PETER de VRIES and TIMOTHY CARTER, Plaintiffs, v. SECAUCUS FIRE DEPARTMENT, FRANK WALTERS, individually and in his official capacity as Chief of the Secaucus Fire Department, SECAUCUS POLICE DEPARTMENT, THE TOWN OF SECAUCUS, ANTHONY IACONO, Administrator of the Town of Secaucus, DENNIS ELWELL, the Mayor of Secaucus, JOHN DOES 1 through 30, Defendants.	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: HUDSON COUNTY DOCKET NO.: HUD-L-3520-04 Civil Action

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PLAINTIFFS' PROPOSED JURY CHARGES

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GENERAL CHARGES

A. Burden of Proof. [1]

The burden of proof is on the plaintiffs ("Peter deVries and Timothy Carter") to establish their claim by a preponderance of the evidence. In other words, if plaintiffs make an allegation, then they must prove the allegation. In this action, plaintiffs have the burden of establishing by a preponderance of the evidence all of the facts necessary to prove the following issues:

1. That defendants violated their rights under the New Jersey Law Against Discrimination.

2. That plaintiffs suffered economic and emotional damages as a result of defendants' conduct.

The defendants, the Town of Secaucus, acting through its Police and Fire Departments, as well as the Mayor of Secaucus, Dennis Elwell, the Town Administrator, Anthony Iacono, and the Chief of the Fire Department, Frank Walters, have the burden of establishing by a preponderance of the evidence all of the facts necessary to prove their affirmative defenses.

B. **Preponderance of the Evidence**.[2]

This is a civil trial not a criminal trial. In a criminal trial, the plaintiff has to prove his case "beyond a reasonable doubt." But, in a civil trial, the plaintiff has to prove his case only by a preponderance of the evidence.

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[1] Model Jury Charges, 1.12(G) (11/1998).

[2] Model Jury Charges, 1.12(H) (11/1998) and 1.12(I) (2/1998).

The term "preponderance of the evidence" means that amount of evidence that causes you to conclude that the allegation is probably true. To prove an allegation by the preponderance of the evidence, a party must convince you that the allegation is more likely true than not true. If the evidence on a particular issue is equally balanced, that issue has not been proven by a preponderance of the evidence. Therefore, the party having the burden of proving that issue has failed with respect to that particular issue.

Plaintiffs have the burden of proving their claims by a preponderance of the evidence. If they fail to carry that burden, they are not entitled to your favorable decision on that claim. To sustain the burden, the evidence supporting the claim must weigh heavier and be more persuasive in your minds than the contrary evidence. It makes no difference if the heavier weight is small in amount. As long as the evidence supporting the claim weighs heavier in your minds, then the burden of proof has been satisfied and the party who has the burden is entitled to your favorable decision on that claim.

However, if you find that the evidence is equal in weight, or if the evidence weighs heavier in your minds against plaintiffs, then the burden of proof has not been carried and they are not entitled to your decision on that claim.

When I talk about weighing the evidence, I refer to its capacity to persuade you. I do not mean that you are to count the number of witnesses presented by each side or measure the length of their testimony. The concept of weighing the evidence refers to its quality and not its quantity. In order to decide whether the burden of proof has been carried, you are to sift through the believable evidence and determine the persuasive weight which you feel should be

assigned to it. The right of each party to have the other party bear the required burden of proof is a substantial one and is not a mere matter of form. Proof need not come wholly from the witnesses produced by the party having the burden of proof, but may be derived from any believable evidence in the case. Proof of "possibility" as distinguished from "probability" is not enough.

C. **Direct and Circumstantial Evidence**.[3]

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as the testimony of an eyewitness. Circumstantial evidence (sometimes called inferences) consists of a chain of circumstances pointing to the existence of certain facts. Circumstantial evidence is based upon deductions or logical conclusions that you reach from the direct evidence.

Let me give you an example of direct and circumstantial evidence. If a witness testified that she observed snow falling last night, that would be an example of direct evidence. On the other hand, if a witness testified that there was no snow on the ground before going to sleep and that when she arose in the morning the ground was snow covered, you could *infer* from these facts that it snowed during the night. That would be an example of circumstantial evidence.

You may consider both direct and circumstantial evidence in deciding this case. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence.

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[3] Model Jury Charges, 1.12(J)(1) (11/1998).

D. Credibility.[4]

In deciding the facts of this case, you will have to decide which witnesses to believe and which witnesses not to believe. You may believe everything a witness says or only part of it or none of it. In deciding what to believe here are some factors you may want to consider.

1. Does the witness have an interest in the outcome of this case?

2. How good and accurate is the witness' recollection?

3. What was the witness' ability to know what he or she was talking about?

4. Were there any contradictions or changes in the witness' testimony? Did the witness say one thing at one time and something different at some other time? If so, you may consider whether or not the discrepancy involves a matter of importance or whether it results from an innocent mistake or willful lie.

5. You may consider any explanation that the witness gave explaining the inconsistency.

6. You may consider the demeanor of the witness. By that I mean the way the witness acted, the way the witness talked, or the way the witness reacted to certain questions.

7. Use your common sense when evaluating the testimony of a witness. If a witness told you something that did not make sense, you have a right to reject that

[4] Model Jury Charges, 1.12(L) (Long Version) (11/1998).

testimony. On the other hand if what the witness said seemed reasonable and logical, you have a right to accept that testimony.

8. Is the witness' testimony reasonable when considered in the light of other evidence that you believe?

E. *Falsus in Uno* (False in One-False in All).[5]

If you believe that any witness deliberately lied to you, on any fact significant to your decision in this case, you have the right to reject all of that witness' testimony. In your discretion, however, you may believe some of the testimony and not believe other parts of the testimony.

[5] Model Jury Charges, 1.12(M) (Sample 1) (11/1998).

NEW JERSEY LAW AGAINST DISCRIMINATION: HOSTILE ENVIRONMENT SEXUAL ORIENTATION HARASSMENT[6]

A. Overview of Issues to Be Decided

Plaintiffs, Peter deVries and Timothy Carter, assert a claim that during the time they lived in the Town of Secaucus, they were subjected to an environment at or near their residence that was polluted with sexual orientation harassment directed against them because their sexual orientation is homosexual. Plaintiffs claim that members of the Secaucus Fire Department, led at times by supervisor-level town employees, and/or firemen, subjected plaintiffs to this harassment in or near their Secaucus residence. Defendants deny these claims and contend that the environment at or near plaintiffs' residence was not a hostile environment polluted with sexual harassment.

Sexual orientation harassment that creates a hostile or polluted environment is prohibited by the New Jersey Law Against Discrimination. The New Jersey Law Against Discrimination prohibits harassment that prevents or substantially limits a person's peaceful enjoyment and use of their residence or that prevents or substantially limits a person's peaceful enjoyment and use of a town or its public facilities including its streets, sidewalks, libraries, city hall, and public businesses.

The law provides, in pertinent part:

[6] Model Jury Charges, 2.22(G) (11/1999); *Lehmann v. Toys 'R' Us*, 132 *N.J.* 587 (1993).

10:5-4. Obtaining employment accommodations, and privileges without discrimination; civil right

All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, sex or source of lawful income used for rental or mortgage payments, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.

Plaintiffs Peter deVries and Timothy Carter claim that the town of Secaucus, acting through various employees and agents, violated their rights under the Law Against Discrimination creating a hostile environment at or near their residence in Secaucus which, according to plaintiffs' allegations, prevented or substantially limited their peaceful enjoyment and/or usage of their residence, and prevented and/or substantially limited their peaceful enjoyment and/or usage of the public accommodations of the town of Secaucus.

In order to decide plaintiffs' claims, you must resolve three basic issues, which I will explain to you in detail. However, I will first give you an overview of these three issues:

First, you must determine whether the complained-of conduct actually occurred.

Second, if you determine that the complained-of conduct did occur, you must then determine whether the conduct constitutes unlawful sexual orientation harassment.

Third, if you determine that the conduct does constitute unlawful sexual orientation harassment, you must then determine whether defendants, the Town of Secaucus, its Fire and

Police Departments, as well as the Mayor, Dennis Elwell, the Town Administrator, Anthony Iacono, and the Fire Chief, Frank Walters, should be held responsible.

As I have said, that is simply an overview of the three basic issues you must decide. I will now explain each of these in more detail.

B. Conduct Must Have Occurred

The first basic issue you must decide is whether the complained-of conduct actually occurred. If you find that plaintiffs have not proven by a preponderance of the evidence that the alleged conduct occurred, then you must return a verdict for defendants on the claim of sexual orientation harassment under the LAD.

If, on the other hand, you find by a preponderance of the evidence that some or all of the complained-of conduct did occur, then you must move on to the second basic issue.

C. Conduct Must Constitute Unlawful Sexual Orientation Harassment As Defined By The Law

The second basic issue you must decide is whether the alleged conduct constitutes unlawful sexual orientation harassment as defined by the law. In order to prove that the alleged conduct constitutes unlawful sexual orientation harassment, plaintiffs must prove two elements by a preponderance of the evidence:

First, plaintiffs must prove that the conduct occurred because of their sexual orientation.

Second, plaintiffs must prove that the conduct was severe or pervasive enough to make a reasonable gay person believe that the conditions of his/her environment were altered and that the

living environment, *i.e.*, the environment at or near their Secaucus residence, was hostile or abusive.

I will explain each of these two elements in more detail.

1. Conduct Must Have Occurred "Because Of" Sexual Orientation

First, plaintiffs must prove that the conduct occurred "because of" their sexual orientation. Stated differently, plaintiffs must prove that the conduct would not have occurred if they had been heterosexual, as opposed to homosexual men.

When the harassing conduct is sexual in nature, the "because of" sex element is automatically satisfied. Thus, for example, plaintiffs claim that they have been subjected to crude sexual comments. That kind of behavior is clearly "because of" their sexual orientation.

Even conduct that is not sexual in nature can constitute unlawful sexual orientation harassment. However, when the alleged conduct is not sexual in nature, plaintiffs must produce some additional evidence that the conduct occurred "because of" their sexual orientation. All that is required is a showing that it is more likely than not that the harassment occurred because of plaintiffs' sexual orientation.

In order to prove that the alleged conduct occurred because of their sexual orientation, plaintiffs do not have to prove that the harasser intended to harass them or intended to create a hostile living environment. The harasser's intent is not at issue. The only issue is whether the conduct occurred because of plaintiffs' sexual orientation.

If you find that the conduct would have occurred regardless of plaintiffs' sexual orientation, then there has been no unlawful sexual orientation harassment. For example, if a harasser is equally crude or vulgar to all town residents, regardless of their sexual orientation, no basis exists for a sexual orientation harassment claim.

If, on the other hand, you find that the conduct did occur because of plaintiffs' sexual orientation, then you must move on to the second element.

2. Conduct Must Be Severe Or Pervasive Enough That A Reasonable Gay Person Would Believe that His/Her Living Conditions Were Altered And That The Living Conditions Had Become Hostile or Abusive.

The second element plaintiffs must prove is that the complained-of conduct was severe or pervasive enough that their living conditions were altered to the point that a"reasonable gay person" would consider the living environment to have become "hostile or abusive." This element has three sub-elements plaintiffs must prove: (1) that the conduct was severe or pervasive; (2) that a reasonable gay person would believe that the living conditions at or near their residence were altered; and (3) that the living environment had become hostile or abusive.

When deciding whether plaintiffs have proven these elements, you should consider the following guidelines:

- The Law Against Discrimination is not a fault-or-intent-based statute. Plaintiffs need not show that the defendants intentionally discriminated or harassed them or intended to create a hostile environment. The purpose of the LAD is to eradicate

discrimination, whether intentional or unintentional. The perpetrator's intent is simply not an element of the cause of action. *Lehman,* 132 *N.J.* 587, 604 to 605.

- The law does not require that the area at or near plaintiffs' residence be free of all vulgarity or sexually-laced speech or conduct. Occasional, isolated and/or trivial remarks or conduct of a sexual nature are generally insufficient to constitute unlawful sexual orientation harassment. Rather, only speech or conduct that is sufficiently severe or pervasive to create a hostile or intimidating living environment can constitute unlawful sexual orientation harassment.

- Also, in determining whether the conduct complained-of was severe or pervasive, keep in mind that the conduct does **not** have to be both severe **and** pervasive. The conduct can consist of a single severe incident or an accumulation of incidents, although it will be a rare and extreme case in which a single incident will be so severe that it would make the living environment hostile. When the conduct consists of multiple incidents, you should not consider each incident individually, but should consider the totality of the incidents. Numerous incidents that would not be sufficient if considered individually may be sufficient when considered together.

- Also, plaintiffs need not personally have been the target of each and every instance of offensive or harassing conduct in order to find that the living environment was sexually hostile. Witnessing harassment of other gays may create a hostile living environment.

As I have said before, plaintiffs like Peter deVries and Timothy Carter in a hostile living environment, sexual orientation harassment case establish the requisite degree of harm to prove their case if they show that their living environment was affected by the harassment to the point at which a reasonable gay person would consider the environment hostile.

In making that showing, plaintiffs may use evidence that other gay people in the area of their residence were harassed. Plaintiffs' living environment is affected not only by conduct directed at themselves but also by the treatment of others. A gay person's view that the living environment is hostile to gay people will obviously be reinforced if they witness the harassment of gays. For the law to be violated, plaintiffs need not personally have been the target of each instance of offensive or harassing conduct. Evidence of sexual orientation harassment directed at other gays in plaintiffs' presence is relevant to both the character of the living environment and its effects on plaintiffs. *Lehmann*, 132 *N.J.* at 610 to 611.

- Also, in deciding whether the alleged conduct in this case is sufficiently severe or pervasive to create a hostile living environment, you must view the conduct from the perspective of a "reasonable gay person," not from plaintiffs' own subjective perspective. In other words, the issue you must decide is not whether plaintiffs personally believed that their living environment was hostile. The issue you must decide is whether a reasonable gay person would find the living environment hostile. Thus, if only an overly sensitive gay person would view the conduct as

sufficiently severe or pervasive to create a hostile living environment, but a reasonable gay person would not, it is not harassing conduct for which plaintiffs can recover. By the same token, even if plaintiffs personally did not find the alleged conduct to be severe or pervasive, but a reasonable gay person would, it is harassing conduct for which plaintiffs can recover.

- Also, it is not necessary that plaintiffs show that they have actually been psychologically harmed by the alleged conduct or that they have suffered any economic loss as a consequence of the conduct. Those issues may be relevant to the damages plaintiffs can recover, but they are not relevant to the issue of whether the alleged conduct constitutes illegal sexual orientation harassment.

If, after applying these guidelines, you find that plaintiffs have not proven by a preponderance of the evidence that the alleged conduct constitutes unlawful sexual orientation harassment, then you must return a verdict for the defendants on plaintiffs' claim of sexual orientation harassment.

If, on the other hand, you find that plaintiffs have proven that the alleged conduct constitutes unlawful sexual orientation harassment, then you must move on to the third issue.

3. Whether Defendant Town of Secaucus Can Be Held Responsible for the Alleged Conduct: Compensatory Damages

The third basic issue you must decide is whether the Town of Secaucus, acting through its Fire and Police Departments, should be held responsible for the alleged conduct of various Secaucus employees and firemen, including, but not limited to, Charles Snyder, Sr., Charles

Snyder, Jr., Charles Mutschler, Mayor Elwell, Chief Walters and Town Administrator Iacono. In other words, you must decide whether defendant Town of Secaucus, acting through its Fire and Police Departments, should have to pay damages because of the alleged conduct of its employees.

First, the Town of Secaucus is automatically liable for any economic damages caused by harassment by Town supervisors. I hereby instruct you that Charles Snyder, Sr. and Charles Snyder, Jr. were, during the time periods relevant to this matter, "supervisors" and, therefore, if you find that they violated the LAD, the Town of Secaucus is automatically liable for any financial losses caused by their illegal conduct. Likewise, defendants (Mayor Dennis Elwell, Town Administrator Anthony Iacono, and Fire Chief Frank Walters), as well as Sergeant Amodeo, were, during the time periods relevant to this matter, "supervisory" employees of the Town and the Town of Secaucus is automatically liable for any economic damages caused by any violation of the LAD engaged in by such individuals.

As to other money damages to compensate plaintiffs for emotional distress and pain and suffering, the Town of Secaucus' liability for a hostile environment caused by Secaucus supervisors is not automatic, but instead, is governed by the following considerations:

(1) Did the Town of Secaucus delegate the authority to the supervisor to control the situation of which plaintiffs complained?

(2) Did the supervisor exercise that authority?

(3) Did the exercise of authority result in a violation of the Law Against Discrimination (LAD)?

(4) Did the authority delegated by the Town of Secaucus to the supervisor aid the supervisor in injuring the plaintiffs?

If the answer to all of these questions is yes, you must hold the Town of Secaucus liable for the full extent of damages caused by the supervisor's harassment.

If the answer to any of those questions is no, you cannot hold the Town of Secaucus liable for the supervisor's harassment, unless you find that the Town of Secaucus has been negligent. You can consider the following in determining whether the Town of Secaucus was negligent:

(1) Did the Town of Secaucus have well-publicized and enforced policies against harassment in place?

(2) Did the Town of Secaucus have effective formal and informal complaint structures, training or monitoring mechanisms in place;

(3) Did the Town of Secaucus have mechanisms to prevent sexual orientation harassment in place?

(4) Did the Town of Secaucus know about the conduct or should the Town of Secaucus have known about it and if so, do anything about it?

If you find that the supervisor did create a hostile living environment, but did so outside the scope of his/her employment by the Town of Secaucus, then you must consider certain other factors. For example, if the Town of Secaucus delegated the authority to control the living environment to the supervisor and he/she abused that delegated authority, then the Town of Secaucus is liable for any hostile living environment created by the supervisor. In making this determination, you must decide:

(1) Did the Town of Secaucus delegate to the supervisor the authority to control the situation of which the plaintiffs complain?

(2) Did the supervisor exercise that authority?

(3) Did the exercise of authority result in a violation of the Law Against Discrimination (LAD)?

(4) Did the authority delegated by the Town of Secaucus to the supervisor aid him/her in injuring the plaintiff?

If you answer yes to all of these questions, the Town of Secaucus is liable for any hostile environment created by the supervisor even if he/she acted outside the scope of his/her authority.

Another basis for the Town of Secaucus' liability when the supervisor acts outside the scope of his/her employment, is negligence.

Someone suing for a hostile living environment may show that the Town of Secaucus was negligent by its failure to have in place well-publicized and enforced anti-harassment policies, effective formal and informal complaint structures, training, and/or monitoring mechanisms. However, the existence of effective preventative mechanisms provides some evidence that the Town was not negligent. Because it is foreseeable that sexual orientation harassment may occur, the absence of effective, preventative mechanisms will present evidence of a Town's negligence. However, the absence of such mechanisms does not automatically constitute negligence, nor does the presence of such mechanisms demonstrate the absence of negligence.

Town liability for conduct outside the scope of employment may also be found if the Town intended the conduct. For example, if plaintiffs can show that upper management had actual knowledge of the harassment by the supervisor and did not take prompt and effective remedial action to stop it, you may find the Town liable. Effective remedial actions are those reasonably calculated to end the harassment. The reasonableness of a Town's remedy will depend on its ability to stop harassment by the person who engaged in harassment.

To summarize, a Town's liability for compensatory damages resulting from a supervisor's sexual orientation harassment will depend on the facts of the case. A Town will be found liable if a supervisor acted within the scope of his or her employment. Moreover, even if the Town's supervisor acted outside the scope of his or her employment, the Town will be liable if it contributed to the harm through its negligence, intent, or apparent authorization of the harassing conduct, or if the supervisor was aided in the commission of the harassment by the agency relationship. Thus, a Town can be held liable for compensatory damages stemming from a supervisor's creation of a hostile living environment if the Town grants the supervisor the authority to control the living environment and the supervisor abuses that authority to create a hostile living environment. A Town may also be held vicariously liable for compensatory damages for sexual orientation harassment that occurs outside the scope of the supervisor's authority, if the Town did not have actual or constructive notice of the harassment, or even if the Town did not have actual or constructive notice, if the Town negligently or recklessly failed to have an explicit policy that bans sexual orientation harassment and that provides an effective procedure for the prompt investigation and remediation of such claims.

The Town of Secaucus should be held liable for sexually harassing conduct by non-supervisory employees or firemen only if (1) the Town of Secaucus' management-level employees knew, or in the exercise of reasonable care, should have known about the harassment and (2) the Town of Secaucus' management failed to take prompt and effective remedial steps to prevent, stop or otherwise provide a remedy for such harassment.[7]

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[7] *Heitzman v. Monmouth County*, 321 *N.J. Super.* 133, 146 (App. Div. 1999), *quoting Allis-Chalmers Corp.*, 797 *F.2d* 1417, 1421 (7th Cir. 1986); *see also, Herman v.*

As to the first element -- whether the Town of Secaucus knew or reasonably should have known of the harassment, plaintiffs contend that Town supervisors were aware of harassment by firemen because (1) they verbally complained to them, (2) because they actually saw and heard the harassment, (3) because some of them actually participated in the harassment, (4) because they made a formal complaint of harassment to the Secaucus Police Department, and (5) because they detailed the harassment in interviews with the Secaucus Police Department. Defendants deny that it knew or should have known of sexual orientation harassment because (1) there was no sexually harassing conduct, (2) plaintiffs never verbally complained to Town supervisors of such conduct, and (3) that Town supervisors never saw or heard such harassment.

As to the second element -- whether defendants took prompt and effective remedial steps -- a further comment on the law is required.

First, if you find by a preponderance of the evidence that there was no sexually harassing conduct, then you must return a verdict in favor of the Town of Secaucus. If you find that there was sexually harassing conduct as described above, then you must consider, as I've discussed above, whether Secaucus supervisors knew or reasonably should have known that such harassment was taking place.

If you find by a preponderance of the evidence that Secaucus supervisors did not know of such harassment and should not reasonably have known of such conduct, then you must return a verdict in favor of the Town of Secaucus. If you find, however, that there was sexual harassment and that Secaucus superiors knew or reasonably should have known that such

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Coastal Corp., 348 *N.J. Super.* 1, 24 to 25 (App. Div.), *certif. denied*, 174 *N.J.* 363 (2002).

harassment was occurring, then you must consider whether the Town of Secaucus took reasonable steps to prevent, stop or otherwise provide a remedy for such harassment.

In determining whether the Town of Secaucus took prompt and effective remedial measures to prevent, stop or otherwise remedy the sexual orientation harassment alleged in this case, you should consider (1) the response of Secaucus to plaintiffs' alleged complaints of sexual orientation harassment, verbal or written, (2) the response of Secaucus to any sexual orientation harassment related to plaintiffs' claim that Town supervisors superior officers witnessed or reasonably should have known about, and (3) the steps that Secaucus took to prevent such alleged harassment from occurring in the first place.

Plaintiffs contend that on various occasions they verbally complained to Town supervisors about being subjected to an illegal and harassing environment. They contend that the Town supervisors took no meaningful steps to punish the harassers. Defendants contend that plaintiffs were not sexually harassed and that they did respond adequately to complaints of harassment.

If you find that plaintiffs were sexually harassed, that they did complain to supervisors about it, and that Secaucus did not take steps reasonably designed to remedy such harassment, you must return a verdict in favor of the plaintiffs for harassment by non-supervisor firemen. If, on the other hand, you find that there was no sexual orientation harassment, or even if there was, that plaintiffs did not complain to Town supervisors about it, or even if they did so complain, that those supervisors took reasonable steps to remedy such harassment, then you must return a verdict for the defendant Town of Secaucus.

The law requires that a Town promptly and effectively investigate a town resident's claims of sexual orientation harassment. The timeliness of a Town's response to complaints of sexual orientation harassment is an important element in determining the effectiveness of an anti-harassment program. A slow response may be perceived as a reluctant response and call into mind the *bona fides* of a Town's anti-harassment program. Similarly, an investigation, though timely instituted, may be pursued half-heartedly and unduly prolonged. On the other hand, a timely, vigorously pursued inquiry that corroborates the victim's accusations will not comply with the LAD if the Town drags its feet in acting on the corroborative evidence.[8]

A remedial scheme that reaches the correct result through a process that is unduly prolonged or that unnecessarily and unreasonably leaves the town resident exposed to continued hostility in the living environment is an ineffective remedial scheme. Such a process, in reality, indirectly punishes residents with the courage to complain about sexual orientation harassment and cannot constitute 'effective' remediation. Indeed, such a scheme can be viewed only as an attempt by the Town to discourage residents from coming forward and utilizing the Town's remedial process in the first place. *Payton, supra* at 538.

Plaintiffs contend that the investigation conducted by the Secaucus Fire and Police Departments was inadequate, that it was conducted in a manner that exposed them to retaliation, that the determination of the Secaucus Fire and Police Departments that none of their claims were substantiated was unreasonable under the circumstances, and that the Town of Secaucus

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[8] *Payton v. New Jersey Turnpike Authority*, 148 *N.J.* 524 (1997) at 537, *quoting* the Appellate Division decision, 292 *N.J. Super.* at 47.

acted unreasonably in failing to punish the perpetrators of the sexual orientation harassment they identified. If you find that the investigation was unreasonable and inadequate, then you must return a verdict for the plaintiffs.

If you find that the defendants' investigation in response to plaintiffs' complaints was prompt and adequate, then you must return a verdict for the Town of Secaucus with regard to plaintiffs' claims concerning non-supervisory firemen.

Plaintiffs contend that the Town of Secaucus acted unreasonably with respect to the training of its rank and file firemen and police, the monitoring of its Town employees for harassing conduct, the creation of mechanisms for encouraging complaints of sexual harassment and protecting complainants from retaliation.

Defendants, on the other hand, contend that it trained its employees with regard to sexual harassment in a timely and adequate manner, that it reasonably monitored its work environment to detect sexual harassment, and that it had in place a complaint mechanism that encouraged and protected employees who wished to complain of sexual harassment.

If you find that plaintiffs were subjected to sexual orientation harassment, that they complained of it verbally or in writing or that Town supervisors reasonably knew of such harassment, that the defendant Secaucus did not reasonably train Town employees, monitor them or enact a complaint mechanism that reasonably encouraged residents to complain of sexual harassment and protected them from retaliation, and if you further find that some or all of the harassment in this matter could have been prevented had the aforesaid training, monitoring, or

complaint mechanisms been reasonable and adequate, then you must find for the plaintiffs with regard to sexual orientation harassment by non-supervisory employees.

On the other hand, if you find that plaintiffs have failed to prove defendants' training, monitoring or complaint mechanisms were unreasonable and inadequate and plaintiffs have not otherwise proven that defendants responded inadequately to their complaints of harassment, then you must return a verdict for the defendant Secaucus.

In summary, the Town of Secaucus can only be held liable for sexual orientation harassment caused by non-supervisory firemen if:

1. Some or all of the events plaintiffs allege actually occurred; and

2. Viewing the events that did occur as a totality, they constitute sexual orientation harassment as I have defined it to you; and

3. The management of the Town of Secaucus actually knew (because of plaintiffs' verbal or written complaints) or reasonably should have known that such harassment was occurring; and

4. The management of the Town of Secaucus failed to take prompt and effective remedial steps to prevent, stop or otherwise remedy the harassment.

If plaintiffs prove these elements by a preponderance of the evidence, you must return a verdict for the plaintiffs.

If plaintiffs fail to prove any or all of these elements, you must return a verdict for the defendants.

RETALIATION[9]

Plaintiffs in this case have charged that the Town of Secaucus, acting through firemen, retaliated against them in various ways because they complained about sexual orientation harassment. The defendants deny this allegation.

The New Jersey Law Against Discrimination prohibits retaliation:

It shall be an unlawful employment practice

* * * *

> For any person to take reprisals against any other person because she has opposed any practices or acts forbidden under this act or because she has filed a complaint, testified or assisted in any proceeding under this act.

In order to establish Secaucus' liability under this provision of the New Jersey Law Against Discrimination, plaintiffs must establish certain elements as follows:

1. Plaintiffs engaged in a protected activity;

2. Firemen knew that plaintiffs had engaged in the protected activity;

3. Firemen thereafter subjected plaintiffs to adverse actions;

4. There was a causal link between plaintiffs engaging in a protected activity and the adverse action; and

5. Secaucus supervisors knew of or should have known of the firemen's retaliatory conduct and failed to take reasonable steps to prevent or remedy such retaliation.

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[9] Model Jury Charges, 2.22(C) (5/1991).

I charge you that plaintiffs' complaint, before April 25, 2004, about firemen throwing condoms over the fence and plaintiffs' complaints on or after April 25, 2004 about sexual orientation harassment meets the first of these four requirements.

I further charge you that defendant Town of Secaucus knew of the aforesaid protected activity.

The parties dispute whether Secaucus firemen subjected plaintiffs to adverse action. Plaintiffs contend that in addition to constituting sexual orientation harassment, the alleged attacks of April 25, 2004 were retaliation by firemen because plaintiffs had previously complained of firemen throwing used condoms at their property. Plaintiffs further contend that after they complained to the police and various town officials about the alleged attack of April 25, 2004, firemen retaliated in various ways, including shining their headlights on plaintiffs' residence during various nighttime hours. Defendants deny these allegations.

Adverse actions are those which affect plaintiffs' living conditions at or near their residence. Although direct economic harm is an important indicator of an adverse action, it is not necessary. If a fireman causes significant disruption in plaintiffs' living conditions, an adverse action has occurred.[10]

If you find by a preponderance of the evidence that plaintiffs were subjected to adverse actions, then you should proceed to consider the next element of this cause of action.

If you find that plaintiffs have not carried their burden of proof in that regard, then you must return a verdict for defendant on this count.

There is a fourth element that plaintiffs must prove with regard to the retaliation cause of action. They must prove that there was a causal link between plaintiffs engaging in protected activity and the adverse action.

In assessing element four, whether there is a causal connection between the protected activity and the adverse action, you are to determine whether there are circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action. For example, in this case plaintiffs claim that shortly after they complained to the Town of Secaucus about condoms thrown onto their property, a mob of firemen attacked their residence yelling and screaming about used condoms. And plaintiffs allege that shortly after plaintiffs called the police about the alleged attack of April 25, 2004, firemen beamed their headlights into plaintiffs' windows late at night.

Defendants deny these claims and allege that there is no causal connection between any of their actions and any protected activity of the plaintiffs.

If you find that plaintiffs have proven by a preponderance of the evidence that there is a causal connection between plaintiffs' protected activity and some or all of the aforesaid adverse actions, then you should proceed to the next issue in relation to retaliation.

If you find that plaintiffs have not carried their burden with respect to this fourth element, then you should return a verdict on the retaliation count for the defendants.

Once plaintiffs have established these elements, the burden of going forward, but not the burden of persuasion, shifts to the Town of Secaucus to articulate some legitimate,

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[10] *See*, Durham Life Ins. Co. v. Evans, 166 F.3d 139, 153-55 (3d Cir.1999).

non-retaliatory reason for the adverse actions. The Town of Secaucus is not required to prove the validity of such reasons by a preponderance of the evidence, but need only articulate facts or produce evidence sufficient to raise a genuine issue of fact as to whether plaintiffs were retaliated against.

If defendant Town of Secaucus articulates a legitimate business reason for adverse actions, plaintiffs are then afforded a fair opportunity to show by a preponderance of the evidence that discrimination or retaliation more likely than not motivated the firemen's action. Plaintiffs can accomplish this by proving that the articulated reason is a pretext for the retaliation or that a retaliatory reason more likely motivated the firemen. In other words, plaintiffs must prove that the reason articulated by defendant for the actions it has taken against plaintiffs are unworthy of credence or that a retaliatory reason more likely was a motivating factor in the actions taken against plaintiffs by defendant.

If plaintiffs succeed in meeting that burden, you may presume that the adverse actions were the product of improper retaliation. Then, the defendant Town of Secaucus must prove by a preponderance of the evidence that the adverse action would have been taken regardless of retaliatory intent.

To prevail, plaintiffs do <u>not</u> have to prove that retaliation was the sole reason for the defendants' actions against them, but only that retaliation was a determinative factor in defendants' adverse decisions. Even if other meritorious reasons were involved in the decisions to act against plaintiffs, if they can prove that their complaints of harassment were a

determinative factor, a factor that made a difference, you should return a verdict in their favor provided they satisfy the next and fifth elements of this claim.

The Town of Secaucus is not liable for damages caused by retaliation by non-supervisory firemen unless the Town knew of or reasonable should have known of the retaliation and failed to prevent it or take reasonable steps to remedy it. I have already instructed you on this element with respect to discrimination.

If the plaintiffs carry their burden of proving all five of the foregoing elements, then you may return a verdict in plaintiffs' favor and against the Town of Secaucus on the issue of retaliation in violation of the LAD.

If plaintiffs fail to carry their burden of proof with respect to anyone of the foregoing elements, you must return a verdict for the defendants.

STATE CONSTITUTION CLAIM

[NOTE TO TRIAL JUDGE: The New Jersey Supreme Court has held that the Legislature has implemented the anti-discrimination provisions of the State Constitution, through passage of the New Jersey Law Against Discrimination. Accordingly, the jury should be charged that if it finds for the plaintiffs under the LAD, it must find fo rthe plaintiffs under the Constitution[11].]

The New Jersey Constitution provides that:

> **1. Natural and unalienable rights**
>
> 1. All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

I charge you and you must accept that homosexuals are "persons" entitled to the protection of the State Constitution. Plaintiffs contend that defendants violated their rights under the State Constitution by preventing them or substantially limiting them in their possession and protection of property, *i.e.*, their residence, and/or by undermining or substantially limiting their "safety and happiness."

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[11] In *Shaner v. Horizon Banccorp.*, 116 *N.J.* 433, 436 (1989), the court held:

> The New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 to 10:5-42 (LAD), was first enacted in 1945. It implements the Constitution, which provides:
>
> No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or

The legal standard for a claim under the State Constitution are the same as those I have explained to you under the New Jersey Law Against Discrimination. Accordingly, if you find for plaintiffs under the LAD, you must find for plaintiffs under the State Constitution. If you find for defendants under the LAD, you must find for defendants under the State Constitution.

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military right ... because of religious principles, race, color, ancestry or national origin. [*N.J. Const. of 1947* art. I, para. 5.]

ECONOMIC DAMAGES[12]

A. Loss of Earnings

1. Past Lost Earnings.

One part of plaintiffs' claim is lost earnings. Plaintiffs have a right to be compensated for any earnings lost as a result of injuries caused by defendants.

So the first thing you must decide is this: were plaintiffs disabled by their injuries which in turn resulted in a loss of income? If you find that took place, next you have to decide and fix the amount of lost earnings. You do this by considering the length of time during which plaintiffs were not and/or will not be able to work and what their income was before the injuries.

In determining the amount of lost earnings, you make your decision based upon the earnings that were probably lost. Naturally, this means that you must exercise your sound judgment, since plaintiffs do not have to prove the loss of earnings with precision, but rather with reasonable probability.

2. Future Lost Earnings

Plaintiffs claim that as a result of defendants' actions, both harassment and retaliation, they became ill and lost income and will continue to lose income. Taking into account education, work experience, and health, you must determine whether she will have lost wages in the future.

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[12] Model Jury Charges, 6.11(D)(11/1999).

Defendants claim that plaintiffs' disability was not caused by any harassment or retaliation by them.

EMOTIONAL PAIN AND SUFFERING DAMAGES[13]

A plaintiff who sustains injuries (including pain and suffering) as a result of harassment, discrimination or retaliation under the New Jersey Law Against Discrimination is entitled to recover fair and reasonable money damages for the full extent of the harm caused. The law recognizes as proper items for recovery, the pain, physical and mental suffering, discomfort, and emotional distress that a person may endure as a natural consequence of such injury. The measure of damages is what a reasonable person would consider to be adequate and just under all the circumstances to compensate plaintiffs, no more and no less.

You may consider plaintiffs' sex, age, usual activities, occupation, family responsibilities and similar relevant factors in evaluating the probable consequence of any injuries you find plaintiffs have suffered. You are to consider the nature, character and seriousness of any injury or discomfort. You must also consider their extent or duration, as any award you make must cover the damages suffered by plaintiffs since the incident, to the present time, and even into the future if you find in fact that the proofs presented justify the conclusion that plaintiffs' injury and its consequences have continued to the present time or can reasonably be expected to continue into the future.

The law does not provide you with any table, schedule or formula by which a person's pain and suffering may be measured in terms of money. The amount is left to your sound discretion. It is not an arbitrary power left to you, but rather the mechanism by which you are to attempt to make plaintiffs whole, so far as money can do so, based upon reason and sound

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[13] Model Jury Charges, 6.11(F)(12/1996).

judgment, without any passion, prejudice, bias or sympathy. You each know from your common experience the nature of pain and suffering, and you also know the nature and function of money. The task of equating the two so as to arrive at a just and fair award of damages is one which requires a high order of human judgment. For this reason, the law can provide no better yardstick for your guidance than your own enlightened and impartial conscience. You are to exercise sound judgment as to what is fair, just and reasonable under all the circumstances. In this undertaking, you should, of course, have regard for the testimony of plaintiffs themselves bearing on the subject of their discomforts. You should measure that testimony against the background of your own common experience and in light of your own appreciation of the inherent probabilities and your own frank appraisal of plaintiffs' demeanor and general credibility as a witness. Similarly, you should scrutinize all the other evidence presented by both parties on this subject. Then, having given weight and consideration to each of the factors presented, to the extent that you feel such weight and consideration is merited, you will arrive at a judgment which fixes the amount of money plaintiffs shall receive in compensation for the total extent of their injuries, including all of the elements I have mentioned.

PUNITIVE DAMAGES[14]

Initially, I want to advise you that the purposes of punitive damages are different from the purposes of compensatory damages. Compensatory damages are intended to compensate plaintiffs for the actual injury or loss plaintiffs suffered as a result of the defendants' misconduct. In contrast, punitive damages are intended to punish a wrongdoer and to deter the wrongdoer and others from similar wrongful conduct in the future. Punitive damages are designed to require the wrongdoer to pay an amount of money that is sufficient to punish the defendants for particular conduct and to deter that defendants from misconduct in the future. Punitive damages are also designed to serve as an example to discourage anyone else from committing similar acts.

I will now explain the considerations that should govern your decision on whether punitive damages should be awarded to plaintiffs in this case. To support an award of punitive damages you must find that plaintiffs have proved, by clear and convincing evidence, that the harm suffered by plaintiffs was the result of that defendants' actions or omissions and that either (1) that defendants' conduct was malicious or (2) that defendants acted in wanton and willful disregard of another's rights. Malicious conduct is intentional wrongdoing in the sense of an evil-minded act. Willful or wanton conduct is a deliberate act or omission with knowledge or a high degree of probability of harm to another who foreseeably might be harmed by defendant's acts or omissions and reckless indifference to the consequence of the acts or omissions.

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[14] Model Jury Charges, 6.20 (A) (Damages-punitive (For Cases Other than Products Liability Actions, Filed on or after October 27, 1995)) (3/2000); 6.20(EMP) (Damages - Punitive (For Discrimination Claims)) (6/1994).

Remember that I instructed you that plaintiffs must prove certain factors by clear and convincing evidence to be awarded punitive damages. Clear and convincing evidence means that standard of evidence which leaves no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. This standard does not mean that plaintiffs must persuade you beyond a reasonable doubt, but it does require more than a preponderance of evidence to support an award of punitive damages. In determining whether punitive damages are to be awarded, you should consider all relevant evidence, including but not limited to the following:

(1) you should consider the likelihood, at the relevant time, that serious harm would arise from the defendant's conduct;

(2) consider the defendant's awareness or reckless disregard of the likelihood that such serious harm would arise from the defendant's conduct;

(3) consider the conduct of the defendant upon learning that its initial conduct would likely cause harm; and

(4) consider the duration of the conduct or any concealment of that conduct by the defendant.

If you decide that the defendants have engaged in the type of wrongdoing that justifies punitive damages, you must then decide the amount of punitive damages that should be awarded.

A. Town Liability for Punitive Damages

I will now explain the consideration that should govern your decision on whether punitive damages should be awarded to plaintiffs and against the defendant Town of Secaucus in this case. If you find defendants' actions were discriminatory or retaliatory as I have defined, this does not automatically give rise to punitive damages. To warrant an award of punitive damages against defendant Town of Secaucus, you must first find that upper management actually participated in or was wilfully indifferent to, the harassment, discrimination against, and

retaliation against plaintiffs. I charge you that Charles Snyder, Jr., Charles Snyder, Sr., Mayor Elwell, Town Administrator Iacono, Fire Chief Walters and Sergeant Amodeo are upper management, and that plaintiffs have met their burden on this issue. If you find that such individuals engaged in the type of conduct justifying an award of punitive damages, then you may award punitive damages against the defendant Town of Secaucus.

B. Amount of Punitive Damages

In determining that amount of punitive damages you must consider all relevant evidence, including but not limited to, evidence of the four factors that I previously mentioned to you in connection with your determination as to whether punitive damages should be awarded at all. As you may recall, these factors are (1) the likelihood, at the relevant time, that serious harm would arise from the defendants' conduct; (2) the defendants' awareness or reckless disregard of the likelihood that such serious harm would arise from the defendants' conduct; (3) the conduct of the defendants upon learning that its initial conduct would likely cause harm; and (4) the duration of the conduct or any concealment of it by the defendants.

Finally you should make sure that there is a reasonable relationship between the actual injury and the punitive damages. After considering all these factors, you should exercise your judgment and determine (1) whether punitive damages should be awarded in this case; and (2) if you decide to award punitive damages, what the proper amount should be.