

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION

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KATHERINE BRENNAN,  
  
Plaintiff/Appellant,

vs.

ALBERT J. ALVAREZ, STATE OF  
NEW JERSEY, MURPHY FOR  
GOVERNOR, INC., ABC  
COMPANIES (1-10) (fictitious  
names of unknown entities)  
and JOHN DOES (1-10)  
(fictitious names of unknown  
persons),

Defendants/Respondents.

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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-004566-2018

Civil Action

**On Transfer From:**  
**Superior Court of New Jersey**  
**Law Division, Mercer County**  
**Docket No.: MER-L-34-19**  
**Sat Below:**  
**Hon. Douglas H. Hurd, P.J.Cv.**

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**BRIEF FOR PLAINTIFF-APPELLANT KATHERINE BRENNAN**

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**SMITH EIBELER, LLC**  
101 Crawfords Corner Road  
Suite 1-105R  
Holmdel, NJ 07733  
(732) 935-7246  
kmcclure@smitheibeler.com

Attorneys for Plaintiff-Appellant  
Katherine Brennan

Kathryn K. McClure, Esq. ID# 037462004  
Christopher J. Eibeler, Esq. ID# 031772004  
Meghan Chrisner-Keefe Esq. ID#21052011  
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## PRELIMINARY STATEMENT

This brief is respectfully submitted in support of Plaintiffs Katherine Brennan and Viktoriya Usachenok's ("Plaintiffs") Motion for Summary Disposition of Plaintiffs' challenges to the constitutionality of N.J.A.C. 4A:7-3.1(j) (hereinafter "Strict Confidentiality Regulation" or "Regulation"). Plaintiffs respectfully submit that the constitutionality of the Regulation is a pure question of law ripe for summary disposition.

Plaintiffs' challenges to the Regulation arose in two separate, unrelated employment disputes involving complaints of sexual harassment and retaliation in the workplace. Plaintiffs are employees of Defendant State of New Jersey who were subjected to the restrictions contained in the Regulation in connection with the State's investigations into their respective complaints. In both cases, the State mandated that Plaintiffs and all other employees interviewed in investigating their complaints keep their claims or knowledge of harassment and retaliation strictly confidential - without exception.

Plaintiffs and other state employees who were interviewed by Defendant State were verbally threatened that any breach of the Regulation could result in discipline, up to and including termination. In addition to being verbally warned of the consequences of breaching confidentiality, complainants and



witnesses of harassment were also required to sign written "Confidentiality" agreements that recited the Regulation verbatim.

There is no legitimate business reason for the State to continue to require strict confidentiality of all victims and witnesses to every investigation, no matter the circumstance. While confidentiality may, in some circumstances, be necessary to protect a victim of harassment or to protect the integrity of an investigation, the Regulation serves as a blanket ban on all speech, regardless of context or need.

The Regulation is unlawful on its face. It is a prior restraint on protected speech that infringes upon the First Amendment rights of public employees to freely and openly speak about matters of public concern. The Regulation also violates the anti-retaliation provision of the Law Against Discrimination by threatening and interfering with state employees' rights to engage in protected activity under the law and denying them the right to disclose issues of harassment and retaliation to the public and the courts. Threatening victims and witnesses with disciplinary action for engaging in conduct that they have a constitutional and statutory right to engage in is unlawful.

At the time of this filing, this Court does not yet have a record before it upon which to make a ruling. This is due to no fault of Plaintiffs; rather, this has resulted from the State's failure to provide a "statement of items comprising the record"

(hereinafter "SICR") as required by R. 2:5-4(b). Pursuant thereto, the State agency responsible for promulgating the Regulation was required to file a SICR in the appellate court "within 30 days of service upon it of the notice of appeal." This 30-day period lapsed on July 29, 2019 and, to date, the agency has yet to file the SICR.

Plaintiffs are confident that the SICR will provide the Court with everything it needs to dispose of this question, and that no further briefing or development of a factual record will be necessary. Plaintiffs' submit that their challenge to the Regulation is a pure question of Constitutional and statutory law and, accordingly, can and should be decided quickly once Defendant files the SICR. As Plaintiffs are without a specific procedural mechanism to compel the State to file the SICR, Plaintiffs resort to this Motion for relief.

#### **PROCEDURAL HISTORY**

Plaintiffs are both state employees who were subjected to sexual harassment and retaliation in the workplace. Plaintiff Usachenok complained about the harassment to her employer, the Department of Treasury, and a formal EEO/AA investigation ensued. In connection with this investigation, Plaintiff Usachenok was interviewed and required to sign a form that contained the Strict Confidentiality Regulation language, requiring that Plaintiff Usachenok maintain strict confidentiality regarding the

investigation as well as the underlying harassment she suffered, or be subject to discipline up to and including termination.

Thereafter, in the process of litigating a civil suit against her harasser and her employer, Plaintiff Usachenok learned that all witnesses interviewed during the investigation were also required to sign forms containing the Strict Confidentiality Regulation language. As a result, those witnesses were unwilling to discuss their knowledge of Plaintiff Usachenok's complaints for fear that they may face discipline or termination.

Plaintiff Brennan complained about being sexually assault by Defendant Alvarez, but the State refused to initiate an investigation on the basis that the conduct she complained about did not implicate the State Policy Prohibiting Discrimination in the Workplace (hereinafter "State Policy"). Thereafter, Plaintiff Brennan made her allegations public and testified in that regard before the New Jersey Legislative Select Oversight Committee. Based on the testimony she gave during that December 4, 2018 hearing, Plaintiff Brennan's employer initiated an EEO/AA investigation and informed her that if she wished to participate, she would be subject to the confidentiality requirements contained in the Strict Confidentiality Regulation.

Plaintiffs are each prosecuting civil cases against their employers for, in part, their failure to properly investigate Plaintiffs' claims of sexual harassment and assault. Plaintiffs'

efforts to obtain the proof necessary to establish their employers' liability have been obstructed by the enforcement and threatened enforcement of the Strict Confidentiality Regulation. Therefore, Plaintiffs brought claims for declaratory judgment declaring the regulation to be null and void as an unconstitutional prior restraint of First Amendment speech and sought temporary and preliminary restraints against the State from continuing to enforce it. Plaintiffs' initial challenges to this regulation were made in connection with their civil cases in the Superior Court, Law Division.

Plaintiffs' challenges to the regulation now come before this Court following Defendant's motion to transfer, filed before Judge Douglas H. Hurd, P.J.Cv., Superior Court, Law Division, Mercer County. As these challenges are to the validity of a rule promulgated by a state administrative agency, Judge Hurd found that Plaintiffs' challenges are properly brought directly to the Appellate Division, pursuant to Rule 2:2-3(a)(2), despite the close relationship between these challenges and the employment disputes still ongoing in the Law Division.

On June 7, 2019, Judge Hurd entered an Order to transfer this action to the Appellate Division. Thereafter, Plaintiffs filed their case information statements and notices of appeal and served the same on Defendant State. Defendant State was served with the notices of appeal on or about June 29, 2019. To date, the State

administrative agency responsible for promulgating the regulation, the Department of Labor and Workforce Development, has not filed the SICR as required by R. 2:5-4.

#### **STATEMENT OF FACTS**

These are challenges to the validity of a regulation promulgated by a state administrative agency. As such, the "facts material to the issues on appeal" are wholly contained within the SICR. The SICR will provide the Court with all factual materials that the Department of Labor and Workforce Development and/or the predecessor agency the Department of Personnel utilized and relied upon in promulgating the regulation.

#### **LEGAL ARGUMENT**

##### **Standard of Review**

Motions for Summary Disposition pursuant to Rule 2:8-3 are generally "reserved for appeals whose ultimate outcome is so clear as not to require further briefs or a full record for decision." GE Capital Mortgage Services, Inc. v. New Jersey Title Ins. Co., 333 N.J. Super. 1, 5 (App. Div. 2000). The procedure "is appropriate where the . . . administrative agency was 'patently in error.'" Harris v. Dept. of Corr., Docket No. A-93-09, 2010 WL 1027870, \*2 (quoting Pressler, Current N.J. Court Rules, comment 2 on R. 2:8-3 (2010)).

This appeal is a facial challenge to an administrative regulation, promulgated by an agency acting pursuant to statutory

authority. As such, this Court is called upon to review the authorizing statute, as well as the regulation itself, to determine if the agency's action in promulgating the regulation was within its statutory authority. In re Amendments to N.J.A.C. 7:27-27.1, 392 N.J. Super. 117 (App. Div.), certif. den. 192 N.J. 295 (2007). Courts are directed to "generally defer to the interpretation that an agency gives to a statute that agency is charged with enforcing . . . [h]owever, this deference is 'not total, as the courts remain the "final authorities" on issues of statutory construction.'" Koch v. Dir. Div. of Taxation, 157 N.J. 1, 8 (1999) (citations omitted).

In addition to determining whether the agency's action was properly within the scope of its statutory authority, the court must interpret the regulation itself, applying the same "principles of statutory interpretation" utilized when interpreting legislative enactments. In re Amendments to N.J.A.C. 7:27-27.1, 392 N.J. Super. 117, 135-36 (App. Div.), certif. den. 192 N.J. 295 (2007). In carrying out this function, the court's standard of review "is limited: An appellate court may reverse an agency decision if it is arbitrary, capricious, or unreasonable." In re Proposed Quest Academy Charter School of Montclair Founders Group, 216 N.J. 370, 385 (2013) (citing In re Petitions for Rulemaking, N.J.A.C. 10:82-1.2 & 10:85-4.1, 117 N.J. 311, 325 (1989)).

In the case George Harms Const. Co. v. Turnpike Auth., 137 N.J. 8, 27 (1994), the Supreme Court provided additional clarification on this standard of review:

Although sometimes phrased in terms of a search for arbitrary or unreasonable agency action, the judicial role is restricted to four inquiries: (1) whether the agency's decision offends the State or Federal Constitution; (2) whether the agency's action violates express or implied legislative policies; (3) whether the record contains substantial evidence to support the findings on which the agency based its action; and (4) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

In making these inquiries, courts must also determine whether the standards for application and enforcement of the regulation provided by the agency are sufficient to "inform the public and guide the agency in discharging its authorized function" to satisfy Due Process concerns. Lower Main Street Assocs. V. N.J. Housing and Mortg. Finance Agency, 114 N.J. 226, 235 (1989) (citations omitted).

#### POINT I

#### **The Strict Confidentiality Regulation Offends the Constitution (Pa1)**

The State's Strict Confidentiality Regulation, applied to all victims and witnesses in all EEO/AA investigations, is a prior

restraint of all state employees' First Amendment<sup>1</sup> rights to freedom of speech.

The core purpose of the First Amendment is to assure "freedom of communication on matters relating to the functioning of government." Richmond v. Newspapers v. Virginia, 448 U.S. 555, 575 (1980). The First Amendment does not grant public employees free rein to speak on any and all subjects, however it provides strong protections for their right to speak on issues and matters of public concern. Pickering v. Bd. of Education, 391 U.S. 563, 574 (1968). These protections include protection against retaliation for speaking on such issues. Ibid.

An employee does not relinquish their First Amendment rights simply by accepting employment with the government. Id. at 568. While employed by the state, those employees are still citizens and they share in the general societal interest of fostering commentary on matters of public concern. Roth v. United States, 354 U.S. 476, 484 (1957); Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964). If that interest is to be meaningfully served, public

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<sup>1</sup> The First Amendment to the New Jersey State Constitution §6 reads, in relevant part:

Every person may freely speak, write and publish his sentiments on all subjects, being responsible for abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press.



employees must be permitted to speak on those issues, as they "are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions." Waters v. Churchill, 511 U.S. 661, 674 (1994) (citing Pickering, 391 U.S. at 572).

In Pickering, the Supreme Court created a balancing test to be employed in cases involving free speech of public employees. The Pickering balancing test requires courts to balance the employee's interest as a private citizen speaking on matters of public concern against the government employer's interest in providing particular public services efficiently. Pickering, 391 U.S. at 568. The Pickering balancing test "involves a two-step process" - first, the court must determine if the challenged speech qualifies as speech "on a matter of public concern;" and second, if the court determines that the speech so qualifies, the court must balance "the interests of the employees and the public" in the speech against the interests "of the government" in operating efficiently and effectively. Davis v. New Jersey Dept. of Law and Public Safety, Div. of State Police, 327 N.J. Super. 59, 71 (citing Pickering, 391 U.S. at 568; Connick v. Myers, 461 U.S. 138, 146 (1983)).

"Restrictions on speech based on its content are 'presumptively invalid' and subject to strict scrutiny." Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 358 (2009) (quoting

Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 188 (2007); R.A.V. v. St. Paul, 505 U.S. 377, 382 (1992)). Further, "[t]he Court has emphasized that '(a) system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.'" Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 180-81 (1968) (quoting Bantam Books v. Sullivan, 372 U.S. 58, 70 (1963); Freedman v. Maryland, 380 U.S. 51, 57 (1965)). Such a provision is particularly disapproved of as it "chills potential speech before it happens." United States v. National Treasury Employees Union ("NTEU"), 513 U.S. 454, 468 (1995).

The issue before the Supreme Court in NTEU was whether a federal statute prohibiting government employees from receiving honoraria for giving speeches or writing articles violated the First Amendment. NTEU, 513 U.S. at 454 (1995). In resolving the issue, the Court fashioned what is now commonly referred to as the "NTEU balancing test." The NTEU balancing test is similar to the Pickering balancing test but is much more difficult for government employers to meet and is reserved for cases involving prior restraints on public employees' speech regarding matters of public concern. Plaintiffs submit that the NTEU test is the appropriate test for the Court to apply in determining the constitutionality of the Strict Confidentiality Regulation.

Under the NTEU balancing test, the government must establish "that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." Id. at 468 (quoting Pickering, 391 U.S. at 571). If the government employer seeks to justify the restriction on the ground that it will "redress past harms or prevent anticipated harms" they bear the burden to "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." Id. at 475 (quoting Turner Board Sys., Inc. v. Federal Communications Comm'n, 512 U.S. 622, 624 (1994)).

In cases where it applies, the NTEU balancing test does not supersede the Pickering balancing test, rather they are applied conjunctively. See In re Disciplinary Action Against Gonzalez, 405 N.J. Super. 336, 346-48 (App. Div. 2009). In that case, the Appellate Division applied the "Pickering/National Treasury Employees test" to determine whether the Waterfront Commission of New York Harbor's media policy was unconstitutionally overbroad. Id. at 348. The court noted that when "a facial challenge is made to a blanket policy that has been alleged to constitute an overbroad prior restraint" on government employee speech (as had been done in that case), the government employer's "burden of

justifying the restraint is greater than that existing if only an isolated disciplinary action is involved." Id. at 347 (citing NTEU).

Government employee speech related to issues of particular personal significance is not necessarily disqualified as being on a matter of public concern. Id. at 351. (Gonzalez's speech about potential toxic waste, "while of particular concern to Gonzalez and his unionized co-employees, were also matters of public concern.") Furthermore, "courts have recognized certain subjects, such as racial discrimination, as inherently of public concern." Davis, 327 N.J. Super. at 73. Public interest and attention is also a factor courts consider in determining whether a matter is one of public concern. Ibid. "News article[s]" and "hearings conducted by the state legislature" into a matter are strong evidence that the matter is one of public concern. Ibid. (citing Rode v. Dellarciprete, 845 F.2d 1195 (3d Cir. 1988)).

Plaintiffs submit that by and through the State's enforcement of the Strict Confidentiality Regulation, Plaintiffs, and all other state employee victims and witnesses of workplace discrimination or harassment who participate in EEO/AA investigations into such discrimination, harassment or retaliation, are prohibited from speaking about anything related to the investigation or the underlying discrimination or harassment at all, to anyone. The Strict Confidentiality

Regulation expressly prohibits State employees from communicating any aspect of their knowledge or investigation of harassment to anyone, without exception.

In the absence of any limitations, the Strict Confidentiality Regulation applies to matters of public concern. This results in prohibitions on victims of racial discrimination from speaking out about the treatment they were subjected to, a topic that is "inherently of public concern." Davis, 327 N.J. Super. at 73. Indeed the Legislature, in promulgating the New Jersey Law Against Discrimination, found "that because of discrimination, people suffer personal hardships, and the State suffers a grievous harm." N.J.S.A. 10:5-3. That "grievous harm" is the precise inherent public concern the Davis court recognized and addressed. Sexual harassment and gender discrimination are also clearly matters of public concern, as evidenced by the public attention that Plaintiff Brennan's case has garnered and the formation of the Legislative Select Oversight Committee that was formed, in part, in response to her allegations.

As the Strict Confidentiality Regulation clearly restricts employee speech on matters of public concern, the relative interests of employer and employee must be balanced. The appropriate test to be applied is the NTEU balancing test, as the Strict Confidentiality Regulation is a blanket ban on a category of speech and serves as a prior restraint on that speech. In order

to justify the extraordinary breadth of the Strict Confidentiality Regulation's speech restriction, Defendant State must demonstrate that "the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." NTEU, 513 U.S. at 468 (citing Pickering, 391 U.S. at 571).

The Strict Confidentiality Regulation was first promulgated by the now-defunct Merit System Board and Department of Personnel in 2002, pursuant to the legislative grant of authority contained in N.J.S.A. 11A:7-4. That statute states "[t]he department shall establish reasonable equal employment and affirmative action goals for State agencies in the form of regulations." Thereafter, the Department of Personnel was abolished as a principal department in the Executive Branch through the passage of L. 2008, c. 29. That bill also created the Civil Service Commission ("CSC"), located within but independent of the Department of Labor and Workforce Development. Id., Sponsor's Statement. The CSC was granted "the continued authority to promulgate rules and regulations with regard to civil service matters in Title 11A of the New Jersey Statutes." Ibid. Thereafter, the Strict Confidentiality Regulation has been amended and readopted by the Civil Service Commission multiple times.

The Strict Confidentiality Regulation sweeps far too broadly and is not sufficiently related to that legislative purpose to overcome its overbreadth. The State cannot demonstrate that any governmental interest protected by the Strict Confidentiality Regulation outweighs the public and governmental interests in exposing relevant knowledge of discrimination and harassment in State administrative agency employment, as required under the NTEU balancing test. The Strict Confidentiality Regulation goes well beyond any potential governmental interest in requiring employees to maintain confidentiality regarding **all** aspects of **every** investigation, under threat of discipline. There is no legitimate governmental interest in keeping all aspects of all workplace harassment complaints and investigations confidential.

Accordingly, the Strict Confidentiality Regulation is repugnant to the Constitution as it violates the First Amendment. Regulations which offend the Constitution are the type of arbitrary or unreasonable regulations that should be invalidated. George Harms, 137 N.J. at 27.

## POINT II

### **The Strict Confidentiality Regulation Violates Express and Implied Legislative Policies (Pa1)**

While administrative regulations are accorded a presumption of validity due to the specialized expertise possessed by administrative agencies that promulgate them, regulations still

"must be within the fair contemplation of the delegation of the enabling statute." New Jersey State League of Municipalities v. Dept. of Community Affairs, 158 N.J. 211, 222 (1999) (citations omitted). An agency does not need a specific statutory authorization to enact a regulation, so long as the regulation "can be said to promote or advance the policies and findings that served as the driving force for the enactment of the legislation." Ibid.

The Strict Confidentiality Regulation is one of the rules promulgated by the Civil Service Commission as one of "the means by which the statutory purposes of the civil service system are carried out." N.J.A.C. 4A:1-1.2(c). Those statutory purposes are "the purposes of Title 11A, New Jersey Statutes." Ibid. Title 11A in turn provides that these purposes include effectuating "the public policy of this State to ensure equal employment opportunity at all levels of the public service." N.J.S.A. 11A:1-2(d). Furthermore, the statutory purposes include "ensur[ing] each State agency's compliance with all laws and rules relating to equal employment opportunity and seek[ing] correction of discriminatory practices, policies, and procedures." N.J.S.A. 11A:7-3(a). The Civil Service Commission is directed to accomplish these purposes by "establish[ing] reasonable equal employment and affirmative action goals for State agencies in the form of regulations." N.J.S.A. 11A:7-4.



Pursuant to the above quoted language from Title 11A, in promulgating regulations to accomplish these statutory purposes, the Civil Service Commission must ensure that those regulations comply with all laws and rules related to employment discrimination, including the New Jersey Law Against Discrimination, Title VII and New Jersey's public policy against harassment and discrimination.

**(1) The Strict Confidentiality Regulation Violates the Legislative Policies of Title 11A as it Violates the Law Against Discrimination (Pal)**

The overarching goal of the LAD is "nothing less than the eradication 'of the cancer of discrimination.'" Lehman v. Toys-R-Us, 132 N.J. 587, 600 (1993) (quoting Fuchilla v. Layman, 109 N.J. 319, 334 (1988)). The LAD prohibits employers from retaliating against employees for engaging in protected activity. N.J.S.A. 10:5-12(d).

Because workplace discrimination "menaces the institutions and functions of a free democratic State", the New Jersey Supreme Court has specifically recognized that "[w]e would ill serve those important purposes were we to demand that one who voices complaints . . . and suffers retaliation as a consequence, also prove that there is a separate, identifiable victim of actual discrimination." Battaglia v. United State Parcel Service, Inc., 214 N.J. 518, 549 (2013). Indeed, "[o]ne searches in vain to find another New Jersey enactment having an equivalently powerful

legislative statement of purpose, along with operative provisions that arm individuals and entities with formidable tools to combat discrimination not only through their use but also by the threat of their use.” Rodriguez v. Raymours Furniture Co., Inc., 225 N.J. 343, 347 (2016).

The Strict Confidentiality Regulation infringes on State employees’ ability to engage in activities that are statutorily protected under the LAD. N.J.S.A. 10:5-12(d) sets forth the following activities as being expressly protected under the LAD:

- Opposing any practices or acts forbidden under the LAD;
- Seeking legal advice regarding rights under the LAD;
- Sharing relevant information with legal counsel;
- Filing a complaint, testifying or assisting in any proceeding under the LAD; and
- Aiding or encouraging any other person in the exercise or enjoyment of any right granted or protected under the LAD.

A state employee who opposes workplace harassment or participates in an EEO/AA investigation is engaging in protected activity under the LAD. Once a state employee complains of harassment, is informed of an incident of harassment or is required to participate in an investigation of harassment, they are automatically subjected to the Strict Confidentiality Regulation, both verbally and in writing. The Strict Confidentiality Regulation expressly threatens the state employee with discipline,

up to and including termination. This is in clear violation of the LAD's anti-retaliation provision.

**(2) The Strict Confidentiality Regulation Violates the Legislative Policies of Title 11A as it Violates the Newly Enacted Non-Disclosure Bill (Pa1)**

On March 18, 2019, Governor Murphy signed Senate Bill 121 into law, rendering provisions in employment or settlement agreements that purport to waive an employee's substantive or procedural rights void and unenforceable as contrary to New Jersey public policy. N.J.S.A. 10:5-12.8. Under the Non-Disclosure provision, employers are no longer able to conceal the underlying details of sexual harassment or other claims of discrimination through the use of non-disclosure or confidentiality provisions in employment contracts or settlement agreements. Ibid.

In addition to the Non-Disclosure provision, Senate Bill 121 also protects employees from facing retaliation for refusing to enter into an agreement or contract that would require them to waive any substantive or procedural rights. N.J.S.A. 10:5-12.7. The provision reads, in pertinent part:

a. A provision in any employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment shall be deemed against public policy and unenforceable.

b. No right or remedy under the "Law Against Discrimination," P.L. 1945, c. 169 (C.10:5-1 et seq.) or any other statute or case law shall be prospectively waived.

The Strict Confidentiality Regulation threatens state employees who participate in EEO/AA investigations with discipline, up to and including termination, should they disclose any aspect of their knowledge regarding the investigation or the underlying allegations of harassment or discrimination. This threat of discipline applies to state employees disclosing the harassment complaint to *anyone* - including their spouse, doctor, lawyer or religious leader.

If, during the course of an EEO/AA investigation, an employee is subjected to harassment at the hands of the investigator, they would potentially face discipline under the Strict Confidentiality Regulation if they reported the harassment. Similarly, the Strict Confidentiality Regulation silences witnesses in harassment investigations from attempting to further aid or encourage the complainant in any subsequent legal actions the victim of harassment undertakes. These are outrageous results, further punishing and victimizing the very individuals that, pursuant to the legislative policies of Title 11A, the State Policy is supposed to protect.

In effect, the Strict Confidentiality Regulation serves as a Non-Disclosure agreement, applied to any employees interviewed during an EEO/AA investigation. If the State attempted to have those employees execute NDAs, they would be unenforceable pursuant to the new Non-Disclosure provision of the LAD. The Strict

Confidentiality Regulation serves the same prohibited purpose, and as such is in violation of this new provision of the LAD.

**(3) The Strict Confidentiality Regulation Violates the Legislative Policies of Title 11A as it Violates Title VII of the Civil Rights Act of 1964 (Pa1)**

Title VII is the federal law counterpart to the LAD and was enacted to accomplish similar legislative purposes, aimed at eradicating workplace discrimination on the basis of an employee's "race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1). Like the LAD, Title VII prohibits workplace discrimination against employees because those employees "opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation" under Title VII. 42 U.S.C. 2000e-3(a).

Like with the LAD, the Strict Confidentiality Regulation violates the legislative policies of Title VII, including its anti-retaliation provision. In this context, the EEOC has stated that strict "confidentiality" policies (such as the regulation at issue here) are "flagrant and not trivial" violations of the federal law's anti-retaliation provision. In a letter dated August 3, 2012, the EEOC notified an employer that maintained a policy similar to the State's in this matter, that its policy violated Title VII. The EEOC stated that prohibiting employee participants in an internal investigation from discussing the investigation or be

subject to discharge, is a violation of Title VII. The relevant excerpt from the letter reads:

You have admitted to having a written policy which warns all employees who participate in one of your internal investigations of harassment that they could be subject to discipline or discharge for discussing "the matter," apparently with anyone.

EEOC guidance states that complaining to anyone, including high management, union officials, other employees, newspapers, etc. about discrimination is protected opposition. It also states that the most flagrant infringement of the rights that are conferred on an individual by Title VII's retaliation provisions is the denial of the right to oppose discrimination. So, discussing one's complaints of sexual harassment with others is protected opposition. An employer who tries to stop an employee from talking with others about alleged discrimination is violating Title VII rights, and the violation is "flagrant" not trivial. In this case telling the ... women who complained of harassment that they were not to tell others about the alleged harassment is enough to constitute a harm under Title VII. There does not have to be a separate adverse action. In addition, your written policy is so broad that a reasonable employee could conclude from reading it that she could face discipline or charge for making inquiries to the EEOC about harassment if that harassment is being or has been investigated internally by your organization.

The Strict Confidentiality Regulation threatens employees with discipline for engaging in protected activity under Title VII. Accordingly, the Strict Confidentiality Regulation is in violation of the legislative policies contained in Title 11A discussed above.

**(4) The Strict Confidentiality Regulation Violates the Legislative Policies of Title 11A as it Violates New Jersey's "Survivor Centric" Public Policy (Pa1)**

Since taking office, Governor Murphy has repeatedly acknowledged New Jersey's strong public policy in creating a safe and discrimination-free work environment for state employees. In announcing the Civil Service Commission's proposed changes to the State Policy (including the Strict Confidentiality Regulation) in February 2019, Governor Murphy stated:

By embracing a survivor-centered approach in New Jersey, we are creating an environment where survivors of sexual harassment, misconduct, or assault are not only encouraged to come forward, but when doing so, they are met with dignity, respect and a straightforward process to attain justice.

(February 5, 2019 Press Release, Governor's Office, available at <https://www.nj.gov/governor/news/news/562019/approved/20190205d.shtml>).

Instead of bringing the Regulation in line with this statement of public policy and state and federal employment discrimination laws, the Civil Service Commission doubled down and sought to make the regulation more egregious. Specifically, the Civil Service Commission proposed revising the Strict Confidentiality Regulation to change the language "[f]ailure to comply with this confidentiality directive may result in administrative and/or disciplinary action" to "[f]ailure to comply with this confidentiality directive **will** result in administrative and/or

disciplinary action." 51 N.J.R. 191(b) (emphasis added). This change was ultimately not made, following public outcry denouncing the proposal.

The Civil Service Commission's desire to mandate discipline against individuals who speak out against workplace harassment and discrimination demonstrates their flagrant disregard for New Jersey's public policy against discrimination and harassment. Regardless, as it is currently worded, the chilling effect imposed on employees by the threat of potential discipline violates New Jersey's "survivor centric" public policy.

#### **CONCLUSION**

For all the foregoing reasons, it is respectfully submitted that Plaintiffs' Motion for Summary Disposition be granted, that Defendant State be ordered to promptly file the SICR, and that N.J.A.C. 4A:7-3.1(j) be declared unconstitutional, violative of the LAD and other legislative policy, and violative of the public policy of the State.

Respectfully submitted,

SMITH EIBELER, LLC

By: /s/Christopher J. Eibeler

Dated: August 16, 2019

CHRISTOPHER J. EIBELER



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VOLUME I OF PLAINTIFF-APPELLANT'S APPENDIX

(page Pa1 through page Pa16)

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KATHERINE BRENNAN,  
Plaintiff/Appellant,

vs.

ALBERT J. ALVAREZ, STATE OF NEW  
JERSEY, MURPHY FOR GOVERNOR,  
INC., ABC COMPANIES (1-10)  
(fictitious names of unknown  
entities) and JOHN DOES (1-10)  
(fictitious names of unknown  
persons),

Defendants/Respondents.

---

SUPERIOR COURT OF NEW  
JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-004566-2018

Civil Action

**CERTIFICATION OF  
CHRISTOPHER J. EIBELER  
IN SUPPORT OF PLAINTIFF-  
APPELLANT'S MOTION FOR  
SUMMARY DISPOSITION**

**I CHRISTOPHER J. EIBELER**, of full age, hereby certifies as follows:

1. I am an attorney at law in the State of New Jersey and a partner at Smith Eibeler, LLC, attorneys for Plaintiff-Appellant Katherine Brennan. As such, I have personal knowledge of the facts set forth herein.

2. I make this Certification in support of Plaintiff-Appellant's Motion for Summary Disposition, for entry of an Order compelling Defendant to file the statement of items comprising the agency record, and for declaratory judgment.

3. I am counsel of record for the Plaintiff-Appellant, Katherine Brennan in this matter.

4. On June 29, 2019, my office caused the Notice of Appeal in this matter to be served upon Defendant State of New Jersey.

5. To date, Plaintiff-Appellant has not received the statement of items comprising the record from the Department of Labor and Workforce Development, despite the passage of more than 30 days since the notice of appeal was served.

6. The court is capable of ruling on this motion, even though the agency has not yet produced the record, because they will either include it in the Appendix they file in connection with their opposition to this motion, or they will not oppose the motion or the granting of the relief sought, pursuant to Rule 2:8-1(a).

I certify that the foregoing statements made by me are true, I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

By: /s/ Christopher J. Eibeler  
CHRISTOPHER J. EIBELER

Dated: August 15, 2019

New Jersey Administrative Code

Title 4a. Civil Service

Chapter 7. Equal Employment Opportunity and Affirmative Action (Refs & Annos)

Subchapter 3. Policy Prohibiting Discrimination in the Workplace; Complaint Procedure, and Appeals

N.J.A.C. 4A:7-3.1

4A:7-3.1 State Policy Prohibiting Discrimination in the Workplace (State Policy)

Currentness

(a) The State of New Jersey is committed to providing every State employee and prospective State employee with a work environment free from prohibited discrimination or harassment. Under this policy, forms of employment discrimination or harassment based upon the following protected categories are prohibited and will not be tolerated: race, creed, color, national origin, nationality, ancestry, age, sex/gender, pregnancy, marital status, civil union status, domestic partnership status, familial status, religion, affectional or sexual orientation, gender identity or expression, atypical hereditary cellular or blood trait, genetic information, liability for service in the Armed Forces of the United States, or disability. To achieve the goal of maintaining a work environment free from discrimination and harassment, the State of New Jersey strictly prohibits the conduct that is described in this policy. This is a zero tolerance policy. This means that the State and its agencies reserve the right to take either disciplinary action, if appropriate, or other corrective action, to address any unacceptable conduct that violates this policy, regardless of whether the conduct satisfies the legal definition of discrimination or harassment.

1. Prohibited discrimination/harassment undermines the integrity of the employment relationship, compromises equal employment opportunity, debilitates morale, and interferes with work productivity. Thus, this policy applies to all employees and applicants for employment in State departments, commissions, State colleges or universities, agencies, and authorities (hereafter referred to in this section as "State agencies" or "State agency"). The State of New Jersey will not tolerate harassment or discrimination by anyone in the workplace including supervisors, co-workers, employees of gubernatorial transition offices, or persons doing business with the State. This policy also applies to conduct that occurs in the workplace and conduct that occurs at any location that can be reasonably regarded as an extension of the workplace (any field location, any off-site business-related social function, or any facility where State business is being conducted and discussed). This policy also applies to posts on any social media site and/or electronic device, personal or business, that adversely affects the work environment defined by the State Policy.

2. This policy also applies to third party harassment. Third party harassment is unwelcome behavior involving any of the protected categories referred to in (a) above that is not directed at an individual but exists in the workplace and interferes with an individual's ability to do his or her job. Third party harassment based upon any of the aforementioned protected categories is prohibited by this policy.

3. It is a violation of this policy to engage in any employment practice or procedure that treats an individual less favorably based upon any of the protected categories referred to in (a) above. This policy pertains to all employment practices such as recruitment, selection, hiring, training, promotion, advancement appointment, transfer, assignment, layoff, return from layoff, termination, demotion, discipline, compensation, fringe benefits, working conditions, and career development.

(b) It is a violation of this policy to use derogatory or demeaning references regarding a person's race, gender, age, religion, disability, affectional or sexual orientation, ethnic background, or any other protected category set forth in (a) above. A violation of this policy can occur even if there was no intent on the part of an individual to harass or demean another.

1. Examples of behaviors that may constitute a violation of this policy include, but are not limited to:

- i. Discriminating against an individual with regard to terms and conditions of employment because of being in one or more of the protected categories referred to in (a) above;
- ii. Treating an individual differently because of the individual's race, color, national origin, or other protected category, or because an individual has the physical, cultural, or linguistic characteristics of a racial, religious, or other protected category;
- iii. Treating an individual differently because of marriage to, civil union to, domestic partnership with, or association with persons of a racial, religious, or other protected category; or due to the individual's membership in or association with an organization identified with the interests of a certain racial, religious, or other protected category; or because an individual's name, domestic partner's name, or spouse's name is associated with a certain racial, religious, or other protected category;
- iv. Calling an individual by an unwanted nickname that refers to one or more of the above protected categories, or telling jokes pertaining to one or more protected categories;
- v. Using derogatory references with regard to any of the protected categories in any communication;
- vi. Engaging in threatening, intimidating, or hostile acts toward another individual in the workplace because that individual belongs to, or is associated with, any of the protected categories; or
- vii. Displaying or distributing materials, in the workplace or outside of the workplace that has an adverse impact on the work environment, including electronic communications, that contains derogatory or demeaning language or images pertaining to any of the protected categories.

(c) It is a violation of this policy to engage in sexual (or gender-based) harassment of any kind, including hostile work environment harassment, quid pro quo harassment, or same-sex harassment.

1. For the purposes of this policy, sexual harassment is defined, as in the Equal Employment Opportunity Commission Guidelines, as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when, for example:

- i. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

ii. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

iii. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

2. Examples of prohibited behaviors that may constitute sexual harassment and are, therefore, a violation of this policy include, but are not limited to:

i. Generalized gender-based remarks and comments;

ii. Unwanted physical contact, such as intentional touching, grabbing, pinching, brushing against another's body, or impeding or blocking movement;

iii. Sexual physical contact that involves any form of coercion, force, or lack of consent, such as sexual assault;

iv. Verbal, written, or electronic sexually suggestive or obscene comments, jokes, or propositions, including letters, notes, e-mail, text messages, invitations, gestures, or inappropriate comments about a person's clothing;

v. Visual contact, such as leering or staring at another's body; gesturing; displaying sexually suggestive objects, cartoons, posters, magazines, or pictures of scantily-clad individuals; or displaying sexually suggestive material on a bulletin board, on a locker room wall, or on a screen saver;

vi. Explicit or implicit suggestions of sex by a supervisor or manager in return for a favorable employment action such as hiring, compensation, promotion, advancement appointment, or retention;

vii. Suggesting or implying that failure to accept a request for a date or sex would result in an adverse employment consequence with respect to any employment practice such as performance evaluation, advancement appointment, or promotional opportunity; or

viii. Continuing to engage in certain behaviors of a sexual nature after an objection has been raised by the target of such inappropriate behavior.

(d) Any employee who believes that she or he has been subjected to any form of prohibited discrimination/harassment, or who witnesses others being subjected to such discrimination/harassment, should promptly report the incident(s) to a supervisor or directly to the State agency's Equal Employment Opportunity/Affirmative Action Officer or to any other persons designated by the State agency to receive workplace discrimination complaints. A person who wishes to take action about prohibited sexual physical contact can file a criminal complaint with law enforcement of the municipality where the incident occurred. That person can also make a criminal report and a report to his or her supervisor/manager and/or Equal Employment Opportunity/Affirmative Action Officer; one does not have to choose one or the other. All employees are expected to cooperate with investigations

undertaken pursuant to (g) below. Failure to cooperate in an investigation may result in administrative and/or disciplinary action, up to and including termination of employment.

(e) Supervisors shall make every effort to maintain a work environment that is free from any form of prohibited discrimination/harassment. Supervisors shall immediately refer allegations of prohibited discrimination/harassment to the State agency's Equal Employment Opportunity/Affirmative Action Officer, or any other individual designated by the State agency to receive complaints of workplace discrimination/harassment. A supervisor's failure to comply with these requirements may result in administrative and/or disciplinary action, up to and including termination of employment. For purposes of this section and N.J.A.C. 4A:7-3.2, a supervisor is defined broadly to include any manager or other individual who has authority to control the work environment of any other staff member (for example, a project leader).

(f) Each State agency shall annually distribute the policy described in this section, or a summarized notice of it, to all of its employees, including part-time and seasonal employees. The policy, or summarized notice of it, shall also be posted in conspicuous locations throughout the buildings and grounds of each State agency (that is, on bulletin boards or on the State agency's intranet site). The Department of the Treasury shall distribute the policy to Statewide vendors/contractors, whereas each State agency shall distribute the policy to vendors/contractors with whom the State agency has a direct relationship.

(g) Each State agency shall follow the State of New Jersey Model Procedures for Processing Internal Complaints Alleging Discrimination in the Workplace with regard to reporting, investigating, and where appropriate, remediating claims of discrimination/harassment. See N.J.A.C. 4A:7-3.2. Each State agency is responsible for designating an individual, or individuals, to receive complaints of discrimination/harassment, investigating such complaints, and recommending appropriate remediation of such complaints. In addition to the Equal Employment Opportunity/Affirmative Action Officer, each State agency shall designate an alternate person to receive claims of discrimination/harassment.

1. All investigations of discrimination/harassment claims shall be conducted in a way that respects, to the extent possible, the privacy of all the persons involved. The investigations shall be conducted in a prompt, thorough, and impartial manner. The results of the investigation shall be forwarded to the respective State agency head to make a final decision as to whether a violation of the policy has been substantiated.

2. Where a violation of this policy is found to have occurred, the State agency shall take prompt and appropriate remedial action to stop the behavior and deter its reoccurrence. The State agency shall also have the authority to take prompt and appropriate remedial action, such as moving two employees apart, before a final determination has been made regarding whether a violation of this policy has occurred.

3. The remedial action taken may include counseling, training, intervention, mediation, and/or the initiation of disciplinary action up to and including termination of employment.

4. Each State agency shall maintain a written record of the discrimination/harassment complaints received. Written records, consisting of the investigative report and any attachments, including witness statements, shall be maintained as confidential records to the extent practicable and appropriate and will remain so indefinitely.

(h) Retaliation against any employee who alleges that she or he was the victim of discrimination/harassment, provides information in the course of an investigation into claims of discrimination/harassment in the workplace, or opposes a

discriminatory practice, is prohibited by this policy. No employee bringing a complaint, providing information for an investigation, or testifying in any proceeding under this policy shall be subjected to adverse employment consequences based upon such involvement or be the subject of other retaliation. Following are examples of prohibited actions taken against an employee because the employee has engaged in activity protected by this subsection:

1. Termination of an employee;
2. Failing to promote an employee or select an employee for an advancement appointment;
3. Altering an employee's work assignment for reasons other than legitimate business reasons;
4. Imposing or threatening to impose disciplinary action on an employee for reasons other than legitimate business reasons;  
or
5. Ostracizing an employee (for example, excluding an employee from an activity or privilege offered or provided to all other employees).

(i) The burden is on the complainant to articulate a sufficient nexus between the alleged conduct to a protected category pursuant to the State Policy. An employee who knowingly makes a false accusation of prohibited discrimination/harassment or knowingly provides false information in the course of an investigation of a complaint, will be subjected to administrative and/or disciplinary action, up to and including termination of employment. Complaints made in good faith, however, even if found to be unsubstantiated, shall not be considered a false accusation.

(j) All complaints and investigations shall be handled, to the extent possible, in a manner that will protect the privacy interests of those involved. To the extent practical and appropriate under the circumstances, confidentiality shall be maintained throughout the investigative process. In the course of an investigation, it may be necessary to discuss the claims with the person(s) against whom the complaint was filed and other persons who may have relevant knowledge or who have a legitimate need to know about the matter. All persons interviewed, including witnesses, shall be directed not to discuss any aspect of the investigation with others in light of the important privacy interests of all concerned. Failure to comply with this confidentiality directive may result in administrative and/or disciplinary action, up to and including termination of employment.

(k) Any employee found to have violated any portion or portions of this policy may be subject to appropriate administrative and/or disciplinary action which may include, but which shall not be limited to: referral for training, referral for counseling, written or verbal reprimand, suspension, reassignment, demotion, or termination of employment. Referral to another appropriate authority for review for possible violation of State and Federal statutes may also be appropriate.

(l) All State agencies shall provide all new employees with training on the policy and procedures set forth in this section within a reasonable period of time after each new employee's appointment date. Refresher training shall be provided to all employees, including supervisors, within a reasonable period of time. All State agencies shall also provide supervisors with training on a regular basis regarding their obligations and duties under the policy and regarding procedures set forth in this section.



BELOW IS A SUMMARY OF THE CASE YOU ARE FILING WITH THE **APPELLATE DIVISION**.  
 REVIEW ALL INFORMATION AND DOCUMENTS FOR ACCURACY PRIOR TO HITTING THE **SUBMIT** BUTTON  
 ON THE NEXT PAGE.

**FILING ID #** 1290510 **TRIAL COURT DOCKET #** MER-L-000034-19  
**APPELLATE #** A-004566-18 **TRIAL COURT COUNTY**  
**CASE TITLE** KATHERINE BRENNAN V. ALBERT J. ALVAREZ, STATE OF NEW JERSEY, MURPHY  
 FOR GOVERNOR, INC., ABC (1-10) (FICTITIOUS NAMES OF UNKNOWN  
 ENTITIES) AND JOHN DOES (1-10) (FICTITIOUS NAMES OF UNKNOWN  
 PERSONS)  
**CASE TYPE** STATE AGENCY **DISPOSITION DATE** 05/24/2019  
**CATEGORY**  
**TRIAL COURT JUDGE** DOUGLAS H. HURD, JSC

### PARTY/ATTORNEY

PARTY NAME	PARTY ROLE	PARTY DESIGNATION	FIRM NAME - ATTORNEY NAME / ATTORNEY ROLE	ADDRESS
ALBERT ALVAREZ	DEFENDANT	RESPONDENT	PRO SE - ALBERT ALVAREZ (ATTORNEY OF RECORD)	209 ROOSEVELT AVENUE, APT. 2 HASBROUCK HEIGHTS, NJ 07604
KATHERINE BRENNAN	PLAINTIFF	APPELLANT	SMITH EIBELER LLC - KATHRYN KRISTINE MC CLURE (ATTORNEY OF RECORD)	101 CRAWFORDS CORNER RD, STE 1-105R HOLMDEL, NJ 07733 732-935-7246 KMCCLURE@SMITHEIBELER.COM, LDALM@SMITHEIBELER.COM, CJEIBELER@SMITHEIBELER.COM (cjeibeler@smitheibeler.com)
MURPHY FOR GOVERNOR, INC.	DEFENDANT	RESPONDENT	DUANE MORRIS, LLP - PAUL PINNI JOSEPHSON (ATTORNEY OF RECORD)	1940 ROUTE 70 EAST, STE 100 CHERRY HILL, NJ 08003-3426 856-874-4200 PPJOSEPHSON@DUANEMORRIS.COM, PFARR@DUANEMORRIS.COM
STATE OF NEW JERSEY	DEFENDANT	RESPONDENT	ATTORNEY GENERAL LAW - JAMES M DUTTERA (ATTORNEY OF RECORD)	25 MARKET ST, PO BOX 112 TRENTON, NJ 08625-0106 609-984-3900 JAMES.DUTTERA@LAW.NJOAG.GOV, DEBRA.WIERZBOWSKI@LAW.NJOAG.GOV

### DOCUMENTS

DOCUMENT / FILE NAME	FILING PARTY	FIRM NAME / ATTORNEY ATTENTION	CATEGORY / DOCUMENT TYPE	SOURCE	DATE POSTED	STATUS
ORDER OF TRANSFER	KATHERINE BRENNAN	SMITH EIBELER LLC - KATHRYN KRISTINE MC CLURE	ORDER - ORDER OF TRANSFER	UPLOAD	06/24/2019	APPROVED
CASE INFORMATION STATEMENT	KATHERINE BRENNAN	SMITH EIBELER LLC - KATHRYN KRISTINE MC CLURE	APPELLATE DOCUMENTS - CASE INFO STATEMENT	SYSTEM GENERATED	06/24/2019	APPROVED
PROOF OF SERVICE	KATHERINE BRENNAN	SMITH EIBELER LLC - KATHRYN KRISTINE MC CLURE	APPELLATE DOCUMENTS - PROOF OF SERVICE	SYSTEM GENERATED	06/24/2019	APPROVED
NOTICE OF DOCKETING	Court		APPELLATE DOCUMENTS - COURT INITIATED NOTICES	INTERFACE	06/26/2019	APPROVED

LETTER OF COMMUNICATION	KATHERINE BRENNAN	SMITH EIBELER LLC - KATHRYN KRISTINE MC CLURE	APPELLATE DOCUMENTS - LETTER OF COMMUNICATION	UPLOAD	06/26/2019	SUBMITTED
PROOF OF SERVICE	KATHERINE BRENNAN	SMITH EIBELER LLC - KATHRYN KRISTINE MC CLURE	APPELLATE DOCUMENTS - PROOF OF SERVICE	SYSTEM GENERATED	06/26/2019	SUBMITTED

**FEES AND PAYMENTS**

Fee Type	Fee Amount	Fee Status	Fee Paid	Payment Date	Payment Type	Amount Due
No record found.						

**RELATED APPEALS**

CASE TYPE	APPELLATE #	TRIAL COURT/ AGENCY DOCKET #	Case Title	Disposition Date	Status
No record found.					

KATHRYN KRISTINE MC CLURE, Esq.  
SMITH EIBELER LLC  
101 CRAWFORDS CORNER RD  
STE 1-105R  
HOLMDEL, NJ 07733  
732-935-7246  
KMCCLURE@SMITHEIBELER.COM  
LDALM@SMITHEIBELER.COM  
CJEIBELER@SMITHEIBELER.COM(cjeibeler@s  
mitheibeler.com)

Before Appellate Division,  
Superior Court of New Jersey  
DOCKET NO. A-004566-18

STATE AGENCY

**KATHERINE BRENNAN**

**V.**

**ALBERT J. ALVAREZ, STATE OF NEW JERSEY, MURPHY FOR GOVERNOR, INC.,  
ABC (1-10) (FICTITIOUS NAMES OF UNKNOWN ENTITIES) AND JOHN DOES (1-10)  
(FICTITIOUS NAMES OF UNKNOWN PERSONS)**

PROOF OF SERVICE

I hereby certify that an original of the following documents, **PROOF OF SERVICE,  
LETTER OF COMMUNICATION** were submitted and transmitted to the parties listed below  
in the following format:

ELECTRONICALLY TO:

**ATTORNEY NAME: JAMES M DUTTERA, Esq.  
JAMES.DUTTERA@LAW.NJOAG.GOV  
DEBRA.WIERZBOWSKI@LAW.NJOAG.GOV  
ATTORNEY NAME: PAUL PINNI JOSEPHSON, Esq.  
PPJOSEPHSON@DUANEMORRIS.COM  
PFARR@DUANEMORRIS.COM**

BY MAIL:

**ALBERT ALVAREZ  
209 ROOSEVELT AVENUE, APT. 2  
HASBROUCK HEIGHTS NJ 07604**

**06/27/2019**

I certify that the forgoing statements made by me are true. I am aware that if any of  
the foregoing statements made by me are willfully false, I am subject to punishment.

**Attorney for APPELLANT  
KATHERINE BRENNAN**

Dated: **06/26/2019**

By: **S/ KATHRYN KRISTINE MC CLURE,  
Esq.**



SMITH EIBELER, LLC

Kathryn K. McClure  
Attorney At Law  
kmcclure@SmithEibeler.com  
www.SmithEibeler.com  
tel. 732.935.7246  
facsimile. 732.444.1096

June 26, 2019

**VIA E-COURTS**

Joseph H. Orlando, Clerk  
SUPERIOR COURT OF NEW JERSEY  
Appellate Division  
R.J. Hughes Justice Complex  
P.O. Box 006  
Trenton, New Jersey 08625-0006

**Re: Katherine Brennan v. Albert J. Alvarez, State of New Jersey, Murphy for Governor, Inc., et al.**  
**Appellate Docket No.: A-004566-18**  
**Law Division Docket No.: MER-L-000034-19**

Dear Mr. Orlando:

Please be advised that this office represents Plaintiff/Appellant Katherine Brennan ("Plaintiff") in the above-captioned matter. Pursuant to the Appellate Division's June 26, 2019 deficiency notice, Plaintiff submits this e clarification to the Court with regard to her answer in response to the question, "Have all the issues as to all the parties in this action, before the trial court or agency, been disposed?" Plaintiff responded "no" and submits this letter as clarification to her response.

On January 7, 2019, Plaintiff filed her original Complaint against Defendants Albert J. Alvarez ("Alvarez"), State of New Jersey ("State"), and Murphy for Governor, Inc. ("Campaign"), together with an Order to Show Cause, in the Superior Court of New Jersey, Mercer County. The first count of Plaintiff's Complaint, and the related Order to Show Cause, sought a declaratory judgment that the confidentiality provision in the State's Anti-Discrimination Policy, codified at N.J.A.C. 4A:7-3.1(j), violates State employees' constitutional and statutory rights and violates New Jersey public policy. Plaintiff sought to enjoin the State from enforcing it.

On March 20, 2019, Plaintiff filed a First Amended Complaint including an amended first count seeking a declaratory judgment that the State's Anti-Discrimination Policy, codified at N.J.A.C. 4A:7-1.1, et seq., violates State employees' constitutional and statutory rights and violates New Jersey public policy and to enjoin the State from enforcing it. Plaintiff's First

Amended Complaint includes the following additional eight (8) counts: Hostile “Public Accommodation” Environment in violation of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq. (“LAD”), with regard to the Defendant Campaign (second count); LAD Hostile Work Environment with regard to the Defendants Campaign and State (third count); Assault against Defendant Alvarez (fourth count); Battery against Defendant Alvarez (fifth count); Violation of the New Jersey Civil Rights Act, N.J.S.A. 10:6-2(c) against Defendant State with regard to the State’s Anti-Discrimination Policy (sixth count); Retaliation in Violation of the LAD against Defendant State with regard to the State’s Anti-Discrimination Policy (seventh count); Violation of the LAD’s Non-Disclosure Provisions with regard to the State’s Anti-Discrimination Policy (eighth count); and Defamation against Defendant Alvarez (ninth count).

On April 10, 2019, Defendant State of New Jersey brought a motion to transfer only the first count of Plaintiff’s First Amended Complaint to the Appellate Division on the basis that the Law Division lacked jurisdiction to hear Plaintiff’s challenge to the State’s Anti-Discrimination Policy, promulgated by regulation by a State agency at N.J.A.C. 4A:7-1.1, et seq. On May 24, 2019, the Honorable Douglas H. Hurd, P.J.Cv., granted to the State’s motion and entered an Order transferring only the first count of Plaintiff’s First Amended Complaint and related Order to Show to the Appellate Division. Plaintiff does not appeal Judge Hurd’s Order granting this transfer. The remaining eight counts (counts two through nine) of Plaintiff’s First Amended Complaint against Defendants remain pending in the trial court before Judge Hurd and, thus, have not been disposed.

Respectfully submitted,

SMITH EIBELER, LLC

*/s/ Kathryn K. McClure*

KATHRYN K. McCLURE

KKM\

cc: James Duttera, Esq. Deputy Attorney General (Via e-Courts and E-mail)  
Paul Josephson, Esq. (Via e-Courts and E-mail)  
Albert J. Alvarez, Esq., *pro se* (Via First Class Mail)

2010 WL 1027870

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK  
COURT RULES BEFORE CITING.

Superior Court of New Jersey,  
Appellate Division.

Dana HARRIS, Plaintiff-Appellant,

v.

DEPARTMENT OF CORRECTIONS,  
Defendant-Respondent.

Submitted March 11, 2010.

Decided March 22, 2010.

On Motion for Summary Disposition.

On appeal from the Department of Corrections.

**Attorneys and Law Firms**

Dana Harris, appellant pro se.

Paula T. Dow, Attorney General, attorney for respondent  
(Kevin R. Jespersen, Assistant Attorney General, on the  
brief).

Before Judges CUFF and C.L. MINIMAN.

**Opinion**

PER CURIAM.

\*1 In this prison disciplinary appeal, respondent Department of Corrections (DOC) moves for summary disposition. We grant the motion and affirm.

Appellant Dana Harris is an inmate at New Jersey State Prison serving a seven-year sentence for robbery and related weapons charges. This appeal relates to a July 3, 2009 incident; at the time Harris was incarcerated at Bayside State Prison.

After finding a two-inch hole in the wall by the pillow area of Harris's bunk bed containing a wire with a "razor handle with a razor melted into the end" and another smaller but empty hole in the wall, Senior Corrections Officer Sutherland filed three disciplinary reports charging Harris with the following prohibited acts: (1) .152-destroying, altering or damaging

government property; (2) \*.202-possession or introduction of a weapon; and (3) \*.306-conduct which disrupts or interferes with the security or orderly running of the correctional facility. *N.J.A.C.* 10A:4-4.1(a). Harris pled not guilty and "counsel substitute" was assigned.

The record contains handwritten notes presumably made by Hearing Officer Maguire indicating that the other inmates charged with the same offenses either denied knowledge of the holes or claimed the holes were there all along. Harris claimed: (1) the charges were "a direct result" of his recently filed complaint about the conditions at the facility; (2) he had "immediately" told an officer about the holes when he was placed in the cell; (3) he was never given a cell inspection form to sign; and (4) he was not aware of the weapon found in the hole. By handwritten interoffice memorandum dated July 9, 2009, Corrections Officer Neiswender claimed that Harris never informed him of the holes in the wall. Another corrections officer named in the report was on leave and not available to respond. Counsel substitute offered no statement and Harris declined the opportunity to cross-examine the witnesses. The record also contains a cell inspection report dated November 14, 2008, purportedly signed by Harris, indicating no damage to the cell walls, and another cell inspection report signed by Harris's cellmate dated March 26, 2009, indicating no damage to the cell walls.

The hearing officer found Harris guilty of the three charges. He imposed the following discipline: thirty days loss of commutation time and ninety days administrative segregation for the .152 infraction; 210 days loss of commutation time, fifteen days detention and 210 days administrative segregation for the \*.202 infraction; and 210 days loss of commutation time, fifteen days detention and 210 days administrative segregation for the \*.306 infraction. The Associate Administrator upheld the hearing officer's decision finding Harris guilty of the three charges based upon "substantial evidence." He found the sanctions "proportionate to the offense." Harris filed a timely notice of appeal.

The party moving for summary disposition must "demonstrate that the issues on appeal do not require further briefs or a full record." *R.* 2:8-3(b). This dispositional alternative is intended to "provide a pre-transcript, pre-argument opportunity for the screening out of appeals whose ultimate outcome is so clear as not to require for decision full perfection and hearing." Pressler, *Current N.J. Court Rules*, comment 2 on *R.* 2:8-3 (2010). See also *GE Capital Mortgage Servs., Inc. v. N.J. Title Ins. Co.*, 333 *N.J. Super.*



1, 5, 754 A.2d 558 (App.Div.2000). Summary disposition is appropriate where the appeal is “patently frivolous and the questions involved patently insubstantial” or where the trial court or administrative agency was “patently in error.” Pressler, *supra*, comment 2 on R. 2:8-3.

\*2 DOC argues that this matter is ripe for summary disposition because the “substantial evidence” on this “fully developed administrative record” shows that there were two holes in the wall of Harris's cell, a weapon was found in the hole that was “directly level” with Harris's pillow on the top bunk, and those cells had to be condemned until the holes could be fixed. We agree.

The finding that Harris constructively possessed the weapon is appropriate because the hole containing the weapon was “accessible only from Harris's top bunk.” Furthermore, the record creates a “reasonable inference that Harris knew about the razor and intended to exercise physical control over it.” Finally, the hearing comported with all procedural due process requirements. See *McDonald v. Pinchak*, 139 N.J.

188, 195, 652 A.2d 700 (1995); *Avant v. Clifford*, 67 N.J. 496, 524-29, 341 A.2d 629 (1975).

Moreover, the discipline imposed comports with the applicable regulations. *N.J.A.C.* 10A:4-5.1(a), provides that a finding of guilty for any offense set forth in *N.J.A.C.* 10A:4-4.1(a) that is preceded by an asterisk “shall render the offender subject to one or more” sanctions including, among others, up to fifteen days detention, administrative segregation for not more than a year, and loss of commutation time up to 365 calendar days. A finding of guilty for all other offenses shall subject the offense to such sanctions as up to fifteen days detention, administrative segregation for not more than ninety days and up to sixty days loss of commutation time. *N.J.A.C.* 10A:4-5.1(b).

Affirmed.

#### All Citations

Not Reported in A.2d, 2010 WL 1027870