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Courts in New Jersey Continue to Endorse "Awkward Theory" of Individual Liability in New Jersey Law Against Discrimination (NJLAD) Cases

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Referred to by some courts as an "awkward theory" of liability, employers and supervisors should be aware that courts in New Jersey continue to recognize the viability of individual liability claims under the "aiding and abetting" provision of the New Jersey Law Against Discrimination, *N.J.S.A.*§10:5-12(e).

Personal Liability for Supervisors: *Title VII vs. NJLAD*

Unlike Title VII of the federal Civil Rights Act, which does *not* provide for individual employee liability, New Jersey courts have held that in addition to "employers" being liable under NJLAD, supervisors can be personally liable for their illegal conduct under an "aiding and abetting" theory. The New Jersey Supreme Court recently clarified the expansive definition of "supervisor" for purposes of the NJLAD as an employee who is (1) authorized to undertake tangible employment decisions affecting the plaintiff, or (2) authorized by the employer to direct the plaintiff's day-to-day work activities. *Aguas v. New Jersey*, 220 N.J. 494, 529 (2015).

To hold a supervisor liable as an "aider and abetter" under the NJLAD, a plaintiff must show that the individual (1) performed a wrongful act that caused an injury; (2) was generally aware of his or her role as part of an overall illegal activity at the time that he or she provided the assistance; and (3) knowingly and substantially assisted in the principal violation. *Tarr v. Ciasulli*, 181 N.J. 70, 83084 (2004). Aiding and abetting requires "active and purposeful conduct." *Cicchetti v. Morris County Sheriff's Office*, 194 N.J. 563, 595 (2008).

What Makes this Aiding and Abetting Theory so "Awkward"?

Courts applying New Jersey law have yet to follow a uniform rule in situations where the plaintiff alleges that a supervisor aided and abetted the "employer" in violating the NJLAD based on the supervisor's *own conduct* (i.e., as the sole actor engaged in the wrongful conduct). In other words, what happens when the supervisor is the only person alleged to have engaged in the wrongful conduct? Two distinct lines of cases have developed in this area of the law – one finding supervisory employees can be personally liable for aiding and abetting their own/the employer's wrongful

conduct (*e.g.*, *Hurley v. Atlantic City Police Dep't*, 174 F.3d 95 (3d Cir. 1999), and another refusing to impose individual liability *(e.g.*, *Newsome v. Admin. Office of the Courts of N.J.*, 103 F. Supp. 2d 807 (D.N.J. 2000). *See* *Aiding and Abetting Your Own Conduct*, New Jersey Law Journal, Volume 209 (July 16, 2012), Employment Counselor, Number 241 (Sept. 2010).

A string of recent decisions by New Jersey state and federal courts suggest that this "awkward" theory is here to stay. For example, in *Yobe v. Renaissance Electric, Inc.*, 2016 WL 614425 (D.N.J. Feb. 16, 2016), the court denied a motion to dismiss the plaintiff's NJLAD disability retaliation claims against his former supervisor, who was the only person alleged to have engaged in the retaliatory conduct. The defendant argued that the plaintiff's claim failed as a matter of law because a supervisor cannot "aid and abet" his own conduct. Citing to the Third Circuit's "prediction" in *Hurley* that the New Jersey Supreme Court would hold a supervisor personally liable under NJLAD, and an unpublished, non-precedential decision by the New Jersey Appellate Division in *Rowan v. Hartford Plaza Ltd.*, 2013 WL 1350095 (App. Div. April. 5, 2013), the court in *Yobe*concluded that "[w]hile it is concededly an 'awkward theory' to hold an individual liable for aiding and abetting his own conduct, it would thwart the NJLAD's broad and remedial purpose, and make little sense, to construe it as permitting 'individual liability for a supervisor who encourages or facilitates another employee's harassing conduct, while precluding individual liability for the supervisor based on his or her own discriminatory or harassing conduct.'"

Impact on Employers and Individual Supervisors

In discrimination, hostile work environment and retaliation cases brought under the NJLAD, it is common for a plaintiff to name his or her former supervisor as an individual defendant, particularly if the supervisor is the person who made the decision to take an adverse employment action against the plaintiff. Naming the supervisor, particularly a high-level manager, might be viewed by the plaintiff as a tactical move to encourage an early settlement by driving a wedge between the employer's interest in defending its business decision and the supervisor's reputational or financial impact concerns. Absent a showing of fraudulent joinder, a plaintiff's naming of his or her supervisor as a defendant might prevent the employer from removing the action to federal court based on complete diversity of citizenship. In addition, legal fees could increase if separate legal representation for the employer and the supervisor is required. These important issues should be considered and discussed with counsel at the outset of the case. Because the NJLAD does not provide for individual liability for aiding and abetting if the employer is not found liable, the best defense is a unified one between the employer and the individual supervisor.

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