CARLOS FORTY, Plaintiff-Appellant, v. INSPIRA HEALTH NETWORK, and BARBARA CONCIELLO, DENISE LAMBRECHT, and JOHN AND/OR JANE DOES 1-20 (Names Being Fictitious), in their individual and corporate capacities, and as aiders and abettors, Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION APPELLATE DOCKET NO: A-4038-23T4 DOCKET NO. BELOW: CUM-L-627-21 SAT BELOW: Hon. James R. Swift, J.S.C. LAW DIVISION – CUMBERLAND COUNTY

BRIEF OF PLAINTIFF-APPELLANT CARLOS FORTY

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PRELIMINARY STATEMENT

This appeal arises from a CEPA complaint brought by Plaintiff Carlos Forty ("Plaintiff") against Defendants Inspira Health Network, Barbara Conicello ("Defendant Conicello"), and Denise Lambrecht ("Defendant Lambrecht"). Plaintiff is a former staffing coordinator for Defendant Inspira, who directly reported to Defendant Conicello. Defendant Conicello had a well-documented history of harassment and abusive behavior in the workplace. Her conduct, however, went beyond the generalized workplace gripes and represented seriously threatening behavior, implicating the language of this State's criminal harassment statute. When Plaintiff and others raised legitimate complaints about her conduct, she orchestrated a campaign to terminate them, using accusations related to "charge pay" (a one dollar per hour extra payroll charge she had previously approved) as a pretext for retaliation. The trial court's decision to grant summary judgment in favor of Defendants ignored these key facts and resolved critical issues that should have been left for a jury's determination.

Defendant Conicello's pattern of harassment was evident and persistent. She frequently directed aggressive behavior towards Plaintiff and others, including verbal abuse, profanity, and even intimidating gestures. Plaintiff, along with other colleagues, consistently reported this misconduct to management.

After a particularly appalling incident in June 2020 (which Defendant Conicello was aware would initiate an investigation), Defendant Conicello turned the tables, shifting the focus away from her own misconduct and instead launching an investigation into Plaintiff and his co-workers over allegations of "charge pay" misuse. Defendant Conicello had initially authorized the charge pay. Yet, once the scrutiny turned toward her conduct, she conveniently claimed ignorance of these payments, shifting blame onto Plaintiff and others. The timing of this sudden concern over charge pay – in conjunction with a pending HR complaint against her — strongly suggests that it was a pretext, meant to create grounds for disciplinary action and eventual termination. In doing so Defendant Conicello successfully short-circuited any real investigation into her own conduct.

This narrative of retaliation is supported by both the timing and nature of Defendants' actions. Plaintiff was subjected to an investigation that deviated from standard practice, with Defendants bypassing the usual progressive discipline policy and moving straight to termination. It also contrasts with the treatment of others who had been identified as having committed "time theft," Plaintiff and his co-workers were immediately terminated while those offenders were permitted to simply repay the money.

When the evidence is viewed in the light most favorable to Plaintiff, it is clear that a jury could reasonably find that Defendant Conicello retaliated against Plaintiff for his complaints about her behavior. The trial court's decision to grant summary judgment deprived Plaintiff of the opportunity to have a jury assess the evidence and draw the reasonable inference that Defendant Conicello's actions were retaliatory. For these reasons, the trial court's decision should be reversed.

PROCEDURAL HISTORY

Plaintiff filed a Complaint against Defendants on September 10, 2021. (Pa1 – Pa12). Defendants filed an Answer on February 14, 2022. (Pa13 – Pa21). Following the close of discovery, Defendants filed a Motion for Summary Judgment on April 17, 2024. (Pa22 – Pa23). Plaintiff filed opposition to the Motion on June 12, 2024. (Pa654 – Pa685.) Defendants filed a reply on July 1, 2024. (Pa688 – Pa708). The Court heard Oral Argument on July 15, 2024, and issued its decision on the record. On July 16, 2024, the Court entered an Order granting Defendants' Motion. (Pa712). Plaintiff filed a Notice of Appeal on August 22, 2024, and an Amended Notice of Appeal on September 3, 2024. (Pa713 – Pa731).

STANDARD OF REVIEW

This Court reviews a grant of summary judgment *de novo*, applying the same standard governing the trial court under R. 4:46. See Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007). Generally, it must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995); see also R. 4:46-2(c).

Summary judgment is inappropriate if an issue of material fact genuinely exists. See R. 4:46-2(c). An issue of fact is genuine if the evidence submitted on the motion, together with all legitimate inferences favoring the non-moving party, is not so one-sided that it requires submitting the issue to a jury. Summary judgment must also be denied when analyzing a question of fact requires a credibility determination. See Parks v. Rogers, 176 N.J. 491, 502 (2003). Moreover, a summary judgment motion should be denied when an action or defense requires determination of a state of mind or intent. See Wilson v. Amerada Hess, 168 N.J. 236, 253-54 (2001). Accordingly, "[a]s a general rule, summary judgment is not a proper vehicle for resolving claims of employment discrimination which often turn on an employer's motivation and

intent." Miller v. Beneficial Mgmt. Corp., 855 F. Supp. 691, 707 (D.N.J. 1994).

STATEMENT OF FACTS

A. Plaintiff Served as a Staffing Coordinator for Defendant Inspira Health Network.

Plaintiff began his employment with Defendant Inspira Health Network in May 2005, first working as a security guard before he was promoted to staffing coordinator. (Pa26). Staffing coordinators are responsible for a variety of tasks, including the printing and distribution of daily staff sheets, assigning hospital staff, reviewing payroll entries, maintaining call logs, answering phone calls from hospital staff related to payroll, and assisting the nursing supervisor with staffing. (Pa27). Plaintiff reported directly to Defendant Conicello, who at the time served as the Lead Administrative Nursing Supervisor. (Pa25 – Pa26). At all times relevant to this litigation, Plaintiff was one of approximately six staffing coordinators, including his former co-workers Rachel Jenkins ("Jenkins") and Nancy Karnuk ("Karnuk"). (Pa27 – Pa28). Neither Plaintiff nor Karnuk had ever been disciplined by Defendants prior to their eventual termination. (Pa655). Similarly, Jenkins' job performance was described as "very good" by Defendant Conicello. (Pa655).

B. Defendant Conicello, Plaintiff's Direct Supervisor, Had a History of Threats and Harassment.

Defendant Conicello, who currently serves as Defendant Inspira's Director of Nursing Operations, was the Lead Administrative Nursing Supervisor from approximately the mid-2000s

until 2022. (Pa26). Defendant Conicello testified that she did not recall receiving training on the anti-harassment policy and was unaware of any anti-retaliation policies in place (Pa655). Conicello displayed aggressive and abusive behavior characterized by verbal abuse. (Pa188, Pa659). Defendant Conicello's behavior was erratic, and often consisted of slamming file cabinets, cursing, and swinging her arms. (Pa291, Pa660). Defendant Conicello would regularly curse at employees, yell, scream, and talk down to people. (Pa244). The conduct gave Jenkins the feeling that Defendant Conicello, while working, was "ready to fight at any minute." (Pa656).

Plaintiff made multiple complaints about Defendant Conicello's conduct to supervisors, including COO Betty Sheridan ("Sheridan"), prior to June 2020. (Pa659). He reported to Sharon Slavic ("Slavic"), the Director of the Med-Surg units, that Defendant Conicello had yelled at him, and he made similar complaints to her on several occasions (Pa659). Slavic instructed Plaintiff to discuss the matter directly with Defendant Conicello or to take it up with HR, but she did not report the complaints herself, as required by hospital policy (Pa659). Instead, Slavic informed Defendant Conicello of Plaintiff's complaints, which Plaintiff believed exacerbated the situation (Pa659).

Jenkins made similar complaints to Slavic regarding Defendant Conicello's conduct. (Pa659). Karnuk had also made complaints

about Conicello's conduct. (Pa659 – Pa660). Karnuk made a complaint in 2018 regarding an incident in which Defendant Conicello blocked a door and refused to let her leave a room. (Pa660). Karnuk further complained about Defendant Conicello's repeated slamming of file cabinets and doors, yelling and cursing, and her threatening body language. (Pa660). Plaintiff, Jenkins, and Karnuk had all made complaints about Defendant Conicello's conduct to Slavic. (Pa662 – Pa663). Slavic, over the years, had discussed the complaints with Defendant Conicello to get her to modify her behavior. (Pa662).

C. Defendant Conicello's Conduct Culminated in an Incident in June 2020.

On June 24, 2020, reacting to a discussion regarding a staffing coordinator's failure to process certain forms, Defendant Conicello emerged from her office visibly upset. (Pa656 – Pa657). Defendant Conicello exited her office and yelled at Plaintiff. (Pa656). Defendant Conicello directed profanity at him, telling him to "shut the fuck up," and continued to berate him telling him he was the laughingstock of the hospital. (Pa656). Defendant Conicello then mocked Plaintiff's previous complaints about her harassment, stating: "you know what Carlos, every time you run to Betty Sheridan, you know what they do, they laugh at you. They [fucking] laugh at you. I'm sick of it. I'm sick of it." (Pa656). Defendant Conicello's behavior was intended to be physically

intimidating, as she stood close to Plaintiff, with her elbows on his desk and her face inches from his face. (Pa657).

Karnuk witnessed the incident and was so uncomfortable she moved to the door. (Pa656). Karnuk then left the room because she was afraid that she might urinate out of fear. (Pa657). Karnuk was shocked by the intensity of the altercation. (Pa658). Jenkins also witnessed the incident and feared that Defendant Conicello was going to physically strike Plaintiff. (Pa657). Plaintiff (who served in the military) testified that the encounter was worse than anything encountered in "boot camp." (Pa657). Following this incident, Plaintiff found it necessary to step away from the office to manage his stress. (Pa658).

D. Investigation into Defendant Conicello's Conduct is Derailed By Defendant Conicello Escalating An Issue That Leads to Plaintiff's Termination.

Plaintiff reported the June 2020 incident to Erich Florentine, the Chief People Officer, and Defendant Lambrecht, Defendant Inspira's Director of Labor Relations, complaining about Defendant Conicello's actions (Pa659). He believed that Defendant Conicello's conduct violated both Inspira's policies and the law, citing her behavior as constituting harassment. (Pa660). Jenkins also reported the incident to Slavic. (Pa247).

Defendant Lambrecht was assigned to investigate the matter. (Pa90, Pa101). Defendant Lambrecht told Plaintiff that she would need to get Defendant Conicello's statement, speak to other

witnesses look at the facts involved, and then alert Defendant Conicello's boss who would make a decision as to discipline or coaching for Defendant Conicello. (Pa101). Defendant Lambrecht informed Defendant Conicello that there was going to be an investigation of her conduct. (Pa667). Defendant Conicello responded by saying: "what now." (Pa101).

On September 1, 2020, Defendant Conicello sent an email to Defendant Lambrecht, initiating an investigation into Plaintiff, Jenkins, and Karnuk, for unauthorized receipt of what Defendants refer to as "charge pay." (Pa661). Charge pay is an additional dollar per hour on top of a given hourly rate for a given shift, which was payable to the "charge nurse" on a particular nursing unit. (Pa43). Charge pay could be given to non-nurse employees with approval from Defendant's upper management. (Pa43). Verbal approval was sufficient to enter charge pay. (Pa661).

In the Spring of 2020, at the height of the pandemic, Defendant Inspira offered certain staff members COVID-19 incentive pay. (Pa42). The staffing coordinators, however, were deemed to be ineligible for this incentive pay because they were not "direct patient care staff." (Pa42). Conicello requested that the staffing coordinators receive the COVID incentives, but it was denied by management. (Pa361.) Defendant Conicello told Jenkins that the staffing coordinators could receive charge pay as long as it did not lead to negative consequences for her. (Pa661).

Following Defendant Conicello's approval, Plaintiff, Jenkins, and Karnuk received charge pay for certain shifts during the Summer of 2020. (Pa45 – Pa46).

In initiating the investigation into charge pay, Defendant Conicello essentially derailed any investigation into her harassment. Defendant Conicello was never interviewed regarding the most recent complaint about her for harassment related to the June 2020 incident with Plaintiff. (Pa667). Despite receiving multiple complaints, Slavic was never interviewed regarding Defendant Conicello's harassment. (Pa667). Defendant Lambrecht combined the two investigations, interviewing members of the staffing department about Defendant Conicello's behavior and the charge pay issues together. (Pa107.) Defendant Lambrecht permitted Defendant Conicello to be present for interviews during the investigation. (Pa109 - Pa110). Karnuk was interviewed with Defendant Conicello present. (Pa667).

Defendant Lambrecht ultimately advised her supervisor, Sheridan, that the incident with Plaintiff was out of character for Defendant Conicello. (Pa667). During the same conversation, Sheridan inquired about the "charge pay" investigation. (Pa667).

D. Plaintiff is Terminated in Retaliation for Protected Activity.

Defendant Inspira has a progressive discipline policy, a four-step process including the following steps: 1) verbal

warning; 2) written warning; 3) suspension and, finally, 4) termination. (Pa655). Prior to September 2020, a group of Defendant Inspira's managers and directors had been caught entering time as time worked when they were, in fact, on vacation. (Pa668). As salaried employees, doing so entitled them to significant payouts of unused PTO time when such time was "cashed out." (Pa668). The employees who had participated in this scheme were not terminated and, instead, were only required to pay the money back to Defendant Inspira. (Pa668).

To terminate an employee, Defendant Conicello was required to work with Defendant Lambrecht. (Pa663). Ultimately, however, it is up to Defendant Conicello to make a recommendation for termination. (Pa663). Despite the fact that Defendant Conicello had an open HR complaint pending against her, Defendant Lambrecht did not believe it was a conflict of interest to consult with her regarding the employment decisions made with regard to Plaintiff, Jenkins, and Karnuk. (Pa117). Once a request for termination is made, the request proceeds to Defendant's "termination panel." (Pa662). Defendant Conicello, working with Defendant Lambrecht, recommended immediate termination (skipping all of the stages of the progressive discipline policy) for Plaintiff, Jenkins, and Karnuk and the action was approved by the panel. (Pa51). Plaintiff and Jenkins were terminated on September 14, 2020, while Karnuk was terminated on September 17, 2020. (Pa666).

LEGAL ARGUMENT

POINT I

THERE IS SUFFICENT EVIDENCE IN THE RECORD TO DENY SUMMARY JUDGMENT ON PLAINTIFF'S CEPA CLAIM

Plaintiff filed a complaint alleging violations of the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 et seq. (Pa1 – Pa8). The trial court erred in granting summary judgment in favor of Defendants because the evidence on record sufficiently supports Plaintiff's CEPA claim, precluding summary judgment as a matter of law. There is sufficient evidence for Plaintiff to support his claims under CEPA, including that he had a reasonable belief that a violation of law, regulation, or clear mandate of public policy was occurring, engaged in protected whistleblowing activity, and suffered an adverse employment action that was causally related to his protected activity. See Kolb v. Burns, 320 N.J. Super. 320 N.J. Super. 467, 477-78 (App. Div. 1999) (setting forth the elements of claims under CEPA).

A. Plaintiff's CEPA Claim is Analyzed Under the McDonnell Douglas Burden Shifting Framework.

When employment cases, such as CEPA claims, rely on circumstantial evidence, this Court applies the McDonnell Douglas three-part burden-shifting test. See Massarano v. N.J. Transit, 400 N.J. Super. 474, 492 (App. Div. 2008). This test, established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and

adopted by New Jersey courts in CEPA cases, provides a structured method for determining whether an employer's action was motivated by retaliatory intent. It operates in three stages: (1) the plaintiff must establish a prima facie case; (2) the defendant must articulate a legitimate, non-retaliatory reason for the adverse action; and (3) the plaintiff must ultimately demonstrate that the reason given by the defendant is pretextual. See Kolb, supra., 360 N.J. Super. at 478.

Plaintiff's evidentiary burden at the *prima facie* stage is low, which acknowledges that requiring greater proof would prevent a plaintiff from accessing the tools – evidence of the employer's motivation – necessary to even begin to assemble a case. See Zive v. Stanley Roberts, 182 N.J. 436, 448 (2005). "The *prima facie* case is to be evaluated solely on the basis of the evidence presented by the plaintiff, irrespective of defendants' efforts to dispute that evidence." See Zive, 182 N.J. at 448. The matter then moves to the second stage of the McDonnell Douglas analysis when the burden shifts to Defendants to articulate a legitimate, non-retaliatory reason for its action. Id. If Defendants satisfy that burden, then in the third stage the burden of production shifts back to Plaintiff to demonstrate that the reason articulated by Defendants is merely a pretext for discrimination or retaliation and not the true reason for the employment decision. Id.

On the last prong of pretext, Plaintiff does not need to

provide direct evidence. Instead, a plaintiff proves retaliation by demonstrating "such weaknesses, implausibilities, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact-finder could rationally find them unworthy of credence" and is a pretext for discrimination. See DeWees v. RCN Corp., 380 N.J. Super. 511, 528 (App. Div. 2005); see also Greenberg v. Camden County, 310 N.J. Super. 189 (App. Div. 1998) (evidence that employer who failed to hire a teacher was "not providing the whole story" and whose words were contradicted by its acts was sufficient to require reversal of summary judgment).

In response to a motion for summary judgment, a plaintiff need not meet the ultimate burden of persuasion but must only cast such serious doubt on the veracity of the employer's articulated legitimate reason as to allow a jury to reasonably conclude that the employer was motivated to act for the retaliatory reason alleged by plaintiff. See Kelly v. Bally's Grand, Inc., 285 N.J. Super. 422, 432 (App. Div. 1995). There are no "exclusive ways to show causation, as the proffered evidence, looked at as a whole, may suffice to raise the inference." Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173, 177 (3d Cir. 1997).

B. Plaintiff Had an Objectively Reasonable Belief That Defendant Conicello's Conduct Violated N.J.S.A. 2C:33-4(a).

In this case, Plaintiff's belief that Defendant Conicello's behavior constituted harassment under N.J.S.A. 2C:33-4 was objectively reasonable, based upon a plain reading of the statute and the evidence in the record regarding Defendant Conicello's conduct.

N.J.S.A. 2C:33-4(a) and (c) define harassment as occurring when a person "makes, or causes to be made, one or more communications . . . in offensively coarse language or any other manner likely to cause annoyance or harm . . . or c) engages in any other course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person." See N.J.S.A. 2C:33-4(a)-(c). In State v. Hoffman, 149 N.J. 564 (1997), the New Jersey Supreme Court held that the terms "annoy," and "annoyance" should be accorded their normal and accepted meanings, and those provisions of the statute do not require physical contact or acts of violence. See Hoffman, 149 N.J. at 580 (citing Fahey v. City of Jersey City, 52 N.J. 103, 107 (1968)).

A plain language, and ordinary, reading of the harassment statute supports Plaintiff's reasonable belief that Defendant Conicello's actions, which included verbal abuse, profanity, and physical intimidation without contact, fell within the statutory definition. That Plaintiff, and others who complained about

Defendant Conicello, may not know the details of the State's harassment statute is irrelevant. The complaining employee need not specifically articulate the "exact violation" that is occurring. See Hernandez v. Montville Tp. Bd. of Educ., 354 N.J. Super. 467, 474 (App. Div.2002), aff'd o.b., 179 N.J. 81 (2004). "The object of CEPA is not to make lawyers out of conscientious employees but rather to prevent retaliation against those employees who object to employer conduct that they reasonably believe to be unlawful." Mehlman v. Mobil Oil Corp., 153 N.J. 163, 193-94 (1998). As such, Plaintiff is not required know the "precise contours and components of the public policy," may learn of the specific violations after the filing of the complaint and may identify them specifically for the first time as late as on appeal. See Regan v. New Brunswick, 305 N.J. Super. 342, 355 (App. Div. 1997) ("We also note that plaintiff, when deposed, may not have been aware of the specific statutory provisions implicated. . .").

Plaintiff must demonstrate only that a "reasonable lay person would conclude that illegal activity was going on." See Young v. Schering Corp., 275 N.J. Super. 221, 233 (App. Div. 1994). Indeed, a reasonable perspective on Defendant Conicello's conduct was proffered by Karnuk in her deposition testimony, when she stated as follows:

> I don't know actually what the law would be called when – is that harassment? Is that – I mean, I'm sure there's a terminology for it.

> Like whether – I'm not sure what you call it. I'm sure there's a law, yes. There's definitely a law that says that you can't act like that in your work environment, and you can't invade people's personal space, and you can't hold the door on people, and you can't, you know, make statements, and, and just create a toxic work environment.
>
> (Pa308).

Defendants' argument, accepted by the Motion Court, that Plaintiff's belief was unreasonable, and that the conduct does not constitute statutory harassment is simply contradictory to the statutory language and, instead, likely draws from perceptions of criminal harassment outside of the text. As the Supreme Court held in Dzwonar v. McDevitt, 177 N.J. 451 (2003) when a defendant argues at summary judgment that an employee's belief is unreasonable, the Court must determine whether there is a "substantial nexus" between the complained of conduct and the implicated law, regulation, or public policy. Dzwonar, 177 N.J. at 464. If such a nexus exists, "the jury then must determine whether the plaintiff actually held such a belief, and if so, whether that belief was objectively reasonable." Id. at 464-65. Such a nexus is present in this case.

There is no need for a "trial within a trial" as to Defendant Conicello's ultimate criminal liability for statutory harassment. In Mehlman, supra., the New Jersey Supreme Court held that an employee's belief in the illegality of conduct does not need to be

ultimately proven correct for the activity to be protected under CEPA. 153 N.J. at 193.

Rather, the only question is whether Plaintiff, as well as other individuals such as Jenkins and Karnuk, had a reasonable belief that Defendant Conicello's conduct was illegal, and whether that conduct falls within a law that gives rise to the protections of CEPA. Based on the facts and the text of the statute, the issue should not have been decided by the Court on summary judgment. There is sufficient evidence to establish that Plaintiff satisfies the first CEPA prong. A jury is in the best position to assess the credibility of witnesses and weigh conflicting evidence to determine whether the employee's belief was objectively reasonable.

C. Plaintiff Engaged in Protected Whistleblowing Activity.

There is also evidence in the record that Plaintiff engaged in protected whistleblowing activity. Plaintiff reported Defendant Conicello to her supervisor, Sheridan, the hospital's COO. (Pa658 – Pa659). Plaintiff further reported Defendant Conicello to Slavic, another member of Defendant's management. (Pa658 – Pa659). Following the June 2020 incident, Plaintiff made multiple complaints to Defendants' Chief People Officer, Florentine. (Pa659). These complaints constitute CEPA-protected activity, whether or not Plaintiff specifically complained about harassment within the meaning of the statute. CEPA does not

require any "magic words" in communicating an employee's reasonable belief of illegal activity. See Beasley v. Passaic County, 377 N.J. Super. 585 (App. Div. 2005). Moreover, reports to these individuals were consistent with Defendants' internal reporting procedures, and the individuals had the authority to correct any violations. See N.J.S.A. 34:19-2(d).

D. Defendants Terminated Plaintiff.

Defendants terminated Plaintiff on September 14, 2020, an adverse action under CEPA. See N.J.S.A. 34:19-2(e) (retaliatory action under CEPA defined as "the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment.")

E. Plaintiff's Termination is Causally Connected to His Protected Activity and There is Sufficient Evidence of Pretext Under the McDonnell Douglas Burden Shifting Framework.

Finally, when viewed in the totality of the circumstances, there is ample evidence in the record that a jury may use to determine that Defendants terminated Plaintiff for his protected whistleblowing activities instead of the reasons Defendants have claimed.

There is no solitary way to demonstrate causation and/or pretext, as it must be identified on fact-specific basis. A causal connection can be demonstrated through evidence of circumstances that justify an inference of retaliatory motive or a "pattern of

antagonism" following the protected conduct. See Kachmar, supra. 109 F.3d at 177; see also Romano v. Brown & Williamson Tobacco Corp., 284 N.J. Super. 543 (1995). Causation may be demonstrated by the temporal proximity between the employee's protected activity and the adverse employment action, when the temporal proximity is combined with facts that are "unusually suggestive" of retaliatory motive. See Young v. Hobart West Group, 385 N.J. Super. 448, 467 (App. Div. 2005)

However, temporal proximity and a pattern of antagonism "are not the exclusive ways to show causation, as the proffered evidence, looked at as a whole, may suffice to raise the inference." Kachmar, 109 F.3d at 177. Plaintiff can demonstrate pretext when circumstantial evidence of retaliation demonstrates such "weaknesses, implausibilities, or contradictions in [Defendants'] proffered legitimate reasons for its action that a reasonable fact-finder could rationally find them unworthy of credence." DeWees, 380 N.J. Super. at 528.

Furthermore, Plaintiff's protected activity does not even have to be the only reason for his termination or adverse employment action, but rather only part of the reason. As explained by this Court in Donofry v. Autotote, 350 N.J. Super. 276 (App. Div. 2001):

> Plaintiff's ultimate burden of proof is to prove by a preponderance of the evidence that his protected, whistleblowing activity was a

> determinative or substantial, motivating factor in defendant's decision to terminate his employment--that it made a difference. Plaintiff need not prove that his whistleblowing activity was the only factor in the decision to fire him.

Donofry, 350 N.J. Super. at 296.

Therefore, even if a reasonable jury believes some of Defendants' rationale for termination, it could still reasonably conclude that Plaintiff's whistleblowing "made a difference" in Defendants deciding to terminate him, and still find for Plaintiff. Here, the facts surrounding Plaintiff's termination contain sufficient weaknesses in Defendants' purported reason for termination that the jury may find them unworthy of credence.

Defendants claim that Plaintiff, along with Jenkins and Karnuk, were terminated for adding an extra one dollar per hour as "charge pay" to certain shifts they worked during 2020. It is Defendants' position, and the testimony of their witnesses including Defendant Conicello, that this charge pay was coincidentally "discovered" by Defendant Conicello around the same time that Defendant Lambrecht initiated her investigation into the latest complaints about Defendant Conicello arising from the June 2020 incident with Plaintiff.

However, this termination rationale is weakened by a fundamental factual dispute which precludes summary judgment. There is record evidence, in the form of Jenkins' deposition

testimony, that establishes that Defendant Conicello permitted the staffing coordinators to add the charge pay as long as she did not face any negative consequences. (Pa661). Specifically, Jenkins testified as follows:

> So I said why can we not at least get charge pay, which is one dollar an hour. And she said, in front of several people, you can get charge pay, as long as I don't get in trouble.
>
> (Pa230).

Defendants dispute that Defendant Conicello approved the charge pay. However, Plaintiff is entitled to all legitimate inferences regarding factual disputes at the summary judgment phase. Moreover, while there may not be any corroborating witnesses, there is (contrary to the Trial Court's opinion) circumstantial evidence that would lend credence to the notion that Defendant Conciello may have done so, and would support Jenkins' testimony. First, Defendant Conicello herself testified that she advocated for the staffing coordinators to get COVID-19 incentive pay that was denied them by Defendant Inspira because they were not involved in direct patient care. (Pa42). Defendant Conicello also admitted that she was aware of Plaintiff receiving charge pay at least once and took no action to correct it, or to discipline Plaintiff. (Pa362, Pa661).

If Defendant Conicello authorized the charge pay, Defendants' entire stated reason for termination crumbles. A pretextual

rationale for termination is sufficient for Defendants' summary judgment motion to be denied under McDonnell Douglas. While a reasonable jury could determine that Defendant Conicello terminated Plaintiff, Jenkins, and Karnuk for another reason, such as her own complicity in their charge pay, it could also attribute a different motive and conclude that she did so in retaliation against three employees who had previosuly made complaints regarding her conduct.

Indeed, there is record evidence that Defendant Conicello exhibited an antagonism towards the complaints that had been made against her, as well as ignorance of Defendants' workplace policies as a whole. During the June 2020 incident with Plaintiff, Defendant Conicello referenced Plaintiff's prior complaints. (Pa656). Specifically, she stated that Defendants' management "laughed" at Plaintiff's complaints and that he was a "laughingstock" for having made them. (Pa656). Defendant Lambrecht, in recounting Defendant Conicello's reaction to having learned that an investigation may be commencing in connection with Plaintiff's latest complaint, dismissively responded: "what now." (Pa101). Even in her deposition testimony in connection with this lawsuit, Defendant Conicello claimed to have no knowledge of whether Defendant Inspira even had an anti-retaliation policy, and stated that she did not recall receiving training on Defendant Inspira's anti-harassment policies. (Pa665). The totality of the

circumstances could support an inference that Defendant Conicello was not above taking action to shut down a pending investigation into her conduct.

Defendant Conicello was, in fact, successful in impeding any investigation into her conduct, which was recognized by the Trial Court in its opinion. In referencing the investigation into the June 2020 incident, the Trial Court noted that: "But clearly, as a result of them getting terminated there really wasn't much to do to Ms. Conciello because Mr. Forty got terminated for this." (T26-20). Instead of investigating Defendant Conicello, Defendant Lambrecht performed a mish-mashed dual "investigation," primarily into the charge pay incident. (Pa107). For example, Defendant Lambrecht permitted Defendant Conicello to be present at staff interviews in connection with the investigation. (Pa109 - Pa 110). Defendant Lambrecht also permitted Defendant Conicello to exercise her discretion in recommending termination of even though she had an open HR complaint pending against her. (Pa117).

The decision to terminate Plaintiff, Jenkins, and Karnuk is further weakened by the failure of Defendants to abide by their own progressive discipline policy and their prior handlings of employees who were alleged to have "stolen" time. Other employees who engaged in similar conduct authorization, cashing out PTO time that had been used, were not terminated (Pa668). This selective enforcement of company policy further undermines Defendants'

explanation.

In conclusion, there is evidence in this record (including testimony that Defendant Conicello authorizes the charges in question) that Defendants' termination of Plaintiff is simply not what it seems. That evidence, from which a jury could attribute a retaliatory motive, was sufficient for the Motion Court to deny Defendants' Summary Judgment motion. Plaintiff has met the requirements for causation, and a jury should determine whether this evidence, combined with other aspects of the case, warrants a finding of retaliation. This Court should reverse the Motion Court's Order.

POINT II

THE MOTION COURT ERRED BY GRANTING SUMMARY JUDGMENT BECAUSE IT DID NOT GRANT PLAINTIFF ALL REASONABLE FACTUAL INFERENCES FROM THE RECORD EVIDENCE.

The Trial Court improperly granted summary judgment by making numerous inferences that favored Defendants rather than granting all reasonable factual inferences to Plaintiff. Here, the Trial Court strayed from the Brill standard by accepting Defendants' narrative without allowing Plaintiff the entitled benefit of the doubt in several key areas and in connection with each CEPA prong.

First, the Trial Court minimized the severity of Defendant Conicello's actions both before and during the June 2020 incident and failed to analyze it under the harassment statute, describing it as "just disagreements within the workplace, not very nice, uncomfortable disagreements" (T33-5). However, Plaintiff's belief that the conduct was unlawful should have been viewed through the lens of a reasonable employee, and the plain language of the statute. A jury could reasonably infer that Defendant Conicello's conduct — berating people in close proximity, using profanity, slamming doors and file cabinets — created a work environment that violated the plain language of the harassment statute.

The Trial Court also improperly weighed the veracity of the testimony by Plaintiff, Jenkins, and Karnuk, stating "Yes, of course, in their depositions they're going to say well we felt

that this was harassment." (T28-13). This statement indicates that the court dismissed the testimony, treating it as self-serving rather than viewing it in the light most favorable to the non-moving party.

The Trial Court's decision also relied on the absence of corroborating testimony from other staff regarding Defendant Conicello's approval of charge pay and its own interpretations of Defendant Conicello's actions and motives. For example, the court noted that "no other witness and no other document has corroborated her testimony" (T21-24). However, at the summary judgment stage, Plaintiff is entitled to the inference that his co-worker's testimony could be truthful, and it is within the jury's province to assess the credibility of these statements. By essentially dismissing Jenkins' testimony without allowing a jury to evaluate it, the court improperly weighed evidence.

The court further inferred that the charge pay investigation was independent of Plaintiff's complaint against Defendant Conicello despite all evidence to the contrary, stating with regard to the June 2020 incident that the "investigation's already been done into that." (T12-6). However, the record shows that no true investigation had been performed and the proximity between the pending investigation of Defendant Conicello's related to the incident in June 2020 and the subsequent initiation of the charge pay investigation in August 2020 raises questions about the true

motivation behind the scrutiny of Plaintiff's actions. The court failed to draw the inference that Defendant Conicello might have leveraged the charge pay issue to derail the investigation into her conduct, especially since the investigation into her behavior was effectively halted once Plaintiff and the others were terminated. As such, a jury could reasonably conclude that the charge pay investigation was a pretext to retaliate against Plaintiff for his complaints.

The court further inferred that Defendant Conicello would not have supported the termination of Plaintiff, Jenkins, and Karnuk because she would have been upset about losing staff during a critical time. The court noted:

> I don't think we should lose sight of the fact that this is a five-person office, during COVID, during the height of COVID, and three of the five people in this very busy, very stressed-out office end up getting terminated. It doesn't really seem that it would make a lot of sense for her to be... happy about this discipline that these parties received, because she lost three-quarters of... her employees.
>
> (T30-23)

This conclusion presumes far too much about Defendant Conicello's intent and motivation for the purpose of a summary judgment motion. A jury could reasonably infer that Defendant Conicello might have been willing to endure the staffing challenges resulting from the

terminations as a means of retaliating against an employee who had complained about her conduct.

In sum, the Court repeatedly granted Defendants the benefits of factual disputes, and inferences that must be resolved in Plaintiff's favor under the appropriate standards.

CONCLUSION

Plaintiff respectfully requests that this Court reverse the Trial Court's Order granting summary judgment to Defendants, and remand the matter for trial.

Respectfully submitted,

/s/Michael K. Fortunato
Michael K. Fortunato, Esq.

Dated: November 5, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

CARLOS FORTY, Plaintiff-Appellant, vs. INSPIRA HEALTH NETWORK, and BARBARA CONCIELLO, DENISE LAMBRECHT, and JOHN AND/OR JANE DOES 1-20 (Names Being Fictitious), in their individual and corporate capacities, and as aiders and abettors, Defendants-Respondents.	Docket No.: A-4038-23T4 On Appeal From: Superior Court of New Jersey, Law Division, Cumberland County DOCKET NO.: CUM-L-627-21 SAT BELOW: Hon. James R. Swift, J.S.C.

BRIEF OF DEFENDANTS-RESPONDENTS INSPIRA HEALTH NETWORK, BARBARA CONICELLO, AND DENISE LAMBRECHT

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PRELIMINARY STATEMENT

Appellant, Carlos Forty ("Forty"), was terminated for his theft of hospital funds. Unable to accept the consequences of his actions, he filed this action alleging retaliation in violation of the Conscientious Employee Protection Act ("CEPA"), N.J.S.A. 34:19-1 to -14, by Respondents, Inspira Health Network ("Inspira"), Barbara Conicello ("Conicello"), and Denise Lambrecht ("Lambrecht") (collectively, "Defendants").

Inspira employed Forty as a Staffing Coordinator, with duties that included ensuring various hospital units were adequately staffed and inputting employee time to facilitate payroll. Forty believed he was underpaid and regularly complained about it, joining in multiple requests for more money. Those requests were denied. Forty then abused his position of trust by entering a category of additional pay—known as "charge pay"—to give two other staffing coordinators, Rachel Jenkins and Nancy Karnuk, an extra dollar per hour for each of their shifts. In return, they entered "charge pay" for Forty. The three did so without approval. They did so by manipulating the payroll system to which they had access to after their supervisor reviewed the records, but before the time was posted, in order to avoid detection. Ultimately, their misconduct was discovered and their employment was terminated.

Forty argues he was a whistleblower because he complained about his supervisor, Conicello, and was terminated in retaliation for that protected activity.

However, as the trial court found below, no reasonable fact finder could credit those claims for several reasons. As an initial matter, the trial court found that none of Forty's "complaints" implicate any reasonably believed violations of law or public policy, putting them outside the scope of conduct protected by CEPA, which is fatal to his claims. All of Forty's "complaints" were either made years prior to his termination, or amounted to generalized gripes about his allegedly callous supervisor. Even if that were not the case, Inspira investigated and addressed Forty's complaints prior to terminating his employment. Moreover, the trial court found that these complaints played no role in the decision to terminate Forty's employment, which was made for legitimate non-retaliatory reasons that cannot be rebutted. Forty schemed with two coworkers to pay themselves more money, without approval, thereby defrauding and stealing from Inspira.

On appeal, Forty has failed to identify any genuine issues of material fact capable of supporting his claim. This Court should affirm the trial court's grant of summary judgment in favor of Defendants.

PROCEDURAL HISTORY

Forty filed his Complaint against Defendants on September 10, 2021. (Pa1-12). Defendants filed a Motion to Dismiss on December 23, 2021, and, following its denial, their Answer on February 14, 2022. (Pa13-21). Defendants thereafter filed a Motion for Summary Judgment on April 17, 2024. (Pa22-23). Forty filed his

opposition on June 12, 2024, (Pa653-54), and Defendants filed a reply on July 1, 2024, (Pa688-709). The trial court heard oral argument on July 15, 2024 and issued its decision granting Defendants' Motion for Summary Judgment at that time, with an Order following. (Pa712). Forty filed his Notice of Appeal on August 22, 2024 and an Amended Notice of Appeal on September 3, 2024. (Pa713-31).

STATEMENT OF FACTS

I. The Parties.

Inspira, a charitable, non-profit health care organization, is one of southern New Jersey's leading networks of health care providers with hospitals located in Vineland, Mullica Hill, and Elmer. (Da1-2). Conicello is currently the Director of Nursing Operations at Inspira. (Pa64 at 14:2-3). Lambrecht is the Director of Labor Relations at Inspira, (Pa89 at 22:2-3), and acts as the Human Resources ("HR") Business Partner for Inspira's corporate department, (Pa89 at 22:12-23:3).

Forty began working at Inspira in 2005 as a security guard. He later accepted a position in the staffing office at Inspira, where he worked until his termination in September 2020. (Pa162 at 13:22-15:7). Rachel Jenkins ("Jenkins") began working at Inspira in 2010 as a transporter. She took a new position in the staffing office in August 2019, where she worked until her termination in September 2020. (Pa227-28 at 10:14-16:19). Nancy Karnuk ("Karnuk") began working at Inspira in 2006 in the staffing office, where she remained until her termination in September 2020.

(Pa280-81 at 12:24-13:21; Pa282 at 19:8-11). Forty, Jenkins, and Karnuk (collectively, "Plaintiffs") reported to Conicello at all relevant times. (Pa163-64 at 20:20-21:4; Pa231 at 25:20-22; Pa284 at 25:6-10).

II. The Staffing Office and Payroll.

The staffing office ensures that Inspira's hospitals have adequate nursing coverage at all times. (Pa67). Inspira employed Plaintiffs as "staffing coordinators." (Pa162; Pa228; Pa282). During the time period relevant to this litigation, the staffing office was comprised of approximately six staffing coordinators, the nursing supervisor, and the nurse manager. (Pa66-67 at 25:18-26:1; Pa67 at 28:15-17).

Staffing coordinators are responsible for a variety of tasks, including important timekeeping and payroll functions. (Pa67). The staffing coordinators have access to Inspira's timekeeping and payroll software called "Kronos." (Pa351). Staffing coordinators are responsible for finalizing employees' Kronos time cards prior to payroll closing. (Pa351 at 38:5-11). Payroll closes at approximately 11:00 am every other Monday. (Pa351 at 38:20-25).

Conicello was responsible for reviewing the staffing coordinators' time cards for any missed entries and accurate paid time off ("PTO") prior to payroll closing. (Pa351-52 at 40:17-41:12). Conicello typically reviewed her staffing coordinators' time cards on Sunday evenings prior to payroll closing. (Pa352 at 41:3-12). While the staffing coordinators could not make alterations to their own time cards, they

could edit entries for other employees, including other staffing coordinators. (Pa351 at 39:13-40:16).

III. Inspira's Policies and Procedures.

Inspira maintains a number of workplace policies and procedures, made available to employees through an internal network called "PolicyTech." (Pa65; Pa92; Pa405). All Inspira employees have access to PolicyTech. (Pa92).

Any employee who believes that he or she has been subject to harassment or discrimination must report the alleged conduct immediately to an employee from Human Resources. (Ibid.). Inspira may commence discipline at any level, including discharge without prior warnings or other corrective action. (Ibid.). Inspira possesses the sole discretion for use of progressive discipline. (Ibid.).

Inspira requires all of its employees to complete training on "mandatory competencies" each year via Inspira's "Health Stream" lessons. (Pa352 at 43:3-22; Pa431 at 11:4-18; Pa93 at 38:21-24). Inspira strictly adheres to its anti-harassment policy. (Pa431 at 11:19-25). Inspira also trains its supervisors on disciplinary policies and the process for disciplining employees. (Pa352-53 at 44:7-45:4). Management also receives coaching from Human Resources on Inspira policies. (Pa93 at 38:12-13). Employee complaints about discrimination or retaliation are to be directed to that employee's manager or a Human Resources representative. (Pa94 at 44:7-14). If any complaints are made under Inspira's policies, Human Resources

investigates the allegations. (Pa432 at 15:16-16:1; Pa94 at 44:15-18).

IV. Staffing Coordinator Office Dynamics and the Impact of COVID-19.

The staffing coordinator office is relatively small, with only two or three staffing coordinators (out of six total) present on any given workday. (Pa66-67). The staffing coordinators sit in an open office suite, with four computers that sit atop an L-shaped desk. Conicello's office is located to the left of that L-shaped desk and to the right of that desk lies the nursing supervisor's office. (Pa66-67).

Conicello testified that she and Forty had a "good working relationship." (Pa354 at 51:20-23). Forty would often confide in Conicello and share with her personal details about his life. (Pa354 at 51:20-52:2). Despite the friendliness of the group, Conicello described the staffing coordinator office as a "very stressful environment." (Pa358 at 66:24-67:8). Those already-high stress levels only amplified during the COVID-19 pandemic. (Pa358-59).

