INDIVIDUAL LIABILITY OF DEFENDANT EMPLOYEES IN EMPLOYMENT DISCRIMINATION CLAIMS

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I. INTRODUCTION

Traditionally, a plaintiff could not successfully file a suit simultaneously against her employer and an individual defendant/employee, typically a manager or supervisor, based upon a claim of employment discrimination. For instance, under federal law, such as Title VII and the Age Discrimination Employment Act (ADEA), there are no provisions that impose individual liability upon a defendant-employee. However, the modern trend is that more and more states are contemplating individual liability in suits against both employers and employees for employment discrimination, retaliation, hostile work environment, aiding and abetting, and intentional infliction of emotional harm, among other claims. Indeed, under New Jersey and New York law, there are various ways that a plaintiff can sue both her employer and a defendant/employee in her individual capacity.

II. NEW JERSEY’S TREATMENT OF INDIVIDUAL DEFENDANT LIABILITY IN EMPLOYMENT DISCRIMINATION CLAIMS

A. New Jersey Law Against Discrimination

1. Protections

New Jersey’s Law Against Discrimination (LAD) regulates the various procedures and processes for employment discrimination claims. It was enacted in order to, among other reasons, protect the public’s general health and welfare and their constitutional guarantee of their civil rights. New Jersey’s LAD mandates that discriminatory practices against “any of [the State’s] inhabitants, because of raced, creed, color, national original, ancestry, age, sex, affection or sexual orientation, marital status, familial status, liability for service in the Armed Forces of the United States, disability or nationality,” be implemented, regulated, and enforced by the State’s government. The State takes a strong public policy-orientated approach, explicitly enumerating the economic, emotional, and other harm that any type of discrimination may cause to a victim.

Specifically, New Jersey’s LAD affirmatively declares that as a result of discrimination:

2. Id. at § 10:5-2.
3. Id. at § 10:5-3.
4. Id. at § 10:5-3.
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.5

The New Jersey LAD contains a detailed section addressing the different types of discrimination, finding that each person has a civil right to pursue employment, housing, enjoyment of places of public accommodation, and the like, without being subjected to discrimination.6 Pursuant to Section 10:5-12, the LAD explicitly mandates what constitutes unlawful discrimination by an employer’s actions or conduct.7

The relevant prohibitions against employment discrimination are as follows:

a. For an employer, because of the race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, sex, disability or atypical hereditary cellular or blood trait of any individual, or because of the liability for service in the Armed Forces of the United States or the nationality of any individual, or because of the refusal to submit to a genetic test or make available the results of a genetic test to an employer, to refuse to hire or employ or to bar or to discharge or require to retire, unless justified by lawful considerations other than age, from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment; . . . [except] where sex [for example] is a bona fide occupational qualification, . . . .

c. For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment, or to make an inquiry in connection with prospective employment [or any intent to], which expresses, directly or indirectly, any limitation, specification or

5. Id.
7. Id. at § 10:5-12.
discrimination[,] . . . unless based upon a bona fide occupational qualification.

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. [Emphasis added].

e. 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 . . . [Emphasis added].

2. Individual Liability/Aiding and Abetting

Notably, although the LAD states that it is an unlawful employment practice for any “person” to retaliate against an employee for a protected complaint, or for any “employer, employee, or person” to “aid and abet” any type of discrimination, it does not clearly impose individual liability upon the alleged “bad actor” for discrimination. Thus, some New Jersey courts have held that for individual liability to apply, the employee must be in a supervisory position or have “aided and abetted” another. Although the case law on this issue is somewhat confusing, generally, an employee may be held liable when furthering an employer’s discriminatory conduct, particularly where the employee is a supervisor or other managerial employee.

Thus, individual liability under the LAD largely revolves around the concept of aiding and abetting. This is because N.J.S.A. 10:5-12(a) (“Subpart 12(a)”), which prohibits “employers” from harassing or otherwise discriminating against employees because of certain protected characteristics, has been held not to impose individual liability upon supervisory personnel. “An individual supervisor is not defined as an ‘employer’ under the LAD.” Therefore, Subpart

8. Id.
9. Id. at §10:5-12(d).
10. Id. at §10:5-12(e).
11. See, e.g., Tyson v. CIGNA Corp., 918 F. Supp. 836, 840 (D. N.J. 1996), aff’d, 149 F.3d 1165 (3d Cir. 1998) (holding individual employees could not be personally liable under LAD because, although supervisors, they did not affirmatively engage in the discrimination, and their actions did not meet aiding and abetting standards).
12(a) precludes an “employer”, rather than supervisory personnel, from engaging in the prohibited conduct.

Indeed, New Jersey Courts have held that supervisory personnel only may be held individually liable for violations of N.J.S.A. 10:5-12(e) (“Subpart 12(e)”), which precludes “any person, whether an employer or an employee or not” from aiding, abetting, inciting, compelling or coercing “the doing of any of the acts forbidden under” the LAD. Accordingly, supervisory employees may not be individually liable for violations of Subpart 12(a) of the LAD.

In 2004, the New Jersey Supreme Court articulated the standard for aiding and abetting liability under the LAD. In Tarr v. Ciasulli, the Court adopted the Restatement of Torts standard to define the terms “aid” or “abet” under the LAD. Section 876(b) of the Restatement imposes such liability upon an individual if he or she “knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself.” The Tarr Court looked to the prior decision of the Third Circuit in Hurley v. Atlantic City Police Dept, to develop its test for aiding and abetting liability, noting that the Restatement definition is consistent with the common usage of those terms.

Thus, in order to hold an employee liable as an aider or 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 he provides the assistance; [and] (3) the defendant must knowingly and substantially assist the principal violation.’”

13. N.J.S.A. 10:5-12(e); Herman, supra, 348 N.J. Super. at 24; Shepherd, supra, 336 N.J. Super. at 424; Tyson v. CIGNA Corp., supra, 918 F. Supp. 836, 840 (D.N.J. 1996) (holding that the only basis upon which to impose individual liability is found in N.J.S.A. 10:5-12(e)); Behrens v. Rutgers Univ., No. 94-CV-358(JBS), 1996 WL 570989, at *6 (D. N.J. Mar. 29, 1996) (finding that “[s]ubpart 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 [leaving] the only possible avenue for individual liability for employment discrimination . . . found in subpart 12(e”)”).
15. Restatement (Second) of Torts, §876(b).
16. Hurley v. Atlantic City Police Dep’t, 174 F.3d at 95 (3d Cir. 1999).
17. Id. at 127.
The comments to Section 876 provide a list of five factors, relied on by the Hurley Court, to assess whether a defendant provides “substantial assistance” to the principal violator. Those factors are: (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. These factors have coalesced to impose liability where supervisory employees commit affirmative acts of discrimination and/or display deliberate indifference to workplace discrimination. A supervisor has a duty to act against harassment, and violation of this duty occurs if his failure to act “rises to the level of substantial assistance or encouragement.”

In summary, the apparently inadvertent oversight in the language of the LAD may result in the anomalous situation that a “bad actor” may not be held individually liable unless he or she “aids and abets” the employer’s discrimination, arguably turning the intent of the statute on its head. However, by proper pleading, individual liability for such aiding and abetting may be invoked under the LAD.

B. Conscientious Employee Protection Act (CEPA)

1. Protections

A powerful New Jersey statute that deals with employment claims and has been held to impose individual liability upon a defendant is the Conscientious Employee Protection Act (CEPA). Under CEPA, employers explicitly are prohibited from taking retaliatory action against an employee for opposing acts of the employer which he or she reasonably believes are illegal or fraudulent, or which violate public policy. These protections are the broadest in the country, and do not require “opposition” in the sense of a complaint; a mere refusal to participate in such acts will suffice. Specific protections have been added in recent years pertaining to shareholder/investor fraud, healthcare workers, and environmental concerns.

18. Restatement (Second) of Torts, supra, §876(b), comment d; Hurley, supra, 174 F.3d at 127, n.27.
21. Id.
A successful plaintiff in a CEPA claim may recover, in additional to legal and/or equitable relief provided by CEPA or any other New Jersey law, all remedies that are offered under common law tort actions, just as may be recovered under the LAD.\(^{23}\) Indeed, where appropriate, a court may order an injunction against the retaliatory conduct, reinstatement of the plaintiff to the same or an equivalent position or title, restoration of full employment benefits and rights of seniority, back-pay, and reasonable litigation costs and attorney’s fees.\(^{24}\)

2. **Individual Liability Under CEPA**

New Jersey Courts have declined defendants’ invitations to look to the language of the LAD to determine whether liability can be extended to individuals under CEPA. The LAD defines “employer” as:

one or more individuals, partnerships, associations, organizations, labor organizations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and fiduciaries.\(^{25}\)

CEPA contains the following much broader language in its definition of “Employer”:

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.\(^{26}\)

This distinction is significant because the inclusion of the “any person” phrase in the CEPA statute is what arguably creates individual liability under CEPA. Both the Appellate Division and the United States District Court for the District of New Jersey have held that this language imposes individual liability under CEPA, where the individual employees or supervisors act with the employer’s authorization.\(^{27}\)

Although the New Jersey Supreme Court has not yet explicitly ruled on this issue, at least one court,\(^{28}\) rejecting the argument by defendants that CEPA is analogous to the LAD in its definition of

\(^{23}\) Id. at § 34:19-5.

\(^{24}\) Id.

\(^{25}\) N.J.S.A. § 10:5-5(a).

\(^{26}\) N.J.S.A. §34:19-5.

“employer”, has cited the New Jersey Supreme Court’s decision in Higgins v. Pascack Valley Hospital,29 for the proposition that that Court will hold that CEPA provides a cause of action against individual defendants.

In Higgins, the employee brought an action against his employer and supervisors for defamation and violations of CEPA. The jury reached a verdict holding the employer liable under CEPA.30 The trial court, however, dismissed the retaliation claims against plaintiff’s co-workers and supervisors, concluding that CEPA did not extend liability to individuals.31 On appeal, the Supreme Court did not address the trial court’s holding that there is no individual liability under CEPA; instead, it affirmed the decision of the trial court, finding that, on the merits, the record did not support any liability against the individual defendants.32 Presumably, the Supreme Court would not have reviewed whether there was sufficient factual evidence to support individual liability if the law did not allow for individual liability.33

The precise parameters of individual liability, however, have yet to be explored. Generally, it appears that liability will not be imposed upon an employee or supervisor unless the plaintiff proves that that defendant took an adverse employment action against him because of his whistleblowing.34

C. Intentional Infliction of Emotional Distress

Under New Jersey law, to successfully argue an intentional infliction of emotional distress claim “a plaintiff must establish intentional and outrageous conduct by the defendant, proximate cause, and distress

30. Id. at 409.
31. Id. at 416.
32. Id. at 425.
33. Notably, under CEPA, supervisors are such individuals who act on behalf of the employer with the employer’s consent. They are defined by CEPA as:
   “any individual with an employer’s organization who has the authority to direct and control the work performance of the affected employee, who had authority to take corrective action regarding the violation of the law, rule of regulation of which the employee complains, or who had been designated be the employer on the notice required under section 7 of this act. N.J.S.A. 34:19-2(d).
that is severe. The conduct must be as extreme and outrageous as to suppress all possible bounds of decency.”\textsuperscript{35} “Mere insults, indignities, threats, annoyances, petty oppression, or other trivialities are not actionable.”\textsuperscript{36} The resulting emotional distress must be so severe that a reasonable person cannot be expected to endure such distress.\textsuperscript{37}

An excellent example of the use of this tort in the employment arena can be seen in \textit{Flizak v. Good News Home for Women},\textsuperscript{38} in which the plaintiff sustained such a claim against both the employer and the individual defendant.

In \textit{Flizak}, plaintiff alleged that the individual defendant had reason to know that she was unusually fragile, because of sexual abuse as a child, and intentionally or recklessly engaged in racial and sexual comments and sexual behavior which could be particularly damaging to her.\textsuperscript{39} In addition, she showed severe emotional distress as a result thereof.\textsuperscript{40} Thus, the Court held that such claims could be sustained.\textsuperscript{41}

\section*{D. Assault and Battery}

A common claim against individual defendants, particularly in sexual harassment cases, is one for assault and battery. Less complicated by far than an aiding and abetting analysis, it requires only an offensive touching or attempt to do so. However, because intent is a factor, unlike in sexual harassment cases, plaintiff must show that the individual intended harm.\textsuperscript{42} Thus, that aspect of the claim may be more difficult.

\section*{III. NEW YORK’S TREATMENT OF INDIVIDUAL DEFENDANT LIABILITY IN EMPLOYMENT DISCRIMINATION CASES}

New York’s treatment of employment discrimination claims against individual defendants is equally complex and interesting. The State’s employment discrimination statute is under the Human Rights Law (HRL), while New York City’s employment discrimination policy is part of the Admin-
istrative Code of the City of New York. Generally speaking, New York City’s treatment of individual defendants in employment discrimination claims is more expansive than the State treatment of such claims.

A. New York State Human Rights Law

1. Protections

Under the New York State Human Rights Law, the State declares itself responsible for acting and policing in a manner to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life and that the failure to provide such equal opportunity, whether because of discrimination, prejudice, [or] intolerance[,] . . . not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants. A division in the executive department is hereby created to encourage programs designed to insure that every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the state; to encourage and promote the development and execution by all persons within the state of such state programs; to eliminate and prevent discrimination in employment, in places of public accommodation, resort or amusement, in education institutions, in public services, in housing accommodations, in commercial space and in credit transactions and to take other actions against discrimination as herein provided; and the division established hereunder is hereby given general jurisdiction and power for such purposes.

The State’s HRL declares that obtaining employment free of any type of discrimination is a civil right. Specifically, the law states that “[t]he opportunity to obtain employment without discrimination because of age, race, creed, color, national origin, sexual orientation, military status, sex or marital status is hereby recognized as and declared to be a civil right.” Notably, the State defines “employer” as a person or entity who employs at least four or more persons; the definition of “employee” excludes persons “employed” by her parents, spouse, or child.

Finally, very similar to New Jersey’s LAD, under Section 296 of the New York State Human Rights Law, the State specifically

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44. NY CLS EXEC. § 290(3).
45. Id. at § 291 (1).
46. Id. at § 292 (5)–(6).
declares what practices constitute unlawful discrimination on the part of an employer. Specifically, the employment anti-discrimination section states that the following practices are unlawful discrimination:

[f]or an employer or licensing agency, because of the age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

An employer also is prohibited from advertising or otherwise circulating any statements, employment applications, or make inquiries regarding prospective employment that either expressly or implicitly specifies, limits, or discriminates against a person based upon one of the promulgated reasons or categories stated above, unless such specifications are based on a legitimate employment qualification standard.

2. Individual Liability Under the HRL

The arguments for individual liability under the New York State Human Rights Law rest on the following provisions:

6. It shall be an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under [the Human Rights Law], or to attempt to do so. [Emphasis Added].

7. It shall be an unlawful discriminatory practice for any person engaged in any activity to which this section applies to retaliate or discriminate against any person because he or she has opposed any practices forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article.

The New York State Human Rights Law’s definition of “employer” does not include the employer’s “employees or agents”. Thus, generally, the courts have held that individual liability may be imposed upon an employee only if he or she has an ownership interest in the employer defendant, or the specific power and authority to make personnel decisions, not merely carry out decisions made by

47. Id. at § 296.
48. Id. at § 296 (1) (a).
49. Id. at § 296 (1) (d).
50. Id. at § 296 (6)–(7).
others. Even corporate officers, managers, and supervisors may be found not to have the requisite power. However, since the HRL also prohibits “aiding and abetting” discrimination, some courts have held that individual employees are responsible for hostile environment claims where they participated in the misconduct.

Notably, before an individual defendant may be found liable for aiding or abetting discriminatory conduct against a plaintiff, liability against the employer must first be established. Without such a showing, such claims must be dismissed.

Most recently, United States District Court for the Southern District of New York has explained the individual liability issue under the State HRL as follows: “When a supervisor has ‘actually participate[ed] in the conduct giving rise to a discrimination claim,’ that supervisor may be liable in his or her individual capacity under SHRL.” “When an individual is merely a co-worker, however, individual liability under the SHRL applies only to those individuals who have aided and abetted the discrimination of their employers.”

B. New York City’s Human Rights Law

1. Protections

In many respects, the New York City’s Human Rights Law, which is promulgated in the City’s Administrative Code, is very similar to that of the State, although it includes additional provisions under which an employer and an employee may be liable for unlawful discriminatory practices. The State Human Rights Law and the New York City’s Human Rights Law both declare it unlawful to discriminate against the same groups of persons. The City Code also

56. Id.
prohibits printing or circulating applications or advertisements that inappropriately limit employment opportunities, although it excludes the State’s language that such applications may be permissible for bona fide occupational qualifications required for a specific position.\textsuperscript{57} Likewise, Sections 6 and 7 of the Code provide for employer and/or individual employee liability for aiding and abetting discriminatory conduct and retaliation.\textsuperscript{58} However, the City’s retaliation provision is much more specific than the State’s, stating as follows:

\begin{quote}
[it] Shall be an unlawful discriminatory practice for any person engaged in any activity to which this chapter applies to retaliate or discriminate in any manner against any person because such person has (i) opposed any practice forbidden under this chapter, (ii) filed a complaint, testified or assisted in any proceeding under this chapter, (iii) commenced a civil action alleging the commission of an act which would be an unlawful discriminatory practice under this chapter, (iv) assisted the commission or the corporation counsel in an investigation commenced pursuant to this title, or (v) provided any information to the commission pursuant to the terms of a conciliation agreement . . . . The retaliation or discrimination complained of under this subdivision need not result in an ultimate action with respect to employment, . . . provided, however, that he retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity.\textsuperscript{59}
\end{quote}

With respect to employment, the Code provides as follows:

1. Employment

It shall be unlawful discriminatory practice: (a) For an employer or an employee or agent thereof, because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, sexual orientation or alienage or citizenship status of any person, to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges or employment.\textsuperscript{60}

The City’s Code explicitly mandates when an employer will be liable for its employee’s or agent’s conduct.\textsuperscript{61} Specifically, the Code holds the employer liable for an employee’s conduct when it constitutes an unlawful discriminatory practice where:

\begin{footnotes}
\item[57] NYC Admin. Code § 8-107 (1) (a)–(d).
\item[58] Id. at § 8-107 (6)–(7).
\item[59] Id. at § 8-107 (7).
\item[60] Id. at § 8-107(a).
\item[61] Id. at § 8-107 (13).
\end{footnotes}
(1) the employee or agent exercised managerial or supervisory responsibility; or

(2) the employer knew of the employee’s or agent’s discriminatory conduct and acquiesced in such conduct or failed to take immediate and appropriate corrective action; an employer shall be deemed to have knowledge of an employee’s or agent’s discriminatory conduct where that conduct was known by another employee or agent who exercised managerial or supervisory responsibility; or

(3) the employer should have known of the employee’s or agent’s discriminatory conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct.62

2. Individual Liability

The New York City Human Rights Law, which contains a much broader definition of “employer” (including “an employee or agent thereof”) than the State law, more readily imposes liability on individual employees.63 At least one court has noted that the standard for individual liability is simply that the individual is shown to have been “responsible for, assisted, or failed to rectify” the discriminatory conduct.64 Thus, a plaintiff whose claim arguably arises under the City Code would be well-served to plead it, if she wishes to preserve the better argument for individual liability.

C. Intentional Infliction of Emotional Distress

Another way that New York may impose individual liability upon a defendant-employee is via the common law doctrine of intentional infliction of emotional distress. Under New York law, a plaintiff must establish the following elements, in order to be successful in her claim:

(1) extreme and outrageous conduct;

(2) intent to cause, or reckless disregard of a substantial probability of causing, severe emotional distress;

(3) a causal connection between the conduct and the injury; and

(4) severe emotional distress.65

62. Id. at § 8-107 (13) (b).
63. Id. at §8-107(a).
Significantly, courts are very reluctant to allow intentional infliction of emotional distress claims, and make it difficult for a plaintiff to establish and meet even the first element of such a claim.66

D. Assault and Battery

Like New Jersey, New York will recognize such a claim.

IV. CONSEQUENCES AND PRACTICAL CONCERNS FOR FILING OR DEFENDING A SUIT AGAINST BOTH A COMPANY AND INDIVIDUAL DEFENDANT-EMPLOYEE

When a plaintiff files claims against both the employer and the defendant-employee simultaneously, there are consequences and concerns that both the plaintiff and defendants must seriously consider. Indeed, plaintiffs’ counsel should seriously consider whether such a strategy is wise, given the legal and practical ramifications of such a decision. Conversely, defendants must decide whether they should litigate jointly or separately, whether any cross-claims between the parties exist, and how litigation costs and any judgment will be borne.

Generally speaking, a plaintiff should concern herself with the jurisdiction in which she is filing the claim, recognizing that Title VII and the ADEA do not allow for individual liability for employment discrimination claims and thus, she will have to rely on state statutes, ordinances, regulations, and common law. Moreover, a plaintiff must weigh the risks and benefits associated with filing against both the employer and individual defendant/employee, such as the potential for inconsistent or adverse verdicts, the ability of the individual defendant to pay an award, the possibility of a joint defense between defendants, litigation costs, and settlement consequences.

Similarly, the defendants, as well as their attorneys, have strategic decisions to make as to how to defend the suit. Defendants must consider whether they will defend the suit jointly, whether the employer will provide legal counsel for all defendants, whether conflicts of interest exist, whether cross-claims will be filed, whether a settlement may occur with or without the consent of all defendants, and finally, the applicability the rules of professional responsibility and how they will affect their defense,

66. Id. at ** 19-20.
representation, and strategy. The legal, ethical, and practical ramifications of these decisions may be far-reaching.67

A. Issues of Joint or Separate Counsel

Deciding whether an employer/defendant and an employee/defendant will have joint or separate counsel is crucial to the determination of how to litigate the case. Although an employer generally is under no obligation to provide joint counsel, indemnification from liability, or to pay for the employee’s counsel, unless otherwise stated in a written contract, an employer may feel inclined to defend its employee for practical, economic, public appearances, and loyalty reasons. Practically speaking, it is important for the employer to support the employee/defendant, because said employee is likely to be a key witness to the suit and thus, without her support and cooperation, the employer may be unable to fully develop its defense.68

Although there is no per se rule against representing defendants who may potentially be adverse to one another, a lawyer must take proper measures to ensure that her professional responsibilities are met. In the employment discrimination setting, it is common for an employer and its employee who allegedly discriminated against the plaintiff to engage in a joint representation relationship. Generally, the employer will agree to such an arrangement only when it believes that its employee was acting within the scope of her employment and responsibilities, which may or may not result in her indemnification. Otherwise, a conflict of interest will exist, as the employer will attempt to avoid or minimize liability by contending that the employee was acting outside the scope of her employment responsibilities.69

Indeed, ABA Model Rule 1.7 states:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

68. Id. at 77-79.
69. Taber, Kenneth W., Representing Corporate and Individual Defendants, 13 N.Y. PRAC. EMPLOY. LITIG. §1.23 (Aug. 2006).
(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing. 70

Thus, before determining whether defendants will have joint counsel, the employer must consider all circumstances surrounding the defendant/employee’s potential liability, innocence, or guilt. If an employer feels that it will raise defenses that are contrary to the defendant/employee’s interests or testimony, it is not ethically permissible for single counsel to represent both parties, due to the conflict of interest, unless both parties have consented in writing. If such conflicts do not arise until after representation has commenced, however, court generally will allow counsel to withdraw from one of the representations, generally from the defendant/employee’s representation. 71

Thus, where all defendants join in the defense that the alleged conduct did not occur, for example, it makes practical and economic sense for defendants to use joint counsel. Conversely, if the employer will assert as a defense that the defendant/employee’s conduct violated its discrimination policies and procedures, the employer should refuse to provide joint counsel and a joint defense with the defendant/


employee. Otherwise, when such a conflict arises, the attorney may be disqualified from representing either defendant.

As a safeguard, it is wise for an attorney to request from the defendants a prospective waiver of potential conflicts, stating that the defendants give the attorney their consent to continue representing the employer (or the employee) in the event that a conflict between the defendants arises. However, counsel should exercise caution in this regard: if the defendant is not considered by the court to be a sophisticated client, and there is a discrepancy as to whether or not the attorney had that defendant’s informed consent to withdraw and continue representation of the other client, a court may find the waiver to be invalid, requiring disqualification or withdrawal of the attorney.

A helpful test, based upon the ABA Standing Committee on Ethics and Professional Responsibility, Informal Ethics Opinion 1441 (1979), for determining whether it is proper to engage in joint representation of defendants with potentially adverse interests is the following:

1. The co-parties agree to a single comprehensive statement of facts describing the occurrence.
2. The attorney reviews the statement of facts from the perspective of each of the parties and determines that it does not support a claim by one against the other.
3. The attorney determines that no additional facts are known by each party which might give rise to an independent basis of liability against the other or against themselves by the other.
4. The attorney advises each party as to the possible theories of recovery or defense which may be foregoing through this joint representation based on the disclosed facts.
5. Each party agrees that the attorney is free to disclose to the other party, at the attorney’s discretion, all facts obtained by the attorney.
6. Each party agrees that the attorney is free to disclose to the other party, at the attorney’s discretion, all facts obtained by the attorney.
7. The attorney outlines potential pitfalls in multiple representation, and advises each party of the opportunity to seek the opinion of independent counsel as to the advisability of the proposed multiple representation; and, each either consults separate counsel or advisers that no separate consideration is desired.

