NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

| | | |
|---|---|---|
| Mark Sheridan and Nancy Sheridan,<br><br>Plaintiff(s),<br><br>v.<br><br>Mondelez Global LLC, William Gomez,<br><br>Defendant(s). | : | SUPERIOR COURT OF NEW JERSEY<br>LAW DIVISION: BERGEN COUNTY<br>DOCKET NO.: BER-L-703-15<br><br>***CIVIL ACTION*** |

**Defendant' Motion to Dismiss Plaintiffs' Amended Complaint**

**Returnable: September 4, 2015**

**Decided: October 13, 2015**

**Honorable Robert L. Polifroni, P.J.Cv.**

Melissa P. Paolella, Esq. (Florio & Kenny LLP), appearing on behalf of plaintiffs

Peter F. Berk, Esq. (Genova Burns), appearing on behalf of defendants

## Procedural History

This matter comes before the court on defendants' motion to dismiss plaintiff's amended complaint, pursuant to R. 4:6-2(e). This court denied without prejudice defendants' initial motion to dismiss plaintiff's complaint on June 12, 2015. Plaintiffs filed an amended complaint on June 19, 2015. Oral argument was heard on September 4, 2015.

## Factual Background

By way of brief background, this case arises out of the alleged discrimination and retaliation against Plaintiff Mark Sheridan ("Plaintiff") that began in December 2012 and continued until January 7, 2015. Plaintiff currently works and has worked as a truck driver for Mondelez Global LLC ("MG") since 1977. As a truck driver, plaintiff is represented by a member of the Teamsters Local No. 560, and the terms and conditions of his employment are

subject to MG's contract with the Teamsters, the Collective Bargaining Agreement ("CBA"). On or around August 25, 2008, plaintiff was involved in a work-related accident that injured his left knee. As a result, plaintiff underwent surgery on February 17, 2009, and subsequently returned to work. Three years later, plaintiff, again, suffered pain in this left knee, and again, filed for Workers' Compensation Benefits around April 27, 2012.

Upon returning to work, plaintiff alleges that defendants began a campaign of discrimination and retaliation against him. Specifically, plaintiff alleges that defendants failed to accommodate his request to drive automatic transmission vehicles since manual transmission trucks aggravated his knee injury. Plaintiff also alleges that subsequent to his request, defendants violated his contractual seniority rights by assigning junior workers to overtime shifts instead of him and not assigning him the routes he desired. Article 3 of the CBA sets forth plaintiff's seniority rights. In relevant part it states:

> Section 1 – Seniority Principle. Seniority shall prevail in that the Employer recognizes the general principle that senior employees shall have preference to choose their shifts and to work at the job for which the pay is highest, provided such employee is qualified for such work and an opening exists. Seniority does not give an employee the right to choose a specific unit, run, trip or load.

After February 3, 2014 and until October 19, 2014, plaintiff went on another Workers' Compensation leave to undergo a total knee replacement and subsequent physical therapy. Upon returning, plaintiff alleges he was again denied his choice of routes and hours in violation of seniority rights under the CBA. Plaintiff also alleges that upon his return, his immediate supervisor William Gomez ("Gomez") created a hostile work environment by assigning plaintiff to the most demanding routes, criticizing plaintiff's work, and denying plaintiff the use of machinery provided to other employees.

## Legal Arguments

### Defendants' Motion to Dismiss

Defendants argue plaintiff's complaint should be dismissed because it is preempted by the Labor Management Relations Act, 29 U.S.C. 185, et. seq. ("LMRA"). They note that the United States Supreme Court and New Jersey courts recognize that the LMRA preempts all state law claims that depend upon an interpretation of a CBA, or if the complaint allegations are inextricably intertwined with the employee's rights delineated in the CBA. See, e.g., Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 405-06 (1988); Labree v. Mobil Oil Corp., 300

N.J. Super. 234 (App. Div. 1997). Relying on Laresca v. AT&T, 161 F. Supp. 2d 323, 331-33 (D.N.J. 2001), defendants argue that preemption is appropriate when a plaintiff's discrimination claims turn on issues such as promotions, seniority, assignments, qualifications, and similar issues directly governed by a [CBA] because such issues "usually require recourse to details that are imbedded in CBAs". As such, defendants contend plaintiff's LAD claims in Counts One, Two, and Three, and plaintiff's CEPA claim in Count Four, are preempted by federal law as they all require an interpretation of the plaintiff's CBA.

Defendants argue plaintiff's claims depend solely on an initial finding that defendants violated the CBA because if defendants did not violate the CBA, then they did not discriminate against the plaintiff. In his amended complaint, plaintiff's allegations relate to work assignments and seniority rights under his CBA. In order to resolve these allegations, defendants argue the court would have to interpret the CBA's provisions on seniority and determine whether routes were assigned based upon seniority. See Reece v. Houston Lighting & Power Co., 79 F.3d 485 (5th Cir.), cert. denied, 519 U.S. 864 (1996).

Next, defendants assert plaintiff's CEPA claim in Count Four should be dismissed because it fails to allege a violation of public policy, fails to allege an adverse employment action, and is time-barred. Under CEPA, an employer is prohibited from retaliating against an employee who opposes "an activity, policy or practice of the employer . . . that the employee reasonably believes is in violation of a law or regulation . . . [or] is incompatible with a clear mandate of public policy". N.J.S.A. 34:19-3(a)(1). In his complaint, plaintiff alleges defendants violated the public policy against reckless and dangerous operation of vehicles on public highways and placed the public in danger by forcing the plaintiff to operate manual transmission vehicles in high traffic areas around the nation. However, defendants argue that plaintiff does not assert any source of law or authority to support his specific public policy argument. Dzwonar v. McDevitt, 177 N.J. 451, 463 (2003) (explaining the plaintiff "must identify a statute, regulation, rule or public policy that closely relates to the complained-of conduct"). Rather, plaintiff focuses solely on private harms that were allegedly inflicted upon him personally.

Moreover, defendants contend the statute of limitations for filing a CEPA action is one year. N.J.S.A. 34:19-5. As plaintiff first filed his complaint on January 22, 2015, defendant argues any employment actions occurring before January 22, 2014 are time barred. Accordingly,

defendants assert that plaintiff's alleged retaliation occurring in 2012 is time barred. Defendants also argue plaintiff failed to allege he suffered any adverse employment action as is required to establish a *prima facie* claim of retaliation under CEPA. Defendant asserts that "[a]dverse employment actions" must constitute "serious intrusions into the employment relationship beyond those solely affecting compensation and rank". Beasley v. Passaic County, 377 N.J. Super. 585, 608 (App. Div. 2005). However, the acts alleged by plaintiff in his amended complaint do not alter the terms and conditions of his employment and as such do not constitute adverse employment actions. Hargrave v. Cnty. of Alt., 262 F. Supp. 2d 393, 427 (D.N.J. 2003). Given the statute of limitation and plaintiff's failure to make a *prima facie* claim of retaliation under CEPA, defendants argue Count Four should be dismissed.

Defendants additionally argue plaintiff's Workers' Compensation retaliation claim in Count Five is preempted and should be dismissed for the reasons outlined above. Defendants explain that if they did not violate plaintiff's rights with respect to work assignments, then they did not retaliate against him for taking Workers' Compensation leave. They contend there can be no finding that defendants retaliated against plaintiff without an interpretation of the CBA. Moreover, defendants argue that Count Four should be dismissed because plaintiff was not terminated. Defendants assert that no court has ever recognized a theory of "anticipatory discharge" as sufficient to satisfy a *prima facie* case of Workers' Compensation retaliation. Notwithstanding the lack of a cause of action, defendants argue plaintiff's action in time-barred by the two-year statute of limitations for such retaliation claims. Labree, 300 N.J. Super. at 234.

Similar to the LAD and CEPA claims, defendants argue plaintiffs' negligent and intentional infliction of emotional distress claims in Counts Six and Seven are preempted by the LMRA. See, e.g., Saridakis v. United Airlines, 166 F.3d 1272, 1278-79 (9th Cir. 1999); Cook v. Lindsay Olive Growers, 911 F.3d 233, 239-40 (9th Cir. 1990) (preempting emotional distress claims based on issues of seniority, promotions, and transfers covered by the CBA). Defendants also contend that all of plaintiffs' LAD and tort claims are preempted by his CEPA claim. Battaglia v. United Parcel Service, Inc., 214 N.J. 518, 556 n. 9 (2013). They explain that the CEPA waiver provision applies to all claims that are "substantially related" to the CEPA claim, in that they arise from the same set of facts. Smith v. Twp. of East Greenwich, 519 F. Supp. 2d 493, 510 (D.N.J. 2007) (internal citations omitted). Defendants assert that the New Jersey

Supreme Court has defined the scope of the waiver provision and concluded that "once a CEPA claim is 'instituted,' any rights or claims for retaliatory discharge based on a contract of employment, [CBA]; state law . . . or regulations or decisions based on statutory authority, are all waived". Young v. SheringCorp., 141 N.J. 16, 23 (1995). They also assert that courts have held CEPA's waiver provision to apply to allegations simultaneously brought under the LAD. See Bowen v. Parking Auth. of Camden, No. 00-5765, 2003 U.S. Dist. LEXIS 16305 (D.N.J. Sept. 18, 2003). Defendants note that in this matter, plaintiff relies upon the same proofs to support both his CEPA and LAD claims. Therefore, defendants argue that plaintiff's complaint, except for Count Four, should also be dismissed under the CEPA waiver provision.

Defendants further argue plaintiff's claim for intentional infliction of emotional distress in Count Six should be dismissed because plaintiff fails to allege outrageous or extreme conduct going beyond all bounds of decency. They contend that in order to establish a claim for intentional infliction of emotional distress, the plaintiff "must establish intentional and outrageous conduct by the defendant, proximate cause, and distress that is severe". Buckley v. Trenton Savings Fund Society, 111 N.J. 355, 366 (1998). In Buckley, the Supreme Court described how extreme the conduct of the defendant must be, explaining "[l]iability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to be regarded as atrocious, and utterly intolerable in a civilized community". Id. Defendants note that in courts applying New Jersey law, the required showing of outrageousness is rarely met in the employment context. Citing Griffin v. Topps Appliance City, Inc, 337 N.J. Super. 15, 23-24 (App. Div. 2001), they note "it is extremely rare to find conduct in the employment context which will rise to the level of outrageousness necessary to provide a basis for recovery for the tort of intentional infliction of emotional distress". As such, defendants argue that in the present case, no reasonable jury can find that their alleged conduct was so outrageous and extreme as to meet the analysis in Buckley. As such, defendants move to dismiss Count Six of plaintiff's amended complaint.

Defendants also move to dismiss Counts Six and Seven of the amended complaint because the emotional distress claims are both preempted by the LAD and barred by the Workers' Compensation Act. Defendants explain that "supplementary common law causes of action may not go to the jury when a statutory remedy under the LAD exists". Catalane v. Gilian

Instrument Corp., 271 N.J. Super. 476 (App. Div.), certif. denied, 136 N.J. 298 (1994) (dismissing plaintiff's tort and contract claims in a suit alleging violations of the LAD). Defendants also highlight the exclusivity provision of the of the New Jersey Workers' Compensation Act, which bars employees injured in the workplace from bringing a common law action for damages against his employer unless the injury was the result of an "intentional wrong". Millison v. E.I. du Pont de Nemours and Co., 101 N.J. 161, 170 (1985). Defendants contend there is no evidence they engaged in the complained of conduct with the intent to injure the plaintiff. As such they move to dismiss Counts Six and Seven.

Defendant moves to dismiss Count Eight of the amended complaint because none of plaintiff's causes of action provide any basis for the ancillary claim of loss of consortium. See Herman v. Coastal Corp., 348 N.J. Super. 1, 30 (App. Div. 2002) (dismissing a loss of consortium claim because no such claim is recognized when based on the LAD); see also Falco v. Community Medical Center, 296 N.J. Super. 298, 305 (App. Div. 1997) (dismissing *per quod* claim brought under CEPA).

Finally, defendants move to dismiss the complaint in its entirety as to defendant Gomez because they argue he cannot be sued under the LAD in an individual capacity as an employee or supervisor. See Tyson v. CIGNA Corp., 918 F. Supp. 836, 840 (D.N.J. 1996), aff'd 149 F.3d 1165 (3d. Cir. 1998); see also Tarr v. Ciasulli, 181 N.J. 70, 83 (2004). Defendants assert the only circumstance in which an individual may be liable for discrimination under the LAD is as an aider and abettor. Cicchetti v. Morris Cty. Sheriff's Office, 194 N.J. 563, 593 (2008). Defendants allege that plaintiff did not plead the existence of an alleged aider and abettor and as such defendant Gomez cannot be held liable because he cannot aid and abet his own conduct. As such, defendants move to dismiss the complaint as to defendant Gomez.

For the aforementioned reasons, defendants move to dismiss plaintiff's Complaint in its entirety, with prejudice, pursuant to R. 4:6-2(e), for failure to state a claim upon which relief can be granted.

**Plaintiff's Opposition**

Plaintiff opposes the instant motion and contends that none of the claims are subject to dismissal. Plaintiff notes that at this early stage of proceedings, the court must give them

considerable latitude and further explain such motions are granted "in only the rarest of instances". Printing-Mart Morristown v. Sharp Elecs. Corp., 1167 N.J. 739, 772 (1989). First, Plaintiff argues that defendant has continually misconstrued plaintiff's reliance on the interpretation of the CBA. Plaintiff asserts, "mere reference to the [CBA] in the Complaint" does not "automatically cast the claim as one invoking federal labor law." Patterson v. Exxon Mobil Corp., 262 F. Supp. 2d 453, 457 (D.N.J. 2003), citing Livadas v. Bradshaw, 512 U.S. 107, 124 (1994). Plaintiff contends he was seeking to assert rights founded in the LAD and CEPA, not rights that are founded in the CBA. Plaintiff's references to his seniority are only meant to serve as evidence of the manner in which defendants discriminated and retaliated against him. Moreover, the heart of plaintiff's claim is defendants' refusal to accommodate his work-related disability. He asserts that he was entitled to these accommodations regardless of the terms of the CBA and to the extent that any of his claims implicate the CBA, it is only as evidence of defendants' retaliation.

Plaintiff also asserts that Federal Courts have recognized the importance of retaining state law avenues through which unionized employees may vindicate their rights under state law. Specifically, the LAD represents "substantive rights a state may provide to workers" that are not subject to any type of LMRA preemption. Lingle, 486 U.S. at 409. Here, the plaintiff contends "enforcement of [the LAD] and the collective-bargaining process" would complement, rather than conflict each other. Maher v. New Jersey Transit Rail Operations, Inc., 125 N.J. 455, 484 (1991). Plaintiff argues that resolution of his claims relies on actions of the plaintiff and actions and motivations of defendants, and does not rely on interpretations of the CBA. See Patterson, 262 F. Supp. 2d at 458.

Plaintiff further contends that his CEPA and Workers' Compensation retaliation claims require far broader considerations than the narrow terms of a CBA. He argues that not only did defendants refuse to accommodate his disability, but they further retaliated against him by manipulating his work assignments and delayed the resolution of his Workers' Compensation claim. Plaintiff asserts neither claim requires reference to the CBA in order to be resolved. Plaintiff contends that defendants' reliance on federal precedent from outside this circuit should not persuade this court. Moreover, plaintiff argues defendants failed to point out any part of his common law claims that require an interpretation of the CBA. Plaintiff argues that defendants cannot use the LMRA as a blanket tool for the resolution of all work related harms suffered by employees subject to a CBA.

Next, plaintiff argues he has sufficiently alleged reporting an independent area of public concern establishing a separate retaliation claim under CEPA. Plaintiff's CEPA claim is grounded not on retaliation for his claims under LAD or Workers' Compensation, but rather is based on the separate and independent public policy concern surrounding plaintiff's ability to safely operate manual transmission vehicles in some of the most demanding traffic around the country. Plaintiff argues that, standing alone, this would represent a cognizable claim under CEPA. Moreover, plaintiff contends under New Jersey law, he need not show that a law, rule, regulation, or public policy is actually being violated. Beasley, 377 N.J. Super. at 605-06 (internal citations omitted). "Plaintiff only has to show that he had an 'objectively reasonable belief' in the existence of such a violation or incompatibility." Maimone v. City of Atl. City, 188 N.J. 221, 233 (2006). Plaintiff argues a trier of fact could find he had an objectively reasonable belief that operating a manual transmission vehicle would violate public policy prohibiting reckless and dangerous operation of motor vehicles on public highways. Id. at 235. Plaintiff contends he has clearly shown that the public policy being violated is one of "public health, safety or welfare or protection of the environment". Id. at 231.

Plaintiff further contends his CEPA claims do not preempt his LAD and tort claims as they do not stem from the same set of operative facts. Plaintiff argues: first, he requested accommodation under the LAD; second, he filed for Workers' Compensation benefits; and third, defendants retaliated against him for exercising those rights, forming the basis of his CEPA claim. Plaintiff argues each of these claims turns on a separate legal and factual basis. Moreover, plaintiff asserts that he has a well-established right to plead alternative theories of liability. Battaglia, 214 N.J. at 556 (quoting Ivan v. Cnty. Of Middlesex, 595 F. Supp. 2d 425, 465-66 (D.N.J. 2009) (stating CEPA claims and LAD claims are not always mutually exclusive)).

Plaintiff argues he has sufficiently established defendants' retaliation. He cites N.J.S.A. 34:15-39.1 which states "It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim workmen's compensation benefits from such employer . . . ." Courts have long recognized that retaliation is not limited to termination or other formal job consequences, but rather can include "increase or decrease of salaries, hours, and fringe benefits" and "physical arrangements and facilities." Beasley, 377 N.J. Super. at 608. Plaintiff contends the changes to his schedule and assignments resulted in reduced compensation and loss of other benefits, satisfying this element for a cause of action under N.J.S.A. 34:19-3. Maimone, 188 N.J. at 236. Moreover, plaintiff relies on Beasley for the proposition that "a

pattern of conduct by an employer that adversely affects the employee's terms and conditions of employment can qualify as retaliation under CEPA". Beasley, 377 N.J. Super. at 609. "[M]any separate but relatively minor instances of behavior directed against an employee . . . combine to make up a pattern of retaliation." Maimone, 188 N.J. at 221 (internal citations omitted).

Plaintiff asserts the Beasley court further rejected the argument that a Workers' Compensation retaliation case is barred jurisdictionally or because a plaintiff has not been terminated. Beasley, 377 N.J. Super. at 585. Plaintiff has also not waived his CEPA claim by pleading theories of retaliation under both CEPA and LAD, as the "waiver provision" relied on by defendants applies at the close of trial evidence and not at the pleading stage. Young, 141 N.J. at 29. Additionally, plaintiff argues there is no statute of limitations issue as CEPA is a continuing offense and defendants' most recent acts of retaliation took place months ago. Retaliation is frequently "not a single discrete action, but one that continue[s]." Beasley, 377 N.J. Super. at 609 (internal citation omitted).

Plaintiff next argues he has plead facts sufficient to establish a *prima facie* case of both intentional and negligent infliction of emotion distress given the applicable standard in Printing Mart. Plaintiff contends that defendants' actions are outrageous enough to serve as the basis for his emotional distress claims, particularly at the pleading stage. Ingraham v. Ortho-McNeil Pharm., 422 N.J. Super. 12, 23 (App. Div. 2011). Plaintiff further asserts these claims are not precluded or barred by his Workers' Compensation actions or the Workers' Compensation law. Millison, 101 N.J. at 186-87. Plaintiff contends defendants conflate his physical and emotional injuries, and argues his emotional distress resulted from defendants' campaign of harassment and retaliation. Plaintiff notes his complaint clearly states he has suffered significant anxiety and depression as a result of defendants' conduct, for which he received medical treatment.

Plaintiff also argues since his common claims should survive, so too should plaintiff Nancy Sheridan's *per quod* claim. He notes that such claims are routinely pled for common law intentional and negligent torts. Physical exacerbation of plaintiff's injuries while he awaited treatment increased Mrs. Sheridan's domestic duties and caused stress to her and their marriage. As such, plaintiff argues the claim should stand.

Plaintiff contends he amply pled age-based discrimination in violation of the LAD: Plaintiff's work assignments have been changed as a consequence of his age; he has been subjected to baseless criticism of his work and harassment by his supervisors; and as one of the oldest employees, has suffered several work related injuries and continues to suffer from on-going related disabilities. Plaintiff alleges defendants harass him and belittle his work

performance while approving of identical performance by younger employees. This is clearly discrimination, based upon a protected characteristic that alters the conditions of plaintiff's employment. Lehman v. Toys R Us, 132 N.J. 587, 604 (1987). "A *prima facie* case of age-discrimination properly focuses not on whether the replacement is a member of the protected class but on 'whether the plaintiff has established a logical reason to believe that the decision rest on a legally forbidden grounds." Bergen Commercial Bank v. Sisler, 157 N.J. 188, 213 (1999). Therefore, particularly under the standard enunciated in Printing-Mart, plaintiff argues he has sufficiently pled his age discrimination claim. Printing-Mart, 1167 N.J. at 746.

Finally, plaintiff contends defendant Gomez is clearly an aider and abettor under Tarr, 181 N.J. at 83. Plaintiff argues he has, at the minimum, plead sufficient facts to establish this for pleading purposes, and anticipates that discovery will reveal additional evidence linking defendant Gomez directly to defendants' course of discriminatory, retaliatory, and tortious conduct. Plaintiff notes defendants mischaracterized his complaint in stating that defendant Gomez was the principal wrongdoer who in engaged in discrimination against him. Rather, plaintiff asserts Gomez facilitated defendants' retaliatory and discriminatory policies by enforcing them. Plaintiff argues he has plead sufficient facts to establish a *prima facie* case against defendant Gomez and is entitled to explore these claims in discovery.

For the reasons set forth above, plaintiff argues he has fully established that none of the plaintiff's claims are subject to dismissal. Plaintiff respectfully requests that the court deny defendants' motion in its entirety.

**Defendants' reply**

Defendants' reply notes plaintiff's amended complaint continually refers to the "contract between defendants and Teamsters Local 560". Specifically, they contend plaintiff makes far more than a "mere reference" to the CBA as the amended complaint contains eight (8) express references to plaintiff's alleged seniority rights, which arise out of the CBA. Defendants argue plaintiff's claims depend on a violation of his CBA rights because if plaintiff did not have certain rights under the CBA, then there could not have been any campaign of harassment and retaliation. Defendants further contend any such campaign is preempted as being impermissibly intertwined with the CBA. Additionally, they note plaintiff's CEPA and workers' compensation retaliation claims are similarly preempted because they depend on defendants' alleged failure to follow established seniority protocols. They argue that a finding of retaliation would require an examination of whether there was such a seniority protocol provided for in the CBA.

Defendants also argue plaintiff's CEPA claims are time barred because the continuity on which plaintiff relies was broken by a prolonged leave of absence the plaintiff took from February 2014 to October 2014. Moreover, defendants note although plaintiff allegedly informed his supervisors in 2012 he could not operate a manual transmission truck, plaintiff does not plead that he was unable to operate a manual vehicle when he returned from leave in October 2014. In the absence of such allegations, defendants argue plaintiff's "whistleblowing" occurred in 2012 and any alleged retaliation occurred in 2012 or 2013. Therefore, defendant contends plaintiff's CEPA claim is time-barred. Defendants also argue that plaintiff fails to allege a violation of public policy sufficient to establish a *prima facie* CEPA claim. Defendants note plaintiff does not identify a single legal authority that bears a substantial nexus to his claim. Moreover, defendants assert that the harm alleged by the plaintiff is peculiar to him, and not a harm to the public as would be required for a CEPA claim. Hitesman v. Bridgeway Inc., 218 N.J. 8, 34-35 (2014) (providing examples of public policy mandates that support a CEPA claim).

Next, defendants argue that "an independent area of public concern" does not make a *prima facie* CEPA claim. To establish a *prima facie* claim, a plaintiff must prove that (1) he held an objectively reasonable belief that the employer's conduct violated a law, regulation, or clear mandate of public policy; (2) he disclosed or threatened to disclose the conduct, or objected to the conduct or refused to participate in it; (3) he suffered retaliatory action; and (4) a causal connection exists between the whistleblowing activity and the retaliatory action. Dzwonar, 177 N.J. at 462. Plaintiff fails to make a *prima facie* claim, even at the most basic level. Moreover, plaintiff fails to show that he suffered an adverse employment action separate from violations of the CBA.

Defendants again argue plaintiff's LAD and tort claims are preempted by his CEPA claim because all of the claims rely on the same operative facts and adverse employment action, specifically that plaintiff's work assignments were altered in violation of the CBA. Defendants argue under CEPA's election of remedies provision, plaintiff must plead two different adverse employment actions, with different proofs for each theory. Battaglia, 214 N.J. at 556 n. 9. As plaintiff relies on one adverse employment action with the same proofs, defendants argue the LAD and torts claims are preempted. Defendants additionally oppose plaintiff's assertion that pleading in the alternative is permitted, as N.J.S.A. 34:19-8 explicitly provides 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 common law".

Defendants then distinguish plaintiff's citation to Ingraham, 422 N.J. Super. at 23, explaining that plaintiff cited the court out of context when discussing "outrageous acts"

sufficient to support plaintiff's intentional infliction of emotional distress claim. Defendants note none of the facts plead by the plaintiff, even if assumed true, come close to the conduct that occurred in the cases cited by the Ingraham court. Id. Defendants assert that conduct in the workplace will rarely be so egregious as to give rise to a claim of intentional infliction of emotional distress." Id. at 23. Regarding plaintiff's negligent infliction of emotion distress claim, defendants argue that plaintiff fails to cite a single authority in which an employee successfully brought such a claim again an employer.

Defendants also note that plaintiff has continually failed to: (1) address the argument that no cause of action exists for unlawful retaliation in violation of the New Jersey Workers' Compensation Act; (2) address the arguments that plaintiff's emotional distress and *per quod* claims fail as a matter of law; (3) provide any legal foundation for his argument that the alleged denial of his rights under the CBA is an independent basis for an LAD claim simply because the alleged denials had discriminatory intent; and (4) provide support for his failure to accommodate claim. Defendants also argue plaintiff's Workers' Compensation retaliation claim is barred because the plaintiff was not terminated. They explain that N.J.S.A. 34:15-39.1 only creates an administrative remedy and does not provide for a civil cause of action. Lally v. Copygraphics, 85 N.J. 668 (1981). Meanwhile, plaintiff attempts to create a civil action for the delay or refusal to provide workers' compensation benefits, a claim which the New Jersey Supreme Court has rejected. See Stancil v. Ace USA, 211 N.J. 276 (2012).

Finally, defendants argue plaintiff's amended complaint never alleged that defendant Gomez was an aider or abettor. Moreover, defendants note that "[d]iscovery is intended to lead to facts supporting or opposing an asserted legal theory; it is not designed to lead to formulation of a legal theory." Camden Cnty. Energy Recovery Assocs., L.P. v. N.J. Dept. of Envtl. Prot., 320 N.J. Super. 59, 64 (App. Div. 1999), aff'd o.b., 170 N.J. 246 (2001).

For the foregoing reasons, and the reasons discussed in defendants' original moving papers and supplemental brief, Defendants respectfully request that this Court grant its motion to dismiss plaintiff's amended complaint in its entirety, with prejudice, pursuant to R. 4:6-2(e), for failure to state a claim upon which relief can be granted.

**Decision**

This court's analysis begins with R. 4:6-2. It states, in relevant part:

> Every defense . . . shall be asserted in the answer . . . except that the following defenses . . . may at the option of the pleader be made by motion, with briefs: . . . (e) failure to state a claim upon which relief can be granted. If a motion is made raising any of

> these defenses, it shall be made before pleading if a further pleading is to be made.

In a motion to dismiss for failure to state a claim, the court must search the complaint in depth and with liberality to determine if a cause of action can be gleaned even from an obscure statement, particularly if further discovery is taken. Liberman v. Port Authority of New York and New Jersey, 132 N.J. 76 (1993) (citing Printing-Mart, 116 N.J. at 746). A complaint should not be dismissed under this rule where a cause of action is suggested by the facts and a theory of actionability may be articulated by amendment of the complaint. Printing Mart, 116 N.J. at 746; see also Lederman v. Prudential Life Ins., 385 N.J. Super. 324, 349 (App. Div.), certif. denied, 188 N.J. 353 (2006). In doing so, a court must view the allegations with great liberality and without concern for the plaintiff's ability to prove the alleged facts. Id. All the facts alleged in the Complaint are deemed admitted, as well as legitimate inferences from those facts. Rieder v. State Department of Transportation, 221 N.J. Super. 547, 552 (App. Div. 1987).

On the other hand, if the complaint states no basis for relief and discovery would not provide one, dismissal of the complaint is appropriate. Energy Rec. v. Dept of Env. Prot., 320 N.J. Super. 59, 64 (App. Div. 1999), aff'd o.b., 170 N.J. 246 (2001); Holmin v. TRW, Inc., 330 N.J. Super. 30, 32 (App. Div. 2000), aff'd o.b., 167 N.J. 205 (2001). If the allegations are "palpably insufficient to support a claim upon which relief can be granted," the court must dismiss the complaint. Rieder, 221 N.J. Super. at 552. A court can consider only the facts on the face of the complaint when deciding whether or not plaintiff has met its burden. Printing Mart, 116 N.J. at 746. A plaintiff's pleading that recites mere conclusions without facts, and an intention to rely on discovery, is inadequate to maintain a cause of action. Glass v. Suburban Restoration Co., 317 N.J. Super. 574, 582 (App. Div. 1999).

Here, defendants argue that plaintiff's Amended Complaint should be dismissed in its entirety because each of plaintiff's claims are substantially dependent on and require interpretation of the terms of the CBA, and as such the Amended Complaint is preempted by the LMRA.

Counts One, Two, and Three

In Counts One, Two, and Three, plaintiff alleges a campaign of age and disability discrimination, and a failure to accommodate his disability. For each of these claims plaintiff

notes changes to his work assignments and responsibilities. The United States Supreme Court and New Jersey Courts recognize the LMRA preempts all state law claims that depend upon the interpretation of a CBA, or if the claims are inextricably intertwined with the employee's rights provided in the CBA. See, e.g., Lingle, 486 U.S. at 405-06; Labree, 300 N.J. Super. at 234. Preemption is appropriate when a plaintiff's discrimination claims turn on issues such as seniority, assignments, and other issues governed by a CBA because such issues usually require analyzing the rights and details imbedded in the agreement. See Laresca, 161 F. Supp. 2d at 331-33.

Plaintiff contends "mere reference to the collective bargaining agreement in the Complaint" does not "automatically cast the claim as one invoking federal labor law." Patterson v. Exxon Mobil Corp., 262 F. Supp. 2d 453, 457 (D.N.J. 2003). However, plaintiff's reliance on Patterson is misplaced. In Patterson, the plaintiff suffered discrimination and retaliation for a complaint he made to his employer about discriminatory hiring in violation of the CBA. Id. at 455. Although the plaintiff invoked the CBA in making his complaint to the employer, the discrimination and retaliation he personally suffered was not inextricably intertwined with the agreement. Id. at 457. The Patterson plaintiff did not allege violations of his CBA rights, and the court found the CBA was merely referenced for "definitional purposes" and "[did not] supply a rule of decision". Id. at 460.

Here, plaintiff references violations of the CBA as evidence of his discrimination and retaliation claims. Determining whether plaintiff's changed work assignments constitutes discrimination would require this court to interpret what his work assignments were under the CBA. Plaintiff's claims are preempted by the LMRA because they are "inextricably intertwined" with his CBA rights. See, e.g., Lingle, 486 U.S. at 405-06; Labree, 300 N.J. Super. at 234. If defendants did not violate the rights provided by the agreement, then it would follow they did not discriminate against the plaintiff. For example, plaintiff makes numerous references to his "seniority," claiming defendants violated the "long-standing company practice" of allowing more senior drivers to control their route assignments, and denied him overtime assignments he was entitled to due to his seniority. These company policies and seniority protocols are found in the CBA. To resolve these claims, the court would need to interpret the agreement and determine the applicability of the seniority issues presented.

Section 301 of the LMRA calls for uniform federal labor laws in order to ensure uniform interpretation of CBAs. Snyder v. Dietz & Watson, Inc., 837 F. Supp. 2d 428, 437 (D.N.J. 2011) (citing Lingle, 486 U.S. at 404). Allowing plaintiffs to bring suits under their state laws could pose the risk of differing interpretations of contract terms and parties' obligations, thereby inevitably disrupting the negotiation and administration of these agreements. Teamsters v. Lucas

Flour Co., 369 U.S. 95, 103 (1962). Plaintiff asserts the gravamen of his LAD claim is the defendants' refusal to engage in a good-faith deliberative process to address plaintiff's request for longer routes and an automatic transmission vehicle. However, the plaintiff himself ties the accommodation request to his seniority rights by referencing the defendants' practice of allowing more senior drivers to control their assignments. This court has given serious consideration to plaintiff's failure to accommodate claim but in the context of the entire lawsuit and the public policy outlined above, this claim ultimately concerns the conditions of plaintiff's employment. Plaintiff suffered a work related injury and requested an accommodation related to his working conditions. If this court accepts plaintiff's own argument regarding his rights, plaintiff's claims must yield to the CBA.

This court further acknowledges that if plaintiff's claims were presented with no agreement between employer and employee's union, plaintiff would likely survive this motion. In those circumstances, discovery would proceed and the matter would be properly addressed through Summary Judgment or trial. However, the essence of this court's decision falls within the courts' policy considerations regarding the scope of collective bargaining agreements. With all the facts and inferences drawn in favor of the plaintiff, it is apparent plaintiff seeks to utilize the provisions of the LAD and CEPA as a sword, rather than as a shield, against alleged inappropriate conduct in the workplace. It is acknowledged these state statutes provide relief which would be more rewarding to plaintiff than the rights afforded to him under the CBA, if his civil lawsuit was successful. But, the same can be said if employees did not have restrictions from suing their employers when they suffered work related personal injuries. Public policy considerations, codified through the Workers' Compensation Act, establish the balance reached by the legislature on this subject. Similarly, public policy as codified by the LMRA, and as interpreted by the Supreme Court, is designed to create an environment for peaceable and consistent resolution of workplace disputes through uniform interpretation of CBAs as per uniform federal law. See Lingle, 486 U.S. at 404; see also Teamsters, 369 U.S. at 103-104. Permitting plaintiff to bring these work-related claims under state statutes would sabotage the abovementioned societal benefits and impugn the cooperation negotiated between employers and unions.

For the reasons discussed above, Counts One, Two, and Three of plaintiff's amended complaint are preempted by the LMRA and are dismissed.

Count Four

In Count Four, plaintiff alleges retaliation under CEPA. As with Counts One through Three, plaintiff alleges defendants retaliated against him by assigning routes that contravened

company policy on seniority. Plaintiff's CEPA claim is similarly inextricably intertwined with his CBA. A determination of whether these changes to plaintiff's job responsibilities constituted retaliation would require an interpretation of the plaintiff's job responsibilities and company policy as outlined in the agreement. In addition to LAD claims, federal labor law preempts CEPA claims requiring interpretations of CBA terms. Puglia v. Elk Pipeline, 437 N.J. Super. 466 (App. Div. 2014), certif. granted, 220 N.J. 573 (2015). As such, plaintiff's CEPA claim is preempted and dismissed.

Notwithstanding the preemption, plaintiff's CEPA claim would be dismissed for failure to establish a *prima facie* cause of action. To maintain a cause of action under N.J.S.A. 34:19-3(a) or (c), a plaintiff must show (1) that he reasonably believed that his or her employer's conduct was violating either a law or rule or regulation promulgated pursuant to law; (2) that he performed whistle-blowing activity described in N.J.S.A. 34:19(a), (c)(1) or (c)(2); (3) an adverse employment action was taken against him; and (4) a causal connection exists between the whistleblowing activity and the adverse employment action. Kolb v. Burns, 320 N.J. Super. 467, 476 (App. Div. 1999) (citing Falco, 296 N.J. Super. at 315-17). In bringing his CEPA claim, plaintiff does not allege that defendants violated a law, rule, or regulation. Rather, Plaintiff bases his CEPA claim on defendants' alleged violation of public policy.

Under N.J.S.A. 34:19(c)(3), a CEPA claim must be based on a "clear mandate of public policy concerning the public health, safety, or welfare or protection of the environment". Dzwonar, 177 N.J. at 463. Complaints of a private harm do not trigger CEPA protections. Maw v. Advanced Clinical Communs., Inc., 179 N.J. 439, 443-46 (2004). Moreover, "the offensive activity must pose a threat of public harm, not merely private harm or harm only to the aggrieved employee." Mehlman v. Mobil Oil Corp., 153 N.J. 163, 188 (1998). Plaintiff alleges his CEPA claim is based on the public policy against reckless and dangerous operation of vehicles on public highways. He claims defendants violated this public policy and placed the public in danger by him to operate manual transmission vehicles in high traffic areas.

This court is not persuaded by plaintiff's public policy argument. The New Jersey Supreme Court has explained that a "clear mandate" of public policy must be "clearly identified and firmly grounded" and cannot be "vague, controversial, unsettled or otherwise problematic". Hitesman, 218 N.J. at 33. The Hitesman Court provided a number of examples illustrating the strength of legal support necessary to demonstrate a "clear mandate of public policy". Id. at 34-35. In the present case however, plaintiff does not identify a single authority that bears a substantial nexus to his claim. Plaintiff alleges his driving a manual transmission vehicle could pose a risk to public safety, but .provides no legal authority for that conclusory statement. As plaintiff failed to provide a sufficient source of law or authority for his CEPA claim and since a

retaliation determination would require an interpretation of his CBA, Count Four is preempted and dismissed.

Count Five

As with the previous four (4) claims, plaintiff's Workers' Compensation retaliation claim is preempted by federal law as plaintiff alleges defendants retaliated against him for taking Workers' Compensation leave by not abiding by seniority protocols for designating work assignments. Furthermore, plaintiff's Workers' Compensation retaliation claim does not exist as a matter of law. To establish such a claim, plaintiff would need to show (1) that he made or attempted to make a claim for workers' compensation; and (2) that he was discharged for making that claim. Cerracchio v. Alden Leeds, Inc., 223 N.J. Super. 435, 442-43 (1988) (internal citation omitted). Plaintiff relies on Lally, 85 N.J. at 670 for the proposition that a civil action exists for all Workers' Compensation retaliation claims. This reliance however is misplaced as the Lally Court specifically addressed civil remedies for retaliatory firing. Defendants' assertion that no cause of action exists for Workers' Compensation retaliation where the employee is still employed by the defendant-employer fairly and appropriately sets forth applicable law. Id. As such, Count Five is dismissed.

Count Six and Seven

Federal courts have held that intentional and negligent infliction of emotional distress claims are preempted by the LMRA when their resolution depends on issues such as seniority that are covered by the CBA. See, e.g., Reece, 79 F.3d at 487-88; Cook, 911 F.3d at 239-40. In Counts Six and Seven, plaintiff alleges he suffered emotional distress due to the demanding assignments and routes that were outside his seniority rights. As such, plaintiff's emotional distress claims are preempted and dismissed.

Further, beyond the issues raised by the preemption doctrine, plaintiff's intentional infliction of emotional distress claim fails as a matter of law. In order to establish such a claim, the plaintiff "must establish intentional and outrageous conduct by the defendant, proximate cause, and distress that is severe". Buckley, 111 N.J. at 366. In Buckley, the Supreme Court described the extent to which defendant's conduct must be extreme, explaining "[l]iability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to be regarded as atrocious, and utterly intolerable in a civilized community". Id. Courts applying New Jersey law generally hold that the required showing of outrageousness is rarely met in the employment context. "[I]t is extremely rare to find conduct in the employment

context which will rise to the level of outrageousness necessary to provide a basis for recovery for the tort of intentional infliction of emotional distress". Griffin v. Topps Appliance City, Inc, 337 N.J. Super. 15, 23-24 (App. Div. 2001). Allegations of intentional discrimination will not, in and of themselves, constitute extreme and outrageous behavior sufficient to state such a claim. See McDonnell v. State Farm Mutual Ins. Co., 61 F. Supp. 2d 356, 362-63 (D.N.J. 1999).

Plaintiff alleges that upon his return from Workers' Compensation leave, he was assigned the most physically demanding routes, despite his statement that the routes would exacerbate his disability and despite company policy allowing senior drivers to control their route assignments. As a result plaintiff alleges he suffered significant anxiety and emotional distress that is ongoing. Under Printing-Mart, plaintiff's complaint must be searched in depth and with liberality to determine if a cause of action can be gleaned even from an obscure statement of claim. Printing Mart, 116 N.J. at 746 (internal citations omitted). Even under such a standard, this court is not persuaded that defendants' alleged conduct is so outrageous and extreme as to make a claim of intentional infliction of emotional distress under Buckley. Plaintiff has not pled facts sufficient to show defendants' conduct was "atrocious" or "utterly intolerable". Buckley, 111 N.J. at 366. Nor would the facts pled by plaintiff "lead an average member of the community [to] arouse his resentment against the actor, and . . . exclaim, 'Outrageous!'" Restatement (Second) of Torts, § 42 cmt (d). Plaintiff's main complaint is that defendants denied him certain routes he had the right to under his CBA, and forced him to continue driving trucks equipped with a manual transmission. Denying an employee his choice of work assignment and/or vehicle can hardly be described as going "beyond all possible bounds of decency". Id.

Given the preemption, and plaintiff's failure to demonstrate extreme and outrageous conduct, Count Six is dismissed.

Count Eight

Plaintiff Nancy Sheridan claims that as a direct and proximate result of the negligence of defendants, she was deprived of the services, society, and consortium of her husband. A *per quod* claim is a derivative claim which is incidental to, and dependent upon, the causes of action asserted on behalf of the injured spouse. Murphy v. Housing Authority & Urban Redevelopment Agency of the City of Atlantic City, 32 F. Supp. 2d 753, 769 (D.N.J. 1999). Because this court will grant defendants' motion to dismiss plaintiff's amended complaint, it follows that such a dismissal is appropriate on Mrs. Sheridan's *per quod* claim. Id. Furthermore, Mrs. Sheridan's *per quod* claims cannot be sustained under either the LAD or CEPA. See, e.g., Herman, 348 N.J. Super. at 30 (dismissing a *per quod* claim brought under the LAD); Falco, 296 N.J. Super. at 305 (dismissing a *per quod* claim brought under CEPA).

Defendant Gomez

Finally, plaintiff argues that defendant Gomez facilitated defendant's retaliatory and discriminatory policies by enforcing them. Because this court is dismissing plaintiff's amended complaint, it follows that such claims will be dismissed as to defendant Gomez.

For the reasons set forth above, defendants' motion to dismiss plaintiff's amended complaint is GRANTED.

_____

Hon. Robert L. Polifroni, P.J.Cv.

Melissa P. Paolella, Esq.
Florio & Kenny
5 Marine View Plaza, Suite 103
Hoboken, NJ 07030

Peter F. Berk, Esq.
Genova Burns
494 Broad Street
Newark, NJ 07102