ADVANCED ISSUES IN NEW JERSEY RETALIATION LAW

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I. RETALIATION CLAIMS

1. Conscientious Employee Protection Act, NJSA 34:19-1, *et seq.*

N.J.S.A. 34:19-3
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 is in violation of a law, or a rule or regulation promulgated pursuant to law, or, in the case of an employee who is a licensed or certified health care professional, reasonably believes constitutes improper quality of patient care;

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, or, in the case of an employee who is a licensed or certified health care professional, provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into the quality of patient care; or

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

(1) is in violation of a law, or a rule or regulation promulgated pursuant to law or, if the employee is a licensed or certified health care professional, constitutes improper quality of patient care;

(2) is fraudulent or criminal; or

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

2. **"PIERCE CLAIMS"** - Common law retaliation claims. The name comes from the seminal N.J. Supreme Court case Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 72 (1980), which held that an employee has a cause of action for termination in violation of public policy.

3. **42 U.S.C. §1983** - Retaliation claims for exercising constitutional rights against persons acting under color of law. A major difference between §1983 and CEPA is that CEPA only protects employees while §1983 protects "all persons" including independent contractors.

4. **New Jersey Civil Acts Act, N.J.S.A.10:6-1, *et seq.*** - New State cause of action gives the Attorney General the right to bring constitutional or retaliation action against any person whether of not acting under color of law. Also creates a State §1983 for persons injured by constitutional claims taken under color of law. Provides attorney's fees for these claims.

10:6-2 Civil actions for rights violations

a. If a person, whether or not acting under color of law, subjects or causes to be subjected any other person to the deprivation of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State, the Attorney General may bring a civil action for damages and for injunctive or other appropriate relief. The civil action shall be brought in the name of the State and may be brought on behalf of the injured party. If the Attorney General proceeds with and prevails in an action brought pursuant to this subsection, the court shall order the distribution of any award of damages to the injured party and shall award reasonable attorney's fees and costs to the Attorney General. The penalty provided in subsection e. of this section shall be applicable to a violation of this subsection.

b. If a person, whether or not acting under color of law, interferes or attempts to interfere by threats, intimidation or coercion with the exercise or enjoyment by any other person of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State, the Attorney General may bring a civil action for damages and for injunctive or other appropriate relief. The civil action shall be brought in the name of the State and may be brought on behalf of the injured party. If the Attorney General proceeds with and prevails in an action brought pursuant to this subsection, the court shall order the distribution of any award of damages to the injured party and shall award reasonable attorney's fees and costs to the Attorney General. The penalty provided in subsection e. of this section shall be applicable to a violation of this subsection.

c. Any person who has been deprived of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under color of law, may bring a civil action for damages and for injunctive or other appropriate relief. The penalty provided in subsection e. of this section shall be applicable to a violation of this subsection.

d. An action brought pursuant to this act may be filed in Superior Court. Upon application of any party, a jury trial shall be directed.

e. Any person who deprives, interferes or attempts to interfere by threats, intimidation or coercion with the exercise or enjoyment by any other person of any substantive due process or

equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State is liable for a civil penalty for each violation. The court or jury, as the case may be, shall determine the appropriate amount of the penalty. Any money collected by the court in payment of a civil penalty shall be conveyed to the State Treasurer for deposit into the State General Fund.

f. In addition to any damages, civil penalty, injunction or other appropriate relief awarded in an action brought pursuant to subsection c. of this section, the court may award the prevailing party reasonable attorney's fees and costs.

L.2004, c. 143, § 2, eff. Sept. 10, 2004.

II. DEFINING PUBLIC POLICY

A. Sources of Public Policy - Generally

Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 72 (1980)

We hold that an employee has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy. The sources of public policy include legislation; administrative rules, regulations or decisions; and judicial decisions. In certain instances, a professional code of ethics may contain an expression of public policy. However, not all such sources express a clear mandate of public policy. For example, a code of ethics designed to serve only the interests of a profession or an administrative regulation concerned with technical matters probably would not be sufficient. Absent legislation, the judiciary must define the cause of action in case-by-case determinations. An employer's right to discharge an employee at will carries a correlative duty not to discharge an employee who declines to perform an act that would require a violation of a clear mandate of public policy. However, unless an employee at will identifies a specific expression of public policy, he may be discharged with or without cause.

Hennessey v. Coastal Eagle Point Oil Co., 129 N J 81 92 93 1992

New Jersey has found the Constitution to be such a source. See, e.g., Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 404, 161 A.2d 69 (1960) ("Public policy at a given time finds expression in the Constitution, the statutory law and in judicial decisions."). Courts in other jurisdictions have agreed when addressing wrongful-discharge claims. *See, e.g.*, Radwan v. Beecham Labs., 850 F.2d 147, 151-52 (3d Cir.1988) (finding a clear mandate of public policy in New Jersey's constitutional right to collective bargaining, N.J. Const. art. 1, ¶ 19); Zamboni v. Stamler, 847 F.2d 73, 83 (3d Cir.) (finding public policy in free-speech and--assembly clauses of United States and New Jersey Constitutions) *cert. denied*, 488 U.S. 899, 109 S.Ct. 245, 102 L.Ed.2d 233 (1988); Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 710 P.2d 1025, 1033 (1985) (general statement including constitution as source of public policy); Gantt v. Sentry Ins., 1 Cal.4th 1083, 4 Cal.Rptr.2d 874, 881, 824 P.2d 680, 687 (1992) (same); Parnar v.

Americana Hotels, Inc., 65 Haw. 370, 652 P.2d 625, 631 (1982) (same); Palmateer v. International Harvester Co., 85 Ill.2d 124, 52 Ill.Dec. 13, 15, 421 N.E.2d 876, 878 (1988) (same) Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859, 871 (Mo.Ct.App.1985) (same); Burk v. K- Mart Corp., 770 P.2d 24, 28 (Okla.1989) (same). Having declared the Pierce doctrine, this Court is not likely to perceive the state's highest source of public policy, namely, its constitution, as irrelevant.

Mehlman v. Mobil Oil Corp., 153 N.J. 163, 187-88 (1998)

The specific applications of the CEPA cause of action continue to evolve. But the core value that infuses CEPA is the legislative determination to protect from retaliatory discharge those employees who, "believing that the public interest overrides the interest of the organization [they] serve[ ], publicly 'blow[ ] the whistle' [because] the organization is involved in corrupt, illegal, fraudulent or harmful activity." *Ralph Nader et al., Whistleblowing: The Report of the Conference on Professional Responsibility* (1972). We look generally to the federal and state constitutions, statutes, administrative rules and decisions, judicial decisions, and professional codes of ethics to inform our determination whether specific corrupt, illegal, fraudulent or harmful activity violates a clear mandate of public policy, but those sources are not necessarily exclusive. A salutary limiting principle is that the offensive activity must pose a threat of public harm, not merely private harm or harm only to the aggrieved employee.

Maw v. Advanced Clinical Communications, Inc., 179 N J 439 444 45 2004

In this case we confront for the first time a question as to the meaning of the phrase clear mandate of public policy More specifically we must determine the contours and scope of a clear mandate sufficient to assert a claim under Section 3c 3 We begin with the observation that a public policy expressed in the form of a statute rule or regulation promulgated pursuant to law is not what was meant under Section 3c 3 To so hold would reduce *N J S A* 34 19 3c 1 Section 3c 1 to mere surplusage since it employs those legal precepts as a frame of reference for evaluating an employer s conduct

A clear mandate of public policy suggests an analog to a constitutional provision statute and rule or regulation promulgated pursuant to law such that under Section 3c 3 there should be a high degree of public certitude in respect of acceptable versus unacceptable conduct

The legislative approach vis vis a clear mandate of public policy bespeaks a desire not to have CEPA actions devolve into arguments between employees and employers over what is and is not correct public policy Such an approach also fits with the legislative requirement of a mandate as opposed to a less rigorous standard for the type of public policy that is implicated

B. What constitutes Public Policy - A Moving target

Code of Ethics

· Hippocratic Oath is not a source of public policy - Pierce v. Ortho., *supra*

· Society of Toxicology's Code of Ethics can be public policy. Mehlman v. Mobil Oil Corp. *supra.*

· Attorney s Code of Professional Responsibility is a source of public policy Jacob v Norris McLaughlin Marcus 128 N J 10 1992 Restrictive covenants unenforceable against attorneys because of public policy protecting attorney client relationships

· State Board of Psychological Examiners Regulation is a source of public policy Comprehensive Psychology System v Prince N J Super App Div 2005 2005 WL 275822 Restrictive covenants unenforceable against psychologists because of public policy protecting psychologist patient relationship

American Medical Association Council on Ethical and Judicial Affairs may constitute public policy Pierson v Medical Health Centers 2004 WL 1416265 *Certif Granted* 181 N J 336 Restrictive covenants still enforceable against doctors based upon Karlin v Weisberg 77 NJ 408 1978 despite physician patient relationship

Employment Agreements

Maw v Advanced Clinical Communications 179 N J 439 2004 A dispute between an employer and employee over a restrictive covenant does not implicate public policy

Ackerman v The Money Store 321 N J Super 308 Law Div 1998 A dispute over an arbitration agreement implicates public policy and can violate LAD and give rise to a Pierce claim

Internal Complaints

· Abbamont v. Piscataway Twp. Bd. of Ed., 136 N.J. 28 (1994). Public policy is implicated where a teacher complained that improper ventilation was causing an unsafe working condition.

· Higgins v. Pascack Valley Hosp., 158 NJ 404 (1999). Public policy is implicated where employee makes in internal complaint that improper forms were filed and that a co-worker mishandled a patient's medication.

· Roach v. TRW, 164 N.J. 598 (2000). Public policy is implicated where employee makes an internal complaint about fraudulent activity of a co-worker.

· Gerard v. Camden Co. Health Services, 348 N.J. Super. 516 (App. Div. 2002), *certif. denied* 174 N.J. 40 (2002). An employee's complaint that another employee is being falsely disciplined constitutes public policy.

CEPA vs. PIERCE - Should both be pled? . . . Can both be pled?

· Despite the waiver provisions of NJSA 34:19-8, both CEPA and Pierce claims may be

pled, so long as one cause of action is dropped before trial.

A sample brief - motion for summary judgment on Pierce claim at the beginning of the case:

The term "Pierce" claim originates from the seminal case of Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 57 (1980), in which the Supreme Court first enunciated a cause of action against an employer for retaliatory termination in violation of public policy. The State Legislature partially codified the Pierce claim when it passed the Conscientious Employee Protection Act, N.J.S.A. 34:19-1, *et seq.* in 1986. Barratt v. Cushman & Wakefield of New Jersey, Inc., 144 N.J. 120, 126-27 (1996); Young v. Schering Corp., 141 N.J. 16, 26-27 (1996). While the Legislature codified the common law retaliation Pierce claims, it did not abolish common law claims. Id.

There are substantial differences between Pierce claims and CEPA claims. For example, the statute of limitations for CEPA is one year, N.J.S.A. 34:19-5, while the statute of limitations for Pierce claims is two years. Montells v. Haynes, 133 N.J. 282 (1993)(holding that common law tort claims are governed by two-year statute). This is significant in this case because the Defendants have asserted an affirmative defense, claiming that part or all of the Plaintiff's claims are barred by the statute of limitation. *See Defendants' Answer,* **Exhibit A.** The Plaintiff has served discovery, asking the Defendants to explain the basis of their claim, but the Defendants have yet to respond to any discovery requests.

The Appellate Division directly addressed this issue in Maw v. Advanced Clinical Communications, Inc., 359 N.J. Super. 420, 440-41 (N.J. Super. 2003), *rev'd on other grounds,* 179 N.J. 43 (2004). In Maw, the defendant had also tried to dismiss the Plaintiff's Pierce claim, making the same arguments advanced by Orkin. The Appellate Division held that it is inappropriate to dismiss the Pierce claim until the Plaintiff has had an opportunity to take discovery, The Court explained:

> Common-law claims of wrongful discharge in violation of public policy, which merely duplicate a CEPA claim, are routinely dismissed under CEPA's exclusivity provision, albeit, generally at later stages of the litigation. Falco v. Cmty. Med. Ctr., 296 N.J.Super. 298, 304, 318, (App.Div.1997), *certif. denied*, 153 N.J. 405, 709 A.2d 798 (1998); Catalane v. Gilian Instrument Corp., 271 N.J.Super. 476, 492-93 (App.Div.), *certif. denied*, 136 N.J. 298, 642 A.2d 1006 (1994); Flaherty v. The Enclave, 255 N.J.Super. 407, 413, 605 A.2d 301 (Law Div.1992). Indeed, the Supreme Court has held that this was precisely the Legislature's intent in enacting CEPA's exclusivity provision. Young, *supra*, 141 N.J. at 27, ("we are persuaded that the Legislature intended that the N.J.S.A. 34:19-8 waiver prevent an employee from pursuing both statutory and common-law retaliatory discharge causes of action" and "curtail ... cumulative remedial actions").

Although none of the cases cited specifically address at what point the

> election must be made, Young is instructive. The Court found the election needed to be made "once a CEPA claim is 'instituted.' " Id. at 29. However, in discussing the meaning of "institution of an action," the Court noted that "[t]he meaning of 'institution of an action' could conceivably contemplate an election of remedies with restrictions in which the election is not considered to have been made until discovery is complete or the time of a pretrial conference contemplated by Rule 4:25-1. Another question is whether the statutory waiver is applicable if the CEPA claim is withdrawn or otherwise concluded prior to judgment on the merits." Id. at 32. ***We take this language to mean that before electing remedies, a plaintiff should have an opportunity to complete discovery. Only after gaining access to all of the facts, will a plaintiff be in a position to make a knowing and meaningful election.*** Here, plaintiff was not given that opportunity. As such, we also reinstate plaintiff's common-law claim.
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> Maw, 359 N.J. Super. at 441. (Emphasis added)

The Supreme Court later dismissed both the CEPA and Pierce claims on other grounds, but the majority did not discuss the Appellate Division's ruling that Pierce and CEPA claims may be brought in tandem, with the election of which to drop being made after discover. The thoughtful dissent by Justices Zazzali and Long, however, explained that the Appellate Division had properly explained the law regarding Pierce preemption:

> Because the same test concerning the requisite demonstration of public policy applies under Pierce, the Appellate Division held that plaintiff stated a claim under the common law. Maw, *supra*, 359 N.J.Super. at 441. The court went on to address the exclusivity provision of CEPA. It found that although a plaintiff who pursues a CEPA claim must forego a common-law claim, it would be unjust to force a party into making that decision at the pleading stage of the proceedings before a court has determined whether either action may lie. Ibid. I find both aspects of the Appellate Division's reasoning to be sound and, therefore, subsume the common-law cause of action into my analysis of the CEPA claim.
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> Maw, 139 N.J. at 450, dissent at FN1.

The Defendants have asserted 13 different affirmative defenses. The Plaintiff has served discovery, specifically asking the Defendants to state the basis of their claims. Instead of answering and moving this case forward, the Defendants have instead filed this motion. It is entirely possible that the Defendants will claim that part or all of the Plaintiff's CEPA case should be dismissed due to some technicalities in this very complicated law.

They may also continue to claim that part or all of the actions complained of violate a statute of limitations. The Plaintiff, at this early stage, does not believe that the

CEPA case is susceptible to any such claims, but it is too early in the litigation to make that election. Where part or all of a CEPA claim is barred by a statute of limitations, it does not preclude a Plaintiff from bringing a common law wrongful termination. Crusco v. Oakland Care Center, Inc., 305 N.J.Super. 605, 613-14 (App. Div. 1997). Since the Defendants have failed or refused to answer interrogatories related to their affirmative defense of statute of limitations, it is completely premature for the Court to dismiss a claim that might not be barred at all if the Defendants are correct, and which will cause no undue prejudice if they are wrong.

There are nuances in this case that may be argued later, which the Plaintiff contends are subsumed under CEPA, and which the Defendant may later argue are not. Possibly some of the claims are subsumed under CEPA and some are not. If that is the case, then the Plaintiff is clearly permitted to keep both causes of action to the extent that they involve separate claims. As the Supreme Court has ruled:

> Construing CEPA's waiver clause consistent with the Legislature's inferred intent, and consistent with the expressed remedial purpose of the entire CEPA statute, convinces us that the waiver provision applies only to those causes of action that require a finding of retaliatory conduct that is actionable under CEPA. The waiver exception does not apply to those causes of action that are substantially independent of the CEPA claim.
> Young v. Schering Corp., 141 N.J. 16, 29 (1996).

When discovery is over in this case, it is quite possible that the Plaintiff will choose to abandon the Pierce claim. At this stage in the litigation, especially since the Defendant has failed or refused to produce any discovery, it is premature to dismiss the Pierce claim, and therefore summary judgment should be denied without prejudice.

Key Differences Between CEPA claims and Pierce Claims

- Statute of limitations - CEPA is one year. N.J.S.A. 34:19-5. Pierce claims are subject to a two year statute of limitations for tort claims and six years for contract claims.

  An employee who is wrongfully discharged may maintain a cause of action in contract or tort or both. An action in contract may be predicated on the breach of an implied provision that an employer will not discharge an employee for refusing to perform an act that violates a clear mandate of public policy. Pierce, 84 N.J. at 72.

- Pierce claims only pertain to terminations. CEPA more broadly protects "any retaliatory action." N.J.S.A. 34:19-3.

- Because Pierce claims are more congruous with the common law retaliation claims of

other states, Pierce claims will be recognized in some situations involving interstate claims, whereas CEPA claims may not. *See e.g.* Ballinger v. Delaware River Port Authority, 172 N.J. 586 (2002).

· Pierce claims have been recognized in situations where a termination is in violation of public policy, even where there is no complaint or refusal to participate in unlawful activities. *See e.g.:*

- Carracchio v. Aldan Leeds, Inc., 223 N.J. Super. 435 (App. Div. 1988) - employee was is terminated for suffering a worker's compensation injury may bring Pierce claim, even when employer, and not employee, files claim with their insurance company.

- Hennessey v. Coastal Eagle Point Oil Co., **129 N J 81 92 93 1992 employee may state a Pierce claim if terminated for refusing a random drug test where the employer does not have a legitimate reason to require such a test**

Velantzas v Colgate Palmolive Velantzas v Colgate Palmolive Co Inc 109 N J 189 1988 employee states a Pierce claim when terminated for requesting to see personnel file for purpose of establishing discrimination

Epperson v Walmart Stores 373 N J Super 522 541 App Div 2004 employee may state Pierce claim where employee is wrongfully terminated and maliciously prosecuted.

> It is arguable that Pierce's holding that the termination of an employee at-will for reasons contrary to public policy could also embrace a claim where the employee was discharged for no reason and simultaneously put to the task of defending a malicious criminal proceeding instituted by her employer. While the Pierce doctrine generally has application where the employee has been discharged for attempting to vindicate a public policy, it is not clear whether a viable wrongful termination claim exists when an employee is victimized by the employer's breach of the well-established public policy against the malicious institution of insubstantial criminal proceedings. That is, plaintiff's wrongful termination claim generates the interesting question of whether an employer--who engages in conduct violative of N.J.S.A. 2C:28-4, the by-product of which is the discharge of its at-will employee--may be held liable for wrongfully terminating the employee who has only been victimized by that conduct. While we need not decide that issue here, we observe that it is arguably incongruous for an employee to possess a viable Pierce claim if discharged for complaining to authorities that the employer maliciously caused another employee to be prosecuted, see Giudice v. Drew Chem. Corp., 210 N.J.Super. 32, 36, 509 A.2d 200 (App.Div.), *certif. denied*, 104 N.J. 465, 517 A.2d 448, 449 (1986), but not have a cause of action when "merely" victimized by similar conduct.

(The Pierce claim was dismissed on "waiver" grounds, as there was also a CEPA and malicious prosecution claim which subsumed the Pierce claim.).

· Attorneys fees are available under CEPA (NJSA 34:19-5e), but are not available under Pierce unless the claim is brought for retaliatory termination taken under color of law

(Civil Rights Act. NJSA 10:6-2.).

CEPA vs. PIERCE - The necessity of prior complaints.

CEPA - a. There is a statutory requirement that before complaining to an outside agency, the employee must first make an internal complaint, unless the employee is reasonably certain that one of more supervisors already know about the problem, or the employee reasonably fears physical harm or that the situation is emergent. N.J.S.A. 34:19-4.

2. There is no requirement of a complaint to an outside agency on part (c) claims, *see supra* Abbamont v. Piscataway Twp. Bd. of Ed., 136 N.J. 28 (1994); Higgins v. Pascack Valley Hosp., 158 NJ 404 (1999); Roach v. TRW, 164 N.J. 598 (2000); Gerard v. Camden Co. Health Services, 348 N.J. Super. 516 (App. Div. 2002), *certif. denied* 174 N.J. 40 (2002).

PIERCE - There is confusion on whether a Pierce claim may be brought in the absence of a complaint to an outside agency. The confusion has arisen as a result of incorrect dictum contained in Young v. Schering Corp., 141 N.J. 16, 27 (1995). ("The CEPA cause of action benefits the employee because notification or threatened notification to a public body or a supervisor of illegal employer conduct is sufficient N J S A 34 19 3 subd a Under Pierce however there must be actual notification to a governmental body of illegal employer conduct

The dictum Young was contradicted on the very next page as the Supreme Court stated Pierce held that an at will employee who has been terminated in retaliation for doing or refusing to do an act protected by a clear mandate of public policy has a common law cause of action against the employer that sounds in contract tort or both Pierce supra 84 N J at 72 417 A 2d 505

The Appellate Division in Young had held that an outside complaint is necessary 275 N J Super 221 234 35 App Div 1994 and relied upon a partial sentence from House v Carter Wallace Inc 232 N J Super 42 49 556 A 2d 353 App Div certif denied 117 N J 154 564 A 2d 874 1989 The complete sentence from House states

> However no New Jersey case has recognized a claim for wrongful discharge based solely upon an employee s internal complaints about a corporate decision where the employee has failed to bring the alleged violation of public policy to any governmental or other outside authority ***or to take other effective action in opposition to the policy***
> Emphasis added

Cases holding that a Pierce claim exists in the absence of complaint to outside agencies include Carracchio v. Aldan Leeds, Inc., 223 N.J. Super. 435 (App. Div. 1988);- Hennessey v. Coastal Eagle Point Oil Co., 129 N J 81 92 93 1992 Velantzas v Colgate Palmolive Velantzas v Colgate Palmolive Co Inc 109 N J 189 1988

ALAN ADD NEW STATUTE D ANNUNZIO ON INDEPENDENT CONTRACTORS NEW FEDERAL CASE ON PIERCE

PRIOR COMPLAINTS SECTION ON ADVERSE ACTION INCLUDE LINDA WONG S RECENT CASE