NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2312-09T3

ROBERT J. TRAVISANO,

Plaintiff-Appellant/
Cross-Respondent,

v.

BOARD OF CHOSEN FREEHOLDERS
FOR UNION COUNTY,

Defendant-Respondent,

and

M. ELIZABETH GENIEVICH,
ALFRED FAELLA and CHARLOTTE
DEFILIPPO, in their official and
individual capacities,

Defendants,

and

GEORGE W. DEVANNEY,

Defendant-Respondent/
Cross-Appellant.

Argued November 1, 2011 - Decided January 27, 2012

Before Judges Carchman, Fisher and Baxter.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket No. L-1592-07.

Mark W. Thompson argued the cause for appellant (Wong Fleming, attorneys; Linda Wong and Daniel C. Fleming, of counsel; Mr. Thompson, on the brief).

Kathryn V. Hatfield argued the cause for respondent/cross-appellant (Bauch Zucker Hatfield, LLC, attorneys; Ms. Hatfield and Evan M. Lison, of counsel and on the brief).

Edward J. Kologi argued the cause for respondent Board of Chosen Freeholders (Kologi Simitz, attorneys; Mr. Kologi and Michael S. Simitz, of counsel and on the brief).

Norman W. Albert, First Deputy County Counsel, argued the cause for respondent Union County (Robert E. Barry, Union County Counsel, attorney; Mr. Albert and Brian P. Trelease, Assistant County Counsel, on the brief).

PER CURIAM

Plaintiff Robert J. Travisano, a former Union County employee, alleged in this action that he was discriminated and retaliated against based on his age, disability, and political affiliation, asserting violations of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, and the New Jersey Civil Rights Act (CRA), N.J.S.A. 10:6-1 to -2, as well as other common law torts. He claims in this appeal, among other things, that the trial court erred in granting summary judgment in favor of defendants George W. Devanney, who was the Union County Manager, and the Board of Chosen Freeholders (the Board), and in denying him leave to amend his complaint to add Union County as

a party late in the litigation. We reject these and all of plaintiff's other arguments and affirm.

I

On May 3, 2007, plaintiff filed a complaint against the Board and Devanney, as well as M. Elizabeth Genievich, the Union County Deputy Manager, Alfred Faella, the Director of Union County's Department of Economic Development, and Charlotte DeFilippo, the Chair of the Union County Democratic Committee and Executive Director of the Union County Improvement Authority. The complaint alleged discrimination based upon age and physical disability in violation of the LAD, political affiliation discrimination in violation of the CRA and the New Jersey Constitution, and intentional infliction of emotional distress. All individual defendants were named "in their official and individual capacities." Union County was not named as a defendant.

DeFilippo, Genievich, and Faella successfully obtained summary judgment; those rulings have not been appealed. The Board and Devanney also moved for summary judgment. The motion judge granted summary judgment in favor of the Board. He also granted partial summary judgment in favor of Devanney on plaintiff's claim of intentional infliction of emotional distress but denied summary judgment on plaintiff's LAD and CRA

violations against Devanney, for reasons set forth in a written opinion filed on March 9, 2009.

On March 12, 2009, plaintiff moved to amend his complaint to add Union County as a defendant. Devanney cross-moved for reconsideration of the March 9, 2009 order insofar as it partially denied his motion for summary judgment. The motion judge denied leave to amend and also clarified his earlier decision, emphasizing that plaintiff's claim that Devanney aided and abetted LAD violations remained part of the case.

On September 21, 2009, the first scheduled trial date, another judge (hereafter "the trial judge") granted a motion to dismiss with prejudice the claim that Devanney aided and abetted any LAD violation. And subsequent motions led to a dismissal of the constitutional claims against Devanney. Because the trial judge thereby resolved all remaining issues as to all parties, plaintiff appealed, presenting the following arguments for our consideration:

> I. THE TRIAL COURT ERRED IN DETERMINING THAT NEITHER THE BOARD NOR DEVANNEY, IN HIS OFFICIAL CAPACITY, WAS TRAVISANO'S "EMPLOYER."
>
> > A. Devanney, In His Official Capacity, Was Travisano's "Employer" For Purposes Of The LAD.
> >
> > B. The Board Should Have Been Subjected To Employer Liability Because It Is Indistinguishable From The County.

II. THE TRIAL COURT ERRED IN DENYING TRAVISANO'S MOTION TO AMEND.

A. The Trial Court Abused Its Discretion By Failing To Conclude That Amendment Would Correct A Mere Misnomer.

B. The Trial Court Failed To Properly Apply R. 4:9-3.

III. DEVANNEY CANNOT ASSERT A QUALIFIED IMMUNITY DEFENSE.

A. The Trial Court Should Not Have Permitted Devanney To Assert Qualified Immunity As A Defense On The Eve Of Trial.

B. Devanney Is Not Entitled To Qualified Immunity In This Case.

In his cross-appeal, Devanney argues[1] he was erroneously denied summary judgment on plaintiff's LAD and political affiliation claims because:

I. DEFENDANT DEVANNEY DID NOT INDIVIDUALLY AID OR ABET DISCRIMINATION UNDER THE LAD.

II. EVEN IF THIS COURT WERE TO DETERMINE THAT MR. DEVANNEY WAS PLAINTIFF'S EMPLOYER, MR. DEVANNEY IS STILL ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S LAD CLAIMS.

III. THE MOTION JUDGE ERRED IN DENYING MR. DEVANNEY'S MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S POLITICAL AFFILIATION CLAIM.

[1]We have renumbered Devanney's points.

Because we find no merit in plaintiff's arguments, we need not reach the merits of those parts of Devanney's cross-appeal not otherwise incorporated in our disposition of plaintiff's appeal.

II

Because the claims against the Board and Devanney were summarily dismissed, the trial court was required to examine the facts in the light most favorable to plaintiff. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). This court is bound to that same standard. Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007).

Plaintiff testified at his deposition that, in 1988, he began his employment with Union County. In 1995, plaintiff had surgery to remove a brain tumor, which left him paralyzed on the left side of his face, deaf in his left ear, and with some vision loss in his left eye. He also suffered depression and embarrassment as a result of the effect of the facial paralysis on his appearance.

In 1997, at the request of then County Manager Michael Lapolla, plaintiff began working in Union County's newly-formed Department of Economic Development as an Economic Development Specialist. Plaintiff and Lapolla were childhood friends and remained very close. In 1997, Devanney was the Deputy County

Manager, the Director of the Department of Economic Development, and plaintiff's direct supervisor.

Plaintiff described his relationship with Devanney at the time as "good," and Devanney testified that, prior to the filing of the lawsuit, he considered plaintiff "a friend." Devanney gave plaintiff "very good" performance evaluations, and even appointed him to the chair of the Retail Coalition Alliance. Although Devanney was plaintiff's supervisor, plaintiff also worked for and received assignments from Lapolla.

In 2002, Lapolla resigned as County Manager upon his appointment to the position of Executive Director of the New Jersey Turnpike Authority. Devanney was appointed County Manager, and Genievich was appointed Deputy County Manager. Following this, Devanney made some "wholesale changes" and reorganized the structure of Union County's departments. Plaintiff testified that, soon thereafter, Devanney asked for his resignation, which was refused. Plaintiff claimed he did not know why Devanney asked for his resignation but asserted at his deposition that he believed it was "because of [plaintiff's] relationship with the Lapollas whom Mr. Devanney didn't like." Plaintiff also based this belief on the fact that on two occasions between 1997 and 2000, Devanney told him "he didn't like the way [Lapolla] was running the county, and that certain

programs were not up to his liking, and that he would do it differently."

In July 2002, Devanney transferred plaintiff to the Department of Human Services, under the supervision of Frank Guzzo, to work on the new juvenile detention facility. Devanney testified at his deposition that "he always thought [plaintiff] was good on projects" and would "be an asset to that project." In his deposition, however, plaintiff testified that Devanney accused him of giving him a hard time about the transfer; when plaintiff said he did not know what Devanney was talking about, Devanney accused him of being insubordinate and "yelled and screamed" at plaintiff.

Plaintiff testified that Guzzo assigned him a cubicle, which was so small he could hardly fit within it. Guzzo denied plaintiff's request for a different cubicle. Plaintiff testified he also asked Guzzo for work, but for eight months Guzzo gave him no assignments. Although he discussed with Guzzo his dissatisfaction with his assignment in Human Services and the problems he was experiencing, he never discussed it with Devanney and did not know whether Guzzo discussed it with Devanney.

In 2003, Devanney transferred plaintiff to the Department of Parks and Recreation under the supervision of Charles

Sigmund. Seven months later, Devanney again transferred plaintiff, this time to the Department of Operations and Facilities, which was then supervised by Michael Lapolla's brother, Richmond Lapolla, who later testified that the Devanney administration was hostile to plaintiff at that time. In an affidavit dated June 13, 2008, Richmond Lapolla related that, soon after plaintiff's transfer to his department, DeFilippo summoned him to her house and asked him "why the Lapolla family was so loyal to the man with the crooked face." Richmond Lapolla "took th[at] statement as a form of intimidation, and . . . got the sense that she knew that [plaintiff] would ultimately be terminated."

Plaintiff also testified that while he worked at the Department of Operations and Facilities, Devanney asked Richmond Lapolla, who was in charge of the motor pool, to reclaim the county vehicle that had been assigned to plaintiff since 2000 and to reclaim plaintiff's county-issued laptop and home computers. In his affidavit, Richmond Lapolla explained that he did not remove plaintiff's county-issued vehicle right away. He "asked Devanney for more time to retrieve the vehicle, which Devanney granted without specifying a deadline." Nevertheless, because he did not act sooner, Richmond Lapolla was suspended

for two days and Devanney removed the motor pool from his authority.

Devanney testified that he reorganized the Department of Operations and Facilities in 2005. In February 2005, he transferred plaintiff to the Department of Economic Development to work on project management under the supervision of James Daley. Devanney testified that he spoke with plaintiff prior to the transfer and that "[plaintiff] expressed that he'd like to go back to economic development where he had been." Devanney also testified that he viewed plaintiff as "a good project manager and thought" it was "a logical fit."

Plaintiff testified at his deposition that in April or May 2005 he was diagnosed with prostate cancer, which required a radical prostatectomy in August 2005. When he returned to work in October 2005, there were no medical restrictions placed on his ability to perform his job, except that he was prohibited from lifting anything heavier than twenty-five pounds. He did not ask for any kind of accommodation, and he could not recall suffering "any discrimination on account of [his] disability from the county or any employee of the county when [he] returned."

Faella testified that he became the Director of Economic Development in 2006, when Daley resigned. At that time, he had

three major projects that consumed most, if not all, of his time; none of them included plaintiff. He had made the decision to leave unaltered the status quo in the department; nobody was given additional duties and no existing duties were taken away from anyone until he had a chance "to evaluate the entire department and see what was going on." Faella testified that he believed it would take six months for him to complete his evaluation. Plaintiff was not aware of any projects within the department that could have been assigned to him at the time. Nevertheless, plaintiff testified that eventually, Faella asked him to supervise the work of the planners on the Trembley Point project.

Devanney testified that in early 2006, the Union County finance director informed him that the county was facing a budget deficit for the 2006 fiscal year. As a result, the Board approved a budget that implemented both an early retirement incentive program and layoffs, and Devanney advised department heads that they needed to determine "whether or not there were positions within their departments that they could do without." Although he left it up to the department heads to determine whether any positions could be eliminated and if so, which positions, he was ultimately responsible for signing off on

their recommendations and did not override any of the recommendations of his department heads.

Faella testified that Devanney wanted to see a minimum of $250,000 savings from each department. On May 1, 2006, Faella forwarded his recommendations for the Department of Economic Development, which included a recommendation that plaintiff's position be eliminated. Faella testified that he did not consider the ages of individuals whose positions were to be eliminated as a result of his recommendation.[2] Faella also recommended the elimination of the Workforce Investment Board Director, a position held by Antonio Rivera. Rivera was not laid off but, instead, exercised his demotional (bumping) rights, which resulted in his transfer to Human Services.

Faella testified that he did not contact the department head of Administrative Services about the possibility of reassigning plaintiff, and that he was unaware of any vacant positions within the Department of Economic Development that plaintiff could have filled. Devanney testified that he did not

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[2]Prior to March 2006, and prior to any layoff notices being issued, plaintiff asked Faella about the truth of a rumor that there were going to be layoffs. Faella testified this inquiry occurred prior to the implementation of the layoff plan and so he told plaintiff he did not know. In May 2006, Faella's secretary impermissibly shared the contents of Faella's memorandum with plaintiff. Faella testified he did not discipline her as a result, but he did transfer her.

inquire of Faella whether plaintiff could have been reassigned; however, as part of their overall compliance with law, "that was something that was asked of the department heads to do."

Devanney testified that ultimately it was he who decided whether to accept the recommendations of his department heads. He did not accept the department heads' recommendations regarding layoffs wholesale; rather, he chose which employees to lay off based on those recommendations. For example, Faella recommended that eight positions be eliminated but only four were actually eliminated, and Sigmund recommended that four positions be cut from the Department of Parks and Services, yet no positions were eliminated. At his deposition, Devanney could not recall why some recommendations were followed and others were not.

By letter dated June 1, 2006, Devanney forwarded to the Department of Personnel Management, the "County of Union Layoff Plan," which explained the reason for the layoffs -- "economy and efficiency" -- and delineated the positions affected. The layoff plan specifically identified seventeen affected positions, including plaintiff's. The plan also set forth alternatives to layoffs, including: "[a] hiring freeze for all county positions," "[a] voluntary Furlough Program," "[a]n Early Retirement Program," "[use of] the Intergovernmental Transfer

Program," and reorganizing the Departments of Public Works and Economic Development.

County counsel, Kathryn V. Hatfield, Esq., certified that the layoff plan was subject to State approval. She also explained that the Department of Personnel was "required to analyze whether each position identified for layoff was eligible for lateral or demotional (bumping) rights. Ultimately, it was the Department of Personnel that would decide whether a particular individual would be eligible for another position within the County by virtue of those bumping rights." The State approved the layoff plan. Although seventeen positions were subject to layoffs, "due to bumping rights and eligible individuals taking advantage of the County's Early Retirement Incentive Program," only two individuals were actually laid off.

By letter dated June 30, 2006, Devanney provided plaintiff with notice of layoff pursuant to N.J.S.A. 11A:8-1; the notice stated:

> Since your position is subject to layoff, you may have the right to displace employees in other positions. A copy of this notice is being forwarded to the New Jersey Department of Personnel, which will be responsible for determining your seniority, lateral displacement, demotion, and/or special reemployment rights. The Department of Personnel will notify both you and the appointment authority of its determinations prior to the effective date of the layoff action.

On August 18, 2006, the Department of Personnel informed plaintiff by letter that his layoff had been recorded and advised him of his special reemployment rights. Plaintiff chose instead to participate in the early retirement offer in lieu of being laid off; his retirement was effective August 31, 2006. He was then sixty-one years old.

Notwithstanding his admitted familiarity with the Union County policy against workplace discrimination and harassment, plaintiff never complained to Devanney, Faella, or anyone else that he was the victim of discrimination, disparate treatment, or a hostile work environment until, on May 3, 2007, approximately nine months after he retired, plaintiff filed his complaint in this suit.[3]

With regard to the political affiliation claim, plaintiff asserted in the complaint that, notwithstanding the fact that Lapolla and Devanney were Democrats, there was a political divide between the two. According to plaintiff's deposition testimony, there were political factions in the Democratic Party

[3]Plaintiff's seven-count complaint alleged his employment was terminated due to his age and disability in violation of the LAD, and his political affiliation in violation of the CRA and the New Jersey Constitution. He also asserted claims against Devanney under the LAD for aiding and abetting the discriminatory conduct and for intentional infliction of emotional distress.

in Union County: "the associates, workers, and friends of Michael Lapolla and the associates, friends, and workers of Mr. Devanney." He could not, however, identify any of the people, other than himself, aligned with the so-called Lapolla faction, or, for that matter, any of the people in the Devanney faction.

III

In his appeal, plaintiff first contends that the motion judge erred in determining that neither the Board nor Devanney was plaintiff's "employer" under the LAD. We reject these arguments; indeed, plaintiff well understood his employer was Union County, as he acknowledged in his complaint.[4]

We start with the understanding that the LAD prohibits "employers" from engaging in unlawful employment practices and discrimination. N.J.S.A. 10:5-12(a). In explaining the meaning of this statute, we have held that "the LAD was intended to prohibit discrimination in the context of an employer/employee relationship," Pukowsky v. Caruso, 312 N.J. Super. 171, 184 (App. Div. 1998), and that the absence of an employment relationship between a plaintiff and a defendant will preclude

[4]The first phrase in the first paragraph of plaintiff's complaint states that "Robert Travisano was a loyal employee of Union County for approximately 18 years . . ." (emphasis added).

liability. Thomas v. Cnty. of Camden, 386 N.J. Super. 582, 594 (App. Div. 2006).

The LAD defines "employer" as including "all persons as defined in [N.J.S.A. 10:5-5(a)[5]] unless otherwise specifically exempt under another section of this act, and includes the State, any political or civil subdivision thereof, and all public officers, agencies, boards or bodies." N.J.S.A. 10:5-5(e). Although the LAD's definitions of the terms "employer" and "employee" are admittedly broad, D'Annunzio v. Prudential Ins. Co. of Am., 383 N.J. Super. 270, 277 (App. Div. 2006), aff'd as modified, 192 N.J. 110 (2007), it has been established that a supervisor or co-worker is not an "employer" under the LAD. Tarr v. Ciasulli, 181 N.J. 70, 82-83 (2004). The LAD does, however, make it unlawful "[f]or any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this act." N.J.S.A. 10:5-12(e). See Tarr, supra, 181 N.J. at

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[5] A "person" is defined as including "individuals, partnerships, associations, organizations, labor organizations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and fiduciaries." N.J.S.A. 10:5-5(a).

83. But there is no liability for aiding or abetting[6] absent a finding that the employer violated the LAD.

Plaintiff argues that Devanney, in his official capacity, was his employer for purposes of the LAD. However, in both his complaint and motion for summary judgment, plaintiff concedes Union County was his employer. Notwithstanding that this acknowledgement is fatal to plaintiff's claim in this regard, plaintiff presents a three-fold argument, asserting: (1) the Pukowsky factors establish that Devanney was his employer; (2) Devanney was a "public officer" within the LAD's meaning of "employer"; and (3) Devanney, in his official capacity, was an agent of Union County and therefore plaintiff's employer.

As to the first aspect, plaintiff's reliance on Pukowsky is misplaced because the test described in that case "contains elements that are unique to a determination of independent contractor status." Feldman v. Hunterdon Radiological Assocs., 187 N.J. 228, 242 (2006). Because plaintiff does not argue he was an independent contractor, Pukowsky is inapposite.[7]

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[6]Although the LAD does not define the terms "aid" or "abet," general principles of statutory construction apply and lead to the conclusion that "active and purposeful conduct" is required. Tarr, supra, 181 N.J. at 83.

[7]Even if the Pukowsky test were applied here, the only reasonable conclusion that could be reached is what was conceded -- that Union County was plaintiff's employer. That is, utilizing the (continued)

In the second aspect, plaintiff argues that Devanney, upon a sufficient demonstration of control, may be considered an employer. We are not persuaded. Indeed, Cicchetti v. Morris County Sheriff's Office, 194 N.J. 563 (2008), upon which the trial court heavily relied, requires rejection of plaintiff's argument. In Cicchetti, the plaintiff, a Morris County Sheriff's officer, alleged that he had been subjected to unlawful harassment after his positive test result for hepatitis was revealed to his co-workers. Id. at 569-72. He commenced a lawsuit against the Sheriff's Office and, individually, the Sheriff, Undersheriff, and several other Sheriff's officers, alleging violations of the LAD. Ibid.

The trial court in Cicchetti granted summary judgment to all the defendants, reasoning they could not be liable for aiding and abetting their own conduct. Id. at 573. On appeal, we affirmed with regard to the plaintiff's co-workers, concluding they could not be liable to the plaintiff but reversed with regard to the Sheriff and Undersheriff, holding

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(continued)
Pukowsky factors, there is no doubt that (1) plaintiff was employed by Union County for eighteen years, and was only supervised by Devanney for four of those years (factors 2 and 5); (2) Union County, not Devanney, furnished the equipment and workplace (factor 4); (3) Union County, not Devanney, paid plaintiff's salary (factor 6); (4) plaintiff accrued retirement benefits paid by Union County (factor 10); and (5) Union County, not Devanney, paid social security taxes (factor 11).

they could be held liable as the plaintiff's supervisors. Id. at 573-74.

The Supreme Court affirmed but noted that although the defendants Sheriff and Undersheriff "each undoubtedly had responsibility over the employees and over the workplace," they were merely the plaintiff's supervisors and the plaintiff's employer was the Sheriff's Office. Id. at 595. The Court also noted that "the plain meaning of the definition of employer in the LAD does not include a supervisor," and that "individual liability of a supervisor, for acts of discrimination or for creating or maintaining a hostile environment, can only arise through the 'aiding and abetting' mechanism that applies to 'any person.'" Id. at 594 (citing N.J.S.A. 10:5-12(e)). Accordingly, the Court held that because neither the Sheriff nor Undersheriff was the plaintiff's "employer" within the meaning of the LAD, they could only be individually liable if they were themselves aiders and abettors. Id. at 595.

Here, in holding that Union County was plaintiff's employer and not Devanney, the motion judge correctly explained that:

> Devanney, as county manager, is akin to the sheriff or undersheriff in [Cicchetti], and Union County is akin to the [Sheriff's] Office. Although Devanney undoubtedly has some control over personnel decisions and some input into the layoff plan, it is Union County which is plaintiff's employer. Therefore, as a supervisor, Devanney can

> only [be] held personally liable if the "aider-abettor" standard is satisfied.

We agree. The Court did not find that the Sheriff was an "employer" under the LAD. Just like the Sheriff in Cicchetti, Devanney would be considered a "public official" but not plaintiff's employer. Cicchetti, supra, 194 N.J. at 595; see also Tarr, supra, 181 N.J. at 82-83.

And, in the third aspect, plaintiff argues that the motion judge erred because he did not distinguish between personal and official capacity suits when determining whether Devanney was his "employer" within the meaning of the LAD. This argument is without merit because the question is not whether Devanney acted in an official capacity; the question was whether Devanney was plaintiff's employer and, clearly, he was not.

We also reject plaintiff's argument that the motion judge erred in determining that the Board could not be held liable as an employer. There is no dispute but that Union County was plaintiff's employer and there can be no dispute that Union County is an entity unto itself. Union County is a body politic and corporate that is subject to suit. N.J.S.A. 40:18-1 to -3; N.J.S.A. 59:1-3. The Board, on the other hand, is the duly elected legislative governing body of Union County under the County Manager form of government. N.J.S.A. 40:41A-1 to -30;

40:41A-45 to -58; 40:41A-86 to -149.[8] Moreover, the Board was entitled to and, in fact, was properly granted summary judgment based upon legislative immunity. See Bogan v. Scott-Harris, 523 U.S. 44, 46, 118 S. Ct. 966, 969, 140 L. Ed. 2d 79, 83 (1998); Brown v. City of Bordentown, 348 N.J. Super. 143, 148-49 (App. Div. 2002). The motion judge properly relied on these authorities in holding that the Board's actions in approving the budget plan to eliminate certain county positions, including plaintiff's, was a legislative act and entitled the Board to immunity.

We, thus, conclude that the motion judge properly determined that neither the Board nor Devanney can be held liable to plaintiff pursuant to the LAD on the claim that either was plaintiff's employer. Liability against any of these defendants could only be based on the claim that they aided or

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[8]In addition, plaintiff's argument that Devanney was an agent of the Board is contrary to statutory authority. Under the statute, the County Manager is not a member of the Board. N.J.S.A. 40:41A-46; 40:41A-50 to -55. Furthermore, the County Manager form of government under the Optional County Charter Law prohibits freeholders from "individually or collectively seek[ing] to influence the head of the executive branch to dismiss any person from . . . any position in the executive branch of county government," N.J.S.A. 40:41A-87(a), and provides that "the board of chosen freeholders shall deal with county employees only through the officials responsible for the over-all executive management of the county's affairs . . . i.e., through . . . the county manager[.]" N.J.S.A. 40:41A-86. Simply put, the County Manager exercises executive power and is independent of the Board, which exercises legislative power.

abetted the alleged discriminatory conduct of plaintiff's employer. A claim of aiding and abetting unlawful employment discrimination presupposes and requires a viable claim against the employer itself.[9] Thus, the aiding and abetting claims could not be maintained here absent a finding of error in the motion judge's denial of plaintiff's motion to join the employer, Union County, as a defendant, a matter to which we now turn.

IV

In his second point, plaintiff claims error in the denial of his motion to amend the complaint to add Union County as a defendant by failing to approach the motion with the liberality demanded by Rule 4:9-1. We disagree.

To be sure, "Rule 4:9-1 requires that motions for leave to amend be granted liberally." Kernan v. One Washington Park Urban Renewal Assocs., 154 N.J. 437, 456 (1998). There necessarily remains, however, an "area of judicial discretion in denying such motions where the interests of justice require." Wm. Blanchard Co. v. Beach Concrete Co., Inc., 150 N.J. Super. 277, 299 (App. Div.), certif. denied, 75 N.J. 528 (1977).

[9]Plaintiff recognizes this, stating in his reply brief that his appeal of the order granting summary judgment on the aiding and abetting claim "is predicated on the reinstatement of his primary LAD claims against the Board of Freeholders or against Devanney in his official capacity as Union County Manager or against Union County itself."

"[T]he factual situation in each case must guide the court's discretion, particularly where the motion is to add new claims or new parties late in the litigation." Bonczek v. Carter-Wallace, Inc., 304 N.J. Super. 593, 602 (App. Div. 1997), certif. denied, 153 N.J. 51 (1998). In exercising that discretion in this case, two concerns were presented, i.e., prejudice to defendants resulting from the amendment and whether permitting the amendment would constitute a futile act.

The trial judge properly denied plaintiff's motion because the proposed amendment would have substantially prejudiced Devanney, an existing defendant, as well as Union County, the proposed new party. The record reveals that leave to amend was sought at a very late date. Plaintiff filed his complaint on May 3, 2007, and specifically asserted in that complaint that he was employed by Union County but did not move for leave to amend until March 12, 2009, after discovery had been completed and with a trial scheduled to begin on March 30, 2009.

In these circumstances, if the amendment was permitted, Devanney would have had to retain new counsel because he was represented by a law firm that had represented Union County as special labor counsel and in litigation involving its employees. In fact, the law firm representing Devanney had advised Union County regarding the layoff plan in question. These circumstances would have disqualified the firm from continuing

to represent Devanney in this case. Additional prejudice would have resulted because, if joined, Union County would have had the right to take discovery. It would have been unfair to require Union County to be content with the state of discovery because no discovery had been taken from the employer's perspective. These circumstances would have necessitated a lengthy delay in the scheduled trial date, yet another reason for denying leave to amend. See N.J. Dep't of Envtl. Prot. v. Dimant, 418 N.J. Super. 530, 547 (App. Div. 2011) (recognizing that an amendment "may be denied if granting it would unduly complicate or delay the trial or otherwise prejudice the parties").

Leave to amend may also be withheld when constituting a futile act. Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 501 (2006). Plaintiff argues the amendment would not have been futile -- despite the fact that when leave to amend was sought the claim against Union County would have been barred by the statute of limitations -- because he believes his amendment ought to be viewed as relating back to the original filing date, citing Rule 4:9-3. We find this argument to have insufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We would only add that Rule 4:9-3 would have permitted relation back only if Union County "knew or should

have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party to be brought in by amendment." The Rule does not apply. The misnomer referred to in the Rule encompasses the situation "where the correct party is already before the court, but the name in the complaint is deficient in some respect." Otchy v. City of Elizabeth Bd. of Educ., 325 N.J. Super. 98, 106 (App. Div. 1999). As we have already mentioned, plaintiff knew his employer was Union County, stated that fact in his complaint, and yet proceeded against the other defendants until the eve of trial knowing that Union County was not a party. Plaintiff instead, with full knowledge of the facts, apparently relied on the mistaken theory that one or more of the other defendants could be found to be his employer within the meaning of the LAD.

V

In point III, plaintiff argues the trial judge erred by granting Devanney summary judgment on the political affiliation discrimination claim based on the contention that Devanney did not properly raise the affirmative defense of qualified immunity or, if he did, he waived it, as well as the contention that he is not entitled to qualified immunity because his conduct violated plaintiff's constitutional rights. We reject these

contentions because the defense was pled and was not waived and because it constituted a complete defense to the claim.

The defense in question arises from the Tort Claims Act, N.J.S.A. 59:1-1 to 12-3, which provides sovereign immunity to public entities, Roman v. City of Plainfield, 388 N.J. Super. 527, 533 (App. Div. 2006), and a qualified immunity for certain public employees, N.J.S.A. 59:3-3; Schneider v. Simonini, 163 N.J. 336, 354 (2000), cert. denied, 531 U.S. 1146, 121 S. Ct. 1083, 148 L. Ed. 2d 959 (2001).

Rule 4:6-2 provides that "[e]very defense, legal or equitable, in law or fact, to a claim for relief in any complaint . . . shall be asserted in the answer thereto." And Rule 4:5-4 delineates those affirmative defenses that must be pleaded. Although not mentioned in Rule 4:5-4, it has been held that a public entity or public employee must plead and prove immunity. See Wymbs v. Twp. of Wayne, 163 N.J. 523, 539 (2000); Wilson v. City of Jersey City, 415 N.J. Super. 138, 154 (App. Div. 2010), certif. denied, 205 N.J. 80 (2011).

We are satisfied that Devanney complied with his obligation to plead the defense. His twelfth affirmative defense asserted that "[t]he provisions of the New Jersey Tort Claims Act N.J.S.A. 59:1-1, et seq., bar recovery herein." Although that allegation was not very specific, it has been held that a

"generalized pleading of the Tort Claims Act as an affirmative defense [i]s sufficient," and no waiver of immunity may be found "merely because [a] defendant d[oes] not plead," as here, "the specific statutory section relied upon." Rivera v. Gerner, 89 N.J. 526, 534-35 (1982). We, thus, reject plaintiff's contention that Devanney failed to plead the defense of qualified immunity.

We also reject the argument that Devanney waived that defense, which plaintiff describes as having resulted from the fact that Devanney's "subsequent actions in the litigation were entirely inconsistent with the notion of relying upon qualified immunity as an affirmative defense." According to plaintiff, "[f]or over two years, including a lengthy discovery process, Devanney's counsel at no time uttered the phrase 'qualified immunity,' nor directed any of discovery efforts towards the end of establishing a defense of qualified immunity."

To be sure, "[t]he one-time mention" of an affirmative defense will not always "serve to preserve that otherwise-unasserted defense" through a lengthy litigation. Williams v. Bell Tel. Labs., Inc., 132 N.J. 109, 119 (1993). However,

> [w]aiver is the voluntary and intentional relinquishment of a known right. An effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights. The intent to waive need not be stated

> expressly, provided the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference. The party waiving a known right must do so clearly, unequivocally, and decisively.
>
> [Knorr v. Smeal, 178 N.J. 169, 177 (2003).]

Devanney may have delayed in seeking dismissal on this basis but his delay was neither purposeful nor unreasonable. The record reveals that Devanney first moved for summary judgment on the merits of plaintiff's constitutional claims and when that motion was denied Devanney moved for dismissal on qualified immunity grounds. According to Devanney, once the court denied his summary judgment motion and, in his view, "expanded the law [of political discrimination claims], the issue of qualified immunity became germane and was raised" by later motion. We are satisfied that Devanney's serial approach in seeking dismissal of this suit, first on the merits and then on immunity grounds, was not unreasonable.

Finally, we reject plaintiff's argument that Devanney was not entitled to immunity because he violated plaintiff's clearly established constitutional right to political affiliation. Our consideration of this contention requires explanation regarding the defense itself.

Qualified immunity shields government officials "from liability for civil damages insofar as their conduct does not

violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396, 410 (1982). "Qualified immunity balances two important interests -- the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." Pearson v. Callahan, 555 U.S. 223, 231, 129 S. Ct. 808, 815, 172 L. Ed. 2d 565, 573 (2009). "The protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" Ibid. (citations omitted).

In Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272, 281 (2001), the Court mandated a two-step process for resolving qualified immunity claims. That process required, first, a determination whether the facts alleged or shown make out a violation of a constitutional right. Ibid. And, if that first step was satisfied, the court was then required to determine if the right at issue was "clearly established" at the time of the defendant's alleged misconduct. Ibid.; Anderson v. Creighton, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523, 531 (1987). In Pearson, the Court

modified this approach, declaring that "the procedure required in Saucier . . . should no longer be regarded as mandatory," although maintaining that the Saucier approach "is often beneficial." 555 U.S. at 236, 129 S. Ct. at 818, 172 L. Ed. 2d at 576. We find its application beneficial here.

A right is clearly established when its "contours . . . [are] sufficiently clear that a reasonable official would understand that [the act in which he is engaging] violates that right." Anderson, supra, 483 U.S. at 640, 107 S. Ct. at 3039, 97 L. Ed. 2d at 531; see also McLaughlin v. Watson, 271 F.3d 566, 571 (3d Cir. 2001), cert. denied, 535 U.S. 989, 122 S. Ct. 1543, 152 L. Ed. 2d 469 (2002). Put another way, "there must be sufficient precedent at the time of action, factually similar to the plaintiff's allegations, to put [the] defendant on notice that his or her conduct is constitutionally prohibited." Id. at 572. The Supreme Court has emphasized that this inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." Brosseau v. Haugen, 543 U.S. 194, 198, 125 S. Ct. 596, 599, 160 L. Ed. 2d 583, 589 (2004) (quoting Saucier, supra, 533 U.S. at 201, 121 S. Ct. at 2156, 150 L. Ed. 2d at 281).

