Ricardo Solano Jr., ID # 041121999
Eric Corngold (*pro hac vice* application pending)
Nora Bojar (*pro hac vice* application pending)
Blair R. Albom (*pro hac vice* application pending)
FRIEDMAN KAPLAN SEILER &
ADELMAN LLP
One Gateway Center
Newark, NJ 07102-5311
(973) 877-6400
Attorneys for Defendant
State of New Jersey

CHRISTOPHER NEUWIRTH,	:	
Plaintiff,	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION,
v.	:	MERCER COUNTY
STATE OF NEW JERSEY, *et al.*,	:	DOCKET NO.: MER-L-1083-20
Defendants.	:	*Civil Action*

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS COUNT TWO OF THE COMPLAINT AND TO STRIKE CERTAIN ALLEGATIONS RELATED TO COUNT TWO

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Defendant State of New Jersey (the "State") respectfully submits this memorandum of law in support of its motion to dismiss Count Two of the First Amended Complaint ("FAC") filed by Plaintiff Christopher Neuwirth ("Neuwirth" or "Plaintiff") and to strike allegations related to Count Two. As discussed below, there is no valid cause of action for "post-termination retaliation" under the Conscientious Employee Protection Act ("CEPA"). Accordingly, as a matter of law, Count Two should be dismissed with prejudice pursuant to N.J. Ct. R. 4:6-2(e), and the allegations in the FAC related to Count Two should be stricken.

PRELIMINARY STATEMENT

In this action, Plaintiff asserts two causes of action. In Count One, Plaintiff alleges that he was terminated by the State in retaliation for engaging in protected activity, in violation of CEPA. (FAC ¶¶ 211-18). While the evidence will ultimately show that Plaintiff – an at-will employee – was terminated lawfully, the Court must accept Plaintiff's non-conclusory allegations as true at this stage of the litigation regardless of their merit. The State, at this juncture, does not seek a dismissal of Count One.

In contrast, Plaintiff has asserted a CEPA claim in Count Two that fails as a matter of law. Specifically, Plaintiff claims that "after unlawfully terminating [his]

employment, . . . Defendants took further retaliatory action . . . ." (Id. ¶ 220) (emphasis added). Count Two, therefore, is predicated exclusively upon supposed "post-termination retaliatory actions taken by Defendants against Plaintiff [that he believes] are in violation of CEPA." (Id. ¶ 227) (emphasis added).

CEPA does not provide a cause of action for post-termination retaliatory actions. The New Jersey Supreme Court in Young v. Schering Corp., 141 N.J. 16, 32 (1995), along with every Appellate Division opinion addressing the issue since, has made it clear that CEPA does not apply to acts allegedly taken after the employment relationship has ended. Accordingly, Count Two of the FAC should be dismissed as a matter of law.

Moreover, because CEPA does not extend to Plaintiff's alleged post-termination retaliatory actions as a matter of law, the allegations in the FAC that relate to the supposed post-termination retaliation by the State are irrelevant, superfluous, and serve no purpose except to harass and prejudice the State. As a result, they should be stricken from the FAC.

STATEMENT OF ALLEGED FACTS

Plaintiff's FAC is full of incendiary, self-serving, and at times conclusory, allegations purporting to detail the reasons why he (incorrectly) believes he was terminated from state employment. The evidence will ultimately establish that

Plaintiff's termination – which, because Plaintiff was an at-will employee, did not need to be for cause – would have been justified for several reasons, all of which are unrelated to any protected activity under CEPA. However, for purposes of this motion, the Court must accept Plaintiff's non-conclusory allegations as true. As pertinent to this motion, those allegations are as follows:

Plaintiff was employed with the New Jersey Department of Health as an Assistant Commissioner from October 29, 2018, until May 28, 2020. (FAC ¶¶ 17, 148). At the time of his termination, Plaintiff was "informed it was a 'no-cause termination' and that his 'services were no longer needed.'" (Id. ¶ 149). Despite what he was told, Plaintiff alleges that he was actually terminated for engaging in CEPA-protected activity. (Id. ¶ 214). Specifically, Plaintiff claims he was terminated because – several weeks before his termination – he made "disclosures, complaints and/or objections to Defendants concerning [him] being instructed to perform a private COVID-19 test on relatives of a Governor's Office employee as 'a favor.'" (Id. ¶¶ 79-136, 218). This alleged conduct is the basis for Plaintiff's CEPA claim asserted in Count One. (Id. ¶ 211-18).

Plaintiff further alleges that after his termination from state employment, "the public position being taken by the State is that the reason for Plaintiff's termination was because

he failed to properly disclose his consulting work for MHA and that he did not obtain appropriate approval to do so." (Id. ¶ 151). Plaintiff also alleges that after his termination, "[a]nonymous sources of the State" have stated that Plaintiff was "'overloaded' with his work at his 'other job' at MHA," and that "Plaintiff faced criticism [within the State] for poor attendance at the DOH post." (Id. ¶¶ 157-58). Plaintiff claims that all of these post-termination allegations and statements about him and his work, including statements that are general in nature and do not reference the Plaintiff specifically, are false and defamatory. (Id. ¶¶ 152-73). The State emphatically disputes these allegations and accepts them for purposes of this motion only.

The alleged post-termination conduct by the State is the basis for Plaintiff's CEPA claim asserted in Count Two. (Id. ¶ 219-229). Specifically, Plaintiff alleges that "[a]fter unlawfully terminating Plaintiff's employment for engaging in whistleblowing activity, Defendants took further retaliatory action against Plaintiff by defaming Plaintiff and misrepresenting to the public his performance, attendance and reasons for termination." (Id. ¶ 220) (emphasis added). Similarly, Plaintiff claims that state officials "aided and abetted the post-termination retaliatory conduct through their public statements to questions posed to them concerning the

reasons for Plaintiff's termination." (Id. ¶ 224) (emphasis added). The FAC, therefore, is unequivocal that Count Two is premised upon post-termination retaliatory actions only. (Id. ¶ 227) ("The post-termination retaliatory actions taken by Defendants against Plaintiff are in violation of CEPA.").

A complaint "cannot survive a motion to dismiss where the claims are conclusory or vague and unsupported by particular overt acts." Delbridge v. Office of Pub. Defender, 238 N.J. Super. 288, 314 (Law Div. 1989). As the Appellate Division recognized, "pleadings reciting mere conclusions without facts and reliance on subsequent discovery do not justify a lawsuit." Glass v. Suburban Restoration Co., 317 N.J. Super. 574, 582 (App. Div. 1998).

ARGUMENT

A judgment dismissing a claim on the pleadings pursuant to R. 4:6-2(e) is appropriate "if even a generous reading of the allegations [of the Complaint] does not reveal a legal basis for recovery." Edwards v. Prudential Prop. & Casualty Co., 357 N.J. Super. 196, 202 (App. Div. 2003). Although the Court must accept as true the allegations in the FAC, and afford Plaintiff the benefit of all reasonable factual inferences that those allegations support, "[t]he motion may not be denied based on the possibility that discovery may establish the requisite claim; rather, the legal requisites for

plaintiff[’s] claim must be apparent from the complaint itself.” Id. Put differently, a judgment of dismissal on the pleadings is warranted where, as here, the plaintiff fails to make allegations in the Complaint “which, if proven, would constitute a valid cause of action.” Kieffer v. Hight Point Ins. Co., 422 N.J. Super. 38, 43 (App. Div. 2011).

POINT I

PLAINTIFF CANNOT, AS A MATTER OF LAW, PURSUE A CLAIM FOR POST-TERMINATION RETALIATION UNDDER CEPA

The only issue before the Court on the State’s motion to dismiss Count Two is whether Plaintiff can pursue a CEPA claim predicated upon allegations of post-termination retaliatory actions taken by the State. The law is clear that he cannot. Accordingly, Count Two must be dismissed as a matter of law.

In Young v. Schering Corp., the Supreme Court, in deciding whether a plaintiff who asserts a CEPA claim waives the right to pursue post-termination tort claims against a former employer, held that CEPA “covers actions taken only with respect to the employment relationship established between the employer and employee.” 141 N.J. 16, 32 (1995). As a result, the Court held that post-termination tort claims were not waived because, “[e]ven if the plaintiff can establish that [defendant] defamed and slandered him, or that [defendant] interfered with his

prospective employment opportunities [after the employment relationship ended], such conduct will not constitute a violation of CEPA." 141 N.J. 16, 32 (1995) (emphasis added) (adopting the analysis of the Appellate Division, 275 N.J. Super. 221, 239-40 (1994)).

Relying upon Young, every Appellate Division opinion confronting the issue has uniformly decided that "CEPA does not apply to post-employment conduct." Zubrycky v. ASA Apple, Inc., 381 N.J. Super. 162, 168 n.2 (2005) (finding "no merit in plaintiff's claim that defendant violated CEPA by opposing his unemployment claim because defendant's action occurred after plaintiff resigned, and CEPA does not apply to post-employment conduct.") (citing Young, 141 N.J. at 30) (emphasis added); accord Beck v. Tribert, 312 N.J. Super. 335 (1998); see also Sharin v Stavola Mgmt. Co., A-2736-12T2, 2014 WL 2765679, at *4 (N.J. App. Div. June 19, 2014) ("[W]e agree that CEPA does not impose liability upon [defendant] for any alleged post-employment actions that affect plaintiff.") (emphasis added); Manee v Edgewood Props., *Inc*., A-1159-04T5, 2007 WL 268248, at *11 (N.J. App. Div. Feb. 1, 2007) ("[W]e agree with defendants that CEPA does not impose liability upon a former employer for alleged post-employment actions that affect a former employee.") (emphasis added).

In Beck, the Appellate Division explained that the Young Court's interpretation that CEPA "covers action taken only with respect to the employment relationship established between the employer and employee . . . is contrary to plaintiff's assertion that CEPA applies to post-employment negative retaliatory references." 312 N.J. Super. at 344 (emphasis added). The Court further reasoned that CEPA's "use of the present tense – 'performs' [in its definition of employee as 'any individual who performs services for and under the control and direction of an employer'] – suggests the Legislature intended to include under CEPA only adverse employment actions that are taken against an employee while he or she is still an employee, and not after termination." Id. (emphasis added); see also Sharin, 2014 WL 2765679, at *4 ("[T]he cause of action [under CEPA] must be based upon conduct occurring during the course of the aggrieved employee's employment."). Accordingly, the Court concluded that "CEPA's express language, as well as the Supreme Court's opinion in Young v. Schering Corp., clearly indicate that CEPA does not apply to post-employment retaliatory negative references." 312 N.J. Super. at 343 (emphasis added).

Here, as in each of the above-referenced cases, Plaintiff is asserting in Count Two a cause of action under CEPA that is predicated upon allegedly retaliatory conduct that the State engaged in after Plaintiff was terminated. (FAC ¶¶ 151-73

(alleging that after his termination, State officials and "anonymous sources of the State" have made false and defamatory statements related to the reasons for Plaintiff's termination); ¶¶ 220-29 (Count Two)). Indeed, the paragraphs specifically alleged in support of Count Two leave no doubt that this cause of action is based upon post-termination conduct allegedly undertaken by, or attributable to, the State. (Id. ¶ 220 ("After unlawfully terminating Plaintiff's employment for engaging in whistleblowing activity, Defendants took further retaliatory action against Plaintiff . . . ."); ¶ 224 ("[State officials] aided and abetted the post-termination retaliatory conduct through their public statements to questions posed to them concerning the reasons for Plaintiff's termination, set forth herein."); ¶ 227 ("The post-termination retaliatory actions taken by Defendants against Plaintiff are in violation of CEPA.")). As the above case law makes clear, however, there is no cause of action under CEPA for post-termination retaliatory actions.

For these reasons, Count Two of the FAC fails to state a valid cause of action and must be dismissed as a matter of law.

POINT II

ALLEGATIONS RELATED TO POST-TERMINATION RETALIATION WERE IMPROPERLY ASSERTED IN SUPPORT OF A NON-EXISTENT CEPA CLAIM AND SHOULD BE STRICKEN

Rule 4:6-4(b) authorizes this Court to "either (1) dismiss any pleading that is, overall, scandalous, impertinent, or, considering the nature of the cause of action, abusive of the court or another person; or (2) strike any such part of a pleading or any part thereof that is immaterial or redundant." An allegation is deemed "impertinent" if it "consists of statements that do not pertain, and are not necessary, to the issues in question." Feld v City of Orange Tp., A-3698-08T3, 2010 WL 4028088, at *5 (N.J. App. Div. July 19, 2010) (quoting Calliari v. Sugar, 180 N.J. Super. 423, 430 (Ch. Div. 1980); DeGroot v. Muccio, 115 N.J. Super. 15, 19 (Law Div. 1971)). Furthermore, "[s]uperfluous historical allegations are a proper subject of a motion to strike." Id. (internal quotation marks and citations omitted).

Count One purports to assert a valid cause of action under CEPA. To properly plead a prima facie CEPA action, a plaintiff must allege 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. 34:19–3(c);
>
> (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.

Lippman v. Ethicon, Inc., 222 N.J. 362, 380 (2015); see also Chiofalo v State of New Jersey, 238 N.J. 527, 542 (2019) (recognizing that the plaintiff's belief must be "objectively reasonable").

Here, in support of his CEPA claim in Count One, Plaintiff alleges that while he was employed by the State he engaged in CEPA-protected activity – namely, that he made "disclosures, complaints and/or objections to Defendants concerning being instructed to perform a private COVID-19 test on relatives of a Governor's Office employee as 'a favor.'" (FAC ¶ 212). He further alleges that in response to his engaging in this protected activity, the State took adverse employment actions against him and subsequently terminated him. (FAC ¶ 214). These core allegations – which are disputed and ultimately will be proven untrue – are relevant to the CEPA claim asserted in Count One and sufficient to set forth that claim.

The FAC, however, also contains a series of lengthy allegations related to supposed post-termination retaliation by

the State. Specifically, Plaintiff claims that after his termination "anonymous sources of the State" have made false and defamatory statements about the reasons for his termination. (See, e.g., FAC ¶¶ 155-173). He further alleges that – again after his termination – high-level State officials "perpetuated the falsehoods," (id. ¶ 164), made false and defamatory reports in the media about his termination, (id. ¶ 168), and endorsed misrepresentations regarding Plaintiff (id. ¶ 171). These allegations, set forth in Paragraphs 155-173, along with the allegations specifically set forth in Count Two of the FAC, Paragraphs 219-229, are all made in support of Plaintiff's purported CEPA claim for post-termination retaliation.

As discussed in Point I, supra, there is no legal cause of action under CEPA for post-termination conduct. See, e.g., Beck, 312 N.J. Super. at 344 (holding that CEPA applies "only [to] adverse employment actions that are taken against an employee while he or she is still an employee, and not after termination.") (emphasis added). Accordingly, the extensive allegations in the FAC that relate to the State's supposed post-termination retaliation are impertinent and irrelevant to this litigation. Simply put, they "do not pertain, and are not necessary, to the issues in question" in this litigation – i.e., whether the State took an adverse employment action against Plaintiff during his employment as a result of him engaging in

CEPA-protected activity." Feld., 2010 WL 4028088, at *5. What the State allegedly did after Plaintiff's termination is not probative – one way or the other – to those issues or the CEPA claim in this case. As such, if they remain in the FAC, those immaterial allegations would serve no purpose except to harass and prejudice the State. Indeed, these allegations against the State and, in particular, its senior leadership are abusive and conclusory in trying to attribute to them alleged falsehoods about Plaintiff that were supposedly made by "anonymous sources." (FAC ¶¶ 155-71). Further, allegations in the FAC that reference general public statements made by high-ranking government officials after Plaintiff's termination, taken out of context, and attempt to tie these statements directly to Plaintiff are similarly impertinent, abusive, and conclusory. (Id. at ¶¶ 164-71).

For these reasons, this Court should strike Paragraphs 155-173 and 219-229 from the FAC pursuant to R. 4:6-4(b), and order Plaintiff to file a revised FAC without these paragraphs.

CONCLUSION

For the reasons set forth above, the CEPA claim alleged in Court Two is invalid as a matter of law and should be dismissed with prejudice. In addition, because there is no valid cause of action under CEPA for post-termination

retaliation, the allegations made in support of Court Two (FAC ¶¶ 155-73, 219-29) are improper and should be stricken.

Dated: September 9, 2020

Respectfully submitted,

FRIEDMAN KAPLAN SEILER & ADELMAN LLP

/s/ Ricardo Solano Jr.

Ricardo Solano Jr., ID # 041121999
Eric Corngold (*pro hac vice* application pending)
Nora Bojar (*pro hac vice* application pending)
Blair R. Albom (*pro hac vice* application pending)
FRIEDMAN KAPLAN SEILER & ADELMAN LLP
One Gateway Center
Newark, NJ 07102-5311
(973) 877-6400
Attorneys for Defendant State of New Jersey