NUTLEY POLICE SERGEANT CHRISTOPHER LAMOND, Plaintiff, vs. TOWNSHIP OF NUTLEY and ALPHONSE PETRACCO, individually, and as Mayor of the Township of Nutley, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION:ESSEX COUNTY DOCKET NO. ESX-L-8109-13 Civil Action

BRIEF IN SUPPORT OF DEFENDANT'S TOWNSHIP OF NUTLEY AND ALPHONSE PETRACCO'S MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Nutley Sgt. Christopher Lamond ("plaintiff" or "Lamond')[1] claims to be a "Whistleblower" under the New Jersey Conscientious Employee Protection Act ("CEPA"), N.J.S.A. 34:19-1, et seq.; because on January 8, 2013 he filed (3) three Internal Affairs ("IA") complaints against fellow officers for: 1) throwing a small rubber duck at him; 2) stating he spends a lot of time at home; and 3) asking whether an officer's flood insurance checks were incorrectly mailed to his home. These minor and trivial internal workplace disputes were thoroughly investigated, proven to be unsubstantiated, and dismissed, yet Lamond now seeks to re-litigate them. The absurdities of Lamond's claims are magnified by his assertion that defendants retaliated against him by not promoting him to a ***non-existent seventh*** Lieutenant's position.[2] (Jean Cert., Exhibit B, ¶¶ 29A, 39A, 44A, 51A, 55A, and 57A). Accordingly, Lamond cannot prove any violation of law or "adverse employment" action to sustain a CEPA claim.

Lamond's remaining claims are utterly unsustainable, and should thus be barred, as a matter of law pursuant to CEPA's election of remedies provision [N.J.S.A. 34:19-8].

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[1] On December 19, 2014, Hon. Dennis F. Carey disqualified Patrick Toscano, Esq. as counsel for plaintiff Christopher Lamond for violation of R.P.C 1.7 and 1.9. (See Exhibit A) Paragraph 2 of the Order states: **"Plaintiff's counsel, as aforesaid, is precluded from having any further participation in this matter."** To date, Lamond has failed to obtain new counsel despite the Court's Order to do so within 30 days of the Order. Mr. Toscano has moved to reconsider the Court's Order of Disqualification, which according to Judge Carey's Chambers, will be heard for oral argument on either March 24 or 25 2015. Given the language in paragraph 2 of the Order, at this time defendants have served their Summary Judgment Motion only on the Pro Se plaintiff, Christopher Lamond and to the Court.

[2] On January 28, 2013, pursuant to Nutley Code §131-2A, as amended by Ord. No. 3087 – Department Superior Officer Complement read as follows: "The complement of superior officer within the Police Department shall be determined by the Director of Public Safety; provided, however, that the authorized number in each rank shall not exceed the following: (1) Chief of Police: one; (2) Deputy Chief of Police: one; (3) Police Captain: one; (4) **Police Lieutenant: six;** (5) Police Sergeant: 13." On October 7, 2014, the Nutley Board of Commissioners amended Ord. No. 3087 with Ord. No. 3298 to allow up to: 1 Chief; 1 Deputy Chief; 3 Captains; **6 Lieutenants**; 13 sergeants.

These claims of (1) New Jersey Civil Rights Act, N.J.S.A. 10:6-2(c) ("NJCRA"); (2) Intentional Infliction of Emotional Distress; (3) Tortious Interference; (4) Civil Conspiracy; and (5) Negligent Supervision all allege that defendants retaliated against Lamond because he exercised his First Amendment Free Speech rights – the very same factual allegations as Lamond's CEPA claim.

For the reasons set forth herein, after 450 days of discovery, Lamond's Complaint must be dismissed in its entirety because it is legally insufficient, and cannot be sustained as a matter of law under R. 4:46-1.

STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON BEHALF OF MAYOR ALPHONSE PETRACCO AND THE TOWNSHIP OF NUTLEY.

In compliance with R. 4:46-2, the following represents a concise recitation of each material facts, which the movants Mayor Alphonse Petracco and Township of Nutley contend there is no issue of material fact.

A. Alleged "Whistle blowing"

1. On October 15, 2013, Lamond filed a Complaint against the Township of Nutley and Mayor Alphonse Petracco, alleging violations of: (1) New Jersey Civil Rights Act, N.J.S.A. 10:6-2(c) ("NJCRA"); (2) New Jersey Conscientious Employee Protection Act ("CEPA"), N.J.S.A. 34:19-1, et seq.; (3) Intentional Infliction of Emotional Distress; (4) Tortious Interference; (5) Civil Conspiracy; and (6) Negligent Supervision.
2. Lamond testified that his three (3) January 8, 2013 IA complaints constitute his only "whistle blowing" activities. (Jean Cert., Exhibit C, 252-9 to 255-11).
3. Lamond testified about his alleged "whistle blowing" activities as follows:

> Q **So to be clear, to be crystal clear, without no ambiguity, when you used the language 'my whistle blowing' in your response to number 22, you were referring to your IA complaints that you made in January of 2013. True or false?**
>
> **A Yes. True.** (Emphasis added). Id. (emphasis added) 255-6 to 11.

B. The "Rubber Ducky" Incident

4. Lamond filed an IA complaint against former Deputy Chief Paul Moscolo ("Moscolo") nine months after Moscolo threw a small pink "rubber ducky" at him in a playful manner. Id. at 133-20 to 135-22.
5. Nine months after the Moscolo incident, Lamond filed the IA complaint against him. Id. at 136-11 to 13.
6. Once the IA investigator Detective Kenneth Watson ("Watson") concluded the "rubber ducky" complaint could not be sustained, Lamond never provided Watson additional supporting evidence. Id. at 142-12 to 143-9.
7. Lamond never filed a criminal complaint against Moscolo with any New Jersey Prosecutor's office. Id. 150-19 to 151-25.
8. Lamond called the Moscolo incident "a humiliating assault" and "very disrespectful." Id. 138-13 to 22.

C. "You Spend A Lot Of Time At Home While On Duty"

9. Detective Robert McDermott ("McDermott") is Lamond's subordinate. Id. at 98-21 to 99-14.
10. Lamond filed an IA complaint against McDermott because he told Lamond: "You spend a lot of time at home while on duty." Id. 109-14 to 110-10.
11. Lamond never disciplined McDermott for his comments by providing him verbal counseling or a written admonition. Id. at 111-10 to 15.
12. Once Watson concluded the complaint against McDermott could not be sustained, Lamond never provided Watson additional supporting evidence Id. at 113-24 to 1.

D. **"Have You Seen My Flood insurance Checks?"**

13. Lamond filed an IA complaint against Det. Sgt. Luberto ("Luberto") because Lamond felt "harassed" when Luberto asked Lamond if he received Luberto's misdirected mail containing flood insurance checks. Id. at 115-24 to 125-24.

14. In defense to Lamond's claims, Luberto supplied IA undisputed evidence that: (a) Luberto was a victim of super storm sandy; (b) Luberto's flood insurance checks were inadvertently mailed to 64 Chesnut Street; and (c) Luberto never harassed Lamond. Jean Cert., Exhibit D, NUTLEY 1-25.

15. Once Watson concluded that the complaint against Luberto could not be sustained, Lamond never provided Watson additional supporting evidence Jean Cert., Exhibit C, 130-25 to 5.

E. Claims Against Nutley and Mayor Alphonse Petracco

16. From 2004 to October 2013, John Holland was Chief of Nutley Police.

17. Lamond never filed a written complaint to Chief John Holland regarding the claims alleged against Mayor Petracco in ¶¶ 5, 7, 9, 10, 11, 12, 13, 14, 19, 21, and 22, and the claims against Lt. Gerald Green in ¶8 of the Complaint. (Id. at 202-22 to 214-4)

18. Lamond never filed any written complaint to any New Jersey Prosecutor's office regarding the allegations plead in ¶¶ 5, 7, 8, 9, 10, 11, 12, 13, 14, 19, 21, and 22 of the Complaint. Id.

19. Lamond believes that Chief Holland had the ability to command the police department. (Id. at 148-9 to 17; 174-3-23)

20. Lamond believes that Chief Holland would "follow the law if [he were] given a written complaint about a violation of law, ordinance, or rule or regulation of the department." Id. at 182-17 to 21.

21. Lamond believes that Chief Holland and current Chief Thomas Strumulo enforced Nutley's Rules and Regulations. Id. at 174-2 to 23.

22. According to Lamond, Chief Holland mandated that "any employee with knowledge of any form of prohibitive harassment, whether directed at them or against others, must immediately report [the same] in writing." Id. at 185-12 to 24.

23. Lamond believes that: "If [a report of harassment] reached John Holland and he didn't think it was right, he'd take care of it." Id. at 190-1 to 9.

24. Lamond agrees that the Nutley Police Department's policy does not tolerate, condone, or permit harassment, or actions that create a hostile work environment. Id. 190-10 to 19.

25. Lamond agrees that Nutley's Rules and Regulations state that:

    a) Employees shall not at any time withhold any information concerning suspected criminal activity and shall report any information concerning suspected criminal activity of others. Id. 179-5 to 8;

    b) Employees knowing of other employees violating laws, ordinances or rules and regulations of the department or disobeying orders shall report same to the Chief of Police through the chain of command. Id. 181-9 to 12;

    c) If the employee believes information is of such gravity that it must be brought to the immediate personal attention of the Chief of Police, or if the offending employee is in the employee's chain of command, official channels may be bypassed. Id. 181-16 to 20;

d) Any employee with knowledge of any form of prohibitive harassment whether directed at them or against others must immediately report it in writing. Id. at 185-16 to 19;

e) All employees of the department shall adhere to the policies and procedures established by the Chief of Police and the Township of Nutley regarding harassment in the workplace. Id. at 192-13 to 16;

f) No employee shall take any official action or initiate or engage in any illegal conduct with the intention to retaliate against any person for criticizing or complaining about any employee. Id. at 191-4 to 7.

F. Lamond's Current Work Status

26. When Lamond filed his October 15, 2013 Complaint, the Nutley Police Table of Organizations allowed only **six police lieutenants**.[3] (Id. at 32-23 to 33 to 2.)

27. On October 15, 2013, Nutley's **six police lieutenants** were: (1) Green; (2) Rhein; (3) Watts; (4) Irwin; (5) Neri; and (6) Locurto. Id. at 53-4 to 55-9.

28. On January 28, 2013, Peter A. Locurto was appointed **Nutley's sixth Lieutenant.** Id. at 248-15 to 18.

29. Lamond's October 15, 2013 Complaint demands a promotion to a **non-existent seventh** Lieutenant position. Jean Cert., Exhibit B, ¶¶ 29A, 39A, 44A, 51A, 55A, and 57A.

30. Lamond testified that Lieutenants: (1) Green; (2) Rheum; (3) Watts; (4) Irwin; (5) Neri; and (6) Locurto were rightfully promoted ahead of him because "**they scored higher than me**." Jean Cert., Exhibit C, 51-12 to 52-9.

[3] October 15, 2013, pursuant to Nutley Code §131-2A, as amended by Ord. No. 3087 – Department Superior Officer Complement read as follows: "The complement of superior officer within the Police Department shall be determined by the Director of Public Safety; provided, however, that the authorized number in each rank shall not exceed the following: (1) Chief Of Police: one; (2) Deputy Chief of Police: one; (3) Police Captain. one; (4) **Police Lieutenant: six;** (5) Police Sergeant: 13." On October 7, 2014, the Nutley Board of Commissioners amended Ord. No. 3087 with Ord. No. 3298 to allow up to three Captain positions.

31. For 24 years, Lamond has been employed with the Nutley Police Department. Id. at 15-17 to 23.

32. On April 30, 1996, Lamond was promoted to Sergeant. Id. at 16-10 to 18.

33. After becoming Sergeant, Lamond has received raises pursuant to his police contract, and he currently earns $120,000 per year. Id. at 23-9 to 24 -7.

34. Lamond is a Sergeant "Patrol Supervisor." Id. 25-15 to 20; 27-21 to 24.

35. Lamond is "second in command next to the Lieutenant." Id.

36. Throughout Lamond's career, he has been assigned more complex assignments as his police training increased. Id. at 24-11 to 25-14.

37. For approximately "two-thirds" of Lamond's career, he chosen to worked the 3:15 p.m. to 11:45 p.m. shift because it provides greater personal flexibility. Id. at 26-7 to 27-17.

LEGAL ANALYSIS

POINT ONE

PLAINTIFF'S NJCRA, CEPA, AND COMMON LAW CLAIMS CANNOT BE ALLEGED SIMULTANEOUSLY AS A RESULT OF CEPA'S ELECTION OF REMEDIES PROVISION

Pursuant to N.J.S.A. 34:19-8, "the **institution** of an action in accordance with this act shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, State law, rule, or regulation under common law." (Emphasis added). Since plaintiff's NJCRA, CEPA, and common law claims are premised on the same set of facts, Lamond's claims under NJRCA and the common law are deemed immediately waived, and should be dismissed in their entirety. Id.

On the subject of the waiver of remedies, when a CEPA cause of action has been pled, case law in New Jersey is settled. See Ehling v. Monmouth-Ocean Hospital Service Corp., 961 F. Supp.2d 659, 672 (D.N.J. 2013) (The Court granted defendants' Motion for summary judgment dismissing plaintiff's LAD and common law retaliation claims finding that plaintiff waived the right to bring such claims when she filed a CEPA action based on the same facts); Beasley v. Passaic County, 377 N.J. Super. 585, 610 (App. Div. 2005) (Plaintiff's claim for intentional infliction of emotional distress was also subject to CEPA's waiver provision); Lynch v. New Deal Delivery Service Inc., 974 F. Supp. 441 (D.N.J. 1997), overturned on other grounds, Farrell v. Plantars Lifesavers Co., 206 F.3d 271 (3d Cir. 2000) ("The waiver only applies to those causes of action that are substantially independent of the CEPA claim. A claim of intentional infliction of emotional distress in conjunction with a retaliatory discharge claim falls within the waiver provision.")

Here, Lamond's NJCRA, CEPA, and common law factual claims rest on the same factual allegations, i.e., Mayor Petracco and Nutley purportedly conspired to retaliate against Lamond because he became a "whistle blower" by filing three (3) non-sustained January 8, 2013 IA complaints. (Jean Cert., Exhibit C, 252-9 to 255-11) All six of the causes of action are based on the same amorphous factual allegations derived from this "whistleblower" theme. That is, both the alleged "retaliation" (failure to promote Lamond to a ***non-existent seventh Lieutenant position***) and the purported causation (Lamond's exercise of Free Speech rights) are derived from Lamond's "whistle blower" claims.

