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JOHN R. AMATULLI,	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: PASSAIC COUNTY
PLAINTIFF,	DOCKET NO.: PAS L - 002648 03
VS.	CIVIL ACTION
ROADMASTER TRUCKING, INC., PRESIDENT CONTAINER, INC., STEVE TESTA, JOHN DOES 1-10, AND XYZ CORP. 1-10,	Date: September 26, 2003 Time: 9:00 a.m. Judge: The Honorable Margaret M. McVeigh, J.S.C.
DEFENDANTS.	

PLAINTIFF=S BRIEF IN OPPOSITION

TO DEFENDANTS= MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF FACTS 3

ARGUMENT 3

I. STANDARD OF REVIEW FOR SUMMARY JUDGMENT 3

II. AMATULLI=S EMPLOYMENT BY DEFENDANTS ENTITLES HIM TO CEPA AND PIERCE PROTECTIONS 4

A. Liberal and Broad Construction 4

B. Fact Question 5

C. Courts Not Bound by Defendants= Labels 6

D. MacDougall Test 7

1. Amatulli=s Services Available Only to Defendants 9

2. All of Amatulli=s Work Came From Defendants 9

3. Amatulli and Other Drivers are Economically Vulnerable Due to Termination 10

4. Whistleblower Protections Will Not Harm Defendants= Legitimate Interests 11

E. Right to Control Test 12

III. AMATULLI CAN ESTABLISH A CLAIM UNDER THE NEW JERSEY CONSTITUTION 14

A. Free Speech as a Cause of Action 14

B. The Schmid Test 16

1. Nature, purposes and primary use of the property 16

2. Extent and nature of the public=s invitation to use that property 16

3. Purpose of expressional activity 17

C. State Action 17

1. Impact upon Public 18

2. Sharing Essential Features of Government Bodies 18

D. Alternatives to Free Speech Limitations 19

IV. AMATULLI CLEARLY STATES A CAUSE OF ACTION UNDER THE RELEVANT STATUTES AND LAWS 19

V. PRESIDENT CONTAINER SHOULD REMAIN A DEFENDANT 20

CONCLUSION 20

INTRODUCTION

Plaintiff, John R. Amatulli (Aplaintiff@ or AAmatulli@) commenced his employment in February 1995 under the direct supervision of Steven Testa (ATesta@). For over eight years, from February 1995 until March 28, 2003, Amatulli worked exclusively for defendants as their truck driver who delivered corrugated cardboard. During this time period, defendants exclusively maintained and exercised the right to control plaintiff=s work and required that plaintiff work solely for the defendant corporations. Plaintiff was supervised by defendants= employees, and required to follow the rules, employee policies, and regulations that defendants set for its employees to follow.

Plaintiff drove trailers that were provided by defendants and delivered corrugated cardboard that was manufactured by defendants. Every morning, plaintiff would congregate in the driver=s dispatch room to get his assignment for the day from defendants who would inform him where he would go to carry out his work duties. Defendants paid plaintiff his travel expenses and part of the insurance on the tractor and trailer according to the representations of

defendants. During this time period, defendants were contractually obligated to pay plaintiff based on the number of stops during his deliveries in accordance with the Roadmaster Trucking, Inc. Company Policy (the APolicy@) (Hyderally Cert. Exhibit A5@).

On March 26, 2003, plaintiff circulated a letter among drivers for their signature complaining of the companies= illegal practices. (Hyderally Cert. Exhibit A2@). The two drivers who physically handed the letter to Testa were told that they were suspended the day they turned in the letter. Later that day, Testa questioned plaintiff about the letter and told him how insulted he was by the letter. Testa then went through the letter with plaintiff trying to explain the letter. Plaintiff went through the illegal and dangerous practices to the public at large of using 53= trailers in urban areas. Plaintiff informed Testa that using these trailers in such areas was against the law. Testa took issue with this conversation and dismissed plaintiff from his office.

Testa then grilled other drivers so as to inquire about the source of the letter. On March 28, 2003, Testa spoke with another driver who admitted that Amatulli gave him the statement to sign. Testa then immediately questioned plaintiff about why he was congregating with other

drivers. Further, Testa told plaintiff that he was firing plaintiff because his signature was the first on the letter and because he knew that plaintiff was circulating the letter to other drivers to get their signatures.

Further, Testa told plaintiff that he would fire a driver every day until he found out who wrote the letter. Plaintiff asked Testa to put that in writing which Testa refused. Plaintiff then told Testa that he wrote the letter. Testa then informed plaintiff that he did not need agitators around here and he had to get back to running a multi-million dollar company. On March 28, 2003, Testa terminated plaintiff.

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STATEMENT OF FACTS

Plaintiff incorporates the Statement of Material and Disputed Facts, allegations of Plaintiff=s Complaint and certifications and attachments of Hyderally and Amatulli as the Statement of Facts.

As noted in the Statement of Material and Disputed Facts, most, if not all, of the material facts are disputed. Plaintiff respectfully submits that on this basis alone, defendants= application for summary judgment should be denied.

ARGUMENT

I. STANDARD OF REVIEW FOR SUMMARY JUDGMENT

The standards for review on a summary judgment motion are well settled. When deciding a motion for summary judgment under Rule 4:46-2, the Court should deny such a motion if, when viewing the competent evidential materials presented in the light most favorable to the non-moving party, there exists a genuine issue with respect to a material fact. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 524 (1995). Additionally, by its plain language, Rule 4:46-2 dictates that a court should deny a summary judgment motion where the party opposing

the motion has come forward with evidence that creates a "genuine issue as to any material fact challenged." The underlying Statement of Facts adequately display that most if not all material facts giving rise to Plaintiff=s Complaint are hotly contested.

Additionally, the Court, when deciding Defendants= Motion for Summary Judgment, should construe all facts and other evidence in the light most favorable to the parties opposing summary judgment. Dairy Stores, Inc. v. Sentinel Publishing Co., Inc., 104 N.J. 125, 135, 516 A.2d 220 (1986). This is so because a party opposing a motion should not be denied a trial unless the moving party sustains the burden of showing clearly the absence of a genuine issue of material fact.

In determining the validity of this Motion for Summary Judgment, plaintiff respectfully submits that, the trial court must not decide issues of fact but merely decide whether there are any such issues that are material and controverted. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 73 (1954); Mercer v. Weyerhaeuser Co., 735 A.2d 576 (App. Div. 1999) citing Brill *supra* at 540 (Appellate standard to review granting of summary judgment motion is Awhether, viewing all of the competent evidential material presented to the trial judge

in a light most favorable to the non-moving party, the evidence is so one-sided that a reasonable fact- finder must resolve the disputed issue of material fact in favor of the movant@); Antheunisse v. Tiffany & Co., Inc., 551 A.2d 1006 (App.Div. 1988) (Same standard should be applied on appeal of such issues). Under such a standard, it is beyond clear that defendants= motion for summary judgment should be denied.

"Generally, we seek to afford "every litigant who has a bona fide cause of action or defense the opportunity for full exposure of his case." United Rental Equip. Co. v. Aetna Life and Casualty Ins. Co., 74 N.J. 92, 99 (1977) (*citing* Robbins v. Jersey City, 23 N.J. 229, 240-41 (1957)). When "critical facts are peculiarly within the moving party's knowledge," it is especially inappropriate to grant summary judgment when discovery is incomplete. Martin v. Educational Testing Serv., Inc., 179 N.J. Super. 317, 326 (Ch.Div.1981). In such cases the standard remains that of Bilotti v. Accurate Forming Corp., 39 N.J. 184, 193 (1963): Since this suit is in an early stage and still not fully developed, we ought to review a judgment terminating it now from the standpoint of whether there is any basis upon which plaintiff should be entitled to proceed further." Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 193 (N.J. , 1988)

II. AMATULLI=S EMPLOYMENT BY DEFENDANTS ENTITLES HIM TO CEPA AND PIERCE PROTECTIONS

Pierce and CEPA both emanate from concerns that whistleblowers are protected and not retaliated against when they engage in certain activities. These protections arise out of the public=s

concern for the well-being of its work force and citizenry and are couched and protected in the strongest of public policy concerns. *See* Costello v. City of Brigantine, 2001 U.S. Dist. LEXIS 8687 *26 (U.S. Dist., June 2001). Indeed, the wrongful discharge doctrine is grounded in public policy and is designed to protect employees when failing to do so would violate a clear mandate of public policy. Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 72, 417 A.2d 505 (1980).

A. Liberal and Broad Construction

New Jersey's Supreme Court has observed that CEPA was enacted "to protect employees from retaliatory actions by employers,@ Abbamont v. Piscataway Township Bd. of Educ., 138 N.J. 405, 650 A.2d 958 (1994), and that it should be liberally construed to effectuate the legislature's protective intent, *see* Young v. Schering Corp., 141 N.J. 16, 660 A.2d 1153 (1995);Barratt v. Cushman & Wakefield, 144 N.J. 120, 675 A.2d 1094 (1996). "Like the New Jersey Law Against Discrimination ("LAD"), CEPA 'seeks to overcome the victimization of employees . . . in the workplace from the improper or unlawful exercise of authority by employers.'" Blackburn v. United Parcel Service, 179 F.3d 81, 91 (3d Cir. 1999) (*quoting* Abbamont, 138 N.J. at 431). Consistent with CEPA's remedial intent, "New Jersey's Courts have held that CEPA's protections should be construed broadly, and its exceptions and limitations read narrowly." Id. Accordingly, the courts have time and time again ruled that the scope of coverage and protection available under both Pierce and CEPA are to be construed broadly and liberally. Thus, the courts define employee, in a coverage determination, broadly. MacDougall v. Weichert, 144 N.J. 380, 389 (1996).

B. Fact Question

AWhether one is an employee or an independent contractor is a part legal and part factual question that may depend on the consequences of the answer. Put differently, the answer may be "employee" for the purposes of applying the Pierce doctrine but "independent contractor" if the

question is whether the putative employer is vicariously liable for the putative employee's tort.@ MacDougal, *supra*.

Thus, defendant=s motion for summary judgment on this issue prior to the conducting of *any* discovery is premature and should be denied accordingly. In fact, in MacDougal, *supra*, the real estate agent working for Weichert that initiated the Pierce action was treated by Weichert as a Form 1099 independent contractor. However, the appellate court reversed the trial court=s granting of summary judgment on the issue of independent contractor coverage and dictated, AI would direct the trial court to analyze MacDougall's situation, and further, to analyze the situation of real estate agents working for firms like Weichert, for it seems to me that the rule should have generality ... it would be preferable to have a full-blown trial of the issue and let the trial court decide whether the matter can be disposed of by the court or requires a factual determination by the jury.@ MacDougall, *supra* at 413.

C. Courts Not Bound by Defendants= Labels

Defendants place great reliance on the fact that their self-serving nomenclature that they attached to plaintiff controls the legal determination of whether plaintiff is protected under the statutes. This position is not couched in the law and is non-sensical unless one is of the belief that the Courts have no purpose other than to blindly and senselessly adopt what parties title one another. However, the New Jersey courts do not play such a robotic role in construing the law. In fact, the courts specifically declared that, AThe categorization of a working relationship depends not on the nominal label adopted by the parties, but rather on its salient features and the specific context in which the rights and duties that inhere in the relationship are ultimately determined. MacDougall, *supra* at 388-389 *citing, see* Volb v. G.E. Capital Corp., 139 N.J. 110, 651 A.2d 1002 (1995) (determining status as special employee using relationship's salient features). In fact, the New Jersey appellate courts have held that the fact that the employer does not withhold or reimburse certain expenses are Amere

distractions@ in determining whether the Courts should treat a person as an independent contractor or employee. Tofani, *infra* at 488. These are the exact same red herring Adistractions@ that defendants advance in the motion for summary judgment.

The United States Supreme Court has time and again found that it is inapposite to protecting people=s rights in a meaningful way if one simply relies upon a label that an employer may place upon an employee to determine whether the Constitution does or does not apply to the person. Such an approach, Awould leave First Amendment rights unduly dependent on whether state law labels a government service provider's contract as a contract of employment or a contract for services, a distinction which is at best a very poor proxy for the interests at stake.@ *See Comment, Political Patronage in Public Contracting*, 51 U. Chi. L. Rev. 518, 520 (1984). ADetermining constitutional claims on the basis of such formal distinctions, which can be manipulated largely at the will of the government agencies concerned, *see* Logue v. United States, 412 U.S. 521, 532, 37 L. Ed. 2d 121, 93 S. Ct. 2215 (1973), is an enterprise that we have consistently eschewed. Bd. of County Comm'Rs v. Umbehr, 518 U.S. 668, 679-681 (1996), *citing, see, e. g.*, Lefkowitz v. Turley, 414 U.S. 70, 83, 38 L. Ed. 2d 274, 94 S. Ct. 316 (1973); *cf.* Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n, ante, at 622 (opinion of BREYER, J.) (AThe government >cannot foreclose the exercise of [First Amendment] rights by mere labels=@) (*quoting* NAACP v. Button, 371 U.S. 415, 429, 9 L. Ed. 2d 405, 83 S. Ct. 328 (1963)); Escobedo v. Illinois, 378 U.S. 478, 486, 12 L. Ed. 2d 977, 84 S. Ct. 1758 (1964) (declining to Aexalt form over substance@ in determining the temporal scope of Sixth Amendment protections); Crowell v. Benson, 285 U.S. 22, 53, 76 L. Ed. 598, 52 S. Ct. 285 (1932) (A[R]egard must be had, . . . in . . . cases where constitutional limits are invoked, not to mere matters of form but to the substance of what is required@); Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 235, 41 L. Ed. 979, 17 S. Ct. 581 (1897) (AIn determining what is due process of law regard

must be had to substance, not to form@); Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 299, 106 L. Ed. 2d 219, 109 S. Ct. 2909 (1989).

D. MacDougall Test

The New Jersey court declared that, Athere are a number of factors that should be considered in determining whether MacDougall is an employee or an independent contractor. Those include: (1) whether MacDougall's services were available to anyone else (or could have been made available to others under his agreement with Weichert); (2) whether a substantial portion of his activities resulted from referrals from Weichert; (3) whether real estate agents in his position are economically vulnerable and can (but will not necessarily) suffer substantial loss from being discharged; and (4) whether invocation of the Pierce rule would unduly restrain Weichert's legitimate rights.@ Weichart *supra* at 412-413.

The court in this case felt that such a matter was inappropriate for summary judgment even though the following facts presented:

> MacDougall and Weichert signed an agreement that purported to make MacDougall an independent contractor. Weichert promised to provide real estate listings and office facilities and MacDougall was to be paid by commissions. Moreover, neither party was liable for the other's expenses. The contract also stated that there were no sales quotas or mandatory sales meetings. In addition, MacDougall was responsible for his own license, trade dues, and health insurance. Either side could terminate the contract at any time by written notice. The contract provided further:
>
> > The Sales Associate acknowledges that he/she is not an employee nor a partner, but a Sales Associate with an independent contractor status, with no rights of [worker's] compensation, salary, pension, sick leave, sick pay, or other attributes of an employee relationship. The Sales Associate will not be treated as an employee with respect to the services performed by such salesperson as a real estate agent for federal tax purposes.
>
> Finally, after the relationship ended, MacDougall could not use any remaining prospects, listings, or referrals.Nevertheless, several facts suggest that Weichert exerted substantial control over MacDougall. MacDougall worked in an office maintained by Weichert, a Weichert manager supervised MacDougall's work, Weichert required MacDougall to take its training program, and Weichert shared the commission profits. The critical issue is whether the elements of control and dependence coupled with the absence of any employment

> protection predominate over factors that favor an independent contractor status. Although in some respects that issue implicates an ultimate factual determination as well as a legal conclusion, there are material issues of subsidiary facts concerning the working relationship between the parties that are unresolved on this record. Consequently, the matter was not amenable to summary judgment. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 666 A.2d 146 (1995).
>
> Weichart, *supra* at 389-390.

Certainly, given the facts, *sub judice,* there are significantly greater facts to demonstrate the requisite elements of control and dependence to substantiate providing Amatulli of the protections of CEPA and Pierce. There substantially more facts to require coverage. Most of these facts will develop in discovery and many facts are noted in Amatulli=s certification.

Amatulli=s Certification and the Statement of Disputed and Material Facts clearly deny the allegations contained in defendants= brief and substantiate the above articulation that plaintiff is protected under CEPA and Pierce.

1. *Amatulli=s Services Available Only to Defendants*

During the time period of plaintiff=s employment, defendants exclusively maintained and exercised the right to control plaintiff=s work and required that he work solely for the defendant corporations. (Amatulli Cert. &24) Thus, it was completely prohibited for Amatulli to work for any other companies. (Amatulli Cert. &45) When Amatulli was employed, defendants told him that he could work only for President Container full time and for no one else. (Amatulli Cert. &45) The drivers were considered employees of the defendant corporations and could work for no other companies. (Amatulli Cert. &45) One example of this was that at one point, Testa found out that another driver, Luis Rodriguez, was working for another company. (Amatulli Cert. &46) Testa went up to Luis and told him that he was terminated. (Amatulli Cert. &46) Thus, there was no possibility that Amatulli could extend his services to any other entity other than the defendant corporations.

Additionally, defendants had sole control over his tractor which he had to lease to them as a condition of employment. (Amatulli Cert. &25) This was due to the lease agreement which gave defendants exclusive rights to use the tractors. (Amatulli Cert. &45); (Hyderally Cert. Ex. A4@) Defendants also limited who Amatulli could utilize to drive the tractor for work. (Amatulli Cert. &33) Even though the lease agreement allows the lessor to employ drivers, defendants mandated that the drivers could no longer do this and cited to insurance reasons. (Amatulli Cert. &33)

2. *All of Amatulli=s Work Came From Defendants*

The work Amatulli performed, is part of the integral part of defendants= business - shipping and delivering corrugated cardboard boxes is what President Container does and what Roadmaster does. (Amatulli Cert. &39) This is what he was employed to do. (Amatulli Cert. &40)

The corporate defendants owned the trailer that Amatulli hitched to the trailer that he drove. (Amatulli Cert. &21) Plaintiff drove trailers that were provided by defendants and delivered corrugated cardboard that was manufactured by defendants. (Amatulli Cert. &23) For over eight years, from February 1995 until March 28, 2003, Amatulli worked exclusively for defendants as their truck driver who delivered corrugated cardboard. (Amatulli Cert. &23) These facts alone should result in a denial of summary judgment as the courts have Afound that an independent contractor is one who does a piece of work according to his own methods and without control of the employer as to means by which the result is to be accomplished.@ Errickson v. F.W. Schwiers, Jr. Co., 108 N.J.L. 481 (E. & A. 1931).

Every morning, Amatulli would congregate in the driver=s dispatch room to get his assignment for the day from defendants who would inform him where he would go to carry out his work duties. (Amatulli Cert. &33) Additionally, the drivers had either morning or afternoon meetings with Testa where he would advise them of the companies= policies. (Amatulli Cert. &32) Even if there was no

such afternoon meeting, the driver has to call dispatch from the last stop prior to returning to plant. (Amatulli Cert. &44) Drivers returning to plant were required to check with dispatch for instructions before dropping off the trailer. (Amatulli Cert. &44)

3. *Amatulli and Other Drivers are Economically Vulnerable Due to Termination*

Amatulli had to work nine (9) hours per day, Monday through Friday, every week for defendants. (Amatulli Cert. &41) This is even referenced in the Policy which was given to him by Steve Testa=s assistant John Cappello. (Amatulli Cert. &41); (Hyderally Cert. Ex. A5@) The Policy mandates that all drivers had to report at assigned times. (Amatulli Cert. &42); (Hyderally Cert. Ex. A5@) Further, part of the Roadmaster Trucking, Inc. Company Policy (the APolicy@) required that owner-drivers had to wear a beeper at work. (Amatulli Cert. &28) Thus, it was mandated that Amatulli was accessible to his employer during all hours of the day. This is the reality even though it is completely different from what Mr. Testa=s affidavit states. (Amatulli Cert. &42) Thus, a factual dispute exists. The Policy further requires that if a driver is not available, he must notify dispatcher the day before. (Amatulli Cert. &43); (Hyderally Cert. Ex. A5@) Further, if the driver cannot deliver the load dispatched, he will be terminated for the day. (Amatulli Cert. &44) Thus, the driver has to make the assigned delivery. (Amatulli Cert. &44)

Defendants also controlled how Amatulli had to maintain the tractor trailer to comply with the companies= specific rules and regulations. The companies= Policy mandated that Amatulli and other drivers must properly maintain trucks and trailers and notes that they will be inspected periodically. (Amatulli Cert. &30); (Hyderally Cert. Ex. A5@) Thus, through defendants= design and their policy, all of Amatulli=s work came from defendants and defendants controlled and supervised his entire work day.

Thus, if Amatulli was terminated, there is no question that he would be significantly impaired financially, as the entirety of his livelihood and revenue source came from defendants due to defendants regulations, rules and requirements.

4. *Whistleblower Protections Will Not Harm Defendants= Legitimate Interests*

Defendants are in the business of manufacturing corrugated cardboard and trucking same to various locations. Protecting drivers who require that defendants comply with their contractual and regulatory obligations will not harm defendants engaging in their legitimate interest of trucking. Plaintiff was supervised by defendants= employees, and required to follow the rules, employee policies, and regulations that defendants set for its employees to follow. (Amatulli Cert. &26) Thus, requiring defendants to follow regulations is completely equitable. Additionally, because defendants have such control over the drivers and mandated what routes drivers take and what loads drivers carried, it would be completely inapposite to the public interest to not protect these drivers when the company requested that they take action to put the public in harm=s way and or take some action which violated a municipal, city or state ordinance or regulation. (Hyderally Cert. Ex. A2-3@)

Such supervision and control is evidenced by the fact that Testa called Amatulli on the road frequently in a supervisory fashion. (Amatulli Cert. &27) Some of the phone calls were to direct Amatulli where to go, to tell Amatulli of additional pick-ups, to ask the status on making deliveries, to see how he was doing with time, and to tell him of routes to take. Id. Additionally, Amatulli would get frequent phone calls from the dispatcher, Kevin Sullivan, telling him what to do while he was on the road. Id.

The defendants control what Amatulli ships, what he ships it in, where he is going, when he goes, when he returns, who drives the tractors and how many shipments he makes. Defendants manufactured the corrugated cardboard that Amatulli delivered, defendants owned the trailer that he

transported, and defendants had exclusive control over the tractor that he drove during working hours. Further, defendants told Amatulli where to go to ship materials and thus controlled the geographic area to which he delivered. Thus, it would be equitable and in keeping with public policy and New Jersey case law to provide Amatulli protections under CEPA and Pierce given the above facts. *See* Abbamont, *supra*, Costello, *supra*, and Young, *supra*. Therefore, we respectfully state that the Court should deny defendant=s motion for summary judgment.

E. Right to Control Test

In fact, an extremely similar question presented in the matter of Tofani v. Lo Biondo Brothers, 83 NJ Super. 480 (App. Div. 1964), wherein the New Jersey appellate court specifically declared that truck drivers were protected under the New Jersey Worker=s Compensation statute. This statute similar to CEPA extends coverage to employees and does not apply to independent contractors.

The court designated various factors to set the factual predicate to a right to control test:

> '(1) A servant is a person employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the other's control or right to control.
>
> (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
>
> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> (d) the skill required in the particular occupation;
>
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (f) the length of time for which the person is employed;
>
> (g) the method of payment, whether by the time or by the job;

> (h) whether or not the work is a part of the regular business of the employer; and
>
> (i) whether or not the parties believe they are creating the relationship of master and servant.'
>
> On only one point as to relative weight of the various tests is there an accepted rule of law: it is constantly said that the right to control the details of the work is the primary test. Where some of the above listed factors point one way and some the other, a court must follow some mental weighing process according to some principle.@
>
> Tofani, *supra* at 497-498.

The facts presented in Tofani are eerily similar to the facts presented here as noted above. Plaintiff owned a tractor trailer. Defendant was a freight carrier and utilized 50 owner operators. Defendant paid plaintiff hourly and leased equipment. The parties entered into a leasing agreement. Defendant testified that they did not have control of the owner, that they did not supervisor owner, that owners were used if work was available, plaintiff could hire help to drive the truck if he wanted help which would be deducted from plaintiff=s check, plaintiff was paid by the tonnage and distance, defendant could fire plaintiff, plaintiff had no choice what he would carry or where he would deliver it, plaintiff worked for no one else other than defendant. Tofani, *supra*. These are the exact facts that present *sub judice,* and, thus, summary judgment should be denied.

Tellingly, the Court found that, AWhen the employer furnishes valuable equipment, the relationship is almost invariably that of employment.@ Tofani *supra* at 486. Clearly, defendants in this case do not deny that they furnished valuable equipment in the form of the trailer and the goods that were transported. The court also found of import that defendant owned the trailer and had exclusive possession of the tractor (per lease) and found that truck drivers were employees. Tofani *supra* at 487. Defendants do not deny that they have leased possession of the tractor. (Hyderally Cert. Ex. A4@) The court also found that the factors of no withholdings or payment of certain expenses were Amere distractions.@ Tofani *supra* at 488.

Under such a Right to Control Test, Amatulli should be extended the protections of CEPA/Pierce for the following reasons: (a) It has been noted that defendants exercise great control and supervision over plaintiff; (b) plaintiff fulfills defendants= business of shipping corrugated boxes; (c) plaintiff is under the supervision and control of defendant at all times through cellular phone and pager/beeper and dispatcher; (d) Plaintiff is not overly skilled in that his job entails driving a truck; (e) Defendants supply the trailer, the corrugated boxes that are shipped, and has control over the tractor per the lease agreement; (f) Amatulli worked in excess of eight (8) years solely for defendants; (g) Amatulli=s compensation and that of the other drivers is dictated by the terms of the employment contract/lease agreement; (h) The work that Amatulli performed was part of the regular business of defendants; (i) Amatulli and the other drivers were certainly under a reasonable belief that they were Aservants@ to Testa and the other supervisors of the defendant companies.

III. AMATULLI CAN ESTABLISH A CLAIM UNDER THE NEW JERSEY CONSTITUTION

A. Free Speech as a Cause of Action

It is a given that, ASpeech concerning matters of public concern occupies the >highest rung of the hierarchy of First Amendment values,= and is entitled to special protection.@ Johnson v. Yurick, 39 Fed. Appx. 742, 745 (U.S. App. , 2002), *citing* Connick v. Myers, 461 U.S. 138, 145, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983) (*citing* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 914, 73 L. Ed. 2d 1215, 102 S. Ct. 3409 (1982); *see also* Carey v. Brown, 447 U.S. 455, 467, 65 L. Ed. 2d 263, 100 S. Ct. 2286 (1980)).

Article I, paragraph 6 of the New Jersey Constitution (1947) guarantees that A[e]very person may freely speak, write and publish his sentiments on all subjects...@ The inclusion of the right of freedom of speech in the state constitution has several consequences of importance for this case. First, the explicit affirmation of the freedom of speech in the constitution serves as a guarantee of that right and not as a restriction on it. State v. Schmid, 84 N.J. 535, 558 (1980). Second, the courts can enforce that constitutional right even in the absence of implementing legislation. Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 76-77 (1978). Third, and most importantly for this case, an individual=s freedom of speech is protectable not only from interference by public officials, but also from interference by private persons as well. State v. Schmid, *supra*, 84 N.J. at 559; King v. South Jersey Nat=l Bank, 66 N.J. 161, 192-93 (1974) (Pashman, J., dissenting).

Thus, the New Jersey Constitution grants, Afree speech rights . . . that, unlike the First Amendment , . . . [are] not limited to protection from government interference.@ New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp. , 138 N.J.26 , 353 (1994), *cert. denied* , 516 U.S. 812 , 116 S. Ct. 62 , 133 L. Ed. 2nd 25 (1995); *see also* State v. Schmid , 84 N.J. 535 , 560 (1980), *appeal dismissed sub nom.*, Princeton University v. Schmid , 455 U.S. 100 , 102 S. Ct. 867 , 70 L. Ed.2d 855 (1982). Finally, the inclusion of the freedom of speech in the state constitution imposes on the state and its various branches an affirmative obligation to protect that right. State v. Schmid, *supra*, 84 N.J. at 559; Mt. Laurel v. Public Advocates of N.J., 83 N.J. 522, 535-6 (1980).

Because of the great importance New Jersey has attached to the protection of state constitutional rights, the courts have held that employees have a cause of action for wrongful discharge if they are fired in retaliation for their exercise of their constitutional rights, including the freedom of speech. Hennessey v. Coastal Eagle Point Oil Co., 129 N.J. 81, 92-3 (1992); Zamboni v. Stamler, 847 F. 2nd 73 (3d Cir.), *cert. denied*, 488 U.S. 899 (1988). In recognizing a wrongful

discharge claim under these circumstances, New Jersey is merely exercising its traditional police power of establishing labor standards. Lingle v. Norge, Div. of Magic Chef, Inc., 486 U.S. 399, 412 (1988).

B. The Schmid Test

The New Jersey Supreme Court has held, as defendants state, that the multi-faceted test to be applied to determine coverage takes Ainto account (1) the nature, purposes, and primary use of such private property, generally its normal use, (2) the extent and nature of the public=s invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property.@ State v. Schmid, *supra* 84 N.J. 535 at 630; at *47.

1. *Nature, purposes and primary use of the property*

No discovery has been taken on this issue. However, defendants operate a trucking company that owns trucks as its property that are placed upon public roads to carry goods for customers to locales in various cities and states around the country. Thus, not only do customers visit the facility, but also the trucks operate on public roads and are subject to inspection during the course of their travels. In fact, numerous members of the public interact with defendants. (Amatulli Cert. 9).

Additionally, defendants argue that the drivers are not employees. Thus, they are estopped from arguing that the company does not invite numerous citizens and members of the public to its premises to conduct its business as the company utilizes those same drivers to conduct its business. (Amatulli Cert. 8).

2. Extent and nature of the public=s invitation to use that property

No discovery has been taken on this issue. However, defendants operate a trucking company and members of the public came to the premises. Thus, a material dispute exists on this point.

Further, the drivers carry their cargo for the public to specific destinations that are owned by members of the public. Additionally, the drivers= specific job duties entail traveling on roads shared by the public. The trucks carry upon them various signs and designations and must comply with the public=s rules and regulations with regard to commercial trucking. Thus, their specific jobs is to transport goods on public roads for public customers to some member of the public=s storehouse for the goods.

3. *Purpose of expressional activity*

The purpose of Amatulli=s actions was, *inter alia*, to protect the public and the drivers of the company. (Amatulli Cert. &&10-17). Amatuli got all the drivers to sign a Petition that was then provided to Testa. (Hyderally Cert. Ex. A1@). Such activity, in so far as presenting a Petition, is at the very bedrock and essence of constitutionally protected free speech. The right to gather and form unions and petition ones= employer are all secured by the New Jersey Constitution. To this end, the Petition specifically stated, A53= *[sic]* foot trailers make deliveries more difficult and dangerous and also reduce available loads per driver. Id. We the drivers request a meeting with Management to discuss these vitally important issues.@ Further, Amatulli specifically discussed, with Testa and other drivers, the illegal and dangerous practices of using 53= trailers in urban areas. (Amatulli Cert. &&11-12). Plaintiff informed Testa that using these trailers in such areas was against the law. (Amatulli Cert. &11). Testa took issue with this conversation and dismissed plaintiff from his office. (Amatulli Cert. &61). Subsequently, Testa terminated Plaintiff in retaliation for engaged in a protected activity. (Amatulli Cert. &&55-56). In fact, plaintiff is correct that defendants were violating regulations in utilizing 53 foot tractor trailers on certain roads. (Amatulli Cert. &&14-16); (Hyderally Cert. Ex. A2-3@). These facts shall be fully developed once discovery is conducted. Thus, the expressional activity was, in part, specifically geared at the safety of the public.

C. State Action

In particular settings, private entities, including educational institutions, may so impact upon the public or share enough of the essential features of governmental bodies as to be engaged functionally in Astate action@ for First Amendment purposes. State v. Schmid, 84 N.J. 535, 1980 N.J. LEXIS 2265 *11 (1980).

1. *Impact upon Public*

Under a Schmid, *supra* at*11, analysis, if a company impacts upon the public in a substantial manner, then persons such as Amatulli would have a cause of action against the company under a First Amendment analysis.

There should be little debate that a company that is focused on putting several ton vehicles on the public roads can impact upon the public. It is part of the reason the industry of trucking and transportation is so heavily regulated. *See e.g.* N.J.S.A. 27:1A-5, Chapter 32, N.J.S.A. 16:32-1.1; (Hyderally Cert. Exs. A2-3@). Of course, no discovery has yet been conducted, thus, this issue will be developed through the pendency of the litigation.

2. *Sharing Essential Features of Government Bodies*

Another basis for determining the existence of state action is the extent of direct governmental regulation of the private entity. Public Utilities Comm'n v. Pollak, 343 U.S. 451, 463, 72 S. Ct. 813, 821, 96 L.Ed. 1068, 1077 (1952), (First and Fifth Amendments to the federal Constitution were applicable to a policy decision made by a private transit company operating in the heavily-regulated field of public transportation because that decision was subject to approval by a governmental agency.) There must be demonstrated a "sufficiently close nexus" between the state regulation and the allegedly unconstitutional actions of the regulated business entity before it can be said that those

actions emanate from or can be attributed to state government. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351, 95 S. Ct. 449, 453, 42 L.Ed. 2d 477, 484 (1974);

This is directly on point with what we have here. We have a company that does transports goods. This action is heavily regulated by statutes as to requirements of symbols on trucks, speed limits for trucks, amount of hours truck drivers can drive, weight of truck, length of truck, width of truck, what roads the truck can go on. What Amatulli complained about, was the fact that defendants compelled drivers to drive trucks into prohibited areas which was unsafe to members of public. Thus, the regulations is directly relevant to the allegedly illegal action. Once again, because no discovery has occurred, this matter will be developed through the pendency of the litigation in so far as the interaction between municipal, state or federal organizations and defendants and the regulation of defendants by such organizations.

D. Alternatives to Free Speech Limitations

Once this analysis is completed, the Courts should then look to whether the company has alternatives to its prescriptions to free speech. State v. Schmid, *supra* at *47-48. Given the fact that no discovery has occurred, this issue is not ripe for a motion for summary judgment. However, under a Brill, *supra*, analysis, the defendants did not provide any alternative to plaintiff=s actions with regard to providing a petition of complaints. Rather the defendants merely terminated plaintiff and threatened others for engaging in the petition and thus attempted to proscribe it completely. (Amatulli Cert. &&57-67). In fact, defendants specifically took action to inquire of and deter the drafter of the document as evidenced by Testa=s actions. Id. As soon as Testa learned that Amatulli drafted the petition, Testa fired Amatulli. Id.

IV. AMATULLI CLEARLY STATES A CAUSE OF ACTION UNDER THE RELEVANT STATUTES AND LAWS

Defendants= brief on this separate point appears to simply parrot what is stated in points 2 and 3 and shall be responded to accordingly by referring to the relevant sections of this brief.

V. PRESIDENT CONTAINER SHOULD REMAIN A DEFENDANT

Upon information and belief, President Container is the alter ego of Roadmaster. Upon information and belief, Roadmaster was created to insulate President Container of exposure to its assets, and discovery is required but has not yet occurred as to the relationship between the two companies. Upon information and belief, Roadmaster has limited to no assets while all financial and other assets are held by President Container. In fact, when Amatulli receive payments from customers that he deliver goods to, they are always directed to make out their checks/payment to President Container. They never make payment to Roadmaster. Upon information and belief, President Container controls Roadmaster. Additionally, upon information and belief, all the corporate officers, owners and shareholders of President Container are the same for Roadmaster. Thus, plaintiff reserves his rights to make application to pierce the corporate veil, if necessary, at the appropriate juncture of this litigation.

CONCLUSION

For all the foregoing reasons, Plaintiff, respectfully requests that the Court deny Defendants= applications for summary judgment. A form of order is attached.

Dated: September 15, 2003

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