SUPREME COURT OF NEW JERSEY

EDWARD W. and NANCY M. KLUMPP, Plaintiffs-Appellants, v. **BOROUGH OF AVALON,** Defendant-Respondent,	Docket No. A-49-09 Civil Action On Petition For Certification From Final Decision Of The Superior Court, Appellate Division Sat Below: Lisa, Sapp-Peterson and Alvarez, JJAD

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PLAINTIFFS-APPELLANTS

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The National Association of Home Builders ("NAHB") is a Washington, D.C.-based trade association whose mission is to enhance the production of housing in the United States, and to advocate on behalf of the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. As the voice of America's housing industry, NAHB helps promote policies that will keep housing a national priority. Founded in 1942, NAHB is a federation of more than 800 state and local associations, including five in New Jersey.

NAHB represents over 200,000 members throughout the United States, including people and firms who construct and supply single-family homes, plus apartment, condominium, multi-family, commercial and industrial builders, land developers and remodelers. NAHB's builder members construct approximately 80 percent of the new homes constructed each year in the United States.

To effectuate its mission, NAHB strives to create an environment in which all Americans have access to the housing of their choice. Toward this end, NAHB is a vigilant advocate in the nation's courts, and it frequently participates as a party

litigant and *amicus curiae* to safeguard the property rights and interests of its members.

By Notice of Motion filed January 13, 2010, NAHB sought to participate in this appeal as *amicus curiae*, pursuant to R. 1:13-9. The motion was unopposed, and was granted by this Court's Order filed January 22, 2010.

PRELIMINARY STATEMENT

The Appellate Division erroneously held that the Borough of Avalon obtained title to the Klumpps' property by inverse condemnation and without paying any compensation. As discussed in the Argument section of this brief, both the United States and New Jersey Constitutions affirm the fundamental importance of private property rights, and both therefore prohibit the government from taking private property without paying just compensation. However, allowing the Appellate Division's decision to stand would permit municipalities to usurp property without paying just compensation, thereby circumventing the U.S. Constitution, the New Jersey Constitution, and other statutory measures which protect individual property rights.

The Appellate Division's holding is also based on a misapplication of the well-established precedents which consistently and clearly establish that inverse condemnation is a cause of action brought ***by a property owner against a governmental defendant*** to recover the value of property taken by the governmental. defendant without formal exercise of its eminent domain power. It is not an action that can be invoked by the sovereign.

The question before this Court is whether a municipality may occupy a property and obtain title through inverse condemnation without initiating condemnation proceedings under

the Eminent Domain Act, N.J.S.A. 20:3-1 to -50. This case presents important constitutional property rights issues, and this Court's decision will have a wide-ranging impact on the development of takings law in the United States, and thus presents an issue of great importance to NAHB and its members. Based upon the overwhelming weight of authority discussed in this brief, the only answer this Court can reach is a resounding "No! A municipality cannot occupy a property or obtain title through inverse condemnation without complying with the applicable statutory requirements given that inverse condemnation is a remedy reserved solely for landowners." Indeed, NAHB respectfully submits that the Takings Clause of the U.S. Constitution is intended to prevent exactly what occurred in this case: a local government over-reaching its statutory authority and violating the constitutionally-protected rights of property owners.

ARGUMENT

I. THE LOWER COURT'S RULING THAT AVALON OBTAINED TITLE TO THE KLUMPPS' PROPERTY WITHOUT INITIATING CONDEMNATION PROCEEDINGS RESULTS IN AN UNCONSTITUTIONAL TAKING OF PRIVATE PROPERTY WITHOUT JUST COMPENSATION

Both the United States and New Jersey Constitutions affirm the fundamental importance of private property rights, and both therefore prohibit the government from taking private property without paying just compensation. Although the government has the right to "take" property from private citizens for public purposes through the power of eminent domain, that power is limited.

As this Court stated in Housing Authority of New Brunswick v. Suydam Investors, LLC, 177 N.J. 2,6 (2003), "Eminent domain is the awesome power of the sovereign to take property for public use without the owner's consent." (internal citation omitted). In Township of West Orange v. 769 Associates, LLC, 198 N.J. 529, 537 (2009), this Court explained that "eminent domain is informed by two separate legal doctrines: the right of the State to take private property for the public good, which arises out of the necessity of government, and the obligation to make just compensation, which stands upon the natural rights of the individual, guaranteed as a constitutional imperative." (internal citations omitted).

The constitutional imperative is found in the Fifth Amendment of the U.S. Constitution which provides that "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. This "Takings Clause" is incorporated into the Due Process Clause of the Fourteenth Amendment and is applicable to states. See U.S. Const. amend. XIV; see also Chicago, B. & Q.R. Co. v. City of Chicago, 166 U.S. 226, 234 (1897). Likewise, the New Jersey Constitution states that "[p]rivate property shall not be taken for public use without just compensation." N.J. Const., art.I, para. 20. The payment of just compensation is a fundamental restraint on the actions of the government and cannot be circumvented by the government. See Penn. Coal Co. v. Mahon, 260, U.S. 393, 416 (1922)("We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."). Thus, property owners must be compensated when the government takes their property.

The grave importance of protecting constitutionally-based individual property rights has led state courts and legislatures to clearly define the context, process, and mechanisms the government must use when taking private property from landowners. See Township of West Orange, supra, at 537("The Eminent Domain Act sets forth the procedural framework within

which the competing interests in a condemnation case are to be resolved"); Michael A. Pane, 35 N.J. Prac., Local Government Law § 21:2, Procedures under Eminent Domain Act (4th ed., 2009)("The Eminent Domain Act was adopted...to provide a uniform method pursuant to which all public and private entities able to condemn would do so...pursuant to constitutional mandates.").

Courts have divided the taking of private property into two distinct categories: condemnation and inverse condemnation. Under this long established application of eminent domain, the government either affirmatively condemns property - paying compensation - or acts in a manner that amounts to an act of condemnation without compensating the property owner. In the latter case, the ***property owner*** has the right to bring an inverse condemnation case in order to obtain compensation. The court below turned this doctrine on its head by allowing the ***government*** to "inversely condemn" property. Inverse condemnation is simply not a power available to the government under its eminent domain authority.

Indeed, courts have consistently held that the condemnation of property through eminent domain may properly occur in one of three ways, none of which includes inverse condemnation. See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 n.17 (2002); San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 652 (1981)("Police power regulations such

as zoning ordinances and other land use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property.") (Brennan, J., dissenting); MacLeod v. County of Santa Clara, 749 F.2d 541, 544-45 (1984)(stating that a "taking" can occur by formal condemnation procedures, regulations that restrict or destroy the use of privately owned property, or physical appropriation).

