(NOTE: The status of this decision is **Unpublished**.)

NOT FOR PUBLICATION WITHOUT THE

APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-0

GLADYS CLARKE,

Plaintiff-Appellant,

v.

ESSEX VALLEY HEALTH CARE, INC.,

d/b/a EAST ORANGE GENERAL

HOSPITAL, JAMES HERRADA,

SHARMAINE BRASSINGTON,

Defendants-Respondents.

October 1, 2014

Submitted September 10, 2014 –
Decided

Before Judges Alvarez and Waugh.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-0091-11.

Eldridge Hawkins, attorney for appellant.

Drinker Biddle & Reath LLP, attorneys for respondents (Jerrold Wohlgemuth and Lawrence J. Del Rossi, on the brief).

PER CURIAM

Plaintiff Gladys Clarke appeals the Law Division's January 25, 2013 orders granting the defendants' motion for summary judgment, denying her cross-motion, and dismissing her second amended complaint with prejudice. We affirm.

I.

We discern the following facts and procedural history from the record on appeal.

Clarke was born in 1940 in Barbados. In 1989, she started working at defendant East Orange General Hospital (Hospital), which is now part of defendant Essex Valley Health Care, Inc. Her initial employment was as a per-diem "float" nurse. She became a full-time employee in 2001. From 1996 until her termination in 2007, Clarke worked in the emergency room (ER). She did not have a written employment agreement, nor was her employment subject to any collective bargaining agreement.

In or about January 2007, Clarke received a copy of the Hospital's employee handbook (Handbook). The introductory letters from the Hospital's president and chief human resources officer are both dated January 2007. The Handbook contains three disclaimers stating that employment is at-will and that the employees do not have a contract with the Hospital. At the top of page three of the Handbook, below the bold, capitalized heading "**ABOUT THIS HANDBOOK**," it states:

> This Handbook is a summary of the policies of Essex Valley Healthcare, Inc. This Handbook is not a contract. Just as all employees are free to resign their employment at any time, the Hospital has the right to terminate any employee's employment, at any time, for any reason, with or without cause, with or without notice, and with or without prior progressive discipline.

On page ten of the Handbook, the last paragraph, titled "**Employment at Will**" in bold, states:

> Employees are employed at will. This means that an employee's employment may be terminated any time for any reason; with or without cause, with or without notice, and with or without progressive discipline, in the sole discretion of Essex Valley Healthcare. Examples of conduct, which may result in termination, include, but are not limited to, misconduct, unsatisfactory job performance, or failure to comply with the organization's or departmental policies, as determined by the organization in its sole discretion. Please keep in mind that Essex Valley Healthcare Inc., may, in its discretion, terminate any employee,

> even if that employee has not
> received previous discipline.

A third disclaimer, which was to be signed and returned to the Hospital, is contained on page twenty-five of the Handbook. Although the Hospital has not produced a receipt page signed by Clarke, she admitted in her responses to interrogatories that she signed for receipt of the Handbook on a general log.

Defendant James Herrada became the manager of the ER in February 2007. According to Clarke, Herrada changed an "unwritten practice" with respect to the payment of overtime by requiring ER employees to receive authorization in advance of working overtime. She maintains that, prior to Herrada's arrival, the accepted "policy" was that ER nurses would stay overtime to deal with emergencies as they developed and then report the time.

Clarke contends that she had no prior notice of the change in the policy. Consequently, she continued to follow the earlier practice and reported her already performed overtime hours to her supervisor. Herrada informed her she would not be compensated for that overtime because it had not been pre-approved. According to Clarke, she was not paid for overtime hours worked from the end of September 2007 until her termination on October 26, 2007.

Clarke further contends that Herrada told her: "I don't like your demeanor, what are you going to do about it." She believes that the comment was made in reference to her Caribbean manner and accent. She also alleges that, on October 12, Herrada curtly said: "Ms. Clarke, you are twice my age, you don't need to be here."

In September 2007, Clarke received a series of written "performance advisories" concerning unsatisfactory work performance. Clarke alleges that Herrada and defendant Sharmaine Brassington, one of her supervisors, began to "alienate" her by reprimanding her for her work performance on innocuous issues that ordinarily were not worthy of discipline. When

shown copies of disciplinary warnings at her deposition, however, Clarke did not recollect having seen them before.

On September 26, Clarke was issued a warning by Brassington because she failed to attend a mandatory ER general meeting. Clarke maintains she had notified both Herrada and Brassington that she was in the ER caring for patients. On October 1, Clarke received a written warning from Herrada for improperly transporting a patient with recurring seizures on a wheelchair instead of a stretcher. The next day, she received another written warning from Herrada for failing to complete paperwork for a blood transfusion properly. On October 10, Clarke received a written warning from Herrada for ignoring a patient calling for assistance, and refusing to attend to the patient even when a supervisor asked her to do so. According to Clarke, on October 11, she was disciplined by Brassington for failing to complete an assessment form for an emergency department patient, which she contends was customarily signed the following day.

The Hospital's records reflect warnings prior to Herrada's appointment as ER manager. In August 1999, Clarke received a written warning from the former ER manager for failing to complete assessments of admitted patients properly. In a performance review dated March 21, 2001, the former manager noted that Clarke "needs to project/display a more pleasant, cheerful disposition. Should display positive responses to negative situations. Should try to display a positive, friendly and relaxed attitude. Strive to work in harmony, with co-workers." On September 24, 2004, Clarke was reprimanded in a "Corrective Interview" after the family member of a patient complained about "rude, arrogant [, and] disrespectful" treat-ment and a "total lack of feeling attitude" in the ER.

Following the warnings in September and October 2007, the Hospital's management team met to consider Clarke's status as an employee. The Hospital issued a letter of termination,

signed by Herrada, on October 27. The letter referred to the recent infractions that had been the subject of verbal or written warnings.

The Hospital maintains a written grievance procedure, which is contained in the Hospital's human resources policies, under which an employee can bring work-related complaints and problems to the attention of management and seek review of disputes or terminations. A terminated employee has the option of having the termination formally reviewed by the head of her department. If the employee is not satisfied with the results of the department head's response, there is an appeal to the chief human resources officer. Beyond that, the employee can have the termination reviewed by a peer review board consisting of six members: three chosen by the employee and three by the Hospital. The board hears evidence and then renders a recommendation to the chief executive officer of the Hospital, who then makes a final decision on the termination. Clarke did not exercise her rights under the policy with respect to any of the performance warnings or her termination.

Clarke filed the initial complaint in this action on December 30, 2010, but it was never served. She filed an amended complaint on January 11, 2011, and a second amended complaint on November 22, 2011.

Clarke pled claims for breach of contract, arguing that the Handbook created an employment contract under the principles outlined in Woolley,[1] a violation of the implied covenant of good faith and fair dealing, and tortious interference. She also asserted a claim under the New Jersey Civil Rights Act (Civil Rights Act), N.J.S.A. 10:6-1 to -2, which provides a cause of action against government officials for violations of constitutional rights. She did not make any claim under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -49, as the two-year statute of limitations had expired prior to the filing of the first complaint.[2]

After the close of discovery, the defendants moved for summary judgment. They argued, in part, that (1) Clarke's breach of contract claim failed because the Handbook contains clear and prominent disclaimers that negate any implication of contractual obligations; (2) the claim for breach of the implied covenant of good faith and fair dealing failed because there was no actual or implied contract; (3) Clarke could not bring a tortious interference claim against Herrada and Brassington because they were parties to her economic relationship with the Hospital; and (4) the Civil Rights Act claim failed because the individual defendants are not state actors. The motion also addressed Clarke's claims for compensatory and punitive damages. Clarke filed a cross-motion for summary judgment in her favor on the claim that the Handbook created an implied contract, arguing that the disclaimers were inadequate.

On January 25, 2013, following oral argument, the motion judge placed an oral decision on the record, explaining his reasons for granting defendants' summary judgment motion and denying Clarke's cross-motion. Implementing orders, one of which dismissed Clarke's second amended complaint with prejudice, were entered on the same day. This appeal followed.[3]

II.

Clarke raises the following arguments on appeal:

POINT ONE: LEGAL STANDARDS WHICH SHOULD HAVE BEEN FOLLOWED AND WERE NOT.

I. PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT ON HER BREACH OF CONTRACT CLAIM.

A. The Handbook Does Not Contain Legally Sufficient

Disclaimers to Cancel the Contract.

B. Plaintiff Has Successfully Pled a Woolley Claim and the Defendants['] Disclaimer Is Ineffective.

C. Defendants Breached Plaintiff's Agreement.

II. SINCE THERE IS A VALID CONTRACT, PLAINTIFF'S CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING [IS] PROVEN BY DEFENDANTS['] BAD FAITH ACTS.

III. IT IS FOR A JURY DETERMINATION WHETHER OR NOT THE INDIVIDUAL DEFENDANTS ARE PARTIES TO THE CONTRACT OF EMPLOYMENT WITH THE HOSPITAL OR ARE NOT. CONTRARY TO DEFENDANTS' POSITIONS, PLAINTIFF'S COMPLAINT SUFFICIENT-LY DEMONSTRATES TORTIOUS INTERFERENCE WITH ECONOMIC ADVANTAGE AND THE CONDUCT OUTLINED IN THE COMPLAINT AND PLAINTIFF'S STATEMENT OF MATERIAL FACTS DEMONSTRATE TORTIOUS INTERFERENCE WITH PLAINTIFF'S ECONOMIC RELATIONSHIP WITH THE HOSPITAL.

IV. PLAINTIFF'S CLAIMS SHOULD NOT HAVE [BEEN] DISMISSED ON STATUTE OF LIMITATIONS REASONS.

A. Plaintiff's [NJCRA] and Other Claims Are Not Barred by the Statute of Limitations.

B. Contract based actions-Breach of Implied Covenant of Good Faith and Fair Dealing[,] Interference with a Beneficial Economic Benefit and N.J.S.A. 2A:14-1.

V. PLAINTIFF'S NJCRA CLAIM IS NOT BARRED BECAUSE THERE IS NO REQUIREMENT THAT THE DEFENDANTS MUST BE STATE ACTORS.

VI. THE COURT SHOULD NOT STRIKE PLAINTIFF'S DEMAND FOR PUNITIVE DAMAGES.

VII. PLAINTIFF'S CLAIMS FOR DAMAGES BASED ON ECONOMIC LOSS MUST NOT BE STRUCK AS SHE HAS DILIGENTLY ATTEMPTED TO MITIGATE HER[] DAMAGES.

A.

We review a grant of summary judgment under the same standard as the motion judge. Rowe v. Mazel Thirty, LLC, 209 N.J. 35, 41 (2012). We must determine whether there are any genuine issues of material fact when the evidence is viewed in the light most favorable to the non-moving party. Id. at 38, 41. "The inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 536 (1995)) (internal quotation marks omitted). "[T]he legal conclusions undergirding the summary judgment motion itself [are reviewed] on a plenary de novo basis." Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 385 (2010).

It is well established that "'conclusory and self-serving assertions' in certifications without explanatory or supporting facts will not defeat a meritorious motion for summary judgment." Hoffman v. Asseenontv.com, Inc., 404 N.J. Super. 415, 425-26 (App. Div. 2009) (quoting Puder v. Buechel, 183 N.J. 428, 440 (2005)); see also Pressler & Verniero, Current N.J. Court Rules, comment 2.2 on R. 4:46-2 (2014) (citing Petersen v. Twp. of Raritan, 418 N.J. Super. 125, 132 (App. Div. 2011); Brae Asset Fund, L.P. v. Newman, 327 N.J. Super. 129, 134 (App. Div. 1999); Fargas v. Gorham, 276 N.J. Super. 135 (Law Div. 1994)).

B.

Clarke contends that the motion judge erred in determining that the Hospital's Handbook did not satisfy the requirements of Woolley, arguing instead that the disclaimers in the Handbook were insufficient to negate the implied contractual nature of her employment relationship with the Hospital with respect to issues related to termination and discrimination in the workplace.

In general, absent a contractual relationship, employment is at-will. Bernard v. IMI Sys., Inc., 131 N.J. 91, 106 (1993). An at-will employee may be discharged from employment for any

reason with or without cause, Woolley, supra, 99 N.J. at 290-91, as long as the employer's action does not contravene laws, such as the LAD, or otherwise violate public policy. Pierce v. Ortho Pharm. Corp., 84 N.J. 58, 72 (1980).

However, "an implied promise contained in an employment manual that an employee will be fired only for cause may be enforceable against an employer even when the employment is for an indefinite term and would otherwise be terminable at will," as long as the employment manual does not have "a clear and prominent disclaimer." Woolley, supra, 99 N.J. at 285-86. "[T]he reasonable expectations of [the] employee[]" is the key factor when determining whether the employment manual contains an implied promise to terminate employment only for cause. Witkowski v. Thomas J. Lipton, Inc., 136 N.J. 385, 392-93 (1994).

To be effective, a disclaimer must clearly advise the employee that the employer has the power to terminate employment "with or without good cause." Woolley, supra, 99 N.J. at 309. The disclaimer must also be "in a very prominent position." Ibid. The requirement of prominence may be satisfied in a variety of ways so long as it is "separated from or set off in a way to attract attention." Nicosia v. Wakefern Food Corp., 136 N.J. 401, 415 (1994). Ways to give a statement prominence include bold lettering, italics, capital letters, underlining, color, bordering, highlighting, or any other presentation that would "make it likely that it would come to the attention of an employee reviewing it." Id. at 415-16. "[T]he requirement of prominence can be satisfied in a variety of settings, and . . . no single distinctive feature is essential per se to make a disclaimer conspicuous." Id. at 416.

As already noted, the Hospital's Handbook has three disclaimers. The first is located on the third page of the Handbook, which is the first "substantive" page because it follows two welcome letters from Hospital executives. The disclaimer section is entitled "**ABOUT THIS HANDBOOK**" in bold, capitalized lettering. Following that heading, the first paragraph includes disclaimer language that notifies employees that the Handbook is not a contract, that

employees are employed at-will, and that they are subject to discharge with or without cause, notice, or progressive discipline.

The second disclaimer is found in the Employee Relations section of the Handbook, following the bolded title "**Employment at Will**." In the first sentence, there is a statement that employees are employed "at will." The disclaimer then describes the meaning of "at will" employment explaining that an employee's employment may be terminated at any time for any reason. The third employment disclaimer appears on the last page of the Handbook, above the signature line for acknowledging receipt of the Handbook. It reiterates that nothing in the Handbook nor other communications, written or oral, constitute a contract.

We are satisfied that the disclaimers more than satisfy the requirements of Woolley. They plainly state that an employee, like Clarke, is an at-will employee and subject to termination at any time and for any reason. It is clear as a matter of law that these are effective disclaimers that provide adequate notice to employees that they are employed only at-will and are subject to termination without cause. See Nicosia, supra, 136 N.J. at 416-17 (holding that the effectiveness of a disclaimer can be resolved by the court as a question of law when the disclaimer is clear and uncontroverted). We also conclude that the first disclaimer, which specifically asserted that the Handbook was not a contract, precludes acceptance of Clarke's argument that the Handbook constituted an implied contract that there would be no discrimination in the workplace. See Flizack v. Good News Home for Women, Inc., 346 N.J. Super. 150, 164 (App. Div. 2001).

Because we find no actual or implied contract, we need not address the merits of Clarke's arguments concerning the implied covenant of good faith and fair dealing. See Nolan v. Control Data Corp., 243 N.J. Super. 420, 429 (App. Div. 1990) ("In the absence of a contract, there is no implied covenant of good faith and fair dealing."); Noye v. Hoffmann-La Roche, Inc., 238 N.J. Super. 430, 434 (App. Div.) ("In the absence of a contract, there can be no breach of an implied

covenant of good faith and fair dealing."), certif. denied, 122 N.J. 146 (1990); McQuitty v. Gen. Dynamics Corp., 204 N.J. Super. 514, 520 (App. Div. 1985) ("Since plaintiff was working without a contract as an at-will employee, his argument that every contract imposes a duty of good faith and fair dealing is irrelevant.").

C.

Clarke also contends that the motion judge erred in rejecting her claim that Herrada and Brassington tortiously interfered with her economic advantage.

A claim for tortious interference requires proof that one or more defendants interfered with a plaintiff's legally protectable expectation of receiving a present or future economic benefit under an existing or prospective contract or economic relationship. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 751 (1989).

> An action for tortious interference with a prospective business relation protects the right to pursue one's business, calling, or occupation, free from undue influence or molestation. Not only does the law protect a party's interest in a contract already made, but it also protects a party's interest in reasonable expectations of economic advantage. To prove its claim, plaintiff must show that it had a reasonable expectation of economic advantage that was lost as a direct result of defendants' malicious interference, and that it suffered losses thereby. Causation is demonstrated where there is "proof that if there had been no interference there was a reasonable probability that the victim of the interference would have received the anticipated economic benefit."

[Lamorte Burns & Co. v. Walters, 167 N.J. 285, 305-06 (2001) (citations omitted).]

Herrada and Brassington were Clarke's supervisors at the Hospital. They were not strangers to her employment relationship and, consequently, cannot be said to have tortiously interfered with it. "[I]t is 'fundamental' to a cause of action for tortious interference with a prospective economic relationship that the claim be directed against defendants who are not parties to the relationship." Printing Mart-Morristown, supra, 116 N.J. at 752; Silvestre v. Bell Atl. Corp., 973 F. Supp. 475, 486 (D.N.J. 1997) (holding that "[a] tortious interference with contract claim can be waged only against a third-party who is not a party to the contractual or economic relationship at issue"), aff'd, 156 F.3d 1225 (3d Cir. 1998). In Mosley v. Bay Ship Management, Inc., 174 F. Supp.2d 192, 202 (D.N.J. 2000), the District Court, applying New Jersey law, held that "[c]laims for tortious interference with a contract brought by an employee against a supervisor . . . acting in the course of his employment must be dismissed." See also Marrero v. Camden Cnty. Bd. of Soc. Servs., 164 F. Supp.2d 455 (2001). In addition, there are insufficient facts in the record to suggest that Herrada and Brassington were acting so contrary to their duties as supervisors for the Hospital that their conduct was outside their participation in the economic relationship between Clarke and the Hospital.

D.

Having reviewed Clarke's remaining arguments in light of the record and applicable law, we conclude that they are without merit and do not warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We add only that her claim under the Civil Rights Act is precluded by the

Supreme Court's recent decision in Perez v. Zagami, LLC, 218 N.J. 202, 215-16 (2014), which held that private individuals cannot bring claims under the Act against individuals who were not acting under "color of [state] law." Because the defendants were not acting under color of state law, Clarke has no viable claim under the Act.

Affirmed.

1 See Woolley v. Hoffman-La Roche, Inc., 99 N.J. 284, modified, 101 N.J. 10 (1985).

2 In addition, Clarke made no claim under the New Jersey Wage and Hour Law, N.J.S.A. 34:11-56a to -56a30, which provides that every employer must pay its employees one-and-one-half times the employee's regular hourly wage (the statutory rate) for each hour the employee works in excess of forty hours in any week. N.J.S.A. 34:11-56a4. That statute also has a two-year limitations period. N.J.S.A. 34:11-56a25.1.

3 On February 8, 2013, Clarke moved for reconsideration in the Law Division. The motion judge denied the reconsideration motion in an order supported by a statement of reasons on March 22. On appeal, Clarke does not address the denial of her motion for reconsideration.
