I. INTRODUCTORY STATEMENT

Since the enactment of the Law Against Discrimination in 1945, New Jersey has been one of the leaders in the fight for equal rights in the workplace. The Appellate Division's decision is directly contrary to the well-established law in this State protecting workers from harassment based upon religion or ethnicity. The Appellate Division's decision is all the more astonishing in that they have taken away the jury's rightful place as the finder of fact, and replaced the jury's well-founded decision with an alternate and inaccurate version of the facts that is not supported by the trial transcript, and an alternate and inaccurate version of the law, which is not supported by the legislation nor the case law of this State.

NELA-NJ, as the largest organization in this State compromised of attorneys primarily advocating employees' right, is very concerned that unless the Supreme Court agrees to review this case, it will stand as a precedent that will literally eviscerate the longstanding precedents protecting the civil rights of New Jersey workers.

II. STATEMENT OF FACTS

The Appellate Division arrived at an erroneous conclusion of law in part because they relied upon a set of facts that was markedly different than the set of facts that had been presented to the jury. The written opinion by the Appellate Panel inaccurately and unfairly paints a picture of the Plaintiff as a bigot who participated in the disgusting discriminatory joking and taunting that permeated

the working atmosphere at the Haddonfield Police Department. The testimony heard by the jury, which the jury based its finding of discrimination, was compelling and completely at odds with the contrary representations set forth in the Appellate Division decision.

Severe and Pervasive Harassment Against Plaintiff

The Appellate Division held that the pattern of harassment against the Plaintiff was "sporadic and not sufficiently severe or pervasive to create a hostile work environment under the LAD". Cutler v. Dorn, 390 N.J. Super. 238, 255. (App. Div. 2007). The jury, which ruled in Plaintiff's favor, heard testimony both from Plaintiff and Defendants that the harassment was neither sporadic nor minimal. With regard to the comment, "let's get rid of those dirty Jews," the jury heard Defendant Dorn, Haddonfield's Safety Director admit that the comment is just as egregious a statement as using the N word to an African-American officer. (2/4/03, T77:17-25). He testified that the comment was egregious whether it is joking or not joking. (Id., T78:1-3).

The jury heard testimony of a relentless barrage ethnic jokes and comments aimed at the Plaintiff by the highest of his superiors on a regular basis over a four year period. The Plaintiff testified that between May 1995 and January 1999, Ostrander, the Chief of Police who was the number one man at the department, made derogatory Jewish about the Plaintiff, such as ridiculing his "big Jew nose", and

comments like "give it to the Jew," twice a month. (2/10/03 T61:14-62:9) The jury heard Ostrander admit that he made the comments and concurred with their frequency. (2/10/03 T19:14-20:14). Ostrander testified that he only saw the Plaintiff about a "half dozen" times a month, meaning that one out of every three times that the Chief saw the Plaintiff he would make ridicule the Plaintiff's ancestry or religion. (Id. 20:7-14).

The Plaintiff also testified that the Police Captain, Corson, made comments like "give it him, Jews are good with numbers," "why didn't you go into your family business? Jews make all the money, why are you here." (2/10/03, T63:9-23). Corson's comments were less frequent than Ostrander's comments - about once or twice a month. (64:2-10). In sharp contrast to the Appellate Division's description of these events as "infrequent," Cutler at 255, during the period of 44 months, the number one and number two managers of the Police Department made between 132-176 separate derogatory comments aimed at the Plaintiff's Jewish ancestry/religion on an almost weekly basis. That does not count all of the other harassing actions taken against the Plaintiff, such as the placing of the Israeli and then German flags on his locker, and stating that they should "get rid of those dirty Jews".

The Plaintiff explained to the jury the cumulative of all of the incessant harassment:

> - - -Somebody walks up to you and taps you no big deal, keeps walking up to and taps you, okay, it gets

> annoying, you know. By the hundredth time that somebody keeps tapping you, you know, it starts to hurt. By the thousandth time, you know, a slight tap would be like a baseball bat. (2/10/2003 T132:9-15).

The Plaintiff did not engage in similar behavior.

The Appellate Division unfairly and completely inaccurately portrayed the Plaintiff as being a willing participant in the racist and bigoted behavior of the Department. There is no testimony to support any such allegations, and much testimony to rebut the mischaracterizations contained in the Appellate Division opinion.

The Appellate Division wrote that the Plaintiff participated in sharing the Department's "humor file" - a file containing various ethnic and offensive jokes. Cutler at 247. There is no factual or evidentiary basis in the trial transcript to support such an untrue statement. The Plaintiff repeatedly testified that he never had control nor accessed the humor file. (2/10/2003 T68:8-69:2; 74:16-19). Even Defendants' counsel, in his closing statement admitted to the jury that there was no evidence that the Plaintiff ever accessed the humor file:

> "Now we're going to have in this case circumstances in which I'm going to ask you to draw an inference such as the humor files in the cabinet, how much did he see or didn't see based on a lot of facts and testimony although I have no witnesses that saw him go in the cabinet, take out the files, and look through them. No witness said he didn't, but no witness said he did other than Mr. Cutler said he saw about 30 percent of the file." [referring to the documents before they were placed in the file]. (2/20/03, T28:23-29:6).

According to the Plaintiff's trial testimony, the humor file

began when he complained that there were too many offensive jokes hanging on the bulletin board. One of the officers removed the offensive material from the bulletin board and placed them in a file in the filing cabinet. (2/13/03, T68:24-70-17; T73:6-14). Nor is there any evidence to support any allegation that the Plaintiff participated in placing documents into the file. There was testimony that a female officer had given the Plaintiff a photocopy of a nude male that had been hung in the women's locker room. The Plaintiff gave it to another officer and told him to get rid of it. He later learned that it ended up in the humor file. (2/10/03, T74: 2-14).

The Appellate Division incorrectly and unfairly states that "Plaintiff acknowledged that he created some of the items in the humor file." The Appellate Division implied that some of the documents that the Plaintiff created were of a racial or ethnic nature. Cutler at 247. In fact, the testimony before the jury was that the Plaintiff admitted to creating one document that ended up in the humor file, and it clearly was not discriminatory in any way. The document consisted of a statue of four Marines in which the Plaintiff had cut out pictures of the heads of the four members of the Police Department who were Marines and pasted their heads on the photo of the Marines statue. (2/10/03, T85:5-89:6). There was no evidence whatsoever before the jury that anyone was ever offended by the document created by the Plaintiff.

The jury made a factual finding based upon the evidence

presented, including the facts cited herein. As the finder of fact, their factual conclusions should not be disturbed unless the facts presented in opposition are so strong that no reasonable factfinder would give them credence. The facts portrayed by the Appellate Division were never before the jury and were not true. In making its determination as to whether the jury verdict should be reversed, the Supreme Court should consider that the Appellate Division's decision rested upon erroneous and misleading factual errors.