J. Super. at 399 (plaintiff alleging that she suffered from "post-traumatic stress disorder, depression, irritable bowel syndrome, migraine headaches, hypertension, reflux esophagitis, and anxiety panic attacks . . . set forth sufficient illnesses and psychological maladies to withstand summary judgment"); *Nieves*, 961 F. Supp. at 796 (varicose veins); *Clowes v. Terminix Int'l Inc.*, 109 N.J. 575, 538 A.2d 794 (1988) (alcoholism); *Andersen v. Exxon Co., U.S.A.*, 89 N.J. 483, 446 A.2d 486 (1982) (back ailment); *In re Cahill*, 245 N.J. Super. 397, 585 A.2d 977 (App. Div. 1991) (drug addiction); *Gimello v. Agency Rent-A-Car Sys., Inc.*, 250 N.J. Super. 338, 594 A.2d 264 (App. Div. 1991) (obesity); *Panettieri v. C.V. Hill Refrigeration*, 159 N.J. Super. 472, 388 A.2d 630 (App. Div. 1978) (heart attack).

Here, Frias alleges he was disabled based on his back and shoulder ailments, his glaucoma, and his stroke. [Frias Dep. 23:8-11; 133:13-19; 148:7-13.]

Frias' back, shoulder, and arm ailments fit squarely into the definition of "disability" under the NJLAD, as they constitute a "physical disability [or] infirmity . . . caused by bodily injury" and include "any degree of . . . lack of physical coordination." N.J.S.A. 10:5-5(q); *see Andersen*, 89 N.J. at 491-92 (finding "ample evidence" that plaintiff fell under the NJLAD's protection based on his back and spinal ailment "that that continue[d] to place certain limitations on his physical

capabilities").

Frias' ailments resulted from a prior injury, which occurred when Frias was hit by a forklift driven by a drunk driver. [Frias Dep. 80:4-16.] Frias experienced ongoing pain in his back and right shoulder, as well as a limited physical ability to fully use his left arm. [Frias Dep. 76:16-24; 93:2-6.] Frias still suffers with the impact this condition has on his life and ability to perform certain manual, everyday tasks. [Frias Dep. 91:8-15.] Although Defendant relies on Frias' responses to its poorly worded questions, which were not limited temporally and which were improper in that they called for a legal conclusion, Frias does not contend that he suffers from a disability now or during all phases of his employment. Rather, Frias contends that during the relevant time period, he suffered from a disability, was discriminated against, and was retaliated against. Frias thus qualifies as disabled under the NJLAD based on his back, shoulder, and arm ailments.

Frias' glaucoma also fits squarely into the definition of "disability" under the NJLAD, as it is "a physical disability [or] infirmity . . . caused by bodily injury . . . or illness . . . , and which shall include, but not be limited to . . . blindness or visual impediment . . . ." N.J.S.A. 10:5-5(q). Glaucoma is a general term for a group of specific diseases that result in damage to the optic nerve and causes vision loss, up to total blindness. [Szyba Cert. Ex. 10.] Accordingly, glaucoma is directly within the "blindness or visual impediment" clause of the NJLAD. N.J.S.A. 10:5-5(q). Frias thus qualifies as disabled under the NJLAD based on his glaucoma.

Finally, Frias' stroke clearly constitutes "a physical disability [or] infirmity . . . caused by bodily injury . . . or illness." N.J.S.A. 10:5-5(q); *see Panettieri*, 159 N.J. Super. at 481, 492 (finding that the plaintiff fell within the NJLAD's definition, and thus could not be discriminated against because of heart attack, regardless of the fact that plaintiff suffered no serious heart damage). In

fact, Frias provided documentation to Defendant Al & John stating that Frias condition was, "without question, life-threatening." [Szyba Cert. Ex. 4 & 5; Frias Dep. 34:2-8.] Further, it is of no consequence that Frias' heart health did not specifically preclude him from engaging in any specific activities, as the NJLAD does not contain such requirement. *See Tynan*, 351 N.J. Super. at 397. Frias thus qualifies as disabled under the NJLAD based his heart disease and stroke.

It should be noted that Defendant's argument regarding Frias' belief that he is not disabled lacks merit. The entirety of Defendant's argument relies upon the definition of "disabled" as construed under the Americans with Disabilities Act ("ADA"). Frias does not assert any claims under the ADA, and thus the definition of "disability" under the ADA is inapplicable. *See* 42 U.S.C. § 12102 (defining "disability" as "a physical or mental impairment that substantially limits one or more major life activities"). The Third Circuit and New Jersey's federal and state courts have repeatedly explained that the definition of "disability" under the NJLAD is much broader than under the ADA. *See Failla*, 146 F.3d at 154; *Olson v. General Elec. Astrospace*, 966 F. Supp. 312, 314-15 (D.N.J. 1997); *Illingworth v. Nestle U.S.A., Inc.*, 926 F. Supp. 482, 488 (D.N.J. 1996); *Gimello v. Agency Rent-A-Car Sys.*, 250 N.J. Super. 338, 362, 594 A.2d 264 (App. Div. 1991).

