

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO.: CRT 1429-02
DCR DOCKET NO.: EW-8WB-44055-E
DATED: September 11, 2003

CATHERINE GREFFE, :
Complainant, :
v. :
HACKETTSTOWN AUTO PARTS; :
Robert Poyer, Jr., :
Owner/Individually :
HACKETTSTOWN TRUE VALUE :
CENTER (a/k/a ABC Co., a :
fictitious name); and :
PRO AUTOMOTIVE WAREHOUSE :
(a/k/a XYZ Co., a fictitious name) :
ROBERT POYER, JR., :
Respondents. :

ADMINISTRATIVE ACTION

FINDINGS, DETERMINATION AND ORDER

APPEARANCES:

D'Andre Workman, Deputy Attorney General, prosecuting this matter for the NJ Division on Civil Rights, for the complainant (Peter C. Harvey, Attorney General of New Jersey, attorney).

Robert Poyer, Jr., for the respondents.

BY THE DIRECTOR:

INTRODUCTION

This matter is before the Director of the New Jersey Division on Civil Rights (Division) pursuant to an amended verified complaint filed by the complainant, Catherine Greffe (Complainant), alleging that the respondents, Robert Poyer, Jr., Hackettstown Auto Parts, Hackettstown True Value Center, and Pro Automotive Warehouse (Respondents), subjected her to sex discrimination in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A.

10:5-1 to -49. On July 24, 2003, the Honorable Maria Mancini LaFiandra, Administrative Law Judge (ALJ), issued an initial decision¹ concluding that Respondents violated the LAD, awarding damages to Complainant and assessing statutory penalties. Having independently reviewed the record, the Director adopts the ALJ's initial decision as modified herein.

PROCEDURAL HISTORY

On July 17, 1998, Complainant filed a verified complaint with the Division alleging that the originally named respondents, Hackettstown Auto Parts (HAP) and Robert Poyer, subjected her to a hostile work environment and terminated her employment based on her sex in violation of the LAD. Respondents HAP and Poyer filed an answer denying the allegations of unlawful discrimination. Their answer also asserted that the complaint should be dismissed, and the Director notified the parties that it would be considered a motion to dismiss. On June 10, 1999, the Director issued a written decision denying the motion and directing the Division to complete an investigation of the allegations of the complaint. Based on the results of that investigation, on October 26, 1999, the Division issued an agency determination finding probable cause to support Complainant's allegations of a sexually hostile work environment, but finding no probable cause to support Complainant's allegations that she was terminated from her employment based on her sex. On January 25, 2002, after attempts to conciliate this complaint proved unsuccessful, the Division transmitted this matter to the Office of Administrative Law for hearing as a contested case.

On April 3, 2003, the ALJ commenced a telephone pre-hearing conference with Deputy Attorney General D'Andre Workman (DAG) and Robert Poyer, who represented himself and Respondent HAP. That conference ended before completion when Poyer became angry and hung up the telephone. The ALJ scheduled an in-person pre-hearing conference for May 28, 2002, and

¹Hereinafter, "ID" shall refer to the written initial decision of the ALJ, "Tr." shall refer to the transcript of the February 26, 2003 administrative hearing, and "Exhibit P" shall refer to Complainant's exhibits admitted into evidence at the administrative hearing.

after waiting over an hour for Poyer or HAP to appear, the ALJ held the conference on an ex parte basis. On May 31, 2002, after reviewing the originally named respondents' prior submissions to the Division, the ALJ issued a pre-hearing order concluding in part that a September 28, 1998 submission from Poyer constituted a counterclaim.²

Complainant thereafter filed a motion to dismiss the counterclaim, as well as a motion to amend the verified complaint to add Hackettstown True Value Center and Pro Automotive Warehouse as additional respondents. By order dated July 23, 2002, the ALJ granted both of Complainant's motions.