The staffing coordinators were the gatekeepers of the personal protective equipment. (Pa359). Employees' morale began to drop during the COVID-19 pandemic as employees became increasingly nervous about spending extra time working at the hospital. (Pa166). Unlike others in hospital administration, the staffing coordinators could not work from home during the COVID-19 pandemic, increasing frustrations. (Pa359).

The stress also impacted Conicello. Christina Love, one of the nursing supervisors who worked with Conicello, described Conicello as more anxious during the COVID-19 pandemic. (Pa454 at 23:14-24). Tyree Ruhl, one of Conicello's staffing coordinators for years, testified that as the COVID-19 pandemic wore on, Conicello grew "angry at the world it seemed like." (Pa433 at 17:3-18). Plaintiffs testified that Conicello sometimes "belittled" and "degraded" them during this time, and that her management style was not always "professional." (Pa175 at 67:13-68:6; Pa176 at 70:10-12; Pa184 at 101:22-102:3; Pa194 at 143:22-144:22; Pa240 at 61:18-62:12; Pa240 at 64:10-18; Pa241 at 65:6-17; Pa285 at 30:23-31:5; Pa286 at 35:1-7; Pa305 at 109:6-110:7). However, Jenkins admitted that Conicello's treatment of the staffing coordinators was not targeted at anyone and "stemmed from frustration." (Pa243 at 75:3-76:18). Plaintiffs routinely vented about Conicello's conduct to each other, as well as to others. (Pa175 at 67:22-68:6; Pa176 at 70:10-12; Pa237-38 at 49:1-55:25; Pa240 at 61:25-62:12).

V. Forty's Chronic Complaints and Improper Behavior.

Forty was always a difficult, and sometimes toxic, personality. Although Forty completed his assigned tasks, he incessantly whined about Inspira's directors and managers, because he "didn't like to be told what to do." (Pa356 at 59:11-60:23; Pa99 at 63:10-65:9). These petty gripes were about his colleagues, his supervisor, managers and the hospital more broadly—indeed, just about anyone he interacted

with. (Pa102 at 75:15-76:4; Pa231 at 27:2-5). Forty, who always believed he knew better than others, would constantly complain about Inspira management. (Pa356 at 60:8-15). Moreover, Forty exhibited behavior that was "difficult in the office," including his frequent bickering with Karnuk and his constant boasting as to his workplace accomplishments. (Pa354 at 52:5-14). Forty would consistently refer to the other staffing coordinators as "lazy" and he "tried to make his persona that he was doing more than like what they were doing and he was the, you know, he was the greatest back stabber." (Pa357 at 63:3-8).

Forty also regularly made inappropriate comments about his sexual relationship with his wife and comments related to his divorce. (Pa356 at 60:4-6). In addition, Forty would make "very inappropriate," personal comments directly to other staffing coordinators, once even suggesting that Karnuk should have let her daughter, who suffered from, and struggled with, addiction, "just die." (Pa287 at 40:3-13; Pa288 at 41:10-18). Forty would also inappropriately "touch people at work." (Pa288 at 42:8-22).

Forty complained about having to work during the COVID-19 pandemic. (Pa359-60 at 72:8-73:3). Forty also frequently disagreed with Conicello's management decisions. (Pa238 at 54:18-56:14). Conicello explained to Forty that although he might not agree with a particular supervisor's decision, it was not his place to decide how those managers should do their jobs. (Pa357 at 61:16-63:8).

VI. Forty's Complaining Reaches a Tipping Point.

On June 24, 2020, Forty, Jenkins, and Karnuk were on duty in the staffing coordinators' office, with Conicello working in her office. (Pa244 at 78:17-24). Forty was complaining about Ruhl's supposed lack of productivity, and Conicello's alleged refusal to address it. (Pa367 at 101:9-24; Pa 367 at 101:25-102:5). A day earlier, some of Ruhl's Kronos reports, which should have been completed, but had been misplaced and left undone, had accidentally fallen on the ground. (Pa300; Pa244 at 79:3-14). Forty often complained about Ruhl, whom he described as "lazy" and the weakest link," and seemingly upset about the unaddressed Kronos reports, muttered to Jenkins: "and let me guess, Barb didn't do anything about it." (Pa467; Pa169 at 44:1-7; Pa244 at 79:3-14; Pa300-01 at 92:9-93:4). Conicello overheard Forty's comment. (Pa367 at 102:13-21).

Having grown tired of Forty's repeated efforts to undermine her management, Conicello walked over to Carlos at his desk, raised her voice, and told Forty she "had enough of him complaining" and that he could bring any of his complaints to Human Resources. (Pa367 at 102:13-21; Pa301 at 95:2-11; Pa301-02 at 96:23-97:23). In her frustration, Conicello's voice was raised in a yelling fashion and she drew close to Forty. (Pa244 at 79:15-21). Forty is a physically imposing man, and a former member of the military, while Conicello is much smaller in stature. (Pa161-62 at 12:21-13:2; Pa175 at 65:7-66:15). Forty ignored Conicello while she spoke to him,

and was unfazed by the confrontation. (Pa161 at 11:3-11; Pa188 at 118:20-119:24; Pa244 at 79:15-21; Pa301 at 96:10-15). Having vented her frustrations, Conicello left Forty alone. (Pa188 at 120:4-5). Forty continued working for some time thereafter before leaving the staffing office for the remainder of the workday. (Pa189 at 121:9-122:11). Conicello did not touch Forty. (Pa188 at 119:7-18).

That same evening, Conicello called Forty and apologized for yelling at him. (Pa367 at 104:1-15). Conicello further explained to Forty that personal issues, combined with COVID, caused her stress to boil over. (Pa367 at 104:2-11). Forty told Conicello not to worry about anything and that he understood Conicello's circumstances. (Pa367 at 104:11-15). Forty admitted he did not think Conicello was rude or condescending, and did not feel intimidated. (Pa184 at 102:7-10; Pa184 at 104:8-18).

Conicello discussed her behavior with the other staffing coordinators as well. (Pa366 at 97:5-21). Jenkins referred to Conicello's June 24, 2020 conduct as an isolated incident and the worst she had seen. (Pa246 at 85:11-21; Pa246 at 86:7-9). Karnuk, meanwhile, admitted that she never raised any complaints about Conicello's treatment of Forty. (Pa304 at 105:7-15).

VII. Forty's Alleged "Complaints" About Conicello Prior to June 24, 2020.

Forty vented about Conicello's management style to members of HR and other managers. (Pa178 at 78:2-12; Pa178 at 79:25-80:2; Pa190 at 125:1-13; Pa285

at 32:5-8; 290 at 50:20-51:3; Pa290 at 51:8-15; Pa240 at 62:18-63:7). However, Forty's complaints were limited to Conicello's use of foul language, alleged verbal abuse, and belittling conduct, which Forty attributed to Conicello simply venting her frustrations. (Pa184 at 101:22-102:3; Pa185 at 107:12-22; Pa194 at 143:22-144:22). In connection with this June 24, 2020 incident, Forty could not identify any law, rule, regulation, or public policy that he reasonably believed Conicello violated. (Pa189 at 124:9-16).

VIII. Inspira Investigates the June 24, 2020 Incident.

On June 26, 2020, Forty emailed Inspira's Chief People Person, Erich Florentine, to discuss Conicello's yelling at him. (Pa178 at 80:17-23; Pa469). Florentine forwarded it to Lambrecht, who was the HR Business Partner for Conicello's department, to address. (Pa471; Pa100 at 68:8-14). Lambrecht then scheduled a meeting with Forty to address his concerns. (Pa90 at 27:6-16; Pa100 at 69:4-7). At that meeting, Lambrecht and Forty discussed the June 24, 2020 incident and Lambrecht told him that she would interview Conicello "to get her statement," and then proceed with the investigation. (Pa101 at 70:15-71:10). During her interview, Conicello recounted the events of June 24, 2020 to Lambrecht, stating that Forty repeatedly questioned her on something she needed him to accomplish, and, after he refused to listen, she "got loud" with him. (Pa102 at 74:5-16).

Lambrecht considered Forty's instigation of the conflict with Conicello to be

similar to a prior incident involving Forty, and consistent with his past conduct. (Pa99 at 63:16-65:9). Forty had previously disobeyed an instruction from a Director of Nursing, Sharon Slavic, regarding the availability of N95 masks during the COVID-19 pandemic. (Pa410 at 35:3-15).

Meanwhile, Conicello's June 24, 2020 conduct was "atypical," and Lambrecht found that Conicello's colleagues, including Forty, did not consider her intimidating. (Pa109 at 104:1-13; Pa454-55 at 24:25-25:4; Pa407 at 23:22-24:3; Pa455 at 25:5-15). Lambrecht informed the executives at Inspira about the investigation into Conicello's conduct, and her conclusion that she had no reason to suspect that Conicello had committed any wrongdoing. (Pa107 at 94:14-95:5).

IX. Forty, Jenkins, and Karnuk Repeatedly Sought More Pay

All staffing coordinators received the same base wage, save for Rosilind Asselta ("Asselta"), another staffing coordinator, given her years of service.[1] (Pa361 at 78:14-79:13; Pa283-84 at 24:24-25-2). Forty, "fixated" on his misconception that other staffing coordinators earned more than him, repeatedly complained about his wages. (Pa299 at 85:3-15; Pa361 at 77:5-15). Jenkins, too, believed the staffing coordinators were underpaid. (Pa163 at 19:24-20:8; Pa361 at 78:17-79:2; Pa230 at 21:8-23). In response, in early September 2020, Conicello confirmed that only

[1] Forty admitted both Asselta and Tyree Ruhl—another staffing coordinator employed alongside Plaintiffs—had longer tenures than him. (Pa164 at 21:14-22:21).

Asselta earned more. (Pa361 at 79:3-13).

In an attempt to secure a higher wage, Jenkins petitioned Conicello for COVID incentive pay, sometimes referred to as "PIP" or "premium incentive pay." (Pa230 at 21:8-22:17; Pa365 at 95:12-17). During the COVID-19 pandemic, Inspira offered financial incentives like PIP to its frontline employees, such as nurses. (Pa361 at 77:16-78:2). These "direct patient care staff" members received an additional amount per shift. (Pa361 at 77:16-78:2). Staffing coordinators were not eligible for this COVID-19 incentive pay as determined by senior leadership. (Pa361 at 78:3-13). Forty thought the staffing coordinators should have received "paid incentives" to work during the pandemic. (Pa361 at 77:16-78:2). Conicello sought extra incentive pay for her employees during the pandemic, but was denied. (Pa361 at 78:14-21). According to Lambrecht, Conicello sought this incentive pay for her employees "several times" but was denied on each occasion by senior management. (Pa106 at 90:7-23; Pa111-12 at 113:11-114:8).

X. Theft of Additional Pay By Forty, Jenkins, and Karnuk.

Inspira offers additional forms of incentive compensation for certain employees under particular circumstances, with one such incentive being "charge pay." (Pa103 at 79:6-17). Charge pay is an additional dollar per hour on top of a given hourly rate for a given shift. (Pa165 at 25:13-20; Pa361 at 80:3-11). The charge nurse, to whom charge pay is payable, is a designated Registered Nurse on a

particular shift who assumes additional responsibilities. (Pa361 at 80:4-11).

Having been rejected for the COVID-19 incentive pay, Jenkins sought charge pay for the staffing coordinators. (Pa230 at 21:19-22:21). While non-nurses could in theory receive charge pay, such a decision required director-level approval. (Pa361-62 at 80:17-81:16; Pa232 at 29:8-12). Staffing coordinators were ineligible for charge pay. (Pa103 at 80:8-13; Pa292 at 60:2-6).

Forty had once mistakenly received charge pay for a single pay period. It was discovered by Jenkins after payroll had already been processed. When Jenkins advised Conicello of her discovery, Conicello indicated "we will let it go this time," because the administrative effort to correct the error was immense. (Pa362 at 84:2-9; Pa103-04 at 81:20-82:18). Conicello would have approved any ongoing prospective charge pay in writing. (Pa473).

Jenkins approached Conicello about whether the staffing coordinators could receive charge pay in lieu of their ineligibility for the PIP. (Pa362 at 83:22-84:9). Conicello expressly denied Jenkins's request for prospective staffing coordinator charge pay. (Pa362 at 83:7-21-84:14; Pa475). Undeterred, Jenkins decided she, Forty, and Karnuk were going to take charge pay anyway. (Pa477). Staffing coordinators could not assign charge pay to themselves, meaning that Jenkins needed others to participate in this scheme for her to obtain the extra pay. (Pa232 at 29:13-21). Forty agreed to add charge pay, despite never having received direct approval

from Conicello. (Pa477). Indeed, Conicello never even spoke to Forty about charge pay. (Pa362 at 84:15-17).

On September 1, 2020, Asselta discovered the unauthorized charge pay and alerted Conicello that Forty, Jenkins, and Karnuk were receiving charge pay. (Pa102-03 at 77:23-78:1; Pa362 at 83:3-21; Pa479-80). Conicello informed Asselta that none of them should have been receiving the charge pay. (Pa362 at 83:10-21; Pa479-80). Upon investigating, Conicello learned that Plaintiffs entered the charge pay on each other's behalf at approximately 11:00 am each Monday before payroll closed. Critically, this was ***after*** Conicello had reviewed their time cards. (Pa364 at 90:5-91:1; Pa475; Pa482-528). Conicello normally reviewed the staffing coordinators' time cards Sunday night. (Pa352 at 41:3-12). The staffing coordinators would then finalize those time cards, and the time cards would be sent to payroll for processing. (Pa532; Pa105 at 86:19-87:8).

The Kronos Time Card Audit Trail establishes that Jenkins entered "hourly charge" pay on Forty's behalf thirty-two times over a period of two months, comprising five pay periods, from May 30, 2020 to July 25, 2020. (Pa482-528; Pa530). It further shows that Jenkins entered "hourly charge" pay on Karnuk's behalf fifteen times over a period of two pay periods, from July 11, 2020 to July 25, 2020. (Pa482-528). Jenkins does not dispute that she entered "hourly charge" for Forty and Karnuk. (Pa248 at 94:13-15; Pa249 at 97:8-10).

