AIDING AND ABETTING YOUR OWN CONDUCT—AN “AWKWARD THEORY” OF PERSONAL LIABILITY FOR SUPERVISING EMPLOYEES UNDER THE NEW JERSEY LAW AGAINST DISCRIMINATION**

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The New Jersey Law Against Discrimination (LAD) is one of the nation’s oldest and broadest antidiscrimination laws. It prohibits a wide array of unlawful employment practices and unlawful discrimination by “employers.” Although supervisory employees are not defined as “employers” under the LAD, they can nonetheless open themselves up to personal liability if they “aid, abet, incite, compel or coerce” the harassment or discrimination of another. The “aiding and abetting” standard under the LAD is, as one court has described it, an “awkward theory” of personal liability where supervisors are held personally liable for aiding and abetting their employers’ violations of the LAD through their own discriminatory or harassing conduct—and a confusing area of the law in which greater clarity is needed.

THE AIDING AND ABETTING STANDARD UNDER THE LAD

The LAD makes it unlawful “[f]or any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden [under the LAD].” The dearth of legislative history surrounding the LAD, enacted in 1945, makes it difficult to
assess what precise conduct or situations the Legislature sought to cover under this aiding and abetting provision. Indeed, it was only within the last decade that the New Jersey Supreme Court set forth the standard for holding an employee liable as an aider and abettor under the LAD.

In *Tarr v. Ciasulli*, the court adopted the standard set forth in § 876(b) of the *Restatement (Second) of Torts* for holding an employee liable as an aider and abettor under the LAD. Specifically, a plaintiff must show that:

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 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.

Courts should consider the following five factors in determining whether a party provides “substantial assistance” as required by the third prong of the aforementioned test:

1. the nature of the act encouraged;
2. the amount of assistance given by the supervisor;
3. whether the supervisor was present at the time of the asserted harassment;
4. the supervisor’s relations to the others; and
5. the state of mind of the supervisor.

This test had already been adopted by federal courts examining aiding and abetting claims under the LAD prior to *Tarr*.

**VICARIOUS LIABILITY VERSUS INDIVIDUAL LIABILITY UNDER THE LAD**

Conduct by a supervisor that gives rise to vicarious liability for an employer will not automatically give rise to individual liability against the supervisor. Recognizing the “apparent confusion” in this area of the law, the New Jersey Supreme Court, in *Cicchetti v. Morris County Sheriff’s Office*, attempted to clarify the different standards that apply to vicarious liability and individual liability, respectively.

An employer may be held vicariously liable for harassment by supervisors if the employer had actual or constructive notice of the harassment or, if the employer did not have actual or constructive notice, the employer nonetheless negligently or recklessly failed to have an effective antiharassment policy.

Because supervisors “ha[ve] a unique role in shaping the work environment,” their responsibilities include “the duty to prevent, avoid, and rectify invidious harassment in the workplace.” An employer may be held liable for creating or maintaining a hostile work environment when:

1. the employer grants a supervisor authority to control the workplace and the supervisor abuses that authority to create a hostile environment;
2. the employer negligently manages the workplace by failing to enact antiharassment policies and mechanisms; or
3. the employer has actual or constructive knowledge of the harassment and fails to take effective measures to end the discrimination.

However, a supervisor can be individually liable under the LAD if he or she gives “substantial assistance” to the principal violation through “active and purposeful conduct.”

**AIDING AND ABETTING ONE’S OWN CONDUCT: AN AWKWARD THEORY OF LIABILITY**

Typically, aiding and abetting liability has been applied to hold a supervisor personally liable under the LAD when two or more employees are alleged to have acted in concert to violate a person’s rights.

Some courts have held that supervisors can be individually liable under an aiding and abetting theory when the only wrongful conduct at issue is the supervisor’s own acts of harassment or discrimination, holding that the supervisors have aided and abetted the employer’s violation of LAD, but the law is far from clear or uniform. Two distinct lines of cases have developed on this issue—one that holds that supervisory employees can be personally liable for aiding and abetting their own wrongful conduct, and another that refuses to impose individual liability for this conduct.

**HURLEY AND ITS PROGENY: INDIVIDUAL LIABILITY FOR AIDING AND ABETTING ONE’S OWN CONDUCT**

The first case to examine whether supervisors can aid and abet their own wrongful conduct and be personally...
liable under the LAD was *Hurley v. Atlantic City Police Department*. In that case, Hurley, a female police sergeant, brought suit against the Atlantic City Police Department and her direct supervisor, Captain Madamba, individually, alleging that Madamba and other police officers had sexually harassed her. Hurley alleged that, in addition to his own affirmative acts of harassment, Madamba laughed when Hurley had complained to him about harassment from her coworkers and told her to stop complaining or it would get worse. After a jury trial, Madamba was found individually liable under the LAD for aiding and abetting.

The Third Circuit Court of Appeals agreed with the district court that Madamba could be held liable as an aider and abettor, stating that a supervisor could be “liable for aiding and abetting the actionable conduct of his employer, [even] when the challenged conduct is failing to stop the supervisor’s own harassment.” The court explained this “somewhat awkward theory of liability” as follows: “A supervisor, under New Jersey law, has a duty to act against harassment. This duty can be violated by deliberate indifference or affirmatively harassing acts. When a supervisor flouts this duty, he subjects himself and his employer to liability.”

The Third Circuit found that Madamba had assisted the Police Department in its wrongful conduct—the employer’s “tolerance of sexual harassment”—by himself “tolerating and even encouraging the harassment.” His liability was “grounded in his failure to stop the harassment, which included both active and passive components.” The court went on to explain that only supervisors could be liable under this theory:

[U]nder New Jersey law, a nonsupervisory employee cannot be held liable as an aider and abettor for his own affirmative acts of harassment, because such affirmative acts do not substantially assist the employer in its wrong, which is its failure to prevent and redress harassment by individual employees . . . A supervisor, by contrast, may be liable as an aider and abettor for active harassment or knowing and willful inaction, because in either case the supervisor violates his or her duty as a supervisor to prevent and halt harassment.

In *Ivan v. County of Middlesex*, the court, following *Hurley*, reached a similar conclusion. In *Ivan*, two female sheriff’s officers brought sexual harassment and gender discrimination claims against the sheriff’s department and several supervisors individually. The court denied a motion for summary judgment made by one of the supervisors despite acknowledging that the claims against him rested solely on his own affirmative harassment. A jury, the court reasoned, could “conclude that [the supervisor] used his position . . . to further his own acts of discrimination” and, therefore, could be held liable as an aider and abettor.

Although in *Hurley* and *Ivan* other employees were alleged to have been involved in the harassment, courts have also imposed individual liability in cases where the allegations are based solely on the conduct of a single supervisor. For example, in *Danna v. Truevance Management Inc.*, Danna brought sexual harassment and hostile work environment claims against her employer and Hancock, her direct supervisor, based solely on Hancock’s alleged harassment. Hancock moved for summary judgment arguing that he “may not be held individually liable because he cannot aid and abet his own allegedly harassing acts.” Although Danna sought “relief against Defendant Hancock based on his own harassing conduct” the court, citing *Hurley*, held that this was a viable theory of liability and denied Hancock’s motion.

**NEWSCOM AND ITS PROGENY: NO INDIVIDUAL LIABILITY FOR AIDING AND ABETTING ONE’S OWN CONDUCT**

Some courts have refused to impose individual liability for supervisors based on their own acts of harassment and discrimination. In *Newsome v. Administrative Office of the Courts of New Jersey*, Newsome brought a sexual harassment claim against her employer and Coleman, her supervisor, based solely on Coleman’s harassment. The court granted Coleman summary judgment on the LAD claim against him because Coleman “as the alleged principal wrongdoer, cannot aid and abet his own wrongful conduct.” The court rejected the theory of liability used by the *Hurley* court: “Even Newsome does not attempt to twist her claims to allege that Coleman aided and abetted the wrongdoing of the AOC in its failure to discipline Coleman, which would simply be a transparent effort to evade the prohibition of direct individual liability.”

The *Newsome* court distinguished *Hurley* based on the participation of other employees in the harassment. The *Hurley* court stated, however, that a supervisor could be liable for aiding and abetting his employer even when the employer’s violation was merely “failing to stop the supervisor’s own harassment.” Moreover, the *Hurley* court
explained that this liability was based on a supervisor’s flouting of his duty to prevent harassment and that duty could be violated by “deliberate indifference or affirmatively harassing acts.” (emphasis added) At no point did Hurley state that a supervisor had to be acting in concert with other individuals.

Courts have frequently cited Newsome in dismissing aiding and abetting claims against supervisors based solely on their affirmative acts of harassment or discrimination. In Harmon v. Bemis Co., Inc., for example, the court granted summary judgment to a supervisor for aiding and abetting claims based on the supervisor’s own acts of harassment. The court held that “the alleged principal wrongdoer cannot aid and abet his own wrongful acts of harassment. The court held that “the alleged principal wrongdoer cannot aid and abet his own wrongful conduct.” Therefore, the supervisor could “not be held liable for any incidents in which he supposedly took part.”

In Spinks v. Township of Clinton, the court, following Newsome, held that a supervisor could not be held liable for aiding and abetting his own conduct. In that case, the plaintiffs, two former police officers, brought a case discrimination and retaliation claims against their employer, Clinton Township, and the chief of police, Clancy, individually. An internal investigation had revealed that a number of officers, including the plaintiffs, had falsified reports. The plaintiffs claimed they were terminated following the investigation while other younger officers who had also falsified reports kept their jobs. They claimed that Clancy had purposely structured the investigation in order to target older officers. The court dismissed the claims against Clancy, stating:

[T]he facts here show that Chief Clancy was acting in his decision-making capacity as Chief of Police. He was not, in any way, aiding or abetting the Township in any discriminatory actions since he was the decision-maker . . . [t]herefore, Chief Clancy cannot be held individually liable for the claims asserted by plaintiff under the N.J.LAD.

THE NEED FOR CLARITY

Under the LAD, an “employer” can be vicariously liable for the wrongful acts of its supervisors (whether those supervisors act alone or in concert with others in violating the LAD). “[T]he LAD also includes a provision that goes beyond employers and provides that “it shall be . . . unlawful discrimination . . . for any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden [under the LAD].” If an individual supervisor knowingly and substantively assists the “principal violation,” that supervisor may be personally liable for the resulting harm, and some courts have gone so far as to hold that, even in situations where the supervisor’s conduct is the only conduct at issue (i.e., the supervisor is alleged to be the principal violator), individual liability may attach. Nowhere in the plain text of the LAD does it state that “supervisors” can be liable for aiding and abetting their own conduct, nor do any of the factors set forth in the § 876(b) of the Restatement (Second) of Torts suggest that acting alone in violating the law constitutes aiding and abetting.

Individual liability for aiding and abetting seems more logical if a supervisor has actually aided and abetted the conduct of another person. The Minnesota Human Rights Act (MHRA), for example, requires that another person—not an employer—be involved before aiding and abetting liability attaches. The MHRA states that “it is an unfair discriminatory practice for any person: Intentionally to aid, abet, incite, compel, or coerce a person to engage in any of the practices forbidden by this chapter.” Because the MHRA requires the involvement of another person, Minnesota courts have held that an individual “must have acted ‘in concert’ with someone else” in order to aid and abet and “an employee cannot aid and abet him or herself.”

The LAD provision is less precise, proscribing the aiding and abetting of “the doing of any of the acts forbidden under this act.” Because the LAD does not explicitly require that another person be involved, some courts, like the Hurley court, have used the provision as an indirect way to impose personal liability on supervisors for their own conduct. Other courts, addressing nearly identical sets of facts, have held that supervisors cannot aid and abet their own conduct.

As the law currently stands, litigants cannot be sure whether a court will impose individual liability on supervisors for their own acts of discrimination or harassment. Until the New Jersey Legislature further clarifies, or the state’s highest court resolves the conflicting decisions on this issue, the “apparent confusion” in this area of the law will likely continue and the LAD’s “awkward theory of liability” will carry on.

ENDNOTES

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1. N.J.S.A. 10:5-12(a).
2. N.J.S.A. 10:5-12(e).
3. For example, a plaintiff sues both the employer and direct supervisor, claiming that the supervisor creat-
ed a sexually charged hostile work environment and employer failed to prevent this conduct. The plaintiff claims the employer is vicariously liable for the acts of the supervisor, and the supervisor is personally liable for those same acts based on “aiding and abetting” the employer’s violation of the LAD.

4. N.J.S.A. 10:5-12(e).


8. Cicchetti v. Morris County Sheriff’s Office, 194 N.J. 563, 595, 947 A.2d 626 (2008) (finding no evidence that supervisors could have been aids and abettors because, although each had some responsibility over the employees and workplace, and there was evidence they had failed to act so as to protect the plaintiff or effectively respond to his complaints of discrimination, those acts fell “well short of the ‘active and purposeful conduct’ required to constitute aiding and abetting liability for purposes of their individual liability).


14. See, e.g., Putterman v. Weight Watchers Int’l, Inc., 2010 WL 3310706 at *2 (D.N.J. Aug. 19, 2010) (citing Newsome, and holding that, because the defendant-supervisor was the “principal violator,” the plaintiff “cannot show that she provided substantial assistance to herself.”).


20. Hubbell v. Better Business Bureau of MN, 2009 WL 5184346 (D. Minn. 2009); see also Wallin v. Minnesota Dept. of Corrections, 598 N.W.2d 393, 405 (Minn. Ct. App. 1999) (dismissing an aiding and abetting claim against an individual defendant because plaintiff had not shown that the defendant had “acted in concert with anyone in order to harass or discriminate.”)


ENGLISH-ONLY POLICIES DRAW FIRE

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A medical system in Baltimore. A motel in New Mexico. A school district in North Carolina. A bookstore/café in Connecticut. While these may seem like four very disparate businesses, they share a common problem; after instituting “English-only” requirements in their workplaces, these employers have been attacked in the media and subjected to charges of discrimination, both in court and out.

Take the case of Atticus Bookstore and Café in New Haven, Connecticut. After adopting a policy earlier this year requiring employees to speak only English when working in the public areas of the business, the store’s management was publicly castigated by the New Haven Workers Association and other labor groups. Calling the policy discriminatory, the groups launched a letter-writ-