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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOSEPH FREDERICKS, Plaintiff, v. TOWNSHIP OF WEEHAWKEN, MAYOR RICHARD TURNER, AND TOWN MANAGER JAMES MARCHETTI, Individually and in their Official Capacities, Defendants.	Case No.: 2:11-cv-05363

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

On Brief: LOUIS A. ZAYAS, ESQ.

CAROLYN CORRADO

PRIMINARY STATEMENT

Plaintiff Joseph Fredericks, the Tax Collector for the Township of Weehawken, alleges in this civil rights action, brought pursuant to the New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-1 *et seq*., the New Jersey Civil Rights Statute, and Title 42 U.S.C. § 1983, that Defendants Township of Weehawken, Mayor Richard Turner, and Town Manager James Marchetti, violated his constitutional rights. Specifically, Plaintiff Fredericks alleges that Defendants retaliated against him for speaking up about Mayor Turner's unlawful and improper political interference with Weehawken's departments, including Fredericks' own tax department. Despite a history of complaints by Fredericks, Mayor Turner had never retaliated against him because Frederick had not aired his grievances publicly. That changed when, on September 20, 2010, Fredericks submitted a signed certification in a federal lawsuit describing Mayor Turner's unlawful political interferences in Weehawken. In Richard DeCosmis v. Township of Weehawken et al., Civil Action No. 08-5221 (ES), Plaintiff blew the whistle on Mayor Turner and explained how Mayor Turner unlawfully manipulated the tax assessments to advance his own political agenda.

FACTS OF THE CASE

Plaintiff Fredericks has been the Tax Collector for the Township of Weehawken since 1994. From at least May 2007 to the present, Fredericks has complained to Weehawken Town Manager Marchetti and Finance Director Richard Barsa regarding Turner's unlawful actions as follows:

- Plaintiff complained about Mayor Turner's interference with Weehawken's assessment of the semi-annual property taxes bills. Fredericks complained to both Marchetti and Barsa every time the tax bills were prepared. (Statutorily, the bills were to be sent on June 14 and Dec 14, however due to Turner's interference, Weehawken was always several months late in sending its bills.) Fredericks would go to Marchetti's office to complain to him that Turner's actions were not legal, to which Marchetti would shrug and say "it's not up to me," or "what do you want me to do?" Plaintiff would complain to Barsa when he ran into him, and Barsa would commiserate, but take no action.

- Plaintiff complained to Marchetti and Barsa about Mayor Turner's interference with personnel decision affecting Frederick's department. For example, Nora Duffy, a clerk in Frederick's department, asked for a day off. As she was an hourly employee, she did not need to submit a vacation request form. When Turner discovered that she was off, he told Fredericks "I did not approve it," to which Fredericks responded that Turner was not allowed to give orders to employees, either directly or indirectly. In retaliation, Turner moved Duffy from Plaintiff's office to Marchetti's office, and threatened to terminate the employment of Rosy, another one of the employees in Frederick's department. Fredericks went to Marchetti's office and told Marchetti: "that's not right. Turner can't

interference in my office," to which Marchetti again shrugged and said "what do you want me to do?"

- Mayor Turner sets the agenda and the fiscal policies for Weehawken
- Mayor Turner directs Tax Assessor what to assess in violation of his duties to follow the state's formula
- Mayor Turner called Frederic to instruct him as to what amount of taxes to assess for political reasons. On one occasion, Mayor Turner told Fredericks: "What if we reduce the garbage collection tax by $200,000, how would that affect the assessed tax levy?"

On or about September 20, 2010, Fredericks furnished a sworn certification describing the above wronging by Mayor Turner to Weehawken Police Lieutenant Richard DeCosmis, a plaintiff who filed a federal lawsuit based on similar constitutional violations by Mayor Turner.

Upon learning of Fredericks' submission of the above certification in the DeCosmis Litigation, Mayor Turner reacted angrily, as in other cases, by immediately launching a campaign of unrelenting harassment designed to punish Fredericks for airing his grievances in another federal lawsuit and displaying disloyalty to him. Soon after the filing of the certification, Mayor Turner directed David Corrigan, Esq, an attorney routinely hired by Mayor Turner to punish Weehawken employees through the initiation of internal disciplinary charges, to launch an internal investigation targeting Fredericks' compensation. In November 2010, less than two months after Fredericks submitted his certification in the DeCosmis Litigation, David Corrigan, Town Attorney Richard Venino, and Town Manager James Marchetti ordered Frederick to Marchetti's office in a

transparent effort to intimidate him by claiming that he has been "overpaid for years" and suggesting that he had fraudulently billed the town. Given Mayor Turner's history of retaliating against those who complained or are viewed as disloyal to him, Fredericks perceived the questioning as threat to his employment if he continued to complain about Mayor Turner. So after the meeting, despite 17 years of diligent service, Mayor Turner stripped Fredericks of most of his authority in the tax department forced to report to Richard Barsa as a means to intimidate Fredericks. In addition to the above acts of retaliation Defendants reduced the pension Plaintiff should have been entitled to and ostracized him in town, thereby creating a hostile and intolerable work environment. All of the retaliations occurred within a year of the filing of Fredericks' certification, including but not limited to:

- In November 2010, Weehawken willfully breached its agreement to compensate Plaintiff $ 10, 400 (2009-2010) and $7,800 (2010-2011) for additional work performing tax abatement.
- In November 2010, Weehawken launched an internal investigation weeks after the filing of Fredericks' certification to intimidate Fredericks.
- On or about October 6, 2010, Weehawken withdrew its financial day prior to Plaintiff's attendance to the annual Saul A. Wittes Foundation Educational Seminar, an event he had attended for sixteen (16) years.
- On October 25, 2010, denying Plaintiff's a four percent (4%) raise he was entitled to under N.J.S.A. 40A: 9-165.

- In May 2011, Weehawken forced Plaintiff's pay to attend the 44th Annual Tax Collector and Treasurer's Spring Conference, despite the fact that Weehawken had paid for this seminar for the last seventeen years (17) years.
- From January 2011 to the present, forcing Plaintiff to take vacation days to attend the Tax Collectors and Tax Association of New Jersey Executive Board Meetings, which meet every other month. The attendance to this professional organization had always been included as part of his job duties as tax collector.
- On September 23, 2010, Plaintiff was stripped of most of his duties and responsibility over the Tax Collector Department and was required to report to Richard Barsa.
- On November 11, 2010, Marchetti sent Plaintiff a letter stating that he had taken unapproved vacation time as a means to threaten his employment.

LEGAL DISCUSSION

POINT I

STANDARD OF REVIEW TO DISMISS A COMPLAINT UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b) (6)

The standard for succeeding in a Fed. R. Civ. P. 12(b) (6) motion is very high. Plaintiffs need only state a "plausible claim for relief" in order to survive a motion to dismiss. Ashcroft v. Iqbal, 129 S.Ct. 1937, 1950 (2009). The factual allegations must be sufficient to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true even if doubtful in fact. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 554 (2007). On a Rule 12(b) (6) motion, "the facts alleged must be taken as true and a complaint may not be dismissed merely because it appears unlikely that the plaintiff can prove those facts or will ultimately prevail on the merits." Phillips v. County of Allegheny, 515 F.3d 224, 231 (3d Cir. 2008). In Iqbal, the Supreme Court stressed that a complaint will survive a motion under Rule 12(b) (6) if it states "sufficient factual allegations, accepted as true, to 'state a claim for relief that is plausible on its face.'" Iqbal, 129 S.Ct. at 1949. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Id.

The case law is also clear about what will not suffice: "threadbare recitals of the elements of a cause of action," an "unadorned, the defendant-unlawfully-harmed-me accusation" and conclusory statements "devoid of factual enhancement." Id. at 1949-50. While the complaint need not demonstrate that a defendant is probably liable for the

wrongdoing, allegations that give rise to the mere possibility of unlawful conduct will not do. Iqbal, 129 S.Ct. at 1949.

Motions to dismiss for failure to state a claim are viewed with disfavor and are rarely granted. Sixth Camden v. Township of Eveshaum, 420 F.Supp. 709, 720 (D.N.J. 1976); Walsh v. McGee, 918 F.Supp 1078 (S.D.N.Y. 1996). That caution applies with even greater force where plaintiff alleges civil rights violations. Berheim v. Litt, 79 F.3d 318(2d Cir. 1996). As the Scheur Court noted:

> When a federal court reviews the sufficiency of a complaint... [t]he issue is not whether the claimant will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test... [I]n passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations should be construed favorably to the pleader.

416 U.S. at 236.

A. Under Iqbal, a Plaintiff's Factual Allegations Need Only Be "Plausible"

Iqbal has two principal holdings that are pertinent here. First, a complaint must contain more than a "formalistic recitation of the elements of a cause of action" to survive a motion to dismiss. Id. at 1949. Second, a complaint must have "facial plausibility" meaning that there is "more than a sheer possibility that a defendant has acted unlawfully." Id. "Determining whether a complaint states a plausible claim for relief will…be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 1950. Importantly, the Court emphasized that "Rule 8 …does not required detailed factual allegations," and that the plausibility standard is "not akin to a probability requirement." Id. at 1949.

In Iqbal, the Supreme Court applied these holdings, which it previously had articulated in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), to a prisoner's complaint about New York prison conditions. The prisoner named as defendants, in addition to prison staff, Attorney General John Ashcroft and FBI Director Robert Mueller. Iqbal, 129 S.Ct. at 1937. Other than allegations that were mere "formulaic recitation of the elements," the prisoner-plaintiff made only two factual allegations about Ashcroft and Mueller: (1) that "the [FBI], under the direction of Defendant Mueller, arrested and detained thousands of Arab Muslim men"; and (2) "that the policy of holding post-September 11th detainees in highly restrictive conditions…was approved by Defendant Ashcroft and Mueller in discussions in the weeks after September 11, 2001." Id. at 1951-52. The Supreme Court held that these two allegations did not "contain facts plausibly showing that [Ashcroft and Mueller] purposely adopted a policy of classifying post September 11th detainees [for restrictive confinement] *because of their race, religion, or national origin,*" a required element of the prisoner's Bivens claims. Id. at 1952 (emphasis added). The "September 11 attacks were perpetrated by 19 Arab Muslim hijackers," who were part of "an Islamic fundamentalist group…headed by another Arab Muslim," the Court wrote, so "[i]t should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs or Muslims." Id. at 1951.

B. Iqbal Does Not Change the Standard in Civil Rights Cases

Since Iqbal, one district court has already recognized that the Fourth Circuit's standard of review for civil rights complaints remains the same, stating that where "the

defendant seeks to dismiss the plaintiff's civil rights complaint, this Court must be especially solicitous of the wrongs alleged and must not dismissed the claim unless it appears to a certainty that the plaintiff would not be entitled to relief under any legal theory which might plausibly be suggested by the facts alleged." Swagler v. Harford County, No. RDB 08-2289, 2009 U.S. Dist. LEXIS 47895, at *9 (D. Md. June 2, 2009) (internal quotation marks omitted) (citing, e.g. Presley v. City of Charlottesville, 464 F.3d 480, 483 (4th Cir. 2006)). Accord Veney v. Wyche 293 F.3d 726, 730 (4th Cir. 2002). These principles apply with equal force here.

POINT II

PLAINTIFF'S CEPA CLAIM IS TIMELY IN THAT DEFENDANTS' RETALIATORY ACTS OCCURRED WITHIN THE ONE YEAR STATUTE OF LIMITATIONS AS PART OF THE CONTINUING VIOLATION THEORY

In moving to dismiss Count One of the Complaint alleging a violation under New Jersey's Conscientious Employee Protection Act ("CEPA"), Defendants argue that the alleged conducted constitute "discrete acts," and as such those acts that occurred prior to September 16, 2010 should be barred by CEPA's one year statute of limitations. Since Plaintiff's state claim is subject to the court's supplemental jurisdiction, the Court must look to New Jersey state law for guidance as to whether the acts complained are timely and, in the alternative, whether New Jersey's continuing violation theory renders the acts timely.

As a preliminary matter, and as further clarified in the proposed amended complaint, every retaliatory act occurred within a year of the filing of the instant complaint. For example, the (1) cancelled 44th Annual Tax Collector's and Treasurer's

Spring Conference occurred in **May Spring 2011**; (2) the forced vacation incident concerning Fredericks' attendance of the Tax Collectors and Tax Association of New Jersey Executive Board Meetings began in **January 2011 to the present**; (3) Weehawken's refusal to pay Frederick's for his Tax Abatement Program was communicated to him in **November 2010** by Weehawken's town attorney David Corrigan during sham investigation regarding his compensation as tax collector and, (4), Plaintiff was informed that Weehawken did not intend to pay his 4% salary increased on or about **October 23, 2010**, when David Corrigan advised him in a letter. Since all of the above retaliatory acts occurred within a year of September 16, 2011, Plaintiff's CEPA claims are timely.

Alternatively, As to the Frederick's allegations that he was deprived of his 4% salary increase in June 30, 2010, his claim is timely under the continuing violation theory. In Roa v. LAFE, 200 N.J. 555 (2010), the New Jersey Supreme Court held that the statute of limitations, for purposes of the anti-retaliation section of the New Jersey's Law Against Discrimination, could be tolled if there was a pattern of indiscrete acts, the last one occurring within the statute of limitations. The Roa Court held that "discrete acts are "…termination, failure to promote, denial of transfer, or refusal to hire…" Roa, 200 N.J. at 567. A continuing violation, however, is a "'series of separate acts that collectively constitute one 'unlawful employment practice.'" Id. at 568 (citation omitted).

The Third Circuit resolved the statute of limitations issue by relying on National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002). Morgan established a bright line distinction between discrete acts which are individually actionable and acts which are not individually actionable but may be aggregated to make out a hostile work

environment claim. Morgan, 536 U.S. at 113. The latter can occur at any time so long as they are linked in a pattern of actions which continue into the applicable limitations period. Under these circumstances, behavior occurring outside the statute of limitations is permissible for purposes of assessing liability. MFS, Inc. v. Dilazaro, 2009 WL 3081569 (E.D.Pa. 2009).

Defendants cite O'Connor v. City of Newark, 440 F.3d 125, 127-130 (3d Cir. 2006). However, the court in O'Connor explains that the aggregation theory "is designed explicitly to address situations in which the plaintiff's claim is based on the cumulative effect of a thousand cuts, rather than on any particular action taken by the defendant. In such cases, obviously the filing clock cannot begin running with the first act, because at that point the plaintiff has no claim; nor can a claim expire as to that first act, because the full course of conduct is the actionable infringement." Id. at 128. Acts which do not give rise to an independent claim, but constitute a part of a continuing violation, may be relied upon under the equitable tolling doctrine. MFS, Inc., 2009 WL 3081569 at 12; Larsen, 553 F.Supp.2d at 417.

This is precisely Plaintiff's situation. Some of the retaliatory actions taken against Plaintiff would not be sufficient on their own to constitute a claim under CEPA. The aggregation theory is meant to apply to employees such as Plaintiff, who face the "cumulative effect of a thousand cuts." O'Connor, 440 F.3d at 128. Defendants argue that Plaintiff's claims are "de minimis," and the specific retaliatory actions taken against him would not alone create a cause of action for "retaliatory adverse employment actions under CEPA." However, employment retaliation is not "limited to a single discrete action, but may include 'many separate but relatively minor instances of behavior

directed against an employee ... that combine to make up a pattern of retaliatory conduct.'" Donelson v. DuPont Chambers Works, 412 N.J.Super. 17, 29 (N.J.Super.A.D. 2010) (quoting Green v. Jersey City Bd. of Educ., 177 N.J. 434, 448 (2003)). Retaliatory action is defined as the "discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment." N.J.S.A. 34:19-2e. Examples of adverse employment action include reductions in pay or the withdrawal of previously provided benefits, which Plaintiff has specifically alleged. Maimone v. City of Atlantic City, 188 N.J. 221, 235-36 (2006).

In short, Plaintiff's CEPA claim is timely since all the acts occurred within the one year statute of limitations. Alternatively, the alleged retaliatory acts are indiscrete acts that form a continuing pattern of retaliation, the last act occurring within the statute of limitations. Accordingly, Defendants' motion to dismiss should be denied.

POINT III

PLAINTIFF DOES NOT ALLEGE ANY OTHER STATE CLAIMS THAT ARE RELATED TO HIS RETALIATORY CEPA CLAIM

Defendants point out that by alleging CEPA claims against Defendants Plaintiff has waived any claims he might have for emotional distress or a hostile work environment. Plaintiff is not alleging any separate claims for emotional distress or hostile work environment. Plaintiff only mentions the emotional distress Defendants have caused him and the hostile work environment they have subjected him to as part of the damages he has suffered.

POINT IV

MAYOR TURNER IS LIABLE UNDER CEPA AS PLAINTIFF'S EMPLOYER

Based on a distortion of the record, Defendants argue that Fredericks has failed to establish a *prima facie* case under CEPA, in part, because of their novel theory that Mayor Turners' alleged wrongdoings were not consistent with its employer's "policies or practices required by the employer." (Defendants' brief at p. 8). What Defendants failed to say is that Mayor Turner is, for all practical purposes, the Employer. In short, Mayor Turner is a smaller version of Vladamir Putin, the Russian President, who exerts complete and utter control over the government through puppets beholden to him. To be sure, Fredericks' certification filed in the DeCosmis Litigation disclosed, what everyone in Weehawken knows, that Mayor Turner controls Weehawken through political patronage and fear of retaliation.

The purpose of CEPA to protect employees from retaliatory discharge for disclosing or testifying about illegal activities by their employer. A *prima facie* case of discriminatory retaliation under Conscientious Employee Protection Act requires a plaintiff to demonstrate: (1) a reasonable belief that the employer's conduct was violating either a law, rule, regulation, or public policy; (2) he or she performed a whistle blowing activity; (3) an adverse employment action was taken against him or her; and (4) a causal connection existed between his whistle-blowing activity and the adverse employment action. Klein v. University of Medicine and Dentistry of New Jersey, 377 N.J.Super. 28, (A.D.2005) certification denied 185 N.J. 39, 878 A.2d 856.

Here, the complaint, and the amended complaint, alleges that Mayor Turner is Fredericks' employer. As such, Mayor Turner and Town Manager Marchetti are

individually liable for retaliating against Fredericks after he filed his certification in the DeCosmis Litigation.

Defendants, citing the unreported case Richardson v. Deborah Heart & Lung Center, 2010 WL 4067179, p. 6-7 (App. Div. 2010), state: "If the alleged violating employee's actions were contrary to the policies or practices required by the employer, they cannot reasonably be viewed as having been condoned by or attributed to the employer. In such circumstances, the alleged violating employees cannot be individually liable for a CEPA violation.

Under the Town Charter of Weehawken, the Town Manager is designated as the person responsible for the day-to-day operation in Weehawken. In essence, Weehawken governs through resolutions passed by the town council. The purpose of this form of government is to remove political influence from interfering with business and purpose of government. Under the town's charter, the Mayor of Weehawken, Richard Turner, is not empowered or authorized to influence the decision of any town official or department head, including those assigned to the police department, tax department, tax assessor department, and recycling department. However, the entire town council was well aware of, and continually permitted, Mayor Turner to run Weehawken. Fredericks routinely complained Marchetti about Mayor Turner's unlawful interference with the day-to-day operations of Weehawken. To be sure, Fredericks provided a sworn certification in the DeCosmis Litigation alleging that Mayor Turner, in fact, runs Weehawken.

Defendants argue, in effect, that despite being mayor, Mayor Turner cannot be held responsible no matter how egregious he retaliates against his employees. The fact is that Mayor Turner is Weehawken and, whatever he does as mayor is official policy.

Plaintiff claims can be distinguished from those in Richardson. In Richardson, the plaintiff describes her protected conduct as enforcement of her employer's policy or practice of correcting potential billing mistakes. The court expressed difficulty identifying the "public policy which the employer has allegedly violated." Richardson, 2010 WL 4067179. Mayor Turner's interference with the day-to-day activities of Weehawken government to advance his own political agenda and self-aggrandizement is clearly contrary to public policy.

As the complaint and proposed amended complaint alleges, Mayor Turner took an active part in the retaliation Defendants exacted upon Plaintiff. For example, both Mayor Turner and Marchetti approached Plaintiff to discuss his participation in the tax abatement program, and to agree on his compensation, which they later denied Plaintiff. It was Mayor Turner himself who later told Plaintiff that "money was tight." When Marchetti handed Plaintiff letters regarding Plaintiff's salary, he intimated they had been written at the request of Mayor Turner. Mayor Turner played an active role in the other retaliatory actions taken against Plaintiff. Whether Turner's participation is sufficient to impose civil liability is a question for a jury, not a question to be decided in a motion to dismiss.

POINT V

PLAINTIFFS HAS SUFFERED TANGIBLE AND INTANGIBLE DAMAGES AS A RESULT OF THE DEFENDANTS' CEPA VIOLATIONS

A § 1983 claimant who asserts a free speech retaliation claim is not required to demonstrate that the illicit factor was the sole or even dominant motive for the government action. Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274

(1977). To hold otherwise would require an unreasonable burden because "[r]arely can it be said that a legislature or administrative body operating under a broad mandate made a

decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one." Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977) ("The search for legislative purpose is often elusive enough) "[T]he removal of even a 'subordinate' purpose may shift altogether the consensus of legislative judgment supporting the statute." McGinnis v. Royster, 410 U.S. 263, 272 (1977)

When governmental motive is pertinent to the constitutional inquiry, the claimant need not show that the retaliatory deprivation was a constitutionally protected right or interest. The retaliation may consist of deprivation of any non-trivial commodity because the individual engaged in constitutionally protected activity. In Rutan v. Republican Party, 497 U.S. 62 (1990), the plaintiffs challenged the constitutionality under the First Amendment of government's use of political patronage in making decisions concerning hiring, rehiring, transfers, and promotions. The Court held that the fact that the plaintiffs had no legal entitlement to promotion, transfer, or recall was "beside the point." Ruton 497 U.S. at 72; Gagliardi v. Village of Pawling, 18 F.3d 188 (2d Cir. 1994) (failure to enforce zoning code against adjoining property in retaliation for exercise of free speech rights); Nestor Colon Medina & Sucesores v. Custodio, 964 F.2d 32 (1st Cir. 1992) (denial of land-use permit for expressing political views); North Mississippi Communications v. Jones, 874 F.2d 1064 (5th Cir. 1989) (Mount Healthy mixed-motive framework applies to claim by newspaper that county board of supervisors withheld

advertising of its proceedings and legal notices in retaliation for paper's publication of editorials and news stories critical of board); Georgia Ass'n of Educators v. Gwinnett County Sch. Dist., 856 F.2d 142 (11th Cir. 1988) (denial of union dues check-off privileges allegedly in retaliation for First Amendment activity); Howland v. Kilquist, 833 F.2d 639, 644 (7th Cir. 1987) ("'[A]n act in retaliation for the exercise of a constitutionally protected right is actionable under [§] 1983 even if the act, when taken for different reasons, would have been proper"') (quoting Buise v. Hudkins, 584 F.2d 223, 229 (7th Cir. 1978), cert. denied, 440 U.S. 916 (1979)); Franco v. Kelly, 854 F.2d 584, 590 (2d Cir. 1988) (same); Harrison v. Springdale Water & Sewer Comm'n, 780 F.2d 1422 (8th Cir. 1986) (retaliatory eminent domain proceeding brought against landowners because they had sued city); Vandenplas v. City of Muskego, 753 F.2d 555, 559 (7th Cir.) cert. denied, 472 U.S. 1018 (1985)("A raze order issued in retaliation for First Amendment freedoms would not, indeed could not, be reasonable").

