SUPERVISORS AND CO-WORKERS ARE INDIVIDUALLY LIABLE FOR AIDING AND ABETTING DISCRIMINATION AND FOR RETALIATORY CONDUCT

By Matthew A. Peluso, Esquire

Discrimination, harassment and retaliation in the workplace are usually perpetrated by an employee's supervisor or manager. Unfortunately, as noted by Lord Acton over 100 years ago, power corrupts, and many employees with authority and control over other employees intentionally abuse that power in unlawful and harmful ways. However, even co-workers without such power often confuse personal and political connections to members of upper management with an unfettered right to abuse and harass their fellow workers. Therefore, it is important that employees know that both their supervisors and even co-workers can be personally liable for unlawful conduct under New Jersey employment-related statutes.

The "New Jersey Law Against Discrimination" ("LAD"), *N.J.S.A.* 10:5-1, *et. seq.*, prohibits discrimination in the workplace based upon an employee's race, gender, religion, age, sexual preference and ethnic background, among other protected traits. The LAD is intended to prohibit discrimination in all aspects of the employment relationship, including terminations and forced retirements. *Alexander v. Seton Hall University,* 204 N.J. 219 (2010).

The essential purpose of the LAD is the "eradication of the cancer of discrimination." *Fuchilla v. Layman,* 109 N.J. 319, 334 (1988). Accordingly, courts in this State must broadly and liberally interpret the LAD in accordance with that purpose. N.J.S.A. 10-5-3. The LAD is not a fault or intent-based statute. An employee is not required to prove that the employer intentionally discriminated or harassed them, or intended to create a hostile work environment.

Under the LAD, it is unlawful "[f]or any person, whether an employer or *an employee, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden*" under the LAD, and such conduct may result in personal liability. [Emphasis added.] N.J.S.A.10:5–12e; *Tarr v. Ciasulli,* 181 N.J. 70, 83 (2004). Although the words "aid" and "abet" are not defined in the LAD, the Supreme Court of New Jersey has adopted the common dictionary definitions of these words used in *Webster's Dictionary*. Among other things, "aid" means "[t]o give help or assistance." "Abet" means "to incite, encourage, or assist, especially in wrongdoing." "Incite" means "to provoke to action." "Compel" means "to force, drive, or constrain," and "coerce" means "to force to act or think in a given way by pressure, threats, or intimidation."

The *Restatement (Second) of Torts* §876(b) states that an employee "aids and abets" a violation of the LAD when he or she knowingly gives substantial assistance or encouragement to the unlawful conduct of an employer. Section 876(b) of the *Restatement* also imposes concert liability on an individual if he or she "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other." As the Supreme Court said in Tarr: "We agree that the *Restatement* provides the proper standard by which to define the terms "aid" or "abet" under the LAD.

Therefore, in order to hold another individual employee liable under the LAD as an aider or abettor, a law enforcement officer must show that: (1) the fellow officer aided or abetted another officer who performed a wrongful act that causes an injury; (2) the fellow officer must have been generally aware of his role as part of an overall illegal or tortious activity at the time that he or she provided the assistance; and (3) the fellow officer must knowingly and substantially assist the principal violator.

Courts in this state apply five factors to determine whether a co-worker provides "substantial assistance" to the principal violator of another employee's rights under the LAD. Those factors are: (1) the nature of the unlawful act encouraged; (2) the amount of assistance given by the co-worker to the perpetrator; (3) whether the co-worker was present at the time of the asserted discrimination or harassment; (4) the co-worker's relations to the others involved in violating an employee's rights; and (5) the state of mind of the co-worker. *Restatement (Second) of Torts, supra,* 876(b), *Comment* d. Thus, for law enforcement officers, if a ranking officer, or even officer of equal rank, aids or abets the discriminatory conduct of any other officer, they can be individually liable under the LAD just like the officer's employer.

The New Jersey Legislature enacted the "Conscientious Employee Protection Act" ("CEPA"), *N.J.S.A.* 34:19-1, *et seq.*, to "protect and encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employers from engaging in such conduct." CEPA was designed to provide broad protections against employer retaliation for employees acting within the public interest and is construed liberally by the courts of this state to effectuate its important social goal.

