SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1454-21

VANESSA WILLIAMS POWELL,

Plaintiff-Appellant,

v.

CITY OF NEWARK, MUNICIPAL COUNCIL OF THE CITY OF NEWARK, PRESIDENT MILDRED CRUMP, JUDGE VICTORIA PRATT, MAYOR RAS BARAKA, and KECIA DANIELS,

Defendants-Respondents.

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Submitted February 28, 2023 – Decided March 22, 2023

Before Judges Sumners and Geiger.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-4727-18.

Christopher C. Roberts, attorney for appellant.

Carmagnola & Ritardi, LLC, attorneys for respondents City of Newark, Municipal Council of the City of Newark, and Kecia Daniels (Domenick Carmagnola, of

counsel and on the brief; Anthony J. Vinhal and Stephanie Torres, on the brief).

Chasan Lamparello Mallon & Cappuzzo, PC, attorneys for respondent Mayor Ras Baraka (James F. Dronzek, of counsel and on the brief; Kirstin Bohn, on the brief).

Lite DePalma Greenberg & Afanador, LLC, attorneys for respondent Victoria Pratt (Victor A. Afanador, of counsel and on the brief; Sarah Diyanidh, on the brief).

Rainone Coughlin Minchello, LLC, attorneys for respondent President Mildred Crump (Brian P. Trelease, of counsel and on the brief).

PER CURIAM

Plaintiff Vanessa Williams Powell appeals from four Law Division orders dismissing her claims against defendants with prejudice pursuant to Rule 4:6-2(e). We affirm in part and reverse and remand in part.

I.

We take the facts from the record, viewing them in the light most favorable to plaintiff. See Richter v. Oakland Bd. of Educ., 246 N.J. 507, 515 (2021). In 2002, plaintiff was appointed as a municipal court judge for the City of Newark. Municipal court judges "serve a term of three years from the date of appointment and until a successor is appointed and qualified." N.J.S.A. 2B:12-4(a). Following a series of reappointments, her last three-year term expired on October 18, 2014. Thereafter, plaintiff continued to serve as a

municipal court judge in a "holdover" capacity until she was terminated by the mayor effective May 26, 2017. A successor judge was appointed on May 31, 2017. Plaintiff claimed her termination was discriminatory because it was impermissibly based on a perceived disability—alcoholism—which she denied.

On July 9, 2018, plaintiff filed a complaint in the Superior Court. Plaintiff named the City of Newark (City), the Municipal Council of the City of Newark (Council), Newark Council President Mildred Crump, Newark Chief Municipal Court Judge Victoria Pratt, Newark Mayor Ras Baraka (Mayor), and Newark Personnel Director Kecia Daniels as defendants. Daniels and the City removed the case to federal district court. Shortly thereafter, Daniels, the City, and Council moved to dismiss the complaint. The complaint asserted claims for: (1) wrongful discharge; (2) breach of the implied covenant of good faith and fair dealing; (3) violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -42; (4) defamation and invasion of privacy by Pratt; (5) defamation and invasion of privacy by Baraka; (6) intentional infliction of emotion distress; (7) intentional interference with prospective economic advantage; and (8) violation of the New Jersey Civil Rights Act (CRA), N.J.S.A. 10:6-1 to -2.

On June 29, 2020, the district court granted Daniels' motion, dismissing the complaint without prejudice.[1] The court found the complaint contained "insufficient factual allegations . . . to plausibly state a claim against her." The court explained the complaint did not allege "that Daniels knew of [p]laintiff's alleged issues with alcohol or that Daniels treated [p]laintiff any differently based on her alleged issues with alcohol." Nor did the complaint allege "[p]laintiff requested an accommodation for her alleged issues with alcohol from Daniels or that Daniels denied [p]laintiff any such accommodation." The court further found the complaint did not "contain any plausible allegations that Daniels knew of [p]laintiff's alleged alcohol issues or was involved in any adverse employment decision as to [p]laintiff." The court granted plaintiff thirty days to file an amended complaint addressing the pleading deficiencies described by the court. Plaintiff did so.

After reviewing plaintiff's amended complaint, the district court judge subsequently, on her own motion, issued an order to show cause (OTSC) indicating the district court likely lacked subject matter jurisdiction and directed plaintiff to file an amended pleading that contained a clearly delineated federal

[1] Pratt and Crump also moved for dismissal, but the court did not reach their motions due to its ruling granting Daniels' motion to dismiss.

cause of action or indicate by letter that no federal claim was intended and that remand to state court would be appropriate. In her response to the OTSC, plaintiff acknowledged that no federal claim was intended and indicated that remand of the case to state court was appropriate. Defendants did not object to a remand. Accordingly, on March 31, 2021, the case was remanded to the Superior Court.

In her amended complaint, plaintiff asserted claims under the LAD, the CRA, and for breach of her contractual employment rights. More specifically, plaintiff alleged: (1) defendants wrongly terminated her (count one); (2) defendants breached the implied covenant of good faith and fair dealing (count two); (3) defendants violated the LAD (count three); (4) Crump, Pratt, and Daniels engaged in defamation per se and invasion of privacy (count four); (5) Baraka engaged in defamation per se and invasion of privacy (count five); (6) defendants intentionally inflicted emotional distress (count six); (7) Pratt and Baraka intentionally interfered with plaintiff's prospective economic advantage (count seven); and (8) defendants violated the CRA (count eight). Plaintiff claimed that following her termination, she became severely depressed and never worked again.