In fact, it may well be that even a trivial retaliatory consequence will suffice to make out a First Amendment claim. In Rutan, the Court said that the First Amendment "protects state employees not only from patronage dismissals but ***alsofrom even an act of retaliation as trivial as failing to hold a birthday partyfor a public employee... when intended to punish herfrom exercising herfree speech rights*** ." Rutan 497 U.S. at 75 n.8, quoting circuit court opinion, 868 F.2d at 954 n.4.

Despite this broad language, the circuit courts are in conflict over whether the retaliatory consequence must be sufficiently substantial to state a First Amendment claim. The fact pattern in Mount Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977) provides a useful prototype of a public employee mixed-motive free

speech retaliation case. Doyle, a non-tenured public school teacher, claimed that his contract was not renewed because he had engaged in expressive activities protected by the First Amendment. Although a non-tenured employee like Doyle may be discharged "for no reason whatever" Id at 283.

Whether the employee's speech is constitutionally protected depends upon whether it involves a matter of public concern, Connick v. Myers, 461 U.S. 138 (1983), and "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the state as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering v. Board of Educ., 391 U.S. 563, 568 (1968); Rankin v. McPherson, 483 U.S. 378 (1987) See § 3.11[C] infra.

In Burlington Northern & Santa Fe Railway Co. v. White, 126 S.Ct. 2405 (June 26, 2006), the plaintiff was suspended without pay for insubordination by her employer after she filed a complaint for unlawful discrimination. The suspension was later rescinded. The plaintiff filed a complaint allegedly unlawful retaliation based on her suspension without pay. As Justice Breyer explained the Court's ruling:

> We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. **Context matters**. "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." (Citation Omitted). A schedule change in an employees work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children...Hence, a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an "act that would be immaterial in some situations is material in others." (Citation Omitted).

126 S.Ct. at 2416.

Under Burlington, a plaintiff is not required to show the retaliatory conduct "directly implicate a plaintiff's employment relationship with either a current employer or any proposed employment elsewhere." A plaintiff must only show that the employer took some retaliatory action that was materially adverse to him, depending on the context.

Federal courts have held the anti-retaliation provision prohibits any discrimination that is reasonably likely to deter protected activity. See e.g., Knox v. State of Indiana, 93 F.3d 1327, 1334 (7th Cir. 1996) ("there is nothing in the law of retaliation that restricts the type of retaliatory act that might be visited upon an employee who seeks to invoke her rights by filling a complaint."). Passer v. American Chemical Society, 935 F.2d 322, 331 (D.C.Cir. 1991)(Section 704 (a)broadly prohibits an employer from discriminating against its employees in any way for engaging in protected activity and does no "limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion"). Thus, a violation will be found if an employer retaliates against a worker for engaging in protected activity through threats, harassment in or out of the workplace, or any other adverse treatment that is reasonably likely to deter protected activity by that individual or other employees. Berry v. Stevinson Chevrolet, 74 F.3d 980, 986 (10th Cir. 1996) (instigating criminal theft and forgery charges against former employee who filed EEOC charge found retaliatory); Passer, 935 F.2d at 331 (canceling symposium in honor of retired employee who filed ADEA charge found retaliatory). EEOC v. Cosmair, 821 F.2d 1085 (5th Cir.

1987) (discontinuous of benefits); EEOC v. Huber Corp., 927 F.2d 1322 (refusing to distribute benefits under employer benefit plans has been held to be a form of retaliation).

In Carlton v. Paramus School Board, 25 F.3d 194 (3d 1994). In Carlton, the plaintiff, a teacher, was retaliated by her former employer when she filed a EEOC complaint after the employment relationship ended. The former employer retaliated by influencing the school board to revoke plaintiff's teacher's license. The Third Circuit held that such retaliatory conduct was prohibited under Title VII. Carlton at 200.

In Berry v. Stevinson Chevrolet, 74 F.3d 980, 986 (10th Cir. 1996), the former employer caused individuals to report the crime of forgery against the plaintiff after he filed an EEOC complaint. The criminal charges were dropped. The Tenth Circuit found that the filing of the criminal complaint was retaliatory. Berry, 74 3d at 986-987.

Here, Fredericks has suffered both tangible and intangible damages. In terms of economic damages, Fredericks has had to been deprived of $10,400 and $7,800 for his work on the tax abatement. Frederick was further deprived of his 4% salary increase or approximately $4,600 per year. His decreased salary will have an adverse impact on his pension when he retires in the near future. Weehawken also withdrew financial support for attending professional meetings forcing Fredericks to pay to attend with his own money or accrued vacation time. In terms of emotional distress and embarrassment, Weehawken has humiliated Fredericks by stripping him of his authority in the tax collector's department, subjecting him to ostracization in town, subjected to an internal investigation, and threaten with termination. Such conduct constitutes the sort of behavior that is deemed retaliatory.

VII

PLAINTIFF'S POLITICAL ASSOCATION WITH RICHARD DECOSMIS, A POLITICAL OPPONENT OF MAYOR TURNER, IS PROTECTED BY THE FIRST AMENDMENT

Defendants argue that Plaintiff has failed to identify any political association in the complaint meriting protection under the First Amendment. Plaintiff's association that was infringed, as the complaint alleges, was supporting Lieutenant DeCosmis, a political adversary of Mayor Turner.

The First and Fourteenth amendments also protect an individual's right to exercise freedom to associate with others for the common advancement of political beliefs and ideas. Kusper v. Pontikes, 414 U.S. 51, 56–57 (1973) See also Lyng v. International Union, UAW, 485 U.S. 360 (1988) (reviewing decisions in which the Court held that individual associational rights must be free from governmental interference). The right to associate with the political party of one's choice and support its platforms and candidates is an integral part of this basic constitutional freedom. Kusper, 414 U.S. at 57. .Pressure upon public employees to support particular political candidates, not of the individual employees own choice constitutes a coercion of belief in violation of the first amendment. Connick v. Myers, 461 U.S. 138, 149 (1983). It is on this basis that the Supreme Court has held that the first amendment rights of nonpolicy making public employees are violated if these types of employees are dismissed solely because of their political affiliation. Brown v. Trench, 787 F.2d 167, 168 (3d Cir.1986)For example, in Keyishian v. Board of Regents,385 U.S. 589 (1967) the Supreme Court held that political association alone could not, consistently with the first amendment, constitute an adequate

ground for denying public employment.

These protections reflect our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,' New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) a principle itself reflective of the fundamental understanding that '[c]ompetition in ideas and governmental policies is at the core of our electoral process....' Williams v. Rhodes, 393 U.S. 23, 32 (1968). Patronage, therefore, to the extent it compels or restrains belief and association, is inimical to the process which undergirds our system of government and is 'at war with the deeper traditions of democracy embodied in the First Amendment.' Illinois State Employees Union v. Lewis, 473 F.2d 561 (7th Cir.1972)]. As such, the practice unavoidably confronts decisions by this Court either invalidating or recognizing as invalid government action that inhibits belief and association through the conditioning of public employment on political faith.

In this case, Plaintiff alleges that his association with Lieutenant DeCosmis is protected under the First Amendment. Moreover, the act of submitting a certification in a federal lawsuit evidenced his association with Lieutenant DeCosmis. Accordingly, Plaintiff has sufficiently alleged a cause of action under Section 1983.

POINT VII

PLAINTIFF'S COMPLAINTS RAISED MATTERS OF A PUBLIC CONCERN FOR PURPOSES OF INVOKING THE PROTECT OF THE FIRST AMENDMENT

Defendants argue that Plaintiff did not complain of matters of public concern, but merely matters involving his employment such as compensation. Defendants' argument

is frivolous. Plaintiff's complaint about Mayor Turner's unlawful interference with his department, as well as other departments in Weehawken to advance his political agenda and power is a matter of public concern as it touches upon good government. Moreover, the filing of a certification in a civil rights case alleging corruption and similar constitutional protection forms a separate and distinct basis of relief under the First Amendment.

A. Standard for protected speech

The Supreme Court has been clear that public employees, such as Plaintiffs, may neither be completely without safeguards under the First Amendment for their expression, nor under blanket protection for all remarks made simply because they concern the public official or entity employer. Connick v. Myers, 461 U.S. 138, 143-148 (1983). Rather, the Supreme Court has articulated a standard which strikes "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Id. at 142 (quoting Pickering v. Bd. of Educ. of Twp. High School Dist. 205, Will County, Illinois, 391 U.S. 563, 568 (1968). The First Amendment protects speech by a government employee when it relates to a matter of public concern. Id. at 146.

To be protected under the First Amendment, speech by a government employee must be on a matter of public concern, and the employee's interest on this matter must not be outweighed by any injury the speech could cause to "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Waters v. Churchill, 511 U.S. 661, 668 (1994) (plurality opinion) (quoting

Connick v. Myers, 461 U.S. 138, 142 (1983)). In Garcetti v. Ceballos, 126 S. Ct. 1951 (2006), the Supreme Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." Id. at 1960. In other words, to be protected by the First Amendment, the plaintiff's statement ordinarily must not be made pursuant to the plaintiff's job responsibilities. In Azzaro, the Third Circuit made clear that whether an employee's conduct addresses a "matter of public concern" is to be determined by the "content, form, and context of a given statement, as revealed by the whole record." Azzaro v. County of Allegheny, 110 F.3d 968, 976 (3d Cir. 1997) (quoting Connick v. Myers, 461 U.S. 138, 147-48 (1983)).

Unfortunately, the Supreme Court has not articulated a comprehensive framework for defining the scope of an employee's duties, but it has stressed that "[t]he proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes." Ceballos, 126 S. Ct. at 1961-62. Thus, a public employee's statement involves a matter of public concern if it can be fairly considered as relating to any matter of political, social or other concern to the community. Muzslay v. City of Ocean City, 238 F.App'x 785, 789 (3d Cir.2007) (citing Brennan v. Norton, 350 F.3d 399, 412 (3d Cir. 2003).

The Third Circuit applies a three-step test to evaluate a public employee's claim of retaliation for engaging in activity protected under the First Amendment. Hill v. City of Scranton, 411 F.3d 118, 125 (3d Cir. 2005). First, the employee must show that the activity is in fact protected. Hill, 411 F.3d at 125 (citing Pickering v. Bd. of Educ., 391 U.S. 563 (1968)). Second, the employee must show that the protected activity "was a substantial factor in the alleged retaliatory action." Id. (quoting Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)). Third, the employer may defeat the employee's claim by demonstrating that the same adverse action would have taken place in the absence of the protected conduct. Id. As discussed below, Plaintiffs' claims satisfy these requirements, as (1) their speech is in fact protected, as Plaintiffs were acting in their individual capacities and complained about matters relating to the public interest (such as potential voting fraud and health violations); (2) Plaintiffs were retaliated against due to their protected activity (for William Malave and Elvin Sanchez, that retaliation was termination from employment, for Cedestino Malave, it is constant harassment), and (3) the retaliation would not have taken place but for Plaintiffs' protected conduct.

In Borough of Kutztown, the court distinguished between retaliation based upon the plaintiff Borough Manager's reporting of harassing behavior and retaliation based upon the plaintiff's advocacy of a telecommunications project. Retaliation based on the reporting was not actionable, because reporting harassment formed part of the Borough Manager's official job duties. However, the court held that the claim of retaliation based on the plaintiff's advocacy of the telecommunications project should not have been dismissed at the 12(b) (6) stage, because the complaint could be read to allege that the

plaintiff was speaking as a citizen rather than as part of his official duties. Borough of Kutztown, 455 F.3d 225, 242 (3d 2006).

In a similar case as that before the bar, the Third Circuit has held that when testifying truthfully in court proceedings, a public employee speaks as a citizen even if the court testimony stemmed from the employee's official duties in an investigation: "the act of offering truthful testimony is the responsibility of every citizen, and the First Amendment protection associated with fulfilling that duty of citizenship is not vitiated by one's status as a public employee. That an employee's official responsibilities provided the initial impetus to appear in court is immaterial to his/her independent obligation as a citizen to testify truthfully." Reilly v. City of Atlantic City, 532 F.3d 216, 231 (3d Cir. 2008).

In this case, Fredericks' complaints of unlawful interference with his department or other departments, were made as a private citizen as it touched a matter of public importance. First, Fredericks was not required as tax collector to complained about Mayor Turner's unlawful interference with his duties, the interference with the town budget or manipulating the tax collections in town. These are matters that are not part of his official duties. Yet Fredericks complained about them, initially through his various conversations with Marchetti and Barsa, but later in the filing of his certification in DeCosmis Litigation. To be sure, the filing of the certification in the DeCosmis Litigation prompted Mayor Turner's wrath since Frederick disclosed his history of grievances in federal court.

POINT VIII

PLAINTIFFS STATE CONSTITUTIONAL CLAIMS ARE SUFFICIENT TO STATE A CAUSE OF ACTION INDEPENDENT OF HIS SECTION 1983 CLAIMS

Defendants argue that Plaintiff's federal civil claims are "generally the same" as New Jersey's Civil Rights Act, and thus should be dismissed for the same reasons. Plaintiffs respectfully submits that Defendants' motion to dismiss his federal and state claims should be denied.

CONCLUSION

For all of the foregoing reasons, Defendants' motion to dismiss should be denied in its entirety.

Dated: January 26, 2012

/s/LOUIS A ZAYAS, ESQ.
LOUIS A. ZAYAS, ESQ.