NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3480-12T2

STEVEN D'AGOSTINO,

Plaintiff-Appellant,

v.

MUSICAL HERITAGE SOCIETY, JEFFREY NISSIM, and STEVEN CILENTO,

Defendants-Respondents.

Argued November 19, 2014 – Decided August 20, 2015

Before Judges Alvarez, Waugh, and Maven.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-4886-09.

Steven D'Agostino, appellant, argued the cause pro se.

Lawrence H. Shapiro argued the cause for respondents (Ansell Grimm & Aaron, attorneys; Mr. Shapiro, on the brief).

PER CURIAM

Plaintiff Steven D'Agostino appeals the Law Division's June 28, 2012 and February 22, 2013 orders dismissing his claims against defendants Musical Heritage Society (MHS), Jeffrey Nissim, and Steven Cilento, and awarding them counsel fees as a discovery sanction. We affirm.

I.

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

A.

MHS, a corporation formerly based in Montclair, was in the business of selling music through the mail and online. MHS specialized in classical music. In October 2006, it hired D'Agostino as an independent contractor, paid on an hourly basis, to assist with the programming necessary to establish its proposed jazz website, which was scheduled to launch in September 2007. Three months later, D'Agostino became a full-time employee at an annual salary of $50,000.

As a full-time salaried employee, D'Agostino was expected to work a minimum of forty hours per week during normal business hours, which were between 9:00 a.m. and 5:00 p.m. He was enrolled in MHS's healthcare insurance plan, which was offered through Horizon Blue Cross Blue Shield of New Jersey (Horizon).

After D'Agostino started as a full-time employee, Nissim, MHS's President, agreed to accommodate D'Agostino's pre-existing commitments as a classical guitar teacher by allowing him to leave work at 4:00 p.m. three days a week. D'Agostino was required to make up the three missed hours by working later on the two remaining work days.

In spring 2007, Nissim noticed that D'Agostino was arriving at work progressively later. At times, he did not arrive until 10:30 a.m. When Nissim advised D'Agostino that he should adhere to the 9:00 a.m. arrival time, D'Agostino explained that his tardiness was the result of sleep apnea.[1]

Nissim then agreed to allow D'Agostino "some flexibility with his start time," as long as he "[made] up any missed hours at the end of the day." According to D'Agostino, however, Nissim did not provide any specific terms regarding the arrangement, merely presenting a "general understanding of flexibility."

During the summer, D'Agostino's tardiness worsened. He sometimes arrived between 11:30 a.m. and 1:00 p.m. MHS time sheets reflect that D'Agostino occasionally stayed at work until 7:00 p.m. or later on the days he arrived late, but that he did not do so on a regular basis.

Nissim received complaints from Cilento, D'Agostino's supervisor, and other staff members that D'Agostino's tardiness was having a negative effect on the progress of the jazz

[1] D'Agostino produced medical records from the 1990s documenting his sleep apnea condition. However, he did not provide medical documentation supporting his claim that his late arrival to work in 2007 was related to sleep apnea or any other medical condition.

website.[2] After reviewing D'Agostino's time sheets, Nissim discovered that D'Agostino was not working the required forty hours per week because of his erratic schedule. As a result, he changed D'Agostino from a full-time to an hourly employee.

On September 14, D'Agostino sent the New Jersey Department of Labor (NJDOL) an email with the subject: "Proof needed for possible wage complaint." D'Agostino wrote that he had an issue with MHS regarding his wages that he was about to bring to Nissim's attention. He explained that he was writing to the NJDOL in advance to create a record that he had complained about his wages, in case the issue was not resolved and he was terminated.

On September 15, D'Agostino telephoned Nissim to ask why he was not being paid for the recent Labor Day holiday and a personal day. D'Agostino recorded the telephone conversation without Nissim's knowledge. Nissim explained that he had switched D'Agostino to hourly from full-time status because he had been averaging twenty-seven hours per week rather than the forty-hour minimum required for full-time status. He reminded D'Agostino that they had discussed the issue several times. D'Agostino did not challenge Nissim's assertion that he and

[2] MHS's new jazz website did not launch on the date planned, which Nissim attributed, in part, to D'Agostino's absence during normal working hours.

Nissim had spoken about his low work hours, but responded only that he had not been aware that an hourly employee was not entitled to be paid for holidays or sick days. D'Agostino told Nissim that he was trying to get back to working the required forty hours, but was often late because he would take Tylenol P.M. in the evening for various injuries.

Nissim also discussed D'Agostino's overall lack of professionalism, expressing concern over his habit of coming into work at noon dressed in sweatpants. Nissim suggested to D'Agostino that he might not be able to work a "full-time[,] forty-hour-a-week paycheck kind of job" because of problems beyond his control. D'Agostino agreed, but expressed his frustration over the pending loss of his health benefits.

After D'Agostino became an hourly employee, he met with Arlene Hodder, Nissim's secretary, to discuss his wages. D'Agostino requested back pay "for those weeks when [he] was changed from [a salaried] to hourly" employee. When Hodder expressed reservations, D'Agostino told her he would file a wage complaint.[3]

Hodder later reviewed D'Agostino's time sheets and confirmed that he had been properly compensated during the time in question, including holidays and "absentee days." She did

[3] D'Agostino did not include any response from the NJDOL in his appendix.

not inform anyone at MHS, including Nissim, that D'Agostino had told her he would file a wage complaint.

On October 2, Cilento sent a memorandum to Nissim recommending D'Agostino's termination. He explained his reasons as follows:

> Over the past several months, [D'Agostino] and I have had many conversations, initiated by me as his Supervisor, due to his inability to fulfill the work responsibilities of a full[-]time employee at [MHS]. Although we have attempted to work with him in granting him the privilege of unorthodox start and finish times during his work week, he has still not been able to meet our requirements to the satisfaction of management. His hours worked did not match the hours paid, meaning we were paying for a full[-]time person who repeatedly came up short on hours worked.
>
> While there was some opportunity for latitude in start time, it has become very apparent, particularly in our most recent push to get our Jazz Store catalog up and running fully on the web, that all members of the IT team should be on hand from the start of the business day (9:00 AM) until all aspects of any program in progress have been checked and cleared.
>
> It was greatly disappointing, after all of our collective efforts had not succeeded in getting the website up and running Thursday, to have the whole team (and Jeff Nissim) left sitting and waiting in the Conference Room for [D'Agostino] to make the necessary changes to the shopping cart, when he had actually left the building for the day. The following day, Friday, everyone waited for [D'Agostino] to arrive so that the shopping cart could be reinstated and the site activated, and he did not appear

> until 12:45 PM. By the time [D'Agostino] had finished his work, the workday had ended for everyone else, and we were not able to turn the site on once again. . . .
>
> This does not cover everything that is unacceptable. [D'Agostino's] attitude of setting himself apart as someone who does his work faster and better than others, entitling him to be singled out and treated differently, is a situation that we cannot live with, working as we do as a team.

After receiving the memorandum, Nissim informed D'Agostino that he was terminated effective October 3, 2007. D'Agostino was also removed from MHS's Horizon insurance plan.

Shortly thereafter, Nissim sent D'Agostino a letter enclosing checks for outstanding wages. Nissim explained the basis for each check. One check was for the Labor Day holiday, and the other was for two work days, two sick days, and unused vacation time.

Nissim's letter explained that D'Agostino had only worked more than forty hours during one week that summer. He had worked fewer than forty hours for all other weeks. Nissim noted that he and Cilento had repeatedly counseled D'Agostino that he must "conform to the hours necessary to get the work of [the] IT team done in a timely manner." He characterized D'Agostino as uncooperative and stated that he had "been responsible for holding up the team and impeding, rather than enhancing the progress made." Nissim offered D'Agostino an opportunity to

work as a consultant on future projects, pending further discussions regarding his hourly rate.

