

LAW OFFICES OF

DAVIS, SAPERSTEIN & SALOMON, P.C.

800 INMAN AVENUE
COLONIA, NJ 07067
(908) 757-0800

375 CEDAR LANE
TEANECK, NJ 07666-3433

FACSIMILE: (201) 692-0444
email: lawinfo@dsslaw.com
(201) 907-5000

20 VESEY STREET
NEW YORK, NY 10007
(212) 608-1917

OF COUNSEL
GELLER & HAUSMAN
MICHAEL N. BEUKAS

CERTIFIED CIVIL TRIAL ATTORNEY
EMPLOYMENT LAW CHAIR
PENNSYLVANIA BAR
NEW JERSEY BAR
NEW YORK BAR
GEORGIA BAR
D.C. BAR

July 16, 2001

VIA HAND DELIVERY

Motion's Clerk
Bergen County Courthouse
Justice Center
10 Main Street
Hackensack, New Jersey 07601

Re: Hoag v. La Promenade, et al.
Docket No.: BER-L-7784-99

Dear Sir/Madam:

The undersigned represents plaintiff, Deneen Hoag ("Hoag"), in the above-captioned matter. Please accept this letter reply brief in further support of plaintiff's motion to compel the financial records of La Promenade.

I STATEMENT OF FACTS

Poignantly, defendant omits significant salient facts from its Statement of Facts section of its Memorandum of Law. Unless noted otherwise, these facts emanate from plaintiff's deposition and from a certification that shall be filed tomorrow under separate cover as Ms. Hoag is out of State until tomorrow.

Namely, defendant omits the following: Plaintiff had made several complaints to the owner of La Promenade, Lori Payradeau, regarding Michael Kaddouh ("Kaddouh") and had told Kaddouh words to the effect of stop his actions towards her. (Hyderally Cert. Ex. 1, Hoag Cert. at 2). These complaints included, *inter alia*, that Kaddouh would

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make sexual comments to Hoag and that Kaddouh touched Hoag. (Hyderally Cert. Ex. 1, Hoag Cert. at 3). These complaints were very similar to two other female employees of La Promenade who had made *prior* complaints of Michael Kaddouh engaging in inappropriate behavior and wrongful touchings. (Hyderally Cert. Ex. 2, Hoag depo. at p.129-135). (Hyderally Cert. Ex. 3, La Promenade's Interrogatory responses) (Hyderally Cert. Ex. 4, Theresa Repole and Cathy Gastrich affidavit). Payradeau's response was to take no responsive action. (Hyderally Cert. Ex. 1, Hoag Cert. at 4). Such a lack of responsiveness was consistent with defendants' policy to have an ineffective sexual harassment policy or reporting policy in place. (Hyderally Cert. Ex. 1, Hoag Cert. at 5). In fact, defendants had no written policy and no posters at the work place pertaining to sexual harassment during the relevant time period. (Hyderally Cert. Ex. 1, Hoag Cert. at 6). Further, Payradeau admitted that she socialized with Kaddouh (Hyderally Cert. Ex. 5, Payradeau depo. at p.81-84) and made Hoag work alone with Kaddouh at the workplace on Sunday, September 7, 1997. (Hyderally Cert. Ex. 1, Hoag Cert. at 7). It was during this Sunday, when Hoag had to work with Kaddouh alone, that Kaddouh sexually assaulted Hoag. (Hyderally Cert. Ex. 1, Hoag Cert. at 8).

While at work, on September 7, 1997, Kaddouh picked Hoag up and put her on a table. (Hyderally Cert. Ex. 6, Bruno depo. at p.23). Kaddouh put his hands between Hoag's legs and grabbed at the waistline of her pants, and Hoag tried to push him away. (Hyderally Cert. Ex. 6, Bruno depo. at p.24). Hoag told Kaddouh to stop, but he continued

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his attack and tried to touch Hoag's chest area. (Hyderally Cert. Ex. 6, Bruno depo. at p.24-25). Kaddouh then kissed Hoag's neck area, face and put his hands all over her body. (Hyderally Cert. Ex. 6, Bruno depo. at p.27). Hoag fought with Kaddouh and tried to push him away. Id. Kaddouh took Hoag's arms and pinned them behind her back and continued his sexual assault. Id. Hoag, while screaming, ran into the kitchen area into a refrigeration type walk-in-box to try to get away from Kaddouh. (Hyderally Cert. Ex. 6, Bruno depo. at p.30). Kaddouh followed Hoag into the walk-in box, closed the door, pinned one of Hoag's hands behind her back and took the other and tried to place it on his crotch area, and said "go ahead and touch it". (Hyderally Cert. Ex. 6, Bruno depo. at p.31-34). After, Hoag got out of the walk-in box, Kaddouh grabbed her again. (Hyderally Cert. Ex. 6, Bruno depo. at p.35). Hoag called the day manager, Vincent Forcina, who replied when Hoag told him the details of what occurred, "sounds like Michael just raped you". (Hyderally Cert. Ex. 2, Hoag depo. at p.185) (Hyderally Cert. Ex. 6, Bruno depo. at p.36-38). Forcina then came to the store and Hoag pleaded with him to stay. (Hyderally Cert. Ex. 6, Bruno depo. at p.39-40). However, he did not stay, and left Hoag alone with Kaddouh. Subsequently, Kaddouh gave Hoag his phone number and told her to come over when his wife wasn't around. (Hyderally Cert. Ex. 6, Bruno depo. at p.41-42).

Subsequently, Hoag made an immediate criminal complaint, the police arrested Kaddouh, Kaddouh was charged with aggravated sexual assault and criminal restraint, Kaddouh pled guilty to charges, and Hoag underwent years of psychiatric treatment by

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Dr. Eileen Steinvurzel who diagnosed Hoag with Posttraumatic stress disorder. (Hyderally Cert. Ex. 2, Hoag Depo. Tr. pp.56, 62,68). (Hyderally Cert. Ex. 1, Hoag Cert. at 9).

After a short period away from work, Hoag returned to the work place to face a different work environment permeated by hostility and retaliation. (Hyderally Cert. Ex. 2, Hoag depo. at p.194-195). Payradeau put Hoag to work in Kaddouh's position which made Hoag extremely uncomfortable. (Hyderally Cert. Ex. 2, Hoag depo. at p.199-200). Vartersian and Payradeau treated Hoag in a cold fashion, told her to get over it, and directed her not to discuss personal issues at the workplace. (Hyderally Cert. Ex. 2, Hoag depo. at p.196-199). Meanwhile, Payradeau constantly discussed her marital problems with other employees such as Hoag. (Hyderally Cert. Ex. 1, Hoag Cert. at 10). Further, Hoag's new direct supervisor, Gary Vartersian, who got Kaddouh his job at La Promenade and whose wife socialized with Kaddouh's wife, added to the hostile work environment, by intentionally causing distress to Hoag. (Hyderally Cert. Ex. 2, Hoag depo. at p.190), (Hyderally Cert. Ex. 5, Payradeau depo. at p.52, 79), (Hyderally Cert. Ex. 7, Vartersian depo. at p.77) .

Soon after Kaddouh's sexual assault on Hoag, Hoag showed up to work one day to confront a kitchen in total disarray, knives stained with tomato juice lying on the floor, rice, sugar, strewn over the floor, and garbage cans turned over. (Hyderally Cert. Ex. 1, Hoag cert. at 11) (Hyderally Cert. Ex. 7, Vartersian depo. at p.39-42). Finally, in March

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1998, Payradeau told Hoag that defendants were "letting her go" because things had changed." (Hyderally Cert. Ex. 2, Hoag depo. at p.204-205).

It is the culmination of the above facts that, when considered in totum, lays more than an ample predicate for punitive damages to be assessed against the defendants due to the assault, battery, intentional infliction of emotional distress, and hostile work environment/retaliation claim. Not only did owner of La Promenade ignore Hoag's complaints about Kaddouh, but she ignored several other female employee's complaints about Kaddouh and socialized with Kaddouh and then made the work environment hostile by retaliating against Hoag following her complaint.

II STANDARD TO OBTAIN DISCOVERY

The right to obtain discovery is liberally granted in the State of New Jersey as the normal rule regarding discovery favors wide discovery of relevant issues. *See Herman v. Sunshine Chemical Specialties, Inc.*, 133 NJ 329, 343 (1993). The New Jersey rules allow that, "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of any party... It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." R. 4:10-2(a).

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III PUNITIVE DAMAGES RECOVERABLE UNDER THE LAD

Certainly, it is beyond dispute that plaintiff may recover punitive damages if she prevails on her intentional torts and/or her claim pursuant to the Law Against Discrimination, N.J.S.A. 10:5-1, et. seq. Lehmann v. Toys 'R Us, Inc., 132 N.J. 587,625 (1993) (employer liability where actual participation by upper management or willful indifference); Sandler v. Lawn-A-Mat Chemical & Equipment Co., 141 N.J. Super. 437, 448 (App. Div. 1976)(plaintiff must establish actual malice by showing intentional wrongdoing, an evil-minded act, or an act accompanied by a wanton and willful disregard of the rights of another); Jackson v. Consolidated Rail Corp., 223 N.J. Super. 467 (App. Div. 1988) (punitive damages can be awarded even if no compensatory damages).

In fact, the Supreme Court of this state has ruled that, the "[Legislature's] 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]. 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).

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 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

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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).

IV STANDARD TO OBTAIN PUNITIVE DAMAGES UNDER THE LAD

Defendants concede that the LAD allows plaintiff to collect punitive damages if Hoag establishes "actual participation by [upper management] 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. Anshelewitz, Barr, Ansell & Bonello, 97 N.J. 37, 49-51, 477 A.2d 1224 (1984), and Leimgruber v. Claridge Assoc. Ltd., 73 N.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.

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V FACTS SUPPORT OBTAINING PUNITIVE DAMAGES

Plaintiff respectfully invites Your Honor's attention to the above Statement of Facts.

VI PROOF OF FINANCIAL CONDITION REQUIRED TO OBTAIN PUNITIVE DAMAGES

Plaintiff's request is premised on McDonough v. Knight, 214, N.J. Super. 338 (App. Div. 1986) and Leimgruber v. Claridge Associates, 73 N.J. 450 (1977), which requires that plaintiff submit evidence related to the worth of the defendant to the jury to obtain punitive damages. Thus, defendants should be compelled to produce the corporate financial records indicating the net worth of the company, so that at the time of trial, when plaintiff makes the appropriate showing, she will possess the necessary documents.

VII DISCOVERY STAGE

Your Honor's ruling to allow Hoag access to documents is not ruling as to the admissibility of documents. However, to deny Hoag access to financial documents would deprive Hoag of having valuable time to prepare to introduce evidence of the company worth at trial after she makes the requisite showing.

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Certainly Hoag would be agreeable to an appropriate protective order being entered in order to protect any privacy considerations of the defendants. *See* R. 4:10-3 (analogous rule is R. 26(c) of the Fed. R. Civ. P.).

Further, plaintiff respectfully notes the limited nature of this request which is in accord with the New Jersey Supreme Court's mandate. *See, e.g. Herman v. Sunshine Chemical Specialties, Inc., supra* at 344-345 (Court ruled that privately -held corporations may be required to disclose certified financial statements but income tax returns may be resisted); Tele-Radio Systems Ltd. v. DeForest Electronics, Inc., 92 F.R.D. 371, 375 (D.N.J. 1981); Gumowitz v. First Fed. Savings & Loan Ass'n of Roanoke, 160 F.R.D. 462 (S.D.N.Y. 1995). Plaintiff seeks only those corporate documents that shows the financial condition of the defendant and does not require support for those documents or income tax returns of the corporation, unless those are the only documents that provides the requested information.

CONCLUSION

For the foregoing reasons, plaintiff, Deneen Hoag, respectfully requests that the Court grants Plaintiff's Motion to Compel. Further, the undersigned certifies as to the enclosures as true and accurate copies.

Respectfully Submitted,

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TY HYDERALLY
DAVIS, SAPERSTEIN & SALOMON, P.C.
For the Firm

TH/mas

Enclosures

cc: The Honorable Isabel B. Stark, J.S.C. (w/enclosures) (via Hand Delivery)
Sharon Moreland, Esq. (w/enclosures) (via facsimile and UPS Overnight Delivery)
Paul Giblin, Esq. (w/enclosures) (via facsimile and UPS Overnight Delivery)