The amended complaint alleged the following facts. On May 5, 2017, Pratt, after purportedly smelling a whiff of alcohol after plaintiff left Pratt's office, asked plaintiff if she had been drinking alcohol before coming into to work. Plaintiff denied that she had. After the meeting, plaintiff reported to work and took the bench each workday without issue until May 17, 2017. According to plaintiff, on May 9, 2017, Pratt sent a memorandum to Daniels that alleged plaintiff was intoxicated and emanating the smell of alcohol when she entered Pratt's office on May 5, 2017. The memo also indicated Pratt suspected plaintiff of being intoxicated at work on a prior occasion. Plaintiff alleged the Mayor was copied on the memo.

On May 22, 2017, Newark Municipal Court Director James Simpson presented plaintiff with a letter from the Mayor stating that her services were no longer needed effective May 26, 2017. After receiving the letter, plaintiff made several telephone calls inquiring about the cause of her termination. According to plaintiff, she was told that the impetus for her termination was a letter from Pratt to the Mayor stating plaintiff was drunk while at work. Shortly thereafter, plaintiff contacted Newark Councilman Joe McCullum, who stated he was shocked by the news of plaintiff's termination, that the Mayor had not informed him, and the Council had not voted on plaintiff's termination. Plaintiff then

emailed Pratt requesting a copy of the letter Pratt had sent to the Mayor. Pratt's assistant advised she was not authorized to release a copy of the letter to plaintiff.

On May 23, 2017, the Council convened an executive session to address plaintiff's employment and alleged alcohol problems. During the executive session, Daniels stated that she offered plaintiff treatment for her condition, but plaintiff refused to undergo treatment. Crump stated plaintiff had previously entered treatment to address her alcohol abuse, which caused issues during the administration of former Mayor Cory Booker. Council continued the executive session to allow Daniels to provide proof of plaintiff having refused treatment.

The executive session reconvened on May 31, 2017. Plaintiff was allegedly precluded from attending the executive session because of her intent to sue Council. During the executive session, Council voted unanimously to remove plaintiff and appoint Ashlie Gibbons to the municipal court judge position. Following the meeting, the Mayor told plaintiff that this was not the first complaint about her drinking, and that Pratt had previously raised concerns to the Mayor about plaintiff's drinking problem.

The parties engaged in discovery. A case management order directed the depositions of all parties and fact witnesses shall be completed by October 22,

2021. The discovery end date (DED) was extended to January 31, 2022. On April 6, 2021, plaintiff noticed defendants' depositions for June 15 and 24, and July 1 and 8, 2021, well within the deposition deadline. The depositions did not take place on those dates. On September 8, 2021, plaintiff re-noticed defendants' depositions for October 21 and 22, 2021, in compliance with deposition deadline. In each instance, defense counsel insisted upon deposing plaintiff before defendants were deposed. Plaintiff was deposed on October 19, 2021. Defendants were not deposed due to defense counsels' insistence and defendants' scheduling conflicts.

On August 3, 10, and 20, 2021, defendants filed their respective motions to dismiss the amended complaint with prejudice for failure to state a claim upon which relief can be granted pursuant to Rule 4:6-2(e). Plaintiff opposed the motions, contending they should be denied substantively and "disallowed" procedurally because defendants had not yet been deposed. The court heard the motions on November 19, 2021, and decided the motions on December 7, 2021, well before the DED. The court did not address the incomplete discovery.[2]

[2] Rule 4:6-2(e) motions test the sufficiency of the pleadings. Here, that required the court to examine "'the legal sufficiency of the facts alleged on the face of the complaint,' giving the plaintiff the benefit of 'every reasonable inference of fact.'" Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021) (quoting

The court granted the motions in separate orders but explained its reasoning in the same twenty-five-page statement of reasons attached to each order. Although defendants moved for dismissal under Rule 4:6-2(e), we treat them as motions for summary judgment because the court considered documents, including plaintiff's statement of material facts[3] and transcripts of City Council executive sessions, beyond the the amended complaint.[4]

Chief Judge Pratt's Motion to Dismiss the Complaint

Pratt contended the amended complaint failed to assert a viable cause of action and that counts one, two, five, and eight did not apply to her. As to

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Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 107 (2019)). "Nonetheless, if the complaint states no claim that supports relief, and discovery will not give rise to such a claim, the action should be dismissed." Ibid. (quoting Dimitrakopoulos, 237 N.J. at 107).

[3] See R. 4:46-2(b) (requiring a party opposing a motion for summary judgment to "file a responding statement either admitting or disputing each of the facts in the movant's statement [of material facts].").

[4] See R. 4:6-2 ("If, on a motion to dismiss based on defense (e), matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by [Rule] 4:46, and all parties shall be given . . . a reasonable opportunity to present all material pertinent to such a motion."). We therefore consider the motions under the standards for summary judgment set forth in Rule 4:46-2(c) and its interpretive case law. See Pressler & Verniero, Current N.J. Court Rules, cmt. 4.1.2 on R. 4:6-2 (2023) (stating that "if any material outside the pleadings is relied [upon] on a [Rule] 4:6-2(e) motion, it is automatically converted into a summary judgment motion").

plaintiff's claim of aiding and abetting under the LAD, Pratt argued that conduct cannot be imputed to her because her actions did not constitute aiding and abetting and there was no "grand plan for which to aid or abet." Pratt also maintained that plaintiff did not plead facts giving rise to an inference that she was perceived as an alcoholic. Pratt further asserted that she was immune from liability for defamation and is entitled to qualified immunity as to the CRA claim. Pratt additionally contended that plaintiff failed to sufficiently plead outrageous or intentional conduct to support a claim for intentional infliction of emotional distress, and failed to state a claim for tortious interference with economic benefit because plaintiff had no reasonable expectation of continued employment.

In her opposition, plaintiff argued that alcoholism is recognized as a disability under the LAD, and her claim was sufficiently pleaded because she was "perceived to be an alcoholic" as evidenced by Pratt's memo. Plaintiff contended Pratt was not protected by qualified immunity because it only applies to the extent Pratt's conduct did not violate clearly established rights that a reasonable person would have been aware of. As to her defamation claim, plaintiff argues Pratt recklessly disregarded the truth when disseminating her memo. Plaintiff claimed Pratt had no objective proof that she was drunk before

disseminating the memo. In reply, Pratt argued that plaintiff misconstrued the need for a Rice[5] notice.

