
BARBARA R. FLEMING, : SUPERIOR COURT OF NEW JERSEY
Plaintiff-Appellant : APPELLATE DIVISION
 : DOCKET NO.: A-4156-97T5
v. :
CORRECTIONAL HEALTHCARE : CIVIL ACTION
SOLUTIONS, INC., JENNIFER :
MIERS, SALLY SIMPSON, JANE : On Appeal From An Order
DOE AND ROBERT ROE, : Entered on February 24, 1998
 : in the Superior Court of New
Defendants-Respondents : Jersey, Law Division,
 : Hunterdon County
 :
 : Sat Below: Roger F. Mahon,
 : J.S.C.
 : Docket No.: L-670-96

BRIEF OF DEFENDANTS-APPELLANTS CORRECTIONAL HEALTHCARE
SOLUTIONS, INC., JENNIFER MIERS AND SALLY SIMPSON

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I. PROCEDURAL HISTORY

Barbara R. Fleming ("Fleming") filed a complaint against Correctional Healthcare Solutions, Inc. ("Correctional"), Jennifer Miers ("Miers") and Sally Simpson ("Simpson") contending that they terminated her from her employment as a nurse with Correctional in violation of the New Jersey Conscientious Employee Protection Act ("CEPA"), N.J.S.A. §34:19-1 et seq. (Pa 51). After all the parties had completed discovery, Correctional, Miers and Simpson filed a motion for summary judgment contending that Fleming had produced insufficient evidence to support a jury verdict in her favor on several elements of her claim, including causation.

On February 20, 1998, the Honorable Rodger F. Mahon ("Judge Mahon"), Judge of the Superior Court of New Jersey, Hunterdon County - Law Division, held oral argument on the motion for summary judgment. At the conclusion of oral argument Judge Mahon ruled from the bench that Correctional, Miers and Simpson had met their burden of establishing no genuine issue of material fact for a jury to resolve. Consequently, Judge Mahon entered summary judgment in favor of Correctional, Miers and Simpson. Judge Mahon issued his formal order on February 23, 1998.

His February 20, 1998 bench opinion contains a detailed explanation of why he concluded that Fleming had failed to produce sufficient evidence to defeat a motion for summary judgment concerning her claim of a violation of CEPA. Judge Mahon held that Fleming had failed to establish sufficient

evidence showing that any activity that she had engaged in protected by CEPA had caused her firing. Fleming alleged that Correctional had terminated her because of her submission to Miers of a July 5 memorandum. The Court found this unconvincing because the July 5 memorandum contained other complaints not protected by CEPA which Fleming admitted could have caused her firing. The Court also rejected the view that mere proximity in time between the receipt of the July memoranda and her firing established causation. The Court relied in part upon Fleming having complained about various violations which she later placed in her memoranda from the first day of her employment with Correctional. The Court indicated that this weakened any proximity argument she might have.

The Court found Fleming's conduct after her termination enlightening. (T21-15 to 21-21). On the day that Correctional fired her, Fleming wrote two letters to Correctional objecting to her termination. (T21-11 to 21-14). Neither letter contained any allegation that Correctional had fired her in retaliation for submitting protected complaints regarding the copay compliance rate and dispensing medicine without authorization. Another nurse who worked with Fleming, Linda Rudland ("Rudland") testified that Fleming told her the day after her termination that Miers had fired her because Miers disliked her. (T21-21 to T21-23).

II. COUNTERSTATEMENT OF THE FACTS

A. Fleming Had Problems With Miers And Simpson While They Worked For The State Of New Jersey At The Edna Mahan Correctional Facility.

Prior to April 1, 1996, the State of New Jersey, employed Fleming, Simpson and Miers as nurses at the Edna Mahan Correctional Facility ("Edna Mahan"), a facility for female prisoners. Fleming had repeated problems with Miers and Simpson while they worked at Edna Mahan. Fleming had written a letter in March, 1996 to a nursing supervisor at Edna Mahan complaining about favoritism that she believed the supervisor had shown to Miers. In the letter Fleming severely criticized Miers. (Pa 100). Fleming admits that if Miers saw the letter, it may have influenced her decision to fire Fleming. (Pa 101a).

Fleming acknowledges that prior to April 1, 1996, while employed by the State of New Jersey as a nurse at Edna Mahan, state officials disciplined her several times. She received a ten day suspension for insubordination. (Pa 71). State officials also charged her with altering and improperly returning an inmate's medication order. She received no discipline for this. (Pa 71).

Fleming also received discipline from her supervisors at Edna Mahan when she attempted to cancel the shift of another nurse because she and another nurse were on duty and wished to remain on duty. (Pa 74). She also received discipline from state officials when Miers attempted to call her at home when she was allegedly sick and she failed to answer the phone. (Pa 72).

New Jersey officials also disciplined Fleming for losing ten syringes. Fleming contends that all the discipline imposed upon her by her supervisors at Edna Mahan prior to Correctional assuming control of the medical department lacked any justification. (Pa 71 to 72).

B. Privatization Occurs.

In April, 1996, the State of New Jersey, Department of Corrections engaged in the privatization of medical services at Edna Mahan. It hired a private corporation to provide various types of medical services to the inmates at Edna Mahan. The private company subsequently subcontracted with Correctional.

Correctional hired Simpson, Miers and Fleming as nurses in the medical department at Edna Mahan. Fleming concedes that the Warden of Edna Mahan did not want Correctional to hire her because "I was not inmate friendly and I did not jump every time one of the custody officers called." (Pa 74).

C. Correctional Did Everything Possible In Accordance With New Jersey Law To Enforce Copay Requirements For Inmates.

In April, 1996, the New Jersey legislature enacted a statute requiring that inmates pay for certain medical services and medications. That statute, N.J.S.A. §30:7E-2, states in relevant part:

(a) an inmate shall be liable for the cost of, and be charged a nominal fee for, any medical care, surgery, dental care, hospitalization or treatment provided to the inmate during the inmate's term of incarceration or detention by the state or county...

(b) an inmate may be charged either the full cost of or a nominal fee for any prescription or nonprescription drug or medicine provided to the inmate during the inmate's term of incarceration or detention by the state or county...

New Jersey law specifically forbids the denial of medical care to inmates for not filling out the required forms. That statute N.J.S.A. §30:7E-5 states in relevant part:

Notwithstanding the provision of sections 2, 3 and 4 of this act, no inmate shall be denied medical care, surgery, dental care, hospitalization, treatment or prescription or nonprescription drugs or medicine because he is not covered under a health insurance plan or because that inmate is unable to reimburse the State or county for the cost of those services, drugs or medicines.

Thus, Correctional had no ability to deny treatment to an inmate who failed to fill out the forms. The New Jersey legislature forbade such action.

Fleming states that she complained from almost the beginning of her tenure at Correctional in April, 1996 about the failure of Correctional to achieve 100% compliance with the inmate copay requirements. (Pa 84). Fleming admits that during the first week after Correctional assumed responsibility for the medical care of inmates at Edna Mahan a crisis situation existed. She stated:

The first week after their take over was bedlam. It was not their fault. It did get better however.

(Pa 81).

According to Fleming the situation Correctional inherited explains the difficulty it had in adhering to the letter of the

state regulations concerning inmate copay for the first four weeks after Correctional began to operate the medical department. (Pa 81).

Her criticism of Correctional as to its alleged failure to enforce the copay requirements imposed by the State of New Jersey against inmates who wanted medical care resulted from her belief that any inmate who failed to complete the required paperwork should be deprived of medical care. She testified:

Q. And your view is if they didn't fill out the forms so they could be appropriately charged, regardless of the medication, they should just be cut off?

A. Absolutely.

Q. What happens to the inmate that gets cut off from the medication and gets sick and dies?

A. Same thing that happens to me if I don't call my physician and ask for a refill, I don't get it.

(Pa 82).

Fleming has no knowledge concerning the relative compliance rates as to enforcement of copay by the State of New Jersey prior to privatization and Correctional after privatization. (Pa 83). Fleming has no knowledge of any inmate ever being refused medication by anyone at Edna Mahan even when the State of New Jersey had responsibility for the medical care because of the failure to fill out a copay form. (Pa 83). Fleming concedes that inmates received medication when the State of New Jersey operated the medical department at Edna Mahan even when they failed to fill out the required copay forms. (Pa 83).

Rudland, who Correctional employed as a nurse on the same shift at Edna Mahan as Fleming, indicated at her deposition that the State of New Jersey when it operated the medical department at Edna Mahan enforced copay about 45% to 50% of the time. (Pa 259). After Correctional assumed control between April 26, 1996 and July, 1996, compliance was about 20% to 25%. Later in the year it rose to 60% to 65%. (Pa 260). Rudland admitted that she had no figures to support her estimates. She lacked the ability to dispute a statement that compliance in July, 1996 had reached the 80% level. (Pa 260). Rudland has no recollection that Simpson ever stated that copay should not be enforced. No one ever told Rudland not to enforce the copay. (Pa 260). Rudland stated that she believed that the compliance level did not result from a deliberate attempt by Correctional not to enforce inmate copay. (Pa 263). She concluded that Correctional was ill prepared when it assumed control of Edna Mahan. It had only been allowed on-site a day or two prior to the take over. (Pa 264). She felt that Correctional tried to do a good job operating the medical unit. (Pa 265).

Carla Streano ("Streano"), a nurse who worked at Edna Mahan during the same time as Fleming, testified that she enforced the inmate copay policy. She never received any criticism for doing this. (Pa 198). Streano stated that there were times when everyone failed to enforce the inmate copay policy because, "...it was just not organized. That was the bottom line." (Pa 199) (emphasis added). When asked if Fleming ever failed to

enforce the policy, Streano responded, "I don't know. I would have to say all of us." (Pa 199)(emphasis added).

Correctional employed Miers as a charge nurse at Edna Mahan from April 27, 1996 until mid-May, 1996. It then promoted her to a nursing supervisor from mid-May, 1996 until June, 1996. She assumed the role of Health Services Administrator, the highest functioning Correctional employee at Edna Mahan in late June, 1996. (Pa 105 to 107).

Miers indicated that prior to Correctional assuming control of the medical department of Edna Mahan the New Jersey Department of Corrections only sporadically attempted to enforce the inmate copay regulations. (Pa 111). After Correctional took over a crisis mode existed:

The state was well aware that while we were getting our feet wet...there were other things that took priority than having somebody fill out a form to access healthcare. We were not, it was our policy at the time during crisis mode not to deny anybody healthcare because they failed to fill out the form. Although the state realized that that was something that we were working towards, not that we ever meant not to implement it but during a crisis we had to prioritize.

(Pa 111).

The Department of Corrections of the State of New Jersey knew of Correctional's enforcement efforts concerning inmate copay. It approved of them. (Pa 111).

Correctional had to deal with hostility from personnel of the New Jersey Department of Corrections. Many of them opposed privatization. They believed that they were the next to be

privatized. (Pa 112).

Only Fleming complained about the level of compliance with inmate copay. (Pa 113). Miers believed that Fleming wanted the inmates cut-off from treatment. (Pa 113). Miers concluded that Fleming's approach had no validity. According to Miers, Correctional did its best to comply. (Pa 113).

Fleming complained to Simpson, her immediate supervisor, on several occasions from the beginning of her employment with Correctional that she saw some medications renewed for which she did not see an inmate copay form. (Pa 156). Simpson's staff had brought to her attention the difficulties of complying with the paperwork regulations because of the volume. (Pa 156). Inmate compliance with the forms was difficult because many of them could not read. They had substantial difficulty understanding the forms. Correctional conducted classes to help inmates complete the forms. (Pa 157).

When Fleming complained to Simpson that the inmate copay forms were not being completed, Simpson investigated. She found that 4 out of 20 charts were missing the form. But, generally compliance had occurred. (Pa 159). Simpson viewed completion of the forms as a priority in May and June, 1996. (Pa 159).

D. Fleming Violates The Chain Of Command Of Correctional For The First Time.

On May 15, 1996, Fleming wrote to Laura Gaines, the President of Correctional, complaining about an incident with an inmate. (Da 10). This violated Correctional's chain of command.

Fleming wrongly contends that Miers admitted that there was

no chain of command policy enforced by Correctional in June and July, 1996. Fleming misinterprets Miers' deposition testimony. Miers specifically testified under oath that Correctional had a chain of command policy in existence in the summer of 1996. (Pa 106).

E. The June 14, 1996 Counseling Summary.

On June 14, 1996, Simpson prepared a counseling summary concerning Fleming. (Da 7). Simpson in the counseling summary related that Fleming had received a verbal warning based on numerous complaints from inmates and prison guards regarding her failure to provide inmates with the required medication. The summary form indicates that the situation had occurred before on many occasions. It stated:

In recent weeks nurse Fleming has displayed a very negative attitude about CHS and Edna Mahan and her job responsibilities.

(Da 7).

Simpson prepared this summary before Fleming had written either of the two memoranda in July that she contends caused her termination. No dispute about this exists.

F. The June 30, 1996 Evaluation Shows Fleming's Failure To Perform Her Job Appropriately.

Simpson prepared on June 30, 1996 a required evaluation of Fleming. It states in relevant part:

Barbara's expectation of inmates is too high. She lost track of the fact that these IM had little education, and less coping skills. She holds them accountable for problem solving and they are not able to meet these expectations.

(Da 8).

The evaluation by Simpson also indicates that Fleming attempted to perform functions outside the scope of her competency. Simpson concludes by stating:

She no longer puts forth quality care or shows enthusiasm with her work. Although she initially resists assignments given she does complete them.

(Da 8).

Simpson has stated that she prepared the June 30, 1996, on June 30th. Fleming has not been able to present any evidence to the contrary. None exists.

G. The July 2, 1996 Memorandum Written By Fleming.

On July 2, 1996, Fleming wrote a letter to Don Moore ("Moore"), then the director of the medical department at Edna Mahan for Correctional. She captioned the memorandum "variety of pesky problems". She complained about six different conditions, including the lack of mat cushions on the floor. (Da 1). At the time that Fleming authored the memorandum, Miers was the Director of Nursing for Correctional at Edna Mahan. Before returning the memo to Fleming, Miers wrote at the bottom of the memo:

Dear Barb,

This should first go to Sally - then Sally should bring it to me and then I'll bring it to Don.¹ (Da 2).

During the next few days after Miers wrote back to Fleming, Miers replaced Moore as the Director of Medical Services at Edna

¹ Fenno's married name is Miers. She was referred to at the time by the last name of Atkinson.

Mahan because of Moore's serious health problems.

H. Correctional Had A Chain Of Command Policy.

The Director of the Medical Department for Correctional at Edna Mahan, Moore, adopted a very strict view concerning the chain of command. He would redirect people who tried to talk to him outside of the chain of command. (Pa 122). When Miers assumed his job in July, 1996, she continued that policy. (Pa 122).

I. On July 3, 1996 Miers Warned Fleming To Obey The Chain Of Command.

On July 3, 1996, Miers prepared a counseling summary. (Da 10). The counseling summary stated under the heading, "Give reasons prompting this disciplinary action":

Insubordination - on the above date I received a letter from Mrs. Fleming entitled 'Pesky Little Problems' - Don Moore also received a copy. I informed Mrs. Fleming of the chain of command and instructed her to bring this type of thing to her charge nurse who would then bring it to me. (Da 10). (Emphasis added).

The counseling summary indicates that this situation had occurred before. According to the counseling summary on May 15, 1996, Fleming wrote to Laura Gaines, the President of Correctional, concerning an incident with an inmate. Fleming never discussed the matter with either her nursing supervisor, the charge nurse or Moore. (Da 10).

J. Fleming Intentionally Sent The July 5, 1996 Memorandum To Miers In Violation Of Miers' Instruction To Her.

On July 5, 1996, Fleming sent a memorandum similar to the

July 2, 1996 memorandum to Miers in her capacity as Supervisor of Nursing at Edna Mahan. In the memorandum she acknowledges that Moore no longer functioned as Director of Medical Services. (Da 3). She sets forth almost identical complaints to those contained in the July 2, 1996 memorandum. (Da 1).

K. Fleming Concedes That Before She Sent The July 5, 1996 Memorandum Miers Had Instructed Her To Send Such Letters To Simpson First.

Fleming concedes that before sending the July 5, 1996 memoranda Miers had been instructed her to send such memoranda to Simpson first. Fleming admits that she deliberately refused to do so. (Pa 92). She believed that as an employee of Correctional she had an obligation to bring her concerns to the highest person in power regardless of regulations or chain of command concerns. (Pa 92).

L. The July 5, 1996 Memorandum Complained About Many Subjects Not Protected by CEPA.

An examination of the July 5, 1996 memorandum to Miers from Fleming shows that it addressed several other problems which did not involve allegations of illegality. The only arguable allegations of illegality related to the provision of medical services to inmates without having the inmates fill out the required inmate copay forms and the contention of Fleming that nurses employed by Correctional had dispensed medications to inmates without a physician's order.

The memorandum contends that the med floor was very hard on legs and backs and asked for cushion floor pads. (Da 3). This

fails to constitute an allegation of illegality in violation of a New Jersey statute or regulation. The July 5, 1996 memorandum also complains about psychiatric consults and renewal requests for psych medicals being written without having the inmate complete the necessary paperwork. (Da 3). Fleming concedes that Correctional had no responsibility for the handling of psychiatric consults or the paperwork relating to psychiatric medicines. (Pa 93). Fleming admits that she has no idea which portions of the July 5, 1996 memo resulted in her termination. She concedes that it could have been her complaint about the floors being too hard that caused Correctional to fire her. (Pa 95).

M. Fleming's Job Performance Deteriorated In June, 1996 And Led Miers To Believe That She Had Reverted To Her Prior Unacceptable Conduct Which She Had Exhibited While Employed By The State Of New Jersey.

Miers had severe reservations about the quality of Fleming's performance prior to privatization. Fleming in her role as a state employee wanted to direct the inmates and the staff members of Edna Mahan as to how to perform their jobs. She was very bossy and agitated others. (Pa 118). Miers found many times she would tell Fleming to do something and Fleming would refuse. (Pa 118). On a consistent basis she would request Fleming to evaluate an inmate's potential medical crisis. Fleming determined that it was not an emergency without examining the inmate. (Pa 118). On days when Fleming worked under Miers' supervision prior to Correctional assuming control a problem existed with Fleming

almost every day. Fleming performed her job the way she wanted to and not as her supervisor desired. (Pa 118).

Fleming refused to deliver medications to inmates who were not located where they should have been when it was a result of a custody error. In other words if the medications were sent to the wrong unit because of inaccurate information provided by the Department of Corrections, Fleming took the view that the inmate was not entitled to her medication. (Pa 118).

Miers first started to be concerned about Fleming's performance after privatization, after her June, 1996 evaluation. (Pa 126). Simpson first came to her about Fleming's job performance and the problems she was having with her on the second shift about mid-June, 1996. Miers recalls Simpson informing her on or about June 14, 1996 that Fleming had refused to take medication to an inmate. (Pa 126). Miers believed:

She was starting to butt the system, starting to disobey direct orders and agitate somewhat.

(Pa 126).

