

No. \_\_\_\_\_

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**In the Supreme Court of the United States**

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BERNARD T. CANETE,

*Petitioner,*

v.

BARNABAS HEALTH SYSTEM, *et al.*,

*Respondents.*

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*On Petition for Writ of Certiorari to the  
United States Court of Appeals for the Third Circuit*

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**PETITION FOR WRIT OF CERTIORARI**

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Luretha M. Stribling  
*Counsel of Record*  
LURETHA M. STRIBLING LLC  
133 Westfield Avenue  
Suite 4  
Clark, New Jersey 07066  
(732) 956-0010  
lmstribling@verizon.net

*Counsel for Petitioner*

## **QUESTIONS PRESENTED**

1. Whether there was engagement in abuse of discretion and misapplication of the summary judgment standard at the District Court which was adopted by the Third Circuit Court of Appeals?
2. Whether the Court disregarded Petitioner's prima facie case of age discrimination in violation of the Age Discrimination in Employment Act and the New Jersey Law Against Discrimination?
3. Whether the Court ignored the Respondent's failure to establish a legitimate business reason which then supported an inference of age discrimination?
4. Whether the Court ignored the Petitioner's prima facie case of race and national origin discrimination in violation of the United States Civil Rights Act of 1964, Title VII and the New Jersey Law Against Discrimination?
5. Whether the Court ignored the Petitioner's prima facie case of discrimination based on military status which violated USERRA and the New Jersey Law Against Discrimination?

### **LIST OF PARTIES**

The Petitioner and Appellant below is Bernard T. Canete.

The Respondents and Appellees below are Barnabas Health System, Newark Beth Israel Medical Center, John Brennan, Zachary Lipner, Joanne Reilly, Mary Furo, MaryEllen Wiggins, Helen Hartney, John Does 1-10, Jane Does 1-10, ABC Corporations A Through Z.

### **CORPORATE DISCLOSURE**

Bernard T. Canete is an individual and is not a corporation.

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**OPINIONS BELOW**

The District Court entered a final Order on the date of December 9, 2016. The Notice of Appeal was timely filed on the date of January 4, 2017. The Third Circuit Court of Appeals entered an Order on the Appeal on the date of April 11, 2018.

**JURISDICTIONAL STATEMENT**

The United States Supreme Court has jurisdiction because the decisions that were entered are from the United States District Court, District of New Jersey. The Petition for Writ of Certiorari is filed after a decision was entered by the Third Circuit Court of Appeals which affirmed the decision of the United States District Court, District of New Jersey. The Supreme Court of the United States has jurisdiction as the claims fall under the laws of the United States, 28 U.S.C., Section 1331. This Court has jurisdiction because this Petitioner seeks redress and recovery of damages for deprivation of rights and privileges conferred as a result of being a citizen of these United States. The Supreme Court of the United States has jurisdiction of this matter pursuant to 28 U.S.C. Section 1291 also.

**STATUTORY PROVISION INVOLVED**

The United States District Court has original subject matter jurisdiction of the claims falling under the laws of the United States, 28 U.S.C. Section 1331. This court has jurisdiction because the Petitioner seeks redress and recovery of damages for deprivation of rights and privileges conferred as the result of being a citizen of the United States. The United States District Court has original subject matter jurisdiction for

claims brought under the United States Civil Rights Act of 1964, Title Seven, Venue is proper in this judicial district under 28 U.S.C. Section 1391(b) and (c) and 42 U.S.C. Section 2000e-5(f)(3), because the Respondents have an office, conduct business and can be found in this district and the causes of action arose and the acts and omissions complained of occurred here. The Court of Appeals had jurisdiction of this matter per 28 U.S.C. Section 1291 and the United States Supreme Court has jurisdiction of this matter per 28 U.S.C. Section 1291.

28 U.S.C. Section 1331 provides that the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treatises of the United States.

28 U.S.C. Section 1391(b) Venue in general provides that a civil action may be brought in (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the District is located. (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim, occurred, or a substantial part of property that is the subject of the action is situated: or (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

28 U.S.C. Section 1391(c) Residency for all Venue Purposes provides (1) a natural person, including an alien lawfully admitted for permanent residence in the United States shall be deemed to reside in the judicial district in which that person is domiciled (2) an entity with the capacity to sue and be sued in its common

name under applicable law, whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question and, if a plaintiff, only in the judicial district in which it maintains its principal place of business; and (3) a defendant not resident in the United States may be sued in any judicial district and the joinder of such a defendant shall be disregarded in determining where the action may be brought with respect to other defendants.

28 U.S.C. Section 1291, Final Decision of District Courts provides the courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the district of the Canal Zone, the district court of Guam, and the district court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

#### **STATEMENT OF THE CASE**

Bernard T. Canete, (Petitioner or Canete) is a Registered Nurse employed at Newark Beth Israel Medical Center in the Psychiatric Emergency Screening Services (PESS) Unit in the Emergency Department. Petitioner has worked diligently in this fast paced environment for a period of time greater than twenty-five years. Petitioner has a Bachelors of Science Degree in Nursing and Master's of Science

Degree in Nursing Administration. He has completed post Master's work in social work. Petitioner is a veteran with the status of Lieutenant Colonel in the Army. In the years of employment at Newark Beth Israel Medical Center, he has periodically been deployed for combat to serve the United States in various wars. It is well known by the Defendants that Mr. Canete is a veteran having served for 20 years in the Army.

Mr. Canete has been subjected to adverse conditions of employment since 2011 forward and his terms and conditions of employment are different and negative when compared to the work experiences of other employees. Mr. Canete has been subjected to discriminatory treatment by superiors condoned by upper management. Mr. Canete filed a Complaint of discrimination against Barnabas Health System and Newark Beth Israel Medical Center with the Equal Employment Opportunity Commission on or about June 20, 2012. A Right to Sue Letter was issued later. Mr. Canete filed a Complaint against Barnabas Health System, Newark Beth Israel Medical Center, John Brennan, CEO, Zachary Lipner, MaryEllen Wiggins, Mary Furo, and Helen Hartney at the United States District Court, District of New Jersey on November 21, 2012. Extensive discovery was exchanged, motions were filed, and Plaintiff sat for deposition twice. In addition, Defendants MaryEllen Wiggins, Helen Hartney and Zachary Lipner were deposed. The Complaint was amended later in the case on September 14, 2015. The documentary evidentiary material obtained throughout the litigation supported the causes of action and Mr. Canete established a *prima facie* case with regard to all claims of discrimination. The matter

should have proceeded to trial as there was a failure to provide a legitimate business reason for the treatment that Mr. Canete was subjected to. The terms and conditions of employment were disparate, discrimination was blatant and management aided and abetted unlawful acts. Mr. Canete was subjected to harassment and a hostile work environment.

The cognizable claims presented in the Complaint and then in the Amended Complaint included violation of the Civil Rights Act of 1964, Title VII, violation of the Age Discrimination in Employment Act, violation of USERRA, violation of the New Jersey Law Against Discrimination which encompassed discrimination based on age, race, national origin and military status, hostile work environment and harassment and aiding and abetting. Mr. Canete set forth a *prima facie* case of discrimination based on race, age and national origin under both the Civil Rights Act of 1964, Title Seven and the New Jersey Law Against Discrimination. Mr. Canete satisfied the *prima facie* requirements of USERRA and the New Jersey Law Against Discrimination as to discrimination based on military status. The litigation progressed and a Notice of Motion for Summary Judgment was filed on or about the date of May 27, 2016. The Plaintiff filed Opposition to the Notice of Motion for Summary Judgment on or about July 5, 2016. The Defendants filed a Reply to the Opposition to the Motion for Summary Judgment on or about July 19, 2016. The Court scheduled oral argument on the Motion for Summary Judgment and Opposition to the Motion for Summary Judgment for December 8, 2016. On December 8, 2016, the Court granted the Motion for Summary Judgment. On

January 4, 2017, Mr. Canete, now Petitioner filed the present Appeal.

It is requested that the United States Supreme Court review this Petition for Writ of Certiorari and reverse and remand this matter to the District Court with the requirement that this case proceed to trial where the trier of fact can make a determination about this case on the merits. The Petitioner met all elements of the law to support the claims of discrimination based on race, national origin, age and military status. Petitioner's claims of harassment and hostile work environment were supported by the record and it was clear that there was a unified front from management which supported Petitioner's claims of aiding and abetting. A jury could find for the Petitioner on the discrimination claims, harassment and hostile work environment as well as aiding and abetting claim. Factual issues of a material nature as here are to go to a jury and be decided by a jury.

### **REASONS FOR GRANTING THE PETITION**

The Petitioner presented substantial and significant questions which involve discrimination based on age, race, national origin and military status. The existence of discrimination is a scourge on our nation and serves to disenfranchise and treat a large segment of the working population as second class citizens because of some unlawful basis which is prohibited by the law. The United States Civil Rights Act of 1964, Title Seven and the New Jersey Law Against Discrimination must be enforced by the Courts or a large segment of the working population will be without recourse for workplace wrongs visited upon them. The Respondents must be made to comply with and enforce the tenets of

the United States Civil Rights Act of 1964, Title Seven as well as the New Jersey Law Against Discrimination and USERRA.

## **LEGAL ARGUMENT**

### **POINT I**

#### **THE DISTRICT COURT ENGAGED IN ABUSE OF DISCRETION BECAUSE THE DISTRICT COURT MISAPPLIED THE SUMMARY JUDGMENT STANDARD WHICH REQUIRED A REVIEW OF THE DOCUMENTARY, EVIDENTIARY MATERIAL AND THE COURT IGNORED APPLICABLE CASE LAW WHICH WAS PRESENTED TO THE COURT**

The Court of Appeals analyzes the District Court determination regarding the admissibility of evidence under abuse of discretion standard. Martin v. Monumental Life Ins. Co., 240 F.3d 223, 232 (3d Cir. 2001). In the instance where a party makes it known to the court what the substance is of the evidence which will be introduced, the District Court's decision to exclude the evidence will be assessed per the abuse of discretion standard. Narin v. Lower Merion Sch. Dist., 206 F.3d 344, 349 (3d Cir. 2000). When the District Court's decision rests upon a clearly erroneous finding of fact, errant conclusion of law or an improper application of the law to fact, the District Court has abused its discretion Forrest v. Beloit Corp., 424 F.3d 344, 349 (3d. Cir. 2005). An abuse of discretion can also occur when no reasonable person would adopt the view taken by the District Court. Blunt v. Lower Merion School District et al, No. 11-4200, p. 8, (9/12/14).

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment as a matter of law. Federal Rule of Civil Procedure 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). The summary judgment standard provides that the mere existence of some alleged factual dispute between the parties will not allow the matter to survive as there must be a dispute as to a genuine issue of material fact. Id. At 248. Disputes over facts that might affect the outcome of the suit under the governing law will preclude the entry of summary judgment. Id. at 248. Summary judgment will not lie if the dispute about a material fact is genuine and a reasonable jury could return with a verdict for the non-movant. Id. at 248. The issues of material fact are not to be resolved at summary judgment, however, this sufficient evidence is to be presented to the jury for determination. Id. at 248-249.

In the instant matter, Plaintiff pled sufficient facts which support the noted causes of action. When the Complaint, Answers to Interrogatories, documents provided and received in discovery, deposition transcripts of Plaintiff, MaryEllen Wiggins, Helen Hartney and Zachary Lipner and all other documentary evidence presented in this matter is reviewed, the only conclusion that could have been reached was that Petitioner had satisfied the *prima facie* requirements for each cause of action pled and was entitled to go to trial. In this matter, the Defendants were unable to set forth a legitimate

business reason to satisfy the McDonnell Douglas burden shifting requirements and as a result, Petitioner was entitled to an inference of discrimination which should have resulted in the matter being scheduled for trial. The District Court engaged in abuse of discretion as the District Court was made aware of the supporting documentary, evidentiary material and ignored this documentary, evidentiary material. In addition, the District Court disregarded the relevant case law which was presented to the Court and the determination reached on this case was flawed and was in error.

It is requested that the Supreme Court find that the District Court engaged in abuse of discretion and failed to consider the requirements of the standard for making a determination per Court Rule 56(c), Summary Judgment. It is requested that this matter be conferenced, scheduled for oral argument and remanded for trial. The implications of a failure to follow the Summary Judgment standard and the failure to apply the law to facts in this case has implications for many other citizens who will seek relief at the District Courts in the USA.

**POINT II****THE DISTRICT COURT FAILED TO CONSIDER AND PROPERLY APPLY THE CASE LAW TO THE CAUSE OF ACTION PRESENTED OF AGE DISCRIMINATION AND AS A RESULT OF THIS DISMISSED A VIABLE CASE OF AGE DISCRIMINATION WHICH WAS AFFIRMED BY THE THIRD CIRCUIT COURT OF APPEALS IN ERROR**

The Age Discrimination in Employment Act (ADEA) prohibits employers from discriminating against individuals in hiring, discharge, compensation, terms, conditions or privileges of employment on the basis of their age. 29 U.S.C. Section 623(a)(1). In establishing a prima facie case at the time of summary judgment, the evidence must be sufficient to convince a reasonable fact-finder to find all of the elements of the prima facie case. Duffy v. Paper Magic Grp., 265 F.3d 163, 167 (3d Cir. 2001). In order to establish a prima facie case of discrimination based on age, the following elements must be established: (1) the person alleging discrimination based on age must be forty years of age or older; (2) the defendant took an adverse employment action against him; (3) the employee was qualified for the position in question; (4) and that younger persons, not in plaintiff's age group were treated better than plaintiff was treated. Smith v. City of Allentown, 589 F.3d 684, 689 (3d Cir. 2009). Per the Age Discrimination in Employment Act, a plaintiff may prove a case of age discrimination by the use of either direct or circumstantial evidence. Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097 (2000). When the proof of age discrimination is circumstantial,

discriminatory remarks which are based on age are viewed from a more flexible perspective. Russell v. McKinney Hosp. Venture, 235 F.3d 219, 226 (5<sup>th</sup> Cir. 2000). Age discriminatory comments which are evidence in circumstantial scenarios must show: “(1) discriminatory animus (2) on the part of the person that is either primarily responsible for the challenged employment action or by a person with influence or leverage over the relevant decisionmaker.” Reed v. Neopost USA Inc., 701 F.3d 434, 441 (5<sup>th</sup> Cir. 2012). In Goudeau v. Nalinel Oilwell Varco, LP, the age stereotyping comments made by the supervisor engaged in termination of the older employee was evidence of age discrimination. Goudeau v. Nalinel Oilwell Varco, LP, 793 F.3d 470 (5<sup>th</sup> Cir. 2015). In that case, the supervisor made disparaging comments about the older employees such as calling the older employees old farts and making comments that the clothes that were worn were old man clothes. Id. at 476. The Court in Goudeau found that a *prima facie* case of age discrimination had been made and that a jury could find that the reasons given for the adverse employment action was pretext and the jury could find age discrimination. Id. at 577. Goudeau was remanded for a jury trial. Id. at 477, 479.

The subject of adverse employment action was addressed in the matter of Victor v. State, 401 N.J. Super. 596, 607 (2010). Victor was a state trooper who suffered injury to his back which resulted in his absence from work and a request for accommodation upon his return to work. Id. at 602-603. Victor was subjected to a transfer to a different work location upon return to work, and had to drive 35 miles to work. Id. at 602. Victor had more seniority than other troopers,

however, a trooper with less seniority was promoted to acting Sergeant. Id. at 603. Victor filed three EEO complaints which were deemed unsubstantiated. Id. at 605. Eventually Victor was placed on leave without pay until he provided adequate medical information. Id. at 605. Victor sued and alleged disparate treatment, failure to accommodate, retaliation and hostile work environment. Id. at 605. The issue of adverse employment action was deemed to be present per the judge as the failure to accommodate Victor was an adverse employment action. Id. at 608. On Defendants' appeal, the Appellate Court noted that an adverse employment action occurred as a result of a failure to accommodate Victor's claimed disability. Id. at 611. Adverse employment actions are a failure to hire or termination from employment. Id. at 615. An adverse employment action is severe or pervasive and results in alteration in the employee's conditions of employment in a material way. El-Soufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 176 (2005). Adverse employment actions affect wages, benefits or cause direct economic harm. Victor supra at 616. Non-economic actions that cause a significant, non-temporary adverse change in employment terms and conditions qualify as adverse employment actions. Id. at 616. Adverse employee actions are actions that are completed and which have a significant and negative effect on the employee's terms and conditions of employment. Beasley v. Passaic County, 7 N.J. Super. 585, 606-608 (App. Div. 2005). Adverse employment actions result in employee's loss of status, clouding of job responsibilities, decrease in authority, disadvantageous transfers or assignments, toleration of harassment by other employees and assignment to different or less desirable tasks. Mancini v. Township of Teaneck, 349 N.J. Super. 527, 564 (App.

