No.

IN THE

Supreme Court of the United States

JAMES KERRIGAN, PETITIONER

v

OTSUKA AMERICA PHARMACEUTICAL, INC.,
AND MARK ALTMEYER

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

In this diversity action for retaliatory discharge, both federal courts refused to apply New Jersey's Conscientious Employee Protection Act which gives a whistleblowing employee like petitioner far more employee-friendly remedies than Title VII provides. Does their substitution of Title VII jurisprudence for this bedrock public policy of New Jersey to deny petitioner relief comport with due process or deprive him of a remedy to which he was entitled under State law, subverting notions of federalism and comity for which *Erie R. Co. v. Tompkins*, 304 U.S. 65 (1938) stands?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULES

OPINIONS BELOW

The unpublished Opinion of the United States Court of Appeals for the Third Circuit in *James Kerrigan v. Otsuka America Pharmaceutical, Inc.; Mark Altmeyer*, C.A. No.16-3218, decided and filed September 1, 2017, and reported at 2017 WL 3833055; 2017 U.S. App. LEXIS 16871 (3rd Cir. 2017), affirming the grant of summary judgment entered in respondents' favor by the United States District Court for the Eastern District of Pennsylvania, is set forth in the Appendix hereto (App. 1-7).

The unpublished decision of the United States District Court for the Eastern District of Pennsylvania in *James Kerrigan v. Otsuka America Pharmaceutical, Inc.; Mark Altmeyer*, U.S. Dist. Court No. 12-4346, filed July 5, 2016, and reported at 2016 WL 3597609 (E.D. Pa. 2016), granting summary judgment in respondents' favor on petitioner's claim of retaliatory discharge, is set forth in the Appendix hereto (App. 8-25).

The unpublished order of the United States Court of Appeals for the Third Circuit in *James Kerrigan v. Otsuka America Pharmaceutical, Inc.; Mark Altmeyer*, C.A. No.16-3218, decided and filed on September 28, 2017, denying petitioner's petition for panel rehearing or for rehearing *en banc*, is set forth in the Appendix hereto (App. 26-29).

JURISDICTION

The decision of the United States Court of Appeals for the Third Circuit affirming the grant of summary judgment entered in respondents' favor by the United States District Court for the Eastern District of Pennsylvania, was entered on September 1, 2017; and its further order denying petitioner's timely filed petition for panel rehearing or for rehearing *en banc* was filed and decided on September 28, 2017 (App. 1-7; 26-29).

This petition for writ of certiorari is filed within ninety (90) days of September 28, 2017. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall...be deprived of life, liberty, or property, without due process of law....

28 U.S.C. § 1332(a)(1):

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between-----
> (1) citizens of different States;
> ....

New Jersey Statute Annotated 34:19-2;19-3 & 19-5 [The New Jersey Conscientious Employee Protection Act] :

34:19-2. Definitions

2. As used in this act:

....

e. "Retaliatory action" means the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment.

34:19-3
Retaliatory action prohibited

3. An employer shall not take any retaliatory action against an employee because the employee does any of the following:

a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer, or another employer, with whom there is a business relationship, that the employee reasonably believes:

(1) is in violation of a law, or a rule or regulation promulgated pursuant to law, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, in the case of an employee who is a licensed or certified health

care professional, reasonably believes constitutes improper quality of patient care; or

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

b. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer, or another employer, with whom there is a business relationship, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, in the case of an employee who is a licensed or certified health care professional, provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into the quality of patient care; or

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

(1) is in violation of a law, or a rule or regulation promulgated pursuant to law, including any violation involving deception of, or

misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, if the employee is a licensed or certified health care professional, constitutes improper quality of patient care;

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

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

....

34:19-5.
Civil action, jury trial; remedies.

Upon a violation of any of the provisions of this act, an aggrieved employee or former employee may, within one year, institute a civil action in a court of competent jurisdiction. Upon the application of any party, a jury trial shall be directed to try the validity of any claim under this act specified in the suit. All remedies available in common law tort actions shall be available to prevailing plaintiffs. These remedies are in addition to any legal or equitable relief provided by this act or any other statute. The court shall also order, where appropriate and to the fullest extent possible:

a. An injunction to restrain any violation of this act which is continuing at the time that the court issues its order;

b. The reinstatement of the employee to the same position held before the retaliatory action, or to an equivalent position;

c. The reinstatement of full fringe benefits and seniority rights;

d. The compensation for all lost wages, benefits and other remuneration; and

e. The payment by the employer of reasonable costs, and attorney's fees.

In addition, the court or jury may order: the assessment of a civil fine of not more than $10,000 for the first violation of the act and not more than $20,000 for each subsequent violation, which shall be paid to the State Treasurer for deposit in the General Fund; punitive damages; or both a civil fine and punitive damages. In determining the amount of punitive damages, the court or jury shall consider not only the amount of compensatory damages awarded to the employee, but also the amount of all damages caused to shareholders, investors, clients, patients, customers, employees, former employees, retirees or pensioners of the employer, or to the public or any governmental

> entity, by the activities, policies or practices of the employer which the employee disclosed, threatened to disclose, provided testimony regarding, objected to, or refused to participate in.

STATEMENT

Petitioner James Kerrigan ("petitioner" or "Kerrigan") was hired in 2006 by respondent Otsuka America Pharmaceutical, Inc. ("respondent" or "OAPI") as its Senior Director of Global Marketing at its corporate headquarters in Princeton, New Jersey. OAPI assigned him the task of supervising the marketing of Samsca, a brand name for tolvaptan, OAPI's pharmaceutical drug which treats hyponatremia, i.e., deficient sodium in the blood. From 2009 until his termination on May 29, 2012, petitioner oversaw the drug's commercial launch, developing budgets, tactical plans and marketing projects. From 2009 to 2011, petitioner surpassed every annual sales goal for Samsca by a wide margin, earning him bonuses and increased salary.

As part of marketing Samsca, petitioner was responsible for making sure that OAPI's promotional communications about this drug complied with all the laws regarding the marketing of pharmaceutical drugs in general. In addition, he was obligated to report any illegal or unethical behavior to OAPI's Human Resources or Legal Affairs Departments; or to its Ethics, Quality & Compliance Department. Petitioner and his team were thus required to hew to OAPI's internal review process which required approval of any promotional materials by its own Promotional Review

Committee ("PRC"). The PRC could thereby insure that these materials were scientifically accurate, asserted substantiated claims, were consistent with labeling, contained fair and balanced information, and conformed with regulations of the Food and Drug Administration ("FDA").

During its promotional effort in 2010, OAPI contracted with Premier Healthcare Source, Inc. ("Premier") to prepare and send newsletters to health care providers who treated patients with hyponatremia. Without any input from petitioner or OAPI, Premier's newsletters describing Samsca failed to indicate important limitations and side effects of the drug and were therefore not fair and balanced. Once this misinformation in Premier's newsletters was discovered, the offending material was pulled from its website; and petitioner complained that these newsletters should have been treated as promotional material subject to initial review by the PRC and that OAPI's Legal, Medical Affairs, and Compliance Departments should have reported the violation to the FDA in accordance with that agency's regulations.

Following this episode of Premier's incomplete newsletter about Samsca in 2010, an article about Samsca appeared in 2011 on a website known as *Today's Hospitalist*. OAPI had neither approved nor authorized the release of this article for publication; but OAPI had sponsored an advisory panel whose information was used in the article. The article had not been formally reviewed by the PRC; it did not disclose OAPI's relationship with the article's research; and it appeared to contain "off label" information about Samsca.

Upon learning of the article's publication, petitioner in February of 2011 reported this infraction of company policy and FDA regulations to Behshad Sheldon "(Sheldon"), his direct supervisor, as well as to OAPI's head of Regulatory Affairs; and he worked to pull the article from the *Today's Hospitalist* website. In May of 2011, OAPI eventually reported this infraction to the FDA. Even though OAPI was not reprimanded by the FDA, it decided to terminate for cause the two employees who unbeknownst to petitioner had reviewed the *Today's Hospitalist* material before it was published and eventually both were allowed to resign in lieu of termination.

After this 2011 episode of publishing an incomplete and unbalanced article about Samsca on the *Today's Hospitalist* website, petitioner became concerned that OAPI had not reported to the FDA the 2010 incident involving Premier's offending newsletters. In June of 2011, petitioner "re-reported" this violation of FDA regulations to his immediate supervisor Sheldon as well as to OAPI's head of Regulatory Affairs; and he further insisted that this violation be reported to the FDA. When OAPI eventually reported this 2010 episode involving Premier's offending newsletters to the FDA in July of 2011, the agency took no enforcement action against OAPI but instead required it to inform the 20,000 affected health care providers in writing of the mistake and its lack of compliance.

In the immediate aftermath of petitioner's reporting these regulatory infractions caused by the *Today's Hospitalist* and Premier communications which, in turn, caused OAPI to report these matters to the FDA, respondent Mark Altmeyer ("respondent" or "Altmeyer"), OAPI's President and CEO, began a series of actions targeting petitioner for ridicule, confrontation and rebuke which created a hostile working environment for him and laid the foundation for his eventual termination from OAPI.

In July of 2011, Altmeyer accused petitioner of putting OAPI "in a bad light" with the FDA by his reporting of these incidents. He began an "offensive" of shaming and belittling petitioner in front of his colleagues. During a series of team meetings in the summer and fall of 2011, Altmeyer told petitioner that he did not "have any understanding of [his] business;" that petitioner's partner did all of the thinking; that he lacked "any insight and [his] strategy must be wrong;" and that his "business acumen" was poor. In a December, 2011 sales meeting, Altmeyer rebuked and belittled petitioner again in front of his colleagues by telling him that he "put the company at risk" with his performance and didn't take compliance "seriously," ignoring the fact that Altmeyer's own strategic miscues had caused some of the problems he was complaining about and that petitioner had nothing to do with the marketing issues for drugs other than Samsca which prompted his statements. These criticisms mounted even as petitioner's team met and exceeded Samsca's sales goals.

Petitioner's year-end evaluations from 2009 through 2011 by his immediate supervisor Sheldon consistently rated "Meets Expectations," entitling him to pay increases and bonuses. At the beginning of 2012, however, Sheldon's rating that petitioner "Meets Expectations" was unilaterally changed by Altmeyer and his Human Resources personnel (without changing any of the numerical scores supporting that evaluation) in contravention of corporate guidelines to "Needs Improvement," a rating which denied petitioner a merit pay increase and reduced his bonus. According to Altmeyer, the compliance issues with Samsca "had put the entire Company at risk by his lack of attention to detail...." In the meantime, Altmeyer's conduct toward petitioner prompted some senior management to complain to Human Resources that he was creating a hostile work environment for petitioner; but Human Resources failed to undertake an investigation which would have prevented Altmeyer's ongoing retaliation and harassment.

In February of 2012, Altmeyer and senior management in OAPI's Compliance and Human Resources Departments decided to fire petitioner without giving him or his immediate supervisor Sheldon notice of their decision; and his job was surreptitiously listed with a "head hunter." In March of 2012, OAPI started receiving resumes for petitioner's job; and in April of 2012, Altmeyer advocated for one of the candidates for petitioner's position, still not giving petitioner notice of his impending termination.

In May of 2012, OAPI learned that Otsuka Pharmaceutical Europe Ltd. ("OPEL"), another subsidiary of OAPI's parent corporation, had entered into a contract with a consulting company owned by petitioner's wife and that petitioner had helped his wife obtain the contract. Even though petitioner had already cleared any potential conflict-of-interest issues with his immediate supervisor Sheldon, that OPEL's President had approved of the contract, and that

OAPI's Legal Department had cleared petitioner and his team of any conflict, Altmeyer and senior management decided that petitioner's conduct violated company policy. During its investigation, OAPI's Human Resources Department confected proof against petitioner by falsely claiming that Sheldon had told him to provide full disclosure of the contract. But since Sheldon left OAPI in March of 2012, her actual advice to petitioner was never determined. On May 29, 2012, OAPI fired petitioner "for cause" and "for putting the company at risk."

On July 11, 2012, petitioner, a resident of Doylestown, Pennsylvania, filed this civil action against respondents OAPI and Altmeyer in the Bucks County Court of Common Pleas alleging six causes of action under New Jersey and Pennsylvania law related to his employment and termination. Respondents removed the case to the federal district court for the Eastern District of Pennsylvania based on diversity of citizenship under 28 U.S.C. § 1332(a)(1). Upon respondents' motion under Fed. R. Civ. P. 12(b)(6), the district judge dismissed four of petitioner's claims with prejudice (violation of New Jersey's Law Against Discrimination; negligent and intentional infliction of emotional distress; and misrepresentation) while dismissing without prejudice petitioner's two remaining claims for retaliation under New Jersey's Conscientious Employee Protection Act, N. J. St. Ann. 34:19-1 *et seq*. ("CEPA"), and for defamation.

Petitioner amended his complaint, re-pleading his CEPA and defamation claims. He alleged that Altmeyer harassed him because he reported compliance violations regarding the *Today's Hospitalist* and

Premier events; and that he was defamed by Altmeyer's derogatory statements in various team meetings and by Human Resources' claim that he had a conflict of interest because of his wife's contract. Respondents once again moved to dismiss these claims and on March 25, 2013, the district court granted the motion ruling *inter alia* that petitioner did not engage in CEPA-protective whistleblowing because his actions fell within his job responsibilities. *Kerrigan v. Otsuka Am. Pharma., Inc.*, 2013 WL 1234190 (E.D. Pa. 2013).

Petitioner appealed and on March 18, 2014, the Third Circuit reversed the dismissal of his CEPA claim under New Jersey law. *Kerrigan v. Otsuka America Pharmaceutical, Inc.*, 560 Fed. App'x 162, 166 (3rd. Cir. 2014). It ruled that intervening State law in the form of *Lippman v. Ethicon, Inc.*, 75 A.2d 432, 449 (N.J. Super Ct. App. Div. 9/4/ 2013), had expressed skepticism of the "job duty" exception upon which the district court relied in dismissing petitioner's CEPA claim and that a remand was therefore necessary to consider *Lippman's* import. *Id.*

Upon remand, the district judge stayed the case after the Supreme Court of New Jersey granted review in *Lippman*. On July 15, 2015, it issued its decision in *Lippman v. Ethicon, Inc.*, 119 A.3d 215 (N.J. 2015); and this case resumed in the district court with a ruling which allowed petitioner's CEPA claim of retaliation for reporting compliance violations in the *Today's Hospitalist* and Premier episodes to proceed.

After discovery, respondents moved for summary judgment. On July 5, 2016, the district court, Beetlestone, J., granted the motion. *James Kerrigan v.*

Otsuka America Pharmaceutical, Inc.; Mark Altmeyer, 2016 WL 3597609 (E.D. Pa. 2016) (App. 8-25). She concluded that petitioner had failed to raise a genuine issue of material fact for trial whether a causal connection existed between his whistleblowing activity and his termination (App. 18-19). As she saw it, the timing of the key events did not suggest retaliatory conduct by respondents: petitioner's reporting of compliance violations in the two episodes took place in February of 2011 (*Today's Hospitalist*) and June of 2011 (Premier) while he suffered an adverse employment action, i.e., was terminated, in May of 2012 (App. 19-20). Relying on federal precedent applying Title VII jurisprudence, the lower court ruled that "a six-month to one-year gap, without more, does not create an inference of causation" (App. 19-20 citing *Leboon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 233 (3rd Cir. 2000)).

Nor did the district judge think that Altmeyer's immediate targeting of petitioner for ridicule, confrontation and rebuke beginning in July of 2011 just after his reporting these two episodes create an inference of retaliatory animus (App. 20-21). Instead, the district judge believed respondents' claim that any negative treatment of petitioner was because Altmeyer and OAPI's senior leadership had lost faith in him and held him and his team responsible for failing to prevent these compliance issues from becoming reportable incidents (App. 20-21). Thus petitioner suffered no adverse employment action *because of* his protected activity and there was no material fact at issue for trial with regard to causation under CEPA (App. 21) (emphasis in original).

Finally, since respondents proffered legitimate, nondiscriminatory reasons for terminating petitioner, because there was no evidence that he was "scapegoated" for reporting these compliance issues, and because respondents had a reason to doubt his transparency about his wife's consulting arrangement with OPEL, there was no evidence to show that respondents' reasons for terminating him were pretextual (App. 21-23).

Petitioner appealed and on September 1, 2017, the court of appeals unanimously affirmed the district court in a non-precedential opinion (App. 1-7). Like the district court, it concluded that petitioner had not shown that a triable fact question existed concerning the causation element of his claim for retaliatory discharge under CEPA (App. 4-5). First, applying Title VII federal precedent instead of New Jersey substantive law developed under CEPA, it ruled that the six months to a year time gap between petitioner's termination in May of 2012 and his protected activity in February and June of 2011, was insufficient temporal proximity to permit an inference of causation (App. 5;7 citing *Leboon*, *supra*).

Second, because this timeline itself was not unusually suggestive of causation, the court found nothing in the record to raise an inference of causation (App. 5-6). As it concluded, the fact that Altmeyer targeted petitioner for ridicule, confrontation and rebuke beginning in July of 2011 after his reporting these two episodes did not create a triable question for a jury "that Altmeyer's attitude towards [petitioner] changed *because* [he] reported the Samsca publishing incidents" (App. 5) (emphasis in original). Instead, the court adopted Altmeyer's explanation that his negative treatment of petitioner sprung from concerns about petitioner's "leadership," a contention which petitioner failed to rebut and left undisputed for purpose of summary judgment (App. 5-6).

It therefore concluded that "[a] reasonable jury could not find that retaliatory discrimination was more likely than not a determinative factor for [petitioner's] negative performance review, reduced compensation, and termination" (App. 6).

Petitioner petitioned the court of appeals for panel rehearing or for rehearing *en banc* arguing that in this removed diversity case it failed to apply the substantive law of New Jersey, specifically CEPA, in assessing whether petitioner's claim of retaliatory discharge was fit for a jury's determination. On September 28, 2017, the court of appeals denied petitioner's petition for panel rehearing or for rehearing *en banc* (App. 26-29).

REASONS FOR GRANTING THE PETITION

The Court of Appeals' Refusal To Apply New Jersey's Conscientious Employee Protection Act To Petitioner's Claim Of Retaliatory Discharge In This Diversity Action Deprived Him Of The Remedy To Which He Was Entitled Under New Jersey Law, Denying Him Due Process And Subverting Notions Of Federalism And Comity For Which *Erie R. Co. v. Tompkins*, 304 U.S. 65 (1938) Stands.

New Jersey's Conscientious Employee Protection Act, N. J. St. Ann. 34:19-1 to 34:19-14, and New Jersey decisional law interpreting its provisions, constitute an authoritative, employee-friendly body of jurisprudence to assess whether petitioner's CEPA claim for retaliatory discharge on account of his whistleblowing activities was fit for decision by a jury. This coherent body of State law developed under CEPA should have been applied by the court of appeals (and the district court) in assessing whether there was a causal connection between petitioner's whistleblowing conduct and the adverse employment actions he suffered thereafter.

Had both courts below applied this State law to this summary judgment record, they would concluded that petitioner suffered a series of adverse employment actions by respondents beginning in July of 2011 shortly after his whistleblowing about Premier and *Today's Hospitalist* and that there was a continuum of escalating retaliatory events which lasted up until May 29, 2012, when respondents committed the last act of retaliation by terminating his employment. Under the

CEPA's very liberal and expansive provisions, the analysis of temporal proximity between the adverse employment action and the protected activity looks not just at the final retaliatory act of termination to determine if the retaliation justifies recovery but rather considers *the continuum of adverse employment actions* leading up to this final retaliatory act of termination in order to assess liability.

This kind of analysis of the record---authorized, indeed mandated, by CEPA and the State's decisional law interpreting its provisions---would have established that beginning in July of 2011 just after his whistleblowing activity about Premier, petitioner was consistently singled out by respondents for harassment, ridicule and rebuke, an escalating series of adverse employment actions lasting through May 29, 2012, when respondents eventually terminated him. Such analysis would have inevitably led to the conclusion that for purposes of petitioner's *prima facie* case under CEPA, a triable fact question existed whether there was a causal connection between his whistleblowing activity and the adverse employment actions he suffered thereafter.

Instead, contrary to CEPA, the court of appeals focused only on the final act of retaliation of May 29, 2012, *as the only adverse employment action respondents committed on this record*, and relying on *federal* precedent implicating Title VII decisional law, then decided that the gap in time between this event in 2012 and petitioner's earlier protected whistleblowing activities in 2011 was too great for a reasonable jury to infer causation. This refusal by the court of appeals and the district court faithfully to apply CEPA's employee-friendly State law on the crucial issue of causation---law enacted specifically to protect whistleblowing employees like petitioner from retaliation---denies petitioner due process and subverts the notions of federalism and comity for which *Erie R. Co. v. Tompkins*, 304 U.S. 65 (1938) stands.

Federal jurisdiction over this controversy was based on diversity of citizenship and both federal courts below were bound to apply the substantive law of Pennsylvania, including its own conflict-of-laws jurisprudence which makes New Jersey employment law, including CEPA, apply to this controversy arising from petitioner's employment by respondents in Princeton, New Jersey, from 2006 through 2012. *General Star Natl. Ins. Co. v. Universal Fabricators*, 585 F.3d 662, 669 (2nd Cir. 2009) citing *Omega Eng'g, Inc. v. Omega, S.A.*, 432 F.3d 437, 442 (2nd Cir. 2005).

CEPA is a centerpiece of New Jersey's employment law and it is akin to a civil rights statute. *Abbamont v. Piscataway Tp. Bd. of Educ.*, 650 A.2d 958, 971 (N.J.1994). Enacted in 1986, this whistleblower statute's purpose is to protect and encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employers from engaging in such conduct. *Donelson v. Works*, 20 A.3d 384, 391 (N.J. 2011). *Dzwonar v. McDevitt*, 828 A.2d 893, 900 (N.J. 2003). *Abbamont*, *supra*. Stated differently, CEPA is supposed to encourage, not thwart, legitimate employee complaints. *Estate of Roach v. TRW, Inc.*, 754 A.2d 544, 550 (N.J. 2000).

Described at the time of its enactment as "the most far reaching 'whistleblower statute' in the nation," *Battaglia v. United Parcel Serv., Inc.*, 70 A.3d 602, 624 (N.J. 2013) quoting *Mehlman v. Mobil Oil Corp.*, 707 A.2d 1000, 1015-1016 (N.J. 1998), CEPA is "powerful medicine," remedial social legislation designed to advance the salutary social policies of ensuring that employees can report harmful practices without fear of losing their jobs and that they can continue to act as public watchdogs for employer action that is contrary to law or public policy. *Donelson*, 20 A.3d at 396 (LaVecchia, J., dissenting, citing N.J.St. Ann. 34:19-3 (prohibiting retaliation against whistleblowers and enumerating protected employee activity)). CEPA thus provides employees like petitioner with significant remedies designed to be prompt and to be particularly protective of those who wish to remain employed or to regain employment. *Id.* citing N.J.St. Ann. 34:19-5 (fixing one-year period for filing suit and defining available remedies).

As remedial social legislation, it has been repeatedly held by New Jersey courts that CEPA "promotes a strong public policy of the State" and "therefore should be construed liberally to effectuate its important social goal" of creating a cause of action for an employee who is subjected to retaliation for reporting workplace misconduct. *Battaglia*, 70 A.3d 624 quoting *Abbamont*, 650 A.2d at 971. Accord, *Lippman v. Ethicon, Inc.*, 119 A.3d 215, 227 (N.J. 2015); *D'Annunzio v. Prudential Ins. Co.*, 927 A.2d 113, 119 (N.J. 2007); *Dzwonar*, 828 A.2d at 901; *Estate of Roach*, 754 A.2d at 550; *Barratt v. Cushman & Wakefield of New Jersey, Inc.*, 675 A.2d 1094, 1098 (1996). Since its enactment in 1986, CEPA's overall structure has remained essentially unaltered but the scope of its protections and the breadth of its remedies have expanded considerably since then. *Donelson*, 20 A.3d at 393 (citing statutory amendments to CEPA from 1989 through 2005).

Thus after *Lippman*, *Donelson*, *Battaglia*, *Dzwonar* and *Abbamont*, CEPA is given a very liberal and expansive reading in order to promote its remedial purpose of providing employees with significant remedies that would encourage, not thwart, their legitimate complaints about retaliation in the workplace. Importantly, in *Quinlan v. Curtiss-Wright Corp.*, 8 A.3d 209, 222-229 (N.J. 2010), the New Jersey Supreme Court made clear that the "broad" and "strong" remedial protections afforded by the analogous provisions of New Jersey's Law Against Discrimination (LAD) extend *further* than Title VII's protections under federal law for similar workplace misconduct and would provide relief to an employee in a close case where a Title VII analysis might not provide a remedy. *Id*. at 226-229.

This commitment by New Jersey courts to give the CEPA a liberal, expansive reading extends to its meaning of "adverse employment action" as used in N.J.St. Ann. 34:19-2(e), which defines "retaliatory action" by an employer to mean "the discharge, suspension or demotion of an employee, *or other adverse employment action* taken against an employee in the terms and conditions of employment" (emphasis supplied). The courts have interpreted this term to include *any* conduct by the employer which "targets [the employee] for reprisals—making false accusations of misconduct, giving negative performance reviews, issuing an unwanted suspension, and requiring pretextual mental health evaluations...." *Donelson*, 20 A.3d at 392. See *Beasley v. Passaic Cty.*, 873 A.2d 673, 684 (N.J. App. Div. 2005). See also *Abu-Ali v. Pinnacle Foods Grp., LLC*, 2017 WL 4248411 at *8 (N.J. App. Div. 9/26/2017) (actions that negatively affect an employee's compensation, rank, or terms and conditions of employment can be the functional equivalent of a demotion).

Petitioner's proof at summary judgment showed that respondents began to impose precisely these kinds of adverse employment actions upon him *immediately after* his whistleblowing activities about Premier in July of 2011. At that time, Altmeyer began an escalating series of events belittling and shaming petitioner; and he made false accusations of misconduct and underperformance (even as petitioner's team met and exceeded Samsca's sales goals) in team meetings through the fall of 2011, even prompting some senior management to complain to Human Resources that Altmeyer was creating a hostile work environment for petitioner.

In January of 2012, Altmeyer unilaterally changed the 2011 job rating for petitioner which had the effect of denying him a merit pay increase and reducing his bonus. In February of 2012, respondents decided to fire petitioner without giving him or his supervisor notice; they hired a "head hunter" to find petitioner's replacement; and when they learned that petitioner had helped his wife obtain a consulting contract with another subsidiary of OAPI's parent corporation (after clearing the event of any conflicts of interest), they used it as a pretext to fire him "for cause" on May 29, 2012.

Thus under CEPA, petitioner's termination on May 29, 2012, was only "the last act of retaliation," *Donelson*, 20 A.3d at 396-398 (LaVecchia, dissenting), in a series of adverse employment actions imposed by respondents beginning in July of 2011. Petitioner's *prima facie* claim under CEPA had to show that (1) he reasonably believed respondents' conduct violated FDA regulations; (2) he performed a whistleblowing activity under the statute; (3) an adverse employment action was taken against him; and (4) *there was a causal connection between his whistleblowing activity and the adverse employment action*. *Lippman*, 119 A.3d at 226. *Dzwonar*, 828 A.2d at 900. His summary judgment materials showed that respondents' adverse employment actions against him began *just after* his whistleblowing activity in July of 2011 and under CEPA, a triable fact question therefore existed about whether his protected activity caused this series of adverse employment actions and his eventual termination as the "last act of retaliation."

Yet both courts below overrode this established law under CEPA, ignoring the series of adverse employment actions petitioner suffered throughout the last half of 2011 and the first part of 2012, focusing instead on his termination in May of 2012 *as the only adverse employment action respondents committed on this record*. This reasoning is a total abnegation of CEPA jurisprudence as developed by the courts of New Jersey on this score and it denied petitioner the benefit of dispositive State law which, if applied in this removed diversity action, would have led to the conclusion that petitioner's proof on this summary judgment motion created a genuine issue of material fact for trial on the issue of causation.

Compounding the impropriety of ignoring the New Jersey courts' expansive reading of "adverse employment action" under CEPA to instead treat petitioner's termination as the only act of retaliation, both courts then relied on *federal* precedent developed under Title VII litigation to conclude that the gap in time between his termination on May 29, 2012, and his earlier protected whistleblowing activities in 2011 was too great for a reasonable jury to infer causation. This analysis founded on federal precedent runs counter to the more expansive, employee-friendly State law developed under CEPA on the issue of causation and it too denied petitioner the benefit of State law which would have created a genuine issue of material fact for trial on the issue of causation.

As for causation under the CEPA, the courts of New Jersey have recognized that a strict adherence to temporal proximity alone in order to determine causation would be unwise. As the court in *Romano v. Brown & Williamson Tobacco Corp.*, 665 A.2d 1139, 1143 (N.J. App. Div. 1995) observed, it is doubtful "that a sophisticated employer, such as defendant, would immediately retaliate," instead choosing a later, more opportunistic time to terminate an employee in order to disguise its true reasons for discharge and avoid liability under CEPA. *Id.* Thus causation under CEPA may be proven by direct or indirect evidence that permits an inference based on all the circumstances; but temporal proximity is but one such circumstance; it is *not* dispositive; and where the timing is not "unusually suggestive," an employee may adduce other evidence to establish a causal link. *Battaglia*, 70 A.3d 626-627. *Maimone v. City of Atlantic City*, 903 A.2d 1055, 1064 (N.J. 2006). *Estate of Roach*, 754 A.2d at 551.

In *Estate of Roach*, 754 A.2d at 551, for example, the employee was laid off *more than a year* after his protected activity and his claim under CEPA was allowed to go to jury which found the employer liable. *Id*. In *Romano*, 665 A.2d at 1143, the employer waited *ten years* to discharge the employee but the employee's claim for retaliatory discharge survived summary judgment. *Id*. In *McCaw v. Vernon Twp. Bd. of Educ.*, 2017 WL 3137558 at **7-8 (N.J. App. Div. 7/25/2017), the court in denying the employee relief held that a *five-year time gap* between the protected activity and the alleged retaliation was not enough by itself to disqualify a CEPA claim for lack of causation.

