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SUPERIOR COURT OF NEW JERSEY
ESSEX VICINAGE
LAW DIVISION, CIVIL PART
DOCKET NO.: L-003412-19

GULBIR ("DINA") K. ANAND,

Plaintiff(s),

v.

NOVARTIS CORPORATION, ABC CORPORATIONS (1-10), DENISE LECLAIR, JOHN DOES (1-10) AND JANE DOES (1-10).

Defendant(s).

Decided: October 15, 2024

Ayesha Hamilton, for plaintiff (Hamilton Law Firm, PC, attorneys)

John B. McCusker, for defendants (Duane Morris, LLP, attorneys)

PETRILLO, J.S.C.

INTRODUCTION

On August 9, 2024, the court heard oral argument on a defense motion for summary judgment and a cross motion by plaintiff seeking the same relief.

Thereafter the court reserved decision to more carefully examine the very substantial motion record in light of the oral argument. Having now completed that examination, the court hereby grants the defense motion for summary judgment and denies the plaintiff's cross motion. All issues left unresolved by this motion shall proceed to trial unless otherwise resolved or disposed.

Plaintiff Gulbir (Dina) Anand ("plaintiff"), an American of Indian descent, born and raised in the United Kingdom, filed a complaint against her employer and her supervisor, defendants Novartis Pharmaceuticals Corporation and Denise Leclair (collectively "defendants" and individually "Novartis" and "Leclair") alleging violations of the Conscientious Employee Protection Act ("CEPA") and the New Jersey Law Against Discrimination ("LAD") based on "ancestry and/or disability" discrimination, failure to accommodate her disability (work-related stress), and retaliation. Plaintiff later added claims for negligent infliction of emotional distress ("NIED") and intentional infliction of emotional distress ("IIED").

For the reasons explained, the court agrees that this case is ripe for summary judgment because there are no material facts in dispute and there is insufficient evidence to support plaintiff's assertions. Indeed, having scoured the enormous record, the court is satisfied, in large part based on plaintiff's own admissions and the secret recordings that she made of an overwhelming number of her workplace

conversations, that summary judgment is appropriate. While plaintiff may have anticipated that these surreptitious recordings would burnish her claims, they have worked the opposite effect. The recordings make clear that plaintiff's claims against defendants are without merit. In their motion, defendants assert that "[p]aintiff's own recordings are the best evidence of what actually occurred and, when considered along with her contemporaneous emails and deposition testimony, the indisputable evidence shows that [p]laintiff's case is a sham and her termination by [Novartis] was neither discriminatory nor retaliatory." The court agrees. [1]

Plaintiff's opposition largely ignores the evidence she created and at first hid (the recordings) and instead focuses almost entirely on her interrogatories. That plaintiff would fail to cite or reference these secret recordings even a single time, despite having testified that she created them to have her own "version" of her interactions with Leclair, cannot be ignored especially given how the recordings contradict certain of plaintiff's allegations.

The secret recordings, however improper their creation might have been, have served an important purpose. They demonstrate, objectively, what went on between plaintiff and Leclair and thus effectively support the defense argument, and the

[1] While not by any means outcome dispositive, it is compelling that for years after plaintiff initiated this lawsuit, plaintiff failed to disclose that she had secretly recorded at least 57 workplace meetings with Leclair, and a number of other coworkers. These recordings include some made while abroad in a jurisdiction where recording without permission is a criminal offense.

court's determination, that there is no factual basis for the plaintiff's claims. In that sense they indeed are the best evidence; evidence that the plaintiff ignores and evidence that plaintiff cannot, and makes no effort to, refute.

FOCUS OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants exhaustively recount plaintiff's testimony and other admissions that undermine her complaint. The arguments as to each count of the complaint case can be summarized thusly:

Defendants argue that **counts one and two** (CEPA) must be dismissed because plaintiff admitted that she never complained that anyone at Novartis was hiding or misrepresenting safety data but rather only "about resources." As such, since plaintiff merely complained about head count and allocation of resources, CEPA protections do not apply.

Defendants argue that **count three** (failure to accommodate) must be dismissed because plaintiff admits that she never requested any accommodation for her disability other than leave (which was granted and extended) which leave continued until plaintiff's own doctors returned her to work some six months later. Thus, plaintiff was never deprived of, or denied any, requested accommodation. In short, plaintiff got what she requested: time off.

Defendants argue that **counts four and six** (LAD ancestry discrimination, disability discrimination, hostile work environment, and aiding and abetting) must be dismissed because the entire claim relies on a single comment by Leclair about plaintiff's "European" style of writing. Plaintiff's secret recordings make clear that when Leclair made the comment to her, plaintiff did not discern the comment as discriminatory or hostile in that plaintiff herself described the comment as neither derogatory nor related to her Indian ancestry. Defendants argue that this "isolated stray" comment is not "actionable" and cannot form the basis of the kind of LAD claim asserted. It is undisputed that plaintiff's position was held for her while she was on medical leave and that she was restored to that position upon her return to service. Plaintiff's only claims that she was asked to be in the office three days a week instead of two, only to nevertheless admit that she ultimately was allowed to work from home three days per week. Plaintiff does not allege that any discriminatory or derogatory comments were made regarding her supposed disability or her leave that would support a claim for discrimination based on disability.

Defendants further argue that **count five** (LAD retaliation) must be dismissed because the only complaint upon which plaintiff could base her claim under the LAD for retaliation is based on her complaints about ancestry discrimination. Plaintiff has not alleged nor is there any evidence in the record to show a causal connection

between her complaints in January 2017 and her termination in May 2018. Additionally, there is no evidence of pretext for plaintiff's termination given that her comments about her supervisor Leclair and plaintiff's insubordinate behavior are well documented in the record. Defendants argue that there is no evidence of causation or pretext and absent such evidence the claim of retaliation under the LAD for complaints about ancestry discrimination fail as a matter of law

Defendants finally argue that **counts seven and eight** (IIED and NIED) must be dismissed because the claims are based on the same factual predicate as the LAD claim, that the NEID claim is barred by the New Jersey Workers Compensation Statute, and that the IIED claim fails to articulate the type of extreme or outrageous conduct required to sustain such a claim.

PLAINTIFF'S TERMINATION

While employed at Novartis, plaintiff reported to Leclair from November 1, 2016, until May 17, 2018. Novartis terminated Plaintiff's employment on May 17, 2018. Novartis maintains that plaintiff was terminated for engaging in an increasing pattern of combative and insubordinate behavior during the more than one year that she reported to Leclair, excluding plaintiff's six month leave period.

In defendants' motion papers they describe plaintiff's "escalating pattern of disrespect and insubordination" and point to the secret recordings and emails in

support of the defense characterization of plaintiff's conduct. In these recordings and emails plaintiff calls Leclair a "liar," bad manager and "middle school[er]"; tells Leclair, "I am not your slave"; and repeatedly refuses to do assigned work, telling Leclair that she should do it herself.

The court reviewed all portions of the multi-volume record cited by the movants to verify this actually happened as described. Based upon the motion record, including the secret recordings, e-mails, and testimony, there is no material issue of fact as to any of this.

PLAINTIFF'S CEPA CLAIM – COUNTS I & II

To make a *prima facie* CEPA claim, plaintiff must establish by a preponderance of the evidence that: she reasonably believed her employer's conduct violated either a law or a clear mandate of public policy concerning the public health, safety or welfare; she performed "whistleblowing" activity, as described in N.J.S.A. 34:19-3(c); an adverse employment action was taken against her; and a causal connection exists between the whistleblowing activity and the adverse employment action. Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003).

Other than the existence of an adverse employment action (i.e. her termination), plaintiff cannot point to evidence to establish any of these elements.

Prong 1

For a CEPA claim to survive, "the trial court must identify a statute, regulation, rule, or public policy that closely relates to the complained-of conduct." Dzwonar, 177 N.J. at 463. The existence of a governing law or clear mandate of public policy is an issue of law to be decided by the court. Id. The plaintiff must then "set forth facts that would support an objectively reasonable belief that a violation" of that statute, regulation, rule or public policy has occurred. Id. "In examining whether a plaintiff identified a cognizable legal authority or public policy that her employer violated, it is not enough for the employee to "rest upon a sincerely held – even if perhaps correct – belief that the employer has failed to follow the most appropriate course of action, even when patient safety is involved." Hitesman v. Bridgeway Inc., 430 N.J. Super. 198, 212 (App. Div. 2013).

"A plaintiff cannot rely upon a broad-brush allegation of a threat of patients' safety[,] because CEPA affords no protection for the employee who simply disagrees with lawful policies, procedures or priorities of the employer." Ibid.

In Klein v. Univ. of Med. & Dentistry of N.J., 377 N.J. Super. 28 (App. Div. 2005), plaintiff, a physician specializing in radiology based his CEPA claim on complaints about internal resource decisions made by his employer, a hospital. Klein alleged that for years "he complained about 'patient safety' concerns involving

resuscitation and anesthesia due to the cramped workspace in the Radiology Department and lack of essential equipment and staffing." Id. at 34. Klein alleged that he reasonably believed inadequate staffing was a violation of the Hospital Licensing Standards for Anesthesia; however, the standards relied upon did not set forth a clear standard for how a hospital must staff its departments. Id. at 44. The appellate division affirmed the trial court's decision to grant summary judgment in favor of the hospital finding that "merely couching complaints in a broad-brush allegation of a threat to patient's safety is insufficient to establish the first prong of a CEPA claim." Id. at 42.

In this case, the court is faced with much of the same. Plaintiff repeatedly testified that her CEPA claim is based upon her complaints to Leclair, to Novartis Human Resources, and to Novartis Employee Relations about the need for additional resources. This is a significant and undisputed fact. A vague and opaque reference to "patient safety" is insufficient on its own to satisfy the first prong of a CEPA claim. This is identical, in that respect, to Klein and Hitesman.

At deposition, plaintiff made clear that the focus of her complaints were "resources" and "head count" and that safety required "adequate resources." Complaining in this narrow and general way fails to "identify a statue, regulation, rule or public policy that closely relates to the complained-of conduct." Dzwonar,

177 N.J. at 463. Nor does plaintiff here, or anywhere, "set forth facts that would support an objectively reasonable belief that a violation" of a statute, regulation, rule or public policy has occurred. Ibid. As stated above, plaintiff's belief that this safety issue was true, without more (and there is no more), is simply not enough.

In short, plaintiff alleges Novartis violated CEPA by retaliating against her and terminated her for complaining about internal resources. An examination of the motion record makes clear that plaintiff was clearly concerned with, and unhappy about, the headcount and staffing resources available to her. This is clear and undisputed. That plaintiff may have herself believed that the Novartis staffing model for her project jeopardized patient safety can be accepted as true for the purposes of this motion.

However, as explained *supra*, as a matter of law, plaintiff's broad-brush concern for "patient safety" paired with her demand for more resources means nothing absent something upon which the court might hang its hat to conclude that in rebuffing plaintiff's complaint's, Novartis somehow violated the law or a clear mandate of public policy concerning public health safety or welfare. In the absence of that hook, Novartis is insulated from exposure to a CEPA claim, under these facts, for how it chose to staff its projects.

Prong 2

Under CEPA, "the dispute between an employer and employee must be more than a private disagreement." Maw v. Advanced Clinical Commc'ns, Inc. 179 N.J. 439, 445 (2004). There is nothing in the law to support the idea that merely questioning or disagreeing with an employer's policies or practices constitutes whistle-blowing activity within CEPA's meaning. Unless the employee somehow indicates to the employer that she believes the employer is doing something unlawful, the objection is not protected by the statute. See Blackburn v. United Parcel Service, Inc., 3 F.Supp 2d 504, 515 (D.N.J. 1998) aff'd, 179 F.3d 81 (3d Cir. 1999).

A review of the motion record makes clear that there is no evidence that plaintiff ever "actually disclosed or objected to conduct that would reasonably be considered unlawful." Id. at 517. Let there be any confusion on this point, plaintiff testified at her deposition that she never complained to anyone that safety data was being hidden. When asked point blank, "Did you report to anybody that Novartis was hiding or misrepresenting safety information?" plaintiff replied, "No. I'm telling you now."

In examining the secret recordings, none contain any evidence of plaintiff disclosing or objecting to conduct that reasonably would be considered unlawful.

Based upon plaintiff's own testimony and her own secret recordings she cannot establish that she disclosed a violation of law or public policy to anyone at Novartis.

Prong 3

Plaintiff cannot meet her burden of presenting specific, substantial and credible evidence that any purported whistleblowing was a "determinative or substantial, motivating factor" in the decision to terminate her. See Dzwonar, *supra*, 177 N.J. at 462.

Plaintiff testified at her deposition that the reason she was retaliated against and ultimately fired was because she "was talking about safety resources." Based upon her own testimony, the court cannot identify any causal connection between any complaint of a violation of law or public policy and Novartis's decision to terminate plaintiff's employment. Plaintiff testified, and this is borne out by the secret recordings, that she complained repeatedly and clearly about a lack of resources and staffing. The court cannot detect a basis for CEPA liability, despite plaintiff's termination, since plaintiff's complaints were always about not having enough staff and not once about a violation of law or public policy.

The uncontroverted record evidence considered by the court on this motion establishes the basis for Novartis's decision to terminate plaintiff's employment is

that she engaged in a pattern of insubordinate, rude, and offensive behavior toward her supervisor, Leclair.

Other possible basis for CEPA liability

In her opposition, plaintiff does not meaningfully distinguish much of the defense argument as to the legal analysis advanced in the defense motion nor is there any dispute as to which law applies. Rather, plaintiff argues that her CEPA claim should survive because she had a reasonable belief that Leclair had an "unethical and unlawful plan to conceal and downplay adverse side effects of Entresto, such as hypertension and anaphylaxis" and was pushing for the proposed Telehealth Program to "be run in a manner that would under-count adverse events."