As discussed above, Frias' conditions fit squarely within the NJLAD definition. Defendant's argument, based on the portions of Frias' deposition discussing "disability" in terms of Frias' ability to perform "life functions," seeks to have the more restrictive ADA standard applied to a NJLAD case. [*See* Frias Dep. 12 to 92:14.] Thus, Defendant's argument should be completely disregarded as it applies the wrong standard.

Drawing all reasonable inferences in Frias' favor, pursuant to the applicable standard of

review at the summary judgment phase, a factfinder could clearly find Frias was disabled pursuant the NJLAD's definition, as required to satisfy the first element of the *prima facie* case. Thus, Defendant's Motion for Summary Judgment should be denied so that the case can be properly determined by a factfinder.

B. PLAINTIFF ADVISED DEFENDANT OF HIS DISABILITY AND REQUESTED ACCOMMODATION

Frias establishes sufficient evidence to require that material facts in dispute be determined by a factfinder, and thus requiring Defendant's Motion for Summary Judgment be denied.

Once an employer is on notice of an employee's request for a reasonable accommodation, the employer has a duty to engage in an interactive process to find potential reasonable accommodations for the disabled employee. *Tynan*, 351 N.J. Super. at 400. To trigger this duty, the employee must show that: (1) the employee was disabled; (2) the employer knew about the disability; (3) the employee requested accommodations or assistance for the disability; (4) the employer did not make a good faith effort to assist the employee in seeking accommodations by engaging in the interactive process; (5) the employee could have been reasonably accommodated but for the employer's lack of good faith in failing to engage in the interactive process; and (6) the employee was terminated. *Id.*; *Victor v. State of New Jersey*, 401 N.J. Super. 596, 624-15, 952 A.2d 493 (App. Div. 2008).

The employee's request for accommodation must be clear insofar as it must put the employer on notice that the employee seeks assistance relating to his or her disability. *Jones v. United Parcel Service*, 214 F.3d 402, 408 (3d Cir. 2000). But, the request does not have to be in writing, does not need to use the phrase "reasonable accommodation," does not need to use any magic words, and does not need to cite to specific legal authority giving rise to the obligation. *Tynan* 352 N.J. Super at

400. Defendant argues that summary judgment should be granted on Frias' failure to accommodate claim because (1) Frias never made a request for accommodation, and, in the alternative, (2) even had Frias made such request, Defendant was under no obligation because Frias was not disabled.

With regard to Defendant's second point, as discussed above, Frias provides an abundance of evidence with regard to his disabilities. Viewed in the light most favorable to Frias for the purpose of the instant motion for summary judgment, Frias clearly establishes that he was disabled, and thus fell under the protection of the NJLAD. Thus, Defendant's argument is of no avail, and the motion for summary judgment cannot be granted on this ground.

With regard to Defendant's first point, the record is replete with evidence that Frias requested accommodation for his disabilities. Frias repeatedly notified his supervisors of the physical difficulties he was experiencing as a result of his disabilities.

In the days leading up to his termination, Frias worked in the recycling department after being transferred there on November 12, 2008. [Frias Dep. 23:3-4.] Frias duties included "struggle[ing]" with blood-soaked cardboard boxes to put them through a recycling machine. [Frias Dep. 57:22 to 63:10.] Animal blood splattered into Frias' eyes while he was working. [Frias Dep. 23:8-11.] The animal blood splatter was harmful to Frias' eyes and aggravated his glaucoma. [Frias Dep. 24:20 to 25:1.] Frias repeatedly requested protective eyewear of Madjarcic, Frias' supervisor in the recycling department. [Frias Dep. 22:15-19; 124:17-21.] Frias explained that the blood splatter hurt his eyes. [Frias Dep. 23:8-13.] Madjarcic refused to provide Frias with the requested eye protection. [Frias Dep. 21:25 to 22:2; 124:22 to 125:8.] These requests were ignored despite other employees of Defendant being given eye protectors. [Frias Dep. 40:14 to 41:10.] Viewed in the light most favorable to Frias for determination of the instant motion for summary judgment, this

genuine issue of material fact warrants that the case be tried before a factfinder.

During this same time, Frias made repeated requests for assistance with the physical aspects of the recycling position. [Frias Dep. 63:6-10.] These physical aspects involved retrieving empty, used boxes and pallets from the meat department, transporting them to the recycling area, breaking down the boxes by hand so they fit into the recycling machine, and then stacking the pallets on top of each other. [Frias Dep. 57:24 to 67:12.] Frias had to lift each of the "20-something-pound boxes over [his] head so [he] could put them into a grinding machine." [Frias Dep. 58:1-2] Then, Frias had to lift the pallets, each weighing up to 62 pounds, approximately a yard off the ground to stack them on top of each other. [Frias Dep. 58:21-22, 59:19-21, 63:8-9.] This work had to be performed in an area of the plant that was so cold that some of the other employees and supervisors would secretly drink alcohol, sometimes to the point of visible intoxication, to cope with the low temperatures. [Frias Dep. 67:10-12, 80:4 to 82:1.]

Frias' supervisor in the recycling department, Madjarcic, admits that he Frias asked for help "every time" Madjarcic spoke to him. [Madjarcic Dep. 65:11-17.] Defendant even admits that Frias specifically requested "to go back to the ready-to-eat packing area because [he was] hurt." [Udrija Dep. 65:13-16; *see also* Frias Dep. 63:20-24.] These continual requests put Defendant on notice of Frias specific disabilities relating to his physical ability to perform the recycling job. Frias also furnished notes from his doctor relating to his disabilities and openly discussed his doctor visits with management, confirming that Defendant was put on notice of Frias' specific disabilities. [Frias Dep. 34:5-8, 57:22 to 58:1, 138:18-20, 77:6-11; *see* Szyba Cert. 4-9.] Further, Frias specifically asked for a transfer back to the packing area—the position he held during the months leading up to his transfer to the recycling department.

Yet, instead of engaging in an interactive process with Frias, Defendant informed Frias that he would have to perform the duties of the job in less time than other employees were allotted—Frias was given eight hours to do the job when others were given ten hours. [Frias Dep. 66:26 to 67:9.] Then, when Frias asked for help, Madjarcic would merely tell him to "hurry up" and "work faster." [Frias Dep. 66:10-16; Madjarcic Dep. 80:2-8; Udrija Dep. 90:9-24.] Udrija would stand close to Frias' work area and laugh at Frias' struggling. [Frias Dep. 66:16-18.] It is beyond dispute that such actions by Defendant's reflect a complete disregard of trying to accommodate a disabled employee, let alone even attempt to engage in the interactive process to accommodate employees. Defendant's failure to engage in the interactive process, should not, of course, be construed as an assumption that no accommodation was possible, as Defendant wrongfully argues in its brief. *Taylor v. Phoenixville School Dist.*, 184 F.3d 296, 318 (3d Cir. 1999). This is yet another independent reason why Defendant's motion is so frivolous and should be denied.

Once Frias put Defendant Al & John on notice of his disability and request for accommodation, Defendant had an obligation to engage in the interactive process. Instead, Defendant imposed heightened requirements and held Frias to a higher standard than that set for other employees. And after approximately two weeks of Frias being transferred to the recycling position, Defendant terminated Frias, regardless of Frias' twelve years of service at Defendant Al & John. This is a clear breakdown of the employer's duty to accommodate a disabled employee and also evidential of Defendant's animus and retaliatory attitude against this disabled employee.

Thus, Frias presents facts, which, viewed in the light most favorable to Frias for determination of the instant motion for summary judgment, establish that genuine issues of material

fact exist. These genuine issues of material fact should be brought before a factfinder for determination, and accordingly Defendant's Motion for Summary Judgment should be denied.

POINT II

GENUINE ISSUES OF MATERIAL FACT EXIST REGARDING DEFENDANT'S RETALIATION AGAINST PLAINTIFF FOR PLAINTIFF'S PROTECTED ACTIVITY

Defendant's Motion for Summary Judgment should be denied so the case may be resolved by a factfinder because Frias provides ample evidence of retaliation as prohibited by the NJLAD.

To establish a *prima facie* claim of retaliation under the NJLAD, a plaintiff must show that: (1) he engaged in protected conduct known to the employer; (2) he was subjected to an adverse employment decision; and (3) that there was a causal link between the protected activity and the adverse employment decision. *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265 (3d Cir. 2001); *Marrero v. Camden County Bd. of Soc. Servs.*, 164 F. Supp. 2d 455 (D.N.J. 2001).

A causal connection can be established by proving either "(1) an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action, or (2) a pattern of antagonism coupled with timing to establish a causal link." *Lauren v. DeFlaminis*, 480 F.3d 259, 267 (3d Cir. 2007). "In the absence of that proof the plaintiff must show that from the 'evidence gleaned from the record as a whole' the trier of the fact should infer causation." *Id.* (citing *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 281 (3d Cir. 2000)).