The Kronos Time Card Audit Trail establishes that Forty entered "hourly charge" pay on Jenkins's behalf thirty-five times over a period of two months, comprising four pay periods, from May 30, 2020 to July 11, 2020. (Pa482-528). It further shows that Forty entered "hourly charge" pay on Karnuk's behalf nine times for one pay period, ending June 27, 2020. (Pa482-528). Forty does not dispute that he entered "hourly charge" for Jenkins and Karnuk. (Pa168 at 40:9-16).

The Kronos Time Card Audit Trail establishes that Karnuk entered "hourly charge" pay on Jenkins's behalf ten times for one pay period, ending July 25, 2020. (Pa482-528).

Neither Asselta, nor Ruhl, the two senior staffing coordinators, received charge pay. (Pa232 at 32:11-15; Pa482-528). Conicello never would have approved extra compensation for only three of her five staffing coordinators. (Pa475).

XI. Inspira Investigates the Unauthorized Entry and Receipt of Charge Pay.

Following this discovery, Conicello contacted HR. (Pa475). HR Business Partner Lambrecht launched an investigation. (Pa102-03 at 77:20-78:14). Lambrecht interviewed each of the staffing coordinators about the charge pay. Conicello was present for various interviews. (Pa99 at 62:11-63:5). Lambrecht took detailed notes for each of these interviews. (Pa536-41). Neither Forty, nor Jenkins, nor Karnuk dispute the accuracy of Lambrecht's notes. (Pa193 at 138:17-140:7; Pa245 at 83:5-84:8; Pa319 at 166:8-167:3).

On September 3, 2020, Lambrecht and Conicello met with Asselta. (Pa473). Asselta recalled a conversation she had with Forty upon her discovery of their receipt of charge pay. Asselta asked Forty why Jenkins would be receiving charge pay. Forty attempted to shift responsibility to management, stating that the "higher uppers" would have more information. (Pa473). Lambrecht also met with Ruhl, but Ruhl did "not know anything about hourly charge." (Pa543).

Lambrecht and Conicello also met with Karnuk. (Pa545; Pa99 at 63:4-9). During their meeting, Karnuk denied receiving charge pay and explained that none of the staffing coordinators receive hourly charge pay. (Pa545). Karnuk admitted she was working on July 27, 2020—the exact date that the Kronos Time Card Audit Trail reveals her login information was used to enter charge pay on behalf of Jenkins. (Pa545). During her interview, Karnuk never claimed that Conicello directly approved her entry or receipt of charge pay. (Pa545). And Karnuk confirmed at her deposition that she had no firsthand knowledge of Conicello approving charge pay for any staffing coordinator. (Pa297 at 80:10-14).

Lambrecht also met with Jenkins. (Pa547-48). Jenkins was aware of the hourly charge in her pay, and acknowledged that she never received confirmation from Conicello of its approval. (Pa547-48). Jenkins further admitted that she, Forty, and Karnuk schemed to enter charge pay for each other because she heard from Forty

that they earned the least of the five staffing coordinators.[2] (Pa547-48). During her interview, Jenkins never claimed that Conicello had directly approved her receipt of charge pay.[3] (Pa547-48).

Forty admitted that he was aware he was receiving hourly charge pay. (Pa477). During his meeting with Lambrecht and Conicello, Forty admitted that he never received direct approval to enter or receive charge pay. (Pa477). Forty claimed that entering the unauthorized charge pay was Jenkins's idea. (Pa477). Forty claimed that he and Jenkins misinterpreted Conicello's silence on the topic as permission to begin entering the charge pay, stating that the two took Conicello's non-answer to Jenkins's initial request as permission. (Pa477). Forty admitted that Jenkins likely entered the charge pay on Karnuk's behalf. (Pa477). Forty further confirmed that Conicello never saw the unauthorized charge pay entries. (Pa477).

In discussing the unauthorized entry of charge pay with Lambrecht, Conicello stated she would "never" have approved only three of the five staffing coordinators for charge pay. (Pa475). Conicello also informed Lambrecht that she would have

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[2] Jenkins then contradicted that statement at her deposition, stating that Forty, Jenkins, and Karnuk entered the charge pay for each other because they assumed additional duties during the COVID-19 pandemic. (Pa230 at 21:16-25; Pa231 at 28:9-14).

[3] At her deposition, Jenkins claimed that Conicello gave her permission "as long as I don't get in trouble." (Pa230 at 22:18-21). Jenkins claimed that Christina Love, a nurse supervisor, was present at that time, but Love has no memory of that alleged approval. (Pa456-57 at 32:17-33:10). And Jenkins's testimony is contradicted by the balance of the evidence in the record.

documented any approval. (Pa105-06 at 89:6-90:6). Following Inspira's investigation into the unauthorized entry of charge pay, Inspira determined that there was sufficient evidence to conclude that the charge pay taken by Plaintiffs was entered by them without proper authorization. (Pa114-15 at 125:24-126:6).

XII. Forty, Jenkins, and Karnuk are Terminated.

After the investigation was completed, Inspira convened a "termination panel." (Pa90 at 26:14-25). Termination panels typically comprise of the Human Resources business partner for the employee's particular department, the assistant-Vice President for Human Resources, in-house counsel, and the employee's manager or director. (Pa90). No singular termination panel member has final decision-making power. (Pa90-91 at 29:19-30:6; Pa353 at 45:16-46:8; Pa353 at 47:17-22). Conicello could not independently terminate an employee's employment. (Pa353 at 45:12-15).

After carefully considering the evidence from Lambrecht's investigation, the termination panel elected to terminate Forty, Jenkins, and Karnuk. (Pa91 at 30:3-6; Pa115 at 127:19-128:12; Pa368 at 108:16-18; Pa90 at 29:19-25). Conicello was saddened by the decision and did not want to lose two-thirds of her staff during the middle of the COVID-19 pandemic, but Conicello had no choice other than to accept the decision. (Pa369 at 109:12-110:10).

Forty was notified of his termination on September 14, 2020. (Pa369 at 111:11-19; Pa369 at 110:16-23). The basis for this decision was his unauthorized

entry of charge pay for other staffing coordinators, "resulting in theft of hospital funds." (Pa369 at 112:3-7; Pa550). At his deposition, Forty admitted he had no evidence to dispute that his termination was the result of entering unauthorized charge pay for other staffing coordinators. (Pa191 at 130:3-17). He also admitted that unauthorized receipt of charge pay was appropriate grounds for termination. (Pa194 at 142:24-143:17).

LEGAL ARGUMENT

I. STANDARD OF REVIEW

An appellate court reviews a grant of summary judgment de novo. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). In applying the same standard as the motion judge, appellate courts "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

Appellate courts "therefore must first determine whether, giving the non-moving party the benefit of all reasonable inferences, the movant has demonstrated that there are no genuine issues of material fact." Walker v. Choudhary, 425 N.J. Super. 135, 142 (App. Div. 2012) (quoting Atl. Mut. Ins. Co. v. Hillside Bottling Co., 397 N.J. Super. 224, 230-31 (App. Div. 2006)).

A party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts," Triffin v. Am. Int'l Group, Inc., 372 N.J. Super. 517, 523-24 (App. Div. 2004), and cannot avoid summary judgment based simply on the assertion of "[u]nsubstantiated inferences and feelings," Petersen v. Township of Raritan, 418 N.J. Super. 125, 132 (App. Div. 2011) (quotation omitted).

A plaintiff's "self-serving assertion alone will not create a question of material fact sufficient to defeat a summary judgment motion." Pressler & Verniero, Current N.J. Court Rules, comment 2.3.1 on R. 4:46-2 (2013 (citing Martin v. Rutgers Cas. Ins. Co., 346 N.J. Super. 320, 323 (App. Div. 2002)). Instead, the party opposing summary judgment has the burden of producing "concrete evidence from which a reasonable juror could return a verdict in his favor." Housel v. Theodoridis, 314 N.J. Super. 597, 604 (App. Div. 1998) (quotation omitted).

An opposing party who offers no substantial or material facts in opposition to the motion cannot complain if the court takes as true the uncontradicted facts in the movant's papers. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954). Therefore, the essence of the inquiry is "'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Brill, 142 N.J. at 536 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986)); BOC Group v.

Chevron Chemical Co., 359 N.J. Super. 135, 150 (App. Div. 2003) (noting that motion for summary judgment should be granted if the evidence is "so one-sided that [the moving party] must prevail as a matter of law").

II. THE TRIAL COURT APPROPRIATELY DISMISSED FORTY'S RETALIATION CLAIMS ON SUMMARY JUDGMENT.

CEPA provides a statutory cause of action for ***certain*** whistleblowers who are subjected to retaliatory discharge. N.J.S.A. 34:19-1 to -8; see also Tartaglia v. UBS PaineWebber Inc., 197 N.J. 81, 103 (2008). The purpose of CEPA is to protect and encourage employees who report illegal or unethical workplace activities. Allen v. Cape May Cty., 246 N.J. 275, 289 (2021); Dzwonar v. McDevitt, 177 N.J. 451, 461 (2003); Abbamont v. Piscataway Twp. Bd. of Educ., 138 N.J. 405, 431 (1994). In relevant part, CEPA provides:

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

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

New Jersey applies the McDonnell-Douglas burden-shifting analysis to retaliation claims under CEPA. See Massarano v. N.J. Transit, 400 N.J. Super. 474, 492 (App. Div. 2008) (quoting Zappasodi v. New Jersey, 335 N.J. Super. 83, 89 (App. Div. 2000)). Initially, the plaintiff must establish a *prima facie* case of retaliation. Lippman v. Ethicon, Inc., 222 N.J. 362, 380 (2015). If a plaintiff is able to establish a *prima facie* claim, the burden shifts to the defendant-employer to "advance a legitimate, nondiscriminatory reason for the adverse conduct against the employee." Klein v. Univ. of Med. & Dentistry of N.J., 377 N.J. Super. 28, 38 (App. Div. 2005). "Upon such a showing by the employer, plaintiff has the ultimate burden of proving that the employer's proffered reasons were a pretext for the discriminatory action taken by the employer." Allen, 246 N.J. at 291 (quoting Kolb v. Burns, 320 N.J. Super. 467, 478 (App. Div. 1999)). The employer never has the burden of proving that its proffered reason was the actual reason for its action, "because the burden of proving the actual discrimination lies at all times with the

plaintiff." Bray v. Marriott Hotels, 110 F.3d 986, 990 (3d Cir. 1997).

A. Forty failed to establish a prima facie case of CEPA retaliation.

To establish a *prima facie* case of retaliation under CEPA, a plaintiff must prove: (1) they had an objectively reasonable belief that the employer's conduct was violating either a law, rule, regulation, or public policy; (2) they performed a "whistleblowing" activity as described in N.J.S.A. 34:19-3(a) or (c); (3) an adverse employment action was taken against them; and (4) a causal connection existed between the whistleblowing activity and the adverse employment action. Klein, 377 N.J. Super. at 38-40; see also Feldman v. Hunterdon Radiologoical, 187 N.J. 228, 237-38 (2006); Yurick v. State, 184 N.J. 70, 78 (2005); Hernandez v. Montville Tp., 354 N.J. Super. 467, 473 (App. Div. 2003), aff'd o.b., 179 N.J. 81 (2004).

1. Forty did not have an objectively reasonable belief that Conicello's conduct violated N.J.S.A. 2C:33-4.

Forty contends that he had an objectively reasonable belief that Conicello's behavior on June 24, 2020 constituted ***criminal*** harassment under N.J.S.A. 2C:33-4.

In order to make a *prima facie* case of CEPA retaliation, a plaintiff must demonstrate "he or she reasonably believed that his or her employer's conduct was violating either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy." Dzwonar, 177 N.J. at 462. Whether a plaintiff's belief is reasonable is evaluated using an objective standard. Id. at 464. A threshold requirement then, is the identification of a statute, regulation, rule, or public policy

that relates closely to a plaintiff's complained-of conduct. Chiofalo v. State, 238 N.J. 527, 541 (2019). "'[W]hen no such law or policy is forthcoming,' judgment can and should be entered for the defendant." Id. at 541-42 (quoting Dzwonar, 177 N.J. at 463).

In determining whether a plaintiff's belief is a reasonable one, courts analyze whether a substantial nexus exists between the complained-of conduct and the law or public policy that plaintiff believes that the conduct violates. Tegler v. Global Spectrum, 291 F. Supp. 3d 565, 580 (D.N.J. 2018). Without a substantial nexus between the plaintiff's complained-of conduct and any identified law or public policy, summary judgment must be granted. See Hitesman v. Bridgeway, Inc., 218 N.J. 8, 32 (2014) ("[A] pivotal component of a CEPA claim is the plaintiff's identification of authority in one or more of the categories enumerated in the statute that bears a substantial nexus to his or her claim.").

As the Appellate Division has made clear, CEPA "is not intended to shield a constant complainer who simply disagrees with the manner in which [a] hospital is operating one of its medical departments, provided the operation is in accordance with lawful and ethical mandates." Klein, 377 N.J. Super. at 42; see also Young v. Schering Corp., 275 N.J. Super. 221, 237 (App. Div.1994) (noting CEPA "was not intended to provide a remedy for wrongful discharge for employees who simply disagree with an employer's decision, where that decision is entirely lawful");

Battaglia v. United Parcel Serv., Inc., 214 N.J. 518, 559 (2013) ("Vague and conclusory complaints, complaints about trivial or minor matters, or generalized workplace unhappiness are not the sort of things that the Legislature intended to be protected by CEPA.").

Forty contends that he reasonably and objectively believed that Conicello criminally harassed him in violation of N.J.S.A. 2C:33-4.[4] (See Pb17). On this point, our Supreme Court has noted that "it is critical to identify the evidence that an aggrieved employee believes will support the CEPA recovery with care and precision." Chiofalo v. State, 238 N.J. 527, 544 (2019) (quoting Battaglia, 214 N.J. at 559). However, in support of his argument, Forty can point only to Karnuk's self-serving deposition testimony. (See Pb.18-19). Karnuk's testimony cannot support Forty's belief on this point. Especially given that Forty testified he "just sat there and just kept calm." (Pa188 at 119:7-18).

Far from criminal harassment, the record reflects only that Conicello was difficult to work with on a day to day basis, that she was occasionally mean to her employees, and that they did not like her sometimes. (See, e.g., Pa446) (Karnuk

[4] Under N.J.S.A. 2C:33-4, criminal harassment requires "intent to harass." State v. Duncan, 376 N.J. Super. 253, 261 (App. Div. 2005) ("A finding that defendant acted with a purpose or intent to harass another is integral to a determination of harassment."). "The mere exposure to profanity, though irritating to many people, is not necessarily indicative of an intention to harass." Id. at 263. Similarly, "mere venting of frustration or irritation at the situation is insufficient by itself to constitute harassment under the statute." Id. at 264.

texting a coworker "I'm over Barbara and her bullshit."); Pa237-38 at 49:1-55:25; Pa242 at 72:13-17; Pa243 at 74:5-24 (noting Conicello's bickering with other staffing coordinators); Pa175 at 67:13-68:6 (Forty stating Conicello would "freak out on everybody"); Pa240 at 64:10-18 (staffing coordinators upset at the way Conicello "treated people"); Pa285 at 30:23-31:5 (Karnuk stating Conicello was not a "team player"); Pa286 at 35:1-7 (Conicello treated the staffer coordinators like children); Pa184 at 101:22-102:6 (Conicello was belittling and degrading toward staffing coordinators)). As noted above, New Jersey case law has clearly established that these sort of petty workplace grievances are not covered under CEPA.

The trial court correctly found that it was objectively unreasonable for Forty to believe that Conicello's challenging management style, and her yelling at him at work, constituted criminal harassment. As noted by the trial court:

> The case law is rife with cases such as this, where employees who bring these suits are upset with the way there were treated at work and just general workplace gripes and unpleasantness with their boss. Clearly it does not give rise to a claim for CEPA. And internal disputes within the workplace are not criminal harassment. They are just that, just disagreements within the workplace, unhappiness with their supervisor, and this one isolated incident where Ms. Conicello screams and yells at Mr. Forty is not a basis in my view of criminal harassment.
>
> [1T 29:5-15.]

As the trial court found, the record shows only that Conicello was a difficult boss to work for. Forty has failed to identify any evidence in the record that would

allow a reasonable jury to find otherwise. On this record, even granting him all reasonable inferences of fact, Forty did not have an objectively reasonable belief that Conicello was ***criminally*** harassing him.

2. Forty's "complaints" cannot constitute "whistle-blowing activity."

Forty next argues that "[t]here is also evidence in the record that Plaintiff engaged in protected whistleblowing activity." (Pb20). Forty argues that he reported Conicello to her supervisor, Betty Sheridan, as well as Sharon Slavic. (Ibid.). Moreover, he contends that he made "multiple complaints" to Inspira's Chief People Officer, Erich Florentine, following the June 24, 2020 argument. (Ibid.). The trial court correctly found these "complaints" insufficient for Forty's claim to survive summary judgment.

CEPA explicitly defines what actions constitute "whistle-blowing activity." A whistle-blowing activity consists of (1) disclosing, or threatening to disclose, to a supervisor or public body an illegal action, N.J.S.A. 34:19-3(a)(1); (2) objecting to or refusing to participate in an activity violating the law, N.J.S.A. 34:19-3(c)(1); or (3) objecting to, or refusing to participate in, conduct "incompatible with a clear mandate of public policy." N.J.S.A. 34:19-3(c)(3).

Here, the "complaints" that Forty cites cannot constitute whistle-blowing activity under CEPA. For example, Forty could not explain what complaints he made to Betty Sheridan, instead characterizing them as "complaints about everything that

we've gone through in the office." (Pa178 at 80:8-16). He admitted that his "complaints" to Sharon Slavic were merely about Conicello yelling at him. (Pa408 at 25:3-4). He further conceded that Conicello was known to vent her frustrations rather than target one specific person. The Appellate Division has found that these types of complaints do not enjoy CEPA protection. See Klein, 377 N.J. Super. at 45 (quoting Estate of Roach v. Trw, Inc., 164 N.J. 598, 609-10 (2000)) ("CEPA was enacted to prevent retaliatory action by an employer against an employee who 'blows the whistle on illegal or unethical activity committed by their employers or co-employers,' not to assuage egos or settle internal disputes at the workplace as in the present case."); see also Dolinski v. Borough of Watchung & Chief Joseph Cina, 2022 N.J. Super. Unpub. LEXIS 1242, at *26 (App. Div. July 8, 2022) (finding no whistle-blowing activity because plaintiff's reporting his complaints of superior officer's mistreatment to the Somerset County Prosecutor's Office constituted "personal job disputes" that were nothing but "an effort bring light to his belief that he was denied employment opportunities and unfairly disciplined"); LeWitt v. Twp. of Gloucester, 2024 N.J. Super. Unpub. LEXIS 429, at *12 (App. Div. Mar. 15, 2024) (finding plaintiff's refusal to alter a report at his superior's direction, leading to the superior officer berating plaintiff via text message, was "merely a labor disagreement with a superior, not a whistle-blowing activity").

"[W]histle-blowing activity" is not simply any type of complaint. Internal

workplace disputes and complaints about discourteous supervisors are not protected under CEPA. See Klein, 377 N.J. Super. at 42 ("The whistle-blower legislation is not intended to shield a constant complainer who simply disagrees with the manner in which the [employer] is operating . . . its . . . [business], provided the operation is in accordance with lawful and ethical mandates."); see also Young, 275 N.J. Super. at 237 ("[CEPA] . . . was not intended to provide a remedy for wrongful discharge for employees who simply disagree with an employer's decision, where that decision is entirely lawful.").

Forty's "complaints" were limited to his belief that his supervisor was mean to him. In other words, Forty's grievances are nothing more than routine, personal work disputes about Conicello's management of the staffing coordinator office. CEPA demands, as the trial court recognized, more from a CEPA whistleblower than the limited activity to which Forty points.

3. Forty has failed to show any *genuine* issues of *material* fact capable of supporting any causal connection between his "complaints" and his termination.

Even if Forty could present evidence capable of supporting a finding that he engaged in whistle-blowing activity, which he cannot, Forty fails to present any genuine issues of material fact connecting his alleged whistle-blowing activity to his termination. On appeal, Forty argues that four allegedly genuine issues of material fact preclude summary judgment: (1) Jenkins's deposition testimony that Conicello

approved the charge pay; (2) Conicello's alleged dismissiveness of Forty's "complaints" could allow jurors to infer a pattern of antagonism toward him; (3) a jury could allegedly infer that Conicello derailed Inspira's investigation of her June 24, 2020 behavior given her "discovery" of the charge pay issue; and (4) Inspira's alleged selective application of policy. However, the record reflects that none of these "facts" are material, genuine, or disputed such that a reasonable factfinder could possibly side with Forty. And that the alleged inferences to be drawn would not be reasonable.

To demonstrate a causal link between their termination and their protected whistle-blowing activity, a plaintiff must show the "retaliatory discrimination was more likely than not a determinative factor in the decision." Donofry v. Autotote Sys., Inc., 350 N.J. Super. 276, 293 (App. Div. 2001). In other words, a plaintiff is required to establish "evidence of circumstances that justify an inference of retaliatory motive." Romano v. Brown & Williamson Tobacco Corp., 284 N.J. Super. 543, 550 (App. Div. 1995). Circumstantial evidence may include "[t]he temporal proximity of employee conduct protected by CEPA and an adverse employment action," Maimone v. City of Atl. City, 188 N.J. 221, 225 (2006), but "[t]emporal proximity, standing alone, is insufficient to establish causation,"

Hancock v. Borough of Oaklyn, 347 N.J. Super. 350, 361 (App. Div. 2002).[5] "***Only*** where the facts of the particular case are so 'unusually suggestive of retaliatory motive' may temporal proximity, on its own, support an inference of causation." Ibid. (emphasis added) (quoting Krouse, 126 F.3d at 503).

First, Jenkins's self-serving deposition testimony is not a genuine dispute of material fact. She testified that Conicello approved the charge pay "as long as I don't get in trouble." (Pa230 at 22:18-21). However, this is directly contradicted by her interview with Lambrecht wherein she stated that she took Conicello's silence on the charge pay as approval. (Pa547). Jenkins's testimony is also contradicted by Forty and Karnuk, who confirmed that Conicello never approved the charge pay, and Conicello's testimony. (See Pa362 at 83:7-21-84:14; Pa475 (Conicello denies Jenkins's request for prospective staffing coordinator charge pay); Pa297 at 80:10-14 (Karnuk admitting at her deposition that she had no firsthand knowledge of Conicello ever approving charge pay for any staffing coordinator); Pa547-48 (Jenkins never notified Lambrecht whether Conicello had directly approved her receipt of charge pay); Pa477 (Forty told Lambrecht that he never received approval from Conicello to enter charge pay); Pa475; Pa105-06 at 89:6-90:6 (Conicello told Lambrecht that she never would have entered charge pay for only three of her five

[5] Forty does not argue that the temporal proximity of his termination is indicative of causation, other than arguing that Conicello interfered with Inspira's investigation of her conduct. This argument is addressed below.

staffing coordinators); Pa361 at 78:14-21 (Conicello previously sought extra pay for her staffing coordinators during the COVID-19 pandemic, but was rejected by senior management); Pa364 at 90:5-91:1; Pa475; Pa482-528 (Plaintiffs suspiciously entered charge pay for each other after Conicello reviewed their time cards for pay periods). As such, no reasonable juror could find that Conicello approved the charge pay. Especially since Forty admitted that he did not possess a single piece of documentation suggesting he was terminated for anything but his entry and receipt of unauthorized charge pay. (Pa191 at 130:3-17; Pa362 at 84:2-9; Pa103-04 at 81:20-82:18 (Forty's single instance of approved charge pay was retroactively approved only because of the administrative difficulties in correcting it).

The trial court considered this exact argument, and properly found it insufficient: "after all three were confronted and interviewed about it, all three admitted that they shouldn't have been getting this charge pay, that it wasn't authorized." (See 1T 25:21-24; see also id. at 25:24-26:5 ("yet [Plaintiffs] kind of go about, around about saying, well Ms. Conicello said it was okay or as long as she didn't get caught or get in trouble for it. But I think that those assertions at that point in time were just inconsistent with how it went down and how they went about trying to surreptitiously hide this additional pay."); Id. at 26:7-13 ("at some point in time they try to say hey well look, maybe she did approve it, or she didn't really approve it, or she didn't say no. But clearly that's not the case, because if it was approved, it

would've been part of the regular pay that Ms. Conicello would have approved during her regular approval of their pay process.")).

Second, Forty has not shown that there exists a genuine issue of material fact as to Conicello's alleged antagonism toward him. Forty, Jenkins, and Karnuk had been making generalized "complaints" about Conicello's management style for ***years***. (See Pa178; Pa178; Pa190; Pa285; Pa290; Pa240). Karnuk "complained" of Conicello's management style as early as 2016. (Pa288-89 at 44:11-47:8l; Pa289-90 at 47:9-50:19). Despite these gripes about Conicello, she and Forty continued working for Conicello for ten years. (See Pa99; Pa354; Pa356; Pa357). In fact, Conicello testified that she and Forty had a "good working relationship." (Pa354 at 51:20-23). Forty would often confide in Conicello and share with her personal details about his life. (Pa354 at 51:20-52:2). Indeed, the record reflects that there is simply no record of such a "pattern of antagonism" from which a reasonable jury could infer causation between Forty's termination and his alleged whistle-blowing activity.

Third, Forty's insistence that Conicello derailed Inspira's investigation into her June 24, 2020 argument with Forty is not a genuine issue of material fact. It was Rosilind Asselta, not Conicello, who first discovered Forty's receipt of charge pay. (Pa102-03 at 77:23-78:1; Pa362 at 83:3-21; Pa479-80). And it was Lambrecht who investigated the matter. Moreover, the investigation of the June 24 issue proceeded

nonetheless.

Lambrecht confirmed that Inspira performed a full investigation into Conicello's June 24, 2020 conduct before concluding that no disciplinary action was necessary. Lambrecht scheduled a meeting with Forty to address his concerns. (Pa90 at 27:6-16; Pa100 at 69:4-7). The two discussed the June 24, 2020 incident and Lambrecht told him that she would interview Conicello, perform a search for other employees who may have been involved, and then proceed with the investigation. (Pa101 at 70:15-71:10). During Lambrecht's interview of Conicello, Conicello recounted the events of June 24, 2020 to Lambrecht, stating that Forty repeatedly questioned her on something she needed him to accomplish, and, after he refused to listen, she "got loud" with him. (Pa102 at 74:5-16). Lambrecht informed the executives at Inspira about the investigation into Conicello's conduct, and her conclusion that she had no reason to suspect that Conicello had committed any wrongdoing. (Pa107 at 94:14-95:5). As such, nothing was de-railed.

Nor did Conicello ever "recommend" Forty's termination, as Forty contends. (See Pb26). After carefully considering the evidence from Lambrecht's investigation into Plaintiffs' unauthorized receipt and entry of charge pay, a termination panel elected to terminate Forty, Jenkins, and Karnuk. (Pa91 at 30:3-6; Pa115 at 127:19-128:12; Pa368 at 108:16-18; Pa90 at 29:19-25). Conicello had no choice other than to accept the decision. (Pa369 at 109:12-110:10). The trial court recognized same:

"it doesn't really seem that it would make a lot of sense for her to be the – that [Conicello] was happy about this discipline that these parties received, because she lost three-quarters of – or at least 60% of her employees." (See 1T 31:7-12). The trial court therefore did not draw any inferences in favor of Defendants, but merely recognized that no evidence exists in this record that could lead a reasonable jury to rule in Forty's favor. Forty has failed to present any facts to support his position that there is a genuine dispute as to Conicello's alleged derailment of Inspira's investigation into her June 24, 2024 conduct.

Finally, there is no genuine dispute of material fact as to Inspira's alleged selective application of its policies that could preclude summary judgment. Inspira's discipline policy explicitly notes that Inspira may commence discipline at any level, including discharge without prior warnings or other corrective measures. (Pa423-26). As for Forty's contention that other employees alleged to have stolen time were not reprimanded, it is demonstrably false. Forty points only to Jenkins's testimony once again to support this argument. (See Pb27; Pa668). Meanwhile, Conicello explained at her deposition that Inspira managers are responsible for submitting "salary time sheets," to ensure that paid time off ("PTO") is properly tracked. These managers were not "falsifying their time cards," as alleged without support, but simply had their PTO retroactively deducted from their PTO bank upon their submission of a group of time sheets. (Pa360 at 74:17-76:11). Conicello confirmed

that no money exchanged hands because Inspira merely deducted the necessary PTO hours from the managers' PTO bank. (Pa360 at 74:17-76:11). There is simply no evidence of "selective" application of Inspira policy, only Forty's bald assertions.

In sum, Forty has failed to present any genuine issues of material fact capable of showing a causal link between his termination and any alleged whistle-blowing activity. Providing all legitimate, reasonable inferences in Forty's favor, no reasonable factfinder could find there exists a causal connection between Forty's continuous gripes about Conicello's management style and his termination.

B. The Trial Court Correctly Found that Inspira Possessed a Legitimate, Non-Discriminatory Reason for Terminating Forty.

Even if Forty could establish a *prima facie* case of CEPA retaliation—he cannot—Forty cannot, and does not, reasonably dispute that his unauthorized receipt and entry of charge pay constitutes a legitimate, non-retaliatory reason for his termination. See N.J. ex rel. Santiago v. Haig's Serv. Corp., 2016 U.S. Dist. LEXIS 113188, at *33 (D.N.J. Aug. 24, 2016) (noting theft from client was a legitimate, non-discriminatory reason for termination); see also Parikh v. UPS, 491 F. App'x 303, 307 (3d Cir. 2012) (affirming District Court's finding that defendants met their burden of identifying a legitimate, non-discriminatory reason for terminating plaintiff, i.e., falsifying timecards.); Rich v. Verizon N.J. Inc., 2017 U.S. Dist. LEXIS 203131, at *65 (D.N.J. Dec. 11, 2017) (defendant's proffered reason for terminating plaintiff, that he falsified answers on a required report, was a legitimate,

non-discriminatory reason for his termination).

When asked at his deposition, Forty testified that he had no evidence to dispute that his termination was the result of entering unauthorized charge pay for other staffing coordinators. (Pa191 at 130:3-17). He also admitted that unauthorized receipt of charge pay was appropriate grounds for termination. (Pa194 at 142:24-143:17). It cannot be disputed that Asselta discovered Forty's receipt of charge pay, that she reported it to Conicello, who raised it to Lambrecht, and that Lambrecht launched an investigation. Neither Forty, nor Jenkins, nor Karnuk dispute the accuracy of Lambrecht's notes, which reflect that charge pay was taken without express approval. (Pa535-41; see also Pa297 at 80:10-14 (Karnuk admitting at her deposition that she had no firsthand knowledge of Conicello ever approving charge pay for any staffing coordinator); Pa547-48 (Jenkins never received confirmation from Conicello as to charge pay); Pa477 (Forty stated he never received approval from Conicello to enter the charge pay)). Based upon the undisputed findings of the investigation reflected in those notes, and the undisputed Kronos Time Card Audit Trial showing the payments, the "term panel" indisputably ended the employed of all three Plaintiffs.

Critically, Defendants have no obligation to correctly determine whether Forty entered and received the charge pay without authorization. See Burton v. Teleflex Inc., 707 F.3d 417, 426 (3d Cir. 2013). "This burden is relatively light and

is satisfied if the employer provides evidence, which, if true, would permit a conclusion that it took the adverse employment action for a non-discriminatory reason."); see also Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994) ("[T]he plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether [retaliatory] animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent."). Defendants have more than met their burden to offer a legitimate, non-discriminatory reason for Forty's termination.

C. Forty Cannot Show that Defendants' Legitimate, Non-Retaliatory Reason for Terminating Him was Pretext.

Following an employer's proffer of a legitimate, non-discriminatory reason for an employee's termination, "plaintiff has the ultimate burden of proving that the employer's proffered reasons were a pretext for the discriminatory action taken by the employer." Allen v. Cape May Cty., 246 N.J. 275, 291 (2021) (quoting Kolb v. Burns, 320 N.J. Super. 467, 478 (App. Div. 1999)). At this stage of the McDonnell-Douglas burden-shifting framework, a plaintiff cannot survive a motion to dismiss unless the plaintiff presents "evidence which: 1) casts sufficient doubt upon each of the legitimate reasons proffered by the defendant so that a factfinder could reasonably conclude that each reason was a fabrication; or 2) allows the factfinder to infer that discrimination was more likely than not a motivating or determinative cause of" adverse employment action. Fuentes v. Perskie, 32 F.3d 759, 762 (3d Cir.

1994).

Employers are free to make personnel decisions objectively or subjectively, even unpopular personnel decisions, so long as unlawful conduct is no factor in those decisions. See Maiorino v. Schering-Plough Corp., 302 N.J. Super. 323, 345-46 (App. Div. 1997). Specifically:

> To discredit the employer's proffered reason, however, the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since **the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent**. Rather, the non-moving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons.
>
> [Fuentes, 32 F.3d at 762 (emphasis in original) (internal citation and quotation omitted).]

Forty principally contends that Conicello's alleged sudden focus on his unauthorized receipt and entry of charge pay was pretext for his retaliatory termination because she "turned the tables," (see Pb2), away from her own alleged misconduct. (See also Pb24-27). When held against the factual record, however, again providing every reasonable inference to Forty, it is clear that the only reason for Forty's termination was his unauthorized receipt and entry of charge pay. The report of Forty's receipt of charge pay was first made by Asselta, ***not*** Conicello. And

Conicello reported it promptly after that. In terms of timing, Conicello's report came approximately two full months after the June 24, 2020 incident, yet she immediately reported it to Lambrecht after Asselta first reported the finding of charge pay. See Young v. Hobart W. Grp., 385 N.J. Super. 448, 467 (App. Div. 2005 (second and third alterations in original) (quoting Krouse v. Am. Sterilizer Co., 126 F.3d 494, 503 (3d Cir.1997)) ("'[T]he mere fact that [an] adverse employment action occurs after [the protected activity] will ordinarily be insufficient to satisfy the plaintiff's burden of demonstrating a causal link between the two.'")).

The trial court also properly noted—not by improperly drawing inferences in favor of Defendants, but in evaluating Forty's claim of pretext—that all staffing coordinators were interviewed, yet only three were terminated. Indeed, Inspira interviewed both Tyree Ruhl and Rosilind Asselta, the remaining staffing coordinators, about Conicello's June 24, 2020 conduct. (Pa536-37). Both commented on Conicello's challenging management style, yet neither were terminated. (See Pa536 (Asselta noting there were "no hard feelings" and that Conicello had apologized to her); Pa537 (Ruhl stated that Conicello's conduct was not "good for the department" and that Conicello's "tantrum" was not her typical behavior). The trial court correctly highlighted this distinction: "I don't think that there are sufficient facts in this record that would permit a jury to see that it's anything but a nondiscriminatory event." (See 1T 31:21-23).

Further, Conicello never would have approved charge pay for only three of the five staffing coordinators. Conicello, managing an already incredibly stressful office whose employees were constantly pulled in different directions as hospital-staffing demands remained fluid during the height of the COVID-19 pandemic, lost sixty-six percent of her staff. (Pa369 at 109:12-110:10). The trial court recognized such an inconsistency in Forty's argument. (See 1T 31:2-7) ("it doesn't stretch the imagination to understand that this was probably actions that Ms. Conicello didn't approve of because it left her with from a five-person office down to a two-person office in a very stressful time during which employment in the hospital was very much needed.").

Forty's termination was not pretext for his alleged "complaints." Rather, as the trial court correctly recognized, he was terminated for his theft of hospital funds. Forty has failed to present any genuine issue of material fact to show that his termination was pretext for CEPA retaliation. No reasonable jury could otherwise find.

III. THE TRIAL COURT DID NOT MISAPPLY THE SUMMARY JUDGMENT STANDARD.

Forty contends that the trial court failed to give him all reasonable inferences of fact in granting Defendants' motion for summary judgment. Forty identifies five inferences that should have been reasonably made in his favor: (1) that Conicello's conduct could violate the criminal harassment statute; (2) the trial court improperly

dismissed Plaintiffs' testimony as to whether they reasonably and objectively believed that Conicello's conduct violated the criminal harassment statute; (3) the trial court improperly dismissed Jenkins's testimony regarding Conicello's alleged approval of the charge pay; (4) that the charge pay investigation was independent of Inspira's investigation into Conicello's June 24, 2020 conduct; and (5) that Conicello would not have supported Plaintiffs' termination given her staffing reduction. However, a review of the trial court's decision, and the record in this matter, reveals that the trial court did provide Forty with all ***reasonable*** inferences of fact. Summary judgment should therefore be affirmed.

First, no factfinder could reasonably conclude that Conicello's conduct constituted criminal harassment, nor is such a inference required. Without citing any law, Forty contends that his belief that Conicello's conduct was unlawful was required to be analyzed "under the lens of a reasonable employee, and the plain language of the statute." (See Pb28). But Forty's testimony on the June 24, 2020 incident leaves no doubt. (See Pa188 at 119:7-18) (Forty testified that he "just sat there and just kept calm."); Pa188 at 119:15-18 (Forty testified that he "relaxed" and "knew to just stay calm."); Pa188-89 at 120:25-121:23 (Forty testified that he completed his work after Conicello yelled at him); Pa189 at 122:12-123:7 (Forty testified that he maintained his composure throughout the incident, relaxed, and "let her just do her thing"). Karnuk's opinions on this matter are irrelevant for purposes

of Forty's claim.

As to alleged conduct occurring before June 24, 2020, the record reflects a litany of personal workplace disputes that amount to nothing more than employees complaining that their boss is mean to them. (See Pa178; Pa184; Pa185; Pa190; Pa194; Pa240; Pa237-38; Pa242; Pa243; Pa285-291). As the trial court appropriately recognized, "those events in and of themselves don't give rise to – to criminal conduct as alleged her in this harassment." (See 1T 23:19-21).

Forty argues that the trial court failed to analyze Conicello's actions under the harassment statute. (See Pb28). However, the trial court explicitly considered Forty's contentions within the context of the harassment statute, noting:

> And internal disputes within the workplace are not criminal harassment. They are just that, just disagreements within the workplace, unhappiness with their supervisor, and this one isolated incident where Ms. Conicello screams and yells at Mr. Forty is not a basis in my view of criminal harassment.
>
> [1T 29:5-15.]

The court continued:

> I find that the activities, the events that gave rise to Mr. Forty's complaints in June of 2020 do not give rise and ***cannot objectively or subjectively on behalf of the plaintiffs give rise to a – a charge of criminal harassment***. It was just disagreements within the workplace, not very vice, uncomfortable disagreements, but certainly not giving rise to a criminal violation.
>
> [1T 32:25-33:7 (emphasis added).]

Second, the trial court did not unreasonably dismiss testimony from Plaintiffs as self-serving. Contrary to Forty's argument, which relies on a single instance of testimony from Jenkins, the record is replete with evidence of what Forty, Jenkins, and Karnuk actually thought—that Conicello was difficult to work with on a day to day basis, that she was mean to her employees, and that they did not like her. (See, e.g., Pa446 (Karnuk texting a coworker "I'm over Barbara and her bullshit."); Pa237-38 at 49:1-55:25; Pa242 at 72:13-17; Pa243 at 74:5-24 (noting Conicello's bickering with other staffing coordinators); Pa175 at 67:13-68:6 (Forty stating Conicello would "freak out on everybody"); Pa240 at 64:10-18 (staffing coordinators upset at the way Conicello "treated people"); Pa285 at 30:23-31:5 (Karnuk stating Conicello was not a "team player"); Pa286 at 35:1-7 (Conicello treated the staffer coordinators like children); Pa184 at 101:22-102:6 (Conicello was belittling and degrading toward staffing coordinators)). As the trial court found, "Plaintiffs cannot show objectively and reasonably believe that Conicello's yelling and screaming at Mr. Forty on June 24, 2020 was a violation of the harassment statute." (See 1T 28:10-13).

Third, no reasonable juror could conclude, on this record, that Conicello approved the charge pay. The trial court must give only all ***reasonable*** inferences to Forty. Here, it is unreasonable to accept Jenkins's unsupported and uniformly contracted—even by her own past statements—testimony that Conicello approved

the charge pay. There is no genuine dispute of material fact that the charge pay was ever approved. The trial court even recognized the undisputed timing of the entries. (See 1T 25:3-7 ("So after, there was an approval of their pay they would go in at 11 o'clock on a Monday, this was every other Monday when their time sheets had to be in and approve time, this additional pay for each other during this period of time."); see also id. at 25:8-12 ("Obviously, it really cannot be disputed that they were doing it to avoid detection from any else and during the chaos of COVID"); Id. at 25:13-15 ("But the facts under how they went about approving this charge pay for each other really belies the assertion that it was approved by Ms. Conicello"). As set forth more fully above, there exist copious facts in the record supporting Defendants' position that the charge pay was not authorized. (See Pa361 at 78:14-21 (Conicello repeatedly sought more pay for her staffing coordinators yet was continuously rejected); Pa362 at 83:7-21-84:14; Pa475 (Conicello denies Jenkins's request for prospective charge pay); Pa477; Pa362 at 84:15-17 (Forty confirmed he never received approval for charge pay, in fact never even discussed charge pay with Conicello); Pa364 at 90:5-91:1; Pa475; Pa482-528 (Conicello discovered that Forty, Jenkins, and Karnuk would enter charge pay for each other after she had already reviewed their time cards); Pa232 at 32:11-15; Pa482-528 (two remaining staff coordinators, Rosilind Asselta and Tyree Ruhl, never received charge pay); Pa475 (Conicello confirmed she never would have approved charge pay for other three out

of her five staffing coordinators); Pa545 (Karnuk, during her interview with Lambrecht, noted that staffing coordinators do not received charge pay); Pa297 at 80:10-14 (Karnuk confirmed that she had no firsthand knowledge of Conicello ever approving charge pay); Pa547-48 (Jenkins stated during her interview with Inspira investigators that she never received confirmation from Conicello that the charge pay was approved); Pa477 (Forty admitted that he had no direct approval from Conicello as to the charge pay and that he and Jenkins effectively took silence from Conicello as approval). No reasonable factfinder could otherwise conclude.

Fourth, Forty contends that the trial court "failed to draw the inference that Defendant Conicello might have leveraged the charge pay issue to derail the investigation into her conduct." (See Pb30). Yet the evidence undisputedly reflects that Inspira performed a full investigation of Conicello's June 24, 2020 conduct. And, separately, that the charge pay issue originated with Asselta, was investigated by Lambrecht, and led to Forty's termination by the termination panel. While Conicello certainly relayed Asselta's discovery to HR, and was a participant in what followed, no reasonable juror could conclude that this was revenge for Forty's "complaint" about the June 24, 2020 incident. Especially given that he had "complained"—or, more accurately, griped—chronically about Conicello for years, to whoever would listen, without incident. As had other staffing coordinators for years without incident. The only other staffing coordinators who were terminated—

Jenkins and Karnuk—did not complain about the events of June 24, 2020, but were also caught stealing Inspira funds.

Finally, Forty contends that the trial court erred in its analysis by inferring that Conicello would not have supported Forty's termination because she lost two-thirds of her staffing during the middle of the COVID-19 pandemic. (See Pb30). Not only is this not a genuine dispute of material fact, but Conicello was never the decision maker. Forty was terminated following a review of his case by a termination panel consisting of Lambrecht, Conicello, in-house counsel, and the assistant-Vice President of Human Resources. Conicello, nor any other member of the termination panel, had any individual decision-making power.

IV. NEITHER CONICELLO NOR LAMBRECHT RETALIATED AGAINST FORTY

There is no basis, and Forty has not articulated any to this Court, on which to hold Conicello or Lambrecht personally liable for his termination. Inspira convened a termination panel, as noted above, that concluded Forty should be terminated. This particular terminal panel included Conicello, Lambrecht, in-house counsel, and the assistant-Vice Present of Human Resources. Critically, no singular termination panel member has final, decision-making power, including Conicello.

Conicello's function was limited to consulting on underlying facts. Conicello testified that she knew she had to escalate the charge pay issue to Human Resources once she learned that Forty was entering the charge pay without authorization.

Conicello "had to support the decision that was made" by the panel to terminate Forty's employment. (Pa369 at 109:12-110:10).

Lambrecht, meanwhile, merely acted as an arm of the Human Resources department. Lambrecht only investigates an employee when a manager contacts Human Resources. She has no final, decision-making power. Lambrecht interviewed each and every staffing coordinator in connection with the allegations that Forty had stolen Inspira time and money, and she participated in the termination panel that ultimately decided to terminate his employment—not as the decision maker, but as a Human Resources representative. Finally, Forty's brief is clear: Lambrecht's conduct was never the basis for his retaliation claims.

The trial court recognized the importance of the termination panel. (See 1T 31:12-18) ("But in any event, she's not the terminator anyway. These people were brought up in front of – these three plaintiffs were brought up in front of the termination panel."). On this record, there is no basis upon which either Conicello or Lambrecht can held to have personally retaliated against Forty.

CONCLUSION

For all the foregoing reasons, Defendants respectfully request that the Court affirm the trial court's grant of summary judgment dismissing Forty's Complaint. First, he has failed to present any genuine issues of material fact capable of supporting a *prima facie* case of CEPA retaliation. Second, even if he could,

Defendants have proffered a legitimate, non-retaliatory reason for their termination: Forty's theft of hospital funds. And, even providing Forty with all reasonable inferences of fact, he cannot point to any disputed facts capable of supporting a finding of pretext. Finally, even if this Court disagrees with all of the above, there is no evidence that Conicello and Lambrecht, individually, retaliated against Forty.

Respectfully submitted,

BROWN & CONNERY, LLP
Attorneys for Defendants-Respondents

Dated: December 6, 2024

/s/ Michael J. Miles
Michael J. Miles

CARLOS FORTY, Plaintiff-Appellant, v. INSPIRA HEALTH NETWORK, and BARBARA CONCIELLO, DENISE LAMBRECHT, and JOHN AND/OR JANE DOES 1-20 (Names Being Fictitious), in their individual and corporate capacities, and as aiders and abettors, Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION APPELLATE DOCKET NO: A-4038-23T4 DOCKET NO. BELOW: CUM-L-627-21 SAT BELOW: Hon. James R. Swift, J.S.C. LAW DIVISION – CUMBERLAND COUNTY

REPLY BRIEF OF PLAINTIFF-APPELLANT CARLOS FORTY

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PRELIMINARY STATEMENT

This case centers on the protections afforded to whistleblowers under CEPA, ensuring that employees who disclose unlawful conduct in good faith are shielded from retaliation. The record evidence, viewed in the light most favorable to Plaintiff, demonstrates genuine disputes of material fact regarding Respondents' motives and actions, requiring reversal of summary judgment and a trial on the merits.

In their Opposition to this appeal, Defendants conflate generalized workplace conduct with specific unlawful actions. CEPA does not require whistleblowers to achieve legal certainty but, instead, protects employees acting in good faith to disclose perceived violations. As Plaintiff set forth in the initial Brief, the Trial Court erred in minimizing Defendant Conicello's conduct as a mere management style, disregarding statutory definitions and the evidence supporting Plaintiff's claim. Further, Plaintiff presented evidence creating genuine issues of material fact regarding pretext and retaliatory intent. Record testimony disputes Respondents' claim that charge pay was unauthorized, undermining their termination justification. Finally, Respondents' claim of independent decision-making is belied by evidence showing that Defendant Conicello, accused of misconduct, recommended Plaintiff's termination. Factual disputes regarding retaliation and pretext should be resolved by a jury.

Accordingly, Plaintiff respectfully requests that this Court reverse the grant of summary judgment and remand for trial.

LEGAL ARGUMENT

POINT I

PLAINTIFF CAN ESTABLISH A *PRIMA FACIE* CEPA CLAIM AND THERE ARE GENUINE FACTUAL DISPUTES WHICH PRECLUDE SUMMARY JUDGMENT.

A. Defendants Conflate Generalized Workplace Conduct with the Conduct Giving Rise to CEPA Protected Activity.

Defendants attempt to conflate Defendant Conicello's generalized workplace conduct with her unlawful harassment. This mischaracterization creates a strawman argument, obscuring the specific conduct that gives rise to Plaintiff's CEPA-protected activity. Two truths coexist: (1) Defendant Conicello had a history of poor workplace conduct that while unprofessional, does not constitute criminal harassment under N.J.S.A. 2C:33-4; and (2) some of Defendant Conicello's specific actions, including the June 2020 incident, constitute unlawful harassment as defined by statute. It is the latter, not the former, that forms the basis of Plaintiff's CEPA claim.

By commingling these distinct issues, Defendants attempt to distract the Court. The Trial Court erroneously minimized the legal violation as a reflection of Defendant Conicello's management style. However, Plaintiff does not argue that Defendant Conicello's generalized "management style" itself constituted criminal harassment. Rather Plaintiff contends that certain specific conduct, most significantly the incident with Plaintiff,

gave rise to a reasonable, good faith belief that Defendant Conicello violated the law, which satisfies the first prong of this Court's CEPA analysis.

As Plaintiff set forth in the Brief, N.J.S.A. 2C:33-4(a) and (c) define harassment as occurring when a person "makes, or causes to be made, one or more communications . . . in offensively coarse language or any other manner likely to cause annoyance or harm . . . or c) engages in any other course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person." See N.J.S.A. 2C:33-4(a)-(c); see also State v. Hoffman, 149 N.J. 564, 580 (1997).

The characterization of Defendant Conicello's behavior as harassment is not a bald assertion but is, instead, rooted in the specific, observed conduct that aligns with the statutory language. These behaviors are not generalized workplace dissatisfaction but specific actions that reasonably suggested an intent to alarm or intimidate. It is also unreasonable to argue that a whistleblower employee must understand the contours of the statute in a manner that is different than its plain language. Whistleblowers are not held to a standard of legal certainty but to a reasonable layperson's understanding of the law.

Plaintiff's belief that the conduct constituted criminal harassment was, therefore, reasonable under the circumstances, as it comports with a lay person's understanding of the statute.

CEPA's framework is designed to protect employees who act in good faith to report perceived violations, not to create mini trials regarding the underlying acts. As set forth in Plaintiff's initial Brief, Plaintiff engaged in protected whistleblowing activity under CEPA by disclosing these incidents of harassment.

B. Defendants Ignore Key Record Evidence Linking Plaintiff's Termination to Protected Activity.

Given that, as set forth in Plaintiff's initial Brief, there is evidence of unlawful conduct and protected activity, the remaining issue is whether a jury could find that Plaintiff's termination was retaliatory. There is significant overlap between the causation prong of the *prima facie* case and the third stage of the McDonnell Douglas burden-shifting framework, as the same evidence used to demonstrate pretext can also establish a causal link between the protected characteristic and the adverse employment action. See Zive v. Stanley Roberts, Inc., 182 N.J. 436, 449-50 (2005)("The evidence of pretext may also be sufficient to satisfy the plaintiff's burden of proving the prima facie case causation prong. In other words, the same evidence that demonstrates a question of fact as to whether the employer's proffered reason for the adverse employment action is pretextual can also be used to establish that the adverse action was taken for a discriminatory reason.")

Here, Plaintiff has presented evidence to support this connection and from which a jury could determine that the stated reason given for Plaintiff's termination is unworthy of credence. It is reasonable for jury to determine that if Defendant Conicello had approved the charge pay, either explicitly or implicitly, that the termination justification is pretextual. If the termination was pretextual, then it is up to the jury to determine what the true reason for termination was, be it retaliation for protected activity or some other reason altogether.

Indeed, Jenkins testified that Defendant Conicello approved the charge pay — disputing the central tenet in Respondents' justification for Appellant's termination. Specifically, Jenkins testified as follows:

> So I said why can we not at least get charge pay, which is one dollar an hour. And she said, in front of several people, you can get charge pay, as long as I don't get in trouble.
>
> (Pa230).

Defendants (knowing they must discredit this evidence) claim that this testimony is contradicted by Defendant Lambrecht as memorialized interview notes, Defendant Conicello's own denials, and the fact that other witnesses had no firsthand knowledge of the approval. (Rb32.) That is not true. The notes from Jenkins' interview with Defendant Lambrecht read:

> Rachel asked Barb if they could get charge pay. Rachel saw another Coordinator was

> getting charge pay (Lexi in Cath Lab). Barb said, "yeah, we can try it if I don't get in trouble." It was not a sit-down conversation. Rachel assumed Barb was not in trouble because she did not say anything. So, Rachel thought they were ok.
>
> (Pa547.)

These notes are consistent with Jenkins' assertion that Defendant Conicello, according to her, approved the charge pay.

Defendants' version of events collapses if Defendant Conicello was aware of the charge pay. Defendants assert that Defendant Conicello promptly reported the charge pay to HR after learning about it from another employee (Rb34-35). However, if Defendant Conicello had prior knowledge of, or explicitly approved, the charge pay, this purported "discovery" is a charade. The charge pay issue was elevated to HR by Defendant Conicello shortly after the June incident and while complaints about her behavior were pending. The timing of the elevation, after she learned of the pending investigation into her harassment, becomes a pretext — a calculated move by Defendant Conicello to deflect attention from her own misconduct and to derail further investigation into her harassment. In that scenario, Plaintiff's disclosure of the events becomes a potential motivating factor for termination. See Donofry v. Autotote, 350 N.J. Super. 276 (App. Div. 2001)("Plaintiff's ultimate burden of proof is to prove by a preponderance of the evidence that his protected whistleblowing

activity was a determinative or substantial, motivating factor in defendant's decision to terminate his employment. . . ")

The trial court erred by discounting this evidence and resolving factual disputes in Respondents' favor, contrary to the Brill standard. See generally Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995). Whether Defendant Conicello approved or knowingly tolerated the charge pay is a dispute that must be resolved by a jury. There is a version of events supported by record evidence that suggests that Defendant Conicello used the charge pay matter to divert scrutiny and undermine those who had witnessed and disclosed her unlawful conduct. A reasonable factfinder could conclude that the investigation was pretextual and intended to silence Plaintiff's whistleblowing activity.

C. Defendant Conicello Recommended Plaintiff's Termination, Undermining Defendants' Claims of Independent Decision-Making.

Defendants also try to obscure the fact that Defendant Conicello, along with Defendant Lambrecht, were the decision makers in Plaintiff's termination, instead attempting to hide them behind an "independent panel," implying that she had no significant role in the decision. (Rb48-49).

Contrary to Defendants' claims, the termination panel does not serve as an independent decisionmaker. Instead, a matter is only brought to the termination panel when termination has already been recommended. (Pa662). Here, there can be no doubt that

Plaintiff was terminated by Defendant Conicello and Defendant Lambrecht. Defendant Conicello reported the charge pay issue to Human Resources, participated in interviews during Defendant Lambrecht's investigation into the charge pay issue, framed the charge pay as unauthorized, and recommended that termination. She and Defendant Lambrecht recommended the termination to the termination panel. (Pa663).

Defendant Conicello was the individual identified by Plaintiff as having acted unlawfully, she was the person who initiated an investigation into Plaintiff, and she was ultimately responsible for Plaintiff's termination. These facts present an example of retaliatory conduct under CEPA. The evidence is sufficient to raise genuine issues of material fact regarding Respondents' motives and actions. As such, this matter must proceed to a jury for resolution. Summary judgment must be reversed.

CONCLUSION

For these reasons and those set forth in Plaintiff's initial Brief, Plaintiff respectfully requests that this Court reverse the Trial Court's Order granting summary judgment to Defendants and remand the matter for trial.

Respectfully submitted,

s/Michael K. Fortunato

Michael K. Fortunato

Dated: December 20, 2024