Simpson also told Miers that Fleming had failed to follow direct orders and was having disputes with prison guards and the inmates. (Pa 127). Simpson had received complaints about Fleming from the prison guards. (Pa 127). Lieutenant Ruff had indicated that Fleming refused to cooperate with prison guards when they had a medical emergency that Fleming did not feel was an emergency. (Pa 127). Fleming refused to respond and never examined the patient. (Pa 127). Lieutenant Porter, a

correctional officer at Edna Mahan, also complained about Fleming not responding to an inmate having an asthma attack. (Pa 128).

On June 14, 1996, Simpson warned Fleming about not providing medication to the housing units. She believed that some of Fleming's past behavior patterns from her employment with the State of New Jersey had resurrected themselves. Simpson documented the verbal counseling with Fleming right after it took place on June 14, 1996. (Pa 163).

Simpson had a special concern when Fleming refused to take medication to inmates in June, 1996. To Simpson this constituted a return to Fleming's unacceptable prior behavior while working as a nurse for the State of New Jersey at Edna Mahan. In that capacity, Fleming had refused to take a narcotic medication to an inmate. She demanded that the physician change the order to a non-narcotic medication. (Pa 169). She also knew of an incident when prison administration had directed Fleming to go to one of the house units with medication for an inmate who had been on a trip. She refused. (Pa 169).

On at least two occasions in June, 1996, Fleming refused to take medication to inmates. (Pa 171). At first Simpson thought that the problem with Fleming could be resolved with some direction. On about four occasions Simpson had to order Fleming to return with medication for inmates. (Pa 171). Fleming still persisted in her refusal to take medication to inmates. (Pa 171).

Inmates also complained about Fleming's attitude toward

them. Between June 1 and June 15, 1996 Simpson received four verbal complaints from inmates and prison guards about Fleming's failure to provide medication. (Pa 172).

N. The July 8, 1996 Counseling Summary

On July 8, 1996, Miers prepared a counseling summary about Fleming relating to a verbal warning. Pursuant to Section 1 of the summary concerning reasons prompting the disciplinary action, Miers wrote:

Insubordination - I counseled Mrs. Fleming on 7/3/96 about following the chain of command. I received a direct communication from her again on 7/8/96 regarding the same problem's of 7/3/96. She again bypassed the chain of command.

(Da 11).

O. The Importance Of The Chain Of Command

Miers strongly believed that the July memoranda of Fleming should have been submitted through the proper channels. A crisis existed concerning the transition from the Department of Corrections of New Jersey operating medical care for the inmates to privatization by Correctional. According to Miers the chain of command was even more important during a crisis. (Pa 113). It was not appropriate for Fleming to bring her complaint directly to Miers without going to Simpson first. (Pa 114).

She did not believe that Fleming should be punished for making the complaint. She was only concerned about Fleming violating the chain of command. (Pa 123). She warned Fleming about sending the first letter of July 2, 1996 outside the chain

of command. (Pa 124).

P. Miers Consulted With Many Other Individuals Who Had No Knowledge Of The Complaints Of Fleming Before Reaching The Decision To Terminate Fleming.

Prior to Fleming's termination on July 12, 1996, Miers spoke with Sandra Milavec ("Milavec"), Vice-President of Personnel at Correctional. (Pa 135). She approved of the termination. At no time did Miers ever mention as a grounds for termination the contents of any letter or memoranda sent by Fleming. (Pa 136).

Miers also consulted with Ann Mack ("Mack"), Vice-President of Operations and acting Regional Administrator of Correctional prior to terminating Fleming. (Pa 135). Miers explained to Mack that she was concerned about Fleming's refusal to follow the chain of command and her poor performance. (Pa 135). Mack told her to terminate Fleming. (Pa 136).

Prior to terminating Fleming, Miers also consulted with Karen Boyd ("Boyd"), the Quality Assurance Officer for the State of New Jersey at Edna Mahan, and Bill Hauck ("Hauck"), Assistant Administrator at Edna Mahan. (Pa 137). Both Hauck and Boyd agreed with the decision to terminate Fleming. Boyd felt that it was the right decision. Hauck said, "It is about time." (Pa 142).

Q. Termination Of Fleming.

Fleming testified at her deposition that Miers told her that she was terminated because of her poor job performance and because she had violated the directives to send the July 5, 1996 memo through the chain of command. (Pa 90). At no time did

Miers ever tell Fleming, according to Fleming, that the contents of the memorandum had influenced the decision to terminate her. (Pa 90).

Fleming admits that she has no idea which portions of the July 5 letter resulted in her being fired. She concedes it could have been the complaint about the floors being too hard that caused her termination. (Pa 95).

Fleming believed that Miers direction to her concerning the sending of the July 5, 1996 memorandum through the chain of command constituted "just an informational type thing". (Pa 98). Fleming concluded that she had the right to disobey that directive. (Pa 98). Fleming admits that she deliberately disobeyed Miers' order to follow the chain of command. (Pa 98).

Miers prepared the separation of employment form for Fleming indicating why she had terminated Fleming. (Pa 76). The form shows two reasons for Fleming's firing; insubordination and poor performance. (Pa 77). Miers did not consider the contents of the July 2 and July 5 memoranda as grounds for termination. (Pa 87).

R. Fleming's Conduct After Her Termination Shows That Correctional, Miers And Simpson Did Not Terminate Her Because Of The Protected Content Of The July 5, 1996 Memorandum

After receiving notice of her termination, on July 12, 1996, Fleming wrote two letters that day. The first letter to Milavec, Vice-President of Human Resources of Correctional, contains no mention of any contention by Fleming that Correctional terminated her because of her complaints about Correctional's nurses

allegedly dispensing drugs without a doctor's orders or because of Correctional's supposed failure to enforce the inmate copay regulations of the State of New Jersey. (Da 4). Instead, she only defends her performance. (Da 4).

The second letter sent by Fleming on July 12, 1996 makes no mention of any contention that Correctional terminated Fleming for any improper reason. Fleming never stated that Correctional terminated her because of her criticism of Correctional for enforcement of the inmate copay regulations. Fleming never indicated that Correctional terminated her because of her complaints about nurses dispensing medication to inmates without appropriate doctor's orders. (Da 5). Fleming concedes that she never brought to Correctional's attention her view that she had been terminated because she presented her concerns to Correctional. (Pa 66).

Paragraph 13 of Fleming's complaint states that by her letters of July 12, 1996, she had informed to Correctional that she had been fired for an inappropriate reason. She admitted at her deposition that paragraph 13 of the complaint was untrue and that she knew it was untrue at the time she approved of the complaint. She admitted that she lied. (Pa 66).

Rudland, a friend and coworker of Fleming, has no evidence that Correctional fired Fleming because she wrote a letter complaining about copay. (Pa 266). Rudland has no evidence that Fleming was fired for complaining about prescriptions being given to inmates without a doctor's authorization. (Pa 267). Rudland

stated:

Q. So you believe that Barbara Fleming was fired because Mrs. Miers didn't like her?...

THE WITNESS: That's part of the component.

Q. Was that an important component?

A. I'm certain.

Q. Do you believe that she was fired because Sally Simpson didn't like her?

A. Probably.

Q. Do you consider those two factors together to be a substantial factor as to why she was fired?...

THE WITNESS: Yes.

Q. And do you believe that because of the dislike of her they were just looking for a reason to fire her?

A. Probably.

Q. And any reason was as good as any other?

A. Yes.

Q. And if she hadn't written a letter they would have found some other reason to fire her?

A. Probably.

(Pa 268 to 270).

Rudland spoke to Fleming the day after Correctional terminated her. According to Rudland:

Q. Did she tell you why she thought she was fired?

A. Yes.

Q. What did she say?

A. She said she thought it was because it

was personal.

Q. Because they didn't like her?

A. Yes.

Q. Did she ever give you any other reason in any other conversation as to why she thought they was fired?

A. No.

(Pa 275) (Emphasis added).

Carla Streano ("Streano"), a practical nurse, who worked at Edna Mahan during the same time as Fleming and on the same shift with her, indicated that it was common knowledge that Miers and Simpson did not like Fleming even when they were state employees. (Pa 195). Streano heard that Miers and Simpson disliked Fleming because she was not part of their clique. (Pa 195).

Streano had a conversation with Simpson concerning the evaluations that Simpson had written for the nurses whom she supervised. Streano asked Simpson if she was going to receive a good evaluation. Simpson said, "I'm not giving anybody a bad evaluation. I don't have anything bad to say about anybody." (Pa 211). The conversation occurred at the end of July or early August, 1996. (Pa 211).

Streano states that sometime after that Fleming received her negative evaluation. (Pa 211). This occurred before Correctional terminated Fleming. (Pa 212). Streano indicated that she asked Simpson about Fleming's negative evaluation. Simpson replied, "We all need our jobs." (Pa 212). Streano never asked Simpson what that meant. Simpson never told her.

(Pa 212). She believes that Fleming was fired at least several days, if not longer, after that conversation. (Pa 213).

Streano's testimony about Fleming's receiving the negative evaluation several days before her termination directly contradicts Fleming's testimony. Fleming indicates that she never received any evaluation until after Correctional terminated her. (Pa 96). Fleming admits that Correctional fired her on July 12, 1996, not two or three weeks later at the end of July.

III. LEGAL ARGUMENT

The Trial Court Properly Granted Summary Judgment In Favor Of Correctional, Miers and Simpson Because Fleming Presented Insufficient Evidence to Support A Jury Verdict In Her Favor On The Issue Of Causation And On The Issue Of Pretext.

A. Standard of Review

In Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 523 (1994) the Supreme Court of New Jersey radically transformed the standard of summary judgment in this state. Henceforth the Supreme Court of New Jersey mandated that a trial court grant a motion for summary judgment in favor of defendant unless the plaintiff in response to the motion submits sufficient evidence to support a jury verdict in her favor on every issue on which she has the burden of proof. In Kelly v. Bally's Grand Inc., 285 N.J. Super. 422, 432 (App. Div. 1995) this Court recognized that the Brill standard for summary judgment required the trial court and this Court to weigh the evidence relating to the material facts to determine the existence of a genuine issue for a jury to resolve. This Court stated:

Applying the Brill standard for summary judgment, we conclude that after weighing the evidence relating to the material facts, a genuine issue exists. 285 N.J. Super. at 432.

The courts of New Jersey have not adopted a special or different summary judgment standard when issues of intent or motivation exist. The party opposing summary judgment still must meet the Brill test and must show sufficient evidence to support a jury verdict in her favor on every issue on which she has the burden of proof.

An examination of the record in this case leads to only one conclusion. Fleming has no ability to meet the standard necessary to defeat summary judgment mandated by the Supreme Court of New Jersey in Brill, supra, 142 N.J. at 523. She has insufficient evidence to support a jury verdict in her favor on the issue of causation. She has to establish a causal connection between her alleged whistle blowing and her termination. She has to prove that a retaliatory motive played a substantial part in her termination by Correctional. Young v. Schering Corp., 275 N.J. Super. 221, 233 (App. Div. 1994)

Fleming has no evidence on this issue at all. She has no ability to establish any causal connection between her termination and the content of her July 5, 1996 memorandum.

B. Fleming Has No Ability To Submit Sufficient Evidence To Support A Jury Verdict In Her Favor On The Issue Of A Causal Connection Between Her Memorandum Of July 5, 1996 And Her Termination.

Fleming bases her claim against Correctional, Miers and

Simpson solely on their alleged termination of her employment with Correctional in violation of N.J. 34:19-3 Conscientious Employee Protection Act (hereinafter referred to as "CEPA").

That statute provides in relevant part:

An employer shall not take retaliatory action against an employee because the employee does any of the following:

a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer or another employer, with whom there is a business relationship, that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to a law;

b. Provides information to or testifies for, 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; 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, rule or regulation promulgated pursuant to the law;

(2) is fraudulent or criminal; or

(3) is incompatible with the clear mandated public policy concerning the public health, safety or welfare or protection of the environment.

Thus, to prevail on a claim brought under CEPA, Fleming must prove three factors. First, she must show that she had a reasonable belief that illegal conduct had occurred in fact. In other words, that given the circumstantial evidence a reasonable

lay person would conclude that illegal activity was going on. Young, supra, 275 N.J. Super. at 228.

Second, she must show that she disclosed or threatened to disclose the activity to a supervisor or public body and that she was fired. Third, she must prove that a causal connection exists between her whistle blowing and her termination. That is that a retaliatory motive played a substantial part in the adverse employment action. Young, supra, 275 N.J. Super. at 233.

Fleming contends that the contents of the July 5, 1996 memorandum to Miers caused her firing. She asserts that two of the issues that she raised in that memorandum resulted in her termination. According to Fleming, Correctional fired her because she complained about the alleged failure to carry out the inmate copay policy of the State of New Jersey requiring inmates to pay for certain medical services and because she complained about nurses dispensing medications to inmates without a physician's orders.

What evidence has she produced that either of these complaints caused her firing? An examination of the record shows that she has not met her burden of establishing sufficient evidence to support a jury verdict in her favor on the issue that the contents of the memorandum caused her termination. Correctional has produced uncontradicted evidence that it terminated her because of her insubordination consisting of sending memoranda outside the chain of command and because of poor job performance.

Her termination notice sets forth these reasons. (Da 12). Correctional has produced a counseling summary dated June 14, 1996. That summary indicates that Simpson, Fleming's supervisor, noted numerous complaints from inmates and prison guards regarding the failure of Fleming to provide medications to inmates. (Da 7).

On June 30, 1996, Simpson prepared an evaluation of Fleming. That evaluation contained substantial criticisms of Fleming. It states that she failed to provide quality care or show enthusiasm for her work. It indicates that she expects too much from inmates and refuses to help them. (Da 8). Simpson prepared this evaluation a week before Fleming ever wrote the July 5 memorandum which she contends caused her firing. No dispute exists on this point.

On July 3, 1996, Miers prepared a counseling summary about Fleming concerning what Miers viewed as her insubordination. She noted that on July 2, 1996 she received a letter from Fleming complaining about certain conditions relating to the medical department operated by Correctional. Miers stated that Fleming had violated the chain of command and should have brought these concerns to the attention of her supervisor, Simpson. The counseling summary also stated that the situation had occurred before. Fleming had written directly in May, 1996 to Laura Gaines, the President of Correctional, complaining about an incident with an inmate without utilizing the chain of command. (Da 10).

Miers returned the July 2, 1996 memorandum to Fleming with the following note:

Dear Barb,

This should go first to Sally and Sally should bring it to me and then I will bring it to Don.

(Da 10; Pa 94).

Fleming concedes that Miers told her that the July 2 memo should have been sent to Simpson first and then Simpson would give it to the Director of Nursing who would then pass it up the chain of command to Miers. Fleming admits that she deliberately decided to disobey Miers instruction. (Pa 92). She believed that as an employee of Correctional she had an obligation to present her concerns to the highest person in power regardless of regulations or chain of command requirements. (Pa 92).

Correctional and Miers terminated Fleming in part because of her admitted insubordination. Fleming reverted back to her earlier behavior that she exhibited continuously while employed by the State of New Jersey. Fleming did what she wanted when she wanted. She ignored superiors. Miers warned her of this by her note on the July 2, 1996 memorandum. Fleming deliberately disregarded that warning. No dispute exists as to this. Fleming concedes her insubordination. (Pa 92).

Thus, Fleming has no ability to produce evidence sufficient to support a jury verdict in her favor on the issue of the contents of the July 5, 1996 memorandum as it related to inmate copay and the prescription of drugs to inmates without

appropriate orders from a physician causing Correctional to terminate her. Judge Mahon correctly concluded that the admissible evidence only led to one conclusion; that Fleming's admitted insubordination in refusing to follow the directions of Miers concerning the chain of command and her poor performance constituted only the reasons for Fleming's termination. (T22-7 to 22-18).

Fleming realizes that she has no ability to prevail because of her admitted disobedience of Miers. Thus, she launches a frontal assault on the validity of Miers terminating her because of her refusal to send her memoranda to the appropriate individuals. She asserts that CEPA prohibits an employer from determining to whom an employee should submit various complaints. Fleming believes that CEPA provides her with the absolute right to ignore the chain of command. She has the power to ignore any rules and regulations that she wants. She believes the legislature has given her a blanket immunity for her conduct. Unfortunately, an examination of CEPA shows that her reading of it has no validity. CEPA fails to authorize insubordination. It does not negate an employee's responsibility to follow rules, regulations, and directions of employers.

Here, Miers in terminating Fleming did not consider the contents of the two memoranda. Instead, she relied only upon the method by which Fleming communicated her concern.

Fleming asks this Court to strip away from employers in the State of New Jersey the ability to determine how their employees

communicate complaints to them. Reversing the granting of the motion for summary judgment by Judge Mahon would provide carte blanche to every employee in the State of New Jersey to violate instructions concerning the chain of command and to engage in whatever conduct they wish however inappropriate. No organization has the ability to function that way.

Could this Court operate if every employee of the Superior Court Appellate Division had the right to march into any judge's office any time they wanted, or interrupt oral argument before this Court, and proclaim in open court that they were not happy with certain matters, in front of attorneys for litigants arguing appellate issues? Of course, it could not. No judge would tolerate such conduct. Yet, Fleming demands that this Court impose this state of affairs upon every employer in New Jersey.

Fleming concluded that she had the right to disobey the directive of Miers. (Pa 98). Fleming admits that she deliberately disobeyed Miers' orders. (Pa 98).

This conduct justified termination. Fleming seeks to transform a narrow exception to the employee at will doctrine, CEPA, enacted by the legislature and expand it to completely abolish the at will approach endorsed by both the legislature and the courts of this State.

In Feinman v. New Jersey Department of Human Services, 272 N.J. Super. 606 (App. Div. 1994), this Court rejected the argument that Fleming now makes concerning the scope of CEPA. In that case a physician contended that his employer, a nursing

home, had provided him with too many patients to care for in violation of the statutes of the State of New Jersey. He therefore refused to treat certain patients. His employer fired him for that. In response the physician invoked the protection of CEPA. This Court concluded that CEPA failed to apply because the physician's refusal to treat patients did not come within the protection of CEPA. Only his complaint about that refusal had the protection of the legislature.

The analysis of this Court in Feinman, supra, applies here. Fleming had the right to complain about what she viewed as illegal conduct. But her employer, Correctional, had the right to control how she voiced those complaints and to whom she communicated them. Any other approach results in chaos in the workplace. It transforms every office and factory into a modern day Tower of Babel.

Fleming asserts that Correctional did not have a chain of command policy. But, Fleming merely sets forth this assertion. She has no evidence to support it. The only evidence in the record shows that Correctional did have a chain of command policy. Miers testified that such a policy existed in July, 1996. (Pa 106). Miers also indicated that her predecessor as Director of the Medical Department of Correctional at Edna Mahan, Moore, adopted a very strict approach concerning the chain of command. (Pa 122). Miers continued that policy. (Pa 122).

Miers stated that she adhered to the chain of command policy because a crisis existed concerning the transition from the State

of New Jersey operating medical care for the inmates to privatization by Correctional. Miers concluded that adhering to the chain of command was even more important in such a situation. (Pa 113).

