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MOISES M. AGOSTO, **PLAINTIFF,** **VS.** **BOROUGH OF POMPTON LAKES, BOROUGH COUNCIL OF POMPTON LAKES, THE HONORABLE MAYOR JOHN E. MURRIN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, JOHN DOES 1-10, AND XYZ CORP. 1-10,** **DEFENDANTS.**	**SUPERIOR COURT OF NEW JERSEY** **LAW DIVISION: PASSAIC COUNTY** **DOCKET NO.: PAS L 004973 06** **CIVIL ACTION**

BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO EXTEND TIME TO ANSWER, PLEAD OR OTHERWISE MOVE AND TO DISMISS

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INTRODUCTION

Plaintiff does not begrudge defendants, Borough of Pompton Lakes, Borough Council Of Pompton Lakes ("Borough Council"), The Honorable Mayor John E. Murrin, Individually and in his Official Capacity ("Murrin") (hereinafter, collectively referred to as "defendants"), the right to file whatever pleading they deem appropriate provided the pleading is not frivolous and/or in bad faith. Because defendants have engaged in bad faith in that their motion to dismiss is so devoid of merit, plaintiff has put defendants on R. 1:4-8 notice demanding that defendants withdraw their motion voluntarily, or pay legal fees to plaintiff once the motion is denied.[1]

Agosto's Complaint sets forth a detailed factual predicate for each cause of action contained therein. Despite this fact, defendants have intentionally ignored the Complaint and filed a frivolous motion to dismiss merely to increase legal fees and costs to Agosto to deter him from pursuing his valid claims.

ARGUMENT

I. PROCEDURAL ISSUES

A. Defendants' Motion Is Filed Out Of Time.

Rule 4:6-1(b) sets out that the time to serve a responsive pleading may be extended for up to sixty (60) days, on written consent of the parties. Defendants have not obtained such consent. Rather, Defendants have twice requested Agosto's consent, specifically, to extend their time *to Answer*, and twice received this consent. As Defendants have failed to obtain Plaintiff's written consent to serve a responsive pleading, such an extension may only be granted on notice by court order, with good cause shown.

[1] On March 17, 2007, plaintiff put defendants' on notice of R. 1:4-8. Because the time for filing this pleading was imminent, plaintiff filed these opposition papers. However, plaintiff maintains his demand that defendants voluntarily dismiss their motion to dismiss in keeping with R. 1:4-8.

Defense counsel contend that they should be allowed an extension of time to move to dismiss Plaintiff's Complaint, because they acted "diligently" in seeking Plaintiff's consent to do so. While Defendants may have exhibited diligence in their efforts, they did not exhibit good faith in their communications with the undersigned. Both Christina Stoneburner, Esq., and Suzanne J. Ruderman, Esq., state that they asked the undersigned for additional time to respond to the Complaint. What Ms. Stoneburner and Ms. Ruderman fail to mention is that each of them specifically asked for ***additional time to file an Answer to the Complaint***. Neither counsel asked for more time to file a motion – until after the undersigned modified the second Stipulation to make it consistent with their statements.

Neither Ms. Stoneburner nor Ms. Ruderman asked for additional time to answer, plead or otherwise move in response to the Complaint. Further, the letters written to the undersigned by both Ms. Stoneburner and Ms. Ruderman state, with specificity, that they are making their requests so that Defendants can "file their Answer in this matter." Each of the letters continue on to direct the undersigned to return the executed Stipulation and Consent Order, "so that I may file it with Defendants' Answer."[2]

Defendants' actions should not be rewarded if the Court Rules that attorneys are to follow have meaning. Accordingly, plaintiff respectfully requests that defendants' motion be denied as it is filed out of time and no good cause exists as defendants' statements to the Court intentionally mislead the Court and lack candor.

If the Court is still inclined to entertain the motion, then Plaintiff respectfully submits it should be denied as it does not comply with rules surrounding Motions to Dismiss.

B. <u>Defendants' Motion To Dismiss Should Be Denied, As It Violates R. 4:6-2.</u>

The main difference between a motion for summary judgment and a motion to dismiss for failure to state a claim under Rule 4:6-2(e) is that the latter motion is based on the pleadings themselves.

[2] As Ms. Stoneburner's written request was in accordance with her verbal request for an extension of time to file an Answer, the undersigned executed the enclosed Stipulation and Consent Order without noticing that the proposed Order was also to extend time for Defendants to plead or otherwise move in response to the Complaint. The undersigned verbally agreed to a second extension of the time to answer, when contacted by Ms. Ruderman. Fortunately, when Ms. Ruderman submitted her written request, the undersigned realized that the Order was to also extend time to plead or otherwise move, and thus he struck that language before executing the document and returning it to Ms. Ruderman.

On a motion made pursuant to R. 4:6-2(e) "the inquiry is confined to a consideration of the legal sufficiency of the alleged facts apparent on the face of the challenged claim." P. & J. Auto Body v. Miller, 72 N.J. Super. 207, 211 (App.Div.1962). The court may not consider anything other than whether the complaint states a cognizable cause of action. Ibid. For this purpose, "all facts alleged in the complaint and legitimate inferences drawn therefrom are deemed admitted." Smith v. City of Newark, 136 N.J. Super. 107, 112 (App.Div.1975). See also Heavner v. Uniroyal, Inc., 63 N.J. 130, 133 (1973); Polk v. Schwartz, 166 N.J. Super. 292, 299 (App.Div.1979). A complaint should not be dismissed under this rule where a cause of action is suggested by the facts and a theory of actionability may be articulated by way of amendment. Muniz v. United Hsps. Med. Ctr. Pres. Hsp., 153 N.J. Super. 79, 82-83 (App.Div.1977).

Rieder v. State, 221 N.J. Super. 547, 552 (App. Div. 1987)

Rule 4:6-2(e) contemplates that parties submitting materials outside the pleadings should ask the Court's permission to do so: "If, on a motion to dismiss based on the defense numbered (e), matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by R. 4:46, and all parties shall be given reasonable opportunity to present all material pertinent to such a motion." Defendants here did not request leave of the Court to present material outside the pleadings, but they did present two certifications with their motion. Thus, we respectfully submit that the outside materials submitted by Defendants should be stricken.

However, should the Court be inclined to accept Defendants' materials outside the pleadings, we request that the Court also accept the certification of the undersigned and Agosto, which is enclosed herewith. In this case, we would also request that the Court give us notice and "reasonable opportunity to present all material pertinent to such a motion," pursuant to R. 4:6-2.

C. Standard of Review

The test for determining the adequacy of a pleading is whether a cause of action is "suggested" by the facts. Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988). In reviewing a Complaint, the Court's inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the Complaint. Rieder v. Department of Transp., 221 N.J.Super. 547, 552 (App.Div.1987). However, a reviewing court "searches the complaint in depth and with

liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." Di Cristofaro v. Laurel Grove Memorial Park, 43 N.J.Super. 244, 252 (App.Div.1957).

At this preliminary stage of the litigation, the Court should not be concerned with the ability of the plaintiff to prove the allegation contained in the complaint. Somers Constr. Co. v. Board of Educ., 198 F.Supp. 732, 734 (D.N.J.1961). For purposes of this analysis, the plaintiff is entitled to every reasonable inference of fact. Independent Dairy Workers Union v. Milk Drivers Local, 680, 23 N.J. 85, 89 (1956). This is so because the examination of a Complaint's allegations of fact required by the aforestated principles should be one that is at once painstaking and undertaken with a generous and hospitable approach. Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (N.J. 1989). Further, it is important to note that a "motion to dismiss a complaint for failure to state a cause of action should be granted only in rare instances, ordinarily without prejudice." State, Dept. of Treasury, Div. of Inv. ex rel. McCormac v. Qwest Communications Intern., Inc., 387 N.J. Super. 469, 479 (App. Div. 2006), citing Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 772, (1989); Fazilat v. Feldstein, 180 N.J. 74, 78, 848 A.2d 761 (2004).

D. The LAD should be interpreted broadly and liberally

When the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, *et seq.* ("LAD") was first enacted in 1945, it guaranteed that all citizens be afforded the civil rights promised by the State Constitution. Viscik v. Fowler Equip. Co., 173 N.J. 1, 12, 800 A.2d 826, 832 (2002). Subsequently, the New Jersey Supreme Court held that it was a statute of the highest order whose "purpose is 'nothing less than the eradication of the cancer of discrimination.'" Fuchilla v. Layman, 109 N.J. 319, 334,(*quoting* Jackson v. Concord Co., 54 N.J. 113, 124 (1969), *cert. denied sub nom.* University of Medicine & Dentistry of N.J. v. Fuchilla, 488 U.S. 826, 109 S.Ct. 75, 102 L.Ed.2d 51 (1988). The statute was viewed as the protector of the very essence of seeking employment which was Arecognized as and declared to be a civil right.@ N.J.S.A. 10:5-4.

In the monumental case of Lehmann v. Toys R US, Inc., the New Jersey Supreme Court held that Athe LAD was enacted to protect the fundamental principle of our society of a discrimination-free workplace as well as the protection of the civil rights of individual

aggrieved employees@ such as the plaintiff. Lehmann v. Toys R Us, Inc. , 132 N.J. 587, 626 A. 2d 445 (1993) *citing* Fuchilla, *supra*, 109 N.J. at 335. Because of its remedial purpose, the LAD should be construed liberally to achieve its aims. Zive v. Stanley Roberts, Inc., 182 N.J. 436, 446 (N.J. 2005), *citing* Franek v. Tomahawk Lake Resort, 333 N.J. Super. 206, 217, 754 A.2d 1237, 1243 (App.Div.2000).

II. SUBSTANTIVE ISSUES

A. Agosto's LAD Claim (Counts I and II) are properly plead.

1. Agosto satisfies requirements of LAD to go beyond a motion to dismiss

Defendants contend that Agosto's LAD claims fail because Defendants did not formally reject him for the position of Lieutenant, and have yet to promote someone else to Lieutenant. They cite the standard laid out in Pepe v. Rival Co., 85 F. Supp.2d 349, 365 (D.N.J. 1999), *aff'd* 254 F.3d 1078 (3rd Cir. 2001), which is a variation of the McDonnell Douglas test. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973).

However, it is well-settled that New Jersey does not apply the McDonnell test "literally, invariably, or inflexibly." Grigoletti v. Ortho Pharmaceutical Corp., 118 N.J. 89, 97-98, 570 A.2d 903 (1990). Rather, "the criteria announced in Peper, Goodman, and Andersen provide only a general framework for analyzing unlawful discrimination claims and must be modified where appropriate." Erickson v. Marsh & McLennan Co., 117 N.J. 539, 550 (N.J. 1990), citing Peper v. Princeton University Board of Trustees, 77 N.J. 55, 82-83 (1978), Goodman v. London Metals Exchange Inc., 86 N.J. 19, 31 (1981) and Andersen v. Exxon Co., 89 N.J. 483, 492 (1982).

Using these criteria as a general framework, it is not appropriate in this case to require a showing that Defendants formally rejected Agosto for the position of Lieutenant. Rather, it should be sufficient for Plaintiff to show that Defendants were biased against him and failed to promote him in part or solely due to his race or national origin.

With the above being said, it is well settled that unless a plaintiff is claiming reverse discrimination, it is unnecessary to show a replacement outside of the protected class in order to satisfy the fourth prong of the prima facie case. DeWees v. RCN Corp., 380 N.J. Super. 511, 525-526 (App. Div. 2005); Pivirotto v. Innovative Sys., Inc., 191 F.3d 344, 353 (3d

Cir.1999) (a woman claiming that she was discharged because of her gender need not show that she was replaced by a man); Petrusky v. Maxfli Dunlop Sports Corp., 342 N.J. Super. 77, 82, 775 A.2d 723 (App.Div.), certif. denied, 170 N.J. 388, 788 A.2d 772 (2001) ("it is erroneous, in an ordinary case of age discrimination in employment, to use reference to a particular replacement employee as the only means for satisfying the customary fourth element of the prima facie showing"); Reynolds v. Palnut Co., 330 N.J. Super. 162, 168, 748 A.2d 1216 (App.Div.2000) (a plaintiff asserting a traditional age discrimination claim need not show that he was replaced by someone younger). A sufficient answer to the fourth prong would be to show that the challenged employment decision (i.e., failure to hire, failure to promote, wrongful discharge) took place under circumstances that give rise to an inference of unlawful discrimination." Williams v. Pemberton Twp. Pub. Sch., 323 N.J. Super. 490, 733 A.2d 571 (App. Div. 1999). *See also,* Young v. Hobart West Group, 385 N.J. Super. 448, 897 A.2d 1063 (App.Div. 2005); Petrusky v. Maxfli Dunlop Sports Corp., 342 N.J. Super. 77, 775 A.2d 723, (App.Div. 2001). This is so because it is inappropriate to require Agosto to show that a Caucasian employee was promoted as the sole means to claim it was discriminatory that he was not promoted. See Meiri v. Dacon, 759 F.2d 989, 995-96 (2d Cir. 1985) ("[Requiring] an employee, in making out a prima facie case, to demonstrate that she was replaced by a person outside the protected class. . . is inappropriate and at odds with the policies underlying Title VII."); Nieto v. L&H Packing Co., 108 F.3d 621, 624 & n.7 (5th Cir. 1997) ("While the fact that one's replacement is of another national origin 'may help to raise an inference of discrimination, it is neither a sufficient nor a necessary condition.' " (*quoting* Carson)); Jackson v. Richards Med. Co., 961 F.2d 575, 587 n.12 (6th Cir. 1992) ("We wish to make clear . . . that the fact that an employer replaces a Title VII plaintiff with a person from within the same protected class as the plaintiff is not, by itself, sufficient grounds for dismissing a Title VII claim."); Walker v. St. Anthony's Med. Ctr., 881 F.2d 554, 558 (8th Cir. 1989) ("The sex of[plaintiff 's] replacement, although a relevant consideration, is not necessarily a determinative factor in answer to either the initial inquiry of whether she established a prima facie case or the ultimate inquiry of whether she was the victim of discrimination."); Howard v. Roadway Express, Inc., 726 F.2d 1529, 1534 (11th Cir. 1984) (holding that a district court misstated the law when it concluded that "there can be no racial discrimination against a black person who is not selected for a job when the person who is selected for the job is black."

Thus, it is clear that it is irrelevant whether Caucasian employees were promoted

as long as Agosto can show that he was not promoted due to his race. Pivirotto v. Innovative Sys., 191 F.3d 344, 354 (3d Cir. 1999)(The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out because of his age.); O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 134 L. Ed. 2d 433, 116 S. Ct. 1307 (1996) (an age-discrimination plaintiff need not prove, as part of his prima facie case, that he was replaced by someone outside of the protected class (i.e., persons under the age of 40).

This is so because a plaintiff 's inability to prove that she was replaced by someone outside of her class is not necessarily inconsistent with her demonstrating that the employer treated her "less favorably than others because of [her] race, color, religion, sex, or national origin." Pivirotto v. Innovative Sys., 191 F.3d 344, 354 (3d Cir. 1999). Even if the plaintiff was replaced by someone within her own class, this simply demonstrates that the employer is willing to hire people from this class--which in the present context is presumably true of all but the most misogynistic employers --and does not establish that the employer did not fire the plaintiff on the basis of her protected status. Similarly, it is not necessary for Agosto to show that other Hispanics were not promoted to Lieutenant – although none were. It is also not necessary to show that Caucasians were promoted. In the situation, *sub judice*, there was a need for Lieutenants which explains why the Police Department contacted the Department of Personnel to request that an examination be administered so that they could make police officers Lieutenant. (Agosto Cert. ¶?). Agosto took the Lieutenant's test and was number one on the list. To promote someone of the list, he had to be promoted. (Agosto Cert. ¶?). Agosto's supervisor, the Chief of Police, Albert L. Ekkers ("Ekkers"), took several actions to get defendants to promote Agosto. Agosto was well qualified for the position as set forth in the Complaint. Certainly there is no one better suited to determine Agosto's qualifications and to determine who is best qualified to serve as Lieutenant. (Agosto Cert. ¶?). Ekkers determined Agosto was qualified and Ekkers acted accordingly. Despite Ekkers contacting the Borough Council and Murrin, defendants refused to promote Agosto to Lieutenant. (Agosto Cert. ¶?). When one looks at the hiring practices of the Borough of Pompton Lakes, there are almost no Hispanics and no minorities – other than Agosto – in the police department. In fact, defendants took an action that was a deviation from its historical practices to prevent Agosto from obtaining his much desired promotion. (Agosto Cert. ¶?). It allowed the list to lapse without promoting anyone off the list. (Agosto Cert. ¶?). There was absolutely no good reason for such action. (Agosto Cert. ¶?). The only reason for such

action is due to a desire to not have Hispanic Puerto Rican police officers such as Agosto be promoted up the Chain of Command. (Agosto Cert. ¶?). These facts scream out discrimination and more than satisfy the fourth prong. These facts set forth the very evil that the LAD was created to eradicate.

In fact, seven of the eight federal courts of appeals to have addressed this issue, have held that a plaintiff need not prove, as part of his prima facie case, that he was replaced by someone outside of the relevant class. The leading case on this point comes out of a per curiam opinion in the Seventh Circuit. The district court held that the fact that plaintiff's replacement was not outside of the protected class prevented the plaintiff from establishing a prima facie case of discrimination. Carson v. Bethlehem Steel Corp., 82 F.3d 157, 158 (7th Cir. 1996). The Court of Appeals reversed the District Court and based their decision on the United States Supreme Court (O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 134 L. Ed. 2d 433, 116 S. Ct. 1307 (1996)) in claiming that the understanding of what is required to make out a prima facie case is erroneous. Id.

The Seventh Circuit's interpretation of the United States Supreme Court was best stated in an illustration set forth in their decision: "Suppose an employer evaluates its staff yearly and retains black workers who are in the top quarter of its labor force, but keeps any white in the top half. A black employee ranked in the 60th percentile of the staff according to supervisors' evaluations is let go, while all white employees similarly situated are retained. This is race discrimination, which the employer cannot purge by hiring another person of the same race later." Id. (*citing* Connecticut v. Teal, 457 U.S. 440, 73 L. Ed. 2d 130, 102 S. Ct. 2525 (1982)). A similar example was cited by the Court in Marzano v. Computer Science Corp., 91 F.3d 497, 508-09 n.4 (3d Cir. 1996), while interpreting the LAD (black employees laid off in RIF with non-black employees does not preclude black employees from claiming discrimination if the reason the black employees were included in the RIF was due to their race).Certainly, it is so that promoting Hispanics would not defeat Agosto's claim, then not promoting Caucasians is completely without consequence. *See* Pivirotto v. Innovative Sys., 191 F.3d 344, 353-354 (3d Cir. 1999).

In the case at bar, Agosto can show and has shown facts adequate to create an inference of discrimination in Defendants' actions of offering the exam and failing to hire him when in the past they had always hired the top-scorer, they had never let a promotional list expire, and they had traditionally had two lieutenants. A strong inference of discrimination is created here,

because it explains Defendants' otherwise nonsensical actions. Why would Defendants give the test if they were not going to hire anyone? It is clear that if Agosto did not file this Complaint, defendants are just going to keep giving test until either: (a) a non-Hispanic, non-Puerto Rican who did not issue a DWI ticket to a council member does better than Agosto, or (b) Agosto gives up and stops taking the exam.

The reason for not promoting Agosto is the critical inquiry, not whether anyone else was promoted. In this situation, defendants admit that there was a need to have someone be a Lieutenant. This is obvious from actions of calling test, allowing people to sit for test, Ekkers' actions to protest Agosto's lack of advancement to Lieutenant that there was a need to promote someone to Lieutenant. Defendants did not expect and were unhappy that Agosto tested number one and they had to promote him. Thus, to keep Hispanics and Puerto Ricans out of making Lieutenant, defendants – for the first time—let the list expire without promoting anyone. (Agosto Cert. ¶?).

Defendants argue that Agosto never alleged that he was rejected for the Lieutenant's position. (Def's Br. at 8). This is a complete misstatement of the Complaint. The Complaint clearly sets forth that Agosto was rejected for the Lieutenant's position. However, to ensure there is no misunderstanding on this point, Agosto clearly states once again, that he was rejected for the Lieutenant's position. (Agosto Cert. ¶?).

2. Defendants argue statute of limitations

Defendants then argue that even if Agosto satisfies the 4th prong, the failure to promote is time barred as all incidences of discrimination occurred in 1993. (Def's Br. at 8). This argument is as outlandish as it is bereft of merit. Plaintiff's complaint is replete with continuing acts of discrimination such as a failure to promote in 2006 and statistical proof of discrimination to the current date. There are almost 50 paragraphs in the Complaint that set forth various acts of retaliation and discrimination that occurred from 2004 to the current date. (Complaint ¶¶42-93). There are over 20 paragraphs of the Complaint that set forth statistical proof of the discrimination that exists to the current date. (Complaint ¶¶ 94-117). All of this is pre-discovery. Defendants' argument on this issue is evidential of how desperate they are to try to prevent Agosto his day in Court.

B. Agosto's LAD Claim (Count III) is properly plead.

1. Retaliatory acts occurred within the Statute of Limitations

This point seems to be a carry over of the point mentioned *supra* in Pl's Br. at A(2). Defendants also protest that plaintiff does not claim to have spoken to supervisors about the discrimination. Complaints are notice pleading and it reflects the premature nature of defendants' frivolous action that the pleading is filed before the commencement of discovery. *See, e.g.*, Wilson v. Amerada Hess Corp., 168 N.J. 236 (N.J. 2001); Wellington v. Estate of Wellington, 359 N.J. Super. 484, 496, 820 A.2d 669 (App. Div.), *certif. denied*, 177 N.J. 493, 828 A.2d 920 (2003); Smith v. Estate of Kelly, 343 N.J. Super. 480, 502, 778 A.2d 1162 (App. Div. 2001); Kaczorowska v. National Envelope Corp., 342 N.J. Super. 580, 591-592, 777 A.2d 941 (App. Div. 2000).

2. Agosto complained of discrimination.

Defendants state that Agosto "does not even allege that any of the Defendants were aware that he believed he was the victim of discrimination or harassment." (Def's Br. at 9). Nothing further from the truth can be true. Defendants intentionally mislead the Court as the Complaint is replete with details surrounding the Charge of Discrimination that was filed on November 16, 1993. This Charge was served on defendants and responded to by defendants. (Agosto Cert. ¶?). Subsequently, Agosto had several conversations with Ekkers over the years wherein he stated that he was being discriminated against due to his race and national origin. (Agosto Cert. ¶?). These conversations were as recent as March 2006 and the filing of this Complaint in November 2006. (Agosto Cert. ¶?).

3. Agosto was subject to an adverse employment action

Defendant contends that because Agosto was not promoted to Lieutenant his position is unchanged and therefore he cannot have suffered an adverse employment action.(Def.'s Br. at 10). The one commendation to extend to defendants is their consistency in making frivolous arguments. A reflection of the lunacy in defendants' argument is demonstrated in the fact that if this was the case, then there would be no such thing as a failure to promote case in the LAD context. One of the cases defendants' cite to is such a case. Pepe v. Rival Co., 85 F. Supp. 2d 349 (D.N.J. 1999). Of course, this is one of numerous such cases that have been litigated in the State of New Jersey.

This argument alone is one of the reasons for putting defendants on R. 1:4-8

notice as it is beyond clear that a failure to promote suffices as an adverse employment action. An adverse employment action includes, "failure to promote." Butler v. Union County Prosecutor's Office, 2007 U.S. Dist. LEXIS 15154 (D.N.J. 2007),*citing, , see* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998); Farmer v. Camden City Bd. of Educ., 2005 U.S. Dist. LEXIS 7339 (D.N.J. 2005) ("Defendants argue that the failure to promote Plaintiff was not an adverse employment action because she had not obtained tenure in the title of Assistant Superintendent. This proposition is doubtful. Indeed, it is well-settled that failure to promote is an adverse employment action sufficient to support a prima facie case for age discrimination.)

C. Counts IV, V, and VI are properly plead as a claim for damages was set forth in the Complaint.

Defendants argue these counts should de dismissed with little to no argument to support the contention. Thus, it is difficult to understand defendants' arguments. Be that as it is may be, Counts IV, V, and VI specifically set forth the false statement made by defendants, the reliance of plaintiff, and the damage caused to plaintiff. Plaintiff respectfully relies upon the counts and adopts them herein.

Defendants called for Lieutenant tests and specifically stated that they would promote police Sergeants to Lieutenant. (Agosto Cert. at ¶?). Agosto studied for the test in reliance on defendants' statements. (Agosto Cert. at ¶?). Agosto spent monies and personal time and vacation time studying for the test and was damaged due to the fact that the statements made were false and defendants knew them to be false when made. (Agosto Cert. at ¶?).

D. Counts VII, VIII, and IX are properly plead as discovery has not yet occurred.

Plaintiff pled a violation of specific written documents such as the handbook. New Jersey subscribes to notice pleading. Discovery has not yet occurred and thus defendants have not yet turned over its discrimination policy, handbook, union contract, and other employment documents that plaintiff will get throughout the course of discovery. (Agosto Cert. ¶?). Plaintiff anticipates that there are contractual obligations in these documents that defendants breached by their actions as set forth in the Complaint. (Agosto Cert. ¶?).

As of this date, no discovery has taken place. Defendant's motion with regard to Agosto's contract claims is thus premature and should be denied. *See, e.g.*, Wilson v. Amerada Hess Corp., 168 N.J. 236 (N.J. 2001); Wellington v. Estate of Wellington, 359 N.J. Super. 484, 496, 820 A.2d 669 (App. Div.), *certif. denied*, 177 N.J. 493, 828 A.2d 920 (2003); Smith v. Estate of Kelly, 343 N.J. Super. 480, 502, 778 A.2d 1162 (App. Div. 2001); Kaczorowska v. National Envelope Corp., 342 N.J. Super. 580, 591-592, 777 A.2d 941 (App. Div. 2000). To the extent the Court requires a more specific pleading of contractual provisions and damages, Plaintiff respectfully requests leave to amend the Complaint.

The breach of implied covenant and good faith claim will be advanced out of the breach of contract claim. Bad faith does not have to be shown unless plaintiff loses the contract claims in summary judgment. Pepe v. Rival Co., 85 F. Supp. 2d 349 (D.N.J. 1999) (In order to survive summary judgment on an implied covenant of good faith and fair dealing claim, a plaintiff must either (1) withstand summary judgment on his contract claim or (2) offer some evidence of bad faith in relation to a contractual term which governs his or her at will employment.). Because discovery has not yet occurred, plaintiff respectfully submits that it is premature to deprive him of his day in court on the breach of implied covenant and good faith claim. Certainly plaintiff asserts and believes that the defendants' breach of their contractual obligations to him were in bad faith, intentional and with malice. (Agosto Cert. ¶?).

E. Borough Council should remain a defendant to this action.

Defendants' counsel make conclusory and unsubstantiated statements about the functions and actions of the Borough Council. (Def's Br. at 12-13). Certainly it is set forth in the Complaint that the Borough Council is a separate entity subject to the LAD. (Agosto Cert. ¶?). Discovery has not yet occurred as noted *infra*. Plaintiff thus submits it is inappropriate to dismiss an entity until discovery has occurred merely based upon conclusory and unsubstantiated statements from defense counsel.

CONCLUSION

Defendants' motion is untimely and no good cause is demonstrated. Thus, Moises Agosto respectfully requests that the Court deny Defendants' Motion to Extend Time to Answer, Plead, or Otherwise Move. If the Court is inclined to entertain the Motion to Dismiss, then Moises Agosto respectfully requests that the Court deny the Motion to Dismiss as it is bereft of merit.

We thank the Court for its courtesies.

Respectfully submitted,

Law Offices Of Ty Hyderally, PC
Attorneys for Plaintiff
Moises Agosto

Dated: March 18, 2006

By: _____
TY HYDERALLY, ESQ.
for the Firm

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