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FILED

SEP 04 2018

SAMUEL J. RAGONESE, J.S.C.

Plaintiff(s) JOSEPH DIBUONAVENTURA vs. Defendant(s) WASHINGTON TOWNSHIP; ROBERT SMITH and RAFAEL MUNIZ, in their individual and official capacities	SUPERIOR COURT OF NEW JERSEY GLOUCESTER COUNTY LAW DIVISION DOCKET NO. GLO-L-1435-13 CIVIL ACTION ORDER

THIS MATTER having been brought before the Court by Birchmeier & Powell LLC attorneys for defendant Robert Smith **AND GOOD CAUSE** having been shown;

IT IS on this 4th day of Sept. 2018, **ORDERED** that defendant Robert Smith's Motion For Summary Judgment is **GRANTED** dismissing any and all claims against him AND WASHINGTON TOWNSHIP. with prejudice.

IT IS FURTHER ORDERED that a copy of this Order be served upon all parties within seven days.

SAMUEL J. RAGONESE, J.S.C.

Determination Attached

FILED

SEP 04 2018

SAMUEL J. RAGONESE, J.S.C.

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JOSEPH DiBUONAVENTURA Plaintiff(s), v. WASHINGTON TOWNSHIP; ROBERT SMITH and RAFAEL MUNIZ, in their individual and official capacities Defendant(s).	SUPERIOR COURT OF NEW JERSEY GLOUCESTER COUNTY LAW DIVISION DOCKET NO: GLO-L-1435-13 CIVIL ACTION **ORDER**

THIS MATTER, having been brought before the Court by Patrick J. Madden, Esquire, counsel for Defendants, Washington Township and Rafael Muniz ("Township Defendants"), seeking an Order granting summary judgment as to the Township Defendants; and

THE COURT, having considered the submissions and arguments in support of and in opposition to said application, and for further good cause having been shown,

IT IS on this 4th day of September, 2018, hereby ordered that the Township Defendants' Motion is GRANTED and plaintiff's Complaint is dismissed with prejudice AS TO WASHINGTON TWP. AND RAFAEL MUNIZ.

IT IS FURTHER ORDERED that a copy of this Order shall be served on all counsel of record within 7 days.

J.S.C.

☑ Motion Opposed
☐ Motion Unopposed

SAMUEL J. RAGONESE, J.S.C.

Determination Attached

PREPARED BY THE COURT

JOSEPH DiBUONVENTURA, PLAINTIFF	SUPERIOR COURT OF NEW JERSEY LAW DIVISION GLOUCESTER COUNTY
v.	DOCKET NO: GLO- L-1435-13
WASHINGTON TOWNSIP, ROBERT SMITH and RAFAEL MUNIZ, in their Individual and official capacities, DEFENDANTS	CIVIL ACTION **MEMORANDUM OF DECISION**

Procedural and Factual Background

Before the court are a series of motions and cross motions for summary judgment. These motions include the Plaintiff's motion for summary judgment as to counts three and four of the second amended complaint regarding allegations of libel and slander as well as defamation to have been committed by Defendant Robert Smith. Plaintiff has also moved for summary judgment seeking determination a "prima facie CEPA" claim exists under counts two and five of the amended complaint. The Defendants, Washington Township and former Chief Rafael Muniz, seek the dismissal of the counts against them including counts one, two and five. Lastly, Defendant Robert Smith seeks dismissal of counts three and four. The Court finds the undisputed material facts as follows.

Plaintiff was employed by Washington Township as a police officer for several years prior to 2012. On July 31, 2012, Plaintiff received information from other officers in his department that the former mayor, and assemblyman, Paul Moriarty, was allegedly drunk at a local car dealership. The Plaintiff stopped Moriarty and, against his protestations, arrested him for driving under the influence (NJSA 39:4-50) and refusing to submit to the alcohol breath test (NJSA 39:4-50.4). Moriarty was also issued a ticket for improper lane change (NJSA 39:4-88) establishing probable cause for the stop on the allegation he

drove from the left lane to the right "cutting off" DiBuonaventura as both cars entered a jug handle. Moriarty filed a formal internal affairs complaint against Plaintiff with the Washington Township Police Department on August 11, 2012. Moriarty later filed a criminal complaint containing 27 counts, 13 of which survived the municipal court process determining probable cause. On November 26, 2012 the Plaintiff was suspended without pay from his position as a police officer with the Defendant Washington Township. On May 1, 2013 the Plaintiff was indicted on these charges and on March 3, 2015 he was acquitted of all charges after trial. On March 10, 2015, Chief Muniz issued an order that Plaintiff would remain suspended without pay pending the outcome of an internal affairs investigation. Also, the township reinstated an internal affairs investigation regarding alleged violations by the Plaintiff concerning motor vehicle stops. On April 17, 2015 Plaintiff was charged with misconduct for his actions involving Moriarty and for falsely claiming to have issued warnings to motorists and reporting the same on daily reports.

The administrative hearing officer, Bernard Hoffman, retired judge of the Superior Court, began hearings on May 14, 2015. He found the Plaintiff had committed misconduct both as to the policies and procedures and also as to the Moriarty arrest and recommended Plaintiff's termination. His decision was appealed to David W. Morgan, J.S.C. Gloucester County, and in a 61 page written opinion Judge Morgan upheld the termination of the Plaintiff from the Defendant police department finding de novo that the Plaintiff's conduct warranted his termination consistent with protecting the public.

The present suit was filed by the Plaintiff on October 15, 2013, before his disciplinary action but after the Moriarty arrest. In his complaint DiBuonaventura alleges New Jersey Constitutional violations, common law violations (defamation) and CEPA violations. The alleged policy or law which he had sought to report as being violated included complaints he had filed with the Gloucester County Prosecutor's Office against the Township in 2011 alleging motor vehicle summonses he had written had been improperly dismissed in the municipal court. Separately he complained to the Prosecutor's Office on

August 6, 2012-only 7 days after his charging Moriarty- that Defendant Chief Muniz had intervened to protect his own son, Lorenzo Muniz, regarding a burglary. Discovery was delayed by the process of the criminal trial against DiBuonaventura. A second amended complaint was filed February 17, 2016 setting forth counts for defamation followed by several extensions of discovery.

Count I- the CEPA and State Constitutional claim

The Defendants contend that Count One should be dismissed as the Conscientious Employee Protection Act requires the prosecution of the CEPA claim as the only cause of action. They cite NJSA 34:19-8 as requiring:

> Nothing in this act shall be deemed to diminish the rights, privileges, or remedies of any employee under any other federal or state law or regulation or under any collective bargaining agreement or employment contract; except that the institution of an action in accordance with this act shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, State law, rule or regulation or under the common-law.

The Plaintiff responds that evidence exists the Defendants Washington Township and Muniz violated Plaintiff's rights under the New Jersey Constitution. He points to "special arrangements" by which Chief Muniz met with Moriarty above the usual and routine internal affairs procedure. He alleges Moriarty and Muniz were political allies, Moriarty having hired Muniz to become Chief and Muniz refusing to disqualify himself from the ultimate charges brought against Plaintiff. Plaintiff maintains Count One only against Defendant Muniz.

The Plaintiff's response to the language of the CEPA statue is that he has plead a separate constitutional claim and that in accordance with Maw v. Advanced Clinical Communications Inc., 359 NJ Super 420 (App. Div. 2003) rev'd on other grounds, 179 NJ 439 (2004), Plaintiff is given the option of deciding after discovery and up to the pre-trial conference to select whether to proceed with the CEPA claim or the constitutional claim. The statutory wording includes "institution of an action". However, Maw

gave the Plaintiff the opportunity to complete necessary discovery to decide how to proceed. Clearly, discovery has been completed by extensions granted in the June 8, 2018 case management order. That order provided that all fact witness discovery would be concluded by August 1. Certain reports from experts and depositions of experts were to be completed by October 1. The Plaintiff has therefore had extended time to decide the case theory with which to proceed. But in order to be able to make that choice, the Plaintiff must have another viable cause of action beside the CEPA claim.

