DAVIS, SAPERSTEIN & SALOMON. P.C.
375 Cedar Lane
Teaneck, NJ 07666
(201) 907–5000
Attorneys for Plaintiff: Abder-Rahim Henderson

ABDER-RAHIM HENDERSON, **Plaintiff,** **vs.** **T.U.C.S. CLEANING SERVICES, MR. KEN SABOSIK, JOHN DOES 1-10, AND XYZ CORP. 1-10,** **Defendants.**	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: OCEAN COUNTY DOCKET NO.: OCN-L-4006-00 CIVIL ACTION Date: February 8, 2002 Time: 9:00 a.m. Judge : Hon. Frank A. Buczynski, J.S.C.

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF PLAINTIFF'S MOTION TO AMEND HIS COMPLAINT

Of Counsel:

TY HYDERALLY

On the Brief:

TY HYDERALLY

Davis Saperstein & Salomon, P.C.
Ty Hyderally, Esq.
375 Cedar Lane
Teaneck, NJ 07666
Telephone: (201) 907-5000
Facsimile: (201) 692-0444
Attorneys for the Plaintiff

I. PRELIMINARY STATEMENT

Plaintiff, Abder-Rahim Henderson ("Plaintiff"), by way of his Motion to Amend his Complaint seeks an Order allowing plaintiff to file a Second Amended Complaint to remove various causes of action and modify the factual allegations to comport with the evidence uncovered. Plaintiff's First Complaint contained an allegation of negligent hiring, retention, supervision and training. Defendants, T.U.C.S. Cleaning Services ("TUCS") and Mr. Ken Sabosik ("Sabosik") (hereinafter collectively the "Defendants") did not move to dismiss this allegation but rather filed a responsive Answer. Plaintiff's motion to amend his Complaint and file a Second Amended Complaint does not affect or pertain to the allegation of negligent hiring, retention, supervision and training. Thus, defendants have not opposed plaintiff's motion, and the motion should be granted. Defendants surreptious attempt to characterize their Motion to Dismiss plaintiff's negligent hiring, retention, supervision and training as an opposition to plaintiff's motion to amend his Complaint must fail, and, on this ground alone, plaintiff respectfully submits that plaintiff's motion should be granted. However, out of an abundance of caution only, plaintiff responds below.

//

//

//

//

//

//

II. ARGUMENT

A. LEGAL STANDARD FOR MOTION TO DISMISS[1]

A motion to dismiss must be "denied if the evidence, together with any legitimate inferences to be drawn therefrom, could sustain a judgment in the petitioner's favor. Consequently, it is clear that at this point of the proceeding all logical inferences must be given to the petitioner, for benefit of any doubt must be resolved in petitioner's favor." B.M. v. Union County Regional High School, 95 N.J.A.R. 2nd (EDA) 149, *5 (OAL Decision 1995). Furthermore, the motion to dismiss "is limited to examining the legal sufficiency of the facts alleged from the face of the complaint" and plaintiff is entitled to every reasonable inference of fact in "a generous and hospitable approach" to the plaintiff." Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989) (citation omitted). Since this is a preliminary stage of the litigation, the court should not concern itself with the ability of plaintiff to prove any allegation contained in the complaint but rather assume that all such allegations are true. Somers Const. Co. v. Board of Educ., 198 F. Supp. 732, 734 (D.N.J. 1961). Thus, plaintiff is entitled to every reasonable inference of fact. Independent Dairy Workers Union v. Milk Drivers Local 680, 23 N.J. 85, 89 (1956). As noted in Pressler, *Current N.J. Court Rules* comment 2 on *R.* 4:6-2 (1995), "Every reasonable inference is therefore accorded the plaintiff and the motion granted only in rare instances and ordinarily without prejudice." As such motions are usually brought at the earliest stages of litigation, they should be granted in 'only the rarest instances'" Lieberman v. Port Authority, 132 N.J. 76, 79, 622 A.2d 1295 (1993) (*Quoting* Printing Mart-Morristown v. Sharp Electronics, *supra*, 116 N.J. at 772, 563 A.2d 31). Based upon such a standard, defendant's motion to dismiss must fail.

[1]Plaintiff maintains his valid objection to defendants' veiled attempt to improperly file their motion to dismiss and does not waive his objection in any manner.

B. HENDERSON CAN MAINTAIN HIS NEGLIGENT HIRING, SUPERVISION, TRAINING, AND RETENTION CLAIM.

The New Jersey Supreme Court recognized a cause of action for negligent hiring/retention of employees in DiCosala v. Kay, 91 NJ 159 (1982). Further, New Jersey courts have allowed common law torts to survive, even where Plaintiff has made claim to a violation of some other state law or public policy. Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980). This has been particularly so where the discharge is in retaliation for the exercise of state rights and obligations. *See* Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 536 A.2d 237 (1988) (discharge of at-will employee in retaliation for requesting information relevant to suspected employment discrimination); Lally v. Copygraphics, 173 N.J. Super. 162, 413 A.2d 960 (App.Div.1980), aff'd 85 N.J. 668, 428 A.2d 1317 (1981) (discharge of at-will employee in retaliation for filing workers' compensation claim); Kalman v. Grand Union Co., 183 N.J.Super. 153, 443 A.2d 728 (App.Div.1982) (discharge of at-will pharmacist in retaliation for keeping pharmacy open contrary to employer's directive but as required by state rules). Further, the courts have allowed state common-law tort claims for retaliation to survive even though the Plaintiff has alleged an independent statutory cause of action that includes a retaliation component. Lepore v. National Tool and Mfg.Co., 540 A.2d 1296, 1306 (App. Div. 1988) (wrongful discharge in retaliation for reporting safe workplace violations was not preempted under Federal Occupational Safety and Health Act, notwithstanding fact that Act prohibited retaliatory discharges and established enforcement procedures encompassing remedy therefor, where Act did not expressly prohibit state from providing aggrieved employee with alternative remedy, and tort claim did not seek to remedy violation of Act but rather violation of state laws and public policy.).

Additionally, defendants' claim that plaintiff cannot maintain plaintiff's negligent hiring, supervision, training, and retention is not consistent with the Court's ruling in Schmidt v. Smith, 294 N.J.Super. 569, 591, 684 A.2d 66 (App.Div.1996), aff'd,

155 N.J. 44, 713 A.2d 1014 (1998). The Schmidt court favorably cited to Seminole Point Hospital Corp. v. Aetna Casualty & Surety Co., 675 F.Supp. 44 (D.N.H.1987). In Semionole, the Court reasoned that the corporate employer could be liable for its supervisory employees' alleged wrongdoing on the basis of negligent supervision and/or failure to investigate. Semionole *supra* at 47.

Plaintiff's allegation of negligent hiring, supervision, training, and retention is certainly connected to plaintiff's claim of discrimination in that plaintiff claims that the employer failed to supervise and retained the harassing employee(s) in the face of his complaints of discrimination promulgated or contributed to by that employee and allowed by that employee. Further, plaintiff claims in the complaint that the defendant corporation supported the employee by intentionally agreeing to terminate the plaintiff as an employee of the defendant corporation. Thus, liability attaches to the defendant corporation for supporting such discriminatory actions by plaintiff's supervisor. *See* Lehmann v. Toys-R-Us, Inc., 132 N.J. 587 (1993).

The New Jersey court in Schmidt, the seminal case in the area of Worker's Compensation, went on to state:

> Clearly, there is no language in the LAD that mandates that claims made by employees against employers under it may only be brought under the Workers' Compensation Act. N.J.S.A. 10:5-1 to -42. Indeed, the Legislature's intent in enacting the LAD appears otherwise. Its intent was to have the LAD broadly applied and liberally construed. The pertinent portion of the act provides: Such harms have under common law given rise to legal remedies including compensatory and punitive damages. The legislature intends that such damages be available to all persons protected by this act and that this act be liberally construed in combination with other protection available under the laws of this state. [N.J.S.A. 10:5-3]. Further, the LAD was specifically amended in 1990 to grant a plaintiff under the Act the right to a jury trial. *L.*1990 *c.*12. If the Legislature had intended workers compensation to be the exclusive remedy for victims of harassment and discrimination in the workplace it would not have provided for a jury trial as well as compensatory and punitive damages.
>
> Schmidt v. Smith, 294 N.J.Super. 569, 585-586, 684 A.2d 66,74-75 (App.Div.1996), aff'd, 155 N.J. 44, 713 A.2d 1014 (1998).

Based upon such an analysis it flows logically that where employers have an affirmative duty to investigate claims of sexual harassment or discrimination and deal appropriately with the offending personnel under the discrimination and sexual

harassment statutes, because failure to investigate gives tacit support to the discrimination and because the absence of sanctions encourages abusive behavior, that plaintiff should be allowed to maintain her cause of action arguing negligent hiring, supervision, training, and retention before this Court. *See, e.g.* Lehmann v. Toys-R-Us, Inc., 132 N.J. 587 (1993); Munford v. James T. Barnes & Co., 441 F.Supp. 459, 466 (E.D.Mich.1977). Based upon this type of analysis, courts ruled that the corporate defendant could be liable for the alleged wrongdoings for its own negligent supervision and failure to undertake an investigation to find out what was taking place. *See,* Seminole Point Hospital Corp. v. Aetna Casualty & Surety Co., 675 F.Supp. 44 (D.N.H.1987); American States Ins. Co. v. Borbor By Borbor, 826 F.2d 888, 892 (9th Cir.1987).[2] In essence, the claim of negligent retention, supervision, hiring, and training is one aimed at the employer for wilfully failing to furnish a safe place to work. Thus, because the misconduct rises to the level of an intentional act, a plaintiff should not be barred from pursuing such a cause due the Worker's Compensation Act.

CONCLUSION

Thus, plaintiff's motion to amend his complaint should be granted.

Dated: February 1, 2002
Place: Teaneck, NJ

DAVIS SAPERSTEIN & SALOMON
A PROFESSIONAL CORPORATION

2

In fact, by way of comparison only, as Pennsylvania has a different Worker's Compensation Act than New Jersey's, The Supreme Court of Pennsylvania has stated that "the spirit and intent of the [Workers' Compensation] Act is not violated by permitting an employee injured by a co-worker for purely personal reasons to maintain a negligence action against his employer for any associated negligence in maintaining a safe workplace." Pryor v. Mercy Catholic Medical Center, 1999 WL 956376 E.D.Pa.,1999, (*citing* Kohler v. McCrory Stores, 532 Pa. 130, 615 A.2d 27, 31 (Pa.1992)) (emphasis added); see also Merritt, 1999 WL 285900, at *6-7 (Sexual harassment claim holding that a negligent supervision claim is not barred by the WCA).

By: _____

TY HYDERALLY

Attorneys for Plaintiff

Abder-Rahim Henderson