

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4008-10T2

ALESSANDRA VIOLA,

Plaintiff-Respondent,

v.

COUNTY OF BERGEN and BERGEN
COUNTY PROSECUTOR'S OFFICE,

Defendants-Appellants,

and

CITY OF HACKENSACK and CHARLES
K. ZISA,

Defendants.

Argued October 24, 2011 – Decided December 15, 2011

Before Judges Parrillo, Grall and Alvarez.

On appeal from the Superior Court of New Jersey, Law
Division, Bergen County, Docket No. L-11052-09.

J. Andrew Kinsey argued the cause for appellants
(Florio, Perrucci, Steinhardt, & Fader, LLC,
attorneys; Mr. Kinsey, of counsel; Keith D. Barrack,
on the brief).

James E. Burden argued the cause for respondent (Smith
Mullin, P.C., attorneys; Neil Mullin, of counsel and
on the brief; Mr. Burden, on the brief).

PER CURIAM

We granted leave to appeal from the Law Division's January 7, 2011 order granting plaintiff Alessandra Viola leave to file a second amended complaint adding the County of Bergen and the Bergen County Prosecutor's Office (BCPO) as named defendants, and from the March 4, 2011 order denying these defendants' motion for reconsideration. For the following reasons, we reverse.

Plaintiff, Alessandra Viola, is a police officer employed by the City of Hackensack. She has been working for the City since 1998, first as a dispatcher then as a police officer. Beginning in June 2008, plaintiff was involved in running the Patrolmen's Benevolent Association (PBA) election.

On September 28, 2009, plaintiff filed a lawsuit against Chief of Police Charles Zisa and the City of Hackensack alleging retaliation in violation of the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -8; sexual harassment, quid pro quo sexual harassment and hostile work environment in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49; and deprivation of her civil rights in violation of the New Jersey Civil Rights Act (NJCRA), N.J.S.A. 10:6-1 to -2. Plaintiff claims that Zisa retaliated against her for her refusal to assist in "'fix'[ing]

the PBA election" and for her rejection of his and his brother's sexual advances. The alleged acts of retaliation and harassment included the commencement of an internal police investigation into a claim that plaintiff operated a police vehicle while her New Jersey driver's license was suspended, resulting in departmental disciplinary charges brought against her in 2009,¹ and criminal charges filed in 2009.²

Thereafter, Zisa was indicted for insurance fraud on April 30, 2010 and later, on May 26, 2010, for official misconduct. He was suspended from the police department. As a result, pursuant to the Criminal Justice Act of 1970, N.J.S.A. 52:17B-98 to -117, and to "maintain and ensure the orderly administration of the law enforcement function[,]" on April 30, 2010, the City of Hackensack and the BCPO entered into a Memorandum of Understanding (MOU), wherein the BCPO "deem[ed] it necessary to provide temporary oversight, through a Monitor, of all major policy decisions and further oversight over the implementation

¹ Plaintiff was served with preliminary Notices of Disciplinary Action on January 6, 2009, January 26, 2009, February 2, 2009, May 18, 2009, and October 22, 2009, consisting of multiple charges including the aforementioned "failure to carry out the function of the Hackensack Police Department by not properly enforcing all laws and ordinances by allowing her New Jersey driver's license to be suspended."

² The criminal charges were dismissed by September 17, 2009.

of daily police operations as shall be administered by a City appointed Acting Officer in Charge"

In furtherance of this goal, the MOU provided for the City's appointment of a police captain (Tom Padilla) as the "Acting Officer in Charge" (AOIC) of the police department, "responsible for [its] day-to-day operations," effective for the duration of the MOU, which terminated on March 11, 2011. The AOIC was considered to be the "Chief Law Enforcement Officer for the City of Hackensack Police Department, and [was to] assume such role and responsibilities as provided by law and statutes." However, all personnel decisions involving "transfers of assignment, promotions, demotions or any other change in assignment or remuneration" were subject to the express written approval of the BCPO, as were the "initiation and resolution of any disciplinary proceedings and matters." (emphasis added).

According to the MOU, the police department's internal affair's function was to "continue in the normal course but be directly overseen by the [BCPO]." Thus, "[n]o investigation or proceeding shall commence, nor charge filed, be it administrative, criminal or otherwise, without the prior express written approval of the Office of the [BCPO]." However, "[a]ny matters currently pending as a Municipal Investigatory matter shall not be affected by this Memorandum, as they are functions

of the City Government." Finally, the BCPO reserved unto itself, in its exclusive discretion, the right under the Criminal Justice Act of 1970, to "supercede the then existing Chain of Command of the department . . . to administer [its] daily operations." See N.J.S.A. 52:17B-107. Significant, for present purposes, the BCPO never exercised its prerogative of supercession throughout the duration of the MOU.

According to plaintiff, after the MOU was executed, she continued to be subjected to retaliation and harassment. Consequently, on September 29, 2010, plaintiff moved for leave to file a second amended complaint adding the County and the BCPO as named defendants, on the theory that both failed in their obligations as monitors, and effectively as her employers, under the MOU. Although she alleged specific examples of harassment and retaliation in her proposed complaint,³ the

³ For example, plaintiff alleged that in August 2010, her supervisor, Lieutenant Nicole Foley, delayed answering her request for vacation, so she asked permission from Lieutenant Lee. Upon discovering this breach of protocol, Foley supposedly became irate, berated plaintiff in the presence of her co-workers, and threatened to write her up for violating the chain of command. In another incident occurring sometime in September 2010, plaintiff was at first refused a paid leave of absence to attend an upcoming PBA convention by the AOIC, and was granted permission only after a significant protest. Lastly, plaintiff alleges that the department failed to effectively handle an internal affairs (IA) investigation into an anonymous threatening letter she received, and during her subsequent hospitalization, the AOIC "hovered in and around" her hospital

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gravamen of plaintiff's claim was that the County and the BCPO (hereinafter defendants at times), failed to dismiss the pending disciplinary charges against her.

By then, however, the departmental disciplinary charges had already been referred, in the normal course, to the City, a civil service municipality, as the appointing authority, for hearing and resolution pursuant to civil service regulations. A six-day hearing was held from October 12 to November 30, 2010, culminating in a January 28, 2011 written decision of the hearing officer sustaining many of the disciplinary charges and dismissing others, and recommending a penalty of suspension without pay for seventy-five days. On February 14, 2011, the City served plaintiff with its final Notice of Disciplinary Action, adopting the hearing officer's findings and recommendations, and imposing the penalty of seventy-five days suspension without pay.

In the meantime, on January 7, 2011, the Law Division, without benefit of oral argument on plaintiff's application, granted her leave to file a second amended complaint naming the County and the BCPO as defendants. On February 7, 2011, defendants sought reconsideration and dismissal of the second

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room while she was being treated for the anxiety caused by the letter incident.

amended complaint. On March 4, 2011, the Law Division judge denied defendants' motion for reconsideration and instead granted plaintiff's cross-motion to file a third amended complaint. In her written decision, the judge reasoned that "the express provisions [of the MOU] are sufficient to lay the groundwork for a nexus of exposure to liability between [p]laintiff's claims and the County and [the] BCPO[,]" effectively rendering defendants legally responsible for all decisions relating to the "administration" of the police department throughout the duration of the MOU.

On appeal, defendants raise the following issues:

- I. THE TRIAL COURT'S INTERPRETATION OF THE EFFECT OF THE MOU ENTERED INTO BY THE BCPO AND THE HPD WAS LEGALLY INCORRECT.
- II. THE TRIAL COURT FAILED TO APPRECIATE THE DISTINCTION BETWEEN MONITORING AND SUPERCEDEURE WHEN INTERPRETING THE MOU'S EFFECT.
- III. BCPO WAS EXERCISING ITS LAW ENFORCEMENT FUNCTION IN MONITORING THE HPD AND, THEREFORE, IS ENTITLED TO PROSECUTORIAL IMMUNITY IN THE INSTANT MATTER.
 - A. THE BCPO IS AN AGENT OF THE STATE WHEN EXERCISING ITS CONSTITUTIONAL AND STATUTORY OVERSIGHT FUNCTION.
 - B. PROSECUTORIAL IMMUNITY BARS PLAINTIFF'S SUIT AGAINST THE BCPO WHERE THE BCPO WAS ENGAGED IN ITS LAW ENFORCEMENT FUNCTION.

- C. ALTERNATIVELY, THE DOCTRINE OF QUALIFIED IMMUNITY BARS THE CLAIMS AGAINST THE BCPO AS THE RIGHT ALLEGED TO HAVE BEEN VIOLATED IS NOT SUFFICIENTLY CLEAR.
 - D. THE BCPO CANNOT BE HELD LIABLE WHERE IT IS NOT STATUTORILY PERMITTED TO INTERVENE IN LOCAL DISCIPLINARY MATTERS.
- IV. THE COUNTY, WHICH IS NOT A SIGNATORY TO THE MOU, CANNOT BE HELD LIABLE TO PLAINTIFF.
- V. NO COURT HAS EVER HELD A PROSECUTOR OR COUNTY TO BE AN "EMPLOYER" OF A LOCAL POLICE DEPARTMENT'S OFFICER WHERE THEY ALLEGEDLY FAILED TO PROPERLY MONITOR A PERSONNEL MATTER INVOLVING THE OFFICER.
- VI. THE CONDITION PRECEDENT FOR FILING A CEPA SUIT AGAINST THESE PUBLIC ENTITIES UNDER N.J.S.A. 34:19-4 WAS NOT MET.
- VII. NEITHER BERGEN COUNTY NOR THE BCPO IS A PERSON AMENABLE TO SUIT UNDER THE NJCRA.

We conclude that the court erred in failing to dismiss plaintiff's complaint for want of stating a claim upon which relief could be granted. R. 4:6-2(e).

We review a ruling on a motion to dismiss pursuant to Rule 4:6-2(e) by "examining the legal sufficiency of the facts alleged on the face of the complaint[,]" Printing Mart v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989), giving the plaintiff the benefit of "'every reasonable inference of fact' and read[ing] the complaint in the light most favorable to

plaintiff." Jenkins v. Region Nine Housing Corp., 306 N.J. Super. 258, 260 (App. Div. 1997) (quoting Printing Mart, supra, 116 N.J. at 746), certif. denied, 153 N.J. 405 (1998).

Moreover, because in this instance the judge's decision denying defendants' motion to dismiss was based on her interpretation of the MOU, we need not give it deference. See Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

As noted, plaintiff predicated her theory of defendants' liability on the notion that under the MOU, the BCPO was designated monitor and overseer of the police department's day-to-day operations and, in fulfilling that responsibility, was exercising not only a law enforcement, but administrative function as well. Even so, plaintiff complains of none of the administrative functions the MOU arguably confers upon the BCPO, namely, the hiring, firing, promotion, demotion, transfer or other assignment of police department employees. Rather, plaintiff's main claim focuses on defendants' alleged failure to intervene in, and dismiss, a disciplinary matter that had been internally investigated and referred for resolution outside the department long before the MOU was executed. In this respect, the MOU specifically and expressly exempts such matters from its provisions as they have become functions, and come under the jurisdiction, of the City as appointing authority. N.J.S.A.

40A:14-118; N.J.A.C. 4A:1-1.3. In fact, nowhere in the MOU is the BCPO authorized to intercede in, much less dismiss, pending disciplinary charges against department employees instituted before and predating the execution of the MOU. Although the MOU authorizes the BCPO to approve the investigation, initiation and filing of new disciplinary charges against department employees, pending actions are explicitly exempted from its provisions.

The MOU thus appropriately recognized that disciplinary matters originating prior to the BCPO's "administrative" involvement, were to continue in the normal course as, in fact, they did here.⁴ Well before the MOU was executed, plaintiff had been served with Preliminary Notices of Disciplinary Action based on the results of completed internal investigations. The matters had been referred to the appointing authority, who instituted and prosecuted disciplinary proceedings against plaintiff in a manner consistent with civil service regulations, and plaintiff has not claimed otherwise in her complaint.

Indeed, the Civil Service appeals process applies to the appointing authority and the employee. See N.J.A.C. 4A:1-1.2. Once disciplinary charges have been filed, plaintiff's initial

⁴ The MOU states in pertinent part: "Any matters currently pending as a Municipal Investigatory matter shall not be affected by this Memorandum, as they are functions of the City Government."

right of appeal is before the Hackensack Municipal Council – her appointing authority. N.J.A.C. 4A:2-2.5. Similarly, the ability to seek a stay or interim relief within a Civil Service Commission appeal may only be petitioned for by a party to the appeal, and not, in this instance, by the BCPO. N.J.A.C. 4A:2-1.2. Moreover, it was the City, not the BCPO, that conducted disciplinary hearings in October and November 2010. Further, it was the City, not the BCPO, that served plaintiff with its Final Notice of Disciplinary Action.

In sum, the factual basis that plaintiff alleges gave rise to the disciplinary charges she claims are retaliatory and harassing occurred long before the effective date of the MOU, as did the departmental investigation and resultant filing of charges against her. For reasons already stated, defendants, who were not the appointing authority, had no power to hear plaintiff's appeal of those disciplinary charges and being non-parties to that appeal, had no authority to seek a stay or interim relief. Lacking both the ability and the power, defendants therefore could not, as a matter of law, be found liable for failing to take remedial action vis-à-vis the disciplinary charges against plaintiff.

Plaintiff claims defendants not only failed to dismiss disciplinary charges against her filed before execution of the

MOU, but also failed to properly investigate a matter she brought to their attention when the MOU was in effect involving an anonymous threatening letter she received in September 2010. To be sure, the MOU vests the BCPO with the authority to oversee internal affairs investigations of the police department commenced after its execution.⁵ Yet plaintiff's complaint never alleges that BCPO's internal management of the police department in this instance violated or transgressed established law enforcement procedures for investigating employee misconduct and for determining whether criminal or disciplinary action is required. Plaintiff's blanket criticism of the BCPO's handling of the department's IA investigation into her grievance is bereft of any factual support in her complaint. Rather, plaintiff merely alleges that she was interrogated at police headquarters by Sergeant Acquilla and then was transported to the BCPO where she was then interrogated by Detective John Haviland. Simply put, such a hollow allegation fails to state a claim under the CEPA, the LAD or the NJCRA upon which relief can be granted.

⁵ In this regard, the MOU provides that "[n]o investigation or proceeding shall commence, nor charge filed, be it administrative, criminal or otherwise, without the prior express written approval of the [BCPO]."

Reversed and remanded for entry of an order dismissing
plaintiff's complaint.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION