DEISY GRANADOS Plaintiff/ Appellant vs. PAN AMERICAN LIFE INS. CO., HOLA DOCTOR INS. & FIN. SERVICES, HORIZON BLUE CROSS BLUE SHIELD OF NEW JERSEY, JONATHAN RUEDE, INDIRA SHAKE, KARLA HARDWICK, Defendants / Respondents	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET No.: A-001736-24 CIVIL ACTION ON APPEAL FROM Union County Superior Court The Hon. Lisa Mirales Mirales Walsh sat below

BRIEF SUBMITTED ON BEHALF OF THE PLAINTIFF / APPELLLANT DEISY GRANDOS

On the Brief:
Ryan Linder, Esq. (037222001)
Marin Linder
24-26 Park Avenue, Suite 2
West Orange, New Jersey 07052

Tale of Contents

Table of Authorities

Cases

Statutes

Federal Statutes

Federal Regulations

TABLE OF JUDGMENTS, ORDERS AND RULINGS UNDER APPEAL

Procedural History

The Plaintiff filed an amended complaint on March 12, 2024. PA 1A-11A. Counsel for Horizon Blue Cross Blue Shield of New Jersey filed a notice of appearance on May 30, 2024. The complaint against Horizon Blue Cross Blue Shield was dismissed after the plaintiff filed a notice of dismissal on September 12, 2024. PA 12A-13A. The present appeal does not seek to revive the plaintiff's complaint against Horizon Blue Cross Blue Shield. As to the remaining defendants: A motion to dismiss was filed on their behalf on June 3, 2024. The defendants' motion was granted by The Hon Lisa Mirales Walsh, J.S.C., on September 13, 2024. PA 14A-25A. In the decision, the court dismissed all three counts of the plaintiff's complaint without prejudice. PA 15A. A second amended complaint was filed on October 1, 2024. PA 26A-38A. The complaint advanced two causes of action: Violation of New Jersey's Conscientious Employee Protection Act, N.J.S.A. 34:19-1 as well as a wrongful termination claim. PA 26A-38A. The defendants filed a second motion to dismiss which was granted with prejudice by the Court on January 2, 2025. PA 39A-49A.

Facts

Defendants Hola Doctor and Pan American Life Insurance were engaged in the business of marketing and selling health insurance products that were offered by Blue Cross and Blue

Shield of New Jersey. PA 26A & 27A. Given the nature of their business, the defendants were deemed to be covered entities under the Health Insurance and Portability Act, 42 U.S.C. 120 "HIPPA"). See 45 C.F.R. § 160.102. PA 29A. As covered entities, the defendants had an affirmative and non-delegable duty to craft, implement and enforce policies to protect the confidentiality of their clients' private health information. See 45 C.F.R. § 164.306(4). PA 29. In this vein, the defendants established guidelines that conformed with HIPPA's minimum standards to protect the sanctity of private client health information. PA 29A-30A. The defendants provided extensive training concerning those guidelines and directed employees to report violations via a hotline or directly to supervisors in the defendant's New Orleans Office. PA 30A.

The plaintiff was employed by both entities. Her position required her to sale health insurance products to the general public and provide them with assistance after they were formally enrolled. PA 28A. The plaintiff, who was hired in 2018, was a highly rated employee who served without incident until she raised issues concerning practices that compromised the security of private patient health information. PA 30A. That is, in April of 2023, the plaintiff became alarmed when employees "began to bring their personal laptops into Hola Doctor's Perth Amboy Office." PA 30A. The plaintiff believed that this violated HIPPA

guidelines and regulations for two reasons. First, it violated a company policy that was developed to ensure compliance with HIPPA's privacy requirements. PA 30A-31A. Second, the presence of personal laptops constituted an unauthorized presence in the workplace which violated HIPPA's regulations and guidelines. PA 30A-31A. The plaintiff's complaint goes on to allege multiple violations of HIPPA and its related guidelines which were reported to senior management. PA 30A-34A. The plaintiff communicated the following complaints to senior management and via the Blue Cross Blue Shield Hotline:

- Non-Employees who were not authorized to be present in the office were allowed to enter and remain in areas where private confidential health information was stored. PA 34A.
- Her colleagues made unauthorized copies of private confidential health information. PA 34.
- Her colleagues were bringing unauthorized computers into the workplace which was "tantamount to having an unauthorized presence in the workplace. PA 34A.

In accordance with the defendant's policy, which encouraged employees to report violations of HIPPA, its related regulations and company policies that were implemented in connection with same, the plaintiff reported the violations to manager Francisco Reccio by phone. PA 31A. When she failed to receive a response, the plaintiff notified defendant Karla Hardwick who directed the plaintiff to contact Jonathan Ruede. PA 31A. The plaintiff left a voicemail message for Mr. Ruede concerning the HIPPA

violations on July 13, 2023. PA 31A. After she failed to receive a response, she forwarded an email to Mr. Ruede that provided a synopsis of her colleagues HIPPA violations. PA 32A. The complaint at issue included the following language concerning the interaction:

> One of the things that is happening is that some employees are bringing their personal Laptops to the office and using it during work hours which is illegal. We only work and Sell products with Horizon Blue Cross & Blue Shield of New Jersey. We receive confidential information from Horizon members and I not know if these employees are sharing this information for another kind of business. They spent their time making copies and copies that are not from work.
>
> She added that an unauthorized person was permitted to enter the office , the workplace was dirty, the manager was absent, her colleagues were making improper photocopies of potentially confidential information and the distribution or work was inequitable.

PA 32A.

HIPPA and by extension the defendants' policy barred acts of retaliation when employees made good faith complaints concerning what they believed to be violations of the policies that were put in place to protect the confidentiality of private client health information. See 45 C.F.R. § 164.316. Notwithstanding the bar against retaliatory acts, the plaintiff was subject to immediate and alarming retaliatory conduct that commenced shortly after her email to Mr. Ruede. For instance,

one day after her email, an angry colleague stormed into the plaintiff's office and threatened her. PA 34A. Additional acts of retaliation referenced in the plaintiff's complaint follow:

- Defendant Indira Shake sought to discipline the plaintiff for failing to appear at work. The allegation was laughable as the plaintiff was at on off-site event at the specific direction of Ms. Shake. PA 34A-35A.
- The plaintiff and her colleagues had a hybrid work schedule that permitted them to work from home on designated days. The defendants allowed the other employees to remain on a Hybrid schedule but barred the plaintiff from working from home. PA 35A.
- Even though Hola Doctor was experiencing problems with its internal communication systems, the plaintiff was issued a warning related to the failure of the system. PA 35A.
- The plaintiff was provided with a negative employment evaluation, her first in five years . PA 35A.
- The plaintiff was terminated from her position and the defendants refused to provide her with her final paycheck unless she agreed to execute a settlement agreement and release. PA 35A.

Notwithstanding the retaliatory acts, the plaintiff remained undaunted as she reported the above referenced HIPPAA violations to the Blue Cross Blue Shield Hotline on September 19, 2023. PA 33A.

Legal Argument

Standard of Review

An appellate court's review of a successful motion to dismiss is plenary in nature, "Appellate review of an order dismissing an action on this basis is governed by a standard no different than that applied by the trial courts. Accordingly, we base our review of the order in question in light of the facts pleaded by plaintiffs and the reasonable inferences that may be drawn therefrom." Seidenberg v. Summit Bank, 348 N.J. Super. 243, 250 (App. Div. 2002). In short, an appellate court reviews the matter to determine whether the plaintiff's complaint sets forth a cognizable cause of action.

With this as a backdrop, a motion to dismiss for failure to state a cause of action is to be granted in only the rarest of instances. Banco Popular of North America v. Gandi, 84 N.J. 161, 166 (2005). As a rule, to the extent the underlying pleading so much as suggests the existence of cause of action, a motion to dismiss should not be granted. Ibid. When reviewing the application, all factual inferences are to be resolved in favor of the non-moving party.

Point One

The court committed a reversible error when it concluded that the plaintiff did not have an objectively reasonable belief that her colleagues conduct violated the law and/or a clear mandate of public policy. (Raised Below at P 45A)

The Conscientious Employee Protection Act, N.J.S.A. 34:4-19("CEPA") is a remedial statute that encourages employees to report conduct that is illegal or at odds with public policy. Abamount v. Piscataway Board of Education, 138 N.J. 405, 417 (1994). As an initial threshold matter, in order for a plaintiff to successfully advance a claim, she must show that she had an objectively reasonable belief that the complained of conduct violated a law or mandate of public policy. Estate of Roach v. TRW, Inc., 164 N.J. 598, 613 (2000). The court erred when it concluded that the plaintiff lacked such belief when it held that the "Second amended complaint fails to establish that she reasonably believed the conduct at issue was against the law under N.J.S.A. 34:19-3(a)(1) or was incompatible with a clear mandate of public policy under N.J.S.A. 34:19-3(C)(3)." PA Opinion at 5.

The court's decision is flawed as it ignores controlling law and the environment within which the plaintiff labored. As previously indicated HOLA Doctor and Pan American Life Insurance were covered entities who were required to create and implement

administrative safeguards to "Protect against any reasonably anticipated threats or hazards to the security of such or integrity of private medical information." 45 C.F.R. § 164.30. The guidelines go on to establish minimum level standards that limit access to client confidential health information to authorized members of a covered entity['s workforce. 145 C.F.R. § 164.308. This end is achieved by barring non-employees from work locations where private confidential health information is stored or may be accessed. 45 C.F.R. § 164.308. the minimum level standards specifically require covered entities to "Implement policies and procedures to limit physical access to its electronic information systems and the facility or facility in which they are housed." 45 C.F.R. §164.310.

Seeking to comply with the controlling regulations, the defendants implemented policies that were designed to limit access to private client health information. The policies included a prohibition on non-employees in the work place as well as a ban on personal laptops. The defendants provided extensive training concerning these guidelines, cautioned their employees to be wary of disgruntled employees who may take steps to compromise confidential client health information and provided reporting mechanisms.

As a remedial statue, the plaintiff does not have to show that a law or mandate of public policy was violated, they need

only demonstrate that they had a reasonable belief that a law or public policy was being violated. Dzwoner v. McDermit, 177 N.J. 451 (2003). The court had occasion to consider this approach in a case wherein the plaintiff was unable to point to a specific law that was violated, but instead relied on a violation of a public policy mandate. Estate of Roach, 164 N.J. N.J. 598, (2000). In that case, the plaintiff discovered that his coworkers were engaging in self-dealing that violated a company policy that was required because of its relationship with a major vendor. Id at 602. While the plaintiff was unable to point to a specific statute that was violated, he reported the matter to a company hotline as the conduct violated internal company policy. Id at 603. The court ultimately concluded that the plaintiff had the requisite objectively reasonable belief that a public policy was being violated, because he was able to point to the company's own internal policy which was required because they were a contract vendor of the US Army. Id at 613.

In the case at bar, the plaintiff finds herself in a similar if not better position than the plaintiff in the Estate of Roach matter. Similar to the employer in Roach, the defendants in the instant action were required to adopt and implement policies because of the nature of their business. In *Dzwoner*, the policies prevented self-dealing. Here, the policies prevented unauthorized persons from accessing private client

health information. However, in this instance the plaintiff also relied on HIPPA regulations which specifically barred non-employees from being present in areas of the office where confidential health information was stored.

In conducting its analysis, the court erred because it failed to take the employment environment into account when arriving at its conclusion concerning the plaintiff's objective beliefs about whether the complained of conduct violated a statute or mandate of public policy. Moreover, the court imposed an additional requirement that went beyond the law, namely the court found that the employee had to have a reasonably objective belief that private client health information was being improperly disclosed. That was not the appropriate threshold. The issue was whether the plaintiff had a good faith belief that HIPAA guidelines and related internal policies that guarded against the improper access of private client health information were being violated, improper disclosure even though suggested, was not required. What is more troubling, is that the plaintiff specifically alleged that her colleagues were copying private client health information for non-business purposes. Her complaint also pointed to the presence of non-employees in work place which was an express violation of HIPPA regulations. This of course begs the question as to how the Court found that the plaintiff's beliefs were not objectively reasonable when her

complaint identified the specific regulations that were violated.

Point Two

The court committed a reversible error when it imposed a heightened pleading standard on the plaintiff and resolved factual disputes in favor of the moving party. (Raised Below at P 46A).

In arriving at its decision, the Court relied on a figure of speech in an email to reach the erroneous conclusion that the plaintiff lacked a reasonably objective belief that her colleagues were engaging in activity that violated the law and/or a public policy. The Court also erred when it resolved the factual dispute in favor of the defendants and simultaneously ignored the balance of allegations raised in her second amended complaint.

It is widely accepted that CEPA "does not require any magic words in communicating a reasonable belief of illegal activity. The objective of CEPA is not to make lawyers out of conscientious employees, but rather to prevent retaliation against those employees who object to employer conduct they deem to be illegal." Mehlman v. Mobil Oil Corp., 153 N.J. 163, 193-94 (1998). The court ignored this standard in arriving at its ruling which appears to focus solely on an email wherein the court misinterpreted a figure of speech as though it were binding affirmative declaration in a certification filed with

the Court. That is, the after numerous voicemails and in person complaints, the plaintiff sent an email to defendant Jonathon Ruede: "One of the things that is happening is that some employees are bringing their personal laptops to the office and using it during work hours which is illegal. We only work and sell products with Horizon Blue Cross & Blue Shield of New Jersey. We receive confidential information from Horizon members and I do not know if these employees are sharing this information for another type of business. They spent. their time making copies and copies that are not from work." PA 32. Based on the fact that the plaintiff used a figure of speech, namely stating that she did not know if private client health information was being shared, the court concluded that her belief was not reasonable. This approach relies on a heightened pleading standard that has been repeatedly rejected by the Court and it resolves a factual dispute in favor of the defendants.

More troubling, is the fact that the court simply ignored the balance of allegations that were contained in her complaint. In short, it is easy to arrive at a decision, when you simply ignore the facts undercut your position. In this instance, the court ignored the following complaints which were communicated to management verbally and on voicemail. First, the plaintiff noted that unauthorized personnel were permitted to enter the office where private confidential health information was stored.

PA 32. This was an express violation of HIPPA guidelines and was sufficient of and in itself to establish plaintiff's reasonable belief of a HIPPA violation. Second, the plaintiff noted that employees were making unauthorized copies which suggests that the information should not have been copied because it was confidential. PA 32. Third, her colleagues were using private confidential health information for non-work related purposes. PA 34. These facts were conveniently brushed aside by the court when it arrived at its decision.

Point Three

The Court committed a reversible error when it concluded that the plaintiff did not engage in whistleblowing activity. (Raised Below at P 46A)

Whistleblowing activity occurs when one, "Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer, or another employer, with whom there is a business relationship, that the employee reasonably believes." N.J.S.A. 34:19-3. The disclosure need only be in writing to one's employer to the extent complaint is later made to a public body. N.J.S.A. 34:19-4.

In the complaint at issue, the plaintiff notes that she reported violations of HIPPA Guidelines and related company policies to human resources, her supervisors and a business

partner. The medium of communication was verbal, via voicemail email and a hotline.

In short, the plaintiff's conduct falls squarely within the ambit of whistleblowing activity contemplated by the controlling statute.

Point Four

The Court committed a reversible error when it refused to allow the plaintiff's wrongful discharge claim to proceed even though she was subject to retaliation after making what she believed to be good faith complaint of activity that she deemed to be in violation of the law and/or public policy. (Raised Below at P 48A).

HIPAA and its related regulations bar employers from taking retaliatory acts against employees who make good faith complaints of HIPAA violations. 45 C.F.R. § 164.316. CEPA also bars employers from retaliating against employees who file good faith complaints alleging violations of law and/or public policy, "An employer shall not take any retaliatory action against an employee because the employee… Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer, or another employer, with whom there is a business relationship, that the employee reasonably believes." N.J.S.A. 34:19-3(a). In Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58 (1980), the New Jersey Supreme Court held that the wrongful termination cause of action bars an

employer from terminating an employee for reasons that violate a clear mandate of public policy.

Both HIPAA and CEPA contain clauses that bar employers from taking retaliatory measures against employees who make good faith complaints of retaliation. In this instance, the plaintiff's employer had a laser like focus on preserving the sanctity of confidential health information. It implemented guidelines that were in accordance with HIPA regulations and provided training to its employees concerning same. It also established a reporting mechanism for its employees to report violations of the policy.

When the plaintiff observed conduct that she reasonably believed to be in violation of the policy, she followed her training and reported the matter in accordance with company policy. The initial retaliatory act occurred within less then 48 hours as the plaintiff was outed to her co-workers for simply reporting violations of company policy. Additional retaliatory acts followed, which ultimately culminated in her termination. Since the defendants violated a clear mandate of public policy when they terminated the plaintiff, the court erred in dismissing her wrongful termination claim.

Conclusion

For the forgoing reasons, the plaintiff asks that the Court reverse the trial court's decision.

Respectfully submitted,
/s/Ryan Linder

DEISY GRANADOS, Plaintiff/Appellant, vs. PAN AMERICAN LIFE INSURANCE CO.; HOLA DOCTOR INSURANCE & FINANCIAL SERVICES; JONATHAN RUEDE; INDIRA SHAKE; and KARLA HARDWICK, Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY – APPELLATE DIVISION Docket No. A-001736-24 Submitted on July 28, 2025 On appeal from the Order of the Honorable Lisa Miralles Walsh, A.J.S.C., Superior Court of New Jersey, Law Division, Union County, dismissing the Second Amended Complaint with prejudice

BRIEF OF DEFENDANTS/RESPONDENTS

Alba V. Aviles, Esq.
(Attorney ID No. 075012014)
David J. Treibman
(Attorney ID No. 023291992)
FISHER & PHILLIPS LLP
400 Connell Drive, Suite 4000
Berkeley Heights, NJ 07922

Attorneys for Defendants/Respondents

Of Counsel:
Alba V. Aviles, Esq.

On the Brief:
David J. Treibman, Esq.

TABLE OF CONTENTS OF BRIEF

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Rules

Other Authorities

PRELIMINARY STATEMENT

Only on Plaintiff's third failed attempt, in her Second Amended Complaint (or "SAC"), to state claims under the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 et seq. ("CEPA"), and *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58 (1980), did the trial court finally dismiss her case with prejudice.

That dismissal was well-earned. Plaintiff based her putative claims on a contention that she "blew the whistle" on workplace conduct she reasonably believed violated the federal Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. §§1320d-1 to -9 ("HIPAA"). But even Plaintiff's latest and greatest pleading was self-defeating, quoting Plaintiff's own supposed whistleblowing internal e-mail as stating, "I do not know if these employees are sharing [confidential medical] information." That e-mail does not show Plaintiff had the requisite objectively reasonable belief that her coworkers were violating the law or a clear mandate of public policy; instead, it demonstrates exactly the opposite – that Plaintiff had no such belief at all. It is an outright confession of ignorance.

With this being the best Plaintiff could do after three tries, the trial court was more than justified in concluding that Plaintiff had not merely failed to state a claim upon which relief can be granted but that she *could not* state a claim

upon which relief can be granted. Accordingly, the trial court's dismissal of Plaintiff's Second Amended Complaint under Rule 4:6-2(e), with prejudice, was the only possible ruling. It should be affirmed.

COUNTERSTATEMENT OF PROCEDURAL HISTORY

I. Original Complaint and First Amended Complaint.

On February 26, 2024, Plaintiff filed her original Complaint in the trial court. (Da4.) On February 28, 2024, the trial court issued two Deficiency Notices. (Da4.) On March 1, 2024, Plaintiff filed a Deficiency Correction. (Da4.) On March 12, 2024, Plaintiff filed an Amended Complaint. (Pa1.) The Amended Complaint named as Defendants the Respondents in this appeal, Pan American Life Insurance Co. ("Pan American"), Hola Seguros LLC d/b/a Hola Doctor Insurance & Financial Services ("Hola") (incorrectly identified in the caption as "Hola Doctor Insurance and Financial Services"), Jonathan Ruede, Indira Shaik (incorrectly identified in the caption as "Indira Shake"), and Karla Hardwick (collectively herein, "Defendants"). (Pa1.) The Amended Complaint also named as Defendant Horizon Blue Cross Blue Shield of New Jersey ("Horizon"). (Pa1.)

Horizon moved to dismiss the Amended Complaint on June 3, 2024. (Da4.) On September 19, 2024, Plaintiff dismissed the Amended Complaint with respect to Horizon with prejudice. (Pa12.)

The Amended Complaint attempted to state claims under the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 et seq. ("CEPA") (Pa7), for common law wrongful discharge under *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58 (1980) (Pa9), and under the New Jersey Civil Rights Act, N.J.S.A. 10:6-1 & -2 ("NJCRA") (Pa10). On June 3, 2024, Defendants moved to dismiss the Amended Complaint. (Da4.)

On September 13, 2024, the trial court granted Defendants' motion, dismissing the Amended Complaint without prejudice and attaching a detailed statement of reasons. (Pa14.) With respect to the CEPA claim, based on Plaintiff's alleged belief that certain activities at the workplace violated HIPAA, the trial court explained:

> Plaintiff has failed to plead facts to establish that she reasonably believed that her colleagues' actions were violating HIPAA. Additionally, plaintiff argues that her complaint alleges sufficient facts to support her claim that she reasonably believed that defendants' actions were violating public policy. However, her complaint fails to even state allegations that she reasonably believed that her colleagues' actions were violating public policy…. [T]he complaint fails to include any facts that suggest that plaintiff reasonably believed that her colleagues' actions were violating HlPAA or public policy. As such, plaintiffs CEPA claim will be dismissed without prejudice and plaintiff will have twenty days from this Order to amend the complaint. [Pa21]

With respect to the *Pierce* claim, based on the allegation that Plaintiff's discharge from employment violated a clear mandate of public policy, the trial court explained:

> Plaintiff's complaint fails to allege facts to support her *Pierce* claim. Plaintiff's complaint does not state any facts that suggest that her termination was contrary to public policy. Plaintiff's complaint fails to identify the public policy that plaintiff's termination was contrary to…. [P]laintiff shall have twenty days to amend her complaint to allege sufficient facts to support her *Pierce* claim. [Pa22]

The trial court also dismissed the NJCRA claim. (Pa23-24.)

II. Second Amended Complaint.

On October 1, 2024, Plaintiff filed her Second Amended Complaint. (Pa26.) Plaintiff did not attempt to state an NJCRA claim in the SAC, but did make another attempt to state claims under CEPA (Count One, Pa33) and *Pierce* (Count Two, Pa36).

On October 21, 2024, Defendants moved to dismiss the SAC with prejudice. (Pa89.)

On January 1, 2025, the trial court granted Defendants' motion, dismissing the SAC with prejudice in an order with a detailed statement of reasons attached. (Pa39.) With respect to Plaintiff's attempt to state a CEPA claim, the court explained, first, that the SAC fails to show Plaintiff "reasonably believed her colleagues' actions were violating the provisions of [HIPAA]" (Pa45):

> [P]laintiff's amended complaint continues to suffer from the same deficiencies [as her First Amended Complaint]. Previously, this Court found plaintiff's First Amended Complaint was lacking in explicit references to any purported violations of [HIPAA] and instead only referred to violations of internal policies. Plaintiff has

> attempted to clarify this issue by emphasizing that defendant's internal policies mirror the provisions of [HIPAA]. However, even giving plaintiff the benefit of all reasonable inferences, the Complaint is lacking in facts evincing a reasonable belief that plaintiff's colleagues were using or distributing clients' confidential and protected health information. [Pa45-46]

The trial court also found that "[b]ased on the facts alleged in plaintiff's Second Amended Complaint," she "has not adequately shown that she engaged in whistle-blowing activity. The alleged facts surrounding the various [internal] complaints plaintiff made are 'vague and conclusory' as they do not indicate whether she reasonably believed that employees had violated [HIPAA]." (Pa47.)

With respect to the Plaintiff's renewed attempt to state a claim under *Pierce*, the trial court found the SAC "lacks concrete facts establishing that plaintiff's colleagues were compromising [HIPAA's] mandate against the unauthorized use and distribution of confidential private health information. As such, plaintiff has not shown that her termination may have been a violation of public policy." (Pa49.)

Plaintiff filed her Notice of Appeal on February 14, 2025. (Pa51.)

COUNTERSTATEMENT OF FACTS

Plaintiff began working for Pan American and Hola in 2018. (Pa28 ¶9.) Plaintiff was an insurance agent whose job was to sell health insurance products to customers and maintain relationships with those customers once the initial policies were secured. (Pa28 ¶¶9-10.)

Plaintiff's position required her and her colleagues to handle confidential health information, including clients' birth dates, social security numbers, employment history, identities of family members, work history, medical providers, and medical history information. (Pa28 ¶11.)

According to the SAC, in April 2023 Plaintiff "became concerned when her work colleagues began to bring their personal laptops into the Perth Amboy office," which is apparently where Plaintiff worked. (Pa30 ¶22; *see* Pa27-29 ¶¶3, 5, 6.) According to the SAC, bringing personal laptops to the office "violated company policy, HIPAA and its related regulations as it allowed unauthorized presences in the workplace that violated HIPAA, its regulations and company policies that were based on both." (Pa30-31 ¶22.) The SAC alleges Plaintiff "reported the matter to Francisco Rescio who worked at the defendant's Headquarters in New Orleans, Louisiana." (Pa31 ¶23.) The SAC does not say what Plaintiff told Rescio, who did not respond. (Pa31 ¶17.)

The SAC alleges that Plaintiff then "contacted" Defendant Karla Hardwick of "Defendants' Human Resource Department to report the repeated violations of HIPAA, its regulations and company policies that were based on the foregoing on either July 8th or 10th of 2023." (Pa31 ¶18.[1]) The SAC does

[1] Two successive sets of paragraphs in the SAC are numbered 17 through 23. (*See* Pa30-32.)

not say what Plaintiff told Hardwick these purported "violations" consisted of. "Hardwick told the [P]laintiff to contact [Defendant] Jonathan Ruede who was in upper management and worked out of the New Orleans office." (Pa31 ¶19.)

Plaintiff "called" Ruede on July 13, 2023 "to report the violations," leaving a voice mail message. (Pa31 ¶20.) The SAC does not say what "violations" Plaintiff reported to Ruede in the voice mail message. Plaintiff did not receive a reply to her voice mail message and followed up with an email on July 25, 2023. (Pa31 ¶21.) The SAC alleges that in her email, Plaintiff "alerted" Ruede "to numerous violations of HIPAA, its regulations and company policies that were based on the foregoing." (Pa31 ¶21.)

The SAC then purports to quote Plaintiff's July 23, 2023 email to Ruede as saying:

> One of the things that is happening is that some *employees are bringing their personal laptop to the office and using it during work hours* which is illegal. We only work and sell products with Horizon Blue Cross & Blue Shield of New Jersey. We receive confidential information from Horizon Members and *I do not know if these employees are sharing this information for another kind of business*. They *spent their time making copies and copies that are not from work.*

(Pa31-32 ¶21, emphasis added.)

The SAC alleges Plaintiff "added that: an unauthorized person was permitted to enter the office, the workplace was dirty, the manager was absent,

her colleagues were making improper photocopies of potentially confidential information and the distribution of work was inequitable." (Pa32 ¶22.)

Plaintiff admits her email "prompted an immediate response from management," which

> circulated an email on July 26, 2023 amongst the staff wherein they reminded employees that, "It is against company policy the use of personal computers during business hours. Personal computers are not allowed to be brought to the retail centers." The e-mail also warned that, "Company property cannot be for personal use, You cannot use the printers to print personal stuff. Please refrain from this practice."

(Pa32 ¶23.)

The SAC alleges that "[n]otwithstanding the cautionary e-mail, violations of HIPAA, its regulations and related company policies that were based on the foregoing continued" (Pa33 ¶25) and Plaintiff "reported the continued violations of the relevant confidential health information policy to the hotline on September 19, 2023" (Pa33 ¶27). The SAC does not allege what Plaintiff purportedly reported.

The SAC alleges that Plaintiff was subjected to adverse employment actions beginning on or about August 5, 2023, which culminated in her termination from employment. (Pa34-35 ¶¶38-46.)

The SAC alleges "Plaintiff believed the following activities violated HIPAA, its related regulations and company policy that was patterned on both":

33. Non-employees were allowed to enter and remain in areas where private confidential health information was stored.

34. Her colleagues were making unauthorized copies of private confidential health information.

35. Her colleagues were using private confidential health information for purposes that were not related to their employment.

36. Her colleagues brought non-authorized computers into the work place which was tantamount to having an unauthorized presence in the work place.

(Pa34 ¶¶32-36.)

The SAC does not allege Plaintiff ever reported or complained that nonemployees were allowed to enter and remain in areas where private confidential health information was stored.

The SAC does not allege that Plaintiff ever reported or complained that her colleagues were making unauthorized copies of private confidential health information.

The SAC does not allege that Plaintiff ever reported or complained that her colleagues were using private confidential health information for purposes that were unrelated to their employment.

The SAC does not allege that Plaintiff ever reported or complained that her colleagues bringing non-authorized computers into the workplace was tantamount to having an unauthorized presence in the workplace.

LEGAL ARGUMENT

I. A Complaint States a Claim Only if It Pleads the Requisite *Facts*.

This Court applies the same standard as the trial court in reviewing a decision granting a motion to dismiss under Rule 4:6-2(e). *Estate of Campbell v. Woodcliff Health & Rehab. Ctr.*, 479 N.J. Super. 64, 70 (App. Div.), *certif. denied*, 259 N.J. 315 (2024). Rule 4:6-2(e) authorizes the dismissal of a complaint, in whole or in part, for "failure to state a claim upon which relief can be granted." To avoid dismissal under this Rule, the complaint must "contain a *statement of the facts* on which the claim is based, showing that the pleader is entitled to relief." *R.* 4:5-2 (emphasis added).

As the Rule reflects, "New Jersey is a 'fact' rather than a 'notice' pleading jurisdiction, which means that a *plaintiff must allege facts* to support his or her claim rather than merely reciting the elements of a cause of action." *Nostrame v. Santiago*, 420 N.J. Super. 427, 436 (App. Div. 2011), *aff'd*, 213 N.J. 109 (2013) (emphasis added). "[A] plaintiff must *plead the facts* and *give some detail* of the cause of action." *Printing Mart-Morristown v. Sharp Elecs. Corp.*, 116 N.J. 739, 768 (1989) (emphasis added). "[P]leadings reciting mere conclusions without facts ... do not justify a lawsuit." *Glass v. Suburban Restoration Co.*, 317 N.J. Super. 574, 582 (App. Div. 1998). A complaint cannot rely on "conclusory" allegations. *Printing Mart*, 116 N.J. at 768. "[A]s 'New Jersey is

a "fact" rather than a "notice" pleading jurisdiction, ... a plaintiff must allege facts to support his or her claim'; conclusory allegations are insufficient." *Estate of Campbell*, 479 N.J. Super at 88. A conclusory allegation is one "[e]xpressing a factual inference without stating the underlying facts on which the inference is based." BLACK'S LAW DICTIONARY (12th ed. 2024) (entry for "conclusory"); *see also, e.g., Borough of Glassboro v. Grossman*, 457 N.J. Super. 416, 435 (App. Div. 2019) ("proclaiming" something "in conclusory fashion" is to state it "without any supporting evidence"); *2175 Lemoine Ave. Corp. v. Finco, Inc.*, 272 N.J. Super. 478, 491 (App. Div. 1994) (statement is "conclusory" where it has "no evidential support").

Speculation, likewise, is insufficient to state a claim. *Borough of Seaside Park v. Comm'r of N.J. Dep't of Educ.*, 432 N.J. Super. 167, 204 (App. Div. 2013) ("speculation is insufficient"); *J.D. v. Davy*, 415 N.J. Super. 375, 391 (App. Div. 2010) ("conclusory, speculative" assertions are insufficient). Nor will a court deny dismissal based on "unsupported evidentiary conclusions," "unwarranted inferences," or "unsupported suspicion[s]." *Insight Global, LLC v. Collabera, Inc.*, 446 N.J. Super. 525, 528 (Law Div. 2015) (citing *Nostrame v. Santiago*, 213 N.J. 109, 129 (2013)).

Finally, a plaintiff may not file a complaint "in the hope that he c[an] use the tools of discovery to uncover evidence of wrongdoing." *Nostrame*, 213 N.J.

at 128. "A motion to dismiss a complaint for failure to state a claim may not be denied on the possibility that discovery may establish the requisite claim; rather, the legal requisites for plaintiffs' claim must be apparent from the complaint itself." *Teamsters Local 97 v. State*, 434 N.J. Super. 393, 413 (App. Div. 2014) (internal quotation marks omitted); *see also, e.g., Printing Mart*, 116 N.J. at 768 ("It is not enough for plaintiffs to assert ... that any essential facts that the court may find lacking can be dredged up in discovery"); *accord, e.g., Nostrame*, 420 N.J. Super. at 436; *Glass*, 317 N.J. Super. at 582.

II. The Complaint Fails to State a Claim Under CEPA (Count One).

A. The Elements of a CEPA Claim.

Plaintiff challenges the trial court's holding that the SAC fails to state a claim under both subsections (a)(1) and (c)(3) of CEPA §3, N.J.S.A. 34:19-3(a)(1), (c)(3). (Pb10; Pa45.)

N.J.S.A. 34:19-3(a)(1) provides, in pertinent part, that "[a]n employer shall not take any retaliatory action against an employee because the employee ... a. *Discloses ... to a supervisor* ... an activity, policy or practice of the employer ... that the employee *reasonably believes*: (1) is in violation of a law, or a rule or regulation promulgated pursuant to law" (emphasis added).

N.J.S.A. 34:19-3(c)(3) provides, in pertinent part, that "[a]n employer shall not take any retaliatory action against an employee because the employee

... c. *Objects to* ... any activity, policy or practice which the employee *reasonably believes*: ... (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment" (emphasis added).

To state a CEPA claim, a complaint must set forth factual allegations showing: (1) the plaintiff "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. 34:19-3 (Plaintiff here contends the SAC's allegations show she engaged in whistleblowing activity under N.J.S.A. 34:19-3(a)(1) and (c)(3)); (3) an "adverse employment action" was taken against the plaintiff; and (4) "a causal connection exists between the whistle-blowing activity and the adverse employment action." *Dzwonar v. McDevitt*, 177 N.J. 451, 462 (2003); *Puglia v. Elk Pipeline, Inc.*, 226 N.J. 258, 280 (2016); *Hitesman v. Bridgeway, Inc.*, 218 N.J. 8, 20 (2014); *Battaglia v. United Parcel Serv., Inc.*, 214 N.J. 518, 556 (2013); *Winters v. N. Hudson Reg'l Fire & Rescue*, 212 N.J. 67, 89 (2012); *Turner v. Associated Humane Societies, Inc.*, 396 N.J. Super. 582, 592 (App. Div. 2007); *Klein v. UMDNJ*, 377 N.J. Super. 28, 38 (App. Div. 2005); *Kolb v. Burns*, 320 N.J. Super. 467, 476 (App. Div. 1999).

"The Legislature enacted CEPA to 'protect and encourage employees to report *illegal or unethical workplace activities* and to discourage public and private sector employers from engaging in such conduct.'" *Dzwonar*, 177 N.J. at 461 (quoting *Abbamont v. Piscataway Twp. Bd. of Educ.*, 138 N.J. 405, 431 (1994); emphasis added). The statute "is designed to 'prevent retaliation against those employees who object to employer conduct that they reasonably believe to be *unlawful or indisputably dangerous to the public health, safety or welfare*.'" *Maw v. Advanced Clinical Commc'ns, Inc.*, 179 N.J. 439, 445 (2004) (quoting *Dzwonar*, 177 N.J. at 464; some emphasis added). On the other hand, CEPA was *not* enacted to "settle internal disputes at the workplace." *Klein*, 377 N.J. Super. at 45.

B. The Whistleblowing and Reasonable Belief Requirements.

The first and second elements of the CEPA prima facie case set forth above are inextricably intertwined, since a plaintiff has not performed a whistleblowing activity described in N.J.S.A. 34:19-3(a)(1) or (c)(3) unless she has "[d]isclose[d] ... to a supervisor" an activity, policy, or practice that she "reasonably believe[d]" violated a "law, or a rule or regulation promulgated pursuant to law," N.J.S.A. 34:19-3(a)(1), or has "[o]bject[ed] to" an activity, policy, or practice that she "reasonably believe[d]" was "incompatible with a clear mandate of public policy concerning the public health, safety or welfare or

protection of the environment," N.J.S.A. 34:19-3(c)(3). Thus, there must be *whistleblowing* concerning activity the plaintiff *reasonably believed* was illegal or violated a clear mandate of public policy.

A plaintiff's *unexpressed* "beliefs," reasonable or not, are irrelevant, because there was no *whistleblowing*. *See, e.g., Newton-Haskoor v. Coface N. Am.*, 524 F. App'x 808, 811-12 (3d Cir. 2013) (Da63) ("[T]o establish a claim for retaliation under CEPA, an employee must show not only that she reasonably believed that the employer was acting wrongfully or unlawfully, but also that she objected to this behavior in some way") (citing N.J.S.A. 34:19-3(c)); *Reynolds v. TCM Sweeping, Inc.*, 340 F. Supp. 2d 541, 548 (D.N.J. 2004) ("The second prong of a CEPA claim requires proof that a plaintiff actually performed some whistle blowing activity and the third prong requires proof that there was an adverse employment action"). Hence, the litany of alleged "activities" Plaintiff supposedly "believed ... violated HIPAA, its related regulations and company policy" that the SAC lists in paragraphs 33 through 36 (Pa34) is irrelevant, because the SAC does *not* allege that Plaintiff either "disclosed" them to a supervisor or "objected to" them.

With regard to the *reasonable belief* requirement, our Supreme Court explains that CEPA "does not require a plaintiff to show that a law, rule, regulation or clear mandate of public policy would actually be violated if all the

facts he or she alleges are true," but "a plaintiff must set forth facts that would support an objectively reasonable belief that a violation has occurred." *Dzwonar*, 177 N.J. at 464.

That requires the existence of "a statute, regulation, rule, or public policy that *closely relates* to the complained-of conduct." *Id.* at 463 (emphasis added). The trial court "must make a threshold determination that there is a *substantial nexus* between the complained-of conduct and a law or public policy." *Id.* at 464 (emphasis added). "The trial court can and should enter judgment for a defendant when no such law or policy is forthcoming." *Id.* at 463. It is the plaintiff who "must identify a statute, regulation, rule or public policy that closely relates to the complained-of conduct." *Turner*, 396 N.J. Super. at 593 (quoting *Dzwonar*, 177 N.J. at 463); *see also, e.g., Hitesman*, 218 N.J. at 33 ("[T]o assert a CEPA claim based on the 'improper qualify of patient care'" of N.J.S.A. 34:19-3(c)(1), "the plaintiff must identify a law, rule, regulation, declaratory ruling adopted pursuant to law or professional code of ethics that applies to and governs the employer in its delivery of patient care"); *id.* at 33 ("[T]he plaintiff must identify the authority that provides a standard against which the conduct of the defendant may be measured").

C. The Second Amended Complaint Fails to Allege Plaintiff Engaged in CEPA-Protected Whistleblowing Activity.

1. Plaintiff's Allegations.

The SAC alleges Plaintiff "disclosed" or "objected to" several purported activities. First, Plaintiff allegedly reported that coworkers were bringing "personal laptops" to the office. Reading the SAC generously, Plaintiff reported this by voice mail to Francesco Rescio, who did not respond; to Karla Hardwick, who told Plaintiff to contact Jonathan Ruede; and to Jonathan Ruede, also by voice mail, and who also did not respond. (Pa30-31 ¶¶22-23, 17-21.)

When Ruede did not respond to Plaintiff's voice mail, she allegedly sent Ruede an email that the SAC quotes as stating, "some employees are bringing their personal laptop to the office and using it during work hours.... We receive confidential information from Horizon Members and *I do not know* if these employees are sharing this information for another kind of business. They spent their time making copies and copies that are not from work." (Pa32 ¶21, emphasis added.)

The SAC goes on to paraphrase the alleged email as adding that "an unauthorized person was permitted to enter the office, the workplace was dirty, the manager was absent, her colleagues were making improper photocopies of *potentially* confidential information and the distribution of work was inequitable." (Pa32 ¶22, emphasis added.)

2. Plaintiff Fails to Establish a Close Relationship or Substantial Nexus.

Plaintiff contends she had a "good faith belief" these complained-of activities "violated HIPAA, its related regulations and company policy that was patterned on both." (Pa33-34 ¶31.) Plaintiff specifically cites 42 U.S.C. §120 (Pa29 ¶¶12, 13; Pb5); 45 C.F.R. §164.30 (Pb11); 45 C.F.R. §306(a)(2), (3), and (4) (Pa29 ¶¶13, 14, 16; Pb5)[2]; 45 C.F.R. §164.308 (Pb11); 45 C.F.R. §164.310 (Pb11); and 45 C.F.R. §164.316 (Pa30 ¶17; Pb17).

Several of these can be disposed of without analysis, because they do not exist: There is no such thing as 42 U.S.C. §120, or 45 C.F.R. §164.30, or 45 C.F.R. §164.316.[3]

45 C.F.R. §164.306(a) requires covered entities to "(1) Ensure the confidentiality, integrity, and availability of all electronic protected health

---

[2] Plaintiff's citations omit the subsection, (a), and cite only the paragraphs.

[3] There is such a thing as 45 C.F.R. §160.316, which is headed "Refraining from intimidation and retaliation" and provides that a "covered entity ... may not threaten, intimidate, coerce, harass, discriminate against, or take any other retaliatory action against any individual or other person for ... [o]pposing any act or practice made unlawful by this subchapter, provided the individual or person has a good faith belief that the practice opposed is unlawful, and the manner of opposition is reasonable and does not involve a disclosure of protected health information in violation of subpart E of part 164 of this subchapter." 45 C.F.R. §160.316(c). Plaintiff's citation of this provision – if this is the provision she intended to cite – is question-begging, since it has a similar standard to CEPA's. It is, in any event, irrelevant, both because Plaintiff is suing under CEPA rather than HIPAA, and because she fails to cite it.

information the covered entity or business associate creates, receives, maintains, or transmits. (2) Protect against any reasonably anticipated threats or hazards to the security or integrity of such information. (3) Protect against any reasonably anticipated uses or disclosures of such information that are not permitted or required under subpart E of this part."

45 C.F.R. §164.308 provides, in pertinent part, that a covered entity must "[i]mplement policies and procedures to prevent, detect, contain, and correct security violations." 45 C.F.R. §164.308(a)(1)(i).

45 C.F.R. §164.310 provides, in pertinent part, that a covered entity must "[i]mplement policies and procedures to limit physical access to its electronic information systems and the facility or facilities in which they are housed." 45 C.F.R. §164.310(a)(1) (quoted in Pb11).

There is neither a "close[] relat[ionship]" nor a "substantial nexus," *Dzwonar*, 177 N.J. at 163, 164, between the alleged activities Plaintiff allegedly disclosed or objected to and the foregoing HIPAA regulations.

This is so obvious with respect to Plaintiff's complaints that "the workplace was dirty, the manager was absent," and "the distribution of work was inequitable" (Pa32 ¶22) that no discussion is necessary.

Plaintiff's report that "[w]e receive confidential information from Horizon Members and *I do not know* if these employees are sharing this information for

another kind of business" and that "her colleagues were making improper photocopies of *potentially* confidential information" (Pa32 ¶¶21, 22; emphasis added) can likewise be disregarded. This is mere speculation, but there must be a "basis in fact" – not in speculation or conjecture – that a law, rule, regulation, or clear mandate of public policy was being violated for a plaintiff's belief to be objectively reasonable under CEPA. *Young v. Schering Corp.*, 275 N.J. Super 221, 233 (App. Div. 1994), *aff'd*, 141 N.J. 16 (1995). More broadly, as discussed above, a complaint cannot rest on speculation, which is "insufficient" to enable a plaintiff to avoid dismissal under Rule 4:6-2(e). *Seaside Park*, 432 N.J. Super. at 204; *J.D.*, 415 N.J. Super. at 391; *Insight Global*, 446 N.J. Super. at 528. The trial court was therefore correct in highlighting Plaintiff's "I do not know" statement (*see* Pa46). Plaintiff's attempt in her briefing to dismiss this admission of ignorance as a "figure of speech" (Pb15) is unconvincing.

Next, Plaintiff appears to be fixated on her allegation that coworkers brought personal laptops to the workplace. (*See* Pa30 ¶22; Pa32 ¶21; Pb5, 6, 7, 11, 15.) But there is no discernible connection between the presence of personal laptops in the workplace and HIPAA or its regulations. Plaintiff's assertion that "the presence of personal laptops constituted an unauthorized presence in the workplace which violated HIPPA's [sic] regulations and guidelines" (Pb6) is baseless.

The SAC also alleges Plaintiff complained that "an unauthorized person was permitted to enter the office." (Pa32 ¶22.) That is no doubt supposed to sound particularly nefarious. In reality, however, it is a mere *conclusory* assertion, not a *factual* allegation, as it tells us only Plaintiff's inference rather than "the underlying facts on which the inference is based." BLACK'S LAW DICTIONARY, *supra*; *accord Grossman*, 457 N.J. Super. at 435; *2175 Lemoine Ave.*, 272 N.J. Super. at 491. Even if we knew something about this unidentified person, his or her mere presence in the "office" has no apparent "close relationship" or "substantial nexus" with the HIPAA regulations Plaintiff relies on – the SAC does not allege the "unauthorized person" had "physical access" to Defendants' "electronic information systems" or "the facility or facilities in which they are housed." 45 C.F.R. §164.310(a)(1). Plaintiff tries in her brief to improve on the SAC by asserting she complained "that unauthorized personnel were permitted to enter the office where private confidential health information was stored" (Pb15), but "[i]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss." *Pa. ex rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173, 181 (3d Cir. 1988) (affirming dismissal under Fed. R. Civ. P. 12(b)(6), which is identical to Rule 4:6-2(e)); *see also, e.g., Carlini v. Curtiss-Wright Corp.*, 71 N.J. Super. 101, 108 (App. Div. 1961) (rejecting attempt to insert a new claim "through the medium of plaintiff's affidavit").

Equally if not more conclusory is the SAC's allegation that Plaintiff "reported the continued violations of the relevant confidential health information policy to the hotline on September 19, 2023." (Pa33 ¶27.) This does not even hint at the content of what Plaintiff allegedly reported.

3. Plaintiff's Arguments About Company Policy Are Misplaced.

Plaintiff also tries to lend significance to her alleged belief that the activities she complained of violated company policy. Plaintiff cites *Estate of Roach v. TRW, Inc.*, 164 N.J. 598 (2000), as holding the plaintiff there stated a claim under CEPA because he reported that coworkers were engaging in self-dealing in violation of company policy. According to Plaintiff, "While the plaintiff [in *Roach*] was unable to point to a specific statute that was violated, he reported the matter to a company hotline as the conduct violated internal company policy. The court ultimately concluded that the plaintiff had the requisite objectively reasonable belief that a public policy was being violated, because he was able to point to the company's own internal policy which was required because they were a contact vendor of the US Army." (Pb12, citation omitted.)

That is not entirely accurate. The *Roach* plaintiff made internal complaints concerning specific conduct by other TRW employees: that they filed false expense reports and false time cards; failed to disclose conflicts of interest when

dealing with subcontractors; leased equipment ostensibly on behalf of TRW but actually for personal use; and were promised kickback payments by another company if TRW followed through on a proposed acquisition of that company. *Roach*, 164 N.J. at 604. Contrary to Plaintiff's description of the case, the Supreme Court *upheld* a jury finding for the *defendant* under N.J.S.A. 34:19-3(c)(3): "[T]he jury made a specific finding under [section 3c.(3)] that the activities [plaintiff] Roach had disclosed *were not incompatible with a clear mandate of public policy*." *Roach*, 164 N.J. at 608 (emphasis added).

The Court also upheld the jury's findings for *plaintiff* under N.J.S.A. 34:19-3(c)(1), which prohibits retaliatory action against an employee who objects to an "activity, policy or practice which the employee reasonably believes [] is in violation of a law, or a rule or regulation promulgated pursuant to law," and under 34:19-3(c)(2), which prohibits retaliatory action against an employee who objects to an "activity, policy or practice which the employee reasonably believes ... is fraudulent or criminal." The Court was "persuaded that the numerous improprieties alleged against plaintiff's co-employees could form the basis of a reasonable belief that unlawful conduct had occurred within the meaning of CEPA." *Roach*, 164 N.J. at 613. The Court did observe that because of TRW's "sensitive position" as a federal defense contractor, it had a code of conduct that "stressed the importance of the highest ethical conduct on the part

of its employees." *Id.* The Court also observed that "[b]ased on that code's requirement of strict compliance, plaintiff reasonably could have believed that the allegations against [his coworkers] rose to the level of significant improprieties consistent with CEPA sections 3c.(1) and 3c.(2)." *Id.*

But it was the nature of the conduct at issue in *Roach* that was the deciding factor – it was self-evidently illegal, fraudulent, and/or criminal, very much unlike what the SAC alleges in this case. In fact, the *Roach* Court warned that "[a]lthough the term 'reasonably believes' ... provides ample justification to sustain the jury's verdict in the present case, we caution that in future cases that language may prove fatal to an employee's claim." *Id.* To repeat, "[t]he Legislature enacted CEPA to 'protect and encourage employees to report *illegal or unethical workplace activities* and to discourage public and private sector employers from engaging in such conduct.'" *Dzwonar* 177 N.J. at 461. The statute "is designed to 'prevent retaliation against those employees who object to employer conduct that they reasonably believe to be *unlawful or indisputably dangerous to the public health, safety or welfare*.'" *Maw*, 179 N.J. at 445. CEPA's purpose is *not* to address mere disagreements with workplace conduct, which is all the SAC alleges Plaintiff complained about here. *See, e.g., Klein*, 377 N.J. Super. at 45 (CEPA's purpose is not to "settle internal disputes at the workplace"); *Hitesman*, 218 N.J. at 31 (noting the distinction under CEPA

between "an employee's objection to, or reporting of, an employer's illegal or unethical conduct" and "a routine dispute in the workplace regarding the relative merits of internal policies and procedures"); *Roach*, 164 N.J. at 613-14 ("CEPA is intended to protect those employees whose disclosures fall sensibly within the statute"; it "is not intended to spawn litigation" concerning "minor infractions" or "trivial or benign employee complaints").

The SAC fails to allege facts showing Plaintiff disclosed or objected to an activity, policy, or practice that she could have *reasonably believed* violated a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy; in other words, the SAC fails to allege that Plaintiff engaged in whistleblowing activity. The SAC therefore fails to state a claim under CEPA and the judgment of the trial court should be affirmed.

III. The Second Amended Complaint Fails to State a Claim for Common Law Wrongful Discharge (Count Two).

A. By "Instituting" a CEPA Claim, Plaintiff Waived Her Right to Pursue a Common Law Claim.

Count Two of the Complaint attempts to state a claim for common law wrongful discharge under *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58 (1980). (*See* Pb17; Pa48.) *Pierce* claims are essentially duplicative of CEPA claims. CEPA was enacted to make it "easier ... for a former employee to prevail on a retaliatory discharge claim" than under the common law pursuant to *Pierce*

and its progeny. *Young v. Schering Corp.*, 141 N.J. 16, 26-27 (1995). In effect, CEPA functions as a replacement of common law *Pierce* claims, which is why the statute expressly provides that "the institution of an action in accordance with this act shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, State law, rule or regulation or under the common law." N.J.S.A. 34:19-8. Because of this waiver provision, "a former employee forfeits his or her common-law retaliatory-discharge cause of action when he or she 'institutes' a CEPA cause of action." *Young*, 141 N.J. at 28-29. Therefore, Plaintiff's assertion of a CEPA claim bars her from simultaneously asserting a common law wrongful termination claim under *Pierce*. *See also, e.g., Battaglia v. UPS, Inc.*, 214 N.J. 518, 556 n.9 (2013) ("By pursuing a CEPA claim, a plaintiff waives any alternative remedy that would otherwise have been available for the same retaliatory conduct"); *Tartaglia v. UBS PaineWebber Inc.*, 197 N.J. 81, 103 (2008) ("[T]he CEPA requirement of an election of remedies precludes any plaintiff from proceeding on both theories simultaneously"); *Catalane v. Gilian Instrument Corp.*, 271 N.J. Super. 476, 492 (App. Div. 1994) ("[P]laintiff's public policy claim, alleging that he was dismissed in retaliation for his threats of 'whistleblowing,' was barred by his assertion of that claim under CEPA, the 'whistleblowing' statute").

There has been some confusion in the courts as to when an action is "instituted" for purposes of the CEPA waiver provision. In *Tartaglia*, the New Jersey Supreme Court wrote that N.J.S.A. 34:19-8 is "a statutory provision that deems the *filing of a CEPA complaint* to be an election of remedies." 197 N.J. at 103 (emphasis added). On the other hand, in *Young*, the Court wrote, "The meaning of 'institution of an action' could conceivably contemplate an election of remedies with restrictions in which the election is not considered to have been made until discovery is complete or the time of a pretrial conference contemplated by *Rule* 4:25–1." 143 N.J. at 32.

Some lower courts, including this Court in *Maw v. Advanced Clinical Commc'ns, Inc.*, 359 N.J. Super. 420, 441 (App. Div. 2003) (quoting *Young*), *rev'd*, 179 N.J. 439 (2004), have read *Young* as if it were a *holding* that "institution of an action" means something other than the filing of a complaint. But *Young* makes no such holding; the question was not before the Court, meaning its comments on the CEPA waiver provision were dicta.

On the other hand, before *Young* arrived at the Supreme Court, this Court affirmed the dismissal *at the pleading stage* of the *Young* plaintiff's common law claims *under CEPA's waiver provision*:

> We are also satisfied that the trial court properly dismissed plaintiff's common law claims based on theories of wrongful discharge, malicious interference with advantageous business relationships, harassment and intentional infliction of emotional

> distress.... These causes of action essentially seek the same remedies at common law that plaintiff sought under CEPA. Therefore, they are within the category of actions that are deemed to be waived under *N.J.S.A.* 34:19–8, the waiver provision of CEPA.

Young v. Schering Corp., 275 N.J. Super. 221, 237 (App. Div. 1994), *aff'd*, 141 N.J. 16 (1995).

The Supreme Court granted defendant's cross-petition for certification from this Court's decision, but *denied* plaintiff's petition. *Young*, 141 N.J. at 19-20, 33. Nevertheless, in its own decision, the Supreme Court floated the idea that "institution of an action" under the CEPA waiver provision "*could conceivably* contemplate an election of remedies with restrictions in which the election is not considered to have been made until discovery is complete or the time of a pretrial conference contemplated by *Rule* 4:25-1." *Id.* at 32 (emphasis added). But after mentioning several other possible questions regarding the waiver provision, the Court observed that "[t]hose and other significant questions are *not decided in this case. Plaintiff's petition for certification sought to review some of those issues, but it was denied*." *Id.* at 33 (emphasis added). This Court's holding that plaintiff's common law claims were properly dismissed at the pleading stage was untouched and continues to bind trial courts. That is why in 2008, 13 years after the Supreme Court's *Young* decision, the same Court was able to say in *Tartaglia* that, through N.J.S.A. 34:19-8, the Legislature "included a statutory provision that *deems the* ***filing*** *of a CEPA*

complaint to be an election of remedies." *Tartaglia*, 197 N.J. at 103 (emphasis added).

This Court's decision in *Maw v. Advanced Clinical Communications, Inc.*, 359 N.J. Super. 420 (App. Div. 2003), *rev'd*, 179 N.J. 439 (2004), which reversed the trial court's dismissal of the complaint, followed the Supreme Court's *Young* dicta in reinstating the plaintiff's *Pierce* claim, despite also reinstating her CEPA claim. *See Maw*, 359 N.J. Super. at 441 (holding that "before electing remedies, a plaintiff should have an opportunity to complete discovery").

However, this Court's discussion of the CEPA waiver provision in *Maw* was also dicta. The *Maw* plaintiff was terminated from employment for refusing to sign an employment agreement that contained a restrictive covenant. Plaintiff sued, alleging the restrictive covenant violated a clear mandate of public policy, and based on that allegation asserted a CEPA claim and a common law claim of wrongful discharge. The defendants moved to dismiss the complaint under Rule 4:6-2(e). "Because the [trial] judge found that a noncompete agreement does not per se violate public policy, she dismissed plaintiff's CEPA and common-law claims against both the corporate and individual defendants." *Maw*, 359 N.J. Super. at 427. This Court reversed, holding that "a noncompete agreement, such as the one plaintiff was required to sign, may, depending on the surrounding

circumstances, violate the public policy necessary to support a cause of action under CEPA and at common law. Therefore, dismissal of plaintiff's claims before she had an opportunity to develop her case through discovery was premature." *Id.*

There is nothing in this Court's *Maw* decision suggesting the trial court addressed CEPA's waiver provision. The Court's discussion of that provision is consequently dicta, as the issue of its applicability was not before the court and did not need to be addressed in reversing the trial court's decision. *See, e.g., Bandler v. Melillo*, 443 N.J. Super. 203, 210 (App. Div. 2015) ("Dictum is a statement by a judge not necessary to the decision then being made") (internal quotation marks omitted). The Court's comments on the waiver provision therefore do "not invoke the principal of *stare decisis*," since "[p]ortions of an opinion that are dicta are not binding." *Id.* at 210-11.

In addition, the Supreme Court reversed this Court's judgment in *Maw*. First, the Supreme Court rejected this Court's *holding*, itself holding that "plaintiff's private dispute over the terms of the do-not-compete provision in her employment agreement *does not implicate violation of a clear mandate of public policy* as contemplated by Section 3c(3) of CEPA." *Maw*, 179 N.J. at 448 (emphasis added). And the Supreme Court did not just reverse this Court's holding, but reversed its entire *judgment*. *See id.* at 443 ("We ... reverse the

judgment of the Appellate Division") (emphasis added); *id.* at 448 ("The *judgment* of the Appellate Division is reversed"). The Supreme Court did not address this Court's *dicta* on CEPA's waiver provision because that provision was no more an issue in the Supreme Court than it had been in this Court. But even if this Court's remarks on the waiver provision had been a holding, the Supreme Court's reversal of this Court's *judgment* would have deprived its remarks of any precedential value. *See, e.g., State v. Rembert*, 156 N.J. Super. 203, 206 (App. Div. 1978) ("The decision of an intermediate appellate court is the law of the State *until reversed* or overruled by the court of last resort") (emphasis added).

Finally, a host of New Jersey state and federal courts have dismissed plaintiffs' statutory or common law claims based on the same factual allegations as their CEPA claims, at the pleading stage, pursuant to CEPA's waiver provision (under Rule 4:6-2(e) in state court, and under Federal Rule of Civil Procedure 12(b)(6) in federal court).[4] *See, e.g., Kelly v. Simpson*, No. A-0190-16T3, 2018 WL 6314644, at *7 (N.J. App. Div. Dec. 4, 2018) (Da56) (affirming dismissal of NJCRA claim in count three because its allegations are "essentially the same as those in count four," which asserts a CEPA claim); *Teryek v. State*,

[4] Admittedly, most of the following decisions are unpublished, *see R.* 1:36-3, but as the saying goes, quantity has a quality all its own.

2011 WL 977515, at *2 (N.J. App. Div. Mar. 22, 2011) (Da90) (affirming dismissal because, while "Plaintiff's assertions may form a basis for a claim under both the LAD [Law Against Discrimination, N.J.S.A. 10:5-1 et seq.] and CEPA, he may not proceed under both statutes simultaneously"; "[h]aving filed his claim of retaliation under CEPA, plaintiff could not proceed under a separate retaliation claim under the LAD"); *Brown v. City of Long Branch*, 380 F. App'x 235, 239 n.5 (3d Cir. 2010) (Da13) (affirming dismissal of LAD retaliation claim because "the institution of a CEPA action statutorily waives all other claims of retaliation under state law"); *DeStefano v. N.J. Small Bus. Dev. Ctr. at Rutgers Univ.*, No. 22-01964, 2023 WL 9017418, at *12 (D.N.J. Dec. 29, 2023) (Da30) (Because "Plaintiff's []LAD retaliation claim in Count Six forms the same basis as his CEPA claim in Count Seven – they are both "based on allegations that Plaintiff was retaliated against for blowing the whistle on Defendants' violations of law" – "the Court dismisses Count Six"); *Goydos v. Rutgers*, No. 19-cv-8966, 2023 WL 2263897, at *14 (D.N.J. Feb. 28, 2023) (Da43) ("CEPA's waiver provision precludes Plaintiff's breach of contract claim as a matter of law. A plaintiff may advance a claim for constructive discharge under CEPA or the common law, but not both"; "the pursuit of the CEPA claim waives the parallel advancement of rights under other laws. Accordingly, Plaintiffs' breach of contract claim will be dismissed with prejudice"); *Rickerson v. Pinnacle Foods*

Inc., No. 17-cv-04469, 2017 WL 6034147, at *4 (D.N.J. Dec. 6, 2017) (Da71) (dismissing wrongful termination claim because it is not "substantially independent of the CEPA claim" and the CEPA waiver provision "bars claims substantially related and based on the same conduct as the CEPA claim"); *Cruz v. N.J.*, No. 16-0703, 2016 WL 1337276, at *4 (D.N.J. Apr. 4, 2016) (Da18) ("Plaintiff alleges (with respect to both the []LAD and CEPA claims) that she suffered retaliation as a result of filing an EEOC complaint"; accordingly, "the Court will dismiss Plaintiff's claim for retaliation under the []LAD as waived by her claim under CEPA"); *Simon v. Shore Cab, LLC*, No. 13-6290, 2014 WL 2777103, at *6 (D.N.J. June 19, 2014) (Da87) (dismissing LAD retaliation claims because "retaliation claims under the LAD necessarily fall within the CEPA waiver provision") (quoting *Ehling v. Ocean-Monmouth Hosp. Serv. Corp.*, 961 F. Supp. 2d 659, 672 (D.N.J. 2013)); *Rodridguez v. Ready Pac Produce*, No. 13-4634, 2014 WL 1875261, at *11 (D.N.J. May 9, 2014) (Da82) (holding "Plaintiff has waived his right to make a wrongful termination claim under New Jersey common law by filing a claim under CEPA"); *Parson v. Home Depot USA, Inc.*, No. 13-4817, 2013 WL 6587316, at *4 (D.N.J. Dec. 13, 2013) (Da67) (denying plaintiff's motion to amend complaint because his proposed "common law retaliation claim and breach of implied covenant of good faith and fair dealing claim would employ the same facts that would be necessary to

support the CEPA claim and are thus duplicative. Therefore, these claims are waived and Plaintiff's proposed amendment is futile"[5]) (record citation omitted); *Torre v. Spirit Airlines, Inc.*, No. 13-1269, 2013 WL 5567134, at *2 (D.N.J. Oct. 8, 2013) (Da94) (dismissing counts for wrongful termination and retaliation as "barred by CEPA's waiver provision," and rejecting plaintiff's contention that "the 'institution of action' language in CEPA's waiver provision means that he need not elect his cause of action until after the completion of discovery or before trial"); *Griffin v. Metromedia Energy, Inc.*, No. 10-3739, 2011 WL 12872504, at *4 (D.N.J. Feb. 7, 2011) (Da49) (denying motion to amend as futile because "it is clear that Plaintiff cannot pursue both his [proposed] wrongful termination and his CEPA causes of action. The allegations supporting his CEPA claim – that he was terminated in retaliation for his whistle-blowing activity – are the same allegations supporting his termination claim"; noting plaintiff is "simply incorrect" that he may "pursue both claims at once": "a Plaintiff must pick only one"); *Torres v. The Home Depot, Inc.*, No.

[5] An amendment to a complaint is "futile" when it fails to state a claim upon which relief can be granted. "The standard of review for futility is therefore the same as that for a motion to dismiss under Fed.R.Civ.P. 12(b)(6)." *Id.* at *2. New Jersey law is an exact analog: "[T]he same standard applicable to a motion to dismiss under *R.* 4:6-2(e)" applies to an "[o]bjection to the filing of an amended complaint." *Interchange State Bank v. Rinaldi*, 303 N.J. Super. 239, 257 (App. Div. 1997).

10-3152, 2011 WL 114831, at *2 (D.N.J. Jan. 13, 2011) (Da98) ("Upon evaluating Plaintiff's state law claims, it is plain that the breach of contract and breach of the implied covenant of good faith and fair dealing causes of action are based on exactly the same facts as the CEPA claim in that both of those claims hinge on allegations that Plaintiff was involuntarily transferred in retaliation for filing a report against his superior. Accordingly, the Court finds those claims to be waived"); *Matthews v. N.J. Inst. of Tech.*, 717 F. Supp. 2d 447, 452-53 (D.N.J. 2010) (holding motion to amend NJCRA claim "must be denied" as futile because that claim and plaintiff's CEPA claim "require similar proofs and allege substantially related facts"); *Figueroa v. City of Camden*, 580 F. Supp. 2d 390, 404 (D.N.J. 2008) ("[T]o the extent that Plaintiffs base their []LAD claims on retaliatory conduct, those claims are dismissed as waived as a result of alleging conduct in violation of the New Jersey Conscientious Employee Protection Act. N.J.S.A. 34:19-8"); *Boyle v. Quest Diagnostics, Inc.*, 441 F. Supp. 2d 665, 671-72 (D.N.J. 2006) (dismissing breach of contract claim for "wrongful actual or constructive termination" and claim for breach of the implied covenant of good faith and fair dealing, because they are "based on the employees' disclosure of wrongdoing" and so "fall[] under CEPA and [are] waived") (internal quotation marks & court's brackets omitted).

Thus, as court after court after court has held, Plaintiff's filing of a CEPA claim waived any right she might have had to maintain a *Pierce* claim based on the same facts. The Supreme Court has instructed the courts to be "vigilant in order to effectuate the Legislature's mandate that alternate remedies be waived." *Battaglia*, 214 N.J. at 556 n.9. Since Plaintiff's *Pierce* claim in Count Two duplicates her CEPA claim in Count One, the trial court's dismissal Plaintiff's *Pierce* claim should be affirmed.

B. The Second Amended Complaint Fails to State a Common Law Claim as a Substantive Matter.

Under *Pierce*, "an employee has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy." *Pierce*, 84 N.J. at 72. A plaintiff's "reasonable belief" that a public policy was violated is insufficient to state a claim; there must have been an *actual* violation of a clear mandate of public policy, and the public policy must have been actually violated *both* (1) by the employer conduct that the plaintiff objected to, *see, e.g., House v. Carter-Wallace, Inc.*, 232 N.J. Super. 42, 53-54 (App. Div. 1989) ("To establish a claim under *Pierce,* an employee must show that he was in fact discharged in retaliation for taking action in opposition to corporate action which violates a clear mandate of public policy"), *and* (2) by the employee's discharge, *see, e.g., Tartaglia*, 197 N.J. at 112 ("*Pierce* requires the employee to prove not only that he or she complained about a public policy, but that his

or her resulting discharge violated a clear mandate of public policy"). The SAC fails to satisfy either requirement.

1. The Second Amended Complaint Fails to Allege that Plaintiff's Discharge Violated a Clear Mandate of Public Policy.

Plaintiff focuses entirely on the second requirement, arguing that her discharge was wrongful under *Pierce* because it violated CEPA and HIPAA regulations. (*See* Pb17-18.) First, Plaintiff argues she states a *Pierce* claim because her termination violated CEPA, specifically N.J.S.A. 34:19-3(a), which, as discussed above, prohibits "retaliatory action" against an employee who "[d]iscloses ... to a supervisor ... an activity ... that the employee reasonably believes: (1) is in violation of a law, or a rule or regulation promulgated pursuant to law," and also against an employee who discloses activity she "reasonably believes" "(2) is fraudulent or criminal." But as shown above, the SAC fails to state a claim under N.J.S.A. 34:19-3(a)(1); it also makes not the slightest attempt to state a claim under (a)(2), and Plaintiff's brief likewise makes not the slightest attempt to argue she "reasonably believed" Defendants' conduct was somehow "fraudulent or criminal," as subsection (a)(2) requires.

Plaintiff also argues her discharge violated 45 C.F.R. §160.316. (*See* Pb17-18.)[6] That provision is similar to CEPA, providing that a covered entity "may not threaten, intimidate, coerce, harass, discriminate against, or take any other retaliatory action against any individual or other person for ... (c) Opposing any act or practice made unlawful by this subchapter, provided the individual or person has a good faith belief that the practice opposed is unlawful, and the manner of opposition is reasonable and does not involve a disclosure of protected health information in violation of subpart E of part 164 of this subchapter." But again, the SAC does not attempt to state a claim under this regulation, and Plaintiff makes no real effort in her briefing to argue Defendants violated it.

Thus, since Plaintiff has no claim for wrongful discharge under the statutory and regulatory provisions she relies on in an attempt to state a *Pierce* claim, as a matter of elementary logic she has no *Pierce* claim.

More fundamentally, though, a common law claim is impermissible where, "if pursued, [it] would not protect an interest in addition to or aside from those protected by [the plaintiff's] statutory action." *Dale v. Boy Scouts of Am.*,

[6] Once again, though, Plaintiff mis-cites the regulation as §164.316. (*See supra* p.18 n.3.)

160 N.J. 562, 604-05 (1999) (internal quotation marks omitted), *rev'd on other grounds*, 530 U.S. 640 (2000).

The SAC accordingly fails to allege Plaintiff's discharge violated a clear mandate of public policy. For this reason alone, the SAC fails to state a *Pierce* claim as a substantive matter and the trial court's dismissal of Count Two should be affirmed.

2. The Second Amended Complaint Fails to Allege Plaintiff Objected to Conduct that Violated a Clear Mandate of Public Policy.

There are no allegations in the SAC satisfying the other requirement to state a claim under *Pierce* – that the employer conduct she objected to actually violated a clear mandate of public policy. For this reason, too, the SAC fails to state a claim for common law wrongful discharge as a substantive matter, and for this reason, too, the trial court's dismissal of Count Two of the SAC should be affirmed.

IV. Dismissal with Prejudice Was Appropriate.

Plaintiff's inability, even in a *second* amended complaint, to supply factual allegations supporting a CEPA or *Pierce* claim is an implicit concession that she has "no further facts to plead"; accordingly, "dismissal with prejudice was entirely appropriate," *Nostrame v. Santiago*, 213 N.J. 109, 128 (2013), since further amendment would be "futile" and "hence, allowing the amendment

would be a useless endeavor," *Notte v. Merchants Mut. Ins. Co.*, 185 N.J. 490, 501 (2006); *see also, e.g., Johnson v. Glassman*, 401 N.J. Super. 222, 247 (App. Div. 2008) (affirming dismissal with prejudice where "plaintiffs have already amended their complaint once" without "adding any material allegations relevant" to their claims"; thus, "provision of a further opportunity to amend would not be fruitful"). The trial court's dismissal of the SAC with prejudice should therefore also be affirmed.

CONCLUSION

Despite being given a second chance to amend her Complaint to plead facts supporting a CEPA or *Pierce* claim, Plaintiff failed to do so in her Second Amended Complaint. Nothing in that pleading suggested she engaged in CEPA-protected whistleblowing, or that her termination from employment violated a clear mandate of public policy. Plaintiff's repeated failure to state a claim demonstrates she had no further facts to plead and that dismissal of her Second Amended Complaint with prejudice under Rule 4:6-2(e) was the correct ruling. The trial court's judgment should therefore be affirmed.

Respectfully submitted,
FISHER & PHILLIPS LLP
Attorneys for Defendants/Respondents

Dated: July 28, 2025

By: *Alba V. Aviles*
ALBA V. AVILES
DAVID J. TREIBMAN

DEISY GRANADOS PLAINITFF / APPELLANT	:	Superior Court of New Jersey Appellate Division Docket No.:A-1736-24 Submitted – 8/13/2025
VS. PAN AMERICAN LIFE INSURANCE, 'CO., HOLA DOCTOR INSURANCE & FINANCIAL SERVICES, JONATHAN RUEDE, INDIRA SHAKE, KARLA HARDWICK DEFENDANTS / APPELLEES	:	On Appeal from the Hon. Lisa Mirales Walsh of the Union County Superior Court

Reply Brief of the Plaintiff / Appellant

Ryan Linder
Marin Linder, LLC
24-26 Park Avenue, Suite 2
West Orange, New Jersey 07052
Attorneys for the Plaintiff / Appellee

Table of Contents of Brief

Table of Authorities

Cases

Procedural History

The plaintiff's appeal was accepted and filed with the Appellate Division on June 30, 2025. Defendant / Appellee, Horizon Blue Cross Blue Shield filed a non-participation letter with the Court on or about July 28, 2025. The appellee's brief was initially filed on July 29, 2025, but was not accepted by the appellate division for filing until a deficiency was addressed. The deficiency was addressed and the appellee's opposition brief was accepted for filing on July 30, 2025.

Facts

The plaintiff / appellant relies on the facts set forth in her initial appellate papers.

Legal Argument

Point One

The plaintiff appellant engaged in whistleblowing activity by reporting what she reasonably believed to be violations of the Health Insurance Portability Act of 1996 ("HIPPA"), 42 U.S.C. § 1320d-1 to -9 to numerous supervisors and the defendants' business partner.

The appellee argues that the plaintiff's claim must be dismissed because she failed to report violations of HIPPA and related company regulations to an appropriate party or otherwise object to the actions that were taking place. See PB9. The defendant's argument relies on invented facts and unpersuasive authority.

As to the facts, the subject pleading is replete with instances wherein the plaintiff reported violations of HIPPA, its related regulations and internal company rules. The plaintiff's complaint contains the following referenced:

1. After the plaintiff became concerned with violations of HIPPA, related regulations and

company policies, the plaintiff reported the violations to a company manager , Francisco Reccio. PA 30A-31A, Pars. 22-23.

2. The plaintiff reported violations of HIPPA, related regulations and company policies to Karla Hardwick who headed the company's Human Resource Division. PA 31A, Par. 18.
3. The plaintiff reported violations of HIPPA, related regulations and company policies in a call to manager Jonathan Ruede on July 13, 2023. PA 31A, Par. 20.
4. The plaintiff sent an email to Jonathon Ruede wherein she noted that, "One of the things that is happening is that some employees are bringing their personal laptop to the office and using it during work hours which is illegal. We only work and sell products with Horizon Blue Cross & Blue Shield of New Jersey. We receive confidential information from Horizon Members and I do not know if these employees are sharing this

information for another kind of business. They spent their time making copies and copies that are not from work. She added that: an unauthorized person was permitted to enter the office, the workplace was dirty, the manager was absent, her coworkers were making improper photocopies of potentially confidential information. PA 32A, Par 21.

5. The plaintiff reported violations of HIPPA, related regulations and company policies in a call to a hotline that was maintained by her employer's business partner, Blue Cross Blue Shield. PA 33A, Par. 27.

Since the plaintiff's second amended complaint contains multiple allegations wherein she notes how she reported violations of HIPAA, its regulations and related company policy to higher ups within the company and to a business partner, the defendants are forced to rely on a sleight to hand. They do so by imposing a heightened threshold wherein they argue that the

plaintiff had to report that client confidential health information had been improperly disclosed when the threshold issue was whether HIPPA regulations and related company polices developed to ensure compliance with HIPAA's mandates concerning the confidentiality of health information were violated. Here, the plaintiff advised her supervisor that unauthorized persons were present in the workspace where confidential health information was stored. This violated the express requirements of HIPPAA, which barred unauthorized persons from accessing locations, such as the plaintiff's office, where confidential information was kept, and company policies that were crafted to guard against the disclosure of confidential information. See 45 C.F.R. § 164.310(a)(1).

The authority relied on by the defendants is unpersuasive. The defendants cite Newton-Haskoor v. Coface N. Am., 524 F. App'x 808, 811-12 (3rd Cir. 2013) in support of the argument that the plaintiff failed to engage inn whistleblowing activity. This case does not

create biding precedent because the decision was entered by a federal court concerning a state law. Moreover, the facts are starkly different than the facts in the instant action. In *Newton-Haskoor* the plaintiff overheard a conversation amongst co-workers wherein illegal activity was being planned; however, she never conveyed the contents of the subject conversation to a supervisor or one who was otherwise in a position of authority. Unlike the plaintiff in *Newton-Haskoor*, the plaintiff in the instant action reported her concerns to multiple managers as well as the company's business partner – Horizon Blue Cross Blue Shield of New Jersey. Moreover, the defendant in *Newton-Haskoor* was able to provide a valid rationale for her termination, namely she provided proprietary company information to her father. Here, the rein of retaliatory terror the plaintiff was subjected to was so immediate and extreme, that the defendants do not even pretend as though they had a legitimate rationale for terminating her.

The defendants' reliance on Reynolds v. TCM Sweeping, Inc., 340 F. Supp. 2d 541 (D.N.J. 2004), is similarly misplaced. The central issue in this case was whether a claim brought pursuant to New Jersey's Conscientious Employee Protection Act, N.J.S.A. 34:19-1, et seq., was preempted by the Federal Labor Management Relations Act, 29 U.S.C. § 185. After concluding it was not preempted, the court ordered the matter transferred to the New Jersey Superior Court. The court's decision did not explore whether the plaintiff had engaged in whistleblowing activity it discussed whether or the matter was properly venued federal court.

Point Two

The plaintiff had an objectively reasonable belief that the activities of which she complained violated HIPPA and its related regulations.

In Dzwoner v. McDermit, 177 N.J. 451, 463 (2003), the court ruled that "when a plaintiff brings an action pursuant to N.J.S.A. 34:19-3c, the trial court must identify a statute, regulation, rule or public policy

that closely relates to the complained of conduct." Applying this rule, the court noted that a plaintiff's belief that the defendant was violating a statute, rule or public policy need not be accurate, they need only have a good faith belief that the complained of activity violated a statute, rule, regulation or public policy. Ibid. Citing the remedial nature of CEPA, which was designed to encourage not thwart legitimate employee complaints the Court held that CEPA, "does not require a plaintiff to show that a law, rule, regulation or clear mandate of public policy actually would be violated if all the facts he or she alleges are true. Instead, a plaintiff must set forth facts that would support an objectively reasonable belief that a violation has occurred." Id at 464.

When conducting the aforementioned analysis, Courts are cautioned to remember that CEPA was not intended or designed to transform employees into attorneys and as such their internal complaints need not mirror the precise statutory language of counsel. Estate of Roach

v. TRW, Inc., 164 N.J. 598, 613 (2000). Indeed, the court has specifically noted that CEPA claims do not require a plaintiff to use any "magic words' in communicating their beliefs that law, rule, regulation or public policy is being violated. Beaseley v. Passaic County, 373 N.J. Super. 605-06 (App. Div. 2005). In addition, an employee's overall work environment may support a finding that their beliefs as to the nature of the complained of conduct were objectively reasonable. For instance, in Abbamount v. Piscataway Township Board of Education, 138 N.J. 405, 410 (1994), the fact that the plaintiff was experiencing respiratory issues contributed to the reasonableness of his belief that a lack of ventilation in his workplace violated regulations concerning air quality standards in shops located within schools. A similar approach was employed in Estate Roach v. TRW, Inc., 164 N.J. 598 (2000). There, the plaintiff's employer was a defense contractor who was directed by its primary customer, the US government, to "implement an ethics program for

the training and education of its employees." Id at 601. Employees were encouraged to report violations of the ethics program and were even provided with a hotline to do so. Ibid. When the plaintiff in Roach was informed that two of his colleagues submitted false time sheets and expense reports and failed to disclose a conflict of interest with an existing subcontractor, he reported the matter to his supervisor and ultimately the company hotline. Ibid. Even though the plaintiff could point to no specific statute, rule or regulation outside of his company's own internal policies, his CEPA claim was upheld. Id at 610-11.

The plaintiff in the instant action stands in similar position to the plaintiffs in *Roach*. Here, as in Roach, the plaintiff's employer adopted internal policies to comply with external requirements. In Roach, the employer was required to adopt a code of ethics at the request of its primary vendor- the US military. Here, defendants were required to implement stringent procedures to guard against the improper

disclosure of client health information by Blue Cross Blue Shield of New Jesey and HIPPAA since it was a covered entity. Plaintiffs in both matters were provided training concerning these guidelines and a reporting mechanism. In short both employees were immersed in an environment where they were encouraged to recognize and report violations of certain company policies that were adopted to comply with external requirements. In fact, in this matter, the plaintiff was specifically warned to be on the lookout for disgruntled employees who violated guidelines designed to protect client confidential information. In light of this environment, it was certainly reasonable for the plaintiff to conclude that HIPAA and its related regulations were being violated, because employees were violating company rules that were put in place to guard their clients' confidential information. To conclude otherwise would require one to conclude that the company policies referenced by the plaintiff served no purpose.

The defendants' opposition fails, because it ignores the plaintiff's work environment, relies on easily distinguishable authority and takes issue with the fact the plaintiff's complaints were not framed in the kings English. First, the defendants fail to recognize that the policies cited by the plaintiff were implemented to protect client health information. The defendant's opposition treats these policies as if they are not related to protecting client health information but were mere extraneous rules that served no real purpose. Second, the defendants are fixated on the language that the plaintiff used in a single email while ignoring the plaintiff's multiple complaints that were submitted in person, on voice mail and to the hotline number that she was provided. The defendants also seek to excoriate the plaintiff for using a commonly phrased figure of speech when she reported violations

As to the cases cited by the defendant in support of its argument; they are distinguishable. The

plaintiff's claim in Hitesman v. Bridgeway, Inc., 218 N.J. 8 2014 (2014), failed because the plaintiff relied on violations of a code of ethics and an internal company handbook that failed to offer specific guidance. In the absence of such clear guidance, the plaintiff's claim was dismissed. In the instant action, the plaintiff was provided clear guidelines and instructions to protect client health information and reported violations of those express specific guidelines. Borough of Seaside Park v. Commission of the NJ Dept. of Ed., 432 N.J. Super. 167 (App. Div. 2013) is also inapplicable to the instant action as the central issue in that case concerned whether the plaintiff exhausted administrative remedies, not whether it could maintain a CEPA action. Finally, Insight Global, LLC v. Collabera, Inc., 446 N.J. Super. 525 (Law Div. 2015) is not applicable as the Court ruled the party lacked standing to bring a claim because it was not registered as required by N.J.S.A. 34:8-24. In short, the central issue in this case was

not whether the plaintiff had a reasonable objective belief that would support a CEPA claim.

Point Three

The plaintiff should be permitted to continue with her wrongful discharge claim because of the nature of the retaliation against her and because doing so would be premature.

An employee may maintain a wrongful termination claim to the extent her discharge violates a clear mandate of public policy. Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58 (1980). HIPAA contains a provision that bars covered entities from threatening, intimidating, harassing, discriminating against or otherwise retaliating against employees who report violations of its related rules and regulations. This statement constitutes a public policy. Here, the plaintiff was subject to immediate and withering retaliation as the defendants ignored their own internal policies and told the plaintiff's colleagues that she had filed a complaint alleging violations of rules designed to protect client health information.

The plaintiff was confronted by an angry colleague and ultimately fired.

Moreover, in Maw v. Advanced Clinical Comm, 359 N.J. Super. 420, 438 (App. Div. 2003), the Court concluded that a plaintiff may maintain a CEPA claim and wrongful termination claim until the conclusion of discovery. In short, while the court acknowledged that a plaintiff may not simultaneously maintain a CEPA and wrongful termination claim, it concluded that the prohibition applies at trial and not during the pre-trial process.

Conclusion

For the forgoing reasons, the plaintiff / appellant requests that the Court grants her appeal and reverse the Order dismissing her second amended complaint.

Respectfully submitted,

/s/Ryan Linder