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8. Each party acknowledges that the facts not mentioned now but later divulged may reveal differing interests, which, if they do not compromise these differences may require the attorney to withdraw from the representation of both without injuring either.

9. Each party agrees that the attorney may represent both in the litigation.73

Indeed, if the parties agree to joint representation, it makes practical sense for an attorney to engage in a written and signed agreement, outlining the scope of representation. Such an agreement may protect an attorney from future malpractice claims or disciplinary hearings if it is written in a way clearly stating the scope of representation, the attorney’s responsibilities to all clients involved in the joint representation, and how the attorney must act when any conflicts arise. It is not only the potential clients who should consider all the relevant factors of representation, conflicts, and confidentiality, but also the attorney should ask herself whether there is a substantial likelihood that a conflict between the clients will occur, whether her representation will be materially affected by any such conflicts, or whether alternatives to withdrawal exist if a conflict arises. Depending on the answers to such questions, the attorney should consider all relevant factors and concerns when advising whether an employer/defendant should agree to joint representation with an employee/defendant.74

Likewise, a lawyer representing multiple defendants must obtain consent to obviate normal rules of confidentiality between an attorney and her client. Generally, a client must give an attorney informed consent before said attorney may disclose any confidential information regarding the client and/or her case, unless the attorney found it necessary for reasons such as avoidance of death or physical harm, prevention of a crime, or to defend oneself in a malpractice claim, among others.75 However, when an attorney is representing multiple defendants, they must agree that the attorney can reveal information about any of the defendants to the others, and thus, confidentiality bounds may be blurred.

However, a defendant/employee who is left to find separate counsel likely will incur substantial economic costs, including legal costs and damages awarded, as well as personal embarrassment. The mere fact that the defendant/employer has decided against joint representation

73. This test was adopted by the District of Columbia Bar Legal Ethics Committee in Ethics Opinion No. 140 (1984).
74. Williams, Douglas L., Representing the Corporate Employer, C588 AMERICAN LAW INST at 90-91.
may be an indication that the defendant/employee is believed to have engaged in improper conduct. Moreover, if the plaintiff is successful, it is often the case that an employer will fire the defendant/employee to salvage its own reputation and to give the appearance to the public and its other employees that it does not condone any type of discrimination. Thus, any individual employee who is sued for employment discrimination will have a difficult road ahead of her, particularly when her employer has decided to distance itself from her.

In sum, representing multiple defendants poses many conflict of interest and practical hazards which counsel must be careful to avoid.

B. Joint Defenses & Cross-Claims Between Defendants

Typically, a joint defense involves each defendant having separate, individual counsel; however, the legal arguments or defenses are united among all defendants. If parties have agreed to a joint defense, generally speaking, defendants’ counsel will speak with one another to

75. ABA MODEL RULE 1.6. ABA Model Rule 1.6 deals with confidentiality in a client-lawyer relationship and specifically mandates the following:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

ABA Model Rule 1.6.
strengthen their defense, without necessarily forming client-lawyer relationships among all parties. Thus, joint defenses create a unique dynamic, because although defendants are working with one another, their concerns, issues, and testimony will differ.

Not surprisingly, a decision whether to conduct a joint defense may involve a related decision not to assert cross-claims against one another, or to withhold them until a later date. Consequently, if a joint defense arrangement breaks down, the attorneys involved must be concerned about to whom their obligations and responsibilities are owed, as well as deciding whether an attorney/client relationship inadvertently was created with all joint defendants, due to misconceptions on the defendants’/clients’ part.

C. Settlement Issues

A defendant/employer’s issues and concerns with respect to settlement become more complicated when the employer considers the defendant/employee’s position, potential liability, and whether the employer will be providing counsel or indemnification for said employee.

Once an employer decides to defend and/or indemnify its defendant/employee, settlement negotiations, assessments, and costs change, most often to the employer’s detriment. Indeed, a plaintiff may not agree to settle with an employer if she feels that the employer is condoning the employee’s alleged illegal conduct. Similarly, plaintiff may only agree to settle if some disciplinary action is taken against the employee, or the employee is required to pay damages from her own pocket. Where the latter is the case, the defendant/employee may cause delay or obstruction of a settlement if she feels that the provisions of the agreement are unfair to her.

Indeed, it is generally the employer who will have to pay substantial damages to a plaintiff for employment discrimination claims. Thus, the individual employee must consider whether settlement is in her best interest, or whether trial proceedings, where individual liability often is difficult to prove, will result in vindication for the individual employee.

Moreover, an individual defendant/employee may not want to participate in a settlement in which the plaintiff expects the employee to be personally liable for paying any portion of the agreed settlement award. Thus, suing an individual employee may cause concerns for all involved parties, including the plaintiff.
D. To Sue or Not to Sue: That is the Question

Simply because a plaintiff can sue an individual defendant does not mean she should sue. Plaintiff’s counsel should carefully avoid a knee-jerk reaction that causes her to file a claim against an individual defendant. While the issues raised above do cause concerns for defendants and their counsel as to ethical obligations, costs, and strategy, suing an individual defendant, particularly a high level employee, may backfire. If the individual sued is a powerful part of the corporate defendant, such as an officer, director, or profitable, valued employee, his or her outrage upon being accused of heinous acts may preclude settlement and cause protracted and risky litigation. Moreover, motion practice as to individual defendant liability likely will be intensive and costly.

Finally, the risk of a jury sympathizing with an individual defendant, who is seen as a “real” person accused of despicable acts, rather than an impersonal corporation, should not be discounted. Inconsistent or adverse verdicts may occur, engendering significant appellate issues. Where the corporate defendant has significant assets which will satisfy a judgment, moreover, there is no financial gain in suing an individual. Much more may be lost by such tactics than gained.

V. CONCLUSION

For the employer, the risks associated with an employment discrimination claim are substantial. An employer must consider the economic costs, such as attorneys’ fees, litigation costs, and any financial impact it will have on its company. Moreover, the employer must consider how the claim will impact its public appearance, employment morale, and internal policies and regulations. These concerns may be exacerbated if an individual employee also is sued. Will having joint representation with its employee assist it in being more successful in the discrimination claim? Will conflicts of interest arise? Will supporting the employee result in a negative association in the public’s view? Will the employee refuse to settle, particularly if she is a powerful person within the defendant company? All of these factors are relevant for both the employer and its counsel to consider prior to litigating an employment discrimination claim involving both the employer and its individual employee as defendants.

Similarly, the employee/defendant must weigh the costs, benefits, and risk associated with agreeing to work with the employer in litigating and defending the suit. It is typically beneficial for the employee to work closely with the employer, as it is the employer who has the necessary
resources to successfully defend a claim: discovery access to relevant documents, counsel, financial resources, insurance, and the like. Indeed, an employee may be indemnified from any liability if she chooses to cooperate with the employer, and often, counsel fees will be covered for the employee. However, there are times when the individual employee may want to separate herself from the employer, such as when there is a claim of “aiding and abetting” the employer’s discriminatory practices, as discussed above. Moreover, where, as is often the case, the plaintiff is focused upon the employer, rather than the individual defendant, the employee may benefit from dealing separately with plaintiff’s counsel.

Finally, plaintiff’s counsel must decide whether her employment discrimination claims will be more or less likely to succeed if she sues both the employer and individual defendant/employee. Will bringing in both parties slow down or terminate the possibility of a settlement? Will the jury sympathize with the individual employee and thus, rule against the plaintiff? Will involving both parties result in additional, higher costs, inconsistent or adverse verdicts, and/or appellate issues? It is important for the plaintiff to consider all aspects of suing both an employer and individual employee in a discrimination case, as this may very well be a determining factor as to whether the case will settle or proceed to trial and whether the plaintiff will be successful on her claims.

Finally, it is imperative that attorneys learn the state of the law in their appropriate jurisdiction, making sure to also follow the professional rules of conduct where individual liability for defendant/employees exists. In addition, the plaintiff and her attorney must weigh the benefits of including an individual defendant against the very real risk that it will frustrate resolution. The employer and its counsel must carefully balance their desire to control the litigation and its costs, as well as the employee sued, with their counsel’s ethical considerations and the appearance (which plaintiff’s counsel certainly will point out to the jury) of condoning illegal conduct by virtue of joint representation.

Clearly, the world of employment discrimination claims is more complicated when both the employer and individual employees are defendants.