STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO. CRT 6505-06
DCR DOCKET NOS. EL07RB-51653-E
AND EL07RB-51654-E

L.W., GUARDIAN AD LITEM FOR R.W. AND D.W., GUARDIAN AD LITEM FOR B.W.,	)	
Complainants,	)	ADMINISTRATIVE ACTION FINDINGS, DETERMINATION AND ORDER
v.	)	
SUBWAY RESTAURANT, RUPESH TRIVEDI, OWNER AND DIPEN PATEL, MANAGER, (incorrectly pled as Depin Patel), INDIVIDUALLY,	)	
Respondents.	)	

APPEARANCES:

Brian O. Lipman, Deputy Attorney General, prosecuting this matter on behalf of the New Jersey Division on Civil Rights (Stuart Rabner, Attorney General of New Jersey, attorney), for the complainants.

Arthur E. Swidler, Esq., for the respondents.

BY THE DIRECTOR:

I. INTRODUCTION

This matter is before the Director of the New Jersey Division on Civil Rights (Division) pursuant to verified complaints filed by L.W. and D.W. (Complainants) (legal guardians for their minor sons) alleging that their sons' former employer, Subway Restaurant located in Lawrenceville, Mercer County, and Manager Dipen Patel, charged

individually (Respondents), unlawfully discriminated against their sons because of their race (Black), in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. On July 19, 2006, the Division issued a default order with regard to both verified complaints. The matter was subsequently transmitted to the Office of Administrative Law (OAL) for a default hearing pursuant to N.J.S.A. 52:14B-1 to -12.

On January 9, 2007, the Honorable Douglas H. Hurd, Administrative Law Judge (ALJ), issued an initial decision[1] concluding that Respondents violated the LAD, awarding damages to Complainants and attorneys' fees to the Division, and assessing statutory penalties. Having independently reviewed the record, the Director adopts the ALJ's initial decision as modified herein.

II. PROCEDURAL HISTORY

On July 26, 2005, Complainants filed verified complaints with the Division alleging that the Manager at Subway Restaurant, Dipen Patel, subjected their minor sons to racially hostile comments, including frequently referring to them as "nigger" in the workplace. Complainants further alleged that Patel's conduct was severe or pervasive enough to create a hostile work environment based on race (Black) and that their sons were constructively discharged, in violation of the LAD.[2] The verified complaints and the Division's document and information requests (D&I) were served on Respondents on August 29, 2005, along with written notice that Respondents were required to file answers

[1] Hereinafter, "ID" shall refer to the written initial decision of the ALJ; "Ex.C" and "Ex.R" shall refer to Complainants' and Respondents' exhibits, respectively, admitted into evidence at the administrative hearing.

[2] Complainants initially filed two individual verified complaints, which the Division processed separately until the Director entered a July 19, 2006 order consolidating the cases.

to both the complaints and the D&I within 20 days. Respondents failed to respond to either document, and after making a number of additional attempts to get Respondents to respond as detailed below, the Division initiated default proceedings pursuant to N.J.A.C. 13:4-5.1-5.4.

The Entry of Default

As part of the Division's police power to prevent and eliminate unlawful discrimination, the Division is mandated to investigate complaints filed with the Division, to determine whether there is probable cause to believe that the respondent engaged in unlawful discrimination. N.J.S.A. 10:5-2, 10:5-6, 10:5-14. The Legislature has determined this mandate to be sufficiently important that willfully impeding or interfering with the Division's investigations is a disorderly persons offense. N.J.S.A. 10:5-26. To ensure that recalcitrant respondents do not obstruct the Division's efforts to investigate charges of unlawful discrimination, the Division has promulgated regulations that permit the entry of default against respondents who fail and refuse to answer the Division's complaints and requests for information, after providing specific and clear notice of the consequences of failure to cooperate. N.J.A.C. 13:4-5.1 to 5.4.

N.J.A.C. 13:4-5.1 provides that the Director may enter default against a respondent for failure to answer the Division's verified complaint and/or D&I. Default may be entered only after a respondent has been advised of the consequences of its failure to answer and has been served with a notice and order granting ten additional days to file answers to the complaint and/or request for information. N.J.A.C. 13:4-5.2 (a). Notice to the respondent must specify that if the respondent fails to answer the interrogatories within the specified time period, the Director may enter a default in the case, which shall constitute an admission that the answers and information, if provided, would establish facts in

accordance with the claim of the complainant. Ibid. The Division's notice must also inform the respondent that entry of default will constitute a waiver of the respondent's rights to have the Division investigate the allegations of the complaint, determine whether there is probable cause to credit the allegations of the complaint, make conciliation efforts or hold a public hearing. The notice must also advise the respondent that the entry of default will constitute a waiver of the respondent's right to present any defenses to the complaint. N.J.A.C. 13:4-5.2(b).

