Superior Court of New Jersey
Law Division, Essex County
Docket No. ESX-L-004762-20

MARC LOEB,

Plaintiff,

V.

VANTAGE CUSTOM CLASSICS INC., AND IRA NEAMAN.

Defendants,

CIVIL ACTION

MOTION FOR DISMISSAL SUPERIOR COURT OF NEW JERSEY

LAW DIVISION ESSEX COUNTY

DECISION

PRELIMINARY STATEMENT

Defendant, Vantage Custom Classics, Inc., ("Vantage") and Ira Neaman, in the within proposed petition for Dismissal, asserts failure to state a claim upon which relief can be granted. Defendants contends that Plaintiff fails to point to any specific law, regulation or clear mandate of public policy which would justify his claim under New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-1.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This statement of facts incorporates by reference facts culled from pleadings submitted by both parties. Plaintiff Mark Loeb was hired as the Chief Operating Officer of defendant, Vantage Custom Classics Incorporated reporting to defendant, Ira Neaman the chief executive officer. Vantage manufacturers apparel which promotes names and logos of corporations, golf courses, resorts and colleges. Plaintiff was responsible to

oversee the operations at each of Vantage's manufacturing plants located in New Jersey, Missouri and California. Plaintiff alleges that on or about March 2, 2020 Plaintiff begin to express concerns about workers safety due to COVID-19 and requested permission to establish protocols to protect workers from contracting and spreading covid-19. Plaintiff further alleges that on or about March 9, 2020 in response to his concerns Defendant agreed to set up a task force to establish safety protocols. Plaintiff established protocols for additional cleaning of machines, doorknobs and light switches. Plaintiff asserts that on or about March 9, he later composed a letter informing workers of the protocols and ordering them to stay home if they felt sick. Plaintiff alleges that upon insistence, this letter was posted on March 13, 2020.

Plaintiff contends that he expressed to Defendants that workers should be allowed to work from home and that Defendant, Neaman agreed to allow employees to work from home for three days a week, but were paid for four hours of those days. Plaintiff also alleges a request to take the temperature of workers entering the factory each day, but that Defendant denied this request.

Vantage faced its first positive COVID-19 case of one of its workers, on March 15, 2020. This employee is believed to have begun feeling sick on March 13, 2020 and called out on March 15, 2020, informing Vantage that she had tested positive for covid-19. Plaintiff asserts that he informed Defendants that the factory should be closed in response, but that Defendants dismissed this idea asserting that all machines had been cleaned since the employee had last worked. Plaintiff next alleges that he emailed Defendants stating that people who had contact with the person carrying the virus had to be informed and told to self-quarantine. Further, Plaintiff asserts that Defendants agreed

to inform the floor manager that came in contact with the positively tested employee, but did not allow Plaintiff to inform the workers. Parties agree that before March 19, 2020 Vantage agreed to call its lawyers and the health department to be advised on procedure. Plaintiff alleges that on the morning of March 19, 2020 he again insisted that workers be advised of their exposure to COVID-19. Plaintiff further alleges that in response Defendant, Neaman stated "today is your last day." Plaintiff argues that he was terminated in retaliation to his insistence that the company follow guidelines and executive orders to keep workers safe during a pandemic.

Defendants Vantage and Ira Neaman filed this Motion to Dismiss Complaint on September 11, 2020. Thereafter Plaintiff Marc Loeb filed an opposition to Motion to Dismiss on October 10, 2020. Defendants replied to the opposition on October 13, 2020. The Court heard oral argument by all parties on October 21, 2020. This decision is issued by the Court November 2, 2020.

A. COVID-19 Guidance

For the purposes of the within motion, the Occupational Safety and Health Administration's 'Guidance on Preparing Workplaces for Covid-19' is incorporated by reference.

> **"Similar to influenza viruses, SARS-CoV-2, the virus that causes COVID-19, has the potential to cause extensive outbreaks. Under conditions associated with widespread person-to person spread, multiple areas of the United States and other countries may see impacts at the same time. In the absence of a vaccine, an outbreak may also be an extended event.**
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> . . .
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> **"This guidance is not a standard or regulation, and it creates no new legal obligations. It contains recommendations as well as descriptions of mandatory safety and health standards. The recommendations are advisory in nature, informational in content, and are intended to assist employers in providing a**

safe and healthful workplace. The Occupational Safety and Health Act requires employers to comply with safety and health standards and regulations promulgated by OSHA or by a state with an OSHA-approved state plan. In addition, the Act's General Duty Clause, Section 5(a)(1), requires employers to provide their employees with a workplace free from recognized hazards likely to cause death or serious physical harm." Occupational Safety and Health Administration (Occupational Safety and Health Act of 1970), *Guidance on Preparing Workplaces for COVID-19,* (Feb. 2020) www.osha.gov/Publications/OSHA3990.