Div. 2002). Adverse employment action include being fired, demoted, and cancellation of health insurance benefits. Roa v. Roa, 200 N.J. 555, 575 (2010). Being reassigned to more arduous and less desirable duties is adverse employment action. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 70-74 (2006). A lateral job transfer which changes work conditions significantly is an adverse employment action Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7<sup>th</sup> Cir. 1996).

In analysis of the prima facie case, according to McDonnell Douglas v. Green, after the Plaintiff has established a prima facie case the burden shifts to the employer to provide and articulate some legitimate, nondiscriminatory reason for the employee's rejection. McDonnell Douglas v. Green, 411 U.S. 792, 803 (May 14, 1973). The burden then shifts to the Plaintiff who must set forth in rebuttal that the stated basis for the adverse action was because of engagement in discrimination. Id. at 802-805. Per McDonnell Douglas, in proving pretext, the Plaintiff must set forth some evidence whether direct or circumstantial from which the fact-finder can reasonably either (1) disbelieve the employer's articulated legitimate business reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's actions. Jones v. School District of Phila., 198 F.3d 403, 413 (3d Cir. 1999) citing Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994). What can also be shown to support a claim of age discrimination is that the employer previously discriminated against an employee in the Plaintiff's protected class or that the employer has treated other employees similarly situated as Plaintiff but not in

Plaintiff's protected class more favorably than Plaintiff has been treated. Simpson v. Kay Jewelers, Inc., 142 F.3d 639, 645 (3d Cir. 1988).

In this case, the Petitioner satisfied the prima facie elements to prove age discrimination, yet the Court made rulings on behalf of the movant and failed to grant the required inferences to the non-movant. Petitioner established a prima facie case of discrimination based on age. Petitioner was 67 years of age, he was qualified for the position he held as he worked as a Registered Nurse. Petitioner had both an undergraduate and graduate degree in nursing and he had a wealth of job experience as he had worked in the psychiatric emergency department for twenty-five years. Petitioner was subjected to repeat acts which affected his terms and conditions of employment and these acts were adverse employment actions. Other employees not in Petitioner's age group and younger than the Petitioner were treated better with regard to the terms and conditions of employment. (**Third Cir. Joint App. 2, p. 32, Second Amended Complaint, Count I**)

One of the adverse conditions of employment was the failure to provide Petitioner with the same conditions of employment that other staff benefitted from. Fundamentally, Petitioner was not given staff coverage so that he could take his breaks and lunch. Petitioner worked a twelve hour shift from 7:00 A.M. to 7:00 P.M. Nurses working on the evening and night shift in PESS worked with two nurses per shift, however, Petitioner worked alone on the day shift which was the busiest shift to work. Petitioner routinely was not provided with breaks or lunch in

2011 and 2012 and those nurses working evening and night shift were able to have their meal breaks. Thus, Petitioner's terms and conditions of employment were less favorable than the terms and conditions of employment for other nurses. A letter was forwarded to the corporate office of Barnabas Health in an effort to resolve the failure to provide breaks and lunch for the Petitioner. (**Third Cir. Joint App. 2, p. 60, Counsel Letter to Ostrowsky**). The employer acknowledged the failure to provide coverage for the Petitioner and seemed to think that providing overtime pay for the missed lunch and breaks was the way to remedy this issue. (**Third Cir. Joint App.2, p. 62, Letter from Sidney Seligman**). The alleged legitimate business reason offered was non-existent and it was stated that Petitioner was paid for missed lunch breaks. Petitioner filed a complaint with the Equal Employment Opportunity Commission. (**Third Cir. Joint App. 2, p. 63, EEOC Intake Questionnaire**). Thereafter, steps were taken to make sure that the Petitioner was provided with lunch breaks. (**Third Cir. Joint App. 2, p. 70, Email from Zach Lipner regarding Plaintiff lunch coverage**).

Petitioner was subjected to another adverse condition of employment when he was exposed to repeated comments regarding his age by other staff persons. (**Third Cir. Joint App. 2, p.32, Second Amended Complaint and Jury Demand, Count I**). Petitioner was asked when he would retire, remarks were made about his age and the age of a fellow employee, Cecelia Perez who was in her sixties and was in the protected class as was Petitioner based on age. The comment made about Ms. Perez which was heard by Petitioner was that she is old and she really has to

go. This comment was heard out in the open for all to hear. There was no intervention by management to reprimand the behavior of the employees and to address the discriminatory comments. (**Third Cir. Joint App. 2, p. 32, Second Amended Complaint and Jury Demand, Count I.**) Joe Gewinizzi, an employee in PESS sat within earshot of Petitioner and stated that employees who are 70 years old should not be working. (**Third Cir. Joint App. 2, T283:2-6, Canete Transcript 8/11/15**) Christine Mohammad, a young employee in the PESS Unit questioned Petitioner about his age and asked him in 2015 when he was going to retire. (**Third Cir. Joint App. 2, T333:6-22; T333:24-25; T334:1-4, Canete Deposition Transcript 8/11/15**). Another employee, Wanda, who was less than forty years of age made comments about Petitioner and inferred that he did not know how to use the printer and that this inability to use the printer was inferred to be related to his age, and as testified to by Mr. Canete, that is the vein in which he took her comment. (**Third Cir. Joint App. 2, T425:1-5, Canete Deposition 8/11/15; Third Cir. Joint App. 2, p. 63, EEOC Intake Questionnaire**). Management was also involved in demonstrating age discriminatory behavior with regard to the treatment of Cecelia Perez who was in Mr. Canete's age group. Joanne Reilly, a Vice President at Newark Beth Israel Medical Center contacted Petitioner about Ms. Perez and an alleged incident between Ms. Perez and another employee. It was alleged by Ms. Reilly that Ms. Perez had been involved in a dispute with another employee and had engaged in violence in the workplace. Petitioner was asked by Joanne Reilly to write a statement regarding the incident that Ms. Perez had been involved in which Petitioner had witnessed. Petitioner wrote a statement

regarding what he had witnessed and provided this letter to Ms. Reilly. (**Third Cir. Joint App. 2, p. 32, Second Amended Complaint, paragraph 28; Third Cir. Joint App. 2, p. 126, Canete Statement Regarding Ms. Perez**). Thereafter, Ms. Reilly insisted that Petitioner re-write his statement and change his statement to reflect that Ms. Perez had engaged in violence in the workplace; Petitioner refused to change his statement like Reilly wanted and the treatment by management grew negative after this time. (**Third Cir. Joint App. 2, T358:6-25; T390:3-19; T390:23-25, Canete Deposition 8/11/15**). Consistent with details in Simpson v. Kay Jewelers, pretext was established by showing that the employer previously discriminated against an employee in the Petitioner's protected class Simpson *supra* at 645. Petitioner has shown pre-text as he was able to illustrate that Ms. Perez, was treated in a discriminatory fashion based on age and Ms. Perez was subsequently terminated from employment. Petitioner experienced a number of other adverse working conditions which may have been related to his age. A new staff psychiatrist, Dr. Von Poelnitz on meeting Petitioner was pleasant, but, after meeting with administration displayed a negative attitude towards the Petitioner and later accused Petitioner of not giving an injection properly to a patient despite the fact that Petitioner had given injections for over twenty-five years. As a result of the accusation of Von Poelnitz, Petitioner was subjected to humiliation as he had to be observed giving an injection by a nursing supervisor, Wesley Willis before he could resume giving injections. (**Third Cir. Joint App. 2, T139:3-10, Lipner Deposition Transcript; Third Cir. Joint App. 2, p.230, Emails Regarding Injection**). Administrators provided coverage for Petitioner after

his initial complaints in 2011 so that he could have his breaks and lunch, but in 2015, the coverage for his breaks ended. (**Third Cir. Joint App. 2, p.70, Reilly Email Re: Plaintiff Complaint of No Break/Lunch**) Petitioner was no longer able to have a break and then only had coverage for lunch despite the fact that he worked twelve hour shifts. Petitioner was given an evaluation with a two which suggests that improvement is needed. Given his long career and having received good evaluations with no ratings which meant needs improvement previously, the act of being rated a two was an insult based on his long career and age. Despite the fact that his overall evaluation was a meets expectation, it was a slap in the face to give Petitioner a two and could be determined by a jury to be not only an adverse action, but also discriminatory based on age. (**Third Cir. Joint App. 2, p. 173, Canete Evaluation of 2012**). Other adverse actions included administrators closely monitoring Petitioner with documentation of Petitioner's actions in over 200 pages of electronic communications. (**Third Cir. Joint App. 2, p. 193, Email to Lipner Re: Plaintiff Complaint of Discrimination; Third Cir. Joint App. 2, p. 210, Administration Emails about Canete**). From the facts provided in the Second Amended Complaint, the statement written about Ms. Perez, Petitioner's testimony at deposition, as well as the wealth of electronic communications, Petitioner satisfied the requirements to make a *prima facie* case of age discrimination. Respondents did not set forth a legitimate business reasons for their actions, yet, the District Court dismissed the claim of age discrimination. The District Court failed to grant an inference to the Petitioner who was the non-movant. The wealth of information supported age

discrimination yet the law was read narrowly and as a result the claim was dismissed. There was no legitimate business reason given by Ms. Reilly when she demanded that Petitioner change his statement about Ms. Perez so that it would be identical to false statements made by other employees who claimed that Ms. Perez had engaged in violence in the workplace. There was no legitimate reason given for subjecting Petitioner to scrutiny regarding an injection when he had given injections for over twenty-five years. Zachary Lipner (Lipner) testified at deposition that giving an improper injection is of great concern to patient care yet never addressed the alleged improper injection given by the Petitioner for four weeks after the alleged improper injection had been given. (**Third Cir. Joint App. 2, T139:17-25; T140:20-24; T142:1-19 Lipner Deposition**) Appellant testified that after he was accused of not giving the injection properly, he immediately escalated the matter to Helen Hartney (Hartney), yet it took management one month to address his concern about being accused of not giving the injection properly (**Third Cir. Joint App. 2, T287:18-25; T288:13-21, Canete Deposition 8/11/15**). Thus, the legitimate business concern was pre-textual for discrimination based on age. The dismissal of this cause of action by the Court was in error as with no legitimate business reason put forth by Defendants, the conclusion reached was that the actions were a pretext to discriminate against Petitioner based on age. The District Court read the law narrowly when it came to proving age discrimination, with regard to application of circumstantial evidence as well as what constituted adverse employment action. (**Third Cir. Joint Supp. App., p. 597, Transcript Summary Judgment**,