CEPA authorizes an aggrieved employee to bring a civil suit against

an employer who retaliates against the employee for reporting illegal or unethical conduct in violation of the statute. CEPA requires proof of four elements: (1) that the plaintiff reasonably believed that employer's conduct violated a law or regulation; (2) that the plaintiff performed "whistle-blowing activity" as defined in CEPA; (3) that an adverse employment action has been taken against him or her; and (4) that the whistle-blowing activity caused such adverse employment action. *N.J.S.A.* 34:19-8. Under CEPA, an "employer" is defined as: "any individual, partnership, association, corporation or any person or group of persons *acting directly or indirectly on behalf of or in the interest of an employer with the employer's consent.*" [Emphasis added.] N.J.S.A. 34:19-2(a). Thus, like the LAD, CEPA also imposes individual liability upon both supervisory and non-supervisory employees who retaliate against co-workers if they are acting with the authorization of their employer. *Palladino v. VNA of Southern New Jersey, Inc.*, 68 F.Supp.2d 455 (D.N.J. 1999).

CEPA defines a "supervisor" as "any individual with an employer's organization who has the authority to direct and control the work performance of the affected employee, who has authority to take corrective action regarding the violation of the law, rule or regulation of which the employee complains, or who has been designated by the employer on the notice required under section 7 of this act." N.J.S.A. 34:19-2(d). Section 7 of CEPA requires an employer to "conspicuously display, and annually distribute to all employees, written or electronic notices of its employees' protections, obligations, rights and procedures under this act, and use other appropriate means to keep its employees so informed." N.J.S.A. 34:19-7.

Therefore, individual "supervisors" as defined above can be personally liable for violating CEPA if they directly retaliate against an employee under their control or just fail to prevent retaliation against any such employee perpetrated by other workers. *See Abbamont v. Piscataway Tp. Bd. of Ed.*, 269 N.J. Super. 11 (App. Div. 1993). Further, this individual liability subjects an offending supervisor to the same remedies available to a plaintiff under CEPA against a violating employer. Pursuant to N.J.S.A. 34:19-5, "[a]ll remedies available in common law tort actions shall be available to prevailing plaintiffs." These remedies include an injunction to restrain the unlawful conduct, compensation for lost wages, benefits and other remuneration, attorney's fees and punitive damages. *Id.* As the *Palladino* court stated: the imposition of individual liability for offending conduct furthers CEPA's protective and remedial purposes.

In addition, an employee cannot be terminated for failing to strictly follow their employer's stated chain-of-command when "blowing the whistle" on illegal conduct in the workplace. In the case of *Czurlanis v. Albanese,* 721 F.2d 98 (3rd Cir. 1983), the U.S. Third Circuit Court of Appeals reviewed an employee's claim that he was wrongly terminated for failing to follow the employer's "chain-of-command" policy when making "whistleblowing" complaints protected by the First Amendment. The Third Circuit ruled that a workplace policy that would compel public employees to route complaints about poor departmental practices to the very officials responsible for those practices would impermissibly chill such speech and would deter "whistleblowing" by public employees on matters of public concern. *Id.*

The New Jersey Supreme Court reached the same conclusion in *Fleming v. Correctional Healthcare Solutions, Inc.,* 164 N.J. 90 (2000). In Fleming, the Supreme Court ruled that an employer cannot terminate an employee for insubordination solely because the employee sidestepped an involved supervisor when reporting unlawful conduct in the workplace, and, if done, that any such termination would contradict the express language of CEPA and its broad remedial purpose. *Id.* Clearly, the *Czurlanis* and *Fleming* decisions should provide law enforcement officers with some comfort that going outside of the sacred chain-of-command to report unlawful activity cannot alone be used as a basis to terminate an officer otherwise protected by CEPA.

As an attorney who represents law enforcement officers in LAD and CEPA cases, I know that bringing a lawsuit against individual officers can end longstanding personal and professional relationships, and can create significant hostility at work. However, if superior, or any other, officers, have violated the law, then the offended law enforcement officer can and should name them as parties in any lawsuit brought against the employer in order to ensure both substantive and procedural completeness.

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