Voice of the Bar

Appellate Division Confronts Issue of LAD Individual Liability

Dear Editor:

Your Sept. 5 synopsis of the Appellate Division's unpublished opinion in *Parker v. Inserra Supermarkets Inc. et al.* [181 N.J.L.J. 979] failed to note one aspect of the opinion that is probably the most important, and for which I believe the opinion should be published.

The Appellate Division reversed a trial court's grant of summary judgment in the case, in which plaintiff Glenn Parker, a grocery employee, alleged that he had been subjected to a hostile environment based upon racial discrimination.

Parker alleged that the person who was chiefly responsible for racist actions against him, John Albanese, was a supervisor who was the "second man," or assistant to the night manager, on the night shift. In addition to deciding that there was sufficient evidence for submission to a jury, and sufficient evidence that the perpetrator was a supervisor, the opinion squarely faced the issue of whether individual liability might be assessed against a supervisor under the state Law Against Discrimination for the discriminatory conduct of the supervisor.

In previous decisions, such as *Tarr v. Ciasulli*, 181 N.J. 70 (2004), the New Jersey and federal courts had imposed liability upon supervisors under the "aiding and abetting" provisions of the LAD. However, the question remained whether individual liability would be imposed upon the perpetrator or wrongdoer, and no decision of the N.J. appellate courts had ruled definitively on that issue. (As an aside, within the past year a trial court judge had dismissed my case against an individual sexual predator who was a supervisor. The Appellate Division denied our motion for leave to appeal directed to the issue of individual liability. Thereafter, the case was settled.)

In *Parker*, the Appellate Division commendably confronted the issue and determined that such liability could be found under the LAD. It cited *Herman v. Coastal Corp.*, 348 N.J. Super. 1 (App. Div. 2002), certif. denied, 174 N.J. 363 (2002), stating that: "Under this approach, the supervisor who 'actively engaged in discriminatory conduct' would be liable."

The *Parker* court also referred to the decision in *Hurley v. Atlantic City Police Dept.*, 174 F.3d 95 (3d Cir. 1999), concluding: "Here, applying the standard set forth in *Hurley*, if Albanese was a supervisor, he ignored his duty to prevent harassment by harassing plaintiff himself and condoning [co-worker Sal] DiCostanzo's remarks...." Thus, if Albanese were a supervisor, he would be personally liable for his own acts of harassment, but if he were a nonsupervisory co-worker, he would not.

The court also held that under the facts, Inserra Supermarkets might be liable for the conduct of Albanese whether or not he was a supervisor.

It has always seemed only logical to include the perpetrator within the ambit of potential individual liability for his/her own discriminatory conduct, especially if such liability were to be imposed upon the person who merely aided or abetted the wrongful conduct. Otherwise, the "lookout" might be liable but the "thief" would go free. It made no sense.

I hope your readers will enjoy a better understanding of the decision in *Parker* after reading this letter and obtaining the decision.

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The writer was attorney of record for the successful plaintiff-appellant in Parker.