SETTLEMENT AGREEMENT AND GENERAL RELEASE

THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE (hereinafter "this Agreement") is entered into by and between Jeffrey Nardello (hereinafter "plaintiff") and Township of Voorhees, its insurers, directors, employees, agents or servants, past or present, and Keith Hummell, Louis Bordi and John Prettyman (hereinafter "defendants"); and

WHEREAS, Plaintiff filed a Complaint against Defendants in the Superior Court of New Jersey entitled Jeffrey Nardello v. Township of Voorhees, Keith Hummell, Louis Bordi, and John Prettyman bearing Docket No. L-5639-01, and has asserted claims in connection with plaintiff's employment with the defendants; and

WHEREAS, the parties settled all controversies between them, including plaintiffs claims bearing Docket No.L-5639-01 and including any and all related claims which were or could have been asserted as of the effective date of the settlement as defined in paragraph 1(a) herein, whether such claims are presently known or unknown; and

WHEREAS, all parties acknowledge that the merits of the controversy are in dispute and have not been finally adjudicated, and that no party admits any liability to any other, but all have reasons to desire amicable resolution of the matter, including to avoid the costs of litigation; and

NOW, for and in consideration of the agreements, covenants and conditions herein contained, the adequacy and sufficiency of which are hereby expressly acknowledged by the parties hereto, the parties agree as follows:

1. The terms of settlement:

   (a) the defendants agree to pay plaintiff the settlement amount of Five Hundred Twenty Thousand Dollars ($520,000.00) stipulated to be allocated to claims for non-economic damages including pain, suffering, humiliation, embarrassment, loss of enjoyment of life, disability, attorney's fees and costs, said settlement amount being fully and completely inclusive of all claims of any nature, sort, or variety, including claims for attorney's fees and costs incurred by counsel for plaintiff. No part of the payment represents, or is intended to represent, payment for lost income or for punitive damages, it being the intention of the parties that this payment is solely to compensate the plaintiff for losses in the nature of personal injury. The parties stipulate to this allocation to make it clear that the payment is not intended to represent economic gain to plaintiff. This payment shall be received no later than fourteen (14) days of the date this agreement is fully executed by the plaintiff and received by defense counsel.

   (b) In addition to the amount set forth in 1(a) above, defendant will pay Four Hundred Ten Thousand Dollars ($410,000.00) directly to plaintiff's counsel, Van Syoc Chartered, based on plaintiff's counsel's disputed

claim of entitlement to a potential fee award. Van Syoc Chartered's Tax ID No. is 22-3688383. No other amount for counsel fees and costs is due. The payment of counsel fees and costs must be made within thirty (30) days of the date on which this matter settled, that being December 2, 2009. As a result, the payment of counsel fees and costs is due to be received no later than January 2, 2010.

(c) The parties understand and agree that an IRS Form 1099 designating the settlement amount as "other income" may be issued. Plaintiff agrees to assume full liability for applicable state, federal and local taxes, if any, that may be required by law to be paid with respect to any settlement payment described herein. Plaintiff further agrees that in the event that the Internal Revenue Service or any other taxing authority deems any tax, interest, penalties or other amounts to be due from the defendants with respect to his settlement, he will indemnify the defendants for any sums defendants may be required to pay, exclusive of attorney's fees and costs. It is the intent of the parties that the payments described in paragraphs 1(a) herein will be the defendants' total payment to or for the benefit of the plaintiff.

(d) Plaintiff represents that his allegations against the defendants arise out of the alleged conduct which plaintiff contends resulted in non-economic damages including loss of enjoyment of life, humiliation, and embarrassment, notwithstanding the fact that the defendants vigorously and wholly deny plaintiff's allegations and are settling this matter for reasons other than the merits of plaintiff's claims, including the avoidance of the cost of litigation. Settlement does not represent an admission of liability by any party.

(e) Plaintiff agrees that, but for this settlement agreement and general release, he would not be entitled to the aforesaid payments and other terms of settlement described herein.

(f) Plaintiff and his counsel agree not to disclose the facts, amounts, and terms of this Agreement, and will keep such information confidential and will not disclose it to anyone, except to immediate family or as may be required to consult with legal counsel or for tax or accounting consultation or advice or unless required to do so by court order or subpoena, or as otherwise required by law.

2. Dismissal of Action: Plaintiff understands and agrees that counsel for the defendants will file with the Superior Court of New Jersey, the executed original of the Stipulation of Dismissal with Prejudice with regard to Docket No. L-5639-01. The parties understand and agree that the terms of the aforesaid dismissals are expressly incorporated by reference within this Settlement Agreement and General Release as if fully set forth herein.

3. Release in Consideration for the Payment and Other Consideration Provided for in this Agreement: In consideration of the payment and other consideration provided for in this agreement, plaintiff, personally and for his estate and his heirs, waives, releases and gives up any and all claims, demands, obligations, damages, liabilities, causes of action and rights, in law or in equity, known and unknown, that he may have against the defendants, their agents, representatives and employees (present and former), and their respective successors and assigns, heirs, executors and personal or legal representatives, based upon any act, event or omission occurring before the execution of this Agreement, including, but not limited to, any events related to, arising from, or in connection with plaintiff's employment, and/or association with the defendants. Plaintiff specifically waives, releases and gives up any and all claims arising from or relating to plaintiff s employment, and/or association with the defendants based upon any act, event or omission occurring before the date of execution of this settlement agreement, including but not limited to, any claim that was asserted or could have been asserted under any federal and/or state statutes, regulations and/or common law. Plaintiff specifically waives, releases and gives up any and all claims arising from or relating to his employment and/or relationship and/or association with defendants, based upon any act, event or omission occurring before the effective date of the settlement as defined in paragraph 10, including but not limited to, any claim that was asserted or could have been asserted under any Federal and/or State statutes, regulations and/or common law, expressly including, but not limited, to any potential claim relating to the following (along with any amendments thereto):

(a) The National Labor Relations Act;

(b) Title VII of the Civil Rights Act of 1964;

(c) Sections 1981 through 1988 of Title 42 of the United States Code;

(d) The Employment Retirement Income Security Act of 1974;

(e) The Immigration Reform Control Act;

(f) The Americans with Disabilities Act of 1990;

(g) The Age Discrimination & Employment Act of 1967;

(h) The Fair Labor Standards;

(i) The Occupational Safety & Health Act,

(j) The Family & Medical Leave Act 1993

(k) The Equal Pay Act;

(l) The New Jersey Law Against Discrimination;

(m) The New Jersey Minimum Wage Law;

(n) The Equal Pay Law for New Jersey;

(o) The New Jersey Worker Health & Safety Act;

(p) The New Jersey Family Leave Act;

(q) The New Jersey Conscientious Employee Protection Act;

(r) Any anti-retaliation provision of any statute or law;

(s) Any other federal, state or local, civil or human rights law or any other local, state or federal law, regulation or ordinance, any provision of any federal or state constitution, any public policy, contract, tort or common law, conversion, spoliation, or any losses, injuries or damages (including back pay, front pay, liquidated, compensatory or punitive damages, attorney's fees and, litigation costs).

4. No Claims Permitted/Covenant Not to Sue: Plaintiff waives his right to file any charge or complaint on his own behalf and/or participate as a complainant, a plaintiff, or charging party in any charge or complaint which may be made by any other person or organization on their behalf, with respect to anything which has happened up to the execution of this Agreement before any federal, state or local court or administrative agency including the EEOC and the DCR, against the defendants, except if such waiver is prohibited by law. Should any charge or complaint be filed, plaintiff agrees that he will not accept any relief or recovery therefrom. Plaintiff confirms that no such charge, complaint or action exists in any forum or form other than the Complaint bearing Docket No L-5639-01, and hereby covenants not to file any charge, complaint or action in any forum or form against the defendants based upon anything which is encompassed by the terms of this Agreement. Except as prohibited by law, in the event that any such charge, complaint or action is filed by plaintiff, it shall be dismissed with prejudice upon presentation of this Agreement.

5, Attorneys Fees and Costs: Plaintiff agrees that plaintiff will bear his own costs and attorney's fees which have been incurred in connection with the within matter and in connection with the negotiation and preparation of this Agreement and that no amounts other than the payment to be made pursuant to paragraph l(a) and (b) of this Agreement shall be sought by or owed to plaintiff or his attorneys from defendants in connection with this matter; the parties also agree that no monies shall be sought by any defendants from plaintiff.

6. No Admission of Liability: It is expressly understood that neither the execution of this agreement nor any other action taken by the defendants in connection with plaintiff's alleged claims or this settlement, constitutes an admission by any of the defendants of any violation of any law, duty or obligation, or that any decisions or actions taken in connection with plaintiff's employment were unwarranted, unjustified, retaliatory, discriminatory, wrongful or otherwise unlawful.

7. Entire Agreement: This Agreement contains the sole and entire agreement between the parties hereto and fully supersedes any and all prior agreements and understanding pertaining to the subject matter hereof, and is intended to memorialize the settlement of plaintiff's claims. Plaintiff represents and acknowledges that, prior to executing this Agreement, he consulted his attorney, that he had ample time to do so that he obtained the advice of counsel prior to making the decision to execute the Agreement and that he had not relied upon any representation or statement not set forth in this Agreement made by any defendants thereto, or, defendants' counsel or representatives, with regard to the subject matter of this Agreement. No other promises or agreements shall be binding unless in writing, signed by the parties hereto, and expressly stated to represent an amendment to this Agreement.

8. Severability: The parties agree that if any court declares any portion of this agreement unenforceable, the remaining portion shall be fully enforceable.

9. Applicable Law: This settlement Agreement shall be construed and interpreted in accordance with the laws of the State of New Jersey. The parties agree that any action to enforce or interpret this Agreement shall only be brought in a court of competent jurisdiction in the State of New Jersey, which the parties hereby acknowledge and agree to be the Superior Court of New Jersey.

10. Effective Date: This Agreement will become effective on the date on which plaintiff executed this Settlement Agreement and General Release.

11. This Settlement Agreement and General Release is not intended to be used and shall not be used as evidence or for any other purpose in any other action or proceeding, other than evidence of the parties' compromise as set forth herein or to enforce the terms of this Settlement Agreement and General Release.

12. Plaintiff understands and acknowledges that he is aware of his legal right to consider the Agreement for a period of 21 DAYS, which such period shall expire on December 23, 2009. Plaintiff further understands and acknowledges that, at his option alone, the Agreement may be executed prior to the expiration of the 21 DAY period.

13. Plaintiff understands and acknowledges that he has seven (7) days following the execution of the Agreement to revoke the terms of the Agreement. Any notice of revocation hereunder must be made in writing and delivered within seven (7) days of the execution of the Agreement to WILLIAM M. TAMBUSSI, ESQ., BROWN & CONNERY, LLP, 360 HADDON AVENUE, WESTMONT, NJ 08108. For the revocation to be effective, written notice must be received by WILLIAM M. TAMBUSSI, ESQ. no later than the close of business on the seventh (7^{th}) day after Plaintiff signs the Agreement. If Plaintiff revokes the Agreement, it shall be null and void, and the obligations or entitlements of both parties under the Agreement shall be eliminated.

14. This Agreement, including but not limited to the Company's obligations hereunder, is not effective until the expiration of seven (7) calendar days following the date the Agreement is signed by Employee (the "Effective Date").

15. BY SIGNING THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE, PLAINTIFF ACKNOWLEDGES:

A. HE HAS READ IT;

B. HE UNDERSTANDS IT AND KNOWS HE IS GIVING UP IMPORTANT RIGHTS;

C. HE AGREES WITH EVERYTHING IN IT;

D. HIS ATTORNEY NEGOTIATED THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE WITH HIS KNOWLEDGE AND CONSENT;

E. HE HAS BEEN ADVISED TO CONSULT WITH HIS ATTORNEY PRIOR TO EXECUTING THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE, AND HAS IN FACT DONE SO; AND

F. HE HAS SIGNED THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE KNOWINGLY AND VOLUNTARILY.

IN WITNESS WHEREOF, the parties have hereunto set their hands.

PLAINTIFF

Jeffrey Nardello

STATE OF NEW JERSEY }:
}:
COUNTY OF CAMDEN }:

I certify that on the 2nd day of December, 2009, Jeffrey Nardello personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

(a) is named in and personally signed this document; and
(b) signed, sealed and delivered this document as his own act and deed.

Marianne M. DiPiero

Marianne M. DiPiero
Notary Public of New Jersey
My Commission Expires January 30, 2012

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1811-03T2

JEFFREY NARDELLO,

Plaintiff-Appellant,

v.

TOWNSHIP OF VOORHEES, KEITH HUMMEL, LOUIS BORDI, JOHN PRETTYMAN,

Defendants-Respondents.

APPROVED FOR PUBLICATION

May 13, 2005

APPELLATE DIVISION

Argued March 16, 2005-Decided April 4, 2005.

Before Judges Braithwaite, Lisa and Winkelstein.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, CAM-L-5639-01.

Clifford L. Van Syoc argued the cause for appellant (Van Syoc Chartered, attorneys; Mr. Van Syoc and James E. Burden, on the brief).

Patricia A. Smith argued the cause for respondent (Ballard Spahr Andrews & Ingersoll, attorneys; Ms. Smith and Edward T. Groh, on the brief).

The opinion of the court was delivered by

WINKELSTEIN, J.A.D.

Plaintiff, Jeffrey Nardello, appeals from the Law Division's summary judgment dismissing his complaint under New

Jersey's Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -8. We reverse.[1]

Plaintiff was employed as a police officer by the Voorhees Township Police Department from September 1980 until September 2002. Defendant Keith Hummel is the Township's Chief of Police; defendant John Prettyman is the Deputy Chief; and defendant Louis Bordi is a lieutenant.

During his employment, plaintiff received excellent work performance evaluations, normal pay raises, and was never demoted; he was promoted to lieutenant in 1999. As a lieutenant, he was the commanding officer of the detective bureau and in charge of the department SWAT team. In his brief, plaintiff lists thirty pages of incidents he claims collectively constitute adverse employment actions his employer took against him. We will not repeat each claim, but will review several of them to place plaintiff's arguments in context.

In 1999, plaintiff was required to perform an internal investigation regarding the alleged misconduct of an officer. Prettyman told plaintiff that Hummel was "gunning" for the officer, indicating that he wanted plaintiff to work hard to find incriminating evidence against the officer. Plaintiff

[1] In arriving at our decision, we have not considered any portion of plaintiff's appendix that was stricken by our order of August 24, 2004.

informed Hummel that he would comply with the law and perform a fair investigation. Thereafter, plaintiff claims his work environment became hostile and retaliatory. He was denied permission to obtain firearms instructor training relative to his membership on the SWAT team. He claims that because of Hummel's animosity, and "in order not to have it adversely impact on plaintiff's friends and colleagues in the SWAT team, plaintiff was coerced into resigning on September 1, 2000, both as a leader and as a member of the SWAT team. . . ."

Also in September 2000, Prettyman ordered plaintiff to conduct an investigation into an adult sex party attended by a Township police officer. Based on plaintiff's "fact-finding," the officer was written up and told not to attend those types of parties because "officers have to abide by a higher moral standard." Plaintiff did not agree with the officer's punishment, believing it to be a violation of the officer's civil rights. Consequently, plaintiff reported the alleged violation to the prosecutor's office. That office later informed plaintiff that the officer's rights were violated and the disciplinary letter should be removed from his file. After plaintiff told Prettyman that he contacted the prosecutor's office and its response, some of plaintiff's job responsibilities were transferred to another officer.

Plaintiff filed a written complaint in October 2000 regarding his concern that department personnel procedures were being routinely violated. Hummel demanded to know who plaintiff intended to call as witnesses for the complaint, but when plaintiff refused to tell him because of an alleged concern about retaliation, Hummel threatened to charge plaintiff with insubordination. Hummel also stated that plaintiff was mentally unstable and should see a psychiatrist.

The following January, plaintiff believed a Township police officer had unreasonably "sicced" a K-9 dog on a suspect and the department was covering it up by submitting black-and-white photographs of the injuries instead of color photographs, in violation of the department manual, which provided that color photographs should always be issued for police dog bite incidents. He asked the Camden County Prosecutor's Office to conduct an internal investigation into the incident. As a result of taking that action, plaintiff claims he was "wrongfully removed from the detective bureau, an act of retaliation, and ultimately had all of his authority and responsibility taken away, such that plaintiff, even though a lieutenant, supervised no one."

On September 7, 2000, plaintiff met with the Township Mayor regarding the "goings on" at the police department. He told the

Mayor about the retaliatory environment and its impact on his work. The Mayor told him to "play the game."

Plaintiff also claims he was given demeaning jobs for his rank: removing and installing an alarm in the stairwell; performing maintenance of toilets; performing background investigations; and overseeing a building project. He was not permitted to work on assignments customarily under a lieutenant's job title.

Plaintiff instituted this lawsuit on September 4, 2001. He retired on September 1, 2002. His retirement was precipitated by a hand injury that prevented him from qualifying to carry a weapon. Plaintiff also claims his retirement was a result of psychological problems he suffered due to his hostile work environment.

CEPA prohibits an employer from retaliating against an employee under certain circumstances. N.J.S.A. 34:19-3. To establish a CEPA violation, a plaintiff must prove that: (1) "he or she reasonably believed illegal conduct was occurring"; (2) "he or she disclosed or threatened to disclose the activity to a supervisor or public body"; (3) "retaliatory employment action was taken against him or her"; and (4) "a causal connection [exists] between the whistle-blowing and the adverse employment action." Hancock v. Borough of Oaklyn, 347 N.J. Super. 350, 358-59 (App. Div. 2002), appeal dismissed, 177 N.J. 217 (2003).

Defendants do not dispute that the activities for which plaintiff claims he was retaliated against may be considered whistle-blowing activities as defined in N.J.S.A. 34:19-3. The primary issue presented to the motion judge, and on appeal, is whether plaintiff can show that retaliatory action was taken against him. In granting summary judgment, the motion judge found "[t]here was no discharge, suspension, demotion or other adverse employment action taken against [plaintiff]." Plaintiff claims that although he was not terminated, suspended or demoted, defendants took adverse employment action against him. At the very least, he asserts that disputed facts exist to defeat summary judgment. We agree.

To decide a summary judgment motion, the judge must determine whether "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995); see also R. 4:46-2(c). The trial court must not decide issues of fact; it must only decide whether there are any such issues. Brill, supra, 142 N.J. at 540. On appeal, we use these same standards. We first determine whether there exists a genuine issue of fact, and if there does not, we decide whether the trial court's ruling on the law was correct. Prudential Prop. &

Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div. 1998). Here, the evidence presented, when viewed in a light most favorable to plaintiff, shows genuine issues of material fact as to whether he suffered retaliatory action by his employer.

N.J.S.A. 34:19-2e defines "Retaliatory action" as "the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment." As such, "employer actions that fall short of [discharge, suspension or demotion], may nonetheless be the equivalent of an adverse action." Cokus v. Bristol Myers Squibb Co., 362 N.J. Super. 366, 378 (Law Div. 2002), aff'd, 362 N.J. Super. 245 (App. Div.), certif. denied, 178 N.J. 32 (2003); see also Anderson v. Davila, 125 F.3d 148, 163 (3rd Cir. 1997)(while alleged retaliatory conduct did not involve tangible adverse employment decision against the plaintiff, actions denied the plaintiff the "benefit of initiating litigation without the harassment of otherwise uncalled for surveillance, simply because [the plaintiff] filed a potentially vexatious lawsuit"); Charlton v. Paramus Bd. of Educ., 25 F.3d 194, 200 (3rd Cir.)(former employee may file retaliation action against prior employer under Title VII for retaliatory conduct), cert. denied, 513 U.S. 1922, 115 S. Ct. 590, 130 L. Ed. 2d 503 (1994); Mancini v. Tp. of Teaneck, 349

N.J. Super. 527, 564-65 (App. Div. 2002)(assignment to different or less desirable tasks may constitute adverse employment action and establish prima facie case of retaliation), aff'd as modified, 179 N.J. 425 (2004).

On the other hand, not every employment action that makes an employee unhappy constitutes "'an actionable adverse action.'" Cokus, supra, 362 N.J. Super. at 378 (quoting Montandon v. Farmland Indus., Inc., 116 F.3d 355, 359 (8th Cir. 1997)); see also Hancock, supra, 347 N.J. Super. at 360 (allegations of retaliatory conduct that made plaintiff's job "mildly unpleasant" and did not result in substantial impact on either plaintiff's working conditions or cause a de facto termination were insufficient to constitute unlawful retaliation).

Recently, the New Jersey Supreme Court discussed the policy underpinnings relating to claims of retaliation in a CEPA action. Green v. Jersey City Bd. of Educ., 177 N.J. 434 (2003). Green was decided on other issues, that being whether punitive damages may be awarded against a public entity under CEPA and whether the claim in that case was barred by CEPA's one-year statute of limitations. Nonetheless, in discussing what constitutes an adverse employment action taken against an employee in the terms and conditions of the employee's employment pursuant to N.J.S.A. 34:19-2e, the Court noted that

"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" may constitute an adverse employment action pursuant to the governing statute. Id. at 448. Quoting Abbamont v. Piscataway Township Board of Education, 138 N.J. 405, 431-32 (1994), the Green Court emphasized that the purpose of New Jersey's CEPA statute "'is to protect and encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employers from engaging in such conduct. Consistent with that purpose, CEPA must be considered "remedial" legislation and therefore should be construed liberally to effectuate its important social goal.'" 177 N.J. at 448.

Although the trial court correctly stated that the cited language was dicta because the primary issue addressed by the Green Court was a statute of limitations question, "as an intermediate appellate court, [we are] bound by carefully considered dictum from the Supreme Court." State v. Breitweiser, 373 N.J. Super. 271, 282-83 (App. Div. 2004), certif. denied, 182 N.J. 628 (2005).

Here, while plaintiff was not discharged, suspended or demoted, when the facts are viewed in a light most favorable to him, a jury could draw an inference that he suffered a series of

adverse retaliatory actions by his employer. In 1999, plaintiff obtained the third highest rank in the department — a lieutenant. As a lieutenant, he was in charge of the SWAT team. Plaintiff set forth several instances beginning in 1999 where he was forced to inform superiors of cover-ups and alleged misconduct. Because of this, plaintiff claims he was: denied permission to obtain firearms instructor training relative to his membership on the SWAT team; coerced to resign as leader and a member of the SWAT team; denied the ability to work on crime prevention programs; and removed from the detective bureau, with his authority to supervise taken away. He also claims he was given demeaning jobs for his rank. While defendant contests that these actions were taken in retaliation for plaintiff's conduct, and claims that plaintiff was unable to fully explain at his deposition exactly what retaliatory conduct was taken against him, we are satisfied that while many of the incidents are relatively minor, plaintiff has made a prima facie case and a jury could conclude that they combine to demonstrate a pattern of retaliatory conduct that is specifically prohibited.

We are mindful that plaintiff suffered no reduction in pay during the course of his employment. He claims among other things, however, that he suffered emotional distress as a result of his employer's actions. As our New Jersey Supreme Court recently noted in a case brought under the New Jersey Law

Against Discrimination, N.J.S.A. 10:5-1 to -42, "the Legislature intended victims of discrimination to obtain redress from mental anguish, embarrassment, and the like, without limitation to severe emotional or physical ailments." Tarr v. Ciasulli, 181 N.J. 70, 81 (2004). We are satisfied that this same analysis may be applied in a CEPA action.

Reversed and remanded for further proceedings.

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

CLERK OF THE APPELLATE DIVISION

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0605-06T1

JEFFREY NARDELLO,

Plaintiff-Appellant,

v.

TOWNSHIP OF VOORHEES, KEITH HUMMEL, LOUIS BORDI AND JOHN PRETTYMAN,

Defendants-Respondents.

Submitted May 12, 2009 - Decided July 8, 2009

Before Judges Winkelstein, Fuentes and Gilroy.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, L-5639-01.

Van Syoc Chartered, attorneys for appellant (Clifford L. Van Syoc, James E. Burden and Sebastian B. Ionno, on the brief).

Brown & Connery, attorneys for respondents (William M. Tambussi, Diane S. Kane and Christopher A. Orlando, on the brief).

PER CURIAM

Plaintiff is a former police officer for defendant Township of Voorhees. Defendant Keith Hummel was the police chief; defendant John Prettyman was the deputy chief; and defendant Louis Bordi was a lieutenant on the force. Plaintiff filed a

complaint against defendants alleging various acts of retaliation in violation of the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -18. On October 10, 2003, the trial court granted defendants' summary judgment motions and dismissed plaintiff's complaint. We reversed. Nardello v. Twp. of Voorhees, 377 N.J. Super. 428 (App. Div. 2005) (Nardello I).

Trial began on March 8, 2006, and continued over thirty-two trial days. At the close of the evidence, the court dismissed the complaint as to the individual defendants and reserved on the Township's Rule 4:40-2 motion to dismiss. The jury returned a verdict in favor of plaintiff, awarding him $500,000 in compensatory damages, but rejecting his claim for punitive damages.

Following the verdict, the Township moved for dismissal of plaintiff's complaint, a judgment notwithstanding the verdict, remittitur, and a new trial. Plaintiff filed a cross-motion for, among other things, a new trial with regard to economic and punitive damages, additur, and reconsideration of the dismissal of the claims against the individual defendants. By order of August 18, 2006, the court granted the Township's Rule 4:40-2 motion and vacated the jury verdict. The court denied plaintiff's cross-motion as to the individual defendants and did

not substantively address plaintiff's remaining motions or the Township's motion for a remittitur.

On appeal, plaintiff challenges the court's dismissal of his claim against all defendants; he asserts that the trial court abused its discretion by barring evidence of retaliation in support of his claim for punitive damages; and he claims the court erred in barring evidence of economic loss for past lost income and reduced pension benefits.

In light of the record and prevailing law, we reverse the trial court's August 18, 2006 order granting the Township's Rule 4:40-2 motion. Consequently, we reinstate the jury verdict. We affirm the court's decision, apparently not reduced to an order, dismissing plaintiff's complaint as to Bordi and Prettyman, but reverse the dismissal as to Hummel and remand for a new trial as to him. We reverse the order denying plaintiff's motions for post-trial relief and remand for consideration of those motions on their merits. On remand, the court shall also substantively address defendant's remittitur motion.

I

Because the jury returned a verdict in plaintiff's favor, we will accept as true all evidence supporting plaintiff's claims and give that evidence the benefit of all reasonable inferences. R. 4:40-2; Dolson v. Anastasia, 55 N.J. 2, 5-6

(1969); Pressler, Current N.J. Court Rules, comment 1 on R. 4:40-2 (2009).

Plaintiff joined the Voorhees police department in September 1980. Hummel promoted him to lieutenant in 1998, and assigned him as the commanding officer of the detective bureau. Hummel also assigned plaintiff to lead the SWAT team.

In early 1999, Officer Tina Hamburg-Smeltzer (Hamburg) complained to plaintiff that her supervisor, Lieutenant Mark Wilson, demeaned her by calling her "Missy" and by giving her menial jobs. Hamburg testified that she was accused by Wilson of being a troublemaker, and he told her that if she "open[ed] [her] mouth again that [she] would be looking for another job." She was intimidated by Wilson. She claimed that when she discussed the matter with Prettyman, who was a captain at the time, he told her she would have to "deal with it." She also discussed it with Hummel, who took no action.

At the time, Hamburg was a DARE officer. She worked regular hours Monday through Friday in a job she "loved." After she complained about Wilson to Hummel, she was "pulled out of DARE" and placed on the midnight shift. She believed that her transfer from DARE to the midnight shift was in retaliation for her complaints. Hamburg testified that she never filed a lawsuit with regard to the harassment because she feared retaliation if she did so.

Plaintiff repeatedly talked to Hummel and Prettyman about Hamburg's situation, but to no avail. Plaintiff argued that Hamburg was being subjected to discrimination. In this lawsuit, plaintiff asserts that Hummel and Prettyman retaliated against him for supporting Hamburg.

In November 1999, plaintiff conducted an internal affairs investigation of Officer Dale Lynch. Prettyman told plaintiff that Hummel was not satisfied with plaintiff's investigation, and that Hummel was "gunning" for Lynch. Plaintiff replied that he intended to perform an honest, complete and comprehensive investigation.

Also in the fall of 1999, plaintiff, Bordi (then a sergeant), and other police personnel, were present at a school that had received a bomb threat. As a lieutenant, plaintiff was in charge of the scene. When plaintiff emerged from the school after speaking to the superintendent, he heard a radio transmission stating that Bordi had been placed in charge. When plaintiff later expressed his displeasure to Hummel about Bordi being placed in command, Hummel became agitated and threatened to send him home.

Hummel testified that he was unable to contact plaintiff at the scene, so he instructed dispatch to have Bordi, the next ranking officer, call headquarters. Later, Hummel revised the police bomb threat policy to ensure clear lines of

communication. He claimed that the change had "nothing to do with . . . [plaintiff] specifically," and was not instituted because plaintiff had relayed Hamburg's complaint to him.

Lieutenant Francis Bialecki testified that Hummel failed to comply with the chain of command during the bomb threat incident. According to Bialecki, placing Bordi, a sergeant, in charge, rather than resting authority in plaintiff, a lieutenant, diminished plaintiff's authority. Bialecki considered Hummel's actions "demeaning."

Plaintiff claimed retaliation when Hummel, in early 2000, denied his and Bialecki's requests for firearms instructor training in connection with their SWAT team memberships. In a January 24, 2000 memorandum from Hummel to Bialecki and plaintiff, Hummel stated:

> Captain Prettyman and the Camden County Police Academy have advised me that you have signed up for Firearms Training and Prism Training. I am officially informing you of the following:
>
> 1. You are not authorized by this Department to attend either training session.
>
> 2. If you decide to attend on your own time, I will not recognize your credentials.
>
> 3. You will not be appointed to the Firearms Committee.
>
> 4. You will not be permitted to represent the Voorhees Township Police Department during Academy Training Sessions.

Another of plaintiff's claims of retaliation arose out of his transfer from the department's investigation division. Hummel testified that he had given thought to the concept of the rotation of command-level personnel when Bialecki sought to invoke his seniority in 1998 and asked to be commander of investigations. At that time, Hummel told Bialecki that he intended to place plaintiff in charge of investigations, and Bialecki would get his turn in the future.

In June 2000, within a month after Hummel returned from taking courses at the FBI Academy, which included courses on rotating command personnel, he told plaintiff that he was going to be rotated out of the investigations bureau. He told plaintiff that he would be reassigned, and Bialecki would be given the opportunity to head that unit. Plaintiff's transfer, initially discussed in June 2000, took place approximately one year later. Bialecki testified that while he was not sure if he had perceived plaintiff's transfer as retaliatory at the time, "[t]aking some things [he] know[s] today . . . it could have been perceived as retaliatory."

Plaintiff further claimed that "[a]s a result of the ongoing retaliation, and in order not to adversely impact on plaintiff's friends and colleagues in the SWAT team, plaintiff was forced to resign on September 1, 2000, both as a leader and

a member of the SWAT team[.]" In a letter to Prettyman dated September 1, 2000, he set forth his reasons for resigning. He asserted that

> the actions of other officers both superior to me, equal to me and those of lesser rank than me have been playing a "casual conversation" game in an effort to go around my decisions and basically get what certain members of the team and certain people outside of the team feel is needed. . . .
>
> On numerous occasions I have had my orders countermanded by other Lieutenants, and at times Sergeants.
>
> . . . .
>
> I have noticed that a few of the team members have learned that they do not have to go through the proper chain of command because they have found that by being a member of the Firearms Committee they can have "casual conversations" with another Lieutenant and or the Chief and ultimately get what they want without my approval. This includes schools, equipment, training, even direct orders to myself all with the approval of the Chief of Police.
>
> I have been informed on more than one occasion that I should speak with certain subordinates if I want something for the SWAT Team instead of going through the Chain of Command as "they can get whatever I want by talking to the Chief."
>
> Orders have been issued by my peers without my input regarding the SWAT Team but apparently with the input of my subordinates.
>
> I have found that certain members have been sent to additional training . . . all without my approval or input. . . .

> I have been ordered to do certain tasks by Sergeants and Lieutenants not within the SWAT Team.

Hummel testified that he and Prettyman reluctantly accepted plaintiff's resignation after they had rejected his two prior attempts to resign. After plaintiff's resignation, the SWAT team obtained new equipment and training from funds received as a result of a June 2001 sale of a seized automobile.

Also in September 2000, plaintiff complained to Voorhees Mayor Gary Finger about plaintiff's impending transfer to a different division. Finger testified that "[i]t was an accepted practice . . . [in the police department to rotate] to get experience in traffic, . . . [the] SWAT team, [d]etective [b]ureau or whatever it may have been, administration." Finger told plaintiff, in effect, that he should "play the game." According to Bialecki, he and plaintiff had been making complaints about violations of the chain of command, which had been causing them problems running their divisions.

On January 13, 2001, members of the Voorhees Police Department conducted a drug-bust at the "G" Street clothing store in the Echelon Mall. The department used a police dog during the operation. The dog and its handler, Patrolman Sacavitch, were stationed outside the store's rear door. Upon encountering the police, a store employee, later identified as

Steven Young, ran out the back of the store. After Young failed to heed police demands to stop, Sacavitch released the dog, which bit and injured Young. Bordi initially ordered black and white photographs of Young's injury, although department policy called for color photographs. Detective Marino, who also participated in the operation, told Bordi that plaintiff wanted color photographs. Hummel directed that color photographs be used.

Hummel testified that at a staff meeting where the Young incident was discussed, plaintiff expressed concern about the use of force, the reports, and the black and white photographs. Plaintiff was also concerned whether probable cause existed to arrest Young because Officer Marino, who participated in the drug-bust, told plaintiff that he did not intend to arrest Young. Plaintiff demanded an internal affairs investigation.

According to Bialecki, Hummel stated at the meeting that "we should do what we can to protect the officers." Hummel admitted making a statement to that effect but explained that "if . . . an officer is involved in a situation, if all of the information comes back that the officer followed the policy, that he followed the law, then . . . we should present that case in [the] best light for the officer. Yes, we should protect him." Hummel testified that he decided that an internal affairs investigation was unnecessary after speaking with officers,

reading reports, checking the color photographs in the file, and consulting with the Camden County prosecutor's office about the use of force.

Officer Kenneth Plotts testified. At the time of the Young incident, plaintiff was his supervisor. Plotts confirmed that the policy was to take color photographs of dog bites, but Bordi wanted black and white photographs taken.

In May 2001, Rick Barrett, a maintenance person assigned to the police department, told plaintiff and Bialecki about an anonymous letter and a confidential investigation being conducted by the State Police, the Attorney General's Office, or the Camden County Prosecutor's office. Without notifying Hummel or Prettyman, plaintiff called those offices, asking if an investigation was in progress. Plaintiff did not notify his superiors of his calls because he did not want to compromise a pending investigation.

Plaintiff and Bialecki told Prettyman that they learned that the New Jersey State Police corruption unit received the anonymous letter, and that that unit forwarded the letter to the Camden County Prosecutor's office. Prettyman obtained a copy of the letter from the prosecutor's office. The letter, addressed to the Attorney General, stated that a "major use of force incident is being covered up by the Voorhees Township Police Administration." The writer requested anonymity but, if

discovered, requested protection under the "whistle blowers protection act." The author requested an investigation of: Hummel for not conducting an internal affairs investigation; Bordi for typing Sacavitch's report of the dog bite incident and failing to obtain timely medical treatment for Young; and Sacavitch for violating the use-of-force policy and for failing to provide timely medical treatment to Young. In response, Prettyman prepared a report dated September 5, 2001, in which he concluded that the anonymous letter's allegations against police personnel were "unfounded."

Meanwhile, in July 2001, the lease on a Voorhees Police Department annex was about to expire and a new structure was under construction. Hummel explained that problems arose with the new building, so he assigned plaintiff to assist Bialecki, who had been in charge of the project and who had asked for help. Plaintiff claimed that when he was transferred, he had no one to supervise, which was contrary to his responsibilities as a lieutenant. Though Hummel agreed that plaintiff did not supervise police personnel for a period of sixty days, he stated that plaintiff supervised contractors.

Bialecki testified that he was told, in a meeting with both Hummel and Prettyman, that plaintiff would be helping him with the building, and plaintiff was to answer to him. Bialecki testified that he had not asked for help; he was not behind

schedule in completing the building; and although Hummel told him that plaintiff's experience in building construction would help him, Bialecki stated that he was not building anything and did not need help. Hummel denied telling Bialecki that his job was to supervise plaintiff and that plaintiff was his assistant.

While Bialecki, as a lieutenant, had been assigned to assist other lieutenants, he had never been assigned to report to another lieutenant. Lieutenant Wilson also testified that neither he nor any other lieutenant had been required to report to another lieutenant, as apparently plaintiff was required to do with regard to the building project. Bialecki and Wilson testified that no other lieutenants were transferred at that time. According to Plotts, not only he, but all of the detectives that worked for him, believed that plaintiff's transfer from the detective bureau to head building maintenance was a demotion, a loss of prestige.

Plaintiff was shocked to learn that he had been removed from the detective bureau, which he thoroughly enjoyed, to work solely on the building project. Plaintiff believed that the building assignment was done to demean, punish and retaliate against him.

Between September 2001 and June or July 2002, Bialecki was on active duty with the Navy. Hummel issued a personnel order stating that Bialecki had been activated for military duty and

plaintiff would therefore be commander of the support services division effective September 26, 2001. Prettyman admitted that when an officer is transferred, the transfer is generally documented by a written order, but he was unable to explain why no written order was extant when plaintiff was transferred from the detective bureau.

Plotts challenged defendants' testimony that plaintiff's transfer from the detective bureau was simply part of a rotation of all lieutenants. He said that lieutenants were sent to training schools for their particular area of expertise, and "to rotate somebody from Criminal Investigations where that's their area of expertise and put him into a position of supervising the building maintenance[,] that just did not make sense." Plotts testified that after plaintiff was removed from the detective bureau, Prettyman took responsibility for that bureau until Bialecki returned from military leave.

Plaintiff walked off of the firing range in March 2002 because he could no longer shoot, after having continued problems with his hand, which he injured during his police academy training. He asserted that he would have had his hand repaired if it was not for the retaliatory and hostile environment in which he had been placed.

Plaintiff voluntarily left the police force. He received full salary until September 2002, when he was granted a

disability retirement pension. He admitted that Hummel never took away any of his contractual benefits, took disciplinary action against him, or sought to have him fired. Acknowledging that Hummel did not "technically" demote him, plaintiff testified: "I didn’t lose my lieutenant's bars or position, what I lost was the authority, the respect. . . . I wasn't given any responsibilities that a lieutenant's supposed to have. I was basically stripped down to less than a police officer at that point."

In support of his claim for damages, plaintiff presented the testimony of Dr. James Hoyme, a psychiatrist. Dr. Hoyme testified that plaintiff was "profoundly depressed, and . . . had all the classic signs and symptoms of severe depression."

II

In rendering its decision as to defendant's Rule 4:40-2 motion, the trial court found a lack of temporal proximity between plaintiff's actions and the Township's alleged retaliatory conduct. The court found no connection between plaintiff's February 1990 claims of discrimination involving Hamburg, or his November 1999 objection to Hummel's suggestion that he tailor his investigation of Lynch for whom Hummel was "gunning"; and Hummel's February 2000 denial of firearms training for plaintiff or Hummel's June 2000 notice to plaintiff

that he would be transferred from the detective bureau. The judge said:

> Case law supports temporal proximity where retaliation is alleged within days or a few weeks of the reporting. The length of time here [is] of months and a year appears to the court to be unsupported, and I find there is no temporal proximity for the February, [19]99 discrimination report [involving Hamburg that plaintiff] filed. It was one year until the plaintiff was denied firearms training and 16 months until he received notice of reassignment.

In addressing whether the denial of firearms training to plaintiff was retaliatory, the judge emphasized Hummel's testimony that plaintiff did not receive firearms training because he had already attended several other courses, including a course at West Point, which was very prestigious. In examining whether plaintiff's transfer from the detective bureau was retaliatory, the court credited Hummel's testimony that if officers wished to advance in rank, they should know how to operate every division in the police department. The court further credited Hummel's testimony that all lieutenants should be rotated, and the other two lieutenants, Wilson and Bialecki, had already served as commander of that division. Further, the court stated that, "At no time did the plaintiff [not] disprove by any testimony, either direct or circumstantial, that his transfer was for retaliatory reasons, nor did he disprove that .

. . Bialecki, as a senior officer wasn't entitled to the transfer to [the] division of his choice."

The court turned to plaintiff's claim that he was retaliated against on September 1, 2000, when Hummel coerced him to resign from the SWAT team by denying equipment for the SWAT team and denying plaintiff's request for training. Once again, the court relied on Hummel's testimony:

> Hummel pointed out that at no time did the SWAT team lose any members to any other assignments as did Lieutenant Bialecki's division of Support Services to projects such as DARE and school training. Additionally, plaintiff never sustained the burden of proving that finances . . . [did not play] a role in the denial of equipment to the SWAT team. The great influx of equipment subsequent to plaintiff's resignation came from a criminal forfeiture arising out of a criminal case of a Porsche resulting in $34,000 in unexpected funds to the police department.

The court considered the Young incident, but discounted plaintiff's claim that he was transferred because of his claims of police impropriety involving that incident. The court found that plaintiff was transferred because of Bialecki's military service notice; that because the transfer to the support services division came in June 2000, the Young incident, which occurred in January 2001, had no effect on the transfer. The court discounted plaintiff's testimony that his transfer to support services was retaliatory, and found that he was not

required to perform menial or degrading jobs while the head of that division.

The court concluded that plaintiff did not suffer an adverse employment action, but was simply unhappy with his transfer. The court said: "[p]laintiff technically lost no status, had clear job responsibilities, had authority to supervise the people in that division and suffered no disadvantage from the transfer."

III

"CEPA is designed to protect employees who blow the whistle on illegal or unethical activity committed by their employers or co-employees." Estate of Roach v. TRW, Inc., 164 N.J. 598, 609-10 (2000). "So viewed, CEPA is remedial legislation. Consequently, courts should construe CEPA liberally to achieve its remedial purpose." Id. at 610 (internal quotations and citation omitted). "CEPA prohibits an employer from taking 'retaliatory action' against an employee for protected conduct." Maimone v. Atl. City, 188 N.J. 221, 235 (2006) (quoting N.J.S.A. 34:19-3). CEPA defines "retaliatory action" as "the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment." Ibid. (quoting N.J.S.A. 34:19-2(e)). An adverse employment action is not limited to a demotion, suspension or discharge and need not result in a loss of pay.

Id. at 236. "Many separate but relatively minor instances of behavior directed against an employee . . . may . . . combine to make up a pattern of retaliatory behavior." Green v. Jersey City Bd. of Ed., 177 N.J. 434, 448 (2003); see also Nardello I, supra, 377 N.J. Super. at 433-36.

An employee who claims retaliation under N.J.S.A. 34:19-3 must demonstrate "a causal connection exists between the whistle-blowing activity and the adverse employment action." Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003). The causal connection "can be satisfied by inferences that the trier of fact may reasonably draw based on circumstances surrounding the employment action." Maimone, supra, 188 N.J. at 237. In drawing inferences from an employer's actions that a plaintiff claims to have been retaliatory, a factfinder takes into consideration whether those actions were based on permissible reasons. Bowles v. City of Camden, 993 F. Supp. 255, 265 (D.N.J. 1998). In doing so, the factfinder may consider any "inconsistencies" or "anomalies" that cast doubt on the employer's credibility, and raise an inference that the employer did not act for the reasons it stated. Ibid.

IV

Applying the evidence to this legal framework, we conclude that the trial record supports a legitimate inference that defendants' conduct toward plaintiff was not motivated by the

reasons defendants proffered, but their stated reasons were pretext for taking retaliatory action against plaintiff. Our conclusion is informed by the following evidence, representing inconsistencies in defendants' testimony, as well as testimony of other members of the Township police department bearing on the veracity of defendants and the pervasive retaliatory atmosphere in the department.

Both Hummel and Prettyman testified that plaintiff was their friend until he retired in September 2002. Hummel claimed that while he had been upset with plaintiff, he was never angry at him. Hummel testified at his deposition that he had full confidence in plaintiff's investigations, conceding that he never knew plaintiff to shade or slant investigations. At trial, however, Hummel testified that plaintiff "would say anything for money."

Lieutenant Bialecki's testimony provided the jury with additional evidence questioning Hummel's credibility. He testified that Hummel told him the trial was going to get "ugly" because Hummel was going to accuse Bialecki of trying to take Hummel's job. Bialecki testified that he feared retaliation if he truthfully testified during the trial. He said: "There [have] been some instances in the past where adverse consequences have happened to people where — in similar circumstances." Bialecki also supported plaintiff's testimony

that Hummel acknowledged that the police department should "do what [it could]" to help officers involved in the Young arrest, implying that black and white rather than color photographs should be used to lessen the impact of the dog bite.

Addressing plaintiff's allegations that Hummel told him that Bialecki required help with the new building, Bialecki testified that he had not asked for help, he was not behind schedule in completing the building, and although Hummel told him that plaintiff's experience in building construction would help him, Bialecki was not building anything and did not need help. When asked if he perceived plaintiff's transfer from the detective bureau to become Bialecki's subordinate was retaliation, he testified: "Taking some things I know today that I didn't know at the time, yes, it could have been perceived as retaliatory." Bialecki also contradicted Hummel's claim that he and plaintiff were friends until the day plaintiff retired.

Bialecki also testified that Hummel failed to comply with the chain of command during the bomb threat incident. Bialecki agreed that under Hummel's leadership, the chain of command rules and regulations were not uniformly enforced, and that a chain-of-command violation demeans a supervisor and undermines his authority. He asserted that when Hummel placed Bordi, a sergeant, in charge, rather than resting authority in plaintiff,

who was a lieutenant, Hummel diminished plaintiff's authority. Bialecki considered Hummel's actions "demeaning."

Plotts also provided testimony from which a jury could find support for plaintiff's claims of retaliation. He testified that he and the detectives that worked for him believed that plaintiff's transfer from the detective bureau to building maintenance was a demotion, a loss of prestige. Plotts also challenged defendants' testimony that plaintiff's transfer from the detective bureau was simply part of a rotation of all lieutenants. He also confirmed that after Hummel removed plaintiff from the detective bureau, the bureau "started to get some things back," including different equipment.

As did Bialecki, Plotts told the jury that Hummel was not truthful when he claimed that he and plaintiff were friends until plaintiff retired. Plotts asserted that as a result of the actions defendants took against plaintiff, Plotts and other officers were afraid to talk to plaintiff because they did not want to be viewed as troublemakers and they were afraid of being retaliated against by the police department senior staff. He testified that within the police department,

> depending on who you were, some people were treated differently. If you were a possible friend of someone, you were given a preferential treatment . . . and things were just . . . swept under the carpet.

> But if you were somebody else that they didn't particularly care for, they [would] enforce the rules and regulations of the police department. In fact, in some points go out of their way to enforce the rules.

Plotts testified that a group of people in the police department were called the "A Team." Those on the A Team were "lined more or less with the philosophy of the police department" and "the Chief's friends and so forth like that or anyone else's friend who's in the administrative part." He asserted that employees who were not part of the A Team were punished for not complying with Attorney General guidelines, while members of the A Team were not. Plotts indicated that Hummel and Prettyman could make "people's lives hell."

Another officer who provided testimony bearing upon Hummel's credibility was Gerard Slack. Hummel had disciplined Slack for violating department guidelines. Slack testified that Hummel charged him with failure to supervise because three of his officers "didn't write enough tickets and have enough calls for service for the year." According to Slack, Patrolman Nicole Wysocki said that Hummel told her that she would be terminated if she did not testify against Slack at his disciplinary proceeding.

A police dispatcher, Patricia Martin, testified that she was concerned about being retaliated against if she testified at

trial, "because of what appeared to have taken place down through the years."

Hamburg testified that after plaintiff was removed from the detective bureau, the remaining lieutenants, Bordi and Wilson, stayed where they were. To her knowledge, there was no truth to the claims that plaintiff's transfer was part of a rotation of all four lieutenants. She confirmed that after plaintiff was removed from the detective bureau, although he remained a lieutenant, he no longer had the power, authority or command as did other lieutenants. It was Hamburg's perception that plaintiff suffered retaliation after he helped her with regard to her harassment complaints. At that point, he became a lieutenant "in name only." Hamburg testified that after his difficulties with Hummel, plaintiff became quiet and withdrawn.

Hamburg never filed a lawsuit with regard to the sexual harassment because she feared retaliation. She was worried about adverse repercussions simply for telling the truth in court. Based on her years of interacting with Hummel, she did not consider him to be truthful or honest.

Wilson supported plaintiff's allegation that plaintiff and Hummel were not friendly with each other. He acknowledged that the department rules and regulations were not enforced even-handedly; some employees were permitted to violate the rules and regulations and others would suffer consequences if they did so.

He confirmed that the police department was not free of retaliation. He was not aware of any other lieutenant, aside from plaintiff, who had had no one to command.

Patrolman Chris Beach provided additional testimony that supported plaintiff's claims of retaliation. He had worked with Hummel for approximately eighteen and one-half years, and he perceived Hummel to be "not always truthful." Beach testified: "[Hummel] doesn't exactly come forward and tell the whole truth about what's going on." Beach "absolutely" perceived plaintiff's transfer as retaliation for plaintiff's attempts to resolve Hamburg's harassment grievance.

In light of this testimony, which substantially undercut the reasons both Hummel and Prettyman gave for the actions taken against plaintiff, a jury could have reasonably drawn an inference that Hummel's and Prettyman's testimony was not entitled to belief, leading the jury to conclude that defendants' actions against plaintiff were retaliatory.

The trial court essentially concluded that plaintiff did not suffer adverse employment action, but was simply unhappy with his transfer. That raises the question of whether the series of defendants' relatively minor actions constituted adverse employment actions for purposes of a CEPA claim. We answered that question in Nardello I, supra, 377 N.J. Super. at 435. We explained that although "plaintiff was not discharged,

suspended or demoted, [viewing the facts] in a light most favorable to him, a jury could draw an inference that he suffered a series of adverse retaliatory actions by his employer." Ibid. Though we decided Nardello I on summary judgment, the trial proofs, as we have just described, support our decision. The record shows that although many of defendants' actions against plaintiff were relatively minor, plaintiff lost his status, his job responsibilities, and substantially lost his authority.

Beginning in 1999, plaintiff informed his superiors of what he considered to be cover-ups and alleged misconduct within the police department. He claims that he was denied permission to obtain firearms instructor training; he was ultimately coerced to resign as a leader and member of the SWAT team; he was denied the ability to work on crime prevention programs; and he was transferred from the detective bureau, with his supervisory authority taken away, and given demeaning jobs that others of his rank were not given, with no one to supervise. He asserts that these actions were taken in retaliation for attempting to intervene with regard to the claims of discrimination by Hamburg; for questioning why the chain of command was not followed; for speaking out when he was implicitly urged to slant his investigation of Sergeant Lynch; and for questioning the department's actions regarding the Young incident.

Although the jury could have accepted defendants' testimony that they had legitimate reasons for their actions, the evidence was also sufficient for the jury to draw the opposite conclusion, that their actions were retaliatory. That conclusion was supported by the extensive testimony by members of the police department concerning the retaliatory atmosphere in the department, the police chief's reputation for a lack of truthfulness, and the favoritism the senior officers showed to certain members of the police department. The testimony showed that other members of the department considered plaintiff's transfer demeaning. Drawing all legitimate inferences in favor of plaintiff, R. 4:40-2, the evidence supports plaintiff's claim that "he was shunned and ostracized both by management and the rank and file."

The record contained ample evidence from which the jury could conclude that plaintiff was effectively demoted, constituting an adverse employment action. See Mancini v. Twp. of Teaneck, 349 N.J. Super. 527, 564-65 (App. Div. 2002) (noting that evidence showing that management ignored and sought to humiliate the plaintiff and encourage, "by both their behavior and inaction, the rank and file officers to treat [the] plaintiff in the same demeaning manner . . . coupled with conveying orders through [the] plaintiff's subordinates, . . . and giving her arguably less desirable assignments and shifts

even though she had achieved the rank of lieutenant, when considered cumulatively, was, in essence an 'effective demotion' sufficient to constitute adverse employment action."), aff'd as modified, 179 N.J. 425 (2004).

In setting aside the verdict, the trial court found no causal connection between plaintiff's whistle blowing and defendants' allegedly retaliatory conduct. The court found that "[c]ase law supports a temporal proximity where retaliation is alleged within days or a few weeks of the reporting. The length of time here [was] months and a year appears to the court to be unsupported." We disagree with the court's interpretation of the law. Proximity, while a factor, 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). And significantly, as we explained in Romano, "[w]e doubt that a sophisticated employer . . . would immediately retaliate." Ibid.

The Third Circuit relied on similar principles in Radwan v. Beecham Labs., a Div. of Beecham, Inc., 850 F.2d 147, 152 (3rd Cir. 1988), where it reversed summary judgment in favor of an employer for what the plaintiff alleged was unlawful termination. The court stated that while a three-year lapse between the plaintiff's conduct and the alleged retaliation could have been indicative of a motive other than retaliation,

the factfinder could have drawn different inferences from the same facts, in that "a knowledgeable employer might mask its reason for discharging an employee by delaying its action for a protracted period after a dispute." Ibid.

Plaintiff resigned from the SWAT team on September 1, 2000, and from the police department in 2002. The retaliatory conduct allegedly began in 1999. Whether the employer's conduct constituted retaliation was for the jury to decide, not for the judge. We agree with plaintiff's argument in his brief that:

> Given the plethora of inconsistencies and incoherencies in the evidence supposedly justifying employer's conduct, the jury had ample evidence to find that the supposedly legitimate reasons were merely a pretext, and that retaliation was probably the primary motive underlying the conduct complained of, such that the trial court dismissal of plaintiff's claims against the employer was error.

V

Next, we address plaintiff's claim that the trial court erred in dismissing the complaint as to the individual defendants. The court found that Bordi, Prettyman, and Hummel were not individually liable. We agree as to Bordi and Prettyman. We disagree, however, as to Hummel.

An "employer" is defined, in part, as "any individual, partnership, association, corporation or any person or group of persons acting directly or indirectly on behalf of or in the

interest of an employer with the employer's consent . . . ." N.J.S.A. 34:19-2a. An "employee" is "any individual who performs services for and under the control and direction of an employer for wages or other remuneration." N.J.S.A. 34:19-2b. A "supervisor" is "any individual with an employer's organization who has the authority to direct and control the work performance of the affected employee, who has authority to take corrective action regarding the violation of the law, rule or regulation of which the employee complains . . . ." N.J.S.A. 34:19-2d.

In Maimone, supra, the trial court dismissed the plaintiff's CEPA claim against Atlantic City and its police chief. 188 N.J. at 228-29. We reversed, reinstating the complaint as to all of the defendants. Id. at 229. The Supreme Court affirmed. Ibid. Although neither the Supreme Court nor this court directly considered whether the police chief was an employer within the meaning of N.J.S.A. 34:19-2a, neither court concluded that personal liability under CEPA could not attach.

We addressed individual liability directly in Maw v. Advanced Clinical Commc'ns, 359 N.J. Super. 420, 439-40 (App. Div. 2003), rev'd on other grounds, 179 N.J. 439 (2004), in which we construed N.J.S.A. 34:19-2a as allowing for individual liability. We agreed with federal court decisions that a fair reading of CEPA's definition of employer, N.J.S.A. 34:19-2a, made "both the employer and the employee subject to CEPA's

prohibitions." Id. at 440; see Espinosa v. Cont'l Airlines, 80 F. Supp. 2d 297, 305-06 (D.N.J. 2000); Palladino ex rel. United States v. VNA of S.N.J., Inc., 68 F. Supp. 2d 455, 474 (D.N.J. 1999).

Consequently, personal liability may attach in a CEPA claim. The question then becomes whether the record supports liability as to any of the individual defendants. Plaintiff failed to prove a CEPA claim as to Bordi or Prettyman. The evidence is simply insufficient to show either was responsible for the retaliatory conduct. The record does, however, support potential liability against Hummel.

As the police chief, Hummel was responsible for denying plaintiff firearms training, transferring him out of the detective bureau, and, if plaintiff is believed, causing him to resign from the SWAT team. Given Hummel's statutory power as head of the police force and his direct responsibility for the efficiency and day-to-day operations of the police department, including assignments of subordinate personnel, N.J.S.A. 40A:14-118 (police chief "shall be the head of the police force and . . . be directly responsible to the appropriate authority for the efficiency and day to day operations thereof," and who, among other things, shall "[p]rescribe the duties and assignments of all subordinates and personnel"), the trial court erred in dismissing plaintiff's claim against Hummel. That claim should

have been presented to the jury. We therefore reverse as to the dismissal of Hummel as a defendant, and order a new trial.

VI

We next turn to plaintiff's argument that the trial court improperly barred other evidence of retaliation proffered in support of plaintiff's claim for punitive damages. We reject plaintiff's argument.

During direct examination of the Voorhees Township Administrator, plaintiff's counsel asked if he had learned of a concern among Township Committee members of potential retaliation from Voorhees Police officers. At sidebar, plaintiff's counsel explained that he was told that a Voorhees police officer claimed to have created a "hit list" containing names of the children of Committee members to whom he planned to issue traffic tickets. The officer, according to counsel, sought to retaliate against the Committee for being denied a promotion. Counsel proffered that when Hummel was asked why the officer would do this, he was reported to respond, "Oh, that's what cops [do]; they retaliate."

In rejecting the proffer, the trial court stated:

> This is something that's subsequent . . . when we get someone who's only been an officer six months, starting in '05, '06, some . . . four, five, six years after your client [retired], number one, I don't see the relevancy of it. Number two, I don't see that it goes to any of the named

> defendants here. Number three, [the officer] is under investigation. It may very well defeat the alleged retaliation claim so I'm not going to permit it for those reasons.

The trial court did not abuse its discretion by barring the testimony. The testimony involved a nonspecific comment Hummel made four years after plaintiff retired from the police department, concerning an individual with no connection to this case.

Next, plaintiff challenges the court's preclusion of plaintiff's economic loss proofs for past lost income and reduced pension benefits. Plaintiff claimed lost wages for the period from October 2002 (the month after he retired) through 2005 (his planned year of retirement) in the sum of $182,417. Using life expectancy tables, plaintiff claimed lost retirement pay from 2002 until his estimated time of death in the amount of $677,875.00. He maintains that he claimed a disability pension because of an aggravation of his prior hand injury. He asserted that the injury had a 50/50 percent chance of surgical repair, but "he was emotionally disabled from his employment as a result of the retaliatory work environment."

The court initially ruled that it would permit plaintiff's testimony concerning lost wages and pension, based upon the supposition that he was told that light duty was unavailable. Based upon plaintiff's testimony that he would not have remained

on the police force even if light duty were available, the court reversed its prior ruling, stating: "I stand corrected. [Plaintiff] just said he wouldn't stay. He just testified to that. That was not part of the equation this morning. There's no lost wages and pension."

The court did not abuse its discretion in barring the economic testimony. Plaintiff did not prove or claim that he was constructively discharged.

> [A]lthough back pay is awarded almost as a matter of course to a person who has been denied employment or terminated for a discriminatory reason, . . . an employee who has taken the initiative in terminating his or her employment will be awarded back pay only if he or she can show that the employer's discriminatory conduct has resulted in a "constructive discharge."
>
> [T.L. v. Toys 'R' Us, Inc., 255 N.J. Super. 616, 662 (App. Div.), certif. denied, 130 N.J. 19 (1992), aff'd. as modified, 132 N.J. 587 (1993).]

Here, plaintiff opted for a disability pension in 2002, and was not constructively discharged. We consequently reject his argument on this issue.

VII

In sum, we reverse the trial court's order setting aside the jury verdict, and reinstate the verdict. We reverse the trial court's order dismissing plaintiff's claim as to Hummel, but affirm the order so far as it dismissed plaintiff's claim

against Bordi and Prettyman. We remand for a new trial as to Hummel. We also remand for the trial court to substantively address plaintiff's post-trial motions, as well as defendant's motion for a remitter. We do not retain jurisdiction.

Affirmed in part, reversed in part, and remanded.