Plaintiff's focus on these two dimensions of her CEPA claim is unavailing for several reasons. First, as the opposition itself makes clear, the United States Food and Drug Administration ("FDA") regulations do not set a standard for how Novartis must gather data of adverse events for its reporting. As discussed, FDA guidance specifically disclaims any such standard. Plaintiff does not contest this. So, in essence, there is no standard.

Second, even if there was a standard, though there is not, there is no evidence that Leclair intended to conceal anything or that she conspired with any person or group, internally or externally to conceal anything.

Plaintiff does not base her CEPA claim on defendant's alleged violation of any internal policy. Even if she did it likely would not matter because there is no legal support for the idea that violation of merely an internal policy is a basis for a CEPA claim.

Plaintiff relies solely on her interrogatory responses, which directly contradict other competent evidence, including her own secret recordings. Plaintiff's secret recordings show plaintiff told Leclair she did not even think hypertension was an adverse event but that she would discuss it with her committee. Indeed it was only after Leclair told plaintiff she thought it should be included on the committee agenda that plaintiff agreed. Regarding including anaphylaxis as a side effect, Leclair stated to plaintiff, "I agree with you."

Plaintiff argues that her self-serving interrogatory responses may be relied upon for summary judgment, citing Fleming v. Correctional Healthcare Solutions, Inc., 164 N.J. 90, 102 (2000). The court agrees with defendants that plaintiff's "reliance on Fleming is misplaced." Self-serving interrogatory responses are not competent evidence when the interrogatory responses are conclusory and contradicted by indisputable evidence in the record. In this case plaintiff's interrogatory responses are contradicted by her secret recordings of her own conversations. The facts of Fleming were different. There, plaintiff's testimony was

sufficient to create a genuine dispute about the reason for her firing where she proffered her own testimony and her testimony was supported by other testimony in the record.

The logic of Fleming does not apply here, because the secret recordings of plaintiff's conversations when compared to her deposition testimony, where she acknowledges never reporting any concealment of safety information, completely contradict and thus completely eviscerate her interrogatory responses.

No less an authority than the Supreme Court of the United States has addressed a very similar scenario. As discussed by the defendants, the case of Scott v. Harris, 550 U.S. 372, 374-381 (2007) is instructive. Scott was an excessive force case brought by a driver who was rendered a paraplegic when intentionally hit by a police car at the end of a car chase. The driver testified he was calmly driving, and the officer's intentional ramming of his vehicle was unconstitutional. The trial and appellate courts denied summary judgment based on disputed fact created by the driver's testimony. The Supreme Court held the driver's testimony was not competent evidence on summary judgment where there was video of the event:

> The videotape quite clearly contradicts the version of the story told by respondent .... Indeed, reading the lower court's opinion, one gets the impression that respondent, rather than fleeing from police, was attempting to pass his driving test. *** The videotape tells quite a different story. There we see

> respondent's vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury. At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a "genuine" dispute as to those facts. ... **When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.**
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> Id. at 374-81 (emphasis added).

The comparison between Plaintiff's secret recordings and descriptions of the very same conversations in her interrogatory responses is as stark as the video compared to the driver's testimony in the Scott case. Plaintiff's secret recordings tell the story of what was actually said. The recordings are clear on several points. Leclair never urged plaintiff to withhold or conceal report information regarding Entresto; Leclair did not push approval of the Telehealth Program; Leclair can be heard on the secret recordings encouraging plaintiff to raise her recommendations

regarding Entresto with internal committees and groups and clearly telling plaintiff that it was entirely up to her to evaluate the Telehealth Program's algorithm and recommend whether or not to move forward with it.

Plaintiff's assertion that there were other conversations with Leclair that she did not record in which Leclair spoke of planned regulatory violations and other unlawful schemes to perpetrate her plan to violate the regulatory structure is blatantly self-serving and simply not plausible. Plaintiff throughout has pointed to specific meetings and interactions many, many, of which she secretly recorded and none of which support the existence of these supposed other, damning conversations.[2] There is simply no reason to believe that any such other recordings exist.

For these reasons, the defendants' motion for summary judgment as to counts one and two is granted.

[2] Plaintiff's argument as to the propriety of the secret recordings being relied upon by the movants is rejected out of hand. First plaintiff concealed these recordings. Once disclosed plaintiff refused to transcribe or authenticate them court order notwithstanding. The originals have at all times been in plaintiff's possession and the excerpts cited by movants were provided. If plaintiff wanted to cite some other part of these recordings, she was perfectly able to do so by reference to the recordings which belong to her.

PLAINTIFF'S FAILURE TO ACCOMMODATE CLAIM – COUNT III

In the third count of her amended complaint, plaintiff claims that she suffered from job related stress that was exacerbated by her inability to work well with Leclair, her supervisor, and that Novartis denied her request for transfer as a reasonable accommodation.

The elements required to establish a cause of action for a failure to accommodate an alleged disability under the LAD: Plaintiff "qualifies as an individual with a disability, or . . . is perceived as having a disability, as that has been defined by statute"; plaintiff "is qualified to perform the essential functions of the job, or was performing those essential functions, either with or without reasonable accommodations"; and Novartis "failed to reasonably accommodate [her] disabilities." Victor v State of New Jersey, 203 N.J. 383, 410 (2010).

The only accommodation requested by plaintiff (and her doctors) to address her disability was for extended leave, which Novartis granted and extended. The requested accommodation was limited to medical leave and for an extension. The record supports that this request was made and was granted. Upon her return to work, plaintiff's doctor's note placed no restrictions on her ability to perform and, as noted in the preceding paragraph, no further accommodation was sought. Plaintiff never requested a new supervisor in order to accommodate a supposed disability and

she verified as much at her deposition when she was asked if she had requested any accommodation and she replied "I didn't request any accommodations…".

There is not a scrap of evidence in the record that a transfer or change of supervisor as an accommodation for her work-related stress was ever requested. In her opposition, plaintiff contradicts the record evidence with reference to her interrogatory answers. While there is no dispute that plaintiff desired a new manager, and apparently had a deep and enduring contempt for Leclair, neither is there any indication that her request for a new supervisor was ever in any way connected, by her or her physician, to a disability accommodation.

The secret recordings between plaintiff and Dorina Bishof following plaintiff's medically unrestricted return from her leave of absence leave zero doubt that plaintiff believed Leclair was a liar and was not trustworthy. Those adjectives were the very words plaintiff used to describe Leclair. That palpable disdain, without more, is inconsequential as a matter of law. Conflict between supervisors and subordinates is, at times, an unfortunate feature of the workplace dynamic. There was no indication by plaintiff's physicians when authorizing her return to work, or any from the plaintiff herself, that a new supervisor was required in order to satisfy a disability accommodation.

Even the email communications between Novartis managers and other personnel exchanged during plaintiff's leave do not support the argument that a disability accommodation had been requested or was under consideration. Discussing where plaintiff would fit upon her return to work merely shows, at best, that there might have been internal thought as to how best to manage the supervisor/subordinate conflict that may have been evident at that time.

There is no reading of those communications, in light of the whole record, that some disability accommodation was under consideration because no such request was ever made. Plaintiff did not like and did not want to report to her supervisor, Leclair, any longer. Despite this, Novartis decided she had to do so anyway. That is what the record supports. That is not actionable under a failure to accommodate theory.

Even assuming that plaintiff's complaints about working for Leclair could be seen as making a disability accommodation request, (a reading of the record so indulgent so as to render the undisputed facts almost irrelevant) the plaintiff still fails to set forth a viable LAD claim under state or federal precedent. In the interests of thoroughness, the court will thus examine the law as it would be applied had plaintiff in fact made such a request, even though the court has concluded no such request was ever made.

Plaintiff returned from disability leave with no restrictions imposed on her return. Thus, at best, her longstanding complaints for a new supervisor would be the only discernible accommodation that could be at issue.

N.J.S.A. 10:5-4.1 prohibits discrimination in employment due to disability "unless the nature and extent of the disability reasonably precludes the performance of the particular employment." See also N.J.S.A. 10:5-29.1. "'The LAD does not specifically address reasonable accommodation, but our courts have uniformly held that the law nevertheless requires an employer to reasonably accommodate an employee's handicap.'" Potente v. County of Hudson, 187 N.J. 103, 110 (2006) (quoting Tynan v. Vicinage 13 of Super. Ct. of N.J., 351 N.J. Super. 385, 396 (App. Div. 2002). See also Raspa v. Office of the Sheriff of the County of Gloucester, 191 N.J. 323, 339 (2007) (slip op. at 14-15).

The Division on Civil Rights has promulgated regulations that detail the specific requirements of reasonable accommodation in the workplace. N.J.A.C. 13:13-1.1 to -2.8. N.J.A.C. 13:13-2.5(b) specifically provides that an employer "must make a reasonable accommodation to the limitations of an employee . . . who is a person with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business."

Four factors govern whether an accommodation would impose an undue hardship on the operation of an employer's business: the size of the business; the type of operation, including the composition and structure of the workforce; the nature and cost of the accommodation; and the need to waive essential requirements of the job. N.J.A.C. 13:13-2.5(b)3i-iv. Whether an employer has failed to provide a reasonable accommodation will be considered on a case-by-case basis. N.J.A.C. 13:13-2.5(b). See also Ensslin v. Twp. of N. Bergen, 275 N.J. Super. 352, 363 (App. Div. 1994), certif. denied, 142 N.J. 446 (1995).

Our courts have frequently resorted to federal law to interpret the LAD as it follows in certain instances federal substantive and procedural standards. Raspa, *supra*, 191 N.J. at 340 (slip op. at 19-20); Viscik v. Fowler Equip. Co., 173 N.J. 1, 13 (2002). This is particularly true in employment discrimination matters, although the LAD is more expansive and offers more protection in certain instances. Tynan, *supra*, 351 N.J. Super. at 397-98. For example, disability is more broadly defined under the LAD than the Americans with Disabilities Act, 42 U.S.C.A. 12101 to 12213. Id. at 398.

An employee presents a *prima facie* case of failure to provide a reasonable accommodation when the employee is disabled as defined by the LAD, the employee is otherwise qualified to perform the essential functions of the job, and he has

suffered an adverse employment decision as a result of the discrimination based on his disability. Shiring v. Runyon, 90 F.3d 827, 831 (3d Cir. 1996).

A request for a reasonable accommodation in the workplace may be oral or written. The employee also does not have to explicitly request a "reasonable accommodation." Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 313 (3d Cir. 1999). When an employee clearly expresses a desire for assistance based on a disability, the employer is obliged to engage in an interactive process to attempt to fashion an "'appropriate reasonable accommodation.'" Id. at 312 (quoting Mengine v. Runyon, 114 F.3d 415, 419-20 (3d Cir. 1997)); Tynan, *supra*, 351 N.J. Super. at 400. Once the employee makes a facial showing of discrimination, the burden is placed on the employer to demonstrate that a reasonable accommodation cannot be provided to the disabled employee. Ensslin, *supra*, 275 N.J. Super. at 363.

Two cases are particularly helpful in this court's consideration of Novartis's response to plaintiff's supposed request for an accommodation due to her inability to work with Leclair and whether summary judgment is appropriate here. In Gaul v. Lucent Technologies, Inc., 134 F.3d 576 (3d Cir. 1998), the plaintiff suffered from depression and anxiety-related disorders. The district court held that his proposed accommodation of a transfer to a position where he would not be subject to

prolonged and inordinate stress by co-workers was unreasonable as a matter of law, Id. at 577, and the court of appeals agreed. Id. at 581.

The court held that Gaul would have had to demonstrate that he had the ability to perform the essential functions of his job. Id. at 580. In order to satisfy that burden, Gaul had to make a facial showing that his proposed accommodation was possible, and that the costs associated with the accommodation were not clearly disproportionate to the benefits. Id. at 580-81. Once he established this facial showing, his employer would be required to prove as an affirmative defense that the requested accommodation was unreasonable. Id. at 581.

The court proceeded to hold that Gaul failed to satisfy his burden because his proposed accommodation was wholly impractical for any employer, that it would impose extraordinary administrative burdens on his employer, and that the court should not be placed in a position whereby it establishes the terms and conditions of a plaintiff's employment. Id. at 581. In short, the "proposed accommodation was unreasonable as a matter of law." Ibid.

In Tynan, *supra*, the appellate division addressed a request for accommodation by a judiciary employee who also suffered from a variety of disabling conditions, including a stress and anxiety disorder. 351 N.J. Super. at 399. Tynan had been employed for many years and had an unblemished record, despite several medical

conditions, until a new person was assigned as her supervisor. Id. at 403. Following an extended period of disability leave, plaintiff requested to return to work, but she did not want to have to report to her current supervisor. Id. at 394. In the alternative, she requested that if she had to communicate with her supervisor that she do so only in writing. Id. at 401.

The appellate division held that summary judgment in favor of the employer should not have been granted for two reasons. First, the employer had failed to engage in an interactive process with the employee to seek to fashion a reasonable accommodation. Id. at 402. Second, it held that Gaul was distinguishable on its facts. Id. at 403. The Tynan court stated:

> Gaul, unlike Tynan, could not work under any stress or tension.
>
> > . . . [A]ny tense situation incapacitated Gaul. The only accommodation Gaul requested was a transfer whenever he decided he was stressed. Such an accommodation was unreasonable as a matter of law. In contrast, Tynan's work record before [her current supervisor] was unblemished. Most of the difficulties [the current supervisor] had with Tynan appear to be trivial and perhaps personality based. The two employees seem to have had some confusion over their respective roles. Furthermore, the vicinage has stated that if Tynan had requested a transfer to another title, that might have been accommodated.
>
> Ibid.

The appellate division also observed that if a lateral transfer was not available, a reasonable accommodation might have included a position at a lower rank. Ibid.

This case is distinguishable from both Gaul and Tynan. Here, assuming plaintiff's complaints about Leclair and her request for a transfer was enough to constitute a disability accommodation request, she did not request that she be placed in a situation in which she would not be exposed to supervision from some other person. She simply asked that she not be made to report to Leclair. This is unlike the plaintiff in Gaul.

On the other hand, unlike Tynan, plaintiff has failed to present any facts to establish her burden that the accommodation she requested, transfer from Leclair's supervision, was possible, let alone reasonable. This is not a heavy burden; plaintiff simply had to make a facial showing that the accommodation she requested was reasonable. She has not done so. Plaintiff did not have to present irrefutable evidence that other positions existed to which she could be assigned. She did, however, have to present some evidence that other positions were available to which she could be assigned that would eliminate or minimize her contact with Leclair. Shiring, *supra*, 90 F.3d at 832.

The court's review of the record reveals that there was insufficient mention of other positions. The only such mention was in the most general sense, i.e. plaintiff

expressing that she would like to report to another supervisor. This is a common workplace desire.

Even if all of plaintiff's complaining about, and criticism of, Leclair was, or should be viewed as, a request for an accommodation, and even if the court accepts that Novartis did not engage in a sufficient interactive process as imposed on it by law, or failed to engage at all, plaintiff did not make a facial showing that the accommodation sought by her was reasonable.

Accordingly, defendant's motion for summary judgment as to count three, failure to accommodate under the LAD, is hereby granted. The undisputed facts of record establish that plaintiff's only request for an accommodation was in the form of medical leave which was granted and then extended. The facts of record further support that plaintiff's request for a different supervisor was never presented in the form a request for a disability accommodation (as opposed to a transfer rooted in dislike for Leclair) and, of equal importance, even if she had requested a new supervisor as a disability accommodation, the request was not reasonable as a matter of law.

PLAINTIFF'S LAD ANCESTRY DISCRIMINATION & HOSTILE WORK ENVIRONMENT CLAIM - COUNT IV & COUNT VI[3]

In count four of the amended complaint plaintiff attempts to allege "Hostile Work Environment and Discrimination Based Upon Ancestry and/or Disability." The language suggests that the count asserts a claim for a disability and national ancestry related hostile work environment, as well as discrimination under the LAD, including a discriminatory discharge. Reading the complaint this way satisfies the court that judgment is appropriate for the defendants because there is absolutely no evidence to support a LAD hostile work environment or discrimination or discriminatory discharge claim based on plaintiff's alleged disability or national ancestry.

Hostile work environment – Disability discrimination

The standards for these disability related LAD claims are well established. To prove a claim for discrimination based upon her disability, plaintiff "must demonstrate: that [she] is in a protected class; that [she] was otherwise qualified and performing the essential functions of the job; that [she] was terminated; and, finally, that the employer thereafter sought similarly qualified individuals for that job." Victor v. State, 203 N.J. 383, 409 (2010). Only if plaintiff establishes a *prima facie* case, would the burden of production shift to Novartis to articulate a legitimate and

[3] Count six also alleges aiding and abetting on the part of Leclair.

nondiscriminatory reason for her termination and then, the burden would shift back to plaintiff to establish the proffered reason is a mere pretext for discrimination. Id.

To establish a claim for hostile work environment under the LAD, plaintiff must point to discriminatory conduct that "was severe and pervasive enough to make a reasonable person in [her] shoes believe that the conditions of employment had been altered and the working environment had become hostile and abusive." See e.g., Dickson v. Community Bus Lines, Inc., 458 N.J. Super. 522, 534 (App. Div. 2019). As stated by the Dickson court, severity and workplace hostility are measured by surrounding circumstances. Taylor v. Metzger, 152 N.J. 490, 506 (1998). In assessing hostile work environment claims, "all the circumstances" must be looked at "including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Green v. Jersey City Bd. of Educ., 177 N.J. 434, 447 (2003)

There is neither an allegation nor record evidence that plaintiff was at any time subject to a hostile work environment or terminated because of her alleged disability (i.e., work related stress). In fact, plaintiff alleges that the hostile work environment supposedly caused work related stress, thus creating the disability (the accommodation for which was already addressed in the court's discussion of count

three). Neither is plaintiff's claim that defendants' conduct was severe and pervasive enough to alter the conditions of her employment supported by the record simply because she was required to take medical leave as a result of her alleged work related stress. To the extent this is the allegation, and frankly the court cannot see any other way to read it, the allegations do not make out a cause of action because that part of the standard which is objective requires the court to "focus on the 'harassing conduct..., not its effect on the plaintiff or the work environment." Cutler v. Dorn, 196 N.J. 419, 431 (2008).

In this case, the evidence of "harassing conduct" consists of generalized accusations of hostility by Leclair towards the plaintiff, yet these accusations are plainly contradicted, or at the very least not supported, by plaintiff's secret recordings. Plaintiff's deposition is particularly unhelpful to her as she was asked more than once to indicate what Leclair had said to her that was antagonistic and hostile. Plaintiff could not do so and further could not point to one of the many secret recordings to support any allegations, for example, that she was "physically threatened or humiliated." Dickson, 458 N.J. Super. at 534.

Novartis kept plaintiff's position open for almost six months while she was on leave. That while on medical she may have traveled to far away countries with dozens of friends and family engaged in various recreational pursuits is not really

relevant (despite it being repeatedly referenced by defendants). What is relevant however, is that upon plaintiff's return to work, she resumed her same position and title and was granted almost $90,000 in annual incentive compensation despite her having been absent for most of the year.

In her opposition to the defense motion, plaintiff fails to point to any evidence of disability discrimination or harassment other than an email (not addressed to her and apparently unknown to her until it was obtained in discovery) in which Leclair refers to her as a "princess." This single instance of immaturity is simply not enough. Following a careful review of the record, it is clear to the court that plaintiff's claim of disability discrimination is entirely without basis in law or fact. Plaintiff sought and was granted an accommodation in the form of leave (which was extended), returned to work thereafter, got her job back, and was then paid a near six figure bonus. The defense motion for summary judgment on the claim of disability discrimination, and disability related hostile work environment, is therefore granted.

Hostile work environment – National ancestry

To establish a hostile work environment claim based on ancestry discrimination, plaintiff must demonstrate defendants' conduct: would not have occurred but for her ancestry; the conduct was severe or pervasive enough to make a reasonable person of that ancestry believe that the conditions of employment are

altered and the working environment is hostile or abusive. See Lehmann v. Toys "R" Us, 132 N.J. 587, 626 (1993). "Any such claims must be evaluated in light of all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Rios v. Meda Pharm., Inc., 247 N.J. 1, 10-11 (2021). The standard is again objective, i.e. whether a reasonable person would have found the work environment to have become hostile. Id. at 12 ("The standard focuses on the harassing conduct itself and 'not its effect on the plaintiff or on the work environment.' ...") (various citations omitted).

Plaintiff's claim turns on a single interaction.

It is undisputed that plaintiff's supervisor commented on plaintiff's writing style in an arguably critical manner, effectively describing it as ineffective and akin to a European writing style ill suited for executive level communications. According to plaintiff, this comment created a hostile work environment, linked, somehow to her Indian ancestry.

After complaining about Leclair's comment, plaintiff was interviewed by human resources. As was her practice, plaintiff secretly recorded the conversation.[4] At the meeting, plaintiff stated that Leclair said "something like, if you can't present to me, you can't present to leadership; I don't know what it is with you; it must be your cultural background, you know; I see the same in the Germans and the Europeans; you guys want everything here, there, every little piece of information." That secretly recorded conversation in which plaintiff describes what Leclair said to her, recounts absolutely nothing ever being said by Leclair regarding plaintiff's ancestry or ethnic background.

Analyzing Leclair's alleged statement under the Lehmann framework can lead to but one outcome: summary judgment for defendants for the following reasons.

Prong 1 – National ancestry based hostile work environment

This requirement is not met as there is nothing in the record that a fact finder could look to in concluding that the supposed statement would not have been made but for plaintiff's Indian heritage. Assuming Leclair said exactly what plaintiff says she said, leaves her nowhere near meeting this first step of the Lehmann analysis. No reasonable fact finder could conclude that this comment, even if made in a sharp

[4] The recorded conversation is the conversation between plaintiff and human resources; not between plaintiff and Leclair.

tone, criticizing plaintiff's writing style, was connected to her Indian heritage. There is simply no linkage and no mention of her ancestry, ethnicity, or heritage.

Leclair explained at her deposition that plaintiff writes in what she termed European style in that she does not lead with conclusions which, according to Leclair, is a less effective writing style than what Leclair apparently surmises is an American style of writing. It is nonsensical to suggest that this comment, about how Europeans write, was made to plaintiff because she is of Indian descent. And compounding the absurdity, is the suggestion that in making this comment, the plaintiff was subjected to discrimination and a hostile work environment. This exact comment could have been made to anyone who writes in a similar fashion regardless of race, gender, sexual orientation, culture, age, faith, or physical ability. Plaintiff has nothing to support that this comment was only made on account of her Indian heritage.

Prong 2 - National ancestry based hostile work environment

This requirement is not met in that this single comment does not constitute severe or pervasive conduct.

Whether conduct is "severe or pervasive" under the LAD "involves examination of the frequency of all the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether

it unreasonably interferes with an employee's work performance." Taylor, 152 N.J. at 498; Lehmann, *supra*, 132 N.J. at 603-04. Here, Leclair's comment regarding plaintiff's writing style was not physically threatening and is not alleged to have interfered with plaintiff's work performance.

Moreover, while the standard is disjunctive, i.e., whether the conduct is "severe or pervasive," here, it is undisputed that Leclair made one single comment supposedly implicating ancestry, and therefore, the conduct at issue cannot be deemed pervasive, by definition. See e.g., Godfrey v. Princeton Theological Seminary, 196 N.J. 178, 197 (2008) (citing the "cumulative impact of successive incidents" creating a hostile work environment.") (citing Lehman, *supra*, 132 N.J. at 607). Therefore, plaintiff's claim can only satisfy this point of a hostile work environment claim if the record supports that the conduct was sufficiently severe. The court is satisfied that it was not.

Significantly, it is "rare and extreme [for] ... a single incident [to] be so severe that it would ... make the working environment hostile." Taylor, 152 N.J. at 500 (internal quotation marks omitted). In those cases where courts have held that a single remark is sufficiently severe, in nearly every instance the remark consisted of a particularly harsh racial epithet. Id., 152 N.J. at 501 (finding the use of "jungle bunny" sufficiently severe as a racial epithet, holding "[t]he connotation of the

epithet itself can materially contribute to the remark's severity. Racial epithets are regarded as especially egregious and capable of engendering a severe impact...The meaning of a racial epithet is often a critical, if not determinative, factor in establishing a hostile work environment.") (extensive citations omitted); Rios, 247 N.J. at 14 (based upon two incidents where a supervisor used a particularly racist derogatory remark, finding requisite severity: "The term 'spick' is 'a derogatory word... that 'embod[ies] a history of disdain toward . . . Latinos.'... And its highly insulting nature is widely recognized.") (citations omitted).

In this case Leclair did not use a racial epithet; she merely commented that the plaintiff's writing style was similar to that of Germans and Europeans rather than Americans. Plaintiff was raised in the United Kingdom. Even if this comment was a criticism, even if this comment revealed a contempt for the so called "European" style of writing, it is of no moment one way or the other. This is far from the single comments of supervisors found to be sufficiently severe in the case law cited above.

The case of El-Sioufi v. St. Peter's University Hosp., 382 N.J. Super. 145 (App. Div. 2005) provides some insight as to when a single instance is insufficient to support a severe and pervasive finding. In El-Soufi, the court concluded that a single statement about plaintiff's status as a Muslim did not "support a subsequent discrimination complaint." This precedent guides the court in this case. Other cases

have reached a similar conclusion. See e.g., Prado v. State, Dept. of Labor, 276 N.J. Super. 231, 244-45 (App. Div. 2005) (finding one incident of ethnically and sexually offensive language insufficient to support a discrimination claim), rev'd on other grounds, 186 N.J. 413, 429 (2006); Mandel v. UBS/PaineWebber Inc., 373 N.J. Super. 55, 72-73 (App. Div. 2004) (finding two remarks about plaintiff's Jewish identity, even if true "do not rise to the level of severe and pervasive conduct required to establish a hostile work environment."), cert. denied, 183 N.J. 214 (2004); Oakley v. Wianecki, 345 N.J. Super. 194, 197 (App. Div. 2001) (finding lack of severity where "plaintiff, a white female, alleges that she was subjected to 'reverse discrimination' and was required to endure a 'hostile workplace' because of her race and gender" based "primarily on a verbal confrontation with another corrections officer... an African American male, in which he directed a coarse, insulting and sexually explicit insult at her.").

The collective weight of this precedent cannot be ignored. Application of this precedent compels but one conclusion: Leclair's remark does not rise to the level of severe or pervasive required to create a hostile work environment.

Prongs 3 and 4 - National ancestry based hostile work environment

Having failed to satisfy prongs one and two of the Lehmann framework, the court has more than sufficient grounds to grant summary judgment to defendants on

the LAD discrimination count based on ancestry related hostile work environment and discrimination. That said, and for the purposes of completeness, the court notes that neither prongs three nor four of the standard find any support in the record either. There is no proof that any condition of employment was changed or that some other person of similar ancestry would conclude otherwise.

These two points are to be viewed objectively. There is no allegation that plaintiff's terms of employment changed. And neither is there anything that any reasonable person of similar ancestry could look to in this record to conclude that Leclair's European style of writing remark was hostile, abusive, discriminatory, or changed the conditions of plaintiff's employment. This remark as made, in context, while perhaps lacking in grace and diplomacy, is simply not capable of creating the sort of sea change in the workplace environment that plaintiff alleges occurred.

Discriminatory termination based on national ancestry

Plaintiff alleges she "was discriminated against in the terms and conditions of her employment, including, without limitation, wrongful termination .... that would not have occurred but for the fact that she is of Indian descent ...." [5]

[5] This language comes from the fourth count of the complaint. In an attempt to track the complaint as best as possible (not an easy task given the blended nature of the claims and the seemingly overlapping count headings) the court has been presenting its ruling count by count. To the extent the court may have misread the location of a particular claim as inside a particular count, the parties

Having carefully examined the very large record, the court agrees with the movants that it lacks any direct evidence of plaintiff's alleged discriminatory discharge. Therefore, plaintiff's claim for ancestry discriminatory discharge is subject to the three-part burden shifting analysis of McDonnell Douglas Corp. v. Green, 411 U.S. 792, (1973). See Victor, *supra*, 203 N.J. at 408-09.

To establish her *prima facie* case of discriminatory discharge, plaintiff must demonstrate: that she is in a protected class; that she was otherwise qualified and performing the essential functions of the job; that she was terminated; and that Novartis thereafter sought similarly qualified individuals for that job. Id. "Under the McDonnell Douglas test, a plaintiff must satisfy the four-pronged test that our courts have modified to suit certain forms of discrimination in particular settings." Id.

In their arguments, movants assumed (for motion purposes only) that plaintiff met her *prima facie* case. The court will do so as well. In making that assumption, even in light of the movants' express, stated reservations as to how that could be possible, a presumption of discrimination is then created. Novartis is then obliged to rebut that presumption by "articulating a legitimate and non-discriminatory reason for the termination." Id. citing Zive v. Stanley Roberts, Inc., 182 N.J. 436, 458 (2005). The burden of persuasion, however, remains with the plaintiff. Once

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are referred to the substance of the court's ruling as to each claim made by the plaintiff, labeling of the counts notwithstanding.

Novartis rebuts the presumption of discrimination, plaintiff "must 'not simply show that the employer's reason was false' or pretextual, 'but must also demonstrate that the employer was motivated by discriminatory intent.'" Id. (quoting Zive, 182 N.J. at 449).

The undisputed facts establish that, since plaintiff was onboarded to the Cardio Franchise, she engaged in an escalating pattern of insubordination. This conduct was documented in her own emails and secret recordings. All of this culminated in her final one on one meeting with Leclair on May 16, 2018. That meeting ended with plaintiff slamming her laptop, walking out, and then not responding to calls and messages from Leclair. The next day, May 17, 2018, Novartis terminated plaintiff's employment due to "several factors, including but not limited to, unacceptable values and behaviors and an unwillingness to work productively with [her] line leadership team."

This is why plaintiff was fired. Therefore, unless she can demonstrate that there is proof of some other, nefarious basis, the claim for unlawful and discriminatory termination cannot succeed.

A plaintiff may defeat a motion for summary judgment "'by either (i) discrediting the proffered reasons, either circumstantially or directly, or (ii) adducing evidence, whether circumstantial or direct, that discrimination was more likely than

not a motivating or determinative cause of the adverse employment action." DeWees v. RCN Corp., 380 N.J. Super. 511, 528 (App. Div. 2005). To do so, a plaintiff "must submit evidence that either casts sufficient doubt upon the employer's proffered legitimate reason so that a factfinder could reasonably conclude it was fabricated, or that allows the factfinder to infer that discrimination was more likely than not the motivating or determinative cause of the termination decision." Crisitello v. Saint Theresa Sch., 465 N.J. Super. 223, 240 (App. Div. 2020).

On this record, this is an impossible task for plaintiff because there is no evidence in the record that plaintiff's Indian heritage played any part in any way whatsoever in Novartis's motivation to terminate her. The court is therefore satisfied that Novartis is entitled to summary judgment dismissing plaintiff's claim for discriminatory termination based upon her ancestry.

Aiding and abetting by Leclair

Plaintiff claims Leclair aided and abetted Novartis's alleged various LAD violations, including creating a hostile work environment, discriminating against her for discharging her based on her ancestry, failing to reasonably accommodate her disability, and retaliation.

The standard for determining whether an individual LAD defendant aided and abetted an employer's alleged violation requires plaintiff to show that: Novartis

performed a wrongful act under the LAD that causes an injury; that Leclair must be generally aware of her role as part of an overall illegal or tortious activity at the time that she provides the assistance; and that Leclair must have knowingly and substantially assisted the principal violation. See Tarr v. Bob Ciasulli's Mack Auto Mall, Inc., 181 N J. 70, 84 (2004). Aiding and abetting liability requires "active and purposeful conduct." Id.

Each of plaintiff's various LAD based claims fail because the undisputed evidence in the record does not support their required elements. This means that plaintiff cannot establish that Novartis performed a wrongful act under the LAD. As such, neither can plaintiff establish the first prerequisite for her claim of aiding and abetting against Leclair.

Without showing a wrongful act by Novartis, the claim that Leclair aided and abetted the commission of such an act fails as a matter of law. In other words, since Novartis did not perform a wrongful act causing injury or harm to plaintiff, the first element of the aiding and abetting standard is not satisfied. Additionally, plaintiff has not presented any evidence that Leclair was aware of her role in any illegal or tortious activity or that she knowingly or substantially assisted Novartis in violating the LAD.

For these reasons, the court grants the defense motion for summary judgment as to counts four and six of plaintiff's complaint.

PLAINTIFF'S LAD RETALIATION CLAIM – COUNT V

Under N.J.S.A. 10:5-12(d), it is an unlawful employment practice:

> [f]or any person to take reprisals against any person because that person has opposed any practices or acts forbidden under this act or because that person has filed a complaint, testified or assisted in any proceeding under this act or to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this act.

Plaintiff alleges that she was retaliated against for complaining about Leclair's European writing style comment. Nothing in the record supports this.

The exchange regarding defendants writing style took place in January 2017.[6] At the time of plaintiff's complaint, Leclair forwarded plaintiff's complaining email to the Business Practices Office ("BPO"). Among the roles of the BPO, is to review internal complaints and assigned them to the appropriate department for investigation. Following Leclair's doing so, plaintiff herself then notified the BPO that she was offended by the comment.

[6] Plaintiff was terminated May 2018.

According to plaintiff, she took offense as she felt the comment conveyed an ignorance on Leclair's part the plaintiff was an American citizen. Based upon plaintiff's contemporaneous characterization of Leclair's actual comment, which plaintiff restated in an email to Leclair and to the BPO representative during one of the secretly recorded conversations, plaintiff admitted the comment was about her writing style being similar to a European writing style (something with which Leclair apparently had a problem). Plaintiff never indicated that Leclair's comment had anything to do with her being of Indian descent, ostensibly because no such comment was made and no such meaning could be inferred from the comment that was made. The idea that plaintiff might take offense to this banal comment is, at best, idiosyncratic and hypersensitive and certainly not a basis on which this claim of retaliation can be sustained.

To establish a *prima facie* retaliation claim under the LAD, plaintiff must demonstrate that: plaintiff was in a protected class; plaintiff engaged in protected activity known to the employer; plaintiff was thereafter subjected to an adverse employment consequence; and that there is a causal link between the protected activity and the adverse employment consequence. See e.g., Woods-Pirozzi v. Nabisco Foods, 290 N.J. Super. 252, 274 (App. Div. 1996). Like plaintiff's CEPA and other LAD claims, the McDonnel Douglas burden-shifting paradigm applies to her claim for retaliation. Woods-Pirozzi, 290 N.J. Super. at 274. A person engages

in a protected activity for purposes of N.J.S.A. 10:12-5(d) "when that person opposes any practice rendered unlawful under the LAD." Young v. Hobart West Group, 385 N.J. Super. 448, 466 (App. Div. 2005).

"[P]laintiff bears the burden of proving that ...her original complaint--the one that allegedly triggered [Novartis's alleged] retaliation--was made reasonably and in good faith." Carmona v. Resorts Int'l Hotel, Inc., 189 N.J. 354, 373 (2007). Significantly, "[t]he obverse also holds true: an unreasonable, frivolous, bad-faith, or unfounded complaint cannot satisfy the statutory prerequisite necessary to establish liability for retaliation under the LAD." Id. In determining whether the underlying complaint was reasonable such that it constitutes the requisite protected activity, our Supreme Court has stated "[w]e do not suggest that the LAD has created a sort of civility code for the workplace where only language fit for polite society will be tolerated." Battaglia v. United Parcel Service, Inc., 214 N.J. 518, 549 (2013).

Plaintiff's complaint that Leclair created a hostile work environment by making a single remark that plaintiff's writing style resembled an ineffective style of writing more like a European writing style than Leclair's preferred presumably American style of writing is simply not reasonable. The idea that this comment was made because plaintiff was of Indian descent as opposed to a bad writer (at least stylistically in Leclair's eyes) is not borne out by anything other than plaintiff

asserting that to be so (without any sort of evidence) after the fact. Neither the emails sent to the BPO nor the secret conversation recorded by plaintiff indicate in any way that there was any negative ethnic connotation, derogatory statement, or discriminatory epithet involved.

"When an employee voices a complaint about behavior or activities in the workplace that he or she thinks are discriminatory, we do not demand that he or she accurately understand the nuances of the LAD." Id. at 548-49. Rather, "as long as the complaint is made in a good faith belief that the conduct complained of violates the LAD, it suffices for purposes of pursuing a cause of action." Id. at 549. On this record the court cannot conclude that this complaint about this interaction was made in good faith.

Even if the complaint had been made in good faith, plaintiff's retaliation claim would still be subject to dismissal given her inability to connect her complaint about the supposedly offensive comment and her termination. Put simply, there is just nothing there. The record is profoundly lacking any evidence of a causal connection between plaintiff's complaint and her termination some seventeen months later (the termination being the adverse employment action). The undisputed evidence establishes that plaintiff was terminated because of escalating insubordinate conduct as has already been described. Novartis has made a showing of a legitimate non-

retaliatory reason for its decision to terminate plaintiff. In response, "[p]laintiff must then show that a retaliatory intent, not the proffered reason, motivated [Novartis's] actions. Plaintiff may do this either indirectly, by proving that the proffered reason is a pretext for the retaliation, or directly, by demonstrating that a retaliatory reason more likely than not motivated defendant's action." Woods-Pirozzi, 290 N.J. Super. at 274. As is the case with her CEPA and other LAD claims, there is just no pretext evidence in the record.

For the reasons, explained, the court grants the defense motion dismissing plaintiff's LAD retaliation claim as set forth in count five.

PLAINTIFF'S NIED & IIED CLAIMS – COUNTS VII & VIII

Plaintiff brings claim for intentional infliction of emotional distress ("IIED") and negligent infliction of emotional distress ("NIED") against defendants. Our courts have consistently held that the LAD preempts common law claims that are (1) based on the same factual predicates and (2) seek the same relief as a plaintiff's LAD claim. A supplementary cause of action is not allowed when the LAD provides a remedy for the wrong.

In Catalane v. Gilian Instrument Corp., the court made clear that common law claims were not allowed under the LAD and that claims arising from a violation of the LAD were purely "statutory." 271 N.J. Super. 476, 492 (App. Div. 1994) The

court stated that that "[o]ur Legislature has declared the remedies available under the LAD and would appear to have expressed the view that a common law claim for discrimination is unnecessary as the statute should be read broadly enough to encompass those claims and damages previously available at common law."

Because of the broad availability of remedies under the LAD, both state and federal courts in New Jersey have frequently held that the LAD bars common law claims based on the same operative facts as underlie the LAD claim. Where the factual predicates for the common law claims and the LAD claims are the same and the remedies sought are the same, the common law claims are barred. Numerous instances can be found in scores of unpublished state and federal court cases holding that the LAD provides plaintiff with all remedies available in common law tort actions.

Plaintiff's complaint makes it clear that her IIED and NIED claims are based on the same underlying conduct as her harassment claims. (See compl. ¶ ¶ 191 and 198 "Plaintiff . . . repeats and realleges each of the foregoing allegations as if set forth at length herein."). The exclusivity of the LAD therefore preempts any supplemental common law tort action that is based on the same factual predicate. Accordingly, plaintiff's IIED and NIED claim against defendants are

preempted by the LAD and summary judgment will be granted on counts seven and eight.

SUMMARY JUDGMENT IS APPROPRIATE

Pursuant to Rule 4:46-2(c), summary judgment must be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." In Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995), the Supreme Court held that "a determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to 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 nonmoving party."

"The 'judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" Id. (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)). A genuine issue of material fact must be of a substantial, as opposed to being of an insubstantial nature. Id., 142 N.J. at 529. "Substantial" means '[h]aving substance; not imaginary,

unreal, or apparent only; true, solid, real,' or, 'having real existence, not imaginary[;] firmly based, a substantial argument.'" Id. (citations omitted).

Disputed facts which are immaterial, fanciful, frivolous, gauzy, or merely suspicious are insubstantial, and hence do not raise a genuine issue of material fact. Id. (citations omitted). Finally, "[m]ere assertions in the pleadings," however, are insufficient to defeat a motion for summary judgment. Ocean Cape Hotel Corp. v. Masefield Corp., 63 N.J. Super. 369, 383 (App. Div. 1960).

As set forth above, the record lacks any disputed material fact that supports plaintiff's claims for relief against Novartis or against Leclair. To the contrary, the undisputed evidence in plaintiff's own written emails and secret recordings lack, as defendants assert, "even one scintilla of evidence that supports her claims but, rather, are complete with evidence supporting [Novartis's] continued efforts toward [p]laintiff's success despite her pattern of ongoing insubordination as well as NPC's legitimate nondiscriminatory reasons for its decision to terminate her employment."

The defendants' motion for summary judgment as to all counts of plaintiff's complaint is granted.