SEXUAL HARASSMENT IN THE WORKPLACE

Critical Concepts and Procedures

I. INTRODUCTION

A. Sexual harassment is a form of sexual discrimination that violates Title VII of the Federal Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq., and the New Jersey Law Against Discrimination (N.J.S. 10:5-1 to -42). Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67, 106 S.Ct. 2399, 2405-06 (1986); Erickson v. Marsh & McLennan Co., 117 N.J. 539, 555-56 (1990); Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 2283 (1998).

B. Title VII specifically provides that it is an unlawful employment practice for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. §2000e-2(a)(1)

C. The New Jersey Law Against Discrimination "was enacted to protect not only the civil rights of individual aggrieved employees but also to protect the public's strong interest in a discrimination-free workplace." Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 600 (1993). In this respect, N.J.S. 10:5-12 provides that it is an unlawful employment practice, or unlawful discrimination for any employer because of the race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, sex * * * of any individual, * * * to refuse to hire or employ or to bar or to discharge * * * from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment * * *.

II. SEXUAL HARASSMENT—Defined

A. "Sexual harassment" consists of unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, or based on gender, when:

1. submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment
2. submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
3. such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

B. Sexual harassment includes, but is not limited to, the following prohibited behavior:

1. Sexual assault; gross sexual imposition:

    a. Physical assaults of a sexual nature, including sexual assault or criminal sexual contact, or the attempt to commit these offenses; or
    b. Intentional physical conduct which is sexual in nature, such as touching, pinching, patting, grabbing, brushing against another employee's body, or poking another employee's body.

2. Seductive behavior: Inappropriate, unwanted, offensive physical or verbal sexual advances, propositions or other sexual comments, including:

    a. sexually oriented gestures, noises, remarks, jokes, or comments about a person's sexuality or sexual experience directed at or made in the presence of any employee who indicates or has indicated in any way that such conduct in his or her presence is unwelcome; or
    b. subjecting, or threatening to subject, an employee to unwelcome sexual attention or conduct.

3. Sexual bribery: Preferential treatment or promise of preferential treatment to an employee for submitting to sexual conduct, including soliciting or attempting to solicit any employee to engage in sexual activity or other sex-linked behavior for compensation or promise of reward.

4. Sexual coercion: Coercion of sexual activity by threat of punishment.

5. Gender harassment: Generalized gender-based remarks and behavior. Includes **intentionally** making performance of the employee's job more difficult because of the employee's gender.

6. Visual harassment: Sexual or discriminatory displays or publications posted or stored in the workplace, such as

    a. pictures, posters, calendars, graffiti, objects, promotional materials, reading materials, or other materials that are sexually revealing, sexually suggestive, sexually demeaning, or pornographic; or

b. the display of signs or other materials purporting to segregate an employee by sex in any area of the workplace, other than restrooms and similar semi-private locker/changing rooms.

7. Retaliation for sexual harassment complaints, such as

a. disciplining, changing work assignments of, providing inaccurate work information to, or refusing to cooperate or discuss work-related matters with any employee because that employee has complained about or resisted harassment, discrimination or retaliation; or
b. intentionally pressuring another person to give false information about an alleged incident of sexual harassment for the purpose of covering up such incident.

III. THE CATEGORIES OF SEXUAL HARASSMENT

A. State and federal case law generally recognize two broad categories of sexual harassment. See e.g., Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257 (1998); Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 601 (1993). These two categories are:

1. Quid pro quo sexual harassment (threats which are carried out):

a. Where the submission to, or rejection of, unwelcome sexual conduct or sexual demands is made a condition of employment.
b. This is where the employee is forced to grant sexual favors in order to obtain, maintain, or improve employment status.
c. It involves an implicit or explicit threat that if the employee does not accede to the sexual demands, he or she will lose his or her job, receive unfavorable performance reviews, be passed over for promotion, or suffer other adverse employment consequences.

2. Hostile work environment sexual harassment (offensive conduct in general):

a. Contains the following four elements. The conduct:

(1) is unwelcome
(2) is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment;
(3) is perceived by the victim as hostile or abusive; and

(4) creates an environment that a reasonable woman/man would find intimidating, hostile or abusive.

b. The New Jersey Supreme Court has held that a victim of actionable hostile workplace sexual harassment states a cause of action in court when the complained of conduct:

(1) would not have occurred but for the employee's gender; and it was
(2) severe or pervasive enough to make a
(3) reasonable person of the same gender to believe that
(4) the conditions of employment are altered and the working environment is hostile or abusive.

Note: The complainant need not personally have been the target of each or any instance of offensive or harassing conduct. Evidence of sexual harassment directed at others in the workplace is relevant to both the character of the work environment and its effect on the complainant. Lehmann v. Toys 'R' Us, Inc., 132 N.J. at 603-04, 611, 614). Thus, a victim may present such "other harassment" evidence, even if the victim was not a witness to it, to show an employer's "motives, attitudes, and intentions." Mancini v. Township of Teaneck, 179 N.J. 425, 434 (2004) (Mancini IV).

The "gender specific" standard (rather than the "reasonable person" standard) is used to respect the difference between male and female perspectives on sexual harassment. Lehmann at 614.

Where "a hostile work environment claim involves allegations of harassment based on religious faith or ancestry, the inquiry is whether a reasonable person of plaintiff's religion or ancestry would consider the workplace acts and comments made to, or in the presence of, plaintiff to be

sufficiently severe or pervasive to alter the conditions of employment and create a hostile working environment." Cutler v. Dorn, 196 N.J. 419, 430 (2008)

c. A hostile work environment is created when individual employees are subjected to suggestive comments, photographs, jokes, obscene gestures, or unwanted physical contacts. It includes visual harassment, such as graffiti written on men's bathroom walls about a female employee, or pervasive displays of nude or pornographic pictures.

d. There is no requirement that the harassing conduct be motivated by the harasser's sexual desires in order to support a claim of discrimination on the basis of sex. Thus, a case for sexual harassment in the workplace may also be made where the harasser and the harassed employee are of the same sex. See Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 82, 118 S.Ct. 998, 1003 (1998) ("sexual discrimination consisting of same-sex sexual harassment is actionable under Title VII).

e. In this area, it is important to recognize that personality conflicts, even severe ones, do not equate to a hostile work environment "simply because the conflict is between a male and female employee." The aggrieved party must demonstrate that the hostility directed toward him or her was "gender motivated." Herman v. Coastal Corp., 348 N.J.Super. 1, 20-21 (App.Div.2002).

B. Other Forms of Sexual Harassment

1. Sexual favoritism. This type of sexual harassment occurs when an agency allows intimate relationships to continue to exist between supervisors and direct subordinates. In a similar vein, an employer may be liable when employees who submit to sexual favors are rewarded while others who refuse are denied promotions or benefits. It has been held that a female employee who wasn't asked for sexual favors while others were was a victim of sexual harassment.

2. "Indirect" or "third party" sexual harassment occurs when one employee witnesses the sexual harassment of another on a repetitive basis, or when an employee is not directly harassed, but the harassment has the effect of adversely altering the terms and conditions of employment.

   a. For example, an employee may be able to claim that he or she was denied job benefits due to the unlawful quid pro quo sexual harassment or sexual coercion of a favored employee.

   b. See also Vinson v. Taylor, 753 F.2d 141, 146 (D.C.Cir. 1985) ("Even a woman who was never herself the object of harassment [may state a claim] if she were forced to work in an atmosphere where such harassment was pervasive."); Hall v. Gus Constr., 842 F.2d 1010, 1015 (8th Cir. 1988) (although plaintiff "was not subjected to sexual propositions and offensive touching, evidence of sexual harassment directed at employees other than

the plaintiff is relevant to show a hostile work environment.") (both cases quoted with approval by the New Jersey Supreme Court in Lehmann).

IV. RESPONSIBILITIES

A. Employees

1. Employees subjected to sexual harassment are encouraged, whether directly or through a third party, to notify the alleged harasser that the behavior in question is offensive and unwelcome. However, failure to do so does not preclude filing a complaint.

2. Employees subjected to sexual harassment should promptly report all such incidents.

3. Employees who observe any behavior by another employee which constitutes sexual harassment must promptly report the incident.

B. Supervisors and Managers should make proactive efforts to maintain a work environment that is free from any form of prohibited harassment or discrimination.

Supervisors and managers are required to ensure adherence to and compliance with the department's/agency's policy governing the prohibition of sexual harassment in the workplace.

1. Upon becoming aware of possible sexual harassment, supervisors must:

   a. Take appropriate immediate action to stop the harassing behavior;

   b. Inform the employee of his or her right to bring a discrimination complaint; and

   c. Refer the matter to the individual or unit (e.g., Internal Affairs) responsible for receiving and investigating such complaints.

2. Supervisors are the key facilitators in the ongoing battle against sexual harassment in the law enforcement workplace.

   a. As representatives of management, first-line supervisors are expected to be proactive in their effort to ensure a harassment-free work environment.

b. As observed by the courts, and echoed by the International Association of Chiefs of Police:

(1) Supervisors have "a unique role in shaping the work environment." Herman v. Coastal Corp., 348 N.J. Super. 1, 25 (App.Div.2002). Through their own actions and words, supervisors function as role models for their subordinates. They help set the moral tone. Consequently, they must never initiate or participate in sexual harassment. On the contrary, supervisors must be prepared to stop the behavior of others that can be perceived as harassment and to take immediate steps to stop further occurrences. As stated by the court in Herman, "[p]art of a supervisor's responsibilities is the duty to prevent, avoid, and rectify invidious harassment in the workplace." Id. at 25. Even the tacit acceptance of sexually inappropriate behavior sends the message that sexual harassment will be tolerated regardless of formal departmental policy.

(2) Supervisors have an affirmative duty to deal effectively with and to report all known or reported cases of sexual harassment to the unit responsible for investigating employee misconduct. Failure to take appropriate action or failure to report incidents of harassment as required by department policy is normally grounds for disciplinary action. This is essential if management wants to ensure the integrity of the anti-harassment effort of all levels of the process.

(3) Each supervisor has a responsibility to reinforce the department's anti-harassment training and behavior modification efforts by actively counseling subordinates on the topic of sexual harassment in the workplace.

(4) Supervisors must make themselves accessible to victims and ensure that their complaints will be handled in a proactive yet discreet and confidential manner. In situations in which allegations of sexual harassment have been lodged, confirmed, and resolved, the supervisor should continue to interact with the parties in order to ensure that the offensive behavior does not resume. The supervisor should also work with the victim to find ways of making the workplace more comfortable for all of the parties concerned.

C. The Department/Agency

1. Establish and disseminate an anti-harassment policy. To prevent liability from charges of sexual harassment, police departments/law enforcement agencies must

establish and disseminate "a well-publicized and enforced anti-harassment" policy.

See Payton v. N.J. Turnpike Auth., 148 N.J. 524, 535-38 (1997) (stressing the importance of an effective anti-sexual harassment policy); Cavuoti v. N.J. Transit Corp., 161 N.J. 107, 121 (1999) ("employers who promulgate and support an active, anti-harassment policy" may be "afforded a form of safe haven" from vicarious liability). See also Gaines v. Bellino, 173 N.J. 301, 319, 320 (employer may "assert the existence of an effective anti-sexual harassment policy as an affirmative defense," but the policy must be more than "mere words"; it must be "backed up by consistent practice").

a. The anti-harassment policy should include, at a minimum, the following ten elements:

(1) A strong policy statement declaring that discrimination or sexual harassment will not be tolerated, and encouraging employees to treat each other with professionalism, dignity and respect.

(2) A definition of sexual harassment and an identification of the types of conduct that may constitute harassment in general, sexual harassment in particular, and unlawful discrimination.

(3) A statement that non-compliance with the policy will result in appropriate disciplinary action.

(4) An explanation of the procedures and identification of the forums for instituting a discrimination or sexual harassment complaint.

(5) An effective formal and informal complaint structure.

(6) A requirement that all incidents of discrimination or sexual harassment be reported through appropriate channels.

(7) Assurance that all complaints or other evidence of discrimination or sexual harassment will be promptly and thoroughly investigated, and to the extent possible, maintained confidential. (The employer can face severe adverse consequences by failing to conduct thorough investigations into complaints of sexual harassment.)

(8) A clear prohibition against retaliation.

(9) Mandatory training for all managers and supervisors.

(10) An effective sensing or monitoring mechanism to ensure that the policy is properly disseminated and enforced, and to determine if the policy and procedures are adequate and trusted.

b. Department/Agency liability

(1) The department/agency will be directly and strictly liable for all equitable damages and relief in cases where supervisors engage in the sexual harassment of employees.

(2) In addition, the department/agency may be vicariously liable to the victimized employee for damages when a supervisor with authority to control the work environment creates a hostile work environment. Gaines v. Bellino, 173 N.J. 301, 312 (2002). Whether an offending employee is, in fact, a "supervisor" of the victimized employee depends on a variety of factors, including whether the individual has authority to undertake or recommend tangible employment decisions affecting the victim, such as the power to fire, promote, demote, reassign, influence compensation, and/or direct job functions or daily work activities. Entrot v. BASF Corp., 359 N.J.Super. 162, 180-81 (App.Div. 2003). In this regard, the definition of "supervisor" also turns on whether the individual was "authorized to direct another employee's day-to-day work activities" as a supervisor, "even if that individual does not have the authority to undertake or recommend tangible job decisions." Aguas v. State, 220 N.J. 494, 527-28 (2015).

(3) Liability may also be imposed where "upper management knew or should have known of the harassment" and "failed to take effective, remedial measures to stop it." Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 623 (1993); Mancini v. Township of Teaneck, 349 N.J.Super. 527, 561 (App.Div.2002). Constructive knowledge—the "should have known" aspect of the existence of sexual harassment in the workplace—will be found in two types of circumstances: (1) "where an employee provides management level personnel with enough information to raise a probability of sexual harassment in the mind of a reasonable employer," and (2) "where the harassment is so pervasive and open that a reasonable employer would have had to be aware of it." Kunin v. Sears Roebuck & Co., 175 F.3d 289, 294-95 (3rd Cir. 1999). See also

Mancini at 561 (citing examples of sexual harassment so open and pervasive that if management was unaware of it, "one has to wonder how well management is doing their job"); Hurley v. Atlantic City Police Department, 174 F.3d 95, 111 (3rd Cir. 1999) (evidence of "other acts of harassment," directed at other employees "is extremely probative" as to whether the police department "knew or should have known that sexual harassment was occurring despite the formal existence of an anti-harassment policy").

(4) Department administrators may also be liable for punitive damages if the victim can establish, by clear and convincing evidence, that the employer's conduct was "egregious," in that upper management either participated directly in the sexual harassment, or showed "willful indifference." Aguas v. State, supra at 531.

(5) An employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid the harm otherwise." Aguas v. State, 220 N.J. 494, 499 (2015) (adopting the standard set forth by the United States Supreme Court in Burlington Industries v. Ellerth, 524 U.S. 742, 765, 118 S.Ct. 2257, 2270 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775, 807-08, 118 S.Ct. 2275, 2292-93 (1998)). "No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." Id.

(6) Clearly, "an employer's implementation and enforcement of an effective anti-harassment policy, or its failure to maintain such a policy, is a critical factor in determining" the agency's liability. See Aguas v. State, supra at 499. See also Herman v. Coastal Corp., 348 N.J.Super. 1, 29 (App.Div.2002), where a company successfully defended a sexual harassment complaint with, among other things, a policy against sexual harassment which "was publicized and distributed to every employee, and reaffirmed every year by Employee Relations through memos and workshops."

V. REPORTING SEXUAL HARASSMENT

A. There are various ways in which employees may file sexual harassment or discrimination complaints within or outside the department/agency, either concurrently or sequentially. Complaints may be filed with:

1. The Internal Affairs Unit/Officer

2. The employee's direct supervisor

3. Other supervisors/managers in the employee's chain of command

4. Officials outside the employee's chain of command

a. The complainant should be permitted to initiate a sexual harassment/discrimination complaint outside his or her direct chain of command, up to the chief executive officer, if filing the complaint using the normal chain of command or the Internal Affairs Unit would pose a conflict of interest by virtue of the alleged harasser having any involvement in the intake, investigative or decision-making process.

b. The complainant may also initiate a sexual harassment or other discrimination complaint directly with the Division of Equal Employment Opportunity and Affirmative Action, Department of Personnel, if filing the complaint with a member of the Department would pose a conflict of interest by virtue of the alleged harasser having any involvement in the intake, investigative or decision-making process.

B. Other Forums include filing the complaint directly with the NJ Superior Court (claims of violations of the NJ Law Against Discrimination); the Federal District Court (claims of violations of Title VII or 42 U.S.C. §1983); the Division on Civil Rights in the NJ Department of Law & Public Safety; the United States Equal Employment Opportunity Commission (EEOC); and the Department of Personnel, Merit System Board (if applicable).

C. Time limitations. A sexual harassment complaint brought under the New Jersey Law Against Discrimination, N.J.S. 10:5-1 to -49 (LAD) must be filed within 2 years after the cause of action has accrued. N.J.S. 2A:14-2; Montells v. Haynes, 133 N.J. 282, 294-95 (1993). See also Shepherd v. Hunterdon Center, 174 N.J. 1, 17 (2002) ("The statute of limitations for claims arising under the LAD is two

years."). A victim of sexual harassment or discrimination may also file a complaint directly with an external agency that investigates such complaints. In this regard, a complaint alleging a violation of State law must be filed with the New Jersey Division on Civil Rights within 180 days of the alleged violation. Under federal law, a complaint under Title VII of the federal Civil Rights Act must be filed with the United States Equal Employment Opportunity Commission (EEOC) within 300 days of the alleged violation. See 42 U.S.C. §2000e-5(e)(1). See also National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 S.Ct. 2061, 2070 (2002)).

1. The "continuing violation" doctrine. Both the United States and New Jersey Supreme Courts recognize an exception to the statute of limitations known as the "continuing violation" doctrine. Under that doctrine, a plaintiff may pursue a claim for harassment or other discriminatory conduct "if he or she can demonstrate that each asserted act by a defendant is a part of a pattern and at least one of those acts occurred within the statutory limitations period." Shepherd at 6-7. As stated in Wilson v. Wal-Mart Stores, 158 N.J. 263, 272 (1999), when an individual is subjected to a continual, cumulative pattern of harassment or discrimination, "the statute of limitations does not begin to run until the wrongful action ceases." See also Morgan, 122 S.Ct. at 2074; Mancini v. Township of Teaneck, 349 N.J.Super. 527, 556 (App.Div.2002) (the "continuing violation" doctrine is "an equitable exception to the statute of limitations"). Thus, by definition, "the continuing violation doctrine exposes a defendant to liability for acts that, standing alone, might have occurred outside the limitations period." Mancini v. Township of Teaneck, 179 N.J. 425, 431 (2004) (Mancini IV).

2. In analyzing questions regarding the statute of limitations, courts have differentiated between "discrete" discriminatory acts and "hostile work environment" claims.

    a. "Discrete acts," such as termination, failure to promote, denial of transfer, refusal to hire, and the like, are easy to identify and, as such, the act "occurs" on the day that it happens. Shepherd at 19; Morgan at 2073.

    b. On the other hand, "hostile work environment" claims " 'are different in kind from discrete acts. Their very nature involves repeated conduct. The "unlawful employment practice" therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable

on its own. Such claims are based on the cumulative effect of individual acts.' " Shepherd at 19 (quoting Morgan at 2073) (internal citations omitted).

(1) Accordingly, it does not matter " 'that some of the component acts of the hostile work environment fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.' " Shepherd at 20, 21 (quoting Morgan at 2074, 2077).

(2) See also Caggiano v. Fontoura, 354 N.J.Super. 111, 115 (App.Div. 2002) (A "complaint alleging a hostile work environment created by a series of acts and incidents, all but the last of which occurred more than two years before plaintiff filed her complaint, should be deemed timely as a continuing violation."). In Fontoura, the last act alleged to have been committed against the plaintiff, a sheriff's officer, was the following comment made in the plaintiff's presence by the Sheriff at a sexual harassment training seminar: "[R]emember, guys, harass is one word, ha, ha, ha." Id. at 121, 133.

(3) In Mancini v. Township of Teaneck, 349 N.J.Super. 527, 559 (App.Div. 2002), the court rejected the Township's argument that the plaintiff failed to assert a viable continuing violation because "she linked together different types of acts by different persons with different subject matters." According to the court, Mancini clearly established a continuing violation for she "was subjected to a continuing escalating pattern of gender-based harassment by multiple individuals in the Department. The subject matter, sexually explicit cartoons or photographs, suggestions of sexual acts, or sexually harassing behavior by other officers, all constituted sexual harassment." Id. Thus, the harassment need not involve the same actor or the same exact form of conduct. Rather, "the focus is the work atmosphere as a whole," and it does not matter "that the collection of incidents comprising the claim were committed by a variety of individuals." West v. Philadelphia Electric Co., 45 F.3d 744, 756-57 (3rd Cir. 1995).

c. A victim with knowledge of his or her claim should not, however, unreasonably delay in filing a complaint. Particularly in cases involving continuing violations, which may involve claims extending over long

periods of time, an employer may raise a "laches" defense, which bars a victim from maintaining a lawsuit if he or she "unreasonably delays in filing a suit and as a result harms the defendant." Morgan at 121-22, 122 S.Ct. at 2076-77.

(1) The defense of laches requires "proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." Id. See also Shepherd at 23 (an employer may have a "laches" defense when "an aggrieved party, with knowledge of a claim based on non-discrete acts, waits a considerable period of time before filing suit"). The defense of laches requires more than a showing of mere delay or mere lapse of time. "There must be delay for a length of time which, unexplained and unexcused, is unreasonable under the circumstances and has been prejudicial to the other party." Mancini v. Township of Teaneck, 179 N.J. 425, 437 (2004) (Mancini IV).

(2) "Procedurally, to maintain a laches defense against a plaintiff's delayed claim, a defendant must assert the defense in a diligent fashion. In other words, diligence is a two-way street." Mancini IV at 433.

(3) Accordingly, the availability of a laches defense encourages victims to pursue their claims diligently, which creates a fairer process for all. "Left unchallenged, sexual harassment not only injures individual victims but also denigrates the entire workplace. From that perspective, all innocent employees benefit when a timely complaint is brought to eradicate discriminatory employment practices." Id. at 435.

D. The "constructive discharge" doctrine. The "constructive discharge" doctrine was originally developed to address situations in which employers coerced employees to resign, often by creating intolerable working conditions. Under this doctrine, an employee's reasonable decision to resign because of "unendurable working conditions" is equated "to a formal discharge for remedial purposes." Pennsylvania State Police v. Suders, 542 U.S. 129, 124 S.Ct. 2342 (2004). The relevant inquiry is objective: "Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" Id., 124 S.Ct. at 2351. As stated by the Equal Employment Opportunity Commission (EEOC), an employer is "responsible for a constructive discharge in the same manner that it is responsible for the outright discriminatory discharge of a charging party." EEOC Compliance Manual, 612:0006 (2002).

1. In Suders, the Court held that an employer may be liable for "constructive discharge" resulting from severe sexual harassment or "hostile work environment" attributable to either a co-worker's conduct, unofficial supervisory conduct, or official employer acts.

2. Generally, for an atmosphere of sexual harassment or hostile work environment to be actionable, the offending behavior must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. "A hostile-environment constructive discharge claim entails something more: A plaintiff who advances such a compound claim must show working conditions so intolerable that a reasonable person would have felt compelled to resign." Id., 124 S.Ct. at 2354. In other words, to establish a case for "constructive discharge," a victim of severe sexual harassment "must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response." Id. at 2347.

3. "An employer may defend against such a claim by showing both (1) that it had installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and (2) that the plaintiff unreasonably failed to avail herself of that employer-provided preventive or remedial apparatus. This affirmative defense will not be available to the employer, however, if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions." Id.

VI. PROTECTION OF ALL PARTIES

A. All complaints must be addressed promptly and investigated thoroughly, and all parties to the complaint shall be afforded all of the protection as in any internal affairs investigation. To the extent possible, the sexual harassment investigative proceedings should be conducted in a manner which protects the confidentiality of the complainant, the alleged harasser and all witnesses.

1. All parties involved in the proceedings will be advised to maintain strict confidentiality, from the initial meeting to the final decision of the organization, to safeguard the privacy and reputation of all involved.

2. The official investigating the complaint of sexual harassment should explain to the complainant that while the information being reported is sensitive, the

department/agency will need to know all the relevant facts to ensure a proper and complete investigation.

3. The official investigating the complaint should also refrain from promising absolute confidentiality, for that will not be possible.

DRUG OFFENDER RESTRAINING ORDER ACT OF 1999, AS AMENDED AND SUPPLEMENTED BY *P.L.* 2001, C. 365 – FORMS FOR USE BY LAW ENFORCEMENT AGENCIES

ATTORNEY GENERAL LAW ENFORCEMENT DIRECTIVE NO. 2002-1

Introduction

As you know, the Drug Offender Restraining Order Act of 1999 has been amended by P.L. 2001, c. 365, effective May 7, 2002. A copy of the amended Act is enclosed herewith. Also enclosed are two forms for use by law enforcement agencies in implementing this Act. These forms, which are discussed below, may be modified in order to include pre-printed county or agency specific information, or to allow your agency to print color-coded multi-part versions of these forms. However, in order to maintain uniformity, the substance of the forms should not be altered.

It is anticipated that the Administrative Office of the Courts will also promulgate standard Court Drug Offender Restraining Order forms for use with this Act.

Enclosed Forms

1. Certification of Offense Location and Application for Drug Offender Restraining Order

The Act has been amended to require that a law enforcement officer or the prosecuting attorney apply for a restraining order. N.J.S.A. 2C:35-5.7a., b., c., and d; see also N.J.S.A. 2C:35-5.9. This may be accomplished by filing the enclosed "Certification of Offense Location and Application for Drug Offender Restraining Order." This one-page form has been designed for use in both juvenile and adult cases. The submission of this form constitutes the required application for a restraining order under the Act. The form includes check-off paragraphs that allow a law enforcement officer to request either the presumed 500-foot buffer zone, or a different buffer zone to be described in the form. Although the form contains citations to all of the offenses covered by the Act, it should be noted that juveniles may not be charged with violations of either N.J.S.A. 2C:35-6 (employing a juvenile in a drug distribution scheme) or N.J.S.A. 2C:35-8 (distribution to person under age 18) since an element of each offense is that the person charged must be at least 18 years of age.

A new section, to be codified as N.J.S.A. 2C:35-5.10, gives specific authority to law enforcement officers to not seek a restraining order if the defendant is charged with an offense resulting from the stop of a motor vehicle, or if the defendant was using public

transportation. This is in keeping with the amended definition of a "place" which now excludes public rail, bus or air transportation lines and limited access highways from the definition of a "place." N.J.S.A. 2C:35- 5.6b. Law enforcement officers have also been given the authority to forego seeking a restraining order if the provisions of N.J.S.A. 2C:35-5.7e (1) "legitimate need" or (2) "serious injustice" are applicable.

2. Law Enforcement Notice of Restraining Order

The second new form is the "Law Enforcement Notice of Restraining Order." This form is to be used only in those cases in which a person is charged as a juvenile and released without being detained. N.J.S.A. 2C:35-5.7d. Unless the juvenile applies to stay or modify the Order, the Family Court will enter a Drug Offender Restraining Order on the first court day following the release of the juvenile. The first court day following the release of the juvenile must be filled in as the effective date of the order. The acknowledgment at the end of the Order should be signed by both the juvenile and a parent or guardian.

Other Amendments

N.J.S.A. 2C:35-5.6b has been amended to redefine the term "place" so as to exclude public rail, bus or air transportation lines and limited access highways.

The Act has been amended to add a "buffer zone." The "buffer zone" is presumed to be 500 feet pursuant to N.J.S.A. 2C:35-5.7f, unless the court determines otherwise.

N.J.S.A. 2C:35-5.7b has been amended to specifically apply the law to those instances where a summons is issued and requires that the restraining order be issued at the defendant's first appearance.

N.J.S.A. 2C:35-5.7g has been amended to authorize various forms of posting, publication or distribution of an order or an equivalent notice.

N.J.S.A. 2C:35-5.7h specifically allows for the order issued upon conviction or adjudication of delinquency to be memorialized in the judgment of conviction or a separate order. The subsection further incorporates the mandate of a "buffer zone" as noted in subsection f. It also allows, in addition to the pre-disposition distributions authorized in subsection g., for a law enforcement agency to post, publish and distribute a photograph of the defendant or juvenile upon conviction or adjudication of delinquency.

N.J.S.A. 2C:35-5.7j requires that upon the entry of a sentencing or dispositional order, the court must forward a copy of the same to the law enforcement agency that made the arrest as well as to the county prosecutor.

N.J.S.A. 2C:35-5.7k mandates that any applications to stay or modify a restraining order be made in the Superior Court and that the court must notify the county prosecutor of such applications.

Conclusion

Any questions regarding procedures under the Act should be directed to your County Prosecutor's Office. Inquiries from County Prosecutor's Offices should be directed to DAG Thomas J. Fisken, Prosecutors and Police Bureau, at (609) 984-2814.

Certification of Offense Location and Application
for Drug Offender Restraining Order
(Juvenile or Adult Offenders)
(*N.J.S.A.* 2C:35-5.4 *et seq*.)

State of New Jersey Complaint # _____
v. (or in the Interest of) Police Case # _____
_____ CDR # _____
(Defendant or Juvenile)

I,_____, a member of _____ hereby certify that the offense charged against defendant/juvenile _____ described in Complaint No_____, Police Case No. _____ occurred at the following location(s):

I hereby request that the court issue an Order prohibiting the defendant/juvenile, who is charged with any of the following:1 *N.J.S.A.* 2C:35-3, *N.J.S.A.* 2C:35-4, *N.J.S.A.* 2C:35-4.1, *N.J.S.A.* 2C:35-5,

N.J.S.A. 2C:35-5.2 or *N.J.S.A.* 2C:35-5.3, *N.J.S.A.* 2C:35-6, *N.J.S.A.* 2C:35-7 or *N.J.S.A.* 2C:35-7.1,

N.J.S.A. 2C:35-8, N.J.S.2C:35-9, or the unlawful possession or use of an assault firearm as defined in subsection w. of *N.J.S.A.* 2C:39-1, from entering: *(check one)*

_____ 1. the premises, residence, business establishment, location or specified area set forth above, and an additional buffer zone of 500 feet surrounding the area

OR

_____ 2. the premises, residence, business establishment, location or specified area set forth above, and an additional buffer zone as described below:

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Date:_____ Signature: _____

Print Name:_____

[1]Juveniles may not be charged with violations of either *N.J.S.A.* 2C:35-6 or *N.J.S.A.* 2C:35-8 since an element of each offense is that the person charged must be at least 18 years of age

LAW ENFORCEMENT
NOTICE OF RESTRAINING ORDER

EFFECTIVE_____DAY OF_____, _____, a Restraining Order will be entered by the Court, pursuant to the *Drug Offender Restraining Order Act of 1999*. Unless you apply to modify or stay the Order, it will read as follows:

SUPERIOR COURT OF NEW JERSEY - COUNTY
CHANCERY DIVISION, FAMILY PART

FJ -

State of New Jersey
In the Interest of

RESTRAINING ORDER

_____
(Juvenile)

Police Department:_____ Police Case No.: _____

Offense Date: _____

Juvenile,_____, having been charged in the above complaint with

o violation(s) of: N.J.S.A. 2C:35-3, N.J.S.A. 2C:35-4, N.J.S.A. 2C:35-5, N.J.S.A. 2C:35-9, N.J.S.A. 2C:35-4.1, N.J.S.A. 2C:35-5.2, N.J.S.A. 2C:35-5.3, N.J.S.A. 2C:35-7, or N.J.S.A. 2C:35-7.1,

or

o Unlawful possession or use of an assault firearm as defined in N.J.S.A. 2C:39-1w

A law enforcement officer or prosecuting attorney having requested an Order and having submitted a certification describing the location of the offense,

It is on this_____day of_____, 20___ hereby Ordered, pursuant to the ***Drug Offender Restraining Order Act of 1999, as amended and supplemented by P.L. 2001, c. 365***, (the Act) that the juvenile is prohibited and restrained from entering and/or returning to the place and returning to within 500 feet of the place or other surrounding buffer zone(s), as described below:

_____
_____
_____
_____

Special Conditions: _____

o Map Attached

LIMITED ACCESS TO LOCATION

It is further Ordered that the juvenile is permitted to return to the following place to retrieve the juvenile's personal belongings and effects, in accordance with the time and duration restrictions indicated below:

o Police Supervision Required

DURATION OF ORDER

It is Ordered that if the prosecutor administratively dismisses or downgrades the charge supporting issuance of this Order, this Order is vacated effective on the date of the administrative dismissal or downgrade of the complaint by the prosecutor. It is further Ordered that this Order shall remain in effect until the case has been adjudicated or dismissed, or for not less than 2 years from the date of the alleged offense, whichever is less.

Notice to Juvenile:

(1) Violation of the provisions of this Order constitutes criminal contempt pursuant to *N.J.S.A.* 2C:29-9 and may result in your arrest and prosecution and can also result in a violation of probation. This may result in your detention. All applications to stay or modify this Order shall be made only in the Superior Court.

(2) If you want to make an application to stay or modify this Order, you must notify the Superior Court, Family Part and a hearing will be scheduled. Contact the Superior Court, Family Part_____, Team Leader at ( ) - , or , Team Leader at ( ) - .

(3) The *Drug Offender Restraining Order Act of 1999* permits law enforcement to post a copy of this Order or an equivalent notice in appropriate locations for the purpose of informing the public, to publish it in newspapers and to distribute it. After an adjudication of delinquency, the notice may include a photograph.

I acknowledge that I received a copy of this Notice of Restraining Order. I understand that a Restraining Order containing the above terms and conditions will issue unless a Superior Court judge orders further modifications.

_____ _____

Juvenile's Name (Print) Juvenile's Signature and Date

_____ _____

Juvenile's Parent/Guardian's Name (Print) Signature and Date

Juvenile's Parent/Guardian's

_____

Name and Title of Person Issuing Notice and Date

CHAPTER 365

AN ACT concerning restraining orders for certain offenders, amending and supplementing P.L.1999, c.334 and making an appropriation.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Section 3 of P.L.1999, c. 334 (C.2C:35-5.6) is amended to read as follows:
C.2C:35-5.6 Definitions relative to removal, restraint of certain offenders.

3. Definitions.

As used in this act:

a. **"Person"** means any person charged with or convicted of a criminal offense or any juvenile charged with delinquency or adjudicated delinquent for an act which, if committed by an adult, would be a criminal offense.

b. **"Place"** includes any premises, residence, business establishment, location or specified area including all buildings and all appurtenant land, in which or at which a criminal offense occurred or is alleged to have occurred or is affected by the criminal offense with which the person is charged. "Place" does not include public rail, bus or air transportation lines or limited access highways which do not allow pedestrian access.

c. **"Criminal offense"** means:

(1) any of the following: N.J.S.2C:35-3, N.J.S.2C:35-4, N.J.S.2C:35-5, N.J.S.2C:35-6, N.J.S.2C:35-8, N.J.S.2C:35-9, P.L.1997, c.185 (C.2C:35-4.1), sections 3 or 5 of P.L.1997, c.194 (C.2C:35-5.2 or C.2C:35-5.3), P.L.1987, c.101 (C.2C:35-7) or P.L.1997, c.327 (C.2C:35- 7.1), or

(2) the unlawful possession or use of an assault firearm as defined in subsection w. of N.J.S.2C:39-1.

2. Section 4 of P.L.1999, c.334 (C.2C:35-5.7) is amended to read as follows:
C.2C:35-5.7 Issuance of order by court.

Issuance of order by court.

4. a. When a person is charged with a criminal offense on a warrant and the person is released from custody before trial on bail or personal recognizance, the court, upon application of a law enforcement officer or prosecuting attorney pursuant to section 3 of P.L. 2001, c.365 (C.2C:35-5.9) and except as provided in subsection e. of this section, shall as a condition of release issue an order prohibiting the person from entering any place defined by subsection b. of section 3 of P.L.1999, c.334 (C.2C:35-5.6), including a

buffer zone surrounding the place or modifications as provided by subsection f. of this section.

b. When a person is charged with a criminal offense on a summons, the court, upon application of a law enforcement officer or prosecuting attorney pursuant to section 3 of P.L. 2001, c.365 (C.2C:35-5.9) and except as provided in subsection e. of this section, shall, at the time of the defendant's first appearance, issue an order prohibiting the person from entering any place defined by subsection b. of section 3 of P.L.1999, c.334 (C.2C:35-5.6), including a buffer zone surrounding the place or modifications as provided by subsection f. of this section.

c. When a person is charged with a criminal offense on a juvenile delinquency complaint and is released from custody at a detention hearing pursuant to section 19 of P.L.1982, c.77 (C.2A:4A-38), the court, upon application of a law enforcement officer or prosecuting attorney pursuant to section 3 of P.L. 2001, c.365 (C.2C:35-5.9) and except as provided in subsection e. of this section, shall issue an order prohibiting the person from entering any place defined by subsection b. of section 3 of P.L.1999, c.334 (C.2C:35-5.6), including a buffer zone surrounding the place or modifications as provided by subsection f. of this section.

d. When a person is charged with a criminal offense on a juvenile delinquency complaint and is released without being detained pursuant to section 15 or 16 of P.L.1982, c.77 (C.2A:4A:34 or C.2A:4A-35), the law enforcement officer or prosecuting attorney shall prepare an application pursuant to section 3 of P.L. 2001, c.365 (C.2C:35-5.9) for filing on the next court day. The law enforcement officer releasing the juvenile shall serve the juvenile and his parent or guardian with written notice that an order shall be issued by the Family Part of the Superior Court on the next court day prohibiting the juvenile from entering any place defined by subsection b. of section 3 of P.L.1999, c.334 (C.2C:35-5.6), including a buffer zone surrounding the place or modifications as provided by subsection f. of this section. The court shall issue such order on the first court day following the release of the juvenile. If the restraints contained in the court order differ from the restraints contained in the notice, the order shall not be effective until the third court day following the issuance of the order. The juvenile may apply to the court to stay or modify the order on the grounds set forth in subsection e. of this section.

e. The court may forego issuing a restraining order for which application has been made pursuant to section 3 of P.L. 2001, c.365 (C.2C:35-5.9) only if the defendant establishes by clear and convincing evidence that:

(1) the defendant lawfully resides at or has legitimate business on or near the place, or otherwise legitimately needs to enter the place. In such an event, the court shall not issue an order pursuant to this section unless the court is clearly convinced that the need

to bar the person from the place in order to protect the public safety and the rights, safety and health of the residents and persons working in the place outweighs the person's interest in returning to the place. If the balance of the interests of the person and the public so warrants, the court may issue an order imposing conditions upon the person's entry at, upon or near the place; or

(2) the issuance of an order would cause undue hardship to innocent persons and would constitute a serious injustice which overrides the need to protect the rights, safety and health of persons residing in or having business in the place.

i. A restraining order issued pursuant to subsection a., b., c., d. or h. of this section shall describe the place from which the person has been barred and any conditions upon the person's entry into the place, with sufficient specificity to enable the person to guide his conduct accordingly and to enable a law enforcement officer to enforce the order. The order shall also prohibit the person from entering an area of up to 500 feet surrounding the place, unless the court rules that a different buffer zone would better effectuate the purposes of this act. In the discretion of the court, the order may contain modifications to permit the person to enter the area during specified times for specified purposes, such as attending school during regular school hours. When appropriate, the court may append to the order a map depicting the place. The person shall be given a copy of the restraining order and any appended map and shall acknowledge in writing the receipt thereof.

ii. (1) The court shall provide notice of the restraining order to the local law enforcement agency where the arrest occurred and to the county prosecutor.

(3) Notwithstanding the provisions of section 1 of P.L.1982, c.79 (C.2A:4A-60), prior to the person's conviction or adjudication of delinquency for a criminal offense, the local law enforcement agency may post a copy of any orders issued pursuant to this section, or an equivalent notice containing the terms of the order, upon one or more of the principal entrances of the place or in any other conspicuous location. Such posting shall be for the purpose of informing the public, and the failure to post a copy of the order shall in no way excuse any violation of the order.

(4) Notwithstanding the provisions of section 1 of P.L.1982, c.79 (C.2A:4A-60), prior to the person's conviction or adjudication of delinquency for a criminal offense, any law enforcement agency may publish a copy of any orders issued pursuant to this section, or an equivalent notice containing the terms of the order, in a newspaper circulating in the area of the restraining order. Such publication shall be for the purpose of informing the public, and the failure to publish a copy of the order shall in no way excuse any violation of the order.

(5) Notwithstanding the provisions of section 1 of P.L.1982, c.79 (C.2A:4A-60), prior to the person's conviction or adjudication of delinquency for a criminal offense, any law enforcement agency may distribute copies of any orders issued pursuant to this section, or an equivalent notice containing the terms of the order, to residents or businesses located within the area delineated in the order or, in the case of a school or any government-owned property, to the appropriate administrator, or to any tenant association representing the residents of the affected area. Such distribution shall be for the purpose of informing the public, and the failure to publish a copy of the order shall in no way excuse any violation of the order.

i. When a person is convicted of or adjudicated delinquent for any criminal offense, the court, upon application of a law enforcement officer or prosecuting attorney pursuant to section 3 of P.L. 2001, c.365 (C.2C:35-5.9) and except as provided in subsection e. of this section, shall, by separate order or within the judgment of conviction, issue an order prohibiting the person from entering any place defined by subsection b. of section 3 of P.L.1999, c.334 (C.2C:35-5.6), including a buffer zone surrounding the place or modifications as provided by subsection f. of this section. Upon the person's conviction or adjudication of delinquency for a criminal offense, a law enforcement agency, in addition to posting, publishing, and distributing the order or an equivalent notice pursuant to paragraphs (2), (3) and (4) of subsection g. of this section, may also post, publish and distribute a photograph of the person.

ii. When a juvenile has been adjudicated delinquent for an act which, if committed by an adult, would be a criminal offense, in addition to an order required by subsection h. of this section or any other disposition authorized by law, the court may order the juvenile and any parent, guardian or any family member over whom the court has jurisdiction to take such actions or obey such restraints as may be necessary to facilitate the rehabilitation of the juvenile or to protect public safety or to safeguard or enforce the rights of residents of the place. The court may commit the juvenile to the care of the Department of Human Services under the responsibility of the Division of Youth and Family Services until such time as the juvenile reaches the age of 18 or until the order of removal and restraint expires, whichever first occurs, or to such alternative residential placement as is practicable.

iii. An order issued pursuant to subsection a., b., c. or d. of this section shall remain in effect until the case has been adjudicated or dismissed, or for not less than two years, whichever is less. An order issued pursuant to subsection h. of this section shall remain in effect for such period of time as shall be fixed by the court but not longer than the maximum term of imprisonment or incarceration allowed by law for the underlying offense or offenses. When the court issues a restraining order pursuant to subsection h. of this section and the person is also sentenced to any form of probationary supervision

or participation in the Intensive Supervision Program, the court shall make continuing compliance with the order an express condition of probation or the Intensive Supervision Program. When the person has been sentenced to a term of incarceration, continuing compliance with the terms and conditions of the order shall be made an express condition of the person's release from confinement or incarceration on parole. At the time of sentencing or, in the case of a juvenile, at the time of disposition of the juvenile case, the court shall advise the defendant that the restraining order shall include a fixed time period in accordance with this subsection and shall include that provision in the judgment of conviction, dispositional order, separate order or order vacating an existing restraining order, to the law enforcement agency that made the arrest and to the county prosecutor.

iv. All applications to stay or modify an order issued pursuant to this act, including an order originally issued in municipal court, shall be made in the Superior Court. The court shall immediately notify the county prosecutor in writing whenever an application is made to stay or modify an order issued pursuant to this act. If the court does not issue a restraining order, the sentence imposed by the court for a criminal offense as defined in subsection b. of this section shall not become final for ten days in order to permit the appeal of the court's findings by the prosecution.

v. Nothing in this section shall be construed in any way to limit the authority of the court to take such other actions or to issue such orders as may be necessary to protect the public safety or to safeguard or enforce the rights of others with respect to the place.

vi. Notwithstanding any other provision of this section, the court may permit the person to return to the place to obtain personal belongings and effects and, by court order, may restrict the time and duration and provide for police supervision of such a visit.

C.2C:35-5.9 Certification of offense location.

The court shall issue a restraining order pursuant to P.L.1999, c.334 (C.2C:35-5.4 et seq.) only upon request by a law enforcement officer or prosecuting attorney and submission of a certification describing the location of the offense.

C.2C:35-5.10 Discretion to not seek restraining order.

A law enforcement officer or prosecuting attorney shall have discretion to not seek a restraining order pursuant to P.L.1999, c.334 (C.2C:35-5.4 et seq.) if the defendant is charged with an offense resulting from the stop of a motor vehicle, if the defendant was using public transportation, or if the provisions of paragraph (1) or (2) of subsection e. of section 4 of P.L.1999, c.334 (C.2C:35-5.7) are applicable.

There is appropriated from the General Fund to the Administrative Office of the Courts $50,000 for the modification of the judiciary's automated systems in accordance with the implementation of this act.

This act shall take effect on the 120th day following enactment except for section 5, which shall take effect immediately.

Approved January 7, 2002.

Procedures for the Uniform Investigation of Serious Violent Crimes Occurring on Premises of any Facility run by the Dept. of Human Services. Attorney General Law Enforcement Directive 2001-6

WHEREAS, it is decidedly in the public interest that serious violent crimes which occur on state facilities run by the Department of Human Services are crimes properly investigated and prosecuted; and,

WHEREAS, the Criminal Justice Act of 1970, N.J.S.A. 52:17b-98, states that it is the public policy of this State: to provide for the general supervision of criminal justice by the Attorney General as chief law enforcement officer of the State, in order to secure the benefits of a uniform and efficient enforcement of the criminal law and the administration of criminal justice throughout the State; and,

WHEREAS, in order to promote statewide uniformity and accountability, it is appropriate for the Attorney General, in cooperation and consultation with the County Prosecutors, to issue and enforce procedures for the uniform investigation of crimes occurring at facilities run by the Department of Human Services;

NOW, THEREFORE, I, John J. Farmer, Jr., Attorney General of New Jersey, by virtue of the authority vested in me by the Constitution and the Statutes of this State, do hereby direct that:

When an offense involving sexual assault, serious bodily injury or homicide, or an unattended death, occurs on the premises of any facility run by the Department of Human Services, the Human Services Police (appointed pursuant to N.J.S.A. 30:4-14) shall immediately notify the local State Police Barracks. It shall be the responsibility of the local State Police Barracks to respond and notify the Major Crimes Section of State Police and the County Prosecutor of the County in which the institution is located whenever the preliminary investigation indicates that a crime involving serious bodily injury or death has occurred.

This Directive shall take effect immediately.

John J. Farmer, Jr.
Attorney General

JUVENILE JUSTICE COMMISSION MONITORING OF MUNICIPAL LOCKUPS – JUVENILE ADMISSIONS LOG

ATTORNEY GENERAL LAW ENFORCEMENT DIRECTIVE NO. 2001-2

March 22, 2001

Introduction

It is the responsibility of the Juvenile Justice Commission (JJC) to monitor law enforcement agencies in New Jersey for compliance with Federal regulations involving the handling of juveniles in custody. The State must remain in compliance with these regulations in order to maintain its eligibility for Federal grant money which is awarded through the Juvenile Justice Commission to develop delinquency prevention programs in counties and municipalities. Furthermore, the State must report annually to the Federal Office of Juvenile Justice and Delinquency Prevention (hereinafter OJJDP) on its level of compliance with these regulations.

As a result of a recent audit of the Juvenile Justice Commission's monitoring system by OJJDP representatives, the Juvenile Justice Commission has been directed to enhance its monitoring of local police departments. Accordingly, this Directive is hereby issued to facilitate cooperation and collaboration between the Juvenile Justice Commission and local law enforcement agencies so as to ensure compliance with Federal regulations and continued eligibility for grant funding.

Applicability

All facilities that may hold juveniles under court authority are monitored and, therefore, subject to this Directive. Currently, this includes approximately 500 lockups in the State used for the temporary holding of individuals. The vast majority of New Jersey's lockup facilities are located in local police departments. Other types of temporary holding facilities are included as well. This list of monitored facilities is revised and updated annually by the Juvenile Justice Commission.

Juvenile Admissions Log and Survey

In order for the State to monitor a facility for compliance with these regulations, it is necessary that a **Juvenile Admissions Log** be maintained by each facility. A copy of the admissions log and an explanatory memorandum from the Juvenile Justice Commission is enclosed herewith.

Semi-annually, each Chief Law Enforcement Officer, whose department is classified by the Juvenile Justice Commission as having a secure holding capacity, will be mailed a survey requesting information on juveniles handled within that facility. The data

maintained in the log is required to complete the survey. The completed survey, not the log, must be transmitted to the Juvenile Justice Commission in a timely fashion. Staff from the Juvenile Justice Commission Monitoring Unit will visit facilities periodically in order to verify that proper documentation procedures are in place and that records are accurate. **If it is not already doing so, your department must begin using the Juvenile Admissions Log immediately.**

Compliance with Federal Statute and Regulations

This monitoring program focuses on compliance with three of the core requirements of the **Juvenile Justice and Delinquency Prevention (JJDP**) Act of 1974, as amended, and accompanying regulations:

1. **Deinstitutionalization of Status Offenders.** The JJDP Act states that status offenders and non- offenders are not to be placed in secure detention or correctional facilities. 42 *U.S.C.* 5633, Section 223(a)(12)(a).

2. **Separation from Adults.** The JJDP Act states that all juveniles in custody within a secure lockup facility must be separated from detained adults. 42 *U.S.C.* 5633, Section 223(a)(13). Federal regulators have interpreted this provision as requiring "sight and sound" separation from detained adults. 28 *C.F.R.* 31.303(d)(1)(i). Furthermore, the *New Jersey Code of Juvenile Justice* provides that "...a juvenile may be held in a police station in a place other than one designed for detention of prisoners and apart from any adult charged with or convicted of crime for a brief period if such holding is necessary to allow release... ." *N.J.S.A.* 2A:4A-37(c)

3. **Jail and Lockup Removal**. The JJDP Act also provides that juveniles cannot be detained in any adult jail or lockup. 42 U.S.C. 5633, Section 223(a)(14). However, federal regulations allow a juvenile to be detained in a municipal lockup, while sight and sound separated from adults, for up to a maximum of six hours for the purpose of processing or holding until release to parents or guardians, or transfer to other authorities. 28 C.F.R. § 31.303(e)(2).

Level of Compliance

The Federal and State Monitors understand that facilities cannot attain perfect compliance with these regulations. In the real world, circumstances will arise that lead to occasional violations of these regulations. For example, regarding the Jail and Lockup Removal Regulation, travel time and difficulties in contacting parents or guardians may cause delays. In addition, juveniles may need to be held over six hours for questioning in serious cases. The New Jersey Supreme Court has held that police must wait for parents to be present prior to questioning juveniles. State v. Presha, 163 N.J. 304 (2000). This

requirement is just one of many factors that may result in questioning that extends beyond the six hour time goal. However, these exceptions, as well as any other non-compliant incidents must be documented as such in the Juvenile Admissions Log.

Conclusion

A reasonable strategy is to plan for compliance and acknowledge barriers that prevent perfect compliance. Isolated violations will not significantly impact State grant eligibility. However, wherever there are patterns of violations in any particular lockup, Juvenile Justice Commission Monitoring Unit staff will work with that facility in an effort to resolve such situations.

Questions regarding the Monitoring Program should be directed to the Juvenile Justice Commission's JJDP Monitoring Unit at (609) 530-5005. Questions regarding the content of this Directive should be addressed to the Prosecutors and Police Bureau, Division of Criminal Justice, at (609) 984- 2814.

TO: **All Police Chiefs**
FROM: **Richard F. Case, Compliance Monitor**
Office of Program Development & Prevention Services
DATE: **October 20, 2000**
SUBJECT: **Juvenile Admissions Log**

The Juvenile Justice Commission (JJC) continues to monitor all municipal police departments in New Jersey for compliance with specific Federal regulations involving the handling of juveniles. When the State is in compliance it is awarded grant money from the Federal government which is funneled through the JJC to develop delinquency prevention programs in counties and municipalities. The Federal regulations involve three of the core requirements of ***The Juvenile Justice and Delinquency Prevention Act (JJDP Act)*** *of 1974,* as amended. There are also some State statutes and regulations that partly reinforce these Federal regulations. The State must report annually to the Office of Juvenile Justice and Delinquency Prevention (OJJDP) on its level of compliance with these regulations. As a result of a recent audit of the JJC's monitoring system by OJJDP representatives, the JJC has been directed to enhance its monitoring of local police departments.

All facilities that may hold juveniles under court authority are monitored. This includes approximately 500 of NJ's **municipal lockups** used for the temporary holding of individuals. The vast majority of NJ's municipal lockup facilities are local police departments. However, the list also includes lockups located in court holding facilities,

colleges and universities, highway and bridge authorities, sports/entertainment complexes, and so on. The following clarifies how these regulations apply to municipal lockups:

1. Deinstitutionalization of Status Offenders (DSO)

42 U.S.C. 5633 Section 223(a)(12)(a) of the JJDP Act states that status offenders and non- offenders are not to be detained or confined in secure detention or correctional facilities.

A **status offender** is a juvenile who is involved in behavior that would not constitute a crime for an adult - i.e. a runaway, truant, incorrigible, curfew violator, a youth charged with Possession/Consumption of Alcohol by a Minor, etc. A non-offender would be a dependent or neglected youth. In NJ, most status offenders and non-offenders are referred to as **"juvenile- family crisis"** cases.

An understanding of what constitutes **secure holding** is necessary in order for a department to be compliant with the intent of the DSO requirement. A facility is defined as secure when it provides the capacity to restrict the mobility of an individual by the use of hardware or architectural features. Therefore, **secure holding occurs when a juvenile is locked in a cell, holding room, processing area, or set of rooms, or, is cuffed to a stationary object.**

2. Separation

Section 223(a)(I 3) of the Act provides that all juveniles in custody within a secure lockup facility shall be **sight and sound separated** from detained adults. N.J.S.A. 2AAA-37(c) reinforces this requirement by stating that "...a juvenile maybe held in a police station in a place other than one designed for detention of prisoners and apart from any adult charged with or convicted of crime for a brief period if such holding is necessary to allow release...."

Sight contact is defined as sustained and clear visual contact between juveniles in custody and detained adults in close proximity to one another. **Sound contact** is defined as direct oral communication between juveniles in custody and detained adults. Sight and/or sound contact that is both brief and inadvertent, or accidental, is allowable.

3. Jail and Lockup Removal

Section 223(a)(14) of the Act, provides that juveniles cannot be detained in any adult jail or lockup. However, the Act does allow a juvenile to be detained in a municipal lockup, while sight and sound separated from adults, for up to a maximum of **six hours** for the purposes of identification, processing, and to arrange for release to parents or transfer to other authorities.

In summary, there are really only a few simple procedures that police staff must follow in order to be compliant with these regulations:

1. *After processing, hold the non-delinquent youth in a non-secure area, in a non-secure manner.*
2. *Keep all in-custody juveniles sight and sound separated from adult detainees.*
3. *Release, or transfer to other authorities, all juveniles in less than 6 hours.*

Juvenile Admissions Log: In order for the State to monitor Your facility for compliance with these regulations It is necessary that a **Juvenile Admissions Log** (see attached) be maintained. The comments of various law enforcement agencies and personnel within the State were solicited during the past year while this Log was being developed. If used properly, the Log will enable your staff to capture and organize pertinent information on the handling of juveniles. Data on **all** juveniles "in custody" within the facility -delinquent as well as non-delinquent youth, held securely or not - must be entered into the Log. This log may be handwritten or maintained electronically. It also may be modified to suit the needs of your department as long as the essential documentation remains.

Semi-annually, each Police Chief will be mailed a **Survey** requesting information on juveniles handled within your facility. Each Survey will cover a time span of six months. A well maintained Log will allow you or your staff to answer the Survey questions quickly and accurately. The Survey, **not the Log,** should then be faxed or mailed back to the Compliance Monitor of the JJC in a timely manner. Staff from the Monitoring Unit will visit facilities periodically in order to verify that proper documentation procedures are in place and that records are accurate.

The JJC has undertaken a more rigorous approach to monitoring municipal lockups within the last year. You may have noticed more phone inquiries, more frequent mailings and Surveys, and your facility may have received an actual site visit from JJC staff. You will receive another Survey, covering the six month period ending October 31, 2000, during the first week of November. In addition to the routine questions regarding Separation and Jail Removal (six hour rule), this Survey will also seek data related to the DSO requirement.

The Juvenile Justice Commission does not expect every facility to be in perfect compliance with these regulations. In the real world, circumstances will arise that may lead to occasional violations of these regulations, This can occur even when police staff are acting in the best interest and safety of juveniles. Furthermore, facilities vary widely in size, age, and layout which impact directly on compliance issues. Departments are also

confronted with diverse juvenile populations and challenges, and respond to them with varying levels of staff availability and resources. A reasonable goal is to aim for as much compliance as possible and to acknowledge obstacles that get in the way. Isolated violations are not a significant concern. However, wherever problematic situations lead to a pattern of violations in any particular lockup, Monitoring Unit staff will cooperatively engage personnel of that facility in an effort to resolve those situations.

Your department is requested to begin using the Juvenile Admissions Log immediately if you are not doing so already. Thank you for your cooperation in this matter. Please direct any questions or concerns to **Rich Case** of the JJC at **(609)530-5005.**

JUVENILE ADMISSIONS LOG

NAME	CASEor FILE #	AGE	SEX	RACE'	CHARGEOR CIRCUMSTANCES OFCUSTODY••	DATE/TIME IN TO FACILITY	DATE/TIME *ovr*	HELD BEYOND SIX H OU RS?'.,	CONTACT WITII ADIJLT DETAINEES?A	HELO SECUR.EL Y?- Yes/No

•Race- Note White (W}, Black (B), Hispanic (H), or Other (0)

**Clearlydifferentiate between delinquent and non-delinquent behavior. Non-delinquentbehavior includes status offenses and" juvenile-family crisis" cases. Themost common oflhese non-delinquent juveniles are runaways, truants, curfew violators, and juveniles charged with Possession/Consumption of Alcohol by a Minor. Note most serious charge(s). If out-of-state runaway, note home state.

***Juveniles may be held up to 6 hours in municipal lockup facilities.

"Sustained "sight and sound contact" between juveniles in custody and detained adults, in secure facilities, is prohibited.

"" After processing, only those juveniles in custody for delinquent behavior may be held securely. Secure holding occurs when the mobility of a juvenile is restricted by the use of hardware or lhe architectural features of a building - i.e. when a juvenile is locked in a room, locked in a set of rooms, cuffed to stationary obj ed, or placed in an area that is designed and primarily use d for secur e holding.