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| NANCY VELEZ,<br><br>Plaintiffs<br><br>vs.<br><br>CITY OF JERSEY CITY, ABC CORP. (said name being fictitious and unknown), ABC COMPANY (said name being fictitious and unknown), and ARNOLD BETTINGER,<br><br>Defendants. | SUPERIOR COURT OF NEW JERSEY<br>LAW DIVISION: HUDSON COUNTY<br>DOCKET NO.: HUD-L-8249-99<br><br>CIVIL ACTION<br><br>Date: August 3, 2001<br>Time: 9:00 a.m.<br>Judge: The Honorable Judge Curran, J.S.C. |

**MEMORANDUM OF LAW OF PLAINTIFF, NANCY VELEZ, IN SUPPORT OF HER MOTION FOR RECONSIDERATION**

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## INTRODUCTION

Plaintiff, Nancy Velez ("Velez" or "plaintiff"), submits this Memorandum of Law in support of its motion, pursuant to R. 4:49-2, for reconsideration of the Court's July 11, 2001, Order (the "Order"), which granted summary judgment as to Counts 3, 5-14 of Velez' Complaint. In particular, Velez requests that the Court reconsider its ruling as to: (1) whether Velez substantially complied with the procedural requirements of the New Jersey Tort Claims Act, N.J.S. 59:1-1, *et. seq.* (TCA); (2) whether the TCA applies to intentional torts; and (3) whether plaintiff must comply with the procedural requirements of the TCA to litigate her claims of assault and battery and intentional infliction of emotional distress against defendant, Arnold Bettinger's ("Bettinger") in his individual capacity and in his official capacity.[1] It is with the utmost respect that Velez believes that the Court did not consider, or did not appreciate the significance of, the case law and treatises which conclusively warrant that the Court modify its ruling.

## STATEMENT OF FACTS

[1]Plaintiff maintains the entirety of her argument made in opposing summary judgment. However, for the purposes of this application, plaintiff shall focus on the three points maintained herein.

Velez, was brutalized by the sexual assault and battery perpetrated by Bettinger on or about December 1, 1997. While Velez was in Bettinger's office, he grabbed her against her will and started kissing Velez all over her face, her cheeks, and her lips. (Hyderally Cert. Ex. 1 Velez Cert. ¶47).[2] 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. 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. "A").

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

## ARGUMENT

## I. STANDARD OF REVIEW FOR MOTION FOR RECONSIDERATION

The New Jersey Civil Practice Rules establish a mechanism whereby a party can request a Court to alter an interlocutory order. Rule 4:49-2 provides in pertinent part:

> [A] motion for ... reconsideration seeking to alter or amend a[n] ... order shall be served not later than 20 days[3] after service of the ... order upon all parties by the party obtaining it. The motion shall state with specificity the basis upon which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred.

Motions for reconsideration are appropriate where:

> 1) the Court has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence.

Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). Furthermore, it is "sensible, economical, and expeditious for [a party] to [seek] an opportunity to be heard on [an 'improvidently entered' order] by motion addressed directly to the trial court." Calcaterra v. Calcaterra, 206 N.J. Super. 398, 403-404 (App. Div. 1986) (reasoning that a review by the trial court is "preferable to the immediate filing of a notice of appeal which inevitably triggers the expense and delay attendant upon the appellate process."). For the reasons discussed below, Velez respectfully requests that the Court reconsider its decision embodied in its expected Order; and to modify that Order to deny summary judgment as to Counts 6 and 10.

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[3] Courts have interpreted the time limitation contained in Rule 4:49-2 to apply only to final judgments and orders - not to interlocutory orders. *See* Johnson v. Cyklop, 220 N.J. Super. 250, 262 n.8 (App. Div. 1987). "[T]he trial court has the inherent power ... to review, revise, reconsider and modify its interlocutory orders at any time prior to the entry of final judgment." Id. at 257.

## II. VELEZ SUBSTANTIALLY COMPLIED WITH THE TCA

The very next day, on December 2, 1997, Velez reported the details of the sexual harassment incident to her second level supervisor Charlie Callari. (Hyderally Cert. Ex. 1 Velez Cert. ¶ 55);(Hyderally Cert. Ex. 2 Callari depo. p.177) .[4] 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). 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.[5] (Hyderally Cert. Ex. 2 Callari depo. pp.178-179).

Callari told his boss, Maureen Corrado, that "Nancy had come into this office regarding an alleged **complaint of sexual harassment regarding an elected official in the City of Jersey City."** (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).

[4]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).

[5]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).[6] Eleanor Gibney was one of the two people designated by Jersey City to handle sexual harassment complaints (Larry Ross was the other so designated employee. (Hyderally Cert. Ex. 8 Gibney depo. pp.17-19).

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.

Jersey City internal guidelines and policies required that the Business Administrator and supervisors document, in writing, Velez' complaint pertaining to the assault and battery.

The sexual harassment policy which was signed by Mayor Bret Schundler as Executive Order 1998-015 and effective April 28, 1998 (the "S.H. Policy"). (Hyderally Cert. Ex.5 Sexual Harassment Policy). The S.H. Policy mandates that Department Directors and Supervisors "immediately report *actual or suspected* violations to the Business Administration *for investigation."* (Hyderally Cert. Ex.5 Sexual Harassment Policy p.2)(emphasis added). "It is the *responsibility* of the Business Administrator or his/her designee to promptly investigate charges of sexual harassment and recommend appropriate action." (Hyderally Cert. Ex.5 Sexual Harassment Policy p.3)(emphasis added). After the completion of this investigation, "if warranted, prompt disciplinary action will be taken up to and including dismissal." (Hyderally Cert. Ex.5 Sexual Harassment Policy p.3).

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). The policy further required that these individuals **submit a written report** to the business administrator of the sexual harassment allegation. (Hyderally Cert. Ex.

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

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). In fact, 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).

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). 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).[7] 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).

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

Jersey City was thus well aware of Velez' claims. This situation was extremely analogous in a matter facing the court in Pinto v. County of Bergen, BER-L-6188-00, wherein Justice Stark ruled that the TCA had been sufficiently complied with and denied defendants' attempt to dismiss Pinto's claims due to the requirements of the TCA. (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).

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

## III. TCA DOES NOT PERTAIN TO INTENTIONAL TORTS

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

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

Margolis and Novak further state that "generally, it would appear that where the act provides no immunity under other New Jersey law, the procedural aspects of the act would similarly not apply." Margolis and Novack, *supra* at pp. 1-2 (*citing, [s]ee* Fuchilla v. Leyman, 109

N.J. 319, 332-338, *cert den'd*, 488 U.S. 826 (1988), Brook v. April, 294 N.J. Super. 90 (App. Div. 1996), and Morgan v. Union County, 268 N.J. Super 337, 357 (App. Div. 1993), *cert den'd* 135 N.J. 468 (1994) (Act's notice provisions do not apply). *See also* Abbamont v. Piscataway Board of Education, 138 N.J. 405, 427-433 (1994) (N.J.S. 59:9-2 (c) bar on punitive damages does not apply to the Conscientious Employee Protection Act (CEPA), N.J.S. 34:9-1, *et seq*.))

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

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

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

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

The TCA was thus intended to apply to only negligence actions. In fact, the case law is replete with examples giving rise to a TCA issue that surround negligence issues. Willis v. Department of Conservation and Economic Dev., 55 N.J. 534, 264 A.2d 34 (1970). The most common type of claim at issue were simple slip and fall cases, *see* Amelchenko v. Borough of Freehold, 42 N.J. 541, 201 A.2d 726 (1964); Hayden v. Curley, 34 N.J. 420, 169 A.2d 809 (1961); Schwartz v. Borough of Stockton, 32 N.J. 141, 160 A.2d 1 (1960); Taylor v. New Jersey Highway Auth., 22 N.J. 454, 126 A.2d 313 (1956); Milstrey v. City of Hackensack, 6 N.J. 400, 79 A.2d 37 (1951), and most of the others involved allegations that governmental negligence

created conditions that resulted in death or injury. *See* Miehl v. Darpino, 53 N.J. 49, 247 A.2d 878 (1968); Bergen v. Koppenal, 52 N.J. 478, 246 A.2d 442 (1968); B.W. King Inc. v. Town of West New York, 49 N.J. 318, 230 A.2d 133 (1967); Visidor Corp. v. Borough of Cliffside Park, 48 N.J. 214, 225 A.2d 105 (1966); Fitzgerald v. Palmer, 47 N.J. 106, 219 A.2d 512 (1966); Goldberg v. Housing Auth. of the City of Newark, 38 N.J. 578, 186 A.2d 291 (1962); Cloyes v. Delaware Township, 23 N.J. 324, 129 A.2d 1 (1957); Kress v. City of Newark, 8 N.J. 562, 86 A.2d 185 (1952); Hartman v. City of Brigantine, 42 N.J.Super. 247, 126 A.2d 224 (App.Div.1956), *aff'd*, 23 N.J. 530, 129 A.2d 876 (1957). Other cases involved situations where negligent supervision on the part of government officials led to the injury of third persons. Jackson v. Hankinson, 51 N.J. 230, 238 A.2d 685 (1968); Titus v. Lindberg, 49 N.J. 66, 228 A.2d 65 (1967); McAndrew v. Mularchuk, 33 N.J. 172, 162 A.2d 820 (1960); Peer v. City of Newark, 71 N.J.Super. 12, 176 A.2d 249 (App.Div.1961), *certif. den.*, 36 N.J. 300, 177 A.2d 342 (1962).

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

When a public employee commits an intentional tort, like an assault and battery, he loses the trapping of public employment as his actions are outside the scope of his normal duties. This was a terrifying attack by a sexual predator. Bettinger put his hands all over Velez, on her breasts, kissed her and licked her face while Velez tried to pull away. She disgustedly wiped Bettinger's saliva off her face. (Hyderally Cert. Ex. 7, Peterson Depo. p.54,60). When a public employee commits an intentional tort, then he is acting as a private citizen and is entitled to all the benefits and protections awarded to private citizens - nothing more, nothing less. In fact, plaintiff respectfully urges that this is the very reason why a

public entity is not liable for the intentional torts of employee. It is for this very reason, by analogy, that the Court should not apply the procedural prerequisites of the TCA to Bettinger.

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

## IV. BETTINGER IS LIABLE IN HIS INDIVIDUAL AN D OFFICIAL CAPACITY

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

### A. Individual Liability of Bettinger

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

The claim against Bettinger is that he, as an individual, assaulted and battered Nancy Velez. It is beyond question that an individual who happens to be a public employee can be held accountable for torts such as assault and battery even where there

is no municipal liability. McDonough v. Jorda, 214 N.J. Super. 338, 345, 350, 519 A.2d 874,877,880 (police officer liable for assault and battery even though there was no municipal liability).

**B. Official Liability of Bettinger**

Plaintiff's claims against Bettinger includes allegations that he engaged *inter alia* in activity that constituted a crime, actual fraud, actual malice or willful misconduct. *See* N.J.S.A. 59:2-10. This same act simply states that "[n]othing in this act shall exonerate a public employee from liability" for, among other things, "actual malice" or "willful misconduct."[8] Therefore, the source of any liability of a public employee must be found outside of N.J.S.A. 59:3-14(a). Like the strong State policy of protecting children from sexual abuse, the State also has a strong policy of protecting its citizens from sexual harassment. S.P. v. Collier High School, 725 A.2d 1142, (App. Div. 1999); *See, e.g.*, N.J.S.A. 10:5-3 (New Jersey Law Against Discrimination); Pukowsky v. Caruso, 312 N.J.Super. 171, 177, 711 2d 398(App.Div.1998); Connolly v. Burger King Corp., 306 N.J.Super.344, 348, 703 A.2d 941 (App.Div.1997).

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

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

## CONCLUSION

For all the foregoing reasons, Plaintiff, Nancy Velez, respectfully requests that the Court reconsider its ruling and deny summary judgment as to Counts 6 and 10. A proposed form of Order is attached.

Dated: July ___, 2001

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