

**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION**

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VIKTORIYA USACHENOK,  
Plaintiff/Appellant,

vs.

STATE OF NEW JERSEY  
DEPARTMENT OF THE TRESURY,  
JOHN MAYO, BULISA SANDERS,  
and DEIRDRE WEBSTER COBB

Defendants/Respondents.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-004567-18

Civil Action

**On Transfer From:**  
**Superior Court of New Jersey**  
**Law Division, Mercer County**  
**Docket No.: MER-L-1577-17**  
**Sat Below:**  
**Hon. Douglas H. Hurd, P.J.Cv.**

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**PLAINTIFF-APPELLANT VIKTORIYA USACHENOK'S BRIEF IN OPPOSITION  
TO RESPONDENT, STATE OF NEW JERSEY'S MOTION TO DISMISS AND IN  
SUPPORT OF PLAINTIFF-APPELLANT'S CROSS MOTION FOR LEAVE  
TO AMEND THE COMPLAINT AND FOR AN ORDER DECLARING  
HER A PREVAILING PARTY**

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## **PRELIMINARY STATEMENT**

Appellant Viktoriya Usachenok ("Appellant") submits this brief in opposition to the Respondent State of New Jersey's ("Respondent" or "State") Motion to Dismiss Appellant's claim for a declaration that the State's confidentiality provisions, policies and practices in connection with investigations by the State's Division of Equal Employment Opportunity and Affirmative Action ("EEO/AA") are null and void, or in the alternative, allow Appellant leave of court to Amend the Complaint and, in support of Appellant's Cross-Motion for Order Declaring Her A Prevailing Party.

Respondent's Motion to Dismiss arises from the false premise that the April, 2020 amendment to N.J.A.C. 4A:7-3-1(j) (the "Amended Confidentiality Directive") has rendered Appellant's challenge to the State's imposition of confidentiality directives on employees as part of EEO/AA investigations moot. A plain reading of the amended regulation and the State Anti-Harassment Policy proves Appellant's challenge to the State's confidentiality directives remains a live controversy and ripe for adjudication. While Appellant was successful in causing the State to eliminate the former strict confidentiality directive, the Amended Confidentiality Directive is a prior restraint that will continue to chill State employees' protected speech on matters of significant public interest. While some of the language of

N.J.A.C. 4A:7-3.1(j) has been changed, the State's confidentiality directive continues to impose an unconstitutional prior restraint on free speech and remains violative of the Law Against Discrimination ("LAD") and New Jersey public policy.

Contrary to the State's position in its moving brief, an employer "requesting" confidentiality in all cases has the same chilling effect upon protected speech as an employer "requiring" confidentiality under all circumstances. Indeed, state employees will undoubtedly adhere to the State's request of confidentiality because otherwise, they are at risk of being found insubordinate and face termination for misconduct. Moreover, contrary to the State's position, the State Policy still threatens employees with disciplinary action, up to and including termination, for any violation of the State Policy under N.J.A.C. 4A:7-3.1(k), which remains unchanged.

In addition, for all the reasons set forth in Appellant's moving brief for summary disposition, the State's Amended Confidentiality Directive does not pass the NTEU/Pickering balancing test applicable to a prior restraint. However, should this Court find that Appellant's challenge to the State's confidentiality directive is moot, this Court should still deny Respondent's Motion to Dismiss because of the important matters of public interest implicated in this case and in the interest of judicial economy. Finally, if the Court nonetheless dismisses the

pending appeal, Appellant respectfully requests that the Court grant Appellant's cross-motion for leave to file an Amended Complaint to challenge the Amended Confidentiality Directive.

For all the reasons to follow, Appellant's legal challenges to the State's use of its confidentiality directive to silence victims and witnesses of discrimination, harassment, and retaliation remains unconstitutional and thus ripe for judicial review. Granting the State's Motion to Dismiss will only further delay the final adjudication of the vitally important constitutional issues raised in this appeal.

#### **STATEMENT OF FACTS AND RELEVANT PROCEDURAL HISTORY**

Appellant has and continues to challenge the validity of the confidentiality directives imposed by the State upon its employees who participate in harassment investigations. Specifically, Appellant continues to seek "a declaration that Defendant State's confidentiality provisions, policies and practices in connection with investigations, as set forth in N.J.A.C. 4A:7-3.1(j), are contrary to law, including the LAD, and public policy..." Pls. 4th. Am. Compl. ¶239.

As originally promulgated, the State Policy "required" State employees to maintain confidentiality surrounding investigations of complaints. N.J.A.C. 4A:7-3.1(j) expressly threatened punishment up to and including termination of employment as a



consequence for failure to comply with the State's confidentiality directive. The State Policy as originally challenged by Appellant, stated in pertinent part:

(j) All complaints and investigations shall be handled, to the extent possible, in a manner that will protect the privacy interests of those involved. To the extent practical and appropriate under the circumstances, confidentiality shall be maintained throughout the investigative process. In the course of an investigation, it may be necessary to discuss the claims with the person(s) against whom the complaint was filed and other persons who may have relevant knowledge or who have a legitimate need to know about the matter. All persons interviewed, including witnesses, shall be directed not to discuss any aspect of the investigation with others in light of the important privacy interests of all concerned. Failure to comply with this confidentiality directive may result in administrative and/or disciplinary action, up to and including termination of employment. N.J.A.C. 4A:7-3.1.

(herein referred to as the "Strict Confidentiality Directive").

On November 30, 2018, the Hon. Ronald X. Susswein, J.S.C., heard oral argument on Appellant's Order to Show Cause for Preliminary Restraints against the State for imposing the "Strict Confidentiality Directive" policy and practice and granting her leave to amend her Complaint to add a claim for Declaratory Judgment to invalidate the State's use of its confidentiality directive, policy and practice. See Tr. of OTSC Oral Argument, Usachenok v. State of New Jersey, et. al. Nov. 30, 2018. ("OTSC Tr."). At the November 30, 2018 oral argument, Judge Susswein announced his decision that the confidentiality directive would not apply in the Usachenok Matter and "whatever happen[ed] in this

matter, the complainant and witnesses in this case [would] be ordered to submit to deposition and not be subject to any kind of restriction, confidentiality restrictions under that regulatory scheme.” Id. at 25:9-12. Judge Susswein entered an Order granting Appellant leave to amend her Complaint to bring a declaratory judgment action seeking to declare the State’s confidentiality directive, policy and practice null and void. Id.

Effective April 20, 2020, in response to Appellant’s continued challenge to the State’s confidentiality requirements, the State amended the language of N.J.A.C. 4A:7-3.1(j). With this amendment, Respondent contends that the new language of N.J.A.C. 4A:7-3.1(j) removes the general requirement of confidentiality, replaces the requirement of confidentiality with a “request” of confidentiality, and eliminates the threat of any disciplinary action. The amended policy has replaced some of the language of subparagraph (j), and now reads as follows:

All complaints and investigations shall be handled, to the extent possible, in a manner that will protect the privacy interests of those involved. To the extent practical and appropriate under the circumstances, confidentiality shall be maintained throughout the investigative process. In the course of an investigation, it may be necessary to discuss the claims with the person(s) against whom the complaint was filed and other persons who may have relevant knowledge or who have a legitimate need to know about the matter. In order to protect the integrity of the investigation, minimize the risk of retaliation against individuals participating in the investigative process, and protect the important privacy interests of all concerned, **the EEO/AA Officer/investigator shall**

**request that all persons interviewed, including witnesses, not discuss any aspect of the investigation with others, unless there is a legitimate business reason to disclose such information. N.J.A.C. 4A:7-3.1. (emphasis added).**

(herein referred to as the "Amended Confidentiality Directive").

Subparagraph (k) of the State Policy following the Amended Confidentiality Directive has not been changed in any respect and continues to threaten disciplinary action, up and including termination. Specifically, Subparagraph (k) reads as follows:

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

## **LEGAL ARGUMENT**

### **POINT I**

**THIS APPEAL SHOULD NOT BE DISMISSED BECAUSE THE STATE'S RECENT AMENDMENTS DO NOT MOOT THE ISSUE OF WHETHER THE STATE'S CONFIDENTIALITY DIRECTIVES ARE UNCONSTITUTIONAL AND UNLAWFUL**

Appellant's challenge to the State's confidentiality directive imposed upon State employees should not be dismissed as a result of to the recent enactment of the Amended Confidentiality Directive. Appellant's claim for Declaratory Judgment continues to

seek the elimination of the confidentiality directives imposed by the State upon complainants and witnesses of EEO/AA harassment investigations. Because the State continues to impose a confidentiality directive upon its employees with the threat of termination, dismissal of Appellant's Declaratory Judgment claims is unwarranted and would be improper.

**A. The State's Enactment of the Amended Confidentiality Directive Does Not Moot Appellant's Constitutional Challenge to N.J.A.C. 4A:7-3.1**

Appellant's challenge to the State's Policy concerning witness confidentiality remains a live and judicable controversy. While Appellant has prevailed in spurring the State to review its State Policy and eliminate the Strict Confidentiality Directive, the State's Amended Confidentiality Directive remains an impermissible prior restraint and violates the First Amendment, the LAD and public policy.

The United States Supreme Court recently decided whether a New York City rule restricting the transportation of firearms remained ripe for judicial review following the City's amendment of the rule. N.Y. State Rifle & Pistol Ass'n Inc. v. City of N.Y., N.Y., 140 S. Ct. 1525, 1526 (2020). Specifically, petitioners sought declaratory and injunctive relief against enforcement of the rule insofar as it prevented them from transporting firearms to a second home or shooting range outside of the city. Id. After the Supreme Court granted certiorari, the State of New York amended

its firearm licensing statute, and the City amended the rule so that petitioners were in fact able to transport firearms to a second home or shooting range outside of the city. Id. Because the majority of the Court determined that the amended rule granted “the precise relief that the petitioners requested in the prayer for relief in their complaint”, the issue was deemed moot and remanded to the lower courts for further proceedings. Id. at 1526-27.

In a detailed dissent by three of the Justices, important clarifications were made regarding the issue of mootness in the face of the amended city and state rules. The most important point at issue was whether or not the amended rule had truly given petitioners all the relief they sought. Id. at 1527 (Alito dissenting). Justice Alito wrote, “It is certainly true that the new City ordinance and the new State law give petitioners *most of* what they sought, but that is not the test for mootness. Instead, ‘a case’ becomes moot only when it is *impossible* for a court to grant *any effectual relief whatever* to the prevailing party.’” Id. at 1528 (citing Chafin v. Chafin, 568 U.S. 165, 172 (2013) (emphasis added in dissent). “As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.” Chafin, 568 U.S. at 172. Thus, to establish mootness, a “demanding standard” must be met. Mission Product Holdings, Inc. v. Tempnology, LLC, 139 S.Ct. 1652, 1660 (2019).

Although the Court was split regarding the impact of the amended rule on the petitioners in N.Y. State Rifle & Pistol Ass'n, the standard for determining mootness has been decided by the Supreme Court, and that standard was not at issue. Given that standard, it is clear that, in this matter, it remains possible for Appellant to obtain relief, and therefore this case is not moot. See Id. at 1533 (Alito dissenting). The Amended Confidentiality Directive does not give Appellant the prospective relief she seeks. Appellant, on behalf of herself and all other state employees, seeks the right to speak about matters of public importance without fear or threat of punishment, and the State's confidentiality directive still fails to provide this relief.

The Amended Confidentiality Directive restrains protected speech of matters of significant public interest. The only exception to when a State employee is permitted to speak about the harassment allegations is when they have "legitimate business reason" to do so. From the face of the State's policy, it is unclear what exactly a "legitimate business reason" means, and the State has done nothing to clarify its reach. Moreover, the confidentiality directive is imposed indefinitely, and not limited to during the pendency of the investigation. Finally, if found to have violated this amended policy, employees are subject to discipline, up to and including termination. N.J.A.C. 4A:7-3.1(j)-(k). As such, the State's Amended Confidentiality Directive

clearly remains an unconstitutional prior restraint of state employees protected speech.

It is material for this motion that the State still withholds from Appellant, and all other state employees in Appellant's position, the very relief she has claimed from the beginning. Appellant and all state employees have a constitutional, legal right to speak openly concerning issues of workplace discrimination, retaliation and harassment. The State's replacement of one confidentiality directive denying State employees' their right to free speech with another confidentiality directive that denies that same right does not change the nature of Appellant's claim or provide her with the relief she seeks. It follows that the case is not moot. See N.Y. State Rifle & Pistol Ass'n, Inc., 140 S. Ct. at 1534, 1539.

Where, as here, Appellant claims that the State's policy violated her constitutional rights, and, as rewritten, the policy continues to violate her constitutional rights, the claim remains the subject of a live dispute. North Carolina v. Covington, 138 S. Ct. 2548, 2553 (2018) (noting that where plaintiffs' claim of racial gerrymandering continued despite redrawn district lines, their constitutional claim was not moot). The State cannot assert that Appellant's claim has become moot simply because it has repealed a portion of its policy and replaced it with language that "differs only in some insignificant respect." Ne. Fla. Chapter

of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 662-63 (1993) (holding that where a newly drafted ordinance may have disadvantaged plaintiffs to a lesser degree, but still disadvantaged them in the same fundamental way, the plaintiffs' claims were not moot); see also Nextel W. Corp. v. Unity Twp., 282 F.3d 257, 261-62 (3rd Cir. 2002). Where, as here, a claim is based on a State mandate that is amended after litigation has commenced, "the amendment may or may not moot the claim, depending on the impact of the amendment." Id. at 261-62. If the revisions to the offending policy effectively remove those directives being challenged, any claim for injunctive relief "becomes moot as to those features." Id. at 262. However, "an amendment does not moot the claim if the updated statute differs only insignificantly from the original." Id. Here, before and after the Amended Confidentiality Directive, State employees remain "disadvantaged in the same fundamental way" because the prohibitive effect of the policy remains. Therefore, the Amended Confidentiality Directive only changed the previous directive in an insignificant manner. Thus, the amendment does not moot Plaintiff's claim.

In sum, the changes to the Strict Confidentiality Directive altered the directive's language without altering the chilling impact it will irrefutable continue to have on all state employees, including victims of sexual harassment and assault. Under these



circumstances, the matter is not moot. Adarand Constructors v. Slater, 528 U.S. 216, 222 (2000) (“Voluntary cessation of challenged conduct moots a case, however, only if it is ‘*absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur.’”) (citing United States v. Concentrated Phosphate Export Assn., Inc., 393 U.S. 199, 203 (1968) (emphasis added)). The “heavy burden” of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness. Id.

Because the Amended Confidentiality Directive continues to impose confidentiality on employees and threatens adverse employment consequences to ensure employees’ compliance, the violations suffered by Appellant can reasonably be expected to continue, and Respondent has not met its burden to suggest otherwise. For these reasons, dismissal is improper.

**B. The Amended Confidentiality Directive is an Unconstitutional Prior Restraint**

In granting Appellant’s Motion to Amend her Complaint to bring this constitutional challenge, Judge Susswein rightfully recognized that the issue Appellant raised regarding the Strict Confidentiality Directive policy and practice was “very significant”, “very sensitive”, “important”, “topical”, “timely” and “complex”. OTSC Tr. at 8:7; 92:7; 6:5-7; 101:2. Judge Susswein further noted that by granting Appellant’s motion to amend the

Complaint to add the declaratory judgment, the parties, along with other interested non-parties, could have the opportunity to pursue discovery, present expert testimony, and develop a record to help him balance the various issues **and determine the best policy when it comes to confidentiality in the Defendant State's workplace investigations.** Id. at 111:1-7 (emphasis added).

During the course of a lengthy oral argument before Judge Susswein on Appellant's Motion to Amend the Complaint, the Court noted that when it comes to the language at issue "there still has to be a plausible interpretation of the written words." Specifically, Judge Susswein noted:

But when it comes to the First Amendment, there still has to be a plausible interpretation of the written words. What's before me is not just the practice, it's the language of the regulation that I've been asked to strike. And if there are exemptions or exceptions or exclusions that narrow, that tailor it, so that it is not facially invalid, you can't keep them a secret. I mean, because that's the whole chilling aspect. It's again, the First Amendment is more than just prohibiting the Government from actually punishing someone for engaging in protected speech, it's for threatening to punish them if it is indeed protected speech, because that's called the chilling effect. Id. at 95:12-24.

Although the State has altered the language of the policy, the new language does little to change its chilling impact. In fact, the plain language of the State's Anti-Harassment Policy refutes Respondent's main contention that the language of the new policy eliminates the requirement of confidentiality as well as

the potential for disciplinary action when confidentiality is not maintained.

For these reasons, Plaintiff's declaratory judgment claim to eliminate the State's confidentiality directive to state employees remains live and ripe for judicial review.

### **1. The Confidentiality Directive Remains Intact**

Respondent contends that the new language of the policy merely requests that witnesses and complainants maintain confidentiality, thereby releasing them of any requirements to maintain confidentiality and removing any hindrances to free speech. This is a specious argument that neglects to consider the impact that such a "request" will have on an employee's perceived ability to exercise his or her First Amendment rights.

First, the investigative officer has no discretion at all in asking employees to maintain confidentiality. The policy states that "the EEO/AA Officer/investigator **shall request** that **all persons** interviewed, including witnesses, not discuss **any aspect** of the investigation with others" allowing no possibility for any situation in which an investigator or officer does not make this request, makes it only of certain witnesses or complainants, or in regards to only certain portions of the investigation. (Emphasis added). Rather, the request to maintain confidentiality will be imposed at all times, on all employees, regarding all aspects of

every investigation, forever and not just during the pendency of the investigation.

