NANCY VELEZ, Plaintiff, vs. CITY OF JERSEY CITY, ABC CORP. (said name being fictitious and unknown), ABC COMPANY (said name being fictitious and unknown), and ARNOLD BETTINGER, Defendants.	**SUPERIOR COURT OF NEW JERSEY** **APPELLATE DIVISION** **DOCKET NO.: A-000623-01T3** **CIVIL ACTION** **ON APPEAL FROM** **THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION, HUDSON COUNTY** **DOCKET NO.: HUD-L-8249-99** **SAT BELOW:** **Barbara A. Curran, J.S.C.**

AMENDED MEMORANDUM OF LAW OF PLAINTIFF, NANCY VELEZ,
IN SUPPORT OF
HER APPELLATE BRIEF
IN ACCORDANCE WITH R. 2:2-3

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INTRODUCTION

Plaintiff, Nancy Velez ("Velez" or "plaintiff"), submits this Memorandum of Law in support of her motion, pursuant to R. 2:2-3, to appeal the Court's August 30, 2001, Order (the "Order"), which granted summary judgment as to the entirety of Velez' Complaint. In particular, Velez appeals the Court's ruling as to: (1) Velez' claim against the City of Jersey City pursuant to the New Jersey Law Against Discrimination, N.J.S.A. § 10:5-1 *et seq.* ("LAD"); (2) Velez' non-compliance with the procedural requirements of the New Jersey Tort Claims Act, N.J.S.A. 59:1-1, *et. seq.* (TCA); (3) the applicability of the TCA to intentional torts; and (4) the applicability of the procedural requirements of the TCA to litigate Velez' claims of assault, battery and intentional infliction of emotional distress against defendant, Arnold Bettinger ("Bettinger") in his individual capacity and in his official capacity. It is with the utmost respect that Velez believes that the Court did not consider, or did not appreciate the significance of, the case law and treatises which conclusively warrant the reversal of the trial court's granting summary judgment as to Counts 1,2,4, 6, and 10.

PROCEDURAL HISTORY

On November 10, 1999, Velez filed her Complaint and Jury Demand in Hudson County Superior Court alleging, *inter alia*, sexual harassment hostile work environment; sexual harassment quid pro quo; negligent hiring, training, retention, and supervision; intentional infliction of emotional distress; negligent infliction of emotional distress; assault; and battery. (App. a-77-87). On June 7, 2001, defendant, Bettinger, filed his Motion for Summary Judgment. On June 8, 2001, defendant, City of Jersey City, filed its Motion for Summary Judgment. On June 22, 2001, plaintiff filed her Response to defendants' Motions for Summary Judgment and plaintiff's Cross-motion for Summary Judgment as to Bettinger's counter-claims. On June 29, 2001, defendant, Bettinger, filed his Reply Motion for Summary Judgment. On July 2, 2001, defendant, City of Jersey City, filed its Reply Motion for Summary Judgment.

On July 11, 2001, the Court stated that it had read all of the above referenced papers and entertained approximately 3½ hours of oral argument from counsel. Following such extensive efforts, the Court made its decision to grant summary judgment as to Counts 3, 5-14 of Velez' Complaint. The Court specifically ruled to deny summary judgment as to Counts 1,2, and 4 which contained plaintiff's LAD cause of action. (App. a-1352-1450); (App. a-1343-1351).

On July 25, 2001, defendant, Bettinger, filed his letter brief in support of his Cross-motion for reconsideration. On July 30,2001, plaintiff filed her Motion for Reconsideration. On August 1, 2001, defendant, City of Jersey City, filed its letter brief in opposition to Plaintiff's Cross-motion for reconsideration and in support of the City's Cross-motion for a Statement of Reasons.

On August 17, 2001, the Court called counsel into chambers and made an unprecedented request for a de novo hearing on the summary judgment applications filed by all parties.

On August 23, 2001, counsel for plaintiff and Bettinger objected to the Court engaging in such an unusual procedure in so far as the Court might overturn a ruling that was favorable to the respective party. It is of significant import that City of Jersey City made *no* written application to the Court in support of this additional hearing. At the hearing itself, the City of Jersey City simply referred to the argument that it had made during the 3 ½ hours of oral argument that the Court already considered. (App. a-1451-1490).

In a shocking reversal, on August 30, 2001, the Court issued a written Order granting summary judgment as to plaintiff's *entire* Complaint -- even though no new arguments were considered or discussed from the City of Jersey City on the subject of its liability under the LAD claim. (App. a-1491-1499).

It is the Court's bizarre procedural actions and reversals that sets the backdrop for this appellate brief. The necessity to appeal the Court's bizarre procedural actions and reversals is augmented by the obvious legal error made by the Court and the impact of this legal error on New Jersey's proud tradition of protecting employees from sexual harassment and discrimination.

The Court's ruling eviscerates the LAD and limits it in a way directly opposed by the LAD itself and the New Jersey Supreme Court. In fact, the Court created an exception to the applicability and scope of the LAD that never before existed.

STATEMENT OF FACTS

Velez, was brutalized by the sexual assault and battery perpetrated by Bettinger on or about December 1, 1997. While Velez was in Bettinger's office, he grabbed her against her will and started kissing Velez all over her face, her cheeks, and her lips. (App. a-138,¶47).[1] While Bettinger grabbed Velez, he grabbed at her breasts and buttocks area, against her will. (App. a-138,¶48). Velez was shocked and tried to push Bettinger off her. (App. a-138, ¶49). Immediately following the sexual victimization, Velez complained to her supervisor as set forth below. Jersey City's response violated the standards set forth by its own sexual harassment policies and procedures and the New Jersey Supreme Court. It is the above actions that form the basis of Velez' claims as they are set forth in her Complaint: sexual harassment hostile work environment; sexual harassment quid pro quo; negligent hiring, training, retention, and supervision; intentional infliction of emotional distress; negligent infliction of emotional distress; assault; and battery. (App. a-65-76).

STANDARD OF REVIEW FOR SUMMARY JUDGMENT

The trial court granted summary judgment utilizing the standard set forth under Rule 4:46-2. Under this rule, the Court should deny such a motion if, when viewing the competent evidential materials presented in the light most favorable to the non-moving party, there exists a genuine issue with respect to a material fact. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 524 (1995). Additionally, by its plain language, R. 4:46-2 dictates that a court should deny a summary judgment motion where the party opposing the motion has come forward with evidence that creates a "genuine issue as to any material fact

[1]Velez' Memorandum contains citations to exhibits and citations made in her underlying Response Brief.

challenged." The underlying Statement of Facts adequately display that most if not all material facts giving rise to Plaintiff's Complaint are hotly contested.

Additionally, the Court, when deciding Defendants' Motion for Summary Judgment, should construe all facts and other evidence in the light most favorable to the parties opposing summary judgment. Dairy Stores, Inc. v. Sentinel Publishing Co., Inc., 104 N.J. 125, 135, 516 A.2d 220 (1986). This is so because a party opposing a motion should not be denied a trial unless the moving party sustains the burden of showing clearly the absence of a genuine issue of material fact. Of course, the Courts have also held that the "standards are to be applied with discriminating care so as not to defeat a summary judgment if the movant is justly entitled to one." Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954).

In determining the validity of this Motion for Summary Judgment, plaintiff respectfully submits that, the trial court must not decide issues of fact but merely decide whether there are any such issues that are material and controverted. Judson, *supra* at 73; Mercer v. Weyerhaeuser Co., 735 A.2d 576 (App. Div. 1999) *citing* Brill, *supra* at 540 (Appellate standard to review granting of summary judgment motion is "whether, viewing all of the competent evidential material presented to the trial judge in a light most favorable to the non-moving party, the evidence is so one-sided that a reasonable fact- finder must resolve the disputed issue of material fact in favor of the movant"); Antheunisse v. Tiffany & Co., Inc., 551 A.2d 1006 (App.Div. 1988) (Same standard should be applied on appeal of such issues). Under such a standard, it is beyond clear that defendants' motion for summary judgment should have been denied.

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ARGUMENT

I. CITY OF JERSEY CITY LIABLE UNDER THE LAD

The premise of Jersey City's argument on their liability for the LAD claim is legally and factually inaccurate. Jersey City's argument, in essence, states that Jersey City is not liable for a sexual assault, and thus it is not liable for a claim of sexual harassment. *See* Db pp.4-5. This argument is intentionally simplistic to mislead the Court from taking the facts *sub judice* into account. The facts before this court amply demonstrate that Velez made an immediate complaint of the sexual harassment and Jersey City cast her complaints aside and violated their own policies in handling her allegations. Further, when Velez returned to work, Jersey City mutated Velez' work environment and retaliated against her to create an actionable hostile work environment. It is the culmination of these actions that gives rise to Velez' claim of hostile work environment sexual harassment.

2. Factual Dispute Exists

The Court admits that "*a factual dispute exists* as to whether as a result of plaintiff's complaints against Bettinger and after returning to her job with the City's Neighborhood Improvement Development Office (NID) from her medical leave of absence, plaintiff was subject to a hostile work environment..." (App. a- 1494)(emphasis added). However, after listing *eight (8) examples of retaliation* (there are actually ten (10) as noted herein on the section on retaliation), the Court dismissively states that "these do not constitute material issues of fact which would preclude a summary judgment determination on purely legal bases." (App. a-1494). Plaintiff is not quite certain what to make of such an incomprehensible statement. If a factual dispute exists on whether plaintiff was

retaliated against, then certainly summary judgment must be denied. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 524 (1995). It is beyond question that the LAD protects Velez from sexual harassment hostile work environment as well as retaliation. LAD at 10:5-1(d). Plaintiff's Complaint put defendants on notice of her claim that defendants violated the LAD at 10:5-1 *sic* and other statutes. City of Jersey City argued that it did not have notice of plaintiff's claim of retaliation that is contained in the LAD at 10:5-1(d). The Court did not rule that defendants were not on notice of plaintiff's claim of retaliation which ostensibly took into consideration the liberal interpretation to be construed to pleadings, especially when one is considering depriving someone of access to protecting his or her civil liberties.[2] The trial court merely ruled that the factual dispute over the issue of retaliation did "not constitute material issues of fact which would preclude a summary judgment determination on purely legal bases." (App. a-1494). Plaintiff respectfully submits that her claim of retaliation and the fact that numerous examples of retaliation exist are alone sufficient grounds to mandate the reversal of the trial court's Order.

This would be consistent with the Court's finding in Vekshteyn v. Movado Group, Inc., Appellate Division, A-4412-99T3, October 4, 2001, Not approved for publication. (13 pages). Facts-on-Call Order NO. 11381. In that case, the plaintiff, a Russian Jewish woman, claimed that her supervisor's use of the ("yenta") and ("kvetch"), as well as his comments to other Jewish employees created a hostile work environment. The Court overturned the granting of summary judgment and stated that matter was particularly ill suited to be decided on the papers because the reasonableness of the plaintiff's reactions to her supervisor's verbal conduct depended on the credibility of the parties and their witnesses and on subtleties such as "facial expression, tone, and nuance in the use of language." Id.

3. "One Free Bite of the Apple Rule"

[2]The plaintiff did point to several parts of the record wherein testimony clearly revealed that plaintiff's claim was one of retaliation as well as sexual harassment (citations set forth below).

The trial court, by its ruling, created a new rule of law in New Jersey that can be best summarized by the "One Free Bite of the Apple Rule". What the Court ruled, in effect, is that: (a) if an employee is called a racial epithet such as "nigger", if an employee is sexually assaulted and molested, if an employee is called a "faggot", if an employee is called a "bitch", or if an employee is called a "whore" who should sleep with her bosses to keep her job; *and* (b) the employee complained to the employer; *and* (c) the employer fails to do an investigation and ignores the complaint; *and* (d) the harasser is an employee or within the control of the employer; *and* (e) the employer retaliates against the employee -- and, here's the kicker, the employer solely and merely states that it did not know that the employee had a propensity to commit the action, the employer has no liability under the LAD. Such a ruling is preposterous.

a. One Bite enough for liability

The New Jersey Supreme Court held that "[t]o state a claim for hostile work environment sexual harassment, a female plaintiff must allege conduct that occurred because of her sex and that a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an intimidating, hostile, or offensive working environment. For the purposes of establishing and examining a cause of action, the test can be broken down into four prongs: the complained-of conduct (1) would not have occurred but for the employee's gender; and it was (2) severe or pervasive enough to make a (3) reasonable woman believe that (4) the conditions of employment are altered and the working environment is hostile, abusive, intimidating or offensive." Lehmann v. Toys R Us, Inc. , 132 N.J. 587 at 603-604, 626 A. 2d 445 (1993).

Defendants concede by their Statement of Material Facts that the assault allegedly perpetrated by Bettinger was an assault on Velez because of her gender. (Db Bettinger Statement of Facts). Certainly Velez' own testimony (App. a-139,¶58-62), her temperament when she reported the incident (fully briefed below), Jersey City's response to her complaints of the sexual harassment (fully briefed below), the retaliation of Jersey City (fully briefed below), and Velez' medical documentation (App. a-584-646) more than adequately demonstrate that the sexual harassment complained of was so severe or pervasive that it altered Velez' working environment into a hostile or abusive working environment. *See*, Lehmann, *supra*.

Nonetheless, the trial court granted summary judgment and, in effect, created a new exception to the coverage of the LAD. The trial court's new rule of law is completely inconsistent with this State's proud and lengthy history of preserving its citizen's civil rights.

i. Reliance on Whitaker misplaced

The Court relies on one case, Whitaker v. Mercer County, 65 F. Supp. 2d 230 (1999), in dismissing plaintiff's LAD claim against the City of Jersey City. This is noteworthy, because the City of Jersey City briefed and relied upon Whitaker, *supra*, in its initial application for summary judgment. The Court heard extensive oral argument regarding Whitaker, *supra*, on July 11, 2001. The Court denied the City's application on this point. Subsequently, the City of Jersey City made the same arguments regarding the applicability of Whitaker, *supra*, on August 23, 2001. On August 30, 2001, the Court granted the City's application on this point.

The Court's reliance on Whitaker v. Mercer County, 65 F. Supp. 2d 230 (1999) is misplaced. In Whitaker, *supra*, the court found it persuasive that "there has been only one alleged instance of discriminatory behavior against a plaintiff, **which the employer took immediate steps to rectify as soon as it was informed**. There appears to be no dispute that Mercer County

Corrections Facility afforded the plaintiff a complaint procedure... As soon as the County Defendants received notice of Soto's assault on the plaintiff, it took immediate steps to investigate and remedy the situation. The plaintiff does *not* argue that the County Defendants had an inadequate complaint procedure." Whitaker, *supra* at 245 (emphasis added).

This is completely inapposite to the facts, as they are set forth herein, where the plaintiff has consistently held, and the defendants do not dispute, that plaintiff complained of the sexual harassment to many individuals including her supervisors (App. a-1494); a high-level supervisor, Charlie Callari, informed the Business Administrator for the City of Jersey City that Velez made a complaint of sexual harassment (App. a-1494); the City of Jersey City conducted no investigation and took no responsive action (citations to record set forth below); and the City of Jersey City engaged in numerous examples of retaliation that is set forth below (citations to record set forth below).

ii. History of the LAD

In 1945, when the LAD was first enacted, 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 "recognized 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 "the 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. The Lehmann court found particularly repugnant the type of discrimination that faces this court in the facts *sub judice* -- discrimination based on gender. Lehmann (*citing* Grigoletti v. Ortho Pharmaceutical Corp., 118

N.J. 89, 96, 570 A.2d 903 (1990) (gender discrimination is "peculiarly repugnant in a society which prides itself on judging each individual by his or her merits."). Although the Court held that the legislature had not spoken on the topic of sexual harassment as an invidious evil covered under the far-reaching tentacles of the LAD, the Court looked to "federal precedent governing Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e to §§ 2000e-17 ("Title VII"), as 'a key source of interpretive authority.'" Grigoletti, *supra*, 118 N.J. at 97.

After exhaustive analyses on the subject, the New Jersey Supreme Court has consistently held that sexual harassment is a form of sex discrimination that violates both Title VII and the LAD. Lehman *supra* at 601(citing *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) (holding that when supervisor sexually harasses a subordinate because of subordinate's sex, that supervisor discriminates on basis of sex in violation of Title VII); Erickson v. Marsh & McLennan Co., 117 N.J. 539, 555-56, 569 A.2d 793 (1990) (suggesting that sexual harassment that creates hostile environment is prohibited under LAD)).

The New Jersey Supreme Court has ruled time and time again that the New Jersey Law Against Discrimination, N.J.S.A. § 10:5-1, *et seq.* ("LAD"), is a statute worthy of liberal interpretation (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)) and should be applied to the full extent of its facial coverage. Peper v. Princeton University Bd. of Trustees, 389 A.2d 465, 472 (1978); *see* Zahorian v. Russell Fitt Real Estate Agency, 62 N.J. 399, 301 A.2d 754 (1973); Jackson v. Concord Co., 54 N.J. 113, 253 A.2d 793 (1969).

The Court's ruling of August 30, 2001, is a shocking and dangerous departure from such a broad and liberal interpretation. The Court's ruling erodes the bedrock of civil rights litigation in this State and jeopardizes all employees as it interprets the LAD in such a restrictive manner that it emasculates and eviscerates the most important statute of this state.

The Court's ruling is directly inapposite to this State's Supreme Court that specifically found that "the LAD is not a fault or intent-based statute, a plaintiff 'need not show that the employer intentionally discriminated or harassed her, or intended to create a hostile work environment.'" Taylor v. Metzger, 152 N.J. 490, 706 A.2d 685 (1998), *quoting*, Lehmann, *supra* at 454. In fact, it is the possibility that one incident may, *in and of itself*, set the factual basis for a sexual harassment hostile work environment claim that led the New Jersey Supreme Court to reject the Andrews v. City of Philadelphia, 895 F.2d 1469 (3rd Cir.(Pa.) 1990) standard (regular *and* pervasive) in favor of the Ellison v. Brady, 924 F.2d 872, 878 (9th Cir.1991) standard (severe *or* pervasive).

The Court found that the "disjunctive standard ... is in conformity with federal Title VII law" and supported by the United States Supreme Court. Lehmann, *supra* at 606 (*citing* Meritor Savings Bank v. Vinson, 477 U.S. 57 at 67, 106 S.Ct. 2399 at 2405, 91 L.Ed.2d 45 at 60 (1986) ("for sexual harassment to be actionable, it must be sufficiently *severe or pervasive"* to cause the requisite harm (emphasis added)). The New Jersey Supreme Court adopted the disjunctive standard so as to include actions based on a single extremely severe incident or multiple but randomly-occurring incidents of harassment. Id. In fact, the New Jersey Supreme Court concluded that the Andrews, *supra*, test strayed from the United States Supreme Court's standard in Meritor, *supra,* and "would bar actions based on a single, extremely severe incident or, perhaps, even those based on multiple but randomly occurring incidents of harassment." Lehmann, *supra*, 626 A.2d at 455.

Indeed, the New Jersey Supreme Court recently concluded that a plaintiff created a triable issue based on a single racial slur. *See* Taylor v. Metzger, 152 N.J. 490, 706 A.2d 685 (1998). In Taylor, the plaintiff presented evidence that her chief ranking supervisor called her a "jungle bunny" in the presence of another supervising officer. The court concluded that these circumstances "were sufficient to establish the severity of the harassment and alter the conditions of plaintiff's work environment." Taylor, *supra*, at 693. The court ruled that severity was measured by taking into consideration the surrounding circumstances. *See*, Taylor, *supra*, at 692. The Court held that, "[i]n common parlance, "jungle bunny" is a racial slur directed at blacks. The Dictionary of

Contemporary Slang 285 (1st Ed.1990); Paul Beale, *A Concise Dictionary of Slang and Unconventional English* 244 (1st American Ed.1989). It is a slur that, in and of itself, is capable of contaminating the workplace. Bolden v. ABF Fabricators, Inc., 864 F.Supp. 1132, 1133-34 (N.D.Ala.1994) (referring to black people as "jungle bunnies," among other slurs, created a racist working environment); *cf.* Resetar v. State Bd. of Educ., 284 Md. 537, 399 A.2d 225, 238 (1979) (upholding dismissal of schoolteacher for referring to black students within earshot as "jungle bunnies" because the epithet is sufficiently vicious). Resetar, *supra, cert. denied*, 444 U.S. 838, 100 S.Ct. 74, 62 L.Ed.2d 49 (1979).

In fact, the court took special note of the fact that the individual who called plaintiff a "jungle bunny" was a high ranking officer who carried the power and authority of office. Taylor,*supra*; *cf.* In re Seaman, 133 N.J. 67, 94, 627 A.2d 106 (1993) (stressing that the sexual harassment by a judge directed to his law clerk was especially egregious because of the judge's authority and superior position). Bettinger's sexual assault on Velez was similarly aggravated by the fact that she sought his assistance in his capacity as a City Councilman and Bettinger committed the sexual while he purported to provide assistance in his capacity as a publically elected official entrusted with the public trust. *See* Lehmann, *supra*.

The New Jersey Supreme Court further stated that a supervisor has a unique role in shaping the work environment. Part of a supervisor's responsibilities is the duty to prevent, avoid, and rectify invidious harassment in the workplace." Taylor, *supra* at 503-504, *citing to, see* Lehmann, *supra*, 132 N.J. at 622-23, 626 A.2d 445 (holding an employer was vicariously liable for sexual harassment if it had knowledge of the harassment but failed to stop it promptly and effectively). This is similar to the facts *sub judice* wherein Velez' first-level (John Mateo), second-level (Charlie Callari), and third-level (Maureen Corrado) supervisors and the Business Administrator (Elinor Gibney) all turned a blind eye to the fact that Velez had been sexually harassed and consequently engaged in numerous examples of retaliation.

Other courts have also recognized that under the severe-or-pervasive test a single incident of invidious harassment can create a hostile work environment. *E.g.*, Torres v. Pisano, 116 F.3d 625, 631, n. 4, (2d Cir.) ("Of course, even a single episode of harassment, if severe enough, can establish a hostile work environment."), *cert. denied*,-- U.S. 563, 118 S.Ct. 563, 139 L. Ed.2d 404 (1997); Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 674 (7th Cir.1993) ("Within the totality of circumstances, there is neither a threshold 'magic number' of harassing incidents that gives rise, without more, to liability as a matter of law nor a number of incidents below which a plaintiff fails as a matter of law to state a claim."); Daniels v. Essex Group, Inc., 937 F.2d 1264, 1274 n. 4 (7th Cir.1991) (a single instance of racial harassment can establish a hostile work environment); Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1511 (11th Cir.1989) ("It is thus incorrect to apply mechanically an absolute numerical standard to the number of acts of harassment which must be committed by the defendant before a jury may reasonably find that a hostile environment exists."); Reid v. O'Leary, No. Civ. A. 96-401, 1996 WL 411494 (D.D.C. July 15, 1996) (the use of one epithet created an issue of material fact regarding whether the plaintiff's work environment was hostile); *see* Del Valle Fontanez v. Aponte, 660 F.Supp. 145, 149 (D.P.R.1987) (a single sexual advance can constitute sexual harassment); Nadeau v. Rainbow Rugs, 675 A.2d 973, 974, 976 (Me.1996)(a single incident of sexual harassment by the highest-ranking employee of the company could reasonably be found "sufficiently severe to alter the conditions of employment and to create an abusive or hostile work environment" and should go to a jury); Radtke v. Everett, 442 Mich. 368, 501 N.W.2d 155, 168 (1993) (single incident of sexual harassment may be sufficient to reach jury); *see also*, Rocha Vigil v. City of Las Cruces, 119 F.3d 871, 873 (10th Cir.1997) (Lucero, J., dissenting) ("If sufficiently severe, harassment is actionable under Title VII--regardless of its pervasiveness or frequency."). Additionally, the Equal Employment Opportunity Commission ("EEOC"), the federal agency tasked with enforcing sexual harassment and discrimination statutes, also recognizes that a single incident, if sufficiently severe, can create a hostile

environment. Schott v. Runyon, No. 4-G-1381- 92, 1996 WL 350896 (E.E.O.C. June 20, 1996) (citing EEOC Policy Guidance on Current Issues of Sexual Harassment, Notice N-915-050, at 104 (March 19, 1990)).

The Taylor court quoted Nadeau, *supra*, in stating that the New Jersey LAD standard "contemplates conduct that is either severe or pervasive. "Although the conduct may be both, only one of the qualities must be proved in order to prevail. The severity of the conduct may vary inversely with its pervasiveness. Whether the conduct is so severe as to cause the environment to become hostile or abusive can be determined only by considering all the circumstances, and *this determination is left to the trier of fact*." Taylor at 589-590 (emphasis added) *quoting* Nadeau, *supra* at 976; Reid v. O'Leary, No. Civ. A 96-401, 1996 WL 411494, at *4 (D.D.C. July 15, 1996) (ruling that "it is very possible that the term 'Coon-Ass' is racially derogatory or severe enough, in and of itself, to create a hostile work environment"); Bailey v. Binyon, 583 F.Supp. 923, 927 (N.D.Ill.1984) ("The use of the word 'nigger' automatically separates the person addressed from every non-black person; this is discrimination per se...."); see also Rocha Vigil, *supra*, 119 F.3d at 873 n. 3 (Lucero, J., dissenting) (Harris v. Forklift Sys., Inc., 510 U.S. 17, 21, 114 S.Ct. 367, 370, 126 L. Ed.2d 295, 302 (1993)), "does not mean that [a] severely degrading, racially derogatory insult of the worst kind escapes actionability under Title VII simply because it is used only occasionally.").

The Courts have certainly ruled that one assault may form the basis of a hostile work environment case. *See* Schmidt v. Smith, 713 A.2d 1014, 1016 (1998) (plaintiff's allegation of the defendant demanding sex and attempting to force "his tongue down her throat," while he fondled Lisa's buttocks and breasts formed the basis of claim of sexual harassment hostile work environment claim); Szczepanski v. Newcomb Medical Center, Inc., 661 A.2d 1232 N.J.,1995 (a single sexual assault followed by inaction of employer when complaint was made, there can exist sufficient grounds to constitute an intentional infliction of emotional distress claim, sexual harassment claim, and an assault claim).

Justice Handler writing for a majority court, with Chief Justice Poritz and Justices Pollock, O'hern, Stein and Coleman and Justice Garibaldi concurring in part and dissenting in part, utilized the Brill, *supra,* standard and found that a rational fact finder could reasonably determine that a single verbal insult could create a hostile work environment. Taylor, *supra* at 689. Accordingly, the New Jersey Supreme Court overturned the appellate court's granting of summary judgment. The standard utilized herein must be the same, as the trial court, utilizing the Brill, *supra,* standard, granted summary judgment to the defendants, City of Jersey City and Bettinger. Thus, the result should be the same in that the trial court's opinion should be reversed.

b. Velez complained of sexual harassment to her employer, City of Jersey City

i. Nancy Velez

Immediately following the incident, Velez told co-employees, Laura Peterson, Frank Hoffman, Paula Hoffman, her physicians, and family members what had occurred to her. (App. a-138,¶53). The very next day, on December 2, 1997, Velez reported the details of the sexual harassment incident to her second level supervisor Charlie Callari. (App. a-139, ¶55). At the time, Callari was the Assistant Head of NID and a management level employee of the City of Jersey City. (App. a-140,¶66).

Velez also told John Mateo, her immediate supervisor and union representative, the details of the sexual harassment incident and told him that she reported the incident to the Assistant Director of NID, Charlie Callari. (App. a-140,¶67).

Velez also told her Union President, Robert Wilson, about the incident. (App. App. a-139,¶64). She told Wilson the details of the assault and told him that she had reported the incident to Callari. (App. a-139,¶65).

ii. John Mateo

Mateo testified that he worked for Jersey City from 1996 in the NID and was promoted to north district supervisor in 1997 and terminated his employment in July 1999. (App. 3T a-418-420, 423-424). Mateo testified that he was Velez' direct supervisor as the North District Supervisor and her union representative in 1997. (App. 3T, a-436, 450).

Velez approached Mateo and asked to talk to him after the roll call. (App. 3T, a-438). They went to his office area where he sat as the north district supervisor. (App. 3T, a-438-439). Velez was very upset and nervous and crying when she spoke to Mateo. (App. 3T, a-440-441). Velez told him the details of the sexual harassment. (App. a-146, ¶114).

iii. Charlie Callari

Callari admitted that Velez complained to him in December 1997 regarding Bettinger. (App. 2T, a320). Velez repeatedly asked to see Callari and appeared upset. (App. 2T, a321,336). She was shaking, repeating herself, and perhaps crying, and, thus, Callari met with Velez in his office. (App. 2T, a321,336). Callari then admitted that Velez told him that Bettinger grabbed her, and attempted to fondle her breasts and kissed her and Velez was upset and pushed him away and ran out of his office. (App. 2T, a324).

Velez testified that she went into the details of the assault and that Callari responded by asking her if she was talking to him as a friend or a supervisor.[3] (App. a-139, ¶¶57,59). Velez felt no choice but to say as a friend, because she felt that by Callari's response, her job would be in jeopardy if she said that she was making an official report. (App. a-139, ¶58). Callari admitted that he asked no follow up questions of Velez. (App. 2T, a-324-325). Callari stated that he told Velez that he would have to report the complaint to the business administrator and handed Velez a copy of Jersey City's policy and procedure manual.[4] (App. 2T, a-325-326).

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[3]Material dispute exists as Callari testified that Velez was the person who insisted that she was coming to him as a friend.

[4]Material dispute exists as Velez denies this assertion by Callari. (App. a-142,¶87).

iv. Maureen Corrado

Callari told his boss, Maureen Corrado, that "Nancy had come into this office regarding an alleged **complaint of sexual harassment regarding an elected official in the City of Jersey City."** (App. 2T, a-339) (Emphasis added). Callari told Corrado the specifics of the incident as relayed to him by Velez, and he informed Corrado that he intended to take the complaint to the business administration office. (App. 2T, a-339,341). Tellingly, Callari could not remember Corrado making any responsive comment or questions. (App. 2T, a-340-343). This conversation lasted only several minutes. Id. This lack of response is consistent with Velez and Wilson's testimony pertaining to Corrado's future retaliatory conduct against Velez. (App. a-146,¶115).

v. Elinor Gibney

Callari testified that he immediately informed the liaison within the business administrator's office, Eleanor Gibney, of Nancy Velez' allegations. (App. 2T, a-341).[5] Eleanor Gibney was the person designated by Jersey City to handle sexual harassment complaints. (App. 6T, a-796-797).

[5]Material factual dispute exists as Gibney testified that Callari never made such a contemporaneous reporting.

Gibney was employed by Jersey City from 1989 as an administrator-analyst in the business administrator's office. (App. 6T, a-786-787). In 1991, she was promoted to Management Specialist. (App. 6T, a-787). Gibney was the business administrator's designee for sexual harassment from the spring of 1997 onwards. (App. 6T, a- 796-797).[6]

Callari had a phone conversation with Gibney and told her the specifics of the incident. (App. 2T, a-341). Gibney's concerns during this conversation was to ponder if the assault occurred on Jersey City property and queried whether anyone was acting in their official capacity. (App. 2T,a-341-342). Following this conversation, Callari had one follow-up phone conversation, several days later, with Gibney pertaining to Velez. (App. 2T, a-343,351).

vi. Robert Wilson

Wilson became the Union President for Jersey City approximately 4 years ago. (App. 4T, a-490).

Velez went to Wilson's official offices as the Union President at the Union Hall at 204 Culver Avenue and asked to speak to Wilson. (App. 4T, a-523). Wilson testified that he was the appropriate person to go to as the Shop Steward for NID, John Mateo, was not as well suited to handle such a complaint.(App. 4T, a-552-553). Velez told Wilson that she had been sexually assaulted by Bettinger. (App. 4T, a-525). She was very upset and crying. (App. 4T, a-525-526). She told him that Bettinger cornered her against the wall, grabbed her breasts, and licked her face. (App. 4T, a-525). Wilson then spoke to Callari the next day and told Callari that such allegations, if true, would not be tolerated. (App. 4T, a-527-528).

Thus, Jersey City was clearly on notice of Velez's complaint of the sexual assault and battery, and clearly Jersey City was on notice that Velez had been sexually harassed by another employee of Jersey City -- Councilman Bettinger.

[6]Gibney and Ross were the designated sexual harassment administrators for Jersey City. (App. 6T, a-797-798).

In such a situation, the Supreme Court of our State has mandated that Velez' employer, Jersey City, may be liable under a LAD claim for sexual harassment as it possessed actual or constructive knowledge of the harassment if Jersey City did not promptly and effectively act to stop it. Lehmann, *supra* at 622, 626 *A*.2d 445. This is exactly what occurred.

c. City of Jersey City failed to respond to sexual harassment complaint

i. Jersey City's policies and procedures

Jersey City's actions were completely inapposite and inconsistent with its sexual harassment policy which was signed by Mayor Bret Schundler as Executive Order 1998-015 and effective April 28, 1998 (the "S.H. Policy"). (App. a-580-583). The S.H. Policy mandates that Department Directors and Supervisors "immediately report *actual or suspected* violations to the Business Administration *for investigation."* (App. a-581).(emphasis added). "It is the *responsibility* of the Business Administrator or his/her designee to promptly investigate charges of sexual harassment and recommend appropriate action." (App. a-582)(emphasis added). After the completion of this investigation, "if warranted, prompt disciplinary action will be taken up to and including dismissal." (App. a-582). Retaliation is *prohibited*.(App. a-582)(emphasis added).

Jersey City has a mandatory procedure to report incidences of sexual harassment to the Business Administrator, who during the relevant time period was Eleanor Gibney. (App. 2T,a-334). Gibney would conduct an investigation by meeting with the parties and gathering facts and taking immediate remedial action. (App. 6T, a-808). Roxanne A. Haynes, Jersey City's administrative analyst in the business administrator's office from 1995 to approximately 1998, testified that, normally, in a sexual harassment investigation, statements are taken from the accused the alleged harasser and witnesses and typed into the computer. (App. 7T, a-870-871,896-897). In fact, Callari admitted that he had received a sexual harassment complaint from his secretary pertaining to a co-worker.(App. 2T, a-328). In that situation, Callari interviewed the harasser who admitted to the complained of conduct. (App. 2T, a-330). Callari also reported the incident to the Business Administrator, Eleanor Gibney. This incident occurred

sometime during the time period of plaintiff's employment by Jersey City. (App. 2T, a-334-335). The responsive action that resulted was to separate the two employees. (App. 2T, a-334-335). This incident occurred sometime during the time period of plaintiff's employment by Jersey City. (App. 2T, a-334-335).

Larry Ross further testified that in sexual harassment investigations, the process that should have been followed was to conduct interviews jointly with Elinor Gibney. (App. 8T, a-1009-1010). Under the 1994 policy, department directors and supervisors were to be more involved firsthand. The policy further required that these individuals submit a written report to the business administrator of the sexual harassment allegation. (App. 6T, a-811). Further it was the supervisor's responsibility to ensure that the sexual harassment stopped immediately. (App. 6T, a-813).

Jersey City clearly did not have an effective sexual harassment policy or complaint structure in place, when it came to Velez. There was no training on the subject of sexual harassment to Velez or Bettinger. (App. a-146,¶116);(App. a-928-934). Sexual harassment training was not mandatory and was not offered to Velez. (App. a-146,¶117). Jersey City had no effective sensing or monitoring mechanisms, and there was certainly no unequivocal commitment from the top to respond efficiently and effectively to complaints of sexual harassment to try to maintain a working environment free of sexual harassment. This abandonment of what the New Jersey Supreme Court has enunciated as the five elements pertaining to sexual harassment gives rise to the employer's liability. *See* Lehmann *supra* at 621.[7] In fact, the Court ruled that, "[G]iven the foreseeability that sexual harassment may occur, the absence of effective preventative mechanisms will present strong evidence of an employer's negligence." Id.

[7] "The five elements are: policies, complaint structures, and that includes both formal and informal structures; training, which has to be mandatory for supervisors and managers and needs to be offered for all members of the organization; some effective sensing or monitoring mechanisms, to find out if the policies and complaint structures are trusted; and then, finally, an unequivocal commitment from the top that is not just in words but backed up by consistent practice..."

In fact, top level managers and supervisors of Jersey City testified in contrary fashions as to what Jersey City's sexual harassment policy was or even admitted that they did not even know what was Jersey City's sexual harassment policy. Gibney testified that the difference between the 1998 sexual harassment policy for Jersey City and the 1994 policy was that the 1998 policy mandated that the Complaint be in writing. (App. 6T, a-807). This varied from Ross' testimony wherein he stated that the main difference was that the 1994 policy allowed for the supervisor to have discretion in making a sexual harassment report whereas the 1998 policy stated that it was mandatory for a supervisor to report sexual harassment charges to the business administrator. At least this was better than Velez' supervisor who admitted that during his employment by Jersey City he never received training on sexual harassment, he was not familiar with Jersey City's sexual harassment policy, he never saw Jersey City's sexual harassment policy, and he had no idea what a sexual harassment investigation should entail. (App. 3T, a-451).

Thus, Jersey City's lack of a post reporting investigation as noted below violated its own policy which stated that such an investigation was mandatory. Thus, their liability for the sexual harassment is beyond question let alone sufficient to satisfy summary judgment. *See*, *e.g.* Woolley v. Hoffman-LaRoche, Inc., 99 N.J. 284, 491 A.2d 1257, *modified*, 101 N.J. 10, 499 A.2d 515 (1985).

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ii. Jersey City's Response

(1) John Mateo, Velez' immediate supervisor

Mateo's only response to Velez' allegation of sexual harassment was -- talk to the Union President. (App. 3T, a-443). Mateo made this statement even though he admitted that Velez came to him because he was *her supervisor* and shop steward;

however, he did not report her complaint to anyone. (App. 3T, a-444). Further, Mateo took no responsive action even though Velez did not tell him to not disclose her complaints to anyone. (App. 3T, a-444). Mateo also testified that Velez came to his house and appeared to be a nervous wreck and stated that she did not know what to do. (App. 3T, a-445-446). Her hands were shaking and she was teary eyed and crying. (App. 3T, a-446). Mateo did not tell her to go to human resources and cannot recall if he told Velez to complain to Callari even though he knew that Velez was making a complaint of sexual harassment. (App. 3T, a-446-448). Mateo did not tell Velez to go to the business director or the personnel director or to make a formal written complaint. (App. 3T, a-449). In fact, after Velez's second complaint to Mateo, he never approached Velez to discuss her complaints of sexual harassment, and he never discussed Velez' complaints with Velez or anyone else. (App. 3T, a-455-456).

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(2) Charlie Callari, Velez' second level supervisor

(a) *Callari's response*

Although Callari appeared furious, his response was to ask Velez if she was telling him about the incident as a superior or a friend. (App. a-139,¶¶57,59).[8] Velez felt cornered into saying as a friend. (App. a-139,¶¶57,59). Velez felt that instead of taking immediate action, he questioned her by asking are you telling me this as your superior or as a friend. (App. a-139,¶¶57,59). Velez and Callari were not friends. (App. a-139,¶60). Certainly such a response by your employer indicates that you should reconsider following through with your Complaint. Callari should have reported the incident immediately. As far as Velez knew, he did not; but, because Velez was afraid she would lose her job, she did not go to business administration or make any further

[8]Material factual disputes exist on this point.

complaints to her supervisors. (App. a-139,¶¶61-62). Velez worked for the city and knew that a city councilman has power and she did not want to lose her job. (App. a-139,¶63).

(b) *Callari's conversation with Wilson*

Wilson also spoke to Callari the next day and told Callari that such allegations, if true, would not be tolerated. (App. 4T, a-527-528). Wilson felt that Velez had been violated. (App. 4T, a-527-574). In fact, Wilson told him "This fucking happened, and that's fucked up." (App. 4T, a-565). Callari agreed and stated that both Jersey City and the Union would pursue the matter. ((App. 4T,a-529).

However, Callari also appeared that he did not want to get involved and was cold faced. (App. 4T, a-567). Subsequently, Callari never informed Wilson what Jersey City would do, and no one from Jersey City ever discussed Velez' complaints or questioned Wilson on the matter. (App. 4T, a-531-532). This reaction is certainly consistent with his future retaliatory actions against Velez as noted below.

(c) *No responsive action*

Callari testified that he informed Ms. Gibney that Velez interacted with Bettinger on prior occasions in the performance of her work duties, and Velez would interact with Bettinger on future occasions in the performance of her work duties.[9] (App. 2T, a-342, 347-348). Velez would interact with Bettinger as her district that Velez patrolled was in Bettinger's ward and "it would not be uncommon for them to come across each other in that ward." Id. Callari also stated that it was *very possible* to transfer Velez to a different Ward that was not in Bettinger's jurisdiction, but this was not done nor even suggested. (App. 2T, a-348-350).

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[9]Material factual dispute exists as the Business Administrator, Elinor Gibney, testified that Callari never reported the incident.

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(d) *No follow-up*

Most glaringly, Callari admitted that he **never** subsequently spoke to Velez about her complaints. (App. 2T, a-350-351). Further, he is unaware if anyone else ever spoke to Velez about her complaints. (App. 2T, a-350-351). In fact, Velez' supervisors never questioned her about her allegations. (App. a-145,¶99). No one from the business administration office ever spoke to Velez about her allegations. (App. a-145,¶99). Maureen Corrado never spoke to Velez about her allegations. (App. a-146,¶113). No one ever asked for a written statement from Velez. (App. a-145,¶103). No one from Jersey City ever told her what if any actions were taken responsive to her complaint. (App. a-145,¶100). No one from Jersey City even followed up with Velez to ask if she wanted to file a formal grievance or report. (App. 2T, a-351-352). Poignantly, Callari never subsequently spoke to Velez about her Complaints. (App. a-145,¶99). Additionally, Callari did not generate a contemporaneous written complaint even though a supervisor should have made such a writing to comply with Jersey City's policies and procedures. (App. 8T, a-1014).

(3) Jersey City's designee for sexual harassment complaints

(a) *Gibney contradicts Callari*

Although Callari testified that Velez complained of sexual harassment in December 1997, and he promptly reported the complaint to Elinor Gibney (App. 2T, a-341), Gibney testified that she did not find out about Velez' complaints until June 1999. (App. 6T, a-795-796).

(b) *Ross was never told of Velez complaint*

Larry Ross testified that he was the most senior employee in the personnel department as the acting personnel director in 1997. (App. 8T, a-943). Thus, he was responsible for enforcing the Jersey City policy on Sexual harassment and was the person

designated by the Business Administrator to conduct sexual harassment investigations. (App. 8T, a-947). Ross testified that he had no recall of any complaints of Velez against Bettinger and no one ever discussed such complaints with him. (App. 8T, a-959,964-965). Additionally, Ross had no written records of any such complaints in his documents and he maintained good records. (App. 8T, a-962,964-965,973).

(4) The Union's Response

Wilson told Velez to file a grievance, but Velez replied that she was nervous because Bettinger was an elected official. (App. 4T, a-526). The Union took no other responsive actions -- even though it was part of the normal sexual harassment complaint procedure and protocol to question the alleged harasser, have a meeting with the two parties, and make a decision. (App. 4T, a-526,532-533,540).

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(5) Arnold Bettinger

No one at Jersey City ever questioned Bettinger about the allegations of Velez. (App. a-146,¶112).

iii. City of Jersey City violated its clear duty

These actions violates the employer's clear duty to take strong and aggressive measures to prevent invidious harassment and also to correct and remediate promptly such conduct when it occurs. Payton v. New Jersey Turnpike Auth., 148 N.J. 524, 537, 691 A.2d 321 (1997) (holding that an employer's remedial response to complaints of harassment is relevant to an employee's discrimination claim); Amirmokri v. Baltimore Gas & Electric Co., 60 F. 3d 1126, 1131 (4th Cir. 1995) (imposing liability for employer's failure to take prompt action calculated to end ethnic harassment after becoming aware of it); Ellison v. Brady, 924 F.2d 872, 882 (9th Cir.1991) (requiring an employer to end sexual harassment); Davis v. Monsanto Chem. Co., 858 F.2d 345, 349 (6th

Cir. 1988) (shielding an employer from liability because it "took quick and appropriate measures to remedy the situation"); Peter M. Panken et al., *Sexual Harassment in the Workplace: Employer Liability for the Sins of the Wicked*, SB36 A.L.I.--A.B.A. 203, 228 (1997) (recognizing employers lessen liability by having an effective and responsive complaint procedure).

When Velez did turn to her employer, she did not receive redress or protection or comfort, solace, or contrition. Rather she was rebuffed and further agitated, to the point of tears, for taking offense to a sexual attack. These words may sound similar. They should. They are directly analogous to what occurred in Taylor, *supra*. There, the Court found that "[w]hen plaintiff did turn to defendant, she did not receive any redress or protection whatsoever, let alone comfort, solace or contrition. Rather, she was rebuffed and further agitated, to the point of tears, for taking offense to a remark that was clearly a slur against her race." Taylor, *supra* at 706 A.2d 685, 692.

In the context of determining employer liability in the area of sexual harassment litigation, the court ruled that:

> [E]mployer liability shall be governed by the agency principles set forth in Section 219 of the Restatement (Second) of Agency as follows: (1) A master is subject to liability for the torts of his servants committed while acting within the scope of their employment. (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: (a) the master intended the conduct or the consequences, or (b) the master was negligent or reckless, or (c) the conduct violated a non-delegable duty of the master, or (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon the apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.
>
> Lehmann*, supra* at 619.

Such woefully deficient responses to a serious allegation that Jersey City admits was an allegation of sexual harassment goes to the very heart of liability as it was set forth by this state's Supreme court in Lehmann, *supra* and its progeny. Thus**,** defendants' applications for summary judgment must fail. *See* Brill, *supra.*

iv. Jersey City knew of harassment and took no responsive action

Velez told her supervisors that she had been sexually harassed and sexually attacked. Velez' supervisors acknowledged that Velez made a complaint of sexual harassment. The City of Jersey City's response was to set aside the complaint

and try to ignore it. The courts have repeatedly held that, "[w]hen an employer knows or should know of the harassment and fails to take effective measures to stop it, the employer has joined with the harasser in making the working environment hostile." Blakey v. Continental Airlines, Inc., 164 N.J. 38, 751 A.2d 538 (2000). Callari's admission on this point is most poignant. Callari admitted that following Velez' complaint, he interacted with Jersey City Councilman Bettinger several times a week. However, during each of these many instances, he never mentioned Nancy Velez or her allegations. (App. 2T, a-352). Callari stated that he felt that to mention Velez' allegations would be contrary to **"the decorum of proper conduct... and thought it was a matter that should be kept confidential, and left at that."** (App. 2T, a-353). This lack of reporting is consistent with the Union President's testimony: a city councilman has influences and stuff like that. (App. 4T, a-507). This testimony should not be taken lightly as Wilson knew Bettinger for many years and was an acquaintance of Bettinger who even helped him campaign during his election for councilman. (App. 4T, a-500-502).

It is Jersey City's definition of the decorum of proper conduct that, *inter alia* creates corporate liability. Such inaction "sends the harassed employee the message that the harassment is acceptable and that the management supports the harasser." Blakey, *supra*. Rather than employ "Effective" remedial measures which are measures reasonably calculated to end the harassment, Jersey City determined to do nothing and put Velez back into the environment of having to incur the possibility of interacting with Bettinger during her every working day. *See*, id. Rather than at least transferring Velez out of Bettinger's Ward, which was "very possible", Jersey City coldly left her within the same Ward as a man whom they were told had just sexually abused and harassed her. (App. 2T, a-211-212,342,347-348).

Jersey City did not file a formal complaint, question witnesses, question the harasser, or follow its own protocol. Such lack of reasonableness provides ample grounds to hold the employer liable under the LAD. *See*, id. citing support in other circuits -- Morris v. Oldham County Fiscal Court, 201 F.3d 784, 791 (6th Cir.2000); *see also* Richardson v. New York State Dept. of

Correctional Service, 180 F.3d 426, 446 (2nd Cir.1999)("an employer [can] be held accountable for allowing retaliatory co-worker harassment to occur if it knows about that harassment but fails to act to stop it."); Gunnell v. Utah Valley State College, 152 F.3d 1253, 1265 (10th Cir.1998)("an employer can [ ] be liable for co-workers' retaliatory harassment where its supervisory or management personnel ... know about the harassment and acquiesce in it in such a manner as to condone and encourage the co-workers' actions."); Knox v. State of Indiana, 93 F.3d 1327, 1334 (7th Cir.1996)("Nothing indicates why a different form of retaliation--namely, retaliating against a complainant by permitting [his or] her fellow employees to punish [him or] her for invoking [his or] her rights under Title VII--does not fall within the statute.").

d. Jersey City has control over Bettinger

i. Bettinger an employee of Jersey City

(1) Velez was introduced to Bettinger in the performance of her official duties

Laura Peterson testified that NID Code Enforcement Officers such as Velez would interact with city councilmen approximately once a month as part of their official work duties. (App. 5T, a-691). It was even a requirement of the job of an NID employee that they knew the name, address, and phone number of the council person whose ward the NID worker worked in.(App. 5T, a-695). In fact, as a Jersey City Councilperson, Bettinger is an employee of Jersey City. (App. a-146,¶118). Additionally, Jersey City councilmen are treated like Jersey City management employees in that they are put in with management of Jersey City for sexual harassment training. (App. 7T, a-884).

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(2) Velez sought out Bettinger's assistance in his official capacity as a Jersey City Councilman

During the performance of her job duties, Callari told Velez, in the summer of 1997, to meet City Councilman Bettinger ("Bettinger") to show him her NID. (App. a-136,¶¶27-28); (App. 5T, a-691). Bettinger was the city councilman of Ward C which was the same ward that included Velez' NID. (App. a-136,¶27); (App. 2T, a-209-212). Thus, there was a great deal of interaction between Bettinger and NID which assists in laying the groundwork for liability for Jersey City for sexual harassment. *See* Woods-Pirozzi v. Nabisco Foods, 290 N.J. Super. 252, 675 A.2d 684 (App. Div. 1996).

Velez subsequently met with Bettinger in October 1997, to get assistance with child support issues. (App. 5T, a-693,695). Velez received the payment approximately a month or so later and dropped by Bettinger's office to thank him. (App. 5T, a-696-698). When Velez went to seek out Bettinger's assistance on her child support issue, she sought out his assistance in his official capacity as a city councilman. (App. a-137,¶35). Further at the time that she met Bettinger, she was in her city uniform for Code Enforcement Officers and identified herself as Nancy Velez from NID. (App. a-137,¶36).

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(3) Bettinger provided Velez assistance in his official capacity as a Jersey City Councilman

As evidenced in the attached Statement of Facts, not only are some of the material facts in dispute, but most are hotly controverted. Defendants intimate that Bettinger was not acting as a city employee when he met with Velez by harping on the fact that Velez met Bettinger at his county offices. This red-herring argument is disingenuous and shows just how desperate are the defendants. During Bettinger's deposition, after being grilled on the subject matter, he finally admitted the following -- He assisted Velez in his role as a City Councilman. (App. a-145,¶105). Bettinger also admitted that he would perform city councilman functions and meet with constituents while he was in his county offices. (App. a-145,¶105).

(4) Bettinger had weekly interaction with high ranking management officials of NID such as Callari

Callari had weekly interaction with and city councilmen, such as Bettinger, as a common part of Callari's job duties. (App. 2T,a-209). Part of this interaction was to inform Code Enforcement Officers what duties to perform in their day to day official activities. (App. 2T,a-209-210); (App. a-136,¶¶31-32). For example, in September 1997, Bettinger met Velez during her work day and used her radio to get an open pothole in her NID repaired. (App. a-136,¶33). Subsequently the pothole was repaired. (App. a-136,¶37).

ii. Accepting arguendo that Bettinger is not an employee of Jersey City, the argument is irrelevant

(1) Liability for actions of non-employee

The Courts have clearly found liability for the actions of non-employees such as independent contractors. *See* Woods-Pirozzi, *supra*. In Woods-Pirozzi, Nabisco eventually stopped using an independent contractor doctor because of complaints by employees of sexual harassment against him. However, the court felt that because it took 3 months from the time employees complained about the doctor for Nabisco to take this action, the jury could conclude that Nabisco was negligent and thus liable under the LAD. Woods-Pirozzi, *supra* at 272-273.

The Court is in accord with federal EEOC regulations interpreting Title VII that state that:

> An employer may also be responsible for the acts of *non-employees,* with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees. [29 *C.F.R.* 1604.11(e) (emphasis added).] All federal cases citing 29 *C.F.R.* 1604.11(e) have followed it. *E.g.,* Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir.1996); Powell v. Las Vegas Hilton Corp., 841 F.Supp. 1024,1027-28 (D.Nev.1992); Magnuson v. Peak Technical Services, Inc., 808 F.Supp. 500, 512-13 (E.D.Va.1992). The regulation governing employer liability for sexual harassment by fellow employees, 29 *C.F.R.* 1604.11(d),

which corresponds with the first sentence of 29 *C.F.R.*1604.11(e), has similarly been followed. Fleenor v. Hewitt Soap Co., 81 F.3d 48 (6th Cir.1996); Rowinsky, *supra*.

Woods-Pirozzi, *supra* at 268-269.

After completing an exhaustive analysis, the court determined the New Jersey Courts would "apply both 29 *C.F.R.* 1604.11(d) and (e) to the LAD." Woods-Pirozzi, *supra* at 269. The court ruled in this fashion and emphasized that "while the harasser may not be an employee, the victim is an employee. An employer that knows or should know its employee is being harassed in the workplace, *regardless of by whom*, should take appropriate action. The fact that an employer has less control over an independent contractor is not made irrelevant by the adoption of 29 *C.F.R.* 1604.11(e), which explicitly makes the degree of control a factor to be considered." Id.

Respectfully, such a test should be left for the jury as it is an issue of credibility determinations in applying these tests. Woods-Pirozzi, *supra* at 269. Thus, the Court's granting of summary judgment must be reversed so that a jury can decide the issue.

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iii. Jersey City provided sexual harassment training that was mandatory for Bettinger to attend

(1) No effective monitoring of training

Haynes was employed by Jersey City from 1995 and was promoted to administrative analyst in the business administrator's office in approximately 1998. (App. 7T,a-870-871). In that function, Haynes reports directly to the business administrator. (App. 7T,a-872-873). Jersey City provided mandatory sexual harassment in the workplace training to council members such as Bettinger. (App. 7T,a-886-888). Thus, Jersey City did have control over Bettinger as his employer and the

entity that mandated training for him to attend. (App. 7T,a-886-888). Therefore, the law would allow for a juror to conclude that Jersey City did have control over Bettinger and could have been negligent regarding Bettinger's harassment of Velez, especially as Jersey City was put on notice of Bettinger's assault and chose to turn a "blind" eye and mandate that Velez continue working in the same NID where she ran the risk of having to interact with Bettinger every working day. Woods-Pirozzi, *supra.*

Of course, Jersey City admitted that although it considered the training mandatory, city council members are not disciplined for missing the training. In fact, Jersey City even explains this fact to the council members. (App. 7T,a-888). Although this lack of an enforced anti-harassment policy and training is not conclusive of sexual harassment, it certainly does present strong evidence on the issue. Lehmann, *supra* at 621-22, 626 A.2d 445.

(2) Bettinger did not attend training

Bettinger admitted in his sworn answers to plaintiff's requests for admissions that although he "was offered workplace behavior training by Jersey City which is assumed to include sexual harassment, he was unable to attend the training as a result of scheduling conflicts."(App. a-931,¶¶32-33). Once again, this lack of an enforced mandatory training policy is not conclusive evidence of sexual harassment, but it certainly does present strong evidence on the issue. Lehmann, *supra* at 621-22, 626 A.2d 445.

(3) Bettinger's prior assault

Bettinger admitted during his deposition that he had been accused by another woman of touching her. This was while he performed his duties as a county official and an investigation followed. (App. a-135,¶¶23-24).

e. Jersey City Is Liable for Sexually Harassing Nancy Velez as it Engaged in a Campaign of Hostility and Retaliation

The sexual assault and sexual harassment promulgated as referenced above was augmented and aggravated by the campaign of retaliation Jersey City engaged in against Nancy Velez.

i. Different treatment when she returned to work

Following the sexual assault, Velez went out on worker's compensation leave. (App. a-140,¶72). When she returned, she was being treated differently. (App. a-140,¶73). NID was giving her a really hard time pertaining to the performance of her work duties. (App. a-141,¶75).

ii. Charlie Callari cold and distant

Velez' supervisor, Callari, treated her in cold fashion and different from the way he used to interact with her. (App. a-141,¶77).

iii. Malfunctioning radio

Velez was not given a functioning radio. (App. a-141,¶76). Peterson also testified that Velez frequently complained that her radio was not functioning. (App. 5T, a-670). Peterson testified that when she had problems with her radio, Peterson would complain to her supervisor and her radio would be repaired in one or two days. (App. 5T, a-672-673).

iv. Not given appropriate uniform for season

Velez was not given the proper uniform to wear. (App. a-141, ¶76). Peterson also testified that Velez complained about her uniform in that it did not fit properly and that she was not given a warm uniform even though it was the wintertime. (App. 5T, a-680-681). Although Velez' complaints were not frivolous or unnecessary, no responsive action occurred. (App. 5T, a-681-682).

v. Not allowed to go on light duty

Velez asked to be put on light duty and Callari and Callari's supervisor, Maureen Corrado informed Velez that there was no light duty as a City of Jersey City employee. (App. a-141, ¶78). Velez heard one of the dispatchers state that he was on light duty during this time period, and she taped the conversation. (App. a-141, ¶79).

vi. Velez' hours changed

Velez complained about her changed hours at work and to the Union. (App. a-141, ¶76); (App. 4T, a-511,521-522). Peterson also testified that Velez made more than one complaint that her hours were changed as requested by the Director, Tom Corcoran, and Jersey City did not accommodate Velez and continued to change her hours. (App. 5T, a-676-677). Jersey City took these actions even though Corcoran responded to Velez that he would accommodate her request to not change her hours. (App. 5T, a-678-679).

vii. Velez not given a city vehicle

Mateo admitted that Jersey City provided him with a city van to patrol his NID. (App. 3T, 484). Velez was never given such a vehicle even though she made complaints. (App. 4T, a-511,521-522,553).

viii. Velez sent surreptiously to drug test, even though told it was only a fitness for duty test

After Velez requested light duty, NID sent her to a drug screening without informing her that they were doing so or obtaining her consent. (App. a-141,¶80).

Wilson testified that Jersey City had to get written consent prior to taking a drug test before Jersey City could send an employee to be drug tested. (App. 4T, a-494,546). In fact, when you provided the urine specimen, the employee should know that they were giving urine for a drug test. (App. 4T, a-570). In fact, Wilson testified that a "fitness for duty" exam does not involve a drug test and he never heard of an employee being subjected to a drug test when they went in for a fitness for duty exam.

(App. 4T, a-576-577). In fact, even if a doctor who was conducting the fitness for duty test suspected that the employee was under the influence of drugs, the doctor would not be able to drug test the individual. (App. 4T, a-577).

No one ever asked or received Velez' consent to be drug tested, and she did not know she was being drug tested when she provided a urine sample. (App. a-141,¶80). Additionally, the only testing that Jersey City informed her that they were sending her to was a fitness for duty examination. (App. a-141,¶80). In fact, Callari even admitted that the only testing that Jersey City told Velez she was being sent for was a fitness for duty test. (App. 2T, 278).

Ross admitted that a fitness for duty examination does not normally include a drug screen. (App. 8T, a-981). In fact, Ross specifically admitted that the physician conducting the fitness for duty examination does not have the authority to request a drug screen. (App. 8T, a-983). Ross did not even know why Velez was sent for a physical examination, even though it is the personnel office that he heads that sends the employee to the examination. (App. 8T, a-1008, 1018-1019). Ross also testified that an employee could not be forced to have a drug test conducted and thus consent was required under normal procedure. (App. 8T, a-983-984).

ix. After a positive urinalysis, Velez was immediately told that she would be terminated and was never offered any treatment/assistance

Wilson has worked in the Department of Public Works for the City of Jersey City from 1980 to the present day. (App. 4T, a-484-486). Wilson testified that he got caught possessing marijuana in a city vehicle while he was working in the Department of Public Works for the City of Jersey City. (App. 4T, a-486). Wilson was criminally tried and received six months P.T.I. (Pre-trial intervention) for his criminal charge of possession. ((App. 4T, a-486-487). Wilson's supervisor and or Jersey City never discussed termination as a possible disciplinary action. (App. 4T, a-484). In fact, Wilson did not even want any assistance and had a career in drugs due to a long history of drug usage. (App. 4T, a-488-489). In fact, Jersey City knew that

Wilson took cocaine, barbiturates, valium, tuenol, stuff like that, and marijuana. (App. 4T, a-493). Yet Jersey City never terminated Wilson. (App. 4T, a-498). In fact, Jersey City allowed Wilson to complete in-patient drug rehabilitation and return to work. (App. 4T, a-498-499).

This was in stark contrast to Jersey City's response when its' illegal drug test of Velez showed positive for marijuana.(App. a-142,¶83). Even though Velez did not use marijuana on the job and no one at Jersey City accused her of using or possessing marijuana while she was working, the immediate response of Jersey City was to tell Velez that she would probably be terminated. (App. a-142,¶83). The only persons terminated over the past 5 years for drugs are those that had criminal charges according to Ross – which never occurred in this matter. (App. 8T, a-986).

x. Velez never offered the Employee Assistance Program

Ross further admitted that the EAP was set up in the 1980s to assist employees who experience either an illegal drug or substance/alcohol abuse problem, etc. (App. 8T, a-985-986). Additionally, Velez' supervisor, Mateo, and the Union President also testified that it was mandatory to offer EAP to employees who tested positive for drugs. (App. 3T, a-453);(App. 4T, a-542, 545).

No one ever offered Velez the opportunity to go through the Employee Assistance Program after she tested positive for marijuana. (App. a-142,¶85).

xi. These actions led to her discharge

The above actions of defendants forced Velez to terminate her employment. (App. a-141,¶81).

Certainly, plaintiff has set forth more than sufficient facts to show that the failure of Jersey City to take appropriate action with regard to her complaint and the subsequent hostile work environment was severe or pervasive enough to make a reasonable woman believe that the conditions of her employment are altered and the working environment is hostile or abusive." Lehmann *supra* at 603-604.

II. VELEZ SUBSTANTIALLY COMPLIED WITH THE TCA

The very next day, on December 2, 1997, Velez reported the details of the sexual harassment incident to her second level supervisor Charlie Callari. (App. a-139,¶55);(App. 2T, a-324).[10] At the time, Callari was the Assistant Head of NID and a management level employee of the City of Jersey City. (App. a-140,¶66). Callari stated that he told Velez that he would have to report the complaint to the business administrator and handed Velez a copy of Jersey City's policy and procedure manual.[11] (App. 2T, a-325-326).

Callari told his boss, Maureen Corrado, that "Nancy had come into this office regarding an alleged **complaint of sexual harassment regarding an elected official in the City of Jersey City."** (App. 2T, 339). (Emphasis added). Callari told Corrado the specifics of the incident as relayed to him by Velez, and he informed Corrado that he intended to take the complaint to the business administration office. (App. 2T, a-339,341).

Callari testified that he immediately informed the liaison within the business administrator's office, Eleanor Gibney, of Nancy Velez' allegations. (App. 2T,341).[12] Eleanor Gibney was one of the two people designated by Jersey City to handle sexual harassment complaints (Larry Ross was the other so designated employee. (App. 6T, a-796-798).

Thus, Jersey City was clearly on notice of Velez's complaint of the sexual assault and battery, and clearly Jersey City was on notice that Velez had been sexually harassed by another employee of Jersey City -- Councilman Bettinger.

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[10]Velez also told John Mateo, her immediate supervisor and union representative, the details of the sexual harassment incident and told him that she reported the incident to the Assistant Director of NID, Charlie Callari. (App. a-140,¶67).

[11]Material dispute exists as Velez denies this assertion by Callari. (App. a-142,¶87).

[12]Material factual dispute exists as Gibney testified that Callari never made such a contemporaneous reporting.

Jersey City internal guidelines and policies required that the Business Administrator and supervisors document, in writing, Velez' complaint pertaining to the assault and battery. Jersey City has a mandatory procedure to report incidences of sexual harassment to the Business Administrator, who during the relevant time period was Eleanor Gibney. (App. 2T, a-334). The policy further required that these individuals **submit a written report** to the business administrator of the sexual harassment allegation. (App. 6T, a-811).

Part of the process includes speaking to the complainant, interviewing witnesses, interviewing the accuser, compiling facts, and giving the investigation to the business administrator. (App. 8T, a-947-948). Additionally, the best process for a supervisor making a sexual harassment complaint was to put the complaint in writing. (App. 8T, a-973-974). In fact, normally, in a sexual harassment investigation, statements are taken from the accused the alleged harasser and witnesses and typed into the computer. (App. 7T, a-896-897).

Jersey City was thus well aware of Velez' claims. This situation was extremely analogous in a matter facing the court in Pinto v. County of Bergen, BER-L-6188-00, wherein Justice Stark ruled that the TCA had been sufficiently complied with and denied defendants' attempt to dismiss Pinto's claims due to the requirements of the TCA. (App. a-1043-1065). In that case, Pinto had complained by writing to the defendants and contacting his union as well as complaining to an outside Board. (App. a-1043-1065).

Jersey City internal guidelines and policies required that the Business Administrator and supervisors document, in writing, Velez' complaint pertaining to the assault and battery. Defendants failed to document the complaint. Their failure should not deprive Velez of pursuing her causes of actions.

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III. TCA DOES NOT PERTAIN TO INTENTIONAL TORTS

During various points of oral argument, Bettinger's counsel, Mr. John Shahdanian, stated repetitively that the preeminent treatise on Title 59 is the text published by Harry A. Margolis and Robert Novack.

These seminal experts note that "a public employee is not entitled to immunity if it is established that his conduct was outside the scope of his employment or constituted a crime, actual fraud, actual malice or wilful misconduct." Margolis and Novack, Claims Against Public Entities (Gann, 1997) at pages 8-9. (*citing* Cucci v. Jaldini, 141 N.J. Super. 297 (App. Div. 1976); Martin v. Tp. of Rochelle Park, 365 A. 2d 197 (App. Div. 1976), and River Edge Savings and Loan Ass'n v. Hyland, 1965 N.J. Super. (App. Div. 1979), certif. den. 81 N.J. 58(1979). *See* also N.J.S.A. 59:3-14 and Comment).

Margolis and Novak further state that "generally, it would appear that where the act provides no immunity under other New Jersey law, the procedural aspects of the act would similarly not apply." Margolis and Novack, *supra* at pp. 1-2 (*citing, [s]ee* Fuchilla v. Leyman, 109 N.J. 319, 332-338, *cert den'd*, 488 U.S. 826 (1988), Brook v. April, 294 N.J. Super. 90 (App. Div. 1996), and Morgan v. Union County, 268 N.J. Super 337, 357 (App. Div. 1993), *cert den'd* 135 N.J. 468 (1994) (Act's notice provisions do not apply). *See also* Abbamont v. Piscataway Board of

Education, 138 N.J. 405, 427-433 (1994) (N.J.S.A. 59:9-2 (c) bar on punitive damages does not apply to the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:9-1, *et seq*.)).

If Bettinger sexually assaulted and battered Velez, he would not be entitled to immunity as his actions would be outside the scope of his employment or would constitute a crime, actual fraud, actual malice or wilful misconduct. Thus, by the facts *sub judice*, the procedural aspects of Title 59 requiring, *inter alia*, a filing of a Tort Claims Act notice should not apply. Thus, the individual claims of assault, battery, intentional infliction of emotional distress and the other torts should not be dismissed as to defendant Bettinger.

The TCA seeks merely to provide compensation to tort victims without unduly disrupting governmental functions and without imposing excessive financial burden on the taxpaying public. *See* N.J.S.A. 59:1-2 (legislative declaration); N.J.S.A. 59:2-1 comment; Fuchilla v. Layman, 109 NJ 319, 334, 537 A.2d 652, 660 (1988). The New Jersey Supreme Court contrasted this situation with a situation wherein it is "the clear public policy of this State is to abolish discrimination in the work place. Id. (*citing to* Jackson v. Concord Co., 54 N.J. 113, 124, 253 A.2d 793 (1969). It is the very sort of discrimination enunciated in the facts *sub judice* that the Supreme Court of our State has held, "threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and functions of a free democratic State." Fuchilla v. Layman, s*upra* at 334-335 (*citing* to N.J.S.A. 10:5-3). This is in accord with our State's long standing policy that "employment discrimination is not just a matter between employer and employee. The public interest in a discrimination-free work place infuses the inquiry." David v. Vesta Co., 45 N.J. 301, 327, 212 A.2d 345 (1965).

It is based upon the above analyses, that the torts alleged by Velez are not subject to the TCA. This is so because the torts alleged by Velez are the very type of torts that lay the factual predicate for a claim of sexual harassment or discrimination - - namely a sexual assault and battery and resulting emotional distress. In fact, Justice Handler noted in his concurring opinion joined by Justice Clifford that the Tort Claims Act provides no immunity for willful or malicious acts caused either by the employee or the entity itself. Fuchilla, *supra*. Further, according to the Act's stated purpose, it is "the public policy of this state that public entities shall only be liable for their negligence within the limitations of this Act." N.J.S.A. 59:1-2. That declaration pertaining to negligent conduct sheds little light on the Legislature's intention concerning discrimination, which depends on proof of motive or intent. Goodman v. London Metals Exch., Inc., 86 N.J. 19, 30, 429 A.2d 341 (1981) (proof of discriminatory motive or intent is a crucial element of a discrimination case).

The New Jersey Supreme Court ruled in a concurring opinion written by Justice Handler joined by Justice Clifford that the "legislature was primarily concerned with addressing negligence actions when it drafted the Tort Claims Act." Fuchilla, *supra* at 339, fn.1. This is consistent with the fact that the TCA refers in large part to negligence actions. N.J.S.A. 59:1-2. Thus, discrimination claims are not subject to the requirements of the TCA. Similarly, intentional torts require proof of intent and motive. Thus, similarly, these claims should not be subject to the requirements of the TCA.

The TCA was thus intended to apply to only negligence actions. In fact, the case law is replete with examples giving rise to a TCA issue that surround negligence issues. Willis v.

Department of Conservation and Economic Dev., 55 N.J. 534, 264 A.2d 34 (1970). The most common type of claim at issue were simple slip and fall cases, *see* Amelchenko v. Borough of Freehold, 42 N.J. 541, 201 A.2d 726 (1964); Hayden v. Curley, 34 N.J. 420, 169 A.2d 809 (1961); Schwartz v. Borough of Stockton, 32 N.J. 141, 160 A.2d 1 (1960); Taylor v. New Jersey Highway Auth., 22 N.J. 454, 126 A.2d 313 (1956); Milstrey v. City of Hackensack, 6 N.J. 400, 79 A.2d 37 (1951), and most of the others involved allegations that governmental negligence created conditions that resulted in death or injury. *See* Miehl v. Darpino, 53 N.J. 49, 247 A.2d 878 (1968); Bergen v. Koppenal, 52 N.J. 478, 246 A.2d 442 (1968); B.W. King Inc. v. Town of West New York, 49 N.J. 318, 230 A.2d 133 (1967); Visidor Corp. v. Borough of Cliffside Park, 48 N.J. 214, 225 A.2d 105 (1966); Fitzgerald v. Palmer, 47 N.J. 106, 219 A.2d 512 (1966); Goldberg v. Housing Auth. of the City of Newark, 38 N.J. 578, 186 A.2d 291 (1962); Cloyes v. Delaware Township, 23 N.J. 324, 129 A.2d 1 (1957); Kress v. City of Newark, 8 N.J. 562, 86 A.2d 185 (1952); Hartman v. City of Brigantine, 42 N.J.Super. 247, 126 A.2d 224 (App.Div.1956), *aff'd*, 23 N.J. 530, 129 A.2d 876 (1957). Other cases involved situations where negligent supervision on the part of government officials led to the injury of third persons. Jackson v. Hankinson, 51 N.J. 230, 238 A.2d 685 (1968); Titus v. Lindberg, 49 N.J. 66, 228 A.2d 65 (1967); McAndrew v. Mularchuk, 33 N.J. 172, 162 A.2d 820 (1960); Peer v. City of Newark, 71 N.J.Super. 12, 176 A.2d 249 (App.Div.1961), *certif. den.*, 36 N.J. 300, 177 A.2d 342 (1962).

By this review of the case law applying the notice requirement of the TCA, it is apparent that it only applies to negligence actions. Such an outcome is consistent with N.J.S.A. 49:2-1, as the TCA specifically exempts from immunity an intentional tort such as assault and battery.

When a public employee commits an intentional tort, like an assault and battery, he loses the trapping of public employment as his actions are outside the scope of his normal duties. This was a terrifying attack by a sexual predator. Bettinger put his hands all over Velez, on her breasts, kissed her and licked her face while Velez tried to pull away. She disgustedly wiped Bettinger's saliva off her face. (App. 5T, a-700,706). When a public employee commits an intentional tort, then he is acting as a private citizen and is entitled to all the benefits and protections awarded to private citizens - nothing more, nothing less. In fact, plaintiff respectfully urges that this is the very reason why a public entity is not liable for the intentional torts of employee. It is for this very reason, by analogy, that the Court should not apply the procedural prerequisites of the TCA to Bettinger.

It would certainly be contrary to public policy to somehow cloak an assault and battery under any of the rules or acts that are in place to apply to the negligence liability of a public entity and thereby limit the exposure of public employees to being held accountable for committing reprehensible acts of violence.

Although these points were raised on August 23, 2001, the Court seemingly ignored these arguments emanating out of Margolis and Novack's treatise on Title 59 and instead found simply that the concurrent opinion of two Supreme Court Justices in Fuchilla v. Layman, 109 N.J. 19 (1988) were of no import and lacking basis.

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IV. BETTINGER IS LIABLE IN HIS INDIVIDUAL AND OFFICIAL CAPACITY

Justice Handler adopted the reasoning of the appellate court below in stating that "The Tort Claims Act in N.J.S.A. 59:3-14a and b permits personal liability and full recovery against a public employee for the results of actual malice or willful misconduct." Fuchilla, *supra.* In fact, Justice Handler went so far as to state that, "Discriminatory conduct actionable under the Law Against Discriminatory is more akin to the malicious or willful acts exempted from the Tort Claims Act than the negligently or similarly inflicted injuries covered thereby." Fuchilla v. Layman, 210 N.J.Super. 574, 579, 510 A.2d 281 (App.Div.1986). Thus, certainly by this analysis, Bettinger should be held liable for committing the wilful act of an assault and battery. Similarly for reasons similar to not requiring notice to maintain a claim of sexual harassment, there should be no notice requirement to maintain a claim of a sexual assault and battery.

1. Individual Liability of Bettinger

Defendants did not address the individual liability of Bettinger at oral argument or in their moving or reply briefs and thus must concede his liability on this issue.

The claim against Bettinger is that he, as an individual, assaulted and battered Nancy Velez. It is beyond question that an individual who happens to be a public employee can be held accountable for torts such as assault and battery even where there is no municipal liability. McDonough v. Jorda, 214 N.J. Super. 338, 345, 350, 519 A.2d 874,877,880 (police officer liable for assault and battery even though there was no municipal liability).

2. Official Liability of Bettinger

Plaintiff's claims against Bettinger includes allegations that he engaged *inter alia* in activity that constituted a crime, actual fraud, actual malice or willful misconduct. *See* N.J.S.A.

59:2-10. This same act simply states that "[n]othing in this act shall exonerate a public employee from liability" for, among other things, "actual malice" or "willful misconduct."[13] Therefore, the source of any liability of a public employee must be found outside of N.J.S.A. 59:3-14(a). Like the strong State policy of protecting children from sexual abuse, the State also has a strong policy of protecting its citizens from sexual harassment. S.P. v. Collier High School, 725 A.2d 1142 (App. Div. 1999); *See, e.g.*, N.J.S.A. 10:5-3 (New Jersey Law Against Discrimination); Pukowsky v. Caruso, 312 N.J.Super. 171, 177, 711 2d 398(App.Div.1998); Connolly v. Burger King Corp., 306 N.J.Super.344, 348, 703 A.2d 941 (App.Div.1997).

Thus, due to the strong state policy in protecting constituents from politicians abusing their position of political authority to sexually abuse a constituent, the Court should not allow Bettinger to escape culpability for committing a sexual assault and battery against Velez.

CONCLUSION

For all the foregoing reasons, Plaintiff, Nancy Velez, respectfully requests that this Court reverses the trial court's granting summary judgment as to Counts 1,2,4, 6, and 10.

Dated: November ___, 2001

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[13]This is consistent with the earlier argument that the protections of the TCA and its protections should not apply to intentional torts.

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