Plaintiff has also responded to the Defendant's attack that Count One pleads a "class of one" theory and should be dismissed under Engquist v. Oregon Department of Agriculture, 553 US 591, 594 (2008). At oral argument, Plaintiff's counsel conceded that Engquist does in fact apply to the states including New Jersey. In Engquist, the United States Supreme Court held that the "class of one" claim of equal protection denial does not apply in the public employment context under the Equal Protection and Due Process clauses of the 14th amendment. The USSC extended its holding to both federal and state employment. A worker in an Oregon public health food testing facility had claimed she was treated unfairly in being passed over for a new assignment by her immediate supervisor and also mistreated by the less qualified co-worker who received the job she sought. She had alleged her treatment was "arbitrary, vindictive, and malicious." Id at 595. Plaintiff had originally argued that there is no case cited upholding Engquist in New Jersey. But any fair reading of Engquist clearly evinces an intent that it be applied to states as well as the federal government in disallowing a "class of one" claim. Not only was it a state employee setting, Oregon, but throughout the opinion the application to the states and all public employees is mentioned. Plaintiff had urged the reasoning of Greenberg v. Kimmelman, 99 NJ 552 (1985) should control. In Greenberg, the New Jersey Supreme Court acknowledged that there are differences between the United States Constitution and the New Jersey Constitution, but that both constitutions seek to protect fundamental rights. Essentially Plaintiff had urged that this court should look to case law existing prior to Engquist and not bar claims under the New Jersey Constitution. However, this court finds

the holding of Engquist controlling. The important rationale of Engquist includes the context of the subjective individual's complaints being balanced against the right of a public employer to have at-will employment. Ultimately the USSC had to strike a balance deciding that there was no constitutional right to deny a government the opportunity to engage in at-will employment. The USSC also considered the reality that there are many statutory protections in place protecting public employees including civil service, unions and regulatory statutes. This court must disagree that Greenberg, decided decades prior to Engquist, has continued application in a case such as at bar. See also Shabazz-Henry v. City of Newark, 2016 WL6156206 (Appellate Division October 24, 2016)[1].

Even if this court were to permit the "class of one" claim to continue, it would rest on the allegations that Plaintiff was subjected to "arbitrary, vindictive or malicious" treatment. But this treatment of which Plaintiff complains, i.e. his discipline and firing, arises from his wrongful and unlawful arrest of a citizen for DUI, refusal to take the alcohol test and improper lane change. In the Plaintiff's counterstatement of facts, the Plaintiff presents a continuing theme of pointing blame at others in an accusatory manner. But Plaintiff never addresses the video recording clearly showing he lied in his arrest reports as to Moriarty. He also does not respond to the testimony of independent witnesses to whom he issued written warnings that they in fact did not receive such warnings. All the while it is not acknowledged that the Plaintiff has been found by the court to have fabricated these charges thus suffering his

[1] Shabazz-Henry involved ongoing neighbor versus neighbor complaints in municipal court that ultimately resulted in the Newark Municipal Court being overwhelmed with her cases. Plaintiff claimed that the requirement that her complaints be screened by the Essex County Prosecutors Office first before submission to the municipal court denied her equal protection. The trial court dismissed her claims relying upon the Engquist decision. The appellate division affirmed the trial court's reliance on the "class of one" prohibition as enunciated in Engquist. The unpublished decision in IMO Freytes 2017 WL 712782 (App.Div. Feb. 23, 2017) also appears substantially as another affirmance of the doctrine.

adjudicated termination from employment. Unlike the other cases cited, this case includes a prior fact finding that has resulted in the termination of Plaintiff from his employment. This is a critical distinction from the cases cited by the Plaintiff. There being a "class of one" claim asserted under Count I, this court must dismiss same as not viable in this public setting.

Counts II and V- Collateral Estoppel

The Plaintiff's complaint at Count Two alleges wrongful retaliation under CEPA resulting in Plaintiff being wrongfully terminated. The Defendants Washington Township and Muniz argue that Counts Two and Five must be dismissed by reasons of collateral estoppel. They assert that the administrative hearing resulting in termination of Plaintiff and the subsequent review de novo by Judge Morgan completed a disciplinary record that considered the claim of retaliation. They argue that the New Jersey Supreme Court opinion in Winters v. North Hudson Regional Fire and Rescue, 212 NJ 67 (2012) is controlling. There, Winters, a Captain in the Fire Department, had made numerous criticisms of his department prior to his being charged. The ALJ found Winters to have committed conduct unbecoming a public employee—abuse of sick leave by working two other public sector jobs while receiving sick leave benefits . He had asserted retaliation as a defense during his administrative hearing. It was noted that Winters chose not to present the retaliation case fully but instead filed a separate lawsuit against his employer in state court. The court noted that Winters "cannot take advantage of his own tactic of throttling back on his claim of retaliation in the administrative proceeding after having initially raised it." Id at 661. Defendants assert that both hearing officer Hoffman and Judge Morgan concluded their fact-finding by conducting independent reviews and making multiple factual determinations upholding the Plaintiff's termination. It is argued that the court must accept these findings in keeping with the Winters decision. They warn that if the Plaintiff is not estopped from bringing forth his CEPA claim, he will be given yet another bite of the apple to second-guess whether the decisions of the hearing officer and Judge Morgan terminating DiBuonaventura were

proper. It would be possible that the Plaintiff could recover pay or be reinstated in the CEPA claim, while he has been terminated in the police disciplinary case.

The Plaintiff responds that collateral estoppel can only be applied where the party asserting it shows: (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) a determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party or in privity with a party to the prior proceeding. Citing Winters at 85.

Plaintiff first asserts that the administrative record has not been presented or is insufficient for the proof to be elicited that the administrative and de novo hearing included the issue of retaliation, and it was not identical to the issue presented here. Similarly, as to the second point, he argues that political retaliation "was not actually litigated" as he did not make it a "central theme of his defense in the administrative matter". Plaintiff's brief p. 19. As to the third criteria, Plaintiff asserts the judgment terminating his employment is not a final judgment on the merits as he has filed an appeal and the same is still pending. For the fourth prong, Plaintiff now asserts the question of retaliation was not essential to the question before the hearing officer and on de novo review- "the issues before the administrative bodies were framed by the personnel orders issued by Washington Township....The hearing officer and Judge Morgan decided the issue of Plaintiff's disciplinary charges without the benefit of the overwhelming evidence related to the Defendants unlawful motivation, the collusion among the Defendants and others to pay political homage to Moriarty"....Plaintiff's brief at 19-20.

As to the first and second prongs it is clear that the Plaintiff had argued alleged retaliatory conduct in the disciplinary proceeding. The Defendants supply a copy of the closing brief submitted by DiBuonaventura in the disciplinary case (Exhibits I and K, Defendant's brief) in which it is stated by DiBuonaventura that Moriarty was a "prominent New Jersey Assemblyman" who had "recruited a

Philadelphia news station, NBC-10, to broadcast his claims" that the stop was "harassment" and he was innocent. "The state, and now the department, attempt to make the defendant a scapegoat to conceal and justify Moriarty's political views and the miscarriage of justice that resulted therefrom." He asserts "it is painfully obvious that neither the state nor the Washington Township Police Department wanted to establish Moriarty violated a traffic law. Indeed, the perceived political power of Moriarty was deafening." p. 26. It was alleged that Moriarty had an *improper* meeting with Chief Muniz of six hours duration.p.25. Further, "Moriarty's TV extravaganza was viewed as an internal affairs complaint that triggered the captain's investigation. While both the county and the department claim to have investigated, the truth is they did nothing." p.29. Apparently, DiBuonaventura felt it was necessary to protect himself from claims that he himself had a vendetta against Moriarty some six years earlier arising from union negotiations while Moriarty was mayor and he was active in the union.

