REBECCA MCCARTHY, Plaintiff, v. CAREONE MANAGEMENT, LLC AND ALISON FITZPATRICK-DURSKI, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BERGEN COUNTY DOCKET NO.: L-8657-16 CIVIL ACTION

BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR INVOLUNTARY DISMISSAL OF PLAINTIFF'S DEMAND FOR PUNITIVE DAMAGES

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Defendants, Care One Management, LLC ("Care One"), and Alison Fitzpatrick-Durski ("Ms. Fitzpatrick-Durski") (collectively, the "Defendants"), by and through their undersigned counsel, submit the instant Motion for Involuntary Dismissal of Plaintiff's Demand for Punitive Damages.

STATEMENT OF UNDISPUTED FACTS

Plaintiff's entire race discrimination claim is premised upon being terminated from her position the day after, Ms. Fitzpatrick-Durski, allegedly said to Plaintiff that she "did not want a black person walking around in a suit as a Vice President."

Plaintiff admitted at trial, among other things:

- Ms. Fitzpatrick-Durski made no other comments, nor engaged in any other conduct, which Plaintiff considered to be racially motivated, derogatory or offensive.
- No other employee of Care One made any type of comment, nor engaged in any form of conduct, which Plaintiff considered to be racially motivated, derogatory or offensive.
- Plaintiff did not believe Care One was a company which discriminated against employees and Plaintiff would not have re-applied for a position with Care One in 2016 (having previously worked for the Company from 2007-2009) if that were the case.
- As the Vice President of Clinical Leadership, Plaintiff was the person ultimately responsible for addressing and correcting any Clinical problems or errors at the Center.

- Despite: (1) having e-mailed Executive Vice President Elizabeth Straus ("Ms. Straus"), General Counsel Alberto Lugo ("Mr. Lugo") and Chief Strategy Officer Timothy Hodges ("Mr. Hodges") the day before Ms. Fitzpatrick-Durski's alleged comment was made; and (2) having personal contact information for Ms. Straus, Mr. Lugo and Mr. Hodges – she made no effort to contact any of these three individuals to report Ms. Fitzpatrick-Durski's alleged comment on October 31, 2016.
- Despite having an obligation as a member of Care One's Management Team to report Ms. Fitzpatrick-Durski's alleged comment through any number of available reporting channels she never did.
- After being terminated from her employment on November 1, 2016, Plaintiff did not contest the basis for her firing i.e. deficient performance or report Ms. Fitzpatrick-Durski's alleged comment to anyone including Ms. Straus, Mr. Lugo, Mr. Hodges, Director of Nursing ("DON") Guirlande Valcin ("Ms. Valcin"), Regional Director of Operations ("RDO") Jean Joseph ("Mr. Jospeh"), anyone in Human Resources or anyone else at Care One.
- Plaintiff admitted in part to the existence of some of the deficiencies identified by Ms. Fitzpatrick-Durski as the basis for the termination of Plaintiff's employment.

As for Ms. Fitzpatrick-Durski the undisputed evidence at trial reveals, among other things:

- In early October 2016, Ms. Fitzpatrick-Durski was assigned to address and correct a number of operational and clinical care deficiencies at the Center.

- Ms. Fitzpatrick-Durski had been tasked with similar assignments at various Care One facilities during her career.
- **On the same day** Plaintiff claims Ms. Fitzpatrick-Durski made the above referenced statement, October 31, 2016, Ms. Fitzpatrick-Durski, requested that Byron Wilson ("Mr. Wilson") who is African-American, serve as her Assistant Administrator i.e. as the Center's second highest ranking employee.
- All five (5) direct reports hired by Ms. Fitzpatrick-Durski, each of whom was hired before November 1, 2016, are minorities, two (2) of whom are African-American.
- Ms. Fitzpatrick-Durski was previously married to an African-American man and is the mother of three (3) children who partake of African-American heritage.
- When asked directly, Mr. Joseph (who is African American and *among other things* celebrated Thanksgiving with Ms. Fitzpatrick-Durski) specifically affirmed that Ms. Fitzpatrick-Durski is NOT a racist.
- Each of: (1) Mr. Hodges; (2) Ms. Straus; (3) Mr. Joseph; (4) Former Care One Head of Human Resources Maureen Montegari ("Ms. Montegari"); (5) Former Center Administrator Matthew Schottlander ("Mr. Schottlander"); (6) Former Center Clinical Services Coordinator ("CSC") and DON Kim Komoroski ("Kim Komoroski"); and (7) Former Assistant Director of Nursing ("ADON") and Facility Educator ("FE") Cynthia Merkin – all confirmed that Ms. Fitzpatrick-Durski has never previously been the subject of any type of complaint, much less any allegation of discrimination.

The undisputed evidence at trial revealed among other things:

- Neither Defendant has ever been accused, much less found liable for engaging in race discrimination.
- Subsequent to resigning after having worked for just thirty-one (31) days, Plaintiff was promoted to the position of Vice President of Clinical Leadership and provided a raise by Ms. Straus and Mr. Hodges – two of the three highest ranking employees at Care One.
- In mid-October 2016, well before Ms. Fitzpatrick-Durski's alleged comment, in response to complaints from among others, hospital administration, doctors and staff about the quality of care in October 2016, Ms. Komoroski was asked by Ms. Straus and Mr. Lugo to assist at the Care One Center to which Plaintiff was assigned, with a number of clinical failings which Plaintiff was ultimately responsible for.
- Multiple witnesses independently corroborated the existence of the following problems which formed the basis for the termination of Plaintiff's employment:
    - The Center was months behind in Accident and Incident Reporting ("A&I Reports") and documentation was lacking for A&I Reports.
    - Patient care planning and grievances had not been addressed for months.
    - Plaintiff failed to transfer a federal Drug Enforcement Agency ("DEA") form/application[1] to the new Vice President of Clinical Services in September 2016, resulting in a depleting supply of narcotics and other medication.
    - Patients were delayed in receiving their medication.

[1] A DEA form/application is needed to obtain certain narcotics for the Center's patients.

- The Center's Administrator Mr. Schottlander, who is Caucasian, was demoted five (5) days before Plaintiff was terminated from her employment on November 1, 2016, and then terminated himself on November 4, 2016.
- The third member of the Center's leadership team (along with Plaintiff and Mr. Schottlander), Ms. Valcin, who is African American, continued to remain employed.

STANDARD OF REVIEW

Rule 4:37-2 governs motions for "Involuntary Dismissals." The rule states:

> After having completed the presentation of the evidence on all matters other than the matter of damages (if that is an issue), the plaintiff shall so announce to the court, and thereupon the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal of the action or of any claim on the ground that upon the facts and upon the law the plaintiff has shown no right to relief. Whether the action is tried with or without a jury, such motion shall be denied if the evidence, together with the legitimate inferences therefrom, could sustain a judgment in plaintiff's favor.

R. 4:37-2(b). A dismissal under *R.* 4:37-2(b) "operates as an adjudication on the merits." *R.* 4:37-2(d). This standard is applied to motions made at the close of plaintiff's case in jury trials. *Verdicchio v. Recca*, 179 N.J. 1, 30 (2004)

Dismissal is appropriate when no rational juror could conclude from the evidence that an essential element of plaintiff's case is present. *Pitts v. Newark Bd. of Educ.*, 337 N.J. Super. 331, 340 (App. Div. 2001).

The trial court to whom such motion is made should permit the motion to be argued and should place on the record its reasons for its action rather than perfunctorily denying it without affording the movant an opportunity a basis therefore. *Atlas v. Silvan*, 128 N.J. Super. 247 (App. Div. 1974). The motion made at the conclusion of the plaintiff's case is required to be then decided

since this rule provides no authorization for reserving the decision. *Castro v. Helmsley Spear, Inc.*, 150 N.J. Super. 160 (App. Div. 1977).

LEGAL ARGUMENT

I. Punitive Damages Standard.

"[P]unitive damages are only to be awarded in exceptional cases even where the LAD has been violated." *Saffos v. Avaya, Inc.*, 419 N.J. Super. 244, 263 (App. Div. 2011) (quoting *Catalane v. Gilian Instrument Corp.*, 271 N.J. Super. 476, 500-01 (App. Div. 1994)); *Maiorino v. Schering-Plough Corp.*, 302 N.J. Super. 323, 353 (App. Div. 1997) ("punitive damages are not automatically available simply on the basis of a LAD violation"); *Miller v. Beneficial Mgmt. Corp.*, 855 F. Supp. 691, 718 n.33 (D.N.J. 1994) ("mere violation of [an employment statute] is an insufficient basis on which to award punitive damages"). Two requirements must be met in addition to the bare fact of an LAD violation: "(1) 'actual participation in or willful indifference to the wrongful conduct on the part of upper management' and (2) 'proof that the offending conduct [is] "***especially egregious***."'" *Cavuoti v. N.J. Transit Corp.*, 161 N.J. 107, 113 (1999) (quoting *Rendine v. Pantzer*, 141 N.J. 292, 314 (1995); emphasis added); *Baker v. Nat'l State Bank*, 161 N.J. 220, 223 (1999) (same); *accord, e.g., Longo v. Pleasure Prods., Inc.*, 215 N.J. 48, 58 (2013).

The plaintiff must establish both requirements by "***clear and convincing evidence***," *N.J.S.A.* §2A:15-5.12(a) (emphasis added); *Longo*, 215 N.J. at 64, which is "evidence which leaves no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. It is a standard which requires more than a preponderance of evidence, but less than beyond a reasonable doubt, to draw a conclusion." *N.J.S.A.* §2A:15-5.10.

The last two statutory citations are to the New Jersey Punitive Damages Act, *N.J.S.A.* §2A:15-5.9 et seq. ("Act"), which expresses "a pervasive legislative intent to curb, rather than expand, the availability of punitive damages," *Dong v. Alape*, 361 N.J. Super. 106, 118-19 (App.

Div. 2003); *see also, e.g., Pavlova v. Mint Mgmt. Corp.*, 375 N.J. Super. 307, 403 (App. Div. 2005) ("The Legislature's purpose in enacting the Act was to establish more restrictive standards with regard to the awarding of punitive damages"). Application of the Act in LAD cases is "mandated." *Baker*, 161 N.J. at 229.

Bluntly, the testimony and evidence established through Plaintiff's case in chief, conclusively demonstrated Plaintiff's complete inability, among numerous other failings, to meet the heightened requirements necessary to establish an award for punitive damages.

II. Plaintiff Doesn't Even Qualify for Compensatory Damages.

Preliminarily, the Punitive Damages Act prohibits an award of punitive damages unless "compensatory damages have been awarded in the first stage of the trial. An award of nominal damages cannot support an award of punitive damages." *N.J.S.A.* §2A:15-5.13(c). Thus, a finding of liability is insufficient by itself even to raise the question of punitive damages. But here, even if Plaintiff could somehow establish a basis for liability, Plaintiff: (1) simply failed to use ***any*** diligence or reasonable efforts to mitigate her alleged damages after the termination of her employment on November 1, 2016; and (2) at best has a claim for nominal emotional distress damages.

With respect to her failure to mitigate, as Plaintiff admitted on cross-examination, after November 10, 2016, a mere ten days after she was terminated from her employment, Plaintiff has no recollection or any documentation concerning any application which she submitted or interviews which she went on. Rather, her mitigation efforts since November 10, 2016, have been limited to leaving her resume posted with what she described as "recruiters" i.e. indeed.com, glassdoor.com and monster.com. Plaintiff did not seek the assistance of an employment agency or hire an independent recruiter or "headhunter." In short, Plaintiff wholly failed to mitigate and has thus forfeited any claim to economic recovery. *Goodman v. London Metals Exchange, Inc.*,

86 N.J. 19, 35 (1981) ("unreasonable refusals to accept other proffered employment or failure to exercise reasonable diligence in seeking other suitable available positions" act to bar recovery).

As to emotional distress damages, Plaintiff admitted that she has not sought counseling, or medical attention as a result of the alleged conduct in this matter, nor has she been prescribed any medication or therapy.[2] For the preliminary reason, that Plaintiff has nominal damages, there is consequently no opportunity for the jury to reach the question of punitive damages.

III. Plaintiff Cannot Meet the Exacting Standard for a Punitive Damages Award.

As already observed, "punitive damages are only to be awarded in exceptional cases even where the LAD has been violated." *Saffos*, 419 N.J. Super. at 263; *accord, e.g. Maiorino*, 302 N.J. Super. at 353; *Miller*, 855 F. Supp. at 718 n.33. A plaintiff seeking punitive damages also must prove, by clear and convincing evidence that the "offending conduct" was "especially egregious." *Cavuoti*, 161 N.J. at 113; *Baker*, 161 N.J. at 223; *Longo*, 215 N.J. at 58; N.J.S.A. 2A:15-5.12(a). That is a tall order. It requires the plaintiff to prove either that the actor who supposedly engaged in the "offending conduct" was "actuated by ***actual malice***" or acted with a "***wanton and willful disregard***" for the rights of the plaintiff. *N.J.S.A.* §2A:15-5.12(a) (emphasis added); *Longo*, 215 N.J. at 59; *Quinlan v. Curtiss-Wright Corp.*, 204 N.J. 239, 274 (2010).

[2] While Plaintiff it is anticipated will inevitably claim that the New Jersey Supreme Court has elevated the potential recovery for garden variety emotional distress claims, the case at bar is not by any stretch of the imagination *Cuevas v. Wentworth Grp.*, No. A-3079-11T3, 2014 WL 4494166, at *6-8 (N.J. Super. Ct. App. Div. Sept. 15, 2014), aff'd, 226 N.J. 480 (2016) for among other reasons Plaintiff: (1) never complained about any alleged conduct as in *Cuevas*; (2) did not file for unemployment and had the application opposed as in *Cuevas*; (3) did not lose a subsequent job as a result of false information provided by her former employer as in *Cuevas*; (4) did not get divorced as a result of being fired as in *Cuevas*; and (5) was not forced to move from her home to a friend's apartment where she slept on a sofa in a spare bedroom as in *Cuevas*. *Ibid.*

"Actual malice" means "an intentional wrongdoing in the sense of an evil-minded act"; "wanton and willful disregard" means "a deliberate act or omission with knowledge of a high degree of probability of harm to another and reckless indifference to the consequences of such act or omission." *N.J.S.A.* §2A:15-5.10.

There is not a hint, let alone clear and convincing evidence, that anything malicious, wanton, or willful took place here especially against the backdrop where it is undisputed *inter alia*:

- Plaintiff's entire race discrimination claim is based on a single alleged statement by Ms. Fitzpatrick-Durski purportedly occurring on October 31, 2016.
- Plaintiff admittedly never reported the alleged statement despite having an obligation to do so through numerous available reporting channels.
- **On the same day** Plaintiff claims Ms. Fitzpatrick-Durski made the statement at issue, October 31, 2016, Ms. Fitzpatrick-Durski, requested that Byron Wilson ("Mr. Wilson") who is African-American, serve as her Assistant Administrator i.e. as the Center's second highest ranking employee.
- In mid-October 2016, well before Ms. Fitzpatrick-Durski's alleged comment, in response to complaints from among others, hospital administration, doctors and staff about the quality of care in October 2016, Ms. Komoroski was asked by Ms. Straus and Mr. Lugo to assist the Center with a number of clinical failings which Plaintiff was ultimately responsible for.
- Multiple witnesses independently corroborated the existence of the clinical problems which formed the basis for the termination of Plaintiff's employment:
- Plaintiff acknowledged in part some of the deficiencies identified by Ms. Fitzpatrick-Durski as the basis for Plaintiff's termination.

- The Center's Administrator Mr. Schottlander, who is Caucasian, was demoted five (5) days before Plaintiff was terminated from her employment on November 1, 2016, and then terminated himself on November 4, 2016.
- The third member of the Center's leadership team (along with Plaintiff and Mr. Schottlander), Ms. Valcin, who is African American, continued to remain employed.
- Neither Defendant has ever been accused, much less found liable for engaging in race discrimination. *See Liptak v. Rite-Aid*, 289 N.J. Super. 199, 217 (App. Div. 1996) (holding that punitive damages serve the admonitory function of expressing society's disapproval of intolerable conduct, and deterring such conduct where no other remedy would suffice.)

In short, there can be no award of punitive damages assessed against Defendants since Plaintiff wholly failed to establish that Defendants acted with evil motive or intent, or that Defendants were reckless or were callously indifferent to Plaintiffs rights. To the contrary, among other things, the Trial Record is replete with evidence that Defendants' actions with regard to Plaintiff were at all times reasonable, lawful, appropriate and conducted in good faith.

CONCLUSION

For the foregoing reasons, Defendants' Motion for Involuntary Dismissal of Plaintiff's Demand for Punitive Damages respectfully should be granted.

Respectfully submitted,

FISHER & PHILLIPS LLP
Attorneys for Defendants

Dated: October 28, 2019

By: s/*Christopher J. Capone*
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