On August 20, 2002, Complainant filed a motion to compel Respondents to answer two sets of previously served interrogatories. By order dated September 6, 2002, the ALJ granted Complainant's motion and ordered Respondents to provide specific and detailed responses to Complainant's interrogatories within 15 days. On September 27, 2002, Complainant filed a motion seeking sanctions based on Respondents' failure to provide the discovery as required by the ALJ's September 6, 2002 order. On October 21, 2002, the ALJ granted Complainant's motion and issued an order suppressing Respondents' Answer and defenses.

The ALJ scheduled a hearing on the merits for February 26, 2003. Respondents failed to appear at the time scheduled for the hearing, and after waiting more than a half hour, the ALJ heard Complainant's proofs on an ex parte basis. On May 16, 2003, Complainant filed a post-hearing brief including proposed factual findings.³ The ALJ issued her initial decision on July 24, 2003, and

² The ALJ also concluded that the originally named Respondents' submissions to the Division constituted a motion to dismiss the complaint, and set a response schedule for that motion. The Director's review of the OAL record and file disclosed no written order of the ALJ specifically disposing of that motion, although it may have been subsumed by the ALJ's October 21, 2002 order suppressing Respondents' answers and defenses. In any event, as noted above, the Director had already considered and denied Respondents' motion to dismiss the complaint prior to transmitting this matter to OAL. See Director's letter decision of June 10, 1999.

³As noted in the ALJ's initial decision, Respondents refused to accept service of Complainant's post-hearing brief, and also refused to accept service of several prior mailings from the ALJ and the prosecuting DAG. In addition, the Division's July 29, 2003 mailing to Respondents, which enclosed a copy of the ALJ's

the Director's final determination in this matter is due on September 11, 2003.

THE ALJ'S DECISION

Findings of Fact

The ALJ made detailed factual findings, which are set forth at pages 3 - 7 of the initial decision. Those findings are briefly summarized as follows. Respondent Robert Poyer, Jr., owned and managed the financial and business operations of Respondents Pro Automotive Warehouse, Hackettstown Auto Parts, and Hackettstown True Value Center (hereinafter, "Respondent companies"), which were all located in the same building (ID 3-4). Complainant was hired to work for Respondent Pro Automotive Warehouse in September 1995, but her paychecks were drawn from the account of Hackettstown Auto Parts (ID 4). Throughout her employment, Complainant was assigned specific duties for Pro Automotive Warehouse, Hackettstown Auto Parts and Hackettstown True Value Center. Ibid.

Respondent Poyer was Complainant's supervisor regarding her work for all three companies (ID 5). During Complainant's employment with Respondents, Respondents did not have a workplace policy against sexual harassment, and there was no one except Poyer to whom employees could complain about Poyer's behavior (ID 7).

During Complainant's employment with Respondent companies, Respondent Poyer regularly engaged in sexual innuendo and made sex-related comments and gestures which disgusted and upset Complainant and made her feel uncomfortable and embarrassed (ID 7). Respondent Poyer also engaged in such conduct and comments in the presence of other female employees, but did not subject male employees to such conduct or comments (ID 6). Such conduct and comments included:

- On a number of occasions, Poyer would extend his finger through his opened pants zipper

initial decision and explained the procedure for filing exceptions, was returned to the Division marked "refused." The Director has received no exceptions to the initial decision.

to imitate a penis and would display this to Complainant and other female employees by walking into their work areas or calling Complainant or other female employees into his office. The female employees were embarrassed and blushed at this conduct, and Poyer made fun of their distress (ID 5).

- Poyer displayed sexually explicit materials and jokes in the female employees' work area (ID 6).
- Poyer displayed nude photographs of women and commented to female employees about those photographs (ID 6).
- Poyer routinely told Complainant and other female employees about his sexual exploits with his girlfriends (ID 6).
- Poyer told sexual jokes and jokes about lesbians and homosexuals (ID 7).

Complainant objected to Poyer's conduct and felt uncomfortable around him (ID 7). Complainant complained to her co-workers about Poyer's behavior; other female employees, including Cherry Terebey, complained to Complainant about Poyer's behavior. Ibid. Complainant and other female employees were intimidated by Poyer's uncontrollable temper - - Poyer verbally abused and screamed at female employees, and on one occasion Poyer threw a carburetor across the room which barely missed hitting Cherry Terebey. Ibid.

