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June 29, 2007

**VIA HAND DELIVERY**
Judge Walter R. Barisonek A.J.S.C
Superior Court of New Jersey
Union County Courthouse
2 Broad Street
Elizabeth, NJ 07207

**RE: Travisano v. Board of Chosen Freeholders for Union County, et al.**
**Docket No.: UNN-L-1592-07**

Dear Judge Barisonek,

This firm represents the plaintiff Robert J. Travisano, in the above captioned action. Please accept this letter in lieu of a more formal brief in support of the plaintiff's Cross-Motion For a Change of Venue pursuant to *R.* 4:3-3(a)(2), and in opposition to defendant Charlotte Defilippo's Motion to Dismiss pursuant to *R.* 4:6-2. Presently, Judge William Daniel is scheduled to hear Defendant's motion on July 6, 2007. Because we are cross-moving at this time for a transfer of this action to another county, we respectfully request that this Court refrain, for the reasons herein, from ruling on the motion to dismiss so that a Superior Court judge in a different county can rule on the motion. Defendant Defilippo's Motion to Dismiss should ultimately be denied because Mr. Travisano has the right to conduct discovery on a cause of action, which upon liberal construction, is properly, plead.

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## FACTS

*The Union County Political Machine*

The plaintiff has presented claims of age, disability and political discrimination, *inter alia*, in violation of his rights under the New Jersey Law Against Discrimination (NJLAD), New Jersey Civil Rights Act (CRA), and New Jersey Constitution against the Charlotte Defilippo, (who also happens to be both the Chairperson of the Union County Democratic Committee (UCDC) and the Union County Improvement Authority (UCIA)), the Union County Manager, George Devanney (who happens to be the nephew of democratic senator and self-described political boss Raymond Lesniak),[1] and the Board of Chosen Freeholders of Union County, as well as Al Faella, and M. Elizabeth Genevich. (See Certification of Ian S. Clement Exhibit A, ¶¶ 1-59 (hereinafter "Complaint")). Charlotte Defilippo is a Union County political boss whose power is rivaled only by that of Senator Lesniak. (Affidavit, ¶ 4). She is a former Union County Freeholder and has served as the UCIA's chair, and only salaried member, for the past eight years. (Affidavit, ¶ 5).

The political and professional relationships of the defendants and their representatives, with those of the Court, are so intertwined that the plaintiff cannot be provided with a fair and impartial decision maker in this venue. Edward J. Kologi, Esq., counsel for Defendant Board of Chosen Freeholders is the newly appointed Chairman of the Linden Democratic Committee, as well as the Linden City Attorney. (Affidavit, ¶ 6). Moreover, Mr. Kologi and Judge William Daniel have been close friends for more than a decade. (Affidavit, ¶ 7). In fact, Mr. Kologi was formerly the board attorney for the Union County Vocational-Technical Schools, and when he could not attend board meetings, Judge Daniel (then a City of Linden Municipal Judge) would

[1] See Affidavit of Robert J. Travisano, Sr. ¶ 2 (hereinafter "Affidavit")

attend in his stead. (Affidavit, ¶ 8). Judge Daniel has been involved with the Union County Democratic Committee for more than 20 years -- from the time that he graduated college, until his appointment as a Municipal Court judge. (Affidavit, ¶ 9). In addition, before he was appointed as a judge, Judge Daniel routinely represented Defendant Board of Chosen Freeholders of Union County as a private attorney. (Affidavit, ¶ 10). Furthermore, it is generally known that in order for any person to receive an appointment to a judgeship in Union County, they must first meet the approval of the Union County political leaders, which, since 1998, would include Defendants Defilippo and Devanney. (Affidavit, ¶ 11). The plaintiff is a Democrat, and a friend, and ally of former democratic Union County Manager Michael LaPolla, who is a rival of George Devanney. (Affidavit, ¶¶ 12,13).

*The Plaintiff's Claims of Discrimination*

Mr. Travisano's allegations of unfair political favoritism and retaliation are one of the fundamental claims in his complaint and he should not be faced with repeated treatment of political cronyism in this court. Mr. Travisano is 61 years old, and, prior to his unlawful termination had worked for the County in various capacities for 18 years. Long before and throughout his employment with Union County, Plaintiff maintained a close friendship with the former Union County Manager Michael LaPolla, who had fractured relations with Defendant Devanney, which was based upon their association with different and competing political factions within the Democratic Party. (Complaint, ¶ 29). Plaintiff's relationship with a political rival of Defendant Devanney was, in part, an additional motivating factor in the termination of Plaintiff's employment even though Plaintiff's political affiliation was not a necessary or integral component of his employment. (Complaint, ¶ 30).

Defendant Devanney, in order to cause Plaintiff's termination because of his age, disabilities and political associations embarked on a malicious campaign to force Plaintiff to quit because they knew his ultimate lay-off was not justified based upon objective business reasons. The plaintiff's was subsequently terminated on August 18, 2006. In an interview with the Star Ledger, County spokesperson Sebastian D'Elia stated in an interview[2] that the County hoped to save 9.4 million dollars that would "stem from eliminating positions and replacing retirees with younger employers who command lower salaries." (Complaint, ¶ 28).

(Complaint, ¶ 33). Defendant Devanney's unlawful and tortious conduct toward Plaintiff, was furthered when he ordered Richmond LaPolla to take away Plaintiff's county issued truck for no apparent or legitimate reason, and to also remove Plaintiff's county issued laptop computer and a desktop computer that Plaintiff set up in his home. (Complaint, ¶ 34).

Defendant openly discriminated against the plaintiff because of his medical conditions, including prostate cancer, paralysis to his face, and a hearing impairment in his left ear because of surgery that he underwent for a brain tumor. (Complaint, ¶ 20). Moreover, Defendant Defilippo subjected the plaintiff to hurtful disparaging remarks to ridicule him because of his facial paralysis, when she derisively referred to Plaintiff as the "man with the crooked face" to his immediate supervisor Richmond LaPolla (who is also the brother of Devanney's political rival Michael LaPolla) in a meeting that she had with him at her home regarding county business. (Complaint, ¶¶ 20, 31). Furthermore, Defendant Defilippo attempted to coerce Mr. LaPolla to accede to the wishes of the County Manager when she asked Mr. LaPolla why he was "so loyal to the man with the crooked face," thus referring to Plaintiff. (Complaint, ¶ 31). Defendant Defilippo often held meetings at her home with Mr. LaPolla regarding county business where she often directed him as who to hire or fire and what consultants to use within

[2] Published in the August 31, 2006 edition.

the County. (Complaint, ¶ 32). As Chair of the UCIA, Ms. Defilippo controls much of the asset procurement, public works construction and public financing regarding the County.[3]

When Mr. LaPolla did not accede to Defendant Devanney's demand with the alacrity that Devanney deemed appropriate, Devanney conducted a teleconference with LaPolla and told him that he would have to take action because LaPolla's open defiance would make him appear weak. (Complaint, ¶ 35).

Devanney thus exacted retribution upon Mr. LaPolla for his recalcitrance, and furthered his discriminatory tactics aimed at the Plaintiff. He subsequently reorganized Richmond LaPolla's department, transferred most of his staff to other sections, removed Mr. LaPolla's motor pool and accused Mr. LaPolla of being incompetent, all because Mr. LaPolla would not aid and abet him in unlawful discrimination and other acts directed toward Mr. Travisano. (Complaint, ¶ 36). After transferring Richmond LaPolla to Union County Technical Institute, Defendant Devanney transferred Mr. Travisano to the Human Services department, where Mr. Travisano was forced to occupy a three-foot by five-foot cubicle, when he had previously shared a 20-foot by 20-foot office with a conference room. (Complaint, ¶ 37). The Plaintiff was subsequently terminated on or about August 18, 2006. (Complaint, ¶ 8).

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[3] The plaintiff asks the Court to take judicial notice of the powers vested in the Union County Improvement Authority by way of *N.J.S.A.* 40:37A-55, pursuant to *N.J.R.E.* 201(a).

## ARGUMENT

## POINT I

**SINCE THE PLAINTIFF CANNOT OBTAIN A FAIR AND IMPARTIAL TRIAL IN UNION COUNTY, THIS COURT SHOULD TRANSFER VENUE OF THIS MATTER TO ANOTHER COUNTY PURSUANT TO *R.* 4:3-3(a)(2).**

The issue presented here is whether substantial doubt exists that the plaintiff can receive a fair trial in Union County. The plaintiff submits that here such substantial doubt does exist, therefore; this Court should transfer this matter to a different county and should not decide Defendant Defilippo's motion to dismiss. Specifically, the plaintiff has filed suit against many Union County political bosses, whose influence might unfairly taint the jury pool. Moreover, said bosses' influence might exert undue pressure on any judge that would be assigned to this case from this county. Therefore, no Union County judge should hear this case. However, Judge William Daniel is scheduled to hear Defendant's Motion on July 6, 2007.

Here, the plaintiff properly laid venue in Union County pursuant to *R.* 4:3-2(a)(2), which requires a plaintiff to lay venue in actions against counties, public agencies or officials, in the county in which the cause of action arose. However, the discretion of the court is invoked when a party moved to change venue pursuant to R.4:3-3(a)(2) or (3). *Doyley v. Schroeter*, 191 *N.J. Super.* 120, 125 (Law Div. 1983). Indeed, the rule itself expresses a bias in favor of plaintiff's choice. *Ibid.*

Due to the dearth of authority in New Jersey regarding motion to change venue in civil matters based on an inability to obtain a fair trial, *R.* 4:3-3(a)(2), the plaintiff relies mainly on foreign authorities. See *Sinderbrand v. Schuster*, 170 *N.J. Super.* 506, 512 (Law Div. 1979). In fact, the *Sinderbrand* Court noted that prior to that case there had been no reported decisions in

New Jersey in which a civil litigant successfully invoked *R.* 4:3-3(a)(2) to change venue. *Id.* The court noted, however, that "courts in other states had employed similar provisions to grant a change in venue in a civil suit where it appeared that the existence of local prejudice made it unlikely that a fair trial could be had where in the county where venue was originally laid." *Ibid.* (citing *Berberian v. Town of Westerly, R.I.,* 381 *A.*2d 1039 (1978); *Castle v. Village of Baudette,* 125 *N.W.*2d 416, 417 (1963) (granting plaintiff's petition for a writ of *mandamus* reversing the trial court's denial of plaintiff's motion to change venue when several prominent citizens of the county provided affidavits stating their belief that plaintiff would not receive a fair trial); *Althiser v. Richmondville Creamery Co. Inc.*, 215 *N.Y.S.*2d 324 (1961) (granting defendant's motion to change venue in the interest of justice where plaintiffs were dairy farmers in a county of approximately 1500 people, many of whom were also dairy farmers); *Berry v. North Pine Elec. Co-op Inc.*, 50 *N.W.*2d 117 (1952) (granting plaintiff's motion for a preemptory writ remanding the matter to the situs of original venue in a case where a minor was injured by a fallen power line, and a large percentage of the prospective jurors were members of the electric cooperative); and *Olson v. City of Sioux Falls* , 262 *N.W.* 85 (1935)).

In *Sinderbrand, supra* the Law Division granted the defendant's motion for change of venue from Atlantic County to Mercer County pursuant to *R.* 4:3-3(a)(2). In that case, the Attorney General's Office received almost 500 letters from citizens from many cities in Atlantic County expressing support for the plaintiff. The court found that the magnitude and one-sidedness of the pre-trial publicity regarding the case made it doubtful that the defendants could obtain a fair trial in Atlantic County.

Here, the plaintiff had filed suit against the democratic political bosses of Union County and the County itself. Many members of the prospective jury pool either are Union County

employees, or maybe otherwise influenced by the power of the parties involved. With so many high-ranking Democratic Party leaders and bosses involved in this matter directly or indirectly, and with the County itself as a defendant in this matter, the plaintiff fears that potential jurors will be unduly influenced by the political power and influence possessed by the defendants and/or their counsel.

Not to mention the pressure that would be brought to bear on any Union County judge by these defendants. In *The Application of Gaulkin*, 69 *N.J.* 185, 189 (N.J. 1976), the Supreme Court summarized the importance of a judiciary free from political influence:

> Since 1948, when the judicial system created by Article VI of the 1947 Constitution came into existence, judges and others officially associated with that court system have been wholly divorced from involvement in partisan or other political activity, as a necessary sacrifice for the sake of judicial integrity and the public appearance thereof. This separation is thought in this State (all judges in New Jersey are appointed) to be indispensable to public confidence in the courts and their probity, impartiality, disinterested objectivity and freedom from outside pressures in their dealing with causes coming before them. Such public confidence in judicial integrity is the foundation (along with Constitution and law) of our courts' power, influence and acceptance as necessary instruments in the effective administration of justice.
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> [*The Application of Gaulkin*, 69 *N.J.* 185, 189 (N.J. 1976)].

In 2001, The New Jersey State Bar Association detailed the process regarding judicial selection in its report: "*Improving the Judicial Selection Process – A Report of the New Jersey State Bar Association*" (May 2001).[4] With respect to the involvement of political expediency in the selection process, the report states:

> ...[T]he process of selecting judges in this State. . . . may or may not include appointment of the most qualified candidates for the bench. .... Recent experience in Essex and Passaic Counties demonstrate the potential for abuse. In short, the process is

4 Attached to the Certification of Ian S. Clement, as Exhibit B.

> strongly subject to political expedients other than, or at the least, in addition to appointment of qualified candidates.
>
> ["*Improving the Judicial Selection Process – A Report of the New Jersey State Bar Association*" (May 2001)].

The Plaintiff submits that the political influence of the defendants, and at least one defense attorney in this case, would have on any Union County judge, makes it impossible for him to obtain a fair trial in Union County. The connection between the Union County judges and the Union County bosses is so great, as evidence by Judge Daniel and his close connection to Edward Kologi that the plaintiff simply receive a fair trial in Union County. In fact, it is incredible, given the close ties and history that Judge Daniel has with these defendants, and Mr. Kologi that he himself did not offer to recuse himself from the case. Consequently, the Plaintiff asks this Court to transfer venue to another county pursuant to R. 4:3-3(a)(2).

## POINT II[5]

**THE PLAINTIFF HAS SUFFICIENTLY PLED THE CAUSES OF ACTION IN HIS COMPLAINT AGAINST THIS DEFENDANT, UPON WHICH RELIEF CAN BE GRANTED; THEREFORE, THIS COURT SHOULD DISMISS DEFENDANT'S MOTION**

### *A. Standard of Review for a Motion for Dismissal Pursuant R. 4:6-2(e).*

Dismissal of a complaint based on failure to state a claim requires an extremely high threshold, which fully favors the plaintiff, and as a result, every reasonable inference is given to the plaintiff. *F.G. v. MacDonell*, 150 *N.J.* 550, 556 (1997); *Craig v. Suburban Cablevision, Inc.*, 140 *N.J.* 623 (1995). Therefore, this type of motion is granted only in rare instances and even if granted, the court will ordinarily grant it without prejudice towards the plaintiff. *Id.* Courts

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[5] Responds to Points I, II and III of defendant's brief.

should approach motions to dismiss for failure to state a cause of action with caution because such motions are usually brought at the earliest stages of litigation. *Talalai v. Cooper Tire & Rubber Co.*, 360 *N.J. Super.* 547 (Law Div. 2001).

A plaintiff is not required to plead with absolute specificity each and every fact that may be applicable in support of a claim. Rather, *R.* 4:5-7 requires only that plaintiff's allegations be simple, concise and direct, with no technical forms of pleading required. Further, all pleadings are to be liberally construed in the interests of justice. *Id.* This idea has been fully espoused by the courts in the *Printing Mart* case.

The Supreme Court of New Jersey, in *Printing Mart v. Sharp Electronics*, 116 *N.J.* 739 (1989), set forth its definitive current standard for a motion to dismiss for failure to state a claim:

> We approach our review of the judgment below mindful of the test for determining the adequacy of a pleading: whether a cause of action is "suggested" by the facts. *Printing Mart*, 116 *N.J.* at 746 (citing *Velantzas v. Colgate-Palmolive Co.*, 109 *N.J.* 189, 192 (1988)).

Moreover, the Court instructed that in reviewing a complaint dismissed under the applicable rule, the court's inquiry is limited only to an examination of the "legal sufficiency" of the facts as alleged on the complaint. *Printing Mart* at 746 (citing *Rieder v. Department of Transp.*, 221 *N.J. Super.* 547, 552 (App. Div. 1987). Therefore, the court is to look to the sufficiency of the allegations in the complaint, and not to the proofs if any (or even a plaintiff's potential ability to provide proofs), at this early stage of a lawsuit. *Id.* (citing *Somers Constr. Co. v. Board of Educ.*, 198 *F. Supp.* 732, 734 (D.N.J. 1961).

Further, the court must search the parameters of Plaintiff's complaint with extreme liberality in the task of determining "whether the fundament of a cause of action may be gleaned even from an obscure statement of claim..." in order to allow the complaint to proceed. *Printing*

*Mart*, at 746 (citing *Di Cristofaro v. Laurel Grove Memorial Park*, 43 *N.J. Super.* 244, 252 (App. Div. 1957). However, the court is also free to grant a plaintiff an opportunity to amend his complaint in order to correctly state a claim, whenever possible, should the complaint fail to sufficiently state a cause of action. *Ibid.* Ultimately, the court must undergo a "painstaking" as well as "generous and hospitable" approach in reviewing plaintiff's complaint in order to ascertain whether plaintiff has properly stated a cause of action. *Ibid.*

Finally, the court should be mindful of its obligation to review the plaintiff's complaint liberally and deeply in search of a cause of action in considering a motion to dismiss. This Court should undertake that responsibility conscious of the notion that information procured through further discovery will grant plaintiff even more opportunity to prove the sufficiency of his or her cause of action. *See*, PRESSLER, CURRENT N.J. COURT RULES, COMMENT *R.* 4:6-2[4.1], (GANN) (citing *Printing Mart*, at 746). As already mentioned, in this particular case, since plaintiff's allegations are properly pleaded and discovery has not yet been conducted by any party, a motion to dismiss is clearly premature. The importance of this point cannot be overstated, as the court's liberality with respect to finding causes of actions in a complaint mandates that future discovery considerations support the finding of properly pleaded causes of action within a complaint. *Printing Mart* 116 *N.J.* at 746. As such it lends further credence to Plaintiff's position that Defendants' motion most be denied.

Most importantly, however, the defendants seek to dismiss claims, which are the subject of material disputed facts that must be developed during discovery. See, *Liberty Surplus Insurance Corporation, Inc., v. Nowell Amoroso, P.A.*, 189 *N.J.* 436 (2007) (improper to grant summary judgment before all discovery is concluded). These include, but are not limited to, facts pertaining to Defendant Defilippo's participation in the affecting the terms and conditions

Mr. Travisano's employment which render her liable, among other things, as an aider and abettor or principle actor, Defendant Defilippo's discriminatory statements concerning Mr. Travisano, the County's adoption of employment recommendations by Defendant Defilippo and the effectiveness of the County's discrimination, retaliation and other employment policies.

### *B. Mr. Travisano's Complaint Adequately Pleads Claims Under the New Jersey Law Against Discrimination and the New Jersey Constitution.*

Defendant Defilippo's Motion to Dismiss must be dismissed because Mr. Travisano has properly pleaded his claims under New Jersey's Law Against Discrimination and the New Jersey Constitution, and he is entitled to discovery on material issues of disputed facts relating to these claims. Defendant Defilippo held several positions of extraordinary power within the County of Union, which influenced employment decisions therein, including the employment of Mr. Travisano. She not only held the position of Chairperson of the Union County Improvement Authority (UCIA) but also held the position of xxx within the Union County Democratic Party (USDC). Defilippo functioned in the capacity of a hybrid State and County employee, similar to the role of prosecutors. Wielding such power as an individual who either exceeded the scope of her employment, or in her official capacity, Defendant Defilippo cannot escape individual liability under the NJLAD or in violating Mr. Travisano's constitutional rights under the free speech and associational rights protected by the Constitution of the State of New Jersey.

Mr. Travisano has presented claims of age, disability, and political discrimination in violation of his rights under the New Jersey Law Against Discrimination (NJLAD) and New Jersey Constitution against officials and managers of Union County and many of the Union County political bosses. Defendant Faella subjected him to a systemic pattern of discrimination and others who marginalized him at work, refused to give him work, relocated him to a small office and ultimately terminated him while retaining other sheriff's officers who were younger

and had less experience and seniority than Mr. Travisano. Defendant Defilippo aided and abetted in the discrimination to which he was subject on the basis of his disability, when she disparaging comments about his facial paralysis and participated in the decision on his lay-off.

To compound the discrimination, Mr. Travisano was subject to political retaliation of which Defendant Defilippo was also a participant. The plaintiff is a Democrat, and a friend, and ally of former democratic Union County Manager Michael LaPolla, who is a political rival of Defendant George Devanney. In short, the plaintiff alleges that the LaPolla family and their allies, including Mr. Travisano, fell out of favor with the Union County political machine. As a collateral effect of the 'LaPolla' fall from grace, the political bosses[6] collectively participated in discriminating against him based on his age and disability, and singled out the plaintiff for termination under the guise of a reduction in force (RIF) – which was just pretext for their unlawful discrimination.

In evaluating motions to dismiss, it is the existence of a cause of action that is critical, not the ability of the plaintiff to prove the allegations. See, *Banco Popular N. Am. v. Gandi*, 184 *N.J.* 161 (2005) (trial judge's pre-discovery dismissal of bank's claims for negligent misrepresentation was premature in light of the strict standard governing motions to dismiss. The issue was not whether the Bank's allegations were true or whether they could be proved, but only whether they were made). See also, *C. B. Snyder Realty Co. v. Seeman Bros., Inc.*, 79 *N.J. Super.* 88 (App. Div. 1963) (finding motion to dismiss was properly denied because it was premature to determine whether plaintiff could prove wrongful interference with prospective economic opportunity on the basis of the complaint); *Seidenberg v. Summit Bank*, 348 *N.J. Super.* 243 (App. Div. 2002) (trial court acted prematurely in dismissing employees' claim for

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[6] Save Senator Lesniak, who is not a party to this action.

violation of the implied covenant of good faith and fair dealing, where all the elements for such a cause of action were contained within the amended complaint, and whether those allegations could be substantiated remained to be seen after the parties had a full and fair opportunity for discovery). Thus, the issue for purposes of this motion is not whether the Plaintiffs can prove each of the factual allegations set forth in the Complaint, but only whether the allegations were made

1. Plaintiff's Claims of Age Discrimination Based on Disparate Treatment and Disparate Impact Under the LAD.

Plaintiff Robert Travisano's age discrimination claims are properly pled against the Defendant Defilippo within the four corners of the complaint. In addition, he is entitled to further discovery on material disputed issues of fact relating to these allegations, and consequently, Defendant's motion must be denied.

In order to establish a *prima facie* case of age based discharge plaintiff must prove that: (1) he was a member of a protected class; (2) he was performing the job at the level that met the employer's legitimate expectations; (3) he was discharged; and (4) the employer sought another to perform the same work after the complainant had been removed from the position. *Catalane v. Gilian Instrument Corp.*, 271 *N.J. Super*. 476, 496-97 (App. Div.), *cert. denied*, 136 *N.J.* 298 (1994).

*N.J.S.A.* 10:5-12 states in pertinent part:

> It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination:
>
> [F]or an employer, because of . . . age, . . . [or] disability . . . to bar or to discharge or require to retire, unless justified by lawful considerations other than age, from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment . . . .

[*N.J.S.A* 10:5-12].

Regarding the quantum of proof needed to establish a claim of age discrimination, the Appellate Division stated in *Maiorino v. Schering-Plough Corp.*, 302 *N.J. Super.* 323, 344 (App.Div.), *certif. denied*, 152 N.J. 189, (1997), "[I]n order to establish a LAD cause of action, the plaintiff must "'show that the prohibited consideration [, age,] played a role in the decision making process and that it had a determinative influence on the outcome of that process.'" *Id.* (quoting *Miller v. CIGNA Corp.*, 47 F.3d 586, 597 (3d Cir. 1995)). "Direct proof of discrimination is not often found, and thus, discrimination cases can be proved through circumstantial evidence." *Greenberg v. Camden County Vocational and Technical Schools*, 310 *N.J. Super.* 189, 198 (App.Div. 1998) See *Parker v. Dornbierer*, 140 *N.J. Super.* 185, 189, (App.Div. 1976) ("we recognize that discrimination is not usually practiced openly and that intent must be found by examining what was done and what was said in the circumstances of an entire transaction."). Furthermore, to establish disparate treatment as the result of age in a reduction in force case, where the plaintiff's job was eliminated, a plaintiff must establish initially that: (1) statutory protections against age discrimination apply to him; (2) Mr. Travisano was laid off from a job for which he was qualified; and (3) other, younger, workers were treated more favorably. *Murray v. Newark Housing Authority*, 311 *N.J. Super.* 163, 172 (Law Div. 1998).

The Complaint alleges that although he was 61 years old, he was fully capable of performing the duties of his former position. He had performed in a highly capable manner for 18 years before his termination. (Complaint, ¶ 8). He had received the highest score on his civil service exam, which formed the basis, in part, for this promotion to his position of Special Projects Manager/Program Development Specialist I. (Complaint, ¶ 10). The plaintiff received

commendation on his excellent work performance, and the County granted him merit increased from 2001 until his termination in 2006. (Complaint, ¶¶ 12, 13). Nevertheless, the plaintiff's employment was terminated as part of the county's RIF – a pretextual reason the plaintiff's termination and the defendant unlawful discrimination based on the plaintiff's age.

Moreover, defendants admitted to the local press that their RIF intentionally targeted employees on the basis of their age, when County spokesperson Sebastian D'Elia stated in an interview published in the August 31, 2006 edition of the Star Ledger, that by granting early retirement to 183 employees and laying off 15 others the County hoped to save 9.4 million dollars which would "stem from eliminating positions and replacing retirees with younger employers who command lower salaries." (Complaint, ¶ 28). Mr. Travisano also alleges that Defendant Defilippo participated in the discrimination against him on the basis of his disability and in the decision to terminate him as an aider and abettor, including her role as one of the political bosses, which made determinations on who should or should not be employed by the County. The plaintiff submits that the facts alleged in Count One of his complaint satisfy all four elements for an age discrimination claim based on disparate treatment as stated in *Murray*, *supra*. Therefore, this Court cannot grant defendant's motion to dismiss as it pertains to Count One.

In an age discrimination case a plaintiff may also proceed on a theory "that his layoff resulted not from any discriminatory motive, but rather from the application of facially neutral criteria that had a disproportionate impact on members of his age group" as stated in *Griggs v. Duke Power Co.*, 401 *U.S.* 424, 91 *S.Ct.* 849, 28 *L.Ed.*2d 158 (1971). *Murray supra* at 172. In the present case, the facts alleged in the plaintiff's complaint suggest that the County's reduction in force policy, while facially neutral, specifically targeted and had a disparate impact on older workers. The plaintiff was one on of those older workers that suffered an adverse employment

action based on nothing more than his age. The plaintiff submits that the facts alleged in Count Two satisfies the test for age discrimination based on a theory of disparate impact in violation of the LAD. *N.J.S.A.* 10:5-1 to 10:5-42, and the Defendant Defilippo was a participant in that decision. Therefore, this Court must deny defendant's motion to dismiss for failure to state a claim with respect to Count Two of the complaint.

2. Plaintiff's Claim of Discrimination Based on Disability/Handicap Under the LAD.

Plaintiff Robert Travisano's handicap/disability discrimination claim is properly pled against the Defendant DeFilippo within the four corners of the complaint. In addition, he is entitled to further discovery on material disputed issues of fact relating to this allegation, and consequently, Defendant's motion must be denied.

In order to state a *prima facie* case for discriminatory discharge due to disparate treatment based on handicap, or disability, under the LAD, Plaintiff must allege: (1) that the employee was handicapped; (2) that she was performing at a level that met the employer's expectations; (3) that the employee was fired; (4) and that the employer then sought someone to perform the same work. *Svarnas v. AT & T Communications*, 326 *N.J. Super.* 59 (App. Div. 1999). Plaintiff has alleged each of these elements.

The Complaint alleges that defendants markedly and adversely changed the conditions of the plaintiff's employment, most notably after he was diagnosed with prostate cancer in August 2005. (Complaint, ¶ 15). Moreover, Defendant Devanney was well aware of the plaintiff's medical condition. After the plaintiff returned from cancer surgery, defendants failed to give the plaintiff any work until February 2006, despite his repeated requests to Defendant Faella for work assignments, and despite the fact that he was fully capable performing to the County's expectations. (Complaint, ¶¶ 8,10,12,13, and 16). Around April of 2006, rumors of a lay-off

list began circulating, and at the time, the plaintiff had received very few work assignments for the previous six months. (Complaint, ¶ 21). The lack of work made the plaintiff fearful that he would be terminated in the lay-off. The plaintiff's fears were realized when on July 4, 2006 Defendant Union County issued a notice to the plaintiff advising him that the County was dismissing him as part of a lay-off. (Complaint, ¶ 25). The plaintiff's was subsequently terminated on August 18, 2006. In an interview with the Star Ledger, County spokesperson Sebastian D'Elia stated in an interview published in the August 31, 2006 edition, that the County hoped to save 9.4 million dollars which would "stem from eliminating positions and replacing retirees with younger employers who command lower salaries." (Complaint, ¶ 28).

Taking all of the Plaintiff's claims as true, the Court could infer that the defendant deliberately did not give the Plaintiff work assignments in order to make him vulnerable to the lay-off that was in the offing. Defendant Defilippo actively participated in the County's disparaging perception of Mr. Travisano on the basis of his disability when she made remarks about his facial paralysis, and this discriminatory animus was carried over into her participation in the decision to terminate him. The Plaintiff submits that these facts, taken as true clearly suggest a claim for discrimination based on Plaintiff's disabilities in violation of the LAD. Consequently, this Court cannot grant defendant's motion to dismiss for failure to state a claim upon which relief could be granted with respect to Count Three.

### *C. Defendant Defilippo Aided and Abetted the Other Defendants in Violation of the LAD.*

Plaintiff Robert Travisano's claim of aiding and abetting in violation of the LAD is properly pled against the Defendant Defilippo within the four corners of the complaint. In addition, he is entitled to further discovery on material disputed issues of fact relating to this allegation, and consequently, Defendant's motion must be denied.

*N.J.S.A.* 10:5-12(e) states "[i]t shall be . . . unlawful discrimination": "For <u>any person</u> whether an employer, or employee, <u>or not</u> to aid, abet, incite, compel or coerce, the doing of any of the acts forbidden under this act or attempt to do so." *N.J.S.A.* 10:5-12(e) (emphasis added). The aid and abet provision of the NJLAD encompass all other provisions, of the LAD and prohibits any person, not just employers, from engaging in the prohibited acts. See *Presbytery of the Orthodox Presbyterian Church v. Florio*, 902 *F. Supp.* 492 (D.N.J. 1995*) aff'd sub nom., Presbytery of N.J. of the Orthodox Presbyterian Church v. Witman*, 99 *F.*3d 101 (3d Cir. N.J. 1996) (hereinafter "*POPC, supra*")(denying a reverend and his church's motion for summary judgment, which was based on the grounds that the aid and abet provision of the NJLAD, prohibiting them from attacking homosexuality, extramarital sex, and other lifestyle characteristics they deemed abhorrent, was a violation of their First Amendment rights). See also, *Bowers v. NCAA*, 151 *F. Supp.* 2d 526, 541 (D.N.J. 2001), *rehearing granted*, 2007 U.S. App. LEXIS 5447 (3d Cir. N.J. Mar. 8, 2007) (where party controlling eligibility process directed to student was denied summary judgment based on aid and abet provisions). The term "aid" has been defined as "to assist, support or supplement the efforts of another" and to "abet" has been defined as "to encourage, counsel, incite or instigate." For purposes of proofs at trial, in order to establish aiding and abetting under the LAD, Plaintiff need only show that the defendant "provided substantial assistance or encouragement" in the discrimination. *Failla v. City of Passaic*, 146 *F.*3d 149, 158 (3d Cir. 1998). No showing of shared intent or common purpose between aider or abettor and the violator is required under the LAD. *Failla*, 146 *F.*3d at 157.

The active participation by Defendant Defilippo in the discrimination and political retaliation against Mr. Travisano is also pled in the Complaint. Mr. Travisano alleges that

Defendant Devanney, as Union County Manager, sought to illegally terminate the plaintiff, and when the plaintiff's friend and supervisor Richmond LaPolla did not do so, Defendant Defilippo aided and abetted Defendant Devanney by exerting pressure upon Richmond LaPolla to succumb to the County Manager's wishes. (Complaint, ¶ 48-49). Furthermore, the plaintiff submits, and the court could infer from the facts as alleged in the complaint that defendant's acts of age, disability and political discrimination were all part of Defendants' overarching scheme to terminate the plaintiff's employment. At the very least, the facts suggest that Defendant Defilippo's actions provided "substantial assistant and encouragement" to Defendant Devanney's plan to unlawfully terminate Mr. Travisano.

In *Thomas v. County of Camden*, 386 *N.J. Super.* 582 (App. Div. 2006), the Appellate Division held that the LAD "does not extend to those whose *only nexus*, employment-wise, is to adversely affect an aggrieved person's employment with a third party." *Id.* at 599 (emphasis added). The facts of the present case are distinguishable from those of *Thomas*, because here the facts suggest that Defendant Defilippo and the other defendants acted in concert. Conversely, in *Thomas*, *supra*, the plaintiff's employer and the defendant had no connection other than the defendant was a supplier of police radio dispatch training.[7] This Court could infer from the *Thomas* Court's use of the phrase "*only nexus*" that it did not intend to create a loophole for third party defendants who actively aid and abet the discriminatory actions of the claimant's employer.

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[7] In *Thomas*, *supra*, a female Hammonton, New Jersey police dispatcher filed suit against the Camden County Communications Center ("CCCC") after she was subjected to lewd and derogatory sexual remarks, and a tape recording of supposed emergency calls consisting of obscene material when she attended a training class at the center. *Id.* at 587-88. The Law Division dismissed her complaint under the LAD under both employer/employee public accommodation rationales. *Id.* at 588-89. The Appellate Division affirmed the Law Division's decision as it pertained to the lack of an employer/employee relationship between the parties, but reversed the lower court's decision regarding the LAD public accommodation rationale, finding that the CCCC was a place of public accommodation covered by the LAD.

Such a holding would be an anathema to the LAD's mandate to rid this State of invidious discrimination. The plaintiff submits that the Appellate Division in *Thomas*, *supra* left open question of active participation in a discriminatory scheme by a third party. The plaintiff deserves the opportunity to develop discovery that further substantiate Defendant Defilippo's liability as an aider and abettor in the defendant's discriminatory scheme. *Carparts v. Automotive Wholesalers of N.E.*, 37 *F*.3d 12, 17 (1st Cir.1994) (trade association and trust administering employer health plan could be considered employer under ADA, if trade association and trust either exercised control over important aspect of individual's employment, or acted as agent of a covered entity). *See also*, *Baranek v. Kelly*, 630 *F.Supp.* 1107 (D.Mass.1986) (state home care agency was employer over regional employees under Title VII because it exercises significant control over an employment situation); *Barone v. Hackett*, 602 *F.Supp.* 481 (D.R.I.1984) (director of state agency liable as employer under Title VII despite agency not employing plaintiffs); *Stomel v. City of Camden*, 383 *N.J. Super*. 615 (App. Div. 2006) (holding that the trial court erred in dismissing the attorney's CEPA claim upon concluding that the attorney was not an employee because the attorney did fit the definition of an employee under the control and relative nature of the work tests and the city was required to have a public defender); *D'Annunzio v. Prudential Ins. Co. of America*, 383 *N.J. Super*. 270 (App. Div. 2006) (agreeing that the trial court erred in concluding that the plaintiff was an independent contractor and that the CEPA did not cover such relationships, and holding that genuine issues of material fact existed as to whether the plaintiff was an employee for CEPA purposes, and noting that the trial judge mistakenly applied the common-law control factors set forth in case law as such test had no bearing on whether an individual was afforded protection under CEPA).

In contravention of well-established precedent, Defendant Defilippo claims that the NJLAD only prohibits discrimination within the employer/employee context. (Db 1,5). Defendant construes the breadth NJLAD coverage too narrowly. *N.J.S.A.* 10:5-12 (f)(1) provides that "[i]t shall be . . . unlawful discrimination":

> For any . . . agent, or employee of any place or public accommodation directly or indirectly to refuse, withhold from or deny to any person any of the accommodations, advantages, facilities or privileges thereof, or to discriminate against any person in the furnishing thereof . . . on account of the [person's] . . . disability . . . .
>
> [*N.J.S.A.* 10:5-12(f)(1)].

Defendant cites *Thomas, supra,* for the simplistic and erroneous proposition that since she was not the plaintiff's direct employer, the plaintiff cannot maintain his NJLAD claims against her. (Db 5). However, the court in *Thomas, supra*, noted that the NJLAD also includes places of public accommodation within its definition of "actors" covered by the Act. *Id.* at 593-94. Moreover, "any State governmental agency is a place of public accommodation for the purpose of inclusion under the umbrella of the LAD" *Id.* at 593. See also *Ptaszynski v. Uwaneme*, 371 *N.J. Super.* 333 (App. Div.), *certif. den.*, 182 *N.J.* 147 (2004) (holding that township police departments, both the buildings and the individual officers are places of public accommodation because a municipal police force is nothing more than an executive enforcement function of municipal government under *N.J.S.A.* 40A:14-118). Consequently, all "[N]ew Jersey governmental entities are, of course bound by the LAD . . ." 386 *N.J. Super.* at 593-94.

Not unlike the township police department in *Ptaszynski*, *supra*, the UCIA is an executive function of county government. The Chosen Board of Freeholders of Union County created the UCIA pursuant to *N.J.S.A.* 40:37A-55. Moreover, *N.J.S.A.* 40:37A-55 specifically states that

every authority so created is . . . "a political subdivision of the State." Among the other powers granted to it pursuant to *N.J.S.A.* 40:37A-55, the UCIA possesses the power to:

> (l) To determine the location, type and character of any public facility and all other matters in connection with all or part of any public facility which it is authorized to own, construct, establish, effectuate and control.
>
> (r) To conduct examinations and investigations, hear testimony and take proof, under oath at public or private hearings of any material matter, require the attendance of witnesses and the production of books and papers and issue commissions for the examination of witnesses who are out of the State, unable to attend, or excused from attendance.
>
> (s) To authorize a committee designated by it consisting of one or more members, or counsel, or any officer or employee to conduct any such investigation or examination, in which case such committee, counsel, officer or employee shall have power to administer oaths, take affidavits and issue subpoenas or commissions.
>
> [*N.J.S.A.* 40:37A-55(r)(s)].

Certainly, an agency that is organized under State statute as a "subdivision of the State," has the exclusive power to control the procurement of services and the construction of buildings in a given county, and has the power to hold hearings and issue subpoenas is a governmental entity.

In *POPC, supra,* the prohibited acts included: "speaking out, printing and disseminating publications that condemn homosexuality, bisexuality, and heterosexual sex outside of marriage as "an abomination and sinful . . . ." 902 *F. Supp.* at 500. Certainly, a pastor and congregation, preaching about the "evils" of homosexuality, *inter alia*, do not fall with the employer/employee relationship. If a church could be found to have violated the aiding and abetting clause for disseminating publications decrying alternate lifestyles, certainly the facts in this case suggest that Defendant Defilippo could be found to have aided and abetted Defendant Devanney in violating the plaintiff's rights under the LAD when she suggested to the plaintiff's immediate

supervisor that he grant the wish of the County Manager to terminate the plaintiff. Moreover, the defendant's "employer/employee" analysis of the LAD's applicability was recently shredded by the Supreme Court of New Jersey in *L.W. v. Toms River Reg'l Schs. Bd. of Educ.*, 189 *N.J.* 381 (2007), where the Court applied the LAD to a school setting in order to protect a student. The plaintiff is entitled to pursue discovery that will further substantiate these valid claims. See *Printing Mart-Morristown v. Sharp Electronics Corp., supra.*

The UCIA offices are located at 10 Cherry Street, in the City of Elizabeth; however, Defendant also has routinely conducted UCIA business from her home. (Affidavit, ¶ 14). As the *Thomas* Court noted "places do not discriminate; people who own and operate places do." *Id.* at 593 (quoting *Dale v. BSA (Dale III)*, 308 *N.J. Super.* 516 (App.Div 1998)). Accordingly, the UCIA and Defendant Defilippo are places of public accommodation under the LAD, and subject to its provisions. *N.J.S.A.* 10:5-12(f)(1).

In sum, the Plaintiff has pled facts that present a prima facie case of aiding and abetting in violation of the LAD. Alternatively, the UCIA and its chair, Defendant Defilippo are places of public accommodation, which subjects them to the strictures of the LAD. Material issues of fact exist regarding this claim. Therefore, Defendant's motion to dismiss is, at the very least, premature, and must be denied as to Count Four.

### *D. Defendants Violated the Plaintiff's Civil Rights Under the CRA and the New Jersey Constitution.*

Plaintiff Robert Travisano's civil rights claims are properly pled against the Defendant Defilippo within the four corners of the complaint. In addition, he is entitled to further discovery on material disputed issues of fact relating to this allegation, and consequently, Defendant's motion must be denied.

The plaintiff has alleged in Counts Five and Six that the defendants violated his civil rights under New Jersey Civil Rights Act (CRA), *N.J.S.A.* 10:6-2 and the New Jersey Constitution when they terminated the defendant based on his political affiliation with the LaPolla family. The CRA provides in pertinent part:

> If a person, whether or not acting under color of law, subjects or causes to be subjected any other person to the deprivation of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State . . . by threats, intimidation or coercion by a person acting under color of law, may bring a civil action for damages and for injunctive or other appropriate relief.
>
> [*N.J.S.A.* 10:6-2]

"Political patronage is a practice 'as old as the American Republic.'" *Galli v. N.J. Meadowlands Comm'n*, 2007 *U.S. App. LEXIS* 14473, 8-9 (3d Cir. N.J. 2007) (quoting *Boyle v. County of Allegheny Pa.*, 139 *F.*3d 386, 394 (3d Cir. 1998)). "However, the Supreme Court has set limits to its use, emphasizing that '[t]o the victor belong only those spoils that may be constitutionally obtained.'" *Id.* (quoting *Rutan v. Republican Party of Ill.*, 497 *U.S.* 62, 64, 110 *S. Ct.* 2729, 111 *L. Ed.* 2d 52 (1990)).

The Supreme Court held in *Elrod v. Burns*, 427 *U.S.* 347, 96 *S. Ct.* 2673, 49 *L. Ed.* 2d 547 (1976), and *Branti v. Finkel*, 445 *U.S.* 507, 100 *S. Ct.* 1287, 63 *L. Ed.* 2d 574 (1980), that termination of public employees because of their political affiliation violates the First Amendment unless the position at issue involves policymaking. See *Elrod*, 427 *U.S.* at 359, 373 (concluding that conditioning public employment on support for the political party in power "unquestionably inhibits protected belief and association"); *Branti*, 445 *U.S.* at 513-17. Generally, "an employee's exercise of

First Amendment rights outweighs the government's interest in maintaining a system of political patronage." *Stephens v. Kerrigan*, 122 *F*.3d 171, 176 (3d Cir. 1997).

The federal courts have derived a three-part test to establish a claim of discrimination based on political patronage in violation of the First Amendment. Galli, 2007 U.S. App. LEXIS 14473, 9-11. To make out a *prima facie* case, the plaintiff must show that: (1) he was employed at a public agency in a position that does not require political affiliation, (2) he was engaged in constitutionally protected conduct, and (3) this conduct was a substantial or motivating factor in the government's employment decision. See, e.g., *Stephens*, 122 *F*.3d at 176. *Id.*

In his complaint, the plaintiff alleged the following facts, if taken as true, suggest claims of violations of the plaintiff's freedom of association, substantive due process rights, and equal protection under the New Jersey Civil Rights Act (Complaint, ¶ 50-52) and of his rights under the New Jersey Constitution (Complaint, ¶ 53-54) with respect to Defendant Defilippo:

- For 18 years before his termination, the plaintiff worked for the Defendant Board of Chosen Freeholders of Union County in various capacities as a public employee. (Complaint, ¶ 8).

- The plaintiff's relationship with a political rival of Defendant Devanney [Michael LaPolla] was, in part, an additional motivating factor in the termination of Mr. Travisano's employment even though Mr. Travisano's political affiliation was not necessary or integral component of his employment. (Compliant, ¶ 30).

- [D]efendant Devanney, in order to cause Mr. Travisano's termination because of his age, disabilities and political associations embarked on a malicious campaign to force Mr. Travisano to quit because they knew his ultimate lay-off was not justified based upon objective business reasons. (Complaint, ¶ 33).

- Defendant Devanney's unlawful and tortious conduct toward Mr. Travisano, was furthered when he ordered Richmond LaPolla, who was Mr. Travisano's supervisor, to

> take away Mr. Travisano's county issued truck for no apparent or legitimate reason, and to also remove Mr. Travisano's county issued laptop computer and a desktop computer that Mr. Travisano set up in his home. ... (Complaint, ¶ 34)

- ... Defendant Charlotte Defilippo, the Union County Democratic Committee Chairperson [and Chairperson of the Union County Improvement Authority], summoned Defendant Devanney's political rival, Richmond LaPolla, the brother of Michael LaPolla [and the plaintiff's immediate supervisor], to her home for a meeting regarding County business, and demonstrated her unlawful animus toward Mr. Travisano when she maliciously asked him why his family was "so loyal to the man with the crooked face," thus referring to Mr. Travisano. (Complaint, ¶ 31).

- .... When Mr. LaPolla did not accede to Defendant Devanney's demand with the alacrity that Devanney deemed appropriate, Devanney conducted a teleconference with LaPolla and told him that he would have to take action because LaPolla's open defiance would make him appear weak. (Complaint, ¶ 34).

The ill will toward Mr. Travisano because of his disability and his political affiliation was so great that the political bosses exacted retribution upon Mr. LaPolla for his recalcitrance:

- Defendant Devanney subsequently reorganized Richmond LaPolla's department, transferred most of his staff to other sections, removed Mr. LaPolla's motor pool and accused Mr. LaPolla of being incompetent, all because Mr. LaPolla would not aid and abet him in unlawful discrimination and other acts directed toward Mr. Travisano. (Complaint, ¶ 36).

Thus, the plaintiff is a (1) public employee, (2) who engaged in Constitutionally protected activity (his political affiliation with the LaPolla family); and (3) that affiliation was a motivating factory for the defendants' termination of the plaintiff. Therefore, the plaintiff has satisfied the *Elrod-Branti* three-prong test. Therefore, this Court must deny Defendant's motion to dismiss with respect to Counts Five and Six.

### *E. Defendant Defilippo Acted Under the Color of State Law*

Ms. Defilippo acted under the color of state law. In *Lugar v. Edmondson Oil Co.*, 457 *U.S.* 922, 73 *L. Ed.* 2d 482, 102 *S. Ct.* 2744 (1982), the Supreme Court delineated a two pronged test to determine when private action maybe fairly attributable to the State: (1) the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible, (2) the party charged with the deprivation must be a person who may fairly be said to be a state actor. *Id.* The court may construe that an individual is a state actor because (a) she is a state official, (b) because she has acted together with or has obtained significant aid from state officials, or (c) because her conduct is otherwise chargeable to the State. *Id.* The Complaint satisfies the *Lugar* two-pronged test.

The Complaint suggests that when Ms. Defilippo summoned the plaintiff's supervisor to her home to conduct Union County business, and then derisively questioned Mr. LaPolla's loyalty to the plaintiff with respect to the County Manager's campaign to terminate him, she did so as the Chairperson of the UCIA. Thus, Defendant Defilippo acted to further the discrimination against the plaintiff during the performance of her official duties.

Defendant Defilippo is the Chairperson of the UCIA -- "a public body politic and corporate constituting a political subdivision of the State, established as an instrumentality exercising public and essential governmental function to provide for the public convenience, benefit and welfare...." *N.J.S.A.* 40:37A-55. As a "political subdivision of the state," the UCIA is a state actor. Moreover, since she is the chair of the UCIA, when Charlotte Defilippo acts on behalf of the UCIA, she does so as a state actor.

The facts pled in the complaint further suggest that though Ms. Defilippo was not the plaintiff's employer, she was a political ally of his employer, George Devanney, moreover; in that she attempted to use her political muscle to intimidate the plaintiff's immediate supervisor into acceding to the wishes of the County Manager, Defendant Defilippo aided and abetted Defendant Devanney in his action to unlawfully terminate the plaintiff, as alleged in Count four of the Compliant.[8] (Complaint, ¶¶ 48-49).

Although, defendant officially chairs the UCIA, the facts suggest that defendant exerts her influence well beyond the boundaries of her role as chair of UCIA. (Affidavit, ¶ 15). Defendant would argue that her outside activities come under the purview of her chairpersonship of the UCDC. Nonetheless, since defendant also conducts the business of the UCDC from her home, the plaintiff should be permitted to further develop facts that establish that either defendant was acting as Chair of the UCIA when she pressured Richmond LaPolla to terminate the plaintiff, or that, in that environment, it was impossible for Richmond LaPolla to discern which "hat" the defendant was wearing at the time, if not both. *Printing Mart-Morristown v. Sharp Electronics Corp.*, 116 *N.J.* 739, 746 (1989).

Defendant cites *Johnson v. Knowles*, 113 *F.*3d 1114 (9th Cir. 1997), *cert. denied*, 522 *U.S.* 996 (1997), for the proposition that when a defendant is both a public official and a political official, the first question is whether the defendant's alleged actions relate to public office or to her role in the political party). The plaintiff notes that the defendant tacitly admits through her parenthetical for *Johnson*, *supra*, (Db 7), that in her role as chair of the UCIA, she is a public

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[8] For the purpose of clarity references to "Defendant Devanney," "George Devanney," or the "Union County Manager" will incorporate references to Defendant Board of Chosen Freeholder of Union County as George Devanney was acting in his official capacity as County Manager. Therefore, Defendant Board of Chosen Freeholders of Union County would be held liable under a *respondeat superior* theory.

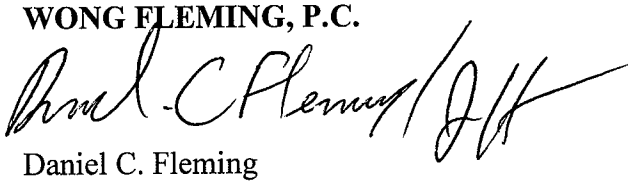
official. Nevertheless, in *Johnson, supra*, the Ninth Circuit Court of Appeals held that although a person may be a public official, they are not acting under the color of state law if the challenged actions are not related to her official office. *Id.* at 1118. Here, however, the Complaint states that Defendant Defilippo summoned the plaintiff's supervisor to her home regarding County business. (Complaint, ¶ 31). The facts suggest that during this meeting Defendant Defilippo was acting as the chair of the UCIA, and not as the chair of the UCDC. It was during this meeting that Defendant Defilippo attempted to coerce the plaintiff's supervisor to terminate the plaintiff in violation of *N.J.S.A.* 10:5-12(e). The plaintiff submits that if Ms. Defilippo were acting as the chair of the UCDC, or as a private citizen, it would have been impossible for Mr. LaPolla to discern that change, not being blessed with clairvoyance. Therefore, this Court must allow the plaintiff the opportunity to conduct discovery that would further substantiate his claim that Defendant Defilippo acted under color of State law. Concomitantly, the Court cannot grant defendant's motion to dismiss.

## CONCLUSION

For the foregoing reasons, this Court should enter an order granting Plaintiff's Motion to Change Venue Pursuant to *R*.4:3-3(a)(2) and not decide defendant's motion to dismiss. In the alternative, this Court should enter an order denying Defendant Defilippo Motion to Dismiss pursuant to *R*. 4:6-2, and awarding the Plaintiff such other relief as the Court deems just and proper.

Respectfully submitted,

**WONG FLEMING, P.C.**



Daniel C. Fleming

cc: All Counsel
File 2186.0001