

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-002852-23T2

THOMAS TESAR
JULIANNA TESAR

Plaintiff-Appellants,

VS.

On Appeal from Final Order of
Superior Court of New Jersey,
Law Division, Middlesex County

SAYREVILLE BOROUGH (POLICE
DEPARTMENT), JOHN ZEBROWSKI,
DAVID ERLA, JOHN DOE 1-10
FICTITIOUS INDIVIDUALS,
CORPORATIONS, JOINTLY AND
SEVERALLY

Sat Below:

Bina K. Desai, J.S.C.

Defendant-Respondents.

BRIEF OF PLAINTIFF-APPELLANTS

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STATEMENT OF PROCEDURAL HISTORY

The Plaintiff-Appellant, Thomas Tesar, Juliana Tesar ("Plaintiff"), filed a Complaint against the Defendant-Respondents ("Defendants"), seeking relief under the Conscientious Employee Protection Act (N.J.S.A 34:19-1 et seq. ("CEPA")) and New Jersey Law Against Discrimination (N.J.S.A. 10:5-1 et seq) ("LAD"). [Pa 1-47].

A First Amended Complaint was also filed (Pa 48-95), to which the Defendants filed an Answer (Pa 96) and Amended Answer (Pa121).

The Defendants filed a motion for summary judgment (Pa 145), which was opposed by the Plaintiff (Pa 172). The Defendants filed reply papers. [Pa 1087].

Oral argument was held before the Honorable Bina K. Desai, J.S.C. of the Law Division of Middlesex County, who rendered her decision from the bench on April 12, 2024. Judge Desai granted the Defendants' motion for summary judgment, entering an oral Opinion and Order. [Pa 1113, 1T47-2].

The Plaintiff subsequently filed a Notice of Appeal on May 20, 2024. [Pa 1117]. On May 10, 2024, an Order was entered sealing all confidential discovery filed by the Parties during the summary Judgment proceedings. [Pa 1115, 2T13-6]

STATEMENT OF FACTS

The Plaintiff, Thomas Tesar,1) was hired by the Sayreville Police Department (hereinafter the “Department”) as a police officer the month of August 2014. On or about the 12th day of April 2024, Plaintiff’s First Amended Complaint filed on August 17, 2021 against his Employer, alleging whistleblower retaliations and discrimination was dismissed in its entirety (1T47-2, Pa1113).

Employment History

Thomas Tesar, (hereinafter Plaintiff or Tesar) joined the “Department” during the month of August 2014. Previously Tesar attended the Monmouth County Police Academy the month of January 2013 and was employed thereafter by the Montclair Township Police Department on or about the summer of 2013. Plaintiff also served in the United States Armed Forces as an active-duty member of the US Navy. [Pa 49].

It is noteworthy that Plaintiff’s five years as a public servant prior to being hired by the “Department”, yielded a perfect disciplinary record and good performance recognition by his supervisors. (PA 49). Plaintiff’s 5 years as a public servant prior to being hired by the “Department” yielded a perfect disciplinary record and good performance recognition by his supervisors. Plaintiff’s employment at Sayreville was also promising until the year 2016 after he elected to report racist comments made in reference to his appearance and demeanor, supposedly made by

the Chief of Police, named defendant, John Zebrowski, as is described in the ensuing paragraphs. [Pa 50, 386]

On or about July 15, 2016, Plaintiff was involved in a motor vehicle accident while responding to a first aid call involving an overdose victim, when he sustained a back injury. Plaintiff was treated at the Raritan Bay Medical Center in Perth Amboy, prescribed medication, and placed on injured while on duty status. Plaintiff was also scheduled for physical therapy sessions as part of his treatment regimen. Plaintiff began receiving one (1) hour therapy treatments 2 to 3 times per week during his assigned work hours (as authorized by management) at Twin Boro Physical Therapy located in Sayreville approximately four (4) minutes travel time from Police Headquarters. [Pa50, 540]

After being in therapy for a couple of weeks, one day after Plaintiff returned to Headquarters from his therapy session, he encountered Chief Zebrowski in the hallway of the main headquarters building. They both stopped, greeted each other cordially and engaged in friendly conversation. The Chief asked plaintiff how he was doing, to which plaintiff responded “I am doing well”, while presuming the Chief was referring to his injury and the therapy treatment progress. [Pa 540]

Plaintiff was dressed in his physical therapy clothing, i.e., shorts, baseball cap, t-shirt), having just returned from a physical therapy session, so plaintiff explained during the brief exchange that he had just returned from his physical therapy

appointment/session. At no point during the conversation, did Chief Zebrowski comment about plaintiff's manner of dress. Additionally, the time was approaching 4:30 pm which is/was the end of the workday for plaintiff, thus preventing the need to change into his uniform. Plaintiff continued walking down the hallway after his brief conversation with the Chief, to the Station Commander's booth, to return his work vehicle keys. Suddenly, Sgt. Al Gawron came around the corner from the direction of the Chief's office and appeared upset. [Pa179, 541]

Sgt. Gawron was plaintiff's direct supervisor while plaintiff was temporarily assigned to the Administration Bureau, while recovering from his injury. As he began speaking, he blurted out, "I just got my ass chewed out by the Chief because of you." plaintiff was now completely confused, as plaintiff had just seen the Chief in the hallway several minutes ago, and had no indication that he was displeased with him. Plaintiff immediately felt tensed and nervously questioned Sgt. Gawron as to what he did wrong. Gawron replied, "It's because of the way you're dressed right now". Plaintiff then explained to him that he had just come in from his physical therapy appointment several minutes ago, and that he was turning in his vehicle keys and getting ready to leave soon, as his workday was almost complete. [Pa 179]

It should be noted that at no point in time, while plaintiff was assigned to the Administration Bureau, that he was told or instructed to change back into his business casual attire for the final minutes of his workday, just to walk out of the

building. Plaintiff had also observed other officers, who had been on light duty in the past, complete their physical therapy appointments at the completion of their workday, as he had, and leave the building in the same clothes. [Pa 52]

The Racial Slur Directed at Plaintiff

Sgt. Gawron replied that he understood the reasoning but stated directly, “The Chief is so pissed off and wanted to know, and I quote, “why is Tesar walking around the building dressed like a nigger”. As plaintiff listened to Sgt. Gawron speak, he was in complete disbelief that these words would be directed toward him due to his attire. Since Gawron prefaced his comments with “and I quote”, plaintiff believed that he too was bothered by this racial slur and was deliberately letting plaintiff know that it was said. Plaintiff’s reply to Sgt. Gawron was “Wow, the Chief really said that?”, to which Sgt. Gawron directly stated “yes”. Plaintiff knew instinctively this created a problem for him because such comments violated Departmental Rules and should be reported. [Pa 52, 180, 541]

Sgt. Gawron also warned Tesar that the Chief questioned him about where Tesar had been all day and stated Plaintiff was on the Chief’s radar. (Pa 53)

The following day, Off. Robert Horsh , who was also on light duty and assigned a similar task as Plaintiff, phoned Plaintiff as Plaintiff was leaving his physical therapy appointment, to warn him that he should return to headquarters because he was hearing rumors the Chief is pissed off at him (Plaintiff) and there is

a target on his back. [Pa 53, 542, 543]

It is noteworthy, that at or around the same year Plaintiff filed his lawsuit ('21) several other officers at the Department filed lawsuits with similar allegations or retaliatory threats made by subordinates allegedly on behalf of the Chief [Pa. 173, 174, 348, 359, 367].

Plaintiff's apprehension was exasperated by Officer Robert Horsch's statements because Horsche was at that time P.B.A Local 98 Vice-President and when Plaintiff described the incident which may have generated the Chief's anger, Ptl. Horsch seemed disinterested and did not want to know anything; but just wanted to give Plaintiff a heads up on what he heard, and cautioned him, "don't go missing, cause they're going to be watching you." [Pa 75, 542, 180]

Plaintiff felt deserted and somewhat confused and upset because he did not deserve to be treated in this threatening way; so, he turned to Ptl. Joseph Monaco who he trusted and respected as someone who seemed to do the right thing. In short, Plaintiff valued Ptl. Monaco's insight because he was aware that Monaco presented a whistleblowing lawsuit against the Department with Zebrowski as Chief some years ago. [Pa 55, 180, 181]. Monaco advised Plaintiff to immediately report the behavior to Lt. Erla of Internal Affairs and he would address it. [Pa 55, 541]

Plaintiff made contact with Lt. Erla at home to explain exactly what

occurred in his conversations with Chief Zebrowski and Sgt. Gawron; however, Lt. Erla did not provide any assistance, but instead told Plaintiff to talk to the Chief himself. Plaintiff testified Lt. Erla told him specifically “as Dave, not Lt. Erla ... just knock on the Chief’s door, go inside and just, you know, squash the bullshit”. [Pa 55, 181, 543]

Plaintiff felt dejected by the conversation with Lt. Erla, and his advice to him as a junior officer with just two (2) years at the Dept. to knock on the Chief’s door and question him about his comment. It was Erla’s responsibility as an I.A. Officer to enforce and ensure the rules and regulations of the Department are complied with. [PA 56, 181, 389]

Plaintiff informed Ptl. Monaco of his exchange with Lt. Erla who was surprised at Erla’s response but encouraged Plaintiff to remain positive; Plaintiff, however, realized that by not choosing to handle his complaint properly and investigate the incident, Erla was protecting Chief Zebrowski and would tell Zebrowski that Plaintiff attempted to report the incident and would face certain retaliation for what he did. [Pa 56, 544]

Plaintiff was correct. A few weeks (2-3) later Chief Zebrowski asked to speak with Plaintiff near the back stairwell of headquarters and stated he had heard rumors about the comment he supposedly made (which confirmed Plaintiff’s suspicion about Lt. Erla) and stated those words must have come from

come from Ron, referring to Captain Ronald Balto, the Administration Captain.
[Pa 59, 183]

Despite Plaintiffs clear expression to Lt. Erla about being uncomfortable with the situation “and would file whatever paperwork necessary or whatever to.... investigate” the matter so it does not continue, the matter was not investigated. [Pa 56, 389-390, 543].

In the face of Lt. Erla’s refusal, Plaintiff felt uneasy and anxious about being in headquarters; so he requested of his worker’s compensation doctor to return him to full duty, that his back was o.k. (although it was not) so he could return to his regular midnight shift. [Pa 57, 390, 182].

It is noteworthy that Lt. Erla stated during his deposition that a racial slur such as the “n-word” directed at an employee is not harassing if the employee is not a minority, and in this case an African American [Pa182, 284]; so, Erla felt he handled the situation correctly by telling Plaintiff to speak to the Chief himself, despite it being a clear violation of Sayreville’s Policy with regard to racial slurs and the Attorney General Internal Affairs Guidelines. [Pa 175-177, 182, 284].

Sayreville’s Borough’s own policy defines racial slurs as harassing that must be reported; Chapter 1.9, also states, violation of this harassment policy will result in disciplinary action up to and including discharge. [Pa 316].

Furthermore, because Tesar's complaint to Lt. Erla alleged that Chief Zebrowski made the ugly comment, it became a reportable incident to be handled by the Middlesex County Prosecutor's Office (MCPO) as a violation of law and/or Rules pursuant to Sayreville's Police Department Rules. [Pa 176, 231]

Furthermore, the State Attorney General's Internal Affairs Policies and Procedures Chapter 5.1.8 provides, in part, that "if the subject of the internal affairs investigations is the Police Chief, Police Director, Sheriff, or Head of Internal Affairs, either the County Prosecutor or the Attorney General's Office shall handle the investigation. [Pa 176-177, 232, 270].

**Plaintiff Provides Statements to County
Prosecutor in February 2019 About the Racial Slur**

Lt. Erla did finally submit Tesar's racial slur complaint to the County Prosecutor's Office the month of February 2019 (more than 2 ½ years after the initial complaint was made by Tesar), as confirmed by the "MCPO" investigative memorandum which resulted in a finding of sustained against Captain Batko and Sgt. Gawran, but not sustained against Chief Zebrowski. [Pa 177, 307].

During the "MCPO" investigation in February 2019, Plaintiff provided a detailed recorded statement to Lt. Erla, with the investigators present, as to what occurred the summer of 2016 when the racial slur was made. [Pa 177, 307-311].

The “MCPO” investigative memo provides clearly Lt. Erla’s acknowledgement that over the past couple of years (since 2016) the matter had been brought up by officers, specifically “when they are receiving discipline”. This caused Lt. Erla to confer with Chief Zebrowski on January 24, 2019, at which time Erla said he was directed to “take care” of the situation. [Pa 307, 310].

Chief Zebrowski also acknowledged, according to the County Investigator Dion McCall, that he (Zebrowski) initiated the I.A. investigation with the County because the officers were referring to the non-investigation of the racial slur incident from the year 2016 as they were being disciplined for behavior. [Pa 307, 310].

However, Chief Zebrowski could not explain during his deposition, why he never spoke to Captain Batko about conveying his message in such a negative fashion in violation of Sayreville’s Rules and Regulations by use of that term, which gives the appearance that Batko was the scapegoat, because he retired shortly thereafter. [Pa 60, 184, 335].

**Plaintiff’s Initial Interaction with Chief Zebrowski
After His Complaint to Lt. Erla**

So, Plaintiff was not satisfied with the Chief’s explanation and requested the Chief address him directly if he had issues with him in the future. [Pa 60, 183, 546]

Shortly thereafter, Plaintiff received a call from Lt. Erla to confirm his conversation with the Chief, and Plaintiff voiced his doubts about the Chief's explanation; but Lt. Erla brushed that aside and treated the matter as settled, but apparently it was far from being settled, as time would reveal. [Pa 60, 306].

Plaintiff felt, having less than two years on the job and having just recently purchased a home, with a newborn on the way, that his career was threatened and decided not to pursue the issue for fear of certain retaliation. [Pa 60, 546].

**The Retaliatory Hostile Work Environment
Plaintiff Faced After His "N" Work Complaint**

Plaintiff began to hear rumors shortly thereafter that he was being too sensitive, a "snitch" and had "ratted" on the Chief, and could detect that certain officers and supervisors who had positive interactions with him began to ignore and/or just be very short and direct with him. [Pa 61, 196, 589, 590]

On or about December 2016, Plaintiff received a verbal reprimand after stopping at his residence for 20-30 minutes. When Plaintiff exited his residence, Lt/Supervisor Novak was waiting outside stating he had received a complaint from Lt. Barbieri that Plaintiff was home at his residence. Plaintiff found the complaint to be hypocritical and harassing because it was not unusual for officers to make brief stops at their residence and it was widely known in the Department that Lt. Barbieri made frequent lengthy stops at home during his daily workday, with no repercussions. [Pa 62, 185, 575]

The Administration Position Not Offered to Plaintiff

During a conversation Plaintiff had with Lt. Michael Gaines in the Station Commander's Office in December of 2017, Gaines informed Plaintiff about the opening of a position within the Administration Bureau, as Ofc. Maslowski was soon to be promoted and his position would be coming available soon. Gaines indicated that most of the patrol officers had been offered the position despite none of them putting a letter of interest in for the position, and there was no interest as all of them had refused this spot. Gaines was surprised to learn that Plaintiff had not been asked because, as Gaines noted, several officers had been asked more than once in what was a desperate attempt to fill the position. Gaines said he would submit my interest the following day. [Pa 63, 601,603]

After several days passed and no formal offer was made, Plaintiff was surprised. Several days later, Plaintiff was at Ofc. Matthew Kenny's residence when Kenny received a phone call from the Patrol Division, Captain Daniel Plumacker. During this phone call, Captain Plumacker offered the administration position to Kenny, although Kenny never expressed interest. [Pa 64, 602, 603]

Shortly thereafter, Plaintiff spoke to Lt. Gaines again, who expressed his confusion about the decision as well. Plaintiff expressed to him his disappointment and the probability of retaliation for attempting to report Chief Zebrowski, and Lt. Gaines agreed that it must have been the reason. [Pa 64, 601-608]

Lt. Erla's use of the "N" Word

Several months after Ofc. Kenny had been assigned to the Administration Bureau, he confided in Plaintiff about an incident that had been bothering him, which he felt he needed to express to Plaintiff as his friend, asking Plaintiff not to tell anyone for obvious fear of retaliation. Kenny began to explain how he had taken a ride during work with Lt. Erla to Newark, NJ to drop off urine samples to the laboratory for drug screening. During their trip, they engaged in a conversation when Lt. Erla had used the word "nigger" casually while speaking to Ofc. Kenny, making him angry as he was aware of the racial slur incident between Chief Zebrowski and Plaintiff, and Lt. Erla's negligence in handling it. [Pa 65,560]

Sensing Ofc. Kenny was uncomfortable with the word being used in front of him, Lt. Erla then sarcastically remarked, "What are you going to do? Call IA on me?" referencing Internal Affairs, as the obvious sarcasm because he was the Supervisor of Internal Affairs in the Sayreville Police Department. [Pa66,560]

When Plaintiff spoke to Sgt. Monaco and told this information to him, he was extremely angry and in disbelief over the actions/conduct at the top of this department. He asked Plaintiff multiple questions about the incident and stated that he was going to speak directly to Ofc. Kenny to verify Plaintiff's story. [Pa 67, 560-61] Earlier in the year of 2019, Sgt. Monaco informed Plaintiff that he confronted Ofc. Kenny at the annual Sayreville Police Memorial, which occurred earlier in the

year of 2019, and asked him directly if Lt. Erla had used a racial slur during their conversation. [Pa 67, 560-561]

Sgt. Monaco then stated that upon asking Ofc. Kenny, Kenny put his head down and stated yes, how did you find out. Sgt. Monaco was honest with Plaintiff and told Ofc. Kenny that Plaintiff had let him know. Sgt. Monaco believed Ofc. Kenny was fearful about this incident getting out by the way he responded. Nevertheless, Ofc. Kenny assured Sgt. Monaco he would tell the truth if the incident was reported. [Pa 68, 560, 561]

Lt. Monaco, who also filed a discrimination/retaliation lawsuit against Sayreville on or about February 2020, was scheduled to be deposed as a voluntary witness in Plaintiff's civil action but was blocked by defense Counsel's efforts, ultimately resulting in Monaco's reticence given what he perceived as a lack of protection from the Court. Lt. Monaco filed two civil actions against Sayreville and both were apparently successful, with the most recent lawsuit resulting in a \$250,000 settlement award, which is part of the public record. [Pa 67, 174,]

Plaintiff's Unfit for Duty Charge

Another incident that Plaintiff was involved in occurred in the year 2018. That day, Plaintiff had gone to a late lunch/early dinner with friends in Linden, NJ prior to working his shift. During the meal, Plaintiff had consumed several alcoholic beverages over a period of time. Plaintiff deliberately did not have a drink after

3:00pm, well before the four hours required prior to his shift, which began at 9:15pm, as per departmental policy. Plaintiff then left the restaurant with no issue, and returned home to take his regular nap to awake at approximately 8:30pm. [Pa 68, 186, 548, 549]

Plaintiff first attempted to call Lt. Gaines prior to leaving to see if he could put in for another type of day off, either a comp day or vacation day, however, Lt. Gaines did not answer. Confident that he was ok to work, he decided he would simply show up at headquarters, dress in his uniform, and go to lineup, before informing the supervisor working that he was not feeling well, which would exempt him from being in violation of the sick call out policy. If an officer leaves work once they arrive, even after just getting to work, there would be no violation of the policy. [Pa 69,549, 550]

Plaintiff then reported upstairs to lineup, but did not see Lt. Gaines until the start of the shift at 9:15pm. Once lineup was concluded, Plaintiff intended to report off sick, however, during the lineup Lt. Gaines requested that Plaintiff report to the Station Commander's Office to see him. Lt. Gaines then asked if Plaintiff had been drinking prior to work, to which Plaintiff responded he had, but hours before his shift began and he felt fine. Plaintiff also informed Lt. Gaines that he attempted to call him two different times to put in for a day off, but could not reach him on the phone. Lt. Gaines instructed Plaintiff that he was no longer allowed to leave and that

since he had technically reported to work, and consumed alcohol earlier that day, he would have to contact Internal Affairs. [Pa 70, 186-189, 549]

Days later, Lt. Erla conducted Plaintiff's Internal Affairs investigation, wherein Plaintiff was found to have violated the policy and was suspended for 15 workdays. Plaintiff found this punishment to be extremely harsh and complained to the PBA President Michael Theile, who was present for the investigation, as well as PBA Attorney Jim Mets, who both instructed Plaintiff to take the 15-day suspension as other departments and appeals had seen longer suspensions for alcohol related incidents. [Pa 70, 186-189, 549, 550]

President Theile advised Plaintiff that Chief Zebrowski was seeking a 45-day suspension, however, due to the fact that Plaintiff had successfully contested false statements in a few of their reports, Plaintiff was "only" given a 15-day suspension, which was still egregious considering what really happened. Plaintiff recalls a similar incident where two Sayreville Police Academy recruits, Patrick Brennan and Jaime Unkel, were caught drinking alcohol by staff while in the Academy and suspended by Chief Zebrowski for only 3 workdays, lenient compared to Plaintiff's suspension. Also, Plaintiff was found not to have been intoxicated at work, and was never put on the Alcotest machine, but was found to be unfit for duty that workday by Internal Affairs. [Pa 71, 186-189, 550]

Disciplined For Comments on Improper Gratuities

During December of 2018, another incident occurred while Plaintiff was on duty. Plaintiff arrived at headquarters for work when he observed a brand-new Keurig coffee machine, along with a significant amount of coffee pods sitting on the Records Bureau desk. These items were a gift to the Sayreville Police Department by a family for the holiday season. When Plaintiff saw them, he jokingly began to question, however still attempting to bring to relevance, that this situation could possibly be a policy violation for accepting a gratuity and gifts which was not allowed; Plaintiff made these remarks in front of Lt. Gaines, as well as Internal Affairs Sgt. Thomas Sheehan. Both seemed dismissive and unresponsive to Plaintiff's statement and so the situation was left as is. [Pa 72, 557]

Several days later, Plaintiff was called into Lt. Erla's office where he relayed to Plaintiff that a confidential report was done and received by him pertaining to Plaintiff's attitude, sarcasm and demeanor. Plaintiff felt this entire incident was done to silence him since he continued to call out perceived violations against the department. [Pa 73, 191, 557]

Lt. Gaines informed Plaintiff that he was approached by Lt. Erla about the incident involving the coffee machine, which was reported to him by Sgt. Sheehan. Lt. Erla spoke to him about the incident and then ordered Lt. Gaines to write the confidential report against Plaintiff, which he stated he never would have written

otherwise and did not feel it was necessary to do. [Pa_74, 193-195]

Sleeping While on Duty Charge

On May 30, 2019, Plaintiff was working a road job on Chevalier Ave. from 2100-0500. At approximately 0014, Plaintiff received a phone call from Det. Pirigyi asking if he was alright and if he needed anything. Confused by the call, plaintiff told him he was ok and did not need anything. Pirigyi then stated that he, along with other detectives, had driven by Plaintiff's patrol vehicle and could not see anyone inside due to the flashing lights and time of night. He also acknowledged it could be due to Plaintiff sitting back in the seat; so, he just wanted to check on Plaintiff. A short time later, Plaintiff received a similar call from Sgt. Atlak. Again confused, Plaintiff replied the same. Shortly thereafter, Sgt. Monaco arrived at Plaintiff's patrol vehicle to check on his status advising that he had received a phone call from an unspecified officer that Plaintiff was possibly sleeping in his vehicle on duty. Having prior knowledge that Sgt. Theile and Lt. Novak have a close relationship, Plaintiff believes Sgt. Theile is the one who contacted Sgt. Novak. Plaintiff believes this was done solely with the intention to harass and retaliate against him because he is a witness in an ongoing internal investigation involving Charles Novak sleeping on duty. [Pa 74, 193-195]

It should be noted as well that during the course of Plaintiff's shift that at no time was he sleeping on duty. Apparently, when the officer passed vehicle 75,

Plaintiff was inside with his seat reclined, but the observer did not stop to inquire. Plaintiff believes that he is being targeted and is harassed due to his testimony against Charles Novak and, more importantly, against Chief John Zebrowski. Furthermore, Det. Sgt. Theile was aware of Plaintiff's testimony against Charles due to his position as PBA president and present during those testimonies.

[Pa 74-75, 193-195, 428, 431, 436]

Shortly thereafter, Plaintiff was contacted by Lt. Erla about the incident informing him that he would be looking into the situation and that Plaintiff's concerns were documented. Weeks passed before Plaintiff was again contacted by Lt. Erla informing him that no formal Internal Affairs investigations would be conducted into this matter, as per the Chief's instructions. So, Lt. Erla never opened an Internal Affairs investigation into what is/was noticeable harassment while concluding in his report, without interviewing Sgt. Theile; "even with recorded statements, I believe I would not be able to prove the motivators of Sgt. Theile and Lt. Novak. Therefore, I would not be able to sustain a harassment charge by Ptl. Tesar against them. It is unlikely that the events set in motion by Sgt. Theile were 100 percent in the best interest of Ptl. Tesar" [Pa74-76, 79, 434-438, 193-194].

It is noteworthy that Det. Pirigyi was in the same patrol vehicle with Sgt. Theile when they passed by Plaintiff's patrol vehicle. Sgt. Pirigyi chose to call Plaintiff directly to check on him while Sgt. Theile contacted the off-duty supervisor,

Lt. James Novak, who is the brother of Ptl. Charles Novak, who was suspended for sleeping on the job due to Tesar's statements to Internal Affairs several months before this incident, and Lt. Erla was fully aware of all these facts. [Pa 435, 76, 428, 431]

Plaintiff's liability expert, Dr. Rosell, observed in his report that "Erla started an inquiry into the baseless accusation against Tesar, while simultaneously failing to pursue Tesar's concern that he was subjected to retaliation". He writes further that: "the allegation of sleeping against Plaintiff Tesar clearly demonstrates the fact that two different sets of discipline existed within the Sayreville Borough Police Department at the time in question. At no time should Tesar have been subjected to an internal investigation, let alone an inquiry. Sergeant Monaco had quickly and decisively handled the situation consistent with the same policy that Theile disregarded, determining that Tesar was safe and had not been sleeping. Still, defendant Erla started an inquiry into the baseless accusation while simultaneously failing to pursue Tesar's concern that he was subjected to retaliation". [Pa 248]

Plaintiff as Witness to Ptl. Charles Novak Sleeping on the Job

Several months prior to Plaintiff being accused of sleeping (10/24/18) on the job, he was witness to, and provided statements to, Internal Affairs about Ptl. Charles Novak (the brother of Lt. James Novak) sleeping while on duty. [Pa 79, 445, 446, 45]. Plaintiff believed he was a target of harassment because he provided testimony

against Charles Novak and Chief Zebrowski. [Pa 76, 440]

Instead of focusing on the target of the investigation, I.A. seemed fixated on turning the investigation against Ofc. Arway and Plaintiff, which resulted in Plaintiff along with a number of officers, receiving discipline for violations of the 16-hour rule.

**Plaintiff Ostracized by Other Officers
Who Did Not Wish to Work With Him**

During the years 2020 and 2021, Plaintiff complained to supervising officers about delayed responses to calls Plaintiff was dispatched to, in particular, identifying Pt. Unkel, who he said would pull into a cul-de-sac until his unit, as the responding unit passed, and then pull out and go to the incident scene. [Pa 79, 192, 383, 1103]

During November 2020, shift picks were conducted to assign shifts for the upcoming year. As Plaintiff had previously worked on A side midnights, rumors quickly spread as to Plaintiff's interest of switching sides based on his seniority to have more holidays off. Plaintiff immediately began to hear rumors that he was not wanted on the B side and they would make work more difficult. [195-197]

It should also be noted as well, that Ofc. Raub, being the junior officer in the department, had no pick and therefore was assigned to work with Plaintiff. Rumor quickly spread that he was unhappy with this outcome, so much so that Raub offered Ofc. Valentine \$1000.00 to switch positions with him, which Valentine declined. Plaintiff spoke to Ofc. Valentine who confirmed personally to Plaintiff that he

indeed was made the offer. This situation was also well known throughout the department, yet no incident, investigation, or discipline was conducted. [Pa 78, 196, 592]

Lt. Erla, when deposed, stated he questioned Ptl. Raub about the offer and Raub said it was a joke, but he did not question Ptl. Valentine, who was the one who told Plaintiff about the offer. Again, willful indifference to Plaintiff's concerns about this possible form of harassment by concluding that Raub's response made sense to him so no further inquiry was needed. [Pa 196, 302, 409]

Plaintiff's Performance Evaluation Appeal Lost by Lt. Erla

Plaintiff appealed his 2018 performance evaluation by letter on or about 4/3/2019, shortly after his interview with the county Prosecutors about the racial slur; but after many months, was asked by Lt. Gaines, his supervisor, if he had a copy of the appeal or the evaluation because Management lost the paperwork. [Pa 85, 409, 591]

Although Lt. Gaines provided a statement at the very end of discovery, which was not provided to Plaintiff in discovery, but presented in Defendants reply to Plaintiff's Responding Statement of Facts during the Summary Judgment proceedings, it does not explain Management's actions in the loss of his appeal. [Pa 85, 468, 591]

**Plaintiff Provides Information to Independent Audit
Agency Involving Sexual Discrimination at Sayreville P.D.**

In late 2020, Plaintiff was interviewed by the outside agency about several incidents involving Sgt. Moat, where he expressed the belief that Sgt. Moat was continually being sexually harassed within the Department. However, Plaintiff acknowledged during his deposition, that only leading questions were asked and his memory was vague as to his responses. [Pa 87, 197, 410]

**Plaintiff Charged with Failure to
Investigate and Write a Report**

In May of 2021, Plaintiff was notified of yet another internal investigation with Plaintiff as the target. The investigation was initiated by Det. Sgt. Michael Theile. This is the same individual who initiated the investigation into Plaintiff allegedly sleeping on a road job. This investigation involved Plaintiff being called into Internal Affairs and questioned on his response and actions on a call involving three black males standing in front of Domino's eating pizza on a Saturday night. The call came from an individual inside Krystal's Bakery, which is adjacent to Domino's Pizza, wherein she claimed to be nervous about their presence. [Pa87]

When Plaintiff arrived, Plaintiff observed the three black males standing underneath the overhang of Krystal's Bakery in an attempt to stay dry as it was raining hard this evening. Plaintiff also observed the individuals to be eating slices of pizza as Domino's pizza directly joins with the bakery, and was still open for

business. Krystal's Bakery was closed. When Plaintiff inquired as to what the individuals were doing, they stated they were eating pizza waiting for their Uber to arrive. At this point, no longer seeing any suspicion with the individuals, and that no crime was being committed, Plaintiff's inquiry into their actions was concluded swiftly. Plaintiff and another officer, Matt Salvatore then parked down the street approximately 100 yards away and spoke to one another in the Minit Mall parking lot. [pa 197, 198, 594, 501]

Plaintiff was questioned by Lt. Erla about his lack of police work in this matter, and as to why he did not park in direct view of these individuals to watch them. Plaintiff was completely confused by this, as he had already approached the individuals and determined they were only eating pizza and waiting for a ride home. Plaintiff even stated in his internal affairs interview that he thought that this was racist and did not feel this was the necessary course of action he should take in this situation. Plaintiff felt this action would violate their constitutional rights and was inappropriate. There no longer was any suspicion involved with these individuals so why was Plaintiff being told to watch them. [Pa 197-199]

Nevertheless, Lt. Erla after his blatant refusal to charge Sgt. Michael Theile for falsely accusing Plaintiff for sleeping on the job, chose to charge and sustain departmental actions in this case for violation of rules and regulations for failure to write a report, warranting a verbal reprimand. [Pa 512]

Lt. Erla's actions were reversed, however, by arbitration proceedings involving Officer Salvatore, wherein the Arbitrator ruled this action had never been initiated against any other officer in the Department was arbitrary and capricious. [Pa 1012, 1013] [Pa 466, 1012, 1013]

The Law Division, in its analysis, determined that because this charge against Plaintiff was reversed as a result of the Arbitrator's Decision, Plaintiff was made completely whole and could not assert this charge as part of his claim of retaliation, while citing Beasley v. Passaic County, 377 N.J. Super 585 (2005). [1T44-16]

The Beasley Court was referring to discrete acts, standing alone and not cumulative behavior (harassment) as adverse employment action. (See Point II pg. 43)

STATEMENT OF STANDARD OF REVIEW

In reviewing a decision on summary judgment rendered by the trial court, the Appellate Division utilizes the same summary standards governing summary judgments at trial.

Thus, the Appellate Division decides first whether there was a genuine issue of fact. If there was not, it then decides whether the lower court's ruling on the law was correct. *Prudential Property Ins. v. Boylan*, 307 N.J. Super. 162, 167 (App. Div. 1998). As noted in *Mandel v. UBS/PaineWebber, Inc.*, 373 N.J. Super. 55, 71-72 (App. Div. 2004)

*****in** determining a motion for summary judgment, the judge must decide 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." Summary judgment must be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). "If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of Rule 4:46-2 ... [W]hen the evidence 'is so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment. **On appeal, we apply the same standard.**

[citations omitted; emphasis added]

LEGAL ARGUMENT

POINT I

BECAUSE THE PLAINTIFF MADE OUT A PRIMA FACIE CASE FOR A HOSTILE WORK ENVIRONMENT CLAIM UNDER CEPA, THE LAW DIVISION ERRED BY GRANTING THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT. (Pa 1113)

The record shows that the Plaintiff made a prima facie showing of a hostile work environment claim under the New Jersey Conscientious Employee Protection Act (CEPA) N.J.S.A. 34:19-1, et. seq.¹ The Law Division, however, held that the Defendants' actions were merely "discrete" actions triggering the one-year statute of limitations under CEPA. However, because the record clearly demonstrates a pattern of retaliatory actions constituting a hostile work environment under CEPA, the one-year limitations period does not apply. In neglecting to recognize that the Defendants' cumulative retaliatory conduct constituted a prima facie case of a hostile work environment, the Law Division erred in granting summary

¹ "Although a hostile work environment claim requires a different showing than a retaliation claim" the claims overlap in that a plaintiff may establish both when he presents "sufficient facts to establish the requisite but-for causation." *Blevins v. Lyndhurst B.of Ed.* , 2009 WL 3128402, (D.N.J.).

judgment.

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." *Abbamont v. Piscataway Twp. Ed. of Educ.*, 138 N.J. 405, 443 (1994). CEPA is intended to "prevent retaliation against those employees who object to employer conduct which they reasonably believe to be unlawful or undisputably dangerous to the public health, safety or welfare." *Mehlman v. Mobil Oil Corp.*, 153 N.J. 163, 193-194 (1998). CEPA's "overriding policy is to protect society at large." *Cedeno v. Montclair State University*, 163 N.J.473, 478 (2000).

A. The Plaintiff Presented a Prima Facie Case of a Hostile Work Environment Under CEPA

To establish a hostile work environment, claim under CEPA, a plaintiff "must show that the complained-of conduct (1) would not have occurred but for the employee's protected status, and was (2) severe or pervasive enough to make a (3) reasonable person believe that (4) the conditions of employment have been altered and that the working environment is hostile or abusive." *Rivera v. Dep't of Human Servs.*, A-0086-17T4, 2019 WL 1418098, at *14-15 (App. Div. Mar. 28, 2019), quoting *Lehmann v. Toys R'Us*, 132 N.J. 587, 603-04 (1993).

Protected Activity

Here, the first element is satisfied, as the Plaintiff engaged in a protected activity. CEPA prohibits employers from retaliating against an employee because the employee engaged in a fairly wide range of what are referred to as "protected activities." This includes objecting to or refusing to participate in an activity the employee reasonably believes (1) is in violation of a law or a legal regulation; (2) is fraudulent or criminal; or (3) is incompatible with a legal requirement relating to public health, safety, welfare or the protection of the environment. N.J.S.A. 34:19-3; *Dzwonar v. McDevitt*, 177 N.J. 451, 462 (2003); *Estate of Roach v. TRW, Inc.*, 164 N.J. 598, 613 (2000).

The Plaintiff need not prove that the statute or regulation which underlies the subject of the whistle-blowing act was actually violated. *Dzwonar v. McDevitt*, 177 N.J. 451, 462 (2003); *Estate of Roach v. TRW, Inc.*, 164 N.J. 598, 613 (2000) Rather, he must only demonstrate a reasonable belief of such a violation based upon some knowledge of the existence of a statute, regulation, common law, or safety guideline that would reasonably justify his accusation. *Roach, supra.*, 164 N.J. at 613; *Gerard v. Camden County Health Services Center*, 348 N.J. Super. 516, 522 (App. Div. 2002). Here, the Plaintiff

had protected status under CEPA as a result of his complaint about the racial slur, as well as providing testimony about a fellow officer being asleep on the job.

Hostile Work Environment

Elements 2 through 4 require that the employer's conduct be severe or pervasive enough to make a reasonable person believe that the conditions of employment have been altered and that the working environment is hostile or abusive. *Lehmann v. Toys R' Us, supra*.

Whether the conduct alleged is severe and pervasive enough to alter the conditions of employment is judged according to an objective standard. *Cutler v. Dorn*, 196 N.J. 419, 431 (2008). The determination of whether conduct rises to the level of a hostile work environment is based on "the totality of the circumstances." *Ibid*. These circumstances include "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." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

"Rather than considering each incident in isolation, courts must consider the cumulative effect of the various incidents[.]" *Lehmann*, 132 N.J. at 607.

A summary recitation of the facts demonstrates the following occurred: (1) Plaintiff complained about the racial slur to the I.A, David Erla, on or about July 2016, Lt. Erla claims he handled the matter informally, directing Plaintiff to speak to Chief Zebrowski himself to settle the matter, which violates policy, (2) Then fast forward to the fall of 2018, when Plaintiff and Officer Arway provided information to I.A. about Charles Novak sleeping on duty, and simultaneously are charged with violating the 16 hour rule along with other officers who complained about the unfairness and inequity in reference to this minor infraction, while the racial slur charges against the Chief were not addressed. (3) January/February 2019, Chief Zebrowski and Lt. Erla were forced to address Plaintiff's racial slur complaint by submitting same to the County Prosecutor's Office (MCPO) for that agency to investigate the matter, (4) On February 6, 2019, Plaintiff, along with Lt. Erla, met with MCPO Investigators with a "February 4, 2019 recorded statement from Plaintiff with a detailed account" of what occurred during the summer of 2016 when Plaintiff was approached by Sgt. Gawron regarding Patrolman Tesar clothing when the "n" word was used (5) Several months later, May/June 2019, Plaintiff is accused by off duty supervisor, Lt. Novak ((who resides 45 minutes travelling time from Sayreville)) of sleeping while on duty. (6) Plaintiff is cleared immediately of the false allegation, but Plaintiff seeks an investigation into the false allegation, sensing a contrivance to harm his employment. (7) However, after investigating the

allegation of sleeping and concluding it was false, Chief Zebrowski and Lt. Erla refused to open an investigation into Sgt. Theile for making the false allegation, claiming that he (Erla) was not 100% certain he could sustain a charge. (8) A few months later, in 2019, Plaintiff was asked by Lt. Gaines if he (Plaintiff) had a copy of his successful 2018 job performance appeal because Lt. Erla and the Command lost or misplaced it and to-date the document has not been replaced. (9) In the year 2020, Plaintiff sought to change his midnight shift from A to B due to seniority, but faced problems with officers attempting to avoid working with him by not responding to calls, when dispatched, in a timely manner and offering money (\$1,000.00) to switch positions so they would not have to work with Plaintiff. (10) Although Plaintiff complained to his supervisors, the issue was not addressed. Lt. Erla said he spoke to Ptl. Raub about the \$1,000.00 offer and Ptl. Raub told him it was a joke, so that was satisfactory for Lt. Erla. Erla did not speak to the officer who was offered the \$1,000.00 to switch. Also, Plaintiff was instructed by his supervisors to cooperate with an independent audit investigation into claims by a female officer, Sgt. Moat, involving claims of harassment and discrimination made by her (Sgt. Moat) against the Department. (12) On or about May 2021, Sgt. Theile initiated another internal complaint against Plaintiff for his refusal to harass three (3) black males standing in front of Domino Pizza, eating pizza while waiting for an Uber ride. Again, Lt. Erla and Chief Zebrowski chose to investigate and charge

Plaintiff with failing to complete a report as required by policy. The call in question was assigned to Tesar. Three other officers including Sgt. Monaco (who at the time also had an ongoing civil action for retaliation/harassment) were investigated, charged and the allegations sustained. However, on the PERC grievance appeal, the arbitrator found Lt. Erla and Chief Zebrowski's actions to be arbitrary and capricious because this policy of writing a report for every minor call had never been enforced.

While some of these actions standing alone may be insufficient to support a claim of a hostile work environment, on summary judgment, the Defendants' cumulative conduct outlined above at the very least raises a factual dispute as to whether the Plaintiff has established a CEPA hostile work environment claim.

Cutler v. Dorn Id 196 N.J. at 432 ("Viewing incidents solely in isolation fails to account for the cumulative and debilitating effect that harassing conduct can have in the workplace."); *Shepherd v. Hunterdon Developmental Ctr.*, 174 N.J. 1, 26 (2002) ("Viewed cumulatively, however, the acts alleged by plaintiffs are sufficient to present a hostile work environment claim to a jury.").

The hostile work conditions faced by the Plaintiff in the instant case compare favorably with cases in which a hostile work environment was found. See, *Piniero v. New Jersey Div. of State Police*, No. 33-2-702 (App. Div. 2012) (claims for retaliation and constructive discharge may exist under

CEPA when an employee receives multiple disciplinary charges shortly after making a complaint); *Lindsey v. New Jersey Dept. of Corr.*, No. 04-3815, 2007 WL 836667, at *11 (D.N.J. Mar.14, 2007) (finding that consistent discipline after protected activity supports hostile work environment claim under Title VII); *Rivera v. Dep't of Human Servs.*, A-0086-17T4, 2019 WL 1418098, at *14-15 (App. Div. Mar. 28, 2019) (verbal harassment, suspension and discipline for work absences due to disability, and refusal to provide a temporary employee to assist with clerical work); *Blevis v. Lyndhurst Ed. of Educ.*, 2009 WL 3128402 (D.N.J. 2009) (employer constantly changed plaintiff's schedule, gave him retributive course assignments, took away his stipends and suspended his employment).

See also *Nardello v. Twp. of Voorhees* 377 N.J. super 828, 435-436 (App. Div. 2005 finding retaliation after a police officer reported misconduct within his department based upon a series of relatively minor instances of retaliation due to the aggregate and cumulative nature of the harassment).

Similarly, in *Donaldson v. DuPont Chambers Works*, 206, N.J. 283, 288 (2011), the Court found adverse action when the employer targets the employee for reprisals, such as making false accusations of misconduct, giving negative performance reviews, issuing unwarranted suspensions; and application of the continuing violation doctrine where the cumulative and connected nature of the

hostile work environment extends beyond the 1-year statutory period. Green v. Jersey City Board of Education 177 N.J. 434, 447 (2002); Shepherd v. Hunterton Development Ctr. 174 N.J. 1, 7 (2002).

Accordingly, the record here supports a finding on summary judgment that the Plaintiff satisfied his burden of proving a prima facie case of a hostile work environment under CEPA.

B. The Plaintiff's Hostile Work Environment Claim Is Not Barred by the CEPA Statute of Limitations Period.

Civil actions of retaliatory employer conduct under CEPA must be brought within one (1) year of a discrete retaliatory act.
N.J.S.A. § 34:19-5.

We note, that additional actions were taken against Plaintiff between the 2016 racial slur incident and the 2019 Middlesex County Prosecutor's Office, proper investigation of the slur which are thoroughly discussed in the Statement of Facts (RSF); however, the questionable 15 day suspension that occurred in 2016 is a discrete act and, as per statutory and case law, is precluded as a viable claim due to the statute of limitation but may be presented or utilized evidentially as "background evidence" in prosecuting Plaintiff's other claims of retaliation and hostile work environment. Roa v. Roa 200 N.J. 555, 567 (2010).

All of the other actions noted above represent a pattern or series of acts,

involving the same upper management supervisors, and are actionable as outlined in this and the ensuing. What is evident is that when Plaintiff complained about actions against him the matter was not investigated; but when Plaintiff was the target of the investigation the matter was pursued and Plaintiff was charged, and the last aggregated act in the pattern or series occurred within one year of filing his complaint. Green v. Jersey City Bd. of Educ. 177 N.J. 434, 448 (2003), Beasley v. Passaic County 377 N.J. super 585.

C. The Law Division's Decision Represents Reversible Error

In addressing the issue of the Plaintiff's hostile workenvironment claim, the Law Division reasoned as follows:

[A]nd so then that leaves me with considering whether or not in combination even if I found substantively that there was violations that would meet the requirements of CEPA, whether that then would amount to the tolling or the continuing conduct such that I could consider it again, as I mentioned earlier, though isolated incidents cannot be used or aggregated to create an ongoing pattern of discrimination towards an employee...(T)he particular violation doctrine needs something more....isolated or sporadic contacts, even if they were retaliatory, would not toll, suffice to toll the statute of limitations. (1T46-4 to 18)

Here, the Court erred in two ways.

First, in addressing the "discrete" versus cumulative acts, it neglected to properly analyze the principles and case law governing a hostile work

environment claim. In analyzing the pattern conduct the Court incorrectly viewed each act as a discrete act before rejecting it as not rising to the level of an adverse action as opposed to viewing the pattern conduct cumulatively.

Second, in citing the discrete act of the Defendant as untimely, it failed to recognize the false allegations against Plaintiff of sleeping on the job after Plaintiff provided a statement to the county investigator in February of 2019, and nothing was done about it. Additionally, Plaintiff, as a witness, provided statements to Internal Affairs about Officer Charles Novak, the brother of Lt. James Novak, sleeping on the job, in the fall months of 2018, who then tried to level the same charge against Tesar. These events, coupled with the other patterned negative acts against the Plaintiff into the year 2020 and 2021, support a prima facie case under CEPA, of a hostile work environment.

Therefore, the Law Division erred in determining as a matter of law that the conduct alleged by Plaintiff did not rise to the level of a hostile work environment. Plaintiff was told by a colleague that he was like a “heat seeking missile” for his whistleblowing activity. (Pa 192)

POINT II

BECAUSE THE PLAINTIFF MADE OUT A PRIMA FACIE CASE FOR RETALIATION UNDER CEPA, THE LAW DIVISION ERRED BY GRANTING SUMMARY JUDGMENT.

(Pa 1113, 1T40-20 to 47-2)

In order to establish a prima facie cause of action under CEPA, a plaintiff must demonstrate that: (1) she reasonably believed that her employer's conduct was violating either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy; (2) she performed a "whistle blowing" activity; (3) an adverse employment action was taken against her; and (4) a causal connection exists between the whistle-blowing activity and the adverse employment action. *Yurick v. State*, 184 N.J. 70, 78 (2005).

The analytical framework for evaluating employment discrimination cases under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) is applicable to cases brought under CEPA *Bowles v. City of Camden*, 993 F.Supp. 255, 261 (D.N.J. 1998); *Donofry v. Autotote Systems, Inc.*, 350 N.J. Super. 276, 291 (App. Div. 2001); *Littman v. Morgan Stanley Dean Witter*, 337 N.J. Super. 134, 143 (App. Div. 2001).

If a Plaintiff meets this initial burden, the defendant employer must

then proffer a legitimate non-discriminatory business reason for its employment action. *McDonnell Douglas, supra.*; *Klein v. University of Medicine and Dentistry of New Jersey*, 377 N.J. Super. 28, 38 (App. Div. 2005). If the defendant employer can present such a reason, the burden shifts back to the plaintiff who must then raise a genuine issue of material fact to show that the employer's explanation is pretextual. *Klein*, 377 N.J. Super at 39.

Essentially, a Plaintiff must prove that the reason proffered by the defendant was false and that retaliation was the real reason. *Blackburn v. United Parcel Service, Inc.*, 179 F.3d 81, 91 (3d Cir. 1999); See also *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994) (a Plaintiff must demonstrate “weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered reasons for its action as to render them unworthy of credence”).

Here, the Plaintiff established facts necessary to satisfy each of the four elements at summary judgment before the Law Division.

A. The Plaintiff Was Under A Reasonable Belief that Chief Zebrowski used and Directed a Racial Slur Directed at Him and Ofc. Charles Novak was Asleep on the Job with such Conduct being a Violation of Policy.

The Plaintiff was under a reasonable belief that employees of the

Defendant engaged in conduct that violated both the laws of New Jersey and clear mandates of public policy. The Plaintiff need not prove that the statute or regulation which underlies the subject of the whistle-blowing act was actually violated. *Dzwonar V. McDevitt*, 177 N.J. 451, 462 (2003); *Estate of Roach V. TRW, Inc.*, 164 N.J. 598, 613 (2000). Rather, he must only demonstrate a reasonable belief of such a violation based upon some knowledge of the existence of a statute, regulation, common law, or safety guideline that would reasonably justify her accusation. *Roach, supra.*, 164 N.J. at 613; *Gerard v. Camden County Health Services Center*, 348 N.J. Super. 516, 522 (App. Div. 2002).

A viable CEPA claim requires, "facts that would support an objectively reasonable belief that a violation [of a law, rule, regulation or clear mandate of public policy] has occurred." *Klein*, 377 N.J. Super. at 40. The court must make a threshold determination whether there is a substantial nexus between the conduct complained of and a law, rule, regulation, or clear mandate of public policy. *Id.* at 38.

Here, such a nexus indeed exists, as to Chief Zebrowski's alleged conduct and Charles Novak's sleeping on the job. This issue was resolved in Plaintiff's favor by the Law Division, where the Court observed that Tesar's

action in 2016 constituted a CEPA claim on its face. [1T40-20]

**B. The Plaintiff Performed A Whistleblowing Activity
When he Reported the Perceived Improper Conduct.**

To satisfy the second element of the prima facie CEPA claim, a plaintiff must demonstrate that she performed a whistleblowing activity. *Dzwonar v. McDevitt*, 177 N.J. 451, 462 (2003).

Generally speaking, CEPA claims "fall into three basic categories: activities that the employee reasonably believes are in violation of some specific statute or regulation, are fraudulent or criminal, or are incompatible with policies concerning the public health, safety or welfare or the protection of the environment. *Estate of Roach*, 164 N.J. 598, 610 (2000)

Here, the Plaintiff has engaged in conduct that meets the requirements of at least two categories of protected whistleblowing activity under N.J.S.A. 34:19-3. He disclosed to both his supervisor and to a public body an activity of another employee that he reasonably believed was in violation of a law rule/regulations.

The record thus shows that the Plaintiff reasonably believed that the complained of activities were a violation of law and incompatible with a clear mandate of a public body pursuant to N.J.S.A. 34:19-3(c).

A disclosure may be made to a "supervisor" or to a "public body." A CEPA plaintiff is not required to make the disclosure to both. *Barratt v. Cushman*

& Wakevield of New Jersey, Inc., 144 N.J. 120, 130 (1996). The Plaintiff here reported the suspect of her to his supervisors and to a “public body”. Therefore, his whistleblowing activities met the requirements of CEPA. *Higgins v. Pascack Valley Hosp.*, 158 N.J. 404, 419, 424 (1999).

The Plaintiff's satisfaction of this element was accepted by the Law Division, as it focused solely upon the adverse action and causal connection principle under the third and fourth element of the test. [1T 40-20]. We do note, however, that the Law Division failed to mention or reference Plaintiff's statement to the County Prosecutors and statements to I.A. about fellow officer Charles Novak sleeping on the job.

C. Plaintiff Was Subjected To An Adverse Employment Action As A Result of His Protected Whistleblowing Activities.

The third prong of the prima facie claim under CEPA requires proof of a retaliatory action by an employer. *Hancock v. Borough of Oaklyn*, 347 N.J. Super. 350 (App. Div. 2002). CEPA defines retaliatory action as "the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and condition of employment." N.J.S.A. 34:19-2(e).

Here, as demonstrated in Point I, the Plaintiff satisfied the element of

showing adverse action by an employer. As the Appellate Division reasoned in *Beasley v Passaic County*, 377, N.J. Super 585, 608 (2005) “Our Supreme Court has stated that retaliation under CEPA need not be a single discrete action . . . an adverse employment action taken against an employee in the terms and conditions of employment”; N.J.S.A. 34:19-2 (e) can include. . . many separate but relatively minor instances of behavior directed against an employee that may not be actionable individually but that combine to make up a matter of retaliatory conduct. *Beasley* Id at 608, citing *Green v. Jersey City Bd. of Educ.* 177 N.J. 434, 448 (2003).

Employer actions that fall short of discharge, suspension, demotion or transfer may nonetheless be the equivalent of an adverse action. *Cokus v. Bristol Myer Squibb Co.*, 362 N.J Super, 366, 378 (Law Div. 2002) aff’d 362 N.J. Super 245, 827 (App.,Div. 2003).

D. A Causal Connection Exists Between Plaintiff's Whistleblowing Activities And The Adverse Employment Action Taken By Defendants.

The fourth element of the prima facie claim under CEPA requires an employee to establish that "a causal connection exists between the whistleblowing activity and the adverse employment action." *Dzwonar*, 177 N.J. at 462. A plaintiff must prove that her employer was motivated by a retaliatory intent which was "morelikely than not a determinative decision in

the [adverse employment] decision." *Fleming V. Correctional Healthcare Solutions, Inc.*, 164 N.J. 90, 101 (2000); *Kolb v. Burns*, 320 N.J.Super. 467 (App. Div. 1999); See also, *Donofry*, 350 N.J. Super. at 293 ("To prove a CEPA claim, the plaintiff must show that the retaliatory discharge was more likely than not a determinative factor in the decision.").

A CEPA plaintiff can prove causation in one of two ways. The plaintiff may present: (1) direct evidence of retaliation; or (2) circumstantial evidence that justifies an inference of retaliation. *Reilly v. City of Atlantic City*, 427 F. Supp. 2d 507 (D.N.J. 2006). To determine whether a retaliatory purpose existed, a causal connection may be inferred based upon the surrounding circumstances. *Estate of Roach v. TRW, Inc.*, 164 N.J. 598, 612 (2000). When making this evaluation, a court must carefully examine circumstantial evidence to determine if the plaintiff's whistleblowing activity was a determinative or motivating factor in the employment decision. For example, in *Hernandez v. Montville Twp. Ed. of Educ.*, 354 N.J. Super. 467 (App. Div. 2002), the Court examined a school custodian's employment record and his working relationships, before and after he made complaints about the safety of the school's bathrooms, and found sufficient evidence to determine that the whistleblowing activity was a substantial factor in the plaintiff's termination.

Temporal proximity between the whistleblowing activity and the adverse employment action is a factor which should be considered in the evaluation of causation. *Tzannetakis v. Seton Hall Univ.*, 344 F. Supp. 2d 438, 448 (D.N.J. 2004). However, New Jersey recognizes that temporal proximity is not required to establish causation. It is important to emphasize that it is causation, not temporal proximity itself, that is an element of a plaintiff's prima facie case. Temporal proximity merely provides an evidentiary basis from which an inference can be drawn. The element of causation, which necessarily involves an inquiry into the motives of an employer, is context specific. While there may be valid reasons as to why an adverse employment action was not taken immediately, the absence of same is not fatal to the cause of action. *Kachmar v. SunGard Data System, Inc.*, 109 F.3d 173, 178 (3d Cir. 1997); *Jalil v. Avdel Corp.*, 873 F.2d 701, 708 (3d Cir. 1989).

Where temporal proximity is not unduly suggestive of retaliation, inclusion of the employer's antagonism or inconsistent conduct constitutes a proper “test of timing plus other evidence”. *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 280 (3d Cir. 2000); *Hancock v. Borough of Oaklyn*, 347 N.J. Super. 350 (App. Div. 2002).

In the instant case involving Plaintiff, a few months after providing statements against the Chief about the racial slur in February of 2019 (with the Chief's right hand I.A. Chief present to intimidate him) Plaintiff was falsely accused of being

asleep on the job under a pretext of concern for his welfare. It was an apparent pretext because neither Novak or Theile wanted an investigation as to how Novak knew about Plaintiff's alleged sleeping because he (Novak) was off duty and miles away from Sayreville, and Sgt Theile's call into Lt. Novak instead of dispatch or Tesar's supervisor, was clearly an intentional effort to harm Tesar since he, as PBA representative, was aware of Tesar's statements against Novak's brother and Chief Zebrowski.

However, with that background and information in hand, Lt. Erla chose not to open an I.A. investigation into Plaintiff's claims that Lt. Novak and Sgt. Theile were purposeful in their actions to harass him, by these false allegations.

Not only did Lt. Erla choose not to open an I.A. investigation into Theile's actions, he failed to question Sgt. Theile about his actions altogether supposedly because "I would not be able to sustain a harassment charge by Ptl Tesar against them, it is unlikely that the events set in motion by Sgt. Theile were 100 percent altruistic and in the best interest of Ptl. Tesar, I would find it more palatable if Sgt Theile had reached out for Ptl. Tesar himself or contacted an on-duty supervisor to conduct a welfare check instead of Lt. Novak who was at home and probably in bed". See Statement of Facts.

We add that Lt. Erla was also aware of that and spoke to two (2) other officers who were in the patrol vehicle with Sgt. Theile (Det. Szkodny and Det. Michael

Pirigyi) when they pass the road job site where Tesar was allegedly sleeping. Det. Pirigyi stated he contacted Ptl. Tesar via cell phone to ask if he was O.K. and Ptl. Tesar answered the call immediately. He sounded awake and alert. Ptl. Tesar stated he was fine and did not need anything.

Nevertheless, with all that information, Lt. Erla failed to open an I.A. investigation and Chief Zebrowski, who was kept informed about the facts, claimed during his deposition that he deferred to Lt. Erla.

The actions and/or non-actions of these upper management employee (Chief Zebrowski and Lt. Erla) were intentional and demonstrates actual participation or willful indifference to the harassing conduct of Novak and Theile. Further, the failure to question Theile and inform Plaintiff of the outcome to this “non” investigation amounted to a willful disregard of Tesar’s rights. Rendine v. Pantzer 141 N.J. 292, Nappe v. Anschelewitz, Barr, Ansell & Bonello 97 N.J. 37, 49-5 (1984).

Therefore, when Tesar complained about apparent harassment, nothing was done to protect him from the harassment which resulted in continued harassment against him.

Thereafter, several incidents, including efforts to ostracize Plaintiff, by ignoring his appeal of a performance evaluation, and false charges of non-performance among other actions as delineated under Point I (page 18-26)

contributed to Plaintiff's perception of the work environment as hostile and the employer's actions as retaliation, which has resulted in demonstrated mental health issues from which Off. Tesar continues to suffer and cannot be made whole. [Pa 476, 490-92]. See also Green v. Jersey City Bd. of Educ., 177 N.J. 434, 448 (2003).

E. Law Division Decision Represents Reversible Error

The failure of the Law Division to analyze and/or discuss the motives of the employer for investigating all accusations against the Plaintiff, including innocuous ones, while refusing to investigate false claims against the Plaintiff, disregards the reasonable inference of causal connection/retaliation by the employer based upon all of the surrounding circumstances. Estate of Roach v. TRW Inc., 164 N.J. 598; Romano v. Brown v. Williamson Tobacco Corp., 284 N.J. super 534, 550 (App. Div. 1995).

As the Court noted in Estate of Roach Id at 612. . . accepting as true all of the evidence which supports the position of the party defending against the motion and according him the benefit of all inferences which can reasonably be deduced there from reasonable minds could differ, the motion must be denied. Estate of Roach Id.

CONCLUSION

For all of the foregoing reasons, the Plaintiff-Appellants respectfully request the Appellate Division reverse and vacate the Order for Summary Judgment entered by the Hon. Bina K. Desai, J.S.C. of the Law Division on April 12, 2024.

Respectfully Submitted,

Theodore Campbell

Theodore Campbell

Dated: September 27, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2852-23

Plaintiffs/Appellants,
THOMAS TESAR, JULIANNA
TESAR

vs.

Defendants/Respondents,
SAYREVILLE BOROUGH
(POLICE DEPARTMENT), JOHN
ZEBROWSKI, DAVID ERLA,
JOHN DOE 1-2 FICTITIOUS
INDIVIDUALS, CORPORATIONS,
JOINTLY AND SEVERALLY

On Appeal From Final Judgment
Entered in the Superior Court, Law
Division,
Middlesex County

Sat Below:

Honorable Bina K. Desai, J.S.C.
Middlesex County Superior Court
Docket No. MID-L-4277-21

**BRIEF ON BEHALF OF DEFENDANTS/RESPONDENTS,
SAYREVILLE BOROUGH, JOHN ZEBROWSKI AND DAVID ERLA**

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PRELIMINARY STATEMENT

Plaintiff Thomas Tesar (“Plaintiff”), and Julianna Tesar, his wife (together, “Plaintiffs”), filed a Complaint against Defendants, the Borough of Sayreville (“Borough” or “Sayreville”), John Zebrowski (“Zebrowski”), and David Erla (“Erla”)¹ (collectively, “Defendants”), alleging claims of discrimination and retaliation under New Jersey’s Contentious Employee Protection Act (“CEPA”) and the New Jersey Law Against Discrimination. Plaintiff also alleges a violation of his constitutional rights under the New Jersey Civil Rights Act. Further, Plaintiff alleges a common law claim under the Pierce Doctrine, a claim of tortious interference with economic advantage, and per quod claim. All of these claims fail as a matter of law and were dismissed on summary judgment. Plaintiff Thomas Tesar now appeals only the dismissal of his CEPA claim.

The record clearly establishes that Plaintiff has continuously worked for the Borough as a Police Officer since 2014 and is a member of the PBA Local 98 union. Plaintiff alleges that in 2016, while working light duty, and dressed in a backwards baseball cap, t-shirt and basketball shorts, Plaintiff was allegedly asked by Sgt. Gawron: “the Chief wants to know you are dressed like

¹ Defendant Erla has since attained the rank of Captain. Since he was a Lieutenant during the time alleged in the Complaint, he will be referred to by Lt. Erla throughout.

a nigger” by Sgt. Gawron. Despite never having heard the Chief use this language at any time during his employment, Plaintiff attributed the statement to the Chief. Inexplicably, Plaintiff called an off-duty Internal Affairs Officer on vacation, Lt. Erla, to discuss the matter. Plaintiff refused to make a formal complaint, spoke with the Chief who expressly denied making the statement, and let Defendants know he was satisfied with the matter.

The record reflects that Plaintiff does not want to follow the Department’s policies and procedures, and when he is held accountable for them, or is asked to participate in an investigation of another officer, he dredges up these old allegations. As a result, in 2019, Defendants requested that the Middlesex County Prosecutor’s Office investigate the allegations that the slur was used in 2016. It was determined that Defendant Chief Zebrowski never said the slur and he was cleared of all allegations of wrongdoing. The Middlesex County Prosecutor’s Office sustained demeanor charges against Sgt. Gawron and Cpt. Batko, finding that they did use the slur. Two years after the findings by the Prosecutor’s Office, Plaintiff filed the subject Complaint alleging, *inter alia*, that he was retaliated against for allegedly reporting the slur. Plaintiff bases this claim on sporadic and isolated incidents, most of which fall outside the statute of limitations, and all of which have no causal connection to his discussion with Defendant Erla in 2016 or any other

alleged protected activity and which do not create a hostile work environment. These incidents comprise of Plaintiff disagreeing with management decisions, being asked to follow rules, and claiming petty slights on the part of his co-workers. As the trial court properly held, these allegations cannot support his claims as a matter of law.

Inconceivably, Plaintiff takes issue with discipline he received in 2018 when he admittedly came to work for his patrol shift, dressed in his uniform, armed himself with his service weapon and taser, all while under the influence of alcohol. Following the advice of counsel, Plaintiff agreed to forfeit vacation days in lieu of a suspension, yet now claims this compassionate agreement was unfair. Plaintiff also astoundingly takes issue with a welfare check performed when he was on a road job when passersby could not see him in his patrol car, because he was reclining so far back in his seat.

Plaintiff has not sustained any adverse employment actions, has not been retaliated against, and was not subject to a hostile work environment.

For the reasons set forth more fully below, Defendants respectfully request that the Court affirm the decision of the trial court, which granted summary judgment to Defendants.

PROCEDURAL HISTORY

On July 20, 2021, Plaintiffs Thomas Tesar (“Plaintiff”) and Julianna Tesar, his wife², filed a Complaint against Defendants, Borough of Sayreville (“Borough”), John Zebrowski, and David Erla. (Pa1-47). Plaintiff filed an Amended Complaint asserting the following claims: (i) harassment, retaliation, and a hostile work environment under the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 *et. seq.* (“CEPA”), (ii) violation of New Jersey’s Pierce Doctrine; (iii) unlawful discrimination and retaliation under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 *et. seq.* (“NJLAD”); (iv) aiding and abetting under the NJLAD; (v) per quod on behalf of Plaintiff Julianna Tesar; (vi) retaliation and violation of the New Jersey Civil Rights Act, N.J.S.A. 10:6-1 *et. seq.* (“NJCRA”); and (vii) interference with economic advantage. (Pa48-95).

On March 15, 2024, Defendants filed a Motion for Summary Judgment seeking dismissal of Plaintiffs’ claims. (Pa145-Pa146). On April 12, 2024, the trial court granted Defendants’ Motion for Summary Judgment and dismissed Plaintiffs’ claims with prejudice. (See Notice of Appeal containing trial court’s April 12, 2024 Order). As it relates to this appeal, the trial court held that

² As Plaintiff Julianna Tesar has brought only a derivative per quod claim which is not the subject of this appeal, all references to Plaintiff in the singular shall refer to Plaintiff, Thomas Tesar.

Plaintiff's CEPA claims were barred by the statute of limitations. (1T 39:18-47:3).³ The court also held that the continuing violation theory did not apply because there was no retaliation or protected activity within CEPA's one year statute of limitations. Id. Plaintiffs' other claims, which are not the subject of this appeal, were also dismissed with prejudice. (1T 38:13-39:12, 47:4-23). Plaintiffs' claims under the New Jersey Law Against Discrimination, New Jersey Civil Rights Act, and Pierce Doctrine were dismissed as they were waived because the allegations arise out of the same operative facts. (Id.) As to the claims in tort, those were dismissed in light of Plaintiffs' failure to file a Notice of Claim pursuant to the Tort Claims Act. Notably, Plaintiffs did not oppose the dismissal of these claims. (1T:38:12-39:2). The trial court noted that, even if there was opposition, summary judgment would still have been appropriate as to these other claims. Id.

Plaintiff now appeals from the April 12, 2024 Order which granted summary judgment to Defendants and dismissed Plaintiffs' claims in their entirety. Plaintiff's appeal is limited to the dismissal of Plaintiff's claims under CEPA. (See Plaintiff's brief at Points I through II limiting such appeal to Plaintiff's CEPA claim).

³ References to 1T refer to the transcript of the trial court's decision granting summary judgment to Defendants, dated April 12, 2024.

COUNTERSTATEMENT OF MATERIAL FACTS

In 2014, Plaintiff, a Caucasian male, was hired by the Borough as a police officer. (Pa530, 32:22-24; Pa604, 324:21-23, Pa617-619). Plaintiff is a member of a union, PBA Local 98. (Pa531, 35:9-16). The Collective Negotiations Agreement between the Borough and PBA Local 98 provides for management's right to direct its employees and the right to make schedules of work and work assignments. (Pa628 at Borough 701; Pa682 at Borough 753). Pursuant to Article VIII of the Agreement, permanent shifts shall be awarded on a seniority basis. (Pa641 at Borough 714; Pa695 at Borough 766).

Plaintiff testified that, as a Patrol Officer within the Department, he is responsible for responding to calls of service, taking reports, and patrol motor vehicle enforcement. (Pa531, 34:3-5).

During the course of his employment, Plaintiff received the policies of the Borough and Police Department on anti-harassment, anti-discrimination, and anti-retaliation, including the procedure for filing a written complaint, as well as related trainings. (Pa611-612, 353:21-354:20; Pa730-762; Pa806-811).

In 2016, following physical therapy stemming from an on-duty injury, Plaintiff returned to Headquarters wearing a backwards baseball cap, t-shirt, shorts, and sneakers. (Pa540, 72:4-9). Plaintiff testified that on his way into Headquarters, he only exchanged pleasantries with Chief Zebrowski. (Pa540,

71:21-24; Pa822-827). Separately, Chief Zebrowski and Capt. Batko discussed that Plaintiff was not in appropriate attire. Capt. Batko offered to address the issue as Plaintiff's Administrative Captain. (Pa332, 48:10-21; Pa822-827).

Chief Zebrowski testified that at no time was the n-word used by him during this discussion Batko. (Pa334, 54:15-19). Batko left Zebrowski and told Sgt. Gawron to ask Plaintiff why he is "walking around 'dressed like a nigger.'" (Pa822-827). Sgt. Gawron relayed Capt. Batko's message to Plaintiff, including the n-word. (Pa540, 72:14-73:20).

Plaintiff admitted that he has no personal knowledge that Chief Zebrowski used the n-word and further admitted he had never heard Zebrowski use the n-word at any time. (Pa541, 74:4-9). Plaintiff admitted he never heard Chief Zebrowski say that he was upset with Plaintiff, that he was going to be watching Plaintiff, or that there was a target on Plaintiff. (Pa541, 75:16-76:2).

Plaintiff then called Defendant Erla, who was assigned to Internal Affairs ("IA"), but not a supervisor at the time. (Pa542, 80:7-18, Pa276, 6:16-20, 7:17-21). Erla was off-duty and on vacation when Plaintiff called. Plaintiff claims that Erla asked if he was coming to him as a member of IA to file a complaint or as "Dave" for advice. Plaintiff told Erla he wanted advice. (Pa543, 82:12-24; Pa835 at 2:20-2:30). Lt. Erla told Plaintiff that the use of the racial slur did not sound like something Chief Zebrowski would say. Plaintiff

testified that Erla suggested he meet with Zebrowski to discuss the incident and that IA could open an investigation if Plaintiff was not satisfied with the meeting. (Pa543, 82:12-24; Pa835 at 2:53-3:30, 9:30-9:42). Plaintiff did not report the incident to any on-duty IA officer or supervisor. (Pa543, 84:19-22).

Subsequently, Chief Zebrowski had a “cordial” discussion with Plaintiff and expressed that he never used the n-word. (Pa540, 71:18-24, Pa546, 94:17-21; Pa835 at 11:30-35).

Plaintiff acknowledged that at no time did he make a complaint to IA regarding his allegations. (Pa543, 84:23-85:1; Pa546, 96:6-12; Pa835 at 12:27-12:42, 13:40-13:55). Plaintiff testified that he never looked up the internal affairs policy regarding how to submit a written complaint. (Pa543, 85:13-15).

Both Zebrowski and Erla separately met with Sgt. Gawron to explain that his language was inappropriate. Lt. Erla discussed proper interactions with subordinates. Chief Zebrowski told Sgt. Gawron he should have checked with him before relaying the purported message because it was “obviously” not something he would approve. (Pa816-821; Pa822-827).

On or about January 24, 2019, Chief Zebrowski independently requested that Lt. Erla open an investigation into the n-word incident, as it had been subsequently brought up by officers when facing discipline in unrelated matters. (Pa613, 357:7-20; Pa822-827). Erla referred the allegation to the

Middlesex County Prosecutor's Office ("MCPO"), which conducted an independent investigation in February 2019. (Pa822-827). During this investigation, Capt. Batko admitted that Chief Zebrowski did not use the n-word. (Pa822-827).

Notably, during this investigation, Plaintiff was asked: "Did you experience any retaliation or . . . did your . . . experience here at the Sayreville Police Department change in any way? Was your shift changed? Was the car you drive changed? . . . Did anything take place to lead you to believe that you were being singled out for any type of retribution?" Plaintiff responded: "no". (Pa835 at 15:00-15:22).

Ultimately, the Middlesex County Prosecutor's Office's issued a report of its findings. (Pa822-827). It sustained demeanor complaints lodged against Sgt. Gawron and Capt. Batko, while Chief Zebrowski was exonerated because it was proven that he never made the comment. (Pa828-832).

Plaintiff Stopped at His Residence While On-Duty and Received No Discipline

Plaintiff alleges that in December of 2016, Lt. Novak responded to a tip by Lt. Thomas Barbieri that Plaintiff had stopped at his residence while he was on-duty. (Pa61-62, ¶ 49-50). Plaintiff admitted that he stopped at his residence while on-duty for approximately 20 to 30 minutes to assist his wife with household tasks. (Pa61-62, ¶ 49-50; Pa575, 205:11-15). Lt. Novak advised

Plaintiff that he should “try to limit the amount of time [he] spend[s] at home” while on duty. (Pa577, 213:4-10). Plaintiff testified that he was not disciplined or subject to any kind of negative consequence for stopping at his residence while on duty. (Pa577, 213:11-18). Plaintiff testified that he had no personal knowledge that Lt. Barbieri was aware of the n-word incident, or that Lt. Barbieri reported him for stopping at his residence while on duty in retaliation for discussing the n-word incident with Lt. Erla. (Pa575, 207:23-208:2).

Plaintiff Reported for Duty After Consuming Several Alcoholic Beverages and Agreed to Forfeit 15 Days of Vacation in Lieu of Suspension

Plaintiff testified that he drank “a couple” of alcoholic beverages with friends on the night of June 24, 2018, before he reported for the start of his shift with the Department. (Pa548-549, 104:17-105:23, 108:23-109:2). Plaintiff testified that he attempted to contact his supervisor Lt. Michael Gaines to call out sick, but Gaines could not pick up because he was driving to Headquarters. Plaintiff never attempted to contact Headquarters to call out sick. (Pa549, 106:21-22; Pa844-847). Plaintiff testified that he drove himself to Headquarters that night after consuming alcohol. (Pa549, 107:18-20).

Plaintiff testified that, when he arrived at Headquarters, he went into the locker room and changed into his patrol uniform, and armed himself with his service weapon and taser. (Pa549, 107:21-108:5; Pa844-847). Plaintiff testified that while in the locker room, Plaintiff admitted to Ptl. Walter Arway that he

had been drinking earlier and did not reach Lt. Gaines prior to the start of his shift. (Pa549, 107:21-108:5). Plaintiff testified that Ptl. Arway left the Locker Room to communicate this information to Lt. Gaines. (Pa549, 108:6-11).

Plaintiff reported for line-up at the start of his shift. (Pa549-550, 108:16-17, 110:15-23). Lt. Gaines detected the odor of alcoholic beverages emanating from Plaintiff at line-up, and observed Plaintiff to have droopy eye lids and bloodshot eyes. (Pa836-843; Pa844-847). Lt. Gaines met with Plaintiff privately, where the odor of alcohol “was still emanating from his person[] and in fact was beginning to consume the room.” Lt. Gaines noted that Plaintiff’s speech was “slow and slurred.” (Pa844-847). Plaintiff admitted to Lt. Gaines that he had been drinking prior to his shift. (Pa836-843; Pa844-847).

Lt. Gaines determined that Plaintiff was “not fit for duty” as he was “clearly intoxicated.” (Pa836-843; Pa844-847). Lt. Gaines’ report notes that Plaintiff began to cry, but became agitated and aggravated when Lt. Gaines attempted to console him because “he had made this such an issue.” (Pa836-843; Pa844-847). Lt. Gaines reported that Plaintiff returned his taser. Lt. Gaines also “removed [Plaintiff’s] department weapon and magazines from his duty belt” and secured same. (Pa844-847).

Lt. Gaines called Capt. Daniel Plumacker to report the incident. (Pa836-843; Pa844-847). Capt. Plumacker drove to Headquarters and called Plaintiff

into his office, where Plaintiff continued crying. Capt. Plumacker noted that Plaintiff's breath held the odor of alcohol and his speech was slurred. (Pa836-843; Pa848-851). Plaintiff admitted to Capt. Plumacker that he had been drinking alcohol prior to his shift, and further that he had "a lot going on" in his personal life because he had spent a sizable sum of money on his custody dispute with his ex-wife, which was putting a strain on his current marriage. (Pa836-843; Pa848-851).

Capt. Plumacker also determined that "it was evident that Officer Tesar had consumed alcohol prior to his shift and was showing signs of impairment." (Pa848-851). Captain Plumacker's report also concludes that Plaintiff "was clearly not fit for duty." Captain Plumacker indicated he agreed with Lt. Gaines' assessment of Plaintiff and the actions taken. (Pa848-851). Plaintiff was ultimately driven home by another officer. (Pa836-843). Capt. Plumacker contacted Chief Zebrowski and advised him he would be reaching out to Lt. Erla to request an IA investigation of the incident. Thereafter, an IA investigation was conducted. (Pa836-843; Pa848-851).

Sayreville Police Department Rule and Regulation 3:6.1 Subsection 1 states: "No employee of the department will appear for, or be on duty, under the influence of an alcoholic beverage and/or drugs, or be unfit for duty because of use of drugs and/or an alcoholic beverage. The reasonable opinion

of a supervising officer that the employee is under the influence or has alcohol and/or drugs in the employee's system shall be sufficient to establish a violation of this provision." (Pa874-876 at Borough 134-136). Following an investigation, Plaintiff was found to be in violation of Sayreville Police Department Rule and Regulation 3:6.1. (Pa836-843). Plaintiff was also found to be in violation of Sayreville Police Department Rules and Regulations 3:6.1 Subsection 7 which states: "No employee shall report for regularly scheduled duty, with the odor of an alcoholic beverage on their breath." (Pa836-843; Pa874-876 at Borough 134-136).

Chief Zebrowski testified that he initially recommended that Plaintiff be suspended for 45 days as a result of these sustained charges, because arriving to work under the influence of alcohol is a major infraction which put Plaintiff, his fellow officers, and his community in danger. (Pa347, 106:8-23). However, the Department and Plaintiff's PBA attorney negotiated this discipline whereby Plaintiff agreed to forfeit 15 days of vacation in lieu of a suspension. (Pa551, 117:5-118:4; Pa894-896). Plaintiff testified that he agreed to this deal on the advice of his attorney, PBA attorney Jim Mets, who advised him to agree to forfeit 15 days of vacation in lieu of suspension, as other police departments had seen longer suspensions for alcohol related incidents. (Pa70, ¶ 76; Pa551, 117:5-118:4).

Plaintiff Witnessed Ptl. Walter Arway Take a Photograph of Ptl. Charles Novak Sleeping On-Duty and Received No Discipline

On September 14, 2018, Plaintiff and Ptl. Arway arrived at Perth Amboy Hospital to relieve Ptl. Charles Novak from his post and found him sleeping on-duty. Ptl. Arway took a photo of the sleeping officer with his phone. (Pa897-917; Pa918-928). Subsequently, it was alleged Ptl. Arway bragged to multiple officers about taking the photo “in case he needs to use it” as leverage against his supervisor, Lt. James Novak. (Pa897-917).

Lt. James Novak reported this matter to Internal Affairs. IA initiated two separate investigations relating to the incident, one against Ptl. Novak for sleeping during his shift and the other against Ptl. Arway for potentially blackmailing Lt. Novak with the picture. (Pa897-917; Pa918-928). The investigation reports reflect that Plaintiff did not report the officer sleeping on duty, but rather was interviewed as a witness during the course of these investigations to provide additional details regarding the matters. Plaintiff was never a target in either investigation. (Pa555, 131:20-22; Pa897-928). Both investigations were conducted by Sgt. Thomas Sheehan of the IA Unit. (Pa897-928). Plaintiff testified that he did not receive discipline as a result of either investigation. (Pa555, 131:20-22, 132:17-19).

Plaintiff Violated the Department's 16-Hour Work Day Rule and Received No Discipline

On September 17, 2018, Sayreville Borough Councilman Daniel Buchanan emailed Chief Zebrowski and Capt. Plumacker, stating, "I am hearing our officers are working their 10 hour shift or whatever hours they work then go into the school for another shift (6-7 hours). Is it accurate that the officers work at minimum of one possibly three or all four of their shifts at double shifts." (Pa950-951). Sayreville Police Department Special Order, which went into effect two years prior on September 1, 2016, titled "Assigning Extra Duty Jobs" states, "Officers whose regular scheduled work day would conflict with the hours of a scheduled extra duty assignment or those who would exceed the 16 hours in a 24 hour period are not eligible for the job..." (Pa943-946).

As a result of Councilman Buchanan's email, an audit was conducted for the period of September 6, 2018 to September 21, 2018. Based on the audit, an internal affairs investigation was conducted by Sgt. Sheehan into seven (7) officers who were revealed by the audit to have violated this policy, including Plaintiff. (Pa556, 135:20-23; Pa929-939; Pa940-942). Plaintiff testified that he was aware of the Police Department's rule that officers are prohibited from working more than 16 consecutive hours in a 24-hour period. (Pa556, 136:7-12). Plaintiff also admitted that there were "absolutely" times he worked more

than 16 hours in a 24-hour period. (Pa556, 136:13-15). Plaintiff acknowledged the policy and his responsibility to follow it, yet still violated same, such that the charge against him for violating the policy was sustained. (Pa929-939; Pa940-942; Pa947-949).

Plaintiff was not disciplined as a result of this finding. (Pa597, 295:14-25; Pa940-942). Instead, Plaintiff was counseled on the policy and was provided clear direction and counseling that any time over the 16-hour maximum would require him to put in compensatory time. (Pa597, 295:14-25; Pa929-939; Pa940-942).

Plaintiff Was Not Disciplined for Making Sarcastic Comments

On December 21, 2018, various foods were donated to the Department by residents. (Pa952-954; Pa955-958). Plaintiff sarcastically commented, “Lieutenant [Gaines], I find this completely inappropriate accepting gifts from residents. I am sure this is a violation of departmental rules. I don’t know Lieutenant, this needs to be investigated. Who’s doing the investigation?” (Pa952-954; Pa955-958). Lt. Gaines memorialized the matter, writing, “I believed Ptl. Tesar was making the statements in jest and sarcastic in nature. However due to my recent experiences with officers making accusations of rules infractions I felt the incident should be documented.” (Pa955-958). Plaintiff later confirmed his statements were sarcastic. (Pa952-954).

On January 3, 2019, Lt. Erla spoke to Plaintiff about the incident to advise him that the other officers are on edge concerning recent IA investigations. Plaintiff told Lt. Erla that he understood and would choose his words more wisely. (Pa558, 144:12-145:7; Pa952-954). During their conversation, Lt. Erla also advised Plaintiff that no complaints were signed and this is not part of any official investigation. (Pa952-954). Plaintiff testified that neither Lt. Erla or Lt. Gaines said they were giving him a verbal reprimand with regards to the incident. (Pa562, 161:14-22). Plaintiff testified an IA investigation was never initiated, and he received no discipline for the incident. (Pa557, 138:19; Pa558, 142:8-9; Pa596, 290:1-4).

Officers Did Not Avoid Responding to Calls Involving Plaintiff

In the Amended Complaint, Plaintiff alleges that officers avoided responding to calls or delayed their response times when Plaintiff was on a call. (Pa78-79, ¶ 96). During his deposition, Plaintiff clarified that this allegation only concerned the response times of Ptl. Jamie Unkel. (Pa579, 221:6-9; Pa592, 273:23-274:8). Plaintiff testified that he did not know where Ptl. Unkel was coming from when she responded to the five calls identified by Plaintiff. (Pa581-585, 230:18-20, 239:20-22, 243:4-7, 246:5-7). Additionally, Plaintiff testified that Ptl. Unkel was likely late in her response times to avoid

being first on the scene and writing a police report, rather than because of him. (Pa587, 253:12-20).

Plaintiff never reported Ptl. Unkel's response times to IA, and further testified that he "didn't want it to get to internal affairs." (Pa583, 240:12-19). Instead, Plaintiff spoke about Ptl. Unkel's response times with his supervisors, Sgt. Jason Mader and Sgt. Brian Braile, who informed Plaintiff they would address the situation with Ptl. Unkel. (Pa581, 232:21-24; Pa584, 241:8-12). Plaintiff acknowledged that Sgt. Braile explicitly told Plaintiff he spoke to Ptl. Unkel about the issue. (Pa584, 241:5-21).

Plaintiff Received No Discipline Following a Welfare Check

Plaintiff alleges that in or around May 2019, the Police Department received a report that he was allegedly asleep in his patrol car while on a road job. (Pa554, 126:18-127:9; Pa959-964; Pa456-459; Pa436-439; Pa428-430). Upon receiving this information, a supervisor was sent to conduct a welfare check on Plaintiff. (Pa554, 127:10-19; Pa428-430). The supervisor observed Plaintiff to be awake, but reclined in his patrol car. (Pa554, 127:10-19; Pa428-430). Plaintiff testified that he never received discipline for the incident as a result of the allegation he was sleeping on duty. (Pa554, 127:23-128:1).

Plaintiff reported to his supervisor that he thought the allegation of him sleeping on duty and welfare check was improper. (Pa959-964). With the

support of Chief Zebrowski, Lt. Erla informally investigated the incident for almost two weeks and spoke to several witnesses, including Plaintiff. (Pa959-964). Lt. Erla determined that the Department would be unable to prove the motivations of the individuals who reported Plaintiff, and determined that harassment charges could not be sustained. (Pa959-964).

Plaintiff testified he has no personal knowledge that he was the subject of a welfare check in retaliation for reporting the Chief. (Pa554, 126:7-12). Plaintiff testified he never made a complaint to the Middlesex County Prosecutor's Office to allege that his complaints were not investigated properly. (Pa604, 322:3-7). Plaintiff testified he never went to any official or employee of the Borough to complain that his complaints were not investigated properly. (Pa604, 322:8-11).

Plaintiff Received a Fair Evaluation Supported by Evidence

In 2019, Plaintiff was evaluated for his performance in the second half of 2018. (Pa1089-1094). Plaintiff received scores of "average – 2" and "above average – 3" in various categories. (Pa1089-1094). The evaluation noted Plaintiff failed to follow orders and demonstrated "a lack of respect for supervisors, the chain of command, and [has a] problem with supervision." (Pa1089-1094). Plaintiff was not satisfied with this evaluation and sought to appeal it. His supervisor, Sgt. Mader, did not change his evaluation. Rather,

Sgt. Mader wrote a thorough memo that substantiated the scores he gave to Plaintiff. (Pa1095-1100). Mader noted that most of Plaintiff's arrests were not self-initiating. Mader also criticized Plaintiff for stating that he should leave drugs found on an overdose call for the individual who had overdosed. Mader noted that while he could have filed a demeanor complaint against Plaintiff for that conduct, he instead chose to handle it differently by counseling Plaintiff. Mader noted that Plaintiff reacted to the counseling with a "smirk and small laugh". Following Plaintiff's appeal of his evaluation, it was determined that Mader had substantiated his scores and the performance evaluation was not changed. (Pa1101-1102).

Plaintiff Chose His Work Schedule

In November of 2020, Plaintiff bid for his work schedule and chose to use his senior position to switch from the A-side to the B-side, which he perceived to have a better schedule with more holidays off. (Pa77-78, ¶ 94; Pa589, 263:10-12). Plaintiff testified that the officers previously working on the B-side were upset Plaintiff did not inform them of his decision to switch sides in advance. (Pa587, 255:6-22). Plaintiff testified that the officers were upset because the friends they had grown close with over years of working on the B-side would be separated between A-side and B-side, and "it wasn't

directly at me.” (Pa587, 255:6-22; Pa589, 264:12-23; Pa592, 273:1-3). Plaintiff testified that no money was exchanged. (Pa592, 273:8-18).

Plaintiff chose his current shift, and testified that in 2021, 2022, and 2022 he received the shift pick he wanted. (Pa531, 37:5-10; Pa590, 265:8-11). Plaintiff testified he has never put in for a shift other than the midnight shift. (Pa601, 309:11-15). Plaintiff testified that no one at the Department told Plaintiff he could not switch to the B-side or stopped him from switching to the B-side. (Pa590, 265:19-22).

Plaintiff testified that he did not report the allegation to Internal Affairs. (Pa592, 273:8-18). After reading Plaintiff’s allegation for the first time in Plaintiff’s Amended Complaint, Lt. Erla spoke with Ptl. Raub and determined there was nothing to investigate, as Raub confirmed that the comment was a joke because he would not be able to work and take the same time off as his friends due to being on a different shift. (Pa302, 110:14-111:24).

Plaintiff Participated as a Witness in an Investigation Without Consequence

In or around November 2020, the Borough retained an outside investigator to perform a workplace investigation into a matter involving another Borough employee. (Pa965-Pa992). The third-party investigator contacted employees seeking to interview them in connection with the investigation. Chief Zebrowski sent identical emails to these employees

indicating he would be complying with the request for an interview and requesting these employees do the same. (Pa965-Pa992).

Plaintiff voluntarily agreed to be interviewed as a witness in connection with the investigation. At his deposition, Plaintiff did not recall what he told the investigator. (Pa593, 280:2-9). Plaintiff testified that he has no personal knowledge that Chief Zebrowski or Lt. Erla were ever made aware of what he told the investigator. (Pa593, 280:10-17). Plaintiff testified he was not subject to any negative consequences for participating in the investigation. (Pa593, 280:18-21).

Plaintiff's Verbal Warning for His Failure to Write a Report Following a Call Was Rescinded

On April 25, 2021, at 2:43 a.m., Marilyn Delponte, the owner of Krystal's Bakery, a Sayreville business, called the Department to report three suspicious individuals blocking the doorway of her business, as she was worried she would not be able to leave. (Pa501-511; Pa993-997). Delponte had previously called the employees of the Domino's Pizza located next-door, who informed her that the individuals had been disruptive and were looking for food but did not have any money. (Pa501-511; Pa993-997).

Plaintiff and another officer were dispatched to the scene. (Pa501-511; Pa993-997). Plaintiff arrived first at the scene and spoke to the individuals while still inside his patrol vehicle. The individuals told Plaintiff that they

were under the Krystal's Bakery awning while it rained waiting for their Uber. This interaction lasted approximately 20 seconds. (Pa501-511; Pa993-997). Plaintiff then parked in a parking lot without a line of sight to Krystal's Bakery, and was joined by another responding officer. Both drove away after about 20 minutes. (Pa595, 287:1-11; Pa501-511; Pa993-997). Plaintiff testified that he never spoke to Delponte to explain that he had talked to the individuals and they did not present a threat. (Pa547, 101:15-20; Pa606, 329:13-17).

Later that day, a friend of Delponte called the Police Department regarding the incident because Delponte had expressed that the police did not respond appropriately to the situation. Delponte had not seen Plaintiff speak briefly with the individuals and Plaintiff had not spoken to her while responding to the call. Accordingly, Delponte reported that she had to call someone for a ride home at 5 a.m. because she felt unsafe leaving alone. (Pa501-511; Pa993-997). Thereafter, an IA investigation opened regarding Delponte's complaint. Plaintiff, as well as Officer Salvatore, Sgt. Maslowski, and Sgt. Monaco, were the subjects of this investigation as they were the officers who responded to the call or the supervising officers. (Pa501-511; Pa993-997). During the course of the investigation, Plaintiff admitted he never wrote a report, despite the fact that one of his duties as a Patrolman is to write reports. (Pa531, 34:3-5; Pa501-511; Pa993-997).

Plaintiff was found to be in violation of Sayreville Police Department Rules and Regulations 3:3.11 for Work Expectation, which states: “Employees are expected to perform their duties to the best of their abilities at all times.” (Pa501-511; Pa993-997). Plaintiff and Officer Salvatore were also found to be in violation of Sayreville General Order on the Field Reporting System III B.7, which states: “A CAD entry with an accompanying narrative by an officer or dispatcher is required in... Field Interviews/Investigative Detentions.” (Pa501-511; Pa993-997). The charges against both supervisors were also sustained. (Pa501-511; Pa993-997). Plaintiff and Officer Salvatore were issued verbal reprimands. (Pa547, 101:2-3; Pa501-511; Pa993-997). The supervising officers were issued written reprimands. (Pa501-511; Pa1001-1014).

Officer Salvatore and Sgt. Maslowski filed grievances with respect to discipline. The arbitrator sustained the grievances and directed the Borough to rescind the discipline issued to Officer Salvatore and Sgt. Maslowski. (Pa1001-1014; Pa1015-1031). Even though Plaintiff did not grieve this discipline, Plaintiff’s verbal reprimand was rescinded under the authority of Defendant Chief Zebrowski and removed from his personnel file. (Pa998-1000).

Plaintiff's Assignments, Trainings and Advancement Within the Department

Plaintiff alleges that in 2017, he was passed over for an assignment to the Administration Bureau. (Pa63, ¶ 53). The assignment to the Administration Bureau was not a change in rank and was therefore not a promotion. (Pa533, 43:22-44:3). Plaintiff acknowledged that an assignment to the Administration Bureau did not come with additional compensation. (Pa533, 44:4-6). Plaintiff testified that he only spoke about the assignment with his supervisor, Lt. Gaines. (Pa533, 44:7-19). Plaintiff testified he never expressed written interest in the assignment. (Pa533, 44:20-23). Plaintiff further testified that he has no personal knowledge that he did not get the assignment because of the n-word incident. (Pa547, 98:17-20).

The Chief of Police reserves all rights to assign personnel to any division, bureau, unit or subdivision for the good of the public and the agency. (Pa867 at Borough 127; Pa1040-1043). Plaintiff testified that he never expressed written interest in the Administration, Traffic, or Narcotics Bureau. (Pa533, 44:20-23; Pa534 49:17-19; Pa537, 61:6-7; Pa601-602, 312:21-313:1). Plaintiff testified that he never expressed written interest in attending trainings to better qualify himself for assignments, or checked the catalog of training courses to see what trainings were available. (Pa537-538, 61:23-25, 62:15-18; Pa601, 312:6-10; Pa602, 314:7-11). Plaintiff did ultimately receive a number

of trainings, including ATV training at the insistence of the Department, which allowed him to be assigned ATV details. (Pa533, 44:24-45:21; Pa1044-1058).

POINT I

**THE APPLICABLE STANDARD OF REVIEW
FOR A GRANT OF SUMMARY JUDGMENT IS
WHETHER THERE EXISTS A GENUINE ISSUE OF MATERIAL
FACT SUFFICIENT TO NECESSITATE A TRIAL ON THE MERITS**

The issue presented in Plaintiff’s appeal is whether summary judgment was properly granted to Defendants John Zebrowski, David Erla, and Borough of Sayreville. In reviewing a trial court’s grant of summary judgment to a party, the Appellate Court utilizes the same standard of review employed by the trial court. See Prudential Property v. Boylan, 307 N.J. Super. 162, 167 (App. Div. 1998).

New Jersey Court Rule 4:46-2 mandates that summary judgment should be granted if “the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.” Moreover, “an issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.” Id.

Although genuine issues of material fact preclude the granting of summary judgment, those that are “of an insubstantial nature” do not. Brill v.

Guardian Life Insurance Co., 142 N.J. 520, 529 (1995). If the opposing party in a summary judgment motion offers only facts that are immaterial, insubstantial, “fanciful, frivolous, gauzy, or merely suspicious, he will not be heard to complain if the court grants summary judgment.” Id. Conclusory or speculative allegations are not sufficient to preclude summary judgment. Merchants Express Money Order Co. v. Sun Nat’l Bank, 374 N.J. Super. 592, 563 (App. Div. 2005). “Perception like speculation and suspicion cannot support a cause of action.” Mandel v. UBS/Paine Webber, Inc., 373 N.J. Super. 55, 79 (App. Div. 2004).

Here, Plaintiff cannot demonstrate that the trial court erred in granting summary judgment to Defendants because (i) Plaintiff failed to present any genuine issue of material fact, and (ii) the trial court properly applied the pertinent law in dismissing Plaintiff’s claims. On April 12, 2024, the trial court granted Defendants’ Motion for Summary Judgment in this matter, finding that in relevant part, Plaintiff’s CEPA claim was time-barred by the statute of limitations and the continuing violation theory could not be applied to revive it.

As set forth herein, Defendants/Respondents respectfully submit that the trial court’s order granting summary judgment in favor of Defendants Zebrowski, Erla, and Borough of Sayreville should be affirmed.

POINT II

PLAINTIFF’S FIRST COUNT FOR RETALIATION UNDER CEPA WAS PROPERLY DISMISSED AS OUTSIDE THE STATUTE OF LIMITATIONS

A. Plaintiff’s CEPA claim falls outside of the one-year statute of limitations.

The First Count of Plaintiff’s Amended Complaint alleges a claim for retaliation under the Conscientious Employee Protection Act (“CEPA”). However, as the applicable statute of limitations is just one year, Plaintiff’s claim falls outside of the limitations period and was properly dismissed as a matter of law. N.J.S.A. 34:19-5.

The purpose of CEPA is to protect whistleblowers from retaliation by employers. Lippman v. Ethicon, Inc., 222 N.J. 362, 378 (2015). CEPA prohibits an employer from “tak[ing] 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.” N.J.S.A. 34:19-3(a)(1). The applicable statute of limitations provision provides that an aggrieved employee may institute a civil action in court within one year of a violation of the Act. N.J.S.A. 34:19-5.

Plaintiff filed his Complaint on July 20, 2021. (Pa1-95). The Amended Complaint alleges Sgt. Gawron asked why he was “dressed like a nigger” in

the Summer of 2016, five (5) years before filing his Complaint. (Pa50-53, ¶ 11-21). Plaintiff further alleges that he discussed the incident with Defendant Erla in the following days. (Pa55, ¶ 31). Such allegations fall well outside the one-year statute of limitations in this matter. Similarly, Plaintiff claims that he allegedly reported Officer Novak for sleeping on duty. The record reflects that Plaintiff did not make a report, but rather was interviewed by Internal Affairs in connection with an investigation. Such investigation took place in 2018. (Pa897-917, Pa918-928). Accordingly, such allegation also is outside the statute of limitations in connection with this matter.

B. Plaintiff Fails to Set Forth Any Retaliation Within the Statute of Limitations.

The continuing violation doctrine tolls the one-year statute of limitations only if an employee can demonstrate that the employer engaged in “an ongoing practice or pattern of discrimination” toward that employee. West v. Phila. Elec. Co., 45 F.3d 744, 754 (3d Cir. 1995); see also Green v. Jersey City Bd. of Educ., 177 N.J. 434, 446 (2003) (holding that the continuing violation doctrine applies to CEPA claims). To establish a continuing violation, a plaintiff must show that at least one retaliatory act occurred within the limitations period and that the retaliatory acts are part of a continuing pattern of retaliation rather than the occurrence of isolated or sporadic acts of intentional retaliation. Hall v. St. Joseph’s Hosp., 343 N.J. Super 88, 101 (App.

Div. 2001) (quoting Rush v. Scott Specialty Gases, Inc., 113 F.3d 476, 481 (3d Cir. 1997)).

The doctrine does not apply to discrete discriminatory acts, even when they are related to acts alleged in timely filed charges. Roa v. Roa, 200 N.J. 555, 567 (2010); see also All. For Disabled In Action, Inc. v. Renaissance Enterprises, Inc., 371 N.J. Super. 409, 418 (App. Div. 2004), aff'd, 185 N.J. 339 (2005) (holding that a plaintiff must prove that “the defendant’s conduct is more than the occurrence of isolated or sporadic acts”). Notably, courts do not permit the aggregation of discrete acts of retaliation for the purpose of reviving an untimely act of retaliation that the victim knew or should have known was actionable. Roa v. Roa, 200 N.J. 555, 569 (2010). Such discrete acts include failure to promote, denial of transfer, wrongful suspension, wrongful discipline, and wrongful accusation. Anyawu v. BJ’s Wholesale Club, Inc., 2009 U.S. Dist. Lexis 70153 (D.N.J. August 10, 2009) (citing National R.R. Passenger Corp v. Morgan, 536 U.S. 101, 114 (2002)). The continuing violation doctrine “cannot be used to bring discrete acts of discrimination within the statutory filing period.” Id. (citing Brennan v. State, 2009 N.J. Super Unpub. Lexis 1920 at *5 (App. Div. 2009)). There is a distinction between a continuing effect and a continuing violation and to treat them as synonymous improperly disregards the statute of limitations. Alliance for

Disabled In Action, Inc. v. Renaissance Enterprises, Inc., 371 N.J. Super 409, 422 (App. Div. 2004).

“Once a plaintiff becomes aware, however, of the discriminatory conduct, he . . . is obligated to commence litigation.” Hall, supra. (“If plaintiff knew, or with the exercise of reasonable diligence should have known that each act was discriminatory, the plaintiff ‘may not sit back and accumulate all the discriminatory acts and sue on all within the statutory period applicable to the last one.’”)

Here, Plaintiff does not allege any protected activity under CEPA or retaliatory acts that fall within the 1-year statute of limitations. Defendants’ Counter Statement of Facts sets forth in detail the allegations made by Plaintiff and a timeline of same. The following allegations of retaliation made by Plaintiff all are outside of the statute of limitations:

2018

- Plaintiff accepted a forfeiture of 15 days of vacation in lieu of a suspension for arriving at work under the influence of alcohol and putting on his uniform, arming himself with his service weapon, and appearing at line up in such condition (Pa836-843, Pa844-847)
- Being investigated, along with 6 other similarly situated employees, for violating the Department’s 16 Hour Rule, no discipline was imposed (Pa929-939, Pa940-942)
- Claiming Officer Unkel delayed her response to calls he was dispatched to. This matter was reviewed by her supervisor and addressed with the officer. Plaintiff admitted this claim of retaliation was not due to any protected activity, but rather Unkel not wanting to write the incident report. (Pa581-585, 230:18-20, 239:20-22, 243:4-7, 246:5-7).

2019

- Having a Welfare Check performed when he looked like he was sleeping on duty, no discipline was imposed (Pa 554, 126:18-121:1, Pa 959-964; Pa 456-459, Pa436-439; Pa428-430).
- Plaintiff received a performance evaluation that he did not agree with, yet there were no adverse ramifications that stemmed from such evaluation (Pa1089-1102).

Plaintiff filed his Complaint on July 20, 2021. (Pa48-95). Thus, the allegations set forth above are all outside the statute of limitations. Accordingly, the relevant time period for Plaintiff's claims is between July 20, 2020 and July 20, 2021. Plaintiff only alleges the following with respect to that period:

2020

- Junior officers joked that they wanted to switch shifts with one another for \$1,000 (Pa30-31).
- Plaintiff voluntarily participated in an investigation by outside counsel regarding the complaint of another officer (Pa593, 280:18-21; Pa965-Pa992).

2021

- Plaintiff, along with three other employees, received a verbal warning for his admitted failure to write a report following being dispatched to a call. This warning was later voluntarily rescinded by the Chief following the grievance arbitration of another officer involved. (Pa501-511; Pa512-514; Pa998-1000; Pa1001-1014).

i. Protected Activity

At the outset, Plaintiff fails to assert any protected activity within the statute of limitations. See N.J.S.A. 34:19-3. The only claim Plaintiff makes as to protected activity within this 1-year period is that he voluntarily agreed to

be interviewed in connection with an outside investigator's investigation into a complaint made by another officer. The record reflects that the outside investigator identified witnesses and requested the opportunity to speak with them regarding her investigation. (Pa965-Pa992). The record further reflects that Chief Zebrowski sent identical emails to approximately thirteen (13) of the employees named by the investigator, indicating that he would be complying with the investigator's request for an interview and requesting these employees voluntarily do the same. (Pa965-Pa992). Plaintiff voluntarily participated in the investigation as a witness. (Pa593, 279:9-17; Pa965-Pa992). There is no evidence in the record that Chief Zebrowski was aware of the contents of the outside investigator's report, or ever received a copy of the report. (Pa593, 280:10-17). Even more, Plaintiff admitted he was not subject to any negative consequences for participating in the investigation. (Pa593, 280:18-21).

Plaintiff's voluntary participation the investigation does not constitute a whistleblowing activity under CEPA. Plaintiff did not disclose or threaten to disclose to a supervisor or public body an unlawful activity, policy or practice of the Department, as Plaintiff was interviewed by an outside investigator. See N.J.S.A. 34:19-3(a). Plaintiff also did not provide information to, or testify before, any public body conducting an investigation, hearing or inquiry into

any violation of law by the Department, as Plaintiff was interviewed by an outside investigator. See N.J.S.A. 34:19-3(b). Finally, Plaintiff did not object or refuse to participate in any activity, policy or practice he believed to be in violation of law, and instead was asked and voluntarily agreed to participate in an interview in connection with a complaint made by another officer. See N.J.S.A. 34:19-3(c). The trial court agreed, holding, “I cannot find that [Plaintiff’s] voluntary participation in a third person’s investigation was somehow protected activity under CEPA.” (1T, 45:14-16).

Plaintiff’s references to his allegation that he reported Defendant Zebrowski for using the n-word is not supported by the record and is not within the statute of limitations. The record reflects that in 2016, Plaintiff contacted an off-duty officer to get advice. Plaintiff did not wish to make a complaint and did not do so. Thus, this allegation is four years outside of the statute of limitations and also does not qualify as protected activity. (Pa 543, 82:12-24, 84:19-22, Pa 835 at 2:20-2:30, 2:553-3:30, 9:30-9:42).

Similarly, the record does not support Plaintiff’s claim that he reported Officer Charles Novak for sleeping on duty in 2018. Not only is this allegation outside of the statute of limitations, but also the record reflects that the matter was reported to internal affairs by Lt. Novak and that Plaintiff was

interviewed as part of the investigation, but was not the subject of it. (Pa897-Pa928).

Thus, Plaintiff fails to set forth any protected activity under CEPA as a matter of law. As a result, Plaintiff's claim fails for lack of protected activity within the statute of limitations.

ii. Retaliation

As set forth above, in order for the continuing violation theory to apply, there must be an act of retaliation within the statute of limitations period. Hall, supra. CEPA "is not meant to shield a constant complainer who simply disagrees with the manner in which the [employer] is operating..." Klein v. UMDNJ, 377 N.J. Super. 28, 42 (App. Div. 2005). "The imposition of a minor sanction is insufficient to constitute a retaliatory action under the statute. Nor does the imposition of a condition on continued performance of duties in and of itself constitute an adverse employment action as a matter of law, absent adverse consequences flowing from that condition." Klein, at 46 (finding that being required to perform work duties while under supervision is not retaliatory under CEPA).

The allegations set forth by Plaintiff do not constitute retaliation as a matter of law pursuant to well-established case law. "Where the affected party does not deny committing an infraction that resulted in discipline, the

discipline cannot be considered proscribed reprisal.” Beasley v. Passaic County, 377 N.J. Super. 585, 607-608 (App. Div. 2005) (citing Esposito v. Twp. of Edison, 306 N.J. Super. 280, 291, 703 (App. Div. 1997), cert. denied, 156 N.J. 384 (1998)).

Additionally, “adverse employment actions do not qualify as retaliation under CEPA merely because they result in a bruised ego or injured pride on the part of the employee.” Beasley, at 607 (citing Klein v. Univ of Med. & Dentistry, 377 N.J. Super. 28, 45-46 (App. Div. 2005) (“CEPA’s purpose is to prevent retaliatory action against whistle-blowers, it is not to “assuage egos or settle internal disputes at the workplace”). Not everything that makes an employee unhappy is an actionable adverse action. Cokus v. Bristol Myers Squibb, 362 N.J. Super. 366, 378 (Law Div. 2002).

Further, rescinded employer action that makes plaintiff completely whole and remedies a prior decision cannot constitute an adverse employment action. Beasley v. Passaic County, 377 N.J. Super. 585, 607-608 (App. Div. 2005) (citing Kadetsky v. Egg Harbor Tp. Bd. of Educ., 82 F. Supp. 2d 327, 340 (D. N.J. 2000) (plaintiff subsequently granted tenure and had incriminating materials taken out of his personnel file)).

CEPA defines “retaliatory action” 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. 34:19-2(e). “The definition of retaliatory action speaks in terms of completed action.” Beasley, at 607-608 (citing Borawski v. Henderson, 265 F. Supp. 2d 475, 486 (D.N.J. 2003) (“Retaliatory action under CEPA is confined to ‘completed... personnel actions that have an effect on either compensation or job rank’”). Notably, retaliatory action does not include an investigation of an employee. Beasley, at 607-608.

New Jersey courts have held that retaliation in the form of disciplinary charges, numerous orders, demands, instructions, and other actions similar in nature to the actions here do not constitute an adverse employment action. See Hancock v. Borough of Oaklyn, 347 N.J. Super. 350, 360 (App. Div. 2002) (holding that conduct alleged to have made plaintiff’s job “unpleasant” but did not affect her compensation or rank was found to be insufficient to constitute proscribed retaliation); Buffa v. New Jersey State Dep’t of Judiciary, 56 Fed. Appx. 571, 576 (3d Cir. 2003) (holding that “intense scrutiny” and “overly critical supervision” do not constitute an adverse employment action); Robinson v. City of Pittsburgh, 120 F.3d 1286, 1298 (3d Cir. 1997) (holding that reprimands do not constitute an adverse employment action).

Here, none of the acts alleged by Plaintiff within the 1-year statute of limitations for CEPA constitute retaliation as a matter of law as there is no

threatening or humiliating conduct or conduct which would unreasonably interfere with Plaintiff's job.

1. Allegations Junior Officers Offered Money to Change Shifts

Shift picks in the Department are selected based on seniority. (Pa641 at Borough 714; Pa695 at Borough 766). Plaintiff claims that in November 2020, a junior patrol officer, with less seniority than Plaintiff, was upset when Plaintiff did not inform him he would be selecting B-side for his shift (switching from Plaintiff's usual preference for A-side). (Pa587, 255:6-22; Pa589, 264:12-2). Plaintiff claims that as a result of his shift pick, the junior officers who previously worked B-side would be separated from their friends on days on and off duty. Id. Plaintiff claims that Officer Raub jokingly offered \$1,000 to Officer Valentine to switch shifts. Plaintiff admitted that this was not because of him or any alleged protected activity. Plaintiff testified, "it wasn't directly at me," Officer Raub "tried to explain. . . that he wanted to just go work with his friends." (Pa592, 273:1-3). Plaintiff did not suffer any adverse action as he was able to receive the shift pick he wanted. (Pa590, 265:8-11). Further, Plaintiff expressly admitted that he did not report this allegation to anyone. (Pa592, 273:12-13). Accordingly, there was no protected activity and no act of retaliation against Plaintiff. At most, this allegation is nothing more than a bruise to Plaintiff's ego, which is not actionable under CEPA. See

Beasley; Klein, supra.; Heitzman v. Monmouth Cty., 321 N.J. Super. 133, 147 (App. Div. 1999) (holding that employment discrimination law is not intended to be a general civility code). As such, the trial court held the alleged actions could not be considered protected activity or retaliation. (1T, 42:24-43:2).

2. Interview Regarding Outside Investigation

Plaintiff also claims retaliation because he that he was interviewed in connection with a third-party investigation related to a complaint made by another employee, Sgt. Moat. At the outset, the record reflects that the outside investigator identified individuals with whom they wanted to speak, and then the Chief sent emails (in fact, the same email to all these individuals), requesting that they voluntarily comply with this request. (Pa965-Pa992). Plaintiff testified that he has no personal knowledge that Chief Zebrowski or Lt. Erla were ever made aware of what he told the investigator. (Pa593, 280:10-17). Notably, Plaintiff also admitted he was not subject to any negative consequences for participating in the investigation. (Pa593, 280:18-21).

Not only is this participation not protected activity under CEPA, but by Plaintiff's own admission, there was no retaliation for his participation. Id.

3. Rescinded Verbal Warning

Finally, Plaintiff claims retaliation stemming from his failure to write a police report in response to being dispatched to a call for service by the owner

of Krystal's Bakery in the early morning hours on April 25, 2021. Plaintiff admits that he never wrote a report regarding this call. (Pa531, 34:3-5; Pa501-511; Pa993-997). Following an investigation, Plaintiff was issued a verbal warning, and the other officer assigned to the call and their supervision were similarly provided with warnings. (Pa547, 101:2-3; Pa501-511; Pa993-997; Pa1001-1014). As a result of the arbitration ruling with respect to Sgt. Maslowski, Chief Zebrowski later rescinded Plaintiff's verbal warning. (Pa998-1000). Any reprimands received by Plaintiff do not constitute an adverse employment action. See Robinson v. City of Pittsburgh, 120 F.3d 1286, 1298 (3d Cir. 1997) (holding that reprimands do not constitute an adverse employment action). Further, since the warning was based on admitted conduct (Plaintiff's admission that he did not write a report) and was later rescinded, such allegation does not constitute retaliation under CEPA as a matter of law. (Pa998-1000). See Beasley, supra. The trial court noted that Plaintiff was treated the same as other individuals involved in the same incident, and further the verbal warning cannot be considered because it has been rescinded. (1T, 44:10-23).

Thus, there is no actionable retaliation within the statute of limitations and Plaintiff's claim fails as a matter of law. Further, since there is no actionable retaliation as a matter of law, the continuing violation theory cannot

apply as a matter of law. Accordingly, the trial court properly dismissed Plaintiff's claim under CEPA. Thus, Defendants request that this Court affirm the decision of the trial court.

POINT III

PLAINTIFF'S FIRST COUNT FOR RETALIATION/HOSTILE WORK ENVIRONMENT UNDER CEPA WAS PROPERLY DISMISSED AS A MATTER OF LAW

As set forth above, Plaintiff cannot maintain a claim under CEPA as a matter of law as there is no adverse action/retaliation that falls within the statute of limitations. In the event that this Court is willing to consider Plaintiff's CEPA claim further, the First Count of the Amended Complaint alleging retaliation and/or a hostile work environment under CEPA still fails as a matter of law and should be dismissed.

A *prima facie* case pursuant to CEPA is established when a plaintiff can demonstrate that: (1) he or she reasonably believed that the employer's conduct was violating either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy; (2) he or she performed a "whistle-blowing" activity described in N.J.S.A. 34:19-3(a)-(c); (3) an adverse employment action was taken against him or her; and (4) a causal connection exists between the whistle-blowing activity and the adverse employment action. Kolb v. Burns, 320 N.J. Super. 467, 476 (App. Div. 1999); see also Model Jury Charge 2.32. Where a plaintiff complains of a hostile work environment, the conduct complained of must be "severe or pervasive enough to make a reasonable person in the employee's shoes believe that the

conditions of employment had been altered and the working environment had become hostile and abusive to the point that the conduct in question is the equivalent of an adverse action.” Cokus v. Bristol Myers Squibb Co., 362 N.J. Super. 366, 387 (Law Div. 2002), aff’d, 362 N.J. Super. 245 (App. Div.), certif. denied, 178 N.J. 32 (2003). The trial court “must be alert to the sufficiency of the factual evidence and to whether the acts complained of could support the finding that the complaining employee’s belief was a reasonable one, and . . . to ensure that the activity complained about meets this threshold.” Allen v. Cape May Cty., 246 N.J. 275, 290 (2021) (quoting Battaglia v. United Parcel Serv., Inc., 214 N.J. 518, 558 (2013)). The Legislature did not intend CEPA to protect against “vague and conclusory complaints, complaints about trivial or minor matters, or generalized workplace unhappiness.” Battaglia, 214 N.J. at 559.

A. Plaintiff’s CEPA claim must be dismissed because Plaintiff failed to detail in writing Defendants’ alleged wrongdoing.

As an initial matter, in order to enjoy the protections afforded under CEPA, an employee must first detail to a supervisor, in writing, the alleged wrongdoing, thus providing the employer with a reasonable opportunity to correct the problem. N.J.S.A. 34:19-4; see also Barratt v. Cushman & Wakefield, 144 N.J. 120, 130 (1996); Mosley v. Femina Fashions, Inc., 356 N.J. Super. 118, 126 (App. Div. 2002). Here, Plaintiff admitted that he never

submitted a written complaint to the Borough or the Police Department regarding the n-word incident, or any other incident contained within his Amended Complaint. (Pa543, 84:23-85:1). Plaintiff further admitted that he never even looked up how to submit a written complaint to the Borough or the Police Department, despite frequent trainings on the availability of anti-discrimination, anti-harassment, and anti-retaliation policies and procedures. (Pa543, 85:13-15; Pa730-754; Pa755-762; Pa806-811). Therefore, because Plaintiff has not given the Department a reasonable opportunity to correct the alleged wrongdoings, his CEPA claim was properly dismissed.

B. Plaintiff's CEPA claim must be dismissed because Plaintiff did not participate in any whistleblowing activity.

Under CEPA, whistleblowing activity includes activity where an employee: (1) discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer; (2) provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer; or (3) objects to, or refuses to participate in any activity, policy or practice. N.J.S.A. § 34:19-3(a)-(c).

Plaintiff's Amended Complaint alleges that Plaintiff's whistleblowing activity comprised of discussing the n-word incident with Lt. Erla and discussing Officer Novak sleeping on duty. (Pa50-53, ¶ 11-21). However, as

noted above, Plaintiff never filed a written complaint concerning the n-word incident and did not want to make a formal complaint regarding the matter. (Pa543, 84:19-85:1; Pa822-827). Further, Plaintiff's participation as a witness in an unrelated IA investigation concerning Officer Novak sleeping on duty at the request of Internal Affairs similarly did not constitute a written disclosure to the Borough and thus does not rise to the definition of whistleblowing set forth in CEPA. Such participation in the investigation into Officer Novak also has no relation to Defendants Zebrowski and Erla, or any other Department supervisor. (Pa555, 131:20-22, 132:17-19; Pa897-917; Pa918-928). Therefore, Plaintiff's claim fails for lack of whistleblowing activity.

C. Plaintiff's CEPA claim for a retaliatory hostile work environment must be dismissed because Plaintiff was not subject to any severe or pervasive conduct.

In order to be actionable, an allegedly retaliatory act must be "sufficiently severe or pervasive to have altered plaintiff's conditions of employment in an important and material manner." El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 176 (App. Div. 2005). Adverse employment action, in the context of CEPA, "must be read to mean an action similar in severity to discharge, demotion, or suspension, each of which has a serious impact on employment." Ruiz v. Morris County Sheriff's Dep't, 2005 U.S. Dist. Lexis 26249, slip op. at *32 (D.N.J. Nov. 1, 2005) (citation omitted).

Further, New Jersey courts have held that being denied a preferential post does not constitute adverse employment action. Ruiz, slip op. at *29-33.

When analyzing claims, courts have been instructed to only consider the conduct itself, not the effect of the conduct on the particular plaintiff. El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 178-79 (App. Div. 2005). “Plaintiff’s subjective responses to the allegedly harassing conduct do not control or otherwise affect, the determination of whether the conduct is severe or pervasive which requires application of the reasonable person standard.” Godfrey v. Princeton Theological Seminary, 196 N.J. 178 (2008).

Courts have made clear that severe or pervasive conduct is determined based on “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.” Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993). “[E]vidence demonstrating a poor relationship between an employer and an employee is not, by itself, sufficient to sustain a hostile work environment claim.” Buffa v. N.J. State Dept. Of Judiciary, 56 Fed. Appx. 571, 575 (3d Cir. 2003). Additionally, an employee is “not entitled to a perfect workplace, free of annoyances and colleagues [he] finds disagreeable.” Herman v. Coastal Corp., 348 N.J. Super 1, 23 (App. Div. 2002).

Plaintiff's claims do not rise to a continuing retaliation/hostile work environment, as set forth in cases involving similar allegations:

- Dolinski v. Borough of Watchung & Chief Joseph Cina, 2022 N.J. Super. Unpub. LEXIS 1242 (App. Div. July 8, 2022) (affirming the trial court's dismissal of the plaintiff's claims, and more specifically rejecting the application of the continuing violation doctrine where the plaintiff alleged he was improperly removed from the SWAT team; was placed on the Early Intervention Program; and received a written reprimand);
- Ruffin v. Springpoint Senior Living, 2021 N.J. Super. Unpub. LEXIS 2244 (App. Div. Sep. 28, 2021) (affirming Middlesex County Court's dismissal of the plaintiff's claims, and more specifically rejecting the application of the continuing violation doctrine where the plaintiff received a number of disciplinary warnings and citations, including a citation for failure to write a report);
- Delorenzo v. N.J. State Police, 2020 N.J. Super. Unpub. LEXIS 1619 (App. Div. Aug. 20, 2020) (affirming the trial court's dismissal of the plaintiff's claims, and more specifically rejecting the application of the continuing violation doctrine where the plaintiff alleged he was the target in a number of different investigations; received a harassing anonymous phone call; and received advice from a superior officer to think about the effect a complaint could have on his career, and that of his son, a new trooper);
- Kownacki v. Saddle Brook Bd. of Educ., 2014 N.J. Super. Unpub. LEXIS 1044 (App. Div. May 8, 2014) (affirming the trial court's dismissal of the plaintiff's claims, and more specifically rejecting the application of the continuing violation doctrine where the plaintiff alleged his complaints were not given sufficient consideration; he received a letter telling him that an accident he made could have been avoided if better judgement and care was exercised; his employer did not investigate an argument he got into with another employee; and was subject to a disciplinary hearing);
- Urbanski v. Twp. of Edison, 2014 N.J. Super. Unpub. LEXIS 103 (App. Div. Jan. 17, 2014) (affirming the trial court's dismissal of the plaintiff's claims, and more specifically rejecting the application of the continuing violation doctrine where the plaintiff alleged he was given an undesirable work assignment for a week; suffered from false allegations that caused him to undergo a fitness for duty exam; suffered from an

insulting comment was posted about him online; was ordered to attend a weight loss seminar; had someone in the police department give inaccurate information to the workers' compensation insurer concerning his claim; and had supervisors criticize his police reports).

Here, Plaintiff has not alleged that he has been subject to discharge, demotion, or other adverse employment action which was significant enough to give rise to an adverse employment action or severe or pervasive conduct; in fact, it is undisputed that Plaintiff has not been subject to discharge or demotion. Rather, Plaintiff unsuccessfully claims adverse employment action in the form of allegedly not being selected for a lateral assignment to the Administrative Bureau in 2016, being investigated for violating Department policy and regulations, reporting for work under the influence of alcohol (which he admitted), being checked on while on a road job, and other officers' response times. (Pa1075-1076, No. 8). However, even if taken as true, none of these allegations are significant enough to give rise to a CEPA claim. See Kolb, 320 N.J. Super. at 476; Cokus, 362 N.J. Super. at 387 (Law Div. 2002); Allen, 246 N.J. at 290; Battaglia, 214 N.J. at 558-59.

The record is devoid of any adverse employment action with respect to Plaintiff. At the outset, Plaintiff is still employed by the Borough and has not been terminated or demoted. (Pa530-531, 33:16-34:2). Plaintiff's claim that he was not selected for an assignment in the Administrative Bureau does not constitute an adverse employment action. Plaintiff testified that the assignment

is not a promotion. (Pa533, 44:1-3). Plaintiff testified that the assignment does not come with any additional compensation. (Pa533, 44:1-6). Plaintiff admitted he did not formally express interest in this assignment in writing. (Pa533, 44:20-23). He bases his expression of interest solely on a conversation he had with his supervisor. (Pa533, 44:7-19). However, there is no evidence in the record that the Chief was made aware of Plaintiff's purported interest in the assignment. (Pa533, 44:7-44:23). In fact, Plaintiff did not formally express interest in any assignment within the Department before filing his Complaint. (Pa533, 44:20-23; Pa534 49:17-19; Pa537, 61:6-7; Pa601-602, 312:21-313:1). Accordingly, such claim cannot constitute an adverse employment action as a matter of law.

The reasonable disciplinary measures taken against Plaintiff similarly do not constitute an adverse employment action. Plaintiff only ever received discipline after he admittedly arrived to his shift under the influence of alcohol. (Pa836-843). At that time, Plaintiff reported for work, put on his uniform, and armed himself with his service weapon and taser. (Pa549, 107:21-108:5; Pa844-847). There, Plaintiff accepted the forfeiture of 15 days of vacation in lieu of a suspension, which did not affect Plaintiff's compensation or rank, or intrude on his employment relationship. (Pa836-843).

Plaintiff negotiated this forfeiture and agreed to same based on the advice of his attorney. (Pa70, ¶ 76; Pa551, 117:5-118:4; Pa894-896).

Further, Plaintiff was investigated for violating the Department's Rule that prohibited officers from working more than 16 hours in a row. During the course of this investigation, Plaintiff admitted that he had worked over the 16 hours, and had not requested compensatory time, which would have prevented him from violating this rule. (Pa929-939). Plaintiff was investigated for this conduct along with six other officers and/or supervisors. (Pa556, 135:20-23; Pa929-939; Pa940-942). Here, as this investigation was based on Plaintiff's admitted conduct, it cannot be considered retaliation as a matter of law. Beasley, supra. Plaintiff received counseling for his admitted violation of the Order that officers can only work a maximum of 16-hours. (Pa597, 295:14-25; Pa929-939; Pa940-942). Such counseling was not discipline and did not adversely affect Plaintiff's employment. (Pa597, 295:14-25; Pa940-942). Further, such allegation does not rise to the level of being severe or pervasive as it did not impact Plaintiff's employment, and was not threatening or humiliating. Harris, supra.; Dolinski, supra.; Ruffin, supra.; Delorenzo, supra.

Plaintiff's allegation that he was mistakenly reported for sleeping on duty also does not rise to the level of severe or pervasive conduct and therefore cannot be considered adverse action. In the case of sleeping on duty,

supervisors indicated that Plaintiff was not visible in his vehicle, and a welfare check was requested. (Pa554, 127:10-19; Pa959-964; Pa428-430). Following this welfare check, it was determined that Plaintiff was reclining in the seat of his patrol car. (Pa554, 127:10-19; Pa428-430). Plaintiff testified that he never received discipline for the incident. (Pa554, 127:23-128:1). Plaintiff testified he has no personal knowledge that he was the subject of a welfare check in retaliation for any prior incident. (Pa554, 126:7-12). In addition to not being retaliatory, this allegation had no impact on Plaintiff's compensation, rank, or general employment. (Pa554, 127:23-128:1). Such an allegation does not rise to the level of being severe or pervasive as it did not impact Plaintiff's employment, and was not threatening or humiliating. Harris, supra.; Urbanski, supra. Additionally, Lt. Erla's determination that the Department would be unable to prove the motivations of the individuals who reported Plaintiff such that harassment charges could not be sustained is not severe, pervasive, or retaliatory. Harris, supra.

With respect to Plaintiff's claim that he was given an unsatisfactory performance evaluation, which was later reversed and lost, Plaintiff again misrepresents the record in this matter. The record shows that in 2019, Plaintiff was evaluated for his performance in the second half of 2018. (Pa1089-1094). Plaintiff received scores of "average – 2" and "above average

– 3” in various categories. (Pa1089-1094). The evaluation noted Plaintiff failed to follow orders and demonstrated “a lack of respect for supervisors, the chain of command, and [has a] problem with supervision.” (Pa1089-1094). Plaintiff was not satisfied with this evaluation and sought to appeal it. His supervisor, Sgt. Mader, wrote a thorough memo that substantiated the scores he gave to Plaintiff. (Pa1095-1100). Mader noted that most of Plaintiff’s arrests were not self-initiating. (Pa1095-1100). Mader also criticized Plaintiff for stating that he should leave drugs found an overdose call for the individual who had overdosed. (Pa1095-1100). Mader noted that while he could have filed a demeanor complaint against Plaintiff for that conduct, he instead chose to handle it differently by counseling Plaintiff despite the fact that the individual who they were there to help, the person who had overdosed, had referred to Plaintiff’s conduct as poor and unprofessional. (Pa1095-1100). Mader noted that Plaintiff reacted to the counseling with a “smirk and small laugh”. (Pa1095-1100). Following Plaintiff’s appeal of his evaluation, it was determined that Mader had substantiated his scores and the performance evaluation was not changed. (Pa1101-1102). As set forth above, one subpar performance evaluation is not severe, pervasive, or retaliatory. Harris, supra.; Cokus v. Bristol Myers Squibb Co., 362 N.J. Super. 366, 388 (Super. Ct. 2002) (holding that unfavorable evaluations are not retaliation for purposes of

CEPA). This evaluation did not change Plaintiff's rank, compensation, or benefits. (Pa530-531, 33:25-34:2).

Therefore, Plaintiff cannot show any adverse employment action taken against him. Additionally, as set forth above, these allegations constitute discreet acts that cannot be aggregated to support a claim for a hostile work environment. See Roa and Anyawu, supra. Further, none of these allegations rises to the level of being threatening, humiliating, and do not unreasonably interfere with the performance of Plaintiff's job. Thus, they cannot meet the severe or pervasive standard as a matter of law and Plaintiff's claim for a retaliatory hostile work environment fails and Defendants request this Court affirm the trial court's grant of summary judgment.

D. Plaintiff's CEPA claim must be dismissed because there is no causal connection between any adverse employment action and Plaintiff's alleged protected activity.

"Temporal proximity, standing alone, is insufficient to establish causation." Hancock v. Borough of Oaklyn, 347 N.J. Super. 350, 361 (2002). However, temporal proximity is probative of the element of causation for a CEPA claim. Maimone v. City of Atlantic City, 188 N.J. 221, 237 (2006). A plaintiff must show a "substantial nexus" between the whistleblowing activity and the adverse employment action. Dzwonar v. McDevitt, 177 N.J. 451, 463 (2003). Acts that are too minor or too far-removed fail due to a lack of causal

connection to the alleged whistleblowing. Sarnowski v. Aire Brooke Limosine, Inc. 510 F.3d 398-405 (3d Cir. 2007). Further, alleged “retaliatory motive on the part of non-decision makers is not enough to satisfy the causation element of a CEPA claim.” Carver v. City of Trenton, 420 F.3d 243, 258 (3d Cir. 2005). Similarly, where the employee points to no evidence the decision makers knew about the content of the protected activity, such claim for retaliation fails. Dominguez v. Costco Wholesale Corp., 356 Fed Appx. 611 (3d Cir. 2009).

Here, there is no connection between Plaintiff’s alleged whistleblowing activity and any alleged adverse employment action. Notably, Plaintiff’s allegation that the Chief used the n-word was reported by Zebrowski and investigated by the Middlesex County Prosecutor’s Office in 2019. In connection with the investigation Plaintiff was asked: “Did you experience any retaliation or . . . did you . . . experience here at the Sayreville Police Department change in any way? Was your shift changed? Was the car you drive changed? . . . Did anything take place to lead you to believe that you were being singled out for any type of retribution?” Plaintiff responded: “no.” (Pa835 at 15:00-15:22).

Additionally, Plaintiff admitted that he has no personal knowledge that he did not get an assignment in the Administrative Bureau because of the n-

word incident. (Pa547, 98:13-20). Plaintiff also did not request trainings that would help better qualify him for other assignments. (Pa537-538, 61:23-25, 62:15-18; Pa601-602, 312:6-10, 314:7-11).

Conversely, Plaintiff forfeited 15 days of vacation in lieu of suspension for arriving to his shift under the influence because he violated the Department's Rules and Regulations. Plaintiff admitted that he drank alcoholic beverages before his shift, drove to work, then went so far as to change into his uniform, arm himself with his service weapon and taser and report for line-up before being sent out on patrol in the inebriated state. (Pa548, 105:21-23). Lt. Gaines and Capt. Plumacker both noted the odor of alcohol emanating from Plaintiff and determined he was not fit for duty. (Pa836-843). A thorough IA investigation was conducted into Plaintiff's violation of Department Rules and Regulations and concerning behavior. The investigation found Plaintiff violated Sayreville Police Department Rules and Regulations 3:6.1 Subsection 1 which requires: "No employee of the department will appear for, or be on duty, under the influence of an alcoholic beverage and/or drugs, or be unfit for duty because of use of drugs and/or an alcoholic beverage. The reasonable option of a supervising officer that the employee is under the influence or has alcohol and/or drugs in the employee's system shall be sufficient to establish a violation of this provision" and Subsection 7 which provides: "No employee

shall report for regularly scheduled duty, with the odor of an alcoholic beverage on their breath.”). (Pa874-876 at Borough 134-136). As such, Plaintiff’s ultimate forfeiture of 15 vacation days in lieu of suspension was not only reasonable but lenient, as Plaintiff’s own PBA attorney advised him to take the discipline instead of filing a grievance because other departments have assessed stricter discipline for such situations. (Pa70, ¶ 76; Pa551, 117:5-118:4).

Similarly, Plaintiff acknowledged the Department’s policies limiting officers to no more than 16 consecutive hours worked in a day. (Pa556, 136:7-12; Pa947-949). After a Councilmember inquired into officers violating this policy, seven (7) officers, including Plaintiff, were investigated for these violations after an audit showed that they worked overtime that violated this policy. (Pa556, 136:7-15; Pa929-939; Pa940-942; Pa950-951). The purpose of this policy was to protect the health and safety of the officers. (Pa329, 33:22-23). Defendant Borough has a legitimate business interest in making sure its policies and procedures are being followed by employees. Plaintiff was not singled out, nor did he receive any discipline following this investigation. Rather he was counseled on the policy. (Pa940-942). Further, there is no causal connection between this investigation and Plaintiff’s allegation that he reported the use of the slur two years earlier.

Plaintiff later claimed that the 16 hour rule investigation was retaliation for him participating in an internal affairs investigation that charged Charles Novak with sleeping on duty. However, again, this claim is pure speculation that is not supported by the record. The record is undisputed that this investigation was initiated at the request of a Councilman, Daniel Buchanan, who was concerned that officers were working beyond the 16 hours. (Pa328, 30:18-31:1; Pa950-951). Following the Department's audit of its time records, Plaintiff, along with six (6) other officers and supervisors, including Charles Novak, were investigated for violating this policy. (Pa556, 135:20-23; Pa929-939; Pa940-942). There is nothing in the record that Officer Charles Novak, or Lieutenant James Novak, had anything to do with initiating this investigation. Rather, it was initiated by the Chief in response to a Councilman's inquiry as set forth in the emails between Chief Zebrowski and Councilman Buchanan. (Pa328, 30:18-31:1; Pa950-951). Further, as set forth in Urbanski, there is insufficient proof of retaliatory motive where other employees who did not blow the whistle also experienced what Plaintiff claims. Urbanski, at *20.

Plaintiff similarly fails to set forth any causal connection between the investigation into the failure of Plaintiff and other officers in 2021 to ensure a report was filed after being dispatched to Krystal's Bakery following a report of suspicious persons. Certainly, there is no temporal proximity as such

investigation occurred five (5) years after Plaintiff's alleged complaint regarding the use of the slur. (Pa50-53, ¶ 11-21, Pa87-88, ¶ 125). Additionally, Plaintiff was not singled out. The investigation was initiated after a member of the public called the Department to complain they had not received any follow up information following a call to dispatch. Plaintiff, along with three (3) other employees, the other responding officer and two supervisors, were investigated since there was no report in the system related to the call. Thus, Plaintiff was treated the same as other officers, and there is no evidence of a causal connection related to protected activity. (Pa 501-511, Pa993-997).

Later, Plaintiff claimed that the verbal warning he received for his failure to write a police report following a call was in retaliation for participating in the outside counsel's investigation into the complaint of Angela Moat. At the outset, such participation is not protected activity under CEPA as set forth above. Further, Plaintiff admitted that he experienced no reprisals as a result of this participation. (Pa593, 280:18-21). Additionally, the record is undisputed that neither Zebrowski nor Erla were aware of the information Plaintiff provided. (Pa593, 280:10-17). Accordingly, Plaintiff has failed to establish causation and his claim fails.

There is also no connection between how Plaintiff was treated by other officers and any alleged whistleblowing. As an initial matter, Plaintiff

admitted he had no personal knowledge that the command staff, secretaries, or other officers were aware he discussed the n-word incident with Lt. Erla back in 2016. (Pa545, 90:24-91:8; 92:22-93:1). Plaintiff admitted that his allegation that an officer delayed response times to calls he was dispatched to were because she did not want to arrive first on the scene, not because of him. (Pa587, 253:12-20). Plaintiff also admitted that the B-side officers' disappointment at Plaintiff's shift change due to Plaintiff's seniority for selection of shift picks was a result of these other officers losing friends on their shift. Plaintiff also acknowledged that these junior officers were also upset with two other senior patrol officers who changed shifts for the same reason. (Pa587, 255:6-22; Pa589, 264:12-23). Plaintiff even admitted that if one of the junior officers offered another money to switch shifts, "it wasn't directly at me." (Pa592, 273:1-3).

Therefore, there is no basis to suggest that any actions by these Defendants were in any way caused by any alleged whistleblowing on the part of Plaintiff.

E. Plaintiff's Citations to Cases Recognizing a CEPA Cause of Action are Distinguishable from the Current Matter

Plaintiff argues that he can maintain his CEPA claim by employing the continuing violation theory. However, in support of this argument, Plaintiff

cites to the following which are factually distinguishable from this matter.

Specifically:

- Nardello v. Township of Voorhees, 377 N.J. Super. 428 (App. Div. 2005): The plaintiff in Nardello was able to put forth adverse actions which could be actionable, including being “denied permission to obtain firearms instructor training relative to his membership on the SWAT team; coerced to resign from his position as leader and a member of the SWAT team; denied the ability to work on crime prevention programs; and removed from the detective bureau, with his authority to supervise taken away,” as well as being given jobs demeaning to his rank. Id. at 435. Thus, the alleged retaliation against Nardello went directly to his rank and compensation. In contrast, here, no such retaliatory action exists. Plaintiff, who is still employed by the Borough, has not been terminated or demoted. (Pa530-531, 33:16-34:2). Plaintiff testified that year after year, he continued to receive the shift pick he wanted and his rank and compensation were not decreased. (Pa590, 265:8-22).
- Donelson v. DuPont Chambers Works, 206 N.J. 243 (2011): Donelson was subjected to threats and verbal abuse by his superiors, isolating shift assignments, and an increased number of performance reviews. Id. at 249-250. By way of comparison, in this case, Plaintiff was never threatened by Defendants, and received regular performance reviews at the same frequency as his coworkers, even if Plaintiff was unhappy on one occasion with the result, which does not rise to the level of retaliation. Further, there is no evidence in the record that Plaintiff’s supervisor gave Plaintiff the performance evaluation because of any whistleblowing activity. Rather, Plaintiff’s performance evaluation was supported by documentation and specific examples. See Cokus, supra. While the Donelson plaintiff was falsely charged with forging timecards and logs, here Plaintiff admittedly violated the Department’s 16-hour work day rule. (Pa556, 136:13-15). Further, Plaintiff’s only allegation of discipline following his discussion with Lt. Erla regarding the use of the n-word was a 15-day forfeiture of vacation time in lieu of a suspension, which Plaintiff concedes is a discreet act that is outside the statute of limitation and cannot form the basis of his claim. (Pa836-843). Also, Plaintiff attributes the welfare check to Sgt. Thiele and Lt. Novak, who do not have any authority to modify the terms and conditions of Plaintiff’s employment.

- Lindsey v. NJ Dept. of Corrections, 2007 WL 836667, at *11 (D.N.J. Mar. 14, 2007): Lindsey was a black male correctional officer who was subject to a number of subordination charges less than a month after filing complaints against his employer, and then terminated. The correctional officer claimed he was wrongfully discharged in violation of CEPA. By contrast, here, Plaintiff was not terminated and not unreasonably reprimanded or singled out for discipline, as several officers were investigated for violating the 16-hour work hour rule and the failure to document interactions with the public, neither of which was connected to any alleged whistleblowing. Further, Plaintiff was only counseled, not disciplined in connection with the 16 hour rule and the warning in connection with his admitted failure to write a report was rescinded, and cannot constitute retaliation. (Pa547, 101:2-3; Pa556, 135:20-23; Pa501-511; Pa929-939; Pa940-942; Pa993-997; Pa1001-1014).
- Rivera v. Dept of Human Services, 2019 WL 1418098, at *14-15 (App. Div. Mar. 28, 2019): Rivera, a housing supervisor, brought an action against his employer, alleging he was singled out for filing complaints and then terminated. The trial court held that there was a genuine issue of material fact as to whether the employer's actions constituted a hostile work environment, including: refusal to provide the plaintiff with necessary assistance and equipment; verbal harassment and embarrassment of the plaintiff in front of coworkers; requiring only him to fill out daily time sheets; suspending and disciplining him for absences due to protected disability; and relocating his work area to a storage closet. By way of comparison, Plaintiff here was not terminated or suspended. Plaintiff has consistently been assigned his requested shifts, and not given undesirable assignments. (Pa590, 265:8-11).
- Blevis v. Lyndhurst Ed. Of Educ., 2009 WL 3128402 (D.N.J. 2009): Blevis was a high school science teacher who alleged the school board and others retaliated against him for filing a lawsuit, as well as raising safety, privacy and academic concerns. More specifically, Blevis was retaliated against with constant changes to his schedule; retributive course assignments; loss of stipend; and suspension, which came seven days after filing the lawsuit. By contrast, here, Plaintiff picked his schedule based on his seniority, and has consistently been given his requested shifts. (Pa590, 265:8-11). He never lost a stipend or any other compensation and was not disciplined within the statute of limitations.
- Piniero v. New Jersey Div. of State Police, 2012 N.J. Super. Unpub. LEXIS 1705 (App. Div. 2012) The Court in Piniero explained that

substantiated disciplinary charges do not constitute retaliation under CEPA, nor does the imposition of minor sanctions. Id. at *64-65. Thus, such holding does not support Plaintiff's claims. The court affirmed the dismissal of two of the plaintiffs' claims finding they did not constitute retaliation under CEPA, indicating there was no temporal proximity and these employees were not treated differently than others. Notably, as is applicable here, the Court held that CEPA does not guarantee employees will receive every requested assignment. Id. at *59. The only plaintiff that was permitted to proceed with his claims had established temporal proximity and evidence of constructive discharge, which is lacking from Plaintiff's claims in this matter.

Rather, as set forth above, Plaintiff cannot show he was retaliated against within the statute of limitations as a matter of law. Further, the record is devoid of any severe or pervasive conduct and Plaintiff's claim for a hostile work environment also fails and was properly dismissed by the trial court.

Therefore, for the foregoing reasons, Plaintiff's claims under CEPA for retaliation and hostile work environment fail as a matter of law and Defendants request this Court affirm the trial court's grant of summary judgment.

POINT IV

**PLAINTIFF WAIVES HIS REMAINING CLAIMS,
WHICH WERE OTHERWISE PROPERLY DISMISSED**

In his brief, Plaintiff does not appeal the remaining claims dismissed by the trial court on summary judgment, specifically the claims in tort, and those brought under the Pierce Doctrine, New Jersey Law Against Discrimination, and New Jersey Civil Rights Act. An issue not brief is deemed waived. W.H. Industries, Inc. v. Fundicao Balancins, Ltda, 397 N.J. Super. 455, 459 (App. Div. 2008). Thus, it is respectfully submitted that the trial court's dismissal of these claims should be affirmed.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court affirm the trial court's grant of summary judgment in favor of Defendants/Respondents Sayreville Borough, John Zebrowski, and David Erla.

Respectfully submitted,

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