FILED

February 3, 2023

Christopher D. Rafano, J.S.C.

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JOHN HOLLIBAUGH, Plaintiff, v. BORDER CAFÉ, OF WOODBRIDGE, INC., JOSE TEJAS, INC., KEITH SANTANGELO, ELWYN MURRAY, JOHN DOES (1-10) (fictitious names of unknown persons) and ABC COMPANIES (1-10) (fictitious names of unknown entities), Defendants.	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MIDDLESEX COUNTY DOCKET NO. MID-L-004680-22 Civil Action **ORDER**

THIS MATTER having been opened to the Court upon the motion of Jackson Lewis P.C., attorneys for Defendants Jose Tejas, Inc. (improperly pled as Border Café of Woodbridge, Inc. and Jose Tejas, Inc.), Elwyn Murray, and Keith Santangelo (collectively, "Defendants"), for an Order dismissing Plaintiff's Complaint with prejudice, and the Court having reviewed the moving papers and opposition and for the reasons set forth on the record at oral argument and herein and for good cause shown:

IT IS on this 3rd day of February, 2023,

ORDERED that Defendant's request that Plaintiff's Complaint be dismissed in its entirety, with prejudice is **DENIED**; and it is further

ORDERED that service of this Order shall be deemed effectuated upon all counsel of record upon its upload to eCourts. Pursuant to Rule 1:5-1(a), movant shall serve a copy of this Order on all parties not served electronically within seven (7) days of the date of this Order.

s/ Christopher D. Rafano
Hon. Christopher D. Rafano, J.S.C

Opposed: X
Unopposed

Statement of Reasons

Standard of Review:

Motions to dismiss under Rule 4:6-2(e) "should be granted only in rare instances and ordinarily without prejudice." Smith v. SBC Commc'ns, Inc., 178 N.J. 265, 282 (2004). This standard of review "is a generous one." Green v. Morgan Props., 215 N.J. 431, 451 (2013).

> [A] reviewing court 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. At this preliminary stage of the litigation the Court is not concerned with the ability of plaintiffs to prove the allegations contained in the complaint. For purposes of analysis plaintiffs are entitled to every reasonable inference of fact. The examination of a complaint's allegations of fact required by the aforestated principles should be one that is at once painstaking and undertaken with a generous and hospitable approach. [Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989) (citations omitted).]

Nonetheless, a court must dismiss a complaint if it fails "to articulate a legal basis entitling plaintiff to relief." Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005). "[A] pleading should be dismissed if it states no basis for relief and discovery would not provide one." Rezem Family Assoc., LP v. Borough of Millstone, 423 N.J. Super. 103, 113 (App. Div. 2011).

Count I:

Count One of Plaintiff John Hollibaugh ("Plaintiff")'s Complaint asserts claims of unlawful retaliation and retaliatory termination in violation of Conscientious Employee Protection Act ("CEPA"). "The purpose of CEPA . . . is to protect and encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employers from engaging in such conduct." Abbamont v. Piscataway Twp. Bd. of Educ., 138 N.J. 405, 431, 650 A.2d 958 (1994). A plaintiff must allege four elements to state a CEPA claim: (1) the plaintiff reasonably believed the employer's conduct violated a law, a regulation or a clear mandate of public policy; (2) the plaintiff performed "whistle-blowing activity" as defined in CEPA; (3) an adverse employment action has been taken against him or her; and (4) the whistle-blowing activity caused such adverse employment action. See Kolb v. Burns, 320 N.J. Super. 467, 476 (App. Div. 1999). A judge determining the sufficiency of a pleading purporting to state a CEPA claim must not overlook that CEPA does not require that the activity complained of actually violates a law or regulation, only that the employee has a reasonable belief that such is the case. Dzwonar v. McDevitt, 177 N.J. 451, 464 (2003). The threshold inquiry is whether the plaintiff has identified a law, regulation, or clear mandate of public policy which may have been violated. Mehlman v. Mobil Oil Corp., 153 N.J. 163, 187-88 (1998). "[S]ources of public policy include legislation; administrative rules, regulations or decisions; and judicial decisions." Id. at 181 (1998). Further, CEPA defines whistle-blowing activity, as:

> Disclos[ing], or threaten[ing] to disclose to a supervisor or to a public body an activity, policy or practice of the employer . . . that the employee reasonably believes: (1) is in violation of a law, or a rule or regulation promulgated pursuant to law . . . or (2) is fraudulent or criminal . . . Object[ing] to, or refus[ing] to participate in any activity, policy or practice which the employee reasonably believes: (1) is in violation of a law, or a rule or regulation promulgated pursuant to law . . . (2) is fraudulent or criminal . . . or (3) is incompatible with a clear

> mandate of public policy concerning the public health, safety or welfare or protection of the environment.[N.J.S.A. 34:19-3(a) and (c)].

The Supreme Court has explained the plain language of the "whistle-blowing" statute "specifically refers to notification, or threatened notification, to an outside agency or supervisor . . . and also permits a claim to be supported by evidence that the employee objected to or refused to participate in the employer's conduct." Tartaglia v. UBS PaineWebber Inc., 197 N.J. 81, 106 (2008) (citing N.J.S.A. 34:19-3(a) and (c)).

Defendants Jose Tejas, Inc. (improperly pled as Border Café of Woodbridge, Inc. and Jose Tejas, Inc.) Elwyn Murray, and Keith Santangelo[1] argue that the factual allegations in the Complaint, even if true, are insufficient to support a CEPA claim. In particular, Defendants contend that Plaintiff's Complaint fails to allege any facts to support the first, second, or fourth prongs of a CEPA claim. Whereas Plaintiff, in his opposition, argues that his Complaint adequately alleges facts that he had a reasonable belief that he would be violating the law, acting criminally and against public policy if he attended work while he was symptomatic following exposure to COVID-19.

Here, the Court finds that Plaintiff reasonably believed the Defendants' conduct violated a law, a regulation or a clear mandate of public policy based upon all the laws, executive orders, mandatory guidelines, and global, federal and state public policy mandates that dealt with COIVD-19 and the pandemic. For example, Plaintiff reasonably believed that he was required to quarantine until his symptoms subsided because of potential exposure to the COVID-19 virus pursuant to CDC guidelines and his health care provider's medical recommendation. Moreover, Plaintiff reasonably believed that Defendants' conduct requiring that he return to work prior to the completion of his quarantine after symptoms subsided, constitutes unlawful conduct in violation of laws, rules and/or regulations and/or is fraudulent and/or constitutes improper quality of patient care and/or is incompatible with a clear mandate of public policy. Further, Plaintiff reasonably believed that he may have contracted COVID-19, that he may be contagious, that he had a legal and ethical obligation to quarantine, and that reporting to work would be in violation of law, rules, regulations, would constitute improper customer service and/or be incompatible with a clear mandate of public policy.

Additionally, the Court is satisfied that Plaintiff has pled sufficient facts establishing that he engaged in a whistleblowing activity as defined by CEPA and that Defendants terminated his employment in retaliation for that protected activity. Plaintiff disclosed to his supervisors that he was symptomatic and reasonably believed he had or could have COVID-19 and thus, was unable under the law to report to work. However, when he was able to return to work consistent with the law, only then did Defendants tell him that he was terminated because he followed the law, public policy and of course, common sense, by taking the medical leave. Further, Plaintiff alleges that he objected to and refused to comply with the Company's requirement that he be at work rather than quarantine. The Court finds that Plaintiff pleaded more than enough competent evidence to survive a motion dismiss under New Jersey's liberal standard. As our Supreme Court has instructed, a reviewing 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." Printing Mart, 116 N.J. at 746.

CEPA Claim as to the Individual Defendants:

New Jersey cases do not directly address this issue of the existence of individual liability under CEPA. However, federal decisions have concluded that individual liability may be imposed

[1] This Court shall refer to all Defendant parties as "Defendants."

under CEPA. See Espinosa v. Cont'l Airlines, 80 F.Supp.2d 297, 305-06 (D.N.J.2000) (individual defendants may be held individually liable under CEPA); Palladino v. VNA of S.N.J., Inc., 68 F.Supp.2d 455, 474 (D.N.J.1999) ("the imposition of individual liability for offending conduct furthers CEPA's protective and remedial purposes").

Defendants argue that Plaintiff's Complaint does not include any factual allegations to suggest the Individual Defendants were involved in his termination or that they were even aware of his "whistleblowing" activity. Defendants claims that Plaintiff's Complaint does not include any factual allegations to suggest that Defendants Murray or Santangelo acted with the consent or authorization of Jose Tejas. Plaintiff argues conversely, reasoning that Defendant Murray is the CEO of the Company and as such, Defendant Murray has the authority to dictate all actions that the Company undertakes, including Plaintiff's termination. Moreover, Plaintiff contends that Defendant Santangelo is the Company's Director of Operations and Defendant Santangelo had the authority to terminate Plaintiff's employment with the Company and was, to Plaintiff's knowledge, the only person aside from Defendant Murray with the authority to terminate Plaintiff's employment.

This Court finds at this point Plaintiff has plead enough facts to support a claim against the individual defendants and more discovery is required. The Court's inquiry is limited to examining the sufficiency of the facts alleged on the face of Plaintiff's Complaint, after an in-depth search, to discern whether a cause of action is found. While Defendant may ultimately absolve themselves of any liability, this Court cannot determine as much at this stage of litigation.

Count II:

In Count II of his Complaint, Plaintiff asserts a claim under Pierce v. Ortho Pharm. Corp., 84 N.J. 58, 72 (1980). A Pierce claim is based upon our Supreme Court's recognition "that an [at-will] employee has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy." Pierce v. Ortho Pharm. Corp., 84 N.J. 58, 72 (1980). "The sources of public policy include legislation; administrative rules, regulations or decisions; and judicial decisions." Id. Generally, the essential elements of a Pierce claim are (a) that the plaintiff complained about a violation of a clear mandate of public policy; (b) that he was discharged by the employer; and (c) that the discharge was causally related to his complaint. See House v. Carter-Wallace, Inc., 232 N.J. Super. 42, 54, certif. denied, 117 N.J. 154 (1989). However, the mandate must "be clearly identified and firmly grounded[;] A vague, controversial, unsettled, and otherwise problematic public policy does not constitute a clear mandate." MacDougall v. Weichert, 144 N.J. 380, 392 (N.J. 1996).

Defendants contends that Plaintiff has failed to clearly articulate a clear violation of public policy. Defendants claim that Plaintiff's sole source of his public policy claim is the CDC guidelines, which they reason is not a clear mandate of public policy. In opposition, Plaintiff argues that Plaintiff has identified numerous public policies which have instilled him with exercisable rights to take a medical leave of absence while recovering from COVID-19 or to take said medical leave of absence while a test for COVID-19 is pending after being exposed to COVID-19 in order to nullify the potential risk of spreading the virus to others. See e.g. supra N.J.S.A. 34:11D-12; N.J.S.A. 26:13-16; N.J. Exec. Order No. 103 (Mar. 9, 2020); New Jersey DOH's "Frequently Asked Questions (FAQs) about COVID-19" at 18.

In this case, this Court finds that Plaintiff has also pleaded a causal nexus between his exercise of an established right grounded in public policy and his termination. Specifically, Plaintiff alleges that when Plaintiff asked why he was being fired, Defendant Santangelo told him it was because he had missed five (5) days of work. This Court finds that Plaintiff has met his

pleading requirements to establish a prima facie Pierce claim. Plaintiff's complaint contains more than enough facts to state a Pierce claim at this stage.

Pierce Claim as to the Individual Defendants:

This Court adopts the same reasoning as in the CEPA section above.

Count III:

To establish a prima facie case of retaliation under the NJLAD, a plaintiff "must plead (1) that she engaged in protected activity; (2) that she suffered an adverse employment action; and (3) that there was a causal connection between the protected activity and the adverse employment action." Davis v. City of Newark, 417 F. App'x 201, 202 (3d Cir. 2011) (citation omitted). For the first element, a "person engages in protected activity under the LAD when that person opposes any practice rendered unlawful under the LAD." Young v. Hobart W. Grp., 385 N.J. Super. 448, 466 (App. Div. 2005); see also Carmona v. Resorts Int'l Hotel, Inc., 189 N.J. 354, 373 (2007) (employee need not prove his complaint was an actual violation of the LAD, but instead that his complaint was reasonable and made in good faith)

Defendants contend that Plaintiff has failed to state a claim for failure to accommodate disability discrimination and as a result, the Court should dismiss Count III of his Complaint. However, Count III of Plaintiff's Complaint alleges a claim under the LAD's anti-retaliation provision set forth in N.J.S.A. 10:5-12 – not one for disability discrimination or failure to accommodate.

The first element of a retaliation claim is engagement in a protected activity. When establishing that an employee was engaged in a protected activity, such as reporting discrimination, Plaintiff does not have to prove that discrimination occurred. Instead, it is sufficient to prove that the employee had good faith and reasonable belief that unlawful discrimination occurred. In this case, a reasonable fact finder could find that Plaintiff engaged in a protected activity in reporting to his employer that he was symptomatic and ill. Further, the Court stresses that Plaintiff need only be able to demonstrate to the judge or jury that the alleged retaliation more likely occurred than not. Next, Plaintiff must demonstrate that the employer took retaliatory action either during or after the protected activity took place. To establish that the employer subjected the employee to retaliation, the employee must prove that they suffered an adverse employment action. Adverse employment actions can include many things, including termination, demotion, denial of a promotion, or disciplinary action. In the absence of such adverse actions, the employee may still be able to prove retaliation by showing that they were subjected to a pattern of retaliatory behavior. In this case, Plaintiff was terminated from his position.

Finally, the employee must be able to show that there is a link between the employee's protected activity and the employer's retaliatory action. This means that the employee must prove to the judge or jury that employer was motivated to retaliate against the employee because the employee engaged in a protected activity. The employee does not have to show that the protected activity was the sole reason for the employer's actions but only that the protected activity motivated the employer in some way. Here, the Court is satisfied that there is a connection. As Plaintiff was fired within days of informing his employer that he was once again experiencing COVID-19 symptoms.