UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0308

September Term, 2014

DENNIS TALBOT

v.

BALTIMORE CITY BOARD OF SCHOOL COMMISSIONERS, *et al*.

Berger,
Nazarian,
Leahy,

JJ.

Opinion by Leahy, J.

Filed: May 3, 2016

Appellant Dennis Talbot was hired as a school bus driver by Barber Transportation in August 2011. Through Barber Transportation's contract with the Baltimore City Public Schools ("BCPS"), Mr. Talbot transported special needs students in the BCPS system to and from school. On June 1, 2012, Mr. Talbot received a parking ticket on his personal vehicle which he had parked in one of the bus parking spaces while he was at work. Mr. Talbot subsequently wrote a letter, which included racial epithets and very specific threats to mutilate the meter maid, and mailed the letter along with his parking ticket to the Baltimore City Parking Fines Section.

On June 22, 2012, Mr. Talbot was notified by his employer that Steven James of the Transportation Department for the BCPS had sent Barber Transportation a letter informing them that Mr. Talbot was disqualified from driving school buses for BCPS because of the letter he wrote. Mr. Talbot claimed not to have any knowledge of the letter, explaining that at the time he wrote it, he was under the influence of prescribed Dilaudid and Ambien for his sciatic nerve pain and sleeping difficulties.

Immediately after receiving notice of his disqualification, Mr. Talbot attempted to contact Mr. James to request a reconsideration. Mr. James refused to reconsider Mr. Talbot's disqualification and told him he could file an appeal. Mr. Talbot sent two letters requesting an appeal: the first to the Director of Pupil Transportation for BCPS and the second to the Executive Director of Operations for BCPS.

Receiving no response to his letters, Mr. Talbot, *pro se*, filed a complaint against the Baltimore City Board of School Commissioners ("Appellee" or the "City Board") in

the Circuit Court for Baltimore City,[1] asserting claims for wrongful discharge, wrongful disqualification, and retaliation. In his complaint, Mr. Talbot alleged that he was permanently disqualified from driving school buses in Maryland, that the endorsements on his commercial driver's license ("CDL") had been revoked, and that he had not been able to appeal his disqualification.

After a hearing on January 8, 2014, the circuit court dismissed Mr. Talbot's wrongful discharge claim, finding that he was not an employee of the City Board, and dismissed Mr. Talbot's wrongful disqualification and retaliation claims for failure to exhaust his administrative remedies.

On April 25, 2014, after the circuit court denied his motion to alter or amend the judgment, Mr. Talbot, still *pro se*, filed an appeal to this Court. Mr. Talbot presented four issues for this Court's review.

Mr. Talbot presented the following questions to this Court:

1. Did the lower court err by not stating that the Appellee's actions were unconstitutional under COMAR regulations, citing Appellee's testimony at the Motions to Dismiss Hearing, .05 Standard of Review?

2. Did the lower court err by not requesting that the Appellee produce the documentation that would state that the Appellant did not file his appeal in the required time under COMAR.03 Response to Appeals. C. Motion to Dismiss (E) The appeal has not been filed within the time prescribed by Regulation .02B of this chapter.

[1] As explained in more detail *infra*, Mr. Talbot initially filed the complaint, incorrectly, against BCPS, but later amended the complaint to substitute the City Board as the proper party.

3. Was there a relationship between the lawful off-duty conduct of the Appellant and the performance of the Appellant's job to warrant disqualification under COMAR .07(D)?

4. The lower court erred by stating the Appellant did not follow the administrative process to challenge the action of the Board.

We affirm the circuit court's grant of the City Board's motion to dismiss on the ground that Mr. Talbot's complaint failed to state a claim for which relief could be granted. Because Mr. Talbot is not an employee of the City Board, his claims for wrongful discharge and retaliation both fail. Additionally, even construing Mr. Talbot's *pro se* complaint liberally, Mr. Talbot failed to plead a legally cognizable cause of action based on his disqualification from driving school buses for Baltimore City Public Schools. The circuit court did not abuse its discretion in striking Mr. Talbot's second amended complaint for prejudicing the City Board because the complaint completely abandoned all prior claims, raised entirely new claims based on tortious interference, and was filed after discovery had closed.

BACKGROUND

Dennis Talbot was employed as a part-time school bus driver with Barber Transportation and drove school buses for special needs children for BCPS under its contract with Barber Transportation. Mr. Talbot wrote the letter at issue to the City of Baltimore Department of Transportation on June 1, 2012 after receiving a parking ticket. In the letter Mr. Talbot detailed his displeasure with the police and residents of Baltimore City, using racial epithets and distasteful analogies to describe the measure of his hatred for Baltimore City. He concluded the letter by stating, "[j]ust make sure that piece of shit

cockroach Meter Maid shows up in court. Because the way I feel right now I will chop her fucking hands off so that worthless Bitch will never write anything again."

Mr. Talbot testified later in his deposition[2] that he received a call from his supervisor, Pat Barber, on June 22, 2012, informing him that Steven James, Safety and Training Manager for BCPS, had sent Barber Transportation a letter addressed to Mr. Talbot. The letter, addressed to Mr. Talbot, advised that, based on the contents of the letter that Mr. Talbot sent in response to getting a parking ticket, "effective immediately [he was] disqualified as a school bus driver or attendant."

Mr. Talbot testified that, until Ms. Barber called him, he was completely unaware that he sent the letter to the Parking Fines Section, stating specifically that he "did not know nothing about that letter." He determined that he must have written the letter after he had taken a high dose of Dilaudid, prescribed to him for sciatic nerve pain, which he claimed, "has those kind of hallucinating side effects. It's like, what, LSD, something . . . . " Mr. Talbot immediately called Mr. James and tried to explain to Mr. James the circumstances surrounding the letter.

On the following Monday, June 25, 2012, Mr. Talbot went down to the district office of BCPS, in an attempt to meet Mr. James in person to explain his story. However, according to Mr. Talbot, Mr. James "did not want to have nothing to do with [him]." At

[2] Mr. Talbot's deposition was taken on August 16, 2013, by the City Board.

that time, Mr. Talbot said he inquired as to whether he had to file an appeal and Mr. James told him "yes," after which Mr. Talbot started his appeal process.

Mr. Talbot sent letters of apology to the Parking Authority and to Mr. James. Both letters were received on June 27, 2012. In his letter to the Parking Authority, Mr. Talbot expressed his remorse for the "offensive, disrespectful and disgraceful letter," and extended an apology specifically to the employee who issued him the ticket. In the letter to Mr. James, Mr. Talbot apologized and explained that his behavior was out of character.

Administrative Remedies

A week after speaking to Mr. James, Mr. Talbot first attempted to appeal his disqualification by sending a letter, via certified mail, to Mike Dodson, Director of Pupil Transportation for the Baltimore City Board of School Commissioners. Mr. Talbot received no response to this letter. Mr. Talbot stated in his deposition that this appeal was handwritten; therefore, there was no copy. However, the record contains a signed return receipt addressed to Mike Dodson, received by Francis Aning, an employee in the BCPS Office of Pupil Transporation, on June 27, 2012. When Mr. Talbot did not receive a response from Mr. Dodson, he went down to the BCPS Department of Human Resources, where he was informed that, because he was not a city employee, he would have to file an appeal with the Maryland State Department of Education. He sent another letter requesting an appeal to the Superintendent's Office for the State Department of Education, which was

received on July 13, 2012.[3] But then, on July 24, 2012, Mr. Leon Langley from the State Department of Education called Mr. Talbot and instructed him that he would have to first file an administrative appeal with BCPS before filing with the State, and told him to direct his filing to John Land, Executive Director of Operations for BCPS.

Mr. Talbot testified that, on July 26, 2012, he faxed a letter requesting an appeal of his disqualification to John Land. He also sent the letter via certified mail, which, according to the signed return receipt, was received on July 31, 2012, by a Mr. John Gibson. Mr. Talbot testified that he did not receive any response at this time, and thereafter, he pursued a remedy through the U.S. Equal Employment Opportunity Commission ("EEOC"), but the EEOC informed him that they did not handle this kind of situation because it was not a discriminatory action.[4]

Original Complaint Filed in the Circuit Court

On October 3, 2012, after his failed pursuit of a remedy with the EEOC, Mr. Talbot, *pro se*, filed a complaint in the Circuit Court for Baltimore City. He brought claims for "Wrongful Discharge, Wrongful Disqualification Deliberate and Unjust Retaliation . . ." against the BCPS Department of Transportation. In his complaint, Mr. Talbot alleged that

[3] Mr. Talbot testified in his deposition that he sent an appeal to the State Board "certified to . . . Lillian Larro", which, he said, prompted Mr. Leon Langley to call him and tell him he had to appeal to the City first. A signed return receipt in the record indicates that Mr. Talbot's letter was delivered on July 13, 2012, to Dr. Lillian Lowery, Superintendent of the Maryland Board of Education.

[4] In his EEOC complaint, Mr. Talbot alleged, inter alia, that "because of the contents of that letter I was disqualified[,] Doc. Attached [,] statewide which is discriminatory this happened off the job."

the actions of Mr. James, Mr. Dodson, and Mr. Land resulted in the removal of the endorsements on his license, which he "earned and paid for," and his "permanent disqualification" from driving school buses in Maryland. Mr. Talbot detailed his fruitless efforts to appeal his disqualification and alleged that he was not allowed to explain himself.

Mr. Talbot also alleged that he experienced retaliation, claiming that

> Mr. James clearly has retaliated against Plaintiff by not allowing me to file an appeal and giving me false information knowing that I have a small window of 30 days to file or the disqualification will be permanent statewide.
>
> * * *
>
> I was told by several HR personnel that Mr. James slandered my name with false unjustified accusations. The evidence I will be presenting will be from Fleming Transportation and Barber Transportation who will state that Mr. James said not to re-hire Plaintiff.[5]
>
> * * *
>
> [Mr. James] retaliated against Plaintiff for complaining about the bus I was driving . . . not having operational air conditioning on a weekly basis after a special needs child . . . had a seizure at school . . . . On Friday, May 25, 2012, we had a driver meeting at Barber Transportation, which Steve James attended. At that meeting several drivers and myself complained about the buses not having working air conditioning. Mr. James' reply was that it is an in-house problem, referring to Barber Transportation. I told Mr. James that [the special needs child] gets heat induced seizures and that I was not going to be held accountable if [the child] has a seizure on my bus and it

[5] Mr. Talbot later admitted during his deposition taken August 16, 2013, that to the best of his knowledge, he was still an employee of Barber Transportation and he had not been disciplined by Barber for this incident. The record does not reflect that Barber Transportation fired Mr. Talbot, but indicates that Mr. Talbot was disqualified from being a school bus driver or attendant for BCPS and that his name was placed on a statewide list of disqualified drivers and monitors. During his deposition Mr. Talbot also explained that following his disqualification from driving for BCPS, he worked for Fleming Transportation for the summer, "on personal driving business . . . it has nothing to do with Baltimore City."

> was irresponsible of him to put [the child's] life in danger for not enforcing the issue with the air conditioning.

Mr. Talbot asked the circuit court to expunge his disqualification and allow him to return to work until the trial date. Mr. Talbot sought back pay, monetary damages, and pain and suffering "for Mr. James deliberately undermining [his] efforts to seek employment at other transportation companies." On November 2, 2012, Mr. Talbot filed an amended complaint, adding only a separate damages section, requesting the injunctive relief of the immediate expungement of his disqualification, back pay of $1,050.00 a month, attorney's fees if required, $145.00 for the filing fee, and $150,000.00 for pain and suffering.[6] Mr. Talbot readily admitted in the complaint that he was never an employee of the BCPS Department of Transportation or the Baltimore City School System.

Mr. Talbot sent his complaint and amended complaint to "Baltimore City Public Schools Pupil Transportation, 200 East North Avenue, Baltimore, Maryland 21218, Attention: to the Superintendent's Office." On January 11, 2013, after not receiving an answer to his complaint, Mr. Talbot requested an order of default, which the circuit court granted on January 22, 2013.

On February 8, 2013, the City Board filed a motion to vacate the order of default, arguing that Mr. Talbot did not properly serve the City Board through its resident agent,

[6] Mr. Talbot alleged in his complaint that during the phone call with Mr. James informing Mr. Talbot of his disqualification, "[Mr. James] threatened [his] health with his unjustified actions causing severe hypotension." Mr. Talbot stated, "Mr. James was fully aware that I was at dialysis, and had no regard that I could have died due to unwarranted stress because of his actions for which he had no justification." (Emphasis supplied in original).

Tammy L. Turner, Esq. The City Board included an affidavit from Mr. Dodson, the Transportation Director, dated February 7, 2013, who stated that he did not have authority to accept service on the City Board's behalf and that he had received only a letter of apology from Mr. Talbot in October 2012. Furthermore, the City Board argued that Mr. Talbot's complaint and amended complaint incorrectly identified the BCPS Department of Transportation as the defendant, and the proper legal entity to be sued was the City Board.

On March 19, 2013, the circuit court vacated the order of default, and Mr. Talbot re-filed his amended complaint, properly served on the City Board on April 8, 2013. The City Board's answer asserted affirmative defenses, including (1) the complaint failed to state claims upon which relief may be granted, and (2) the court lacked subject matter jurisdiction over the claims alleged because Mr. Talbot "failed to exhaust his administrative remedies prior to filing the Complaint."

On October 16, 2013, the City Board filed a motion to dismiss or, in the alternative, a motion for summary judgment. The City Board argued that Mr. Talbot could not assert a claim for wrongful termination against the City Board because Mr. Talbot was not employed by the City Board. With respect to the remaining two claims, the City Board asserted that wrongful disqualification is not a recognized cause of action in Maryland, and the cause of action for retaliation "only protects individuals who are retaliated against because they have opposed unlawful employment practices based on race, color, religion, sex, age, nation[al] origin, marital status, sexual orientation, genetic information, or disability or have made a charge or participated in the investigation of unlawful

employment practices based on these factors," citing Maryland Code (1984, 2013 Repl. Vol.), State Government Article ("SG"), § 20-606.

Mr. Talbot filed a response to the City Board's motion in which he retold many of the facts contained in his original complaint and argued that he was an employee of the City Board because he completed his "'In-Service class'" with the BCPS Department of Transportation. Mr. Talbot reiterated that he was denied his appeal rights through the local school system because his appeal letters were "intentionally ignored." Mr. Talbot asked the circuit court to deny the City Board's motion for summary judgment.[7]

[7] In November 2013, while his complaint was pending, Mr. Talbot additionally filed a Motion [Petition] for Judicial Review, arguing that because his appeal rights were ignored, he was denied due process to exhaust administrative remedies. The City Board responded, arguing that Mr. Talbot lacked standing to pursue judicial review under Maryland Rule 7-202(c) because there was no order or action issued by an administrative agency in this case.

On December 18, 2013, the circuit court denied Mr. Talbot's petition for judicial review because the allegations set forth in Mr. Talbot's complaint did not arise out of an order or action of an administrative agency' as required by Maryland Rule 2-701(a). To obtain judicial review of an agency decision, an individual must file a petition for judicial review in the circuit court. SG § 10-222. However, as the City Board correctly pointed out, a petition must arise from an agency decision, which was not issued in this case. *See* Md. Rules 7-202(c). Furthermore, a petition for judicial review must be filed within 30 days of the latter of "(1) the date of the order or action of which review is sought; (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or (3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner." Md. Rule 7-203(a). Therefore, even if Mr. Talbot's disqualification could be considered a final agency action, he was notified of his disqualification on June 22, 2012, but did not file his petition for judicial review until November 15, 2013, more than 30 days after he received notice. Mr. Talbot did not note an appeal from the court's decision denying his petition for judicial review.

Second Amended Complaint

In late 2013, Mr. Talbot secured a lawyer, who filed both a supplemental response to the City Board's motion to dismiss or for summary judgment and a second amended complaint on December 20, 2013. The supplemental response argued that Mr. Talbot did not receive due process, stating:

> [T]he [City]Board extended [Mr. Talbot's] disqualification throughout those systems coming within the purview of the Maryland State Department of Education, by placing him on its list of those "ineligible to operate a school vehicle or work as a monitor" anywhere in the State. That Draconian action was taken without prior notice or an opportunity to be heard, and with flagrant disregard . . . of causing Mr. Talbot to be unemployable at his chosen work . . . .

Furthermore, Mr. Talbot argued that, where, as here, State action caused the private action of his unemployment, the courts may find constitutional rights, such as free speech, are violated by the private action.

The second amended complaint alleged two completely new claims, one for tortious interference with a contractual relationship, and a second for tortious interference with prospective economic advantage. The complaint did not contain any of the claims Mr. Talbot stated in his original complaint or amended complaint filed at the beginning of his action. The City Board filed a motion to strike Mr. Talbot's second amended complaint, arguing that, because discovery closed in September 2013 and the dispositive motions deadline of October 2013 had passed, it would prejudice the City Board to consider a complaint with completely different claims at this late stage in the proceeding.

On January 8, 2014, the circuit court heard argument on the City Board's motion to dismiss or for summary judgment, and the City Board's motion to strike Mr. Talbot's second amended complaint. The circuit court, in an oral ruling, granted the City Board's motion to dismiss, dismissing Mr. Talbot's amended complaint with prejudice, and striking his second amended complaint. As to Mr. Talbot's first count for wrongful discharge, the court decided:

> The first [count] clearly fails to state a claim, because admitted on the face of the complaint is that Mr. Talbot was an employee of Barber Transportation, and not an employee of the Baltimore City Public Schools or the Baltimore City Board of School Commissioners. And, therefore, that count clearly fails to state a claim upon which relief may be granted.

The court next disposed of Mr. Talbot's second and third claims of wrongful disqualification and retaliation, determining:

> The second and third counts, wrongful disqualification and retaliation, appear to be directed toward challenging the action of the Board in finding that Mr. Talbot was disqualified from serving as a school bus driver, and those counts are barred by his failure to exhaust his administrative remedies with the local board and then with the state board, which would have allowed him the opportunity to contest both the propriety of their action under the COMAR regulations or even the discretion exercised in whether the action was appropriate or should be ameliorated. And instead, Mr. Talbot has sought to bring those arguments directly to the Court in a way that is not permitted.
>
> Therefore, the motion to dismiss the amended complaint will be granted.

The court went on to grant the City Board's motion to strike Mr. Talbot's second amended complaint, stating:

> The attempt at this late date to amend the complaint with a second amended complaint stating two new causes of action is both too late in the game to avoid prejudice to the Defendant, given that this case now has a

> February trial date. But more to the point is that it doesn't solve the problem of the failure of Mr. Talbot to pursue the administrative remedies. That is, he is still, by different theories, attempting to challenge the same administrative remedies. That is, he is still, by different theories, attempting to challenge the same administrative action of the local board in disqualifying him as a school bus driver.
>
> So even more importantly than the late date of that amendment, is the fact that it still has the same defect that affects the amended complaint. Therefore, the attempt to file the second amended complaint will be denied and that second amended complaint is stricken in this case.

On February 7, 2014, Mr. Talbot filed a motion to alter or amend the judgment, which was denied on April 1, 2014. Mr. Talbot, again *pro se*, noted an appeal on April 25, 2014.

DISCUSSION

I.

Motion to Dismiss

When an appellate court reviews the grant of a motion to dismiss, the proper standard is "whether the trial court was legally correct." *Britton v. Meier*, 148 Md. App. 419, 425 (2002) (citing *Fioretti v. Md. State Bd. of Dental Exam'rs*, 351 Md. 66, 71-72 (1998)). "When a motion to dismiss is based upon lack of jurisdiction, the court can consider affidavits or hold an evidentiary hearing on the motion to dismiss without converting the motion into a motion for summary judgment." *Evans v. Council of Prince George's Sitting as District Council*, 185 Md. App. 251, 256 (2009). In reviewing the sufficiency of the pleadings, the appellate court must "determine whether the complaint, on its face, discloses a legally sufficient cause of action." *Fioretti*, 351 Md. at 72 (citing *Bramble v. Thompson*, 264 Md. 518, 520 (1972)). We "presume the truth of all well-pled

facts in the complaint, along with any reasonable inferences derived therefrom." *Id.* (citations omitted).

A. Administrative Remedy

Mr. Talbot challenges the circuit court's grant of the City Board's motion to dismiss for failure to exhaust his administrative remedies. On appeal, Mr. Talbot argues that the City Board ignored his initial administrative appeal and denied him his appeal rights and due process. In response, the City Board asserts that Mr. Talbot did not timely appeal through the local school system, in compliance with COMAR 13A.06.07.21. Therefore, the City Board argues, the circuit court did not have jurisdiction over Mr. Talbot's claims "because they were not properly contested in the administrative process."

The disqualification letter sent to Mr. Talbot and his employer, Barber Transportation, did not cite the regulation nor the provision of that regulation that applied to disqualify Mr. Talbot. However, at the motions hearing, the City Board stated that Mr. Talbot was disqualified pursuant to COMAR 13A.06.07.07.[8]

[8] The letter did state that Mr. Talbot's name, driver's license number, and social security number would be placed on the Maryland State Department of Education's list of disqualified drivers and monitors. This action is required by COMAR 13A.06.07.07 (F), which states:

> F. Disqualified Driver Database.
> (1) The Department's Office of Pupil Transportation shall maintain a confidential computer database of drivers who have been disqualified by a local school system under §§B-E of this regulation or for any other reason.
> (2) The supervisor of transportation shall notify the Department's Office of Pupil Transportation of a driver's disqualification within 30 days of the driver's receipt of notification of the disqualification. (continued…)

Under the applicable regulations, a disqualified school vehicle driver may appeal to the State Board of Education ("State Board") *after* that individual has "exhausted the local school system appeal process . . . ." COMAR 13A.06.07.21. Following an appeal to the State Board, within 30 days, a party may appeal the State Board's decision to "the circuit court of the jurisdiction where the appellant resides." COMAR 13A.01.05.11(A).

The parties have not explained, and our independent research has not revealed, precisely what the "local school system appeal process" was at that time in Baltimore City. Nevertheless, it is clear from the record that Mr. Talbot did not receive a final decision from the City Board prior to bringing this action before the circuit court. Accordingly, we cannot say that the circuit court was incorrect in its determination that Mr. Talbot had failed to exhaust administrative remedies. Notwithstanding that, we note, as did the circuit court, that Mr. Talbot's complaint fails to state a claim for which relief may be granted, and is also properly dismissed on those grounds. *See Fioretti*, 351 Md. at 72 (citation omitted) (stating that an appellate court must "determine whether the complaint, on its face, discloses a legally sufficient cause of action").

> (3) The notification to the Department's Office of Pupil Transportation shall be in the format prescribed by the Department.
> (4) Upon receipt of the current list of active school vehicle drivers, the Department's Office of Pupil Transportation shall match that list with the Department's confidential computer database established under this regulation and immediately notify the supervisor of transportation if an active driver is listed on the Department's computer database.

B. Failure to State a Claim: Wrongful Discharge and Unjust Retaliation

Mr. Talbot does not challenge the circuit court's finding that he could not properly bring a claim for wrongful discharge because he was not an employee of BCPS. In Maryland, the tort action for wrongful termination or discharge is an exception to the established principle that an at-will or contract employee "may be discharged by his employer for any reason, or no reason at all." *Wholey v. Sears Roebuck*, 370 Md. 38, 49 (2002) (citing *Adler v. American Standard Corp.*, 291 Md. 31, 35 (1981) and *Ewing v. Koppers Co. Inc.*, 312 Md. 45, 49 (1988)). To properly establish wrongful discharge, "the *employee* must be *discharged*, the basis for the employee's discharge must violate some clear mandate of public policy, and there must be a nexus between the employee's conduct and the employer's decision to fire the employee." *Id.* at 50-51 (emphasis added).

In *Cogan v. Harford Memorial Hospital*, the United States District Court for the District of Maryland applied Maryland law to hold that a radiologist's claim of wrongful discharge was not properly pleaded where the radiologist was an independent contractor of the hospital, not an employee. 843 F.Supp. 1013, 1022 (D. Md. 1994). The district court acknowledged that there were no cases in Maryland extending the tort of wrongful termination outside of an "employment" relationship. *Id.* Therefore, Mr. Talbot's claim for wrongful termination fails because he was not an employee of BCPS.[9]

[9] And, we note that Mr. Talbot has not demonstrated that he was ever "discharged" from his employment.

Under the same reasoning, Mr. Talbot's claims for unjust retaliation also fails. To establish a cause of action for retaliation, an *employee* must plead that he or she "(1) 'engaged in a statutorily protected expression or activity;' (2) 'suffered an adverse employment action by her *employer*;' and (3) 'there is a causal link between the protected expression and the adverse action.'" *Taylor v. Giant of Maryland, LLC*, 423 Md. 628, 658 (2011) (emphasis added) (quoting *Manikhi v. Mass Transit Administration*, 360 Md. 333, 349 (2000)). Because the circuit court found, and Mr. Talbot himself made clear, that Mr. Talbot was not an employee of the City Board, the retaliation claim was properly dismissed.[10]

C. Failure to State a Claim: "Wrongful Disqualification"

In his amended complaint, Mr. Talbot sought to "fil[e] [a] charge of . . . Wrongful Disqualification . . . against the Baltimore City Public Schools' Department of Transportation and the Baltimore City Public School System." To support his claim for wrongful disqualification, Mr. Talbot's complaint averred:

> [I am] not an employee of Baltimore City Schools Department of Transportation or Baltimore City School System. I am employed by Barber Transportation, a contractor for the BCPS. I am paid by Barber Transportation. Therefore, [the Safety and Training Manager of BCPS] had

[10] Although Mr. Talbot admits in the complaint that he was never employed by the City Board, and does not directly contradict this statement in his brief submitted in this Court, he does claim to be "in the category of employees identified as 'certificated professional' personnel" once he completed his In-Service training, required by COMAR 13A.06.07.06B. However, a "certified professional" is defined as professional personnel certificated by the state superintendent in accordance with the Professional Standards and Teacher Education Board. Educ. § 2-303 (g)(1). Mr. Talbot is not a professional personnel certified by the state superintendent, and, therefore, he is not covered by statutes or regulations applying only to "certificated personnel."

> no right or justification to disqualify [me] without referring me to Barber for progressive disciplinary action, which could have been a verbal warning. But, since this unintentional incident happened off the job in my private life over a parking ticket, regardless of the contents of that letter, it had nothing at all to do with BCPS school bus personnel procedure for which I did not violate. Mr, James. Mr, Dodson and Mr. Land all chose not to respond to my letters of appeal . . . because they know that it was unjustifed [sic] by me not being employed by BCPS. By their actions, I cannot drive school buses in Maryland. They have no right or jurisdiction beyond Baltimore City School Transportation to disqualify me to drive anywhere in the State of Maryland. Their actions have also taken away my school bus endorsement on my license, which I earned and paid for.
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> * * *
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> I reported in my appeal that I was prescribed a controlled substance for the treatment of severe back and left lower leg pain (Sciatica) and a herniated disk. With that being stated, the Baltimore City Public Schools Department of Transportation permanent disqualification should not apply due to mitigating circumstances. Section (viii) states that a driver cannot drive a bus while under the influence of a controlled substance. That is why I could only take it on Friday evenings and Saturdays.

(Emphasis in original).

As we concluded above, it is clear from the record that Mr. Talbot did not receive a final decision from the City Board or the State Board prior to bringing this claim before the circuit court and, therefore, failed to exhaust administrative remedies. Thus, the circuit court was correct in dismissing the claim. Nevertheless, we note that, even construing Mr. Talbot's *pro se* complaint liberally,[11] Mr. Talbot has failed to plead a legally cognizable cause of action based on his "disqualification" from driving school buses for Baltimore

[11] *See Erickson v. Pardus,* 551 U.S. 89, 94 (2007) ("A document filed *pro se* is to be liberally construed, and a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." (internal quotations marks and citations omitted)).

City. The BCPS Department of Transportation is charged with the safe transportation of pupils. *See* Baltimore City Charter, Art. VII, § 61(h). To contend that the BCPS, after learning of a potentially violent and concerning incident involving a driver transporting those pupils, must allow a driver to continue transporting pupils while BCPS waits for the contract employer to undertake disciplinary proceedings is plainly incompatible with the duties entrusted to BCPS. Mr. Talbot does not and cannot point to any law, regulation or policy that objects to his disqualification from driving the City's school children following the letter *that he does not deny he wrote* threatening to seriously harm another BCPS employee.

D. Failure to State a Claim: First Amendment Violation

On appeal, Mr. Talbot argues that the motion to dismiss was improperly granted where he pleaded a cause of action against the City Board for violating his right to free speech guaranteed by the First Amendment of the Constitution of the United States. Mr. Talbot's argument that his disqualification violated his First Amendment rights does not explicitly appear in his amended complaint. The argument was apparently first raised in Mr. Talbot's "Supplemental Memorandum in Opposition to Defendant's Motion to Dismiss/Motion for Summary Judgment."[12] In the supplemental motion and the hearing before the circuit court, Mr. Talbot argued that his complaint did state a claim upon which

[12] The constitutional argument was also raised in Mr. Talbot's Second Amended Complaint, also filed on December 20, 2013. However, as noted *supra*, the circuit court properly struck this second amended complaint after the hearing on January 8, 2014.

relief could be granted for violation of his First Amendment rights. Mr. Talbot asserted that he was disqualified solely because of the contents of the letter he sent to the Parking Fines Section. Mr. Talbot argued that disqualifying him for the contents of the letter, which led to him losing his employment with Barber, violated his right to free speech. Even though BCPS was not Mr. Talbot's employer, Mr. Talbot argued that losing his employment based on violation of his right to free speech was fairly attributable to the State, bringing the action under the state action doctrine.

The City Board responded to these arguments at the hearing, arguing that in order for an employee's speech to be protected, it must address a matter of public concern. The City Board argued that Mr. Talbot's statements and threats to the meter maid were not protected by the First Amendment.

In *Newell v. Runnels*, the Court of Appeals stated that "[a]lthough the government stands in a different position when dealing with its employees than it does when dealing with other citizens, a government employer, generally, may not fire or demote an employee based on the employee's exercise of her or his First Amendment freedoms. 407 Md. 578, 608-09 (2009) (citations omitted). Nevertheless, the Court recognized that the test for determining whether an aggrieved employee was discharged allegedly for engaging in speech or expressive conduct, derives from the Supreme Court's decision in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). *Id.* at 610. The Court of Appeals noted that in *Pickering* "[t]he Court held that government employees retain their right to speak as a citizens on 'matters of public concern.'" *Id.* (citation omitted). Additionally, this Court has made clear

that "the terminated employee bears the burden to prove that he engaged in speech or overt activity protected by the First Amendment." *Maryland Dep't of Transp. v. Maddalone*, 187 Md. App. 549, 575 (2009).

In the present matter, Mr. Talbot's amended complaint fails to aver that his speech—threatening to chop the hands off of the officer who gave him a parking ticket, among other things—was speech on a matter of public concern or was otherwise protected speech. Mr. Talbot essentially contends that he could never be dismissed or disqualified based on any threats he may express without running afoul of the First Amendment. This, however, is clearly not the standard. Mr. Talbot's complaint failed to aver that he engaged in protected speech, and therefore, fails to state a claim for relief based on the First Amendment. *See Id.* at 575.

II.

Striking the Second Amended Complaint

Mr. Talbot argues on appeal that the circuit court abused its discretion in granting the City Board's motion to strike his second amended complaint. Mr. Talbot asserts that the City Board was not prejudiced by the filing of the second amended complaint because it contained the same facts as the amended complaint. Furthermore, Mr. Talbot argued that the new claims for tortious interference were not prejudicial because the City Board knew of the contractual relationship between Barber Transportation and the City Board, therefore, would not have to undertake any further investigation to address the claims.

The City Board disagreed, arguing that Mr. Talbot's second amended complaint, filed well after the deadline for the close of discovery and motions for summary judgment, would prejudice the City Board and cause undue delay. The City Board asserted that Mr. Talbot "prevented [the City Board] from conducting additional discovery and investigating the new claims alleged. . . . The new claims. . .would have required [the City Board] to investigate facts and circumstances that have not been developed in the instant case."

We review the circuit court's decision to grant the motion to strike Mr. Talbot's second amended complaint for abuse of discretion. *See Hendrix v. Burns*, 205 Md. App. 1, 45 (2012) (citing *Schmerling v. Injured Workers' Ins. Fund*, 368 Md. 434, 443-44 (2002)). Per Maryland Rule 2-341, pleadings may be amended without leave of court "by the date set forth in a scheduling order or, if there is no scheduling order, no later than 30 days before a scheduled trial date." The general rule in Maryland is that amendments to pleadings are to be allowed "freely and liberally so long as the operative factual pattern remains essentially the same, and *no new cause of action is stated invoking different legal principles*." *Hartford Acc. and Indem. Co. v. Scarlett Harbor Associates Ltd. Partnership*, 109 Md. App. 217, 248 (1996) (emphasis added) (quoting *Gensler v. Korb Roofers, Inc.*, 37 Md. App. 538, 543 (1977)); *see also Prudential Securities Inc. v. E-Net, Inc.*, 140 Md. App. 194, 232 (2001). However, this Court has held that freely allowing amendments to a pleading under Mr. Rule § 2-341(c) must be "read in conjunction with Rule 2-504 (c) which provides that a pre-trial scheduling order 'controls the subsequent course of the action but may be modified by the court to prevent manifest injustice.'" *Berry v. Dept. of Human*

Res., 88 Md. App. 461, 467-468 (1991) (stating that to allow the plaintiffs to amend their complaint and a month before the scheduling order required that all discovery be completed "would make a mockery of the Scheduling Order, as . . . it would have to be totally revised to accommodate the Amended Complaint"). Further, Amendments to pleadings are not allowed if prejudice to the opposing party or undue delay results. *Prudential Securities Inc.*, 140 Md. App. at 232 (citations omitted).

Here, Mr. Talbot's second amended complaint abandoned his original claims, which focused on wrongful discharge, and pleaded two new claims, focused Mr. Talbot's contract with Barber Transportation and interference with Mr. Talbot's "prospective ability to secure employment elsewhere as a school bus driver." These new claims invoke entirely new legal principles based on alleged facts that the City Board was not able to challenge or investigate in the discovery process. The scheduling order stated that discovery must be completed by September 14, 2013, and any motion for summary judgment be submitted by October 14, 2013. We cannot reasonably conclude, based on the complete change in legal argument in Mr. Talbot's second amended complaint filed on December 20, 2013 (three months after the close of discovery), that the City Board would not have been prejudiced. We hold that the circuit court did not abuse its discretion in striking the second amended complaint.

III.

Disqualification Under COMAR 13A.06.07.07D.

In his amended complaint, Mr. Talbot asserted that, because the incident leading to his disqualification occurred off the job, he did not violate any COMAR provisions for disqualification of student vehicle drivers. On appeal, Mr. Talbot asks whether there was "a relationship between the lawful off-duty conduct of the Appellant and the performance of the Appellant's job to warrant a disqualification under COMAR [13A.06.07.07D]?" COMAR 13A.06.07.07D provides that a student vehicle driver may be disqualified for "[u]nsafe [a]ctions," including "[m]isfeasance, incompetence, insubordination, or any act of omission that adversely affects transportation or safety. . . ." Mr. Talbot argues that, because the letter he authored was outside of the school environment and was not related to his job as a bus driver, it had no effect on transportation or safety.

Whether Mr. Talbot was properly disqualified under COMAR 13A.06.07.07 is not properly before this Court. The circuit court did not reach the merits of Mr. Talbot's disqualification, and we decline to address the issue where it was not addressed by the circuit court. Md. Rule 8-131 ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]").

JUDGMENTS AFFIRMED.
COSTS TO BE PAID BY APPELLANT.