In short, qualified immunity is not available if the unlawfulness of the official's act is objectively apparent given

the state of the law at the time of the alleged deprivation of rights. Anderson, supra, 483 U.S. at 640, 107 S. Ct. at 3039, 97 L. Ed. 2d at 531. "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." Id. at 639, 107 S. Ct. at 3038, 97 L. Ed. 2d at 531. Here, plaintiff contends that he established a prima facie case of discrimination based on political patronage. He alleges Devanney violated his rights by forcing him to resign because of his political affiliation with Lapolla, an alleged political rival of Devanney.

To make out a prima facie case of political affiliation discrimination, a plaintiff must show that (1) he was "employed at a public agency in a position that does not require political affiliation"; (2) he was "engaged in constitutionally protected conduct"; and (3) the conduct was "a substantial or motivating factor in the government's employment decision." Galli v. N.J. Meadowlands Comm., 490 F.3d 265, 271 (3d Cir. 2007). In initially denying partial summary judgment, and holding that plaintiff had established a prima facie case of political

affiliation discrimination against Devanney, the motion judge explained:

> It is undisputed that plaintiff's position did not involve policy making, and thus did not require political affiliation. However, the second element, whether plaintiff was engaged in constitutionally protected conduct, is in dispute. The courts have sometimes described the second prong "as a requirement that the employee maintain an affiliation with a political party." Galli, 490 F.3d at 272. However, the constitutionally protected activity is broader than the act of joining a political party. Id. It includes the right not to have allegiance to the official or party in power, irrespective of whether an employee is actively affiliated with an opposing candidate or party. Id. Accordingly, the courts have held that ["]a plaintiff can meet the second prong of a prima facie political discrimination claim if she suffers because of active support for a losing candidate within the same political party." Id.
>
> The essence of plaintiff's allegations are that he was forced to resign because of his political affiliation with Michael Lapolla, the former county manager who was replaced by Devanney, an alleged political rival of Lapolla. Therefore, plaintiff essentially alleges he was forced to resign because of his affiliation with a losing candidate in the same political party and has satisfied the second prong of the prima facie case.
>
> With regards [sic] to the third element, plaintiff alleges the motivating factor in his forced resignation was his political affiliation with Lapolla. It should also be noted that this final element delves into defendant's motivation or intent

> and, therefore, is a matter of credibility typically best left for the jury to decide. Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995). After granting plaintiff all favorable inferences, a prima facie case for political affiliation discrimination has been established[.]

In his cross-appeal, Devanney contends that the motion judge erred in holding that plaintiff established a prima facie case of political affiliation and asserts that plaintiff's life-long friendship with Lapolla should not be viewed as political affiliation. We need not decide that question but instead focus on whether, even if the motion judge was correct in viewing the merits of the political affiliation claim, Devanney was entitled to qualified immunity because his actions were objectively reasonable in light of the rules clearly established at the time action was taken.

At the time the action in question was taken by Devanney, the political affiliation action was only cognizable if Devanney's participation in the employment action in question stemmed from plaintiff's maintenance of a political affiliation with a particular party or, specifically, from plaintiff's active support of a losing candidate in an election, failure to support a winning candidate, or "failure to engage in any political activity whatsoever." Galli, supra, 490 F.3d at 272-73. It remains unclear whether an employee's mere friendship or

alignment with a former, political appointee qualifies as constitutionally-protected conduct.

As we have previously mentioned, Devanney argues that plaintiff's claim in this regard is not cognizable and that Devanney was entitled to its dismissal without the need to resort to the qualified immunity defense contained in N.J.S.A. 59:3-3. Assuming we were to agree that plaintiff stated a cause of action against Devanney in this regard -- a question we need not reach -- we cannot conclude that such a claim was sufficiently established as to negate the application of the qualified immunity to which Devanney would otherwise be entitled. At best, if cognizable, plaintiff's claim of a constitutional deprivation arises from his friendship with Lapolla, Devanney's predecessor. Lapolla, however, was not an elected official, and plaintiff was not forced from office; he voluntarily left to pursue other opportunities. The motion judge's analogizing of plaintiff's relationship to Lapolla as the equivalent of supporting a losing candidate constitutes, if correct, a view far more expansive than recognized in law when the action was taken. Accordingly, Devanney's alleged failure to conform to the standard imposed by the motion judge in this case does not negate application of the qualified immunity to which he was entitled.

For these reasons, the orders under review in plaintiff's appeal are affirmed. As a result, we need not reach the issues raised in Devanney's cross-appeal.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION