New Jersey Law Journal

VOL. CLII – NO. 1 – INDEX 32 APRIL 6, 1998 ESTABLISHED 1878

IN PRACTICE

EMPLOYMENT LAW

By CHARLES R. CHURCH

Charles R. Church is an attorney who devotes most of his efforts to human rights issues: detention, torture, the facility at Guantanamo Bay, habeas corpus, etc.
His website is: www.churchlawllc.com
Email him at: charleschurchllc@gmail.com

The Case for Individual Liability Under the LAD

After decades of seemingly ignoring the question, employment law practitioners have argued and courts have found in recent years that individuals may not be liable for unlawful discrimination under Title VII. This development, in turn, has led to sporadic arguments that individuals also may not be liable under the New Jersey Law Against Discrimination. Practitioners make this proposition even though the arguments favoring non-liability under Title VII do not apply to the LAD, and the LAD specifically provides for liability of aiders and abettors of unlawful discrimination by employers.

In *Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061 (3d Cir. 1996), cert. denied, 117 S.Ct. 2532 (1997), the Third Circuit en banc followed the line of cases holding that individuals may not be liable under Title VII. The court cited these cases as authority (see 100 F.3d at 1077), but examined the issue independently. Congress, in amending Title VII by means of the Civil Rights Act of 1991, provided a detailed sliding scale of damages ranging from $50,000 for an employer of more than 14 and fewer than 101 employees; to $300,000 for employers with more than 500 employees; it made no reference to any amount of damages to be paid by individuals. This omission strongly suggested to the Third Circuit that Congress did not contemplate that damages could be assessed against individuals who are not themselves the employing entity.

Further, the court noted that Congress previously had expressed its concern about the impact of Title VII litigation on small businesses when it excluded businesses with fewer than 15 employees from the definition of "employer." "It is reasonable to infer that Congress's concern in that regard applies as well to individuals," the court found. Id. at 1078.

The *Sheridan* court did not address an important counterargument. *Schanzer v. Rutgers University*, 934 F.Supp. 669 (D.N.J. 1996), decided before *Sheridan*, pointed out that Title VII defines the term "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees *and any agent* of such person." 42 U.S.C. 2000e(b) (emphasis added). The *Schanzer* court observed that:

> The meaning of the phrase "and any agent" is responsible for generating a substantial split of authority among the federal courts [on the issue of individual liability].

934 F.Supp. at 675.

The *Schanzer* court elected to follow the line of authority, concluding that "the reference to agents in the definition of employer is simply to incorporate respondeat superior liability into Title VII." 934 F.2d at 676. See also *Miller v. Maxwell's Intern'l Inc.*, 991 F.2d 583, 587 (9th Cir. 1993), cert. denied, 114 S.Ct. 1049 (1994)

The author is counsel to Roseland's Post, Polak, Goodsell & MacNeil. He has practiced in the area of employment law for more than 25 years.

(court applied this reasoning to both Title VII and ADEA claims).

Liability Under the LAD

None of these reasons for finding that individuals may not be sued under Title VII applies to the LAD. And any analysis of the LAD language must begin with its truly extraordinary prefatory statement. While courts must be mindful of the remedial nature of these discrimination statutes and the consequent need to interpret them broadly, see *Schanzer*, 934 F.Supp. at 676, n.8, the powerful statement by the state Legislature demands the broadest possible interpretation.

The Finding and Declaration by the Legislature states:

> The Legislature finds and declares that practices of discrimination against any of its inhabitants, because of race, creed, color, national origin, ancestry, age, sex ... *are matters of concern to the government of the State, and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State*;
>
> ***
>
> *The Legislature further declares its opposition to such practices of discrimination* when directed against any person by reason of the race, creed, color, national origin, ancestry, age, sex ... of that person ... *in order that the economic prosperity and general welfare of the inhabitants of the State may be protected and ensured.*
>
> *The Legislature further finds that because of discrimination people suffer personal hardships, and the State suffers a grievous harm. The personal hardships include: economic loss; time loss; physical and emotional stress; and in some cases severe emotional trauma, illness, homelessness or other irreparable harm resulting from the strain of employment controversies; relocation, search and moving difficulties; anxiety caused by lack of information, uncertainty, and resultant planning difficulty; career, education, family and social disruption; and adjustment problems, which particularly impact on those protected by this act.* Such harms have, under the common Law, given rise to legal remedies, including compensatory and punitive damages. *The Legislature intends that such damages be available to all persons protected by this act and that this act shall be liberally construed in combination with other protections available under the laws of this State.*

N.J.S.A. 10:5-3 (emphasis added).

The *Behrens* Case

A search turns up only one unreported decision in which, despite this powerful declaration, a court decided that individuals may not be liable under the LAD. In *Behrens v. Rutgers Univ.*, 1996 WL 570989 (D.N.J. 1996), the court dismissed claims against individual defendants under Title VII. But these defendants sought dismissal under the LAD as well. The court declared that the reasons for dismissal of the Title VII claims do not apply to the LAD. "Consequently, we will analyze the possibility of individual liability under NJLAD separately." 1996 WL 570986 at p. 7. The court reviewed the provisions of N.J.S.A. 10:5-12 for its subsections which proscribe discrimination and prohibit specific groups of people from engaging in particular conduct. The court stated:

> Clearly the drafters of this statute knew how to identify different groups and considered when to award individual liability. Subpart 12(a), the only section to deal with employment discrimination, does not provide for individual liability; instead it states that an employer cannot engage in discriminatory acts.

Id.

Having made this argument, the court then sought to deal with the provision in the LAD which destroys it. For N.J.S.A. 10:5-12 explicitly provides for individual liability in subpart 12e, which states:

> [It shall be an unlawful employment practice or discrimination] *for any person, whether an employer, employee or not,* to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under [LAD], or to attempt to do so. (Emphasis added.)

The court incorrectly relied upon *Passaic Daily News v. Blair*, 63 N.J. 474 (1973), to read Section 12e out of the LAD. In *Passaic Daily News*, the plaintiffs challenged the Employment Advertising Rule adopted under the LAD by the Division on Civil Rights. This rule held newspapers responsible for violation of the LAD by segregating classified advertising employment columns on the basis of sex and other categories. Since N.J.S.A. 10:5-12c, the LAD provision which directly deals with employment ads, does not include newspapers within its proscriptions, the attorney general relied upon Section 12e to support the rule, contending that by making available advertising columns for the offending ads, the publisher was aiding the employer or employment agency placing the ad in discriminating on the basis of sex. The Supreme Court expressly approved this reasoning, stating that:

> It seems to us that the prominent, if not indispensable place of newspaper classified advertising in the employment recruiting field is such that it is unrealistic to contend that a publisher of a paper who either initiates or acquiesces in advertising publication practices which discriminate or encourage or facilitate discrimination in employment is not "aiding" in such discrimination within the meaning of the statute.

Id. at 488.

The *Behrens* court ignored this enforcement by the Supreme Court of 12e by using *Passaic Daily News* to disavow the use of definitions for aid and abet from criminal law, 1996 WL 570989, at 7,

which definitions had been employed by LAD cases decided after *Passaic Daily News* and before *Behrens* when finding individual liability. See, *Tyson v. Cigna Corp.*, 918 F.Supp. 836, 840-42 (D.N.J. 1996), and *Baliko v. Stecker*, 275 N.J. Super. 182, 191 (App. Div. 1994).

In doing so, the court ignored the reality that other definitions, for example from civil case law, might profitably be employed. Instead, it threw the baby out with the bath water, holding:

> We cannot imagine that the drafters of NJLAD, who have been so specific when articulating prohibited actions and identifying the parties to which these subparts apply, including individuals and employees, intended to hold individual employees liable for employment discrimination

Behrens, 1996 WL 570986, at 8.

In short, despite the plain language of Section 12e to the contrary, according to *Behrens* individual employees could not on any basis be deemed liable for violations of the LAD.

Individual Liability Under the LAD

It is true that case law imposing liability under Section 12e expressly has defined aid and abet according to criminal law precepts. *Tyson v. Cigna Corp.*, 918 F.Supp. 836 (D.N.J. 1996) (the LAD does not impose liability on non-supervisory employees; supervisor liable only to the extent that he or she affirmatively engages in discriminatory conduct while acting in the scope of employment); *Baliko v. Stecker*, 275 N.J. Super. 182 (App. Div. 1994) (individual defendants liable as aiders and abettors of union).

While reference to criminal law definitions may be problematic under *Passaic Daily News*, preserving the clear intention of Section 12e to impose liability upon individuals plainly is correct.

The preliminary statement in *Lehmann v. Toys 'R' Us, Inc.*, 132 N.J. 587 (1993), applies equally to individuals:

> The New Jersey Law Against Discrimination was first enacted in 1945. Its purpose is "nothing less than the eradication 'of the cancer of discrimination.'"
>
> ***
>
> The LAD was enacted to protect not only the civil rights of individual aggrieved employees but also to protect the public's strong interest in a discrimination-free workplace. ... Freedom from discrimination is one of the fundamental principles in our society. ...

Id. at 600 (citations omitted).

And the statutory language in the LAD is clear. Persons involved to the extent required by Section 12e in unlawful acts under the statute are liable to the injured party.

If defining aid and abet under criminal law authorities is deemed a problem on account of *Passaic Daily News*, *Baliko* urges that the terms found in criminal cases "frequently have been used with the same meaning in civil law contexts." 275 N.J. Super. at 191 (citing as examples *Jaclyn, Inc. v. Edison Bros. Stores, Inc.*, 170 N.J. Super. 334, 368 (Law Div. 1979), and *Schneider v. Hamilton Trust Co.*, 116 N.J. Eq. 55, 57 (Ch. 1934), *aff'd,* 119 N.J. Eq. 93 (E. & A. 1935)). The authorities cited in *Baliko* are buttressed by the thorough treatment of aiding and abetting liability in a civil context in *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983). Briefly describing aiding and abetting as "concerted action by substantial assistance," the court then stated:

> Aiding-abetting includes the following elements: (1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as a part of an overall illegal or tortious activity at the time that he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation.

Id. at 477 (citations omitted).

An aider-abettor is liable for the damages caused by the main perpetrator. Id. at 478.

These definitions of aid and abet call into question the restriction of Section 12e liability to supervisors in the workplace, since co-workers could just as easily fulfill the criteria for liability.

It can be argued that the state Supreme Court, while not explicitly referring to Section 12e, has applied its content to individuals. See *Jones v. Haridor Realty Corp.*, 37 N.J. 384 (1962). In a case arising under the prior codification of the Law Against Discrimination (N.J.S.A. 18:25-1, et seq.) and challenging its constitutionality under due process norms, the individual defendants argued that the corporate defendant was the offending actor, and it alone should be subjected to the order against defendants. The court found that personal rejection of an African-American applicant was not necessary for liability. The corporation and the two principals acted as a unit, and all were deemed subject to the LAD.

But wherever the state Supreme Court fixes the final parameters of Section 12e liability, it nonetheless should be clear that the lonely effort in *Behrens* to read that section out of the LAD must fail. What the Legislature has enacted cannot simply be ignored. ■

The arguments favoring non-liability under Title VII do not apply to the LAD and the LAD specifically provides for liability of aiders and abettors of unlawful discrimination.