

Melissa Matthews,

Plaintiff,

v.

CITY OF BAYONNE; JAMES M. DAVIS,,

individually and in his official capacity; JOHN COFFEY, individually and in his official capacity; DONNA RUSSO, individually and in her official capacity; TIM BOYLE, individually and in his official capacity; MARK BONAMO, individually and in his official capacity; EDUARDO FERRANTE; individually and in his official capacity; MUNICIPAL EMPLOYEES 1-5, fictitious names whose actual identities are unknown at this time; ABC PUBLIC ENTITIES 6-10, fictitious names whose actual identities are unknown at this time

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: HUDSON COUNTY
DOCKET NO.: HUD-L-001316-21

CIVIL ACTION

MEMORANDUM OF DECISION

DATE OF DECISION: August 12, 2021

DED: 12/1/21

ARB: none

TRIAL: 5/24/21

PRELIMINARY STATEMENT

This matter was brought before the Court as a motion to dismiss for failure to state a claim filed by Defendant Tim Boyle (“Boyle”) to dismiss the Complaint filed by Plaintiff Melissa Matthews (“Ms. Matthews”) with prejudice. Ms Matthews who is the Business Administrator for the City of Bayonne (“the City”), and a higher-ranking City employee than Boyle, has sued the City and six City employees, including Boyle in their individual and official capacities. This matter arises from an employment dispute involving the alleged violations of the New Jersey Law Against Discrimination (“LAD”) and the New Jersey Conscientious Employee Protection Act (“CEPA”)

in Counts 1-3 of the Complaint and common law claims for intentional infliction of emotional distress, negligent infliction of emotional distress, and violation of public policy consistent with Pierce v. Orthos Pharmaceutical Corp., 84 N.J. 58 (1980) in Counts 4-6 of the Complaint.

In support of the motion, Mr. Boyle alleges that the Complaint falls short of establishing that Mr. Boyle is individually liable under the LAD or CEPA. Mr. Boyle contends that he cannot be individually liable as a matter of law under LAD because he was not Ms. Matthews's supervisor, and Ms. Matthews has made no allegations of fact to indicate that Mr. Boyle was personally involved with any claimed retaliation in violation of CEPA such that he, as an individual, could be found liable. Additionally, Ms. Matthews's common law tort claims, or intentional infliction of emotional distress is also dismissed because they are precluded by her LAD and CEPA claims based entirely on the same facts. The Court also dismisses those two tort claims because Ms. Matthews failed to allege in the Complaint that she filed the notice of claim required by the New Jersey Tort Claims Act. In addition, the Workers' Compensation Act precludes Ms. Matthews from bringing an infliction of emotional distress claim based on alleged workplace negligence. Further, Ms. Matthews has not alleged sufficient facts to state a claim for either intentional or negligent infliction of emotional distress. Finally, Mr. Boyle argues that Ms. Matthews's violation of public policy claim pursuant to Pierce v. Orthos Pharmaceutical Corp., 84 N.J. 58 (1980), cannot be brought against Mr. Boyle as an individual defendant, and also fails as a matter of law because Ms. Matthews has not been terminated and remains employed by the City.

In opposition, Ms. Matthews alleges that all of the Defendants are liable under the New Jersey Law Against Discrimination (the "LAD"), N.J.S.A. 10:5-1, *et. seq.*, based on hostile work

environment (Count I) and retaliation (Count II) theories. In Count III of the Complaint, Ms. Matthews alleges that all of the Defendants retaliated against her in violation of the New Jersey Conscientious Employee Protection Act (“CEPA”), N.J.S.A. 34:19-3, *et. seq.* Ms. Matthews further alleges, in Counts IV and V of the Complaint, respectively, that the Defendants committed the common law torts of intentional and negligent infliction of emotional distress. Finally, Ms. Matthews claims in Count VI of the Complaint that Defendants’ actions violated the public policy of New Jersey. Through the Complaint, Ms. Matthews seeks judgment against all Defendants, jointly and severally, for compensatory damages, treble damages, punitive damages, attorneys' fees, costs, and other further relief from the Court.

STANDARD OF REVIEW

MOTION TO DISMISS STANDARD

Rule 4:6-2(e) permits dismissal of a complaint for failure to state a claim. The New Jersey Supreme Court has said that “the test for determining the adequacy of a pleading is whether a cause of action is ‘suggested’ by the facts.” Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989) (quoting Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)). The reviewing court does not consider whether the plaintiff can prove the allegation in the Complaint; it simply “searches 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, opportunity being given to amend if necessary.” Id. (quoting Di Cristofaro v. Laurel Grove Memorial Park, 43 N.J. Super. 244 (App. Div. 1957)). The plaintiff is afforded “every reasonable inference of fact.” Id. (citations omitted). Motions are granted only in rare instances and ordinarily without prejudice. See Wild v. Carriage Funeral, Inc., 241 N.J. 285, 287 (2020), *aff’ing o.b.* 458 N.J. Super. 416 (App. Div. 2019).

But if “matters outside the pleading are presented to and not excluded by the court” in support of a motion under R. 4:6-2(e), “the motion shall be treated as one for summary judgment and disposed of as provided by R. 4:46.” R. 4:6-2(e); see also Lederman v. Prudential Life Ins. Co. of America, 385 N.J. Super. 324, 337 (App. Div.), *certif. den.*, 188 N.J. 353 (2006). However, a motion to dismiss the pleadings is not converted into a summary judgment motion by filing documents with the court which are referred to in the pleading. Myska v. New Jersey Mfrs. Ins., 440 N.J. Super. 458, 482 (App. Div.), app. dismissed 224 N.J. 523 (2015) (“In evaluating motions to dismiss, courts consider ‘allegations in the Complaint, exhibits attached to the Complaint, matters of public record, and documents that form the basis of a claim. It is the existence of the fundament of a cause of action in those documents that is pivotal; the ability of the plaintiff to prove its allegations is not at issue.’” (quoting Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183) (further citations omitted)). When allegations in a complaint are contradicted by the records to which it refers, the records control. Id. (citing Rapaport v. Robin S. Weingast & Assocs., 859 F. Supp. 2d 706, 714 (D.N.J. 2012)).

ANALYSIS

I. LAD Claim

a. Ms. Matthew’s LAD Claim is Dismissed

If an employee is the Plaintiff’s subordinate rather than a supervisor, then the employee cannot be individually liable under the Law Against Discrimination. See Herman v. Coastal Corp., 348 N.J. Super. 1, 28 (App. Div. 2002) (“Plaintiffs do not challenge the dismissal of Jim Soden as an individual defendant. Soden was not a supervisor, and thus there is no individual liability under the LAD”); Hurley v. Atl. City Police Dep’t, 174 F.3d 95, 129 (3d Cir. 1999) (non-supervisory employee cannot be individually liable under the LAD); Poveromo-Spring v. Exxon Corp., 968 F.

Supp. 219, 229 (D.N.J. 1997) (dismissing LAD claim “since plaintiff fails to allege, nor does it appear, that [the individual defendant] had supervisory authority over [plaintiff]”); Tyson v. CIGNA Corp., 918 F. Supp. 836, 837 (D.N.J. 1996), aff’d, 149 F.3d 1165 (3d Cir. 1998) (“We hold that the NJLAD: (1) does not impose liability on non-supervisory employees”).

Here, Ms. Matthews does not allege in the Complaint that Mr. Boyle was her supervisor. Ms. Matthews "as Business Administrator, was in a greater position of authority than Defendants Tim Boyle and Mark Bonamo." (Compl. ¶14). In addition, Ms. Matthews alleges that she was able to issue orders and requests to Mr. Boyle that he was required to follow. Id. That Mr. Boyle was Ms. Matthews's subordinate, rather than her supervisor, means that he cannot be individually liable under LAD as a matter of law. Accordingly, the motion to dismiss is granted and this Count is dismissed without prejudice. Ms. Matthews may move separately to amend the Complaint.

b. The Hostile Work Environment is Dismissed Without Prejudice

To prevail on a hostile work environment claim, the plaintiff must show: (1) she is in a protected class; (2) she was subjected to conduct that would not have occurred but for that protected status; and (3) the conduct was severe or pervasive enough to make a reasonable person believe that the conditions of employment are altered, and the working environment is hostile and abusive. See Lehmann v. Toys R’Us, Inc., 132 N.J. 587, 603-04 (1993). Whether the alleged conduct is “severe or pervasive” depends upon the totality of the circumstances, including the (1) frequency of the claimed discriminatory conduct; (2) its severity; (3) “whether it is physically threatening or humiliating, or a mere offensive utterance”; and (4) “whether the conduct unreasonably interferes with the employee’s job performance.” Godfrey v. Princeton Theological Seminary, 196 N.J. 178, 196 (2008) (internal citation and quotation marks omitted).

Moreover, “the harassing conduct itself must be evaluated, ‘not its effect on the plaintiff.’” Id. (quoting Lehmann, 132 N.J. at 606).

Here, Ms. Matthews alleges that she was subjected to a hostile work environment due to Defendants' gender or sex-based discrimination. However, Ms. Matthews has not alleged conduct by Mr. Boyle that could reasonably be considered "severe or pervasive." Ms. Matthews allegations concern infrequent conduct – an isolated incident in July 2019 and six incidents between March and October 2020. The alleged actions by Mr. Boyle did not interfere with Ms. Matthews's job performance given that she was promoted and appointed Business Administrator amid the alleged harassment. Also, none of the comments allegedly made by Mr. Boyle to Ms. Matthews referred to Ms. Matthews's gender. Although Ms. Matthews alleges that Mr. Boyle screamed and shouted at Ms. Matthews and chastised her, in all but one or two instances, Ms. Matthews fails to allege what Mr. Boyle said to her on those occasions. Ms. Matthews relies on second-hand information, which cannot be used to determine whether Ms. Matthews has stated a hostile work environment claim. See Godfrey, 196 N.J. at 201 (“To satisfy the severe-or-pervasive element of a hostile work environment claim, a plaintiff must marshal evidence of bad conduct of which she has firsthand knowledge”); Fitzgerald v. Stanley Roberts, Inc., 186 N.J. 286, 319 (2006) (office gossip about alleged acts of other harassment is inadmissible to demonstrate a hostile work environment).

Even if Mr. Boyle made the alleged comments, they are not "severe or pervasive" enough to satisfy the legal standard. See Taylor v. Metzger, 152 N.J. 490, 506 (1998). (“Whether the conduct identified by plaintiff is sufficiently “severe or pervasive,” is determined based upon the totality of the circumstances.”); Shepherd v. Hunterdon Dev. Ctr., 336 N.J. Super. 395, 416 (App.

Div.2001) (“Neither rudeness nor lack of sensitivity alone constitutes harassment, and simple teasing, offhand comments, and isolated incidents do not constitute discriminatory changes in the terms and conditions of one’s employment”), aff’d in part, rev’d in part, 174 N.J. 1 (2002). Based on the allegations in the Complaint, Ms. Matthews has failed to state a claim that she was subjected to a hostile work environment in violation of the LAD because the conduct was not severe or pervasive. Therefore, this Count is dismissed without prejudice. Ms. Matthews may move separately to amend the Complaint.

c. Count II of the Complaint is Dismissed Without Prejudice

To prevail on a claim of retaliation in violation of the LAD, Plaintiff must show that: (1) she engaged in protected activity known by her employer; (2) she was subjected to an "adverse employment decision"; (3) a causal link between the protected activity and the adverse employment action; and (4) a good faith, reasonable basis for the Complaint. Battaglia v. United Parcel Serv., Inc., 214 N.J. 518, 547 (2013). The factors to be considered in determining whether an employee has experienced an adverse employment decision are the employee’s “loss of status, a clouding of job responsibilities, diminution in authority, disadvantageous transfers or assignments, and toleration of harassment by other employees.” Richter v. Oakland Bd. of Educ., 459 N.J. Super. 400, 417 (App. Div. 2019) (quoting Mancini v. Township of Teaneck, 349 N.J. Super. 527, 564 (App. Div. 2002)).

Here, Ms. Matthews has failed to sufficiently plead any adverse employment actions in violation of the LAD, and certainly none taken by Mr. Boyle. Ms. Matthews simply states she was “retaliated against” by all of the Defendants but has not included any factual allegations to establish that any retaliation took place. Ms. Matthews is still employed with the City. Ms.

Matthews's vague allegation that she was stripped of responsibilities (Compl. ¶27) is impossible to square with her allegation that she was promoted to a position of higher authority Id., ¶1) Ms. Matthews's conclusory allegations are not enough, and the retaliation claim is dismissed without prejudice. Ms. Matthews may move separately to amend the Complaint.

II. Ms. Matthew's Claim Against Mr. Boyle for Retaliation under the CEPA is Dismissed Without Prejudice

At the outset, Ms. Matthews's allegations fail to state a claim against Mr. Boyle in his individual capacity. CEPA prohibits retaliatory action by an "employer." N.J.S.A. 34:19-3. The definition for "employer" includes "any person or group of persons acting directly or indirectly on behalf of or in the interest of an employer with the employer's consent[.]" N.J.S.A. 34:19-2(a). New Jersey courts have determined that an individual employee may be liable under CEPA only when the employee acted "“on behalf of or in the interest of an employer with the employer's consent.”" Ivan v. Cty. of Middlesex, 595 F. Supp. 2d 425, 478 (D.N.J. 2009) (CEPA imposes individual liability "upon retaliatory parties who act with the authorization of their employers" or when an employee acts "“on behalf of or in the interest of an employer with the employer's consent”") (quoting N.J.S.A. 34:19-2(a)).

Here, Ms. Matthews did not allege facts that could be the basis to impose individual liability on Mr. Boyle under CEPA. Ms. Matthews does not make factual allegations, or allege any facts from which to infer, that Mr. Boyle engaged in any acts of improper retaliation with the authorization of his employer, or on behalf of his employer and with his employer's consent. The Complaint does not include allegations identifying: (i) any specific acts of purported retaliation taken by any of the individual Defendants; (ii) the dates of any of the alleged acts of retaliation; (iii) the way in which Ms. Matthews was treated differently than the other named employees; (iv)

the harassment, bullying, and intimidation that was allowed to continue; or (v) the responsibilities stripped from Ms. Matthews. (Compl. ¶34). The reviewing court does not consider whether the plaintiff can prove the allegation in the Complaint; it simply “searches 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, opportunity being given to amend if necessary.” *Id.* (quoting Di Cristofaro v. Laurel Grove Memorial Park, 43 N.J. Super. 244 (App. Div. 1957)).

In her CEPA claim, Ms. Matthews alleges that the Defendants “retaliated against Plaintiff” by “disparately treating Plaintiff in comparison to other employees, allowing harassment, bullying, and intimidation of Plaintiff to continue, and stripping Plaintiff of her responsibilities.” (Compl. ¶34). Those vague allegations reveal nothing about the actions taken by Mr. Boyle individually and, given the authority discussed above, are insufficient to permit a CEPA claim against Mr. Boyle in his individual capacity.

The CEPA claim also states no basis for relief and is dismissed under R. 4:6-2(e). To maintain a claim for retaliation in violation of CEPA, Ms. Matthews was required to allege: (1) she reasonably believed her employer's conduct was "violating either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy;" (2) she engaged in whistleblowing activity as defined by N.J.S.A. 34:19-3c; (3) an "adverse employment action" was taken against her; and (4) "a causal connection exists between the whistleblowing activity and the adverse employment action." Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003).

The whistleblowing activity includes an employee's disclosure or threatened disclosure to a supervisor or public body. N.J.S.A. 34:19-3. The law requires that Plaintiff reasonably believed

that a statute, law, or regulation had been violated, even if no such violation actually occurred. See Estate of Roach v. TRW. Inc., 164 N.J. 598, 612-13 (2000); Mehlman v. Mobil Oil Corp., 153 N.J. 163, 193 (1998). Under CEPA's first two prongs, it is not enough that a plaintiff "blow any whistle," instead she must show that she "reasonably believed" that her employer's conduct violated "either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy." Carmona v. Resorts Int'l Hotel, Inc., 189 N.J. 354, 371 (2007). A CEPA claimant "must set forth facts that would support an objectively reasonable belief that a violation has occurred." Dzwonar, 177 N.J. at 464. The facts alleged must rise above the level of vague accusations of wrongdoing. See Catalane v. Gillian Instrument Corp., 271 N.J. Super. 476, 493-94 (App. Div.), certif. denied, 136 N.J. 298 (1994). A plaintiff, therefore, "must *set forth facts* that would support an objectively reasonable belief that a violation has occurred." Dzwonar, 177 N.J. at 464 (emphasis added).

Here, Ms. Matthews has not alleged that Mr. Boyle himself took any adverse employment actions against her. CEPA defines "retaliatory action" as "the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment." N.J.S.A. 34:19-2e. Ms. Matthews's allegation that she was "in a greater position of authority" than Mr. Boyle and was able to issue orders, requests, and directives to him (Compl. ¶14), squarely precludes any inference that, among all of the Defendants accused by Ms. Matthews of retaliation in violation of CEPA, Mr. Boyle could have given Ms. Matthews disparate treatment compared to other employees, allowed harassment of her to continue, or changed Ms. Matthews's work responsibilities. (Compl. ¶34).

Among all of Ms. Matthews's alleged reports, the one which might potentially be protected activity—"misappropriation of public funds and abuse of public office" by "certain municipal employees and administrators"—was not made to Mr. Boyle, and there are no allegations to indicate he was aware of those reports by Ms. Matthews. (Compl. ¶33). The absence of allegations in the Complaint that Mr. Boyle knew of any protected activity by Plaintiff means that she has not alleged causation, and her CEPA claim is, for another reason, insufficient. See Robles v. U.S. Environmental Universal Servs., Inc., 469 F. App'x 104, 108 (3d Cir. 2012) (noting that, in the context of a CEPA claim, "[t]he plaintiff must also establish that the employer knew of the protected activity"). Therefore, this Count is dismissed without prejudice. Ms. Matthews may move separately to amend the Complaint.

III. Ms. Matthews's Emotional Distress Claims Are Dismissed Without Prejudice.

Ms. Matthews LAD or CEPA claims against Mr. Boyle as an individual, her common law infliction of emotional distress claims, premised on the same facts as her LAD and CEPA claims, are preempted and are dismissed. In her claim for intentional infliction of emotional distress (Count IV), Ms. Matthews alleges that "Defendants' actions were extreme and outrageous in character, were designed to and did intentionally or recklessly inflict severe emotional distress upon Plaintiff," and that "as a direct and proximate cause of Defendants' actions, Plaintiff has suffered severe emotional distress, loss of income and other severe emotional losses." (Compl. ¶¶ 39-40) (emphasis added). Ms. Matthews alleges no facts in support of her emotional distress claims; she is evidently relying on the factual allegations related to her LAD and CEPA to establish these common law tort claims.

State and federal courts in New Jersey have “routinely held that supplementary common law causes of action are barred when a statutory remedy under NJLAD exists,” and “common law claims that duplicate asserted NJLAD claims are preempted.”

Here, Ms. Matthews’s common law tort claims for infliction of emotional distress are duplicative of her LAD claims and is therefore dismissed. CEPA’s exclusive remedy provision also bars Ms. Matthews’s common law tort claims for infliction of emotional distress. Under N.J.S.A. 34:19-8, the institution of a CEPA claim “shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, state law, rule or regulation or under the common law.” As outlined above, Ms. Matthews’s infliction of emotional distress claims rests upon the same facts as her CEPA claim.

The Court dismiss the Ms. Matthews’s emotional distress tort claims for a different reason. The TCA, N.J.S.A. 59:1-1, et seq., provides that a claimant bringing a tort claim against a public entity or public employee must file a notice of the potential tort claim within 90 days date of the tort claim accrues. N.J.S.A. 59:8-7, 8. The tort claims notice requirements are required for intentional torts and tortious action based on mere negligence. Bonitsis v. New Jersey Institute of Tech., 363 N.J. Super. 505, 518 (App. Div. 2003). New Jersey courts have long held that filing an effective and appropriate Notice of Claim is a precondition of, and is inherent to, maintaining an action against a public entity. Dept. of Transportation v. PSC Resources, Inc., 159 N.J. Super. 154, 158 (Law Div. 1978). In fact, where “it appears from the face of Plaintiff’s Complaint that Plaintiff did not file a timely Notice of Claim before filing tort claims against a ‘public entity or public employee’ per the New Jersey Tort Claims Act,” the court must dismiss plaintiff’s tort claims. County Concrete Corp. v. Town of Roxbury, 442 F.3d 159, 173-74 (3d Cir. 2006)); see also Lutz v. Township of Gloucester, 153 N.J. Super. 461, 463 (App. Div. 1977);

Fuller v. Rutgers State University, 154 N.J. Super. 420 (App. Div. 1977).

Here, the Complaint reveals that the City and Mr. Boyle were not presented with a notification of the claim within ninety days of accrual, as required by the Tort Claims Act. Ms. Matthews failed to fulfill the statutory condition precedent to maintain an action against the City or any of its employees, and Counts IV Complaint is dismissed with prejudice.

IV. Count V: Negligent Infliction of Emotional Distress

Plaintiff consents to dismissal of this Count with prejudice.

V. Ms. Matthews's Fails to State a Claim for Violation of Public Policy

Finally, Ms. Matthews's "Violation of Public Policy" claim pursuant to Pierce, 84 N.J. at 58, is dismissed as to Mr. Boyle. A Pierce claim lies only against an employer and not the individual employees. See O'Lone v. New Jersey Dep't of Corr., 313 N.J. Super. 249, 256 (App. Div. 1998) (affirming dismissal of Pierce cause of action against individual defendants). A wrongful discharge claim under Pierce v. Ortho Pharm. Corp., 84 N.J. 58, 72 (1980), requires a showing that the plaintiff complained about a violation of some law or clear mandate of public policy and then was discharged.

Here, the Court dismisses Ms. Matthews's Pierce claim for the separate reason that she has not alleged in the Complaint that she was ever terminated from her employment with the City of Bayonne. The Complaint indicates that Ms. Matthews is "the current Business Administrator of the City of Bayonne." (Compl. ¶1). Ms. Matthews's failure to allege that she was terminated is fatal to her Pierce claim. See, e.g., Sabatino v. Saint Aloysius Par., 288 N.J. Super. 233, 240 (App. Div. 1996) ("plaintiff's claim under Pierce . . . is not supported by the record. Sabatino concedes that Pierce involved an employee alleging wrongful discharge and that the circumstances

in this matter do not give rise to such a claim. The plaintiff in this case clearly was not discharged”); House v. Carter-Wallace, Inc., 232 N.J. Super. 42, 53–54 (App. Div. 1989) (“To establish a claim under Pierce, an employee must show that he was discharged in retaliation for taking action in opposition to corporate action which violates a clear mandate of public policy”). Therefore, Ms. Matthews's public policy claim is dismissed without prejudice, and Defendant's motion to dismiss is granted.

CONCLUSION

For the foregoing reasons, Mr. Boyle’s motion to dismiss is granted. Counts 1 (Hostile Work Environment), 2 (Retaliation under LAD), 3 (Retaliation under CEPA), and 6 (Violation of Public Policy) are hereby dismissed without prejudice. Count 4 (Intentional Infliction of Emotional Distress) and Count 5 (Negligent Infliction of Emotional Distress) are hereby dismissed with prejudice.

SO ORDERED.



HON. KIMBERLY ESPINALES-MALONEY, J.S.C.

R. 1:6-2(a): The within matter was X opposed unopposed.