B. Executive Order 102

On February 3, 2020, Governor Murphy issued Executive Order No. 102, establishing a Coronavirus Task Force. Governor Murphy described the Coronavirus as a severe, potentially fatal respiratory illness that can result in Pneumonia, acute respiratory distress syndrome, septic shock, and multi-organ failure. Governor Murphy also set forth guidelines by the "World Health Organization" ("WHO") declaring that as of January 30, 2020 COVID-19 is a "Public Health Emergency of International Concern."

C. Executive Order 103

On March 9, 2020, Governor Murphy issued Executive Order No. 103, declaring a "Public Health Emergency and State of Emergency" in the state of New Jersey. Further declaring that the International Health and Regulations Emergency committee of WHO declared the outbreak a public health emergency requiring an international response.

D. Executive Order 104

On March 16, 2020 Governor Murphy issued Executive Order 104 closing schools, casinos, racetracks, gyms, entertainment centers and reduced the hours of non-essential businesses declaring that the President of the United States determined as of March 13, 2020 that COVID-19 pandemic has sufficient magnitude and severity to warrant an

emergency determination under Section 501(b) of the Robert Stafford Disaster Relieve and Emergency Assistance Act, 42 U.S.C. §5121-5207.

E. Executive Order 107

On March 21, 2020 Governor Murphy issued a stay at home order, under order No. 107 declaring that all businesses or non-profits of the state whether closed or op to the public must accommodate their workforce, wherever practicable for telework, or work-from-home arrangements.

F. Executive Order 122

On April 8, 2020, Governor Murphy issued Executive Order No. 122 incorporating all relevant Executive Orders in relation to pandemic COVID-19, Declaring;

"All essential retail businesses, warehousing businesses, manufacturing businesses, and businesses performing essential construction projects must also adopt policies that include, at minimum, the following requirements:

- **a. Immediately separate and send home workers who appear to have symptoms consistent with COVID-19 illness upon arrival at work or who become sick during the day;**
- **b. Promptly notify workers of any known exposure to COVID-19 at the worksite, consistent with the confidentiality requirements of the Americans with Disabilities Act and any other applicable laws;**
- **c. Clean and disinfect the worksite in accordance with CDC guidelines when a worker at the site has been diagnosed with COVID-19 illness; and**
- **d. Continue to follow guidelines and directives issued by the New Jersey Department of Health, the CDC and the Occupational Health and Safety Administration, as applicable, for maintaining a clean, safe and healthy work environment."**

LEGAL ANALYSIS

Under Rule 4:6-2(e), a Motion to Dismiss is "a proper vehicle for early disposition . . ." CKC Condo. Ass'n, Inc. v Summit Bank, 335 N.J.Super. 385, 387 (App. Div. 2000). Conversely, the Court recognizes dismissal as an extraordinary action. In Printing Mart-Morristown v. Sharp Elecs. Corp., the court stipulated that a court "should grant [a]

dismissal in only the rarest of instances." 116 N.J. 739, 772 (1989). Such a review "is limited to examining the legal sufficiency of the facts alleged on the face of the complaint." Id. at 746.

It is well settled that Rule 12b generally governs dismissal as a result of failure to state a claim. Fed. R. Civ. P. 12b(6):

"[A] Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, *ibid.*, a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true." Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

The question before the Court considers failure to state an actionable claim under clear mandates of public policy as applied to New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-1 ("CEPA"). Our Supreme Court has followed clear guidelines outlined within this State's application of CEPA:

> **"[A]n employee has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy. The sources of public policy include legislation; administrative rules, regulations or decisions; and judicial decisions. In certain instances, a professional code of ethics may contain an expression of public policy . . . Absent legislation, the judiciary must define the cause of action in case-by-case determinations. An employer's right to discharge an employee at will carries a correlative duty not to discharge an employee who declines to perform an act that would require a violation of a clear mandate of public policy. However, unless an employee at will identifies a specific expression of public policy, he may be discharged with or without cause."** Mehlman v. Mobil Oil Corp., 153 N.J. 163 (1998)(Quoting Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58 (1980)).

DISCUSSION

Our Supreme Court has noted that the goal of CEPA is "not to make lawyers out of conscientious employees but rather to prevent retaliation against those employees who object to employer conduct that they reasonable believe to be unlawful or indisputably dangerous to public health, safety or welfare." Dzwonar v. McDevitt, 177 N.J. 451 (2003)(quoting Mehlman v Mobil Oil Corp., 153 N.J. 163. 193-4 (1998))(Where evidence relied upon by the Court was drawn from several sources, including regulations that came into effect after Mehlman's termination). A plaintiff who brings action pursuant to CEPA must, rely on a source or law or governing authority, as an expression of public policy, that sets a standard of conduct. See, Id. at 463; See also, Maw v. Advanced Clinical Communications Inc., 179 N.J. 439, 444 (2004).

Conversely, In Dzwonar the court reasoned that "N.J.S.A. 34-19-3c does not require a plaintiff to show that a law, rule, regulation or clear mandate of public policy actually would be violated if all the facts he or she alleges are true. Id. At 464. Further it is iterated, that the court must "make a threshold determination that there is a substantial nexus between the complained-of-conduct and a law or public policy identified by the court or plaintiff." Ibid.

Defendant, Vantage, asserts that dismissal in the instant matter is appropriate as Plaintiff fails to state a claim upon which relief may be granted. Counsel for the defense relies on Mehlman, arguing that a mandate of public policy cannot be "vague, controversial, unsettled or otherwise problematic." Mehlman, 153 N.J. at 181. More specifically, Defendant argues that Plaintiff fails to point to any specific law, regulation or clear mandate of public policy, and instead Plaintiff relies on sources providing only

suggestions that do not apply to Vantage and were not in place until after Plaintiff's termination. Defendants argue that Plaintiff's assertions as to OSHA guidance, has only set forth suggestions of safe working conditions for Vantage or any other manufacturing facility. Defendants contend that CDC and OSHA guidelines were not cited within the plaintiff's Complaint, and only provide what employers "can" or "should" do as to safety protocols, without offering a clear mandate of public policy of what employers "must" do. Again, the defendants argue that these declarations do little to provide clear or mandatory conduct.

In contrast, counsel for the plaintiff argues that several clear guidelines were mentioned and relied upon as an actionable claim under CEPA. Plaintiff bases argument heavily on Dzwonar, citing that CEPA does not "require a plaintiff to show that a law, rule regulation or clear mandate of public policy," where it is clear that there is a connection between public policy and the complained-of-conduct. Dzwonar, 177 N.J. at 464. Additionally, the defense argues that the court in Mehlman, relied upon public policy mandates that were set forth even shortly after that plaintiff's termination.

Counsel sets forth both CDC guidelines implementing combative changes to the workplace and OSHA guidance, confirming that COVID-19 is an illness that is required to be recorded if contracted at work. Citing to OSHA 29 C.F.R. §1904.1(2), Plaintiff argues that OSHA guidance confirms that COVID-19 is an illness that is required to be recorded if contracted at work, and further requires non-exempt companies to keep OSHA injury and illness records, and that Vantage is not exempt. C.F.R. 19047(b)(7); 1904.5(b)(2)(viii); 1904.11.

In the wake of global pandemic COVID-19 extensive steps have been taken in order to slow the spread and contraction of the virus. At outsight, many of these practices began as precautionary steps. However, as the virus grew, many reasonable guidelines became government mandates. Notably, Executive Order No. 102, Governor Murphy's first executive order in relation to COVID-19, detailed the severity of COVID-19. In this order, Governor Murphy furnished a "Corona Task Force," relying on the World Health Organization and CDC's guidelines in addressing public health and welfare hazards caused by the dangers of COVID-19.

Plaintiff has pointed to specific guidelines set forth under numerous regulations, both before and after termination. Specifically, Governor Murphy's executive order No. 122, which was issued after Plaintiff's termination, set clear mandatory guidelines, requiring compliance with orders Nos. 102, 103, 104, 107 and 119, declaring COVID-19 as a "Public Health Emergency." The orders further required compliance with CDC guidelines set forth by Plaintiff, as well as requiring employers to take direct actions to protect their employees from the spread of COVID-19 within the workplace, as mentioned by Plaintiff. The instant case is akin to Mehlman, where even after termination it is reasonable and altogether fair to suggest that Plaintiff may rely on all orders and regulations set forth before and directly after termination in forming reasonable guidelines to rest this complaint.

Counsel for the plaintiff has made a clear showing of a claim of relief, pointing to a numerous amount of specific regulations within the CDC, OSHA and Governor Murphy's executive orders issued both before and after Plaintiff's termination in response to COVID-19. Further, being that defendants complied with a large part of

Plaintiff's suggestions, via the CDC (setting up a task force to establish safety protocols for additional cleaning of machines, door knobs and light switches, composing a letter informing workers of the protocols and ordering them to stay home if they felt sick) it is reasonable to suggest that the implementation of safety protocols were to benefit the employment in its entirety.

CONCLUSION

Following the guidelines set forth within OSHA, CEPA, Mehlman and Dzwonar, it is clear that Plaintiff has pointed to clear regulations on which he may state a claim. Therefore, Motion for Dismissal of this matter is hereby, DENIED.