SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0895-20

A. DAWN TAWWATER,

Plaintiff-Appellant,

v.

ROWAN COLLEGE AT GLOUCESTER COUNTY, ROWAN COLLEGE AT GLOUCESTER COUNTY BOARD OF TRUSTEES, DR. FRED KEATING, President, DR. LINDA MARTIN, Vice President for Academic Services, DANIELLE MORGANTI, Executive Director of Human Resources, DR. PAUL RUFINO, Dean of Liberal Arts, ALMARIE JONES, Director of Diversity, and MARNA L. CARLTON, Assistant Director of Human Resources, in their individual and official capacities,

Defendants-Respondents,

and

GENE J. CONCORDIA,

Chairperson, YOLETTE C. ROSS, Vice Chairperson, DOUGLAS J. WILLS, ESQUIRE, Treasurer, JEAN L. DUBOIS, Secretary, LEN DAWS, DR. JAMES J. LAVENDER, RUBY LOVE, CODY D. MILLER, PEGGY NICOLOSI, DR. GEORGE J. SCOTT and VIRGINIA N. SCOTT,

Defendants.

Argued February 1, 2023 – Decided May 9, 2023

Before Judges Vernoia, Firko and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Gloucester County, Docket No. L-0130-15.

Donald F. Burke argued the cause for appellant (Law Office of Donald F. Burke, attorneys; Donald F. Burke and Donald F. Burke, Jr., on the briefs).

Michael J. DiPiero argued the cause for respondents (Brown & Connery, LLP, attorneys; Michael J. DiPiero and Andrew S. Brown, on the briefs).

Foundation for Individual Rights and Expression, attorneys for amicus curiae Foundation for Individual Rights and Expression (Greg Harold Greubel, on the brief).

American Civil Liberties Union of New Jersey Foundation, Rutgers Constitutional Rights Clinic

Center for Law & Justice, and Pashman Stein Walder Hayden, PC, attorneys for amicus curiae American Civil Liberties Union of New Jersey (Jeanne LoCicero and Alexander Shalom, of counsel and on the brief; Ronald K. Chen and Howard Pashman, on the brief).

PER CURIAM

Plaintiff A. Dawn Tawwater appeals from an October 19, 2020 Law Division order denying her requests to reinstate her claims under the New Jersey Civil Rights Act (NJCRA), N.J.S.A. 10:6-1 to -2, for partial summary judgment as to liability on her NJCRA claims, and to return the case to the active trial list. The order was entered following resolution of her contract-based claims in arbitration. Having considered plaintiff's arguments in light of the record and controlling legal principles, we affirm.

I.

We summarize the relevant facts from the record before the motion court in a light most favorable to plaintiff. Elazar v. Macrietta Cleaners, Inc., 230 N.J. 123, 135 (2017). On July 21, 2014, plaintiff was hired by defendant Rowan College at Gloucester County (Rowan) as a ten-month tenure track sociology instructor with a starting salary of $42,500 per annum. Plaintiff moved from Texas, where she was employed at Austin Community College as a non-tenured adjunct professor, to New Jersey after she accepted the position.

Plaintiff completed and signed paperwork in the new employee packet that Rowan sent to her. One of the documents listed college policies that may result in disciplinary action. Other documents contained in the packet were the collective bargaining agreement (CBA),[1] and the probationary board rule and regulation 7014 (also referred to as Administrative Procedure 7014).[2] Plaintiff signed Rowan's offer letter, and by doing so, agreed to be governed by applicable statutes, board policy, "college administrative rules and regulations, and the [CBA]." During her ninety-day probationary period, she was considered an at-will employee[3], subject to reassignment or termination.

Plaintiff was assigned to teach "Principles of Sociology," "Sociology of the Family," and "Social Problems." She taught her first class on September 3, 2014. Less than three weeks later, defendant Dr. Paul T. Rufino, the dean of

---

[1] The CBA is between Rowan's Board of Trustees and plaintiff's CBA representative, Rowan's Association of Teachers, which is affiliated with the New Jersey Education Association and National Education Association.

[2] Administrative Procedure 7014 is Rowan's probationary policy for its employees, which has been in effect since 1987.

[3] "In New Jersey, an employer may fire an employee for good reason, bad reason, or no reason at all under the employment-at-will doctrine. An employment relationship remains terminable at the will of either an employer or employee, unless an agreement exists that provides otherwise." Wade v. Kessler Inst., 172 N.J. 327, 338 (2002) (quoting Witkowski v. Thomas J. Lipton, Inc., 136 N.J. 385, 397 (1994)).

liberal arts, received a complaint via email from one of plaintiff's students. The student said the class was "not what [she] expected" and that plaintiff was "very unprofessional."

Specifically, the student described several instances in which plaintiff used foul language when speaking to her class, and said "fuck you" in response to another student's comment. By way of example, in describing how someone might respond to an individual falling out of a chair, plaintiff said someone might help "or we would just leave that motherfucker on the floor." In response to a question posed by the complaining student, plaintiff stated, "if you were paying attention, maybe you would fucking know." The student also reported that plaintiff stated in the same class session "some bitches should really fucking pay attention in class so that they know what we are learning."

In addition, the student's email criticized plaintiff's showing of the feminist music-video parody of "'Blurred Lines' by Robin Thicke"[4] as

[4] In her verified complaint, plaintiff describes the music-video parody called "Defined Lines" as "similar in style and execution to the video for 'Blurred Lines,' but with the gender roles reversed." The "Defined Lines" version "feature[s] men in their underwear, whereas the 'Blurred Lines' video features topless women." In the Foundation for Individual Rights and Expression's (FIRE) amicus brief, it elaborates that three female Australian law students filmed "Defined Lines" to explain "female objectification and misogyny" portrayed in "Blurred Lines" and pop culture.

"absurd." The student explained plaintiff created "an extremely uncomfortable environment," and requested to switch to another class. Rufino met with the student in person to discuss the complaint and brought the student to defendant Almarie Jones, director of diversity and equity, to address the complaint.

On September 22, 2014, Rufino met with plaintiff and reviewed the student's email with her. According to Rufino, plaintiff admitted using the "F" word in class but "didn't think it was offensive." Plaintiff was not sure if she used the profanity as part of "class content" or because she was "impassioned" about what she was saying. Rufino disagreed with the use of profanity, and plaintiff indicated she would "discontinue the use of such language." Plaintiff, on the other hand, testified at her deposition that Rufino told her the complaint was primarily about a "film" she showed in class. Rufino reviewed the film and found it "a little racy." The film was not reviewed by any other employee at Rowan other than Rufino. Plaintiff explained to Rufino "the pedagogy and the theoretical point" she was trying to make when she showed the film to her class, and to provoke her students "to think critically about sexual objectification in [the] media."

With regard to plaintiff's use of the "F" word, Rufino explained to her it was "touchy" and she should refrain from saying or using material with the "F"

word in her classroom, but she could use "damn" and "shit." Plaintiff denied using profane language in class but told Rufino she would "try to keep it [in] check."

Thereafter, another complaint was made by a student in another class who was offended by plaintiff's foul language. The student claimed plaintiff was "racist, sexist," and the student felt she was discriminated against because of her "learning disabilities." The student complained plaintiff said "motherfucker" four times during one class. The student requested to switch to a different class. Another student similarly complained of plaintiff's offensive language, "racial stereotypes," and not following the syllabus or materials. Additionally, the student complained plaintiff came late to class on one occasion, and the students left prior to her arrival.

Three days later, plaintiff lectured for twenty minutes, admonished the students for leaving the day she arrived late, and told them they would "lose points on their final grades." Plaintiff left the class early that day, turned off the lights, and shut the door behind her. Another student complained plaintiff "states a lot of her opinions and stereotypes about the black race that aren't true" and plaintiff was not "open" to students' views on topics. There was also a complaint about plaintiff cancelling a class without authorization.

To address these complaints, Rufino scheduled another meeting with plaintiff on October 6, 2014, and informed her she could be accompanied by a union representative. Prior to the meeting, plaintiff requested that Danielle Morganti, executive director of human resources, provide her with Rowan's employee conduct and work rules. Plaintiff, Rufino, Jones, defendant Dr. Linda Martin[5], vice president for academic services, defendant Marna L. Carlton, assistant director of human resources, and Oron Nahom, a union representative, were present at the meeting. At her deposition, plaintiff described the meeting as "heated." She admitted to using profane language both during the meeting and at her deposition, denied cancelling class, and explained she left class early on one occasion because she had finished lecturing. Specifically, plaintiff admitted saying "fuck you" to a student.

Because plaintiff admitted to some of the conduct, she was presented with a "last chance agreement" (LCA) that Rowan offered employees as an alternative to discharge. The LCA, authorized by defendant Dr. Fred Keating, Rowan's president, provided plaintiff with a final opportunity to improve her performance in order to continue her employment with Rowan. The LCA

[5] Dr. Linda Martin is also referred to as "Dr. Linda Martin-Hurlbert" in the record. We refer to her as Dr. Martin in this opinion.

required plaintiff to admit to the conduct which violated Rowan's polices, specifically the use of foul language and the unauthorized cancellation of class.

Plaintiff would also be required to refrain from the prohibited conduct in the future, publicly apologize to the affected classes, and participate in a training program, which would include "effective teaching methodologies, sensitivity training, and effective conversation." Any future student complaint filed against plaintiff or violation of the LCA would result in her immediate termination. Plaintiff was also advised that if she did not sign the LCA, her employment would be immediately terminated.

Plaintiff refused to sign the LCA. Based upon her teaching experience, plaintiff believed her behavior was appropriate. After refusing to sign the LCA, the Board of Trustees met and voted to terminate plaintiff. According to plaintiff, she was not given notice of the Board of Trustees meeting. After the meeting, plaintiff was provided with a letter stating:

> This letter is to inform you that effective today your position of Instructor I has been terminated. This action is based on violations of the following [c]ollege policies:
>
> - Board Policy and [Administrative] Procedure 7065 Employee Conduct and Work Rules

Based on the following actions:

> - Four student complaints filed within the first [thirty] days of employment for using indecent language and inappropriate behavior in the classroom.
>
> - Being late to one class that resulted in class cancellation for that day, and subsequently dismissing the same class early on the next scheduled meeting date without informing your [d]ean.
>
> The [c]ollege has no alternative but to terminate your position . . . .

Plaintiff was then given a printed copy of Administrative Procedure 7065, with the sections highlighted indicating her alleged violations:

> - Indecent or abusive language or gestures;
> - Leaving assigned work area without permission;
> - Participating in any activity that interferes with normal operations, or attempting to influence or persuade others to engage in such activities;
> - Rude or discourteous behavior to a student;
> - Failure to adhere to the rules, regulations and/or statutes;
> - Making vicious or malicious statements concerning any student; and
> - Insubordination, including the refusal to follow a supervisor's instructions.
>
> [(internal quotations omitted).]

After plaintiff was terminated, another student filed a complaint about her "excessive foul language that bothered a lot of students and distract[ed] from the actual lesson."

Plaintiff's union representative filed a grievance contesting the process that led to plaintiff's termination and the termination itself. On October 10, 2014, the grievance was received by Keating. That day, Morganti denied considering the grievance on the grounds Administrative Procedure 7014 provided for a ninety-day probationary period during which an employee was considered at-will. Any action occurring during such period would therefore not be subject to the grievance procedure or other internal appeals.

The CBA provides for steps culminating in binding arbitration with a third-party neutral individual. For reasons that are not clear in the record, the grievance was processed by Rowan, and at plaintiff's request, the grievance hearing was rescheduled to March 4, 2015. Prior to the hearing, plaintiff retained counsel and advised Rowan she would not be proceeding with the grievance hearing. The union representative formally withdrew her grievance. Plaintiff returned to Texas and recommenced employment with Austin Community College as an adjunct professor.

On January 26, 2015, plaintiff filed an order to show cause (OTSC) and a verified complaint in the Law Division seeking summary relief—primarily reinstatement to her former position—pursuant to Rule 4:67-1(a) and N.J.S.A. 47:1A-1 to -13. The verified complaint alleged violations of the NJCRA and sought declaratory relief (academic freedom and due process) (count one); violations of the NJCRA warranting injunctive relief and equitable reinstatement (count two); deprivation of a property right and breach of contract (count three); and detrimental reliance (count four). The court entered the OTSC and set a hearing date. Rowan opposed plaintiff's application for injunctive relief and for summary disposition and moved to dismiss count two of the verified complaint. On April 9, 2015, the OTSC hearing date, the court denied plaintiff's application and Rowan's motion to dismiss count two.

On May 13, 2015, Rowan moved to dismiss the verified complaint in lieu of filing an answer. The court granted Rowan's motion to dismiss Rowan's Board of Trustees as a defendant but denied its motion to dismiss the verified complaint. Following a period of discovery, on January 20, 2017, Rowan filed a motion for summary judgment on each of the claims in the verified complaint. On March 3, 2017, the court conducted oral argument on Rowan's motion. Five days later, plaintiff filed a motion on short notice for

leave to file and serve an amended complaint to add a cause of action for defendants' breach of "the covenant of good faith and fair dealing implied in every contract" (count five). Trial was scheduled to commence on March 20, 2017. Plaintiff's motion to amend was nonetheless granted, and the trial date was adjourned.

On August 12, 2017, the court granted in part and denied in part Rowan's motion for summary judgment. The court dismissed with prejudice plaintiff's civil rights and constitutional claims, including the NJCRA, procedural due process, substantive due process, freedom of speech, academic freedom founded on freedom of speech, and fundamental fairness claims. The court, however, denied Rowan's motion for summary judgment on plaintiff's breach of contract-based claims, including breach of contract, breach of good faith and fair dealing, and breach of contract based on plaintiff's alleged right of academic freedom claims because it found there were genuine issues of material fact as to those claims.

On October 26, 2017, Rowan moved for reconsideration of the court's decision as to plaintiff's contract-based claims. On January 2, 2018, the court granted Rowan's motion for reconsideration, in part. The court directed the parties to proceed with arbitration in accordance with the CBA on plaintiff's

contract-based claims, including conditions of employment, contract issues, good faith and fair dealing issues, and detrimental reliance. The court denied Rowan's motion to dismiss the complaint with prejudice but dismissed the contract-based claims listed above that were sent to arbitration without prejudice.[6]

The arbitration took place over the course of four days in September 2019. The parties were unable to stipulate to the issues the arbitrator was to determine. Plaintiff asserted the arbitrative issues were: (1) whether Rowan proved it had just cause to terminate her; (2) whether Rowan breached its obligation of good faith and fair dealing; and (3) whether plaintiff relied to her detriment on Rowan's promises and representations. Rowan contended the arbitrator should determine whether it violated the CBA and/or annual contract of employment when it terminated plaintiff's contract, and if so, what the remedy should be.

The arbitrator considered testimony from Rowan's representatives and plaintiff's prior students. On March 16, 2019, the arbitrator issued an opinion and award. The arbitrator found plaintiff's termination was not "arbitrary

[6] Rowan changed its name to Rowan College of South Jersey during the pendency of the arbitration.

and/or capricious;" however, she found that Rowan "failed to comply with its own policies and procedures for termination" because plaintiff was terminated "on the spot."

The arbitrator also found plaintiff established by a preponderance of the evidence that Rowan breached the covenant of good faith and fair dealing. The arbitrator determined the appropriate remedy for Rowan's breach of the implied covenant of good faith and fair dealing in failing to apply "normal procedures to terminate a non-tenured full-time teaching staff member" was "full salary payment for the first semester of the September 2014 to June 30, 2015 academic year," including all emoluments under the CBA.

On August 27, 2020, plaintiff moved for partial summary judgment on her NJCRA claims based on the factual findings made by the arbitrator and to return the matter to the active trial calendar. Specifically, plaintiff argued the arbitrator found Rowan "acted in bad faith" and "failed to comply with its own policies and procedures for termination." In light of the arbitrator's findings, plaintiff contended her NJCRA claims should be reinstated. Plaintiff claimed "[t]he facts were developed to a point that they had not even been developed at the time" of the court's earlier decision on August 12, 2017. In addition, plaintiff claimed the August 12, 2017 order was entered prior to the entry of a

final judgment, which means it "is interlocutory and can be reviewed at the [c]ourt's discretion." Rowan, however, contended plaintiff was improperly attempting to revive old claims that were already dismissed with prejudice.

Alternatively, plaintiff moved for a final appealable order. On October 19, 2020, in an oral opinion and order, the court denied plaintiff's request to reinstate her NJCRA claims, for partial summary judgment on her NJCRA claims, and to return the matter to the active trial calendar. The court noted plaintiff's NJCRA claims had already been dismissed on August 12, 2017. The court granted plaintiff's alternative request and certified the October 19, 2020 order as final for purposes of an appeal.

Plaintiff presents the following arguments for our consideration: (1) the arbitrator's findings could be construed to conclude that Rowan acted in "bad faith" and failed to comply with its own policies and procedures for termination, thereby depriving plaintiff of her constitutional rights and her rights under the NJCRA; (2) viewed in a light most favorable to plaintiff, a jury could find Rowan violated her free speech and academic freedom rights; (3) plaintiff was deprived of a property right; (4) the court erred in dismissing the individual defendants from the suit; and (5) the court erred in granting summary judgment to defendants.

We granted the FIRE's and the American Civil Liberties Union of New Jersey Foundation's (ACLU-NJ) application to file amicus curiae briefs. Both amici join in plaintiff's arguments seeking reversal of the order dismissing her NJCRA claims, and they argue faculty censorship has escalated without regard for protected pedagogical decisions. The FIRE also contends the LCA was an impermissible prior restraint on plaintiff's free speech.

II.

We review the disposition of a summary judgment motion de novo, applying the same standard used by the motion judge. Townsend v. Pierre, 221 N.J. 36, 59 (2015). Like the motion judge, we view "the competent evidential materials presented . . . in the light most favorable to the non-moving party, [and determine whether they] are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Town of Kearny v. Brandt, 214 N.J. 76, 91 (2013) (quoting Brill v. Guardian Life Ins. Co. 142 N.J. 520, 540 (1995)); see also R. 4:46-2(c). If "the evidence 'is so one-sided that one party must prevail as a matter of law,'" courts will "not hesitate to grant summary judgment." Brill, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)).

While a court must view the evidence in the light most favorable to the non-movant, "[c]ompetent opposition requires 'competent evidential material' beyond mere 'speculation' and 'fanciful arguments.'" Cortez v. Gindhart, 435 N.J. Super. 589, 605 (App. Div. 2014) (quoting Hoffman v. Asseenontv.com, Inc., 404 N.J. Super. 415, 426 (App. Div. 2009)). A motion for summary judgment will not be defeated by bare conclusions lacking factual support, Petersen v. Twp. of Raritan, 418 N.J. Super. 125, 132 (App. Div. 2011), self-serving statements, Heyert v. Taddese, 431 N.J. Super. 388, 414 (App. Div. 2013), or disputed facts "of an insubstantial nature," Pressler & Verniero, Current N.J. Court Rules, cmt 2.2 on R. 4:46-2 (2023).

III.

In denying plaintiff's motion for partial summary judgment in her favor and denying her request to reinstate the complaint, the court reasoned plaintiff failed to identify any specific civil rights violation. The court explained:

> I don't find any authority for procedural due process or substantive due process or a constitutional violation, that is a New Jersey constitutional violation, by the fact that the arbitrator alone found that there was, "termination on the spot" and [Rowan] acted in bad faith in not following [its] own procedures. There are many cases that talk about breach of contract in terms of failure to follow good faith. I find that it is just as likely that [the arbitrator] me[an]t here, as she did, she had the jurisdiction to proceed under a contract theory

> and she did. [Plaintiff] did not remark that these were constitutional violations. [Plaintiff] did not say that. And, in fact, [on August 12, 2017, the court],[7] . . . found that there were insufficient facts and law to warrant consideration of those alleged constitutional claims; and, therefore, [it] dismissed those claims.
>
> Remember what we're talking about here, as premised as a constitutional right, is the use of, repeatedly, of the vulgar F word within the first [thirty] days that this person was hired as a college instructor. Arguments that [Rowan] . . . did not have the right—and that's just the top of the consideration. She had other violations. [Plaintiff] missed her classes or she came late to her classes, once she was late in meeting her superior as well, and that she terminated a class early without getting the authority from her supervisor to do so. She refused to sign a [LCA] leading to the "termination on the spot."
>
> I do not find that under those facts there is a cause of action that can be equated. I find that it is a contractual argument that may, and as [the prior court] so found, that may lie in the agreements between the union and/or the plaintiff herself in her individual contract that she signed. I do not find there is any support in this record for constitutional violations.

Plaintiff also argues her NJCRA claim should not have been dismissed because Rowan acted "under color of law" and deprived her of rights secured by the Open Public Meetings Act (OPMA), N.J.S.A. 10:4-6 to -21, by not

[7] A prior judge handled the matter on August 12, 2017.

giving her a Rice notice.[8] Plaintiff contends she presented triable issues of material fact under the NJCRA because plaintiff was not provided with a Rice notice and the opportunity to have a public discussion about her personnel issues before she was terminated. Plaintiff also asserts Rowan's Board of Trustees' failure to maintain minutes of the meeting at which she was terminated violated the OPMA, N.J.S.A. 10:4-14, which requires a board to keep "reasonably comprehensive minutes" of its meetings. Stressing that she was deprived of a full and fair opportunity to be heard, plaintiff also claims her Title 18A rights were violated, thereby creating triable issues of fact under the NJCRA.

Additionally, plaintiff argues the court did not apply the proper standard of review and did not accept the facts alleged as plaintiff or the findings made by the arbitrator—some of which were favorable to plaintiff—by a preponderance of the evidence. Plaintiff contends the arbitrator's finding that Rowan failed to comply with its own policies and procedures by terminating her "on the spot," constitutes evidence Rowan acted in "bad faith." Plaintiff

---

[8] In Rice v. Union County Regional High School Board of Education, 155 N.J. Super. 64, 68-69 (App. Div. 1977), we held that the school board's failure to give advance notice to employees that their termination would be discussed violated the OPMA, N.J.S.A. 10:4-12(b)(8).

asserts the orders dismissing her NJCRA claims should be vacated, and partial summary judgment should be entered thereon because she claims the arbitrator's findings are binding and dispositive relative to her procedural and due process claims and establish her freedom of speech was infringed.

We conclude that viewing the facts in the light most favorable to plaintiff and as a matter of law, the court properly dismissed plaintiff's NJCRA claims because plaintiff did not assert facts sufficient to establish a violation of the NJCRA. The NJCRA in pertinent part states:

> Any person who has been deprived of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any exercise or enjoyment of those substantive rights, privileges or immunities secured by the Constitution or laws of this State, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under color of law, may bring a civil action for damages and for injunctive or other appropriate relief.
>
> [N.J.S.A. 10:6-2(c).]

Thus, the NJCRA provides a cause of action to any person who has been deprived of any rights under either the Federal or State constitutions by a "person" acting under color of law. Ibid. It "is not a source of rights itself." Lapolla v. Cnty. of Union, 449 N.J. Super. 288, 306 (App. Div. 2017) (citation

omitted). By its terms, "[t]wo types of private claims are recognized under this statute: (1) a claim when one is 'deprived of a right,' and (2) a claim when one's rights have been 'interfered with by threats, intimidation, coercion or force.'" Ibid. (quoting Felicioni v. Admin. Off. of Cts., 404 N.J. Super. 382, 400 (App. Div. 2008)).

The NJCRA, modeled after the Federal Civil Rights Act, 42 U.S.C. § 1983 (Section 1983), affords "a remedy for the violation of substantive rights found in our State Constitution and laws." Brown v. State, 442 N.J. Super. 406, 425 (App. Div. 2015), rev'd on other grounds, 230 N.J. 84 (2017) (quoting Tumpson v. Farina, 218 N.J. 450, 474 (2014)). The NJCRA has been interpreted by our Supreme Court to be analogous to Section 1983; thus, New Jersey courts "look[] to federal jurisprudence construing [Section 1983] to formulate a workable standard for identifying a substantive right under the [NJCRA]." Harz v. Borough of Spring Lake, 234 N.J. 317, 330 (2018). "[S]peech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." Connick v. Myers, 461 U.S. 138, 145 (1983) (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982)).

Under Harz, the test for establishing whether a statutory right may form the basis of a cause of action under the NJCRA requires the court to determine:

> (1) whether, by enacting the statute, the Legislature intended to confer a right on an individual; (2) whether the right "is not so 'vague and amorphous' that its enforcement would strain judicial competence," and (3) whether the statute "unambiguously impose[s] a binding obligation on the [governmental entity]."
>
> In addition to satisfying those three "factors," for purposes of our [NJCRA], plaintiffs must also "show that the right is substantive, not procedural."
>
> [234 N.J. at 331-32 (alterations in original) (citing Gonzaga Univ. v. Doe, 536 U.S. 273, 283-84 (2002) and quoting Tumpson, 218 N.J. at 475, 478).]

If a statute creates substantive rights under the Tumpson/Harz test, the court must then determine whether enforcement of those rights under the NJCRA is compatible with the statute. See Tumpson, 218 N.J. at 475 (explaining that even if a federal statute is found to create an individual right, this only gives rise to a rebuttable presumption that the right is enforceable under Section 1983). We now address each of plaintiff's arguments.

A.

OPMA

Plaintiff maintains it was error for the court not to reinstate her NJCRA claims because a jury could find Rowan deprived her of rights secured by the

OPMA, specifically her right to a Rice notice because she was not present at the public meeting addressing her personnel matters and could not "witness government in action." Plaintiff relies on the arbitrator's finding that Rowan failed to comply with its policies and procedures and terminated her on the spot. We observe that plaintiff did not allege a violation of her rights under OPMA in her amended complaint. Nonetheless, the court addressed the OPMA argument and found plaintiff could not maintain a cause of action under the OPMA. The court emphasized the OPMA is "remedial" in nature but "does not create, in any individual complainant, a private cause of action." Thus, the court found plaintiff has no basis for recovery under the OPMA. We agree.

The issue raised on appeal is one of statutory interpretation and requires that we construe the NJCRA and OPMA. Therefore, we undertake a de novo review of the trial court's decision, owing no deference to the trial court's legal determination. Id. at 467 (citing Farmers Mut. Fire Ins. Co. v. N.J. Prop.-Liab. Ins. Guar. Ass'n, 215 N.J. 522, 535 (2013)).

We begin our analysis by acknowledging that the OPMA establishes substantive rights under the Tumpson/Harz test. First, among other things, the OPMA states that the public has the right "to be present at all meetings of

public bodies, and to witness in full detail all phases of the deliberation . . . [and] to have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way." N.J.S.A. 10:4-7. Second, the public's rights under the OPMA are not vague and amorphous and the enforcement of such rights would not strain judicial competence. See Tumpson, 218 N.J. at 477. In addition, the OPMA creates unambiguous obligations on the part of public bodies that are subject to its requirements. See ibid.

Since the OPMA creates substantive rights under the Tumpson/Harz test, the question then becomes whether enforcement of those rights under the NJCRA is compatible with the OPMA. See Tumpson, 218 N.J. at 478. In the OPMA, our Legislature created specific remedies for violations of the law, which do not include claims brought under the NJCRA for deprivations or threatened deprivations of rights under the OPMA. The OPMA provides in pertinent part that "[a]ny action taken by a public body at a meeting which does not confirm with [OPMA's requirements is] . . . voidable in a proceeding in lieu of prerogative writs," which may be brought in the Law Division. N.J.S.A. 10:4-15(a).

Moreover, "[a]ny party, including a member of the public, may institute" such a proceeding. N.J.S.A. 10:4-15(b). If the court finds that "the action was taken at a meeting[,] which does not conform to the provisions of [the OPMA,] the court shall declare such action void." Ibid. The OPMA also states that "[a]ny person . . . may apply to the Superior Court for injunctive orders or other remedies to ensure compliance with the provisions of [the OPMA]." N.J.S.A. 10:4-16.

Thus, the OPMA establishes a comprehensive statutory scheme with limited remedies. We are not convinced the Legislature intended to supplement that statutory scheme by applying the NJCRA to deprivations or threatened deprivations of rights established under the OPMA. In our view, the broad remedies available under the NJCRA are entirely inconsistent with the comprehensive statutory scheme in the OPMA. Otherwise, applying the remedies under the NJCRA to violations under the OPMA would significantly alter a comprehensive legislative scheme.

For example, the OPMA does not provide for an award of damages, which is permitted under the NJCRA. And, the OPMA provides for the grant of injunctive relief and other remedies to ensure prospective compliance with its provisions. N.J.S.A. 10:4-16. Any attempt to apply remedies under the

NJCRA to violations of the OPMA would not complement the OPMA and would substantially alter a comprehensive legislative scheme. Hence, even if Rowan failed to provide plaintiff with adequate Rice notice, that violation does not provide a basis for the relief requested under the NJCRA. The OPMA provides for limited remedies. We conclude the court correctly determined that plaintiff did not have a private cause of action under the OPMA in the context of a NJCRA matter.

B.

Title 18A

Plaintiff further asserts that Rowan is liable under the NJCRA because it failed to provide her with notice and a full and fair opportunity to be heard in violation of her rights under Title 18A. Plaintiff contends Rowan violated two provisions under Title 18A: (1) N.J.S.A. 18:64A-12(f) and (2) N.J.S.A. 18A:64A-13. Chapter 64A under Title 18A governs county colleges. N.J.S.A. 18A:64A-12(f) states that the Board of Trustees is empowered "[t]o appoint, upon nomination of the president, members of the administrative and teaching staffs and fix their compensation and terms of employment subject to the provisions of N.J.S.A. 18A:64A-13." N.J.S.A. 18A:64A-13 provides:

> The teaching staff employees and administrative officers other than the president of the county college

> are hereby held to possess all the rights and privileges of teachers employed by local boards of education. The president and teaching staff members shall be eligible for membership in the teachers' pension and annuity fund.
>
> For the benefit of its other officers and employees, the county college, as a public agency, may elect to participate in the public employees' retirement system.

Again, the issue raised on appeal is one of statutory interpretation. "'The Legislature's intent is the paramount goal when interpreting a statute and, generally, the best indication of that intent is the statutory language.'" Soto v. Scaringelli, 189 N.J. 558, 569 (2007) (quoting DiProspero v. Penn, 183 N.J. 477, 492 (2005)). A court should "'ascribe to the statutory words their ordinary meaning and significance, and read them in context with related provisions so as to give sense to the legislation as a whole.'" Ibid. (quoting DiProspero, 183 N.J. at 492).

A plain reading of these Title 18A statutory provisions does not confer rights to "notice" or a "full and fair opportunity to be heard," at any Board of Trustee or other meetings regarding employment matters. Moreover, Title 18A does not create a substantive due process protection as advanced by plaintiff. Therefore, plaintiff was not entitled to judgment as a matter of law on his NJCRA claim based on the alleged violation of Title 18A. We conclude

the court correctly found that plaintiff was not entitled to proceed on a Title 18A claim.

C.

Property Right

Next, plaintiff argues that because the arbitrator found she was terminated "on the spot," this evidences she was "deprived of her rights secured by Article I, Paragraph 1 of the New Jersey Constitution."[9] Following arbitration, the court denied plaintiff's request to reinstate her property right claim she is entitled to continued employment at Rowan. The court found:

> [Plaintiff] was never a tenured employee. Indeed, she was a brand-new employee. She had just started the job at the time that she was hired on September 1st.
>
> She was afforded the opportunity of the grievance procedure also, which she opted out of in favor of proceeding with the lawsuit, apparently, at the earliest stage here before [the court] referred it back to that process.
>
> And, again, the fact that she's non-tenured undermines [her] claim of the deprivation of a property right. She has no expectation in the period of

[9] "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." N.J. Const. art. I, ¶ 1.

> employment, she's a non-tenured. Indeed, the five-year tenure process would be rendered meaningless were the [c]ourt to simply award the opportunity to again litigate matters that this [c]ourt finds are not supported by the facts, in any event.

Plaintiff maintains that a jury could find she had a right to continued employment for "a stated term of [ten] months," and therefore, the court erred in declining to reinstate her property-based claim. In support of her argument, plaintiff cites Meade v. Moraine Valley Community College, 770 F.3d 680, 686 (7th Cir. 2014). In Meade, an adjunct professor at a state college was terminated before she was scheduled to teach for the fall semester. Id. at 682-83. Meade brought a suit under Section 1983 alleging she was deprived of a property interest limited to the fixed term stated in her employment agreement. Id. at 688

The Seventh Circuit held "[t]o demonstrate a cognizable property interest . . . [they] must be able to show that [they] had some legitimate expectation of continued employment." Id. at 686. Such an "expectation can arise through contractual language limiting the [entity's] discretion to fire" the employee." Ibid. The Seventh Circuit concluded that Meade's term stated in the employment agreement limited the college's ability to fire her immediately and created a property interest for the stated employment term. Id. at 687.

Here, in contrast, plaintiff was subject to a probationary period, set forth in Administrative Procedure 7014, which states:

> The first several weeks on a new job are crucial for new employees and their supervisors. A probationary period provides time to:
>
> 1. Orient and train new employees;
>
> 2. Determine whether the selection and placement of the new employees has been satisfactory; [and]
>
> 3. Permit new employees the opportunity to evaluate the college.
>
> [Rowan] has determined that the probationary period will be [ninety] calendar days. During this time the employee will be considered an at-will employee, subject to reassignment or termination. Any action taken by the college during this period will not be subject to the grievance procedure or other internal avenues of appeal. Employees will normally be given [seven] days' notice of any action.
>
> [(emphasis added).]

We have stated there is no constitutionally protected property interest for an at-will employee in continued public employment. "[A]n employee hired at will has no protected interest in [their] employment and may not prevail on a claim that [their] discharge constituted a violation of property rights." Filgueiras v. Newark Pub. Schools, 426 N.J. Super. 449 at 469-70 (App. Div.

2012) (citing Morgan v. Union Cnty. Bd. of Chosen Freeholders, 268 N.J. Super. 337, 355 (App. Div. 1993)). Because the undisputed facts show plaintiff was a probationary, non-tenured instructor at the time she was terminated, the court properly found plaintiff does not have a property interest in any continued employment at Rowan. Therefore, plaintiff was not entitled to substantive due process protections. See ibid. (holding the "plaintiff's substantive due process claim failed because a non-tenured teacher does not possess a sufficient property interest to trigger constitutional protection"). The court correctly denied plaintiff's motion to reinstate her property claim.

Plaintiff further maintains that the ninety-day probationary period should be deemed "null and void" because it was an "additional term" to her "existing" employment contract and Rowan did not provide any "new or additional consideration." And, plaintiff claims that Rowan's assertion that they could terminate her for any reason in the first ninety days of her employment would essentially render her ten-month employment contract illusory.

In the July 21, 2014 paperwork and new employee packet, plaintiff received a document listing Rowan's policies. Included in the packet was the "New Hire Acknowledgment," which states:

> I understand that I have the responsibility to read, understand and comply with each of these policies, as well as all other policies published by the Board of Trustees. I understand that the policies do not constitute a contract of employment and are subject to revision by the Board of Trustees without prior notice and at its sole discretion.
>
> . . . .
>
> I certify that I have been advised that copies of all the Board's policies are available to me for reference, at any time, by going to [Rowan's] portal and clicking on . . . either the Administrative Rules and Regulations or Board of Trustees Policy Manual links.
>
> I understand that failure to comply with any policies may subject me to disciplinary action.

By accepting employment with Rowan, plaintiff was subjected to all Rowan's policies, which included the ninety-day probationary period. It is undisputed plaintiff received the forms, signed, and returned them. Moreover, plaintiff acknowledged that it was her responsibility to read, understand, and comply with all policies. We also note that in the August 4, 2014 offer letter signed by Keating, it stated plaintiff would "be governed by applicable New Jersey Statutes, Board Policy, [c]ollege administrative rules and regulation[s], and the [CBA] between Rowan . . . and . . . Rowan['s] . . . Board of Trustees." We therefore reject plaintiff's argument that the probationary period was an additional term. Clearly, it was not.

Plaintiff's argument that the probationary period rendered her employment contract illusory is also devoid of merit:

> [A]n illusory promise is one in which the promisor has committed himself not at all. Thus, if performance of an apparent promise is entirely optional with a promisor, the promise is deemed illusory.
>
> A promise is not illusory if the power to terminate is conditioned upon some factor outside the promisor's unfettered discretion, such as the promisee's non-performance, or the happening of some event such as a strike, war, decline in business, etc." In general, our courts should seek to avoid interpreting a contract such that it is deemed illusory.
>
> [Bryant v. City of Atlantic City, 309 N.J. Super. 596, 620-21 (App. Div. 1998) (internal quotations and citations omitted).]

Plaintiff failed to assert facts to establish Rowan promised her unconditional employment. We join the court in concluding that plaintiff was subject to a ninety-day probationary period during which she was an at-will employee. The agreement between plaintiff and Rowan was not illusory based upon the substantial credible evidence in the record.

Equally unavailing is plaintiff's claim that Rowan harmed her "good name and reputation," which is "constitutionally protected." The record is devoid of any facts evidencing plaintiff's name and reputation were tarnished following her termination from Rowan. And, she returned to her previous

professorial position in Austin. In Filgueiras, we observed "no New Jersey precedent . . . has recognized a liberty interest in one's good reputation that is embodied in our [S]tate [C]onstitution and protected by substantive due process rights." 426 N.J. Super. at 473. We declined "to convert what was essentially a tort claim of defamation into something actionable under the [NJ]CRA," and we refused "to recognize a cause of action, particularly one of constitutional dimension, heretofore never recognized under existing jurisprudence." Id. at 474-75.

Finally, plaintiff maintains that a jury could find that Rowan deprived her of substantive rights protected by Article I, Paragraph 1 of the New Jersey Constitution because she was not provided with:

> (1) notice of the reasons for dismissal; (2) notice of the names of adverse witnesses and the nature of their testimony; (3) a meaningful opportunity to be heard; and (4) the right to be heard by a tribunal which possesses some academic expertise and an apparent impartiality toward the charges leveled against the teacher.

While plaintiff contends she was deprived of these "substantive rights," in our view, the rights she asserts are entirely inconsistent with the substantive rights provided in our jurisprudence and are more akin to procedural due process under this State's Constitution. See Doe v. Poritz, 142 N.J. 1, 99-100

(1995) (quoting Greenberg v. Kimmelman, 99 N.J. 552, 568 (1985)) (noting that, unlike the Fourteenth Amendment, "Article I, paragraph 1 of the New Jersey Constitution does not enumerate the right to due process, but protects against injustice and, to that extent, protects 'values like those encompassed by the principle[] of due process'"). As we previously stated, a violation of procedural due process is not actionable under the NJCRA. Tumpson, 218 N.J. at 477; see also State v. Polanca, 332 N.J. Super. 436, 442 (App. Div. 2000) (citing Mettinger v. Globe Slicing Mach. Co., 153 N.J. 371, 389 (1998)) ("Procedural due process requires notice and an opportunity to be heard."); Mattson v. Aetna Life Ins. Co., 124 F. Supp. 3d 381, 390 (D.N.J. 2015) (finding that procedural due process is not protected by the NJCRA). The court duly determined plaintiff was always an at-will employee, and it did not err in denying her motion to reinstate her property right claim.

D.

Free Speech

Plaintiff argues on appeal the court should have "reevaluated" her claim that Rowan "interfered with her free speech rights secured by Article I, Paragraph 6 of the New Jersey Constitution in light of the arbitrator's finding that Rowan acted in 'bad faith.'" Rowan objects to this characterization and

contends the arbitrator did not make a "bad faith" finding.[10] According to plaintiff, a motivating "factor" in her termination was the use of the "Defined Lines" video in her Sociology class, which she claims is "constitutionally protected [as] it was used as a teaching tool to explore gender norms and sexual harassment," falling within her academic freedom rights. In denying plaintiff's request to reinstate these claims, the court highlighted:

> There is a right of the college to control, . . . what is taught, when it is taught, how it is taught, and there is nothing here that would make me find differently that there is an opportunity that has been taken away wrongly. A deprivation of rights did not exist in this case, I do not find it.
>
> . . . .
>
> I agree with . . . defendant that it fails in the value analysis of the freedom of speech. There was nothing here that she conceded to be protected that we would then engage and balance. She had a vulgar approach to her teaching. Why? I don't know. And she was insistent on apparently proceeding without the [LCA] as well.
>
> . . . .

[10] Since Rowan terminated plaintiff "on the spot," the arbitrator found Rowan failed "to apply its requisite procedures for termination." Therefore, the arbitrator found that Rowan violated the implied covenant of good faith and fair dealing. Notably, there is no reference in the arbitrator's decision as to a constitutional violation involving "bad faith."

> Engaging in the free speech rights, again, we don't get to that, I'd say, because in my view—in this [c]ourt's view, it is apparent that this employee was not speaking about matters of public concern but just simply in an absolutely vulgar manner. I haven't heard anything differently. In fact, in the papers and in the arguments today, the fact of what she did is not addressed at all. The fact of how she approached her classroom teaching is the central focus of what we're doing here and what the school had to address. It needs to be addressed on the record. That's what we're focused on. That's the cause of action that you're going to argue is free speech. It's not free speech. She was out of bounds. You can't maintain a cause of action and these matters were previously dismissed for that reason as lacking any merit, and they were . . . with prejudice.

"[T]he First Amendment was designed to assure that debate on matters of public importance is uninhibited, and wide open." Karins v. City of Atlantic City, 152 N.J. 532, 547 (1998) (citation omitted). Nevertheless, "that amendment's guarantees have never been absolute." Ibid. Exceptions to the guarantees "have been carved out" and, in each exception, "the right of free expression must be balanced against some competing governmental interest." Ibid. The exception for the exercise of free speech by public employees requires "the balancing of [their] . . . freedom of expression against the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Id. at 547-48.

When undertaking the task of showing speech is protected, a government employee must prove that (1) "the employee spoke as a citizen, (2) the statement involved a matter of public concern, and (3) the government employer did not have an 'adequate justification for treating the employee differently from any other member of the general public.'" Palardy v. Twp of Millburn, 906 F.3d 76, 81 (3d Cir. 2018) (quoting Hill v. Borough of Kutztown, 455 F.3d 225, 241-42 (3d Cir. 2006)). The record is clear that the speech at issue was spoken by plaintiff in her capacity as a sociology instructor employed by Rowan, and not as a citizen.

We recognize "[t]eachers have a job to do." Green Twp. Educ. Assoc. v. Rowe, 328 N.J. Super. 525, 538 (App. Div. 2000). Indeed, "[t]he first rule of teaching should be that teachers shall teach." Id. at 534. But, a classroom should not be "transmogrified into a teacher's soapbox." Ibid. (citation omitted). Thus, "[j]ust as a [B]oard of [E]ducation may set the curriculum, it may also require teachers to confine their classroom activities to providing students with a thorough and efficient education." Ibid. Because "where government is employing someone for the very purpose of effectively achieving its goals, such restrictions [on speech] may well be appropriate." Id. at 538-39.

While "[o]penness is not to be condemned[,]" "teachers serve as authority figures, and students are their captive audience. A classroom is not a free market of ideas." Id. at 539 (internal quotation omitted); see also Ali v. Woodbridge Twp. Sch. Dist., 957 F.3d 174, 184 (3d Cir. 2020) ("Teachers do not have a protected First Amendment right to decide the content of their lessons or how the material should be presented to their students.") Here, plaintiff failed to show Rowan violated her First Amendment rights. Moreover, plaintiff has failed to raise a genuine issue of material fact as to this claim and therefore, there is no basis to submit this cause of action to the jury because the decision on what to teach ultimately remained with Rowan.

E.

Academic Freedom

Plaintiff also argues the court erred by not reinstating her academic freedom claim because her First Amendment rights were violated. Again, we disagree. "The public interest in promoting higher education reflects the view that it 'performs an essential social function' by promoting 'the pursuit of truth, the discovery of new knowledge through scholarship and research, teaching and general development of students, and the transmission of knowledge and

learning to society at large.'" In re Univ. of Med. & Dentistry of N.J., 144 N.J. 511, 533 (1996) (quoting Dixon v. Rutgers, 110 N.J. 432, 448 (1988)).

"As a result of this interest, courts have developed a concept of '[a]cademic freedom, [which,] though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.'" Dixon, 110 N.J. at 448 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978)).

> The extent of this academic freedom concept was charted thirty years ago by Justice Frankfurter in his oft-quoted concurrence in Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957), when he spoke of "four essential freedoms" of universities, namely, the freedom to determine for themselves "on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."
>
> [Dixon, 110 N.J. at 448-49; see In re Univ. of Med. & Dentistry of N.J., 144 N.J. at 533.]

Thus, it is the college or university which has the freedom to determine what is taught, not the individual instructor. See Urofsky v. Gilmore, 216 F.3d 401, 410 (4th Cir. 2000) (holding that "to the extent the Constitution recognizes any right of 'academic freedom' above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the [u]niversity, not in individual professors").

Rowan recognizes the academic freedom afforded to its faculty through its CBA, which provides, in part:

> (a) Any unit member is entitled to full freedom in research and in the publication of the results, subject to the satisfactory performance of [their] employment duties.
>
> (b) Any unit member is entitled to freedom of discussion in the performance of [their] faculty responsibilities and in the classroom, provided the discussion is relevant to the course.

Rowan is also accredited by the Middle States Commission on Higher Education, which sets forth standards for academic freedom:

> Academic freedom, intellectual freedom and freedom of expression are central to the academic enterprise. These special privileges, characteristic of the academic environment, should be extended to all members of the institution's community (i.e. full-time faculty, adjunct, visiting or part time faculty, staff, students instructed on the campus, and those students associated with the institution via distance education programs).
>
> Academic and intellectual freedom gives one the right and obligation as a scholar to examine data and to question assumptions. It also obliges instructors to present all information objectively because it asserts the student's right to know all pertinent facts and information. A particular point of view may be advanced, based upon complete access to the facts or opinions that under[ly] the argument, as long as the right to further inquiry and consideration remains unabridged.

> To restrict the availability or to limit unreasonably the presentation of data or opinions is to deny academic freedom. The effective institution addresses diversity of opinion with openness and balance.

The court rejected plaintiff's attempt to reinstate her academic freedom claim because Rowan's decision to terminate her was based on her reprehensible conduct vis-à-vis her students. Rowan did not interfere with plaintiff's academic agenda or criticize her performance. Plaintiff was terminated because she disrespected and offended her students. Plaintiff also lacked professionalism and decorum in contravention of Rowan's policies, justifying her termination and not because she advanced controversial or unpopular opinions.

Rowan had the right "to determine for itself on academic grounds who may teach, what may be taught, [and] how it shall be taught." In re Univ. of Med. & Dentistry of N.J., 144 N.J. at 533 (quoting Sweezy, 354 U.S. at 263). The American Federation of Teachers has recognized that "[a]cademic freedom and its attendant rights do not mean that 'anything goes.'"[11] The academic integrity of higher educational institutions must be upheld. Faculty must be "professional" when it comes to their academic and interactions with

[11] Academic Freedom, American Federation of Teachers, https://www.aft.org/position/academic-freedom (last visited Apr. 14, 2023).

students. Ibid. Because Rowan was permitted to restrict plaintiff's speech and activities to achieve its goals, the court did not err in denying plaintiff's request to reinstate her academic freedom claim.

We have considered the other arguments raised by plaintiff, the FIRE, and ACLU-NJ. We conclude these arguments lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

Affirmed.