SUPREME COURT OF NEW JERSEY
Docket No. 073,324

JOEL S. LIPPMAN, M.D.,	:	Civil Action
Plaintiff-Respondent-Cross Petitioner,	:	ON PETITION FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-4318-10T2
v.	:	
ETHICON, INC. and JOHNSON & JOHNSON, INC.,	:	ENTERED September 4, 2013
Defendants-Petitioners-Cross Respondents.	:	Sat Below: Hon. Jose L. Fuentes, P.J.A.D. Hon. Jonathan N. Harris, J.A.D. Hon. Ellen L. Koblitz, J.A.D.

AMICI CURIAE BRIEF ON BEHALF OF THE NEW JERSEY WORK ENVIRONMENT COUNCIL, THE NEW JERSEY STATE INDUSTRIAL UNION COUNCIL, AND 25 OTHER ENVIRONMENTAL, LABOR, CONSUMER AND COMMUNITY ORGANIZATIONS

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INTERESTS OF AMICI CURIAE

The twenty-seven environmental, labor, consumer and community organizations[1] that have joined in presenting this brief together represent more than half a million New Jerseyans. They support the Appellate Division's holding below "that an employee's job title or employment responsibilities should [not] be considered outcome determinative in deciding whether the employee has presented a cognizable cause of action under CEPA." Lippman v. Ethicon, Inc., 432 N.J. Super. 378, 381 (App. Div. 2013). They ask this Court to firmly reject the contrary view set forth in Massarano v. New Jersey Transit, 400 N.J. Super. 474, 491 (App. Div. 2008) and to hold that an employee who "was merely doing her job" can claim CEPA's protections.

These organizations are particularly alarmed by the idea that, if this Court endorses the Massarano court's view, employers could add "watchdog" duties to every employee's job description and thereby remove their CEPA protection. Each job

[1] The 27 organizations, in alphabetical order, are: American Federation of Teachers-NJ; Burlington County Central Labor Council; CATA - The Farmworker Support Committee/El Comite de Apoyo a los Trabajadores Agricolas; Clean Water Action New Jersey; Communications Workers of America District 1; Concerned Citizen Coalition of Long Branch; Delaware Riverkeeper Network; Environment New Jersey; GreenFaith; Hackensack Riverkeeper; Health Professionals and Allied Employees AFT, AFL-CIO; International Brotherhood of Teamsters Local 469; International Brotherhood of Teamsters Local 877; National Employment Lawyers Association/New Jersey; New Jersey Citizen Action; New Jersey Education Association; New Jersey Environmental Lobby; New Jersey Public Interest Research Group; New Jersey State Industrial Union Council; New Jersey State Laborers Health and Safety Fund; New Jersey Work Environment Council; New Labor; NY/NJ Baykeeper; Public Employees for Environmental Responsibility; Raritan Headwaters Association; United Steelworkers District 4; and Utility Workers Union of America Local 534, AFL-CIO.

description might say something like "If you suspect any wrongdoing by any company employee, it is your duty to report it immediately and to refuse to participate in that conduct unless directed to by a supervisor who has heard your objection." Indeed, several of these *amici* report seeing employers increasingly requiring job applicants and employees to sign statements promising to report all possible environmental, safety and other violations. While including such language in job descriptions may be commendable, its purpose is completely undercut if its presence amounts to a complete defense to a claim brought when management nevertheless retaliates against a conscientious employee who adheres to that job duty.

If the Massarano court's view is upheld by this Court, CEPA rights could effectively be taken away from union and nonunion workers simply by adding a clause to every job description. In a time of government cutbacks and efforts to curb governmental regulation and enforcement, such a result would undermine the public interest. These *amici* believe we must have courageous people willing to speak up about environmental, job safety and health concerns, as well as innumerable other consumer and public interest concerns, without fear of retaliation.

These twenty-seven organizations urge this Court to hold that every employee is entitled to the full protections of CEPA, without regard to their job description. In addition, they believe that the public interest requires "watchdog" employees to have greater protection from CEPA than ordinary employees

have. They therefore oppose the "exhaustion" requirement created by the panel below, and further argue that the ultimate burden of persuasion should be on the employer whenever a "watchdog" employee brings a CEPA claim to trial.

These organizations believe that the core question in every CEPA case is not what the plaintiff's job description was. The core issue must always be the employer's *mens rea*.

IDENTIFICATION OF AMICI CURIAE

New Jersey Work Environment Council (WEC) is a membership alliance of labor, environmental, and community organizations working for safe, secure jobs and a healthy, sustainable environment. WEC links workers, communities, and environmentalists through training, technical assistance, grassroots organizing and public policy campaigns to promote dialogue, collaboration, and joint action. Formed in 1986, WEC is the nation's oldest state labor/environmental ("blue/green") coalition. Among its other activities, WEC provides public education programs about CEPA and trains employees to be "watchdogs" in order to effectively participate in preventing workplace and environmental hazards. It lobbied successfully for the 2004 amendment of N.J.S.A. 34:19-7 which requires employers to provide annual notice to employees of their rights under CEPA. Because other statutes, including OSHA and federal environmental laws, have anti-retaliation provisions that in many respects are weaker, WEC believes that CEPA is essential to protect worker, environmental and public safety and health.

The New Jersey State Industrial Union Council (IUC) is a coalition of private and public sector unions. Together, the affiliated unions of the IUC represent more than 100,000 employees throughout the State. The IUC has participated as *amicus curiae* in numerous matters before the New Jersey Supreme Court and Appellate Division during its more than 50 years of existence. These cases include, most recently, Hargrove v. Sleepy's, LLC, Supreme Court Docket No. A-70-12 (awaiting decision) as well as Green Party of New Jersey v. Hartz Mountain Industries, Inc., 164 N.J. 127 (2000); and Lepore v. National Tool & Mfg. Co., 115 N.J. 226 (1989). According to Article III of its Constitution, the IUC's first "object and principle" is "To promote the concept of worker and human rights for all people." It considers a worker's rights not to be compelled to participate in an employer's unlawful activity and to seek to correct such employer conduct to be among those basic rights.

Clean Water Action New Jersey is the largest environmental organization in the State. Clean Water Action has been influential in shaping environmental policy in New Jersey because its programs educate citizens and get them involved in the decision-making process. Clean Water Action's community organizers bring local groups together to develop unified campaigns which result in passing effective policies that emphasize pollution prevention. By giving citizen activists hands-on experience in organizing, media relations, research and lobbying, a base of leaders can build a stronger environmental

movement throughout the state. It believes that CEPA is an important protection for the citizen activists it works with.

Health Professionals and Allied Employees AFT represents health care workers throughout New Jersey. HPAE initiated and lobbied successfully for the amendments that added protection for any "employee who is a licensed or certified health care professional [who objects or refuses to participate in conduct that s/he] reasonably believes constitutes improper quality of patient care" to N.J.S.A. 34:19-3. Many of HPAE's members are required by existing licensing and certification standards to report improper quality of patient care to management and, in some cases, their licensing boards, thereby making them "watchdog" employees as a matter of law. In addition, HPAE believes that such "watchdog" duties are an inherent part of the job description of all health care workers whether they are licensed or unlicensed. HPAE therefore fears that adoption of the Massarano view that an employee who is "merely doing her job" has no CEPA protection would nullify the CEPA amendments designed to encourage quality patient care, undercut the objectives of the licensing and certification requirements, and completely deprive health care workers of CEPA protection.

GreenFaith is one of the oldest religious-environmental organizations in the United States. It was founded in 1992 by Jewish and Christian leaders who believed that New Jersey's religious community needed an organization to connect diverse religious traditions with the environment. GreenFaith's work is

based on beliefs shared by the world's great religions - protecting the earth is a religious value, and environmental stewardship is a moral responsibility. It believes that CEPA provides important protections for employees who act in accordance with the dictates of conscience to protect the environment.

International Brotherhood of Teamsters Local 877 represents employees at the Phillips 66's Linden Bayway Refinery where it has been required to defend its officers and members from what it believes to be retaliation for engaging in CEPA-protected activities.

Communication Workers of America District One represents State, county and municipal employees as well telecommunications employees in New Jersey. Among its bargaining unit members are the employees of the New Jersey Departments of Environmental Protection, Labor and Workforce Development, Health, and Law and Public Safety including its Division of Consumer Affairs. It therefore has experience with the benefits of both sides of the CEPA coin - its members have been aided in their regulatory and enforcement work by employees who have had the courage to make reports despite the possibility of employer retaliation, and they have defended employees that they believe were victimized by employer retaliation.

Delaware Riverkeeper Network, **Hackensack Riverkeeper**, **Raritan Headwaters Association and NY/NJ Baykeeper** are all directly involved in monitoring water pollution from industrial

and other point and non-point sources in order to help to preserve the natural ecosystems of their namesake bodies of water. They have all had experiences where their work has benefitted from employee reports of illegal workplace conduct. They believe that such reports are often the only effective way that unsafe environmental practices can be discovered and that employees who make such reports should be entitled to the full protection of CEPA no matter their job duties.

United Steelworkers District 4 is the Nation's and New Jersey's largest industrial union. Its members are employed in a wide range of industries including chemical plants, pipelines and transfer facilities, oil refineries, foundries, and steel fabrication plants. Many of these facilities can release toxic substances into the air or water and some process or store highly hazardous chemicals that present potentially catastrophic risks to surrounding communities. Many of its members serve as "watchdogs" for ensuring safety for their co-workers and the general public, by monitoring the use and disposal of hazardous materials and pollutants and by participating in health and safety committees that inspect facilities, raise safety and environmental issues with management, and report incidents to regulatory agencies. Some employers do not appreciate these efforts, and USW District 4 has had to defend members that it believes management retaliated against for engaging in such CEPA-protected activities.

New Jersey Citizen Action is the state's largest citizen

watchdog coalition. New Jersey Citizen Action works to protect and expand the rights of individuals and families and to ensure that government officials respond to the needs of people rather than the interests of those with money and power. An important part of its work has long been fighting to establish and defend whistleblowers' rights. It believes that CEPA should be read liberally to protect conscientious employees and should not be restricted by job descriptions.

New Jersey Education Association (NJEA) and American Federation of Teachers - New Jersey (AFT) are unions which between them represent virtually all public K-12 schoolteachers and staff in the State. Their members therefore play a key role in protecting the health and safety of New Jersey children. Both unions offer extensive health and safety training programs and actively encourage their members to speak up about unhealthy school conditions such as mold, asbestos, lead paint and polychlorinated biphenyls in window caulkings. It is plain that public school teachers and staff benefit from the protections of CEPA from two cases that this Court would have had to decide differently if the Massarano Court's view had been the law. See Hernandez v. Montville Twp. Bd. of Educ., 179 N.J. 81 (2004), affirming on the opinion below, 354 N.J. Super. 467 (App. Div. 2002) (school janitor pressing for repairs in toilet and other areas he was charged with cleaning) and Abbamont v. Piscataway Township Bd. of Educ., 138 N.J. 405 (1994) (school shop teacher pressing for repairs to ventilation systems in shop classrooms).

NJEA and AFT believe that Messrs. Hernandez and Abbamont were both just doing their jobs when they were retaliated against by their public school administrations, and that schoolteachers and staff deserve the same protection today.

New Labor and CATA - The Farmworker Support Committee/El Comite de Apoyo a los Trabajadores Agricolas work to engage and educate non-union, low-wage and often contingent workers, some of whom are undocumented, through leadership development and capacity building so that they are able to make informed decisions regarding the best course of action for their interests. New Labor is an alternative model of worker organization that combines new and existing strategies to improve working conditions and provide a voice for immigrant workers throughout New Jersey. CATA is a migrant farmworker organization that is governed by and comprised of farmworkers who are actively engaged in efforts to obtain better working and living conditions. The workers that both organizations serve are often excluded from the full protections of laws that benefit many other workers. They are, however, protected by CEPA. New Labor and CATA believe that a robust, broadly interpreted CEPA aids their efforts to attain safe and healthful working conditions for their members.

New Jersey Public Interest Research Group (NJPIRG) is a consumer group that stands up to powerful interests whenever they threaten consumer's health and safety, financial security or right to fully participate in democratic society. It works

to uncover threats to public health and wellbeing and to end them, using the time-tested tools of investigative research, media exposés, grassroots organizing, advocacy and litigation. NJPIRG strives to deliver persistent, result-oriented public interest activism that protects consumers, encourages a fair, sustainable economy, and fosters responsive, democratic government. It believes that employee whistleblowing casts light upon problems that would otherwise remain in the shadows. Its work has benefitted from such exposures and it believes that employees who face retaliation for engaging in such conduct must be protected.

Environment New Jersey and New Jersey Environmental Lobby (NJEL) are both non-partisan, member-supported 501(c)(4) organizations. Environment New Jersey is a statewide, citizen-based environmental advocacy organization. It works through research reports, news conferences, interviews with reporters, op-ed pieces, letters to the editor and meetings with public officials to raise awareness of environmental issues and promote sensible solutions. For almost 40 years, NJEL has represented the interests of New Jersey's citizens on environmental issues. Reflecting its founders' backgrounds in business, science, and academia, NJEL has been a moderate voice for policies that balance economic viability and environmental protection. Both organizations strongly support a robust CEPA.

Public Employees for Environmental Responsibility (PEER) is a national non-profit alliance of local, state and federal

scientists, law enforcement officers, regulatory officers and other public employees which maintains a field office in New Jersey. Its mission is to assist public employees with environmental job duties who are not being permitted by their management to vigorously pursue their environmental duties or who are being retaliated against for speaking out on environmental issues. PEER has a particular interest in CEPA, which it believes is an important tool that helps the New Jersey employees who seek their services, which include litigation.

The New Jersey State Laborers Health and Safety Fund is a joint labor-management Taft-Hartley Fund that provides safety, health and wellness services to New Jersey Laborers Union members and their employers. It supports the idea of workers reporting unsafe or unhealthy conditions to their employers, but it also knows that when economic conditions are poor, jobs are scarce, and workplace conditions are hostile, employees often fear complaining up the chain of command or going beyond that by reporting issues to higher authorities such as OSHA. This is especially true when workers see hazards that may not affect them directly, but may cause injury or illness to other workers or to the public. For these reasons, it believes that strong CEPA protections must be in place so that there is recourse when employees face retribution simply for reporting a hazard.

Concerned Citizens Coalition of Long Branch is a community group that monitors hazards in and around Long Branch, including the ongoing remediation efforts at several toxic sites. It

relies primarily on volunteer labor and small donations in order to operate and therefore knows the difficulties of confronting well-funded corporations who may sometimes prefer to conceal the true hazards of their operations. Accordingly, they believe in the importance of CEPA to protect employees who are willing to speak out in the public interest.

Burlington County Central Labor Council is an umbrella labor organization of unions representing a wide range of employees in Burlington County in matters of mutual interest and concern. Protecting employees from unlawful retaliation is one of those mutual concerns, as its members have seen such problems in the construction, healthcare and other industries.

Utility Workers Union of America Local 534 represents employees at the Bergen County Utilities Authority. Its members operate the largest environmental control facility in the region, processing and discharging 80 million gallons of industrial and domestic wastewater from 46 municipalities into the fragile ecosystem of the Hackensack River and the New Jersey Meadowlands every day. Its employees are responsible for strict adherence to environmental regulations and must safeguard against any act or omission that could jeopardize their operations, place themselves or the public in danger, or harm the environment. Its members do not want to fear that their conscientious fulfillment of their job duties might someday leave them facing retaliation without a meaningful remedy.

International Brotherhood of Teamsters Local 469 represents

over 3000 members in a wide variety of private and public sector employment. It has represented members that it believes suffered employer retaliation from simply doing their jobs. It does not believe that CEPA's protections should be denied to such workers.

The National Employment Lawyers Association- New Jersey (NELA-NJ) is a not-for-profit membership organization of approximately 140 New Jersey attorneys in private practice who devote substantial portions of their practice to representing individual employees in employment litigation. NELA-NJ has appeared as amicus curiae before this Court in many of the most significant employment cases of the past twenty years, including Walker v. Giuffre, 209 N.J. 124 (2012); Donelson v. Dupont Chambers Works, 206 N.J. 243 (2011); Alexander v. Seton Hall University, 204 N.J. 219 (2010); Victor v. State, 203 N.J. 383 (2010); Quinlan v. Curtiss-Wright Corp., 204 N.J. 239 (2010); Stengart v. Loving Care Agency, 201 N.J. 300 (2009); Wein v. Morris, 194 N.J. 364 (2006); Pierson v. Medical Health Centers, 183 N.J. 65 (2005); Zive v. Stanley Roberts, Inc., 182 N.J. 436 (2005); Tarr v. Ciasulli, 181 N.J. 70 (2004); Maw v. Advanced Clinical Communications, Inc., 179 N.J. 439 (2004); Hernandez v. Montville Twp. Board of Ed., 179 N.J. 81 (2004); Lockley v. State of New Jersey, 177 N.J. 413 (2003); Green v. Jersey City Bd. of Educ., 177 N.J. 434 (2003); Holmin v. TRW, Inc., 167 N.J. 205 (2001); Estate of Roach v. TRW, Inc., 164 N.J. 598 (2000); Higgins v. Pascack Valley Hospital, 158 N.J. 404 (1998); and

Payton v. New Jersey Turnpike Authority, 148 N.J. 524 (1997). The scope of employee protection under CEPA is of obvious importance to an association of lawyers who dedicate themselves to vigorous advocacy on behalf of New Jersey employees. Many NELA-NJ members regularly prosecute CEPA cases, and the organization therefore has developed considerable expertise in the legal questions presented to the Court in this case.

PROCEDURAL AND FACTUAL BACKGROUND

For purposes of this Brief, we rely on the recitation of the relevant procedural history and factual background found in the Appellate Division's decision below. See Lippman v. Ethicon, Inc., 432 N.J. Super. 378, 382-405 (2013).

ARGUMENT

I. AN EMPLOYER MAY NOT RETALIATE AGAINST AN EMPLOYEE FOR OBJECTING TO ACTIVITY THAT IS ILLEGAL OR CONTRARY TO A CLEAR MANDATE OF PUBLIC POLICY, MERELY BECAUSE THE PROTECTED ACTIVITY FALLS WITHIN THE EMPLOYEE'S NORMAL JOB DUTIES

The Appellate Division below correctly held that an employer may not retaliate against an employee who engages in what would normally be protected activity under CEPA, merely because the protected activity falls within the employee's ordinary job duties. The Appellate Division's position on this issue is squarely supported by CEPA's plain language, by ordinary canons of statutory construction and by the Legislature's broad remedial purpose in enacting CEPA. This holding is also consistent with laws of our sister states that have enacted whistleblower protections. The Appellate

Division's holding in this regard should be affirmed.

> This Court presented the issue for this appeal thus:
>
> Can employees who are responsible for monitoring and reporting on employer compliance with relevant laws and regulations – so-called "watchdog employees" – seek whistleblower protection under the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 et seq., and, if so, under what circumstances?

http://www.judiciary.state.nj.us/calendars/sc appeal.htm.

Because they recognize the answer to this question is plainly "yes," defendants in this Court struggle mightily to reframe the issue. Defendants contend that the question is not whether "watchdog employees" can be protected by CEPA. Defendants admit that "watchdog employees" plainly fall within the statutory definition of "employees," N.J.S.A. 34:19-2(b), and are protected. Drb2.[2]

Instead, defendants contend that this appeal is really a dispute over what it means to "object" to activity that is unlawful or contrary to a clear mandate of public policy. Drb1-Drb2. See N.J.S.A. 34:19-3(c).[3] Defendants insist that the word

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[2] Throughout this Brief, we cite to defendants' Petition for Certification as "Db__," and we cite to defendants' Reply in Support of Petition for Certification as "Drb___."

[3] One of the problems with defendants' argument is that they only address themselves to subsection (c), which protects an employee who "[o]bjects to, or refuses to participate in" illegal activity. N.J.S.A. 34:19-3(c). Defendants never articulate an argument for why a so-called "watchdog employee" would not be protected by subsection (a), which protects an employee who "discloses" illegal activity, even if the "disclosure" were part of the employee's "core job duties." See N.J.S.A. 34:19-3(a). Still less do defendants attempt to explain why subsection (b) would not protect an employee who "[p]rovides information to, or testifies before," a public body about illegal activity, even if it were part of the employee's "core job duties" to provide information to a public body. See N.J.S.A. 34:19-3(b). Thus,

"object" is ambiguous and therefore – albeit contrary to CEPA's broad remedial purpose – should be interpreted restrictively to only reach activity that goes beyond the employee's "core job duties." Thus, defendants argue, a "watchdog employee" ***would*** be protected under CEPA, but only if she did "something" that goes beyond her ordinary job functions. Thus, a safety inspector would be protected if she complained about accounting improprieties, but not about workplace safety. An accountant would be protected if he complained about workplace safety, but not about accounting improprieties.

But as we explain below, defendants' sleight of hand does not avail. Regardless of how the issue is framed, the outcome of defendants' argument is the same: two employees could engage in ***exactly*** the same activity, yet only one would be protected under CEPA, solely because of the difference in their job duties. Thus, according to defendants' reading of CEPA, a plant safety inspector who wrote a memo complaining about several workplace hazards would not be protected, but a janitor who wrote the same memo would be protected. All of defendants' protestations to the contrary notwithstanding, they are indeed trying to create two classes of employees under CEPA, one that will be protected and one that will not, with the only distinction being their job duties.

Defendants' proposed caste system for employees under CEPA,

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under defendants' approach it would appear that a "watchdog employee" would be protected from retaliation "just for doing her job" under subjections (a) and (b), but not under subjection (c). See infra at 30-31.

of course, is contrary to the statute's plain language, which simply protects ***any*** "employee" who engages in protected activity. Equally important, defendants' crabbed reading of the statute sabotages CEPA's broad remedial purpose. Not surprisingly, safety inspectors are most likely to uncover workplace hazards, accountants are most likely to uncover tax evasion, nurses are most likely to uncover threats to patient safety and health, pollution monitors are most likely to uncover environmental dangers, and nuclear plant engineers are most likely to uncover the next Chernobyl. To permit employers to retaliate against these employees for "just doing their jobs" does not merely harm the employees – it endangers all of us, by exposing us to increased health, safety, environmental and financial threats.

And, indeed, that is the core flaw in defendants' analysis. Defendants incorrectly focus on the intent of the employee – was the "watchdog employee" merely "doing her job," or did she intend to go (somehow) beyond her "core job duties" and "object"? We submit the proper focus should be on the intent of the employer. If the employer sought to punish an employee for calling attention to activity that is unlawful or in violation of a clear mandate of public policy, then the employer has violated CEPA, regardless of whether the employee's actions were within the scope of her job duties or not. If an employer retaliates against an employee for reporting safety hazards, it does not matter if she was the plant safety inspector or not.

Defendants insist that protecting employees who object to illegal activity in the course of their normal job duties will "open the floodgates" to litigation. But the holding below only allows through the stream of cases where the employer retaliated against the employee for his complaints. On the other hand, defendants' crippling interpretation of CEPA ***will*** open the floodgates – to a toxic stew of unchecked threats to our safety, our health, our financial system and our environment.

A. CEPA's Plain Language Does Not Permit An Employer To Retaliate Against An Employee Who Objects To Activity That Is Illegal Or Contrary To A Clear Mandate Of Public Policy, Even Where The Whistleblowing Is Part Of The Employee's Ordinary Job Duties

Defendants argue that CEPA's definition of protected activity does not "include an employee's performance of his or her regular job duties." Db8. Thus, defendants claim that under CEPA, even if the employee's conduct was, in fact, an objection to illegal conduct, the employer may still retaliate against the employee with impunity because CEPA's "language cannot apply to an employee's performance of regular job responsibilities." Db14. Defendants' argument is flatly contradicted by the statute's plain language.

Any analysis of CEPA's scope "begin[s] . . . by looking at the statute's plain language, which is generally the best indicator of the Legislature's intent." Donelson v. DuPont Chambers Works, 206 N.J. 243, 256 (2011); see also Higgins v. Pascack Valley Hospital, 158 N.J. 404, 418 (1999). "A statute should be interpreted in accordance with its plain meaning if it

is 'clear and unambiguous on its face and admits of only one interpretation.'" Bd. of Educ. of Neptune v. Neptune Tp. Educ. Ass'n, 144 N.J. 16, 25 (1996).[4] CEPA's definition of what constitutes protected activity states as follows:

> An employer shall not take any retaliatory action against an employee because the employee does any of the following:
>
> a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer, or another employer, with whom there is a business relationship, that the employee reasonably believes:
>
> (1) is in violation of a law, or a rule or regulation promulgated pursuant to law, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, in the case of an employee who is a licensed or certified health care professional, reasonably believes constitutes improper quality of patient care; or
>
> (2) is fraudulent or criminal, including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity;
>
> b. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer, or another employer, with whom there is a business relationship, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, in the case of an employee who is a licensed or certified health care professional, provides information to, or

[4] Amicus the Employers Association of New Jersey (EANJ) begins its brief to this Court by asserting the Appellate Division's holding "ignores the plain language and intent of CEPA." EANJ Brief, at 1. Comically, the EANJ then proceeds to never quote, or even cite to, CEPA's actual language at any point in its entire brief.

testifies before, any public body conducting an investigation, hearing or inquiry into the quality of patient care; or

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

(1) is in violation of a law, or a rule or regulation promulgated pursuant to law, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, if the employee is a licensed or certified health care professional, constitutes improper quality of patient care;

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

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

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

As noted, defendants' argument, put simply, is an employer may retaliate against any employee who engages in any of the foregoing conduct, as long as the conduct was undertaken as part of the employee's "regular job duties."[5] Therefore:

[5] In their various briefs to various courts, defendants have used a variety of verbal formulations for this idea: "core job responsibilities"; "regular job responsibilities"; "part of his or her job"; "ordinary job responsibilities"; "regular job duties"; "regular performance of his job responsibilities." Db1, Db8, Db10, Db19, Drb1, Drb2. None of these formulations are found in the statute's actual language, which probably explains why they are ever shifting in defendants' briefs. Likewise, defendants understandably make no attempt to distinguish between a "job responsibility," a "regular job responsibility," or a "core job responsibility," because none of these terms are in the statute anyway. One is left to wonder, however, how courts, employees and employers will be expected to figure out what is a "core" job duty (and thus not whistle-blowing) versus what is merely a "job duty" (which apparently might be whistleblowing). Compare Defendants' Appellate

*An employer could retaliate against a safety engineer who "disclosed" to the Nuclear Regulatory Commission the employer's illegal dumping of nuclear waste, notwithstanding N.J.S.A. 34:19-3(a), if one of the employee's "regular duties" was to make periodic reports to the NRC.

*An employer could retaliate against an accountant who "provided information" about the employer's illegal tax evasion during an Internal Revenue Service audit, notwithstanding N.J.S.A. 34:19-3(b), if one of the accountant's "regular duties" was to respond to IRS inquiries.

*An employer could retaliate against a nurse who "objected" to improper patient care, which was both illegal and life threatening, notwithstanding N.J.S.A. 34:19-3(c), if one of the nurse's "regular duties" was to prevent any instance of improper patient care.

But the only way to achieve these macabre results would be to amend the statute. For example, the employer could retaliate with impunity against the nurse in the above example, but only if this Court re-wrote N.J.S.A. 34:19-3(c) to read that CEPA protects an employee who "[o]bjects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes . . . constitutes improper quality of patient care, ***unless it is part of the employee's regular job duties to make such an objection***." In fact, that is precisely what defendants are asking this Court to do.

But this Court has repeatedly declined the invitation to re-write CEPA to add exceptions to its provisions that are not already there. "The clear language of CEPA is our surest guide. We will not 'rewrite a plainly-written enactment' or engraft 'an additional qualification which the Legislature pointedly

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Division Brief, at 42 n.17 (attempting to distinguish "principal job functions" from "ancillary or general responsibilities").

omitted.' See Mazzacano v. Estate of Kinnerman, 197 N.J. 307, 323 (2009) (internal quotation marks and citation omitted)." Donelson v. DuPont Chambers Works, 206 N.J. at 261; see also Higgins v. Pascack Valley Hospital, 158 N.J. at 418-19. "It is ***not*** the role of a court to supply what the Legislature has omitted . . . ." Munoz v. New Jersey Automobile Full Ins. Underwriting, 145 N.J. 377, 389 (1996) (emphasis added).

There is simply no ambiguity in CEPA's language that would justify rewriting the description of protected activity. The mere fact that N.J.S.A. 34:19-3 does not include the limiting language – "unless it is part of the employee's regular job duties" – does not render the statute ambiguous. If that were the rule, every statute would be ambiguous "unless it explicitly sets forth every possible condition, qualification, or exception that it does ***not*** adopt." GE Solid State v. Director, Taxation Div., 132 N.J. 298, 307 (1993) (emphasis in original). Such reasoning "renders inoperable" the most basic canons of statutory construction. Id. at 307-08.

Defendants are asking this Court to "engraft" onto N.J.S.A. 34:19-3 limiting language that simply is not there. "That we cannot do. We are charged with interpreting a statute; we have been given no commission to rewrite one." Murray v. Plainfield Rescue Squad, 210 N.J. 581, 596 (2012).

B. Every Relevant Canon Of Statutory Construction Compels An Interpretation Of CEPA That Prohibits Retaliation For Whistleblowing, Regardless Of Whether The Employee Is "Merely" Performing Her Job Duties

We submit that the plain language of CEPA ends the

analysis. On its face, N.J.S.A. 34:19-3 makes no exception for an employee whose whistleblowing is supposedly part of her "regular job duties." We submit only the legislature has the power to change CEPA's plain language. "If the plain language of the statute 'leads to a clear and unambiguous result, then [the] interpretive process is over.'" Too Much Media, LLC v. Hale, 206 N.J. 209, 229 (2010). "It is not the court's function to 'rewrite a plainly-written enactment of the Legislature [or] presume that the Legislature intended something other than that expressed by way of the plain language.'" Ryan v. Renny, 203 N.J. 37, 54 (2010).

However, even if the Court were to turn to ordinary canons of statutory construction, every interpretive aid would lead to and confirm the same conclusion: An employer may not retaliate against an employee who engages in whistleblowing merely because the employee's actions fell within his "ordinary job duties."

1. There is no ambiguity in CEPA's description of what constitutes protected activity, but even if there were, the terms would have to be given a liberal construction to serve the statute's broad remedial purpose

Defendants insist that the word "object" in N.J.S.A. 34:19-3(c) is ambiguous, and so the Court should resort to extrinsic aids to determine its meaning. Defendants' Response to Cross-Petition for Certification, at 11 (contending the courts need to "address[] the ambiguity of what it means to 'object to' proposed action," and must be "vigilant" "to ensure that the specific actions alleged to constitute protected activity meet

the statutory threshold"). From this alleged "ambiguity," defendants contend that the word "object" should be interpreted restrictively to only include "conduct by an employee that goes beyond or even contradicts what the employer asks the employee to do as part of his or her job." Db14. See also Db2; Defendants' Response to Cross-Petition, at 10; Defendants' Appellate Division Brief, at 30. Thus, defendants argue that an employee who is merely "doing her job" cannot be "objecting" and thus is not engaged in protected activity under CEPA.

We submit there is nothing "ambiguous" about the word "object." This Court "must ascribe to the words used in CEPA their 'ordinary meaning and significance' . . . ." Donelson v. DuPont Chambers Works, 206 N.J. at 256. The commonly accepted meaning of the word "object" (when used as a verb) is "to disagree with something or oppose something." Merriam-Webster's Collegiate Dictionary (11th ed. 2003). Thus, if an employee disagrees with or opposes an activity, policy or practice that is illegal or contrary to a clear mandate of public policy, she has engaged in protected activity under N.J.S.A. 34:19-3(c).

But even if there were some ambiguity in the meaning of "object," it would not help defendants. The primary rule of statutory construction that this Court has always applied to CEPA is that, as a broad, remedial statute, its terms should be interpreted liberally to provide the greatest scope of protection for employees who complain about illegal activity.

> A single guiding principle has instructed our interpretation of CEPA in the decades since its enactment.

> As broad, remedial legislation, the statute must be construed liberally.

D'Annunzio v. Prudential Ins. Co., 192 N.J. 110, 120 (2007). A liberal interpretation helps achieve CEPA's goals. "Because CEPA is 'remedial legislation,' it 'should be construed liberally to effectuate its important goal' – 'to encourage, not thwart, legitimate employee complaints.'" Donelson v. DuPont Chambers Works, 206 N.J. at 256. See also Fleming v. Correctional Healthcare, 164 N.J. 90, 96-97 (2000); Estate of Roach v. TRW, Inc., 164 N.J. 598, 610 (2000) ("[c]onsistent with CEPA's broad remedial purpose, we are satisfied that the Legislature did not intend to hamstring conscientious employees"); Abbamont v. Piscataway Tp. Bd. of Educ., 138 N.J. 405, 431 (1994); Barratt v. Cushman & Wakefield, 144 N.J. 120, 129 (1996); Young v. Schering Corp., 141 N.J. 16, 25 (1995).

For example, in Donelson, addressing the scope of what constitutes "adverse employment action" under N.J.S.A. 34:19-2(e), this Court said:

> What constitutes an "adverse employment action" must be viewed in light of the broad remedial purpose of CEPA, and our charge to liberally construe the statute to deter workplace reprisals against an employee speaking out against a company's illicit or unethical activities.

Donelson v. DuPont Chambers Works, 206 N.J. at 257-58. "Cast in that light," this Court gave a particularly broad interpretation to the meaning of "adverse employment action." Id. at 258.

Another example is found in Higgins, where this Court declined to add language to N.J.S.A. 34:19-3(c) to limit CEPA's protections to complaints about illegal activity "of the

employer," after noting the statute's broad remedial purpose.

> Misconduct of employees, like that of employers, can threaten the public health, safety, and welfare. . . . Sometimes, moreover, only an employee can bring a co-employee's wrongdoing to the attention of the employer or a public agency. If left unprotected, employees who otherwise would complain about a co-employee might hesitate to come forward out of fear of retribution. A vindictive employer could resent disruption in the workplace or the disclosure of improper practices within the organization. In this context, "reporting a fellow employee's violation . . . is not so different from traditional notions of whistle-blowing."

Higgins v. Pascack Valley Hospital, 158 N.J. at 421. Of course, the same argument applies here. Misconduct can threaten the public safety, health and welfare, regardless of whether reporting the issues fall within the normal job duties of the whistleblower or not. As in Higgins, sometimes the employee whose duties include monitoring health and safety is the only person who can bring wrongful conduct to light. And, as in Higgins, if left unprotected, an employee who would otherwise complain will hesitate to come forward about safety issues involving his job duties, out of fear of retribution by a vindictive employer who resents disruption in the workplace.

In contrast to the long-standing rule that CEPA is to be interpreted liberally, defendants want to define what it means to "object" restrictively. According to defendants, even when an employee opposes an illegal practice, it is not protected activity unless the employee somehow goes outside her normal job functions to protest. This approach – to interpret CEPA's protections narrowly – is contrary to this Court's jurisprudence. "The public at large benefits from a less

restricted approach to who may sue under CEPA as an employee of a business enterprise. It is unlikely to us that the Legislature meant to sanction a restricted approach to CEPA's reach." D'Annunzio v. Prudential Ins. Co., 192 N.J. at 124.

2. When placed in context, CEPA's description of protected activity must include actions an employee undertakes as part of her normal job duties

A second canon of statutory construction also defeats defendants' narrow reading of CEPA: noscitur a sociis – a word is known by the company it keeps. This Court has always taken the position, in interpreting CEPA, that the individual words in the statute must be read "'in context with related provisions so as to give sense to the legislation as a whole.'" Donelson v. DuPont Chambers Works, 206 N.J. at 256.

This Court has explained this principle of statutory construction as follows:

> "The coupling of words denotes an intention that they shall be understood in the same general sense. The natural, ordinary and general meaning of terms and expressions may be limited, qualified and specialized by those in immediate association. Words which, standing alone, might seem of doubtful significance, may yet be made plain by comparison with other terms and provisions of the law." . . .
>
> "It is always an unsafe way of construing a statute . . . to divide it by a process of etymological dissection, and to separate words and then apply to each, thus separated from its context, some particular definition given by lexicographer and then reconstruct the instrument upon the basis of these definitions. An instrument must always be construed as a whole, and the particular meaning to be attached to any word or phrase is usually to be ascribed from the context, the nature of the subject matter treated of, and the purpose or intention of . . . the body which enacted or framed the statute or constitution."

State v. Sisler, 177 N.J. 199, 206, 207 (2003) (citations

omitted). See also Perez v. Professionally Green, LLC, 215 N.J. 388, 399 (2013); Sinclair v. Merck & Co., Inc., 195 N.J. 51, 64 (2008) ("'particular words may be enlarged or restricted in meaning by their associates and the evident spirit of the whole expression'").

In this case, when the words "objects to" are placed in context, it defeats defendants' contention that an employee cannot be a "whistleblower" when she is engaged in her normal job duties. This is true for at least three reasons.

First, the words "objects to" are immediately followed by the phrase "or refuses to participate in." N.J.S.A. 34:19-3(c). But an employee would never be expected to "participate" in an activity unless it fell within her job duties in the first place. A receptionist at a corporation could not "refuse to participate" in signing off on a fraudulent tax return or the issuance of a false filing with the Securities and Exchange Commission, because it would never be part of his "regular job duties" to approve such a document anyway. Only an employee charged with that responsibility (e.g., an accountant or auditor or financial officer) could "refuse to participate" in such illegal activity, because only a person in such a position would be asked to perform such a task in the first place – as part of her "regular job duties." If the legislature meant to deny employees any protection for whistle-blowing that concerned issues that fell within their job duties, it is difficult to see why the legislature would include the "participation" language

in N.J.S.A. 34:19-3(c) at all. To read the "participation" language out of CEPA (which defendants are required to do, if their argument is going to make any sense), violates yet another canon of statutory construction.

> Another important guidepost is the bedrock assumption that the Legislature did not use "any unnecessary or meaningless language," . . . so a court "should try to give effect to every word of [a] statute . . . [rather than] construe [a] statute to render part of it superfluous" . . . . Accordingly, "'[w]e must presume that every word in a statute has meaning and is not mere surplusage.'"

Jersey Cent. Power v. Melcar Util., 212 N.J. 576, 587 (2013) (citations omitted).

Defendants' problem becomes more acute as we expand our view to examine the rest of the language of N.J.S.A. 34:19-3(c). Subsection (c)(1) specifically protects any licensed "health care professional" who "refuses to participate" in "any activity" that "constitutes improper quality of patient care." N.J.S.A. 34:19-3(c)(1). This language was deliberately added by amendment (and also added to subsections (a) and (b)). See L. 1997, c. 98, § 2. It is quite impossible to see why the Legislature added this language, if it meant to deny any protection for a nurse who refused to participate in a medical procedure that he reasonably believed jeopardized a patient's health. It would never be the "regular job duty" of a janitor to "object to" or "refuse to participate in" a dangerous and unlawful medical procedure. But it most certainly would be a "core job duty" of a medical doctor to "object to" and "refuse to participate in" a surgery she believed would "constitute[]

improper quality of patient care." Yet, in defendants' world, the surgeon could be fired for her "refusal to participate," even if she was completely right.

Finally, when we move past subsection (c) and examine the balance of N.J.S.A. 34:19-3, defendants' argument becomes completely impossible to reconcile with the statutory language. Defendants insist that the word "object" "logically refer[s] to some action by the employee beyond his or her normal performance of duties for the employer." Defendants' Response to Cross-Petition, at 10. But subsection (a) protects an employee from retaliation who "discloses" to a supervisor or a public body an activity that is illegal, fraudulent or criminal. N.J.S.A. 34:19-3(a). Similarly, subsection (b) protects from retaliation an employee who "provides information" to a public body during any inquiry into any violation of law (among other things). N.J.S.A. 34:19-3(b). Patently, an employee is not necessarily acting outside her "regular job duties" when she discloses or provides information about illegal activities. Given the world we live in, depending on the type of business, there can be a number of employees who are ***obligated***, as part of their "regular job duties," to disclose or provide information about activities that are illegal, fraudulent, deceptive or endanger patient care. Defendants agree – this is a "broad class" of employees.

> It potentially includes employees in myriad positions – compliance officers, auditors, produce quality managers, legal counsel, and others whose ordinary, core job responsibilities involve making reports, recommendations, or decisions alleged to involve legal compliance or matters of public policy.

Db17-Db18. CEPA states, in the plainest language possible, that these employees are engaged in protected activity when they "disclose" or "provide information" about illegal activity. N.J.S.A. 34:19-3(a) and (b). Defendants offer nothing from any approach to statutory interpretation that would allow retaliation against these employees for just "doing their jobs." Yet, it is impossible to understand why the Legislature would afford protection to "watchdog employees" under subsections (a) and (b), while giving them no protection under subsection (c).

In sum, the entire structure of N.J.S.A. 34:19-3 supports the conclusion that CEPA is designed to prohibit retaliation against employees who, in the ordinary course of their regular duties, disclose, provide information about, object to or refuse to participate in illegal activity.

3. Every extrinsic interpretive aid shows CEPA protects employees from retaliation when they complain about illegal activities in the course of their regular job duties.

Again, we emphasize, we believe the analysis begins and ends with CEPA's plain language. We simply cannot add language to the statute, and the restriction defendants want to place on CEPA's protections just is not there. The Court need look no further. "[A]ny deviation from the plain meaning of a statute is permitted only where there is 'specific' legislative intent ***requiring*** an alternate reading." ." Munoz v. New Jersey Automobile Full Ins. Underwriting, 145 N.J. 377, 388 (1996) (emphasis added). See Donelson v. DuPont Chambers Works, 206 N.J. at 260-61; see also N.J.S.A. 1:1-1 (statutes should be

given their generally accepted meaning "unless inconsistent with the ***manifest*** intent of the legislature") (emphasis added). There is no evidence of any "specific" legislative intent that employees who object to illegal activities as part of their "regular job duties" are not protected from retaliation.

"If the statute is clear and unambiguous, we need not look beyond its terms to determine the legislative intent." State v. Sutton, 132 N.J. 471, 479 (1993). Although formal legislative history may be used to ascertain legislative intent, "it is the statute's express language that determines in what manner and to what extent the Legislature sought to attain those goals. In the final analysis, it is the statute as written that must govern." Perez v. Pantasote, Inc., 95 N.J. 105, 114 (1984). See also State v. Kittrell, 145 N.J. 112, 125 (1996) (legislative commentary "cannot overcome the plain language of the statute").

Nonetheless, for their proposed re-writing of CEPA's plain language, defendants rely on the purported legislative objectives of CEPA's drafters, arguing that legislative history and CEPA's underlying purpose show it was only meant to apply to employees acting outside their normal job responsibilities (e.g., the janitor who stumbles upon an illegal plan to dump nuclear waste), and not to an employee "merely performing the responsibilities of his or her job." Defendants' Appellate Division Brief, at 34. Amicus EANJ attempts to make the same argument (albeit without mentioning CEPA's actual language).

But in truth, the legislative history of CEPA does not help defendants. "There is a dearth of legislative history . . . explaining CEPA." Young v. Schering Corp., 141 N.J. 16, 24 (1995). What "scant" legislative history exists does not suggest that an employee will not be protected from employer retaliation for objecting to illegal activity that concerns the employee's job duties. The formal committee statements that accompanied passage of CEPA merely recite the statutory language. See Assembly Labor Committee Statement, Senate, No. 1105 – L. 1986, c. 105 (May 22, 1986); Senate Committee Statement, Senate, No. 1105 – L. 1986, c. 105 (Feb. 24, 1986). None of this legislative history reveals a "specific" legislative intent to exclude from protection an employee who objects to illegal activity as part of her job duties. Munoz v. New Jersey Automobile Full Ins. Underwriting, 145 N.J. at 388-89. See also John H. Dorsey, Protecting Whistleblowers, N.Y. Times, Nov. 2, 1986, § 11NJ, at 34 (analysis by Senate sponsor of CEPA, describing purpose of statute was to protect workers who "report illegal or irregular business practices," who "disclose illegal practices," who "mak[e] known wrongdoing," or who report "unhealthy, unsafe or illegal practices"), cited in Mehlman v. Mobile Oil Corp., 153 N.J. 163, 179 (1998). The simple fact is that neither defendants nor their amicus cite any language from any legislative history (or any other contemporary source) that even remotely suggests that CEPA does not apply to employees who are performing their "regular job duties."

Indeed, when we examine the actual genesis of CEPA, it shows defendants and their amicus are dead wrong.

> The purpose of CEPA is to "protect employees who report illegal or unethical work-place activities." . . . Generally speaking, CEPA codified the common-law cause of action, first recognized in Pierce v. Ortho Pharm. Corp., 84 N.J. 58, 72, 417 A.2d 505 (1980), which protects at-will employees who have been discharged in violation of a clear mandate of public policy.

Higgins v. Pascack Valley Hospital, 158 N.J. at 417-18.

This Court's reference to CEPA as codifying the holding in Pierce is telling. After all, Dr. Pierce was the Director of Medical Research, responsible for overseeing the development of therapeutic drugs and for insuring their safety. Pierce, 84 N.J. at 62. Her specific complaint was that a drug being developed by her team might prove unsafe. Id. at 62-63. In recognizing a cause of action for an employee in Pierce's situation, this Court described the dilemmas faced by employees whose job duties might involve clear mandates of public policy.

> One writer has described the predicament that may confront a professional employed by a large corporation:
>
> > Consider, for example, the plight of an engineer who is told that he will lose his job unless he falsifies his data or conclusions, or unless he approves a product which does not confirm to specifications or meet minimum standards. Consider also the dilemma of a corporate attorney who is told, say in the content of an impending tax audit or antitrust investigation, to draft backdated corporate records concerning events which never took place or to falsify other documents so that adverse legal consequences may be avoided by the corporation; and the predicament of an accountant who is told to falsify his employer's profit and loss statement in order to enable the employer to obtain credit.
>
> Employees who are professionals owe a special duty to abide not only by federal and state law, but also by the

> recognized codes of ethics of their professions. That duty may oblige them to decline to perform acts required by their employers.

Pierce, 84 N.J. at 71 (citation omitted). Ironically, if defendants' argument were to prevail, neither the engineer nor the lawyer nor the accountant in this Court's hypothetical would receive any protection under CEPA, because in each case the employee's complaints would just be part of his or her "regular job duties." The reality is that defendants are attempting to overturn Pierce, which CEPA was intended to codify.

One other point about CEPA's legislative history bears mention. While defendants urge this Court to re-write CEPA to restrictively limit the scope of protected activities, the Legislature obviously feels otherwise. "[T]he scope of protected activities has been expanded through several amendments." Donelson v. DuPont Chambers Works, 206 N.J. at 259. Since its enactment in 1986, CEPA has been amended six times, in each instance to expand its scope and remedies, and never to restrict or diminish its protections. See L. 1989, c. 220, § 1 (expanding the scope of protected activity under N.J.S.A. 34:19-3); L. 1990, c. 12, § 4 (expanding the remedies under N.J.S.A. 34:19-5 and adding the right to a jury trial); L. 1997, c. 98, § 2 (adding specific protections for health care professionals under N.J.S.A. 34:19-3); L. 2004, c. 148, § 1 (expanding notifications required under N.J.S.A. 34:19-7); L. 2005, c. 329, §§ 1-2 (expanding the scope of protected activity under N.J.S.A. 34:19-3(a) and (b), and expanding the available remedies under N.J.S.A. 34:19-5); L. 2006, c. 53, §§ 1-6 (adding

N.J.S.A. 34:19-9 to -14 to protect employees from employer intimidation regarding religious or political opinions).

It would certainly run counter to CEPA's legislative history for this Court to take the step the Legislature has declined to take for 28 years, and to re-write CEPA's language to restrict the scope of its protections.

C. Contrary To Defendants' Argument, Under CEPA, To Be A Whistleblower, An Employee Does *Not* Have To Act In Opposition To A Policy, Practice Or Activity "Of The Employer"

Despite CEPA's plain language, remedial purpose, overall construction and legislative history, defendants doggedly insist that CEPA could not possibly be construed to protect employees who complain about unlawful activity during the course of performing their ordinary job duties. Their reasoning – indeed, it is the linchpin of their entire argument – is that "whistleblowing" by definition ***must*** mean taking a position that is opposed to an activity, practice or policy ***of the employer***. Defendants argue, sotto voce, that if an employer hires a "watchdog employee," that's because the employer genuinely wants the "watchdog employee" to vigorously insist on compliance with the law. So, for example, if a factory hires a safety inspector to enforce OSHA regulations, that's because the employer really does want the OSHA regulations enforced, and expects the safety inspector to "do her job" and report and eliminate any workplace hazards. Therefore, defendants conclude, when the safety inspector complains about a dangerous and unlawful condition at the factory, she's just "doing her job," but she's not

"whistleblowing."

Defendants weave this argument over and over again throughout their briefs to the Appellate Division and to this Court. Here's one typical example of how they articulate it:

> The "objects to, or refuses to participate in" element, by its terms, describes conduct by an employee that goes beyond or even contradicts what the employer asks the employee to do as part of his or her job. This language cannot apply to an employee's performance of regular job responsibilities for the employer – that is, doing what the employer has directed the employee to do. . . . Here, Plaintiff never opposed anything that was undertaken or otherwise established as an activity, policy or practice ***of Ethicon***. Instead, he was a decision-maker helping to decide what the Company's activity, policy or practice would be. That does not come within the statutory element of "object[ing] to" an activity, policy or practice ***of the employer***.

Db14, Db15 (emphasis added). See also Defendants' Appellate Division Brief, at 1, 30, 32-33, 34, 42; Defendants' Response to Cross-Petition, at 10-11.

This argument – at the heart of defendants' entire appeal – is deeply flawed, both factually and legally.

Factually, it is naïve to contend that if an employer adopts a policy to comply with the law, and hires someone in a role to enforce that policy, it must mean that the employer is sincere about conducting business in a fashion that is both lawful and consistent with good public policy. Certainly, we hope that the majority of businesses genuinely attempt to comply with the law and the requirements of public policy. But just because an employer adopts a policy of putatively complying with the law, it does not follow that they want it enforced. In short, sometimes an employer hires what it claims is a watchdog,

but the employer really wants a lapdog. See, e.g., Diana Henriques, Madoff's Accountant Pleads Guilty in Scheme, N.Y. Times, Nov. 4, 2009. In those circumstances, if the watchdog takes her role too seriously, she may suffer retaliation, even though ostensibly she is "just doing her job" and trying to get the employer to live up to its own promise of full legal compliance.

While defendants say, "trust us," cf. Defendants' Appellate Division Brief, at 35-36, since its inception, CEPA has taken a different view. As Governor Thomas Kean put it when CEPA was enacted:

> It is most unfortunate – but, nonetheless, true – that conscientious employees have been subjected to firing, demotion or suspension for calling attention to illegal activity on the part of his or her employer. It is just as unfortunate that illegal activities have not been brought to light because of the deep-seated fear on the part of an employee that his or her livelihood will be taken away without recourse.

Office of the Governor, News Release at 1 (Sept. 8, 1986), quoted in Higgins v. Pascack Valley Hospital, 158 N.J. at 420.

But we do not need to doubt the sincerity of employers to see a second, even more important flaw in defendants' argument. Even if the members of the board of directors most sincerely want full legal compliance, and expect their company policies regarding safety, financial integrity, environmental protections, and so on, to be strictly enforced, it does not follow that this belief is shared by everyone down the chain of command. For example, when Josephine Higgins complained that a co-worker had stolen a patient's medicine, and had falsified

records, there was simply no evidence that the leadership of Pascack Valley Hospital itself actually wanted employees to falsify records or steal medication. There was likewise no evidence that Higgins was doing anything other than implementing the Hospital's own policies. Nonetheless, the jury found (and this Court affirmed), that Higgins' supervisors retaliated against her for her complaints. As this Court explained:

> A vindictive employer could resent disruption in the workplace or the disclosure of improper practices within the organization.

Higgins v. Pascack Valley Hospital, 158 N.J. at 421.

And that brings us to the legal flaw in defendants' argument. It is simply not true, as defendants' contend, that to be a whistleblower under CEPA the employee must object to a policy, practice or activity "of the employer." See Db14, Db15. In fact, this issue was settled by Higgins itself, which flatly held that a complaint about a co-employee's illegal activity, even if there were no employer complicity whatsoever, would still be protected activity under CEPA. Higgins v. Pascack Valley Hospital, 158 N.J. at 424-25. Higgins was decided under N.J.S.A. 34:19-3(c). However, about a year later, this Court expanded Higgins' holding to claims under subsections (a) and (b). See DeLisa v. County of Bergen, 165 N.J. 140 (2000). Even though Peter DeLisa's information provided to investigators was solely about the misconduct of co-employees, and did not allege any wrongdoing by the employer, this Court held that he was still engaged in protected activity under CEPA. By insisting a

whistleblower must be one who opposes a policy, practice or activity "of the employer," defendants are implicitly asking this Court to overturn Higgins and DeLisa.

In sum, an employee does not need to oppose a policy, practice or activity "of the employer" in order to be engaged in protected activity under CEPA. An employee can be a whistleblower even if her complaints only seek enforcement and compliance with the employer's own stated policies – even if, in other words, she is "just doing her job."

D. Any Failure To Extend The Full Protection Of CEPA To So-Called "Watchdog Employees" Would Undermine The Statute's Broad Remedial Purpose

CEPA was "described at the time of its enactment as the most far reaching 'whistleblower statute' in the nation." Mehlman v. Mobil Oil Corp., 153 N.J. 163, 179 (1998). "Since its creation, CEPA's overall structure has remained essentially unaltered, but the scope of its protections and the breadth of its remedies have expanded considerably." Donelson v. DuPont Chambers Works, 206 N.J. at 259. But if defendants' argument were adopted, New Jersey will have judicially amended CEPA, turning it into one of the few whistleblower statutes in the country that does not protect employees who complain about illegal activity in the course of performing their normal job duties. See infra at 49-52.

As the Appellate Division noted below:

> "Watchdog" employees, like plaintiff, are the most vulnerable to retaliation because they are uniquely positioned to know where the problem areas are and to speak out when corporate profits are put ahead of consumer

> safety. . . .
>
> Those in the highest levels of corporate governance at times might be inclined to decide on a monetary basis the cost of recalling a defective product outweighs the potential cost of compensating those who may be injured by it.[6] These decision makers must also consider that CEPA will protect from retaliation those employees whose core function and duty is to monitor the employer's compliance with the relevant laws, regulations, or other expressions of a clear mandate of public policy.

Lippman v. Ethicon, Inc., 432 N.J. Super. at 409.

In short, CEPA's protections must extend to the "regular job duties" of employees charged with securing compliance with our laws, so that they act as watchdogs – and not lapdogs.

Of course, defendants do have a counter-argument concerning public policy. It is not a new argument: If "watchdog" employees are deemed to engage in protected activity in the course of their "regular job duties," then employers will be "inundated" with lawsuits, and the employees will be nearly "immune" from termination or discipline, even if their performance actually endangers the public weal.[7] In short, extend CEPA's protections to the "regular job duties" of "watchdog" employees, and the sky will fall. See, e.g., Db8 (the decision below "cloaks such an employee with potential immunity against adverse employment actions based on how he or

[6] Indeed. For the Court's convenience, we have annexed to this Brief just one glaring, historically infamous example, the so-called "Ford Pinto Memo," where the "benefit" of avoiding an estimated "180 burn deaths" and "180 serious burn injuries" was found to be outweighed by the "cost" of replacing an $11 part. See WECa1-WECa8.

[7] Of course, in this instance, defendants do not even allege Dr. Lippman was fired for poor performance or endangering the public. They claim he was fired for a "romantic relationship" with another employee.

she performed those job responsibilities"); Db17; Db18-Db19; Db20; Drb8. Amicus EANJ makes essentially the same argument. See, e.g., EANJ Brief, at 9 (if the Appellate Division is affirmed, employers will be "inundated with CEPA lawsuits" and "watchdog" employees will be "untouchable" employees who "cannot be the subject of an adverse employment action" without triggering a lawsuit).

We say this argument is nothing new because, candidly, employer advocates have been predicting that the "sky is falling" due to CEPA's putatively excessive protections for several years. See, e.g., Vito Gagliardi, Jr. and Kerri Wright, Blowing the Whistle on CEPA Expansion, N.J.L.J., Mar. 24, 2010; Carolyn Dellatore, Blowing the whistle on CEPA: Why New Jersey's Conscientious Employee Protection Act has gone too far, 32 Seton Hall Legis. J. 375 (2008); Richard West, No plaintiff left behind: Liability for workplace discrimination and retaliation in New Jersey, 28 Seton Hall Legis. J. 127 (2003).

Yet, despite these dire warnings, during this time since CEPA's enactment, the Legislature has amended CEPA six times, and each time elected to expand, rather than contract, its protections. See supra at 35-36; see also Donelson v. DuPont Chambers Works, 206 N.J. at 259. Apparently, the Legislature believes the sky is not yet about to fall. We acknowledge there are competing policy considerations at stake in determining CEPA's scope. We respectfully submit, however, that in a democracy those policy considerations need to be resolved by our

elected Legislature – not by an unelected judiciary hearing the arguments of lawyers.

Having said that, we submit the public policy concerns raised by defendants and their amicus have four flaws – two of which are glaringly obvious, and two of which perhaps require greater explication.

First, the fact that an employee has engaged in protected activity does not, in fact, mean that the employer will be sued. The employer only risks liability if it ***takes adverse action against the employee in retaliation for the employee's whistleblowing.*** Thus, employers are not going to be "inundated" with lawsuits unless they regularly respond to employees' complaints by retaliating against them. It is not a tall order to ask New Jersey's employers to not retaliate against an employee who raises a concern about a possible violation of the law. Significantly, CEPA was 22 years old by the time Massarano v. New Jersey Transit, 400 N.J. Super. 474 (App. Div. 2008) was decided, and there had been numerous published cases where employees had brought successful CEPA actions based on whistleblowing undertaken in the course of their "regular job duties." See, e.g., Hernandez v. Montville Twp. Bd. of Educ., 179 N.J. 81 (2004) affirming on the opinion below 354 N.J. Super. 467 (App. Div. 2002) (school janitor pressing for repairs in toilet and other areas he was charged with cleaning); Higgins v. Pascack Valley Hospital, 158 N.J. 404 (1999) (nurse raising concerns about falsification of records and stealing patient

medication); Mehlman v. Mobil Oil Corp., 153 N.J. 163 (1998) (toxicologist raising concerns about toxicity of company product); Abbamont v. Piscataway Township Bd. of Educ., 138 N.J. 405 (1994) (school shop teacher pressing for repairs to ventilation systems in shop classrooms); Turner v. Associated Humane Societies, Inc., 396 N.J. Super. 582 (App. Div. 2007) (animal shelter employee questioning client adoption of doberman pinscher that had bitten previous owner and was scheduled for euthanasia); Gerard v. Camden County Health Services Center, 348 N.J. Super. 516 (App. Div. 2002) (middle manager refusing to impose unwarranted discipline upon a subordinate despite order to do so); Parker v. M & T Chemicals, Inc., 236 N.J. Super. 451 (App. Div. 1989) (in-house attorney raising professional ethics concerns). Yet, the sky did not fall – at least the Legislature did not think so, which explains why it continued to expand CEPA's reach over and over and over again. Cf. Green v. Jersey City Bd. of Educ., 177 N.J. 434, 445 (2003) (long-standing failure of Legislature to overturn decisions allowing punitive damages against public entities, supports conclusion that Legislature intended that punitive damages be allowed).

Second, the fact that some employees will bring baseless lawsuits is not a compelling argument for restricting a statute's scope. We recognize, for example, that defendants contend they would never actually retaliate against anyone, and that they risk a lawsuit only because an "untouchable" employee will falsely claim she was terminated in retaliation for her

whistleblowing. But the same argument could be made for any number of statutorily created rights (or, for that matter, claims that have existed for hundreds of years at common law). Our Law Against Discrimination, N.J.S.A. 10:5-1 et seq., for example, has existed for nearly 70 years – in other words, longer than anyone on this Court has been alive. Have there been baseless suits brought by employees under the LAD? Unfortunately, the answer is yes. Yet, it still appears to be the collective judgment of our State (and certainly of our Legislature) that the LAD has worked well, not only to combat discrimination, but to make everyone – employer and employee alike – better off. See, e.g., Quinlan v. Curtiss-Wright Corp., 204 N.J. 239, 258-59 (2010). Just like the so-called "watchdog" employee who may engage in protected activity every day, so it is also true that an employee in a protected class under the LAD will likely be in that protected class every day of her life. But the LAD has not made her "untouchable." It has merely given her a few more rights than she once had.

Defendants, of course, will argue that even so, if we allow that a "watchdog" employee is regularly engaging in protected activity under CEPA, then it will be easy for the employee to mount a viable lawsuit any time she is fired or disciplined. But for two reasons, even this more modest contention is flawed.

First, a "watchdog" employee will not even be able to make out a prima facie case if he cannot establish causation. Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003). If the

employee's alleged protected activity is just the daily performance of his job, causation is going to be difficult to establish. For example, if a safety inspector has been filing OSHA reports, raising concerns about safety hazards, investigating workplace accidents and so on for several years, and is then laid off, he's going to have trouble explaining why the employer suddenly decided to retaliate against him after all that time. Likewise, if a police detective claims that her pursuit of various criminal investigations lead to her termination, she will have to explain why all the other detectives pursuing similar investigations were not fired as well. See, e.g., Sarnowski v. Air Brooke Limousine, Inc., 510 F.3d 398, 404-05 (3d Cir. 2007).

The remaining flaw in defendants' argument is much more significant. Throughout their various briefs, defendants insist that if the Appellate Division is affirmed, it will follow that a "watchdog" employee will be able to raise a CEPA claim merely based on an internal disagreement or debate about company policy. This is perhaps one of the most oft-repeated arguments throughout defendants' submissions. For example, they claim:

> A company's management of its business requires that it be able to determine whether a high-level decision maker such as Plaintiff was "needlessly conservative" in performing his job and, for example, needlessly keeping safe and effective medical products off the market.
>
> . . .
>
> Under what Plaintiff identifies as the standard under the Appellate Division's decision, an employer could not address the performance of a safety inspector who in the course of performing his job responsibilities raises

> unnecessary alarms shutting down operations (or even exposing employees to risk), as long as the employee claims a "reasonable belief."

Db18; Drb8; see also Db15; Defendants' Response to Cross-Petition, at 2, 13. This argument is dead wrong, and is simply confusing two completely separate issues.

It is not enough, and it has never been enough, for an employee to merely have a disagreement with his employer about "the best way to proceed." To engage in protected activity, the employee must, first, identify either a particular law or regulation, or some other clear mandate of public policy, which he believes was being violated. "A vague, controversial, unsettled or otherwise problematic public policy does not constitute a clear mandate." MacDougall v. Weichert, 144 N.J. 380, 392 (1996). See, e.g., Smith-Bozarth v. CARA, 329 N.J. Super. 238, 245-46 (App. Div. 2000). Consequently, for example, a purely private dispute that does not implicate the public interest, does not qualify. See, e.g., Dzwonar v. McDevitt, 177 N.J. at 469; Maw v. Advanced Clinical Communications, Inc., 179 N.J. 439, 446 (2004). Consequently, where an employee merely has a disagreement about "the best way to proceed," but does not contend that any law for clear mandate of public policy is being violated, he is not engaged in protected activity.

Further, it is not true, as defendants repeatedly contend, that an employee can establish a CEPA claim merely by ***stating*** that he has a reasonable belief that a violation of law or a clear mandate of public policy is occurring. On the contrary, the employee must have "an ***objectively*** reasonable belief that a

violation has occurred." Dzwonar v. McDevitt, 177 N.J. at 464 (emphasis added); see also Mehlman v. Mobil Oil Corp., 153 N.J. at 193. Thus, the employee's mere subjective believe that the law is being violated does not suffice. Nor is an employer helpless in the face of an employee who keeps making baseless complaints, disrupting the workplace. "An employer . . .retains the authority to dismiss an employee for filing a complaint that is not supported by an objectively reasonable basis." Higgins v. Pascack Valley Hospital, 158 N.J. at 425.

Consequently, it is just not true that under the decision below employers are vulnerable to being "inundated" with lawsuits concerning internal policy debates about the best way to run a business. Unless an employee can point to objectively reasonable facts showing a violation of law or clear mandate of public policy, she will never have a claim.

But, more importantly, defendants' alleged concern about employees weaving bogus claims out of internal company deliberations is a red herring that has nothing to do with this appeal. This appeal concerns whether CEPA applies to an employee's complaints made as part of her "regular job duties." This appeal does ***not*** concern whether Plaintiff's complaints failed to identify a violation of law or clear mandate of public policy. Defendants' repeated arguments about the courts supposedly "interfer[ing] with an organization's internal deliberations over the best way to proceed," Db15, concern the latter issue, which is ***not*** the subject of this appeal. This

appeal's debate over extending CEPA to "watchdog" employees, and defendants' (misplaced) concern that courts could become entangled in debates that do not involve a violation of law or public policy, are simply two separate, unrelated issues. Thus, concerns that employees might try to elevate legitimate internal debate into bogus whistleblowing claims, provide no reason for excluding "watchdog" employees from CEPA's protections.

E. The Whistleblower Laws Of Other States Almost Uniformly Provide Protection For Activities Within The Scope Of The Employee's Ordinary Job Duties

Of the eighteen other state statutes that protect whistle blowing in private employment, none provide an exception when the employee's complaints are made in the performance of her ordinary job duties.[8]

Likewise, in the public employment setting, none of the forty-six other state statutes that protect whistle blowing limit their protections to reports made outside the employee's ordinary job duties.[9]

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[8] See Ariz. Rev. Stat. Ann. § 23-1501(3)(c); Cal. Lab. Code § 1102.5; Conn. Gen. Stat. Ann. § 31-51m(b); Del. Code Ann. tit. 29, § 1703; Fla. Stat. Ann. § 448.102; Haw. Rev. Stat. Ann. § 378-62; Ill. Comp. Stat. Ann. §§ 174/15 and 174/20; Me. Rev. Stat. Ann. tit. 26, § 833; Mich. Comp. Laws Ann. § 15.362; Mont. Code Ann. § 39-2-904(1)(a); N.H. Rev. Stat. Ann. §§ 275-E:2 and 275-E:3; N.Y. Lab. Law § 740(2); N.D. Cent. Code § 34-01-20(1); Ohio Rev. Code Ann. § 4113.52(B); R.I. Gen. Laws § 28-50-3; Tenn. Code Ann. § 50-1-304; Va. Code Ann. § 2.2-3010; W. Va. Code Ann. § 6C-1-3.

[9] Ala. Code § 36-26A-3; Alaska Stat. § 39.90.100; Ariz. Rev. Stat. Ann. § 38-532; Ark. Code Ann. § 21-1-603; Cal. Gov't Code § 8547.2(d); Colo. Rev. Stat. Ann. § 24-50.5-102; Conn. Gen. Stat. Ann. § 31-51m(b); Del. Code Ann. tit. 29, § 5115; Fla. Stat. Ann. § 112.3187; Ga. Code Ann. § 45-1-4; Haw. Rev. Stat. Ann. § 378-62; Idaho Code § 6-2104; Ill. Comp. Stat. Ann. §§ 174/15 and 174/20; Ind. Code Ann. § 36-1-8-8; Iowa Code Ann. §

For example, in Brown v. Mayor of Detroit, 734 N.W.2d 514 (Mich. 2007), the plaintiffs were a detective and a bureau chief in Detroit's police department. They had investigated and reported allegations of illegal conduct by officers in the Executive Protection Unit and by Mayor Kwame Kilpatrick. They alleged they were retaliated against for their actions, in violation of Michigan's Whistleblowers Protection Act, Mich. Comp. Laws Ann. § 15.361 et seq. The Mayor sought dismissal of the claims, arguing inter alia that the plaintiffs were not engaged in protected activity because they were merely engaged in their ordinary job duties as law enforcement officers. After noting the statute's plain language, the Michigan Supreme Court rejected this argument:

> [T]here is also no language in the statute that limits the protection of the WPA to employees who report violations or suspected violations only if this reporting is outside the employee's job duties. The statute provides that an employee is protected if he reports a "violation or a suspected violation of a law or regulation or rule . . . ." . . . There is no limiting language that requires that the employee must be acting outside the regular scope of his employment. The WPA protects an employee who reports or is

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70A.28; Kan. Stat. Ann. § 75-2973; Ky. Rev. Stat. Ann. § 61.102; La. Rev. Stat. Ann. § 42:1169; Me. Rev. Stat. Ann. tit. 26, § 833; Md. Code Ann. State Pers. & Pens. § 5-305; Mass. Gen. Laws Ann. ch. 149, § 185; Mich. Comp. Laws Ann. § 15.362; Miss. Code Ann. § 25-9-171; Mo. Rev. Stat. § 105.055; Mont. Code Ann. § 39-2-904(1)(a); Neb. Rev. Stat. § 81-2705; Nev. Rev. Stat. Ann. § 281.631; N.H. Rev. Stat. Ann. §§ 275-E:2 and 275-E:3; N.Y. Civ. Serv. Law § 75-b; N.C. Gen. Stat. § 126-85; N.D. Cent. Code § 34-11.1-04; Ohio Rev. Code Ann. § 4113.52(B); Okla. Stat. Ann. tit. 74, § 840-2.5; Or. Rev. Stat. § 659A.203; 43 Pa. Cons. Stat. Ann. § 1423; R.I. Gen. Laws § 28-50-3; S.C. Code Ann. § 8-27-20; Tenn. Code Ann. § 8-50-116; Tex. Gov't Code Ann. § 554.002; Utah Code Ann. § 67-21-3; Vt. Stat. Ann. tit. 3, § 973; Va. Code Ann. § 2.2-3010; Wash. Rev. Code Ann. §§ 42.40.020 and 42.40.050; W. Va. Code Ann. § 6C-1-3; Wis. Stat. Ann. §§ 230.80 and 230.83; Wyo. Stat. Ann. § 9-11-103.

> about to report a violation or suspected violation of a law or regulation to a public body. The statutory language renders irrelevant whether the reporting is part of the employee's assigned or regular job duties.

Brown v. Mayor of Detroit, 734 N.W.2d at 518.[10]

Likewise, in Rogers v. City of Fort Worth, 89 S.W.3d 265 (Tex. Ct. App. 2002), a deputy marshal was discharged in retaliation for a report he made of an alleged violation of law in the course of his duties. The Texas Court of Appeals rejected the argument that this was not protected activity under the Texas Whistleblower Act, Tex. Gov't Code Ann. § 554.001 et seq., because Rogers was "simply doing his job."

> Further, while it appears that Rogers made his report primarily in his role as an employee rather than as a citizen, we decline to hold, based on this fact, that Rogers did not report a violation of law. See City of Weatherford v. Catron, 83 S.W.3d 261, 270, 2002 Tex. App. LEXIS 5118 (Tex. App. – Fort Worth 2002, no pet.) (rejecting city's argument that city water plant manager was "simply doing his job" when he reported low chlorine levels in city's water supply to Texas Natural Resources Conservation Commission); City of San Antonio v. Heim, 932 S.W.2d 287, 290-91 (Tex. App. – Austin 1996, writ denied) (op. on reh'g) (holding that police officer who, in the course of his employment, arrested an off-duty officer for driving while intoxicated reported a violation of law within the meaning of the Act); Castaneda, 831 S.W.2d at 503 (holding that public employee who participated in investigation at the request of law enforcement authorities reported a violation of law protected by the Act).

Rogers v. City of Fort Worth, 89 S.W.3d at 276. See also Mackowiak v. Univ. Nuclear Sys., 735 F.2d 1159, 1162-63 (9th Cir. 1984) (internal safety reports made by quality control inspector at nuclear power plant constituted protected activity under whistleblower provisions of Energy Reorganization Act).

[10] Mayor Kilpatrick's argument for a crabbed interpretation of Michigan's WPA is especially ironic, in light of his subsequent conviction and imprisonment for criminal wrongdoing.

Cf. Kidwell v. Sybaritic, Inc., 784 N.W.2d 220, 226-27 (Minn. 2010) (three Judge plurality, with three Judges dissenting, interpreting Minnesota's whistleblower statute, Minn. Stat. Ann. § 181.931 et seq., "reject[s] as too broad the court of appeals' conclusion that, as a matter of law, 'an employee does not engage in protected conduct under the whistleblower act if the employee makes a report in fulfillment of the duties of his or her job,'" but holds that the employee's job duties are relevant to determine if the employee's report was made in "good faith").

Nothing in CEPA's language, construction, history or purpose even suggests that a different result should be reached here. As in all of the other states that have whistleblower protection statutes, conduct that is within the sphere of an employee's job-related duties is entitled CEPA's protection. To interpret CEPA any other way would not only require a re-write of the statute, but it would render CEPA one of the most retrograde whistleblower laws in the country.

II. THE APPELLATE DIVISION ERRED IN HOLDING THAT A "WATCHDOG" EMPLOYEE MUST FIRST EXHAUST ALL INTERNAL MEANS OF SECURING COMPLIANCE BEFORE SHE WILL BE PROTECTED BY CEPA

Having concluded that "watchdog" employees are still protected by CEPA when performing their ordinary job duties, however, the Appellate Division, near the end of its opinion, added this significant caveat:

> [T]he employee must establish that he or she refused to participate *or* objected to this unlawful conduct, ***and advocated compliance with the relevant legal standards to the employer or to those designated by the employer with the authority and responsibility to comply***. To be clear, this second element requires a plaintiff to show he or she

> either (a) ***pursued and exhausted all internal means of securing compliance;*** or (b) refused to participate in the objectionable conduct.

Lippman v. Ethicon, Inc., 432 N.J. Super. at 410 (emphasis added). While not 100% clear, this holding appeared to be limited to N.J.S.A. 34:19-3(c), only because the court limited its discussion to subsection (c).

In announcing this holding, the court provided no explanation for where the italicized language came from. The only legal authority cited in this passage was this Court's decision in Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003), cited in Lippman v. Ethicon, Inc., 432 N.J. Super. at 410. But Dzwonar simply does not provide any support for this holding. All Dzwonar says, without further elaboration, is that the employee must show "he or she performed a 'whistle-blowing' activity described in N.J.S.A. 34:19-3c." Dzwonar v. McDevitt, 177 N.J. at 462. It does not impose any exhaustion requirement.

We submit that the Appellate Division's holding, in this respect, was wrong. Under N.J.S.A. 34:19-3(c), an employee is required to "object[], or refuse[] to participate in" the unlawful activity. There is no requirement that the employee "advocate compliance with the relevant legal standards" and there is no requirement that the employee "pursue[] and exhaust[] all internal means of securing compliance."

We submit that the lower court's holding is nothing other than a different proposed rewrite of the statute, which no court has the authority to undertake.

Again, we start with the statute's plain language.

Donelson v. DuPont Chambers Works, 206 N.J. at 256. Subsection (c) does not include any requirement of exhaustion of internal remedies. The employee is engaged in protected activity if she simply "objects" to the unlawful policy, practice or activity. There is nothing in the language of N.J.S.A. 34:19-3(c) that warrants forcing the objecting employee to jump through an extra hoop before she could be protected from retaliation.

The structure and other provisions of CEPA also preclude imposing this burden on employees seeking protection under Subsection (c). Defendants argue that the Appellate Division's holding was simply developing an alternate model of proof for claims brought by "watchdog" employees. Defendants' Response to Cross-Petition, at 12. But this argument is foreclosed when we examine CEPA's other provisions.

In particular, Subsections (a) and (b) both provide that it is protected activity under CEPA when an employee discloses or provides information to a "public body." N.J.S.A. 34:19-3(a) and (b). But the reference to a "public body" is missing from Subsection (c). CEPA then goes on to add a proviso that – by its terms – is ***only*** applicable to Subsections (a) and (b):

> The protection against retaliatory action provided by this act ***pertaining to disclosure to a public body*** shall not apply to an employee who makes a disclosure to a public body ***unless the employee has brought the activity, policy or practice in violation of a law, or a rule or regulation promulgated pursuant to law to the attention of a supervisor*** of the employee by written notice and has afforded the employer a reasonable opportunity to correct the activity, policy or practice. Disclosure shall not be required where the employee is reasonably certain that the activity, policy or practice is known to one or more supervisors of the employer or where the employee

> reasonably fears physical harm as a result of the disclosure provided, however, that the situation is emergency [sic] in nature.

N.J.S.A. 34:19-4 (emphasis added). Finally, CEPA also provides that an employer is required to display and to distribute to employees notices that include, among other things, the name(s) of the person(s) designated to receive notification under N.J.S.A. 34:19-4. See N.J.S.A. 34:19-7.

To summarize this structure:

> *Whistleblowing in the form of disclosure to a "public body" only arises under N.J.S.A. 34:19-3 (a) and (b), but it does not apply at all to Subsection (c).
>
> *Before disclosure to a public body under Subsections (a) and (b), the employee is required to bring it to the attention of a supervisor, in writing, and to give the employer a "reasonable opportunity" to correct the problem. N.J.S.A. 34:19-4.
>
> *However, there is no requirement that the employee exhaust any type of internal remedies before making an objection under Subsection (c). CEPA's "exhaustion" requirement is strictly limited, by its terms, to disclosures to outside public bodies. N.J.S.A. 34:19-3(c); N.J.S.A. 34:19-4.
>
> *Further, there is no requirement, even for disclosures to public bodies, that the employee "exhaust all internal means of securing compliance." The employee is only required to give written notice to a supervisor, and allow the employer a "reasonable opportunity" to remedy the problem. N.J.S.A. 34:19-4.
>
> *Moreover, even the limited "exhaustion" requirement for disclosures to public bodies has several specific exceptions which allow the employee to go straight to the public body. N.J.S.A. 34:19-4.
>
> *Finally, the employee is not required to guess to whom she has to go before making a disclosure to a public body. The employer is specifically required to identify the persons to receive the internal notice. N.J.S.A. 34:19-7.

In the face of these provisions, the Appellate Division's addition of an exhaustion requirement to N.J.S.A. 34:19-3(c) is

indefensible. The Legislature obviously knew how to add an exhaustion requirement when it wanted to do so. It clearly chose to impose this requirement on reports to public bodies under N.J.S.A. 34:19-3(a) and (b), but it deliberately chose not to impose this requirement on complaints under Subsection (c). This Court has always followed the principle of expressio unius est exclusio alterius – the express mention of one thing excludes all others. "Indeed, it is elementary that when the Legislature includes limiting language in one part of a statute, but leaves it out of another section in which the limit could have been included, we infer that the omission was intentional." Ryan v. Renny, 203 N.J. 37, 58 (2010).

For example, in Higgins the employer argued that under N.J.S.A. 34:19-3(c) the plaintiff should be required to show that she was complaining about a practice, policy or activity "of the employer," even though this limiting language is not found in Subsection (c). This Court observed:

> Although subsections "a" and "b" limit the statute's application to policies, practices and activities "of" or "by" "the employer," subsection "c" contains no such limitation. The omission of the phrase "of the employer" in subsection "c" is too obvious to ignore. . . . When "the Legislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded."

Higgins v. Pascack Valley Hospital, 158 N.J. at 419 (citations omitted). This reasoning is fully applicable here. Having deliberately created an exhaustion requirement for complaints under Subsections (a) and (b), the Legislature plainly elected not to impose such a requirement for complaints under Subsection

(c). See also Fleming v. Correctional Healthcare, 164 N.J. 90, 97, 99 (2000) (refusing to create a limitation on the type of supervisor to whom an employee could complain under N.J.S.A. 34:19-3, because to do so would "contradict the express language of CEPA and its broad remedial purpose").

But the Appellate Division's rewrite of Subsection (c) is worse than that. Not only did they create a new exhaustion requirement, their exhaustion requirement is very different from, and much more onerous than, the Legislature's exhaustion requirement. The Appellate Division requires the employee to "exhaust[] all internal means of securing compliance," whereas the Legislature only requires the employee to give written notice and afford the employer a reasonable opportunity to fix the problem. The Appellate Division includes no exceptions, whereas the Legislature's provision sensibly provides several ways in which the employee can dispense with the exhaustion requirement (e.g., when there's an emergency). The Appellate Division leaves the employee to guess whether she has "exhausted all internal means" or not, whereas the Legislature forces the employer to designate by name to whom the employee must give notice. Of course, even to discuss these differences reveals the absurdity of the Appellate Division's holding – we are talking about a court that has drafted its own statutory provision, in competition with our elected Legislature!

Finally, imposing this newly minted "exhaustion" requirement on complaints under N.J.S.A. 34:19-3(c) would

violate the "single guiding principle [that] has instructed our interpretation of CEPA in the decades since its enactment. As broad, remedial legislation, the statute must be construed liberally." D'Annunzio v. Prudential Ins. Co., 192 N.J. at 120.

First, the exhaustion requirement will mean that if the employer retaliates swiftly, before the employee can exhaust "all internal means" of securing compliance, the employee's objection to the illegal activity will be unprotected. Second, if there is an emergency, or if pursuing internal remedies would be futile, the employee would still be required to fulfill the exhaustion requirement – thus subjecting others to potential harm. Third, in most instances an employee will not know if she has exhausted "all internal means," and therefore will be inhibited from complaining. Fourth, because this exhaustion requirement appears to apply only to "watchdog" employees (a term defined nowhere in the statute), it will also mean that if an employee is unsure if she counts as a "watchdog" employee, she will not know if the exhaustion requirement applies to her or not. Finally, the newly minted exhaustion requirement is an open invitation to employers to create multiple hoops through which employees must jump (with elaborate and lengthy internal compliance processes), so they can delay and ultimately discourage any complaints.

Altogether, the Appellate Division's rash decision to impose a judicially manufactured exhaustion requirement on complaints under N.J.S.A. 34:19-3(c) is tailor made to "thwart .

. . legitimate employee complaints," Donelson v. DuPont Chambers Works, 206 N.J. at 256, and "to hamstring conscientious employees." Estate of Roach v. TRW, Inc., 164 N.J. at 610. It is not quite as bad as excluding "watchdog" employees from CEPA's protection entirely, but it is pretty close.

III. THE EMPLOYER SHOULD BEAR THE BURDEN OF PERSUASION ONCE A "WATCHDOG" EMPLOYEE HAS PROVEN A *PRIMA FACIE* CASE

Taking a clear-eyed view of the realities of profit-driven business decisions, the Appellate panel below wrote:

"***'Watchdog' employees . . . are the most vulnerable to retaliation*** because they are uniquely positioned to know where the problem areas are and to speak out when corporate profits are put ahead of consumer safety." Lippman v. Ethicon, Inc., 432 N.J. Super. at 406-07 (emphasis added). As they went on to explain, "Those in the highest level of corporate governance at times might be inclined to decide on a monetary basis the cost of recalling a defective product outweighs the potential cost of compensating those who may be injured by it." Id. at 409.

The panel relied on this reality to support their principal holding that "If an individual's job is to protect the public from exposure to dangerous defective medical products, CEPA does not permit the employer to retaliate against that individual because of his or her performance of duties in good faith, and consistent with the job description." Id. at 410.

Consistent with this holding, we submit that to satisfy the "objection" prong of a successful proof the employee need show no more than "his or her performance of duties in good faith,

and consistent with the job description."

Such a definition properly directs the CEPA factfinder's attention to where it should be - whether the cause of the adverse action was retaliation for the employee having expressed views or having acted upon concerns that were reasonably rooted in law or public policy. It is this *mens rea* issue that is the ultimate core of any CEPA case. There is no *actus reus* prohibited by CEPA. CEPA assumes that but for the employer's unlawful intent its conduct would have been entirely proper.

If any changes are to be made to the elements of proving a "watchdog" employee's CEPA claim, then those changes should afford greater protection to those employees rather than less. As the panel below noted, they are the employees "most vulnerable to retaliation." It follows that they are also those who are most in need of protection.

Accordingly, the frequently-cited public policy concerns set forth in Abbamont v. Piscataway Twp. Bd. of Educ., 138 N.J. 405, 431-32 (1994), strongly argue for giving "watchdog" employees, rather than their employers, the benefit of the doubt when it comes to proving the reason for the adverse action. Instead of merely having "the employer . . . articulate some legitimate non-retaliatory reason for the adverse action," Jamison v. Rockaway Twp. Bd. of Educ., 242 N.J. Super. 436, 445 (App. Div. 1990), upon the plaintiff's *prima facie* showing, the burden of persuasion should shift so that "the employer must prove by the preponderance of the evidence that the adverse

action would have been taken regardless of retaliatory intent." Id. at 406 (describing burden shifting in "mixed motive" case).

Shifting the burden in this way is especially appropriate in the context of CEPA, which is essentially a regulatory scheme without a regulatory enforcement agency. CEPA is enforced entirely through private litigation with no governmental involvement. It is a private regulatory scheme calculated to decrease the need for government inspections and enforcement actions by protecting those employees who stand up for the law and public interest in the face of employer hostility.

CEPA is the other side of the coin to the "trust us" claim frequently made by businesses opposing new regulatory proposals. "Trust us," they say, "our own, self-imposed and self-enforced controls are more than enough to protect the public interest and render new regulations unnecessary and superfluous."[11] CEPA empowers employees to hold business to its word.

"Watchdog" employees obviously play a key role in ensuring that employers can, in fact, be trusted to abide by the law and protect the public interest even when government inspections and reviews are few and far between. If business is asking the

[11] A good example of this is British Petroleum's public comment letter to the Mineral Management Service of the Department of the Interior opposing stricter regulation of offshore drilling in the Gulf of Mexico approximately a year before its disaster there. "We are not supportive of the extensive, prescriptive regulations as proposed in this rule. We believe industry's current safety and environmental statistics demonstrate that the voluntary programs . . . have been and continue to be very successful." Mike Soraghan, BP, Other Oil Companies Opposed Effort to Stiffen Environmental, Safety Rules for Offshore Drilling, N.Y. Times, Apr. 27, 2010.

public to trust that its "watchdog" employees are empowered to fully protect the environment, the public's safety, its workers' health, and other important public interests, then business should be required to bear the burden of proof when its trustworthiness is legitimately placed in doubt.

If one balances the equities, the harm to the public interest that would flow from an erroneous judgment that a "watchdog" employee was not the victim of unlawful retaliation is plainly much greater than the harm flowing from an erroneous judgment that he or she was a victim of retaliation. The former determination will cause "watchdog" employees to fear that their employers can get away with retaliating against them; the latter determination will give them greater confidence that they can perform their jobs without such fear.

The plaintiff's claims in the present case are a good example of how even a conscientious company's sound processes, designed to ensure compliance with the law and legitimate health concerns, can be subverted by managers whose desire for profit outweighs their desire for adherence to the demands of law and public policy. Lippman v. Ethicon, Inc., 432 N.J. Super. at 408-09. The defendant, of course, contests those claims, asserting that it acted with a lawful motive. The defendant is obviously in the better position to prove the *bona fides* of its claimed lawful motive. It made the decision and is therefore in full possession of all of the evidence as to why it made that decision. If the defendant genuinely respected and maintained

its "watchdog" employee's independence, then it should easily be able to prove that. If the "watchdog" employee plaintiff's proofs are nevertheless sufficient to put the issue in doubt, the employee should get the benefit of that doubt.

The entire job of a "watchdog" employee is imbued with the public interest. It is therefore in the public interest for them to be fearless in fulfilling their duties. There is no better way to insure their diligence and vigilance than to free them from the fear that they may face retaliation precisely because they are diligent and vigilant. CEPA is plainly intended to do this by providing an effective remedy if retaliation occurs. "[Corporate] decision makers must . . . consider that CEPA will protect from retaliation those employees whose core function and duty is to monitor the employer's compliance with the relevant laws, regulations, or other expressions of a clear mandate of public policy." Lippman v. Ethicon, Inc., 432 N.J. Super. at 409.

CEPA should be interpreted in a manner that will enable it to perform this important function. When a prima facie case of retaliation is established, the ultimate burden of persuasion should therefore be placed on the employer rather than upon the "watchdog" employee.

CONCLUSION

The public interest requires "watchdog" employees to benefit from the full protections of CEPA. The twenty-seven environmental, labor, consumer and community organizations that have filed this *amicus* brief believe that the public interest requires CEPA to provide an even greater level of protection to "watchdog" employees than is provided to other employees. This is because the public relies upon "watchdog" employees to ensure that their employer's internal controls function properly to maintain compliance with the law and with clear mandates of public policy. The best way to accomplish this is by placing the ultimate burden of persuasion upon the employer when a "watchdog" employee brings a CEPA case to trial.

For all of the foregoing reasons, your *amici* urge you to affirm the Appellate Division's order and remand this case for trial with the following instructions: (1) a "watchdog" employee's performance of his or her duties in good faith, and consistent with the job description, can satisfy the requirements of N.J.S.A. 34:19-3; (2) a "watchdog" employee is not required to exhaust all internal means of securing compliance before being protected by CEPA; and (3) upon a "watchdog" employee's prima facie showing, the burden of persuasion shifts to the employer to prove by the preponderance

of the evidence that the adverse action would have been taken regardless of retaliatory intent.

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Respectfully submitted,

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