Second, the language of the Amended Confidentiality Directive purports to allow for the disclosure of information whenever there is "a legitimate business reason to disclose such information." Respondent fails to consider, however, that once an employer has requested compliance with one of its policies, there remains no conceivable "business reason" that could hold more legitimacy for an employee than complying with the instructions of his or her employer. The risks of being found to be insubordinate<sup>1</sup> or having committed misconduct<sup>2</sup> in the face of an employer's directives are

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<sup>1</sup> "Insubordination" has been found in an employee's "'willful refusal of submission' to the authority of [his or] her superiors." Laba v. Bd. of Educ., 23 N.J. 364, 385 (1957) (quoting Harrison v. State Bd. of Educ., 134 N.J.L. 502, 505 (Sup.Ct.1946)); see also Ricci v. Corp. Express of the East, Inc., 344 N.J.Super. 39, 45-46 (App.Div.2001) ("a 'willful disregard of an employer's instructions ...' or an 'act of disobedience to proper authority'" (quoting Black's Law Dictionary 802 (7th Ed.1999))), certif. denied, 171 N.J. 42 (2002). Insubordination is cause for termination and other adverse employment consequences. In re Tenure Hearing of Ziznewski, Not Reported in A.3d, 2012 WL 1231874, \*3 (App. Div. Apr. 13, 2012) (finding insubordination where an employee repeatedly failed to comply with the requests of her employer). In particular, an employee terminated for insubordination will be ineligible for unemployment benefits.

<sup>2</sup> New Jersey unemployment law mandates the disqualification of unemployment benefits to any individual who is terminated for committing misconduct. N.J.S.A. 43:21-5; N.J.A.C. 12:17-10.5. Whether an individual has committed an act of misconduct depends on whether the employee has committed any of the following actions during his or her employment leading to termination:

- (1) Refused without good cause to comply with instructions from the employer, which were lawful, reasonable and did not require the individual to

grave, and Appellant is at a loss to imagine what "business reason" would exist for an employee that could trump his or her employment status. What is clear by the plain language of the Amended Confidentiality Directive is that the State is still able to prevent employees from speaking about investigations with their doctors, lawyers, family members and religious leaders without fear of punishment "up to and including termination."

Because every employee is asked in an investigation to maintain confidentiality about every aspect of that investigation, the State has done nothing to dismantle the expectation of silence that the State Policy has always required. By refusing to comply with the State's request to limit disclosures to "legitimate business reasons," an employee can easily be perceived as having acted beyond his or her implied authority or having violated a rule of the employer. When faced with the State's expectation of confidentiality, an employee must make the decision to either honor the State's directive or risk being perceived as insubordinate or guilty of misconduct. The new language of the policy presents a

- 
- perform services beyond the scope of his or customary job duties;
  - (2) Acted beyond the expressed or implied authority granted to the individual by the employer; or
  - (3) Violated a reasonable rule of the employer which the individual knew or should have known was in effect.

N.J.A.C. 12:17-10.5.

false choice to any employee who needs his or her employment. The confidentiality directive remains alive in the policy despite its new wording, and this issue is therefore not moot.

## **2. The Threat of Disciplinary Action Remains Intact**

Respondent contends that the new language of its confidentiality directive has removed the potential for disciplinary action against employees who fail to adhere to the State's expectations of confidentiality. This contention is demonstrably false. Although Respondent highlights the change in language to subparagraph (j), the State fails to mention that subparagraph (k) contains a catch-all provision that ensures it is still able to terminate or otherwise penalize employees who it determines have failed to comply with this policy. Subparagraph (k) reads:

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

Given the clear language of the State's Policy, Respondent's argument that employees need not fear disciplinary action for failure to maintain confidentiality is untenable, and the threat of adverse employment consequences remain to those employees who

choose to speak about investigations. Therefore, the question of constitutionality, and violations of LAD and public policy stemming from the State's unlawful policy remain and Respondent's Motion to Dismiss should be denied.

## POINT II

### **DISMISSAL OF APPELLANT'S FACIAL CHALLENGE IS IMPROPER, REGARDLESS OF TECHNICAL MOOTNESS**

It is well established that "the New Jersey Constitution does not confine the exercise of judicial power to actual cases and controversies." State v. Gartland, 149 N.J. 456, 464 (1997); see also N.J. Const. art. VI, sec. 1, par. 1. For the reasons set forth below, even if this Court determines that this appeal is "technically" moot, the appeal should still not be dismissed and this Court should retained jurisdiction for a full adjudication of the controversy in question.

#### **A. The Appeal Should Not Be Dismissed As Moot Because the Appeal Involves Important Matters of Public Interest**

The Supreme Court explained that New Jersey courts "have often declined . . . to dismiss a matter on grounds of mootness, if the issue in the appeal is an important matter of public interest." Reilly v. AAA Mid-Atl. Ins. Co. of New Jersey, 194 N.J. 474, 484 (2008) (citations omitted). Respondent paraphrased the above quoted language, but grafted an additional requirement for

a technically moot challenge to be heard: the issue must have “a strong likelihood of recurrence.” Respondent Brief at p. 7. This requirement does not appear in Reilly, contrary to Respondent’s contention. This is likely why Respondent avoided quoting Reilly directly.

Like the case at hand, the plaintiff in Reilly challenged an agency regulation. The agency argued that the plaintiff’s challenge was moot because, in part, the agency was “in the process of amending the challenged regulation to provide clarity.” Id. at 484. Despite this stated intention, the Supreme Court “concluded that the questions raised in [the] appeal qualify as important matters of public interest” and they would “address their merits notwithstanding the fact that the plaintiff can derive no relief as a result.” Id. at 484-85. The New Jersey Supreme Court did not conclude that there was a strong likelihood that this issue would recur. Such a conclusion was not required for application of the important matters of public interest exception to mootness. Application of this exception is not limited to Reilly. See, e.g., State v. McCabe, 201 N.J. 34, 44 (2010) (“The issue before the Court is a matter of significant public importance, which could justify deciding this appeal even if it were technically moot.”) (citing Reilly and Gartland); Nini v. Mercer Cty. Cmty. Coll., 202 N.J. 98, 105 n. 4 (2010) (“We therefore conclude that those questions ‘qualify as important matters of public interest’ and



thus we will address the merits of this appeal.”) (quoting Reilly); Transamerica Ins. Co. v. National Roofing, Inc., 108 N.J. 59, 64 (1987) (“Even if a matter is technically moot, our courts may retain jurisdiction if to do so is in the public interest.”) (citation omitted).

It is apparent that Respondent conflated two different exceptions to the general mootness doctrine in citing Reilly. As the Appellate Division recently reiterated, “despite circumstances that preclude the availability of an effective remedy, courts may still decide a case when its issues are of ‘great public importance,’ **or** are ‘capable of repetition,’ ‘yet [will] evade review.’” Matter of Commitment of C.M., 458 N.J. Super. 563, 568 (App. Div. 2019) (emphasis added) (citations omitted). As this language makes clear, Respondent is conflating multiple exceptions to the mootness doctrine, in order to hold Appellant to a more onerous standard than the law compels.

Looking now to substance, there can be little doubt that this issue is an important matter of public interest. This appeal involves a regulation, and a larger regulatory scheme, that regulates the employees for the largest employer in New Jersey -- the State. The regulation itself restricts and chills speech, and dissuades employees from making complaints of discrimination, harassment, or retaliation and/or participating in investigations into complaints of discrimination, harassment, or retaliation.

Issues involving workplace rights, particularly in relation to discrimination, harassment, and retaliation, undoubtedly constitute important matters of public interest. See, e.g., Nini, 202 N.J. at 105 n. 4 (“The questions presented in this case center on the interpretation of our Law Against Discrimination, N.J.S.A. 10:5-12(a). They have a significant effect on senior citizens in the workplace, and they continue to divide our courts. We therefore conclude that those questions ‘qualify as important matters of public interest’ and thus we will address the merits of this appeal.”) (citing Reilly).

While Respondent has amended the challenged regulation, this merely demonstrates that Respondent is capable of changing the regulation. What has been changed once can be changed again. As will be discussed further *infra*, Respondent’s ability to reestablish the challenged regulation is a ground unto itself for this court to continue exercising jurisdiction over the appeal. It also provides additional support for the contention that this is an important matter of public interest.

In a recent case, the Appellate Division found a zoning ordinance to be invalid, but went on to address an “arguably moot” challenge to the application of that ordinance “in order to provide guidance in the event that a future ordinance [was] adopted in response to [its] opinion.” Jennings v. Borough of Highlands, 418 N.J. Super. 405, 425 (App. Div. 2011) (citing Reilly). The

Appellate Division proceeded to reverse the trial court's finding on this question "in order to give guidance in the event that litigation ensues over a future enactment." Ibid. In Jennings, the court found that the trial court erred in not allowing the plaintiff to present expert testimony to attack the ordinance. Ibid. This matter of public interest was sufficiently important to justify application of the mootness exception. Here, there can be little doubt that the matter is of significantly greater importance, implicating free speech rights, as well as workplace protections under the LAD. As the court said in Jennings, the public interest would be well served if this Court provides guidance to the State in the event that future ordinances are adopted reinvoking similar limitations on speech.

Appellant respectfully submits that this Court retains jurisdiction to address this important matter of public interest.

**B. The Appeal Should Not Be Dismissed as Moot Because the Purported Mootness was Manufactured by Respondent State's Voluntary Cessation of Offending Conduct**

Another exception to the general mootness doctrine is the concept of voluntary cessation. The Supreme Court instructs:

Voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot. A controversy may remain to be settled in such circumstances, e.g., a dispute over the legality of the challenged practices. The defendant is free to return to

his own ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. For to say the case has become moot means that the defendant is entitled to a dismissal as a matter of right. The courts have rightly refused to grant defendants such a powerful weapon against law enforcement.

The case may nevertheless be moot if the defendant can demonstrate that "there is no reasonable expectation that the wrong will be repeated." The burden is a heavy one.

Galloway Tp. Bd. of Educ. v. Galloway Tp. Educ. Assoc.,  
78 N.J. 25, 42 (1978)].

As noted above, the purported mootness in this case was manufactured by Respondent State through the adoption of an amended regulation. It was only a year ago that the State proposed tightening the restrictions imposed by its confidentiality directive. See 51 N.J.R. 191(b) (2019) (proposing a change to N.J.A.C. 4A:7-3.1(j) that would have *mandated* "administrative and/or disciplinary action, up to and including termination of employment" for violating a confidentiality directive for those involved in a sexual misconduct investigation, including witnesses). Although the State ultimately abandoned that effort, in the event of dismissal without adjudication, Respondent will be free to "return to [its] own ways" without having demonstrated that its wrongs will never be repeated.

The State has done everything in their power to delay the the adjudication of this vitally important issue. For this additional reason, the State's Motion to Dismiss should be denied.

**C. If the Court is to Grant Respondents' Motion to Dismiss, the Appellant Should be Granted Leave to Amend Her Pleadings and/or Supplement the Factual Record to Challenge the Regulation as Amended**

Notwithstanding all of the above, if the Court determines that this appeal is moot and not amenable to one of the mootness exceptions set forth *supra*, Appellant should be permitted the opportunity to amend her complaint for Declaratory Judgment to set forth a specific challenge to the Amended Confidentiality Directive.

As the United States Supreme Court recently reiterated, while mootness generally warrants dismissal, "in instances where the mootness is attributable to a change in the legal framework governing the case, and where the plaintiff may have some residual claim under the new framework that was not asserted previously, our practice is to vacate the judgment and remand for further proceedings in which the parties may, if necessary, amend their pleadings or develop the record more fully." New York State Rifle & Pistol Assoc. v. City of New York, New York, 140 S.Ct. 1525, 1526 (2020) (citations omitted). This practice is likewise followed in New Jersey. See Fulton's Landing, Inc. v. Borough of

Sayreville, Not Reported in A.3d, 2015 WL 6112935, \*12 (N.J. App. Div. Oct. 19, 2015) (granting plaintiff leave to amend his complaint after revision of zoning ordinance rendered initial claim moot).

Here, Appellant, who remains employed by the State, has standing to pursue a challenge to this new regulation. While Appellant posits that requiring her to amend her complaint once again is unnecessary and will only result in further undue delay to the adjudication of this matter, should the Court believe dismissal is appropriate, we respectfully request the Court also grant leave to file an amended pleading to include a specific challenge to the Amended Confidentiality Directive.

**POINT III  
PLAINTIFF HAS PREVAILED IN ELIMINATING THE STRICT  
CONFIDENTIALITY DIRECTIVE AND IS ENTITLED TO  
ATTORNEYS' FEES**

Appellant cross-moves for attorneys' fees and costs as the prevailing party in this matter. In awarding attorneys' fees and costs to a prevailing party, New Jersey courts have long recognized the catalyst theory. Mason v. City of Hoboken, 196 N.J. 51, 73 (2008) (citing Singer v. State, 95 N.J. 487, 495, 472 A.2d 138, cert. denied, N.J. v. Singer, 469 U.S. 832 (1984)). The Court has adopted a two-part test to determine whether a party is a prevailing party under this theory: (1) there must be "a factual

causal nexus between plaintiff's litigation and the relief ultimately achieved," in other words, plaintiff's efforts must be a "necessary and important factor in obtaining the relief;" and (2) "it must be shown that the relief ultimately secured by plaintiffs had a basis in law." Singer, 95 N.J. at 495. See also North Bergen Rex Transport v. TLC, 158 N.J. 561, 570-71 (1999). The "form of the judgment is not entitled to conclusive weight." Warrington v. Village Supermarket, Inc., 328 N.J. Super. 410, 421 (App. Div. 2000). Rather, courts must look to whether a plaintiff's lawsuit acted as a catalyst prompting the defendant to correct an unlawful practice. Id. In addition to judgments on the merits, the catalyst theory "allows an award where there is no judicially sanctioned change in the legal relationship of the parties." Buckhannon Board and Care Home, Inc. v. W.Va. Dept. of Health and Human Resources, 532 U.S. 598, 605 (2001). See also Szczepanski v. Newcomb Med. Ctr. 141 N.J. 346, 355 (1995) (citing Hensley v. Eckhart, 461 U.S. 424, 433 (1983) defining a prevailing party as "one who succeeds 'on any significant issue in litigation [that] achieves some of the benefit the parties sought in bringing suit'").

A plaintiff is considered a prevailing party when relief on the merits of the claim materially alters the relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff. Warrington, 328 N.J. Super. at

420. When, as here, the plaintiff can establish a causal nexus between the litigation and the change in defendant's conduct, courts are empowered to award attorneys' fees and costs. Id. Courts should conduct this fact-sensitive inquiry on a case-by-case basis, evaluating the motivations for the defendant's change in behavior, and viewing each matter on its merits. Mason, 196 N.J. at 79.

The New Jersey Appellate Division has recognized that "a prevailing party need only be nominally successful." Warrington, 328 N.J. Super. at 417 (applying the catalyst theory to the LAD fee-shifting statute, which justifies an award of attorneys' fees if the lawsuit "prompted defendants to take action to correct the unlawful practice"). Even where a plaintiff does not recover compensatory damages or only minimal equitable relief, that plaintiff is still considered a prevailing party if the defendant altered its conduct as a result of the plaintiff's legal action. Holmes v. Jersey City Police Department, No. A-1896-18T3, Not reported in Atl. Rptr., 2020 WL 2298700, \*4 (N.J. App. Div. May 8, 2020) (affirming the award of attorneys' fees to the plaintiff as the prevailing party where the filing of the lawsuit and court's subsequent denial of defendant's motion for summary judgment were the catalysts to defendant's changes in policy). See also State v. Hudson Cty. Register, 422 N.J. Super. 387, 394 (App. Div. 2011) ("A plaintiff may qualify as a prevailing party, and thereby be



entitled to a fee award, by taking legal action that provides a 'catalyst' to induce a defendant's compliance with the law."). The Third Circuit has held that even where a plaintiff does not prevail on all of its claims, plaintiffs are eligible for attorney's fees under the catalyst theory where the lawsuit caused the defendant to alter the conduct in dispute, thereby establishing "some degree of success on the merits." Boyle v. Intnat'l Brotherhood of Teamsters Local 863 Welfare Fund, 579 Fed. Appx. 72, 78 (3d Cir. 2014).

In the present matter, Appellant is a prevailing party under New Jersey law and therefore, should be awarded attorneys' fees and costs incurred in her challenge to the Strict Confidentiality Directive. Respondent concedes that the language of N.J.A.C. 4A:7-3.1(j) has been amended to eliminate the provisions alleged by Appellant to be unconstitutional (Respondents' Letter Brief p. 5). This amendment took place after Appellant filed her Third Amended Complaint which intended to eliminate the Strict Confidentiality Directive at issue. (Brief p. 3, 7). Given this Court's directive to Respondents during oral argument on Appellant's Motion to Amend the Complaint, it is clear that the current litigation was not only a catalyst, but also the driving force behind Respondents' change to the policy.

In relevant part, Judge Susswein stated, "And frankly, I'm saying this to defense counsel, it will allow the State an

opportunity to review the program, the policy, the regs, and to make either any revisions or clarifications that may be necessary and appropriate, that would limit the potential for chilling protected speech.” OTSC Tr. at 89:24-91:1.

After receiving this suggestion from the trial court, Respondents changed the regulation in order to remove the language contained therein that infringed upon Appellant’s free speech rights. In short, there was a causal nexus between Appellant’s litigation and the relief ultimately achieved, making Appellant’s efforts a “necessary and important factor in obtaining the relief” and conferring on Appellant the status of prevailing party entitled to attorneys’ fees and costs. See Singer, 95 N.J. at 495.

**CONCLUSION**

For all the foregoing reasons, it is respectfully submitted that the Court deny Respondents Motion to Dismiss, or in the alternative, provide Appellant Leave of Court to File an Amended Pleading, and grant Appellant’s Cross-Motion for an Order Finding Appellant a Prevailing Party in Eliminating the Strict Confidentiality Directive.

Respectfully submitted,  
SMITH EIBELER, LLC

Dated: July 31, 2020

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