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COMMENTARY

The Law Against Discrimination's 'Sole Harasser' Loophole

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Legislation

By Brian M. Block | May 26, 2023 at 10:00 AM

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Imagine this rather un-imaginary scenario. Karen Smith is employed by the Acme Company as a bookkeeper. Hugh Creeper is the office manager at the Acme Company and supervises Karen. Over the course of a few months, Hugh makes several sexual comments to Karen and even goes so far as to inappropriately touch her at the office. Karen tells Hugh to stop but to no avail. The conduct continues and eventually Karen decides to resign as a result. Karen finds a great employment litigator who sues the Acme Company for hostile work environment sexual harassment under the LAD and sues Hugh for the same sexual harassment claims, plus aiding and abetting liability. It's a slam dunk case for individual liability against Hugh, right? Wrong.

In *Cicchetti v. Morris County Sheriff's Office*, 194 N.J. 563 (2008), the New Jersey Supreme Court clarified that the LAD's principal liability provision, N.J.S.A. 10:5-12(a), imposes liability only on the "employer," exactly as it reads. At the same time, *Cicchetti* was crystal clear that a supervisor's individual liability can arise only under the LAD's aiding and abetting provision, N.J.S.A. 10:5-12(e), because it applies to "any person." That subsection makes it unlawful for anyone "to aid, abet, incite, compel or coerce the doing of any of the acts forbidden" by the LAD or to attempt to do so. And in *Tarr v. Ciasulli*, 181 N.J. 70 (2004), the Supreme Court stated that for aiding and abetting liability under the LAD to apply, the person must know "the other's conduct" is a breach of a duty and must give "substantial assistance or encouragement" to the other's conduct. The court then set forth a three-prong, five-factor test.

Now, let's circle back to Karen's LAD claims against Hugh. There is no direct liability under subsection (a) because Hugh is not Karen's employer, Acme Company is. So that leaves aiding and abetting liability under subsection (e). Who did Hugh aid, abet, compel or coerce to engage in conduct that violated the LAD? Nobody. To be sure, Hugh sexually harassed Karen. But he did not aid, abet or coerce anyone else to sexually harass Karen. He was the sole harasser..

So, as counterintuitive as it may be, Hugh is not individually liable to Karen under the LAD. At least, that is the position of no fewer than eight federal district courts and state appellate courts. *S*ee, e.g., *Newsome v. Admin. Office of Courts of State of New Jersey*, 103 F. Supp. 2d 807, 823 (D.N.J. 2000), aff'd, 51 F. App'x 76 (3d Cir. 2002); *Putterman v. Weight Watchers International*, No. 10-CV-1687 (D.N.J. Aug. 19, 2010); *Shaw v. FedEX*, No. A-1634-10T3, (N.J. Super. Ct. App. Div. July 20, 2012). These decisions are rooted in the LAD's plain language and case law like *Cicchetti* and *Tarr*. The courts concluded—what would appear to be correctly—that the perpetrator of sexual harassment cannot aid and abet himself or herself to trigger liability under N.J.S.A. 10:5-12(e). Indeed, a trial court came to the same conclusion in a more recent high-profile case against the former director of the Office of Attorney Ethics and, for that reason, dismissed the plaintiff's LAD claims against him individually. See Charles Toutant's article, "Judge Dismisses Office of Attorney Ethics Director From Discrimination Lawsuit," N.J.L.J. (May 29, 2019).

There is, however, another line of cases that take the opposite view. That line started with, and is based principally on, the Appellate Division's unpublished decision in *Rowan v. Hartford Plaza*, No. A-0107-11T3 (N.J. Super. Ct. App. Div. Apr. 5, 2013). However, a review of *Rowan* reveals that its conclusion that a sole harasser can be held liable under the LAD for aiding and abetting is rooted not in the LAD's actual statutory text or an application of the *Tarr* test for aiding and abetting liability, but rather, in understandable public policy concerns. That is, *Rowan* found "untenable" the notion that N.J.S.A. 10:5-12(e) provides for individual liability for a supervisor who aids another employee's harassing conduct but precludes liability if the supervisor himself or herself was the sole perpetrator of harassing conduct.

The problem, of course, is that an appellate court is not a legislative body. Hopefully, few would disagree that a sole harasser *should* be held individually liable under the LAD. But that decidedly is not how the LAD currently reads. Indeed, reading subsection (e) to permit sole harasser liability essentially merges subsections (a) and (e) to turn the LAD into a de facto individual liability statute in all cases. That interpretation is irreconcilable with *Cicchetti* and *Tarr*. Nor is there any cogent and honest way to apply the *Tarr* test for aiding and abetting liability to find a sole harasser individually liable.

Whether the perpetrator of unlawful conduct can be held individually liable under the LAD to his or her victim should not come down to luck-

of-the-draw regarding which trial judge or appellate panel handles the case. The New Jersey Legislature should not foist the burden on the New Jersey Supreme Court to wrestle with the issue. Nor does it appear that an appropriate case for the Supreme Court to decide the issue is even on the horizon. Therefore, the time is right for the Legislature to step in to amend the LAD's liability scheme in N.J.S.A. 10:5-12 to close the statutory loophole. This issue arises with some frequency in LAD cases, and alleged victims and alleged perpetrators should not be left twisting in the wind about whether individual liability exists.

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