SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A—001428-24

MAURICE CLINE,	:	CIVIL ACTION
Plaintiff/Appellant,	:	**ON APPEAL FROM**
-v-	:	SUPERIOR COURT OF NEW JERSEY
CITY OF PATERSON, TIMOTHY MUNGO and JOHN/JANE DOES 1-10,	:	LAW DIVISION PASSAIC COUNTY
Defendant/Respondent.	:	DOCKET NO. PAS-L-001475-22
	:	**SAT BELOW**
	:	HON. RUDOLPH A. FILKO, A.J.S.C.

BRIEF AND APPENDIX ON BEHALF OF APPELLANT, MAURICE CLINE

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Date Submitted:
May 14, 2025

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RULE 2:6-1(A)(1) STATEMENT OF ALL ITEMS SUBMITTED TO THE TRIAL COURT ON THE SUMMARY JUDGMENT MOTION

ITEM SUBMITTED: **APPENDIX PAGE:**

PRELIMINARY STATEMENT

This appeal involves a fundamental right to be free from retaliation and discrimination in the workplace. The trial court granted the Defendants' Motion for Summary Judgment despite the genuine issues of material facts that were presented. Appellant alleges in his Complaint Counts for Hostile Work Environment in violation of the New Jersey Law Against Discrimination, Appellant engaged in Protected Activity and that the Respondents retaliated against him in violation of the New Jersey Law Against Discrimination and lastly that the Respondents retaliated against Appellant in violation of the Conscientious Employee Protection Act. Appellant alleges that he was discriminated against by the Respondents due to derogatory comments made about African-Americans in general, which were specifically critical of Jamaicans. Moreover, Appellant asserts that he was subject to retaliation for filing internal complaints with the Respondent, City of Paterson.

The evidence in the record established that there were a multitude of genuine issues of material fact to defeat Defendants' Motion for Summary Judgment. In its request for summary judgment, the Defendants showed their callousness, their willingness to continue to conceal the truth and their gross attempt to manipulate their culpability in connection with their actions. Thus, the trial court should have denied the Defendants' Motion for Summary Judgment and should have permitted this matter to proceed to a jury trial.

PROCEDURAL HISTORY

Plaintiff filed his Complaint against the Defendants on June 15, 2022. (Pa017). On August 30, 2024, Defendants filed a Motion for Summary Judgment (Pa003). Plaintiff filed a Brief in Opposition to Defendants' Motion for Summary Judgment on October 28, 2024. (Pa181). Defendants filed a Reply Brief in further Support of their Motion for Summary Judgment. The Honorable Rudolph A. Filko, A.J.S.C. heard oral argument on Defendants' Motion for Summary Judgment on December 10, 2024. (1T)[1] After oral argument, Judge Filko granted the Defendants' Motion for Summary Judgment dismissing Plaintiff's Complaint. (Pa001). Plaintiff filed a Notice of Appeal to this Court on January 18, 2025. (Pa211).

[1] 1T – Transcript of December 10, 2024

STATEMENT OF FACTS

Defendant, Timothy Mungo, approached Plaintiff while at the Community Improvement Building in Paterson, New Jersey and apologized for his discriminatory comments and the manner in which he treated Plaintiff throughout his employment. (Pa194). Plaintiff's main supervisor, Louis Guzman, made a remark in front of Plaintiff and two other people about him not liking Jamaicans. (Pa043). Plaintiff's co-worker, Michael McCoy, filed a Complaint against Louis Guzman for this incident. (Pa046). Plaintiff was a witness for Mr. McCoy's allegations set forth in his Complaint against Mr. Guzman. (Pa049-Pa050).

After returning to work after his work-related accident, Mr. Guzman informed Plaintiff not to lift anything heavy but Defendant Mungo had Plaintiff lifting heavy things the same day. (Pa057). Louis Guzman and Billy Rodriguez, the Director of the Department of Public Works, gave Plaintiff a hard time when he asked to be transferred to his job position of cleaning buildings. (Pa059-Pa061). Plaintiff received a write-up for incompetency and insubordination from Defendant Mungo because Plaintiff did not bring up cans of paint at the same time as spackle because it caused a sharp back in his back. (Pa062-Pa063).

Plaintiff was also present outside of a building where he was working when a co-worker, Juan Hernandez, was driving his vehicle very fast and almost struck Plaintiff. (Pa095). Upon exiting his vehicle, Mr. Hernandez was asked why was he driving

like that and his response was "he drive like that so he could kill Jamaicans." (Pa094).

STANDARD OF REVIEW

The standard of review for an appeal of a decision pertaining to a Motion for Summary Judgment is a de novo review. *Fernandez v. Nationwide Mutual Ins.,* 402 N.J. Super. 166, 170 (App. Div. 2008). The de novo means that the Appellate Court reviews the case as if it were deciding the issues for the first time. The Appellate Court will (1) consider the evidence in the light most favorable to the appealing party, (2) determine if there are any genuine issues of material fact, and (3) review the correctness of the trial court's rulings on the law. Therefore, the trial court's "interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference. *Manalapan Realty, L.P. v. Twp. Comm. Of Twp. Of Manalapan,* 140 N.J. 366, 378 (1995).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED WHEN IT DETERMINED THAT THE CITY OF PATERSON WAS ENTITLED TO SUMMARY JUDGMENT BECAUSE PLAINTIFF WAS NOT SUBJECTED TO A HOSTILE WORK ENVIRONMENT (Pa001)

The trial court erred when it determined that the Defendant, City of Paterson, was entitled to summary judgment on Count One of Plaintiff's Complaint because there are genuine issues of material fact that exist to establish that Plaintiff was subjected to a hostile work environment under the New Jersey Law Against Discrimination.

A. HOSTILE WORK ENVIRONMENT UNDER THE NJLAD.

The New Jersey Law Against Discrimination prohibits discrimination based on:

> Race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy or breastfeeding, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait of any individual, or because of the liability for service in the Armed Forces of the United States or the nationality of any individual, or because of the refusal to submit to a genetic test to an employer.

N.J.S.A. 10:5-12(a).

For Plaintiff to maintain a claim under the New Jersey Law Against Discrimination, it must be established that the conduct (1) would not have occurred but for his/her protected characteristic; (2) the conduct complained of was severe or

pervasive; and (3) that a reasonable person would believe that the conditions of employment are altered and the working environment is hostile or abusive. *Lehman v. Toys 'R' Us, Inc.,* 132 N.J. 587, 603-604 (1993). Hostile work environment claims "must be evaluated in light of 'all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Cutler v. Dorn,* 196 N.J. 419, 432 (2008) (*quoting Green v. Jersey City Bd. Of Educ.,* 177 N.J. 434, 447 (2003)).

Claims asserting a hostile work environment "must be evaluated in light of all the circumstances including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it reasonably interferes with an employee's work performance." *Cutler v. Dorn,* 196 N.J. 419, 432 (2008) (*quoting Green v. Jersey City Bd. Of Educ.,* 177 N.J. 434, 447 (2003)).

As an initial matter, Plaintiff accepts that no one is entitled to a workplace free of annoyances and unpleasant comments. However, race and disability discrimination are different matters entirely and under no circumstances should a person be expected to tolerate such discrimination. In the context of a NJLAD claim, the complained of conduct need not be both "severe and pervasive," since such a dual requirement "would bar actions based on a single, extremely severe incident or,

perhaps, even those based on multiple but randomly-occurring incidents of harassment." *Lehman v. Toys 'R' Us, Inc.,* 132 N.J. 587, 606 (1993).

Severe or pervasive conduct can be shown by alleging "numerous incidents that, if considered individually, would be insufficiently severe to state a claim, but considered together are sufficiently pervasive to make the work environment intimidating or hostile." *Id.* Our courts have also noted that the severity of discriminatory remarks are exacerbated when such remarks are uttered by a supervisor and not just any ordinary co-worker of the plaintiff. *Hurley v. Atlantic City Police Dept.,* 174 F.3d 95, 126 (3d Cir. 1999).

The Appellate Division in *Herman v. Coastal Corp.,* 348 N.J. Super. 1 (App. Div. 2022) accurately sets forth the proper standard to apply in these situations:

> [W]hile a claim for a hostile work environment must consider the totality of the circumstances, the complained of conduct must be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Lehmann, supra, 132 N.J. at 608 A.2d 445. Plaintiff's attempt to lump random incidents and disagreements with co-workers during her tenure . . . are ineffective in meeting the standard of "an abusive working environment." As stated by the District Court of New Jersey, "Although a person is legally entitled to a work environment free of hostility, she is not entitled to a perfect workplace, free of annoyances and colleagues she finds disagreeable. In short, what is illegal is a 'hostile work environment." Not an 'annoying work environment.'" Lynch v. New Deal Delivery Serv., Inc. 974 F.Supp. 441, 452 (D.N.J. 1997). Summary judgment was properly granted, dismissing Plaintiff's claims of a hostile working environment. Herman, supra, 348 N.J. Super. at 23.

The person who made the comments can also be considered when determining the severity of the words used or the objective reasonableness of the Plaintiff's belief that their work environment is hostile and abusive. *Taylor v. Metzger,* 152 N.J. 490, 503 (1998).

B. FILING A WORKERS' COMPENSATION CLAIM IS NOT A PROTECTED CHARACTERISTIC UNDER THE NJLAD BUT DISABILITY IS PROTECTED.

The New Jersey Law Against Discrimination prohibits discrimination based on:

> Race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy or breastfeeding, sex, gender identity or expression, **disability** or atypical hereditary cellular or blood trait of any individual, or because of the liability for service in the Armed Forces of the United States or the nationality of any individual, or because of the refusal to submit to a genetic test to an employer.

N.J.S.A. 10:5-12(a) (emphasis added).

While Plaintiff acknowledges that the NJLAD does not include protection for filing a workers' compensation claim, it does prohibit discrimination based on disability which there can no doubt Plaintiff has as a result of said workers' compensation accident. Plaintiff received an award of twenty-five percent partial total disability for injuries to his lower back and left hip as a direct result of his work-related accident.

Thereafter, upon his return to work after his work-related accident, Mr. Guzman informed Plaintiff not to lift anything heavy but Defendant Mungo had Plaintiff lifting heavy things the same day. (Pa057). Moreover, Plaintiff received a write-up for incompetency and insubordination from Defendant Mungo because Plaintiff did not bring up cans of paint at the same time as spackle because it caused a sharp back in his back. (Pa062-Pa063). Thus, the actions of Defendant Mungo were in direct violation of the NJLAD.

C. THE REMARKS OF GUZMAN AND HERNANDEZ WERE SEVERE OR PERVASIVE AND DID CREATE A HOSTILE WORK ENVIRONMENT.

Defendants' asserted that the "only incidents" involved here were two isolated remarks related to "anti-Jamaican" statements made by Plaintiff's supervisor and Hernandez. The first incident involves Plaintiff's main supervisor, Louis Guzman, making a remark in front of Plaintiff and two other people about him not liking Jamaicans. (Pa043). Plaintiff's co-worker, Michael McCoy, filed a Complaint against Louis Guzman for this incident. (Pa046). Plaintiff was a witness for Mr. McCoy's allegations set forth in his Complaint against Mr. Guzman. (Pa049-Pa050).

Thereafter, Plaintiff was also present outside of a building where he was working when a co-worker, Juan Hernandez, was driving his vehicle very fast and almost struck Plaintiff. (Pa095). Upon exiting his vehicle, Mr. Hernandez was asked why was he

driving like that and his response was "he drive like that so he could kill Jamaicans." (Pa094).

There are the "only two incidents" which Plaintiff has asserted throughout this litigation. These comments were most certainly physically threatening or humiliating and most certainly interfered with Plaintiff's work performance. One of Plaintiff's co-worker nearly runs over the Plaintiff and states that he "drive like that so he could kill Jamaicans" and that does not interfere with Plaintiff's work performance.

Moreover, Plaintiff's main supervisor, Louis Guzman, made a remark in front of Plaintiff and two other people about him not liking Jamaicans. While this comment alone may not rise to the level of a violation of the NJLAD, coupled together with the comment made by Hernandez and the remarks become severe or pervasive so as to create a hostile work environment. Accordingly, the trial court erred when it granted the Defendant, City of Paterson's, Motion for Summary Judgment dismissing Count One of Plaintiff's Complaint.

LEGAL ARGUMENT

POINT II

THE TRIAL COURT ERRED WHEN IT DETERMINED THAT THE CITY OF PATERSON WAS ENTITLED TO SUMMARY JUDGMENT BECAUSE IT INVESTIGATED AND REMEDIATED PLAINTIFF'S REPORTED COMPLAINTS (Pa001)

The City of Paterson's investigation into Plaintiff's allegations miraculously concluded that Defendant Mungo's actions towards the Plaintiff were not based on his membership on any protected class. While Plaintiff did not report the comments made by Guzman and Hernandez, Plaintiff testified that his co-worker, Michael McKoy, informed the City of Paterson. In fact, Plaintiff spoke on behalf of Mr. McKoy in his complaints against the City of Paterson when they were investigated.

Just because the City of Paterson has a policy which states that it prohibits harassment or retaliation in the workplace does not mean that Plaintiff has confidence in that policy. The City of Paterson makes much out of Plaintiff not reporting the comments of Guzman or Hernandez. However, as previously stated, those comments were presented on behalf of Michael McKoy so that explains why Plaintiff did not file a complaint on those issues. Judge Filko concluded that the City of Paterson did its investigation, however Judge Filko also concluded that said investigation was not generated by the discriminatory comments. 1T:32:22-1T:33:12. Accordingly, the trial court erred when it granted the Defendant, City of

Paterson's, Motion for Summary Judgment dismissing Count One of Plaintiff's Complaint.

LEGAL ARGUMENT

POINT III

THE TRIAL COURT ERRED WHEN IT DETERMINED THAT THE CITY OF PATERSON WAS ENTITLED TO SUMMARY JUDGMENT DISMISSING PLAINTIFF'S NJLAD RETALIATION CLAIM (Pa001)

The NJLAD makes it unlawful to retaliate against an employee as follows:

> to take reprisals against any person because that person has opposed any practices or acts forbidden under this act or because that person has filed a complaint, testified or assisted in any proceeding under this act or to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this act.

N.J.S.A. 10:512(d).

In the present matter, Plaintiff's main supervisor, Louis Guzman, made a remark in front of Plaintiff and two other people about him not liking Jamaicans. (Pa043). Plaintiff's co-worker, Michael McCoy, filed a Complaint against Louis Guzman for this incident. (Pa046). Plaintiff was a witness for Mr. McCoy's allegations set forth in his Complaint against Mr. Guzman. (Pa049-Pa050).

Plaintiff testified in a proceeding advanced by Michael McKoy regarding a discriminatory comment made by their Supervisor, Louis Guzman, about Jamaicans. Thereafter, Plaintiff began to feel the "reprisals" of having testified on behalf of Mr. McKoy.

While Plaintiff acknowledges that the NJLAD does not include protection for filing a workers' compensation claim, it does prohibit discrimination based on disability which there can no doubt Plaintiff has as a result of said workers' compensation accident. Plaintiff ultimately received an award of twenty-five percent partial total disability for injuries to his lower back and left hip as a direct result of his work-related accident.

Upon his return to work after his work-related accident, Mr. Guzman informed Plaintiff not to lift anything heavy but Defendant Mungo had Plaintiff lifting heavy things the same day. (Pa057). Moreover, Plaintiff received a write-up for incompetency and insubordination from Defendant Mungo because Plaintiff did not bring up cans of paint at the same time as spackle because it caused a sharp back in his back. (Pa062-Pa063). Thus, the actions of Defendant Mungo were in direct violation of the NJLAD. Accordingly, the trial court erred when it granted the Defendant, City of Paterson's, Motion for Summary Judgment dismissing Count Two of Plaintiff's Complaint.

LEGAL ARGUMENT

POINT IV

THE TRIAL COURT ERRED WHEN IT DETERMINED THAT THE CITY OF PATERSON WAS ENTITLED TO SUMMARY JUDGMENT BECAUSE PLAINTIFF FAILED TO ESTABLISH A PRIMA FACIE CASE OF RETALIATION UNDER THE NJLAD (PA001)

To establish "a prima facie case of retaliation under the NJLAD, a plaintiff must show that 1) he was engaged in a protected activity known to the defendant; 2) he was thereafter subjected to an adverse employment decision by the defendant; and 3) there was a causal link between the two." *Woods-Pirozzio v. Nabisco Foods,* 290 N.J. Super. 252, 274 (App. Div. 1996).

Initially, Plaintiff asserts that Defendant Mungo approached Plaintiff while at the Community Improvement Building in Paterson, New Jersey and apologized for his discriminatory comments and the manner in which he treated Plaintiff throughout his employment. (Pa194). Plaintiff main supervisor, Louis Guzman, made a remark in front of Plaintiff and two other people about him not liking Jamaicans. (Pa043). Plaintiff's co-worker, Michael McCoy, filed a Complaint against Louis Guzman for this incident. (Pa046). Plaintiff was a witness for Mr. McCoy's allegations set forth in his Complaint against Mr. Guzman. (Pa049-Pa050).

Thereafter, after returning to work after his work-related accident, Mr. Guzman informed Plaintiff not to lift anything heavy but Defendant Mungo had Plaintiff lifting heavy things the same day. (Pa057). Louis Guzman and Billy

Rodriguez, the Director of the Department of Public Works, gave Plaintiff a hard time when he asked to be transferred to his job position of cleaning buildings. (Pa059-Pa061). Plaintiff received a write-up for incompetency and insubordination from Defendant Mungo because Plaintiff did not bring up cans of paint at the same time as spackle because it caused a sharp back in his back. (Pa062-Pa063). Each of these acts alone may be not enough to substantiate a claim for retaliation but taken as a whole it is respectfully submitted that the trial court erred when it granted Defendants' Motion to Summary Judgment dismissing Count Two of the Complaint.

LEGAL ARGUMENT

POINT V

MUNGO WAS NOT ENTITLED TO SUMMARY JUDGMENT (Pa001)

Defendant Mungo may be held liable under the aiding and abetting provision of the NJLAD because Mungo had supervisory authority over Plaintiff and Guzman directly engaged in acts which discriminated against and harassed Plaintiff on the basis of his race. The NJLAD provides that it is unlawful for "any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this act, or to attempt to do so." *N.J.S.A.* 10:5–12(e). As such, this provision of the NJLAD expressly delineates individual liability for those who "aid or abet" an employer's unlawful employment actions. *Cortes v. University of Medicine and Dentistry of New Jersey*, 391 F.Supp.2d 298, 314 (2005). The NJLAD also contains an anti-retaliation provision, which deems it unlawful for "any person to take reprisals against any person because that person has opposed any practices or acts" which the NJLAD prohibits. *Cortes,* 391 F. Supp. at 314; *N.J.S.A.* 10:5-12(d). This provision therefore expressly contemplates direct liability for supervisory employees. *Id.* Thus, those employees who have been delegated some degree of supervisory authority can be held personally liable under the NJLAD as "aiders and abettors." *Id.*

The Third Circuit has specifically held that individual supervisors may be liable for aiding and abetting under the NJLAD. *Failla v. City of Passaic*, 146 F.3d 149 (1999). A supervisor has a unique role in shaping the work environment. *Taylor v. Metzger*, 152 N.J. 490, 502 (1998). To that end, part of a supervisor's responsibilities is the duty to prevent, avoid, and rectify invidious harassment in the workplace. This duty can be violated by deliberate indifference or affirmatively harassing acts. When a supervisor flouts this duty, he subjects himself and his employer to liability. Where a supervisor's malice substantially assists an employer's inaction, the supervisor's liability is grounded in the failure to stop the harassment, which includes both active and passive components.

Defendant Mungo was not Plaintiff's co-worker but was his direct supervisor. Consistent with Mungo's responsibilities as Plaintiff's supervisor, he is bestowed with supervisory authority over Plaintiff. Defendant Mungo was Plaintiff's direct supervisor and that fact is not disputed by Defendants. In his supervisory capacity, Mungo engaged in affirmative acts of discrimination as described in Plaintiff's Complaint and this brief. As such, Mungo is susceptible to liability for aiding and abetting his own discriminatory and harassing conduct under the NJLAD.

LEGAL ARGUMENT

POINT VI

THE TRIAL COURT ERRED WHEN IT DETERMINED THAT THE DEFENDANTS WERE ENTITLED TO SUMMARY JUDGMENT BECAUSE PLAINTIFF FAILED TO ESTABLISH UNLAWFUL RETALIATION UNDER CEPA (Pa001)

The purpose of CEPA is to protect and encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employers from engaging in such conduct. Thus, CEPA must be considered remedial in nature and should be construed liberally to effectuate its important social goal. *Abbamont v. Piscataway Tp. Bd. of Educ.,* 138 N.J. 405 (1994). The Legislature intended that CEPA encourage, not thwart, legitimate employee complaints. *Turner v. Associated Humane Societies, Inc.*, 396 N.J. Super. 582 (App. Div. 2007).

To establish a prima facie case of retaliation under CEPA, Plaintiff must demonstrate that: (1) he reasonably believed that his employer was engaged in the violation of a law or rule or duly promulgated regulation; (2) he engaged in whistleblowing as defined in the statute; (3) he was subjected to an adverse employment action; and (4) there is a causal relationship between the whistleblowing actions and the adverse employment action. *Racanelli v. County of Passaic*, 417 N.J. Super. 52 (App. Div. 2010). Just as the *McDonnell* court established the four-step, burden-shifting framework to analyzing a prima facie case

of racial discrimination under the NJLAD, the *Winters* court established the same framework for determining whether a prima facie claim for retaliation is established under CEPA. *Winters v. North Hudson Regional Fire and Rescue,* 212 N.J. 67 (2012). See also *Donofry v. Autotote Systems, Inc.*, 350 N.J. Super. 276 (App. Div. 2001) (framework for proving a CEPA claim follows that of a NJLAD claim).

The most significant element under CEPA is that the objecting employee must have an objectively reasonable belief, at the time of objection or refusal to participate in the employer's offensive activity, that such activity is either illegal, fraudulent or harmful to the public health, safety or welfare and that there is a substantial likelihood that the questioned activity is incompatible with a constitutional, statutory or regulatory provision, code of ethics, or other recognized source of public policy. *Massarano v. New Jersey Transit*, 400 N.J. Super. 474 (App. Div. 2008). In furtherance of its purpose to protect and encourage whistleblowers, CEPA is not intended to make lawyers out of conscientious employees. Therefore, in order to show that the plaintiff had a reasonable belief that his employer's conduct was in violation of a law or other rule, a plaintiff is not required to show that the relevant legal authority or clear mandate of public policy actually would be violated if all the facts he or she alleges are true. Rather, the plaintiff must set forth facts that would support an objectively reasonable belief that a violation has occurred. *Hitesman v. Bridgeway Inc.,* 430 N.J. Super. 198

(App. Div. 2013). Thus, a CEPA action will lie if the employee reasonably believes that objection to his employer's conduct is warranted even if no law or public policy was actually violated or no crime or fraud actually committed. *Gerard v. CCHSC*, 248 N.J. Super. 516, 523-525 (App. Div. 2002).

Here, Plaintiff's whistleblowing activity concerned his reasonable belief that Defendants were violating long-established prohibitions against racial discrimination in the workplace. Plaintiff participated in an investigation into an employee complaint with the City against Guzman, and after an internal investigation, these complaints were corroborated by the City. Plaintiff does not dispute that private disagreements cannot form the basis of a CEPA retaliation claim. *Maw*, 359 N.J. Super. at 448. However, our courts do not support private disagreements that are grounded in racism.

The trial court concluded that there was no evidence of any adverse employment action against Plaintiff. 1T:34:1-5. Adverse employment action can take many forms, from the most blatant to the most subtle. Defendants' Supervisors, Louis Guzman and Billy Rodriguez, the Director of the Department of Public Works, gave Plaintiff a hard time when he asked to be transferred to his job position of cleaning buildings. (Pa059-Pa061). Plaintiff received a write-up for incompetency and insubordination from Defendant Mungo because Plaintiff did not bring up cans of paint at the same time as spackle because it caused a sharp back in his back.

(Pa062-Pa063). These actions can be considered adverse employment action. The trial court was entertaining a Motion for Summary Judgment not a bench trial. All reasonable inferences should be given to the Plaintiff. When considering all the facts presented, together with all reasonable inferences, the trial court erred when it granted the Defendants' Motion for Summary Judgment dismissing Count Three of Plaintiff's Complaint.

CONCLUSION

Plaintiff therefore respectfully requests that this Court reverse the trial court's December 10, 2024 decision granting the Defendants summary judgment and remand the matter back for a trial on the issues of liability and damages. The trial court not only erred when it concluded that there were no genuine issues of material facts, it did not give the Plaintiff any reasonable inferences from the evidence presented. Accordingly, it is respectfully submitted that the trial court's decision to grant Defendants' Motion for Summary Judgment should be reversed.

Respectfully submitted,

SHAH & RUBENSTEIN, LLC
Attorneys for Plaintiff,
Maurice Cline

By: *Fredrick L. Rubenstein*
Fredrick L. Rubenstein

Dated: May 14, 2025

MAURICE CLINE, **Plaintiff/Appellant,** **-v-** **CITY OF PATERSON, TIMOTHY MUNGO AND JOHN/JANE DOES 1-10,** **Defendant/Respondent.**	**SUPERIOR COURT OF NEW JERSEY** **APPELLATE DIVISION: A-001428-24** **CIVIL ACTION** **ON APPEAL FROM PASSAIC COUNTY, LAW DIVISION** **DOCKET NO. BELOW PAS-L-001475-22** **SAT BEFORE: HON. RUDOLPH A. FILKO, J.S.C.** **DATE SUBMITTED: JULY 16, 2025**

AMENDED BRIEF OF DEFENDANTS/RESPONDENTS, CITY OF PATERSON AND TIMOTHY MUNGO

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PRELIMINARY STATEMENT

While PLAINTIFF/APPELLANT, MAURICE CLINE, ("APPELLANT,") alleges that he was a victim of harassment and retaliation in violation of the New Jersey Law Against Discrimination, ("NJLAD,") and the New Jersey Conscientious Employees Protection Act, ("CEPA,") during his employment with DEFENDANT/RESPONDENT, CITY OF PATERSON, ("PATERSON,") the Trial Court was correct to grant summary judgment in favor PATERSON and CO-DEFENDANT/RESPONDENT, TIMOTHY MUNGO, ("MUNGO") (collectively "RESPONDENTS,") and dismiss APPELLANT'S Complaint with prejudice. APPELLANT failed to present any admissible facts in opposition to RESPONDENTS' motion which created a genuine dispute of material fact regarding his claims of (1) hostile work environment by MUNGO based on his filing of a workers compensation petition after PLAINTIFF was injured while following MUNGO'S instructions; (2) hostile work environment based on statements made by his department Director, LUIS GUZMAN, ("GUZMAN,") and the Recycling Director, JUAN HERNANDEZ, ("HERNANDEZ"), regarding their supposed dislike of persons of Jamaican nationality; or (3) retaliation after filing a workers compensation complaint and based on his cooperation with an investigation into a harassment complaint against his MUNGO by another employee. Given the lack of support for APPELLANT'S allegations, as well as the undisputed facts which were

presented by RESPONDENTS in support of their Motion, the Trial Court had no alternative but grant judgment in RESPONDENTS' favor as a matter of law. Respectfully, this Appellate Panel should affirm that decision.

RESPONDENTS are entitled to Summary Judgment for several reasons as recognized by the Trial Court. First, with respect to a hostile work environment, in as much as the filing of a workers compensation claim is not a protected characteristic under the NJLAD, APPELLANT'S claim does not fall with the scope of that statute. Try as he might, APPELLANT cannot distance himself from his own allegations, which reference only the filing of a workers compensation claim and make no mention of a hostile work environment based on a disability. Even if APPELLANT were granted such a favorable inference, his claim fails nonetheless as there is no evidence of any severe and pervasive conduct by RESPONDENTS towards APPELLANT based on his physical condition. Nor can APPELLANT establish a genuine issue of material fact as to the existence of a hostile work environment based on the alleged "anti-Jamaican" comments of GUZMAN or HERNANDEZ, (which, again, was not plead in PLAINTIFF'S Complaint), as, again, those isolated remarks were neither severe nor pervasive so as to alter the conditions of APPELLANT'S daily work environment. Finally, it is undisputed that once PATERSON became aware of APPELLANT'S complaints against MUNGO,

it promptly investigated those claims – thus enforcing an effective anti-harassment policy – and removed APPELLANT from MUNGO's supervision.

RESPONDENTS are also entitled to Summary Judgment dismissing the allegations of retaliation under the NJLAD as that claim, as plead, is also based on his filing of a workers compensation claim. Even if there were a question of fact as to whether the NJLAD applies to such claims, APPELLANT failed to raise any facts suggesting he was subject to any retaliatory conduct or adverse employment action based on that filing, nor did he present any evidence of retaliation based on any alleged "disability," or his support of a co-worker's separate harassment complaint.

Finally, PATERSON is entitled to Summary Judgment dismissing APPELLANT'S CEPA claim as it is undisputed that PLAINTIFF is not a "whistleblower," that PLAINTIFF did not experience an adverse employment action as a result of such alleged "whistleblowing" and that there is not a "substantial nexus" between PLAINTIFF'S alleged "whistleblowing" and an "adverse employment" action. For all of these reasons, RESPONDENTS respectfully request that the Appellate Panel affirm the Order granting Summary Judgment in their favor and dismissing APPELLANT'S Complaint with prejudice.

RELEVANT PROCEDURAL HISTORY

RESPONDENTS adopt the Procedural History as set forth in APPELLANT'S Brief.

CROSS-STATEMENT OF FACTS

APPELLANT began his employment with PATERSON on or about February 10, 2020. (See EXHIBIT B to HARRIOTT CERT. at 6:23-7:1) APPELLANT was assigned to "building repair," where he performed manual labor "handy work" and "assisted the carpenter." (See EXHIBIT B to HARRIOTT CERT. at 7:25-8:24) In the course of his employment, APPELLANT was supervised by GUZMAN, the department Director, and MUNGO. (See EXHIBIT B to HARRIOTT CERT. at 9:12-16)

In the summer of 2020, GUZMAN allegedly "made a remark in front of [APPELLANT] and two other people about him not liking Jamaicans." (See EXHIBIT B to HARRIOTT CERT. at 12:19-13:2) APPELLANT and two other employees who were present at the time of GUZMAN'S alleged remark are Jamaican. (See EXHIBIT B to HARRIOTT CERT. at 12:5-12 and 14:8-19) APPELLANT testified:

> I can't tell you what initiated the conversation because I really wasn't paying attention to it initially. The statement is what really like made me like turn around and interact. So I really don't know exactly what they were talking about prior to the comment, but once he made the comment, I turned around and was like, you know, you got three Jamaicans standing in front of you. And he went further on about saying how he didn't like both Jamaicans and Dominicans. And my remark was, but you're Dominican, and he went to go explain, and I kind of walked off because I was – you know, I just didn't want to hear it anymore.

(See EXHIBIT B to HARRIOTT CERT. at 13:18-14:7)

APPELLANT did not further address the comment with GUZMAN, nor did he file a complaint regarding GUZMAN'S alleged remarks. (See EXHIBIT B to HARRIOTT CERT. at 15:10-23) He believes one of the other employees filed a complaint at a later time. (See EXHIBIT B to HARRIOTT CERT. at 15:18-20) APPELLANT was interviewed as part of the investigation but does not know the outcome of that complaint. (See EXHIBIT B to HARRIOTT CERT. at 18:10-21 and 19:2-22)

On or about February 8, 2021, APPELLANT was injured at work when he tripped over a rolled-up rug while moving a file cabinet from the basement of City Hall. (See EXHIBIT B to HARRIOTT CERT. at 10:8-11:6 and 11:19-22) At the time of his injury, APPELLANT was being supervised or directed by MUNGO. (See EXHIBIT B to HARRIOTT CERT. at 11:23-12:1) APPELLANT was out of work for approximately eight (8) months after the incident and filed a worker's compensation claim to cover his medical treatments. (See EXHIBIT B to HARRIOTT CERT. at 20:22-21:3)

APPELLANT returned to work on August 25, 2021. (See EXHIBIT B to HARRIOTT CERT. at 21:13) APPELLANT returned to work with instructions from his doctor that he "wasn't supposed to be lifting heavy because of the type of injury that I had, and if I did have pain, that I should wear a back brace." (See EXHIBIT B to HARRIOTT CERT. at 23:8-21) APPELLANT was not given a specific weight

restriction. (See EXHIBIT B to HARRIOTT CERT. at 23:22-24:1) Upon returning to work, APPELLANT was instructed by GUZMAN that he should not perform any "heavy lifting." (See EXHIBIT B to HARRIOTT CERT. at 24:15-25:2) APPELLANT testified that despite GUZMAN's directive, "[MUNGO] had me lifting heavy things, the same exact day." (See EXHIBIT B to HARRIOTT CERT. at 26:17-20) Although APPELLANT did not complain to GUZMAN at first, he later asked to be moved to a different position that did not entail such lifting. (See EXHIBIT B to HARRIOTT CERT. at 27:8-18) APPELLANT was eventually moved to a new position in or about January 2022. (See EXHIBHIT B to HARRIOTT CERT. at 30:9-13 and 57:8-24)

In or about October 2021, APPELLANT was working at the police station and instructed by MUNGO to pick up cans of paint and spackle from another location. (See EXHIBIT b to HARRIOTT CERT. at 30:14-31:9) When MUNGO returned to the police station, he was unable to lift the "large bucket" of spackle due to pain in his back and instead carried the paint inside, which was "lighter." (See EXHIBIT B to HARRIOTT CERT. at 31:13-19) PLAINTIFF testified that when MUNGO observed PLAINTIFF, MUNGO "gave me like a look, like – it was almost like a look like, you know --like, I know you can lift it, whatever." (See EXHIBIT B to HARRIOTT CERT. at 31:19-25) APPELLANT then went back with another employee to retrieve the spackle but was allegedly told by MUNGO to "forget it, we

have a press conference to do." (See EXHIBIT B to HARRIOTT CERT. at 31:25-32:9) The following day, APPELLANT received a "write-up for incompetency to do my job and insubordination" from MUNGO. (See EXHIBIT B to HARRIOTT CERT. 32:11-14) APPELLANT was not disciplined based on this incident. (See EXHIBIT B to HARRIOTT CERT. at 65:9-12)

At some point in "late 2021," APPELLANT was allegedly standing in front of his building near Eastside Park when HERNANDEZ "came driving really fast through the park, which he almost hit us." (See EXHIBIT B to HARRIOTT CERT. at 64:10-13; 67:6-11 and 67:19-21) When the other employee standing with APPELLANT asked HERNANDEZ why he was driving in that manner, HERNANDEZ allegedly responded "he drive like that so he could kill Jamaicans." (See EXHIBIT B to HARRIOTT CERT. at 64:14-17) APPELLANT did not file a complaint regarding this incident and does not know whether a complaint was filed with PATERSON by the other employee who was present. (See EXHIBIT B to HARRIOTT CERT. at 64:21-24 and 68:23-69:1)

On or about November 3, 2021, APPELLANT filed a complaint with PATERSON regarding MUNGO. (See EXHIBIT B to HARRIOTT CERT. at 40:12-15 and EXHIBIT C to HARRIOTT CERT.) APPELLANT'S complaint mentions only the October 2021 incident involving the cans of spackle and does not make any reference to any "anti-Jamaican" remarks by MUNGO, GUZMAN, HERNANDEZ

or anyone else. (See EXHIBIT C to HARRIOTT CERT.) In fact, APPELLANT has not identified any "anti-Jamaican" statements allegedly made by MUNGO. (See EXHIBIT B to HARRIOTT CERT. at 60:3-7) On December 2, 2021, APPELLANT filed a supplemental complaint which alleged that MUNGO was wearing a body camera and filming APPELLANT while he worked, and that MUNGO was "interrupting" APPELLANT'S work "when [I] was not working under his direction." (See EXHIBIT D to HARRIOTT CERT.) APPELLANT testified that he observed MUNGO wearing "little camera clipped to his shirt and he had a button next to it that said smile, you're on camera." (See EXHIBIT B to HARRIOTT CERT. at 49:1-4) APPELLANT did not address the issue with MUNGO. (See EXHIBIT B to HARRIOTT CERT. at 51:3-6) Shortly thereafter, PATERSON issued a memorandum advising all City employees "that nobody could voice, video, or sound record on city property without written permission, and then [MUNGO stopped wearing the camera." (See EXHIBIT B to HARRIOTT CERT. at 52:19-23)

APPELLANT and other witnesses were interviewed as part of PATERSON'S investigation of his complaint. Following an investigation, (See EXHIBIT E to HARRIOTT CERT.) As a result of the investigation, PATERSON determined that MUNGO'S behavior was not based on APPELLANT'S membership in one LAD-protected categories. (See EXHIBIT E to HARRIOTT CERT.)

STANDARD OF REVIEW

On appeal, the grant or denial of a Motion for Summary Judgment is reviewed de novo, applying the same standard used by the Trial Court. Samolyk v. Berthe, 251 N.J. 73 (2022); Stewart v. N.J. Tpk. Auth./Garden State Parkway, 249 N.J. 642, 655 (2022). As such, an Appellate Court must determine "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995). When the moving party demonstrates that there is no genuine issue of material fact, they are entitled to judgment as a matter of law and summary judgment is appropriate. R. 4:46-2(c). A factual dispute is genuine if a reasonable jury could return a verdict for the non-movant, and is material if, under the substantive law, it would affect the outcome of the suit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

While the court must grant the non-moving party all favorable inferences from the competent evidence presented, the Brill court reemphasized, "it is within [the court's] province 'to determine whether there is a genuine issue for trial.'" O'Loughlin v. National Community Bank, 338 N.J. Super. 592 (App. Div. 2001) (citing Brill, 142 N.J. at 540.) That the trier of fact makes determinations as to credibility does not require a court to ignore the weight of the evidence. The

opponent must do more than simply show that there is some metaphysical doubt as to the material fact. Id. at 607. The non-movant cannot rest on mere allegations and instead must present actual evidence that creates a genuine issue as to a material fact for trial. Therefore, summary judgment cannot be defeated if the non-moving party fails to offer any concrete evidence from which a reasonable juror could return a verdict in his favor. Housel v. Theodoridis, 314 N.J. Super. 597 (App. Div. 1998).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT AS APPELLANT WAS NOT SUBJECTED TO A HOSTILE WORK ENVIRONMENT.

The Trial Court properly granted Summary Judgment in favor of RESPONDENTS and dismissed Count One of APPELLANT'S Complaint with prejudice as there is no evidence that APPELLANT was subjected to a hostile work environment under the NJLAD. First, in as much as the filing of a workers compensation claim is not a protected characteristic under the NJLAD, APPELLANT'S claim does not fall with the scope of that statute. Try as he might, APPELLANT cannot distance himself from his own allegations, which reference only the filing of a workers compensation claim and make no mention of a hostile work environment based on a disability. Even if APPELLANT were granted such a favorable inference, his claim fails nonetheless as there is no evidence of any severe

and pervasive conduct by RESPONDENTS towards APPELLANT based on his physical condition. Nor can APPELLANT establish a genuine issue of material fact as to the existence of a hostile work environment based on the alleged "anti-Jamaican" comments of GUZMAN or HERNANDEZ, (which, again, was not plead in PLAINTIFF'S Complaint), as, again, those isolated remarks were neither severe nor pervasive so as to alter the conditions of APPELLANT'S daily work environment. Finally, it is undisputed that once PATERSON became aware of APPELLANT'S complaints against MUNGO, it promptly investigated those claims – thus enforcing an effective anti-harassment policy – and removed APPELLANT from MUNGO's supervision.

A. HOSTILE WORK ENVIRONMENT UNDER THE NJLAD.

Count One of APPELLANT'S Complaint alleges that RESPONDENTS "created a hostile work environment" in violation of the NJLAD. (See EXHIBIT A to HARRIOTT CERT. at ¶52.) Count One further alleges that PATERSON "failed to investigate and remediate Plaintiff's complaints of a hostile work environment and to rectify same after repeated notice of such conduct by Plaintiff." (See EXHIBIT A to HARRIOTT CERT. at ¶53.)

The NJLAD prohibits discrimination based on:

> race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy or breastfeeding, sex, gender identity or expression, disability or atypical hereditary cellular

> or blood trait of any individual, or because of the liability for service in the Armed Forces of the United States or the nationality of any individual, or because of the refusal to submit to a genetic test or make available the results of a genetic test to an employer.

[N.J.S.A. 10:5-12(a).]

In order to survive Summary Judgment under the NJLAD, APPELLANT must at least raise a genuine issue of material fact that the complained-of conduct (1) would not have occurred but for his protected characteristic; and it was (2) severe or pervasive enough to make a (3) reasonable person believe that (4) the conditions of employment are altered and the working environment is hostile or abusive. Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 603-604 (1993). Allegations of a hostile work environment "must be evaluated in light of "all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Cutler v. Dorn, 196 N.J. 419, 432 (2008) (quoting Green v. Jersey City Bd. of Educ., 177 N.J. 434, 447 (2003)). In evaluating a hostile work environment claim under the NJLAD, Courts are "mindful that 'offhanded comments, and isolated incidents (unless extremely serious) are not sufficient to sustain a hostile work environment claim." Carver v. City of Trenton, 420 F.3d 243, 262 (3rd Cir. 2005)(quoting Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998)).

Whether the conduct was sufficiently severe or pervasive must be "measured by [the] surrounding circumstances." Rios v. Meda Pharmaceutical, Inc., 247 N.J. 1, 11 (2021)(quoting Taylor v. Metzger, 152 N.J. 490, 506 (1998)). In determining whether the conduct at issue is sufficiently extreme, Courts consider the "totality of the circumstances." Ibid. Among other things, "courts must consider the cumulative effect of the various incidents, bearing in mind that each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created may exceed the sum of the individual episodes." Ibid. (quoting Lehmann, 132 N.J. at 607), See also Mandel v. M & Q Packaging Corp., 706 F.3d 157, 168 (3rd Cir. 2013)("[C]ourts must examine the totality of the circumstances in assessing whether the conduct was either severe or pervasive, including but not limited to: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance.") It is only in "rare and extreme cases" that a single incident can also create a hostile work environment. Ibid. (citing Taylor, 152 N.J. at 499-501).

Settled case law relies on an objective standard to evaluate a hostile work environment claim. Cutler, 196 N.J. at 431; Taylor, 152 N.J. at 506; Lehmann, 132 N.J. at 604. That standard focuses on the harassing conduct itself and "not its effect on the plaintiff or on the work environment." Lehmann, 132 N.J. at 606 (citing

Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991)); Cutler, 196 N.J. at 431 ("[N]either a plaintiff's subjective response to the harassment, nor a defendant's subjective intent when perpetrating the harassment [controls]."

If a supervisory employee is acting within the scope of his or her employment, an employer will be liable if the supervisor's conduct creates a hostile work environment. Lehmann, 132 N.J. at 619. Even if a supervisor were to act beyond the scope of his or her employment, the employer may be liable for that supervisor's discriminatory behavior under one of the exceptions identified in Restatement section 219(2). Id. at 619–20. If an employer delegates to a supervisor the authority to control the work environment and the supervisor abuses that authority, vicarious liability may be found to exist under section 219(2)(d). Id. at 620. The question whether a supervisor, who creates a hostile work environment, was aided by delegated power to control the day-to-day work environment is a fact-sensitive inquiry. Ibid. There are several questions as relevant to the inquiry:

> 1. Did the employer delegate the authority to the supervisor to control the situation of which the plaintiff complains?
> 2. Did the supervisor exercise that authority?
> 3. Did the exercise of authority result in a violation of [the LAD]?
> 4. Did the authority delegated by the employer to the supervisor aid the supervisor in injuring the plaintiff?

[Ibid. (citation omitted).]

If those questions are answered in the affirmative, the employer may be vicariously liable under section 219(2)(d) for the hostile workplace environment created by the supervisor. Ibid.

B. FILING A WORKERS COMPENSATION CLAIM IS NOT A PROTECTED CHARACTERISTIC UNDER THE NJLAD.

The Trial Court was correct to grant Summary Judgment in favor of RESPONDENTS as to Count One of APPELLANT'S Complaint as APPELLANT has failed to present any facts which suggest that MUNGO'S actions would not have occurred but for his protected characteristic as APPELLANT alleges that MUNGO took action against APPELLANT due to APPELLANT'S filing of a workers compensation claim[1]. At no point, either in his Complaint or during discovery, has APPELLANT stated that MUNGO made any "anti-Jamaican" remarks to him, about him or in his presence. By its own terms, the NJLAD does not include acceptance of workers compensation benefits or filing a workers compensation claim as a protected characteristic. See N.J.S.A. 10: 5-12(a). Nor does the applicable case law hold that the receipt of workers compensation benefits or the filing of a workers compensation claim is a protected characteristic under the NJLAD. See, e.g., Stewart v. County of Hudson, 2011 WL 2935042 (Appellate Division July 22, 2011) (Filing of grievances unrelated to race or gender-based issues does not qualify as a

[1] At no point in his Complaint, answers to interrogatories or his deposition testimony does PLAINTIFF allege to be "disabled" under the NJLAD or otherwise allege that he was harassed and/or discriminated against based on any "disability."

"protected activity" under the NJLAD.) Likewise, the caselaw is clear and unequivocal that general complaints about wrongful treatment in the workplace or grieving workplace discipline do not satisfy the first element of a retaliation complaint. Barber v. CSX Distribution Services, 68 F. 3d 694, 701-702 (3rd Cir. 1995) (holding that a letter written to employer by employee alleging general unfair treatment did not constitute a protected activity under the ADEA where it did not allege discrimination); Reyes v. McDonald Pontiac-GMC Truck, Inc., 997 F. Supp. 614, 619 (D.N.J. 1998) (holding that the plaintiff's complaint of a co-worker's outbursts and name-calling was not protected activity under the LAD where the plaintiff did not state that these actions were "gender-related or sexual in nature")

Accordingly, to the extent that APPELLANT is alleging that he was subjected to a "hostile work environment" by MUNGO based on his filing of a workers compensation claim, the Trial Court's grant of Summary Judgment was proper and should be affirmed by this Appellate Panel.

C. APPELLANT FAILED TO ESTABLISH A HOSTILE WORK ENVIRONMENT BASED ON DISABILITY.

Putting aside the fact that APPELLANT'S Complaint does not even contain the word "disability" or "disabled" or that APPELLANT did not cite such alleged conduct as a basis for his hostile work environment claim or his retaliation claim in his answers to interrogatories (See EXHIBIT A to RUBENSTEIN CERT. OF

COUNSEL), APPELLANT failed to establish a hostile work environment based on disability under the NJLAD.

In order to do so, "the factfinder's first inquiry is whether the plaintiff has proven that he or she had a disease or condition recognized as a disability under the LAD." Delvecchio v. Twp. of Bridgewater, 224 N.J. 559, 573 (2016). Here, APPELLANT has failed to set forth any facts which establish (or even create a genuine issue of material fact) that he suffered a "disability" under the NJLAD. The NJLAD defines "disability" as a

> physical or sensory disability, infirmity, malformation, or disfigurement which is caused by bodily injury, birth defect, or illness including epilepsy and other seizure disorders, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impairment, deafness or hearing impairment, muteness or speech impairment, or physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device, or any mental, psychological, or developmental disability, including autism spectrum disorders, resulting from anatomical, psychological, physiological, or neurological conditions which prevents the typical exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques. Disability shall also mean AIDS or HIV infection.

N.J.S.A. 10:5-5(q).

For a physical disability claim under the NJLAD, a plaintiff must show he or she is: "(1) suffering from physical disability, infirmity, malformation or disfigurement (2) which is caused by bodily injury, birth defect or illness including epilepsy." Viscik v. Fowler Equip. Co., 173 N.J. 1, 15(2002). Here, APPELLANT

failed to make such a showing in opposition to RESPONDENTS' Motion (or on this Appeal), as APPELLANT did not include any facts in the Counterstatement of Facts which establishes that injuries which caused him to file a Workers Compensation claim also satisfy the NJLAD's definition of a "disability." In the absence of any such facts, RESPONDENTS are entitled to Summary Judgment.

Even if his work-related injury qualifies as a "disability," APPELLANT failed to set forth facts which create a genuine issue of material fact that he was subject conditions which were severe or pervasive enough to alter the conditions of employment. At most, APPELLANT has identified two (2) incidents related to his alleged "disability." In the first, APPELLANT allegedly was asked, and agreed, to lift "heavy items" despite an alleged restriction against same. APPELLANT was not injured as a result of such conduct nor were the conditions of his employment altered. In the second instance, APPELLANT received a "write up" from MUNGO after failing to lift a bucket of spackle but admittedly was not actually disciplined in any fashion thereafter. In fact, once APPELLANT allegedly complained to his supervisor, he was moved to a different position where such lifting was not required. Given these facts, APPELLANT'S allegations are insufficient to create a hostile work environment based on his "disability" and RESPONDENTS are entitled to Summary Judgment dismissing that claim with prejudice.

D. THE REMARKS OF GUZMAN AND HERNANDEZ WERE NEITHER SEVERE NOR PERVASIVE AND DID NOT CREATE A HOSTILE WORK ENVIRONMENT.

APPELLANT cannot rely upon the alleged comments of GUZMAN or HERNANDEZ (which was not plead in APPELLANT'S Complaint) to establish a hostile work environment under the NJLAD as those remarks were neither severe nor pervasive and the Trial Court was correct to grant Summary Judgment on that basis.

The only incidents which involve NJLAD-protected characteristics are the alleged "anti-Jamaican" statements of GUZMAN and HERNANDEZ which were made in Summer 2020 and "late 2021," – two isolated remarks which were not made in close temporal proximity to each other. APPELLANT has not identified any other alleged remarks which created a hostile work environment since that time. These two isolated remarks, neither of which were directed specifically to APPELLANT himself, are insufficient to establish a hostile work environment under the NJLAD. Again:

> [A] hostile work environment discrimination claim cannot be established by epithets or comments which are `merely offensive.' An employment discrimination law such as the LAD is not intended to be "a `general civility' code" for conduct in the workplace. . . . "[D]iscourtesy or rudeness should not be confused with racial [or ethnic] harassment," and "a lack of racial [or ethnic] sensitivity does not, alone, amount to actionable harassment." Thus, "simple teasing," offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the "terms and conditions of employment."

Mandel v. UBS/Paine Webber, Inc., 373 N.J. Super. 55, 73 (2004) (quoting Heitzman v. Monmouth County, 321 N.J. Super. 133, 147 (App. Div. 1999)).

The alleged remarks of GUZMAN and/or HERNANDEZ are, at worst, rude and/or "merely offensive." Neither remark was physically threatening or humiliating, nor did either remark unreasonably interfere with APPELLANT'S work performance. Neither remark contained language identical or similar to that which has been found to create a hostile work environment even when used on only a single instance. See, e.g. Taylor v. Metzger, 152 N.J. 490 (1998). Here, in both instances, a brief and fleeting remark was made in passing in APPELLANT'S presence, after which he returned to his work duties without issue. APPELLANT did not identify any other instances where he had any issue with either individual; in fact, APPELLANT did not identify any other instances where he even interacted with HERNANDEZ, who was not his supervisor. Moreover, while APPELLANT did file a complaint with PATERSON, it made absolutely no mention of the remarks allegedly made by GUZMAN and/or HERNANDEZ and related solely to the alleged conduct of MUNGO. One would expect that if such remarks were sufficiently serve and pervasive as to create a hostile work environment, APPELLANT would have brought those remarks to the attention of his employer.

E. PATERSON PROMPTLY INVESTIGATED AND ADDRESSED APPELLANT'S COMPLAINT REGARDING MUNGO.

Finally, PATERSON is entitled to the Summary Judgment on Count One of the Complaint in as much as it adopted and enforced an effective anti-harassment policy. In Count One of the Complaint, APPELLANT alleges that "[DEFENDANTS] failed to adequately investigate and remediate [APPELLANT'S] complaints of hostile work environment and to rectify same after repeated notice of such conduct by [APPELLANT]." (See EXHIBIT A to HARRIOTT CERT. at ¶53)

In Lehmann, supra, the Court identified section 219(2)(b) of the Restatement (Second) of Agency as an alternative basis in negligence for employer liability. 132 N.J. at 621. Although no bright-line rule was established, several factors were identified as being relevant to determining whether an employer had acted negligently in failing to establish an anti-harassment policy in its workplace, such as the existence of: (1) formal policies prohibiting harassment in the workplace; (2) complaint structures for employees' use, both formal and informal in nature; (3) anti-harassment training, which must be mandatory for supervisors and managers, and must be available to all employees of the organization; (4) the existence of effective sensing or monitoring mechanisms to check the trustworthiness of the policies and complaint structures; and (5) an unequivocal commitment from the highest levels of the employer that harassment would not be tolerated, and demonstration of that policy commitment by consistent practice. Ibid.

In Aguas v. State, 220 N.J. 494 (2015) the Court determined that an "employer's implementation and enforcement of an effective anti-harassment policy is a critical factor in determining negligence." Id. at 499. Further, in Gaines v. Bellino, 173 N.J. 301 (2002), the Court identified several factors in determining whether said policy is effective such as whether there is a formal prohibition of harassment; formal and informal complaint structures; anti-harassment training; sensing and monitoring mechanisms for assessing the policies and complaint procedures; and unequivocal commitment to intolerance of harassment demonstrated by consistent practice. Id. at 313.

Here, it is undisputed that APELLANT was aware of PATERSON'S anti-harassment policy and filed a complaint November 3, 2021, which only identified the October 2021 incident involving the cans of spackle and did not make any reference to any "anti-Jamaican" remarks by MUNGO, GUZMAN, HERNANDEZ or anyone else. On December 2, 2021, APPELLANT filed a supplemental complaint which alleged that MUNGO was wearing a body camera and filming APPELLANT while he worked. That conduct was addressed shortly thereafter when PATERSON issued a memorandum to all City employees and then MUNGO stopped wearing the camera. APPELLANT and other witnesses were interviewed as part of PATERSON'S investigation of his complaint. As a result of the investigation, PATERSON determined that MUNGO'S behavior was not based on

APPELLANT'S membership in one LAD- protected categories and APPELLANT was eventually moved to a new position in or about January 2022, approximately sixty (60) days after first filing his complaint. Given as much, the undisputed facts establish that PATERSON had an effective anti-harassment policy and belie any claim of negligence.

Accordingly, for the reasons set forth herein, RESPONDENTS are entitled to Summary Judgment dismissing Count One of APPELLANT'S Complaint.

POINT II

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT DISMISSING APPELLANT'S NJLAD RETALIATION CLAIM

RESPONDENTS are also entitled to Summary Judgment dismissing the allegations of retaliation under the NJLAD. First, that claim, as plead, is also based on his filing of a workers compensation claim, which is not a protected characteristic under the NJLAD. Even if there were a question of fact as to whether the NJLAD applies to such claims, APPELLANT failed to raise any facts suggesting he was subject to any retaliatory conduct or adverse employment action based on that filing, nor did he present any evidence of retaliation based on any alleged "disability," or his support of a co-worker's separate harassment complaint.

A. THE FILING OF A WORKERS COMPENSATION CLAIM IS NOT A PROTECTED CHARACTERISTIC UNDER THE NJLAD.

The Trial Court properly granted Summary Judgment dismissing APPELLANT'S NJLAD retaliation claim as APPELLANT alleges that he was

retaliated against by MUNGO based on his filing of a workers compensation claim, which is not a protected characteristic under the NJLAD. As such, PATERSON is entitled to judgment in its favor as a matter of law and Count Two of APPELLANT'S Complaint should be dismissed with prejudice.

Count Two of APPELLANT'S Complaint alleges that APPELLANT'S "protests, reports and complaints about the conduct of [PATERSON'S] employees constitutes protected activity" under the NJLAD and that PATERSON retaliated against him for such protected activity. (See EXHIBIT A to HARRIOTT CERT. at ¶58-59.)

The NJLAD makes it unlawful for an employer to retaliate against an employee, defined as follows:

> to take reprisals against any person because that person has opposed any practices or acts forbidden under this act or because that person has filed a complaint, testified or assisted in any proceeding under this act or to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this act.

N.J.S.A. 10:5–12(d).

"[A] person engages in a protected activity under the LAD when that person opposes any practice rendered unlawful under the LAD." Young v. Hobart W. Grp., 385 N.J. Super. 448, 466 (App. Div. 2005). See also Jamison, supra, 242 N.J. Super. at 445 ("Such an unlawful employment practice occurs when an employer, or an

employee, for any reason, takes reprisal against another employee because the latter has challenged any practices or acts forbidden by the LAD[,]") Again, protected activity, if involving a complaint, must concern discrimination. Reyes, supra, 997 F.Supp. at 619; Barber, supra, 68 F.3d at 702.

Here, the only complaint filed by APPELLANT with PATERSON was the November 3, 2021 complaint, supplemented by the December 2, 2021 complaint, against MUNGO. That Complaint related solely to PLAINTIFF'S belief that MUNGO was harassing him after he filed a workers compensation claim for injuries he believed were caused by MUNGO'S improper supervision. That complaint did not identify any other basis for MUNGO'S actions. Again, as Stewart v. County of Hudson, supra, makes clear, the filing of a grievance, or internal complaint unrelated to race or gender-based issues does not qualify as a "protected activity" under the NJLAD. As is the case here, Stewart involved a claim of retaliation after the filing of a workers compensation claim against the County. After determining that the filing of a workers compensation claim is not a protected activity under the NJLAD, the Appellate Division vacated the trial verdict in favor of the APPELLANT and remanded the matter back to the trial court for consideration of the remaining claims.

B. APPELLANT CANNOT ESTABLISH A PRIMA FACIE CASE OF RETALIATION UNDER THE NJLAD AS HE DID NOT EXPERIENCE AN ADVERSE EMPLOYMENT ACTION.

Een if the filing of a workers compensation claim is a protected activity under the NJLAD for which one cannot be retaliated against, APPELLANT has failed to present any facts which show he was subject to an adverse employment action by PATERSON causally related to his protected activity. Any attempt by APPELLANT to rely upon the complaint filed by his co-worker regarding GUZMAN'S alleged "anti-Jamaican" remark is equally unavailing, as, again, APPELLANT has failed to demonstrate that he suffered an adverse employment action by PATERSON causally related to his protected activity. As such, the Second Count of the Complaint should be dismissed with prejudice as a matter of law.

To state "a prima facie case of retaliation under the NLAD, a plaintiff must show that 1) he was engaged in a protected activity known to defendant; 2) he was thereafter subjected to an adverse employment decision by the defendant; and 3) there was a causal link between the two." Woods–Pirozzi, supra, 290 N.J. Super. at 274. Once a plaintiff establishes a prima facie case of retaliation, the burden of production shifts to the defendant to articulate a "legitimate, non-retaliatory reason" for the decision. Jamison v. Rockaway Twp. Bd. of Educ., 242 N.J. Super. 436, 445 (App. Div. 1990). The plaintiff must then demonstrate that a retaliatory intent, not the employer's stated reason, motivated the employer's action, which can be

accomplished by proving the employer's articulated reason was merely a pretext for discrimination. Woods, supra, 290 N.J. Super. at 274; Jamison, supra, 290 N.J. Super. at 445.

The Court have routinely stated that in order to qualify as an "adverse employment action," the alleged retaliation "must have impacted the employee's compensation or rank or be virtually equivalent to discharge." Fraternal Order of Police, Lodge 1 v. City of Camden, 842 F.3d 231, 241 (3rd Cir. 2016) (internal quotation omitted) (finding that "placement on an 'abuse of sick time' list, the cancellation of a vacation, and a visit by an Internal Affairs officer" was not adverse employment action.) To constitute an adverse action, the alleged retaliatory act must seriously intrude "into the employment relationship." Beasley v. Passaic County, 377 N.J. Super. 585, 608 (App Div. 2005). To amount to an "adverse employment action", the employer's action must have a significant "impact" on the employee's "compensation or rank." Hancock v. Borough of Oaklyn, 347 N.J. Super. 350, 360 (App. Div. 2002). "Not every employment action that makes an employee unhappy constitutes " 'an actionable adverse action.'" Cokus v. Bristol Myers Squibb Co., 362 N.J. Super. 366, 378 (Law Div. 2002), aff'd, 362 N.J. Super. 245 (App. Div. 2003)(quoting Montandon v. Farmland Indus., Inc., 116 F.3d 355, 359 (8th Cir.1997)

APPELLANT has failed to identify any alleged acts of retaliation by DEFENDANTS causally related to APPELLANT'S filing of a workers

compensation complaint or his filing of a complaint against MUNGO for alleged harassment based on that earlier workers compensation complaint. After returning from workers compensation leave, APPELLANT identifies only two alleged acts of retaliation involving MUNGO which he relates to the filing of his workers compensation claim – the August 2021 incident where APPELLANT was told by MUNGO to lift heavy items and the October 2021 incident where APPELLANT was "written-up" for not following MUNGO'S instruction to bring a can of spackle from the truck to the jobsite. By APPELLANT'S own admission, he was not actually subject to any discipline for the October 2021 incident. Neither of these alleged ats of retaliation had any impact whatsoever on APPELLANT'S rank or compensation or is in any way tantamount to a discharge. APPELLANT has not identified any other action allegedly undertaken by MUNGO against him in retaliation for filing a workers compensation claim. Moreover, APPELLANT has not identified a single act by MUNGO, or anyone else, which occurred after he filed his November 3, 2021 complaint against MUNGO with PATERSON which he considers an "adverse employment action." In the absence of same, DEFENDANTS are entitled to Summary Judgment dismissing Count Two of APPELLANT'S Complaint.

The same goes for APPELLANT'S claim that he was subject to retaliation by RESPONDENTS after he supported his co-worker's complaint against GUZMAN for alleged "anti-Jamaican" statements. While APPELLANT was apparently

interviewed as part of that investigation[2], he has not identified a single allegedly retaliatory action undertaken by GUZMAN or anyone else which he believes is attributable to his participation in that investigation. Again, in the absence of any such facts, RESPONDENTS are entitled to Summary Judgment dismissing Count Two of the Complaint with prejudice.

C. MUNGO IS ENTITLED TO SUMMARY JUDGMENT AS THERE IS NO EVIDENCE THAT HE AIDED OR ABETTED RETALIATION AGAINST APPELLANT BY ANOTHER PERSON.

MUNGO is also entitled to Summary Judgment dismissing Count Two of the Complaint as APPELLANT has failed to provide any facts which establish that MUNGO aided or abetted retaliation against APPELLANT by another individual. In the absence of same, he is entitled to judgment in his favor as a matter of law.

The NJLAD does not provide for individual liability of named employees or supervisors, unless those employees "aid, abet, incite, compel, or coerce the doing of the acts forbidden" by others. N.S.J.A. 10:5-12(e). In order to hold a supervisor liable as an aider or abettor, a APPELLANT must show that: (1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time he provides the assistance; and (3) the defendants must knowingly and substantially assist the principal violation. Tarr v. Ciasulli, 181 N.J. 70, 84 (2004).

[2] PLAINTIFF has not provided the date on which his co-worker's complaint was filed or the date when he was interviewed as part of the investigation of that claim.

In Tarr, the Court also held that an aider or abettor cannot be held individually liable for his own wrongful acts. Ibid. See also, Failla v. City of Passaic, 146 F.3d 149, 159 (3rd Cir. 1998) (requiring employer's liability before considering individual's liability); Abbamont v. Piscataway Twp. Bd. Of Ed., 138 N.J. 405 (1994) (holding no supervisor liability unless liability of employer is established).

Further, it is not enough to simply allege that a supervisory employee failed to act to prevent discrimination or respond to complaints. See Cicchetti v. Morris County Sheriff's Office, 194 N.J. 563, 595 (2008). Rather, to find a supervisor individually liable under an "aiding and abetting" theory "requires active and purposeful conduct" on the part of the supervisor toward the employee. Id. at 594 (citing Tarr, 181 at 83.) Factors that indicate whether a party has provided "substantial assistance" to the principal violator are:

> (1) the nature of the act encouraged, (2) the amount of assistance given by the supervisor, (3) whether the supervisor was present at the time of the asserted harassment, (4) the supervisor's relations to the others, and (5) the state of mind of the supervisor.

Tarr, 181 N.J. at 84 (citing Hurley v. Atlantic City Police Dep't, 174 F.3d 95, 127 (3rd Cir. 1999).)

The Cicchetti decision is instructive, if not outright controlling of the present matter. In that case, the Supreme Court had held that the employee's claims under the LAD should have been dismissed against his supervisors as a matter of law since the supervisors' conduct had fallen short of the "active and purposeful conduct"

necessary for individual liability due to "aiding or abetting." In so doing, the Court found:

> The record on appeal contains no evidence that would support the conclusion that Sheriff Rochford or Undersheriff Dempsey could have been aiders or abettors. Although each undoubtedly had responsibility over the employees and over the workplace, and although there is evidence that they failed to act so as to protect plaintiff or effectively respond to his complaints of discrimination, their acts are imputed to plaintiff's employer, the Sheriff's Office, as a result of their status as supervisors. A different paradigm applies to plaintiff's efforts to hold them individually liable, however. Standing alone, the acts and failures to act that plaintiff attributes to the Sheriff and Undersheriff fall well short of the "active and purposeful conduct," that we have held is required to constitute aiding and abetting for purposes of their individual liability.

Cichetti, 194 N.J. at 595. (internal citations omitted)

Here, APPELLANT has failed to identify any conduct by MUNGO other than his own actions that were allegedly undertaken in retaliation for the filing of a workers compensation claim. APPELLANT has failed to identify any acts allegedly undertaken by MUNGO in furtherance of harassment or retaliation by another person against APPELLANT. Again, MUNGO cannot aid and abet his own conduct, only the conduct of others. There is no allegation or evidence to support an allegation that MUNGO undertook any action to support "anti-Jamaican" harassment or retaliation by GUZMAN or HERNANDEZ. Nor is there even any evidence that MUNGO was aware of such alleged "anti-Jamaican" harassment by those individuals.

Again, in the absence of any such facts, MUNGO is entitled to Summary Judgment dismissing Count Two of the Complaint with prejudice.

POINT III

RESPONDENTS ARE ENTITLED TO SUMMARY JUDGMENT AS APPELLANT HAS FAILED TO ESTABLISH UNLAWFUL RETALIATION UNDER CEPA.

RESPONDENTS are entitled to Summary Judgment dismissing Count Three of APPELLANT'S Complaint as APPELLANT has failed to present sufficient facts to establish a prima facie case under CEPA. More specifically, it is undisputed that APPELLANT is not a "whistleblower," that APPELLANT did not experience an adverse employment action as a result of such alleged "whistleblowing" and that there is not a "substantial nexus" between APPELLANT'S alleged "whistleblowing" and an "adverse employment" action. Accordingly, APPELLANTS are entitled to judgment in its favor as a matter of law.

Again, Count Three of APPELLANT'S Complaint alleges that APPELLANT "engaged in whistle-blowing activities in that he reasonably believed that [PATERSON] engaged in conduct which he reasonably believed was in violation of law, or public policy, and/or rules and regulations promulgated by law and/or public policy" and that PATERSON retaliated against APPELLANT as a result of same. (See EXHIBIT A to HARRIOTT CERT. at ¶64-65.)

CEPA prohibits employers from taking "any retaliatory action against an employee" who "[d]iscloses, 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[.]" N.J.S.A. 34:19-3. To establish a CEPA retaliation claim, APPELLANT must demonstrate: (1) he reasonably believed that his employer's conduct was violating a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy; (2) he performed a "whistleblowing" activity described in N.J.S.A. 34:19-3 c; (3) an adverse employment action was taken against him; and (4) a causal connection exists between the whistle-blowing activity and the adverse employment action. See Young v. Twp. of Irvington, 629 F. App'x 352, 356 (3rd Cir. 2015) (quoting Caver v. City of Trenton, 420 F. 3d 243, 254 (3rd Cir. 2005)); Maimone v. Atlantic City, 188 N.J. 221, 230 (2006). As a threshold matter, the Court must first "identify a statute, regulation, rule, or public policy that closely relates to the complained-of conduct." Dzwonar v. McDevitt, 177 N.J. 451, 469 (2003). Where a APPELLANT alleges a claim under subsection c(3), "he or she must first articulate the existence of a clear mandate of public policy which the employer's conduct violates." Mehlman v. Mobil Oil Corp., 153 N.J. 163, 187 (1998). A limiting factor is that the alleged activity "must represent a public harm rather than a private harm or harm only to the aggrieved employee." Mehlman, 153 N.J. at 188 (1998). As set

forth in Dzwonar, the "clear mandate" must exist to prevent harm to the public, rather than to protect exclusively private interests. Id. at 469. See also, Maw, supra, 179 N.J. at 444-445. (The legislative approach vis-à-vis a "clear" mandate of public policy bespeaks a desire not to have CEPA actions devolve into arguments between employees and employers over what is, and is not, correct public policy. Such an approach also fits with the legislative requirement of a "mandate" as opposed to a less rigorous standard for the type of public policy that is implicated.) Therefore, as determined in Hitesman v. Bridgeway, Inc., 218 N.J. 8 (2014):

> The trial court must first determine whether there is a substantial nexus between the complained-of conduct and a "clear mandate of public policy" identified by the court or the plaintiff. If the trial court, reviewing the evidence under the standard of Rule 4:37-2(b), determines that the plaintiff has demonstrated a substantial nexus, the motion should be denied. ..If the plaintiff fails to demonstrate a substantial nexus between the employer's conduct and the identified clear mandate of public policy, the trial court should grant the motion and dismiss the claim.

Id. at 31 (internal citations omitted). See also, Dzwonar, 177 N.J. at 464.

As the Court stated later in the Hitesman decision:

> Accordingly, a pivotal component of a CEPA claim is the plaintiff's identification of authority in one or more of the categories enumerated in the statute that bears a substantial nexus to his or her claim. As the Court noted in Dzwonar, supra, in which it rejected the plaintiff's contention that union bylaws constituted a law, rule or, regulation or clear mandate of public policy for purposes of N.J.S.A. 34:19-3(c), "[t]he trial court can and should enter judgment for a defendant when no such law or policy is forthcoming...[T]he plaintiff must identify the authority that provides a standard against which the conduct of the defendant may be measured.

Id. at 32-33.

Additionally, the employee must have an "objectively reasonable belief" in the occurrence of improper conduct, rather than an objection based on some other principle no matter how deeply believed. McLelland v. Moore, 343 N.J. Super. 589, 600 (App Div. 2000). To prove a CEPA claim under subsection a. or c., plaintiff must establish, among other things, that "a causal connection exists between the whistle-blowing activity and the adverse employment action." Kolb v. Burns, 320 N.J. Super. 467, 476 (App. Div. 1999).

CEPA defines actionable retaliation as "the 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. 34:19–2e. The Third Circuit has interpreted this language to mean that "in order for [retaliatory] actions to qualify under CEPA, they must have impacted the employee's compensation or rank or be virtually equivalent to discharge." Fraternal Order of Police, Lodge 1, supra, 842 F.3d at 241. To constitute an adverse action under CEPA, the alleged retaliatory act must seriously intrude "into the employment relationship." Beasley, supra, 377 N.J. Super. at 608. To amount to an "adverse employment action" under CEPA, the employer's action must have a significant "impact" on the employee's "compensation or rank." Hancock, supra, 347 N.J. Super. at 360. "Not every employment action that makes an employee unhappy constitutes "'an actionable

adverse action.'" Cokus, supra, 362 N.J. Super. at 378 (Law Div. 2002) (quoting Montandon v. Farmland Indus., Inc., 116 F.3d 355, 359 (8th Cir.1997)

In the present matter, APPELLANT has failed to present any facts which even create a question of material fact as to whether he has experienced an adverse employment action causally connected to such "whistle-blowing," be it his own complaint against MUNGO or his involvement with his co-worker's separate harassment complaint Again, after returning from workers compensation leave, APPELLANT identifies only two alleged acts of retaliation involving MUNGO which he relates to the filing of his workers compensation claim – the August 2021 incident where APPELLANT was told by MUNGO to lift heavy items and the October 2021 incident where APPELLANT was "written-up" for not following MUNGO'S instruction to bring a can of spackle from the truck to the jobsite. By APPELLANT'S own admission, he was not actually subject to any discipline for the October 2021 incident. Neither of these alleged ats of retaliation had any impact whatsoever on APPELLANT'S rank or compensation or is in any way tantamount to a discharge. APPELLANT has not identified any other action allegedly undertaken by MUNGO against him in retaliation for filing a workers compensation claim. Moreover, APPELLANT has not identified a single act by MUNGO, or anyone else, which occurred after he filed his November 3, 2021 complaint against MUNGO with PATERSON which he considers an "adverse employment action."

The same goes for APPELLANT'S claim that he was subject to retaliation by RESPONDENTS after he supported his co-worker's complaint against GUZMAN for alleged "anti-Jamaican" statements. While APPELLANT was apparently interviewed as part of that investigation, he has not identified a single allegedly retaliatory action undertaken by GUZMAN or anyone else which he believes is attributable to his participation in that investigation.

CONCLUSION

Accordingly, for the reasons set forth herein, DEFENDANTS/RESPONDENTS, CITY OF PATERSON and TIMOTHY MUNGO, respectfully request that this Appellate Panel affirm the Order granting Summary Judgment in their favor and dismissing APPELLANT'S Complaint with prejudice.

Respectfully Submitted,

FLORIO KENNY RAVAL, L.L.P.

Christopher K. Harriott

CHRISTOPHER K. HARRIOTT, ESQ.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A—001428-24

MAURICE CLINE,	:	CIVIL ACTION
Plaintiff/Appellant,	:	**ON APPEAL FROM**
-v-	:	SUPERIOR COURT OF NEW JERSEY
CITY OF PATERSON, TIMOTHY MUNGO and JOHN/JANE DOES 1-10,	:	LAW DIVISION PASSAIC COUNTY
Defendant/Respondent.	:	DOCKET NO. PAS-L-001475-22
	:	**SAT BELOW**
	:	HON. RUDOLPH A. FILKO, A.J.S.C.

REPLY BRIEF ON BEHALF OF APPELLANT, MAURICE CLINE

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Date Submitted:
July 29, 2025

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POINT I

THE TRIAL COURT ERRED WHEN IT DETERMINED THAT THE CITY OF PATERSON WAS ENTITLED TO SUMMARY JUDGMENT BECAUSE PLAINTIFF WAS NOT SUBJECTED TO A HOSTILE WORK ENVIRONMENT (Pa001)

Notwithstanding the Defendants' obfuscation of the central facts surrounding the Plaintiff's claims, the trial court erred when it determined that the Defendant, City of Paterson, was entitled to summary judgment on Count One of Plaintiff's Complaint because there are genuine issues of material fact that exist to establish that Plaintiff was subjected to a hostile work environment under the New Jersey Law Against Discrimination.

A. HOSTILE WORK ENVIRONMENT UNDER THE NJLAD.

The New Jersey Law Against Discrimination prohibits discrimination based on:

> Race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy or breastfeeding, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait of any individual, or because of the liability for service in the Armed Forces of the United States or the nationality of any individual, or because of the refusal to submit to a genetic test to an employer.

N.J.S.A. 10:5-12(a).

For Plaintiff to maintain a claim under the New Jersey Law Against Discrimination, it must be established that the conduct (1) would not have occurred

but for his/her protected characteristic; (2) the conduct complained of was severe or pervasive; and (3) that a reasonable person would believe that the conditions of employment are altered and the working environment is hostile or abusive. *Lehman v. Toys 'R' Us, Inc.,* 132 N.J. 587, 603-604 (1993). Hostile work environment claims "must be evaluated in light of 'all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Cutler v. Dorn,* 196 N.J. 419, 432 (2008) (*quoting Green v. Jersey City Bd. Of Educ.,* 177 N.J. 434, 447 (2003)).

As an initial matter, Plaintiff accepts that no one is entitled to a workplace free of annoyances and unpleasant comments. However, race and disability discrimination are different matters entirely and under no circumstances should a person be expected to tolerate such discrimination. In the context of a NJLAD claim, the complained of conduct need not be both "severe and pervasive," since such a dual requirement "would bar actions based on a single, extremely severe incident or, perhaps, even those based on multiple but randomly-occurring incidents of harassment." *Lehman v. Toys 'R' Us, Inc.,* 132 N.J. 587, 606 (1993).

Severe or pervasive conduct can be shown by alleging "numerous incidents that, if considered individually, would be insufficiently severe to state a claim, but considered together are sufficiently pervasive to make the work environment

intimidating or hostile." *Id.* Our courts have also noted that the severity of discriminatory remarks are exacerbated when such remarks are uttered by a supervisor and not just any ordinary co-worker of the plaintiff. *Hurley v. Atlantic City Police Dept.,* 174 F.3d 95, 126 (3d Cir. 1999).

The Appellate Division in *Herman v. Coastal Corp.,* 348 N.J. Super. 1 (App. Div. 2022) accurately sets forth the proper standard to apply in these situations:

> [W]hile a claim for a hostile work environment must consider the totality of the circumstances, the complained of conduct must be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Lehmann, supra, 132 N.J. at 608 A.2d 445. Plaintiff's attempt to lump random incidents and disagreements with co-workers during her tenure . . . are ineffective in meeting the standard of "an abusive working environment." As stated by the District Court of New Jersey, "Although a person is legally entitled to a work environment free of hostility, she is not entitled to a perfect workplace, free of annoyances and colleagues she finds disagreeable. In short, what is illegal is a 'hostile work environment." Not an 'annoying work environment.'" Lynch v. New Deal Delivery Serv., Inc. 974 F.Supp. 441, 452 (D.N.J. 1997). Summary judgment was properly granted, dismissing Plaintiff's claims of a hostile working environment. Herman, supra, 348 N.J. Super. at 23.

The person who made the comments can also be considered when determining the severity of the words used or the objective reasonableness of the Plaintiff's belief that their work environment is hostile and abusive. *Taylor v. Metzger,* 152 N.J. 490, 503 (1998).

B. FILING A WORKERS' COMPENSATION CLAIM IS NOT A PROTECTED CHARACTERISTIC UNDER THE NJLAD BUT DISABILITY IS PROTECTED.

To establish a NJLAD disability claim, a plaintiff must prove that he or she is "(1) suffering from physical disability, infirmity, malformation or disfigurement (2) which is caused by bodily injury, birth defect or illness including epilepsy." *Viscik v. Fowler Equip. Co.,* 173 N.J. 1 (2002). While Plaintiff acknowledges that the NJLAD does not include protection for filing a workers' compensation claim, it does prohibit discrimination based on disability which there can no doubt Plaintiff has as a result of said workers' compensation accident. Plaintiff received an award of twenty-five percent partial total disability for injuries to his lower back and left hip as a direct result of his work-related accident.

Thereafter, upon his return to work after his work-related accident, Mr. Guzman informed Plaintiff not to lift anything heavy but Defendant Mungo had Plaintiff lifting heavy things the same day. (Pa057). Moreover, Plaintiff received a write-up for incompetency and insubordination from Defendant Mungo because Plaintiff did not bring up cans of paint at the same time as spackle because it caused a sharp back in his back. (Pa062-Pa063). Thus, the actions of Defendant Mungo were in direct violation of the NJLAD.

C. THE REMARKS OF GUZMAN AND HERNANDEZ WERE SEVERE OR PERVASIVE AND DID CREATE A HOSTILE WORK ENVIRONMENT.

Defendants assert that the anti-Jamaican comments of Louis Guzman and Juan Hernandez are insufficient to establish a hostile work environment under the

NJLAD. Defendants further assert that the "only incidents" involved here were two isolated remarks related to "anti-Jamaican" statements made by Plaintiff's supervisor and Hernandez. The first incident involves Plaintiff's main supervisor, Louis Guzman, making a remark in front of Plaintiff and two other people about him not liking Jamaicans. (Pa043). Plaintiff's co-worker, Michael McCoy, filed a Complaint against Louis Guzman for this incident. (Pa046). Plaintiff was a witness for Mr. McCoy's allegations set forth in his Complaint against Mr. Guzman. (Pa049-Pa050).

Thereafter, Plaintiff was also present outside of a building where he was working when a co-worker, Juan Hernandez, was driving his vehicle very fast and almost struck Plaintiff. (Pa095). Upon exiting his vehicle, Mr. Hernandez was asked why was he driving like that and his response was "he drive like that so he could kill Jamaicans." (Pa094).

There are the "only two incidents" which Plaintiff has asserted throughout this litigation. These comments were most certainly physically threatening or humiliating and most certainly interfered with Plaintiff's work performance. One of Plaintiff's co-worker nearly runs over the Plaintiff and states that he "drive like that so he could kill Jamaicans" and that does not interfere with Plaintiff's work performance.

Moreover, Plaintiff's main supervisor, Louis Guzman, made a remark in front of Plaintiff and two other people about him not liking Jamaicans. While this comment alone may not rise to the level of a violation of the NJLAD, coupled together with the comment made by Hernandez and the remarks become severe or pervasive so as to create a hostile work environment.

D. THE TRIAL COURT ERRED WHEN IT DETERMINED THAT THE CITY OF PATERSON WAS ENTITLED TO SUMMARY JUDGMENT BECAUSE IT INVESTIGATED AND REMEDIATED PLAINTIFF'S REPORTED COMPLAINTS

The City of Paterson's investigation into Plaintiff's allegations miraculously concluded that Defendant Mungo's actions towards the Plaintiff were not based on his membership on any protected class. While Plaintiff did not report the comments made by Guzman and Hernandez, Plaintiff testified that his co-worker, Michael McKoy, informed the City of Paterson. In fact, Plaintiff spoke on behalf of Mr. McKoy in his complaints against the City of Paterson when they were investigated.

Just because the City of Paterson has a policy which states that it prohibits harassment or retaliation in the workplace does not mean that Plaintiff has confidence in that policy. The City of Paterson makes much out of Plaintiff not reporting the comments of Guzman or Hernandez. However, as previously stated, those comments were presented on behalf of Michael McKoy so that explains why Plaintiff did not file a complaint on those issues. Judge Filko concluded that the City of Paterson did its investigation, however Judge Filko also concluded that said

investigation was not generated by the discriminatory comments. 1T:32:22-1T:33:12. Accordingly, the trial court erred when it granted the Defendant, City of Paterson's, Motion for Summary Judgment dismissing Count One of Plaintiff's Complaint.

POINT II

THE TRIAL COURT ERRED WHEN IT DETERMINED THAT THE CITY OF PATERSON WAS ENTITLED TO SUMMARY JUDGMENT DISMISSING PLAINTIFF'S NJLAD RETALIATION CLAIM (Pa001)

The NJLAD makes it unlawful to retaliate against an employee as follows:

> to take reprisals against any person because that person has opposed any practices or acts forbidden under this act or because that person has filed a complaint, testified or assisted in any proceeding under this act or to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this act.

N.J.S.A. 10:5-12(d).

A. FILING A WORKERS' COMPENSATION CLAIM IS NOT A PROTECTED CHARACTERISTIC UNDER THE NJLAD BUT DISABILITY IS PROTECTED.

In the present matter, Plaintiff's main supervisor, Louis Guzman, made a remark in front of Plaintiff and two other people about him not liking Jamaicans. (Pa043). Plaintiff's co-worker, Michael McCoy, filed a Complaint against Louis Guzman for this incident. (Pa046). Plaintiff was a witness for Mr. McCoy's allegations set forth in his Complaint against Mr. Guzman. (Pa049-Pa050).

Plaintiff testified in a proceeding advanced by Michael McKoy regarding a discriminatory comment made by their Supervisor, Louis Guzman, about Jamaicans. Thereafter, Plaintiff began to feel the "reprisals" of having testified on behalf of Mr. McKoy.

While Plaintiff acknowledges that the NJLAD does not include protection for filing a workers' compensation claim, it does prohibit discrimination based on disability which there can no doubt Plaintiff has as a result of said workers' compensation accident. Plaintiff ultimately received an award of twenty-five percent partial total disability for injuries to his lower back and left hip as a direct result of his work-related accident.

Upon his return to work after his work-related accident, Mr. Guzman informed Plaintiff not to lift anything heavy but Defendant Mungo had Plaintiff lifting heavy things the same day. (Pa057). Moreover, Plaintiff received a write-up for incompetency and insubordination from Defendant Mungo because Plaintiff did not bring up cans of paint at the same time as spackle because it caused a sharp back in his back. (Pa062-Pa063). Thus, the actions of Defendant Mungo were in direct violation of the NJLAD.

B. APPELLANT CAN ESTABLISH A PRIMA FACIE CASE OF RETALIATION UNDER THE NJLAD

To establish "a prima facie case of retaliation under the NJLAD, a plaintiff must show that 1) he was engaged in a protected activity known to the defendant; 2)

he was thereafter subjected to an adverse employment decision by the defendant; and 3) there was a causal link between the two." *Woods-Pirozzio v. Nabisco Foods,* 290 N.J. Super. 252, 274 (App. Div. 1996).

Initially, Plaintiff asserts that Defendant Mungo approached Plaintiff while at the Community Improvement Building in Paterson, New Jersey and apologized for his discriminatory comments and the manner in which he treated Plaintiff throughout his employment. (Pa194). Plaintiff's main supervisor, Louis Guzman, made a remark in front of Plaintiff and two other people about him not liking Jamaicans. (Pa043). Plaintiff's co-worker, Michael McCoy, filed a Complaint against Louis Guzman for this incident. (Pa046). Plaintiff was a witness for Mr. McCoy's allegations set forth in his Complaint against Mr. Guzman. (Pa049-Pa050).

Thereafter, after returning to work after his work-related accident, Mr. Guzman informed Plaintiff not to lift anything heavy but Defendant Mungo had Plaintiff lifting heavy things the same day. (Pa057). Louis Guzman and Billy Rodriguez, the Director of the Department of Public Works, gave Plaintiff a hard time when he asked to be transferred to his job position of cleaning buildings. (Pa059-Pa061). Plaintiff received a write-up for incompetency and insubordination from Defendant Mungo because Plaintiff did not bring up cans of paint at the same time as spackle because it caused a sharp back in his back. (Pa062-Pa063). Each of these acts alone may be not enough to substantiate a claim for retaliation but taken

as a whole it is respectfully submitted that the trial court erred when it granted Defendants' Motion to Summary Judgment dismissing Count Two of the Complaint.

C. MUNGO WAS NOT ENTITLED TO SUMMARY JUDGMENT.

Defendant Mungo may be held liable under the aiding and abetting provision of the NJLAD because Mungo had supervisory authority over Plaintiff and Guzman directly engaged in acts which discriminated against and harassed Plaintiff on the basis of his race. The NJLAD provides that it is unlawful for "any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this act, or to attempt to do so." *N.J.S.A.* 10:5–12(e). As such, this provision of the NJLAD expressly delineates individual liability for those who "aid or abet" an employer's unlawful employment actions. *Cortes v. University of Medicine and Dentistry of New Jersey*, 391 F.Supp.2d 298, 314 (2005). The NJLAD also contains an anti-retaliation provision, which deems it unlawful for "any person to take reprisals against any person because that person has opposed any practices or acts" which the NJLAD prohibits. *Cortes,* 391 F. Supp. at 314; *N.J.S.A.* 10:5-12(d). This provision therefore expressly contemplates direct liability for supervisory employees. *Id.* Thus, those employees who have been delegated some degree of supervisory authority can be held personally liable under the NJLAD as "aiders and abettors." *Id.*

The Third Circuit has specifically held that individual supervisors may be liable for aiding and abetting under the NJLAD. *Failla v. City of Passaic*, 146 F.3d 149 (1999). A supervisor has a unique role in shaping the work environment. *Taylor v. Metzger*, 152 N.J. 490, 502 (1998). To that end, part of a supervisor's responsibilities is the duty to prevent, avoid, and rectify invidious harassment in the workplace. This duty can be violated by deliberate indifference or affirmatively harassing acts. When a supervisor flouts this duty, he subjects himself and his employer to liability. Where a supervisor's malice substantially assists an employer's inaction, the supervisor's liability is grounded in the failure to stop the harassment, which includes both active and passive components.

Defendant Mungo was not Plaintiff's co-worker but was his direct supervisor. Consistent with Mungo's responsibilities as Plaintiff's supervisor, he is bestowed with supervisory authority over Plaintiff. Defendant Mungo was Plaintiff's direct supervisor and that fact is not disputed by Defendants. In his supervisory capacity, Mungo engaged in affirmative acts of discrimination as described in Plaintiff's Complaint and this brief. As such, Mungo is susceptible to liability for aiding and abetting his own discriminatory and harassing conduct under the NJLAD.

POINT III

THE TRIAL COURT ERRED WHEN IT DETERMINED THAT THE DEFENDANTS WERE ENTITLED TO SUMMARY JUDGMENT BECAUSE PLAINTIFF FAILED TO ESTABLISH UNLAWFUL RETALIATION UNDER CEPA

The purpose of CEPA is to protect and encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employers from engaging in such conduct. Thus, CEPA must be considered remedial in nature and should be construed liberally to effectuate its important social goal. *Abbamont v. Piscataway Tp. Bd. of Educ.,* 138 N.J. 405 (1994). The Legislature intended that CEPA encourage, not thwart, legitimate employee complaints. *Turner v. Associated Humane Societies, Inc.*, 396 N.J. Super. 582 (App. Div. 2007).

To establish a prima facie case of retaliation under CEPA, Plaintiff must demonstrate that: (1) he reasonably believed that his employer was engaged in the violation of a law or rule or duly promulgated regulation; (2) he engaged in whistleblowing as defined in the statute; (3) he was subjected to an adverse employment action; and (4) there is a causal relationship between the whistleblowing actions and the adverse employment action. *Racanelli v. County of Passaic*, 417 N.J. Super. 52 (App. Div. 2010). Just as the *McDonnell* court established the four-step, burden-shifting framework to analyzing a prima facie case of racial discrimination under the NJLAD, the *Winters* court established the same

framework for determining whether a prima facie claim for retaliation is established under CEPA. *Winters v. North Hudson Regional Fire and Rescue,* 212 N.J. 67 (2012). See also *Donofry v. Autotote Systems, Inc.*, 350 N.J. Super. 276 (App. Div. 2001) (framework for proving a CEPA claim follows that of a NJLAD claim).

The most significant element under CEPA is that the objecting employee must have an objectively reasonable belief, at the time of objection or refusal to participate in the employer's offensive activity, that such activity is either illegal, fraudulent or harmful to the public health, safety or welfare and that there is a substantial likelihood that the questioned activity is incompatible with a constitutional, statutory or regulatory provision, code of ethics, or other recognized source of public policy. *Massarano v. New Jersey Transit*, 400 N.J. Super. 474 (App. Div. 2008). In furtherance of its purpose to protect and encourage whistleblowers, CEPA is not intended to make lawyers out of conscientious employees. Therefore, in order to show that the plaintiff had a reasonable belief that his employer's conduct was in violation of a law or other rule, a plaintiff is not required to show that the relevant legal authority or clear mandate of public policy actually would be violated if all the facts he or she alleges are true. Rather, the plaintiff must set forth facts that would support an objectively reasonable belief that a violation has occurred. *Hitesman v. Bridgeway Inc.,* 430 N.J. Super. 198 (App. Div. 2013). Thus, a CEPA action will lie if the employee reasonably believes

that objection to his employer's conduct is warranted even if no law or public policy was actually violated or no crime or fraud actually committed. *Gerard v. CCHSC*, 248 N.J. Super. 516, 523-525 (App. Div. 2002).

Here, Plaintiff's whistleblowing activity concerned his reasonable belief that Defendants were violating long-established prohibitions against racial discrimination in the workplace. Plaintiff participated in an investigation into an employee complaint with the City against Guzman, and after an internal investigation, these complaints were corroborated by the City. Plaintiff does not dispute that private disagreements cannot form the basis of a CEPA retaliation claim. *Maw*, 359 N.J. Super. at 448. However, our courts do not support private disagreements that are grounded in racism.

The trial court concluded that there was no evidence of any adverse employment action against Plaintiff. 1T:34:1-5. Adverse employment action can take many forms, from the most blatant to the most subtle. Defendants' Supervisors, Louis Guzman and Billy Rodriguez, the Director of the Department of Public Works, gave Plaintiff a hard time when he asked to be transferred to his job position of cleaning buildings. (Pa059-Pa061). Plaintiff received a write-up for incompetency and insubordination from Defendant Mungo because Plaintiff did not bring up cans of paint at the same time as spackle because it caused a sharp back in his back. (Pa062-Pa063). These actions can be considered adverse employment action. The

trial court was entertaining a Motion for Summary Judgment not a bench trial. All reasonable inferences should be given to the Plaintiff. When considering all the facts presented, together with all reasonable inferences, the trial court erred when it granted the Defendants' Motion for Summary Judgment dismissing Count Three of Plaintiff's Complaint.

CONCLUSION

Plaintiff therefore respectfully requests that this Court reverse the trial court's December 10, 2024 decision granting the Defendants summary judgment and remand the matter back for a trial on the issues of liability and damages. The trial court not only erred when it concluded that there were no genuine issues of material facts, it did not give the Plaintiff any reasonable inferences from the evidence presented. Accordingly, it is respectfully submitted that the trial court's decision to grant Defendants' Motion for Summary Judgment should be reversed.

Respectfully submitted,

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