SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

LIEUTENANT DAWN SHYNER, *Plaintiffs/Appellants,* v. STATE OF NEW JERSEY, THE OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, COLONEL RICK FUENTES, MAJOR MARK WONDRACK (ret.), MAJOR ANTHONY CERAVOLO, CAPTAIN JAMES RYAN, LIEUTENANT ANTHONY GUIDI, MARY BETH WOOD, DEPUTY ATTORNEY GENERAL – CHIEF LEFAL COUNSEL TO THE NEW JERSEY STATE POLICE and JOHN DOES 1-5. *Defendants/Respondents.*	Appellate Docket No. A-977-24 On appeal from: SUPERIOR COURT OF NEW JERSEY, LAW DIVISION Docket No.: MER-L-0951-22 Hon. Brian McLaughlin, J.S.C.

BRIEF ON BEHALF OF PLAINTIFF/APPELLANT

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TABLE OF CONTENTS

TABLE OF JUDGEMENTS

TABLE OF AUTHORITIES

CASES PAGE

STATUTES

RULES

I. PRELIMINARY STATEMENT

This employment matter is on appeal at the pleading stage on a purely procedure record. The case was erroneously dismissed for failure to prosecute under Rule 1:13-7 at a time when a Motion to Amend Complaint was fully briefed and awaiting a decision by the court. Over a year after the Motion to Amend Complaint was filed, and while the case was administratively dismissed for failure to prosecute, the court ruled that Plaintiff was not entitled to amend the complaint. The court's opinion found that all of Plaintiff's claims, including claims squarely within the statute of limitations, were time barred. Plaintiff then filed a Motion to Reinstate and for Reconsideration, which was also denied.

The following will show that the court erred in failing to reinstate the complaint because there was no failure to prosecute. It will also show how the court erred in failing to recognize claims brought within the statue of limitations are not time barred and may be added through an amended complaint. And finally, that the relates back and continuing violation doctrine allow certain other claims to be cognizable here.

II. SCOPE OF REVIEW

The Appellate Court reviews de novo a trial court's decision to dismiss a complaint for failure to state a claim. *Teamsters Local 97 v. State*, 434 N.J. Super.

393, 413, 84 A.3d 989 (App. Div. 2014). The Appellate Court owes no deference to the trial court's conclusions of law. *Rezem Fam. Assocs. L.P. v. Borough of Millstone*, 423 N.J. Super. 103, 114, 30 A.3d 1061 (App. Div. 2011). The decision of the Appellate Court is governed by the same standards as applied by the trial court. *Donato v. Moldow*, 374 N.J. Super. 475, 483, 865 A.2d 711 (App. Div. 2005). McVey v. AtlantiCare Medical System Inc., 472 N.J. Super. 278, 285-286 (2022).

III. PROCEDURAL HISTORY

This is an appeal results from an order denying a Motion for Reconsideration of orders dismissing this case without prejudice for supposed failure to prosecute under Rule 1:13-7 and denying a Motion to Amend Complaint. This Procedural History attempts to capture the entirety of this lengthy process.

A. *The Original Lawsuit*

(Raised Below: 1a)

Plaintiff Dawn Shyner was a Lieutenant with the New Jersey State Police. She alleged in a complaint filed on November 16, 2016 that she was discriminated against and retaliated against under New Jersey Law Against Discrimination, N.J.S.A. 10:5-12 et. seq. ("NJLAD") and Conscientious Employee Protection Act, N.J.S.A.34:19-1 et. seq. ("CEPA") as a result of protests she made about the

discriminatory hiring practices of the State Police. Among other things, Shyner complained that the State Police were lying to the National Association for the Advancement of Colored People ("NAACP") about hiring practices within the State Police. The Complaint alleges a hostile work environment based on retaliatory disciplinary charges as well as claims for failure to promote. That Complaint was filed at Docket Number MER L 002294-16. ("Original Lawsuit"). [1a].

B. *The Stay of the Original Lawsuit and the institution of the New Lawsuit*

(Raised Below: 122a; 175a)

At the time the original complaint was filed, Plaintiff Shyner was facing major disciplinary charges related to her complaints about discrimination. On February 16, 2018, by motion initiated by Defendants, the Original Lawsuit was stayed pending the adjudication of related disciplinary hearings against Plaintiff held by the Office of Administrative Law. [16a]. In or around April 2021, those disciplinary procedures concluded and this firm was ultimately retained to represent Plaintiff. While the Original Lawsuit remained stayed, Plaintiff requested and received a case management conference with Judge Anthony M. Massi. At the case management conference, held on April 20, 2021 Judge Massi, did not lift the stay. Instead, Judge Massi determined that Plaintiff should re-file the matter as a new case, creating a new docket, so that this matter may proceed with discovery. There was a second case management conference before Judge Massi on November 18, 2021.

Following this case management conference, on November 24, 2021, counsel for Plaintiff and Defendants proposed an updated Complaint and consented to filing of the original lawsuit as a new matter with deadlines tolled as to the original filing. On January 5, 2021, defense counsel advised Plaintiff's counsel that they would not consent to filing a proposed Amended Complaint, but would consent to dismissal of the existing Complaint without prejudice and to re-filing the Complaint of the original matter to restart the discovery clock with the understanding they would not pursue a statute of limitations defense on all the original claims pled. (346a-347a)

C. *The New Lawsuit is Filed and a Motion to Amend the Complaint Follows.*

(Raised Below: 62a; 64a)

At the trial court's direction and with the agreement of Defendant, Plaintiff re-filed the original complaint in a new docket - Civil Action No. MER-L-0951-22 docket ("the New Lawsuit") on May 27, 2022.[1]

[1]Ultimately, the parties then consented to dismissal of the Original Lawsuit without prejudice and with a waiver of any statute of limitation defense. A stipulation dismissing the Original Lawsuit without prejudice and, including an agreement that the Defense would not pursue a statute of limitations defense as to the original claims as pled and as to the original defendants' names, was filed on January 3, 2023. [261a]. There was no consent to amendments to original complaint.

Before any discovery had been conducted, on June 8, 2022 Plaintiff filed a Motion to File an Amended Complaint in the New Lawsuit. The proposed amended complaint made two types of changes. First, it added some language to clarify facts from the original complaint. Second, it added facts related to events that occurred between the original filing date of November 16, 2016 and the proposed amendment date of June 8, 2022. All of the new facts alleged that additional acts of retaliation occurred because of the original complaint about discrimination made by Plaintiff. Some of the new factual allegations fell inside and outside of two years of the New Lawsuit.

Regarding clarification of facts, the Amended Complaint added (amended language is in bold):

3. Prior to 2015, Plaintiff had never been subjected to any substantial discipline or accused of any significant wrongdoing. Plaintiff consistently received exemplary performance evaluations.

26. As a result of the influence of the Defendants Wood and Wondrack, the Plaintiff was subjected to an internal investigation that exceeded the time limits for a New Jersey State Police investigation and was deliberately stalled so as to remove the Plaintiff from the promotional system within the State

Police. ***False allegations were added by Defendant Wondrack to prevent Plaintiff from being eligible for promotion.***

27. On or about October 5, 2014, Plaintiff called 9-1-1 to have her husband removed from the marital residence in connection with a temporary custody order.

28. No one was arrested, no criminal charges were ever filed, and no domestic violence temporary restraining order was ever sought or issued as a result of this incident.

29. Plaintiff immediately reported the incident to her supervisor, Captain Glenn Darden.

30. As a result, the Plaintiff was forced to surrender her weapon and was required to turn in her State Police assigned car.

31. During that encounter, Captain Glenn Darden advised Plaintiff that he did not believe the incident would reach the level of a domestic violence investigation.

32. Plaintiff reasonably did not believe that the incident would be investigated as a domestic violence investigation.

33. Plaintiff **was forced to sign SP-908 form indicating that she understood that her authority to enforce the laws of the State of New Jersey and of the United States was suspended.**

34. Plaintiff surrendered her issued firearm and was directed to relinquish her assigned unmarked Troop car the following day.

35. On or about October 21, 2014, the keys to her State Police assigned motor vehicle were returned to her by Lieutenant Pentti Forsman who was the Section Administrative Officer. ***Forsman later lied to investigators about returning to Plaintiff the keys to her assigned Troop car.***

The proposed Amended Complaint [271a-284a] also added allegations for events that occurred between the time the original complaint was filed (November 16, 2016) and the time of the proposed Amended Complaint (June 6, 2022), (additional allegations language is in bold):

67. At that time that Plaintiff scored in the top tier, a woman had not been promoted to an executive leadership position within Internal Affairs in over a decade.

68. In November 2016, Lt. Lori Andrews initiated an internal investigation against Plaintiff because Plaintiff had allegedly shared a picture of her supervisor with coworkers. Plaintiff supervised Andrews and had verbally reprimanded Andrews because her personal affair with Lt. Joseph Weeast was interfering with her job performance.

69. This investigation was initiated in order to retaliate against Plaintiff and to prevent Plaintiff from being promoted.

70. In or around December 2016, Plaintiff was subjected to a retaliatory transfer. Defendant Ebner transferred Plaintiff. Ebner continued to retaliate against and harass Plaintiff through 2020.

71. The picture in question, which depicted Plaintiff's supervisor posing with a dolphin, had been publicly shared by Plaintiff's supervisor on his social media.

72. In September 2017, Plaintiff contacted the State Police's Equal Employment Opportunity ("EEO") office to report ongoing discriminatory and retaliatory actions.

73. Plaintiff reported to EEO that the discrimination and retaliation was perpetrated by, in part, Captain Colon.

74. On October 4, 2017, Plaintiff gave a statement to EEO regarding the discrimination and/or retaliation perpetrated by Captain Colon.

75. On October 27, 2017, Captain Colon was promoted to Major.

76. On November 21, 2017, Plaintiff signed her statement to EEO naming then-Captain Colon as an individual who had discriminated and/or retaliated against her.

77. In November 2017, Plaintiff was subjected to a written reprimand for sharing the publicly-available dolphin picture.

78. This written reprimand was imposed on Plaintiff in order to retaliate against her.

79. In January 2018, Plaintiff learned that she was the subject of an internal investigation. Plaintiff would later learn that the internal investigation was based on a complaint made by Major Colon.

80. The State Police conducted an improper and highly irregular investigation into Major Colon's complaint. Among other things, Major Colon was interviewed last, even though the complainant is always interviewed first in such investigations.

81. On May 17, 2021, Captain Sal Ingui was the Hearing Officer for this investigation. During the hearing, Lt. Jon Bentivegna gave testimony that Defendant Santiago directed the investigation and approved all of the added allegations against Plaintiff. In his decision, Captain Ingui indicated that questionable practices by the investigator were evident.

82. In June of 2018, Plaintiff was disciplined as a result of Major Colon's complaint.

83. On December 10, 2018, the Office of Administrative Law (the "ALJ") dismissed all of the May 2016 disciplinary charges against Plaintiff.

84. In June 2019, Plaintiff was falsely informed that she was not allowed to sit on Candidate Review Boards or Promotional Boards.

85. In August 2020, Plaintiff spoke out about promotional opportunities denied to women and to racial minorities.

86. On September 1, 2020, the Appellate Division of the Superior Court of New Jersey upheld the majority of the decision of the ALJ, upholding only a minor disciplinary charge relating to Plaintiff's attempt to protect the medical privacy of her coworkers. Defendant Callahan imposed an arbitrary and unnecessary suspension. Plaintiff's superiors respectfully asked Defendant Callahan to allow Plaintiff to serve the suspension after the holidays. Defendant Callahan denied the request.

87. On September 4, 2020, Plaintiff attended the New Jersey State Police graduation ceremony.

88. On September 9, 2020, a misconduct investigation was initiated by Defendant Ebner against Plaintiff for attending the ceremony and for Plaintiff's attire at the ceremony. When interviewed and after reading Defendant Ebner's complaint, Plaintiff advised investigators that Defendant Ebner's behavior was disturbing, bizarre and harassing. The results of the investigation were "unfounded".

89. In or around October 2020, Plaintiff put in for a promotion.

90. Plaintiff was later denied this promotion due to the discipline against her.

91. In 2021, Plaintiff scored in the top tier of three additional Captain's positions. Plaintiff was told by Major Dan Engelhardt that she would not be considered for promotion because of her discipline history.

92. In or around 2022, Plaintiff retired from her employment.

On December 10, 2022, while the Plaintiff's Motion to File an Amended Complaint was pending, this New Lawsuit was administratively dismissed without prejudice for lack of prosecution pursuant to Rule 1:13-7.[2] [352a]. See also [305a] ("Case status: closed")

In an August 31, 2023 order, the trial court denied Plaintiff's Motion to File an Amended Complaint. The court reasoned that: "1. the continuing violations doctrine is not applicable to Plaintiff's CEPA claim and Plaintiff did not claim a Hostile work environment under NJLAD" and that "2. Equitable tolling is not appropriate." [329a-330a].

On August 28, 2024 Plaintiff filed a Motion to Reinstate Case and for Reconsideration. [263a],[3] Among other things, Plaintiff argued that the trial court

[2] The administrative dismissal was ordered on December 10, 2022 during the time the trial court was pondering the Plaintiff's Motion to File an Amended Complaint. The Motion to File an Amended Complaint and Opposition was fully briefed by July 13, 2022. The court did not decide the Motion until August 31,2023.
[3] This Motion was delayed due to a maternity leave.

ignored the claims brought within the statute of limitations and that even without judicial doctrines, Plaintiff's proposed amended complaint timely filed new causes of action against defendants within the statute of limitations. [271a]. The court held there were no exceptional circumstances for a reconsideration. The court did not find that its reasoning was in error and that the delay prejudices the Defendants in the case. [286a]. The trial court also refused to reinstate the original or new lawsuit to the active docket.

This appeal followed.

IV. FACTS

Because this matter was dismissed before discovery was taken, the facts applicable to this matter are the Complaint and Proposed Amended Complaint, which are described in the Procedural History above and incorporated herein.

V. ARGUMENT

A. THE COURT ERRED IN FAILING TO REINSTATE THE ORIGINAL COMPLAINT IN THE NEW LAWSUIT.

(Raised Below: 234a)

As an initial matter, Appellant appears to be out of court at this time because the new lawsuit (Civil Action No. MER-L- 0951-22) was dismissed without prejudice for failure to prosecute while the court considered the Motion to Amend

the Complaint. And then, the trial court refused to reinstate the new lawsuit with the original complaint upon reconsideration.[4]

A plaintiff may seek reinstatement of a complaint by consent order or motion. A reinstatement motion may be filed after the plaintiff has served the complaint. *R.* 1:13-7(a) ("If the defendant has been properly served but declines to execute a consent order, plaintiff shall move on good cause shown for vacation of the dismissal.") (emphasis added). A motion judge will "ordinarily routinely and freely grant [reinstatement] when plaintiff has cured the problem that led to the dismissal even if the application is made many months later." *Ghandi*, 390 N.J. Super. at 196 (quoting *Rivera v. Atl. Coast Rehab. & Health Care Ctr.*, 321 N.J. Super. 340, 346 (App. Div. 1999)).

The original Complaint in this matter was filed in the New Lawsuit on May 27, 2022. Plaintiff then filed a Motion to Amend the Complaint on June 6, 2022 in the New Lawsuit. The Motion papers related to the proposed Amended Complaint were fully briefed by July 13, 2022. However, the trial court took over a year to issue an opinion regarding the Motion to Amend the Complaint. During the year, while the trial court considered the Motion, on December 10, 2022, this New Lawsuit was

[4] While at the same time, with direction from the court, the original lawsuit was dismissed by stipulation without prejudice and, including an agreement that the Defense would not pursue a statute of limitations defense as to the original claims as pled and as to the original defendants' names on January 3, 2023. [261-2a].

dismissed without prejudice for failing to prosecute pursuant to Rule 1:13-7. That dismissal was not the fault of Appellant in this matter, and was the result of the delay in disposition of the outstanding Motion. Appellant in this matter should not be penalized for the court's delay. Moreover, the "lack of prosecution" did not happen. The matter was pending with a Motion at the time it was administratively dismissed. Accordingly, the trial court has erred in failing to allow this case to go forward via the original Complaint in the New Lawsuit. *See*, *Giannakopoulos v. Md State Mall*, 438 N.J. Super. 595, 609 (App. Div. 2014) ("absent a finding of fault by the plaintiff and prejudice to the defendant, a motion to restore under the rule should be viewed with great liberality." quoting *Ghandi v. Cespedes*, 390 N.J. Super. 193, 197 (App. Div. 2007)).

Appellate seeks an order from this Honorable Court reinstating the Complaint in the New Lawsuit- Civil Action No. MER-L- 0951-22.

B. PLAINTIFF'S MOTION TO AMEND THE COMPLAINT WAS ERRONEOUSLY DENIED.

(Raised Below: 229a)

Plaintiff's proposed Amended Complaint may be broken into three types of factual amendments from the original complaint. Those are:

1. amendments about events that occurred between May 16, 2016 and May 27, 2020 (the date the original complaint was filed and the time before the New Lawsuit Complaint was re- filed); and
2. amendments about events that occurred between May 27, 2020 and May 27, 2022 (the two years before the New Lawsuit Complaint was filed) and
3. amendments that modify or add to facts about events that occurred before May 16, 2016.[5]

The trial court did not distinguish these three types of amendment in either of its opinions. The trial court found no legal distinction between factual allegations within the two-year, May 27, 2020 –2022 timeframe or outside of that timeframe. It is submitted that the matters within the statute of limitations should be analyzed differently than those outside of the typical statute of limitations.

The following will separately address why it was error to deny the proposed Amended Complaint's allegations within the statute of limitations and those outside of it. And, in so doing, show the proper and separate analysis required.

A. It was error to deny Plaintiff the opportunity to amend the complaint to include facts and claims that happened within two years of the proposed Amended Complaint.
(Raised below 229a)

[5] It is submitted that amendments to additional facts/ clarification of facts about events that occurred before November 16, 2016 do not appear to be in dispute at this time and should be allowed on remand.

On May 27, 2022, Plaintiff filed her the complaint from her Original Lawsuit in a new docket- MER-L- 0951-22 ("the New Lawsuit"). Plaintiff then filed her Motion to Amend Complaint on June 8, 20222 in the New Lawsuit. The bulk of the changes from the original complaint proposed in Amended Complaint allege that between May 27, 2020 and May 27, 2022, Plaintiff was charged with additional bogus disciplinary charges and denied two more promotions in retaliation for her speech about discriminatory practices in the State Police in violation of the NJLAD and CEPA. See, Proposed Amended Complaint at ¶ 85-92 [79a-80a]. NJLAD has a 2-year statute of limitations. N.J.S.A. 2A:14-2(a). Thus, any alleged NJLAD violation that occurred between May 27, 2020 and May 27, 2022 should be actionable under law. The trial court held otherwise.

The trial court erred in failing to recognize that the proposed Amended Complaint alleged violations within the time statute of limitations period of May 27, 2020 and May 27, 2022. Instead, the trial court found that the Amended Complaint was required to be filed by November of 2021- within seven months of the February 16, 2018 stay issued in the Original Lawsuit. The court held that the allegations of retaliation that occurred between August 2020 and 2022 were barred because the continuing violation doctrine did not apply. The trial court states in its August 31, 2023 opinion: "Plaintiff would have had seven months (until November

of 2021) to file a LAD claim based on retaliatory transfer but failed to do so."[290a].

In so holding, the trial court confuses the continuing violation doctrine with direct claims within the statute of limitations. [6] Plaintiff's claims of NJLAD retaliation that occurred within two years of the proposed Amended Complaint did not need the continuing violation doctrine to be actionable because they were filed within the two-year statute of limitations. The trial court erred by depriving Appellant of her right to file a claim within two years under NJLAD.

The trial court then denied the Plaintiff's Motion for Reconsideration and stated again:

> "Moreover, in contemplating the interests of justice, the delay also prejudices the defendants in this case. There was a time when some claims could have been made timely, and then even with that, there was approximately a seven-month period where some claims could have still been served in the statue (sic)of limitations but that time lapsed. There has to be, statute of limitations, it's a substantive bar. The Court had previously found

[6] In *Wilson v. Wal-Mart Stores,* the New Jersey Supreme Court recognized the continuing violation doctrine in a LAD case. 158 N.J. 263, 272-74, 729 A.2d 1006 (1999). We observed that "a significant number of courts recognize that the cumulative effect of a series of discriminatory or harassing events represents a single cause of action[.]" *Id.* at 273, 729 A.2d 1006. The Court stated as a general rule that "[w]hen an individual is subject to a continual, cumulative pattern of tortious conduct, the statute of limitations does not begin to run until the wrongful action ceases." *Id.* at 272, 729 A.2d 1006; *see also Ali v. Rutgers*, 166 N.J. 280, 286, 765 A.2d 714 (2000) (reaffirming "existing jurisprudence" as articulated in *Wilson*). The continuing violation doctrine is not necessary for claims within the statute of limitations.

> that the allegations do not qualify for a continuing violation period. The Court reiterates its findings and rulings in that regard. So in the meantime, the Court finds that there would be prejudice to defendants by this exceedingly long period and especially since the Court is not convinced that the continuing violation theory applies." [349a-350a]

It is well-settled that requests to amend pleadings "should be freely granted in the interest of justice." Marinelli v. Mitts & Merrill, 303 N.J. Super. 61, 63 (App. Div. 1997). "*Rule* 4:9-1 requires that motions for leave to amend be granted liberally." Kernan v. One Wash. Park Urban Renewal Assocs., 154 N.J. 437, 456 (1998). Motions for leave to amend "should generally be granted even if the ultimate merits of the amendment are uncertain." *G & W, Inc. v. Borough of E. Rutherford*, 280 N.J. Super. 507, 516 (App. Div. 1995); *see also* Interchange State Bank v. Rinaldi, 303 N.J. Super. 239, 256 (App. Div. 1997) (motions for leave to amend should be liberally granted without consideration of the ultimate merits of the amendment). The "broad power of amendment should be liberally exercised at any stage of the proceedings, including on remand after appeal, unless undue prejudice would result or unless the amendment would be futile." Pressler & Verniero, Current N.J. Court Rules, cmt. 2.1 on *R.* 4:9-1 (2022).

The New Jersey Law Against Discrimination ("NJLAD") has a 2-year statute of limitations. N.J.S.A. 2A:14-2(a). The following was pled in the proposed Amended Complaint within two years of the filing:

85. In August 2020, Plaintiff spoke out about promotional opportunities denied to women and to racial minorities.

86. On September 1, 2020, the Appellate Division of the Superior Court of New Jersey upheld the majority of the decision of the ALJ, upholding only a minor disciplinary charge relating to Plaintiff's attempt to protect the medical privacy of her coworkers. Defendant Callahan imposed an arbitrary and unnecessary suspension. Plaintiff's superiors respectfully asked Defendant Callahan to allow Plaintiff to serve the suspension after the holidays. Defendant Callahan denied the request.

87. On September 4, 2020, Plaintiff attended the New Jersey State Police graduation ceremony.

88. On September 9, 2020, a misconduct investigation was initiated by Defendant Ebner against Plaintiff for attending the ceremony and for Plaintiff's attire at the ceremony. When interviewed and after reading Defendant Ebner's complaint, Plaintiff advised investigators that Defendant Ebner's behavior was disturbing, bizarre and harassing. The results of the investigation were "unfounded".

89. In or around October 2020, Plaintiff put in for a promotion.

90. Plaintiff was later denied this promotion due to the discipline against her.

91. In 2021, Plaintiff scored in the top tier of three additional Captain's positions. Plaintiff was told by Major Dan Engelhardt that she would not be considered for promotion because of her discipline history.

92.In or around 2022, Plaintiff retired from her employment.

All of these allegations squarely fit within two years of the filing of the proposed Amended Complaint and are therefore actionable. The trial court's opinion of August 31, 2023 does not address whether these claims are within the statute of limitations. Nor does its reconsideration opinion of November 18, 2024. It was plain error to deny the Motion to Amend and it was further error fail to reconsider this error.

> *B. The trial court erred in denying Plaintiff's Motion to Amend Complaint regarding matters outside of the two-year statute of limitations because such a ruling was premature without discovery, and these claim relate back to those allegations outside of two years.*
> (Raised Below: 64a)

Plaintiff's proposed Amended Complaint at ¶ 68-84 added facts that occurred between November of 2016 and May of 2022 that fall outside of the standard two-year statute of limitations. In summary, these facts allege that the Defendant State Police continued to retaliate against her, after her original complaint was filed, by charging her with false disciplinary infractions, retaliatory transfers, refusing to place her on committees and failing to promote her. It is alleged that these new retaliatory acts were ongoing since her original protected speech in 2015. Specifically, these allegations are:

68. In November 2016, Lt. Lori Andrews initiated an internal investigation against Plaintiff because Plaintiff had allegedly shared

a picture of her supervisor with coworkers. Plaintiff supervised Andrews and had verbally reprimanded Andrews because her personal affair with Lt. Joseph Weeast was interfering with her job performance.

69. This investigation was initiated in order to retaliate against Plaintiff and to prevent Plaintiff from being promoted.

70. In or around December 2016, Plaintiff was subjected to a retaliatory transfer. Defendant Ebner transferred Plaintiff. Ebner continued to retaliate against and harass Plaintiff through 2020.

71. The picture in question, which depicted Plaintiff's supervisor posing with a dolphin, had been publicly shared by Plaintiff's supervisor on his social media.

72. In September 2017, Plaintiff contacted the State Police's Equal Employment Opportunity ("EEO") office to report ongoing discriminatory and retaliatory actions.

73. Plaintiff reported to EEO that the discrimination and retaliation was perpetrated by, in part, Captain Colon.

74. On October 4, 2017, Plaintiff gave a statement to EEO regarding the discrimination and/or retaliation perpetrated by Captain Colon.

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80. The State Police conducted an improper and highly irregular investigation into Major Colon's complaint. Among other things, Major Colon was interviewed last, even though the complainant is always interviewed first in such investigations.

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82. In June of 2018, Plaintiff was disciplined as a result of Major Colon's complaint.

83. On December 10, 2018, the Office of Administrative Law (the "ALJ") dismissed all of the May 2016 disciplinary charges against Plaintiff.

84. In June 2019, Plaintiff was falsely informed that she was not allowed to sit on Candidate Review Boards or Promotional Boards.

Counts I and II were amended to include:

COUNT I

4. Besides the deprivation of promotion, Plaintiff has been subjected to multiple additional retaliatory acts as described in the foregoing paragraphs.

5. This retaliation is ongoing.

COUNT II

3. As described in the foregoing paragraphs, Defendants have been subjecting Plaintiff to retaliation since at least 2015.

4. This retaliation is ongoing.

1. The trial court erred by failing to accept the facts alleged in the proposed Amended Complaint as true and applied an erroneous strict standard rather than a liberal one.

For the purposes of a motion to amend and motion for reconsideration, the trial court was required to assume the allegations of the proposed Amended Complaint as true. "At this preliminary stage of litigation, the [c]ourt is not concerned with the ability of [Plaintiff] to prove the allegation[s] contained in the complaint." *Geyer v. Faella*, 279 N.J. Super. 386, 389 (App. Div. 1995) all allegations pled in the complaint here assumed true, and the Plaintiff is entitled to "all reasonable factual inferences that those allegations support." *F.G. v. MacDonell,* 150 N.J. 550, 556 (1997). "A generous reading of the allegations merely suggest a cause of action the complaint will withstand the motion. *Ibid*.

The trial court failed to recognize that ¶72-76, 79-82 (discrimination and retaliation complaints that occurred within 2 years of the filing of the amended complaint) were parts of an ongoing discrimination and retaliatory process, all stemming from her initial protected activity as described in the initial 2016 complaint. A reasonable and liberal reading of the complaint would tie all of the discrimination and retaliation to Plaintiff's engagement of protected activity as alleged in the original complaint.

Plaintiff argued below that these allegations were permitted under the continuing violation doctrine as a continuation of the retaliation that began with the Original Lawsuit and continued during the stay. Alternatively, Plaintiff argued that these allegations were subject to equitable tolling.

The trial court disagreed and found that the continuing violation doctrine was inapplicable because "[p]laintiff is not able to connect her alleged retaliatory transfer to the no-time barred period- a single action in November 2017 is not sufficient." August 31, 2023 opinion at page 4 [330a]. From a purely factual perspective alone, the trial court is wrong because the proposed Amended Complaint at Counts I and II ¶ 3-4 respectively, do allege that the retaliatory transfer, among other things was "ongoing retaliation" since 2015 [80a]. Thus, under the proper, liberal standard to be applied to motions to amend, the trial court erred in failing to treat the alleged facts in the complaint as truth.

2. *The trial court erred in finding that the relates back and continuing violation doctrine are inapplicable at this initial pleading stage.*

New Jersey courts have long granted leave to amend the complaint without consideration of the ultimate merits of the amendment. City Check Cashing v. National State Bank, 244 N.J. Super. 304, 308-309 (App. Div. 1990).

> [W]hile motions for leave to amend are to be determined "without consideration of the ultimate merits of the amendment," *Interchange State Bank v. Rinaldi*, 303 N.J. Super. 239, 256, 696 A.2d 744 (App.Div.1997) (citing *City Check Cashing v. Nat'l State Bank*, 244 N.J. Super. 304, 308-09, 582 A.2d 809 (App.Div.), *certif. denied,* 122 N.J. 389, 585 A.2d 391 (1990)), those determinations must be made "in light of the factual situation existing at the time each motion is made." *Ibid.* (citing *Fisher v. Yeats*, 270 N.J. Super. 458, 467, 637 A.2d 546 (App.Div.1994)).

Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 501-502 (2006).

Moreover, the allegation that the statute of limitations has run is far from dispositive in this matter. “[Defendants] argue, however, that Patano’s original complaint against them was time-barred when filed and, therefore, a nullity. Thus [Defendants] reason, there simply is nothing to which {Planitiff}’s new claims can "relate back." We disagree.” *Id.* at 500.

> Statutes of limitations, unlike statutes of repose, *see Greczyn v. Colgate-Palmolive*, 183 N.J. 5, 869 A.2d 866 (2005), "are not self-executing. Such statutes are based on the goals of achieving security and stability in human affairs and ensuring that cases are not tried on the basis of stale evidence." *Zaccardi v. Becker*, 88 N.J. 245, 256, 440 A.2d 1329 (1982). For those reasons, the defense that a claim is time-barred must be raised by way of an affirmative defense, either in a pleading or by a timely motion, or it is waived. *Id.* at 256-57, 440 A.2d 1329; *Fees v. Trow*, 105 N.J. 330, 335, 521 A.2d 824 (1987). Therefore, until adjudicated time-barred, a stale claim filed after the expiration of the applicable statute of limitations is nonetheless valid. In those circumstances, then, the fact that [Plaintiff]'s original claims against [Defendants] were filed after the expiration of the applicable statute of limitations is of no legal significance. Stated differently, "[b]ecause there was notice of plaintiff's action, our holding does not offend

> the policy underlying the statute of limitations, and 'accomplish[es], consistent with the general aim and policy of [the Court Rules] . . . substantial justice on the merits by permitting a technical . . . flaw to be corrected where such correction will not materially prejudice another party." *Kernan v. One Washington Park Urban Renewal Assocs.*, 154 N.J. 437, 459, 713 A.2d 411 (1998) (citations omitted) *Zuidema v. Pedicano*, 373 N.J. Super. 135, 149-50, 860 A.2d 992 (App.Div.2004).

Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 500 (2006).

Notte is directly on point with the instant matter. In Notte, the plaintiff filed an NJLAD and CEPA claim against Defendant almost 21 months after her alleged constructive discharge. Six weeks after discovery ended, Defendants filed a partial motion for summary judgment on the CEPA claims, correctly arguing that they were time-barred. In response, Plaintiff filed a motion for leave to file an amended complaint. The motion sought leave to replead the time-barred CEPA claims as common law wrongful discharge and LAD claims for retaliation. Plaintiff argued that the time-barred causes of action "relate back" to the original cause of action pled under Rule 4:9-3 and Wimmer v. Coombs, 198 N.J. Super. 184, 187 (App. Div. 1985). The trial court denied the motion to amend. The appellate division reversed based on *Harr v. All State Ins. Co.*, 54 N.J. 287, 255 (1969):

> "In its substance, *Rule* 4:9-3 is clear: "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading[.]" Its application is similarly clear:
>
> The rule should be liberally construed. Its thrust is directed not toward technical pleading niceties, but rather to the underlying conduct, transaction

> or occurrence giving rise to some right of action or defense. When a period of limitation has expired, it is only a distinctly new or different claim or defense that is barred. Where the amendment constitutes the same matter more fully or differently laid, or the gist of the action or the basic subject of the controversy remains the same, it should be readily allowed and the doctrine of relation back applied. It should make no difference whether the original pleading sounded in tort, contract or equity, or whether the proposed amendment related to the original or a different basis of action.

Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 499 (2006), quoting, Harr v. Allstate Ins. Co., 54 N.J. 287, 299-300, 255 A.2d 208 (1969) (citations omitted).]

Accordingly, "the Defendants have no cause to complain of the late assertion against them for claims granted on the same conduct already alleged in the complaint. Notte 185 N.J. at 501.

The facts of this case are far more compelling for permitting the full amended complaint than those of Notte. Here, unlike in Notte, no discovery has been completed. Because there has been no discovery and the defense is on notice of the new allegations, there can be no prejudice to the defense in defending these claims. The defense will have ample time through discovery to refute or accept that the alleged retaliatory acts were ongoing. Then, if the allegations in the proposed Amended Complaint are wrong, the Defendant can file a Motion for Summary Judgment- where the issue of continuing violation and relates back can be fully heard with actual facts to support or defeat the motion.

In Notte, plaintiffs brought a CEPA claim after the statute of limitations expired. The Supreme Court allowed the plaintiff to amend to change the claim to one under NJLAD retaliation after discovery had been completed and a partial motion for summary judgment filed. The failure to timely file the CEPA claims and the delay until after discovery was completed was all the fault of the plaintiff in Notte. The Court held:

> Here, the new common law wrongful discharge and LAD claims asserted by [Plaintiff] against [Defendants] are based on the same facts [Plaintiff] alleged in support of his original CEPA claims against [Defendants]. Indeed, save for the charging paragraphs in the new common law wrongful discharge claims and the necessary addition of conclusory allegations in the new LAD claims, [Plaintiff]'s original complaint and his corrected amended complaint are identical. It is, therefore, clear that "the underlying conduct, transaction or occurrence" charged is the same in both pleadings and that "the gist of the action or the basic subject of the controversy remains the same." *Ibid.* As the Appellate Division here aptly noted, "[a] claim that presently labels such [already pled] conduct wrongful under both the common law and LAD is still the same matter 'differently laid.'" Under those circumstances, the conclusion that {Planitff]'s corrected amended complaint "relates back" to {Plaintiff}s original complaint is compelled."
>
> Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 499 (2006).

In the instant matter, Plaintiff brought timely CEPA and NJLAD retaliation claims in 2016. The matter was stayed through no fault of the Plaintiff for several years. Then, at the direction of the trial court, instead of lifting the stay, a new docket and case was begun using the same original complaint (waiving any statute

of limitation defense as the original claims). When the instant dispute over the Motion for Reinstatement and to Amend the Complaint was fully briefed, through no fault of the Plaintiff, the trial court took a year to decide the issue.

Similar to Notte, the proposed Amended Complaint here describes an ongoing retaliatory situation under CEPA and NJLAD. In contrast, while the Notte plaintiff failed to make any attempt to amend until after discovery, the Appellant here sought to amend the complaint before any discovery was ever conducted. It would be an injustice under these circumstances to not permit the Plaintiff's claims to relate back after the Appellate Division and Supreme Court allowed the Notte plaintiff's amended complaint to be revived.

VI. CONCLUSION

First, the trial court erred by not re-opening the administrative dismissal. Then the trial court failed to consider the proposed Amended Complaint in a light most favorable to Plaintiff. The trial court also ignored Plaintiff's claims in the Amended Complaint that fell within the statute of limitations and failed to appreciate that those outside the statute of limitations related back and were also a continuing violation.

For the foregoing reasons, this Honorable Court should reverse the trial court's orders denying Plaintiff's Motion to Reinstate and Amend the Complaint and denying Plaintiff's Motion for Reconsideration.

Respectfully submitted,

/s/ Gregg L. Zeff
Gregg L. Zeff, Esq.

Dated: March 19, 2025

LIEUTENANT DAWN SHYNER, Plaintiff-Appellant, v. STATE OF NEW JERSEY, THE OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, COLONEL RICK FUENTES, MAJOR MARK WONDRACK (ret.), MAJOR ANTHONY CERAVOLO, CAPTAIN JAMES RYAN, LIEUTENANT ANTHONY GUIDI, MARY BETH WOOK, DEPUTY ATTORNEY GENERAL – CHIEF LEGAL COUNSEL TO THE NEW JERSEY STATE POLICE and JOHN DOES 1-5, Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-000977-24 **Civil Action** ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, MERCER COUNTY Docket No. MER-L-000951-22 Sat below: Honorable R. Brian McLaughlin, J.S.C. Date Submitted: May 30, 2025

BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF JUDGMENTS, ORDERS AND RULINGS

TABLE OF AUTHORITIES

Page

Cases

Statutes and Regulations

Rules

PRELIMINARY STATEMENT

Respondents-Defendants State of New Jersey, the Office of the Attorney General of the State of New Jersey, Colonel Rick Fuentes (Ret.), Major Mark Wondrack (Ret.), Major Anthony Ceravolo (Ret.), Captain James Ryan (Ret.), Lieutenant Anthony Guidi, Mary Beth Wood, Deputy Attorney General – Chief Legal Counsel to the New Jersey State Police ("NJSP") (collectively, "Defendants") submit this brief in opposition to Appellant-Plaintiff, Lt. Dawn Shyner's appeal from the trial court's November 18, 2024 Order that: 1) denied her motion to reinstate her case that was previously dismissed for the failure to prosecute; and 2) denied her motion for reconsideration of the court's August 31, 2023 Order denying Plaintiff's Motion for Leave to File an Amended Complaint. As set forth more fully below, the trial court's November 18, 2024 Order should be affirmed, and this matter should remain dismissed.

To start, the trial court acted well within its discretion to deny Plaintiff's Motion to Reinstate. Plaintiff has neither established exceptional circumstances nor good cause to justify reinstatement. Indeed, there is no justification for Plaintiff's more than 12-month delay in failing to take any action to prosecute this matter. It would also be highly prejudicial to Defendants to litigate employment claims subject to one- and two-year statutes of limitations that are now almost a decade old. Since the trial court correctly denied Plaintiff's motion

for reinstatement and did not otherwise abuse its discretion in doing so, this matter should remain dismissed. As such, this Court need not consider whether reconsideration was properly denied.

Nevertheless, to the extent that this Honorable Court is reviewing denial of reconsideration, the trial court correctly exercised its discretion denying Plaintiff's Motion for Reconsideration of the August 31, 2023 Order, which had been entered more than a year earlier, denying Plaintiff's Motion for Leave to File an Amended Complaint. The trial court's decision should not be disturbed. The proposed Amended Complaint included numerous events and claims that were either time-barred or were insufficiently plead to meet the elements of either a New Jersey Law Against Discrimination ("LAD") or a Conscientious Employee Protection Act ("CEPA") claim. The interests of justice did not warrant reconsideration. The trial court acted well within its discretion in denying same.

Plaintiff argues, in conclusory fashion, that all the changes in the proposed Amended Complaint are directly related to her original 2016 Complaint and are updated facts of continued retaliation against Plaintiff. However, this is incorrect. Rather, the proposed Amended Complaint submitted in 2022 contains numerous additional alleged discrete acts that, on their face, are plainly

unrelated to the original 2016 Complaint and would not survive a Motion to Dismiss for failure to state a claim and/or are based upon time-barred events.

The newly alleged different events relate to independent acts which are logically disconnected from the original discipline or do not involve the same group of alleged wrongdoers. Plaintiff's conclusory claim - that these new events are connected to those already pled - is a misguided and transparent attempt to salvage time barred claims. However, even if the additional allegations were not time barred, many of these allegations would still fail to survive a Motion to Dismiss. The proposed amendments were futile.

In sum, the trial court's November 18, 2024 Order correctly denied Plaintiff's Motion to Reinstate, and it also correctly denied Plaintiff's Motion for Reconsideration of the August 31, 2023 Order.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

A. Background; Plaintiff's Initial Lawsuit; and the Limited Stay Thereof

On November 16, 2016, Plaintiff filed a Complaint and Jury Demand in the matter entitled Lieutenant Dawn Shyner v. State of New Jersey, et. al, Docket

[1] Given the nature of the issues on this Appeal, for the purpose of clarity and for the convenience of the Court, Defendants have combined the Procedural History and Statement of Facts sections in this brief. Indeed, Plaintiff contends that this matter presents "on a purely procedure[al] record." (Pb1). Defendants agree.

No. Mer-L-2294-16, in the Mercer County Superior Court (the "Initial Lawsuit").[2] (Pa1-Pa9, Pa113). Defendants filed their Answer on March 13, 2017. (Pa118).

The two-count Complaint alleged that Plaintiff was unlawfully retaliated against, in violation of the LAD and CEPA, due to her complaints about the background investigation phase of the New Jersey State Police ("NJSP") recruit selection process. (Pa1-Pa9). According to the Complaint, Plaintiff worked in the NJSP's "Investigation Section" and was responsible for overseeing investigators who investigated the backgrounds of applicants who were to enter the Police Academy. (Pa1-Pa2). The NJSP had entered into an agreement with the NAACP to encourage minority recruiting. (Pa2). Plaintiff allegedly complained to higher ranking officials about the NJSP's alleged lack of compliance with the agreement and/or manipulation of the applicant process to look as if the NJSP was complying, which resulted in her being retaliated against. (Pa2-Pa5).

In the original Complaint, Plaintiff's claim of retaliation for her complaints rested in part on an internal investigation of Plaintiff. That internal

[2] Da = Defendants/Respondents' appendix
Pa = Plaintiff/Appellant appendix
Pb = Plaintiff/Appellant's Brief
1T = Transcript from November 18, 2024 Motion Hearing

investigation stemmed in turn from Plaintiff's surrender of her service weapon and State Police assigned car after an October 2014 domestic dispute between Plaintiff and her husband that resulted in a 911 call. (Pa4). Plaintiff alleges that the subsequent 2015 internal investigation was deliberately mismanaged in an effort to avoid promoting her. (Pa4-Pa7).

As set forth in the original Complaint, on May 10, 2016, after the internal investigation was concluded, a disciplinary hearing was held based on the findings of that investigation, and Plaintiff was charged with three disciplinary offenses that included violations of NJSP Standard Operating Procedures ("SOP") (using a NJSP vehicle after relinquishing her service weapon) and lack of candor. (Pa7). Plaintiff was offered a 45 days' suspension without pay, but she refused. (Pa7). On May 16, 2016, Plaintiff filed an Office of Administrative Law ("OAL") appeal challenging the disciplinary charges. (Pa113).

The OAL hearing to review the 2016 charges was subsequently scheduled for March 7-8, 2018, which was for while the Initial Lawsuit was pending and was approximately one and a half months before the end of discovery in the Initial Lawsuit. (Pa113, Pa126). On January 31, 2018, Defendants filed a motion to stay the Initial Lawsuit pending final adjudication of Plaintiff's discipline by the OAL. (Pa45-Pa59, Pa113, Pa119). At that time, Plaintiff's retaliation claims were based on the same subject matter of the OAL hearing and discovery

remained in its early stages. (Pa49-Pa50). Plaintiff had not propounded discovery demands on defendants. Plaintiff had also not responded to defendants' discovery demands. (Pa113). The motion to stay the Initial Lawsuit was unopposed. (Pa122-124).

On February 16, 2018, the Court granted Defendants' Motion. (Pa122-124). The Order indicated that the Initial Lawsuit was "stayed pending final adjudication of the OAL hearing," and that after final adjudication of the OAL Hearing, "the Civil Action before this Court shall resume by way of a Case Management Conference to be scheduled by this Court." (Pa123). The limited stay thus only applied to the claims asserted in the Initial Lawsuit, rather than subsequent and separate discrete acts of alleged retaliation. (Pa123).

On December 10, 2018, Administrative Law Judge Kathleen Calemmo issued an Initial Agency Decision recommending that the three disciplinary charges against Plaintiff be dismissed. The NJSP thereafter filed exceptions to the Initial Agency Decision. (Pa113-Pa114). On March 8, 2019, the NJSP Acting Superintendent issued a Final Agency Decision that modified ALJ Calemmo's finding regarding Charge #1, but determined that no penalty would be assessed regarding this charge. (Pa114, Pa126). However, the Acting Superintendent rejected ALJ Calemmo's finding that Charges #2 and #3 should be dismissed,

and he imposed a 40-day suspension for the two sustained disciplinary violations. (Pa114, Pa126).

Plaintiff subsequently appealed the NJSP Acting Superintendent's Final Agency Decision to the Superior Court, Appellate Division. (Pa114). In the Matter of Dawn Shyner, Lieutenant #5217, Docket No. A-3546-18T1, 2020 WL 5191664 (App. Div. Sept. 1, 2020).[3] On September 1, 2020, the Appellate Division reversed one of the two remaining disciplinary charges imposed by the Acting Superintendent and remanded the remaining disciplinary charge back to the Acting Superintendent to determine the appropriate penalty for the one remaining charge. (Pa114). See also In the Matter of Dawn Shyner, Lieutenant #5217, Docket No. A-3546-18T1, 2020 WL 5191664 (App. Div. Sept. 1, 2020).

On October 15, 2020, the NJSP Acting Superintendent filed a Final Agency Decision on Plaintiff's final disciplinary charge, imposing a 20-day suspension. (Pa131). Plaintiff did not appeal from the Final Agency Decision. (Pa114). The forty-five days for Plaintiff to appeal expired on or about December 1, 2020, and no appeal was filed. (Pa114). It is undeniable that the disciplinary proceedings concluded on October 15, 2020. (Pa114, Pa133).

[3] A copy of this unpublished opinion, which is being cited solely for procedural context, is included in Defendants' appendix in accordance with R. 1:36-3. (Da10).

Six months later, Plaintiff obtained new counsel who advised the court on April 16, 2021, that Plaintiff's disciplinary matter was "fully adjudicated" such that the matter could continue. (Pa114, Pa133). On April 20, 2021, counsel for the parties attended a Case Management Conference before the Hon. Anthony M. Massi, J.S.C., and the status and age of the litigation were discussed. (Pa114). By operation of the February 18, 2018 Stay Order's terms, the occurrence of the Case Management Conference automatically lifted the stay and resumed the matter. (Pa122-124).

On November 18, 2021, another Case Management Conference was held with Judge Massi. (Pa115). Following this second Case Management Conference, on November 24, 2021, Plaintiff's counsel sent Defendants' counsel a proposed "updated Complaint" and asked if defendants would consent to filing the "updated Complaint" as a "new matter with deadlines tolled as original filing." (Pa115, Pa139, Pa141).

On January 5, 2022, Defendants' counsel advised Plaintiff that Defendants would not consent to Plaintiff filing the proposed Complaint as Defendants desired to challenge the veracity of the claims. (Pa138-Pa139). However, counsel advised: Defendants "will consent to Plaintiff's dismissal of the existing Complaint, without prejudice, and will consent to Plaintiff refiling her original claims as pled and as to the original defendants to restart the

discovery clock, and with the understanding that we will not pursue a statute of limitations defense as to those original claims as pled and as to the original defendants." (Pa138-Pa139).

Over a month later, on February 28, 2022, Plaintiff wrote to the Court and requested a Case Management Conference. (Pa144). Five months after receiving Defendant's consent to refile the original complaint, on May 27, 2022, Plaintiff wrote to Defendant and confirmed she would be refiling "the original complaint as pled and dismiss without prejudice the current docket" and advised that she would "reserve the right to seek leave from the Court to file an amended complaint." (Pa138). Plaintiff further inquired about who should take the lead on drafting a stipulation of dismissal without prejudice, and Defendants requested that Plaintiff provide it. (Pa138).

Although Defendants' counsel requested that Plaintiff provide a draft stipulation for review, Plaintiff did not timely do so. (Pa115, Pa136-Pa137). A voluntary dismissal was to be appropriately filed by Plaintiff pursuant to Rule 4:37-1.[4] Despite Defendants' cooperation, a stipulation of dismissal was not filed by Plaintiff until a year later on January 3, 2023. (Pa175-176).

[4] Rule 4:37-1 provides that: "an action may be dismissed by the plaintiff without court order by . . . filing a stipulation of dismissal specifying the claim or claims being dismissed, signed by all parties who have appeared in the action." (emphasis added).

Meanwhile, on May 27, 2022, before dismissing the Initial Lawsuit, Plaintiff re-filed the original complaint filed in the Initial Lawsuit under a new docket number, MER-L-000951-22 (the "New Lawsuit"). (Pa164-Pa174). That re-filed complaint was identical to the original complaint.

B. Plaintiff's Motion For Leave To Amend, The Proposed Amended Allegations Unrelated To Plaintiff's Original Claim, And The Administrative Dismissal

On June 8, 2022, Plaintiff filed a Motion for Leave to Amend the re-filed complaint in the New Lawsuit to include additional claims based on new and discrete acts of retaliation under LAD and CEPA against new defendants. (Pa181). The proposed Amended Complaint filed on Plaintiff's Motion for Leave to Amend, (Pa184-Pa197)[5], contains the following newly alleged claims and allegations:

1. Allegations Stemming from a November 2016 Internal Investigation Regarding Plaintiff's Dissemination of a Picture (2016 Employment Transfer and 2017 Written Reprimand) (Pa192-Pa193)

Plaintiff alleges that in November 2016, an internal investigation was commenced against her regarding her dissemination of a picture of her supervisor as retaliation for Plaintiff verbally reprimanding an NJSP co-worker for poor work performance allegedly due to that co-worker's inter-office affair.

[5] The new parties and allegations added in the proposed amended pleading are bolded in the document. (Pa184-Pa197).

(Pa192-Pa193). As a result of the investigation, Plaintiff was allegedly subject to a retaliatory transfer in or around December 2016 and prevented from promotion. (Pa193). Plaintiff alleged that she was also subject to a written reprimand in November 2017 as retaliation. (Pa193).

2. Allegations Stemming from Plaintiff's Report in September 2017 to the EEO Office Regarding Alleged Discrimination and Retaliation (June 2018 Discipline) (Pa193-Pa194)

Plaintiff also alleged that in September 2017, she reported discrimination and retaliation "perpetrated by, in part, [then] Captain Colon" to NJSP's Equal Employment Opportunity office." (Pa193-Pa194). Plaintiff further alleged that in January 2018, she was subject to another internal investigation that was based on a complaint made by Major Colon and that the investigation was "improper and highly irregular." (Pa193-Pa194). Plaintiff was subsequently disciplined as a result of this January 2018 investigation. (Pa194).

3. Allegations Stemming from The September 9, 2020 "Misconduct Investigation" Against Plaintiff (Pa194-Pa195)

Plaintiff alleged that she "spoke out about promotional opportunities denied to women and to racial minorities" in August 2020. (Pa194). Subsequently, on September 9, 2020, yet another internal investigation was commenced against Plaintiff, by NJSP Lt. Col. Scott Ebner, regarding Plaintiff's attendance at the NJSP graduation ceremony. (Pa195). No disciplinary action was taken against Plaintiff. (Pa195).

In October 2020, Plaintiff then alleged that she put in for a promotion and scored in the top tier but was thereafter denied a promotion, and that she was later told, in 2021, that she was denied a promotion by Major Dan Engelhardt, who is not a party, because of "the discipline against her" – i.e., the final discipline imposed against Plaintiff in 2020 that was not further challenged. (Pa126-Pa131, Pa195).

4. Allegations Against Proposed Defendant Lt. Col. Scott Ebner (Pa193-Pa194)

Lt. Col. Ebner allegedly is responsible for Plaintiff's "retaliatory transfer" in December 2016 and unidentified continued harassment and retaliation through 2020. (Pa193). Plaintiff generally and vaguely alleges that Ebner "continued to retaliate against and harass Plaintiff through 2020." (Pa193). Lt. Col. Ebner also allegedly initiated the September 9, 2020 "misconduct investigation" against Plaintiff regarding her attendance at the NJSP graduation ceremony, which resulted in no discipline against Plaintiff. (Pa194).

5. Allegations Against Proposed Defendant Major Mark Santiago (Pa194)

The only allegation against proposed Defendant Maj. Santiago stem from the fact that he supposedly "directed" the January 2018 internal investigation against Plaintiff. (Pa194).

6. Allegations that Plaintiff Retired in 2022 (Pa195)

Plaintiff alleges that "in or around 2022, [she] retired from her employment." (Pa195). No constructive discharge is alleged. (Pa195-Pa196). The last instance before her retirement where Plaintiff was allegedly denied a promotion was in 2021. (Pa195).

While Plaintiff's Motion for Leave to Amend was pending, on October 8, 2022, the trial court issued a lack of prosecution dismissal warning, of which Plaintiff received and had notice. (Da1). Plaintiff took no action to address this notice.

Since Plaintiff did nothing, on December 10, 2022, the New Lawsuit was administratively dismissed without prejudice under "Rules 1:13-7 or 4:43-2 . . . For Lack of Prosecution," with the notice stating that a "formal notice of motion is now required to restore this case to active trial status." (Pa228).

On January 3, 2023, a year after the parties agreed to the dismissal of the Initial Lawsuit and after the New Lawsuit was filed but administratively dismissed, Plaintiff finally filed the stipulation of dismissal without prejudice in the Initial Lawsuit. (Pa175). The January 3, 2023 Stipulation stated:

> the matter in difference in the above captioned action having been filed on a new docket bearing the number MER-L-951-22, that the matter herein bearing the docket number MER-L-2294-16 is hereby DISMISSED in its entirety WITHOUT PREJUDICE. It is further agreed that Defendants shall not pursue a statute of

> limitations defense as to the original claims as pled and as to the original defendants named in the initial complaint filed in MER-L-2294-16.
>
> [(Pa175).]

C. The Trial Court Correctly Denies Plaintiff's Motion For Leave To Amend

On August 31, 2023, after the matter had already been administratively dismissed, the Hon. R. Brian McLaughlin, J.S.C., issued an Order and Statement of Reasons[6] denying Plaintiff's Motion for Leave to Amend. (Pa199-Pa203).

In denying Plaintiff's Motion, the trial court found that Plaintiff's proposed amended claims were time-barred, and the continuing violations doctrine did not apply because Plaintiff was not able to connect her alleged retaliatory discrete acts back to the non-time barred period. (Pa201). The Court also held there was no equitable tolling because, after the stay was lifted, Plaintiff still had seven months to file a LAD claim based on an alleged retaliatory transfer, but Plaintiff failed to do so. (Pa202-Pa201).

Thereafter, inexplicably, Plaintiff took no action with respect to the litigation until 12 months after the Court's August 2023 decision denying her

[6] Plaintiff does not appeal from the August 31, 2023 Order. Plaintiff only appeals from the November 18, 2024 Order denying reconsideration of this Order and Plaintiff's motion to reinstate. (Pa218).

motion to amend, and 20 months after the New Lawsuit was administratively dismissed. (Pa204-Pa210).

D. Plaintiff's Motion To Reinstate And For Reconsideration

It was not until August 28, 2024, that Plaintiff moved to reinstate the New Lawsuit that had been administratively dismissed since December 2022, and for reconsideration of the trial court's August 31, 2023 Order denying her motion for leave to amend. (Pa204-Pa210).

Plaintiff's motion to reinstate and for reconsideration was again heard by the Hon. R. Brian McLaughlin, J.S.C. (1T). On November 18, 2024, after oral argument, the trial court denied Plaintiff's motion in an oral opinion. (Pa234). In doing so, the trial court explained:

> The Court reiterates and adopts its prior statement with respect to its reasoning for finding that a leave to [amend] should not be granted despite the liberality of amending pleadings and the fact that some of the claims alleged were time barred. It said the court's not going to rehash everything that was argued and discussed and ruled upon by the court.
>
> Initially, as a threshold matter, the Court is sympathetic to the reasons why there was -- part of the reasons why there was a delay in filing the complaint, but the Court agrees with defendants that this whole matter has been beset by delays and that it's not a unique situation with respect to this particular litigation.
>
> The standard is exceptional circumstances. The Court finds that the reasons set forth in the moving papers and in this argument do not constitute exceptional

circumstances and that in and of itself is determinative of the denial of the reinstatement of the complaint.

Even if the Court's found to have erred, the Court finds that there's likewise no basis for a motion for reconsideration. The Court appreciates the distinction between the two types of motions for reconsideration as reiterated and enunciated by the Appellate Division in Lawson, but the Court finds, and, therefore, this is the standard where it's the interests of justice. The Court finds that the interests of justice does not compel -- does not predominate in terms of granting reconsideration here.

Again, the Court realizes it's not dealing with the grounds of the other 20-day motion, the Court's reasoning being palpably unreasonable, but essentially the Court does not find that -- it does not believe that it erred in making the detailed findings it made in August of 2023, and again readopts the reasoning set forth there.

Moreover, in contemplating the interests of justice, the delay also prejudices the defendants in this case. There was a time when some claims could have been made timely, and then even with that, there was approximately a seven-month period where some claims could have still been served in the statute of limitations but that time lapsed.

There has to be, statute of limitations, it's a substantive bar. The Court had previously found that the allegations do not qualify for a continuing violation period. The Court reiterates its findings and rulings in that regard.

So in the meantime, the Court finds that there would be prejudice to defendants by this exceedingly long period and especially since the Court is not convinced that the continuing violation theory applies.

[(1T15:25-18:3).]

Plaintiff now appeals from the trial court's November 18, 2024 Order. (Pa218, Pa234). As set forth below, the November 18, 2024 Order should be affirmed.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFF'S MOTION TO REINSTATE (Raised below: Pa234, 1T)

A. The Appellate Standard of Review Is Abuse of Discretion

Plaintiff incorrectly states that the scope of review is de novo. (Pb1-2). Rather, it is well-settled that appellate "review of an order denying reinstatement of a complaint dismissed for lack of prosecution proceeds under an abuse of discretion standard." Baskett v. Kwokleung Cheung, 422 N.J. Super. 377, 382 (App. Div. 2011) (quoting Weber v. Mayan Palace Hotel & Resorts, 397 N.J. Super. 257, 262 (App. Div. 2007)). An abuse of discretion is only found "when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467-68 (2012) (quoting Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 123 (2007)). As such, contrary to Plaintiff's assertions,

the law is clear that the standard of appellate review is abuse of discretion and not de novo. (Pb1-2).

B. The Trial Court Correctly Denied Reinstatement

Rule 1:13-7(a) sets forth the standard for reinstatement, which can vary based on the circumstances in which the application is being made. The Rule allows for reinstatement by consent or motion. R. 1:13-7(a). Where a defendant "has been properly served but declines to execute a consent order, plaintiff shall move on good cause shown for vacation of the dismissal." R. 1:13-7(a). However, "[i]n multi-defendant actions in which at least one defendant has been properly served, the consent order shall be submitted within 60 days of the order of dismissal, and if not so submitted, a motion for reinstatement shall be required." R. 1:13-7(a). Further, "[t]he motion shall be granted on good cause shown if filed within 90 days of the order of dismissal, and thereafter shall be granted only on a showing of exceptional circumstances." R. 1:13-7(a) (emphasis added).

Here, this is a multi-defendant case where at least one defendant was served (all defendants acknowledge receipt of the original Complaint), and Defendants did not consent to and opposed reinstatement. Therefore, because reinstatement was sought well beyond 90 days of the order of dismissal, the exceptional circumstances test applies. Baskett, 422 N.J. Super. at 384

(citing R. 1:13-7(a)). Plaintiff has not met this standard and, thus the trial court correctly denied Plaintiff's motion and did not otherwise abuse its discretion in doing so.

Plaintiff received notice in October 2022 that the matter was to be subject to administrative dismissal if Plaintiff did not take further action within 60 days. If Plaintiff believed this notice was erroneous due to the filing the of the Motion for Leave to Amend, then Plaintiff should have acted immediately, but certainly, at a minimum, at least taken some action within 60 days to avert dismissal. Yet, Plaintiff did nothing. As a result, in December 2022, the matter was administratively dismissed. Plaintiff was aware of this dismissal. Yet again, Plaintiff did not take any action to reinstate the Complaint for 20 months.

Plaintiff offers no legitimate justification or explanation for why she did nothing to seek reinstatement in a timely manner. On appeal, Plaintiff attempts to blame the trial court for the dismissal, writing "dismissal was not the fault of Appellant in this matter, and was the result of the delay in disposition of the outstanding" motion for leave to amend, and that Plaintiff "should not be penalized for the court's delay." (Pb14). Plaintiff provides no other reason for her delay in her brief for her total failure to take any remedial action.

However, the trial court's alleged delay in deciding the motion for leave to amend is no excuse for, and is immaterial to, Plaintiff's failure to timely

address either the October 2022 deficiency notice or the December 2022 dismissal. Indeed, notwithstanding the pending motion for leave to amend, Plaintiff still had an obligation to administratively maintain her own Complaint and causes of action. There was nothing precluding Plaintiff from doing this while the motion to amend was pending. It is not the trial court's fault that Plaintiff sat on her rights and obligations and did absolutely nothing.

Even if the trial court could somehow be blamed for the dismissal, and if Plaintiff for some inexplicable, unidentifiable reason was waiting for the decision on the leave to amend motion prior to seeking reinstatement, the trial court rendered its decision denying leave to amend in August 2023. Thereafter, Plaintiff still did nothing for an entire year and did not seek reinstatement until August 2024. There is simply no justification or excuse for this year long delay, and Plaintiff has provided none. Indeed, Plaintiff cannot blame the trial court for her failure to do anything from August 2023 to August 2024. On appeal, Plaintiff has offered no other justifiable basis for her total lack of prosecution of her claims.[7]

[7] Plaintiff should be barred from raising any additional alleged justifications for the first time on reply. See, e.g., Borough of Berlin v. Remington & Vernick Eng'rs, 337 N.J. Super. 590, 596 (App. Div. 2001) ("Raising an issue for the first time in a reply brief is improper" and declining to hear issues that are not "properly addressed by the parties in this appeal"); Bacon v. N. J. State Dep't of Educ., 443 N.J. Super. 24, 38 (App. Div. 2015) ("We generally decline to consider arguments raised for the first time in a reply brief."); Bouie v. N.J.

At the trial level, desperate for some type of excuse to justify Plaintiff's total lack of prosecution, Plaintiff attempted to rely on the temporary stay of the Initial Lawsuit as a basis for her delay.[8] However, Plaintiff's reliance on the February 16, 2018 Order staying the Initial Lawsuit was a red herring and wholly irrelevant, which Plaintiff appears to have acknowledged since it was not raised on appeal. (Pb12-14).

The record is clear that Plaintiff's claims did not remain indefinitely stayed. The stay did not need to be vacated by formal motion but was lifted by operation of the February 16, 2018 Order's plain terms. The stay was not indefinite but limited. The matter was only "stayed pending final adjudication

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Dep't of Comm. Affairs, 407 N.J. Super. 518, 525-26 (App. Div. 2009) (explaining "a party may not advance a new argument in a reply brief[,]" and finding an argument raised for the first time in a reply brief "was abandoned"); Fuhrman v. Mailander, 466 N.J. Super. 572, 599 (App. Div. 2021) ("A matter raised for the first time in a reply brief need not be addressed by this court.").

[8] Since Plaintiff has not raised this argument regarding the stay on appeal, it should be deemed waived. See, e.g., Soc'y Hill Condo. Ass'n, Inc. v. Soc'y Hill Assoc., 347 N.J. Super. 163, 176 (App. Div. 2002) (noting lthough an issue was mentioned in plaintiff's brief, it was not "briefed"; therefore the court deemed it waived); Telebright Corp., Inc. v. Dir., N.J. Div. of Taxation, 424 N.J. Super. 384, 393 (App. Div. 2012) (finding appellant waived right to challenge an issue due to its failure to brief the issue); Lie v. Ashcroft, 396 F.3d 530, 532, n.1 (3d Cir. 2005) (finding issue waived where not raised in brief on appeal). Nevertheless, in the interest of completeness, abundance of caution, and to show that the trial court carefully considered all relevant facts and circumstances in denying Plaintiff's motion to reinstate, we address it now.

of the OAL hearing," and that after final adjudication of the OAL Hearing, "the Civil Action before this Court shall resume by way of a Case Management Conference to be scheduled by this Court." (Pa122-Pa124). The stay was lifted pursuant to the terms of the Order after the OAL proceeding was finally resolved and Case Management Conference in April 2021 was held, after which the matter "resume[d]" by operation of the order. (Pa122-Pa124).

Further, the parties' subsequent conduct confirms that the stay in the Initial Lawsuit was lifted as Defendants consented to the dismissal of the original Complaint without prejudice, ending the Initial Lawsuit, so that the original Complaint could be refiled in a new action. Certainly, Plaintiff cannot allege that her claims remained stayed after the New Lawsuit was filed in 2022. If, as Plaintiff had contended, a stay remained in place, then it would have been improper not only for Plaintiff to refile the original Complaint, but also to seek leave to amend to assert additional claims. The temporary stay of the Initial Lawsuit cannot serve as a basis for Plaintiff's failure to prosecute her claims.

It would also be highly prejudicial to Defendants to now be forced to litigate what would otherwise be time-barred claims from 2016 because of Plaintiff's complete and total lack of diligence. Significant time has now passed since the alleged events forming the basis of Plaintiff's claims occurred. Witness memories have faded, and many of the individual defendants, Colonel Rick

Fuentes (Ret.), Major Mark Wondrack (Ret.), Major Anthony Ceravolo (Ret.), Captain James Ryan (Ret.), (Pa184), have long since retired from the NJSP. Indeed, if this matter were reinstated, Defendants would then be called upon to defend against a Complaint arising from events that occurred nearly a decade ago after multiple years of inactivity. Such an outcome would be untenable and highly prejudicial.

Defendants extended Plaintiff every professional courtesy and reasonable indulgence. Yet Plaintiff exercised no diligence to prosecute her own claims. Certainly, in January 2022, when Defendants agreed to a dismissal of the Initial Lawsuit without prejudice and to not assert statute of limitations arguments as to those original claims, it was not done with the belief or intent that Plaintiff could sit back and wait in perpetuity before filing and prosecuting its claims at her leisure, subjecting Defendants to indefinite and potential forever liability. A reasonable extension of courtesy should not be abused. While Defendants consent to the dismissal of the Initial Lawsuit and the refiling of the original complaint, Defendants never consented to Plaintiff allowing this matter to languish for the next two years, or for Plaintiff to be able to assert her original claims anytime in perpetuity. Defendants should not now be punished due to Plaintiff's failure to meet her basic obligations, especially where, as here, Plaintiff has no justifiable basis for failing to do so.

In sum, Plaintiff has not established good cause, let alone exceptional circumstances, required by Rule 1:13-7(a), to justify reinstatement. Plaintiff has set forth no basis in law or fact to show that the trial court abused its discretion in denying reinstatement. Accordingly, since the trial court did not abuse its discretion in denying reinstatement, the November 18, 2024 Order should be affirmed.

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION OF ITS DECISION DENYING PLAINTIFF'S MOTION FOR LEAVE TO AMEND (Raised Below: Pa234, 1T).

To the extent that the November 18, 2024 Order is not affirmed, and the matter is to be reinstated, which Defendants submit that it should not be, as set forth more fully below, the portion of the November 18, 2024 Order denying Plaintiff's motion for reconsideration of the August 31, 2023 Order that denied Plaintiff's motion for leave to amend should still be affirmed. Plaintiff should not be permitted to proceed with the proposed Amended Complaint.

As an initial matter, there was no error in the trial court's August 31, 2023 decision. Regardless, Plaintiff also failed to identify any interests of justice that warranted reconsideration. In her motion for reconsideration, which was filed one year after the court denied her motion for leave to amend, Plaintiff merely

repeated the same arguments that were already considered and rejected by the trial court on her initial motion for leave to amend. Plaintiff did nothing more than attempt to seek the proverbial second bite of the apple. Nothing changed since Plaintiff's initial motion was denied. Moreover, Plaintiff's inexplicable year-long delay in seeking reconsideration belies any contention that the interest of justice warranted reconsideration.

A. The Appellate Standard of Review Is Abuse of Discretion for Motions for Leave to Amend and for Reconsideration

1. Motions For Leave to Amend

Motions for leave to amend are governed by Rule 4:9-1. Like motions for reconsideration, appellate courts also review a trial court's decision under Rule 4:9-1 for an abuse of discretion. Kernan v. One Washington Park Urban Renewal Assocs., 154 N.J. 437, 456-57 (1998).

The New Jersey Supreme Court has explained "that 'Rule 4:9-1 requires that motions for leave to amend be granted liberally' and that 'the granting of a motion to file an amended complaint always rests in the court's sound discretion.'" Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 501 (2006) (quoting Kernan v. One Wash. Park Urb. Renewal Assocs., 154 N.J. 437, 456-57 (1998)). "That exercise of discretion requires a two-step process: whether the non-moving party will be prejudiced, and whether granting the amendment would nonetheless be futile." Notte, 185 N.J. at 501.

"The determination of a motion to amend a pleading is generally left to the sound discretion of the trial court, and its exercise of discretion will not be disturbed on appeal, unless it constitutes a 'clear abuse of discretion.'" Franklin Med. Assocs. v. Marucci, 362 N.J. Super. 494, 506 (App. Div. 2003) (internal citations omitted). An appellate court may only reverse a trial court's discretionary order if it "was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment." Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005).

"[C]ourts are 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." Interchange State Bank v. Rinaldi, 303 N.J. Super. 239, 257 (App. Div. 1997) (quoting Mustilli v. Mustilli, 287 N.J. Super. 605, 607 (Ch. Div. 1995)). "Objection to the filing of an amended complaint on the ground that it fails to state a cause of action should be determined by the same standard applicable to a motion to dismiss under R. 4:6–2(e)." Id. If the proposed amendment fails to state a claim upon which relief may be granted, the amendment should be denied. See Howard v. Univ. of Medicine, 172 N.J. 537, 559-60 (2002).

Under Rule 4:6-2(e), a Court should dismiss a Complaint that fails to articulate a legal basis entitling the plaintiff to relief. Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005). "[T]he inquiry is confined to a consideration of the legal sufficiency of the alleged facts apparent on the face of the challenged claim." Rieder v. State, Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987); see also Printing Mart v. Sharp Electronics, 116 N.J. 739, 746 (1989). The court may not consider anything other than whether the complaint states a "cognizable cause of action" and "a dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted." Rieder, 221 N.J. Super. at 552.

Although a plaintiff need not prove his/her case to survive a motion to dismiss, the plaintiff must, at a minimum, plead facts that would constitute a valid cause of action if proven true. See Kieffer v. High Point Ins. Co., 422 N.J. Super. 38, 43 (App. Div. 2011) (quoting Leon v. Rite Aid Corp., 340 N.J. 462, 472 (App. Div. 2001)). A complaint must be dismissed if it states no conceivable basis for relief, and it is evident that the allowance of discovery would not provide one. See Rezem Family Assoc., L.P. v. Borough of Millstone, 423 N.J. Super. 103, 113 (App. Div. 2011) (citing Camden Cty. Energy Recovery Assocs., L.P. v. N.J. Dep't of Envtl. Prot., 320 N.J. Super. 59, 64 (App. Div. 1999), aff'd, 170 N.J. 246 (2001)).

Importantly, a plaintiff may not simply rely upon the potential prospect of discovery to uncover the facts supporting their claims and, instead, must assert them in their complaint. See Printing Mart, at 768. Under a "fact" pleading standard, "[i]t is not enough for plaintiffs to assert […] at argument of the motion [to dismiss], that any essential facts that the court may find lacking can be dredged up in discovery. A plaintiff can 'bolster a […] cause of action through discovery, but not […] file a conclusory complaint to find out if one exists.'" Id.; see also Glass v. Suburban Restoration Co., 317 N.J. Super. 574, 582 (App. Div. 1998) (where the factual pleading is insufficient, a plaintiff may not rely upon mere conclusions and an intention to substantiate them with future discovery). Because "New Jersey is a 'fact' rather than a 'notice' pleading jurisdiction, […] a plaintiff must allege facts to support his or her claim rather than merely reciting the elements of a cause of action." Nostrome v. Santiago, 420 N.J. Super. 427, 436 (App. Div. 2011). See also Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988) (It is the plaintiff's "factual recitals," that are reviewed to determine whether she/he can "make out a *prima facie* cause of action").

Even where the merits of the claim asserted in a proposed amendment are "marginal," it is not an abuse of discretion to deny leave to add such a claim when it is likely to prolong the litigation. Stuchin v. Kasirer, 237 N.J. Super.

604, 609 (App. Div. 1990). "It is well-settled that an exercise of that discretion will be sustained where the trial court refuses to permit new claims and new parties to be added late in the litigation and at a point at which the rights of other parties to a modicum of expedition will be prejudicially affected." Du-Wel Prod., Inc. v. U.S. Fire Ins. Co., 236 N.J. Super. 349, 364 (App. Div. 1989). "[P]rogressive judicial policy in permitting amendments, generally, is not intended to afford a refuge to languid or dilatory litigants." Branch v. Emery Transportation Co., 53 N.J. Super. 367, 375 (App. Div. 1958). Lateness of a motion coupled with apparent lack of merit virtually dictates denial. See Fox v. Mercedes-Benz Credit Corp., 281 N.J. Super. 476 (App. Div. 1995).

2. Motions for Reconsideration

Rule 4:42-2 provides that interlocutory orders "shall be subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of justice." Reconsideration of an interlocutory order before final judgment is a matter committed to the sound discretion of the trial judge. Lombardi v. Masso, 207 N.J. 517, 536 (2011); Lawson v. Dewar, 468 N.J. Super. 128, 134 (App. Div. 2021). "Until entry of final judgment, only 'sound discretion' and the 'interest of justice' guides the trial court." Id.

An appellate court will not disturb the trial court's reconsideration decision "unless it represents a clear abuse of discretion." Hous. Auth. of

Morristown v. Little, 135 N.J. 274, 283 (1994). See also Cummings v. Bahr, 295 N.J. Super. 374, 389 (App. Div. 1996). A mistaken exercise of discretion arises where "the 'decision [was] made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" United States v. Scurry, 193 N.J. 492, 504 (2008) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561 (2002)). Reviewing courts "may only disturb the decision below if it finds error which is 'clearly capable of producing an unjust result.'" Casino Reinvestment Dev. Auth. v. Teller, 384 N.J. Super. 408, 413 (App. Div. 2006) (quoting R. 2:10–2).

B. The Trial Court Initially Correctly Denied Plaintiff's Motion for Leave to Amend and There Is No Basis to Disturb Its Well-Reasoned Decision

The trial court's underlying August 31, 2023 decision to deny leave to amend was correct. In the proposed Amended Complaint, Plaintiff seeks to augment her previously asserted claims under the LAD (Count One) and CEPA (Count Two). The Initial Complaint filed in 2016 proceeded on a LAD retaliatory failure to promote claim and CEPA retaliation claim based on events that occurred in 2014-2016. The proposed Amended Complaint, which Plaintiff sought leave to file on June 8, 2022, seeks to include additional separate, discrete alleged instances of retaliation that occurred thereafter for both claims against new parties. As the trial court correctly found, certain allegations, as identified

and discussed below, are time-barred and/or fail to state a claim. Plaintiff should not be given leave to file an Amended Complaint with time-barred and/or insufficient allegations that would not survive a Motion to Dismiss under Rule 4:6-2 and are thus futile. Plaintiff should also not be given leave to file amended claims for which she exhibited no diligence to prosecute.

Plaintiff argues, in conclusory fashion, that all the changes in the proposed Amended Complaint relate to her original 2016 complaint and are updated facts of alleged continued retaliation against Plaintiff. While Rule 4:9-3, generally, permits claims in an amended pleading that "arose out of the conduct, transaction or occurrence set forth . . . in the original pleading, the amendment relates back to the date of the original pleading," the relation back doctrine is inapplicable here to Plaintiff's new proposed claims of separate, discrete acts of alleged retaliation. See Harr v. Allstate Ins. Co., 54 N.J. 287, 299 (1969) (stating relation back rule does not apply to "distinctly new or different claim[s]").

Indeed, many of the additional alleged retaliatory events are, on their face, not causally related or even germane to Plaintiff's complaints about the background investigation phase of the NJSP recruit selection process from 2014/2015. The statute of limitations for these unrelated events ***were not*** subject to the stay in the Initial Lawsuit since the final adjudication of the OAL discipline on Plaintiff had no impact on asserting these separate and distinct

claims. These allegations would not survive a Motion to Dismiss under Rule 4:6-2 for failure to state a claim or reliance upon time-barred events. However, even if it is accepted that all the additional allegations are in fact related to her original 2016 Complaint and thus, entitled to the benefit of the stay in the Initial Lawsuit, these allegations would still fail to survive a Motion to Dismiss.

As set forth below, many of the allegations contained in Plaintiff's proposed Amended Complaint are time-barred, stale, or otherwise fail to state a claim. As the trial court correctly held, it would be futile to allow Plaintiff to belatedly file the proposed Amended Complaint.

1. Allegations Stemming from the November 2016 Internal Investigation of Plaintiff are Time-Barred Under the LAD And Not Actionable.

The statute of limitations for all claims asserted under the LAD is two years. Montells v. Haynes, 133 N.J. 282, 286 (1993); N.J.S.A. 2A:14-2(a). As to discrete acts, the cause of action accrues on the day the unlawful employment practice occurred. Roa v. Roa, 200 N.J. 555, 568 (2010) (quoting Shepherd v. Hunterdon Developmental Center, 174 N.J. 1, 21 (2002). Discrete acts cannot be aggregated under the continuing violation theory. Id. Nor can the discrete acts be aggregated merely by alleging that the discrete acts are ongoing.

When a claim is of a "continuing violation," which are a series of separate acts that taken collectively may constitute one unlawful employment practice,

the statute of limitations begins on the date when the last act occurred. Id. at 567. The continuing violation doctrine has been applied to LAD hostile work environment claims.[9] See Shepherd v. Hunterdon Developmental Center, 174 N.J. at 20-21.

However, as explained by the New Jersey Supreme Court in Roa, "[w]hat the [continuing violation] doctrine does not permit is the aggregation of discrete discriminatory acts for the purpose of reviving an untimely act of discrimination that the victim knew or should have known was actionable. Each such 'discrete discriminatory act starts a new clock for filing charges alleging that act.'" Id. at 569-570 (quoting National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002)). Where a plaintiff knew or should have known that a particular discrete act was actionable, he or she has an obligation to file that claim within the applicable statute of limitations period. Id. at 569-72.

It is well established in New Jersey that discrete acts include, but are not limited to, "'termination, failure to promote, denial of transfer, or refusal to hire.'" Roa, 200 N.J. at 566-67 (2010) (quoting Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114 (2002)). In Shepherd v. Hunterdon Developmental

[9] The proposed Amended Complaint does not include a claim for LAD hostile work environment. Plaintiff cites to Wilson v. Wal-Mart Stores, 158 N.J. 263, 273 (1999) for the proposition that the continuing violation doctrine has been recognized in LAD cases. (Pb17). But this was in connection with a hostile work environment claims under the LAD, which Plaintiff has not alleged. Id. at 273.

Ctr., the New Jersey Supreme Court also found that "[a]n unwelcome job transfer clearly constitutes a discrete act." 174 N.J. at 27 (citing Morgan, 536 U.S. at 114). As such, any "discrete acts" pled by Plaintiff which occurred outside the two-year statute of limitations are time barred.

The proposed Amended Complaint alleges that the November 2016 internal investigation of Plaintiff was initiated by Lt. Lori Andrews because "Plaintiff supervised Andrews and had verbally reprimanded Andrews because her personal affair with Lt. Joseph Weeast was interfering with her job performance." (Pa73). There is no logical connection between Plaintiff's complaints about the NJSP recruit selection and the investigation initiated by Lt. Andrews. These constitute separate, discrete acts. Plaintiff's conclusory legal contention that the purpose of the investigation was "to retaliate against Plaintiff and to prevent Plaintiff from being promoted" is speculation and does not reveal a logical connection to her alleged protected activity or prior discipline. (Pa73-Pa74). The internal investigation resulted in an alleged "retaliatory transfer" in December 2016 and a written reprimand in November 2017. (Pa74).

The statute of limitations on a claim relating to the alleged retaliatory transfer began to run in December 2016. Since this internal investigation was wholly unrelated to the identified protected activity in Plaintiff's original 2016

Complaint and constitutes a discrete act, the applicable statute of limitations was not subject to the stay in the Initial Lawsuit. Thus, the time for Plaintiff to file an LAD claim based on this event expired in December 2018. Plaintiff failed to do so. This claim is time-barred.

Even if Plaintiff is given the benefit of the stay in the Initial Lawsuit as tolling the statute of limitations during the stay period, which she should not be, this claim is still time-barred. When the Court entered the Order staying the Initial Lawsuit on February 16, 2018, there were approximately seven months remaining for Plaintiff to timely file an LAD claim based on the retaliatory transfer. Even assuming the clock was tolled but began to run again on April 20, 2021 (the date the Court held a Case Management Conference with counsel after final adjudication of Plaintiff's OAL discipline), Plaintiff would have had to assert her LAD claim based on this retaliatory transfer approximately seven months later, in approximately late November 2021. She failed to do so.

The written reprimand to Plaintiff in November 2017 was unrelated to the identified protected activity in Plaintiff's original 2016 Complaint. This written reprimand is also insufficient to revive the time-barred retaliatory transfer. Discrete acts, such as a retaliatory transfer, cannot be aggregated under the continuing violation theory. Roa, 200 N.J. at 567. Thus, Paragraphs 68-71 and 77-78 of the proposed Amended Complaint, which relate to the November 2016

internal investigation are stale and time-barred under the LAD, and thus, futile. (Pa73-Pa74).

2. Allegations Stemming From the November 2016 Internal Investigation of Plaintiff are Time-Barred Under CEPA And Not Otherwise Actionable.

CEPA has a one-year statute of limitations. See N.J.S.A. 34:19-5 ("upon a violation of any of the provisions of this act, an aggrieved employee or former employee may, within one year, institute a civil action in a court of competent jurisdiction."). CEPA has the same restrictions on the application of a continuing violation theory as does the LAD; namely, a plaintiff is precluded from relying upon his timely claims of retaliation and retaliatory harassment to revive any of his untimely claims via a continuing violation theory as a matter of law. Green v. Jersey City Bd. Of Educ., 177 N.J. 434, 447-48 (2003) (applying the LAD's continuing-violation theory to CEPA when there is no single discrete act).

Given CEPA's one-year statute of limitations, Plaintiff would have needed to assert her claim based on her retaliatory transfer by December 2017 at the latest. At that point, the Initial Lawsuit had not yet been stayed. Since she failed to do so, the allegations stemming from the November 2016 internal investigation of Plaintiff are time-barred under CEPA's statute of limitations as well, and any such CEPA claim based on these allegations would be thus futile.

The written reprimand to Plaintiff in November 2017 is insufficient to revive the time-barred CEPA claim because even assuming that event sets forth a *prima facie* CEPA claim, it is still time-barred. After the written reprimand was issued, (Pa74), Plaintiff needed to file her CEPA claim based on this event by December 2018. She failed to do so. Even if she is granted the benefit of the stay in the Initial Lawsuit as tolling the statute of limitations during the pendency of the stay, she is still time barred. Approximately three months elapsed after the written reprimand was issued before the Court entered its Order staying the Initial Lawsuit. Thus, when the Initial Lawsuit resumed on April 20, 2021, Plaintiff had approximately nine months to file this claim – by January 20, 2022. Plaintiff failed to do so. The allegations stemming from the November 2016 internal investigation of Plaintiff are time-barred under CEPA's statute of limitations as well, and any such CEPA claim based on these allegations would be futile.

Additionally, internal investigations do not qualify as adverse actions under CEPA. Fraternal Ord. of Police, Lodge 1 v. City of Camden, 842 F.3d 231, 241-42 (3d Cir. 2016) (finding that charging the plaintiff with a disciplinary action and internally investigating him for allegations made against him did not qualify as an adverse action under CEPA). Indeed, retaliatory actions under the CEPA must have impact "on the employee's compensation or rank or be

virtually equivalent to discharge." Id. at 241. As such, regardless of timeliness, the November 2016 internal investigation is not sufficient to sustain a CEPA claim in any event.

3. Plaintiff Fails to State an LAD Claim Based Upon the Allegations Stemming from Plaintiff's Report in September 2017 to the EEO Office Regarding Alleged Discrimination and Retaliation by Major Colon Because It Is Time-Barred and There Was No Adverse Employment Action.

The proposed Amended Complaint alleges that after Plaintiff reported discrimination and retaliation by Maj. Colon to the EEO office beginning in September 2017, she was subjected to another internal investigation based on a complaint by Maj. Colon and subsequently disciplined in June 2018. (Pa74-Pa75). Again, Plaintiff fails to even allege that the internal investigation was related to her complaints about the NJSP recruit selection process and her initial discipline – rather, it was motivated by her complaints against Maj. Colon.

The events surrounding Maj. Colon are distinct and unconnected to the facts alleged in Plaintiff's initial Complaint. Plaintiff is not entitled to the benefit of the stay in the Initial Litigation to toll the statute of limitations as to the events surrounding Maj. Colon; she should have filed an LAD claim on or before June 2020 pursuant to the LAD's two-year statute of limitations. She failed to do so, and the claim is thus time-barred. See Welsh v. Bd. of Ed. of Tewksbury Twp., 7 N.J. Super. 141, 145 (App. Div. 1950) ("It has been the firmly implanted rule

that an entirely new and distinctly different cause of action cannot by means of an amendment of the pleadings be introduced after the statute has tolled the action.").

Plaintiff also fails to state a *prima facie* LAD claim as to these new allegations. "In order to establish a prima facie claim for retaliation under the LAD, plaintiff must demonstrate: (1) that she engaged in protected activity; (2) the activity was known to the employer; (3) plaintiff suffered an adverse employment decision; and (4) there existed a causal link between the protected activity and the adverse employment action." Young v. Hobart W. Grp., 385 N.J. Super. 448, 465 (App. Div. 2005) (citing Craig v. Suburban Cablevision, 140 N.J. 623, 629-30 (1995). Under the LAD, an employer may not "refuse to hire or employ or to bar or to discharge or require to retire, unless justified by lawful considerations other than [an LAD protected category], from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment." N.J.S.A. 10:5-12(a).

Further, an employer's adverse employment action:

> must rise above something that makes an employee unhappy, resentful or otherwise cause an incidental workplace dissatisfaction. Clearly, actions that affect wages, benefits, or result in direct economic harm qualify. So too, noneconomic actions that cause a significant, non-temporary adverse change in employment status or the terms and conditions of employment would suffice…[A]n exhaustive list of

> qualifying events cannot be compiled and these determinations must turn on the facts and circumstances presented."

Victor v. State, 401 N.J. Super. 596, 616 (App. Div. 2008), aff'd as modified, 203 N.J. 383, (2010) (examining adverse employment action in context of LAD age discrimination claim). As it relates to investigations, "[o]nly when the investigation results in some real detriment, such as a suspension, demotion, or termination, should the aggrieved employee be able to invoke the protection of the LAD." Spinks v. Twp. of Clinton, 402 N.J. Super. 465, 484 (App. Div. 2008) (citing El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 169-70 (App. Div. 2005)).

Here, per the proposed Amended Complaint, Plaintiff was only disciplined. (Pa75). Discipline because of an investigation, without more, cannot be an adverse employment action sufficient for an LAD claim. Spinks, 402 N.J. Super. at 484. Thus, Paragraphs 72-76 and 79-82 of the proposed Amended Complaint fail to state a *prima facie* claim under the LAD, and are futile. (Pa74-Pa75).

4. Plaintiff Fails to State a CEPA Claim Based Upon the Allegations Stemming from Plaintiff's Report in September 2017 to the EEO Office Regarding Alleged Discrimination and Retaliation by Maj. Colon Because It is Time-Barred and There Was No Adverse Employment Action.

The proposed Amended Complaint indicates that Plaintiff was disciplined in June 2018 after an internal investigation based on a complaint made by Maj. Colon. (Pa75). As set forth above, this event is not entitled to the benefit of the stay in the Initial Litigation to toll the statute of limitations because it was wholly unrelated to Plaintiff's original alleged complaints about the NJSP recruit selection process. Plaintiff needed to assert a CEPA claim based on this event on or before July 2019. She failed to do so. The claim is time-barred.

However, even with the benefit of the stay, this claim would be time-barred. This discipline occurred during the time period the Initial Lawsuit was stayed. However, when the stay was lifted on April 20, 2021, Plaintiff had at most one year under CEPA's statute of limitations to file her CEPA claim – by April 20, 2022. She failed to do so. Thus, this claim is time-barred.

Moreover, Plaintiff fails to identify an adverse employment action under CEPA. CEPA prohibits an employer from taking any retaliatory action against an employee who "discloses or threatens to disclose" or "objects to, or refuses to participate in any policy or practice which the employee reasonably believes" is "in violation of a law, or a rule or regulation promulgated pursuant to any

law[,]" "is fraudulent or criminal," or "is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment." N.J.S.A. 34:19-3. A plaintiff who brings a cause of action pursuant to N.J.S.A. 34:19-3 must show that:

> (1) he or she reasonably believed that his or her employer's conduct was violating either a law, rule, or regulation promulgated pursuant to law, or a clear mandate of public policy; (2) he or she performed a "whistle-blowing" activity described in N.J.S.A. 34:19-3c; (3) an adverse employment action was taken against him or her; and (4) a causal connection exists between the whistle-blowing activity and the adverse employment action.
>
> [Dzwonar v. McDevitt, 177 N.J. 451, 462 (2003)].

Turning to the third prong, retaliatory action is defined as "the discharge, suspension or demotion of an employee or other adverse employment action taken against an employee in terms and conditions of employment." N.J.S.A. 34:19-2(e). Though certain employer actions that fall short of discharge, suspension, or demotion may be equivalent to an adverse action, "not every employment action that makes an employee unhappy constitutes 'an actionable adverse action.'" Nardello v. Twp. of Voorhees, 377 N.J. Super. 428, 433-34 (App. Div. 2005) (citing Cokus v. Bristol Myers Squibb Co., 362 N.J. Super. 366, 378 (Law Div. 2002), aff'd, 362 N.J. Super. 245 (App. Div.), certif. denied, 178 N.J. 32 (2003)). The employment action must substantially impact the

employee's work or conditions at work, or constitute a de facto termination. Hancock v. Borough of Oaklyn, 347 N.J. Super. 350, 360 (App. Div. 2002), appeal dismissed, 177 N.J. 217 (2003).

Here, the proposed Amended Complaint simply indicates that Plaintiff was disciplined, which, without more, is insufficient to prove an adverse employment action under CEPA, and permitting the proposed Amended Complaint based on this CEPA claim with these allegations would be futile

5. Plaintiff Fails to State Either an LAD or CEPA Claim Based Upon the September 9, 2020 "Misconduct Investigation" Because There Was No Adverse Employment Action.

Plaintiff alleges she "spoke out about promotional opportunities denied to women and to racial minorities" in August 2020. (Pa75). Subsequently, a "misconduct investigation" was initiated against Plaintiff, but the results were "'unfounded.'" (Pa75). Since Plaintiff did not experience "real detriment" as a result of the investigation, there was no adverse employment action sufficient for a LAD or CEPA claim. Spinks, 402 N.J. Super. at 484. There was no "wrongful act that causes an injury." Tarr v. Ciasulli, 181 N.J. 70, 84 (2004) (quoting Hurley v. Atlantic City Police Dep't, 174 F.3d 95, 129 (3d Cir. 1999)). Thus, Paragraphs 87-88 of the proposed Amended Complaint fail to state a claim under the LAD and CEPA, and both claims are futile. (Pa75-Pa76).

6. It Would be Futile to Attempt to Join Lt. Col. Ebner and Maj. Santiago as Defendants, Since Their Alleged Behavior is not Actionable Under the LAD or CEPA.

Lt. Col. Ebner allegedly is responsible for Plaintiff's "retaliatory transfer" in December 2016. (Pa74). As set forth above, no LAD or CEPA claim can be asserted on the basis of these allegations since they are time-barred.

Lt. Col. Ebner also allegedly initiated the September 9, 2020 "misconduct investigation" against Plaintiff regarding her attendance at the NJSP graduation ceremony, which resulted in no discipline against Plaintiff. (Pa75). As set forth in Point II(B)(5) above, no LAD or CEPA claim can be asserted on the basis of these allegations since there was no adverse employment action.

Plaintiff also includes a vague statement that Lt. Col. Ebner "continued to retaliate against and harass Plaintiff through 2020." (Pa74). Plaintiff fails to identify any specific adverse employment actions committed by Lt. Col. Ebner. Plaintiff also fails to allege any facts to support the conclusory legal contention that Plaintiff was allegedly being "retaliated against" and/or "harassed," sufficient to give rise to an employment claim. This is an insufficient basis on which to join Lt. Col. Ebner in as a defendant on either the CEPA or LAD claims. Certainly, Plaintiff should not need discovery to identify the alleged specific instances she was retaliated against.

As for Maj. Santiago, the only allegation against him stems from the fact that he "directed" the January 2018 internal investigation against Plaintiff. (Pa75). As set forth in Point II(B)(1)-(4), no LAD or CEPA claim can be asserted on the basis of these allegations because these allegations are time-barred and there is no adverse employment action.

Plaintiff fails to assert a cognizable claim under the LAD or CEPA which would warrant bringing in Lt. Col. Ebner or Maj. Santiago as defendants to this litigation.

7. Plaintiff's Retirement From the NJSP in 2022

Plaintiff argues that retaliation is alleged through 2022 in the proposed Amended Complaint. (Pb20). However, again, no adverse employment action is alleged therein, nor is an active or constructive discharge alleged. Rather, all that is alleged in the proposed pleading is that "[i]n or around 2022, Plaintiff retired from her employment." (Pa76). There is no reference anywhere in the proposed Amended Complaint to a discharge or constructive termination.

Regardless, even if an innocuous allegation that Plaintiff "retired" could be construed as a "constructive termination," Plaintiff has not otherwise pled sufficient facts that amount to a constructive termination to sustain a LAD or CEPA claim.

In Shepherd v. Hunterdon Developmental Center, 174 N.J. 1, 28 (2002), the Court held that a constructive discharge claim requires a showing of egregious circumstances that is even higher than what is required to establish a hostile work environment, writing:

> In contrast [to a hostile work environment claim], constructive discharge requires not merely "severe or pervasive" conduct, but conduct that is so intolerable that a reasonable person would be forced to resign rather than continue to endure it. Jones v. Aluminum Shapes, Inc., 339 N.J. Super. 412, 428 (App. Div. 2001). More precisely, the standard envisions a "sense of outrageous, coercive and unconscionable requirements." Id. Simply put, a constructive discharge claim requires more egregious conduct than that sufficient for a hostile work environment claim.

Indeed, "[f]or purposes of the laws against discriminatory or retaliatory discharge, an employee is expected to take all reasonable steps necessary to remain employed." Zubrycky v. ASA Apple, Inc., 381 N.J. Super. 162, 166 (App. Div. 2005).

Here, Plaintiff does not allege that she was subjected to a hostile work environment. Plaintiff also does not allege any facts to establish that her employment conditions were so unbearable that no reasonable person could tolerate it. She does not allege that she was threatened with discharge; demoted; or literally any other deleterious effects; she merely alleges that she retired and provides no reason for her retirement.

8. Plaintiff Fails to State Either a CEPA or LAD Claim Based Upon Alleged Promotion Denials in 2020 and 2021.

Plaintiff alleges that she was denied promotions at some unspecified times in 2020 and 2021. (Pa76). However, as noted, CEPA has a one-year statute of limitations. See N.J.S.A. 34:19-5. As such, alleged discrete acts of retaliation against Plaintiff in 2020 and 2021 were time-barred by the time Plaintiff sought leave to amend in June 2022.

While claims under the LAD have a two-year statute of limitations, this claim was still nonetheless properly dismissed because Plaintiff has failed to state a claim upon which relief may be granted. Plaintiff failed to otherwise tie these allegations to her LAD claim.

Additionally, since the trial court properly denied Plaintiff's motion for reinstatement, there was thus no active pleading for Plaintiff to amend.

9. Plaintiff's Reliance on The Notte Case Is Misplaced as Notte is Plainly Inapplicable to This Matter.

Plaintiff relies on Notte v. Merchants Mut. Ins. Co., 185 N.J. 490, 499 (2006), which she asserts is "directly on point," to argue that her proposed amended claims are timely because they can "relate back" to her initial complaint. (Pb26). However, Notte and Rule 4:9-3 are wholly inapplicable to this matter.

In Notte, the New Jersey Supreme Court found that the new common law wrongful discharge and LAD claims that the plaintiff sought leave to amend to assert after the discovery end date expired and after the statute of limitations for those claims had run could "relate back" under Rule 4:9–3 to the date of the original pleading. Id. at 499. The Notte Court only found this appropriate, however, because the new claims were "based on the same facts [the plaintiff] alleged in support of his original CEPA claims" that were already in the complaint. Id. (emphasis added). The Notte Court explained "save for the charging paragraphs in the new common law wrongful discharge claims and the necessary addition of conclusory allegations in the new LAD claims, [the plaintiff's] original complaint and his corrected amended complaint are identical." Id. (emphasis added).

Here, unlike in Notte, Plaintiff's proposed initial complaint and the proposed Amended Complaint are quite different. The proposed amended claims were not based on identical facts to the original claims. Plaintiff's proposed Amended Complaint attempts to assert entirely new, separate and discrete acts of alleged retaliation under LAD and CEPA, based on entirely new sets of facts not previously asserted, against new persons, and which are distinct from the facts previously asserted in the initial complaint. Discrete acts of retaliation

cannot be aggregated under the continuing violation theory to extend the statute of limitations. See, supra, Point II(B)(1).

Plaintiff here likewise cannot use subsequent discrete acts of alleged retaliation based on new facts to extend the statute of limitations under the "relation-back" doctrine. See Young v. Schering Corp., 275 N.J. Super. 221, 225-26 (App. Div. 1994), aff'd, 141 N.J. 16 (1995). To do so would turn Roa v. Roa, 200 N.J. 555 (2010) on its head as it would contradict the Court's holding that "[w]hat the [continuing violation] doctrine does not permit is the aggregation of discrete discriminatory acts for the purpose of reviving an untimely act of discrimination that the victim knew or should have known was actionable." Id. at 569-570. As the Court is Notte stated, when a period of limitation has expired, those "distinctly new or different claim[s] or defense[s]" remain barred. Notte, 185 N.J. at 499 (quoting Harr, 54 N.J. at 299-300).

C. The Trial Court Did Not Abuse Its Discretion in Denying Plaintiff's Motion for Reconsideration.

Not only was the trial court's decision denying leave to amend correct, but the interests of justice did not otherwise warrant reconsideration. R. 4:42-2. Nor has Plaintiff presented any. Plaintiff's motion for reconsideration did nothing but reargue that same exact points that the trial court already considered and rejected. Plaintiff also provided no justification for waiting one year before filing for reconsideration. If the trial court had mistakenly denied Plaintiff's

motion for leave to amend as alleged by Plaintiff, then Plaintiff should not have sat on her rights and taken no action in response.

Plaintiff has provided no justification for why she took no action for one whole year to challenge the court's decision if she believed it was erroneous. The grounds for which Plaintiff sought reconsideration in August 2024 existed in August 2023 when the court first denied leave to amend. There is no valid reason for Plaintiff's delay, which, in and of itself, belies any contention that the interests of justice warrant reconsideration. Plaintiff's delay only served to further compound the prejudice on Defendants. Indeed, Defendants would be severely prejudiced if they were now forced to litigate claims that are nearly a decade old after a substantial period of inactivity.

The trial court properly exercised its discretion in denying reconsideration. The November 18, 2024 Order should be affirmed.

CONCLUSION

For these reasons, Defendants respectfully request that this Court affirm the trial court's order denying reinstatement and reconsideration of Plaintiff's motion for leave to amend.

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Attorneys for Defendants-Respondents

By: */s/ Jemi G. Lucey*
JEMI G. LUCEY

Dated: May 30, 2025

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

LIEUTENANT DAWN SHYNER, *Plaintiffs/Appellants,* v. STATE OF NEW JERSEY, THE OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, COLONEL RICK FUENTES, MAJOR MARK WONDRACK (ret.), MAJOR ANTHONY CERAVOLO, CAPTAIN JAMES RYAN, LIEUTENANT ANTHONY GUIDI, MARY BETH WOOD, DEPUTY ATTORNEY GENERAL – CHIEF LEFAL COUNSEL TO THE NEW JERSEY STATE POLICE and JOHN DOES 1-5. *Defendants/Respondents.*	Appellate Docket No. A-977-24 On appeal from: SUPERIOR COURT OF NEW JERSEY, LAW DIVISION Docket No.: MER-L-0951-22 Hon. Brian McLaughlin, J.S.C.

BRIEF ON BEHALF OF PLAINTIFF/APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES PAGE

STATUTES

RULES

POINT I

The headings in this Reply Brief track the headings from the Opposition Brief.

A. Standard of Review

The standard of review for an order denying reinstatement of a complaint dismissed for lack of prosecution is abuse of discretion. Baskett v. Kwokleung Cheung, 422 N.J. Super. 377, 382. However, there is an abuse of discretion when a decision is "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Estate of Semprevivo v. Lahham, 468 N.J. Super. 1, 11. The relevant policy here is R. 1:13-7, which outlines policies and processes for dismissal of civil cases for lack of prosecution. R. 1:13-7 states that the court shall issue a written notice of dismissal without prejudice if an action has been pending for four months and there has been no (1) proof of service or acknowledgment of service filed with the court; or (2) filing of answer; or (3) entry of default; or (4) entry of default judgment. R. 1:13-7.

Here, there is no dispute that there was proof of service with the original complaint in the New Lawsuit for all defendants. As an initial matter, the Court should never have initiated the process for dismissal for lack of prosecution.

1. Appellees mistake the standard of R.1:13-7

When a case is dismissed for lack of prosecution, a plaintiff may file a motion for reinstatement. R. 1:13-7. A court ruling on a motion for reinstatement must determine whether the plaintiff has established good cause on one hand, or

exceptional circumstances on the other, depending on the timing of the motion and the number of parties in the case. Estate of Semprevivo v. Lahham, 468 N.J. Super. 1, 11-12. In their brief, Appellee misrepresents the exceptional circumstances standard of R.1:13-7. This Court has been very clear that the exceptional circumstances standard "was intended to avoid delay where a case has proceeded against one or more defendants, and the plaintiff then seeks to reinstate the complaint against a previously-dismissed additional defendant." Estate of Semprevivo v. Lahham, 468 N.J. Super. 1, 12 (quoting Giannakopoulos v. Mid State Mall, 438 N.J. Super. 595, 609 (App. Div. 2014) certif. denied, 221 N.J. 492 (2015); see also, Pressler & Verniero, Current N.J. Court Rules, comment 1.2 on R. 1:13-7(a) (2017). "The exceptional circumstances standard… applies in multi-defendant cases that proceed against a properly served defendant prior to the filing of a motion to reinstate a complaint that was administratively dismissed against another defendant." Abnathya v. Medley, 2017 N.J. Super. Unpub. LEXIS 2538, 5 (Super. Ct. App. Div. Oct. 10, 2017).

Here, we are not dealing with a situation in which the case has proceeded against a properly served defendant and was dismissed against another. Appellees mention in their brief that all defendants were properly served and acknowledged receipt of the original complaint. (See Defendants' Br. 18). Thus, the court should instead apply the good cause standard. See, Estate of Semprevivo v. Lahham, 468 N.J. Super. 1, 14.

2. Good cause exists and the Trial Court abused its discretion.

There is good cause to reinstate this case. In Ghandi vs. Cespedes, the Court said, "absent a finding of fault by the plaintiff and prejudice to the defendant, a motion to restore under [Rule 1:13-7(a)] should be viewed with great liberality." Ghandi v. Cespedes, 390 N.J. Super. 193, 197 (2007). The right to reinstatement is ordinarily routinely and freely granted when the plaintiff has cured the problem that led to the dismissal even if the application is made many months later. Id. at 196. There is good cause to grant a motion for reinstatement when there is no blame directly attributable to plaintiffs for the initial cause of the dismissal. See, Estate of Semprevivo v. Lahham, 468 N.J. Super. 1, 15. The dismissal for lack of prosecution was not the fault of Appellant in this matter, and was the result of the delay in disposition of the outstanding Motion to Amend the Complaint and administrative error by the court. (See Appellants' Br. 14). Thus, there is good cause to grant the Motion for Reinstatement in this case.

In their brief, Appellees claim that they would be prejudiced by the amount of time that has passed during this process because "witness memories have faded". (See Appellees' Br. 22). They are incorrect. The Court is clear that "speculative lapse in memory" does not constitute prejudice. See, Estate of Semprevivo v. Lahham, 468 N.J. Super. 1, 15. Furthermore, Appellant's amended complaint contains allegations from as recent as 2021. (See Appellants' Br. 11). Appellant filed their Motion to Reinstate Case and for Reconsideration in 2024. Id. The Court has found no prejudice in cases where just as much time, or more, has passed between events alleged in a

complaint and a motion for reinstatement. See, e.g., Ghandi v. Cespedes, 390 N.J. Super. 193 (2007)(finding no prejudice where reinstatement was sought four years after the car accident leading to the action). Appellees will not be prejudiced by the reinstatement of this case.

Appellees also claim that it would be prejudicial for them to litigate claims that are otherwise time barred, and that when they "agreed to a dismissal of the Initial Lawsuit without prejudice and to not assert statute of limitations arguments as to those original claims, it was not done with the belief or intent that Plaintiff could sit back and wait in perpetuity before filing and prosecuting its claims at her leisure, subjecting Defendants to indefinite and potential forever liability." Appellant did not sit back and wait in perpetuity, and Appellees will not be subject to forever liability. Appellant filed her Motion for Reinstatement 20 months after the notice of dismissal. The Court clearly stated in Ghandi, where Plaintiff's motion was filed 15 months after the notice of dismissal, that "eagerness to move cases must defer to our paramount duty to administer justice in the individual case." Ghandi v. Cespedes, 390 N.J. Super. 193, 198 (2007). If Appellees had a time limit or pace in mind for the case to proceed, they had every opportunity to say so before entering into their agreement with Appellant. This Court has also been clear that even if there is delay, there is good cause to reinstate a claim when the reason for delay is attributable to staffing issues of the plaintiff's law firm. Audubon Volunteer Fire Co. No. 1 v. Church Constr., 206 N.J. Super. 405, 406 (Super. Ct. App. Div. 1986) ("ordinarily, the swift movement of cases

serves the parties' interests, but the shepherding function we serve is abused by unnecessarily closing the courtroom doors to a litigant whose only sin is to retain a lawyer who delays filing an answer during settlement negotiations."). Here, the only applicable potential delay is the delay in filing Appellant's Motion to Reinstate Case and for Reconsideration, which is attributable to a maternity leave at the firm. (335a).

Appellant in this matter was not responsible for the Court's dismissal for lack of prosecution, and reinstatement of the case would not be prejudicial to Appellee. Thus, the Court abused its discretion in denying Appellant's Motion to Reinstate Case and for Reconsideration. Appellant's Motion to Reinstate Case and for Consideration should be granted.

POINT II

A. The Trial Court Abused Its Discretion in Failing to Allow Leave to Amend and for Reconsideration.

The Trial Court and now Appellees have failed to recognize the nature of notice pleading and the standard for a Motion to Dismiss is far different than that for a Motion for Summary Judgment.

For the purposes of motions to amend and for reconsideration, the Trial Court was required to assume the allegations of the proposed Amended Complaint as true. "At this preliminary stage of litigation, the [c]ourt is not concerned with the ability of [Plaintiff] to prove the allegation[s] contained in the complaint." Geyer v. Faella, 279 N.J. Super. 386, 389 (App. Div. 1995). All allegations pled in the complaint are

assumed true, and the Plaintiff is entitled to "all reasonable factual inferences that those allegations support." F.G. v. MacDonell, 150 N.J. 550, 556 (1997).

The Appellees urge this Honorable Court to ignore this precedent and the Rules of Court and to adopt a more stringent standard that would now require a Plaintiff to recite specific, irrefutable facts, all within a statute of limitations timeframe in order to move forward with a complaint. This would not only contradict the precedent and Rules, but subject every complaint to a stringent motion to dismiss without development of any evidence or facts. Interchange State Bank v. Rinaldi, 303 N.J. Super. 239, 256 (App. Div. 1997) (motions for leave to amend should be liberally granted without consideration of the ultimate merits of the amendment). The “broad power of amendment should be liberally exercised at any stage of the proceedings, including on remand after appeal, unless undue prejudice would result or unless the amendment would be futile.” Pressler & Verniero, Current N.J. Court Rules, cmt. 2.1 on R. 4:9-1 (2022).

It must also be noted that Defendants have broken down the various factual allegations from the proposed Amended Complaint differently than Plaintiff. Plaintiff distinguished between: (1) amendments about events that occurred between May 27, 2020 and May 27, 2022 (the two years before the New Lawsuit Complaint was filed); (2) amendments that modify or add to facts about events that occurred before May 16, 2016; and (3) amendments that modify or add to facts about events that occurred before May 16, 2016.

For the sake of consistency and readability, this Reply responses seriatim to Defendant's categories but submits that the way Defendants parse out the categories is an attempt to view the allegations in a vacuum.

1. Appellant/Plaintiff should be permitted to add facts in the Proposed Amended Complaint stemming from the November 2016 Internal Investigation.

Defendants argue that the LAD and CEPA statutes of limitations prevent Plaintiff from amending her Complaint to add facts about retaliation that occurred in 2016. This argument, which the lower court accepted, improperly twists the Rules of Court and case law by imposing on a Plaintiff the burden of proving her case factually within the amended complaint. The original Complaint, as is allowed in notice pleading, was thin on details of the alleged CEPA and LAD retaliation. The law permits a Plaintiff to amend a complaint to add details. It is well-settled that requests to amend pleadings "should be freely granted in the interest of justice." Marinelli v. Mitts & Merrill, 303 N.J. Super. 61, 63 (App. Div. 1997). Motions for leave to amend "should generally be granted even if the ultimate merits of the amendment are uncertain." G & W, Inc. v. Borough of E. Rutherford, 280 N.J. Super. 507, 516 (App. Div. 1995). The "broad power of amendment should be liberally exercised at any stage of the proceedings, including on remand after appeal, unless undue prejudice would result or unless the amendment would be futile." Pressler & Verniero, Current N.J. Court Rules, cmt. 2.1 on R. 4:9-1 (2022).

Defendants attempt to argue at Page 32 of the Appellee Brief that allegations stemming from the November 2016 internal investigation of Plaintiff are time barred and not actionable. The original complaint in this matter (1a), shows that Plaintiff pled that she suffered retaliation due to her complaints about: (1) the manipulation of test scores and the approval of candidates who were clearly unqualified; and (2) the attempt to mislead the NAACP into believing the State of New Jersey was, in fact, complying with the agreement. Plaintiff further pleaded that she was subjected to a retaliatory internal investigation that exceeded the time limit for a New Jersey State Police investigation. The proposed Amended Complaint at paragraphs 3, 26, 27-35 simply adds factual detail to the allegation of retaliation by describing the events of the investigation. (64a at ¶¶3, 26-35).

This record is merely at the notice stage level and should not be construed in the strict fashion the Trial Court found.[1] Accordingly, the Trial Court erred in failing to recognize that the addition of facts are supplementing the slim original facts regarding the nature of the retaliation that occurred in 2016. For pleading purposes in

[1] Defendants at Page 37, make an invalid argument that internal investigations do not qualify as adverse employment actions under CEPA, citing Fraternal Order of Police, Lodge 1 v. City of Camden 842 F.3d. 231 (3d Cir. 2016). This argument is beyond the scope of this appeal. It was not raised below, and should be considered only for summary judgment purposes. By way of further response, an investigation that results in elimination of Plaintiff from a promotional process does clearly create an adverse employment action.

this stage of the proceeding, this should have been allowed. It was an abuse of discretion to hold otherwise.

2. Defendant/Appellees' argument that allegations stemming from Plaintiff's Report in September 2017 to the EEOC Office is time barred fails and their argument that there was no adverse employment action was not addressed specifically by the Trial Court and should not be addressed on appeal.

Defendants argue that the allegations stemming from a September 2017 EEOC report alleged to be retaliation cannot be allowed in the proposed amended complaint because it is time barred and there was no adverse employment action. These allegations are part of the proposed Amended Complaint ¶'s 68-94 which make allegations amendments that modify or add to facts about events that occurred between May 16, 2016 and May 27, 2020 (the date the original complaint was filed and the time before the New Lawsuit Complaint was re-filed.). Defendant has framed this allegation in a vacuum in an attempt to call it a distinct cause of action. It is not. This act has been alleged to be part of a continuing pattern of ongoing retaliation. See Plaintiff's Opening Brief at pages 24-5 (Citing: Count I and II of the proposed Amended Complaint which alleges that Plaintiff has been subjected to multiple additional retaliatory acts as described in the foregoing paragraphs.)

The Trial Court accepted Defendant's argument that the continuing violation doctrine did not apply to these allegations. The Trial Court and Defendants would have this Honorable Court ignore the proposed Amended Complaint's allegation that "this retaliation is ongoing," and the pattern of multiple retaliatory acts alleged. The Trial Court and Defendants would also have this Honorable Court ignore its own precedent

and Rules which provide that New Jersey courts have long granted leave to amend the complaint without consideration of the ultimate merits of the amendment. City Check Cashing v. National State Bank, 244 N.J. Super. 304, 308-309 (App. Div. 1990).

[W]hile motions for leave to amend are to be determined "without consideration of the ultimate merits of the amendment," Interchange State Bank v. Rinaldi, 303 N.J. Super. 239, 256 (App. Div.1997)… those determinations must be made "in light of the factual situation existing at the time each motion is made." Ibid. (citing Fisher v. Yeats, 270 N.J. Super. 458, 467 (App. Div.1994)).

Statutes of limitations are based on the goals of achieving security and stability in human affairs and ensuring that cases are not tried on the basis of stale evidence." *Zaccardi v. Becker*, 88 N.J. 245, 256 (1982). For those reasons, the defense that a claim is time-barred must be raised by way of an affirmative defense, either in a pleading or by a timely motion, or it is waived. *Id.* at 256-57. Therefore, until adjudicated time-barred, a stale claim filed after the expiration of the applicable statute of limitations is nonetheless valid. In those circumstances, then, the fact that [Plaintiff]'s original claims against [Defendants] were filed after the expiration of the applicable statute of limitations is of no legal significance. Stated differently, "[b]ecause there was notice of plaintiff's action, our holding does not offend the policy underlying the statute of limitations, and 'accomplish[es], consistent with the general aim and policy of [the Court Rules] . . . substantial justice on the merits by permitting a technical . . . flaw to be corrected where such correction will not materially

prejudice another party." *Kernan v. One Washington Park Urban Renewal Assocs.*, 154 N.J. 437, 459, 713 (1998) (citations omitted).

Here, before any discovery has been taken, the words of the Amended Complaint must be taken as true: that an ongoing retaliation was present.[2] The Rule and precedent allowing amendments to pleadings, including allegations of a continuing violation that relates back is logical and the correct result. Suppose Defendants have a series of communications that link how they plan to retaliate against Plaintiff that dates back to the original protected activity in this matter. Plaintiff, at the pleading stage, has no way of knowing these exist or other communications that may bolster her allegation of an ongoing retaliation. Only discovery would allow the truth to be found. Notice pleading prevents the kind of unjust result displayed in this matter, as so far no discovery has been conducted. If the facts demonstrate a continuing pattern of retaliation, Plaintiff may win. If they do not, the remedy for a Defendant is a motion for summary judgment where the discovered facts can be mustered and presented.

3. Defendants' argument that Plaintiff fails to state either an LAD or CEPA claim based upon the September 9, 2020 "Misconduct Investigation" because there

[2] To the extent that this Honorable Court or the Trial Court had any issue with clarity in the proposed Amended Complaint, leave should have or still can be granted to modify the Amended Complaint to provide even more details or clarity. If necessary, Plaintiff would further amend to include words like "ongoing and continuous retaliation" or even a separate count for hostile work environment based on retaliation. The draconian result here flies in the face of precedent, rules and equity.

was no adverse employment action fails because an adverse employment action is alleged and because this argument was not considered below.

The Trial Court threw out Plaintiff's case and proposed Amended Complaint, stating that the continuing violations doctrine was not applicable, Plaintiff did not claim a Hostile work environment under NJLAD, and that equitable tolling was not appropriate." [329a-330a]. On August 28, 2024, Plaintiff filed a Motion to Reinstate Case and for Reconsideration. [263a],[3] Among other things, Plaintiff argued that the Trial Court ignored the claims brought within the statute of limitations and that even without judicial doctrines, Plaintiff's proposed amended complaint timely filed new causes of action against defendants within the statute of limitations. [271a]. The Trial Court held there were no exceptional circumstances for a reconsideration, and also refused to reinstate the original or new lawsuit to the active docket.

The claims related to the August 2020 protected speech and retaliation were filed in a proposed Amended Complaint on May 27, 2022, within two years of the occurrence and within the statute of limitations for LAD retaliation claims. Neither the Trial Court of Defendants in their Opposition Brief have any explanation why these and other matters within two years were part of a blanket order dismissing the claims because they were supposedly outside the statute of limitations.

Defendants now argue that there was no adverse action tying the protected activity to the speech. Although this argument was not considered below, this

[3] This Motion was delayed due to a maternity leave.

Honorable Court should note that paragraphs 89-91 of the proposed Amended Complaint state the opposite, and clearly allege that Plaintiff was denied a promotion due to the false discipline against her. 64a at ¶¶ 89-91). Accordingly, Plaintiff's allegations within the statute of limitations should be allowed by this Honorable Court. (See Appellants' Br. 23)

4. Defendants' argument that it would be futile to attempt to join Lt. Col Ebner and Major Santiago as Defendants since their alleged behavior is not actionable under LAD or CEPA was not addressed below and is not the law.

Again, Defendants attempt to have matters filed within the statute of limitations thrown out without giving the Trial Court an opportunity to opine. Plaintiff's Proposed Amended Complaint makes multiple allegations against Defendant Ebner, including that he transferred and harassed Plaintiff for retaliatory reasons. (64a at ¶¶70, 88-90). For related reasons, the Proposed Amended Complaint contains more than sufficient allegations against all other Defendants as well. (64a). The allegations fall within the statute of limitations and should be allowed to proceed.[4]

5. Plaintiff has pled sufficiently to establish promotional denials under CEPA or LAD for 2020-1 occurrences.

[4] In their brief, Defendants also argues that the Plaintiff's statement that she retired is insufficient to allege a constructive discharge. The Trial Court has not ruled on this. If this Honorable Court is so inclined to rule on this matter, then the liberal pleading standard discussed above must be used and the constructive discharge allowed to proceed. Or, in the alternative, leave should be granted to include the more language about a constructive discharge.

Defendants again make an argument regarding the sufficiency of pleading regarding promotions that was not addressed below. The argument seems to be that Plaintiff sought promotion in 2020-21 at an unspecified time and since the Amended Complaint was filed on May 27, 2022, those promotional denials are time barred. Should this Honorable Court consider this argument, the Proposed Amended Complaint at ¶91 states that Plaintiff was told that she would not be considered for promotion due to her disciplinary history. (64a).

This statement is sufficient in a pleading under the Rules. Additional discovery may be needed to determine the date Plaintiff was notified of this statement.

6. The Notte case cannot be distinguished.

Defendants try to distinguish Notte, supra by pointing out that Notte sought amendment to their complaint to add new claims while this matter adds new facts. First, the amended complaint in Notte did add new facts, as noted in Defendant's Opposition at page 48: "[t]he Notte Court explained 'save for the charging paragraphs in the new common law wrongful discharge claims and the necessary addition of conclusory allegations in the new LAD claims, [the plaintiff's] original complaint and his corrected amended complaint are identical.' Id. (emphasis added)."

Second, Appellees are correct that Notte holds that a Plaintiff may amend a complaint to add a cause of action after discovery. Appellees attempt to distinguish this holding from this matter is backwards. Notte stands for a liberal standard. This case was judged with strictness. Allowing a Plaintiff to amend a complaint to add a cause of

action after discovery is procedurally far more generous than the decisions of this Trial Court. Our Supreme Court in Notte found no problem or prejudice allowing amendment at a much later time (after discovery) and with far greater consequence (new causes of action after discovery). Here, discovery has not taken place, no new causes of action have been added, and most of the facts in the proposed amendment fall within the statute of limitations. Thus, Notte shows how far the liberal pleading standard New Jersey extends. It is submitted that the instant case is much less extreme than the posture of Notte. Here, the Trial Court failed to recognize the liberal standard and instead chose the most extreme option. For this and other reasons, the Trial Court abused its discretion.

As discussed *infra* throughout, Notte and its progeny hold that notice pleading is the gold standard in New Jersey. Notte and its progeny allow liberal amendment of pleadings, including allegations that may later turn out to be invalid or outside the statute of limitations. To limit Notte and its progeny to amendments that add a cause of action is the antithesis of New Jersey jurisprudence.

CONCLUSION

For the foregoing reasons, this Honorable Court should REVERSE the decision of the lower court and REMAND this case to REINSTATE and allow the Amended Complaint to be filed.

*/s/_Gregg L. Zeff_*

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