SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1055-20

CHARLES KIM,

Plaintiff-Appellant,

v.

NEW JERSEY INSTITUTE OF TECHNOLOGY, DEPARTMENT OF PUBLIC SAFETY,

Defendant-Respondent.

Argued February 6, 2023 – Decided June 21, 2023

Before Judges Whipple, Mawla and Marczyk.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-3805-20.

Zinovia H. Stone argued the cause for appellant (Caruso Smith Picini, PC, attorneys; Timothy R. Smith, of counsel; Zinovia H. Stone, on the briefs).

Jennifer Roselle argued the cause for respondent (Genova Burns LLC, attorneys; Jennifer Roselle and Eric D. Engelman, of counsel and on the brief).

PER CURIAM

Plaintiff Charles Kim appeals from the November 13, 2020 order dismissing his complaint against defendant New Jersey Institute of Technology (NJIT) with prejudice. Following our review of the record and applicable legal principles, we affirm in part, vacate in part, and remand for further proceedings.

I.

Plaintiff is a police officer at NJIT. On August 22, 2018, he restrained and arrested a person on NJIT's campus. Plaintiff subsequently filed an incident report wherein he stated he sustained injuries during the arrest. Plaintiff was subsequently indicted on a charge of fourth-degree unsworn falsification, N.J.S.A. 2C:28-3(a). It was alleged he falsified a report of the injuries he sustained during the arrest. He was suspended from his employment following the indictment. The charge was later downgraded to a disorderly persons offense of unsworn falsification to authorities, N.J.S.A. 2C:28-3(b). On February 12, 2020, following plaintiff's trial, the court granted his motion for acquittal.

Thereafter, NJIT began its own internal affairs investigation into the allegations plaintiff had falsified the August 2018 arrest report. On March 31, 2020, NJIT's Internal Affairs Unit interviewed plaintiff about the August 2018 incident. On April 10, 2020, plaintiff was served with a disposition letter and

notice of disciplinary action (NDA).[1] On April 24, 2020, NJIT sought to schedule a due process meeting with plaintiff so he could respond to the charges.[2] Plaintiff refused to attend the hearing because defendant failed to provide him with discovery that it intended to use against him. Therefore, he asserted he was unable to meaningfully respond to the allegations. Plaintiff further claimed the provision of the Collective Bargaining Agreement (CBA), which provides NJIT's police officers can only receive discovery during the grievance-appeals process, violated his due process rights.

When plaintiff failed to participate in the due process meeting, NJIT imposed a thirty-day suspension without pay. In a letter dated May 26, 2020, NJIT explained that during plaintiff's March 31, 2020 interview with the Internal Affairs Unit, he admitted that after the August 2018 arrest, he prepared two documents—the "employee preliminary injury and use of force" reports—based

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[1] The disposition letter and NDA were not included in the parties' appendices but were requested by us and received while the appeal was pending. See generally R. 2:5-4(d). As discussed below, it does not appear the trial court was provided with this document prior to rendering its decision.

[2] NJIT filed five charges against plaintiff. The NDA indicated the charges involved plaintiff's alleged filing of a false report. NJIT asserted plaintiff's report was based on opinions as opposed to facts, wherein he claimed he had injured his back, which purportedly was not supported by the available body camera footage or witness statements. He was further charged with failing to activate his body camera during the arrest.

on his "own opinion, [and] not known fact[s] . . . at the time (and further proven to be false)." The letter noted plaintiff "admitted to having to 'write something' and 'picking' a body part. Both reports, however, were worded and written as factually based, not [based on] opinion[s]. These actions and behaviors display[ed] dishonesty and lack of personal integrity which ultimately result[ed] in loss of credibility with the community." The letter further explained that during the interview, plaintiff stated he was "struck/hit" in the back, but during the investigation, "[n]o witness statements or camera evidence . . . corroborated that statement and it [was] deemed false." In addition, plaintiff was not operating his body worn camera at the time of the arrest, in violation of department policy.

On June 5, 2020, plaintiff filed a complaint in lieu of prerogative writs seeking, among other relief, reversal of his suspension. Plaintiff sought judicial review of the decision pursuant to N.J.S.A. 40A:14-150. He further asserted his due process rights were violated under Loudermill[3] based on NJIT not providing discovery prior to his suspension. NJIT subsequently moved to dismiss the complaint pursuant to Rule 4:6-2(e).

[3] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).

The trial court first determined N.J.S.A. 40A:14-150 does not apply to non-municipal police officers, so plaintiff was not entitled to judicial review of his suspension. The court found the text of the statute clear, and the legislative intent did not broaden the application of the statute to non-municipal police officers.

As to plaintiff's allegation that his Loudermill rights were violated, the court found NJIT satisfied the Loudermill requirements by providing written notice to plaintiff of the charges and evidence against him in its May 26, 2020 letter.[4] Additionally, the court found plaintiff "expressly rejected the opportunity to be heard" by refusing to attend the due process meeting, so plaintiff could not "now argue that his due process rights were violated."

II.

Plaintiff reprises his argument before us that NJIT violated his Loudermill due process rights by not providing discovery prior to his suspension and that the trial court improperly dismissed his claim by finding that N.J.S.A. 40A:14-150 does not apply to university law enforcement officers. He further contends

[4] The trial court relied on NJIT's May 26, 2020 letter as notice to plaintiff of the charges he faced. However, this letter was the "Notice of Suspension," not the NDA. Although plaintiff was apparently served with the April 10, 2020 NDA, the court did not reference same in its decision.

the CBA violated the Attorney General's "Internal Affairs Policy & Procedures" (IAPP) and that the CBA was unconscionable. Finally, plaintiff maintains that even if the trial court correctly determined his Loudermill rights were not violated and he could not seek judicial review under N.J.S.A. 40A:14-150, other theories supported his claims, and he should have been given an opportunity to amend his complaint.

We "review[] de novo the trial court's determination of [a] motion to dismiss under Rule 4:6-2(e)," Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 108 (2019), "applying the same standard under Rule 4:6-2(e) that governed the motion court." Wreden v. Twp. of Lafayette, 436 N.J. Super. 117, 124 (App. Div. 2014). In doing so, we "owe[] no deference to the trial court's legal conclusions." Dimitrakopoulos, 237 N.J. at 108. In considering a Rule 4:6-2(e) motion, we examine "the legal sufficiency of the facts alleged on the face of the complaint," Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989), limiting our review to "the pleadings themselves," Roa v. Roa, 200 N.J. 555, 562 (2010), the "exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim." Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005) (citation omitted).

Motions made under Rule 4:6-2(e) should be approached "with great caution" and should be granted "in only the rarest of instances." Printing Mart-Morristown, 116 N.J. at 771-72. Finding the fundament of a cause of action in those documents is pivotal; a plaintiff's ability to prove its allegations is not at issue. Id. at 746. Nevertheless, a complaint should be dismissed if it states no valid claim, and discovery could not give rise to a claim. Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021); Dimitrakopoulos, 237 N.J. at 107-08.

A.

Plaintiff asserts his Loudermill rights were violated because NJIT failed to provide discovery prior to the due process meeting. Specifically, he contends that before sanctioning him, defendant failed to advise plaintiff what aspects of the report he falsified and on what basis NJIT determined he lied on his report. Plaintiff concedes he was provided with notice of the charges and an opportunity to speak to his supervisors, but he was not provided with a statement of the evidence against him, as required by Loudermill.

NJIT contends an employee is only entitled to notice of the charges and the opportunity to respond.[5] We disagree with NJIT insofar as it fails to recognize plaintiff is also entitled to "an explanation of the employer's evidence"

[5] Buckner v. City of Highland Park, 901 F.2d 491, 494-95 (6th Cir. 1990).

under Loudermill. 470 U.S. at 546. Specifically, "Loudermill is a due process vehicle which requires in explicit terms that an employee 'is entitled to oral or written notice of the charges against [them], an explanation of the employer's evidence, and an opportunity to present [their] side of the story.'" Caldwell v. N.J. Dep't of Corr., 250 N.J. Super. 592, 615 (App. Div. 1991) (quoting Loudermill, 470 U.S. at 546) (emphasis added).

The record is not clear what precise information was presented to the trial court regarding the charges, but as noted above, it appears the parties only provided the court with NJIT's May 26, 2020 Notice of Suspension letter to plaintiff. Significantly, this letter was sent after the discipline was imposed on plaintiff. The trial court exclusively relied on this document in support of its conclusion plaintiff was provided with "notice of the charges against him and an explanation of the evidence against him," despite the fact the letter was sent after plaintiff had been suspended.

Although we obtained a copy of the April 10, 2020 NDA during the course of this appeal, it was not addressed by the trial court in the context of plaintiff's Loudermill claims, and we decline to do so in the first instance. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) ("[A]ppellate courts will decline to consider questions or issues not properly presented to the trial court when an

opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.") (Internal quotation marks omitted). Accordingly, we are constrained to vacate this aspect of the trial court's order and remand for further proceedings to further address this issue by analyzing the NDA in the context of plaintiff's Loudermill claims.

B.

Plaintiff further contends the judicial review available under N.J.S.A. 40A:14-150 should apply to all law enforcement officers regardless of whether they are municipal officers. He notes N.J.S.A. 40A:14-200 and N.J.S.A. 40A:14-210 broaden the definition of law enforcement agencies, and recently introduced legislation suggests the Legislature did not intend to limit N.J.S.A. 40A:14-150 to municipal officers. We are unpersuaded.

N.J.S.A. 40A:14-150, in pertinent part, provides:

> Any member or officer of a police department or force in a municipality wherein Title 11A of the New Jersey Statutes is not in operation, who has been tried and convicted upon any charge or charges, may obtain a review thereof by the Superior Court; provided, however, that in the case of an officer who is appealing removal from his office, employment or position for a complaint or charges, other than a complaint or charges relating to a criminal offense, the officer may, in lieu of serving a written notice seeking a review of that

> removal by the court, submit his appeal to arbitration pursuant to section 10 of P.L.2009, c. 16 (C. 40A:14-209).

In interpreting a statute, our primary objective is to ascertain the intent of the Legislature by first looking to the "statutory language." DiProspero v. Penn, 183 N.J. 477, 492 (2005). The language of the statute is "the best indicator" of legislative intent. In re Plan for the Abolition of the Council on Affordable Hous., 214 N.J. 444, 467 (2013). "[W]e 'give words "their ordinary meaning and significance,"' acknowledging that the 'statutory language is "the best indicator of [the Legislature's] intent."'" State v. Fuqua, 234 N.J. 583, 591 (2018) (quoting Tumpson v. Farina, 218 N.J. 450, 467 (2014)) (alteration in original). "If the plain language leads to a clear and unambiguous result, then [the] interpretive process is over." Richardson v. Bd. of Trs., Police & Firemen's Ret. Sys., 192 N.J. 189, 195 (2007). We "will not presume that the Legislature intended a result different from what is indicated by the plain language or add a qualification to a statute that the Legislature chose to omit." Fuqua, 234 N.J. at 591 (quoting Tumpson, 218 N.J. at 467-68). We only resort to extrinsic evidence, such as legislative history and committee reports, if the statutory language at issue is ambiguous. Ibid.

N.J.S.A. 40A:14-150 limits judicial review to "[a]ny member or officer of a police department or force in a municipality" who has been sanctioned. (emphasis added). Because it is undisputed plaintiff is not employed by a municipality, the trial court correctly determined the plain language of the statute does not apply to plaintiff under the facts of this case. Therefore, there is no basis for us to look beyond the statute to the legislative history, given the clear and unambiguous language of N.J.S.A. 40A:14-150. We therefore affirm the trial court's decision on this issue.

We briefly add the following. Shortly before the trial court's decision in this matter, we issued our decision in the Matter of DiGuglielmo, 465 N.J. Super. 42 (App. Div. 2020),[6] which also involved an NJIT police officer, where we determined, in interpreting N.J.S.A. 40A:14-209 and -210, that campus police officers could not challenge their termination through "special disciplinary arbitration" administered by the Public Employment Relations Commission (PERC). Id. at 60. Specifically, we concluded that Section 150 (i.e., N.J.S.A. 40A:14-150), as cross-referenced in Sections 209 and 210, precluded

[6] Although not extensively briefed before us, at oral argument before the trial court, the parties referenced DiGuglielmo. The trial court also briefly discussed the case in its oral decision, but not in its written opinion.

DiGuglielmo from "availing himself of the special disciplinary arbitration process." Ibid.

Our Supreme Court subsequently reversed our decision in the Matter of DiGuglielmo, 252 N.J. 350 (2022). The Court noted that our holding was "contrary to the plain language of Sections 200 and 209. As noted, the term 'law enforcement agency,' as defined in Section 200, is in no way limited to a 'municipal law enforcement agency.'" Id. at 367. The Court concluded "that NJIT police officers are not barred from seeking review of disciplinary action through special disciplinary arbitration by virtue of Section 150." Ibid.

Plaintiff here did not seek special disciplinary arbitration under Section 209. Rather, he sought judicial review under Section 150. Notably, in discussing Section 150, the Court concluded it "undoubtedly applies to municipal officers." Id. at 365. In short, contrary to plaintiff's contentions, he is not entitled to judicial review under Section 150, as the trial court concluded.

C.

Plaintiff next argues portions of the CBA are contrary to the IAPP because they allow a sanction without a hearing and discovery. He contends the CBA contravenes public policy and is unconscionable. NJIT counters these issues were not properly raised before the trial court. Moreover, NJIT asserts the trial

court lacks jurisdiction to declare provisions of the CBA invalid because PERC has primary jurisdiction to determine whether a provision falls within the scope of the collective negotiations. NJIT further contends plaintiff has no standing to strike portions of the CBA as those issues must be raised by the employer or an employee's majority representative. N.J.S.A. 34:13A-5.4. As we are remanding for further proceedings regarding the Loudermill issue, and because the trial court did not have an opportunity to address these issues, we do not consider these questions at this juncture. Nieder, 62 N.J. at 234.

D.

Plaintiff next asserts the trial court should not have dismissed his complaint with prejudice. Rather, he contends he advanced other arguments that supported his claims in the complaint. More particularly, plaintiff maintains even if his contentions under N.J.S.A. 40A:14-150 and Loudermill fail, his complaint is supported by other legal theories, such as the CBA being inconsistent with the IAPP. Therefore, he should have been provided an opportunity to amend his complaint.

"If plaintiff's complaint has failed to articulate a legal basis that would entitle plaintiff to relief, the court must dismiss the complaint." Lakeview Mem'l Park Ass'n v. Burlington Cnty. Constr. Bd. of Appeals, 463 N.J. Super.

459, 471 (Law Div. 2019) (citing Camden Cty. Energy Recovery Assocs., L.P. v. N.J. Dep't of Env't Prot., 320 N.J. Super. 59, 64 (App. Div. 1999)). However, "[g]enerally, such a dismissal should be [entered] without prejudice in order to permit [a] plaintiff to file an amended complaint to cure the defects in their pleadings." Id. at 471-72 (citing Printing Mart-Morristown, 116 N.J. at 746). "The dismissal . . . may be issued with prejudice if the complaint lacks even a suggestion of the claim, or if the plaintiff concedes that he has no further facts to plead without utilizing discovery." Id. at 472 (citing Nostrame v. Santiago, 213 N.J. 109, 128 (2013)).

Here, absent an explanation for departing from the general rule, the complaint should have been dismissed without prejudice. Accordingly, although we are also remanding for the trial court to address plaintiff's Loudermill claims, we are also remanding to allow plaintiff to file an amended complaint.[7]

[7] If plaintiff elects to file a new complaint, he should clearly articulate any additional theories or authority he is relying upon to provide defendant and the court proper notice of what claims are being asserted. Defendant and the trial court should not be left to speculate concerning the grounds for plaintiff's claims. We also note defendant asserts plaintiff failed to exhaust his administrative remedies, which we also do not address at this time. Defendant is not foreclosed from presenting this argument on remand. We take no position on the propriety of either parties' arguments not specifically addressed in this opinion.

Affirmed in part, vacated in part, and remanded for further proceedings. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION