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parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-0110-15T1

TROOPER BRETT BLOOM  
(BADGE NO. 5239),

Plaintiff-Appellant,

v.

STATE OF NEW JERSEY,  
NEW JERSEY STATE POLICE, THE  
OFFICE OF THE ATTORNEY GENERAL  
OF THE STATE OF NEW JERSEY,  
SERGEANT ROBERT COWDEN, LIEUTENANT  
JAMES RYAN, CAPTAIN JOHN FLYNN, and  
MAJOR MARSHALL CRADOCK,<sup>1</sup>

Defendants-Respondents.

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Submitted May 2, 2017 – Decided August 2, 2017

Before Judges Fasciale and Sapp-Peterson.

On appeal from the Superior Court of New  
Jersey, Law Division, Mercer County, Docket  
No. L-542-12.

Daggett & Kraemer, attorneys for appellant  
(George T. Daggett, on the brief).

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<sup>1</sup> Major Marshall Craddock was incorrectly designated as "Major Craddock" in the record.

Christopher S. Porrino, Attorney General,  
attorney for respondents (Lisa A. Puglisi,  
Assistant Attorney General, of counsel and on  
the brief; Gregory R. Bueno, Deputy Attorney  
General, on the brief).

PER CURIAM

Plaintiff, Brett Bloom (Bloom), a member of the New Jersey Division of State Police (Division), appeals from the August 7, 2015 order granting summary judgment, and dismissing with prejudice, his complaint against defendants, the State of New Jersey, the Division, Detective Sergeant Robert Cowden (Cowden), Lieutenant James Ryan (Ryan), Captain John Flynn (Flynn), and Major Marshall Cradock (Cradock) (collectively referred to as defendants). In his complaint, Bloom raised two separate causes of actions under the New Jersey Conscientious Employee Protection Act ("CEPA"), N.J.S.A. 34:19-1 to -14, alleging that his superiors subjected him to harassment and retaliation. Bloom additionally asserted a claim that defendants violated his right to petition guaranteed under the First Amendment to the United States Constitution, U.S. Const. amend. I, and Article I of the New Jersey Constitution, N.J. Const. art. I, ¶¶ 6 and 18 (Petition Clause) (Count Three). Finally, in Count Four Bloom alleged that there

had been "a systematic endeavor by the [Division] to cover up the actions of Defendant Cowden."<sup>2</sup>

In granting summary judgment, the motion judge concluded that all but one of the facts asserted in Count One, Bloom's retaliatory transfer in April 2011, were barred by the statute of limitations; and the remaining 2011 retaliatory transfer claim, as well as the retaliatory transfer claim in Count Two failed to raise genuinely disputed issues of fact sufficient to withstand summary judgment. With regard to the Petition Clause claim in Count Three, the motion judge granted the motion because Bloom failed to offer any opposition to the motion.<sup>3</sup>

#### I.

We recite the facts found in the summary judgment record, which we view in a light most favorable to plaintiff. Robinson v. Vivirito, 217 N.J. 199, 203 (2014); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Bloom graduated from the 115th class of the State Police Academy. He served in the

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<sup>2</sup> Bloom failed to address Count Four of the complaint in the summary judgment motion and has not briefed this count in his appeal. We therefore consider the claim asserted in this count as abandoned. See McGarry v. Saint Anthony of Padua Roman Catholic Church, 307 N.J. Super. 525, 531, 537 (App. Div. 1998) (deeming particular count of complaint not briefed on appeal as abandoned).

<sup>3</sup> Although the judge's oral decision makes no reference to Count Four, the order granting summary judgment dismissed the complaint, with prejudice, in its entirety.

Ballistics Unit (BU) from June 2005 until his reassignment to the Firearms Investigation Unit (FIU). He also served an eight-month detachment to the Business Integrity Unit (BIU) in 2012.

The facts giving rise to the complaint first unfolded on September 5, 2007. On that date, Cowden presented plaintiff with a ballistics report, which he wanted Bloom to "peer review," meaning, to verify Cowden's findings. Bloom had not worked on the particular examination, but was aware that at least one other co-worker had reviewed Cowden's findings and disagreed with the conclusions Cowden reached. Bloom did not feel comfortable signing off on the report and refused to peer-review it. Although Bloom did not believe Cowden's actions violated any particular law or standard operating procedure, he considered Cowden's actions to be "an ethical violation." He also believed Cowden's actions amounted to falsification of evidence. He reported the incident to a superior, Lieutenant James Storey, but he did not file a report.

Shortly thereafter, following several confrontations with other members of the BU, Cowden was transferred to another unit, but returned in 2010 as its assistant head under Ryan, who headed the BU. Upon Cowden's return, he started to verbally harass and subject Bloom to a hostile working environment. Specific incidents of harassment Bloom alleged occurred throughout the first part of

2010 included Ryan ordering him to speak to a BU employee about the use of sick time and overtime; Ryan changing his work schedule, despite the fact the schedule had been approved one year earlier; no longer serving as a lecturer and instructor on behalf of the Division; and, having to turn over his newer vehicle to Cowden. In addition, when Bloom turned over the vehicle, Cowden verbally attacked him for failing to report a scratch on the vehicle, leaving a window partially opened, and having the gas card in his pocket.

In June 2011, Bloom took administrative leave, which he alleged was caused by the harassing and hostile work environment engineered by Cowden and Ryan. Upon his return in April 2011, Cradock transferred him from the BU to the FIU.

On June 6, 2012, Bloom reported to his superiors that the Division was violating federal statutes because it was not registering all machine guns and other destructive devices with the federal government. On June 30, 2012, he was transferred from the FIU to the BIU, where he remained for eight months before returning to the FIU at his request.

On March 2, 2012, Bloom filed a one-count complaint alleging that he had been subjected to a pattern of harassment and retaliation after reporting that Cowden attempted to fabricate evidence (Count One). Bloom filed an amended complaint adding a

second count, in which he alleged that he was transferred from FIU in June 2012, without notice and without cause, in retaliation for his complaint that the Division was violating federal law (Count Two). Finally, in a second amended complaint, Bloom added two more counts, one alleging that defendants violated his right of petition guaranteed under the Petition Clause (Count Three) and another alleging that there had been "a systematic endeavor by the [Division] to cover up the actions of Defendant Cowden" (Count Four).

Upon completion of discovery, defendants moved for summary judgment. Defendants argued that all but one of the retaliatory acts alleged in Count One were barred by the statute of limitations. On the merits, with regard to the remaining claims, defendants urged that plaintiff failed to establish a prima facie case of retaliation under CEPA or violation of the Petition Clause.

Addressing Count One, the court granted the motion finding that, other than the retaliatory transfer, the claims set forth in this count were barred by the statute of limitations. The court also found that even if the claims were not statutorily barred, the purported retaliatory pre-transfer actions about which Bloom complained, "cumulatively or otherwise," had not impacted the terms and conditions of his employment. Turning to Bloom's

transfer from the BU to the FIU in 2011, the court found that there was a disputed fact as to whether the transfer rose to the level of an adverse employment action, but concluded summary judgment was nonetheless appropriate because Bloom failed to establish a causal connection between his objection to peer-reviewing Cowden's ballistics report and his transfer from the BU to the FIU in 2011.

The court next focused upon the 2012 action resulting in Bloom's transfer from the FIU to the BIU, after he reported the Division was violating federal law in connection with its firearms registration requirements. The court found that while there was a factual dispute as to whether the transfer constituted an adverse employment action, it could not find a causal connection between Bloom's complaint and the transfer. The court reasoned that "giving all inferences for the plaintiff once again," the articulated reasons for the transfer were "unassailable" and there was nothing in the record other than Bloom's "own unsupported allegations with respect to the reasons for the transfer."

Finally, the court addressed the Petition Clause allegation contained in the third count. The court noted "there was really no opposition to the [P]etition[] [C]lause."

## II.

Appellate courts review orders granting summary judgment de novo, employing the same standard utilized by trial courts. Qian v. Toll Bros., Inc., 223 N.J. 124, 134-35 (2015). Summary judgment is granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). An issue of fact is only genuine "if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." Ibid. Further, appellate courts review questions of law de novo and the legal determinations of the trial court are not entitled to any special deference. Gere v. Louis, 209 N.J. 486, 499 (2012); Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

CEPA was enacted to eliminate "vindictive employment practices[.]" Abbamont v. Piscataway Twp. Bd. of Educ., 138 N.J. 405, 418 (1994). CEPA has been construed to place the onus of compliance upon employers because they "are best situated to avoid or eliminate impermissible vindictive employment practices, to



implement corrective measures, and to adopt and enforce employment policies that will serve to achieve the salutary purposes of [CEPA]." Ibid.

CEPA prohibits employers from taking "any retaliatory action" against an employee who:

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 . . . ; or

(2) is fraudulent or criminal . . . ;

b. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer . . . ; or

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

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

(2) is fraudulent or criminal . . . ; or

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

[N.J.S.A. 34:19-3.]<sup>4</sup>

CEPA defines 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). However, as our Supreme Court clarified, "the universe of possible retaliatory actions under CEPA is greater than discharge, suspension, and demotion," as evidenced by the statute's express inclusion of "other adverse employment action taken against an employee in the terms and conditions of employment." Donelson v. Dupont Chambers Works, 206 N.J. 243, 257 (2011) (quoting N.J.S.A. 34:19-2(e)).

An act of retaliation also need not be a single discrete event. Green v. Jersey City Bd. of Educ., 177 N.J. 434, 448 (2003). Instead, an employee may point to "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." Ibid. Accord Beasley v. Passaic Cty., 377 N.J. Super. 585, 608-09 (App. Div. 2005). Ultimately, the question of whether an employer's action constitutes retaliation "must be viewed in light of the broad

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<sup>4</sup> Bloom cites to only N.J.S.A. 34:19-3(c).

remedial purpose of CEPA . . . ." Donelson, supra, 206 N.J. at 257.

To establish a prima facie claim under CEPA, a plaintiff must prove each of the following:

- (1) he or she reasonably believed that his or her employer's conduct was violating either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy;
- (2) he or she performed a "whistle-blowing" activity described in N.J.S.A. 34:19-3(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.

[Lippman v. Ethicon, Inc., 222 N.J. 362, 380 (2015) (citing Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003)).]

If a plaintiff makes this threshold showing, the burden shifts to the defendant to set forth a legitimate non-retaliatory reason for the adverse action. Klein v. Univ. of Med. & Dentistry of N.J., 377 N.J. Super. 28, 38 (App. Div.), certif. denied, 185 N.J. 39 (2005). "If such reasons are proffered, plaintiff must then raise a genuine issue of material fact that the employer's proffered explanation is pretextual." Id. at 39 (citing Bowles v. City of Camden, 993 F. Supp. 255, 262 (D.N.J. 1998), Kolb v. Burns, 320 N.J. Super. 467, 479 (App. Div. 1999)).

The statute of limitations for filing a CEPA action is one year. N.J.S.A. 34:19-5. An employee's CEPA claim accrues on the date the adverse action occurs. Villalobos v. Fava, 342 N.J. Super. 38, 50 (App. Div.), certif. denied, 170 N.J. 210 (2001). "A plaintiff need not know with certainty that there is a factual basis for a claim under CEPA for the one year limitation period to be triggered; it is sufficient that he should have discovered that he may have a basis for a claim." Id. at 49 (emphasis omitted).

In Villalobos, the plaintiff was twice transferred "for the good of the . . . [o]ffice" and resigned. Id. at 42-43. The plaintiff later received information that the transfers were an attempt to force his resignation and sued for constructive discharge. Id. at 43-44. On appeal, we held that the plaintiff's claim was barred by the statute of limitations, which started to run on the date of his resignation and that he should have discovered his CEPA claim before he received the additional information regarding his transfers. Id. at 49-50.

We now apply these principles to the facts of this case. We first address the dismissal of Bloom's pre-transfer claims as time-barred. Bloom alleges that when he refused to peer review Cowden's ballistics report in 2007, he was later subjected to a

harassing and hostile work environment, after Cowden returned to the BIU in 2010.

We assume, for purposes of viewing the evidence most favorably towards Bloom, that Cowden harbored a retaliatory animus towards him, which Cowden continued to hold upon his return to the BU in 2010, as its assistant head. We further assume that upon Cowden's return, he and Ryan put into motion the harassing and retaliatory actions about which Bloom complains led to his leave of absence in June 2010.

The retaliatory acts he identified as occurring between January 2010 and June 2010, all occurred nearly two years before Bloom filed his complaint and are thus time barred. N.J.S.A. 34:19-5. Because those actions are time barred it is unnecessary to address whether any of the acts are deemed retaliatory within the meaning of CEPA. Falco v. Cmty. Med. Ctr., 296 N.J. Super. 298, 317-18 (App. Div. 1997) (declining to engage in "any additional evaluation of [the] plaintiff's CEPA claim" because "the motion judge correctly determined that [the] plaintiff was not a whistleblower under CEPA"), certif. denied, 153 N.J. 405 (1998).

We turn now to Bloom's transfer in 2011. The motion judge found that the claim was timely filed, there were genuinely disputed issues of fact as to whether Bloom engaged in

whistleblowing activity and also that it was genuinely disputed whether his transfer from the BU to the FIU was an adverse employment action. The motion judge nonetheless concluded summary judgment was warranted because there was no evidence in the record establishing a causal connection between the 2007 incident and Bloom's transfer in 2011, and because the reasons given for Bloom's transfer were "unassailable."

The requirement that an employee who brings a CEPA action must show a causal connection between his or her protected activity and the alleged adverse employment action "can be satisfied by inferences that the trier of fact may reasonably draw based on circumstances surrounding the employment...action[.]" Maimone v. Atlantic City, 188 N.J. 221, 237 (2006). The temporal proximity between protected conduct and an adverse employment action "is one circumstance that may support an inference of a causal connection." Ibid. Here, temporally, Bloom's first transfer occurred more than three years after the 2007 incident with Cowden. Hence, there is no temporal proximity from which to draw an inference of retaliation. Ibid.

We note that although temporal proximity to an adverse employment action is only one circumstance from which an inference of retaliatory action under CEPA may be established, ibid., it "is [not] the only circumstance that justifies an inference of causal

connection." Romano v. Brown & Williamson Tobacco Corp., 284 N.J. Super. 543, 550 (App. Div. 1995). The record here, however, is devoid of any facts from which a trier of fact could reasonably conclude that there was a causal connection between the 2007 incident and Bloom's transfer in 2011.

Defendants put forth their articulated reasons for Bloom's reassignment. The record revealed that prior to his actual return to work in April 2011, Bloom met with Cradock, where he expressed that he wanted Cowden removed because Cowden "had been involved in numerous confrontations with other individuals, including [himself]" and believed "that it would be a natural progression for [Cowden] to be removed and not [him]." He made clear to Cradock and others that he did not want to return to the BU as long as Cowden was there.

Cradock, in his deposition, testified that internal investigations failed to disclose any wrongdoing on the part of Cowden. He explained the investigation revealed that Cowden's management style was decidedly different than his predecessor. Cradock testified that Cowden's style of supervision held "everybody to task." He characterized the BU environment before Cowden's return as "relaxed and laissez faire." He was aware that Bloom could not work with Cowden, and made the decision that Bloom's return to the BU was not an option at that time and that

he was not going to remove Cowden from BU based solely upon Bloom's accusations. He told Bloom that if the investigation revealed wrongdoing on Cowden's part, he would take appropriate action at that time. He offered Bloom five choices for assignment, but Bloom told him that he would rather remain out on administrative leave.

Thus, while the unworkable relationship between Cowden and Bloom was the reason Cradock told Bloom returning to the BU was not an option at that time, there was no evidence in the record that Cradock's decision was tied to the 2007 incident. The fact that Cowden was essentially still inextricably linked to Bloom, insofar as Bloom's desire to remain in the BU was concerned, does not raise an inference that the transfer was effectuated because of the 2007 incident.

Moreover, even if the intervening instances of harassment to which Bloom claims he was subjected when Cowden returned to the BU in 2010 are viewed as evidential, these incidents do not raise a disputed issue of fact that the stated reason for his 2011 transfer was false. For example, Ryan directed him to speak to an employee about the use of sick time. Bloom served as this employee's training officer. There is nothing to suggest that it was inappropriate for him to speak to the employee about sick time or, that there was no real issue about the employee's use of sick



time and directing Bloom to speak to her was merely a pretext to retaliate against Bloom for the 2007 incident.

Similarly, while it is undisputed that Ryan changed his work schedule because he believed Bloom had unilaterally set the hours, it is also undisputed that Ryan reinstated Bloom's schedule after learning the schedule had been approved by a captain. Further, although Bloom complained about inappropriate language directed at him within the workplace, he himself acknowledged that he too used inappropriate language in the workplace, admittedly referring to himself as "a pussy." Additionally, at the time Bloom was asked to turn over his newer vehicle to Cowden, who was his superior, Bloom was going on administrative leave. He was also provided another vehicle.

Finally, in addition to Bloom making it clear that he did not want to return to the BU as long as Cowden remained assigned to the unit and Cradock's management decision not to remove Cowden in the absence of evidence of misconduct, both the Division's physician and Bloom's therapist recommended that Bloom not be assigned to the same unit as Cowden because of the personality conflicts between the two men. There is no evidence in the record that Cradock's assignment decision or the recommendations of the Division's physician and Bloom's therapist were in any way linked to Bloom's 2007 refusal to peer review Cowden's report.

