
**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION**

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| <p>WILLIAM NIELSEN,</p> <p style="text-align: center;">Plaintiff/Appellant,</p> <p style="text-align: center;">v.</p> <p>COUNTY OF CAPE MAY, LIEUTENANT STEPHEN PRINCE, AND JOHN DOES 1-50, INCLUSIVE, FICTICIOUSLY NAMED DEFENDANTS, JOINTLY, SEVERALLY, AND IN THE ALTERNATIVE,</p> <p style="text-align: center;">Defendants/Respondents.</p> | <p>Civil Action</p> <p>DOCKET NO. A-003807-23</p> <p>On Appeal from Superior Court Law Division – Cape May County Docket No.: CPM-L-320-19</p> <p>SAT BELOW: Honorable James H. Pickering Jr., J.S.C.</p> |
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**PLAINTIFF/APPELLANT’S BRIEF AND
APPENDIX IN SUPPORT OF APPEAL**

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T1

PRELIMINARY STATEMENT

This is a Conscientious Employee Protection Act (“CEPA”) case. Plaintiff-Appellant William Nielsen (“Plaintiff” or “Nielsen”) is employed by the Cape May County Department of Corrections (“CMDC”) as a Sergeant in the County Jail. Nielsen started with the Corrections Department in 2004 and remains employed there today. (Pa 355 at p. 23)

Nielsen first engaged in protected conduct in 2017 when he reported that another corrections officer (“CO”) was involved in a bar fight, arrested, and did not report the incident, which Plaintiff believed to be a violation of the Department Rules and Regulations. (Pa 3) Plaintiff next engaged in protected conduct on June 22, 2017, when he reported to the Personnel Director for Cape May County that he was asked to alter an official document to remove negative comments in his performance evaluation of the same CO, which Plaintiff believed to be official misconduct, N.J.S.A. 2C:30-2. (Pa 3-5) Plaintiff again engaged in protected conduct on or about June 28, 2017, when he reported another CO for using excessive force on an inmate, which Plaintiff believed to be a violation of various rules and statutes. (Pa 9-10) Plaintiff next engaged in protected conduct in September 2018 when he reported his belief that Captain Charles Magill was stealing time from the Department. (Pa 429) Plaintiff received a twenty-five-day suspension for reporting Magill. (Pa 83)

After Nielsen first engaged in protected conduct in 2017, his work life and career changed dramatically for the worse. When Nielsen became a Sergeant in 2015, he was considered an excellent employee, trusted with the supervisory

responsibilities necessary for a safe and regulated work environment. His career progressed well until 2017, when he engaged in various instances of protected conduct. The timeline is clear. After his protected conduct, Nielsen was subjected to numerous frivolous IA investigations and discipline, most of which are unheard of for the alleged offenses, and disproportionate discipline was imposed for other offenses. Nielsen has been subjected to a relentless campaign of retaliation that includes bogus discipline, degradation, humiliation, embarrassment, nitpicking, additional scrutiny, false allegations of incompetence, and ultimately undermining his supervisory duties by constant retaliatory harassment.

PROCEDURAL HISTORY

Plaintiff William Nielsen filed his Complaint on August 16, 2019, and his Amended Complaint on April 1, 2021. (Pa 1-25) Upon the completion of discovery, Defendants filed a motion for summary judgment (Pa 112) and the Court heard oral argument on February 16, 2024. On June 25, 2024, the Court entered an Order and decision granting the Defendants' Motion and dismissing Plaintiff's Complaint with prejudice. (Pa 953). Plaintiff is not appealing the following adverse rulings: (1) the trial court's ruling that the June 2018 harassment report submitted by Nielsen was not protected conduct; (2) the dismissal of defendant Prince; and (3) the dismissal of his New Jersey Civil Rights Act claim and Constitutional claims. Finally, the plaintiff does not allege below and does not allege here that the 45-day suspension he received for the unauthorized internet usage was an act of retaliation.

STATEMENT OF FACTS

William Nielsen (“Nielsen”) was hired by the County in 2004 as a Corrections Officer (“CO”) and promoted to the rank of Sergeant in March of 2015. (Pa 355 at p. 23). Nielsen was interviewed for the position of Sergeant in 2015 by Sheriff Schaffer (“Schaffer”), Warden Lombardo (“Lombardo”) and possibly Captain Magill (“Magill”). (Pa 357 at p. 30). Nielsen’s, now wife, was promoted to Sergeant in 2015 as well. (Pa 357 at p. 31) Part of the duties of a sergeant is to evaluate COs every year. (Pa 357 at p. 31) When Nielsen first became a sergeant, he performed yearly evaluations. At some point, the yearly evaluations stopped, and in 2021, they began again. (Pa 357 at p. 31-32)

The Guardian Tracking (“GT”) system keeps track of CO behavior, good and bad. (Pa 358 at p. 33) Prior to 2020, the Sergeants had discretion regarding entry of lateness into GT. It then became mandatory. (Pa 358 at p. 34) Prior to the change in the policy, if an CO was late for work, time was deducted from his or her time bank and they would still get paid for that time. (Pa 358 at p. 34)

Discipline at the jail ranges from a verbal reprimand to a suspension. (Pa 359 at p. 39) Internal Affairs (“IA”) is run by Undersheriff Maher “Maher”. (Pa 361 at p. 46) When an inmate makes a complaint, it does not automatically go to the level of an IA investigation, it starts off as an inquiry. (Pa 453 at p. 19-20) A supervisory investigation (“SI”) could result in a GT entry, a counseling notice or a warning

notice. (Pa 454 at p. 22) Lombardo has an informal agreement with Maher that they will discuss before a matter becomes an IA. (Pa 454 at p. 23)

Nielsen was subjected to eleven (11) IA investigations from 2008 to 2013. (Pa 362 - Pa 369) Plaintiff did not dispute the outcome of those IAs nor any discipline imposed. See *id.* Lombardo stated that Nielsen was promoted in 2015 to Sergeant because during the 18-month period after the Warden raised issues regarding Nielsen's performance, he changed his workplace personality and became a productive member of the Department. (Pa 455 at p. 29) The Warden was satisfied with Nielsen's first year as a Sergeant. (Pa 455 at p. 29-30)

Officer Baker's Evaluation and other conduct The retaliation started after Nielsen put one negative comment in his evaluation of CO Richard Baker, which Baker acknowledged was true. Nielsen's putting a truthful comment in Baker's evaluation became a SI when he declined to change it, and resulted in Nielsen reporting the incident to county counsel. (Pa 377 at p. 110-113)

In Baker's 2017 evaluation, Nielsen indicated that he was told Baker was "skating," meaning trying to get out of work, but Baker had said he would change and Nielsen thought that was the end of it. (Pa 378 at p. 113-114, Pa 662) During Nielsen's interview with an outside attorney he provided multiple examples of Baker's skating. (Pa 672) Nielsen's 2016-2017 evaluation of Baker was completed and signed by Baker on May 28, 2017, and then after Nielsen engaged in protected conduct in his interviews with Lindsay, a SI was opened on or about July 3, 2017.

See id. Magill sent an email to county counsel regarding Baker's 2016-17 evaluation. (Pa 685) The evaluation with Baker rose to the level of the Warden and the Warden interviewed Baker regarding his yearly evaluation. (Pa 687) Baker never reported to Nielsen that he felt harassed. (Pa 3780 at p. 121) Three months later Nielsen was told to alter Baker's evaluation to change the wording about Baker' skating. (Pa 380 at p. 124) Lieutenant Campbell left a note on the evaluation telling him to change it. (Pa 380 and 381 at p. 124-125) Lombardo verified that the only time an evaluation that a Sergeant conducted of a CO was brought to his attention was the one involving Baker and Nielsen. (Pa 459 at p. 44)

Prior to the Baker evaluation, Nielsen was never asked to change an evaluation. (Pa 381 at p. 126) In response to the note by Lieutenant Campbell, Nielsen asked to meet with him, but the meeting never occurred. (Pa 381 at p. 127) After meeting with Lindsay for a second time, during which Nielsen reported the illegal demand, the issue over Baker's evaluation was elevated to a SI. (Pa 381 at p. 128) Even Lombardo was unsure who raised the issue regarding Baker's evaluation. (Pa 461 at p. 52).

During his second interview with Lindsay, Nielsen reported that Baker received preferential treatment at the corrections center, such as not being disciplined for being arrested for getting involved in a bar fight. (Pa 382 at p. 129) The day after the bar fight, Baker reported to work wearing dark glasses and worked at a post by himself where he had no inmate contact. (Pa 382 at p. 130) Baker did not normally

like working that post so Nielsen would not put him there. (Pa 382 at p. 131)
Lombardo verified that if a CO is involved in an incident that results in police contact, the CO must report that to the department. (Pa 461 at p. 51)

During his second meeting with Lindsay, Nielsen reported that he had to alter Baker's evaluation, though he indicated that he observed Baker skating himself. (Pa 384 at p. 138-139) Nielsen believed the SI into Baker's evaluation was retaliatory as it was opened four months after he prepared the evaluation and after the second interview with Lindsay. (Pa 384 at p. 139-140) The SI into Baker's evaluation took about six months to complete. (Pa 385 at p. 143)

Report of Excessive Force On or about June 28, 2017, Nielsen reported that another CO McGonigle used excessive force for sweeping the legs of inmate Phillippe after he was already handcuffed. (Pa 634, 672-673) As a direct result Nielsen was subject to a supervisory investigation. (Pa 387 at p. 150-151) Nielsen reported it to prevent recurrence and because the Jail was being sued for a prior similar incident. (Pa 387-88 at p. 152-153, 156)

Stealing Time In September, 2018 Nielsen reported to the Cape May County Prosecutor's office that he believed Magill was stealing time because he would come in late and leave early without using PTO time. (Pa 429 at p. 71) Prosecutor's Office followed Magill for a week and noticed that he was not at work and he was not at the new jail when he was supposed to be and then remanded the matter back to the Jail for administrative action. (Pa 430 at p. 75, Pa 272)

Warden Lombardo Lombardo acknowledged that even if COs do everything correctly, inmates can still file a complaint. (Pa 467 at p. 75) Lombardo also noted that certain inmates were troublemakers and would file bogus claims against the COs. (Pa 467 at p. 75) Lombardo could recall one inmate being sent to the Atlantic County Jail because of behavioral issues. (Pa 467 at p. 75-76)

On March 6, 2018, Warden wrote a report that stated we must curtail his (Nielsen's) medieval supervisory practices. (Pa 471 at p. 91; Pa 802) Without reviewing reports, the Warden could not testify to what Nielsen did that he thought was a medieval supervisory practice. (Pa 471 at p. 91-92) The Warden then remembered an incident that was an example of this medieval supervisory practice, which was that Nielsen allegedly pointed at an inmate. (Pa 471 at p. 92) The Warden wrote that Nielsen should be advised of our concerns regarding all five investigations in the past two years and the possibility of major discipline if this type of behavior continues. (Pa 476 at p. 111-112) Out of the five IAs referenced by the Warden, only one was sustained against Nielsen, one Nielsen was exonerated, two were labeled as not sustained. (Pa 476 at p. 112)

When an inmate was accepted into the old jail, they would have to go through a booking officer who would start the receiving process, and at some point, a sergeant would review the paperwork. (Pa 477 at p. 114-118)

The Warden told Vanessa James that he believed other litigation impacted Nielsen at work, but he could not provide any examples of what he meant. (Pa 480

at p. 126-128) Lombardo could not think of any other occasions where an inmate still in the facility attempted to have criminal charges filed against one of the COs other than inmate Lewin filing criminal charges against Nielsen. (Pa 481 at p. 130-132)

Under Sheriff John Maher Baker went to high school with Schaffer's children and played soccer with Schaffer's sons. (Pa 524 at p. 16) Schaffer advised Maher that he was going to consider Baker for employment before Baker even applied with the County. (Pa 525 at p. 18-19. 1) At one point, Schaffer and Maher talked about the fact that Baker had some sort of learning disability. (Pa 525, Pa 526 p. 21-22) Other than Baker, Maher could not think of any other times he had a conversation with Schaffer about another employee at the jail having a disability without the individual requesting an accommodation. (Pa 526 at p. 24)

Maher believes it would be rare for County Counsel Lindsay to be involved in a CO's evaluation. (Pa 528 at p. 32)

The Jail could discipline an inmate for making false misconduct allegations against an CO or supervisor. (Pa 530 at p. 40-41) The Cape May County Jail inmates can make as many complaints as they want, and they do. (Pa 533 at p. 51) Maher has also seen inmates make complaints against COs as a way of trying to punish the COs for holding the inmates accountable. (Pa 533 at p. 51) Based on Maher's experience, most inmate complaints lack merit. (Pa 533 at p. 52)

Other than describing Nielsen, Maher could not think of another occasion where the Warden used the terms loose cannon or medieval in describing the behavior of another CO. (Pa 537 at p. 68) While Maher believed there were other COs who the Warden recommended for psych examinations other than Nielsen, he was unable to provide the names of any. (Pa 538 at p. 72-74) Maher also acknowledged that Lewin's false allegations should have been taken into account when evaluating his complaints against Nielsen. (Pa 539 and Pa 540 at p. 77-78)

Other than Nielsen, Maher could not think of any other times when the County increased the discipline sought against an employee from the Preliminary Notice of Disciplinary Action through the Final Notice of Disciplinary Action. (Pa 541 at p. 82-83) Maher also indicated that an CO may use profanity as a type of constructive force. (Pa 534 at p. 54-55)

Captain Magill Magill is the operations commander of the jail, and he oversees the day-to-day operations. Magill confirmed that if the schedule was locked and an CO wanted to take a personal holiday, a sergeant could not approve that. The sergeant would have to call whoever locked the schedule to discuss the situation. (Pa 571 at p. 25) If a sergeant has to leave their shift early because they are sick or there is a personal emergency, they will just need to report it to the other sergeant. (Pa 573 at p. 30-31)

Magill was aware that Baker played soccer with the Schaffer's kids. (Pa 575 at, p. 39) Other than Nielsen's evaluation of Baker, Magill was unaware of any other

evaluations that had been sent back to a sergeant because they had put information in there that they did not have personal knowledge of. (Pa 579 at p. 54) Baker did not raise an issue with his evaluation; rather, the concern was raised by Lieutenant Campbell. (Pa 579 at p. 56) Magill was unaware why it took over five months to complete the SI into Baker's evaluation. (Pa 582 at p. 68-69)

Magill acknowledged that there are inmates at the jail who just make up complaints. (Pa 584 at p. 75-76) Magill would have been ordered by either the Warden or the Undersheriff to send Nielsen the email about having no contact with inmate Lewin. (Pa 584 at p. 76-77) Magill described inmate Lewin as problematic. (Pa 585 at p. 80)

Aside from reading it in the report, Magill was unaware of the Warden describing Nielsen as a loose cannon. (Pa 587 at p. 88-89) Magill said that we would not talk like that about the COs in reference to the loose cannon comment. (Pa 587 at p. 89) Magill acknowledged that the County has moved problem inmates to an out-of-county jail. (Pa 589 at p. 94) Inmates have been moved from the Cape May County Jail because of behavioral issues. (Pa 592 at p 107) Magill was not aware of any other COs being ordered to stay away from inmate Lewin and was not present when Nielsen was allegedly ordered to stay away from inmate Lewin. (Pa 593 at p. 112; Pa 591 at p. 102)

Lieutenant Stephen Prince Lieutenants do not acquire comp time if they work more than the allotted hours according to Magill. (Pa 598 at p. 130) At one point,

Lieutenant Prince was Chief of Security, and that position was taken away from him due to a lack of productivity. (Pa 811 at p. 21-22)

Prince acknowledged that if an CO admitted to his sergeant that he was skating too much, a sergeant could put that information in a performance review. (Pa 819 at p. 50) The only time Prince was ever asked to conduct a SI into a performance evaluation was Nielsen's evaluation of Baker. (Pa 845 at p. 14) Prince remembered that inmate Lewin made a lot of complaints about jail staff. (Pa 845 at p. 16-17) Despite being a Cape May County Correctional Facility lieutenant, Prince could not tell the difference between a civil lawsuit and criminal charges. (Pa 848, 849)

The difference between a personal holiday and a vacation day is that a personal holiday allows you to take overtime for a shift, whereas a scheduled vacation cannot. (Pa 855 at p. 55) Prince could only recall accusing an CO of possible retaliation with Nielsen for putting Baker down as using a sick day rather than a personal holiday. (Pa 859 at p. 70)

Prince stated that Magill reviewed camera footage to determine that Nielsen was taking excessive meal breaks. (Pa 862 at p.82-83) Nothing prohibits a sergeant from doing work in the CO's dining room. (Pa 862 at p.89) COs prepare paperwork throughout the jail, including the housing unit desk and the sergeant's office. (Pa 865 at p.94)

Nielsen prepared an evaluation for Baker for the evaluation period of February 19, 2016, to February 19, 2017 (Pa 647) As a result of the evaluation that

Nielsen prepared for Baker, he was subject to a supervisory investigation. (Pa 653)
Even though the SI started on July 1, 2017, it was still ongoing as of November 30, 2017. (Pa 865)

Retaliation After engaging in protected conduct, Nielsen noticed what started as a subtle but persistent campaign of retaliation that later became more severe and pervasive. Nielsen questioned the findings of IA 17-13 on September 20, 2017. (Pa 658) Nielsen reported on or about August 2, 2017, that he felt he was being retaliated against for issues involving Baker and did not understand why he was being required to remove the skating comment from an official performance evaluation when Baker admitted that he skates. (Pa 714)

On or about August 2, 2017, Nielsen received an IA for allegedly harassing an inmate, Mark Caserta, which resulted in a finding of not sustained, even though the whole incident was caught on a body-worn camera. See Id. Nielsen met with Maher and Lombardo on December 5, 2017, regarding Caserta's complaint and informed him that the result of the IA could not be "exonerated" because the inmate was not charged for breaking his things, which made absolutely no sense. See Id. Nielsen questioned why the outcome was "not sustained" as opposed to "unfounded" or "exonerated", as there was video of the incident clearly showing whether Nielsen or the inmate at issue engaged in any misconduct. (Pa 658)

Prince humiliated Nielsen by sending an August 10, 2017, email to all Sergeants and the Warden instead of correcting Nielsen in a private email. (Pa 432)

As a result of reporting McGonigle potentially using excessive force on an inmate, Nielsen was subjected to a supervisory investigation. (Pa 708)

On October 4, 2017, Nielsen received the GT entry for being late to work. (Pa 391 at p. 166-168) Nielson indicated that he thought the GT was inappropriate as he was aware of other COs who were late, such as Joseph Talerico, without it ever being documented. (Pa 391 at p. 168)

Nielsen was subjected to another SI when he received a call from Baker indicating that he (Baker) was sick and had requested to use a personal holiday, but Nielsen advised him that the schedule was locked and he would put him down for a sick day. (Pa 704)

Nielsen was the target of IA 18-08 which involved an incident where the inmates of housing unit trashed the day room and books, cups, and trash were thrown everywhere, along with some inmates throwing feces. (Pa 373-374 at p. 96-97) Since none of the inmates would admit to engaging in the prohibited conduct, Nielsen charged the entire unit with a loss of privileges. (Pa 374 at p. 97) Dean Lewin was one person in that unit. (Pa 374, p. 97) Nielsen was disciplined because he commented in reference to the inmate who threw feces by saying “your man enough to throw it but too much of a pussy to own up to it.” (Pa 374 at p. 98) IA 18-08 was initially closed then it was reopened, resulting in Nielsen receiving a 96-hour suspension. (Pa 374 at p. 99) **Lombardo could not identify any other officer,**

sergeant, lieutenant, or captain who had ever been disciplined for cursing at an inmate other than Nielsen. (Pa 465 at p. 69)

Lombardo, in a special report dated February 19, 2018, indicated there was a disturbing pattern of behavior concerning Sergeant Nielsen because he was subjected to four (4) IA investigations, with one being exonerated, two being, and only one being sustained. (Pa 692)

On or about March 5, 2018, inmate Lewin made two false allegations against Nielsen, one being that Nielsen took his back brace when it was determined in his medical chart that he was never issued a back brace, and then falsely accused Nielsen of calling him a “fucking pussy” under his breath. (Pa 694)

Magill authored a March 6, 2018, email regarding Nielsen conducting a shakedown in door room 5 where inmate Lewin was housed and asked Nielsen to remove himself but at no point in his special report did he indicate that Nielsen was ordered to stay away from Lewin. In fact, he said, “I went on to say that I did not need to get another complaint from inmate Lewin because he, Sergeant Nielsen did not need to be in the area.” (Pa 696) Nielsen made multiple requests to have Lewin moved to another facility given that he kept making false allegations of harassment against Nielsen and because he attempted to press false criminal charges against Nielsen. (Pa 699)

In Lombardo’s March 6, 2018, report, he indicates that if Nielsen conducts himself in a professional manner, he will not have any legitimate problems with

Lewin or any other inmate, for that matter. (Pa 641-643) Lombardo further described Nielsen as **irresponsible, irrational and that the administration must curtail his medieval supervisory practices**. See *id.* Lombardo then hypothesized that “**Nielsen could be dealing with resistance to taking orders, abuse of his own authority, retaliation and revenge?** Lombardo also wrote that **maybe a fit for duty examination by Jennifer Kelly who is board certified in police and public safety psychology should be seriously considered**”. See *id.* (emphasis added)

Nielsen confirmed that during the February 27, 2018, meeting that Lombardo never ordered Nielsen not to have any further interaction with inmate Lewin. (Pa 374 and Pa 375 at p. 100-101) The Warden alleges he advised Nielsen not to have further contact with Lewin. Nielsen further confirmed that he was not told to avoid contact with inmate Lewin unless it was an emergent circumstance. (Pa 375 p. 101) Even though the complaints that inmate Lewin filed against Nielsen turned into IAs, the complaints that Lewin filed against other COs did not. (Pa 418 at p. 28).