On October 11, D'Agostino sent Hodder an email contesting the amounts of the checks Nissim had sent him. He claimed that he was still owed $11,596.39 and that MHS had overcharged him for the health insurance. D'Agostino also stated that Nissim had "most likely" been "miscalculating [his] average hours worked each week, and thus as a result [D'Agostino] felt [Nissim's] entire decision to switch [him] to hourly instead of salary was based upon an erroneous calculation." In addition, he accused Cilento of falsifying his timesheets. Finally, he contended that MHS had failed to pay him the five-figure bonus he had been promised when the jazz website was completed.

MHS's law firm responded to D'Agostino's email, denying his allegations and indicating that employment decisions were within MHS's sole legal discretion. The letter also maintained that MHS employees had not been promised a bonus once the jazz website was launched.

D'Agostino filed a claim for unemployment benefits, which MHS disputed.[4] He also filed a wage complaint with the NJDOL, which stated that MHS (1) had failed to compensate him correctly

[4] D'Agostino's application for unemployment benefits was denied because he was terminated for cause.

following his transition from salaried to hourly status and (2) had wrongfully terminated him.[5]

According to emails exchanged between D'Agostino and the NJDOL district supervisor during January 2008, D'Agostino maintained that Hodder had suggested, during the unemployment compensation hearing, that D'Agostino had been fired for filing a wage complaint. After a review of the recording of the hearing, the NJDOL determined that D'Agostino had not been terminated for filing a wage complaint. According to the NJDOL's internal emails, the recording reflected that Hodder had cited different reasons for D'Agostino's termination, including his frequent absence from work. The NJDOL ultimately found that D'Agostino "had been paid all wages owed to him and that his termination was based on poor performance."

In a letter dated June 20, D'Agostino advised MHS's attorney that he had filed suit against Horizon for failing to pay its share of charges for his October 10 doctor visit. In response, MHS confirmed with Horizon that D'Agostino should have remained a participant in MHS's insurance plan through the end of October 2007. MHS sent Horizon the premium payment for that month. Horizon then paid the doctor in June 2008. On July 2, D'Agostino and Horizon entered into a settlement in which the

[5] The record before us does not include a copy of D'Agostino's wage complaint.

default judgment, which had been obtained against D'Agostino by his doctor for the outstanding medical bill, was vacated. Horizon was ordered to pay D'Agostino $122 in litigation costs.

B.

D'Agostino filed a pro se complaint against MHS in October 2009, alleging that MHS underpaid him, failed to pay a bonus he had been promised, and terminated him in retaliation for threatening to file a wage claim. D'Agostino filed an amended complaint in May 2010, after being granted leave to do so, which added Nissim and Cilento as individual defendants and pled other causes of action.

Defendants moved to dismiss the sixteen-count amended complaint for failure to state a claim. On August 27, the motion judge placed an oral decision on the record.[6] He dismissed ten of the sixteen counts, three with prejudice and seven without prejudice. He granted D'Agostino leave to re-plead the counts that had been dismissed without prejudice.

On October 25, 2012, D'Agostino filed a sixteen-count second amended complaint. It made the following claims: (1) contractual damages for unpaid wages; (2) damages for breach of contract for MHS's failure to pay him the five-figure bonus he

[6] The motion was decided on the papers with the consent of both parties.

alleged he had been promised; (3) damages for his wrongful discharge; (4) damages for conversion/fraud in connection with the over-deduction for health care contributions; (5) damages for common law fraud as a result of Nissim's alleged misrepresentation regarding the over-deduction of money from his paycheck; (6) damages for fraudulent concealment of the alleged misrepresentation regarding his health insurance; (7) damages for defendants' breach of their fiduciary duties to him "to ensure that deductions taken from his last paycheck were paid to [Horizon] for health care coverage to continue through the entire month of October 2007"; (8) damages for harm caused to his "future income potential" by (a) Nissim's alleged comments to other employers about him, and (b) Nissim having urged him to scale back his guitar lessons, which caused friction with the music store at which he gave lessons; (9) damages for Nissim's alleged injury to his reputation by providing poor recommendations to prospective employers; (10) damages resulting from tortious interference with his economic advantage by Nissim and Cilento; (11) damages resulting from Nissim and Cilento's conspiracy to commit a tort in connection with Cilento's recommendation to Nissim that he fire him; (12) damages resulting from Cilento's creation of a hostile work environment by speaking to him in a "demeaning tone" in front of other employees knowing that the primary cause of his tardiness was

his sleeping condition; (13) damages resulting from intentional malice towards him by over-deducting money from his last paycheck for his health insurance and by challenging his receipt of unemployment benefits; (14) damages resulting from defendants' "agent's negligence causing harm to others," assuming he could not prove intentional malice; (15) punitive damages; and (16) damages for defendants' breach of the covenant of good faith and fair dealing in connection with a five-figure bonus.

In November 2010, MHS and Nissim[7] filed a motion to dismiss the second amended complaint for failure to state a claim. On January 28, 2011, with D'Agostino and MHS's counsel present, the motion judge placed an oral decision on the record. He granted the motion to dismiss counts thirteen, intentional/malicious harm, and fourteen, agent's negligence, on the basis that they were primarily factual narratives rather than causes of action. He dismissed count ten, tortious interference with economic advantage, for the same reason.

With respect to count nine, defamatory injury to reputation, the judge explained to D'Agostino that, as written, the claim would be barred by the statute of limitations.

[7] Cilento did not file an answer. Although D'Agostino obtained a default against him, it was vacated and all three defendants were ultimately represented by the same firm.

However, he allowed D'Agostino to obtain discovery to determine whether Nissim had made any statements to prospective employers that he considered defamatory within the one-year limitations period.

The judge declined to dismiss count four, conversion/fraud; count five, common law fraud; count six, fraudulent concealment; and count seven, breach of fiduciary duty, which he characterized as within the "language of the law." The judge found that the ultimate issue was whether defendants intended to misrepresent to D'Agostino that insurance coverage had been provided to him in October 2007, when in fact it had not been. He noted that the issue was complicated by the fact that MHS and Horizon had worked out an arrangement as to his health insurance premium for the month of October 2007 only after the doctor had sued D'Agostino. As a result, the judge found that D'Agostino had pled those counts sufficiently. Finally, the judge dismissed count eight, damage to future income potential, with prejudice as to all defendants because "there is no such claim in and of itself in the State of New Jersey."[8]

During his May 13 deposition, D'Agostino testified that he recorded the conversation in which Nissim had promised him a

[8] The judge did not address each count of D'Agostino's second amended complaint.

five-figure bonus once the jazz website went live, but that he had been unable to find the recording during the eleven-month discovery period. He explained that he had been "extremely busy," although he was unemployed at the time. D'Agostino added that it was his regular practice to tape record people, conceding that he never requested permission from those he recorded.

With respect to his claim that Nissim had defamed him to a prospective employer, D'Agostino did not provide the name of the prospective employer in his responses to interrogatories and document demands. When asked to provide the name during the deposition, D'Agostino responded: "I believe that I will provide that answer later." However, he never did so.

The parties had selected August 2 for D'Agostino's depositions of nine MHS employees, including Nissim and Cilento. D'Agostino failed to appear. Instead, D'Agostino left a voicemail at defense counsel's office the night of August 1, asserting that he had to cancel because he was up late preparing an emergent application to file with this court.[9]

[9] Although a copy of the application is not in the record, the transcript of the August 12 case management conference reflects that D'Agostino filed an application seeking leave to appeal one or more discovery orders relating to the production of his audiotapes. We denied the application and ordered the trial judge to establish new discovery deadlines, including a deadline for D'Agostino to turn over all audiotapes in his possession. (continued)

On August 3, defendants filed a motion to dismiss some of D'Agostino's claims for failure to make discovery. They cited D'Agostino's failure to provide the audiotape in which Nissam was alleged to have promised a bonus, his redaction of the only audiotape he turned over to defendants, his refusal or inability to identify the prospective employer to whom the allegedly defamatory statement was made, his cancellation of the depositions he had requested the evening before they were scheduled, and his refusal to answer certain questions at his deposition.

The motion judge heard argument on October 18. With respect to the identity of the person to whom Nissam allegedly made the defamatory statements, D'Agostino explained that he had received a telephone call from someone who told him that Nissim had made disparaging comments about him. However, he admitted that he was unable to determine whether the caller was in fact a prospective employer.

The judge declined to dismiss any claims, citing the need for further discovery. However, due to D'Agostino's failure to comply with discovery orders in connection with the production of the audiotapes and last minute cancellation of depositions,

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(continued)
On August 12, the judge again ordered D'Agostino to produce all relevant audiotapes in his possession.

the judge requested defense counsel to submit an affidavit of services so he could award fees.

On March 5, 2012, defendants filed a motion for summary judgment seeking dismissal of the amended complaint with prejudice. A new motion judge heard oral argument on June 15. She granted the motion and entered an order dismissing D'Agostino's second amended complaint. D'Agostino filed an appeal, which we dismissed because the fee issue had not been resolved.

On February 22, 2013, the second motion judge held a hearing to address the amount of counsel fees. After reviewing defense counsel's affidavits, including one setting forth hourly rates and the number of hours expended in preparing witnesses for the cancelled depositions, as well as the factors set forth in Rule 4:42-9(b) and RPC 1.5(a), the judge concluded that an award of $7,450.36 was appropriate.[10] This appeal followed.

II.

D'Agostino raises the following issues for our review:

I. ERRORS IN THE DISMISSAL OF MY ENTIRE CASE ON DEFENDANTS' SUMMARY JUDGMENT MOTION.

A. Erroneous dismissals of multiple counts for failure to state a claim.

[10] On October 15, the judge allowed defense counsel to execute against D'Agostino's home in order to satisfy the February 2013 counsel fee judgment. D'Agostino filed an emergent application seeking a stay pending appeal, which we denied.

1. Erroneous dismissal of Count 3 (Wrongful discharge)

2. Erroneous dismissal of Counts 2 and 16 (Unpaid bonus)

3. Erroneous dismissal of Count 1 (Unpaid wages)

4. Erroneous dismissal of Counts 13, 14, and 15

B. Erroneous dismissal of Count 11 (Conspiracy)

C. Erroneous dismissals of remaining Counts

1. Erroneous dismissal of Count 12 (Hostile Work Environment)

2. Erroneous dismissal of Counts 4, 5, and 6 (Fraud Counts)

3. Erroneous dismissal of Count 7 (Breach of Fiduciary Duty)

4. Erroneous dismissal of Count 10 (Tortious Interference)

II. ERROR IN IGNORING DEFENDANTS' CONTUMACIOUS WITHHOLDING AND DECEPTIVE ALTERATION OF EVIDENCE.

III. ERRORS IN AWARDING SANCTIONS TO DEFENDANTS AND FAILING TO AWARD ME SANCTIONS.

IV. COUNTS 13, 14, AND/OR 15 NECESSARY FOR RETALIATORY DENIAL OF UNEMPLOYMENT BENEFITS.

V. NO AFFIRMATION ON OTHER GROUNDS.

A. The Entire Controversy Doctrine Not Applicable.

B. Evidence Supporting Count 3 (Wrongful Termination)

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 [finder of fact] 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)). "[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).

Although there were factual disputes between the parties, the motion judge went through the record with considerable care to determine whether those factual differences were genuine and material, and discussed each of the counts contained in D'Agostino's complaint separately.

A.

We turn first to D'Agostino's claim under the Wage Payment Law (WPL), N.J.S.A. 34:11-4.1 to -4.14. D'Agostino contends

that he "had been changed from a salaried employee to an hourly employee without any prior notice" and that he worked as an hourly employee for six weeks during the summer of 2007, during which time his pay rate had been decreased.

The relevant section of the statute requires employers to "[n]otify [their] employees of any changes in the pay rates or pay days prior to the time of such changes." N.J.S.A. 34:11-4.6(b).[11] See also Winslow v. Corporate Express, Inc., 364 N.J. Super. 128, 136 (App. Div. 2003). A plaintiff may maintain a private cause of action against an employer for an alleged violation of N.J.S.A. 34:11-4.6(b). Winslow, supra, 364 N.J. Super. at 137.

The judge found that D'Agostino's "rate of pay did not change" because "his hourly rate was determined by taking his prior weekly salary and dividing it by [forty] hours. Thus, if [D'Agostino] worked the same [forty] hours he had been obligated to work as a salaried employee, he would have received the same pay." As noted above, the record reflects that D'Agostino only worked forty hours for one week in summer 2007, and he earned the same amount he had earned as a full-time employee for that week.

[11] The law interpreting this particular provision of the WPL is limited.

We conclude that the trial judge correctly found that there had been no change in D'Agostino's pay rate, and that MHS was not required to provide him with notice under the statute. The record reflects that D'Agostino was also compensated for those benefits he would have received as a salaried employee. As a result, the motion judge did not err in dismissing D'Agostino's claim under the WPL.

B.

We next consider D'Agostino's breach of contract claims, including his allegation that defendants violated the implied covenant of good faith and fair dealing.

There is nothing in the record to suggest that there was a written or oral employment contract between MHS and D'Agostino.[12] D'Agostino argues that he entered into an oral agreement with Nissim for a five-figure bonus once the jazz store website was launched. However, he repeatedly failed to produce any audiotape supporting his assertion, despite his representation that such a recording was in his possession. D'Agostino points to another MHS employee who testified at a deposition about receiving bonuses on occasion. Significantly, that MHS employee

[12] In addition, because D'Agostino was an at-will employee, his termination could not have been a breach of the implied covenant of good faith and fair dealing.

did not testify that he received a bonus in connection with the jazz website.

In addition, D'Agostino failed to articulate the specifics of the purported agreement, such as the amount promised and the consideration for the bonus. As we held in Malaker Corp. Stockholders Protection Committee v. First Jersey National Bank, 163 N.J. Super. 463, 474 (App. Div. 1978), certif. denied, 79 N.J. 488 (1979), "[a]n agreement so deficient in the specification of its essential terms that the performance by each party cannot be ascertained with reasonable certainty is not a contract." The motion judge properly determined that D'Agostino had failed to create a genuine issue of material fact that he was entitled to additional compensation for doing what was "part and parcel of [his] general work obligations."

Because we find no actual or implied contract, we need not address the merits of D'Agostino'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.").

We conclude that the judge properly dismissed both the breach of contract and violation of the implied covenant of good faith and fair dealing claims.

C.

We now turn to D'Agostino's argument that the motion judge erred in dismissing his wrongful termination claim.

Absent an employment contract, "employers or employees have been free to terminate the employment relationship with or without cause." Pierce v. Ortho Pharm. Corp., 84 N.J. 58, 65-66 (1980) (citing Schlenk v. Lehigh Valley R.R. Co., 1 N.J. 131, 135 (1948)). To protect at-will employees from abusive practices by their employers, the Supreme Court has recognized a common law cause of action for at-will employees "who were discharged for reasons that were in some way 'wrongful.'" Id. at 67. For example, it is well settled that an employee may sue an employer "where he is discharged in retaliation for filing a worker's compensation claim, even if the worker's compensation statute does not provide such a remedy." Id. at 68 (citing Lally v. Copygraphics, 173 N.J. Super. 162 (App. Div. 1980), aff'd, 85 N.J. 668 (1981)).

To that end, an employee in New Jersey "has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy." Id. at 72; see also N.J.S.A. 34:19-1 to -8 (recognizing a statutory cause of action for retaliatory discharge; passed after Pierce). Sources of public policy include "legislation; administrative rules; regulations or decisions; and judicial decisions." Pierce, supra, 84 N.J. at 72. If an employee fails to point to a clear expression of public policy, a court "can grant a motion to dismiss or for summary judgment." Id. at 73.

In order to support a Pierce claim, a plaintiff must lodge a complaint with the appropriate entities. Tartaglia v. UBS Paine Webber Inc., 197 N.J. 81, 109 (2008). More specifically, "a complaint to an outside agency will ordinarily be a sufficient means of expression, but a passing remark to co-workers will not." Ibid. Further, "[a] direct complaint to senior corporate management would likely suffice, but a complaint to an immediate supervisor generally would not." Ibid. The record supports D'Agostino's claim that he reported his wage complaint to the NJDOL. However, there is an issue of fact as to whether he told Hodder and whether she, in turn, told Nissim. In reviewing a motion for summary judgment, however, we must assume that Hodder told Nissim that D'Agostino mentioned that he might file a complaint.

We conclude that the record before us does not contain sufficient evidence from which it could be inferred that MHS's stated reason for firing D'Agostino, his lateness and working of insufficient hours, was merely a pretext, and that the real reason was retaliation for his threat to file a wage complaint. D'Agostino has produced insufficient circumstantial or direct evidence that retaliation was more likely than not a motivating or determinative cause for his termination and he has failed to discredit the reason offered by MHS as the legitimate and non-discriminatory one. See DeWees v. RCN Corp., 380 N.J. Super. 511, 527-29 (App. Div. 2005) (citing Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994)).

The recorded conversation between Nissim and D'Agostino, the memorandum from Cilento to Nissim, the conclusions reached by the NJDOL, and the time sheets all demonstrate that the primary, if not sole, reason for D'Agostino's termination was his persistent tardiness. The purported connection between D'Agostino's remark to Hodder and his discharge a few weeks later is wholly speculative. See House v. Carter-Wallace, Inc., 232 N.J. Super. 42, 54 (App. Div.), certif. denied, 117 N.J. 154 (1989) (rejecting a "wholly speculative" connection between a complaint and a later termination).

For those reasons, we conclude that the motion judge did not err in dismissing the wrongful termination claim.

D.

Counts four, five, and six of the second amended complaint are based on MHS's alleged fraud in deducting approximately $115 from D'Agostino's last paycheck while failing to pay his health insurance premium for the month of October 2007. D'Agostino also alleges that the failure to pay the premium resulted in a breach of MHS's fiduciary duty.

D'Agostino failed to advance any evidence that MHS collected, but intentionally failed to pay, his health insurance premium for October 2007. That the premium was deducted but not paid to Horizon in a timely manner does not raise a question of fact as to fraudulent intent. In any event, the delayed payment did not result in any harm. After MHS contacted Horizon about the issue, D'Agostino's medical bill was paid, the default judgment was vacated, and his litigation costs were reimbursed by Horizon. We conclude, therefore, that the motion judge properly dismissed these claims.

E.

We now address D'Agostino's argument that the motion judge erred in dismissing his claim that Cilento interfered with his 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).]

Because Cilento was D'Agostino's supervisor at MHS, he cannot be said to have tortiously interfered with D'Agostino's relationship with MHS. "[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 (D.N.J. 2001). There are insufficient facts in the record to suggest that Cilento was acting so contrary to his duties as a supervisor that his conduct was outside his participation in the economic relationship between D'Agostino and MHS.

For that reason, we find that the judge correctly dismissed the claim.

F.

We turn next to D'Agostino's claim that he was subjected to a hostile work environment on the basis of sleep apnea.

The Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, defines "disability" as follows:

> [P]hysical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness including epilepsy and other seizure disorders, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech

> impediment or physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device, or any mental, psychological or developmental disability, including autism spectrum disorders, resulting from anatomical, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques.
>
> [N.J.S.A. 10:5-5(q) (emphasis added).]

To establish a cause of action based on a hostile work environment, a plaintiff must prove that the complained-of conduct: (1) would not have occurred but for the employee's protected status and was (2) severe or pervasive enough to make a (3) reasonable person of plaintiff's protected status believe that (4) the conditions of employment have been altered and that the working environment is hostile or abusive. Cutler v. Dorn, 196 N.J. 419, 430 (2008) (quoting Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 603-04 (1993)).

"Where the existence of a [disability] is not readily apparent, expert medical evidence is required." Viscik v. Fowler Equip. Co., 173 N.J. 1, 16 (2002). D'Agostino failed to produce current medical evidence demonstrating that he suffered from sleep apnea at the time Cilento allegedly demeaned, harassed, and embarrassed him, thereby creating a hostile work environment. At most, D'Agostino presented medical records,

rather than a certification or medical report, demonstrating that he suffered from sleep apnea or a similar condition in the early to mid-1990s. He did not, however, present any documentation to support his claim that he suffered from this same condition in 2007 or that it caused him to be late for work.

We find no error in the dismissal of the hostile work environment claim.

G.

D'Agostino argues that the motion judge erred in dismissing his defamation claim against Nissim.

To prove defamation, a plaintiff must establish that the defendant "(1) made a defamatory statement of fact (2) concerning the plaintiff (3) which was false, and (4) which was communicated to a person or persons other than the plaintiff." Feggans v. Billington, 291 N.J. Super. 382, 390-91 (App. Div. 1996). The fifth element that must be proven is fault. Id. at 391. Fault in private defamation is proven by a negligence standard. Costello v. Ocean Cnty. Observer, 136 N.J. 594, 612 (1994). "[P]laintiff must plead facts sufficient to identify the defamatory words, their utterer and the fact of their publication. A vague conclusory allegation is not enough." Darakjian v. Hanna, 366 N.J. Super. 238, 249 (App. Div. 2004) (internal quotation marks omitted).

D'Agostino's claim that Nissim defamed him through comments made to an unidentified prospective employer cannot survive a motion for summary judgment. In addition to the fact that the nature of the defamatory remarks is not made clear in the record, D'Agostino cannot even identify the person to whom the remarks were made or the nature of the employment it is alleged to have prevented him from obtaining. Although D'Agostino repeatedly asserted that he would provide the name of the employer "at a later date," he never did so. As the motion judge determined, D'Agostino's proof of the defamation and its publication, which rests solely on his own testimony of something an unidentified caller told him, also constitutes inadmissible hearsay.

We conclude that the judge properly dismissed the claim.

H.

Finally we address the issue of the amount of counsel fees awarded to defendants. D'Agostino contends that the motion judge erred in imposing sanctions, in the form of counsel fees, for his failure to produce the audiotapes and for canceling nine depositions on their eve. We disagree.

The decision whether to award counsel fees is discretionary and subject to an abuse of discretion standard on appellate review. Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001). "'We will disturb a trial court's determination on

counsel fees only on the "rarest occasion," and then only because of clear abuse of discretion.'" Barr v. Barr, 418 N.J. Super. 18, 46 (App. Div. 2011) (quoting Strahan v. Strahan, 402 N.J. Super. 298, 317 (App. Div. 2008)).

With respect to the audiotapes, which were relevant to D'Agostino's claims for defamation and breach of contract, the first motion judge accurately reviewed the record and found that D'Agostino had withheld discovery for over a year, producing only one redacted audiotape, when he had represented that several other tapes existed.

As to the canceled depositions, D'Agostino himself admitted at the October 18 hearing that he "was not able to attend that day [because he] was up the night before preparing [his] emergent appeal," further conceding that he "mismanaged" his time. There was nothing so urgent about D'Agostino's application as to justify the cancellation of nine depositions that had been scheduled in advance. Although he left a message on counsel's office voicemail the night before the scheduled depositions, that cannot reasonably be expected to give adequate or even actual notice that a deposition the following morning has been cancelled.

We find no clear abuse of the judge's discretion in awarding counsel fees.

III.

D'Agostino's remaining arguments are without merit and do not warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.