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DONOVAN BEZER, Plaintiff, vs. CITY OF JERSEY CITY, NEW JERSEY; JACOB V. HUDNUT, in his capacity as Chief Prosecutor of the City of Jersey City, New Jersey; and MARK BUNBURY, in his capacity as Director of Human Resources for the City of Jersey City, New Jersey, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – HUDSON COUNTY DOCKET NO.: Civil Action **COMPLAINT & DEMAND FOR TRIAL BY JURY**

Plaintiff Donovan Bezer ("Plaintiff"), by way of Complaint against Defendants City of Jersey City, New Jersey ("Defendant Jersey City"), Jacob V. Hudnut ("Defendant Hudnut"), and Mark Bunbury ("Defendant Bunbury") (collectively "Defendants") alleges as follows:

PARTIES

1. Plaintiff is an individual who resides at 39 E. Cedar Street, Metuchen, New Jersey 08840. Plaintiff began his employment with Jersey City in or about December 17, 2013 and was

terminated on May 24, 2019.

2. Defendant Jersey City is a municipality within the State of New Jersey.

3. Defendant Hudnut is an individual who has served as the Chief Prosecutor of Jersey City since July 2, 2018.

4. Defendant Bunbury is an individual who served as the Director of Human Resources for Jersey City from January 2018 to October 2019.

FACTS COMMON TO ALL CLAIMS

5. Plaintiff was employed by Jersey City as an Assistant Prosecutor from December 17, 2013, to May 24, 2019.

6. In his capacity as an Assistant Prosecutor, Plaintiff worked under the Chief Municipal Prosecutor, Jacob V. Hudnut.

7. Plaintiff's employment as an Assistant Prosecutor was a part-time position. Plaintiff typically worked for Jersey City five days per week for about three to four hours per day.

8. Plaintiff earned a salary of $42,500 per year as an Assistant Prosecutor.

9. Plaintiff also received health benefits from his position as an Assistant Prosecutor.

10. Plaintiff was also in line to receive a pension of 30% of his salary if he worked for Jersey City until age 62. Plaintiff had no plans to leave his position prior to age 62.

11. During his employment with Jersey City, Plaintiff also owned and operated his own litigation practice.

12. Plaintiff successfully balanced his two jobs for five years, earning many positive reviews and comments from co-workers, superiors, and other Jersey City officials. Plaintiff never received any negative performance reviews and was never the subject of disciplinary measures prior to the events forming the basis of this complaint.

13. On or around July 11, 2018, Defendant Hudnut convened a meeting at which he informed all Jersey City municipal prosecutors of a new policy ***instituting a ban on all criminal prosecutions for marijuana possession in Jersey City.*** In other words, Jersey City municipal prosecutors would no longer be allowed to use their judgment to dismiss certain cases, but were instead directed by Defendant Hudnut to dismiss ***all*** cases involving simple possession of marijuana regardless of the circumstances.

14. Defendant Hudnut's directive constituted an unlawful appropriation of the authority to set State policy regarding the criminality of marijuana possession and prosecutorial response thereto.

15. The New Jersey Supreme Court has held that, while "[a] prosecutor has important discretionary authority in the enforcement of the criminal laws," this discretion must serve the prosecutor's "obligation to defendants, the State and the public to see that justice is done, and truth is revealed in each individual case. The goal should be to achieve individual justice in individual cases." State v. Hessen, 145 N.J. 441, 452-53 (1996) (quoting Pressler, Current N.J. Court Rules, Guideline 3 to R. 7:4-8 (1995)).

16. Furthermore, the Criminal Justice Act of 1970, N.J.S.A. 52:17B-97 to -117 provides for the general supervision of criminal justice by the New Jersey Attorney General as chief law enforcement officer of the State to secure the benefits of uniform and efficient enforcement of the criminal law and the administration of criminal justice throughout the State.

17. Pursuant to his authority, Attorney General Gurbir S. Grewal issued a Memorandum of Guidance addressing the scope and appropriate use of prosecutorial discretion by municipal prosecutors on August 29, 2018. This Memorandum of Guidance expressly provides that, "A Municipal Prosecutor May Not Adopt a Categorical Policy or Practice of Refusing to Seek

Convictions for Statutory Offenses Related to Marijuana."

18. In response to Attorney General Grewal's Memorandum of Guidance, Defendant Hudnut emailed copies of the Memorandum to all Jersey City municipal prosecutors along with a note stating that the prosecutors were forbidden from prosecuting "a marijuana or marijuana-related paraphernalia as a disorderly persons offense" unless they received advance permission from Defendant Hudnut.

19. Plaintiff reasonably believed that Defendant Hudnut's directives to Jersey City municipal prosecutors forbidding them from criminally prosecuting *any* charges of marijuana possession was in violation of the Supreme Court's mandate that individual municipal prosecutors must reveal the truth and achieve individual justice *in each individual case*. Later, Plaintiff also reasonably believed that Defendant Hudnut's directives were in violation of Attorney General Grewal's Memorandum of Guidance.

20. Because of his reasonable belief that Defendant Hudnut's directives were in violation of New Jersey law as set forth by the Supreme Court, the Criminal Justice Act of 1970, and Attorney General Grewal, Plaintiff reasonably believed he could not follow the directives and participate in Defendant Hudnut's unlawful policy.

21. On or around August 23, 2018, Plaintiff met with Defendant Hudnut and explained that he could not ethically follow Defendant Hudnut's directives regarding blanket dismissals of marijuana charges. Plaintiff further advised Defendant Hudnut that he believed the directives were unlawful and that the total ban on prosecuting marijuana offenses had to stop.

22. At the August 23 meeting, Plaintiff also asked Defendant Hudnut for help transferring to a different Jersey City office where he would not be forced to refuse instructions from a supervisor. Defendant Hudnut refused to help Plaintiff transfer, saying that Plaintiff was

one of his best prosecutors and that he could not let Plaintiff go.

23. The day after his meeting with Defendant Hudnut, Plaintiff was informed that a witness tampering charge involving a defendant threatening Plaintiff's witness in another matter had not been filed by the Jersey City Police Department ("JCPD"). Upon information and belief, Defendant Hudnut instructed the JCPD to void and destroy the witness tampering charge in retaliation against Plaintiff for complaining about Defendant Hudnut's directives on August 23, 2018.

24. After returning from vacation in or around early September 2018 and discovering Defendant Hudnut's response to Attorney General Grewal's Memorandum of Guidance, Plaintiff wrote a formal letter memorializing his complaints about Defendant Hudnut's directives and notifying Defendant Hudnut that the directives were unlawful and that he could not follow them.

25. Specifically:

> Dear Jake,
>
> I am writing you as my supervisor to disclose, object to, and refuse to participate in actions/policies that are illegal and/or violate public policy. Please note that I am making this disclosure based on conscientious deliberations over a period of months. I deeply regret that I have to bother you with this, as I have high regard for you personally, and (as you know) consider you a friend.
>
> As you are aware, on July 19, 2018, you participated in promulgating a written policy that Jersey City will not prosecute marijuana cases. Then, on Friday, August 17, 2018, as Chief Prosecutor you convened a "Reset Meeting" in front of all day municipal prosecutors and two Human Resources representatives. You followed this meeting the next week with a memorandum titled "Reset Memo 8 17 18."1 The Reset Memo directed us to "refrain from exhibiting judgment" about defendants, be "compassionate" towards defendants, and be guided by "the impact of convictions on accused persons."
>
> While I expect that you will argue that these directives are not necessary illegal, I trust that you will at least accept that they are entirely unworkable. We are prosecutors. Harboring judgment about, for example, a defendant

accused of slapping his wife in the face enables us to prosecute that defendant and achieve justice for a domestic violence victim. And putting on a case in front of the judge *ipso facto* involves "exhibiting judgment."

But more importantly, your directives as stated at the meeting and commemorated in the memo require your prosecutors (and, central to this memo, me in particular) to incur professional risk. N.J.S.A. 2B:25-5 requires municipal prosecutors to exercise their own independent judgment in deciding whether to prosecute, downgrade, or dismiss a case.2

Regarding marijuana prosecutions, Supreme Court Plea Guideline # 4B has always been interpreted by prosecutors, defense counsel, and courts as precluding outright dismissals of all marijuana/hashish cases, or downgrade to municipal ordinances.

In setting policy on July 19, 2018, that no municipal prosecutor may "criminally prosecute marijuana possession before the municipal courts of Jersey City" (i.e., Decriminalization on Marijuana Memorandum), you usurped from your municipal prosecutors the right and duty to exercise their own independent judgment. This policy necessarily entails professional risk for each individual municipal prosecutor, because our duty is to enforce and obey State law, at the direction of the Attorney General and his designee, the Hudson County Prosecutor.3

You have directed your municipal prosecutors to accept your new interpretation of Supreme Court Plea Guideline # 4B notwithstanding that for more than 28 years, the entirety of the bar has held a contrary interpretation. (I am aware that to some extent the Attorney General has recently voiced support for this new interpretation, but as described below I think that your approach to the Supreme Court Plea Guideline contradicts the Attorney General's pronouncement on this issue). The City and its elected officials are seeking to achieve social justice, and as you know I feel that your efforts in this regard are bold and commendable. But we assistant prosecutors put ourselves in professional jeopardy if we break the law or ignore the legislative process by which marijuana will hopefully become legal.4

Municipal prosecutors can be, and have been, subject to professional discipline for not faithfully enforcing the law.5 The Supreme Court – and not a Chief Prosecutor or any elected official – permits municipal prosecutors to practice law. And while the City can stop us from prosecuting by terminating our relationship with the City, the Supreme Court can take away altogether our ability to practice law. The Supreme Court's ability to discipline attorneys who violate Supreme Court Plea Guidelines is not preempted by the Attorney General's view on Guideline 4B.

As you know I brought these concerns to your attention in a meeting in your office at 4:15 – 4:45 p.m. on August 23, 2018. I cited N.J.S.A. 2B:25-5, and you wrote it down on a post-it note as you were leaving to a doctor or dentist's appointment.

Subsequently, on August 29, 2018, the Attorney General issued a memorandum to "all municipal prosecutors" that said it was published to address "how municipal prosecutors may permissibly exercise their discretion in cases involving marijuana-related offenses." (Emphasis added). The second paragraph of the memo specifically states that a prosecutor who has subordinates cannot adopt a policy of categorically refusing to prosecute marijuana charges. You yourself participated in the working group that led to the wording and promulgation of this memo. The Attorney General's memo states that any leniency given to people charged with marijuana violations must be on a case-by-case basis. By definition, you yourself as Chief Prosecutor cannot ensure that leniency is given to every single defendant, because you are not in every court, on every day, arguing every case.

Nonetheless, on August 29, 2018, you forbade your assistant prosecutors from prosecuting a marijuana or marijuana-related paraphernalia as a disorderly persons offense unless authorized by you beforehand. This usurps our independent professional judgment. It requires us to sublimate our own judgment on individual cases to your own policy judgments.

I further understood your statements on this issue to indicate that you would direct our staff to abstain from ever getting a laboratory report to prove that a substance is marijuana, so that insufficiency of the evidence (i.e. no lab report) would serve in every single case to support an amendment or dismissal, and impede prosecution, regardless of the case-by-case policy of the Attorney General. Under ABA guidelines (which you are aware of because you have quoted them in your memos), a prosecutor should advise his employer if he lacks resources to properly prosecute cases. See, e.g., American Bar Association, Fourth Edition of the Criminal Justice Standards, for the Prosecution Function, Standards 3-1.8(a), 3-2.3, 3-3.1(b), and 3-5.3(e). I am advising you that we need lab reports because if, on a case-by-case basis, we opt to prosecute a marijuana case, the lab is a necessary element of proof.

Please reconsider and reverse your position. Additionally, please accept this letter as notice under N.J.S.A. 34:19-1 *et seq.* that I intend to disclose these violations of law, Court Rules (including R.P.C.s), Attorney General directives, ABA guidelines, and public policy to a higher authority if we cannot achieve lawful compliance in-house.

In closing, please know that I am only writing this letter after having been internally troubled by these issues for months. I anticipate that as a human being, you may take this personally, but my sincere hope is that you do not. People with diametrically-opposed opinions on the most important issues of morality and law can disagree respectfully and even be friends, as was demonstrated by the personal friendship between Ruth Bader Ginsburg and the late Justice Scalia.

Respectfully,

Donovan Bezer

1 At the meeting, you stated orally that your assistant prosecutors should treat defendants as though they are innocent until they are actually found guilty. While defendants enjoy a general presumption of innocence, prosecutors are not only permitted, but are affirmatively *required* to proceed as if the defendant is guilty, because if a prosecutor believes the charges cannot be sustained, s/he has an absolute obligation to move for dismissal. If we treat all defendants as though they are innocent, then we cannot prosecute anyone. The demand to treat defendants as though they are innocent did not appear in your Rest Memo, and therefore I assume that you understand that that was an unreasonable demand to place on prosecutors, and have reconsidered and withdrawn that demand.

2 The Municipal Prosecutor Act was enacted in 2000, at N.J.S.A. 2B:25-1 through -12, and requires municipal prosecutors to exercise their own independent professional judgment. See generally, Constantine v. Township of Bass River, 406 N.J. Super. 305, 327 (App. Div. 2009). "The concept of prosecutorial discretion is well known in our system." State v. Vitiello, 377 N.J. Super. 452, 456 (App. Div. 2005) (citing State v. Winne, 12 N.J. 152, 172-74, 96 A.2d 63 (1953); note, "Prosecutorial Discretion," 1 Crim. Just. Quarterly [***6] 154 (1973); In re Grand Jury Appearances Request by Loigman, 183 N.J. 133, 870 A.2d 249 (2005); State v. Hampton, 61 N.J. 250, 275, 294 A.2d 23 (1972); State v. LeVien, 44 N.J. 323, 326-27, 209 A.2d 97 (1965); State v. States, 44 N.J. 285, 292, 208 A.2d 633 (1965); and State v. Ward, 303 N.J. Super. 47, 58, 696 A.2d 48 (App.Div.1997)).

3 "Each municipal prosecutor is the subordinate of the county prosecutor. There is a direct line of authority." State v. Miles, 2014 N.J. Super. Unpub. LEXIS 2436, *7-8 (citing State v. Holup, 253 N.J. Super. 320, 324-25, 601 A.2d 777 (App. Div. 1992); and N.J.S.A. 2B:25-1 to -12). The Hudson County Prosecutor prosecutes state law as enacted by the Legislature, and not the policy directives of mayors within Hudson County. We risk professional discipline if we follow the dictates of our Mayor or Chief Prosecutor when they conflict with State law. "[A] municipal prosecutor does not determine which cases will be filed in the municipal court, but has a statutory obligation to prosecute them." State v. Martens, 2016 N.J. Super. Unpub. LEXIS 2592, *16, 2016 WL 7102736.

4 As stated by Attorney General Gurbir S. Grewal, "[b]y categorically suspending enforcement of a State law, a municipal prosecutor impermissibly assumes a role that properly belongs to the Legislature."

5 See, e.g., Matter of Segal, 130 N.J. 468, 480 (1992); Matter of Norton, 128 N.J. 520 (1992).

26. Plaintiff emailed his letter complaining about Defendant Hudnut's unlawful directives to Defendant Hudnut on or around October 22, 2018. Plaintiff waited roughly six weeks

before sending the letter because of his fear of immediate retaliation, which was informed by the JCPD's failure to file his witness tampering charge in response to his verbal complaints to Defendant Hudnut on August 23, 2018. Plaintiff also delayed sending the letter in the vain hope that his requested transfer to a different City office would be approved, which would solve the dilemma without his having to formally blow the whistle on Defendant Hudnut.

27. On October 23, 2018 – the day after Plaintiff emailed his letter to Defendant Hudnut – Jersey City placed Plaintiff on a one-day suspension.

28. In response to the suspension, Plaintiff retained counsel and sent his attorney's contact information to Defendant Hudnut and to the Jersey City Human Resources ("HR") Department by email dated Friday, October 26, 2018.

29. On Monday, October 29, 2018, Plaintiff was told to report to HR the next day instead of going to court as planned.

30. The next day, October 30, 2018, Defendant Bunbury placed Plaintiff on indefinite paid administrative leave.

31. Plaintiff remained on administrative leave until May 24, 2019. On that date, Defendant Bunbury notified Plaintiff that Jersey City had terminated his employment.

32. Jersey City maintained Plaintiff's medical benefits following his termination.

33. However, in or about September 2019, Jersey City terminated Plaintiff's medical benefits without informing him.

34. Plaintiff did not discover that his medical benefits had been terminated until October 22, 2019.

35. Defendants' conduct is clearly violative of CEPA, which specifically provides:

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

36. Plaintiff thus was fired for engaging in whistleblowing activity – i.e., he reported and objected to activities and practices of the Defendants that he reasonably believed were in violation of law, lies, fraudulent, deceitful, and violation of public policy – in violation of N.J.S.A. 34:19-3 subsections (a)(1) and (2) and (c)(1) and (2).

37. In addition to subsections (a)(1) and (2) of and (c)(1) and (2), the above conduct falls squarely within the purview of N.J.S.A. 34:19-3(c)(3). Indeed, Plaintiff specifically alleges he reported this conduct to his superiors because he believed it violated clear public policy.

COUNT ONE

RETALIATION IN VIOLATION OF NEW JERSEY CONSCIENTIOUS EMPLOYEE PROTECTION ACT ("CEPA")

38. Plaintiff repeats each and every allegation set forth above as if set forth fully herein at length.

39. In the course of his employment, Plaintiff informed his supervisor, Defendant Hudnut, that directives and policies implemented by Defendant Hudnut were unlawful and contrary to authoritative policies and decisions of the New Jersey Supreme Court and Attorney General Gurbir S. Grewal.

40. Plaintiff further informed Defendant Hudnut that he would not follow the unlawful directives and that he would seek transfer to a different Jersey City office where he would not be pressured to pursue unlawful conduct.

41. Defendant Hudnut, Defendant Jersey City, and Defendant Bunbury had knowledge of Plaintiff's complaints and/or protests.

42. As a direct result of Plaintiff raising complaints, Defendants took retaliatory action against Plaintiff by subjecting him to excessive discipline, by placing him on administrative leave, and by discharging him from employment.

43. The affirmative acts of retaliation committed by Defendant Hudnut and Defendant Bunbury occurred within the scope of their employment by Jersey City.

44. Defendants are vicariously, strictly, and/or directly liable to Plaintiff for unlawful retaliatory conduct in violation of the New Jersey Conscientious Employee Protection Act ("CEPA"), pursuant to N.J.S.A. 34:19-1, *et seq.*

45. As a proximate result of the aforementioned acts and omissions set forth herein, Plaintiff has sustained damages.

WHEREFORE, Plaintiff demands judgment in his favor and against Defendants on this Count, together with compensatory and equitable relief, all remedies available under CEPA, punitive damages, pre-and post-judgment interest, attorney's fees and costs of suit, and for such other relief that the Court deems equitable and just.

DEMAND FOR DISCOVERY OF INSURANCE COVERAGE

Pursuant to Rule 4:10-2(b), demand is made that Defendants disclose to Plaintiff's attorney whether or not there are any insurance agreements or policies under which any person or firm carrying on an insurance business may be liable to satisfy part or all of the judgment which may be entered in this action or indemnify or reimburse for payments made to satisfy the judgment and provide Plaintiff's attorney with true copies of those insurance agreements or policies, including,

but not limited to, any and all declaration sheets. This demand shall include and cover not only primary insurance coverage, but also any excess, catastrophe, and umbrella policies.

DEMAND FOR TRIAL BY JURY

Plaintiff demands a trial by jury on all issues.

McOMBER & McOMBER, P.C.
Attorneys for Plaintiff

By: */s/ R. Armen McOmber*
R. ARMEN McOMBER

Dated: November 11, 2019

DESIGNATION OF TRIAL COUNSEL

Pursuant to Rule 4:25-4, R. ARMEN McOMBER, ESQUIRE is hereby designated as trial counsel for Plaintiff.

CERTIFICATION

Pursuant to Rule 4:5-1, it is hereby certified that, to the best of my knowledge, there are no other civil actions or arbitration proceedings involving this matter with respect to this matter and no other parties need to be joined at this time.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

McOMBER & McOMBER, P.C.
Attorneys for Plaintiff

By: */s/ R. Armen McOmber*
R. ARMEN McOMBER

Dated: November 11, 2019