If the respondent fails to file answers to the interrogatories by the end of the ten day period specified in the Director's notice and order, the Director shall order the entry of default against the respondent. N.J.A.C. 13:4-5.2(b). Nevertheless, within 10 days after the entry of default, the Director must serve notice of the entry of default on the respondent which informs the respondent of the opportunity to petition the Director to vacate the entry of default before the case is transmitted to the OAL for a hearing. N.J.A.C. 13:4-5.2 (d). Under the Division's rules, the respondent may petition the Director to vacate the default and reopen the case for good cause shown supported by affidavit, which shall include complete answers to the complaint and information request. N.J.A.C. 13:4-5.3. Should the respondent fail to so petition the Director, the case shall be transmitted to the OAL within 20 days of the notice of the entry of default. At the ensuing default hearing, the proofs shall consist of the order of entry of default, supporting affidavits, and any other evidence proffered by the complainant, and the only cognizable issues shall be whether the facts established constitute an act of discrimination. N.J.A.C. 13:4-5.4 (a).

Here, on November 14, 2005, the Division issued and served a subpoena duces

tecum on Respondent Patel, requiring him to appear at the Division offices on November 23, 2005, and produce specified documents. The Division attempted to personally serve the subpoena on Respondents but was unable to do so and left a copy of the subpoena at Respondent's place of business with an individual who identified herself as Patel's niece. On January 27, 2006, the Division served the subpoena by overnight mail, requiring Respondents to furnish the Division with an answer and the information requested by February 8, 2006. On January 31, 2006, the Division's counsel spoke with Arthur E. Swidler, Esq., who confirmed that he represented Respondents. He was advised to file a response to the verified complaint and document and information request by February 8, 2006, and that answering those documents would satisfy the requirements of the subpoena. The Division's counsel confirmed the conversation by a letter dated February 3, 2006, attaching copies of the verified complaints, document and information requests, and subpoena, and further advised Mr. Swidler that his answer to the verified complaints and document and information requests should be filed with the Division by February 8, 2006. The letter further provided that if he was unable to respond by February 8, 2006, he should contact the Division's Trenton office and advise as to when a response would be forthcoming. Finally, the letter advised counsel that "if the Division does not hear from you by that time, the Division will take whatever action is necessary to compel compliance, which may include the filing of an action to enforce the subpoena or initiating default proceedings." By February 22, 2006, Respondent had failed to either appear or provide the information requested.

On February 22, 2006, the Division's counsel left a message on Mr. Swidler's voicemail advising him that if the Division did not hear from him by March 1, 2006, it would

file an action to enforce the subpoena. A letter was also sent confirming this message. On March 9, 2006, the Division filed an Order to Show Cause in Superior Court to enforce the subpoena. A copy of the Order to Show Cause along with a March 14, 2006 Order by the Honorable Neil H. Shuster, P.J.Ch., was served on Respondent Patel on March 16, 2006. A copy was also sent to Mr. Swidler on March 17, 2006 via certified mail and he was advised that the Division had personally served Respondent Patel on the previous day. Judge Shuster's Order required Respondent to respond to the Order to Show Cause by filing an answer, brief and certifications on or before April 3, 2006. Neither Mr. Patel nor Mr. Swidler responded to Judge Shuster's Order. On April 12, 2006, the court issued an Order requiring compliance with the Division's subpoena within twenty days of the Order, and ordering Patel to pay reasonable attorney fees to the Division for filing and prosecuting the Order to Show Cause. The Court specifically noted that Mr. Patel filed no opposition to the Division's Order to Show Cause. The Division served copies of the court's Order on Mr. Patel and Mr. Swidler on April 18, 2006. By May 16, 2006, however, Respondents failed to comply with the Court's Order. Accordingly, by letter dated May 16, 2006, with a copy to Mr. Swidler, the Division's counsel notified Mr. Patel that his failure to respond to the subpoena or pay the Division's attorney fees of $3902.50 constituted a violation of the April 12, 2006 Superior Court Order. The letter also advised Patel that if he failed to file a response to the Division's subpoena by May 26, 2006, the Division would move before the Superior Court to have him found in contempt. Finally, the Division advised Mr. Patel that because he failed to provide an answer to the Division's verified complaint, the Division intended to initiate default proceedings pursuant to N.J.A.C. 13:4-5.2. Respondents were advised that under the default procedures:

> A default will result in all allegations against you contained in the

> verified complaint to be deemed as admitted. The Division will thereafter be permitted to make findings of liability, damages and penalties based solely upon the State's evidence supporting the allegations in the verified complaint. You will not be permitted to present any defense during a hearing on any of these issues. Damages in this matter can include pain and suffering on the part of each Complainant. The Division may also assess an administrative penalty of up to $10,000.00 and issue an order for you to pay the Division's costs in prosecuting this matter. You should be further advised that once a default is entered, you can be required to pay all costs associated with obtaining the default judgment if you wish to vacate it prior to a hearing.

Despite numerous communications by the Division to Respondents, and a subpoena enforcement action in Superior Court, Respondents failed to respond. By May 17, 2006, the Subway Corporation advised the Division that Mr. Trivedi is owner of the Subway restaurant franchise named as Respondent in this matter. Accordingly, on May 17, 2006, the Division served a copy of the verified complaints on Mr. Trivedi by certified mail, providing him with twenty (20) days to file answers. By June 23, 2006, neither Patel nor Trivedi had filed answers to the verified complaints. Therefore, the Division issued a Notice and Order notifying Respondents that should they fail to file answers to the verified complaints and requests for information within ten (10) days, a default would be entered in this case. That Order provided in relevant part that a default shall constitute:

> (a) An admission that the interrogatories, if answered, would have established facts in accordance with the claim of the complaint;
>
> (b) A waiver of your right to have this Division conduct further investigation, find whether there is probable cause, make conciliation efforts or hold a public hearing (N.J.S.A. 10:5-14, 10:5-14, 10:5-15; N.J.A.C. 13:4-2.1, 13:4-6.1, 13:4-11, 13:4-12.1).
>
> (c) A waiver of your right to present any and all defenses.

The Division served a copy of the Notice and Order on Patel, Trivedi and Mr. Swidler on or about June 23, 2006. Neither Patel, Trivedi nor Mr. Swidler responded to the Notice

and Order. Nor did Respondents petition the Director to vacate the entry of default. On July 19, 2006, the Division served the Default Order on Patel, Trivedi and Mr. Swidler and the matter was transferred to OAL.

On September 9, 2006, the OAL issued a Notice of Filing and served a copy of the Notice on Mr. Swidler. A pre-hearing conference was held on September 27, 2006. Subsequently, Respondents filed a motion to vacate the entry of default pursuant to N.J.A.C. 13:4-5.3(d). On October 5, 2006, Judge Hurd denied Respondent's motion to vacate the default order, and pursuant to the default procedural regulations a hearing commenced on December 11, 2006.

III. THE ALJ'S DECISION

The ALJ first determined that pursuant to the Division's default procedures, there were no disputed issues of fact and " the only cognizable issues shall be whether the facts established by the complainant and admitted by respondent constitute an act of discrimination and, if so, the amount of damages or other recommended relief." (ID 2, citing N.J.A.C. 13:4-5.4).

The ALJ heard testimony from Complainants and their minor sons, and found the testimony of all four witnesses to be credible. Complainants' sons are African-American, and were sixteen at the time they worked for Subway. R.W. started working at Subway in June 2005 and B.W. began in March 2005. Both worked Monday through Friday from 4 p.m. to 11 p.m and also full days on the weekend. Both earned $6.50 per hour. (ID 2). The minors testified that they reported to supervisor Dipen Patel, who assigned them tasks, told them when they should arrive and leave and signed their paychecks. Mr. Patel was the son of an owner of the Subway restaurant. (ID 3).

The ALJ found that Mr. Patel called B.W. “nigger” almost every day from the second day he started working. The job at subway was B.W.’s first job. Although he planned to work until August, B.W. quit in July because Mr. Patel’s constant use of the racial slur made him feel sad . R.W. similarly testified that Patel repeatedly called him “nigger” and degraded him, and told R.W. that “I own you.” R.W. testified that this kind of behavior by Patel happened everyday and that others could hear these remarks, which made R.W. feel humiliated. (ID 3).

L.W., mother of R.W., testified that she saw changes in R.W. while he worked at Subway, and that the job made him really upset. D.W., mother of B.W., likewise testified that B.W. was upset and mad during his employment at Subway. The ALJ found that both B.W. and R.W. were depressed and unhappy as a result of Patel’s behavior. (ID 3).

