

Melanie R. Savarese (SBN 216950)
SAVARESE LAW FIRM
37 West Sierra Madre Blvd.
Sierra Madre, CA 91024
Tel. 626-355-3264
Fax. 626-355-3491
melanie@savareselawfirm.com

Attorneys for Plaintiff,
Christine Hougan

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE

CHRISTINE HOUGAN

Plaintiff,

vs.

CITY OF NEWPORT BEACH POLICE
DEPARTMENT; CITY OF NEWPORT
BEACH; JAY JOHNSON, an individual; and
DOES 1 through 10, inclusive

Defendants.

CASE NO.30-2013-00646369-CU-WT- CJC

SECOND AMENDED COMPLAINT FOR:

- (1) SEXUAL HARASSMENT IN VIOLATION OF FEHA;
- (2) GENDER DISCRIMINATION IN VIOLATION OF FEHA;
- (3) WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY (GENDER);
- (4) RETALIATION / WRONGFUL TERMINATION IN VIOLATION OF FEHA;
- (5) RETALIATION IN VIOLATION OF PUBLIC POLICY;
- (6) FAILURE TO PREVENT AND/OR REMEDY DISCRIMINATION, HARASSMENT, AND RETALIATION;
- (7) WRONGFUL TERMINATION BASED ON DISABILITY / PERCEIVED DISABILITY

Plaintiff complains and alleges as follows:

1. Plaintiff, CHRISTINE HOUGAN, at all times relevant hereto, was an employee, agent, or other protected relationship with defendants. Specifically, Ms. Hougan worked at the Newport Beach Police Department for approximately 21 years. She rose through the ranks from Records, Community Service Officer, and then became a Dispatcher.
2. At all times herein relevant, plaintiff was a resident of the State of California, County of Orange.

1 3. Plaintiff is informed and believes and thereon alleges that defendant CITY OF NEWPORT
2 BEACH ("CITY") operates THE NEWPORT BEACH POLICE DEPARTMENT
3 ("DEPARTMENT") with its principal place of business located at 870 Santa Barbara Drive
4 Newport Beach, CA 92660.

5 4. Plaintiff is informed and believes and thereon alleges that defendant JAY JOHNSON is a
6 resident of the City of Cypress, Orange County.

7 5. Defendants CITY, DEPARTMENT and DOE Defendants 1 through 10 are hereinafter
8 sometimes referred to as "DEFENDANTS".

9 6. The true names and capacities of the defendants named herein as Does 1 through 10, inclusive,
10 whether individual, corporate, associate or otherwise, are unknown to plaintiff who therefore
11 sues such defendants by fictitious names pursuant to California Code Civil Procedure section
12 474. Plaintiff is informed and believes that all of the Doe defendants are California residents.
13 Plaintiff will amend this Complaint to show such true names and capacities when they have been
14 determined.

15 7. Plaintiff is informed and believes, and thereby alleges that each of the defendants herein was at
16 all times relevant hereto the agent, employee or representative of the remaining defendants and
17 was acting at least in part, within the course and scope of such relationship in doing the things
18 herein alleged.

19 8. Plaintiff is informed and believes, and thereby alleges that each of the defendants was acting in
20 a single or joint employer, and/or alter ego capacity such that they are liable for the acts of their
21 agents and/or employees.

22 **BACKGROUND FACTS COMMON TO ALL CAUSES OF ACTION**

23 9. Ms. Hougan began working for DEFENDANTS in approximately 1990. She worked for a few
24 years as a Community Services Officer, and then a few years later, became a Dispatcher. Ms.
25 Hougan's husband, John Hougan, was likewise hired by the Newport Beach Police Department
26 as a police officer in 1990. He was promoted to Sergeant in 2005. DEFENDANTS fired John
27 Hougan in July 2011 and then fired Christine Hougan on February 16, 2012. At the time of Ms.
28 Hougan's termination, Mr. and Mrs. Hougan were the only two employees at the Newport Beach
Police Department who the Chief had fired. Mr. Hougan's employment relationship is relevant

1 to the allegations herein as Ms. Hougan alleges she was wrongfully terminated, harassed and
2 retaliated against, in part due to the protected conduct her husband engaged in while an employee
3 for this same defendant. If it is in fact proven that John Hougan engaged in protected conduct
4 while working fo DEFENDANT, this entitles Mrs. Hougan to protection under *Thompson v.*
5 *North American Stainless, LP.* (2010) __US__, 131 S.Ct. 863, 868 as she falls “within the zone
6 of interests” as his spouse.

7 10. From 1990 through the time of her termination, Ms. Hougan performed her work for
8 DEFENDANTS satisfactorily, with no disciplinary actions. This was true of her husband as well.

9 11. While working as a dispatcher and her husband as a police officer, Ms. Hougan’s mother was
10 raped and killed. This was well-known throughout the entire department. This event caused Mrs.
11 Hougan to have post traumatic stress disorder, that was also well-known throughout the entire
12 department. Despite her PTSD, Ms. Hougan received treatment and continued to work.

13 12. In December of 2008 and continuing for several months following, as a board member of the
14 Police Management Association, John Hougan demanded the Civil Service Board to investigate
15 misconduct from top city officials regarding departmental promotional processes, the illegal
16 implementation of a "side-letter" agreement into the Association's Memorandum of
17 Understanding (“MOU”), the failure to follow rules and policies in hiring the Chief of Police and
18 misconduct of the Civil Service Board itself for a lack of oversight.

19 13. In October 2008 (at a deposition) and then in February 2009 (at the time of trial), John Hougan
20 testified in the case styled *Harvey v. City of Newport Beach* (“*Harvey*”). *Harvey* was a FEHA
21 case brought by a Sergeant of the Newport Beach Police Department who sued, in part, because
22 he was treated wrongfully based on the fact that his co-workers perceived him to be homosexual.
23 Defendants in the *Harvey* case adamantly denied that the perception that Sergeant Harvey was
24 a homosexual existed.

25 14. Sergeant John Hougan testified truthfully and in a manner that was perceived by Defendants to
26 be harmful to their case. Specifically, Sergeant Hougan testified that there were “very prevalent”
27 rumors that Harvey was a homosexual and the majority of these comments were supervisors.
28 Sergeant Hougan proceeded to testify about the names of specific co-workers at the Newport

1 Beach Police Department who he heard mention their perception that Sergeant Harvey was a
2 homosexual.

3 15. At the time of trial, defense counsel for the City of Newport Beach even asked the Court to treat
4 Sergeant Hougan as a “hostile witness” during his trial testimony because his testimony was so
5 damaging to DEFENDANTS’ case.

6 16. On March 17, 2009, a unanimous jury found that DEFENDANTS had discriminated against
7 Sergeant Harvey in violation of the FEHA, and awarded him 1.7 million dollars.

8 17. Despite a finding of discrimination and retaliation against DEFENDANTS, no Department
9 employees were disciplined or fired.

10 18. Within weeks if not days of John Hougan’s testimony, Mrs. Hougan’s co-workers, including her
11 supervisor, came into Dispatch to speak disparagingly about Mr. Hougan’s testimony in the
12 *Harvey* case. Their comments drove Mrs. Hougan to tears and she was sent home from work.

13 19. A few weeks after the Jury Verdict, Captain Johnson called Sergeant Hougan into his office to
14 tell him that he "did not appreciate" or "agree with" his testimony against him at the Trial.
15 Captain Johnson said that he "just wanted [HOUGAN] to know that". That was the sole reason
16 Captain Johnson called Sergeant Hougan into the office.

17 20. Sergeant Hougan was called a "traitor" by co-workers, had a picture of a bomb taped to his desk,
18 had items stolen from him at work and was otherwise ostracized and essentially ignored by his
19 fellow police officers.

20 21. In March of 2009, Sergeant Hougan reported misconduct (to include policy violations of
21 accepting gratuities and perjury) against a Police Captain. This Captain was good friends with
22 the (now former) Chief of Police and with the (now former) City Manager. The Chief of Police
23 essentially ignored the complaint, which another individual eventually referred to the City
24 Attorney's office for investigation.

25 22. In or around May 2009, Ms. Hougan was again diagnosed with Post Traumatic Stress Disorder
26 and began actively treating for same.

27 23. In July 2009, a supposed “random audit” of Sergeant Hougan’s computer discovered what
28 DEFENDANTS contended was “out of policy computer use.” Sergeant Hougan was thereafter
put ***under investigation*** then **demoted** in August 2010 for “out of policy computer use”. This

1 was pretextual as a Captain had previously been found to have a large amount of pornography
2 on his work computer yet was never disciplined for it. DEFENDANTS were just trying to get
3 rid of Sergeant Hougan.

4 24. On August 5, 2010, Chief of Police Jay Johnson had a 90 minute closed-door meeting with Ms.
5 Hougan. He then proceeded to tell Ms. Hougan about the plethora of information related to her
6 husband's investigation that was either inaccurate or inflammatory. He sat within inches of her
7 and used his position of authority to intimidate her. Chief Johnson would not have done this to
8 Plaintiff had she been a man. He was using his rank and his gender to intimidate her and render
9 her powerless.

10 25. Around this same time, Chief Johnson would physically come into Dispatch about 90% of the
11 time that Ms. Hougan was "plugged in" and working. He would frequently lean against her
12 console, often standing very physically close to her. He told her more than once, "I like you. I
13 REALLY like you." He would sometimes take a position directly behind her chair such that she
14 could feel his breath on the back of her neck.

15 26. Plaintiff never witnessed Chief Johnson exhibit this type of conduct described in paragraph 23
16 toward any other male co-worker, and in fact alleges that Chief Johnson acted this way because
17 he knew due to his rank and his gender, and the fact that Plaintiff was a subordinate female, he
18 could exercise his rank and power in a way that would intimidate her, make her fearful, and
19 submit to his authority.

20 27. On August 17, 2010, Ms. Hougan was working in Dispatch. Chief Johnson came in to
21 Communications, leaned against her position, smiled and said, "Why are YOU hear?" To which
22 Ms. Hougan politely responded, "A mom's work is never done" and that she works there. This
23 bizarre inquiry by the Chief made Ms. Hougan very uncomfortable and intimidated. She made
24 a conscious effort to side-step the Chief so as to avoid interactions with him.

25 28. On October 14, 2010, Chief Johnson brought his brother, a former Commander from the City
26 of Long Beach, into the Communications Center. Plaintiff was working. She had her back turned
27 to the center of the room because she was working and the radio was busy. She heard Chief
28 Johnson pause to introduce her, so she turned quickly around in her chair to shake hands with
the Commander. As soon as she stuck out her hand, he said, "Ooohhh, I like THAT uniform"

1 – all the while, staring at Ms. Hougan’s legs (she was wearing a City issued uniform skort). The
2 room became silent while Ms. Hougan came up with a response. The Chief did nothing to
3 chastise or object to what his brother had just said. In fact, his silence communicated to Ms.
4 Hougan that he thought this behavior was ok. This made Ms. Hougan even more uncomfortable
5 while at work. The Chief never allowed or ratified any such type of sexist conduct toward any
6 males in Plaintiff’s department.

7 29. After this October 14, 2010 incident with the Chief and his brother, Ms. Hougan reported the
8 incident to Detective Donald Prouty and Master Officer in Personnel, Andrew Halpin. Plaintiff
9 told them exactly what happened , amidst her tears, she told them:

10 She had her back turned to the center of the room because she was working and the radio
11 was busy. She heard Chief Johnson pause to introduce her, so she turned quickly around
12 in her chair to shake hands with the Commander. As soon as she stuck out her hand, he
13 said, “Ooohhh, I like THAT uniform” – all the while, staring at Ms. Hougan’s legs (she
14 was wearing a City issued uniform skort). The room became silent while Ms. Hougan
15 came up with a response. The Chief did nothing to chastise or object to what his brother
16 had just said. In fact, his silence communicated to Ms. Hougan that he thought this
17 behavior was ok. This made Ms. Hougan even more uncomfortable while at work. The
18 Chief never allowed or ratified any such type of sexist conduct toward any males in
19 Plaintiff’s department.

20 30. It was clear to Detective Prouty that Mrs. Hougan was in fact complaining out the Chief ratifying
21 and/or condoning sexually inappropriate conduct in the workplace because Detective Prouty
22 mentioned during this conversation about “reporting it”. He then responded to Mrs. Hougan that
23 she “probably shouldn’t” because “John was trying to get his stripe back” and it was very likely
24 if Plaintiff made a big deal about the incident described in Paragraph 26, that her husband would
25 be retaliated against and not be given his rank as sergeant back.

26 31. In January 2011, now *Officer* Hougan suffered an injury to his back while responding to a call
27 that resulted in him having to physically subdue a subject, along with four other officers. Seven
28 days after Officer Hougan was released from the hospital, he received a call at home from Lt. Lu
(of the Professional Standards Unit) advising him he was ***under investigation*** for allegedly

1 running over a bird while patrolling the beach. This conduct led both Hougans to believe
2 Defendants were being retaliatory because policy is not to bother officers when they are home
3 with an injury, and moreover, they had never heard of an officer being investigated for running
4 over a bird in either of their careers.

5 32. On February 3, 2011, Ms. Hougan complained to Patrol Lt. Scott McKnight about Chief
6 Johnson's inappropriate behavior toward her. She reported to McKnight that the Chief was
7 always physically following her around.

8 33. On March 8, 2011, Ms. Hougan was commended for her work on a "Critical Incident." The
9 Critical Incident that Supervisor McGlinchey documented above involved a child waking up
10 alone in his home and discovering his mother dead on the couch. The child called 9-1-1 and Ms.
11 Hougan answered the call. At the time, Ms. Hougan also had small children of her own.

12 34. On that day, Ms. Hougan's supervisor wrote: "I want to say a proud thank you to Christie
13 Hougan and Dave Ballantyne for their handling of a very emotional call." She continues, "Both
14 Dispatchers did a great job of keeping those ('especially hard') emotions in check during the
15 call."

16 35. Defendant knew that Plaintiff had previously been diagnosed with post traumatic stress disorder
17 as it was documented in her personnel file.

18 36. Mrs. Hougan's supervisor documented on that day of the "Critical Incident" described in
19 paragraph 31, that she witnessed Plaintiff very emotional at work – "crying, kneeling on the
20 floor, slamming her hand against the console counter in frustration." A co-worker "pulled her
21 from the console after she hung up [and] held her as she cried, trying to recover." Mrs. Hougan's
22 supervisor continued to document how she "was concerned about the multiple stressors
23 occurring in Christie's world at the present time and that she seemed very emotionally fragile".
24 Mrs. Hougan's supervisor then provided the same information to Lieutenant Lewis

25 37. Defendants train their employees to recognize signs of post traumatic stress disorder ("PTSD"),
26 which includes symptoms like crying spells, irritability and/or uncontrolled anger. They have an
27 established written protocol for dealing with PTSD (called a Trauma Support Team), yet they
28 did nothing in Mrs. Hougan's instance though they acknowledged the extremely stressful

environment she was in, and likewise acknowledged how Mrs. Hougan's reaction to it was different, at that time, then it would have been for any other dispatcher.

38. ***On this same day*** described in paragraph 31, DEFENDANTS allege that Ms. Hougan engaged in conduct that was extremely disruptive to the Communications Center, and that ultimately was offered as evidence in support of her termination many months later. Despite this, and the fact that DEFENDANTS acknowledged the symptoms that a Critical Incident can cause, DEFENDANTS did nothing. The Supervisors at the department chose to ignore her "[c]hange in interactions with others, [...] unusual behavior, angry outbursts, and [...] angry and intensified emotional reactions" and instead of ordering her to see a Psychologist for a de-briefing (as dictated by policy), the Department chose to use her symptoms against her 11 months later in her termination.

39. Chief Johnson was aware of this Critical Incident and even engaged Ms. Hougan in a conversation about the incident; complimenting her technique and handling of the call. This happened just a few hours prior to her discussion with him later that afternoon set forth *infra* at paragraphs 38-39. Chief Johnson also noted this Critical Incident in his Management Staff Meeting Minutes in March.

40. In March 2011, Officer Hougan's civil service hearing began, appealing his demotion. On March 10, 2011, while waiting outside of the hearing, Ms. Hougan was told that Chief Johnson testified that Ms. Hougan may be comfortable with the sexual act of wife swapping. To be clear, wife swapping refers to two married couples, switching partners for the purposes of having sex. While outside, Ms. Hougan then approached Chief Johnson, who was in the presence of Lt. Lu, to complain about the sexually explicitly comment he made about her during the hearing, and to be sure that she made it clear she opposed this kind of sexually derogatory conduct toward her. Chief Johnson secretly recorded part of the conversation without Christie's consent (in violation of department policy and State Law).

41. When Ms. Hougan approached Chief Johnson, she was off duty and on a public sidewalk. He was not in uniform. She did indeed advise Chief Johnson that she was going to "tell everybody" about his sexually inappropriate and intimidating conduct toward her. Chief Johnson responded by asking if Ms. Hougan was threatening him.

1 42. On April 22, 2011, Chief Johnson silently stood behind Ms. Hougan's chair, unannounced and
2 silent, as he peered over her shoulder while she worked. He was using his rank and power to
3 intimidate her. In fact, one of Ms. Hougan's co-workers asked her, "who is stalking you?"

4 43. Chief Johnson acted in the manner described in paragraph 40 way because he knew due to his
5 rank and his gender, and the fact that Plaintiff was a subordinate female, he could exercise his
6 rank and power in a way that would intimidate her, make her fearful, and submit to his authority.

7 44. After the above-incident on April 22, 2011, Saku Ethir of the Law Firm of Lackie, Dammeier
8 & McGill advised Lt. Lu and Sgt. Hamilton during an audio taped interview that Chief's
9 Johnson's misconduct was harassing and "actionable". They made this advisement on Plaintiff's
10 behalf. After this admonishment, the Chief took to going on ride-alongs with the patrol officers
11 in the field. During these ride-alongs, the Chief refused to answer any of Ms. Hougan's radio
12 traffic, which was against the DEPARTMENT'S written policy.

13 45. On May 17, 2011, Ms. Hougan was then escorted to the Professional Standards Unit and was told
14 she was under investigation for repeating the sexual comments about wife-swapping that the
15 Chief had made.

16 46. DEFENDANTS then interviewed Ms. Hougan for almost three hours about the statements she
17 made to Chief Johnson, in an attempt to have her make a false statement.

18 47. In May of 2011, *Officer* Hougan was advised that he was ***under investigation*** again for computer
19 use and for providing a misleading statement to Chief Johnson. (Note that this is the third
20 Professional Standards Unit ("PSU") investigation initiated by DEFENDANTS against Sergeant
21 Hougan in two years - prior to his testimony in the *Harvey* Trial, there had not been a single PSU
22 investigation against Sergeant Hougan in two decades.)

23 48. Eventually, in July of 2011, DEFENDANTS terminated Officer Hougan for alleged
24 insubordination, computer use and for providing a misleading statement to Chief Johnson (all
25 which allegedly occurred one year before). Indeed, Officer Hougan's termination stems from the
26 same alleged conduct for which he was demoted.

27 49. In September 2011, Ms. Hougan made a complaint to the Federal Bureau of Investigation
28 regarding unfair, harassing and retaliatory conduct by Chief Johnson.

1 50. Then, DEFENDANTS conducted a sham investigation or about ***October 21, 2011 (nine months***
2 ***after the fact)***, directed at eliciting “evidence” to fire Ms. Hougan. In this “investigation”
3 Defendants read Plaintiff’s e-mails to/from her husband and others. Therein, Ms. Hougan
4 admitted to being “415.” During this investigation, Ms. Hougan likewise made it clear that she
5 already felt she was being retaliated against by the DEPARTMENT. She told the investigators
6 that she felt retaliated against for complaining about the Chief and for the protected acts of her
7 husband, that she felt isolated, and she cried often and uncontrollably. They noted her “sobbing.”
8 She told the investigators (who were also co-workers in management positions) about how when
9 she received bad news at work, she hung her head to cry.

10 51. In January 2012, Ms. Hougan was advised by her direct supervisor, Joe Horton, that she was a
11 great employee and would receive a good performance evaluation. Approximately one week
12 later, Ms. Hougan was notified by Lt. Lewis of DEFENDANTS’ intention of terminating her.
13 She was officially terminated on February 16, 2012 for allegedly violating ***eleven*** different
14 departmental policies. The ultimate result of the accusations in her termination notification is
15 that Ms. Hougan spoke disparaging about the Chief, and disobeyed an order (that was given to
16 her when she was not working).

17 52. Plaintiff knows that the reasons given for her termination are simply a pretext for the real reason
18 she was terminated. Plaintiff knows this because she has been witness to dozens of other police
19 officers and other DEPARTMENT employees conduct themselves in a manner far worse than
20 that of which she was accused, yet retain their employment. Of note, DEFENDANTS have made
21 a lot of noise about Ms. Hougan’s alleged words about the Chief, yet Plaintiff has first hand
22 knowledge of others within the DEPARTMENT who have spoke disparagingly about the Chief
23 yet retained their jobs. In fact, they work there today.

24 53. Specifically, the Police Association at the Newport Beach Police Department drafted a document
25 questioning the Chief’s policies and tactics. On the document were the letters “WTF.” This
26 document was posted on-line for the DEPARTMENT to read. Nobody was fired for this conduct.

27 54. There was another instance where a Newport Beach Police Officer stood up in a Police
28 Association meeting and called the Chief a “liar,” yet this Officer was never fired.

1 **FIRST CAUSE OF ACTION**

2 **SEXUAL HARASSMENT IN VIOLATION OF FEHA**

3 **(Against All Defendants and Does 1 through 10)**

4 55. Plaintiff repeats and realleges paragraphs 1 to 54 of the Complaint as if the same were fully set
5 forth herein and with the same full force and effect.

6 56. At all times herein relevant, there was an employer/employee, agency, or other qualified
7 relationship between plaintiff and the defendants.

8 57. It is illegal to sexually harass an individual pursuant to California Government Code section
9 12940 et seq.

10 58. Chief Johnson engaged in sexual harassment as described above. He used his power to intimidate
11 and belittle her. When she put her foot down, complained about, opposed and reported the
12 conduct to others, he began retaliating against her, and setting her up for failure.

13 59. Defendant has a pattern and practice of sexually harassing his employees, and intimidating
14 women using his rank and position of power within the DEPARTMENT.

15 60. Defendants are strictly liable for the sexual harassment because at all times, it was committed
16 by an employee in a supervisory position.

17 61. In addition to the acts described above, Mrs. Hougan was also aware of numerous other sexually
18 inappropriate, demeaning and discriminatory things constantly going on in the workplace around
19 here at Newport Beach Police Department. Some of these instances – all of which Mrs. Hougan
20 was aware of at the time include:

21 62. Female co-worker Caroline Staub complained to Detective Lt. Dennis Birch about the sexually
22 offensive language and content of the topics discussed by her male co-workers in her presence.
23 She complained that they were insulting and made her uncomfortable. The complaint was
24 dismissed, no investigation conducted and mocked by Lt. Birch when he placed a mug in the area
25 with a sign attached that said, 'Bad Language---1 cent penalty.' Neither Lt. Birch nor any of the
26 employees behaving in an offensive manner were ever investigated or reprimanded.

27 63. Multiple female employees observed Officer Randy Query looking at pornography in their
28 presence. Complaints were ignored and shortly thereafter Officer Query was promoted to the
rank of Sergeant. This was widely known within the Department

1 64. While a probationary sergeant, two more female employees complained about Sgt. Query's
2 harassing and intimidating behavior towards them while they were performing their duties at
3 their work stations. Patrol Captain James Kaminsky demoted Sgt. Query back to Officer.
4 However, in 2012, Chief Johnson re-promoted Officer Randy Query back to the rank of
5 Sergeant. When concerns were voiced, Chief Johnson dismissed the concerns stating that the
6 sexual harassment issues regarding Sgt. Query were, in his opinion, "no big deal." The Chief
7 excused the behavior by lamenting to other male employees that Query's actions were
8 "something we all would have done" and that he (Chief Johnson) "had probably done that at
9 some point in [his] career."

10 65. In the spring of 2012, a number of female police employees approached C.S.O. Tina Parker in
11 tears, upset about the behavior, language and statements of the newly appointed Administrator,
12 Jonathan Stafford directed at them. Shortly thereafter, Professional Standards Unit ("P.S.U.")
13 Lt. Tom Fischbacher approached Ms. Parker and requested her opinion on the job performance
14 of Administrator Stafford. Ms. Parker advised Lt. Fischbacher of the unsolicited complaints that
15 had been brought to her attention from some of the young female employees regarding the
16 Administrator's inappropriate behavior towards them. Lt. Fischbacher did not file a report (as
17 required by the N.B.P.D. Manual). When Ms. Parker followed up on the status of the complaints,
18 Lt. Fischbacher told her he had "talked to Chief Johnson about the matter," and that "Chief
19 Johnson would talk to Administrator Stafford." No formal investigation was ever conducted.

20 66. In another incident with Mr. Stafford, he approached Officer Mike O'Beirne, who was eating
21 lunch in the police department lobby, and asked him what he was having. Officer O'Beirne
22 replied, "a tuna sandwich." In front of other employees, many female, Mr. Stafford replied,
23 "what? Don't you have a girlfriend?" A comment that was understood by bystanders and
24 O'Beirne to be sexual in nature.

25 67. Captain Dale Johnson was standing with a group of employees when a new, young and attractive
26 Dispatcher walked by and politely said "hello." After she was out of earshot, Captain Johnson
27 (who at the time was in charge of Communications) said to the group of men he was speaking
28 with, "there goes my gift to Patrol."

1 68. Sgt. Birtch got angry at Chief Klein's secretary, Suzanne Haro because of some work she was
2 asking him about. In anger, he rolled up a piece of paper and threw the wad at her head in front
3 of the entire room in personnel, causing her to depart, crying. Sgt. Birtch was promoted to Lt.
4 thereafter.

5 69. At a Detective briefing in 2012, Chief Johnson was giving a synopsis of what he had learned at
6 a recent conference he had just returned from. The conference was called, "Women in Law
7 Enforcement." Chief Johnson told the room-full of mostly male detectives that he learned that
8 a woman's mind thinks differently than a man's mind...that women cannot think as logically as
9 a man.

10 70. Captain Dale Johnson routinely spoke derogatorily about his wife. He constantly referred to her
11 as having "a bubble-gum butt." He called her "fat" and "lazy," because she was a stay at home
12 mom.

13 71. In the spring of 2011, Chief Johnson was training to run in the Baker to Vegas Relay Race along
14 with other employees who would be representing the department. The Chief periodical sent out
15 emails to the males on the racing team and excluded all the females also racing. He began the
16 e-mails with, "Dear Gentlemen," or "Gentlemen."

17 72. Chief Johnson began teasing and flirting with Community Services Officer, Tina Parker. When
18 co-workers started noticing and making comments to Parker about how much the Chief Johnson
19 sought her out and clearly "really liked [her]" she became increasingly uncomfortable. She
20 attempted to avoid Chief Johnson but when this proved futile she brought the matter to her
21 supervisor, Wendy Jo. Jo laughed at Parker and refused to take her complaint seriously. Nothing
22 was ever done to investigate Parker's allegations.

23 73. At the SWAT Christmas party in December of 2011, the entire SWAT team was included except
24 for the lone female dispatcher who was a member of the team as a Tactical Dispatcher. The male
25 members of the Tactical Dispatch SWAT team were invited.

26 74. In a Union Board meeting with Chief Johnson in 2011, the members of the board brought to
27 Chief Johnson's attention the inappropriate comments made by Captain Dale Johnson towards
28 females in the station and about females in general. One of these comments was "I want to rub
her (a female employee's) breasts." Chief Johnson asked the only female in the meeting, Nicole

1 Gumiran if Captain Johnson had said anything directly to her. Ms. Gumiran reported that
2 although Captain Johnson had not said anything to her, that it was “common knowledge” that
3 Captain Johnson made inappropriate comments to women. An investigation regarding these
4 allegations was never conducted. Shortly thereafter Chief Johnson appointed Captain Johnson
5 to the Ethics and Leadership Committee.

6 75. On September 17, 2011, Plaintiff and female Dispatcher Joni Thompson received a favorable
7 commendation for handling a suicidal 911 call. The officers that responded (all male) were
8 Officers, P. Carpentieri, J. Mika, A. Yim, R. Hufford and Sgt. Wolik. Early the next year (spring
9 of 2012) all of the male officers were awarded medals at the Newport Beach Police Department
10 awards ceremony in front of 500 members of the community and city leaders. Ms. Thompson,
11 who was still an employee, was never even mentioned.

12 76. Plaintiff filed a timely charge of harassment with the California Department of Fair Employment
13 and Housing (“DFEH”) and received a Notice of Case Closure informing her of her right to sue.
14 Therefore, plaintiff has exhausted all of her administrative remedies. (See Exhibit A hereto.)

15 77. As a proximate result of defendants’ harassment of plaintiff, plaintiff has suffered and continues
16 to suffer substantial losses in earnings, and other employment and retirement benefits and has
17 suffered and continues to suffer embarrassment, humiliation and mental anguish all to her
18 damage in an amount according to proof.

19 78. Defendants committed the acts alleged herein maliciously, fraudulently and oppressively, with
20 the wrongful intention of injuring plaintiff, from an improper and evil motive amounting to
21 despicable conduct, and in conscious disregard of plaintiff's rights. Plaintiff therefore seeks
22 punitive damages against Defendant, Jay Johnson.

23 79. As a result of defendants’ harassing acts as alleged herein, plaintiff is entitled to reasonable
24 attorneys' fees and costs of said suit as provided by California Government Code section 12965,
25 section (b).

26 **SECOND CAUSE OF ACTION**

27 **GENDER DISCRIMINATION IN VIOLATION OF FEHA - WRONGFUL TERMINATION**

28 **(Govt. Code, § 12940 et seq.)**

**(Against Defendants CITY OF NEWPORT BEACH POLICE DEPARTMENT, CITY OF
NEWPORT BEACH DOES 1 through 10)**

80. Plaintiff repeats and realleges paragraphs 1 to 79 of the Complaint as if the same were fully set forth herein and with the same full force and effect.

81. At all times herein relevant, there was an employer/employee, agency, or other qualified relationship between plaintiff and the defendants. California Government Code §12940 et seq. prohibits discrimination in employment on the basis of gender.

82. Plaintiff is female.

83. Defendants' fired plaintiff February 16, 2012. Mrs. Hougan's gender was a substantial motivating reason for her discharge. Women have been mistreated, and held to an entirely different standard than men at Newport Beach Department for years continuing through the present. Specific instances of the overwhelming discriminatory attitude by Chief Johnson and others are set forth *supra* at paragraphs 58-75 and 24-28, 40, 42-43.

84. Defendants have a pattern and practice of discriminating against female workers as alleged in detail in paragraphs 58-75 herein.

85. Moreover, defendants' facially neutral policy of nondiscrimination in employment decisions has an unfavorable impact on those employees who are in a similar position to plaintiff.

86. Plaintiff filed timely charges of discrimination with the California Department of Fair Employment and Housing ("DFEH") and EEOC and received a Notice of Case Closure informing her of her right to sue. Therefore, plaintiff has exhausted all of her administrative remedies. (See Exhibit A hereto.)

87. As a proximate result of defendants' discrimination against plaintiff, plaintiff has suffered and continues to suffer substantial losses in earnings, and other employment and retirement benefits and has suffered and continues to suffer embarrassment, humiliation and mental anguish all to her damage in an amount according to proof.

88. Defendants did the acts herein alleged maliciously, fraudulently and oppressively, amounting to despicable conduct, and in conscious disregard of plaintiff's rights. The acts alleged herein were known to, authorized and ratified by defendant.

1 89. As a result of defendants' discriminatory acts as alleged herein, plaintiff is entitled to reasonable
2 attorneys' fees and costs of said suit as provided by California Government Code section 12965,
3 subsection (b).
4

5 **THIRD CAUSE OF ACTION**

6 **VIOLATION OF PUBLIC POLICY**

7 **(Against Defendants CITY OF NEWPORT BEACH POLICE DEPARTMENT, CITY OF**
8 **NEWPORT BEACH DOES 1 through 10)**

9 90. Plaintiff repeats and realleges paragraphs 1 to 89 of the Complaint as if the same were fully set
10 forth herein and with the same full force and effect.

11 91. At all times herein relevant, there was an employer/employee, agency, or other qualified
12 relationship between plaintiff and the defendants.

13 92. Plaintiff was fired as a result of the defendants' violation of fundamental public policies. It is
14 against California Public Policy to discriminate on the basis of gender or sex, and also against
15 California Public Policy to retaliate for making a complaint of retaliation, discrimination or
16 harassment. It is against California Public Policy to retaliate against an employee and his spouse
17 for participating in and testifying in a proceeding brought under Government Code Section
18 12940 et seq., or for making any other type of protected complaint under the law. This
19 discrimination and retaliation was a substantial motivating reason for the firing of plaintiff.

20 93. As a proximate result of defendants' actions, plaintiff has suffered and continues to suffer
21 substantial losses incurred in earnings, bonuses, deferred compensation and other employment
22 benefits.

23 94. As a further proximate result of defendants' actions, plaintiff has suffered and continues to suffer
24 emotional distress, mental anguish, embarrassment, humiliation and anxiety all to her damage
25 in an amount in excess of the minimum jurisdictional limits of this court. Plaintiff will seek
26 leave of court to amend his complaint to allege the correct amount at the time of trial or
27 according to proof at trial.
28

1 95. Defendant, and each of them, did the acts herein alleged maliciously, fraudulently and
2 oppressively, amounting to despicable conduct, and in conscious disregard of plaintiff's rights.
3 The acts alleged herein were known to, authorized and ratified by defendants.
4

5 **FOURTH CAUSE OF ACTION**

6 **RETALIATION IN VIOLATION OF FEHA**

7 **(Against Defendants CITY OF NEWPORT BEACH POLICE DEPARTMENT, CITY OF**
8 **NEWPORT BEACH DOES 1 through 10)**

9 96. Plaintiff repeats and realleges paragraphs 1 to 95 of the Complaint as if the same were fully set
10 forth herein and with the same full force and effect.

11 97. At all times herein relevant there was an employer/employee relationship between the plaintiff
12 and the defendants.

13 98. It is against the law to retaliate against an employee for making protected complaints of
14 harassment and discrimination pursuant to California Government Code section 12940 et seq.
15 It is likewise against the law to retaliate against an employee and his spouse because he
16 participated in and in fact testified in a FEHA proceeding.

17 99. As set forth above, herein, Plaintiff did in fact make protected complaints of harassment and
18 disparate treatment toward her based on her gender. Defendants knew about these complaints.
19 Moreover, Plaintiff's husband engaged in protected activity as set forth above that likewise
20 affords Mrs. Hougan protection under the law as she is in the "zone of interests" that anti-
21 retaliation laws are designed to protect.

22 100. Plaintiff's complaints of harassment, retaliation and discrimination were a substantial motivating
23 factor in her termination. Officer Hougan's participation in and testimony given in the prior
24 noted FEHA proceeding were likewise a substantial motivating factor in Mrs. Hougan's
25 termination.

26 101. Plaintiff filed timely charges of discrimination with the California Department of Fair
27 Employment and Housing ("DFEH") and received a Notice of Case Closure informing her of her
28 right to sue. Therefore, plaintiff has exhausted all of her administrative remedies. (See Exhibit
A hereto.)

1 102. As a proximate result of defendants' retaliation against plaintiff, plaintiff has suffered and
2 continues to suffer substantial losses in earnings, and other employment and retirement benefits
3 and has suffered and continues to suffer embarrassment, humiliation and mental anguish all to
4 her damage in an amount according to proof.

5 103. Defendants committed the acts alleged herein maliciously, fraudulently and oppressively, with
6 the wrongful intention of injuring plaintiff, from an improper and evil motive amounting to
7 despicable conduct, and in conscious disregard of plaintiff's rights.

8
9 **FIFTH CAUSE OF ACTION**
10 **RETALIATION IN VIOLATION OF PUBLIC POLICY**
11 **(Against Defendants CITY OF NEWPORT BEACH POLICE DEPARTMENT, CITY OF**
12 **NEWPORT BEACH DOES 1 through 10)**

13 104. Plaintiff repeats and realleges paragraphs 1 to 103 of the Complaint as if the same were fully set
14 forth herein and with the same full force and effect.

15 105. At all times herein relevant there was an employer/employee relationship between the plaintiff
16 and the defendants.

17 106. It is against the public policy to retaliate against an employee for making protected complaints
18 of harassment and discrimination pursuant to California Government Code section 12940 et seq.
19 It is likewise against the law to retaliate against an employee and his spouse because he
20 participated in and in fact testified in a FEHA proceeding.

21 107. As set forth above, herein, Plaintiff did in fact make protected complaints of harassment and
22 disparate treatment toward her based on her gender and retaliation based on her husband's
23 protected activity. Defendants knew about these complaints. Moreover, Plaintiff's husband
24 engaged in protected activity as set forth above that likewise affords Mrs. Hougan protection
25 under the law as she is in the "zone of interests" that anti-retaliation laws are designed to protect.

26 108. Plaintiff's complaints of harassment, retaliation and discrimination were a substantial motivating
27 factor in her termination. Officer Hougan's participation in and testimony given in the prior
28 noted FEHA proceeding were likewise a substantial motivating factor in Mrs. Hougan's
termination.

1 109. Plaintiff filed timely charges of discrimination with the California Department of Fair
2 Employment and Housing (“DFEH”) and received a Notice of Case Closure informing her of her
3 right to sue. Therefore, plaintiff has exhausted all of her administrative remedies. (See Exhibit
4 A hereto.)

5 110. As a proximate result of defendants’ retaliation against plaintiff, plaintiff has suffered and
6 continues to suffer substantial losses in earnings, and other employment and retirement benefits
7 and has suffered and continues to suffer embarrassment, humiliation and mental anguish all to
8 her damage in an amount according to proof.

9 111. Defendants committed the acts alleged herein maliciously, fraudulently and oppressively, with
10 the wrongful intention of injuring plaintiff, from an improper and evil motive amounting to
11 despicable conduct, and in conscious disregard of plaintiff’s rights.

12
13 **SIXTH CAUSE OF ACTION**
14 **FAILURE TO REMEDY AND/OR PREVENT DISCRIMINATION AND HARASSMENT**
15 **IN VIOLATION OF FEHA**
16 **(Against Defendants CITY OF NEWPORT BEACH POLICE DEPARTMENT, CITY OF**
17 **NEWPORT BEACH DOES 1 through 10)**

18 112. Plaintiff repeats and realleges paragraphs 1 to 111 of the Complaint as if the same were fully set
19 forth herein and with the same full force and effect.

20 113. At all times herein relevant, there was an employer/employee, agency, or other qualified
21 relationship between plaintiff and the defendants.

22 114. It is illegal to discriminate, harass, and retaliated against an individual pursuant to California
23 Government Code section 12940 et seq.

24 115. Defendants discriminated, harassed, and retaliated against plaintiff. Defendants’ knew of this
25 harassment and/or reasonably should have known of the harassment, and failed to act to prevent
26 and/or remedy it in violation of Govt. Code, § 12940, subd. (j)(1). Further, defendants failed to
27 take all reasonable measures to prevent harassment from occurring it in violation of Government
28 Code, § 12940, subd. (k).)

1 116. Plaintiff filed a timely charge of harassment with the California Department of Fair Employment
2 and Housing (“DFEH”) and received a Notice of Case Closure informing her of her right to sue.
3 Therefore, plaintiff has exhausted all of her administrative remedies. (See Exhibit A hereto.)

4 117. As a proximate result of defendants’ discrimination and harassment of plaintiff, plaintiff has
5 suffered and continues to suffer substantial losses in earnings, and other employment and
6 retirement benefits and has suffered and continues to suffer embarrassment, humiliation and
7 mental anguish all to her damage in an amount according to proof.

8 118. Defendants committed the acts alleged herein maliciously, fraudulently and oppressively, with
9 the wrongful intention of injuring plaintiff, from an improper and evil motive amounting to
10 despicable conduct, and in conscious disregard of plaintiff's rights.

11 **SEVENTH CAUSE OF ACTION**

12 **WRONGFUL TERMINATION BASED ON DISABILITY/PERCEIVED DISABILITY**

13 **(Against Defendants CITY OF NEWPORT BEACH POLICE DEPARTMENT, CITY OF**
14 **NEWPORT BEACH DOES 1 through 10)**

15 119. Plaintiff repeats and realleges paragraphs 1 to 118 of the Complaint as if the same were fully
16 set forth herein and with the same full force and effect.

17 120. At all times herein relevant, there was an employer/employee, agency, or other qualified
18 relationship between plaintiff and the defendants. California Government Code §12940 et
19 seq. prohibits discrimination in employment on the basis of disability or perceived disability.

20 121. Plaintiff was in fact disabled. Namely, she suffered from post traumatic stress disorder.
21 Defendants knew this as set forth above. Instead of abiding by their own written policies that
22 apply to dealing with employees with PTSD, they ignored it and used her symptoms as a
23 weapon against her to warrant her termination.

24 122. Defendants’ fired plaintiff. A substantial motivating factor in the discharge was plaintiff’s
25 disability/perceived disability.

26 123. Defendants have a pattern and practice of discriminating against disabled workers.

27 124. Moreover, defendants’ facially neutral policy of nondiscrimination in employment decisions
28 has an unfavorable impact on those employees who are in a similar position to plaintiff.

1 125. Plaintiff filed timely charges of discrimination with the California Department of Fair
2 Employment and Housing (“DFEH”) and EEOC and received a Notice of Case Closure
3 informing her of her right to sue. Therefore, plaintiff has exhausted all of her administrative
4 remedies. (See Exhibit A hereto.)

5 126. As a proximate result of defendants’ discrimination against plaintiff, plaintiff has suffered
6 and continues to suffer substantial losses in earnings, and other employment and retirement
7 benefits and has suffered and continues to suffer embarrassment, humiliation and mental
8 anguish all to her damage in an amount according to proof.

9 127. Defendants did the acts herein alleged maliciously, fraudulently and oppressively, amounting
10 to despicable conduct, and in conscious disregard of plaintiff’s rights. The acts alleged
11 herein were known to, authorized and ratified by defendant.

12
13 PRAYER FOR RELIEF

14 WHEREFORE, Plaintiff requests relief as follows:

- 15 1. For compensatory economic damages according to proof including losses
16 incurred in seeking substitute employment and loss of earnings, and other
17 employment benefits;
- 18 2. For compensatory non-economic damages for losses resulting from
19 humiliation, mental anguish, and emotional distress according to proof;
- 20 3. For interest on the amount of losses incurred in earnings, deferred
21 compensation and other employee benefits at the prevailing legal rate;
- 22 4. For costs incurred by plaintiff, including reasonable attorneys' fees;
- 23 5. For reinstatement;
- 24 6. For punitive damages as to Defendant Jay Johnson;

25
26 ///

27 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

7. For such other and further relief as the Court may deem proper.

Dated: October 17, 2013

SAVARESE LAW FIRM

By: 
Melanie Rasic Savarese
Attorney for Plaintiff

1
2 **PROOF OF SERVICE**

3 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

4 I am employed in the County of Los Angeles, State of California. I am over the age of 18 and
not a party to the within action; my business address is 37 W. Sierra Madre Blvd, Sierra Madre,
California 91024.

5 On **October 17, 2013**, I served the foregoing document described as

6 **PLAINTIFF CHRISTINE HOUGAN'S SECOND AMENDED COMPLAINT**

7 on all interested parties in this action by placing a true copy thereof enclosed in a sealed envelope
as follows:

8 Christopher Wesierski 9 Laura Barns 10 Christian Counts 11 Wesierski & Zurek 12 One Corporate Park, Suite 200 13 Irvine, CA 92606 14 Tel: 949-975-1000 15 Fax: 949-756-0517	
--	--

16 **By Facsimile:** from (626) 355-3491 to SEE ABOVE pursuant to CCP §1013a, I caused the
17 machine to print a report of the transmission.

18 x **By Mail:** I am familiar with the regular mail collection and processing practices of said
19 business, the mail is deposited with the United States Postal Service that same day. I deposited
20 such envelope in the mail at Sierra Madre, California. The envelope was mailed with postage
21 thereon fully prepaid.

22 **By FEDEX Overnight Mail:** As follows: I am "Readily familiar" with the firm's practice of
23 collection and processing correspondence for FEDEX Overnight Mail. Under that practice, it
24 would be deposited in the FEDEX pick-up box before the last pick-up time at Sierra Madre,
25 California, in the ordinary course of business.

26 **By Personal Service:** I personally delivered such envelope by hand to the address named
27 above.

28 I declare under penalty of perjury under the laws of the State of California that the above
is true and correct.

Executed on October 17, 2013, in Sierra Madre, California.

22 
23 _____
24 Melanie Savarese

1 Christopher P. Wesierski [Bar No. 086736]
cwesierski@wzllp.com
2 Laura J. Barns [Bar No. 093485]
lbarns@wzllp.com
3 Kyle E. Rowen [Bar No. 232351]
krowen@wzllp.com
4 WESIERSKI & ZUREK LLP
One Corporate Park, Suite 200
5 Irvine, California 92606
Telephone: (949) 975-1000
6 Facsimile: (949) 756-0517

7 Attorneys for Defendants
CITY OF NEWPORT BEACH (also
8 incorrectly named herein as CITY OF
NEWPORT BEACH POLICE
9 DEPARTMENT) and JAY JOHNSON

10
11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF ORANGE, CENTRAL JUSTICE CENTER
13

14 CHRISTINE HOUGAN,

15 Plaintiff,

16 vs.

17 CITY OF NEWPORT BEACH POLICE
DEPARTMENT; CITY OF NEWPORT
18 BEACH; JAY JOHNSON, an individual;
and DOES 1 through 10, inclusive,

19 Defendants.
20
21
22

CASE NO. 30-2013-00646369-CU-WT-
CJC

**NOTICE OF DEMURRER AND
DEMURRER TO SECOND AMENDED
COMPLAINT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT**

Hearing Date: December 2, 2013
Time: 9:00 a.m.
Dept.: CX103

JUDGE RONALD L. BAUER

Action Filed: April 29, 2013
Trial Date: May 12, 2014

24 PLEASE TAKE NOTICE that on December 2, 2013, at 9:00 a.m., in Department
25 CX103 of the above entitled Court, located at 751 W. Santa Ana Blvd., Santa Ana,
26 California 92701, Defendants City of Newport Beach (also incorrectly named herein as
27 City of Newport Beach Police Department) ("The City") and Jay Johnson ("Johnson")
28 (jointly referred to herein as "Defendants") will demur and hereby demur to each cause of

ELECTRONICALLY FILED
Superior Court of California,
County of Orange
10/31/2013 at 04:25:00 PM
Clerk of the Superior Court
By Fidel Ibarra, Deputy Clerk

1 action of the Second Amended Complaint ("SAC") filed by Plaintiff Christine Hougan
2 ("Plaintiff").

3 Defendants' demurrers to each cause of action in the original complaint were
4 sustained. Plaintiff filed a First Amended Complaint ("FAC"). Plaintiff's FAC did not
5 cure the defects. Defendants' demurrers to each cause of action in the FAC was sustained
6 without leave to amend as to one cause of action and with leave as to the remaining seven
7 causes of action.

8 Plaintiff has now filed a SAC. As with the FAC, Plaintiff's SAC does not cure any
9 of the previously identified defects.

10 The demurrers of The City will be based on the grounds that the each of the causes
11 of action against The City does not plead sufficient facts to constitute a cause of action.
12 (*Code of Civil Procedure* §430.10(e).) In addition, each of the causes of action is
13 uncertain. (*Code of Civil Procedure* §430.10(f).)

14 Defendant Johnson demurs to the first cause of action for sexual harassment on the
15 grounds that the first (and only) cause of action alleged against him does not plead
16 sufficient facts to constitute a cause of action. In addition, the first cause of action is
17 uncertain. (*Code of Civil Procedure* §430.10(f).)

18 As a result, each of these causes of action fails to state a claim upon which relief
19 may be granted.

20
21 Specifically, Defendant Johnson demurs to:

22 1. The first cause of action in that Plaintiff has not alleged sufficient facts to
23 establish a cause of action for sexual harassment in violation of FEHA. (*Code of Civil*
24 *Procedure* §430.10(e)); and

25 2. The first cause of action in that Plaintiff's allegations are uncertain as to
26 what alleged conduct is alleged to constitute the basis for a cause of action for sexual
27 harassment in violation of FEHA. (*Code of Civil Procedure* §430.10(f)).

28 ///

Specifically, Defendant The City demurs to:

1. The first cause of action in that Plaintiff has not alleged sufficient facts to establish a cause of action for sexual harassment in violation of FEHA. (*Code of Civil Procedure* §430.10(e));

2. The first cause of action in that Plaintiff's allegations are uncertain as to what alleged conduct is alleged to constitute the basis for a cause of action for sexual harassment in violation of FEHA. (*Code of Civil Procedure* §430.10(f));

3. The second cause of action in that Plaintiff has not alleged sufficient facts to establish a cause of action for gender discrimination in violation of FEHA. (*Code of Civil Procedure* §430.10(e));

4. The second cause of action in that Plaintiff's allegations are uncertain as to what alleged conduct is alleged to constitute the basis for a cause of action for gender discrimination in violation of FEHA. (*Code of Civil Procedure* §430.10(f));

5. The third cause of action in that Plaintiff has not alleged sufficient facts to establish a cause of action for wrongful termination in violation of public policy (gender). (*Code of Civil Procedure* §430.10(e));

6. The third cause of action in that Plaintiff's allegations are uncertain as to what alleged conduct is alleged to constitute the basis for a cause of action for wrongful termination in violation of public policy (gender). (*Code of Civil Procedure* §430.10(f));

7. The fourth cause of action in that Plaintiff has not alleged sufficient facts to establish a cause of action for retaliation/wrongful termination in violation of FEHA. (*Code of Civil Procedure* §430.10(e));

8. The fourth cause of action in that Plaintiff's allegations are uncertain as to what alleged conduct is alleged to constitute the basis for a cause of action for retaliation/wrongful termination in violation of FEHA. (*Code of Civil Procedure* §430.10(f));

9. The fifth cause of action in that Plaintiff has not alleged sufficient facts to establish a cause of action for retaliation in violation of public policy. (*Code of Civil Procedure* §430.10(e));

1 10. The fifth cause of action in that Plaintiff's allegations are uncertain as to
2 what alleged conduct is alleged to constitute the basis for a cause of action for retaliation in
3 violation of public policy. (*Code of Civil Procedure* §430.10(f));

4 11. The sixth cause of action in that Plaintiff has not alleged sufficient facts to
5 establish a cause of action for failure to prevent and/or remedy discrimination, harassment
6 and retaliation in violation of FEHA. (*Code of Civil Procedure* §430.10(e));

7 12. The sixth cause of action in that Plaintiff's allegations are uncertain as to
8 what alleged conduct is alleged to constitute the basis for a cause of action for failure to
9 prevent and/or remedy discrimination, harassment and retaliation in violation of FEHA.
10 (*Code of Civil Procedure* §430.10(f));

11 13. The seventh cause of action in that Plaintiff has not alleged sufficient facts to
12 establish a cause of action for wrongful termination based on disability/perceived
13 disability. (*Code of Civil Procedure* §430.10(e));

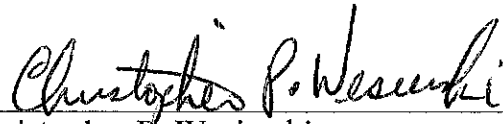
14 14. The seventh cause of action in that Plaintiff's allegations are uncertain as to
15 what alleged conduct is alleged to constitute the basis for a cause of action for wrongful
16 termination based on disability/perceived disability. (*Code of Civil Procedure* §430.10(f));

17 These Demurrers will be based upon this Notice, the Demurrers, the attached
18 Memorandum of Points and Authorities, the Complaint on file herein, the pleadings and
19 files contained within the court file in this matter, and such oral and documentary evidence
20 as may be presented at the time of the hearing of this matter.

21 DATED: October 31, 2013

WESIERSKI & ZUREK LLP

22
23 By:



Christopher F. Wesierski

Attorneys for Defendants CITY OF
NEWPORT BEACH (also incorrectly named
herein as CITY OF NEWPORT BEACH
POLICE DEPARTMENT) and JAY
JOHNSON

DEMURRERS

Defendants City of Newport Beach (also incorrectly named herein as City of Newport Beach Police Department) ("The City") and Jay Johnson ("Johnson") hereby demur to the Second Amended Complaint ("SAC") of Plaintiff Christine Hougan ("Plaintiff"), as follows:

Defendant Johnson demurs to:

1. The first cause of action in that Plaintiff has not alleged sufficient facts to establish a cause of action for sexual harassment in violation of FEHA. (*Code of Civil Procedure* §430.10(e)); and

2. The first cause of action in that Plaintiff's allegations are uncertain as to what alleged conduct is alleged to constitute the basis for a cause of action for sexual harassment in violation of FEHA. (*Code of Civil Procedure* §430.10(f)).

Defendant The City demurs to:

1. The first cause of action in that Plaintiff has not alleged sufficient facts to establish a cause of action for sexual harassment in violation of FEHA. (*Code of Civil Procedure* §430.10(e));

2. The first cause of action in that Plaintiff's allegations are uncertain as to what alleged conduct is alleged to constitute the basis for a cause of action for sexual harassment in violation of FEHA. (*Code of Civil Procedure* §430.10(f));

3. The second cause of action in that Plaintiff has not alleged sufficient facts to establish a cause of action for gender discrimination in violation of FEHA. (*Code of Civil Procedure* §430.10(e));

4. The second cause of action in that Plaintiff's allegations are uncertain as to what alleged conduct is alleged to constitute the basis for a cause of action for gender discrimination in violation of FEHA. (*Code of Civil Procedure* §430.10(f));

///

1 5. The third cause of action in that Plaintiff has not alleged sufficient facts to
2 establish a cause of action for wrongful termination in violation of public policy (gender).
3 (*Code of Civil Procedure* §430.10(e));

4 6. The third cause of action in that Plaintiff's allegations are uncertain as to
5 what alleged conduct is alleged to constitute the basis for a cause of action for wrongful
6 termination in violation of public policy (gender). (*Code of Civil Procedure* §430.10(f));

7 7. The fourth cause of action in that Plaintiff has not alleged sufficient facts to
8 establish a cause of action for retaliation/wrongful termination in violation of FEHA.
9 (*Code of Civil Procedure* §430.10(e));

10 8. The fourth cause of action in that Plaintiff's allegations are uncertain as to
11 what alleged conduct is alleged to constitute the basis for a cause of action for retaliation/
12 wrongful termination in violation of FEHA. (*Code of Civil Procedure* §430.10(f));

13 9. The fifth cause of action in that Plaintiff has not alleged sufficient facts to
14 establish a cause of action for retaliation in violation of public policy. (*Code of Civil*
15 *Procedure* §430.10(e));

16 10. The fifth cause of action in that Plaintiff's allegations are uncertain as to
17 what alleged conduct is alleged to constitute the basis for a cause of action for retaliation in
18 violation of public policy. (*Code of Civil Procedure* §430.10(f));

19 11. The sixth cause of action in that Plaintiff has not alleged sufficient facts to
20 establish a cause of action for failure to prevent and/or remedy discrimination, harassment
21 and retaliation in violation of FEHA. (*Code of Civil Procedure* §430.10(e));

22 12. The sixth cause of action in that Plaintiff's allegations are uncertain as to
23 what alleged conduct is alleged to constitute the basis for a cause of action for failure to
24 prevent and/or remedy discrimination, harassment and retaliation in violation of FEHA.
25 (*Code of Civil Procedure* §430.10(f));

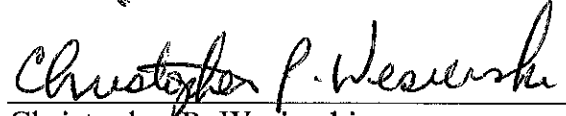
26 13. The seventh cause of action in that Plaintiff has not alleged sufficient facts to
27 establish a cause of action for wrongful termination based on disability/perceived
28 disability. (*Code of Civil Procedure* §430.10(e));

1 14. The seventh cause of action in that Plaintiff's allegations are uncertain as to
2 what alleged conduct is alleged to constitute the basis for a cause of action for wrongful
3 termination based on disability/perceived disability. (*Code of Civil Procedure* §430.10(f));
4

5 DATED: October 31, 2013

WESIERSKI & ZUREK LLP

6
7
8 By:



Christopher P. Wesierski

Attorney for Defendants CITY OF
NEWPORT BEACH (also incorrectly named
herein as CITY OF NEWPORT BEACH
POLICE DEPARTMENT) and JAY
JOHNSON
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
A. Allegations of Sexual Harassment Against Johnson.....	2
B. Allegations of Hostile Work Environment Involving Others	3
C. Plaintiff's Allegations of Gender Discrimination Against The City	3
D. Plaintiff's Third Cause of Action for "Violation of Public Policy"	4
E. Plaintiff's Fourth and Fifth Causes of Action for Retaliation	4
F. Plaintiff's Sixth Cause of Action for Failure to Remedy/Prevent Discrimination or Harassment.....	5
G. Plaintiff's Seventh Cause of Action for Wrongful Termination Based on Disability/Perceived Disability	5
II. LEGAL STANDARDS ON DEMURRER.....	5
III. PLAINTIFF FAILED TO ALLEGE SEXUAL HARASSMENT.....	6
IV. THE SECOND CAUSE OF ACTION FOR GENDER DISCRIMINATION FAILS TO STATE A CAUSE OF ACTION.....	11
V. THE THIRD CAUSE OF ACTION FOR "VIOLATION OF PUBLIC POLICY" FAILS TO STATE A CAUSE OF ACTION.....	12
VI. PLAINTIFF'S FOURTH AND FIFTH CAUSES OF ACTION FOR RETALIATION FAIL TO STATE A CAUSE OF ACTION	15
VII. PLAINTIFF'S SIXTH CAUSE OF ACTION IS DEPENDENT ON HER CLAIMS OF HARASSMENT AND DISCRIMINATION	15
VIII. THE DEMURRER TO THE SEVENTH CAUSE OF ACTION SHOULD BE SUSTAINED.....	15
IX. PLAINTIFF HAS NOT SUFFICIENTLY ALLEGED THAT SHE EXHAUSTED HER ADMINISTRATIVE REMEDIES.....	16
X. CONCLUSION	17

TABLE OF AUTHORITIES

Page

State Cases

1		
2		
3		
4	<u>State Cases</u>	
5	<i>Ankeny v. Lockheed Missiles & Space Co.</i> (1979) 88 Cal. App. 3d 531	6
6	<i>Arteaga v. Brink's, Inc.</i> (2008) 163 Cal. App. 4th 327.....	16
7	<i>Brennan v. Townsend & O'Leary</i> , (2011) 199 Cal. App. 4th 1336.....	8
8	<i>Brundage v. Hahn</i> (1997) 57 Cal. App. 4th 228	16
9	<i>Chen v. County of Orange</i> (2002) 96 Cal. App. 4th 926.....	14
10	<i>Clark County School Dist. v. Breeden</i> (2001) 532 U.S. 268, 273-274, 121 S.Ct. 1508.....	14
11	<i>Faust v. California Portland Cement Co.</i> (2007) 150 Cal. App. 4th 864.....	16
12	<i>Fisher v. San Pedro Peninsula Hospital</i> , (1989) 214 Cal.App. 3d 590	6, 7, 9, 10, 15
13	<i>Guz v. Bechtel National, Inc.</i> (2000) 24 Cal. 4th 317	16
14	<i>Hawkins v. Oakland Title Insurance Co.</i> (1958) 165 Cal. App. 2d 116	5
15	<i>Herberg v. California Institute of the Arts</i> (2002) 101 Cal. App. 4th 142.....	8
16	<i>Knight v. Hayward Unified School Dist.</i> , (2005) 132 Cal. App. 4th 121	16
17	<i>Lyle v. Warner Brothers Television Productions</i> (2006) 38 Cal.4th 264, 295.....	7, 9, 12
18	<i>McCoy v. Pacific Maritime Associate</i> , 2013 WL 1962666.....	9
19	<i>Mokler v. County of Orange</i> (2007) 157 Cal. App. 4th 141	7, 8
20	<i>Richmond Redevelopment Agency v. Western Title Guaranty Co.</i> (1975) 48 Cal. App. 3d 343	5, 14
21	<i>Romano v. Rockwell Internat., Inc.</i> (1996) 14 Cal.4th 479.....	17
22	<i>Thompson v. North American Stainless, LP</i> (2011) ___ U.S. ___, 131 S.Ct. 863, 868	14
23	<i>Trop v. Sony Pictures Entertainment Inc.</i> (2005) 129 Cal. App. 4th 1133.....	16
24	<i>Von Batsch v. American Dist. Telegraph Co.</i> (1985) 175 Cal. App. 3d 1111	5
25	<i>Williams v. Beechnut Nutrition Corp.</i> (1986) 185 Cal. App. 3d 135.....	6
26		
27		
28		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Federal Cases

Leibovitz v. New York City Transit Auth. (2nd Cir. 2001) 252 F.3d 1799

Manatt v. Bank of America, 339 F.3d 792 (9th Cir. 2003).....13

Statutes

Government Code §129404, 13

Government Code §1292613

MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

After two successful demurrers, Plaintiff Christine Hougan ("Plaintiff") now brings a Second Amended Complaint ("SAC"). Plaintiff's third bite at the proverbial apple still suffers from the same fatal defects as her prior two complaints. The SAC alleges seven (7) causes of action for everything from sexual harassment, to retaliation, to gender and disability discrimination, and wrongful termination against the City of Newport Beach (also incorrectly named herein as the City of Newport Beach Police Department) ("The City"). She also alleges a single cause of action for sexual harassment against the Chief of Police for The City, Jay Johnson ("Johnson") (jointly referred to herein as "Defendants").

Defendants previously demurred to the original complaint and the First Amended Complaint ("FAC") alleging the same causes of action.¹ Plaintiff has now filed a SAC. Unfortunately for Plaintiff, the SAC still does not cure the previously identified defects.

Plaintiff's SAC only adds a few unsubstantiated allegations that have nothing to do with Plaintiff and Johnson.² In fact, Plaintiff was not a witness, participant or party to any of the new allegations she has haphazardly thrown into the SAC. Through these new allegations, it appears Plaintiff has switched her theory to be one of a hostile work environment claim. However, Plaintiff's claims and theories, no matter what they are, still fail.

Plaintiff's SAC alleges causes of action for: (1) sexual harassment in violation of FEHA; (2) gender discrimination in violation of FEHA; (3) wrongful termination in violation of public policy (gender); (4) retaliation/wrongful termination in violation of FEHA; (5) retaliation in violation of public policy; (6) failure to prevent and/or remedy

¹ The original complaint and FAC also included an eighth cause of action for an alleged "Failure to Accommodate/Engage in the Interactive Process in violation of FEHA." The Court sustained, without leave to amend, Defendants' demurrer to this cause of action in the FAC.

² See SAC, Paragraphs 62-75.

1 discrimination, harassment and retaliation; and (7) wrongful termination based on
2 disability/perceived disability.

3 She still includes allegations about her husband, John Hougan, to support her
4 claims. These allegations do not support a retaliation claim.³ The actions purportedly taken
5 against John Hougan are too remote in time to even have a tenuous connection to her
6 claims.

7 Plaintiff's SAC fails to allege facts to support the causes of action alleged.
8 Defendants' demurrers should be sustained without leave to amend.

9 **A. Allegations of Sexual Harassment Against Johnson**

10 Plaintiff's allegations of the purported sexual harassment by Johnson consist of only
11 the following: (i) on August 5, 2010, he had a closed door meeting with Plaintiff where
12 he "sat within inches of her and used his position of authority to intimidate her" (§24 of
13 SAC); (ii) he came into dispatch while she was "plugged in" and "frequently lean[ed]
14 against her console, often standing very physically close to her" and told her he liked her
15 and "sometimes" she felt his breath on her neck when he stood behind her (§25 of SAC);
16 (iii) on August 17, 2010, he "leaned against her position, smiled and said 'Why are YOU
17 hear [sic]?', that this inquiry was "bizarre" and made her "uncomfortable (§27 of SAC);
18 and (iv) on October 14, 2010, Johnson introduced Plaintiff to his brother, former
19 Commander from the City of Long Beach. His brother – not Johnson – allegedly stared at
20 her legs and made a comment about liking her uniform. (§28 of SAC.)

21 Plaintiff reported the last "incident" to a Detective and Master Officer Halpin. (§29
22 of SAC.) Almost four months later, on February 3, 2011, she spoke to a patrol lieutenant
23 about Johnson's alleged "inappropriate behavior." (§32 of SAC.) She also alleges she made
24 other complaints, including a complaint to the FBI. (§44 and §49 of SAC, respectively.)

25
26 ³ Plaintiff relies upon *Thompson v. North American Stainless, LP* (2011) __ U.S. __, 131 S.Ct. 863, 868
27 for the contention that she can state claims for retaliation, harassment and wrongful termination because of
28 the "protected activity" purportedly engaged in by her husband. The authority does not support her
contention as is discussed, *infra*.

1 Plaintiff alleges one more incident where she claims Johnson "silently stood behind
2 her," "peered over her shoulder while she worked" and refused to answer her radio traffic
3 when he was going on "ride-alongs." (§§42 and 44 of SAC.)

4 Plaintiff then alleges, without factual support, that Johnson "has a pattern and
5 practice" of sexually harassing employees and intimidating women. (§59 of SAC.)

6 These alleged incidents are untrue but, even if true, are simply insufficient to
7 support a claim of "severe and pervasive" harassment.

8 **B. Allegations of Hostile Work Environment Involving Others**

9 Plaintiff's SAC now includes a few paragraphs of unsubstantiated allegations
10 regarding alleged treatment by and towards other employees of The City's Police
11 Department. All of these allegations have one thing in common. Plaintiff was not a
12 witness, participant or party to any of the new allegations. (See §§ 62-75 of SAC.)

13 Further, every alleged incident, except one, does not include a specific date when it
14 is alleged to have occurred. In addition, Plaintiff uses conclusory allegations without
15 providing any specifics. (See e.g. ¶ 64 "employees complained about Sgt. Query's
16 harassing and intimidating behavior;" and ¶65 employees were "upset about the behavior,
17 language and statements" of a new supervisor.) Moreover, most of these incidents are not
18 sexual in nature and have nothing to do with gender.

19 This alleged conduct could, at best, be called occasional, isolated, sporadic, or
20 trivial. These allegations do not establish that the alleged harassment directed at others
21 permeated Plaintiff's direct and immediate work environment and that she personally
22 witnessed it. Thus, Plaintiff has not met the higher burden required to establish a
23 sufficiently severe and pervasive harassment for a hostile work environment claim.

24 **C. Plaintiff's Allegations of Gender Discrimination Against The City**

25 The above allegations appear to be the only allegations relevant to Plaintiff's second
26 cause of action for alleged gender discrimination. She alleges no other facts in this cause
27 of action; she simply concludes a "substantial motivating reason" in terminating her was
28 her gender and Defendants had a pattern and practice of discriminating against female

workers. (§§83 and 84 of SAC.) The facts she alleges do not support these allegations. She also alleges some unspecified "facially neutral policy of nondiscrimination" which has an "unfavorable impact" on similarly situated employees. (§68 of SAC.) There are no facts alleged as to what that policy was that allegedly had an "unfavorable" impact.

D. Plaintiff's Third Cause of Action for "Violation of Public Policy"

Plaintiff's third cause of action against The City is uncertain and fails to state a cause of action. Plaintiff simply alleges she was terminated in violation of public policy; apparently, a cause of action for wrongful termination in violation of public policy. Even if so, Plaintiff does not allege any facts to show such a violation. She simply incorporates previous allegations which primarily concern her husband and the above allegations of sexual harassment and concludes that "it is against California public policy" to "discriminate on the basis of gender or sex, and also against California Public Policy to retaliate for making a complaint of retaliation, discrimination or harassment." She further alleges it is against "California Public Policy to retaliate against an employee and his spouse for participating in and testifying in a proceeding brought under *Government Code* Section 12940, et seq., or for making any other type of protected complaint under the law." (§92 of SAC.) She speculates that "discrimination" and "retaliation" was a substantial motivating reason for her termination. (*Id.*) These allegations are insufficient to support a claim for wrongful termination in violation of public policy. The City's demurrers should be sustained without leave to amend.

E. Plaintiff's Fourth and Fifth Causes of Action for Retaliation

Plaintiff's fourth and fifth causes of action for retaliation are based upon the same conclusory allegations and are almost indistinguishable from her third cause of action. She includes the contention that, because her husband purportedly engaged in protected activity, she is afforded protection as she is in the "zone of interest". (§§99 and 107 of SAC.) This is insufficient. The demurrers to these causes of action should be sustained without leave to amend as Plaintiff did not allege sufficient facts to state a cause of action and it is uncertain.

1 **F. Plaintiff's Sixth Cause of Action for Failure to Remedy/Prevent**
2 **Discrimination or Harassment**

3 Again, Plaintiff makes the same conclusory allegations that she was discriminated
4 against, harassed and retaliated against and The City knew about it and failed to prevent it
5 or to act to remedy it. (§115 of SAC.) These allegations are insufficient to state a cause of
6 action and are uncertain. The demurrers should be sustained without leave to amend.

7 **G. Plaintiff's Seventh Cause of Action for Wrongful Termination Based on**
8 **Disability/Perceived Disability**

9 Plaintiff's last cause of action against The City is based on her allegation that in
10 May 2009 she was diagnosed with "Post Traumatic Stress Disorder." (§22 of SAC.) She
11 allegedly was "disabled" as she had post traumatic stress disorder. (§121 of SAC.) She
12 makes the conclusory allegation that "Defendants knew this" and they ignored some
13 unknown written policy to deal "with employees with PTSD." (§121 of SAC.) From this,
14 she claims a "substantial motivating factor in [her] discharge" was her alleged
15 "disability/perceived disability." (§122 of SAC.) These allegations are insufficient to
16 support the seventh cause of action as Plaintiff never advised of any alleged disability and
17 has failed to allege sufficient facts that The City should have known that her conduct was
18 purportedly related to a diagnosis made years before of a purported condition.

19 **II. LEGAL STANDARDS ON DEMURRER**

20 To be sufficient, a complaint must contain a statement of facts which, without the
21 aid of other, unstated or conjectured facts, shows a complete cause of action. (*Hawkins v.*
22 *Oakland Title Insurance Co.* (1958) 165 Cal.App.2d 116.) The presumptions are always
23 against the pleader and all doubts are to be resolved against him/her, because it is
24 presumed that the pleader has stated her cause of action as favorably as possible.
25 (*Richmond Redevelopment Agency v. Western Title Guaranty Co.* (1975) 48 Cal.App.3d
26 343, 349.) Where there is no reasonable possibility that defect can be cured by amendment,
27 sustaining a demurrer without leave to amend is proper. (*Von Batsch v. American Dist.*
28 *Telegraph Co.* (1985) 175 Cal.App.3d 1111, 1117.)

Also, a demurrer is properly founded when a plaintiff's allegations are so confusing that the defendant cannot tell to what it is supposed to respond. (*Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135.) "Those recitals, references to, or allegations of material facts which are left to surmise are subject to special demurrer for uncertainty." (*Ankeny v. Lockheed Missiles & Space Co.* (1979) 88 Cal.App.3d 531, 537.)

The SAC does not state the essential facts with clearness and precision.⁴ Therefore, the demurrers should be sustained without leave to amend.

III. PLAINTIFF FAILED TO ALLEGE SEXUAL HARASSMENT

Plaintiff's first cause of action for sexual harassment is alleged against Johnson and The City. This cause of action is based on a couple of incidents where Johnson allegedly stood too close to her, somehow "used his authority" to intimidate her, told her he liked her and Johnson's brother told her he liked her uniform and was purportedly looking at her legs. These few non-descript incidences allegedly occurred over a period of approximately two months. These allegations do not support a claim of severe or pervasive harassment.

In the SAC, Plaintiff has added a few allegations in an attempt to establish a claim of a hostile work environment. Plaintiff was not a participant, witness or party to any of these new allegations. These allegations fall far short of the "even higher showing" required to establish a hostile work environment claim. (*Fisher v. San Pedro Peninsula Hospital (Fisher)*, (1989) 214 Cal.App.3d 590, 610.) In order to establish such a claim, Plaintiff "must establish that she personally witnessed the harassing conduct and that it was in her immediate work environment. For instance, it is not enough to allege that harassment occurred in the [workplace]; a plaintiff who is not a direct victim must also allege exactly what occurred in her presence in her immediate work environment and describe that work environment." (*Fisher, supra*, 214 Cal.App.3d at 611.)

⁴ The SAC is not a model of clarity. In fact, Defendants cannot decipher some of Plaintiff's paragraphs and cross-references to other paragraphs. (See ¶¶ 26, 30, 38, 39, and 40.) For example, paragraph 39 states "[t]his happened just a few hours prior to her discussion with him later that afternoon set forth *infra* at paragraphs 38 – 39." The paragraph simply refers back to itself in a circular fashion.

1 A unanimous California Supreme Court cited this rule from *Fisher* with approval
2 when it stated "[t]he reason for this is obvious: if the plaintiff does not witness the
3 incidents involving others, 'those incidents cannot affect ... her perception of the hostility
4 of the work environment.'" (*Lyle v. Warner Bros. Television Productions (Lyle)*, (2006) 38
5 Cal.4th 264, 285.) In addition, the timing of these other allegations directed at a hostile
6 work environment claim is essential because "if only a couple of acts occurred during the
7 one year preceding the filing of the complaint, than [a plaintiff] cannot properly plead a
8 claim for environmental sexual harassment." (*Fisher, supra*, 214 Cal.App.3d at 613.)

9 "Whether the sexual conduct complained of is sufficiently pervasive to create a
10 hostile or offensive work environment must be determined from the totality of the
11 circumstances. [Citation.]" (*Fisher, supra*, 214 Cal.App.3d at 609.) "To be actionable, 'a
12 sexually objectionable environment must be both objectively and subjectively offensive,
13 one that a reasonable person would find hostile or abusive, and one that the [plaintiff] in
14 fact did perceive to be so.'" (*Lyle, supra*, 38 Cal.4th at 284.)

15 Factors that may be considered in determining what is "sufficiently
16 pervasive" are: (1) the nature of the unwelcome sexual acts or works
17 (generally, physical touching is more offensive than unwelcome verbal
18 abuse); (2) the frequency of the offensive encounters; (3) the total number of
19 days over which all of the offensive conduct occurs; and (4) the context in
20 which the sexually harassing conduct occurred. [Citation.]" (*Id.* at 609-610.)
21 FEHA's prohibitions are not a "civility code" and "are not designed to rid the
22 workplace of vulgarity." (*Lyle v. Warner Brothers Television Productions*
23 (2006) 38 Cal.4th 264, 295.) ("*Lyle*").

24 The conduct alleged in Plaintiff's SAC does not even rise to the level of those found
25 insufficient in *Mokler v. County of Orange* (2007) 157 Cal.App.4th 141, 145 ("*Mokler*").
26 In *Mokler*, a county supervisor had daily contact with the agency that employed the
27 plaintiff. The supervisor asked plaintiff about her marital status and, when she said she
28 was single, called her an "aging nun." (*Id.* at 131-132, 145.) A few days later, the
supervisor acted flirtatiously while holding the plaintiff's arm, complimenting her suit and
legs, and looking her up and down. (*Id.* at 132, 145.) Finally, the following month, the
supervisor put his arm around the plaintiff, rubbing her breast with his arm as he did so,

1 and then making a crude but nonsexual remark when she pushed herself away. (*Id.* at 132,
2 145.) These acts were found not sufficiently severe or pervasive to alter the conditions of
3 employment and create an abusive working environment. The *Mokler* court reversed the
4 trial court's order denying judgment notwithstanding the verdict on the claim for sexual
5 harassment.

6 Taken as a whole, the foregoing acts demonstrate rude, inappropriate, and
7 offensive behavior. To be actionable, however, a workplace must be
8 "permeated with ""discriminatory intimidation, ridicule and insult,"
9 [citation] that is "sufficiently severe or pervasive to alter the conditions of
10 the victim's employment and create an abusive working environment. The
11 acts Mokler has alleged here are similar in scope to those found insufficient
12 to constitute a hostile work environment in other cases. (See, e.g., *Quinn v.*
13 *Green Tree Credit Corp.* (2d Cir. 1998) 159 F.3d 759, 768 [harasser's
14 statement that plaintiff had been voted the " 'sleekest ass' " in the office and
15 single deliberate act of touching plaintiff's breasts with papers he was
16 holding in his hand held insufficient]; *Weiss v. Coca-Cola Bottling Co. of*
17 *Chicago* (7th Cir. 1993) 990 F.2d 333, 337 [insufficient where supervisor
18 told plaintiff how beautiful she was, repeatedly asked her out, tried to kiss
19 her on three separate occasions, put " 'I love you' " signs on her work area,
20 and touched her shoulder at least six times]; *Chamberlin v. 101 Realty, Inc.*
21 (1st Cir. 1990) 915 F.2d 777, 783 [five sexually motivated advances on
22 plaintiff over a four-or five-week period held insufficient for hostile work
23 environment].) (*Id.* at 145.)

24 Plaintiff's SAC has not changed any of the previous allegations, or added any new
25 allegations, regarding Johnson's alleged conduct that was directed at Plaintiff. At most,
26 Plaintiff has alleged sporadic and isolated instances where Johnson purportedly stood near
27 her work station in a manner she alleges was uncomfortable for her. This Court previously
28 found this was insufficient to establish sexual harassment. As nothing has changed, the
same should be true once again.

Plaintiff does not allege there was any touching involved. There is not one instance
that can be classified as "severe" enough to constitute sexual harassment. An isolated
incident of harassing conduct may qualify as severe only when it consists of a physical
assault or the threat thereof. (*Hughes*, 46 Cal.4th at 1049, *see also, Brennan v. Townsend*
& *O'Leary* (2011) 199 Cal.App.4th 1336.) Liability for sexual harassment may not be
imposed based on a single incident that does not involve egregious conduct akin to a
physical assault or the threat of physical assault. (*Herberg v. California Institute of the*

1 *Arts* (2002) 101 Cal.App.4th 142, 150–153.) Plaintiff's allegations that Johnson leaned on
2 her station, told her he liked her and that she could feel his breath on her neck are
3 insufficient for a claim of severe or pervasive harassment.

4 In *McCoy v. Pacific Maritime Assoc.*, (2013) 216 Cal.App.4th 283, the Court of
5 Appeal for the Second District upheld the grant of summary adjudication where the
6 plaintiff alleged, at most, nine comments over four months. The court found that,
7 "[a]lthough crude and offensive, these remarks were not so severe and pervasive as to alter
8 the conditions of appellant's employment; the conduct did not create a work environment
9 'permeated' with sexual harassment" and did not constitute sexual harassment. (*McCoy v.*
10 *Pacific Maritime Assoc.*, *supra*, 216 Cal.App.4th at 294.)⁵

11 Plaintiff must allege conduct that is both objectively and subjectively offensive.

12 a sexually objectionable environment must be both objectively and
13 subjectively offensive, one that a reasonable person would find hostile or
14 abusive, and one that the victim in fact did perceive to be so. [Citation.] That
15 means a plaintiff who subjectively perceives the workplace as hostile or
16 abusive will not prevail under the FEHA, if a reasonable person in the
17 plaintiff's position, considering all the circumstances, would not share the
18 same perception. Likewise, a plaintiff who does not perceive the workplace
19 as hostile or abusive will not prevail, even if it objectively is so. (*Lyle*, 38
20 Cal.4th at 284) (Citations omitted.) (*See also, Hughes*, 46 Cal.4th at 1044.)

21 Plaintiff has failed to allege conduct that is objectively offensive. Plaintiff also
22 makes conclusory allegations of a "pattern and practice" of sexual harassing employees.
23 (§59 of SAC.) Plaintiff's new allegations involving others do not support this allegation or
24 that she knew of or witnessed this alleged harassment. As stated above, Plaintiff must
25 allege the harassment directed at others "was in her immediate work environment, and that
26 she personally witnessed it." (*Lyle*, 38 Cal.4th at 285.) (*See also, Fisher v. San Pedro*
27 *Peninsula Hosp.*, *supra*, 214 Cal.App.3d 590, 611, and *Leibovitz v. New York City Transit*
28 *Auth.* (2nd Cir. 2001) 252 F.3d 179, 189—alleged harassment occurred "out of [plaintiff's]

5 In that case, the plaintiff claimed comments were made about women's bodies and "once included their speculation as to who one of the women was in a sexual relationship with." Comments included referring to a woman as "having a 'J-Lo ass' or a 'nigger ass,'" a woman was "ogled" and gestures made behind a woman's backs. (*McCoy v. Pacific Maritime Assoc.*, *supra*, 216 Cal.App.4th at 293-294.)

1 sight and orbit" in "venues in which she did not work".)

2 Plaintiff has attempted to add allegations in the SAC concerning alleged harassment
3 by others and directed at others. These allegations still are insufficient to allege a cause of
4 action for sexual harassment, environmental or otherwise. Plaintiff's allegations fall far
5 short of those found insufficient to state a cause of action in *Fisher*. In *Fisher*, the plaintiff
6 was personally subjected to sexual harassment by one individual. In addition, the plaintiff
7 witnessed this same individual "[p]ulling [women] onto his lap, hugging and kissing them
8 while wiggling, making offensive statements of a sexual nature, moving his hands in the
9 direction of a woman's vaginal area, grabbing women from the back with his hands on
10 their breasts or in the area of their breasts, picking up women and swinging them around,
11 throwing a woman on a gurney, walking up closely behind a woman with movements of
12 his pelvic area." (*Fisher, supra*, at 612.) If this conduct that was witnessed by the plaintiff
13 in *Fisher* was insufficient to establish environmental sexual harassment, surely Plaintiff's
14 non-descript, conclusory allegations involving other must fall short as well.

15 Plaintiff makes the conclusory allegation that she never witnessed Johnson
16 exhibiting conduct described in paragraph 23 toward any other male co-worker⁶ and,
17 therefore, "alleges that Chief Johnson acted this way because he knew due to his rank and
18 his gender, and the fact that Plaintiff was a subordinate female, he could exercise his rank
19 and power in a way that would intimidate her, make her fearful, and submit to his
20 authority." (§26 of SAC.)⁷

21 As to The City, she also claims that she complained about the "incident" with
22 Johnson's brother to Detective Prouty and Master Officer Halpin about what allegedly
23

24 ⁶ The conduct described in paragraph 23 does not involve or make reference to Johnson. In addition,
25 Paragraph 23 describes the audit of Plaintiff's husband's computer that discovered his "out of policy
26 computer use." Plaintiff's husband is a male and was also her co-worker at the City's Police Department.
27 Therefore, the allegation in paragraph 26 of the SAC is factually inaccurate and false.

28 ⁷ Yet, at the same time, she alleges she was retaliated against because "she put her foot down, complained
about, opposed and reported the conduct to others, he began retaliating against her, and setting her up for
failure." (§58 of SAC.)

1 happened. She claims she told them, among other things, "his silence communicated to
2 Ms. Hougan that he thought this behavior was ok", and Johnson "never allowed or ratified
3 any such type of sexist conduct toward any males" in her department. (§29 of SAC.)
4 Without considering the likelihood or credibility of these allegations, this is still
5 insufficient to state a claim for harassment. Plaintiff fails to identify the authority of the
6 people to whom she allegedly complained, does not state when the complaints were
7 allegedly made, does not allege that Detective Prouty or Master Officer Halpin were her
8 supervisor or were someone to whom she should report the alleged actions.

9 Plaintiff has simply failed to allege severe or pervasive harassment. In fact,
10 Plaintiff cannot do so. Plaintiff's long-winded SAC apparently sets forth the best
11 allegations she can come up with to support her allegations. These allegations fall far short
12 of what is required to allege sexual harassment. The demurrers should be sustained
13 without leave to amend.

14 **IV. THE SECOND CAUSE OF ACTION FOR GENDER DISCRIMINATION**
15 **FAILS TO STATE A CAUSE OF ACTION**

16 Plaintiff's second cause of action for gender discrimination – wrongful termination,
17 is alleged against The City only. Johnson is not named in this cause of action or the
18 remaining causes of action.⁸ The allegations of "gender discrimination" are based upon the
19 same allegations as the sexual harassment claim. Although sexual harassment can be a
20 form of gender discrimination, Plaintiff has not alleged sufficient facts to support her cause
21 of action for sexual harassment. Plaintiff still must also allege facts to support allegations
22 of gender discrimination. She has failed to do so. A prima facie case for discriminatory
23 discharge under the FEHA requires allegations that:

24 (1) complainant belongs to a protected class; (2) [her] job performance was
25 satisfactory; (3) he was discharged; and (4) others in the protected class were

26 ⁸ Johnson cannot be liable for discrimination, retaliation, failure to accommodate or wrongful
27 termination as he was not the employer. (See, *Reno v. Baird* (1998) 18 Cal.4th 640, 644–664 and *Jones v.*
28 *Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1160, 1173.)

1 retained in similar jobs, and/or his job was filled by an individual of
2 comparable qualifications not in the protected class. (*Mixon v. Fair
Employment & Housing Com.* (1987) 192 Cal.App.3d 1306, 1318.)

3 In *Lyle*, the California Supreme Court noted that, "workplace harassment, even
4 harassment between men and women, is [not] automatically discrimination because of sex
5 merely because the words used have sexual content or connotations." Rather, "[t]he critical
6 issue ... is whether members of one sex are exposed to disadvantageous terms or conditions
7 of employment to which members of the other sex are not exposed.' " (*Id.* 38 Cal.4th at
8 279-280.) (Citation omitted.) Here, Plaintiff does not even allege any words were
9 allegedly used having sexual content or connotations.

10 She also makes the conclusory allegations that The City had a pattern and practice
11 of discriminating against female workers and an unidentified "neutral policy" that had an
12 "unfavorable impact" on employees who are in a similarly situated position as Plaintiff –
13 which apparently means other females. She alleges no facts to support these allegations.

14 Plaintiff has failed to allege any facts to show that she was discriminated against
15 because of her gender. She merely concludes that she was discriminated against and a
16 "substantial motivating factor" in her discharge was her gender; no facts suggesting a link
17 are alleged. The City's demurrer to this cause of action should be sustained without leave
18 to amend. The bare fact that Plaintiff alleges she is a female is insufficient to allege
19 discrimination based on gender.

20 **V. THE THIRD CAUSE OF ACTION FOR "VIOLATION OF PUBLIC**
21 **POLICY" FAILS TO STATE A CAUSE OF ACTION.**

22 Plaintiff's third cause of action is entitled "Violation of Public Policy." There is no
23 such cause of action. Assuming that Plaintiff intended this cause of action to be wrongful
24 termination in violation of public policy, since she has failed to allege the requisite
25 violation of public policy, this cause of action must fail as well.

26 It is unclear what "public policy" Plaintiff claims was violated by The City. She
27 incorporates her previous allegations concerning the alleged sexual harassment and the
28 irrelevant allegations concerning actions taken by and allegedly against her husband and

1 refers to "California Public Policy." She then claims that she was terminated in violation
2 of public policy which she identifies as "gender or sex, and . . . retaliation for making a
3 complaint of retaliation, discrimination or harassment". (§92 of SAC.) She also alleges it
4 is against public policy to retaliate against an employee "and his spouse for participating in
5 a proceeding brought under *Government Code* §12940, et seq." (*Id.*) The *Government*
6 *Code* does not contain such a prohibition.

7 Again, Plaintiff fails to allege any facts to support these conclusions. She does not
8 allege one fact to support a contention that there is a causal connection between the actions
9 of her husband and the alleged conduct of The City to her.

10 Although the causal connection element of a retaliation claim may initially be met
11 by alleging actions taken by the employer within a relatively short time after the alleged
12 protected activity, Plaintiff cannot rely upon this contention. She alleges her husband
13 testified in the other FEHA matter in October 2008 and reported misconduct against a
14 police captain in March 2009. (§ 13, 21 of SAC.) The earliest conduct allegedly directed
15 toward Plaintiff was eighteen months later in August 2010 when Johnson had a meeting
16 with her. (§24 of SAC.) Plaintiff was not terminated until February 2012, over three years
17 after her spouse testified at trial. (*See, Manatt v. Bank of America*, 339 F.3d 792, 802 (9th
18 Cir. 2003), no inference of retaliation arises on account of the nearly nine-month gap
19 between her protected complaints and termination.)

20 Plaintiff's spouse is not making a claim of discrimination, harassment or retaliation.
21 Plaintiff is not alleging that her spouse was a member of a "suspect class." Although under
22 *Government Code* §12940, it is unlawful to discriminate against someone who associates
23 with a person who is a member of a suspect class, husbands are not a suspect class.
24 (*Government Code* §12926(n) defines "race, religious creed, color, national origin,
25 ancestry, physical disability, mental disability, medical condition, genetic information,
26 marital status, sex, age, or sexual orientation" to include a person who is associated with a
27 person who has, or is perceived to have, any of those characteristics.) The fact that
28 Plaintiff's husband allegedly engaged in protected activity, does not mean that she was

1 discriminated against because of her "marital status." (*See, Chen v. County of Orange*
2 (2002) 96 Cal.App.4th 926, 943-944, marital status discrimination does not extend to "the
3 status of being married to a particular person." (Citation omitted.))

4 In her SAC, Plaintiff cites to *Thompson v. North American Stainless, LP* (2011) ____
5 U.S. ___, 131 S.Ct. 863, 868, to support her contention she may allege she falls "within the
6 zone of interests" as to her spouse. This contention is without merit. In *Thompson*, an
7 employee of the defendant filed an EEOC complaint alleging sex discrimination. Three
8 weeks later, the employer terminated Thompson, her fiancée. Thompson alleged he was
9 terminated to retaliate against his fiancée for filing her EEOC charge.

10 Here, the protected activity Plaintiff's husband allegedly engaged in was seventeen
11 to eighteen months before the purported retaliation against her. John Hougan's deposition
12 testimony in the Harvey matter was in October 2008 and trial testimony in February 2009.
13 (¶¶ 13-15 of SAC.) The first allegations concerning Plaintiff did not occur until August 5,
14 2010, when the 90 minute meeting with Johnson allegedly occurred. (¶24 of SAC.) As
15 stated in *Clark County School Dist. v. Breeden*:

16 The cases that accept mere temporal proximity between an employer's
17 knowledge of protected activity and an adverse employment action as
18 sufficient evidence of causality to establish a prima facie case uniformly
19 hold that the temporal proximity must be 'very close,' (*O'Neil v. Ferguson*
20 *Constr. Co.*, 237 F.3d 1248, 1253 (C.A.10 2001). See, e.g., *Richmond v.*
21 *ONEOK, Inc.*, 120 F.3d 205, 209 (C.A.10 1997) (3-month period
22 insufficient); *Hughes v. Derwinski*, 967 F.2d 1168, 1174-1175 (C.A.7 1992)
23 4-month period insufficient). Action taken (as here) 20 months later
24 suggests, by itself, no causality at all. (*Clark County School Dist. v. Breeden*
25 (2001) 532 U.S. 268, 273-274, 121 S.Ct. 1508.) (Emphasis added.)

26 Plaintiff has failed to allege sufficient facts to show she was retaliated against
27 because of her husband's alleged protected activity as she has not, and cannot allege, a
28 causal connection. In opposition to one of Defendants' previous demurrers, Plaintiff
contended that the 90 minute meeting was in close proximity to her husband's demotion.
However, this demotion was not "protected activity." Plaintiff's contention she was
retaliated against for her own complaints of harassment are also without merit. Plaintiff
allegedly made complaints about Johnson's alleged harassment sometime after October

1 2010, February 2011, and in September 2011, after she was advised on May 17, 2011, she
2 was under investigation. (§§29, 30, 32, and 49 of SAC.) Plaintiff was terminated on
3 February 16, 2012. Again, Plaintiff has failed to allege a causal connection.

4 **VI. PLAINTIFF'S FOURTH AND FIFTH CAUSES OF ACTION FOR**
5 **RETALIATION FAIL TO STATE A CAUSE OF ACTION**

6 Plaintiff's fourth and fifth causes of action are for retaliation. "To establish a prima
7 facie case of retaliation, a plaintiff must show that she engaged in protected activity, that
8 she was thereafter subjected to adverse employment action by her employer, and there was
9 a causal link between the two." (*Fisher v. San Pedro Peninsula Hospital, supra*, 214
10 Cal.App.3d at 614.)

11 For the same reasons discussed above, Plaintiff does not allege facts to support her
12 claim that she was retaliated against for her complaints of "alleged harassment, retaliation
13 and discrimination" or because her husband testified three years before her termination in
14 another FEHA matter. (§100 of SAC.) Plaintiff has failed to allege a causal link between
15 the alleged protected activity and her termination. The demurrers should be sustained.

16 **VII. PLAINTIFF'S SIXTH CAUSE OF ACTION IS DEPENDENT ON HER**
17 **CLAIMS OF HARASSMENT AND DISCRIMINATION**

18 The allegations of Plaintiff's sixth cause of action fail to state a cause of action
19 against The City as it is dependent upon her defective claims of harassment and
20 discrimination. As discussed previously, her claims for harassment and discrimination fail.
21 As such, the demurrer to this cause of action should also be sustained.

22 **VIII. THE DEMURRER TO THE SEVENTH CAUSE OF ACTION SHOULD BE**
23 **SUSTAINED**

24 Plaintiff's final cause of action alleges she had a disability and The City wrongfully
25 terminated her based upon this alleged disability/perceived disability. Plaintiff fails to
26 allege sufficient facts to state this cause of action.

27 To establish a prima facie case for disparate treatment discrimination, plaintiff must
28 show (1) she suffers from a disability, (2) she is otherwise qualified to do her job, (3) she

1 suffered an adverse employment action, and (4) the employer harbored discriminatory
2 intent. (*See Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355; *Arteaga v. Brink's,*
3 *Inc.* (2008) 163 Cal.App.4th 327, 342, 77 Cal.Rptr.3d 654.)

4 Plaintiff must allege and prove the ultimate fact of intentional discrimination.
5 (*Knight v. Hayward Unified School Dist.*, (2005) 132 Cal.App.4th 121, 128; *Faust v.*
6 *California Portland Cement Co.* (2007) 150 Cal.App.4th 864, 886.)

7 Plaintiff makes the conclusory allegations that in 2009 she was diagnosed with post
8 traumatic stress disorder and The City should have known that this diagnosis somehow
9 was relevant to her actions in 2011 – two years later. This is insufficient. “An adverse
10 employment decision cannot be made ‘because of’ a disability, when the disability is not
11 known to the employer.” (*Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 236, *see also,*
12 *Trop v. Sony Pictures Entertainment Inc.* (2005) 129 Cal.App.4th 1133, 1145, “[a]n
13 employee cannot make out a prima facie case of discrimination based on pregnancy under
14 FEHA in the absence of evidence the employer knew the employee was pregnant.”)

15 “While knowledge of the disability can be inferred from the circumstances,
16 knowledge will only be imputed to the employer when the fact of disability
17 is the only reasonable interpretation of the known facts. ‘Vague or
18 conclusory statements revealing an unspecified incapacity are not sufficient
19 to put an employer on notice of its obligations under the [FEHA].’
20 [Citation.]” (*Brundage v. Hahn, supra*, 57 Cal.App.4th at 237.)

21 Plaintiff fails to allege facts to support a contention that The City was aware of her
22 alleged disability or that it discriminated against her based upon that alleged disability. An
23 alleged notation in 2009 in Plaintiff's personnel file that she was diagnosed with PTSD is
24 insufficient to support an allegation that, based upon that notation, Defendant knew in
25 2011 and 2012 about her alleged disability and her disability was a substantial motivating
26 factor in her termination. Therefore, the demurrers should be sustained without leave to
27 amend.

28 **IX. PLAINTIFF HAS NOT SUFFICIENTLY ALLEGED THAT SHE**
EXHAUSTED HER ADMINISTRATIVE REMEDIES

To maintain an action under FEHA, a plaintiff must exhaust administrative

1 remedies. (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 492.) Plaintiff
2 alleges she has done so and claims to attach a Notice of Case Closure to the Amended
3 Complaint. She did not do so. Defendants' have raised this issue before and Plaintiff still
4 has failed to correct it. One must assume then that Plaintiff cannot correct this fatal error.
5 She also did not allege the date she claims to have filed the complaint with the DFEH and
6 EEOC or the date of the Notice. As such, she has failed to allege a cause of action under
7 FEHA and the first, second, fourth, sixth and seventh causes of action fail to state a cause
8 of action.

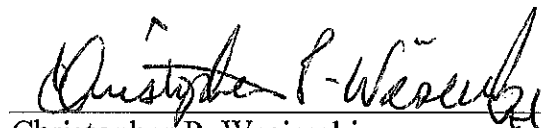
9 **X. CONCLUSION**

10 For the foregoing reasons, Defendants' demurrers to Plaintiff's SAC should be
11 sustained without leave to amend.

12 DATED: October 31, 2013

WESIERSKI & ZUREK LLP

13
14 By:



Christopher P. Wesierski

Attorneys for Defendants CITY OF
NEWPORT BEACH (also incorrectly named
herein as CITY OF NEWPORT BEACH
POLICE DEPARTMENT) and JAY
JOHNSON

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Orange, State of California. My business address is One Corporate Park, Suite 200, Irvine, California 92606.

On **October 31, 2013**, I served true copies of the following document(s) described as **NOTICE OF DEMURRER AND DEMURRER TO SECOND AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT** on the interested parties in this action as follows:

Melanie R. Savarese, Esq.
SAVARESE LAW FIRM
37 West Sierra Madre Boulevard
Sierra Madre, CA 91024
Phone: (626) 355-3264
Fax: (626) 355-3491

Attorney for Christine Hougan

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Wesierski & Zurek LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **October 31, 2013**, at Irvine, California.



Michele Wesierski