Here, the timing and totality of the facts presented provide more than ample evidence to establish a causal link. As Defendants do not dispute, for purposes of the instant motion for summary judgment, that Frias can establish that he engaged in protected activity and that an adverse

employment action took place, Frias will limit this submission accordingly to only address Defendant's arguments.

The timing of events—a repeated pattern of Frias' protected action followed soon after by Defendant's reaction—reveals that as time progressed, management became increasingly hostile to Frias' needs and began to take retaliatory actions to make Frias employment less and less bearable. Over the span of approximately three years, Frias endured transfers, disruptions in his health insurance coverage, demotions, and verbal hostility. This progressively retaliatory and antagonistic pattern is revealed by the facts themselves.

Prior to 2005, Frias experienced no significant health complications or needs with respect to his employment and thus remained uneventfully employed by Defendant as a bone chip separator. Frias' first step toward being seen as a problem by Defendant occurred when Frias was diagnosed with glaucoma in 2005. [Frias Dep. 23:21-25.] Frias' needs for medical attention began increasing, and so did Defendant's awareness of Frias' health.

In 2006, Frias was injured at work when a drunk forklift operator lost control of the vehicle and crushed Frias. [Frias Dep. 79:17 to 80:13.] As a result, Frias needed surgery. [Frias Dep. 84:4-8.] Frias also needed to go out on leave. [Frias Dep. 84:9-18.] When Frias attempted to return to work as a bone chip separator, Udrija refused to allow Frias back to work and refused to accommodate Frias' restriction in any way. [Frias Dep. 85:9 to 86:20.] Frias was out of work on leave for over three months. [Frias Dep. 84:13-15.] During that time, Frias was refused health insurance coverage. [Frias Dep. 85:9-13.]

On September 17, 2007, Frias had a stroke. [Frias Dep. 150:3-12.] The stroke was a result of Frias being refused medical insurance coverage, despite Frias being a ten-year employee of

Defendant who was out on approved leave. [*See* Frias Dep. 36:17-20.] Because Frias had no insurance coverage, he could not afford the prescribed heart medication, and thus was unable to take the heart medication meant to prevent a stroke. [*See* Frias Dep. 31:1-4, 32:3-4, 36:17-20.]

After working for approximately ten years for Defendant Al & John without any medical issues, Frias now had three major medical incidents occur in the span of approximately two years, and started seeing doctors regularly. Defendant's view of Frias changed specifically because of Frias' disability, and began driving Defendant's conduct towards Frias.

In October 2007, Defendant Al & John transferred Frias from his union position in the bone chip separation department, where he had been working since he first began his employment at Defendant Al & John in 1996. [Frias Dep. 103:7-13.] This transfer directly caused Frias to lose his health insurance. [Udrija Dep. 37:3-5.] This transfer is evidence that Defendant began taking retaliatory actions towards Frias.

Frias' supervisors also started commenting to Frias that, "Papi, you go to too many doctors." [Frias Dep. 109:19-21.] Management's displeasure with Frias became apparent as they no longer treated him the same way and were different toward him, despite there being no issues with his work. [Frias Dep. 46:8-22.] This, it is apparent that Frias' disability was on the forefront of management's minds when taking retaliatory action with respect to Frias.

But, due to his medical needs, Frias could not ignore the need to seek medical attention, and he continued to visit the requisite doctors. [Frias Dep. 116:4-8.] Frias soon started receiving bills directly, as Defendant removed Frias from his union health insurance by effectuating the transfer.

Frias objected immediately upon discovering he was no longer being covered by health insurance, and went so far as filing a grievance with his union. [Frias Dep. 118:19-23.] Defendant,

on the other hand, tried to force upon Frias a different insurance plan that did not cover Frias' necessary medications. [Frias Dep. 128:15-18.] Thus, even when Frias commenced a grievance through his union, Defendant only offered Frias the inferior health insurance plan. This action is evidence that Defendant was trying to make Frias' employment more difficult due to the medical issues and disabilities that he suffered from and his objections to their discriminatory treatment.

Despite this, Frias continued to have medical needs. So when Frias rejected Defendant's offer of inferior health insurance, it was clear to Defendant that Frias was vocally asserting his rights with respect to his medical needs. *See Abramson*, 260 F.3d at 288 (finding that complaints are sufficient to satisfy the first prong of the *prima facie* case regardless of whether they are oral, written, formal, or informal, provided they expressed opposition to a protected activity).

Defendant then increased its retaliatory actions. Defendant transferred Frias into the recycling department to make Frias' employment unbearable in an effort to get rid of Frias. [Frias Dep. 121:14-17.] The recycling department is known among employees for being extremely physically demanding and is considered one of the least desirable positions at Al & John. [Frias Dep. 63:15-19, 123:7-9.] Nonetheless, Defendant transferred Frias into this grueling position, involving heavy labor and lifting, extreme temperatures, and blood splattering in Frias' eyes, even though Frias had been diagnosed with glaucoma, had a shoulder injury, and had recently suffered a stroke.

Immediately after Frias' transfer into the recycling department, Defendant's management determined that Frias had performance issued and harangued Frias daily. [Frias Dep. 67:2-9.] Madjarcic would badger Frias to work faster, and Udrija stood close by and laughed as Frias struggled. [Frias Dep. 66:15-18.] Frias repeatedly asked for eye protectors so avoid blood

splattering in his eyes. [Frias Dep. 22:15-19.] Frias repeatedly told management he had difficulty because of his disabilities. [Frias Dep. 66:4-6; Udrija Dep. 67:13-16.] Frias repeatedly asked for a transfer to another department, as other employees had been accommodated. [Udrija Dep. 65:13-16; *see also* Frias Dep. 63:20-24.]

Instead, management continued to criticize Frias' performance and reprimand Frias for inferior work, so as to build a record to justify Frias' ultimate termination. The criticisms constituted a pattern of retaliatory conduct and antagonism taken against Frias, who at this point had worked for Defendant for over ten years without performance issues, and was now being subject to daily reprimands.

When Frias noticed that Defendant was increasing its retaliatory efforts and nothing was being done to help him, he lodged a formal, detailed written complaint, copies of which were sent to Defendant's managers on November 18, 2009. [Frias Dep. 149:21-24; *see* Szyba Cert. Ex. 11.]

On November 20, Frias injured his shoulder while working and had to be taken for treatment by a co-worker. [Frias Dep. 139:23 to 140:21. 144:1-9; Udrija Dep. 82:1-10.] The clinic where Frias was taken released Frias that same day, but prescribed medication and a course of physical therapy. [Stoneburner Cert. Ex. I.] Further, the clinic reported to Defendant that Frias suffered: "shoulder/upper arm strain," "shoulder pain," and a "sprain of unspecified site of shoulder and upper arm." [*Id.*] The clinic further informed Defendant that Frias was not expected to make a full recovery until approximately December 20, 2008. [*Id.*]

The following day, November 21, Frias reported to work to the recycling department at his usual time. Upon arriving, Frias was terminated. [Frias Dep. 147:1-4.]

It is surprising that Defendants even have the gall to argue to this Court that there is no

temporal connection between an adverse action and a situation surrounding Frias' disability. However, this should probably not be so surprising given Defendant's arguments with regard to the union grievance. Defendant's intimate to the Court that the arbitrator somewhere deliberated over the issues of disability discrimination and retaliation and found the termination to be not in violation of the NJLAD. [Def. Brf. p.3.] Nothing can be further from the truth as the issue of disability discrimination and/or retaliation was not before this arbitrator. [*See* Stoneburner Cert. Ex. B (deciding solely (1) whether Defendant "violate[d] the C.B.A. when it transferred Jose Frias from the Union position of bone chip separator to the non-union position of helper," and (2) whether Defendant "ha[d] just cause to discharge Jose Frias").]

Thus, as is readily apparent, each protected action is coupled with a retaliatory reaction from Defendant. These incidents reveal a chain of occurrences over the course of approximately two years. As Frias' needs gradually increased from 2005 to 2008, he was subject to increasingly harsh retaliatory reactions by Defendant. Thus, a temporal connection is established, revealing the causal relationship between each individual incident and the corresponding reaction, and also highlighting that it was not until Frias began experiencing medical issues and asserting his rights that such retaliatory conduct was taken against him. This point is clearly made when one considers that Frias worked for ten years without incident. It was only when he began to suffer from disabilities that Frias began to have corresponding issues at work. As the final incident, within 3 days of Frias' formal written complaint, and the day following an injury that would leave Frias disabled for a period of time, Defendant terminated Frias' employment.

Considering all of the facts presented, a jury has sufficient evidence to find that the adverse employment actions were caused by Frias' disabilities. The record is replete with evidence that ties

Defendant's retaliatory conduct and negative treatment of Frias to the fact that Frias was disabled, sought medical assistance, and objected to a trampling of his rights.

Looking at the facts in a light most favorable to Frias, per the summary judgment standard, sufficient evidence is presented regarding disputes of material fact to warrant presenting the instant case to a factfinder for determination. Thus, the Court should deny Defendant's motion for summary judgment.

POINT III

GENUINE ISSUES OF MATERIAL FACTS EXIST REGARDING PLAINTIFF'S CLAIMS THAT HE WAS UNLAWFULLY DEPRIVED OF HEALTH BENEFITS UNDER ERISA

Count IV of Plaintiff's Complaint, alleging that Defendant unlawfully deprived Frias of healthcare benefits in violation of ERISA, should proceed to trial so that a factfinder may determine the established genuine issues of material fact.

ERISA § 510, 29 U.S.C. § 1140, protects against "Interference with protected rights." Specifically, ERISA § 510 states, in pertinent part, that:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provision of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act.
>
> ERISA § 510, 29 U.S.C. 1140.

A plaintiff may prove a violation of ERISA § 510 through circumstantial evidence using the *McDonnell Douglas-Burdine* burden-shifting scheme. *Jakimas v. Hoffman-La Roche, Inc.*, 485 F.3d 770, 785 (3d Cir. 2007) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *Tx. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed.

2d 207 (1981); *DiFederico v. Rolm Co.*, 201 F.3d 200, 205 (3d Cir. 2000)). To do so, the plaintiff must first establish a *prima facie* case, showing that "'(1) the employer committed prohibited conduct (2) that was taken for the purpose of interfering (3) with the attainment of any right to which the employee may become entitled.'" *Id.* (quoting *DiFederico*, 201 F.3d at 205).

If the plaintiff establishes his *prima facie* case, the defendant bears the burden of production to "articulate a legitimate, nondiscriminatory reason for the prohibited conduct." *Id.* at 785-85 (quoting *DiFederico*, 201 F.3d at 205).

Once the defendant meets his burden, the plaintiff has the burden of persuasion to show that the defendant's proffered reason is pretextual—that that true reason for defendant's conduct was discrimination, or that the employer's explanation lacks merit. *Id.*

In the instant case, Frias establishes a *prima facie* case. As the Third Circuit has explained, a wide range of employer conduct can violate ERISA § 510, which is intended to cover employer conduct such as termination of employment as well as "employee harassment which falls short of firing." *Becker v. Mack Trucks, Inc.*, 281 F.3d 372 (3d Cir. 2002) (citing *McGath v. Auto-Body North Shore, Inc.*, 7 F.3d 665, 669 (7th Cir. 1993) (ERISA § 510 "protects the employee not only against the classical forms of employer harassment that might occasion the loss of benefits, but also against the more atypical forms of employer misconduct that can produce the same result.")).

Frias satisfies all elements of the *prima facie* case, based on Defendant's transfer of Frias from a union position to a non-union position in October 2007. This action qualifies as prohibited conduct under the definition of ERISA § 510, because it was a fundamental change of Frias' employment at Al & John, impacting some of the basic characteristics of his employment relationship. The transfer was much more than just a change in job description and duties. In his

union position, Frias was eligible for a set of protections that were not available to nonunion employees, and Frias was eligible for a completely separate and distinct set of benefits made available exclusively to union employees. [*See, e.g.*, Frias Dep. 26:25 to 27:3, 30:2-4; Udrija Dep. 28:19 to 30:5, 55:6-15.] Once transferred, Frias was no longer entitled to the benefits or protections afforded union employees because he was no longer eligible to be in the union. [*See* Udrija Dep. 32:19-21, 36:24 to 37:12.] Additionally, this transfer effectively constituted a demotion to the extent that Frias was transferred from a unionized position requiring some specialized training and skill to that of a nonunion "helper"—a position requiring no skill or training, and that "[a]nybody could do it." [Frias Dep. 11:8-12, 18:23-24, 20:20-21; Udrija Dep. 16:5-6.]

As a direct result of this demotion and transfer, Frias lost the healthcare benefits to which he was entitled as a union member and was taken out of the union. The October 2007 demotion and transfer was the only reason that Frias lost his healthcare benefits. [Udrija Dep. 37:3-5.] This transfer is similar to the reclassification of employees from "employee" status to "independent contractor" status, which has been found to constitute employer conduct calculated to lead to the loss of benefits and has been held to violate ERISA § 510. *See In re Allstate Ins. Co.*, 400 F.3d 505, 506 (7th Cir. 2005); *Gitlitz v. Compagnie Nationale Air France*, 129 F.3d 554, 558-59 (11th Cir. 1997). Here, as in the reclassification cases, the transfer impacted Frias' employment in such a manner that the conduct therefore rises to the level of "prohibited conduct." Frias simultaneously establishes that his transfer was a demotion and prohibited conduct, and Defendant, by way of Plant Manager Udrija, admits that but for the transfer Frias would not have lost his healthcare benefits. Thus, Frias satisfies the first and second elements of the *prima facie* case.

In satisfaction of the third element of his *prima facie* case, there is little, if any, dispute that Frias was entitled to benefits prior to his transfer. Frias was, in fact, enrolled to receive healthcare benefits to which he was entitled as a result of his union membership. [Frias Dep. 30:9-15.] Further, once he was removed from the union, Frias was entitled to healthcare benefits on the company's nonunion plan. [Udrija Dep. 42:3-25.] In fact, as an employee in his eleventh year of service, Frias was entitled to healthcare benefits pursuant to either benefits scheme, as he had satisfied every condition precedent or other hurdle an employee must overcome to qualify for eligibility. Thus, Frias satisfies the third element of his *prima facie* case, showing that his employer engaged in prohibited conduct specifically intended to interfere with rights to which Frias was entitled.

Defendant, however, proffers that Frias was transferred from his union position into a non-union position because Defendant acquired a machine for the function that Frias performed, and thus Frias' bone chip separation services were no longer needed. [Udrija Dep. 19:1-6; Madjarcic Dep. 18:15-22.]

Thus, the burden falls on Frias to show that Defendant's proffered reason is pretextual—that that true reason for Defendant's conduct was discrimination, or that Defendant's explanation lacks merit. *Eichorn v. AT & T Corp.*, 248 F.3d 131, 149 (3d Cir. 2001). As noted, under ERISA § 510, "the retaliation or interference does not need to be the sole reason for the employer's conduct." *Gavalik v. Continental Can Co.*, 812 F.2d 834, 851 (3d Cir. 1987).

Here, Defendant's explanation lacks merit. At the time of Frias' transfer, Frias had been employed by Defendant Al & John for eleven years. [Frias Dep. 9:12-14, 70:4-6.] During that time, Frias was known as a consistent performer in his department. [Madjarcic Dep. 33:15-21; Udrija

Dep. 62:10-12.] His duties as a bone chip separator required the most skill of anyone in his immediate area in that he was the only one who used a knife when handling the meat—a fact Frias' former supervisor disputes. [*Compare* Frias Dep. 16:2-10, 20:6-25, *with* Madjarcic Dep. 22:7-25.] He was also the only union member, and thus the only one enrolled in the particular healthcare plan, in his immediate department. [Frias Dep. 21:1-7-10; *see* Udrija Dep. 37:3-12.] The rest of the workers in the bone chip separation department were "helpers"—a position requiring no skill, possessing no defined job description, and generally considered the lowest-ranked position at Defendant Al & John plant. [Udrija Dep. 16:5-7, 19:22-24.]

At the time of the October 2007 demotion and transfer, seven employees worked in the bone chip separation department, inclusive of Frias. [Frias Dep. 70:13-18.] Frias was transferred out of the bone chip separation department along with four helpers. [Frias Dep. 70:23 to 71:3.] Defendant selected Frias to be transferred despite the fact that he had more experience and seniority than the two employees who remained in the bone chip separation department. [Frias Dep. 70:13-18.] The two persons who were not transferred and thus remained in the department had less seniority and less experience than Frias and were not in the union. [Frias Dep. 108:15-20.] Despite these facts, Frias was transferred to a department where he would be a "helper"—an "extra guy" for whom there was no official position—notwithstanding his eleven years of service and experience in bone chip separation. [Udrija Dep. 68:18-23.]

Despite Defendant's assertion that Frias was no longer needed in the department, Defendant's explanation makes no sense as to the reason why a senior, more experienced employee was transferred from a department in which he worked for eleven years, instead of two unskilled employees with significantly less experience. Although it is true that Frias had no specific

experience with the new machine, no other employee in the department had any such experience because the machine was recently purchased and was thus new to all employees. No employee had any experience with it. Prior to the purchase of the machine, no other machine did the same function, as Frias was employed to separate bone chips by hand using a knife. Defendant cannot, and does not, allege that the cause of the transfer was a lack of any specific skill or knowledge. Although the specific tasks Frias performed would be performed by a machine, two people were still needed in the specific bone chip separation department.

Thus, Defendant's argument that Frias was no longer necessary is meritless, and Plaintiff can sufficiently establish that Defendant's proffered reason is a pretext for conduct violative of ERISA § 510.

Further, Frias presents ample evidence to establish that his transfer was effectuated with the specific intent of interfering with his rights. Generally, a causal link can be established through either "(1) an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action, or (2) a pattern of antagonism coupled with timing." *Lauren v. DeFlaminis*, 480 F.3d 259, 267 (3d Cir. 2007). Otherwise, a plaintiff may ask the trier of fact to infer a causal connection based on "evidence gleaned from the record as a whole." *Id.* In ERISA § 510 cases, the employer must have had the "specific intent" to retaliate or interfere with the plaintiff's ERISA-protected benefits, although the retaliation or interference does not need to be the sole reason for the employer's conduct. *Gavalik v. Continental Can Co.*, 812 F.2d 834, 851 (3d Cir. 1987). This "specific intent" does not create a heightened standard of proof, but rather merely calls for a showing that the employer's actions were motivated for purposes proscribed by ERISA § 510, as opposed to other unlawful motives. *See Larimer v. IBM Corp.*, 370 F.3d 698, 702-03 (7th Cir.

2004). Here, the timing, a pattern of conduct, and factual circumstances as a whole reveal Defendant's specific intent to retaliate and interfere with Frias' healthcare benefits.

During his employment by Defendant, Frias specifically sought continued and uninterrupted healthcare benefits because he could not otherwise afford necessary medical treatment and care. [Frias Dep. 30:16 to 31:4.] Frias had to go so far as filing a grievance with the NLRB so that he could be eligible for these benefits. [Udrija Dep. 20:8-20.] He ultimately prevailed in becoming a union member and securing the healthcare benefits. [Frias Dep. 99:17-23; Udrija Dep. 22:10-17.]

Udrija, the plant manager and the person who made the decision to transfer Frias, admitted that he was aware that a transfer such as the one effectuated in October 2007 would specifically cause a loss of the benefits to which Frias was entitled. [Udrija Dep. 37:3-5.] Udrija also knew of Frias' medical needs and reliance on his healthcare benefits. [Frias Dep. 101:3-8.]

After Frias enrolled in the union benefits plan, management's attitude towards Frias "changed." [Frias Dep. 46:13-15.] Although management "was always happy with [Frias'] work," Frias' direct supervisor, Milan Madjarcic, made comments such as, "Papi, you go to too many doctors." [Frias Dep. 46:16-22; Frias Dep. 109:21.] Comments of this nature reveal that management's attitude and perception of Frias was being affected by Frias' medical needs and conditions more so than by his work performance.

As Frias' medical needs increased, so did Defendant's motivation to get rid of Frias and his medical expenses. Since 2005, Frias has suffered from glaucoma and has required ongoing treatment and prescriptions. [Frias Dep. 23:21-25.] Frias' glaucoma treatment and medications resulted in medical expenses being charged to his healthcare plan. In 2006, Frias had surgery that resulted from a workplace injury. [Frias Dep. 29:10-20.] Frias required treatment and prescriptions,

all of which Frias submitted for coverage by his healthcare plan. Then, approximately one month before the he was transferred, Frias suffered a stroke. [Frias Dep. 150:3-12.] As a result, Frias needed medical attention and prescriptions, which in turn resulted in a new wave of medical expenses being charged to his healthcare plan.

These escalating healthcare costs and Defendant's discriminatory animus towards Frias made Frias a target. Thus, Frias was transferred because his "medicines were too expensive" and because management "wanted to take me out of there to packing [to] give me a different type of insurance." [Frias Dep. 109:12-15.] After the transfer, Frias was left to languish without insurance for some time before Defendant unilaterally enrolled Frias in a lesser plan established for "helpers." [Frias Dep. 116:4-11, 128:8-25; Udrija Dep. 36:6-24, 42:3-25.] Thus, Udrija—"the brains behind everything"—was able to control the means and outcome of the conduct against Frias, insofar as he had full authority and power to effectuate the transfer and directly trigger a loss of Frias' union-issued healthcare benefits in a one calculated, specific move. [*See* Frias Dep. 96:8-10.]

Simply put, in Defendant's eyes, Frias had become undesirable and costly. Since Frias' union membership and resulting healthcare plan were important to Frias, a transfer would have a severely debilitating impact on Frias. This impact was calculated to force Frias to ultimately resign. Thus, a causal connection showing Defendant's specific intent to interfere with an ERISA-protected right is clearly established.

Plaintiff therefore furnishes sufficient facts to establish a *prima facie* case and to establish that Defendant's reason for the October 2007 transfer was a pretext for unlawful retaliation and interference with ERISA-protected healthcare benefits. For purposes of summary judgment, with

the facts viewed in the light most favorable to Frias, sufficient factual disputes remain to require determination by a factfinder.

Defendant's argument that summary judgment should be granted with regard to Count IV-ERISA is based merely on the notice requirements under the Consolidated Omnibus Budget Reconciliation Act ("COBRA"). The Complaint and subsequent discovery, including all depositions, addressed the facts and circumstances surrounding Frias' October 2007 transfer. Thus, Defendant's COBRA argument should have no impact or bearing on the ERISA cause of action.

Because Plaintiff has satisfied all requirements in bringing a case under ERISA § 510, the case should proceed so that a factfinder can resolve issues of material fact. Thus, Defendant's Motion for Summary Judgment should be denied with respect to Count IV of Plaintiff's Complaint.

CONCLUSION

For all the foregoing reasons, Defendant's motion seeking the dismissal of Plaintiff's claims by way of summary judgment should be denied.

Respectfully submitted,
HYDERALLY & ASSOCIATES, P.C.

BY: s/ Ty Hyderally
TY HYDERALLY, ESQ.