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NANCY VELEZ, Plaintiffs 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 LAW DIVISION: HUDSON COUNTY DOCKET NO.: HUD-L-8249-99 CIVIL ACTION Date: July 11, 2001 Time: 3:00 p.m. Judge: The Honorable Judge Curran, J.S.C.

PLAINTIFF=S BRIEF IN OPPOSITION
TO DEFENDANTS= MOTIONS FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT AS TO BETTINGER'S COUNTER-CLAIMS

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INTRODUCTION

Plaintiff, City of Jersey City employee[1], Nancy Velez (AVelez@ or Aplaintiff@), was brutalized by the sexual assault and battery perpetrated by Defendant, City of Jersey City Councilman Arnold Bettinger (ABettinger@) on or about December 1, 1997.

The damage committed by these actions were compounded *inter alia* by the Defendant, City of Jersey City=s (AJersey City@) creation of a hostile work environment as evidenced by its failure to take remedial action after Velez complained to her supervisor of Bettinger=s sexual assault and battery and its retaliation against Velez and for making her complaint that she was the victim of a sexual assault.

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. (Healey Cert. Ex. AA@).

Bettinger belatedly filed a second Answer that included Counterclaims against Plaintiff alleging defamation and malicious prosecution. (Healey Cert. Ex. AB@). Because Bettinger's claims are completely devoid of merit, plaintiff cross-moves for summary judgment as to Bettinger=s counterclaims.

Plaintiff=s Statement of Material and Disputed Facts, Statement of Material and Undisputed Facts, Certifications, exhibits and other supporting documents amply demonstrate why defendants=

[1]Plaintiff was employed by City of Jersey City during the relevant time period. She is no longer so employed.

motions for summary judgment must be denied and plaintiff=s cross-motion for summary judgment must be granted, and plaintiff incorporates them into this brief accordingly.

Finally Velez moves to strike Bettinger=s Statement of Facts and narration of facts in his Brief as they violate R. 4:46-2(a) in that they do not cite to the portion of the motion record to establish the fact or demonstrate that it is uncontroverted. Accordingly, because Bettinger's moving papers are deficient as a matter of court rule, his papers must be denied.

For all of the above reasons, Defendants= Motions for Summary Judgment should fail, Plaintiff=s Cross-Motion for Summary Judgment should be granted, and Defendant, Bettinger=s Statement of Facts should be stricken.

STATEMENT OF FACTS

During the relevant time period, Velez worked for Jersey City in its Neighborhood Improvement Division. (Hyderally Cert. Ex. 1 Velez Cert. &25). Her supervisor was Charlie Callari (ACallari@) who held the title of Division Director, Division of Neighborhood Management during the relevant time period. (Hyderally Cert. Ex. 2 Callari depo. p. 51). Callari reported to Maureen Corrado (ACorrado@) who was the Department Director, Department of Neighborhood Improvement during the relevant time period. (Hyderally Cert. Ex. 2 Callari depo. p. 56).

As part of Velez= job duties, she would patrol her assigned district which was referred to as her ANID@ and ensure *inter alia* that her NID was clean and free from illegal activity. (Hyderally Cert. Ex. Velez Cert. &27).

During the performance of her job duties, Callari told Velez, in the summer of 1997, to meet City Councilman Bettinger (ABettinger@) to show him her NID. (Hyderally Cert. Ex. 1 Velez Cert.

27). Bettinger was the city councilman of Ward C which was the same ward that included Velez= NID. (Hyderally Cert. Ex. 1 Velez Cert. & 28); (Hyderally Cert. Ex. 2 Callari Depo. pp. 62,65). Such interaction between Callari and city councilmen, such as Bettinger, was a common part of Callari=s job duties. (Hyderally Cert. Ex. 2 Callari Depo. p. 62). Thus, plaintiff first met Bettinger during the summer of 1997 to patrol her NID. (Hyderally Cert. Ex. 1 Velez Cert. &27). Subsequently, in September 1997, Bettinger met Velez during the performance of her work duties to demand that actions be taken pertaining to repairing an open pothole. (Hyderally Cert. Ex. 1 Velez Cert. & 31).

On December 1, 1997, during the working day, and in her work uniform, Velez went to Bettinger=s office and identified herself as an employee of Jersey City who had met him in the past. (Hyderally Cert. Ex. 1 Velez Cert. &37). Velez went to Bettinger=s office to thank him for assisting her in his official capacity as a City Councilman. (Hyderally Cert. Ex. 1 Velez Cert. & 39).

Bettinger took advantage of his position as a city councilman to assault and batter Velez. (Hyderally Cert. Ex. 1 Velez Cert. &50). In fact, Bettinger even promised Velez that he would run for Mayor and that she could assist him in running for Mayor. (Hyderally Cert. Ex. 1 Velez Cert. & 51). Bettinger grabbed Velez against her will and started kissing her all over her face, her cheeks, and her lips. (Hyderally Cert. Ex. 1 Velez Cert. &47). While Bettinger grabbed Velez, he grabbed at her breasts and buttocks area, against her will. (Hyderally Cert. Ex. 1 Velez Cert. & 48). Velez was shocked and tried to push Bettinger off her. (Hyderally Cert. Ex. 1 Velez Cert. &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. Further, Jersey City created a hostile work environment and engaged in retaliation against Velez.

ARGUMENT

I. STANDARD OF REVIEW FOR SUMMARY JUDGMENT

The standards for review on a summary judgment motion are well settled. When deciding a motion for summary judgment under Rule 4:46-2, 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, Rule 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 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 Astandards 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 Awhether, 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 be denied.

II. THE SEXUAL HARASSMENT STANDARD

In 1945, when the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 *et seq.* (ALAD@) was first enacted, the New Jersey Supreme Court held that it was a statute of the highest order whose Apurpose is >nothing less than the eradication of the cancer of discrimination.=@ Fuchilla v. Layman, 109 N.J. 319, 334,(*quoting* Jackson v. Concord Co., 54 N.J. 113, 124 (1969), *cert.denied sub nom.* University of Medicine & Dentistry of N.J. v. Fuchilla, 488 U.S. 826, 109 S.Ct. 75, 102 L.Ed.2d 51

(1988). The statute was viewed as the protector of the very essence of seeking employment which was Arecognized as and declared to be a civil right.@ N.J.S.A. 10:5-4.

In the monumental case of Lehmann v. Toys R US, Inc., the New Jersey Supreme Court held that Athe LAD was enacted to protect the fundamental principle of our society of a discrimination-free workplace as well as the protection of the civil rights of individual aggrieved employees@ such as the plaintiff. Lehmann v. Toys R Us, Inc. , 132 N.J. 587, 626 A. 2d 445 (1993) *citing* Fuchilla, *supra*, 109 N.J. at 335. 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 Apeculiarly 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 Afederal 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.

Additionally, the Courts have held that these type of employment cases are particularly poorly suited for the granting of summary judgment. For example, 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, the plaintiff, a Russian Jewish woman, claimed that her supervisor=s use of the (Ayenta@) and (Akvetch@), 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 Afacial expression, tone, and nuance in the use of language.@ Id.

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)).

III. LAD CLAIM AGAINST JERSEY CITY

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* Jersey City=s Brief at 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.

1. Jersey City had actual notice of sexual harassment complaint

a. Plaintiff made immediate complaints of sexual assault/harassment.

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. (Hyderally Cert. Ex. 1 Velez Cert. & 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. (Hyderally Cert. Ex. 1 Velez Cert. & 55). At the time, Callari was the Assistant Head of NID and a management level employee of the City of Jersey City. (Hyderally Cert. Ex.1 Velez Cert. &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. (Hyderally Cert. Ex. 1 Velez Cert. 67).

Velez also told her Union President, Robert Wilson, about the incident. (Hyderally Cert. Ex. 1 Velez Cert. & 64). She told Wilson the details of the assault and told him that she had reported the incident to Callari. (Hyderally Cert. Ex. 1 Velez Cert. &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. (Hyderally Cert. Ex. 3

Mateo Depo. pp. 10-12,15-16). Mateo testified that he was Velez= direct supervisor as the North District Supervisor and her union representative in 1997. (Hyderally Cert. Ex. 3, Mateo Depo. pp. 28, 42).

Velez approached Mateo and asked to talk to him after the roll call. (Hyderally Cert. Ex. 3 Mateo Depo. p. 30). They went to his office area where he sat as the north district supervisor. (Hyderally Cert. Ex. 3 Mateo Depo. pp. 30-31). Velez was very upset and nervous and crying when she spoke to Mateo. (Hyderally Cert. Ex. 3 Mateo Depo. p. 32-33). Velez told him the details of the sexual harassment. (Hyderally Cert. Ex. 1, Velez Supp. Cert. &114).

iii. Charlie Callari

Callari admitted that Velez complained to him in December 1997 regarding Bettinger. (Hyderally Cert. Ex. 2 Callari depo. p.173). Velez repeatedly asked to see Callari and appeared upset. (Hyderally Cert. Ex. 2 Callari depo. pp.174,189). She was shaking, repeating herself, and perhaps crying, and, thus, Callari met with Velez in his office. Id. 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.(Hyderally Cert. Ex. 2 Callari depo. p.177).

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.[2] (Hyderally Cert. Ex. 1 Velez Cert. 57, 59). Velez felt no choice but to say as a friend, because she felt that by Callari=s response, her job would

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

be in jeopardy if she said that she was making an official report. (Hyderally Cert. Ex. 1 Velez Cert. & 58). Callari admitted that he asked no follow up questions of Velez. (Hyderally Cert. Ex. 2 Callari depo. pp.177-178). 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.[3] (Hyderally Cert. Ex. 2 Callari depo. pp.178-179).

iv. Maureen Corrado

Callari told his boss, Maureen Corrado, that ANancy had come into this office regarding an alleged **complaint of sexual harassment regarding an elected official in the City of Jersey City.@** (Hyderally Cert. Ex. 2 Callari depo. p.192) (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. (Hyderally Cert. Ex. 2 Callari depo. pp.192,194). Tellingly, Callari could not remember Corrado making any responsive comment or questions. (Hyderally Cert. Ex. 2 Callari depo. pp.193-194,195-196). 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. (Hyderally Cert. Ex.1 Velez Supp. Cert. &115).

v. Elinor Gibney

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[3]Material dispute exists as Velez denies this assertion by Callari. (Hyderally Cert. Ex.1 Velez Cert. &87).

Callari testified that he immediately informed the liaison within the business administrator=s office, Eleanor Gibney, of Nancy Velez= allegations. (Hyderally Cert. Ex. 2 Callari depo. p.194).[4] Eleanor Gibney was the person designated by Jersey City to handle sexual harassment complaints. (Hyderally Cert. Ex. 8 Gibney depo. pp.17-18).

Gibney was employed by Jersey City from 1989 as an administrator-analyst in the business administrator=s office. (Hyderally Cert. Ex. 8 Gibney Depo. pp. 7-8). In 1991, she was promoted to Management Specialist. (Hyderally Cert. Ex. 8 Gibney Depo. p. 8). Part of Gibney=s duties include the oversight of policies and procedures. (Hyderally Cert. Ex. 8, Gibney Depo. p.9). As such, Gibney was the business administrator=s designee for sexual harassment from the spring of 1997 onwards. (Hyderally Cert. Ex. 8, Gibney Depo. pp. 17-18).[5]

Callari had a phone conversation with Gibney and told her the specifics of the incident. (Hyderally Cert. Ex. 2, Callari depo. p.194). 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. (Hyderally Cert. Ex. 2, Callari depo. pp.194-195). Following this conversation, Callari had one follow-up phone conversation, several days later, with Gibney pertaining to Velez. (Hyderally Cert. Ex. 2, Callari depo. p.196, 204).

vi. Robert Wilson

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

[5]Gibney and Ross were the designated sexual harassment administrators for Jersey City. (Hyderally Cert. Ex. 8, Gibney Depo. pp.18-19).

Wilson became the Union President for Jersey City approximately 4 years ago. (Hyderally Cert. Ex. 4, Wilson Depo. p. 13).

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. (Hyderally Cert. Ex. 4, Wilson Depo. p. 46). 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. (Hyderally Cert. Ex. 4, Wilson Depo. pp. 75-76). Velez told Wilson that she had been sexually assaulted by Bettinger. (Hyderally Cert. Ex. 4, Wilson Depo. p. 47). She was very upset and crying. (Hyderally Cert. Ex. 4, Wilson Depo. p. 47-48). She told him that Bettinger cornered her against the wall, grabbed her breasts, and licked her face. (Hyderally Cert. Ex. 4, Wilson Depo. p. 47).

Wilson spoke to Callari the next day and told Callari that such allegations, if true, would not be tolerated. (Hyderally Cert. Ex. 4, Wilson Depo. pp. 50-51). Wilson felt that Velez had been violated. (Hyderally Cert. Ex. 4, Wilson Depo. p. 97). In fact, Wilson told him AThis fucking happened, and that=s fucked up.@ (Hyderally Cert. Ex. 4, Wilson Depo. p. 88). Callari agreed and stated that both Jersey City and the Union would pursue the matter. (Hyderally Cert. Ex. 4, Wilson Depo. p. 51). However, Callari appeared that he did not want to get involved and was cold faced. (Hyderally Cert. Ex. 4, Wilson Depo. p. 89). Certainly this reaction is consistent with his future retaliatory actions against Velez as noted herein. *See* Plaintiff's Brief (Retaliation section).

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.

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.

2. Jersey City=s response to sexual harassment claim violates Jersey City=s own policies and procedures and *Lehmann* standard

a. 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 AS.H. Policy@). (Hyderally Cert. Ex.5 Sexual Harassment Policy). The S.H. Policy mandates that Department Directors and Supervisors Aimmediately report *actual or suspected* violations to the Business Administration *for investigation.@* (Hyderally Cert. Ex.5 Sexual Harassment Policy p.2)(emphasis added). AIt is the *responsibility* of the Business Administrator or his/her designee to promptly investigate charges of sexual harassment and recommend appropriate action.@ (Hyderally Cert. Ex.5 Sexual Harassment Policy p.3)(emphasis added). After the completion of this investigation, Aif warranted, prompt disciplinary action will be taken up to and including dismissal.@ (Hyderally Cert. Ex.5 Sexual Harassment Policy p.3). Retaliation is *prohibited*. (Hyderally Cert. Ex.5 Sexual Harassment Policy p.3) (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. (Hyderally Cert. Ex. 2, Callari depo. p.187). Gibney would conduct an investigation by meeting with the parties and

gathering facts and taking immediate remedial action. (Hyderally Cert. Ex. 8, Gibney Depo. pp. 29). Ross further testified that in sexual harassment investigations, the process that should have been followed was to conduct interviews jointly with Elinor Gibney. (Hyderally Cert. Ex. 11, Ross Depo. pp. 76-77). 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. (Hyderally Cert. Ex. 8, Gibney Depo. p. 32). Further it was the supervisor=s responsibility to ensure that the sexual harassment stopped immediately. (Hyderally Cert. Ex. 8, Gibney Depo. pp. 34).

Part of the process includes speaking to the complainant, interviewing witnesses, interviewing the accuser, compiling facts, and giving the investigation to the business administrator. (Hyderally Cert. Ex. 11, Ross Depo. p. 14-15). Additionally, the best process for a supervisor making a sexual harassment complaint was to put the complaint in writing. (Hyderally Cert. Ex. 11, Ross Depo. pp. 40-41). The normal process of the Jersey City 1997 sexual harassment policy would be for the supervisor to contact the business administrator and one of the staff members would immediately notify Ross because of the importance of the call. (Hyderally Cert. Ex. 11, Ross Depo. pp. 41-42). This same policy mandated that the supervisor notify the business administrator of the complaint of sexual harassment. (Hyderally Cert. Ex. 11, Ross Depo. pp. 42-43).

Haynes was employed by Jersey City from 1995 and was promoted to administrative analyst in the business administrator=s office in approximately 1998. (Hyderally Cert. Ex. 9, Haynes Depo. pp. 8-9). In that function, Haynes reports directly to the business administrator. (Hyderally Cert. Ex. 9, Haynes Depo. pp. 9-10). She testified that, normally, in a sexual harassment investigation,

statements are taken from the accused the alleged harasser and witnesses and typed into the computer. (Hyderally Cert. Ex. 9, Haynes Depo. pp. 34-35). She would know this as she and Larry Ross were the and continue to be the Jersey City investigators who conduct sexual harassment investigations. (Hyderally Cert. Ex. 9, Haynes Depo. pp. 35-36).

In fact, Callari admitted that he had received a sexual harassment complaint from his secretary pertaining to a co-worker.(Hyderally Cert. Ex. 2 Callari depo. p. 181). In that situation, Callari interviewed the harasser who admitted to the complained of conduct. (Hyderally Cert. Ex. 2 Callari depo. p.182). Callari also reported the incident to the Business Administrator, Eleanor Gibney. In fact, Callari admitted that he had received a sexual harassment complaint from his secretary pertaining to a co-worker.(Hyderally Cert. Ex. 2, Callari depo. p. 181). Callari interviewed the harasser who admitted to the complained of conduct. (Hyderally Cert. Ex. 2, Callari depo. p.182). Callari also reported the incident to the Business Administrator, Eleanor Gibney, and the only responsive action that was take was to separate the two employees. (Hyderally Cert. Ex. 2, Callari depo. pp.182-183, 185). This incident occurred sometime during the time period of plaintiff=s employment by Jersey City. (Hyderally Cert. Ex. 2, Callari depo. pp.186-187). The responsive action that resulted was to separate the two employees. (Hyderally Cert. Ex. 2, Callari depo. pp.186-187). This incident occurred sometime during the time period of plaintiff=s employment by Jersey City. (Hyderally Cert. Ex. 2 Callari depo. pp.186-187).

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. (Hyderally Cert. Ex.1 Velez Supp. Cert. & 116) (Hyderally Cert. Ex.10 R.F.A. to

Bettinger). Sexual harassment training was not mandatory and was not offered to Velez. (Hyderally Cert. Ex.1 Velez Supp. Cert. & 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[6]. In fact, the Court ruled that, A[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.

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. (Hyderally Cert. Ex. 8, Gibney Depo. p. 28). 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

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[6]AThe 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...@

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. (Hyderally Cert. Ex. 3, Mateo Depo. p. 43).

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).

b. Jersey City=s Response

i. *John Mateo, Velez= immediate supervisor*

Mateo=s only response to Velez= allegation of sexual harassment was -- talk to the Union President. (Hyderally Cert. Ex. 3, Mateo Depo. p. 35). 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. (Hyderally Cert. Ex. 3, Mateo Depo. p. 36). Further, Mateo took no responsive action even though Velez did not tell him to not disclose her complaints to anyone. (Hyderally Cert. Ex. 3, Mateo Depo. p. 36). 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. (Hyderally Cert. Ex. 3, Mateo Depo. pp. 37-38). Her hands were shaking and she was teary eyed and crying. (Hyderally Cert. Ex. 3, Mateo Depo. p. 38). 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. (Hyderally Cert. Ex. 3, Mateo Depo. p. 38-40). Mateo=s only response was that Velez should speak to Corrado. (Hyderally Cert. Ex. 3, Mateo Depo. p. 39). Mateo did not tell Velez to go to the business director or the personnel director or to make a formal written complaint. (Hyderally Cert. Ex. 3, Mateo Depo. p. 41). 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. (Hyderally Cert. Ex. 3, Mateo Depo. pp. 47-48).

Mateo further 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. (Hyderally Cert. Ex. 3, Mateo Depo. p. 43).

ii. *Charlie Callari, Velez= second level supervisor*

(1) *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. (Hyderally Cert. Ex. 1, Velez Cert. & 57, 59).[7] Velez felt cornered into saying as a friend. (Hyderally Cert. Ex. 1 Velez Cert. & 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. (Hyderally Cert. Ex. 1 Velez Cert. & 57, 59). Velez and Callari were not friends. (Hyderally Cert. Ex. 1, Velez Cert. &60). Certainly such a response by your employer indicates that you should reconsider following through with your Complaint. Callari should have reported the incident

[7]Material factual disputes exist on this point.

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 complaints to her supervisors. (Hyderally Cert. Ex. 1 Velez Cert. && 61-62). Velez worked for the city and knew that a city councilman has power and she did not want to lose her job. (Hyderally Cert. Ex. 1, Velez Cert. & 63).

(2) 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. (Hyderally Cert. Ex. 4, Wilson Depo. pp. 50-51). Wilson felt that Velez had been violated. (Hyderally Cert. Ex. 4, Wilson Depo. p. 97). In fact, Wilson told him AThis fucking happened, and that=s fucked up.@ (Hyderally Cert. Ex. 4, Wilson Depo. p. 88). Callari agreed and stated that both Jersey City and the Union would pursue the matter. (Hyderally Cert. Ex. 4, Wilson Depo. p. 51).

However, Callari also appeared that he did not want to get involved and was cold faced. (Hyderally Cert. Ex. 4, Wilson Depo. p. 89). 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. (Hyderally Cert. Ex. 4, Wilson Depo. pp. 53-54).

(3) 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.[8] (Hyderally Cert. Ex. 2, Callari depo. pp.195, 200-

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

201). Velez would interact with Bettinger as her district that Velez patrolled was in Bettinger=s ward and Ait 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.. (Hyderally Cert. Ex. 2, Callari depo. pp. 201-203).

(4) No follow-up

Most glaringly, Callari admitted that he **never** subsequently spoke to Velez about her complaints. (Hyderally Cert. Ext. 2, Callari Depo. pp. 203-204), Further, he is unaware if anyone else ever spoke to Velez about her complaints. (Hyderally Cert. Ex. 2, Callari depo. pp.203-204). In fact, Velez= supervisors never questioned her about her allegations. (Hyderally Cert. Ex. 1, Velez Supp. Cert. &99). No one from the business administration office ever spoke to Velez about her allegations. (Hyderally Cert. Ex. 1, Velez Supp. Cert. &99). Maureen Corrado never spoke to Velez about her allegations. (Hyderally Cert. Ex. 1,Velez Supp. Cert. &113). No one ever asked for a written statement from Velez. (Hyderally Cert. Ex. 1, Velez Supp. Cert. &103). No one from Jersey City ever told her what if any actions were taken responsive to her complaint. (Hyderally Cert. Ex. 1, Velez Supp. Cert. &100). No one from Jersey City even followed up with Velez to ask if she wanted to file a formal grievance or report. (Hyderally Cert. Ex. 2, Callari depo. pp. 204-205). Poignantly, Callari never subsequently spoke to Velez about her Complaints (Hyderally Cert. Ex. 1, Velez Supp. Cert. &&99).

iii. *Maureen Corrado - Velez= third level supervisor*

Maureen Corrado never spoke to Velez about her allegations. (Hyderally Cert. Ex. 1, Velez Supp. Cert. &113).

iv. *Jersey City=s designee for sexual harassment complaints*

No one from the business administration office ever spoke to Velez about her allegations. (Hyderally Cert. Ex. 1 Velez Supp. Cert. &98). No one ever asked for a written statement from Velez. (Hyderally Cert. Ex. 1, Velez Supp. Cert. &99). No one from Jersey City ever told her what if any actions were taken responsive to her complaint. (Hyderally Cert. Ex. 1 Velez Supp. Cert. &100). No one from Jersey City even followed up with Velez to ask if she wanted to file a formal grievance or report. (Hyderally Cert. Ex. 2 Callari depo. pp. 204-205).

(1) Gibney contradicts Callari

Gibney testified, in stark contradiction to Callari=s testimony, that she did not find out about Velez= complaints until June 1999. (Hyderally Cert. Ex. 8, Gibney Depo. pp. 16-17). Callari testified that Velez complained of sexual harassment in December 1997 and he promptly reported the complaint to Gibney. (Hyderally Cert. Ex. 2 Callari Depo. p. 194).

(2) 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. (Hyderally Cert. Ex. 11, Ross Depo. p. 10). 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. (Hyderally Cert. Ex. 11, Ross Depo. p. 14).

Even though Callari testified that he informed the Business Administrator of the sexual harassment allegations of Velez, shockingly, Ross testified that he had no recall of any complaints of Velez against Bettinger and no one ever discussed such complaints with him. (Hyderally Cert. Ex. 11, Ross Depo. pp. 26, 31-32). Additionally, Ross had no written records of any such complaints in his documents and he maintained good records. (Hyderally Cert. Ex. 11, Ross Depo. pp. 29, 31-33, 40). Ross also has no written records of Callari discussing Velez= complaints with the Business Administrator. (Hyderally Cert. Ex. 11, Ross Depo. p. 29). Glaringly, Ross testified that Gibney never discussed Velez= complaint when it was made. (Hyderally Cert. Ex. 11, Ross Depo. pp. 26, 31-32). Further, equally telling, Ross was not aware of any sexual harassment complaint wherein Gibney determined that it was not appropriate to conduct an investigation. (Hyderally Cert. Ex. 11, Ross Depo. p. 80), and he was aware of no situation where he received an oral communication pertaining to a complaint of sexual harassment *as the supervisor should have made the complaint in writing*. (Hyderally Cert. Ex. 11, Ross Depo. p.81)(emphasis added).[9] In fact, in the 12 sexual harassment complaints that Ross reviewed since 1997, he received them all in writing first. (Hyderally Cert. Ex. 11, Ross Depo. p. 82). However, Ross was never given and never received any written document pertaining to Velez= allegations of sexual harassment until a memorandum drafted in July 1999. (Hyderally Cert. Ex. 11, Ross Depo. pp. 82-83).

Ross also testified that Jersey City received only 3-4 complaints of sexual harassment per year. (Hyderally Cert. Ex. 11, Ross Depo. p. 39-40). Ross reviewed his files to determine if there was any

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[9]Callari testified that he only orally discussed the sexual harassment allegation with the Business Administrator and that he never did a written complaint.

investigation done into Velez= complaint and there were no documents reflecting an investigation. (Hyderally Cert. Ex. 11, Ross Depo. pp. 78-79). Ross also admitted, under defendants= questioning, that Ms. Gibney shared every sexual harassment complaint that she became aware of with him, and he was aware of *no* exceptions. (Hyderally Cert. Ex. 11, Ross Depo. pp. 79-80).

v. *The Union=s Response*

Wilson told Velez to file a grievance, but Velez replied that she was nervous because Bettinger was an elected official. (Hyderally Cert. Ex. 4, Wilson Depo. p. 49). The Union took no other responsive actions. (Hyderally Cert. Ex. 4, Wilson Depo. p. 49). Wilson does not know if anyone ever questioned Bettinger. (Hyderally Cert. Ex. 4, Wilson Depo. p. 58). However, it was part of the normal sexual harassment complaint procedure to question the alleged harasser. (Hyderally Cert. Ex. 4, Wilson Depo. p. 63). Further, Wilson never even approached Velez to discuss her complaints. (Hyderally Cert. Ex. 4, Wilson Depo. p.54).

These actions were taken even though Wilson testified that the proper protocol on conducting a sexual harassment investigation was to have a meeting with the two parties in question and make a decision. (Hyderally Cert. Ex. 4, Wilson Depo. pp. 55-56).

vi. *Arnold Bettinger*

No one at Jersey City ever questioned Bettinger about the allegations of Velez. (Hyderally Cert. Ex. 1 Velez Supp. Cert. &112).

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. Lehmann, *supra,* established a three-part standard

to be applied in determining an employer's liability for hostile work environment sexual harassment. The Court held that the employer may be strictly liable for all equitable relief, including reinstating the harassment victim and providing back pay and/or front pay. Lehmann, *supra* at 617.

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.
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> Lehmann, *supra* at 619.

When one examines the facts *sub judice,* there are certainly several material factual disputes pertaining to the potential liability of Jersey City for its negligent and reckless response to Velez= complaints and its= investigation and for its intentional creation of a hostile work environment and retaliation as evidenced below. Thus**,** defendants= applications for summary judgment must fail. *See* Brill, *supra.*

1. *Lehmann* standard

Jersey City knew of the harassment. Their response was to set aside the complaint and try to ignore it. The courts have repeatedly held that, A[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., 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. (Hyderally Cert. Ex. 2, Callari depo. 205). Callari stated that he felt that to mention Velez= allegations would be contrary to **Athe decorum of proper conduct... and thought it was a matter that should be kept confidential, and left at that**.@ (Hyderally Cert. Ex. 2, Callari depo. 206). This lack of reporting is consistent with the Union President=s testimony: a city councilman has influences and stuff like that. (Hyderally Cert. Ex. 4, Wilson Depo. p. 30). 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. (Hyderally Cert. Ex. 4, Wilson Depo. pp. 23-25).

It is Jersey City=s definition of the decorum of proper conduct that, *inter alia* creates corporate liability. Such inaction Asends the harassed employee the message that the harassment is acceptable and that the management supports the harasser.@ Blakey v. Continental Airlines, Inc., 164 N.J. 38 (2000). Rather than employ AEffective" 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, Jersey City coldly left her within the same Ward as a man whom they were told had just sexually abused and harassed her.

Jersey City displayed a complete lack of reasonableness in intentionally choosing to take no action to address the sexual harassment. It 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.").

2. Sexual Assault constitutes part of factual basis for claim of sexual harassment

a. ***Lehmann* 4 Prong Test**

The New Jersey Supreme Court held that A[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, *supra* at 603-604.

Defendants concede by their Statement of Material Facts that the assault allegedly perpetrated by Bettinger was an assault on Velez because of her gender. (Bettinger Statement of Facts). Certainly Velez= own testimony (Hyderally Cert. Ex.1, Velez Cert. &58-62), her temperament when she reported the incident (fully briefed above), Jersey City=s response to her complaints of the sexual harassment (fully briefed above), the retaliation of Jersey City (fully briefed below), and Velez= medical documentation (Hyderally Cert. Ex.6, Medical Records) 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*. The Courts have certainly ruled that one assault may form the basis of a hostile work environment case. In 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. In a sexual harassment case where assault was a cause of action that was properly dismissed because plaintiff could not meet factual elements of assault, the intentional infliction of emotional distress claim should still have gone to the jury as a fact issue. Wigginton v. Servidio, 734 A.2d 798,N.J.Super.A.D.,1999. Additionally, even where there is 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. Szczepanski v. Newcomb Medical Center, Inc., 661 A.2d 1232 N.J.,1995.

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[10] standard (severe *and* pervasive) in favor of the Ellison[11] standard (severe *or* pervasive).

The Court found that the Adisjunctive 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) (Afor 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.

Thus, Bettinger=s sexual assault on Velez which was aggravated by the fact that he committed the act in his political office while he sat as a publically elected official entrusted with the public trust is a sufficient basis to articulate a sexual harassment claim. *See* Lehmann, *supra*.

b. **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.

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[10]Andrews v. City of Philadelphia, 895 F.2d 1469 (3rd Cir.(Pa.) 1990).

[11]Ellison v. Brady, 924 F.2d 872, 878 (9th Cir.1991).

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. (Hyderally Cert. Ex. 7, Peterson Depo. p.45). 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.(Hyderally Cert. Ex. 7, Peterson Depo. p. 48). In fact, as a Jersey City Councilperson, Bettinger is an employee of Jersey City. (Hyderally Cert. Ex. 1 Supp. Cert. Velez 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. (Hyderally Cert. Ex. 9, Haynes Depo. p. 22).

(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 (ABettinger@) to show him her NID. (Hyderally Cert. Ex. 1 Velez Cert.&27-28); (Hyderally Cert. Ex. 7, Peterson Depo. p.45). Bettinger was the city councilman of Ward C which was the same ward that included Velez= NID. (Hyderally Cert. Ex. 1, Velez Cert. &27). (Hyderally Cert. Ex. 2, Callari Depo. pp. 62,65). 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, *infra*.

Velez subsequently met with Bettinger in October 1997, to get assistance with child support issues. (Hyderally Cert. Ex. 7, Peterson Depo. pp.47, 49). Velez received the payment approximately a month or so later and dropped by Bettinger=s office to thank him. (Hyderally Cert. Ex. 7, Peterson

Depo. pp.50-52). 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. (Hyderally Cert. Ex. 1, Velez Cert. &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. (Hyderally Cert. Ex. 1, Velez Cert. &36).

(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 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. (Hyderally Cert. Ex. 1, Velez Supp. Cert. &105).

Bettinger also admitted that he would perform city councilman functions and meet with constituents while he was in his county offices. (Hyderally Cert. Ex. 1, Velez Supp. Cert. & 105). Unfortunately, even Bettinger=s admission to this fact, does not prevent defendants= counsel from harping on the fact that Velez met Bettinger at his county offices. This red herring statement is simply a desperate ploy by defendants to avert liability and should be summarily discarded.

(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. (Hyderally Cert. Ex. 2, Callari Depo. p. 62). Part of this interaction was to inform Code Enforcement Officers what duties to perform in their day to day official activities. (Hyderally Cert. Ex. 2, Callari Depo. pp. 62-63); (Hyderally Cert. Ex. 1 Velez Cert. &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. (Hyderally Cert. Ex. 1, Velez Cert. &33). Subsequently the pothole was repaired. (Hyderally Cert. Ex. 1, Velez Cert. &37). Additionally, Velez= NID was and continued to be in Bettinger=s Ward, even after Bettinger sexually traumatized her, Velez complained to her supervisors of the sexual harassment. (Hyderally Cert. Ex. 2, Callari depo. pp. 62-65,195, 200-201) Callari admitted that even though it was Avery possible@ to put Velez in another NID, it was never offered to Velez nor done. Id.

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 v. Nabisco Foods, 290 N.J. Super. 252, 675 A.2d 684 (App. Div. 1996). 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. Due to the parallels in the facts *sub judice*, Jersey City could certainly be liable for Bettinger=s actions.

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 Aapply 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 Awhile 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, defendants= application for summary judgment must fail.

(2) Liability due to hostile work environment and retaliation

(a) This section is briefed below

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. (Hyderally Cert. Ex. 9, Haynes Depo. pp. 8-9). In that function, Haynes reports directly to the business administrator. (Hyderally Cert. Ex. 9, Haynes Depo. pp. 9-10).

Jersey City provided mandatory sexual harassment in the workplace training to council members such as Bettinger. (Hyderally Cert. Ex. 9, Haynes Depo. pp. 24-26). Thus, Jersey City did have control over Bettinger as his employer and the entity that mandated training for him to attend. (Hyderally Cert. Ex. 9, Haynes Depo. pp. 24-26). 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 Ablind@ 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. (Hyderally Cert. Ex. 9, Haynes Depo. p. 26). 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 Awas 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.@(Hyderally Cert. Ex. 10, Bettinger=s Answers to Plaintiff=s Request for Admissions &&. 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. (Hyderally Cert. Ex. 1, Velez Cert. &).

IV. 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.

1. Different treatment when she returned to work

Following the sexual assault, Velez went out on worker=s compensation leave. (Hyderally Cert. Ex.1, Velez Cert. &72). When she returned, she was being treated differently. (Hyderally Cert. Ex.1, Velez Cert. &73). NID was giving her a really hard time pertaining to the performance of her work duties. (Hyderally Cert. Ex.1, Velez Cert. &75).

2. Charlie Callari cold and distant

Velez= supervisor, Callari, treated her in cold fashion and different from the way he used to interact with her. (Hyderally Cert. Ex.1, Velez Cert. &77).

3. Malfunctioning radio

Velez was not given a functioning radio. (Hyderally Cert. Ex.1, Velez Cert. &76). Peterson also testified that Velez frequently complained that her radio was not functioning. (Hyderally Cert. Ex. 7, Peterson Depo. p. 24). 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. (Hyderally Cert. Ex. 7, Peterson Depo. pp. 26-27).

4. Not given appropriate uniform for season

Velez was not given the proper uniform to wear. (Hyderally Cert. Ex.1, Velez Cert. &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. (Hyderally Cert. Ex. 7, Peterson Depo. pp. 34-35). Although Velez= complaints were not frivolous or unnecessary, no responsive action occurred. (Hyderally Cert. Ex. 7, Peterson Depo. pp. 35-36).

5. 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. (Hyderally Cert. Ex.1, Velez Cert. & 78). Velez heard one of the dispatchers state that he was on light duty during this time period, and she taped the conversation. (Hyderally Cert. Ex.1, Velez Cert. &79).

6. Velez= hours changed

Velez complained about her changed hours at work and to the Union. (Hyderally Cert. Ex.1, Velez Cert. & 76); (Hyderally Cert. Ex. 7, Wilson Depo. pp. 34, 44-45). 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. (Hyderally Cert. Ex. 7, Peterson Depo. pp. 30-31). Jersey City took these actions even though Corcoran responded to Velez that he would accommodate her request to not change her hours. (Hyderally Cert. Ex. 7, Peterson Depo. pp. 32-33).

7. Velez not given a city vehicle

Mateo admitted that Jersey City provided him with a city van to patrol his NID. (Hyderally Cert. Ex.3, Mateo Depo. p.76). Velez was never given such a vehicle even though she made complaints. (Hyderally Cert. Ex.4, Wilson Depo. pp. 34, 44-4576).

8. 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. (Hyderally Cert. Ex.1, Velez Cert. &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. (Hyderally Cert. Ex. 4, Wilson Depo. pp. 17, 69). In fact, when you provided the urine specimen, the employee should know that they were giving urine for a drug test. (Hyderally Cert. Ex. 4, Wilson Depo. p. 93). In fact, Wilson testified that a Afitness 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. (Hyderally Cert. Ex. 4, Wilson Depo. pp. 99-100). 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. (Hyderally Cert. Ex. 4, Wilson Depo. p. 100).

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. (Hyderally Cert. Ex. 1, Velez Cert. &80). Additionally, the only testing that Jersey City informed her that they were sending her to was a fitness for duty examination. (Hyderally Cert. Ex. 1, Velez Cert. &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. (Hyderally Cert. Ex. 2, Callari Depo. p. 131).

Ross admitted that a fitness for duty examination does not normally include a drug screen. (Hyderally Cert. Ex. 11, Ross Depo. p. 48). A drug screen can be ordered by an immediate supervisor, department heard, or division manager. (Hyderally Cert. Ex. 11, Ross Depo. pp. 48-49). However, there is no written policy on this point. (Hyderally Cert. Ex. 11, Ross Depo. p. 49). In fact, Ross specifically admitted that the physician conducting the fitness for duty examination does not have the authority to request a drug screen. (Hyderally Cert. Ex. 11, Ross Depo. p. 50). However, in Velez= fitness for duty test, even accepting the defendants= story, it was the doctor who contacted Callari to tell him that he suspected that Velez was under the influence and Callari contacted Ross to ask if a drug screen could be conducted. (Hyderally Cert. Ex. 11, Ross Depo. p. 50).

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. (Hyderally Cert. Ex. 11, Ross Depo. pp. 75, 85-86). Ross also testified that an employee could not be forced to have a drug test conducted and thus consent was required under normal procedure. (Hyderally Cert. Ex. 11, Ross Depo. p. 50-51).

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

Wilson has worked in the Department of Public Works for the City of Jersey City from 1980 to the present day. (Hyderally Cert. Ex. 4, Wilson Depo. pp. 7-9). 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. (Hyderally Cert. Ex. 4, Wilson Depo. pp. 9). Wilson was criminally tried and received six months P.T.I. (Pre-trial intervention) for his criminal charge of possession. (Hyderally

Cert. Ex. 4, Wilson Depo. pp. 9-10). Wilson=s supervisor and or Jersey City never discussed termination as a possible disciplinary action. (Hyderally Cert. Ex. 4, Wilson Depo. p. 9). In fact, Wilson did not even want any assistance and had a career in drugs due to a long history of drug usage. Hyderally Cert. Ex. 4, Wilson Depo. pp. 11-12). In fact, Jersey City knew that Wilson took cocaine, barbiturates, valium, tuenol, stuff like that, and marijuana. (Hyderally Cert. Ex. 4, Wilson Depo. p. 16). Yet Jersey City never terminated Wilson. (Hyderally Cert. Ex. 4, Wilson Depo. p. 21). In fact, Jersey City allowed Wilson to complete in-patient drug rehabilitation and return to work. (Hyderally Cert. Ex. 4, Wilson Depo. pp. 21-22).

This was in stark contrast to Jersey City=s response when its= illegal drug test of Velez showed positive for marijuana.(Hyderally Cert. Ex. 1, Velez Cert. &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. (Hyderally Cert. Ex. 1, Velez Cert. &83).

The only persons terminated over the past 5 years for drugs are those that had criminal charges according to Ross. (Hyderally Cert. Ex. 11, Ross Depo. p. 53). Incredulously enough, Ross testified that he had reviewed Velez= disciplinary file and had no recollection of a disciplinary process surrounding her positive drug test. (Hyderally Cert. Ex. 11, Ross Depo. pp. 57-58). However, Ross finally admitted that there was a disciplinary action in progress related to Velez and that her file contained a memorandum that recommended termination due to the drug screen. (Hyderally Cert. Ex. 11, Ross Depo. pp. 60-61). In fact, a disciplinary action form existed in Velez= file that reflected that

the only basis of discipline against Velez was because she tested positive for marijuana and that disciplinary action would occur. (Hyderally Cert. Ex. 11, Ross Depo. p. 68-69).

10. 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. (Hyderally Cert. Ex. 11, Ross Depo. p. 52-53). Additionally, Velez= supervisor, Mateo, and the Union President also testified that it was mandatory to offer EAP to employees who tested positive for drugs. (Hyderally Cert. Ex. 3, Mateo Depo. p. 45); (Hyderally Cert. Ex. 4, Wilson Dep. pp. 65, 68).

No one ever offered Velez the opportunity to go through the Employee Assistance Program after she tested positive for marijuana. (Hyderally Cert. Ex. 1, Velez Cert. &85).

11. These actions led to her discharge

The above actions of defendants forced Velez to terminate her employment. (Hyderally Cert. Ex.1, Velez Cert. & 81).

Hostile work environment sexual harassment occurs when an employer or fellow employees harass an employee because of his or her sex to the point at which the working environment becomes hostile. Lehmann, *supra* at 601. *See* Muench v. Township of Haddon, 255 N.J. Super. 288, 605 A.2d 242 (App.Div.1992) (holding defendant employer liable for hostile work environment sexual harassment where employees harassed dispatcher because she was female although harassment was not sexual in nature). The New Jersey Supreme Court specifically adopted the Meritor standard

(Asevere and pervasive@)[12] over the one set forth in Andrews, *supra*, 895 F.2d 1469, ("regular and pervasive" standard). The court did this because it felt that the "regular and pervasive" standard would improperly bar actions based on a single, extremely severe incident or, perhaps, even those based on multiple but randomly-occurring incidents of harassment. Lehmann, *supra* at 606. In fact, the Court made specific reference to the fact that allegations of sexually harassing incidences, Aif considered individually, would be insufficiently severe to state a claim, but considered together are sufficiently pervasive to make the work environment intimidating or hostile.@ Lehmann at 607 citing Ellison, *supra*, 924 F.2d at 878.

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.

V. NANCY VELEZ'S CLAIM OF ASSAULT AND BATTERY AGAINST DEFENDANTS

1. Tort Claims Act has been satisfied

Jersey City was well aware of Velez= claims. Velez complained to her supervisor and put her union on notice through the Union President and her steward the day following the assault. (Hyderally

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[12]Meritor, *supra* 477 U.S. et 67, 106 S.Ct. at 2405, 91 L. Ed. 2d. at 60.

Cert. Ex. 1, Velez &64-67). Additionally, Velez filed criminal charges against Bettinger and Jersey City had to provide affidavits to the Hudson County Prosecutor=s Office to respond to Velez= complaints. (Hyderally Cert. Ex. 1, Velez &9). 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 Tort Claims Act (ATCA@). (Hyderally Cert. Ex. 12, Pinto Briefs and Order) In that case, Pinto had complained by writing to the defendants and contacting his union as well as complaining to an outside Board. (Hyderally Cert. Ex. 12, Pinto Briefs and Order).

2. No TCA notice requirements for intentional torts

The claim against Jersey City employee Bettinger is that he assaulted and battered Jersey City employee Nancy Velez while performing his functions as a City councilman. His attorneys now try to hide behind the TCA to claim that he is not liable for his actions. The Tort Claims Act does not apply to situations where there exists allegations against a public employee constituting a crime, actual fraud, actual malice, or willful misconduct. *See* N.J.S.A. 59:2-10.

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 Athe 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,

Athreatens 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 Aemployment 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 analysis 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.

a. Liability of Defendants

Justice Handler also 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*.

b. Jersey City liability

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).

In fact, the New Jersey Supreme Court ruled in a concurring opinion written by Justice Handler joined by Justice Clifford that the Alegislature 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.

c. Liability of Bettinger

Justice Handler adopted the reasoning of the appellate court below in stating that AThe 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.@ Id. 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).] Sexual assault at work is the very type of action that sexual harassment laws were intended to cover. This type of claim based upon a sexual assault that occurred while the person was working is deserving of the same protections as a sexual harassment claim. This is consistent with the argument that there is no requirement to put an entity on notice for a claim of intentional torts.

A. Individual Liability for Bettinger

Defendants do not address the individual liability of Bettinger 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).

B. Official Liability for 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 A[n]othing in this act shall exonerate a public employee from liability@ for, among other things, Aactual malice@ or Awillful 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).

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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.

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.

V. NANCY VELEZ'S CLAIM OF THE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AGAINST DEFENDANTS

In so far as liability issues, notice requirements, and damages, plaintiff repeats and incorporates the above.

In order to establish a viable claim of intentional infliction of emotional distress, a plaintiff must prove: (1) that defendant acted intentionally or recklessly; (2) that defendant's conduct was extreme and outrageous; (3) that defendant's actions were the proximate cause of the plaintiff's distress; and (4) that the emotional distress suffered by the plaintiff was severe. Buckley v. Trenton Saving Fund Society, 111 N.J. 355, 366 (1988). The emotional distress suffered must be so severe that no reasonable person could be expected to endure it. Id. A severe and disabling emotional or mental condition which is capable of being generally recognized and diagnosed by professionals trained to do so qualifies as severe emotional distress. Taylor v. Metzger, 152 N.J. 490, 515 (1998). Post-traumatic stress disorder may qualify as severe emotional distress. Id.

In a sexual harassment case where assault was a cause of action that was properly dismissed because plaintiff could not meet factual elements of assault, the intentional infliction of emotional distress claim should still have gone to the jury as a fact issue. Wigginton v. Servidio, 734 A.2d

798,N.J.Super.A.D.,1999. Additionally, even where there is 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. Szczepanski v. Newcomb Medical Center, Inc., 661 A.2d 1232 N.J.,1995.

There is no greater harm than misusing ones= political office. Such a violation tears asunder the very fabric of our society and destroys the citizenry=s trust in our elected officials. It soils the heart of our political system. Bettinger stated in a conversation with a reporter that it was open season on politicians. When asked what he meant by the comment during his deposition, he equating himself with President William J. Clinton. (Hyderally Cert. Velez Supp. Cert.). This comparison is of great significance. After repeatedly denying that he had a sexual affair with Ms. Lewinsky, President Clinton finally confessed to having sexual relations with her. Bettinger committed a grievous sexual assault upon a constituent who looked to him for his official assistance as a city councilman. Bettinger violated the public=s trust and attempted to take advantage of another city employee, Ms. Velez, in her moment of need, to sexually abuse and batter her.

This type of conduct ripped at the very fabric of Velez= life. The trauma has endured as demonstrated in her medical records, her complaints to co-workers, supervisors, and union officials, and her deposition testimony.(Hyderally Cert. Ex. 7, Peterson Depo. pp.6-7); (Hyderally Cert. Ex. 6, Medical Records); (Hyderally Cert. Ex. 1, Hudson County Prosecutor=s file, Ex. A14"). *See, e.g.*, Hill v. NJ Department of Corrections Commissioner William Fauver, -- A.2d -- (App. Div. 2001) and Aly v. Garcia, 754 A.2d 1232 (App. Div. 2000).

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. (Hyderally Cert. Ex. 7, Peterson Depo. p.54,60). When Velez recounted the experience to others, she started to shake and cry and was repeating herself and extremely upset. (Hyderally Cert. Ex. 7, Peterson Depo. p.57). Velez feared reporting the incident, job security, retaliation, and resulting political vendetta. Certainly, the above adequately displays a potential cause of action for emotional distress.

VI. NEGLIGENT RETENTION, TRAINING, HIRING, AND SUPERVISION

Court should allow this claim to go forward as this is not a traditional negligence claim that is preempted by worker=s compensation, but rather a negligence claim permissible under the rubric of LAD as demonstrated in Woods-Pirozzi, *supra* and Lehmann, *supra* wherein the Court discusses the employer=s liability for its negligence.

Further, the New Jersey Supreme Court recognized a cause of action for negligent hiring/retention of employees in DiCosala v. Kay, 91 NJ 159 (1982). Further, New Jersey courts have allowed common law torts to survive, even where Plaintiff has made claim to a violation of some other state law or public policy. Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980). This has been particularly so where the discharge is in retaliation for the exercise of state rights and obligations. *See* Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 536 A.2d 237 (1988) (discharge of at-will employee in retaliation for requesting information relevant to suspected employment

discrimination); Lally v. Copygraphics, 173 N.J. Super. 162, 413 A.2d 960 (App.Div.1980), aff'd 85 N.J. 668, 428 A.2d 1317 (1981) (discharge of at-will employee in retaliation for filing workers' compensation claim); Kalman v. Grand Union Co., 183 N.J.Super. 153, 443 A.2d 728 (App.Div.1982) (discharge of at-will pharmacist in retaliation for keeping pharmacy open contrary to employer's directive but as required by state rules). Further, the courts have allowed state common-law tort claims for retaliation to survive even though the Plaintiff has alleged an independent statutory cause of action that includes a retaliation component. Lepore v. National Tool and Mfg.Co., 540 A.2d 1296, 1306 (App. Div. 1988) (wrongful discharge in retaliation for reporting safe workplace violations was not preempted under Federal Occupational Safety and Health Act, notwithstanding fact that Act prohibited retaliatory discharges and established enforcement procedures encompassing remedy therefor, where Act did not expressly prohibit state from providing aggrieved employee with alternative remedy, and tort claim did not seek to remedy violation of Act but rather violation of state laws and public policy.). Thus, Velez= negligent hiring, retention, training, and supervision claim should survive albeit the fact that she alleges a cause of action under the LAD.

Additionally, defendants= claim that plaintiff cannot maintain her negligent hiring, supervision, training, and retention is not consistent with the Court=s ruling in Schmidt v. Smith, 294 N.J.Super. 569, 591, 684 A.2d 66 (App.Div.1996), aff'd, 155 N.J. 44, 713 A.2d 1014 (1998). The Schmidt court favorably cited to Seminole Point Hospital Corp. v. Aetna Casualty & Surety Co., 675 F.Supp. 44 (D.N.H.1987). In Semionole, the Court reasoned that the corporate employer could be liable for its supervisory employees' alleged wrongdoing on the basis of negligent supervision and/or

failure to investigate. Semionole *supra* at 47. Certainly this is consistent with our Supreme Court=s discussion of employer liability for negligence actions. *See, e.g.*, Lehmann, *supra*.[14]

Plaintiff=s allegation of negligent hiring, supervision, training, and retention is certainly connected to her claim of sexual harassment in that she claims that the employer failed to supervise and retained Bettinger in the face of her complaints of him sexually traumatizing her. Further, Velez claims in her complaint that Jersey City supported Bettinger by taking no responsive action and retaliating against her. Thus, liability attaches. *See* Lehmann v. Toys-R-Us, Inc., 132 N.J. 587 (1993).

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

> Clearly, there is no language in the LAD that mandates that claims made by employees against employers under it may only be brought under the Workers' Compensation Act. N.J.S.A. 10:5-1 to -42. Indeed, the Legislature's intent in enacting the LAD appears otherwise. Its intent was to have the LAD broadly applied and liberally construed.
>
> The pertinent portion of the act provides: Such harms have under common law given rise to legal remedies including compensatory and punitive damages. The legislature intends that such damages be available to all persons protected by this act and that this act be liberally construed in combination with other protection available under the laws of this state. [N.J.S.A. 10:5-3]. Further, the LAD was specifically amended in 1990 to grant a plaintiff under the Act the right to a jury trial. *L.*1990 *c.*12. If the Legislature had intended workers compensation to be the exclusive remedy for victims

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[14]In fact, the Bergen County Superior Court allowed plaintiff to pursue a cause of action for negligent hiring, retention, training, and supervision when faced with this argument and denied defendants= motion to dismiss. (Hyderally Cert. Ex. 12, Pinto v. Bergen County). Additionally, on June 22, 2001, the Morris County Superior Court when facing the same arguments as those made by Bettinger and Jersey City, ruled to deny defendants= motion to dismiss plaintiff=s negligent hiring, retention, training, and supervision claim. MacKnight v. Lucent Technologies, Inc., et al., MRS-L-1081-01.

of harassment and discrimination in the workplace it would not have provided for a jury trial as well as compensatory and punitive damages.

Schmidt v. Smith, 294 N.J.Super. 569, 585-586, 684 A.2d 66,74-75 (App.Div.1996), *aff'd*, 155 N.J. 44, 713 A.2d 1014 (1998).

Based upon such an analysis it flows logically that where employers have an affirmative duty to investigate claims of sexual harassment or discrimination and deal appropriately with the offending personnel under the discrimination and sexual harassment statutes, because failure to investigate gives tacit support to the discrimination and because the absence of sanctions encourages abusive behavior. Thus, Velez should be allowed to maintain her cause of action arguing negligent hiring, supervision, training, and retention before this Court. *See, e.g.* Lehmann v. Toys-R-Us, Inc., 132 N.J. 587 (1993); Munford v. James T. Barnes & Co., 441 F.Supp. 459, 466 (E.D.Mich.1977). Based upon this type of analysis, courts ruled that the corporate defendant could be liable for the alleged wrongdoings for its own negligent supervision and failure to undertake an investigation to find out what was taking place. *See*, Seminole Point Hospital Corp. v. Aetna Casualty & Surety Co., 675 F.Supp. 44 (D.N.H.1987); American States Ins. Co. v. Borbor By Borbor, 826 F.2d 888, 892 (9th Cir.1987).[15] In essence, the

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In fact, by way of comparison only, and taking express notice of the variations in Pennsylvania law as Pennsylvania has a different Worker=s Compensation Act than New Jersey=s, The Supreme Court of Pennsylvania has stated that "the spirit and intent of the [Workers= Compensation] Act is not violated by permitting an employee injured by a co-worker for purely personal reasons to maintain a negligence action against his employer for any associated negligence in maintaining a safe workplace." Pryor v. Mercy Catholic Medical Center, 1999 WL 956376 E.D.Pa.,1999, (*citing* Kohler v. McCrory Stores, 532 Pa. 130, 615 A.2d 27, 31

claim of negligent retention, supervision, hiring, and training is one aimed at the employer for wilfully failing to furnish a safe place to work. Thus, because the misconduct rises to the level of an intentional act, a plaintiff should not be barred from pursuing such a cause due the Worker=s Compensation Act.

VIII. PUNITIVE DAMAGES AGAINST CITY OF JERSEY CITY

Defendants concede that the LAD allows plaintiff to collect punitive damages if Velez establishes "actual participation by [the Board] or willful indifference." Lehmann, *supra*, 132 N.J. at 625, 626 A.2d 445. Similarly, plaintiff is entitled to seek punitive damages because her LAD claims require proof that the harassing conduct was "severe or pervasive," Lehmann, *supra*, 132 N.J. at 606-607, 626 A.2d 445, which may be especially egregious under Nappe v. Anschelewitz, Barr, Ansell & Bonello, 97 N.J. 37, 49-51, 477 A.2d 1224 (1984), and Leimgruber v. Claridge Assoc. Ltd., 73 .J. 450, 454, 375 A.2d 652 (1977), to satisfy the Lehmann "higher level of culpability than mere negligence." Lehmann, *supra*, 132 N.J. at 624, 626, 626 A.2d 445.

IX. PUNITIVE DAMAGES AGAINST ARNOLD BETTINGER

Plaintiff has alleged intentional torts in addition to her claims of sexual harassment. If she prevails, she is legally entitled to emotional distress and punitive damages. Wilson v. Parisi, 268

(Pa.1992)) (emphasis added); see also Merritt, 1999 WL 285900, at *6-7 (Sexual harassment claim holding that a negligent supervision claim is not barred by the WCA).

N.J.Super. 213,219-220, 633 A.2d 113, 116, (N.J. Super. 1993); T.L. v. Toys 'R' Us, Inc.,255 N.J.Super.616, 619, 605 A.2d 1125 (App.Div.1992), and certification was denied on non LAD claims, 130 N.J. 19, 611 A.2d 657 (1992); Carey v. Lovett, *supra*, 132 N.J. at 56-57, 622 A.2d 1279 (assault and battery claims involve physical contact which legally entitles plaintiff to collect emotional distress damages if they can be established); Eyrich for Eyrich v. Dam, 193 N.J.Super. 244, 252, 473 A.2d 539 (App.Div.), *certif. denied*, 97 N.J. 583, 483 A.2d 127 (1984); Greenberg v. Stanley, 51 N.J.Super. 90, 105-06, 143 A.2d 588 (App.Div.1958), *modified on other grounds*,30 N.J. 485, 153 A.2d 833 (1959).

A. Punitive damages against Bettinger in his official capacity

As noted above, Bettinger has no protection for engaging in intentional torts.

B. Punitive damages against Bettinger in his individual capacity

Defendants do not address and thus waive, by omission, this point. Certainly, there exists no preferential treatment to Bettinger as compared with any other private citizen who is sued for an intentional tort. Thus, punitive damages are available as referenced above.

X. PAIN AND SUFFERING DAMAGES AGAINST CITY OF JERSEY CITY

The New Jersey Supreme Court intentionally opened the door to provide a remedy for plaintiffs who are emotionally victimized and scarred by a defendant=s conduct.

The court did so because it has always held in interpreting a statute that the "courts must seek to fulfill the statutory objective 'so far as the terms of the legislation and proper consideration of the interests of those subject to it will fairly permit.' " State v. Haliski, 140 N.J. 1, 9, 656 A.2d 1246

(1995) (*quoting* State v. Gill, 47 N.J. 441, 444, 221 A.2d 521 (1966)); Merin v. Maglaki, 126 N.J. 430, 435, 599 A.2d 1256 (1992). The court is allowed to interpret statutes to advance the sense of the statute in a meaningful manner. Lesniak v. Budzash, 133 N.J. 1, 14, 626 A.2d 1073 (1993).

Thus, the New Jersey Supreme Court interpreted the TCA in such a manner to allow Velez to claim for pain and suffering damages due to her emotional distress. Thus, Bettinger cannot escape damages for violating Velez= emotional well-being. Collins v. Union County Jail, 696 A.2d 625, 627, N.J.,1997. The Supreme Court focused on the requirement of the TCA that there be a "permanent loss of a bodily function." to obtain pain and suffering damages. N.J.S.A. 59:9-2(d). Succinctly put, the court found that the plaintiff could recover pain and suffering damages even though his only damage was emotional distress damages and no physical injury. Collins, *supra.*

This argument has been recognized and advanced in multiple jurisdictions that post-traumatic stress disorder and its accompanying symptoms have been recognized by other jurisdictions as objective, physical injuries. See, e.g., Bloom v. Consolidated Rail Corp., 41 F.3d 911, 915 n. 5 (3d Cir.1994) (asserting that plaintiff demonstrated physical manifestation of injury under Federal Employers' Liability Act through weight loss, loss of sleep, nightmares, vomiting, and diagnosed post-traumatic stress disorder); Towns v. Anderson, 195 Colo. 517, 579 P.2d 1163, 1164 (1978) (*en banc*) (stating that nightmares, sleepwalking, nervousness, and irritability showed sufficient physical manifestation of injuries); Daley v. LaCroix, 384 Mich. 4, 179 N.W.2d 390, 396 (1970) recognizing that weight loss, inability to perform household duties, extreme nervousness, and irritability are facts from which jury could find physical injury). The symptoms recognized as physical injuries in other jurisdictions are the very symptoms that plaintiff allegedly experiences. Similarly, in Saunderlin v. E.I.

DuPont Co., 102 N.J. 402, 508 A.2d 1095 (1986), this Court held that the term "function of the body" under the Workers' Compensation Act, N.J.S.A. 34:15-36, that defines permanent partial disability, includes psychiatric harm as a compensable injury. Saunderlin, *supra*, 102 N.J. at 410, 508 A.2d. Thus, the Court ruled that, AWe are satisfied that the Legislature could not have intended that the verbal threshold provision of the Act would bar all psychological claims caused by a rape simply because there was no residual physical injury.@ Id.

The testimony of Velez and the records of her treating and evaluating psychiatrists and her statement to the prosecutor=s office as well as her deposition testimony adequately portray that she may have suffered permanent psychological injury as a result of the sexual assault. Collins , *supra*.[16] Thus, the applications before this Court to bar punitive damages must be dismissed. *See* Brill.

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The Court held that plaintiff's claim of alleged permanent psychological harm in the form of post-traumatic stress disorder resulting from the rape by the corrections officer, constitutes a "permanent loss of a bodily function" within the meaning of N.J.S.A. 59:9-2(d). As a result of the rape, plaintiff allegedly lost the ability to function in a normal mental state. Plaintiff and his psychologist testified that plaintiff suffers from frequent nightmares, flashbacks, difficulty in sleeping, sudden outbursts of crying, screaming in his sleep, a severe loss of self-esteem, and an inability to trust others.

CROSS MOTION

I. BETTINGER'S COUNTER-CLAIMS SHOULD BE DISMISSED

1. Malicious Prosecution

Bettinger testified that he has no knowledge why Velez is making the allegations she is doing. (Hyderally Cert. Ex. 1, Velez Cert. &7). Bettinger=s only support for his counter-claims is that he disputes Velez= claim. (Hyderally Cert. Ex. 1, Velez Cert. &8,15).

Bettinger has absolutely no evidence that Velez is telling an untruth and Velez has never recanted her allegations. (Hyderally Cert. Ex. 1, Velez Cert. & 19). Additionally, Bettinger has spoken to the press and denounced Velez. (Hyderally Cert. Ex. 1, Velez Cert. &90).

Further, Velez has testified that she was sexually assaulted in this matter, to the prosecutor, to the Grand Jury, and in statements to the press. (Hyderally Cert. Ex. 1, Velez Cert. & 89); (Hyderally Cert. Ex. 1, Ex. 13 Grand Jury Transcript); and (Hyderally Cert. Ex. 14, Hudson County Prosecutor=s file). In fact, as shocking as it may appear, even though the Prosecutor knew that Velez made contemporaneous complaints to people whom his office interviewed, he failed to invite any of those people to testify. (Hyderally Cert. Ex. 1, Velez Cert. &11). In fact, the only person called to testify was Bettinger=s assistant who testified in Bettinger=s favor. (Hyderally Cert. Ex. 1, Velez Cert. & 11, 12-16). (Hyderally Cert. Ex. 13, Grand Jury Testimony). It is of no great wonder why the Hudson County Prosecutor was not able to get the Grand Jury to issue an indictment against elected Jersey City Councilman and Hudson County official Bettinger.

Thus, Bettinger cannot show the necessary elements to prove a claim for malicious prosecution in that such a claim requires that he prove that the Athe original action complained of (1) was brought without probable cause; (2) was actuated by malice; (3) was terminated favorably to plaintiff; and (4) that plaintiff suffered a special grievance. LoBiondo v. Schwartz, 323 N.J.Super. 391, 423, 733 A.2d 516 (App.Div.), *certif. denied*, 162 N.J. 488, 744 A.2d 1211 (1999).

In fact, the New Jersey courts disfavor this type of tort, Aout of fear that its use could chill free access to the courts. Baglini v. Lauletta, 338 N.J.Super. 282 (App. Div. 2000) (*citing* Tedards v. Auty, 232 N.J.Super. 541, 549, 557 A.2d 1030 (App.Div.1989)). The courts have further ruled that by setting up the requirements of the tort so stringently, it recognizes the "counter-policy of free access to judicial bodies.@ Rainier's Dairies v. Raritan Valley Farms, Inc., 19 N.J. 552, 564, 117 A.2d 889 (1955).

2. Defamation

Bettinger is a public figure in so far as being an elected city councilman. (Hyderally Cert. Ex. 1, Velez Supp. Cert. & 119). Thus, defendant must show that Velez Awas motivated by Aactual malice"--that [she] either knew the statement was false or recklessly disregarded its falsity. Costello v. Ocean County Observer, 136 N.J. 594, 612, 643 A.2d 1012 (1994); Fortenbaugh v. New Jersey Press, Inc., 317 N.J.Super. 439, 455, 722 A.2d 568 (App.Div.1999). This standard was promulgated by the United States Supreme Court when the court ruled that Aa public official may not recover damages in a defamation suit "relating to his official conduct unless he proves that the statement was made with 'actual malice'--that is, with knowledge that it was false or with reckless disregard of whether it was false or not."New York Times Co. v. Sullivan, 376 U.S. 254, 279-280, 84 S.Ct. 710, 725, 11 L. Ed.2d

686, 706 (1964). *See also, e.g.,* Turf Lawnmower Repair, Inc. v. Bergen Record Corp., 139 N.J. 392, 409, 655 A.2d 417 (1995), *cert. denied,* 516 U.S. 1066, 116 S.Ct. 752, 133 L. Ed.2d 700 (1996); Sisler, *supra,* 104 N.J. at 266, 516 A.2d 1083.This standard was extended to apply to public figures in Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975, 18 L. Ed.2d 1094 (1967). Because Bettinger has failed to demonstrate either of these requirements, his claim must be dismissed.

Even if the Court were to construe Bettinger as a private figure, he could still not meet the requirements to prove a defamation case. Bettinger would have to show damages, a defamatory statement of fact concerning Bettinger that was false and which was communicated to others and fault. Beck v. Tribert, 312 N.J.Super. 335, 349-350 (App. Div. 1998). Fault may also be established by showing that [the] defendant knows the statement is false and that it defames plaintiff or [the] defendant acts with reckless disregard of its truth or falsity. Id. Because Bettinger cannot even meet this standard, the claim must be dismissed with prejudice.

CONCLUSION

For all the foregoing reasons, Plaintiff, Nancy Velez, respectfully requests that the Court deny Defendants= applications for summary judgment and grant plaintiff=s Cross-Motion for Summary Judgment, and strike Defendant, Bettinger=s Statement of Facts.

Dated: June 22, 2001

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