For example, in the First Count, entitled "New Jersey Civil Rights Act," Lamond asserts:

> Defendants' conduct was motivated by....his criticism of actions taken and/or contemplated by defendants and his other advocacy and leadership relative to Nutley police officers and public safety. Such conduct interfered with plaintiff's **right to free speech** and association secured by the New Jersey Constitutions. (emphasis added) (See Complaint, ¶26)

Lamond continues:

> [T]he plaintiff had a reasonable and protected property right and interest in his **promotional rights and retirement benefits.** The defendants acted deliberately and purposefully to interfere with said right and interest and to prevent plaintiff form receiving such benefits. (Emphasis added) (See Complaint, ¶27)

Accordingly, if Lamond's allegations in the first Count were true, this would be the very activity that CEPA was created to protect, (free speech), and thus, it is subsumed within that statutory scheme. Lamond's First Amendment claim is nothing more than a claim for "whistle-blowing" disguised as a claim under NJCRA. Similarly,

Lamond's claims for Intentional infliction of Emotional Distress, Tortious Inference, Civil Conspiracy, and Negligent Supervision stem from the same alleged "whistle-blowing" conduct. In all these Counts, Lamond asserts that defendants denied him a promotion to Lieutenant because of his purported "whistle blowing" activities. Jean Cert., Exhibit B, ¶¶ 40-57. As such, Lamond's NJCRA and common law claims alleged in Count 1, and Counts 3 - 6 should be dismissed as a matter of law.

POINT TWO

ASSUMING THE COURT DOES NOT DENY COUNT ONE BASED ON THE CEPA WAIVER PROVISION, COUNT ONE MUST STILL BE DISMISSED BECAUSE LAMOND HAS NEITHER DEMONSTRATED A CONSTITUTIONAL VIOLATION UNDER THE NJRCA, NOR THAT HIS CONSTITUTIONAL RIGHTS WERE DEPRIVED PURSUANT TO A POLICY OR CUSTOM IMPLEMENTED BY NUTLEY

Lamond has failed to plead with particularity a constitutional violation of his rights committed by defendants. Henschke v. Borough of Clayton, 251 N.J. Super. 393, 401 (App. Div. 1991) Assuming arguendo, that Lamond has established that defendants violated his constitutional rights (which idea strains the very bounds of logic), Lamond has not provided any evidence that defendants acted pursuant to an overarching municipal "custom" or "policy;" and thus, all claims against Nutley must be dismissed. Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 691 (1978).

A. Plaintiff Has Failed To Adduce Any Evidence That He Was Deprived of a Constitutional Right Under the NJRCA

The NJRCA "was modeled after 42 U.S.C. §1983, and creates a private cause of action for violations of civil rights secured under either the United States or New Jersey Constitutions." Pettit v. New Jersey, 2011 WL 1325614 at *3 (D.N.J. Mar. 30, 2011)[4]. In relevant part, the NJRCA provides a private cause of action to:

> Any person who has been deprived of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be

[4] Pursuant to R. 1:36-3, a copy of the unpublished decision Pettit v. New Jersey, 2011 WL 1325614 at *3 (D.N.J. Mar. 30, 2011) is attached to the Certification of Counsel as Exhibit E.

> interfered with, by threats, intimidation or coercion by a person acting under color of law, may bring a civil action for damages and for other injunctive or other appropriate relief.

N.J.S.A. 10:6-2

"The elements of a substantive due process claim under the NJRCA are the same as those under §1983... [i.e.] 'the first task...is to identify the state actor, 'the person acting under color of law,' that caused the alleged deprivation.'" Filqueiras v. Newark Public Schools, 426 N.J. Super. 449 (App. Div. 2012) (citing Rivin v. Dover Twp. Rent Leveling Bd., 143 N.J. 352, 363 (1996); Monell, supra, 436 U.S. at 691). "'The second task is to identify a 'right, privilege or immunity' secured to the claimant by the Constitution or other federal laws of the United States." Id. (quoting 42 U.S.C. §1983). Importantly, plaintiff is required to set forth **specific** conduct by the state demonstrating the constitutional violation. See Henschke, supra, 251 N.J. Super. at 401. (The Appellate Division held that "under 42 U.S.C. §1983, a plaintiff is required to set forth specific conduct by the state or its officials which violated the constitutional rights of plaintiff. Plaintiff is required to establish with specificity that defendant deprived him of a right secured by the Constitution and that such deprivation was caused by a person acting under color of law.")

In the matter at bar, Lamond asserts that defendants deprived him of his First Amendment and "substantive due process" rights. (Jean Cert., Exhibit B, ¶¶ 24-28)

1. First Amendment Violation

The First Amendment protects statements by public employees on matters of **public concern**. Pickering v. Board of Ed. of Tp. of High School Dist. 205, 391 U.S. 563, 573 (1968) While the First Amendment prevents public employers from restricting

the liberties enjoyed by their employees as private citizens, it does not empower such employees to "**constitutionalize the employee grievance**." Connick v. Myers, 461 U.S. 138, 154 (1983) (Emphasis added).

> A public employee's retaliation claim for engaging in protected First Amendment activity is evaluated under a three-step process:
>
> > (1) First, the plaintiff must establish the speech in question was protected in that it involved a **matter of public concern, and the public interest favoring the express of that speech must outweigh any injury the speech could cause to the 'interest of the State**, as an employer, in promoting the efficiency of the public services it performs through its employees,'
> >
> > (2) Second, the plaintiff must show that the protected activity was a **substantial or motivating** factor in the alleged retaliatory action,
> >
> > (3) Finally, the public employer can rebut the claim by demonstrating that the same decision would have been reached even in the absence of the protected conduct.

Bradshaw v. Twp. of Middletown, 145 Fed.Appx. 763, 766-67 (3d Cir. 2005)[5]. The Court determines as a matter of law if the speech addresses a matter of public concern. Myers v. County of Somerset, 515 F.Supp.2d 494, 501 (D.N.J. 2007). Speech pertains to a matter of public concern if the speech "can be fairly considered as relating to any matter of political, social, or other concern to the community." Watters v. City of Philadelphia, 55 F.3d 886, 892 (3d. Cir. 1995). Whether "speech can be fairly characterized as relating to any matter of political, social, or other concern to the community is determined by its 'content, form, and context.'" Holder v. City of Allentown,

[5] Pursuant to R. 1:36-3, a copy of the unpublished decision, Bradshaw v. Twp. of Middletown, 145 Fed. Appx. 763, 766-67 (3d Cir. 2005), is attached to the Certification of Counsel as Exhibit F.

987 F.2d 188, 195 (3d Cir. 1993) (quoting Connick v. Myers, 461 U.S. 138, 147-48 (1983)). "In the employment context, the most important consideration is whether the employee's speech was aimed at advancing a personal interest." Nittoli v. Morris County Bd. of Chosen Freeholders, 2007 WL 1521490 at *4 (D.N.J.)[6] (citing McGreevy v. Stroup, 413 F.3d 359, 365 (3d Cir. 2005); Cahill v. O'Donnell, 75 F.Supp.2d 264, 272 (S.D.N.Y. 1999)).

In this matter, Lamond's First Amendment claim fails to satisfy the first step because his three (3) IA complaints fall **directly** within the parameters of a **personal, employee grievance**. See Connick, supra, 461 U.S. at 154.

Lamond's alleged "whistle blowing activities" complaints are summarized as follows:

First, Lamond filed an IA complaint against Moscolo for throwing a small pink "rubber ducky" at him. Jean Cert., Exhibit C, 133-20 to 135-22. Second, Lamond filed an IA complaint against his subordinate - McDermott because he opined: "You spend a lot of time at home while on duty." Id. at 109-14 to 110-10. Third, Lamond filed an IA complaint against Luberto because he felt slighted when Luberto left him a home voice mail and then spoke to him regarding whether his flood insurance checks were inadvertently mailed to Lamond's residence. Id. at 115-24 to 125-24. Accordingly, plaintiff's claims have no merit, and they must be dismissed, as a matter of law.

None of these 3 trivial IA complaints are a subject for "public concern." These complaints squarely address plaintiff's skewed, private agenda, and do not deserve the protections of the First Amendment, nor this Court. See Nittoli, supra, 2007 WL

[6] Pursuant to R. 1:36-3, a copy of the unpublished decision, Nittoli v. Morris County Bd. of Chosen Freeholders, 2007 WL 1521490 (D.N.J.), is attached to the Certification of Counsel as Exhibit G.

1521490 at *4 (citing McGreevy, supra, 413 F3d at 365; Cahill, supra, 75 F.Supp.2d at 272). As such, Lamond's First Amendment claim must be dismissed, as matter of law.

2. Due Process and Equal Protection

Given that Lamond has advanced no facts to indicate how he was procedurally or substantively deprived of his due process rights, Nutley demands that this claim be dismissed as a matter of law. U.S. Constit., Amend. 14. Similarly, Lamond has not pled any unequal application of the laws which could be considered an equal protection violation, and thus, any such claims should be dismissed as a matter of law. Id.

B. Plaintiff Has Failed to Adduce Any Evidence That His Constitutional Rights Were Violated Pursuant To A Municipal Custom Or Policy

In the context of a §1983 claim, which analysis is also applicable to the NJRCA claims, the United States Supreme Court held that a municipality cannot be liable under 42 U.S.C. §1983 for the actions of an employee solely on the basis of *respondeat superior*. Monell, supra, 436 U.S. at 691. A municipality can, however, be held liable under §1983 when "an action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers." Id. at 690. See also Stomel v. City of Camden, 192 N.J. 137, 145 (2007) (Holding "[a]lthough local governments are 'persons' for the purposes of §1983, a municipality generally cannot be held liable for the actions of employees under the principle of *respondeat superior*. An exception exists when an official municipal 'policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy,' is the cause of the constitutional deprivation.") (Internal citations omitted).

"To bring a §1983 claim against a local government entity, a plaintiff must plead that a municipality's policy or custom caused a violation of plaintiff's constitutional rights." Association for Los Angeles Deputy Sheriffs v. County of Los Angeles,et al., 648 F.3d 986, 992-93 (9th Cir. 2011) (Emphasis added) (Monell, supra, 436 U.S. at 691). See Santiago v. Warminster Township, et al., 629 F.3d 121, 134 (3d Cir. 2010) (The Third Circuit affirmed the dismissal of plaintiff's Complaint against the township for the plaintiff's failure to plead Monell liability as there were no facts pled indicating that the Chief of Police was a final policymaker, nor did she show that her injury was caused by a policy or custom of the township); Wood v. Williams, et al., 2014 WL 2503802 *4-5 (3d. Cir. June 4, 2014)[7] (The Third Circuit affirmed the dismissal of plaintiff's Monell claim against her former employer, a school, on a Fed. R. Civ. P. 12(b)(6) Motion, on the basis that her complaint "failed to identify any unlawful policy or custom and failed to identify any policymaker or decision maker for the unlawful conduct alleged" regarding plaintiff's contention that the school failed to properly hire, train, and screen employees); Gaymon v. Esposito, 2012 WL 1068750 *6,9 (D.N.J. March 29, 2012)[8] (The District Court of New Jersey dismissed claims for supervisory/Monell liability against individual defendants and Essex County on a Fed. R. Civ. P. 12(b)(6) Motion for the failure to allege either a municipal custom or policy in the way of a "statement, ordinance, regulation, or official decision adopted and promulgated by Essex County" to sustain plaintiff's claims for excessive force and the failure to train police officers).

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[7] Pursuant to R. 1:36-3, a copy of the unpublished decision, Wood v. Williams, et al., 2014 WL 2503802 (3d. Cir. June 4, 2014) is attached to the Certification of Counsel as Exhibit H.

[8] Pursuant to R. 1:36-3, a copy of the unpublished decision, Gaymon v. Esposito, 2012 WL 1068750 *6,9 (D.N.J. March 29, 2012), is attached to the Certification of Counsel as Exhibit I.

In this matter, Lamond has failed provide a scintilla of factual support that defendants acted pursuant to some custom or policy of Nutley to deprive him of his constitutional rights. Monell, supra, 436 U.S. at 690. On the contrary, Lamond agrees that Nutley does not tolerate, condone, or permit harassment, or actions that create a hostile work environment. Id. 190-10 to 19. Lamond agrees that Nutley's Rules and Regulations state that:

(1) Employees shall not at any time withhold any information concerning suspected criminal activity and shall report any information concerning suspected criminal activity of others. Id. 179-5 to 8;

(2) Employees knowing of other employees violating laws, ordinance or rules and regulations of the department or disobeying orders shall report same to the Chief of Police through the chain of command. Id. 181-9 to 12;

(3) If the employee believes information is of such gravity that it must be brought to the immediate personal attention of the Chief of Police or if the offending employee is in the employee's chain of command, official channels may be bypassed. Id. 181-16 to 20;

(4) Any employee with knowledge of any form of prohibitive harassment whether directed at them or against others must immediately report it in writing. Id. at 185-16 to 19;

(5) All employees of the department shall adhere to the policies and procedures established by the Chief of Police and the Township of Nutley regarding harassment in the workplace. Id. at 192-13 to 16;

(6) No employee shall take any official action or initiate or engage in any illegal conduct with the attention to retaliate against any person for criticizing or complaining about any employee. Id. at 191-4 to 7.

Moreover, Lamond agrees that both former Chief Holland and current Chief Thomas Strumulo enforced Nutley's written rules and regulations. Id. at 174-2 to 23. Lamond agrees that Chief Holland would "follow the law if [he were] given a written complaint about a violation of law, ordinance, or rule or regulation of the department" Id.

at 182-17 to 21. Lamond agrees that Chief Holland mandated that "any employ with knowledge of any form of prohibitive harassment whether directed at them or against others must immediately report [the same] in writing." Id. at 185-12 to 24.

Based on the above, Lamond has failed to adduce any evidence demonstrating that Nutley either explicitly or tacitly knew of civil rights violations, or approved of them. Thus, Lamond has failed to meet his burden to establish Monell liability, and as such, all constitutional violations must be dismissed against Nutley. Association for Los Angeles Deputy Sheriffs, supra, 648 F.3d at 992-93; Monell, supra, 436 U.S. at 691.

POINT THREE

COUNT TWO MUST BE DISMISSED AS LAMOND CANNOT SUSTAIN A "WHISTLE-BLOWER" CLAIM UNDER CEPA

Lamond has not proffered any evidence to support the premise that he engaged in "whistle-blowing" activity under CEPA for which he sustained retaliation. N.J.S.A. 34:19-1, et seq.

CEPA provides protection to "whistle-blowers" against work-related retaliation resulting from the reporting of an employer's **illegal activity**. See Klein v. University of Medicine and Dentistry of New Jersey, 377 N.J. Super. 28, 38-39 (App. Div. 2005) (emphasis added). To state a claim under CEPA, a plaintiff must plead: (1) he reasonably believed that his employer's conduct violated either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy; (2) he performed a "whistle-blowing" activity described in N.J.S.A. 34:19-3c; (3) an adverse employment action was taken against him; and (4) a causal connection existed between the "whistle-blowing" activity and the adverse employment action. Klein, supra, 377 N.J. Super. at 38; See Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003).

It is now axiomatic that when bringing a CEPA action, a plaintiff "must identify a statute, regulation, rule, or public policy that closely relates to the complained-of conduct." Dzwonar, 177 N.J. at 463. The plaintiff has the burden of proving he held an objectively reasonable belief that such a violation has occurred. Id. at 464. If plaintiff fails to carry his burden, the court must enter judgment for the defendant.

Retaliation under CEPA is defined as "the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment." N.J.S.A. 34:19-2(e). Thus, employer actions

affecting the terms and conditions of employment, but falling short of discharge, suspension, or demotion, can constitute an adverse employment action. Nardello v. Twp. of Voorhees, 377 N.J. Super. 428, 433-34 (App. Div. 2005). To constitute "retaliatory action" under CEPA, however, the action must have had a significantly negative effect on the employee's terms and conditions of employment. See Beasley, supra, 377 N.J. Super. at 606-09.

Not all adverse employer actions constitute retaliation under the CEPA, even though the employee is negatively affected by them. Nardello, 377 N.J. Super. at 434. "Adverse employment actions do not qualify as retaliation under CEPA 'merely because they result in a bruised ego or injured pride on the part of the employee.'" Beasley, supra, 377 N.J. Super. at 607 (citing Klein, supra, 377 N.J. Super. at 46). It is axiomatic that "CEPA's purpose is to prevent retaliatory action against whistle-blowers, it is not to 'assuage egos or settle internal disputes at the workplace.'" Id. (citing Klein, supra, 377 N.J. Super. at 45). In this matter, Lamond cannot cite to any "statute, regulation, rule, or public policy" mandate that defendants violated. Dzwonar, supra, 177 N.J. at 463.

a. Lamond's IA Claims Against Moscolo Are Not Actionable Under CEPA Because They Are Neither Violations Of Law Or "Whistle Blowing" Activates"

Lamond has not testified or informed a "public body" or "superior" regarding his belief that Moscolo, McDermott, or Luberto violated any "statute, regulation, rule, or public policy." Dzwonar, supra, 177 N.J. at 463. In fact, after Lamond's purported "whistle blowing" against his fellow officers was proven to be unsubstantiated, Lamond failed to pursue any action demonstrating that he ever possessed a reasonable belief that these officers violated any law. To that end, Lamond's allegations fall directly within

the parameters of the conduct determined not to be violative of CEPA by Beasley, and constitute nothing more than an "internal disputes at the workplace." Beasley, supra, 377 N.J. Super. at 607 (citing Klein, supra, 377 N.J. Super. at 46).

As to the claims against Moscolo, after Lamond's complaint was proven to be un-sustained by Watson, Lamond – a knowledgeable Police veteran of 24 years who understands New Jersey's criminal-code never provided Watson additional supporting evidence against Moscolo because he knew, in the first instance, that Mocoso violated no articulable law. Id. at 142-12 to 143-9. Equally noteworthy, Lamond never filed a Criminal complaint against Moscolo with any New Jersey Prosecutor's office. Id. 150-19 to 151-25. In fact, Lamond merely called the Moscolo incident "a humiliating assault" and "very disrespectful," not a violation of a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy. (Jean Cert., Exhibit C, 138-13 to 22)

b. Lamond's IA Claims Against McDermott Are Not Actionable Under CEPA Because They Are Neither Violations Of Law Nor "Whistle Blowing" Activities

After McDermott's comments regarding Lamond's work ethic, Lamond never disciplined McDermott, his subordinate officer, by providing him verbal counseling or a written admonition. Id. at 111-10 to 15. Additionally, after Watson concluded that Lamond's complaints against McDermott could not be sustained, Lamond never provided Watson additional supporting evidence regarding any violation of law, public policy, or otherwise. Id. at 113-24 to 1. Accordingly, it defies all logic for Lamond to assert that he reasonably believed that McDermott violated any law, or that Lamond performed a "whistle blowing" by filing an IA complaint against his subordinate.

c. The IA Claims Against Luberto Are Not Actionable Under CEPA Because They Are Neither violations Of Law Nor "Whistle Blowing" Activities

Likewise, after Luberto provided Watson undisputed evidence that Lamond's claims were baseless, (including proofs that Luberto: a) was a victim of Hurricane Sandy; b) had his flood insurance checks inadvertently mailed to 64 Chesnut Street; and c)never harassed Lamond), Lamond never provided Det. Watson additional supporting evidence of any violation of law. Jean Cert., Exhibit C, 130-25 to 5. Clearly, Lamond failed to do so because he knew his allegations against Luberto were baseless. Accordingly, this IA complaint, like the ones against Moscolo and McDermott are insufficient under CEPA's requirements because they do not prove a violation of any "statute, regulation, rule, or public policy." Dzwonar, supra, 177 N.J. at 463.

d. Lamond Has Failed to Adduce Any Evidence of Adverse Employment

Most glaringly, Lamond has failed to set forth any serious, tangible adverse action which would qualify under CEPA. Klein, supra, 377 N.J. Super. at 38; Dzwonar, supra, 177 N.J. at 462. The undisputed facts establish that Lamond never suffered any "adverse employment" action. Lamond's October 15, 2013 demand for a promotion to a **non-existent seventh** Lieutenant is illogical. Jean Cert., Exhibit B, ¶¶ 29A, 39A, 44A, 51A, 55A, and 57A.

Lamond's "adverse employment" claims are illogical based on the following: First, when Lamond filed his October 15, 2013 Complaint, the Nutley Police Table of Organizations allowed only **six police lieutenants**. Id. at 32-23 to 33 to 2. Second, on October 15, 2013, Nutley's **six police Lieutenants** were: (1) Green; (2) Rhein; (3) Watts; (4) Irwin; (5) Neri; and (6) Locurto. Id. at 53-4 to 55-9. Third, belying any claim of discriminatory hiring, Lamond agrees that Lieutenants: (1) Green; (2) Rheum; (3) Watts;

(4) Irwin; (5) Neri; and (6) Locurto were rightfully promoted ahead of him because, according to Lamond, "**they scored higher than me**." Id. 51-12 to 52-9. Given that there was no room for a seventh police lieutenant, Lamond's adverse employment claims are meritless.

Moreover, Lamond – a 24 year veteran, has not experienced any retaliatory discharge, suspension, demotion, or otherwise. Throughout Lamond's career, he has been assigned more complex work assignments as his police training increased. Id. at 24-11 to 25-14. After becoming Sergeant, Lamond has received raises pursuant to his police contract, and he currently earns $120,000 per year. Id. at 23-9 to 24 -7. He is also a Sergeant "Patrol Supervisor" who is "second in command to the lieutenant." Id. at 25-15 to 20; 27-21 to 24.

Lamond's supervisors have even accommodated his work schedule in order for him to enjoy a home-work balance. For approximately "two-thirds" of his career, Lamond has been allowed, by his election, to work the 3:15 p.m. to 11:45 p.m. shift because it provides him greater personal flexibility. Id. at 26-7 to 27-17. Based on this overwhelming evidence, Lamond cannot support his assertion that he has somehow suffered an "adverse employment" action.

POINT FOUR

LAMOND HAS FAILED TO SET FORTH A *PRIMA FACIE* CASE FOR COMMON LAW CONSPIRACY

As stated above, Lamond's common law conspiracy cause of action is barred by CEPA's waiver provision. N.J.S.A. 34:19-8. Nonetheless, even if the Court considers plaintiff's claim on the merits, it still fails as a matter of law.

In New Jersey, a civil conspiracy is "a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another, and an overt act that results in damage." Banco Popular N. Am. v. Gandi, 184 N.J. 161, 177 (2005). "To establish a conspiracy, 'it simply must be shown that there was a 'single plan, the essential nature and general scope of which [was] known to each person who is to be held responsible for the consequences.'" Morgan v. Union County Bd. of Chosen Freeholders, 268 N.J. Super. 337, 364 (App. Div. 1993) (quoting Hoffman-LaRoche, Inc. v. Greenberg, 447 F.2d 872, 875 (7th Cir. 1971))

Lamond's Complaint does not contain a scintilla of evidence demonstrating any Nutley defendant to deprive him of any right. There is no evidence of an "agreement" or "plan" to retaliate against plaintiff, and to further belabor this point for the Court is unnecessary. Banco Popular N. Am., 184 N.J. at 177; Morgan, 268 N.J. Super. at 364. Simply stated, this cause of action is unsupported by any factual allegations whatsoever. As such, Count Five must be immediately dismissed, as a matter of law.

CONCLUSION

For the reasons set forth above, plaintiff has failed to state actionable claims under the NJCRA, CEPA, and the common law against Nutley upon which relief may be granted. As a result, those claims should be dismissed as a matter of law.

CHASAN LEYNER & LAMPARELLO, PC
Attorneys for Defendant Township of Nutley and Mayor Alphonse Petracco

By: _____
ROOSEVELT JEAN

Dated: February 20, 2015