

PRESS RELEASE

Re: Domenic Cappella v. City of Atlantic City, Lorenzo Langford, Timothy Mancuso, George Tibbitt, Dennis Mason, Eugene Robinson and William Marsh

We are pleased to report that the Honorable Nelson Johnson of the Atlantic County Superior Court, Law Division, has granted Atlantic City's formal application to dismiss the plaintiff's complaint in its entirety. We are pleased that Judge Johnson in a comprehensive 18 page opinion accepted the City's argument that under no circumstances was the City involved in any retaliatory action in connection with any alleged whistleblowing by Mr. Cappella. Indeed, we are gratified that the Court recognized that Mr. Cappella was in fact not involved in any whistleblowing whatsoever. The Court recognized that Mr. Cappella's unprofessional and disruptive behavior contributed to an atmosphere of hostility and animosity that infected City government during that pertinent period of time.

A copy of the opinion is attached for your ready reference. All future inquiries may be made directly with:

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JUN 22 2012

NELSON C. JOHNSON

SUPERIOR COURT OF NEW JERSEY

NELSON C. JOHNSON, J.S.C.

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MEMORANDUM OF DECISION ON MOTION
Pursuant to Rule 1:6-2(f)

TO: Counsel List

RE: Cappella vs. City of Atlantic City DOCKET NO. ATL-L-4883-09

NATURE OF MOTION(S): Defendants' Motions for Summary Judgment

HAVING CAREFULLY REVIEWED THE MOVING PAPERS AND ANY RESPONSE FILED, I HAVE RULED ON THE ABOVE CAPTIONED MOTION(S) AS FOLLOWS:

Presently before the Court are Defendants, the City of Atlantic City, Dennis Mason, Eugene Robinson, William Marsh, Timothy Mancuso and George Tibbit (collectively referred to as "Defendants") Motion for Summary Judgment and Codefendant, Mayor Lorenzo Langford's ("Langford") Motion for Summary Judgment. Plaintiff, Domenic Cappella ("Plaintiff") opposes these Motions.

The volume of materials submitted by counsel is prodigious. Despite the excellent arguments of all counsel, the Court recognizes that it simply isn't possible within the confines of this Memorandum of Decision to acknowledge each and every fact to which the attorneys and their clients attach importance. Based upon the Court's review of the parties' submissions, together with the arguments of counsel and colloquy with the Court at a hearing conducted on June 15, 2012, the Court makes the following findings of fact:

Findings of Fact

1. This matter arises from Plaintiff's employment with the City of Atlantic City. (See Plaintiff's Br., Exhibit W, Complaint, hereinafter "Complaint").
2. Plaintiff's employment with the City spanned from January 2002 to May 2010. (See Complaint).
3. The City of Atlantic City Government is structured with the Mayor at the head of the local government. According to the Plaintiff, the Business Administrator (BA) is immediately below the Mayor, and the Assistant Business Administrator (ABA) is third in power, directly below the BA. (See Defendants' Exhibit B, City of Atlantic City Organizational Chart). According to Mr. Scott, the organizational chart did not reflect the actual operation of the City government and the ABA was not third in line as Plaintiff alleges. (See Defendant's Reply, Scott Dep. 58).
4. In January 2002, Mayor Langford designated Plaintiff the Director of the Mercantile Division in Atlantic City. Later in 2002, Mayor Langford made Plaintiff the ABA. (See Complaint; Cappella Dep. 134). Plaintiff served in this position until May of 2005, when Mayor Langford terminated him for "budgetary reasons." (See Complaint ¶ 21; Cappella Dep. 134).
5. After Plaintiff was terminated, he retained an attorney, John M. Donnelly, Esq. to file an action against the City and Mayor Langford. Plaintiff filed this action alleging CEPA violations, Freedom of Speech violations, Freedom of Association violations and unlawful reprisals. (See Langford Cert., Exhibit I, 2005 Complaint).
6. In August 2005, Plaintiff's claims were settled. A broad form of release was signed which released the City, the Mayor, and any of its officers and officials for all claims "which Cappella may have or ever had against the City, the Mayor and the released parties from the beginning of time to the date Cappella executes this Release." (See Langford Br., Exhibit J, Cappella 2005 Release).
7. In October 2005, Plaintiff was reinstated as ABA. (See Complaint ¶26). During November of this same year, Mayor Langford lost his re-election for Mayor. The new Mayor, Robert Levy ("Mayor Levy") hired Plaintiff as the Business Administrator. Plaintiff's salary then rose to \$102,000. (See Cappella Dep. 51; Langford Cert. 45).
8. Shortly after taking office, in the Summer of 2006, Mayor Levy "disappeared." (See Cappella Dep. 46). Thereafter, Codefendant, City Council President William Marsh ("Marsh") became acting Mayor. (See Complaint ¶41; Defendants' Br., Statement of Facts p.5).
9. Marsh testified that Plaintiff was combative and disruptive during Council Meetings. (See Marsh Dep. 42).

10. On May 30, 2007, City Council gave Plaintiff a vote of “no confidence.” (See Cappella Dep. 202).
11. In November 2007, Plaintiff and Scott Evans, a firefighter, were vying for the appointment of Mayor for the balance of the term of Mayor Levy, who resigned following a criminal conviction. Evans was ultimately appointed Mayor by City Council. (See Cappella Dep. 105). Evans was a white male.
12. When Evans took Office, he did not reappoint Plaintiff as BA and instead appointed Carol Fredericks (“Fredericks”), a white female, in January of 2008. After Fredericks was appointed, Plaintiff again became the ABA. (See Langford’s Cert. 45, 60). As ABA, Plaintiff’s pay was reduced to \$60,000. (See Complaint ¶50).
13. Evans stated that he didn’t appoint Plaintiff as BA because he “was not capable of performing basic administrative functions.” Further, Evans stated that Plaintiff “was insubordinate. In one instance he actually alienated and irritated State officials investigating City financial affairs.” Even more, Evans stated that he “antagonized members of City Council and created an unprofessional and disruptive environment.” (See Defendant’s Reply, Evans Cert.).
14. The position of BA is one that is appointed directly by the Mayor. (See Langford Cert. 72). Plaintiff understood that all Mayors have discretion as to who they appoint as Business Administrator. (See Cappella Dep. 271-273).
15. In the Spring of 2008, while continuing in his position as ABA, Plaintiff became a mayoral candidate running against both Evans and Langford. (See Langford Cert. 60).
16. On March 20, 2008, Plaintiff arrived late to work because he was appearing as a guest on the radio. Carol Fredericks sent a letter reprimanding Plaintiff for conducting political activity during work hours in violation of City policy. The letter states that “any repeated unacceptable behavior or work will result in more serious action being taken.” (See Langford Cert., Exhibit V, Frederick’s Letter). Plaintiff did not sign the letter, but acknowledges seeing it. (See Cappella Dep. 373).
17. A memo Plaintiff wrote states that in the Spring of 2008 he “was suspended from work indefinitely” because of his “being a candidate,” but that they only took three days and he returned to work. (See Langford’s Br., Exhibit N, Cappella Memo 60).
18. In May of 2008, Plaintiff was given a notice of disciplinary action, which resulted in his suspension for three days without pay. (See Cappella Dep. 374).
19. The initial notice of disciplinary action stated that “on or about May 6, 2008, you appeared at a debate in which confidential information regarding City of Atlantic City personnel information was revealed; specifically, regarding the resolution of a personnel

action as well as personnel information regarding a potential employee's health." (See Plaintiff's Br., Exhibit O).

20. The aforesaid notice contained a statement which said "it has been determined that your immediate suspension is necessary to maintain safety, health, order, and/or effective direction of public service. (See Exhibit O; Cappella Dep. 352). Plaintiff contends that this language actually meant his suspension was necessary to maintain *his* personal physical health. (See Cappella Dep. 352).

21. With regard to this allegation, Plaintiff testified as follows:

First of all, Mr. Winston was never an employee of the City so, therefore, I couldn't have gave confidential information. He came to my office and I believe he was quite upset. I asked him what he was upset about. I know he always had some kind of problem with his heart or whatever. And he said, Mr. Evans told him to go and report for a job, a position in Public Works. I said, That's okay. So what could I do for you? He said he thinks he got set up. I said, What do you mean? They told me to take a physical, and you know I can't take a physical. And he started crying. And I kind of felt bad for him so I asked Jonetta, who was my assistant, and I don't know, get him a glass of water or coffee. So I said, Look, as far as I know when you get a job, especially, I believe, the job was labor, you need to take a physical to see if you are competent to pick up things and all that. He said, I'm not taking no physical, so I guess I don't get the job. I said, Go see Evans. Maybe he can straighten it out. And he left, that's it.

(See Cappella Dep. 339). At the May 6, 2008 debate, Mr. Winston apparently made a comment that the City needed more workers in Public Works. Plaintiff commented "I don't know what you are talking about. The reason why you weren't hired is because you wouldn't take a physical." (See Cappella Dep. 343).

22. The memorandum of understanding stated that "in [Plaintiff's] official capacity as ABA . . . [he] made inappropriate comments under the City's policies and procedures." (See Cappella Dep. 374). In agreeing to a three day suspension for these comments, Cappella signed a memorandum of understanding wherein he stated that he did not contest the charges. Plaintiff claims that he signed the memorandum of understanding "under duress." (See Cappella Dep. 374).

23. Plaintiff alleges that this disciplinary suspension was because he refused to sign a contract which would pay the law firm of Bernstein and George \$250,000 to represent the City. (See Cappella Dep. 376). There is no testimony from anyone other than the Plaintiff corroborating this assertion.

24. According to Plaintiff, at another debate in May, he confronted Langford about the settlement money and Langford became angry, almost punching him. (See Cappella Affidavit). Langford testified that at this debate, Plaintiff disrespected a female and he

intervened to separate the Plaintiff. He testified that he did not even come close to punching him. (See Langford Dep. 152-53).

25. In November 2008, Langford won the election and again became Mayor. (See Langford Cert. 60).

26. Langford appointed Redenia Gillian-Mosee as Business Administrator. (See Complaint ¶ 55; Langford Br. 60). According to Plaintiff, Gillian-Mosee brought "credibility to the Langford Administration." (See Langford Cert. 60).

27. Mayor Langford testified that he did not hire Plaintiff as BA because he:

was an extremely polarizing figure. City Council would not work with him, registered their either dissent or disapproval, if you will, in the form of a resolution that was, if memory serves me correctly, was almost unanimous, we need a BA who is eminently qualified. We need a BA who is a galvanizing force who can bring people together, not be a polarizing figure who tends to have people not be able to work in harmony and in uniformity. And so I did not think that Mr. Cappella was in any way, shape or form in that respect qualified[.] (See Langford Dep. 165-66).

28. On November 26, 2008, Plaintiff sent a request for back pay to Ms. Gillian-Mosee asking that his base salary increase to reflect his title, effective on March 11, 2008. (See Plaintiff's Br., Exhibit R, Memo to Gilliam-Mosee).

29. During her tenure, Ms. Gillian-Mosee contracted a terminal illness and passed away. In April 2009, Mayor Langford appointed Michael Scott as the BA. (See Langford Cert. 61). Both Ms. Gillian-Mosee and Michael Scott were African American.

30. The record reflects that in 2009, Plaintiff made several complaints to Michael Scott claiming that he was being "bypassed" and "ignored." (See Plaintiff's Cert., Exhibit U, Memo to Michael Scott). There is no testimony from anyone other than Plaintiff corroborating this allegation.

31. In his deposition, Plaintiff claims that Michael Scott's failure to involve him in meetings was racially motivated. (See Cappella Dep. 288-290).

32. Plaintiff filed his initial Complaint in this matter on December 8, 2009. (See Plaintiff's Cert., Exhibit V, Complaint).

33. The entirety of Plaintiff's deposition reveals that Plaintiff was dissatisfied with the amount of pay he received as ABA and for his brief stint at Business Administrator. Plaintiff believed that others who previously held the position received higher pay. It is likewise clear from a reading of the deposition that Plaintiff was immersed in the politics of City Hall, both as an employee and a candidate. (See generally Cappella Dep.).

34. From January 2006 to January 2008, Plaintiff contends that he complained to Mayor Levy; Council President Marsh, the Law Department and City Council about the City's practice of awarding street-end rights to political contributors. Plaintiff alleges he reported the same conduct to the City's ethics board. (*See Plaintiff's Cert, Exhibit A, Plaintiff's Affidavit of Merit*).
35. In 2007, Plaintiff contends that he complained to the same people about the City Council's plan to extend the costly Gardner's Basin lease to the Gardner's Basin Foundation. Plaintiff also states that he complained to Governor Corzine about this. (*See Plaintiff's Affidavit of Merit*).
36. Marsh stated that he was totally unaware Plaintiff had complained to Governor Corzine about the Gardner's Basin Lease. (*See Marsh Dep. 160*).
37. After a settlement involving Mayor Langford was voided, the New Jersey Supreme Court required Mayor Langford to pay back the \$850,000 settlement. Plaintiff contends that he was vocal in supporting the efforts of the Law Department to recover that settlement money. (*See Plaintiff's Affidavit of Merit*). Kim Baldwin (now Procopio) testified that Plaintiff had no involvement in enforcing the repayment of this settlement. (*See Plaintiff's Cert., Procopio Dep. 71*).
38. Plaintiff also contends that he was vocal in his support of eradicating City Council's practice of awarding campaign supporters with lucrative legal service contracts. (*See Plaintiff's Affidavit of Merit*).
39. Plaintiff further states that he investigated and discovered abuse of City car and gasoline privileges and wrote a written complaint to Council President Marsh and ultimately a complaint to the City's Ethics Board. (*See Plaintiff's Affidavit of Merit*). After this, Plaintiff contends that Marsh banned him from meetings. (*Ibid.*)
40. Although Marsh acknowledges that Plaintiff complained to him about this, he was unaware that Plaintiff reported this conduct to the Ethics Board. (*See Defendant's Reply, Marsh Dep. 160*).
41. At the beginning of 2010, the City of Atlantic City had an operating budget deficit in the approximate amount of \$10,000,000 for the 2010 fiscal year. (*See Defendants' Cert. 89*).
42. Stephen Glickman, then labor counsel for the City of Atlantic City, commenced negotiations with uniformed and non-uniformed labor organizations that represented City employees, in an attempt to avoid layoffs and/or reductions in force. (*See Defendants' Cert. 92-93*).
43. During the winter of 2010, after the City labor unions refused all of Mr. Glickman's proposals, Mr. Glickman formulated a proposed lay off and demotion plan (hereinafter

the "Glickman Plan"). This plan included the elimination of many positions, including the title of ABA. (See Defendants' Cert. 93).

44. On April 12, 2010, the State of New Jersey, through the Department of Personnel (DOP), the New Jersey Civil Service Commission, approved the Glickman Plan.
45. There is nothing in the record to show that Plaintiff or any other employee questioned, challenged, or appealed the DOP's approval of the Glickman Plan. Counsel reported to the court at oral argument that a city union had challenged the Glickman Plan but that the DOP rejected the same.
46. On this same day the plan was approved, the City issued general notices of layoff or demotions to the forty-seven employees who were affected by the approved Glickman Plan. (See Defendants' Cert. 93). There are no facts to support a finding that the Glickman Plan was prepared in bad faith.
47. Councilman Marsh testified that City Council had no role in the elimination of Mr. Cappella's position. (See Marsh Dep. 99). There is nothing before the Court indicating that anyone other than Mr. Glickman was the author of the Glickman Plan.
48. Notwithstanding the layoff general notice, Plaintiff had "bumping rights" to revert to his former position of Director of the Mercantile Division. (See Defendants' Cert. 93). Rather than exercise these rights, Plaintiff voluntarily left his position. (See Cappella Dep. 394:19).
49. Plaintiff's Complaint contains the following Counts: Count I, a violation of the Conscientious Employee Protection Act (CEPA); Count II, a violation of the New Jersey Law Against Discrimination (LAD) for race discrimination; Count III, a violation of the LAD for Hostile Work Environment based on race; Count IV, a violation of the LAD for Retaliation; and Count V, Intentional Infliction of Emotion Distress (IIED).
50. Councilmen Mancuso, Robinson, and Marsh are all named Defendants in Plaintiff's Complaint. Plaintiff alleges that these Defendants all voted for Plaintiff's removal and voted "no confidence" in Plaintiff's job performance. (See Cappella Dep. 49). Plaintiff also named Councilmen Dennis Mason and George Tibbit in his Complaint.

Parties' Contentions

Preliminarily, individual Defendants Dennis Mason, Eugene Robinson, William Marsh, Timothy Mancuso and George Tibbit contend that they cannot be individually liable under any theory. Specifically, they contend that they did not aid and abet the discrimination that Plaintiff asserts.

1. CEPA Violation (Count I)

Defendants and Mayor Langford argue that Plaintiff cannot establish a CEPA claim because (1) he did not engage in any protected activity; and (2) he suffered no adverse employment action. Additionally, Defendants contend that the laches defense bars Plaintiff from asserting claims which occurred beyond the statute of limitations.

Plaintiff contends that he has made out a *prima facie* case of a CEPA violation. Specifically, Plaintiff argues that he repeatedly complained to the Law Department of the City and/or City Council about: Pay-to-Play law violations arising from the award of legal services Contracts; violations arising from the award of street-end rights and the Gardner's Basin lease; unethical conduct by Council members arising from its members' abuse of their office and of their City car privileges; and Faulkner Act violations. Plaintiff contends that he suffered an initial adverse employment action of a disciplinary suspension and was ultimately "terminated" because of this whistle-blowing activity.

2. LAD: Race Discrimination (Count II)

Preliminarily, Defendants contend that all Plaintiff's LAD claims are barred by his election to pursue CEPA claims. Plaintiff contends that he has not waived his LAD claims because these are "substantially independent" from the CEPA claims.

With regard to race discrimination, Defendants argue that Plaintiff cannot establish that he was discriminated against because of his race. Specifically, Defendants contend that Plaintiff cannot introduce anything prior to his 2005 settlement because he specifically released any claims he had against all Defendants arising prior to this time. Defendants contend that Plaintiff cannot establish a *prima facie* case of reverse race discrimination because there were several legitimate non-discriminatory reasons for not hiring him as Business Administrator. Further, Defendants contend that they did not impair any term or condition of his employment during the time Plaintiff was employed as ABA. Mayor Langford contends that he cannot be liable in his individual capacity for discrimination because he was the alleged wrongdoer and thus could not "aid and abet" his own wrongdoing.

Plaintiff argues that he has established a *prima facie* case of reverse race discrimination. Specifically, Plaintiff contends that he was bypassed for promotion, demoted, had reduced

compensation and suffered unfair disciplinary treatment because of his race. Plaintiff contends that he has established he was better qualified than both Michael Scott and Ms. Gillian Mosee and that Mayor Langford and/or Mayor Marsh had a reason or inclination to discriminate against the majority class.

3. Hostile Work Environment (Count III)

Defendants argue that Plaintiff cannot establish a claim for hostile work environment. Specifically, Defendants argue that Plaintiff has pointed to only isolated discriminatory comments which do not amount to a hostile work environment. Additionally, Defendants contend that Plaintiff's work conditions were never altered. Plaintiff contends that he suffered discrimination that was so severe and pervasive to amount to a hostile work environment. In support of this contention, Plaintiff argues that the severe and pervasive discrimination was his being promoted, having his duties diminished, and being paid less than his peers.

4. LAD: Retaliation (Count IV)

Plaintiff's counsel conceded at oral argument that there is no basis to this claim, offering no opposition to the dismissal of this Count.

5. Intentional Infliction of Emotional Distress (Count V)

Mayor Langford contends that Plaintiff cannot establish a claim for IIED because Mayor Langford did not engage in any "extreme" or "outrageous" conduct. Further, Mayor Langford contends that Plaintiff's IIED claim is preempted by the LAD. Plaintiff contends that the evidence shows that Mayor Langford's conduct was intentional and outrageous and intended to cause him severe emotional distress.

Discussion

A. Summary Judgment

Rule 4:46-2 provides that Summary Judgment is appropriate where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." All inferences of doubt are drawn against the movant and in favor of the opponent of the motion. *See Brill vs. Guardian Life Ins. Co.*, 142 N.J. 520 (1985).

In deciding a Summary Judgment motion, the trial court's "function is not . . . to weigh the evidence and determine the truth . . . but to determine whether there is a genuine issue for trial." *Brill*, 142 N.J. at 540. To determine that, the trial judge must consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." *Ibid*. If there is "a single, unavoidable resolution of the alleged disputed issue of fact," then the issue is not "genuine." *Ibid*. The thrust of *Brill* is that "when the evidence 'is so one-sided that one party must prevail as a matter of law,' . . . the trial court should not hesitate to grant summary judgment." *Ibid*.

B. Court's Analysis

Preliminarily, the Court notes that Plaintiff entered into a settlement agreement and general release in August 2005, wherein he waived all claims he may have had against the City, the Mayor, and any of its officers or officials up to the time of the release. Despite Counsel's urgings at oral argument to consider various events and verbal exchanges prior to that date, the Court will not consider anything which occurred prior to Cappella's 2005 settlement.

Additionally, the Court finds that Plaintiff has no valid causes of action against the individual Defendants named in his Complaint, namely: Dennis Mason, Eugene Robinson, William Marsh, Timothy Mancuso, George Tibbit, and Lorenzo Langford.

Plaintiff has alleged CEPA violations and violations of the LAD. CEPA only permits liability for an "employer." See N.J.S.A. 34:19-3. The LAD only permits individual liability under an aiding and abetting theory. N.J.S.A. 10:5-12(e). To be individually liable under such a theory: "(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." *Tarr v. Ciasulli*, 181 N.J. 70, 84 (2004) (internal citations omitted). Plaintiff has presented no evidence which suggests that any of the individual defendants are liable under the standard set forth in *Tarr*. Accordingly, the Court hereby GRANTS Mason, Robinson, Marsh, Mancuso, Tibbit, and Langford's Motion for Summary Judgment as to Counts I-IV of Plaintiff's Complaint.

Moreover, the Court finds that Plaintiff's LAD Claims for Race Discrimination and Hostile Work environment are not waived by CEPA's waiver provision. It is well-established that "the causes of action which fall within this waiver provision are those causes of action that are directly related to the employee's termination due to disclosure of the employer's wrongdoing." *See Young v. Schering*, 275 N.J. Super. 221, 239 (1994). Accordingly, Count IV of Plaintiff's Complaint is barred by CEPA's waiver provision, but Counts II and III are not.

Finally, overarching this Court's analysis of Plaintiff's LAD claims is the principle that the LAD is meant to protect against discrimination. *See N.J.S.A. 10:5-12(a)*. The LAD is not a mechanism for an employee to air his or her grievances or differences with other employees or supervisors.

1. CEPA Violation (Count I)

It is well-established that to prevail on a claim brought under CEPA, a plaintiff must establish that:

(1) he or she reasonably believed that his or her employer's conduct was violating either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy; (2) he or she performed a "whistle-blowing" activity described in N.J.S.A. 34:19-3c; (3) an adverse employment action was taken against him or her; and (4) a causal connection exists between the whistle-blowing activity and the adverse employment action.

See Maimone v. City of Atlantic City, 188 N.J. 221, 230 (2005). CEPA prohibits an employer for taking "retaliatory" action against any employee for reporting conduct protected under N.J.S.A. 34:19-3c. *Ibid.* at 235. "Retaliation" pursuant to the statute is "the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment." *Ibid.* at 236. To be considered an "adverse employment action" the action must impact the employee's "compensation or rank" or "be virtually equivalent to discharge." *Borawski v. Henderson*, 347 N.J. Super. 350, 360 (2002). With regard to the fourth requirement, that the Plaintiff establish a causal connection between his whistle-blowing and the adverse employment action, the proximity of the adverse employment action to the protected conduct may weigh in favor of a causal connection. *Maimone*, 188 N.J. at 237 (2005).

Here, Plaintiff cannot establish that Defendants retaliated against him for his whistle blowing activity. With regard to prongs 1 and 2, the Court accepts the Plaintiff's assertions that he complained extensively (*See Findings of Fact ## 30-39*).

Pursuant to N.J.S.A. 34:19-3c, an employer shall not take retaliatory action against an employee who:

Discloses, or threatens to disclose to a *supervisor* or to a *public body* an activity, policy or practice of the employer, or another employer, with whom there is a business relationship, that the employee reasonably believes:

(1) is in violation of a law, or a rule or regulation promulgated pursuant to law, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, in the case of an employee who is a licensed or certified health care professional, reasonably believes constitutes improper quality of patient care; or

(2) is fraudulent or criminal, including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity;

Here, Plaintiff made complaints about the Gardner's Basin Lease, the failure of Langford to repay his settlement proceeds, the City's practice of awarding street-end rights to political contributors, City employees' abuse of City car privileges, and the City's practice of awarding legal services contracts to political contributors. Of these Complaints, it is documented that he reported at least those Complaints about the Gardner's Basin Lease and the City employees' abuse of City car privileges to Governor Corzine and the City's Ethics Board, respectively. For purposes of this Motion, the Court finds that Plaintiff's Complaints are sufficient to amount to whistle-blowing activity pursuant to the CEPA statute.

Plaintiff's CEPA claim fails because he cannot establish that the City retaliated against him as a result of his complaints. Plaintiff alleges that he suffered adverse employment actions including: bypass for promotion, demotion, suspension and eventual discharge. He contends that these adverse employment actions were causally connected to his whistle-blowing.

The facts relevant to the third and fourth prongs needed to establish a CEPA violation are as follows. In October 2005, Plaintiff was reinstated as ABA. Shortly after he was reinstated, Mayor Levy defeated Mayor Langford in the November mayoral election. Mayor Levy then hired Plaintiff as BA and Plaintiff's pay rose to \$102,000. When Mayor Levy left office in the Summer of 2006, Marsh became acting Mayor. In November 2007, Plaintiff and Scott Evans were vying for the appointment of Mayor for the balance of Mayor Levy's term. Evans was ultimately appointed Mayor by the City Council. Evans did not reappoint Plaintiff as BA and instead appointed Carol Fredericks. Plaintiff then became the ABA and his pay was reduced to \$60,000. Evans unequivocally stated that he chose not to appoint Plaintiff because he was incapable, insubordinate, and antagonized members of City Council. Plaintiff contends that Evans failure to appoint him BA was a "demotion" and/or a "failure to promote." However, Plaintiff acknowledged that all Mayors have discretion as to whom they appoint as Business Administrator.

In the Spring of 2008, Plaintiff again became a mayoral candidate. After becoming a candidate, Plaintiff was suspended twice; first in late March 2008 for conducting political activity during work hours; second in May 2008 for making inappropriate comments about a City applicant's health during a public debate. Plaintiff signed a memorandum of understanding wherein he agreed he did not contest the charges. Plaintiff claims he did so under "duress." Specifically, Plaintiff stated:

Well, according to the attorney, they said, Listen, we can take this and we can win it but it's going to take a few weeks, a little bit of time. At that time I couldn't afford it. I had a big mortgage and everything else. You know what, let me get back to work and I'll sign it. That's it. I didn't agree with it, but I signed it. I needed money. I had to support my wife.

Cappella Dep. 375. Plaintiff alleges that he was suspended because he contested a contract Mayor Evans was attempting to award to a lawyer, Phil George.

In November 2008, Langford won the mayoral election and again became Mayor. Langford appointed Ms. Gilliam-Mosee as Business Administrator. Plaintiff contends that this amounted to a "failure to promote." After Ms. Gilliam-Mosee's untimely passing, Langford appointed Michael Scott as Business Administrator. Plaintiff contends that after Mr. Scott held

this position, he was bypassed and ignored. In December 2009, Plaintiff filed the instant Complaint.

In April 2010, the State of New Jersey approved the Mr. Glickman's plan to lay off and/or demote forty-seven employees. As part of this State-approved plan, Plaintiff's position – ABA – was eliminated. It is also undisputed that Plaintiff had bumping rights to revert to his old position as Mercantile Director but instead chose to resign. Plaintiff contends that the City's conduct amounted to a "termination" and that this was causally related to his whistle-blowing.

Here, the Court is satisfied that none of the adverse employment actions Plaintiff alleges he suffered were causally related to his alleged whistle-blowing. Plaintiff kept his job from August 2005 until he voluntarily resigned in May 2010. During this time, Plaintiff made several complaints about various practices of City employees; however, in no time during this period did Plaintiff lose his job or get demoted after he made said complaints. Additionally, there is nothing in the record to suggest that any of his supervisors were aware of the Complaints he made to the City's ethics board or Governor Corzine. Further, the record is devoid of any evidence that Plaintiff's reversion to ABA after Mayor Evans was appointed had anything to do with his whistle-blowing. Rather, the evidence suggests that Mayor Evans chose not to hire Plaintiff because of his opinion that Plaintiff performed poorly at his job and behaved badly. Plaintiff acknowledges that the Mayor has full discretion as to whom to appoint as Business Administrator.

Additionally, Plaintiff's assertion that his suspensions were related to his whistle-blowing lacks an evidentiary basis. Each time he was suspended, he acknowledged the conduct (albeit not the impropriety of the conduct) which led to the suspensions. Plaintiff even voluntarily signed a memorandum of understanding (MOU) as to his May 2009 suspension. Although Plaintiff asserts that these suspensions were related to complaints he made about Evans hiring a specific attorney, he has not provided any evidence of the same.

Plaintiff also contends that he signed this MOU under "duress" and that he did not agree with what it said. It is well-established that a person may establish duress if consent was "coerced; that is, was the person complaining 'induced by the duress or undue influence to give his consent, and would not have done so [absent the undue influence].'" *Rubenstein v. Rubenstein*, 20 N.J. 359, 366 (1956). Here, Plaintiff was represented by Counsel and elected to

sign the MOU hoping to return to work promptly. Plaintiff has provided no evidence that he was in any way "coerced" to enter into this agreement. Accordingly, the Court is satisfied that Plaintiff did voluntarily agree to this MOU.

Finally, Plaintiff's ultimate exit from his position as ABA was not a "termination" as he alleges. Rather, the elimination of his position was a State-approved decision to begin to remedy the financial troubles Atlantic City faced in 2010. Plaintiff could have asserted his bumping rights, but instead decided to voluntarily resign. It is undisputed that Mr. Glickman's Certification stated that the plan was developed as a necessary remedy for the City's financial situation. Again, the record contains no evidence that the City's plan to lay off or demote forty-seven City employees was related to Plaintiff's whistle-blowing. Additionally, Councilman Marsh testified that City Council had nothing to do with the elimination of Plaintiff's position, and Plaintiff has presented no evidence to rebut the same.

In sum, the record establishes that Plaintiff's complaints are based solely on his disagreements with not being named Business Administrator. Although Plaintiff was suspended and ultimately chose to not take an alternative position with the City when they were forced to downsize, Plaintiff has presented no evidence to suggest that these employment actions were in any way related to the complaints he made. Rather, the record suggests that the adverse employment actions he suffered were a result of: (a) two mayors who chose not to appoint him to a higher office for valid reasons; (b) his own improper conduct; and (c) a fiscal crisis faced by the City of Atlantic City.

Based on the foregoing, the Court hereby GRANTS Defendants' Motion for Summary Judgment on Count I of Plaintiff's Complaint.

2. LAD: Race Discrimination (Count II)

A claim for reverse race discrimination requires that a Plaintiff prove, as the first prong of a *prima facie* case, that the "background circumstances [support] the suspicion that defendant is the unusual employer who discriminates against the majority." *Erickson v. Marsh & McLennan Co.*, 117 N.J. 539, 551 (1990). This standard places a heavy burden on the Plaintiff. To make this showing, Plaintiff must establish (1) that he was better qualified for the minority candidate selected; or (2) that the employer had some reason or inclination to discriminate against the majority. *Bergen Commercial Bank v. Sisler*, 157 N.J. 188, 214. If Plaintiff can make such a

showing, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for its employment actions. *Kelly v. Bally's Grand, Inc.*, 285 N.J Super. 422, 420 (1995). Once the employer has articulated a legitimate, non-discriminatory reason for its employment action, the burden shifts back to the plaintiff to prove that the employer's reason is merely a pretext for discrimination. *Ibid.*

Here, Plaintiff has not met his burden of proving that he was discriminated against because of his race. Preliminarily, Plaintiff cannot allege reverse discrimination for Evans' action in not appointing him because Evans, like Plaintiff, is a white male. Plaintiff contends that Langford discriminated against him because of his race by not appointing him Business Administrator, despite the fact that he was more qualified than the African-Americans he selected. However, Langford unequivocally stated that he did not appoint Plaintiff because of his divisiveness. Plaintiff contends that this is a pretext for not hiring him because he was white. Plaintiff, however, has submitted nothing which suggests to this Court that Langford's decision was based upon anything but his, and City Council's view, that Plaintiff was divisive and polarizing. Plaintiff is certainly correct that there was some animosity toward him that is present in the record. However, there is nothing to suggest that this animosity was racially motivated.

Accordingly, the Court hereby GRANTS Defendants' Motion for Summary Judgment as to Count II of Plaintiff's Complaint.

3. LAD: Hostile Work Environment (Count III)

To state a claim for hostile work environment under the LAD, a plaintiff must show that "the complained of conduct (1) would not have occurred but for the employee's [race]; and it was (2) severe or pervasive enough to make a (3) reasonable [person] believe that (4) the conditions of the employment are altered and the working environment is hostile or abusive." *See Lehmann v. Toys 'R' Us, Inc.*, 132 N.J. 587, 620 (1993). When assessing whether conduct is sufficiently "severe or pervasive," courts must consider the totality of the circumstances and focus on the "harassing conduct . . . , not its effect on the plaintiff or the work environment." *Ibid.* at 606. In determining whether conduct is "severe or pervasive" a court should consider "(1) the frequency of all the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating, or a mere offensive utterance; and (4) whether it unreasonably interferes with an employee's work performance." *Godfrey v. Princeton Theological Seminary*,

196 N.J. 178, 196 (2008) (internal quotation marks omitted). Neither a plaintiff's subjective response, nor a defendant's subjective intent is controlling on whether an actionable hostile work environment claim exists. *See Cutler v. Dorn*, 196 N.J. 419, 431 (2008).

Plaintiff alleges that the City has "repeatedly humiliated" him by: "(1) refusing to promote him to acting BA or BA; (2) diminishing his duties as ABA while handing his responsibilities to less qualified African-Americans; (3) paying him less than his African-American peers; and (4) ultimately terminating his employment." These allegations are insufficient to establish a claim for hostile work environment. First, Plaintiff has not established that the way he was treated by the City had anything to do with his race. In the time Plaintiff was employed as BA and ABA, there was a white mayor, a white BA, an African-American mayor, and an African-American BA. Neither the white Mayor (Evans) nor the African-American Mayor (Langford) chose to keep or appoint him as BA because of his personality and work behavior, which existed irrespective of his race. Even more, Plaintiff has not shown that there was any severe discriminatory conduct which would unreasonably interfere with his work performance. The record reflects admitted tension between Plaintiff and City Council, the Mayors, and BAs; however, tension, without any evidence of discriminatory conduct, is insufficient to establish a claim for hostile work environment.

Accordingly, the Court hereby GRANTS Defendants' Motion for Summary Judgment as to Count III of Plaintiff's Complaint.

4. LAD: Retaliation (Count IV)

Plaintiff does not oppose the dismissal of this claim as it falls under CEPA's waiver provision. Accordingly, the Court hereby GRANTS Defendants' Motion for Summary Judgment as to Count IV of Plaintiff's Complaint.

5. IIED (Count V)

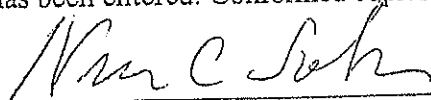
To establish a claim for IIED, a plaintiff must show that (1) the Defendants intended to cause emotional distress; (2) the conduct was extreme and outrageous; (3) the Defendant's actions proximately caused the emotional distress; and (4) that the emotional distress was severe. *Buckley v. Trenton Savings Fund Society*, 111 N.J. 355, 366 (1988). For conduct to be "extreme and outrageous" it 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." *Ibid.*

Here, there is absolutely no evidence that any of the individual defendants or the City engaged in any "extreme" or "outrageous" conduct. Plaintiff's only assertion is that Langford attempted to punch him and that this is extreme and outrageous conduct. Although Langford vigorously disputes this assertion in his deposition, *even if* it is true, this would not amount to conduct which is "atrocious" and "beyond all possible bounds of decency." Even more, Plaintiff cannot establish that this action was meant to cause him emotional distress.

Accordingly, the Court hereby GRANTS Defendants' Motion for Summary Judgment as to Count V of Plaintiff's Complaint.

In sum, Plaintiff's Complaint is hereby DISMISSED with prejudice. An appropriate Order has been entered. Conformed copies accompany this Memorandum of Decision.



NELSON C. JOHNSON, J.S.C.

Date of Decision: 6-22/12