

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3734-07T1

PEDRO FONTANEZ,

Plaintiff-Appellant,

v.

STATE OF NEW JERSEY,  
NEW JERSEY STATE POLICE,  
DEPARTMENT OF LAW AND  
PUBLIC SAFETY,  
GAIL CAMERON, KARIN MAY,  
AL KERNAGIS, JAMES GRANT,  
PATRICK RILEY, DONALD BURTON,  
and TIMOTHY GOSS,

Defendants-Respondents.

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Argued September 22, 2010 - Filed March 29, 2011

Before Judges Fuentes, Gilroy and Ashrafi.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-2199-06.

Michael J. Reimer argued the cause for appellant.

Robert J. Hagerty argued the cause for respondent (Capehart & Scatchard, P.A., attorneys; Mr. Hagerty, of counsel and on the brief).

PER CURIAM

Plaintiff Pedro Fontanez appeals from the March 12, 2008 order that dismissed his complaint pursuant to Rule 4:37-2(b). We affirm.

I.

Plaintiff, an Hispanic male, is a staff sergeant in the New Jersey Division of State Police (NJSP). On October 29, 2004, plaintiff filed a complaint against defendants State of New Jersey; the NJSP; the New Jersey Department of Law and Public Safety; and seven individual members of the NJSP: Sergeant First Class Gail Cameron; Lieutenant Kaierain May;<sup>1</sup> Retired Lieutenant Colonel Al Kernagis; Captain James Grant; Lieutenant Patrick Reilly;<sup>2</sup> Sergeant First Class Donald Burton; and Captain Timothy Goss. In his complaint, plaintiff alleged causes of action under the Civil Rights Acts of 1866, 1871, and 1964, 42 U.S.C.A. §§ 2000e to 2000e-17, and violations of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, by failing to promote him because of his race, ancestry, and/or national origin; subjecting him to a hostile work environment;

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<sup>1</sup> Incorrectly designated in the complaint as Karin May.

<sup>2</sup> Incorrectly designated in the complaint as Patrick Riley. Because the record also references Patrick Reilly's brother, Lieutenant Brian Reilly, when referencing either individual, we shall refer to him by his full name.

and retaliating against him for having "opposed employment practices declared unlawful by the [LAD]."

Pretrial discovery closed on May 30, 2006. On September 1, 2006, plaintiff filed a motion seeking, among other things, to extend the discovery end date. The court denied the motion on October 13, 2006. In the interim, on September 13, 2006, the court noticed the parties of a trial date for January 8, 2007. However, the trial did not proceed as scheduled. On May 17, 2007, plaintiff filed a second motion seeking to extend the discovery end date. The court denied the motion on June 11, 2007, determining that plaintiff had not established exceptional circumstances for granting the motion, the court having already set a second trial date in the matter for July 9, 2007. For undisclosed reasons, the trial did not commence on July 9, 2007. On August 17, 2007, plaintiff filed a third motion seeking to compel discovery and to extend the trial date. The court denied the motion on September 7, 2007.<sup>3</sup>

The matter was tried before a jury on February 13, 19, and 20, 2008. On the first day of trial, the court granted defendants' motion limiting plaintiff's claims to events that

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<sup>3</sup> Plaintiff failed to provide this court with copies of the October 13, 2006 and September 7, 2007 transcripts of the trial court's decisions denying his requests to extend the discovery end date and to compel discovery.

occurred after February 28, 2001, determining that prior events were not sufficiently connected to events that occurred from that day forward as to constitute a continuing violation for the purpose of extending the statute of limitations. Also on that day, the court dismissed the complaint as to defendants Kernagis and Cameron. Following the close of plaintiff's case on February 19, 2008, the remaining defendants moved to dismiss the complaint pursuant to Rule 4:37-2(b), contending that plaintiff failed to establish a prima facie cause of action under the LAD. The court granted the motion the next day, and entered a memorializing order on March 12, 2008. It is from this order that plaintiff appeals.<sup>4</sup>

## II.

We discern the following facts from the trial record. Plaintiff left Pemberton Township High School in 1976 before completing his high school education. On leaving high school, he joined the United States Army. While in the Army, plaintiff obtained his high school Graduate Equivalency Diploma. Plaintiff served three years of active duty with the Army. He subsequently joined the United States Air Force Reserves and

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<sup>4</sup> Defendants' motion for an involuntary dismissal addressed plaintiff's three LAD claims. Although the March 12, 2008 order dismissed plaintiff's complaint in its entirety, including his federal civil rights claims, plaintiff does not challenge the dismissal of the civil rights claims on appeal.

recently retired from military service after twenty-five years. While serving in the Air Force Reserves, plaintiff obtained two college Associate degrees: one in Applied Sciences and the other in Social Sciences. In 2001, plaintiff obtained a Bachelor of Arts degree.

Plaintiff joined the NJSP in 1985 as a trooper and was promoted in 1989 to the rank of sergeant. Plaintiff is qualified as a rescue scuba diver and scuba dive master. He possesses a private airplane pilot license, an Emergency Medical Technician's license, a Practical Nurse license, a first-degree black belt in Tang Soo Do, and a red belt in Tae Kwon Do.

In 2001, plaintiff attended Northwestern University Command School with five other troopers--four sergeants and one first-class sergeant. Since 2001, three of the other five troopers rose through the ranks of the NJSP to the position of captain. No evidence was presented, however, as to the race, ethnic backgrounds, or qualifications of any of those individuals.

While plaintiff attended Northwestern University, the NJSP created the title of "staff sergeant" to designate sergeants who supervised patrol squads. The title of "staff sergeant" is merely a designation within the NJSP. Although plaintiff had been supervising a patrol squad before attending Northwestern University, he was not designated a staff sergeant upon his

return from the University in May 2001. NJSP gave the designation to plaintiff's former classmate at the State Police Academy who had been supervising a squad in the Tactical Patrol Unit. That sergeant was a Caucasian male. However, at the time of trial in February 2008, plaintiff held the designation of staff sergeant.

Shortly after returning from Northwestern University, plaintiff received a Performance Notice (PN) from Lieutenant May, his then Station Commander, for a report authored by plaintiff concerning an investigation of an automobile accident involving another trooper.<sup>5</sup> On August 22, 2001, plaintiff filed a discrimination complaint with then Lieutenant Goss of the NJSP Equal Employment Opportunity/Affirmative Action Office (EEO/AA), alleging discrimination against May. Although plaintiff believed that Goss had not properly acted on the complaint, plaintiff received a letter dated August 29, 2001, from Deputy Attorney General (DAG) David Rosenblum advising that the "Attorney General's Office has determined that you have not articulated a violation of the State Policy Prohibiting Discrimination, Harassment or Hostile Environments in the

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<sup>5</sup> A PN is not a disciplinary notice. It is a reprimand advising the recipient of matters that need improvement. However, an accumulation of PNs can later lead to disciplinary action.

Workplace."<sup>6</sup> The letter further declared that "[a]bsent any evidence of a Policy violation, however, we will not be taking any further action or investigating your allegation of discrimination. As you have represented that you would like to better understand the criteria for the staff sergeant position and work towards its attainment in the future, this matter will be referred to State Police management for appropriate action." In subsequent weeks, plaintiff received three or four additional PNs from May.

In November 2001, the NJSP found plaintiff responsible for causing an automobile accident while on duty. In November of the following year, plaintiff was again found at fault in causing a second automobile accident.

On December 28, 2001, plaintiff filed a discrimination complaint against May with the Division of Personnel.<sup>7</sup> He was subsequently contacted by Lieutenant Patrick Reilly, who set up a mediation meeting between plaintiff and May. Despite

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<sup>6</sup> Contrary to plaintiff's belief that Goss had failed to properly investigate the complaint, Goss testified during plaintiff's case that he acted in accordance with Standard Operating Procedures, which required him to turn the complaint over to the Director of the Office of the Attorney General EEO Unit. The Attorney General's Office then makes the decision whether to investigate further, and if so, assigns investigators to inquire into the matter.

<sup>7</sup> Plaintiff also failed to provide this court with a copy of this complaint, nor did he testify to its particulars.

plaintiff's request that only he, May, and Patrick Reilly be present at the meeting, other NJSP members who plaintiff had asked not attend the meeting were present. The other individuals in attendance included then Lieutenant Grant, Sergeant First Class Burton, and the former classmate of plaintiff who had recently been designated as a staff sergeant. Plaintiff did not voice any discrimination complaints against May at that meeting. According to plaintiff, Patrick Reilly neither filed a report of the mediation meeting, nor interviewed individuals whose names plaintiff gave him.

On July 3, 2002, plaintiff filed a complaint with the United States Equal Employment Opportunity Commission (EEOC) setting forth allegations of racial discrimination and harassment in the NJSP. The EEOC examined twenty personnel records of NJSP employees similarly classified as plaintiff at plaintiff's assigned station. After completing its investigation, the EEOC determined that the complaint was without merit and recommended its dismissal. In furtherance of its decision, the EEOC stated in relevant part:

. . . Of those reviewed, you along with five others received highly rated evaluations in 2002. Of these individuals, three were minority employees.

Further, your file contained many letters of appreciations from private citizens and [an] internal recognition.



There is evidence that all of your co-workers are scrutinized and subjected to reviews. Other employees were also reprimanded in 2002, along with you. [These persons are] white. There is no evidence that you are continually harassed or that damaging information is being placed into your personnel file.

However, the EEOC also indicated that it was going to forward plaintiff a letter advising of his right to file a private action. The EEOC provided the notice on September 29, 2004.

From March 2003 to March 2004, as a member of the Air Force Reserves, plaintiff was deployed to the European Theatre to assist with the wars in Iraq and Afghanistan. Upon returning from active duty, plaintiff met with Sergeant Brian Royster who began to re-investigate plaintiff's 2001 EEO/AA complaint against May. Because plaintiff never received a final report from Royster, plaintiff assumed that he had been removed from the case before completing his investigation. Contrary to plaintiff's belief, Royster completed his investigation into the complaint in April 2004 and turned his investigation file over to then-Lieutenant Austin O'Malley, the new head of the EEO/AA Unit.

In May 2004, plaintiff filed a complaint against Patrick Reilly with the NJSP Office of Professional Standards (OPS) claiming Patrick Reilly failed to investigate his 2001 complaint

against May. While on sick leave for stress, plaintiff was contacted by Lieutenant Brian Reilly, who at the time was assigned to the NJSP's medical unit. Brian Reilly requested that plaintiff obtain and deliver to NJSP's Division Headquarters within twenty-four hours records of plaintiff's visits to his physician and psychologist to document his leave of absence. After plaintiff's attorney contacted the NJSP complaining the time provided for compliance with the request was unreasonable, the NJSP provided plaintiff an additional twenty-four hours. Plaintiff complied.

On July 27, 2004, plaintiff received a letter from DAG Valerie Egar confirming that plaintiff's OPS complaint against Patrick Reilly had been investigated and that the investigation did not disclose any improper conduct. After plaintiff returned to work from sick leave in 2006, he was transferred from a station that was approximately five minutes from his home to one approximately one hour from his home. He was later reassigned to a station that was a thirty to forty-five minute commute from his home. It is against this record that the court granted defendants' motion for an involuntary dismissal.

In granting the motion, the court determined that as to the hostile environment claim the record was devoid of any evidence upon which a jury could reasonably find that "actions were

taken, or actions were not taken because of some animus that focuses on the plaintiff's national origin, the fact that he is . . . Hispanic." Concerning plaintiff's claim of failure to promote, the court concluded that although plaintiff is a talented individual and has a number of achievements in his background, there was an "utter absence" of . . . evidence to support the conclusion "that things didn't go plaintiff's way because he is Hispanic[.] . . ." The court found that plaintiff failed to present evidence of the NJSP's standards governing promotions of sergeants to higher positions. Indeed, the court noted that the failure to provide such evidence would have left the jury to speculate as to why plaintiff had not been promoted. As to plaintiff's retaliation claim, the court found no evidence existed to support the claim.

On appeal, plaintiff argues the trial court erred in: 1) denying his motions to compel discovery and to extend the discovery end date; 2) limiting the evidence of discriminatory behavior to actions that occurred after February 28, 2001; and 3) granting the motion for an involuntary dismissal.

### III.

Plaintiff first argues that the trial court erred in denying his motions to compel defendants to provide discovery and to extend the discovery end date. Plaintiff contends that

the trial court abused its discretion in denying his three discovery motions of September 1, 2006, May 17, 2007, and August 17, 2007. Although all three orders indicate on their face that the motions were denied for reasons placed upon the record by the trial court, plaintiff failed to provide this court with the necessary record to consider the merits of his arguments challenging the September 13, 2006 and September 7, 2007 orders.

Plaintiff's failure to properly prosecute the appeal challenging the September 13, 2006 and September 7, 2007 orders by not providing us with transcripts of the two motion hearings impedes us from reviewing the correctness of the trial court's decisions underlying those two orders. In re Zakhari, 330 N.J. Super. 493, 495 (App. Div. 2000). Accordingly, we will only address plaintiff's challenge to the June 11, 2007 order that denied his second motion to extend discovery for failure to establish exceptional circumstances. See Pressler & Verniero, Current N.J. Court Rules, comment 1 on R. 2:6-1 (2011) ("[T]he Appellate Court may decline to address issues requiring review of those parts of the trial record not included in the appendix.").

Appellate courts grant deference to trial courts' discovery rulings and will only reverse such decisions if they constitute an abuse of discretion. Wilson v. Amerada Hess Corp., 168 N.J.

236, 253 (2001); Payton v. N.J. Tpk. Auth., 148 N.J. 524, 559 (1997). However, if a court rests its decision on an improper interpretation of the law, the decision is not entitled to any special deference. Isetts v. Borough of Roseland, 364 N.J. Super. 247, 253 (App. Div. 2003).

Motions to extend discovery are governed by Rule 4:24-1(c), which provides in relevant part: "No extension of the discovery period may be permitted after an arbitration or trial date is fixed, unless exceptional circumstances are shown." Thus, before an arbitration or trial date is fixed, an extension should be liberally granted. Ponden v. Ponden, 374 N.J. Super. 1, 9-11 (App. Div. 2004), certif. denied, 183 N.J. 212 (2005). However, after either of those events has occurred, an explanation for the cause of delay and the actions taken during the elapsed time is necessary to show exceptional circumstances justifying an extension of the discovery period. Bender v. Adelson, 187 N.J. 411, 429 (2006). Generally, to establish exceptional circumstances under Rule 4:24-1(c), a party must provide:

"some showing that the circumstances presented were clearly beyond the control of the attorney and the litigant seeking an extension of time. An excessive work load, recurring problems with staff, a desire to avoid expense associated with discovery, or any delays arising out of extended efforts to resolve [the] matter through negotiations

generally will not be sufficient to justify an extension."

[Huszar v. Greate Bay Hotel & Casino, Inc., 375 N.J. Super. 463, 473 (App. Div.) (quoting Zadigan v. Cole, 369 N.J. Super. 123, 132 n.8 (Law Div. 2004)), certif. granted and remanded on other grounds by 185 N.J. 290 (2005).]

Here, the trial court found that plaintiff failed to make a showing of exceptional circumstances as required by the rule and case law. The court determined that discovery had closed one year prior, that a second trial date was scheduled for July 9, 2007, and that counsel's certification filed in support of the motion failed to demonstrate due diligence in pursuing discovery as required by Huszar, supra, 375 N.J. Super. at 473. We determine that the trial court correctly employed the exceptional circumstance standard. We find no abuse of discretion under the facts presented to the court on the motion.

#### IV.

Plaintiff next argues that the trial court erred in limiting evidence to events that occurred after February 28, 2001. Plaintiff contends that actions which occurred prior to that date were admissible as part of a continuing LAD violation. Not so.

LAD claims are subject to a two-year statute of limitations. Alexander v. Seton Hall Univ., 204 N.J. 219, 228

(2010); Montells v. Haynes, 133 N.J. 282, 292 (1993).

"Determining when the limitations period begins to run depends on when the cause of action accrued, which in turn is affected by the type of conduct a plaintiff alleges to have violated the LAD." Alexander, supra, 204 N.J. at 228.

The accrual dates for discrete acts are the dates on which the events occurred. Roa v. Roa, 200 N.J. 555, 567 (2010). "However, when the complained-of conduct constitutes 'a series of separate acts that collectively constitute one unlawful employment practice[,] the entire claim may be timely if filed within two years of 'the date on which the last component act occurred.'" Alexander, supra, 204 N.J. at 229 (quoting Roa, supra, 200 N.J. at 567).

In his complaint, plaintiff alleged that since the beginning of his NJSP tenure he had been subjected to a hostile work environment because he was Hispanic. He contended that the NJSP subjected him to "a pattern and practice of disparate treatment on account of race and national origin," and that he had been "denied promotions, advancement and other tangible employment benefits" on account of the same. Prior to plaintiff's attendance at the Northwestern Command School commencing February 28, 2001, the last incident plaintiff complained of had occurred in or about June 1998 when his wallet

containing his NJSP identification card was stolen. Plaintiff asserted that, although an investigator found him not responsible, an NJSP lieutenant directed the investigator to alter the report to find plaintiff at fault. Plaintiff did not file his complaint until October 29, 2004.

In limiting evidence to events which occurred after February 28, 2001, when plaintiff attended the Northwestern Command School, the court first noted that a hostile work environment under the LAD has a two-year limitations period. Because plaintiff had filed his complaint on October 29, 2004, the court initially determined that matters before October 29, 2002 would have ordinarily been barred. However, because plaintiff had been deployed to military service for one year, the court concluded that this tolled the statute of limitations for a like period of time under the Servicemembers Civil Relief Act.<sup>8</sup> Thus, the court indicated it would fix October 29, 2001 as the relevant date for plaintiff's hostile work environment claim.

Plaintiff's counsel requested that the court permit evidence of events prior to October 29, 2001. In considering plaintiff's continuing violation argument, the court noted, "I don't find that this was a pattern of discriminatory conduct.

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<sup>8</sup> 50 U.S.C.A. app. §§ 501-597.



Quite to the contrary. . . I find absolutely nothing that . . . amount[s] to a continuing violation prior to the time period that I noted." Despite this, the court extended the time period for consideration from October 29, 2001 back to February 28, 2001, when plaintiff attended Northwestern Command School noting that "in good conscience [it] could not go further than that."

The trial court did not abuse its discretion in making this determination. If it erred in fixing the limitations period, it erred in favor of plaintiff. The court articulated a rational basis for restricting evidence to events occurring after February 28, 2001 based on the two-year statute of limitations and the one year it was tolled. We agree with the court's determination that there was an insufficient nexus between the last event complained of within the limitations period (not receiving the designation of staff sergeant in May 2001), to the last event that preceded February 28, 2001 (the June 1998 incident concerning plaintiff's stolen NJSP identification card).

V.

Lastly, plaintiff challenges the trial court's grant of defendants' motion for an involuntary dismissal. Plaintiff argues that the motion should have been denied because he

presented a prima facie case of workplace harassment, failure to promote, and retaliation under the LAD. We disagree.

We review a trial court's grant of a defendant's motion for judgment at the close of the plaintiff's case de novo, that is, by applying the same legal standard as the trial court. Epperson v. Wal-Mart Stores, Inc., 373 N.J. Super. 522, 527 (App. Div. 2004). Under the rule, the trial court is required to deny the motion "if the evidence, together with the legitimate inferences therefrom, could sustain a judgment in plaintiff's favor." R. 4:37-2(b). Stated another way, if the trial court, after accepting as true all the evidence presented in a plaintiff's case and providing the plaintiff with the "'benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied.'" Zive v. Stanley Roberts, Inc., 182 N.J. 436, 441-42 (2005) (quoting Verdicchio v. Ricca, 179 N.J. 1, 30 (2004)). If we determine that "there is no genuine issue of material fact, we decide whether the trial court's ruling on the law was correct." Turner v. Wong, 363 N.J. Super. 186, 199 (App. Div. 2003). "However, '[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special

deference.'" Ibid. (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

Plaintiff argues that he presented sufficient proofs to establish a prima facie hostile work environment claim under the LAD. As evidence that he was subjected to a hostile work environment, plaintiff cites to the EEO/AA and the OPS failures to pursue investigations of his complaints against May, and against Patrick Reilly, respectively; Brian Reilly's demand that he produce his medical records relating to his leave of absence in twenty-four hours; and his reassignment to a station forty-five minutes from his home, collectively. The trial record does not support plaintiff's argument.

N.J.S.A. 10:5-12a provides in pertinent part that "[i]t shall be an unlawful employment practice . . . [f]or an employer, because of the race, creed, color, national origin, [or] ancestry . . . of any individual . . . to discriminate against such individual . . . in terms, conditions or privileges of employment." To prove a prima facie hostile work environment claim under the statute, a plaintiff "must show that the complained-of conduct (1) would not have occurred but for the employee's protective status, and was (2) severe or pervasive enough to make a (3) reasonable person believe that (4) the conditions of employment have been altered and that the

working environment is hostile or abusive." Shepherd v. Hunterdon Developmental Ctr., 174 N.J. 1, 24 (2002).

In determining whether an actual work environment claim exists, courts "'look to all the circumstances, including the frequency of discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" Id. at 19-20. (quoting Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114-18, 122 S. Ct. 2061, 2073-74, 153 L. Ed. 2d 106, 123-25 (2002) (internal quotations omitted)). In assessing "[w]hether harassing conduct makes a work environment hostile," we use "a reasonable-person standard, which . . . keep[s] the test for harassing conduct tied to reasonable community standards and yet allow[s] for its evolution as societal norms mature." Godfrey v. Princeton Theological Seminary, 196 N.J. 178, 197 (2008) (fn. omitted).

In concluding that plaintiff had failed to make a prima facie showing that he had been subjected to a hostile work environment, the trial court determined that he failed to present evidence that any of the complained of conduct was asserted against him because of racial or ethnic animus. The court noted that the jury would have been left to speculate as to his allegations. We agree.

For example, plaintiff's belief that OPS had failed to investigate his complaint against Patrick Reilly was without merit as plaintiff had received a letter from DAG Egar advising that his complaint had been formally investigated and that the investigation failed to disclose any improper conduct by Patrick Reilly. So too as to plaintiff's other complaints filed against superior officers. Plaintiff's EEO/AA complaint against Goss had been investigated by the Attorney General's Office, and plaintiff's complaint filed with the United States EEOC alleging allegations of racial discrimination and harassment in the NJSP was investigated by the federal agency. Both investigations found that plaintiff's complaints lacked merit. We also determined that plaintiff's allegation that he was harassed by Brian Reilly's demanding production of medical records within twenty-four hours to support a leave of absence fails to show that he was harassed because of race or national origin. Plaintiff did not present any evidence as to what the NJSP's normal timeframe is for producing medical records in support of a leave of absence. Moreover, plaintiff requested an extension of time in which to produce the records, and NJSP acquiesced to his request.

Plaintiff contends that the NJSP has failed to promote him to a higher rank because he is Hispanic.

To establish a prima facie case under LAD, a plaintiff must show: "(1) that [he] is a member of a class protected by the anti-discrimination law; (2) that [he] was qualified for the position or rank sought; (3) that [he] was denied promotion, reappointment, or tenure; and (4) that others . . . with similar or lesser qualifications achieved the rank or position." Dixon v. Rutgers, the State Univ. of N.J., 110 N.J. 432, 443 (1988).

Once a prima facie case has been presented, the burden shifts to the defendant employer to rebut the presumption of discrimination by articulating a legitimate, nondiscriminatory reason for the adverse employment action. Andersen v. Exxon Co., U.S.A., 89 N.J. 483, 493 (1982). "The defendant employer, however, only carries the burden of production, rather than persuasion, to show a legitimate, nondiscriminatory reason for its action." Maiorino v. Schering-Plough Corp., 302 N.J. Super. 323, 347 (App. Div.), certif. denied, 152 N.J. 189 (1997). If the employer proffers such a reason, then plaintiff must show that the employer's reason is merely pretextual, that is, not the true reason for the employment decision. Andersen, supra, 89 N.J. at 493. This is satisfied if a plaintiff can show that "(1) a discriminatory reason more likely motivated the employer than the employer's proffered legitimate reason, or (2) the defendant's proffered explanation is 'unworthy of credence.'"

Maiorino, supra, 302 N.J. Super. at 347 (quoting Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256, 101 S. Ct. 1089, 1095, 67 L. Ed. 2d 207, 217 (1981)).

Plaintiff asserted that while he was at Northwest University the NJSP had created the title of staff sergeant, designating sergeants who supervised squads of troopers. Plaintiff contended that although he had been supervising a squad when he went to Northwestern, he did not receive the designated title upon his return, but that the designation was given to a former classmate who had been supervising a squad in the Tactical Patrol Unit. Plaintiff admitted, however, that the staff sergeant title does not constitute a promotion within the NJSP; only a re-designation.

Plaintiff contended that individuals who complete the Northwestern Command School "usually rise through the ranks of the [NJSP]." According to plaintiff, three of the five other troopers who attended the command school with him in 2001 did subsequently rise to the rank of captain. However, plaintiff failed to provide evidence as to the race, ethnic backgrounds or qualifications for any of those individuals, or to the remaining trooper who was not promoted.

Plaintiff also asserted that after he became a sergeant, he was evaluated for promotion to a higher rank twice. However,

plaintiff again failed to support his claim that the failure to promote was because of racial or ethnic bias. He did not present evidence as to the qualifications, rank or position of the individuals who received the promotions for which he had been considered. Nor did plaintiff present evidence of the NJSP's standards governing promotions of sergeants to higher position to prove that he was qualified. The trial court concluded that this lack of evidence was fatal to plaintiff's claim: "I don't know what the standard is for promotion in the [NJSP]. There's nothing before this jury that they can gauge that on. What we have is speculation." We agree.

Lastly, plaintiff cites to his individual accomplishments as evidence that he was qualified to be promoted to a position above the rank of sergeant. However, plaintiff candidly conceded that several of his accomplishments did not pertain to promotion within the NJSP. For example, on cross-examination, plaintiff agreed that neither his scuba diving certifications nor his belts in the martial arts were relevant to promotion, only to possible reassignment to the NJSP TEAMS Unit. As to holding an airplane pilot license, plaintiff acknowledged that the NJSP does not possess any fixed wing aircraft.


We have considered plaintiff's remaining arguments in light of the record and applicable law, and determined that they are



without merit to warrant discussion in a written opinion. R.  
2:11-3(e)(1)(E). Accordingly, we conclude that the trial court  
properly granted the dismissal of plaintiff's complaint.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION