APPENDIX

APPENDIX

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NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-2097

STEPHEN J. SIMONI,
Appellant

v.

EDWARD DIAMOND, Individually and as Manager Cardiac Services of JSUMC; KATHRYN J. LUCIANI, SPHR, Individually and as Human Resources Site Manager of JSUMC; MERIDIAN HEALTH SYSTEMS, INC.; MERIDIAN HEALTH, INC.; MERIDIAN HOSPITALS CORP.; MERIDIAN HEALTH; DONNA M. CUSSON, Individually and as Assistant Nurse Manager Invasive Care Cardiology of JSUMC; JERSEY SHORE UNIVERSITY MEDICAL CENTER ('JSUMC'); ERICKA D. CLARK DISTANISLAO, Individually and as Staff Nurse and Preceptor Invasive Cardiology of JSUMC; JENNIFER S. LOVEY, Individually and as Staff Nurse and Preceptor Invasive Cardiology of JSUMC; HEALTH PROFESSIONALS AND ALLIED EMPLOYEES, AFT/AFL-CIO ('HPAE'); HPAE LOCAL 5058

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 3:10-cv-06798)
District Judge: Honorable Peter G. Sheridan

No. 20-1024

STEPHEN J. SIMONI,
Member of HEALTH PROFESSIONALS
AND ALLIED EMPLOYEES, LOCAL 0558, AFT/AFL-CIO,
Appellant

v.

JERSEY SHORE UNIVERSITY MEDICAL CENTER;
HACKENSACK MERIDIAN HEALTH

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 3:18-cv-17714)
District Judge: Honorable Freda L. Wolfson

Submitted Under Third Circuit L.A.R. 34.1(a)
on September 14, 2020

Before: KRAUSE, RESTREPO, and BIBAS, *Circuit Judges*

(Filed: November 5, 2020)

OPINION[*]

BIBAS, *Circuit Judge*.

After performing poorly and clashing with his supervisors, Stephen Simoni disobeyed a direct order and was fired. He asks us to infer that the real reason he was fired was something more nefarious: retaliation for whistleblowing. But there is no basis for that claim. He also seeks attorney's fees, but no contractual provision or clear law entitles him to recover them from his employer. So we will affirm.

[*] This disposition is not an opinion of the full Court and, under I.O.P. 5.7, is not binding precedent.

I. BACKGROUND

A. Simoni's work at the Hospital

From August to October 2010, Simoni worked as a cardiac nurse at the Jersey Shore University Medical Center. He started as a probationary employee, as all new nurses do for their first three months. But at the end of his first month, Simoni's first supervisor told him that he was not learning fast enough and did not take guidance or criticism well. Rather than accepting this feedback, he lashed out at her. And the next day, he reported her for violating hospital safety rules.

This was not an isolated incident. Simoni's second supervisor thought his progress was "very slow" and that he grew "defensive when criticism [wa]s given." App. 236. When a manager relayed these comments to him, he grew defensive and said he thought his supervisor "had more integrity than" to criticize him as she did. App. 237, 462. The manager told him not to discuss this with his supervisor. But right afterwards, he did just that, confronting the supervisor and telling her: "I thought you had more integrity than that." App. 275.

The managers recommended that the Hospital fire Simoni because he took criticism poorly and had disobeyed the direct order not to confront his supervisor. The Hospital agreed. Five days after the encounter, the managers fired him, telling him it was based on his "inappropriate and insubordinate confrontation of" his supervisor. App. 239. Simoni objected and threatened to sue.

The Hospital had a collective-bargaining agreement with the Health Professionals and Allied Employees Union. The Agreement required just cause to fire an employee. At

Simoni's request, the Union filed a grievance challenging his firing. But the Hospital denied that challenge. The Union refused to appeal that denial to arbitration, saying that he had no right to it because he was a probationary employee.

B. Procedural history

Simoni sued the Hospital and the Union under Section 301 of the Labor Management Relations Act (Taft-Hartley Act), 29 U.S.C. § 185. He claimed that the Union had breached its duty to represent him fairly, but later settled that claim with the Union. He also claimed that the Hospital had breached the Agreement by firing him without just cause and failing to follow the mandated grievance process. The District Court granted summary judgment for him on the latter claim, finding that the Hospital had not followed the grievance procedure required by the Agreement. *Simoni v. Diamond*, No. 10-6798, 2015 WL 4915535, at *8 (D.N.J. Aug. 18, 2015).

The grievance thus went to arbitration. The arbitrator in turn found that the Hospital had just cause to fire Simoni but that it had infringed on his right to the grievance process. He awarded Simoni back pay and interest but not attorney's fees. So Simoni sued once again, seeking the attorney's fees the arbitrator had denied. But the District Court dismissed this new claim, finding that the arbitrator had not manifestly disregarded the law. Simoni appeals that dismissal.

Along with his Section 301 claim, Simoni brought various state-law claims against the Hospital and its employees. The District Court exercised supplemental jurisdiction over several of these, including his whistleblower, discrimination, and ethics-code claims. It granted summary judgment for the defendants on each. Simoni appeals only the

whistleblower decision under the New Jersey Conscientious Employee Protection Act. His two appeals are consolidated before us.

C. Standard of review

We review the District Court's grant of summary judgment de novo. *Cranbury Brick Yard, LLC v. United States*, 943 F.3d 701, 708 (3d Cir. 2019). So too with the denial of a motion to alter an arbitration award. *Whitehead v. Pullman Grp., LLC*, 811 F.3d 116, 119 n.23 (3d Cir. 2016). District courts must presume arbitral awards valid and may not correct factual or legal errors. *Brentwood Med. Assocs. v. United Mine Workers of Am.*, 396 F.3d 237, 240–41 (3d Cir. 2005). Only when one of four narrow statutory grounds is met does the Federal Arbitration Act authorize setting the award aside. 9 U.S.C. § 10(a).

II. SIMONI HAS NO RIGHT TO RECOVER ATTORNEY'S FEES FROM THE HOSPITAL

Simoni claims that because the Hospital prevented him from going to arbitration, he is entitled to attorney's fees. By denying that claim, he argues, the arbitrator manifestly disregarded the law. But the Federal Arbitration Act does not list manifest disregard of law as a ground to challenge an award. 9 U.S.C. § 10(a). And though we have previously recognized such challenges, we have not decided whether this ground survives the Supreme Court's decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584 (2008). *Whitehead*, 811 F.3d at 120–21. We need not decide that issue today. Even if the theory is still viable, the arbitrator did not manifestly disregard the law.

The arbitrator did not have to award Simoni attorney's fees. An employee's claim that his employer breached a collective bargaining agreement is "contractual in nature." *Ames v. Westinghouse Elec. Corp.*, 864 F.2d 289, 292 (3d Cir. 1988). That usually means the

employee cannot recover attorney's fees from the employer unless some exception applies. For instance, the employer may be liable if the Agreement provides for attorney's fees or the employer litigates in bad faith. And there might be an exception if the employer instigates or takes part in the union's breach of its duty of representation. *Id.* at 293. If the union has breached that duty, forcing the employee to sue the employer under Section 301, the employee can recover those attorney's fees *from the union*. *Id.*

At first, Simoni claimed bad faith. In his complaint, he alleged that the "Hospital conducted the litigation in bad-faith" and "continues to litigate in bad-faith." App. 86–87. But he does not appear to have made that argument to the arbitrator. And the District Court properly found that while the Hospital's litigating position may have been weak, it was not indefensible. A defensible argument does not bad faith make.

On appeal, Simoni no longer argues bad faith. Instead, he now seems to claim that the Hospital instigated or took part in the Union's breach of its duty of fair representation. But as the District Court rightly found, Simoni "does not plead factual allegations to support that the Hospital instigated or assisted in the Union's breach of fair representation." App. 10 n.5. In any event, our circuit has left open whether an employee could recover attorney's fees in those circumstances. *Ames*, 864 F.2d at 293. That means our circuit has no clear law that the arbitrator could have manifestly disregarded. So the District Court properly dismissed the claim to modify the arbitral award.

III. SIMONI HAS NO EVIDENCE THAT HE WAS FIRED BECAUSE OF WHISTLEBLOWING

Simoni also alleges a violation of New Jersey's whistleblower law. N.J. Stat. Ann. § 34:19-3. New Jersey courts apply a burden-shifting framework to such claims, requiring the plaintiff to first establish a prima facie case of discriminatory retaliation. *Klein v. Univ. of Med. & Dentistry of N.J.*, 871 A.2d 681, 687 (N.J. Super. Ct. App. Div. 2005). Here, Simoni claims that the Hospital fired him for alleging that his first supervisor failed to follow hospital safety codes. The District Court rightly rejected that claim on summary judgment, finding that he had not made out the fourth element of his prima facie case: that there was a causal connection between his whistleblowing and his firing. *Sarnowski v. Air Brooke Limousine, Inc.*, 510 F.3d 398, 404 (3d Cir. 2007) (citing *Dzwonar v. McDevitt*, 828 A.2d 893, 900 (N.J. 2003)).

Simoni's only proof of causation is temporal proximity. He stresses that he was fired soon after reporting the violations. But that is not enough for us to infer causation. Temporal proximity alone suffices only when it is "unusually suggestive of retaliatory motive." *Young v. Hobart W. Grp.*, 897 A.2d 1063, 1073 (N.J. Super. Ct. App. Div. 2005) (quoting *Krouse v. Am. Sterilizer Co.*, 126 F.3d 494, 503 (3d Cir. 1997)).

Here, the timing is not suggestive. Right after blowing the whistle on his first supervisor, Simoni was not fired. Rather, he went on to his second rotation with a new supervisor. Though he claims to have reported these violations again days before he was fired, the record does not support that claim. All it shows is that he made "negative" comments, not whistleblowing complaints. App. 386.

The Hospital decided to fire Simoni right after he disobeyed the manager by telling his supervisor that she lacked integrity. The managers told him that was why they were firing him. Simoni admits that he did make that comment to his supervisor, even though the manager had told him not to. And he admits that the managers told him that was why they were firing him. He neither rebuts this evidence nor offers any other evidence of causation beyond closeness in time. Thus, the District Court properly rejected his whistleblowing claim on summary judgment.

* * * * *

Simoni was fired not because he reported his first supervisor's alleged safety violations, but because he disobeyed a direct order and confronted his second supervisor. And no contractual provision or clear law entitled him to recover attorney's fees from the Hospital. So we affirm the grant of summary judgment on the whistleblowing claim and the dismissal of his motion to modify the arbitral award.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

STEPHEN SIMONI, Member of HEALTH PROFESSIONALS & ALLIED EMPLOYEES, LOCAL 5058, AFT/AFL-CIO	Civ. A. No.: 18-17714 (FLW)
Plaintiff, v.	**OPINION**
JERSEY SHORE UNIVERSITY MEDICAL CENTER and HACKENSACK MERIDIAN HEALTH,	
Defendants.	

WOLFSON, Chief Judge:

This matter comes before the Court on Defendants Jersey Shore University Medical Center and Hackensack Meridian Health's (collectively, the "Hospital") Motion to dismiss Plaintiff Stephen Simoni's ("Plaintiff") First Amended Complaint, wherein he seeks to modify an arbitration judgment and award.[1] For the reasons set forth below, the Hospital's Motion is **GRANTED**.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On August 10, 2010, Plaintiff began working at the Jersey Shore University Medical Center as a Registered Nurse in the Cardiac Catherization Laboratory. The Hospital and Health Professionals & Allied Employees, Local 5058, AFT, AFL-CIO ("Union") were parties to a

[1] I note that Plaintiff's First Amended Complaint reads much like a brief, as his pleadings raise various legal arguments and discuss certain case law which he relied upon in the arbitration proceeding.

collective bargaining agreement ("CBA"), which was effective from October 31, 2009 to October 31, 2011.

On October 18, 2010, the Hospital terminated Plaintiff. Approximately one week later, Plaintiff contacted the Union to file a grievance on his behalf, concerning the Hospital's alleged wrongful termination of his employment. However, the Hospital rejected Plaintiff's grievance, taking the position that he was not a covered union employee under the CBA, because he was terminated during his probationary period. The Union agreed with the Hospital's position that Plaintiff was not eligible to utilize the resolution procedures set forth in the CBA, and his grievance was processed no further. Plaintiff then filed suit against the Hospital and the Union, asserting a federal hybrid § 301 claim under the Labor Management Relations Act ("LMRA"),[2] alleging a breach of the CBA and a breach of the duty of fair representation. Plaintiff also asserted various state law claims. That case was assigned to the Honorable Joel A. Pisano, U.S.D.J. (Ret.). *See Roe v. Diamond*, No. 10-6798, 2011 U.S. Dist. LEXIS 115596 (D.N.J. Oct. 5, 2011).

On October 6, 2011, Judge Pisano granted the Hospital and the Union's motions to dismiss Plaintiff's Amended Complaint. In particular, Judge Pisano held that Plaintiff did not assert a cognizable § 301 claim, because he did not sufficiently allege a breach of the duty of fair representation against the Union. However, on appeal, the Third Circuit reversed the dismissal of Plaintiff's § 301 claim. In an Opinion issued on March 20, 2013, the Third Circuit ruled that

[2] As this Court has previously explained, a "hybrid" § 301/fair representation claim is comprised of two separate, but interdependent, causes of action that may be brought simultaneously. *See Simoni v. Diamond*, No. 10-6798, 2015 U.S. Dist. LEXIS 108640, at *14 (D.N.J. Aug. 18, 2015). Generally, in such a hybrid suit, an employee files a claim against the union alleging a breach of the duty of fair representation by discriminatorily or arbitrarily failing or refusing to pursue his ensuing contractual grievance against the employer, together with a claim against the employer alleging a breach of the collective bargaining agreement in violation of § 301 of the LMRA. *Id*.

Plaintiff's factual allegations, as pled, were sufficient to state a claim as to the Union's failure to provide fair representation on behalf of Plaintiff, when the Union declined to pursue his grievance under the CBA. On remand, that action was transferred to me, and the parties cross-moved for summary judgment.

On January 29, 2015, I granted summary judgment in favor of Plaintiff on his § 301 claim under the LMRA. In my decision, based upon a fair reading of the CBA, I found, consistent with the Third Circuit's reading, that Plaintiff was a covered union employee, and that the Hospital committed a breach of that agreement by precluding him from enforcing his contractual rights. Having determined that the protections of the CBA applied, the parties were directed to brief whether the relief to which Plaintiff might be entitled, as a result of proving a § 301 violation, was required to be determined through the administrative grievance process set forth in the CBA. On January 9, 2017, after that matter was again transferred, the Honorable Peter G. Sheridan, U.S.D.J., answered that question in the affirmative, and instructed the parties to arbitrate the remaining issues as to Plaintiff's § 301 claim, in accordance with the CBA's grievance provisions. *See Simoni v. Diamond*, No. 10-6798, 2017 U.S. Dist. LEXIS 2746 (D.N.J. Jan. 9, 2017).

On August 31, 2019, Arbitrator James M. Cooney issued an Opinion and Award in partial favor of Plaintiff. In particular, the Arbitrator held that the Hospital terminated Plaintiff's employment for just cause, on the basis of his insubordinate and intimidating workplace behavior. However, the Arbitrator ultimately adopted the prior rulings of this Court, finding that the Hospital breached the CBA because it infringed upon Plaintiff's right to access the arbitration process set forth therein. As a result, the Arbitrator awarded Plaintiff back pay and interest in the amount of $81,338, but he denied Plaintiff's request for attorney's fees, reasoning that the CBA did not provide for such contractual relief.

On November 29, 2018, Plaintiff filed a one-count Complaint in the New Jersey Superior Court, Law Division, Monmouth County, seeking to modify the labor arbitration award to include attorney's fees in an unspecified amount. On December 28, 2018, the Hospital removed Plaintiff's Complaint on the basis of federal question jurisdiction, pursuant to 28 U.S.C. § 1441(a). On January 15, 2019, Plaintiff filed a motion to remand, which this Court denied, finding that Defendant's removal was proper. Now, Defendants move to dismiss Plaintiff's First Amended Complaint for the failure to allege sufficient grounds to modify the arbitration award. Plaintiff opposes the Motion.

II. DISCUSSION

A. Standard of Review

In reviewing a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the court must, as an initial matter, separate the factual and legal elements of the claims, accepting the well-pleaded facts as true and drawing all reasonable inferences in the plaintiff's favor. *See In re Ins. Brokerage Antitrust Litig*., 618 F.3d 300, 314 (3d Cir. 2010); *see also Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-11 (3d Cir. 2009). To survive a motion to dismiss, the plaintiff must provide "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The Third Circuit requires a three-step analysis to meet the plausibility standard mandated by Twombly and Iqbal. First, the court should "outline the elements a plaintiff must plead to a state a claim for relief." *Bistrian v. Levi*, 696 F.3d 352, 365 (3d Cir. 2012). Next, the court should "peel away those allegations that are no more than conclusions and thus not entitled to the assumption of truth." *Id*.; *see also Iqbal*, 556 U.S. at 678-79 ("While legal conclusions can provide

the framework of a complaint, they must be supported by factual allegations."). Indeed, it is well-established that a proper complaint "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (internal quotations and citations omitted). Third, the court should assume the veracity of all well-pled factual allegations, and then "determine whether they plausibly give rise to an entitlement to relief." *Bistrian*, 696 F.3d at 365 (quoting *Iqbal*, 556 U.S. at 679). A claim is facially plausible when there is sufficient factual content to support a "reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. This final step is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id*. at 679.

B. Analysis

Section 301 of the LMRA "represents a clear Congressional mandate that agreements to arbitrate labor disputes be enforced by the district courts." *Union Switch & Signal Div. American Standard, Inc. v. United Electrical, Radio & Machine Workers, Local 610*, 900 F.2d 608, 616 (3d Cir. 1990). Section 10 of that statute, however, provides four grounds pursuant to which a district court may vacate an arbitration award, including: "(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct . . . or of any other misbehavior by which the rights to any party have been prejudiced; or (4) where the arbitrators exceeded their powers . . . . " 9 U.S.C.A. § 10(a)(1)-(4). "The party seeking to overturn an award bears a heavy burden, as these are 'exceedingly narrow circumstances,' and courts accord arbitration decisions exceptional deference." *Handley v. Chase Bank USA NA*, 387 Fed. Appx. 166, 168 (3d Cir. 2010) (citation omitted).

Although not explicitly enumerated in the Federal Arbitration Act ("FAA"), the Third Circuit has recognized an additional basis to vacate an arbitration award pursuant to the manifest disregard of the law doctrine. *See Black Box Corp. v. Markham*, 127 Fed. Appx. 22, 25 (3d Cir. 2005); *Goldman v. Citigroup Global Mkts., Inc.*, 834 F.3d 242, 255 (3d Cir. 2016). The manifest disregard of the law doctrine is "a judicially-created one that is to be used 'only [in] those exceedingly rare circumstances where some egregious impropriety on the party of the arbitrators is apparent, but where none of the provisions of the [FAA] apply."[3] *Black Box Corp*., 127 Fed. Appx. at 25; *Dluhos v. Strasberg*, 321 F.3d 365, 369 (3d Cir. 2003) (explaining that, in order to vacate an arbitration award, it must "evidence[] [a] manifest disregard of the law rather than an erroneous interpretation"). Because "there is a strong presumption in favor" of enforcement, arbitration awards are presumed to be valid "unless it is affirmatively shown to be otherwise." *Brentwood Medical Assoc. v. United Mine Workers of America*, 396 F.3d 237, 241 (3rd Cir. 2005) (quotation marks and citation omitted); *Bender v. Smith Barney, Harris Upham & Co.*, 901 F. Supp. 863, 870 (D.N.J. 1994) ("The 'manifest disregard' doctrine may provide a basis for vacating an award in some circumstances, but its scope is exceedingly narrow[.]"); *DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818, 821 (2d Cir. 1997) (Explaining that "the reach of the manifest disregard doctrine is severely limited.") (internal quotations marks and citation omitted).

[3] The Supreme Court has cast doubt on the viability of the manifest disregard of law doctrine, finding this basis is not one of the enumerated, exclusive grounds for vacataur under Section 10 of the FAA. *See Hall Street Associates v. Mattel, Inc.*, 128 S. Ct. 1396, 1405 (2008). Although the Third Circuit has not had the occasion to weigh in on the issue, circuit courts have differed over whether, in light of *Hall Street*, the manifest disregard doctrine is viable. *Compare Ramos-Santiago v. United Parcel Service,* 524 F.3d 120, 124 n. 3 (1st Cir. 2008) (finding that the doctrine of manifest disregard does not survive the Supreme Court's holding in *Hall Street*) *with Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 95 (2d Cir. 2008) (finding that *Hall Street* "did not . . . abrogate the 'manifest disregard' doctrine altogether."). Notwithstanding the disagreement, however, the threshold for a showing of manifest disregard of the law remains high.

In determining whether an arbitrator has committed a manifest disregard of the law, the court's role is:

> [N]ot to correct factual or legal errors made by an arbitrator. Courts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misrepresents the parties' agreement. When an arbitrator resolves disputes regarding the application of a contract, and no dishonesty is alleged, the arbitrator's improvident, even silly, fact-finding does not provide a basis for a reviewing court to refuse to enforce the award.

The Major League Umpires Assoc. v. The American League of Professional Baseball Clubs, 357 F.3d 272, 279-80 (3rd Cir. 2004); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986) (holding that a party seeking relief from an arbitration award must show "more than error or misunderstanding with respect to the law," but rather a complete disregard for well-settled legal principle). A court reviewing an arbitration award for manifest disregard of the law "should not vacate an award unless it finds 'both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit and clearly applicable to the case.'" *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Millar*, 274 F. Supp. 2d. 701, 706 (W.D. Pa. 2003) (citations omitted); *see also N.Y. Tel. Co. v. Commc'ns Workers of Am. Local 1100*, 256 F.3d 89, 91 (2d Cir. 2001).

Here, because Plaintiff does not challenge the arbitration award pursuant to the four explicit grounds set forth in the FAA, the resolution of this dispute solely depends on whether the arbitrator rendered a decision in manifest disregard of the law, in the denial of Plaintiff's request for legal

fees. I answer that question in the negative, finding that the Arbitrator's rulings do not warrant a modification[4] of the arbitration award.

Numerous federal courts, including the Third Circuit, have held that the remedy against an employer for breaching a provision in a collective bargaining agreement is "contractual in nature," and, therefore, subject to the American Rule which requires parties to a litigation to bear their own expenses. *See Ames v. Westinghouse Electric Corp.*, 864 F.2d 289, 293 (3d Cir. 1988) ("[N]o statute authorizes fee shifting in section 301 cases."); *Alday v. Raytheon Co.*, 693 F.3d 772, 794 (9th Cir. 2012) ("Extra-contractual damages are generally not allowed under the LMRA for breach of a CBA."); *United Food & Commercial Workers, Local 400 v. Marval Poultry Co.*, 876 F.2d 346, 350 (4th Cir. 1989) (explaining, within the context of a § 301 hybrid claim, that "[w]ithout such express contractual or statutory authorization, courts generally adhere to the American Rule which requires each party to bear its own litigation costs, including attorney's fees."); *Knollwood Cemetery Asso. v. United Steelworkers of America, etc.*, 789 F.2d 367, 369 (6th Cir. 1986) ("It is clear that § 301 of the LMRA does not authorize an award of attorney fees as an element of damages.").

The Third Circuit had the occasion to apply these principles in *Ames*, wherein a claimant sought legal fees within the context of a § 301 hybrid action against his employer and the union. *Ames*, 864 F.2d at 293. In denying fees, the Third Circuit emphasized that, "we cannot lose sight of the point that the employee's claim" as to his employer arises from its breach of a contractual provision. *Id*. at 292. Under these circumstances, in the absence of a fee shifting clause in the collective bargaining agreement, the Third Circuit explained that a claim for fees "as damages falls

[4] Although Plaintiff moves to modify, instead of vacate, the arbitration award to include an award of legal fees, the manifest disregard of law standard still governs the resolution of this Motion.

squarely within the American rule that each party to a lawsuit pay its own attorney's fees." *Id*. at 293. Indeed, the Third Circuit found that "[t]here is no legal authority . . . for an award of attorney's fees" against the claimant's employer, as a result of its alleged breach of the collective bargaining agreement.[5]

On the other hand, the Third Circuit explained that a breach of fair representation claim "is predicated upon the duties which are imposed by the federal labor law," requiring union representatives to enforce collective bargaining agreements. *Id*. at 293. In that connection, because the union's alleged breach required the claimant "to retain an attorney in order to pursue his contract remedies against" his employer, the Third Circuit ruled that "the cost of substitute representation should be recoverable" against the union.[6] *Id*. at 294. In so finding, the Third Circuit joined in the holdings of other appellate courts which, too, allow for a claimant to recover from his union attorney's fees incurred in pursuing a § 301 claim as "consequential damages flowing from the Union's alleged breach of its duty of fair representation." *Id*. at 293; *see also Bagsby v. Lewis Bros. Inc. of Tenn.*, 820 F.2d 799, 801 (6th Cir. 1987); *Zuniga v. United Can Co.*, 812 F.2d 443, 454-55 (9th Cir. 1987); *Seymour v. Olin Corp.*, 666 F.2d 202, 215 (5th Cir. 1982); *Self v.*

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[5] I note that, although the Third Circuit recognized that an employer could potentially be liable for non-contractual damages in instances where it "instigated or participated in the Union's breach of the duty of fair representation," those allegations were not raised in *Ames*. *Ames*, 864 F.2d at 293. Thus, the Third Circuit deferred on the issue, "postpon[ing] for another occasion consideration of the question whether, if such instigation or participation were alleged, an employer would be liable for non-contractual damages." *Id*. Notwithstanding the unresolved nature of that question, however, I find that Plaintiff' First Amended Complaint does not plead factual allegations to support that the Hospital instigated or assisted in the Union's breach of fair representation. Rather, his allegations rest on bad faith. *See infra*.

[6] Plaintiff's claims against the Union settled on February 21, 2014. Their settlement presumably accounted for the legal fees which Plaintiff incurred in pursuing litigation against the Hospital.

Drivers, Chauffeurs, Warehousemen & Helpers Local Union No. 61, 620 F.2d 439, 444 (4th Cir. 1980).

In the absence of a contractual or statutory fee-shifting provision, a litigant can prevail on a request for fees against an employer only under limited circumstances. *See Ames*, 864 F.2d at 293 (denying an award for fees against an employer, where no contractual or statutory basis existed, and no exceptions to the American Rule applied). The Supreme Court of the United States has recognized various exceptions to the American Rule that warrant an award of fees, including "when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 257-59 (1975) (internal quotations and citations omitted). Moreover, a finding of bad faith falls within the discretion of the district court and requires a factual determination that is appropriate in narrow circumstances, including when a litigant engages in the "intentional advancement of a baseless contention that is made for an ulterior purpose, *e.g.*, harassment or delay." *Ford v. Temple Hospital*, 790 F.2d 342, 347 (3d Cir. 1986).

Here, as stated, the Arbitrator awarded Plaintiff back pay and interest in the amount of $81,338, as a result of the Hospital's breach of the CBA. In his decision, the Arbitrator ruled against Plaintiff's request for attorney's fees, reasoning that those "are not typically awarded for breach of contract claims, and [that] the CBA does not provide for an award of attorney's fees." Arbitration Opinion and Award (dated August 31, 2018) ("Arb. Award."), p. 28. Significantly, the Arbitrator's rationale with respect to the denial of Plaintiff's fee request conforms to the above-referenced "American Rule," which requires litigants to bear their own legal costs, unless otherwise provided for in a governing contract or statute. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991); *FTC v. Penn State Hershey Med. Ctr.*, 914 F.3d 193, 195 (3d Cir. 2019). Indeed, as

the Arbitrator noted, and the parties do not dispute, no provision in the CBA authorizes an award of attorney's fees in the event of a contractual breach. Nor does the LMRA, a violation of which Plaintiff proved, contain fee-shifting provisions for prevailing litigants. *See Ames*, 864 F.2d at 293; *Amalgamated Cotton Garment & Allied Industries Fund v. J.B.C. Co. of Madera, Inc.*, 608 F. Supp. 158, 168 (W.D. Pa. 1984) ("The LMRA makes no provision for attorney's fees."). Therefore, because neither of the recognized grounds for awarding fees exists, as the Arbitrator so found, the Hospital was not required to reimburse Plaintiff's litigation expenses. *See Ames*, 864 F.2d at 293 (finding that the American Rule barred an award of legal fees arising from an employer's breach of a CBA within the context of a § 301 action).

Notwithstanding the "high bar that exists for [the] modification of arbitral awards," as Plaintiff, himself, acknowledges, he argues that the Arbitrator disregarded the following decisions which support his right to recover legal fees from the Hospital: (1) *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244 (9th Cir. 1994); (2) *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998); (3) *DeGaetano v. Smith Barney, Inc.*, 983 F. Supp. 459 (S.D.N.Y. 1997); and (4) *Riding v. Towne Mills Craft Ctr.*, 166 N.J. 222 (2001). Pl.'s Opp., at 15-17. I, however, disagree, as these cases fail to demonstrate that the Arbitrator's judgment was rendered in manifest disregard of the law.

For instance, in *Halligan*, the Second Circuit vacated an arbitration award because the panel's decision lacked reasoning, and their findings conflicted with "very strong evidence" presented during the grievance proceeding. *Halligan*, 148 F.3d at 198-99. At no point in that decision did the appellate court address the issue of whether to award the claimant with attorney's fees. Moreover, the remaining authorities that Plaintiff references likewise are not relevant to the resolution of this case. Unlike the claims at issue here, *DeGaetano*, *Graham Oil Co.*, and *Riding*

all concern statutes that either include explicit fee-shifting provisions, or establish a presumptive right to an award of fees for prevailing parties. *See DeGaetano*, 983 F. Supp. at 462 (vacating an arbitration award which failed to include fees, because Title VII "establishes a presumptive entitlement to an award of attorney's fees for prevailing parties."); *Graham Oil Co.*, 43 F.3d at 1245 (striking an arbitration provision from a franchise agreement that precluded the franchisee from recovering fees, as the Petroleum Marketing Practices Act creates a "statutorily-mandated right to recover reasonable attorney's fees"); *Riding*, 166 N.J. at 230 (holding that the claimant, who prevailed on her New Jersey Law Against Discrimination Act claim, was entitled to an award of fees pursuant to the statute's "fee-shifting provision for prevailing parties."). Thus, these decisions do not support a modification of the arbitrator's award, particularly since the LMRA lacks a fee-shifting clause.

In addition, Plaintiff contends that the Arbitrator overlooked the cases in his submissions, which, he argues, establish a "legal presumptive right" to recover "extra-contractual damages" from the Hospital, including the legal expenses which Plaintiff incurred as a result of their prior litigation. Pl.'s Opp., at 9-14. According to Plaintiff, because collective bargaining agreements do not typically contain fee-shifting provisions, courts have responded by awarding attorney's fees within the context of labor dispute actions, particularly when the employer wrongfully denies an employee's access to a contractual grievance process. *Id.* at 10. Plaintiff's contentions, however, lack merit.

Here, to establish his ostensible "presumptive legal right" to legal fees, without providing a substantive discussion of the case, Plaintiff primarily relies on a mere footnote in *De Arroyo*, generally stating that "the cost of attorney's fees is an injury to the employee directly attributable to and necessitated by the failure of the union and/or employer to utilize the contractual grievance

procedures . . . . " 425 F.2d 281, n.17 (1st Cir. 1970). However, Plaintiff overemphasizes the significance of this language, which constitutes non-binding dictum that the Arbitrator was not obligated to consider in resolving the parties' fee dispute.[7] In fact, in *De Arroyo*, the employer was not required to reimburse the legal expenses that the claimant incurred in a labor dispute, as the First Circuit noted, in accordance with the general principle, that "such relief should be charged against the union[,]" not the employer. *Id*. at 293. However, even if, as Plaintiff avers, *De Arroyo* can be interpreted in a manner that allows for an award of legal fees and costs against an employer, this lone decision cannot constitute a well-settled legal principle that required the Arbitrator to deviate from the widely-applied American Rule, within the context of an employment dispute pursuant to § 301 of the LMRA.[8]

In addition, Plaintiff quotes various opinions which, at first blush, appear to support an award of fees; however, a closer inspection reveals that the language upon which he relies from those decisions is taken out of context. For example, Plaintiff references *Vacas*, which holds that

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[7] *See e.g.*, *State Auto Prop. & Cas. Ins. Co. v. Pro Design, P.C.*, 566 F.3d 86, 92 (3d Cir. 2009) (defining the term dicta to include "statements of law in the opinion which could not logically be a major premise of the selected facts of the decision") (internal quotation marks, alteration, and citation omitted); *see also, e.g.*, *IMO Indus. v. Kiekert AG*, 155 F.3d 254, 261 n.4 (3d Cir. 1998).

[8] Although Plaintiff, in the arbitration proceeding, referenced a string cite of cases from the *De Arroyo* Opinion for the proposition that federal courts "routinely award[] attorney's fees as part of the successful plaintiff's recovery in the labor relations context in the absence of express statutory authorization," Am. Comp., ¶ 31, those decisions are distinguishable, as none of them concern § 301 hybrid claims. *See*, *e.g.*, *Rolax v. Atlantic Coast Line R. Co.*, 186 F.2d 473, 481 (4th Cir. 1951) (legal fees awarded to employee arising from the union's breach of the duty of fair representation under the Railway Labor Act); *Gartner v. Soloner*, 384 F.2d 348 (3d Cir. 1967), *cert. denied*, 390 U.S. 1040 (1968) (awarding fees where the union member proved that his local union violated the Labor-Management Reporting and Disclosure Act); *Sheet Metal Workers, International Asso. Local 223 v. Atlas Sheet Metal Co.*, 384 F.2d 101, 109-110 (5th Cir. 1967) (attorney's fees awarded to an employer against a labor union pursuant to § 303 of the National Labor Relations Act); *Gulf Coast Bldg. & Constr. Trades Council v. F. R. Hoar & Son, Inc.*, 370 F.2d 746, 748 (5th Cir. 1967) (same).

an "employee should not be limited to the exclusive remedial procedures established by the [CBA] . . . when the conduct of the employer amounts to a repudiation of those contractual procedures," but, in contrast to his contentions, that statement does not support an award of extra-contractual damages. *Vacas v. Sipes*, 386 U.S. 171, 185 (1967). Rather, under such circumstances, the Supreme Court ruled that an employee can file suit without adhering to the administrative grievance process, a legal right which Plaintiff, in fact, exercised in his prior litigation. *Id*. Furthermore, although Plaintiff cites to *Ames*, the referenced portion of that decision applies to an employee's right to recover legal fees from the union, as opposed to the employer. *Ames*, 864 F.2d at 293. Therefore, I find that these decisions, too, fail to establish that the arbitrator acted in manifest disregard of the law in the denial of Plaintiff's fee request.[9]

Having failed to demonstrate that a contract or statute entitles him to an award of legal fees, to prevail on this Motion, Plaintiff must show that an exception to the American Rule is applicable. In his Amended Complaint, Plaintiff references various examples of the Hospital's

[9] Plaintiff includes a collection of cases in his brief which he does not appear to have submitted to the Arbitrator. Pl.s Opp., at 12-13. Nonetheless, none of the referenced cases stand for the general proposition that a claimant is entitled to recover an award of fees against an employer in a § 301 hybrid action, and, as such, these decisions do not support that the Arbitrator rendered a decision in manifest disregard of the law. *See International Union, etc. v. Bowman Transp., Inc.*, 421 F.2d 934, 935 (5th Cir. 1970) (affirming the lower court's award of fees in favor of the union, under "the circumstances of this particular case," where the breaching company "without justification refused to abide by the award of an arbitrator."); *United Steelworkers of America v. Butler Mfg. Co.*, 439 F.2d 1110, 1112 (8th Cir. 1971) (finding that the "facts here justify an award of attorney's fees," in a case where the lower court found that the company's defenses to the union's claim were made in "bad faith"); *United Shoe Workers v. Brooks Shoe Mfg. Co.*, 298 F.2d 277, 278 (3d. Cir. 1962) (affirming an award of compensatory damages, in the form of union dues, not attorney's fees, in favor of the union, as a result of the employer's breach of the collective bargaining agreement); *Bygott v. Leaseway Transp. Corp*., 637 F. Supp. 1433, 1441 (E.D. Pa. 1986) (finding that the employees were entitled to an award of legal fees *against the union* as an element of damages arising from the breach of the duty of fair representation, and noting that such fees "may only be awarded against the union[.]"); *United Steelworkers of America v. United Steelworkers of America*, 338 F. Supp. 1154, 1164 (W.D. Pa. 1972) (awarding attorney's fees *against the union*, as a result of its breach of the duty of fair representation).

claimed "bath faith." Amended Complaint ("Am. Compl."), ¶¶ 1-3, 25-27, 38, 40. However, the Hospital's conduct, as alleged in the pleadings, cannot serve as a basis to modify the arbitration award for multiple reasons. As a threshold issue, a claimant cannot presume that an arbitrator is aware of a particular legal principle, regardless of whether it constitutes well-established law. *See DiRussa.*, 121 F.3d at 822-23. Rather, a claimant must demonstrate that he or she communicated a governing legal principle to the arbitrator "either by written submission or orally[.]" *Id*. at 823. Otherwise, the modification of an arbitration award cannot be obtained because of the arbitrator's alleged failure to apply a particular legal principle in a grievance proceeding.

Here, I note that Plaintiff does not include his submissions to the Arbitrator as an exhibit to this motion, as he, instead, only provides certain sections of his briefing as factual allegations in his Amended Complaint. Am. Compl., ¶¶ 27-31. However, because the quoted portions do not discuss the bad faith exception to the American Rule, Plaintiff has not alleged that he explained that particular principle to the arbitrator as a basis for awarding fees. Thus, his failure to meet this threshold requirement precludes the Hospital's alleged conduct from serving as a means to modify the arbitration award. *See DiRussa*, 121 F.3d at 822-23 (no manifest disregard of the law where the employee was not awarded fees, because he failed to explain that such a result was required by statute).

Nonetheless, even if Plaintiff informed the Arbitrator regarding the bad faith exception, his allegations do not suffice for its application. Plaintiff argues that the Hospital refused to resolve this dispute through the administrative grievance process, notwithstanding his union status under the CBA and the continuation of their lawsuit after the Third Circuit's findings on appeal. However, these grounds also do not warrant an award of fees against the Hospital, as the Arbitrator considered the procedural posture of the case and the parties' litigation history without finding bad

faith. Arb. Award, pp. 1-3. A contrary ruling on this motion would ignore the exceptional deference to the Arbitrator's decision. *Mobil Oil Corp. v. Independent Oil Workers Union*, 679 F.2d 299, 302 (3d Cir. 1982) ("This court has emphasized that federal court review of an arbitrator's award is extremely narrow, however, and if the arbitrator's 'interpretation (of the meaning of the collective bargaining agreement) can in any rational way be derived from the agreement,' courts must enforce the award.") (citation omitted).

Yet, even if the Court were to conduct a *de novo* review, I reject Plaintiff's bad faith argument. As stated, in a prior litigation, Plaintiff alleged that the Hospital and the Union violated § 301 of the LMRA, in declining to submit his grievance to arbitration. In assessing his pleadings, the Third Circuit ruled that Plaintiff asserted a sufficient claim against the Union for breaching the duty of fair representation, a "necessary condition precedent" to a § 301 hybrid claim. Having so held, the Third Circuit instructed the lower court "to reach the second prong of the hybrid claim, to wit, [Plaintiff's] Section 301 claim against the Hospital." In that regard, because the Third Circuit did not consider the Hospital's alleged violation of the CBA, it was entitled to raise a subsequent defense against Plaintiff's claims, even if the Hospital's arguments somewhat overlapped with those rejected on appeal. Indeed, Plaintiff's allegations, at most, establish that the Hospital engaged in a flawed, but not indefensible, interpretation of the CBA. However, because "the bad faith exception to the [American Rule] requires more than a showing of a weak or legally inadequate case[,]" I do not find that the Hospital's alleged conduct in a prior litigation justifies an award of legal fees in favor of Plaintiff.[10] *Randolph Engineering Co. v. Fredenhagen Kommandit-*

[10] Plaintiff also cites to a prior litigation between himself and the Hospital involving claims pursuant to the Consolidated Budget Reconciliation Act of 1986 (the "Cobra Litigation"). Contrary to his allegations, however, the Hospital's conduct in the COBRA Litigation, a prior and unrelated matter, is not indicative of its alleged bad faith conduct in the instant action. Nonetheless, I note that this Court rejected Plaintiff's contentions of bad faith against the Hospital in the prior COBRA

Gesellschaft, 476 F. Supp. 1355, 1361 (W.D. Pa. 1979) (quoting *Americana Industries, Inc. v. Wometco de Puerto Rico, Inc.*, 556 F.2d 625 (1st Cir. 1977)); *Bd. of Trs. v. Int'l Fid. Ins. Co.*, 63 F. Supp. 3d 459, 475 (E.D. Pa. 2014); *EEOC v. BE&K Eng'g Co.*, 562 F. Supp. 2d 641, 644 (D. Del. 2008); *Medical Legal Consulting Service, Inc. v. Covarrubias*, 648 F. Supp. 153, 159 (D. Md. 1986).

At bottom, because Plaintiff seeks to recoup his legal fees from the Hospital, as a result of its breach of a collective bargaining agreement, the success of his request rises and falls on the applicability of the American Rule. However, because he has not demonstrated a recognized basis under the law to render such an award, the Arbitrator's refusal to deviate from the application of the American Rule during the grievance proceedings was not made in manifest disregard of the law.

III. CONCLUSION

For the foregoing reasons, the Hospital's Motion to dismiss the First Amended Complaint is **GRANTED**.

DATED: December 30, 2019

/s/ Freda L. Wolfson
Freda L. Wolfson
U.S. Chief District Judge

Litigation. As such, I need not address them again on this Motion. *See* Defendants' Motion to Dismiss, Exhibits B-C.

AMERICAN ARBITRATION ASSOCIATION

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In the Matter of Arbitration between:

HEALTH PROFESSIONALS & ALLIED EMPLOYEES, LOCAL 5058, AFT/AFL-CIO,

Union,

-and-

JERSEY SHORE UNIVERSITY, MEDICAL CENTER,

Employer.

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Case No. 01-17-0002-0560
(Grievance: Discharge - Stephen Simoni)

OPINION AND AWARD
(August 31, 2018)

Arbitrator:
James M. Cooney, Esq.

Appearances:
FOR THE EMPLOYER
William M. Honan, Esq.
Sarah Beth Johnson, Esq.
Caroline R. Robb, Esq.
Fox Rothschild, LLP

FOR THE GRIEVANT
Thomas C. Jardim, Esq.
Richard S. Meisner, Esq.
Matther A. Stoloff, Esq. (on the brief)
Jardim, Meisner & Susser, PC

BACKGROUND

Jersey Shore University Medical Center ("Employer" or "Hospital") and Local 5058 of the Health Professionals and Allied Employees, AFT, AFL-CIO ("Union"), are parties to a collective bargaining agreement ("CBA"), effective October 31, 2009 through October 31, 2011. A dispute arose after the Hospital terminated the employment of Stephen Simoni ("Grievant") on October 18, 2010.

The Union filed a grievance on October 26, 2010, alleging that Grievant was terminated without just cause. The Employer denied the grievance. The grievance was not processed further since the Union and Employer each viewed Grievant as a probationary employee who was not eligible to utilize the grievance procedure under the CBA. Grievant thereafter filed litigation over his termination, alleging claims against multiple defendants, including both the Employer and the Union.[1] Ultimately, by Memorandum and Order dated January 9, 2017, the Hon. Peter G. Sheridan, United States District Judge, ruled that certain of Grievant's claims should be resolved under the CBA's grievance procedure.

Accordingly, on April 9, 2017 Grievant filed a demand for arbitration with the American Arbitration Association ("AAA"), which appointed the undersigned to serve as Arbitrator pursuant to Article 13 of the CBA.

Arbitration hearings were held on October 23, 24, 26, 31, and December 11 & 12, 2017, at the Sheraton Eatontown Hotel, in Eatontown, New Jersey. The parties had the full and fair opportunity to present evidence and make arguments in support of their respective positions. The parties entered various documents into evidence. The Employer presented the testimony of Kathryn Luciani, Human Resources Manager, Ericka Clark, Staff Nurse, Jennifer Lovey, Staff Nurse, Donna Cusson (now Dwyer), Assistant Nurse Manager, Mary L. Southard, Staff Nurse, and Edward Diamond, Manager of Invasive Cardiology.[2] The Grievant testified on his own behalf.

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[1] Grievant settled his claims against the Union. The Union did not participate in the arbitration proceedings. A more complete procedural history is set forth below.

[2] Job titles are from the time of Grievant's employment at the Hospital in 2010.

Thereafter, the parties filed post-hearing briefs, at which time the record closed on May 29, 2018. The parties consented to an extension of the AAA deadline for issuance of this Opinion and Award.

ISSUES

By Order of the U.S. District Court, the issues presented for arbitration are Grievant's claims for: (1) wrongful termination under the CBA; (2) defamation; (3) tortious interference with prospective economic advantage; and (4) breach of contract.

RELEVANT CONTRACT & OTHER LANGUAGE

COLLECTIVE BARGAINING AGREEMENT

12 DISCIPLINE AND DISCHARGE

12.01 The Hospital shall reserve the right to discipline, suspend or discharge any employee only for just cause.

No employee shall be suspended in connection with a level II infraction prior to review/consultation taking place with the Vice President of Human Resources, Administrative representative or Administrator on-call unless there is a demonstrated, clear and present danger to patients or staff personnel. An official of the union must be notified as soon as possible to ensure that this standard has been met.

In the event an employee is suspended, the hospital will schedule the disciplinary review meeting within two (2) working days of notice of suspension.

* * *

21. **MANAGEMENT RIGHTS:** The Management and operation of the enterprise and the direction of the work force are vested exclusively with the Hospital. The Hospital retains all of the power, rights, functions, responsibilities and authority to operate its business and direct its employees except as limited by express language of this Agreement.

Prominent among the rights reserved to and retained by the Employer but by no means wholly inclusive, are the sole right to hire, discipline or discharge for just cause * * *

* * *

MERIDIAN HEALTH TEAM MEMBER HANDBOOK

* * *

LEVEL II (GROSS) INFRACTIONS

The following are classified as gross infractions and will result in suspension without pay pending investigation and a disciplinary review process meeting to establish either upholding the suspension, termination or reinstatement.

- Failure to maintain confidentiality of a patient's condition and/or illness. Viewing and/or sharing confidential information without authorization.
- Falsification of any Meridian Health document or record.
- Unauthorized use of recording equipment on any Meridian Health premises.
- Sleeping while on duty.
- Direct or tacit refusal to comply with a supervisor's instructions or perform a job assignment.
- Failure to properly render service to a patient, when such service is within the regular and/or reasonable scope of an team member's duties, or is required in a bona fide emergency.
- Use of abusive language and/or unnecessary shouting in a patient care, public contact or general work area.
- Reporting for duty in a condition which is unfit for proper performance of assigned work. (Refer to Fitness for Duty policy)
- Use or possession of a weapon on Meridian Health premises.

- Misappropriation, unauthorized possession or misuse of property belonging to Meridian Health or any team member, patient or Meridian Health visitor.

- Unauthorized possession, misuse, reading or copying of Meridian Health documents or records or disclosure of information of such records to unauthorized persons.

- Threatening, intimidating or coercing of another team member, patient or Meridian Health visitor including verbal or physical altercations or related disorderly conduct.

- Any illegal act or conduct on Meridian Health property/theft.

- Any act or conduct which is seriously detrimental to patient care or Meridian Health operations.

- No call – no show 3 days – immediate termination.

- Second Level II infraction – immediate termination.

Disciplinary Procedure for Level II Infractions. In cases involving the Level II gross infractions listed above, a three (3)-step process will be followed that involves a suspension without pay, investigation of the charges, and a Disciplinary Review Meeting.

Team members are permitted to have previously approved Meridian persons or team members attend the meeting to provide factual information pertaining to the charges. As a result of the meeting, one of the following three actions will occur:

1. Upholding of the suspension without pay

2. Termination

3. Reinstatement

FACTS

The Employer is a non-profit, academic medical center within the Hackensack Meridian Health system, formerly known as the Meridian Health System ("Meridian"). Grievant was employed by the Hospital as a Registered Nurse ("RN") in the Employer's Cardiac Catheterization Laboratory ("Cath Lab") from August 10, 2010 through October 18, 2010.

As a new RN in the Cath Lab, Grievant was subject to a preceptorship consisting of three 4-week periods during which he was assigned to a different preceptor. During the first period, he was assigned to work with Ms. Clark. On September 16, 2010, a meeting was held between Mr. Diamond, Ms. Clark, and the Grievant, at which time Ms. Clark outlined areas of weakness which she had observed on Grievant's part, including his inability to anticipate the needs of physicians and staff during Cath Lab procedures, and her belief that he lacked certain basic nursing skills. Grievant became defensive in the meeting, and blamed Ms. Clark for his slow development. At the end of the meeting, Grievant was informed that he would be assigned to a new preceptor, Ms. Lovey, and that he was expected to improve his job performance.

Mr. Diamond met alone with Grievant about an hour later, to assure him that the Hospital was committed to continuing the orientation process, and that he should view as a new opportunity his ability to work with a different preceptor. Notwithstanding such assurances, Grievant remained defensive about Ms. Clark's observations. Grievant showed up the next day at Mr. Diamond's office, spoke of

a "conspiracy," and stated his belief that staff were looking to get him fired. Mr. Diamond assured him that such was not the case.

Thereafter, Grievant was assigned to work with Ms. Lovey. Ms. Lovey's preceptor notes show that she too was not satisfied with Grievant's job performance, and she communicated her concerns to her supervisor, Ms. Cusson.

On October 13, 2010, Grievant met with Ms. Cusson to discuss his preceptorship under Ms. Lovey. Ms. Cusson allowed Grievant to see the preceptor notes prepared by Ms. Lovey, and informed him that his job performance was deficient thus far. Ms. Cusson's notes from the meeting include the following:

> After reading the information provided to me regarding his progress his comment was that he thought Jen Lovey had more integrity than that. I told him it was not a personal attack and her job was to inform us on his progress. Stephen has a negative attitude toward Ericka is [sic] first preceptor and has spoken negatively about her to other staff members. I told him that was unprofessional and inappropriate. I asked him not to leave our discussion with the same negative attitude. (Exhibit E-10)

Ms. Cusson testified that during this meeting, she told Grievant that she "didn't want him to go to [Ms. Lovey] and say anything about her evaluation."

Immediately after the meeting, Grievant approached Ms. Lovey on the Hospital floor and, in the presence of a patient, co-workers, and Ms. Cusson, told her that he thought that she "had more integrity than that." Ms. Lovey testified that she was disturbed and frightened by Grievant's comment. Ms. Cusson considered Grievant's conduct to be insubordination, since she had just asked him not to speak to Ms. Lovey about her evaluation of his performance.

After the incident, Grievant sent Ms. Cusson an email on October 14, 2010, which referred to his "ill-advised placement" with Ms. Clark as his initial preceptor and his subsequent reassignment to Ms. Lovey. Grievant's email also stated that he was "flabbergasted" by Ms. Lovey's "strange criticisms" of his performance and confirmed his statement to Ms. Lovey that he thought that she had "more integrity than that." Ms. Cusson referred Grievant's email to Mr. Diamond, who forwarded it to Ms. Luciani in Human Resources.

Later that same day, Ms. Luciani, Mr. Diamond, and Ms. Cusson met to discuss the status of Grievant's employment. During the meeting, Ms. Luciani agreed that Grievant's employment should be terminated, and that he should be notified of that fact on his next work day. Ms. Luciani testified that Grievant's termination was warranted for the following reasons:

> Based on the fact that he was in his orientation period, there were clearly competency issues, skill issues; competency is probably a better word. And the fact that he directly violated something that Donna [Cusson] said to him, he was insubordinate. He immediately did something that he was told not to do. And did so, first of all, in front of a patient and secondly, in an intimidating manner, in a harassing manner. (Oct. 23, 2010 Tr. at 30)

Prior to being notified of his termination, Grievant sent Ms. Lovey a letter, dated October 16, 2010, via regular and certified mail, discussing his view of his preceptorship with her, stating that she had "defamed [him] by portraying [him] in a false light," and citing a reported court case involving a $5.1 million damage award.[3] Grievant demanded that Ms. Lovey "retract" her allegedly defamatory statements, and advised her to place on notice her "homeowner's insurance carrier

[3] Grievant is also an attorney at law.

and [her] professional malpractice carrier as these policies typically render payment for damages caused by defamatory activity of the homeowner/nurse."

On October 18, 2010, Mr. Diamond and Ms. Cusson met with the Grievant and notified him that his employment was being terminated, for insubordination and poor performance during his orientation period.

That same day, Grievant emailed a letter, written on his attorney letterhead, to Mr. Diamond and Ms. Cusson, objecting to his termination and threatening legal action. Specifically, Grievant referred to himself in the third person, and asserted claims of defamation, slander, libel, libel *per se*, conspiracy to defame, breach of contract, violation of duty of good faith and fair dealing, tortious interference with prospective economic advantage, and negligence. Grievant again admitted stating to Ms. Lovey that he thought she had "more integrity than that." Grievant's letter further advised Mr. Diamond and Ms. Cusson to place on notice their homeowner's insurance carriers and professional malpractice carriers. Grievant also filed - - but later dismissed - - a lawsuit against Ms. Clark in New Jersey Superior Court, Special Civil Part, Small Claims Section.

In late October 2010, Grievant attempted to grieve his termination under the CBA. However, since he had not completed 90 days of employment, neither the Union nor the Hospital deemed him eligible to use the grievance procedure.

By letter dated December 21, 2010, Ms. Luciani responded to Grievant's October 18, 2010 letter concerning his termination. Ms. Luciani's letter cited a Meridian Health Team Member Handbook ("Handbook") provision providing that an employee's first 90 days of employment were "an introductory period" and that

either party has the right to terminate employment without notice if a party feels "the working relationship is not beneficial."

PROCEDURAL HISTORY

On December 28, 2010, Grievant filed a complaint in the U.S. District Court for the District of New Jersey, asserting various claims against the Union, the Hospital, Mr. Diamond, Ms. Cusson, Ms. Clark, Ms. Lovey, Ms. Luciani, and Meridian. The Honorable Joel Pisano, U.S.D.J., dismissed Grievant's lawsuit on October 6, 2011, but on appeal the Third Circuit vacated the dismissal of certain of his claims on March 20, 2013.[4] The Third Circuit held that Grievant's complaint stated claims for breach of the duty of fair representation against the Union and breach of the CBA against the Hospital for failing to adhere to the grievance procedure of the CBA.

On remand on August 18, 2015, the Honorable Freda L. Wolfson, U.S.D.J., granted partial summary judgment to Grievant on his Section 301 "hybrid" claim, under the Labor Management Relations Act, upon a finding that the Hospital had improperly failed to allow Grievant to use the grievance procedure under the CBA. Thereafter, Judge Sheridan issued his January 9, 2017 Order directing that certain of Grievant's claims be submitted to arbitration.

THE PARTIES' POSITIONS

The parties to the CBA are the Hospital and the Union. Under Article 13.04 of the CBA, only the Union may submit a grievance to arbitration. Individual employees do not have the right to do so. Nevertheless, based on the

[4] While the Third Circuit appeal was pending, Grievant filed a lawsuit in New Jersey Superior Court, on September 24, 2012, alleging the same state claims that were included in his federal court case.

Court's disposition of Grievant's claims, he was permitted to file a demand for arbitration with AAA. The case is captioned in the name of the Hospital and the Union, although the Union did not participate in the hearings and Grievant was permitted to proceed with representation by counsel of his own choice. Therefore, the parties' positions as set forth below are those of the Grievant and the Hospital.

I have fully reviewed and considered all written submissions and arguments made by the parties. The following summarizes the parties' arguments on some of the major issues presented.

The Grievant's Position

Grievant argues that he is entitled to reinstatement to employment, and "substantial equitable and monetary remedies and reimbursements," pursuant to the court decisions in this case. He contends that the only issues before the Arbitrator are how much training he must receive before reinstatement, whether he can be compensated for legal fees, and whether he is entitled to an award of punitive damages. The Grievant argues that these remedies are warranted even if the Arbitrator determines that he was terminated for just cause under the CBA.

On the just cause issue, Grievant vehemently takes issue with the Employer's contention that his discharge was warranted because he was "potentially dangerous" and that his "continued employment posed a risk to the health and safety of the Hospital's patients." Specifically, Grievant contends that Mr. Diamond's testimony that Grievant's termination was called for "because he would have killed somebody" is wholly unsupported by any evidence. Grievant notes that Mr. Diamond failed to document his alleged concern over patient safety

and submits that no Cath Lab physician ever expressed concern over his job performance.

Grievant similarly argues that he was never insubordinate. He contends that Ms. Cusson never directed or ordered him not to confront Ms. Lovey over his belief that she "had more integrity than that." Instead, Grievant maintains that, at most, Ms. Cusson merely "requested" that he not confront Ms. Lovey about her preceptor notes. Grievant points out that Ms. Cusson's documentation of the October 13, 2010 meeting makes no reference to any order, directive, or request. Grievant further argues that, even assuming that he committed insubordination, the CBA does not provide for termination for such an offense.

Grievant contends that he was denied "industrial due process" since he was not provided with a hearing or other opportunity to he heard prior to the Hospital's decision to terminate his employment. He maintains that such a pre-termination hearing is essential, while alleged incidents are still fresh and claims and defenses can be more easily corroborated or refuted. Grievant argues that the Hospital's denial of industrial due process mandates that he be reinstated to employment with compensation, even if the Arbitrator concludes that the Hospital had just cause to terminate his employment.

The Grievant also argues that the Hospital did not provide him with specific reasons for his termination in October 2010, and therefore it should be foreclosed from providing *post hoc* reasons in this arbitration proceeding.

As to his defamation claim, Grievant argues that the Hospital published knowingly false statements about his professional abilities, which precluded any

opportunity for him to resume work as a cardiac Cath Lab nurse. Specifically, Grievant points to Ms. Clark's statements that Grievant "had no basic skills or critical care experience" and that Grievant "admitted to [her] his only experience in the cath lab was taking vital signs." Grievant contends that these statements were published to third parties, specifically, "the Union and Hospital management," and constituted defamation *per se* under New Jersey law.

Grievant argues that the Hospital refused to provide him with a written statement confirming his dates of employment, causing him more damages in terms of his job search and his ability to take a nursing certification exam. Grievant also claims that the Hospital improperly denied his post-termination employment applications for other nursing positions at the Hospital.

Grievant next contends that the Hospital is liable for tortious interference of prospective economic advantage, since its management representatives allegedly repeated the afore-mentioned defamatory statements without verifying the factual basis. Grievant relies upon Patel v. Irvington General Hospital, 369 N.J.Super. 192, 251 (App. Div.), cert. denied, 182 N.J. 141 (2004) to support this claim.

In sum, the Grievant submits that his grievance should be sustained and that the Arbitrator should fashion an appropriate remedy to reinstate him and compensate him for all losses to date, along with an award of punitive damages, attorney's fees and costs.

The Employer's Position

The Hospital first argues that it had just cause to terminate Grievant's employment due to his "insubordinate, hostile, and threatening behavior directed

at his preceptor, Jen Lovey." It points to Grievant's alleged admission that he ignored Ms. Cusson's request to refrain from confronting Ms. Lovey at the workplace. The Hospital further notes that Grievant confronted Ms. Lovey just moments after having been cautioned not to do so by Ms. Cusson. It also cites Ms. Lovey's testimony that Grievant made his statement ("I thought you had more integrity than that") in a "very venomous nasty kind of way" and that she found Grievant's actions to be disturbing and frightening. The Hospital notes that the incident was witnessed by Ms. Cusson, and that Grievant himself created a confirming contemporaneous record of the incident.

The Hospital argues that Grievant's conduct "fits squarely within the definition of insubordination." It contends that Grievant's apparent failure to comprehend the inappropriate nature of his conduct does not undermine the fact that Ms. Cusson and Mr. Diamond considered it to be insubordination and a Level II infraction, and thereafter properly recommended his termination on that basis.

The Hospital also maintains that it had just cause to terminate Grievant due to his poor performance, as witnessed by both preceptors. However, it concedes that Grievant had two more weeks remaining in his probationary period, and that his termination was the direct result of his behavior towards Ms. Lovey.

The Hospital rejects Grievant's reference to the disciplinary history of other employees to support his disparate treatment claim. It contends that since Grievant failed to cite a case with facts similar to his own, there is no true "comparator" and thus his argument falls.

Regarding Grievant's defamation claim, the Hospital first argues that Grievant failed to identify any allegedly defamatory statement to any prospective employer or governmental agency. Instead, it notes that he merely points to two statements made by Ms. Clark in her internal evaluation of Grievant's job performance. The Hospital contends that Grievant failed to prove that the statements made by Ms. Clark were false statements of fact. Instead, the Hospital argues that Ms. Clark's statements were matters of her own personal opinion as to his workplace performance and conduct. The Hospital further maintains that Ms. Clark's statements were privileged since they were published in good faith and pursuant to law, and involved important matters of public interest and concern related to health care. Further, the Hospital contends that the statements were not published outside of the workplace but rather only internally for purposes of evaluating Grievant's performance, and without evidence of any malice or abuse of privilege. Lastly, the Hospital argues that Grievant failed to prove any compensable injury from the alleged defamation.

The Hospital portrays Grievant as an angry man with a dubious "relationship with the truth." It questions his affection to nursing, noting his two whistleblower lawsuits against other hospitals, his voluntary resignation from two nursing jobs subsequent to his termination, and his failure to include on his Jersey Shore employment application his termination from employment as a probationary Cath Lab nurse with White Plains Hospital.

In sum, the Hospital submits that it had just cause to discharge the Grievant's employment and that he has failed to establish any of his other claims. Therefore, it requests that his grievance be denied in its entirety.

DISCUSSION

(A) Just Cause Under the CBA

The "just cause" issue presented is disciplinary in nature and therefore the Employer bears the burden of proof in this arbitration proceeding. The Employer has advanced two grounds (poor job performance and insubordination) to support its contention that it had just cause to discharge the Grievant. I shall examine each ground in turn below.

I first find as unfounded Grievant's claim that the Hospital should be foreclosed from advancing in arbitration any reasons for his termination, since it allegedly did not do so at the time of his termination. The record is clear that the Hospital had very specific reasons to support its decision to terminate Grievant, and that it informed him of those reasons. Thus, Ms. Cusson credibly testified that she and Mr. Diamond verbally informed Grievant on October 18, 2010 that he was being terminated for insubordination and poor performance during his orientation period. Furthermore, the Hospital's documentation related to Grievant's termination refers to what the Hospital viewed as insubordination and poor job performance by him during his "introductory" period of employment.

Secondly, I find without basis Grievant's argument that he was denied "industrial due process" in the form of a pre-termination hearing or other opportunity to be heard. The cases cited by Grievant in his post-hearing brief

primarily consist of situations where an employer has wholly failed to learn of the employee's side of the story prior to making a decision on termination. In contrast, in the present case there was no factual dispute as to the pivotal event involving Grievant's confrontation of Ms. Lovey immediately after his October 13, 2010 meeting with Ms. Cusson, since Grievant confirmed in writing his words and actions by way of his October 14, 2010 email to Ms. Cusson. He also placed his position into writing via his attorney demand letters that he wrote to Ms. Lovey, Ms. Cusson, and Mr. Diamond, close in time to the date of his termination.

Contrary to Grievant's suggestion, nothing in the CBA precludes the Hospital from terminating an employee prior to an arbitration hearing. In fact, "just cause" arbitration proceedings routinely occur *after* an employee has been terminated. In sum, I conclude that Grievant was not deprived of pre-termination industrial due process.[5]

(i) ***Grievant's Job Performance***

The Hospital cites Grievant's job performance as a reason for its termination of his employment. To be sure, the documentation created by his two preceptors, Ms. Clark and Ms. Lovey, confirms that neither nurse believed that Grievant was adequately performing his job, and that his nursing skills were not at a satisfactory level. That documentation was amplified by the wholly credible testimony of both nurses at the arbitration hearing. Therefore, I believe that it is

[5] Grievant's industrial due process argument is distinct from his claim that the Hospital breached the CBA by failing to allow him to use the grievance procedure after his termination. That claim will be discussed below.

more likely than not that Grievant would have been terminated for performance reasons at the end of his preceptorship.

However, it is also possible that the Hospital would have viewed more favorably Grievant's job performance in his final weeks of the preceptor program, and that Grievant thereby would have continued in his employment at the Hospital. On this point, it is undisputed that the Hospital had committed to allowing Grievant to complete his preceptorship, prior to events of October 13, 2010. The Hospital has admitted as much in these proceedings. Therefore, since the Hospital otherwise would have allowed Grievant to complete the preceptor program before making a final assessment of his competency, I conclude that it did not have just cause to terminate him for performance reasons on October 18, 2010.[6]

(ii) ***Insubordination***

The Hospital next cites Grievant's behavior and conduct on October 13, 2010, which it terms "insubordination," as a reason for his termination. The Hospital readily concedes that Grievant's termination was the direct result of his behavior towards Ms. Lovey that day. The basic facts on this point are undisputed, with one important exception discussed below.

The parties agree that Ms. Cusson met with Grievant that day to discuss his progress under the supervision of Ms. Lovey. During the meeting, Ms. Cusson allowed Grievant to review Ms. Lovey's preceptor notes regarding his

[6] I find no basis to Mr. Diamond's statement, made in the heat of cross-examination, that Grievant's continued employment may have posed a danger to patients. There is no record of any such concern on the part of the Hospital, and no other witness mentioned it in such terms during the arbitration proceedings.

performance. Ms. Cusson told Grievant that he would need to significantly improve his performance over the next two weeks, or he would be let go. Grievant became defensive over Ms. Lovey's critiques and comments, as documented in her preceptor notes. Grievant stated to Ms. Cusson that he "thought [Ms. Lovey] had more integrity than that," to which Ms. Cusson told him it was not a personal attack and asked him not to leave the meeting with the same negative attitude.

The parties differ on one important fact. Ms. Cusson testified that she also requested that Grievant not leave the meeting and confront Ms. Lovey over the comments in her preceptor notes regarding his job performance. In contrast, Grievant denies that Ms. Cusson made any such request.

Upon weighing the evidence, I credit Ms. Cusson's testimony on this point. While it is true that her notes from the October 13, 2010 meeting do not include a reference to a request that Grievant not confront Ms. Lovey, I am convinced that she did indeed make that request. Aside from Ms. Cusson's testimony on the point, there are references to the incident in the Hospital's documentation, including Mr. Diamond's October 18, 2010 email to Richard Hader, Senior Vice President ("he was specifically asked not to confront her as he did with the previous preceptor") and Ms. Luciani's December 21, 2010 letter to Grievant ("This comment was made in front of a patient and co-workers. In addition, it was said immediately after you were instructed to not pursue the matter").

Even assuming that Ms. Cusson made a "request" that Grievant not confront Ms. Lovey, Grievant nevertheless argues that disregard of a mere request cannot rise to the level of insubordination.

On this point, I note that in the classic labor law context, "insubordination" typically involves the intentional refusal of an employee to obey a direct order by a supervisor. A supervisor is not required to use "magic words," such as "I hereby direct you," or "I order you," so long as the employee is placed on clear notice of the specifics of the supervisor's directive.

Article 12 ("Discipline and Discharge") of the CBA makes specific reference to the Hospital Handbook's "Level II" infractions that can lead to immediate termination. The Handbook does not list "insubordination" as a Level II infraction, but it does set forth the following closely related infraction, which uses broader and more liberal language than the classic definition of "insubordination:" "Direct or tacit refusal to comply with a supervisor's instructions or perform a job assignment."

Using that definition, I find that Grievant's conduct on October 13, 2010, whether or not termed "insubordination," rose to the level of a Level II infraction providing the Hospital with just cause to terminate his employment. Even assuming that Ms. Cusson did not "order or direct" Grievant not to confront Ms. Lovey, the evidence convinces me that she clearly "instructed" him not to do so. Notwithstanding such instruction, Grievant immediately proceeded to confront Ms. Lovey and state that he thought she "had more integrity than that," in the very presence of the supervisor who instructed him not to do so.

I further find that Grievant's conduct constituted a Level II infraction under the category: "Threatening, intimidating or coercing of another team member, patient or Meridian Health visitor including verbal or physical altercations or related disorderly conduct." Ms. Lovey credibly testified that she was disturbed and frightened by Grievant's tone, inflections and mannerisms, involving his "integrity" statement, which she testified was made in a "very venomous nasty kind of way." While Grievant may not have understood how his confrontation caused Ms. Lovey to feel, it was clear from her testimony that she reasonably found his actions to be intimidating and unnerving.

Lastly, I find that Grievant's conduct constituted a Level II infraction under the category: "Any conduct which is seriously detrimental to patient care or Meridian Health operations." On this point, it was wholly inexcusable for Grievant to confront his supervising preceptor in the open presence of a patient and co-workers. Such impulsive conduct showed extremely poor judgment on the part of Grievant, which the Hospital was clearly within its right to consider. To the extent that Grievant wished to discuss his job performance and preceptorship with Ms. Lovey, this should have been done calmly and privately, outside of the presence of patients and co-workers.

In sum, I conclude that the Hospital did not have just cause to terminate Grievant for job performance, but had just cause to terminate him for committing Level II infractions on October 13, 2010.[7]

[7] I have considered but do not find compelling Grievant's disparate treatment argument. On this point, I agree with the Hospital that none of the employees cited by Grievant were "true comparators" to him. It

(B) Defamation

Grievant bears the burden of proof in his common-law claim alleging defamation. Under New Jersey law, a claim for defamation consists of three elements: (1) the assertion of a false and defamatory statement concerning another; (2) the unprivileged publication of that statement to a third party; and (3) fault amounting at least to negligence by the publisher. *Judge Sheridan's January 9, 2017 Memorandum and Order*, page 9, and cases cited therein.

It was not easy to determine from Grievant's testimony exactly what statements he considered to be defamatory. It is undisputed, however, that any and all such statements are contained in the preceptor notes of Ms. Clark and Ms. Lovey. Grievant specifically references Ms. Clark's preceptor note stating that he had "no critical care nursing skills" and another note recounting Grievant's statement that "his only experience in the cath lab was charting vital signs" at a previous hospital.

I do not find these statements to be false statements of fact. Rather, the first statement was Ms. Clark's opinion, as an evaluating preceptor, of Grievant's competency and performance in the Cath Lab, based on her first-hand observations of his "skills." Similarly, her second statement was not a false statement regarding Grievant's employment history or experience, but rather her recollection of what Grievant had told her about his prior experience at another hospital. At no point did Ms. Clark [or Ms. Lovey] state in preceptor notes that Grievant had falsified his employment record, or that he had never before worked

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also was not possible to properly analyze cases involving other Hospital employees without full knowledge of the facts of those cases.

as a nurse. Rather, it is abundantly clear that all statements contained in the preceptor notes reflected the opinions of Ms. Clark and Ms. Lovey as to Grievant's ability to perform the job. The entire purpose of the preceptor program is for a supervising nurse to evaluate and comment upon the skills and abilities of a nurse serving in an "introductory" period of employment.

For similar reasons, I find that the statements made in the preceptor notes of Ms. Clark and Ms. Lovey were protected by a qualified privilege. Specifically, the statements met the standards set forth in Bainhauer v. Manoukian, 215 N.J.Super. 9, 40-41 (App. Div. 1987)(privilege determined by (1) "the appropriateness of the occasion on which the defamatory information is published, [2] the legitimacy of the interests thereby sought to be protected or promoted, and [3] the pertinence of the receipt of that information by the recipient"). Here, it was entirely appropriate (and required) for Ms. Clark and Ms. Lovey to provide their preceptor notes to Ms. Cusson and others at the Hospital, in the normal course of business. Further, the legitimacy of the interests protected was high, namely, to ensure competency of a new nurse in the Cath Lab. For similar reasons, it was pertinent that such information be received by those who were to decide whether to continue the employment of a new nurse beyond the introductory period. Grievant failed to demonstrate any "actual malice" on the part of either preceptor towards him, with respect to comments made in their preceptor notes, such as to constitute abuse of the qualified privilege.

Grievant further failed to prove that the alleged defamatory statements about him were published to third parties. There is no evidence in the record that

any statement from the preceptor notes was ever provided to a prospective employer, or any similar third party.

I find without basis Grievant's contention that disclosure of the preceptor notes internally to other Hospital personnel constituted publication to a "third party." All persons at the Hospital who reviewed the preceptor notes had a "need to know," either in a supervisory health care capacity, or from a human resources perspective. Assuming that Grievant's Union Representative was provided with a copy of the preceptor notes, this too did not constitute requisite publication to a third party. The Union was clearly serving as Grievant's representative in connection with his employment, and the Hospital was thus required to share relevant information to the Union since he was a bargaining unit employee facing discipline or termination.[8]

Lastly, Grievant's defamation claim is without merit since he failed to establish any damages. On this point, Grievant failed to specify any injury or harm that he suffered in terms of a lost job opportunity with a prospective employer, or any similar type of harm.

I find non-actionable Grievant's related argument that the Hospital's refusal to sign-off on a written statement of the dates of his employment, drafted by him, caused him damages. In general, there is no requirement that an employer provide a former employee with such a document, particularly where the document has been drafted by the former employee. There is no evidence that the Hospital ever

[8] I am aware of the State Court ruling that the Union could be a "third party" for publication purposes. However, that ruling was made on a motion to dismiss Grievant's defamation claim on the face of the pleadings, with no factual context. Here, the facts demonstrate that any receipt by the Union of preceptor notes was in the Union's role as Grievant's collective bargaining representative.

refused to directly provide any prospective employer (or any nursing certification exam administrator) with confirmation of Grievant's dates of employment. In fact, the record before me contains no evidence that any prospective employer or exam administrator ever contacted the Hospital to confirm Grievant's dates of employment. Therefore, Grievant has failed to establish any fault or harm on this point.[9]

In light of the foregoing, I conclude that Grievant has failed to establish a claim for defamation.

(C) Tortious Interference With Prospective Economic Advantage

Grievant bears the burden of proof in his common-law claim alleging tortious interference with prospective economic advantage. Under New Jersey law, a tortious interference claims consists of the following elements: (1) a protected interest – either a prospective economic or contractual relationship; (2) malice, i.e., intentional interference without justification; (3) a reasonable likelihood that the interference caused the loss of the (prospective economic or contractual) gain; and (4) resulting damages. *Judge Sheridan's January 9, 2017 Memorandum and Order*, pages 9-10, and cases cited therein.

Grievant relies upon the Patel v. Irvington General Hospital case, as previously cited, and his theory that the Hospital's management representatives repeated defamatory statements about him without verifying the factual basis. Since I have concluded that Grievant's defamation claim is without merit, his

[9] Similarly without merit is Grievant's contention that the Hospital improperly bypassed him for other employment opportunities that became available after his termination. The Hospital was under no obligation to re-hire a nurse who it had previously terminated for the conduct demonstrated by Grievant on October 13, 2010.

tortious interference claim must fail too. Furthermore, Grievant failed to establish any prospective economic or contractual relationship that was interfered with by anyone at the Hospital, and thus did not meet the required elements of proving a tortious interference claim.

(D) Breach of Contract

The Third Circuit and Judge Wolfson each found that Grievant established a Section 301 hybrid claim based on the Hospital's failure to provide him with the protections of the grievance procedure under the CBA. Those rulings are binding upon this Arbitrator and I therefore conclude that Grievant has prevailed on his breach of contract claim.

(E) Remedy

If this were the typical "just cause" labor arbitration case, there would be no need to discuss the issue of remedy. Since the Employer established just cause to terminate the Grievant, he would be entitled to no remedy. However, this is not the typical labor arbitration case, and it comes to this Arbitrator after years of litigation and with federal court rulings that the Employer violated the CBA by failing to allow Grievant to pursue the grievance procedure after his termination. Therefore, I must consider whether Grievant is entitled to any remedy for that violation, and if so, what type of remedy.

The Hospital urges that the Grievant has received all protections due under the CBA since he was provided with an arbitration hearing. The Hospital further argues that Grievant's breach of contract claim has become moot since there is "no reasonable expectation that the alleged events will recur, and because interim

relief or events have completely eradicated the effects of the violation." This may be so, but it overlooks the fact that the Grievant was required to litigate the issue for approximately eight years prior to these arbitration proceedings.

Given the circumstances, it would be manifestly unjust not to award a remedy in this case. In terms of a remedy, I find that Grievant should receive back pay for the time period from his termination on October 18, 2010, until the earlier of either: (1) the date on which Grievant was permitted to file a demand for arbitration, or (2) the date on which Grievant mitigated his damages by finding substantially comparable employment.

The evidence shows that Grievant obtained substantially comparable employment with Desert Regional Medical Center on December 5, 2011. Therefore, I will award back pay to Grievant for the time period October 18, 2010 through December 5, 2011. Grievant testified that he was earning an annual salary of $68,000 with the Hospital at the time of his termination. Using that sum as a guideline, he is entitled to $79,333 for the approximate 14-month period of back pay. To that sum, he is entitled to pre-Award interest in the amount of $2,005, for the total sum of $81,338 in back pay and interest.[10]

I will deny Grievant's request for any additional damages and compensation. As noted above, I have concluded that the Hospital had just cause to terminate his employment, and he failed to prevail on his defamation and tortious interference claims.

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[10] Back pay shall be calculated using salary alone, without consideration of the value of benefits, overtime, or any other sums. Interest was calculated for the time period 2011-2017, using pre-judgment rates posted by the New Jersey Judiciary.

I will also deny Grievant's request for an award of attorney's fees, as such fees are not typically awarded for breach of contract claims, and the CBA does not provide for an award of attorney's fees.

Lastly, in light of the lengthy period of delay before Grievant was permitted to use the grievance process, I will direct that the Hospital bear full responsibility for payment of the Arbitrator's costs and fees.

In light of the foregoing, I hereby make the following Award.

AMERICAN ARBITRATION ASSOCIATION

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In the Matter of Arbitration between:

HEALTH PROFESSIONALS & ALLIED EMPLOYEES, LOCAL 5058, AFT/AFL-CIO,

Union,

-and-

JERSEY SHORE UNIVERSITY, MEDICAL CENTER,

Employer.

Case No. 01-17-0002-0560
(Grievance: Discharge - Stephen Simoni)

AWARD

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The grievance is hereby granted in part, and denied in part, as follows:

1. The Employer did not have just cause to terminate Grievant for job performance;

2. The Employer had just cause to terminate Grievant for committing Level II violations under the Team Member Handbook;

3. Grievant failed to establish a claim for defamation;

4. Grievant failed to establish a claim for tortious interference with prospective economic advantage;

5. Grievant established a claim for breach of contract;

6. As a remedy for the breach of contract claim, the Employer shall pay to Grievant mitigated back pay in the sum of $79,333.00, plus interest in the sum of $2,005.00, for a total of $81,338.00;

7. Grievant's request for an award of punitive damages, attorney's fees and costs, and any other compensation, is denied; and

8. The Employer shall be responsible for payment of the Arbitrator's costs and fees.

I shall retain jurisdiction over any issues or disputes related to remedy.

Dated: August 31, 2018

James M. Cooney, Esq.
Arbitrator

State of New Jersey)
:SS
County of Middlesex)

On this 31st day of August, 2018, before me personally came and appeared James M. Cooney, Esq., to me known to be the person described herein who executed the foregoing instrument and who acknowledged to me that he executed the same.

Notary Public of New Jersey

CHERYL A. MILLER
Notary Public
State of New Jersey
My Commission Expires Oct. 1, 2018
I.D.# 2439108

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-2097

STEPHEN J. SIMONI,
Appellant

v.

EDWARD DIAMOND, Individually and as Manager Cardiac Services of JSUMC; KATHRYN J. LUCIANI, SPHR, Individually and as Human Resources Site Manager of JSUMC; MERIDIAN HEALTH SYSTEMS, INC.; MERIDIAN HEALTH, INC.; MERIDIAN HOSPITALS CORP.; MERIDIAN HEALTH; DONNA M. CUSSON, Individually and as Assistant Nurse Manager Invasive Care Cardiology of JSUMC; JERSEY SHORE UNIVERSITY MEDICAL CENTER ('JSUMC'); ERICKA D. CLARK DISTANISLAO, Individually and as Staff Nurse and Preceptor Invasive Cardiology of JSUMC; JENNIFER S. LOVEY, Individually and as Staff Nurse and Preceptor Invasive Cardiology of JSUMC; HEALTH PROFESSIONALS AND ALLIED EMPLOYEES, AFT/AFL-CIO ('HPAE'); HPAE LOCAL 5058

(D.N.J. No. 3:10-cv-06798)

No. 20-1024

STEPHEN J. SIMONI,
Member of HEALTH PROFESSIONALS
AND ALLIED EMPLOYEES, LOCAL 0558, AFT/AFL-CIO,
Appellant

v.

JERSEY SHORE UNIVERSITY MEDICAL CENTER;
HACKENSACK MERIDIAN HEALTH

(D.N.J. No. 3:18-cv-17714)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, and McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, and PHIPPS, Circuit Judges

The petition for rehearing filed by Appellant in the above-captioned case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc is **DENIED**.

By the Court,

s/Stephanos Bibas
Circuit Judge

Dated: December 8, 2020
PDB/cc: All Counsel of Record