NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2882-13T1

GARY S. DEMARZO and
BRANDY M. DEMARZO,

Plaintiffs-Appellants,

v.

THE CITY OF WILDWOOD,

Defendant-Respondent,

and

CHIEF JOSEPH A. FISHER, CAPT.
STEVEN LONG, CAPT. DAVID DEATON,
LT. ROBERT N. REGALBUTO, DET. LT.
KEVIN MCLAUGHLIN, PTL. SHAWN YUHAS,
MAYOR ERNIE TROIANO, JR., ESTATE
OF COMMISSIONER FREDERICK G. WAGER,
and COMMISSIONER KATHY BREUSS,

Defendants.

Argued May 4, 2015 – Decided August 28, 2015

Before Judges Lihotz, Espinosa and Rothstadt.

On appeal from Superior Court of New Jersey, Law Division, Cape May County, Docket No. L-326-11.

Arthur J. Murray argued the cause for appellants (Jacobs and Barbone, P.A., attorneys; Louis M. Barbone, of counsel; Mr. Murray, on the briefs).

Patrick J. Madden argued the cause for respondent (Madden & Madden, P.A., attorneys; Mr. Madden, of counsel and on the brief).

PER CURIAM

Plaintiff Gary S. DeMarzo,[1] a former Wildwood City police officer, appeals from the January 24, 2014 summary judgment dismissal of his complaint alleging violations of the Conscientious Employees Protection Act, N.J.S.A. 34:19-1 to -8 (CEPA) by his former employer, defendant City of Wildwood, and several individual defendants employed by the Wildwood City Police Department.[2] In a written memorandum, the judge examined plaintiff's complaint and found his assertions were previously presented and denied in an administrative disciplinary hearing, conducted by the Civil Service Commission (Commission). Citing Winters v. North Hudson Regional Fire & Rescue, 212 N.J. 67 (2012), the motion judge concluded final disposition of plaintiff's claims of retaliation in defense of the administrative action precluded him from litigating the same issue in Superior Court. Nevertheless, the judge examined the

[1] Co-plaintiff Brandy M. DeMarzo asserts a claim for damages because she was deprived of prescription benefits as a consequence of her husband's suspension. For ease in our opinion we solely designate Gary S. DeMarzo as plaintiff.

[2] Plaintiff's appeal is limited to the dismissal of his claims against defendant City of Wildwood. He has not appealed from the summary judgment dismissal of his claims against defendants Chief of Police Joseph A. Fisher, Captain Steven Long, Captain David Deaton, Lieutenant Robert N. Regalbuto, Detective Lieutenant Kevin McLaughlin, Patrolman Shawn Yuhas, Mayor Ernie Troiano, Jr., Estate of Commissioner Frederick G. Wager, or Commissioner Kathy Breuss.

substance of the claim, finding the record did not contain facts to support plaintiff held an objectively reasonable belief he was challenging a perceived violation of law or public policy.

On appeal, plaintiff principally maintains the judge erroneously applied Winters and the record is sufficient to establish a prima facie CEPA claim, independent of any alleged retaliatory conduct, obviating the entry of summary judgment. We disagree and affirm.

We recite the facts taken from the summary judgment record, as viewed in the light most favorable to plaintiff, the non-moving parties. Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 405-06 (2014). Plaintiff's retaliation claim originated from a patrol incident when he was dispatched to investigate a reportedly abandoned vehicle with out-of-state license plates. The 1991 Ford pick-up truck had a current Tennessee registration sticker, a flat tire and, by its appearance, had not been moved in some time. Plaintiff identified the vehicle's owners, who he unsuccessfully attempted to contact. Using an auto entry tool, he opened the vehicle's locked door and found an expired insurance card. Concluding the vehicle was abandoned, he placed a sticker on the car, which included his name, a case number, and the word "Abandoned."

Later that day, the owner called plaintiff and explained he lived on the street where his vehicle was legally parked and questioned why it was stickered as abandoned. Shortly thereafter, City Commissioner Kathy Breuss called plaintiff, stating she was following up regarding the investigation of the abandoned vehicle, which she explained belonged to her son-in-law. Breuss advised plaintiff the vehicle was locked and asked him whether he "broke into the truck." She maintained she was "not questioning what [he] did," but was "just trying to find out what happened. That's all." Plaintiff responded he felt intimidated. Both conversations were recorded.

Plaintiff filed an operations report, stating "Breuss very specifically accused me of breaking into the vehicle. [She] continued to accuse me of wrong doing [sic] and I took that as she would now retaliate against me if I didn't forget the incident. In violation of [N.J.S.A.] 2C:27-3." The report eventually reached Chief of Police Joseph A. Fisher, who asked the Cape May County Prosecutor's Office to investigate whether Breuss violated the law. Determining no actionable conduct occurred, the prosecutor's office wrote, "[T]he conversations did not reveal a colorable claim of official misconduct or any other violation of criminal statutes."

Breuss informed City Commissioner Frederick G. Wager, who supervised the police department, that it appeared her son-in-law's vehicle was forcibly entered because "[t]he contents of the glove box had been tossed around. Some were on the seat. Some were on the floor. Further, the [rear-side-door-window-frame] was damaged." Ten days later, Lieutenant Robert N. Regalbuto issued a counseling notice to plaintiff. The notice cited plaintiff's warrantless search without probable cause as "not lawful" and set forth the ordinance provisions requiring police wait five days after stickering a vehicle before it could be towed.

Two months later, plaintiff was again disciplined after an internal affairs investigation determined his conduct violated departmental standards and procedures in the arrest of an alleged assault suspect. The man was arrested in his home, processed and released, but plaintiff never prepared an arrest report or signed a criminal complaint.[3] Private video surveillance cameras captured the audio and video of the underlying events. The investigation determined plaintiff

[3] The victim of the alleged assault had initially reported the event on June 7, 2004. The matter was transferred to a detective for investigation. Inquiring on how the matter was progressing, the victim followed up several times with plaintiff, including on June 21, 2004, the date plaintiff and another patrolman went to the alleged perpetrator's residence.

lacked legal justification for the arrest. Further, plaintiff's failure to complete the required paperwork prompted review of other matters, revealing 250 additional record delinquencies. Plaintiff was issued a ninety-day suspension.

Plaintiff requested a departmental hearing to contest his suspension. Prior to the finalization of this matter, plaintiff filed a CEPA complaint. By stipulation, the action was dismissed without prejudice, reserving all parties' rights, pending administrative review of the disciplinary matter.[4]

The departmental hearing officer sustained eight of the ten disciplinary charges, but reduced plaintiff's suspension to sixty days. Plaintiff sought a fair hearing. The matter was certified as a contested case for review by the Office of Administrative Law and a formal evidentiary hearing was held before an Administrative Law Judge (ALJ). The ALJ affirmed plaintiff's amended suspension, sustaining charges related to plaintiff's conduct during the underlying arrest and dismissing those related to the violation of departmental documentation procedure.

Upon de novo review, the Commission upheld a majority of the ALJ's findings and his recommendation to affirm the amended

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[4] The stipulation of dismissal mentions plaintiff also received a five-day suspension, the details of which are not in the record.

suspension. The Commission cited plaintiff's conduct during the arrest and his subsequent failure to timely complete reports as "unacceptable and warrant[ing] a major disciplinary action."

Before the departmental hearing officer and the ALJ, plaintiff maintained the disciplinary charges resulted from his being "picked out for selective enforcement," noting he had "been treated differently from any other member of the department for . . . similar type allegations of wrongdoing." Plaintiff's counsel then suggested the motive resulted because "a commissioner of this municipality, which controls the operations of government, [wa]s clearly not pleased with [plaintiff]'s conduct. And this may very well have been the precipitating factor for all of these disciplinary matters." The theory of plaintiff's report suggested Breuss "wrongfully exerted her influence" into the workings of the police department, was the "precipitating factor . . . behind a series of allegations" and an "improper investigation" preponderated plaintiff's summation brief filed in the departmental hearing. Tying Breuss's phone call to the "bias investigation [sic]," plaintiff argued the "inescapable conclusion" was the "series of charges with no basis in fact . . . were based upon improper motives and which have resulted in extraordinary unfair [sic] discipline."

Similarly, before the ALJ, plaintiff testified he had no difficulty with his performance until the incident with Breuss. Plaintiff affirmed he was "written-up on charges" for the unlawful arrest, but suggested he was being "singled out" because of the incident with Breuss. When this theory was challenged, he stated: "I think the police department was digging in the dirt, looking for worms, whatever they could find. And one of the things they found was the same thing everybody was doing, and they decided to take me out of line."

The ALJ examined plaintiff to clarify his claims:

> [ALJ]: But, you're saying that this case was motivated by your action with the abandonment of the car?
>
> [PLAINTIFF]: Yes.
>
> [ALJ]: I'm trying to make that connection.
>
> [PLAINTIFF]: The connection, I think, was to put a — to stack enough against me to make the Kathy Breuss thing go away and the totality of some sort of resolution to make those two complaints go away. That Kathy Breuss hearing was coming very close to fruition when this, all of a sudden, happened.
>
> . . . .
>
> [ALJ]: Okay. Between April 20th, 2004 and 6/21/04 what happened between you and the police department, separate and aside from the Kathy Breuss incident, that showed some kind of animus, bias, retaliation.

Plaintiff responded his relationship with his supervising captain deteriorated and the other issues arose as detailed in his CEPA complaint. The ALJ again asked what happened and requested plaintiff detail the actions, asking, "you want me to consider the motivation of the police department as being . . . improper[?]" To which plaintiff responded affirmatively.

Plaintiff detailed several grievances, including "clothing allowances, overtime issues. I wasn't paid overtime. The chief denied overtime. I went to a class. He refused to pay for it." Plaintiff stated the clothing allowance involved the denial of his request for a second pair of shoes. The overtime and class issue related to his attendance of a three-day motor vehicle accident investigation class, which he attended. Plaintiff recounted he was paid for the class's regularly scheduled hours, but denied compensation for additional time the class "ran over," which he estimated was between four and six hours. Plaintiff further suggested the disciplinary charges for recordkeeping lapses were manufactured as no other officer to his knowledge had even been disciplined for similar conduct.

In his opinion, the ALJ acknowledged, plaintiff "claims he is being singled out" consistent with his comment during the hearing that plaintiff "want[s] me to consider the motivation of the police department as being – as being improper." The ALJ

did not otherwise discuss this defense; however, its rejection is noted from detailed findings sustaining the disciplinary charges. Plaintiff did not appeal from the final agency determination.

Over two years after the Commission issued its final determination, plaintiff filed a new CEPA complaint.[5] Plaintiff's complaint recounted the events surrounding his investigation of the abandoned vehicle, which were questioned by Breuss, who "critique[d] and berate[d]" plaintiff's conduct and "threatened to cause or initiate penalty against . . . plaintiff within the Police Department because of . . . plaintiff's lawful exercise of duty with regard" to the vehicle. Plaintiff reported these events of Breuss's "official misconduct" and her "attempt to influence and intimidate a sworn officer," which he stated led to him being disciplined. Thereafter, plaintiff's everyday functions were scrutinized in a plan orchestrated to "fabricate[] violations of rules and regulations, general orders, violations of departmental policy, protocol, and standard operating procedures, all for the purpose of retaliating against plaintiff for his lawful conscientious and reasonable belief and complaint to his supervisors regarding the

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[5] On appeal, no party has raised whether the refiling was timely or consistent with the terms of the stipulation of dismissal.

improper, unlawful and unauthorized acts of Commissioner Breuss."

The complaint itemized alleged acts of "consistent harassment and retribution," beginning with the performance notice because he broke into an alleged abandoned vehicle. The other alleged instances, occurring between April 29, 2004, and December 5, 2004, include: three denials of requests for clothing reimbursement, rejection of an overtime reimbursement, commencement of an internal affairs investigation following the unlawful arrest that resulted in the sixty-day suspension, selection for a random law enforcement drug test while he was suspended, assignment to the midnight shift, being ordered to attend an interview regarding two internal complaints, and correction by superiors of a report he had filed.

Plaintiff also alleged, when discovery demands were issued by his attorney for an incident involving Lieutenant Regalbuto, additional retaliation occurred as he was appointed as plaintiff's supervisor. Plaintiff maintained: he was regularly harassed for technical infractions, such as the failure to file a time card; denied vacation requests; his transfer requests for a new supervisor were rejected; he suffered criticism during roll call for reading; he was cited for improperly handling

evidence; and repeatedly scolded, criticized and subjected to verbal discipline.

Following discovery, defendant moved for summary judgment, arguing plaintiff failed to establish a prima facie CEPA claim and the holding in Winters collaterally estopped plaintiff's whistleblowing claim as it was addressed in a prior administrative proceeding. Defendant maintained the harassment issue was raised before the Commission and rejected, barring plaintiff from later raising it before the Law Division as the basis for retaliation under CEPA.

In opposition, and for the first time, plaintiff alleged defendant failed to annually distribute and keep its employees informed of how to investigate and present whistleblowing complaints, in violation of N.J.S.A. 34:19-7. Plaintiff also challenged the application of Winters, conceding "the issue of retaliation was talked about, . . . was raised," but rejected the notion it was "fully litigated" before the Commission.

On January 24, 2014, the Law Division judge entered an order granting the summary judgment dismissal of plaintiff's complaint with prejudice. In a written opinion attached to the order, the judge found the record demonstrated plaintiff "did raise the issue of retaliation in his disciplinary proceedings," stating "he felt he was being singled out because of the 2004

incident with Commissioner Breuss." Plaintiff "elaborated upon the department's alleged retaliatory acts," recounting issues pertaining to uniform and clothing allowances, "and [the] refusal to approve [his request for] overtime pay." Citing Winters, the judge concluded the alleged acts of retaliation were "central" to the underlying administrative proceeding and, therefore, barred by the doctrine of collateral estoppel from forming the basis of plaintiff's whistleblowing activity for purposes of his CEPA claim.

Nonetheless, the judge also addressed the substance of plaintiff's CEPA claim, rejecting it because plaintiff did not demonstrate he held the "objectively reasonable" belief a law, regulation, or clear mandate of public policy was being violated. The judge found the recorded conversation between plaintiff and Breuss failed to substantiate an unlawful threat or an attempt to "interfere[e] with the official duties of police officers." This appeal ensued.

On appeal, plaintiff challenges the summary judgment dismissal of his complaint as error, arguing the judge incorrectly applied Winters to broadly preclude his CEPA claim. Plaintiff also maintains defendant's reporting deficiencies pursuant to N.J.S.A. 34:19-7 provides him with an independent

cause of action, separate and distinct from the alleged instances of retaliation.

Appellate review of a trial court's summary judgment determination is well-settled.

> In our de novo review of a trial court's grant or denial of a request for summary judgment, we employ the same standards used by the motion judge under Rule 4:46-2(c). Brickman Landscaping, supra, [219] N.J. [at 406]. First, we determine whether the moving party has demonstrated there were no genuine disputes as to material facts, and then we decide whether the motion judge's application of the law was correct. Atl. Mut. Ins. Co. v. Hillside Bottling Co., 387 N.J. Super. 224, 230-31 (App. Div.), certif. denied, 189 N.J. 104 (2006). In so doing, we view the evidence in the light most favorable to the non-moving party. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). Factual disputes that are merely "'immaterial or of an insubstantial nature'" do not preclude the entry of summary judgment. Ibid. (quoting Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 75 (1954)). Also, we accord no deference to the motion judge's conclusions on issues of law. Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 382-83 (2010).
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> [Manhattan Trailer Park Homeowners Ass'n v. Manhattan Trailer Court & Trailer Sales, Inc., 438 N.J. Super. 185, 193 (App. Div. 2014).]

"The very object of the summary judgment procedure . . . is to separate real issues from issues about which there is no serious dispute." Shelcusky v. Garjulio, 172 N.J. 185, 200-01

(2002). A motion for summary judgment will not be precluded by bare conclusions lacking factual support, Petersen v. Twp. of Raritan, 418 N.J. Super. 125, 132 (App. Div. 2011), self-serving statements, Heyert v. Taddese, 431 N.J. Super. 388, 413-14 (App. Div. 2013), or disputed facts "of an insubstantial nature." Pressler & Verniero, Current N.J. Court Rules, comment 2.1 on R. 4:46-2 (2015). "[W]hen the evidence is so one-sided that one party must prevail as a matter of law, the trial court should not hesitate to grant summary judgment." Brill, supra, 142 N.J. at 540 (citation and internal quotation marks omitted).

Before examining the issues raised on appeal, we briefly review the nature of plaintiff's cause of action. CEPA was "enacted . . . to protect and encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employers from engaging in such conduct." Dzwonar v. McDevitt, 177 N.J. 451, 461 (2003) (citation and internal quotation marks omitted). The statute provides, in pertinent part:

> An employer shall not take any retaliatory action against an employee because the employee does any of the following:
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> 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, including any violation involving deception of, or misrepresentation to . . . any governmental entity . . .; or
>
> (2) is fraudulent or criminal, including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud . . . any governmental entity;
>
> . . . .
>
> 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, including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any . . . any governmental entity . . . .

[N.J.S.A. 34:19-3.]

The Supreme Court has identified the necessary elements a plaintiff must establish to assert a prima facie claim under CEPA. Lippman v. Ethicon, Inc., ___ N.J. ___, ___ (2015) (slip

op. at 34) (citing Dzwonar, supra, 177 N.J. at 462). To sustain his or her claim, an aggrieved whistleblower must demonstrate:

> (1) he or she reasonably believed that his or her employer's conduct was violating either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy;
>
> (2) he or she performed a "whistle-blowing" activity described in N.J.S.A. 34:19-3[];
>
> (3) an adverse employment action was taken against him or her; and
>
> (4) a causal connection exists between the whistle-blowing activity and the adverse employment action.
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> [Id. at 34-35 (citation and internal quotation marks omitted).]

See also Winters, supra, 212 N.J. at 89.

This standard does not require a plaintiff to "show that his or her employer or another employee actually violated the law or a clear mandate of public policy." Dzwonar, supra, 177 N.J. at 462, 464. Rather, "a plaintiff must set forth facts that would support an objectively reasonable belief that a violation has occurred." Id. at 464.

> In other words, when a defendant requests that the trial court determine[d] as a matter of law that a plaintiff's belief was not objectively reasonable, the trial court must make a threshold determination that there is a substantial nexus between the complained-of conduct and a law or public policy identified by the court or the

> plaintiff. If the trial court so finds, the jury then must determine whether the plaintiff actually held such a belief and, if so, whether that belief was objectively reasonable.
>
> [Ibid.]

See also Klein v. Univ. of Med. & Dentistry of N.J., 377 N.J. Super. 28, 40 (App. Div.) ("CEPA requires judicial resolution of threshold legal issues respecting existence of a statutory, regulatory or other clear mandate of public policy before the trier of fact determines whether an employee has been retaliated against for acting upon an objectively reasonable belief of the existence of such clear mandate by objecting to or refusing to perform acts in violation of the mandate." (citation and internal quotation marks omitted)), certif. denied, 185 N.J. 39 (2005).

Once a plaintiff establishes these elements, the burden shifts to the defendant to "advance a legitimate, nondiscriminatory reason for the adverse conduct against the employee." Id. at 38. "If such reasons are proffered, [the] plaintiff must then raise a genuine issue of material fact that the employer's proffered explanation is pretextual." Id. at 39.

Also implicated by this matter is the collateral estoppel effect of administrative disciplinary hearings upon later filed CEPA actions. See Winters, supra, 212 N.J. at 85-88. In

Winters, the plaintiff was terminated from his position of public employment after separate disciplinary proceedings on unrelated matters. Id. at 71. Following discovery and a hearing before an ALJ, the employer's disciplinary action was upheld in part, "despite [the] plaintiff's defensive theme of employer retaliation" which the ALJ found unsupported. Ibid.

The plaintiff filed a complaint in the Law Division, asserting the defendant had taken retaliatory action against him in violation of, among other things, CEPA. Id. at 82. The defendant moved for summary judgment, arguing principles of collateral estoppel barred the plaintiff from pursuing his claims. Ibid. The motion was denied and affirmed upon appeal, prompting the Supreme Court to grant certification. See Winters v. N. Hudson Reg'l Fire & Rescue, No. A-1117-09 (App. Div. August 30, 2010), rev'd, 212 N.J. 67 (2012). The issue addressed by the Court, as framed, was "whether a plaintiff, who was removed from public employment after positing a claim of employee retaliation in a civil service disciplinary proceeding, should be barred from seeking to circumvent that discipline through a subsequent [CEPA] action also alleging retaliation." Winters, supra, 212 N.J. at 71.

Following its review, the Supreme Court articulated "certain principles" which guided its query, namely that "it is

critical that there be intelligent and respectful interplay between the two systems of relief that may be called on to review the discipline of public employees -- the civil service disciplinary system and CEPA's relief from retaliatory adverse employment action by an employer." Id. at 72. Recognizing "concerns about finality and consistency" when examining "the intersection of judicial and administrative proceedings," id. at 87, the Court held a plaintiff who unsuccessfully raised retaliation as a defense in a disciplinary proceeding was subsequently barred by the principles of collateral estoppel from relitigating retaliation claims in a CEPA action before the Law Division. Id. at 72 ("A litigant should not be permitted to participate in the administrative system designed to promote a fair and uniform statewide system of public employee discipline," only to eschew advancing a meritorious defense "in an attempt to save it for later duplicative litigation."). In reaching its conclusion, the Court instructed: "Findings made as part of the discipline process will have preclusive impact in later employment-discrimination litigation raising allegations of employer retaliation based on the same transactional set of facts" because "[i]t is unseemly to have juries second-guessing major public employee discipline imposed after litigation is

completed before the Commission to which the Legislature has entrusted review of such judgments." Id. at 74.

As in Winters, plaintiff raised acts of harassment as an administrative defense to combat the disciplinary charges resulting in his suspension. He articulated his challenge during the ALJ hearing stating Breuss's conduct, which he believed was an unlawful attempt to intimidate him and influence a police matter, resulted in retaliatory conduct. Further acts of retaliation included denial of his clothing request and overtime submission, the pursuit of disciplinary charges, and a suspension for his unremarkable failing in paperwork upkeep. His CEPA complaint states defendant commenced "a campaign of sequential and consistent harassment and retribution" against plaintiff following the incident with Breuss. As noted the complaint identifies the same act of retribution plaintiff testified to before the ALJ.

Here, plaintiff's CEPA retaliation claims are based on exactly "the same transactional set of facts," ibid., as his defense to the disciplinary charges. Testimony in the administrative hearing squarely raised the same issues, which the ALJ noted in his opinion. The ALJ examined each disciplinary charge, viewing whether plaintiff was singled out as he suggested, and upheld those charges grounded upon

violations of the law or departmental regulations and policy. In doing so, he rejected assertions of pretext or retaliation.

We find no flaw in the motion judge's application of Winters as the record contains no other facts to support plaintiff's CEPA claim. Accordingly, as required by Winters, plaintiff is precluded from affirmatively repackaging the same issues raised before the ALJ as support for asserted violations of CEPA. See Wolff v. Salem Cnty. Corr. Facility, 439 N.J. Super. 282, 292-96 (App. Div.) (discussing the scope of Winters's preclusive effect), certif. denied, 221 N.J. 492 (2015).

Next, plaintiff argues the retaliation at issue encompasses more than his suspension, which he concedes is barred as a basis for relief. However, the complained-of actions do not demonstrate the required "'adverse employment action . . . taken against him.'" Lippman, supra, slip op. at 35 (quoting Dzwonar, supra, 177 N.J. at 462). The retaliatory action against an employee as used in N.J.S.A. 34:19-3 is defined by the statute. "'Retaliatory action' means 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). Plaintiff's complaints of

repeated scolding, criticism, correction, and verbal discipline do not rise to this level.

Plaintiff's newly added claim asserting an independent cause of action for defendant's violation of N.J.S.A. 34:19-7 is equally unavailing. The statute states, in pertinent part:

> An employer shall conspicuously display, and annually distribute to all employees, written or electronic notices of its employees' protections, obligations, rights and procedures under this act, and use other appropriate means to keep its employees so informed. . . . The notice shall include the name of the person or persons the employer has designated to receive written notifications pursuant to . . . this act. . . .
>
> [N.J.S.A. 34:19-7.]

A whistleblower plaintiff pursuing a cause of action based on disclosure to a public body, as claimed by plaintiff who asserts he disclosed Breuss's conduct in his report, must demonstrate compliance with the exhaustion requirement in N.J.S.A. 34:19-4. Lippman, supra, slip op. at 47. N.J.S.A. 34:19-4 makes clear that "[t]he protection against retaliatory action provided by this act" is inapplicable unless the aggrieved employee makes his or her whistleblower disclosure to "the attention of a supervisor of the employee by written notice and has afforded the employer a reasonable opportunity to correct the activity, policy or practice." "The purpose of that

requirement, which was part of CEPA as it was originally enacted, is to provide an employer with the opportunity to correct illegal or unethical activities." Barratt v. Cushman & Wakefield, 144 N.J. 120, 130 (1996).

Here, the record contains no facts supporting plaintiff's compliance with this provision. Further, no causal link is averred between the alleged adverse employment action and the failure to comply with N.J.S.A. 34:19-4. Plaintiff does not claim defendant failed to inform him about the act. The lack of proof supporting each element of the cause of action properly requires summary judgment dismissal.

Next, we reject as specious, plaintiff's argument suggesting he could advance a CEPA claim asserting he was "singled out" for discipline, when the discipline was imposed following his unequivocal acts of executing an illegal search and an equally unjustified arrest. The motion judge's determinations in this regard were supported by the facts of record. Plaintiff's arguments to the contrary lack merit. R. 2:11-3(e)(1)(E).

Lastly, we are compelled to comment on plaintiff's repeated mantra he was disciplined for "following informal policy" -- singled out for doing what everyone else was doing. No factual basis exists to conclude Breuss's phone call was more than what

she explained it was, to find out what happened. See Maw v. Advanced Clinical Commc'ns, Inc., 179 N.J. 439, 445 (2004) (reaffirming "the limiting principle enunciated in Mehlman[v. Mobil Oil Corp., 153 N.J. 163, 188 (1998)], that the complained of activity must have public ramifications, and that the dispute between employer and employee must be more than a private disagreement"). The record is equally devoid of any factual support for plaintiff's bald assertions of "informal" departmental policies. See Petersen, supra, 418 N.J. Super. at 132 (recognizing "[u]nsubstantiated inferences and feelings" and "[b]are conclusions . . . will not defeat a meritorious application for summary judgment" (second alteration in original) (citations and internal quotation marks omitted)). Defendant presents actual policies in contravention of plaintiff's claims, which were unrebutted by any evidence.

Plaintiff was not disciplined for placing a sticker on a vehicle he believed was abandoned or disciplined because he fell behind in his paperwork. He was sent a counseling notice for committing a warrantless search of a vehicle, with no legal justification, see State v. Vargas, 213 N.J. 301, 321 (2013) (holding the community-caretaking doctrine will not justify a warrantless search absent exigent circumstances), and he was disciplined for violating a citizen's due process rights in

effectuating an unwarranted arrest. The departmental hearing officer, ALJ, and Law Division noted plaintiff's defensive response to Breuss's inquiry, which was ultimately found to be an unwarranted police intrusion, was not an objectively reasonable basis to support his claims of retaliation.

Affirmed.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAPE MAY COUNTY

TO: Arthur Murray, Esquire
Patrick J. Madden, Esquire
James R. Birchmeier, Esquire

CASE: Gary S. DeMarzo et al v The City of Wildwood et al
DOCKET NO. CPM L 326-11

NATURE OF APPLICATION: DEFENDANTS THE CITY OF WILDWOOD, CHIEF JOSEPH A. FISHER, CAPTAIN STEPHEN LONG, CAPTAIN DAVID DEATON, LIEUTENANT ROBERT N. REGALBUTO, DETECTIVE LIEUTENANT KEVIN MCLAUGHLIN, PATROLMAN SHAWN YUHAS, MAYOR ERNIE TROIANO, JR., AND COMMISSIONER KATHY BREUSS'S MOTION FOR SUMMARY JUDGMENT DISMISSING PLAINTIFF'S COMPLAINT

AMENDED MEMORANDUM DECISION ON MOTION

NATURE AND BACKGROUND OF MOTION

The Complaint in this matter was filed June 7, 2011. The discovery end date was September 13, 2013. The discovery end date has been extended four (4) times before. Trial is scheduled for March 31, 2014.

Plaintiff Gary DeMarzo, a former Wildwood Police Officer, alleges Defendants the City of Wildwood, Chief Joseph A. Fisher, Captain Stephen Long, Captain David Deaton, Lieutenant Robert N. Regalbuto, Detective Lieutenant Kevin McLaughlin, Patrolman Shawn Yuhas, Mayor Ernie Troiano, Jr., the Estate of Commissioner Frederick G. Wager, and Commissioner Kathy Breuss retaliated against him in violation of the New Jersey Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1, *et seq.* The instant matter has a complex history due largely to related

departmental disciplinary proceedings and separate litigation between Mr. DeMarzo and the City of Wildwood.

The retaliation at issue allegedly here stems from Mr. DeMarzo's investigation of an abandoned vehicle. In April of 2004, he allegedly broke into a supposedly abandoned vehicle to locate documents related to ownership. The vehicle was owned by the son-in-law of then commissioner for the City of Wildwood Kathy Breuss. She contacted Mr. DeMarzo by telephone to complain and he eventually received a written admonition for unlawfully entering the vehicle.

Mr. DeMarzo complained to his superiors that Commissioner Breuss had violated New Jersey's criminal code as her phone call constituted a threat of harm to a public servant with the purpose of influencing him to violate his official duties. See N.J.S.A. 2C:27-3(a)(3). Mr. DeMarzo submitted a recording of the telephone conversation to the Cape May County Prosecutor's office for investigation. They determined no criminal violations had occurred.

Mr. DeMarzo alleges the City of Wildwood commenced a campaign of harassment against him as a result of his complaint regarding Commissioner Breuss's conduct. Mr. DeMarzo was suspended in June of 2004 on charges of misconduct originating from the arrest of Dennis Patterson. The resulting departmental hearing led to a decision by the Hearing Officer sustaining eight (8) of the charges against Mr. DeMarzo and rejecting two (2). The Hearing Officer found the charges supported a ninety (90) day suspension.

The Office of Administrative Law upheld the suspension but dismissed the charges against Mr. DeMarzo related to his failure to complete certain paperwork. The Civil Service Commission agreed with the decision of the Administrative Law Judge (ALJ), except that it found the charges relating to failure to complete paperwork shouldn't have been dismissed, but reduced the suspension to sixty (60) days.

Mr. DeMarzo originally filed an action arising from alleged retaliation in Superior Court on October 28, 2005 under Docket No. CPM-L-605-05. Subsequently, the matter was transferred to Atlantic County and assigned Docket No. ATL-L-2624-06. On April 3, 2007, the matter was dismissed by stipulation of the parties without prejudice pending the resolution of the related departmental proceedings.

Due to a separate dispute arising from Mr. DeMarzo concurrently holding the position of commissioner and police officer, the City of Wildwood filed suit against him in Superior Court. That action was titled City of Wildwood v. DeMarzo, Docket No. CPL-302-07.

On April 29, 2009, the Honorable Valerie H. Armstrong, A.J.S.C. ruled the first matter instituted by Mr. DeMarzo would remain dismissed but the filing of any new complaint would be held in abeyance until no later than sixty (60) days after Mr. DeMarzo leaves the office of commissioner. Additionally, Judge Armstrong ordered Mr. DeMarzo to forfeit either his position as Commissioner or his position as a police officer. Mr. DeMarzo appealed and the Appellate Division affirmed.

The Appellate Division directed that the position of municipal police officer and the position of commissioner within said municipality were incompatible. The Appellate Division concluded the appropriate remedy was to permit the official to choose which position to retain. As a result, further litigation ensued regarding Mr. DeMarzo's initiation of a voluntary layoff in his capacity as commissioner as opposed to resigning. See Adair v. City of Wildwood, Docket No. CPM-L-351-10.

Finally, Mr. DeMarzo elected to retain his position as Commissioner and resigned his position as a police officer. In May of 2011, Mr. DeMarzo lost his bid for re-election. The instant matter was re-filed shortly thereafter.

Defendants the City of Wildwood, Chief Joseph A. Fisher, Captain Stephen Long, Captain David Deaton, Lieutenant Robert N. Regalbuto, Detective Lieutenant Kevin McLaughlin, Patrolman Shawn Yuhas, Mayor Ernie Troiano, Jr., and Commissioner Kathy Breuss move for summary judgment dismissing the Complaint.[1] The Court has carefully and thoroughly reviewed the moving papers and attached exhibits submitted by the parties with this motion.

LEGAL ANALYSIS

I. SUMMARY JUDGMENT

R. 4:46-2(c), governing motions for summary judgment, provides, in pertinent part, that:

> the judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that

[1] The only defendant not represented in the instant motion is the Estate of Commissioner Frederick G. Wager.

> 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. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

A genuine issue of material fact must be of substantial, as opposed to being of an insubstantial nature. Brill v. Guardian Life Ins. Co. 142 N.J. 520, 529 (1995). "Substantial" means "[h]aving substance; not imaginary, unreal, or apparent only; true, solid, real," or, "having real existence, not imaginary[;] firmly based, a substantial argument." Id. (citations omitted). Disputed facts which are immaterial, fanciful, frivolous, gauzy, or merely suspicious are insubstantial, and hence do not raise a genuine issue of material fact. Id. (citations omitted).

In determining whether a genuine issue of material fact exists, the motion judge must "engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Id. at 533. This weighing process "requires the court to be guided by the same evidentiary standard of proof—by a preponderance of the evidence or clear and convincing evidence—that would apply at the trial on the merits when deciding whether there exists a 'genuine' issue of material fact." Id. at 533-34. In short, the motion judge must determine "whether the competent evidentiary 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." Id. at 540.

II. CLAIM AND ISSUE PRECLUSION

Res judicata applies to foreclose re-litigation of a cause of action, by the same parties or a party in privity with a party to the earlier proceeding, where said claim has been finally determined on the merits by a tribunal with proper jurisdiction. Roberts v. Goldner, 79 N.J. 82, 85 (1979). Collateral estoppel is a broader preclusion doctrine that bars re-litigation of any issue which was actually determined in a prior action, generally between the same parties, involving a different claim or cause of action. State v. Gonzalez, 75 N.J. 181, 186 (1977). Collateral estoppel applies to foreclose re-litigation of an issue where: (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding. In re Estate of Dawson, 136 N.J. 1, 20 (1994)(citations omitted).

III. THE CONSCIENTIOUS EMPLOYEE PROTECTION ACT

The New Jersey Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1, *et seq.*, provides an individual cause of action for retaliation against whistleblowers in the employment context. CEPA provides, in pertinent part, that:

> [a]n 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, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, in the case of an employee who is a licensed or certified health care professional, reasonably believes constitutes improper quality of patient care; or

(2) is fraudulent or criminal, including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity;

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 another employer, with whom there is a business relationship, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, in the case of an employee who is a licensed or certified health care professional, provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into the quality of patient care; 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, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, if the employee is a licensed or certified health care professional, constitutes improper quality of patient care;

(2) is fraudulent or criminal, including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor,

client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity; or

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

N.J.S.A. 34:19-3.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT[2]

Defendants maintain they are entitled to summary judgment dismissing the Complaint as Plaintiffs are collaterally estopped from re-litigating the issue of retaliation under CEPA due to previous adjudications as part of his departmental disciplinary process.

I. ISSUE PRECLUSION UNDER WINTERS

Defendants provide the New Jersey Supreme Court's recent decision in Winters v. North Hudson Reg'l Fire and Rescue, 212 N.J. 67 (2012) held the adjudication of an issue by an administrative tribunal may trigger the application of issue preclusion. Id. 212 N.J. at 85. New Jersey has long recognized "administrative tribunals can and do provide a full and fair opportunity for litigation of an issue". Hennessey v. Winslow Twp., 183 N.J. 593, 600 (2005). In order for preclusion to result, the administrative tribunal must have afforded the parties with "significant procedural and substantive safeguards comparable to those accorded to litigants in courts." Winters, supra, at 87 (quoting Olivieri v. Y.M.F. Carpet, Inc., 186 N.J. 511, 522 (2006).

In Winters, the plaintiff was a firefighter disciplined for an alleged abuse of sick leave. Supra, at 74, 78-80. The plaintiff therein maintained the discipline was unjustified and constituted an unlawful attempt to retaliate against him for engaging in protected conduct under CEPA. Id. at 81. The dispute was presented to the Civil Service Commission. Id. at 80.

There, partial summary judgment was granted in favor of the employer by an ALJ and sustained by the Civil Service Commission. Id. at

[2] James R. Birchmeier of Powell, Birchmeier, & Powell represent Defendants Joseph A. Fisher, Steven Long, and David Deaton with respect to any claims for punitive damages only. He joins in Defendants' motion for summary judgment with respect to any claims for punitive damages. He directs that, even if the motion for summary judgment is denied any claims for punitive damages should be dismissed as there is no genuine issue of material fact Plaintiffs have satisfied the requirements of the New Jersey Punitive Damages Act, N.J.S.A. 2A:15-5.9, et seq.

81. Allegedly, the plaintiff elected not to present all of the supposed evidence of retaliation in his defense before the Commission. Id. at 88. Subsequently, the plaintiff filed a CEPA action in the Superior Court claiming he had been the victim of retaliation due to his whistleblowing activities. Id. at 82.

The Supreme Court of New Jersey held the plaintiff was precluded from bringing a CEPA claim because the Civil Service Commission had already decided the discipline was justified. Id. at 88. The Supreme Court determined that, despite his strategic decision to not focus on retaliation in the administrative action, retaliation remained a central theme as part of the Commission's overall determination. Id. at 92. Consequently, the plaintiff was estopped from re-litigating the issue in a CEPA claim before the Superior Court. Id. at 88-89.

Defendants direct that Mr. DeMarzo already raised the issue of retaliation in the prior departmental disciplinary hearings. Defendants provide the Hearing Officer, the ALJ, and the Civil Service Commission all found Plaintiff's suspension from the Wildwood Police Department to be supported by the circumstances. Defendants assert Plaintiffs are therefore estopped from re-litigating the issue of retaliation under Winters, supra, 212 N.J. 67 (2012).

II. SUBSTANTIVE CLAIM

Additionally and in the alternative, Defendants maintain they are entitled to summary judgment dismissing the Complaint with prejudice because Plaintiffs have not demonstrated a prima facie claim under CEPA.

Defendants provide that to establish a prima facie cause of action under CEPA, a plaintiff must demonstrate: (1) he disclosed or threatened to disclose an activity, policy, or practice that he reasonably believed violated either a law, rule, regulation, or was either fraudulent, criminal, or in violation of a public policy; (2) he performed a whistleblowing activity as described in N.J.S.A. 34:19-3; (3) an adverse employment action was taken against him; and (4) a causal connection exists between the whistle-blowing activity and the adverse employment action. Dzwonar v. McDevitt, 177 N.J. 451, 461-62 (2003).

Defendants provide Plaintiffs have failed to demonstrate an objectionably reasonable belief that a violation of a law, rule, regulation or clear mandate of public policy had occurred. See Klein v. Univ. of Med. and Dentistry of New Jersey, 377 N.J. 28 (App. Div. 2005). Defendant states Ms. Breuss's complaint against Mr. DeMarzo did not threaten him in the performance of his official duties pursuant to N.J.S.A. 2C:27-3(a)(3)[3]. Defendants provide an objective law enforcement officer could not reasonably believe Ms. Breuss's complaint threatened "harm" in an effort to influence him to violate his official duty. See MacDougall v. Weichert, 144 N.J. 380, 394-95 (1996)(stating the overarching prohibition of the statute is that one may not threaten harm to a public servant in the performance of his duties).

Defendants note the phone conversation between Commissioner Breuss and Mr. DeMarzo was recorded. Defendants provide the transcript does not contain anything an objectively reasonable police officer could conclude was an explicit or implicit threat in an attempt to influence Mr. DeMarzo's performance of his duties.

Furthermore, Defendants provide Commissioner Breuss was justified in complaining about Mr. DeMarzo's conduct. Defendants direct that Mr. DeMarzo's entry and search of the vehicle were in violation of the Fourth Amendment to the United States Constitution as well as Article 1, Paragraph 7, of the New Jersey Constitution.

Defendants note the search was not supported by a warrant. See State v. Patino, 83 N.J. 1, 7 (1980)(stating warrantless searches are presumptively invalid unless an exception is show to apply). Defendants state none of the exceptions permitting warrantless searches of automobiles applied to the incident. Defendants provide Mr. DeMarzo had no probable cause to believe criminal contraband was in the vehicle. See State v. Cook, 163 N.J. 657, 751 (2000). The New Jersey Supreme Court has already held warrantless searches of vehicles parked in violation of parking ordinances cannot be justified under the community caretaking exception. See State v. Hill, 115

[3] Defendants assert that (a)(3) is the only plausible section applicable to the factual scenario at issue in Ms. Breuss's complaint.

N.J. 169, 174 (1989). And the vehicle was not abandoned as it was registered and properly parked.

Next, Defendants contend the request of Mr. DeMarzo's counsel for discovery as part of his disciplinary proceedings does not constitute whistle-blowing. Defendants provide a lawyer's request for discovery does not constitute any whistle-blowing activity conceived of by N.J.S.A. 34:19-3. And the letter accompanying the request stated only that certain discovery was being requested to explore the defense of selective enforcement.

Defendants assert Mr. DeMarzo's sixty (60) day suspension and the other retaliatory actions complained of are not sufficiently severe to constitute retaliation under CEPA. CEPA defines retaliatory action as action impacting the employee's compensation or rank or the virtual equivalent to discharge. Klein v. Univ. of Med. and Dentistry of New Jersey, 377 N.J. Super. 28, 46 (App. Div. 2005)(citing Hancock v. Borough of Oaklyn, 347 N.J. Super. 350, 360 (App. Div. 2002)). Defendants note CEPA does not explicitly limit retaliatory action to discharge, suspension, or demotion, but direct that adverse employment action must seriously impact the terms and conditions of employment to be actionable. See Beasley v. Passaic Cnty., 377 N.J. Super. 585, 608 (App. Div. 2005)(defining terms and conditions of employment as "those matters which are the essence of the employment relationship" and including as adverse actions "serious intrusion into the employment relationship beyond those solely affecting compensation and rank")(citations omitted).

Defendant lists Plaintiffs' complaints of retaliation as: (1) a performance notice regarding the subject vehicle; (2) Plaintiff's suspension regarding misconduct during the arrest of Dennis Patterson; (3) denial of Plaintiff's request for an additional pair of boots and a winter coat; (4) denial of Plaintiff's request for overtime; (5) required submission to urinalysis during suspension; (6) assignment to the night shift; (7) Lieutenant Regalbuto's verbal scolding for various infractions; (8) interview regarding two internal affairs complaints; (9) order to review and correct a domestic violence form previously submitted; (10) deferral of request for vacation to

decision by previous shift commander; (11) order to submit a shift assignment request; and (12) demand by defendants for production of medical records in accordance with a workers' compensation claim pursued by Plaintiff. Defendants maintain the incidents complained of, minus the suspension for misconduct upheld by the Merit System Board, are de minimus. As such, Defendants assert they cannot support a CEPA claim.

As an aside, Defendants direct that Brandy DeMarzo's claim is not legally cognizable under CEPA. Defendants provide Ms. DeMarzo is not an employee of the City of Wildwood under N.J.S.A. 34:19-3 and is therefore not protected under CEPA. Lastly, Defendants argue there is no sufficient factual support to impose individual liability on the officials and employees of the City of Wildwood under CEPA. Ivan v. Cnty. of Middlesex, 595 F. Supp. 2d 425, 478 (D.N.J. 2009), but see Higgins v. Pascack Valley Hosp., 158 N.J. 404, 425 (1999).

As such, Defendants request the Court grant its motion for summary judgment dismissing the Complaint with prejudice.

OPPOSITION

Plaintiffs oppose Defendants' motion for summary judgment on the grounds there exist genuine issues of material fact as to whether Defendants violated CEPA.

I. FAILURE TO DISPLAY AND DISTRIBUTE INFORMATION

Plaintiffs direct that N.J.S.A. 34:19-7, as amended in 2004, provides that:

> [a]n employer shall conspicuously display, and annually distribute to all employees, written or electronic notices of its employees' protections, obligations, rights and procedures under this act, and use other appropriate means to keep its employees so informed. Each notice posted or distributed pursuant to this section shall be in English, Spanish and at the employer's discretion, any other language spoken by the majority of the employer's employees. The notice shall include the name of the person or persons the employer has designated to receive written notifications pursuant to section 4 [C.34:19-4] of this act. The Commissioner of Labor and Workforce Development shall make available to employers a text of a notice fulfilling the requirements of this section and provide copies of the notice

> suitable for display and distribution to any employers who request the copies, charging them as much as is needed to pay the costs of the department. The commissioner shall also provide notices printed in a language other than English and Spanish, at the request of the employer.

Plaintiffs assert Defendant the City of Wildwood has not produced any evidence it annually distributes CEPA information or that it has designated anyone as the appropriate individual to contact as required under the statute. Plaintiffs argue Defendants have not produced any of the information through discovery and there exists testimony many employees had never received a copy of the information.

Thus, Plaintiffs provide that, in addition to any substantive violation of CEPA, they have a separate and distinct cause of action under N.J.S.A 34:19-7. As such, Plaintiffs request the Court deny Defendants' motion for summary judgment.

II. COUNSEL'S DISCOVERY REQUEST

Plaintiffs provide they are not contending the request of counsel for Mr. DeMarzo in the Regalbuto matter is a separate whistle-blowing act. Plaintiffs state that event occurred in 2000. Plaintiffs indicate the retaliation at issue here took place between 2004 through 2007. Plaintiffs assert the discovery request was merely included as the springboard from which alleged acts of retaliation emanated.

III. MR. DEMARZO'S COMPLAINT REGARDING BREUSS

Plaintiffs provide a genuine issue of material fact exists as to whether Mr. DeMarzo reasonably believed Commissioner Breuss's phone call constituted criminal wrongdoing. Plaintiffs direct it is immaterial the Cape

May County Prosecutor's Office found no actual criminal wrongdoing. Plaintiffs direct the actual wording of the transcript is of no moment as the tone itself left Mr. DeMarzo feeling threatened and intimidated. Furthermore, Plaintiffs note Defendant the City of Wildwood never referred Mr. DeMarzo's concerns about Commissioner Breuss to the appropriate authority for investigating whistleblowing complaints.

IV. DEMARZO'S OBJECTION

Plaintiffs provide a genuine issue of material fact exists as to whether Mr. DeMarzo objected to the conduct complained of.

Plaintiffs note neither "objects to" or "refuses to participate" are defined within CEPA. Plaintiffs state that New Jersey Courts have consistently held that an employee's objection or refusal must be communicated in some fashion. See Beasley v. Passaic Cnty., 377 N.J. Super. 585, 605 (App. Div. 2005)(citations omitted). Plaintiffs argue Mr. DeMarzo submitted an operational report regarding the 2004 incident and conveyed to Commissioner Breuss herself his feeling intimidated and threatened. If Commissioner Breuss utilized her elected office to garner influence on behalf of her son-in-law, Plaintiffs provide the Court should determine whether the conduct Mr. DeMarzo complained of violates any statute or clear mandate of public policy of New Jersey.

As such, Plaintiffs request the Court deny Defendants' motion for summary judgment.

V. RETALIATORY ACTION

Plaintiffs provide a genuine issue of material fact exists as to whether Mr. DeMarzo suffered retaliatory action within the meaning of CEPA.

N.J.S.A. 34:19-2(e) provides retaliatory action contemplates discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment. See Green v. Jersey City Bd. of Educ., 177 N.J. 434, 448 (2003)(stating many separate but relatively minor instances of conduct may as a whole constitute an actionable pattern of retaliatory conduct). Indeed, the universe of retaliatory action under CEPA is greater than simply discharge, suspension, and demotion. Donelson v. Dupont Chambers Works, 206 N.J. 243, 257 (2011).

Plaintiffs direct that Mr. DeMarzo was retaliated against because: (1) he received a counseling notice for following informal procedure regarding abandoned vehicles; (2) he was intimidated by Commissioner Breuss in a phone conversation; (3) Defendant the City of Wildwood violated New Jersey Attorney General Guidelines in its discipline procedures; (4) lack of explanation as to why Plaintiff were without medical prescription benefits for two weeks; (5) lack of COBRA notice with temporary loss of benefits; (6) he was not issued a second pair of shoes and other officers were; (7) Defendant Regalbuto was cold and angry towards him; (8) other officers were allowed to change shifts and he was not; (9) promises were made to look into his complaints regarding Regalbuto; (10) supervisors were told to stop listening to him; (11) he was forced into a stress induced medical leave; (12) inquiry

was made into medical and workers' compensation issues despite his representation by counsel.

Plaintiffs maintain it is for a jury to decide whether the above referenced items constitute retaliatory action under CEPA. As such, Plaintiffs request the Court deny Defendants' motion for summary judgment.

VI. CAUSAL CONNECTION

Plaintiffs direct that a genuine issue of material fact exists as to whether there is a causal connection between Mr. DeMarzo's whistleblowing and retaliatory action. Plaintiffs provide each of the individual named Defendants were aware of his whistleblowing activities and the temporal proximity of the retaliation is sufficient to create a genuine issue as to causation. While Defendants have proffered some legitimate business reasons for some of the actions taken, Plaintiffs provide those reasons could also be viewed as pretextual. As such, Plaintiffs request the Court deny Defendants' motion for summary judgment.

VII. PUNITIVE DAMAGES

Plaintiffs provide CEPA provides for punitive damages where the employer participated in the retaliation through the actions or indifference of upper management. See Lehmann v. Toys 'R' Us, 132 N.J. 587 (1993). In New Jersey, wanton recklessness or malice is required for the imposition of punitive damages. See Nappe v. Anschelewitz, Barry, Ansell & Bonello, 97 N.J. 37, 49 (1984). Plaintiffs state Defendants Troiano, Breuss, Deaton, Long, Regalbuto, McLaughlin, and Fisher all qualify as upper management. Plaintiffs provide the question as to the City of Wildwood's distribution of

CEPA information and the combination of the ranks of the individual defendants prevent the Court from entering summary judgment.

VIII. INDIVIDUAL LIABILITY

Plaintiffs provide CEPA does not contain an "aiding and abetting" subsection like the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, *et seq.* Plaintiffs assert as long as individual defendants acted indirectly or directly on behalf of or in the interests of the City of Wildwood, they may be individually liable under the LAD.

IX. ISSUE PRECLUSION

Plaintiffs provide the instant action should not be precluded under Winters v. North Hudson Reg'l Fire and Rescue, 212 N.J. 67 (2012). Plaintiffs state the discipline stemming from the Patterson arrest is but one example of the retaliation against Mr. DeMarzo. Plaintiffs direct issue preclusion should apply only to those issues actually determined in a prior proceeding. Figueroa v. Hartford Insurance Co., 241 N.J. Super. 578, 584 (App. Div. 1990)(citations omitted). Additionally, Plaintiffs state issue preclusion should be applied equitably and not mechanically where fairness requires such application. Pivnick v. Beck, 326 N.J. Super. 474, 485 (App. Div. 1999). Plaintiffs argue issue preclusion should not apply as the extent to which retaliation was raised is debatable.

REPLY

In reply, Defendants argue Plaintiffs' opposition does not demonstrate any genuine issue of material fact precluding summary judgment.

Defendants provide the argument relating to N.J.S.A. 34:19-7 is a red herring. Defendants assert there is not a single reported decision holding that section provides an individual right of action based on violation of CEPA's information distribution requirement. Additionally, Defendants note there is no causal connection between the alleged failure to properly distribute information and the adverse employment action alleged. Lastly, the alleged failure to distribute information did not inhibit Mr. DeMarzo's alleged whistleblowing activities regarding Commissioner Breuss.

Defendants assert that, while Plaintiffs provide a lengthy discussion of whether Mr. DeMarzo engaged in disclosure, he could not have reasonably believed the conduct complained of violated N.J.S.A. 2C-27-3. See Hitesman v Bridgeway Inc., 430 N.J. Super. 198, 215 (App. Div. 2013)(stating the required relationship between a complaint and the identified authority for it cannot exist when a necessary element under that authority is missing)(citations omitted). As the transcript of the communication at issue is available, Defendants maintain there is no genuine issue of material fact as to whether the communication violated any public policy. Indeed, Defendants assert that, if anything, public policy favors complaints regarding police misconduct. See N.J.S.A. 40A:14-181(requiring law enforcement agencies to have internal affairs functions consistent with the Attorney General's Guidelines).

Defendants reiterate that the instant matter is precluded under Winters v. North Hudson Reg'l Fire and Rescue, 212 N.J. 67 (2012). Defendants note the import of Winters is that a plaintiff may not pursue a

retaliation claim when retaliation is raised in related administrative proceedings. Although Plaintiffs attempt to sidestep the issue is their opposition, Defendants provide it is not "arguable" whether retaliation is allowed as a defense. Defendants note Mr. DeMarzo can and did raise retaliation as a defense in those proceedings.

Lastly, Defendants provide there is an absence of evidence the Plaintiffs' health benefits were ever terminated by the City of Wildwood. The fact CVS was unable to fill Ms. DeMarzo's prescriptions could be due to any number of anomalies within their system.

As such, Defendants request the Court grant their motion for summary judgment dismissing the Complaint.

SUR-REPLY

In response to Defendants' reply, Plaintiffs have produced copies of unpublished decisions by the Honorable Nelson C. Johnson, J.S.C., the Honorable James E. Isman, J.S.C., the Honorable Joseph E. Kane, J.S.C., and the Honorable James P. Savio, J.S.C. purporting to hold N.J.S.A. 34:19-7 provides an individual cause of action.

DISCUSSION

The Court finds Defendants are entitled to the relief requested pursuant to R. 4:46-2(c).

The instant motion for summary judgment involves the interplay between the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1, *et seq.*, the doctrine of collateral estoppel, and the New Jersey Supreme Court's recent decision in Winters v. North Hudson Reg'l Fire and Rescue,

212 N.J. 67 (2012). Pursuant to Winters, supra, Plaintiff's CEPA claim is barred due to the adjudication of the retaliation issue by the Merit Review Board. To the extent the parties also dispute the substantive viability of Plaintiffs' CEPA claim, the Court also addresses those issues herein.

I. COLLATERAL ESTOPPEL

Collateral estoppel is an equitable doctrine that applies when an issue of law or fact has been previously adjudicated. It bars the re-litigation of an issue where: (1) it is identical to the issue decided in the prior proceeding; (2) it was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to that judgment; and (5) the party against whom the doctrine is asserted was a party to, or in privity with a party to, the earlier proceeding. In re Estate of Dawson, 136 N.J. 1, 20 (1994)(citations omitted); State v. Gonzalez, 75 N.J. 181, 186 (1977).

New Jersey courts take a flexible approach in the application of equitable defenses. O'Keeffe v. Snyder, 83 N.J. 478, 517 (1980). In public employee discipline matters, the public interest in the finality of any administrative determination weighs in favor of the application of collateral estoppel. See Winters v. North Hudson Reg'l Fire and Rescue, 212 N.J. 67, 85 (2012).

In Winters, the New Jersey Supreme Court addressed the issue of collateral estoppel in CEPA claims where the claimant was involved in related administrative disciplinary proceedings. Therein, Steven J. Winters brought a claim for retaliatory discharge under CEPA against his former

employer Regional Hudson Fire and Rescue. Id. The Supreme Court held that his claim was precluded because he had previously raised the issue of retaliation before the Merit Review Board in related departmental disciplinary proceedings. Id. at 88.

The Court held that, for collateral estoppel to apply, the administrative tribunal must have afforded the parties with "significant procedural and substantive safeguards comparable to those accorded to litigants in courts." Id. at 87. Like the claimant in Winters, Mr. DeMarzo raised the issue of retaliation in related departmental disciplinary proceedings before the ALJ and the Civil Service Commission. Such proceedings afford sufficient procedural and substantive safeguards that collateral estoppel may apply to any claims or issues raised. Winters, supra, at 38 (citing Ensslin v. Twp. of N. Bergen, 275 N.J. Super. 352, 371 (App. Div. 1994)(holding "no significant difference... in the quality or extensiveness of the proceedings" between the Merit System Board and Superior Court), cert. denied, 142 N.J. 446 (1995)).

Winters is analogous to the instant matter in several ways. Both claimants were public employees. Both involved a departmental disciplinary hearing where the matter was adjudicated by a Hearing Officer, an ALJ, and the Civil Service Commission. And both claimants argued in Superior Court the administrative proceedings did not adequately address the issue of retaliation.

In Winters, the Supreme Court rejected contention the issue of retaliation was not sufficiently litigated or essential to the decision of the Civil Service Commission. Supra, at 73. The Supreme Court reasoned that,

after Mr. Winters raised his retaliation themed defense in the opening session with the ALJ, nothing prevented him from presenting said defense more fully than he did. Id. It directed that whatever tactical concerns motivated his decision, that decision left him with consequences. Id. at 90 ("[Mr. Winters] could not fold his arms and declare he would no longer participate in the administrative forum to which he had submitted – not on a claim that he had raised.").

Like the claimant in Winters, Mr. DeMarzo raised the issue of retaliation in related departmental disciplinary proceedings. And like the claimant in Winters, Plaintiffs argue that the issue was not actually litigated in those proceedings. However, a review of the record demonstrates Mr. DeMarzo actually developed the issue of retaliation more than the claimant in Winters.

Unlike Winters, the instant action was not filed after the instigation of departmental disciplinary proceedings. The delay in this matter was the result of Mr. DeMarzo's election to the position of Commissioner for the City of Wildwood and the separate litigation regarding said position. However, Mr. DeMarzo is still bound by the determinations by the Merit System Board with respect to any issues raised there.

Plaintiffs cannot escape the impact of the prior administrative adjudication by arguing the instances of retaliation addressed there were but a part of the course of conduct comprising their CEPA claim in the instant action. Mr. DeMarzo can and did raise the issue of retaliation in the prior disciplinary proceedings. See, e.g., In the Matter of Gary S. DeMarzo, State of

New Jersey Office of Administrative Law, Docket No. CSV 4930-07, Vol. X, November 21, 2008, at 18:1-5; 19:13-18; 20:14-20; 21:6-22; 245:2-21; 247:18-21. Indeed, counsel for the City of Wildwood objected to testimony pertaining to the issue of retaliation. Id. at 18:10-20:8. The ALJ overruled the objection and provided: "[c]ertainly [Mr. DeMarzo] has a right to explore motive, bias, things of that nature... [a]nd I'll allow it for that reason." Id. at 19:24-20:2.

When asked if he felt he was being singled out because of the 2004 incident with Commissioner Breuss, Mr. DeMarzo responded he did. Id. at 245:2-11. He further provided "I think the police department was digging in the dirt, looking for worms, whatever they could find... [a]nd one of the things they found was the same thing that everybody else was doing [failing to complete reports], and they decided to take me out of line." Id. at 245-17-21. Mr. DeMarzo elaborated upon the department's alleged retaliatory acts, directing that they involved several other issues including uniform allowances, clothing allowances, and refusal to approve of overtime pay. Id. at 247:14-15; 250:10-15.

The whistleblowing activity central to Mr. DeMarzo's retaliation claim is his complaint regarding Commissioner Breuss's telephone call concerning the 2004 motor vehicle invasion incident. In the Matter of Gary S. DeMarzo, State of New Jersey Office of Administrative Law, Docket No. CSV 4930-07, Vol. X, November 21, 2008, at 247:18-21. With regard to the issue of retaliation, the underlying administrative proceedings focused on, though were not limited to, that incident. Id. And the failure to provide additional

instances of retaliatory conduct in those proceedings has consequences. See Winters, supra, at 90.[4]

After reviewing the matter and the conclusions of the ALJ, the Civil Service Commission found the charges against Mr. DeMarzo were justified and upheld the discipline prescribed against him. See Final Administrative Action of the Civil Service Commission, Docket No. 4930-07, March 27, 2009, at 4-5. The Court is satisfied the issue of retaliation was sufficiently litigated to trigger the application of collateral estoppel precluding the instant CEPA action.

The Court notes there is some inconsistency with the mandate of Winters and the doctrine of collateral estoppel generally. Application of collateral estoppel usually requires that the issue to be precluded be identical to the issue litigated in the prior proceeding. In re Estate of Dawson, 136 N.J. 1, 20 (1994). Furthermore, the issue need be essential to the prior judgment on the merits. Id. But equitable defenses such as collateral estoppel should be applied equitably rather than mechanically where fairness requires their application. Pivnick v. Beck, 326 N.J. Super. 474, 485 (App. Div. 1999).

CEPA is remedial legislation enshrining important public policy and "should be construed liberally to effectuate its important social goal." Dzwonar v. McDevitt, 177 N.J. 451, 463 (2003)(citations omitted). However, our Supreme Court has made clear where the issue of retaliation is raised

[4]Plaintiffs argue they have a separate and distinct CEPA cause of action under N.J.S.A. 34:19-7 for failure to provide required information. The Court notes no binding precedential opinion of the State of New Jersey supports the proposition N.J.S.A. 34:19-7 provides for an independent cause of action. Defendants have provided four unpublished law division opinions to the contrary. However, the Court is satisfied that if such a cause of action were recognized in the instant matter, it is not sufficiently distinct from the issue of retaliation raised before the Merit Review Board, to escape the broad preclusive impact of Winters, supra.

and considered by an administrative tribunal, the important public interest of preventing duplicative or inconsistent determinations warrant the application of collateral estoppel to preclude subsequent CEPA actions. See Winters, supra, at 89 ("[The Superior Court and Merit System Board] can and must be reconciled, and not made duplicative of, irrelevant to, or worst, inconsistent with, one another.").

Accordingly, Defendants' motion for summary judgment dismissing the Complaint with prejudice is granted.

IV. SUBSTANTIVE CLAIM

Even if Plaintiffs' claim were not barred by the doctrine of collateral estoppel, Defendants would be entitled to the relief requested pursuant to R. 4:46-2(c) and N.J.S.A. 34:19-1, *et seq.*

To state a prima facie claim pursuant to CEPA, a claimant must demonstrate that: (1) he reasonably believed his employer's conduct was violating either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy; (2) he performed a "whistle-blowing" activity described in N.J.S.A. 34:19-3(c); (3) an adverse employment action was taken against him; and (4) a causal connection exists between the whistle-blowing activity and the adverse employment action. Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003)(citations omitted).

It is not necessary for the employee to articulate the precise source of law or public policy the employer's conduct allegedly violated. See Mehlman v. Mobil Oil Corp., 153 N.J. 163, 193-94 (1998)("Specific knowledge of the precise source of public policy is not required. The object of CEPA is not to

make lawyers out of conscientious employees but rather to prevent retaliation against those employees who object to employer conduct that they reasonably believe to be unlawful or indisputably dangerous to the public health, safety or welfare."). However, it is the employee's burden to articulate facts that, if true, would support an objectively reasonable belief that such a violation of law or a clear mandate of public policy had occurred. Dzwonar v. McDevitt, supra, 177 N.J. at 454.

Plaintiffs assert that the phone conversation between Commissioner Breuss and Mr. DeMarzo supports an objectively reasonable belief Commissioner Breuss violated N.J.S.A. 2C:27-3 and/or public policy of elected officials refraining from improperly interfering with police officers' performance of their official duties. N.J.S.A. 2C:27-3 provides that:

> (a) Offenses defined. A person commits an offense if he directly or indirectly:
>
> (1) Threatens unlawful harm to any person with purpose to influence a decision, opinion, recommendation, vote or exercise of discretion of a public servant, party official or voter on any public issue or in any public election; or
>
> (2) Threatens harm to any public servant with purpose to influence a decision, opinion, recommendation, vote or exercise of discretion in a judicial or administrative proceeding; or
>
> (3) Threatens harm to any public servant or party official with purpose to influence him to violate his official duty.
>
> (b) Grading. An offense under this section is a crime of the third degree.

The Court notes N.J.S.A. 2C:27-3(a)(3) appears to be the provision applicable in the instant matter.

Plaintiffs argue the transcript of the telephone conversation between Mr. DeMarzo and Commissioner Breuss is not dispositive of whether she threatened him with harm. Plaintiffs provided at oral argument that Commissioner Breuss's tone and demeanor reasonably caused Mr. DeMarzo to feel intimidated.

To "threaten harm" under N.J.S.A. 2C:27-3(a)(3) has been interpreted to mean to threaten or inflict a harm that was unlawful as a crime or tort, or violation of a law, administrative regulation, applicable code of ethics, or other legal duty;. See MacDougall v. Weichert, 144 N.J. 380, 395-97 (1996). Even if Mr. DeMarzo was intimidated by Commissioner Breuss' tone, it was not objectively reasonable for Mr. DeMarzo to perceive a threat of unlawful harm from the context of the conversation. Commissioner Breuss' statement that: "[I] was just trying to understand what happened, that's all" undermines Plaintiffs' contention that the tone of the call was threatening.

Furthermore, the Court finds it was not objectively reasonable for Mr. DeMarzo to conclude Commissioner Breuss' call violated a clear mandate of public policy against interference in officers' duties by public officials. The determination of whether a claimant has established the existence of a clear mandate of public policy is an issue of law. Mehlman v. Mobil Oil Corp., 153 N.J. 163, 187 (1998). Courts should consider the competing interests of society, the employer, and the employee. Hennessey v. Coastal Eagle Point Oil Co., 129 N.J. 81, 100 (1992).

Commissioner Breuss called Mr. DeMarzo because he broke into her step-son's vehicle to determine who it belonged to and whether it was

abandoned. Plaintiffs assert this was the unofficial policy of the City of Wildwood Police Department at the time of the incident. It is undisputed such a policy was illegal.

Under the Walsh Act, a commissioner is the chief administrator of the department assigned to him or her by the board and is responsible for executing and overseeing all of the administrative functions associated with that department. City of Wildwood v. DeMarzo, 412 N.J. Super. 105, 123 (App. Div. 2010)(citing N.J.S.A. 40:72-6, *et seq.*). Whether or not Commissioner Breuss was specifically charged with oversight of the police department, it was within the ken of her responsibilities as commissioner to reach out to the police department upon learning of their ill-advised policy regarding abandoned vehicles.

Admittedly, there may have been more appropriate channels for Commissioner Breuss to go through instead of contacting Mr. DeMarzo directly. However inappropriate it might have been, it is insufficient to support an objectively reasonable belief that it violated a clear mandate of public policy against interfering with the official duties of police officers.

The activity at issue, whether unofficial department policy or not, was illegal. And oversight of the police department was within the responsibility of the city commissioners. Despite Commissioner Breuss' involvement being somewhat personal, as she stated, she was "just trying to find out what happened, that's all."

Plaintiffs have not demonstrated an objectively reasonable belief the conduct complained of violated either a law, rule, regulation promulgated

pursuant to law, or a clear mandate of public policy. Therefore, even if Plaintiffs' CEPA claim was not precluded pursuant to Winters, Plaintiffs have failed to demonstrate a prima facie CEPA claim.

CONCLUSION

The motion for summary judgment is opposed. Defendants have demonstrated they are entitled to the relief requested pursuant to R. 4:46-2(c) and Winters v. North Hudson Reg'l Fire and Rescue, 212 N.J. 67 (2012). The motion for summary judgment dismissing the Complaint with prejudice is granted.

An appropriate form of Order has been executed. Conformed copies of that Order will accompany this Memorandum of Decision.

March 5, 2014

J. Christopher Gibson, J.S.C.