SUPERIOR COURT OF NEW JERSEY
ESSEX VICINAGE

CHAMBERS OF

MICHAEL R. CASALE
JUDGE

ESSEX COUNTY
COURTS BUILDING
NEWARK, NEW JERSEY 07102

July 15, 2010

William Maderer, Esq.
Saiber LLC
18 Columbia Turnpike, Suite 200
Florham Park, NJ 07932

Charles J. Sciarra, Esq.
Sciarra & Catrambone, LLC
1130 Clifton Ave., Suite 3
Clifton, NJ 07924

Re: Henry-Taylor v. UMDNJ et al.
Docket No.: ESX-L-9979-06

Dear Counselors:

This matter comes before the Court by way of a Motion for Summary Judgment filed by Plaintiff Deirdre Henry Taylor (hereinafter "Plaintiff"). Defendants University of Medicine & Dentistry of New Jersey and University Hospital (collectively referred to as "Defendants") have Cross-Moved for Summary Judgment and have also Moved to Strike Plaintiff's Statement of Undisputed Facts.

STATEMENT OF FACTS

Plaintiff commenced her employment with Defendants on January 5, 2002 as a Compliance Officer. At the time Plaintiff was hired, she was supervised by Sid Mitchell until December 2003. Plaintiff had a "straight line" reporting structure to Mitchell and a "dotted line" to Karen Silliter, who was the UMDNJ Compliance Officer until her replacement in 2003 by Mary Kate Noonan. Plaintiff alleges she first learned of the subject billing issue in approximately April 2003 from Adam Henick. Henick was hired by the University Hospital as Vice President of the Ambulatory Care Center in April 2002 until his termination in April 2004. Henick allegedly expressed his concern to Plaintiff that UMDNJ needed to resolve the billing issue quickly, as it was allegedly continuing for a long period of time. Plaintiff further claims Henick suggested that she attend the Task Force meetings because of her position. Plaintiff also alleges Kathryn Gibbons, the Executive Director of Revenue Policy and Fiscal Analysis for the University Hospital, also explained to Plaintiff the related billing issues.

There were two components to the double-billing issue: (1) the billing of Medicare Code 11; and (2) the Medicaid cost report reimbursement for clinical billing and physician costs. Medicare pays doctors a higher amount when the doctor provides care at a private office (Code 11) and a lower amount when care is rendered at a hospital-based clinic (Code 22). It is alleged that some of the physicians at the University Hospital were providing services in the clinics, which could be objectively considered hospital-based clinics, yet billing Medicare with Code 11 as if the services were provided in a private office.

Further, Medicaid reimburses the hospital for physicians' costs. Medicaid will take costs included by the hospital in the Medicaid cost report and create a "Schedule D3." Medicaid uses this Schedule D3 to reimburse the hospital for the physicians' costs associated with providing services to Medicaid patients. Medicaid only pays one party, either the hospital or physician, but not both. Plaintiff alleges she learned that, for some departments, the Hospital was claiming reimbursement for physician services, while the doctors were billing for those very same services through the University Physicians Association ("UPA"). Plaintiff alleges that Gibbons was the first UMDNJ employee to bring the double-billing issues to light.

In mid-2003, Plaintiff became part of the Task Force to address the double-billing issues. Plaintiff alleges that the Task Force had been meeting for at least one year prior to her joining this group. The Task Force was comprised of Jim Lawler, Gibbons, Dr. Deborah Johnson, Walker-Modu, Henick, Jane Feeney, Silliter, Mike Saulich and Plaintiff. Plaintiff notes Mitchell and Vivian Sanks-King attended two meetings. Sanks-King was also acting as UMDNJ's General Counsel at the time. Dr. Johnson was a member of the UPA and Associate Dean of the University's Medical School. Johnson allegedly reported directly to Dr. John Petillo, UMDNJ's acting President from September or October 2004 until about February 2006. Dr. Petillo later left UMDNJ at the request of former Governor Jon Corzine. Plaintiff alleges she was the lowest ranking person at these meetings, with the exception of Jane Feeney.

Plaintiff stated that members of the Task Force were split as to how to resolve the billing issue, with Plaintiff, Lawler and Gibbons believing that the faculty practice should cease billing the technical part of Code 11 and the University could compensate the faculty for not receiving this form of compensation. Plaintiff alleges that Johnson and Walker-Modu were of the opinion that the UPA could continue to bill Code 11. Plaintiff alleges that after voicing her concerns, Johnson started to treat her "differently," and she was under the impression that Johnson did not want Plaintiff or Gibbons at the meetings.