First, a public entity may effectuate a taking by physical appropriation. See, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) ("Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred."); see also Lorio v. City of Sea Isle City, 88 N.J. Super. 506, 509 (Law Div. 1965)(holding that a dune built on private property represented an appropriation to public use and accordingly, landowners must be compensated). Second, a public entity may take property through formal condemnation proceedings pursuant to the state's eminent domain statute. See Twp. of West Orange, supra, at 537. Third, a public entity may regulate the use of private property to such an extent that the landowner retains no economically viable use. See Mansoldo v. State, 187 N.J. 50, 59 (2006)("If the [agency] regulation does deny all economically beneficial or productive use of the [property],

then the State must provide just compensation"); see also Gardner v. New Jersey Pinelands Comm'n, 125 N.J. 193, 205 (1991)(discussing whether regulation constituted a governmental taking). In each of these situations, the public entity is ultimately required to pay just compensation to the property owner deprived of their property rights.

In New Jersey, the Local Lands and Buildings Law, N.J.S.A. 40A:12-1, et seq., and the Eminent Domain Act of 1971, N.J.S.A. 20:3-1, et seq., codify the state's well-established balancing of the government's right to take private property, and the government's obligation to pay just compensation as mandated by the U.S. and New Jersey Constitutions. See Township of Hillsborough v. Robertson, 260 N.J. Super. 37, 42 (Law Div. 1992); Pane, supra, at § 21:2.

The Local Lands and Buildings Law governs all municipalities and counties in New Jersey and regulates the manner in which they may buy, sell, lease or exchange real property. N.J.S.A. 40A:12-4(a) authorizes a county or municipality to acquire interests in real property, and N.J.S.A. 40A:12-5(a)(1) indicates that municipalities can acquire such property "[b]y purchase, gift, devise, lease, exchange, ***condemnation***, or installment purchase agreement." (emphasis added). The plain language of the statute clearly indicates that the legislature chose not to authorize a county or

municipality to acquire property by inverse condemnation. Because the statute lists five ways in which property can lawfully be acquired, it is appropriate to consider the time-honored statutory construction doctrine of *expressio unius est exclusio alterius* - the expression of one thing is to the exclusion of the other. Here, as in Evans v. Atlantic City Board of Education, 404 N.J.Super. 87 (App. Div. 2008), "[t]he language chosen by the Legislature unmistakably precludes the inclusion of other matters not specifically mentioned." Thus, the lower court's holding that the Avalon could take the Klummps' property by inverse condemnation or without compensation violates the clear language of N.J.S.A. 40A:12-5(a)(1) and would circumvent the policy objectives embodied by the statute.

As then-Governor William T. Cahill noted in his December 2, 1971 conditional veto message on what became the Eminent Domain Act of 1971,[1] the bill "would revise the Eminent Domain Laws of New Jersey to make uniform the legal requirements for all entities and agencies having the power to condemn. The bill would increase protection to the citizen whose property is condemned." Governor's Recommendations for Reconsideration Statement to Assembly Bill No. 504, at 1 (Dec. 2, 1971) (L.

[1] A Governor's conditional veto of a bill may be considered in determining legislative intent. DiProspero v. Penn, 183 N.J. 477, 503 (N.J. 2005)

1971, c. 361). Thus, the statute, provides a uniform procedure to be followed by all entities, such as Avalon, that have the power to condemn:

> Whenever any condemnor shall have determined to acquire property pursuant to law; including public property already devoted to public purpose but cannot acquire title thereto or possession thereof by agreement with a prospective condemnee, whether by reason of disagreement concerning the compensation to be paid or for any other cause, the condemnation of such property and the compensation to be paid therefor, and to whom payable, and all matters incidental thereto and arising therefrom, shall be governed, ascertained and paid by and in the manner provided by this act...

N.J.S.A. 20:3-6.

This provision of the Eminent Domain Act of 1971 is to be strictly construed. City of Passaic v. Shennett, 390 N.J. Super. 475, 482 (App. Div. 2007); Borough of Rockaway v. Donofrio, 186 N.J. Super. 344, 353-54 (App. Div. 1982), certif. denied, 95 N.J. 183 (1983).

The act details when and how a condemnation is to be commenced and continued, including among others, provisions governing mandatory pre-litigation bona fide negotiations with the property owner, N.J.S.A. 20:3-6; the filing of a complaint, N.J.S.A. 20:3-8; service of process, N.J.S.A. 20:3-9; imposition of a lis pendens, N.J.S.A. 20:3-10; the appointment of commissioners, N.J.S.A. 20:3-12(b); hearings, N.J.S.A. 20:3-12(c)-(e); the setting of compensation, N.J.S.A. 20:3-12(g); appeals, N.J.S.A. 20:3-13; the declaration of taking, N.J.S.A.

20:3-17; the vesting of title, N.J.S.A. 20:3-19; deposits, N.J.S.A. 20:3-18; abandonment, N.J.S.A. 20:3-35 to -36; counsel fees, N.J.S.A. 20:3-26; and interest, N.J.S.A. 20:3-31 to -32.

In light of New Jersey's clear recognition of the constitutionally-protected rights of property owners, as evidenced by the due process safeguards adopted by the Legislature and enforced by courts, this Court cannot let the Appellate Division's decision stand as a sword by which the government can circumvent the U.S. Constitution, the New Jersey Constitution, the Local Lands And Building Law, or the Eminent Domain Act of 1971 and usurp property without paying just compensation. Because the decision below eviscerates these constitutional and statutory protections, property owners in New Jersey will be unable to rely on the Eminent Domain Act's express protections in the future.

II. INVERSE CONDEMNATION IS A REMEDY RESERVED FOR LANDOWNERS

In United States v. Clarke, 445 U.S. 253, 257 (1980), the Supreme Court described inverse condemnation as "the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." See also First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (1987); Kirby Forest Indus., Inc v. U.S., 467 U.S. 1, 4 (1984); Hawkins v. City of

Greenville, 358 S.C. 280, 290 (2004)("Inverse condemnation is a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency,"); District of Columbia Redevelopment Land Agency v. Dowdey, 618 A.2d 153, 164 (D.C. 1992)("Inverse condemnation is the description of a proceeding where 'a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted.'").

The courts below misapplied black-letter law and decisions of the U.S. Supreme Court and this Court which clearly demonstrate that inverse condemnation is not a method for government bodies to acquire property, but rather is a cause of action brought ***by a property owner against a governmental defendant*** to recover the value of property that has been taken by the governmental defendant without formal exercise of its eminent domain power. See, e.g., Mansoldo v. State, 187 N.J. 50, 56 (2006)(inverse condemnation action brought by landowner against state arguing that Department of Environmental Protection regulation was a taking of his property); Greenway Dev. Co., Inc. v. Borough of Paramus, 163 N.J. 546, 549 (2000)(landowner action against borough, mayor, and zoning official for inverse condemnation of property); Tabb Lakes, Ltd.

v. U.S., 10 F.3d 796, 799(3d Cir. 1993)(property owner sued U.S. seeking compensation under Fifth Amendment for alleged taking of his property due to order of U.S. Army Corps of Engineers requiring owner to cease and desist filling wetlands on his property without permit).

After asserting for decades that the Klumpps owned the property and denying that it had taken the land, midway through this litigation, the Borough of Avalon claimed for the first time that it acquired the Klumpps' property through inverse condemnation. Rather than "inverse," what the Borough of Avalon did to the Klumpps was a perverse condemnation, standing the law of inverse condemnation on its head. In explaining the doctrine of inverse condemnation, courts have consistently recognized a distinction between "condemnation" and "inverse" condemnation, as well as a distinction between inverse condemnation and eminent domain. As the U.S. Supreme Court stated in Agins v. City of Tiburon:

> Inverse condemnation should be distinguished from eminent domain. Eminent domain refers to a legal proceedings in which a government asserts its authority to condemn property. Inverse condemnation is "a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted."

447 U.S. 255, 258 n.2 (1980) (quoting Clarke, 445 U.S. at 257). See also 27 Am. Jur. 2d Eminent Domain § 743 (2d ed., 2009)(inverse condemnation is distinct from eminent domain). The distinction between condemnation proceedings and "inverse" condemnation proceedings is also duly noted by courts. In Clarke, the Supreme Court stated:

> There are important legal and practical differences between an inverse condemnation suit and a condemnation proceeding...a "condemnation" proceeding is commonly understood to be an action brought by a condemning authority such as the Government in the exercise of its power of eminent domain...The phrase "inverse condemnation," as a common understanding of that phrase would suggest, simply describes an action that is the "inverse" or "reverse" of a condemnation proceeding.

445 U.S. at 257. Similarly, in In re Jersey Central Power & Light Co., the Appellate Division explained that, "condemnation proceedings are normally initiated by the condemning authority; inverse condemnation proceedings are initiated by the landowner, hence the 'inverse' label." 166 N.J. Super. 540, 544 (1979). As a basic interpretation of these phrases suggests, the word "inverse" is there for a reason. If a municipality can both "condemn" and "inversely condemn" private property, the additional label renders it superfluous.

Inverse condemnation describes an action grounded on the constitutional proscription against the taking or damaging of property for public use without compensation. In Clarke, the

U.S. Supreme Court stated that a "landowner is entitled to bring [an inverse condemnation] action as a result of 'the self-executing character of the constitutional provision with respect to compensation'" 445 U.S. at 257(internal citations omitted); see also Hawkins, 358 S.C. at 290 ("The action is not based on tort, but on the constitutional prohibition of the taking of property without compensation."); 27 Am. Jur. 2d Eminent Domain § 739 (2d ed., 2009)("Some jurisdictions hold...that when a [governmental entity] with the power of eminent domain damages property for a public use, the owner may seek damages...in a statutory action for inverse condemnation or in a constitutional action for inverse condemnation."). Accordingly, the inverse condemnation claim has developed specifically to give private landowners a legal right of action to fend off government's unconstitutional interference of property rights without due process of law. See U.S. Const., amend. XIV; N.J. Const., art. I, para.1.

Except for the lower court decisions in this case, New Jersey courts have also consistently applied inverse condemnation solely as a landowner's remedy. The Appellate Division properly described inverse condemnation in In re Jersey Cent. Power & Light Co., supra, 166 N.J. Super. at 544, as:

> A remedy designed to protect a landowner whose property has been taken De facto by insuring that he be paid reasonable compensation therefore...an appropriation of

> property by a governmental entity...having power of eminent domain without its having undertaken to condemn or pay compensation to the landowner for the taking, can be redressed by the owner's action in the nature of Mandamus to compel institution of condemnation proceedings.

In its discussion of inverse condemnation as a cause of action, the Jersey Central panel explained that an owner's action to compel condemnation originates from an alleged violation of state and federal constitutional guarantees. Id.

Further, on page 26 of its A Practitioner's Guide to New Jersey's Civil Court Procedures, available at http://www.judiciary.state.nj.us/civil/practitioners_guide.pdf, (visited Feb. 1, 2010) the New Jersey Judiciary describes an inverse condemnation case as an "action brought by owner of real property seeking damages compensating the owner for a taking of the owner's private real property for a public use."

NAHB respectfully submits that this Court should take judicial notice of the Practitioner's Guide definition, as provided in Ev. R. 202(b) and Ev. R. 201(a). The cover of the Guide contains the names of the Chief Justice and of Hon. Glenn A. Grant, J.A.D., Acting Administrative Director of the Courts. The Guide contains a Notice on its unnumbered first page, stating:

> This document is intended to embody the policies adopted by the New Jersey Supreme Court, the Judicial Council and the Administrative Director of the Courts, but does not itself establish case management policy.

> It has been reviewed by the Judicial Council and the Conference of Civil Presiding Judges and is intended to promote uniform practices and procedures statewide.

In analogous circumstances, the Appellate Division recently took judicial notice of the Chief Justice's Administrative Directives and other documents that establish the Judiciary's policy of rotating veteran judges in the discretion of the Assignment Judge. See, e.g., Schott v. State, 2006 N.J. Super. Unpub. LEXIS 2577, *12-13 (App. Div. July 13, 2006).[2]

Here, the Appellate Division permitted the Borough of Avalon to maintain that it acquired the Klumpps' property through inverse condemnation. However, this use of inverse condemnation by the government pays no heed to the constitutional origins of the doctrine. Inverse condemnation may only be used to protect the property rights of private citizens. To allow a municipality to use inverse condemnation as a sword, circumvent statutory guidelines for condemnation, and leave a landowner with no form of defense not only makes a mockery of statutes like the Eminent Domain Act, but also makes a mockery of the due process and private property rights guaranteed by the New Jersey and United States Constitutions.

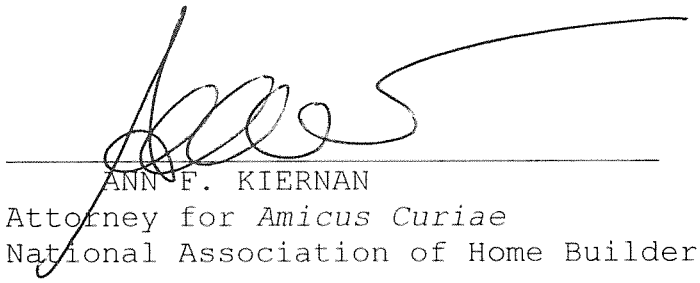
Moreover, the Appellate Division's decision is particularly damaging because it eliminates a long-established remedy

[2] Pursuant to R. 1:36-3, a copy of the Schott v. State opinion is attached to this brief, and is being served on all counsel. NAHB counsel is unaware of any other relevant unpublished opinions.

reserved for property owners and unconstitutionally gives this cause of action to the government, leaving absolutely no remedy to property owners.

CONCLUSION

For the foregoing reasons, the National Association of Home Builders respectfully urges that the Supreme Court reverse the decision of the Appellate Division.



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CERTIFICATE OF SERVICE

I hereby certify that on this date, two (2) copies of this Brief were served this day via Express Mail on the following:

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I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

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DATED: February 4, 2010

FRANCINE A. SCHOTT, Plaintiff-Appellant, v. STATE OF NEW JERSEY, Defendant-Respondent.

DOCKET NO. A-2612-04T1

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2006 N.J. Super. Unpub. LEXIS 2577

June 5, 2006, Argued
July 13, 2006, Decided

NOTICE: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY RULE 1:36-3 FOR CITATION OF UNPUBLISHED OPINIONS.

SUBSEQUENT HISTORY: Certification denied by *Schott v. State, 188 N.J. 577, 911 A.2d 69, 2006 N.J. LEXIS 1721 (2006)*

PRIOR HISTORY: [*1]
On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket No. MER-L-1157-03.

COUNSEL: Nancy Erika Smith argued the cause for appellant (Smith Mullin, attorneys; Ms. Smith of counsel; Ms. Smith, Kathryn K. McClure and Kelly A. Smith, on the brief).

Cynthia M. Jacob argued the cause for respondent (Fisher & Phillips, attorneys; Ms. Jacob of counsel; David J. Treibman, Patricia S. Robinson and Scott E. Ross, on the brief).

JUDGES: Before Judges Cuff, Holston, Jr. and Gilroy.

OPINION

PER CURIAM

Plaintiff, Francine A. Schott (Judge Schott), a tenured judge of the Superior Court of New Jersey, on February 24, 2003, filed a four-count complaint against defendant, the State of New Jersey (State), asserting employment discrimination and retaliation claims under the Law Against Discrimination (LAD), *N.J.S.A. 10:5-1 to -42*. In Count One, Judge Schott alleged that her September 1, 2001 judicial assignment from the Civil Division to the Criminal Division within the Essex County vicinage was made on the basis of gender discrimination in violation of the LAD. In Count Two and Count Three, Judge Schott alleged she was denied assignment opportunities and was transferred from the Civil Division to the [*2] Criminal Division in retaliation for having complained of gender discrimination to the Administrative Director of the Courts, Judge Richard J. Williams, and Chief Justice Deborah T. Poritz. Count Four of Judge Schott's complaint asserted a claim under the LAD for acts Judge Schott alleged are reflective of a pattern and practice of gender discrimination within the Essex County vicinage.

On January 6, 2004, Judge Shuster entered a confidentiality order regarding discovery materials, which the judge ordered defendant to provide to Judge Schott. By order filed October 16, 2004, Judge Shuster granted defendant's motion to dismiss Count One through Count Three for failure to state a claim upon which relief can be granted pursuant to *Rule 4:6-2(e)* and denied Judge Schott's cross-motion to amend her complaint to allege additional retaliatory acts of discrimination. The order memorialized Judge Shuster's twenty-three-page written opinion, finding as a matter of law that plaintiff's complaint and proposed amended complaint failed to allege that she suffered an adverse employment action from her employer, a requirement necessary to assert a viable claim under the LAD. By order dated September [*3] 27, 2004, Judge Shuster denied Judge Schott's motion for reconsideration, memorializing the judge's oral decision of the same date. By order filed December 17, 2004, the judge granted defendant's motion to dismiss Count Four of the complaint under *Rule 4:6-2(e)* also for its failure

to allege an adverse employment action, as required under the LAD. Judge Schott appeals the dismissal of her complaint and the imposition of the confidentiality order.

In September 1992, Judge Schott became a judge of the Superior Court and was assigned to the Essex County vicinage. Prior to her appointment, she practiced law, primarily in the areas of environmental, commercial and employment litigation. As a judge, plaintiff intended to "establish herself as a respected civil jurist." That goal was unobtainable at first, however, as she was assigned to the Criminal Division during the first four years of her judgeship.

In late 1996, plaintiff was transferred to the Civil Division. She remained there briefly until March 1998. From March until September 1998, she was again assigned to the Criminal Division. In September 1998, she was transferred to the Civil Division and remained in that assignment until September [*4] 2001.

Sometime during plaintiff's second assignment to the Civil Division (September 1998 to September 2001), plaintiff was appointed to an Executive Judge position. According to plaintiff, that title carried with it prestige and supervisory duties. [1] Plaintiff lost that title in September 2001 when she was again transferred to the Criminal Division. The facts surrounding that transfer form the basis of her complaint.

> 1 The record does not explain in any detail the duties of an Executive Judge. The position is not referred to in the Court Managerial Structure detailed in *Rule 1:33-2*.

In about December 2000, two female and two male judges were appointed to the Civil Division. One of the male judges had experience with medical malpractice cases. According to plaintiff, defendant created for that male judge "a specialty list of medical malpractice cases," which included "a better class of cases . . . [that] provide[d] a higher level of job satisfaction." Meanwhile, she alleged, "the female judges, herself included, presided over 'run of the mill' car accident and slip and fall cases."

In April 2001 plaintiff complained to her Assignment Judge that male judges received preferential treatment [*5] and better employment opportunities. Believing that she was entitled to the same opportunities as the male judges, plaintiff requested a specialty list of employment cases, which she believed would provide her better job opportunities.

About three weeks after Judge Schott made that request and complaint, her Assignment Judge told her that he was going to recommend to the Chief Justice that she be reassigned to the Criminal Division for the 2001-2002 term. The Assignment Judge said that he wanted to transfer Judge Schott so that he could assign a male judge to the Civil Division to enable him to gain experience in the Civil Division. Plaintiff alleged that the judge sought the experience "to create the possibility of post-retirement job opportunities as a mediator/arbitrator." Judge Schott did not want to be reassigned to the Criminal Division because she wanted to establish herself as a civil jurist.

In May 2001, Judge Schott telephoned the Chief Justice to object to the transfer. In support of her request to remain in the Civil Division Judge Schott told the Chief Justice that:

> 1. The Assignment Judge had recommended the transfer in retaliation for her complaints that male judges received [*6] preferential treatment;
>
> 2. The Assignment Judge had, on prior occasions, exhibited discriminatory behavior toward her that could only be explained by a stereotypical view of professional women;
>
> 3. Judge Schott would have more frequent contact with the Assignment Judge if the Chief Justice transferred her to the Criminal Division, and that would subject her to further discrimination because the Assignment Judge took an active role in the Criminal Division;
>
> 4. It was inappropriate to transfer her to accommodate the goals of a less-senior male judge while simultaneously denying her the opportunity to reach her goal; and
>
> 5. Other female judges agreed with her perception of the discrimination and would say so if asked.

According to a certification filed by plaintiff's counsel, in late 2001 Judge Schott retained her to represent her in this matter. In February 2002, her counsel met with Judge Williams to discuss plaintiff's claims and willingness to file a lawsuit against the State. Around the first week of March 2002, plaintiff's counsel was advised that the Judiciary would investigate plaintiff's claims and "immediately" return her to the Civil Division. Plaintiff received that transfer on [*7] March 8, 2002.

On March 11, 2002, defendant retained retired Judge Robert Muir to conduct an investigation into Judge Schott's complaints pursuant to the "New Jersey Judiciary Discrimination and Sexual Harassment Complaint

Procedure." Thereafter, Judge Muir found that there was no probable cause to support Judge Schott's allegations. Judge Schott appealed that finding to the Chief Justice.

According to the Chief Justice in her April 7, 2003 letter opinion, [2] after plaintiff complained to her, she "sought information about the concerns she [Judge Schott] had raised." The Chief Justice was informed by the Assignment Judge that he was recommending the transfer of two male judges to the Civil Division to allow one of the judges to gain experience in the Civil Division and to accommodate the other judge who was seriously ill. "To make those changes without disadvantage to the criminal courts," the Assignment Judge recommended that Judge Schott and another male judge be reassigned to the Criminal Division as they both had experience in that division. She noted that neither judge wished to be transferred.

> 2 The April 7, 2003 letter opinion constituted the Judiciary's final administrative decision [*8] on Judge Schott's appeal of the determination of Administrative Director Williams in which he found no substantiation of allegations of gender bias against Judge Schott in violation of the Judiciary's Anti-Discrimination Policy, following the investigation of the Administrative Office of the Courts (AOC) into Judge Schott's complaints.

After considering various recommendations for the General Assignment Order, the Chief Justice decided to make the transfers that Judge Schott's Assignment Judge had recommended, primarily because plaintiff and the male judge, the Assignment Judge also recommended for transfer, "had prior experience in the criminal courts and there was a need for experienced judges due to existing backlogs." According to the Chief Justice, she conveyed that information to Judge Schott in July 2001 and told Judge Schott that she would "make every effort to move her back to the Civil Division before the next General Assignment Order issued." Upon reassignment to the Criminal Division, Judge Schott lost the title Executive Judge.

Plaintiff alleged in her proposed amended complaint that while assigned to the Criminal Division she was subjected to harassment and retaliation [*9] in the following ways: (1) she was assigned "one of the most voluminous [and difficult] lists of cases in the vicinage"; (2) lawyers were sent unannounced to her courtroom for trial while she conducted other proceedings; (3) her Presiding Judge labeled her "flippant" when she said that it was irrational to ask her to try other judges' cases when she was trying to manage her own "disorganized and voluminous list"; (4) contrary to division policy cases that other judges had requested were returned to her without being tried; (5) staff was instructed to "monitor [her] to determine what she was doing"; and (6) a female judge who was assigned to the Criminal Division and who had no prior experience in the Civil Division was transferred to the Civil Division and assigned the list of employment cases that plaintiff requested in April 2001.

In her April 7, 2003 decision, the Chief Justice agreed with Judge Muir that plaintiff's allegations were not substantiated. The Chief Justice concluded:

> After review of this history, I am satisfied that there was no violation of the Judiciary's Anti-Discrimination Policy when [the Assignment Judge] recommended that Judge Schott be reassigned to the Criminal [*10] Division. His recommendation was intended to accommodate a judge who was seriously ill and a judge who never had had the benefit of rotation but wished experience in the Civil Division. Those motives are not indicative of gender bias. The same recommended reassignment affected [the male Judge] who also had expressed his preference to remain in the Civil Division.

Judge Schott contends that the trial court erred in granting defendant's motion to dismiss her complaint for failure to state a claim upon which relief can be granted pursuant to *Rule 4:6-2(e)* on the ground that she failed to allege an adverse employment action. Judge Schott asserts that the trial court failed to apply the proper legal standard to a *Rule 4:6-2(e)* motion to dismiss for failure to state a claim. We disagree and affirm.

I

The Court in *Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746, 563 A.2d 31 (1989)*, discussed the standard to be applied on a motion to dismiss. It said:

> In reviewing a complaint dismissed under *Rule 4:6-2(e)* our inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint. However, a reviewing court "searches the complaint in depth and with liberality [*11] 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, 128 A.2d 281 (App. Div. 1957)*. At this pre-

> liminary stage of the litigation the Court is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint. For purposes of analysis plaintiffs are entitled to every reasonable inference of fact. 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.
>
> [*Ibid.* (additional citations omitted).]

Appellate review of an order dismissing an action on the basis of *Rule 4:6-2(e)* is governed by a standard no different than that applied by the trial courts. *Seidenberg v. Summit Bank, 348 N.J. Super. 243, 250, 791 A.2d 1068 (App. Div. 2002)*. Accordingly, this court should consider Judge Shuster's August 16, 2004 order dismissing Count One through Count Three of plaintiff's complaint and his December 17, 2004 order dismissing Count Four of the complaint in light of the facts pleaded by plaintiff **[*12]** and the reasonable inferences that may be drawn therefrom. *Ibid.*

However, in reviewing Judge Schott's complaint for legal sufficiency, we take judicial notice of *N.J. Const. art. VI, § 7, P 2*, Directive # 6-88, issued by former Chief Justice Robert N. Wilentz, and Chief Justice Poritz's letter opinion of April 7, 2003, *In the Matter of Gender Discrimination Claim of Justice Francine A. Schott. See N.J.R.E. 201* and *N.J.R.E. 202*; *Mianulli v. Gunagan, 32 N.J. Super. 212, 215, 108 A.2d 200 (App. Div. 1954)* (on a motion to dismiss a complaint for failure to state a cause of action, material facts sufficiently alleged in complaint are generally regarded as admitted, unless facts are alleged that are contrary to facts of which the court takes judicial notice). *See also Kirchner v. Greene, 294 Ill. App. 3d 672, 691 N.E.2d 107, 112, 229 Ill. Dec. 171 (Ill. App.)* (in a motion to dismiss the pleadings, a court may consider matters subject to judicial notice and judicial admissions in the record), *review denied, 178 Ill. 2d 580, 699 N.E.2d 1032, 232 Ill. Dec. 847 (Ill. 1998)*.

It is well settled that an Administrative Directive by the Chief Justice of the New Jersey Supreme Court is equivalent to a rule of court and thus is binding on bench and bar. *State v. Clark, 162 N.J. 201, 205, 744 A.2d 109 (2000)*; **[*13]** *New Century Financial v. Nason, 367 N.J. Super. 17, 22-23, 842 A.2d 179 (App. Div. 2004)*. Such a directive has the force of law. *State v. McNamara, 212 N.J. Super. 102, 109, 514 A.2d 63 (App. Div. 1986), certif. denied, 108 N.J. 210, 528 A.2d 30 (1987)*. *See Rule 1:1-1*; Pressler, *Current N.J. Court Rules*, comment 3 on *R. 1:1-1* (2006). As it equates to a rule of court, therefore, an Administrative Directive is subject to judicial notice, as permitted by *N.J.R.E. 201(a)*. *N.J.R.E. 201(a)* lists "rules of court" among the sources of law that may be judicially noticed.

Thus Judge Shuster in his decision granting dismissal could have taken, and impliedly did take, judicial notice of Chief Justice Wilentz's Directive # 6-88, in which he declared the Judiciary's policy of rotating veteran judges in the discretion of the Assignment Judge. The directive in applicable part reads:

> B. Judges Other Than Those Newly Appointed
>
> After consultation with the Assignment Judges, I have determined that, for somewhat different reasons, the policy of rotation of judicial assignments should also extend to sitting judges other than those recently appointed. However, rather than the automatic rotation prescribed for new judges, the rotation of experienced **[*14]** judges will be implemented in a way that takes into account such considerations as the preferences of judges for particular assignments, their special skills and experiences, their age, the past assignment practices in the vicinage, as well as vicinage and division needs. But rotation is nonetheless the preferred policy and, accordingly, is encouraged.
>
> Additionally, when the assignment of an experienced judge is changed, that judge shall be provided with all available aids, such as the videotapes of the portions of the new judges orientation seminar relevant to the judge's new assignment, and shall be offered the opportunity to attend the relevant portions of the next such scheduled orientation seminar. That judge will also be given the opportunity to attend relevant judicial education courses, both within and outside of the state, as appropriate.
>
> In my introductory remarks at the 1987 Judicial College, I made reference to some of the reasons underlying this aspect of rotation, as follows:
>
> > [J]udges can get stale and so can the support staff that works with a judge. And judges who never move sometimes unfairly

> prevent others from trying something new. Preparation is required before such [*15] rotation can occur[,] including training of judges in new fields of law and procedure when necessary. There is a certain professional challenge that is lost when there is no rotation. Finally, sometimes the public interest requires rotation. I know of no better example than the Family division whose work is second to none in its impact on society, on children, on the lives of our citizens. It can often save and sometimes destroy. You would think that the most experienced judges would be called upon to give at least some of their time and talent to this work. As you know, that's not always so. Again this is for the assignment judge to decide. But I intend to continue to strongly urge them to consider these policies that I've just mentioned.

The Directive also stated that "the Presiding Judge position should not be looked upon as a permanent appointment," and that rotation out of that position should not be deemed a demotion.

Directive # 6-88 further provides:

> II. Rotation of Presiding Judges
>
> I recently reiterated the rotation policy with regard to the designation of Presiding Judges. That policy establishes the preference for rotation, but permits flexible implementation. The key is that [*16] the Presiding Judge position should not be looked upon as a permanent appointment. Notices to the effect that such designations are not permanent will continue to be published periodically in the New Jersey Law Journal and in the New Jersey Lawyer.

As I stated at the 1987 Judicial College:

> The competing considerations on the question of rotation of presiding judges are, on the one hand, [that] the experience and talent of the present presiding judge argues for [retention]. On the other, the scarcity of positions in the judiciary with important administrative responsibility argues for rotation so that others will have a chance.
>
> I favor rotation not as an absolute rule, but from time to time to give others a chance. If you want at least some limited experience in judicial administration, you shouldn't have to hope that someone dies or retires before you do.
>
> The real problem I think lies in expectations and perceptions. If we could only get over the idea that somehow being replaced as presiding judge is a demotion, if we could get over that idea, rotation would be much easier and more widely accepted. *It isn't a demotion.* It's a chance for someone else, maybe worse, maybe better, certainly [*17] different. Someone else is entitled to that experience. (emphasis added).

Rotation of Presiding Judges, in and of itself, is good for the system in that rotation presents an opportunity to include other judges in the management and policy making experience.

By extension, therefore, the loss of Judge Schott's designation as Executive Judge could not be considered a demotion and thus could not constitute an adverse employment action as a matter of law.

Although Judge Shuster did not rely on the Chief Justice's April 7, 2003 decision, he could have taken judicial notice of it as well. *N.J.R.E. 201* permits judicial notice of the decisional law and "determinations of all governmental subdivisions and agencies thereof." *N.J.R.E. 201(a)*. In her decision, Chief Justice Poritz characterized the determination as being "my decision on appeal, made in my capacity as 'the administrative head of all the courts in the State.' *N.J. Const. Art. VI, § VII, par. 1*." The Chief Justice concluded: "This letter opinion constitutes the Judiciary's final administrative decision on appeal in this matter." That decision could have been judicially noticed as a statement of the Judiciary's policy that rotation of **[*18]** judges is an important component of judges' professional development and of the administrative efficiency of the courts. The Chief Justice stated,

> At the November 1996 Judicial College, when Judge Schott was present, I informed the judges that the rotation policy established by my predecessor Chief Justice Robert N. Wilentz -- would be carried out flexibly.
>
> . . . .
>
> To the extent that I use the rotation policy in my capacity as chief administrator in the court system, I consider whether a judge has had the benefit of serving *in at least two Divisions* when I evaluate that judge for an administrative position. By way of example, a review of the rotation histories of the eleven Assignment Judges appointed since 1996 reveals that four had served in two Divisions and four had served in three (or four, including General Equity). Rotation is also an important consideration for advancement to the Appellate Division because a broad understanding of the law in the trial courts is important for that assignment. Consequently, rotation is an advantage in our system. (emphasis added).

We determine that Judge Schott's service in two divisions serves to advance Judge Schott in her judicial career, not **[*19]** to limit her career advancement.

Finally, provisions of the State Constitution also have the force of law and may be judicially noticed. *N.J.R.E. 201(a)*. Judge Shuster correctly relied on *N.J. Const. art. VI, § 7, P 2*, as allowing lateral transfer of judges without any adverse consequences.

Art. VI, § 7, P 2, reads, "The Chief Justice of the Supreme Court shall assign Judges of the Superior Court to the Division and Parts of the Superior Court, and may from time to time transfer Judges from one assignment to another, as need appears." This paragraph permits the Chief Justice to assign and transfer judges within the Superior Court, a power that further facilitates her authority over administration of the courts. *See* Williams, Robert F., *The New Jersey State Constitution* Art. VI Judicial, 104 (1990).

The Chief Justice in her April 7, 2003 opinion noted:

> Each spring, the Assignment Judges in the fifteen vicinages of the Judiciary are asked to forward recommended assignments for the next court year to my chambers. Those recommendations are collected and held until June, when the Administrative Director and I review them together and, after further consultation with the Assignment Judges and **[*20]** others as necessary, I make the final assignments. The assignments are formalized in the General Assignment Order issued in July for implementation in September.

Art. VI, § 3, P 1, provides: "The Superior Court shall consist of such number of judges as may be authorized by law, each of whom shall exercise the powers of the court subject to rules of the Supreme Court." Art. VI, § 3, P 3 states, "The Superior Court shall be divided into an Appellate Division, a Law Division and a Chancery Division, which shall include a family part. Each division shall have such other parts, consist of such number of judges, and hear such cases, as may be provided by rules of the Supreme Court."

Rule 1:33-2 provides the court's managerial structure. *Subsection (c)* provides: "Within each vicinage, the Chief Justice shall organize the trial court system into four functional units to facilitate the management of the trial court system within each vicinage. These units shall be: Civil, Criminal, Family and General Equity." *Subsection (d)* states, "Each functional unit shall be supervised by a Presiding Judge who shall be appointed by the Chief Justice, after consultation with the Assignment Judge, and who shall **[*21]** serve at the pleasure of the Chief

Justice." Clearly, the above stated constitutional provisions and the rules implemented by the Supreme Court pursuant thereto contemplate that each of the Divisions of the Superior Court and the parts thereof are of equal importance and structure in New Jersey's court system.

As he was required to do by *Rule 4:6-2(e)*, Judge Shuster assumed that all pleaded facts were true. With respect to the dispositive question--adverse employment action--Judge Schott pleaded that (1) her career objective was to be a civil judge; (2) she was denied assignment to "specialty lists" of cases in which she had a special interest, thereby depriving her of "a higher level of job satisfaction"; (3) she was transferred out the Civil Division, contrary to her preference; (4) as a result of defendant's actions, she "has suffered and shall continue to suffer harm to her career development, loss of employment benefits, and physical and emotional stress." Judge Shuster ruled that, even assuming Judge Schott did not get the assignments that she preferred and that gave her the most job satisfaction, those effects could not qualify as adverse employment actions as defined in the **[*22]** case law.

In order to establish a prima facie case of gender discrimination as contained in Count One of Judge Schott's complaint, an employee must prove that she suffered an adverse employment action. *Jamison v. Rockaway Twp. Bd. of Educ., 242 N.J. Super. 436, 445, 577 A.2d 177 (App. Div. 1990)*. Likewise, in order to establish a prima facie case of retaliation, which is the foundation of the second and third counts of Judge Schott's complaint and proposed amended complaint, the employee must demonstrate that she was subjected to an adverse employment action by her employer. *Ibid.*

Although there are no bright-line rules defining an adverse employment action, New Jersey has looked for guidance to federal law dealing with Title VII and civil rights legislation to determine what constitutes an adverse employment decision in the context of a LAD retaliation claim. *Mancini v. Twp. of Teaneck, 349 N.J. Super. 527, 564, 794 A.2d 185 (App. Div. 2002)* (*Mancini I*) (citing *Wanamaker v. Columbian Rope Co., 108 F.3d 462, 466 (2d Cir. 1997)*). The factors to be considered include an "employee's loss of status, a clouding of job responsibilities, diminution in authority, disadvantageous transfers or assignments, and toleration **[*23]** of harassment by other employees." *Ibid.* "In order to constitute 'adverse employment action' for the purpose of the LAD, 'retaliatory conduct must affect adversely the terms, conditions, or privileges of the plaintiff's employment or limit, segregate or classify the plaintiff in a way which would tend to deprive her of employment opportunities or otherwise affect her status as an employee.'" *Marrero v. Camden County Bd. of Soc. Servs., 164 F. Supp. 2d 455, 475 (D.N.J. 2001)*. As the Law Division observed in *Cokus V. Bristol Myers Squibb Co., 362 N.J. Super. 366, 378, 827 A.2d 1173 (2002)*, "'not everything that makes an employee unhappy is an actionable adverse action.'" (quoting *Montandon v. Farmland Indus., 116 F.3d 355, 359 (8th Cir. 1997))*, *aff'd, 362 N.J. Super. 245, 827 A.2d 1098 (App. Div. 2003)*.

Additionally, whether an employment action is "adverse" must be assessed objectively. A LAD claim based on gender is to be judged based on a reasonable woman standard. *Taylor v. Metzger, 152 N.J. 490, 517, 706 A.2d 685 (1998)* (citing *Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 614-15, 626 A.2d 445 (1993))*; *see also, El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 170, 887 A.2d 1170 (App. Div. 2005)*. An employee's subjective feelings are irrelevant **[*24]** in making that analysis. *See Klein v. Univ. of Med. and Dentistry of New Jersey, 377 N.J. Super. 28, 46, 871 A.2d 681 (App. Div. 2005)* ("Although plaintiff feels that performing his [assignment] . . . was demeaning, . . . [a]n employer's actions are not [adverse] merely because they result in a bruised ego or injured pride on the part of the employee."), *certif. denied, 185 N.J. 39, 878 A.2d 856 (2005)*. [3]

> 3 The Supreme Court recently decided *Burlington Northern and Santa Fe Railway Co. v. White, 548 U.S. 53, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006)*, *U.S.L.W.*, Vol. 74, No. 49 (pg. 4423), which construes the degree of harm required in a *Section 704(a)* Title VII retaliation discrimination claim for an adverse action to fall within its scope. *Id.* at 4424. The Court determined that a plaintiff must show that a reasonable employee would have found the challenged action "materially adverse." *Id.* at 4425. The Court adopted a "reasonable employee" standard because the Court determined that the provision's standard for judging harm must be *objective. Ibid.* (emphasis added).

Measured by an objective standard, Judge Schott's lateral transfer from civil to criminal and consequent loss of the Executive Judge position **[*25]** cannot be considered adverse. Judge Schott's subjective views in light of her personal goals and aspirations can play no part in an objective analysis.

We are satisfied that the provisions of the State Constitution and rules of court adopted pursuant to those provisions, which we have cited above, the 1988 Directive, Chief Justice Poritz's opinion, and the applicable case law, all compel the conclusion that as a matter of law, Judge Schott's transfers from Civil to Criminal were lateral ones and her consequent loss of incumbency in the Executive Judge position had no impact on tangible benefits or opportunities available to her and thus could not objectively be considered materially adverse.

In his opinion denying reconsideration, Judge Shuster refuted Judge Schott's claim that he had improperly resolved factual disputes in dismissing the complaint at the pleading stage. Rather, the judge assumed the pleaded facts were true but "found them immaterial in determining whether as a matter of law an adverse employment action took place." The judge stated that he did not look beyond the complaint to find facts. On the contrary, he looked at sources of law, as he was required to do.

We are, [*26] therefore, convinced that the judge correctly ruled that, even assuming the facts as pleaded by Judge Schott are true, the law precludes the finding of a key element of a cause of action under the LAD -- that Judge Schott suffered an adverse employment action. We have thoroughly reviewed plaintiff's complaint in light of the applicable law cited by Judge Shuster and in view of the law of which we take judicial notice. Accordingly, we affirm the Order of August 16, 2004, dismissing Count One through Count Three of Judge Schott's complaint and denying her motion to amend her complaint, the order of September 27, 2004, denying reconsideration, and the December 17, 2004 order dismissing Count Four of Judge Schott's complaint essentially for the reasons expressed in Judge Shuster's thorough, comprehensive and well-reasoned written opinion of August 16, 2004, and in the Judge's oral opinion on reconsideration of September 27, 2004, as supplemented by his brief written opinion of December 17, 2004. We determine that as a matter of law pursuant to *Rule 4:6-2(e)* that plaintiff's complaint fails to state a claim upon which relief can be granted because it fails to allege a legally cognizable [*27] adverse employment action.

II

Judge Schott additionally appeals the Law Division's January 6, 2004 confidentiality order. On April 9, 2003, before defendant answered the complaint, Judge Schott filed a motion to compel defendant to produce a copy of the report of Judge Muir (Muir Report), who was retained by the AOC to investigate Judge Schott's claims of gender discrimination and to determine whether the Judiciary's Anti-Discrimination Policy was being honored.

On May 29, 2003, the judge denied without prejudice Judge Schott's motion to compel discovery, because she had not served on defendant a document request pursuant to *Rule 4:18-1*. The court ordered her to do so and ordered defendant to respond on an expedited schedule.

After plaintiff served the document request, defendant responded by advising plaintiff that twenty of thirty interview tape recordings of interviews conducted by Judge Muir no longer existed. On June 23, 2003, defendant made application for a protective order. The application sought an order authorizing defendant to give Judge Schott a redacted version of the Muir report and to mark as confidential the report and documents relating to it. Defendant asserted that as [*28] part of the Judiciary's Anti-Discrimination Policy it has adopted the practice of maintaining the confidentiality of the investigative materials resulting from the investigation. Defendant contends that Judge Muir advised all the individuals he interviewed that their discussions were confidential and that a confidentiality order is critical to encouraging reporting of discrimination and candor by witnesses.

Plaintiff contended that Judge Muir's conclusion that there was no probable cause to support the finding of any violation of the Judiciary's Anti-Discrimination Policy constitutes an inability to perceive discrimination. Thus, Judge Schott contended that defendant's request for a protective order and proposed redactions to the Muir Report should be denied and discovery compelled. Judge Schott claimed that only full disclosure of the withheld materials and the ability to discuss them with others will reveal the report's flaws.

On December 8, 2003, the court granted plaintiff's renewed motion to compel discovery and refused to allow defendant to redact the vast majority of information in the Muir Report. The court granted, however, defendant's request to mark as confidential the report [*29] and documents relating to it. On January 6, 2004, the court entered a corresponding confidentiality order.

In Judge Shuster's written opinion, the judge stated:

> Plaintiff asserts the need to discuss the report and related materials with others in order to ascertain misstatements and identify the alleged flaws in the Muir report. The Court finds that the proposed Order of Confidentiality submitted by Defendant in this matter is reasonable for these purposes. Under the proposed Order, all employment records and documents of information relating to employment records, as well as all documents or information relating to Plaintiff's complaint of discrimination would receive confidential status. The parties, Court, attorneys, paralegals and secretarial personnel employed by counsel, and experts retained by the parties for the purposes of litigation will have access to the documents and information protected by the Confidentiality Order.
>
> Furthermore, designation of the items as confidential will not greatly restrict the

use of any of the documents subject to the Order in litigation because they can be used as exhibits or during depositions taken in this matter. The use of the documents and information [*30] in depositions is subject to the limitation that in all subsequent court proceedings, disclosure of the part of the deposition subject to the Confidentiality Order will be limited to the witnesses and all other persons subject to the Confidentiality Order.

The court finds that the best balance between the parties' interests can be met by adopting the language of the proposed Confidentiality Order and limiting access to the Muir report and related investigatory materials to those parties involved in the litigation, the court, attorneys, paralegals and secretarial personnel employed by counsel and experts retained by the parties for the purposes of litigation. Disclosure of the Muir report, and related investigatory materials and documents to witnesses will be allowed, but will be limited to portions of these materials that are relevant to Plaintiff's or Defendant's inquiries of that witness for deposition purposes, pursuant to the proposed Confidentiality Order.

In April 2004, Judge Schott notified the judge that defendant had not fully complied with the order compelling discovery and requested the court to again order defendant to produce documents. Because on August 16, 2004, the judge [*31] granted defendant's motion to dismiss and denied plaintiff's motion to amend, Judge Shuster did not decide plaintiff's motion to compel discovery.

In January 2005, Judge Schott filed a timely notice of appeal of the court's decisions dismissing her complaint and denying her motion to amend her complaint. Thereafter, Judge Schott filed with this court a motion for relief from the protective order and a motion to amend her notice of appeal to include the court's confidentiality order. By order dated June 9, 2005, we denied plaintiff's motion for relief from the protective order but granted her motion to amend her notice of appeal. Plaintiff then added to her notice of appeal a challenge to Judge Shuster's January 6, 2004 confidentiality order. [4]

4 When the appeal was filed, the clerk of this court impounded the appellate file. After the parties' briefs on appeal had been filed and while this matter was pending oral argument, on November 28, 2005, Judge Edwin H. Stern, P.J.A.D., entered Consent Order to Disclose Certain Materials, which modified the order of confidentiality.

The January 6, 2004 order of confidentiality prohibited dissemination of employment records; the Muir Report; information [*32] relating to plaintiff's complaint and Judge Muir's investigation; discrimination complaints made against another judge; and documents relating to the internal policies of the court system. All of these materials were unfiled discovery documents provided to Judge Schott pursuant to *Rule 4:10-2*. On appeal, Judge Schott does not challenge each category of documents that are subject to the order; instead, she challenges the order as a whole on the ground that it violated her right to free speech and the public's right to access trials and court documents.

There is no question that the AOC's investigative materials were discoverable by Judge Schott under *Rule 4:10-2*. Judge Schott had a significant interest in knowing why and how defendant decided to assign her; she needed that information in order to prosecute her LAD complaint in court. Without those materials, Judge Schott could not hope to prove her discrimination claim. *See, e.g., Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 539, 691 A.2d 321 (1997)*. That interest was secured by the January 2004 protective order, which allowed plaintiff to obtain the materials but protected them against public release. Hence she obtained all the documents [*33] that were pertinent to her discrimination cause of action, and she was not prevented from having her "day in court" as to that issue.

Plaintiff's remaining interest at this stage, therefore, is not in securing information for herself but rather in allowing that information to be publicized to others. [5] We are convinced, however, that plaintiff has no legally cognizable entitlement, in the context of the present action, to release those materials to the public. "The universal understanding in the legal community is that unfiled documents in discovery are not subject to public access." (footnote omitted). *Estate of Frankl v. Goodyear Tire Co., 181 N.J. 1, 10, 853 A.2d 880 (2004)* (citing *Seattle Times Co. v. Rhinehart, 467 U.S. 20, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984))*. While the Muir Report and related documents were provided to plaintiff in discovery, as they should have been under *Rule 4:10-2*, they were not "filed"; hence they were not subject to the case law acknowledging the public's presumptive entitlement to gain access to filed pleadings in civil cases. *See Hammock by Hammock v. Hoffmann-LaRoche, Inc., 142 N.J. 356, 375-76, 381, 662 A.2d 546 (1995)*; *Lederman v. Prudential Life Ins. Co., 385 N.J. Super. 307, 322, 897 A.2d 362 (App. Div. 2006)*.

5 We [*34] note that no media outlet or other member of the public has demanded this material. The Supreme Court has adopted procedures for requesting court records. *New Jersey Judiciary Open Records: Policies and Procedures for Access to Case-Related Court Records*, Directive # 15-05 (November 4, 2005).

Protective orders are reviewable under an abuse-of-discretion standard. *Payton, supra, 148 N.J. at 559*. We conclude that the order of January 2004 was well within Judge Shuster's discretion, as it encompassed only unfiled discovery materials relating to the internal investigation and deliberation of the AOC in considering plaintiff's pre-lawsuit allegations of discriminatory practices. The judge justified his order in a detailed twenty-page opinion, applying a balancing-of-interests test: plaintiff's interest in seeing the AOC's internal documents had to be balanced against the AOC's interest in fostering candor among those contacted during an internal investigation. Judge Shuster reasonably determined in his written decision that the best balance of those interests was to release the materials to plaintiff for use in her lawsuit but to seal them from public disclosure. We affirm the January 6, [*35] 2004 confidentiality order as a proper exercise of the court's discretion.

In light of our disposition and the narrow scope of the confidentiality order, which we now affirm, and because of the extensive publicity that this case has received, we release the appellate record from impoundment.

Affirmed.