SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – CIVIL PART

JOSEPH ERNEST, Plaintiff, THE BOROUGH OF METUCHEN, et al Defendants.	**DOCKET NO: MID-L-891-11** CIVIL ACTION OPINION Decided April 11, 2014.

Not for Publication Without the Approval of the Committee on Opinions.

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WOLFSON, J.S.C.

I. Introductory Statement of the Issue Presented

This matter is before me by way of the defendants' (Borough of Metuchen and its Police Department (the "Borough" and the "MPD" respectively, collectively "Defendants") motion for summary judgment on the plaintiff's complaint of unlawful retaliation in violation of the New Jersey Civil Rights Act, N.J.S.A. 10:6-2(c) ("NJCRA").

According to the plaintiff ("Ernest" or "Plaintiff") the MPD, through the actions of its Chief of Police, (Chief Kean or "Chief") engaged in a pattern of harassing and retaliatory

conduct against him because of his participation as a member and delegate of the Policemen's Benevolent Association ("PBA"). Such conduct, Plaintiff maintains, violated the New Jersey Civil Rights Act.

In adjudicating this motion, I must resolve an issue not yet addressed by any New Jersey Court – whether the protections of the NJCRA coincide with, or are broader than those afforded by the Federal Civil Rights Act, 42 U.S.C. § 1983.

Since its landmark decision in 1978, Monell v. New York City Dep't of Social Serv., 436 U.S. 658 (1978), the United States Supreme Court held that the mere existence of an employment relationship was insufficient to subject a municipality to liability under § 1983 for the constitutional torts of its employees. Rather, *respondeat superior* liability could attach only if the deprivation of federal rights was a result of a municipal policy or custom. Id. 694-95.

After the enactment of New Jersey's own civil rights statute in 2004, New Jersey Courts have routinely looked to § 1983 to assist in its interpretation and scope. Being mindful of the broad remedial purposes of the NJCRA, I am nonetheless satisfied that neither the statutory language, nor the legislative history of its enactment, reflect a Legislative intent to allow liability for the constitutional torts committed by its employees to be visited upon the Municipality itself under a theory of *respondeat superior*. Instead, the rationale and logic underlying the Monell decision compel a contrary conclusion – that only the actions attributed to a municipality itself, either through its action or customs and policies can result in governmental liability.

Having concluded that a Monell analysis applies to NJCRA-based claims, I must determine whether Chief Kean's actions reflected official municipal policy, or whether his "edicts or acts may fairly be said to represent official policy." See Stomel v. City of Camden, 192 N.J. 137 (2007). In the present case, when viewed in a light most favorable to the plaintiff, I

am satisfied that there has been a sufficient showing upon which a reasonable jury could conclude that Kean, in fact occupied such a position of authority, and as such, the Defendants' motion for summary judgment must be denied.

II. Factual Background.

Ernest was first hired by the MPD in 1998, as a patrolman. In 2005, Plaintiff was promoted to Corporal, where he remained until 2008, when he was reassigned to the Detective Bureau, a position he believed carried with it a significant level of prestige and recognition along with other more tangible benefits, such as flexible hours and a monetary stipend.

In 1999, Ernest joined the PBA where he became quite active, becoming Vice President in 2002, and later in 2005, its President. Since 2005, he served as a PBA delegate, and was therefore involved in negotiating employment contracts on behalf of the PBA members, attending certain meetings, and in serving as a voice to air the grievances of the PBA's rank and file members..

According to the complaint, Plaintiff's involvement with the union caused the Chief to develop an animus towards him which manifested itself in multiple incidents of retaliation, including: (1) singling him out with a specific order to bring his vehicle into compliance with Title 39; (2) initiating an Internal Affairs investigation against him for time theft; (3) transferring him from the Detective Bureau to a less prestigious department; (4) investigating his cell phone use; and (5) implementation of a number of policy changes that were specifically targeted at Plaintiff.[1] In point of fact, Ernest contends that there were never any complaints about his

[1]Other less obvious instances of acts of retaliation were alleged as well. For example, after his reassignment, the Chief cleaned out his desk in the Detective Bureau so that another officer, assigned to that position could use it. In addition, Ernest's old badge number was unavailable upon his reassignment to patrol, although it was provided to him shortly thereafter. Ernest also claims that he was denied a vacation day request, while a less senior officer who had requested that same day off, and was given permission.

performance until he (as a PBA delegate) challenged one of the Chief's orders as being overly broad and detrimental to certain PBA members.

That order, issued in January of 2010, was announced by the Chief after he observed a vehicle that looked like a "piece of junk" parked in an area designated "Police business only." When he later discovered that the car belonged to a police officer, he promptly instructed that officer to bring his car into compliance with provisions of Title 39. Thereafter, the Chief noticed that many of the other officers' cars were similarly noncompliant with, and in violation of Title 39. As a result, on January 4, 2010, Kean ordered any police officer, whose personal car violated Title 39 "including window tinting, both license plates, inspection" would be precluded from parking in the police lot. Upon receiving that order, Plaintiff, in his role as a PBA delegate, together with Bob Belluscio (the PBA president at the time) ("Belluscio"), met with the Chief and expressed their concerns that the order could be detrimental to the PBA members.[2] Specifically, Plaintiff pointed out that since Title 39 covered such a wide range of possible infractions, the Chief's order was, for all practical purposes, too vague, as well as potentially prohibitively expensive. As an example of just how broad the order was, Ernest pointed out that even his own car would be technically noncompliant.[3]

The next day, the Chief rescinded his order, explaining that "unfortunately, to my surprise, this has become a contentious issue which was never my intention. After lengthy discussion with the PBA president and in the interest of maintaining harmony within the police

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[2] During his deposition, the Chief understood that Ernest was speaking on behalf of the PBA. As he testified, "I don't think he disagreed so much with it. He just felt that it was his job to fight for the PBA or looking out for his members." See Kean Dep. Tr. 92:22-24.

[3] Ernest stated that his vehicle had two infractions. First, instead of a front license plate, Plaintiff had a blue plate which is used in the police community to signal to other police officers that the driver himself is a police officer and is available in case of an emergency. His car also had tinted windows which were, potentially, motor vehicle violations.

department, I am not going to push the issue at this time." Notwithstanding the order's rescission, the Chief directed Plaintiff (and only Plaintiff) to replace the blue plate in the front of his car with a license plate within 72 hours or face disciplinary action.[4] While Plaintiff ultimately complied with the Chief's order, he believed it evidenced the Chief's animosity towards him since no other officers with similar infractions were specifically ordered to rectify them.[5]

According to Plaintiff, the Chief's alleged retaliation did not stop with the Title 39 order. Less than a month later, Kean ordered an internal affairs officer, Sergeant Kilker ("Kilker"), to commence a "time theft" investigation against Plaintiff. Defendants' contention was that in early February of 2010, Plaintiff would report to work late, but would record that he was on time in the sign-in book, or he would leave early while indicating that he worked a full shift. Kilker conducted his investigation by comparing the video recorded times of Plaintiff's arrivals and departures with the sign-in book, and reported that Ernest "misrepresented" his hours on eleven occasions. After learning the results of the investigation, the Chief suspended Plaintiff for two days.

Predictably, Plaintiff vehemently disagreed with the outcome of this investigation and questioned its validity, asserting that his assignment to the Detective Bureau, entitled him to "flexible" hours, a tacitly accepted "perk" of being a detective. Further, Plaintiff also noted that he frequently would not put in for his overtime, and instead, requested permission from his direct

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[4] The occurrence of these events is disputed by the parties. Defendants, relying on the certification of Belluscio, maintain that during the meeting with the Chief, Belluscio agreed that the PBA members will affix front license plates to their vehicles, and those instructions were forwarded to all the police officers via text messages, and Ernest was the only one who failed to comply. Since this is a motion for summary judgment, I am required to view the facts in light most favorable to Ernest. Therefore, for the purposes of this motion only, I will accept Plaintiff's version as true.

[5] As an example, Plaintiff points to Officer Knoll who never put a front license plate on his vehicle and to Officer Karalevich who did not replace his tinted windows.

supervisor to leave early or come in late as a trade-off. None of those facts were reflected in the internal investigations report, despite Plaintiff's contention that such trading of hours was routinely allowed in that department. Moreover, a comparison of the log book and the video revealed that at least two other officers failed to sign out at the end of their shifts, although no investigation nor any discipline was ever directed at them.

Frustrated by what he believed to be retaliatory conduct, Ernest sent an email to the Chief on February 21, 2010. There, he addressed the deteriorating relationship between them: "I'm writing this e-mail, for lack of a better term, to clear the air. I need to get into the animosity that has festered it's [sic] way into our relationship over the past month(s)." (Def. Br. Patel Cert. Ex. 11). That same email communication included an apology for his Title 39 infraction along with a request that the Chief reconsider his two day suspension. The Chief, in fact, did so, and the two-day suspension order was lifted.

Thereafter, no significant retaliatory actions were alleged to have occurred until the end of 2010, when the Chief reassigned Ernest from the Detective Bureau to the Patrol Division as a Corporal. Plaintiff declined that assignment, choosing to accept a position of a patrolman instead.[6] In what some might consider a disingenuous argument, Defendants' claim that Plaintiff's removal from the Detective Bureau was not a demotion. Indeed, even the Chief conceded that the Detective Bureau is considered more "elite" than other available assignments and opined that only the best officers are assigned there. That there are tangible benefits associated with being a detective further bolsters Plaintiff's argument that the reassignment constituted an adverse employment action. Some of those benefits are: (1) better hours; (2) flexibility of hours, (3) having most holidays off; and (4) a stipend of $2,500.00 per year, (not

[6] In refusing the rank of "Corporal," Plaintiff explained that the added duties of that position would inhibit his ability to spend time with his children.

available to patrolmen). Importantly, placement in the Detective Bureau is generally regarded as a positive step in advancing one's career since, historically, most officers are promoted after their service in the Bureau.

Ernest posits that his reassignment was due to his involvement in the collective bargaining negotiations on behalf of the PBA, and not because of any flaws in the performance of his duties. Any claim of poor performance, according to Plaintiff, was simply a pretext.[7] As alleged by Plaintiff, when the PBA's collective bargaining agreement expired in 2009, new negotiations ensued between the Borough Administrator and the PBA, which was represented by Belluscio and Ernest. Although the Chief did not participate directly in those negotiations, it is alleged that he knew of Plaintiff's involvement and was made aware of many of the PBA's demands.[8] By May of 2010, almost six months after the talks had commenced, the parties reached a stalemate, prompting the PBA to exercise its right to file for arbitration. Upon learning

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[7] In addition of the time theft investigation, in August 2010, Belluscio, as a head detective on a narcotics case, assigned Ernest to conduct drug-related-overnight surveillance at a particular house in Metuchen, which Ernest apparently failed to do. When he was asked the following day whether he had observed anything suspicious at the house, according to Belluscio he answered "No." It was not until later that day that Belluscio learned that Ernest never conducted the surveillance and remained in the police department all night.

[8] The Defendants deny that the Chief knew of Ernest's involvement with the negotiations. Specifically, the Borough points to the following testimony:

> Q: Ernest was negotiating this contract with the borough at this time. Correct?
> A: The PBA was. It might have been Joe [Ernest] personally. It might have been Joe and Belluscio. I'm not sure.
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> Kean Dep. Tr. 133:14-18

Whether or not the Chief was unsure of the extent of Ernest's and Belluscio's involvement in the negotiation, this testimony presents precisely the type of factual dispute that should be resolved by a jury.

that the PBA filed for arbitration, the Chief made known his displeasure, both within the department and through postings on the internet.[9]

Plaintiff urges that these postings show the depth of the Chief's anger with the PBA and certain of its members, and explains the Chief's motivation in using his authority to retaliate against Plaintiff.

Even after being re-assigned from the Detective Bureau to the patrol division, Plaintiff asserts that the retaliation continued. According to Ernest, after he began his new assignment in patrol, the Chief, for the first time instituted time checks, prompting one of the patrol officers on Ernest's squad to sarcastically "thank" him because the squad had not been subjected to such scrutiny prior to his (Ernest's) arrival. Thereafter, Plaintiff's performance was consistently criticized by the Chief, and yet another internal affairs investigation was instituted against him, this time to determine the extent of his personal use of a department-issued cell phone – an action, he alleges, was never taken against any other officer.

By January of 2011, the increased stress at work exacerbated Plaintiff's pre-existing asthma condition to such an extent that his physician recommended a four-month leave of

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[9] In point of fact, throughout April of 2010, the Chief made numerous postings on an internet blog (nj.com), all of which accused the PBA of greediness and attempted to discredit it. For example, one of such postings read as follows:

> Band of Brothers?????? Cops are selfish and only care about themselves. They would sell out their own mother for a dollar. They should accept a wage freeze, it's the right thing to do. I wonder if that BS PBA brotherhood means anything over the almighty dollar. They should stick together and do what is right for the Borough and not be stupid and greedy. Unfortunately I know some of them and most understand, but more are selfish

Although there is a department rule specifically prohibiting the Chief's conduct ("no officer or member of the department shall make any remark in regard or any officers or member of the department, which may bring the department or any member thereof into disrepute or subject to it, or him, or them, to any ridicule . . . ." See Metuchen Police Department Rules Operations and Procedures Manual (Revised Aug 19, 2010)), no investigation and no disciplinary proceedings were ever instituted against the Chief.

absence. His treating physician forwarded his medical evaluation to the Department, which indicated that "[t]he patient clearly states that harassment at work is triggering his asthma symptoms and not the regular duties of police officer." (See Pl.'s Ex. P 24) Responding to those allegations, the Metuchen Borough Attorney instructed Department to "immediately initiate an Internal Affairs Investigation into the harassment . . . ." (See Def's Ex. 24)[10] In response to the Borough attorney's directive, the Defendant hired Verital LLC, an "independent" investigatory agency, which issued its report on June 15, 2011, concluding that there had been no harassment. (Def. Ex. 25). Consequently, no further action was taken by the Borough regarding the matter and the Chief was neither reprimanded nor otherwise criticized.

In this motion, Defendants argue that the Borough cannot be held liable for the actions of the Chief because he was not a "final" policy decision-maker pursuant to Monell, supra, and, even if he were, Plaintiff's cause of action still fails under the NJCRA because: (1) Plaintiff did not engage in any protected activity; (2) there was no hostility or disparate treatment towards Plaintiff; and (3) Plaintiff cannot show any nexus between any protected activity and the purported disparate treatment.

II. Standard of Review.

Rule 4:46 provides that a motion for summary judgment must be granted if:

> the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

[10] By that point, the within Superior Court complaint (filed on February 2, 2011) had also been forwarded to the Borough.

At this stage in the proceedings, all the competent evidence, as well as any reasonable inferences therefrom, must be viewed in light most favorable to the non-moving party. Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995). To determine whether there are any genuine issues of material fact for trial, a motion judge must determine whether the evidential materials presented are "sufficient to permit a rational fact finder to resolve the alleged disputed issues in favor of the non-moving party." Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995). However, if there is single unavoidable resolution of "the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of Rule 4:46-2." Id. A motion for summary judgment, therefore, should be denied when there is such genuine issue of material fact, or if a party opposing the motion has come forward with evidence that creates such issue. See Brill, supra, 142 N.J. at 529.

III. Discussion.

A. Vicarious Liability under the New Jersey Civil Rights Act.

When addressing the interpretation of any particular statue, the court's goal is to discern and effectuate the Legislative's intent to the fullest extent possible. See State v. Lewis, 185 N.J. 363, 369 (2005). The NJCRA was enacted in order to ensure that "every individual in this State enjoys the free exercise of his civil rights which are guaranteed and secured under the New Jersey Constitution and the Federal Constitution." See L. 2004, c. 143, see also S. Juduciary Comm., Statement to Assemb. Bill No. 2073 at 3. The bill thus provides New Jersey citizens with a State remedy for deprivation of or interference with one's civil rights and is meant to "address potential gaps which may exist under remedies currently provided by New Jersey's Law Against Discrimination." Id. The Sponsors of the Bill have also recognized that it was "modeled on the Federal Civil rights law which provides for civil action for deprivation of civil

rights (42 U.S.C.A. § 1983)" as well as the Massachusetts and Maine Civil Rights Acts. Juduciary Comm., Statement to Assemb. Bill No. 2073 at 3

In his statement accompanying the signing of the bill, Governor McGreevey explained that while the NJCRA enhances the civil rights protections available to our citizens by offering a powerful new procedural mechanism "the very existence of which will help deter those who would improperly deprive us of our constitutional rights, complementing existing statutes," it nonetheless "does not create any new substantive rights, override existing statutes of limitations, waive immunities or alter jurisdictional or procedural requirements . . . that are otherwise applicable to the assertion of constitutional and statutory rights." Office of the Governor, News Release at 1 (Sept. 10, 2004). By "signing this new law, New Jersey has now established a State analog to the federal civil rights act codified at 42 U.S.C.A. § 1983." Id.

The broad remedial purpose of the NCJRA is readily apparent from the legislative history. See Owens v. Feigin, 194 N.J. 607, 613 (2004) ("[T]he legislature adopted the CRA for the broad purpose of assuring a state law of action for violations of state and federal constitutional rights . . . [.]") The statute allows a cause of action when

> 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.

N.J.S.A. 10:6-2(c)

The penalty for such violations is imposed pursuant to subsection (e), which provides:

> 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.
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> N.J.S.A. 10:6-2(e)

Those legislative pronouncements strongly suggest that in analyzing the scope and reach of the NJCRA, the court should look to the precedents established by the Federal Courts in their interpretations of §1983. Indeed, our courts have routinely relied on Federal interpretations of § 1983 as persuasive authority in determining the scope of NJCRA, and have engrafted numerous federal requirements into the State statute. See e.g. Ramos v. Flowers, 429 N.J. Super. 13 (App. Div. 2012) (holding that the qualified immunity defense available under § 1983 was also available under the NJRCA ("The committee statements make it clear that the 'gaps' referred to in the bill statement cannot be construed as an indication that the Legislature sought to avoid the application of the qualified immunity defense available in § 1983 cases")); Filgueiras v. Newark Public Schools, 426 N.J. Super. 449 (App. Div. 2009) (refusing to recognize a liberty interest in one's reputation as being protected by substantive due process right under the NJCRA since "[t]he federal precedent under § 1983 has refused to do so under similar circumstances"); Rezem Femily Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 115 (App. Div. 2011) (finding that the elements of a cause of action for violations of substantive due process are identical under the State and Federal law, stating "[w]e see no reason to apply different elements to a cause of action brought under State statute from those the New Jersey Supreme Court found were applicable under federal civil rights litigation"); Gonzalez v. Auto

Mall 46, Inc., 2012 N.J. Super. Lexis Unpubl. LEXIS 1560, (App. Div. July 2, 2012) (interpreting the statutory phrase "under the color of law" analogously to its federal counter-part). See also Trafton v. City of Woodbury, 799 F. Supp. 2d 417, 443 (D.N.J. 2011) ("This district has repeatedly interpreted NJCRA analogously to § 1983").

While no New Jersey Court has addressed whether the Monell's general rule precluding *respondeat superior* liability would apply to the State Civil Right Act, one Federal Judge has concluded that it does. In Ingram v. Twp. of Deptford, 911 F. Supp. 2d 289 (2012), Chief Judge Simandle opined that New Jersey would follow the federal precedent: "[B]ecause *respondeat superior* liability is not permitted under § 1983, and because New Jersey courts interpret the NJCRA as analogous to § 1983, the Court holds that *respondeat superior* liability is not permitted for claims under the New Jersey Constitution and the NJCRA." Id. at *24.

I agree with Judge Simandle's well-reasoned opinion. To be sure, the Legislative pronouncements that the NJCRA was modeled after §1983, years after the Supreme Court decided Monell, strongly suggests that the Legislature, which is presumed to be aware of relevant judicial precedents, intended to preclude *respondeat superior* liability from attaching to municipalities. Had they intended otherwise, that language of the statute would, and easily could, have so indicated.

In addition to the considerations expressed by Judge Simadle, the propriety of a rule prohibiting *respondeat superior* liability from being imposed on a municipality is further buttressed both by the express language of the statute itself, and considerations of sound public policy. For example, the monetary fine envisioned by the NJCRA can only be imposed against someone "who deprives, interferes or attempts by threats, intimidation or coercion" to cause a deprivation of one's Constitutional rights. Indeed, such phrasing makes it clear that one must

engage in conduct that deprives one of his rights, to be liable. Thus, the requirement that the conduct complained of be the "official policy" of the municipality, and not merely the actions of municipal employees, makes it clear that the municipality liability "is limited to actions for which the municipality is actually responsible". See Stomel, supra, 192 N.J. at 145-46 (citing Pembaur v. City of Cincinnati, 475 U.S. 469, 479 (1986)). Accordingly, a municipality will be held accountable only when it has acted, either through its creation of a policy or a custom, or by its having delegated final decision-making authority to a particular individual who exercised it in a way that violated one's constitutional rights.[11]

Plaintiff, relying on Owens v. Feigh, 194 N.J. 607 (2008) argues that Monell's limitations on vicarious liability should not apply. Because the CRA is a "gap filling" statute, it should be liberally construed so as to expand civil rights protections wherever necessary to fulfill its remedial purposes. Those arguments are not persuasive. In the first instance, Owens, supra, does not compel such a conclusion. In that case, the Court held only that the "notice of claims" requirement, (normally applicable to the actions under the Torts Claims Act) did not apply to the NJCRA claims. Id. at 612. While the Court did acknowledge the important remedial aims of this legislation, that alone was not the basis of its decision. Rather, after examining the statutory language, the sponsor's statements, committee statements, and floor amendments, the Court was satisfied that there was no evidence of any legislative intent to impose the TCA requirements on the NJCRA, finding that the statutory history was utterly "bereft of any express or implied expression of intent that the TCA's notice-of-claim requirement was envisioned to constitute a prerequisite to the maintenance of the CRA claim." Id. The Court also noted that the NJCRA's purpose "includes rectifying violations of constitutional rights, the protection of which was never

[11] This holding accomplishes another salient public purpose – preventing a flood-gate of *respondeat superior* litigation draining municipal treasuries with litigation costs and damages where the only nexus to the constitutional violation is employment by the municipality.

dependent on the TCA's procedural and substantive requirements". Id. at 613.

In addition, because New Jersey's Law Against Discrimination is interpreted more broadly than its Federal analog, Plaintiff argues that the NJCRA should, likewise, offer broader protections than those extant under § 1983. I disagree. New Jersey has a long standing and fervent public policy to eradicate the "cancer of discrimination." Lehmann v. Toys "R" Us, 132 N.J. 587, 600 (1993). Indeed, New Jersey "has always been in the vanguard" of that fight. Anderson v. Exxon Co., U.S.A., 89 N.J. 483, 492 (1982). While it is, without a doubt, important to protect one's right to free speech, the impact typically felt by a person whose right of speech was restricted or curtailed does not equate so readily with the severe and potentially devastating or debilitating psychological effects that individuals may endure when they are subjected to racial, sexist, or some other horrific or invidious discriminatory treatment or epithets. Indeed, New Jersey's public policy is so strong in this respect that the NJLAD has historically offered broader protections against unlawful discrimination than have been afforded by the Federal Courts under Title VII, 42 U.S.C. §§ 2000e et seq., and compare N.J.S.A. § 10:5-12. See e.g. Cicchetti v. Morris County Sheriff's Office, 194 N.J. 563, 594 (2008) (holding that under the NJLAD one may liable for his own conduct as an aider and abettor of unlawful discrimination, while no such liability could be imposed under the federal law); Bergen Commer. Bank v. Sisler, 157 N.J.188 (1999) (holding that NJLAD's age discrimination provision applied to all ages and not only the "protected age group" of forty and above under Title VII); Enriquez v. West Jersey Health System, 342 N.J. Super. 501 (App. Div. 2001) (holding that discrimination against transsexuals was unlawful under the NJLAD, while its status under the federal law was still unclear).

B. Application of the Monell Standard.

Having concluded that Monell's prohibition of *respondeat superior* liability applies to Plaintiff's cause of action, I must determine whether in this case, the Chief's alleged actions reflected a policy or custom, or otherwise represented the final decision-making authority of the municipality thereby rendering it fair for the Borough to be held accountable for his conduct.

Pursuant to Monell, a municipality may only be held vicariously liable for the actions of its employees when "the policymakers make a deliberate choice from among various alternatives to follow a particular course of action, where the policy reflected deliberate indifference to the constitutional rights of the municipality inhabitants and where the policy was the moving force behind a constitutional violation." Mark v. Borough of Hatboro, 51 F.2d 1137, 1149 (3d. Cir. 1995). Therefore, liability will attach only when the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." Id. A governmental "policy" may be shown by evidence that a "'decision maker possess[ing] final authority to establish municipal policy with respect to the action' issues an official proclamation, policy, or edict." Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir. 1990).

Generally, the term "official policy" refers to formal governmental rules or practices. Stomel, supra, 192 N.J. at 146. In some circumstances, however, a "single act or decision by a municipal policymaker can impute liability to the municipality." Id. Such liability is appropriate when the "decision maker possesses the final authority to establish municipal policy with respect to the action ordered." Id. Authority to make municipal policy may be granted by a legislative enactment or it may be delegated by an official who possesses such authority. Id. Whether an official has policy making authority is determined by State law. Id.

In Loigman v. Twp Comm. Of Middletown, 185 N.J. 566 (2006), the Supreme Court enumerated the factors to be considered in determining when a decision or an act of a municipal official is sufficient to establish an unconstitutional municipal policy:

> First, the municipality faces § 1983 liability only for "acts which the municipality has officially sanctioned or ordered." Second, the municipality is subject to liability only for the acts of those officials "who have final policymaking authority." Third, state law determines "whether a particular official has final policymaking authority." Last, the unconstitutional "action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in *that area* of the [municipality's] business
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> 185 N.J. at 591, 889 A.2d 426 (citations omitted, emphasis in the original) (quoting City of St. Louis v. Praprotnik, 485 U.S. 112, 123, 108 S. Ct. 915, 924, 99 L. Ed. 2d 107, 118 (1988)).

Whether or not a municipal employee is a "final" decision maker is "a question of law for the trial court and is not an issue to be submitted to the jury." Stomel, supra, at 145. If the trial court "has determined that an individual official has the power to make official policy *on a particular issue,* it is then for the jury to decide whether that individual's decision caused the deprivation of rights at issue." Id. (emphasis supplied) In making this assessment the court should review "state and local positive law, as well as custom or usage having the force of law." Besler v. Board of Educ. Of West Windsor-Plaintisboroo Regional School Dist., 201 N.J. 544, 564 (2010). Simply stated, did the Chief have the final decision-making authority over the "harassing" acts alleged by the plaintiff – i.e. the internal affairs investigation, the re-assignments, and the disciplinary actions taken against Ernest.

Predictably, the Defendants assert that he did not, urging that so long as an employee's "decision is subject to review, even discretionary review, it is not final and that employee is therefore not a policymaker for purposes of imposing municipal liability under § 1983." Citing

Brennan v. Norton, 350 F.3d 399, 428 (3d Cir. 2003). Additional support for the proposition that the Chief was not a final decision-maker may also be gleaned from the collective bargaining agreement between the MPD and the PBA, which provides that any action taken by the Chief in retaliation for union activity is subject to review by (1) the Borough Administrator and (2) the arbitration process. Inasmuch as the Chief's actions were reviewable, Defendants assert that he cannot be deemed the final decision-maker as a matter of law. This argument is without merit.

Notwithstanding the fact that some other governmental entity or official may have retained the ability to review another's particular decision, where it chooses not to do so, or otherwise embraces the decision by declining to intervene or remedy the violation, liability may still attach. For example, in Stomel, supra, the plaintiff, a former public defender, asserted that the Mayor of Camden, wrongly retaliated against him, in violation of his First Amendment rights, by removing him from his position because he testified against the Mayor at his corruption trial. Stomel, supra, 192 N.J. at 147. The City maintained that the Mayor was not the "final" decision-maker because the Mayor's authority to remove a department head (which a Public Defender was), was subject to the City Council's authority to exercise its veto power. N.J.S.A. 40-69A-43(c), Id. at 150-51. Rejecting the City's "formalistic" approach the Supreme Court explained that the Mayor was "by implication as well as by official council resolution, the authorized decision-maker responsible for contracting with" the Public Defender for his services. Id. at 151. Moreover, "the fact is that by virtue of Stomel having brought this action, the Council had effective notice of the removal and could have disapproved it. It did not. Instead, the Council effectively ratified the Mayor's action when it did not exercise its veto power[.]" Id. at 153 (emphasis supplied) (stressing that the Council "cannot be permitted to step away, in this fashion, from the authority that it conferred" on the Mayor).

Another similarly unavailing argument was presented to the Court in Besler v. Board of Educ. Of West Windsor-Plaintisboroo Regional School Dist., 201 N.J. 544, 564 (2010). There, the local School Board sought to avoid liability for a constitutional tort committed by the Board's President. In that case, the plaintiff alleged that his First Amendment right to free speech was violated when the Board President prevented him from completing a statement regarding a coach's verbally abusive demeanor. Id. 555-56. While the Board President was not empowered with final decision-making authority on all board-related issues, he did control the meeting in question. Id. At 568. Once again rejecting a formalistic view in favor of a common sense approach, the Court observed: "even if the remaining members of the Board had the authority to overrule [the board president] and insist that [the plaintiff] be heard, they obviously acquiesced in the decision to silence [the plaintiff] . . . . In that sense, the members of the board, by their silence, ratified [the president's] gaveling down of [the plaitniff]." Id. at 568 (emphasis supplied).

In the instant matter, the Chief was vested with authority to oversee the day-to-day activities in the police department though Borough Ordinance 2010-15, enacted pursuant to the N.J.S.A. § 40A:14-118, commonly known as the Chief's Bill of Rights. That statute provides:

> The governing body of any municipality, by ordinance, may create and establish, as an executive and enforcement function of municipal government, a police force, whether as a department or as a division, bureau or other agency thereof, and provide for the maintenance, regulation and control thereof. Any such ordinance shall, in a manner consistent with the form of government adopted by the municipality and with general law, provide for a line of authority relating to the police function and for the adoption and promulgation by the appropriate authority of rules and regulations for the government of the force and for the discipline of its members. The ordinance may provide for the appointment of a chief of police and such members, officers and personnel as shall be deemed necessary, the determination of their terms of office,

the fixing of their compensation and the prescription of their powers, functions and duties, all as the governing body shall deem necessary for the effective government of the force. Any such ordinance, or rules and regulations, shall provide that the chief of police, if such position is established, shall be the head of the police force and that he shall be directly responsible to the **appropriate authority** for the **efficiency and routine day to day operations** thereof, and that he shall, pursuant to policies established by the appropriate authority (emphasis supplied):

> **a.** Administer and enforce rules and regulations and special emergency directives for the disposition and discipline of the force and its officers and personnel;
>
> **b.** Have, exercise, and discharge the functions, powers and duties of the force;
>
> **c.** Prescribe the duties and assignments of all subordinates and other personnel;
>
> **d.** Delegate such of his authority as he may deem necessary for the efficient operation of the force to be exercised under his direction and supervision; and
>
> **e.** Report at least monthly to the appropriate authority in such form as shall be prescribed by such authority on the operation of the force during the preceding month, and make such other reports as may be requested by such authority.

As used in this section, "appropriate authority" means the mayor, manager, or such other appropriate executive or administrative officer, such as a full-time director of public safety, or the governing body or any designated committee or member thereof, or any municipal board or commission established by ordinance for such purposes, as shall be provided by ordinance in a manner consistent with the degree of separation of executive and administrative powers from the legislative powers provided for in the charter or form of government either adopted by the municipality or under which the governing body operates.
Except as provided herein, the municipal governing body and individual members thereof shall act in all matters relating to the police function in the municipality as a body, or through the appropriate authority if other

than the governing body.

> Nothing herein contained shall prevent the appointment by the governing body of committees or commissions to conduct investigations of the operation of the police force, and the delegation to such committees or commissions of such powers of inquiry as the governing body deems necessary or to conduct such hearing or investigation authorized by law. Nothing herein contained shall prevent the appropriate authority, or any executive or administrative officer charged with the general administrative responsibilities within the municipality, from examining at any time the operations of the police force or the performance of any officer or member thereof. In addition, nothing herein contained shall infringe on or limit the power or duty of the appropriate authority to act to provide for the health, safety or welfare of the municipality in an emergency situation through special emergency directives

The Borough of Metuchen, through its adoption of such an ordinance, delegated broad responsibility for the day-to-day operations of the department to its Chief of Police. Federal Courts, addressing a similar ordinance in the context of § 1983, have interpreted it to have vested final decision-making authority in the chief. See e.g., Hines v. Albany Police Dep't, 520 Fed. Appx. 5 (2d Cir. 2013). Like the Metuchen ordinance in this case, the Albany City Code, in Hines expressly authorized the Police Chief to "make, adopt and enforce such reasonable rules, orders and regulations" as were necessary for the Police Department's "performance of all duties." Id. In that case, the Albany Police Department had a designated unit that handled the seizure and holding of property. The head of this unit reported to the police chief. Id. At trial, the police chief testified that he retained discretion to refuse to seize a particular item, and that he was the individual tasked with handling any citizens' complaints. Id. Under those circumstances, the court held that the chief was the final decision-maker responsible for establishing the policy with respect to the subject matter in question. Id.

In another case, Andrews v. Philadelphia, 895 F. 2d 1469 (3d Cir. 1990) the court held that a Police Commissioner was a final policy-maker because "he promulgated and disseminated

a police department training manual and a course outline explaining the prohibitions against sexual harassment and discrimination." Id. at 1482. Under his supervision, "bulletins and regulations were issued outlining the duties of police officers with respect thereto and implementing city and departmental anti-discrimination policy. In addition, he set up a division, the Equal Employment Office, to deal with problems of discrimination and he *personally* reviewed the IAD report issued in this case." Id. Accordingly, the Commissioner was deemed to be the final decision-maker allowing for imposition of vicarious liability on the city of Philadelphia. Id.

Santiago v. City of Vineland, 107 F. Supp. 2d. 512 (D.N.J. 2000), is not to the contrary. While the court there concluded that hiring and firing authority was not vested in the chief of police, Id. at 539, the facts in that case are markedly different from those present here. Each of the Chief's actions identified by Ernest fall squarely within the parameters of N.J.S.A. 40A:14-118, and importantly, were expressly delegated to the Chief of Police by ordinance. Indeed, the Chief is specifically authorized to administer rules and regulations regarding discipline, which he purportedly did here by: (1) ordering Ernest to affix a license plate to the front of his car; (2) initiating the internal affairs investigation against him; and (3) by suspending him for two days as a result of the time theft investigation. Likewise, the Chief is empowered to "prescribe duties and **assignments**" (emphasis supplied), a power which he unilaterally exercised when he reassigned Ernest from the Detective Bureau to Patrol.

Even if the Chief were not the final decision-maker here due to the Borough Administrator's ability to review his actions, liability would nonetheless attach because of the Borough's clear ratification of the Chief's decisions. See Besler, supra, 201 N.J. at 564; Stomel, supra, 192 N.J. at 153. This is especially apparent in light of the Borough's initiation of an

"independent" investigation of Ernest's harassment allegations and its acceptance of the report's finding of no fault or harrssment in any of the Chief's actions. By declining to discipline the Chief or return Plaintiff to the Detective Bureau, the Borough, at a minimum, acquiesced, ratified and approved each of the Chief's decisions. I am therefore satisfied that Borough may be held vicariously liable under the NJCRA if Plaintiff's allegations are accepted as credible by a jury.

C. Whether Plaintiff States a Cause of Action Under the NJCRA.

There is a three (3) prong test for analyzing whether a cause of action for unlawful retaliation in violation of §1983 and the NJCRA will lie: (1) the plaintiff engaged in a protected activity; (2) that defendants' retaliatory action was sufficient to deter a person of ordinary firmness from exercising his or her rights; and (3) that there was a causal connection between the protected activity and the retaliatory action. See e.g. Lauren W v. DeFlaminis, 480 F. 3d 259, 267 (3d Cir. 2007).

1. Protected Activity.

First, Defendants do not dispute, nor can they, that Plaintiff's union activities, including his involvement with the PBA's contract negotiations, constitute protected activity. They do dispute, however, that the Title 39 issue rises to that level. Plaintiff, on the other hand, asserts that New Jersey Constitution, Article 1 Paragraph 19, specifically protects his right as a public employee to "organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing." Thus, according to Plaintiff, since he was communicating the PBA's grievance regarding the Chief's original Title 39 order as a PBA delegate, he was engaged in protected

activity. [12]

Each of the cases relied on by Defendants are Federal cases which, unremarkably, have interpreted § 1983 so as not to "constitutionalize employee grievances" under the First Amendment since, ordinarily, such speech would not be protected. See Garcetti v. Ceballos, 547 U.S. 410, 420 (2006) ("[T]he First Amendment does not empower public employees to 'constitutionalize the employee grievance.'"); See also, Green v. Philadelphia Hous. Auth., 105 F. 3d. 882, 885 (3d. Cir. 1997) (to qualify as protected activity, the speech must be on a matter of public concern).

By way of contrast, the NJCRA is intended to protect against violations of the New Jersey State Constitutional rights. To suggest that grievances or statements made by union representatives must be of public concern, lest they be unprotected, would essentially make the NJCRA inapplicable to most, if not all of the actions taken by unions through their members or their representatives, thereby making those union members or officials vulnerable to adverse

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[12] Defendants, relying on an unpublished Appellate Division decision, Duncan v. Mayor and Committee of Hazlet, 2011 N.J. Super. Unpub. LEXIS 1941 (App. Div. July 19 2011), urge that to be protected by the NJCRA, Ernest's speech must have related to a matter of public concern; and since the internal procedures of the police department are of no significance to the public, there was no "protected" activity.

In Duncan, the plaintiff claimed that his rights to free speech and to air grievances, guaranteed by the New Jersey Constitution, were violated. 2011 N.J. Super Unpub. LEXIS 1941 at *8. The trial court entered summary judgment in favor of the township (and the Appellate Division affirmed) because another officer filed the grievance which caused the alleged discrimination, not Plaintiff. Id. at *18-19. The Appellate Division acknowledged that claimed Constitutional violations should be analyzed under the-three prong test enunciated Baldassare v. New Jersey, 250 F. 3d 188 (3d. Cir. 2001), and as such, Plaintiff would have to establish that (1) the speech involve a matter of public concern; (2) that his interest in the speech outweighs the state's countervailing interest as an employer in promoting the efficiency of the public services it provides through its employees; and (3) that the protected activity was a substantial or motivating factor in the retaliatory action. Baldassare, 250 F.3d at 194-95. However, the plaintiff there never raised a cause of action under the New Jersey Civil Rights Act, as Ernest did here. Duncan, N.J. Super. Unpub. at *21. Accordingly, the case has little or no precedential value in the context of this case.

employment actions with no hope of redress. To suggest that such conduct would be exempt or excluded from the reach of the NJCRA is simply untenable, and is both wholly unsupported by the language of the statute, and completely inconsistent with its broad remedial purposes. I am therefore satisfied that there are sufficient facts in the record to establish that Plaintiff engaged in protected activity, despite the fact that the grievances may not have involved matters of "public concern."

2. Retaliatory Activity and Causation.

A retaliatory action is one that is "likely to chill a person of ordinary firmness in the exercise of their constitutional rights." Marrero v. Camden County Bd. of Soc. Serv., 164 F. Supp. 2d 455, 467 (D.N.J. 2011). Defendants argue that Plaintiff failed to establish that any of the Chief's actions were retaliatory. This argument lacks merit. While I agree that certain of plaintiff's allegations, when viewed separately, might be viewed as trivial or insignificant, others, taken separately or in the aggregate, could, if proven, be interpreted as retaliatory by a jury.

Although, the initiation of an internal affairs investigation will not ordinarily be deemed retaliatory *per se*, a jury may conclude that it was, if it was undertaken to harass or punish Plaintiff. Indeed, the jury in this case will likely be asked to draw just such an inference from the fact that the same Internal Affairs investigation revealed that at least two other officers misstated their work hours, but no follow up investigation or any disciplinary proceedings was ever instituted as to them. A retaliatory motive may also be inferred from the Borough's inexplicable failure to have even asked Ernest's direct supervisor whether Ernest had, as he maintained, asked for or received permission to leave early (or arrive late) as a trade off for not putting in a claim for overtime.

Even more troubling, perhaps, is Ernest's reassignment from the Detective Bureau to the

patrol division. Ernest, as well as other officers, (including the Chief) all testified that a transfer of this nature could be viewed negatively, as only the "best" officers are placed on the Detective Squad. This "prestige" factor, especially when added to losing the benefit of: (1) more flexible employment hours; (2) days off during the holidays; and (3) a financial stipend, could certainly be viewed by a jury as a retaliatory adverse employment action.

Nor am I persuaded by Defendants' arguments regarding the nexus between the adverse actions taken against Ernest and the protected activity. Plaintiff has presented a plethora of facts, which if accepted by a jury, could rationally sustain a finding of causation. First, the Chief acknowledged in his deposition testimony that he felt "animosity" towards Plaintiff. Evidence also exists that the Chief engaged in "selective" enforcement of the regulations by singling out Plaintiff for Title 39 compliance even after he rescinded his general order, and even though at least one other officer was non-compliant. Further, only weeks after that order was issued, the Chief instructed the Internal Affairs office to commence an investigation into Plaintiff's suspected "time theft." Remarkably, when the investigation revealed that other officers may also have engaged in "time theft," the Chief declined to initiate any disciplinary or internal affairs proceedings against them. Finally, the Chief's blatant criticism of the PBA's position during contract negotiations could very well convince a jury that he transferred Ernest to a less desirable post to punish him for his role in furthering the union's agenda. Given the totality of these circumstances, I am satisfied that Plaintiff's evidence of temporal proximity, animus, and disparate treatment , is sufficient to allow a jury to decide whether there existed a nexus between Plaintiff's protected activity and the Chief's acts of retaliation.

IV. CONCLUSION

For the reasons set forth above, Defendant's summary judgment motion is denied.

Plaintiff shall submit an appropriate form of order under the five (5) day rule, incorporating this opinion by reference.