NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-6125-09T1

HECTOR L. AYALA, BRIAN BETHUNE, RAUL COUCE, MIGUEL CRUZ, RONALD DRAYTON, JR., SERGIO FERNANDEZ, KERRY GOSHEY, DARREN C. JONES, STEPHEN MUNGO, AMALIO NIEVES, SCOTT W. PACKWOOD, MARK PIERCE, AARON PORTEE, ANDRE ROBINSON, JEFFREY T. SHAW, JEFF SIMS, JOHNNY SOTO, BROOKLYN C. SMITH, DENNIS SPRUIEL, JOHN THURMOND, GEORGE W. TURNER, MICHAEL TRAVIS, ROBERT WILKINS and RICARDO VALMON,

Plaintiffs-Appellants,

v.

NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF STATE POLICE, JOSEPH FUENTES, in his official capacity and ATTORNEY GENERAL, STATE OF NEW JERSEY in his/her official capacity,

Defendants-Respondents.

Argued September 14, 2011 - Decided October 25, 2011

Before Judges Lihotz and St. John.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-2829-08.

Surinder K. Aggarwal argued the cause for appellants (William H. Buckman Law Firm, attorneys; Mr. Aggarwal and William H. Buckman, on the brief).

Mary Beth Wood, Deputy Attorney General, argued the cause for respondents (Paula T. Dow, Attorney General, attorney; Ms. Wood, on the brief).

PER CURIAM

Plaintiffs Hector L. Ayala, Brian Bethune, Raul Couce, Miguel Cruz, Ronald Drayton, Jr., Sergio Fernandez, Kerry Goshey, Darren C. Jones, Stephen Mungo, Amalio Nieves, Scott W. Packwood, Mark Pierce, Aaron Portee, Andre Robinson, Jeffrey T. Shaw, Jeff Sims, Johnny Soto, Brooklyn C. Smith, Dennis Spruiel, John Thurmond, George W. Turner, Michael Travis, Robert Wilkins and Ricardo Valmon, appeal from an order dated March 19, 2010, denying leave to amend their complaint pursuant to Rule 4:9-1; an order dated July 9, 2010, dismissing their complaint (except as to plaintiff Nieves) pursuant to Rule 4:6-2(e); and an order dated July 23, 2010, dismissing plaintiff Nieves's complaint pursuant to Rule 4:23-5(a)(2). We affirm.

We glean these facts from the motion record. Plaintiffs, African-American or Hispanic males, are troopers of varying ranks in the New Jersey Division of State Police (NJSP). On July 15, 2008, plaintiffs filed a complaint against defendants, the New Jersey Department of Law and Public Safety, Division of

State Police; Joseph Fuentes, in his official capacity; and the Attorney General, State of New Jersey, in his/her official capacity. In their complaint, plaintiffs alleged violations of their rights under the New Jersey Constitution, N.J. Const. art. 1, ¶ 5, and violations of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, by failing to promote each of them because of their race, ancestry, and/or national origin. Nieves asserted an additional claim against defendants alleging violations of the Conscientious Employees Protection Act (CEPA), N.J.S.A. 34:19-1 to -8.

On August 4, 2008, plaintiffs filed a first amended complaint, and a second amended complaint adding a claim for a violation of the New Jersey Civil Rights Act, N.J.S.A. 10:6-1 to -2. On November 14, 2008, plaintiffs filed a third amended complaint correcting the ranks of certain plaintiffs and alleging that NJSP retaliated against plaintiff Travis by failing to promote him despite the fact that his claims against the NJSP for discrimination and civil rights violations were settled in 2003.

On January 21, 2009, defendants filed a motion to dismiss in lieu of an answer pursuant to Rule 4:6-2, or in the alternative, for more definitive pleadings. Judge Andrew J. Smithson granted defendants' motion and allowed plaintiffs to

file a more definitive fourth amended complaint. Plaintiffs filed a fourth amended complaint on June 25, 2009. On August 6, 2009, defendants filed a motion to dismiss the fourth amended complaint. On September 25, 2009, Judge Smithson granted defendants' motion and (except for Nieves's CEPA claim), dismissed without prejudice, plaintiffs' complaint for failure to state a claim upon which relief can be granted. R. 4:6-2(e).

When Nieves failed to respond to defendants' discovery requests, defendants moved to dismiss his remaining claims. R. 4:23-5(a). Judge Darlene J. Pereksta granted the unopposed motion, without prejudice.

Thereafter, plaintiffs filed another motion to amend and sought to file a fifth amended complaint. In opposition, defendants argued that the fifth amended complaint failed to state a claim, averring it contained only vague and conclusory allegations. Defendants asserted that they would be prejudiced and that allowing the filing would be a futile act. The court opined that "there was no reason to allow the fifth amended complaint, because it was really no different than the others, I think [] [plaintiffs] have had ample opportunity to plead a cause of action . . . [Plaintiffs] haven't been able to do so as to those others[.]" Plaintiffs' request for interlocutory review of that order was denied.

Thereafter, defendants moved for entry of judgment, as plaintiffs' claims were repeatedly unaccompanied by factual support, and Nieves had failed to provide discovery, as the requisite sixty days having elapsed. R. 4:23-5(a)(2).

After reviewing the pleadings, Judge Pereksta entered two orders. The court granted defendants' motion to dismiss, except as to Nieves. The motion judge reviewed in detail Nieves's interrogatory answers and clearly set forth deficiencies with regard to each inadequate answer. The court allowed Nieves seven days to produce responsive answers and carried defendants' motion to dismiss his claims. On July 23, 2010, the court conducted a thorough, answer by answer review of Nieves's supplemental answers. Upon finding that they were not responsive, she dismissed all of Nieves's claims in plaintiffs' complaint, with prejudice, for failure to provide discovery and denied Nieves's concomitant motion to reinstate. This appeal followed.

I.

Plaintiffs argue that the motion judge erred in denying leave to file an amended complaint and dismissing the complaint with prejudice, as the proposed fifth complaint stated a valid cause of action under the LAD and the New Jersey Constitution.

Furthermore, plaintiffs argue that the proposed fifth amended complaint would not prejudice defendants. We disagree.

Leave to amend a complaint should be freely granted. R. 4:9-1; Kernan v. One Washington Park Urban Renewal Assocs., 154 N.J. 437, 456-57 (1998). The decision rests in the motion judge's sound discretion and requires a two-step process: "whether the non-moving party will be prejudiced, and whether granting the amendment would nonetheless be futile." Notte v. Merchants Mut. Ins. Co., 185 N.J. 490, 501 (2006). The motion judge is "'free to refuse leave to amend when the newly asserted claim is not sustainable as a matter of law. In other words, there is no point to permitting the filing of an amended pleading when a subsequent motion to dismiss must be granted.'" Id. at 501-02 (quoting Interchange State Bank v. Rinaldi, 303 N.J. Super. 239, 257 (App. Div. 1997)); see also Pressler & Verniero, Current N.J. Court Rules, comment 2.2.1 on R. 4:9-1 (2012).

The gravamen of plaintiffs' claims is that they were subject to a discriminatory failure to promote in violation of the LAD and the New Jersey Constitution. Relying on the pronouncements of the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), which concerned the establishment of a prima

facie case of discrimination under federal law, the New Jersey Supreme Court announced a four-part analysis to be applied in LAD actions, beginning with its decisions in Peper v. Princeton University Board of Trustees, 77 N.J. 55, 82-83 (1978), and followed thereafter in Goodman v. London Metals Exchange Inc., 86 N.J. 19, 31 (1981); Andersen v. Exxon Co., 89 N.J. 483, 492 (1982); and Clowes v. Terminix International, Inc., 109 N.J. 575, 597 (1988).

In Andersen, the Court explained that a prima facie case of unlawful discrimination is established when:

> The plaintiff [] demonstrate[s] by a preponderance of the evidence that he or she (1) belongs to a protected class, (2) applied and was qualified for a position for which the employer was seeking applicants, (3) was rejected despite adequate qualifications, and (4) after rejection the position remained open and the employer continued to seek applications for persons of plaintiff's qualifications.
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> [89 N.J. at 492 (citing McDonnell Douglas, supra, 411 U.S. at 802, 93 S. Ct. at 1824, 36 L. Ed. 2d at 677).]

In order to maintain an action for discriminatory failure to promote, each plaintiff must establish:

> "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to

> seek applicants from persons of complainant's qualifications."
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> [Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253-54, 101 S. Ct. 1089, 1094, 67 L. Ed. 2d 207, 216 (1981) (quoting McDonnell Douglas, supra, 411 U.S. at 802, 93 S. Ct. at 1824, 36 L. Ed. 2d at 677).]

Defendants asserted their right to a responsive pleading which would set forth facts supporting, among other things, a prima facie case of discrimination. They posited that plaintiffs' complaint, and each amended complaint, were so vague and ambiguous that defendants could not frame a responsive pleading since plaintiffs did not set forth the basics of where, when, and to whom discriminatory actions were taken by defendants. Judge Pereksta gave plaintiffs the opportunity to prepare a complying fifth amended complaint.

Following submission of their request to file the fifth amended complaint, the court determined:

> Here, the plaintiffs' fourth amended complaint was dismissed for failure to state a claim, as the Court found that it included simply conclusory counts that parrot the statutory language. The proposed fifth . . . amended complaint does little to change that . . . .
>
> And so, I do find that defendants would be prejudice[d] by an amended complaint, having to again go through the motions as literally to dismiss it. So, . . . to allow the amendment is futile, no cognizable claim is asserted in the proposed amended

> complaint, and therefore the motion to amend is denied.

Plaintiffs' complaint and each of the proposed five amended complaints are bereft of any specifics with regard to each plaintiff's application for promotion; his qualifications; the dates of the rejection; whether the sought after position was filled and, if so, by whom; and, if there was a successful candidate, the successful candidate's qualifications. After giving each plaintiff all favorable inferences, we agree with the motion judge that no plaintiff provided a benchmark in the complaint to determine whether he was qualified for the position sought (such as educational requirements, seniority, distinguished service, etc.). The complaint includes only anecdotal references rather than factual assertions to support claims that Caucasian troopers with fewer qualifications were promoted ahead of each plaintiff.

While a court will accept well-pled allegations as true for the purpose of the motion, it will not accept bald accusations, unsupported conclusions, unwarranted inferences, or sweeping legal conclusions cast in the form of factual allegations.

II.

Plaintiff Nieves argues that the motion judge erred in dismissing his CEPA claim because he sufficiently answered all of defendants' interrogatories. Accordingly, Nieves maintains

that the order of dismissal with prejudice should be reversed. We disagree.

Rule 4:23-5 provides a two-step procedure to ensure that parties provide timely answers to interrogatories. An aggrieved defendant may move initially for dismissal of the plaintiff's complaint without prejudice, Rule 4:23-5(a)(1), and then, if the failure continues for more than sixty days, for a dismissal with prejudice. R. 4:23-5(a)(2). The Rule's objective is to compel the answers rather than to dismiss the case.

In St. James AME Development Corp. v. Jersey City, 403 N.J. Super. 480 (App. Div. 2008), we noted that, "[t]he purpose behind this rule is to eliminate the conduct of some attorneys for the moving party, who refuse to accept answers to interrogatories served after the motion has been made or to inform the court that such answers have been received." Id. at 485. The Rule provides that,

> [t]he motion to dismiss [the complaint] or suppress [the answer] with prejudice shall be granted unless a motion to vacate the previously entered order of dismissal or suppression without prejudice has been filed by the delinquent party and either the demanded and fully responsive discovery has been provided or exceptional circumstances are demonstrated.
>
> [R. 4:23-5(a)(2).]

See also Cooper v. Consol. Rail Corp., 391 N.J. Super. 17, 22-23 (App. Div. 2007) (affirming a dismissal with prejudice where the plaintiff did not provide the requested discovery between the order of dismissal without prejudice and the return date of the motion to dismiss with prejudice and further offered no "exceptional circumstances").

Lastly, we noted that "[w]hether to grant or deny a motion to reinstate a complaint lies within the sound discretion of the trial court." Sullivan v. Coverings & Install., Inc., 403 N.J. Super. 86, 93; Cooper, supra, 391 N.J. Super. at 22-23 (citing Comeford v. Flagship Furniture Clearance Ctr., 198 N.J. Super. 514, 517 (App. Div. 1983), certif. denied, 97 N.J. 581 (1984)). We will "decline to interfere with such matters of discretion unless it appears that an injustice has been done." Cooper, supra, 391 N.J. Super. at 23 (citation omitted).

Here, the discovery provided by Nieves was not in compliance with the obligation to provide responsive discovery in his answers to interrogatories. The motion judge noted that the discovery end-date had passed and once again delineated Nieves's six non-responsive answers. After reviewing the deficiencies concerning damages and medical treatment, the judge focused on the lack of response to questions concerning the names, ranks, training and experience of individuals who

received acting supervisor positions. Nieves's answers were also wholly lacking in response to the question of dates that he applied for promotion.

Significantly, Nieves failed to state any acts of retaliation, hostility, or negative employment treatment other than (1) being dismissed by a superior officer at the conclusion of a meeting attended by officers of lower rank to Nieves, with the words "Okay that's all;" and (2) discovering that an e-mail was circulating among the State Police Barracks illustrating "how erosive the non-diverse members of the command staff (all young white males) were being to [] Nieves's command."

In light of the noted deficiencies, and in the absence of a showing of exceptional circumstances, we hold that Judge Pereksta did not abuse her discretion in dismissing Nieves's claims and denying his motion to reinstate the complaint.

In reaching this decision, we are mindful that "it is a tenet of our jurisdiction that resolution of disputes on the merits are to be encouraged rather than resolution by default for failure to comply with procedural requirements." St. James, supra, 403 N.J. Super. at 484 (citing The Trust Co. of N.J. v. Sliwinski, 350 N.J. Super. 187, 192 (App. Div. 2002)). However, Nieves's persistent failure to provide discovery in this matter justifies this result.

As to plaintiffs' Constitutional and LAD claims, we agree with the decision of the motion judge. During the two years from filing of the complaint to its dismissal with prejudice, plaintiffs failed to put forth any new claims, and therefore, allowing the complaint to be amended for the fifth time would prove to be futile and unduly prejudice defendants. Similarly, as to Nieves's CEPA claim, we agree that no circumstances were shown justifying why we should reinstate the complaint. Therefore, we are not persuaded that the motion judge abused her discretion in denying plaintiffs' motions with prejudice.

Affirmed.