Superior Court of New Jersey
Appellate Division

ALAN S. DILLON,

Plaintiff-Appellant,

v.

STATE OF NEW JERSEY, STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, DAN KENNEDY, MAGDALENA PADILLA, KAREN FELL, SANDRA KRIETZMAN, JASON STRAPP, YVONNE HERNANDEZ, LINDA DOUGHTY, MATTHEW R. WILSON, NICK DIMARTINO, KELLEY CUSHMAN, LERONDA AVILES, STEVE DOUGHTY AND JOHN DOES 1-10 BEING AGENTS, SERV-ANTS AND EMPLOYEES OF DEFENDANTS AS A CONTINUING INVESTIGATION MAY REVEAL (WHO ARE FICTITIOUSLY NAMED BECAUSE THEIR TRUE IDENTITIES ARE UNKNOWN) (ALL DEFENDANTS NAMED HEREIN IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES),

Defendants-Respondents.

Docket No. A-001250-22T1

Civil Action

On Appeal from the Superior Court of New Jersey, Law Division, Mercer Vicinage

Docket No. Below: MER-L-432-17

Sat Below: Honorable Douglas Hurd, P.J.Cv.

BRIEF OF PLAINTIFF-APPELLANT ALAN S. DILLON

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PRELIMINARY STATEMENT

Alan Dillon (Dillon) had a stellar career with the New Jersey Department of Environmental Protection ("NJDEP" or "employer") for nearly three decades until he engaged in protective activity by opposing unlawful discrimination and retaliation. This matter must be reversed and remanded because the motion judge dismissed Dillon's retaliation claim as a matter of law by applying the wrong legal standard. Rather than considering whether the negative consequence of an employer's retaliatory actions would dissuade a reasonable person from complaining about discrimination, the trial court applied a much more stringent standard requiring that the employer's retaliation involve a "tangible adverse employment action" that must "alter an employee's compensation, terms, conditions, or privileges of employment, deprived future employment opportunities, or otherwise have a material adverse effect on his status as an employee." The motion judge never analyzed whether the actions taken by the employer against Dillon, independently or collectively, would dissuade a reasonable person from complaining about discrimination as required by New Jersey Supreme Court precedent. Further, throughout its analysis, the motion judge decided disputed issues of fact in favor of the employer and against Dillon and decided that the employer had met its burden of proving a legitimate reason for the disciplinary actions taken against Dillon on the grounds that Dillon failed to follow DEP protocol and procedure justifying the discipline, only by ignoring evidence to

the contrary, including facts contradicting the employer's basis for taking the numerous disciplinary actions, the timing of the retaliatory actions being taken shortly after Alan Dillon's protected activity, the employer's failures to comply with its own policies, a finding by the employer in 2012 that Karen Fell, a person who retaliated against Alan Dillon, had earlier created a hostile environment, a 2015 investigation by the employer finding no discrimination and retaliation that was deeply flawed because it ignored important evidence, the posting of a derogatory retirement flyer throughout the NJDEP headquarters that depicted Alan Dillon in a false and unflattering light alleging criminality that even the defendants described as "inappropriate," "derogatory," "meanspirited," "mean," "hateful," and "hurtful."

By failing to apply the correct legal standard, the motion judge failed to appreciate that anti-discrimination laws rely on employee's complaints for enforcement and when an employee complains about discrimination, anti-discrimination laws are supposed to protect that worker from retaliation. Under clear New Jersey precedent, an employee suffers an adverse action if the employer's retaliation would dissuade a reasonable person from complaining about discrimination.

This case is important because motion judges, like the motion judge here, are declaring a wide swath of conduct as insufficiently serious to constitute retaliation as a matter of law and are thereby making factual determinations about what

reasonable people think. Motion judges are increasingly making factual findings on motions for summary judgment declaring, as here, there are no disputed issues of material fact under the guise that the non-moving party did not present "credible or reliable evidence." Whether evidence is credible or reliable, however, is inherently a jury determination and not one for the court. As one example, the motion judge concluded that the defendants "acted appropriately in all regards" when they barred Dillon from entering the NJDEP unescorted where he had previously enjoyed regular and unescorted access and his wife works there. The motion judge's factual finding was reached notwithstanding evidence that the action taken was taken because Dillon was "suing multiple employees at DEP" and because he "has been litigating against the DEP, alleging he was discriminated against and retaliated against." A jury could find that restricting Dillon in this manner because he filed a lawsuit was not appropriate and along with the many other actions taken by the employer detailed below, including disciplinary actions, a jury could find this might dissuade a reasonable person from complaining about discrimination and retaliation.

PROCEDURAL HISTORY

Plaintiff Alan S. Dillon (Dillon) filed this action on June 14, 2017 and on January 30, 2018, Dillon filed a First Amended Complaint (Pa19-Pa55) pursuant to the New Jersey Law Against Discrimination, New Jersey Civil Rights Act and the Constitution of New Jersey seeking redress for workplace discrimination,

harassment and retaliation. On February 15, 2018, defendants filed an Answer To Plaintiff's First Amended Complaint with Separate Defenses and Jury Demand (Pa56-Pa81) and filed an amended Answer to plaintiff's First Amended Complaint on March 20, 2018. (Pa82 to Pa108). On January 4, 2019, the Court sua sponte entered an Order appointing Honorable Wilbur H. Mathesius, J.S.C. (ret.) as a mediator in this case and mandating that the parties participate in mediation and precluding the filing of discovery motions unless the parties attempt to resolve the issue through mediation. (Pa122-Pa123). On May 31, 2019, the court entered an Order directing plaintiff to pay the mediator's bill notwithstanding a dispute regarding the matter (Pa208-Pa209). On July 5, 2019, the court scheduled a hearing entering an Order setting the matter down for a hearing on the issue of the mediator's fee. (Pa210-Pa211).

Plaintiff filed a Second Amended Complaint (Pa245-Pa283). On August 29, 2019, an Answer to the Second Amended Complaint was filed on behalf of Defendants State of New Jersey, State of New Jersey Department of Environmental Protection, Dan Kennedy, Magdalena Padilla, Karen Fell, Sandra Krietzman, Jason Strapp and Yvonne Hernandez. (Pa212-Pa218). On August 29, 2019, a motion to dismiss the Second Amended Complaint was filed on behalf of Steve Doughty, Kelley Cushman, Leronda Aviles, Nick DiMartino, Matthew Wilson, and Linda Doughty. (Pa219-Pa221).

On October 11, 2019, an Order was entered dismissing the Second Amended Complaint against Steve Doughty in its entirety and dismissing Counts 2 and 4 only against moving defendants Kelley Cushman, Leronda Aviles, Nick DiMartino, Matthew Wilson, and Linda Doughty. (Pa223-Pa224). On October 11, 2019, an Answer to the Second Amended Complaint was filed on behalf of Leronda Aviles, Kelley Cushman, Nick DiMartino, Linda Doughty, and Matthew Wilson. (Pa225-Pa232).

On July 29, 2022, a Motion for Summary Judgment was filed by defendants State of New Jersey, State of New Jersey Department of Environmental Protection, Dan Kennedy, Magdalena Padilla, Karen Fell, Sandra Krietzman, Jason Strapp, Yvonne Hernandez, Linda Doughty, Matthew Wilson, Nick DiMartino, Kelley Cushman and Leronda Aviles. (Pa233-Pa398). On September 27, 2022, a Cross Motion for Summary Judgment was filed on behalf of plaintiff Alan Dillon. (Pa399-Pa700). On October 17, 2022, defendants filed additional documents in reply to plaintiff's opposition to defendants' Motion for Summary Judgment and in opposition to plaintiff's Cross Motion for Summary Judgment. (Pa703-Pa805).

On October 19, 2022, plaintiff Alan Dillon filed a Notice of Motion for an Order Permitting Defendants to Substantively Respond to Paragraphs 22 to 29, 31 to 67, 69 to 81, 83 to 130, 132 to 146, 148 to 198 and 201 to 242 of Plaintiff Alan S. Dillon's Statement of Material Facts in Support of Motion for Summary Judgment

or, Alternatively, to Consider Those Paragraphs Unopposed in Conformance With Rule 4:46-2(b). (Pa806-Pa836).

On November 10, 2022, an Order entering summary judgment in favor of defendants was entered and the second amended complaint was dismissed with prejudice as to all defendants. (Pa837-Pa838).[1] Also on November 10, 2022, an Order denying plaintiff's Motion for Summary Judgment was entered (Pa839-Pa841) and an Order was entered denying plaintiff's Motion for an Order Permitting Defendants to Substantively Respond to Paragraphs 22 to 29, 31 to 67, 69 to 81, 83 to 130, 132 to 146, 148 to 198 and 201 to 242 of Plaintiff Alan S. Dillon's Statement of Material Facts in Support of Motion for Summary Judgment or, Alternatively, to Consider Those Paragraphs Unopposed in Conformance with Rule 4:46-2(b). (Pa842-Pa844).

Plaintiff filed a Notice of Appeal (Pa845-Pa853) and a Certification of Transcript Completion and Delivery was filed on February 6, 2023. (Pa854).

STATEMENT OF FACTS[2]

Plaintiff began his career at defendant State of New Jersey Department of Environmental Protection in January of 1986. (Pa401). During his thirty-year career

[1] 1T refers to the January 4, 2019 transcript, 2T refers to the May 31, 2019 transcript and 3T refers to the November 10, 2022 transcript.

[2] The full Statement of Facts are set forth in Plaintiff's Statement of Material Facts in Support of Motion for Summary Judgment (Pa401-Pa446) and the pertinent evidence set forth in a narrative chronological summary is set forth here in conformance with Rule 2:6-2(a)(5).

Alan Dillon advanced from an Environmental Engineer Trainee to the Section Chief in the Burau of Safe Drinking Water, Division of Water Supply and Geoscience in the New Jersey Department of Environmental Protection. (Pa409).

Alan Dillon was professionally active and achieved numerous accomplishments awards in the field of Safe Drinking Water including receiving several awards and citations from the American Water Works Association, the largest nonprofit, scientific and educational association dedicated to managing and treating water; serving as President of the Association of Boards of Certification, the national association of certification of water and wastewater operators; serving for many years as course coordinator for the Rutgers University Safe Drinking Water Act Regulatory Update annual course and being recognized as a leader in the field of Safe Drinking Water – lecturing and writing on issues of public concern in this important field. (Pa410; Pa453).

After Alan Dillon brought to the attention of his employer his managers were engaged in discrimination, hostility and harassment against him, including official complaints on May 23, 2012 resulting in a finding that Karen Fell created a hostile environment, Dillon's stellar career took a nosedive. (Pa530; Pa641). Dillon's employer failed to take appropriate remedial action to protect him from retaliation and the harassment and hostility intensified.

Dillon opposed discrimination and retaliation in 2014 when he complained to Assistant Commissioner Dan Kennedy that Karen Fell the Assistant Director of Water System Operations said to him in front of Bureau Chief Krietzman and Bureau Chief Zalaskus, that Dillon should not attend a 2014 conference because Dillon was "too old." Bureau Chief Zalaskus objected to Karen Fell's statement by stating out loud to that Karen Fell "did not really mean to suggest that [Alan Dillon] was too old to attend a conference" and Karen Fell persisted and insisted that is "exactly what she meant." (Pa869-Pa870; Pa659). Dillon reported the comment to Fred Sickels, the Director and Karen Fell's supervisor and made an EEO complaint that Dillon was told in November of 2014 was being referred to the NJDEP EEO office for investigation. On November 17, 2014, Dillon's complaint of age discrimination and retaliation was sent to the NJDEP EEO office (Melanie Armstrong) for handing by the NJDEP Office of Labor Relations responsible for discipline (Jason Strapp). (Pa834). Thereafter, Karen Fell impeded Alan Dillon's participation as a speaker in the American Waterworks seminar to be held on November 6, 2014 and she impeded Alan Dillon's participation in the annual Rutgers University "Safe Drinking Water Regulatory Update" in 2014 (Pa539). Karen Fell suppressed Dillons presentations on open air water reservoirs and fracking stating they were "political" (Pa540-Pa541). On February 3, 2015, Karen Fell requested disciplinary action against Alan Dillon for "[t]wo incidents at the Safe Drinking Water Regulatory Update seminar

in New Brunswick" in 2014 annual Rutgers University" (Pa532-Pa537, page 2 "Incident Details"). On February 3, 2015, Karen Fell and Sandra Krietzman engaged in harassment of Alan Dillon by interfering with his scheduled presentation at the American Waterworks Association Annual Conference on Thursday, March 19, 2015 on "Effecting Behavioral change for Asset Management" which the American Waterworks Association had already been accepted and placed on the agenda. (Pa868; Pa869-Pa873).

On February 10, 2015, Dillon filed a formal complaint of discrimination and retaliation with the NJDEP EEO and 10 days later, on February 20, 2015, the NJDEP Office of Labor Relations (Jason Strapp) advised Alan Dillon of a request to discipline him. (Pa479).

The investigation of Alan Dillon's February 10, 2015 report of discrimination and retaliation by Karen Fell and Sandra Krietzman was conducted by Melanie Armstrong, the Director of the NJDEP's Office of Equal Opportunity and Public Contract Assistance. (Pa860-Pa867; Pa661-Pa662). Melanie Armstrong issued a report dated April 24, 2015 concluding that Alan Dillon's report of discrimination was "unsubstantiated." (Pa860-Pa867; Pa662).

A flawed and partial investigation, found Dillon's charges to be "unsubstantiated." (Pa860-Pa867; Pa664). A review of the underlying investigation reveals there was corroboration which was ignored by Melanie Armstrong and much

to substantiate Alan Dillon's report of discrimination and retaliation, none of which Melanie Armstrong presented in her report such as:

a) The finding in 2012 substantiating Alan Dillon's claim that Karen Fell was engaged in harassing conduct against him; The statement of Todd Taylor, an employee of the Bureau of Safe Drinking Water taken on March 9, 2015 substantiating that Alan Dillon had told him about the derogatory age and gender related comments and that he agreed that the workplace had become "a more female dominated environment." (Pa874).
b) The statement of Paul Smith, an employee of the Bureau of Safe Drinking Water taken on February 24, 2015 reporting to Melanie Armstrong that he has "observed a lot of women being promoted and many of the new hires are women"; that "[m]any of the promotions involve employees more than 10 years younger (in their 40s)", that there "appears to be a bias" and "Fell does attempt to intimidate employees." (Pa876).
c) The statement of Nasir Butt, an employee of the Division of Water Supply and Geoscience, Bureau of Water Supply Engineering taken on February 24, 2015 reporting that "most promotional opportunities had been given to young women." (Pa879).
d) The statement of Fred Sickels, the Director of the Department, describing Karen Fell as a "bulldog" meaning "aggressive" and "very thorough." (Pa862).
e) The statement of Sandra Krietzman, taken on March 6, 2015 (but not signed until March 11, 2015) who when confronted with the statement by Alan Dillon that Karen Fell announced in Sandra Krietzman's presence that Alan Dillon was "too old" to attend conferences did not outright deny such a statement was made but, instead, responded "I doubt Karen would say that." (Pa880).
f) The statement of Karen Fell taken on February 27, 2015 (but not signed until April 6, 2015) confirming that Sandra Krietzman may have asked what Alan Dillon's retirement plans were because "Krietzman was losing several employees to retirement." (Pa881).

[(Pa664-Pa665).]

Notably absent from the EEO file of Melanie Armstrong's investigation is

a) any statement of Bureau Chief Zalaskus who was present when Karen Fell stated and repeated that Alan Dillon was "too old" to attend conferences. (Pa524-Pa525).
b) any reference to the information Melanie Armstrong received from Jason Strapp that Alan Dillon had already "received discipline last week related to the incident [Alan Dillon] described in this complaint." (Pa522).

[(Pa665).]

Also notably absent from the report of Melanie Armstrong is any reference to the following undisputed facts that corroborate Alan Dillon's complaint that he was being discriminated and retaliated against:

a) the determination of the State of New Jersey Department of Environmental Protection Division of Human Re-source, Office of Labor Relations, advised Karen Fell that her investigation determined that she engaged in and created a "hostile environment" and engaged in "conduct unbecoming a public employee." (Pa530).
b) the 20 year history of Alan Dillon participating as coordinator of the annual Rutgers Safe Water regulatory update without any interference from the NJDEP. (Pa460).
c) the 25 year history of Alan Dillon being a member of the American Water Works Association (NJAWWA) and his regular attendance at its conferences and participation as a presenter. (Pa460).
d) the approval Alan Dillon received to engage in outside activities of training on environmental issues March 3, 2008, Alan Dillon sought permission from the NJDEP's Office of Legal Affairs to conduct environmental training as an outside activity and his request was approved by Alice A. Previte on March 8, 2008. (Pa511-Pa512).
e) the approval Alan Dillon received to engage in outside activities in January, 2015.
f) the prerequisite for discipline is up to date PARs and the fact that Alan Dillon had not had a PAR (a prerequisite for discipline) for "several years." (Pa526).
g) Simultaneously, on April 13, 2015, Karen Fell drafts a Work Place Violence retaliation claim against Alan Dillon including an insubordination accusation. [(Pa665-Pa666).]

Also notable and undisputed is that both Karen Fell, Sandra Krietzman, Fred Sickels and Jason Strapp were advised of Alan Dillon's complaint of discrimination and retaliation. (Pa666). Notwithstanding the above corroborative facts, the report stated no action would be taken because Karen Fell and Sandra Krietzman denied making the derogatory statements to Alan Dillon. (Pa856-Pa859). Thereafter the following took place:

- On June 24, 2015, two months after being advised that the harassment, discrimination and retaliation reported by Alan Dillon was "unsubstantiated", Karen Fell and Sandra Krietzman again brought disciplinary action, authorized by Jason Strapp, Fred Sickels and Director of Human Resources Director Robin Liebeskind, against Alan Dillon alleging "Insubordination and Conduct Unbecoming of a Public Employee" (Pa477).
- On November 24, 2015, 6 days after Alan Dillon again reported discrimination and retaliation by Karen Fell, Karen Fell retaliated against Alan Dillon by preventing him from speaking on matters of public concern in his field of expertise and initiating disciplinary charges against him for allegedly not receiving her approval prior to submitting an abstract to the American Water Works Association on Safe Drinking Water - a matter of public concern. (Pa503).
- On December 18, 2015, a Notice of Disciplinary Action dated charged Alan Dillon with "Insubordination" and "Conduct unbecoming a public employee for submitting an abstract for presentation New Jersey Water Works Association (NJAWWA) Annual Conference to be held in March of 2016.
- On April 12, 2016, Yvonne Hernandez of the NJDEP's Office of Labor Relations in the Human Resources Department issued discipline charges against Alan Dillon signed by Jason Strapp alleging falsification and conduct unbecoming a public employee on the sole grounds that Alan Dillon lied when he denied being under Linda Doughty's desk. (Pa465-Pa466).
- On April 12, 2021, numerous altered and derogatory retirement posters were placed throughout the NJDEP workplace with Alan Dillon's photograph stating **"HELP US CELEBRATE (WELL REJOICE OVER) ALAN DILLON'S HASTY, UNSCHEDULED AND DOWN-RIGHT EMBARRASSING DEPARTURE FORM DEP TO AVIOD PENSION**

SANCTIONS AND OTHER FURTHER DISCIPLINARY ACTIONS FOLLOWING A SCANDOLUS END TO A 30 YEAR CAREER OF DISREPUTABLE BEHAVIOU, ALIENATING COLLEGUES AND ABUSING REGULATEES" – relating facts that were discussed at an April 11, 2016 communications among Patricia Gardner, Jason Strapp and Linda Doughty.