Conclusions of Law

As Respondents failed to appear at the hearing despite appropriate notice, the ALJ concluded that it was appropriate to grant Complainant's request to present ex parte proofs and to issue a written initial decision on the merits. N.J.A.C. 1:1-14.4(c). Addressing the merits of Complainant's claims, the ALJ noted that Respondents' Answer and defenses had been stricken due to failure to provide discovery (ID 8). The ALJ concluded that Poyer engaged in conduct which was sexual in nature, and was both severe and pervasive (ID 9). The ALJ further concluded that a reasonable woman would find that Poyer's sexual "antics" rendered the work environment hostile

or abusive to women (ID 10-11). Accordingly, the ALJ concluded that Complainant carried her burden of proving that she was subjected to hostile work environment sexual harassment in violation of the LAD (ID 8).

In addressing remedies and liability, the ALJ concluded that in this case the employer and the supervisor are one in the same (ID 11). The ALJ further concluded that Complainant experienced pain and suffering as a direct and proximate result of Respondent Poyer's creation of a sexually hostile work environment. Ibid. Based on the exceptionally egregious nature of Poyer's conduct, the finding that the sexual harassment was both severe and pervasive, and the extent of the verbal and emotional abuse he inflicted upon Complainant, the ALJ awarded Complainant \$20,000 in pain and humiliation damages. Ibid.

The ALJ also assessed statutory penalties pursuant to N.J.S.A. 10:5-14.1a. The ALJ assessed the maximum permissible penalty (\$10,000) against Respondent Poyer individually, because he took advantage of his authority and power to continually sexually harass Complainant and other female employees (ID 12). The ALJ assessed an additional \$10,000 penalty against each of the Respondent companies, based on her findings that the sexually harassing behavior was extremely egregious, odious and offensive, and that Respondents failed to present any evidence to militate against imposing the maximum penalty against each of them (ID 12-13).

THE DIRECTOR'S DECISION

The Director's Factual Findings

The ALJ heard testimony from Complainant's witnesses regarding the sex-related comments and conduct in the workplace, as well as the ownership, management and supervisory structure of the Respondent companies, the absence of any sexual harassment complaint

procedure and the emotional distress Complainant experienced as a result of the hostile work environment. 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. The Administrative Hearing Process

The ALJ issued several orders prior to issuance of the initial decision in this matter, which are now reviewable by the Director. N.J.A.C. 1:1-14.10(j); N.J.A.C. 1:18.6. For the reasons discussed below, the Director adopts each of the ALJ's pre-hearing orders.

a. Dismissal of Respondents' Counterclaim.

As noted above, the ALJ's pre-hearing order determined that Respondents' written submission to the Division would be treated as a counterclaim, and the ALJ subsequently issued an order granting Complainant's motion to dismiss that counterclaim. For the reasons that follow, the Director adopts the ALJ's order dismissing the counterclaim.

A counterclaim is not a defense, but is an affirmative cause of action. See, e.g., Manganaro Consulting v. Carneys Point Township Sewerage Authority, 344 N.J. Super. 343, 347 (App. Div. 2001). An ALJ has jurisdiction to hear only those claims which an agency head has transmitted to the OAL as contested cases. N.J.A.C. 1:1-3.2. As the Director did not accept for filing or transmit to the OAL any claim from Respondents which constituted a contested case, the ALJ had no jurisdiction to hear any claim for affirmative relief asserted by Respondents.

Moreover, Respondents' September 20, 1998 submission does not constitute a cognizable claim for which relief can be granted by the Division. That submission alleges that Complainant

refused to provide files to a consultant; displayed a calendar containing photographs of naked men and became defensive and abusive when directed to remove it; asked Poyer to re-hire an employee who had previously quit; contradicted Poyer's instructions to other employees; used the telephone for personal use; visited with her father at Respondents' place of business during work hours; became angry when Respondents refused to hire her father; failed to perform her job duties properly; and asked other employees to perform her assigned tasks.

