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LYNN RUSSELL,
JERSEY

: SUPERIOR COURT OF NEW
LAW DIVISION, HUNTERDON

COUNTY
Plaintiff

: DOCKET NO.: L-662-99

v. :

STATE OF NEW JERSEY (acting by and :
through its Department of Corrections at
Charolette Blackwell), and CORRECTIONAL:
HEALTHCARE SOLUTIONS, INC.

ORDER

Defendants
:

AND NOW, this day of , 2000, it is hereby ORDERED and DECREED

that the Motion of Correctional Healthcare Solutions, Inc. to Dismiss the Amended Complaint of
Linda Russell is GRANTED and plaintiff's Amended Complaint is DISMISSED in its entirety
as to Correctional Healthcare Solutions, Inc. for failure to state a cause of action.

BY THE COURT:

J.

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STATE OF NEW JERSEY (acting by and :
through its Department of Corrections at
Charolette Blackwell), and CORRECTIONAL:
HEALTHCARE SOLUTIONS, INC.

: MOTION OF CORRECTIONAL
HEALTHCARE SOLUTIONS, INC. TO
DISMISS THE AMENDED COMPLAINT
OF LYNN RUSSELL PURSUANT TO
CIVIL RULE 4:6-2(e)

Defendants

Correctional Healthcare Solutions, Inc. (“Correctional”) respectfully requests that its motion to dismiss the amended complaint of Lynn Russell (“Russell”) be granted and states in support thereof the following:

1. Russell has filed an amended complaint against the State of New Jersey and Correctional based upon the State of New Jersey barring her from access to her employment as a nurse by Correctional at the Edna Mahan Correctional Facility for Women (“Edna Mahan”). A

copy of Russell's amended complaint appears hereto as Exhibit "A". An examination of the averments set forth in the amended complaint show that as a matter of law Russell has failed to state a cause of action against Correctional.

2. According to the amended complaint, the State of New Jersey entered into a contract with Correctional pursuant to which Correctional had the responsibility to provide healthcare services for inmates in the custody of the New Jersey Department of Corrections at Edna Mahan. See Exhibit "A", paragraph 3.

3. According to the amended complaint, Correctional employed Russell as a registered nurse on April 4, 1996 and assigned her to work at Edna Mahan, a state correctional facility for women inmates. Exhibit "A", paragraph 5. Russell completed her probationary period and continued to work successfully in her assignment as a registered nurse providing medical care to inmates until November 9, 1997. See Exhibit "A", paragraph 6.

4. On November 15, 1997, an incident occurred at Edna Mahan whereby four tablets of a medication known as Oxycodin were thought to have been missing. Exhibit "A", paragraph 7. Russell had been working the shift prior to the discovery that the four tablets of Oxycodin were missing. Exhibit "A", paragraph 8.

5. According to the amended complaint employees of the New Jersey Department of Corrections under the immediate supervision of Charolette Blackwell ("Blackwell"), the Superintendent at Edna Mahan, on November 15, 1997 and again on November 16, 1997, questioned Russell about the missing four tablets of Oxycodin. Exhibit "A", paragraph 9. According to the amended complaint Jennifer Miers ("Miers"), a supervisor of Correctional, participated in the questioning.

6. On November 16, 1997, employees of the New Jersey Department of Corrections acting under the supervision of Blackwell, terminated Russell's privilege to enter Edna Mahan by physically confiscating her picture identification card. Exhibit "A", paragraph 10.

7. On November 17, 1997, Correctional notified Russell in writing that Correctional had suspended her from employment "pending an administrative investigation". See Exhibit "A", paragraph 11.

8. On December 19, 1997, Correctional notified Russell in writing that employees of the New Jersey State Department of Corrections had notified Correctional that the New Jersey State Department of Corrections had permanently terminated Russell's privilege to enter Edna Mahan. As a direct result Correctional terminated Russell's employment with Correctional as a nurse at Edna Mahan effective December 20, 1997. Exhibit "A", paragraph 12.

9. Russell concedes in her amended complaint that Correctional terminated her employment as a direct result of the decision of the New Jersey Department of Corrections acting through Blackwell to terminate Russell's access to her work location at Edna Mahan. Exhibit "A", paragraph 13.

10. In her amended complaint Russell asserts that she sought to mitigate her damages caused by the actions of the New Jersey State Department of Corrections barring her from her employment with Correctional at Edna Mahan by seeking a job with Correctional Medical Solutions ("CMS") as a nurse at the Mountainview Youth Correctional Facility located in Annandale, New Jersey. Russell contends that CMS is related to Correctional. As a result of her interview with CMS, Russell first learned that the New Jersey Department of Corrections had determined to deny her access to every correctional facility in the State of New Jersey. Exhibit "A", paragraph 15.

11. According to the amended complaint on November 13, 1998 Russell learned that the New Jersey State Board of Nursing had received a complaint from an employee at the New Jersey Department of Corrections, and that the New Jersey State Board of Nursing had reviewed the information supplied to it by the New Jersey Department of Corrections and had concluded that insufficient causes existed to initiate formal disciplinary action against Russell. See Exhibit "A", paragraph 16.

12. In her amended complaint Russell asserts that her loss of privileges at Edna Mahan and her subsequent termination by Correctional directly resulted from Miers allegedly making false statements to the investigator of the State of New Jersey solely for the purpose of making Russell a scapegoat and avoiding corporate responsibility for Miers and Correctional's alleged shortcomings in managing medical care at Edna Mahan. An examination of the investigator's report shows no support for this contention. The investigator reached her own conclusions independent of anything that Miers said. A copy of the investigator's report appears hereto as Exhibit "B".

13. The amended complaint contains seven separate counts. The first two counts attempt to state causes of action only against the State of New Jersey. See Exhibit "A".

14. The third count of the amended complaint alleges a cause of action against Correctional by Russell based upon wrongful termination because of an alleged violation of the employee handbook issues by Correctional. See Exhibit "A", third count.

15. The fourth count of the amended complaint attempts to state a cause of action against Correctional by Russell arising from the tort of the breach of good faith and fair dealing. See Exhibit "A", paragraphs 26 to 28.

16. The fifth count of the amended complaint alleges a cause of action against Correctional by Russell based upon the breach of leave provision. See Exhibit “A”, paragraphs 29 through 32.

17. The sixth count of the amended complaint attempts to state a cause of action against Correctional on the ground that Correctional violated the public policy of New Jersey by terminating Russell’s employment because of the belief that Russell’s behavioral stemmed from a perceived health impairment. Exhibit “A”, paragraphs 33 to 35. Russell relies upon the New Jersey Supreme Court’s decision in Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58 (1980).

18. The seventh count of the amended complaint of Russell attempts to state a cause of action against Correctional based upon an alleged violation of the New Jersey Law Against Discrimination (“NJLAD”), N.J.S.A. 10:5-4.1 and 10:5-29.1. See Exhibit “A”, paragraphs 36 to 40. According to the seventh Count of the amended complaint Miers, Correctional’s supervisor, held the belief that Russell suffered from an impairment and relying upon that impairment concluded that she had improperly diverted narcotic substances. See Exhibit “A”, paragraphs 36 and 37.

19. All of the counts of the amended complaint, directed against Correctional stem from the same factual premise; that Miers believed incorrectly that Russell suffered from an impairment which resulted in her diverting narcotic substances.

20. Because Russell has attempted to set forth a cause of action based on the NJLAD, she lacks the ability to state a cause of action based on common law torts, based on Pierce, supra, and based on the breach of the employment handbook issued by Correctional. The Appellate Courts of New Jersey have repeatedly concluded that common law causes of action that duplicate claims under the NJLAD are barred. Shaner v. Horizon Bancorp., 116 N.J. 433 at 453-

454 (1989) (LAD precludes common law wrongful discharge claim aimed at vindicating the same rights as the LAD); Catalane v. Gilian Instrument Corp., 271 N.J. Super. 476, 491-92 (App. Div.) cert. den., 136 N.J. 298 (1994); DeCapua v. Bell Atlantic-New Jersey, 313 N.J. Super. 110 (Law Div. 1998). Thus, Counts Three, Four, Five and Six of the amended complaint of Russell fail to state a cause of action. They duplicate the cause of action that appears in Count Seven based on the NJLAD.

21. Count Three of the amended complaint fails to state a cause of action for a second reason independent of the duplication of the cause of action asserted based on the NJLAD. In Count Three of the amended complaint Russell contends that Correctional wrongfully terminated her in violation of Correctional's employee handbook. According to the Russell, Correctional had an obligation to employ her even though she concedes that she had no ability to perform her job as a nurse in any correctional facility in the State of New Jersey.

22. Pursuant to the express terms of the employee handbook, Correctional had the right to terminate her employment if the State of New Jersey Department of Corrections refused to admit Russell to the facility where Correctional employed her. Section 3, page 13 of the employee handbook in effect at the time that Russell contends that a wrongful termination occurred specifically authorized Russell's termination at the request of the State of New Jersey.

It states as follows:

From time to time, CHS is requested to terminate an employee who is unacceptable to the facility/agency. In that instance, because the facility/agency has the right under the contract with CHS to approve our staff, the HSA/Supervisor should attempt to obtain a written directive from the facility/agency. If the facility/agency refuses to issue a written directive the HSA/Supervisor should document the conversation with the facility/agency representative and forward it to the VPHR.

See Exhibit "C", employee handbook.

23. The employee handbook of Correctional states that:

Conduct normally resulting in a discharge for the first offense include but are not limited to the following:

...

17. Dishonesty on the CHS or security application or failure to obtain the required security clearance.

Exhibit "C", employee handbook.

24. No dispute exists that Russell received this handbook at the appropriate time and had a full and complete opportunity to read it.

25. No wrongful termination occurred. Correctional had no choice but to cease paying Russell since the Department of Corrections of the State of New Jersey failed to authorize her access to Edna Mahan or to any other facility at which Correctional had a contract with the State of New Jersey to provide medical services. Correctional had no responsibility to pay and employ Russell when she lacked the means to perform her job. Russell had no ability to arrive at work on any day. Thus, Correctional based on the handbook and on common sense, had no duty to pay her for a job that she could no longer perform. When Russell and Correctional entered into the employment agreement embodied in the employee handbook neither intended that Correctional would have to pay Russell when she could no longer work.

26. Count Four of the amended complaint fails to state a cause of action for a second reason independent of and in addition to its preemption by the NJLAD claim contained in the seventh count. The fourth count of the amended complaint seeks to base a cause of action on a breach of the duty of good faith and fair dealing. New Jersey courts have concluded that tort damages do not exist for the breach of an implied covenant of good faith and fair dealing found in an employment contract. Noye v. Hoffmann-LaRoche, Inc., 238 N.J. Super. 430, 436 (App.

Div. 1990). Even if the Court construes Count Four as stating a cause of action based on breach of contract and as asking only for contractual damages it fails to state a cause of action.

Correctional never breached the contract that supposedly existed between it and Russell. Russell has no factual averments in the amended complaint which support such a cause of action for breach. Russell concedes that Correctional terminated Russell because the New Jersey Department of Corrections barred Russell from entering Edna Mahan Prison and prevented Russell from performing her duties for Correctional. Russell fails to identify any provision of the employee handbook issued by Correctional which creates a duty on behalf of Correctional toward Russell which Correctional violated. No indication exists that the investigator for the Department of Corrections relied upon any statements made by Miers. An examination of the investigative report shows without doubt or reservation that the investigator reached her own conclusions independent of any comments uttered by Miers.

27. Courts applying New Jersey law, have concluded that to state a cause of action for violation of a contract based on breach of the duty of good faith and fair dealing an employee must submit allegations showing bad faith or unconscionable behavior by the breaching party and lack of privilege for the actions taken. Borbely v. Nationwide Mutual Insurance Co., 547 F.Supp. 959, 973 (D.N.J. 1981); McGarry v. St. Anthony of Padua, 307 N.J. Super. 525, 533 (App. Div. 1998). Russell has not alleged in her amended complaint any conduct by Correctional that reaches the level of bad faith or unconscionable behavior.

28. In McGarry, supra, the New Jersey Superior Court Appellate Division has held that even where an employee performs his duties satisfactorily criminal activity by the employee can justify his discharge for breach of an employment contract. Here, Russell concedes that she

has been accused of criminal activity. Thus, she has no cause of action as a matter of law based on the breach of any covenant of good faith and fair dealing.

29. The fifth count of the amended complaint of Russell also fails to state a cause of action for reasons independent of the preemptive effect of the NJLAD. The fifth count of the amended complaint contends that it states a cause of action for breach of leave provisions. The amended complaint never identifies any such leave provisions contained in any publication of Correctional. An examination of the relevant employee handbook shows that no such leave provisions appear. Instead, the relevant provisions of the handbook provide for the discharge of an employee immediately upon the discretion of Correctional for using drugs. See employee handbook, Section IV, page 3, Exhibit “D”. No indication exists that Correctional terminated Russell because of its belief that she had engaged in the use of illicit drugs. Instead, Russell concedes that Correctional terminated her because of the decision of the New Jersey Department of Corrections to prevent access for Russell to Edna Mahan. See Exhibit “A”, paragraph 13.

29. The sixth count of the amended complaint attempts to state a cause of action based upon Pierce, supra. Russell contends that Correctional discriminated against her on the basis of a medical impairment. The amended complaint never identifies the medical impairment. The amended complaint never indicates that Correctional’s termination of Russell resulted from Correctional’s belief that Russell suffered from a medical impairment but instead, as Russell has pled in her amended complaint, from the inability of Russell because of the actions of the State of New Jersey to perform her responsibilities as a nurse at Edna Mahan. Russell lacked the ability to gain access to Edna Mahan because of the action of the State of New Jersey in barring her from Edna Mahan permanently.

31. The courts of New Jersey and courts interpreting New Jersey law have concluded that no action exists pursuant to Pierce arising from a public policy exception to the employment at will doctrine where the plaintiff has a cause of action based on the NJLAD. Here, Russell has asserted a cause of action arising from the NJLAD in Count Seven of her amended complaint. Consequently, she has no cause of action based upon Pierce, supra. See Shaner v. Horizon Bancorp., 116 N.J. 433, 453-454 (1989); Dale v. Boy Scouts of America, 308 N.J. Super. 516, 542-543 (App. Div.) aff'm 160 N.J. 562 (1999).

32. The seventh count of the amended complaint attempts without success to state a cause of action based on a violation of the NJLAD. Russell asserts at the conclusion of the investigation of her by an investigator from the State and Miers, a supervisor of Correctional, that they both held the belief that Russell was impaired and relying upon their perception of her medical condition they concluded that she had improperly diverted narcotic substances. See Exhibit "A", paragraph 36. On the basis of this conclusion, according to the amended complaint, the State of New Jersey decided that Russell presented an unacceptable security risk. On the basis of the action of the State of New Jersey, barring Russell from Edna Mahan according to the amended complaint, Correctional decided that Russell must be terminated. See Exhibit "A", paragraphs 37 and 38. According to the amended complaint, the actions taken by the State of New Jersey and Correctional resulted from the medical condition of Russell. See Exhibit "A", paragraph 39.

33. The amended complaint ever identifies any handicap of Russell. The Court lacks the ability to determine whether Russell suffered from a handicap protected by the NJLAD since the amended complaint never identifies the medical condition of Russell which Russell asserts

constituted a handicap. Not every medical condition meets the requirements of a handicap protected by the NJLAD.

34. If Russell asserts that Correctional terminated her because of its belief that she had a drug addiction problem then the NJLAD fails to apply. See Attorney General Formal Opinion No. 1-1989, 125 N.J.L.J. 100 (January 11, 1990) which held that the protections of the NJLAD do not apply to current or former drug addicts whose addiction presently involves or involved illegal use of controlled dangerous substances.

35. To state a prima facie case based on a handicap pursuant to the NJLAD, Russell must allege that she was terminated despite her qualifications. But she has failed to do so. Russell concedes in the amended complaint that Correctional terminated her because of the actions of the State of New Jersey barring her from Edna Mahan.

36. To state a cause of action pursuant to the NJLAD, Russell must allege in her amended complaint that after her termination her job remained open and Correctional sought applicants with her qualifications. Seiden v. Marina Associates, 315 N.J. Super. 451 (Superior Court of New Jersey, Law Division 1998). No such averment appears anywhere in the amended complaint.

WHEREFORE, Correctional Healthcare Solutions, Inc. respectfully requests that its motion to dismiss the amended complaint of Lynn Russell be granted.

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ALAN S. GOLD

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HEALTHCARE SOLUTIONS, INC.

MEMORANDUM OF LAW OF
CORRECTIONAL HEALTHCARE
SOLUTIONS, INC. IN SUPPORT OF
ITS MOTION TO DISMISS THE
AMENDED COMPLAINT OF LYNN
RUSSELL

Defendants

I. INTRODUCTION AND FACTUAL BACKGROUND

Lynn Russell (“Russell”) has filed an amended complaint against the State of New Jersey and Correctional Healthcare Solutions, Inc. (“Correctional”) based upon the State of New Jersey barring her from access to her employment as a nurse by Correctional at the Edna Mahan Correctional Facility for Women (“Edna Mahan”). A copy of Russell’s amended complaint appears hereto as Exhibit “A”. An examination of the averments set forth in the amended

complaint show that as a matter of law Russell has failed to state a cause of action against Correctional.

According to the amended complaint, the State of New Jersey entered into a contract with Correctional pursuant to which Correctional had the responsibility to provide healthcare services for inmates in the custody of the New Jersey Department of Corrections at Edna Mahan. See Exhibit "A", paragraph 3.

According to the amended complaint, Correctional employed Russell as a registered nurse on April 4, 1996 and assigned her to work at Edna Mahan, a state correctional facility for women inmates. Exhibit "A", paragraph 5. Russell completed her probationary period and continued to work successfully in her assignment as a registered nurse providing medical care to inmates until November 9, 1997. See Exhibit "A", paragraph 6.

On November 15, 1997, an incident occurred at Edna Mahan whereby four tablets of a medication known as Oxycodin were thought to have been missing. Exhibit "A", paragraph 7. Russell had been working the shift prior to the discovery that the four tablets of Oxycodin were missing. Exhibit "A", paragraph 8.

According to the amended complaint employees of the New Jersey Department of Corrections under the immediate supervision of Charolette Blackwell ("Blackwell"), the Superintendent at Edna Mahan, on November 15, 1997 and again on November 16, 1997, questioned Russell about the missing four tablets of Oxycodin. Exhibit "A", paragraph 9. According to the amended complaint Jennifer Miers ("Miers"), a supervisor of Correctional, participated in the questioning.

On November 16, 1997, employees of the New Jersey Department of Corrections acting under the supervision of Blackwell, terminated Russell's privilege to enter Edna Mahan by physically confiscating her picture identification card. Exhibit "A", paragraph 10.

On November 17, 1997, Correctional notified Russell in writing that Correctional had suspended her from employment "pending an administrative investigation". See Exhibit "A", paragraph 11.

On December 19, 1997, Correctional notified Russell in writing that employees of the New Jersey State Department of Corrections had notified Correctional that the New Jersey State Department of Corrections had permanently terminated Russell's privilege to enter Edna Mahan. As a direct result Correctional terminated Russell's employment with Correctional as a nurse at Edna Mahan effective December 20, 1997. Exhibit "A", paragraph 12.

Russell concedes in her amended complaint that Correctional terminated her employment as a direct result of the decision of the New Jersey Department of Corrections acting through Blackwell to terminate Russell's access to her work location at Edna Mahan. Exhibit "A", paragraph 13.

In her amended complaint Russell asserts that she sought to mitigate her damages caused by the actions of the New Jersey State Department of Corrections barring her from her employment with Correctional at Edna Mahan by seeking a job with Correctional Medical Solutions ("CMS") as a nurse at the Mountainview Youth Correctional Facility located in Annandale, New Jersey. Russell contends that CMS is related to Correctional. As a result of her interview with CMS, Russell first learned that the New Jersey Department of Corrections had determined to deny her access to every correctional facility in the State of New Jersey. Exhibit "A", paragraph 15.

According to the amended complaint on November 13, 1998 Russell learned that the New Jersey State Board of Nursing had received a complaint from an employee at the New Jersey Department of Corrections, and that the New Jersey State Board of Nursing had reviewed the information supplied to it by the New Jersey Department of Corrections and had concluded that insufficient causes existed to initiate formal disciplinary action against Russell. See Exhibit "A", paragraph 16.

In her amended complaint Russell asserts that her loss of privileges at Edna Mahan and her subsequent termination by Correctional directly resulted from Miers allegedly making false statements to the investigator of the State of New Jersey solely for the purpose of making Russell a scape goat and avoiding corporate responsibility for Miers and Correctional's alleged shortcomings in managing medical care at Edna Mahan. An examination of the investigator's report shows no support for this contention. The investigator reached her own conclusions independent of anything that Miers said. A copy of the investigator's report appears hereto as Exhibit "B".

The amended complaint contains seven separate counts. The first two counts attempt to state causes of action only against the State of New Jersey. See Exhibit "A". The third count of the amended complaint alleges a cause of action against Correctional by Russell based upon wrongful termination because of an alleged violation of the employee handbook issues by Correctional. See Exhibit "A", third count. The fourth count of the amended complaint attempts to state a cause of action against Correctional by Russell arising from the tort of the breach of good faith and fair dealing. See Exhibit "A", paragraphs 26 to 28. The fifth count of the amended complaint alleges a cause of action against Correctional by Russell based upon the breach of leave provision. See Exhibit "A", paragraphs 29 through 32. The sixth count of the

amended complaint attempts to state a cause of action against Correctional on the ground that Correctional violated the public policy of New Jersey by terminating Russell's employment because of the belief that Russell's behavioral stemmed from a perceived health impairment. Exhibit "A", paragraphs 33 to 35. Russell relies upon the New Jersey Supreme Court's decision in Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58 (1980). The seventh count of the amended complaint of Russell attempts to state a cause of action against Correctional based upon an alleged violation of the New Jersey Law Against Discrimination ("NJLAD"), N.J.S.A. 10:5-4.1 and 10:5-29.1. See Exhibit "A", paragraphs 36 to 40. According to the seventh Count of the amended complaint Miers, Correctional's supervisor, held the belief that Russell suffered from an impairment and relying upon that impairment concluded that she had improperly diverted narcotic substances. See Exhibit "A", paragraphs 36 and 37.

All of the counts of the amended complaint, directed against Correctional stem from the same factual premise; that Miers believed incorrectly that Russell suffered from an impairment which resulted in her diverting narcotic substances. Because Russell has attempted to set forth a cause of action based on the NJLAD, she lacks the ability to state a cause of action based on common law torts, based on Pierce, supra, and based on the breach of the employment handbook issued by Correctional. The Appellate Courts of New Jersey have repeatedly concluded that common law causes of action that duplicate claims under the NJLAD are barred. Shaner v. Horizon Bancorp., 116 N.J. 433 at 453-454 (1989) (LAD precludes common law wrongful discharge claim aimed at vindicating the same rights as the LAD); Catalane v. Gilian Instrument Corp., 271 N.J. Super. 476, 491-92 (App. Div.) cert. den., 136 N.J. 298 (1994); DeCapua v. Bell Atlantic-New Jersey, 313 N.J. Super. 110 (Law Div. 1998). Thus, Counts Three, Four, Five and

Six of the amended complaint of Russell fail to state a cause of action. They duplicate the cause of action that appears in Count Seven based on the NJLAD.

Count Three of the amended complaint fails to state a cause of action for a second reason independent of the duplication of the cause of action asserted based on the NJLAD. In Count Three of the amended complaint Russell contends that Correctional wrongfully terminated her in violation of Correctional's employee handbook. According to the Russell, Correctional had an obligation to employ her even though she concedes that she had no ability to perform her job as a nurse in any correctional facility in the State of New Jersey. Pursuant to the express terms of the employee handbook, Correctional had the right to terminate her employment if the State of New Jersey Department of Corrections refused to admit Russell to the facility where Correctional employed her. Section 3, page 13 of the employee handbook in effect at the time that Russell contends that a wrongful termination occurred specifically authorized Russell's termination at the request of the State of New Jersey. It states as follows:

From time to time, CHS is requested to terminate an employee who is unacceptable to the facility/agency. In that instance, because the facility/agency has the right under the contract with CHS to approve our staff, the HSA/Supervisor should attempt to obtain a written directive from the facility/agency. If the facility/agency refuses to issue a written directive the HSA/Supervisor should document the conversation with the facility/agency representative and forward it to the VPHR.

See Exhibit "C", employee handbook.

The employee handbook of Correctional states that:

Conduct normally resulting in a discharge for the first offense include but are not limited to the following:

...

17. Dishonesty on the CHS or security application or failure to obtain the required security clearance.

Exhibit “C”, employee handbook.

No dispute exists that Russell received this handbook at the appropriate time and had a full and complete opportunity to read it. No wrongful termination occurred. Correctional had no choice but to cease paying Russell since the Department of Corrections of the State of New Jersey failed to authorize her access to Edna Mahan or to any other facility at which Correctional had a contract with the State of New Jersey to provide medical services. Correctional had no responsibility to pay and employ Russell when she lacked the means to perform her job. Russell had no ability to arrive at work on any day. Thus, Correctional based on the handbook and on common sense, had no duty to pay her for a job that she could no longer perform. When Russell and Correctional entered into the employment agreement embodied in the employee handbook neither intended that Correctional would have to pay Russell when she could no longer work.

Count Four of the amended complaint fails to state a cause of action for a second reason independent of and in addition to its preemption by the NJLAD claim contained in the seventh count. The fourth count of the amended complaint seeks to base a cause of action on a breach of the duty of good faith and fair dealing. New Jersey courts have concluded that tort damages do not exist for the breach of an implied covenant of good faith and fair dealing found in an employment contract. Noye v. Hoffmann-LaRoche, Inc., 238 N.J. Super. 430, 436 (App. Div. 1990). Even if the Court construes Count Four as stating a cause of action based on breach of contract and as asking only for contractual damages it fails to state a cause of action.

Correctional never breached the contract that supposedly existed between it and Russell. Russell has no factual averments in the amended complaint which support such a cause of action for breach. Russell concedes that Correctional terminated Russell because the New Jersey Department of Corrections barred Russell from entering Edna Mahan Prison and prevented

Russell from performing her duties for Correctional. Russell fails to identify any provision of the employee handbook issued by Correctional which creates a duty on behalf of Correctional toward Russell which Correctional violated. No indication exists that the investigator for the Department of Corrections relied upon any statements made by Miers. An examination of the investigative report shows without doubt or reservation that the investigator reached her own conclusions independent of any comments uttered by Miers.

Courts applying New Jersey law, have concluded that to state a cause of action for violation of a contract based on breach of the duty of good faith and fair dealing an employee must submit allegations showing bad faith or unconscionable behavior by the breaching party and lack of privilege for the actions taken. Borbely v. Nationwide Mutual Insurance Co., 547 F.Supp. 959, 973 (D.N.J. 1981); McGarry v. St. Anthony of Padua, 307 N.J. Super. 525, 533 (App. Div. 1998). Russell has not alleged in her amended complaint any conduct by Correctional that reaches the level of bad faith or unconscionable behavior.

In McGarry, supra, the New Jersey Superior Court Appellate Division has held that even where an employee performs his duties satisfactorily criminal activity by the employee can justify his discharge for breach of an employment contract. Here, Russell concedes that she has been accused of criminal activity. Thus, she has no cause of action as a matter of law based on the breach of any covenant of good faith and fair dealing.

The fifth count of the amended complaint of Russell also fails to state a cause of action for reasons independent of the preemptive effect of the NJLAD. The fifth count of the amended complaint contends that it states a cause of action for breach of leave provisions. The amended complaint never identifies any such leave provisions contained in any publication of

Correctional. An examination of the relevant employee handbook shows that no such leave provisions appear. Instead, the relevant provisions of the handbook provide for the discharge of an employee immediately upon the discretion of Correctional for using drugs. See employee handbook, Section IV, page 3, Exhibit “D”. No indication exists that Correctional terminated Russell because of its belief that she had engaged in the use of illicit drugs. Instead, Russell concedes that Correctional terminated her because of the decision of the New Jersey Department of Corrections to prevent access for Russell to Edna Mahan. See Exhibit “A”, paragraph 13.

The sixth count of the amended complaint attempts to state a cause of action based upon Pierce, supra. Russell contends that Correctional discriminated against her on the basis of a medical impairment. The amended complaint never identifies the medical impairment. The amended complaint never indicates that Correctional’s termination of Russell resulted from Correctional’s belief that Russell suffered from a medical impairment but instead, as Russell has pled in her amended complaint, from the inability of Russell because of the actions of the State of New Jersey to perform her responsibilities as a nurse at Edna Mahan. Russell lacked the ability to gain access to Edna Mahan because of the action of the State of New Jersey in barring her from Edna Mahan permanently.

The courts of New Jersey and courts interpreting New Jersey law have concluded that no action exists pursuant to Pierce arising from a public policy exception to the employment at will doctrine where the plaintiff has a cause of action based on the NJLAD. Here, Russell has asserted a cause of action arising from the NJLAD in Count Seven of her amended complaint. Consequently, she has no cause of action based upon Pierce, supra. See Shaner v. Horizon

Bancorp., 116 N.J. 433, 453-454 (1989); Dale v. Boy Scouts of America, 308 N.J. Super. 516, 542-543 (App. Div.) aff'm 160 N.J. 562 (1999).

The seventh count of the amended complaint attempts without success to state a cause of action based on a violation of the NJLAD. Russell asserts at the conclusion of the investigation of her by an investigator from the State and Miers, a supervisor of Correctional, that they both held the belief that Russell was impaired and relying upon their perception of her medical condition they concluded that she had improperly diverted narcotic substances. See Exhibit "A", paragraph 36. On the basis of this conclusion, according to the amended complaint, the State of New Jersey decided that Russell presented an unacceptable security risk. On the basis of the action of the State of New Jersey, barring Russell from Edna Mahan according to the amended complaint, Correctional decided that Russell must be terminated. See Exhibit "A", paragraphs 37 and 38. According to the amended complaint, the actions taken by the State of New Jersey and Correctional resulted from the medical condition of Russell. See Exhibit "A", paragraph 39.

The amended complaint ever identifies any handicap of Russell. The Court lacks the ability to determine whether Russell suffered from a handicap protected by the NJLAD since the amended complaint never identifies the medical condition of Russell which Russell asserts constituted a handicap. Not every medical condition meets the requirements of a handicap protected by the NJLAD.

If Russell asserts that Correctional terminated her because of its belief that she had a drug addiction problem then the NJLAD fails to apply. See Attorney General Formal Opinion No. 1-1989, 125 N.J.L.J. 100 (January 11, 1990) which held that the protections of the NJLAD do no

apply to current or former drug addicts whose addiction presently involves or involved illegal use of controlled dangerous substances.

To state a prima facie case based on a handicap pursuant to the NJLAD, Russell must allege that she was terminated despite her qualifications. But she has failed to do so. Russell concedes in the amended complaint that Russell terminated her because of the actions of the State of New Jersey barring her from Edna Mahan.

To state a cause of action pursuant to the NJLAD, Russell must allege in her amended complaint that after her termination her job remained open and Correctional sought applicants with her qualifications. Seiden v. Marina Associates, 315 N.J. Super. 451 (Superior Court of New Jersey, Law Division 1998). No such averment appears anywhere in the amended complaint.

II. ARGUMENT

A. Because Russell Has Attempted To Assert A Cause Of Action Pursuant To The NJLAD The NJLAD Bars Her Claims Based On Common Law Causes Of Action Set Forth In Counts Three, Four, Five, And Six Of Her Amended Complaint.

In Count Seven of her amended complaint Russell attempts to state a cause of action pursuant the NJLAD, the New Jersey Law Against Discrimination, based upon the same factual averments upon which she relies to state her common law causes of action in Counts Three, Four, Five and Six of her amended complaint. All of the causes of action set forth in her amended complaint depend upon the same factual allegations. They all assert that Correctional wrongfully terminated Russell from her employment because the State of New Jersey barred her from Edna Mahan and because of the perception of Miers, an employee of Correctional, that

Russell suffered from an impairment which caused her to take drugs from the infirmary at Edna Mahan. Examine each count of the amended complaint. Each count of the amended complaint depends upon the same core averments.

Thus, the pleading of a NJLAD claim based on an assertion of discrimination because of suffering from a handicap by Russell results in the dismissal of all of the remaining causes of action of Russell. In Shaner v. Horizon Bancorp., supra, 116 N.J. 453, the Supreme Court of New Jersey concluded that the NJLAD precludes a common law wrongful discharge claim aimed at vindicating the same rights as a cause of action based on the NJLAD where the plaintiff has pled both a violation of the NJLAD and a common law wrongful discharge cause of action. Accord, Catalane v. Gilian Instrument Corp., 271 N.J. Super. 476, 491-92 (App. Div.), cert. den., 136 N.J. 298 (1994); DeCapua v. Bell Atlantic-New Jersey, 313 N.J. Super. 110 (Law Div. 1998); Caldwell v. KFC Corp., 958 F.Supp. 962, 970 (D.N.J. 1997).

In Dale v. Boy Scouts of America, supra, 308 N.J. Super. at 542-543, the Superior Court Appellate Division has concluded that the NJLAD “encompass[es] all those claims and damages previously available at common law, rendering unnecessary a separate common law claim for discrimination in employment.” Thus, the Superior Court indicated that no need existed to create a cause of action based on the Supreme Court’s decision in Pierce, supra, 84 N.J. at 72. In that case the Supreme Court of New Jersey recognized that in certain situations an employee has a cause of action for wrongful discharge when the discharge occurred in a situation contrary to a clear mandated public policy. The Courts of the State of New Jersey have concluded that where a plaintiff has asserted a cause of action based on the NJLAD no need exists to create a common law cause of action and no common law cause of action exists.

In Dale, supra, on appeal the Supreme Court of New Jersey held that no common law cause of action existed where it merely duplicated the remedy provided by the LAD. 160 N.J. at 604 and 605. In Lawrence v. National Westminster Bank, 98 F.3d 61, 73 (3d Cir. 1996) the Court of Appeals interpreting New Jersey law stated:

Because the ‘sources of public policy [plaintiff] relies on are coterminous with his statutory claims, he cannot advance a separate common law public policy claim. Id. at 73.

In Caldwell v. KFC Corp., 958 F.Supp. 962, 970 (D.N.J. 1997) the District Court applying New Jersey law dismissed the common law claim based on wrongful termination for failure to state a cause of action because the NJLAD supplanted any common law cause of action. Accord, Lynch v. New Deal Delivery Service, Inc., 974 F.Supp. 441, 459 (D.N.J. 1997)(“because [plaintiff] has a viable claim under the NJLAD, the Court concludes that sex discrimination claim based upon public policy is unnecessary”); DeJoy v. Comcast Cable Communications, Inc., 941 F.Supp. 468, 475-476 (D.N.J. 1996)(common law claim for wrongful termination is not viable to the extent it seeks the same remedy available under NJLAD); Kapossy v. McGraw-Hill, Inc., 921 F.Supp. 234, 249 (D.N.J. 1996)(“Catalane holds that the New Jersey legislature, by providing a remedy in the NJLAD, intended to preempt any public policy cause of action based on the same facts which support the discrimination claim”); Schanzer v. Rutgers University, 934 F.Supp. 669, 678-679 (D.N.J. 1996)(“As it appears the New Jersey Supreme Court would decline to extend a Pierce remedy to victims of employment discrimination on the basis that these individuals are similarly protected by the NJLAD, this court will decline to do so as well”); Butler v. Sherman, Silverstein & Kohl, 755 F.Supp. 1259,

1263-1265 (D.N.J. 1990)(“the [New Jersey] Supreme Court does not intend to allow a supplementary cause of action where the NJLAD provides a remedy for the wrong”).

By pleading a cause of action based on the NJLAD, Russell has waived any common law cause of action based on either tort or breach of contract. Thus, Counts Three, Four, Five and Six fail to state a cause of action upon which relief can be granted as a matter of law.

B. Count Three Of The Amended Complaint Fails To State A Cause Of Action For Wrongful Termination Because The Employee Handbook Does Not Create A Contract Entitling Russell To Be Discharged Only Under Certain Conditions.

Even if this Court concludes that the pleading of a claim based on the NJLAD fails to bar Count Three of her amended complaint, Russell has still failed to state a cause of action in Count Three of her amended complaint as a matter of law. In Count Three Russell has pled a wrongful termination claim against Correctional based solely upon the employee handbook creating a contract entitling her only to be discharged under certain conditions. See Exhibit “A”, paragraphs 21 through 25. She contends that her employment with Correctional was not conditioned upon her maintenance of working privileges at a specific facility. Exhibit “A”, paragraph 25.

An examination of the employee handbook upon which Russell solely relies for her claim shows that her contention fails to survive an examination of that employee handbook. The employee handbook specifically states that Correctional may terminate an employee who is unacceptable to the facility in question. The employee handbook specifically provides that the State of New Jersey has the right under the contract with Correctional to approve the staff of Correctional. The pertinent provision of the employee handbook states:

From time to time, CHS is requested to terminate an employee who is unacceptable to the facility/agency. In that instance, because the facility/agency has the right under the contract with CHS to approve our staff, the HSA/Supervisor should attempt to obtain a written directive from the facility/agency. If the facility/agency refuses to issue a written directive the HSA/Supervisor should document the conversation with the facility/agency representative and forward it to the VPHR.

Section 3, page 13 of the employee handbook attached hereto as Exhibit "C".

The handbook expressly provides for immediate termination by Correctional of any employee who fails to obtain the required security clearance. The employee handbook states:

Conduct normally resulting in discharge for the first offense include, but are not limited to the following:

...

17. Dishonesty on the CHS or security application or failure to obtain the required security clearance.

Exhibit "C", Section 3, page 12.

Thus, the employee handbook does condition Russell's employment on her continued approval by the facility where she works, in this case, Edna Mahan. Russell concedes that the State of New Jersey Department of Corrections has barred her from all of its correctional facilities in the State of New Jersey. Correctional has no ability to continue to employ her. The State of New Jersey forbids it. This constitutes an undisputed fact contained in Russell's complaint. See Exhibit "A", paragraphs 10, 12, 13 and 15.

Russell contends that Correctional has the duty to continue to pay her even though she can perform no nursing services for Correctional anywhere in the State of New Jersey. How can this be? It makes no sense. It fails to constitute the intent of the parties when they entered into the employment relationship. The handbook contradicts Russell's position. Nothing in the

handbook creates a duty upon Correctional to continue to employ Russell when she lacks the ability to perform her job.

The appellate courts of this State in recognizing that an employee handbook in certain situations create contractual obligations stated:

[t]he key consideration in determining whether an employment manual gives rise to contractual obligations is the reasonable expectation of the employees.

Cooper v. the Mayor, 299 N.J. Super. 174, 690 A.2d 1036, 1037-1038 (App. Div. 1997) quoting with approval from Witkowski v. Thomas J. Lipton, Inc., 136 N.J. 385, 392, 643 A.2d 546 (1994).

Here the parties never intended to create an obligation on the part of Correctional to pay Russell when Russell lacked the ability to work for Correctional. Russell concedes in her amended complaint that Correctional has no ability to utilize her services. This fails to constitute a contested issue. See Exhibit "A", paragraph 15.

Even if this Court concludes that the specific language of the handbook of Correctional fails to specifically provide that Correctional has the right to terminate an employee who is unacceptable to the State of New Jersey Department of Corrections the general language of the manual prevents it from creating a cause of action on behalf of Russell for wrongful termination. The contents of the manual must be such as to create a reasonable expectation of job security. Jackson v. Georgia-Pacific Corp., 296 N.J. Super. 1, 685 A.2d 1329 (App. Div. 1996). In Radwan v. Beecham Labs, 850 F.2d 147 (3d Cir. 1988) the court applying New Jersey law concluded that no implied contract was created by a handbook where the termination policy provided dismissal for cause but included language that stated, "may include, but is not limited

to the examples listed.” Id. at 850 F.2d at 149. The analysis of that court applies here. The employee handbook of Correctional contains the following language:

Conduct normally resulting in discharge for the first offense include but are not limited to the following... 17. Dishonesty on the CHS or security application or failure to obtain the required security clearance.

Section 3 of the handbook, page 12, Exhibit “C”. Thus, the handbook provides a non-exhaustive list of grounds for automatic discharge. It does not provide for any type of hearing or warning for the offenses listed on page 12 of the employee handbook.

The hand book specifically includes the failure to obtain the required security clearance as a basis for discharge without warning, any hearing or any progressive discipline. The handbook fails to support a cause of action for wrongful termination as a matter of law.

C. Count Four Of The Amended Complaint Fails To State A Cause Of Action For Breach Of The Duty Of Good Faith And Fair Dealing.

In Count Four of her amended complaint Russell attempts without success to state a cause of action based upon breach of the duty of good faith and fair dealing. To support her claim Russell relies solely upon the averments contained in paragraph 27 of her amended complaint. See Exhibit “A”. She asserts in paragraph 27 that she experienced both loss of privileges at Edna Mahan and termination by Correctional because of the conduct of Miers, a supervisor at Correctional at Edna Mahan, including Miers making numerous false statements to the investigator of the State of New Jersey solely for the purpose of making Russell a scapegoat and avoiding corporate responsibility for Miers’ and Correctional’s short comings in managing the medical facility at Edna Mahan. This fails to state a cause of action against Correctional for several reasons, each independent of the other. First, as previously indicated, the NJLAD

contained in Count Seven of the amended complaint bars this claim. It constitutes a duplication of the NJLAD claim. It seeks the same relief. It arises from the same core averments.

Second, the amended complaint never indicates that Miers acted within the scope of her authority as an employee of Correctional. Correctional has no responsibility for the actions of Miers unless it authorized her actions. No indication exists from the averments in the amended complaint that this occurred.

Third, New Jersey courts have uniformly refused to permit tort damages for a breach of an implied covenant of good faith and fair dealing found in an employment contract. Noye v. Hoffmann-LaRoche, Inc., 238 N.J. Super. 430, 436 (App. Div. 1990). Here, Russell seeks tort damages. Thus, she has failed to state a claim as a matter of law.

Fourth, to the extent that Russell bases Count Four of her amended complaint on a breach of contract claim arising from a violation of the duty of good faith and fair dealing she has failed to allege sufficient averments to support such a cause of action. To state a cause of action based upon a breach of the covenant of fair dealing and good faith, New Jersey courts generally require that:

...neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract...Borbely v. Nationwide Mutual Ins. Co., 547 F.Supp. 959, 973 (D.N.J. 1981)(citing Palisades Properties, Inc. v. Burnetti, 44 N.J. 117, 130 (1965); Accord, McGarry, supra, 307 N.J. Super. at 533 (App. Div. 1998).

New Jersey courts applying this test in the employment context have required a showing of bad faith or unconscionable behavior by the breaching party and lack of privilege for the actions taken. McGarry, supra, 307 N.J. Super. at 533. In McGarry, the Superior Court,

Appellate Division held that even where an “employee performs the duties contracted for satisfactorily, criminal activity by the employee can justify his discharge for breach of an employment contract”. McGarry, supra, 307 N.J. Super. at 533.

Here, Russell concedes that the State of New Jersey accused her of criminal conduct. That accusation resulted in the revocation by the State of New Jersey of her access to any state prison facility in the entire State of New Jersey. Thus, Correctional did not breach any duty of fair dealing or good faith concerning any employment contract that had existed between Correctional and Russell.

No averments appear in the amended complaint that, if proven, support a jury verdict on the issue of bad faith or unconscionable behavior by Correctional. No averment in the amended complaint approaches the level of conduct required for bad faith or unconscionable behavior.

Thus, Count Four of the amended complaint fails to state a cause of action upon which relief can be provided as a matter of law.

D. The Fifth Count Of The Amended Complaint Fails To State A Cause Of Action For Breach Of Leave Provisions.

In Count Five Of Her Amended Complaint, Russell attempts to state a cause of action for what she entitles “breech (sic) of leave provisions”. See Exhibit “A”. She asserts that she suffered from a number of medical conditions and was taking prescription drugs at the direction of competent and fully authorized medical care. See Exhibit “A”, paragraph 30. These conditions, according to Russell, caused her medical distress to be visible to her supervisors at Correctional. She contends that nonetheless Miers, an employee of Correctional, persisted in the belief that she was impaired by reason of illicit substance abuse and refused Russell’s offer to

submit to invasive drug testing. See Exhibit “A”, paragraph 31. She contends that terms of her employment agreement with Correctional required a different course of action for an employee thought to be impaired by reason of substance abuse.

Russell has failed to state a cause of action for several separate reasons, each of which independently requires the dismissal of Count Five of her amended complaint. First, the NJLAD claim bars Count Five. Count Five constitutes a duplicative cause of action arising from the same factual averments upon which the NJLAD claim set forth in Count VII depends.

Second, Russell never alleges that Miers acted within the scope of her authority. No indication exists that Correction directed Miers to terminate Russell because of her supposed impairment by reason of illicit substance abuse. No indication exists that Correctional even knew that Russell had such an impairment. Correctional has no liability for actions taken by its employees outside the scope of their authority. Russell has not even set forth a conclusory averment that Miers acted within the scope of her authority concerning her conduct toward Russell about which Russell complains. See Exhibit “A”.

Third, an examination of the employment manual issued by Correctional to Russell shows no basis for Russell’s assertion that Correctional violated any provision of the employment manual. The employment manual does not require that any leave be given to Russell. It does not set forth a mandatory course of action toward Russell if Correctional believes that she suffered from substance abuse. See Exhibit “D”, page 3. Russell has failed to identify any provision of the employee manual upon which she relies. She has not indicated how Correctional violated its alleged employment agreement with her.

Fourth, Russell concedes that Correctional terminated her because of the actions of the State of New Jersey. An examination of the report prepared by the investigator for the State of New Jersey shows that the investigator did not rely upon any statements uttered by Miers but reached independent conclusions based upon the investigator's own examination of the evidence. See Exhibit "B". Russell also cannot escape the effect of her admission contained in paragraph 13 of her amended complaint. Russell states at paragraph 13:

13. Plaintiff's employment was in fact terminated by CHS [Correctional] on December 20, 1997 as a direct result of defendant Blackwell's determination to terminate plaintiff's access to her work location. See Exhibit "A".

This requires the dismissal of all the counts of Russell's amended complaint. It constitutes a fatal flaw that affects all of her proposed causes of action.

F. Count Seven Of The Amended Complaint Fails To State A Cause Of Action Based On The NJLAD.

An examination of Count Seven of the amended complaint of Russell shows that it fails to state a cause of action pursuant to the NJLAD for several different reasons each of which independently doom Count VII to defeat.

First, an examination of the amended complaint shows that Russell has failed to identify a handicap. Examine the amended complaint, paragraph by paragraph, line by line, word by word. Where does she indicate the nature of her handicap? She never does. To state a cause of action based upon NJLAD she must assert a handicap which she contends resulted in discrimination against her by Correctional. In Dixson v. Rutgers, 110 N.J. 432, 455 (1988) the Supreme Court of New Jersey indicated that a complaint must state the allegations of discrimination with sufficient particularity. Russell has failed to do that here.

Based upon the failure of Russell to identify a handicap, this Court lacks the ability to decide whether or not Russell has stated a claim pursuant to the NJLAD. Russell's failure to identify a handicap requires the dismissal of Count Seven of her amended complaint.

Second, if Russell asserts that her handicap consists of the perception of her as suffering from an impairment caused by the use of illicit drugs she has failed to state a cause of action as a matter of law. The Attorney General of New Jersey has issued Attorney General Form Opinion No. 1-1989 (October 6, 1989), 125 N.J.L.J. 100 (Jan. 11, 1990). In that opinion the Attorney General has held that the protections of the NJLAD fail to apply to drug addicts.

The legislature of the State of New Jersey never intended the NJLAD to protect individuals who engage in illegal conduct. Russell asserts that Correctional fired her because Miers believed that she had engaged in illegal conduct. This fails to constitute a violation of the NJLAD as a matter of law.

Third, Russell has failed to state a cause of action based on a violation of the NJLAD because she has not alleged her replacement by someone not suffering from a disability. She must submit such an averment in order to state a cause premised on the NJLAD. Seiden, supra, 315 N.J. Super. at 459. Fourth, Russell has not alleged an adverse employment decision or action based on her disability. An examination of the amended complaint shows that it contains no such averment. To state a cause of action based on the NJLAD, Russell must submit such an allegation. Seiden, supra, 315 N.J. Super. at 459.

III. CONCLUSION

In the light of the foregoing, Correctional Healthcare Solutions, Inc. respectfully requests that its motion to dismiss the amended complaint of Lynn Russell be granted.

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CERTIFICATION OF SERVICE

I, SEAN ROBINS, Esquire, hereby certify that a true and correct copy of Defendant, Correctional Healthcare Solutions, Inc.'s Motion to Dismiss, was served by first-class mail, postage prepaid on April 25, 2000, to counsel noted below:

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