Nielsen had to interact with inmate Lewin as the sergeants had to tour the correctional center. (Pa 376 at p. 105-106) Nielsen requested that Lewin be moved to another facility as he was constantly making false allegations against him and eventually Nielsen was no longer allowed to go down to his unit so he was not allowed to tour down that entire unit, which was extremely embarrassing to him as Sergeant, that he cannot even perform his job duties. Nielsen requested that inmate

Lewin be removed from the facility on two occasions. He sent the second request after the first one was ignored (Pa 421 at p. 40)

One of the allegations made by Lewin that was investigated by IA was a comment made by CO John along the l. of “my grandmother walks faster than you”. Because Nielsen thought that was an inappropriate comment to be made by an CO to an inmate, he reprimanded CO John. (Pa 419 at p. 29) Nielsen was never charged with insubordination as a result of any of his interactions with inmate Lewin. (Pa 410 at p. 32)

On June 14, 2018, Nielsen received his yearly sergeant’s evaluation from Terinoni which included a negative notation about a SI that had been closed and did not result in any negative GT entries. (Pa 675)

There was an incident where a person was admitted to the jail (by someone other than Nielsen) even though she (the person) did not have a single warrant in excess of \$500.00. Nielsen acknowledged a mistake with regard to IA 18-29 wherein he accidentally misread the two warrants and retained the person when she should have been released. (Pa 423 at p. 48) Nielsen did not realize the warrants were from two different Courts and since each individual warrant was not greater than \$500.00, the person should have been released. (Pa 424 at p. 49) This incident resulted in Lombardo recommending major discipline for Nielsen, as he was the sergeant on duty, yet Lombardo recommended training for the CO who actually admitted the person. (Pa 689)

It was a common practice for Sergeants to approve their own time off. (Pa 426 at p. 57) If a Sergeant had to leave, Lieutenants would never cover a post. (Pa 426 at p. 57-58) Yet, Magill described Nielsen leaving to deal with a family matter as sneaky. (Pa 427 at p. 62-63)

Nielsen was brought up on disciplinary charges for reporting to the Cape May County Prosecutor's Office that Magill was stealing time. (Pa 429 at p. 71) The Cape May County Prosecutor's Office followed Magill for a week and noticed that he was not at work and he was not at the new jail when he was supposed to be and then remanded the matter back to the jail to handle. (Pa 430 at p. 75) The County sought to discipline Nielsen for 5 days for engaging in protected conduct in reporting that Magill was stealing, but then upped the discipline and suspended Nielsen for 25 days, yet never disciplined Magill. (Pa 429 at p. 72)

In the Fall of 2019, Nielsen sent out requests for use of personal holidays which were ignored for an extended period of time by his supervisors. (Pa 716) When Nielsen was working as a rover in 2019, he was surveilled during his shift and was issued a warning because he spent some of the shift in the sergeant's office.

LEGAL ARGUMENT

III. THE TRIAL COURT ERRED IN DETERMINING THAT NIELSEN DID NOT ENGAGE IN PROTECTED CONDUCT IN OBJECTING TO BEING DIRECTED TO REMOVE HONEST NEGATIVE COMMENTS FROM OFFICER BAKER'S PERFORMANCE EVALUATION. (27-29)

A. LEGAL STANDARD UNDER CEPA. (20-26)

The Conscientious Employee Protection Act (“CEPA”) was enacted in 1986 to protect employees who object to, or “blow the whistle on” employer activity that violates a law, rule, regulation, or strong mandate of public policy from retaliation by the employer. Abbamont v. Piscataway Township Bd. of Educ., 138 N.J. 405, 417-18 (1994). The statute was described at the time of its enactment as the most far reaching “whistleblower” statute in the nation. Mehlman v. Mobil Oil Corp., 153 N.J. 163, 179 (1998).

The Supreme Court has set forth the following requirements that a plaintiff pursuing a claim under CEPA must demonstrate: (1) He reasonably believed that her employer’s conduct violated law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy; (2) He engaged in a “whistleblowing activity” described in N.J.S.A. 34:19-3(c); (3) An adverse employment action was taken against him; and (4) There is a causal connection between the whistleblowing activity and the adverse employment action. Dzwonar v. McDevitt, 177 N.J. 451, 461 (2003) (citations omitted).

A plaintiff who engages in protected conduct need not, at that time, specifically articulate the “exact violation” that is occurring (Hernandez v. Montville Twp. Bd. of Educ., 354 N.J. Super. 467, 474 (App. Div. 2002), *aff’d o.b.*, 179 N.J. 81 (2004)) and Plaintiff need not be cognizant of the specific source of Defendants’ illegality. Mehlman, *supra* 153 N.J. at 181.

At the outset of the discussion of Nielsen's protected conduct, it must be noted that even if the Court were to determine that none of the conduct Nielsen objected to actually violated a law, rule, or regulation, as long as Nielsen had a reasonable belief there was a violation, he engaged in CEPA protected conduct. See Hernandez v. Montville Twp. Bd. of Educ., 354 N.J. Super. 467 at 474.

B. PLAINTIFF ENGAGED IN PROTECTED CONDUCT WHEN HE REPORTED/OBJECTED TO BEING DIRECTED TO IMPROPERLY CHANGE OFFICER BAKER'S EVALUATION. (27-29)

The trial court incorrectly held that Plaintiff objecting to the improper alteration of Baker's evaluation does not constitute CEPA protected conduct. In this case, you cannot simply look at the evaluation and what occurred thereafter to fully appreciate Nielsen's state of mind and reasonable beliefs. Baker was an employee who was repeatedly given preferential treatment over other COs and was not subject to the normal rules applied to all other jail personnel. (Pa 382) Respondents alleged that Nielsen's evaluation was improper because in one sentence of the evaluation, he indicated that he had received information from other COs that, at times, Baker was skating. Respondents argued below that since Nielsen did not have personal knowledge Baker was skating, it was improper to put in the evaluation, and the trial court blindly accepted that despite evidence that Baker had admitted to skating. In doing so the trial court improperly gave Respondents the benefit of all reasonable inferences and denied that benefit to Nielsen.

Before the trial court, Respondents failed to cite any actual policy prohibiting a supervisor from putting information in an evaluation that was reported by other COs. Moreover, it is not as if Nielsen included this sentence in the evaluation without verifying it. He specifically spoke to Baker about these concerns and Baker admitted to skating. (Pa 652) Nielsen then noted that after he spoke to Baker about it, his performance improved. (Pa 652) Objectively, this was clearly an appropriate comment for an evaluation and Nielsen was not harassing Baker. (Pa 652)

First, Baker signed the evaluation without raising any issues or concerns to Nielsen. This only became an issue when the administration saw the evaluation and the highest members of upper management took action to protect the “golden boy’s” promotional opportunities, including Lombardo, Maher, and Lindsey. (Pa 685, 687, 380) Nielsen reported that Respondents were seeking to have him change his evaluation three months after it was issued (Pa 380 @ p.124, 1.6-14), to make it more positive and falsely improve Baker’s chances at a promotion. That constitutes official misconduct. N.J.S.A. 2C:30-2 provides in part, “A public servant is guilty of official misconduct when, with purpose to obtain a benefit for himself or another...” he “commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized or he is committing such act in an unauthorized manner...”

Respondents’ actions were intended to obtain benefits for Baker as they wanted to increase the likelihood of him being promoted and receiving increased

compensation by removing a negative comment from his performance evaluation, as he was the favored employee. Nielsen reasonably believed this was official misconduct because he was aware of the other preferential treatment that Baker received and Respondents' position here did not make any sense, as Baker admitted to the bad conduct and Nielsen noted in the evaluation that Baker improved after being spoken to. (Pa 382 at p. 129, l. 4-17)

Nielsen reported that he had to alter Baker's evaluation during his second meeting with Lindsay. Nielsen indicated that he observed Baker skating himself. (Pa 384 at p. 138, l. 25 through p. 139, l. 4) Nielsen believed the SI into the Baker evaluation was retaliatory as it was opened soon after he prepared the evaluation and after the second interview with Lindsay. (Pa 384 at p. 139, l. 25 through p. 140, l. 11) The SI into Baker's evaluation took about six months to complete. (Pa 385 at p. 143, l. 20-25)

The trial court improperly held:

The initial post-it note placed on the evaluation asked if the comments regarding skating were based on Nielsen's observations, and asked if he documented his conversation where Baker admitted to skating. Nielsen was told to "Please adjust accordingly." That is not an instruction to change the evaluation by removing any reference to skating. Instead, it is to clarify the basis for the skating comments, and to document Baker's admission. A rational and fair person can read the comments on the post-it note only one way: as suggestions as to how Nielsen could strengthen the comments regarding Baker skating. Obviously, if Nielsen had included a statement that he had observed Baker skating, that would be a stronger statement than the hearsay statements relating observations of other

unnamed persons. Further, if he had included a statement of the date of his conversation with Baker, and that Baker admitted he had been skating, and that since the conversation Nielsen had observed Baker no longer skating, it would have been a much stronger report....

Nielsen has not produced any law that indicates a superior cannot ask or even tell a Sergeant to adjust an evaluation to make it better. Nielsen instead asserts that Defendants wanted Nielsen to change the evaluation to make it more positive for Baker so that he could be promoted and receive a higher salary. Plaintiff's Brief, p. 8. This court finds that no rational and fair person could perceive the issues Nielsen was instructed to to (sic) address in the evaluation were changes that would be more favorable to Baker. To the contrary, the requests were to make the evaluation that Baker skated stronger and more reliable, based on Nielsen's observations, and not based on hearsay allegations from others, and to include documentation of a damaging admission made by Baker that he was skating.

Nielsen asserts that the requests made in the post-it note were a violation of N.J.S.A. 2C:30-2, which states that a public servant is guilty of official misconduct when for purposes of benefitting someone "[h]e commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized or he is committing such an act in an unauthorized manner; . . ." Nielsen's asserts he was told to alter the evaluation for the financial benefit of Baker, and that was official misconduct. Nielsen has not pointed to any law that prohibits a supervisor from requiring a subordinate to change an evaluation. Further, no one ever told Nielsen to alter the evaluation, except in a way to make the evaluation stronger.

No rational and fair person could conclude that Nielsen objectively reasonably believed that Defendants had committed official misconduct⁵. (Pa 980 through Pa 982)

⁵ Underlying Nielsen's argument is his assertion that Baker received preferential treatment, and that he was instructed to alter the evaluation so that Baker could be promoted and make more money. Nielsen has not offered any evidence of

In the above cited passage, the trial court looks at the event involving Baker's evaluation in the light most favorable to the moving defendants in violation of the summary judgment standard. The trial court frames this issue as a simple request by a supervisor to strengthen the evaluation. However, that could not be further from the truth. This was a concerted effort by the jail administration that included a Lieutenant, Captain, Warden, Undersheriff and went all of the way to County Counsel to have Nielsen change this evaluation that Baker signed off on three months prior and made no complaints about it. The trial court mistakenly proffers that Respondents sought to strengthen the evaluation, which clearly gives the benefit of all reasonable inferences to the moving defendants and not Nielsen. If one were looking at this incident in a light most favorable to Plaintiff Nielsen one would consider these facts: (1) that this was an CO who Nielsen believed was receiving preferential treatment, (2) an CO Nielsen spoke to about the evaluation, (3) an CO who admitted to skating, and (4) an CO who improved his performance after Nielsen spoke to him about skating. The evaluation fairly noted the performance issue and the improvement. One looking this in a light most favorable to Plaintiff Nielsen, as is required by R. 4:46, would also consider that Nielsen was then pressured by members of upper management to change his honest evaluation, not to make it stronger or more fair, but to remove any potentially negative language to make the

preferential treatment. For instance, Nielsen has not provided any evidence that Baker has been promoted or received any pay increase not received by others in the seven (7) years that have elapsed since Nielsen prepared Baker's evaluation.

evaluation more positive for Baker to artificially increase his qualification for specialty positions and promotions in the future.

The trial court also diminished this allegation of protected conduct by characterizing it as simply a case of a supervisor asking a subordinate to change an evaluation. One could come to that conclusion if one ignored all of the surrounding facts, such as this being the only evaluation that the witnesses could confirm went all the way to the Warden, Undersheriff, and County Counsel; that the individual was the chosen favorite of the Sheriff; and that the evaluatee had admitted to the conduct that the administration wanted removed from the evaluation. The trial court also attempted to downplay the significance of receiving a positive evaluation in an organization like this, which could clearly help an individual receive promotions and specialty assignments.

The trial court also seems to indicate improperly that every time a supervisor requests a subordinate to change an evaluation, it is proper and lawful. There are plenty of situations where a supervisor could request that a subordinate change an evaluation that would be legal and lawful. However, when it is being done in the circumstances that we have here, under the threat of discipline and involves a favored employee, a person in the plaintiff's position could reasonably believe it to be official misconduct.

For all of the foregoing reasons, it is respectfully requested that the trial court erred in determining as a matter of law that Nielsen objecting to county counsel regarding the demand that he alter Baker's evaluation was not protected conduct.

C. NIELSEN ENGAGED IN PROTECTED CONDUCT WHEN HE REPORTED TO LINDSAY THAT BAKER WAS ARRESTED AS A RESULT OF AN OFF DUTY PHYSICAL ALTERCATION AND DID NOT REPORT THE INCIDENT AS REQUIRED. (30-33)

The trial court erred in finding that Nielsen did not engage in protected conduct during his interview with County Counsel Lindsay when he reported that Baker was arrested by Somers Point Police following a bar fight he was involved in. (Pa 382 at p. 129, l. 4-17)

Nielsen reasonably believed that this conduct by Baker violated N.J.A.C.4(a)2-2.3 which provides in part:

(a) An employee may be subject to discipline for:

1. Incompetency, inefficiency or failure to perform duties;
2. Insubordination;
3. Inability to perform duties;
4. Chronic or excessive absenteeism or lateness;
5. Conviction of a crime;
6. Conduct Unbecoming a public employee;
7. Neglect of duty;
8. Misuse of public property, including motor vehicles;
9. Discrimination that affects equal employment opportunity (as defined in N.J.A.C. 4A:7-1.1), including sexual harassment;
10. Violation of Federal regulations concerning drug and alcohol use by and testing of employees who perform functions related to the operation of

commercial motor vehicles, and State and local policies issued thereunder;

11. Violation of New Jersey residency requirements as set forth in P.L. 2011, c. 70; and

12. Other sufficient cause.

Nielsen believed Baker's conduct violated the provision that prohibited conduct unbecoming of a public employee and also neglect of duty for his failure to report his arrest.

Nielsen also believed this conduct to be a violation of the Cape May County Sheriff's Department's Rules and Regulations. Chapter 4.1(b) provides in part that unbecoming conduct is broadly defined as any conduct that adversely affects the morale or efficiency of the government unit and has the tendency to destroy public trust or confidence in the delivery of governmental service. (Pa 753 and Pa 754) A member of law enforcement being involved in a fist fight, even if it occurred off hours, has a tendency to destroy public respect or confidence in the Cape May County Corrections and Sheriff's Departments.

The trial court improperly held:

Nielsen reported to Lindsay that Baker had been in an off-duty bar fight that did not involve any contact with law enforcement authorities. This was an incident that, at best, was a minor infraction, a violation of internal policies and procedures, or concerned trivial or benign employee complaints of another employee getting favorable treatment. Reporting that a co-employee was in an off-duty bar fight is not the type of conduct intended to be protected by CEPA. (Pa 980)

Again, here the trial court ignored facts of record and gave the moving defendants the benefit of all reasonable inferences when it evaluated Nielsen's protected conduct when reporting that Baker was involved in an off-duty fight and that he was arrested by Somers Point Police Department. The trial court, ignored the fact that Baker was arrested and ignored the fact that Baker reported to work with a black eye. (Pa 381, p. 128, l. 21 through Pa 382, p. 129, l. 17). The trial court just pretended that this portion of the record did not exist in determining that Nielsen did not engage in protected conduct in reporting that Baker was arrested by the Somers Point Police Department in connection with his involvement in a bar fight and that he reported to work with a black eye. The trial court also failed to appreciate that being arrested and being in a bar fight when you are a sworn member of law enforcement, is monumentally different than a non-law enforcement individual engaging in the same misconduct. Law enforcement COs are held to a higher standard. Being arrested or in a fight outside of work is not a minor infraction or a benign employee complaint about another employee getting favorable treatment. Lombardo made it clear that these types of contacts with police need to be reported. Nielsen indicated that he looked into it and could not see any report regarding these incidents, which is why he then reported it to County Counsel. Clearly, when considering all of the facts and evidence in the light most favorable to Plaintiff Nielsen on this issue, his reporting of Baker's arrest and police contact constitutes

protected conduct as defined by CEPA. As such, the trial court's ruling on this issue must be reversed.

D. THE TRIAL COURT PROPERLY HELD THAT PLAINTIFF ENGAGED IN PROTECTED CONDUCT WHEN HE REPORTED EXCESSIVE FORCE BY A SUBORDINATE AND WHEN HE REPORTED CAPTAIN MAGILL TO THE PROSECUTOR'S OFFICE FOR STEALING TIME. (33-34)

The trial court found the next two reports constituted protected conduct under CEPA. Nielsen reported McGonigle for using excessive force on an inmate. McGonigle took an inmate to the ground who was handcuffed behind his back. Both Leininger and Nielsen, who were the two sergeants at the scene, issued reports outlining their concerns that McGonigle used an inappropriate level of force on an inmate who was already handcuffed. Nielsen had a reasonable belief that McGonigle's conduct violated the aforementioned provisions of the administrative code, and that it was conduct unbecoming of public employee, neglect of duty and incompetency. See N.J.A.C. 4(a):2-2.3. Nielsen also believed it violated the rules and regulations of the Sheriff's Department at 4.11(a) Nielsen believed the use of force violated N.J.S.A. 2(c):3-7, which deals with the use of force in a law enforcement setting, as well as a violation of N.J.S.A. 2(c):12-1, which prohibits a person from intentionally or recklessly injuring another.

Nielsen reported to the Prosecutor's Office and IA his reasonable belief that Magill was stealing time. Over a period of time Nielsen, along with others, observed

Magill frequently come in late, leave early, and not use accumulated time off on his time sheet. (Pa 272 – (Pa 279)

The Prosecutor’s Office then interviewed Nielsen as part of its investigation, who truthfully disclosed to the Prosecutor’s Office investigators that on multiple occasions he had observed Magill come in late or leave early without using PTO time, which is protected conduct. As a result, the Prosecutor’s Office followed Magill for a week, and its observations corroborated Nielsen’s account. Ultimately, the Prosecutor’s Office declined to prosecute and, instead, sent the matter to the County for appropriate administrative action. The conduct that Nielsen reported is a violation of N.J.S.A. 2C:30-2 (Official Misconduct). (Pa 272-Pa 279 and (Pa 286) Plaintiff’s belief that Magill’s actions were theft of time was reasonable, as the reporting of it triggered an investigation by the Prosecutor’s Office that corroborated his observations (Pa 272-Pa 279)

II. THE TRIAL COURT ERRONEOUSLY HELD THAT NIELSEN WAS NOT SUBJECTED TO ANY ADVERSE EMPLOYMENT ACTION. (37-52)

A broad range of circumstances and actions may form the basis for retaliation claims under CEPA. See e.g., Mancini v. Township of Teaneck, 349 N.J.Super. 527, 568-569 (App. Div. 2002), *mod and aff’d*, 174 N.J. 425 (2004); and Nardello v. Township of Voorhees, 377 N.J.Super. 428 (App. Div. 2005).

In Green v. Jersey City Board of Education, 177 N.J. 434, 447 (2003), the New Jersey Supreme Court concluded that the same analysis applies to retaliation

claims arising under the LAD and CEPA, both remedial legislation that must be construed liberally to achieve important social goals. See, e.g., Bennen v. Cushman & Wakefield of New Jersey, Inc., 144 N.J. 120, 126 (1996). Remedial statutes must be interpreted to give words the most extensive meaning to which they are susceptible. Metpark Inc. v. Kensharper, 206 N.J. Super. 151, 156 (Law Div. 1985). “Like LAD, CEPA promotes a strong public policy of the State: We view this legislation as a reaffirmation of this State’s repugnance to an employer’s retaliation against an employee who has done nothing more than assert statutory rights and protections.” Abbamont, *supra* at 431, quoting Lepore v. National Tool & Mfg. Co., 115 N.J. 226, 228 (1989).

A. OSTRACISM, HEIGHTENED SCRUTINY, VERBAL DISPLAYS OF ANIMUS, AND UNEVEN APPLICATION OF POLICY CAN CONSTITUTE RETALIATORY HARASSMENT. (37-52)

In Shepherd v. Hunterton Developmental Center, 336 N.J. Super. 395, 404 (App. Div. 2001), *aff’d in relevant part, rev’d in part and remanded*, 174 N.J. 1 (2002), Plaintiffs alleged retaliation after they supported co-workers who sued their employer for racial discrimination. Shepherd, 336 N.J. Super. at 406. The Shepherd Plaintiffs were subjected to verbal animosity to heightened scrutiny, which had not occurred before their co-workers’ trial. Shepherd, 336 N.J. Super. at 406-407. In addition, their boss ceased greeting Plaintiffs, spoke to them in a hostile, unfriendly, and sharp tone; ostracized them in the workplace; denied breaks; required “medical

verification” when calling out sick; and subjected both Plaintiffs to disciplinary charges. Id. at 407-408.

In reversing the dismissal of Plaintiffs’ Complaint, this Court stated that, “... Plaintiffs were treated differently from the manner in which they were treated before the... litigation,” Plaintiffs allege the employer “cruelly made what would be normally difficult work situations purposely more trying. Both Plaintiffs also allege that they were not given little “perks” that other employees were given” and that the employer “started to write [Plaintiff] up for picayune violations of work rules.” The Court held that “[t]aken together in considering the context of the work environment, Plaintiffs’ grievances appear more serious than trivial” and that “[b]y themselves, these instances might not be actionable. A supervisor is obviously allowed to enforce work rules and regulations. However, their enforcement must be even-handed and cannot discriminate against employees based on their protected status.” Shepherd, 336 N.J. Super. at 416-417.

B. LOSS OF STATUS, CLOUDING OF JOB RESPONSIBILITIES, DIMINUTION IN AUTHORITY, AND DISADVANTAGEOUS TRANSFERS OR ASSIGNMENTS CAN CONSTITUTE RETALIATORY HARASSMENT. (37-52)

The evidence of retaliation in Mancini v. Township of Teaneck, 349 N.J. Super. 527, 568-569 (App. Div. 2002), *mod and aff’d*, 174 N.J. 425 (2004), included: (1) Plaintiff’s immediate superior no longer spoke with her, (2) people who worked in the bureau Plaintiff supervised were treated differentially with respect to their jobs and potential advancement, and (3) Plaintiff was shunned by

management as well as the rank and file. Mancini, 349 N.J.Super. at 550-554, 564. In determining whether the challenged employment action was sufficiently “adverse,” Mancini held that the trial court properly considered factors “such as the employee’s loss of status, a clouding of job responsibilities, diminution in authority, disadvantageous transfers or assignments, and toleration of harassment by other employees,” noting “assignment to different or less desirable tasks can be sufficient to constitute an adverse employment action and establish a *prima facie* case of retaliation.” Mancini, 349 N.J.Super. at 564. Mancini is consistent with the New Jersey Supreme Court’s holding in Taylor v. Metzger, 152 N.J. 490 (1998), that “evidence of specific, tangible adverse changes in the work environment is not required in order to state a LAD racial harassment claim. ‘[A] loss of a tangible job benefit is not necessary since the harassment itself affects the terms or conditions of employment’.” Taylor, 152 N.J. at 507, (citation omitted).

C. SEPARATE BUT RELATIVELY MINOR INSTANCES OF BEHAVIOR DIRECTED AGAINST AN EMPLOYEE MAY COMBINE TO CREATE A PATTERN OF RETALIATORY BEHAVIOR. (37-52)

In Nardello v. Township of Voorhees, 377 N.J. Super. 428, (App. Div. 2005), this Court held that a CEPA Plaintiff need not show that he was suspended, discharged, or demoted to demonstrate that he was retaliated against by his employer in violation of CEPA. Nardello, 377 N.J. Super. at 435, and found the following facts sufficient for a jury to draw an inference that Nardello suffered a series of adverse retaliatory actions by his employer, “In 1999, Plaintiff obtained the third highest

rank in the department -- a lieutenant.” Plaintiff was head of the SWAT team and “set forth several instances beginning in 1999 where he was forced to inform superiors of cover-ups and alleged misconduct.” After this, Plaintiff claims he was denied permission to obtain firearms instructor training and forced to resign 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. He also claims he was given demeaning jobs for his rank. Nardello, 377 N.J. Super at 435-436.

D. PLAINTIFF WAS SUBJECTED TO ADVERSE EMPLOYMENT ACTION. (37-52)

The trial court erred in conflating the elements of adverse employment action and retaliation/causation, as they are two separate elements of a CEPA claim. (Pa 991). Here the trial court held:

Nielsen devotes less than a page to listing adverse employment action taken against him. Nielsen Brief, p. 20-21. He claims “multiple bogus/inflated suspensions”, “bogus written warnings and notices of counseling”, “multiple and lengthy supervisory investigations”, “subjected to inappropriate IA determinations, heightened scrutiny, poor reviews, referred to as a loose cannon and engaging in medieval supervisory practices by the warden without evidence, threatened with psychological evaluation, and other adverse action.” No specifics are offered. (Pa 990 and Pa 991)

...

None of the events claimed by Nielsen to be adverse employment action are adverse employment action. Even when looking at all the facts in the light most favorable to Nielsen, and making all reasonable inferences from those

facts, no rational jury could find that the events are adverse employment action. (Pa 1001)

As detailed above, there are four elements of a CEPA cause of action, with the third being that plaintiff was subject to adverse employment action, and the last being a causal connection between the whistleblowing activity and adverse action. Dzwonar, at 461. The trial court improperly merged the last two elements of a CEPA cause of action. The third element of a CEPA claim merely requires a plaintiff to identify adverse employment action. As cited above, an adverse employment action can constitute a suspension, a demotion, a termination, or other action that officially alters the terms and conditions of employment. The trial court mistakenly adds an additional element to the adverse employment action prong by indicating that you have to establish causation, which may be why the trial court did not understand Nielsen's opposition brief. (Pa 990 and Pa 991)

Given that Nielsen sustained an 8-day suspension, a 10-day suspension and a 25-day suspension, he did not believe he needed to expend multiple pages detailing the adverse employment action. Even under the most restrictive definition, Nielsen easily established adverse employment actions. The more difficult issue is whether some of the less severe adverse actions, such as Nielsen being subject to unnecessarily lengthy SIs, failing to protect Nielsen from bogus inmate complaints, putting Nielsen's latenesses in GT when other COs' were not, the Memo from the Warden calling Nielsen's supervisory tactics medieval and saying that he is a loose cannon who had revenge fantasies, surveilling Nielsen while he worked,

intentionally embarrassing him in front of his co-workers, ignoring his requests for days off, and subjecting him to differential discipline when he approved his own time compared to other Sergeants who approved their own time off. (Pa 991 and 992)

These types of actions that do not amount to a suspension, demotion, or termination require additional analysis, which the trial court failed to do, to determine whether they form a pattern or practice of conduct that constitutes adverse employment action as this Court held in Nardello v. Voorhees at 435-436. Regardless of how this Court or the trial court rule on the non-monetary parts of the adverse employment action, it is respectfully submitted that Nielsen's three suspensions clearly establish he was subjected to adverse employment action. As such, this portion of the trial court's decision must be reversed.

III. A CAUSAL LINK CAN BE INFERRED BETWEEN THE PROTECTED CONDUCT AND THE RETALIATORY ADVERSE EMPLOYMENT ACTIONS. (49-51)

A. LEGAL STANDARD ON CAUSATION UNDER CEPA. (49-51)

In assessing whether a causal connection exists between the protected activity and the retaliatory actions, the fact finder can consider whether there are circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action. See, Bennen v. Rutgers, The State University, 737 F. Supp. 1393, 1399 (D.N.J. 1990); DeCintio v. Westchester County Medical Center, 821 F.2d 111 (2d Cir.), cert. den., 484 U.S. 965.

In the case of Regan v. City of New Brunswick, 305 N.J. Super. 342 (App. Div. 1997), this Court defined the standard to be used in ruling on a motion seeking to dismiss a CEPA claim, holding that the summary judgment motion judge must assess Plaintiffs' claims, based on the totality of the underlying circumstances which preceded the employer's alleged retaliatory action. Regan involved a police officer's CEPA claim alleging that the failure to promote him from Sergeant to Lieutenant was retaliatory. This Court held that the analysis required by law must include a review of each event Plaintiff claimed ultimately lead up to the retaliatory action. Id. at 345. This Court held that the motion judge erred in failing to consider the evidence of personal animus toward Plaintiff, ruling that competent evidence of such animus would be evidence of retaliation, even though the sole evidence presented of a nexus between the alleged protected conduct and the claimed adverse employment action were statements made in two confrontations, "don't talk to that rat f-ck," and the other "once a rat, always a rat." Id. at 348-351. This Court reversed an Order granting summary judgment on the CEPA claim, holding that the motion judge's failure to consider all of the facts in the light most favorable to the Plaintiff since Plaintiff was entitled to all inferences that may be drawn in his favor. Id. at 356.

Because direct proof of intentional retaliation is often not available, Plaintiff is allowed to prove retaliation by circumstantial evidence. Therefore, a Plaintiff is not required to show direct evidence of pretext or directly prove retaliation, but rather may rely upon circumstantial "weaknesses, implausibility's, inconsistencies,

incoherencies, and contradictions.” Kolb v. Burns, 320 N.J. Super. 467 at 478 (App. Div. 1999), and Desert Palace, Inc. v. Costa, 123 S.Ct. 2148 (2003). Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence. Thus, a variety of evidence may bear on this issue, such as whether (1) there was no prior criticism of Plaintiffs' performance, (2) inconsistencies existed in explaining the adverse job action, (3) the absence of contemporaneous documentation to corroborate Defendants' claims of a legitimate non-retaliatory justification, (4) the existence of good performance reviews before the conduct alleged to have triggered the retaliatory conduct occurred, and (5) the timing of the alleged retaliatory action, all of which, together or individually, may likewise support an inference of retaliation. See, e.g., Littman v. Fireside Tire & Rubber Co., 709 F. Supp. 461, 471 (D.N.J. 1989); and Bowles v. City of Camden, 993 F. Supp. 255 (D.N.J. 1998).

In Bowles, Judge Irenas utilized both the “pretext” analysis, which required Plaintiff to show that the retaliation was a “determinative factor”, as well as the “mixed motive” approach, by which a Plaintiff could show that although the employer had a reason that was legitimate, it was mixed with a wrongful retaliatory motive, which retaliatory motive was a “substantial motivating factor” in the adverse employment action. Bowles, 993 F. Supp. at 262. In the “mixed motive” context, the employer must show that its legitimate reasons, standing alone, would have induced it to make the same decision. Id. The Third Circuit in Radwan v. Beecham Laboratories a Division

of Beecham Inc., 850 F. 2d 147 (3rd Cir. 1988), had a case where there was a three (3) year gap of time from the protected conduct to the alleged retaliatory termination determined that the temporal proximity was not fatal and held: “Nevertheless, we are satisfied that a jury could infer that from the time of the strike Radwan was doomed at Beecham and that his discharge was a direct consequence of his refusal to plant something on the steward. After all a knowledgeable employer might mask its reason for discharging an employee by delaying its action for a protracted period after a dispute thus showing more sophistication....” Id. at 850 F. 2d 147, 152.

B. PLAINTIFF HAS PRESENTED SUFFICIENT EVIDENCE TO ESTABLISH A CAUSAL LINK BETWEEN THE PROTECTED CONDUCT AND THE RETALIATION HE WAS SUBJECTED TO. (49-51)

Even though the trial court erroneously held that Plaintiff Nielsen did not suffer any adverse employment action, it seems to have analyzed causation in its decision. (Pa 992 through Pa 1004) By way of example, in its decision on the 25-day suspension that Nielsen received for reporting to the Prosecutor’s Office that McGill was stealing time, the trial court in a conclusory manner held, “this court finds that this discipline, which resulted from an investigation, and the facts of which are not in dispute, is not an adverse employment action.” (Pa 999). That passage by the court is so inconsistent with the record that it is as if the court did not review the Motion before writing its decision.

Nielsen has been clear throughout that he did not conduct any investigation into Magill’s activities, but rather advised Sergeant Leininger on a couple of

occasions when he noticed Magill leave. There is no allegation or admission that Nielsen did anything more than that. Nielsen then gave a statement to the Prosecutor's Office confirming what he saw, which demonstrated that Magill was potentially stealing time. In addition, the Preliminary Notice of Disciplinary Action sought a 10-day suspension (Pa 281), but the Final Notice of Disciplinary Action, (Pa 286) imposed a 25-day suspension. Maher testified that he was unaware of any other occasion where the county upped the discipline in a matter between the Preliminary and Final Notices. (Pa561 @ p.82, 1.15 - p.83, 1.8) The trial court's conclusory decision seems to indicate that if the employer conducts an investigation and disciplines an employee, that is the end of the analysis, and the appropriateness of the discipline cannot be challenged. Once again there was no case law to support this proposition by the trial court. If there were no employee would be able to challenge discipline through the LAD, CEPA or civil service because the employer's discipline would be determined to be valid as a matter of law.

Moreover, the Court conclusively held, without any support in the record, that Nielsen admitted to the conduct alleged. That is simply untrue as in his detailed statement to the Prosecutor's Office he indicates exactly what he did and did not do and at no point did he engage in the conduct alleged by the defendants and at no point was he dishonest or untruthful with any of the information provided to either the Prosecutor's Office or Internal Affairs. (Pa 275) This is just another example of the trial court accepting whatever defendants say as true, giving defendants the

benefit of all reasonable inferences, ignoring evidence in the record and coming to a decision that was clearly not consistent with the facts and law. The court, without any support on the record, further indicates that Nielsen was disciplined because he used county resources, such as a computer, something he absolutely denied, and there is no evidence for this in the record. (Pa 998)

For all of these reasons, it is clear that the trial court erred in finding that the 25-day suspension, which was directly linked to the plaintiff reporting that McGill was stealing time, was both an adverse employment action and retaliation.

The trial court also improperly found that the 8-day suspension was appropriate because Nielsen used insensitive language when talking to inmates on a specific cell block. The trial court ignored the full context of this incident as inmates were destroying the area and throwing feces. (Pa374 @ p.99, l.16 - p.100, l.7). This is not an instance where Nielsen used inappropriate language to insult or rile up the inmates for no reason - Nielsen and other COs were under attack by inmates throwing poop and damaging the facility. Nielsen made a discretionary decision to use constructive authority by using intemperate language and a raised voice in the hope of gaining compliance through lesser force. The trial court also looked at this incident in a light most favorable to Respondents with the assumption that the word “pussy” is some sort of anti-gay slur and a CO saying the word results in liability to the County. The trial court failed to cite any legal authority for that proposition. Again, looking at this in a context most favorable to Nielsen, and not Respondents,

it is clear that under these circumstances, an CO using constructive authority in verbally chastising inmates is a proper use of force and did not discriminate. Context matters and the comments were made in a jail when inmates were throwing feces at COs. To show that the alleged legitimate reason for the discipline here is nothing but a farce, Maher testified that COs can use profanity when talking to inmates as long as it is not aimed at them, and COs can use profanity as a type of constructive force. (Pa534 @ p.54, l.5 - p.55, l.12) The warden was unaware of any other CO ever being disciplined for cursing at an inmate. (Pa465 @ p.69, l.14 - 18) Given the totality of the facts here, it is respectfully submitted that a reasonable fact finder would conclude that the 8-day suspension for using a profanity was a pretext for retaliation.

The trial court also summarily dismissed the 10-day suspension that Nielsen received for accidentally admitting an inmate who should not have been detained. Nielsen admitted that it was a mistake. However, Nielsen was the Sergeant on duty who signed the paperwork, and the person who actually admitted the individual only received training. (Pa 689) As discussed above, Nielsen did not realize the person who was being admitted had two \$500 warrants by the same court, but they were actually from different courts for the same amount. (Pa689 and Pa424 at p.49, l.2-4) The trial court held that since Nielsen admitted he made the mistake, that there is no way for him to challenge the quantum of discipline. Again, the trial court is creating a new standard to evaluate CEPA and LAD cases under which if the employer issued

the discipline, it must be valid. That is not the law and these types of cases are much more nuanced than the simplistic approach proposed by the trial court. Here, we have another CO involved in the improper admission of this individual who is only issued training while Nielsen received major discipline. It is respectfully submitted that under the facts of this case and the timeline of events, a reasonable fact finder could infer that Nielsen received major discipline as opposed to training or even minor discipline, not because of any legitimate reason, but as an additional act of retaliation. As such, the trial court erred in finding the 10-day suspension does not constitute adverse employment action or retaliation.

Respondents argued below that Nielsen cannot show these adverse employment actions constitute retaliation because he admitted to the conduct. That statement is true in part and false in part. Many decisions in law enforcement and in any paramilitary organization are subject to the supervisor's discretion. A supervisor can choose whether to recommend or implement discipline and at what level, including to handle similar instances with lower levels of discipline. Nielsen is not alleging that Respondents made up all of the allegations against him, just some; he is alleging that Respondents abused their discretion to retaliate against him by using the disciplinary matters. For example, Nielsen testified that there was a custom of sergeants approving their own time off, not a written policy, but Nielsen was the only Sergeant disciplined for approving his own time off, subjected to a supervisory investigation, and referred to by the Captain as sneaky for doing it. (Pa 426-427)

Next, we have the issues with inmate Lewin. It is beyond dispute that inmates make up complaints against COs. It was acknowledged by Respondents that inmates use complaints to retaliate against COs who hold them accountable. Yet once again, Respondents took advantage of Inmate Lewin's false complaints against Nielsen to further their campaign of retaliation. They falsely accused Nielsen of violating orders that were never given to him. They falsely implied Nielsen was somehow harassing Lewin without evidence to substantiate that claim. The trial court simply ignored this evidence.

In fact, IA determined that Lewin outright lied when he made a complaint that his back brace was taken. (Pa 538-540) Yet the Jail Administration continued to take every one of Lewin's complaints against Nielsen seriously, undermining Nielsen's authority and ability to do his job without any legitimate basis. They also failed to move inmate Lewin to another jail even though other inmates had been moved to other facilities after engaging in the same conduct. (Pa 592 @ p. 106-107) They refused to remove Lewin even though he tried to file criminal charges against Nielsen. (Pa 699) Defendants alleged that it was common for inmates to file criminal charges against COs, but when tested on that claim could name few if any actual examples. The Defendants could have protected Nielsen from Lewin's false allegations by bringing him up on disciplinary charges for filing false allegations against Nielsen or moving Lewin to a different jail, but refused to do so. This is yet

another example of supervisors using their authority and abusing their discretion to retaliate against Nielsen. (Pa 480-481, 538)

Other examples of retaliatory actions are the warden sending a memo to the executive undersheriff describing Nielsen as engaging in medieval supervisory tactics with no justification, calling Nielsen a loose cannon, speculating whether Nielsen had revenge fantasies, and indicating that Nielsen should submit to a psychological fitness for duty examination without one iota of evidence to support any of the allegations. (Pa 640) When the warden was asked at his deposition as to why he made the above comments about Nielsen the only thing he could think of was that on one occasion Nielsen pointed at an inmate. (Pa 471 at p. 92, l. 4-18)

While Respondents try to paint Nielsen as some rogue sergeant, the facts and evidence do not back that up. Most of the IAs against him that were utilized in forming these outrageous opinions resulted in either Nielsen being exonerated or the allegations not being sustained. (Pa 692) All the allegations by Lewin should have been dismissed out of hand given that he was a documented liar and that there was no merit to his claims. It seemed that every inmate complaint against Nielsen would rise to the level of an IA investigation. Once again, Respondents abused their discretion to retaliate against Nielsen.

The March 6, 2018, special report by the Warden was meant to sabotage the rest of Nielsen's career. (Pa 641) That is something that will stay in his file and every supervisor will see it when considering him for promotion. The Warden could not

support any of his opinions or conclusions contained in that memo, which demonstrates as a matter of law that there's no factual basis for them. (Pa 471 at p. 92, l. 4-18) It is also important to note that the Warden did not describe any other CO using the above terms. (Pa 537 and Pa 538) Also the Maher testified that this was the only time he could recall the Warden recommending sending a CO for a psychological evaluation, but thought there may be others. (Pa 538 at p. 72, l. 20 - p. 74, l. 21) There were other discretionary decisions that were also used to retaliate against Nielsen. For example, if a Sergeant was late there was a common practice of allowing them to use PTO time to make up for the time, but when it came to Nielsen, he was given a GT entry. (Pa 426 at p. 57, l. 3-10) He was surveilled while working and automatically assumed not to be doing his job without a proper and thorough investigation. (Pa 726) Nielsen was working in the CO's mess hall and was accused of being in there for too long without anyone considering the possibility that he was working there as COs sometimes do. See. Id. Whenever something could be looked at in a light most negative to Nielsen it was and this only started after he engaged in protected conduct and the trial court took the same approach in deciding summary judgment.

Nielsen was also subject to numerous lengthy SIs, that are only to be conducted for legitimate reasons and meant to be done in an expedited manner. He was chastised and embarrassed for doing his job when he sent out an e-mail

reminding sergeants about documenting inmate movements or when he reprimanded an CO for talking inappropriately in front of an inmate.

It is respectfully submitted that Nielsen has established a clear pattern that after he engaged in protected conduct in April 2017 Respondents abused their authority and their discretion to create a retaliatory work environment. They used their authority and discretion to Nielsen's detriment to punish him for blowing the whistle on the above-cited issues. For all the foregoing reasons it is clear the trial court erred in dismissing Plaintiff's CEPA claim.

C. PLAINTIFF HAS PRESENTED SUFFICIENT EVIDENCE TO DEMONSTRATE DEFENDANTS' ASSERTED LEGITIMATE, NON-RETALIATORY REASONS FOR THE ADVERSE EMPLOYMENT ACTIONS ARE PRETEXT FOR RETALIATION. (49-51)

Below, Respondents argued that since Nielsen was disciplined, the imposition of discipline demonstrates that Nielsen engaged in the conduct alleged and the trial court accepted that argument. The trial court held that since investigations against Nielsen resulted in discipline, he cannot allege they were retaliatory. That holding makes no sense at all and is circular reasoning. Also, the trial court made credibility determinations against Nielsen in direct violation of the summary judgment standard articulated below. If Nielsen had not been disciplined, the trial court would have dismissed the case for lack of adverse employment action. Since discipline was imposed against Nielsen, the trial court now holds that it must be legitimate, and he cannot credibly challenge it. To be clear, some level of adverse action must occur

for a plaintiff to have a whistleblower case. The trial court is using the fact that discipline was issued proves the discipline was warranted. This type of logic is rampant through the trial court's weak decision and, if affirmed, would neuter CEPA.

There is no legitimate business reason to demean, disrespect, and issue bogus and inflated discipline. There is no legitimate business reason to lie or exaggerate about Nielsen as the Warden did in his March 6, 2018, memo. For the reasons set forth in this brief, it is respectfully submitted that Nielsen has established adequate evidence to establish causation and rebut any alleged business reason given for the adverse employment action at issue.

IV. THE TRIAL COURT ERRED IN DETERMINING THAT PLAINTIFF'S CEPA CLAIMS ARE TIME BARRED BY MISAPPLYING THE STATUTE OF LIMITATIONS AND THE CONTINUING TORT DOCTRINE. (51-53)

A. WHEN A CEPA CAUSE OF ACTION ACCRUES. (51-53)

The trial court improperly held that a CEPA cause of action accrues on the date of the protected conduct and not at the time of the adverse employment action.

(Pa 1005) The trial court's holding on the statute of limitations ignored well established published case law when it held:

Here, Nielsen has alleged five acts of protected conduct: Events surrounding Baker's evaluation in May 2017; reporting to Lindsay in June 2017 that Baker had been in a bar fight; reporting that McGonigle had used excessive force on June 28, 2017; completing a harassment survey in June 2018, and Reporting in September 2018 that Magill had stolen time.

The Complaint was filed on August 16, 2019.

Of all of the alleged events of protected conduct, only reporting in September 2018 that Magill was stealing time occurred within a year before Nielsen filed the Complaint. The other events depend on whether the continuous tort doctrine applies....

If the only grounds in Defendants' Motion for Summary Judgment was that the statute of limitations had expired, any and all claims of retaliation arising from the events surrounding Baker's evaluation, from reporting to Lindsay that Baker had been in a bar fight, reporting that McGonigal had used excessive force, and completing a harassment survey, would be time barred. Only alleged acts of retaliation arising from Nielsen reporting that Magill was stealing time would be able to proceed. The court therefore is compelled to grant summary judgment against Plaintiff and in favor of Defendant because the statute of limitations expired as to all the alleged acts of protected conduct, except for Nielsen reporting Magill for stealing time in September 2018. (Pa 1005 and Pa 1006)

Our courts have had occasion to address when a cause of action arises under CEPA or the LAD. For example, in Daniels v. The Mutual Life Ins. Co., 773 A.2d 718 (App. Div. 2001), this Court discussed when a cause of action under CEPA arises.⁶ This Court in Daniels held: "A cause of action under the statute arises upon the commission or a violation by the employer. In Keelan, supra, we held that, 'The definition of retaliatory action speaks in terms of completed action. Discharge, suspension, or demotion are final acts. Retaliatory action does not encompass action taken to effectuate the "discharge, suspension or demotion. We therefore find no

⁶ The New Jersey Supreme Court in Green v. Jersey City Bd. Of Educ., 177 N.J. 434, 447 (2003) held that the same analysis applies to retaliation claims arising under the LAD and CEPA, both being remedial legislation and must be construed liberally to achieve important social goals.

retaliatory action until plaintiff's actual discharge.” (emphasis added) See, Daniels.⁷ The Court in Daniels further stated that, “It is also clear that the employer can rescind the termination decision prior to actual discharge. Therefore, in theory, the employee has not suffered any harm. In short, notice of discharge is not final and thus does not constitute retaliatory action until the day of separation from employment.”

On September 13, 2010 the Supreme Court held: “As these examples demonstrate, there is no single prima facie case that applies to all discrimination claims. Instead, the prima facie elements of a claim vary depending upon the particular employment discrimination claim being made. What they traditionally share; however, is the requirement that plaintiff endure an adverse employment consequence as a result of the discriminatory act.” Roy M. Victor v. State of New Jersey, 203 N.J. 383, at 400 (2010).

It is clear that the Daniels and Victor decisions are consistent with the necessary elements for deciding when LAD retaliation and CEPA causes of action accrue; specifically, that a cause of action under either does not accrue until the plaintiff is actually damaged. Stated another way, under Daniels and Victor there is no cause of action under the LAD or CEPA until the plaintiff is subjected to an adverse employment action.

⁷ The Daniels case is being provided as an example and is not the only case from our Appellate or Supreme Court which stands for the proposition that a CEPA or LAD retaliation cause of action does not accrue until the date that a plaintiff suffers adverse employment action, there are literally hundreds.

The trial court once again erred when it applied the statute of limitations to the date in which the plaintiff engaged in protected conduct and not the date that he was subject to the retaliatory action. Here, the trial court erroneously held, “Here, Nielsen has alleged five acts of protected conduct: Events surrounding Baker’s evaluation in May 2017; reporting to Lindsay in June 2017 that Baker had been in a bar fight; reporting that McGonigle had used excessive force on June 28, 2017; completing a harassment survey in June 2018, and Reporting in September 2018 that Magill had stolen time.” (Pa 1005)

The above-cited case law makes it clear that a plaintiff in a retaliation case does not have a cause of action, and therefore, the statute of limitations does not start to run until plaintiff is subjected to adverse employment action. That is a basic tenet of retaliation law as the plaintiff does not have a claim for simply engaging in protected conduct. They only have a claim when they are subjected to adverse employment action that is causally related to the protected conduct. Under the trial court’s perverted interpretation of the statute of limitations, an employee could engage in protected conduct on January 1, 2018, and an employer could wait until January 2, 2019, to retaliate and be able to do so with impunity because it was more than a year after the protected conduct. That result is simply absurd. The trial court’s analysis focused improperly on protected conduct, not the adverse action. It is clear that the three suspensions at issue and most of the smaller adverse employment actions all occurred within one year of Nielsen filing his complaint. This is an

undisputable fact based on the evidence of record. Therefore, applying the proper statute of limitations shows that all or nearly all of the adverse action occurred during the statutory period.

B. CONTINUING TORT DOCTRINE. (51-53)

Respondents argued below that many of Plaintiff's claims are barred pursuant to CEPA's 1-year statute of limitations. This argument is contrary to the "continuing tort doctrine," under which the numerous acts of retaliation are absolutely admissible. Under the theory of "continuing violation," a plaintiff may pursue a claim for a hostile/retaliatory work environment that includes periods of time outside the one (1) year statute of limitations where the plaintiff can establish that the acts occurring outside that period are part of an ongoing practice or pattern of prohibited conduct. This constitutes an equitable exception to the statute of limitations. Bolinger v. Bell Atlantic Corp., 330 N.J. Super. 300, cert. denied, 165 N.J. 491 (2000). Such is the case here.

Our Supreme Court has held, in no uncertain terms, that where an individual is subjected to a continual and cumulative pattern of tortious conduct, the statute of limitations does not even begin to run until the wrongful action ceases; in this case, it never did cease. See, Ali v. Rutgers, 166 N.J. 280, 285 (2000). Likewise, our Supreme Court has held that once a pattern of harassment has resulted so as to create a psychologically offensive work environment, the status quo of such continuous

wrongful conduct can be based upon the harasser's mere presence. Wilson v. Wal Mart Stores, 158 N.J. 263, 272-273 (1999).

Nielsen filed his initial Complaint on August 16, 2019. (Pa1) Therefore, if Nielsen is seeking to use adverse employment action prior to August 16, 2018, he must rely on the continuing tort doctrine. All adverse actions that occurred on or after August 16, 2018, are clearly within CEPA's one-year statute of limitations despite the trial court's decision otherwise.

Here, Nielsen alleges that some of the adverse actions he was subjected to occurred prior to August 16, 2018, and submits that the adverse actions are still actionable under the continuing tort doctrine. Nielsen has demonstrated that once he had his second interview with Lindsay, in the late Spring/early Summer of 2017, he began to be subjected to adverse employment action. He was brought up on bogus SIs that lasted months; he was issued inappropriate findings in IA investigations, such as not sustained, when there was a video of the incident, which mandated that it be found unfounded or exonerated. (Pa 658). He was sent an email by Prince in which Prince cc'd all of the Sergeants in a clear attempt to embarrass Nielsen. (Pa432 @ p.86, 1.6-16) He was issued a GTfor being late to work, even though his co-workers were not issued a GTfor similar conduct. (Pa 391 and 678). He was issued another SI when he entered Baker as using a sick day when Baker requested to use a personal holiday, but the schedule was locked, and Nielsen was unable to list Baker as having a personal holiday (Pa 704).

The Department refused to support Nielsen with regard to inmate Lewen, who made multiple false allegations against Nielsen and made it extremely difficult, if not impossible, for Nielsen to perform his duties as a Sergeant when Respondents finally advised Nielsen he could no longer have contact with Lewen. (Pa 692 - 699).

The Warden issued that improper May 6, 2018, Memo when he, without any evidence, described Nielsen as irresponsible or irrational, engaging in medieval supervisory practices, and hypothesized that Nielsen could be dealing with resistance to taking orders, abuse of his own authority, and having revenge fantasies. The Warden also speculated about sending Nielsen for a fitness for duty exam. (Pa 641 - 643). When the Warden was confronted with the Memo, the only evidence that he could provide to support his findings was that Nielsen pointed at an inmate. (Pa 471 at p. 92, l. 4 - 18). The Department also falsely alleged that Nielsen had been told not to have any contact with Lewen as of February 27, 2018, which was false as the order did not come until days later. (Pa 374-375). The limitations that the administration put on Nielsen regarding Lewen made it extremely difficult for him to do his job, as he could not tour the cell blocks, and it was embarrassing that he was not able to perform many of the duties associated with his position.

When Nielsen would make complaints about COs potentially engaging in misconduct, his behavior was reviewed rather than the other CO, such as the incident with Officer John and inmate Lewen. (Pa 410, 419) In July of 2018, Nielsen's yearly Sergeant's evaluation indicated that he was subjected to an SI that did not result in

any negative findings, but was still noted on his evaluation. (Pa 675) These are just an examples of some of the smaller instances of adverse action that Nielsen was subjected to which occurred prior to August 16, 2018. However, the above cited instances of adverse action are the smaller types of conduct that in and of themselves are not actionable and only become actionable after a sustained pattern has been established. It is respectfully submitted that Nielsen has met the standard of the continuing tort doctrine as the above referenced incidents. It is respectfully submitted that the trial court never engaged in any analysis to determine whether these incidents were subject to the continuing tort doctrine because it improperly held that the statute of limitations starts to run on the date of protected conduct and not on the date of the retaliatory action. As such, for all of the reasons outlined above, this portion of the trial court's decision should be reversed.

IV. THE TRIAL COURT ERRED IN DISMISSING NIELSEN'S PUNITIVE DAMAGE CLAIM. (57)

In Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587 (1993), the New Jersey Supreme Court held that punitive damages will only be awarded where Plaintiff establishes: “1) actual participation in or willful indifference to the wrongful conduct on the part of upper management and 2) proof that the offending conduct [is] especially egregious.” Lehmann, 132 N.J. at 624-625. “Especially egregious conduct is conduct that was motivated either by actual malice, or that was done with a willful and wanton disregard of the rights of Plaintiff.” Civil Model Jury Charge 6.20(b). Nielson has clearly established a pattern of harassment and retaliation in direct response to his protected

conduct, as he was subjected to a relentless campaign of harassment and retaliation, as detailed at great length above. The trial court erred in holding, “Here, no reasonable jury could find Defendants were wantonly reckless or malicious. In every investigation claimed by Nielsen to be retaliatory, Nielsen was not disciplined, or, Nielsen admitted some level of culpability, or was found to have some level of culpability, and he was disciplined. There is simply no basis for punitive damages.” (Pa 1010) That finding ignores the multiple acts of retaliation and harassment following Nielsen’s protected conduct, none of which occurred before. It further ignores the direct link between the 25-day suspension and the protected conduct in reporting Magill to the Prosecutor’s Office.

It is improper to dismiss punitive damages, as it requires an analysis of evidence yet to be presented at trial and requires credibility determinations. Ratner v. General Motors Corporation, 241 N.J. Super 197, 198-206 (1990); Sculler v. Sculler, 348 N.J. Super 374 (Chan. Div. 2001). Accordingly, it is respectfully submitted that the trial court erred in granting the defendant summary judgment as to Nielsen’s claim for punitive damages.

VI. RESPONDENTS FAILED TO MEET THE SUMMARY JUDGMENT STANDARD. (18-20)

Summary judgment was inappropriately granted by the trial court. Summary judgment should be granted only if there are no genuine issues of material fact. R. 4:46. The Supreme Court of New Jersey set forth the standard for summary judgment when it decided the case of Brill v. The Guardian Life Ins. Co. of America, 142 N.J.

520, 666 A.2d 146 (1995). In order to determine whether there exists a "genuine issue" of material fact that precludes summary judgment, the motion judge must consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The trial court repeatedly gave Respondents the benefit of all reasonable inferences and resolved most material factual disputes in the Respondents' favor in direct violation of the summary judgment standard. As such, the trial court's order granting summary judgment must be reversed.

CONCLUSION

For the foregoing reasons, Plaintiff/Appellant Nielsen respectfully requests that this Court reverse the trial court's order granting summary judgment and remand this case for trial.

Respectfully submitted,
IONNO & HIGBEE, ATTORNEYS AT LAW

BY: _____



SEBASTIAN B. IONNO

Dated: 5/21/2025

WILLIAM NIELSEN,

Plaintiff-Appellant,

v.

COUNTY OF CAPE MAY,
LIEUTENANT STEPHEN PRINCE,
AND JOHN DOES 1-25,
INCLUSIVE, JOINTLY,
SEVERALLY, AND IN THE
ALTERNATIVE,

Defendants-Respondents.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3807-23

ON APPEAL FROM:
SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAPE MAY COUNTY
DOCKET NO. CPM-L-320-19

SAT BELOW:
JAMES H. PICKERING, J.S.C.

Civil Action

BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS
COUNTY OF CAPE MAY AND LIEUTENANT STEPHEN PRINCE

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PRELIMINARY STATEMENT

Plaintiff-Appellant William Nielsen claims retaliation under the Conscientious Employment Protection Act (“CEPA”), yet he lacks evidence to support a *prima facie* case that the Cape May County Sheriff’s Office (“CMCSO”) retaliated. Some of the incidents Plaintiff claims are protected conduct are not. Ultimately, Plaintiff’s claims fail because there was no subsequent adverse employment action under CEPA. Instead, Plaintiff was subject to action that was neutral and did not impact his employment. However, where Plaintiff was disciplined, he admitted to the conduct for which he was disciplined, which precludes a finding of retaliation. In addition, Plaintiff cannot overcome CMCSO’s legitimate non-retaliatory reason for any purported adverse employment action. Finally, Plaintiff does not have any evidence to support a claim of harassment under CEPA.

In the alternative, Plaintiff’s claims of adverse employment action that occurred prior to August 16, 2018, one year prior to the date on which Plaintiff filed the instant Complaint, are barred by the statute of limitations.

All of Plaintiff’s claims were properly dismissed by the trial court below. Defendants-Respondents County of Cape May and Lieutenant Stephen Prince respectfully request that this court affirm the trial court’s order granting summary judgment.

PROCEDURAL HISTORY

Defendants incorporate the procedural history set forth in Plaintiff's brief. (Pb2).

STATEMENT OF FACTS¹

Plaintiff's appeal relates to four allegations of protected "whistleblowing" conduct, and multiple incidents of alleged retaliation. The following statement of facts relates events in chronological order.

Officer Baker's Evaluation – S.I. 17-027

Plaintiff has been employed at the CMCSO since June 2004. Plaintiff's position as Sergeant placed Plaintiff in a supervisory position over officers of lower rank and required Plaintiff to conduct performance evaluations of the officers he supervised. (Pa1 to Pa2). Plaintiff alleges that one of the officers he was responsible for supervising, Officer Richard Baker ("Officer Baker"), was politically well-connected and generally impossible to write-up or discipline. (Pa3).

On or around March 28, 2017, Plaintiff completed an annual performance evaluation (the "Evaluation") for Officer Baker. Plaintiff indicated in the Evaluation that Officer Baker was "skating" or "leaving his

¹ Pursuant to an agreement between counsel for both parties, deposition testimony in the matter of Amy Nielsen v. County of Cape May et al., Docket No. CPM-L-000220-19, which matter is also on appeal, Docket No. A-3011-23, was incorporated in the present matter for the purposes of establishing certain background information.

area a lot.” (Pa652; Pa378). Plaintiff testified he never previously counseled Officer Baker at any point prior to the Evaluation for “skating” or doing anything else improper. (Pa384). Plaintiff reviewed the Evaluation with Officer Baker and then submitted it to Lieutenant Robert Campbell (“Lieutenant Campbell”). (Pa379).

On May 18, 2017, then-Human Resources Director Jeffrey Lindsay, Esq. (“Mr. Lindsay”) interviewed Plaintiff relating to “a complaint of two sergeants” against Plaintiff. (Pa379; Pa678). During that interview, Mr. Lindsay asked Plaintiff “a lot of questions about Officer Baker” and whether Officer Baker was being harassed. (Pa379). Plaintiff testified that, based on the questions, he believed he was being accused of harassing Officer Baker, or being aware Officer Baker was being harassed and not addressing it. (Pa380). However, Plaintiff admitted that there was nothing improper with Mr. Lindsay questioning him about alleged harassment of Officer Baker. (Pa380).

On or around June 9, 2017, Plaintiff’s Evaluation of Officer Baker was returned to Plaintiff with a note from Lieutenant Campbell. A note on the Evaluation addressed to Plaintiff indicated the following: “Bill, Regarding the last 2 lines of your comments; 1. Did you witness Ofc. Baker ‘skating’? Evals are your observations and 2. Did you document your conversation regarding the issue? Please adjust accordingly. LT.” (Pa648). Plaintiff claims he was

asked to amend the Evaluation because it was “part of them accusing [Plaintiff] of harassing Officer Baker.” (Pa381).

According to Lieutenant Campbell, during the first week of June 2017, pursuant to department protocol (Pa576), Lieutenant Campbell was reviewing evaluations. Plaintiff’s Evaluation of Officer Baker that he was “skating” indicated that Plaintiff’s information came from other officers who had advised Plaintiff that Officer Baker often left his assigned posts. The Evaluation also indicated Plaintiff had spoken with Officer Baker regarding the other officers’ observations. Lieutenant Campbell reviewed the Evaluation packet, but there was no attached documentation regarding the other officers’ observations or Plaintiff’s subsequent conversation with Officer Baker. Lieutenant Campbell then brought the Evaluation to the attention of Captain Charles Magill (“Captain Magill”) because he believed more details were needed. Captain Magill agreed as evaluations are to be based on personal observations, not the observations of other officers. (Pa166; Pa576; Pa578). Captain Magill instructed Lieutenant Campbell to return the Evaluation to Plaintiff to “fix or redo” the Evaluation so that it would not be based on other officers’ opinions. (Pa576). Warden Donald Lombardo (“Warden Lombardo”) also testified that the issue with the Evaluation was simply that it was based

upon information provided by other officers and there was insufficient documentation. (Pa459).

Plaintiff alleges that he was thereafter retaliated against in the form of investigations and discipline.²

On or around June 22, 2017, Plaintiff once again met with Mr. Lindsay, along with Personnel Assistant Sara Maloney (Pa714), at Plaintiff's request, to report to Mr. Lindsay of his belief that Officer Baker received "special treatment" and that the Evaluation Plaintiff conducted of Officer Baker was returned to him to amend. (Pa381; Pa678). During that meeting, Plaintiff

² At the CMCSO, Guardian Tracking is a computerized system to memorialize performance of officers, training, and other similar events. Guardian Tracking entries are not necessarily discipline as they can be positive, neutral, or negative. (Pa163 to Pa164; Pa358; Pa454).

Supervisory Investigations ("SI") are "fact finding investigations" and are not, by themselves, discipline. (Pa152; Pa360). They might simply result in additional training for the individual subject of the investigation. (Pa157). At the conclusion of a SI, a final determination is made if the subject employee of the investigation did something inappropriate and what discipline, if any, should be issued based upon same. (Pa157 to Pa158). SIs are limited to three levels of discipline: a Guardian Tracking entry, a counseling notice, and a written warning. (Pa155). Sometimes there is no discipline issued at all.

SIs are elevated to an Internal Affairs Investigation ("IAI") if and when the SI revealed additional facts warranting same. (Pa159). IAIs can result in a finding of unfounded, exonerated, not sustained, or sustained. (Pa468). Unfounded means the alleged incident that is the subject of the IAI never happened. Exonerated means the incident did happen but the officer's actions were justified, legal, and proper. (Pa472). Not sustained means the incident could not be proved or disproved. (Pa455).

alleges he told Mr. Lindsay that Officer Baker had previously been arrested. Plaintiff had heard “through the grapevine” that Officer Baker had been arrested while Officer Baker was employed as a Records Clerk. According to Plaintiff, the incident was “swept under the rug.” (Pa383). Plaintiff conceded that just because he was not personally aware of an investigation does not mean the incident was “swept under the rug.” (Pa383).

Plaintiff further alleges that he reported to Mr. Lindsay, during the meeting on June 22, 2017, that Officer Baker was involved in a physical altercation at a bar in early 2017 and that Officer Baker thereafter reported to work wearing sunglasses to conceal a black eye. Plaintiff questioned Officer Baker as to whether he reported the altercation to the Administration. According to Plaintiff, Officer Baker responded that he already told Administration that he was involved in a bar fight. (Pa382).

Warden Lombardo testified he was unaware of Officer Baker’s alleged physical altercation that resulted in a black eye. (Pa461). Likewise, Captain Magill testified he has no recollection of the incident (Pa583), nor did Lieutenant Stephen Prince (“Lieutenant Prince”). (Pa843 to Pa844). If an officer is involved in a physical altercation but there is no contact with law enforcement, there is no requirement that the altercation be reported to the

Administration unless an injury was sustained preventing the officer from fulfilling employment obligations. (Pa461; Pa583; Pa844).

Plaintiff also indicated he informed Mr. Lindsay of his belief that Officer Baker received “special treatment” because he was once given a “free day off,” and was moved to another squad after Officer Baker complained of being harassed by the squad Plaintiff oversaw. (Pa382). Plaintiff does not dispute that it is not unreasonable to move an officer who is uncomfortable or feels they are being bullied or harassed to a different squad after an investigation is done. (Pa382).

Plaintiff alleges that his refusal to change Plaintiff’s Evaluation and his subsequent report to Mr. Lindsay on June 22, 2017 was protected conduct. In addition, Plaintiff alleges that, during the meeting with Mr. Lindsay, Plaintiff’s report that Officer Baker had been in a bar fight, appearing at work the next day with a black eye, and that there was no subsequent investigation of the fight was also protected conduct.

Mr. Lindsay informed Plaintiff that their meetings on May 18, 2017 and June 22, 2017 were confidential. In an email from Mr. Lindsay to Plaintiff, Mr. Lindsay specifically stated, “the supervisory investigation could not be connected to the information you shared with me during the workplace investigation because no one outside of my office had access to the interview

transcript.” (Pa178). Instead, Mr. Lindsay stated to Plaintiff that SI 17-027 resulted from a complaint from Officer Baker about the Evaluation. (Pa178). Plaintiff also admits that Mr. Lindsay did not report any of their conversations about Officer Baker to the Administration. (Pa178; Pa714). Plaintiff admitted in his deposition he does not have any evidence indicating Mr. Lindsay spoke to the Administration regarding Plaintiff’s comments about Officer Baker. (Pa385).

On or around July 1, 2017, more than two years prior to the filing of Plaintiff’s Complaint, Plaintiff received an email from Lieutenant Prince advising him that SI 17-027 had been opened relating to Officer Baker’s Evaluation. (Pa172). Plaintiff asserts that it was his belief that SI 17-027 was opened as an act of retaliation against him due to him making complaints about Officer Baker, but conceded that, at that same time, Officer Baker was indicating to the Administration that Officer Baker was being bullied and harassed in part based upon Plaintiff’s Evaluation of him. (Pa384).

On or around July 3, 2017, Plaintiff emailed Mr. Lindsay advising him of SI 17-027 and further indicating that Plaintiff felt the investigation was “retaliation” for Plaintiff speaking to Mr. Lindsay about his “concerns with Officer Baker getting special treatment.” (Pa174).

SI 17-027 resulted in a request for Plaintiff to author a Special Report regarding the comment in the Evaluation that was based upon information received from other officers. (Pa654). Plaintiff conceded that, as a result of SI 17-027, he essentially just had to answer questions. (Pa384). Plaintiff submitted the Special Report as requested on or around July 4, 2017. (Pa176). Plaintiff's Special Report again indicated that Plaintiff used other officers' statements regarding Officer Baker skating, but that Officer Baker also indicated to Plaintiff that "he had been 'skating' and would correct the problem." (Pa176). On July 8, 2017, Lieutenant Prince asked Plaintiff to submit a second Special Report, indicating that Plaintiff "may have misunderstood what [Prince] was requesting" as Lieutenant Prince "was inquiring if [Plaintiff] use[d] other officer's opinions in conducting [Plaintiff's] evaluations of officers," as previously requested in the prior email. (Pa654).

Lieutenant Prince's emails on July 1, 2017 and July 8, 2017 did not direct Plaintiff to change Plaintiff's Evaluation. (Pa654). Plaintiff was not disciplined as a result of SI 17-027 (Pa385). As admitted by Plaintiff, he merely had to answer questions.

Plaintiff conceded in his deposition that it was possible that, in conducting Officer Baker's Evaluation, Plaintiff's reliance on other peoples'

perceptions or opinions could result in misinterpretations and mischaracterizations. (Pa384).

Plaintiff met with Mr. Lindsay and Ms. Maloney again on August 2, 2017, more than two years prior to the filing of Plaintiff's Complaint. He reported to Mr. Lindsay, for a second time, that he felt he was being "retaliated against" for "speaking out" against Officer Baker. (Pa714).

While Plaintiff claims that the investigation related to Officer Baker's Evaluation was retaliatory, Plaintiff also admits that Mr. Lindsay advised Plaintiff on August 2, 2017 that the conversations between Plaintiff, Mr. Lindsay, and Ms. Maloney were confidential and that Mr. Lindsay did not report any of their conversations about Officer Baker to the Administration. (Pa178; Pa714). In an email from Mr. Lindsay to Plaintiff, Mr. Lindsay specifically stated, "the supervisory investigation could not be connected to the information you shared with me during the workplace investigation because no one outside of my office had access to the interview transcript." (Pa178). Instead, Mr. Lindsay stated to Plaintiff that SI 17-027 resulted from a complaint from Officer Baker about the Evaluation. (Pa178). Plaintiff admitted in his deposition he does not have any evidence indicating Mr. Lindsay spoke to the Administration regarding Plaintiff's comments about Officer Baker. (Pa385).

Reporting Excessive Use of Force – SI 17-036

Plaintiff next alleges he was subject to retaliation on or around June 28, 2017, more than two years prior to the filing of Plaintiff's Complaint, after Plaintiff and Sergeant Robert Leininger ("Sergeant Leininger") reported their concerns of another officer's excessive use of force, which Plaintiff claims is protected conduct. (Pa180; Pa387). Plaintiff indicated that an inmate, who was handcuffed, was "running his mouth" and the officer thereafter slammed the inmate to the ground. (Pa180; Pa387). In response to Plaintiff's and Sergeant Leininger's reports, SI 17-036 was opened. (Pa182). Plaintiff testified all use of force incidents gets reviewed. (Pa388).

Then-Sergeant First Class Prince asked Plaintiff and Sergeant Leininger to submit Special Reports indicating why they allowed the officer, who they alleged to have used excessive force, to escort, by himself, the inmate against whom force was used, which Plaintiff admits doing. (Pa189; Pa389). Then-Sergeant First Class Prince indicated in his Special Report that both Plaintiff and Sergeant Leininger "did not act appropriately" by risking additional excessive force in allowing the accused officer to escort the inmate alone. (Pa709). Ultimately, it was found that the officer who used force handled the incident consistent with department policies and procedures. (Pa192). Plaintiff was not issued any discipline as a result of SI 17-036. (Pa389).

Harassment of Inmate M.C. – IAI 17-13

Plaintiff next alleges that on or around August 2, 2017, more than two years prior to the filing of Plaintiff's Complaint, Plaintiff received notice that IAI 17-13 had been opened on or around July 24, 2017 for harassing an inmate. (Pa200). This IAI was the result of multiple complaints by two inmates who claimed that Plaintiff and another officer moved one inmate from his cell to a different cell due to a broken sink, and denied an inmate his full recreation time. (Pa196; Pa202 to Pa203). Plaintiff was interviewed on August 15, 2017 about the inmates' complaints. (Pa205).

Plaintiff and the other officer were both notified on September 18, 2017, that the investigation was not sustained. (Pa211). Plaintiff admitted that he was not disciplined as a result of IAI 17-13, but training was recommended regarding inmates' recreational time. (Pa208; Pa415).

Despite the finding that IAI 17-13 was not sustained, Plaintiff claims he should have been exonerated from any purported wrongdoing. (Pa415). Plaintiff requested a meeting with Executive Undersheriff John Maher ("Undersheriff Maher") on or around September 20, 2017 to discuss the findings of the investigation. (Pa658). On or around December 5, 2017, Plaintiff met with Undersheriff Maher and Warden Lombardo, at which time Plaintiff was advised that the investigation was found to be "not sustained" as

opposed to “exonerated” because Plaintiff failed to charge the inmate with breaking the sink. (Pa417). According to Plaintiff’s deposition testimony, he could not have charged the inmate with breaking the sink because he “didn’t see him do it” (Pa417). Plaintiff conceded there was nothing improper about IAI 17-13 but for the amount of time it took Plaintiff to meet with Executive Undersheriff Maher. (Pa417). However, Plaintiff’s own email indicates he was aware Undersheriff Maher was out on leave during this time. (Pa213).

“Harassing” Email About Moving Inmates

Plaintiff claims that he received purportedly “harassing” emails from Lieutenant Prince regarding inmates’ in-house moves. In or around August 10, 2017, Plaintiff sent an email to seven colleagues who were sergeants about moving inmates, and copied Lieutenant Prince in the email. (Pa217). Plaintiff’s email indicated to the sergeants that he did not see a reason for inmates to be moved from their assigned cells to another cell floor as it requires “way too many steps.” (Pa217). Plaintiff’s email also indicated moving an inmate from their assigned cell to another cell floor had been “addressed with his squad.” (Pa217).

Plaintiff thereafter received an email, more than a year prior to the filing of Plaintiff’s Complaint, that his attempt to provide procedural directions to other sergeants violated Standard Operating Procedure (“SOP”) 100 as it

relates to the dissemination of information to employees so that employees have a clear understanding of what is expected of them. The email indicated that Captain Magill and Lieutenant Prince would meet with Plaintiff to discuss the parameters of SOP 100. (Pa706). Another email was thereafter sent by Lieutenant Prince to all sergeants, more than a year prior to the filing of Plaintiff's Complaint, to make them aware that moving an inmate from a floor spot in a cell to another cell and still remain on the floor is an acceptable practice. (Pa218).

Plaintiff's Tardiness

On or around September 17, 2017, Plaintiff was thirty minutes late to work, but compensated the missed time with his own reserve of comp time. Plaintiff alleges that for being late he was issued Guardian Tracking entry on October 4, 2017, more than a year prior to the filing of Plaintiff's Complaint. Plaintiff admitted that he arrived late to work because he overslept. (Pa391).

Swearing at Inmate D.L. – IAI 18-08

Plaintiff alleges that on or around February 8, 2018, he was notified that IAI 18-08, was being opened against him for another complaint of Plaintiff harassing inmates. This complaint stemmed from an incident wherein Plaintiff was alleged to have sworn at an inmate. (Pa220). Inmate D.L. complained that Plaintiff referred to him as a "fag" and a "pussy" and that Plaintiff told him to

“stop acting like a pussy” when the inmate was crying after allegedly having feces and urine thrown at him by another inmate. (Pa220; Pa222).

Plaintiff was advised on or around February 20, 2018, more than a year prior to the filing of Plaintiff’s Complaint, that IAI 18-08 was not sustained. However, Plaintiff was found to have violated a Standard of Conduct/Unbecoming Conduct for referring to an entire housing unit of inmates as “pussies,” *which Plaintiff admits*. (Pa224; Pa227).

Plaintiff thereafter had additional interactions with Inmate D.L. where Plaintiff told another officer to “watch what [the officer] says” because the officer “might get in trouble,” essentially indicating to the officer that Inmate D.L. would file a complaint against the officer if the office was not careful in Inmate D.L.’s presence, and where Plaintiff wrote up Inmate D.L. for having a torn bedsheet. (Pa418). Warden Lombardo met with Plaintiff on February 27, 2018 to review Plaintiff’s encounters with Inmate D.L., at which time Warden Lombardo directed Plaintiff to avoid contact with Inmate D.L. except in emergent circumstances. (Pa418). Plaintiff admitted that he was told to not have any contact with D.L. in order to avoid additional problems. (Pa423).

However, on March 2, 2018, Plaintiff commenced a “shakedown” in Dorm 5 where Inmate D.L. was housed as rolling papers were found in that

dorm. Plaintiff was immediately told to “remove himself from this shakedown.” (Pa642).

On March 6, 2018, Warden Lombardo authored a Special Report to Undersheriff Maher indicating that Warden Lombardo was “extremely concerned due to the fact that [Plaintiff] was to avoid contact” with the Inmate D.L. but continued to interact with him anyway. (Pa641).

Plaintiff was then advised that a supplemental interview regarding IAI 18-08 was being conducted and, during an interview, Plaintiff was asked a series of questions regarding the shakedown and other issues with Inmate D.L. During the interview, Plaintiff was advised that Inmate D.L. had made a complaint against Plaintiff to the Middle Township Police Department which was transferred to the Cape May County Prosecutor’s Office due to the fact that the investigation may be categorized as a bias incident as D.L. is a member of a protected class. (Pa230; Pa641 to Pa643).

Plaintiff thereafter made requests for Inmate D.L. to be transferred to another jail facility which Lieutenant Prince forwarded to the Administration. (Pa700 to Pa701). Inmate D.L. was not moved, which Plaintiff alleges was an act of retaliation because the inmate was making false allegations against Plaintiff and the Administration purportedly allowed it to happen. (Pa422). Plaintiff admitted he does not know the process for moving an inmate to

another facility and is not involved at all in the decision-making process. Further, Plaintiff conceded that the Administration's decision not to move Inmate D.L. could have been done for reasons having nothing to do with Plaintiff's preferences. (Pa422).

According to Captain Magill and Warden Lombardo, inmates typically are not moved between facilities. (Pa588; Pa467). Warden Lombardo specifically testified that inmates are not moved simply for making "bogus complaints" being made by the inmate. (Pa467).

On or around March 21, 2018, more than a year prior to the filing of Plaintiff's Complaint, Plaintiff met with Warden Lombardo. Plaintiff was advised during the meeting that as a result of IAI 18-08, wherein he was found to have violated a Standard of Conduct/Unbecoming Conduct for referring to an entire housing unit of inmates as "pussies," *which Plaintiff admits* (Pa224; Pa227), Plaintiff would receive a suspension for 10 days. (Pa232). After a hearing, Plaintiff was issued a Final Notice of Disciplinary Action for eight 12-hour days. (Pa234). As of the date of his deposition, Plaintiff was "fighting" the discipline. (Pa423).

Warden Referring to Plaintiff as a "Loose Cannon"

Plaintiff complains that, during the time frame in which Plaintiff's interactions with Inmate D.L. were under investigation, Warden Lombardo

authored the above-referenced Special Report dated March 6, 2018. Warden Lombardo's Special Report referred to Plaintiff as a "loose cannon," called Plaintiff's conduct "medieval," requested that Plaintiff's constant defiant behavior be addressed, and raised the possibility that Plaintiff be submitted to a mental health examination, which was never done. (Pa641 to Pa643; Pa538).

Plaintiff alleges that these statements were due to Warden Lombardo's "problems" with Plaintiff's "protected conduct and retaliation for Plaintiff's political preferences." (Pa80). However, between December 2016 through July 2017, Plaintiff had four other IAIs related to inmate complaints of harassment in addition to the one involving Inmate D.L. (Pa237 to Pa242). In addition, prior to being promoted to Sergeant, Plaintiff was the subject of multiple other IAIs, some of which involved harassment, as noted in a Special Report authored by Warden Lombardo on November 5, 2013, which noted "serious concerns" about Plaintiff's "workplace personality." (Pa645 to Pa646).

Officer Baker's Request for Time Off – SI 18-26

Plaintiff next alleges that on May 14, 2018, Officer Baker, the same officer who complained of harassment and bullying by Plaintiff's squad, and whose Evaluation Plaintiff authored, was off from work which Plaintiff recorded in the system as a "sick day" rather than a "personal day" as requested by Officer Baker. (Pa244).

On or around May 24, 2018, more than a year prior to the filing of Plaintiff's Complaint, Plaintiff was advised that SI 18-026 was being opened regarding Officer Baker's use of a sick day. Plaintiff and Officer Baker were requested to submit Special Reports. (Pa244 to Pa245).

CMCSO employees were encouraged to use personal days as opposed to sick time. However, scheduling had become difficult due to officers all wanting to use personal days at the end of the calendar year. The purpose of encouraging the use of personal days earlier in the year upon officer requests was to help Sergeants manage the schedule toward the end of the year. Lieutenant Prince testified that generally personal days are not denied. (Pa857).

Plaintiff alleges that the schedule was "locked" by Captain Magill and therefore Plaintiff "did not have the ability to approve" Officer Baker's time as a personal day. (Pa244 to Pa245). However, Plaintiff admits that he had approved two personal days for other employees while the schedule was locked (Pa133; Pa312). There had been various other documented instances when personal days were issued both when the schedule was locked and when officers were sick, including instances approved by Plaintiff himself. (Pa247 to Pa252).

No discipline resulted from SI 18-26, as Lieutenant Prince only recommended a Guardian Tracking entry. (Pa245).

Plaintiff's Yearly Evaluation

Plaintiff next alleges that on or around June 14, 2018, more than a year prior to the filing of Plaintiff's Complaint, Plaintiff received his yearly Sergeant's evaluation from Lieutenant Vincent Terinoni ("Lieutenant Terinoni") which included a negative "NS" notation involving SI 17-036 for reporting excessive force. Plaintiff further indicates that there was a "NS" entry on the evaluation stating Plaintiff met with Undersheriff Maher and Warden Lombardo in reference to demeanor toward certain inmates. (Pa81 to Pa82).

Harassment Survey³

On or around June 14, 2018, more than a year prior to the filing of Plaintiff's Complaint, Plaintiff reported in an Annual Harassment Survey that he was the "victim of harassment in the workplace" and submitted a Special Report to Undersheriff Maher on or around June 28, 2018 setting forth all the above-referenced incidents which he claims were retaliatory. (Pa169; Pa678 to Pa684). Plaintiff's seven-page June 28, 2018 Special Report set forth every single one of the above SIs and IAIs that had occurred up until that point, including SIs 17-027, 17-036 and 18-26, and IAIs 17-13 and 18-08, as well as the emails from Lieutenant Prince and Plaintiff's yearly evaluation, all of

³ Plaintiff is not appealing the trial court's determination that this harassment survey is not protected conduct. (Pb2).

which Plaintiff claimed were retaliatory. Plaintiff stated in the Special Report that he believed the retaliation was the result of his meetings with Mr. Lindsay in 2017. (Pa684).

Investigating Captain Magill – IAI 18-26

In or around September 2018, IAI 18-26 was opened against Plaintiff and other Sergeants who had conducted their own investigation into Captain Magill while they were on-duty and responsible for supervising their squads. (Pa269 to Pa270). Plaintiff *admitted* that Sergeant Leininger had shown Plaintiff indicating that Captain Magill left early on several days. Plaintiff *admitted* he cross-checked the Captain's time in the time keeping system. (Pa275). Sergeant Leininger reported to the County Prosecutor that Captain Magill was "stealing time." Plaintiff was interviewed. (Pa274 to Pa275).

IAI 18-26 determined that Plaintiff and the other Sergeants failed to report to the Administration what they believed was a violation by the Captain, as is required by CMCSO policy, and for conducting an unauthorized investigation during working hours. (Pa281 to 282; Pa755 to Pa758). In addition, Plaintiff was not truthful when stating his involvement in the investigation. (Pa281 to Pa282).

The IAI was sustained (Pa284) and after a hearing, Plaintiff was charged with Conduct Unbecoming of a Public Employee, Neglect of Duty, and Other

Sufficient Cause including but not limited to: Conduct that violates the CNMCSO Rules and Regulations Standard of Conduct, Neglect of Duty, and Obedience to Laws and Regulations. (Pa286 to Pa287). On July 2, 2020, Plaintiff received a 25-day suspension. (Pa286).

Despite being found guilty at a hearing, and despite admitting to involvement in the investigation, Plaintiff alleges the charges are “frivolous” and “entirely false.” (Pa83).

Wrongful Inmate Detention – IAI 18-29

In or around October 24, 2018, IAI 18-29 was opened regarding an inmate being detained when she should have been released. (Pa423; Pa254; Pa256). As a Sergeant, it was Plaintiff’s responsibility to sign off on the processing paperwork of an inmate “saying that the inmate is good to come to jail.” (Pa423; Pa259). Plaintiff testified he advised Lieutenant Terinoni of the mistake. (Pa424). Plaintiff alleges Lieutenant Terinoni waited until the courts opened for guidance. (Pa424). Plaintiff *admitted* the inmate should not have been detained and that he violated a policy/procedure. (Pa423 to Pa424). It was recommended Plaintiff receive a 10-day suspension for Neglect of Duty which he is currently “fighting.” (Pa424; Pa261).

Plaintiff alleges the amount of suspension time and the fact that Lieutenant Terinoni was not disciplined “to the best of Plaintiff’s knowledge”

is evidence of retaliation. (Pa424). Plaintiff concedes that by the time Lieutenant Terinoni was made aware, the inmate was already detained improperly due to Plaintiff's error. (Pa424).

Plaintiff's Time Off – SI 19-17

In or around March 2019, Plaintiff was the subject of SI 19-17 (Pa265) regarding Plaintiff requesting and approving his own time off and calling in overtime for coverage. (Pa425 to Pa426). Plaintiff admitted he approved his own time off. (Pa265). The day after Plaintiff departed work early approving his own time and causing overtime, Plaintiff was asked by Capitan Magill to submit a Special Report. (Pa427). CMCSO employees are not permitted, by policy, to approve their own time. (Pa263; Pa265; Pa570). Plaintiff conceded he does not know what the policy says. (Pa426). Rather, Plaintiff alludes it was "common practice" for Sergeants to approve their own time off during that time frame, while still admitting it was not necessarily permitted. (Pa426). Plaintiff was issued a neutral Guardian Tracking entry as a result of SI 19-17. (Pa426; Pa861).

Captain Magill testified that the issue in this instance was twofold: The first issue was that Plaintiff took comp time after starting his shift and created overtime without approval, which would have been required, and the second issue was that Plaintiff approved his own time which he is not permitted to do.

(Pa595). Captain Magill testified that when a Sergeant needed to leave work on sick time, they would notify the other Sergeant on duty who would then put the early departure in the scheduling system. (Pa574). The Sergeant who put the time into the system would then notify a Lieutenant overtime is being called in. (Pa574). Captain Magill testified that when a Sergeant needed to leave work using personal time and there was already overtime on the schedule, the Sergeant would need to get approval from Captain Magill or Warden Lombardo. (Pa574). Despite Plaintiff alleging that other Sergeants approved their own time off, Plaintiff conceded he does not know whether those same Sergeants were issued Guardian Tracking entries for doing so. (Pa426).

Captain Magill advised Plaintiff to write a Special Report which Plaintiff alleges was “retaliation” for Plaintiff attending a Freeholders meeting and sent an email documenting his “feelings” and requesting a meeting with Undersheriff Maher regarding Captain Magill’s “demeanor” when he was asked to submit a Special Report. (Pa267; Pa427). Plaintiff testified he was one of many CMCSO personnel present at the Freeholders meeting, however, Captain Magill was not present to Plaintiff’s knowledge. (Pa428).

Personal Holidays

In the fall of fall of 2019, Plaintiff's requests for personal holidays were purportedly ignored for a period of time. (Pa716).

Plaintiff Surveilled as a Rover and Meal Breaks

In early 2020, Plaintiff received two written warnings for his excessive meal breaks and not performing his duties as a rover. (Pb17; Pa971).

Judge Pickering's Opinion

The trial court below granted Defendants' motion for summary judgment in an order dated June 25, 2024. (Pa953). The court determined that two of the four claimed incidents of protected conduct that are the subject of this appeal were not protected conduct pursuant to CEPA: Plaintiff's objection to and report of Officer Baker's Evaluation, and Plaintiff's report that Officer Baker was involved in a bar fight. (Pa980 to Pa986). While the trial court determined that Plaintiff's reports about use of excessive force and that Captain Magill was stealing time were protected conduct (Pa986 to Pa987), the allegations of retaliation did not satisfy the criteria for adverse employment action (Pa987 to Pa1003).

Defendants argued that Plaintiff's claims were barred by the statute of limitations. The trial court agreed. As the events surrounding Officer Baker's evaluation occurred between May 2017 and June 2017, and the Complaint was

filed in August 2019, those incidents of alleged protect conduct are time-barred under the one-year CEPA statute of limitations. Likewise, Plaintiff's complaint about an officer's use of excessive force was also in June 2017, and is time-barred. Plaintiff was clearly aware he perceived the incidents to be retaliatory because he reported same to Jeffrey Lindsay at the time of occurrence. As such, the only the count alleging protected activity of reporting that Captain Magill was stealing time was filed within the limitations period. As the trial court determined there was no adverse employment action, the continuing tort doctrine is inapplicable. (Pa1005 to Pa1006).

Finally, Judge Pickering determined that there was no basis for punitive damages. (Pa1010).

LEGAL ARGUMENT

POINT I STANDARD OF REVIEW

Summary judgment is proper "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 judgment or order as a matter of law." R. 4:46-2(c). When deciding a motion for summary judgment, the trial court should consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a

rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party.” Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). The “mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.” Ibid. (citation omitted).

Further, when a “record is barren of any evidence...other than [Plaintiff’s] own self-serving assertion,” it is “clearly insufficient to create a question of material fact” necessary to defeat a motion for summary judgment. Martin v. Rutgers Cas. Ins. Co., 346 N.J. Super. 320, 323 (App. Div. 2002).

POINT II
PLAINTIFF CANNOT ESTABLISH THAT
DEFENDANTS VIOLATED CEPA

Plaintiff cannot establish any viable claim of retaliation pursuant to CEPA as he fails to demonstrate sufficient evidence to support a *prima facie* showing. As such, Plaintiff’s claim fails as a matter of law.

CEPA provides in relevant part:

An employer shall not take any retaliatory action against an employee because the employee does any of the following:

- a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer, or another employer, with whom there is a business relationship, that the employee reasonably believes:

(1) is in violation of a law, or a rule or regulation promulgated pursuant to law...

* * *

c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:

(1) is in violation of a law, or a rule or regulation promulgated pursuant to law...; [or]

* * *

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

[N.J.S.A. 34:19-3(a) and (c).]

CEPA defines actionable retaliation as “the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment.” N.J.S.A. 34:19-2(e). The statute further states that “[u]pon a violation of any of the provisions of this act, an aggrieved employee or former employee may, within one year, institute a civil action in a court of competent jurisdiction.” N.J.S.A. 34:19-5; Green v. Jersey City Bd. of Educ., 177 N.J. 434, 446 (2003).

“CEPA is a civil rights statute and is analyzed using the framework for retaliatory discharge claims under Title VII and the New Jersey Law Against Discrimination (“LAD”).” Cokus v. Bristol Myers Squibb Co., 362 N.J. Super.

366, 377 (2002), certif. denied, 178 N.J. 32 (2003) (citing Abbamont v. Piscataway Twp. Bd. Of Educ., 138 N.J. 405 (1994)); Kolb v. Burns, 320 N.J. Super. 467 (App. Div. 1999). This framework requires that Plaintiff first establish a *prima facie* case of retaliation. Id. at 479 (citing Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998)).

To establish a *prima facie* case of retaliation under CEPA, a plaintiff must show: “(1) that he or she reasonably believed that his or her employer’s conduct was violating either a law or a rule or regulation promulgated pursuant to law; (2) that he or she performed the 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, supra, at 476.

When and if the plaintiff establishes a *prima facie* case of a CEPA violation, “the burden of persuasion is shifted to the employer to rebut the presumption of [retaliation] by articulating some legitimate [non-retaliatory] reason for the adverse employment action.” Kolb, supra, at 478 (citing Andersen v. Exxon Co., 89 N.J. 539, 550 (1990)). Thereafter, the plaintiff has “the ultimate burden” of proving that the employer’s stated reasons for its employment action were “a pretext for the [retaliatory] action taken by the employer.” Ibid.

A. Protected Activity

As the summary judgment hearing below, Plaintiff argued that he engaged in four instances of protected conduct: (1) objected to changing Officer Baker's evaluation and reported same to Mr. Lindsay; (2) reporting to Mr. Lindsay that Officer Baker was in an off-duty bar fight which resulted in a black eye; (3) reporting excessive force by another officer; and (4) reporting that Captain Magill was stealing time.⁴ The trial court properly determined that Plaintiff's reports relating to Officer Baker were not protected activity. While the trial court determined that Plaintiff's reports relating to excessive force and relating to Captain Magill's time are protected conduct (Pa986 to Pa987), it is of no moment because there was no subsequent adverse employment action, discussed in more detail below.

The trial court did not err in determining that Plaintiff's reports relating to Officer Baker were not protected conduct. Under CEPA, the scope of

⁴ Plaintiff did not argue below that his report to Mr. Lindsay that Officer Baker was arrested while working as a Records Clerk was protected conduct, and accordingly the trial court did not address same. The trial court opinion specifically notes that Plaintiff "does not assert that it was protected conduct to report to Lindsay that Baker had been arrested while working as a file clerk." (Pa983). However, on appeal, Plaintiff argues that the same is protected conduct that the trial court simply ignored. (Pb25 to Pb28). Plaintiff does not cite to any evidence that he raised this issue before the trial court. As such, the issue cannot be raised for the first time on appeal. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (holding that appellate courts will decline to consider issues not properly presented to the trial court when an opportunity for such presentation is available).

protected activities 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(a) and (c).

In the instant matter, in order to meet the *prima facie* burden with regard to this particular claim, Plaintiff must show that (1) he reasonably believed that the perceived “special treatment” of Officer Baker by the Administration violated a law, rule, or regulation promulgated pursuant to law, and that he reasonably believed that Administration’s failure to investigate Officer Baker’s alleged involvement in a bar fight similarly violated a law, rule, or regulation; (2) he objected to same; (3) he was subject to an adverse employment action; and (4) there was a causal connection between his protected activity and the adverse employment action. See Kolb, supra, 320 N.J Super. at 476.

In proving a *prima facie* case, a plaintiff need not show that an employer actually violated the law or a clear mandate of public policy; however, the plaintiff must show that he or she “reasonably believed” that to be the case. Dzwonar v. McDevitt, 177 N.J. 451, 467 (2003). Plaintiff must hold such an “objectively reasonable belief...at the time of objection.” Mehlman v. Mobil Oil Corp., 153 N.J. 163, 193 (1998).

Here, Plaintiff alleges that he engaged in protected conduct when he reported to Mr. Lindsay on June 22, 2017 that he had been asked to change Officer Baker's Evaluation and that Officer Baker received "special treatment." Plaintiff's conduct fails to qualify as protected activities pursuant to a *prima facie* CEPA claim.

The Evaluation authored by Plaintiff stated that it had come to Plaintiff's attention that Officer Baker was "skating," or trying to get out of work. Lieutenant Campbell returned the Evaluation to Plaintiff with a note asking him for clarification: "Bill, Regarding the last 2 lines of your comments; 1. Did you witness Ofc. Baker 'skating'? Evals are your observations and 2. Did you document your conversation regarding the issue? Please adjust accordingly. LT." (Pa648).

The trial court properly determined that a reasonable factfinder could interpret the note as a request for clarification to strengthen the comment about Officer Baker skating, not a directive to improperly change the Evaluation. (Pa980). The trial court also noted that Plaintiff admitted in his summary judgment brief that Plaintiff had, in fact, spoken to Officer Baker directly and that Baker had admitted to skating, yet the same was not initially included in the Evaluation, warranting clarification. As such, the trial court concluded that

it was not protected conduct for Plaintiff to object to clarifying the Evaluation, or to report the same to Mr. Lindsay. (Pa981).

Plaintiff further alleges that he engaged in protected conduct when, during the same meeting on June 22, 2017, he reported to Lindsay that Officer Baker had previously been involved in an off-duty bar fight. Plaintiff claims he reasonably believed that Officer Baker had a duty to report the same to the Administration, but failed to do so.⁵ (Pa983).

CMCSO policies and procedures do not require employees to report physical altercations to the Administration unless the altercation resulted in a physical injury that prevented the officer from fulfilling their duties. (Pa461; Pa583; Pa844).

As such, the trial court concluded that no reasonable factfinder could have believed that Plaintiff reported what he believed to be a violation a law, rule, regulation, or mandate of public policy. The CMCSO policies “do not require employees to report off-duty physical altercations where there is no police involvement unless the altercation resulted in injury that prevented the Officer from performing their duties.” (Pa984). Surely Plaintiff, who was employed at CMCSO since 2004 and was a supervisor, was aware of same.

⁵ The trial court noted that Plaintiff’s opposition to Defendants’ summary judgment motion admits that the CMCSO “did not know of the bar fight, and that Baker violated certain regulations and policies by not telling the Department.” (Pa984).

The trial court agreed. Furthermore, CEPA is not intended to protect employees who report minor infractions or violations of internal policies and procedures. (Pa984 to Pa985 (citations omitted)). The trial court concluded that “[r]eporting that a co-employee was in an off-duty bar fight is not the type of conduct intended to be protected by CEPA.” (Pa985).

