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ROBERT L. TAYLOR, Plaintiff, vs. COUNTY OF CAPE MAY, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION CAPE MAY COUNTY Docket No. CPM-L-0530-17 Civil Action **ORDER**

This matter being opened to the Court by Cooper Levenson, P.A., Russell L. Lichtenstein, Esquire, appearing, attorneys for Defendant, and after considering the pleadings, this motion with supporting briefs and for good cause shown;

IT IS on this 10th day of December 2018, ORDERED as follows:

1. Defendant, the County of Cape May's Motion to Dismiss Plaintiff, Robert L. Taylor's Amended Complaint with prejudice for failure to state a claim upon which relief can be granted, is granted.

2. Plaintiff's Amended Complaint is hereby dismissed, pursuant to R. 4:6-2(e), with prejudice.

3. A copy of this Order shall be served on all parties to this litigation within 7 days of this Order.

J. Christopher Gibson, J.S.C.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAPE MAY COUNTY

CASE: **Robert L. Taylor v. County of Cape May**

DOCKET NO.: **CPM-L-530-17**

NATURE OF APPLICATION: **DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR FAILURE TO STATE A CLAIM**

MEMORANDUM OF DECISION ON MOTION

BACKGROUND AND NATURE OF MOTION

The Complaint in this matter was filed on November 20, 2017. There is no discovery end date. There are five hundred ten (510) days of discovery. There have been no discovery extension(s). Neither arbitration nor trial is scheduled.

Defendant, the County of Cape May, now moves to dismiss Plaintiff, Robert L. Taylor's Complaint for failure to state a claim.

This Court has carefully and thoroughly reviewed the moving papers and attached exhibits submitted by the parties with this motion.

LEGAL ANALYSIS

R. 4:6-2(e) provides, in pertinent part,

> Every defense, legal or equitable, in law or fact, to a claim for relief in any complaint, counterclaim, cross-claim, or third-party complaint shall be asserted in the answer thereto, except that

> the following defenses … failure to state a claim upon which relief can be granted.

Motions to dismiss a Complaint for failure to state a claim should be granted "in only the rarest of instances." Printing Mart-Morristown v. Sharp Elect. Corp., 116 N.J. 739, 772 (1989). In approaching a motion to dismiss for failure to state a claim upon which relief can be granted, the court's inquiry is limited to "examining the legal sufficiency of the facts alleged on the face of the complaint." Id. at 746. The court must search the complaint "in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim … ." Id. For purposes of analysis, the plaintiff is entitled to "every reasonable inference of fact … [and the examination] should be one that is at once painstaking an undertaken with a generous and hospitable approach." Id.

In reviewing the motion, the court is not concerned with the "ability of plaintiffs to prove the allegation contained in the complaint." Id. The complaint need only allege sufficient facts as to give rise to a cause of action or *prima facie* case. Dismissal of the plaintiff's complaint is only appropriate after the complaint has been "accorded … [a] meticulous and indulgent examination … ." Id. at 772. If dismissal of the plaintiff's complaint is appropriate, the dismissal "should be without prejudice to a plaintiff's filing of an amended complaint." Id.; Major v. Maguire, 224 N.J. 1, 26 (2016). In circumstances where the plaintiff's pleading is inadequate in part, the court has the discretion to dismiss only certain counts from the complaint. See,

e.g., Jenkins v. Region Nine Hous. Corp., 306 N.J. Super. 258 (1997). If pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of by R. 4:46 … ."

MOVANT'S POSITION

Defendant, the County of Cape May, now moves to dismiss Plaintiff's Complaint, with prejudice.

Plaintiff, Robert L. Taylor, served as the Cape May County Prosecutor from October 1, 2004 to his retirement on October 1, 2017. See Certification of Russell L. Lichtenstein ("Lichtenstein Cert."), Exhibit A, ¶ 1. The attorneys working in the Prosecutor's Office were unionized and were represented by a Union Leader, who is unnamed in the Amended Complaint. The Union Leader was an Assistant Prosecutor in Cape May County (the "County"), and according to Plaintiff's Amended Complaint, some believed she would be Plaintiff's successor upon his departure. Id. ¶ 6. The Union Leader was subsequently appointed to the New Jersey Judiciary.

The Amended Complaint alleges that Defendant Jeffrey R. Lindsay, Esquire ("Lindsay"), the Human Resources Director for the County, represented the County in heated contract negotiations with the union. Id., ¶¶ 7, 8. During the contract negotiations, the Union Leader served an Open Public Records Act ("OPRA") request upon a local municipal police department seeking personal information about Lindsay unrelated to the contract negotiations. Id. ¶ 9. The Union Leader's actions then prompted the County of Cape May Board of Chosen Freeholders (the "Board") to file an

internal affairs case against the Union Leader. The Board filed this complaint directly with the Attorney General's Office, rather than the Prosecutor's Office, where the Union Leader was an Assistant Prosecutor. Id., ¶¶ 31, 32. The Attorney General's Office remanded the investigation to the Prosecutor's Office, which dismissed the complaint after an investigation. Id., ¶ 33.

Plaintiff alleges in his Complaint that his discussions with Lindsay and Freeholder Gerald M. Thornton ("Thornton") revealed that the two individuals did not support the Union Leader and were concerned with the Union Leader's continued employment at the Prosecutor's Office. Defendant notes that they allegedly voiced their objection to the Union Leader ever becoming Prosecutor. Id., ¶¶ 19, 22.

Defendant asserts that Plaintiff vaguely alleges that Thornton and Lindsay pressured him to sustain the allegations in the internal affairs complaint, discipline the Union Leader/Assistant Prosecutor, and "derail her possible judgeship." Id., ¶ 12. Defendant notes that Plaintiff claims that he "refused to participate in their concerted effort to remove the union leader from not only her leadership position within the union, but also from employment with the Cape May County Prosecutor's Office." Id., ¶ 28. Defendant submits that Plaintiff alleges, without factual support, that Plaintiff "found the statements and suggestions" of Thornton and Lindsay "as well as their characterizations and references to the Union Leader to be an affront to the efficient operation" of the Prosecutor's Office, and "further

found them to be in violation of the law." Id., ¶ 17. Defendant notes that none of the allegedly offense remarks were directed at Plaintiff.

Plaintiff's Amended Complaint also claims that Plaintiff "objected to County Counsel… about the filing of an 'Internal Affairs' Complaint." Id., ¶ 32. The Amended Complaint further alleges that Plaintiff "knew he was jeopardizing his relationship with the Freeholders … by not going along with their efforts to get said Union Leader and Assistant Prosecutor fired, disciplined or have negative information placed into her background investigation." Id., ¶ 36. However, Defendant asserts that Plaintiff does not allege that either Thornton or Lindsay threatened him in any way, or indicated that the consequence of his failure to comply with their requests.

Plaintiff alleges that he also brought his concerns regarding the opioid crisis in Cape May County to the Board, who encouraged Plaintiff to disregard the actual data and embrace stale data. Id. at ¶ 46. Plaintiff alleges that he rebuffed this alleged suggestion, and stated that intended to release the actual data to the media. Id. ¶ 47. Plaintiff also alleges that he was to receive the same benefits as another Assistant Prosecutor, John David Meyer ("Meyer"), for whom Defendant apparently chose to extend health insurance coverage to for life after Meyer's retirement. This was memorialized in a written contract in 2011. Id. ¶¶ 49-55. However, Defendant asserts that Plaintiff alleges that Freeholder Ralph Sheets offered this to Plaintiff, not Defendant, who was Plaintiff's employer. Defendant adds that Plaintiff does not allege that Defendant promised this to him, or that Freeholder Sheets

had the authority to bind Defendant to this alleged promise.

Defendant submits that Plaintiff alleges that he was retaliated against for his refusal to participate in Defendant's attempts to remove the Union Leader, and for Plaintiff's refusal to release purportedly "false information" to the media about the drug epidemic. Id., ¶ 67. This action includes: "defaming [Plaintiff] *per se*, impugning his reputation and not affording him all of the emoluments of being a retired employee of Defendant … that were given to similarly situated retiring employees and that had been previously promised to Plaintiff." Id., ¶ 71.

Defendant argues that Plaintiff's CEPA claim fails for his inability to plead facts sufficient to support a *prima facie* claim. Defendant submits that in order to establish a *prima facie* case of unlawful retaliation under CEPA, a plaintiff must demonstrate: (1) a reasonable belief that the employer's conduct was violating either a law, rule, regulation or public policy; (2) the employee performed a "whistle blowing" activity as described in N.J.S.A. § 34:19(a) or (c); (3) an adverse employment action was taken against him or her; and (4) a causal connection existed between his whistle-blowing activity and the adverse employment action. Klein v. Univ. of Med & Dentistry of N.J., 377 N.J. Super. 28, 38 (App. Div. 2005).

To constitute an adverse employment action, "the retaliatory conduct alleged must be 'serious and tangible' enough to alter an employee's compensation, terms, conditions, or privileges or employment, deprive her future employment opportunities, or otherwise have a 'materially adverse'

effect on her status as an employee." Hargrave v. Cnty. of Atlantic, 262 F. Supp. 2d 393, 427 (D.N.J. 2003) (quoting Robinson v. Cty. of Pittsburgh, 120 F.3d 1286, 1300-01 (3d Cir. 1997)). Defendant argues that Plaintiff cannot satisfy a *prima facie* CEPA claim, as this Court has already determined that Plaintiff has not demonstrated a reasonable belief that the employer's conduct was violating a law, rule, regulation or public policy, and Plaintiff has not alleged new facts in the Amended Complaint.

Defendant notes that the Court already determined that Plaintiff's initial Complaint failed to allege any law, rule, regulation, or public policy that Plaintiff believed Defendant violated, and argues that Plaintiff does not allege additional facts supporting a *prima facie* CEPA claim in his Amended Complaint. Defendant argues that case doctrine follows the "fundamental legal principle … that once an issue has been fully and fairly litigated, it ordinarily is not subject to relitigation between the *same parties* either in the same or in subsequent litigation" in a court of equal jurisdiction. Morris Cnty Fair Hous. Council v. Boonton Twp., 209 N.J. Super. 393, 444 n. 16 (Law Div. 1985) (emphasis in brief).

Defendant first argues that the Court already determined that Plaintiff's initial Complaint cited rules, regulations, or public policy he believed Defendant violated; however, the cited policies were vague and unspecific, and thus, Plaintiff failed to state a CEPA claim. See Lichtenstein Cert., Exhibit C, p. 52, Exhibit B, ¶ 29. Defendant asserts that Plaintiff's Amended Complaint recites the same vague and unspecific rules, regulations,

or public policies that he believes Defendant violated—despite the Court's clear and specific reasoning that same were insufficient to establish a *prima facie* claim. Id., Exhibit A, ¶ 16. Defendant argues that Plaintiff cannot claim based on the facts alleged that Defendant violated any regulation or policy. Defendants assert that Plaintiff's allegations amount to nothing more than a difference in opinion between an employer and management regarding a poorly performing employee. Defendant submits that it was concerned with the Union Leader's OPRA request, and allegedly expressed its concerns regarding same to Plaintiff, the Union Leader's supervisor. Defendant asserts that no public policy was violated, nor was a regulation or law violated. Instead, Defendant performed its duty as a public entity as a public entity by addressing the Union Leader's malfeasance and abuse of her office.

Defendant asserts that determining that its actions violate a public policy under CEPA will have a chilling effect on all employers forced to contend with errant employees. Defendant argues that employers should be able to discuss an employee's merits or lack thereof with management, and suggest a course of action in response to an employer's objectionable behavior. As such, Defendant submits that Plaintiff's allegations do not suggest that Defendant violated a public policy or regulation.

Second, Defendant argues that Plaintiff's Amended Complaint also fails to allege any facts of an adverse employment action. Defendant submits that Plaintiff claims that Defendant's adverse retaliatory action consisted of impugning his reputation through purported *per se* defamatory statements in

the internal affairs Complaint, and that he received an oral promise for a lifetime of free health insurance upon retirement. Defendant asserts that neither of these allegations support the conclusion that Defendant took retaliatory action against Plaintiff.

With respect to harm to Plaintiff's reputation, Defendant argues that Plaintiff fails to allege any facts to support his claim that Defendant impugned his reputation, but relies on statements made in the internal affairs complaint. Defendant notes that Plaintiff is not named explicitly or referenced implicitly in the letter; it describes only conduct attributable to the Union Leader. Defendant argues that no reasonable person would interpret the internal affairs complaint as impugning Plaintiff's reputation. Defendant submits that there are no statements about Plaintiff in the internal affairs complaint, contrary to Plaintiff's assertions. See Lichtenstein Cert., Exhibit A, ¶¶ 23-24. Nor are there any inferences that Plaintiff engaged in official misconduct by employing the Union Leader. Defendant argues that a plain reading of the internal affairs complaint demonstrates that the letter does not impugn Plaintiff in any way, and thus, it is not evidence of *per se* defamation, or that Defendant harmed Plaintiff's reputation.

Defendant further asserts that while the Amended Complaint alleges that the Freeholders and Lindsay were displeased with the Union Leader, it is devoid of any factual allegation that Defendant said or did anything that would affect Plaintiff's reputation in retaliation of Plaintiff's support of the

Union Leader. Moreover, Plaintiff's Amended Complaint does not allege that Plaintiff's dispute regarding the opioid data impugned his reputation. As such, Defendant argues that the allegations that Defendant impugned Plaintiff's reputation are insufficient to support a claim for retaliatory action under CEPA, because he cannot prove an adverse employment action.

With respect to the retirement benefits, Defendant argues that Plaintiff fails to allege that Defendant, Plaintiff's employer, promised the same retirement benefits as were promised to Assistant Prosecutor Meyer. Further, Defendant asserts that Plaintiff does not allege that Freeholder Sheets had the authority to promise Plaintiff a lifetime of health care benefits upon retirement. Defendant notes that it does have discretionary authority to provide health insurance benefits to a retiring County employee upon certain conditions. See N.J.S.A. § 40A:10-23(a). Defendant asserts that the period of service determined by Cape May County pursuant to this section to be eligible for lifetime health insurance benefits is twenty-five (25) years of employment with the County or another qualified employment under N.J.S.A. § 4:A10-23(a), such as "any county or municipal police department, sheriff's department or county prosecutor's office." Ibid.

Defendant submits that Plaintiff worked for the Cape May Prosecutor's Office for only thirteen (13) years, and has not alleged any other qualifying employment under N.J.S.A. § 40A:10-23(a). As a result, Defendant argues that Plaintiff is statutorily ineligible for full coverage of health insurance retirement benefits and Defendant could not retaliate against

Plaintiff by denying benefits for which Plaintiff does not qualify as a matter of law. Defendant adds that Plaintiff does not allege that he worked anywhere other than the Cape May County Prosecutor's Office from October 1, 2004 to October 1, 2017. See Lichtenstein Cert., Exhibit A, ¶ 1. Defendant submits that Plaintiff fails to allege where he was employed before 2004, whether that employment was with Defendant, or in what capacity he was employed with Defendant before 2004. Defendant argues that the statute requires twenty-five (25) years of service *with the employer*. Without final allegations of his prior employment, Defendant argues that Plaintiff's Amended Complaint fails to sufficiently plead facts that would entitle him to a lifetime of free health insurance coverage, and fails to apprise Defendant of the claims and issues to be listed at trial. See Jardine Estates, 24 N.J. at 52.

Defendant argues that "service" under N.J.S.A. § 40A:10-23, which regulates health insurance upon retirement, cannot be construed to mean the same as "creditable service" under N.J.S.A. § 43:16A-1, which regulates annuities, because of the "significant differences in the language, purposes, and legislative history of the two statutes." See Wolfersberger v. Borough of Point Pleasant Beach, 305 N.J. Super. 446, 449 (App. Div. 1996), aff'd, 152 N.J. 40 (1997).

In this matter, Defendant argues that Plaintiff's initial Complaint alleged that he was denied health insurance coverage upon retirement in retaliation for supporting the Union Leader and suggesting the release of opioid data. However, Defendant submits that the Court determined that

Plaintiff failed to allege that he qualified for the "emoluments of being a retired employee." See Lichtenstein Cert., Exhibit C, p. 50. Defendant argues that Plaintiff's Amended Complaint similarly fails to allege that Plaintiff qualifies for discretionary health benefits because he is statutorily ineligible; Defendant notes that Plaintiff does not allege that he completed twenty-five (25) years of actual service for Defendant, and it is undisputed that he did not work for Defendant for twenty-five (25) years. Thus, Defendant argues that Plaintiff cannot claim that he was wrongfully denied health benefits in retaliation.

Defendant further argues that Plaintiff's claim that Freeholder Sheets specifically promised retirement benefits to Plaintiff similar to those received by Meyers, fails to establish any entitlement those benefits. Defendant argues that N.J.S.A. § 40A:10-23(a) provides that Defendant, as the employer, may at its discretion continue assuming the cost of health insurance benefits for a retiring employee who has twenty-five (25) years of service with the employer. Defendant asserts that even if Plaintiff could establish that he has twenty-five (25) years of service with Defendant, Freeholder Sheets' oral promise alone is not enough to prove that Plaintiff was entitled to those benefits. Further, Defendant asserts that Plaintiff does not allege that Freeholder Sheets had actual or apparent authority to compel Defendant to continue paying for Plaintiff's health insurance upon retirement. See Bridgewater-Rariton Ed. Ass'n v. Bd. of Ed. of Bridgewater-Raritan School Dist., Somerset Cty., 221 N.J. 349, 363 (2015) ("authority

arises 'when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations") (citation omitted).

Defendant argues that as such, Plaintiff is statutorily ineligible for health insurance benefits upon retirement, and without such entitlement, Plaintiff cannot show that the benefits were denied in retaliation in violation of CEPA. Defendant adds that denying health insurance under these circumstances is not an adverse employment action. As such, Defendant argues that the alleged facts do not suggest a CEPA claim, and Plaintiff has failed to show a retaliatory action by Defendant, and cannot establish a *prima facie* CEPA claim.

Therefore, Defendant argues that Plaintiff's Amended Complaint should be dismissed with prejudice, as he has whittled his Complaint down to one Count and one Defendant, but still cannot establish a *prima facie* claim against Defendant. Defendant notes that although motions to dismiss for failure to state a claim are usually dismissed without prejudice, in this instance, Plaintiff had the opportunity to amend his Complaint to sufficiently plead a single count for CEPA violation, but failed to do so. Defendant argues that rather than giving Plaintiff yet another bite at the apple, the Court should dismiss the Amended Complaint with prejudice.

OPPOSITION

Plaintiff, Robert L. Taylor, first argues that New Jersey is a notice pleading State. See R. 4:5-7; Spring Motors Distributors, Inc. v. Ford Motor

Co., 191 N.J. Super. 22, 29-30 (App. Div. 1983), rev'd on other grounds, 98 N.J. 555 (1985). Second, Plaintiff argues that the law of the case doctrine does not apply in this matter. Plaintiff argues that the Court's original Memorandum of Decision allowed Plaintiff to file an Amended Complaint within a certain time frame, which he has done. As such, the Amended Complaint must be viewed on its own supplemental by the additional case law relied upon by Plaintiff as set forth in his opposition. Third, Plaintiff argues that CEPA is meant to afford far-reaching protection for whistleblowers. Specifically, New Jersey courts have consistently held that CEPA was enacted to "protect and encourage employees to report illegal or unethical workplace activities and to discourage public or private sector employees from engaging in such conduct." Abbamont v. Piscataway Twp. Bd. of Ed., 138 N.J. 405, 431 (1994); See also, Hernandez v. Montville Twp. Bd. of Ed., 354 N.J. Super. 467, 473).

Fourth, Plaintiff argues that CEPA is designed to protect employees from retaliation based upon whistleblowing. Plaintiff asserts that

> CEPA does not require any magic words in communicating an employee's reasonable belief of illegal activity. "The object of CEPA is not to make lawyers out of conscientious employees but rather to prevent retaliation against those employees who object to employer conduct that they reasonably believe to be unlawful." Mehlman v. Mobil Oil Corp., 153 N.J. 163, 193-94 (1998). CEPA is designed to protect employees who "blow the whistle" on illegal or unethical activity committed by their employers or co-employees, and as such, is remedial legislation that should be construed liberally to achieve its purpose. Estate of Roach v. TRW, Inc., 164 N.J. 598, 609-10 (2000).

Beasley v. Passaic Cty., 377 N.J. Super. 585, 605 (App. Div. 2005). Plaintiff submits that in light of the above, it is of no moment that Plaintiff's CEPA allegations concern actions taken by Thornton and Lindsay. Fifth, Plaintiff argues that the statutes relied upon as sources of public policy by Plaintiff have been accepted by at least one Appellate Panel in an unpublished decision. See Exhibit A.

Sixth, Plaintiff argues that his Amended Complaint does not plead the same CEPA complaint as in his original Complaint. Plaintiff argues that all the Court needs to do is compare Exhibit A and Exhibit B of Defendant's brief. Plaintiff argues that his Amended Complaint has almost double the amount of paragraphs in his Complaint. See Defendants' Exhibits A and B. Plaintiff notes that some of the individual paragraphs are the same, and others have been amended, and there are new paragraphs. However, Plaintiff asserts that he took the Court's comments under advisement, and drafted his Amended Complaint in order to address the Court's concerns.

Seventh, Plaintiff argues that he adequately pleads a cause of action under CEPA in his Amended Complaint. In order to maintain a cause of action under CEPA N.J.S.A. § 34:19-1 to -8, a plaintiff must establish: (1) that he or she reasonably believes that his or her employer's conduct is violating either a law or a rule or regulation promulgated pursuant to law; (2) that he or she performs whistle-blowing activity described in § 34:19-3a, c(1) or c(2); (3) an adverse employment action is taken against him or her; and (4)

a causal connection exists between the whistle-blowing activity and the adverse employment action. Kolb v. Burns, 320 N.J. Super. 467, 471 (App. Div. 1999). Plaintiff argues that his Amended Complaint contains adequate allegations that he reasonably believed his co-employee's conduct was violating either a law or rule or regulation promulgated pursuant to law or the public policy of the state of New Jersey, and that he performed whistleblowing activity. Plaintiff argues that he has adequately set forth facts at Paragraphs 13, 17, 18, 35, and 45 to establish the first two prongs of CEPA.

Plaintiff adds that the Amended Complaint contains adequate allegations that an adverse employment action was taken against him and that a causal connection exists between his whistleblowing activity and the adverse employment action. Plaintiff notes that retaliatory action is defined under N.J.S.A. § 34:19-2(e) to mean the "discharge, suspension or demotion of an employee in the terms and conditions of employment." Plaintiff further asserts that CEPA retaliation includes "other adverse employment action" taken against the employee's "terms and conditions of employment." See Beasley, at 606-09. Plaintiff argues that he adequately set forth facts in Paragraphs 67, 71, and 73 of his Amended Complaint to establish the last two prongs of CEPA.

Eighth, Plaintiff argues that the internal affairs complaint referenced in the Amended Complaint indirectly refers to Plaintiff in a variety of locations. Plaintiff submits that although his name does not explicitly appear,

he is referred to indirectly. In Paragraph 1, reference is made to "a member of the Prosecutor's Office," of which Plaintiff was the head of the office at the current time. In Paragraph 4, reference is made to "was being made in her official capacity as an Assistant County Prosecutor and a member of the agency that is charged with oversight of local law enforcement." Plaintiff asserts that he was the head of the office at that time.

Paragraph 6 refers to "necessary witnesses" of the Prosecutor's Office. Plaintiff asserts that without discovery, it is unknown whether the Freeholders were or were not including Plaintiff. Plaintiff argues that Defendant's moving papers are nothing more than conjecture, speculation, and lay opinion that no reasonable person could believe any of these references concern Plaintiff or impugn his reputation. Plaintiff argues that discovery must be conducted as to the authors and what was meant, as well as the recipients and how each read the internal affairs complaint.

Ninth, Plaintiff argues that he has pled that at least one previously retired employee in similar circumstances to himself was treated differently, and is entitled to discovery as to why. Lastly, Plaintiff argues that absent a specific finding of futility, any dismissal of the Amended Complaint must be done without prejudice and must afford Plaintiff the opportunity to file an Amended Complaint to cure any perceived defects.

REPLY

Defendant argues that Plaintiff's opposition brief is as unconvincing as his last brief opposing Defendant's initial Motion to Dismiss. Defendant

submits that Plaintiff failed to set forth any compelling argument as to why the law of the case should not apply, and this Court has already dismissed the initial Complaint for failing to suggest facts to support the first element of a *prima facie* CEPA claim regarding whether Defendant violated a rule, regulation or clear mandate of public policy. Defendant asserts that even if the Court were to reconsider that element Plaintiff does not allege as to what Defendants did to violate the statutes cited in the Amended Complaint, and Plaintiff does not present a valid argument supporting his claim that Defendants' response to Plaintiff's alleged whistleblowing constituted an adverse employment action.

Defendant argues first that it is unclear from Plaintiff's brief why he thinks the law of the case doctrine does not apply, as this Court has already determined that Plaintiff did not cite any law, rule, regulation, or public policy that Plaintiff could reasonably believe that Defendant violated. Defendant asserts that Plaintiff merely duplicates, verbatim, the paragraph from the initial Complaint citing the same rules, laws, regulations and public policy he alleges Defendant violated, yet expects a different result. Defendant further asserts that contrary to Plaintiff's argument, a Motion to Dismiss is not an interlocutory ruling but is a dispositive motion. Defendant asserts further that the Court carefully considered the initial Complaint and found that Plaintiff did not allege sufficient facts to sustain a CEPA claim, in part because he failed to allege facts that suggested that Defendants' conduct violated a law, rule, regulation or public policy. Defendant argues that

Plaintiff's Amended Complaint on its face is insufficient to plead a cause of action because it adds nothing new to change the Court's conclusion.

Second, Defendant argues that the citations to laws, rules, regulations, or public policy allegedly violated by Defendant does not satisfy what is required to prove the first element of a *prima facie* CEPA claim. Defendant asserts that in order to prove the first element of a *prima facie* CEPA claim, Plaintiff must allege facts to show that he reasonably believed that Defendant's conduct violated either a law or rule or regulation promulgated pursuant to law. Hernandez v. Montville Twp., 854 N.J. Super. 467, 473 (App. Div. 2002). Defendant adds that when a plaintiff alleges that the employer violated a law or clear mandate of public policy, "the trial court must identify a statute, regulation, rule, or public policy that closely relates to the complained-of conduct. The trial court can and should enter judgment for a defendant when no such law or policy is forthcoming." Dzwonar v. McDevitt, 177 N.J. 451, 463 (2003).

Defendant asserts that Plaintiff's Amended Complaint lists the same statutes referenced in the initial Complaint, none of which are closely related to the complained of conduct. Further, Defendant notes that Plaintiff's brief fails to specify how the cited statutes relate to the complained of conduct. See Plaintiff's Brief pp. 10-12. Plaintiff merely concludes, with no argument, that Paragraphs 13, 17, 18, 35, and 45 establish the first two prongs of a CEPA claim. Id. at 12. Defendant notes that the statues listed in the first Amended Complaint are as follows:

1. N.J.S.A. § 11A:1-2(b)—providing public officials with authority to appoint, supervise, and oversee personnel in order to properly execute responsibilities

2. N.J.S.A. § 40A:22.2(d)—requiring standards to evaluate whether public duties are being faithfully performed

3. N.J.S.A. § 34:13A-14(a)—because police and firefighters protect the citizens and risk their lives, it is public policy to maintain high morale and the efficient operation of such departments to give police and firefighters expeditious binding procedure for the resolution of disputes

4. N.J. Const., Art. 1, ¶ 19—private employees have the right to collective bargaining, and public employees have the right to file grievances

5. N.J.S.A. § 40A:5-33—elected and appointed officials must subscribe to an oath

6. N.J.S.A. § 41:1-1—the oath referenced above requires elected and appointed officials to swear support to the Constitution and will "bear true faith and allegiance to the same and to the Governments"

7. N.J.S.A. § 40A:9-22.5—requiring county ethics boards to establish a code of ethics

8. N.J.S.A. § 40A:9-22.5—forbidding local government officers or employees from using official position for private privilege

See Amended Complaint, ¶ 18.

Defendant submits that these statutes and regulations are not only vague and unspecific, as the Court previously determined, but are also unrelated to the complained of conduct. Defendant argues that Plaintiff offers no explanation as to why he believed Defendants violated the statute regulating, for example, collective bargaining, or police and firefighter's right to binding dispute resolutions. Defendant asserts that Plaintiff cannot

explain the connection between these statutes and Defendant's conduct because there is none, and the statutes are unrelated to Defendant's conduct. As the Court cannot "identify a statute, regulation, rule or public policy that closely relates to the complained-of conduct," Defendant argues that the Court must enter judgment for Defendant. Dzwonar, 177 N.J. at 463.

Defendant argues that the conduct alleged in this matter is not the type of egregious conduct the Courts have addressed in previous CEPA case law, which impacts the reasonableness of the belief that the employer is violated a law or public policy. In this matter, Plaintiff alleges that Defendant privately criticized the Union Leader—who herself had behaved so unprofessionally that the Freeholders were compelled to file an internal affairs complaint against her. Plaintiff also alleges that Defendant used old data regarding opioid abuse in the county. Defendant argues that Plaintiff has failed to establish that the complained of conduct was so egregious or inappropriate, that he reasonably believed that it violated any clear mandate of public policy closely related to that conduct. Further, Defendant argues that the statutes cited in Plaintiff's Amended Complaint are unrelated to the complained-of conduct.

Furthermore, Defendant argues that Plaintiff fails to cite any "clear mandate of public policy" that forbids a public official from addressing, in private, an employee's abuse of office. Defendant notes that Plaintiff has failed to cite any public policy that requires the dissemination of data that is, according the Prosecutor, the most current and up to date. Defendant argues

that as Plaintiff has not and cannot identify any clear mandate of public policy that he could have reasonably believed Defendants violated.

Third, Defendant argues that Plaintiff's brief fails to address the remaining elements of a CEPA claim, as he has not responded to Defendant's arguments about whether there was an adverse employment action. Defendant argues that as Plaintiff's Amended Complaint fails to plead any adverse employment action taken by Defendant, or any causal connection between Plaintiff's purported whistleblowing activity and the purported adverse employment action. As such, Plaintiff's Amended Complaint must be dismissed in its entirety.

Fourth, Defendant argues that the sealed internal affairs complaint fails to implicate Plaintiff. Defendant submits that while Plaintiff quotes sections of the internal affairs complaint and claims that the complaint impugns his reputation, his claim that simply because he was the head of the Prosecutor's Office that any reference made in the Complaint to the Prosecutor's Office impugns his reputation is irrational and illogical. Specifically, the internal affairs complaint states that the Union Leader was a "member of the Prosecutor's Office"; while true, Defendant asserts that Plaintiff does not indicate why that statement impugns his reputation. Plaintiff also quotes a statement about the Union Leader's "official capacity as an Assistant County Prosecutor," which is charged with oversight of law enforcement, and again notes that he was the head of the Prosecutor's Office, but fails to indicate why the Union Leader's employment in his Office

impugns his reputation. Plaintiff also states that the internal affairs complaint claims that the Union Leader "discredited the Cape May County Prosecutor's Office," of which Plaintiff was the head," but Plaintiff cannot show how or why that statement impugns *his* reputation. Defendant argues that the letter does not claim that Plaintiff approved of the Union Leader's conduct, condoned the conduct, or turned a blind eye to the conduct.

Defendant argues that no reasonable, rational person could possibly read the internal affairs complaint and think negatively about Plaintiff; the internal affairs complaint relates only to the Union Leader's objectionable conduct, it does not imply that Plaintiff is guilty by association, as he seems to suggest. With regard to Plaintiff's claim that the internal affairs complaint is per se defamatory, Defendant asserts that Plaintiff fails to explain how, as defamation requires a false statement. G.D. v. Kenny, 205 N.J. 275, 293 (2011). Defendant notes that Plaintiff does not specify which statements are false, or why they are false. Thus, Defendant argues that as there are no statements about Plaintiff in the internal affairs Complaint, Plaintiff cannot make such an argument.

Fifth, Defendant argues that Plaintiff's Amended Complaint fails to plead sufficient facts regarding the denial of retirement benefits to warrant discovery. Defendant notes that Plaintiff's Amended Complaint alleges that at least one other retired employee received a lifetime of health benefits, and thus asserts that he is "entitled to discovery on whether there are additional similarly situated retired employees" receiving lifetime benefits. See

Plaintiff's brief, p. 16. Defendant adds that this was also addressed in Defendant's previous Motion to Dismiss, where Defendants argued that Plaintiff did not allege facts to support his theory that other "similarly-situated employees" received benefits after only working thirteen (13) years. Defendant asserts that while a plaintiff may bolster a cause of action through discovery, one may not file a conclusory complaint to find out if such a claim exists. Camden Cty. Energy Recovery Assocs., L.P. v. N.J. Dep't of Envtl. Prot., 320 N.J. Super. 59, 64 (App. Div. 1999). The Court determined that Plaintiff failed to place Defendants on notice of what the "emoluments of a retired employee" entail. See Certification of Russell Lichtenstein, Exhibit C, p. 51.

Plaintiff now claims that the Amended Complaint adds sufficient factual allegations to apprise Defendant as to the "emoluments of a retired employee" that he claims he was wrongfully denied, entitling him to discovery to determine if there are more similarly-situated employees who received lifetime benefits, or that he was treated differently. See Plaintiff's brief, p. 16. Defendant argues that at most, the Amended Complaint alleges that another County employee, John David Meyer, who undisputedly secured the required twenty-five (25) years of service, received lifetime health insurance benefits at the County's discretion. Defendant asserts that even if there were other employees who received the retirement benefits, Plaintiff has not pled facts to suggest that he met the statutory requirements set forth in N.J.S.A. § 40A:10-23(a), to receive the discretionary retirement benefits.

And furthermore, as he has not worked for the County for the requisite length of time, the County could not have used its discretion to award him retirement benefits.

Lastly, Defendant argues that the Amended Complaint must be dismissed with prejudice. Defendant notes that usually, dismissals under R. 4:6-2 are without prejudice unless "further opportunity to amend would not be fruitful." Johnson v. Glassman, 401 N.J. Super. 222, 247 (App. Div. 2008). In this matter, Defendant argues that Plaintiff had ample opportunity to draft a CEPA complaint that would at a minimum suggest a cause of action, and he has failed to do so, twice. As such, Defendant argues that the Court should refrain from granting Plaintiff yet another opportunity to fail, and therefore should dismiss Plaintiff's Amended Complaint with prejudice.

DISCUSSION

R. 4:6-2(e) provides, in pertinent part,

> Every defense, legal or equitable, in law or fact, to a claim for relief in any complaint, counterclaim, cross-claim, or third-party complaint shall be asserted in the answer thereto, except that the following defenses … failure to state a claim upon which relief can be granted.

Motions to dismiss a Complaint for failure to state a claim should be granted "in only the rarest of instances." Printing Mart-Morristown v. Sharp Elect. Corp., 116 N.J. 739, 772 (1989). In approaching a motion to dismiss for failure to state a claim upon which relief can be granted, the court's inquiry is limited to "examining the legal sufficiency of the facts alleged on the face of the complaint." Id. at 746. The court must search the complaint "in depth

and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim … ." Id. For purposes of analysis, the plaintiff is entitled to "every reasonable inference of fact … [and the examination] should be one that is at once painstaking an undertaken with a generous and hospitable approach." Id.

In reviewing the motion, the court is not concerned with the "ability of plaintiffs to prove the allegation contained in the complaint." Id. The complaint need only allege sufficient facts as to give rise to a cause of action or *prima facie* case. Dismissal of the plaintiff's complaint is only appropriate after the complaint has been "accorded … [a] meticulous and indulgent examination … ." Id. at 772. If dismissal of the plaintiff's complaint is appropriate, the dismissal "should be without prejudice to a plaintiff's filing of an amended complaint." Id.; Major v. Maguire, 224 N.J. 1, 26 (2016). In circumstances where the plaintiff's pleading is inadequate in part, the court has the discretion to dismiss only certain counts from the complaint. See, e.g., Jenkins v. Region Nine Hous. Corp., 306 N.J. Super. 258 (1997). If pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of by R. 4:46 … ."

A prima facie case of discriminatory retaliation under CEPA requires a plaintiff to demonstrate, in relevant part: (1) a reasonable belief that the employer's conduct was violating either a law, rule, regulation or public policy; (2) he or she performed a "whistle blowing" activity as described in N.J.S.A. § 34:19-3(a) or (c); (3) an adverse employment action was taken

against him or her; and (4) a causal connection existed between his whistleblowing activity and the adverse employment action. Klein v. Univ. of Med. & Dentistry of N.J., 377 N.J. Super. 28, 38-39 (App. Div. 2005); Bowles v. City of Camden, 993 F. Supp. 255, 262 (D.N.J. 1998); Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003); Kolb v. Burns, 320 N.J. Super. 467, 476 (App. Div. 1999). "If a plaintiff is able to establish these elements, then the defendants must come forward and advance a legitimate, nondiscriminatory reason for the adverse conduct against the employee." Klein, 377 N.J. Super. at 38-39), citing Zappasodi v. State, Dept. of Corrections, 335 N.J. Super. 83, 89 (App. Div. 2000); Kolb, supra, 320 N.J. Super. at 479. "If such reasons are proffered, plaintiff must then raise a genuine issue of material fact that the employer's proffered explanation is pretextual." Bowles, 993 F. Supp. at 262; Kolb, 320 N.J. Super. at 479.

"A plaintiff need not show that his or her employer actually violated a law, rule, regulation, or clear mandate of public policy, just that he or she believes that to be the case." Dzwonar, 177 N.J. at 462-64; Estate of Roach v. TRW, Inc., 164 N.J. 598, 613 (2000); Gerard v. Camden County Health Servs. Ctr., 348 N.J. Super. 516, 522 (App. Div.), certif. denied, 174 N.J. 40 (2002). In order for a plaintiff to meet the threshold to withstand summary judgment under N.J.S.A. § 34:19-3(c), he or she must "furnish the trial court with enough by way of proof and legal basis to enable the court to determine as a matter of law" that the plaintiff has identified "the asserted violation with adequate particularity" for a jury's consideration. McLelland v. Moore, 343

N.J. Super. 589, 601 (App. Div. 2001), certif. denied, 171 N.J. 43 (2002).

To determine whether a plaintiff has presented a viable CEPA claim under section 3(c),

> a trial court must first identify and enunciate the specific terms of a statute, rule, regulation, declaratory ruling, professional code of ethics, or clear expression of public policy that the employee reasonably believes would be violated if the facts as alleged are true and determine that there is a substantial nexus between the complained-of conduct and the law or public policy identified by the court or the plaintiff.

Dzwonar, 177 N.J. at 464. "Judgment for a defendant is appropriate when no such law or policy is forthcoming." Ibid. "CEPA requires judicial resolution of threshold legal issues respecting existence of a statutory, regulatory or other clear mandate of public policy before the trier of fact determines whether an employee has been retaliated against for acting upon an objectively reasonable belief of the existence of such clear mandate by objecting to or refusing to perform acts in violation of the mandate." Fineman v. New Jersey Dept. of Human Services, 272 N.J. Super. 606, 609 (App. Div.), certif. denied, 138 N.J. 267 (1994); see also, McLelland, 343 N.J. Super. at 601.

First, with respect to the statutes cited by Plaintiff in his Amended Complaint, Plaintiff has failed to allege how Defendant violated the statutes. While Plaintiff need not prove a violation, he must articulate the basis for his reasonable belief of a violation. See McLelland, at 601. Further, Plaintiff's opposition fails to establish that any of those statutes are related to Defendant's alleged conduct. Plaintiff simply states in his opposition brief

that the first two prongs of CEPA are established by Paragraphs 13, 17, 18, 35, and 45, without any factual or legal support. He does not assert how he reasonably believed that Defendant's conduct violated a law, rule or regulation promulgated pursuant to law. See Dzwonar, at 463. Plaintiff has also not explained how Defendant's conduct violated the public policy behind these statutes or how it relates to Plaintiff's alleged whistleblowing. Plaintiff also fails to articulate the remaining elements of a CEPA claim. Although Plaintiff lists numbered paragraphs in his opposition, he again failed to respond to Defendants' arguments regarding an adverse employment action, or whether his alleged whistleblowing even when accepted as true was causally connected to Defendant's alleged retaliatory conduct.

With respect to Plaintiff's claim for retirement benefits, the Court finds that Plaintiff has again failed to plead sufficient facts to establish that he is entitled to health insurance benefits from the County after his retirement. Paragraph 1 of Plaintiff's Complaint states that he was the County Prosecutor for thirteen (13) years. Plaintiff claims that he is entitled to the "emoluments of being a retired employee" that were given to John David Meyer despite having less than twenty-five (25) years of service with the Prosecutor's Office. See generally, Plaintiff's Amended Complaint ¶¶ 49-57. However, as the Court explained in its previous Memorandum of Decision, Plaintiff only worked for Defendant for thirteen (13) years, and therefore is statutorily ineligible for full coverage of health insurance retirement benefits. See N.J.S.A. § 40A10-23(a). As such, Plaintiff is statutorily ineligible for the

type of "emoluments [that] a retired employee" of Defendant would receive, and Plaintiff has failed to state a claim upon which relief can be granted for this issue, and the Complaint must be dismissed with prejudice. Further, Plaintiff's reliance on the alleged representation of one County Freeholder even if true is insufficient to substantiate a claim for an "agreement" between Plaintiff and the Freeholder board, on behalf of the County.

Next, the Court will address Plaintiff's claim that Defendant impugns Plaintiff's reputation through the internal affairs complaint. Defendant argues that the sealed internal affairs complaint fails to implicate Plaintiff. The complaint addresses the alleged conduct of an Assistant Prosecutor while working at the Prosecutor's office. While Plaintiff quotes sections of the internal affairs complaint and asserts that the complaint impugns his reputation, he fails to support his claim that simply because he was the head of the Prosecutor's Office that any reference made in the Complaint to the Prosecutor's Office impugns his individual reputation.

Specifically, the internal affairs complaint states that the Union Leader was a "member of the Prosecutor's Office"; Plaintiff also quotes a statement about the Union Leader's "official capacity as an Assistant County Prosecutor," which is charged with oversight of law enforcement, and again notes that Plaintiff was the head of the Prosecutor's Office; Plaintiff also states that the internal affairs complaint claims that the Union Leader "discredited the Cape May County Prosecutor's Office," of which Plaintiff was the head." While all of these statements may be included in the internal

affairs complaint, Plaintiff does not establish how these statements impugn Plaintiff's reputation or that the statements are defamatory. Defendant argues that the letter does not claim that Plaintiff approved of the Union Leader's conduct, condoned the conduct, or turned a blind eye to the conduct.

Defendant argues that no reasonable, rational person could possibly read the internal affairs complaint and think negatively about Plaintiff; the internal affairs complaint relates only to the Union Leader's objectionable conduct, it does not imply that Plaintiff is guilty by association, as he suggests. As stated above by Defendant, defamation requires a false statement. G.D. v. Kenny, 205 N.J. 275, 293 (2011). With respect to the internal affairs complaint, Plaintiff fails to specify which statements are false, how they are false, or how they are directed at Plaintiff specifically. As such, Plaintiff has not established that the internal affairs complaint impugns his reputation, or even references him. Thus, Plaintiff fails to state a claim upon which relief can be granted as to this issue.

Even if the Court presumes, *arguendo*, that Plaintiff had a reasonable belief of a violation and that Plaintiff engaged in protected whistleblowing activity, from a notice pleading perspective, Plaintiff's Complaint has not articulated any adverse employment action, and likewise, no causal connection between the alleged whistleblowing activity and an adverse employment action. See R. 4:5-7; see also, Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989) ("the test for determining the adequacy of a pleading: whether a cause of action is 'suggested' by the facts").

Accordingly, after giving the Amended Complaint and in-depth review, and affording "every reasonable inference of fact" to Plaintiff, the Court finds that Plaintiff has failed to establish a *prima facie* CEPA claim in his Amended Complaint for a second time. Printing Mart-Morristown, 116 N.J. at 772. Therefore, the Complaint shall be dismissed with prejudice.

CONCLUSION

The motion is opposed.

Defendant, the County of Cape May's Motion to Dismiss Plaintiff, Robert L. Taylor's Amended Complaint with prejudice for failure to state a claim upon which relief can be granted, is granted.

Plaintiff's Amended Complaint is hereby dismissed, pursuant to R. 4:6-2(e), with prejudice.

An appropriate form of order has been executed. Conformed copies of that order will accompany this memorandum of decision.

December 10, 2018

J. Christopher Gibson, J.S.C.