But later at paragraph 40 of Exhibit I, and despite the Plaintiff's CEPA complaint having been filed some two years prior, DiBuonaventura chose to refrain from alleging he was being attacked as a whistle blower. These circumstances resemble the facts in Winters because DiBuonaventura first had to defend claims he himself was biased against Moriarty and he thus "throttled back". The issue of retaliation was therefore presented but rejected by the court despite the claims that Plaintiff was harmed by a "prominent" person who had influence with a television network and the State.

Exhibit K, focusing on the "warnings case" of the underlying disciplinary matter also alleged a constitutional attack by Plaintiff claiming he was being retaliated against and being treated differently than a former officer, Attinasi, who had also written warnings to motorists without actually doing so. "The type of conduct that officer DiBuonaventura is accused of is identical in nature and far less severe in scope than the conduct Attinasi admittedly engaged in. And yet, in the case of officer DiBuonaventura, there were 15 charges, eight of which arose from a secondary investigation initiated by counsel after officer DiBuonaventura testified that he was in the middle of a lot of pressure stemming from his arrest of

Moriarty, and the negative notoriety which was affecting his state of mind.....In the case of Attinasi, the charges were immediately resolved with a minor one day suspension, without any secondary investigation to determine whether or not the officer had previously engaged in similar conduct." In addition, there is a significant difference in the types of charges brought in this case.

Judge Morgan was thus fairly presented with DiBuonaventura' s request for reinstatement and his demand for back pay, counsel fees and costs. See Judge Morgan's Oct. 19, 2017 Order and Decision. The present application again, under the CEPA counts, requests these same items of relief.

As to prong three, the hearing officer decided the matter and on de novo appeal, Judge Morgan considered the matter anew on the record. Upon Judge Morgan's decision, the matter was certified as a final decision and is now before the Appellate Division. But there is no stay of the court's decision and as such the decision is considered a final decision by this court.

With regards to prong four, a "determination of the issue was essential to the prior judgment", this element is molded by the Winters ruling and as stated above there is ample evidence that the retaliatory claims were considered by Judge Hoffman and then Judge Morgan.

Clearly prong five was satisfied as Plaintiff was the party in both the underlying disciplinary matter and the present civil suit.

While the five points indicated above are the standard to determine whether an issue has been decided and will be precluded from yet another determination, Winters also stands for the proposition that a party cannot hold back in an effort to "redo" the proceedings later. It is also clear that the Plaintiff had filed his civil complaint in this matter on October 15, 2013 alleging the core of his CEPA claim, some two years prior to the administrative hearings leading to Plaintiff's termination. In his disciplinary case, Exhibits I and K of the Defendant's brief make it clear that the Plaintiff defended himself by claiming he was the subject of a political set up, including the orchestration by Moriarty of local television support and manipulation with Muniz. These claims were given no regard or weight in the disciplinary process.

This court sees the disciplinary issues faced by the Plaintiff as being integrally intertwined with this case. The alleged biases leading to claimed retaliation were presented in the disciplinary case. DiBuonaventura's defenses are also the basis for the claims presented in the Second Amended Complaint. As stated in Winters, DiBuonaventura "cannot take advantage of his own tactic of throttling back on his claim of retaliation in the administrative proceeding after having initially raised it." Id at 661. The hearing officer's opinion was subjected to a de novo review arriving at the same ultimate conclusion that Plaintiff was unfit to serve as a police officer. This court therefore finds that the substance of claims presented in Counts II and V were previously litigated and the issues are precluded from re-determination here. This court relies heavily on the Supreme Court's rationale in Winters in so holding and finds that the risk of inconsistent verdicts is a concern.

Counts II and V- Is there a prima facie CEPA claim?

Notwithstanding the above ruling, the court also addresses the other alternative argument of Defendants for dismissal. Washington Township and Muniz also urge that a prima facie case has not been established by the Plaintiff for a CEPA claim. The law is well settled in this area that a Plaintiff must prove four elements: (1) he reasonably believed that conduct of the employer violating a law, rule or regulation, or the criminal law, was occurring; (2) he disclosed or threatened to disclose the activity to a supervisor or public body; (3) retaliatory employment action was taken against him; and (4) a causal connection existed between the protected activity and adverse employment action. They assert Plaintiff's termination was not the result of his engagement in some sort of protected activity, but was instead due to the fact that he was found guilty of charges of misconduct pursuant to NJSA 40A:14–1 47 as so found by the hearing officer and Judge Morgan on de novo appeal. They claim as a matter of law there is no nexus between any alleged protected activity, and Plaintiff's termination from the Washington Township Police Department. Accordingly, Plaintiff is unable to establish a prima facie case for his CEPA claim. Further, the Plaintiff cannot establish his termination was by pretext. In accordance with McDonnell-Douglas, once pretext of firing for an illegitimate reason is shown by Plaintiff, the burden of production will then shift to the employer to articulate some legitimate reason for the adverse employment action. Once the employer does so, the presumption of retaliatory discharge created by the prima facie case disappears and the burden shifts back to the employee. They assert that it is undisputed that the Plaintiff was discharged pursuant to the due process of law and findings of misconduct made by the hearing officer and upheld by Judge Morgan. Thus, there are legitimate reasons for Plaintiff's termination and there is no nexus linking Plaintiff's termination to wrongful conduct.

The Plaintiff's response is that he has met his burden to show a prima facie case. He cites to the liberal construction to be given to achieve remedial purposes. Blackburn v. United Parcel Service, Inc. 179 F. 3d 81, 91 (D.N.J. 1998) citing Abbamont v. Piscataway Township Board of Education, 138 NJ 405 (1994). He repeats that he has met his burden of showing that he had been engaged in protected whistleblowing and that he reasonably believed that the Defendants conduct violated a law, rule or regulation, and he suffered an adverse action and consequence in that protected activity. He concludes that the evidence of pretext is "abundant as set forth in the cross motion".

This case is unique as the Plaintiff has been adjudicated as having fabricated evidence leading to the false arrest of Moriarty on manufactured probable cause[2] and in falsely claiming he had issued warnings to motorists when he had not. Here the court cannot find that a prima facie case has been met by the failure of the third prong as Plaintiff's conduct has justly warranted the action taken against him to protect public safety. The legitimate disciplinary action taken cannot also qualify as "retaliatory" because it is the result of an established disciplinary process. At oral argument Plaintiff's counsel could not provide the citation of any case where the disciplinary process has been distinguished as not controlling. The court has accepted the allegations that the Plaintiff made multiple complaints concerning ticket writing and cover up by the chief of police concerning a burglary committed by his son in satisfaction of both prongs one and two. However prong three, proof "That an adverse employment action was taken against the employee" utterly fails in this case. No adverse action is found by this court to exist in a prima facie sense. It is not disputed that Defendant Muniz first declined to proceed with discipline against DiBuonaventura and only went forward after being instructed to do so by the Prosecutors Office. Subsequently, there was

[2] Judge Morgan's careful 61 page opinion of October 19, 2017 recounts the de novo analysis he conducted to ultimately find that "DiBuonaventura must be terminated as the appropriate discipline due to his demonstrated animosity and dislike for Moriarty in targeting him, fabricating a basis to stop him and omitting from his investigation the real reasons for his pursuit with the latter only revealed when it became clear that the entire scenario of Moriarty driving was recorded on video." P.60

a deliberate process for the disciplinary hearing and the Plaintiff was a part. There has been a fair process of adjudication that has had already one level of appeal from the hearing officer to the Superior Court on de novo review. This disciplinary action cannot be considered triggering adverse employment action as it has been the result of due process, and so prong four is also not met. The disciplinary action taken against DiBuonaventura was not at all causally related to the employee's alleged whistleblowing, taking his allegations in the light most favorable to the Plaintiff. His allegations of political cronyism leading to his discipline cannot be reconciled with the findings he committed misconduct. Clearly his termination was caused by his violations of law and the requirements of the cited New Jersey statute regarding conduct of a police officer. This court therefor cannot find that there has been a prima facie case established for CEPA violation claims to continue. Plaintiff's complaint, originally commenced in October 2013 sought "back pay, front pay and/or reinstatement." He has clearly been adjudicated unfit, and he cannot be reinstated. His underlying actions were determined improper and he cannot receive either back pay or front pay by reason of the termination. Indeed, the Plaintiff would seek to "redo" his trial by having another trial of the termination issue under the CEPA claim, and this proposition is against the holding in Winters. In accordance with R 4:46-2(c), there is no genuine issue of material fact and Counts II and V must therefore be dismissed as a matter of law. In Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995), the New Jersey Supreme Court explained the summary judgment standard as follows: "a determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to 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 factfinder to resolve the alleged disputed issue in favor of the non-moving party. The judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." In this case, there is no possibility that treasonable minds could differ and find that

DiBuonaventura's retaliation by Moriarty Muniz or anyone in Washington Township lead to his discipline and termination.

Counts III & IV, libel, slander -defamation

The Defendant Washington Township and Robert Smith also move for summary judgment and the Plaintiff cross moves for summary judgment as to Counts Three and Four claiming libel and slander and defamation.

Both Counts Three and Four appear to be the same cause of action alleging defamation committed by Robert Smith who served as the Defendant Township's business administrator during the Plaintiff's last years of employment. The essential facts are uncontested in alleging Smith was contacted by a local newspaper reporter who inquired as to whether the Plaintiff owed outstanding reimbursements for unemployment compensation he received after being reinstated to employment following a prior termination.[3] Michelle Caffrey, a reporter for NJ.com, contacted Smith sometime in April 2013 regarding the Plaintiff whom she had previously covered in the paper. She had inquired about the repayment of unemployment benefits by the Plaintiff. It is uncontroverted that Smith then contacted the township payroll clerk, and together they reviewed a spreadsheet that had been created by her. Smith was advised by the payroll clerk that no reimbursement had been received and at that time the state records still indicated that reimbursement was outstanding. Smith called the reporter back and was quoted in an article which she wrote and published indicating that the Plaintiff "does owe the township unemployment funds that were paid out 2 to 3 years ago during a period of time when he was suspended and/or terminated from the township." He also admitted to asking the town attorneys to be forceful and aggressive in seeking collection from the Plaintiff. The article also attributes Smith as confirming that $15,000 was due to the township.

[3] Plaintiff had previously been disciplined prior to the Moriarty affair and the warnings cases constituting his second round of formal discipline. On appeal that discipline was reversed and the Township was ordered to reimburse the Plaintiff his back wages.

The core allegations of defamation are that Smith had stated that $15,000 was owed to the Township regarding unemployment benefits. In fact, DiBuonaventura returned $40,880 to the State Department of Labor as part of his Settlement Agreement reinstating him to the position of police officer. Indeed, admittedly there was a substantial period of delay in the repayment by Plaintiff to the State. DiBuonaventura had been reinstated in January 2011 and had received all of his back pay from the Township by March 2012. However, he did not reimburse the Department of Labor as required until March 13, 2013. As late as March 20, 2013 the State authored a letter to the Plaintiff advising that they were requesting repayment in the amount of $40,880. It was not until May 9, 2013 that the Plaintiff's attorney advised the township that DiBuonaventura had repaid his unemployment compensation.

It is also not controverted that a substantial period of time following the settlement agreement had passed without the Plaintiff making payment to the Department of Labor. Though the money was owed to the New Jersey Division of Unemployment Compensation, Smith had stated that it was due to the township and in the amount of $15,000.

The Plaintiff contends the negligence standard for defamation should be applied as the Plaintiff was a "private figure". Such a determination is left to the trial court. See Lawrence v. Bauer Publishing & Printing, 89 NJ 451 (1982) citing Gertz v. Welch, 418 US 323, 94 S. Ct. 2997, 41 L. Ed.2d 789 (1974).[4] In accordance with Gertz, the court must analyze the facts not in controversy surrounding the alleged defamation.

In this case it is uncontroverted that news reporter Caffrey had previously contacted Defendant Robert Smith who was Washington Township's Administrator to follow up on the status of DiBuonaventura. As stated in Gertz, the news media's right is to speak freely and to disseminate news

[4] It has also been previously held that a police officer may be considered a public official under New Jersey Law. Costello v. Ocean County Observer, 136 NJ 594 (1994).

where the information about public figures is intricately related to the First Amendment guarantees. The public figure question involves a limited constitutional privilege and is therefore a matter of law for the trial court to decide. Id at 474. Here, the determination that Plaintiff is a public figure is pivotal as it will cast upon the Plaintiff the burden of demonstrating that the Defendant acted with actual malice. In this case, at oral argument the Plaintiff conceded that there is no proof of actual malice. Thus, in order for the Defendant Smith, and by respondeat superior, Washington Township, to be held liable, it must be shown that the Plaintiff was a private and not a public figure. Gertz calls for a case by case examination "looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation". Gertz at 418 US 352, 94 S.Ct. at 3013, 41 L.Ed.2d at 812. Important factors that led the court to conclude that Gertz was not a public figure included that he never "Thrust himself into the vortex of this public issue, nor engaged the public's attention in an intent to influence its outcome. " In this case it is clear that the Plaintiff had, approximately two years earlier, sued the Defendant Washington Township claiming civil rights violations which are the subject of this complaint also. This was not the first time that the Plaintiff had made himself a newsworthy item. Obviously, DiBuonaventura had dominated the news pages with his arrest of the politician known as Paul Moriarty and subsequently himself been arrested and indicted for allegedly manufacturing Moriarty's arrest. Indeed, the Plaintiff was cited on television and in the newspapers as having arrested Moriarty improperly. Under the circumstances, Smith's alleged negligent statements pale by comparison to the publicity DiBuonaventura received on these other occasions. Nonetheless, Smith was asked by a reporter to provide information that also was at least arguably was correct at the time-Plaintiff owed money pursuant to a settlement agreement that had not been repaid from an earlier suspension and reinstatement. That case was settled well before the Moriarty affair. It appears Plaintiff had become a public figure by his notoriety which had become pervasive with his suspensions, arrest, subsequent indictment and jury trial. The undisputed facts justify the conclusion of this court that the wrongdoing found by Judge Morgan to have been committed establish that

DiBuonaventura had created his own notoriety. He was a publicly known police officer entrusted with the public's interest and a guardian of its safety. Certainly his conduct was newsworthy. His repeated occasions by which the press reported on his behavior must instill in him the designation of public figure by his volitional conduct. It was his own conduct in causing the false arrest of Moriarty that created the specter of his notoriety. He must be found to be a public figure.

In light of DiBuonaventura being found to be a public figure, and in the absence of any proof that Defendant Smith acted with actual malice, the court must grant the motions for summary judgment by Defendant Smith and Washington Township.

Conclusion

In light of the court's analysis of the undisputed facts in the record, this court finds that there are no genuine issues of material fact warranting a trial as to Counts One through Five and the Plaintiff's complaint is dismissed with prejudice.

Sept. 4, 2018

SAMUEL J. RAGONESE, J.S.C.