The ALJ found that Patel, a supervisor, used racist language to degrade Complainants’ sons and create an unbearable situation for these new employees. Accordingly, the ALJ concluded that complainants’ evidence of the pervasive use of the word “nigger” in the workplace by Patel is clearly sufficient to establish a hostile working environment under the LAD. (ID 3). In addressing remedies and liability, the ALJ concluded that in this case both Respondents were liable for the hostile work environment. Respondent Patel is liable as a supervisor because he was the one who created the hostile environment by uttering the racial slurs on multiple occasions. The ALJ found Subway vicariously liable for the hostile work environment because Mr. Patel’s discriminatory conduct would not have occurred but for Subway’s delegation of authority to Patel. The ALJ concluded that Respondent Subway was liable either because of its negligence in permitting a hostile work environment to exist or because its agency relationship with Patel

aided in the commission of the harassment.

Because Respondents' actions violated the LAD, the ALJ determined that Complainants were entitled to damages to compensate them for loss of work and the pain and suffering their sons endured. With respect to the award for pain and suffering, the ALJ noted that because the minors were just starting out in the workplace, Patel's racist language inflicted terrible pain and suffering and will live with them the rest of their lives. (ID 4). Thus ,the ALJ ordered Respondents to pay Complainants $2,349.72 in lost wages each, for a total of $4,699.44, and also ordered Respondents to pay Complainants $60,000.00 each in pain and humiliation damages. (ID 4-5). The ALJ also found that Patel should be penalized for his incredibly egregious conduct, as should Subway, Patel's employer, which demonstrated contempt for the Division's authority. Based on these findings, the ALJ imposed statutory penalties in the amount of $10,000.00 each against Respondent Patel and Respondent Subway. Finally, the ALJ found that Respondents were liable for the Division's attorneys' fees and costs incurred in the amount of $27,142.25. (ID 5).

IV. THE DIRECTOR'S DECISION

The Director's Procedural Rulings

Initially, the Director finds that the record establishes that the Division properly served Respondents with all notices and otherwise complied with all procedures required by N.J.A.C. 13:4-5.2. Thus, the Director is satisfied that the entry of default in this matter was appropriate. The Director also notes that Respondents have filed no exceptions to the ALJ's initial decision, and have in no other manner objected to the ALJ's rulings. As provided by N.J.A.C. 13:4-5.3(d), the ALJ had jurisdiction to hear Respondents' motion to

vacate the default previously entered by the Director, as it was filed after this matter was transmitted to OAL. The ALJ denied Respondent's motion, and the Director finds no good cause to disturb that ruling.

The Director's Factual Findings

The default order suppressed any defenses which Respondents might have raised in this matter, and constituted respondents' admission that answers to the verified complaint and the D&I request, if provided, would have established facts in accordance with Complainants' claims. N.J.A.C. 13:4-5.2 (b). Thus, the Director deems the allegations of Complainants' verified complaints to be true. Moreover, the ALJ heard testimony from Complainants and Complainants' witnesses regarding racially offensive comments, the supervisory structure of the Respondent Subway, and the emotional distress the minor sons experienced as a result of the hostile work environment. He found this testimony to be credible. Generally, the Director must give substantial weight to the ALJ's credibility determinations and to all findings based on these determinations, since it was the ALJ who had an opportunity to hear the testimony of the witnesses and to assess their demeanor. See Clowes v. Terminix International, Inc., 109 N.J. 575, 587(1988); Renan Realty Corp. v. Dept. of Community Affairs, 182 N.J. Super. 415, 419 (App. Div. 1981). Accordingly, the Director adopts the ALJ's factual findings as set forth in the initial decision and as summarized above.

The Legal Standards and Analysis

1. Hostile Work Environment

Hostile work environment racial harassment is a form of race discrimination

prohibited by the LAD. Taylor v. Metzger, 152 N.J. 490, 498 (1998). In Taylor, supra, the New Jersey Supreme Court articulated the basic standards for establishing such a claim. In order to establish a prima facie case of hostile work environment racial harassment under the LAD, an individual must demonstrate that the defendant's conduct (1) would not have occurred but for the employee's [race]; and [the conduct] was (2) severe or pervasive enough to make a (3) reasonable [African-American] believe that (4) the conditions of employment are altered and the working environment is hostile or abusive. Taylor v. Metzger 152 N.J. 490, 498 (1998), citing Lehmann v. Toy 'R' Us, Inc., supra, 132 N.J. at 603-04 (emphasis omitted).

In Taylor, the Supreme Court also found that a single extreme racial epithet ("Jungle Bunny") uttered to an African-American female by her supervisor was sufficiently severe to create a hostile work environment. Ibid. In recognizing that a single severe incident can alter the terms and conditions of a person's employment, the Court noted that such epithets are regarded as especially egregious forms of harassment, capable of engendering a severe impact, and that their meanings are often a critical, if not determinative factor in establishing a hostile work environment. Taylor, supra at 502. Words such as "jungle bunny" and "nigger" are unambiguously racist and "discrimination per se ..." Id., quoting Bailey v. Binyon, 583 F. Supp. 923, 927 (N.D. Ill. 1984). The experience of being called such names "is like receiving a slap in the face. The injury is instantaneous." Id. at 503.

Applying these standards, it is clear that the actions of Dipen Patel were sufficiently severe to match the "rare and extreme" case of unlawful harassment based on a single event. The ALJ found as fact that Patel called B.W. and R.W. "nigger" repeatedly, and almost every day, and that B.W. also recalled Patel saying "I own you," a transparent

reference to slavery. The ALJ also found that Patel made the racist comments in situations where others could hear them. (ID 3). Clearly, in this case, Patel's conduct was at least as egregious as the single comment uttered in Taylor. Moreover, the repeated, everyday nature of Patel's comments makes the racial hostility pervasive as well as severe.

Complainants' proofs establish that Dipen Patel subjected their minor sons to racially derogatory statements described in the ALJ's factual findings above and that these statements spanned the minors' tenure with Respondent Subway Restaurant. The Director concludes that these words were overtly racial, and for that reason the harassment would not have occurred "but for" Complainants' sons' race. The Director further concludes that Patel's racially charged words were severe and pervasive enough for reasonable employees of the minor sons' race to believe that their work environment had become hostile or abusive. The Director also notes that Patel's supervisory position at Respondent Subway Restaurant rendered his racially biased words particularly egregious. Accordingly, the Director concludes that Complainants have established that Respondents subjected their sons to a racially hostile work environment, in violation of the LAD.

2. Constructive Discharge

Where acts of discrimination make working conditions so intolerable that a reasonable person subject to such conditions would resign, the employer may be liable for terminating the employment of an employee who leaves his job in response to the discriminatory conditions. Goss v. Exxon Office Systems Co., 747 F.2d 885, 888 (3rd Cir. 1984). The Appellate Division, examining a claim of constructive discharge in a sex discrimination case, adopted a "reasonable person" test which focuses on the impact of an employer's action on a "reasonable employee." Muench v. Township of Haddon, 255 N.J.

Super. 288 (App. Div. 1992). Under this standard, courts will find a constructive discharge where an "employer knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign." Id. at 302. In order to establish a prima facie case of constructive discharge in New Jersey, a plaintiff must establish that "the employer knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign." Shepherd v. Hunterdon Center, 174 N.J. 1, 27-28, (2002), quoting Muench v. Township of Haddon, 255 N.J. Super. 288, 301-02, (App.Div.1992). As the Court also put it in Shepherd, supra, 174 N.J. at 28, "[C]onstructive discharge requires not merely "severe or pervasive" conduct, but conduct that is so intolerable that a reasonable person would be forced to resign rather than continue to endure it. Jones v. Aluminum Shapes, Inc., 339 N.J. Super. 412, 428 (App.Div.2001). More precisely, the standard envisions a "sense of outrageous, coercive and unconscionable requirements." Ibid. Simply put, a constructive discharge claim requires more egregious conduct than that sufficient for a hostile work environment claim.

In the present case, Complainants have satisfied this test. Dipen Patel subjected B.W. and R.W. to racially derogatory statements that a reasonable African-American would find intolerable. Although a hostile work environment can be established by showing conduct that is either severe or pervasive, in the present case, Patel's comments were not only stinging, unambiguous racial epithets, Complainants' sons were subjected to them repeatedly, and almost every workday. Thus, the racial harassment here was both severe and pervasive. Further, Patel's use of the phrase "I own you," plainly evokes the notion of slavery, taking this beyond any tolerable level of harassment for African-Americans in the workplace. Moreover, the fact that Patel further humiliated the employees by making those

racially hostile comments in front of others lends further support to the conclusion that a reasonable African-American employee in these circumstances would feel compelled to resign. Accordingly, the Director adopts the ALJ's decision that Respondents constructively discharged B.W. and R.W. in violation of the LAD.

3. Liability

Based on the above, B.W. and R.W. were subjected to a racially hostile work environment and constructively discharged based on their race. The act of terminating an employee, whether an actual or a constructive discharge, is an act of the employer, and an employer is liable for all damages flowing from a race-based termination. Cf. Entrot v. BASF Corp., 359 N.J. Super. 162, 192 (App. Div. 2003) (A constructive discharge is a tangible employment action). Thus, Respondent Subway is liable for all equitable and compensatory relief awarded based on Complainants' constructive discharge.

Although an employer is strictly liable for damages based flowing from the race-based discharge of an employee, an employer is not automatically liable for all damages flowing from a race-based hostile work environment created by its employees. An employer is directly and strictly liable for equitable relief flowing from a supervisor's racial harassment, and is liable for compensatory damages where "the employer contributed to the harm through its negligence, intent, or apparent authorization of the harassing conduct, or if the supervisor was aided in the commission of the harassment by the agency relationship." Lehman v. Toys 'R' Us, Inc., 132 N.J. 587, 624 (1993). The last of these liability theories -- aided by agency liability - - has been broken down to three elements: the employer delegated authority to the supervisor to control that aspect of the work environment which proved to be hostile, the supervisor's exercise of that authority violated

the LAD, and the delegated authority aided the supervisor in injuring the employee. Shepherd v. Hunterdon Developmental Center, 336 N.J. Super. 395, 422 (App. Div. 2001) aff'd in relevant part, rev'd in part, 174 N.J. 1 (2002); Herman v. The Coastal Corporation, 348 N.J. Super. 1, 25 (App. Div. 2002), citing Lehman v. Toys 'R' Us, supra, 132 N.J. at 620.

Applying this standard, the record reflects that Dipen Patel had a supervisory relationship with B.W. and R.W. at all times relevant to the complaint. The Appellate Division has held that, rather than limiting a determination of supervisory capacity to specific factors such as the power to hire, fire, or control daily tasks, it should be determined based on whether the victim reasonably perceived that the harasser had the power to adversely affect his or her worklife. Entrot, supra, 359 N.J. Super. at 181. Here, the ALJ found as fact that Patel controlled the minors' work hours, assigned their daily tasks, and signed their paychecks. (ID 3). Moreover, Patel's statements such as "I own you," Ibid, would reasonably lead B.W. and R.W. to conclude that he had the power to adversely affect their working conditions.

In addition, the record reflects that the employer delegated oversight of its day to day operations to Patel, and he exercised that authority in scheduling employees and in assigning and overseeing B.W.'s and R.W.'s work. The authority delegated by the employer enabled Patel to create a work environment which was hostile to Blacks in violation of the LAD. Accordingly, the Director concludes that the employer is vicariously liable for Patel's race-based employment discrimination, both the hostile work environment and the constructive discharge.

Turning to Respondent Dipen Patel's individual liability, the LAD prohibits employers from discriminating based on race, but an individual supervisor is not an "employer" under

the LAD. N.J.S.A. 10:5-5 (e); Tarr v. Ciasulli, 181 N.J. 70, 83 (2004). However, the LAD also prohibits any person, whether an employer or employee or not, from aiding and abetting unlawful discrimination.[3] N.J.S.A. 10:5-12e. A supervisory employee is liable for aiding and abetting the employer's racially hostile work environment where the employer engaged in wrongful conduct (here, allowing B.W. and R.W. to be subjected to a racially hostile work environment), the supervisor was generally aware of his role in the wrongful conduct, and the supervisor knowingly and substantially assisted the wrongful conduct. Tarr v. Ciasulli, supra, 181 N.J. at 84. As discussed above, the evidence presented supports the conclusion that Respondent violated the LAD by allowing Complainants' sons to be subjected to a racially hostile work environment. Here, there is ample evidence to support the conclusion that Respondent Patel was aware that his actions were making the work environment hostile or abusive to B.W. and R.W., and that he knowingly and substantially assisted in creating the racially hostile work environment, as he was responsible for all of the racially abusive comments and actions to which these employees were subjected, and his racially hostile comments were both severe and pervasive. Thus, the Director concludes that Patel is individually liable under the aiding and abetting provisions of the LAD.[4]

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[3]The verified complaints in these matters charged Respondents with violations of the New Jersey Law Against Discrimination, including but not limited to N.J.S.A. 10:5-12(a), which is the subsection applicable to employers. Although subsection 12(e) was not specifically cited in the complaints, Respondent Patel was named as liable "Individually." To ensure that individual liability is premised on aiding and abetting, courts have looked beyond the four corners of the complaint to consider briefs, motions and jury charges. See, e.g. Hurley v. Atlantic City Police Dept., 174 F. 3rd 95, 125 (3rd Cir. 1999) Moreover, if it were necessary to amend the complaint to specifically allege aiding and abetting, amendments are to be freely given in the interests of justice. R. 4:9-1. Where, as here, the individual respondent was on notice of his alleged individual liability from the commencement of this action, no prejudice would result from amending the complaint to conform to the evidence. R. 4:9-2. As such an amendment would allege or rely on only those actions cited in the original complaint, any amendment would relate back to the original complaint. R. 4:9-3.

[4]Although it may appear awkward to conclude that the harasser himself "aids and abets" a hostile work environment attributed to his employer, the harasser's actions could not result in such extensive injury to the victims unless the employer provided the type of workplace situation that could be rendered hostile by the harasser's actions. Where there is more than one harasser, it is not difficult to recognize that a harasser

V. REMEDIES

1. Back Pay

The LAD provides that, upon a finding that a respondent has engaged in an unlawful employment practice, the Director may provide appropriate affirmative relief, including an award of back pay. N.J.S.A. 10:5-17. The basic purpose of awarding back pay is to make the victim whole by reimbursement of the economic loss suffered. Goodman v. London Metals Exch., Inc., 86 N.J. 19, 35 (1981). Here, the Director finds that the ALJ's back pay award is supported by the evidence, and finds Respondents jointly and severally liable for such damages.

Pre-judgment interest may be awarded to make an employee whole by reimbursing the employee for losses incurred because the employer retained use of wages which rightfully belonged to the employee, and to avoid unjustly enriching the employer who was able to make profitable use of those funds until judgment is entered. Decker v. Bd. of Ed. of City of Elizabeth, 153 N.J. Super. 470, 475 (App. Div. 1977), certif. denied, 75 N.J. 612 (1978). Applying the interest rates set forth in New Jersey Court Rule 4:42-11, the Director awards Complainants prejudgment interest on the back pay award through the date of this order. Back pay and interest for each Complainant totals $2433.41. Respondents are jointly and severally liable for these damages.

2. Emotional Distress Damages

It is well established that a victim of unlawful discrimination under the LAD is entitled

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aids and abets the cumulative hostile work environment; it should be no less clear that an individual who is the sole perpetrator of workplace harassment is equally liable under a theory of aiding and abetting. See, e.g., Shepherd v. Hunterdon Developmental Center, supra, 336 N.J. Super. at 234 (acknowledging that despite the awkwardness of this conclusion, an aiding and abetting analysis may be appropriate to determine a harasser's individual liability.)

to recover non-economic losses such as mental anguish or emotional distress proximately related to unlawful discrimination. Anderson v. Exxon Co., 89 N.J. 483, 502-503 (1982); Director, Div. on Civil Rights v. Slumber, Inc., 166 N.J. Super. 95 (App. Div. 1979), mod. on other grounds, 82 N.J. 412 (1980); Zahorian v. Russell Fitt Real Estate Agency, 62 N.J. 399 (1973). Such awards are within the Director's discretion because they further the LAD's objective to make the complainant whole. Andersen, supra, 89 N.J. at 502. As provided in a recent amendment to the LAD, emotional distress damages are available in LAD actions filed with the Division to the same extent as in common law tort actions. N.J.S.A. 10:5-17.

A victim of discrimination is entitled, at a minimum, to a threshold pain and humiliation award for enduring the "indignity" which may be presumed to be the "natural and proximate" result of discrimination. Gray v. Serruto Builders, Inc., 110 N.J. Super. 297, 312-313, 317 (Ch. Div. 1970). Thus, pain and humiliation awards are not limited to instances where the complainant sought medical treatment or exhibited severe manifestations. Id. at 318. Here, B.W.'s own testimony, as well as that of his mother, demonstrate that B.W. suffered emotional distress as a result of the bias-based harassment. R.W. testified that as a result of the harassment, he felt humiliated and depressed. R.W.'s mother testified that she saw changes in her son and that he was really upset by his experience at the restaurant. Similarly, D.W. testified that her son was mad and upset all the time during his employment at Respondent Subway Restaurant.

The Director awards damages for emotional distress based on the extent and duration of emotional suffering experienced by each complainant. Here, the harassment to which B.W. and R.W. were subjected included repeated bias-based slurs by a

supervisory employee. They found the harassment to be severe enough to warrant leaving their employment to escape the harassment. In light of the emotional distress that can be presumed to be the "natural and proximate" result of repeatedly inflicting such harassment on an impressionable adolescent, and after reviewing the applicable portions of the record, the Director concludes that the ALJ's award of $60,000.00 in emotional distress damages to each Complainant is appropriate in this case, and finds Respondents jointly and severally liable for these damages.

3. Statutory Penalties

In addition to any other remedies, the LAD provides that the Director shall impose a penalty payable to the State Treasury against any respondent who violates these statutes. N.J.S.A. 10:5-14.1a. The maximum penalty for a first violation of the LAD is $10,000. Ibid. The ALJ assessed a $10,000 penalty against each Respondent based on his findings that the harassing "conduct was extremely egregious and designed to inflict lasting harm on the Complainants." Moreover, Respondents' failure to respond to the verified complaints demonstrated "contempt for the Division's authority and complete inability to comprehend the severity of their actions." (ID 5).

After a review of the record, the Director concludes that the maximum penalty of $10,000 to be assessed against each Respondent is appropriate for Respondents' LAD violations. As punitive damages cannot be awarded in LAD actions filed administratively and can only be awarded in actions before the Superior Court, the $10,000 civil penalty is the only remedy available to serve an admonitory or deterrent purpose in this case.

4. Counsel Fees

A prevailing party in a LAD action may be awarded "a reasonable attorneys' fee."

N.J.S.A. 10:5-27.1. See also, Rendine v. Pantzer, 141 N.J. 292 (1995). Where, as here, Complainants' case was prosecuted by the attorney for the Division, counsel fees and costs may be assessed against Respondents. N.J.S.A. 10:5-27.1. The Director concludes that it is appropriate to make an award of attorney fees in this case.

DAG Brian O. Lipman, who prosecuted this matter, submitted an application for $27,142.25 in counsel fees. His application was supported by his own certification of the time expended for specific legal services in this matter, from January 12, 2006 through December 20, 2006. In addition, the fee application was supported by a July 21, 2005 memorandum from the Acting Director of the Division of Law, establishing uniform hourly rates of compensation for DAsG to be used for fee applications, based on their years of legal experience.

The New Jersey Supreme Court has determined that the starting point for calculating a reasonable attorney's fee is computation of the "lodestar," which is derived by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. Rendine v. Pantzer, supra, 141 N.J. at 334-35. Counsel requests $175 per hour for his work in prosecuting this matter, based on his years of experience. The Director finds this hourly rate to be reasonable, as it is less than the prevailing rates in the relevant community for attorneys of comparable skill and experience. Id. at 337.

To be compensable, a certification of services must be sufficiently detailed to allow meaningful review and scrutiny. Rendine v. Pantzer, 141 N.J. at 335. In this case, the DAG has submitted sufficiently detailed billing summaries showing the hours expended and services rendered, commencing with DAG Lipman receiving the case for enforcement of a subpoena in Superior Court. After careful review, the Director finds that the hours

expended are reasonable and necessary in light of both the nature of the litigation and the results achieved.

VI. ORDER

Based on all of the above, the Director concludes that Respondents engaged in unlawful discrimination in violation of the LAD. Therefore, the Director orders as follows:

1. Respondents and their agents, employees and assigns shall cease and desist from doing any act prohibited by the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -49.

2. Respondent Subway Restaurant shall immediately post the Division's official employment and public accommodations posters in a place easily visible by all employees, applicants for employment, and patrons of the restaurant.

3. Within 45 days from the date of this order, Respondents shall forward to the Division certified funds payable to B.W. in the amount of $62,433.41 as compensation for B.W.'s lost wages with interest, and his pain and humiliation. Whereas B.W. is a minor, these funds will be held by the Director until such time as B.W. reaches majority age.

4. Within 45 days from the date of this order, Respondents shall forward to the Division certified funds payable to R.W. in the amount of $62,433.41 as compensation for R.W.'s lost wages with interest, and his pain and humiliation. Whereas R.W. is a minor, these funds will be held by the Director until such time as R.W. reaches majority age.

5. Within 45 days from the date of this order, Respondent Patel shall forward to the Division a certified check payable to "Treasurer, State of New Jersey," in the amount of $10,000 as a statutory penalty.

6. Within 45 days from the date of this order, Respondent Subway Restaurant shall

forward to the Division a certified check payable to "Treasurer, State of New Jersey," in the amount of $10,000 as a statutory penalty.

7. Within 45 days from the date of this order, Respondents shall forward to the Division certified funds payable to "Treasurer, State of New Jersey" in the amount of $27,142.25 for attorneys' fees.

8. The penalty and all payments to be made by the Respondents under this order shall be forwarded to Richard Salmastrelli, New Jersey Division on Civil Rights, P.O. Box 089, Trenton, New Jersey 08625.

9. Any late payments will be subject to post-judgment interest calculated as prescribed by the Rules Governing the Courts of New Jersey, from the due date until such time payment is received by the Division.

DATE: February 23 , 2007

J. FRANK VESPA-PAPALEO, ESQ.
DIRECTOR
NEW JERSEY DIVISION ON CIVIL RIGHTS