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EMPLOYMENT LAW

Finding Individual Liability Under the N.J. LAD

It requires active and purposeful conduct in furtherance of the violation

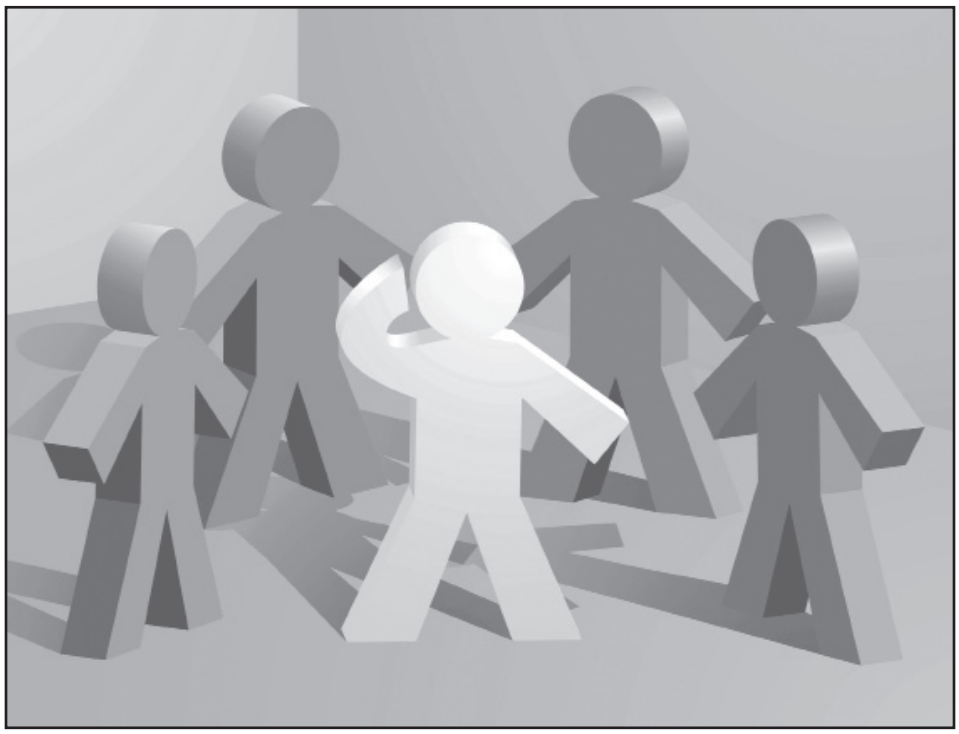
By Vivian Lekkas and Jared Schure

On a recent Monday morning, we arrived at the office to retrieve several frantic voicemail messages from a new client—a supervisor who had been named as a defendant in a lawsuit under the New Jersey Law Against Discrimination (LAD). We promptly returned his calls and attempted to calm his nerves. "Am I going to have to pay money out of my pocket for this?" he asked. Having received a "reservation of rights" letter from his employer's liability insurance carrier, he had spoken with colleagues and his own supervisors, only to receive mixed messages, ultimately fearing that he was facing personal exposure.

"I didn't do anything wrong. It was her co-worker who harassed her. I just referred the matter to the affirmative action officer. Why am I being sued?"

The first order of business was to explain the difference between questions of indemnification—whether from his employer or from his employer's insurer—and questions of liability. Our client's defense was being funded by the insurer; any uninsured or otherwise nonindemnified risk would not be realized unless and until a judgment was entered against him. As to his potential liability, in the case of a claim under the LAD against an individual employee, the questions of liability were different from those applicable to the employer.

The LAD, codified at N.J.S.A. § 10:5-1, et seq., generally protects certain classes of individuals from discrimination in the workplace or in places of public accommodation.



While the definition of "employer" under the LAD includes "one or more individuals, partnerships, associations, organizations, labor organizations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers and fiduciaries," N.J.S.A. §§10:5-5(a) and (e), the New Jersey Supreme Court has held that an individual employee is not an "employer" under the LAD. *Tarr v. Ciasulli*, 181 N.J. 70, 83 (2004). The LAD's only avenue for holding an individual liable is its so-called "aiding and abetting" provision, which prohibits "any person, whether or not an employer or an employee, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this act, or to attempt to do so." N.J.S.A. §10:5-12(e). The Appellate Division has held that only supervisors can be held individually liable under the LAD. *Herman v. Coastal Corp.*, 348 N.J. Super. 1, 27-28 (App. Div. 2002). Thus, in the employment context, the LAD provides for individual liability only against supervisors who aid or abet an act proscribed by the statute.

In a series of decisions rendered over the past decade, New Jersey courts have defined "aiding and abetting" to set a high bar for the imposition of individual liability under the LAD. In *Tarr*, 181 N.J. at 84, the New Jersey Supreme Court held that in order to find an individual liable for aiding or abetting an act proscribed by the LAD, a plaintiff must show:

> (1) the party whom the defendant aids must perform a wrongful act that causes injury;

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(2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; and

(3) the defendant must knowingly and substantially assist the principal violation.

The *Tarr* court emphasized that "aiding and abetting" requires "active and purposeful conduct" in aid of a wrongdoer; mere negligence can never constitute aiding or abetting under the LAD.

Four years after *Tarr*, the Supreme Court in *Cicchetti v. Morris County Sheriff's Office*, 194 N.J. 563 (2008), further refined the definition of "aiding and abetting" to exclude mere inaction. Cicchetti, a sheriff's officer, discovered that he was infected with the hepatitis C virus. When word of his diagnosis spread throughout the Sheriff's Office, his co-workers, led by Officers Marinelli and McWilliams, subjected him to a vicious campaign of harassment, which included verbal taunts; repeatedly mentioning death and dying in his presence; breaking bottles of mouthwash against his locker; refusing to shake his hand; donning latex gloves and surgical masks when he was around; blocking his radio communications with other officers; and, on one occasion, driving an automobile toward him at high speed on a parking deck. Cicchetti filed a formal report with his supervisor, Undersheriff Dempsey, recounting at least 75 incidents of harassment visited upon him by his fellow officers. After filing the report, Cicchetti met with Dempsey on numerous occasions to discuss his co-workers' behavior toward him. Dempsey told Cicchetti that he met with Marinelli and McWilliams, who assured him that they would be more sensitive in the future. Otherwise, Dempsey appeared to have done little or nothing to address Cicchetti's complaints. Ultimately, the harassment against Cicchetti continued unabated, prompting his resignation.

Subsequent to his resignation, Cicchetti filed a complaint alleging disability discrimination and a hostile work environment under the LAD against, among others, the Sheriff's Office, Marinelli, McWilliams and Dempsey. The trial court dismissed the claims against Marinelli, McWilliams and Dempsey, finding that they did not aid or abet anyone and that Marinelli and McWilliams were nonsupervisory employees, therefore, they could not be held individually liable under the LAD. In an unpublished opinion, the Appellate Division reversed the dismissal as to Dempsey, holding that sufficient evidence existed to warrant submitting to a jury the question of his individual liability.

The Supreme Court reversed, finding that the appellate panel "confused the significance of a supervisor's act as a basis for an employer's liability with the significance of those same acts for purposes of the supervisor's individual liability." *Id.* at 595. The court held that the record, shocking as it was, contained no evidence to support the conclusion that Dempsey aided or abetted anyone. While Dempsey "failed to act so as to protect plaintiff or effectively respond to his complaints of discrimination," Dempsey's inaction fell "well short of the active and purposeful conduct that we have held is required to constitute aiding and abetting for purposes of their individual liability." Accordingly, Dempsey could not be held individually liable under the LAD, and insofar as his conduct was discriminatory in itself, his actions were to be "imputed to plaintiff's employer, the Sheriff's Office[.]"

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In *Cowher v. Carson & Roberts*, 425 N.J. Super. 285, 304 (App. Div. 2012), the Appellate Division held that a question of fact existed as to whether two supervisors' actions amounted to the active and purposeful conduct that is a prerequisite to individual liability. The two supervisors allegedly created and maintained a "locker room atmosphere" by encouraging each other to make anti-Semitic slurs toward an employee whom they believed to be Jewish. This decision illustrates that the concept of aiding and abetting is broad enough to encompass two supervisors encouraging each other to commit acts that the LAD forbids. Perhaps counterintuitively, such a supervisor may be held liable for encouraging another to commit acts of harassment but may not be held individually liable for his or her own acts of harassment.

Some post-*Cicchetti* decisions appear to contradict the above interpretation of individual liability by holding that a supervisor can be held individually liable for his own discriminatory conduct in the absence of aiding and abetting. In *Ivan v. County of Middlesex*, 612 F.Supp.2d 546, 553 (D.N.J. 2009), U.S. District Judge Walls (citing the pre-*Cicchetti* Third Circuit decision in *Hurley v. Atlantic City Police Dept*., 174 F.3d 95 (3d Cir. 1999)), held that the Supreme Court's failure in *Cicchetti* to expressly reject the *Hurley* court's language permitting individual liability of a supervisor for his own discriminatory acts implicitly permits a harassing supervisor to be held individually liable under the LAD.

More recently, in *Rowan v. Hartford Plaza Ltd*. (App. Div. Apr. 5, 2013), in an unpublished decision, an appellate panel cited *Ivan* in reversing a trial court's dismissal of sexual harassment claims against a supervisor, where the supervisor was alleged to have been the harasser. Citing the LAD's "broad and pervasive reach" and the requirement that it be "liberally construed," the court concluded that the supervisor should not "escape individual liability for his own allegedly egregious conduct based on a narrow construction of the 'aiding and abetting' provision of the statute." The court acknowledged the standard for aiding and abetting set forth in *Tarr*, but credited the *Hurley* court's observation that it is a "somewhat awkward theory of liability" which "appears to permit a supervisor to be held liable for 'aiding and abetting' another individual, while letting a supervisor escape liability when the supervisor is the sole harasser."

While one may have a reasonable policy disagreement with immunity under the LAD for a supervisor or co-worker who directly engages in discriminatory conduct toward a member of a protected class, *Tarr*, *Cicchetti* and *Cowher* articulate the current standard by which individual liability under the LAD should be determined. Practitioners should be aware of the need for active and purposeful conduct in furtherance of a violation of the LAD—conduct other than the behavior that forms the basis of the alleged violation of law itself. This standard should dictate the manner in which counsel draft pleadings, conduct discovery, and address dispositive motions and trial of disputes under the New Jersey Law Against Discrimination.■