Regarding Plaintiff’s claim that his report to Mr. Lindsay that Officer Baker had been arrested while working as a Records Clerk was protected activity, which was not raised before the trial court, supra note 4, the report was not protected conduct. Plaintiff’s claims that the Administration was covering up Officer Baker’s arrest is nothing more than Plaintiff’s lack of knowledge of an investigation. Plaintiff admitted that his only knowledge about Officer Baker’s arrest was hearing about it “through the grapevine.” According to Plaintiff, the incident was “swept under the rug.” (Pa383). Plaintiff conceded that just because he was not personally aware of an investigation does not mean the incident was “swept under the rug.” (Pa383). Plaintiff was not reporting what he “reasonably believed” was a violation of law. Instead, Plaintiff was simply guessing that no action was taken because Plaintiff was not apprised of same. This is not protected conduct, even if it had been raised during the summary judgment proceeding below.

Ultimately, all of Plaintiff's CEPA claims fail, including those relating to Officer Baker which the trial court did not deem to be protected conduct as well as those relating to reporting the use of excessive force and reporting about Captain Magill's time which the trial court determined could be considered to be protected conduct, because there is no evidence of adverse employment action.

B. Plaintiff Cannot Prove That He Suffered Adverse Employment Actions as a Result of Engaging in Any Protected Conduct

Plaintiff has no proof that he suffered any adverse employment action after engaging in any purported protected activity. The adverse employment actions Plaintiff alleges do not rise to the level of adverse employment actions under CEPA.

CEPA defines retaliatory employment 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). "Adverse employment action" may include such things as "making false accusations of misconduct, giving negative performance reviews, issuing an unwarranted suspension, and requiring pretextual mental-health evaluations." Donelson v. DuPont Chambers Works, 206 N.J. 243, 257-58 (2011). Adverse employment action need not be a single discrete action, but

can be “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 pattern of retaliatory conduct.” Green v. Jersey City Bd. of Ed., 177 N.J. 434, 448 (2003).

However, “not everything that makes an employee unhappy is an actionable adverse action.” Cokus v. Bristol Myers Squibb Co., supra, 362 N.J. Super. at 378 (citation omitted). “[I]n 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) (quoting Cokus, 362 N.J. Super. at 386) (emphasis added). Incidents that cause a “bruised ego or injured pride,” Beasley v. Passaic County, 377 N.J. Super. 585, 607 (App. Div. 2005), or that make an employee’s job “mildly unpleasant” but do not have a substantial impact on the terms and conditions of employment, Hancock v. Borough of Oaklyn, 347 N.J. Super. 350, 360 (App. Div. 2002), are insufficient to prove actionable retaliation.

1. Supervisory Investigations, Internal Affairs Investigations, and Discipline

Plaintiff alleges that after his complaints about Officer Baker he was subject to investigations and discipline. A review of the record, however, reveals that a number of the investigations involving Plaintiff were brought

about by complaints from inmates or other employees, wholly unconnected to Plaintiff's reporting and many of which were required to be investigated per CMCSO's policies and procedures. In addition, a number of the investigations did not result in any discipline. Finally, in the instances where he was disciplined, Plaintiff does not, and cannot, refute that he engaged in the conduct that was the basis for his discipline. In fact, he admits to each and every one of the acts for which he was disciplined.

IAIs do not rise to the level of adverse employment actions "absent allegations that it 'impacted on the employee's compensation or rank' or was 'virtually equivalent to discharge.'" Fraternal Ord. of Police, Lodge 1 v. City of Camden, 842 F.3d 231, 241 (3d Cir. 2016); see also Dillard v. Morris Cnty. Prosecutor's Off., 2020 U.S. Dist. LEXIS 152617 at *25 (D.N.J. Aug. 24, 2020) (finding that IAIs do not constitute adverse employment action where there was no impact to compensation or rank or was equivalent to a discharge.)

Further, "where [an] affected party does not deny committing an infraction that resulted in discipline, the discipline cannot be considered "proscribed reprisal." Beasley, supra, 377 N.J. Super. at 607 (App. Div. 2005). In addition, where a Plaintiff is "afforded a hearing and represented by counsel, plaintiffs 'cannot claim that...substantiated disciplinary charges and resulting brief suspensions from work [are] retaliatory.'" Ibid.

(citing Hancock, supra, at 361 (App. Div. 2002), appeal dismissed as improvidently granted, 177 N.J. 217 (2003)).

At CMCSO, IAIs can result in a finding of unfounded, exonerated, not sustained, or sustained. (Pa468).⁶ SIs are fact finding investigations conducted at a level below IAIs. (Pa152; Pa360). The purpose of initiating SIs is to keep consistent, chronological records regarding investigations. (Pa152; Pa154 to Pa155). SIs on their own are not discipline; however, they can result in discipline in the form of a Guardian Tracking entry, a counseling notice, or a written warning. (Pa155). Guardian Tracking memorializes performance of officers, training, and other issues concerning to the Sheriff's Office. Guardian Tracking entries are not necessarily discipline but can be positive, neutral, or negative. (Pa160).

Plaintiff claims the following incidents were "retaliation":⁷

- SI 17-027, opened on July 1, 2017, relating to the Evaluation Plaintiff performed of Officer Baker on or around March 28, 2017. Plaintiff advised Mr. Lindsay of SI 17-027 on July 3, 2017, indicating that Plaintiff felt the investigation was "retaliation" for Plaintiff previously speaking to Mr. Lindsay about Officer Baker. As part of SI 17-027, Plaintiff was asked to author two Special Reports regarding the comment in the Evaluation that was based upon information received from other

⁶ See supra note 2.

⁷ As the incidents of alleged retaliation are set forth in detail in the Statement of Facts above, Defendants will summarize the incident and the resulting discipline, if any.

officers. There was **no discipline** issued as a result of SI 17-027. Plaintiff conceded he simply had to answer questions.

- SI 17-036, opened on or around June 28, 2017, related to Plaintiff's and another officer's reports concerns about another officer's excessive use of force. All use of force incidents are reviewed. Plaintiff and the other reporting officer were asked to submit Special Reports indicating why they allowed the offending officer to escort the inmate against whom the force was used by himself, which Plaintiff admits to doing, and which was determined to be inappropriate under the circumstances. There was **no discipline** as a result of SI 17-036.
- IAI 17-13, opened on or around August 2, 2017, against Plaintiff and another officer for harassing an inmate resulting from complaints made by two inmates. All complaints of inmate harassment by officers are investigated. Plaintiff and the other officer were notified on September 18, 2017, that IAI 17-13 was **not sustained**. Plaintiff was advised that the investigation was found to be "not sustained" as opposed to "exonerated" because Plaintiff failed to charge the inmate with breaking the sink. There was **no discipline** from this investigation.
- On September 17, 2017, Plaintiff was thirty minutes late to work, and **admitted** to the same, and received a **neutral Guardian Tracking** entry on October 4, 2017.
- IAI 18-08, opened on or around February 8, 2018, against Plaintiff for swearing at an inmate. This investigation was **generated by an inmate's complaint**. Plaintiff was advised on or around February 20, 2018 that the investigation of harassment against him was not sustained, however, Plaintiff was found to have violated a Standard of Conduct/Unbecoming Conduct for referring to an entire housing unit of inmates as "pussies," which Plaintiff admits. Plaintiff had been directed to avoid contact with the complaining inmate relating to

multiple previous complaints. On or around March 2, 2018, rolling papers were found in the area where the complaining inmate was housed. Plaintiff began to conduct a shakedown and was then contacted by Captain Magill who advised Plaintiff not to assist in the shakedown to avoid further complaints from the inmate. Plaintiff was then advised that a supplemental interview regarding IAI 18-08 was being conducted and Plaintiff was asked a series of questions regarding the shakedown and other issues with the inmate. Plaintiff thereafter made requests for the inmate to be transferred to another jail facility. The inmate was not moved. Plaintiff conceded that the Administration's decision not to move the inmate could have been done for reasons having nothing to do with Plaintiff at all. On or around March 21, 2018, Plaintiff was advised that as a result of IAI 18-08, he was receiving a suspension for 10 days. After a local **hearing**, Plaintiff was issued a Final Notice of Disciplinary Action for an **8-day suspension**. Plaintiff **admitted** he called an entire housing unit of inmates "pussies" which was the basis for the discipline.

- SI 18-026, opened in or around May 24, 2018, relating to Officer Baker's request for a personal holiday when he was feeling sick. Plaintiff put the time in as "sick time" despite the request and despite CMCSO's normal practices. Plaintiff alleges part of his reasoning in denying the use of a personal holiday was that the schedule was "locked" by Captain Magill and therefore Plaintiff "did not have the ability to approve" the time as a personal day. Interestingly, however, a review of Plaintiff's past approval of personal holiday requests revealed that Plaintiff approved two personal holidays for other employees while the schedule was locked. There was **no discipline** from this investigation.
- IAI 18-26, opened in or around September 2018, due to Plaintiff and other Sergeants conducting their own investigation into Captain Magill while they were on-duty. Plaintiff **admitted** to the conduct for which he

was disciplined, and was found guilty at a **hearing**. Plaintiff was disciplined with a **25-day suspension**.

- IAI 18-29, opened on or around October 24, 2018, after an inmate was detained when she should have been released pursuant to a court order. Plaintiff **admitted** the inmate should not have been detained and that he violated a policy/procedure. Plaintiff's priority was not the release of the woman who was detained in violation of a court order as Plaintiff was found to be using the internet for personal reasons during this time. It was recommended Plaintiff receive a **10-day suspension** for Neglect of Duty which he is currently fighting, despite admitting to the conduct for which he was disciplined.
- SI 19-17, in March 2019, based on Plaintiff requesting and approving his own time off creating overtime. Plaintiff **admitted** that he approved his time off. Plaintiff was thereafter asked to submit a Special Report. Plaintiff was issued a **neutral Guardian Tracking** entry.

The IAIs and SIs did not affect Plaintiff's rank, compensation, or amount to the equivalent of a discharge. Plaintiff's four SIs resulted in no discipline. At most, one of the SIs resulted in a neutral Guardian Tracking entry. Although Plaintiff was asked to submit reports relating to the IAIs, being asked to write a report is not "adverse employment action" contemplated by CEPA. Further, where there were multiple employees being investigated, Plaintiff was not treated any differently in the handling of these investigations than other employees.

Regarding Plaintiff's four IAIs, two resulted from inmates' complaints. All inmate complaints of harassment are investigated. One IAI resulted in no

discipline as the charges against Plaintiff were not sustained. The other three IAIs resulted in discipline for conduct **to which Plaintiff admits**. The law in New Jersey is clear – where a party does not deny the conduct for which they are disciplined, the discipline cannot be considered retaliatory. Beasley, supra, at 607. Finally, three of the IAIs which resulted in discipline resulted in a local hearing. New Jersey law provides that those substantiated disciplinary charges resulting from hearings cannot be retaliatory. Ibid. (citing Hancock, supra, at 361 (App. Div. 2002), appeal dismissed as improvidently granted, 177 N.J. 217 (2003)).

Finally, after admitting to being tardy, Plaintiff received neutral, non-disciplinary Guardian Tracking entry. SIs and Guardian Tracking entries alone are not disciplinary in nature. Fraternal Ord. of Police, Lodge 1 v. City of Camden, supra, at 241; Dillard v. Morris Cnty. Prosecutor’s Off., supra 2020 U.S. Dist. LEXIS 152617 at *25 (D.N.J. Aug. 24, 2020).

2. Alleged “Harassment”

Along with above investigations, Plaintiff further alleges he was subject to “retaliation” by way of “harassment.” (Pb34). The allegations of retaliatory harassment are as follows:⁸

⁸ The allegations of retaliatory harassment are set forth in detail in the Defendants’ Statement of Facts, and are summarized here.

- On or around August 10, 2017, Plaintiff sent an email to seven Sergeants and copied Lieutenant Prince regarding inmates' in-house moves, stating that he did not see a reason why it was necessary, noting the multiple steps required to do so. Lieutenant Prince responded with directions as to the procedure for moving inmates. Lieutenant Prince then sent an email to all Sergeants with the informing them of the proper procedure for moving inmates. This, Plaintiff unreasonably claims, was harassing and embarrassing.
- On or around June 14, 2018, Plaintiff received his yearly Sergeant's evaluation from Lieutenant Terinoni. which included a negative "NS" notation relating to SI 17-036 as well as for Plaintiff's demeanor toward certain inmates.
- In 2018, when Plaintiff was being investigated for swearing at an inmate, Warden Lombardo referred to Plaintiff as a "loose cannon." However, Plaintiff had four other IAIs related to inmate complaints of harassment by Plaintiff and a prior history of IAIs some of which were also related to harassment of inmates.
- In the fall of fall of 2019, Plaintiff's requests for personal holidays were purportedly ignored for a period of time.
- In Early 2020, Plaintiff two, non-disciplinary written warnings for his excessive meal breaks and not performing his duties as a rover.

To support the claim that ostracism, heightened scrutiny, verbal displays of animus and uneven application of policy can constitute retaliatory harassment, the Appellate Division held that "[n]either rudeness nor lack of sensitivity alone constitutes harassment, and simple teasing, offhand comments, and isolated incidents do not constitute discriminatory changes in

the terms and conditions of one's employment." Shepherd v. Hunterdon Dev. Ctr., 336 N.J. Super. 395, 416 (App. Div. 2001), aff'd in part, rev'd in part, 174 N.J. 1, 803 A. 2d 611 (2002).

Similarly, in Cokus v. Bristol-Myers Squibb Co., supra, 362 N.J. Super. at 378, the Appellate Division upheld the trial court's dismissal of the plaintiff's claims on the defendant's motion for summary judgment holding that being "ostracized" and getting "an unfavorable performance evaluation" are not sufficient to establish retaliation under CEPA. The purpose of CEPA is to "prevent retaliatory action against whistle-blowers, it is not to 'assuage egos or settle internal disputes at the workplace.'" Beasley, supra, at 607 (citing Klein v. Univ. of Med. & Dentistry, 377 N.J. Super. 28, 46 (App. Div. 2005)).

In the instant appeal, the email regarding inmate in-house moves is not harassing. The reality is Plaintiff was sending out instructions to fellow Sergeants which is outside the scope of his job duties. Lieutenant Prince simply corrected same and sent out information so that all Sergeants were aligned as to the proper procedure for in-house inmate moves. Similarly, Warden Lombardo's comments about Plaintiff being a "loose cannon" were based on Plaintiff's history and reflect an opinion. Even if the Warden bruised Plaintiff's ego, that conduct cannot be deemed harassment.

Unfavorable performance evaluations are not sufficient to establish retaliation. See Cokus at 378. Even so, the notations on Plaintiff's evaluation were valid. Plaintiff allowed an officer who he "believed" to have used excessive force to continue to escort an inmate against whom he used force by himself. Further, Plaintiff clearly has a long, well-documented history of problematic interactions with inmates as set forth above.

Similarly, there is no evidence that CMCSO delayed personal holiday requests, or were inappropriately cited Plaintiff for taking meal breaks or failing to properly perform his duty as a rover.

The record evidence does not reasonably support any inference of retaliatory harassment.

C. Causal Connection

Even if Plaintiff's purported adverse employment actions rose to the level of those required by the statute, which Defendants respectfully submit they do not, Plaintiff cannot establish a causal connection between his engagement in any purported protected activity and the alleged adverse employment action.

When proving a causal connection "temporal proximity, standing alone, is insufficient to establish causation." Hancock, *supra*, at 361. Only where the facts of the particular case are so "unusually suggestive of retaliatory motive"

may temporal proximity, on its own, support an inference of causation. Ibid. Where the timing alone is not “unusually suggestive,” the plaintiff must set forth other evidence to establish the causal link. Young v. Hobart West Group, 385 N.J. Super. 448, 467 (App. Div. 2005).

Here, the record clearly indicates that there are no facts “unusually suggesting retaliatory motive.” Plaintiff was disciplined for conduct which he admits to. Making complaints about perceived special treatment of another officer or use of force does not shield Plaintiff from being disciplined for poor conduct.

Accordingly, Plaintiff is unable to establish a *prima facie* CEPA claim.

D. Even if Plaintiff could establish a *prima facie* case of retaliation in violation of CEPA, Defendants have articulated legitimate, non-retaliatory reasons for any purported adverse employment action.

When and if the plaintiff establishes a *prima facie* case of a CEPA violation, “the burden of persuasion is shifted to the employer to rebut the presumption of [retaliation] by articulating some legitimate [non-retaliatory] reason for the adverse employment action.” Kolb, supra, 320 N.J. Super. at 478 (citing Andersen, supra, 89 N.J. at 550).

There is no evidence that the investigations, discipline, or other “harassment” that Plaintiff complains of were retaliatory for Plaintiff’s purported protected activities.

Rather, the evidence clearly establishes that, in instances where other employees were subject to investigations along with Plaintiff, Plaintiff was treated the same as those employees. In addition, by Plaintiff's own admissions, he does not dispute a single fact for which he was disciplined. Plaintiff's CEPA claim is based upon nothing but self-serving conclusions.

Accordingly, Defendants have met their burden of production with respect to proffering legitimate reasons to support the decision to not promote Plaintiff and to support any alleged "adverse employment action" taken against him.

E. Because Defendants have articulated a legitimate, non-retaliatory reason, the burden of proof shifts back to Plaintiff to prove by a preponderance of the evidence that Defendants' articulated reasons were merely a pretext for retaliation.

Following an employer's ability to demonstrate legitimate and non-retaliatory reasons for purported adverse employment actions, the burden shifts back to the Plaintiff. "Upon such a showing by the employer, plaintiff has the ultimate burden of proving that the employer's proffered reasons were a pretext for the [retaliatory] action taken by the employer." Kolb, supra, 320 N.J. Super. at 478 (citing Romano v. Brown & Williamson Tobacco Corp., 284 N.J. Super. 543, 551 (App. Div. 1995)).

“To discredit the employer’s proffered reasons, the plaintiff cannot simply show that the employer’s decision was wrong or mistaken, since the factual dispute at issue is whether [retaliatory] animus motivated the employer, not whether the employer is wise, shrewd, prudent or competent.” Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994) (citing Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 531, 533 (3d Cir. 1992)). In order to prevail at trial, the plaintiff must be able to “show both that the proffered reason was false and that [retaliation] was the real reason.” Johnson v. Penske Truck Leasing Co., 949 F. Supp. 1153, 1171 (D.N.J. 1996) (citing St. Mary’s Honor Center v. Hicks, 509 U.S. 502, 515 (1993)) (“a reason cannot be proved to be a pretext for discrimination unless it is shown both that the reason was false, and that discrimination was the real reason”); Seman v. Coplay Cement Co., 26 F.3d 428, 433 & n.9 (3d Cir. 1994) (stating that “rejection of the employer’s proffered reasons, without a finding of discrimination, is insufficient to warrant judgment for the employee”). “The ultimate burden of proof always remains with the plaintiff.” Mandel v. USB/PaineWebber, Inc., 373 N.J. Super. 55, 69-70 (App. Div. 2004).

It is not enough for Plaintiff to speculate that the reasons given by the employer were pretext, yet Plaintiff’s allegations, along with his deposition testimony, indicate that speculation and “belief” are all Plaintiff offers.

Plaintiff's burden requires him to put forth evidence and he has failed to adduce any beyond his own self-serving conclusions.

Given the various admissions from Plaintiff regarding investigations and discipline, along with a complete lack of any evidence at all, Defendants' articulated reasons for engaging in any conduct which affected Plaintiff's employment were not pretextual or retaliatory. Plaintiff cannot sustain his ultimate burden of proof.

Accordingly, the trial court correctly granted summary judgment in Defendants' favor.

POINT III

Alternatively, Plaintiff's Claims of Adverse Employment Action Pertaining to Certain Discipline and Certain "Harassment" are Barred by the Statute of Limitations

While Defendants respectfully submit Plaintiff's CEPA claim fails for the substantive reasons stated above, Defendants additionally argue that, in the alternative, the one-year CEPA statute of limitation bars particular claims.

Pursuant to CEPA, "upon a violation of any of the provisions of this act, an aggrieved employee or former employee may, within one year, institute a civil action in a court of competent jurisdiction." N.J.S.A. 34:19-5; see also Green v. Jersey City Bd. of Educ., supra, at 446 (2003).

A Plaintiff may allege that either a discrete act of retaliation occurred or a continuing violation. AMTRAK v. Morgan, 536 U.S. 101 (2002). Discrete acts include termination, failure to promote, denial of transfer, refusal to hire, and *wrongful discipline*. Id. at 114 (emphasis added); see also O'Connor v. City of Newark, 440 F.3d 125, 127 (3d. Cir. 2006) (citing AMTRAK v. Morgan's “non-exhaustive list of discrete acts”). “A discrete retaliatory or discriminatory act ‘occurred’ on the day that it ‘happened.’” AMTRAK, supra, at 110. A discrete discriminatory act that is time barred is not actionable “even when they are related to acts alleged in timely filed charges.” Ibid. “Each discrete discriminatory act starts a new clock for filing charges alleging that act.” Ibid.

Conversely, continuing violations occur over a period of time and a single act of harassment may not be actionable on its own. Id. at 115. “To establish a continuing violation, a plaintiff must show that at least one discriminatory act occurred within the limitations period and that the discriminatory acts are part of a continuing pattern of discrimination.” Hall v. St. Joseph's Hosp., 343 N.J. Super. 88, 101 (App. Div. 2001). “If, however, a 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.” Id. at 103 (emphasis added.)

Plaintiff’s Complaint in this matter was filed on August 16, 2019. As such, any discipline Plaintiff received prior to August 16, 2018 is barred by the statute of limitations. The discipline is a discrete act subject to a one-year statute of limitations regardless if it is related to other “retaliatory” conduct that is not barred by the statute of limitations.

Further, any SI or IAI occurring before August 16, 2018 are also barred by the statute of limitations. To the extent the court considers the investigations disciplinary, which Defendants submit they are not, then they would be discrete acts barred by the statute of limitations. However, the investigations occurring before August 16, 2018 are barred even if the court does not consider them disciplinary as Plaintiff made numerous allegations that the investigations and reports he was required to submit as a part of the investigations were retaliatory as early as 2017.

Plaintiff’s complaints of harassment make it obvious that he believed he had a cause of action. As early as July 3, 2017, over two years prior to filing of the Complaint, Plaintiff complained in writing to then-Human Resources Director, Jeffrey Lindsay, Esq., that he was being “retaliated” against for

speaking to Mr. Lindsay about Officer Baker's perceived special treatment. (Pa173).

Further, on or around June 14, 2018, more than a year prior to the filing of Plaintiff's Complaint, Plaintiff reported in an Annual Harassment Survey that he was the victim of harassment and retaliation and submitted a Special Report to Undersheriff Maher related to same. Plaintiff's Special Report dated June 28, 2018 (Pa678 to Pa684) set forth every single one of the above SIs and IAIs that had occurred up until that point, including SIs 17-027, 17-036 and 18-26, and IAIs 17-13, and 18-08, as well as the emails from Lieutenant Prince and Plaintiff's yearly evaluation which he claims were retaliatory based his comments about Officer Baker and his political affiliations. (Pa168; Pa678 to Pa684).

There can be no question that Plaintiff believed these acts to be retaliatory. He enumerated every single investigation, interaction, and incident that occurred up until that point that which are the basis of this litigation. The case law is clear. Plaintiff *cannot* sit back and accumulate multiple acts of retaliation and commence litigation for all the acts within the statutory period of the last act. That was precisely his aim.

For these reasons, any discipline or alleged “harassment” that occurred prior to August 16, 2018 – one year prior to the filing of the Complaint – are barred by the statute of limitations.

POINT IV
Plaintiff Cannot Demonstrate the Clear and Convincing Evidence of Actual Malice or Deliberate Indifference to Consequences Necessary to Support His Claim of Punitive Damages

Plaintiff is unable to meet the clear and convincing evidence burden of wanton and willful conduct required for a showing of punitive damages.

Punitive damages may be awarded against an employer only where the plaintiff shows both “actual participation by upper management or willful indifference” and that the employer’s conduct was “especially egregious.” Rendine v. Pantzer, 141 N.J. 292, 313-14 (1995); Cavuoti v. New Jersey Transit Corp., 161 N.J. 107, 113 (1999). Plaintiff cannot make this showing based upon the evidence in this matter.

Here, the Plaintiff cannot establish the especially egregious conduct standard necessary to permit consideration of his punitive damages claim. To establish the element of “especially egregious conduct,” a plaintiff must prove that the conduct alleged was not only offensive, but “wantonly reckless or malicious” or, in other words, “an intentional wrong in the sense of an evil-

minded act or act accompanied by a wanton and willful disregard for the rights of another.” Rendine v. Pantzer, supra at 314 (1995).

Plaintiff has presented no evidence of any conduct which meets such a heightened standard. In fact, the types of claims the courts have allowed for the consideration of punitive damages by a jury are those that are so offensive and shocking that they are upsetting even to read in a legal brief. Simply put, courts require far more egregious facts than those presented here to submit the issue of punitive damages to a factfinder. See examples of offensive and egregious facts necessary to warrant an entitlement to consideration of punitive damages within Jackson v. Consolidated Rail Corp., 223 N.J. Super. 467, 474-475 (App. Div. 1988) and Gares v. Willingboro Township, 90 F.3d 720, 723-733 (3d. Cir. 1996).

Regardless of Plaintiff’s claims, it is implausible to believe that the Plaintiff was damaged in a manner so significantly that a reasonable person could not be expected to endure it, most notably because Plaintiff **continues to work for CMCSO**. Further, Plaintiff has provided no expert on the issue of emotional distress and has supplied no evidence, by way of document production or responses to Interrogatories indicating he has ever treated for same.

Plaintiff's claim for punitive damages was properly dismissed by the trial court below as a matter of law.

CONCLUSION

Plaintiff was not the victim of unlawful retaliation. Plaintiff has failed to establish that he engaged in protected conduct with regard to any disclosure of or objection to any conduct that could reasonably be found to be illegal relating to Officer Baker's Evaluation or reports relating to Officer Baker's conduct. Second, any alleged adverse employment action which Plaintiff alleges he suffered was wholly unrelated to any retaliatory motivation on the part of the Defendants. To the contrary, for every single alleged adverse employment action which Plaintiff claims he suffered that rise to the level contemplated by the statute, Plaintiff *admits* to the conduct for which he was disciplined thus precluding him from claiming the discipline is retaliatory under CEPA. Further, many of the adverse actions Plaintiff alleges do not rise to the level contemplated by the statute and even they if did, Plaintiff is unable to establish a causal connection. Finally, Plaintiff simply has no evidence that will allow him to sustain his ultimate burden of proving that any adverse employment action was in retaliation for engaging in protected conduct.

The trial court properly granted summary judgment to Defendants as to Plaintiff's CEPA claims.

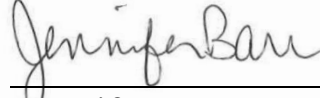
In the alternative, Defendants respectfully submit that Plaintiff's claims as to certain discipline and "harassment," as outlined above, are barred by the statute of limitations.

Accordingly, Defendants-Respondents County of Cape May and Lieutenant Stephen Prince respectfully request that this court affirm the trial court's order granting summary judgment to Defendants.

Respectfully submitted,

COOPER LEVENSON, P.A.

By:



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Attorney for Defendants-Respondents
County of Cape May and Lieutenant
Stephen Prince

Dated: October 15, 2025

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December 4, 2025

VIA ECOURTS

Clerk, Appellate Division
Hughes Justice Complex
25 W. Market Street
Trenton, NJ 08625

**Re: William Nielsen v. County of Cape May, Lieutenant Stephen Prince, and John Does 1-50, Inclusive, Fictitiously Named Defendants, Jointly, Severally, and in the Alternative.
Docket No.: A-3807-23**

Dear Honorable Sir or Madame:

This office represents Appellant William Nielsen (hereinafter “Nielsen”) in the above-captioned matter. Please accept this letter brief in lieu of a more formal brief in response to the Respondents’ brief in opposition to Nielsen’s appeal of the Order dismissing his Complaint with prejudice on summary judgment. Nielsen stands by and incorporates by reference the statement of facts and legal arguments set forth in his brief and appendix on appeal.

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PRELIMINARY STATEMENT

As set forth in Nielsen’s initial brief, he is employed by Cape May County’s Department of Corrections as a Corrections Officer. Following his protected

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conduct under the Conscientious Employee Protection Act (“CEPA”) Nielsen’s career trajectory changed markedly for the worse. A sergeant who had previously been considered an excellent employee with a bright future in the Department suddenly became the target of a campaign of retaliation including frivolous supervisory and internal affairs investigations, excessive and disproportionate discipline, discipline for offenses that other officers commit without consequence, and suspensions as well as acts meant to humiliate and embarrass him in front of his subordinates and undermine his supervisory authority.

I. RESPONDENTS CONFLATE AND CONFUSE WHICH ARREST OF OFFICER BAKER NIELSON ENGAGED IN CEPA PROTECTED CONDUCT BY REPORTING, AND THE TRIAL COURT ERRONEOUSLY DISMISSED IT AS A TRIVIAL MATTER THAT COULD NOT BE PROTECTED CONDUCT.

In footnote 4 on page 30 Respondents conflate and confuse an important issue when they write, “Plaintiff did not argue below that his report to Mr. Lindsay that Officer Baker was arrested while working as a Records Clerk was protected conduct, and accordingly the trial court did not address same.” While there was an instance where Nielsen believes Baker was arrested as a file clerk, Nielsen did not assert that as an instance of protected conduct.

However, Nielsen did allege in opposition to summary judgment and in his brief on appeal that when Baker was a full-fledged officer, he was involved in a physical fight off duty while in a bar, was arrested by the local police, and came to

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work with a black eye as a result of the fight. (See Pa 382, noting Baker was an officer at the time; See also Pa 983, where the trial court addresses the bar fight in its decision, confirming Nielsen raised the issue below.) Nielsen alleged below that he engaged in protected conduct under CEPA on June 22, 2017, when he reported Officer Baker's involvement in a bar fight, which was briefed below and decided wrongly by the Trial Court, and did not allege protected conduct related to any fight Baker was involved in when he was working as a clerk before he became an officer.

The protected conduct related to Baker's bar fight is twofold. First, an officer engaging in a bar fight is conduct unbecoming a public employee and, two, Baker's failure to report his arrest as required is neglect of duty. Nielsen reasonably believed that this conduct by Baker violated N.J.A.C. 4(a)2-2.3 and Cape May County Sheriff's Department's Rules and Regulations. Chapter 4.1(b). When Nielsen reported Baker's involvement in the fight and his arrest, Nielsen engaged in protected conduct under CEPA. The Trial Court erroneously focused on Nielsen's testimony that Baker had told Nielsen he did report his arrest, but disregarded that Nielsen did not think Baker was being honest because Baker was not subject to any investigation Nielsen was aware of and was not being treated as an officer would have after being arrested in connection with a fight. Further, regardless of whether Baker reported his arrest or told Nielsen he did, Nielsen

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reporting Baker's arrest to Lindsey was protected conduct and the Trial Court wrongly held it was not.

In making its ruling, the Trial Court made a material error in its recitation of facts and based its decision on that error. Specifically, the trial court improperly stated that "Nielsen reported to Lindsay that Baker had been in an off-duty bar fight that did not involve any contact with law enforcement authorities. This was an incident that, at best, was a minor infraction... not the type of conduct intended to be protected by CEPA." (Pa 980) Baker was arrested by the Somers Point Police and reported to work with a black eye. (Pa 381, p. 128, l. 21 - Pa 382, p. 129, l. 17). The Trial Court ignored or misunderstood these facts and did not account for the fact that a sworn law enforcement officer engaging in a bar fight and being arrested is not a trivial incident, and his department's ignoring it is unusually favorable treatment. Further, Warden Lombardo made it clear that it is the type of incident that must be reported.

II. THE TRIAL COURT WRONGLY AND INEXPLICABLY DISMISSED CLEAR PROTECTED CONDUCT IN NIELSEN'S OBJECTION TO BEING DIRECTED TO ALTER BAKER'S EVALUATION.

The second clear act of protected conduct that the Trial Court erroneously discounted was Nielsen being directed to change his evaluation of Baker's performance. Nielsen noted in the evaluation that Baker was "skating" based on

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information from other officers who observed it. Baker admitted to skating when Nielsen discussed it with him and Nielsen noted in the evaluation that following their conversation he noticed an improvement in Baker's behavior. Respondents had made Baker a "golden child" and were trying to ensure Baker had a completely clean record so they could justify promoting him up the ranks. Nielsen engaged in protected conduct by preparing an honest evaluation and declining to change his evaluation to further Respondents' goal of clearing the way for Baker's rise in the department. Altering an official document to include false information is fraud and official misconduct, and is even more serious in this context, as Nielsen was directed to do so to artificially improve Baker's path to promotions and raises in compensation, pension, and other benefits paid for with public monies.

Respondents' argument that the direction to remove the skating details from Baker's evaluation was proper because Nielsen did not personally witness Baker skating is illogical. Baker admitted skating to Nielsen when asked, which is noted in the evaluation, so there was no legitimate concern that Nielsen had included anything in the evaluation that was not true or unfair. Further evidence that some fix was in on Baker's evaluation is that the issues with this evaluation went all the way to County Counsel, which is highly unusual.

The trial court also failed to appreciate the facts when it dismissed this allegation of protected conduct as simply a supervisor asking a subordinate to

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revise an evaluation and ignored all of the surrounding facts set forth above and at length in Nielsen's brief on appeal. The Trial Court also downplayed the significance of positive evaluations in a law enforcement organization, which could clearly help an individual receive specialty assignments, promotions, and raises.

The Trial Court also oddly and improperly suggested that every time a supervisor requests a subordinate to change an evaluation, it is proper and lawful, when there are many situations in which a supervisor could unlawfully demand that a subordinate change an evaluation or other official document. In the situation presented here, where the direction to alter the evaluation is made under threat of discipline and to benefit a favored employee, a person in Nielsen's position could reasonably believe it to be official misconduct.

III. THE TRIAL COURT FAILED TO PROPERLY ANALYZE THE RETALIATION BY IMPROPERLY COMBINING IT WITH CAUSATION AND NOT CONSIDERING THE LESS SEVERE ADVERSE EMPLOYMENT ACTIONS CUMULATIVELY.

The other issue on which the Trial Court erred is the retaliation. In this matter, there is some degree of nuance to the retaliation. As set forth at length in Nielsen's brief, Respondents subjected him to numerous disciplinary actions, including written warnings, supervisory investigations, and Internal Affairs investigations. Respondents administered discipline in a retaliatory manner. In

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instances where there was no evidence for the charge, Respondents rendered a determination of “not substantiated” instead of “unfounded,” which are significantly different for a law enforcement officer’s record. In instances where Nielsen admitted to the allegations against him, the quantum of discipline or the decision to impose discipline at all was harsher for Nielsen than was customary.

By way of example, Nielsen admitted he called the inmates “a bunch of pussies” for throwing feces at the corrections officers. Nielsen was disciplined for using foul language with the inmates, when Undersheriff Mayer admitted that officers use coarse language as a form of constructive force or authority and that no officer had ever been disciplined for cursing at an inmate, while Nielsen was.

As to the retaliation, Respondents also argue that the adverse employment actions Nielsen alleges are minor and cannot constitute retaliation, but under Nardello v. Township of Voorhees, 377 N.J. Super. 428, (App. Div. 2005), separate but relatively minor instances of behavior directed against an employee may combine to create a pattern of retaliation and the Court has to consider the individual incidents cumulatively to look for retaliation in violation of CEPA.

Respondents also argue that Nielsen could not challenge the discipline or allege retaliation when he admitted to the conduct. Superficially, that argument may seem meritorious; however, as set forth above, there is some nuance in this case because Respondents attempted to insulate their retaliatory motive by

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disciplining Nielsen more harshly than any other officer would have been for the same conduct. Nielsen was subject to disparate treatment in the disciplinary process and the only reason for that is retaliation for his protected conduct.

Further, as set forth at length in Nielsen's brief on appeal, the trial court erroneously conflated the elements of what can be adverse employment action and retaliation/causation, as they are two separate elements of a CEPA claim. (Pa 991). The third and fourth prongs of a CEPA cause of action are: (3) was the plaintiff subject to adverse employment action, and (4) is there a causal connection between the protected conduct and the adverse action? Dzwonar v. McDevitt, 177 N.J. 451, 461 (2003). The trial court improperly merged the last two elements of a CEPA cause of action and held that a plaintiff has to prove there was causation to establish adverse employment action. Adverse employment action can be a range of things, which is detailed in Nielsen's brief on appeal. Whether the adverse employment action is causally related to the protected conduct is a separate analysis. (Pa 990 and Pa 991)

As noted above, given that Nielsen sustained an 8-day suspension, a 10-day suspension and a 25-day suspension, the multiple other less severe adverse employment acts were not belabored in his opposition to summary judgment, but

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were all part of the record¹. Under Nardello v. Voorhees, at 435-436, the separate, more minor instances of protected conduct require additional analysis to determine whether they form a pattern or practice of conduct that constitutes adverse employment action, which the trial court failed to do.

Regardless of how the Trial Court might have evaluated the less serious instances of retaliation, had it done so, it is respectfully submitted that, even under the most restrictive definition, Nielsen easily established adverse employment actions through the three suspensions.

IV. THE TRIAL COURT BASED ITS CAUSATION ANALYSIS ON INCORRECT FACTS AND AN UNEXPLAINED FINDING THAT THE EMPLOYER'S DISCIPLINE CANNOT BE CHALLENGED.

Even though the trial court held that Plaintiff Nielsen did not suffer any adverse employment action, it erroneously analyzed causation. (Pa 992 - 1004) Regarding the 25-day suspension, the Trial Court again incorrectly recited the facts of record and then based its flawed decision on those inaccurate facts. The Trial Court gave no explanation of its determination that if an employer conducts an

¹Such as Nielsen being subject to unnecessarily lengthy SIs, failing to protect Nielsen from bogus inmate complaints, putting Nielsen's latenesses in GT when other COs' were not, the Memo from the Warden calling Nielsen's supervisory tactics medieval and saying that he is a loose cannon who had revenge fantasies, surveilling Nielsen while he worked, intentionally embarrassing him in front of his co-workers, ignoring his requests for days off, and subjecting him to differential discipline when he approved his own time compared to other Sergeants who approved their own time off. (Pa 991 and 992)

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investigation and disciplines an employee, the appropriateness of the discipline cannot be challenged and it cannot be retaliatory. The Trial Court also incorrectly stated that Nielsen admitted to the conduct alleged by Respondents when the record is clear that he did not. (Pa 275, 998)

V. THE TRIAL COURT'S DECISION THAT THE STATUTE OF LIMITATIONS BEGINS TO RUN FROM THE DATE OF THE PROTECTED CONDUCT AND NOT THE RETALIATORY ADVERSE EMPLOYMENT ACTION IS WRONG.

The Trial Court erred when it determined that Nielsen's CEPA claims are time barred because the protected conduct occurred more than a year before the Complaint was filed and then failed to engage in any analysis of whether any of the more discreet acts of retaliation were actionable under the Continuing Tort Doctrine.

As set forth at length in Nielsen's brief on appeal, the statute of limitations under CEPA does not begin to run until the retaliatory act(s) are completed. See e.g., Daniels v. The Mutual Life Ins. Co., 773 A.2d 718 (App. Div. 2001). This is so clearly established and supported by numerous decisions that it is indisputable and the Trial Court's decision is incomprehensible on this point.

The faulty decision on the statute of limitations led to a failure to undertake any analysis under the Continuing Tort Doctrine on the adverse employment

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actions that occurred prior to August 16, 2018, one year before the filing of Nielsen's Complaint.

CONCLUSION

For these reasons, the trial court's opinion should be reversed and this matter should be remanded for trial.

Respectfully submitted,

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