**T52:10-25).** The District Court judge throughout oral argument was repeatedly critical of the Petitioner and stated that we are not going to deal in speculation (**Third Cir. Joint Supp. App., p. 597, Transcript Summary Judgment, T6:21-25**). The Court repeatedly stated that the Court was not trying to be difficult (**Third Cir. Joint Supp. App., p. 597, Transcript Summary Judgment, T68:17-20, T88:7-12**) and questioned Petitioner's counsel on each cause of action rather than Defendant making his arguments based on the content of his Motion for Summary Judgment. During the oral argument, the Court stated that the Court would go back to Petitioner's counsel to argue each cause of action even though it was not the Petitioner's motion (**Third Cir. Joint Supp. App., p. 597, Transcript Summary Judgment, T37:17-25**).

It is requested that the United States Supreme Court conference and consider this Petition for Writ of Certiorari and schedule this matter for oral argument. It is requested that this matter be reversed and remanded to the District Court to proceed to trial. The Petitioner met all elements of the law to support the claim of discrimination based on age. A jury could find for the Petitioner on the claim of age discrimination.

**POINT III****PETITIONER SATISFIED THE REQUIREMENTS AND MADE A PRIMA FACIE CASE OF RACE AND NATIONAL ORIGIN DISCRIMINATION WHICH WAS DISCOUNTED BY THE COURT AND RESULTED IN A DISMISSAL OF THESE NOTED CAUSES OF ACTION IN ERROR AND AFFIRMANCE BY THE THIRD CIRCUIT COURT OF APPEALS IN ERROR**

The United States Civil Rights Act of 1964, Title Seven which is codified at 42 U.S.C. 2000e at Section 703 provides that it shall be an unlawful employment practice for an employer to (1) fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex or national origin. 42 U.S.C. 2000e, Section 703. To set forth discrimination based on race per the Civil Rights Act of 1964, Title Seven, the following factors must be met: (1) Plaintiff is a member of a protected class; (2) Plaintiff was qualified for her position; (3) She suffered an adverse employment action and (4) The adverse employment action occurred under circumstances giving rise to an inference of discrimination. Fisher v. Vassar College, 114 F.3d 1332, 1334 (2<sup>nd</sup> Cir. 1997).

In Lehmann v. Toys R Us, the Court formulated the basic standard for determining whether acts of harassment in the workplace constitute invidious discrimination which is in violation of the Law Against Discrimination. Taylor v. Metzger, 152 N.J. 490, 498 (1998). When a Black plaintiff alleges racial

harassment per the Law Against Discrimination, that plaintiff must demonstrate that the defendant's conduct (1) would not have occurred but for the employee's race and (2) the conduct was severe and pervasive enough to make (3) a reasonable African-American believe that (4) the conditions of employment had changed and the workplace was hostile and abusive. Id. at 498.

To establish a *prima facie* case of employment discrimination on the basis of national origin, a plaintiff must show that: (1) he is a member of a protected class; (2) he was qualified for the position; (3) he suffered an adverse employment action; and (4) the adverse employment action was made under circumstances that give rise to an inference of unlawful discrimination. Sarullo v. United States Postal Serv., 352 F.3d 789, 797 (3<sup>rd</sup> Cir. 2003)(per curiam).

Petitioner was born and raised in the Philippines and is Asian. Petitioner was employed at Newark Beth Israel Medical Center for a period of twenty-five years plus. He was qualified to perform his job and did perform his job successfully. He was subjected to adverse events in the workplace which were discriminatory based on race and national origin. Petitioner was told while in the cafeteria that he had to return to his unit while Caucasian employees from his unit sat at another table and ate a leisurely lunch. (**Third Cir. Joint App. 2, p. 63, EEOC Intake Questionnaire**). Caucasian employees on his unit were able to stop for breaks and lunch and were able to eat on the unit in the kitchen but per Hartney, Petitioner could not eat in that area or use the microwave. (**Third Cir. Joint App. 2, p. 32, Second**

**Amended Complaint, par. 54).** Petitioner was told by management that when he worked the weekend he had to wear a shirt and tie, however, Caucasian employees and employees not from the Philippines were allowed to work the weekends wearing casual dress including jeans. **(Third Cir. Joint App. 2, p. 32, Second Amended Complaint, par. 55).** Petitioner while at seminar at work was subjected to stereotypical statements about employees from the Philippines. The speaker stated that when employees from the Philippines are reprimanded they simply cry. **(Third Cir. Joint App. 2, p. 32, Second Amended Complaint, par. 57; Third Cir. Joint App. 2, T203:1-3;T262:11-25;T271:15-25 Canete Deposition 8/11/15).** The awareness that employees not from the Philippines were treated in a better way as compared to the treatment that Petitioner received supports an inference of discriminatory treatment based on race and national origin. Petitioner complained of discrimination based on race, color, national origin and military status in a letter to Lipner dated May 26, 2012. **(Third Cir. Joint App. 2, p. 193, Plaintiff Letter to Lipner Re: Discrimination).** There were no steps taken by management to address the concerns delineated in Petitioner's letter to Lipner. Petitioner in 2015 has to provide care for a psychiatric patient who posed a danger. Petitioner placed a physical hold on this psychiatric patient for safety and sought an order from the physician afterwards. Placement of physical holds require an order from the physician. The physician failed to give Petitioner an order for a physical hold and Petitioner had to explain the circumstances to Laura Budnick (Budnick) who was in charge of Behavioral Health. Petitioner was told that he was supposed to get an order from the physician for

the physical hold and Petitioner felt as if he had been verbally counseled. Three weeks prior to Petitioner placing a physical hold, a Caucasian nurse placed a physical hold on a patient and sought an order afterwards. That nurse was not required to provide an explanation, nor did she have to explain the circumstances to Budnick. (**Third Cir. Joint App. 2, T368:3-22, Canete Deposition 8/11/15**). It is incorrect to view what constitutes adverse working conditions narrowly; a narrow reading results in the conclusion that only those conditions which result in the ultimate discipline or loss of pay count as adverse working conditions. Negative employment events are those events that affect the daily work experience and have a deleterious impact on the terms and conditions of employment and a resultant cumulative impact. Petitioner has set forth sufficient facts which infer discrimination based on race and national origin. Respondents did not show a legitimate business reason for their actions against Petitioner in the facts set forth above including placement of a physical hold on a patient. There was an inference of both race and national origin discrimination based on different and negative treatment of Petitioner under the same circumstances as other employees who were not Asian and not from the Philippines. The Court unreasonably dismissed the claims of discrimination based on race and national origin.

It is requested that the United States Supreme Court consider this Petition for Writ of Certiorari and reverse and remand this matter to the District Court to proceed to trial. The Petitioner met all elements of the law to support the claim of discrimination based on race and national origin. A jury could find for the

Petitioner on the claim of race and national origin discrimination as factual issues of materiality are to go to a jury and be decided by a jury.

#### **POINT IV**

#### **PETITIONER SET FORTH FACTS WHICH SUPPORTED HIS CLAIM OF DISCRIMINATION BASED ON MILITARY STATUS AND THE DISMISSAL OF THIS CAUSE OF ACTION WAS IN ERROR BY BOTH THE DISTRICT COURT AND THE THIRD CIRCUIT COURT OF APPEALS**

The purpose of the New Jersey Law Against Discrimination is to ban discrimination “because of race, creed, color, national origin, ancestry, age, sex, marital status or because of ... liability for service in the Armed Forces of the United States.” N.J.S.A. 10:5-3. N.J.S.A. 10:5-4, pronounces that “the opportunity to obtain employment” constitutes a “civil right.” Fuchilla v. Layman, 109 N.J. 319, 332, 537 A.2d 652 (1988). “The clear public policy of this State,” reflected in the LAD, “is to abolish discrimination in the workplace.” Castellano v. Linden Bd. Of Educ., 79 N.J. 407, 400 A.2d 1182 (1979). The LAD is concerned with more than the individual victim of discrimination. It recognizes that “discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and functions of a free democratic State.” N.J.S.A. 10:5-3, quoted in Fuchilla, supra, 109 N.J. at 334-35, 537 A.2d 652.

The LAD makes it unlawful for any person to refuse to provide goods, services, or information to a person on the basis of their service in the U.S. Armed Forces. § 10:5-12(l). When analyzing cases under the NJ LAD,

New Jersey and federal courts look to the closest analogous federal statute and adopt its evidentiary framework. See Grigoletti v. Ortho Pharm. Corp., 570 A.2d 903, 906-07 (N.J. 1990). The federal statutory analogue to McMahon's NJ LAD claim is the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). Patrick McMahon v. Susan W. Salmond, Rutgers University, Docket No. 13-4550, p. 11 (2013). Per the application of the Sheehan v. Department of Navy, 240 F.3d 1009 (Fed. Cir. 2001), the framework, to establish a claim under the USERRA, the plaintiff has the initial burden of production to show that, by a preponderance of the evidence, "the employee's military service was 'a substantial or motivating factor' in the adverse employment decision. Sheehan, 240 F.3d at 1013 (quoting NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 400-01 (1983).

The New Jersey Law Against Discrimination prohibits discrimination based on military status. The interpretation of military status discrimination under NJLAD follows the interpretation and application set out under the Uniformed Services Employment and Re-Employment Rights Act (USERRA). The proper application per USERRA is to analyze discrimination based on past, present or future military status. The application of the four prongs of NJLAD to the discrimination based on military status requires that Petitioner show that military status was a substantial motivating factor in the adverse action that was visited upon him in the workplace. Petitioner established via documents completed in the Human Resources Department with Zachary Lipner that he had previously been in the military and was honorably discharged in 2006 after a twenty year career. On an annual basis,

there was a celebratory program to honor veterans and there was acknowledgement by co-workers that Petitioner was a Lieutenant Colonel in the military and maintained that designation. (**Third Cir. Joint App. 2, Second Amended Complaint, p. 32, Count 4**) Despite the knowledge that Petitioner was a veteran, he was denied the simplest of terms, conditions and benefits of employment, namely not being able to have breaks and lunch that other employees without military background took for granted. Petitioner was questioned by Sidney Seligman of the Barnabas Corporation about whether he was a veteran which Petitioner answered in the affirmative. With knowledge of the Petitioner's military status, management deprived Petitioner of terms of employment that other employees received, namely having his breaks and lunch. In interaction with a co-worker via telephone who called Petitioner's work location, Petitioner answered the telephone by stating Lieutenant Colonel Canete to which the co-worker responded by laughing. Petitioner felt that there was disrespect for his military status and that he was subjected to humiliation related to military status. Petitioner believed that the adverse conditions that he was subjected to in the workplace were the result of his being a military man. Historically, Vice President of Nursing Services, Cathy Kuck verbally counseled Petitioner as he had taken leave from work when deployed for combat. (**Third Cir. Joint App. 2, Canete Deposition 8/15, T364:6-23**). A co-worker in the ER, Ms. Griesbeland laughed when Petitioner answered the phone as Colonel Canete. (**Third Cir. Joint App. 2, Canete Deposition 8/15, T307:20-24; T305:12-15**). The adverse treatment could have been related to Petitioner's military status. The factual circumstances are material issues for a jury to decide.

Plaintiff has established discrimination based on military status per USERRA as well as the New Jersey Law Against Discrimination. The actions of the employer could have been the result of military status and simply claiming that the treatment that Plaintiff was subjected to would have occurred without his being in the military is a statement which is speculative and nothing more. The evidence in this case supports discrimination based on military status and this claim should have gone to the jury.

It is requested that the United States Supreme Court consider this Petition for Writ of Certiorari and reverse and remand this matter to the District Court to proceed to trial. The Petitioner met all elements of the law to support the claim of discrimination based on military status. A jury could find for the Petitioner on the claim of military status discrimination.

#### **POINT V**

**PETITIONER WAS SUBJECTED TO HARASSMENT AND A HOSTILE WORK ENVIRONMENT PER THE UNITED STATES CIVIL RIGHTS ACT OF 1964, TITLE SEVEN AS WELL AS THE NEW JERSEY LAW AGAINST DISCRIMINATION AND THE DISTRICT COURT READ THE LAW NARROWLY AND DISMISSED THE CASE. WITH AFFIRMANCE BY THE THIRD CIRCUIT COURT OF APPEALS**

Hostile work environment claims are based on acts which by their very nature involves repeated conduct. National Railroad Passenger Corporation v. Morgan, 536 U.S. 101, 103 (2002). A hostile work environment occurs over a series of days or perhaps years. Id. at 103.

To establish the presence of a hostile work environment under the Civil Rights Act of 1964, Title Seven plaintiff must show: (a) that she suffered intentional discrimination because of her membership in a protected class; (b) that the discrimination was severe or pervasive; (c) that the discrimination detrimentally affected her; (d) that the discrimination would have detrimentally affected a reasonable person in the same position; and (e) the existence of respondeat superior liability. West v. Philadelphia Elec. Co., 45 F.3d 744, 753 (3d Cir. 1995). Per NJLAD the elements to be satisfied are the same as noted per the United States Civil Rights Act of 1964, Title Seven. The complaint of harassment must be examined under the standard of severe or pervasive conduct and provides that one incident of harassment or harassing conduct can create a hostile work environment. Taylor v. Metzger, 152 NJ 490, 499 (1998). Whether conduct is so severe as to cause the environment to become hostile or abusive is a determination to be made by the trier of fact. Id. at 502.

Petitioner satisfied the prongs to establish hostile work environment and harassment. Petitioner was not relieved for breaks and lunch. (**Third Cir. Joint App. 2, T235:1-2; T234:6-25 Canete Deposition 8/11/15**). Petitioner was closely monitored to find opportunities to discipline him and was subjected to age related comments. (**Third Cir.App. 2, p. 199, Answers to Interrogatories, paragraphs one and twenty-two; App. 2, T283:2-6; T333:24-25, T334:1-4, Canete Deposition 8/11/15; App. 2, T388:6-25; T390:13-15, T390:23-25 Canete Deposition, 8/11/15. App. 2, T116:15-18; T116:24-25; T117:1-3, 13-16, Lipner Deposition**). Petitioner was subjected to a chart audit

to find errors and discipline him. (**Third Cir. Joint App. 2, Second Amended Complaint, Count Five**). Petitioner received negative evaluations. (**App. 2, Second Amended Complaint, Count Five**). Petitioner was accused of giving improper injections. (**Third Cir. App. 2, T139:3-10, Lipner Deposition; App. 2, T299:12-22; T296:7-11, Canete Deposition 8/15**) Petitioner was counseled for using physical restraints on a patient. (**Third Cir. App. 2, p. 208, Canete Letter to Budnick**). Petitioner satisfies all of the elements for hostile work environment.

The Court reduced the harassment claims to missed lunch breaks. (**Summary Judgment Transcript, T17:1-25**). The hostile work environment claim is supported by the negative events which were cumulative. It is requested that the United States Supreme Court reverse and remand this matter for trial.

## **CONCLUSION**

For all of the foregoing reasons, it is requested that the United States Supreme Court grant the Petition for Writ of Certiorari and take up the issues documented within this brief. It is further requested that the United States Supreme Court Order that Petitioner's lawsuit be reinstated and remanded to the District Court for presentment to a jury. Based on the facts of this case and the law it is evident that a *prima facie* case of age, race, national origin discrimination as well as discrimination based on military status were presented in the record at the District Court. The Petitioner is entitled to relief on all causes of action noted and a jury should be allowed to make a determination on the merits of the case.

Respectfully submitted,

Luretha M. Stribling  
*Counsel of Record*  
LURETHA M. STRIBLING LLC  
133 Westfield Avenue  
Suite 4  
Clark, New Jersey 07066  
(732) 956-0010  
lmstribling@verizon.net

*Counsel for Petitioner*