Council President Crump's Motion to Dismiss the Complaint

Crump argued plaintiff did not have a vested contractual right to her position as a municipal court judge and was legally succeeded by another judge. Crump argued count two must be dismissed because there is no privity of contract between Crump and plaintiff. Crump further argued that count three failed to allege a discharge and failed to allege individual liability against her. Crump asserted qualified privilege on the defamation and invasion of privacy claims. Crump maintained plaintiff failed to plead that Crum engaged in outrageous conduct in support of her intentional infliction of emotional distress claim. As to the CRA claim, Crump posited plaintiff lacked a property interest in her judgeship and was entitled to qualified immunity.

In her opposition, plaintiff argued Crump aided and abetted the other individual defendants in the vote to terminate plaintiff and in recommending that she be terminated. Plaintiff asserted the limitations of qualified privilege

[5] In Rice v. Union County Regional High School Board of Education, we held that pursuant to the Open Public Meetings Act's personnel exception, N.J.S.A. 10:4-12(b)(8), employees must be given reasonable notice when a public body intends to consider taking adverse employment actions against them during an executive session. 155 N.J. Super. 64, 71-74 (App. Div. 1977).

and that it did not apply to per se slander and libel, because Crump recklessly disregarded the truth. In rely, Crump argued plaintiff was not entitled to a Rice notice and failed to plead intent, malice, or reckless disregard by Crump.

Mayor Baraka's Motion to Dismiss the Complaint

Baraka raised the same defenses asserted by Crump. Plaintiff reiterated the same arguments she made in opposition to Crump's motion. In reply, Baraka argued plaintiff failed to allege any facts showing that he knew that plaintiff failed to receive a Rice notice or that he actively denied plaintiff access to any meetings.

The Motion to Dismiss filed by the City, Council, and Daniels

The City, Council, and Daniels argued plaintiff did not have a vested contractual right as a municipal court judge and was legally succeeded after the expiration of her term. Consequently, they argued plaintiff's breach of the implied covenant of good faith and fair dealing fails. As to her LAD claim, movants argued plaintiff was not discharged and that she was a mere holdover judge who was lawfully succeeded. They further argued that plaintiff's CRA claim fails because she did not suffer a deprivation of property as a matter of law. Daniels argued there were no facts supporting the claim that she aided and abetted the alleged discrimination. As to the intentional infliction of emotional

distress claim, Daniels argued the facts showed she acted as a messenger and did not otherwise engage in any outrageous conduct. Daniels also argued she was entitled to qualified immunity.

In her opposition, plaintiff reiterated her previously described arguments. She claimed she was denied a Rice notice, that her LAD claim was viable because she was wrongfully discharged, that Daniels' multiple misrepresentations before the Council was purposeful and aided and abetted the discrimination. Plaintiff further argued that by informing that she did not have to report to work anymore, Daniels physically carried out the termination. Plaintiff also argued Daniels aided and abetted by not attempting to offer an accommodate plaintiff's perceived disability. Plaintiff further argued that Daniel's lies during the executive session was sufficiently outrageous and that she had a property right in her position as a public employee. In reply, Daniels argued her memo did not allege plaintiff was an alcoholic, but rather, was under the influence of alcohol while at work. The City and Council argued that aiding and abetting only attaches to acts of an individual supervisor, and also requires active and purposeful conduct.

On December 7, 2021, the judge issued a single twenty-five-page statement of reasons and four orders dismissing plaintiff's complaint with

prejudice. As to plaintiff's contractually related claims, the court provided the following reasoning:

> The majority of [p]laintiff's claims are contractual in nature or otherwise predicated upon the [p]laintiff's entitlement to her position as a Municipal Court Judge. These claims—specifically, wrongful termination, breach of implied covenant of good faith and fair dealing, [CRA], [and] intentional interference with prospective economic advantage—all fail for the same reason. Under New Jersey law, it is well established that the employment relationship between government appointees and their respective governing bodies are controlled by the statutory scheme under which that individual was appointed and are not contractual in nature.
>
> Plaintiff became a hold over judge upon the expiration of her three-year term of appointment on October 18, 2014. N.J.S.A. 2B:12-4(a) plainly states that "[e]ach judge of a municipal court shall serve for a term of three years from the date of appointment and until a successor is appointed and qualified." Ibid. Judge Ashley Gibbons was appointed and qualified pursuant to N.J.S.A. 2B:12-4 on May 31, 2017. As such, [p]laintiff was removed pursuant to the statute governing the appointment and re-appointment of Municipal Court Judges, and therefore, cannot lawfully rely on principles of contract, claims of entitlement to, and/or deprivation of substantive and procedural rights in the present action.
>
> . . . .
>
> Plaintiff cannot raise a claim for the violation of the covenant of good faith and fair dealing because [p]laintiff could be and was lawfully replaced pursuant

> to N.J.S.A. 2B:[14-4(a)]. Therefore, [p]laintiff has failed to state a claim upon which relief could be granted under [c]ounts [one and two] because [p]laintiff was not subject to a wrongful termination and the implied covenant of good faith and fair dealing is inapplicable.
>
> [(Citations omitted).]

Regarding plaintiff's LAD claims, the court found plaintiff failed to state a prima facie case under the LAD and fails to state a claim for aiding and abetting because she cannot establish that she was terminated from her position as a municipal court judge. The court reiterated that "a hold over judge serves at the pleasure of the [m]unicipality and may be replaced at any time after the expiration of a three-year term of appointment. N.J.S.A. 2B:12-4."

As to plaintiff's CRA claim, the court explained that plaintiff "'must show a violation of a substantive right or that someone "acting under color of law" interfered with or attempted to interfere with a substantive right.' State v. Quaker Valley Farms, LLC, 235 N.J. 37, 64 (2018)." The court noted "that the State may not deprive a public employee of a property interest without due process of law." However, "a person must have more than a unilateral expectation of continued employment; rather, she must have a legitimate entitlement to such continued employment." (Quoting Elmore v. Cleary, 399 F.3d 279, 282 (3d Cir. 2005)). The court then quoted Battaglia v, Union County

Welfare Board, which held that "an employee hired at will or one whose term of office has expired has no entitlement to the position and may not prevail on a claim that loss of the employment constituted deprivation of property." 88 N.J. 48, 57 (1981).

Regarding plaintiff's substantive property right deprivation claim, the court reiterated that because her term of office had expired, her claim fails since "plaintiff cannot establish that she had a legitimate entitlement to the judgeship." The court also rejected plaintiff's Rice notice due process claim, explaining that N.J.S.A. 10:4-12(b)(8) permits public bodies to exclude the public during executive sessions at which the public body discusses the employment or termination of a current employee, unless the employee "whose rights could be adversely affected request[s] in writing that the matter . . . be discussed at a public meeting[]." The court found plaintiff was not entitled to a Rice notice because she "[did] not have a legitimate entitlement or property right to her . . . [j]udgeship. . . . It naturally follows that Plaintiff cannot state a claim for being deprived of notice or the opportunity to be heard on a matter that [p]laintiff had no entitlement to in the first place." (Emphasis in original).

Turning next to plaintiff's intentional interference with prospective advantage claim, the court reasoned that because "a holdover judge" "could be

re-appointed or replaced at will" and had no "protectable right to continued employment," plaintiff did not "adequately plead that she had a protectable right" or "that [d]efendants acted intentionally and without justification or excuse." The court found that plaintiff's mere conclusory statement that "[d]efendants internationally interfered with a protectable right . . . [did] not sufficiently suggest a showing under the third prong of an intentional interference with prospective economic advantage claim."

The court also found that plaintiff's intentional infliction of emotional distress claim failed. The court noted that an element of the claim is that "[t]he conduct must be 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" (quoting Buckley v. Trenton Sav. Fund Soc'y, 111 N.J. 355, 366 (1988) (quoting Restatement (Second) of Torts § 46 cmt. d (Am. Law Inst. 1965))). The court further noted that "[a] defendant may also be liable where the [d]efendant acts in a reckless manner 'in deliberate disregard of a high degree of probability that emotional distress will follow.' Ibid."

Affording plaintiff all reasonable inferences, the court found defendants did not act in a manner constituting intentional infliction of emotional distress.

> Defendants acted under a reasonable good faith belief that the [p]laintiff was reporting to work while under the influence of alcohol. Relaying this belief to superiors and discussing such allegations before a meeting of the city council is within the realm of appropriate behavior and cannot possibly be construed as behavior going beyond "all possible bounds of decency" or utterly intolerable in a civilized community. Alone, the conclusory allegation that the [d]efendants acted in an extreme and outrageous manner is not sufficient to state a claim for [i]ntentional [i]nfliction of [e]motional [d]istress. (citation omitted).

The court also found plaintiff's claims for defamation and invasion of privacy failed. The court engaged in the following analysis of the defamation claim. A potential defamatory statement is subject to a qualified privilege where a "legitimate public 'interest . . . underlying the publication outweighs the important reputation interests of the individual.'" (quoting Erickson v. Marsh & McLennan Co., 117 N.J. 539, 564 (1990)). The court noted that Erickson, 17 N.J. at 564, stated: "The critical elements of this test are the appropriateness of the occasion on which the defamatory information is published, the legitimacy of the interest thereby sought to be protected or promoted, and the pertinence of the receipt of that information by the recipient." However, the court also stated that qualified privilege may be lost where the publisher knows the statement is false or acts in reckless disregard of its truth or falsity, the publication is contrary

to the interests of the qualified privilege, or the statement is excessively published.

The court found the allegedly defamatory statements satisfied these tests and were subject to qualified privilege. It noted that as chief judge, Pratt "had a profound interest in maintaining the integrity of the [j]udiciary" and Pratt's reporting of plaintiff's alleged intoxication was a bona fide communication made upon a subject matter in which Pratt had a duty. The court further found that in their respective positions as Mayor and Council President, Barka and Crump likewise had a substantial interest in the conduct of the City's municipal court judges. The court concluded that defendants did not abuse the privilege since the facts did not suggest the publication was made with knowledge of its falsity or reckless disregard for the truth or that they were excessively published. The court also concluded that plaintiff failed to plead facts sufficient to overcome the privilege.

II.

On appeal, plaintiff argues:

> I. THE TRIAL JUDGE ERRED IN NOT GIVING ALL FAVORABLE INFERENCES TO THE NON-MOVING [PLAINTIFF] BY ACCEPTING ALL [DEFENDANTS'] STATEMENTS AS TRUE AND FOR NOT MAKING ANY FINDINGS OR GIVING ANY REASONS FOR ITS FINDING [PLAINTIFF]

DID NOT MAKE A PRIMA FACIE CASE OF PERCEIVED DISABILITY OR DISABILITY DISCRIMINATION.

a. Individual [Defendants] Crump[,] Pratt, Daniels, [and] Baraka Aided and Abetted Each Other in the Discriminatory Vote Not Terminate and/or Recommend Termination of [Plaintiff's] Employment.

b. [Plaintiff] Was Not Afforded [the] Opportunity to Take Depositions But [Defendants] Were Able To Do So.

II. THE TRIAL COURT ERRED IN DISMISSING [PLAINTIFF'S] COMPLAINT ON QUALIFIED PRIVILEGE GROUNDS IN AS MUCH AS [PLAITIFF] IS ALLEGING THE [DEFENDANTS] PRATT, CRUMP AND DANIELS STATEMENTS WERE KNOWINGLY FALSE AND THAT [DEFENDANT] BARAKA DISSEMINATED THAT FALSE INFORMATION BEYOND THOSE ENTITLED TO RECEIVE IT.

III. THE TRIAL COURT ERRED IN FINDING THAT [DEFENDANTS] DID NOT COMMIT INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS DESPITE THE FACT THAT THEIR EXTREME AND OUTRAGEOUS CONDUCT CAUSED APPELLANT TO SEVERE DEPRESSION.

IV. THE TRIAL COURT ERRED IN FINDING THAT [DEFENDANTS] DID NOT DEFAME/SLANDER [PLAINTIFF] DESPITE THE FACT THAT [DEFENDANTS] KNOWINGLY [P]UBLISHED FALSE STATEMENTS ABOUT [PLAINTIFF] THAT WERE INCOMPATIBLE WITH POSITION AS A MUNICIPAL COURT JUDGE.

We initially note that on appeal, plaintiff did not brief the dismissal of her claims for: wrongful termination (count one); breach of the implied covenant of good faith and fair dealing (count two); defamation and invasion of privacy by Crump (part of count four); invasion of privacy by Baraka (part of count five); and claims under the CRA (count eight). We deem those claims waived. See Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011) ("An issue not briefed on appeal is deemed waived."). We therefore affirm the dismissal of counts one, two, and eight. We also affirm the trial court's dismissal of plaintiff's claims against Crump in count four, and her claim of invasion of privacy against Baraka in count five.

III.

We review a grant of summary judgment "de novo and apply the same standard as the trial court." Rios v. Meda Pharm., Inc., 247 N.J. 1, 13 (2021). Summary judgment will be granted when "the competent evidential materials submitted by the parties," viewed in the light most favorable to the non-moving party, show there are no "genuine issues of material fact," and that "the moving party is entitled to summary judgment as a matter of law." Grande v. Saint Clare's Health Sys., 230 N.J. 1, 23-24 (2017) (quoting Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)). We must give the non-moving party "the benefit of the most

favorable evidence and most favorable inferences drawn from that evidence." Est. of Narleski v. Gomes, 244 N.J. 199, 205 (2020) (quoting Gormley v. Wood-El, 218 N.J. 72, 86 (2014)). We owe no special deference to the motion judge's legal analysis. RSI Bank v. Providence Mut. Fire Ins. Co., 234 N.J. 459, 472 (2018).

Plaintiff contends that she should have been able to depose the defendants before the court considered the dismissal motions. Although the motions were filed under Rule 4:6-2(e), "the judge accepted and considered facts beyond the pleadings, thus converting the application[s] into [] motion[s] for summary judgment." Luiz v. Sanjurjo, 335 N.J. Super. 279, 280 n.1 (App. Div. 2000). "Because the trial court relied on materials outside the pleadings to dismiss [plaintiff's] claims against the [defendants,] . . . we deem its decision to be a grant of summary judgment pursuant to Rule 4:46-2, not a grant of a motion to dismiss for failure to state a claim." H.C. Equities, LP v. Cnty. of Union, 247 N.J. 366, 380 (2021).

"Generally, summary judgment is inappropriate prior to the completion of discovery." Wellington v. Est. of Wellington, 359 N.J. Super. 484, 496 (App. Div. 2003) (citing Velantzas v. Colgate–Palmolive Co., 109 N.J. 189, 193 (1988)). "When 'critical facts are peculiarly within the moving party's

knowledge,' it is especially inappropriate to grant summary judgment when discovery is incomplete." Velantzas, 109 N.J. at 193 (quoting Martin v. Educ. Testing Serv., Inc., 179 N.J. Super. 317, 326 (Ch. Div. 1981)). "Where discovery on material issues is not complete the respondent must, therefore, be given the opportunity to take discovery before disposition of the motion." Pressler & Verniero, cmt. 2.3.3 on R. 4:46-2. For example, a motion for summary judgment should be adjourned to allow the non-moving party an opportunity for discovery as to facts first disclosed in a recent deposition. Lenches-Marrero v. Law Firm of Averna & Gardner, 326 N.J. Super. 382, 387-88 (App. Div. 1999).

Additionally, summary judgment should ordinarily be denied where an action requires determination of a state of mind, such as claims of bad faith. See Auto Lenders Acceptance Corp. v. Gentilini Ford, Inc., 181 N.J. 245, 271-72 (2004) (stating that when the intent of an employee is at issue, it "becomes a disputed issue of fact generally not appropriate for disposition through summary judgment"); Wilson v. Amerada Hess Corp., 168 N.J. 236, 253-54 (2001) (finding that when a claim is based on an allegation of bad faith, discovery that might produce facts giving rise to an inference of bad faith must be permitted

before a summary judgment motion is heard); Pressler & Verniero, cmt. 2.3.4 on R. 4:46-2.

Summary judgment should also be denied when determination of material disputed facts depends primarily on credibility evaluations. Pressler & Verniero, cmt. 2.3.2 on R. 4:46-2. However, "discovery need not be undertaken or completed if it will patently not change the outcome." Minoia v. Kushner, 365 N.J. Super. 304, 307 (App. Div. 2004).

Here, plaintiff twice served notices to depose defendants before the DED was reached. Defendants took the position that plaintiff should be deposed first. While that may be common practice, defendants have no right to postpone their depositions because they wish to depose plaintiff first. See R. 4:10-4 ("Unless the court upon motion . . . orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not, of itself, operate to delay any other party's discovery.").

As we have noted, although plaintiff opposed defendants' motions, contending they should be denied substantively and "disallowed" procedurally because defendants had not yet been deposed, the court did not address the incomplete discovery. We presume it did not do so because it decided the

motion under Rule 4:6-2(e), which considers "the legal sufficiency of the facts alleged on the face of the complaint," Baskin, 246 N.J. at 171 (quoting Dimitrakopoulos, 237 N.J. at 107), rather than facts obtained through discovery.

Motions to dismiss a complaint for failure to state a claim upon which relief can be granted are typically filed in lieu of an answer at the front end of a case. See R. 4:6-2. Here, in contrast, defendants' motions were filed on August 3, 10, and 20, 2021, after the parties engaged in discovery, including plaintiff's deposition but not defendants' depositions, and before the court-ordered October 22, 2021 deadline to conduct depositions. The motions were heard by the court on November 19, 2021, and decided by the court on December 7, 2012, before the January 31, 2022 DED. This atypical motion practice might be viewed as an end run around the procedural requirements imposed on summary judgment motions under Rule 4:46-2.

Moreover, dismissal of a complaint pursuant to Rule 4:6-2(e) is ordinarily without prejudice, Pressler & Verniero, cmt. 4.1.1 on R. 4:6-2, to allow the plaintiff to file an amended complaint alleging additional facts, see Hoffman v. Hampshire Labs, Inc., 405 N.J. Super. 105, 116 (App. Div. 2009), if doing so would not be futile, particularly where discovery may give rise to a viable claim, see Dimitrakopoulos, 237 N.J. at 107. Here, as we explain infra, several causes

of action hinged on whether defendants' conduct was intentional or undertaken with malice, making their depositions a critical aspect of discovery. Defendants' depositions did not take place because they insisted plaintiff be deposed first.

IV.

We begin our analysis of plaintiff's remaining LAD claims by recognizing that "[f]reedom from discrimination is one of the fundamental principles of our society." Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 600 (1993). "The purpose of the LAD is to eradicate discrimination, whether intentional or unintentional." Id. at 604-05. "Therefore, the perpetrator's intent is simply not an element of the cause of action." Id. at 605. The plaintiff need only show the discrimination would not have occurred but for her protected status. Ibid.

Alcoholism is considered a disability within the meaning of the LAD. Delvecchio v. Twp. of Bridgewater, 224 N.J. 559, 574 (2016) (quoting Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 591-93, 595 (1988)). An employee perceived to have a disability is protected under the LAD to the same extent as someone who is actually disabled. Grande, 230 N.J. at 18. "LAD claims based upon a perceived disability still require 'a perceived characteristic that, if genuine, would qualify a person for the protections of the LAD.'" Dickson v.

Cmty. Bus Lines, Inc., 458 N.J. Super. 522, 532 (App. Div. 2019) (quoting Cowher v. Carson & Roberts, 425 N.J. Super. 285, 296 (2012)).

To state a prima facie case of perceived disability discrimination under the LAD, a plaintiff must allege that: (1) the employer perceived the employee as disabled; (2) the employee remains qualified to perform the essential functions of the job and was performing at a level that met the employer's expectations; (3) an adverse employment action because of the perceived disability; and (4) the employer thereafter sought a similarly qualified individual. Wild v. Carriage Funeral Holdings, Inc., 458 N.J. Super. 416, 429 (App. Div. 2019), aff'd but criticized on other grounds, 241 N.J. 285 (2020) (citing Grande, 230 N.J. at 17-18 and Victor v. State, 203 N.J. 383, 410-13 (2010)). "The evidentiary burden at the prima facie stage is 'rather modest: it is to demonstrate to the court that plaintiff's factual scenario is compatible with discriminatory intent – i.e., that discrimination could be a reason for the employer's action.'" Zive v. Stanley Roberts, Inc., 182 N.J. 436, 447 (2005) (quoting Marzano v. Comput. Sci. Corp., 91 F.3d 497, 508 (3d Cir. 1996)).

Plaintiff was still serving as a holdover judge even though her three-year term had expired when she received notification from the Mayor that her services were no longer needed effective May 26, 2020. Her successor was

appointed on May 31, 2020. Because she was denied reappointment, she is protected under the LAD against an adverse employment action based upon a perceived disability. See Henry v. N.J. Dep't of Hum. Servs., 204 N.J. 320, 331 (2010) (noting that denial of promotion, reappointment, or tenure is an adverse employment action); Greenberg v. Camden Cnty. Vocational & Tech. Schs., 310 N.J. Super. 189 198-99 (App. Div. 1998) (same). Our Supreme Court has stated that "no functional difference exists between the failure to reappoint at the end of [a] fixed term and the dismissal of an at-will employee." Battaglia, 88 N.J. at 62-63.

"If the employee establishes a prima facie case [under the LAD], 'the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employer's action.'" Hejda v. Bell Container Corp., 450 N.J. Super. 173, 193 (App. Div. 2017) (quoting Zive, 182 N.J. at 449). "Once that reason is articulated, it is left to the employee to prove by a preponderance of the evidence that the reason was merely pretextual." Id. at 193-94 (citing Zive, 182 N.J. at 449).

Plaintiff argues that Pratt, Baraka, Crump, and Daniels aided and abetted in the discriminatory conduct. "[I]t is unlawful '[f]or any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing

of any of the acts forbidden [under the LAD],' N.J.S.A. 10:5-12e, and such conduct may result in personal liability." Tarr v. Ciasulli, 181 N.J. 70, 83 (2004) (second and third alterations in original). To hold an employee liable for aiding and abetting under the LAD, "a plaintiff must show that '(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; [and] (3) the defendant must knowingly and substantially assist the principal violation.'" Id. at 84 (alteration in original) (quoting Hurley v. Atl. City Police Dep't, 174 F.3d 95, 127 (3d Cir. 1999)). To determine if a defendant provides "substantial assistance" to the principal violator, a court must consider: "(1) the nature of the act encouraged, (2) the amount of assistance given by the supervisor, (3) whether the supervisor was present at the time of the asserted harassment, (4) the supervisor's relations to the others, and (5) the state of mind of the supervisor." Ibid. (quoting Restatement (Second) of Torts § 876(b) cmt. d).

We hold that plaintiff stated a prima facie case of perceived disability discrimination against defendants. Because plaintiff had not deposed defendants, discovery was not complete on the critical issue of defendants' state

of mind and intent. We reverse the dismissal of plaintiff's LAD claims and remand for completion of that discovery.

V.

Regarding plaintiff's remaining defamation claims, we begin our analysis by noting summary judgment practice is generally encouraged in defamation actions. See Durando v. Nutley Sun, 209 N.J. 235, 254 (2012). "[A] timely grant of summary judgment in a defamation action has the salutary effect of discouraging frivolous lawsuits that might chill the exercise of free speech on matters of public concern." G.D. v. Kenny, 205 N.J. 275, 304-05 (2011). Nevertheless, "the state-of-mind analysis required for an 'actual malice' determination may not lend itself to summary judgment." Pressler & Verniero, cmt. 5 on R. 4:46-2. However, "to survive summary judgment in an action against a public official, a plaintiff must produce substantial evidence of actual malice." Ibid. (citing Hopkins v. City of Gloucester, 358 N.J. Super. 271, 279 (App. Div. 2003)). Genuine material factual issues as to actual malice will preclude summary judgment. Lynch v. N.J. Educ. Ass'n, 161 N.J. 152, 173-74 (1999); Ricciardi v. Weber, 350 N.J. Super. 453, 469-72 (App. Div. 2002).

The elements of defamation are "(1) the assertion of a false and defamatory statement concerning another; (2) the unprivileged publication of

that statement to a third party; and (3) fault amounting at least to negligence by the publisher." Leang v. Jersey City Bd. of Educ., 198 N.J. 557, 585 (2009) (quoting DeAngelis v. Hill, 180 N.J. 1, 13 (2004)). "To determine if a statement has a defamatory meaning, a court must consider three factors: '(1) the content, (2) the verifiability, and (3) the context of the challenged statement.'" Ibid. (quoting DeAngelis, 180 N.J. at 14).

"Slander per se exists when one accuses another: '(1) of having committed a criminal offense, (2) of having a loathsome disease, (3) of engaging in conduct or having a condition or trait incompatible with his or her business, or (4) of having engaged in serious sexual misconduct.'" Too Much Media, LLC v. Hale, 413 N.J. Super. 135, 167 (App. Div. 2010) (quoting McLaughlin v. Rosanio, Bailets & Talamo, Inc., 331 N.J. Super. 303, 313-14 (App. Div. 2000), aff'd as modified, 206 N.J. 209 (2011)). Slander per se is likewise subject to privileges.

Here, plaintiff does not allege that defendants' defamation was in retaliation for prior events or circumstances. Nor does she allege defendants had some other ulterior motive for defaming her. Instead, plaintiff argues Pratt's allegation that she had been intoxicated on multiple occasions constituted per se slander and libel.

"Although defamatory, a statement will not be actionable if it is subject to an absolute or qualified privilege." Erickson, 117 N.J. at 563. A statement is subject to qualified privilege where it is:

> made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, [and that communication] is privileged if made to a person having a corresponding interest or duty, although it contains criminatory matter which, without this privilege, would be slanderous and actionable.
>
> [NuWave Inv. Corp. v. Hyman Beck & Co., 432 N.J. Super. 539, 560 (App. Div. 2013) (quoting Bainhauer v. Manoukian, 215 N.J. Super. 9, 36 (App. Div. 1987)), aff'd, 221 N.J. 495 (2015).]

"[A] qualified privilege extends to an employer who responds in good faith to the specific inquiries of a third party regarding the qualifications of an employee." Ibid. (quoting Erickson, 117 N.J. at 562). In Erickson, the court explained:

> The critical test of the existence of the privilege is the circumstantial justification for the publication of the defamatory information. The critical elements of this test are the appropriateness of the occasion on which the defamatory information is published, the legitimacy of the interest thereby sought to be protected or promoted, and the pertinence of the receipt of that information by the recipient.
>
> [117 N.J. at 564 (quoting Bainhauer, 215 N.J. Super. at 36-37).]

A qualified privilege is overcome by a showing of actual malice. Id. at 563. "[O]nly evidence demonstrating that the publication was made with knowledge of its falsity or a reckless disregard for its truth will establish . . . actual malice . . . ." DeAngelis, 180 N.J. at 14. "To prove publication with reckless disregard for the truth, a plaintiff must show that the publisher made the statement with a 'high degree of awareness of [its] probable falsity,' or with 'serious doubts' as to the truth of the publication." Lynch, 161 N.J. at 165 (alteration in original) (first quoting Garrison v. Louisiana, 379 U.S. 64, 74 (1964) then quoting St. Amant v. Thompson, 390 U.S. 727, 731 (1968)).

A qualified privilege may also be lost if: "(1) the publisher knows the statement is false or the publisher acts in reckless disregard of its truth or falsity; (2) the publication serves a purpose contrary to the interests of the qualified privilege; or (3) the statement is excessively published." Kass v. Great Coastal Express, Inc., 152 N.J. 353, 356 (1998) (quoting Williams v. Bell Tel. Lab'ys Inc., 132 N.J. 109, 121 (1993)). "[A]n abuse of a qualified privilege must be proven by clear and convincing evidence." Ibid.

The trial court determined that defendants' statements were subject to qualified privilege. Whether defendants engaged in actual malice requires a determination of their intent, a fact sensitive analysis that must await the

completion of defendants' depositions. We reverse the dismissal of plaintiff's remaining defamation claims and remand for that purpose.

VI.

In count six, plaintiff asserted a claim of intentional infliction of emotional distress. She alleged defendants "acted with a reckless disregard of the probability of causing [p]laintiff emotional distress." In her brief, however, other than generally referencing the allegations in the complaint, plaintiff only discusses Personnel Director Daniels' allegedly false statement during Council's executive session that she offered treatment to plaintiff that plaintiff rejected. Plaintiff claims her termination "led to a medical diagnosis of depression which debilitated [plaintiff] for months" during which "she did nothing but lay on the floor."

To establish a prima facie case of intentional infliction of emotional distress a plaintiff must show:

> (1) defendant acted intentionally; (2) defendant's conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community;" (3) defendant's actions proximately caused [her] emotional distress; and (4) the emotional distress was "so severe that no reasonable [person] could be expected to endure it."

> [Delvalle v. Trino, 474 N.J. Super. 124, 142-43 (App. Div. 2022) (second alteration in original) (quoting Segal v. Lynch, 413 N.J. Super. 171, 191 (App. Div. 2021)).]

In Delvalle, we listed the following cases where intentional infliction of emotional distress was found:

> (1) a county sheriff's using an atrocious racial slur to refer to an African-American employee, Taylor v. Metzger, 152 N.J. 490, 508-21 (1998); (2) a defendant teacher's false report that the plaintiff teacher, a practicing non-violent Buddhist, had threatened to kill her students, and arranging to have the plaintiff removed publicly from the school, allegedly in retaliation for rebuking the defendant's sexual advances, Leang v. Jersey City Bd. of Educ., 198 N.J. 557, 568, 587-88 (2009); (3) a supervisor and two co-workers at a military facility surrounding the plaintiff and making comments and gestures to suggest that she was to perform a sexual act on the supervisor while the others watched, followed by a threatening telephone call implying that the Mafia would become involved if the plaintiff pursued the investigation, Wigginton v. Servidio, 324 N.J. Super. 114, 119-20, 123, 130-32 (App. Div. 1999); (4) a landlord's intentional shutting off heat, running water, and security in a rent-controlled building in an effort to induce the tenants to vacate, 49 Prospect St. Tenants Ass'n v. Sheva Gardens, Inc., 227 N.J. Super. 449, 455-57, 466, 471-75 (App. Div. 1988); and (5) a doctor's allegedly telling parents that their child was "suffering from a rare disease which may be cancerous knowing that the child has nothing more than a mildly infected appendix," Hume v. Bayer, 178 N.J. Super. 310, 319 (Law Div. 1981).

> [Id. at 143 (alterations in original) (quoting Ingraham, 422 N.J. Super. at 21).]

In the following cases intentional infliction of emotional distress was not found:

> (1) the decedent's children from an earlier marriage were not informed about and thus excluded from a viewing at the funeral home after the decedent was murdered, Cole v. Laughrey Funeral Home, 376 N.J. Super. 135, 147-48 (App. Div. 2005); (2) a supervisor expressed doubt that the plaintiff had been diagnosed with breast cancer, and then came near her "on the verge of physically bumping into [the plaintiff's] breast area as if to see" if she truly had a mastectomy, Harris v. Middlesex County College, 353 N.J. Super. 31, 36, 46-47 (App. Div. 2002); (3) managers at an appliance retailer brought theft charges against the plaintiff sales manager for selling a television to his brother-in-law below cost, [Griffin v. Tops Appliance City, Inc., 337 N.J. Super. [15,] 20-25 (App. Div. 2001)]; and (4) the defendant in a divorce case had a long-term adulterous affair with her boss, Ruprecht v. Ruprecht, 252 N.J. Super. 230, 236-38 (Ch. Div. 1991).
>
> [Id. at 143-44 (quoting Ingraham, 422 N.J. Super. at 22).]

Even if true, the conduct plaintiff alleged defendants committed falls far short of being "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." For these reasons, count six was properly dismissed.

VII.

In count seven, plaintiff claims that Pratt and Baraka's conduct interfered with her prospective economic advantage by defaming her, which led to her termination and economic losses. She alleges Pratt and Baraka intentionally and recklessly defamed plaintiff's character and placed her in a false light by accusing her of being intoxicated at work and disclosing the accusations to Council and Crump.

New Jersey recognizes a cause of action for "tortious interference with a prospective economic advantage." Patel v. Soriano, 369 N.J. Super. 192, 242 (App. Div. 2004). To prevail on a claim for tortious interference with a prospective economic advantage,

> a plaintiff must prove that [(1)] he had a reasonable expectation of advantage from a prospective contractual or economic relationship, [(2)] that defendant interfered with this advantage intentionally and without justification or excuse, [(3)] that the interference caused the loss of the expected advantage, and [(4)] that the injury caused damage.
>
> [Ibid. (citing Printing Mart-Morristown v. Sharp Elects. Corp., 116 N.J. 739, 751-52 (1989)).]

Whether Pratt and Baraka acted intentionally and without justification hinges on their intent and the truthfulness of their statements, a fact sensitive analysis that must await the completion of defendants' depositions. We reverse

the dismissal of plaintiff's claims of intentional interference with prospective economic advantage and remand for that purpose proceedings.

VIII.

In sum, we affirm the dismissal with prejudice of counts one, two, six, and eight. We also affirm the dismissal with prejudice of plaintiff's claims of defamation and invasion of privacy against Crump (part of count four) and her claim of invasion of privacy against Baraka (part of count five). We remand the remaining counts and claims for the completion of discovery consistent with this opinion. We express no opinion on the merits of those claims.

Affirmed in part and reversed and remanded in part. We do not retain jurisdiction.