Title VII jurisprudence on temporal proximity, on the other hand, reflects none of these liberal, expansive concepts of temporal proximity and its effect on causation which New Jersey's CEPA law contains. As this Court observed in *Clark County Sch. Dist. v. Breedon*, 532 U.S. 268, 273-274 (2001), "[t]he cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case [under Title VII] uniformly hold that the temporal proximity must be 'very close.'" *Id*. citing *Neal v. Ferguson Constr. Co.*, 237 F.3d 1248, 1253 (10th Cir. 2001); *Richmond v. Oneok, Inc.*, 120 F.3d 205, 209 (10th Cir. 1997) (3-month period insufficient); *Hughes v. Derwinski*, 967 F.2d 1168, 1174-1175 (7th Cir. 1992) (4-month period insufficient). See also *Leboon v.*

Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d at 233 (3-month gap cannot create an inference of causation); *Jalil v. Avdel Corp.*, 873 F.2d 701, 708 (3rd Cir. 1989 (two-day gap sufficient).

By applying this more stringent Title VII law of temporal proximity to petitioner's CEPA claim, both courts below denied petitioner the benefit of the more liberal, employee-friendly New Jersey law to which he was entitled in this removed diversity action. Even if both courts below were right to regard petitioner's termination in May of 2012 as the only adverse employment action he suffered at the hands of respondents—an assumption he disputes because under CEPA he suffered a series of adverse employment actions immediately after his protected activity—the less than one-year gap between that event and his protected activity is enough under CEPA to create a genuine issue of material fact for trial regarding causation.

This refusal to apply established CEPA law to determine when petitioner suffered adverse employment actions and whether the temporal proximity between these actions and his protected activity was close enough to reasonably infer causation denies petitioner due process and subverts the notions of federalism and comity for which *Erie* stands. It nullifies the substantive law of New Jersey and effectively repeals a substantial portion of it employment law, depriving petitioner of a remedy he otherwise would have had in State court, see *Michael O. Leavitt v. Jane L.*, 518 U.S. 137, 144-145 (1996); and it undermines New Jersey's bedrock public policy reflected in CEPA of protecting its employees from harm done them by employers in the workplace on account of their whistleblowing activities. The decision thereby creates unprincipled federal common law about the liability of employers in New Jersey who retaliate for their employees' whistleblowing activities, undermining *Erie's* principles.

Under *Erie*, when a federal court exercises diversity, pendent or supplemental jurisdiction over State law claims, "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Felder v. Casey*, 487 U.S. 131, 151 (1988) quoting *Guaranty Trust Co. York*, 326 U.S. 99, 109 (1945). Avoiding judge-made rules in federal court which undercut a litigant's rights which he otherwise would enjoy under State law promotes comity and federalism, discourages forum-shopping and acknowledges that the pronouncements of the State courts on the substantive rights of its citizens are in most cases expressions of their own sovereignty. *Bush v. Gore*, 542 U.S. 692, 740-742 (2000) (Rehnquist, C.J., concurring). All of these concerns of *Erie* are undermined by the result here.

In addition, petitioner's right to have his claims fairly heard and decided by the federal courts in this removed diversity action----to have his day in court----is a valuable property right entitled to due process protection. *Board of Regents v. Roth*, 408 U.S. 564, 571-572 (1972). *Gibbes v. Zimmerman*, 290 U.S. 326, 332 (1933); See *Boddie v. Connecticut*, 401 U.S. 371, 374-375 (1971). The actions of the federal courts in disposing of claims before it are encompassed within the fifth amendment's Due Process Clause. *Palmore v. Sidoti*, 466 U.S. 429, 434 (1984). Accordingly, the preemptive dismissal of petitioner's cause of action under CEPA with prejudice by a federal court---using the *wrong* law to reach its result—not only is in clear conflict with the law of the forum State but also is a denial of a fair hearing on the issues and a denial of due process. See *Lewis v. Casey*, 518 U.S. 343, 346 (1996); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (A decision is arbitrary and capricious if the decision maker relies on factors it is not permitted to consider under the applicable law).

Finally, incident to their summary judgment motion, respondents had to prove that they were entitled to judgment *as a matter of law*, i.e., under the substantive State law of CEPA as it has been interpreted by the courts of New Jersey. Yet by ignoring this expansive, employee-friendly State law about when petitioner suffered adverse employment actions and whether the temporal proximity between these actions and his protected activity was close enough to reasonably infer causation, neither federal court below could have fairly rendered summary judgment as a matter of law for respondents on this record.

CONCLUSION

For the reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit and, ultimately, to vacate and reverse that judgment and remand the matter to the United States District Court for the Eastern District of Pennsylvania, with instructions to set the matter down for trial, or provide petitioner with such further relief as is fair and just in the circumstances of this case.

Respectfully submitted,

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