As relevant to this matter, the Division's jurisdiction is limited to taking complaints alleging violations of the LAD.⁴ N.J.S.A. 10:5-6; N.J.A.C. 13:4-4.1. The LAD, in pertinent part, prohibits employers from discriminating against employees, and prohibits any persons from aiding or abetting an employer's discriminatory actions. N.J.S.A. 10:5-12(a),(e). Since Respondents' submission does not allege that Complainant was Respondents' employer or a person aiding or abetting Respondents' employer, Respondents' assertions do not constitute a cognizable claim under the employment provisions of the LAD. Further, Respondents' assertions do not constitute a cognizable claim under any other provision of the LAD. See N.J.S.A. 10:5-12(f) to (n) (prohibiting discrimination in business transactions, public accommodations or housing).

b. Amendment of the Complaint.

The ALJ granted Complainant's motion to amend the complaint to add Hackettstown True Value Center and Pro Automotive Warehouse as additional respondents. Amendments to pleadings should be freely and liberally permitted in the interest of justice, unless undue prejudice would result. N.J.A.C. 1:1-6.2; R. 4:9-1; Cuesta v. Classic Wheels, Inc., 358 N.J. Super. 512, 518 (App. Div. 2003). A complaint may be amended by an administrative law judge during or even after a

⁴The Division also has jurisdiction to take complaints alleging violations of the New Jersey Family Leave Act, N.J.S.A. 34:11B-1 to -16, however, nothing in Respondents' pleadings could be interpreted to allege a violation of that statute.

hearing to conform to the evidence presented. N.J.A.C. 13:4-6.3; N.J.A.C. 1:1-6.2.

Where, as here, the amended claim arose out of the same conduct alleged in the original complaint, an amendment to add a new party after the statute of limitations has expired should be permitted if it meets two criteria - - the added party received such notice of the original complaint that it will not be prejudiced in defending on the merits, and the added party knew or should have known that, but for the charging party's error or lack of information, it would have been named in the original complaint. Kernan v. One Washington Park, 154 N.J. 437, 458 (1998); see also, R. 4:9-3. Where the originally named party and the parties sought to be added have such an identity of interest to justify treating them as a single entity, these standards will be satisfied. See, e.g., Otchy v. City of Elizabeth Board of Education, 325 N.J. Super. 98, 108-109 (App. Div. 1999).

The record reflects that Respondent Poyer was at all relevant times the owner and manager of Hackettstown True Value Center and Pro Automotive Warehouse (ID 3). The record further reflects that Respondent Poyer originally hired Complainant to work for Pro Automotive Warehouse, and then proceeded to pay Complainant's wages by checks issued on the account of Hackettstown Auto Parts, and issued W-2 forms for Complainant indicating that her employer was Hackettstown Auto Parts (ID 4; Exhibit P-3). Respondent Poyer assigned Complainant to perform tasks for all three Respondent companies, and similarly cross-assigned all employees except mechanics to work for all three companies (Tr. 23). The continual cross-assignment of employees among the businesses, identity of ownership, and location of the businesses at the same premises leads the Director to conclude that Pro Automotive Warehouse, Hackettstown Auto Parts and Hackettstown True Value Center operated as a single employer in relation to Complainant.

Respondent Poyer personally presented defenses to this matter on behalf of himself individually and on behalf of Hackettstown Auto Parts as Complainant's employer. Accordingly, Poyer, both personally and as owner of his business, was on notice of the substance of Complainant's complaint, and the manner in which it related to Complainant's employment at his

entire business operation, which was an integrated enterprise that constituted a single employer in relation to Complainant. As Poyer was at all relevant times the owner and manager of Pro Automotive Warehouse and Hackettstown True Value Center, the additional respondents were not prejudiced in their defense on the merits of Complainant's claims against them.

Based on all of the above, the Director concludes that both Pro Automotive Warehouse and Hackettstown True Value Center had actual or constructive notice of the substance of Complainant's complaint from the time it was served on the originally named Respondents, and were not prejudiced by the delayed amendment of the complaint to specifically designate them as respondents. Accordingly, the Director concludes that the requested amendment meets the standards articulated by the Supreme Court in Kernan, supra, and adopts the ALJ's decision amending the complaint to add the additional respondents.

c. Suppression of Respondents' Defenses and Conduct of the Hearing.

The Director finds that the ALJ's ruling which barred Respondents from presenting defenses or evidence for failure to provide discovery was appropriate under the circumstances. The Uniform Administrative Procedure Rules provide that, after notice and an opportunity to be heard, an ALJ may impose sanctions under N.J.A.C. 1:1-14.14, which may include suppressing a party's defense or claim for failure to provide requested discovery. N.J.A.C. 1:1-10.4; N.J.A.C. 1:1-10.5; N.J.A.C. 1:1-14.14. Here, Respondents were provided with notice and an opportunity to be heard prior to entry of the ALJ's order suppressing their Answer and defenses, and the Director finds the ALJ's suppression order was within her discretion pursuant to the Uniform Administrative Procedure Rules.

Where a party fails to appear at a hearing, an ALJ may hear ex parte proofs. N.J.A.C. 1:1-14.4(c). If the ALJ receives no explanation for the party's failure to appear, he or she may issue an initial decision based on the ex parte proofs, which memorializes the absent party's failure to

appear. Ibid. The record reflects that the ALJ made every effort to provide Respondents with appropriate notice of the administrative hearing, waited an appropriate length of time before commencing the hearing in Respondents' absence, and waited an appropriate amount of time after the hearing for Respondents to explain their absence. The Director finds that, under the circumstances, it was appropriate for the ALJ to take ex parte proofs when Respondents failed to appear for the hearing. N.J.A.C. 1:1-14.4(c). Thus, the Director concludes that it is appropriate to issue a final order in this matter based on the record presented.

2. The LAD

Sexual harassment is a form of sex discrimination prohibited by the LAD. Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 601 (1993). Hostile work environment sexual harassment occurs when an employee is subjected to conduct which "occurred because of her sex and that a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an intimidating, hostile or offensive working environment." Id. at 604.

Based on the findings of fact and evidence presented, the Director adopts the ALJ's conclusion that Respondents subjected Complainant to a sexually hostile work environment in violation of the LAD. Both Complainant and her former co-worker, Cherry Anne Terebey, testified that Respondent Poyer repeatedly engaged in sexual gestures in their presence and in the presence of other female employees, displayed naked images of women, told jokes of a sexual nature, commented about female employees' bodies, and talked about his sexual experiences (Tr. 29 -51; 70-82). Based on this testimony, the Director concludes that Poyer's harassing behavior occurred because of Complainant's sex, both because it was sexual in nature, Lehmann, supra, 132 N.J. at 605, and because Poyer engaged in the harassing conduct only in the presence of the female employees.

The record reflects that these comments and conduct occurred throughout most, if not all, of Complainant's tenure with Respondents, and permeated her tasks for all three Respondent

companies (Tr. 32). Complainant also testified that other female employees complained to her about Poyer's sex-related comments and conduct, which, along with Terebey's testimony, supports the conclusion that a reasonable woman would find that the conduct was severe or pervasive enough to render the work environment hostile or abusive (Tr. 36-40; 70-82). Accordingly, the Director adopts the ALJ's conclusion that Complainant was subjected to a sexually hostile work environment in violation of the LAD.

3. Liability of the Parties

a. Liability of Respondent Companies

An employer is directly and strictly liable for equitable relief flowing from a supervisor's actions in creating a hostile work environment, but is not automatically liable for compensatory damages attributed to that hostile work environment. Lehmann, supra, 132 N.J. at 617. One situation in which the employer will be liable for compensatory damages is where the harasser was acting within the scope of his or her employment in creating the hostile work environment. Id. at 620. In the more common situation in which the harassing conduct exceeded the scope of employment, an employer can be held liable for compensatory damages where 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, Inc., 132 N.J. 587, 620 (1993). Alternatively, an employer can be held liable for compensatory damages for sexual harassment based on the employer's own negligence. See Lehmann, supra, 132 N.J. at 621-623.

In the present case, Poyer is the owner of Respondent companies, and the ALJ concluded

that Poyer and the employer “are one in the same” (ID 11). In a case like this, where the harassing supervisor is the alter ego of the employer, it is reasonable to conclude that the harassing actions were within the scope of Poyer’s role as owner/supervisor. Thus, the harassing actions were actions of the employer, and the employer is liable for compensatory damages flowing from those actions.

Even if the harassment exceeded the scope of Poyer’s employment, the record reflects that the Respondent companies are liable for compensatory damages based on their delegation of authority to Poyer. Each Respondent company delegated oversight of its day to day operations to Poyer, and he exercised that authority in managing the Respondent companies, as well as in his direct supervision of employees. Poyer had a supervisory relationship with Complainant while she worked for all three Respondent companies, and Complainant was subjected to sexually hostile comments and actions regardless of whether she was performing tasks for one or another of the Respondent companies. Thus, the sexually hostile work environment permeated Complainant’s employment with each of the Respondent companies. As the authority delegated by each Respondent company enabled Poyer to create a work environment which was hostile to women in violation of the LAD, the Director concludes that Respondent companies are each vicariously liable for compensatory damages based on their delegation of authority to Poyer.

Examining Respondents’ liability under a negligence theory, the record reflects that none of the Respondent companies had in place any written or unwritten, formal or informal sexual harassment complaint procedure, and that Complainant found there was no one to whom she could complain about Poyer’s sexual harassment. Based on this evidence, the Director concludes that the Respondent companies were negligent in failing to have in place effective procedures to protect employees from sexual harassment, and this forms an additional basis for liability of the Respondent companies. See Lehmann, supra, 132 N.J. at 621-623.

b. Poyer’s Liability

The LAD prohibits employers from engaging in sexual harassment, but a supervisor is not defined as an “employer” under the LAD. Herman v. The Coastal Corporation, supra, 348 N.J. Super. at 24. Thus, a supervisor cannot be held personally liable for LAD violations under N.J.S.A. 10:5-12(a).

However, under the participation theory of liability, corporate officers can be held personally liable for their own tortious acts, where the corporation had a duty of care to the victim, that duty was delegated to the corporate officer, and the corporate officer breached that duty. Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 303 (2002). New Jersey has also applied the participation theory to hold corporate officers personally liable for their own actions which violate remedial statutes. See Kugler v. Koscot Interplanetary, Inc., 120 N.J. Super. 216, 257 (Ch. Div. 1972) (holding a corporate officer personally liable for Consumer Fraud Act violations).

In addition, the Appellate Division has recently held that the sole stockholder and chief executive officer of a corporate employer can be held individually liable under a negligence theory for sexual harassment committed by his employees, and for his own actions and inactions which contributed to the creation of a sexually hostile work environment. See Tarr v. Ciasulli’s Mack Auto Mall, Inc., et al., 360 N.J. Super. 265, 277-280 (App. Div. 2003). While the Appellate Division in Tarr did not cite the participation theory of personal liability, the court’s evaluation of both the supervisor’s role as an owner of the corporation, and his complicity in the harassment is consistent with the participation theory and supports applying that rationale to LAD cases.

Respondent Poyer was an owner of each of the Respondent companies. Each of the Respondent companies delegated to Respondent Poyer the day to day management of the businesses, including the duty to provide employees with a workplace free of unlawful discrimination. Poyer personally breached that duty by sexually harassing Complainant. Accordingly, applying the participation theory of liability, Respondent Poyer can be held personally liable for the employer corporations’ LAD violations.

4. Remedies

After an administrative hearing on the merits and a finding that a respondent has violated the LAD, the Director has the statutory authority to award equitable relief, compensatory damages, and incidental damages for pain and humiliation. See, e.g., Anderson v. Exxon Co., 89 N.J. 483, 502-503 (1982). In addition to awarding any other relief, the Director shall also impose statutory penalties for any violation of the LAD. N.J.S.A. 10:5-14.1a.

a. Pain and Humiliation damages

It is well established that a victim of unlawful discrimination under the LAD is entitled 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; Goodman, supra, 86 N.J. at 35.

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, the Director adopts the ALJ's findings that Complainant experienced pain and suffering as a proximate result of Poyer's sexual harassment, and that Poyer's sexual harassment created an "exceptionally egregious" sexually hostile work environment. The Director generally seeks to ensure that pain and humiliation damage awards are consistent with awards granted to other prevailing complainants who have come before the Division, based on the extent and duration of emotional suffering experienced by each complainant. After reviewing the applicable portions

of the record, and considering emotional distress damage awards made to other prevailing complainants, the Director concludes that the ALJ's award of \$20,000 in pain and humiliation damages is appropriate to compensate Complainant for the indignities, pain and humiliation she suffered as a result of Respondents' actions. The Director recently awarded \$15,000 in pain and humiliation damages to a complainant who was subjected to racial slurs and sexual harassment which culminated in a constructive discharge, where the complainant worked for the respondents for only a brief period, but developed physical as well as non-physical symptoms of emotional distress. Wiley v. Victoria's Café, et al., OAL Docket No. CRT 5058-98; DCR Docket No. EB60WB-40094 (February 26, 2002). The Director also awarded \$15,000 in pain and humiliation damages to a complainant who was subjected to a racially hostile work environment and race-based termination, where the complainant worked for the respondents for less than half a year. Dawson v. R.W. Vogel. Inc., et al., OAL Docket No. CRT 4501-00; DCR Docket No. EQ11RB-41666-E (August 28, 2002).

In the present case, Respondents subjected Complainant to a sexually hostile work environment for well over two years. Complainant testified that whenever Poyer gestured to her with his finger extending from his pants zipper, she would wonder why he was doing that to her, and was unable to do her work (Tr. 61- 62). She also testified that she became very uncomfortable, embarrassed, offended, disgusted and angry when Poyer engaged in sex-related conduct or comments, (Tr. 61-62), and that she became extremely stressed when Poyer appeared to have lost control of himself and screamed at or threw things at female employees (Tr. 63).

Moreover, the Director is mindful that, before fashioning an award of emotional distress damages, the ALJ had an opportunity to observe Complainant's demeanor as she testified in detail about her reactions to working in Respondents' sexually hostile environment. Having weighed all of the foregoing considerations, including amounts awarded to prevailing parties in comparable matters and Complainant's testimony regarding her pain and humiliation, the Director concludes

that the ALJ's award of \$20,000 in pain and humiliation damages is appropriate in this case, and finds all Respondents jointly and severally liable for these damages.

b. Statutory Penalties

In addition to any other remedies, the LAD provides that the Director shall impose a penalty of not more than \$10,000 for a respondent's first violation of the LAD, payable to the State Treasury. N.J.S.A. 10:5-14.1a⁵. Civil penalties can serve a dual purpose - - to deter unlawful conduct, and to provide the public and State government with liquidated damages for the State's costs in investigating and enforcing the applicable law. See Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123, 129-130 (1987); In the Matter of Ramon Garay, M.D., 89 N.J. 104, 114 (1982). Where the legislature has afforded the decisionmaker with discretion to assess a penalty amount, the decisionmaker must ensure that penalties are reasonable in relation to the State's interest, and factors to be considered include the State's costs and the extent of the wrongdoing in the specific case. See In the Matter of Garay, supra, 89 N.J. at 116; In the Matter of Kaplan, 178 N.J. Super. 487, 494 (App. Div. 1981).

Based on the specific facts and procedural history of this case, the Director concludes that it is inappropriate to assess a separate penalty against each of the Respondent companies. As noted above, the complaint was not amended to add Hackettstown True Value Center and Pro Automotive Warehouse as respondents until after this matter was transmitted to the OAL for hearing. The Division did not conduct separate investigations into discrimination committed by

⁵This section was amended effective November 15, 2001 to raise the maximum penalty for a first violation of the LAD from \$2,000 to \$10,000. Although the LAD violation in this case occurred prior to that amendment, new or amended civil penalties may generally be imposed for unlawful acts which occurred prior to enactment of the new or enhanced remedy. See, e.g., State Dept. of Environmental Protection v. Arlington Warehouse, 203 N.J. Super. 9, 14 (App. Div. 1981) (remedial or procedural statute may be given retroactive effect without unconstitutionally infringing on vested rights, provided that the new statutory remedy provides redress for acts which were unlawful at the time they were committed).

each of the Respondent companies, did not separately evaluate the actions of each company to reach its probable cause determination or otherwise expend more resources in processing the complaint because Complainant's job entailed tasks for three separate businesses. Accordingly, the State resources expended on this case do not warrant imposing the maximum penalty on each of the Respondent companies.

Moreover, under the specific facts of this case, the Director concludes that imposing the maximum penalty on each of the Respondent companies is not warranted to deter future LAD violations. The record reflects that all three companies operated as a single employer in relation to Complainant. The three businesses shared common management, ownership and financial control, were located in the same building, and shared a number of employees. The record reflects that Respondent Poyer owned, supervised and managed all three businesses, and there is no evidence in the record showing that the harassment was more egregious or pervasive in the work environment of any one or other of the companies. Accordingly, as the same actors are involved in all three businesses, the businesses were inextricably intertwined, and there is scant evidence in the record on which the Director can rely to determine the extent of harassment or negligence which should be attributed to any one of the Respondent companies, the Director concludes that, under the particular facts of this case, the deterrent functions of the LAD's statutory penalties are best served by imposing one penalty for which all three Respondent companies and Respondent Poyer will be jointly and severally liable. After considering the nature and extent of the unlawful conduct, the procedural history of this matter, the specific relationship among the Respondents, and Complainant's relationship with each of the Respondents, the Director concludes that it is appropriate to make Respondents Robert Poyer, Jr., Hackettstown Auto Parts, Hackettstown True Value Center and Pro Automotive Warehouse jointly and severally liable for \$10,000 - -the maximum penalty for a first violation of the LAD. The Director finds that this penalty is appropriate based on the duration and nature of Poyer's harassing conduct, as well as the finding that it was

both severe and pervasive.

CONCLUSION

For all of the reasons discussed above, the Director adopts the ALJ's recommended decision finding the Respondents liable for subjecting Complainant to hostile work environment sexual harassment in violation of the LAD. The Director adopts the ALJ's award of \$20,000 in pain and humiliation damages to Complainant, and modifies the ALJ's assessment of statutory penalties, making each of the Respondents jointly and severally liable for a \$10,000 penalty.

ORDER

Based on all of the above, the Director finds that Respondents Hackettstown Auto Parts, Hackettstown True Value Center, Pro Automotive Warehouse and Robert Poyer subjected Complainant to a sexually hostile work environment in violation of the LAD. **THEREFORE**, the Director orders and directs as follows:

1. Respondents, 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. Within 45 days from the date of this order, Respondents, jointly and severally, shall forward to the Division a check payable to the Complainant in the amount of \$20,000 as compensation for her pain and humiliation.
3. Within 45 days from the date of this order, Respondents Hackettstown Auto Parts, Hackettstown True Value Center, Pro Automotive Warehouse and/or Robert Poyer, Jr., jointly and severally, shall forward to the Division a statutory penalty in the amount of \$10,000, payable to "Treasurer, State of New Jersey."
4. The penalties and all payments to be made by the Respondents under this order shall

be forwarded to the Division on Civil Rights, Bureau of Policy, P.O. Box 089, Trenton, New Jersey 08625.

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

DATE: _____

J. FRANK VESPA-PAPALEO, ESQ.,
DIRECTOR

JFVP:GL:EB: