NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0957-09T3

EDWARD FLORES,

Plaintiff-Appellant,

v.

CITY OF TRENTON and FIREMAN'S
MUTUAL BENEVOLENT ASSOCIATION
LOCAL NO. 6,

Defendants-Respondents.

EDWARD FLORES,

Plaintiff-Appellant,

v.

CITY OF TRENTON, DENNIS M. KEENAN,
RICHARD J. SNYDER, DOUGLAS
PIERSON, CAPITAL HEALTH SYSTEM,
INC. d/b/a THE CORPORATE HEALTH
CENTER, MICHAEL J. MAKOWSKY, MD,
MERCER COUNCIL ON ALCOHOLISM &
DRUG ADDICTION, INC. d/b/a METRO
EMPLOYEE ASSISTANCE SERVICE,
SCOTT B. SECHRIST, GREGORY
REARICK, and NORA KASHINSKY,

Defendants-Respondents.

EDWARD FLORES,

Plaintiff-Appellant,

v.

CITY OF TRENTON, MAYOR DOUGLAS PALMER, individually and in his official capacity, JANE FEIGENBAUM, individually and in her official capacity, JAMES NORTON, individually and in his official capacity, DENISE LYLES, individually and in her official capacity, DENNIS M. KEENAN, individually and in his official capacity, RICHARD J. SNYDER, individually and in his official capacity, LAUFER, KNAPP, TORZEWSKI, DALENA, & SPOSARO, L.L.C., STEPHEN TRIMBOLI, individually and in his official capacity, JAMES PRUSINOWSKI, individually and in his official capacity, FIREMAN'S MUTUAL BENEVOLENT ASSOCIATION, LOCAL NO. 6, PAUL PALUMBI, individually and in his official capacity, RONALD ETTINGER, individually and in his official capacity, KENNETH WALTERS, individually and in his official capacity, RON KOSTZTYU, JR., individually and in his official capacity, CAPITAL HEALTH SYSTEMS d/b/a THE CORPORATE HEALTH CENTER, and DR. MICHAEL MAKOWSKY,

Defendants.

Telephonically Argued: January 14, 2011 - Decided: March 10, 2011

Before Judges Axelrad, R. B. Coleman, and Lihotz.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket

Nos. L-667-05 and L-781-06 (consolidated), and L-25-07.

Raymond C. Staub argued the cause for appellant (Destribats, Campbell, Magee, Staub & Burns, LLC, and AnnMarie Flores, attorneys; Mr. Staub and Ms. Flores, on the briefs).

Steven S. Glickman argued the cause for respondent City of Trenton (Ruderman & Glickman, P.C., attorneys; James T. Prusinowksi, of counsel and on the brief; Alex W. Klein, on the brief).

Allan C. Roth argued the cause for respondent Fireman's Mutual Benevolent Association Local No. 6 (Roth D'Aquanni, LLC, attorneys; Michael A. D'Aquanni, on the brief).

Kimberley A. Wilson argued the cause for respondents Dennis Keenan, Richard Snyder, and Douglas Pierson (R. Denise Lyles, Director of Law, City of Trenton, attorney; Ms. Lyles, on the brief).

Lora M. Foley argued the cause for respondents Capital Health System, Inc., d/b/a/ The Corporate Health Center, and Michael J. Makowsky, M.D. (Parker McCay, P.A., attorneys; Ms. Foley and Monica Chheda, of counsel; Stacy L. Moore, Jr., on the brief).

John H. Maucher argued the cause for respondents the Mercer Council on Alcoholism and Drug Addiction d/b/a Metro Employee Assistance Service, Scott B. Sechrist, Gregory Rearick, and Nora Kashinsky (Mintzer Sarowitz Zeris Ledva & Meyers, LLP, attorneys; Mr. Maucher, on the brief).

PER CURIAM

Plaintiff Edward Flores, a former City of Trenton (City)

firefighter, appeals from a variety of interlocutory and summary judgment orders, in essence, dismissing all his claims. We affirm.

I.

The following lengthy factual and procedural history is relevant to our consideration of the arguments advanced on appeal. Flores was a firefighter with the Trenton Fire Department (TFD) for almost fourteen years before he was terminated. During that time he was addicted to drugs and alcohol. Pursuant to a referral from defendant, Metro Employee Assistance Service (MEAS),[1] Flores attended a five-day inpatient substance abuse treatment program at Princeton House, a drug and alcohol treatment center, in May 2001.

However, Flores failed a return-to-work drug test given on July 6, 200l, testing positive for cocaine. As a result, he was charged by TFD's Deputy Chief Richard J. Snyder with a violation of the fire department's rules and regulations.[2] On July 13, 200l, Snyder issued Flores a Preliminary Notice of Disciplinary

[1] MEAS is an independent contractor that provides employee assistance services, such as treatment referrals, for City employees.

[2] The City Impaired Employee Policy (IEP) states that all City "employees are expected to report to work in a physical and mental condition appropriate to performing their duties safely and effectively."

Action, seeking a ninety-day suspension without pay. The disciplinary matter was resolved the same day by Flores signing an "On-Notice" (ON) employment agreement, which provided, in part, that his continued employment with the TFD was contingent upon remaining drug and alcohol free. Flores also pled guilty to the disciplinary charge and agreed to accept a twenty-day suspension without pay beginning on July 28, 2001.

On October 17, 2001, Flores, who had returned to work after a period of drug and alcohol rehabilitation, again tested positive for cocaine. On October 24, 2001, a Preliminary Notice of Disciplinary Action was issued against him, outlining four charges, i.e., illicit use of drugs, rendering himself mentally or physically incapable of performing required duties, conduct unbecoming a public employee, and violation of the ON agreement. The disciplinary action sought immediate suspension without pay and removal. At the October 26, 2001 hearing, Flores, who was accompanied by the Fireman's Mutual Benevolent Association's (FMBA) Vice President Kenneth Walters, was suspended without pay.

At a departmental hearing on February 20, 2002 before TFD Director Dennis M. Keenan, Flores was found guilty on all counts and his employment was terminated effective February 26, 2002.

Flores appealed to the then-existing Merit System Board

(Board)[3] and an Office of Administrative Law (OAL) hearing was conducted before Solomon A. Metzger, Administrative Law Judge (ALJ). On October 29, 2003, the ALJ issued a written initial decision recommending Flores' dismissal be affirmed. On December 8, 2003, the Board issued its decision, accepting and adopting the ALJ's findings and conclusions, and affirming the action taken by the City.

Flores appealed and we affirmed in an unpublished opinion. In re Flores, No. A-2771-03T1 (App. Div. Aug. 18, 2005) (Flores). The Supreme Court denied Flores' petition for certification on November 10, 2005. In re Flores, 185 N.J. 390 (2005). On September 5, 2006, we denied Flores' application for reconsideration.

In the meantime, in October 2003, Flores filed a complaint against the City defendants,[4] the Capital Health System, Inc. (CHS) defendants,[5] and the MEAS defendants[6] in the United States District Court for the District of New Jersey, alleging, in

[3] On June 30, 2008, the MSB was renamed the Civil Service Commission. N.J.S.A. 11A:11-1.

[4] The City defendants are comprised of the City of Trenton, Keenan, Snyder, and Douglas Pierson.

[5] The CHS defendants are comprised of CHS and Michael J. Makowsky, MD.

[6] The MEAS defendants are comprised of MEAS, Scott B. Sechrist, Gregory Rearick, and Nora Kashinsky.

part, violations of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, and the Family and Medical Leave Act (FMLA), 29 U.S.C.A. §§ 2601-2654, breach of contract, and negligence. On August 4, 2004, a number of claims were dismissed by summary judgment, including the LAD claims, under which the court expressly found Flores was not entitled to protection because he was an active narcotics user, and the FMLA claims. On September 1, 2004, the City filed counterclaims for unjust enrichment and misappropriation of funds based on Flores' receipt of salary and medical benefits between May 29 and July 13, 2001, a period during which the City had claimed Flores was fit for duty but remained on sick leave. On March 2, 2006, the court granted Flores' motion for leave to voluntarily dismiss his federal claims with prejudice but denied his motion to remand the case to state court, and dismissed the remaining claims without prejudice to Flores filing those claims in state court pursuant to 28 U.S.C.A. § 1367(d).

On March 1, 2005, Flores filed a Superior Court complaint (L-667-05) against the City and the FMBA, alleging, in part: (1) the FMBA should have provided him with representation against the City's federal counterclaims; (2) the City violated the LAD by filing its federal counterclaims in retaliation; and (3) the FMBA violated the LAD by discriminating against him based upon

his race and his substance abuse. On June 24, 2005, Judge Mary C. Jacobson dismissed Flores' claims against the City without prejudice on grounds of comity.

On March 22, 2006, Flores filed a second complaint in Superior Court (L-781-06) against the City defendants, the CHS defendants, and the MEAS defendants. Flores alleged, in part: (1) the City defendants discriminated against him based on his race and substance abuser status; (2) various other LAD violations by defendants; and (3) negligence by the MEAS and CHS defendants.

Flores moved for partial summary judgment against the City as to the claims in L-781-06 and to amend his complaint to add, in part, a claim for fraudulent concealment of evidence insofar as he alleged the City defendants deliberately withheld disciplinary policies and the records of similarly situated employees.[7] The City also moved for summary judgment. By orders of September 22, 2006, Judge Jacobson denied Flores' motion and granted the City's motion, dismissing all claims against it and against the City defendants with prejudice.

In January 2007, Flores filed a third complaint in Superior Court (L-25-07) against the City defendants, Palmer, Feigenbaum

[7] Flores also unsuccessfully sought to add additional City defendants: Mayor Douglas Palmer, Business Administrator Jane Feigenbaum, and Personnel Officer James Norton.

and Norton, the CHS defendants, and the FMBA and its representatives Walters, Paul Palumbi, Ronald Ettinger and Ron Kostztyu, Jr. Flores alleged, in part, fraudulent concealment of evidence, including General Order (GO) # 07-03-005, Penalties for Violations of Drug and Alcohol Policies, issued in July 2003 and reissued in April 2006. The City defendants moved to enforce the summary judgment order, and following argument on March 2, 2007, Judge Jacobson granted the motion, treating Flores' new complaint as essentially a motion for reconsideration of the summary judgment decision. By order of the same date, the judge found the claims barred against the City defendants, including the Mayor, Business Administrator and Personnel Officer, and dismissed with prejudice L-25-07 as to them; the judge did the same regarding the FMBA defendants by order of April 13, 2007. By order of March 2, 2007, the judge also denied Flores' motion to vacate the September 22, 2006 summary judgment order and appoint a Special Discovery Master. By order of May 1, 2007, Flores and the CHS defendants stipulated that L-25-07 was dismissed without prejudice as to the CHS defendants. Flores appealed and by order of July 18, 2007, we granted the City defendants' motion to dismiss the appeal as interlocutory.

Numerous discovery motions ensued on the remaining claims

before Judge Jacobson. On June 8, 2007, the judge granted Flores' motion to compel the depositions of FMBA representatives in L-667-05. On the same date, Flores withdrew his motions to compel the depositions of Keenan and Snyder following rescheduling of those depositions. In another order of June 8, 2007, the judge denied Flores' motion for sanctions based on the City's cancellation of Keenan's deposition. By orders of August 22, 2007, the judge granted the MEAS defendants' motion to quash a subpoena seeking financial records in L-781-06 and quashed subpoenas seeking depositions of dismissed City defendants, although she ordered the City to produce some documents in discovery.

Following a judicial rotation, the matter was transferred to Judge Andrew J. Smithson. Flores renewed his motion to vacate the September 22, 2006 summary judgment order (and the March 3, 2007 order denying that relief) and to amend his complaint to add the fraudulent concealment of evidence claim. He also sought permission to assert claims arising under the state and federal constitutions and to reassert the FMLA claim that was dismissed in federal court. The City responded with a "safe harbor" letter, demanding withdrawal of the motions as frivolous in accordance with Rule 1:4-8 and N.J.S.A. 2A:15-59.1. Flores refused and the City defendants opposed the motions and

moved for sanctions. By order of January 28, 2008, Judge Smithson denied Flores' motions and granted the FMBA's motion to quash the subpoena for the deposition of Conrad Dubow, another disciplined firefighter. By order of March 14, 2008, the judge quashed Flores' subpoena for depositions of an unidentified City employee with respect to contracts the City executed with MEAS and CHS.

By order of August 14, 2008, Judge Smithson granted the motion of the City defendants for sanctions against Flores under Rule 1:4-8(d), awarding $16,485.79 in attorneys' fees incurred in defending Flores' "frivolous motion to vacate and amend." By another order of the same date, the judge denied Flores' motions to reconsider the January 28, 2008 order denying Flores' motion to amend his complaint and to vacate the September 22, 2006 summary judgment, as well as the decision to quash the Dubow subpoena. The judge also consolidated L-781-06 and L-667-05 under L-667-05.[8]

The MEAS defendants, CHS defendants, and FMBA defendants subsequently moved for summary judgment. Flores moved for summary judgment as to three counts, one each against Kashinsky, Dr. Makowsky, and the FMBA. By written opinion and order of

[8] Flores filed a second federal District Court complaint, which litigation was stayed by order of August 28, 2008, pending the outcome of this appeal.

September 14, 2009, Judge Smithson granted summary judgment in favor of all defendants on all counts and dismissed Flores' complaint in its entirety.

On October 26, 2009, Flores appealed from the following interlocutory and final orders entered by Judge Jacobson:

> June 24, 2005 - granting the City's motion to dismiss Flores' complaint without prejudice;
>
> June 9, 2006 - denying Flores' motion for sanctions and attorneys' fees;
>
> September 22, 2006
>
> a) denying Flores' motion to compel the City, Snyder and Pierson to respond to interrogatories and for sanctions and attorneys' fees,
>
> b) denying Flores' motion for partial summary judgment against the City and to amend the complaint, and
>
> c) granting summary judgment with prejudice to the City, Keenan, Snyder and Pierson on all counts of Flores' complaint;
>
> March 2, 2007
>
> a) denying Flores' motion to vacate the September 22, 2006 orders and requests for a Special Discovery Master and an investigation, and
>
> b) granting the City's motion to dismiss Flores' complaint under Docket 25-07 as to the City, Palmer, Feigenbaum, Snyder, Laufer, Knapp, Torzewski, Dalena & Sposaro, LLC, Stephen E. Trimboli, Esq., and James Prusinowski, Esq;

April 13, 2007 - dismissing Flores' complaint with prejudice against FMBA, Palumbi, Ettinger, and Kostztyu;

May 11, 2007

a) denying Flores' motion seeking an order for the return of his litigation files from his former counsel, Fox & Fox, who were disqualified from representing FMBA by order of June 10, 2005;

b) denying Flores' motion seeking an order prohibiting Fox & Fox, the Union and its members from contacting the employers or business partners of Flores and his wife, or otherwise interfering with their business relationships; and

c) denying Flores' motion seeking an order preventing Fox & Fox from discussing any aspect of Flores' case and their representation of him with anyone outside the firm;

June 8, 2007 - denying Flores' motion to compel depositions and for sanctions and attorneys' fees;

August 22, 2007 - quashing subpoenas served by Flores on Keenan and the City and his subpoena to the City seeking disciplinary records and settlement agreements involving City firefighters.

According to the Notice of Appeal, Flores also appealed from the following interlocutory and final orders entered by Judge Smithson:

January 28, 2008

a) denying Flores' motion to vacate the September 22, 2006 and March 2, 2007 orders,

b) denying Flores' motion to amend the complaints to include an unreasonable search and seizure claim and reinstate his FMLA claim,

c) denying Flores' motion to amend the complaint to assert fraudulent concealment of evidence by any defendant, former defendant, or representative,

d) denying Flores' motion to name Fox & Fox, Craig Gumpel and Benjamin Benson as defendants, and

e) granting FMBA's motion to quash Flores' subpoena to Dubow;

March 14, 2008 - denying Flores' motion and quashing his subpoenas to the City for the deposition of a representative regarding MEAS and CHS services;

August 14, 2008

a) denying Flores' motion for reconsideration of the January 28, 2008 order, and

b) granting the motions of the City, Snyder, Keenan, and Pierson for sanctions of $16,485.79 under Rule 1:4-8 for Flores' motion to vacate the September 22, 2006 orders and to amend the complaint; and

September 14, 2009 - granting summary judgment to all remaining defendants.

II.

Flores, an Hispanic male, began his career with the TFD in August 1988 when he was twenty-five years old. He reported using cocaine, and occasionally marijuana, in his mid- to late twenties.

On April 2, 2001, Keenan issued a memorandum to all TFD personnel informing them of the department's initiation of a random drug testing policy, with the first tests to occur in early May of that year. He warned that "penalties for violations will be severe" and could include termination. Keenan suggested that any employee with a drug problem seek help prior to initiation of the random tests. On the same date, Keenan also issued a revised copy of Standard Operating Procedure (SOP) # 2.4.01, which explained the purpose of random drug testing and detailed the method by which it would occur.

On May 11, 2001, Keenan released a non-negotiated GO # 5-01-003, which explained potential penalties for violations of the drug and alcohol policy, stating penalties were "based on circumstances and could be up to and including termination." In accordance with the City's IEP, the GO required "an employee who tests positive for prohibited drug/alcohol use to be placed on probation for one year and sign an 'on notice' agreement attesting that his/her continued employment is conditional upon successful compliance with the conditions set forth in [the] agreement." A sample ON agreement was included in the IEP.

The GO also listed "MINIMUM penalties" for substance abuse. Specifically, for drug abuse, the GO provided:

> The employee shall be prohibited from driving a Department vehicle for a period of

> at least six months. He or she shall also serve a minimum suspension as follows:
>
> Firefighters: Two days
> Captains: Four days
> Battalion Chiefs: Six days
> Deputy Chiefs: Eight days
> Director: Twelve days
>
> In addition the employee must sign the "On Notice" Agreement and be on probation for a minimum of one year.
>
> Should the employee test positive for a prohibited substance during that probationary period, he or she shall be suspended for a minimum of thirty (30) days and be placed on a two-year probation.
>
> Further violations during that two-year period shall result in termination.

Defendant Snyder certified that the TFD's GOs "are distributed to all of the firefighters who work for the City," thus "[e]ach and every firefighter is required to know and understand the [GOs] that are in force and effect." He further explained that the GOs are stored at headquarters and firehouses in the City and "are open public documents, which can be accessed and reviewed by anyone who makes an appropriate request."

Prior to implementing the random drug testing policy, the City had implemented an Employee Assistance Program (EAP) that was intended to help employees cope with problems such as drug addiction and mental illness in a confidential manner.

According to the policy statement, a request for diagnosis and treatment assistance would not jeopardize the employee's "job security or promotional opportunities."

To provide this service, the City contracted with MEAS. The City's contract with MEAS for the years 2002 through 2005 required that MEAS, in its counseling role, see an employee a maximum of five times, evaluate the employee's problem, and refer the employee to the appropriate treatment center. The City also contracted with CHS for, in part, provision of return-to-work exams. These exams were generally conducted to determine "fitness to return to duty after non-work related injuries and illnesses." In accordance with the contract, CHS also conducted random drug tests and return-to-work exams specifically for substance abuse situations. The results of these tests were reviewed by a Medical Review Officer (MRO) such as Dr. Makowsky, discussed with the employee, and passed on to the City's Personnel Officer. The contract further provided that in the event of a confirmed positive drug test, the MRO would refer the employee to MEAS, monitor the employee's progress, and conduct any additional testing.

In May 2001, Flores was the senior driver of his platoon at the firehouse. However, at some point he was relieved of his driving responsibilities because it was discovered he had failed

to maintain his license and registration. During the course of his career with the TFD, Flores also had ten suspensions, unrelated to the instant matter, as a result of several violations of the sick leave policy, an arrest for patronizing a prostitute, absence without leave, and other miscellaneous violations.

Gregorio Rodriguez was acting captain of Flores' platoon and defendant Pierson was the battalion chief of the firehouse, which consisted of four platoons. Around early May 2001, Rodriguez was informed by other platoon members of their belief that Flores was on drugs. Rather than having Flores drug tested, Rodriguez contacted Flores on two occasions and referred him to the EAP. Flores initially claimed he had a thyroid condition but eventually admitted he had a drug problem and agreed to contact the EAP.

On May 18, 2001, Rodriguez called MEAS on Flores' behalf and four days later he transported Flores to MEAS. At that time Kashinsky and Rearick were employee assistance counselors and their supervisor was MEAS' Executive Director Sechrist. Although Rearick was the primary contact for TFD issues, due to his unavailability when Rodriguez called, Kashinsky was assigned as Flores' counselor. She conducted an assessment during an interview with Flores, who reported drinking seven or more

drinks at a time, four to six days per week. He also admitted to using drugs on the weekends, including cocaine, explaining he had used cocaine since he was twenty-two years old and his use had dramatically escalated over the prior two years. Although he felt tired, had lost weight, and had suffered drug-related numbness, ulcers and nasal problems, Flores had continued to abuse drugs. He estimated he spent approximately thirty-one to forty-eight hours per week drinking or using drugs and overcoming the effects of this behavior.

Flores admitted he used both alcohol and drugs "to relieve emotional discomfort, such as sadness, anger, or boredom." He also admitted neglecting responsibilities and missing work as a result of his substance abuse, and had frequently driven while under the influence of alcohol or drugs. Kashinsky determined Flores should enter a substance abuse rehabilitation program and referred him to Princeton House for detoxification.

Flores also signed a records release authorization for Kashinsky, which allowed her to contact Dr. Makowsky, the insurance company, Snyder, and Rodriguez on an as-needed basis with information pertaining to Flores' status. On May 23, Kashinsky informed Snyder that Flores was in MEAS' care.

Flores reported to Princeton House intake that he had

> been drinking and using cocaine daily for the past two years[,] [] drinking about 12

> beers a day and . . . smoking and snorting cocaine up to $200 a day. He report[ed] having financial problems and problems at work due to his addiction. He started using alcohol twenty years ago. He has been using cocaine for ten years [and] . . . ha[d] been using Ecstasy in the past two years.

Flores was diagnosed as alcohol and cocaine dependent and suffering from a depressive disorder not otherwise specified (NOS). After a five-day detoxification program, Flores was discharged from Princeton House on May 28, 200l, and was to undergo intensive outpatient treatment and then attend ninety Alcoholics Anonymous/Narcotics Anonymous meetings in ninety days. Flores complied with none of these recommendations. According to Kevin Sopko, Flores' case manager at Princeton House, Flores was "medically cleared to resume full work duties with no restrictions" on May 29, 2001.

However, Kashinsky was informed by Princeton House personnel on June 28 that Flores had tested positive for cocaine the prior week and had a beer in his car at group therapy. A few days later, Flores admitted to using cocaine, and also stated that he was on an antidepressant. On July 2, Flores admitted to Kashinsky that he had used drugs twice since he was released from Princeton House.

According to Dr. Makowsky, Flores appeared for a return-to-work evaluation on July 6 and advised he was ready to return to

his job. Flores tested positive for cocaine. Flores then admitted to Kashinsky and Dr. Makowsky that he had been using cocaine since his release from Princeton House. The positive drug results were provided to the TFD.

Pursuant to the IEP and GO, on July l3, 200l, the City filed a disciplinary action against Flores, which was resolved when he agreed to enter into an ON agreement with the City. Flores signed the agreement on July 13, 200l in the presence of Snyder, Keenan, Rodriguez and an FMBA representative. The ON agreement provided that Flores' continued employment with the City was conditioned on his compliance with all terms and conditions of the agreement, including one-year probation, becoming and remaining drug and alcohol free, participating in an appropriate treatment program, and being medically monitored and submitting to random drug tests during the probation period. Following an August 7, 200l hearing at which Flores pled guilty to the charges and acknowledged his obligations under the ON agreement, a Final Notice of Disciplinary Action was issued suspending Flores without pay for an agreed-upon twenty-day period beginning July 28, 200l. He was also removed from driving status for six months.

After attending outpatient treatment at Princeton House during the summer of 200l, Flores submitted to and passed a

return-to-work assessment at CHS on September 5, 200l, which included a drug test, and was cleared to return to his regular duties as a City firefighter on September l0, 200l. Flores performed his job without incident and passed one random drug test on October 8, 200l. However, on October l7, 200l, Flores tested positive on a random urine screen. Based on the resulting violation of the ON agreement, disciplinary charges were filed and Flores was suspended without pay pending a departmental hearing.

Flores entered an inpatient treatment program at Seabrook House from November 26 to December 11, 2001, and thereafter participated in the Princeton House outpatient program through February 2002. In his deposition, Flores claimed he stopped using drugs in October 2001. However, in his intake statement to Seabrook House, Flores reported last using drugs on November 24, 2001. He explained, "I keep relapsing[.] I just cannot stop the urge of doing drugs. I am suspended from my job because I relapsed on the job." Flores reported he had been drinking a twelve pack of beer every other day for ten years and was snorting a gram of cocaine every other day for three years. Flores also admitted to twenty years of marijuana use, but claimed he had stopped such use the prior year.

Following a February 20, 2002 hearing, Flores received a

Final Notice of Disciplinary Action terminating his employment, effective immediately. In the accompanying memorandum, Keenan stated that, although he applauded Flores' efforts "to conquer what has evidently been a longstanding problem with drugs and alcohol, and wish[ed] him luck in his recovery efforts," he could not "ignore the seriousness of the[] charges." Thus, termination was warranted.

In his deposition on October 12, 2007, Keenan explained that, as per the GO, the thirty-day suspension and two-year probationary period following violation of an ON agreement is a "minimum penalty." FMBA officer Palumbi elaborated:

> [A] minimum penalty is a minimum penalty. Every [union] member knows if you get caught a second time, there is a very good chance that you are going to be terminated.
>
> . . . .
>
> My understanding, me personally, if you got caught the second time, you were no longer going to be employed by the [TFD]. However way you wanted to opt out of it was up to you, whether resign, retire, pensions or get terminated. That was your choice. But if you got popped the second time, you were no longer going to be employed here, and ever[y] member knows that.

Flores submitted a January 11, 2008 report by Thomas W. Worrell, MA, CEAP, concluding the failure of the MEAS defendants "to properly follow and apply the standards of care and policies of the City of Trenton resulted in [] Flores' termination." He

found, in part, that under U.S. Department of Transportation (DOT) regulations relied on by the City in establishing its drug and alcohol abuse and testing policies for the TFD, Kashinsky and Rearick were not qualified to perform the duties of an SAP (Substance Abuse Professional); Kashinsky did not properly monitor Flores' progress in the rehabilitation program; Flores' case was "mismanaged and poorly coordinated"; and all defendants deviated from the industry standard by failing to provide an appropriate return-to-work protocol. He additionally opined: (l) the July 6, 200l drug test should have been canceled because it was not authorized and there was no recommendation from the treatment provider; (2) Flores should not have been required to enter into the July 13, 200l ON agreement; and (3) the positive test results should have been utilized solely for the purpose of referring Flores for re-evaluation so the level of care could be reassessed.

Flores also submitted a January 14, 2008 report by Adam Redlich, MD, MRO regarding the CHS defendants' actions. Dr. Redlich opined they breached the standard of care in the following instances: (l) Dr. Makowsky's failure to obtain a written report from the SAP prior to conducting a return-to-work evaluation relating to drug abuse; (2) Dr. Makowsky's resulting failure to cancel the return-to-work drug test and request such

report; and (3) Dr. Makowsky's failure to obtain written clearance from Flores' private physician who was treating him for hyperthyroidism, for which he was being kept out of work.

On March 7, 2008, Ben LoCasto, LCSW, CEAP submitted an expert report on behalf of the MEAS defendants, finding the MEAS counselors were qualified to perform SAP duties; the City had exempted itself from DOT regulations; there was no return-to-work clearance required from MEAS; and Kashinsky did not send Flores for a drug test. He opined that Flores received "all that duty required him to receive from MEAS" and his own actions resulted in his two violations of the City's IEP and ON agreement and subsequent termination from employment.

Robert Swotinsky, MD, MPH, the CHS defendants' expert, submitted a report on March 13, 2008, concurring that DOT regulations did not apply and the City was not required to follow the regulations in full despite having used them as a model for several policies. He opined that CHS was not obligated to first obtain a written order from the City or a report from MEAS authorizing return-to-work tests. He also noted that hyperthyroidism is not a disqualifying condition from serving as a firefighter and Dr. Makowsky did, in fact, receive a letter from Flores' personal physician dated July 6, 2001 authorizing his return to work. Dr. Swotinsky concluded the

July 6, 200l drug test was appropriately performed by CHS, nothing rendered the results unreliable so the test should not have been canceled, and CHS properly notified the City of the results.

III.

On appeal, Flores argues:

> POINT I
> THE MOTION JUDGE ERRED IN GRANTING SUMMARY JUDGMENT TO THE [CITY] DEFENDANTS ON COLLATERAL ESTOPPEL GROUNDS BECAUSE TRENTON INTERFERED WITH FLORES' EMPLOYMENT RIGHTS AND AFFECTED HIS ABILITY TO OBTAIN AN IMPARTIAL HEARING.
>
> l. Collateral Estoppel does not apply to this case.
>
> 2. Trenton cannot diminish or interfere with Flores' right to the second chance provision of the negotiated discipline policy.
>
> a) The motion judge erred by changing the express terms of the negotiated discipline policy.
>
> POINT II
> THE LAD PROTECTS FLORES BECAUSE THE TERMS, CONDITIONS, AND PRIVILEGES OF EMPLOYMENT IDENTIFIED IN THE EAP AND LABOR AGREEMENTS REQUIRE EQUAL TREATMENT OF EMPLOYEES REGARDLESS OF THE TYPE OF SUBSTANCE TO WHICH AN EMPLOYEE IS ADDICTED.
>
> POINT III
> THE MOTION JUDGE ERRED IN DENYING FLORES' REQUEST TO AMEND THE COMPLAINT TO INCLUDE A CLAIM FOR RACIAL DISCRIMINATION.
>
> l. The motion judge should have related

Flores' racial discrimination claims back to the date of his original complaint.

2. The motion judge erred in finding litigation tactics are not subject to the continuing violation doctrine.

3. The Discovery Rule permits the amendment.

POINT IV

THE MOTION JUDGE SHOULD HAVE PERMITTED FLORES' CONCEALMENT OF EVIDENCE CLAIMS.

POINT V

THE MOTION JUDGE'S DENIAL OF FLORES' MOTION TO VACATE THE SUMMARY JUDGMENT ORDERS AND TO AMEND THE COMPLAINT WAS AN ABUSE OF HIS DISCRETION.

1. Trenton Defrauded The Court By Concealing And Presenting False Testimony.

2. The newly discovered evidence provides additional support that Trenton interfered with the impartial adjudication of Flores' case.

POINT VI

THE MOTION JUDGE ABUSED HIS DISCRETION BY EXCLUDING FLORES FROM THE TERMS, CONDITIONS AND PRIVILEGES OF EMPLOYMENT BASED ON FLORES' ADDICTION TO A CONTROLLED DANGEROUS SUBSTANCE.

POINT VII

THE MOTION JUDGE ABUSED HIS DISCRETION IN SANCTIONING FLORES FOR MOVING TO VACATE THE SUMMARY JUDGMENT ORDERS AND FOR SEEKING TO AMEND HIS COMPLAINT.

POINT VIII

THE MOTION JUDGE'S ORDER FAILED TO DESCRIBE THE VIOLATIVE CONDUCT AND THE BASIS FOR THE SANCTION IMPOSED.

POINT IX

THE MOTION JUDGE SHOULD HAVE GRANTED FLORES' MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENIED THE SUMMARY JUDGMENT MOTIONS OF THE MEAS, CHS, AND FMBA DEFENDANTS.

1. THE DRUG TESTS TAKEN DURING FLORES' PARTICIPATION IN THE EAP PROGRAM VIOLATED FLORES' RIGHTS TO THE RETURN TO WORK PROCEDURES AND SHOULD NOT HAVE BEEN USED FOR DISCIPLINE.

2. THE UNION BREACHED ITS DUTY TO FLORES TO PROVIDE HIM WITH FAIR REPRESENTATION.

POINT X

FLORES IS ENTITLED TO DEPOSE CONRAD DUBOW AND A TRENTON REPRESENTATIVE KNOWLEDGEABLE ABOUT THE MEAS AND CHS CONTRACTS.

POINT XI

FLORES' MOTIONS FOR SANCTIONS AND AN INVESTIGATION SHOULD HAVE BEEN GRANTED.

Based on our review of the record and applicable law, we are satisfied none of these arguments have merit.

A.

Judge Jacobson determined that collateral estoppel barred Flores from now arguing he was terminated for other reasons that violated the LAD, finding the question of the propriety of the termination was fully and fairly litigated in the prior administrative proceeding. We reject Flores' first argument as we are satisfied summary judgment was properly granted to the City defendants on September 22, 2006 based on the collateral estoppel doctrine.

When reviewing a grant of summary judgment, we employ the same standards used by the motion judge. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). First, we determine whether the moving party has demonstrated that there were no genuine disputes as to material facts, and then we decide whether the motion judge's application of the law was correct. Atl. Mut. Ins. Co. v. Hillside Bottling Co., 387 N.J. Super. 224, 230-31 (App. Div.), certif. denied, 189 N.J. 104 (2006). In so doing, we view the evidence in the light most favorable to the non-moving party. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). We accord no deference to the motion judge's conclusions on issues of law, Manalapan Realty, L.P., v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995), which we review de novo. Dep't of Envtl. Prot. v. Kafil, 395 N.J. Super. 597, 601 (App. Div. 2007).

"The doctrines of collateral estoppel, issue preclusion, res judicata, and the like serve the important policy goals of 'finality and repose; prevention of needless litigation; avoidance of duplication; reduction of unnecessary burdens of time and expense; elimination of conflicts, confusion and uncertainty; and basic fairness[.]'" First Union Nat'l Bank v. Penn Salem Marina, 190 N.J. 342, 352 (2007) (alteration in

original) (quoting Hackensack v. Winner, 82 N.J. l, 32-33 (l980)). The doctrine of collateral estoppel precludes a party "from relitigating claims or issues which the party actually litigated, [which] were determined in a prior action, and [which] were directly in issue between the parties." Ensslin v. Twp. of N. Bergen, 275 N.J. Super. 352, 369 (App. Div. 1994) (citing Mazzilli v. Accident & Cas. Ins. Co. of Winterthur, Switzerland, 26 N.J. 307, 314-16 (1958)), certif. denied, 142 N.J. 446 (1995).

In First Union, supra, the Court reiterated the requirements to foreclose relitigation of an issue, explaining that the party asserting the bar must demonstrate:

> (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.
>
> [190 N.J. at 352 (quoting Hennessey v. Winslow Twp., 183 N.J. 593, 599 (2005)).]

Application of the doctrine is not limited to court proceedings. Winner, supra, 82 N.J. at 32. The findings of administrative tribunals can, under appropriate circumstances, also preclude further litigation. Id. at 31-33; Ensslin, supra,

275 N.J. Super. at 369.

In Ensslin, supra, the plaintiff raised the LAD as a bar to termination, thereby invoking the Board's jurisdiction "to determine whether he had established a *prima facie* case of handicap discrimination" and whether reasonable accommodations could be made. 275 N.J. Super. at 369-70. The issues presented at the administrative hearing were "essentially the same" as those pled in the Law Division. Id. at 370. Citing the Restatement (Second) of Judgments, § 28 (1982), we noted five exceptions to issue preclusion: (1) as a matter of law, review of the initial judgment was impossible; (2) the issue is a legal one and either the actions involve substantially unrelated claims or some intervening change in the law requires a new determination; (3) jurisdictional issues or procedural differences between the two courts warrant a new determination; (4) the burden is heavier on either party in the second proceeding or has shifted; or (5) either public interest warrants a new determination, it was not foreseeable the issue would arise again, or special circumstances prohibited full and fair adjudication at the initial proceeding. Ibid.

We concluded that issue preclusion was not prohibited because the plaintiff had obtained full review of the judgment and the issue involved substantially related legal and factual

disputes. Id. at 371. Moreover, the agency and court procedures were similar and the burdens were the same. Id. at 371-72. There also was no impact on the public interest, the plaintiff initiated both actions, and he had incentive to fully develop the issues before the agency. Id. at 372. Finally, since the plaintiff contended from the start that his termination violated the LAD, he could have initiated suit in Superior Court. Ibid.

So, too, in the present case. Flores challenged his termination in the administrative hearing. Flores, supra, slip op. at 11. The ALJ concluded the City successfully demonstrated, "by a preponderance of the credible evidence," that Flores "violated his last chance opportunity to refrain from using illegal drugs." Significantly, Flores was unable to prove his assertions that Kashinsky did not adequately follow his progress, his superiors pressured him to return to work, or that he did not understand the ON agreement. TFD policy mandated contact from supervisors during leave and Flores admitted that only general inquiries as to his health and possible return date were made. Furthermore, Flores signed the ON agreement in the presence of his union representative and acknowledged his continued employment was contingent on his drug-free status. As concluded by the ALJ:

> [I]t was [Flores] who twice tested positive for cocaine and it is he who ought to have demonstrably exposed [the City's] assistance efforts as superficial. From this record it appears that [the City] gave [Flores] reasonable non-punitive opportunities to self-correct. After testing positive for cocaine a second time on October 22, 2001 [Flores] sought out TASC and Seabrook House. It may be that these organizations were better able to help him confront his addictions and if that is so then it is enormously positive for his future. However, the moment in time when this issue was relevant to [the City] passed on October 22, 2001. As of that date [Flores] seriously violated the terms of probation and dismissal is the natural and known consequence for that breach[.]

In Flores' appeal from the Board's affirmance, he raised three points: (1) his termination was improper due to the invalidity of the ON agreement; (2) the City breached its obligation to him; and (3) termination was unwarranted. Id. at 16. We rejected these arguments and affirmed the Board's decision upholding Flores' termination. We concluded MEAS was "primarily a referral service," and noted Flores' expert's admission that "Princeton House offered appropriate programs for persons with substance abuse addictions." Id. at l7. We were also satisfied Flores' failure to follow the recommendations on discharge, resumption of his illicit drug use, and positive return-to-work urine test were his own fault, commenting, "[i]t is hardly appropriate to suggest that the responsibility for

that result be laid at the feet of" the City. Ibid.

We cited In re Cahill, 245 N.J. Super. 397 (App. Div. 1991), in which the termination of a firefighter due to substance abuse was upheld, noting with approval the Appellate Division's conclusion "that the negligent or improper performance of firefighter duties places persons and property at risk of serious harm." Id. at 18. However, we questioned Cahill's "conclusion that current illicit drug use is a protected handicap that must be reasonably accommodated," and cited numerous other contrary opinions, including Bosshard v. Hackensack University Medical Center, 345 N.J. Super. 78, 88 (App. Div. 2001). Id. at 19-20. In either instance we were satisfied Flores was "properly and confidentially referred to a recognized drug-treatment facility, fulfilling any responsibility that the [TFD] had assumed." Id. at 20.

We further concurred with the ALJ's finding that Flores had voluntarily entered into the ON agreement and was aware of the consequences of a breach as "supported by substantial, credible evidence contained in the record, including [Flores'] own testimony and the testimony of . . . Snyder, who stated that he explained the agreement . . . point-by-point." Id. at 16, 20. It is undisputed Flores was accompanied by his union representative, and we found without basis Flores' appellate

argument that he was intoxicated at the time or in any way coerced. Finally, because Flores never disputed the disciplinary charge and voluntarily entered into the ON agreement, we also rejected the argument that he was improperly disciplined for the July 6, 2001 test because he was not actually on duty at the time. Id. at 21.

We concluded:

> In summary, we cannot conclude on this record that any action or inaction by [the City] was responsible for [Flores] failing to adequately address his drug abuse problem. To the contrary, as noted by Judge Metzger, the record supports the conclusion "that [the City] gave [Flores] reasonable non-punitive opportunities to self-correct." Considering that within a period of approximately five months [Flores] was referred to a recognized treatment facility, received detoxification treatment, failed to follow through with the aftercare recommendations, that he thereafter tested positive for cocaine, then entered knowingly into an On-Notice, last-chance agreement, received therapeutic treatment, and then again tested positive for cocaine, we cannot conclude that the disciplinary sanction of removal constitutes arbitrary, capricious or unreasonable administrative action.
>
> [Id. at 21-22.]

In the September 22, 2006 hearing before Judge Jacobson that resulted in dismissal of the City defendants on summary judgment, she recognized that Flores' LAD claims were not expressly raised in the OAL proceeding, but concluded the

predicate facts and issues were addressed, stating:

> What is the difficult part of the analysis here is that the [LAD] nomenclature was not -- and specific [LAD] claims were not raised in the [OAL]. But when you look to see what those claims are and what facts they require, you find that [Flores] cannot make out a prima facie case in this Court under the LAD because of issues and facts that have already been fully and fairly litigated in the [OAL] process.

The judge relied on Ensslin for support of her conclusion that the findings in the OAL hearing were entitled to preclusive effect even though that plaintiff had raised the LAD claims in the OAL proceeding while Flores had affirmatively reserved the claims. Despite the differences, she found "the risk of a party that goes through the OAL is that they will provide facts and raise issues that really preclude them from coming to Superior Court despite their effort to reserve them and not raise them." The judge emphasized that Flores "fully availed himself" of review of the OAL decision and had ample opportunity to have these "substantially related" issues addressed there.

The judge further explained that the OAL proceeding allowed for the appearance of live witnesses and cross-examination, and noted, although there are limitations on discovery in

"conference type hearings"[9] at the OAL, "nothing in the case law" suggested that such a hearing was "inadequate for collateral estoppel effect." She further noted that Flores could have sought additional discovery but did not do so.[10] Moreover, Judge Jacobson referenced our review of the administrative proceeding, analysis of the case law holding that current drug use does not constitute a handicap under the LAD, and conclusion that Flores' termination was due solely to his own actions.

Accordingly, Judge Jacobson determined that all of the elements for a finding of collateral estoppel were met, stating:

> The same operative facts that are the basis for the complaint here were the operative facts that were the basis of the OAL proceeding. Even though there -- as I mentioned, the LAD nomenclature wasn't used . . . really the same -- similar things that would have been shown in an LAD claim were raised in terms of the drug use and . . . what the City did in response to [Flores'] condition . . . . [T]here was a final judgment all the way up to denial . . . of certification of the Appellate Division decision by the Supreme Court.

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[9] The regulations at that time provided for a "conference hearing" before an ALJ, in which discovery was limited. N.J.A.C. 1:1-2.1. Conference hearings were eliminated by R. 2007 d. 393, effective December 17, 2007. 39 N.J.R. 5201(a) (December 17, 2007).

[10] Pursuant to N.J.A.C. 1:1-10.6(d), in effect at that time, any discovery in conference hearings other than the limited discovery permitted by (a) and (b), could only be obtained "by motion to the judge and for good cause shown."

We do not find persuasive Flores' argument that he was not given adequate discovery in the OAL proceeding and that newly discovered documents mandated further consideration of his case. Our denial of reconsideration arguably hinged on a determination that consideration of these documents would not alter our earlier decision. Moreover, because the GO only established minimum penalties, its absence from the earlier proceeding did not so taint the result that the administrative dismissal should not be given collateral estoppel effect. As correctly noted by Judge Jacobson,

> It doesn't change the fact that [Flores], as presented to the OAL, signed an [ON agreement] in which he admitted at the OAL hearing he understood if he had another dirty urine he would be terminated. Nothing about [the GO] can change those facts. And nothing about the policy that says that the minimum that can be done suggests that what was done for [Flores] was not appropriate.

Here, the crux of Flores' complaints at both the administrative and Superior Court levels was that the basis for his termination was improper. Although the LAD claims were not specifically raised in the prior proceedings, we were not convinced Flores could claim violation of the LAD based on a protected disability because, in accordance with Bosshard, supra, 345 N.J. Super. at 88, current substance abuse is not protected. Thus, although the OAL and Superior Court claims

were not identical, the issues were, at their core, the same. The previous proceedings, following an opportunity for full and fair litigation and review, resulted in a finding that Flores' termination was due to his own continued substance abuse in violation of the ON agreement. He is estopped from arguing otherwise.

B.

In our prior opinion, we essentially disposed of Flores' second argument, i.e., his current drug addiction constituted a disability under the LAD, and Judge Jacobson erred by finding to the contrary. We stated:

> [W]e question the Cahill panel's conclusion that current illicit drug use is a protected handicap that must be reasonably accommodated, see Bosshard [supra,] 245 N.J. Super. [at] 88 . . . (holding that "current conduct of a criminal nature is not a handicap under the LAD"), In re Jackson, 294 N.J. Super. 233, 236 n.l (App. Div. l996) (noting that habituation or dependency on illegal drugs is not a handicap under the LAD as a matter of law), certif. denied, 149 N.J. 141 (l997), and A.B.C., Inc. v. XYZ Corp., 282 N.J. Super. 494, 508 (App. Div. l995) (Petrella, concurring)(noting that it "strains credulity that the Legislature would prohibit [a criminal activity] on the one hand, but condone it on the other hand, by making it a protected handicap under the LAD")[.]
>
> [Flores, supra, slip op. at 19-20.]

Regardless, we found the TFD had fulfilled all of its

responsibilities to Flores.

Flores makes no persuasive argument to convince us to part company with Bosshard. Under the standard established in Bosshard, supra, Flores' active drug use at the time of his termination removed him from the class of disabled individuals protected by the LAD because his continued illicit drug use demonstrated he had not "addressed the condition in an appropriate manner." 345 N.J. Super. at 89. Thus, the City terminated his employment for violation of the ON agreement and TFD drug policies without violating the LAD. Alternatively, even under the more liberal standard established in Cahill, Flores' termination was proper in light of the City's reasonable accommodations and Flores' public safety position as a firefighter.

There was no evidence in the record that Flores was terminated for any reason other than violation of the ON agreement. Thus, no rational factfinder could find the City defendants violated the LAD when they terminated Flores' employment. Brill, supra, 142 N.J. at 523.

C.

Judge Jacobson denied Flores' motion to amend his complaint based on the expiration of the applicable two-year statute of limitations. She rejected Flores' continuing violations theory,

finding there was "nothing for the race discrimination [claim] to tack on to [to] save it from the statute of limitations." The judge explained that the City's federal counterclaims for unjust enrichment and misappropriation of funds, which were never adjudicated, could not save Flores' claim. She also pointed out that Flores made litigation strategy decisions that did not include performing an investigation into possible discriminatory motives following his termination. Therefore, the judge found Flores' claim could not relate back to previously pled claims and was unsustainable in light of the statute of limitations.

We discern no error by the judge in her discretionary decision not to permit the amendment. Although Rule 4:9-1 requires such motions be granted liberally, see Kernan v. One Wash. Park Urban Renewal Assocs., 154 N.J. 437, 456 (1998), "they nonetheless are best left to the sound discretion of the trial court in light of the factual situation existing at the time each motion is made." Fisher v. Yates, 270 N.J. Super. 458, 467 (App. Div. 1994).

"That exercise of discretion requires a two-step process: whether the non-moving party will be prejudiced, and whether granting the amendment would nonetheless be futile." Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 501 (2006). With respect

to the latter step, although "motions for leave to amend are to be determined 'without consideration of the ultimate merits of the amendment,'" the court must nonetheless make its decision in light of the specific factual situation in existence at the time of the motion. Ibid. (quoting Interchange State Bank v. Rinaldi, 303 N.J. Super. 239, 256 (App. Div. 1997)). "More specifically, 'courts are free to refuse leave to amend when the newly asserted claim is not sustainable as a matter of law. In other words, there is no point to permitting the filing of an amended pleading when a subsequent motion to dismiss must be granted.'" Notte, 185 N.J. at 501-02 (quoting Interchange, supra, 303 N.J. Super. at 256-57).

Flores did not raise the race/ethnicity discrimination claim in his administrative proceeding, in multiple federal complaints, or in his state litigation. Moreover, Flores sought to raise the claim more than four years after his employment was terminated. See Montells v. Haynes, 133 N.J. 282, 292-94 (1993) (holding there is a two-year statute of limitations period for claims brought under the LAD).

Furthermore, nothing in the record suggests that Flores' termination was in any way related to his being Hispanic. He was employed by the TFD for fourteen years despite numerous violations and suspensions. Flores was afforded the opportunity

to continue his employment following a positive drug test. It was not until he failed a second drug test, thereby violating the ON agreement, that his employment was terminated.

The judge also properly concluded the continuing violation doctrine for tolling the limitations period, Wilson v. Wal-Mart Stores, 158 N.J. 263, 272 (1999), was inapplicable to the present case. We outlined the requisite elements of this doctrine as follows:

> To establish a continuing violation based on a series of discriminatory acts, a plaintiff must show that
>
> (1) at least one allegedly discriminatory act occurred within the filing period and
>
> (2) the discrimination is "more than the occurrence of isolated or sporadic acts of intentional discrimination" and is instead a continuing pattern of discrimination.
>
> [Bolinger v. Bell Atl., 330 N.J. Super. 300, 307 (App. Div.) (quoting Harel v. Rutgers, The State Univ., 5 F. Supp. 2d 246, 261 (D.N.J. 1998), aff'd, 191 F.3d 444 (3d Cir. 1999), cert. denied, sub nom., Harel v. Lawrence, 528 U.S. 1117, 120 S. Ct. 936, 145 L. Ed. 2d 814 (2000)), certif. denied, 165 N.J. 491 (2000).

Contrary to Flores' assertion, there is no evidence the City's litigation strategies were racially motivated, discriminatory, or retaliatory. Moreover, Flores had already been terminated by that juncture, thus any actions taken by the City defendants during the course of litigation clearly played

no part in Flores' termination and could not constitute adverse employment actions under the LAD.

We also reject Flores' argument that amendment of his complaint should have been permitted under the discovery rule. Application of the discovery rule acts in equity to remedy any unjust results stemming from the rigid application of a rule of law. Grunwald v. Bronkesh, 131 N.J. 483, 492 (1993). It is used in special circumstances and where the interests of justice require in order "to postpone the accrual of a cause of action when a plaintiff does not and cannot know the facts that constitute an actionable claim." Ibid. Application of the rule starts the limitations period once a plaintiff is aware of "the facts underlying" the injury and fault, as opposed to "when a plaintiff learns the legal effect of those facts." Id. at 493.

Flores contends it was not until he obtained the records of other similarly situated firefighters that he learned race may have played a role in his termination and attributes ill motive to the City defendants in withholding such records. Flores chose to proceed to final judgment in the administrative proceeding without full discovery and did not request the "conference hearing" be converted to a type that permitted more extensive discovery. See N.J.A.C. 1:1-12.1 (requiring a party to file a motion to convert a conference hearing into another

form of proceeding).[11] Moreover, the GO he contends was concealed from him was a policy with which he should have been familiar as a firefighter, was a public document available through an Open Public Records Act request, and was readily available at the firehouses. Moreover, as Judge Jacobson determined, even if the GO had been produced or relied upon during the disciplinary hearing, the same result would have ensued as GO # 5-01-003 sets forth minimum penalties for a firefighter who tests positive for illegal drugs and does not prohibit termination as a result of a failed second drug test.

D.

We similarly reject Flores' fourth point challenging Judge Jacobson's denial of his motion to amend to assert fraudulent concealment of evidence claims against the City defendants reflected in the September 22, 2006 order, and dismissal of his 2007 complaint (L-25-07) reflected in the March 2, 2007 order. We discern no basis to second-guess the judge's comprehensive ruling articulated on the record on both dates.[12] R. 2:11-

[11] As aforestated, conference hearings and applicable regulations have been repealed. 39 N.J.R. 5201(a) (December 17, 2007).

[12] In order to succeed on a fraudulent concealment of evidence claim, a plaintiff must establish the existence of five elements:

> (1) That defendant in the fraudulent concealment action had a legal obligation to

(continued)

3(e)(l)(A) and (E). The judge appropriately determined there was no basis for a fraudulent concealment claim since GOs were readily available in the firehouses and the policy amendments were irrelevant as they occurred after Flores' termination. As for the information regarding other firefighters, the judge found that the reason it was not obtained earlier was due to Flores' litigation strategy during the OAL proceeding.

Although the bulk of Flores' appellate arguments regarding his fraudulent concealment claims focus on the City defendants, he also briefly mentions evidence that allegedly was concealed by the CHS, MEAS, and FMBA defendants. Those claims were

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(continued)

> disclose evidence in connection with an existing or pending litigation;
>
> (2) That the evidence was material to the action;
>
> (3) That plaintiff could not reasonably have obtained access to the evidence from another source;
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> (4) That defendant intentionally withheld, altered or destroyed the evidence with purpose to disrupt the litigation; [and]
>
> (5) That plaintiff was damaged in the underlying action by having to rely on an evidential record that did not contain the evidence defendant concealed.
>
> [Rosenblit v. Zimmerman, 166 N.J. 391, 406-07 (2001).]

similarly dismissed by Judge Jacobson on the record on April 13, 2007 and by Judge Smithson's written opinion of September 14, 2009.[13]

E.

Flores' fifth point challenging Judge Smithson's January 17, 2008 order declining to vacate the September 22, 2006 summary judgment order dismissing his complaint (L-781-06) against the City defendants and denying his motion to amend the complaint to assert an FMLA claim as an abuse of discretion is equally without merit. The judge explained that, particularly in light of the federal court decision, the essence of Flores' state case boiled down to termination resulting from his own criminal conduct, thus there was no basis for a claim of violation of rights under the FMLA. Res judicata prohibits state court actions following identical federal court actions which were disposed of on the merits. Reid v. Reid, 310 N.J. Super. 12, 19 (App. Div.), certif. denied, 154 N.J. 608 (1998).

The judge was also convinced his predecessor's summary judgment dismissal based on collateral estoppel was sound and not susceptible to vacation based on a claim of newly discovered

[13] After transfer of the case to Judge Smithson, Flores again moved to amend the L-781-06 complaint to add the fraudulent concealment claims. Judge Smithson denied this relief on the record on December 13, 2007 and January 17, 2008.

evidence, fraud, or "any other reason justifying relief." R. 4:50-1(b), (c), and (f). The record does not support Flores' contention that the City intentionally defrauded Judge Jacobson by concealing evidence that would have affected her decision. As aforestated, Flores failed to demonstrate fraudulent concealment of the GO and related documents. None of the allegedly "new" evidence changes the fact that Flores was terminated for violating a voluntarily executed ON agreement to remain substance free or suffer the consequences. Nothing in the record suggests that termination was not a legitimate penalty for a second positive drug test, regardless of whether other firefighters received the same or different penalties based on their particular circumstances.

The judge also had ample basis to deny Flores' motion for reconsideration. As he explained on August 14, 2008, although both MEAS and CHS were "federally sponsored drug treatment 'programs or activit[ies]'" in accordance with 42 C.F.R. § 2.11, his consideration of the two drug tests did not violate federal confidentiality law. Judge Smithson concluded that the drug tests were not administered for treatment purposes, 42 U.S.C.A. § 290dd-3, but, rather, they were administered for the benefit of the public and to promote safety in the workplace. Specifically, as found by the ALJ, although Flores' first test

occurred following a period of rehabilitation, its purpose was not continued rehabilitation but was a "routine return-to-duty medical evaluation to assess [Flores'] fitness to perform firefighter duties after taking sick leave" and the October 2001 test occurred randomly, also to ascertain Flores' fitness for continued duty in accordance with the ON agreement.

Judge Smithson also found the Legislative purpose of the statute - to encourage hesitant individuals to undergo treatment - was "not jeopardized by disclosure of the results to the employer" where the tests were "a mandatory aspect of continued employment." Moreover, Flores understood that both tests were "part of his employer's effort to enforce its drug policy, and not a mere initiation or continuation of 'treatment.'"

F.

The record is devoid of any evidence of bias by Judge Smithson based upon Flores' significant drug abuse. The judge simply noted, as did the ALJ and our opinion affirming the Board's decision, that Flores' own behavior in abusing drugs caused his termination.

G.

In Flores' seventh point, he argues Judge Smithson abused his discretion by sanctioning him for frivolous motion practice without adequate explanation. In point eleven, Flores

challenges the judge's denial of his motions for sanctions and an investigation into alleged ethical violations and harassment by defendants' attorneys. We discern no error in either instance.

At the March 14, 2008 oral argument on the motion for sanctions, the City's attorney explained his reasons for requesting sanctions under Rule 1:4-8:[14]

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[14] N.J.S.A. 2A:15-59.1, which is supplemented by Rule 1:4-8, Masone v. Levine, 382 N.J. Super. 181, 192 (App. Div. 2005), provides that:

> a. (1) A party who prevails in a civil action, either plaintiff or defendant, against any other party may be awarded all reasonable litigation costs and reasonable attorney fees, if the judge finds at any time during the proceeding or upon judgment that a complaint, counterclaim, cross-claim or defense of the nonprevailing person was frivolous.
>
> (2) When a public entity is required or authorized by law to provide for the defense of a present or former employee, the public entity may be awarded all reasonable litigation costs and reasonable attorney fees if the individual for whom the defense was provided is the prevailing party in a civil action, and if there is a judicial determination at any time during the proceedings or upon judgment that a complaint, counterclaim, cross-claim, or defense of the nonprevailing party was frivolous.
>
> b. In order to find that a complaint, counterclaim, cross-claim or defense of the

(continued)

> [T]he reality is that . . . when the Court says no to the issues [Flores] presents, [he and his counsel] don't take no for an answer. They respond with ugly letters. They respond with ugly motions. They respond with these items that require the City to consistently defend [] itself.
>
> We have gone through federal court, state court, reconsiderations, new complaints. I've been named personally as a litigant twice now. There's a new complaint that's been [filed] in federal court because they don't like the decisions that are being made here and it just continues to go on.

In his comprehensive written opinion, Judge Smithson detailed the complicated procedural history leading up to his ruling, including Flores' numerous efforts to attempt to revive several previously dismissed claims, once in the face of a reprimand, his multiple complaints, and repetitive motions. He

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(continued)

> nonprevailing party was frivolous, the judge shall find on the basis of the pleadings, discovery, or the evidence presented that either:
>
> (1) The complaint, counterclaim, cross-claim or defense was commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury; or
>
> (2) The nonprevailing party knew, or should have known, that the complaint, counterclaim, cross-claim or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

explained:

> [Flores'] September 2007 motion to amend the complaint and to vacate Judge Jacobson's summary judgment order of September 22, 2006 was utterly devoid of factual or legal merit and, in this court's view, reflected an ongoing strategy of harassment against the City and its employees. The motions included unsupportable legal contentions and reiterated legal arguments rejected by the OAL, the M[S]B, the Federal District Court, and Superior Court. This court concurs in the City's characterization of the motions as a "hail mary pass" by [Flores], to exploit the reassignment of the case to a new judge, to resuscitate a claim for fraudulent concealment that had been twice rejected by Judge Jacobson and to revive a claim under NJLAD that had been dismissed by every judge who considered it. A side by side comparison of [Flores'] opposition brief, submitted in the context of the September 2006 motion for summary judgment and the supporting brief submitted in the context of [Flores'] September 2007 motions reveals that the second round of motions was essentially a reiteration of [Flores'] opposition to the first. [Flores'] effort to resurrect his fraudulent concealment claim by way of amendment is particularly troubling given the fact that Judge Jacobson rejected the amendment once and reprimanded [Flores] for an "abuse of process" after he attempted to circumvent the court's order by filing the claim as a separate lawsuit.
>
> The court's review of the lengthy and tortured procedural history of this dispute mandates the determination that [Flores'] September 2007 motion to vacate and amend was without good faith basis in law or fact. After numerous adverse rulings on [Flores'] fraudulent concealment allegations and the ad nauseum litigation and deconstruction of his LAD theories, [Flores'] latest gambit to

reintroduce those issues was hopeless from the outset. The deficiencies in the September 2007 motions went well beyond debatable inference and colorable legal argument. The adopted arguments were whole cloth from the September 2006 motions that Judge Jacobson had soundly rejected. Moreover, they advanced an FMLA claim that had already been dismissed on the merits in Federal Court, and a constitutional claim that was plainly barred by the applicable statute of limitations. In short, the applications were pitiably weak, a waste of judicial resources, and an unnecessary burden on the defending parties.

With the assistance of counsel, [Flores] has pursued a litigation strategy in this matter that has exceeded the permissible bounds of zealous advocacy. Particularly disturbing is what, in this court's view, amounts to a purposeful scheme of collateral attacks on unfavorable judgments. After the Federal District Court dismissed the FMLA claim on the merits and twice dismissed the LAD claims, [Flores] orchestrated a "remand" to state court, voluntarily dismissing the remainder of his federal claims, defeating federal question jurisdiction, and refiling in Superior Court. There, he repled his LAD theories and, in [] September 2007, attempted to resurrect the FMLA claim that had already been dismissed on the merits. Similarly, in the case of the fraudulent concealment claim, when [Flores] received an unfavorable decision from Judge Jacobson, he sought to circumvent the ruling by alleging fraudulent concealment in a separate lawsuit against defendants. After this collateral assault failed, [Flores] took a second and prohibited bite at the apple by filing motions to vacate and amend in September 2007. By engaging in illegitimate collateral attacks and frivolous motion practice, [Flores] acted in a manner that was both vexatious and contrary to the

> prescribed standards of conduct. R.P.C. 3.1.

The judge also examined the numerous discovery documents and deposition transcripts that had been produced since the September 22, 2006 order and determined that none of those items "would warrant a second look at that order." He further commented that "[t]here is an important line to be drawn between zealous advocacy and using the court system as a tool of harassment." In Judge Smithson's opinion, Flores "ha[d] repeatedly stepped over that line in an effort to 'get his job' back, whatever the costs."

We are satisfied the judge acted appropriately within his discretion in sanctioning Flores under Rule 1:4-8(d) by requiring him to compensate the City for the reasonable attorneys' fees incurred in defending itself and its employees against Flores' September 2007 motions to vacate Judge Jacobson's September 22, 2006 summary judgment and to file an amended complaint. The $16,485.79 award was both reasonable and "reasonably calculated to deter future abuses of process," R. 1:4-8(d), and was amply supported by the submitted certifications. See Belfer v. Merling, 322 N.J. Super. 124, 144 (App. Div.) ("A claim will be deemed frivolous or groundless when no rational argument can be advanced in its support, when it is not supported by any credible evidence, when a reasonable

person could not have expected its success, or when it is completely untenable."), certif. denied, 162 N.J. 196 (1999). Masone, supra, 382 N.J. Super. at 193 (holding that the decision to award sanctions, whether made under N.J.S.A. 2A:15-59.1 or Rule 1:4-8, is subject to an abuse of discretion standard).

Judge Smithson also acted well within his discretion in denying Flores' motion for sanctions against the City for its failure to serve his wife, who was one of his attorneys of record, and "for its continued harassment of her." Although Flores' wife was his sole counsel of record on one of the two complaints that had been filed as of the court's order, the City nevertheless demonstrated that it had attempted unsuccessfully to serve her and was only able to receive confirmation from her co-counsel. Presumably, Flores' wife worked closely with her co-counsel and could obtain any documentation she may not have received through him. Moreover, the City's inability to effectuate service on Flores' wife was through no fault of its own.

Flores' argument of court error in his motion for sanctions with respect to Keenan's canceled deposition is similarly without merit. Judge Smithson found that although Flores may have been entitled to sanctions and fees in light of the City's last-minute cancellation of the deposition, his counsel's

reactionary poor behavior negated the need for any such award. According to the judge, Flores' counsel made a "spectacle . . . at City Hall by insisting on taking a court reporter there after learning that the deposition had been canceled and insisting on admission to a conference room."

Finally, Flores contends that defendants' course of unethical conduct required that the court order an investigation, something he also asserts we should do. However, Flores cites no authority for such an order and, although he claims the record is rife with "many potential ethical and Court Rule violations," he fails to specifically identify any such violations or to explain why an investigation is necessary. Moreover, Flores' argument that he and his counsel are victims is negated by his numerous duplicative claims and motions in the face of a reprimand, multiple dismissals and adverse findings, and sanctions.

H.

In Flores' ninth point, he argues that Judge Smithson erred by denying his motion for partial summary judgment and granting that of the MEAS, CHS, and FMBA defendants. Specifically, he contends the MEAS and CHS defendants breached duties owed to him by allowing drug tests to be taken during his participation in the EAP. He further argues the evidence showed the FMBA

breached its duty to provide him with fair representation.

Judge Smithson dismissed Flores' LAD claims against the MEAS and CHS defendants because Flores' continued use of cocaine removed him from the class of individuals with disabilities protected under the LAD. The judge further dismissed Flores' racial discrimination claims because he "fail[ed] to provide any credible evidence whatsoever of such discrimination." The judge also found no support for Flores' claim that MEAS and CHS breached their contract with the City.

The CHS contract stated that, following a positive drug test, CHS (Dr. Makowsky) was required to contact MEAS, follow the employee's progress, oversee and make recommendations as to his return to work, and conduct follow-up testing. Flores argued that Dr. Makowsky did not abide by the contract because he believed he was only obligated to read test results. However, the judge agreed with MEAS that Dr. Makowsky's responsibilities accrued after Flores' first positive drug test, at which point the evidence showed he contacted Kashinsky at MEAS, performed a second drug test, cleared Flores to return to work, and performed a third test. Based on the supportable conclusion that Dr. Makowsky fulfilled his obligations, summary judgment dismissal of claims against him was warranted.

Flores' negligence claims against the MEAS defendants were

based on allegations that their failure to obtain a written release from treatment caused him to undergo the September 5, 2001 drug test, which he passed and which enabled him to return to work "prematurely"; sign an ON agreement subjecting him to random testing; and undergo the October 17, 2001 drug test, which he failed in violation of the ON agreement, resulting in his termination. As Judge Smithson pointed out, the record does not establish a duty by the MEAS defendants to provide a written release for return-to-work tests. In fact, contrary to Flores' contention, the majority of the testimony in the record demonstrates that verbal releases were sufficient.

Nonetheless, even if written releases were required, the judge was satisfied Kashinsky was not at fault since she denied releasing Flores and no evidence existed proving otherwise. Moreover, the positive drug test that violated the ON agreement occurred after MEAS ceased involvement in Flores' treatment. Accordingly, Flores was unable to establish the elements of negligence and summary judgment dismissing this claim was warranted. See Polzo v. Cnty. of Essex, 196 N.J. 569, 584 (2008) (requiring a plaintiff to prove four core elements to sustain a common law cause of action in negligence: duty of care, breach of that duty, proximate cause, and actual damages) (citation and quotation marks omitted).

Similarly, Flores asserted a negligence claim against the CHS defendants based on Dr. Makowsky's alleged breach of duty of care in testing Flores after receiving verbal authorization from Kashinsky. Ample evidence in the record supports Judge Smithson's conclusion that verbal authorizations were sufficient; as written releases were not required, the CHS defendants could not be found liable for failing to obtain them.

Additionally, Flores asserted claims of breach of good faith and fair dealing by the MEAS defendants in failing to advocate for the best available treatment for him, not correcting violations in the return-to-work procedures, and blaming him for violating the City's policies and losing his job. He further asserted breach of fiduciary duty claims against Kashinsky and Rearick. For the most part, Flores provided no cites to the record to support these claims. The judge appropriately found these accusations completely unsubstantiated and entered summary judgment in defendants' favor. See Nextel of N.Y. v. Englewood Cliffs Bd. of Adj., 361 N.J. Super. 22, 45 (App. Div. 2003) (reiterating that courts will not consider issues based on "mere conclusory statements by the brief writer"). We note that the contract with MEAS provided only that it evaluate an employee and refer him to an appropriate treatment center; it owed no duty to Flores to

monitor his treatment beyond September 10, 2001. Kashinsky evaluated Flores, sent him to Princeton House, and even monitored his progress until he returned to work. As has been found by numerous courts throughout the course of this litigation, the cause of Flores' termination was his second positive drug test, and resultant violation of the ON agreement. At the time he took the second test, Flores had returned to work and the evidence demonstrates that MEAS no longer had any responsibility to Flores.

With respect to his promissory estoppel claim, Flores alleged MEAS promised to provide confidential assistance and to maintain his job security. He contended he relied on these promises to his detriment because he did not receive adequate treatment, was terminated from his employment, and suffered damage to his reputation. However, Judge Smithson found the evidence demonstrated that MEAS fulfilled its duties insofar as referring Flores for treatment and maintaining confidentiality. Moreover, as the court pointed out, MEAS was under no obligation to monitor Flores indefinitely and guarantee his employment despite the completion of treatment and subsequent failed drug tests. Accordingly, Flores was unable to establish the existence of a valid promise on which he relied to his detriment. See Toll Bros. v. Bd. of Chosen Freeholders of

Burlington, 194 N.J. 223, 253 (2008) (holding that a claim for "[p]romissory estoppel is made up of four elements: (1) a clear and definite promise; (2) made with the expectation that the promisee will rely on it; (3) reasonable reliance; and (4) definite and substantial detriment"). Thus, Flores failed to provide any evidence to support a conclusion that any breach of the covenant of good faith and fair dealing or breach of fiduciary duty on the part of the MEAS defendants caused his termination.

As for Flores' challenge to dismissal of his race discrimination claim, the judge correctly determined that no evidence existed to support such a finding. Flores presented no evidence that the MEAS or CHS defendants discriminated against him on the basis of his race.

Finally, Flores argues that one undisputed fact demands judgment in his favor: because he was ineligible for a return-to-work test on July 6, 2001, the test violated his rights and should not have been used to discipline him. First, despite Flores' repeated arguments to the contrary, there is no evidence he was not authorized to take the test. We also squarely rejected this argument in our August 18, 2005 decision, determining Flores never contested the resulting charge and voluntarily entered a settlement agreement to resolve it.

Flores, supra, slip op. at 21. Accordingly, Flores cannot now allege that either the charge or the test were improper.

Flores alleged the FMBA breached its duty of fair representation because: (1) FMBA representation was improperly determined by the race of the employee; (2) members do not always receive representation and Flores' request for representation was ignored; (3) the FMBA failed to investigate the City's adherence to EAP policies; and (4) an FMBA representative did not advise Flores of his rights. In his written opinion of September 14, 2009, citing Maher v. N.J. Transit Rail Operations, 125 N.J. 455, 478 (1991), Judge Smithson explained that Flores had a heavy burden to prove the breach of the duty of fair representation, requiring him to establish evidence of intentional bias unrelated to legitimate objectives. The judge concluded:

> [Flores] fail[ed] to provide evidence of discrimination regarding legal representation. Despite Flores' allegations that request for legal assistance was ignored, his Union representative appeared at his administrative hearing, and the union hired the law firm of Fox & Fox, later replaced by Katz & Dougherty, to defend Flores against [the City's] counterclaims that Flores violated a sick leave policy. The voluminous record before the court does not support [Flores'] allegations that the defendant Union failed to investigate adherence to policies and failed to advise him of his rights.

The New Jersey Supreme Court, citing Czosek v. O'Mara, 397 U.S. 25, 27, 90 S. Ct. 770, 772, 25 L. Ed. 2d 21, 24 (1970), has noted that, whenever possible, complaints alleging a union's breach of the duty of fair representation should be construed in such a way as to avoid dismissal. Maher, supra, 125 N.J. at 478. A plaintiff alleging a breach "must show that his union's conduct . . . was 'arbitrary, discriminatory, or in bad faith.'" Ibid. (quoting Zalejko v. Radio Corp. of Am., 98 N.J. Super. 76, 83 (App. Div. 1967), certif. denied, 51 N.J. 397 (1968)). The plaintiff has the heavy burden of presenting evidence of intentional bias unrelated to any legitimate objective. Ibid. Only such intentional and deliberate conduct can constitute a breach. Ibid.

There is no evidence in the record suggesting that the FMBA discriminated against Flores on the basis of his race or deliberately ignored his requests for representation. Moreover, there is no evidence Flores ever requested FMBA representation in the hearings or that a request was denied. Flores had outside counsel at the OAL hearing and every future hearing. Thus, although the FMBA did not represent Flores at his disciplinary hearing or advise him of his rights there, Flores had retained private counsel, thereby rendering any error by the FMBA incapable of rising to the egregious level required for a

finding of a breach of the duty of fair representation. Moreover, Flores is unable to show any harm resulting from the FMBA's failure to represent him.

The judge inadvertently stated that the FMBA provided counsel to defend Flores against the City's federal counterclaims, but this error is harmless in light of the fact that Flores requested the FMBA's outside counsel, which was representing him in the federal suit with respect to his claims against the City, withdraw as his counsel. At that time, Flores was also informed that his attempt to convince the FMBA to file a complaint with PERC against the City created an irresolvable conflict of interest.

With respect to Flores' request that the FMBA file a grievance with PERC, its failure to file was harmless in light of the subsequent dismissal of the federal case. Moreover, the filing of the City's counterclaims was not an unfair labor practice under N.J.S.A. 34:13A-5.4(a), so the FMBA was not obligated to file a complaint with PERC protesting the filing.

Flores also failed to provide evidence that in terminating him, the City breached the collective bargaining agreement, or that the FMBA could have prevented his termination. Any allegations that the FMBA failed to provide Flores with the GO or other policies are similarly without merit because the court

had already determined that disclosure of those documents would not have changed the outcome of the OAL hearing.

I.

Lastly, we dispose of Flores' tenth argument, i.e., that Judge Smithson erred when he granted the FMBA's motion to quash Flores' subpoena for Dubow's deposition and quashed Flores' subpoenas served on the City to compel the deposition of an unidentified employee regarding the City's contractual relationship with MEAS and CHS. Noting he considered the parties' lengthy briefs, charts and arguments, the judge found Flores' and Dubows' situations to be disparate and Dubow's deposition not to be relevant, primarily because the Dubow matter was based on alcohol, not substantial drug abuse.[15] Additionally, Dubow's termination occurred in 2003, two years after Flores' termination. The judge denied reconsideration.

A court's decision to quash a subpoena is reviewed for an abuse of discretion. See Wasserstein v. Swern & Co., 84 N.J. Super. 1, 6 (1964); Connolly v. Burger King Corp., 306 N.J. Super. 344, 349 (App. Div. 1997). We discern no abuse of discretion here. Although Dubow's disciplinary proceedings

[15] On September 26, 2003, Dubow, a Caucasian, agreed that, in exchange for a guilty plea, the City would withdraw the suggested removal penalty and, instead, suspend Dubow without pay for approximately fourteen months. Any subsequent violations would result in termination.

occurred prior to Flores' OAL hearing, the two situations are so distinct as to render any material related to Dubow irrelevant to the question of Flores' termination. Despite Dubow's initial discipline for substance abuse, his second violation was for alcohol abuse.

As of at least September 2007, Flores possessed copies of the 1983-1984 and 2002-2005 MEAS contracts and the 1999-2001 CHS contract. These contracts are simple and straightforward. Moreover, the two MEAS contracts are virtually identical except for an expanded explanation of counseling services in the later contract and the addition of a requirement for provision of staff workshops. Flores failed to demonstrate any need for testimony from a City employee regarding the contracts because the documents spoke for themselves.

Affirmed.