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

PRELIMINARY STATEMENT

This matter was brought before the Court by as a motion to dismiss for failure to state a claim filed by Defendant, the City of Bayonne ("Bayonne" or "City") and individual Defendants, employees of the City, James Davis ("Mr. Davis"), John F. Coffey II ("Mr. Coffey"), Donna Russo ("Ms. Russo"), Mark Bonamo ("Mr. Bonamo"), and Eduardo Ferrante ("Mr. Ferrante") (collectively the "Defendants") to dismiss the Complaint filed by Plaintiff Melissa Matthews (“Ms. Matthews”) with prejudice. Tim Boyle (“Mr. Boyle”), who is also an individual Defendant in this action, is represented by separate counsel. 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. Ms. Matthews is the current Business Administrator for the Defendant City of Bayonne.

In support of the motion, Defendants states that intentional infliction of emotional distress in Count 4 must be dismissed with prejudice because Plaintiff has not pled that she filed a tort claim notice with the City as required by the New Jersey Tort Claims Act. Defendant also contends that the Court must dismiss Count 6 with prejudice because Plaintiff was not discharged from employment. Further, Defendants argue that the Court must dismiss the Complaint without prejudice against Defendant Eduardo Ferrante. Plaintiff advances only conclusory allegations of wrongdoing, without supporting facts sufficient to put Ferrante on notice of the claims against him. Moreover, Defendants contend that the Complaint against Defendant Bonamo must be dismissed without prejudice because it contains a conclusory allegation of wrongdoings in Counts 2-6. The factual allegations in Count 1 do not support a cause of action for a hostile work environment in violation of the LAD.

In opposition, Plaintiff states that she substantially complied with the Torts Claim Act. Additionally, Plaintiff contends that she had pled sufficiently for Mark Bonamo and Eduardo Ferrante to remain in the case. Further, Plaintiff admits that the Court may dismiss Count VI of the Complaint but that such dismissal should be without prejudice. Lastly, Plaintiff withdraws any claim of negligent infliction of emotional distress and argues that it has reserved the right to amend its Complaint.

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

1. City of Bayonne

a. Count IV: Intentional Infliction of Emotional Distress

To satisfy Ms. Matthews's claim for intentional infliction of emotional distress, Ms. Matthews must satisfy the TCA. The TCA provides that "[n]o action shall be brought against a public entity or public employee" unless the claim upon which it is based has been presented per the notice provisions of the TCA. N.J.S.A. 59:8- 3; see also Dep't of Transp. v. PSC Res., Inc., 159 N.J. Super. 154, 158 (Law Div. 1978) (citation omitted) (stating that N.J.S.A. 59:8-3 "makes it clear that a notice of claim is a precondition and an inherent part of maintaining an action under the act"). The TCA further provides that any claim for damages must be presented to the public entity no "later than the ninetieth day after the accrual of the cause of action." N.J.S.A. 59:8-8. The notice must include the name of the public entity, employee, or employees causing the injury (if known), a general description of the injury, damage or loss incurred, the amount claimed as the date of presentation of the claim, etc. N.J.S.A. 59:8- 4. A claimant who fails to present a claim to the public entity within ninety days "shall be forever barred from recovering against a public entity or public employee[.]." N.J.S.A. 59:8-8; see also Dep't of Transp., 159 N.J. Super. at 158 ("Absent compliance with the notice requirements, no suit may be maintained.").

Here, Defendant City is a municipality established under the State of New Jersey laws and is a public entity for purposes of the TCA. N.J.S.A. 59:1-3. Individual Defendants Davis, Coffey, Russo, Bonamo, and Ferrante are public employees for purposes of the TCA. Id. Accordingly, the procedural requirements of the TCA apply to tort claims pursued as to the Defendants. There is no dispute that claims for intentional and/or negligent infliction of emotional distress are for "injury or damage to person or property" within the meaning of the TCA. N.J.S.A. 59:8-8; see also Velez v. City of Jersey City, 180 N.J. 284, 293-96 (2004) (holding that the TCA notice requirements were intended to apply to claims for common law negligent and intentional torts against public employees); Bonitsis v. New Jersey Inst. of Tech., 363 N.J. Super. 505, 518- 22 (App. Div. 2003), rev'd on other grounds, 180 N.J. 450 (2004) (affirming dismissal of claims for intentional infliction of emotional distress and tortious interference with a contract for failure to file a tort claims notice). Thus, Plaintiff needed to satisfy the TCA notice requirements to sustain Count 4 of her Complaint, and the motion to dismiss is granted with prejudice.

b. **Count VI: Violation of Public Policy**

Count 6 of the Complaint is dismissed because Plaintiff is the Business Administrator for Defendant City of Bayonne and was never discharged. (Compl. at ¶ 1.) While Ms. Matthews alleges that she has been subjected to adverse employment actions in violation of public policy consistent with Pierce v. Orthos Pharmaceutical Corp., 84 N.J. 58 (1980), it is undisputed that she remains employed by Defendant City. However, a Pierce cause of action for retaliation in violation of public policy is limited to wrongful discharge causes of action. See, e.g., Hampton v. Armand Corp., 364 N.J. Super. 194, 199 (App. Div. 2003)("New Jersey recognizes a claim for

wrongful termination of an at-will employee when the discharge is contrary to a clear mandate of public policy."); Sabatino v. Saint Aloysius Par., 288 N.J. Super. 233, 240 (App. Div. 1996)("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."); DeVries v. McNeil Consumer Prod. Co., 250 N.J. Super. 159, 172 (App. Div. 1991)("Pierce recognized a limited exception to the right of an employer to discharge an at-will employee."); 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 in fact discharged in retaliation for taking action in opposition to action which violates a clear mandate of public policy.") Accordingly, Count 6 of the Complaint is dismissed with prejudice in its entirety for failure to state a claim upon which the Court may grant relief.

2. Count V: Negligent Infliction of Emotional Distress

Plaintiff consents to dismissal of this Count with prejudice.

3. Counts I-IV, VI: Defendant Eduardo Ferrante

The allegations of wrongdoing against individual Defendant Mr. Ferrante are not supported by sufficiently pled facts to put Mr. Ferrante on notice of the claims against him as required to survive a motion to dismiss for failure to state claim. The Defendants make the following arguments in dismissing Plaintiff's counts:

- There are no allegations of wrongdoing against Mr. Ferrante in Count 1 of the Complaint. His name does not appear in the Count.

- In Counts 2 and 3, it is alleged, in a conclusory fashion, and without supporting facts, that all named Defendants, including Mr. Ferrante, retaliated against Plaintiff by "disparately treating Plaintiff in comparison to other employees, allowing harassment, bullying, and intimidation to continue, and stripping Plaintiff of her responsibilities." (Compl. at ¶¶ 27, 34).
- In Counts 4, 5 and 6 (which must be separately dismissed), Plaintiff "repeats and realleges the allegations" of wrongdoing set forth in the previous Counts, contending that Defendants' aforementioned actions amount to intentional infliction of emotional distress, negligent infliction of emotional distress, and a violation of public policy, respectively. (Compl. at ¶¶ 38, 41, and 44).

In sum, the Court agrees that Counts 1, 4, 5, and 6 do not contain factual allegation of wrongdoing against Mr. Ferrante. The Court agrees that while allegations of wrongdoing are set forth in Counts II and III, they are conclusory in nature and are advanced collectively against all Defendants without distinction. There is no way to discern Plaintiff's duty to plead facts against Mr. Ferrante sufficient to put him on notice of what he did, or did not do, which allegedly caused the Plaintiff harm. See, e.g. B.R. v. Vaughan, 427 N.J. Super. 487, 48 A.3d 1210 (Super. Ct. 2012) (Plaintiff must "plead sufficient facts in her complaint to put defendants on notice of her liability claims against them."). Accordingly, Plaintiff has failed to state a viable claim under Counts 1, 4, 5, and 6 against Mr. Ferrante, and thus the Court grants the dismissal of the Complaint without prejudice as to him pursuant to R. 4:6-2(e). Ms. Matthews may move separately to amend the Complaint.

4. **Defendant Bonamo**

Counts 2 through 6 of the Complaint are dismissed against individual Defendant Mr. Bonamo for the same reason they are dismissed against individual Defendant Mr. Ferrante. Defendants state that Plaintiff's complaint only contains conclusory allegations of wrongdoing, without supporting facts sufficient to put Mr. Bonamo on notice of his alleged misconduct. As it relates to Ms. Matthews's cause of action against Mr. Bonamo in Count 1, Ms. Matthews's complains that:

- "Tim Boyle and Mark Bonamo" improperly addressed her, improperly spelled her name, and improperly referred to her by a different name to harass, frustrate, or annoy her. Id. at ¶ 13.
- "Tim Boyle and Mark Bonamo" undermined, ignored, usurped, and otherwise disobeyed her orders, requests, initiatives, and authority despite that she was in a greater position of authority than them. Id. at ¶ 14.
- Plaintiff made numerous complaints about "Tim Boyle and Mark Bonamo's" behavior to Defendants Davis, Coffey, and Russo, but despite the same, Plaintiff continued to be subjected to gender-motivated harassment by "Tim Boyle and Mark Bonamo." Id. at ¶¶ 16 and 19.

However, the Court again agrees with the Defendant that these are conclusory allegations of wrongdoing and are collectively against Mr. Boyle and Mr. Bonamo without distinction. Additionally, Defendant argues that he only pled factual allegations of wrongdoing against Bonamo are in paragraph 15 of the Complaint. Therein, Plaintiff alleges that:

- On or about January 4, 2020, Mr. Bonamo screamed at a female municipal employee, at one point demanding that she say his last name. Id. at ¶ 15.

- During the entirety of Ms. Matthews's tenure as Business Administrator, which began in May 2020, Plaintiff noticed that Mr. Bonamo would rarely respond to women, acknowledge women, or look women in the eye when speaking with them. Id. at ¶ 15.
- In or about August 2020, Plaintiff was informed by Defendant Russo that Mr. Bonamo seemed to have a problem with women. Id. at ¶ 15.

These factual allegations, however, fall short of supporting a cause of action for a hostile work environment under LAD. LAD requires a showing that a plaintiff was subjected to a gender-motivated hostile work environment and the harassment was sufficiently "severe or pervasive" in nature to make a reasonable woman believe that the conditions of employment have been altered and the working environment is hostile or abusive. Lehmann v. Toys R Us, Inc., 132 N.J. 587, 603-604 (1993); Godfrey v. Princeton Theological Seminary, 196 N.J. 178, 196 (2008). Our "Supreme Court has explained, the LAD does not create a 'sort of civility code for the workplace." Dunkley v. S. Coraluzzo Petroleum Transporters, 437 N.J. Super. 366, 382 (App. Div. 2014) (quoting Battaglia v. United Parcel Serv., Inc., 214 N.J. 518, 549 (2013)). For example, "offhand comments and isolated incidents, unless extremely serious, will not amount to discriminatory changes in the terms and conditions on employment." Herman v. Coastal Corp., 348 N.J. Super. 1, 21 (App. Div. 2002).

Here, the factual allegations of wrongdoing advanced against Mr. Bonamo fail to state a claim of a hostile work environment for two reasons. First, they do not support a finding that Mr. Bonamo harassed Plaintiff Ms. Melissa Matthews. Plaintiff alleges to have only witnessed or heard about Mr. Bonamo's conduct. There are no factual allegations whatsoever that Mr. Bonamo, for example, screamed at Plaintiff during a conversation. Second, Mr. Bonamo's alleged actions, which were

not directed at Plaintiff, were not severe or pervasive, as required to maintain a cause of action for a hostile work environment. For the foregoing reasons, Plaintiff has failed to state a cause of action against individual Defendant Bonamo, and thus the Court grants the motion to dismiss without prejudice. Ms. Matthews may move separately to amend the Complaint.

CONCLUSION

For the foregoing reasons, the City of Bayonne's motion to dismiss is granted with prejudice on Counts IV, V, and VI, and Defendants Mr. Ferrante and Mr. Bonamo are dismissed without prejudice on all Counts.

SO ORDERED.

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

R. 1:6-2(a): The within matter was__X___opposed ____unopposed.