- In 2019, Alan Dillon was banned from the NJDEP building where his wife still works, in retaliation for filing a lawsuit. (Pa831-Pa832). [(Pa641-Pa644).]

LEGAL ARGUMENT

Point I

THE STANDARD OF REVIEW IS *DE NOVO* WHICH REQUIRES APPLICATION OF THE CORRECT LEGAL STANDARD, VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE NON-MOVING PARTY, PRECLUDING DECIDING ISSUES OF FACT AND MAKING CREDIBILITY DETERMINATIONS AND REQUIRING SUBMISSION OF DISPUTED ISSUES OF FACT TO A JURY (Pa837; 3T)

An Appellate Court reviews a grant or denial of a motion for summary judgment *de novo*, applying the same standard used by the trial court. Stewart v. N.J. Tpk. Auth./Garden State Parkway, 249 N.J. 642, 655 (2022); Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). Rule 4:46-2(c) provides that only if there is no "genuine issue as to any material fact challenged" should summary judgment be entered. In considering a motion for summary judgement a court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

In applying this standard, a motion judge may not abrogate the jury's exclusive role as the finder of fact. Suarez v. E. Int'l Coll., 428 N.J. Super. 10, 27 (App. Div. 2012). "The court's function is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" Rios v. Meda Pharm., Inc., 247 N.J. 1, 13 (2021) (quoting Brill, 142 N.J. at 540). "To decide whether a genuine issue of material fact exists, the trial court must 'draw[] all legitimate inferences from the facts in favor of the non-moving party.'" Friedman v. Martinez, 242 N.J. 450, 472 (2020) (alteration in original) (quoting Globe Motor Co. v. Igdalev, 225 N.J. 469, 480 (2016)). The motion judge's function is not to weigh the evidence and determine the truth of the matter but to determine only whether there is a genuine issue for trial. Brill, 142 N.J. at 540.

For the reasons set forth below, the motion judge considering this case erred by applying the wrong standard for evaluating retaliation claims (Point II) and by making credibility determinations in favor of the employer and against Dillon and by deciding disputed issues of fact in favor of the employer and against Dillon. (Point III).

Point II

THE MOTION JUDGE ERRED BY FAILING TO APPLY THE CORRECT LEGAL STANDARD THAT ENCOURAGES EMPLOYEES TO OPPOSE AND REPORT DISCRIMINATION BY PROTECTING THEM FROM RETALIATION THAT WOULD DISSUADE A REASONABLE WORKER FROM MAKING OR SUPPORTING A CHARGE OF DISCRIMINATION AND INSTEAD REQUIRED THE RETALIATION TO ALTER THE TERMS AND CONDITIONS OF DILLON'S EMPLOYMENT (Pa837; 3T)

The NJLAD prohibits retaliation. The LAD makes it unlawful for an employer to:

> **take reprisals against any person because that person has opposed any practices or acts forbidden under this act** or because that person has filed a complaint, testified or assisted in any proceeding under this act or to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this act.
>
> [N.J.S.A. 10:5-12(d) (emphasis added).]

The motion judge erred by requiring Dillon to demonstrate that the retaliatory conduct be "serious and tangible enough to alter employee's compensation, terms, conditions, or privileges of employment, deprived future employment opportunities, or otherwise have a material adverse effect on his status as an employee" (3T28:24-3T29:3). The proposition that retaliation must rise to the level of altering an employee's terms and conditions of employment was rejected by the New Jersey Supreme Court in Roa v. Roa, 200 N.J. 555, 574-75 (2010) which relied upon the United States Supreme Court's analysis in Burlington Northern & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006) (Burlington Northern).

The United States Supreme Court in Burlington Northern analyzed the anti-retaliation provision of Title VII. The Supreme Court recognized that discrimination laws depend upon the cooperation of employees who are willing to file complaints and act as witnesses for enforcement. "Plainly, effective enforcement could thus

only be expected if employees felt free to approach officials with their grievances." Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960). The United States Supreme Court in Burlington Northern reversed the 6th Circuit's holding that a retaliatory action must cause a "materially adverse change in the terms and conditions' of employment" in order to be actionable, Burlington Northern, 548 U.S. at 60, emphasizing that interpreting antiretaliation provisions to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of anti-discrimination laws depend. The Supreme Court in Burlington Northern held that the question must be whether an employer's retaliatory action would "dissuaded a reasonable worker from making or supporting a charge of discrimination" id. at 68 and soundly rejected the proposition that that the anti-retaliation provision of Title VII is limited to retaliatory actions that "affect the terms and conditions of employment." Id. at 64.

The Supreme Court observed that the "significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. " Id. at 69. The Supreme Court thus established the legal standard that a plaintiff claiming retaliation under Title VII need show only that a reasonable employee would have found the alleged retaliatory actions by an employer "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Id. at 68 (quotation omitted).

Accordingly, an employer's retaliation actionable under the anti-retaliation provisions of Title VII encompasses a broader range of actions than an "adverse action" subject to challenge under the non-discrimination provisions. Id. at 67. The Supreme Court in Burlington Northern held that "Title VII's substantive provision and its antiretaliation provision are not coterminous." Ibid. The rationale for making protection from retaliation broader that protection from discrimination is because:

> Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses. "Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances." Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292 (1960). Interpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act's primary objective depends.
> [Ibid.]

New Jersey has adopted the same standard established by the United States Supreme Court in determining what constitutes an adverse employment action or reprisal in a retaliation claim under the New Jersey Law Against Discrimination. (NJLAD). Roa, 200 N.J. at 574-75 (2010) (citing Burlington Northern). The Court in Roa held that

> In addressing the question of how harmful an act of retaliatory discrimination must be in order to fall within the provision's scope . . . a Plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well **might have dissuaded a reasonable worker from making or supporting a charge of discrimination**.
> [Id. at 575 (emphasis added) (citations and internal quotation marks omitted).]

The United States Supreme Court pointed out in its analysis that a jury can even find an employer's conduct to be capable of deterring a reasonable employee from complaining about discrimination even if the individual was not in fact deterred. Burlington Northern, 548 U.S. at 68; see, e.g., Patane v. Clark, 508 F.3d 106, 116 (2d Cir. 2007) (rejecting the employer's argument that the challenged action was not sufficiently adverse under Burlington Northern since it did not dissuade the plaintiff herself from reporting sexual harassment again).

The Burlington Northern decision made clear that whether an action is reasonably likely to deter protected activity depends on the surrounding facts because the "significance of any given act will often depend on the particular circumstances. Context matters." Burlington Northern, 548 U.S. at 69 (citing Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 81-82 (1998)). An "act that would be immaterial in some situations is material in others." Ibid. (citation omitted). The Supreme Court recognized that whether a retaliatory employment action actionable "often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Burlington Northern, 548 U.S. at 69 (citation and internal quotation marks omitted).

Examples of actionable retaliation cited by the Supreme Court include the FBI's refusing to investigate "death threats" against an agent, the filing of false

criminal charges against a former employee, changing the work schedule of a parent who has caretaking responsibilities for school-age children, and excluding an employee from a weekly training lunch that contributes to professional advancement. Id. at 63, 69; see also Williams v. W.D. Sports, N.M., Inc., 497 F.3d 1079, 1090 (10th Cir. 2007).

Denial of promotion, refusal to hire, denial of job benefits, demotion, suspension, and discharge are, of course employer actions that could dissuade a reasonable person from engaging in protected activity. Roberts v. Roadway Express, Inc., 149 F.3d 1098, 1104 (10th Cir. 1998) (suspensions and terminations "are by their nature adverse"). Similarly, negative or lowered evaluations could dissuade a reasonable person from engaging in protected activity. See, e.g., Walker v. Johnson, 798 F.3d 1085, 1095 (D.C. Cir. 2015) (holding that the "denial of a deserved rise in performance rating" can be actionable as retaliation).

Warnings and reprimands issued against an employee who engaged in protected activity could dissuade a reasonable person from engaging in protected activity. Millea v. Metro-N. R.R. Co., 658 F.3d 154, 165 (2d Cir. 2011) (a letter of reprimand is materially adverse for a retaliation analysis even if it "does not directly or immediately result in any loss of wages or benefits, and does not remain in the employment file permanently"); Ridley v. Costco Wholesale Corp., 217 F. App'x 130, 135 (3d Cir. 2007) (upholding a jury verdict finding that, although demotion

was not retaliatory, the post-demotion transfer to warehouse, counseling notices for minor incidents, and failure to investigate complaints about these actions were unlawful retaliation).

By requiring Dillon to demonstrate that the retaliatory conduct be "serious and tangible enough to alter employee's compensation, terms, conditions, or privileges of employment, deprived future employment opportunities, or otherwise have a material adverse effect on his status as an employee" (3T28:24-3T29:3), the motion judge erred. The motion judge improperly added to the Burlington Northern/Roa reasonable person standard because Burlington Northern and Rao expressly rejected the requirement that an employee demonstrate a change in terms, conditions, or privileges of employment. The sole question under Burlington Northern/Roa is whether a jury considering the facts in a light most favorable to Dillon could conclude that the employer's actions could dissuade a reasonable employee from making or supporting a charge of discrimination.

Point III

THE MOTION JUDGE ERRED BY FAILING TO VIEW THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE NON-MOVING PARTY, BY MAKING CREDIBILITY DETERMINATIONS AND BY DECIDING GENUINE ISSUES OF MATERIAL FACT IN FAVOR OF THE EMPLOYER AND AGAINST DILLON (Pa837; 3T)

The governing standard for granting summary judgment provides that a court should grant summary judgment only when "there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment as a matter

of law." R. 4:46-2(c); Brill, 142 N.J. at 528-529. Conversely, a trial court must deny summary judgment if the non-moving party presents evidence that supports a genuine issue of material fact. Brill, 142 N.J. at 529. Imperatively, "[i]t [is] not the court's function to weigh the evidence and determine the outcome but only to decide if a material dispute of fact existed." Gilhooley v. Cnty. of Union, 164 N.J. 533, 545 (2000).

If an employee presents facts upon which a jury *could* conclude the proffered non-discriminatory reason is unworthy of belief, then defendants' summary judgment motion must be denied, and plaintiff's discrimination claim must go to a jury. An employee may defeat summary judgment by either by (1) discrediting the proffered reason; or (2) adducing evidence that discrimination was more likely than not a motivating cause of the adverse employment action. Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994) (citation omitted). To defeat a motion for summary judgment, an employee need only "demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder *could* rationally find them 'unworthy of credence,' . . . and hence infer 'that the employer did not act for [the asserted] non-discriminatory reasons.'" DeWees v. RCN Corp., 380 N.J. Super. 511, 528 (App. Div. 2005) (quoting Fuentes, 32 F.3d at 765) (emphasis in original; citations omitted); see also Greenberg v. Camden Voc. Schools, 310 N.J. Super. 189,

200 (App. Div. 1998).

An employee is not required to have some kind of "smoking gun" evidence of discriminatory intent, beyond the proof that the employer's proffered reason for the adverse employment decision is not worthy of belief. A fact finder is permitted to infer discriminatory animus from facts showing that the employer's proffered non-discriminatory reason is "weak" or "implausible" or "incoherent" has long been accepted as one way to prove, circumstantially, that the proffered reason is pretextual. Dewees v. RCN Corp., 380 N.J. Super. 511, 526-28 (App. Div. 2005).

In DeWees, the Appellate Division observed that New Jersey has adopted the standard set forth by the United States Supreme Court in Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 146 (2000) stating "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." Dewees, 380 N.J. Super. at 526-27 (quoting Reeves, 530 U.S. at 147). To cast doubt on an employer's claim that it had a legitimate reason for the adverse employment decision, an employee need only point out inconsistencies in the employer's articulated reasons or point to "other evidence in the record sufficient to support the inference of retaliatory animus." LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 232-33 (3d Cir. 2007). See also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

The motion judge erred by making credibility determinations in favor of the employer and adverse to Dillon, by ignoring certain facts of record and by deciding disputed issues of fact that are the province of the jury. In doing so, the motion judge not only disregarded the proposition that a jury not a judge decide issues of fact but disregarded the admonition that the question of whether an action is reasonably likely to deter protected activity depends on the surrounding facts because the "significance of any given act will often depend on the particular circumstances. Context matters." Burlington Northern, 548 U.S. at 69.

The U.S. Supreme Court held in an intellectual property case that when a "reasonable person" standard applies, a jury should decide the issue. Hana Financial, Inc. v. Hana Bank, 574 U.S. 418 (2014). The issue in Hana was whether a consumer's understanding of the similarity between two trademarks is a question that should be decided by a judge or a jury. The Supreme Court held that "when the relevant question is how an ordinary person or community would make an assessment, the jury is generally the decision maker that ought to provide the fact-intensive answer." Id. 422 (citations omitted).

The underlying issue involves the reasonable person standard – whether an employer's action would have dissuaded a reasonable employee from filing or pursuing a claim and the issue should be decided by a jury following Hana.

Based upon what it termed a lack of "credible or reliable" evidence supporting plaintiff's cause of action, the motion judge concluded that the employer had a "legitimate nondiscriminatory reason for the disciplinary or adverse employment action taken against [Dillon]" (3T23:25-3T24:2) – and that "plaintiff has not been able to show any type of pretext or implausibilities in that explanation." (3T23:14-15). What is "reliable and credible" is inherently a jury determination and not one for the Court or else the right to a jury trial will be in jeopardy. Further, the motion judge's conclusion can be reached only by ignoring facts of record upon which a jury could find pretext, as follows.

1. Dillon's opposition to discrimination and retaliation and the 2015 Written Warning that followed are facts upon which a jury could conclude they were retaliatory (Pa837; 3T)

The events related to the first disciplinary action brought against Dillon – the 2015 Written Warning – began on October 20, 2014 when Dillon sent Sandra Krietzman a speaker request form to make a presentation at the American Waterworks Association annual seminar to be held on November 6, 2014 and Karen Fell, Fred Sickels and others were copied on his email. (Pa504-Pa506; Pa655). Karen Fell unilaterally decided Alan Dillon "can't attend and can't present" on behalf of the NJDEP but that Alan could present "on [his] own time" and because this email authorized Alan Dillon to present on his own time, he was placed on the agenda to speak. (Pa655).

Alan Dillon had earlier reported to Fred Sickels that Karen Fell engaged in discriminatory and retaliatory conduct including stating, in the presence of Bureau Chief Krietzman and Bureau Chief Zalaskus, that Dillon should not attend a 2014 conference because [Dillon] was too old." Alan Dillon further reported that Bureau Chief Zalaskus objected by stating out loud to that Karen Fell "did not really mean to suggest that [Alan Dillon] was too old to attend a conference" and Karen Fell persisted and insisted that is "exactly what she meant." (Pa659). Alan Dillon reported the comment to Fred Sickels, the Director and Karen Fell's supervisor and made an EEO complaint that Dillon was told in November of 2014 was being referred to the NJDEP EEO office. (Pa660). On November 17, 2014, Dillon's complaint of age discrimination and retaliation was sent to the NJDEP EEO office (Melanie Armstrong) for handing by the NJDEP Office of Labor Relations responsible for discipline (Jason Strapp). (Pa656).

Subsequently, in January 2015, Sandra Krietzman asked Dillon "several times when [Dillon] was going to retire." (Pa660). Karen Fell then actively sought to impede or outright prohibit Alan Dillon's participation at conferences in the Safe Water Drinking field. (Pa661). Dillon had been the course coordinator of the annual Rutgers University Safe Drinking Water Act update for 20 years. (Pa661).

On February 3, 2015, Karen Fell directed Sandra Krietzman to obtain information from Alan Dillon about his presentation at the American Waterworks

Association Annual Conference to be held on Thursday, March 19, 2015 on "Effecting Behavioral change for Asset Management" which the American Waterworks Association had accepted and placed on the agenda. (Pa658-Pa659). Alan Dillon responded that Karen Fell had previously given approval. (Pa659). Also, on February 3, 2015, Karen Fell told Dillon that he could not make his scheduled presentation at the American Waterworks Association Annual Conference on Thursday, March 19, 2015 despite being told earlier by Fell that he could make the presentation on his own time and Dillon's presentation had already been placed on the agenda. Finally, also on February 3, 2015, Karen Fell requested that the NJDEP Office of Labor Relations initiate disciplinary action against Dillon for "[t]wo incidents at the Safe Drinking Water Regulatory Update seminar in New Brunswick" in 2014 at Rutgers University (Pa658-Pa659).

On February 10, 2015, unaware of Karen Fell's request for disciplinary action, Dillon followed up on his EEO complaint he had made in 2014 that he was told would be referred to the NJDEP EEO for investigation by filing a formal Discrimination Complaint Processing Form with the NJDEP EEO reporting discrimination based on age and gender as well as retaliation. Dillon specifically reported that Karen Fell had engaged in discriminatory and retaliatory conduct including Karen Fell's statement, in the presence of Bureau Chiefs Krietzman and Zalaskus, that Dillon "should not attend a 2014 ABC conference because [Dillon]

was too old." (Pa426).

On February 11, 2015, the day after Dillon filed his report of discrimination/retaliation, emails show that Melanie Armstrong, the Director of the NJDEP EEO requested Jason Strapp, the NJDEP's Director of Labor Relations who is responsible for discipling NJDEP employees for information regarding Dillon and Jason Strapp falsely told her that Dillon "received discipline last week related to the incident [Dillon] described in this complaint." (Pa663).

On February 20, 2015, 10 days after Dillon again filed a formal Discrimination Complaint Processing Form against Karen Fell and Sandra Krietzman, the NJDEP Office of Labor Relations (headed by Jason Strapp) advised Alan Dillon of a request to discipline him. (Pa479, Pa455). A jury could find that this February 20, 2015 notification of a request for disciplinary action was in an effort to dissuade Dillon from proceeding with his discrimination/retaliation he filed. Dillon replied to the notification:

> "I am floored. . . I have no idea what the charge is. No one here has indicated anything about this. It is strange, I am available [to discuss] this afternoon. What time?"
> [(Pa479).]

The temporal proximity of Dillon's protected activity and the initiation of disciplinary action can support an inference of a retaliatory motive. Young v. Hobart W. Grp., 385 N.J. Super. 448, 467 (App. Div. 2005).

Specifically with regard to the February 3, 2015 initiation of discipline by

Karen Fell, alleging "Insubordination and Conduct Unbecoming of a Public Employee" (Pa532-Pa537) a jury could find, contrary to the motion judge's finding, that this was not brought for a legitimate reason because:

- In a memo dated June 24, 2015, the same day as the Written Warning, Dillon specifically and expressly denied he was insubordinate or otherwise engaged in the conduct alleged and explained that he followed instructions given to him. (Pa514).
- The summary judgment record included proof that such a claim was false because Dillon did follow instructions regarding the replacement of two topics on the agenda and none of the topic handouts appeared in the course packet. (Pa670).
- Further, formal service of the disciplinary charges initiated by Karen Fell on February 3, 2015 was delayed until June 24, 2015 so that the employer could finalize its investigation of Dillon's February 3, 2015 complaint of discrimination and retaliation. A jury could find this added to the circumstantial evidence that the disciplinary action was taken for a retaliatory purpose, *i.e.*, delaying the disciplinary charges gave the employer time to declare that Dillon's retaliation complaint was unfounded so that it could proceed with the disciplinary action.
- Dillon's had a decades long history of coordinating the Rutgers Annual Safe Water Course and lecturing at the American Water Works annual meeting which was encouraged by his employer until he opposed discrimination.
- The disciplinary charges were issued notwithstanding undeniable proof that as of February 3, 2015, no current PAR rating was on file for Alan Dillon, a prerequisite for considering whether disciplinary charges may be filed, and the employer's disciplinary policy states that "failure to have adequate control documents in place or to perform consistent supervisory functions may limit the ability to take further disciplinary action." Jason Strapp, Robin Liebeskind and Fred Sickels ignored this failure to comply with the employer's policy. (Pa669). A jury could find the employer's failure to comply with its own policies to be circumstantial evidence that the real reason for the disciplinary action was retaliation.
- The Warning Notice was served on June 24, 2015 for conduct Alan Dillon allegedly engaged in at least six months before formal discipline was issued related to the Rutgers University Office of Continuing Professional Education (OCPE) Safe Drinking Water Act Regulatory Update presentation Alan

Dillon gave on January 29, 2015 (Pa668) and not formally served until June 24, 2015 notwithstanding the employer's disciplinary policy states that disciplinary action should be "timely, appropriate and directly related to the seriousness of the infraction committed to encourage proper conduct and performance." (Pa667-Pa668). Again, a jury could find the employer's failure to comply with its own policies to be circumstantial evidence that the real reason for the disciplinary action was retaliation.

- As to the allegation that Alan Dillon made "disparaging comments" during his presentation at the Rutgers University Office of Continuing Professional Education (OCPE) Safe Drinking Water Act Regulatory Update on January 29, 2015, it is undisputed that Alan Dillon has never been told by Karen Fell, Jason Strapp or anyone else what he said that was disparaging and Alan Dillon affirmatively denied making "disparaging remarks." (Pa671).
- Regarding the allegation that Alan Dillon released "water rate data at the Rutgers course", it is undisputed that the water rate data had already been published by University of North Carolina – Chapel Hill Environmental Finance Center (UNC-EFC) on its rate dashboard with the approval of Fred Sickels and Sandra Krietzman. The UNC-EFC rate dashboard is a USEPA funded rate assessment tool provided as a public service utilizing Federal (public) funds. As such this information is accessible to the public upon inquiry. (Pa671).

While it is true that "petty slights, minor annoyances, and simple lack of good manners will not" do not give rise to actionable retaliation claims under the Burlington Northern/Roa standard, a formal reprimand issued by an employer is not a "petty slight," "minor annoyance," or "trivial" punishment; it can reduce an employee's likelihood of receiving future bonuses, raises, and promotions, and it may lead the employee to believe (correctly or not) that his job is in jeopardy. A reasonable jury could conclude as much even when, as here, the letter does not directly or immediately result in any loss of wages or benefits and does not remain in the employment file permanently. Millea v. Metro–N. R.R. Co., 658 F.3d 154,

165 (2d Cir. 2011). In this case, a jury could find that the Written Warning alone could dissuade a reasonable person from reporting.

2. Dillon's continuing opposition to discrimination and retaliation on November 18, 2015 and the Notice of Disciplinary Action dated December 18, 2015 which was initiated on November 24, 2015 are facts upon which a jury could conclude this was retaliatory (Pa837; 3T)

On November 18, 2015, Alan Dillon filed another formal complaint against Karen Fell alleging retaliation. (Pa671). On November 24, 2015, Karen Fell prohibited Dillon from speaking at the March 2016 American Waterworks Annual Conference in his field of expertise and she initiated disciplinary action against Alan Dillon for not receiving her approval prior to submitting an abstract to the NJAWWA on Safe Drinking Water. (Pa671-Pa673).

The Notice of Disciplinary Action dated December 18, 2015 charged Alan Dillon with "Insubordination" and "Conduct unbecoming a public employee" alleging that Dillon "again failed to follow the protocol for requesting to speak at outside events" when he submitted an abstract to the American Waterworks Association and fill out the Speaker Request Form. (Pa642).

A jury could find that the December 18, 2015 disciplinary action was retaliatory because it was initiated by Karen Fell 6 days after Dillon complained of discrimination (Pa456) and retaliation and disciplining a NJDEP employee for submitting an abstract – a proposal – for consideration was unprecedented and no rule of the NJDEP required permission of the employer to submit an abstract.

Regarding the charge that Alan Dillon "failed to fill out the Speaker Request Form" Alan Dillon was not chosen to speak, having only submitted an abstract with a proposal and filling out a "Speaker Request Form" would have been grossly premature and presumptuous. (Pa461). Regarding proposals for presentations at the American Waterworks Association Annual Conference to be held in March 2016, American Waterworks Association was to advise persons submitting proposals "by the end of December 2014" if their proposal was accepted and "submittals of accepted presentations would be required by February 20, 2015." (Pa675). The presentation approval process required "approval prior to accepting requests to make presentations speak at meetings, etc." and not approval before submitting abstracts. (Pa544).

Even if approval for submitting an abstract was required, on December 18, 2014, Alan Dillon had filed an Ethics Disclosure for regarding his proposal to "[p]rovide presentations regarding national drinking water issues" which was approved by his Director Fred Sickels January 23, 2015 and approved by the Ethics Liaison Officers on January 26, 2015. (Pa673-Pa674). Sandra Kreitzman testified at the disciplinary hearing that was not aware Mr. Dillon had received approval from the Ethics Office for Outside Activity.

A jury could find a retaliatory motive because the discipline initiated by Karen Fell initiated on November 24, 2015 for submitting an abstract without her

permission was unprecedented. Also, Dillon requested vacation on the week of the NJAWWA conference in March of 2016 so that he could attend on his own time and it was approved. (Pa461). The motion judge was simply incorrect by stating "Plaintiff sought to speak at a 2016 New Jersey AWWA Conference without seeking the approval and was suspended for one day as a result." (3T22:18-20). Dillon was disciplined for submitting an abstract without approval and was assessed and he served a two day suspension, not a one day suspension.

3. Dillon's continuing opposition to discrimination and retaliation and the Notice of Disciplinary Action dated April 12, 2016 are facts upon which a jury could conclude this was retaliatory (Pa837; 3T)

The circumstances surrounding the April 12, 2016 discipline charges against Dillon are also such that a jury could find that they were not taken for legitimate reasons. On April 12, 2016, Yvonne Hernandez of the NJDEP's Office of Labor Relations in the Human Resources Department issued discipline charges against Alan Dillon signed by Jason Strapp alleging falsification and conduct unbecoming a public employee on the sole and unprecedented grounds that Alan Dillon lied when he denied being under Linda Doughty's desk. The Preliminary Notice of Disciplinary Action alleged "Conduct unbecoming an employee" and "Other sufficient cause- Falsification, violation of DEP policy 2.35" (Pa466) and sought a 5 day penalty stating:

> You were observed by co-workers in Linda Doughty's cubical under her desk with her computer monitor sideways on two separate

> occasions while she was on vacation (2-18-16 & 2-19-16). When asked by Ms. Doughty why you were under her desk you denied such actions to her. When questioned by the Office of Labor Relations regarding your actions you provided false statements as well as a false reports, stating you were not under Ms. Doughty's desk and that you never had a conversation to Ms. Doughty regarding her inquiry. You have failed to cooperate with OLR in violation of DEP Policy 2.35. Further, you had no legitimate reason to be in Ms. Doughty's office under her desk In her cubicle on two separate occasions.
> [(Pa466).]

Without explanation and contrary to the motion record, the motion judge decided that "Any claims against the State and DEP regarding the incident with Doughty's desk must be dismissed as well. Plaintiff was never disciplined or barred from the DEP building for the allegation he was under Doughty's desk." (3T39:4-8). The following review of the facts compels the conclusion that a jury could find that the April 12, 2016 disciplinary charges were retaliatory.

On March 1, 2016, Matt Wilson told Linda Doughty of an occurrence that happened when "she was out on vacation." (Pa679). Linda Doughty reported in a memo that Matt Wilson told him "several people" had seen Alan Dillon "under her desk" with her "PC turned sideways" and that this was observed "on two different days" and that this was "odd" because "there would be no reason for Alan Dillon to be under her desk." (Pa679).

A jury could find this suspicious because under oath at deposition, Matt Wilson denied telling Linda Doughty there were several people who observed Alan Dillon under the desk because at deposition he admitted there were allegedly only

two. (Pa679). As far as Matt Wilson was concerned, even if true, the allegations made about Alan Dillon being under Linda Doughty's desk was not a "rule violation" of any sort and he did not report it to his supervisor or anyone else. (Pa680).

On March 2, 2016, Linda Doughty, Section Chief of the Bureau of Safe Drinking Water, made the allegations about Dillon to Sandra Krietzman and on March 3, 2016 Sandra Krietzman reported the allegations to Jason Strapp by email and copied Linda Doughty, Karen Fell and Patricia Gardner. The email Sandra Krietzman sent to Jason Strapp on March 3, 2016 had as an attachment a two-page type written statement reporting that NJDEP employee Matt Wilson told her on Tuesday, March1, 2016 that when Linda Doughty was "out on vacation" "several people" saw Alan Dillon "under her desk with her PC turned sideways." (Pa680).

Linda Doughty confronted Alan Dillon on March 2, 2016, asking "And by the way, what were you doing under my desk while I was out on vacation?" (Pa680). Linda Doughty's report stated that Alan Dillon was taken a back and responded: "I wasn't under your desk", yet at deposition, Linda Doughty changed her position and her new version was Alan Dillon "didn't say he wasn't under my desk." (Pa680-Pa681). The report of Linda Doughty also made statements which a jury could find supports a retaliatory motive as follows:

- that Marvin Hunt, a NJDEP IT person, checked her computer and found nothing unusual. (Pa681). Thus, the initial claim that Dillon engaged in

computer meddling by placing a listening device was demonstrated to be false.

- that Leronda Aviles claimed that on February 18, 2016, Alan was "completely under" the desk "with my computer turned sideways." (Dillon.Discipline 008) (Pa681) which at deposition Leronda Aviles denied. Leronda Aviles testified at deposition that she never told anybody that she saw Alan Dillon turn the computer monitor sideways and she never told anybody that Alan Dillon was under the desk attempting to do something to Linda Doughty's desktop computer. (Pa692).
- that Leronda Aviles claimed that co-worker Joe Durocher also saw Alan Dillon under the desk and, in fact, had a conversation with Alan Dillon when he was under the desk. (PSMF 160) which Joe Durocher later denied. Also, Leronda Aviles testified at deposition that she never told anybody that Joe Durocher saw Alan Dillon under Linda Doughty's desk. (Pa692).
- that Alan Dillon had knowledge of meetings that he would not otherwise be privy to inferring he planted some sort of listening device. (Pa681) which is a vague and unspecified allegation ominously and falsely suggestion that Dillon installed a microphone or other listening device that lacked any proof whatsoever.

On March 17, 2016, Linda Doughty sent an email to Jason Strapp asking for "the status of the incident and Jason Strapp told her that he had "opened up a case investigation on this matter" and that Alan Dillon was "coming in with his union representative next Tuesday [March 21, 2016] to be interviewed regarding the matter" (Pa681-Pa682) which a jury could find supports a retaliatory animus because discipline in the NJDEP is supposed to be kept strictly confidential.

On March 21, 2016, Alan Dillon's Union Representative, Lauren Young-Boukema, the Executive Vice President of CWA Local 1036 advised Yvonne

Hernandez of the NJDEP Office of Labor Relations, who Jason Strapp assigned to investigate Linda Doughty's allegations against Alan Dillon, that Alan Dillon was retiring on May 1, 2016 and asked whether the Office of Labor Relations had anybody with "direct knowledge" of what Alan Dillon was alleged to have done because what Linda Doughty reported was all hearsay. (Pa682).

On March 29, 2016, Patricia Gardener, the Director of the Division of Water Supply & Geoscience, sent an email to Jason Strapp requesting an update and asking whether Alan Dillon was interviewed and advising "Staff are looking for resolution of this matter prior to Alan Dillon's retirement" (Pa682) which also supports a retaliatory motive.

In response to the questions of Alan Dillon's Union Representative, Jason Strapp responded on April 4, 2016 stating that Alan Dillon was "observed being under a co-workers desk by several staff while the co-worker was on vacation" (Pa682) when this was a lie, also supporting a retaliatory motive. In response to the Union Representative's question "Who filed the complaint," Jason Strapp refused to provide that information. (Pa683).

On April 8, 2016, Jason Strapp reported to Patricia Gardener:

> FYI, we interviewed Mr. Dillon this morning. He denied any recollection of being under Ms. Doughtys desk or every having a conversation regarding such. Accordingly, based on the eyewitnesses who witnessed his activity, our office is preparing a major disciplinary charges to be served to Mr. Dillon for conduct unbecoming and falsification of statements to our office. We will cc you on the notice.

[(Pa683).]

As noted above, this also supports a retaliatory motive because, again, employee discipline is confidential and Jason Strapp tells Pat Gardner that he would discipline Alan Dillon for having no recollection of the event which is unprecedented – disciplining someone for not admitting guilt.

On April 11, 2016, Linda Doughty disclosed to her husband Steve Doughty, who worked as Chief of Staff for Patricia Gardener, confidential information about Alan Dillon's disciplinary relayed to her by Jason Strapp, stating "news to tell you." (Pa684).

On April 11, 2016, Matt Wilson, sent Linda Doughty an email with a derogatory retirement flyer about Dillon stating, "for your eyes only" depicting a person under a desk and Linda Doughty replied "Hilarious!!!" (Pa684). On April 11, 2016, at 4:22 pm, Linda Doughty advised co-worker Matt Wilson that she learned about the status of the disciplinary action taken against Alan Dillon that Alan Dillon "[d]enied it completely when questioned," that the Director of Labor Relations, Jason Strapp, "doesn't believe him at all" and "wants to throw the book at him" for "lying," and "the issue may cause problems [for Alan Dillon] with pensions." (Pa684-Pa685). A jury could find that this supports a retaliatory motive, specially the "problems with pensions" statement.

On April 11, 2016, Linda Doughty, Matt Wilson, Nick De Martino Leronda Aviles and Kelley Cushman shared derogatory flyers about Alan Dillon via email. (Pa685). The computer hard drives of these individuals were allegedly destroyed well after this lawsuit was filed making retrieval of evidence impossible. (Pa686). A jury could find this to support a retaliatory motive against Dillon to fabricate charges against him to force him to resign.

On April 12, 2016, and Diane Zalaskus emailed Patricia Gardener at 11:03 a.m. advising her that she was concerned about Dillon because the day before, April 11, 2016, Dillon was upset and his hands were shaking and he told her husband that he was being "forced into retirement." (Pa686). Patricia Gardener forwarded the email of Diane Zaluskus referenced above to Jason Strapp stating, "Given the ongoing investigation and preliminary disciplinary action distributed today, I wanted to bring this to your attention." (Pa686). On April 12, 2016, Jason Strapp had the disciplinary charges for falsification served on Dillon on April 12, 2016.

Also, on April 12, 2016, numerous altered and derogatory retirement posters were placed throughout the NJDEP workplace with Dillon's photograph, stating:

> **HELP US CELEBRATE (WELL REJOICE OVER) ALAN DILLON'S HASTY, UNSCHEDULED AND DOWN-RIGHT EMBARRASSING DEPARTURE FORM DEP TO AVOID PENSION SANCTIONS AND OTHER FURTHER DISCIPLINARY ACTIONS FOLLOWING A SCANDOLUS END TO A 30 YEAR CAREER OF DISREPUTABLE BEHAVIOUR, ALIENATING COLLEGUES AND ABUSING REGULATEES.**
> [(Pa644; Pa888).]

Thus, the derogatory poster disclosed facts that were discussed at an April 11, 2016 communications among Patricia Gardner, Jason Strapp and Linda Doughty. The next day, on April 15, 2016, Patricia Gardner asked Jason Strapp whether the disciplinary action and five (5) day suspension taken against Alan Dillon would "delay his retirement" and Jason Strapp stated he could not answer that as he did not know what "Pensions will do." (Pa689). A jury could find that this question reveals the motive behind the bogus discipline was retaliatory, beyond any legitimate interest to discipline Dillon.

In July of 2016, also after Alan Dillon had retired, defendants advised they would withdraw the disciplinary charges as long as Alan S. Dillon's agreed not to bring any "claims, suits or actions" against the "State of New Jersey, the New Jersey Department of Environmental Protection, their employees, agents, or assigns." (Pa698). A jury could find this shows a retaliatory motive and defendants exposure to liability that they wished to avoid. In 2019, Alan Dillon was banned from the NJDEP building where his wife still works without an escort in retaliation for filing a lawsuit alleging a violation of the NJLAD. (Pa699).

Taken in a light most favorable to Dillon, a jury could find that each of the above events standing alone could be found by a jury to dissuade a reasonable person from making or supporting a charge of discrimination and when the totality of the circumstances are considered a jury could easily find that a reasonable person could

be dissuaded from making or supporting a charge of discrimination and find in favor of Dillon. A jury could find that the relentlessness of the efforts to damage Dillon's career and force Dillon from the workplace as set forth above could dissuade a reasonable employee from making or supporting a claim of discrimination.

Importantly, retaliatory harassing conduct can satisfy the Burlington Northern/Roa standard even if it is not severe or pervasive enough to alter the terms and conditions of employment. See, e.g., Martinelli v. Penn Millers Ins. Co., 269 F. App'x 226, 230 (3d Cir. 2008) (ruling that after Burlington Northern, an employee claiming "retaliation by workplace harassment" is "no longer required to show that the harassment was severe or pervasive"). The retaliatory actions taken against Dillon were much more than just the disciplinary actions taken against him, something the trial court failed to analyze or even acknowledge.

Point IV

THE MOTION COURT ERRED IN ITS CAUSATION ANALYSIS (Pa837; 3T)

The motion judge erred by finding as a matter of law that the facts of record failed to show a "causation element of the analysis" that the disciplinary "was taken because plaintiff filed an EEO complaint" or refute the employers claim of a legitimate reason for bringing disciplinary charges against Dillon "because he failed to follow DEP protocol." (3T38:3-9).This calls for a discussion of causation in an employment case. In Bostock v. Clayton County, 590 U.S. ____, 140 S. Ct. 1731, 1739 (2020), the Supreme Court recognized the "but for causation standard was

applicable to employment cases and explained that "the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision."

Thus, the but for causation standard allows for more than one cause for an employment action but if one reason is retaliation, it would be a violation of the New Jersey Law Against Discrimination, even if there was another cause such as violating protocol. It is not an either or choice and the question is uniquely a jury decision. A causal connection "can be satisfied by inferences that the trier of fact may reasonably draw based on circumstances surrounding the employment action." Maimone v. City of Atl. City, 188 N.J. 221, 237 (2006). A plaintiff does not need to show a "direct causal link" between the protected activity and the retaliation. Battaglia v. United Parcel Serv., Inc., 214 N.J. 518, 558 (2013).

Point V

THE FACTS TAKEN IN A LIGHT MOST FAVORABLE TO DILLON SHOW THE INDIVIDUAL DEFENDANTS TO HAVE RETALIATED AGAINST DILLON AND TO HAVE AIDED AND ABETTED DISCRIMINATION AND RETALIATION (Pa837; 3T)

Under the LAD, individual defendants can be held individually liable as aiders and abettors, under N.J.S.A. 10:5-12(e). The New Jersey Supreme Court has explained "aiding and abetting":

> Thus, in order to hold an employee liable as an aider and abettor, a plaintiff must show that "(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious

> activity at the time that he provides the assistance; [and] (3) the defendant must knowingly and substantially assist the principal violation."

Tarr v. Ciasulli, 181 N.J. 70, 84 (2004). See also Failla v. City of Passaic, 146 F.3d 149, 157-58 (3d Cir. 1998) (citing Restatement (Second) of Torts § 876(b)). The facts recounted above setting forth the roles of each of the defendants in the retaliatory actions taken against Dillon are sufficient for a jury to find they retaliated against Dillon and "assist[ed], support[ed], encourage[d], and supplement[ed] the efforts of [Colonial] in conduct which violates the LAD." See Baliko v. Stecker, 275 N.J. Super. 182, 191 (App. Div. 1994).

Point VI

PLAINTIFF HAS ESTABLISHED A PATTERN OR SERIES OF DISCRIMINATORY AND RETALIATORY ACTS THAT WHEN VIEWED CUMULATIVELY CONSTITUTE A HOSTILE AND DISCRIMINATORY WORK ENVIRONMENT (Pa837; 3T)

This case presents a case of a discriminatory and retaliatory hostile environment that under the guideposts set by the Supreme Court in Rios v. Meda Pharm., Inc., 247 N.J. 1 (2021), can be found by a jury as a hostile work environment. The court in Rios noted that the goal of the LAD is "'nothing less than the eradication of the cancer of discrimination.'" Raspa v. Off. of Sheriff of Gloucester, 191 N.J. 323, 335 (2007) (quoting Fuchilla v. Layman, 109 N.J. 319, 334 (1988)). Among other things, courts must consider the cumulative effect of the various incidents and that each successive episode has its predecessors, that the

impact of the separate incidents may accumulate, and that the work environment created may exceed the sum of the individual episodes. Thus, "it is the cumulative impact of separate successive incidents that cements the hostile work environment." Cutler v. Dorn, 196 N.J. 419, 432 (2008) (citation omitted). The facts recounted above would allow a jury to find in favor of Dillon on his claim of a retaliatory hostile environment based on the cumulative effect of each event.

Point VII

THE MOTION JUDGE ERRED BY GRANTING SUMMARY JUDGMENT ON DILLON'S CONSTITUTIONAL CLAIMS (Pa837; 3T)

Dillon brought claims that defendants deprived him of rights protected by the New Jersey Constitution directly and through the New Jersey Civil Rights Act. The New Jersey Supreme Court has held that the New Jersey Civil Rights Act "is intended to 'provide the citizens of New Jersey with a State remedy for deprivation of or interference with the civil rights of an individual.'" Tumpson v. Farina, 218 N.J. 450, 473 (2014) (quoting S. Judiciary Comm. Statement to S. No. 1558, 211th Leg. 1 (May 6, 2004)).

1. Unconstitutional governmental interference with Dillon's speech (Pa837; 3T)

The New Jersey Constitutions provide protections from governmental interference with the speech of its citizens. N.J. Const. art. I, ¶ 6. ("Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty

of speech or of the press."). When a government regulation directly impinges on the constitutionally protected right of free speech, the government is required to justify the restriction. Bell v. Stafford Township, 110 N.J. 384, 395 (1988). See also State Twp. of Pennsauken v. Schaad, 160 N.J. 156, 175-76 (1999).

The United States Supreme Court recognizes a government employer's interests as an employer in regulating the speech of its employees differ from regulating speech of the citizenry in general and in two watershed cases have established the applicable tests. In Pickering v. Board of Education, 391 U.S. 563 (1968), the Court confirmed the Constitutionally protected right of public employees to speak out on matters of public concern and established the Pickering balancing test described below. In United States v. National Treasury Employees Union, 513 U.S. 454 (1995) the Supreme Court adjusted the Pickering balance test to increase the government's burden to justify a prior restraint of speech (hereinafter the "National Treasury" test). Under Pickering and National Treasury, courts, including New Jersey courts, have struck down regulations requiring public employees to obtain permission from employers on matters which were not followed by the motion court. In Pickering, the Supreme Court rejected the notion that a public employee has forfeited his or her right to free speech by accepting public employment firmly establishing that a public employee does not relinquish his or her First Amendment right to comment on matters of public interest, otherwise

available to citizens, simply as the result of the fact of public employment. The Supreme Court established a balancing test between the interests of the public employee, as a citizen, in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. Pickering, 391 U.S. at 568. The Pickering test is the classic balancing approach taken to evaluate First Amendment rights of public employees. See Waters v. Churchill, 511 U.S. 661 (1994); Rankin v. McPherson, 483 U.S. 378 (1987); Connick v. Myers, 461 U.S. 138 (1983); Sanjour v. EPA, 984 F.2d 434 (D.C. Cir. 1993); Baird v. Cutler, 883 F. Supp. 591 (D. Utah 1995). To be protected, the speech must be on a matter of public concern, and the employee's interest in expressing herself on this matter must not be outweighed by any injury the speech could cause to "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Connick, 461 U.S. at 142 (quoting Pickering, 391 U.S. at 568).

In 1995, the Supreme Court in United States v. National Treasury Employees Union, 513 U.S. 454 (1995) ("National Treasury" or "NTEU") significantly altered the Pickering balance test, greatly increasing the government's burden to justify regulations requiring public employees to obtain permission to speak with the media. In National Treasury, the Supreme Court imposed a heightened standard, one less deferential to government than the test established in Pickering to public employee

First Amendment challenges involving a generally applicable law. Because the expressive activities, public speaking, fell "within the protected category of citizen comment on matters of public concern," id. at 466, the Court applied Pickering's familiar balancing test balancing "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Id. at 465-66 (citing Pickering, 391 U.S. at 568).

The Court was clearly concerned with the far-reaching scope of the *honoraria* ban at issue and its impact on employee free speech. Although not a complete ban on speaking, the Supreme Court viewed it as a prior restraint regulating broad categories of employee speech and differentiated this situation from an after-the-fact penalty on individual speakers on the ground that the employee speech disrupted the workplace. The Court held, "[f]or these reasons, the Government's burden is greater with respect to this statutory restriction on expression than with respect to an isolated disciplinary action [and the] Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." Id. at 468. The Court held the government was unable to justify the regulation "on the grounds of immediate workplace disruption." Id. at 470. The Court held: "The speculative

benefits the *honoraria* ban may provide the Government are not sufficient to justify this crudely crafted burden on respondents' freedom to engage in expressive activities." Id. at 477.

The precedent established by the National Treasury decision is that, to justify a prior restraint on speech – such as requiring authorization before speaking at a professional event at issue here – the government must demonstrate that unrestrained speech will concretely produce serious harm and that the restraint "will in fact alleviate these harms in a direct and material way." Id. at 475 (quoting Turner Broad. Sys., Inc. v. Federal Communications Comm'n, 512 U.S. 622, 624 (1994) (plurality opinion)). Applying the National Treasury analysis, courts have routinely and reliably sided with public employees who challenge workplace rules that forbid them from discussing their work with the public or press or require them to get permission before they may speak. For instance, in Harman v. City of New York, 140 F.3d 111, 118 (2d Cir. 1998), the Second Circuit applied National Treasury to strike down policies forbidding employees from speaking with media regarding policies or activities of the agency without first obtaining permission. The Harman court, applying the National Treasury analysis, observed that the government's burden "is particularly heavy where, as here, the issue is not an isolated disciplinary action taken in response to one employee's speech, but is, instead, a blanket policy designed to restrict expression by a large number of potential speakers." Id. at 118. To justify

this kind of prospective regulation, "[t]he Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are, outweighed by that expression's 'necessary impact on the actual operation' of the Government." Ibid. (quoting National Treasury, 513 U.S. at 468 (in turn quoting Pickering, 391 U.S. at 571)); see also Providence Firefighters Local 799 v. City of Providence, 26 F. Supp.2d 350 (D.R.I. 1998) (a rule that "forces a person to ask permission to speak bears a heavier presumption against constitutionality than one that merely penalizes people who have already spoken."); Auburn Police Union v. Carpenter, 8 F.3d 886, 903 (1st Cir. 1993).

In 1999, the court in Davis v. N.J. Dep't of Law & Pub. Safety, 327 N.J. Super. 59 (Law. Div. 1999) granted a preliminary injunction against a state police policy requiring, among other things, that officers "[t]reat as confidential, unless the contrary is specifically authorized by competent Division authority, any matters or information which pertain to the Division, its operations, investigations or internal procedures," id. at 66, on the ground that it constituted an unlawful prior restraint. The Davis stated that the "government bears a particularly heavy burden in this balancing test where, as here, the issue is not a single disciplinary action taken against, an individual employee, but rather a regulation which prospectively, burdens a broad category of speech by a large number of potential speakers." When

such a regulation is challenged, "[t]he government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the government.'" Davis, 327 N.J. Super. at 70-71. In In re Action Against Gonzalez, 405 N.J. Super. 336, 341 (App. Div. 2009), the New Jersey Appellate Division applied Davis and National Treasury test to strike down a policy of the Waterfront Commission that stated, "No staff member shall initiate contact with the media without prior approval of the Executive Director." Id. at 341.

In the instant case, the motion judge did not analyze the "balancing of interests" test articulated in National Treasury and defendants failed to provide any facts of record to carry their evidentiary burden to justify requiring Dillon to seek permission to make presentations to professional organizations on his own time on issues regarding safe drinking water – a matter of public concern.

2. Retaliation for exercising his constitutional right to file a lawsuit (Pa837; 3T)

The New Jersey Civil Rights Act, N.J.S.A. 10:6-2(c) provides a civil action to any person "who has been deprived of . . . any substantive rights, privileges or immunities secured by the Constitution or laws of this State, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under color of law. Further, Linda Doughty, Jason Strapp, Kelley

Cushman and the NJDEP retaliated against Alan Dillon for exercising his constitutional right to file a lawsuit by banning him from entering 401 East State Street, Trenton, NJ without an escort when he previously enjoyed unescorted access simply because he had filed a lawsuit seeking redress for discrimination and retaliation. The stated reason for the restriction is that Dillon "is suing multiple employees at DEP . . . we are asking that security not allow him to walk around 401 unescorted." (Pa699). The right to file a lawsuit is fundamental right protected by the New Jersey Constitution and when a person acting under color of state law retaliates against a person for exercising that right, it violates the Constitution. The motion judge erred in entering summary judgment on Dillon's constitutional claims.

CONCLUSION

For the reasons set forth above, plaintiff Alan S. Dillon respectfully requests that the Court reverse the Order of Summary Judgment in favor of the defendants and remand for trial.

Respectfully submitted,

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Alan S. Dillon

By: s/ Donald F. Burke
Donald F. Burke, Esq.

Dated: August 3, 2023

ALAN S. DILLON Plaintiff-Appellant, v. STATE OF NEW JERSEY, STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, DAN KENNEDY, MAGDALENA PADILLA, KAREN FELL, SANDRA KRIETZMAN, JASON STRAPP, YVONNE HERNANDEZ, LINDA DOUGHTY, MATTHEW R. WILSON, NICK DIMARTINO, KELLEY CUSHMAN, LERONDA AVILES, STEVE DOUGHTY, AND JOHN DOES 1-10 BEING AGENTS, SERVANTS AND EMPLOYEES OF DEFENDANTS AS A CONTINUING INVESTIGATION MAY REVEAL (WHO ARE FICTICIOUSLY NAMED BECAUSE THEIR TRUE IDENTIES ARE UNKNOWN) (ALL DEFENDANTS NAMED HEREIN IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES), Defendant-Respondents.	:	SUPERIOR COURT OF NEW NEW JERSEY, APPELLATE DIVISION DOCKET NO. A-001250-22T1 On Appeal from New Jersey Superior Court, Law Division, Mercer County Hon. Douglas H. Hurd, P.J. Cv. MER-L-432-17

BRIEF OF DEFENDANT-RESPONDENTS STATE OF NEW JERSEY, STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, et al.

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Jason Strapp, Yvonne Hernandez, Linda Doughty, Matthew R. Wilson,
Nick DiMartino, Kelley Cushman, Leronda Aviles and Steve Doughty

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STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Plaintiff-Appellant Alan Dillon appeals the grant of summary judgment in favor of defendants on November 10, 2022, by the Honorable Douglas H. Hurd, Presiding Judge of the Civil Division, Mercer County.

Plaintiff served in the New Jersey Department of Environmental Protection (DEP) from 1986 until retiring on May 1, 2016, to work for the State of Hawaii, Department of Health, beginning the next day, May 2, 2016. (Pa248-249; Pa256; Pa289). Dillon had applied for the position in Hawaii as early as August 7, 2015, and had secured the position by January 27, 2016. (Pa394; Pa396).

While at the DEP, plaintiff, who identifies as a male, served as a Section Chief in the Bureau of Safe Drinking Water. (Pa245). He worked directly under defendant Sandy Krietzman. (Pa249). Krietzman worked directly under defendant Karen Fell. (Pa249).

On January 29, 2015, Dillon disregarded the instructions of his supervisors about a public speech he gave at Rutgers University, and then used a profane reference when lecturing in his capacity as DEP representative. (Pa378; Pa344-345).

[1] The procedural history and factual statement have been combined to minimize repetition and for the court's ease of reading.

Dillon filed a discrimination complaint within the DEP against Krietzman and Fell on February 10, 2015, alleging gender and age bias. (Pa249 Pa333).[2] The complaint was not substantiated following an investigation. (Pa250; Pa860-867).

Plaintiff claims that Fell then retaliated against him on two occasions for making the complaint. (Pa251). Dillon alleges he was unfairly disciplined in June 2015 for remarks he made during a public speech given as a DEP supervisor on January 29, 2015 at Rutgers University during which he referred to "fracking" as the "f-word." (Pa252). Dillon received a written warning from Krietzman as his direct supervisor. (Pa335). He claims he was disciplined again in December 2015 for planning another speech at an AWWA conference without getting approval from the DEP pursuant to long-standing policy. (Pa254). Dillon received a one-day suspension. (Pa338).

Plaintiff announced his retirement on March 18, 2016, having secured the position in Hawaii in January 2016 at the latest. (Pa256; Pa291; Pa396).

Dillon claims he was unfairly exposed to potential discipline through a preliminary notice of discipline issued on April 12, 2016. (Pa255). It was alleged he had been seen under the desk of another supervisor (defendant Linda Doughty)

[2] The EEO complaint was filed shortly after Fell initiated discipline for the remarks at the Rutgers conference.

in February 2016 without explanation. (Pa255; Pa293). He was never disciplined for the February 2016 incident. (Pa311).

Finally, as he was retiring, plaintiff claims he was the subject of a flyer posted in the workplace suggesting that he violated the law. (Pa260). DEP conducted an investigation, but the responsible party was never found. (Pa569; Pa571; Pa574; Pa894).

Individual Defendants, Common Factual Settings, and Pursuit of Claims on Appeal

For the sake of clarity, defendant-appellees set forth their individual factual position in the underlying case, some common factual background, and whether plaintiff-appellant suggested any legal error in dismissal of claims against them individually.

Dan Kennedy

Kennedy was an Assistant Commissioner of the DEP. (Pa246).

Magdalena Padilla

Padilla was the Chief of Staff of the DEP. (Pa246).

Report of Dillon Under Linda Doughty's Desk

In February 2016, while defendant Linda Doughty was away from the office on vacation, defendant DEP employees Kelley Cushman and Leronda Aviles reported to DEP supervisor and defendant Matt Wilson that they had seen Dillon under Doughty's desk close to Doughty's computer. (Pa631; Pa755-756). Wilson

reported it to Doughty when she returned from vacation. (Pa609). Doughty reported it to her supervisors and the matter was forwarded to DEP's Office of Employee Relations. (Pa256; Pa609).

In the investigation of Doughty's complaint, Dillon wrote he "did not recollect the incident." (Pa398). At deposition, when plaintiff was asked if it was possible that he would be in Doughty's cubicle on a day she was not in the office, plaintiff said, "It's possible I would be." (Pa300). When asked if he had used Doughty's computer without her permission, Dillon said, "It's possible." (Pa300). When asked if it was possible he had been under Doughty's desk, plaintiff responded he did not "remember" or "recollect" being under Doughty's desk in February 2016. (Pa300; Pa304).

A proposed five-day suspension for the report of Dillon being seen under Doughty's desk was dropped after Dillon retired on May 1, 2016. (Pa256; Pa311). It is considered void by the DEP. (Pa311).

The Privately Circulated Flyer

On April 4, 2016, three weeks before his May 1, 2016 retirement, one of plaintiff's subordinates, Joe Durocher, circulated a flyer promoting a retirement gathering for Dillon. (Da4).[3] Later that day, defendant Wilson, a coworker of Dillon

[3] Defendants had submitted a confidential two-exhibit appendix with a motion to file certain documents under seal. The motion was granted. (Da1). Plaintiff submitted the second exhibit in his appendix. (Pa893). The first exhibit,

and Durocher, emailed defendants DiMartino, Cushman, and Aviles, and three non-parties a modified version of the legitimate Durocher retirement flyer. (Pa261; Pa297). The irreverent flyer was created by Wilson and DiMartino. (Pa614; Pa891-Pa893). It made reference to issues some recipients had about plaintiff at work including: "talk[ing] endlessly at staff meetings," "hit[ting] us as we walk down the hallway," and the report of plaintiff being seen under Doughty's desk. (Pa893). It also made light of the perception that plaintiff wore his pants low on his hips. (Pa893).

This was not the same flyer that appeared publicly in the office eight days later on April 12, 2016. (Pa888). Plaintiff describes the flyer posted in the DEP office as alleging Dillon violated the law. (Pa260). The flyer privately circulated by Wilson makes no such allegation. (Pa893).

Linda Doughty

Plaintiff alleges that Linda Doughty was a coworker. (Pa246). He admits that on March 1, 2016, Doughty was told by Wilson that Dillon had been seen under her desk while she was on vacation. (Pa679). Dillon faults Doughty for reporting this

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Durocher's flyer, is submitted here. (Da4). Because the public record has contained multiple references to the alterations to the original flyer, and the original flyer is not the subject of any discipline of a public employee, the confidential designation made of the document when it was produced in discovery is no longer necessary.

bizarre event and for her mistaken belief that "several" people had witnessed the event when it turned out only two people saw it. (Pa679).

Plaintiff also claims that Doughty "revealed confidential information" from a meeting with DEP Labor Relations about the investigation of Dillon being under her desk. (Pa684). Plaintiff identifies the recipients of "confidential information" about her complaint as Doughty's husband, defendant Steve Doughty, and Wilson, who had advised Linda Doughty of the report of Dillon being under her desk. (Pa684).

Matthew Wilson

Plaintiff identifies Wilson as a coworker. (Pa247). He notes that Wilson sent his irreverent retirement flyer to others. (Pa297). Dillon suggests that Wilson acted wrongfully by advising Doughty that people had seen Dillon under her desk when she was not present. (Pa679).

Nick DiMartino

Plaintiff also identifies DiMartino as a coworker. (Pa247). Dillon claims that DiMartino "shared" the fake derogatory flyer that was never posted at DEP. (Pa685).

Kelley Cushman

Plaintiff alleges that Cushman was a coworker. (Pa247). Dillon alleges defendant Cushman shared the privately circulated flyer with others. (Pa685). Cushman reported to her supervisor Wilson that she and Leronda Aviles had seen

Dillon under Doughty's desk in February 2016. (Pa755-756). This led Doughty to file a complaint. (Pa679).

Leronda Aviles

Plaintiff alleges that Aviles was another coworker of plaintiff. (Pa247). Dillon faults Aviles for overhearing coworker Joe Durocher speaking to Dillon shortly after seeing plaintiff under Doughty's desk and assuming Durocher also saw Dillon there. (Pa692).

Steve Doughty

Besides reference to Steve Doughty being dismissed from the case on October 11, 2019 , Dillon's only reference to this defendant is a claim that he was advised by his wife Linda that she had "news" to tell him. (Pa684).

Yvonne Hernandez

Plaintiff notes that Hernandez worked in the DEP Office of Labor Relations. (Pa246). Substantive allegations against Hernandez are that she gave Dillon charges signed by the Labor Relations Director Jason Strapp. (Pa465-466).

It is undisputed that Hernandez was not aware that Dillon had ever filed a discrimination or hostile work environment claim about Fell. (Pa307).

Jason Strapp

Dillon describes Strapp as the Administrator of the DEP Office of Labor Relations. (Pa246). Dillon faults Strapp for discussing or issuing disciplinary

charges as the head of employee relations. (Pa466). Strapp served Dillon with the notice of a two-day discipline in December 2015 for planning a public speech at an AWWA conference without getting prior DEP approval. (Pa254).

The issue of the two-day discipline was resolved after plaintiff retired on May 1, 2016, and resulted in a one-day suspension. (Pa310; Pa338).

Sandra Krietzman

Krietzman was the Chief of the Bureau of Safe Drinking Water and plaintiff's direct supervisor. (Pa246). Dillon suggests that Krietzman asked him in 2015 when he planned to retire. (Pa881). Plaintiff neglects to mention he had submitted applications for retirement as early as April 28, 2008, for a November 1, 2010 retirement date and continued to submit applications in 2009, 2011, 2012, 2013, and on July 7, 2014. (Pa709-Pa716).

Karen Fell

Fell is described as the Assistant Director of Water Operations and oversaw the Bureau of Safe Drinking Water. (Pa246). Plaintiff has known Fell for over thirty years, was friendly with Fell's husband, and was the best man at defendant Fell's wedding. (Pa320-321).

Despite their earlier association, Dillon filed a "workplace violence" complaint against Fell in 2012. (Pa323). He reported to Fell's supervisor, Director of the Division of Water Supply and Geoscience Fred Sickels, that Fell had been

"standing in [Dillon's] personal space" while admonishing him. (Pa323). Plaintiff did not make reference to his age or gender in his report. (Pa323).

The DEP conducted an investigation and concluded that Fell had behaved in an inappropriate manner in admonishing her subordinate in violation of DEP policy. (Pa329). It issued a determination letter on July 26, 2012. (Pa329). On October 18, 2012, the DEP issued an amended letter clarifying that while the behavior described was not appropriate, it did not rise to the level of "workplace violence." (Pa331). There is no indication Fell violated any anti-discrimination policies. (Pa331).

On February 10, 2015, Dillon filed an EEO complaint that he was mistreated based on age and gender by Fell and Krietzman. (Pa249; Pa333).[4] Fell had initiated disciplinary action against plaintiff on February 3, 2015, for Dillon's actions at the January 29, 2015, Rutgers Safe Drinking Water conference. (Pa738-743). The DEP's EEO office conducted an investigation into Dillon's February 10, 2015 complaint and did not substantiate that either of Dillon's supervisors had engaged in age or gender discrimination. (Pa857-867).

After Fell was cleared in the EEO investigation, plaintiff claims she retaliated against Dillon in two instances. (Pa252; Pa335; Pa254; Pa338). First, he claims

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[4] The nature of Dillon's EEO complaint has been described at length in public filings. The complaint did not lead to the discipline of any State employee. Thus, defendants do not believe the contents of this particular page require continued protection of the "confidential" designation made when the document was produced.

issuance of a written warning for speaking in January 2015 at a "Safe Drinking Water Update" given at Rutgers University was retaliatory. (Pa252; Pa335). Second, claims he was unjustifiably disciplined for not seeking approval to present at an AWWA meeting to take place in 2016. (Pa254). As noted above, this discipline was ultimately a one-day suspension. (Pa338).

Rutgers Safe Drinking Water Update

The first alleged act of retaliation involved Dillon's role as the Course Coordinator of the Safe Drinking Water Update to take place on January 29, 2015. (Pa385-386). Dillon claims he was advised by his DEP supervisors to replace two topics from the agenda for the Rutgers conference and replace them with two other topics. (Pa341). The topics to be replaced were "open air reservoirs" and "fracking." (Pa341). He claims Fell advised him to do so because the topics were "political." (Pa341).

On December 11, 2014, having seen the topics that plaintiff had announced for the Rutgers Safe Drinking Water Update the following month, Fell advised Dillon of issues with two topics that needed substituted subjects. (Pa378). First, speaking on "open air reservoirs" involved only two water systems in the State and was considered "sensitive." (Pa378). Fell decided this state-wide update course for the many water systems in New Jersey was not the place to discuss an issue involving only two water systems. (Pa378). Second, while Fell agreed "fracking" would be

an interesting topic, it did not directly relate to any New Jersey water systems and was also a sensitive topic. (Pa378). Dillon was invited to discuss either topic with Fell. (Pa378).

Instead of finding substitute topics as instructed by Fell on December 11, Dillon chose to share with a Rutgers contact that Fell had deemed the topics "sensitive" and "inappropriate." (Pa380). The Rutgers representative contacted Fell on January 19, 2015, more than a month after Dillon had been advised to change the topics. (Pa378; Pa380). Director Sickels responded on behalf of the DEP. (Pa380). Sickels indicated that he, not Fell, made the ultimate decision on the topics and reiterated the lack of relevance of the topics to New Jersey licensed operators who would be attending the session. (Pa380).

Meanwhile, Dillon went a full month after Fell's December 11, 2014 instruction (and a December 18, 2014 reminder from Krietzman) before advising his supervisors he had arranged no substitute presentations to replace the topics Fell and Sickels had decided against. (Pa382-Pa383). The task of finding replacement topics, assigned to Dillon, was completed by his supervisor, Krietzman, when Dillon failed to do so. (Pa382; Pa741).

Dillon admits that when he was speaking to the large group of attendees at the conference on January 29, 2015, he publicly raised to the collected attendees the topics he had originally listed on the agenda, and did not update. (Pa378; Pa344).

He described the topics as being "sensitive," and referred to 'fracking" as "an F word." (Pa344-345). In course materials, Dillon was publicized as a DEP Section Chief in his role as Course Coordinator. (Pa385-386).

Fell initiated disciplinary action on February 3, 2015. (Pa738-743). Dillon filed his EEO complaint against Fell on February 10, 2015. (Pa333).

The AWWA Conference

In the second alleged act of retaliation that resulted in a one-day suspension, Dillon planned to speak at the AWWA meeting in Atlantic City. (Pa348). He did not seek DEP approval to speak at the 2016 conference, despite being identified as a Section Chief in the abstract he submitted to the AWWA. (Pa349-350; Pa353-355). Dillon chose not to seek approval despite the fact he was advertising his "30 years of service with New Jersey's Water Community,"[6] was speaking in New Jersey, and was addressing "licensed operators," who appear to be water systems regulated by the DEP. (Pa353-355).

The Process of Internal Approvals for Employee Public Speaking

The Division of Water Supply & Geoscience, in which Dillon was a Section Chief, had a protocol to be followed for pre-approval to make presentations or speak at meetings outside the office. (Pa357).

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[5] Dillon's 30 years of service were with the DEP. (Pa248-249).

In October 2014, Dillon was fully aware of the need to get prior approval to speak at events as evidenced by his submitting the required form. (Pa359-361). In November and December 2014, Dillon was reminded by Fell about submitting approval forms, this time for the Rutgers Safe Drinking Water course. (Pa363).

In February 2015, Dillon was reminded again that as a current DEP employee he needed approval to speak at AWWA events. (Pa365-366). Late that month, plaintiff demonstrated his knowledge of the need for approval by submitting the appropriate form. (Pa368).

In May 2015, Dillon suggested he was unclear on the policy for getting approval to speak at outside events. (Pa373). Director Sickels responded that the policy had been clear for "at least the last five years" and reviewed what Dillon needed to do to obtain approval. (Pa373).

As noted above, plaintiff submitted an abstract to speak at a 2016 New Jersey AWWA conference without seeking DEP approval. (Pa353-355). Dillon was clearly aware of the procedure for obtaining approval and simply chose not to follow it. (Pa357-373).

Plaintiff was notified of a two-day suspension on February 8, 2016, for not following the established policy. (Pa388). That was later reduced to a one-day suspension. (Pa338).

Access to the DEP Building

In October 2019, Strapp received a report that Linda Doughty had an encounter with Dillon in the building where she still worked, and from which Dillon had retired three years earlier. (Pa831-832). The DEP decided that Dillon should have an escort while he was in the building and not have the same complete access to the building as an employee. (Pa831). The DEP wanted to continue to allow appellant in the building, however, as it knew that Dillon's wife still worked at the DEP. (Pa751-752).

Plaintiff's Basic Claims

Plaintiff initially filed suit on March 2, 2017, against the State of New Jersey, DEP, Kennedy, Padilla, Hernandez, Strapp, Krietzman and Fell. (Pa1). He filed an amended complaint against these same defendants on January 30, 2018. (Pa19).

Those defendants filed an answer to the amended complaint on February 15, 2018. (Pa56).

On December 13, 2018, plaintiff filed a second amended complaint to add claims that new defendants Steve Doughty, Linda Doughty, Wilson, DiMartino, Cushman, and Aviles somehow wronged him in 2016 as he was about to retire from the DEP. (Pa245).

The substantive counts in the second amended complaint can be broken down into four categories. First, plaintiff made discrimination claims based on gender and

age under the New Jersey Law Against Discrimination (LAD), the equal protection clause of the State Constitution, and the New Jersey Civil Rights Act (CRA)(Counts One and Five). (Pa264-267; Pa273-274). These will be referred to as the "discrimination claims."

Second, Dillon made retaliation claims under the LAD, the due process protections of the State Constitution, and the CRA (Counts Two and Six).[6] (Pa267-271; Pa275-276). These will be referred to as the "retaliation claims." Third, Dillon claimed his free speech rights were violated (Count Four). (Pa272-273). Fourth, plaintiff claimed that defendants engaged in a conspiracy to violate LAD and his constitutional rights (Counts Three and Seven). (Pa271-272; Pa276-278). Appellant does not make any argument that these "conspiracy claims" were improperly dismissed below after the trial court reviewed the issues and dismissed the claims.[7] (3T44:2-6). Defendants State of New Jersey, DEP, Kennedy, Padilla, Fell,

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[6] To the extent that plaintiff makes claims against these defendants in their official capacity in Counts Five and Six under the CRA, defendants are exempt from suit. This was recognized by the trial court. Reference to the trial court's opinion is designated as "3T" in this brief. (3T45:3–3T46:15). Dillon does not appeal this issue.

[7] Thus Counts Three and Seven do not appear to be a subject in this appeal. Count Eight (request for equitable relief) and Count Nine (punitive damages) are derivative of the seven "substantive" counts. Judgment in favor of defendants on the substantive counts extinguished counts Eight and Nine, thus making a separate analysis unnecessary.

Krietzman, Strapp and Hernandez filed an answer to the second amended complaint on August 29, 2019. (Pa212).

On October 11, 2019, this Court dismissed Counts Two and Four against defendants Linda Doughty, Wilson, DiMartino, Cushman, and Aviles. Claims against Steve Doughty were dismissed in the entirety. (Pa223).[8]

Linda Doughty, Wilson, Martino, Cushman and Aviles filed an answer to the second amended complaint on October 23, 2019. (Pa225).

Summary Judgment Proceedings

The defendants moved for summary judgment on all remaining claims on July 29, 2022. (Pa233). Relative to this appeal, defendants argued that Dillon failed to make a prima facie case under discrimination, retaliation, or free speech principles. (3T5:25-3T6:5). They also argued that Dillon could point to no evidence in the record suggesting that a causal connection existed between any EEO complaint and adverse action. (3T34:20-23). Thus, defendants argued, plaintiff failed to meet any of the four prongs required to make a prima facie case under LAD retaliation law. (3T:28:11-20).

[8] Plaintiff makes no argument on appeal how dismissal at this initial stage of LAD retaliation or free speech claims against these defendants was legally deficient. Thus, they are not properly subject to this appeal.

Defendants also argued that plaintiff could not cite facts suggesting that the legitimate reasons given by defendants for the written warning and one-day suspension were a pretext for discrimination or retaliation. (3T:37:16-3T38:9).

Cross-Motion for Summary Judgment

Plaintiff opposed the motion and cross-moved for summary judgment. (Pa 399). The cross-motion was denied. (Pa839). The trial court's denial of that cross-motion does not appear to be a subject of this appeal.

Motion with Regard to Plaintiff's "Statement of Material Facts"

Plaintiff also filed a motion suggesting that defendants' response to the statement of material facts submitted with his cross-motion was somehow deficient. (Pa806). Again, he has not indicated to this court on appeal how he was entitled to relief on this issue. The lower court's denial of that motion does not appear to be a subject of this appeal. (3T5:13-15).

Ruling in the Trial Court

In a November 10, 2022 ruling, Judge Hurd issued a forty-six-page oral opinion examining all of the parties' various motions and arguments. (3T:5:5-3T46:22) The essential holding was that plaintiff could not produce any materials suggesting a genuine issue of material fact existed with regard to the issues at the heart of the case. (3T:9:1-3T46:22). First, plaintiff could not refute that he disregarded instructions of his supervisors about topics at the Rutgers

Safe Drinking Water Update and made a profane reference in his public speech. (3T31:20-3T32:22). Second, it was uncontroverted that Dillon willfully ignored the policy on seeking approval for public speeches with regard to the AWWA conference. (3T37:16–3T38:9).

LEGAL ARGUMENT

POINT ONE

THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT SHOULD BE AFFIRMED AS PLAINTIFF DID NOT PUT FORTH COMPETENT EVIDENCE SUGGESTING A MATERIAL ISSUE OF FACT ON MAKING A PRIMA FACIE CASE UNDER AGE OR GENDER DISCRIMINATION LAW OR THAT THE REASONS STATED FOR DISCIPLINE WERE A PRETEXT FOR DISCRIMINATION.

On appeal, the propriety of a trial court's decision on summary judgment is a legal, not a factual determination. Carlson v. City of Hackensack, 410 N.J. Super. 491, 495 (App. Div. 2009). The appellate court will use the same standard that governs the trial court when reviewing a summary judgment decision. Ibid. (citing Block 268, LLC v. City of Hoboken Rent Leveling & Stabilization Board, 401 N.J. Super. 563, 567 (App. Div. 2008)).

Rule 4:46-2(c) provides that summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the 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 or order as a matter of law." The moving party bears the burden of demonstrating to the trial court the absence of a genuine issue of material fact. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). Summary judgment will be appropriate if the moving party meets this burden and the non-moving party offers no affidavits or material in opposition, or if the opposition is "immaterial or of an insubstantial nature." Judson, 17 N.J. at 75.

A plaintiff's own self-serving assertion is insufficient to create a material issue of fact defeating summary judgment. Martin v. Rutgers Casualty Ins. Co., 346 N.J. Super. 320, 323 (App. Div. 2002). Plaintiff cannot rely upon his own "feeling" without competent evidential support to defeat summary judgement. Puder v. Buechel, 183 N.J. 428, 441 (2005).

Bare conclusions by the non-moving party, without factual support cannot defeat summary judgment. Brae Asset Fund, L.P. v. Newman, 327 N.J. Super. 129, 134 (App. Div. 1999). Evidence in opposition to summary judgment must be admissible, competent evidence. Jeter v. Stevenson, 284 N.J. Super. 229, 233 (App. Div. 1995) (citing Sellers v. Schonfeld, 270 N.J. Super. 424, 427 (App. Div. 1993)).

For opposition to be considered "competent" for the purposes of opposing summary judgment, it must be record evidence that is beyond mere "speculation and fanciful arguments." Cortez v. Gindhart, 435 N.J. Super. 589, 605 (App. Div. 2014)

(citing Hoffman v. Asseenontv.com, Inc., 404 N.J. Super. 415, 425-26 (App. Div. 2009)).

Dillon barely makes reference to age or gender discrimination on appeal other than to argue that he "established a pattern" of discriminatory events such that a jury could find a hostile work environment existed. (Pb42-43).

To state a prima facie case of a hostile work environment based on gender or age, plaintiff would need to show that the conduct of a moving defendant (1) would not have occurred but for plaintiff's gender or age, was (2) severe or pervasive enough to make (3) an individual of plaintiff's gender or age believe (4) the conditions of employment were altered and the working environment was hostile or abusive. Lehmann v. Toys 'R Us, Inc., 132 N.J. 587, 603-604 (1993).

The first element of a prima facie case of discrimination under the LAD is discrete from the other prongs. Lehmann, 132 N.J. at 604. "Common sense dictates that there is no LAD violation if the same conduct would have occurred regardless of the plaintiff's [protected class]." Ibid. Appellant makes no attempt to present a disputed issue of fact regarding this initial prong of Lehman with regard to the vast majority of the defendants.

With regard to liability of the twelve individual defendants, plaintiff fails to address the controlling case on the subject. Surprisingly, Cicchetti v. Morris County

Sherriff's Office, 194 N.J. 563 (2008), does not even appear in the table of authorities in appellant's brief.

In Cicchetti, 193 N.J. at 594, the New Jersey Supreme Court found that "aiding and abetting" liability under N.J.S.A. 10:5-12(e) is the sole method of bringing a LAD claim against an individual defendant like the twelve named by Dillon. The Cicchetti Court ruled that the "acts and failures" to act of supervisors did not result in the possibility of aiding and abetting liability under N.J.S.A. 10:5-12(e). Id. at 595. Here, as in Cicchetti, Dillon would have to prove "active and purposeful" conduct on the part of a moving defendant that provided substantial assistance in discrimination in order to maintain a LAD claim against that individual. The trial court recognized and applied the standard. (3T8:20-23).

In the interest of simplicity, claims against each defendant will be examined individually or in a small group.

Dan Kennedy

Dillon mentions Kennedy in his procedural recitation of the proceedings. (Pb4; Pb5). He makes no substantive argument as to how the dismissal of Kennedy was in error. Thus, the trial court's dismissal of Kennedy should be affirmed as to both discrimination and retaliation and no further analysis is warranted.

Magdalena Padilla

Again, Dillon references Padilla in procedural history. (Pb4; Pb5). He makes no argument that her dismissal with regard to either discrimination or retaliation claims. was in error. Such dismissal should be affirmed.

Steve Doughty

No argument is put forth in this appeal indicating how the dismissal of Steve Doughty was in error. Thus, it should be upheld and further analysis is not required.

Linda Doughty, Wilson, DiMartino, Cushman and Aviles

Dillon's appeal does not attempt to raise any issues about these defendants that relate to age or gender discrimination. The dismissal of Counts One and Five against Linda Doughty, Wilson, DiMartino, Cushman and Aviles should be affirmed.

Hernandez and Strapp

Plaintiff does not allege any facts that Hernandez or Strapp discriminated against him based on his age or his gender. Dismissal of Counts One and Five against Hernandez and Strapp should be affirmed.

Sandra Krietzman

Dillon suggests that in early 2015, Krietzman asked him about his retirement plans. (Pb10). His "evidence" is that Fell speculated in an EEO interview that Krietzman could have asked Dillon about his plans when she was losing several other subordinates to retirement. (Pb10, citing Pa665, Pa881). Not only is Dillon's

interpretation of Fell's speculation not competent evidence that creates an issue of fact, it does not create a genuine issue of age discrimination in this context.

Even if the Court were to accept this allegation as a contested issue of fact, it fails to state a claim for two reasons. First, when put in the context of Dillon's earlier actions in putting in for retirement several years in a row, such a question would not raise a genuine issue of material fact suggesting a discriminatory motive. It is undisputed on this record that plaintiff had submitted applications for retirement as early as April 28, 2008, for a November 1, 2010 retirement date and continued to submit retirement applications in 2009, 2011, 2012, 2013, and on July 7, 2014. (Pa709-Pa716).

Thus, even if such a question was asked by Krietzman in January 2015 after Dillon had submitted many prior applications for retirement, it does not create a genuine issue suggesting age discrimination. Relating such a question to age discrimination in this context is not evidential, it is purely plaintiff's "feeling." Puder, 183 N.J. at 441. The trial court recognized that plaintiff's reliance on his own self-serving statement (Pa665) does not constitute competent evidence. (3T18:12 – 3T:19:6).

Second, while it is possible for a single incident to be "severe" enough to constitute a hostile work environment, "it will be a rare and extreme case in which a single incident will be so severe that it would, from the perspective of a reasonable

[person situated as the claimant], make the working environment hostile." Taylor v. Metzger, 152 N.J. 490, 500 (1998) (quoting Lehmann, 132 N.J. at 606-07) (alteration in original).

Dillon's claim that Krietzman once asked him about retirement, balanced against his numerous previous applications for retirement, is not "severe" or "pervasive" enough to change the work environment into one which is hostile to older people.

The dismissal of discrimination claims against Krietzman should be affirmed.

Karen Fell

Plaintiff claims that Fell made a comment about his being "too old" to go to a conference in 2014 in front of defendant Krietzman and Diane Zalaskus, another DEP manager. (Pb8, citing only his own internal complaint, Pa659; Pa869-870).

Plaintiff presented no evidence in the record as to Fell's age relative to his own, though the record is undisputed that they are contemporaries to the extent they have known each other in excess of thirty years and that Dillon was the best man at Fell's wedding. (Pa320-321). The record is also clear that Fell herself retired the same year as plaintiff, 2016, worked at the DEP a year longer than Dillon's thirty-year career, and was born in 1957, making her at least fifty-six years old when the alleged remark was made in 2014. (Pa719-720).

The record is also clear that despite the claim that he was told he was "too old" to go to a conference in 2014, Dillon continued to attend conferences with Fell's approval in 2014 and 2015. (Pa359; Pa361; Pa363; Pa365-366; Pa368; Pa385-386; Pa782-784; Pa786; 3T19:8-20).

Dillon's reference to his own internal complaint (Pa869-870), not verified by either of the alleged witnesses, is not the type of competent, reliable, non-hearsay evidence required to defeat summary judgment. Martin, 346 N.J. Super. at 323. The undisputed record shows that Dillon and Fell were contemporaries who previously had a personal connection and that Dillon was not excluded from attending conferences in 2014 and 2015.

In reality, even if the Court were to find a genuine issue of fact existed as to the alleged "too old" utterance, the relative age and earlier relationship of the parties, the fact that Dillon did in fact attend conferences, and the fact it was a single alleged comment, demonstrated it is not a material fact such that summary judgment would be precluded. The trial court noted that Fell was a contemporary of Dillon, worked at DEP longer than Dillon, retired the same year, was at least fifty-six years old when the alleged remark was made, and continued to send Dillon to conferences from 2014 to 2016. (3T19:7-20). See Brae, 327 N.J. Super. at 134; Taylor, 152 N.J. at 500.

The trial court was correct in its analysis of Dillon's discrimination claims against Fell. Dismissal of Counts One and Five against Fell should be affirmed.

State of New Jersey and DEP

Dillon complained about Fell on February 10, 2015, shortly after his Rutgers remarks. (Pa333). The DEP's EEO office conducted an investigation. (Pa857-867). Plaintiff suggests that the fact that the EEO investigation did not substantiate his complaint against Fell means that it was "flawed and partial." (Pb9). In support, he cites excerpts of statements of male employees who noticed women getting promotional opportunities, and Fell being described as "aggressive," and "intimidating." (Pb10).

Dillon criticizes the investigation for not containing a statement of Diane Zalaskus. (Pb11). Notably, plaintiff has submitted no sworn statement, or statement of any type, from Zalaskus regarding his allegation about the "too old" comment.

Plaintiff's claims against the State and the DEP fail for two reasons. First, plaintiff's citation to males who took offense that women got promoted or thought Fell was an "aggressive" woman, are not evidential as it relates to Dillon's individual gender discrimination claim. The trial court noted that Dillon would have to submit evidence of bad conduct of the defendants of which he had first-hand knowledge. (3T7:17-21). The "feelings" of other males that the DEP was promoting women is not competent evidence on Dillon's specific gender claims. Dillon makes no promotional claim. Furthermore, plaintiff's mere suggestion that supervisors being female is evidence itself of gender discrimination (Pb10), is far from credible,

reliable material from the record to oppose summary judgment. The trial court noted that simply being a male and having a majority of supervisors being female is not evidence of gender discrimination. (3T25:3-10). As a legal proposition, it is farcical.

Dillon suggests that the lower court made "credibility" determinations in reaching its ruling and thus usurped the role of a jury. (Pb23). In reality, plaintiff was simply relying on his own self-serving EEO complaint alleging what he claims Fell or witness Diane Zalaskus said or heard. (Pb11; Pa524-525). Dillon conflates what is considered "competent" material in the record with a suggestion that the Judge was making "credibility" determinations. In reality, plaintiff failed to present "competent" evidence such that he met the threshold to reach a jury on the question of whether his former family friend and peer, Fell, suggested he was "too old" to go to conferences, which he continued to attend with her approval.

The record put forth by plaintiff did not raise genuine issues of fact based on competent evidence. The trial court noted that Dillon did not even suggest facts related to gender or age discrimination against defendants other than Krietzman and Fell. (3T9:15-3T13:14). With regard to Krietzman, the trial court noted that Dillon cannot simply rely on his own internal complaint as competent evidence. (3T18:12-20). The court noted the undisputed record on plaintiff continually submitting applications for retirement such that a single alleged question about his plans would

not create a genuine issue of fact suggesting discrimination by Krietzman. (3T18:12-3T19:6).

With regard to Fell, the Court noted that Dillon could point to no facts in the record suggesting discriminatory motive by Fell, while the uncontested facts were that Fell was Dillon's contemporary, worked at DEP a little longer, retired the same year, and had documented and undisputed reasons for her actions. (3T:19:7-3T26:3). As such, defendants' summary judgment application was properly granted.

Legitimate Non-Discriminatory Actions

Should a court determine that plaintiff does make a prima facie case of either gender or age discrimination against a defendant, it would next consider whether the stated reason for the written warning and the one-day suspension were a pretext for age or gender discrimination. Schiavo v. Marina District Development Co., 442 N.J. Super. 346, 368-69. (App. Div. 2015).

The non-discriminatory reasons for plaintiff receiving a written warning for his actions at the Rutgers Safe Drinking Water Update and the one-day suspension for not seeking approval to speak at the AWWA conference were laid out in detail above. Defendants had a set process for obtaining internal approvals for a DEP employee speaking at outside events. (Pa357; Pa359-361; Pa363; Pa365-366; Pa368; Pa373). The record with regard to the Rutgers Safe Drinking Water Update was provided. (Pa341; Pa344; Pa345; Pa378; Pa380; Pa382-383; Pa385-386;

Pa738-743). The events surrounding the AWWA conference were explained. (Pa349-350; Pa353-355).

As noted by the trial court, plaintiff was then obliged pursuant to Schiavo to overcome these legitimate reasons by a preponderance of the evidence to demonstrate these reasons were merely a pretext for discrimination. Schiavo 442 N.J. Super. at 368-69. (3T20:15-22).

Not only did plaintiff fail to state a prima facie case of discrimination against any defendant, he also could not contradict the legitimate reasons for the written warning and the one-day suspension. (3T22:18–3T23:15). Dillon has not met either his prima facie burden or his obligation under Schiavo. Plaintiff's discrimination claims were properly dismissed.

POINT TWO

THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT SHOULD BE AFFIRMED AS PLAINTIFF DID NOT PUT FORTH COMPETENT EVIDENCE SUGGESTING A MATERIAL ISSUE OF FACT MAKING A PRIMA FACIE CASE UNDER RETALIATION PROHIBITIONS OR THAT THE REASONS STATED FOR DISCIPLINE WERE PRETEXT FOR RETALIATION.

Dillon alleges that he complained of discrimination by Krietzman and Fell on February 10, 2015, and was retaliated against for doing so. (Pb9-12). The New Jersey LAD prohibits "reprisal" against any person who has filed a complaint

involving discrimination. N.J.S.A. 10:5-12(d). To establish a prima facie case of reprisal or retaliation under the LAD, plaintiff must show: (1) that he was engaged in protected activity known to the defendant; (2) he was subjected to an adverse employment action by the defendant; and (3) there was a causal link between the two. Woods-Pirozzi v. Nabisco Foods, 290 N.J. Super. 252, 274 (App. Div. 1996). Plaintiff does not clearly articulate his substantive due process claims under Count Six or how they might differ from a LAD retaliation claim.

While the LAD does not define "adverse" job action, courts have recognized the law to require a "tangible adverse employment action" to state a claim of retaliation. "In order to constitute an 'adverse employment action,' the retaliatory conduct alleged must be 'serious and tangible' enough to alter an employee's compensation, terms, conditions, or privileges of employment, deprive [his] future employment opportunities, or otherwise have a 'materially adverse' effect on [his] status as an employee." Hargrave v. Cnty. of Atl., 262 F. Supp. 2d 393, 427 (D.N.J. 2003) (quoting Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300-01 (3d Cir. 1997)).

In the analogous setting of cases involving the New Jersey Conscientious Employee Protection Act, retaliatory action is defined as the "discharge, suspension, or demotion of an employee, or other adverse employment action taken in the terms and conditions of employment." N.J.S.A. 34:19-2(e). The definition of retaliatory

action "speaks in terms of completed action." Beasley v. Passaic Cnty., 377 N.J. Super. 585, 606 (App. Div. 2005) (quoting Keelan v. Bell Commc'ns Rsch., 289 N.J. Super. 531, 539 (App. Div. 1996)).

Yvonne Hernandez

To establish a prima facie case of retaliation against Hernandez, Dillon must show: (1) that he was engaged in protected activity known to Hernandez; (2) he was subjected to an adverse employment action by the defendant; and (3) there was a causal link between the two. Woods-Pirozzi, 290 N.J. Super. at 274.

The first critical failure in plaintiff's retaliation claim against Hernandez is that it is undisputed that Hernandez did not know that Dillon had filed an earlier complaint against Fell. (Pa307). The second failure is that Dillon never actually suffered any adverse employment action as a result of Hernandez's investigation. The undisputed record is that he was not disciplined. (Pa311). See Beasley, 377 N.J. Super. at 606 (anti-retaliation law speaks in terms of "completed actions").

Plaintiff could not meet any of the prongs necessary for a prima facie retaliation case against Hernandez. Woods-Pirozzi, 290 N.J. Super. at 274. Counts Two and Six against her were properly dismissed. (3T31:2-7).

Jason Strapp

Plaintiff appears to suggest that Strapp's retaliatory actions were in permitting disciplinary action to continue against Dillon after he announced his retirement and

potentially affecting his State pension. (Pb39). It is undisputed that Dillon was never disciplined regarding the allegation of being under the desk and that his pension was never affected. There is no evidence that Strapp ever tried to affect his pension. (Pa311). In fact, the undisputed record is that Strapp had no control over the potential actions of the New Jersey Division of Pensions, even if Dillon had been disciplined. (Pa732).

Dillon's retirement was approved by the Division of Pensions weeks before he retired. (Pa734). Any suggestion that Strapp made any effort, or had any authority, to affect plaintiff's pension is refuted by the record.

Plaintiff cannot make a prima facie case that he suffered an adverse employment action as a result of any actions by Strapp. The trial court noted that Dillon was never disciplined over the alleged incident and that claims about it must be dismissed. (3T39:4-8). There was no "completed" adverse action with regard to Doughty's desk. Beasley, 377 N.J. Super. at 606. Thus, plaintiff fails on the second prong of the Woods-Pirozzi analysis.

Sandy Krietzman

Dillon suggests that Krietzman retaliated against him by interfering with his speaking engagements as a DEP employee and bringing unfounded disciplinary actions against him that resulted in the written warning and a one-day suspension. (Pb9; Pb12).

Plaintiff claims he filed a discrimination complaint against Krietzman on February 10, 2015. (Pb9). Fell had initiated disciplinary actions seven days earlier on February 3, 2015, as a result of Dillon's actions at Rutgers. (Pa738-743). Plaintiff's claims against Krietzman fail for two reasons.

First, plaintiff had not engaged in the protected activity of filing an EEO complaint against Krietzman on February 10, 2015, until after the "adverse action" was initiated against him for the Rutgers conference. (Pa738-743). Krietzman could not have known of protected activity that occurred seven days after the process had begun. Dillon fails on the initial prong of Woods-Pirozzi, 290 N.J. Super. at 274.

Second, plaintiff fails to raise a genuine issue of material fact disputing any of the documented reasons for the written warning or the one-day suspension. With regard to the Rutgers conference, he does not dispute: (1) he was advised by supervisors that he should replace two topics and get replacement speakers; (2) that he did not to do so; (3) Krietzman herself had to complete the task he was directed to perform; and (4) he used the term "F-word" in front of the collective group attending the conference. (Pa344-345; Pa378; Pa380; Pa382).

With this undisputed evidence, plaintiff cannot make a causal connection between the written warning and the February 10, 2015 EEO complaint as required in the third prong of Woods-Pirozzi. The trial court saw no competent evidence cited by Dillon connecting Krietzman to retaliation. (3T31:16-19).

With regard to the one-day suspension for trying to speak at the 2016 AWWA conference as a "Section Chief" without approval, the record is undisputed that Fell, not Krietzman, was the person that raised the issue. (Pa721-722). It was Fell, and not Krietzman, who addressed the issue with Dillon and advised him that Assistant Commissioner Kennedy would be speaking at the conference for which Dillon had not followed the established protocol. (Pa723; Pa736).

Dismissal of retaliation claims against Krietzman should be affirmed.

Karen Fell

Dillon suggests that Fell retaliated against him by interfering with his speaking engagements and bringing unfounded disciplinary actions against him. (Pb25-26).

Dillon notes that he filed a workplace violence complaint against Fell in May 2012 and Fell received a written warning. (Pb7). Dillon had received a positive performance evaluation in April 2012, reviewed and approved by Fell the month before he filed the workplace violence complaint. (Pa706-707). The complaint and written warning had no relation to any protected characteristic. (Pa529-530).

Plaintiff claims he filed a discrimination complaint against Fell on February 10, 2015. (Pa333). As noted above, Fell had initiated disciplinary action against plaintiff seven days earlier as a result of his action at Rutgers. (Pa738-743).

As with Krietzman, Dillon can point to no reliable evidence in the record at summary judgment disputing that: (1) he was told by supervisors to replace two topics and get replacement speakers for the topics being added; (2) that he refused to do so; (3) Krietzman had to complete the task; and (4) he used a profane reference in front of the conference attendees. (Pa344-345; Pa378; Pa380; Pa382).

Plaintiff claims Fell also retaliated against him by not permitting him to speak at the 2016 AWWA conference after he had submitted an abstract, but had not sought approval. (Pa353-355). He argues that he submitted an abstract, but planned to take vacation to attend and speak. (Pb32). Thus, he argues the court inappropriately made a credibility determination favoring Fell's view that he planned to give a speech in violation of the policy. (Pb31-32).

As noted above, the Division in which Dillon was a supervisor had a protocol to be followed. (Pa357). Dillon was well aware of the protocol. (Pa359-361; Pa363). Dillon was reminded of the requirement in February 2015. (Pa365-366). He demonstrated his knowledge of the need for approval. (Pa368). When he suggested he was unclear on the policy for getting approval to speak at outside events, Director Sickels responded that the policy has been clear for "at least the last five years" and reviewed what Dillon needed to do to obtain approval. (Pa373). His abstract identified him as a Section Chief. (Pa354). On his abstract, he indicated he had thirty years of experience in the field. (Pa354). All of it was with DEP, whose

regulated entities which would attend the conference. (Pa248-249; Pa353-355). Plaintiff presented no competent evidence from the record contesting any of these undisputed facts.

If plaintiff is suggesting he had some form of blanket "ethics approval," he is mistaken. (Pa650). In 2008, he was given approval to "provide training on sanitary inspection of public water systems for states such as Washington and California." (Pa375). He was not approved to provide training to any New Jersey related entity or on New Jersey environmental laws and regulations. He was not approved to provide training to entities he came in contact with through his work at the DEP. (December 9, 2008 memorandum included at Pa375-376). To suggest the 2008 approval gave plaintiff blanket permission to speak in New Jersey, to entities who are licensed operators regulated by the DEP, is simply incorrect.

Plaintiff's retaliation claim against Fell fails for two reasons. First, he fails to cite any competent evidence from the record suggesting that there is a causal connection between the written warning or the one-day suspension with the 2012 workplace violence complaint or the February 2015 EEO complaint. Thus, he fails on the third prong of Woods-Pirozzi, and does not make a prima facie case.

Second, even if the Court were to determine that he met this prima facie threshold, he has presented no competent evidence refuting the facts supporting the legitimate, non-retaliatory reasons for the written warning and the one-day

suspension. Plaintiff has presented only self-serving assertions from his own statements and speculation in response to the uncontested materials presented by defendants. This is not sufficient to survive summary judgment. Schiavo, 442 N.J. Super. at 368-69; Martin, 346 N.J. Super. at 323; Cortez, 435 N.J. Super. at 605.

The trial court noted that plaintiff could present no evidence contradicting the undisputed record that Fell simply wanted plaintiff to follow the procedures required of all speakers to get approval. (3T33:10-12). Judge Hurd noted that even with all favorable inferences given to plaintiff, he simply could not demonstrate that he followed DEP policies and procedures such that discipline might be considered pretextual. (3T37:16-3T38:9). The court found that DEP provided record evidence of legitimate non-retaliatory reasons for the written warning and one-day suspension. (3T37:21–3T38:9).

Fell was entitled to judgment on the retaliation claims. That ruling should be affirmed.

Linda Doughty, Steve Doughty, Wilson, DiMartino, Cushman and Aviles

Retaliation claims against these defendants were dismissed pursuant to a motion in lieu of an answer in October 2019. (Pa223). Dillon makes no argument how that dismissal was inappropriate as a matter of law. Similarly, he makes no cogent argument as to why these defendants would not have been entitled to judgment as a matter of law based on the record at summary judgment. There is no

suggestion that any of these coworkers were in a position to take adverse job action against him.

Dillon provides no citation to policy, or legal authority, as to why a victim of a bizarre workplace incident, such as a report of another manager being under her desk, would prohibit Doughty discussing such an allegation with her husband (Steve Doughty) or another supervisor who reported it to her (Wilson). (Trial court's analysis at 3T11:12-17).

Plaintiff does not argue how a husband being updated by his spouse about an investigation into a coworker being under her desk is a violation of any legal standard.

Similarly, Dillon presents no suggestion of a causal connection between the actions of these defendants and complaints he had made about Fell or Krietzman in February 2015. The trial court noted that not only were these defendants unaware of the EEO complaint, they had no authority to affect Dillon's employment or ability to take adverse job action against him. (3T29:22–3T30:12).

State of New Jersey and DEP

Dillon suggests that the DEP treated him unfairly in the Linda Doughty desk incident because early reports suggested "several" people saw him under Doughty's desk. (Pb33-35). It turned out only two people, Aviles and Cushman, reported seeing him. (Pa631; Pa755-756).

Aviles saw Dillon under the desk where Doughty's computer tower was located. (Pa631). Cushman saw Dillon under the desk with the computer turned outward. (Pa755-756). Plaintiff indicated he "did not recollect the incident" (Pa398), did not "remember" and did not "recollect" being under Doughty's desk. (Pa300; Pa304). Plaintiff was not disciplined in the incident. The semantic "dispute" between "several" witnesses and two witnesses is of no consequence.

Plaintiff also faults the DEP for not taking disciplinary action against employees in the investigation of the publicly posted flyer. (Pb13). Dillon provided no case law, or even a legal theory on how inaction against others could evidence retaliation against him by the State or the DEP. Plaintiff fails to articulate any cognizable legal claim against the State or the DEP as it relates to retaliation on these issues. The trial court noted that no genuine issue of fact existed suggesting individual defendants had retaliated, Dillon was not disciplined for the desk allegation, was not barred from the building, and he puts forth no legal argument suggesting DEP not finding the individuals who publicly posted a flyer constitutes retaliation against him. (3T39:1-11). Beasley, 377 N.J. Super. at 606.

Finally, plaintiff suggests the DEP "banned" him from the DEP building after he retired. (Pb13). The record is undisputed that he is incorrect. Dillon was advised that he could not enter without an escort. (Pa751). Plaintiff cites no case law that a member of the public should have free access to travel through government buildings

unescorted without an appointment or a business purpose for being there. An outright ban was not considered because the DEP knew plaintiff's wife was still working in the building and that he may want to visit her. (Pa752). As noted by the trial court, the DEP was not retaliating by denying unescorted access to wherever he wished to travel in the building. (3T43:2-5).

The State and DEP were entitled to judgment on the retaliation claims. The dismissal of these claims should be affirmed.

Dillon argues that the appropriate standard in a retaliation claim is set forth in Roa v. Roa, 200 N.J. 555, 574-75 (2010). (Pb15). Plaintiff argues that because Roa cited Burlington Northern Railroad v. White, 548 U.S. 53, 61 (2006), that the trial court should have adopted a Title VII analysis instead of relying upon established New Jersey cases like Wood-Pirozzi. (Pb15; Pb20 citing 3T28:24–3T29:3).

Appellant also argues that the lower court erred in seeking some competent evidence of a causal link between plaintiff's February 10, 2015 EEO complaint and either the written warning, the one-day suspension, or both. (Pb40). Dillon suggests that his own beliefs and insinuations would be sufficient to reach a jury. (Pb41).

The Roa Court, 200 N.J. at 574, relied on Burlington Northern Railroad for the proposition that retaliatory acts by an employer, or former employer, could include actions outside the actual job setting, such as interfering with an employee's health insurance. However, Roa and Burlington Northern have no impact on the

analysis used by the lower court here as to whether the written warning and the one-day suspension, both clearly related to the job, were supported by the record.

In reality, plaintiff cannot raise a genuine issue of fact, using either direct evidence, or circumstantial evidence, suggesting that the written warning or the one-day suspension were a pretext for a retaliatory motive by any defendant.

POINT THREE

THE LAW DIVISION PROPERLY DISMISSED FREE SPEECH CLAIMS IN COUNT FOUR AS DILLON WAS SPEAKING IN HIS CAPACITY AS A DEP OFFICIAL AND NO ISSUE OF PRIOR RESTRAINT WAS IMPLICATED IN DEP'S ACTIONS.

The United States Supreme Court has indicated that two questions guide the analysis of the free speech rights of public employees. First, it must be determined whether the employee spoke as a citizen on a matter of public concern. Garcetti v. Ceballos, 547 U.S. 410, 418 (2006). Second, it must be determined whether the relevant government agency had justification for treating the employee differently from another member of the general public. Ibid.

The Third Circuit of the United States Court of Appeals has pointed out that when a public employee makes a statement pursuant to their official duties, they are not speaking as a "citizen," and the Constitution does not insulate them from discipline. DeRitis v. McGarrigle, 861 F.3d 444, 453 (3d Cir. 2017) (citing Garcetti, 547 U.S. at 421).

The only ramification involving plaintiff's public "speech" appears to be the written warning he received after the Rutgers Safe Drinking Water presentation. (Pa335). It is undisputed that Dillon appeared at the Safe Drinking Water Update self-identifying as a DEP employee. (Pa386). He publicized himself as a Section Chief in his biography as Course Coordinator. (Pa386). He worked on the event as part of his duties at the DEP. (Pa378; Pa380; Pa382). When his Rutgers contact had a concern, she contacted Dillon's DEP supervisors and was responded to by Director Sickels. (Pa380). It is clear from the record Dillon appeared and spoke as a DEP employee. The trial court recognized this was beyond dispute. (3T40:20–3T41:2).

To the extent the written warning dealt with Dillon's words at the Rutgers conference, he was being recognized as an official of the DEP. As such, he was not speaking as a private citizen and is not insulated from discipline. DeRitis, 861 F.3d at 453. Furthermore, to the extent he chose to publicly refer to "fracking" as an "f word," he was not raising an issue of "public concern," but could be casting some doubt on the professionalism displayed by a DEP Section Chief. The trial court noted that Dillon was not speaking as a private citizen, and his profane reference could not be considered a matter of public concern. (3T41:13-16).

Dillon, speaking in his advertised role as a DEP Section Chief, before licensed water operators regulated by his department, was not free to speak as he wished. His

constitutional free speech rights do not insulate him from the written warning that he received. DeRitis, 861 F.3d at 453; Garcetti, 547 U.S. at 421.

In opposition to summary judgment, plaintiff pivoted from his second amended complaint and suggested for the first time that his suit was designed to address a "prior restraint" on speech as addressed in United States v. National Treasury Employees Union, 513 U.S. 454 (1995). (Pb44). He now proposes the suit was seeking to strike down a DEP "regulation" restricting employee speech. (Pb49).

Dillon reviewed the National Treasury analysis and then suggested that his use of the term "f-word" when speaking at the Rutgers Safe Water Drinking course as a representative of the DEP, was the same as a "blanket policy" on government employees accepting honoraria or officials needing prior approval before speaking to the media. (Pb44-47).

Upon review, the fourth count of plaintiff's second amended complaint alleging violation of free speech rights (the only count listing "free speech") makes no mention of "prior restraint," the existence of a DEP "regulation," or suggests that it is challenging any policy at all. (Pa272-Pa273). The second amended complaint basically pleads that plaintiff should not be punished for using the term "f-word" at the Rutgers conference and that he should be free to speak at the AWWA conference as a "section chief" without advising anyone at the DEP.

With regard to the AWWA, plaintiff neglects to point out that Assistant Commissioner Dan Kennedy was already planning to speak at the conference on behalf of the DEP on "water system sustainability" (Pa736), a topic very similar to Dillon's proposed talk on "managerial and financial components of operating a sustainable water utility." (Pa353-355). It is obvious that Dillon was not blocked from speaking at the AWWA because of the content of his proposed talk. Dillon would not be approved to speak because another official was preparing to speak on a similar topic, and Dillon refused to follow the basic protocol that would enable the DEP to know of such a conflict in advance.

National Treasury, 513 U.S. 454, and its progeny cited by plaintiff on prior restraint, do not stand for the proposition that a government employee, advertising themselves in that capacity, is free to speak whenever they like on whatever topic they like, using coarse language if they choose, to entities regulated by that employee's agency. The real issue in the second amended complaint (Pa272-273), was whether Dillon getting a written warning for insubordination and using the term "F-word" infringed on a free speech right. It does not. The trial court conducted a detailed analysis of the prevailing law, distinguished Dillon's reference to National Treasury, and concluded that the undisputed record required dismissal of the free speech claim. (3T39:12-3T42:16). DeRitis, 861 F.3d at 453; Garcetti, 547 U.S. at 421.

The recent vintage of plaintiff's new theory on "prior restraint" is evidenced by the opposition papers he filed when defendants Linda and Steve Doughty, Cushman, Aviles, DiMartino and Wilson moved to dismiss this same Count Four in 2019. (Pa285-286). Dillon's 2019 opposition papers on dismissal of Count Four did not raise "prior restraint" at all in opposition and National Treasury and the cases plaintiff now cites on "prior restraint" appear nowhere in the brief. (Excerpts of plaintiff's October 3, 2019 brief and table of authorities at Pa758-766).

Once defendants demonstrated at summary judgment that Dillon's actions were not protected pursuant to Garcetti and DeRitis, he sought to reframe his complaint to allege "prior restraint" and reimagine Count Four to avoid dismissal. (Pb49). To suggest he can avoid dismissal by raising a claim he never pleaded is puzzling. Such maneuvering should not be countenanced.

Count Four was properly dismissed and such dismissal should be affirmed.

CONCLUSION

For the reasons stated above, defendants were entitled to summary judgment and dismissal of all claims with prejudice should be affirmed.

FLAHIVE MUELLER
ATTORNEYS AT LAW, L.L.C.

By: WPF
William P. Flahive

Date: 12/4/23

Superior Court of New Jersey
Appellate Division

ALAN S. DILLON,

Plaintiff-Appellant,

v.

STATE OF NEW JERSEY, STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, DAN KENNEDY, MAGDALENA PADILLA, KAREN FELL, SANDRA KRIETZMAN, JASON STRAPP, YVONNE HERNANDEZ, LINDA DOUGHTY, MATTHEW R. WILSON, NICK DIMARTINO, KELLEY CUSHMAN, LERONDA AVILES, STEVE DOUGHTY AND JOHN DOES 1-10 BEING AGENTS, SERV-ANTS AND EMPLOYEES OF DEFENDANTS AS A CONTINUING INVESTIGATION MAY REVEAL (WHO ARE FICTITIOUSLY NAMED BECAUSE THEIR TRUE IDENTITIES ARE UNKNOWN) (ALL DEFENDANTS NAMED HEREIN IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES),

Defendants-Respondents.

Docket No. A-001250-22T1

Civil Action

On Appeal from the Superior Court of New Jersey, Law Division, Mercer Vicinage

Docket No. Below: MER-L-432-17

Sat Below: Honorable Douglas Hurd, P.J.Cv.

REPLY BRIEF OF PLAINTIFF-APPELLANT ALAN S. DILLON

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Point I

THE FACTS OF RECORD WOULD ALLOW A JURY TO CONCLUDE THAT DILLON ENGAGED IN PROTECTED ACTIVITY UNDER THE NJLAD AND THAT DEFENDANTS RETALIATED AGAINST HIM IN WAYS WHICH WOULD DISSUADE A REASONABLE WORKER FROM OPPOSING PRACTICES OR ACTS FORBIDDEN UNDER THE NEW JERSEY LAW AGAINST DISCRIMINATION AND THE ORDER OF SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS MUST, THEREFORE, BE REVERSED[1]

The New Jersey Law Against Discrimination (NJLAD) makes it unlawful for an employer to "take reprisals against any person because that person has opposed any practices or acts forbidden under this act" or "to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this act." N.J.S.A. 10:5-12(d). In Tartaglia v. UBS PaineWebber Inc., 197 N.J. 81, 125-26 (2008), the New Jersey Supreme Court set forth what a plaintiff must show in order to establish a prima facie case of retaliation under the NJLAD: "(1) the plaintiff in good faith engaged in a protected

[1] Once Dillon complained in good faith about discrimination the retaliation was overwhelmingly clear and the focus of this Reply Brief is on retaliation. Dillon is not, however, abandoning his claim that defendants discriminated against him on the basis of age and sex which is supported in the record by comments of Karen Fell that he was too old to present at outside conventions; by Paul Smith who told the NJDEP EEO that he "observed a lot of women being promoted and many of the new hires are women"; that "[m]any of the promotions involve employees more than 10 years younger (in their 40s)"; that there "appears to be a bias" and "Fell does attempt to intimidate employees" **(Pa876)**; and by Nasir Butt, who told the NJDEP EEO that "most promotional opportunities had been given to young women." **(Pa879)**.

activity known by the employer; (2) thereafter their employer unlawfully retaliated against them; and (3) their participation in the protected activity caused the retaliation." Ibid. In their brief, the defendants do not contest that Dillon engaged in a protected activity. Indeed, in 2012, Dillon's complaint that Karen Fell created a hostile work environment was confirmed by the Department of Environmental Protection, Division of Human Resources, and Dillon made a number of complaints thereafter, formal and informal, about discrimination and retaliation. Defendants also do not contest that after he made complaints about discrimination and retaliation defendants took adverse action against him. These included precluding him from speaking at outside events, filing disciplinary charges against him, suspending him without pay for two days, imposing major discipline (5 days) and circulating and posting derogatory flyers about him throughout the NJDEP headquarters that contained confidential information regarding proposed discipline against Dillon to which only Jason Strapp, Linda Doughty and Patricia Gardner were privy.

The motion judge granted defendants summary judgement by incorrectly requiring Dillon to demonstrate that the retaliatory conduct be "serious and tangible enough to alter [the] employee's compensation, terms, conditions, or privileges of employment, deprived [of] future employment opportunities, or otherwise [to] have a material adverse effect on his status as an employee" (3T28:24-3T29:3) and by deciding disputed material facts in favor of defendants. In their appellate brief,

defendants maintain that the motion judge's analysis was correct only by ignoring directly applicable New Jersey Supreme Court precedent of Roa v. Roa, 200 N.J. 555 (2010). Roa held that a plaintiff alleging retaliation must show only "that a reasonable employee would have found the challenged action materially adverse, which in this context means it well **might have dissuaded a reasonable worker from making or supporting a charge of discrimination**." Id. at 575 (emphasis added) (citations and internal quotation marks omitted). Defendants rely almost exclusively on Hargrave v. Cntv. of Atl., 262 F. Supp. 2d 393 (D.N.J. 2003) to rebut Roa and continue to maintain in their Appellate Brief that retaliatory conduct alleged must be "serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment, deprive [his] future employment opportunities, or otherwise have a 'materially adverse' effect on [his] status as an employee." (Db30). Hargrave, however, is a federal district court case that is not precedential here and it predates Roa, which rejected the proposition that the anti-retaliation provisions of the NJLAD are limited to retaliatory actions that "affect the terms and conditions of employment" id. at 64, in favor of a more employee friendly standard making unlawful retaliation that would "dissuaded a reasonable worker from making or supporting a charge of discrimination." Roa, 200 N.J. at 574-75. Also, Hargrave supports Dillon because it held a suspension "constituted the type of tangible, 'adverse employment action' contemplated by Title VII and the NJLAD."

Id. at 423. The reason the New Jersey Supreme Court adopted a more employee friendly standard that retaliatory action need only "dissuaded a reasonable worker from making or supporting a charge of discrimination" is because discrimination laws depend upon the cooperation of employees who are willing to file complaints and act as witnesses for enforcement and that effective enforcement requires employees to feel free to oppose discrimination by protecting employees from discrimination. Roa, 200 N.J. at 574-575. In this case, the facts would support a jury finding that each of the many retaliatory actions taken against Dillon, viewed separately, would "dissuaded a reasonable worker from making or supporting a charge of discrimination" and viewed cumulatively, the retaliatory actions would certainly have had that effect.

Dillon's protected complaints began on May 21, 2012 when Dillon made a formal complaint that his supervisor, Karen Fell, was creating a hostile work environment. **(Pa323).** After an investigation, the Department of Environmental Protection, Division of Human Resources agreed and in its letter to Karen Fell dated July 26, 2012, the Department of Environmental Protection, Division of Human Resources stated that Karen Fell "did create a hostile environment" and "engaged in conduct unbecoming a public employee." **(Pa329).** Unfortunately, the Department of Environmental Protection, Division of Human Resources failed to protect Dillon from further retaliation which is synopsized below.

- **Protected Activity.** On November 17, 2014, Alan Dillon reported discrimination by Karen Fell to Lindi Ashton of Human Resources who reported it to Melanie Armstrong, Rina Heading and Jason Strapp. **(Pa428).** Karen Fell made a statement in front of Dillon's co-workers that he should not attend a 2014 ABC conference because he "was too old." **(Pa869).** Bureau Chief Zalaskus responded to Karen Fell's discriminatory comment stating that Karen "did not really mean to suggest that [Dillon] was too old to attend a conference" and Karen Fell responded that that was "exactly what she meant." **(Pa870).** Dillon complained to the Director, Fred Sickels, at the time but no corrective action was taken. **(Pa431).**
- **Protected Activity.** On February 10, 2015, Dillon filed a formal complaint of discrimination and retaliation with the NJDEP EEO and 10 days later, on February 20, 2015, the NJDEP Office of Labor Relations (Jason Strapp) advised Alan Dillon of a request to discipline him. **(Pa479).** Karen Fell, Sandra Krietzman, Fred Sickels and Jason Strapp were advised of Alan Dillon's complaint of discrimination and retaliation. **(Pa666).**
- **Protected Activity.** On November 18, 2015, Alan Dillon again reported discrimination and retaliation by Karen Fell. **(Pa423 and Pa454).**
- **Retaliatory Action.** On February 20, 2015, only 10 days after Dillon filed a formal complaint of discrimination and retaliation with the NJDEP EEO, the NJDEP Office of Labor Relations (Jason Strapp) advised Alan Dillon of a request to discipline him. **(Pa479)**. Karen Fell, Sandra Krietzman, Fred Sickels and Jason Strapp had been advised of Alan Dillon's complaint of discrimination and retaliation. **(Pa666).**
- **Retaliatory Action.** On June 24, 2015, Karen Fell and Sandra Krietzman, with authorization from Director Fred Sickels head of labor relations, Jason Strapp and Director of Human Resources Director Robin Liebeskind, disciplined Dillon for "Insubordination and Conduct Unbecoming of a Public Employee" **(Pa477)** because of the content of his speech given at the Rutgers Safe Drinking Water Regulatory Update Course (Rutgers Course), a course offered by Rutgers University to professionals in the field of safe drinking water. The same day the disciplinary action was issued, June 24, 2015, Dillon prepared a memo, specifically and expressly denied he was insubordinate or otherwise engaged in the conduct alleged, explained that he followed instructions given to him and that he made no disparaging remarks. **(Pa514).**
- **Proof of Pretext.** Defendants characterize this disciplinary action to be based upon Dillon's "disregard" of his supervisor's instructions and use of a "profane reference when lecturing in his capacity as DEP representative." (Db1). Dillon did not disregard his supervisor's instructions, he did as he was told by her and changed his proposed presentation by deleting reference to fracking. **(Pa514,**

Pa378). Dillon replaced the two topics on the agenda as directed and none of the topic handouts appeared in the final course packet that was distributed. **(Pa670).** Dillon told the audience that he would not discuss "fracking," as he had earlier proposed and humorously referring to it as an "F-word" **(Pa345)** but there is nothing profane about anything Dillon said and no support for any allegation that he disregarded the directions of his supervisors. **(Pa514).** Also, Alan Dillon has never been told by Karen Fell, Jason Strapp or anyone else what he said that was disparaging. **(Pa514).** Regarding the allegation that Alan Dillon released "water rate data at the Rutgers course", the water rate data had already been published by University of North Carolina – Chapel Hill Environmental Finance Center (UNC-EFC) on its rate dashboard with the approval of Fred Sickels and Sandy Krietzman. The UNC-EFC rate dashboard is a USEPA funded rate assessment tool provided as a public service utilizing Federal (public) funds. **(Pa514).** As such this information is accessible to the public upon inquiry. **(Pa514).** These are factual issues to be decided by a jury and not decided by the Court on a motion for summary judgment.

- **Protected Activity.** On November 18, 2015, Alan Dillon filed another EEO complaint against Karen Fell alleging retaliation and Melanie Armstrong advised Jason Strapp, of Dillon's EEO complaint (which was supposed to be kept confidential) and Jason Strapp advised to Karen Fell to file disciplinary charges against Alan Dillon**. (Pa454, Pa423).**
- **Retaliatory Action.** On November 24, 2015 (only 6 days after Alan Dillon again reported discrimination and retaliation), Karen Fell initiated disciplinary action against Alan Dillon for allegedly not receiving her approval prior to submitting an abstract to the NJAWWA on Safe Drinking Water which was approved by Dan Kennedy and Jason Strapp. **(Pa672, Pa673).** Dillon's Abstract to the NJAWWA proposed a presentation on capacity development exploring the role of licensed operators in promoting the long term viability of water supplies as well as providing information on the concrete daily steps an operator can take to initiate an infrastructure maintenance plan and recommend a variety of tools and reference materials that are available for a water system to provide competent utility stewardship. **(Pa673).** On December 18, 2015, Jason Strapp issued a Notice of Disciplinary Action charging Alan Dillon with "Insubordination" and "Conduct unbecoming" for submitting an abstract for presentation New Jersey Water Works Association (NJAWWA) Annual Conference **(Pa673).**
- **Proof of Pretext.** With regard to the charge that Dillon violated the rules because he "failed to notify his supervisor Sandy Krietzman or Assistant Director Karen Fell in advance of having an abstract submitted to the NJAWWA Technical Program Committee" this is disputed. **(Pa673-Pa675).** First, there is no rule of the NJDEP requiring an employee to notify or obtain permission before submitting an

abstract. **(Pa673-Pa675).** Further, disciplining an employee for submitting an abstract – a proposal for a presentation – was completely unprecedented and Dillon was the only employee ever subjected to discipline for submitting an abstract to an outside entity to speak on matters of public concern. **(Pa673-Pa675).** With regard to the charge that Dillon "failed to fill out the Speaker Request Form," on February 23, 2015, Dillon sent an email to Karen Fell and Sandy Krietzman stating, "Attached please find speaker request. Event is either in afternoon or evening. Either way I can use my own time." **(Pa673-Pa675).** Also, Dillon had ethics approval to be an individual member of the NJAWWA, he had received ethics approval to conduct speaking engagements outside the NJDEP. **(Pa673-Pa675).** Finally, Dillon explained that he had not even been chosen to speak, having only submitted an abstract and, therefore, a Speaker Request Form was not even required. Finally, Dillon requested vacation on the week of the NJAWWA conference in March of 2016 so that he could attend and present on his own time in the event his abstract was accepted. **(Pa461; Pa673-Pa675).** Thus, even though there was no rule regarding obtaining permission before submitting an abstract to speak at an outside event, he had filled out a Speaker Request form and provided it to Karen Fell and Sandy Kreitzman, he had ethics approval to be an individual member of the NJAWWA and to conduct speaking engagements outside the NJDEP he was suspended for two days. **(Pa673-Pa675).** The two day suspension was issued on February 8, 2016 by Robin Liebeskind, the Director Division of Human Resources, who advised a "suspension without pay will affect your seniority." **(Pa462).** Jason Strapp directed Dillon to serve the two-day suspension on March 8 and March 9, 2016 and, again, advised Dillon that the "suspension without pay will affect your seniority." **(Pa462).** Defendants continue to contend in their Appellate Brief that "Dillon received a one-day suspension" (Db2) and the motion judge accepted this as fact (3T22:18-20) when this is disputed. Dillon received a two day penalty as demonstrated by the letters from Robin Liebeskind (2-8-16) and Jason Strapp (12-18-15) both imposing a two (2) day suspension without pay. **(Pa678).**

The defendants characterize this incident as "Dillon cho[o]s[ing] not to seek approval despite the fact he was advertising his '30 years of service with New Jersey's Water Community,' was speaking in New Jersey, and was addressing 'licensed operators,' who appear to be water systems regulated by the DEP. (Pa353-355)." (Db12). This is disputed. Dillon did not choose "not to seek approval" to speak at the NJAWWA annual convention as defendants contend. This is pretext for retaliation for engaging in protected activity because 1) there was no rule regarding obtaining permission before submitting an abstract to speak at an outside event, 2) Dillon had filled out a Speaker Request form and provided it to Karen Fell and Sandy Kreitzman, 3) Dillon had ethics approval to be an

individual member of the NJAWWA and to conduct speaking engagements outside the NJDEP. Thus, this is an issue of fact for the jury to decide and not one to be decided on a motion for summary judgment. Notwithstanding the above genuine issues of material fact, the Motion Judge decided this disputed fact in favor of the defendants stating, "Plaintiff sought to speak at a 2016 New Jersey AWWA Conference without seeking the approval and was suspended for one day as a result." (3T22:18-20).

- **Retaliatory Action.** On April 12, 2016, Yvonne Hernandez of the NJDEP's Office of Labor Relations in the Human Resources Department, who worked for Jason Strapp and Robin Liebeskind, issued discipline charges against Alan Dillon which were signed by Jason Strapp alleging falsification and conduct unbecoming a public employee and seeking a 5 day suspension on the sole allegation that Alan Dillon lied when he denied being under Linda Doughty's desk. **(Pa465-Pa466).**
- **Proof of Pretext.** The defendants claim this discipline, even if retaliatory, is not sufficient to establish an actionable adverse action because Dillon "was never disciplined for the February 2016 incident." (Db3). Defendants state in their Appellate Brief that Dillon "cannot make a prima facie case that he suffered an adverse employment action as a result of any actions by Strapp. The trial court noted that Dillon was never disciplined over the alleged incident and that claims about it must be dismissed. (3T39:4-8). There was no 'completed' adverse action with regard to Doughty's desk."

  Defendants' position regarding what constitutes an adverse action is wrong as a matter of law as discussed above. Being served with disciplinary action seeking a 5 day penalty is enough to dissuade a reasonable person from opposing conduct the NJLAD prohibits and this is a jury issue, not one to be decided on summary judgment. Facts of record show, however, a 5 day penalty was issued against Dillon, which he appealed. **(Pa311).** This is established by the email from Director Patricia Gardener who asked Jason Strapp "did Alan Dillon appeal his disciplinary action (5 day suspension)" **(Pa467).**

  Further, defendants misleadingly claim in their Appellate Brief that "A proposed five-day suspension for the report of Dillon being seen under Doughty's desk was dropped after Dillon retired on May 1, 2016. (Pa256; Pa311). It is considered void by the DEP. (Pa311)." (Db4). This is disputed. The proposition advanced by defendants is based upon a litigation ploy and noting more. Jason Strapp testified on July 22, 2020 that the disciplinary action "is inactive -- the case was never heard." but then agreed that the term voided "might not have been the correct term" and that, in any event and he admitted that no one notified Mr. Dillon that the disciplinary action against him seeking a five day penalty was "inactive" in the more than four years since the disciplinary action was brought **(Pa311)** even

though Dillon's Complaint was filed more that 3 years earlier on June 14, 2017. **(Pa19-Pa55).**

The circumstances surrounding the April 12, 2016 discipline charges against Dillon are also such that a jury could find that they were not taken for legitimate reasons but were pretext for retaliation. First, the story is based on hearsay and innuendo and the story changes in material aspects between what Linda Dougherty reported and what witnesses testified to under oath. Linda Doughty reported in a memo that Matt Wilson told him "several people" had seen Alan Dillon "under her desk" with her "PC turned sideways" and that this was observed "on two different days" and that this was "odd" because "there would be no reason for Alan Dillon to be under her desk." **(Pa679).** At his deposition, however, Matt Wilson denied telling Linda Doughty there were several people who observed Alan Dillon under the desk and that there were allegedly only two. **(Pa679).** As far as Matt Wilson was concerned, even if true, the allegations made about Alan Dillon being under Linda Doughty's desk was not a "rule violation" of any sort and he did not report it to his supervisor or anyone else. **(Pa680).** On March 3, 2016 Sandra Krietzman reported the story Linda Dougherty told her to Jason Strapp by email and copied Linda Doughty, Karen Fell and Patricia Gardner. **(Pa680).**

Alan Dillon, when confronted by Linda Dougherty with this story stated firmly: "I wasn't under your desk", yet at deposition, Linda Doughty changed her position and her new version was Alan Dillon "didn't say he wasn't under my desk." **(Pa680-Pa681).** An alleged eyewitness, Leronda Aviles, was reported to have stated that on February 18, 2016, Alan was "completely under" the desk "with my computer turned sideways" **(Pa681)** but at her deposition, Leronda Aviles denied she ever told anybody that she saw Alan Dillon turn the computer monitor sideways and she never told anybody that Alan Dillon was under the desk attempting to do something to Linda Doughty's desktop computer. **(Pa692).** Also, Linda Doughty reported that Leronda Aviles claimed that co-worker Joe Durocher also saw Alan Dillon under the desk and, in fact, that Joe Durocher had a conversation with Alan Dillon when he was under the desk. **(PSMF 160, Pa681).** Not only did Joe Durocher deny this, but Leronda Aviles also testified at deposition that she never told anybody that Joe Durocher saw Alan Dillon under Linda Doughty's desk. **(Pa692).** Further, the charges were based not on being under Linda Dougherty's desk but for denying he was under the desk. **(Pa683, Pa687).** Jason Strapp could not identify any other employee who was charged with major discipline for denying he or she engaged in wrongful conduct. **(Pa569).** On April 8, 2016, Jason Strapp reported to Patricia Gardener that Dillon "denied any recollection of being under Ms. Doughty's desk or every having a conversation regarding such" and Strapp was "preparing a major disciplinary charges to be served to Mr. Dillon for conduct unbecoming and falsification of statements to our

office." (Pa683). On April 11, 2016, Linda Doughty emailed co-worker Matt Wilson that she learned about the status of the disciplinary action taken against Alan Dillon that Alan Dillon "[d]enied it completely when questioned," that the Director of Labor Relations, Jason Strapp, "doesn't believe him at all" and "wants to throw the book at him" for "lying," and "the issue may cause problems [for Alan Dillon] with pensions." **(Pa684-Pa685).** Thus, a jury could easily conclude that the story on which the disciplinary charges were based is full of holes and the real reason for the disciplinary action taken against Dillon seeking a 5 day penalty was to retaliate against him for opposing discrimination and retaliation.

- **Retaliatory Action.** On April 11, 2016, Linda Doughty, Matt Wilson, Nick De Martino Leronda Aviles and Kelley Cushman shared derogatory flyers about Alan Dillon via email. **(Pa685).**
- **Proof of Pretext.** Spoliation - the computer hard drives of these individuals were allegedly destroyed well after this lawsuit was filed making impossible the retrieval of evidence regarding the derogatory flyers. **(Pa686).** A jury could find that destruction of evidence supports Dillon's claim of a retaliatory motive.
- **Retaliatory Action.** On April 12, 2021, numerous altered and derogatory retirement posters were placed throughout the NJDEP workplace with Alan Dillon's photograph, stating **"HELP US CELEBRATE (WELL REJOICE OVER) ALAN DILLON'S HASTY, UNSCHEDULED AND DOWN-RIGHT EMBARRASSING DEPARTURE FROM DEP TO AVOID PENSION SANCTIONS AND OTHER FURTHER DISCIPLINARY ACTIONS, FOLLOWING A SCANDALOUS END TO A 30-YEAR CAREER OF DISREPUTABLE BEHAVIOR, ALIENATING COLLEAGUES, AND ABUSING REGULATEES" (Pa888).**
- **Proof of Pretext.** Defendants claim that that they cannot be responsible for the derogatory posters disparaging Dillon by stating he was facing "pension sanctions" following a "scandalous end to a 30 year career" in which Dillon engaged in "disreputable behavior." Defendants do not deny that 1) the derogatory retirement posters that were placed throughout Dillon's workplace, 2) the derogatory posters relate facts that were discussed in confidence at the April 11, 2016 meeting attended by Patricia Gardner, Jason Strapp and Linda Doughty and 3) Jason Strapp had all of the derogatory posters gathered and destroyed, thus, making impossible any forensic examination to trace them to a printer, computer hard drive, etc. A jury could find that this was part of the concerted effort by defendants to "take reprisals" against Dillon because he "opposed practices or acts forbidden by the NJLAD" and to "coerce, intimidate, threaten or interfere with" Dillon "in the exercise or enjoyment of . . . any right granted or protected by this act" in violation of N.J.S.A. 10:5-12(d). Also, a jury could find that destruction of evidence supports Dillon's claim of a retaliatory motive.

- **Retaliatory Action.** In 2019, Alan Dillon's formerly unimpeded access to the NJDEP building was taken away expressly in retaliation for filing a lawsuit. **(Pa831-Pa832; Pa644).**

Retaliatory harassing conduct that may dissuade a reasonable person from making or supporting a charge of discrimination is actionable even if it is not severe or pervasive enough to alter the terms and conditions of employment. Roa, 200 N.J. at 574-75. See also Martinelli v. Penn Millers Ins. Co., 269 F. App'x 226, 230 (3d Cir. 2008) (citation omitted). Defendants assert in their brief that "[a] plaintiffs own self-serving assertion is insufficient to create a material issue of fact defeating summary judgment" relying on Martin v. Rutgers Cas. Ins. Co., 346 N.J. Super. 320, 323 (App. Div. 2002). Martin, however, involved a proponent's self-serving statement which lacked documentary evidence in the record. The proof upon which Dillon's case is based are facts of record and a jury could find that the retaliatory actions set forth above, were taken against Dillon after and because he engaged in activity protected by the NJLAD and that these retaliatory actions would dissuade a reasonable person from engaging in protected activity and violate the law.

Point II

DEFENDANTS HAVE NOT ESTABLISHED THAT THE GOVERNMENT'S INTEREST IN THE EFFICIENCY OF PUBLIC SERVICES OUTWEIGHS DILLON'S INTEREST IN SPEAKING ON MATTERS OF PUBLIC CONCERN OR THAT ITS REGULATION REQUIRING EMPLOYEES TO OBTAIN PERMISSION TO SPEAK AND THE MOTION JUDGE FAILED TO PROPERLY ANALYZE THE ISSUE

Defendants penalized Dillon and imposed a two day penalty for not seeking permission to submit an abstract proposing to speak at the NJAWWA Annual Convention on Safe Drinking Water and they prohibited Dillon from speaking at the annual convention. Dillon had an interest as a citizen in speaking on matters of public concern. Dillon's abstract to the NJAWWA proposed a presentation on "capacity development" of water systems to promote "the long term viability of water supplies as well as providing information on the concrete daily steps an operator can take to initiate an infrastructure maintenance plan and recommend a variety of tools and reference materials that are available for a water system to provide competent utility stewardship." **(Pa355).** Dillon was also ordered not to discuss fracking during his presentation to the attendees at the Rutgers Safe Drinking Water annual course at which he was presenting. **(Pa540).** The defendants, of course, have an interest as employers in promoting the efficiency of the public services they perform. The United States Supreme Court in Pickering v. Board of Education, 391 U.S. 563, 568 (1968) confirmed the constitutional right of public employees to speak out on matters of public concern and established the Pickering balancing test to balance the interests of a public employee, as a citizen, in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. The balance is that the employee's speech on matters of public concern not be outweighed by any injury

the speech could cause to "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Connick v. Myers, 461 U.S. 138, 142 (1983) (quoting Pickering, 391 U.S. at 568). The burden is on the government to justify restrictions on speech. United States v. National Treasury Employees Union, 513 U.S. 454 (1995) (Government must show that the free speech interests are outweighed by the impact on the actual operation of the Government). Defendants have presented no facts to justify restricting Dillon's public speech on capacity development of water systems. Indeed, it is difficult to grasp any legitimate interest of the NJDEP in suppressing such speech.

More troubling is the NJDEP requirement (a "blanket policy") that an NJDEP employee seek permission before speaking on matters of public concern. National Treasury imposes on the government the burden to demonstrate that unrestrained speech will concretely produce serious harm and that the prior restraint "will in fact alleviate these harms in a direct and material way" Id. at 475. This has not been done. The regulation requiring such permission before speaking on matters of public concern is, therefore, an unconstitutional prior restraint.

Further, defendants have presented nothing to suggest that Dillon's discussion of Fracking or his humorously stating that Fracking is an "F-word" detrimentally impacts "the interest of the State, as an employer, in promoting the efficiency of the

public services it performs." Pickering, 391 U.S. at 568. These issues were briefed and presented to the motion judge for ruling but not properly analyzed.[2]

Without any reference to the record, defendants state in their Appellate Brief that Dillon "was not blocked from speaking at the [NJ]AWWA because of the content of his proposed talk" but because "another official was preparing to speak on a similar topic." (Db44). The problem with this argument is that the NJAWWA could have had both Dillon and the other official speak and, if there was only the capacity for one speaker, it may have chosen Dillon over the other speaker. Defendants, however, took it upon themselves to restrict Dillon's speech.

Finally, DeRitis v. McGarrigle, 861 F.3d 444, 453 (3d Cir. 2017), relied upon by defendants (Db41), does not change the analysis. DeRitis was an Assistant Public Defender who told Judges and other attorneys that he was being punished for taking too many cases to trial and "[b]ecause of DeRitis's statements to all of these individuals," DeRitis was fired. Id. at 450-51. The Third Circuit stated the rule for analyzing whether speech is as a public citizen or a government employee is whether

[2] The contention that because Dillon did not raise the issue of prior restraint in his opposition to the motions of Linda and Steve Doughty, Cushman, Aviles, DiMartino and Wilson to dismiss Cout Four of the Complaint must be rejected because the policy imposing a prior restraint and the suppression of Dillons protected speech was not something those defendants were responsible for, defendants State of New Jersey and State of New Jersey Department of Environmental Protection had the policy and Dan Kennedy, Magdalena Padilla, Karen Fell, Sandra Krietzman and Jason Strapp deprived Dillon of his constitutionally-protected right to free speech.

the speech was "possible only as an ordinary corollary to his position as a government employee." Id. at 454. "DeRitis had the opportunity to speak in court to attorneys and judges only as an ordinary corollary to his position as an Assistant Public Defender[and] his speech in that role was not citizen speech." Ibid. This is markedly different that Dillon addressing the NJAWWA Annual Convention on Safe Drinking Water consisting of professionals in the field of safe drinking water on his own time and at his own expense when he had ethics approval to make such presentations and sought to discuss "capacity development" of water systems to promote "the long term viability of water supplies." Dillon's proposed speech was decidedly a matter of public concern unlike the discussion of the conditions of a government employee's workplace at issue in DeRitis and Garcetti v. Ceballos, 547 U.S. 410, 418 (2006).

CONCLUSION

For the reasons set forth above and for the reasons previously presented, plaintiff Alan S. Dillon respectfully requests that the Court reverse the Order of Summary Judgment in favor of the defendants and remand for trial.

Respectfully submitted,

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