

INDIVIDUAL LIABILITY UNDER LAD & CEPA

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In order to decide whether to name an individual defendant in a lawsuit under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, *et seq.* (“LAD”) or the Conscientious Employee Protection Act, N.J.S.A. 34:19-1, *et seq.* (“CEPA”), there are numerous factors to consider. This outline attempts to analyze the various factors and the decision tree that must be navigated in order to determine whether an individual defendant can or should be added to a Complaint under LAD or CEPA. Those factors include:

1. The effect on jurisdiction; State vs. Federal Court;
2. The effect on venue, which vicinage or county can lawsuit be brought?;
3. Can the individual be held liable for his/her actions under LAD and CEPA?;
4. What are the advantages of naming an individual defendant?;
5. What are the disadvantages of naming an individual defendant?;
6. At what point, if any, do I dismiss claims against the individuals?

A. JURISDICTIONAL CONSIDERATIONS

A primary consideration in determining whether to name an individual defendant is the effect the inclusion will have on the jurisdiction. Deciding between State Court and Federal Court is often a matter of personal preferences, and many different opinions exist among experienced practitioners. As a general rule, however, most Plaintiff’s attorneys prefer to have their cases adjudicated in State Court, while most Defendant’s attorneys prefer to have their cases adjudicated in Federal Court.

Among the differences and factors to consider:

1. Discovery - Federal Court is much faster, streamlined, better managed, and much more limited than discovery in State Court. Federal Court generally allows six months for discovery; State Court permits 450 days for LAD and CEPA cases. Federal Court can be a significant advantage if the case is relatively uncomplicated and the attorney wants to limit and complete discovery as soon as possible. On the other hand, State Court permits unlimited interrogatories and deposition, while Federal limits to 25 interrogatories and 10 depositions;
2. Length of Time to trial - Although discovery is limited in Federal Court, dispositive motions often take more than six months to resolve, while in State Court the dispositive motions are usually done in less than 60 days. Once the case is ready for trial, however, trial dates are more reliable in Federal Court while State Court tends to have many postponements;
3. Case Management - The case management system is generally better in Federal Court,

where a Magistrate manages the case throughout and assists with settlement where necessary;

4. Judges - Federal District judges are generally better versed and more familiar with complex civil rights and discrimination/retaliation matters than State Court judges, which is a significant advantage for Federal Court;
5. Summary Judgment - Federal judges are much more likely to dismiss cases on Summary Judgment and motions to dismiss, which is a major advantage for defendant counsel, and a significant reason why defense counsel tries to remove cases to Federal Court whenever possible;
6. Appellate Process - This is the perhaps the single most important factor, and the reason why many Plaintiff attorneys argue that it is almost malpractice to bring a case Federal Court. The New Jersey Appellate system, the Appellate Division and Supreme Court, have consistently supported and expanded the protections of employees under the Law Against Discrimination. On the other hand, the Federal Appeal system, the 3rd Circuit Court of Appeals and US Supreme Court, have been much less hospitable to discrimination claims.

PRACTICE NOTE - Before deciding on the identity of your defendants, conduct research on the New Jersey Secretary of State website to determine the citizenship of the corporate defendants. Also, know where any potential individual defendants live.

1. Diversity jurisdiction

If the plaintiff's attorney is interested in preventing removal to Federal Court, a major consideration is whether the inclusion of an individual defendant will defeat diversity jurisdiction and therefore prevent removal from State Court to Federal Court. Unless the Plaintiff pleads a Federal cause of action, a Defendant cannot remove a case from State Court to Federal Court unless there is complete diversity of the parties. 28 U.S.C. §1332. Since many corporations are incorporated in States other than New Jersey, for purposes of diversity jurisdiction, these corporations are citizens of other States. Adding an individual defendant who is a New Jersey will defeat diversity jurisdiction and prevent removal from State to Federal Court.

2. Venue

New Jersey Rule of Civil Procedure 4:3-2(a) provides that, unless the defendant is a public entity, the county of venue is the county in which "in the county in which the cause of action arose, or in which any party to the action resides at the time of its commencement". While a corporation is deemed to reside "in the county in which its registered office is located or in any county in which it is actually doing business," R.4:3-2(b), adding an individual defendant that resides in a county on which the defendant does not do business can add additional venue options for the plaintiff.

B. CAN THE INDIVIDUAL BE HELD LIABLE FOR HER/HER ACTIONS UNDER THE

LAD AND CEPA?

1. Individual liability under the LAD

There are two separate theories for assessing individual liability in LAD cases, (1) aiding and abetting liability; and (2) retaliation.

a. Individual liability for Aiding and Abetting

The LAD, N.J.S.A. 10:5-12(e), specifically provides that it is unlawful:

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 this act, or to attempt to do so.

In order to hold an employee liable as an aider and abettor, 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.

Tarr v. Ciasulli, 181 N.J. 70, 84, 853 A.2d 921, 929 (2004), (*quoting* Hurley v. Atlantic City Police Dep't, 174 F.3d 95, 127 (3rd Cir.1999)).

Courts routinely analyze the following five factors from the Restatement (Second) of Torts in evaluating whether an employee “substantially assisted” the principal violator:

- (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.”

Tarr, 181 N.J. at 84.

Inaction can also form the basis of liability if it rises to the level of providing substantial assistance or encouragement. Failla v. City of Passaic, 146 F.3d, 149, 158 (3rd Cir. 1998) (*citing* Dici v. Pennsylvania, 91 F.3d, 542, 553 (3rd Cir. 1996)). Courts have also rejected the requirement that an individual and an employer share the same discriminatory intent in order to find aiding and abetting liability. Hurley, 174 F.3d at 126 (*citing* Failla v. City of Passaic, 146 F.3d 149, 157 (3rd Cir. 1998)).

Applying these general principles, courts have found individual defendants liable under NJLAD when, for example: (a) they act to embolden other acts of discrimination (Ivan v. County of Middlesex, 612 F.Supp.2d 546, 554 (D.N.J. 2009); (b) they flout their duty as supervisors to act against harassment, including indifference thereto, thereby creating liability for his “himself and his employer” (Hurley, 174 F.3d at 126; *see also* United States v. Sain, 141 F.3d 463 (3rd Cir. 1998); or (c) when they promote the interests of the defendant employer when they harass or commit other unlawful acts under NJLAD against the Plaintiff. Shepherd v. Hunterdon Development Center, 226 N.J. Super. 395, 426-427 (App. Div. 2001), *aff’d in relevant part*, 174 N.J. 1 (2002).

Bottom line - when the harasser is a high level supervisor, manager, director, officer or owner, there is support for aiding and abetting liability. Where the harasser is a co-worker or a low level manager it will be much more difficult to establish aiding and abetting liability. *But see* Caggiano v. Foutoura, 354 N.J. Super. 111, 133 (App. Div. 2002)(holding both co-worker and supervisor personally liable).

b. Individual liability for retaliation

Where the cause of action against the individual is for retaliation, it is governed by N.J.S.A. 10:5-12(d). The statute provides:

d. For any person to take reprisals against any person because that person has opposed any practices or acts forbidden under this act or because that person has filed a complaint, testified or assisted in any proceeding under this act or to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this act.

As defined in the statute, “‘Person’ *includes one or more individuals*, partnerships, associations, organizations, labor organizations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and fiduciaries.” N.J.S.A. 10:5-5(a) (emphasis added). Taken together, these provisions prohibit “any person” – a category that includes individuals – from engaging in acts of retaliation. *See, e.g.* Cortes v. University of Medicine and Dentistry of New Jersey, 391 F.Supp.2d 298, 314 (D.N.J.2005) (noting that NJLAD expressly contemplates direct liability for individual supervisory employees).

c. Individual liability under CEPA

Under CEPA, N.J.S.A. 34:19-2(a), the "employer" is defined as:

a. "Employer" means 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 and shall include all branches of State Government, or the several counties and municipalities thereof, or any

other political subdivision of the State, or a school district, or any special district, or any authority, commission, or board or any other agency or instrumentality thereof.

It has now been well established that persons who retaliate against whistleblowers may be sued individually under CEPA. *See Maimone v. Atl. City*, 188 N.J. 221, 229 (2006); *Maw v. Advanced Clinical Commc'ns*, 359 N.J.Super. 420, 439-40 (App.Div.2003), *rev'd on other grounds*, 179 N.J. 439 (2004); *Espinosa v. Cont'l Airlines*, 80 F.Supp.2d 297, 305-06 (D.N.J.2000); *Palladino ex rel. United States v. VNA of S.N.J., Inc.*, 68 F.Supp.2d 455, 474 (D.N.J.1999); *Nardello v. Township of Voorhees*, 2009 WL 1940390 (App. Div. 2009).

C. ADVANTAGES OF ADDING AN INDIVIDUAL DEFENDANT

In addition to the jurisdiction and venues issues discussed above, adding an individual defendant can provide many significant advantages.

1. Solvency

When suing a small company or a closely-held corporation, if an owner, partner, or upper manager is a wrongdoer, adding them as a party can provide an additional deep pocket. While the small business might threaten bankruptcy in order to gain settlement leverage. That leverage can be quickly reversed if the individual defendant has liquid assets that could be at risk in the event of a personal judgment.

2. Discovery

Generally, party witnesses are deposed before fact witnesses. Naming an individual as a party permits a Plaintiff to compel their deposition by Notice rather than subpoena, and to take the depositions earlier in the process. Where discovery is limited, as in Federal Court, adding additional defendants will provide for additional discovery opportunity.

3. Insurance issues

Sometimes, naming an individual defendant can implicate additional insurance policies, creating more coverage, or perhaps coverage in areas that would not otherwise be covered. Sometimes conflict issues will create a situation where the insurance company needs to appoint two more different law firms to represent individual defendants. This can greatly increase the cost of insurance defense and create opportunities for early settlement. There are also many opportunities to settle separately with the individual defendants which can assist with the costs of continuing with the litigation.

4. Creating Challenges for Defendant counsel

Depending on the relationship between the employer and the individual defendant, the addition of an individual defendant can create conflict situation for defense counsel. For example, if the same counsel represents both the employer and an accused harasser, the defense runs the risk of having the employer painted with the same brush as the harasser. On the other hand, if separate counsel is obtained for the individual defendant, it becomes more difficult for the defendants to manage the case, as there may be competing litigation strategies with the different defendants having competing agenda.

On some occasions, especially where the individual defendant is no longer employed by the erstwhile defendant employer, there may even be an opportunity to “flip” the individual defendant whereby settlement is made with the individual defendant in return for the individual admitting the discriminatory acts and admitting that other such acts were tolerated by the Defendant. Such a deal is often a complete game changer.

5. Trial advantages

At trial, having an additional defendant affords more opportunities to become the prevailing party. With so much at stake in terms of attorney’s fees, the more opportunity to become a prevailing party, the greater the opportunity for recovery of attorney’s fees. Sometimes a corporate defendant can act completely appropriately, yet the individual harasser or retaliator could still be held personally liable for his or her own despicable behavior.

If the defendant has chosen to have one attorney represent all individual defendants, there is very often a serious conflict situation, especially if the employer points its finger at the individual. Competing interests and trial strategies can create very serious problems for defendants, including very real ethical dilemmas.

With regard to trial testimony, naming the harasser as a defendant allows otherwise inadmissible hearsay evidence about things that the harasser may have said to others to become admissible as admissions of a party opponent.

Finally, with additional defendants comes the possibility of alternate and/or additional damages and punitive damages.

D. DISADVANTAGES TO NAMING AN INDIVIDUAL DEFENDANT

1. Jurisdiction

Obtaining jurisdiction by way of an individual can sometimes lock you into a strategy making it difficult to later jettison the individual because the loss of the party could suddenly change the diversity or subject matter jurisdiction of the Court.

2. Discovery

Additional defendants means that there may be multiplying discovery coming from different defendants with sometimes disparate motives. If the individual defendant is the harasser, then he or she has the right to attend depositions. If the individual defendant has separate counsel it creates scheduling challenges and additional motions. Separate counsel gets to separately interrogate your client and all of the witness. Sometimes separate counsel becomes so difficult to work with that serious consideration needs to be given to simply dismissing the individual rather than deal with the disruptions.

3. Creating further antagonism

Sometimes the strategy of naming an individual defendant can backfire, infuriating a party that may have been indifferent or uninterested, but will now stop at nothing to get even with your client. If the sole purpose of naming an individual is based upon a gamble that flip will result in a win, consideration should be given to the possibility that you could create the opposite effect. If the individual has separate counsel, they could decide to disrupt your case. If the individual has the same counsel as the employer, it will be impossible to separate them.

4. Trial Considerations

If the individual defendant has not already been dismissed, serious challenges await at trial. If the individual defendant has separate counsel, they will get additional peremptory challenges, which will detrimentally affect the composition of the jury. In addition, the separate counsel will be able to cross-examine all witnesses, meaning that your client will be double-teamed.

An even bigger problem can arise if the harasser is particularly evil, in which the jury could apportion a majority of the damages to the harasser, who is judgment-proof, rather than the deep pocketed employer.

PRACTICE NOTE - All of the above potential windfalls and pitfalls should be carefully considered prior to deciding whether to add an individual defendant.

E. AT WHAT POINT, IF ANY, TO DISMISS CLAIMS AGAINST INDIVIDUAL DEFENDANTS?

The easy answer is that you dismiss claims against the individual defendants when the disadvantages of having individual defendants outweigh the advantages. This decision needs to be made on a case by case basis. Keep in mind that the inclusion of individuals creates just as many headaches for the defense, and settlement opportunities continue right up to and during trial. There would rarely be a case where inclusion at trial would be advantageous, especially when the individual is represented by separate counsel. If there is one counsel for all defendants, however, and the individual has the ability to pay a substantial judgment, the advantages would probably still outweigh the disadvantages.