Fleming attacks the wisdom of the adherence by Miers and Correctional to a chain of command policy in operating the medical department at Edna Mahan. Federal courts interpreting a variety of discrimination statutes have concluded that such attacks always fail to establish a discrimination claim. The United States Court of Appeals for the Third Circuit in Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509 (3d Cir. 1992) recognized the substantial limitation that exist upon a court's evaluation of an employer's business judgment concerning criteria that the employer establishes for its employees to meet. The Court of Appeals held that a court must focus on whether the criteria relied upon by an employer for its adverse employment decision were discriminatorily applied. The court must refrain from questioning an employer's non-discriminatory judgment of what criteria should be applied and how they should be applied. Id. 983 F.2d at 527-528, 531.

Fleming asks this Court to ignore the directive issued by the United States Court of Appeals in Ezold, supra, 983 F.2d at 527-528, 531. Fleming asks that this Court substitute its business judgment for that of Correctional. Fleming insists that this Court should prohibit Correctional from requiring an employee to follow a legitimate chain of command procedure. This

constitutes nonsense in the extreme. Under the cloak of CEPA, Fleming asks this Court to adopt statewide standards concerning the chain of command for all employers in the State of New Jersey. The legislature has never authorized such action. It constitutes a frontal assault on private enterprise.

Both this Court and Fleming lack the ability to second guess the decisions of Correctional concerning enforcing its chain of command policy. In Smith v. Monsanto Chem. Co., 770 F.2d 719, 723 n. 3 (8th Cir. 1985) the Court recognized that an employer may develop arbitrary, ridiculous and even irrational policies as long as they are applied in a non-discriminatory manner. In Polland v. Rea Magnet Wire Co., 824 F.2d 557, 560 (7th Cir. 1987), the Court held:

No matter how medieval a firm's practices, no matter how highhanded its decisional process, no matter how mistaken the firm's managers, [the ADEA does] not interfere.

In Simpson v. Kay Jewelers Div. of Sterling, Inc., 142 F.3d 639 (3d Cir. 1998) the United States Court of Appeals for the Third Circuit specifically rejected the position of Fleming. In Simpson, supra, plaintiff contended that his employer used inappropriate criteria to evaluate her performance. The Court of Appeals rejected this argument concluding that implicit in it is the contention that evaluation scores are more indicative of performance than sales quotas. The Court held that whether sale quotas or evaluation scores are a more appropriate measure of a manager's performance is not for the court to decide. Accord, Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1109 (3d

Cir. 1997) ("The question is not whether the employer made the best or even a sound business decision; it is whether the reason is [discrimination]"); Healy v. New York Life Insurance Co., 860 F.2d 1209, 1216 (3d Cir. 1988) ("Our inquiry...is not an independent assessment of how we might evaluate and treat a loyal employee"); Bellissimo v. Westinghouse Elec. Corp., 764 F.2d 175, 182 (3d Cir. 1985) ("unfortunate and destructive conflict of personalities does not establish...discrimination").

Fleming has failed to meet her burden as to causation for several additional reasons. Many of these independently defeat her claim. Correctional, Miers and Simpson discuss each of these issues in the sections set forth below.

1. After Termination Fleming Wrote Two Letters To Correctional In Which She Failed To Mention That She Had Been Fired In Retaliation For Engaging In Conduct Protected By CEPA.

When Correctional terminated Fleming, Fleming did not react by asserting that she had been fired in retaliation for engaging in protected conduct. She never mentioned the issue until she filed her complaint in this case months after her termination. Instead, she wrote two letters on July 12, 1996, to officials of Correctional. In neither letter did she ever mention retaliation for protected conduct as a reason for her termination. (Da 4 and 5).

2. Fleming Complained Numerous Times To Simpson Without Any Action Being Taken Against Her.

Fleming admits that she complained numerous times to Simpson about Correctional's alleged failure to enforce inmate copy and

about prisoners receiving medication without a doctor's authorization during a seven or eight week period before her firing. Fleming concedes that she started to complain within three to four weeks after Correctional took over. Thus, by the middle of May, she began to submit verbal complaints to Simpson. (Pa 84). Yet, by her own admission, Correctional took no action against her as a result of these complaints until she violated the chain of command and sent a memorandum over her supervisor's head for the second time. She received a favorable evaluation at the end of May, 1996 even though she had been complaining for two weeks. This defeats her attempt to establish causation. She has no admissible evidence of causation sufficient to support a jury verdict in her favor.

3. Fleming's Two Memoranda Also Deal With Issues Not Protected By CEPA.

Fleming contends that the July 2, 1996 and the July 5, 1996 memoranda that she authored and sent to Correctional supervisory personnel resulted in her termination. She asserts that CEPA protects the content of those memoranda. But Fleming fails to tell this Court a crucial fact. Both of these memoranda address problems which do not involve allegations of illegality. Both memoranda contended that the med floor is very hard on the legs and back and asked for cushion floor pads. (Da 1 and 3). Both memoranda complained about psychiatric consults and renewal requests for psych medicals being written without having the inmate complete the necessary paperwork. (Da 1 and 3). Fleming concedes that Correctional had no responsibility for the handling

of psychiatric consults or the paperwork relating to psychiatric medicines. (Pa 93).

Fleming admits that she has no idea which portions of the two memoranda resulted in her being fired. She concedes that it could have been the complaint about the floor mats being too hard that caused her termination. (Pa 95).

How can Fleming prove causation when she admits that non-protected portions of the two memoranda may have caused her firing? Her own admissions defeat her claim.

4. Fleming Concedes That Miers May Have Terminated Her Because Of Past Disputes Unrelated To Accusations Of Illegality.

Fleming identified at her deposition a March 22, 1996 letter she wrote to Kathleen Smith, the nursing supervisor at Edna Mahan prior to Correctional assuming control in April, 1996. (Pa 100; Da 13). In the letter Fleming severely criticizes Miers. (Pa 101). Fleming admits that if Miers had seen the letter, it may have influenced her in her decision to fire Fleming. (Pa 101). This letter dealt with Miers' performance prior to Correctional assuming control for the medical care of inmates at Edna Mahan. Miers and Fleming both worked together as nurses at Edna Mahan for the State of New Jersey.

This admission also dooms Fleming's claim. She lacks the ability to establish causation. She cannot show a relationship between her complaints about alleged illegal conduct in her July 2, 1996 and July 5, 1996 memoranda and her termination. She concedes that another reason not prohibited by law existed for

her termination; that Miers resented her for criticizing her.

5. Fleming Has Failed To Prove Causation Because She Concedes That Miers And Simpson May Have Fired Her Because They Did Not Like Her.

Fleming admits that Miers and Simpson did not like her and may have fired her for that reason. (Pa 91).

Thus, Fleming concedes that three separate reasons explain her firing apart from any violation of the New Jersey Conscientious Employee Protection Act. First, she admits that she may have been fired for complaining in the July 2, 1996 and July 5, 1996 memoranda of conduct that failed to violate any public policy of the State of New Jersey such as the absence of floor mats. (Pa 95). Second, Fleming concedes that Miers may have terminated her because of a letter that she wrote in April, 1996 criticizing Miers prior to Correctional assuming control of medical care at Edna Mahan. None of the criticism related to any protected conduct. (Pa 100 to 101; Da 13). Third, Fleming concedes that Miers and Simpson may have fired her because they did not like her. (Pa 91). How can this establish causation?

6. Fleming Has Failed To Establish Any Evidence That Verbal Complaints Made By Her To Simpson Caused Her Firing.

Fleming contends that verbal complaints that she made prior to writing the two memoranda contributed to her termination in violation of CEPA. She never submits these allegations in her complaint. She should not be able to assert a new cause of action for the first time in response to her motion for summary judgment. She should have amended her complaint. She never did

that. She never sought to do that.

But even if this Court concludes that it can consider such an allegation not pled in the complaint Fleming has not presented sufficient evidence to support a jury verdict in her favor on the issue of the verbal complaints playing a substantial factor in her termination. She has not produced any evidence that Miers knew of those verbal complaints. Fleming concedes that Miers made the decision to terminate Fleming and suggested Fleming's termination to Simpson. See brief of Fleming in opposition to the motion for summary judgment of Correctional, Simpson and Miers. How could Miers have relied on verbal complaints that she did not know about? Fleming fails to address this issue.

7. Linda Rudland's Deposition Testimony Contains A Fatal Admission By Fleming.

Fleming submitted Rudland as one of her key witnesses to support her contention that Correctional terminated her in response to her authoring two memoranda. Fleming attempted to rely on certain portions of Rudland's deposition testimony to defeat the summary judgment motion of Correctional, Miers and Simpson. Fleming ignores a fatal admission by her contained in Rudland's deposition testimony. Rudland spoke to Fleming the day after she was fired. According to Rudland,

Q. Did she tell you why she thought she was fired?

A. Yes.

Q. What did she say?

A. She said she thought it was because it was personal.

Q. Because they didn't like her?

A. Yes.

Q. Did she ever give you any other reason in any other conversation as to why she thought they was fired?

A. No.

(Pa 275). (Emphasis added).

Neither in Fleming's response to the motion for summary judgment nor in her brief before this Court does she ever deny that she made this statement to Rudland. She states that Rudland did not understand what was meant by "personal". But Rudland was specifically asked if Fleming told her that she was fired because Miers and Simpson did not like her. She responded, yes. (Pa 275). No indication exists that Rudland was confused as to the meaning of the question. She unequivocally answered that Fleming told her that Miers and Simpson had terminated her because of personal dislike. (Pa 275). Fleming also concedes in her own deposition testimony that this may have been the reason why she was fired. (Pa 91).

8. Streano's Testimony Fails To Support A Jury Verdict On The Issue Of Causation.

Fleming submits Streano's testimony as support for causation existing between the firing of Fleming and the contents of the two memoranda. An examination of Streano's testimony shows that it fails to provide any such support. Streano stated that she had no reason to believe that Simpson, or anyone from Correctional, prepared Fleming's evaluation after the decision to fire her had been made. (Pa 215). Fleming asks this Court to

make this inference without any support for it.

Also, Streano's statement that when she expressed her shock to Simpson concerning Simpson's negative evaluation, Simpson replied, "We all need our jobs," fails to support an inference that Miers knew that the evaluation was incorrect. Miers made the decision to terminate. No indication exists that Simpson suggested termination to Miers. No indication exists that Simpson's statement "we all need our jobs" refers to an attempt to fire Fleming because of the July 2 and July 5, 1996 memoranda. It could just as easily support the assumption that Simpson disliked Miers and wanted her terminated for that reason.

Streano indicates that Fleming received the negative evaluation prior to her termination. (Pa 211 and 212). This contradicts Fleming's contention that she never saw the evaluation and never heard about it until after her termination. Streano's testimony negates the inference that the negative evaluation constituted a subterfuge or a pretext.

Streano stated that the conversation with Simpson occurred in late July or early August, 1996. (Pa 211). But Correctional fired Fleming on July 12, 1998, over two weeks before Streano contends Simpson promised everyone a good evaluation. This makes no sense.

Since the uncontradicted testimony shows that Miers alone made the decision to terminate without a recommendation from Simpson supporting termination any statement by Simpson as to what she did and why she did it fails to support the view that

Miers terminated Fleming for an impermissible reason.

9. The Timing Of The Firing Fails To Support A Causal Relationship.

Essentially Fleming relies solely upon her termination occurring on July 12, 1996, after she sent the memorandum dated July 5, 1996 to support her claim that her complaints in the memorandum concerning various illegal activities caused her firing. No New Jersey court and no court interpreting New Jersey law has ever found this evidence alone, the proximity between the complaints and the firing, sufficient to support a jury verdict on the issue of causation concerning a claim brought pursuant to CEPA.

Fleming relies solely on case authority from the federal courts interpreting 42 U.S.C. §2000(e) et seq. and other federal employment statutes. No indication exists that the New Jersey courts will adopt this approach concerning CEPA. Strong policy reasons exist why this Court should not adopt such an approach. To do so undercuts the employment at will doctrine which governs employment relationships in the State of New Jersey. Pursuant to Fleming's analysis an employee who fears termination only has to send a protected letter raising allegations of illegality to obtain a cause of action against her employer on the verge of firing that employee. The employer even loses the ability to defeat such a frivolous claim by means of summary judgment.

Fleming would have this Court hold that the mere proximity in time between the protected activity and the termination creates a genuine issue of material fact. This vastly expands

the whistle blower statute. Action by the legislature should be required before such a pervasive change in the at will employment doctrine occurs.

Fleming offers an inaccurate statement concerning federal law on this issue. Most courts to consider the question have concluded that timing alone fails to create an inference of causation. Quiroga v. Hasbro, Inc., 934 F.2d 497, 501 (3d Cir. 1991). In Robinson v. City of Pittsburgh, 120 F.3d 1286 (3d Cir. 1997) the most recent pronouncement of the United States Court of Appeals for the Third Circuit on this issue, the Court stated that the mere fact that an adverse employment action occurs after a complaint will ordinarily be insufficient to satisfy the plaintiff's burden of demonstrating a causal link between the two events. Id. at 1302. That analysis applies here.

10. Miers' Waiting To Terminate Fleming Until After Fleming Disobeyed Her Directive Concerning The Chain Of Command Does Not Constitute Evidence That She Did Not Rely Upon The June, 1996 Negative Evaluation.

Fleming contends that since Miers failed to immediately terminate Fleming after reviewing the negative June 30, 1996 evaluation this shows that she did not rely upon it in reaching her decision to terminate Fleming. This contention makes no sense. The unrebutted evidence in the record establishes that Miers terminated Fleming for two reasons. First, she relied upon Fleming's insubordination in disregarding Miers express directions concerning the chain of command. Second, she relied upon Fleming's poor performance as set forth in part in the June

30, 1996 memorandum. Since Miers did not reach the decision to terminate until after the problem with the chain of command arose she could not have terminated Fleming immediately after receiving the June 30, 1996 evaluation. The June 30, 1996 evaluation by itself did not cause Fleming's termination. It constituted part of the reason for Fleming's termination.

Fleming attempts to postulate a rule of law that would prevent an employer from firing an employee for more than one reason and permit the plaintiff to turn reliance on more than one cause against an employer. This makes no sense. It impairs the smooth functioning of businesses in the State of New Jersey. It fails to serve any legitimate purpose necessary for the enforcement of the goals envisioned by the legislature when it enacted CEPA.

11. Simpson And Miers Had Nothing To Fear From The Complaints Of Fleming.

Fleming asserts that one of her grounds for establishing a jury verdict in her favor on the issue of causation stems from the supposed fear of Simpson and Miers that action would be taken against them because of Fleming's complaints relating to inmate copay and the prescription of drugs to prisoners without orders from physicians. No evidence exists in the record of any such fear. Fleming creates this argument out of thin air. She never presented it to Judge Mahon in opposition to the motion for summary judgment. She should not be able to raise it before this Court for the first time on appeal.

Simpson and Miers had no indication that any action would be taken against them by either the State of New Jersey or Correctional because of the complaints of Fleming. The unrebutted testimony of Miers shows that the Department of Corrections of the State of New Jersey knew of Correctional's enforcement efforts concerning inmate copay. It approved of them. (Pa 111). At no time did the State of New Jersey ever indicate any dissatisfaction with Miers', Simpson's and Correctional's enforcement of inmate copay.

The business manager of Edna Mahan, a state official, had primary responsibility for insuring the posting of all copayments. The institutional medical administrator, an employee of the State of New Jersey, was responsible for compliance, provision of services, and communication of charges to the business office. (Pa 33). No indication exists that either of these officials had any problem with the level of compliance of Correctional. They knew what it was. They had the responsibility for such compliance. They never cited Correctional for a violation. They never even communicated to Correctional that a violation had occurred or that compliance was anything other than satisfactory.

In every CEPA case the plaintiff has the ability to contend that the defendant employer fears the reporting of the violation. No New Jersey court has ever held that this mere fear unsupported by evidence supports a jury verdict on the issue of causation. A very important policy reason exists for this. If it did support

a jury verdict on causation then in every CEPA case the plaintiff would be able to establish causation simply by contending without producing any evidence that the defendant employer had a fear of being reported and that constitutes the reason for the termination of the employee. This would render every allegation of a CEPA violation one of strict liability. The employer would have no defense. This interpretation of CEPA guts the employee at will doctrine and broadens CEPA's application beyond anything that the legislature ever intended.

C. Pretext Analysis Does Not Apply To CEPA.

Fleming urges this Court to adopt the prima facie case and pretext analysis approach adopted by the federal courts and by the courts of the State of New Jersey in actions brought pursuant to various employment discrimination statutes. No New Jersey Court has ever accepted this approach.

United States District Judge Irenas concluded in Bowles v. City of Camden, 993 F.Supp. 255 (D.N.J. 1998) that the analytical framework for evaluating employment discrimination cases should apply to CEPA. He bases this solely upon his view that the elements necessary to prove a retaliatory discharge claim under CEPA are similar to those necessary to prove a violation of Title VII. He submits no case authority from any other court to support his conclusion. None exist. No state court or federal court has ever adopted Judge Irenas' approach.

Strong policy reasons exist to reject it. The approved utilized in employment discrimination cases has developed as a

result of intense analysis concerning the factors involved in those claims. Federal and state courts have agonized over what constitutes a prima facie case. They have developed over years of jurisprudence, a shifting burden of proof concerning pretext. The particular contours of the employment discrimination statutes have influenced the approach of the federal courts and of the courts of New Jersey.

Little justification exists to simply pick up this approach and drop it onto a new statute, CEPA. The Title VII analytical framework fails to lend itself to easy transplantation.

If this Court concludes that pretext analysis applies to CEPA claims, it fails to apply here. The issue of causation constitutes a separate inquiry from that of pretext. Fioriglio v. City of Atlantic City, 996 F.Supp. 379 (D.N.J. 1998). Since Fleming has failed to produce sufficient evidence to defeat a motion for summary judgment on the issue of causation pursuant to CEPA, no need exists to evaluate whether Fleming has produced sufficient evidence to establish pretext. Id.

D. Fleming Has Failed To Produce Sufficient Evidence To Support A Jury Verdict In Her Favor On The Issue Of The Reasons For Her Termination By Correctional Constituting A Pretext.

Even if Fleming has set forth a prima facie case establishing violation of CEPA, Fleming, in order to survive summary judgment, must show that the reason for termination provided by Correctional, constitutes a pretext. Fleming has failed to produce to sufficient evidence to support a jury verdict in her favor on this issue. She has the burden of proof.

No New Jersey court has ever discussed the legal requirements for establishing pretext in the context of a CEPA claim. If this Court adopts the pretext analysis it most probably will rely upon the approach that it and the federal courts have taken in employment discrimination cases.²

When utilizing a Title VII analysis courts first require that a prima facie case be established by the plaintiff. After the plaintiff establishes a prima facie case, including showing causation between the protected activity and the employer's violation, the employer has the burden to advance a legitimate non-discriminatory reason for making the adverse employment decision. Once the employer has proffered such a reason, the plaintiff must raise an issue of fact regarding whether the defendant's proffered explanation is pretextual or whether retaliatory discrimination was more likely than not a determinative factor in the decision. Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994). To survive summary judgment when the employer has articulated legitimate non-discriminatory reasons for its action, the plaintiff must produce:

...some evidence, direct or circumstantial, which a factfinder could reasonably (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause for the employer's actions. Fuentes v. Perskie, 32 F.3d 759, 762 (3d Cir. 1994).

² Correctional, Miers and Simpson strongly believe that such an approach is inappropriate in a CEPA case for the reasons previously stated.

To discredit the employer's articulated reason, the plaintiff must point to "weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered legitimate reasons that a reasonable factfinder could rationally find 'unworthy of credence' and hence, infer that the proffered nondiscriminatory reason 'did not actually motivate' the employer's actions." Ezold, supra, 983 F.2d at 531.

To show that discrimination was more likely than not a cause for the employer's action, the plaintiff must produce evidence with sufficient probative force that a factfinder could conclude by a preponderance of the evidence that age or gender was a motivating or determinative factor in the employment decision. Simpson v. Kay Jewelers, supra, 142 F.3d at 644, 645. A plaintiff's own belief or feeling that he is the victim of unfair treatment fails to defeat a motion for summary judgment. Momah v. Albert Einstein Medical Center, 978 F.Supp. 621, 630 (E.D. Pa 1997). The court lacks the ability to substitute its judgment for that of the employer. The belief that a qualification has no basis or that an employer overreacted to conduct of an employee, does not constitute grounds for a Court to deny a motion for summary judgment based on a finding of pretext. Jones v. American Travelers Corp., 896 F.Supp. 463, 467 (E.D. Pa 1995).

As the United States Court of Appeals for the Third Circuit noted in Billet v. Cigna Corp., 940 F.2d 812, 828 (3d Cir. 1995),

[a] plaintiff has the burden of casting doubt on an employer's articulated reasons for an

employment decision.

Without some evidence to cast this doubt, this court will not interfere in an otherwise valid management decision. To require less would be to expose to litigation every management decision impacting on a protected party.

Merely reciting that age or sex discrimination was the reason for the decision, fails to make it so. Billet v. Cigna Corp., supra, 940 F.2d at 816. The employer's proffered reason cannot be proved to be a pretext for discrimination unless the plaintiff establishes a basis from which the trier could conclude "both that the reason was false, and that discrimination was the real reason." Rocco v. American Long Wall Corp., 965 F.Supp. 709, 713 (W.D. Pa 1997). If the plaintiff only establishes that the employer's decision was wrong or mistaken, he fails to meet his burden. Fuentes, supra, 32 F.3d at 765.

In carrying his ultimate burden of persuasion in a pretext case, the employee must establish a basis from which the trier of fact can conclude by a preponderance of the evidence that there is a "but-for" causal connection between the plaintiff's age and/or gender and the employer's adverse decision; that is, that age and/or sex actually played a role in the employer's decision-making process and had a determinative influence on the outcome of the process. Rocco, supra, 965 F.Supp. at 713.

Here, without a doubt, Correctional, Miers and Simpson have met their burden of showing a nondiscriminatory reason for termination. They contend that Miers terminated Fleming because of Fleming's admitted insubordination and because of her poor

performance.³ An examination of the record shows insufficient evidence of pretext presented by Fleming to create a genuine issue of material fact sufficient to support submission of this case to a jury.

1. Fleming's Contention That She Did Not Engage In Conduct Constituting Poor Performance Fails To Support A Jury Verdict In Her Favor On The Issue Of Pretext.

Fleming contends that because she disputes that she engaged in the conduct offered by Correctional to support her termination for poor performance, she has shown that Correctional used poor performance as a pretext and thus has submitted sufficient evidence to support a jury verdict in her favor. No New Jersey has ever accepted such an argument. This Court in Falco v. Community Medical Center, 296 N.J. Super. 298 (1997) rejected the identical argument made by Fleming, stating:

The mere fact that plaintiff, in her certification, denied committing the acts that constituted defendant's reasons for plaintiff's termination does not raise a genuine issue of material fact. The dispositive issue is whether defendants had a good faith belief that plaintiff committed those acts and considered those acts in reaching their decision to terminate plaintiff. In other words, were the three acts that were attributed to plaintiff a legitimate rational basis to terminate her employment? Id. at 296 N.J. Super. at 309. (Emphasis added).

In Falco, supra, the plaintiff provided a certification with detailed factual averments. This Court concluded that this was

³ Section B of this brief sets forth the nondiscriminatory reasons for the termination of Fleming.

not enough. This Court held that the trial court had to focus on the defendant's reasons for termination not the plaintiff's rebuttal of those reasons. Thus, the dispositive issue consists of whether the defendant had a good faith belief that the plaintiff committed the acts upon which it based termination. Fleming has failed to show that Correctional lacked such a good faith belief.

Here, Fleming concedes that many of the statements by Correctional, Miers and Simpson concerning her poor performance were true. She admits that inmates complained about her. She stated that she did not care. (Pa 97). Fleming concedes that she deliberately violated the directive of Miers to send memoranda through the chain of command. Fleming concluded that she had the right to disobey that directive for no reason other than she felt like it. (Pa 98).

2. Miers Consulted With Many People Before Reaching The Decision To Terminate Fleming.

Before reaching the decision to terminate Fleming, Miers consulted with many other people. None of these individuals had ever seen the July 2 or July 5, 1996 memoranda. None of these individuals knew about either memoranda. Yet, they all concurred in the decision to fire Fleming. Miers consulted with Milavec, President of Personnel, before firing Fleming. Milavec agreed with the decision. (Pa 135).

Miers consulted with Mack, Vice-President of Operations, before firing Fleming. Mack agreed to the dismissal. (Pa 135 to 136).

Miers consulted Hauck, the official at Edna Mahan who had responsibility for supervising medical care. Hauck agreed with the termination decision. He said, "It is about time." (Pa 142).

Miers asked Boyd, the Quality Assurance Director for the State of New Jersey, who had responsibility for healthcare for inmates at Edna Mahan her opinion about terminating Fleming. Boyd agreed with the decision. (Pa 142).

The number of individuals who Miers consulted with prior to terminating Fleming rebuts any contention of Fleming concerning pretext. If Miers had sought to terminate Fleming for an illegal reason she would not have consulted with the number of individuals that she did. Their concurrence with the decision shows that Miers had good cause for the termination of Fleming and that the termination did not occur in violation of CEPA.

3. Miers Has Adequately Explained Why She Did Not Provide The Evaluations And Counseling Summaries To Fleming.

Miers' affidavit establishes that she interpreted the Correctional handbook to prevent her from providing any employee on probationary status with copies of verbal warnings or employment evaluations. According to Miers she believed that she had to provide this information at the end of the probationary period only. The probationary period had not ended for Fleming or for any of the other Correctional employees. (Da 14 to 15).

Miers in her affidavit states that she provided no evaluation to any employee of Correctional until after the

probationary period had expired. Neither Simpson, nor Rudland, nor Fleming has refuted this. No one has testified that they ever received an evaluation prior to the expiration of their probationary period. (Da 14 to 15).

Here, Fleming knew that she had failed to perform appropriately. She concedes that inmates complained about her conduct. (Pa 97). She did not care. She intended to continue in conduct that she deemed appropriate no matter who complained about it. Fleming concedes that the Warden of Edna Mahan probably did not want Correctional to hire her because "I was not inmate friendly and I did not jump every time one of the custody officers called." (Pa 74).

This fails to constitute a situation where an employee disagrees about the adequacy of her performance. Here, Fleming concedes that she failed to meet the expectations of custody officers and inmates; her clients and patients. She asserts that their expectations do not matter and she has the right to ignore them and to act any way she pleases.

The legislature of New Jersey never meant CEPA to encourage, sanction or protect such outrageous conduct by an employee. It was meant to protect the reporting of illegal conduct not to protect illegal conduct. Here, Fleming ignored the rights of inmates. Correctional took appropriate disciplinary action.

4. Correctional Had A Chain Of Command Policy At All Times Relevant To This Case.

Fleming asserts that the actions of Correctional in terminating her for insubordination are pretextual because

Correctional had no chain of command policy. This constitutes nonsense. Miers testified that a chain of command policy did exist in July, 1996 and that she strictly enforced it. (Pa 106). Fleming has produced no evidence to contradict this or to create a genuine issue of material fact concerning the lack of existence of such a policy. Fleming makes these statements without factual support. Merely uttering statements unsupported by the record fails to create a genuine issue of material fact sufficient to defeat a motion for summary judgment.

5. The Timing Of The Discharge Fails To Constitute Evidence Of Pretext.

Fleming argues that the mere timing of the discharge supports a jury verdict of pretextual conduct. She submits as her only case authority for this startlingly assertion a decision from the United States Court of Appeals for the Third Circuit, Jalil v. Abdel Corp., 873 F.2d 701 (3d Cir. 1989), cert. den., 493 U.S. 1023 (1990).

The very same court that issued that decision has subsequently repudiated it. In Robinson v. City of Pittsburgh, 120 F.3d 1286, 1302 (3d Cir. 1997) the United States Court of Appeals for the Third Circuit concluded that the decision in Jalil had to be limited to its facts and had no applicability outside its specific and unusually suggestive factual context.

Thus, Fleming asks this Court to defeat a motion for summary judgment based solely upon the timing of the discharge. No court anywhere has ever accepted such a proposition. Every court to consider it has rejected it.

6. Attacks On The Reasonableness Of Correctional's Reason For Discharge Fails To Constitute Evidence Of Pretext.

Fleming launches a lengthy attack upon the reasonableness of Correctional's decision to terminate Fleming because of her violation of the chain of command. Fleming contends that this decision makes no sense. Courts engaging in pretextual analysis have routinely concluded that such attacks fail to constitute evidence of pretext. Correctional has the right to select any criteria that it wishes. It has the ability to terminate employees for what it regards to be insubordination even if others in the same situation would reasonably reach a different conclusion. The court in Healy v. New York Life Insurance Co., supra, 860 F.2d 1209, 1216 concluded:

Our inquiry...is not an independent assessment of how we might evaluate and treat a loyal employee.

Fleming asks this Court to make just such an assessment. It cannot. This Court cannot second guess the decision of Correctional. Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1109 (3d Cir. 1997) ("The question is not whether the employer made the best, or even a sound, business decision; it is whether the real reason is [discrimination]").

In Elmore v. Clarion University of Pennsylvania, 933 F.Supp. 1237 (M.D. Pa 1996), the court rejected the pretext argument offered by plaintiff, a professor, who alleged that the defendant University had terminated her because of her race. The University contended that she had failed to perform adequately

and relied on student evaluations. Plaintiff responded by arguing that the student evaluations constituted pretext. The Court, in granting summary judgment for the defendant University, concluded that even if the plaintiff had established the unreliability of the student evaluations, that fact did not support a conclusion that Clarion did not actually rely on them in deciding not to renew the plaintiff. According to the Court, the reliability of student evaluations in deciding who is and who is not an effective teacher, is irrelevant to the issue of whether or not the defendant University acted appropriately in terminating the plaintiff.

That analysis applies here. Fleming concedes that she engaged in insubordination. She admits it. But, she contends that she has the right to determine the reasonableness of such a policy. No court anywhere interpreting any discrimination statute has ever accepted such an absurd notion. To do so results in courts trampling the rights of private employers concerning business decisions.

7. Simpson's Statements To Streano Cannot Be Considered By This Court.

For the reasons previously stated in Section B.8 of this brief, Simpson's alleged statements to Streano fail to support pretext. This Court lacks the ability to even consider the statements even if it finds them probative. In Brewer v. Quaker State Oil Refining Corp., 72 F.3d 326, 334 (3d Cir. 1995) the United States Court of Appeals for the Third Circuit indicated that usually comments made by executives not involved in the

termination process fail to constitute evidence of pretext and should not be considered by the trial court in deciding a motion for summary judgment.

That analysis applies here to the alleged statements of Simpson. Fleming concedes that Simpson did not participate in the termination process. Simpson did not make the decision to terminate. Miers did.

8. Fleming's Own Conduct When Terminated Shows That Her Present Complaint Constitutes A Pretext Of No Merit Or Value.

Fleming's own conduct in this case shows that her entire complaint constitutes pretext. Upon learning of her termination Fleming wrote two letters to Correctional. (Pa 65 to 66; Da 4 and 5). She concedes that in neither letter did she ever bring to the attention of Correctional that her termination occurred because of informing Correctional of her concerns about various supposed illegal activities of Correctional.

In both letters she addressed other issues. She disputed the basis of her termination. But she never stated that Correctional had fired her because of complaints that she had made concerning inmate copay or the prescription of drugs to inmates without proper authorization from a physician.

Fleming contends in her brief in this Court that she explained in her deposition why she did not state in the two letters that she wrote on July 12, 1996 to Correctional that she had been terminated in retaliation for her complaining about illegal conduct. She contends that she believed that if she

addressed the reasons provided by Miers for her firing she could convince Correctional to reconsider.

An examination of the deposition testimony of Fleming shows that she never presented such an explanation anywhere in her deposition. The page cited in her brief fails to contain any reference to this explanation whatsoever. Fleming contends that the trial court failed to credit this explanation. How could it when Fleming never presented it?

To add insult to injury, Fleming concedes that she knowingly lied in her complaint filed in the Superior Court Law Division when she stated that she had informed Correctional in both of those letters that she believed that she had been fired in retaliation for her expressing concerns about illegal activity. She concedes that she knew it was not true when she approved the complaint. (Pa 66).

E. No Evidence Exists That Simpson Engaged In Any Act In Violation Of CEPA.

Fleming has produced no admissible evidence indicating that Simpson engaged in any action to terminate Fleming in violation of CEPA. Fleming concedes that Simpson did not participate in the decision to terminate her. Miers made that decision. Thus, as a matter of law summary judgment should be issued in favor of Simpson.

F. The Trial Court Properly Analyzed The Evidence As Required By The Supreme Court In Brill.

The trial court engaged in no credibility determination. An examination of the trial court's opinion indicated that he did

not determine whom he believed and whom he did not. He accepted all testimony presented as true. He weighed the testimony as required by this Court to determine whether or not a genuine issue of material fact existed sufficient to defeat the motion for summary judgment of Correctional, Miers and Simpson. See Kelly v. Bally's Grand, Inc., 285 N.J. Super. 422, 432 (App. Div. 1995).

He reached the only reasonable conclusion available. Fleming has not produced sufficient evidence of causation. Fleming has not shown pretext.

G. Fleming Has Failed To Establish That She Had An Objectively Reasonable Basis To Believe That Correctional Had Engaged In Illegal Conduct.

In order to establish a cause of action pursuant to CEPA, Fleming has the burden of proving that she had an objectively reasonable basis to believe that Correctional had engaged in illegal conduct. An examination of the relevant record shows that Fleming lacked such a basis. See Young v. Schering Corp., supra, 275 N.J. Super. at 232. She has insufficient evidence to support a jury verdict in her favor on this issue.

The trial court erred in concluding that she had produced sufficient evidence. An examination of the record shows that she did not. Fleming contends that Correctional violated regulations promulgated by the State of New Jersey pursuant to 30:7E-2. That statute requires inmates of State correctional facilities to reimburse the State of New Jersey for certain types of medical treatment and medicine. According to Fleming, Correctional

failed to comply 100% with the requirements of inmate copay. Correctional provided medical treatment to inmates who did not fill out the required forms permitting them to be charged for the service at a later date. Fleming concedes that during the first weeks after Correctional assumed responsibility for health care at Edna Mahan it lacked the ability to comply with inmate copay for reasons beyond its control. (Pa 81). According to Fleming, this problem explains Correctional's difficulty in adhering to the letter of the state regulations for the first four weeks that Correctional operated the health care department at Edna Mahan. (Pa 81).

Fleming concedes that universal compliance with the paperwork requirements of the inmate copay failed to occur at anytime, even before Correctional assumed responsibility for health care at Edna Mahan. (Pa 83). She does not know the comparative compliance rates between the State of New Jersey and Correctional. (Pa 83). She believes that compliance was higher before Correctional took over. But she has no statistics or information to support this contention. (Pa 83). It constitutes an unsupported opinion.

Fleming concedes that inmates received medications from the State of New Jersey prior to Correctional assuming responsibility even when they failed to fill out the required copay forms. (Pa 83). According to Fleming when inmates failed to complete the required paperwork they should have been refused all medical treatment. (Pa 82). One crucial problem exists with this

approach advocated by Fleming. The New Jersey legislature forbid Correctional from adopting it. N.J.S.A. §30:7E-5 states:

Notwithstanding the provisions of sections 2, 3 and 4 of this act, no inmate shall be denied medical care, surgery, dental care, hospitalization, treatment or prescription or nonprescription drugs or medicine because he is not covered under a health insurance plan or because that inmate is unable to reimburse the State or county for the cost of these services, drugs or medicines.

Thus, Fleming demanded that Correctional violate state law. She had no reasonable belief that Correctional had violated state law. Instead, either intentionally or through her own ignorance, she advocated a course of conduct which required Correctional to violate state law.

Fleming concedes that she never saw an inmate refused medical care when the State of New Jersey had responsibility for health care prior to Correctional assuming control of the medical department at Edna Mahan. (Pa 83). Fleming never observed such conduct because the State of New Jersey knew that the legislature forbid it.

Miers has testified that both Hauck, Administrator at Edna Mahan for the State of New Jersey Department of Corrections, and Boyd, the State of New Jersey's Quality Assurance Officer at Edna Mahan for healthcare knew of the degree of compliance by Correctional with inmate copay. Neither individual had any problem with that level of compliance. Neither individual viewed Correctional as having violated the regulations relating to inmate copay.

Fleming has no evidence that Correctional engaged in a deliberate violation of the inmate copay statute. She has no ability to show that Correctional failed to take any steps that it could have taken to increase the level of enforcement of the filling out of forms relating to inmate copay. Instead, Fleming relies upon her contention that Correctional had the responsibility to cut inmates off from healthcare for failure to fill out inmate copay forms. The legislature has forbidden Correctional from engaging in such conduct. Thus, Fleming lacked a reasonable basis to believe that Correctional had engaged in illegal conduct relating to inmate copay. A reasonable lay person could not have concluded that Correctional had engaged in illegal activity.

The same analysis applies to Fleming's contention that nurses working for Correctional provided prescription medications to inmates without a doctor's authorization. Fleming in her deposition produced absolutely no evidence of this. Instead, she only contended that Simpson engaged in this conduct. She fails to indicate how many times it occurred. She never states that Simpson lacked oral orders from a doctor. She never indicates that she investigated the files to determine whether Simpson had a basis for giving out medications without a doctor's orders. (Pa 93). Fleming lacked a reasonable basis to believe that Correctional had engaged in a violation of any New Jersey statute or regulation or any federal statute or regulation based on the conduct of Simpson.

IV. CONCLUSION

Based upon the foregoing, it is respectfully requested that the trial court's February 23, 1998 order be affirmed.

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CERTIFICATE OF SERVICE

I, SEAN ROBINS, ESQUIRE, hereby certify that I have sent Defendants-Appellees, Correctional Healthcare Solutions, Inc., Sally Simpson and Jennifer Miers' Brief to the following individuals on this date:

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