Thus, Defendants articulated a legitimate non-retaliatory reason for Bloom's transfer, namely, the personality conflicts between Cowden and Bloom and the internal investigation disclosed no evidence of wrongdoing on the part of Cowden. Therefore, any presumption of a retaliatory transfer disappeared, with the burden shifting back to Bloom, to present evidence raising a genuinely disputed issue of fact that the articulated reasons for the transfer were false and the real reason was retaliation because he refused to peer review Cowden's report in 2007. Bloom presented no evidence in this regard.

In short, there were no genuinely disputed issues of fact establishing a causal connection between the 2007 incident and Bloom's 2011 transfer, and, as the motion judge observed, defendants' articulated reasons for Bloom's transfer were "unassailable." Thus, the motion judge properly granted summary judgment dismissing Count One on the merits in its entirety.

We turn to Bloom's June 6, 2012 report that the Division was violating federal statutes by not registering all machine guns and other destructive devices. Bloom contends, within weeks of reporting this violation to his superior, that he was transferred out of the FIU and into the BIU. According to Bloom, this transfer occurred without notice or cause despite the fact that there were members of his unit who had submitted papers seeking a transfer

out of the FIU. Bloom characterized the reassignment as a "lateral move," and one that did not promote career advancement.

Assuming that the true reason for the transfer was in retaliation for his reporting violations of federal law, this retaliatory action does not, as a matter of law, constitute an adverse employment action. It is undisputed that the transfer was not a demotion, a loss in status, a reduction in pay, any diminution in job responsibilities, or an assignment to perform menial tasks. See Mancini v. Township of Teaneck, 349 N.J. Super. 527, 564 (App. Div.), remanded, 174 N.J. 359, reaff'd, 354 N.J. Super. 282 (App. Div. 2002).

In addition, Bloom does not dispute that transfers within the Division are discretionary and may occur with or without notice and may also be accomplished irrespective of any request for a transfer. Further, Bloom acknowledged that when transferred to the BIU, he was given the title of "squad leader" and supervisory responsibilities over fourteen civilian personnel. In contrast, while assigned to the FIU, Bloom had supervisory responsibility for two employees and no title as "squad leader."

Consequently, the facts viewed most favorably toward Bloom do not raise a genuinely disputed issue of fact that his transfer from the FIU to the BIU in June 2012 was an adverse employment action under CEPA. Merely because he disagreed or objected to the

Division's decision to transfer him and believed his skills were better suited in the FIU or even the BU does not translate into an adverse employment action. Ibid. (holding that an adverse employment action does not occur simply because an employee is unhappy). Consequently, the second count of Bloom's complaint was properly dismissed.

### III.

Finally, Bloom contends that the motion judge erred in dismissing the Petition Clause claim set forth in Count Three. Bloom argues this claim was a matter for the jury, specifically noting that he had filed an Equal Employment Opportunity grievance. Bloom urges that there are sufficient facts to infer that defendants targeted him for an internal investigation after He initiated the underlying civil lawsuit.

Notably, Bloom offered no opposition before the motion court below to defeat defendants' summary motion relative to the Petition Clause claim. Ordinarily, absent extraordinary circumstances, we will not entertain an argument presented for the first time on appeal that was not presented to the trial court. 809-811 Washington St. Assocs. v. Greco, 253 N.J. Super. 34, 50 (App. Div. 1992). Bloom has not presented any extraordinary circumstances in his appellate brief that would lead us to depart from this general rule of appellate review. See ibid.

Moreover, any consideration of the Petition Clause claim would not, based upon the record, be based upon any competent evidence Bloom submitted to defeat the motion as to that claim. Paragraph 239 through paragraph 258 of defendants' "Statement of Undisputed Material Facts," filed in support of their summary judgment motion, addresses the Petition Clause claim. Bloom's expressed opposition to these paragraphs in his "Response to Defendant[s'] Statement of Material Facts," is limited to: "leaves Defendants to their proofs"; "admits that the testimony was given"; or "denie[s]" the proffered undisputed fact. Further, in his "Statement of Undisputed Material Facts," Bloom puts forth no facts regarding the Petition Clause claim.

Rule 4:46-5(a) provides, in pertinent part, that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleading[.]" In other words, Bloom's mere denials or statement that he leaves defendants' to their proofs will not defeat the motion. G.D. v. Kenny, 205 N.J. 275, 304 (2011) (quoting Rule 4:46-5(a)). Thus, granting summary judgment on this claim and dismissing Count Three was proper.

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

A handwritten signature in black ink, appearing to be 'JLD', is written over the text 'file in my office.' and partially over the title 'CLERK OF THE APPELLATE DIVISION'.

CLERK OF THE APPELLATE DIVISION