

KURKOWSKI LAW, LLC
By: Daniel M. Kurkowski, Esquire
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Attorneys for Plaintiffs

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COUNTY COUNSEL
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FEB 13 2013
CIVIL DIVISION
SUPERIOR COURT-CAPE MAY COUNTY
CAPE MAY COUNTY, N.J.

SCOTT SMITH,

Plaintiff,

v.

CAPE MAY COUNTY; and JOHN DOE
DECISIONMAKERS (Plural 1-10), jointly,
severally and in the alternative,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAPE MAY COUNTY – LAW DIVISION

DOCKET NO. CPM-L- 80-13

Civil Action

COMPLAINT AND JURY DEMAND

Plaintiff, Scott Smith, residing at 2326 Rt. 9, Cape May Court House, New Jersey 08210,
by way of Complaint as against all Defendants, states and avers the following:

COUNT ONE

1. This Count is brought specifically against Cape May County (hereinafter also referred to collectively as “Defendants” or “the County”) for violation of the New Jersey Conscientious Employee Protection Act (hereinafter “CEPA”) codified at N.J.S.A. 34:19-1 to 8 for unlawful workplace retaliation for disclosing, or threatening to disclose, to a supervisor or a public body an activity, policy or practice of the employer that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law; and for retaliation for objecting to, or refusing to participate in any activity, policy or practice of the employer that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law, is fraudulent or criminal, or is incompatible with a clear mandate of public policy concerning the public

health, safety or welfare.

2. Plaintiff was employed by Defendants' Facilities Department from the time period of November, 2008 to October 1, 2012. The County's Facilities Department follows New Jersey Civil Service rules and laws.
3. Plaintiff was initially hired into an unclassified position, working as a liaison between the County and private contractors which the County hired for construction related work. Plaintiff is knowledgeable of the New Jersey construction codes, safety regulations, fire regulations and other rules governing building and construction such as local permit rules and Plaintiff's knowledge qualified him for the unclassified liaison position.
4. It was never Plaintiff's job to report improprieties, but rather to act as a liaison between the County and the outside contractors.
5. Plaintiff was an excellent employee for Defendants in the unclassified liaison position, and was the recipient of praise and positive evaluations from his direct superior, former Director of Facilities and Services Bud Springer and other employees he worked in congruence with during his employment in that regard. Plaintiff is a veteran builder and no employer he ever worked for prior to Defendants ever complained about his performance. He was never terminated from any of his positions prior to the County.
6. On or about June 7, 2011, Plaintiff was told that his position of unclassified liaison was being abolished due to "politics". The position was not abolished, but rather reassigned.
7. On or about June 8, 2011, Plaintiff was offered a provisional Carpenter title, with a significant pay cut. Plaintiff accepted the provisional Carpenter position, which he began working under on or about July 3, 2011. As a provisional Carpenter, Plaintiff's direct supervisor was Kenneth Karstens, Carpenter Shop Supervisor.

8. Plaintiff was an excellent employee for the County in his provisional Carpenter position.
9. In or about August 2011, Plaintiff took notice to many issues wherein the Facilities employees were not complying with the New Jersey building and construction codes, fire regulations, safety regulations and municipal permit rules.
10. Amongst other specific issues, Plaintiff took notice of numerous construction code violations pertaining to roof work without proper equipment, electrical work, concrete work, flooring, elevator issues, hardware insufficiencies, railing height problems/lack of railings, insufficient wall studs, removal of fire rated sheetrock and replacing it with regular sheetrock, bathroom building code violations, improper rebar used, violations hidden from building inspectors, ramps required by the Americans with Disabilities Act, lack of permits for work requiring such and many other issues.
11. In December 2011, Plaintiff was told that his provisionary Carpenter position was being eliminated and he must take the Civil Service test for a permanent position. Plaintiff did so, and later ranked first on the Civil Service list for Carpenter.
12. On or about January 30, 2012, Plaintiff disclosed the code violations, OSHA safety regulations, permit laws for construction, and fire regulations of the building code to the County's Risk Manager, Al Barnett and William Holmes. As a provisional Carpenter, his duties do not include a reporting requirement. Plaintiff took it upon his own onus to report and disclose the various violations of the building code, OSHA safety regulations, permit laws for construction.
13. On or about March 13, 2012, Plaintiff made his disclosures of building and construction code violations, OSHA safety regulation violations, fire regulation violations and lack of permits to Barbara Blakely-Marino, Director of Human Resources. Plaintiff carbon

copied Gerald Thornton, Freeholder Director and Al Barnett, Risk Manager for the County.

14. Plaintiff also discussed the code violations and work without permits with Ann Marie McMahon, who told him that the permit requirements did not apply to the County, but were rather a courtesy to the township and the construction codes were guidelines, not requirements and the County did not have to follow the same rules because they were a government facility. Plaintiff contested that her position was not true.
15. Plaintiff was hired into a permanent Contractor position due to his placing first on the Civil Service list.
16. Although working as a Carpenter, Plaintiff was reassigned to work in Crest Haven Nursing Home, wherein he would now report to Joseph Martino, Acting Supervisor of Building Maintenance and Repair who supervised the Facilities workers at the nursing home.
17. During Plaintiff's tenure working under Joseph Martino, he took notice to many issues at the Crest Haven nursing home wherein the Facilities employees were not complying with OSHA safety regulations and EPA health regulations. Amongst other specific issues, Plaintiff took notice of black mold at the nursing home. Mr. Martino was directing employees to simply cover up black mold in the ceilings by replacing ceiling tiles rather than treating the mold required by law. Mr. Martino specifically told Plaintiff and other employees, "Don't let anyone know about the mold, because we can't afford to be shut down like the schools." Plaintiff reasonably and correctly believed that simply covering up black mold in a nursing home was in violation of a law.
18. Plaintiff began disclosing and reporting the health and safety violations to his superiors.

Plaintiff first disclosed to the acting supervisor at the nursing home, Joseph Martino. Plaintiff thereafter made multiple disclosures to Joseph Martino, many of which were related to black mold. Mr. Martino did not address the issues, instead developing a negative attitude towards him.

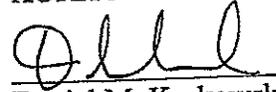
19. As a Carpenter, Plaintiff was to be supervised by Kenneth Karstens, Supervisor of the Carpenter shop. However, Plaintiff was assigned to work under Joseph Martino of the Maintenance and Repair department. Plaintiff was the only employee working under the title of Carpenter and assigned to Maintenance and Repair.
20. Per New Jersey Civil Service rules, all newly hired permanent employees must undergo sixty (60) day and ninety (90) day reviews by which Civil Service terms the "working test period".
21. Plaintiff received a satisfactory evaluation on September 3, 2012 on his sixty (60) day progress report. Plaintiff was evaluated by Kenneth Karstens.
22. After Plaintiff disclosed to Mr. Martino and no actions were taken to resolve the black mold, he brought his disclosures to Michael Owens, Mr. Martino's supervisor. The disclosures still fell on deaf ears.
23. Plaintiff then made the disclosures up the chain of command to Anne Marie McMahon, now Director of Facilities and Services. Ms. McMahon told Plaintiff that she, "only recently began the job, don't bog me down with paperwork and investigations like this."
24. Despite the fact that Plaintiff received a satisfactory on his sixty (60) day evaluation by the Supervisor of the Carpenter Shop and signed by the Director of Facilities and Services, Joseph Martino decided to evaluate Plaintiff on his own accord in his own sixty (60) day evaluation. Mr. Martino rated Plaintiff's work as unsatisfactory and slandered

Plaintiff in the "review".

25. Only after Plaintiff made various disclosures and reports about health and safety violations of OSHA and the EPA did his supervisor present work performance issues.
26. Plaintiff's peers and coworkers state that Mr. Martino completely fabricated what issues were presented in his self-designated sixty (60) day review.
27. Plaintiff was a Carpenter, and under such title Kenneth Karstens, Supervisor of the Carpenter Shop, was his direct supervisor.
28. On October 3, 2012, Plaintiff received an unsatisfactory on his ninety (90) day review. Plaintiff was terminated from employment on October 1, 2012, prior to his review.
29. Plaintiff was the subject of workplace retaliation after his reporting of construction code violations, OSHA safety violations, fire safety regulations, and the EPA.
30. New Jersey's Conscientious Employee Protection Act, N.J.S.A. 34:19-3, states that an employer shall not take any retaliatory action against an employee because the employee discloses, or threatens to disclose to a supervisor or a public body an activity, policy or practice of the employer that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law; or objects to, or refuses to participate in any activity, policy or practice of the employer that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law, is fraudulent or criminal, or is incompatible with a clear mandate of public policy concerning the public health, safety or welfare.
31. As a result of the negligence, carelessness, recklessness, and/or intentional acts and conduct, Defendants, j/s/a, have offended Plaintiff's rights under New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-3, for employment retaliation

Operators (Plural 1-10) and John Doe Decision Makers (Plural 1-10), jointly, severally,
and in the alternative for compensatory damages, counsel fees and costs and for such
other relief as a judge or jury may deem just and appropriate.

KURKOWSKI LAW, LLC



Daniel M. Kurkowski, Esq.
Attorneys for Plaintiff

Dated: February 13, 2013

CERTIFICATION

I hereby certify that there are no other actions to my knowledge pending in any Court concerning the subject matter of the Complaint contained herein. I further certify that there are no other parties to my knowledge who should be joined in this action at this time.

Nothing contained in this Complaint shall be construed or deemed an admission, of any kind, against Plaintiff. This is not a verified complaint and is a document prepared by counsel.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DEMAND FOR JURY TRIAL

Plaintiffs demand trial by jury on all of the triable issues of this complaint, pursuant to Rule 1:8-2(b) and 4:35-1(a).

NOTICE OF TRIAL COUNSEL

PLEASE TAKE NOTICE that pursuant to Rule 4:25-4, Daniel M. Kurkowski, Esq. is hereby designated as Trial counsel in the above captioned litigation on behalf of Kurkowski Law, LLC, attorneys for Plaintiffs.

KURKOWSKI LAW, LLC



Daniel M. Kurkowski, Esq.
Attorney for Plaintiffs

Dated: February 13, 2013

CONFIDENTIAL SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Confidential Settlement Agreement and General Release ("Agreement and Release") is made on this 24 day of November, 2014, by and between SCOTT SMITH, the Releasor, (referred to as "SMITH"), and CAPE MAY COUNTY, its related and affiliated entities, and any and all of CAPE MAY's employees, agents, elected officials and other professionals, including those employed or on its staff, servants and assigns, Officers and/or Directors, past and current members of the Cape May County Board of Chosen Freeholders, and Insurer The Travelers Indemnity Company (collectively referred to as "CAPE MAY" or "Releasees"). All parties heretofore mentioned may be referred to as "Parties."

WITNESSETH THAT:

WHEREAS, SMITH asserts a claim for violations of the New Jersey Conscientious Employee Protection Act;

WHEREAS, SMITH has filed litigation in the Superior Court of New Jersey, Cape May County, entitled Scott v. Cape May County, Docket No. CPM-L-80-13 ("The Litigation").

WHEREAS, CAPE MAY has denied all allegations made by SMITH and deny that SMITH has been harmed in any way or that CAPE MAY is liable to SMITH in any way, and have vigorously defended against SMITH's claims;

WHEREAS, SMITH and the Releasees desire to settle with prejudice all claims, disputes, or causes of action which may exist between the Parties, including those that were or could have been asserted in The Litigation;

NOW, THEREFORE, in consideration of the termination of The Litigation and the further promises and covenants that hereafter follow, the Parties hereby agree to end, on the terms and conditions set forth below, all existing or potential disputes between them, which arose on or before the Effective Date of this Agreement and Release:

TERMS

1. **RELEASE:** Upon the execution of this Agreement and Release, SMITH, for full consideration as recited below, and on behalf of himself, his heirs, successors, assigns, executors, administrators, agents and representatives, hereby waives, discharges, releases and gives up any claim, cause of action or damages he may have against CAPE MAY as well as any parent, subsidiary and affiliate corporations, its employee benefits plans and the trustees, fiduciaries, parties-in-interest and administrators of those plans, and any of its present or past employees, including, but not limited to, elected officials, officers, directors, agents, representatives, and contractors and the predecessors and successors of each and any and all of its employees, agents, elected officials, officers, or directors, and all insurers for CAPE MAY from all of the following claims, prayers for relief or alleged damages which arose or existed on or before the Effective Date of this Agreement and Release: (a) any and all claims, issues, prayers for relief and any other causes of action arising from either SMITH's employment with CAPE MAY or SMITH's separation from employment with CAPE MAY, including but not limited to those which were or could have been alleged, whether real or perceived, including but not limited to all claims for breach of contract, breach of covenant of good faith and fair dealing, common law tort, express, implied or quasi contract (including claims for vacation, sick or personal leave pay or payment pursuant to any employment practice, policy, handbook or manual), wrongful discharge, promissory or equitable estoppel, detrimental reliance of any sort, misrepresentation, fraud or negligence, violations of public policy, bodily, medical, emotional and psychological injuries or damages, including attorneys' fees and costs, and all possible claims arising under federal, state and/or local employment laws, civil rights or whistleblower laws including but not limited to claims brought pursuant to: Employee Retirement Income Security Act ("ERISA"), Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, the Age Discrimination in Employment Act ("ADEA"), the Americans With Disabilities Act ("ADA"), the New Jersey Temporary Disability Benefits Law ("NJTDB"), the Older Workers Benefit Protection Act ("OWBPA"), the New Jersey Law Against Discrimination ("LAD"), the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), the Conscientious Employee Protection Act ("CEPA"), Fair Credit Reporting Act, the Equal Pay Act, the Rehabilitation Act, the False Claims Act, 31 U.S.C. §3729, the Family and Medical Leave Act ("FMLA"), the New Jersey Family Leave Act

("NJFLA"), the Fair Labor Standards Act ("FLSA"), the Worker Adjustment and Retraining Notification Act ("WARN"), New Jersey Wage Payment Law ("NJWPL"), New Jersey Wage and Hour Law ("NJWHL"), the New Jersey Antitrust Act, N.J.S.A. 56:9-1, et seq., the Federal Antitrust Act, 15 U.S.C. §1, et seq., the New Jersey Security and Financial Empowerment Act ("NJSAFE"), P.L. 2013 c.82, the United States Constitution, and the New Jersey Constitution and any claims for counsel fees; and (b) any and all claims, issues, prayers for relief, and any other causes of action SMITH has, or may have, known or unknown, and of whatever kind or nature, against Releasees arising or existing on or before the Effective Date of this Agreement and Release. SMITH also acknowledges, warrants, and affirms that he has not sustained any injuries while employed by CAPE MAY that are compensable under the New Jersey Workers Compensation Law, other than those previously asserted in Claim petition # 2011-25188.

SMITH further affirms that he has not filed, caused to be filed, or presently is a party to any claim against CAPE MAY beyond those contemplated by this Agreement. SMITH also affirms that he has been paid and/or has received all compensation, wages, bonuses, and/or benefits to which he may be entitled and that he has no known occupational diseases.

Both SMITH and CAPE MAY acknowledge that this Agreement does not limit either party's right, where applicable, to file or participate in an investigative proceeding of any federal, state, or local governmental agency. To the extent permitted by law, SMITH agrees that if such an administrative claim is made, he shall not be entitled to recover any individual monetary relief or other individual remedies.

2. **PAYMENT:** In consideration for making this Agreement and Release, CAPE MAY shall pay to SMITH a total settlement of \$40,000 (Forty Thousand Dollars), and payment will be broken down as follows:

- **\$22,447.20** payable to SCOTT SMITH subject to an IRS Form 1099 designating payment as other income; and
- **\$17,552.80** payable to KURKOWSKI LAW, LLC, subject to an IRS Form 1099 designating payment as other income.

SMITH further agrees that he is not relying on CAPE MAY, its counsel, The Travelers Indemnity Company, or his own counsel for advice regarding the taxability of any amount paid to

him under this Agreement and will fully save harmless and indemnify CAPE MAY, The Travelers Indemnity Company, and/or his counsel for any costs, expenses, fines, or any monies that CAPE MAY may be obligated to pay to the Federal or State taxing authorities representing any tax liability of SMITH or his counsel for sums paid hereunder.

SMITH further agrees that he will fully save harmless and indemnify CAPE MAY and Travelers Indemnity Company for any costs, expenses, fines or any monies that CAPE MAY or Travelers Indemnity Company may be obligated to pay to the Federal or State taxing authorities representing any tax liability of the Releasor only for sums paid hereunder.

All payments described in this paragraph will be delivered to Daniel M. Kurkowski, Esquire, KURKOWSKI LAW, LLC, 1252 Route 109 South, Cape May, New Jersey 08204.

The Parties agree that no other consideration has been provided to SMITH in exchange for this Agreement and Release.

3. **NO ADMISSION OF LIABILITY:** SMITH expressly understands and agrees that, by settling all disputes, the Releasees in no way admit that they are liable to him or otherwise treated him unlawfully or unfairly, either in the manner alleged in The Litigation or in any manner. In fact, the Releasees expressly deny all such allegations. SMITH agrees that he is barred from seeking to introduce this Agreement and Release into evidence in any federal or state court, administrative proceeding, or arbitration, except to prove or enforce its terms, since this Agreement and Release is not, in any way, an admission by the Releasees that they breached any legal duty owed to SMITH or are liable to SMITH for any reason.

4. **CONFIDENTIALITY CLAUSE:** SMITH agrees not to disclose the terms and conditions of this Agreement and Release to any third party without prior written consent from CAPE MAY and/or the Releasees other than to his Attorneys, immediate family, and accountants for tax and financial advice and other than in response to a Subpoena or Court Order compelling such testimony. Other than as stated herein, any inquiry made to the SMITH regarding this matter and its resolution will be met with the response, "It has been resolved." A violation of this paragraph by SMITH shall be considered a breach of this Release. If any Releasee learns of any actual or threatened violation of any of the provisions of this Confidentiality Clause, then SMITH shall be contacted to attempt to have such violations cured, unless the Releasee believes that such efforts would not be effective. Without limiting any of the other remedies available to

the Releasees, at law or in equity, SMITH knowingly and voluntarily agrees that any actual or threatened violation of any of the provisions of the Confidentiality Clause may be immediately restrained or enjoined by any Court of competent jurisdiction and that any Temporary Restraining Order or emergent preliminary injunction may be issued by any Court of competent jurisdiction, without notice and without bond. A violation of this provision of the Release shall subject SMITH to liability to CAPE MAY in the amount of \$5,600 or 25% of the consideration paid to him hereunder if such violation is proven in a Court of competent jurisdiction.

5. **NON-DISPARAGEMENT CLAUSE:** SMITH agrees not to communicate any defamatory or disparaging information about any of the Releasees to any third party.

6. **NO REAPPLICATION FOR EMPLOYMENT:** SMITH agrees and warrants that he shall not apply for reemployment or seek in any way to become rehired by CAPE MAY or any Releasees in the future.

7. **NEUTRAL JOB REFERENCE:** Releasees agree to provide a neutral reference to any potential employer seeking a reference regarding SMITH. SMITH should list the Cape May County Director of Human Resources as the point of contact for all such references. In response to a reference request, the Director of Human Resources will confirm the employment of SMITH and supply his dates of employment and title at time of separation. CAPE MAY makes no other representation with respect to any response that any other CAPE MAY employee, representative, or agent may make with respect to SMITH.

8. **MEDICARE AND/OR MEDICAID:** SMITH represents and warrants that no Medicare or Medicaid payments have been made to or on behalf of SMITH and that no liens, claims, demands, subrogated interests, or causes of action of any nature or character exist or have been asserted arising from or related to any matters released hereby. SMITH further agrees that SMITH, and not Releasees, shall be responsible for satisfying all such liens, claims, demands, subrogated interests, or causes of action that may exist or have been asserted or that may in the future exist or be asserted.

9. **OLDER WORKERS' BENEFIT PROTECTION ACT COMPLIANCE:** SMITH hereby acknowledges that he has been advised in writing to discuss, and that he has discussed, all aspects of this Agreement and Release with his personal attorney. SMITH further acknowledges that he fully understands all provisions of this Agreement and Release and their

legal and practical effect, and that he has had twenty-one (21) days to consider this Agreement before executing it, consistent with the terms of the "Older Workers' Benefit Protection Act." Further, SMITH is signing this Agreement and Release freely and voluntarily, without coercion of any kind, and with the full knowledge and understanding of its content. SMITH is further aware that he has seven (7) days from the execution of this Agreement and Release to revoke it after the expiration of which it shall become binding consistent with the terms of the "Older Workers' Benefit Protection Act." SMITH is fully aware that he is waiving any and all rights that he may have under the Age Discrimination Employment Act, 29 U.S.C. § 601 *et seq.* (the "ADEA"). The consideration set forth in Paragraph 2, *supra*, hereunder will be delivered to Daniel M. Kurkowski, Esquire, KURKOWSKI LAW, LLC, 1252 Route 109 South, Cape May, New Jersey 08204, after the conclusion of the twenty-eight (28)-day period set forth in this Paragraph unless such timeframes can and have been waived consistent with law.

10. **ENTIRE AGREEMENT:** SMITH expressly warrants and agrees that this Agreement and Release contains the entire agreement between him and the Releasees. SMITH further acknowledges and agrees that no other promises or agreements have been made to him or his counsel other than those set forth in this Agreement and Release and that there is no written or oral understanding or agreement between the Parties not recited herein. In executing this Agreement and Release, SMITH has not relied on any statement by any Releasee that is not contained in this Agreement. This Agreement and Release may only be changed, altered or modified by a written document executed by all Parties.

11. **CHOICE OF LAW:** The Parties agree that this Agreement and Release is to be construed under the laws of the State of New Jersey, that its terms are severable, and that if any term herein is found unenforceable, the remaining terms shall remain in full force and effect. The Parties further agree that the terms of this Agreement and Release shall not be construed against the drafter in any respect.

12. **EFFECTIVE DATE:** This Agreement and Release shall be effective upon SMITH's execution hereof (the "Effective Date").

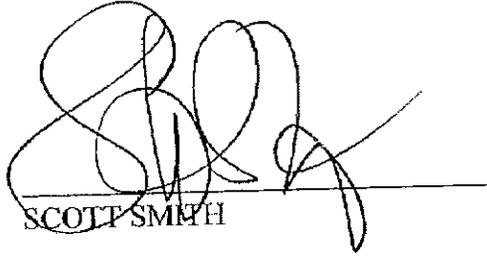
13. **COUNTERSIGNATURES:** This Agreement and Release may be executed in more than one counterpart, and each counterpart shall be considered an original.

IN WITNESS WHEREOF, intending to be forever legally bound hereby, the parties have executed this Agreement and Release, being seven (7) pages in length, on the dates set forth below.

On this 24 day of November, 2014



Witness Daniel M. Kucawski, Esq.


SCOTT SMITH

Witness

(see attached)
On Behalf of CAPE MAY

Res. 943-14
12/9/14

ATTEST:


Elizabeth Bozzelli
Clerk of the Board

COUNTY OF CAPE MAY

By: 
Gerald M. Thornton, Director
Board of Chosen Freeholders

Date: December 9, 2014

APPROVED AS TO FORM:


James B. Arsenault, Esquire
Assistant County Counsel