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JOSHUA CUMMIS, *Plaintiff-Appellant,* v. TOWNSHIP OF MAPLEWOOD & ALL MEMBERS OF THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MAPLEWOOD, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES, VICTOR DELUCA, NANCY J. ADAMS, INDIA LARRIER, FRANK MCGEHEE, AND GREGORY LEMBRICH, *Defendants-Respondents.*	SUPERIOR COURT OF N.J. APPELLATE DIVISION Civil Appeal Docket # A-3036-22 Trial Court Docket # ESX-L-6341-17 *On appeal from Order of the Superior Court, Law Division, Essex County* Sat Below: Hon. Keith E. Lynott, J.S.C.

PLAINTIFF-APPELLANT'S BRIEF

Of Counsel & on the Brief:

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PRELIMINARY STATEMENT

Plaintiff-Appellant Joshua Cummis ("Plaintiff") appeals the Trial Court's ruling granting summary judgment to Defendants Township of Maplewood and the individual members of its governing body as to Plaintiff's claims under the New Jersey Conscientious Employee Protection Act ("CEPA"), N.J.S.A. 34:19-1, *et seq.* Plaintiff, a former Police Captain for the Township, alleges that in retaliation for his protected activity, Defendants illegally suspended him from his employment and scurrilously labeled him as a racist cop as a result of Plaintiff performing his duties as a Police Captain in enforcing the law during a police response to an incident during which Defendants concede Plaintiff engaged in no wrongdoing.

In improperly granting summary judgment the Trial Court imposed a non-existent and overly restrictive requirement that under CEPA, in order for a plaintiff-employee to have a reasonable belief that conduct was in violation of a law, regulation or public policy, an employer must have issued or announced a previously existing order, directive, policy, or practice sanctioning that illegal conduct. Such a requirement is inconsistent with the statute and our case law regarding CEPA.

Our Courts' interpretation of CEPA favors a broad application of the statute, as opposed to some hyper-technical parsing of who is a whistleblower. Under the facts of this matter and the applicable law, Plaintiff here is entitled to CEPA protections from retaliation. Thus, upon its *de novo* review, this Court should

reverse the grant of summary judgment below and remand this matter for trial as to Plaintiff's CEPA claim.

PROCEDURAL HISTORY

Plaintiff's Amended Complaint filed on February 8, 2018 alleges violations of the New Jersey Conscientious Employee Protection Act ("CEPA") and the New Jersey Civil Rights Act ("CRA"), and names the Township and the five individual members of its governing body as Defendants. (250a). After the completion of discovery, Defendants filed a motion for summary judgment. (30a). Based upon discovery and the relevant statutory and case law, including CEPA's waiver provision, Plaintiff elected his remedies to pursue his claims under the CEPA statute and opposed summary judgment as to that claim.

The Trial Court heard oral argument on December 12, 2022. (1T). On May 22, 2023, the Trial Court issued its Order and Statement of Reasons granting Defendants' motion for summary judgment and dismissing Plaintiff's Amended Complaint. (12a). Plaintiff timely filed his Notice of Appeal and Civil Case Information Statement with this Court. (1a, 7a).

In its decision below, the Trial Court recited the relevant facts in Plaintiff's favor, including: [a] during the July 5, 2016 incident an unruly group of fifty juveniles failed to disperse, questioned the authority of the officers on scene, assembled in a roadway obstructing traffic, used profanity, engaged in physical

altercations, resisted arrest, and assaulted an officer; [b] there was no allegation by anyone that Plaintiff engaged in any wrongdoing, including any accusation of excessive force or racial profiling; [c] the Essex County Prosecutor's Office concluded there was insufficient evidence to warrant either criminal or administrative charges against Plaintiff; [d] Defendants suspended Plaintiff without engaging in the required internal affairs and disciplinary process and procedures, in violation of Attorney General Guidelines; [e] Defendants at public meetings announced their intent to terminate Plaintiff's employment and associated him with complaints of racial profiling, notwithstanding the lack of any legitimate basis for those allegations against Plaintiff, thereby falsely labeling Plaintiff as a racist in the face of political and media pressure; & [f] Plaintiff was fired from his subsequent employment because of his employer's concerns about allegations of racially motivated behavior stemming from Plaintiff's role in enforcing the law during the July 5, 2016 incident that were in fact false, and the resulting action by Defendants in suspending Plaintiff. (15a-18a).

The issue for this Court on appeal is the improper rationale below in dismissing Plaintiff's CEPA claim. Specifically, the Trial Court imposed a prerequisite that under CEPA a plaintiff-employee must establish that the defendant-employer, prior to the plaintiff's whistle-blowing activity, enunciated a specific order, directive, practice or policy that the plaintiff reasonably believed was

incompatible with a law, regulation or clear mandate of public policy. (23a). No such onerous requirement exists under the CEPA statute or its case law.

Under this theory created by the Trial Court from whole cloth, an employer could engage in illegal activity, an employee could blow the whistle on it, but unless the employer previously announced its intention, or stated a policy, to engage in that illegal activity or to sanction it, no whistle-blowing activity took place. The Trial Court's restrictive reasoning is inconsistent with the CEPA statute and the case law interpreting it, as well as the requirement that the statute be liberally construed to achieve its important social goal of protecting whistleblowers from retaliation.

CEPA provides protection to an employee such as Plaintiff, a Police Captain who, in the performance of his duties, sought to enforce the law and was brazenly retaliated against by his employer for doing so, by way of Defendants' illegal suspension of Plaintiff and Defendants' false and public branding of Plaintiff as a racist cop. Therefore, this Court should reverse the grant of summary judgment below and remand this matter for trial on Plaintiff's CEPA claim.

STATEMENT OF FACTS

Plaintiff is a former Police Captain for Defendant Township of Maplewood, having worked for the Township's Police Department for twenty-five years until his retirement on September 1, 2017. (Plaintiff Dep. 8:5-18, 824a). This matter arises out of a police response to an incident after the Township's July 4th fireworks display

that took place on July 5, 2016. (Plaintiff's Complaint, 63a). The following specific facts are established in the record regarding the July 5, 2016 incident: [a] following the July 4th fireworks display that night, a crowd of juveniles, totaling approximately fifty, failed to disperse, and questioned police officers' directives to do so and instead stood in an active roadway where traffic was supposed to flow, with a number of the juveniles becoming highly irate and shouting profanities at the officers while refusing the officers' orders to exit the roadway; & [b] members of the crowd were acting in an unruly and disorderly manner and engaging in physical altercations or 'fights'. (Deposition of Township Administrator Joseph Manning at 32:24-33:14, 510a; 43:25-44:2, 513a; Deposition of Captain Dawn Williams at 45:5-16, 46:2-5, 48:7-23, & 52:2-53:10, 591a-593a; 370a; 354a).

Multiple juveniles were arrested, and some were combative with police officers and resisted arrest, including one individual who grabbed an officer by the hand and attempted to pull him away from another individual. (370a; Williams Dep. 46:7-20, 49:8-50:4, & 53:11-16, 591a-593a). Another arrestee spit at an officer and was being disorderly, agitated and combative, and was shouting profanities at officers even after he was arrested. (Id. at 49:15-50:24, 592a-593a; 369a-370a). Then-Township Administrator Manning testified that one or more of the juveniles assaulted one or more of the police officers who responded to the altercation. (Manning Dep. 44:21-25, 513a).

According to Township Committee Member Gregory Lembrich, on the night of the incident there was a fight amongst individuals in the crowd after the fireworks and "the police needed to intervene to break up the fight and to disperse the crowd". (Deposition of Gregory Lembrich at 21:1-17, 623a; 54:20-23, 632a). Lembrich testified that several individuals in the crowd, who were in their "teens and early 20s", were acting in a "disorderly manner" and "some people acted in a confrontational manner towards our [Maplewood] police when the police tried to break up the fight and disperse the crowd". (Id. at 21:21-22, 623a; 28:14-16 & 29:8-15, 625a). The officers on scene attempted to "disperse the crowd and ultimately, not all of the crowd did disperse". (Id. at 30:13-14, 626a).

According to Lembrich, one of the individuals in the crowd spit on an Irvington Police Officer and was taken into custody. (Id. at 57:19-24, 632a). There were "multiple arrests made" and "an altercation between individuals [in the crowd] and officers of both departments". (Id. at 59:18-22, 633a). Also, an officer on scene used "OC" spray which Lembrich admits was "deemed appropriate" as a use of "non-lethal force" to break up the fight. (Id. at 61:3-62:5, 633a-634a).

The suggestion that the officers on scene were directing the crowd to Irvington is contradicted by Defendants' own testimony. Township Committee member Adams testified that based upon the video footage she reviewed the police vehicles were following the crowd as they moved east, and she was not aware that they were

being led by police in any one direction. (Adams Dep. 65:18-21, 754a; 67:6-8, 755a). Similarly, Sonia Alves-Viveiros, who was the Assistant Township Administrator in 2016 and 2017, recalled that the crowd was heading east towards Irvington and there was no allegation that the police officers were preventing the crowd from dispersing. (Deposition of Sonia Alves-Viveiros at 39:23-40:7, 887a).

Defendant Lembrich testified that in September 2016, two months after the July 5, 2016 Maplewood fireworks display, there was a discussion amongst the members of the Maplewood Township Committee where they acknowledged that other towns in northern New Jersey no longer had fireworks on July 4th due to incidents where attendees felt "unsafe" due to "fights and other problems" and "Maplewood was drawing a bigger crowd" than it had in the past. (Lembrich Dep. 80:6-81:2, 636a). There was a concern amongst the members of the Township Committee in the aftermath of the July 5, 2016 incident that the event was getting too big from a safety perspective due to larger crowds, specifically "with the crowd being bigger, there would be a lot more crowd for the police to handle, and if there were an incident, it would be … more difficult to handle given the size of the crowd. Not that in a large crowd crime is more likely to occur, but it would be more difficult for the police to respond to that crime or that situation". (Id. at 82:11-84:15, 637a).

Plaintiff was performing his duties as a Police Captain on the night of the incident by enforcing the law. (Manning Dep. 44:7-20, 591a). Plaintiff was acting

as a supervisor during the police response pursuant to his duties as a Police Captain. (Williams Dep. 26:10-12, 587a). Plaintiff made radio transmissions pursuant to his duties and to supervise the officers on scene and to enforce the law during an incident where approximately fifty individuals were engaging in conduct which Plaintiff reasonably believed was in violation of criminal statutes. (Plaintiff Deposition 18:23-19:12, 827a). Plaintiff was also monitoring the location of the crowd and in what direction they were moving. (Ibid.).

Manning, the Township Administrator at the time of the incident in July 2016, testified that there was not even an allegation that Plaintiff engaged in any wrongdoing or failure to act in performing his duties as a Police Captain in controlling a disorderly crowd who Defendants admit engaged in violations of criminal statutes:

> Q. At any point between the time of the incident on July 5th 2016 and the time Captain Cummis retired on September 1, 2017, did anyone ever tell you or make an allegation that Joshua Cummis engaged in some wrongdoing on that night of the July 5th, 2016 incident, during the police response to the incident?
> A. No.
> Q. Did anyone at any point between July 5th, 2016, and September 1st, 2017, ever allege or suggest that Captain Cummis didn't do something he was supposed to do or did something he wasn't supposed to do?
> A. No.
> Q. Are you aware of any specific allegation of wrongdoing against Captain Cummis as a result of the July 5th, 2016 [*sic*], with regard to his actions or his supervision on that night?
> A. No.
> Q. Did any member of the Township Council ever make such an allegation, specifically that Joshua Cummis, specifically Captain Cummis, engaged in

> some misconduct on the night of July 5th, 2016, or did not take some action he was supposed to take?
> (objection)
> A. No. (Manning Dep. 50:25-52:3, 515a).

Maplewood Township Committee member Victor DeLuca similarly testified as follows:

> Q. … Did you ever have a conversation with anyone between July 2016 and August 2017 where that individual told you, via phone or in person, that Captain Cummis engaged in some sort of misconduct towards the juveniles, any of the juveniles during the July 5th, 2016 police response?
> A. No.
> Q. Did anyone ever advise you in writing between July 2016 and August 2017 of an allegation that Captain Cummis engaged in any type of misconduct towards the juveniles during the police response on July 5th, 2016?
> A. No.
> Q. Between July 2016 and August 2017, were you ever made aware of any accusation of racial profiling or racial bias on the part of Captain Cummis during the police response in the incident regarding the juveniles after the fireworks display on July 5th, 2016?
> A. No. (Deposition of Victor DeLuca 43:20-44:14, 677a).

All of the other Defendant Township Committee Members similarly admit that they were aware of no specific allegation of wrongdoing from anyone regarding Plaintiff's actions or purported inaction on the night of the July 5, 2016 incident, which includes the absence of any allegation against Plaintiff that he engaged in an act of racial profiling or bias, or excessive use of force. (Deposition of Frank McGehee 24:22-25:14 & 29:25-30:4, 712a-714a; see also Deposition of Nancy Adams 29:15-21, 745a; 54:2-16, 752a; see also Deposition of India Larrier 47:11-48:14, 800a). Lembrich denied having any knowledge of anything Captain Cummis

said or did that exhibited any racial bias or profiling on the night of July 5, 2016, and he had no basis to think that occurred. (Lembrich Dep. 45:20-46:1, 629a-630a; 46:22-25, 630a). Then-Mayor DeLuca was similarly aware of no such allegation against Plaintiff, or any complaint that Plaintiff failed to act when he should have. (DeLuca Dep. 44:8-14 & 48:11-17, 677a-678a).

The Essex County Prosecutor's Office ("ECPO") investigated Plaintiff's conduct during the July 5, 2016 incident and advised Defendants via letter that "there is insufficient credible evidence to warrant a criminal prosecution in this matter. In addition, the investigation and a review of all information failed to disclose sufficient evidence to clearly prove or disprove the allegation and it is closed as **not sustained**." (303a). Plaintiff similarly received a letter from ECPO Deputy Chief AP Gallagher advising him that there was insufficient evidence to establish either a criminal or an administrative disciplinary action against him. (498a). Gallagher acknowledged that in addition to finding insufficient evidence to sustain a criminal prosecution of Plaintiff, the ECPO also concluded that any administrative allegations against Plaintiff that could result in disciplinary action were "not sustained". (Deposition of Gail Gallagher Boykewich 36:15-37:2, 865a).

Then-Administrator Manning admitted that the Township was bound by the ECPO's findings as a result of its investigation and Defendants were precluded from taking any action against Plaintiff either administratively or criminally arising from

his conduct during the July 5, 2016 incident. (Manning Dep. 63:5-14, 518a). Manning testified specifically as follows:

> Q. So if the prosecutor's office found that Captain Cummis did not engage in any criminal conduct, and further, their investigation was not able to sustain any allegation of wrongdoing that would give rise to an administrative action or disciplinary charges, the Township would be bound by that; isn't that correct?
> (objection)
> A. Yes. (Id. at 63:15-24, 518a).

The members of the Township Committee were also advised by the ECPO that Plaintiff did not engage in any misconduct or failure to act which could result in any disciplinary action against him regarding his employment with the Township. (Larrier Dep. 30:21-31:5, 796a; 34:10-22, 797a).

At its meeting on August 1, 2017 the Maplewood Township Committee passed a "no confidence" resolution regarding Police Chief Robert Cimino and called for his immediate resignation. (309a-310a; 322a-323a). Defendants placed Plaintiff on "administrative leave" on that same date. (321a). However, the resolution placing Plaintiff on immediate 'administrative leave' effective August 1, 2017 does not indicate that action was 'pending his retirement'. (Ibid.). Then-Township Administrator Manning testified that the Township Committee suspended Plaintiff, as well as Chief Cimino, as opposed to merely placing Plaintiff on 'administrative leave pending his retirement':

> *The suspension came from the Township Committee*. They suspended them via a resolution. I notified whoever was acting [Chief of Police], and I'm pretty

> sure it was Jim DeVaul [who eventually became the Chief], you know, was to do the day-to-day functioning of the town, *that they were suspended and we needed their badge and gun*. (Manning Dep. 132:15-24, 529a) (emphasis added).

The Township Committee suspended Plaintiff notwithstanding Defendants' admissions that: [a] a sworn law enforcement officer such as Captain Cummis, prior to any disciplinary action being imposed against him, would have to be the subject of an internal affairs investigation conducted by a sworn law enforcement officer pursuant to Attorney General Guidelines which results in a finding that the allegation[s] of misconduct against the officer were sustained; [b] only the Chief of Police would make a determination as to whether the officer was to receive any disciplinary action, and the appropriate authority for the Township, specifically the Township Administrator, would have some role in that process; & [c] the Township Committee has absolutely no role in police internal affairs investigations or in the police disciplinary process. (Lembrich Dep. 15:6-17 & 17:25-18:18, 622a-623a; 141:19-20, 647a; McGehee Dep. 11:13-19, 709a).

DeLuca, the Mayor of Maplewood Township in August 2017, similarly admitted as follows:

> Q. Does the Township Committee, including the Public Safety Committee, ever become involved in internal affairs investigations being conducted by the police department of individual officers who are employed by the police department?
> A. No.

> Q. Does the Township Committee, including the Public Safety Committee, ever become involved in decisions regarding disciplinary action to be taken against an officer?
> A. No.
> Q. When I say "disciplinary action," I'm referring to reprimand, suspension, demotion, and removal. Do you understand that?
> A. Yes.
> Q. And is your answer to my question still no?
> A. … My answer is still no. (DeLuca Dep. 16:6-25, 670a).

As outlined *supra*, the ECPO confirmed in writing to Defendants that pursuant to its investigation, any allegation that Plaintiff engaged in conduct that could give rise to any administrative disciplinary action was not sustained, and Defendants were bound by that finding. (303a). Consistent with the internal affairs and disciplinary process, and the ECPO findings as to Plaintiff, outlined above, Captain Williams confirmed that the Maplewood Police Department conducted no internal affairs investigation of Plaintiff. (Williams Dep. 18:12-22, 585a; 57:14-18, 594a; 61:22-62:3, 595a-596a; 64:6-13, 596a). Captain Williams did not even interview Plaintiff pursuant to her internal affairs investigation of the July 5, 2016 incident. (Id. at 19:22-24, 585a).

Plaintiff testified that at 9:00pm on August 1, 2017, he received a call from Administrator Manning advising Plaintiff that Defendants had suspended him, with that suspension being without cause and without the Maplewood Township Police Department conducting an internal affairs investigation of which Plaintiff was the target and that resulted in a "sustained" finding, in violation of state statute,

specifically Title 40A, and Attorney General Guidelines which govern internal affairs and police discipline. (Plaintiff Dep. 22:5-22, 828a). When he was suspended, Defendants required Plaintiff to surrender his Police Captain's badge and identification, firearm, and uniforms. (Id. at 70:10-22, 840a).

Then-Mayor DeLuca confirms this, and that Plaintiff was prohibited from entering police headquarters. (Deluca Dep. 122:9-17, 697a). Lembrich also confirms that Plaintiff was not granted a hearing or opportunity to be heard, nor did Defendants conduct any investigation. (Lembrich Dep. 172:13-22, 653a).

Notwithstanding the Township Committee's utter lack of authority to take any action regarding Plaintiff's employment, while the July 5, 2016 incident was being discussed at the August 1, 2017 Township Committee meeting, Mayor DeLuca stated that "we now have the authority to start making decisions". (309a; see also Lembrich Dep. 163:8-22, 651a). Township Committee Member-Defendant Adams curiously attempted to disavow any knowledge of and distance herself from Defendants' illegal suspension of Plaintiff. She testified that she did not "really remember who placed him on administrative leave or any of the details around it" or the basis for removing Plaintiff from his duties, and when asked if she believed that action should have been taken against Plaintiff, she responded, "I don't really know" even though she voted for the resolution placing Plaintiff on 'administrative leave'. (Adams Dep. 76:23-77:10, 757a; see also 321a & 310a).

At the Township Committee meeting on August 21, 2017, Lembrich stated his intent to "affirmatively terminate Captain Cummis' employment with the Maplewood Police Department". (326a, ¶5). Lembrich testified that he inquired at the meeting "if we could terminate him [referring to Plaintiff] … if Captain Cummis were to unretire or, you know, pull back his papers …". (Lembrich Dep. 188:13-18, 657a). Lembrich also confirmed that Defendants' removal of Plaintiff from his employment was actively discussed by the Township Committee at the meeting, even though Lembrich admits that he had never as a member of the Township Committee previously been involved in any disciplinary issues regarding a police officer. (Id. at 191:17-25 & 193:7-16, 658a).

Administrator Manning confirmed in his deposition testimony that he understood that Lembrich was asking if Defendants could terminate Plaintiff's employment, notwithstanding that Manning did not know what the legitimate factual basis for Plaintiff's termination would be. (Manning Dep. 143:22-144:6, 532a; 182:18-183:18, 542a). Additionally, at the public Township Committee meeting on August 21, 2017, Mayor DeLuca stated, while specifically referencing a complaint of racial profiling, that the Township Committee wanted to "make sure that Captain Cummis doesn't come back to work on September 1, 2017 and that the Township Committee is going to continue to work on his separation from the Police Department". (327a, ¶7). Manning confirmed in his deposition that was in fact the

intent of the Committee. (Manning Dep. 148:18-149:1, 533a). Specifically, if Plaintiff rescinded his notice to retire on September 1, 2017, then Mayor DeLuca and the rest of the Township Committee would have actively sought to terminate Plaintiff. (Id. at 150:1-151:13, 534a).

Defendant Lembrich went so far as to send an email to an on-line media website, the Village Green, stating, "it is the TC's [the Township Committees'] desire to not have Mr. Cummis return to the Maplewood Police Department". (421a; DeLuca Dep. 149:4-150:8, 702a-703a). Lembrich confirmed that Mayor DeLuca specifically referenced "a complaint of racial profiling" in the context of discussing Plaintiff's employment, even though Lembrich testified, "I don't recall any specific allegation of racial profiling against Captain Cummis. I recall there being allegations of racial profiling with respect to the July 5th, 2016 incident generally, but I don't recall there being anything specific about Captain Cummis". (Lembrich Dep. 195:24-197:4, 659a).

Defendant DeLuca, the Mayor in 2017, testified that there were allegations from citizen and community groups that the officers on scene during the July 5, 2016 incident supposedly engaged in racial profiling or racially biased behavior, and he was concerned about "backlash from the community", but he was not aware of Plaintiff's name coming up in any such allegations. (DeLuca Dep. 82:12-22, 687a; 83:24-84:1, 687a). DeLuca received several inquiries from the media regarding this

issue of 'alleged racial profiling' in which Plaintiff became ensnared by way of Defendants' unjustified removal of Plaintiff from his duties in a public forum, even though, as Defendants concede, there was no factual basis for such an allegation and there was no such specific complaint against Plaintiff by anyone. (Id. at 86:9-89:16, 688a; 409a-412a).

DeLuca admits that he felt pressure from the public and media during 2017. (DeLuca Dep. 93:15-94:4, 689a-690a). As a result, Mayor DeLuca communicated via email with fellow Township Committee member Nancy Adams and another individual who was running for Township Committee with DeLuca during the Maplewood 2017 political campaign, Dean Dafis, about crafting a statement regarding the July 5, 2016 to distribute to the media. (Id. at 91:8-93:4, 689a; 97:16-101:17, 690a-691a; 414a-415a).

Lembrich, in an email exchange with fellow Committee members Adams and McGehee in March 2017, characterized the July 5, 2016 incident as a "the big sword hanging over our heads" in the context of a discussion about alleged racial bias by the Maplewood Police Department. (406a-407a). However, Lembrich testified that he "didn't recall there being specific allegations against Captain Cummis from the public. Just that there were demands, you know, from the public that we take action against Maplewood Police Department leadership". (Lembrich Dep. 101:19-23, 641a).

Township Committee Member McGehee also made extensive and racially charged public comments at the August 1, 2017 meeting during which Defendants suspended Plaintiff, suggesting that the actions of the police on the night of July 5, 2016 were based upon race and that the officers used excessive force against "black children" who were supposedly "herded like cattle out of Maplewood … simply because of the color of [their] skin", and that "being black is not a crime". (307a-308a; McGehee Dep. 36:15-42:4, 715a-717a). This is notwithstanding that McGehee claims that in making overt claims of racial bias he was not referring to Captain Cummis or anything he did or did not do on July 5, 2016. (Id. at 38:12-39:1, 716a; 42:5-18, 717a).

At the August 1, 2017 Township Committee meeting that was open to the public and during which Defendants removed Plaintiff from his duties as Police Captain, DeLuca stated that the members of the Township Committee "were appalled by the excessive force used by police officers against a group of young people," notwithstanding that there was no factual basis for that allegation, there was no allegation against Plaintiff that he either used or witnessed excessive use of force and did nothing, and that the Prosecutor's Office made no finding of excessive force being used by the officers on the night of July 5, 2016. (DeLuca Dep. 118:21-119:23 & 120:22-121:11, 696a; McGehee Dep. 29:25-30:4, 713a-714a; 309a).

Defendants thus publicly and falsely labeled Plaintiff as a racist cop who unjustifiably used, or permitted to be used, excessive force against a group of minority youths. In referencing Plaintiff, Mayor DeLuca stated that "we don't want your kind here". (Plaintiff Dep. 53:6-7 & 55:15-23, 836a). Township Administrator Manning agreed that "the politicians" were being motivated by political considerations, notwithstanding what in fact occurred on July 5, 2016 and the conclusions of the investigations of that incident. (Manning Dep. 95:1-96:5, 524a).

In anticipation of his retirement, in June 2017 Plaintiff accepted a job at the Morristown Beard School ("MBS"). (Plaintiff Dep. 64:25-65:14, 838a-839a). He was contracted to work there for the 2017-18 and 2018-19 school years, but MBS fired him in October 2018. (403a & 404a; Deposition of Peter Caldwell 38:21-39:1, 916a). A component of Plaintiff's economic loss alleged in this matter is that Defendants' illegal action resulted in Plaintiff's termination from his post-retirement employment with MBS. (Plaintiff's Answers to Interrogatories at #'s 2 & 6, 896a & 898a-899a).

Plaintiff's supervisor at MBS advised Plaintiff that he was being terminated because the school received an anonymous phone call advising that they were employing a racist, referring to Plaintiff. (Plaintiff's Dep. 76:18-22, 841a). The Head of School at MBS, Peter Caldwell, confirmed in his deposition that a call from an unidentified parent of a student expressing concern about what that parent

supposedly read in the newspaper, specifically about the unsupported allegations of racism against Plaintiff by the Maplewood Defendants, is what caused MBS to terminate Plaintiff's employment there. (Caldwell Dep. 39:22-42:14, 916a-917a).

Bruce Adams, the head of MBS security and Plaintiff's supervisor, advised Caldwell that the issue against Plaintiff had "racial overtones" and involved "alleged racist behavior" by Plaintiff. (Id. at 41:22-42:14, 916a-917a). Caldwell also confirmed that the issue raised by an African American family whose child attended MBS arose out of a concern about Captain Cummis' role during the police response to the July 5, 2016 incident. (Id. at 46:15-20, 918a).

Caldwell's understanding was that there was a "disruption" in Maplewood, Captain Cummis was part of the police response to "maintain control", that there were "some interactions that were interpreted as untoward and that there was a complaint filed", and there "were some arrests, some kind of spray used". (Id. at 51:22-52:18, 919a). Caldwell's recollection was that "it just didn't look good for Morristown Beard to have members of our school community who felt uncomfortable" and the alleged behavior by Plaintiff, which as demonstrated at length, *supra*, did not actually occur and was instead manufactured by Defendants, "was interpreted by the black community as being racially motivated", including "the black community of Maplewood of which we have members in our [MBS] community". (Id. at 55:6-56:10, 920a).

Caldwell testified that at the time MBS terminated Plaintiff's employment, Plaintiff was performing his duties in a satisfactory manner and MBS had never cited him for any performance issues. (Id. at 60:13-24, 921a; 82:3-11, 927a). MBS's decision to terminate Plaintiff " … was based on the news article in which … *there was some complaint by the Town of Maplewood … "* about Plaintiff's *" … behavior, potentially allegedly racist behavior in this incident of July 4th … "*. (Id. at 89:14-90:2, 928a-929a) (emphasis added). At the time of his termination in October 2018, Plaintiff's annual salary at MBS was $45,400. (Id. at 32:22-25, 914a; 38:21-39:1, 916a).

LEGAL ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AS THERE ARE GENUINE ISSUES OF MATERIAL FACT ESTABLISHED IN THE RECORD THAT CREATE INFERENCES THAT WOULD ALLOW A REASONABLE JURY TO CONCLUDE THAT DEFENDANTS VIOLATED CEPA. *(1T; 12a-27a)*

A. The Summary Judgment Standard. *(1T; 12a-27a)*

Due to the genuine issues of material fact, the grant below of summary judgment was improper. This Court's review on appeal is *de novo*, applying the same standard as the Court below. Chance v. McCann, 405 N.J. Super. 547, 563 (App. Div. 2009). In establishing the summary judgment standard to be applied, our Supreme Court held as follows:

> ...[A] determination whether there exists a genuine issue of material fact that precludes summary judgment requires the motion judgment to

> 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 fact-finder to resolve the alleged disputed issue in favor of the non-moving party. The judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. It is critical that the trial court ruling on a summary judgment motion not shut a deserving litigant from his [or her] trial.' (other citations and quotations omitted). Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 540 (1995) (other citations omitted).

A jury has the unyielding role of determining the ultimate question in employment matter cases alleging discrimination or retaliation:

> The role of determining whether the inference of discrimination is warranted must remain with the province of the jury, because a finding of discrimination is at bottom a determination of intent. In making that finding, the jury must perform its traditional function of assessing the weight of the evidence, the credibility of the witness through observation of both direct testimony and cross-examination at trial, and the strength of the inferences that can be drawn from the elements of the *prima facie* case and the evidence that undermines the employer's proffered reasons for its actions. This is uniquely the role of the fact-finder, not the court. Kennedy v. Chubb Group, 60 F. Supp. 2d 384, 394 (D.N.J. 1999).

B. The *prima facie* elements of a CEPA claim and the purpose and important public policy underpinning the statute. *(1T; 12a-27a)*

The New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-1 *et seq*. ("CEPA") is intended to "encourage employees to report illegal or unethical workplace activities and to discourage … employers from engaging in such conduct." Fleming v. Correctional Healthcare Solutions, Inc., 164 N.J. 90, 96 (2000); Abbamont v. Piscataway Twp. Bd. of Ed., 138 N.J. 405, 431 (1994). CEPA

codifies and expands the common law cause of action first enunciated in Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58 (1980), which "protects at-will employees who have been discharged in violation of a clear mandate of public policy." Higgins v. Pascack Valley Hospital, 158 N.J. 404, 417-418 (1999). Thus, CEPA "establishes a statutory exception to the general rule that an employer may terminate an at-will employee with or without cause." Higgins, 158 N.J. at 418.

CEPA is a civil rights statute and is remedial in nature; therefore, it is "to be construed liberally to achieve its important social goal." Kolb v. Burns, 320 N.J. Super. 467, 477 (App. Div. 1999); Fleming, 164 N.J. at 97. Our Supreme Court stated in Abbamont its view of CEPA as follows:

> We view [CEPA] as a reaffirmation of this State's repugnance to an employer's retaliation against an employee who has done nothing more than assert statutory rights and protections and a recognition by the Legislature of a pre-existing common-law tort cause of action for such retaliatory discharge. In New Jersey, we are deeply committed to the principle that an employer's right to discharge an employee carries a correlative duty to protect his freedom to decline to perform an act that would constitute a violation of a clear mandate of public policy. 138 N.J. at 431-32.

In order to maintain a cause of action under CEPA, a plaintiff must establish the following *prima facie* elements: [1] he or she reasonably believed that his or her employer's conduct was violating either a law, rule or regulation promulgated pursuant to law, or a clear mandate of public policy; [2] he or she performed a "whistle-blowing" activity described in N.J.S.A. 34:19-3; [3] an adverse

employment action was taken against him or her; and [4] a causal connection exists between the whistle-blowing activity and the adverse employment action. Dzwonar v. McDevitt, 177 N.J. 451, 464 (2003).

"The evidentiary burden at the *prima facie* stage is '**rather modest** ….'". Zive v. Stanley Roberts, Inc., 182 N.J. 436, 447 (2005) (emphasis added). Moreover, "[t]hese requirements must be liberally construed to effectuate CEPA's important social goals." Maimone v. City of Atlantic City, 188 N.J. 221, 230 (2006).

C. There is evidence in the record to support: [i] Plaintiff's reasonable belief of a violation of law or public policy that he objected to or refused to participate in; & [ii] Plaintiff's whistle-blowing activity, under N.J.S.A. 34:19-3c. *(1T; 12a-27a)*

Pursuant to N.J.S.A. 34:19-3, which defines the types of employee conduct protected by CEPA, an employer is prohibited from taking retaliatory action against an employee who:

a. [*omitted as it is not relevant to this matter*]; or
b. [*omitted as it is not relevant to this matter*]; or
c. Objects to, **or** refuses to participate in any activity, policy or practice which the employee reasonably believes:
    (1) **is in violation of a law, or rule or regulation promulgated pursuant to law**, or, if the employee is a licensed or certified health care professional, constitutes improper quality of patient care; *or*
    (2) **is fraudulent or criminal**; including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity; *or*

> (3) **is incompatible with a clear mandate of public policy concerning the public health, safety or welfare** or protection of the environment. (emphasis added).

Our Supreme Court reasoned in Mehlman v. Mobil Oil Corp. that the employee "is not required to have specific knowledge of the precise source of the public policy." 153 N.J. 163, 193 (1998). In Battaglia v. UPS, Inc., 214 N.J. 518, 464 (2013), the Supreme Court stated that "either 'the court or the plaintiff' must identify the statute, regulation, rule or public policy that closely relates to the complained of-conduct."

Thus, for the purposes of CEPA, it is sufficient that the Court will be able to identify the law or public policy that may have been violated by the conduct about which the plaintiff complains. Id. at 193-96. See also Turner v. Associated Humane Societies, Inc., 396 N.J. Super. 582 (App. Div. 2007) (employee's objectively reasonable belief that customer's adoption of dog with a history of biting humans violated or was incompatible with law or clear mandate of public policy); Abbamont, 269 N.J. Super. at 24-25 (wherein the Court allowed a CEPA claim of an industrial arts teacher who made complaints about inadequate ventilation in classrooms which plaintiff reasonably believed put the health and safety of students at risk, even though the plaintiff-employee was not aware that safety guidelines he believed were being violated were based upon the state administrative code); Regan v. City of New Brunswick, 305 N.J. Super. 342, 353-55 (App. Div. 1997) (reinstating complaint,

where employee did not identify until appeal the criminal statutes he believed were being violated, as those statutes were identifiable from the record and from the plaintiff-employee's description of the nature of the illegal conduct alleged by the plaintiff); Woods v. Township of Irvington, 2009 WL 2475323 (App. Div. 2009) (wherein the Appellate Division reversed the ruling of the Trial Court granting the defendants' motion for summary judgment on the plaintiff's CEPA claim, holding that the plaintiff-police officer reasonably believed that her supervisor engaged in conduct in contravention of a criminal statute, N.J.S.A. 2C:28-6, "tampering with or fabricating physical evidence", by way of his violation of internal affairs procedures in mishandling and concealing evidence in an internal affairs investigation) (964a).

Plaintiff does not have to demonstrate that the employer's activities *actually* violated or were incompatible with a statute, rule or other clear mandate of public policy. See Dzwonar, 177 N.J. at 463-464. Rather, Plaintiff only has to show that he had an "objectively reasonable belief" in the existence of such a violation or incompatibility. Id. at 464. "The goal of CEPA ... is not to make lawyers out of conscientious employees but rather to prevent retaliation against those employees who object to employer conduct that they reasonably believe to be unlawful or indisputably dangerous to the public health." Ibid. (internal quotations omitted).

Additionally, "the trial court must make a threshold determination that there is a substantial nexus between the complained-of conduct and a law or public policy

identified by the court or the plaintiff." Dzwonar, 177 N.J. at 464. If the trial court finds a substantial nexus, at trial the jury must then determine whether the plaintiff actually held such a belief and, if so, whether that belief was objectively reasonable. Id. at 464.

Plaintiff here had an objectively reasonable belief that the following criminal laws were being violated. Through his performance of his duties as a Police Captain during the police response on the night of July 5, 2016, Plaintiff objected to a violation of these laws: N.J.S.A. 2C:33-2 (disorderly conduct); N.J.S.A. 2C:12-1 (assault); and N.J.S.A. 2C:33-4 (harassment). Further, as outlined more extensively *infra*, Plaintiff, by enforcing the law, refused to participate in a dereliction of his duties, which he reasonably believed would be in violation of N.J.S.A. 2C:30-2, our State's criminal official misconduct statute, the reach of which has been broadly interpreted by our Courts, particularly in the law enforcement context.

Defendants illogically and without any legitimate basis retaliated against Plaintiff for not refraining from performing his duties and not sitting back and allowing an unruly and lawless crowd engaging in criminal activity to run amok. Plaintiff instead directed the police response on July 5, 2016 and sought to enforce the law. Defendants, specifically the individual members of the Township Committee, in bowing to political and media pressure and without any legal authority to do so, in August 2017 unjustifiably suspended Plaintiff from his duties

as well as falsely and publicly labeled him as a racist cop who engaged in or permitted acts of excessive force to be committed against a supposed innocent group of minority youths. The facts in the record, including Defendants' own admissions in deposition testimony, establish that the opposite actually occurred.

Specifically, Defendants' testimony establishes that on the night of July 5, 2016: [a] the crowd, who were engaging in physical altercations, failed to disperse and became unruly, highly irate and combative with police officers in failing to follow their directives which were designed to re-establish order; & [b] multiple members of the crowd spit on, shouted profanities at, and assaulted multiple police officers on scene. Further, even Defendant Lembrich, in his deposition testimony, agreed that police intervention was required on July 5, 2016 and the police response was appropriate, including the "appropriate" use of OC spray as a proper exercise of "non-lethal force".

This reality is in direct conflict with Defendants' subsequent public grandstanding in August 2017 whereby Lembrich, McGehee, DeLuca, and their fellow Committee members suspended and sought to terminate Plaintiff while fraudulently branding him as a racist by way of overt allegations of racial profiling and bias. As Defendants admit in their deposition testimony, Plaintiff engaged in no misconduct or failure to act, and there was not even an allegation that Captain

Cummis did anything wrong on July 5, 2016, as confirmed by the Prosecutor's Office investigation and findings.

Plaintiff cited below the Court's opinion in City of San Antonio v. Heim, 932 S.W. 2d 287 (Court of Appeals of Texas 1996) (954a). In Heim, the Court ruled that a police department's retaliation against a police officer for arresting an off-duty officer for driving while intoxicated ("DWI") fell within the protections afforded under Texas' whistleblower statute. Id. at 290-91. Specifically, the Court cited "an unwritten practice in the Department of not arresting fellow officers or their family members – a practice of professional courtesy". Id. at 289.[1] The plaintiff's activity in Heim made him unpopular amongst his fellow officers, as evidenced by the retaliatory conduct against the plaintiff by those officers, including "hang up" phone calls to his home, his belongings being stolen, his car being towed from his workplace, officers refusing to sit next to the plaintiff, and, most seriously, officers refusing to back-up the plaintiff on calls, thus endangering the plaintiff's personal safety as well as public safety. Id. at 292.

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[1] As argued herein, CEPA does not require a pre-existing policy or practice of violating the law in order for a single violation to be the subject of *bona fide* whistleblowing activity protected under the statute. Selective enforcement of DWI is unlawful in New Jersey whether it occurs once or multiple times within a police department, and an officer who gives a "professional courtesy" to a drunk driver and fails to enforce the law would be subject to criminal prosecution under our State's Official Misconduct statute, regardless of whether such a past practice or unwritten policy existed in that officer's department or not.

Here, Plaintiff suffered more significant adverse employment action. Specifically, Defendants, with retaliatory intent, suspended Plaintiff from his duties as well as publicly and falsely branded him as a racist law enforcement officer who either engages in excessive use of force against minorities, or allows such illegal behavior to occur, even though Defendants acknowledge that: [a] the Essex County Prosecutor's Office after an investigation found no sufficient evidence that Plaintiff engaged in such conduct; & [b] there was no allegation from anyone that Captain Cummis specifically engaged in such conduct. Nonetheless, Defendants ensnared Plaintiff in a political and media-driven witch-hunt that resulted in him being suspended from his duties as a Police Captain under a cloud of scurrilous allegations against him that had no basis in fact, merely because Plaintiff was doing his job as a sworn law enforcement officer.

Thus, Heim is on point and supports Plaintiff's argument that his whistle-blowing activity, and Defendants' acts of retaliation against him, fall under the protections afforded to him under CEPA. We respectfully submit that the Appellate Division or Supreme Court here in New Jersey, a far more progressive jurisdiction than Texas, interpreting our whistleblower statute, CEPA, has similarly found that such activity is protected. See Maimone, 188 N.J. at 230 (the requirement of Plaintiff to make a prima facie case "must be liberally construed to effectuate CEPA's important social goals").

New Jersey has a very broad, wide-ranging official misconduct statute. N.J.S.A. 2C:30-2a imposes second-degree and third-degree felonies against public servants who commit an act relating to his or her office but constituting an unauthorized exercise of his or her official functions, knowing that such act is unauthorized or he or she is committing such act in an unauthorized manner. Further, the statute creates criminal liability for public servants who knowingly refrain from performing a duty that is imposed upon him or her by law or is clearly inherent in the nature of his or her office. N.J.S.A. 2C:30-2b. See State v. Gleitsmann, 62 N.J. Super. 15 (App. Div.), certif. denied, 33 N.J. 386 (1960) (sufficient evidence of official misconduct where captain of detectives improperly used municipal telephone and police car in effort to intercede on behalf of defendant charged with a traffic violation in another state).

Police officers are held to a higher standard than other public employees. There is an "implicit standard of good behavior which devolves upon one who stands in the public eye as the upholder of that which is morally and legally correct." See Asbury Park v. Department of Civil Serv., 17 N.J. 419, 429 (1955); In re Tuch, 159 N.J. Super. 219, 224 (App. Div. 1978). The obligation to act ethically is especially compelling in a case involving a law enforcement official:

> A police officer is a special kind of public employee. His primary duty is to enforce and uphold the law. He carries a service revolver on his person and is constantly called upon to exercise tact, restraint and good judgment in his relationship with the public. He represents law and

> order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public.... Township of Moorestown v. Armstrong, 89 N.J.Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80(1966); In re Phillips, 117 N.J. 567, 576-77 (1990).

A finding of misconduct by a police official need not be predicated on the violation of any particular department rule or regulation. In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960).

By suspending Plaintiff and falsely labeling him as a racist cop, Defendants engaged in retaliation in violation of CEPA because of Plaintiff's performance of his job duties as a Police Captain and his refusal to look the other way at illegal conduct. Those criminal acts by the unruly crowd on the night of July 5, 2016 included acts of assault, including those committed upon police officers, and disorderly conduct. Plaintiff refused to refrain from performing his law enforcement duties, as that would have been a violation of the official misconduct statute cited *supra*. Specifically, our State's broad-ranging official misconduct statute makes it a second-degree crime for a law enforcement officer "to knowingly refrain from performing a duty which is imposed upon him or her by law or is clearly inherent in the nature of his or her office". See N.J.S.A. 2C:30-2b.

Notwithstanding the Trial Court's incorrect analysis below, an act of official misconduct is unlawful, regardless of whether it occurs a single time or is pursuant to a policy or common practice in a particular law enforcement agency. A single act

of official misconduct is both prosecutable under our criminal law and gives rise to illegal activity about which a sworn law enforcement officer may blow the whistle under CEPA and in turn be protected from illegal retaliation by his or her employer.

With respect to a claim under N.J.S.A. 34:19-3c, "the determination of whether the plaintiff adequately has established the existence of a clear mandate of public policy is an issue of law." Mehlman, 153 N.J. at 187. "The recognized sources of public policy within the ambit of subsection [c][3] includes state laws, rules and regulations." Turner, 396 N.J. Super. at 593. Our Supreme Court in Maimone reasoned as follows:

> it is easier for an employee who proceeds under [subsection] [c][3] to prove that he or she reasonably believed the employer's conduct was 'incompatible' with a clear mandate of public policy expressed in a law, rule or regulation than to show, as required by [subsection][c][1], a reasonable belief that the employer's conduct 'violated' a law, rule or regulation. 188 N.J. at 231.

The Court in Mehlman stated with respect to the "clear mandate of public policy" requirement as follows:

> Public policy has been defined as that principal of law which holds that no person can lawfully do that which has a tendency to be injurious to the public or against the public good. The term admits of no exact definition ... Public policy is not concerned with minutiae, but with principles. 153 N.J. at 187 (internal quotations omitted).

Subsection [c][3] requires an additional showing that "the complained of activity must have public ramifications, and that the dispute between employer and employee

must be more than a private disagreement." Maw v. Advanced Clinical Commc'ns, Inc., 179 N.J. 439, 445 (2004).

In Maimone, a police officer was demoted from detective to patrol officer for voicing his concern, in a memorandum, that the police department was no longer enforcing certain laws prohibiting prostitution. 188 N.J. at 225-29, 232. The Court stated that the laws that prohibit prostitution constitute "a clear mandate of public policy concerning the public, health, safety or welfare." Id. at 232. Here, Plaintiff's performance of law enforcement duties on the night of July 5, 2016 involved concerns that he had regarding the public health, safety and welfare of the public. Here, as was the case in Maimone where the plaintiff objected to the cessation of all investigations and enforcement of laws prohibiting prostitution and restricting the location of sexually-oriented businesses, "a trier of fact could find that plaintiff had an objectively reasonable belief that defendants made a policy decision that was incompatible with a clear mandate of public policy concerning the public health, safety and welfare". 188 N.J. at 235.

Even Committee Member Lembrich admitted in his deposition that in the aftermath of the July 4th fireworks in Maplewood in 2016, he and his fellow Committee members discussed the public safety issues associated with that event, in the context of the July 5, 2016 incident in which a group of young people engaged in violations of criminal statutes, including assault and disorderly conduct. By way

of his refusing to allow that to go without the appropriate police response, Plaintiff, in seeking to enforce the law, engaged in activity protected under CEPA.

In Lippman v. Ethicon, Inc., 222 N.J. 362, 388 (2015), our Supreme Court rejected a defendant-employer's contention that the protections afforded by CEPA do not apply to certain employees based upon their job functions and duties. Specifically, the Court held that "we find no support in CEPA's language, construction or application in this Court's case law that supports that watchdog employees are stripped of whistleblower protection as a result of their position or because they are performing their regular job duties". Id. at 387. The Court also specifically rejected any 'exhaustion of remedies' requirement as not supported by CEPA's statutory language and held that "CEPA imposes no additional requirements on watchdog employees bringing a CEPA claim". Id. at 388.

In interpreting the specific language of N.J.S.A. 34:19-3, which requires that a plaintiff proceeding under subsection [c] have "objected to" or "refused to participate in" what the plaintiff reasonably believes to be illegal conduct, our Supreme Court in Lippman reasoned that: [1] there is no language in subsection [c] "that hints that an employee's job duties affect whether he or she may bring a CEPA action; & [2] the statutory language "**implies that CEPA-protected conduct can occur within the course of an employee's normal job duties**". Id. at 383-84. (emphasis added).

Simply stated, if there is a current trend regarding the judicial interpretation of CEPA it is for the broad application of the statute, as opposed to some hyper-technical parsing of who is a whistleblower beyond what is present in the text of the statute. See Lippman, 222 N.J. at 387. New Jersey Courts have held that "CEPA does not require any magic words in communicating an employee's reasonable belief of illegal activity." Beasley v. Passaic Cty., 377 N.J. Super. 585, 605 (App. Div. 2005).

Plaintiff here is properly afforded a remedy under CEPA and the case law interpreting the statute, including our Supreme Court's decisions in Lippman and Maimone, *supra*. The Trial Court incorrectly imposed an unworkable and newly-created burden upon a plaintiff in order to establish employer liability under CEPA, akin to that which is required in a civil rights claim under §1983 or under the New Jersey Civil Rights Act, N.J.S.A. 10:6-1 *et seq*., pursuant to Monell v. Dept. of Social Services, 436 U.S. 658 (1978). In such cases, liability to a public entity may attach where the challenged action was "taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the city's business." See City of St. Louis v. Praprotnik, 485 U.S. 112, 123 (1988).

In contrast, no such requirement exists under CEPA. Under the Trial Court's logic, a police officer could: [a] discover that his Chief of Police was committing official misconduct by, for example, "stealing time" and seeking compensation for

hours that the Chief in fact did not work, or fixing tickets or terminating DWI prosecutions of the Chief's friends or family members, or other public officials, and [b] so long as the Chief never previously announced the intent to engage in that illegal conduct or stated that it was an established policy or practice to do so, [c] that police officer would have no remedy under CEPA if he objected to or refused to participate in that misconduct and was retaliated against by his employer by way of a suspension, demotion, termination, or some other adverse employment action. Such a scenario is directly at odds with the purpose of the CEPA statute, its case law cited *supra*, and the high standard by which members of law enforcement are bound, per our State Official Misconduct statute and its broad application by our Courts.

For the foregoing reasons, Plaintiff has established for the purposes of summary judgment inferences that would allow a reasonable jury to conclude that Plaintiff satisfies the "reasonable belief" and "whistle-blowing" *prima facie* elements of his CEPA claim. Thus, the Trial Court improperly granted summary judgment below and this Court should reverse that ruling upon its *de novo* review.

D. There is evidence in the record to support that Plaintiff suffered adverse employment action. *(1T; 12a-27a)*

Retaliatory action is defined by the CEPA statute as "discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment." N.J.S.A. 34:19-2(e). Further, the statute provides that if a CEPA plaintiff prevails at trial he or she is entitled to

"[a]ll remedies available in common law tort actions." See N.J.S.A. 34:19-5. Finally, "[t]he statute further provides that '[t]he court shall also order, where appropriate and to the fullest extent possible[,] ... compensation for all lost wages, benefits and other remuneration.'" Donelson v. DuPont Chambers Works, 206 N.J. 243, 258 (2011), quoting N.J.S.A. 34:19-5.

Retaliation is not "limited to a single discrete action, but may include 'many separate but relatively minor instances of behavior directed against an employee ... that combine to make up a pattern of retaliatory conduct.'" Donelson v. DuPont Chambers Works, 412 N.J. Super. 17, 29 (App. Div. 2010), quoting Green v. Jersey City Bd. Of Ed., 177 N.J. 434, 448 (2003). Our Supreme Court outlines a broad interpretation of what constitutes an adverse employment action under CEPA in Maimone, as follows:

> [A]ny reduction in an employee's compensation is considered to be an 'adverse ... action ... in the terms and conditions of employment. *See* Beasley v. Passaic County, 377 N.J. Super. 585, 608 (App. Div. 2005). Moreover, **even without any reduction in compensation**, a withdrawal of benefits formerly provided to an employee may be found in some circumstances to constitute an adverse employment action. 188 N.J. at 236 (emphasis added) (other citations omitted).

Since Maimone, our Supreme Court has consistently rejected a restrictive analysis of what constitutes retaliation under CEPA. The Court once again adopted a broad-based approach due to the significant policy implications of the statute. In Donelson, our Supreme Court declared as follows:

> What constitutes an 'adverse employment action' must be viewed in light of the broad remedial purpose of CEPA, and our charge to **liberally construe the statute** to deter workplace reprisals against an employee speaking out against a company's illicit or unethical activities. 206 N.J. at 257-58, citing N.J.S.A. 34:19-2e (emphasis added).

Our Supreme Court in Donelson went on to identify the following as a non-exclusive list of potential adverse employment actions: targeting an employee for reprisals; **making false accusations of misconduct**; giving negative performance reviews; issuing an unwarranted suspension; and requiring pre-textual mental health evaluations. Ibid.

Here, Plaintiff suffered adverse employment action because of his activity protected under CEPA. Township Administrator Manning admits that Defendants' removal of Plaintiff from his duties in August 2017 was in fact a suspension. Defendants stripped Plaintiff of his duties, denied him access to police headquarters, and took away his Police Captain badge, gun, identification and uniforms. Township Committee member Lembrich admitted in his deposition that Plaintiff was not granted a hearing or opportunity to be heard, nor did Defendants conduct any investigation prior to summarily and illegally relieving Plaintiff of his duties.

Further, the Members of the Township Committee admittedly would have actively sought to terminate Plaintiff's employment had he not retired on September 1, 2017. Defendants' actions against Plaintiff were borne from false allegations of misconduct and racism, which Defendants' own witnesses admit were without any

legitimate basis and were the subject of no specific allegations by anyone against Plaintiff.

Under our Supreme Court's decision in Donelson, *supra*, those false accusations against Plaintiff alone constitute actionable adverse employment action under CEPA. Notably, in recognition of the lack of legal or factual basis for Defendants' removal of Plaintiff, during her deposition in February 2021 Committee member Adams went so far as to feign amnesia as to who suspended Plaintiff or the reasons for it. Adams also testified that she "[didn't] really know" if she believed that action was proper, notwithstanding her vote in favor of it in August 2017.

Further, as Defendants also admit, the members of the Township Committee sought to inject themselves into the internal affairs and disciplinary process in publicly suspending Plaintiff and openly discussing the termination of his employment at a public meeting, in the context of allegations of racial profiling and racial bias, notwithstanding that there were no such credible allegations against Plaintiff.

Defendants' own witnesses acknowledge that they had no authority to seek to discipline Plaintiff and had never before sought to become involved in police internal affairs and disciplinary matters in Maplewood. Further, Defendants admit that they were bound by the County Prosecutor's findings that there was insufficient evidence to proceed against Plaintiff either criminally or administratively.

Defendants illegally removed Plaintiff from his position as Police Captain in violation of N.J.S.A. 40A:14-147, which provides as follows:

> Except as otherwise provided by law, **no permanent member or officer of the police department or force shall be removed from his office, employment or position** for political reasons or for any cause other than incapacity, misconduct, or disobedience of rules and regulations established for the government of the police department and force, nor shall such member or officer be suspended, removed, fined or reduced in rank from or in office, employment, or position therein, **except for just cause as hereinbefore provided and then only upon a written complaint setting forth the charge or charges against such member or officer**. The complaint shall be filed in the office of the body, officer or officers having charge of the department or force wherein the complaint is made and a copy shall be served upon the member or officer so charged, **with notice of a designated hearing thereon by the proper authorities**, which shall be not less than 10 nor more than 30 days from date of service of the complaint. (emphasis added).

Here, it is undisputed that Defendants illegally suspended, and vowed to actively seek to terminate, Plaintiff from his position as Police Captain in violation of the statute which provides very specific due process protections to members of law enforcement. These protections include removal only for "just cause", a written complaint as contained in a notice of charges issued only after a finding pursuant to an appropriate internal affairs investigation that the allegations were sustained, and the requirement that a hearing take place within 10-30 days of the complaint. Defendants illegally removed Plaintiff without charges, without just cause, and without a notice of a hearing from the Township's Police Department through the

Chief of Police, as is statutorily required. See N.J.S.A. 40A:14-147 & N.J.S.A. 40A:14-118 (establishing chief of police as head of a police department "directly responsible" for, *inter alia*, enforcement of rules and regulations and discipline of the department's members).

In addition to the above, Plaintiff was terminated from his subsequent employment at the Morristown Beard School as a direct result of Defendants' illegal actions herein. Thus, Plaintiff suffered adverse employment action and satisfies that *prima facie* element of his CEPA claim.

E. There are genuine issues of material fact that a jury must consider regarding the fourth prong of CEPA, causation; the record establishes inferences of pretext sufficient to submit the ultimate issue of retaliation to a jury. *(1T; 12a-27a)*

Defendants' retaliatory motive, more specifically, whether Plaintiff's whistle-blowing activity was a motivating factor for Defendants' adverse employment actions against him, is an issue for a jury. Causation is a highly context specific inquiry into the motives of an employer. Kachmar v. Sungard Data Systems, Inc., 109 F. 3d 173, 178 (3d Cir. 1997). "A Plaintiff may rely upon a broad array of evidence to illustrate a causal link." Abramson v. William Paterson College of New Jersey, 260 F. 3d 265, 289 (3d Cir. 2001). Typically, in an employment matter alleging retaliation, "the plaintiff must proffer circumstantial evidence sufficient to raise the inference that the plaintiff's protected activity was the likely reason for the

adverse employment action." Rodriguez v. Torres, 60 F. Supp. 2d 334, 339-40 (D.N.J. 1999).

"What makes an employer's personnel action unlawful discrimination [or retaliation] is the employer's intent." Zive, 182 N.J. at 446. The New Jersey Supreme Court noted the difficulty proving discriminatory and retaliatory intent:

> Employment discrimination cases thus suffer from the difficulty that inheres in all state-of-mind cases – the difficulty of proving discriminatory intent through direct evidence, which is often unavailable. 'All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult ... There will seldom be eyewitness testimony as to the employer's mental processes.' Id. at 446.

"Our legal scheme against discrimination would be little more than a toothless tiger if the courts were to require such direct evidence of discrimination [or retaliation]." Id. at 447. "Even an employer who knowingly discriminates [or retaliates] on the basis of [protected status or activity] may leave no written records revealing the forbidden motive and may communicate it orally to no one." Ibid.

When analyzing discrimination and retaliation cases for intent, Courts have adopted the analytical framework outlined by the United States Supreme Court in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973); Zive, 182 N.J. at 447. Under that framework, first, a plaintiff must fulfill the "rather modest" burden of establishing a *prima facie* case and merely demonstrating that the plaintiff's factual scenario is indicative of retaliatory intent. Ibid. Once a plaintiff has

established a *prima facie* case, the employer-defendant is then required to articulate a legitimate, non-retaliatory rationale for its conduct. Clowes v. Terminix Int'l Inc., 109 N.J. 575, 596 (1988).

Plaintiff is then given the opportunity to demonstrate that a retaliatory intent motivated Defendants' actions and not the legitimate reason offered by Defendants. Romano v. Brown & Williamson Tobacco Corp., 284 N.J. Super. 543, 551 (App. Div. 1995). Plaintiff must simply persuade the Court that the evidence presented provides a reasonable basis for a juror to believe that Defendants' articulated reasons "w[ere] merely a pretext to mask the [retaliation] or was not the true motivating reason for the employment decision." Greenberg v. Camden County Vocational & Tech. Schools, 310 N.J. Super. 189, 198 (App. Div. 1998).

Courts have recognized that a Plaintiff can meet this burden in two (2) ways: (1) indirectly, by showing that the employer's explanation for the employment decision is unworthy of credence, or (2) directly, by showing that a retaliatory rationale more likely provided the motivation for the employment decisions. Greenberg, 310 N.J. Super. at 199-200; Kelly v. Bally's Grand, Inc., 285 N.J. Super. 422, 431 (App. Div. 1995). Courts review a plaintiff's evidence rebutting the employer's proffered reason to determine if such evidence allows a reasonable inference by a fact-finder that the employer's proffered reason "was either a *post hoc* fabrication or otherwise did not actually motivate the employment decision."

Greenberg, 310 N.J. Super. 189, 200, quoting Fuentes v. Perskie, 32 F. 3d 759, 764-65 (3d Cir. 1994). In short, a "plaintiff must 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'." Fuentes, 32 F. 3d at 765.

Additionally, Courts have held that in determining whether a plaintiff has raised an inference of retaliation, a trial court may consider inconsistencies contained in the testimony of an employer's witnesses regarding the employer's explanation for its adverse employment action. EEOC v. L.B. Foster Co., 123 F.3d 746, 753 (3d Cir. 1997), *cert. denied* 522 U.S. 1147 (1998). The record sufficiently establishes such inconsistencies, including Adams' improper attempt during her deposition to disentangle herself from the decision to suspend Plaintiff, and the Township Administrator's proper designation of that action as a suspension and not as it was improperly characterized by Defendants as 'administrative leave'.

Yet, the burden-shifting approach is unnecessary where a plaintiff has direct evidence of retaliatory intent. Zive, 182 N.J. at 446-47. If a plaintiff produces such "smoking gun" evidence, there is no need for the court to construct a chain of inferences through circumstantial evidence. Ibid.

This is the rare case where Plaintiff has alleged direct evidence that the defendant-employer "placed substantial reliance on a proscribed factor in making its decision" to engage in adverse actions. See Smith v. Millville Rescue Squad, 225 N.J. 373, 394 (2016). Here, Defendants suspended Plaintiff and falsely branded him as a racist as a direct result of his enforcing the law on July 5, 2016 and his refusal to refrain from his sworn duty to do so.

The record is sufficiently demonstrative of Defendants' retaliatory intent, including Mayor DeLuca's comments in August 2017 at public Township Committee meetings that Defendants sought to ensure Plaintiff never returned to work, in the context of discussing non-existent allegations of racial profiling against Plaintiff. Other members of the Committee, including Lembrich and Adams and their political ally who was also running for election to the Committee in 2017, crafted a statement to local media.

Lembrich characterized the issues related to the July 5, 2016 incident as "the big sword hanging over our heads", and DeLuca admittedly was concerned about "backlash from the community", the public, and media pressure. Further, Lembrich testified that he "didn't recall there being specific allegations against Captain Cummis from the public. Just that there were demands, you know, from the public that we take action against Maplewood Police Department leadership". Nonetheless, Defendants removed Plaintiff from his position as Police Captain in order to appease

the uninformed views of the public, thereby advancing the scurrilous allegation that Plaintiff was a racist cop while the facts confirm he was anything but, as Defendants admit.

Additionally, Township Committee member McGehee made racially charged comments at the August 1, 2017 public meeting where the vote occurred to suspend Plaintiff, including his falsely suggesting that "black children" were "herded out of town", an allegation directly contradicted by Defendants' own witnesses. DeLuca similarly stated in public comments that that the Committee members "were appalled by the excessive force used by police officers against a group of young people", notwithstanding that: [a] there was no factual basis for any allegation against Plaintiff that he either used or witnessed excessive use of force and did nothing; & [b] the Prosecutor's Office made no finding of excessive force being used by the officers on the night of July 5, 2016.

Further, Defendants' theorize that Plaintiff suffered no retaliatory adverse employment action because at the time he retired he was already employed at the Morristown Beard School ("MBS"). However, there is sufficient evidence in the record that Plaintiff's employment at MBS was terminated as a direct result of the unsupported allegations of racism against Plaintiff by the Maplewood Defendants arising from the July 5, 2106 police response to the unruly and disorderly crowd after the fireworks display. Specifically, MBS Headmaster Caldwell testified that

MBS's decision to terminate Plaintiff " … was based on the news article in which … there was some complaint by the Town of Maplewood ... " about Plaintiff's " … behavior, potentially allegedly racist behavior in this incident of July 4th ... ". Plaintiff's damages in this matter thus properly encompass those suffered as a result of the loss of his subsequent employment at MBS. See Roa v. Roa, 200 N.J. 555 (2010) (holding that in the context of an LAD claim a post-termination act of retaliation such as loss of health insurance is actionable regardless of whether it relates to present or future employment).

Additionally, one way a plaintiff may demonstrate causation is by citing to the temporal proximity between an employee's [adverse employment action] and his or her protected activity. Schlichtig v. Inacom Corp., 271 F. Supp. 2d 597, 612 (D.N.J. 2003). However, Plaintiff does not need to rely upon temporal proximity as a means of demonstrating causation for his CEPA retaliation claim. "It is important to emphasize that it is causation, not temporal proximity itself, that is an element of plaintiff's *prima facie* case, and temporal proximity merely provides an evidentiary basis from which an inference can be drawn." Kachmar, 109 F. 3d at 178. Stated differently, there is no requirement in the law for retaliation to occur in close proximity to the protected activity. Romano, 284 N.J. Super. at 550-51. While close temporal proximity may support a claim of causation, "the absence of temporal

proximity would not necessarily disprove the causal connection." McCullough v. City of Atlantic City, 137 F. Supp. 2d 557, 573 (D.N.J. 2001).

For instance, in Romano, the plaintiff engaged in conduct protected by the LAD at least *ten years* before his termination. 284 N.J. Super. at 549. Despite this gap, the Court held that a reasonable jury could find that the plaintiff's termination was related to his LAD complaint. Id. at 550. In reaching its holding, the Court cautioned against a mechanical analysis of retaliation by merely focusing on the passage of time as it may create a safe harbor for patient employers who seek to retaliate against their employees. Ibid. Specifically, the Court stated, "[w]e doubt that a sophisticated employer, such as defendant, would immediately retaliate." Ibid.

Likewise, in Reilly v. City of Atlantic City, a CEPA case, the Court held that there was sufficient evidence of causation to defeat the defendants' summary judgment motion even though there was a ten-year gap between the whistle-blowing activity and the adverse employment action. 427 F. Supp. 2d 507, 524 (D.N.J. 2006), aff'd in part, rev'd in part on other grds., 532 F. 3d 216 (3d Cir. 2008). Although the defendants argued a lack of temporal proximity prohibited a finding of causation, the Court reasoned that there was circumstantial evidence of causation where the employer's proffered reasons for their disciplinary recommendations were unworthy of credence. Reilly, 427 F. Supp. 2d at 524.

Plaintiff engaged in statutorily protected activity in July 2016 and was retaliated against commencing in August 2017, immediately upon there being a public outcry about the police response to the July 5, 2016 incident, an issue that Administrator Manning conceded was of concern to "the politicians". Thus, under the facts established in the record, in addition to the direct evidence outlined *supra*, temporal proximity is also indicative of Defendants' retaliatory intent.

Here, Plaintiff has, at the very least, demonstrated *"some* evidence, either direct or circumstantial, from which a reasonable fact-finder could conclude that defendants' proffered reasons were 'either a *post hoc* fabrication or otherwise did not actually motivate the employment action (that is, the proffered reason is a pretext),'" as is required to defeat a defendant-employer's motion for summary judgment. Kolb, 320 N.J. Super. at 480, quoting Fuentes, 32 F. 3d at 764. Thus, the grant of summary judgment below as to Plaintiff's CEPA was in error and should be reversed.

CONCLUSION

For the foregoing reasons, this Court should reverse the grant of summary judgment below and remand this matter for trial as to Plaintiff's CEPA claim.

Respectfully submitted,
Sciarra & Catrambone, LLC
Attorneys for Plaintiff-Appellant
By: /s/ Jeffrey D. Catrambone #024491996

Dated: August 17, 2023

Superior Court of New Jersey

Appellate Division

Docket No. A-3036-22

JOSHUA CUMMIS, *Plaintiff-Appellant,* vs. TOWNSHIP OF MAPLEWOOD & ALL MEMBERS OF THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MAPLEWOOD, individually and in their official capacities, VICTOR DELUCA, NANCY J. ADAMS, INDIA LARRIER, FRANK MCGEHEE and GREGORY LEMBRICH, *Defendants-Respondents.*	:	CIVIL ACTION ON APPEAL FROM AN ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, ESSEX COUNTY DOCKET NO. ESX-L-6341-17 Sat Below: HON. KEITH E. LYNOTT, J.S.C.

BRIEF FOR DEFENDANTS-RESPONDENTS

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PRELIMINARY STATEMENT

The sole issue in this case is whether the Trial Court erred in granting Defendants' motion for summary judgment on the grounds that Plaintiff had not and could not establish a *prima facie* case under the New Jersey Conscientious Employee Protection Act ("CEPA").

Plaintiff-Appellant, Joshua Cummis, ("Plaintiff") was employed as a captain in the Police Department of Defendant-Respondent Township of Maplewood ("Defendant" or the "Township"). Following the Township's fireworks display on the night of July 5, 2016, a crowd consisting of mostly juveniles became unruly, and the police were called.

Plaintiff's sole basis for his CEPA claim is that he performed his duties as a police officer on the night of July 5, 2016 in responding to alleged criminal conduct by juveniles and that he made radio transmissions in conjunction with these duties.

Significantly, there is no dispute that the laws being enforced on the night of July 5, 2016 were not being violated by Defendants. Nor did Plaintiff have a reasonable belief that Defendants had violated any law, rule or clear mandate of public policy.

Indeed, when asked what he contended Defendants did improperly in this case, Plaintiff stated, "Nothing that I'm aware of." Plaintiff also testified that

he did not make any radio transmissions in order to correct any conduct by Defendants that was allegedly illegal or improper. Nor was there any evidence that Defendants had said or done anything allegedly improper or contrary to law or public policy on or before July 5, 2016.

In short, the record below is devoid of any evidence whatsoever that Plaintiff reasonably believed that Defendants violated any law, rule or clear mandate of public policy, or that Plaintiff allegedly reported, complained about or refused to participate in any such allegedly improper conduct.

In a well-reasoned decision, which painstakingly evaluated all of the evidence in a light most favorable to Plaintiff, the Trial Court correctly applied the law to the undisputed facts and concluded that Plaintiff had failed to establish a *prima facie* case under CEPA as a matter of law. For the reasons set forth below, Defendants maintain that the Trial Court's decision should stand.

PROCEDURAL HISTORY

After being placed on administrative leave on August 1, 2017, Plaintiff filed an Order to Show Cause to Proceed Summarily Pursuant to R.67-1 and R.69-1, seeking a summary hearing to void his administrative leave. (Pa59 at ¶13). The Court denied Plaintiff's Order to Show Cause on September 29, 2017. (Pa59 at ¶14). Thereafter, Plaintiff filed the Amended Complaint in this matter on February 8, 2018, alleging that he was retaliated against for exercising his right to Freedom of Speech in violation of the New Jersey Civil Rights Act ("NJCRA") and in violation of the Conscientious Employee Protection Act. (Pa63 to Pa77). On September 30, 2022, following the close of discovery, Defendants filed a motion for summary judgment. (Pa30 to Pa31). In response to Defendants' motion for summary judgment, Plaintiff voluntarily withdrew his freedom of speech claim. (Pa19 at n.1).

The Court held oral argument as to the Motion for Summary Judgment on December 12, 2022. (1T)[1]. By Order dated May 22, 2023, the Trial Court granted Defendants' motion for summary judgment and dismissed Plaintiff's First Amended Complaint in its entirety with prejudice. (Pa12 to Pa13).

On May 22, 2023, Plaintiff filed a Notice of Appeal and Case Information Statement. (Pa1 to Pa11).

[1] Plaintiff identified the transcript as "1T."

STATEMENT OF FACTS

Plaintiff-Appellant Joshua Cummis ("Plaintiff") was employed as a police captain by Defendant-Respondent the Township of Maplewood ("Defendant" or the "Township"). (Pa66 at ¶13).

On July 5, 2016, following the Township's July 4th celebration and fireworks display, the police were called to disperse a crowd which had become unruly/disruptive. (Pa81 at T20-24 to 21-7). During this incident/event, Plaintiff made radio transmissions in conjunction with his duties as a police officer. (Pa107 at T18-11 to 18-20). In these radio transmissions, Plaintiff claims to have said, "maintain the border" and "asked for mutual aid". (Pa107 to Pa108 at T18-23 to 19-3). Plaintiff further "advised dispatch a direction that the group of juveniles were [sic] heading." (Id.).

The Essex County Prosecutor's Office investigated the conduct of a number of Maplewood police officers involved in dispersing the crowd on July 5, 2016, including Plaintiff and the Chief of Police. (Pa195). On March 30, 2017, Plaintiff received a letter from the Essex County Prosecutor's Office advising that it had concluded that there was insufficient evidence to warrant criminal or administrative action against him. (Pa197).

In 2017, Plaintiff had applied to retire from the Maplewood Police Department. Plaintiff testified that the reason he retired was the fact that he had

accepted a security position at a private school, the Morristown Beard School, which was to begin in the fall of 2017. (Pa153 to Pa154 at T64-25 to 65-14; Pa199).

On June 27, 2017, the State of New Jersey issued a letter accepting his application for retirement to be effective on September 1, 2017. (Pa199).

At the August 1, 2017 Township Committee meeting, the Township Committee passed a resolution placing Plaintiff on administrative leave through August 31, 2017, pending his retirement on September 1, 2017. (Pa205).

On or about August 23, 2017, while still on administrative leave, and prior to his official retirement from the Maplewood Police Department on September 1, 2017, Plaintiff began working for the Morristown Beard School. (Pa158 to Pa159 at T69-14 to 70-6). Thereafter, Plaintiff retired as planned effective September 1, 2017. (Pa148 at T59-3 to 59–9).

Plaintiff filed an Order to Show Cause to Proceed Summarily Pursuant to R.67-1 and R.69-1, seeking a summary hearing to void his administrative leave. (Pa59 at ¶13). On September 29, 2017, the Court denied Plaintiff's Order to Show Cause, and on February 8, 2018, Plaintiff filed an Amended Complaint, alleging that he was retaliated against in violation of the Conscientious Employee Protection Act and for exercising his right to Freedom of Speech in violation of the New Jersey Civil Rights Act ("NJCRA"). (Pa59 at ¶14 and Pa63

to Pa77). In response to Defendants' motion for summary judgment, Plaintiff voluntarily withdrew his freedom of speech claim. (Pa19 at n.1).

During discovery, Plaintiff testified that he did not contend that Defendants had done anything wrong on or before the night of July 5, 2016. (Pa110 at T21-8 to 12). In particular, when asked what he contended Defendants did improperly in this case, Plaintiff stated, "Nothing that I'm aware of." (Id.). Plaintiff further testified that he did not issue the radio transmissions in order to correct any conduct by Defendants that was allegedly illegal or improper. (Pa109 at T20-7 to 10). Nor was there any evidence that Defendants had said or done anything allegedly improper or contrary to law or public policy on or before July 5, 2016.

Plaintiff testified that his claimed protected conduct under CEPA was the above-described radio transmissions related to dispersing the crowd. (Pa107 at T18-5 to 22). However, Plaintiff further testified that he did not issue the radio transmissions in order to correct any conduct by Defendants that was allegedly illegal or improper. (Pa109 at T20-7 to 10).

In response to Defendants' motion for summary judgment, Plaintiff also alleged that various criminal statutes were being violated by juveniles attending the Fourth of July festivities and that the performance of his duties as a police

officer regarding those alleged crimes constituted protected conduct under CEPA. (Pa23 to Pa24).

On May 22, 2023, the Trial Court issued an Order and decision granting Defendants' motion for summary judgment as to Plaintiff's CEPA claim. (Pa12 to Pa27). In so doing, the Court held that, viewing the record in a light most favorable to Plaintiff, a reasonable trier of fact could not find that Plaintiff had a reasonable belief that Defendants had violated either a law, rule, regulation, or clear mandate of public policy. (Pa20 to Pa24). Likewise, no rational trier of fact could find that Plaintiff objected to any such wrongdoing, or that such objection was the basis for alleged retaliatory action by Defendants. (Pa24 to Pa27).

LEGAL ARGUMENT

THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS AS TO PLAINTIFF'S CLAIM UNDER THE NEW JERSEY CONSCIENTIOUS EMPLOYEE PROTECTION ACT AS NO RATIONAL TRIER OF THE FACTS COULD OR WOULD CONCLUDE PLAINTIFF ENGAGED IN ANY PROTECTED CONDUCT UNDER THE ACT (PA23 TO PA27)

In order to establish a *prima facie* case under the Conscientious Employee Protection Act, 34:19-1 et. seq. ("CEPA"), Plaintiff must show that: (1) he reasonably believed that **his employer's conduct** was violating either a law, rule or a regulation promulgated pursuant to law, or a clear mandate of public policy; (2) he performed a "whistleblowing" activity as defined by CEPA; (3) an adverse employment action was taken against him; and (4) a causal connection exists between the whistleblowing activity and the adverse employment action. Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003)(emphasis added); Kolb v. Burns, 320 N.J. Super. 467, 476-79 (App. Div. 1999). In the case at bar, the Trial Court correctly held that Plaintiff cannot establish the elements of a *prima facie* case under CEPA. (Pa23 to Pa27).

A. The Trial Court Correctly Held that There Was No Evidence that Plaintiff Reasonably Believed that Defendants' Conduct on or before July 5, 2016 Was Violative of Any Law, Rule or Regulation, or Clear Mandate of Public Policy. (Pa23 to Pa25)

CEPA was enacted "to protect from retaliatory action employees who 'blow the whistle' on *employers engaged* in illegal or harmful activity." Blackburn v. UPS, 3 F. Supp. 2d 504, 512 (D.N.J. 1998)(citations omitted)(emphasis added). In order to establish the first prong of a *prima facie* case under CEPA, Plaintiff must show that he reasonably believed that his *employer's conduct* was violating either a law, rule or a regulation promulgated pursuant to law, or a clear mandate of public policy. Dzwonar, 177 N.J. at 462 (emphasis added). In short, in order to maintain an action under CEPA, a Plaintiff must first be able to establish that he or she reasonably believed that his or her employer engaged in some misconduct that was contrary to law or public policy.

In the case at bar, the Trial Court correctly found that Plaintiff failed to establish this "most fundamental element of a CEPA claim." (Pa23). In this regard, the Trial Court accepted as true Plaintiff's contention that various criminal statutes were being violated by members of the public on the night of July 5, 2016. (Pa23 to Pa24). However, the Court found this fact to be irrelevant, stating that there was "no basis in this record to find that the

Defendants were violating such statutes." (Pa24). In short, there is absolutely no factual basis for the contention that the Township or any of the individual defendants had done anything even arguably illegal or improper.

This holding is directly supported by Plaintiff's own deposition testimony. In particular, when asked what he contended Defendants did improperly in this case, Plaintiff stated, "[n]othing that I'm aware of." (Pa110 at T21-8 to 12). Plaintiff also specifically testified that at the time he made the radio transmissions, he did not believe that anyone acting under his command was doing anything illegal or improper. (Pa109 at T20-2 to 6). Nor did he make the radio transmissions in order to correct any allegedly illegal or improper conduct by Defendants. (Pa109 at T20-7 to 10). As the Court noted in Dzwonar, under such circumstances, "[t]he trial court can and should enter judgment for a defendant when no such law or policy is forthcoming." 177 N.J. at 463.

In reaching its decision in the case at bar, the Trial Court also correctly distinguished the case law cited by Plaintiff. In particular, the Court found that all of the cases cited by Plaintiff involved alleged practices or policies of the employer claimed to be illegal or in violation of public policy which were the predicate for the plaintiffs' alleged protected activity under CEPA. (Pa24 to Pa25).

For example, in City of San Antonio v. Heim, 932 S.W. 2d 287 (Court of Appeals of Texas 1996), the City had an unwritten practice of not arresting fellow officers or their family members as "a professional courtesy." That was the predicate alleged wrongful conduct to which the plaintiff in that case had objected. (Pa 25). In Maimone v. City of Atlantic City, 188 N.J. 221 (2006), the City had directed law enforcement employees not to enforce anti-prostitution laws. Id. at 233-34. That directive was the alleged predicate wrongful conduct as to which that plaintiff had objected. (Pa25). Likewise, the plaintiff in Turner v. Associated Humane Society, Inc., 396 N.J. Super. 582 (App. Div. 2007) had witnessed management permitting the adoption of animals known to be dangerous in violation of law and company policy, and in Lippman v. Ethicon, Inc., 222 N.J. 362 (2015), the employer had produced unsafe products which were not compliant with applicable law. (Pa25).

In the case at bar, the Trial Court correctly found that "[t]here is simply no comparable circumstance presented on this record, even when examined through a prism that favors Cummis." (Pa25). Even Plaintiff's own hypothetical is not analogous to the case at bar. (Pb37). Indeed, in the case at bar, Plaintiff did not object to any official misconduct like "stealing time"; "fixing tickets" or "terminating DWI prosecutions." (Pb37). No one ever told Plaintiff to refrain from performing his job duties, and there was no written or unwritten directive

or practice of requiring the police officers not to perform their job duties. Indeed, the Trial Court correctly found that there was simply no evidence of any identifiable order, directive, practice or policy of the Township's Police Department that Plaintiff "reasonably believed violated or was incompatible with a law, regulation or clear mandate of public policy in existence at the time of the incident and [Plaintiff's] claimed enforcement of the law in opposition or resistance to the same." (Pa23). Plaintiff was never advised to perform illegal acts, violate public policy, or to pursue procedures that did implicate laws, rules, regulations or public policy.

B. Plaintiff Cannot Establish That He Engaged in Protected Whistleblowing Activity. (Pa24 to Pa25).

In order to satisfy the second prong of a *prima facie* case under CEPA, Plaintiff must also show that "he disclosed, threatened to disclose, objected to or refused to participate in [the] activity, policy or practice that [he] reasonably believed was illegal or contrary to public policy." Matthews v. N.J. Inst. of Tech., 772 F. Supp. 2d 647, 655 (D.N.J. 2011)(citing N.J.S.A. § 34:19-3). That is, the Plaintiff must be able to demonstrate that he took some action to expose, object to or refuse to participate in the employer's allegedly improper conduct.

In the case at bar, the Trial Court properly held that Plaintiff could not establish this element of a *prima facie* case as a matter of law since there was absolutely no evidence of any such protected conduct. (Pa25).

At deposition, Plaintiff testified that he assumed that it was the "radio transmissions" he made in conjunction with his duties as a police officer during the Township's July 4th celebration and fireworks display on July 5, 2017 which constituted his alleged whistleblowing activity. (Pa107 at T18-5 to22). Plaintiff testified that he was not aware of any other whistleblowing activity in which he engaged. (Id.; Pa108 at T19-13 to 16). As noted above, Plaintiff also specifically testified that he did not make the radio transmissions in response to any alleged misconduct by Defendants. (Pa109 at T20-7 to 10).

In response to Defendants' Motion for Summary Judgment, Plaintiff also claimed that by performing his law enforcement duties, he somehow objected to alleged criminal conduct by civilians. (Pa24). In this regard, the Trial Court correctly held that Plaintiff's conduct, including enforcing the law as to alleged civilian misconduct, could not constitute protected conduct under CEPA because Plaintiff did not act "in a manner that a rational trier of the facts could find was an objection to or refusal to abide by an order, directive, practice, policy or pronouncement of the Township Police Department or the Township that violated a law, rule or clear mandate of public policy." (Id.). In particular, there was no "order, directive, instruction, practice, policy or procedure of his employer, formal or informal, spoken or unspoken, that was known or believed by [Plaintiff] to be in existence in July 2016 to act or respond to an incident of

the character at issue in any way that was at odds with the actions he chose to perform or undertake. . .” (Pa25).

As to Plaintiff’s claim that simply performing his duties as a police officer constituted protected conduct, the Court stressed that there was absolutely no evidence, “even evidence of mere rumor within the Police Department” that Defendants “. . . directed, instructed or even expressed a preference that [Plaintiff] not proceed exactly as he did.” (Pa24).

This holding is also supported by and consistent with the applicable law cited above. See e.g., Maimone, 188 N.J. at 233-34; see also Heim, 932 S.W. 2d at 289.

CONCLUSION

For the foregoing reasons, the Trial Court did not err in granting summary judgment as to Plaintiff's First Amended Complaint and dismissing Plaintiff's First Amended Complaint with prejudice in its entirety, and Defendants/Respondents respectfully request that this Court uphold the decision of the Superior Court, Law Division with regard to same.

Respectfully submitted,
BRATTI GREENAN LLC

/s/ Dominick Bratti

By:_____
DOMINICK BRATTI

Dated: October 23, 2023

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JOSHUA CUMMIS, *Plaintiff-Appellant,* v. TOWNSHIP OF MAPLEWOOD & ALL MEMBERS OF THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MAPLEWOOD, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES, VICTOR DELUCA, NANCY J. ADAMS, INDIA LARRIER, FRANK MCGEHEE, AND GREGORY LEMBRICH, *Defendants-Respondents.*	SUPERIOR COURT OF N.J. APPELLATE DIVISION Civil Appeal Docket # A-3036-22 Trial Court Docket # ESX-L-6341-17 *On appeal from Order of the Superior Court, Law Division, Essex County* Sat Below: Hon. Keith E. Lynott, J.S.C.

PLAINTIFF-APPELLANT'S REPLY BRIEF & APPENDIX

Of Counsel & on the Brief:

Jeffrey D. Catrambone (#024491996)

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PRELIMINARY STATEMENT

Plaintiff-Appellant Joshua Cummis ("Plaintiff") submits this Reply Brief in response to the Brief filed by Defendants-Respondents Township of Maplewood and the individual members of the Township Committee ("Defendants"). We respectfully incorporate by reference the factual and legal arguments made in Plaintiff-Appellant's Brief filed on August 17, 2023.

LEGAL ARGUMENT

I. The Trial Court's rationale in granting summary judgment below and Defendants' arguments in this appeal are unavailing as [a] our Supreme Court has expressly held that there is no requirement under CEPA of employer complicity in the misconduct, and [b] there is no requirement under CEPA that in order for a plaintiff-employee to have a reasonable belief that conduct was in violation of a law, rule, regulation or public policy, an employer must have issued or announced a previously existing order, directive, policy, or practice sanctioning that illegal conduct. *(1T; 12a-27a)*

As argued at length in Plaintiff-Appellant's Brief at Point I.C., the record below establishes that Plaintiff is for the purposes of summary judgment a *bona fide* whistleblower under CEPA. Defendants' primary argument in their Brief is that Defendants did not engage in any conduct that was allegedly illegal or improper. This argument is both legally and factually incorrect.

In Higgins v. Pascack Valley Hosp., 158 N.J. 404 (1999), our Supreme Court held that CEPA protects employees even in the absence of employer complicity in the misconduct at issue. The Court cited N.J.S.A. 34:19-3 that provides as follows:

> An employer shall not take any retaliatory action against an employee because the employee does any of the following:
>
> a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice *of the employer* that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law;
>
> b. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of a law, or a rule or regulation promulgated pursuant to law *by the employer*; or
>
> c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:
>
> (1) is in violation of a law, or a rule or regulation promulgated pursuant to law;
>
> (2) is fraudulent or criminal; or
>
> (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare. Higgins, 158 N.J. at 419 (emphasis added).

In interpreting the statute, specifically, the Court reasoned as follows:

> A plain reading of the statute suggests that the CEPA covers employees who object to the conduct of co-workers. The term 'any' in subsection 'c' indicates that the statute applies regardless of the source of the activity, policy or practice. Although subsections 'a' and 'b' limit the statute's application to policies, practices and activities 'of' or 'by' 'the employer,' subsection 'c' contains no such limitation. *The omission of the phrase 'of the employer' in subsection 'c' is too obvious to ignore*. Ibid. (emphasis added).

Here, as argued in our Brief at Point I.C., Plaintiff's whistleblowing activity falls under subsection c of the statute, which does not require that the misconduct at issue be that of the employer. Ibid. The Court noted that the omission of such

language, specifically the term "employer" in subsection c, "must be deemed purposeful." Ibid. This is in contrast to subsections a & b, which as the Court points out in Higgins both explicitly include the requirement that the employer's conduct be at issue. Ibid.

"When the Legislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded." Ibid. (other citation omitted). "Nothing indicates that the Legislature intended that the CEPA's expansive protection should depend on a strict parsing of employer and employee conduct." Id. at 421. The Court noted that under CEPA "the wrong imputed" to the defendant-employer "is the retaliatory action" against the plaintiff taken by the defendants, and "it is irrelevant that the alleged illegal acts of" the co-employees "cannot be attributed to" the defendant-employer.[1] Id. at 424.

Defendants also argue that "[p]laintiff was never advised to perform illegal acts, violate public policy, or to pursue procedures that did implicate laws, rules, regulations or public policy." (Defendants-Respondents' Brief at 12). Defendants point to the Trial Court's imposing a requirement that the employer have previously announced an established "order, directive, practice, policy or procedure" to violate law or public policy. (Id. at 13-14). There is no such requirement under CEPA.

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1 While Higgins addressed this issue in the context of alleged misconduct by co-employees, the Court's analysis is applicable here to the facts underpinning Plaintiff's CEPA claim.

As argued in our Brief, the Trial Court incorrectly imposed an unworkable and newly-created burden upon a plaintiff in order to establish employer liability under CEPA, akin to that which is required in a civil rights claim under 42 U.S.C. §1983 or under the New Jersey Civil Rights Act, N.J.S.A. 10:6-1 *et seq*. ("NJCRA"), pursuant to Monell v. Dept. of Social Services, 436 U.S. 658 (1978). In such cases, liability to a public entity may attach where the challenged action was "taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the city's business." See City of St. Louis v. Praprotnik, 485 U.S. 112, 123 (1988).

This Monell requirement to establish employer liability does not exist under CEPA. Nonetheless, this Court has ruled that evidence of a policy or custom under Monell may be inferred from conduct that occurred *after* the events in question. See Ehler v. Belleville Police Dept., 2007 WL 2162526 (App. Div. 2007) (976a), citing Grandstaff v. City of Borger, 767 F.2d 161 (5th Cir. 1985), *cert. denied*, 480 U.S. 916 (1987). This Court ruled in Ehler as follows in reversing the trial court's grant of summary judgment below as to the plaintiff's §1983 claim:

> In rejecting the trial judge's determination, we adhere to the logic of *Grandstaff,* and the similar decisions of other courts, in concluding that **post-event circumstances may be probative of the existence of a municipal policy existing at the time of the event in question**. The boundaries delineated by the Supreme Court in defining the scope of a municipality's liability under § 1983 do not foreclose a plaintiff from attempting to prove a municipal policy in this fashion. *See Bordanaro, supra,* 871 *F.*2d at 1166-67 (observing that the Supreme Court 'has

> never held that inferences about what customs or policies existed in a city before an event could not be drawn from subsequent actions'). Certainly, in considering the obvious proof problems caused by the fact that the relevant evidence of a policy is possessed by the municipality and its employees, it is quite appropriate to adhere to *Grandstaff*. Ehler at *9 (emphasis added).

This Court further noted as follows in Ehler:

> [T]he proposition that the subsequent existence of a quality or condition may serve to establish its existence at an earlier time rests upon the general experience of humankind and is consonant with common sense. **When presented with such evidence, a factfinder ought to be given the opportunity to determine, based upon its weighing of all relevant evidence, whether a custom existed prior to an event by considering the municipality's response to the event itself as well as any other similar post-event occurrences**. Ibid. (emphasis added) (internal quotation marks omitted).

As outlined extensively in our Brief, the individual Defendants as members of the Township Committee announced at public meetings their intent to terminate Plaintiff's employment and associated him with complaints of racial profiling, notwithstanding the lack of any legitimate basis for those allegations against Plaintiff, thereby falsely labeling Plaintiff as a racist in the face of political and media pressure. Applying this Court's reasoning in Ehler, these acts that took place after the July 5, 2016 incident raise inferences that Defendants engaged in retaliation in violation of CEPA because of Plaintiff's performance of his job duties as a Police Captain and his refusal to look the other way at illegal conduct. Those criminal acts by the unruly crowd on the night of July 5, 2016 included acts of assault, including those committed upon police officers, and disorderly conduct. Plaintiff refused to

refrain from performing his law enforcement duties, as that would have been a violation of our State's broad-ranging criminal Official Misconduct statute. Even though Plaintiff under CEPA is not required to establish Monell liability as this is not a §1983 or NJCRA case, this Court's analysis in Ehler is applicable and persuasive here.

CONCLUSION

For the foregoing reasons, this Court should reverse the grant of summary judgment below and remand this matter for trial as to Plaintiff's CEPA claim.

Respectfully submitted,
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