

Memorandum of Decision on Motion

**NOT FOR PUBLICATION WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS**

Maria Machado
v.
New Jersey Department of Corrections, et al.
and
Robert Trent
v.
Omayra Ortega, et al.

Docket No. HNT-L-604-09

Motions for Summary Judgment

Opposed

Argued: March 30, 2012

Decided: March 30, 2012

The Honorable Peter A. Buchsbaum, J.S.C.

Facts and Procedural Posture:

The present matter stems from allegations of sexual harassment made by plaintiff, Maria Machado ("Machado"), and third party plaintiff, Robert Trent ("Trent"), against each other. Machado has since settled her lawsuit and filed a Stipulation of Dismissal that dismisses all counts of her Complaint. Trent still pursues the present lawsuit against defendants, Machado, Omayra Ortega ("Ortega"), New Jersey Department of Corrections ("DOC"), and Mountainview Youth Correctional Facility ("Mountainview"). Machado and Ortega file the instant summary judgment motion, asking the Court to dismiss all counts of Trent's Third Party Complaint against them. DOC and Mountainview also file a motion for summary judgment, similarly asking the Court to dismiss Trent's Third Party Complaint against them.

According to the movants' Statements of Material Facts, the relevant facts are as follows:¹ Trent is employed with the State

¹As set forth below, Trent's opposition does not directly address any facts contained in the movants' Statements of Material Facts. Pursuant to Rule 4:46-2(b), then, the movants' facts are deemed admitted for the purposes of the current summary judgment motions. See R. 4:46-2(b).

of New Jersey as a Senior Investigator at Mountainview. During his employment, Trent received sexual harassment training, which included training on the procedures of reporting allegations of sexual harassment to the Equal Employment Division ("EED"). Scott Russo ("Russo"), as Principal Investigator, was Trent's supervisor. Ortega was a Senior Investigator. Machado was a Clerk Typist. When Russo was out of the office, Trent was Machado's supervisor.

Trent alleges that Machado began sexually harassing him around January of 2009. In particular, Trent claims that Machado entered his office, moved her shoulders in a suggestive manner, and stated, "I'm attracted to older men as long as their tools are working." When Trent responded that Machado could get herself into trouble, Machado allegedly responded, "Life is too short not to enjoy yourself." On another occasion, Trent alleges that Machado stated, "Now that we're alone, are you going to play with yourself?" Trent further alleges that Machado stated, "You have a warm butt; my husband tells me when he sleeps with me that I have a cold butt and feet." Machado also allegedly asked Trent if he would drive her home in the event that she drank too much at a co-worker's retirement party. Moreover, Trent alleges that Machado bragged to him about an old boyfriend, told him that she would one day show him the scar between her breasts, stated to him that she was no longer in love with her husband, showed him a photograph of a woman's bare buttocks on her cell phone, and harassed him with inappropriate sexual remarks and details about her personal life.

On February 24, 2009, Trent called the office from home to speak with Russo, and Machado answered the phone. Trent alleges that he told Machado that he wanted to speak with Russo about a personal issue, and Machado became irate, so Trent hung up the phone. Trent claims that he then called Ortega and told her that he had an EED issue with Machado, which he needed to discuss with Russo. Trent later reached Russo and discussed the alleged harassment with him. Trent claims that he was advised he was being transferred before he had an opportunity to file a complaint against Machado. On February 25, 2009, Trent filed a formal complaint against Machado.

On March 20, 2009, an EED investigator submitted an investigative report based on the allegations submitted by Machado, Trent, and Ortega. As to Trent's allegations against Machado, the investigator found that Machado did not violate the Policy Prohibiting Discrimination in the Workplace.

The EED suggested that Trent be permanently reassigned to an office other than the one where Machado worked. Trent was thereafter transferred to Central Reception and Assignment Facility in West Trenton, New Jersey. This transfer increased Trent's daily commute to one hour and ten minutes each way. However, Trent's salary, title, and hours remained unchanged. In addition to the relocation, Trent was given one-on-one EED counseling.

Later, the Civil Service Commission determined that Trent could not be reassigned without disciplinary procedures being used. Rather than bringing disciplinary charges against Trent, the Department of Corrections decided to relocate Trent back to Mountainview. On October 8, 2011, Trent returned to Mountainview, where he currently works with Ortega and Machado. Since he has returned to Mountainview, there have been no complaints of sexual harassment from Machado or Trent.

In his Third Party Complaint against Machado, Ortega, DOC, and Mountainview, Trent pursues claims of sexual harassment, gender discrimination, aiding and abetting discrimination, violation of the Conscientious Employee Protection Act, civil rights violations, defamation, constitutional rights violations, and conspiracy. Trent also asserts liability on the part of DOC and Mountainview under the theory of *respondeat superior*. Trent's demand for damages includes emotional distress damages, hedonic damages, and punitive damages.

In support of their summary judgment motion, DOC and Mountainview contend that Trent's sexual harassment claim must be dismissed because DOC and Mountainview took prompt remedial action in response to Trent's complaint of sexual harassment. Next, DOC and Mountainview assert that Trent's New Jersey Law Against Discrimination claim must be dismissed because Trent has failed to establish a *prima facie* case of gender discrimination, nor has he established that DOC and Mountainview's legitimate, non-discriminatory reason for relocating him is pretext for gender discrimination. DOC and Mountainview also join in Machado and Ortega's contentions, as set forth below, that: (1) Trent cannot sustain a claim under the Conscientious Employee Protection Act; (2) Trent's civil rights and discrimination claims are barred by the waiver provision of the Conscientious Employee Protection Act; (3) Trent's defamation claim fails as a matter of law; and (4) Trent has not established a separate cause of action under *respondeat superior*. Moreover, DOC and Mountainview contend that Trent's constitutional claims must be dismissed because DOC and Mountainview cannot be held liable

under 42 U.S.C. §1983 or the New Jersey Civil Rights Act, and because Trent's constitutional rights have not been violated. DOC and Mountainview further maintain that Trent's conspiracy claims must be dismissed because Trent cannot establish a *prima facie* case of conspiracy. Next, DOC and Mountainview contend that Trent has presented no evidence that they aided and abetted discrimination. Lastly, DOC and Mountainview assert that Trent cannot be awarded punitive damages because he has not shown that their conduct was sufficiently egregious. As there is no genuine issue of material fact requiring resolution at trial, DOC and Mountainview contend that summary judgment should be awarded in their favor and Trent's Third Party Complaint should be dismissed as against them.

Machado and Ortega, in support of their summary judgment motion, contend that all of Trent's claims under the New Jersey Law Against Discrimination must be dismissed because Machado and Ortega are not supervisors and cannot be liable as aiders and abettors. Moreover, Machado and Ortega assert that Trent has not established a *prima facie* case of gender discrimination. Further, Machado and Ortega submit that they cannot be held liable under the Conscientious Employee Protection Act because Trent has not identified the rule that they have violated, and Machado and Ortega are not supervisors/employers under the Act. Next, Machado and Ortega maintain that Trent's civil rights and discrimination claims are barred by the waiver provision of the Conscientious Employee Protection Act. Moreover, Machado and Ortega contend that Trent does not establish a cause of action for defamation because his Third Party Complaint is devoid of any specific allegations as to this cause of action. Further, Machado and Ortega submit that Trent's civil rights claims should be dismissed because Ortega does not qualify as a person subject to suit under 42 U.S.C. §1983, and Trent's Third Party Complaint fails to sufficiently state his civil rights claims. Next, Machado and Ortega contend that Trent fails to establish his conspiracy claims because he does not specifically allege the motives and acts in furtherance of the alleged conspiracy. Further, Machado and Ortega assert that they are not subject to the doctrine of *respondeat superior* because they are not Trent's employers. Next, Machado and Ortega allege that they cannot be held individually liable because they are not final decision-makers. Further, Trent cannot, according to Machado and Ortega, sustain a claim for emotional distress damages because there is not sufficient proof of emotional harm. Lastly, Machado and Ortega maintain that Trent cannot obtain punitive damages (as Machado and Ortega's conduct was not sufficiently egregious) or hedonic damages (as Trent has not shown a physical impairment

that has affected his ability to enjoy life). With no genuine issue of material fact requiring trial, Machado and Ortega conclude that they are entitled to an award of summary judgment in their favor.

In opposition to both summary judgment motions, Trent contends that there are genuine issues of material fact precluding summary judgment as to: (1) his sexual harassment and hostile work environment claims under the New Jersey Law Against Discrimination; (2) his gender discrimination claim under the New Jersey Law Against Discrimination; (3) his Conscientious Employee Protection Act claim; (4) his defamation claim; (5) his constitutional claims; (6) his civil rights claims; (7) his claim for emotional distress damages; (8) his claim for hedonic damages; and (9) his claim for punitive damages. Trent further asserts that the Conscientious Employee Protection Act does not prevent him from bringing his discrimination or civil rights claims because those claims are based on different facts than his Conscientious Employee Protection Act claim. Additionally, Trent submits that he has satisfied the elements of aider and abettor liability for Ortega and Machado. Next, Trent maintains that his *respondeat superior* claim is not redundant and is a viable separate cause of action against DOC and Mountainview. Therefore, Trent concludes that each count in his Third Party Complaint cannot be dismissed because each count contains issues of material fact that require resolution at trial.

Analysis:

Summary Judgment Standard

A party is entitled to summary judgment if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). "Summary judgment procedure pierces the allegations of the pleadings to show that the facts are otherwise than as alleged." *Judson v. Peoples Bank & Trust Co.*, 17 N.J. 67, 75 (1954) (citation omitted).

"[A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the

non-moving party." *Brill v. Guardian Life Ins. Co.*, 142 N.J. 520, 530 (1995). Accordingly, "when the evidence is 'so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." Id. (citation omitted).

The party presenting a summary judgment motion must provide a Statement of Material Facts containing citations to the record, as required by Rule 4:46-2(a):

The statement of material facts shall set forth in separately numbered paragraphs a concise statement of each material fact as to which the movant contends there is no genuine issue together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted.

R. 4:46-2(a).

The party resisting a summary judgment motion must then provide responses to the moving party's Statement of Material Facts, which again must contain citations to the record. See R. 4:46-2(b). Where the opposing party does not admit or deny each statement in the moving party's Statement of Material Facts with record citations, the moving party's facts are deemed admitted for the purposes of the summary judgment motion, as set forth in Rule 4:46-2(b):

A party opposing the [summary judgment] motion shall file a responding statement either admitting or disputing each of the facts in the movant's statement. . . . [A]ll material facts in the movant's statement which are sufficiently supported will be deemed admitted for purposes of the motion only, unless specifically disputed by citation . . . demonstrating the existence of a genuine issue as to the fact.

Id.

Here, all movants have complied with Rule 4:46-2(a) by providing a Statement of Material Facts containing citations to the record. See R. 4:46-2(a). Trent, on the other hand, does not directly address (i.e., admit or deny) any facts in the movants'

Statements of Material Facts in his opposition, in violation of Rule 4:46-2(b). See Trent's Statement of Material Facts; R. 4:46-2(b). Instead, Trent provides his own Statement of Material Facts. See Trent's Statement of Material Facts. Under Rule 4:46-2(b), then, the facts contained in the movants' Statements of Material Facts are deemed admitted for the purposes of the present summary judgment motions. See R. 4:46-2(b).

Nonetheless, this Court must find that no genuine issue of material fact exists as to each count of Trent's Third Party Complaint in order to award summary judgment in favor of Machado, Ortega, DOC, and Mountainview. See R. 4:46-2(c). Each count of Trent's Third Party Complaint is addressed in turn below.

Count One: Sexual Harassment and Hostile Work Environment under the New Jersey Law Against Discrimination

A claim for hostile work environment sexual harassment contains the following elements: "the complained-of conduct (1) would not have occurred *but for* the employee's gender; and it was (2) *severe or pervasive* enough to make a (3) *reasonable [person]* believe that (4) the conditions of employment are altered and the *working environment is hostile or abusive.*" *Lehmann v. Toys 'R' Us*, 132 N.J. 587, 603-04 (1993) (emphasis in original).

As an initial matter, liability under a hostile work environment claim is premised on the defendant being the plaintiff's employer. Id. at 619. Machado and Ortega are indisputably not Trent's employers. Machado is Trent's inferior (as Clerk Typist), and Ortega is Trent's peer (as Senior Investigator). In fact, Russo was Trent's supervisor (as Principal Investigator). Therefore, Machado and Ortega cannot be liable for the allegedly hostile work environment forming the basis of Trent's sexual harassment claim. As such, Count One of Trent's Third Party Complaint is dismissed as to Ortega and Machado.

Turning next to Trent's actual employers, DOC and Mountainview, they contend that they are not liable for the hostile work environment allegedly created by Machado's sexual advances because they took prompt remedial action in response to Trent's complaint of sexual harassment.

"[T]he core inquiry in a cause of action against an employer in a [hostile work environment sexual harassment case]

is whether the employer had an effective, properly enforced anti-harassment policy." *Payton v. New Jersey Turnpike Authority*, 292 N.J. Super. 36, 46 (App. Div. 1996). "'Effective' remedial measures are those reasonably calculated to end the harassment." *Lehmann*, 132 N.J. at 623.

Here, DOC and Mountainview have shown that they had an effective, properly enforced anti-harassment policy in place at the time the alleged sexual harassment occurred. *Payton*, 292 N.J. Super. at 46. Trent participated in sexual harassment training before the alleged incidents took place. This training explained the procedures by which an employee like Trent could file a sexual harassment complaint with the EED. According to DOC and Mountainview, the typical procedure for responding to a complaint of sexual harassment was to separate the alleged violator from the alleged victim while the investigation was ongoing. That process is "reasonably calculated to end the harassment," *Lehmann*, 132 N.J. at 623, as the opportunity for sexual harassment is no longer available when the parties are separated. Moreover, an employee could be transferred from one location to another without experiencing a decrease in pay or a demotion in title.

Here, that is precisely what occurred. Trent was transferred to a different location while the investigation took place. This remedial measure was effective because the sexual harassment ceased at that point. Later, Trent was even transferred back to Mountainview.² Although Trent claims that the initial transfer was improper because he (as a man), rather than Machado (as a woman), was forced to relocate, this Court will not fault DOC and Mountainview for the inevitable decision in choosing to move one employee and keep the other employee in place. There is simply no evidence that the decision was based on gender considerations. Rather, Machado filed her complaint of sexual harassment before Trent filed his complaint, and, as Trent himself anticipated, the first alleged harasser was moved. Under these circumstances, employer liability for a hostile work environment sexual harassment claim (on the part of DOC and Mountainview) is not appropriate. Therefore, Count One of Trent's Third Party Complaint is dismissed as to DOC and Mountainview.

Count Two: Gender Discrimination under the New Jersey Law Against Discrimination

² No claims of sexual harassment have been made since Trent's relocation back to Mountainview.

Turning next to Count Two of Trent's Third Party Complaint, he pursues a gender discrimination claim under the New Jersey Law Against Discrimination. New Jersey courts typically follow the standard of proof guidelines in federal discrimination statutes when interpreting the New Jersey Law Against Discrimination. See *Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1212 (3rd Cir. 1995); *Jason v. Showboat Hotel & Casino*, 329 N.J. Super. 295, 303 (App. Div. 2000). In a gender discrimination case like the present one, this standard is set forth by *McDonnell Douglas Corp. v. Green*. See 411 U.S. 792 (1973).

Under *McDonnell Douglas*, *id.*, a plaintiff-employee must first establish a *prima facie* case of gender discrimination, which creates a presumption that the employer discriminated against the employee. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993). To establish a *prima facie* case of discrimination, the plaintiff-employee must demonstrate that he is a member of a protected group, that his employer took an adverse employment action against him, and that someone outside of his class was treated differently. *Jason*, 329 N.J. Super. at 304-05.

The defendant-employer may rebut the plaintiff-employee's *prima facie* case of gender discrimination by demonstrating that the adverse employment action was taken for a legitimate, nondiscriminatory reason. *St. Mary's Honor Ctr.*, 509 U.S. at 507 (internal citation omitted). "'The defendant must clearly set forth, through the introduction of admissible evidence,' reasons for its actions which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action." *Id.* (internal citation omitted) (emphasis in original). The plaintiff must then demonstrate that the defendant's proffered reason is pretext for the underlying discriminatory motive. *Id.* at 516. Ultimately, the burden of persuasion that the defendant discriminated against the plaintiff remains with the plaintiff. *Id.* at 507.

As stated above with reference to Trent's claims of sexual harassment, Machado and Ortega cannot be liable to Trent under the New Jersey Law Against Discrimination because they are not Trent's employers. Therefore, Trent's gender discrimination claim (i.e., Count Two of Trent's Third Party Complaint) must be dismissed as to Machado and Ortega.

Turning next to Trent's gender discrimination claim against DOC and Mountainview, even if Trent established a *prima facie* case of gender discrimination, Trent did not rebut the

legitimate, nondiscriminatory reason offered by DOC and Mountainview to show it was pretext for their underlying discriminatory motive. Id. at 516.

As an initial matter, Trent created the potential inference of gender discrimination by making the *prima facie* showing that Trent, as a male, was relocated to another facility that required a longer commute, while his female counterpart, Machado, was permitted to stay put at her current facility. *Jason*, 329 N.J. Super. at 304-05; see also *Torre v. Casio, Inc.*, 42 F.3d 825, 831 n.7 (3rd Cir. 1994) (“[A] transfer, even without loss of pay or benefits, may, in some circumstances, constitute an adverse job action.”). While the inference of gender discrimination is tenuous here, the inference nonetheless exists.

DOC and Mountainview, however, have demonstrated a legitimate, nondiscriminatory reason for Trent’s relocation. *St. Mary’s Honor Ctr.*, 509 U.S. at 507. Pending the outcome of the EED investigation, a decision was made to temporarily transfer Trent to another facility. This course of action was the typical procedure when an employee (here, Machado) alleged sexual harassment on the part of another employee (here, Trent). This procedure is a legitimate business decision, as it represents an effort to separate two employees who have pending sexual harassment complaints against each other.

Confronted with this legitimate, nondiscriminatory reason for his relocation, Trent did not satisfy his burden of persuasion in order to prove that the proffered reason was pretext for the real, discriminatory motive underlying his relocation. Id. at 507, 516. Contrary to Trent’s assertions, there is not a hint of evidence of pretext and an underlying gender-based motivation in the decision to relocate Trent and not Machado. Rather, as Trent himself admitted, the first person accused of sexual harassment is typically relocated. Here, that was Trent, as Machado filed her complaint first. Although Trent claims that DOC and Mountainview “made an arbitrary and capricious decision to remove [Trent], a male, from the office, rather than remove [Machado], a female, from the office,” see Trent’s Opposition at 7, there is no simply evidence that this decision was motivated by the gender of the two parties. Ultimately, the Court is not persuaded on the present record that Trent can sustain a claim for gender discrimination. Thus, Count Two of Trent’s Third Party Complaint is dismissed as to DOC and Mountainview as well.

Count Three: Conscientious Employee Protection Act

In order to establish a *prima facie* case of discriminatory retaliation under the Conscientious Employee Protection Act, a plaintiff must demonstrate the following:

(1) a reasonable belief that the employer's conduct was violating either a law, rule, regulation or public policy; (2) he or she performed a "whistle blowing" activity as described in N.J.S.A. 34:19-3a or c; (3) an adverse employment action was taken against him or her; and (4) a causal connection existed between his whistle-blowing activity and the adverse employment action. If a plaintiff is able to establish these elements, then the defendant must come forward and advance a legitimate, nondiscriminatory reason for the adverse conduct against the employee. If such reasons are proffered, plaintiff must then raise a genuine issue of material fact that the employer's proffered explanation is pretextual.

Klein v. University of Medicine and Dentistry of New Jersey, 377 N.J. Super. 28, 38-39 (App. Div. 2005) (internal citations omitted).

The term "employer," when used in the context of the Conscientious Employee Protection Act, is defined as:

any individual, partnership, association, corporation or any person or group of persons acting directly or indirectly on behalf of or in the interest of an employer with the employer's consent and shall include all branches of State Government, or the several counties and municipalities thereof, or any other political subdivision of the State, or a school district, or any special district, or any authority, commission, or board or any other agency or instrumentality thereof.

N.J.S.A. § 4:19-2(a). As stated above, there is no rationale whereby Machado or Ortega could be considered as Trent's employers, nor does Trent allege such. Id.

Next, Trent must point to a violation of law, rule, regulation, or public policy in order to make a threshold showing under the Conscientious Employee Protection Act. Id. at 40. In fact, the Appellate Division has stated that:

[i]n order for a plaintiff to meet the threshold to withstand summary judgment under N.J.S.A. 34:19-3c, he or she must "furnish the trial court with enough by way of proof and legal basis to enable the court to determine as a matter of law" that the plaintiff has identified "the asserted violation with adequate particularity" for a jury's consideration.

Id.

Despite this mandate, Trent has failed to identify (with any particularity) a violation of any law, rule, regulation, or public policy on the part of defendants. Id. Instead, Trent insists that he need not identify such. Accordingly, Count Three of Trent's Third Party Complaint alleging a violation of the Conscientious Employee Protection Act is dismissed as to Machado, Ortega, DOC, and Mountainview.

The Court will additionally note that the waiver provision of the Conscientious Employee Protection Act barred Trent from bringing certain other claims when he pursued his Conscientious Employee Protection Act claim. See N.J.S.A. §34:19-8. This provision states as follows:

Nothing in this act shall be deemed to diminish the rights, privileges, or remedies of any employee under any other federal or State law or regulation or under any collective bargaining agreement or employment contract; except that *the institution of an action in accordance with this act shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, State law, rule or regulation or under the common law.*

Id. (emphasis added). This waiver provision does not apply to claims that are distinct from the Conscientious Employee Protection Act claims. *Notte v. Merchants Mut. Ins. Co.*, 386 N.J. Super. 623, 630 (App. Div. 2006).

By pursuing his claim under the Conscientious Employee Protection Act, then, Trent waived his right to pursue state law or common law claims that arise from the same facts. Id. Thus, the waiver provision acts to bar Trent's civil rights claims and New Jersey Law Against Discrimination claims, as the claims all arise from an identical set of facts - the circumstances surrounding Trent and Machado's sexual harassment claims and Trent's relocation. Id.

Count Four: Defamation

In Count Four of Trent's Third Party Complaint, he pursues a cause of action in defamation, alleging that defendants falsely accused Trent of sexual harassment, subjecting Trent to public ridicule. In order to establish a cause of action in defamation, Trent must prove, in addition to damages and fault, that defendants: "(1) made a defamatory statement of fact (2) concerning [Trent] (3) which was false, and (4) which was communicated to a person or persons other than [Trent]." *Feggans v. Billington*, 291 N.J. Super. 382, 391 (App. Div. 1996). "A statement is defamatory when it 'is false and injurious to the reputation of another' or exposes another person to 'hatred, contempt or ridicule' or subjects another person to 'a loss of the good will and confidence' in which he or she is held by others." Id. at 390 (internal citations omitted).

Even when a plaintiff makes the requisite showing for defamation, a defendant will be protected by a qualified privilege when "the circumstances induce a correct or reasonable belief that (a) there is information that affects a sufficiently important interest of the publisher, and (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest." Id. at 392 (internal citation omitted). In particular, "the qualified privilege enables principled employees to report actual or suspected misconduct without fear of legal liability for defamation." Id. at 393.

Here, there is no evidence of any specific statement, as required for defamation. Trent's vague allegations in his Fourth Count that something bad was said somewhere, some time, some

how, did not state a defamation claim. *Zonereich v. Overlook Hospital*, 212 N.J. Super. 83, 101 (App. Div.) certif. denied, 107 N.J. 32 (1986). The First Amendment demands more before speech will be punished.

Further, Trent makes no claim that the allegedly defamatory statements about Trent were made to anyone but Trent's employer. Thus, the statements alleging that Trent committed sexual harassment were made to Trent's employer within the boundaries protected by the qualified privilege. Id. Regardless of defendants' motivation in reporting the conduct, the fact remains that defendants were reporting suspected misconduct on the part of Trent in accordance with standard procedure. Id. In such a situation, the qualified privilege applies so as to immunize defendants from liability for defamation, in the absence of a showing of malice, which has not been shown here. Id. As such, Count Four of Trent's Third Party Complaint alleging defamation is dismissed as to Machado, Ortega, DOC, and Mountainview.

Count Five: Violation of First and Fourteenth Amendments of U.S. Constitution under 42 U.S.C. §1983

In Count Five of his Third Party Complaint, Trent pursues constitutional claims under 42 U.S.C. §1983.³ This section only applies to individual defendants acting under the color of state law at the time of the alleged constitutional violation, as provided below:

To establish a claim under 42 U.S.C. §1983, [the] plaintiff must satisfy a two-prong standard: first, that he was deprived of a right secured by the Constitution or laws of

³This section provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

See 42 U.S.C. §1983.

the United States; and second, that the defendants who allegedly deprived him of that right were acting under color of state law at the time the alleged constitutional violation occurred.

Salerno v. O'Rourke, 555 F. Supp. 750, 755 (D.N.J. 1983).

The U.S. Supreme Court has held that "neither a State nor its officials acting in their official capacities are 'persons' under §1983." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). Therefore, Trent may not pursue a Section 1983 claim against defendants, who represent state agencies and state officials acting in their official capacities. Moreover, Trent fails to address in his opposition the issue of whether or not defendants are amenable to suit under Section 1983.

Even if defendants could be sued under Section 1983, Trent has shown no basis whereby his First and Fourteenth Amendment rights were violated. There is simply no evidence that defendants retaliated against Trent for exercising his First or Fourteenth Amendment rights. Trent has shown no tie between the retaliation he alleges (presumably, his relocation) and his exercise of his First and Fourteenth Amendment rights (presumably, his filing of the sexual harassment complaint against Machado).⁴ Trent's relocation, rather, was in response to Machado's filing of a sexual harassment claim against him. Trent even admitted that he was informed of his scheduled relocation before he had the opportunity to file his own complaint. Thus, there is no logical basis for a Section 1983 claim here. Accordingly, Count Five of Trent's Third Party Complaint is dismissed as to Machado, Ortega, DOC, and Mountainview.

Count Six: Violation of New Jersey Civil Rights Act

Not only are Trent's civil rights claims waived by his pursuit of his Conscientious Employee Protection Act claim, as set forth above, but his claims under the New Jersey Civil Rights Act⁵ are also barred by the preceding logic with reference

⁴ Trent's allegations regarding the violation of his constitutional rights are very ambiguous, and therefore require some conjecture on the part of the Court.

⁵ The New Jersey Civil Rights Act provides as follows:

Any person who has been deprived of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of

to Trent's Section 1983 claims. The New Jersey Civil Rights Act was modeled after 42 U.S.C. §1983 and has been interpreted analogously to that Section. *Trafton v. City of Woodbury*, 799 F. Supp.2d 417, 443 (D.N.J. 2011).

As discussed above with reference to Trent's Section 1983 claims, defendants are not "person[s] acting under color of law" to which the New Jersey Civil Rights Act applies. See N.J.S.A. §10:6-2(c). Trent does not contend otherwise in his opposition brief.

Moreover, there is no clear violation of Trent's constitutional rights on the part of defendants, as discussed above. Trent's only allegation of a constitutional violation in his opposition brief is the following: "Because of the actions of the defendants, [Trent] was sexually harassed, discriminated against and retaliated against. During the course of events, [Trent's] Constitutional rights were violated, and as such, [Trent] has a viable claim under the CRA." See Trent's Opposition at 20-21. These bare allegations, devoid of any reference to facts or circumstances comprising the alleged constitutional violations, are insufficient to withstand a summary judgment motion seeking to dismiss his New Jersey Civil Rights Act claims. There is no way that this Court can construe the facts that Trent has provided to substantiate a violation of his constitutional rights.

Therefore, Count Six of Trent's Third Party Complaint is dismissed as to Machado, Ortega, DOC, and Mountainview.

Count Seven: Conspiracy under 42 U.S.C. §1985 and New Jersey Constitution

To establish a claim for conspiracy under 42 U.S.C. §1985, a plaintiff must prove:

- (1) a conspiracy;
- (2) for the purpose of depriving, either directly or indirectly,

this State, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under color of law, may bring a civil action for damages and for injunctive or other appropriate relief. The penalty provided in subsection e. of this section shall be applicable to a violation of this subsection.

N.J.S.A. §10:6-2(c).

any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

United Bd. of Carpenters & Joiners, Local 610 v. Scott, 463 U.S. 825, 828-29 (1983).

In his response papers, Trent does not oppose dismissal of his Section 1985 claims. Rather, he fails to address his conspiracy claims at all. In this vein, Rule 4:46-5(a) provides as follows:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleading, but must respond by affidavits meeting the requirements of R. 1:6-6 or as otherwise provided in this rule and by R. 4:46-2(b), setting forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered unless it appears from the affidavits submitted, for reasons therein stated, that the party was unable to present by affidavit facts essential to justify opposition, in which case the court may deny the motion, may order a continuance to permit additional affidavits to be obtained, depositions to be taken or discovery to be had, or may make such other order as may be appropriate.

See R. 4:46-5(a). Thus, Trent was obligated, in his opposition to defendants' summary judgment motions, to provide facts that show a genuine issue of material fact requiring resolution at trial. Id. Trent did not do so here.

Further, Trent's Third Party Complaint fails to provide any facts that are sufficient to comprise the elements of conspiracy. *United Bhd. of Carpenters & Joiners*, 463 U.S. at 828-29. For one, Trent alleges no acts that defendants allegedly

performed in furtherance of the conspiracy. Id. Accordingly, Count Seven of Trent's Third Party Complaint is dismissed as to Machado, Ortega, DOC, and Mountainview.

Count Eight: Failure to Supervise under 42 U.S.C. §1986 and New Jersey Constitution

In Count Eight of Trent's Third Party Complaint, he asserts a claim under 42 U.S.C. §1986. Like his Section 1985 claim, Trent fails to address his Section 1986 claim in his papers opposing defendants' summary judgment motions, in violation of Rule 4:46-5(a). See R. 4:46-5(a). It would appear from this behavior that Trent has abandoned his conspiracy claims.

Moreover, a violation of Section 1986 depends upon a violation of Section 1985, as explained below:

In order to maintain a cause of action under §1986, the plaintiffs must show the existence of a §1985 conspiracy. Any issue of material fact in a §1986 action presupposes and relates to a §1985 conspiracy. Thus, if the elements of the §1985 conspiracy are missing, a §1986 cause of action is properly dismissed on summary judgment.

Clark v. Clabaugh, 20 F.3d 1290, 1295 n.5 (3d Cir. 1994). As this Court has determined that Trent does not possess a viable Section 1985 claim, it necessarily follows that his Section 1986 claim must be dismissed. Id. Therefore, Count Eight of Trent's Third Party Complaint is dismissed as to Machado, Ortega, DOC, and Mountainview.

Count Nine: Aiding and Abetting Discrimination

In Count Nine of his Third Party Complaint, Trent alleges that Machado and Ortega aided and abetted the discrimination he suffered at the hands of DOC and Mountainview. N.J.S.A. §10:5-12(e) prohibits aiding and abetting discrimination as follows:

It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination . . . [f]or any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the

doing of any of the acts forbidden under this act, or to attempt to do so.

N.J.S.A. §10:5-12(e).

With reference to the counts in Trent's Third Party Complaint alleging discrimination and retaliation, this Court has already found that Trent does not possess viable claims. As Trent admits in his opposition brief, the New Jersey Law Against Discrimination only "makes it illegal to attempt to aid and abet a violation of the act," including an "act of retaliation." See Trent's Opposition at 21. In fact, the New Jersey Supreme Court has declared that:

in order to hold an employee liable as an aider or abettor, a plaintiff must show that (1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; [and] (3) the defendant must knowingly and substantially assist the principal violation.

Tarr v. Ciasulli, 181 N.J. 70, 84 (2004) (internal citation omitted). Thus, in order to find aider and abettor liability under the New Jersey Law Against Discrimination, an underlying violation on the part of the person or entity aided/abetted must first be shown. Id.

Here, this Court has held that DOC and Mountainview are not liable for discrimination or retaliation. Therefore, Machado and Ortega cannot be liable as aiders and abettors. Id. Accordingly, Count Nine of Trent's Third Party Complaint is dismissed as to all Defendants.

Count Ten: *Respondeat Superior*

The doctrine of *respondeat superior* provides that an employer will be liable for the acts of its employee if the employee was acting within the scope of his employment at the time of the act. *Hill v. New Jersey Dept. of Corrections Com'r Fauver*, 342 N.J. Super. 273, 305 (App. Div. 2001). This doctrine creates vicarious liability on the part of an employer for a violation its employee has committed. Id.

As repeatedly stated above, Machado and Ortega are not Trent's employers. Thus, they cannot be liable under the doctrine of *respondeat superior*. Id. As such, Count Ten of Trent's Third Party Complaint is dismissed as to Machado and Ortega.

As to DOC and Mountainview, there must first be a violation on the part of its employees, Machado and Ortega, before DOC and Mountainview can be liable for this violation under the theory of *respondeat superior*. Id. As Machado and Ortega are not liable under any of the theories in Trent's Third Party Complaint, see supra and infra, Trent's claim of *respondeat superior* against DOC and Mountainview must fail. Therefore, Count Ten of Trent's Third Party Complaint is dismissed as to all defendants.

Count Eleven: Official Policy

In Count Eleven of Trent's Third Party Complaint, Trent alleges that defendants, as "final decision-makers or agents" of the State of New Jersey, have taken illegal actions that "represent official government policy and practice." See Trent's Third Party Complaint at ¶120.

In defendants' motions for summary judgment, they contend that they cannot be held liable under this theory, as it applies only to municipalities. Trent does not contend otherwise in his opposition papers, as he fails to address this claim entirely, in violation of Rule 4:46-5(a). See R. 4:46-5(a). Thus, Trent does not show a genuine issue of material fact requiring resolution at trial as to this claim. Id.

Moreover, defendants are correct that Trent cannot pursue this claim against them, as the claim can only be pursued against municipalities. See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91 (1978). No defendant here is a municipality; thus, no defendant is subject to suit on this basis. Id. Finally, Trent has demonstrated no illegal policy. Accordingly, Count Eleven of Trent's Third Party Complaint is dismissed as to Machado, Ortega, DOC, and Mountainview.

Emotional Distress Damages

The New Jersey Legislature authorized recovery of emotional distress damages in New Jersey Law Against Discrimination claims as follows:

The Legislature further finds that *because of discrimination, people suffer personal hardships, and the State suffers a grievous harm.* The personal hardships include: economic loss; time loss; physical and emotional stress; and in some cases severe emotional trauma, illness, homelessness or other irreparable harm resulting from the strain of employment controversies; relocation, search and moving difficulties; anxiety caused by lack of information, uncertainty, and resultant planning difficulty; career, education, family and social disruption; and adjustment problems, which particularly impact on those protected by this act. *Such harms have, under the common law, given rise to legal remedies, including compensatory and punitive damages.* The Legislature intends that such damages be available to all persons protected by this act and that this act shall be liberally construed in combination with other protections available under the laws of this State.

N.J.S.A. §10:5-3 (emphasis added).

To be entitled to these damages, however, the Court must first find that discrimination occurred. Id. "The quantum of compensation . . . is dependent upon the relevant factors . . . including duration of the discriminatory conduct, its public nature, and its content and may be enhanced by such additional proofs of indicia of suffering as plaintiff may adduce." Tarr, 181 N.J. at 81. As this Court has described above, there is no evidence of discrimination on the part of Defendants. As such, Trent is not entitled to emotional distress damages allegedly arising therefrom. Id. Accordingly, Trent's claim for emotional distress damages is dismissed as to all defendants.

Punitive Damages

As enumerated above, the New Jersey Legislative also authorized punitive damages in a New Jersey Law Against Discrimination case. See N.J.S.A. §10:5-3. Nonetheless, punitive damages, like emotional distress damages, require an underlying violation of the New Jersey Law Against Discrimination. Id. No such violation was found here.

Moreover, Trent has not met the requisite threshold for a finding of punitive damages. Punitive damages may be awarded where the plaintiff proves "that the harm suffered was the result of the defendant's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed by those acts or omissions." N.J.S.A. §2A:15-5.12.

There is absolutely no evidence of actual malice or willful/wanton conduct here. Id. Trent fails to point to such evidence in his opposition brief. Rather than pointing to evidence that creates a genuine issue of material fact, see R. 4:46-5(a), Trent instead conclusively states that "whether the defendants' actions and/or inactions constitute a wanton and willful disregard for [Trent's] rights is also a question of fact." See Trent's Opposition at 25. Although Trent is correct that the issue of punitive damages is suitable for determination by a jury, Trent must actually present some evidence of actual malice or wanton/willful conduct in order for this Court to present this issue to a jury. *Abbamont v. Piscataway Twp. Bd. of Educ.*, 138 N.J. 405, 433 (1994).

Having no evidence of actual malice or wanton/willful conduct on the part of defendants, as well as no violation of law to form the premise of a punitive damages award, Trent's claim for punitive damages is dismissed as to all defendants.

Hedonic Damages

Trent also pursues hedonic damages in his Third Party Complaint, which are defined as "those damages which flow from physical impairments which limit plaintiff's capacity to share in the amenities of life." *Eyoma v. Falco*, 247 N.J. Super. 435, 446 (App. Div. 1991). As an initial matter, Trent does not have a viable cause of action from which any damages, including hedonic damages, could flow.

Moreover, Trent has not shown any *physical* impairment that has limited his capacity to enjoy life. Id. Even in his opposition brief, Trent fails to point to any physical impairment that may have created a genuine issue of material fact as to this issue. See R. 4:46-5(a). Instead, Trent contends that the issue of hedonic damages is an issue the jury is capable of handling. Regardless of whether or not the jury is capable of resolving this issue, there must first be a disputed issue for the jury to resolve. See R. 4:46-2(c). No such issue is present here as to hedonic damages, as Trent has not shown a

physical impairment that has affected his ability to enjoy life. *Eyoma*, 247 N.J. Super. at 446. Thus, Trent's claim of hedonic damages is dismissed as to all Defendants.

Conclusion:

For the foregoing reasons, all counts and claims of damages contained in Trent's Third Party Complaint are dismissed. As such, Machado and Ortega's motion for summary judgment is **GRANTED**. DOC and Mountainview's motion for summary judgment is similarly **GRANTED**.