It was at one of these meetings when Plaintiff allegedly learned of the Kalison McBride opinion letter. The Kalison McBride letter was a memorandum prepared by attorney Andrew McBride who had been retained by UMDNJ to review the billing issue in 2001. The final draft of the opinion concluded that Defendants' billing practices were not illegal, but recommended the University should check with the physicians to see if they were separately billing for the same services for which the Hospital was being reimbursed. Plaintiff alleges she was first advised that the billing issues started in 2001, which concerned Plaintiff at the time. Plaintiff alleges that she voiced her concerns to Walker-Modu, Gibbons and Sanks-King as to why no minutes were being taken at the Task Force meetings. Plaintiff allegedly recommended minutes to be taken from a compliance standpoint, and when her idea was rejected by Sanks-King, Plaintiff started taking her own personal notes. These notes were later produced as part of the Hospital's response to subpoena requests by the U.S. Attorney's Office.

At one of the Task Force meetings, Plaintiff alleges she expressed to Mitchell that the relationship between UMDNJ and UPA would "ruin" UMDNJ. Plaintiff further alleges she reiterated her concerns during a one-on-one meeting with Mitchell. In her deposition, Plaintiff alleges that after joining the Task Force, she started "making noise," along with other individuals, to the Dean, Sanks-King, the President, and "to anyone who would listen" (Sciarra Cert., Exhibit C, Plaintiff's Dep. T142:7-16). Plaintiff allegedly took the billing problems up to Mitchell, Sanks-King, Silliter and Noonan, who were all senior executive-level employees.

In approximately 2003 or the beginning of 2004, Henick allegedly approached Plaintiff about reporting the billing issue to the Office of the Inspector General ("OIG"). Plaintiff alleges she encouraged Henick to report the matter because it had went on for so long. Plaintiff alleges that "everyone," including Sanks-King, knew of her involvement with Henick's report. Plaintiff claims that Henick first approached her to report the billing issue to OIG several months earlier, but Plaintiff told him to wait until she attempted to correct the matter with Sanks-King and Mitchell. Plaintiff stated she wanted to try to work out any issues internally before going outside of the

Hospital. When Plaintiff allegedly spoke to Sanks-King about Henick's intentions, Sanks-King allegedly stated that she did not like Henick making threats. Plaintiff also alleges that secret meetings were being held where Gibbons, Lawler and herself were not invited.

Most importantly, Plaintiff alleges she was part of the group who drafted the November 16, 2004 letter to John Guhl of the Division of Medical Assistance and Health Services (hereinafter referred to as the "Guhl letter") discussing the double-billing issues. Plaintiff recalled that she and other Task Force members voiced their opinion that the Guhl letter should be forwarded out to the Division. Plaintiff alleges that Lawler took her notes from the meetings and used them to draft the letter. Plaintiff further alleges that she had discussions with Cox about the Guhl letter. After Henick was allegedly forced to resign from the Hospital, he contacted the authorities regarding UMDNJ's billing practices.

In approximately 2004, Plaintiff and Henick were removed from the Task Force. Plaintiff believed Johnson viewed her as a "whistle-blower." Plaintiff alleges she learned from Johnson's assistant, Wendy Moses, that Johnson requested Plaintiff to be removed from the meetings. However, after Silliter left UMDNJ and was replaced by Noonan, Noonan began to re-invite Plaintiff to the Task Force. Plaintiff's later involvement with the Task Force was again suspended and reinstated throughout 2004 and 2005.

Sometime during the Summer of 2005, UMDNJ received subpoenas from the U.S. Attorney's Office regarding the billing issue. Plaintiff assisted in producing documents on behalf of Defendants in compliance with the subpoenas. Herve Gouraige had represented UMDNJ as outside counsel since 1996 in a variety of billing investigations. Gouraige was hired by the General Counsel's office to allegedly review Medicare and Medicaid billing issues and to provide counsel to the University and Board. Gouraige's involvement with the billing issues lasted through December 2005 and January 2006, when the matter was then transferred to Walter Timpone, Esq. Timpone was appointed by UMDNJ's Board as counsel for the University in 2005. Plaintiff alleges that Gouraige met with staff attorneys from the U.S. Attorney's Office, along with U.S. Attorney Christie, and later recommended to the Board of Trustees that they establish a committee to be his principal contact with the University about the billing issue. Gouraige testified that this subcommittee of the Board met periodically from the time it was created in the late Summer up to December 2005.

On or about August 5, 2005, Plaintiff received her performance evaluation from her then-supervisor Cox. Plaintiff was rated as being "instrumental to the department's overall success" and was noted as performing in an "exemplary manner." Moreover, on September 1, 2005, Cox received a letter from Robert Saporito, DDS who was UMDNJ's Senior Vice President of Academic Affairs. Saporito commented that Plaintiff's "extraordinary service should be recognized during her annual performance evaluation." Petillo was also copied on this correspondence.

On September 9, 2005, Plaintiff alleges that Gouraige, his associate Lawler, the Chief Financial Officer of the Medical School, Walker-Modu, Johnson, Noonan, Gibbons and herself had a meeting regarding billing and the pediatrics clinic. In the meeting, which Gouraige described as "contentious," Plaintiff alleges Johnson questioned Gouraige as to why he was revealing to the government the entire 17 year history of the double-billing issue, instead of only from 2000 forward as requested. Gouraige again met with the U.S. Attorney's Office on September 21, 2005 to discuss the billing issue, whereby he allegedly placed the blame on the UPA.

Gouraige later interviewed Petillo on or about November 3, 2005. Petillo allegedly stated that he became aware of the double-billing issue when he became interim President in June 2004. Contrary to his deposition testimony, Plaintiff notes Petillo told Gouraige he did not recall being told of this double-billing issue. Plaintiff also alleges that besides delegating the matter to Sanks-King and informing the Board, Petillo took no further action regarding the billing issue. Plaintiff notes that during Petillo's deposition, he denied knowing Plaintiff prior to the date of her termination. Notwithstanding this testimony, Plaintiff points to an alleged conversation between Gouraige and Petillo on November 3, 2005. Gouraige allegedly spoke with Petillo of "Henry-Taylor's conversation

with Adam Henick, that 'after the election, indictments are going to start,' and that they will be targeted at 'Jim Archibald, John Ekarius, and Vivian Sanks-King'" (Id., Exhibits R and I).

During this interview, Petillo and Gouraige also allegedly discussed Henick in more detail and his actions in alerting the government. Plaintiff also cited a December 13, 2005 letter from the Chairperson of the Board of Trustees, Sonia Delgado to Petillo. In the correspondence, Delgado indicated that significant decisions, which would include "both personnel decisions either at the hospital or in central administrations" and any decisions directly impacting the investigation, should not be made without first consulting the Board of Trustees.

On or about December 14, 2005, Gouraige interviewed Plaintiff. Plaintiff points out this was a mere seven days before she was terminated. Plaintiff did not want personal counsel before preceding. During the interview, Plaintiff alleges she indicated that she reported the double-billing issue to Mitchell, her supervisor, in 2004. Plaintiff also allegedly stated that she told Mitchell the relationship between UMDNJ and the UPA would "ruin" UMDNJ. Gouraige admitted in his deposition to later independently verifying these statements with Mitchell. Plaintiff also allegedly told Gouraige that she expressed concern to both Walker-Modu and Sanks-King that there were no official minutes taken during the Task Force meetings.

On or about December 20, 2005, the Board of Trustees held a meeting to develop a proposal to the U.S. Attorney's Office regarding the double-billing issue. This meeting was also allegedly attended by U.S. Attorney Christie, other members of the U.S. Attorney's Office, Petillo, and Gouraige. During this meeting, the Board was advised that UMDNJ was potentially the subject of indictments because of the Medicare/Medicaid billing issue. However, Plaintiff alleges that during the meeting, there was no indication that any employees had to be terminated or that any employee was mentioned as a target or person of interest in the investigation.

UMDNJ had until January 11, 2006 to decide whether to enter into the Deferred Prosecution Agreement ("DPA"). Also during the meeting, the U.S. Attorney purportedly stated that Gouraige could no longer represent UMDNJ with regard to the double-billing issue because of a conflict. Timpone stated in his deposition that he was present at the meeting and that the Board retained him to negotiate the terms of the DPA because of Gouraige's conflict. However, Plaintiff points out that the minutes to the meeting does not reflect Timpone's attendance, and Petillo testified he had no recollection of Timpone at the meeting. Plaintiff also notes that Timpone has offered conflicting statements as to whether U.S. Attorney Christie had approved his involvement.

Thereafter on December 22, 2005, a meeting was held at then-Acting Governor Codey's Newark office. Timpone claims in his August 2007 certification that the meeting was attended by Christie, three Assistant U.S. Attorneys, Acting Governor Codey, Timpone and the Governor's Counsel Paul Fader. Plaintiff notes in Timpone's 2007 certification Christie stated UMDNJ would not be permitted to enter into to the DPA unless certain pre-conditions were met, including the termination of four UMDNJ employees. Plaintiff points out that in Timpone's deposition, he remembered asking Christie himself why certain employees had to be terminated, to which Christie allegedly replied that they were "part of the problem." However, Timpone could not recall in his deposition Fader or Governor Codey having anything to say about the four employees who had to be terminated.

By contrast, Plaintiff points out that Fader testified that Christie provided a lengthier response to the same question, which mentioned specific activities the employees were involved in, including an alleged email that requested changes to the McBride opinion letter. However, Fader could not recall whether Christie specifically named Plaintiff as a person who had to be terminated. Moreover, Gouraige was allegedly never told that anyone had to be terminated as a condition of the DPA. Plaintiff notes that although Timpone certified that there were "pre-conditions, including the termination of four UMDNJ employees," the only precondition he could later name at his deposition was the termination of the four employees. Moreover, Timpone further certified and stated in his deposition that Petillo, in fact, attended the December 22nd meeting. However, Petillo testified that he "absolutely" and "unequivocally" did not attend the meeting.

Fader stated that after the meeting with Christie, he drove to Petillo's office where he met with Petillo and Timpone. Petillo testified he then learned from Timpone and Fader that Plaintiff had to be terminated. Plaintiff alleges that Timpone did not take any further actions to investigate the terminations. Plaintiff was then paged to come to Petillo's office. Plaintiff claims that Petillo then told her she had to resign by the end of the day. Plaintiff alleges that Petillo first blamed the resignation on the billing issue, however after Plaintiff protested, he then claimed that the U.S. Attorney's Office demanded her resignation. At this meeting, Plaintiff alleges that Petillo did not mention her resignation was a condition of the DPA. Plaintiff notes that although Christie allegedly demanded her termination, she was allowed to resign.

Petillo later admitted in his deposition that he did not know the reason why Plaintiff had to be terminated. Petillo never received anything orally or in writing from U.S. Attorney Christie's office as to these alleged reasons. Even further, Plaintiff notes that there is nothing written in the terms of the DPA which indicates that the termination of certain UMDNJ employees was a condition precedent to the agreement itself. Plaintiff also claims that Petillo's decision to terminate Plaintiff conflicted with Delgado's December 13th letter, which told Petillo not to make any personnel decisions without first consulting the Board of Trustees.

The DPA was subsequently entered into by UMDNJ in late December 2005. Plaintiff claims that Walker-Modu was not terminated until January 2006, after the DPA was signed, even though her termination was also an alleged precondition to the agreement. Plaintiff notes that none of the indictments issued by the U.S. Attorney's Office against UMDNJ employees involved any of the four employees terminated as an alleged precondition to the DPA. Plaintiff also notes that shortly after December 22, 2005, Timpone became General Counsel for the University in place of Sanks-King, whose termination was also allegedly a condition precedent of the DPA.

LEGAL ANALYSIS

I. The Summary Judgment Standard

New Jersey Court Rule 4:46 states the standard for granting a Motion for Summary Judgment:

> The movant is entitled to summary judgment if, on the full motion record, the party opposing the motion, who is entitled to have all the facts and inferences viewed most favorably to it, has not demonstrated the existence of a material and genuine issue of factual dispute.
>
> *****
>
> The judgment or order sought shall be rendered forthwith 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. See R. 4:46-2.

Under this standard, a "genuine issue" of material fact precludes summary judgment if a rational fact-finder could find the alleged disputed issue in favor of the non-moving party. All inferences of doubt are to be drawn against the movant in favor of the party opposing the motion. Brill v. Guardian Life Ins. Co. of America, 142, N.J. 520 (1995).

When deciding a motion for summary judgment under R.4:46-2, whether there exists a genuine issue with respect to a material fact requires the motion judge to consider if the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. Davidson v. Slater, 189 N.J. 166, 186 (2007). Where there is a failure to meet the prima facie case standard for summary judgment, the motion must be denied. Questions of law dependent upon the operative facts cannot be

decided by summary judgment when those facts are in dispute. Parks v. Pep Boys, 282 N.J. Super. 1 (App. Div. 1995).

II. Whether Plaintiff is Entitled to an Award of Summary Judgment under the Facts of the Case

Plaintiff alleges specific retaliatory conduct in violation of CEPA, namely her termination from employment. CEPA codifies and expands the common law cause of action first enunciated in Pierce v. Ortho Pharmaceuticals Corp., 84 N.J. 58 (1980), which "protects at-will employees who have been discharged in violation of a clear mandate of public policy." Higgins v. Pascack Valley Hospital, 158 N.J. 404, 417-418 (1999). CEPA is considered a "remedial" legislation and therefore should be construed liberally to effectuate its important social objectives. Abbamont v. Piscataway Bd. of Ed., 138 N.J. 405, 431 (1994). The goal behind CEPA is to protect employees who report "illegal or unethical work-place activities." Barratt v. Cushman & Wakefield of N.J., Inc., 144 N.J. 120, 127 (1996).

To establish a cognizable claim under CEPA, an employee must demonstrate (1) she reasonably believed that the employer's conduct was violating either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy; (2) she performed a "whistle-blowing" activity described in N.J.S.A. 34:19-3(c); (3) an adverse employment action was taken against her; and (4) a causal connection exists between the whistle-blowing activity and the adverse employment action. See Massarano v. N.J. Transit, 400 N.J. Super. 474, 488 (App. Div. 2008) (quoting Dzwonar v. McDevitt, 177 N.J. 451 462 (2003)).

A. Whether Plaintiff Has Demonstrated a Prima Facie CEPA Cause of Action

Plaintiff alleges she was terminated for voicing her concerns about the double billing issue, attempting to document the Task Force meetings and for being part of the "team" that provided information to an outside agency. In relation to Plaintiff's prima facie case, the Court will assume that Plaintiff meets her burden under the first and third prongs of the CEPA test, in the interest of judicial economy, and will focus its inquiry on the disputed "whistle-blowing" activities and causal connection.

1. Plaintiff's alleged "whistle-blowing" activities

A plaintiff must demonstrate she engaged in a whistle blowing activity as defined by CEPA. In regards to whistle-blowing activity, an employer shall not take any retaliatory action because an 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, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, in the case of an employee who is a licensed or certified health care professional, reasonably believes constitutes improper quality of patient care; or
> >
> > (2) is fraudulent or criminal, including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity;

b. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer, or another employer, with whom there is a business relationship, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, in the case of an employee who is a licensed or certified health care professional, provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into the quality of patient care; 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, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, if the employee is a licensed or certified health care professional, constitutes improper quality of patient care;

(2) is fraudulent or criminal, including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity; 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. Stat. § 34:19-3]

In the instant matter, Plaintiff alleges she engaged in several acts which constitute whistle-blowing pursuant to N.J.S.A. 34: 19-3 under subsections a, b and c. Specifically, Plaintiff claims: (1) during the Task Force meetings, Plaintiff objected to the view, held by Johnson and Walker-Modu, that the UPA could continue to bill Code 11; (2) Plaintiff also expressed her views about double-billing outside of the meetings to Mitchell, Sanks-King, Noonan, and Henick; (3) Plaintiff expressed her concerns over why the billing issue was going on for so long to Mitchell, Sanks-King, Silliter and Noonan, all of whom were executive-level employees above her in the chain of command; (4) Plaintiff complained about the billing issue "to anyone who would listen" with other UMDNJ employees; (5) Plaintiff and Noonan voiced concerns that Walker-Modu was allowing the billing issue to go one for so long; (6) Plaintiff complained to her supervisor Mitchell during one-on-one meetings; (7) Plaintiff objected to Sanks-King's position that there were not any minutes to the Task Force meetings and memorialized this objection in writing; (8) Plaintiff objected to Mitchell and Sanks-King when she was taken off the Task Force on two separate occasions; (9) Plaintiff was part of the "team" that drafted the November 16, 2004 Guhl letter; (10) Plaintiff encouraged Henick to report the double-billing issue to the OIG; and (11) Plaintiff was responsible for gathering documents in compliance with the U.S. Attorney's Office Federal Grand Jury subpoenas.

Plaintiff claims these whistle-blowing activities implicated both State and Federal laws and regulations. Plaintiff further claims her conduct implicates actions on the part of UMDNJ which are incompatible with a clear mandate of public policy concerning the public health, safety and welfare under the Health Care Facilities Planning Act. Defendants, in turn, argue that Plaintiff has not adduced any competent evidence during discovery to show that she was terminated in retaliation for any alleged whistle-blowing activity. Defendants further argue that Plaintiff never disclosed any information to anybody at UMDNJ who had not already known about the billing issue. Therefore, Defendants argue there was no "whistle" for Plaintiff to blow.

The Court agrees with Defendants, however, that simply performing one's "job duties" is not whistle-blowing under CEPA. See Massarano v. N.J. Transit, 400 N.J. Super. 474 (App. Div. 2008). Defendants claim one of Plaintiff's job functions during that period was to attend and participate in the Task Force meetings. In their Brief, Defendants cite foreign case law where the plaintiffs had complained about alleged improper conduct. However, none of these cases involve the key issue where outside entities, not just supervisors or employers, were allegedly made aware of the alleged illegal conduct by the subject whistle-blowers. In the case at hand, it is undisputed the Guhl letter was provided to an outside agency, although Defendants claim Plaintiff only made "minor changes" to it.

Based upon these material disputes, it will be for the trier of fact to determine Plaintiff's degree of involvement in preparing the Guhl letter or, perhaps, if executive-level employees perceived the threat that Plaintiff intended to provide outside authorities with more information. Here, the Court finds that the U.S. Attorney's investigation was prompted by certain whistle-blowing activities by UMDNJ employees. There is nothing in the case law which suggests, as Defendants argue, that the illegal conduct an employee complains about has to necessarily be "new" information to the employers. In fact, the statute seems to contemplate the exact scenario where an employee calls attention to long-standing illegal conduct which permeates the work environment.

2. Causal Connection Between the Activities and Termination

Defendants argue that, according to Plaintiff's own testimony, she was permanently excluded from the Task Force meetings in June 2005. Defendants note that all other "whistle-blowing" events Plaintiff cites occurred before this date. As such, the Defendants allege the latest possible date Plaintiff "blew the whistle" was in June 2005, at least six months prior to her termination, thereby negating any temporal proximity. Further, Defendants argue that, although Plaintiff cites her complaints to Johnson, Sanks-King, Gouraige, Mitchell and Cox, Plaintiff has not provided any evidence that any of these people played any role in the decision to terminate Plaintiff's employment. Moreover, Defendants argue that on the day of her termination, neither Petillo nor Timpone had any knowledge of her alleged whistle-blowing activities, and, therefore, could not have any thoughts of retaliating against her.

Yet, Plaintiff claims that although Petillo denied ever having knowledge of who she was before her termination, Gouraige's memo provides evidence that he spoke to Petillo about Plaintiff and Henick. Plaintiff points to Gouraige's deposition whereby Gouraige and Petillo spoke of the possibility of Sanks-King being "exposed" in the indictments only weeks before Plaintiff's termination. Plaintiff also notes that mere days before her termination, on December 14, 2005, Gouraige interviewed Plaintiff about the double-billing issue. Plaintiff informed Gouraige that she reported problem to her supervisor, which Gouraige later confirmed. Thereafter, on December 22, 2005, Plaintiff was terminated from her position. Plaintiff claims the termination was not based on her performance, as she only received positive feedback and reviews prior to her termination.

In the case at hand, the Court must make a determination if there is a substantial nexus between the complained-of conduct and a law or public policy identified by the court or the plaintiff. Dzwonar 177 N.J. at 464. The temporal proximity of employee conduct and an adverse employment action is one circumstance that may support an inference of a causal connection. Maimone v. City of Atlantic City, 188 N.J. 221 (2006). The Court cannot determine as a matter of law, under these circumstances, that the whistle-blowing activities set forth by Plaintiff was the reason for her termination. Causation is a highly context specific inquiry into the motives of an employer. Kachmar v. Sungard Data Systems Inc., 109 F. 3d 173, 178 (3rd Cir. 1997). It will be for the trier of fact to weigh the credibility of the witnesses, specifically Petillo, who alleges that he was completely unaware of who Plaintiff was prior to her termination.

III. Defendants' Proffered Legitimate, Non-Retaliatory Defense

Defendants argue that Petillo, UMDNJ's decision maker, testified that his sole motivation for asking Plaintiff to resign was because he understood that the U.S. Attorney's Office required it as a pre-condition to the DPA. Therefore, Defendants argue that because U.S. Attorney Christie's statement directing Plaintiff's termination constituted the basis of Petillo's termination, it is admissible in evidence as non-hearsay. Defendant claim they are not seeking to prove the actual truth of Christie's statement and only the effect on Petillo.

Where, as here, a plaintiff has no direct evidence of retaliation and is relying upon circumstantial evidence justifying an inference of retaliation, the courts apply the framework as set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and its progeny. Fleming v. Corr. Healthcare Solutions, Inc., 164 N.J. 90, 98-100 (2000). Under this standard, once an employee has made a prima facie case showing retaliation, the burden then shifts to the employer to articulate a legitimate, non-retaliatory reason for the alleged adverse employment decision. Id. at 100. If the employer does produce such evidence, the burden then shifts back to the employee who must show that the employer's explanation is incredible and only a pretext to retaliation. While it is true, as Defendants point out in Fleming, that in order to ultimately prevail Plaintiff must prove that retaliatory intent actually motivated her employer, this proof of subjective pretext becomes an issue only after the employer was able to articulate a legitimate, non-discriminatory/retalitory basis for adverse action.

Defendants argue that UMDNJ's sole motivation for terminating Plaintiff's employment was that the U.S. Attorney's Office required it in order for UMDNJ to enter into the DPA. Both Timpone and Petillo testified that at the December 20, 2005 Board meeting, Christie stated that, as a result of the investigation, UMDNJ could either enter into the DPA or be indicted. After the December 22, 2005 meeting at Governor Codey's Office, Timpone and Fader allegedly immediately went to Petillo's office to advise him of Christie's pre-conditions. Defendants argue that Plaintiff has not put forth any evidence that would dispute the fact that Petillo terminated Plaintiff at the direction of the U.S. Attorney's Office.

The Court must determine in the Motions before it whether Defendants' sole legitimate, non-retaliatory reason for terminating Plaintiff fails as a matter of law. On January 18, 2008, the late Judge Hector DeSoto heard the U.S. Attorney's Motion to Quash subpoenas that Plaintiff served on September 14, 2007. Plaintiff, before the Court, opposed the Motion to Quash and filed a Cross-Motion to Strike the Defendants' eleventh affirmative defense. UMDNJ opposed Plaintiff's Cross-Motion, but took no position with regard to the U.S. Attorney's Motion to Quash the subpoenas. Judge DeSoto ruled that the Court could not compel the U.S. Attorney's Office to answer the subpoena based upon sovereign immunity grounds.

However, Plaintiff's counsel arguably placed the Court and Defendants on notice that without discovery from the U.S. Attorney's Office, UMDNJ would be unable to articulate their non-retaliatory reason. Plaintiff, pointing to dicta, notes that Judge DeSoto agreed with Plaintiff's position that testimony from UMDNJ's witnesses about what U.S. Attorney Christie may have said regarding any preconditions would be inadmissible as hearsay. Judge DeSoto did, in fact, deny Plaintiff's application without prejudice as it was premature due to the limited amount of discovery exchanged at that point. Plaintiff alleges that Judge DeSoto's beliefs about the hearsay statements are the law of the case. See State v. Reldan, 100 N.J. 187, 204 (1985). However, the Court will not consider Judge DeSoto's dicta as binding, but will give it the proper discretion. Gonzalez v. Ideal Tile Importing Co., Inc., 371 N.J. Super. 349, 356 (App. Div. 2004).

After the hearing before Judge DeSoto, Defendants did not file any Motions to compel testimony from the U.S. Attorney's Office. In response to Plaintiff's prior Motion before this Court to bar the testimony and production from the U.S. Attorney's Office, counsel for UMDNJ, William Maderer, Esq., wrote to the Assistant U.S. Attorney Kevin O'Dowd and requested that his office produce witnesses and documents. Mr. Maderer conceded in this letter that such evidence was "essential" to the defense. This Court subsequently entered an Order giving Defendants until December 31, 2009 to produce individuals and documents from the U.S. Attorney's Office. The Order further

provided that if federal witnesses were not produced by the end of the year, the Court would grant Plaintiff's Motion to bar the testimony of Christie and any other witness from the U.S. Attorney's Office, and likewise exclude any documentary evidence or other testimonial evidence from the U.S. Attorney's Office. To date, Defendants have still not produced any evidence from the U.S. Attorney's Office directly supporting its claim.

Plaintiff claims that Defendants are relying on inadmissible hearsay to support its sole defense to her prima facie case. N.J.R.E. 801(c) defines hearsay as "a statement, other than the one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." However, Defendants argue this testimony is not hearsay because Christie's statement to Timpone and Fader, as repeated to Petillo, is not being offered for its truth, but rather for its effect on the listener. Defendants argue testimony offered to prove the state of mind and actual motivation of the listener is admissible testimony under N.J.R.E. 801 and 802.

Specifically, Defendants argue that in the retaliatory context, New Jersey courts have consistently held that statements concerning an employee are non-hearsay when they are relied upon by a decision-maker employer in terminating an employee and are offered to prove the employer's motivation. Defendants cite Carmona v. Resorts Int'l Hotel, Inc., 189 N.J. 354 (2007), where an employer's investigative report was admissible as non-hearsay, and El-Sioufi v. Simpson, 382 N.J. Super. 145 (App. Div. 2005), where a file of memoranda maintained by the plaintiff's supervisor was also admitted as non-hearsay. However, in the instant matter, the issue is not whether Petillo acted in good faith upon relying on internal performance reviews or circulating complaints about Plaintiff, as in the cited cases. Defendants are not seeking to submit an internal document, such as a co-worker's complaint, but a direct statement from an outside government agency.

In fact, the truth over whether or not Christie called for Plaintiff's termination is a key concern in this case. As in Spragg v. Shore Care, 293 N.J. Super. 33 (App. Div. 1996), the court held that the jury could only accept evidence as to the defendant's state of mind if it first accepted the subject statements to be the truth. Here, Petillo could not have acted in good faith by blindly relying upon Timpone and Fader's statements. There is no evidence showing that Timpone and Fader provided Petillo with any legal advice as to the potential consequences of terminating an employee without first conducting an internal investigation.

Further, if Petillo truly did not know of Plaintiff before that day, it should have been disconcerting to him that Christie singled her out as one of only four employees whose involvement in the fraud was so extensive that their termination was a mandatory pre-condition to the DPA. Finally, there is no mention in the Board of Trustee's minutes of December 20, 2005 and, more importantly, in the DPA of this alleged pre-condition. It would be rather surprising if Defendants would not have wanted to protect themselves down the line by clearly outlining any preconditions in writing in order to prove full compliance.

In the instant matter, the Court finds that Defendant's alleged legitimate, non-retaliatory reason for Plaintiff's termination fails as a matter of law. Moreover, since Defendants have not come forth with any alternate non-retaliatory reason for Plaintiff's termination, as set forth in their Answers to Interrogatories, the Court hereby strikes Defendant's Eleventh Affirmative Defense in its entirety. The court, therefore, need not consider whether Plaintiff could prove pretext, since the Defendants have not come forward with a viable rationale in its defense. See Greenberg v. Camden County Vocational & Tech. Schools, 310 N.J. Super. 189 (App. Div. 1998).

This decision, however, does not entitle Plaintiff to an award of summary judgment. Plaintiff argues that since Defendants have not satisfied their burden of production on this record, Plaintiff prevails as a matter of law with her CEPA claim. Although a plaintiff may be entitled to summary judgment where a defendant fails to articulate a rationale for the subject termination, the plaintiff must first meet his or her burden to prove the prima facie case. See Murray v. Newark Housing Authority, 311 N.J. Super. 163 (Law Div. 1998) (based upon the evidence presented, the Court ruled that the "presumption of discrimination which arose out of plaintiff's prima facie case remains unrebutted.")

CONCLUSION

In conclusion, the Court hereby **DENIES** Plaintiff's Motion for Summary Judgment, as there are still issues of material fact with respect to her prima facie CEPA claim. The Court further **DENIES** Defendants' Motion for Summary Judgment. However, based upon the Court's conclusion that U.S. Attorney Christie's previous statement regarding Plaintiff's termination is considered inadmissible hearsay, the Court hereby **STRIKES** Defendants' Eleventh Affirmative Defense with prejudice.

The Court has attached the Orders in accordance with this decision.

Sincerely,

Hon. Michael R. Casale J.S.C.

Encl.